IN THE
SUPREME COURT OF FLORIDA
TALLAHASSEE, FLORIDA

CASE NUMBER	16-2013-CF-005781-AXXX-MA DIVISION CR-D (Circuit)
APPEAL NUMBER	SC18-822

DONALD JAMES SMITH	Appellant___,	RONNIE FUSSELL, CLERK OF THE CIRCUIT AND COUNTY COURTS
VS		
STATE OF FLORIDA	Appellee___,	

RECORD ON APPEAL

VOLUME 1

Appeal from the Circuit Court

Duval County, Florida

BEFORE THE HONORABLE JUDGE MALLORY COOPER

PUBLIC DEFENDER FOR APPELLANT	ATTORNEY GENERAL FOR APPELLEE

IN THE CIRCUIT COURT OF THE FOURTH JUDICIAL CIRCUIT, IN AND FOR DUVAL COUNTY, FLORIDA

DONALD JAMES SMITH
APPELLANT

CASE NO: 16-2013-CF-005781-AXXX-MA
DIVISION: CR-D (Circuit)

STATE OF FLORIDA
APPELLEE

APPEAL NO: SC18-822

VOLUME 1

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TESTIMONY & PROCEEDINGS OF NOVEMBER 2ND, 2015, BEFORE THE HONORABLE JUDGE MALLORY D. COOPER	06/01/18	3573-3578
TESTIMONY & PROCEEDINGS OF NOVEMBER 17TH, 2015, BEFORE THE HONORABLE JUDGE MALLORY COOPER	08/13/18	3579-3585
TESTIMONY & PROCEEDINGS OF NOVEMBER 5, 2015, BEFORE THE HONORABLE JUDGE MALLORY D. COOPER	06/11/18	3586-3608
TESTIMONY & PROCEEDINGS OF DECEMBER 15, 2015, BEFORE THE HONORABLE JUDGE MALLORY D. COOPER	06/11/18	3609-3614
TESTIMONY & PROCEEDINGS OF FEBRUARY 2, 2016, BEFORE THE HONORABLE JUDGE MALLORY D. COOPER	06/11/18	3615-3638

TESTIMONY & PROCEEDINGS OF MARCH 1, 2016, BEFORE THE HONORABLE JUDGE MALLORY D. COOPER	06/11/18	Redacted: 3639-3706
TESTIMONY & PROCEEDINGS OF MARCH 8, 2016, BEFORE THE HONORABLE JUDGE MALLORY D. COOPER	06/11/18	3707-3716
TESTIMONY & PROCEEDINGS OF APRIL 11, 2016, BEFORE THE HONORABLE JUDGE MALLORY D. COOPER	06/11/18	3717-3723
TESTIMONY & PROCEEDINGS OF MAY 4, 2016, BEFORE THE HONORABLE JUDGE MALLORY D. COOPER	06/11/18	Redacted: 3724-3734
TESTIMONY & PROCEEDINGS OF MAY 26, 2016, BEFORE THE HONORABLE JUDGE MALLORY D. COOPER	06/13/18	3735-3756
TESTIMONY & PROCEEDINGS OF JULY 15, 2016, BEFORE THE HONORABLE JUDGE MALLORY D. COOPER	06/13/18	3757-3768
TESTIMONY & PROCEEDINGS OF JULY 21, 2016, BEFORE THE HONORABLE JUDGE MALLORY COOPER	07/13/18	3769-3783
TESTIMONY & PROCEEDINGS OF AUGUST 18, 2016, BEFORE THE HONORABLE JUDGE MALLORY D. COOPER	06/13/18	Redacted: 3784-3855
TESTIMONY & PROCEEDINGS OF OCTOBER 18, 2016, BEFORE THE HONORABLE JUDGE MALLORY D. COOPER	06/25/18	3856-3882
TESTIMONY & PROCEEDINGS OF DECEMBER 12, 2016, BEFORE THE HONORABLE JUDGE MALLORY D. COOPER	06/13/18	3883-3889
TESTIMONY & PROCEEDINGS OF JANUARY 18, 2017, BEFORE THE HONORABLE JUDGE MALLORY D. COOPER	06/13/18	3890-3895
TESTIMONY & PROCEEDINGS OF AUGUST 8, 2017, BEFORE THE HONORABLE JUDGE MALLORY D. COOPER	06/13/18	3896-3902
TESTIMONY & PROCEEDINGS OF OCTOBER 3, 2017, BEFORE THE HONORABLE JUDGE MALLORY D. COOPER	06/13/18	3903-3909
TESTIMONY & PROCEEDINGS OF NOVEMBER 2, 2017, BEFORE THE HONORABLE JUDGE MALLORY D. COOPER	06/13/18	3910-3922
TESTIMONY & PROCEEDINGS OF DECEMBER 19, 2017, BEFORE THE HONORABLE JUDGE MALLORY D. COOPER	06/13/18	3923-3930
TESTIMONY & PROCEEDINGS OF MAY 11,	06/13/18	3931-3937

2017, BEFORE THE HONORABLE JUDGE MALLORY D. COOPER		
TESTIMONY & PROCEEDINGS OF JANUARY 11TH, 2018, BEFORE THE HONORABLE JUDGE MALLORY COOPER	08/13/18	3938-3949
TESTIMONY & PROCEEDINGS OF JANUARY 22, 2018, BEFORE THE HONORABLE JUDGE MALLORY D. COOPER	07/30/18	Redacted: 3950-3979
TESTIMONY & PROCEEDINGS OF JANUARY 24, 2018, BEFORE THE HONORABLE JUDGE MALLORY D. COOPER	07/30/18	3980-4043
TESTIMONY & PROCEEDINGS OF FEBRUARY 1, 2018 BEFORE THE HONORABLE JUDGE MALLORY D. COOPER	08/06/18	4044-4058
CERTIFICATE OF CLERK		

- **COURT'S EXHIBIT # 3 – DVD OF JURY QUALIFICATION FROM 2/5/2018 WITH JUDGE WHITTINGTON ON CD FILED 2/6/2018**

- **STATE'S EXHIBIT #5 – 911 CALL OF RAYNE PERRYWINKLE ON CD FILED 2/12/2018**

- **STATE'S EXHIBIT # 6 – COMPOSITE – DVD (3) DOLLAR GENERAL SURVEILLANCE VIDEOS ON CD FILED 2/12/2018**

- **STATE'S EXHIBIT # 7 – COMPOSITE DVD (16) WALMART SURVEILLANCE VIDEOS ON CD FILED 02/12/2018**

- **STATE'S EXHIBIT # 8 – DOLLAR GENERAL SURVIELLENCE VIDEO EDITED BY FBI ON CD FILED 2/12/2018**

- **STATE'S EXHIBIT # 9 – DVD – WALMART SURVIELLENCE VIDEO EDITED BY FBI ON CD FILED 2/12/2018**

- **STATE'S EXHIBIT # 10 – 911 CALL OF CHRISTINA HOWARD ON CD FILED 2/12/2018**

- **DEFENDANT'S EXHIBIT C – DEMONSTRATIVE COMPOSITE EXHIBIT DR. BUFFINGTON ON CD FILED 2/22/2018**

- **DEFENDANT'S EXHIBIT D – DEMONSTRANTIVE COMPOSITE EXHIBIT DR. COLINO ON CD FILED 2/22/2018**

- **DEFENDANT'S EXHIBIT E - DEMONSTRANTIVE COMPOSITE EXHIBIT DR. WU ON CD FILED 2/22/2018**

- **DEFENDANT'S EXHIBIT O - DEMONSTRANTIVE COMPOSITE EXHIBIT DR. BUTLER ON CD FILED 2/22/2018**

- **STATE'S EXHIBIT #1 – TESTIMONY OF DR. RAO FROM TRIAL ON CD FILED 3/28/2018**

Case #: 16-2013-CF-005781-AXXX-MA
VS
DONALD JAMES SMITH (Offender # 2013-016727)

#	Effective Date	Count	Description
1	06/23/2013		ARREST & BOOKING REPORT 2013-016727 6/22/2013
2	06/23/2013	2	S787.01(1)(A)2 KIDNAPPING TO COMMIT OR FACILITATE THECOMMISSION OF A FELONY WITH A FIREARM
3	06/23/2013	1	S782.04 MURDER
4	06/23/2013	2	BOND SET AT NONE
5	06/23/2013	1	BOND SET AT NONE
6	06/23/2013		APPLICATION FOR CRIMINAL INDIGENT STATUS - FILED
7	06/23/2013		DEFENDANT DECLARED INDIGENT, ORDER APPOINTING PUBLIC DEFENDER - FILED
8	06/23/2013		FINDING OF PROBABLE CAUSE ,
9	06/23/2013		PD APP FEE 50.00 IMPOSED
10	06/23/2013		FEES DUE: 6/24/2013
11	06/23/2013		ARRAIGNMENT COURT DATE: 07/16/2013 SUBJECT TO CHANGE. CALL FOR VERIFICATION
12	06/27/2013		CASE FEES PAID: $270.00 ON RECEIPT NUMBER 1870106
13	06/28/2013		MOT. FOR STATEMENT OF PARTICULARS
14	06/28/2013		NOTICE OF DISCOVERY & SPECIFIC DEMAND FOR INFORMATION
15	06/28/2013		PUBLIC DEFENDER REQUEST FOR COPY OF JSO PHOTOGRAPHS
16	07/01/2013		ORDER OF REASSIGNMENT
17	07/01/2013		ORDER OF RECUSAL
18	07/02/2013	1	INDICTMENT FILED FOR S782.04(1)(A) MURDER - FIRST DEGREE
19	07/02/2013	2	INDICTMENT FILED FOR S787.01(3)(A) KIDNAPPING A CHILD UNDER THE AGE 13
20	07/02/2013	3	INDICTMENT FILED FOR S794.011(2)(A) SEXUAL BATTERY: DEFENDANT 18 OR OLDER VICTIM LESS THAN 12
21	07/02/2013		ARRAIGNMENT DATE 07/16/2013 9:00 AM - 605 6TH FLOOR, 501 W ADAMS ST JACKSONVILLE FL 32202
22	07/02/2013		CASE FEES PAID: $2.00 ON RECEIPT NUMBER 1874034
23	07/03/2013		ARREST & BOOKING REPORT 2013-016727
24	07/03/2013		APPLICATION FOR CRIMINAL INDIGENT STATUS - FILED
25	07/03/2013		DEFENDANT DECLARED INDIGENT, ORDER APPOINTING PUBLIC DEFENDER - FILED
26	07/03/2013		PD APP FEE 50.00 IMPOSED
27	07/03/2013		FEES DUE: 7/11/2013
28	07/15/2013		ARRAIGNMENT COURT DATE: 07/23/2013 SUBJECT TO CHANGE. CALL FOR VERIFICATION

29	07/16/2013		JUDGE COOPER, MALLORY
30	07/16/2013		ASST. STATE ATTY. CALIEL, MARK
31	07/16/2013		ASST. PUB. DEF. GAZALEH, FRED CANANN
32	07/16/2013		DEFENDANT PRESENT IN JAIL
33	07/16/2013		DEF. W/READING OF INFO & PLEAD NOT GUILTY
34	07/16/2013		> INDICTMENT
35	07/16/2013		NOTICE OF INTENT TO SEEK DEATH PENALTY AND REQUEST FOR STATEMENT OF PARTICULARS OF MENTAL MITIGATION
36	07/16/2013		PRETRIAL 09/04/2013 9:00 AM - 605 6TH FLOOR, 501 W ADAMS ST JACKSONVILLE FL 32202
37	07/16/2013	1	PLEA OF NOT GUILTY
38	07/16/2013	2	PLEA OF NOT GUILTY
39	07/16/2013	3	PLEA OF NOT GUILTY
40	07/18/2013		STATE'S DISCOVERY EXHIBIT AND DEMAND FOR RECIPROCAL DISCOVERY
41	07/24/2013		STATES FIRST SUPPLEMENTAL DISCOVERY EXHIBIT
42	08/02/2013		MOTION FOR PROTECTIVE ORDER
43	08/02/2013		PRAE, FOR WITNESS SUBPOENA- BY STATE (MEDICAL RECORDS)
44	08/06/2013		HEARING ON MOTION (TO BE SET) 08/19/2013 9:00 AM - 605 6TH FLOOR, 501 W ADAMS ST JACKSONVILLE FL 32202
45	08/06/2013		PER EMAIL MEMO
46	08/06/2013		OBJECTION TO PRODUCTION
47	08/19/2013		JUDGE COOPER, MALLORY
48	08/19/2013		ASST. STATE ATTY. CALIEL, MARK
49	08/19/2013		ASST. PUB. DEF. GAZALEH, FRED CANANN
50	08/19/2013		DEFENDANT APPEARANCE WAIVED
51	08/19/2013		OTHERS PRESENT: MR. BURKE - ATTY FOR CHANNEL 4
52	08/19/2013		HEARING ON MOTION 08/22/2013 1:30 PM - 605 6TH FLOOR, 501 W ADAMS ST JACKSONVILLE FL 32202
53	08/19/2013		@1:30
54	08/21/2013		MOTION OF MORRIS PUBLISHING GROUP LLC TO INTERVENE AND MEMO INOPPOSITION TO DEFT'S MOTION FOR PROTECTIVE ORDER
55	08/21/2013		MOTION INTERVENOR POST-NEWSWEEK STATIONS FLORIDA INC'S MOTION TO INTERVENE AND BE HEARD ON MATTERS OF PUBLIC RECORD
56	08/22/2013		STATES SECOND SUPPLEMENTAL DISCOVERY EXHIBIT
57	08/22/2013		JUDGE COOPER, MALLORY
58	08/22/2013		ASST. STATE ATTY. CALIEL, MARK
59	08/22/2013		ASST. PUB. DEF. GAZALEH, FRED CANANN
60	08/22/2013		DEFENDANT PRESENT IN JAIL
61	08/22/2013		OTHERS PRESENT: E. BURKE ATTY FOR CHANNEL 4 AND T. CONNER ATTY FOR FTU
62	08/22/2013		HEARING ON MOTION FOR PROTECTIVE ORDER HELD IN

			FULL - U/A ORDER TO BE ENTERED
63	08/22/2013		OBJECTION TO PRODUCTION WITHDRAWN
64	08/22/2013		PRETRIAL 09/04/2013 9:00 AM - 605 6TH FLOOR, 501 W ADAMS ST JACKSONVILLE FL 32202
65	08/26/2013		NOTICE INTERVENOR POST-NEWSWEEK STATIONS FLORIDA, INC'S NOTICE OF SUPPLEMENTAL AUTHORITY
66	09/04/2013		JUDGE COOPER, MALLORY
67	09/04/2013		ASST. STATE ATTY. CALIEL, MARK
68	09/04/2013		ASST. PUB. DEF. GAZALEH, FRED CANANN
69	09/04/2013		DEFENDANT PRESENT IN JAIL
70	09/04/2013		** WAIVER OF SPEEDY TRIAL **
71	09/04/2013		PRETRIAL 10/15/2013 9:00 AM - 605 6TH FLOOR, 501 W ADAMS ST JACKSONVILLE FL 32202
72	09/06/2013		ORDER ON DEFTS. MOTION FOR PROTECTIVE ORDER
73	09/30/2013		NOTICE OF TAKING DEPOSITION -4 FILED
74	10/02/2013		SUBPOENA RETURNED EXECUTED
75	10/03/2013		STATES THIRD SUPPLEMENTAL DISCOVERY EXHIBIT
76	10/04/2013		SUBPOENA RETURNED EXECUTED
77	10/04/2013		SUBPOENA RETURNED UNEXECUTED
78	10/15/2013		JUDGE COOPER, MALLORY
79	10/15/2013		ASST. STATE ATTY. CALIEL, MARK
80	10/15/2013		ASST. PUB. DEF. GAZALEH, FRED CANANN
81	10/15/2013		DEFENDANT PRESENT IN JAIL
82	10/15/2013		PRETRIAL 12/03/2013 9:00 AM - 605 6TH FLOOR, 501 W ADAMS ST JACKSONVILLE FL 32202
83	11/04/2013		NOTICE OF TAKING DEPOSITION
84	11/05/2013		NOTICE OF TAKING DEPOSITION
85	11/05/2013		NOTICE OF TAKING DEPOSITION
86	11/05/2013		NOTICE OF TAKING DEPOSITION
87	11/07/2013		SUBPOENA RETURNED EXECUTED
88	11/13/2013		SUBPOENA RETURNED EXECUTED -9 FILED
89	11/14/2013		SUBPOENA RETURNED UNEXECUTED
90	11/15/2013		SUBPOENA RETURNED UNEXECUTED
91	11/20/2013		MOT. FOR MORE DEFINITE ADDRESS
92	11/21/2013		SUBPOENA RETURNED UNEXECUTED
93	12/03/2013		JUDGE COOPER, MALLORY
94	12/03/2013		ASST. STATE ATTY. CALIEL, MARK
95	12/03/2013		ASST. PUB. DEF. GAZALEH, FRED CANANN
96	12/03/2013		DEFENDANT PRESENT IN JAIL
97	12/03/2013		HEARING ON MOTION (TO BE SET) 01/06/2014 9:00 AM - 605 6TH FLOOR, 501 W ADAMS ST JACKSONVILLE FL 32202
98	12/03/2013		DEATH MOT; 5/8/14 FPT; 5/12/14 JS; 5/19/14 PP
99	12/10/2013		MOTION CAPITAL CASES INDEX
100	12/10/2013		MOTION IN LIMINE RE: GRAND JURY
101	12/10/2013		DEMAND FOR DISCLOSURE OF FAVORABLE EVIDENCE
102	12/10/2013		NOTICE CONCERNING TRIAL OBJECTIONS

103	12/10/2013		REQUEST FOR FAVORABLE EVIDENCE IN PENALTY PHASE
104	12/10/2013		MOT. FOR STATEMENT OF PARTICULARS POST-INDICTMENT
105	12/10/2013		DEFENDANT'S REQUEST FOR TRIAL COURT TO STATE BASIS OF ITS RULINGS
106	12/10/2013		MOTION TO EXCLUDE CONFUSING OR MISLEADING EVIDENCE
107	12/10/2013		MOTION IN LIMINE CONCERNING REBUTTAL WITNESSES
108	12/10/2013		MOTION FOR STATEMENT OF AGGRAVATING CIRCUMSTANCES
109	12/10/2013		MOTION TO PROHIBIT ARGUMENT AND/OR INSTRUCTIONS CONCERNING FIRST DEGREE FELONY MURDER
110	12/10/2013		MOTION FOR SPECIAL VERDICT AS TO THEORY OF GUILT
111	12/10/2013		MOTION FOR PRE-TRIAL CONFERENCE TO SET MOTION IN LIMINE SCHEDULED AND MOTION IN LIMINE CUT-OFF DATE
112	12/10/2013		DEMAND FOR NOTICE OF INTENT TO RELY ON HEARSAY
113	12/10/2013		MOTION OBJECTION AND MOTION TO PRECLUDE IMPROPER ARGUMENT
114	12/10/2013		MOTION TO COMPEL DISCOVERY AS TO DNA EVIDENCE
115	12/10/2013		MOTION FOR TRIAL COURT TO REFRAIN FROM COMMENTING ON IDENTIFICATION EVIDENCE
116	12/10/2013		MOTION FOR COURT ORDER DIRECTING CLERK OF COURT TO LIMIT PROSPECTIVE JURORS ACCESS/EXPOSURE TO PRETRIAL LOCAL MEDICA COVERAGE PRIOR TO JURY SELECTION
117	12/10/2013		MOTION TO PRODUCE STATE'S WRITTEN PROTOCOL WHEN SEEKING THE DEATH PENALTY
118	12/10/2013		MOTION TO EXCLUDE GRUESOME OR INFLAMMATORY PHOTOGRAPHS
119	12/10/2013		DEFENDANT'S REQUESTED PRE-VOIR DIRE INSTRUCTION
120	12/10/2013		MOTION FOR VOIR DIRE AFTER GUILTY VERDICT
121	12/10/2013		MOTION IN LIMINE CONCERNING OTHER CRIMES EVIDENCE
122	12/10/2013		MOTION FOR INDIVIDUAL AND SEQUESTERED VOIR DIRE
123	12/10/2013		MOTION TO PROHIBIT THE PROSECUTOR FROM USING PEREMPTORY CHALLENGES TO STRIKE JURORS WHO ARE DEATH SCRUPLED BUT ARE NOT EXCLUDABLE FOR CAUSE AND MOTION FOR APPROPRIATE RELIEF
124	12/10/2013		MOTION FOR ADDITIONAL PEREMPTORY CHALLENGES DUE TO NUMERICAL DISPARITY REGARDING PEREMPTORY CHALLENGES PROVIDED BY RULE 3.350(A) FLA. RULES OF CRIMINAL PROCEDURE AND SECTION 913.08 FLA. STATUTES AND DUE TO SENSITIVE VOIR DIRE ISSUES IN THIS CASE
125	12/10/2013		MOTION TO PROHIBIT USE OF JURORS CRIMINAL RECORDS

			BY THE STATE AND ALTERNATIVE MOTION FOR DISCLOSURE OF CRIMINAL RECORDS OF PROSPECTIVE JURORS
126	12/10/2013		MOTION TO PRECLUDE DEATH QUALIFICATIONS OF JURORS IN THE INNOCENCE OR GUILT PHASE OF THE TRIAL AND TO UTILIZE A BIFURCATED JURY, IF A PENALTY PHASE IS NECESSARY
127	12/10/2013		MOTION TO DECLARE FLA CAPITAL SENTENCING PROCEDURE UNCONSTITUTIONAL UNDER RING V. ARIZONA
128	12/10/2013		MOTION TO PROHIBIT ANY REFERENCE TO THE JURY'S ROLE AT THE PENALTY PHASE AS BEING "ADVISORY" OR TO THE JURY'S PENALTY VERDICT AS BEING A "RECOMMENDATION'
129	12/10/2013		MOTION TO PROHIBIT MISLEADING REFERENCES TO THE ADVISORY ROLE OF THE JURY AT SENTENCING
130	12/10/2013		MOTION IN LIMINE REGARDING REFERENCE TO NON-ENUMERATED MITIGATING FACTORS
131	12/10/2013		MOTION FOR JURY INSTUCTION DELINEATING ALL MITIGATING FACTORS UNDER FLA. STATUTE 921.141(6)(H)
132	12/10/2013		MOTION TO DISMISS AND TO DECLARE DEATH NOT A POSSIBLE PENALTY AND TO DECLARE SECTIONS 782.04 AND 921.141 FLA. STATUTES, UNCONSTITUTIONAL FOR A VARIETY OF REASONS
133	12/10/2013		MOTION TO DECLARE SECTIONS 921.141, 922.10 AND 922.105 FLA. STATUTES UNCONSTITUTIONAL BECAUSE ELECTROCUTION AND LETHAL INJECTION ARE CRUEL AND UNUSUAL PUNISHMENTS
134	12/10/2013		MOTION TO DECLARE FLA'S DEATH PENALTY UNCONSTITUTIONAL BECAUSE OF UNREALIABILITY
135	12/10/2013		MOTION TO DECLARE FLA'S DEATH PENALTY UNCONSTITUTIONAL AS NOW APPLIED
136	12/10/2013		MOTION TO DECLARE SECTIONS 782.04 & 921.141 FLA. STATUTES UNCONSTITUTIONAL BECAUSE OF TREATMENT OF MITIGATING CIRCUMSTANCES
137	12/10/2013		MOTION TO DECLARE SECTION 921.141 F.S. UNCONSTITUTIONAL AS APPLIED BECAUSE OF ARBITRARINESS IN JURY OVERRIDES AND SENTENCING
138	12/10/2013		MOTION TO DECLARE F.S. 782.04 & 921.141 UNCONSTITUTIONAL
139	12/10/2013		MOTION TO DECLARE SECTION 921.141 F.S. UNCONSITUTIONAL BECAUSE ONLY A BARE MAJORITY OF JURORS IS SUFFICIENT TO RECOMMEND A DEATH SENTENCE
140	12/10/2013		MOTION TO DECLARE FLA. DEATH PENALTY UNCONSTITUTINAL UNDER EVANS VS. MCNEIL
141	12/10/2013		MEMORANDUM OF LAW IN SUPPORT OF DEFT'S MOTION

			TO DECLARE FLA. DEATH PENALTY UNCONSTITUTIONAL UNDER EVANS V. MCNEIL
142	12/10/2013		DOCUMENTS FILED - EVANS VS. MCNEIL
143	12/10/2013		MOTION TO DECLARE 921.141(7) F.S. UNCONSTITUTIONAL & FOR PRETRIAL DETERMINATION OF ADMISSIBILITY OF ALL "VICTIM IMPACT" EVIDENCE UNDER 90.104(2), 90.105, 90.403 F.S.
144	12/10/2013		MOTION TO EXCLUDE EVIDENCE OR ARGUMENT DESIGNED TO CREATE SYMPATHY FOR THE DECEASED (VICTIM IMPACT EVIDENCE)
145	12/10/2013		MOTION ALTERNATIVE TO LIMIT PRESENTATION & ARGUMENT OF VICTIM IMPACT EVIDENCE TO JUDGE ALONE
146	12/10/2013		MOTION REQUESTING PROFFER OF "VICTIM IMPACT EVIDENCE"
147	12/10/2013		MOTION TO DECLARE SECTIONS 921.141 AND/OR 921.141(5)(B) F.S. AND/OR THE STANDARD (5)(B) INSTRUCTION UNCONSTITUTIONAL FACIALLY AND AS APPLIED WITH MEMO OF LAW
148	12/10/2013		MOTION TO DECLARE SECTION 921.141(5)(D) F.S. UNCONSTITUTIONAL AS WRITTEN AND APPLIED WITH MEMO OF LAW
149	12/10/2013		MOTION TO DECLARE SECTION 921.141(5)(E), F.S. UNCONSTITUTIONAL AS WRITTEN & APPLIED
150	12/10/2013		MOTION TO DECLARE SECTION 921.141(5)(H) F.S. UNCONSTITUTIONAL AS WRITTEN & AS APPLIED
151	12/10/2013		MOTION TO DECLARE SECTION 921.141(5)(I) F.S. UNCONSTITUTIONAL AS WRITTEN & AS APPLIED
152	12/10/2013		MOTION TO DECLARE SECTION 921.141(5)(L) F.S. UNCONSTITUTIONAL (THE VICTIM UNDER AGE OF 12" AGGRAVATOR) AND MEMO OF LAW
153	12/10/2013		DOCUMENTS - RULE 3.112(I) F.S. OF CRIMINIAL PROCEDURE - CERTIFICATION BY PUBLIC DEFENDER
154	12/10/2013		STATES# FOURTH SUPPLEMENTAL DISCOVERY EXHIBIT
155	12/30/2013		NOTICE OF TAKING DEPOSITION
156	01/03/2014		SUBPOENA RETURNED EXECUTED
157	01/06/2014		JUDGE COOPER, MALLORY
158	01/06/2014		ASST. STATE ATTY. CALIEL, MARK
159	01/06/2014		ASST. PUB. DEF. GAZALEH, FRED CANANN
160	01/06/2014		DEFENDANT APPEARANCE WAIVED
161	01/06/2014		HEARING ON MOTION 01/09/2014 1:30 PM - 605 6TH FLOOR, 501 W ADAMS ST JACKSONVILLE FL 32202
162	01/06/2014		@ 1:30 (DEATH MOT); 5/8/14 FPT; 5/12/14 JS; 5/19/14 PP
163	01/09/2014		SUBPOENA RETURNED UNEXECUTED
164	01/09/2014		SUBPOENA RETURNED EXECUTED
165	01/09/2014		JUDGE COOPER, MALLORY
166	01/09/2014		ASST. STATE ATTY. CALIEL, MARK

167	01/09/2014		ASST. PUB. DEF. GAZALEH, FRED CANANN
168	01/09/2014		DEFENDANT PRESENT IN JAIL
169	01/09/2014		HEARING ON DEATH PENALTY MOTIONS HELD IN FULL
170	01/09/2014		PRETRIAL 02/12/2014 9:00 AM - 605 6TH FLOOR, 501 W ADAMS ST JACKSONVILLE FL 32202
171	01/09/2014		5/8/14 FPT; 5/12/14 JS; 5/19/14 PP
172	01/10/2014		CASE FEES PAID: $42.00 ON RECEIPT NUMBER 2012280
173	01/16/2014		SUBPOENA RETURNED EXECUTED
174	01/17/2014		SUBPOENA RETURNED EXECUTED
175	01/28/2014		STATES FIFTH SUPPLEMENTAL DISCOVERY EXHIBIT
176	01/29/2014		NOTICE OF TAKING DEPOSITION
177	02/03/2014		SUBPOENA RETURNED EXECUTED
178	02/12/2014		JUDGE COOPER, MALLORY
179	02/12/2014		ASST. STATE ATTY. CALIEL, MARK
180	02/12/2014		ASST. PUB. DEF. GAZALEH, FRED CANANN
181	02/12/2014		DEFENDANT APPEARANCE WAIVED
182	02/12/2014		PRETRIAL 03/19/2014 9:00 AM - 605 6TH FLOOR, 501 W ADAMS ST JACKSONVILLE FL 32202
183	02/12/2014		5/8/14 FPT; 5/12/14 JS; 5/19/14 PP
184	03/19/2014		JUDGE COOPER, MALLORY
185	03/19/2014		ASST. STATE ATTY. CALIEL, MARK
186	03/19/2014		ASST. PUB. DEF. GAZALEH, FRED CANANN
187	03/19/2014		DEFENDANT PRESENT IN JAIL
188	03/19/2014		MOTION FOR CONTINUANCE - DEFENSE / GRANTED - ORDER ENTERED
189	03/19/2014		STRIKE 5/8/14 FPT; 5/12/14 JS; 5/19/14 PP
190	03/19/2014		PRETRIAL 05/07/2014 9:00 AM - 605 6TH FLOOR, 501 W ADAMS ST JACKSONVILLE FL 32202
191	03/19/2014		10/2/14 FPT; 10/6/14 JS; 10/13/14 PP
192	05/07/2014		JUDGE COOPER, MALLORY
193	05/07/2014		ASST. STATE ATTY. CALIEL, MARK
194	05/07/2014		ASST. PUB. DEF. GAZALEH, FRED CANANN
195	05/07/2014		DEFENDANT PRESENT IN JAIL
196	05/07/2014		PRETRIAL 07/16/2014 9:00 AM - 605 6TH FLOOR, 501 W ADAMS ST JACKSONVILLE FL 32202
197	05/07/2014		10/2/14 FPT; 10/6/14 JS; 10/13/14 PP
198	05/23/2014		NOTICE OF TAKING DEPOSITION
199	05/23/2014		NOTICE OF TAKING DEPOSITION
200	05/27/2014		SUBPOENA FOR DEPOSITION (DEFENSE)
201	05/27/2014		SUBPOENA FOR DEPOSITION (DEFENSE)
202	05/29/2014		NOTICE OF TAKING DEPOSITION DEFENSE
203	05/29/2014		SUBPOENA FOR DEPOSITION DEFENSE
204	05/30/2014		SUBPOENA FOR DEPOSITION DEFENSE
205	06/04/2014		SUBPOENA FOR DEPOSITION (DEFENSE)
206	07/16/2014		JUDGE COOPER, MALLORY
207	07/16/2014		ASST. STATE ATTY. CALIEL, MARK

208	07/16/2014		ASST. PUB. DEF. GAZALEH, FRED CANANN
209	07/16/2014		DEFENDANT PRESENT IN JAIL
210	07/16/2014		PRETRIAL 09/03/2014 9:00 AM - 605 6TH FLOOR, 501 W ADAMS ST JACKSONVILLE FL 32202
211	07/16/2014		10/2/14 FPT; 10/6/14 JS; 10/13/14 PP
212	08/04/2014		NOTICE OF TAKING DEPOSITION (OUT OF STATE)
213	08/05/2014		SUBPOENA FOR DEPOSITION, DEFENSE
214	09/03/2014		JUDGE COOPER, MALLORY
215	09/03/2014		ASST. STATE ATTY. CALIEL, MARK
216	09/03/2014		ASST. PUB. DEF. GAZALEH, FRED CANANN
217	09/03/2014		DEFENDANT PRESENT IN JAIL
218	09/03/2014		MOTION FOR CONTINUANCE - DEFENSE / GRANTED - ORDER ENTERED (STRIKE 10/2/14 FPT; 10/6/14 JS; 10/13/14 PP)
219	09/03/2014		PRETRIAL 11/04/2014 9:00 AM - 605 6TH FLOOR, 501 W ADAMS ST JACKSONVILLE FL 32202
220	09/03/2014		1/15/15 FPT; 1/20/15 JS; 1/26/15 TRIAL; 2/12/15-2/13/15 PP
221	10/16/2014		NOTICE OF TAKING DEPOSITION
222	11/04/2014		JUDGE COOPER, MALLORY
223	11/04/2014		ASST. STATE ATTY. CALIEL, MARK
224	11/04/2014		ASST. PUB. DEF. GAZALEH, FRED CANANN
225	11/04/2014		DEFENDANT PRESENT IN JAIL
226	11/04/2014		WAIVER OF SEQUESTRATION OF JURY BETWEEN FIRST AND SECOND PHASES OF TRIAL
227	11/04/2014		HEARING ON MOTION 12/11/2014 9:00 AM - 605 6TH FLOOR, 501 W ADAMS ST JACKSONVILLE FL 32202
228	11/04/2014		@1:30PM - T/D CERTAIN; 1/15/15 FPT; 1/20/15 JS; 1/26/15 TRIAL; 2/9-10/15 PP
229	11/17/2014		CERTIFICATE OF CONFLICT & MOTION TO WITHDRAW
230	11/17/2014		NOTIFICATION OF ATTORNEY CONFLICT
231	11/18/2014		HEARING ON MOTION 11/19/2014 9:00 AM - 605 6TH FLOOR, 501 W ADAMS ST JACKSONVILLE FL 32202
232	11/18/2014		TO WITHDRAW /// PER EMAIL /// 01/15/15 FPT, 01/20/15 JS, 01/26/15, 02/09/15 PP
233	11/18/2014		REGIONAL CONFLICT COUNSEL RESPONSE - DECLINE
234	11/19/2014		JUDGE COOPER, MALLORY
235	11/19/2014		ASST. STATE ATTY. CALIEL, MARK
236	11/19/2014		ASST. STATE ATTY. MOODY, JEFFREY MITCHELL
237	11/19/2014		ASST. PUB. DEF. GAZALEH, FRED CANANN
238	11/19/2014		ASST. PUB. DEF. RADO, TRICIA ANNE
239	11/19/2014		DEFENDANT PRESENT IN JAIL
240	11/19/2014		HEARING ON MOTION TO WITHDRAW HELD IN FULL - U/A
241	11/19/2014		PRETRIAL 11/24/2014 10:30 AM - 605 6TH FLOOR, 501 W ADAMS ST JACKSONVILLE FL 32202
242	11/19/2014		ROM @ 10:30; 12/11/14 HOM TBS; 1/15/15 FPT; 1/20/15

			JS; 1/26/15 TRIAL; 2/9/15-2/10/15 PP
243	11/24/2014		JUDGE COOPER, MALLORY
244	11/24/2014		ASST. STATE ATTY. CALIEL, MARK
245	11/24/2014		ASST. PUB. DEF. GAZALEH, FRED CANANN
246	11/24/2014		DEFENDANT PRESENT IN JAIL
247	11/24/2014		MOTION TO WITHDRAW - DENIED / ORDER TO BE ENTERED
248	11/24/2014		PRETRIAL 12/04/2014 9:00 AM - 605 6TH FLOOR, 501 W ADAMS ST JACKSONVILLE FL 32202
249	11/24/2014		12/11/14 HOM @ 1:30; 1/15/15 FPT; 1/20/15 JS; 1/26/15 TRIAL; 2/9-10/15 PP
250	11/25/2014		MOTION IN LIMINE (STATE'S FIRST)
251	11/25/2014		MOTION IN LIMINE (STATE'S SECOND)
252	12/02/2014		COURT ORDER DENYING DEFENDANT'S CERTIFICATE OF CONFLICT AND MOTION TO WITHDRAW
253	12/04/2014		JUDGE COOPER, MALLORY
254	12/04/2014		ASST. STATE ATTY. CALIEL, MARK
255	12/04/2014		ASST. PUB. DEF. GAZALEH, FRED CANANN
256	12/04/2014		> T. RADO FOR F. GAZALEH
257	12/04/2014		DEFENDANT PRESENT IN JAIL
258	12/04/2014		COURT DATE PREVIOUSLY SET 12/11/14 @ 1:30 HOM
259	12/10/2014		PETITION FOR WRIT OF CERTIORARI (EMERGENCY)-STYLED DCA
260	12/10/2014		MOTION TO STAY PROCEEDINGS (EMERGENCY) - STYLED DCA, 1D14-5647
261	12/11/2014		JUDGE COOPER, MALLORY
262	12/11/2014		ASST. STATE ATTY. CALIEL, MARK
263	12/11/2014		ASST. PUB. DEF. GAZALEH, FRED CANANN
264	12/11/2014		DEFENDANT PRESENT IN JAIL
265	12/11/2014		HEARING ON STATES FIRST MOTION IN LIMINE HELD IN FULL - U/A ORDER TO BE ENTERED
266	12/11/2014		PRETRIAL 01/05/2015 9:00 AM - 605 6TH FLOOR, 501 W ADAMS ST JACKSONVILLE FL 32202
267	12/11/2014		1/15/15 FPT; 1/20/15 JS; 1/26/15 TRIAL; 2/9-10/15 PP
268	12/11/2014		STATES MOTION IN LIMINE (SECOND) - GRANTED NO OBJECTION BY DEFENSE / ORDER ENTERED
269	12/12/2014		COURT ORDER ON STATE'S FIRST MOTION IN LIMINE
270	12/12/2014		COURT ORDER ON DEFENDANT'S CAPITAL CASE MOTIONS
271	12/12/2014		MOTION TO STAY (EMERGENCY)
272	12/16/2014		HEARING ON MOTION 12/19/2014 10:30 AM - 605 6TH FLOOR, 501 W ADAMS ST JACKSONVILLE FL 32202
273	12/17/2014		REPLY to state's response in opposition to petition for writ of certiorari - styled dca, 1d14-5647
274	12/19/2014		JUDGE COOPER, MALLORY
275	12/19/2014		ASST. STATE ATTY. CALIEL, MARK
276	12/19/2014		ASST. PUB. DEF. GAZALEH, FRED CANANN

277	12/19/2014		DEFENDANT PRESENT IN JAIL
278	12/19/2014		MOTION (EMERGENCY) TO STAY PROCEEDINGS - DENIED / ORDER TO BE ENTERED
279	12/19/2014		MOTION FOR CONTINUANCE (DEFENSE) - GRANTED / ORDER ENTERED
280	12/19/2014		CANCELLED PRETRIAL ON 1/5/2015 9:00:00 AM
281	12/19/2014		> CANCEL REASON - STRIKEN
282	12/19/2014		PRETRIAL 01/15/2015 9:00 AM - 605 6TH FLOOR, 501 W ADAMS ST JACKSONVILLE FL 32202
283	12/19/2014		COURT ORDER DENYING DEFTS. EMERGENCY MOTION TO STAY PROCEEDINGS
284	12/23/2014		DCA ORDER DIRECTING THE LOWER COURT TO FILE TRANSCRIPTS OF THE "IN-CAMERA" PORTIONS OF THE PROCEEDINGS HELD 11/19/14 AND 12/5/14 OF CASE 08-CF-12641 ... UNDER SEAL. 1D14-5647
285	12/29/2014		COURT ORDER TO ALLOW CLERKS OFFICE TO SEND SEALED TRANSCRIPTS OF IN-CAMERA HEARING TO 1ST DCA
286	12/29/2014		TESTIMONY & PROCEEDINGS OF THE IN-CAMERA HEARING HELD ON NOVEMBER 19, 2014 (FILED UNDER SEAL)
287	01/15/2015		JUDGE COOPER, MALLORY
288	01/15/2015		ASST. STATE ATTY. CALIEL, MARK
289	01/15/2015		ASST. PUB. DEF. GAZALEH, FRED CANANN
290	01/15/2015		DEFENDANT APPEARANCE WAIVED
291	01/15/2015		PRETRIAL 02/05/2015 9:00 AM - 605 6TH FLOOR, 501 W ADAMS ST JACKSONVILLE FL 32202
292	01/23/2015		petitioner's supplemental Brief - styled dca, 1d14-5647
293	02/03/2015		CANCELLED PRETRIAL ON 2/5/2015 9:00:00 AM
294	02/03/2015		> CANCEL REASON - PER EMAIL
295	02/03/2015		PRETRIAL 02/04/2015 9:00 AM - 605 6TH FLOOR, 501 W ADAMS ST JACKSONVILLE FL 32202
296	02/04/2015		JUDGE COOPER, MALLORY
297	02/04/2015		ASST. STATE ATTY. CALIEL, MARK
298	02/04/2015		ASST. PUB. DEF. GAZALEH, FRED CANANN
299	02/04/2015		DEFENDANT APPEARANCE WAIVED
300	02/04/2015		PRETRIAL 03/05/2015 9:00 AM - 605 6TH FLOOR, 501 W ADAMS ST JACKSONVILLE FL 32202
301	02/18/2015		STATUS HEARING 02/20/2015 9:00 AM - 605 6TH FLOOR, 501 W ADAMS ST JACKSONVILLE FL 32202
302	02/18/2015		APPOINT COUNSEL // PER EMAIL // 3/5/15 PT
303	02/19/2015		ORDER APPOINTING ATTORNEY (COURT-APPOINTED COUNSEL)
304	02/20/2015		JUDGE COOPER, MALLORY
305	02/20/2015		ASST. STATE ATTY. CALIEL, MARK
306	02/20/2015		> J. MOODY FOR M. CALIEL
307	02/20/2015		ATTY. FOR DEF. SCHLAX, JULIE AGENT
308	02/20/2015		DEFENDANT PRESENT IN JAIL

309	02/20/2015		COURT ORDER GRANTING THE DEFENSE CERTIFICATE OF CONFLICT AND MOTION TO WITHDRAW - ENTERED
310	02/20/2015		COURT STRIKES 3/5/2015 PRETRIAL DATE
311	02/20/2015		CANCELLED PRETRIAL ON 3/5/2015 9:00:00 AM
312	02/20/2015		> CANCEL REASON - IN OPEN COURT
313	02/20/2015		PRETRIAL 03/24/2015 9:00 AM - 605 6TH FLOOR, 501 W ADAMS ST JACKSONVILLE FL 32202
314	03/03/2015		COURT ORDER APPOINTING COURT APPOINTED COUNSEL
315	03/03/2015		MOTION TO APPOINT ADDITIONAL COUNSEL FOR PURPOSES OF TRIAL AND PENALTY PHASE
316	03/05/2015		MANDATE FROM APPELLATE COURT ORDERS QUASHED AND CASES REMANDED, 1D14-5647 BOOK 17087 PAGE 1643-1657
317	03/05/2015		COURT ORDER GRANTING MOTION TO APPOINT ADDITIONAL COUNSEL FOR PURPOSE OF TRIAL AND PENALTY PHASE
318	03/24/2015		JUDGE COOPER, MALLORY
319	03/24/2015		ASST. STATE ATTY. CALIEL, MARK
320	03/24/2015		ATTY. FOR DEF. SCHLAX, JULIE AGENT
321	03/24/2015		DEFENDANT PRESENT IN JAIL
322	03/24/2015		MOTION FOR APPOINTMENT AND AUTHORITY TO INCUR COSTS OF MITIGATION COORDINATOR/INVESTIGATOR AND MITIGATION EXPENSES - FILED
323	03/24/2015		COURT ORDER OF APPOINTMENT AND AUTHORITY TO INCUR COSTS OF MITIGATION COORDINATOR/INVESTIGATOR AND MITIGATION EXPENSES - ENTERED
324	03/24/2015		PRETRIAL 05/12/2015 9:00 AM - 605 6TH FLOOR, 501 W ADAMS ST JACKSONVILLE FL 32202
325	05/11/2015		MOTION TO TAKE DEPOSITION TO PERPETUATE TESTIMONY (STATE'S)
326	05/12/2015		JUDGE COOPER, MALLORY
327	05/12/2015		ASST. STATE ATTY. CALIEL, MARK
328	05/12/2015		ATTY. FOR DEF. SCHLAX, JULIE AGENT
329	05/12/2015		DEFENDANT PRESENT IN JAIL
330	05/12/2015		COURT ORDER GRANTING STATE'S MOTION FOR DEPOSITION TO PERPETUATE TESTIMONY - ENTERED
331	05/12/2015		PRETRIAL 07/02/2015 9:00 AM - 605 6TH FLOOR, 501 W ADAMS ST JACKSONVILLE FL 32202
332	05/12/2015		& PERPETUATE TESTIMONY @ 1:30 PM
333	05/21/2015		NOTICE OF TAKING DEPOSITION
334	07/02/2015		JUDGE COOPER, MALLORY
335	07/02/2015		ASST. STATE ATTY. CALIEL, MARK
336	07/02/2015		ATTY. FOR DEF. SCHLAX, JULIE AGENT
337	07/02/2015		DEFENDANT PRESENT IN JAIL
338	07/02/2015		PERPETUATED TESTIMONY OF PATRICIA MOORE HEARING HELD IN FULL

339	07/02/2015		PRETRIAL 08/13/2015 9:00 AM - 605 6TH FLOOR, 501 W ADAMS ST JACKSONVILLE FL 32202
340	07/14/2015		AMENDED MOTION FOR APPOINTMENT AND AUTHORITY TO INCUR OF COSTS OF MITIGATION COORDINATOR/INVESTIGATOR AND MITIGATION EXPENSES
341	07/14/2015		MOTION FOR AUTHORITY TO INCUR COSTS ADDITIONAL COSTS OF MITIGATION COORDINATOR/INVESTIGATOR AND MITIGATION EXPENSES
342	07/17/2015		COURT ORDER AUTHORIZING ADDITIONAL COSTS OF MITIGATION COORDINATOR/INVESTIGATOR AND MITIGATION EXPENSES
343	07/17/2015		COURT ORDER AMENDED OF APPOINTMENT AND AUTHORITY TO INCUR COSTS OF MITIGATION COORDINATOR/INVESTIGATOR AND MITIGATION EXPENSES
344	07/22/2015		MOTION FOR PAYMENT OF COSTS OF SELECT DEPOSITION TRANSCRIPTS
345	07/29/2015		ORDER GRANTING MOTION TO INCUR COSTS OF SELECT DEPOSITION TRASCRIPTS
346	08/13/2015		JUDGE COOPER, MALLORY
347	08/13/2015		ASST. STATE ATTY. CALIEL, MARK
348	08/13/2015		ATTY. FOR DEF. SCHLAX, JULIE AGENT
349	08/13/2015		DEFENDANT PRESENT IN JAIL
350	08/13/2015		PRETRIAL 09/14/2015 9:00 AM - 605 6TH FLOOR, 501 W ADAMS ST JACKSONVILLE FL 32202
351	09/14/2015		CANCELLED PRETRIAL ON 9/14/2015 9:00:00 AM
352	09/14/2015		> CANCEL REASON - PRIOR TO COURT STARTING PER JA
353	09/14/2015		PRETRIAL 09/15/2015 9:00 AM - 605 6TH FLOOR, 501 W ADAMS ST JACKSONVILLE FL 32202
354	09/14/2015		PER JA
355	09/15/2015		JUDGE COOPER, MALLORY
356	09/15/2015		ASST. STATE ATTY. CALIEL, MARK
357	09/15/2015		ATTY. FOR DEF. SCHLAX, JULIE AGENT
358	09/15/2015		DEFENDANT PRESENT IN JAIL
359	09/15/2015		HEARING ON MOTION (TO BE SET) 11/02/2015 9:00 AM - 605 6TH FLOOR, 501 W ADAMS ST JACKSONVILLE FL 32202
360	09/15/2015		3/31/2016 FPT AND 4/4/2016 JS
361	09/17/2015		COURT ORDER APPOINTING MENTAL HEALTH EXPERT
362	09/17/2015		COURT ORDER AUTHORIZING ADDITIONAL COSTS OF MITIGATION COORDINATOR/INVESTIGATOR AND MITIGATION EXPENSES
363	10/16/2015		MOTION FOR CHANGE OF VENUE
364	11/02/2015		JUDGE COOPER, MALLORY
365	11/02/2015		ASST. STATE ATTY. CALIEL, MARK
366	11/02/2015		ATTY. FOR DEF. SCHLAX, JULIE AGENT
367	11/02/2015		DEFENDANT PRESENT IN JAIL

368	11/02/2015		HEARING ON MOTION 11/05/2015 9:00 AM - 605 6TH FLOOR, 501 W ADAMS ST JACKSONVILLE FL 32202
369	11/02/2015		03/31/2016 FPT & 04/04/2016 JS
370	11/04/2015		AMENDED MOTION FOR CHANGE OF VENUE
371	11/05/2015		JUDGE COOPER, MALLORY
372	11/05/2015		ASST. STATE ATTY. CALIEL, MARK
373	11/05/2015		ATTY. FOR DEF. SCHLAX, JULIE AGENT
374	11/05/2015		DEFENDANT PRESENT IN JAIL
375	11/05/2015		HEARING ON MOTION TO CHANGE VENUE HELD IN FULL-RESERVING RULING ON MOTION
376	11/05/2015		PRETRIAL 11/17/2015 9:00 AM - 605 6TH FLOOR, 501 W ADAMS ST JACKSONVILLE FL 32202
377	11/05/2015		03/31/2016 FPT (RM#406) & 04/04/2016 JS(RM#406)
378	11/05/2015		MOTION FOR THE APPOINTMENT OF A PRIVATE INVESTIGATOR
379	11/05/2015		COURT ORDER APPOINTING PRIVATE INVESTIGATOR
380	11/05/2015		MOTION FOR APPOINTMENT OF PRISON EXPERT
381	11/05/2015		COURT ORDER APPOINTING PRISON EXPERT
382	11/06/2015		COURT ORDER APPOINTING A NEUROPSYCHOLOGIST
383	11/09/2015		MOTION FOR APPOINTMENT OF A NEUROPSYCHOLOGIST
384	11/09/2015		MOTION FOR APPOINTMENT OF A PHARMACOLOGIST
385	11/17/2015		JUDGE COOPER, MALLORY
386	11/17/2015		ASST. STATE ATTY. CALIEL, MARK
387	11/17/2015		ATTY. FOR DEF. SCHLAX, JULIE AGENT
388	11/17/2015		DEFENDANT PRESENT IN JAIL
389	11/17/2015		STATUS HEARING 12/15/2015 9:00 AM - 605 6TH FLOOR, 501 W ADAMS ST JACKSONVILLE FL 32202
390	11/17/2015		03/31/2016 FPT & 04/04/2016 JS
391	11/25/2015		MOTION FOR APPOINTMENT OF A PHARMACOLOGIST
392	11/25/2015		COURT ORDER APPOINTING A PHARMACOLOGIST
393	12/10/2015		JUSTICE ADMINISTRATIVE COMMISION'S RESPONSE TO MOTION FOR APPOINTMENT OF OUT OF STATE EXPERT AND REQUEST TO APPEAR TELEPHONICALLY
394	12/15/2015		JUDGE COOPER, MALLORY
395	12/15/2015		ASST. STATE ATTY. CALIEL, MARK
396	12/15/2015		ATTY. FOR DEF. SCHLAX, JULIE AGENT
397	12/15/2015		DEFENDANT PRESENT IN JAIL
398	12/15/2015		PRETRIAL 01/25/2016 9:00 AM - 405 4TH FLOOR, 501 W ADAMS ST JACKSONVILLE FL 32202
399	12/15/2015		BEFORE JUDGE MALLORY COOPER/03/31/2016 FPT & 04/04/2016 JS
400	12/15/2015		MOTION TO DIRECT DEPARTMENT OF CORRECTIONS TO PERMIT TESTING
401	12/15/2015		COURT ORDER DIRECTING DEPARTMENT OF CORRECTIONS TO PERMIT TESTING
402	01/12/2016		MOTION TO STRIKE NOTICE OF INTENT TO SEEK THE

			DEATH PENALTY AND BAR THE STATE FROM SEEKING THE DEATH PENALTY BASED ON U.S. SUPREME COURT'S DECISION IN HURST V. FLORIDA
403	01/21/2016		CANCELLED PRETRIAL ON 1/25/2016 9:00:00 AM
404	01/21/2016		> CANCEL REASON -
405	01/21/2016		PRETRIAL 02/02/2016 9:00 AM - 405 4TH FLOOR, 501 W ADAMS ST JACKSONVILLE FL 32202
406	01/21/2016		BEFORE JUDGE MALLORY COOPER/03/31/2016 FPT & 04/04/2016 JS PER JA E-MAIL
407	01/22/2016		STATES SIXTH SUPPLEMENTAL DISCOVERY EXHIBIT
408	01/28/2016		MOTION FOR AUTHORITY TO INCUR COSTS ADDITIONAL COSTS OF MITIGATION COORDINATOR/INVESTIGATOR AND MITIGATION EXPENSES
409	02/02/2016		JUDGE BORELLO, MARK
410	02/02/2016		SITTING JUDGE - COOPER, MALLORY
411	02/02/2016		ASST. STATE ATTY. CALIEL, MARK
412	02/02/2016		ATTY. FOR DEF. SCHLAX, JULIE AGENT
413	02/02/2016		DEFENDANT PRESENT IN JAIL
414	02/02/2016		OTHERS PRESENT: CHUCK FLETCHER - CO-COUNSEL
415	02/02/2016		COURT ORDER GRANTING MOTION FOR INTERIM REIMBURSEMENT FOR COSTS
416	02/02/2016		COURT ORDER AUTHORIZING ADDITIONAL COSTS OF MITIGATION COORDINATOR/INVESTIGATOR AND MITIGATION EXPENSES
417	02/02/2016		PRETRIAL 03/01/2016 9:00 AM - 405 4TH FLOOR, 501 W ADAMS ST JACKSONVILLE FL 32202
418	02/02/2016		HEARING ON MOTION - BEFORE JUDGE MALLORY COOPER @9:00AM/3-31-16 FPT; 4-4-16 JS
419	02/02/2016		STATE'S RESPONSE TO DEFENDANT'S MOTION TO STRIKE NOTICE OF INTENT TO SEEK THE DEATH PENALTY AND BAR THE STATE FROM SEEKING THE DEATH PENALTY BASED ON U.S. SUPREME COURTS DECISION IN HURST V. FLORIDA
420	02/02/2016		NOTICE OF INTENT TO FILE MOTION FOR PROTECTIVE ORDER AND REQUEST FOR A REASONABLE TIME
421	02/02/2016		COURT ORDER AUTHORIZING ADDITIONAL COSTS OF MITIGATION COORDINATOR/INVESTIGATOR AND MITIGATION EXPENSES
422	02/02/2016		COURT ORDER GRANTING MOTION FOR INTERIM REIMBURSEEMENT FOR COSTS
423	02/09/2016		COURT ORDER GRANTING MOTION TO DETERMINE CONFIDENTIALITY OF COURT RECORDS
424	02/11/2016		COURT ORDER -AMENDED- GRANTING MOTIONT TO INCUR COSTS OF SELECT DEPOSITION TRANSCRIPTS
425	02/17/2016		COURT ORDER AMENDED -GRANTING MOTION TO INCUR COSTS OF SELECT DEPOSITION TRANSCRIPTS
426	02/17/2016		NOTICE OF SEALING DOCUMENT
427	02/17/2016		MOTION TO MAKE COURT RECORDS CONFIDENTIAL AND

			MOTION FOR PROTECTIVE ORDER SEALING SPECIFIC COURT DOCUMENTS AND RECORDS
428	02/17/2016		COURT ORDER SEALING SPECIFIC DOCUMENTS AND RECORDS
429	02/17/2016		EX PARTE ORDER APPOINTING
430	02/18/2016		MOTION OF MORRIS PUBLISHING GROUP, LLC TO INTERVENE, AND MEMORANDUM IN OPPOSITION TO DEFENDANT'S NOTICE OF INTENT TO FILE MOTION FOR PROTECTIVE ORDER AND REQUEST FOR REASONABLE TIME
431	02/19/2016		DEFENDANT'S MOTION TO DETERMINE CONFIDENTIALITY AND MOTION FOR PROTECTIVE ORDER REGARDING THE STATE'S SIXTH SUPPLEMENTAL DISCOVERY EXHIBIT AND REQUEST FOR INCAMERA REVIEW
432	02/22/2016		EX-PARTE MOTION FOR APPOINTMENT OF OUT OF STATE EXPERT AND REQUEST FOR IN-CAMERA HEARING
433	02/22/2016		AFFIDAVIT OF EMOG
434	02/22/2016		DOCTOR'S NOTES 1A, 1B, 2A, 2B,3A, 3B, 4A, 4B
435	02/22/2016		DOCUMENTS CURRICULUM VITAE, VOUCHER, IMAGES, MEDICAL PRINTOUT
436	02/22/2016		DOCUMENTS ABBREVIATED CHRONOLOGY
437	02/23/2016		DEFENDANT'S MOTION TO PROHIBIT DEATH QUALIFICATION OF THE JURY
438	02/24/2016		ORDER SETTING HEARING INTERVENOR, MORRIS PUBLISHING GROUP, LLC'S MOTION TO INTERVENE AND MEMORANDUM IN OPPOSITION TO DEFENDANT'S NOTICE OF INTENT TO FILE MOTION FOR PROTECTIVE ORDER AND REQUEST FOR REASONABLE TIME; AND DEFENDANT'S MOTION TO DETERMINE CONFIDENTIALITY AND MOTION FOR PROTECTIVE ORDER REGARDING THE STATE'S SIXTH SUPPLEMENTAL DISCOVERY EXHIBIT AND REQUEST FOR IN CAMERA REVIEW
439	02/26/2016		MOTION TO INTERVENE FOR PURPOSES OF OPPOSING DEFENDANT'S MOTION TO DETERMINE CONFIDENTIALITY AND TO SET ASIDE ORDERS SEALING DOCUMENTS
440	02/29/2016		INTERVENOR GRAHAM MEDIA GROUP, FLORIDA, INC.'S MOTION TO INTERVENE AND OPPOSE DEFENDANT'S NOTICE OF INTENT AND MOTION REGARDING SIXTH SUPPLEMENTAL DISCOVERY EXHIBIT
441	02/29/2016		INTERVENOR GRAHAM MEDIA GROUP, FLORIDA, INC.'S MOTION TO INTERVENE, TO OPPOSE DEFENDANT'S MOTIONS, AND TO VACATE RESULTANT ORDERS SEALING VARIOUS DOCUMENTS
442	02/29/2016		COURT ORDER SETTING HEARING ON INTERVENOR , MORRIS PUBLISHING GROUP, LLC'S MOTION TO INTERVINE FOR PURPOSES OF OPPOSING DEFTS. MOTION TO DETERMINE CONFIDENTIALITY AND TO SET ASIDE ORDERS SEALING DOCUMENTS, INTERVENOR, GRAHAM MEDIA

			GROUP, FLORIDA, INC'S MOTION TO INTERVINE AND OPPOSE DEFTS. NOTICE OF INTENT AND MOTION REGARDING SIXTH SUPPLEMENTAL DISCOVERY EXHIBIT: AND MOTION TO INTERVINE TO OPPOSE DEFTS. MOTION , AND TO VACATE RESULTANT ORDERS SEALING VARIOUS DOCUMENTS
443	03/01/2016		JUDGE BORELLO, MARK
444	03/01/2016		SITTING JUDGE - COOPER, MALLORY
445	03/01/2016		ASST. STATE ATTY. CALIEL, MARK
446	03/01/2016		ATTY. FOR DEF. SCHLAX, JULIE AGENT
447	03/01/2016		DEFENDANT PRESENT IN JAIL
448	03/01/2016		OTHERS PRESENT: JENNIFER MANSFILED WITH HOLLAND AND KNIGHT MORRIS PUBLISHING; EDWARD BIRK WITH CHANNLE 4
449	03/01/2016		IN CAMERA REVIEW- GRANTED- ORDER TO BE ENTERED
450	03/01/2016		ALL OTHER MOTIONS HEARD AND ARE UNDER ADVISEMENT
451	03/01/2016		PRETRIAL 03/08/2016 9:00 AM - 405 4TH FLOOR, 501 W ADAMS ST JACKSONVILLE FL 32202
452	03/01/2016		BEFORE JUDGE COOPER // 03/31/16 FPT, 04/04/16 JS
453	03/01/2016		INTERVENOR GRAHAM MEDIA GROUP, FLORIDA, INC.'S NOTICE OF SUPPLEMENTAL AUTHORITY IN SUPPORT OF MOTIONS HEARD ON MARCH 1, 2016
454	03/02/2016		MOTION FOR AUTHORITY TO INCUR COSTS ADDITIONAL COSTS OF MITIGATION COORDINATOR/INVESTIGATOR AND MITIGATION EXPENSES
455	03/02/2016		COURT ORDER AUTHORIZING ADDITIONAL COSTS OF MITIGATION COORDINATOR / INVESTIGATOR AND MITIGATION EXPENSES
456	03/04/2016		MOTION TO APPOINT EXPERT (EX-PARTE)
457	03/04/2016		EX PARTE ORDER APPOINTING
458	03/07/2016		COURT ORDER APPOINTING DR.GEOFFREY COLINO
459	03/08/2016		JUDGE BORELLO, MARK
460	03/08/2016		SITTING JUDGE - COOPER, MALLORY
461	03/08/2016		ASST. STATE ATTY. CALIEL, MARK
462	03/08/2016		ATTY. FOR DEF. SCHLAX, JULIE AGENT
463	03/08/2016		DEFENDANT PRESENT IN JAIL - NOT BROUGHT OUT "SICK"
464	03/08/2016		OTHERS PRESENT: C. FLETCHER - CO COUNSEL
465	03/08/2016		MOTION FOR CONTINUANCE - FILED; GRANTED WITHOUT OBJECTION - ORDER ENTERED **STRIKE 4/4/16 JS**
466	03/08/2016		COURT ORDER DENYING MOTION TO STRIKE NOTICE OF INTENT TO SEEK THE DEATH PENALTY AND MOTION TO PROHIBIT DEATH QUALIFICATION OF THE JURY
467	03/08/2016		PRETRIAL 04/04/2016 9:00 AM - 406 4TH FLOOR, 501 W ADAMS ST JACKSONVILLE FL 32202
468	03/08/2016		BEFORE JUDGE COOPER // STRIKE 03/31/16 FPT
469	03/22/2016		CANCELLED PRETRIAL ON 4/4/2016 9:00:00 AM

470	03/22/2016		> CANCEL REASON -
471	03/22/2016		HEARING ON MOTION (TO BE SET) 04/11/2016 9:00 AM - 406 4TH FLOOR, 501 W ADAMS ST JACKSONVILLE FL 32202
472	03/22/2016		BEFORE JUDGE COOPER // PER EMAIL
473	03/31/2016		MOTION TO DIRECT DEPARTMENT OF CORRECTIONS TO PERMIT TESTING
474	04/04/2016		COURT ORDER DENYING MOTION TO DIRECT DEPARTMENT OF CORRECTIONS TO PERMIT TESTING
475	04/04/2016		COURT ORDER ON MOTIONS TO INTERVENE AND DEFENDANTS MOTION TO DETERMINE CONFIDENTIALITY AND MOTION FOR PROTECTIVE ORDER AND REQUEST FOR IN - CAMERA REVIEW
476	04/04/2016		COURT ORDER GRANTING IN PART AND DENYING IN PART MOTION TO INTERVENE ; ORDER VACATING PREVIOUSLY ENTERED ORDER GRANTING MOTION TO DETERMINE CONFIDENTIALITY AND ORDERS SEALING RECORDS; ORDER ON PROTECTIVE ORDER AND SEALING CONFIDENTIAL RECORDS.
477	04/07/2016		MOTION TO SUPPRESS STATEMENTS
478	04/07/2016		MOTION TO CONTINUE ON HEARING ON MOTION TO SUPPRESS
479	04/11/2016		JUDGE BORELLO, MARK
480	04/11/2016		SITTING JUDGE COOPER
481	04/11/2016		ASST. STATE ATTY. CALIEL, MARK
482	04/11/2016		ATTY. FOR DEF. SCHLAX, JULIE AGENT
483	04/11/2016		DEFENDANT APPEARANCE WAIVED
484	04/11/2016		OTHERS PRESENT: C. FLETCHER - CO-COUNSEL
485	04/11/2016		MOTION FOR CONTINUANCE OF HEARING ON MOTION TO SUPPRESS (DEFENSE) - GRANTED
486	04/11/2016		HEARING ON MOTION 05/04/2016 9:00 AM - 405 4TH FLOOR, 501 W ADAMS ST JACKSONVILLE FL 32202
487	04/13/2016		REQUEST FOR RE-APPOINTMENT OF COUNSEL TO FORMER CLIENT RANDALL DEVINEY
488	04/25/2016		NOTICE OF JUSTICE ADMINISTRATIVE COMMISION RESPONSE TO REQUEST FOR RE-APPOINTMENT OF COUNSEL TO FORMER CLIENT RANDALL DEVINEY
489	04/28/2016		MOTION FOR THE APPOINTMENT OF A PRIVATE INVESTIGATOR
490	04/29/2016		STATE'S RESPONSE TO DEFENDANT'S MOTION TO SUPPRESS
491	05/02/2016		COURT ORDER APPOINTING PRIVATE INVESTIGATOR
492	05/02/2016		MOTION TO MODIFY THIS COURT'S PROTECTIVE ORDER ENTERED ON APRIL 6, 2016
493	05/02/2016		DEFENDANT'S SECOND MOTION FOR CONTINUANCE OF HEARING ON MOTION TO SUPRESS
494	05/03/2016		STATE'S NOTICE OF AGGRAVATING FACTORS THE STATE INTENDS TO RELY ON AND MOTION FOR NOTICE OF

			MITIGATING CIRCUMSTANCES
495	05/04/2016		JUDGE BORELLO, MARK
496	05/04/2016		SITTING JUDGE - COOPER, MALLORY
497	05/04/2016		ASST. STATE ATTY. CALIEL, MARK
498	05/04/2016		ATTY. FOR DEF. SCHLAX, JULIE AGENT
499	05/04/2016		ATTY. FOR DEF. FLETCHER, W CHARLES
500	05/04/2016		DEFENDANT PRESENT IN JAIL
501	05/04/2016		HEARING ON SECOND MOTION FOR CONTINUANCE OF HEARING ON MOTION TO SUPPRESS & MOTION TO MODIFY COURT'S PROTECTIVE ORDER ENTERED ON APRIL 6, 2016 HELD IN FULL
502	05/04/2016		HEARING ON MOTION 05/26/2016 9:00 AM - 405 4TH FLOOR, 501 W ADAMS ST JACKSONVILLE FL 32202
503	05/04/2016		(MOTION TO SUPPRESS) BEFORE JUDGE MALLORY COOPER
504	05/04/2016		COURT ORDER SECOND MOTION FOR CONTINUANCE OF HEARING ON MOTION TO SUPPRESS
505	05/05/2016		COURT ORDER GRANTING MOTION TO MODIFY THIS COURTS PROTECTIVE ORDER ENTERED ON APRIL 06, 2016
506	05/06/2016		MOTION TO PROHIBIT DEATH QUALIFICATION BECAUSE THE NEW LEGSLATION CREATING A NEW DEATH PENALTY SCHEME IS NOT RETROACTIVE
507	05/10/2016		MOTION TO DECLARE FLORIDA STATUTE 921.141 (2016) UNCONSTITUTIONAL
508	05/17/2016		MOTION TO BAR THE STATE FROM SEEKING THE DEATH PENALTY BASED ON FAILURE TO PROVIDE NOTICE PURSUANT TO FLORIDA STATUTE 782.04(1)(b) 2016
509	05/25/2016		MOTION FOR CONTINUANCE OF HEARING ON MOTION TO SUPPRESS
510	05/25/2016		MOTION TO UNSEAL DOCUMENTS
511	05/26/2016		JUDGE BORELLO, MARK
512	05/26/2016		SITTING JUDGE - COOPER, MALLORY
513	05/26/2016		ASST. STATE ATTY. CALIEL, MARK
514	05/26/2016		ASST. STATE ATTY. MOODY, JEFFREY MITCHELL
515	05/26/2016		ATTY. FOR DEF. SCHLAX, JULIE AGENT
516	05/26/2016		ATTY. FOR DEF. FLETCHER, W CHARLES
517	05/26/2016		DEFENDANT PRESENT IN JAIL
518	05/26/2016		HEARING ON DEFENSE MOTION TO UNSEAL DOCUMENTS HELD IN FULL - TAKEN UNDER ADVISMENT - ORDER TO BE ENTERED
519	05/26/2016		HEARING ON DEFENSE MOTION TO CONTINUE MOTION TO SUPPRESS HELD IN FULL
520	05/26/2016		HEARING ON MOTION 07/21/2016 9:00 AM - 405 4TH FLOOR, 501 W ADAMS ST JACKSONVILLE FL 32202
521	05/26/2016		- (THURS/FRI) TO BE HEARD BEFORE JUDGE COOPER @ 9:00 AM // 1/17/17 JS (CRT RM 406/407)
522	05/26/2016		COURT ORDER UNSEALING RECORDS FOR IN CAMERA INSPECTION

523	05/26/2016		COURT ORDER GRANTING MOTION FOR CONTINUANCE OF HEARING ON MOTION TO SUPPRESS
524	06/16/2016		COURT ORDER ON DEFTS. MOTION TO UNSEAL RECORDS
525	06/16/2016		STATUS HEARING 07/15/2016 9:00 AM - 405 4TH FLOOR, 501 W ADAMS ST JACKSONVILLE FL 32202
526	06/16/2016		ON MOTION TO UNSEAL RECORDS // TO BE HEARD BY JUDGE COOPER @ 9:30
527	07/15/2016		HEARING ON MOTION (TO BE SET) 08/02/2016 9:00 AM - 405 4TH FLOOR, 501 W ADAMS ST JACKSONVILLE FL 32202
528	07/15/2016		PER EMAIL BEFORE JUDGE M. COOPER
529	07/15/2016		JUDGE BORELLO, MARK
530	07/15/2016		ASST. STATE ATTY. CALIEL, MARK
531	07/15/2016		ATTY. FOR DEF. SCHLAX, JULIE AGENT
532	07/15/2016		DEFENDANT PRESENT IN JAIL
533	07/15/2016		OTHERS PRESENT: DEFENSE: CHARLES FLETCHER
534	07/15/2016		DEFENDANT'S MOTION TO UNSEAL RECORDS HEARD IN FULL AND GRANTED AS TO (ITEM 2), THE TRANSCRIPT OF THE IN CAMERA HEARING HELD ON NOVEMBER 19, 2014..
535	07/15/2016		HEARING ON MOTION 07/21/2016 9:00 AM - 405 4TH FLOOR, 501 W ADAMS ST JACKSONVILLE FL 32202
536	07/15/2016		CANCELLED HEARING ON MOTION ON 7/21/2016 9:00:00 AM
537	07/15/2016		> CANCEL REASON - COURT DATE SET TWICE.
538	07/15/2016		(MOTION TO SUPPRESS)
539	07/18/2016		COURT ORDER ON DEFTS MOTION TO UNSEAL RECORDS-GRANTED
540	07/19/2016		CANCELLED HEARING ON MOTION (TO BE SET) ON 8/2/2016 9:00:00 AM
541	07/19/2016		> CANCEL REASON - PER EMAIL
542	07/19/2016		HEARING ON MOTION 08/18/2016 9:00 AM - 405 4TH FLOOR, 501 W ADAMS ST JACKSONVILLE FL 32202
543	07/19/2016		TO SUPPRESS /// TO BE HEARD BEFORE JUDGE COOPER @9:30
544	07/21/2016		JUDGE COOPER, MALLORY
545	07/21/2016		ASST. STATE ATTY. CALIEL, MARK
546	07/21/2016		ATTY. FOR DEF. FLETCHER, W CHARLES
547	07/21/2016		DEFENDANT PRESENT IN JAIL
548	07/21/2016		STATUS HEARING HELD IN FULL
549	07/21/2016		BY 7/28/16 MR HERNANDEZ IS TO DISCLOSE TO MR FLETCHER DOCUMENTS THAT HAVE BEEN REQUESTED TO BE RELEASED.
550	07/21/2016		MR FLETCHER TO RESPOND TO THE COURT & STATE BY 8/4/16 ON DISCLOSURE OF DOCUMENTS RELEASED.
551	07/21/2016		COURT DATE PREVIOUSLY SET 08/18/16 @9:30 #405 MOT. TO SUPPRESS // BEFORE JUDGE COOPER
552	07/28/2016		COURT ORDER GRANTING MOTION TO INCUR COSTS OF SELECT DEPOSITION TRANSCRIPT

553	08/02/2016		COURT ORDER AUTHORIZING COSTS OF MEDICAL TESTING
554	08/02/2016		COURT ORDER APPOINTING A RADIOLOGIST
555	08/03/2016		MOTION TO TRANSPORT DEFT. FOR MEDICAL TESTING
556	08/03/2016		ORDER TO TRANSPORT
557	08/04/2016		RECEIPT FOR CIVIL PROCESS, JAIL, WARRANTS
558	08/18/2016		JUDGE COOPER, MALLORY
559	08/18/2016		ASST. STATE ATTY. CALIEL, MARK
560	08/18/2016		ATTY. FOR DEF. FLETCHER, W CHARLES
561	08/18/2016		DEFENDANT PRESENT IN JAIL
562	08/18/2016		ORAL MOTION (DEFENSE) TO COMPEL DEPARTMENT OF CHILDREN AND FAMILIES TO RELEASE UNREDACTED CONFIDENTIAL RECORDS OF DONALD SMITH - GRANTED
563	08/18/2016		COURT ORDER DIRECTING DEPARTMENT OF CHILDREN AND FAMILIES TO RELEASE UN-REDACTED CONFIDENTIAL RECORDS OF DONALD SMITH
564	08/18/2016		DEFENSE MOTION TO SUPPRESS HEARING HELD IN FULL & TAKEN UNDER ADVISEMENT
565	08/18/2016		CLERKS MEMO OF HEARING
566	08/18/2016		CLERKS EXHIBIT MEMO
567	08/18/2016		STATUS HEARING 10/06/2016 9:00 AM - 405 4TH FLOOR, 501 W ADAMS ST JACKSONVILLE FL 32202
568	08/18/2016		STATE EXHIBITS FILED #1
569	08/18/2016		STATE EXHIBITS FILED # 2
570	08/18/2016		STATE EXHIBITS FILED #3
571	08/18/2016		STATE EXHIBITS FILED # 4
572	08/18/2016		STATE EXHIBITS FILED #5
573	08/18/2016		STATE EXHIBITS FILED #6
574	08/24/2016		AMENDED MOTION TO SUPPRESS STATEMENTS
575	08/26/2016		COURT ORDER DENYING DEFENDANT'S MOTION TO SUPPRESS STATEMENTS AND AMENDED MOTION TO SUPPRESS STATEMENTS
576	09/13/2016		COURT ORDER (AMENDED) DENYING DEFENDANT'S MOTION TO SUPPRESS STATEMENTS AND AMENDED MOTION TO SUPPRESS STATEMENTS
577	09/22/2016		NOTICE OF HEARING ON MOTION FOR PAYMENT OF EXCESS ATTORNEY'S FEES
578	10/05/2016		CANCELLED STATUS HEARING ON 10/6/2016 9:00:00 AM
579	10/05/2016		> CANCEL REASON - DUE TO HURRICANE MATTHEW
580	10/05/2016		STATUS HEARING 10/11/2016 9:00 AM - 405 4TH FLOOR, 501 W ADAMS ST JACKSONVILLE FL 32202
581	10/05/2016		BEFORE JUDGE M. COOPER
582	10/11/2016		CANCELLED STATUS HEARING ON 10/11/2016 9:00:00 AM
583	10/11/2016		> CANCEL REASON -
584	10/11/2016		STATUS HEARING 10/18/2016 9:00 AM - 405 4TH FLOOR, 501 W ADAMS ST JACKSONVILLE FL 32202
585	10/11/2016		PER E-MAIL BEFORE JUDGE M. COOPER

586	10/13/2016		COURT ORDER ON MOTION FOR PAYMENT OF INTERIM ATTORNEY'S FEES IN EXCESS OF THE STATUTORY CAP PURSUANT TO SECTION 27.5304(12) OF THE FLORIDA STATUTES
587	10/13/2016		COURT ORDER ON MOTION FOR PAYMENT OF INTERIM ATTORNEY'S FEES IN EXCESS OF THE STATUTORY CAP PURSUANT TO SECTION 27.5304(12) OF THE FLORIDA STATUTES
588	10/18/2016		JUDGE COOPER, MALLORY
589	10/18/2016		ASST. STATE ATTY. CALIEL, MARK
590	10/18/2016		ATTY. FOR DEF. FLETCHER, W CHARLES
591	10/18/2016		DEFENDANT PRESENT IN JAIL
592	10/18/2016		OTHERS PRESENT: PA: J. SCHLAX
593	10/18/2016		MOTION (DEFENSE) FOR COURT INTERVENTION BASED ON THE PRE-TRIAL DETENTION FACILITY'S FAILURE TO PROVIDE NECESSARY MEDICAL ATTENTION IN VIOLATION OF THE PROHIBITION AGAINST CRUEL AND UNUSUAL PUNISHMENT- FILED
594	10/18/2016		COURT ORDER GRANTING DEFENSE MOTION FOR COURT INTERVENTION BASED ON THE PRE-TRIAL DETENTION FACILITY'S FAILURE TO PROVIDE NECESSARY MEDICAL ATTENTION IN VIOLATION OF THE PROHIBITION AGAINST CRUEL AND UNUSUAL PUNISHMENT- ENTERED
595	10/18/2016		ORAL MOTION (JOINT) TO STRIKE 1/17/17 TRIAL DATE- GRANTED **1/17/17 STRICKEN FROM CALENDAR**
596	10/18/2016		STATUS HEARING 12/12/2016 9:00 AM - 405 4TH FLOOR, 501 W ADAMS ST JACKSONVILLE FL 32202
597	10/18/2016		*JUDGE COOPER PRESIDING*
598	11/04/2016		COURT ORDER AUTHORIZING ADDITIONAL COSTS OF NEUROPSYCHOLOGIST
599	11/17/2016		STATES# SEVENTH SUPPLEMENTAL DISCOVERY EXHIBIT
600	12/07/2016		MOTION FOR PAYMENT OF COSTS/ FOR APPROVAL OF ADDITIONAL FEES AND OTHER NECESSARY COSTS FOR LEGAL PSYCHOLOGIST DR. BROOKE BUTLER
601	12/07/2016		MOTION FOR PAYMENT OF COSTS FOR APPROVAL OF ADDITIONAL FEES AND OTHER NECESSARY COSTS FOR INVESTIGATOR
602	12/12/2016		JUDGE COOPER, MALLORY
603	12/12/2016		ASST. STATE ATTY. CALIEL, MARK
604	12/12/2016		ATTY. FOR DEF. FLETCHER, W CHARLES
605	12/12/2016		DEFENDANT PRESENT IN JAIL
606	12/12/2016		MOTION FOR APPROVAL OF ADDITIONAL FEES AND OTHER NECESSARY COSTS FOR INVESTIGATOR (COPY)
607	12/12/2016		COURT ORDER GRANTING MOTION FOR APPROVAL OF ADDITIONAL FEES AND OTHER NECESSARY COSTS FOR INVESTIGATOR
608	12/12/2016		MOTION FOR APPROVAL OF ADDITIONAL FEES AND OTHER

			NECESSARY COSTS FOR LEGAL PSYCHOLOGIST DR. BROOKE BUTLER (COPY)
609	12/12/2016		COURT ORDER GRANTING MOTION FOR APPROVAL OF ADDITIONAL FEES AND OTHER NECESSARY COSTS FOR LEGAL PSYCHOLOGIST DR. BROOKE BUTLER
610	12/12/2016		STATUS HEARING 01/25/2017 9:00 AM - 405 4TH FLOOR, 501 W ADAMS ST JACKSONVILLE FL 32202
611	12/12/2016		BEFORE JUDGE COOPER
612	01/17/2017		CANCELLED STATUS HEARING ON 1/25/2017 9:00:00 AM
613	01/17/2017		> CANCEL REASON - PER JA EMAIL
614	01/17/2017		STATUS HEARING 01/18/2017 9:00 AM - 405 4TH FLOOR, 501 W ADAMS ST JACKSONVILLE FL 32202
615	01/17/2017		PER JA EMAIL
616	01/18/2017		JUDGE COOPER, MALLORY
617	01/18/2017		ASST. STATE ATTY. CALIEL, MARK
618	01/18/2017		ATTY. FOR DEF. FLETCHER, W CHARLES
619	01/18/2017		OTHERS PRESENT: PA: J. SCHLAX
620	01/18/2017		DEFENDANT PRESENT IN JAIL
621	01/18/2017		PRETRIAL 05/03/2017 9:00 AM - 405 4TH FLOOR, 501 W ADAMS ST JACKSONVILLE FL 32202
622	01/18/2017		BEFORE JUDGE COOPER
623	03/21/2017		CANCELLED PRETRIAL ON 5/3/2017 9:00:00 AM
624	03/21/2017		> CANCEL REASON -
625	03/21/2017		PRETRIAL 05/11/2017 9:00 AM - 405 4TH FLOOR, 501 W ADAMS ST JACKSONVILLE FL 32202
626	03/21/2017		BEFORE JUDGE COOPER - PER EMAIL MEMO
627	04/19/2017		COURT ORDER AUTHORIZING ADDITIONAL EXPERT FEES
628	04/19/2017		COURT ORDER AUTHORIZING ADDITIONAL COSTS OF MITIGATION COORDINATOR/INVESTIGATOR AND MITIGATION EXPENSES
629	05/11/2017		JUDGE BORELLO, MARK
630	05/11/2017		SITTING JUDGE - COOPER, MALLORY
631	05/11/2017		ASST. STATE ATTY. CALIEL, MARK
632	05/11/2017		ATTY. FOR DEF. SCHLAX, JULIE AGENT
633	05/11/2017		DEFENDANT PRESENT IN JAIL
634	05/11/2017		PRETRIAL 08/08/2017 9:00 AM - 405 4TH FLOOR, 501 W ADAMS ST JACKSONVILLE FL 32202
635	05/11/2017		@ 9:00 ; 02/01/2018 FPT & 02/05/2018 JS RM# 406-ALL DATES BEFORE JUDGE MALLORY COOPER
636	08/08/2017		JUDGE COOPER, MALLORY
637	08/08/2017		ASST. STATE ATTY. CALIEL, MARK
638	08/08/2017		ATTY. FOR DEF. SCHLAX, JULIE AGENT
639	08/08/2017		DEFENDANT APPEARANCE WAIVED
640	08/08/2017		PRETRIAL 09/12/2017 9:00 AM - 405 4TH FLOOR, 501 W ADAMS ST JACKSONVILLE FL 32202
641	08/08/2017		2/1/18 FPT & 2/5/18 JS IN COURTROOM 406

642	08/15/2017		CANCELLED PRETRIAL ON 9/12/2017 9:00:00 AM
643	08/15/2017		> CANCEL REASON -
644	08/15/2017		PRETRIAL 09/14/2017 9:00 AM - 405 4TH FLOOR, 501 W ADAMS ST JACKSONVILLE FL 32202
645	08/15/2017		BEFORE JUDGE M. COOPER PER E-MAIL; FPT 2/1/18; JS 2/5/18 IN COURTROOM 406
646	09/22/2017		PRETRIAL 10/03/2017 9:00 AM - 405 4TH FLOOR, 501 W ADAMS ST JACKSONVILLE FL 32202
647	09/22/2017		@9:00 BEFORE JUDGE M. COOPPER PER JA E-MAIL
648	10/03/2017		JUDGE COOPER, MALLORY
649	10/03/2017		ASST. STATE ATTY. CALIEL, MARK
650	10/03/2017		ATTY. FOR DEF. SCHLAX, JULIE AGENT
651	10/03/2017		DEFENDANT APPEARANCE WAIVED
652	10/03/2017		PRETRIAL 11/02/2017 9:00 AM - 405 4TH FLOOR, 501 W ADAMS ST JACKSONVILLE FL 32202
653	10/03/2017		(POSSIBLE HOM) - @ 9:00 A.M. BEFORE JUDGE M. COOPER - *02/01/18 FPT; 02/05/18 JS IN ROOM 406*
654	10/31/2017		AMENDED MOTION TO PROHIBIT DEATH QUALIFICATION BECAUSE THE NEW LEGISLATION CREATING A NEW DEATH PENALTY SCHEME IS NOT RETROACTIVE
655	11/02/2017		JUDGE COOPER, MALLORY
656	11/02/2017		ASST. STATE ATTY. CALIEL, MARK
657	11/02/2017		ATTY. FOR DEF. SCHLAX, JULIE AGENT
658	11/02/2017		DEFENDANT PRESENT IN JAIL
659	11/02/2017		PRETRIAL 12/19/2017 9:00 AM - 405 4TH FLOOR, 501 W ADAMS ST JACKSONVILLE FL 32202
660	11/02/2017		BEFORE JUDGE M. COOPER - *01/22/18 HOM TBS;02/01/18 FPT; 02/05/18 JS IN ROOM 406*
661	11/02/2017		ORDER AMENDED MOTION TO PROHIBIT DEATH QUALIFICATION BECAUSE THE NEW LEGISLATION CREATING A NEW DEATH PENALTY SCHEME IS NOT RETROACTIVE - DENIED
662	11/02/2017		ORDER MOTION TO BAR THE STATE FROM SEEKING THE DEATH PENALTY BASED ON FAILURE TO PROVIDE NOTICE PURSUANT TO FLORIDA STATUTE 782.04(1)(B)2016 - DENIED
663	11/02/2017		ORDER MOTION TO DECLARE FLORIDA STATUTE 921.141 (2016) UNCONSTITUTIONAL - DENIED
664	12/19/2017		JUDGE COOPER, MALLORY
665	12/19/2017		ASST. STATE ATTY. CALIEL, MARK
666	12/19/2017		ATTY. FOR DEF. SCHLAX, JULIE AGENT
667	12/19/2017		DEFENDANT PRESENT IN JAIL
668	12/19/2017		COURT ORDER AUTHORIZING ADDITIONAL COSTS FOR MENTAL HEALTH EXPERT DR. HEATHER HOLMES
669	12/19/2017		COURT ORDER AUTHORIZING ADDITIONAL COSTS OF A NEUROPSYCHOLOGIST
670	12/19/2017		COURT ORDER AUTHORIZING ADDITIONAL COSTS OF A

			RADIOLOGIST
671	12/19/2017		COURT ORDER AUTHORIZING ADDITIONAL COSTS FOR DR. GEOFFREY COLINO
672	12/19/2017		HEARING ON MOTION 01/22/2018 9:00 AM - 406 4TH FLOOR, 501 W ADAMS ST JACKSONVILLE FL 32202
673	12/19/2017		BEFORE HONORABLE JUDGE COOPER //*02/01/18 FPT; 02/05/18 JS IN ROOM 406*
674	12/20/2017		DEFENDANT'S MOTION FOR REQUESTED JURY INSTRUCTION: MERCY
675	12/20/2017		DEFENDANT'S SECOND MOTION IN LIMINE
676	12/20/2017		DEFENDANT'S THIRD MOTION IN LIMINE
677	12/20/2017		STATEMENT OF PARTICULARS OF MENTAL MITIGATION
678	01/02/2018		MOTION TO REQUEST THE DEFENSE BE PERMITTED TO SHOW PHOTOGRAPH OF THE VICTIM DURING JURY SELECTION
679	01/03/2018		MOTION DEFT'S FIRST IN LIMINE TO INSTRUCT ON ALL MITIGATING CIRCUMSTANCES
680	01/03/2018		MOTION TO ADOPT ALL PREVIOUSLY FILED MOTIONS BY PRIOR COUNSEL
681	01/05/2018		MOTION IN LIMINE DEFT'S FIRST TO INSTRUCT ON ALL MITIGATING CIRCUMSTANCES
682	01/05/2018		MOTION FOR MEANINGFUL INQUIRY IN JURY SELECTION AND MOTION FOR JURY QUESTIONNAIRE
683	01/05/2018		MOTION FOR SEQUESTRATION OF THE JURY
684	01/05/2018		REQUEST FOR JUDICIAL NOTICE
685	01/05/2018		MOTION TO ADOPT ALL PREVIOUSLY FILED MOTIONS BY PRIOR COUNSEL
686	01/09/2018		HEARING ON MOTION 01/11/2018 9:00 AM - 305 3RD FLOOR, 501 W ADAMS ST JACKSONVILLE FL 32202
687	01/09/2018		@ 1 PM DEFENSE MOTION TO SEQUESTER JURY PER JA E-MAIL 01/22/18 HOM BEFORE HONORABLE JUDGE COOPER *02/01/18 FPT; 02/05/18 JS IN ROOM 406
688	01/11/2018		JUDGE COOPER, MALLORY
689	01/11/2018		ASST. STATE ATTY. CALIEL, MARK
690	01/11/2018		ASST. STATE ATTY. NELSON, MELISSA WILLIAMSON
691	01/11/2018		ATTY. FOR DEF. SCHLAX, JULIE AGENT
692	01/11/2018		ATTY. FOR DEF. FLETCHER, W CHARLES
693	01/11/2018		DEFENDANT PRESENT IN JAIL
694	01/11/2018		MOTION FOR SEQUESTRATION OF THE JURY - WITHDRAWN BY DEFENSE
695	01/11/2018		COURT DATE PREVIOUSLY SET 1/22/18 HEARING ON MOTIONS
696	01/12/2018		STATE EXHIBITS FILED # 20
697	01/18/2018		MOTION TO INCUR COSTS OF SELECT DEPOSITION TRANSCRIPTS
698	01/19/2018		REQUEST FOR JUDICIAL NOTICE
699	01/19/2018		SECOND AMENDED REQUEST FOR JUDICIAL NOTICE

700	01/22/2018		JUDGE COOPER, MALLORY
701	01/22/2018		ASST. STATE ATTY. CALIEL, MARK
702	01/22/2018		STATE ATTY MELISSA NELSON, CO-COUNSEL
703	01/22/2018		ATTY. FOR DEF. SCHLAX, JULIE AGENT
704	01/22/2018		ATTY TCHARLES FLETCHER, CO-COUNSEL FOR DEFENDANT
705	01/22/2018		DEFENDANT PRESENT IN JAIL
706	01/22/2018		HEARING ON MOTION TO ADOPT ALL PREVIOUSLY FILED MOTIONS BY PRIOR COUNSEL HELD IN FULL - GRANTED - ORDER TO BE ENTERED
707	01/22/2018		HEARING ON MOTION TO REQUEST THE DEFENSE BE PERMITTED TO SHOW PHOTOGRAPH OF THE VICTIM DURING JURY SELECTION HELD IN FULL - GRANTED - ORDER TO BE ENTERED
708	01/22/2018		HEARING ON MOTION FOR MEANINGFUL INQUIRY IN JURY SELECTION AND MOTION FOR JURY QUESTIONNAIRE HELD IN FULL - RESERVE RULING
709	01/22/2018		HEARING ON DEFENDANT'S SECOND MOTION IN LIMINE HELD IN FULL - RESERVE RULING
710	01/22/2018		HEARING ON SECOND AMENDED REQUEST FOR JUDICIAL NOTICE HELD IN FULL - RESERVE RULING
711	01/22/2018		HEARING ON MOTION 01/24/2018 9:00 AM - 406 4TH FLOOR, 501 W ADAMS ST JACKSONVILLE FL 32202
712	01/22/2018		@ 9:00 A.M. BEFORE HONORABLE JUDGE COOPER ; (02-01-18 FPT ; 02-05-18 JS) IN ROOM 406
713	01/24/2018		JUDGE COOPER, MALLORY
714	01/24/2018		ASST. STATE ATTY. CALIEL, MARK
715	01/24/2018		STATE ATTY. NELSON, MELISSA WILLIAMSON
716	01/24/2018		ATTY. FOR DEF. SCHLAX, JULIE AGENT
717	01/24/2018		ATTY. FOR DEF. FLETCHER, W CHARLES
718	01/24/2018		DEFENDANT PRESENT IN JAIL
719	01/24/2018		DEFENDANT'S EIGHTH MOTION IN LIMINE
720	01/24/2018		DEFENDANT'S NINTH MOTION IN LIMINE
721	01/24/2018		DEFENDANT'S TENTH MOTION IN LIMINE
722	01/24/2018		HEARING ON DEFENDANT'S EIGHTH, NINTH, AND TENTH MOTIONS IN LIMINE HELD IN HELD IN FULL - RESERVE RULING
723	01/24/2018		CLERKS MEMO OF HEARING
724	01/24/2018		FINAL PRETRIAL 02/01/2018 9:00 AM - 406 4TH FLOOR, 501 W ADAMS ST JACKSONVILLE FL 32202
725	01/24/2018		COURT ORDER GRANTING MOTION TO INCUR COSTS OF TRANSCRIPTS
726	01/25/2018		AFFIDAVIT/RETURN OF SERVICE
727	01/25/2018		AFFIDAVIT/RETURN OF SERVICE
728	01/25/2018		NOTICE OF TAKING DEPOSITION
729	01/25/2018		NOTICE OF TAKING DEPOSITION
730	01/25/2018		STATE'S RESPONSE TO DEFENDANT'S TENTH MOTION IN LIMINE

731	01/25/2018		STATE'S RESPONSE TO DEFENDANT'S SECOND MOTION IN LIMINE
732	01/25/2018		STATE'S RESPONSE TO DEFENDANT'S EIGHTH MOTION IN LIMINE
733	01/25/2018		STATE'S RESPONSE TO DEFENDANT'S THIRD MOTION IN LIMINE
734	01/25/2018		STATE'S RESPONSE TO DEFENDANT'S MOTION FOR REQUESTED JURY INSTRUCTION: MERCY
735	02/01/2018		RECEIPT NUMBER 1870106 REVISED-ORIGINAL RECEIPT DATE 6/27/2013
736	02/01/2018	1	SAME S782.04(1)(A) MURDER - FIRST DEGREE
737	02/01/2018		JUDGE COOPER, MALLORY
738	02/01/2018		ASST. STATE ATTY. CALIEL, MARK
739	02/01/2018		STATE ATTY. NELSON, MELISSA WILLIAMSON
740	02/01/2018		ASST. STATE ATTY. WHEELER-SANCHEZ, VANESSA
741	02/01/2018		ATTY. FOR DEF. SCHLAX, JULIE AGENT
742	02/01/2018		ATTY. FOR DEF. FLETCHER, W CHARLES
743	02/01/2018		DEFENDANT PRESENT IN JAIL
744	02/01/2018		MOTION FOR MEANINGFUL INQUIRY IN JURY SELECTION AND MOTION FOR JURY QUESTIONNAIRE - GRANTED / ORDER TO BE ENTERED
745	02/01/2018		DEFENDANT'S SECOND MOTION IN LIMINE - DENIED / ORDER TO BE ENTERED
746	02/01/2018		DEFENDANT'S THIRD MOTION IN LIMINE - DENIED / ORDER TO BE ENTERED
747	02/01/2018		DEFENDANT'S FIRST MOTION IN LIMINE TO INSTRUCT ON ALL MITIGATING CIRCUMSTANCES - RULING RESERVED
748	02/01/2018		DEFENDANT'S MOTION FOR REQUESTED JURY INSTRUCTION: MERCY - DENIED / ORDER TO BE ENTERED
749	02/01/2018		DEFENDANT'S EIGHTH MOTION IN LIMINE - DENIED / ORDER TO BE ENTERED
750	02/01/2018		DEFENDANT'S NINTH MOTION IN LIMINE - RULING RESERVED
751	02/01/2018		DEFENDANT'S TENTH MOTION IN LIMINE - DENIED / ORDER TO BE ENTERED
752	02/01/2018		SECOND AMENDED REQUEST FOR JUDICIAL NOTICE - RULING RESERVED
753	02/01/2018		DEFENSE ORALLY RENEWS MOTION FOR CHANGE OF VENUE
754	02/01/2018		JURY SELECTION 02/05/2018 9:00 AM - 406 4TH FLOOR, 501 W ADAMS ST JACKSONVILLE FL 32202
755	02/01/2018		@ 9:30 (300 JURORS)
756	02/01/2018		CASE FEES PAID: $270.00 ON RECEIPT NUMBER 1870106 - ORIGINAL RECEIPT DATE 6/27/2013
757	02/01/2018		ORDER GRANTING DEFENDANT'S MOTION TO SHOW PHOTOGRAPH OF THE UNDERAGE VICTIM DURING JURY SELECTION

758	02/01/2018		ORDER GRANTING DEFENDANT'S MOTION TO ADOPT ALL PREVIOUSLY FILED BY PRIOR COUNSEL
759	02/05/2018		JUDGE COOPER, MALLORY
760	02/05/2018		ASST. STATE ATTY. CALIEL, MARK
761	02/05/2018		STATE ATTY. NELSON, MELISSA WILLIAMSON
762	02/05/2018		ASST. STATE ATTY. WHEELER-SANCHEZ, VANESSA
763	02/05/2018		ATTY. FOR DEF. SCHLAX, JULIE AGENT
764	02/05/2018		ATTY. FOR DEF. FLETCHER, W CHARLES
765	02/05/2018		OTHERS PRESENT : DR. BROOKE BUTLER
766	02/05/2018		DEFENDANT PRESENT IN JAIL
767	02/05/2018		JURY SELECTION HELD IN PART
768	02/05/2018		DEFENDANT'S NINTH MOTION IN LIMINE - DENIED / ORDER TO BE ENTERED
769	02/05/2018		JURY SELECTION 02/06/2018 9:00 AM - 406 4TH FLOOR, 501 W ADAMS ST JACKSONVILLE FL 32202
770	02/05/2018		@ 8:30
771	02/06/2018		ORDER DIRECTING THAT JURORS' IDENTITIES BE KEPT CONFIDENTIAL
772	02/06/2018		JUDGE COOPER, MALLORY
773	02/06/2018		ASST. STATE ATTY. CALIEL, MARK
774	02/06/2018		STATE ATTY. NELSON, MELISSA WILLIAMSON
775	02/06/2018		ASST. STATE ATTY. WHEELER-SANCHEZ, VANESSA
776	02/06/2018		ATTY. FOR DEF. SCHLAX, JULIE AGENT
777	02/06/2018		ATTY. FOR DEF. FLETCHER, W CHARLES
778	02/06/2018		OTHERS PRESENT : DR. BROOKE BUTLER
779	02/06/2018		DEFENDANT PRESENT IN JAIL
780	02/06/2018		JURY SELECTION HELD IN PART
781	02/06/2018		JURY SELECTION 02/07/2018 9:00 AM - 406 4TH FLOOR, 501 W ADAMS ST JACKSONVILLE FL 32202
782	02/06/2018		@ 9:00
783	02/06/2018		COURT ORDER GRANTING MOTION TO INCUR COSTS OF TRANSCRIPTS
784	02/07/2018		JUDGE COOPER, MALLORY
785	02/07/2018		ASST. STATE ATTY. CALIEL, MARK
786	02/07/2018		STATE ATTY. NELSON, MELISSA WILLIAMSON
787	02/07/2018		ASST. STATE ATTY. WHEELER-SANCHEZ, VANESSA
788	02/07/2018		ATTY. FOR DEF. SCHLAX, JULIE AGENT
789	02/07/2018		ATTY. FOR DEF. FLETCHER, W CHARLES
790	02/07/2018		OTHERS PRESENT : DR. BROOKE BUTLER
791	02/07/2018		DEFENDANT PRESENT IN JAIL
792	02/07/2018		JURY SELECTION HELD IN PART
793	02/07/2018		JURY SELECTION 02/08/2018 9:00 AM - 406 4TH FLOOR, 501 W ADAMS ST JACKSONVILLE FL 32202
794	02/07/2018		@ 9:30
795	02/08/2018		JUDGE COOPER, MALLORY
796	02/08/2018		ASST. STATE ATTY. CALIEL, MARK

797	02/08/2018		STATE ATTY. NELSON, MELISSA WILLIAMSON
798	02/08/2018		ASST. STATE ATTY. WHEELER-SANCHEZ, VANESSA
799	02/08/2018		ATTY. FOR DEF. SCHLAX, JULIE AGENT
800	02/08/2018		ATTY. FOR DEF. FLETCHER, W CHARLES
801	02/08/2018		OTHERS PRESENT : DR. BROOKE BUTLER
802	02/08/2018		DEFENDANT PRESENT IN JAIL
803	02/08/2018		JURY SELECTION HELD IN PART
804	02/08/2018		COURT ORDER (AMENDED) GRANTING, PURSUANT TO CHANGE IN FLORIDA LAW, DEFENSE MOTION TO PROHIBIT ANY REFERENCE TO THE JURY'S ROLE AT THE PENALTY PHASE AS BEING "ADVISORY" OR TO THE JURY'S PENALTY VERDICT AS BEING A "RECOMMENDATION"
805	02/08/2018		COURT ORDER (AMENDED) GRANTING, PURSUANT TO CHANGE IN FLORIDA LAW, DEFENSE MOTION TO PROHIBIT MISLEADING REFERENCES TO THE ADVISORY ROLE OF THE JURY AT SENTENCING
806	02/08/2018		JURY SELECTION 02/09/2018 9:00 AM - 406 4TH FLOOR, 501 W ADAMS ST JACKSONVILLE FL 32202
807	02/08/2018		@ 9:00
808	02/09/2018		JUDGE COOPER, MALLORY
809	02/09/2018		ASST. STATE ATTY. CALIEL, MARK
810	02/09/2018		STATE ATTY. NELSON, MELISSA WILLIAMSON
811	02/09/2018		ASST. STATE ATTY. WHEELER-SANCHEZ, VANESSA
812	02/09/2018		ATTY. FOR DEF. SCHLAX, JULIE AGENT
813	02/09/2018		ATTY. FOR DEF. FLETCHER, W CHARLES
814	02/09/2018		OTHERS PRESENT : DR. BROOKE BUTLER
815	02/09/2018		DEFENDANT PRESENT IN JAIL
816	02/09/2018		JURY SELECTION HELD IN FULL
817	02/09/2018		CLERKS EXHIBIT MEMO
818	02/09/2018		TRIAL 02/12/2018 9:00 AM - 406 4TH FLOOR, 501 W ADAMS ST JACKSONVILLE FL 32202
819	02/09/2018		@ 8:45
820	02/09/2018		THIRD AMENDED REQUEST FOR JUDICIAL NOTICE
821	02/09/2018		COURT EXHIBITS # 1
822	02/09/2018		COURT EXHIBITS # 2
823	02/09/2018		COURT EXHIBITS # 4
824	02/12/2018		JUDGE COOPER, MALLORY
825	02/12/2018		JURY TRIAL HELD
826	02/12/2018		ASST. STATE ATTY. CALIEL, MARK
827	02/12/2018		STATE ATTY. NELSON, MELISSA WILLIAMSON
828	02/12/2018		ASST. STATE ATTY. WHEELER-SANCHEZ, VANESSA
829	02/12/2018		ATTY. FOR DEF. SCHLAX, JULIE AGENT
830	02/12/2018		ATTY. FOR DEF. FLETCHER, W CHARLES
831	02/12/2018		DEFENDANT PRESENT IN JAIL
832	02/12/2018		JURY EMPANELLED & SWORN
833	02/12/2018		OPENING STATEMENTS TO JURY

834	02/12/2018		EVIDENCE TO JURY IN PART BY STATE
835	02/12/2018		TRIAL 02/13/2018 9:00 AM - 406 4TH FLOOR, 501 W ADAMS ST JACKSONVILLE FL 32202
836	02/12/2018		STATE EXHIBITS FILED # 1
837	02/12/2018		STATE EXHIBITS FILED # 2
838	02/12/2018		STATE EXHIBITS FILED # 3
839	02/12/2018		STATE EXHIBITS FILED # 4
840	02/12/2018		STATE EXHIBITS FILED # 11
841	02/12/2018		STATE EXHIBITS FILED # 12
842	02/12/2018		STATE EXHIBITS FILED # 13
843	02/12/2018		STATE EXHIBITS FILED # 14
844	02/12/2018		STATE EXHIBITS FILED # 15
845	02/12/2018		STATE EXHIBITS FILED # 16
846	02/12/2018		STATE EXHIBITS FILED # 17
847	02/12/2018		STATE EXHIBITS FILED # 18
848	02/12/2018		STATE EXHIBITS FILED # 19
849	02/12/2018		STATE EXHIBITS FILED # 21
850	02/12/2018		STATE EXHIBITS FILED # 22
851	02/12/2018		STATE EXHIBITS FILED # 23
852	02/12/2018		STATE EXHIBITS FILED # 24
853	02/12/2018		STATE EXHIBITS FILED # 25
854	02/12/2018		STATE EXHIBITS FILED # 26
855	02/12/2018		STATE EXHIBITS FILED # 28
856	02/12/2018		STATE EXHIBITS FILED # 29
857	02/12/2018		STATE EXHIBITS FILED # 30
858	02/12/2018		STATE EXHIBITS FILED # 31
859	02/12/2018		STATE EXHIBITS FILED # 32
860	02/12/2018		STATE EXHIBITS FILED # 34
861	02/12/2018		STATE EXHIBITS FILED # 35
862	02/12/2018		STATE EXHIBITS FILED # 36
863	02/12/2018		STATE EXHIBITS FILED # 37
864	02/12/2018		STATE EXHIBITS FILED # 38
865	02/12/2018		STATE EXHIBITS FILED # 39
866	02/12/2018		STATE EXHIBITS FILED # 40
867	02/12/2018		STATE EXHIBITS FILED # 41
868	02/12/2018		STATE EXHIBITS FILED # 42
869	02/12/2018		STATE EXHIBITS FILED # 43
870	02/12/2018		STATE EXHIBITS FILED # 44
871	02/12/2018		STATE EXHIBITS FILED # 46
872	02/13/2018		JUDGE COOPER, MALLORY
873	02/13/2018		JURY TRIAL HELD
874	02/13/2018		ASST. STATE ATTY. CALIEL, MARK
875	02/13/2018		STATE ATTY. NELSON, MELISSA WILLIAMSON
876	02/13/2018		ASST. STATE ATTY. WHEELER-SANCHEZ, VANESSA
877	02/13/2018		ATTY. FOR DEF. SCHLAX, JULIE AGENT
878	02/13/2018		ATTY. FOR DEF. FLETCHER, W CHARLES

879	02/13/2018		DEFENDANT PRESENT IN JAIL
880	02/13/2018		EVIDENCE TO JURY IN PART BY STATE
881	02/13/2018		DEFENSE ORAL MOTION FOR MISTRIAL - DENIED
882	02/13/2018		EVIDENCE CONTINUED TO JURY IN FULL BY STATE
883	02/13/2018		STATE RESTS
884	02/13/2018		DEFENSE ORAL MOTION FOR JUDGMENT OF ACQUITTAL - DENIED
885	02/13/2018		DEFENSE RESTS
886	02/13/2018		CHARGE CONFERENCE HELD IN FULL
887	02/13/2018		STIPULATION
888	02/13/2018		TRIAL 02/14/2018 9:00 AM - 406 4TH FLOOR, 501 W ADAMS ST JACKSONVILLE FL 32202
889	02/13/2018		STATE EXHIBITS FILED # 47
890	02/13/2018		STATE EXHIBITS FILED # 48
891	02/13/2018		STATE EXHIBITS FILED # 49
892	02/13/2018		STATE EXHIBITS FILED # 50
893	02/13/2018		STATE EXHIBITS FILED # 51
894	02/13/2018		STATE EXHIBITS FILED # 52
895	02/13/2018		STATE EXHIBITS FILED # 53
896	02/13/2018		STATE EXHIBITS FILED # 54
897	02/13/2018		STATE EXHIBITS FILED # 55
898	02/13/2018		STATE EXHIBITS FILED # 56
899	02/13/2018		STATE EXHIBITS FILED # 57
900	02/13/2018		STATE EXHIBITS FILED # 58
901	02/13/2018		STATE EXHIBITS FILED # 59
902	02/13/2018		STATE EXHIBITS FILED # 60
903	02/13/2018		STATE EXHIBITS FILED # 61
904	02/13/2018		STATE EXHIBITS FILED # 62
905	02/13/2018		STATE EXHIBITS FILED # 63
906	02/13/2018		STATE EXHIBITS FILED # 64
907	02/13/2018		STATE EXHIBITS FILED # 65
908	02/13/2018		STATE EXHIBITS FILED # 66
909	02/13/2018		STATE EXHIBITS FILED # 67
910	02/13/2018		STATE EXHIBITS FILED # 68
911	02/13/2018		STATE EXHIBITS FILED # 69
912	02/13/2018		STATE EXHIBITS FILED # 70
913	02/13/2018		STATE EXHIBITS FILED # 71
914	02/13/2018		STATE EXHIBITS FILED # 72
915	02/13/2018		STATE EXHIBITS FILED # 73
916	02/13/2018		STATE EXHIBITS FILED # 74
917	02/13/2018		STATE EXHIBITS FILED # 75
918	02/13/2018		STATE EXHIBITS FILED # 76
919	02/13/2018		STATE EXHIBITS FILED # 77
920	02/13/2018		STATE EXHIBITS FILED # 78
921	02/13/2018		STATE EXHIBITS FILED # 79
922	02/13/2018		STATE EXHIBITS FILED # 84

923	02/13/2018		STATE EXHIBITS FILED # 85
924	02/13/2018		STATE EXHIBITS FILED # 86
925	02/13/2018		STATE EXHIBITS FILED # 89
926	02/13/2018		STATE EXHIBITS FILED # 90
927	02/13/2018		STATE EXHIBITS FILED # 91
928	02/13/2018		STATE EXHIBITS FILED # 92
929	02/13/2018		STATE EXHIBITS FILED # 93
930	02/13/2018		STATE EXHIBITS FILED # 94
931	02/13/2018		STATE EXHIBITS FILED # 95
932	02/13/2018		STATE EXHIBITS FILED # 96
933	02/13/2018		STATE EXHIBITS FILED # 97
934	02/13/2018		STATE EXHIBITS FILED # 98
935	02/13/2018		STATE EXHIBITS FILED # 99
936	02/13/2018		STATE EXHIBITS FILED # 108
937	02/13/2018		STATE EXHIBITS FILED # 109
938	02/13/2018		STATE EXHIBITS FILED # 110
939	02/13/2018		STATE EXHIBITS FILED # 111
940	02/13/2018		STATE EXHIBITS FILED # 112
941	02/13/2018		STATE EXHIBITS FILED # 113
942	02/14/2018		JUDGE COOPER, MALLORY
943	02/14/2018		ASST. STATE ATTY. CALIEL, MARK
944	02/14/2018		STATE ATTY. NELSON, MELISSA WILLIAMSON
945	02/14/2018		ASST. STATE ATTY. WHEELER-SANCHEZ, VANESSA
946	02/14/2018		ATTY. FOR DEF. SCHLAX, JULIE AGENT
947	02/14/2018		ATTY. FOR DEF. FLETCHER, W CHARLES
948	02/14/2018		DEFENDANT PRESENT IN JAIL
949	02/14/2018		STATE'S CLOSING ARGUMENT TO JURY
950	02/14/2018		DEFENSE WAIVES CLOSING ARGUMENT
951	02/14/2018		INSTRUCTIONS TO JURY IN FULL AND CHARGE TO JURY
952	02/14/2018		JURY OUT AT 11:16AM - JURY BUZZED AT 11:28AM - JURY IN AT 11:39AM
953	02/14/2018	1	VERDICT- GUILTY AS CHARGED
954	02/14/2018	2	VERDICT- GUILTY AS CHARGED
955	02/14/2018	3	VERDICT- GUILTY AS CHARGED
956	02/14/2018		JURY POLLED
957	02/14/2018		JURY DISCHARGED AS TO GUILT PHASE
958	02/14/2018		JURY INSTRUCTIONS – FILED
959	02/14/2018		CLERKS MEMO OF TRIAL
960	02/14/2018		CLERKS EXHIBIT MEMO
961	02/14/2018		PENALTY PHASE 02/20/2018 9:00 AM - 406 4TH FLOOR, 501 W ADAMS ST JACKSONVILLE FL 32202
962	02/14/2018		@ 8:45
963	02/14/2018	1	DEF. FOUND GUILTY
964	02/14/2018	2	DEF. FOUND GUILTY
965	02/14/2018	3	DEF. FOUND GUILTY
966	02/14/2018		Notice of Intent to Rely Upon Business Record

967	02/14/2018		Notice of Intent to Rely Upon Business Record
968	02/15/2018		DISCLOSURE TO PROSECUTION
969	02/20/2018		JUDGE COOPER, MALLORY
970	02/20/2018		PENALTY PHASE PROCEEDINGS HELD IN: PART
971	02/20/2018		ASST. STATE ATTY. CALIEL, MARK
972	02/20/2018		STATE ATTY. NELSON, MELISSA WILLIAMSON
973	02/20/2018		ASST. STATE ATTY. WHEELER-SANCHEZ, VANESSA
974	02/20/2018		ATTY. FOR DEF. SCHLAX, JULIE AGENT
975	02/20/2018		ATTY. FOR DEF. FLETCHER, W CHARLES
976	02/20/2018		DEFENDANT PRESENT IN JAIL
977	02/20/2018		OPENING STATEMENTS TO JURY FOR PENALTY PHASE
978	02/20/2018		EVIDENCE TO JURY IN FULL BY STATE
979	02/20/2018		STATE RESTS
980	02/20/2018		EVIDENCE TO JURY IN PART BY DEFENSE
981	02/20/2018		STIPULATION
982	02/20/2018		PENALTY PHASE 02/21/2018 9:00 AM - 406 4TH FLOOR, 501 W ADAMS ST JACKSONVILLE FL 32202
983	02/20/2018		@ 915
984	02/20/2018		DEFENDANT'S EXHIBIT # 1
985	02/20/2018		DEFENDANT'S EXHIBIT # 3
986	02/20/2018		DEFENDANT'S EXHIBIT # 4
987	02/20/2018		DEFENDANT'S EXHIBIT # 5
988	02/20/2018		DEFENDANT'S EXHIBIT # 6
989	02/20/2018		DEFENDANT'S EXHIBIT # 7
990	02/20/2018		DEFENDANT'S EXHIBIT # 8
991	02/20/2018		DEFENDANT'S EXHIBIT # 9
992	02/21/2018		PENALTY PHASE PROCEEDINGS HELD IN: PART
993	02/21/2018		JUDGE COOPER, MALLORY
994	02/21/2018		ASST. STATE ATTY. CALIEL, MARK
995	02/21/2018		STATE ATTY. NELSON, MELISSA WILLIAMSON
996	02/21/2018		ASST. STATE ATTY. WHEELER-SANCHEZ, VANESSA
997	02/21/2018		ATTY. FOR DEF. SCHLAX, JULIE AGENT
998	02/21/2018		ATTY. FOR DEF. FLETCHER, W CHARLES
999	02/21/2018		DEFENDANT PRESENT IN JAIL
1000	02/21/2018		EVIDENCE TO JURY IN FULL BY DEFENSE
1001	02/21/2018		DEFENSE RESTS
1002	02/21/2018		CHARGE CONFERENCE HELD IN FULL
1003	02/21/2018		MOTION FOR AUTHORITY TO INCUR ADDITIONAL COSTS FOR DR. DANIEL BUFFINGTON
1004	02/21/2018		ORDER AUTHORIZING ADDITIONAL COSTS FOR DR. DANIEL BUFFINGTON
1005	02/21/2018		PENALTY PHASE 02/22/2018 9:00 AM - 406 4TH FLOOR, 501 W ADAMS ST JACKSONVILLE FL 32202
1006	02/21/2018		@ 9:30
1007	02/22/2018		JUDGE COOPER, MALLORY
1008	02/22/2018		PENALTY PHASE PROCEEDINGS HELD IN: FULL

1009	02/22/2018		ASST. STATE ATTY. CALIEL, MARK
1010	02/22/2018		STATE ATTY. NELSON, MELISSA WILLIAMSON
1011	02/22/2018		ASST. STATE ATTY. WHEELER-SANCHEZ, VANESSA
1012	02/22/2018		ATTY. FOR DEF. SCHLAX, JULIE AGENT
1013	02/22/2018		ATTY. FOR DEF. FLETCHER, W CHARLES
1014	02/22/2018		DEFENDANT PRESENT IN JAIL
1015	02/22/2018		CLOSING ARGUMENTS IN: FULL
1016	02/22/2018		INSTRUCTIONS TO JURY IN FULL AND CHARGE TO JURY
1017	02/22/2018	1	VERDICT- JURY UNANIMOUSLY FINDS DEFENDANT SHOULD BE SENTENCED TO DEATH
1018	02/22/2018		JURY POLLED
1019	02/22/2018		JURY AND ALTERNATE JURORS DISCHARGED
1020	02/22/2018		JURY OUT AT 12:58PM - JURY BUZZED AT 3:02PM - JURY IN AT 3:19PM
1021	02/22/2018		CLERKS MEMO OF TRIAL (PENALTY PHASE)
1022	02/22/2018		CLERKS EXHIBIT MEMO (PENALTY PHASE)
1023	02/22/2018		JURY INSTRUCTIONS FOR PENALTY PHASE
1024	02/22/2018		SPENCER HEARING 03/28/2018 9:00 AM - 406 4TH FLOOR, 501 W ADAMS ST JACKSONVILLE FL 32202
1025	02/22/2018		@ 9:00
1026	03/05/2018		MOTION FOR NEW TRIAL
1027	03/28/2018		JUDGE COOPER, MALLORY
1028	03/28/2018		STATE ATTY. NELSON, MELISSA WILLIAMSON
1029	03/28/2018		ASST. STATE ATTY. CALIEL, MARK
1030	03/28/2018		ATTY. FOR DEF. SCHLAX, JULIE AGENT
1031	03/28/2018		ATTY. FOR DEF. FLETCHER, W CHARLES
1032	03/28/2018		DEFENDANT PRESENT IN JAIL
1033	03/28/2018		SPENCER HEARING HELD IN FULL
1034	03/28/2018		COURT ORDER ON DEFENSE MOTION FOR NEW TRIAL - MOOT
1035	03/28/2018		COURT ORDER ON DEFENSE AMENDED MOTION FOR NEW TRIAL - DENIED
1036	03/28/2018		CLERKS MEMO OF HEARING
1037	03/28/2018		CLERKS EXHIBIT MEMO
1038	03/28/2018		SENTENCING 05/02/2018 9:00 AM - 406 4TH FLOOR, 501 W ADAMS ST JACKSONVILLE FL 32202
1039	04/26/2018		STATE'S MEMORANDUM IN SUPPORT OF THE IMPOSITION OF THE DEATH PENALTY
1040	04/30/2018		AMENDED MOTION FOR NEW TRIAL
1041	05/01/2018		MOTION FOR POST VERDICT, PRE-SENTENCING MISTRIAL AND REQUEST FOR NEW PENALTY PHASE
1042	05/01/2018		DEFENDANT'S SENTENCING MEMORANDUM IN SUPPORT OF A SENTENCE OF LIFE WITHOUT PAROLE
1043	05/02/2018		JUDGE COOPER, MALLORY
1044	05/02/2018		ASST. STATE ATTY. CALIEL, MARK
1045	05/02/2018		ATTY. FOR DEF. SCHLAX, JULIE AGENT

1046	05/02/2018		DEFENDANT PRESENT IN JAIL
1047	05/02/2018	1	JUDGMENT AND SENTENCE TO STATE PRISON FOR DEATH BOOK 18373 PAGE 1222-1230
1048	05/02/2018	1	DEF. ADJUDGED GUILTY - FINGERPRINTS TAKEN
1049	05/02/2018	1	CREDIT TIME: 1775 DAYS
1050	05/02/2018	1	DEFENDANT DEEMED SEXUAL PREDATOR
1051	05/02/2018	1	CONSECUTIVE EACH COUNT
1052	05/02/2018	1	LEEA 5.00 IMPOSED
1053	05/02/2018	1	COST OF COURT 50.00 IMPOSED
1054	05/02/2018	1	COURTATTY(JDGMTCOSTS) 100.00 IMPOSED
1055	05/02/2018	1	CCT 50.00 IMPOSED
1056	05/02/2018	1	LGTF 225.00 IMPOSED
1057	05/02/2018	1	TNC 3.00 IMPOSED
1058	05/02/2018	1	AACC 65.00 IMPOSED
1059	05/02/2018	1	SAIEF 14,946.74 IMPOSED
1060	05/02/2018	1	CSTF 20.00 IMPOSED
1061	05/02/2018		FEES DUE: 12/31/2099
1062	05/02/2018	2	DEF. ADJUDGED GUILTY - FINGERPRINTS TAKEN
1063	05/02/2018	2	CREDIT TIME: 1775 DAYS
1064	05/02/2018	2	JUDGMENT AND SENTENCE TO STATE PRISON FOR LIFE
1065	05/02/2018	2	RCTF 151.00 IMPOSED
1066	05/02/2018	2	ADDL CRTCST CRIMES 151.00 IMPOSED
1067	05/02/2018		FEES DUE: 12/31/2099
1068	05/02/2018	3	DEF. ADJUDGED GUILTY - FINGERPRINTS TAKEN
1069	05/02/2018	3	CREDIT TIME: 1775 DAYS
1070	05/02/2018	3	JUDGMENT AND SENTENCE TO STATE PRISON FOR LIFE
1071	05/02/2018	3	DOBS 201.00 IMPOSED
1072	05/02/2018	3	RCTF 151.00 IMPOSED
1073	05/02/2018	3	ADDL CRTCST CRIMES 151.00 IMPOSED
1074	05/02/2018		FEES DUE: 12/31/2099
1075	05/02/2018		CALENDAR PAGE AND GRID SHEET
1076	05/02/2018		SENTENCING GUIDELINES
1077	05/02/2018		PAYMENT AUTHORIZATION SHEET
1078	05/02/2018		COURT ORDER ON STATE'S MOTUION FOR AWARD OF COSTS OF PROSECUTION PURSUANT TO SECTION 938.27, FLORIDA STATUTES
1079	05/02/2018		REQUEST FOR RELEASE OF PROPERTY
1080	05/02/2018		RESTITUTION ORDER CREATED FOR: $ $2,500.00 BOOK 18373 PAGE 1233-1234
1081	05/02/2018		DOCUMENTS - FILED WITH RESTITUTION ORDER
1082	05/02/2018		COURT ORDERED COSTS/FINES/FEES BOOK 18373 PAGE 1235-1236
1083	05/02/2018		UNIFORM COMMITMENT TO CUSTODY OF DEPT. OF CORRECTIONS
1084	05/02/2018		COMMITMENT CHECKLIST SENT
1085	05/02/2018		CERTIFICATE OF SERVICE FOR JUDGMENT AND SENTENCE

1086	05/02/2018		STATE PRISON CONFINEMENT PACKAGE PRINTED
1087	05/02/2018		RECEIPT FOR CIVIL PROCESS, JAIL, WARRANTS
1088	05/23/2018		CAPITAL SENTENCING ORDER
1089	05/23/2018		NOTICE OF APPEAL BOOK 18399 PAGE 497-497
1090	05/23/2018		DIRECTIONS TO CLERK
1091	05/23/2018		STATEMENT OF JUDICIAL ACTS TO BE REVIEWED
1092	05/23/2018		DESIGNATION TO COURT REPORTER
1093	05/29/2018		SUPREME COURT ACKNOWLEDGMENT SC18-822
1094	05/29/2018		SUPREME COURT ORDER DIRECTING THE COURT CLERK TO FILE THE RECORD ON APPEAL WITH THIS COURT TWENTY DAYS AFTER FILING OF THE TRANSCRIPT(S)
1095	05/30/2018		COURT ORDER FINDING THE DEFENDANT INDIGENT FOR PURPOSE OF APPEAL AND APPOINTING PUBLIC DEFENDER AS APPELLATE COUNSEL
1096	05/30/2018		MOTION TO DISCHARGE ATTORNEY
1097	05/31/2018		REPORTER'S ACKNOWLEDGEMENT
1098	05/31/2018		NOTICE OF APPEARANCE WEBB, ELIZABETH HOGAN
1099	06/01/2018		NOTICE OF DISCHARGING ATTORNEY
1100	06/01/2018		TESTIMONY & PROCEEDINGS OF NOVEMBER 2ND, 2015, BEFORE THE HONORABLE JUDGE MALLORY D. COOPER
1101	06/01/2018		TESTIMONY & PROCEEDINGS OF NOVEMBER 19, 2014, BEFORE THE HONORABLE JUDGE MALLORY COOPER
1102	06/04/2018		REQUEST FOR RELEASE OF PROPERTY
1103	06/04/2018		TESTIMONY & PROCEEDINGS OF NOVEMBER 19TH, 2014, BEFORE THE HONORABLE JUDGE MALLORY COOPER ***CORRECTED***
1104	06/11/2018		TESTIMONY & PROCEEDINGS OF FEBRUARY 2, 2016, BEFORE THE HONORABLE JUDGE MALLORY D. COOPER
1105	06/11/2018		TESTIMONY & PROCEEDINGS OF FEBRUARY 12, 2014, BEFORE THE HONORABLE JUDGE MALLORY D. COOPER
1106	06/11/2018		TESTIMONY & PROCEEDINGS OF MARCH 1, 2016, BEFORE THE HONORABLE JUDGE MALLORY D. COOPER
1107	06/11/2018		TESTIMONY & PROCEEDINGS OF APRIL 11, 2016, BEFORE THE HONORABLE JUDGE MALLORY D. COOPER
1108	06/11/2018		TESTIMONY & PROCEEDINGS OF MAY 4, 2016, BEFORE THE HONORABLE JUDGE MALLORY D. COOPER
1109	06/11/2018		TESTIMONY & PROCEEDINGS OF JULY 2, 2015, BEFORE THE HONORABLE JUDGE MALLORY D. COOPER
1110	06/11/2018		TESTIMONY & PROCEEDINGS OF NOVEMBER 24, 2014, BEFORE THE HONORABLE JUDGE MALLORY D. COOPER
1111	06/11/2018		TESTIMONY & PROCEEDINGS OF DECEMBER 4, 2014, BEFORE THE HONORABLE JUDGE MALLORY D. COOPER
1112	06/11/2018		TESTIMONY & PROCEEDINGS OF DECEMBER 11, 2014, BEFORE THE HONORABLE JUDGE MALLORY D. COOPER
1113	06/11/2018		TESTIMONY & PROCEEDINGS OF DECEMBER 15, 2015, BEFORE THE HONORABLE JUDGE MALLORY D. COOPER
1114	06/11/2018		TESTIMONY & PROCEEDINGS OF JULY 16, 2013, BEFORE

			THE HONORABLE JUDGE MALLORY D. COOPER
1115	06/11/2018		TESTIMONY & PROCEEDINGS OF JULY 16, 2014, BEFORE THE HONORABLE JUDGE MALLORY D. COOPER
1116	06/11/2018		TESTIMONY & PROCEEDINGS OF AUGUST 13, 2015, BEFORE THE HONORABLE JUDGE MALLORY D. COOPER
1117	06/11/2018		TESTIMONY & PROCEEDINGS OF AUGUST 22, 2013, BEFORE THE HONORABLE JUDGE MALLORY D. COOPER
1118	06/11/2018		TESTIMONY & PROCEEDINGS OF SEPTEMBER 4, 2013, BEFORE THE HONORABLE JUDGE MALLORY D. COOPER
1119	06/11/2018		TESTIMONY & PROCEEDINGS OF SEPTEMBER 15, 2015, BEFORE THE HONORABLE JUDGE MALLORY D. COOPER
1120	06/11/2018		TESTIMONY & PROCEEDINGS OF NOVEMBER 5, 2015, BEFORE THE HONORABLE JUDGE MALLORY D. COOPER
1121	06/11/2018		TESTIMONY & PROCEEDINGS OF MARCH 8, 2016, BEFORE THE HONORABLE JUDGE MALLORY D. COOPER
1122	06/11/2018		TESTIMONY & PROCEEDINGS OF SEALED IN CAMERA PROCEEDINGS OF FEBRUARY 2, 2016, BEFORE THE HONORABLE MALLORY D. COOPER
1123	06/12/2018		TRIAL-TESTIMONY & PROCEEDINGS OF FEBRUARY 5, 2018, BEFORE THE HONORABLE JUDGE MALLORY D. COOPER
1124	06/12/2018		TRIAL-TESTIMONY & PROCEEDINGS OF FEBRUARY 6, 2018, BEFORE THE HONORABLE JUDGE MALLORY D. COOPER
1125	06/12/2018		TRIAL-TESTIMONY & PROCEEDINGS OF FEBRUARY 7, 2018, BEFORE THE HONORABLE JUDGE MALLORY D. COOPER
1126	06/12/2018		TRIAL-TESTIMONY & PROCEEDINGS OF FEBRUARY 8, 2018, BEFORE THE HONORABLE JUDGE MALLORY D. COOPER
1127	06/12/2018		TRIAL-TESTIMONY & PROCEEDINGS OF FEBRUARY 9, 2018, BEFORE THE HONORABLE JUDGE MALLORY D. COOPER
1128	06/12/2018		TRIAL-TESTIMONY & PROCEEDINGS OF FEBRUARY 12, 2018, BEFORE THE HONORABLE JUDGE MALLORY D. COOPER
1129	06/12/2018		TRIAL-TESTIMONY & PROCEEDINGS OF FEBRUARY 13, 2018, BEFORE THE HONORABLE JUDGE MALLORY D. COOPER
1130	06/12/2018		TRIAL-TESTIMONY & PROCEEDINGS FEBRUARY 14, 2018, BEFORE THE HONORABLE JUDGE MALLORY D. COOPER
1131	06/12/2018		TRIAL-TESTIMONY & PROCEEDINGS OF FEBRUARY 21, 2018, BEFORE THE HONORABLE JUDGE MALLORY D. COOPER
1132	06/12/2018		TRIAL-TESTIMONY & PROCEEDINGS OF FEBRUARY 22, 2018, BEFORE THE HONORABLE JUDGE MALLORY D. COOPER
1133	06/13/2018		TESTIMONY & PROCEEDINGS OF JANUARY 18, 2017, BEFORE THE HONORABLE JUDGE MALLORY D. COOPER
1134	06/13/2018		TESTIMONY & PROCEEDINGS OF MAY 11, 2017, BEFORE THE HONORABLE JUDGE MALLORY D. COOPER
1135	06/13/2018		TESTIMONY & PROCEEDINGS OF MAY 26, 2016, BEFORE

			THE HONORABLE JUDGE MALLORY D. COOPER
1136	06/13/2018		TESTIMONY & PROCEEDINGS OF JULY 15, 2016, BEFORE THE HONORABLE JUDGE MALLORY D. COOPER
1137	06/13/2018		TESTIMONY & PROCEEDINGS OF AUGUST 8, 2017, BEFORE THE HONORABLE JUDGE MALLORY D. COOPER
1138	06/13/2018		TESTIMONY & PROCEEDINGS OF AUGUST 18, 2016, BEFORE THE HONORABLE JUDGE MALLORY D. COOPER
1139	06/13/2018		TESTIMONY & PROCEEDINGS OF OCTOBER 3, 2017, BEFORE THE HONORABLE JUDGE MALLORY D. COOPER
1140	06/13/2018		TESTIMONY & PROCEEDINGS OF NOVEMBER 2, 2017, BEFORE THE HONORABLE JUDGE MALLORY D. COOPER
1141	06/13/2018		TESTIMONY & PROCEEDINGS OF DECEMBER 12, 2016, BEFORE THE HONORABLE JUDGE MALLORY D. COOPER
1142	06/13/2018		TESTIMONY & PROCEEDINGS OF DECEMBER 19, 2017, BEFORE THE HONORABLE JUDGE MALLORY D. COOPER
1143	06/14/2018		TRIAL-TESTIMONY & PROCEEDINGS OF FEBRUARY 20, 2018, BEFORE THE HONORABLE JUDGE MALLORY D. COOPER
1144	06/25/2018		TESTIMONY & PROCEEDINGS OF OCTOBER 18, 2016, BEFORE THE HONORABLE JUDGE MALLORY D. COOPER
1145	06/25/2018		TESTIMONY & PROCEEDINGS OF MAY 7TH, 2014, BEFORE THE HONORABLE JUDGE MALLORY D. COOPER
1146	06/25/2018		TESTIMONY & PROCEEDINGS OF FEBRUARY 20, 2015, BEFORE THE HONORABLE JUDGE MALLORY COOPER
1147	06/25/2018		TESTIMONY & PROCEEDINGS OF MARCH 24, 2015, BEFORE THE HONORABLE JUDGE MALLORY COOPER
1148	06/28/2018		STATUS REPORT (FIRST)
1149	07/13/2018		TESTIMONY & PROCEEDINGS OF JULY 21, 2016, BEFORE THE HONORABLE JUDGE MALLORY COOPER
1150	07/13/2018		TESTIMONY & PROCEEDINGS OF MAY 12, 2015, BEFORE THE HONORABLE JUDGE MALLORY D. COOPER
1151	07/23/2018		TESTIMONY & PROCEEDINGS OF MARCH 19, 2014, BEFORE THE HONORABLE JUDGE MALLORY COOPER
1152	07/25/2018		STATUS HEARING 07/26/2018 9:00 AM - 405 4TH FLOOR, 501 W ADAMS ST JACKSONVILLE FL 32202
1153	07/25/2018		PER JA EMAIL
1154	07/26/2018		JUDGE COOPER, MALLORY
1155	07/26/2018		ASST. STATE ATTY. CALIEL, MARK
1156	07/26/2018		ATTY. FOR DEF. FLETCHER, W CHARLES
1157	07/26/2018		DEFENDANT NOT PRESENT
1158	07/26/2018		STATUS HEARING 08/29/2018 9:00 AM - 0 NO COURT ROOM ENTERED
1159	07/30/2018		SECOND STATUS REPORT
1160	07/30/2018		TESTIMONY & PROCEEDINGS OF JANUARY 22, 2018, BEFORE THE HONORABLE JUDGE MALLORY D. COOPER
1161	07/30/2018		TESTIMONY & PROCEEDINGS OF JANUARY 24, 2018, BEFORE THE HONORABLE JUDGE MALLORY D. COOPER

1162	07/30/2018		TRIAL-TESTIMONY & PROCEEDINGS OF MARCH 28, 2018, BEFORE THE HONORABLE JUDGE MALLORY D. COOPER
1163	07/30/2018		TRIAL-TESTIMONY & PROCEEDINGS OF MAY 2, 2018, BEFORE THE HONORABLE JUDGE MALLORY D. COOPER
1164	08/06/2018		TESTIMONY & PROCEEDINGS OF FEBRUARY 1, 2018 BEFORE THE HONORABLE JUDGE MALLORY D. COOPER
1165	08/07/2018		TESTIMONY & PROCEEDINGS OF AUGUST 19TH, 2013 BEFORE THE HONORABLE JUDGE MALLORY COOPER
1166	08/07/2018		TESTIMONY & PROCEEDINGS OF SEPTEMBER 3RD, 2014 BEFORE THE HONORABLE JUDGE MALLORY COOPER
1167	08/09/2018		TESTIMONY & PROCEEDINGS OF OCTOBER 15, 2013, BEFORE THE HONORABLE JUDGE MALLORY D. COOPER
1168	08/10/2018		TESTIMONY & PROCEEDINGS OF JANUARY 15, 2015, BEFORE THE HONORABLE JUDGE MALLORY COOPER
1169	08/10/2018		TESTIMONY & PROCEEDINGS OF DECEMBER 19, 2014, BEFORE THE HONORABLE JUDGE MALLORY COOPER
1170	08/13/2018		TESTIMONY & PROCEEDINGS OF JANUARY 6TH AND 9TH, 2014, BEFORE THE HONORABLE JUDGE MALLORY COOPER
1171	08/13/2018		TESTIMONY & PROCEEDINGS OF FEBRUARY 4TH, 2015, BEFORE THE HONORABLE JUDGE MALLORY COOPER
1172	08/13/2018		TESTIMONY & PROCEEDINGS OF NOVEMBER 17TH, 2015, BEFORE THE HONORABLE JUDGE MALLORY COOPER
1173	08/13/2018		CERTIFICATE OF NO RECORD (FILED BY REPORTERS)
1174	08/13/2018		TESTIMONY & PROCEEDINGS OF NOVEMBER 4TH, 2014, BEFORE THE HONORABLE JUDGE MALLORY COOPER
1175	08/13/2018		TESTIMONY & PROCEEDINGS OF DECEMBER 3RD, 2013, BEFORE THE HONORABLE JUDGE MALLORY COOPER
1176	08/13/2018		TESTIMONY & PROCEEDINGS OF JANUARY 11TH, 2018, BEFORE THE HONORABLE JUDGE MALLORY COOPER
1177	08/13/2018		MOTION FOR PAYMENT OF ATTORNEY'S FEES IN EXCESS OF THE STATUTORY CAP PURSUANT TO SECTION 27.5304(12) OF THE FLORIDA STATUTES
1178	08/14/2018		CERTIFICATE OF NO RECORD (FILED BY REPORTERS) (CORRECTED COPY)
1179	08/15/2018		STATUS REPORT
1180	08/22/2018		COURT ORDER SETTING HEARING ON MOTION FOR PAYMENT OF ATTORNEY'S FEES IN EXCESS OF THE STATUTORY CAP PURSUANT TO SECTION 27.5304(12) OF THE F.S.
1181	08/29/2018		JUDGE COOPER, MALLORY
1182	08/29/2018		ASST. STATE ATTY. CALIEL, MARK
1183	08/29/2018		ASST. PUB. DEF. WEBB, ELIZABETH HOGAN
1184	08/29/2018		DEFENDANT NOT PRESENT
1185	08/29/2018		NO FUTURE COURT DATE SET TODAY
1186	08/29/2018		STATUS REPORT (THIRD); STYLED SC, SC18-0822

CERTIFICATE OF CLERK

STATE OF Florida,
COUNTY OF DUVAL

16-2013-CF-005781-AXXX-MA
SC18-822

I, RONNIE FUSSELL, Clerk of the Circuit and County Courts for the County of Duval, State of Florida, do hereby certify that the foregoing pages 1 to 4058 inclusive contain a correct transcript of the record of the judgment in the case of STATE OF FLORIDA vs. DONALD JAMES SMITH and a true and correct recital and copy of all such papers and proceedings in said cause as appears from records and files of my office and that have been directed to be included in said record by the directions furnished to me.

VOLUME 1 PAGES 1 TO 4058

Inclusive embrace the transcribed notes of the reporter as made at the trial and certified by him to me.

VOLUME 2 PAGES 1 TO 2234

In Witness Whereof, I have set my hand and affixed the Seal of said Court this 30th day of August, A.D. 2018.

RONNIE FUSSELL,
CLERK OF THE CIRCUIT AND
COUNTY COURTS OF DUVAL
COUNTY

/s/ *Katherine Espiritu*

BY KATHERINE ESPIRITU
Deputy Clerk

501 West Adams St. Room 1262
Jacksonville, FL 32202
(904) 255-2208
Email:
Katherine.Espiritu@DuvalClerk.com

CLERK OF THE CIRCUIT COURT
SUUM CUIQUE
DUVAL COUNTY, FLORIDA

First Appearance:	Continued:	Continued:	Continued:	Continued:
Continued:	Continued:	Continued:	Continued:	Continued:

Arrest And Booking Report
Jacksonville Sheriff's Office
Jacksonville Florida

ADULT

Yr: 2013 Inc #422457 Amend #

Prev Juv Jail #

Jail # 2013016727 6/22/2013 15:55 File Direct: YES

JSO ID # Court: Circuit

SSN OBTS #

Arresting Agency: Jacksonville Sheriff's Office

Route To:
Homicide
N.C.I.C.

ORIGINAL

CLERK COPY

FELONY

Day/Date/Time Arrested: Saturday 6/22/2013 09:05

Name: SMITH, DONALD JAMES
Aliases: JOHN KENDALL

Nickname(s): DON

Arrestee's Home Address: 2495 SEGOVIA AVE Apt./Lot #: Sub-Sector: G2
City: JACKSONVILLE State: FLORIDA Zip: 32217
Taz: 689 Crossstreet:

OC deployed prior to/during Arrest: NO

DOB: 9/4/1956 Age: 56

Height: 5' 10" Weight (lbs): 160
Race: WHITE Ethnicity: NOT OF HISPANIC ORIGIN Sex: Male
Eye Color: UNKNOWN Hair Color: WHITE Complexion: FAIR / LIGHT Build: Thin
ECD Usage: NOT APPLICABLE
RTR written related to this incident? NO RTR Incident Yr: RTR Incident #:
Is an Offense a hate crime? NO Is an Offense a dating violence crime? NO Required to register as a sex offender? YES
Suspect Invoke Miranda? YES Arrestee needs ADA Consideration? NO Arrestee Confessed? Miranda Rights Given? YES

Disability or Special Consideration:

Accommodations Requested:

Driver's License # State: Subject's Resident Type: CITY
Hm Phone # (904)-737-5215 Bus. Phone # Phone Ext.
Cell Phone # Cell Phone Provider E-mail
Is Vagrant? NO

Arrest Made On: CALL

Subject's Residence Status: RESIDENT Armed With: NOT APPLICABLE (NONE)
Distinguishing Marks:
Employer: UK Place of Birth: ATLANTA COBB GEORGIA UNITED STATES Country of Citizenship: UNITED STATES
School Last Attended: G.E.D.

US Citizen: YES

Domestic Violence Involved: NO Children under 18 Present: YES If No is it Domestic Related: NO

Day/Date/Time of Incident-From: Friday 6/21/2013 23:18 Day/Date/Time of Incident-To: Friday 6/21/2013 23:20
Incident Address: 12100 LEM TURNER RD Apt./Lot #: Sub-Sector: P2
City: JACKSONVILLE State: FLORIDA Zip: 32218
Taz: 275 Crossstreet:
Offense Location Type: Highway / Roadway Interviewed by: W.P.CULLEN Interviewer ID: 5875

JUN 23 2013

Where Arrested: 501 BAY ST E Apt./Lot #: Sub-Sector: A3
City: JACKSONVILLE State: FLORIDA Zip: 32202
Taz: 97 Crossstreet:
Involved in Traffic Accident: NO Injuries from Accident: Is Incident Gang Related: NO Is Arrestee a Gang member: NO

ORIGINAL

Statute or Ordinance Number(s): #1
Statute No: 787.01(1)(A)2 Degree: F1 UCR Code: 1000 Attempt Code: Commit 6/22/2013-12:06 Updated:

KIDNAPPING / COMMIT OR FACIL[illegible]E COMMISSION OF ANY FELONY

Citation #	SA#	Warrant Type: **Not Applicable**
Jso Control #	Warrant/Case #	No. of Counts:

Jurisdiction: CT. Location/Div.:

Purge/Bond Type: Bond Amount: none Date of Issue: Date of Return: Judge:

Disposition: **Blanket Bond:** Disposition Date:

VOP/FTA ONLY

Original Statute No: Degree: UCR Code: Attempt Code: **Commit**

Description:

Statute or Ordinance Number(s): #2

Statute No: **782.04** Degree: **CF** UCR Code: **090A** Attempt Code: **Commit** **6/22/2013-12:06**

MURDER

Citation #	SA#	Warrant Type: **Not Applicable**
Jso Control #	Warrant/Case #	No. of Counts:

Jurisdiction: CT. Location/Div.:

Purge/Bond Type: **Bond** Bond Amount: none Date of Issue: Date of Return: Judge:

Disposition: **Blanket Bond:** Disposition Date:

VOP/FTA ONLY

Original Statute No: Degree: UCR Code: Attempt Code: **Commit**

Description:

ADDITIONAL INFORMATION **1** Reporting Officer: **W.P.CULLEN 5875**

□On 6-21-2013, at 2318 hours, patrol responded to a kidnapping of 8 year old victim Charish Perrywinkle who was abducted from the Walmart from 12100 Lem Turner Road, Jacksonville,FL . The victim was found deceased in the morning hours of 6-22-2013. A witness (victim's mother) identified Donald James Smith as the person last seen with the victim at the Wal-Mart. Video surveillance was reviewed by detectives and showed the victim leaving the store with Donald James Smith. Donald James Smith is a registered Sexual Offender in the State of Florida.

□A witness reported a tip that she possibly sighted a white van that matched the description of Donald James Smith's van parked behind a church in the 10400 block of Rutgers Road. As officers were responding to the area, they observed Donald James Smith's van driving. The van was ultimately stopped by officers and Donald James Smith was driving. There was no one else in the van. Donald James Smith was wearing the same clothes he was seen in at the Wal Mart and his clothes were soaked in what appeared to be water and were dirty. Officers responded back to the 10400 block of Rutgers Road where they located the victim's body in the water in a creek.

Smith was transported to the PMB Homicide Office and read his Constitutional Rights by Sgt. D.S. Coarsey, #6957. The suspect invoked his right an attorney and the interview stopped.

□

Transported By: W.P.CULLEN #5875
Arresting Officer(s) #1: W.P.CULLEN #58
Div/Zone or Unit: DETECTIVE ZONE 2

Approving Supervisor: D.S.COARSEY 957
#2: D.V.ALEXANDER #5284
# of Cases Cleared:

State of Florida, County of Duval

Arresting / Transporting Officer's Signature: WPC 5875

Sworn to (or affirmed) and subscribed before me this 22 day of JUN, 20 13, by

Personally Known ✓ or Produced Identification ____ Type of Identification produced: _____

S L WEBER

Print, Type, or Stamp, Commissioned name of Notary Public

Signature of Notary - State of Florida Certified Law Enforcement Officer or Corrections Officer: 690C3

Investigative Time:

#1 Hours: 12 **Minutes:** 0 **Cost Amount:** $578.88

Drug Activity: UNKNOWN
Alcohol Related: UNKNOWN (OR N/A)
Drug Type: UNKNOWN
Drug Related: UNKNOWN (OR N/A)

Vehicle: #1

Status: SUSPECT
Year: 0 Type: TRUCK/VAN/SUV Make: DODGE Model: OTHER
Primary Color: WHITE Top Color: WHITE
Year: 0 State: FLORIDA Tag: BCBK32
Last Driver of Vehicle: Arrestee SMITH, DONALD JAMES
Vehicle Released To: NA ,
Location Vehicle Towed to or Left at: JSO STORAGE WAREHOUSE

ORIGINAL

VICTIM: #1

Relationship to Suspect: STRANGER
Race: WHITE Ethnicity: NOT OF HISPANIC ORIGIN
Sex: Female
DOB: 12/24/2004 Age: 8
Name: PERRYWINKLE CHARISH LILLY
Address: [redacted] Apt./Lot #:
Sub-Sector: N2
City: [redacted]
Taz: 145 Crossstreet: Home Phone # Bus. Phone # Phone Ext.
Cell Phone # Cell Phone Provider E-mail
Is Vagrant? NO

WITNESS AND COMPLAINANT #1

Race: WHITE Ethnicity: NOT OF HISPANIC ORIGIN
Sex: Female
DOB: 4/13/1968 Age: 45
Name: PERRYWINKLE RAYNE KIMI
Address: [redacted] Apt./Lot #:
Sub-Sector of Arrest Location: N2
City: [redacted]
Taz: 145 Crossstreet: Home Phone # Bus. Phone # Phone Ext.
Cell Phone # [redacted] Cell Phone Provider E-mail
Is Vagrant? NO

Jail Information (Back Door)

Jail # 2013016727

Date and Time Admitted: 6/22/2013 15:55
Juvenile/Court Clerk #

Triage Questions:

Involved in Traffic Accident: NO Injuries from Accident:
OC deployed prior to/during Arrest: NO Was a hobble restraint used on the arrestee? NO
Does the arrestee exhibit any signs of suicidal behavior or attempts? NO Does the arrested have any observable medical/mental health problems? NO
Has the arrestee shown any escape potential or violence propensity behaviors? NO
Is there any other information about the arrestee that jail personnel need to know? NO
If yes, what?

Part II of Arrest And Booking Report:

Arrestee Personal Information: How Long in Jax? 4/ year

ORIGINAL

Chemical Test Data

Specimen:

Blood *Breath* *Urine* *Unable* *None*

Analysis Results:			*Refused:*
1st	*g/210L*	*TIME:*	*Blood:*
2nd	*g/210L*	*TIME:*	*Urine:*
3rd	*g/210L*	*TIME:*	*Breath:*

Breath Test Instrument:

Type: *Machine #*

Operator Name and I.D.# *Date:*

Verification By: _____

Right Thumb Print

FILED
JUN 24 2013
CLERK CIRCUIT COURT

Jacksonville Sheriff's Office
Victim Notification Request from incident report

Jail # 20130167 27

Year: 2013 ***Incident No.:*** **422457**

Incident Information

INCIDENCE INVOLVES JUVENILE(S)

Day/Date/Time of Incident-From: **Friday 6/21/2013 23:18** *Day/Date/Time of Incident-To:* **Friday 6/21/2013 23:20**

Location of Incident: **12100 LEM TURNER RD** *Apt./Lot #:* *Sub-Sector:* **P2**

City: **JACKSONVILLE** *State:* **FLORIDA** *Zip:* **32218**

Taz: **275** *Crossstreet:* *Day/Date/Time Incident Reported:* **Friday 6/21/2013 23:20**

Victim Information #1

VICTIM TYPE: **JUVENILE**

Name: **PERRYWINKLE, CHARISH LILLY**

Address: [redacted] *Apt./Lot #:* *Sub-Sector:* **N2**

City: [redacted]

Taz: **145** *Crossstreet:*

Home Phone # Bus. Phone # Ext.

Cell Phone # Cell Phone Provider E-mail

ORIGINAL

Is Vagrant? **NO**

Alternate Address: *Alt Apt./Lot #:* *Alt Sub-Sector:*

Alt City: *Alt State:* *Alt Zip:*

Alt Taz: *Alt Crossstreet:*

Alt Home Phone # Alt Bus. Phone # Alt Ext.

Alt Cell Phone # Alt Cell Phone Provider Alt E-mail

Hospital Where Victim taken: **NOT APPLICABLE**

Place of Employ /School:

Race: **WHITE** *Ethnicity:* **NOT OF HISPANIC ORIGIN** *Sex:* **Female** *DOB:* **12/24/2004**

Age: **8**

Height: **4' 3"** *Weight (lbs):* **60**

Eye Color: *Hair Color:* **BROWN**

Injury Extent: **NONE** *Injury Type:* **NOT APPLICABLE**

Residence Type: **CITY**

Residence Status: **RESIDENT**

Offenses Victim of:

#1 KIDNAPPING / COMMIT OR FACILITATE COMMISSION OF ANY FELONY

Victim Relationship To Offender:

STRANGER **#1 UK,**

Victim Disabilities: **NONE / (NOT APPLICABLE)**

Weapons Involved: **NOT APPLICABLE**

Suspect Information #1

Suspect Location: At Large

Name: **UK**

Address: *Apt./Lot #:* *Sub-Sector:*

City: *State:* *Zip:*

Taz: *Crossstreet:*

Home Phone # Bus. Phone # Ext.

Cell Phone # Cell Phone Provider E-mail

Is Vagrant? **NO**

Place of Employ /School:

Race: **WHITE** *Ethnicity:* **NOT OF HISPANIC ORIGIN** *Sex:* **Male** *DOB:*

Age range is from **55** *to* **65**

Height range is from **5' 9" 6' 1"** *Weight (lbs) range is from* **180** *to* **200**

Eye Color: **UNKNOWN** *Hair Color:* **WHITE** *Hair length:* **MEDIUM**

Hair Style: **STRAIGHT** *Complexion:* **FAIR / LIGHT** *Voice:* *Facial Hair:* **MUSTACHE**

Distinguishing Marks:

Clothing/Description: **BLACK SHIRT/ BLUE JEANS**
Nickname(s):
Aliases: **DON**

Charges:
#1 KIDNAPPING / COMMIT OR FACILITATE COMMISSION OF ANY FELONY
Jail Booking # N/A *OBTS No.* *Juvenile:* **No** *Miranda Warnings Given:* **No** *Suspect Confessed?*
Ecd Usage: **NOT APPLICABLE**
RTR written related to this incident? **NO** *RTR Incident Yr:* *RTR Incident #:*

Offense #1

Statute No: **787.01(1)(A)2** *Degree:* **F1** *UCR Code:* **1000** *Attempt Code:* **Commit**
KIDNAPPING / COMMIT OR FACILITATE COMMISSION OF ANY FELONY

Witness/Complainant Information: #1 *Type: WITNESS AND COMPLAINANT*

Name: **PERRYWINKLE RAYNE KIMI**
Address: [redacted] *Apt./Lot #:* *Sub-Sector:* **N2**
City: [redacted]
Taz: **145** *Crossstreet:*
Home Phone # Bus. Phone # Ext.
Cell Phone # [redacted] *Cell Phone Provider* *E-mail*
Is Vagrant? **NO**
Place of Employ /School:
Race: **WHITE** *Ethnicity:* **NOT OF HISPANIC ORIGIN** *Sex:* **Female** *DOB:* [redacted] *Age:* **45**

Relationship To Victim:
PARENT **#1 PERRYWINKLE, CHARISH LILLY**

Detective Called To the Scene: **D.V. ALEXANDER**
Reporting Officers: **A.A.LEWIS** *ID#* **#61131**
ID# **#0** **6/22/2013 04:25**

Jacksonville Sheriff's Office
Threat Assessment Form

Jail # 2013016727

Year: 2013 ***Incident No.:*** **422457**

Incident Information

INCIDENT INVOLVES JUVENILE(S)

Day/Date/Time of Incident-From: **Friday 6/21/2013 23:18** *Day/Date/Time of Incident-To:* **Friday 6/21/2013 23:20**

Location of Incident: **12100 LEM TURNER RD** *Apt./Lot #:* *Sub-Sector:* **P2**

City: **JACKSONVILLE** *State:* **FLORIDA** *Zip:* **32218**

Taz: **275** *Crossstreet:* *Day/Date/Time Incident Reported:* **Friday 6/21/2013 23:20**

Drug Activity: **NOT APPLICABLE** *Drug Type:* **NOT APPLICABLE** *# Of Offenses:* **1**

Alcohol Related: **UNKNOWN (OR N/A)** *Drug Related:* **UNKNOWN (OR N/A)** *# Of Victims:* **1**

M.C.I. Case: **No** *Follow-up by:* *Was Hate Crime Involved:* **No** *Dating Violence Involved:* **No** *# Of Suspects:* **1**

Victim Information #1

VICTIM TYPE: **JUVENILE**

ORIGINAL

Name: **PERRYWINKLE, CHARISH LILLY**

Address: [redacted] *Apt./Lot #:* *Sub-Sector:* **N2**

City: [redacted]

Taz: **145** *Crossstreet:*

Home Phone # Bus. Phone # Ext.

Cell Phone # Cell Phone Provider E-mail

Is Vagrant? **NO**

Alternate Address: *Alt Apt./Lot #:* *Alt Sub-Sector:*

Alt City: *Alt State:* *Alt Zip:*

Alt Taz: *Alt Crossstreet:*

Alt Home Phone # Alt Bus. Phone # Alt Ext.

Alt Cell Phone # Alt Cell Phone Provider Alt E-mail

Hospital Where Victim taken: **NOT APPLICABLE**

Place of Employ /School:

Race: **WHITE** *Ethnicity:* **NOT OF HISPANIC ORIGIN** *Sex:* **Female** *DOB:* **12/24/2004**

Age: **8**

Height: **4' 3"** *Weight (lbs):* **60**

Eye Color: *Hair Color:* **BROWN**

Injury Extent: **NONE** *Injury Type:* **NOT APPLICABLE**

Residence Type: **CITY**

Residence Status: **RESIDENT**

Offenses Victim of:

#1 KIDNAPPING / COMMIT OR FACILITATE COMMISSION OF ANY FELONY

Victim Relationship To Offender:

STRANGER **#1 UK,**

Victim Disabilities: **NONE / (NOT APPLICABLE)**

Weapons Involved: **NOT APPLICABLE**

Suspect Information #1

Suspect Location: At Large

Name: **UK**

Place of Employ /School:

Race: **WHITE** *Ethnicity:* **NOT OF HISPANIC ORIGIN** *Sex:* **Male** *DOB:*

Age range is from **55** *to* **65**

Height range is from **5' 9" 6' 1"** *Weight (lbs) range is from* **180** *to* **200**

Eye Color: **UNKNOWN** *Hair Color:* **WHITE** *Hair length:* **MEDIUM**

Hair Style: **STRAIGHT** *Complexion:* **FAIR / LIGHT** *Voice:* *Facial Hair:* **MUSTACHE**

Distinguishing Marks:

Clothing/Description: **BLACK SHIRT/ BLUE JEANS**

Nickname(s):
Aliases: **DON**

Charges:
#1 KIDNAPPING / COMMIT OR FACILITATE COMMISSION OF ANY FELONY
Jail Booking # N/A

Witness/Complainant Information: #1 ***Type: WITNESS AND COMPLAINANT***
Name: **PERRYWINKLE RAYNE KIMI**
Address: [redacted] *Apt./Lot #:* *Sub-Sector:* **N2**
City [redacted]
Taz: **145** *Crossstreet:*
Home Phone # Bus. Phone # Ext.
Cell Phone # [redacted] *Cell Phone Provider* *E-mail*
Is Vagrant? **NO**
Place of Employ /School:
Race: **WHITE** *Ethnicity:* **NOT OF HISPANIC ORIGIN** *Sex:* **Female** *DOB:* [redacted] *Age:* **45**

Relationship To Victim:
PARENT **#1 PERRYWINKLE, CHARISH LILLY**

Is Offense Related to Domestic Violence: **No** *If yes, were Children under 18 Present:* **Yes**

Childrens Names Living in the Household:
[redacted]

Detective Called To the Scene: **D.V. ALEXANDER**
Reporting Officers: **A.A.LEWIS** *ID#* **#61131**
ID# **#0** **6/22/2013 04:25**

Ronnie Fussell
Clerk of Circuit Court

ADD ON DOCKET

Date: JUNE 23, 2013 Judge: ROBERTO ARIAS P/A: BRITTANY ONEIL

PASS TO: 07/16/2013
CIRCUIT COURT

DEF ADJ INSOLVENT &
PUBLIC DEFENDER APPT'D
[redacted]
PROBABLE CAUSE FILED

PSJ2451

APP FOR CRIMINAL INDIGENT STATUS
DEFT FOUND (X) INDIGENT ( ) NOT INDIGENT

8

IN THE CIRCUIT OR COUNTY COURT OF THE 4TH JUDICIAL CIRCUIT IN AND FOR DUVAL COUNTY, FLORIDA

STATE OF FLORIDA vs.

Donald J. Smith
Defendant/Minor Child

CASE NO. 13 16727

APPLICATION FOR CRIMINAL INDIGENT STATUS

✓ I AM SEEKING THE APPOINTMENT OF THE PUBLIC DEFENDER

OR

___ I HAVE A PRIVATE ATTORNEY OR AM SELF-REPRESENTED AND SEEK DETERMINATION OF INDIGENCE STATUS FOR COSTS

Notice to Applicant: The provision of a public defender/court appointed lawyer and costs/due process services are not free. A judgment and lien may be imposed against all real or personal property you own to pay for legal and other services provided on your behalf or on behalf of the person for whom you are making this application. There is a $50.00 fee for each application filed. If the application fee is not paid to the Clerk of the Court within 7 days, it will be added to any costs that may be assessed against you at the conclusion of this case. If you are a parent/guardian making this affidavit on behalf of a minor or tax-dependent adult, the information contained in this application must include your income and assets.

1. I have 0 dependents. *(Do not include children not living at home and do not include a working spouse or yourself.)*
2. I have a take home income of $ 0 paid ( ) weekly ( ) bi-weekly ( ) semi-monthly ( ) monthly ( ) yearly. *(Take home income equals salary, wages, bonuses, commissions, allowances, overtime, tips and similar payments, minus deductions required by law and other court ordered support payments.)*
3. I have other income paid ( ) weekly ( ) bi-weekly ( ) semi-monthly ( ) monthly ( ) yearly: *(Circle "Yes" and fill in the amount if you have this kind of income, otherwise circle "No")*

Social Security benefits	Yes $___	No	Veterans' benefit	Yes $___	~~No~~
Unemployment compensation	Yes $___	No	Child support or other regular support from family members/spouse	Yes $___	No
Union Funds	Yes $___	No	Rental income	Yes $___	No
Workers compensation	Yes $___	No	Dividends or interest	Yes $___	No
Retirement/pensions	Yes $___	No	Other kinds of income not on the list	Yes $___	No
Trusts or gifts	Yes $___	No			

4. I have other assets: *(Circle "Yes" and fill in the value of the property, otherwise circle "No." Use the back of this form to provide additional information)*

Cash	Yes $___	No	Savings	Yes $___	No
Bank account(s)	Yes $___	No	Stocks/bonds	Yes $___	No
Certificates of deposit or money market accounts	Yes $___	No	*Equity in Real Estate (excluding homestead)	Yes $___	No
*Equity in Motor Vehicles/Boats/ Other tangible property	Yes $___	No	*Equity means value minus loans. Also list any expectancy in an interest in such property.		
List the year/make/model and tag #:___			*List the address of this property:* Address ___ City, State, Zip ___ County of Residence ___		

5. I have a total amount of liabilities and debts in the amount of $ 0.
6. I receive: *(Circle "Yes" or "No")*

Temporary Assistance for Needy Families-Cash Assistance	Yes	No
Poverty-related veterans' benefits	Yes	No
Supplemental Security Income (SSI)	Yes	No

7. I have been released on bail in the amount of $ ___ Cash ___ Surety ___ Posted by: Self ___ Family ___ Other ___

A person who knowingly provides false information to the clerk or the court in seeking a determination of indigent status under s. 27.52, F.S., commits a misdemeanor of the first degree, punishable as provided in s. 775.082, F.S., or s. 775.083, F.S. **I attest that the information I have provided on this Application is true and accurate to the best of my knowledge.**

Signed, this 23 day of 6, 2013

[redacted]
Signature of Applicant for Indigent Status

9-4-56
Date of Birth

Print Full Legal Name 2195 SEGOVIA AVE.
Address
City, State, Zip JAX. FL. 32211
Phone Number

Driver's license or ID number

CLERK'S DETERMINATION

✓ Based on the information in this Application, I have determined the applicant to be (✓) Indigent ( ) Not Indigent

___ The Public Defender is hereby appointed to the case listed above until relieved by the Court.

Dated this 23 day of 6, 2013

FILED
JUN 13 2013
DAVID W. ANSELL
CLERK CIRCUIT COURT

Clerk of the Circuit Court

This form was completed with the assistance of

Clerk/Deputy Clerk/Other authorized person

APPLICANTS FOUND NOT INDIGENT MAY SEEK REVIEW BY ASKING FOR A HEARING TIME. Sign here if you want the judge to review the clerk's decision of not indigent. ___

07/11

WHITE COPY - CLERK PINK COPY - PUBLIC DEFENDER GOLDENROD COPY - DEFENDANT PS-1273

FILED

JUN 2 3 2013

RONALD W. DAMSELL
CLERK CIRCUIT COURT

IN THE CIRCUIT OR COUNTY COURT,
FOURTH JUDICIAL CIRCUIT, IN AND
FOR DUVAL COUNTY, FLORIDA

STATE OF FLORIDA

VS.

Donald Smith

DIVISION: B

CASE NO.: 2013-16727

ORDER DETERMINING ELIGIBILITY FOR COURT-APPOINTED COUNSEL

The above-named defendant appearing before the Court, and said defendant having executed an affidavit of insolvency and financial statement, testimony having been taken by the Court, and the Court being otherwise fully advised in the premises, it is, thereupon,

X **ORDERED AND ADJUDGED** that the defendant be declared indigent and that the Office of the Public Defender for the Fourth Judicial Circuit of Florida is hereby appointed to represent said defendant.

___ **ORDERED AND ADJUDGED** that the defendant shall pay an application fee in the amount of $50.00 to the Clerk of the Circuit Court in Room 1223 for misdemeanor cases and Room 2136 for felony cases, Duval County Courthouse, 501 W. Adams Street, Jacksonville, Florida 32202 no later than seven days from the date of this order. If the fee is not paid by that date, the Court will inquire of the defendant concerning the circumstances of the nonpayment. The Court may then order the fee to be paid forthwith or include the fee in any lien subsequently filed in this case.

___ **ORDERED AND ADJUDGED** that pursuant to section 27.512, Florida Statutes, the defendant is charged with a violation of a municipal ordinance or a misdemeanor, the defendant will not be imprisoned if convicted in this case; and, there being no legal requirement for the appointment of counsel, the said defendant has been advised that he/she may proceed without counsel, or, with retained counsel of the defendant's choice.

DONE AND ORDERED this_____day of JUN 2 3 2013 ,20____

CIRCUIT/COUNTY JUDGE

WHITE COPY - CLERK YELLOW COPY - PUBLIC DEFENDER PINK COPY - DEFENDANT

PS-2507

FILED
JUN 2 3 2013
CLERK CIRCUIT COURT

IN THE COUNTY COURT OF THE FOURTH JUDICIAL CIRCUIT, IN AND FOR DUVAL COUNTY, FLORIDA

DOCKET NUMBER: 13-40627

STATE OF FLORIDA

-v-

Donald Smith

FINDING OF PROBABLE CAUSE TO DETAIN

Pursuant to Florida Rules of Criminal Procedure 3.131, this Court, having heard the evidence and having been fully advised in the premises, hereby determines that there is probable cause to detain the above-named defendant pending further proceedings.

Dated at Jacksonville, Duval County, Florida, this _____ day JUN 2 3 2013, 20___.

JUDGE

PSJ-1138

Felony Clerk

FILED 06/28/13 AM 11:25 R FUSSELL

IN THE CIRCUIT COURT, FOURTH JUDICIAL CIRCUIT, IN AND FOR DUVAL COUNTY, FLORIDA.

CASE NO.: 16-2013-CF-005781

DIVISION: CR-I

STATE OF FLORIDA

VS.

DONALD SMITH

MOTION FOR STATEMENT OF PARTICULARS

Defendant, DONALD SMITH, by and through the undersigned attorney, the Public Defender for the Fourth Judicial Circuit of Florida, pursuant to Rule 3.140(n), Florida Rules of Criminal Procedure, respectfully moves this Honorable Court to order the State of Florida to file a written statement of particulars with the Court specifying as definitely as possible the place, date and time of the offense(s) charged in the Information(s).

I HEREBY CERTIFY that a copy of the above and foregoing Motion for Statement of Particulars has been furnished to the Office of the State Attorney, by hand, this 27 day of June, 2013.

Respectfully submitted,

MATT SHIRK
PUBLIC DEFENDER

BY: _____
FRED C. GAZALEH, #353787
Assistant Public Defender

/tll

(D-02)

Felony Clerk

FILED 06-28-13 AM 11:25 R FUSSELL

IN THE CIRCUIT COURT OF THE FOURTH JUDICIAL CIRCUIT, IN AND FOR DUVAL COUNTY, FLORIDA.

CASE NO.: 16-2013-CF-005781

DIVISION: CR-I

STATE OF FLORIDA

VS.

DONALD SMITH

NOTICE OF DISCOVERY AND
SPECIFIC DEMAND FOR INFORMATION

Pursuant to Rule 3.220(a), Florida Rules of Criminal Procedure, Defendant hereby gives notice that he intends to participate in discovery and requests that all information, statements, evidence or other matters encompassed by Rule 3.220(b) and (j) be provided to Defendant by the State within 15 days of this Notice.

Defendant specifically demands the State provide Defendant with all information it has regarding any physical evidence which either: 1) contains DNA which may exonerate Defendant, or 2) upon which DNA testing could be performed which may exonerate the defendant, pursuant to Section 925.12, Florida Statutes (2006), *Brady v. Maryland*, 83 S. Ct. 1194 (1963), and *United States v. Agurs*, 427 U.S. 97 (1976). In addition, Defendant specifically demands the State provide Defendant with all information it has regarding DNA evidence that, if tested and compared to the DNA of Defendant or any other person might mitigate guilt or cause a necessary reduction of the charges filed in this cause.

I HEREBY CERTIFY that a copy of the foregoing "Notice of Discovery" has been furnished to the Office of the State Attorney, by hand delivery, this 27 day of June, 2013.

Respectfully submitted,

MATT SHIRK
PUBLIC DEFENDER

BY: _____
FRED C. GAZALEH, #353787
Assistant Public Defender

felony Clerk

FILED0628"13AM1125 R RUSSELL

FILED0628"13AM1125 R RUSSELL

PUBLIC DEFENDER REQUEST FOR COPY OF JSO PHOTOGRAPHS

In the case of State of Florida v DONALD SMITH, Case Number: 16-2013-CF-005781, Jail Number: 2013-016727, the undersigned Assistant Public Defender certifies that Defendant will file a Notice of Discovery in this case and that Defendant will be bound by reciprocal obligations. I hereby request a copy of all photographs relating to this case be provided to the Defendant as soon as possible (this should include the electronic media as well as a printout of the thumbnails). The CCR# in the case is 2013-422457.

A copy of this request has been delivered to the Office of the State Attorney this 27 day of June, 2013.

Signed: _____

FRED C. GAZALEH, #353787
Assistant Public Defender
Telephone number: 255-4620

cc: Office of the State Attorney
Office of the Public Defender, Investigations

D40

IN THE CIRCUIT COURT, FOURTH JUDICIAL CIRCUIT, IN AND FOR DUVAL COUNTY, FLORIDA.

CASE NO:**16-2013-CF-5781**
DIVISION: CR-I

STATE OF FLORIDA

vs

DONALD JAMES SMITH,
Defendant.

FILED
JUL 01 2013
RONNIE W. POWELL
CLERK CIRCUIT COURT

ORDER OF REASSIGNMENT

It appearing that the Honorable Suzanne Bass, the presiding Judge of Division CR-I has entered an Order of Recusal in the above- styled cause, and that this matter should be reassigned to another division of the Circuit Court for further proceedings pursuant to Rule 2.215(b)(4), Florida Rules of Judicial Administration, it is,

ORDERED AND ADJUDGED that the above-styled cause is hereby reassigned to **Division CR-D**, in the Circuit Court, Fourth Judicial Circuit, in and for Duval County, Florida, for further proceedings and disposition.

DONE AND ORDERED at Jacksonville, Duval County, Florida, this 1 day of July, 2013.

DONALD R. MORAN, JR.
CHIEF JUDGE

Copies to:
Honorable Suzanne Bass
Honorable Mallory Cooper
Office of the State Attorney-Div. CR-I
Office of the Public Defender-Div. CR-I

FILED 07/01/13 PM 02:55 R FUSSELL

IN THE CIRCUIT COURT, FOURTH
JUDICIAL CIRCUIT OF FLORIDA,
IN AND FOR DUVAL COUNTY,
FLORIDA.

CASE NO.: 2013-CF-5781
DIVISION: CR-I

STATE OF FLORIDA

vs.

DONALD JAMES SMITH
Defendant.
_____/

ORDER OF RECUSAL

It appearing that the above-entitled cause now pending in Division CR-I of this Court may be more appropriately disposed of by another division of this Court; accordingly, it is

ORDERED AND ADJUDGED that I, Suzanne Bass, hereby recuse myself in this cause and request the Chief Judge to reassign the same to another division of the court.

DONE AND ORDERED at Jacksonville, Duval County, Florida, this 1 day of July, 2013.

Suzanne Bass
SUZANNE BASS
Circuit Judge

Copies to:

Honorable Donald R. Moran, Jr., Chief Judge

Office of the State Attorney
Division CR-I

Office of the Public Defender
Division CR-I

S. A. CASE NO.: 13CF039428AD

CLERK NO.: 162013CF005781AXXXMA
DIVISION: CRD

IN THE CIRCUIT COURT OF THE FOURTH JUDICIAL CIRCUIT
OF THE STATE OF FLORIDA, IN AND FOR DUVAL COUNTY,
SPRING TERM, IN THE YEAR TWO THOUSAND THIRTEEN

STATE OF FLORIDA

vs.

DONALD JAMES SMITH

INDICTMENT FOR:

MURDER IN THE FIRST DEGREE;
KIDNAPPING A CHILD UNDER THE AGE OF 13 YEARS;
SEXUAL BATTERY ON A CHILD LESS THAN 12 YEARS OLD

IN THE NAME OF AND BY AUTHORITY OF THE STATE OF FLORIDA

The Grand Jurors of the State of Florida and County of Duval, empaneled and sworn to inquire and true presentment make in and for the body of the County of Duval, upon their oaths, do present and charge that DONALD JAMES SMITH, on or between the 21st day of June, 2013 and the 22nd day of June, 2013, in the County of Duval and the State of Florida, did unlawfully and from a premeditated design to effect the death of Cherish Perrywinkle, did then and there kill the said Cherish Perrywinkle, a human being, by strangling the said victim, contrary to the provisions of Section 782.04(1)(a), Florida Statutes.

COUNT 2

The Grand Jurors of the State of Florida and County of Duval, empaneled and sworn to inquire and true presentment make in and for the body of the County of Duval, upon their oaths, do present and charge that DONALD JAMES SMITH, on or between the 21st day of June, 2013, and the 22nd day of June, 2013, in the County of Duval and the State of Florida, did confine, abduct or imprison Cherish Perrywinkle, a child under the age of 13, forcibly, secretly, or by threat against her will and without lawful authority, with intent to commit or facilitate the commission of a felony, to-wit: Sexual Battery, and did commit a Sexual Battery upon Cherish Perrywinkle, contrary to the provisions of Section 787.01(3)(a), Florida Statutes.

COUNT 3

The Grand Jurors of the State of Florida and County of Duval, empaneled and sworn to inquire and true presentment make in and for the body of the County of Duval, upon their oaths, do present and charge that DONALD JAMES SMITH, on or between the 21st day of June, 2013 and the 22nd day of June, 2013, in the County of Duval and the State of Florida, being a person 18 years of age or older, did commit a Sexual Battery upon Cherish Perrywinkle, or in an attempt to commit Sexual Battery, injured the sexual organs of Cherish Perrywinkle, a person less than 12 years of age, contrary to the provisions of Section 794.011(2)(a), Florida Statutes.

Foreperson of the Duval County Grand Jury

ANGELA B. COREY, STATE ATTORNEY
FOURTH JUDICIAL CIRCUIT

Angela B. Corey
Bar Number 0300942
State Attorney
Fourth Judicial Circuit in and for Duval County, Florida,
Prosecuting for said State

I, Angela B. Corey, State Attorney for the Fourth Judicial Circuit of the State of Florida, in and for Duval County, hereby certify that I, as such Prosecuting Officer and as authorized and required by law, have advised the Grand Jury which returned this Indictment this 2nd day of July, 2013.

Angela B. Corey
Bar Number 0300942
State Attorney

NOTICE OF CONFIDENTIAL INFORMATION WITHIN COURT FILING

Pursuant to Florida Rule of Judicial Administration 2.420(d)(2), the filer of this court record (Information) indicates that confidential information is included within the document being filed; to wit: Social Security Number, § 119.0714.

Race: White Sex: Male DOB: 09/04/1956 **SSN:**

Custody: X Yes ____ No Bond $____ None X

Capias: ____ (If not in custody) Arraignment Date: July 16, 2013

Juvenile: ____ Yes X No Sealed ____ Yes ____ No

Receiving Judge:

MCL NO.(S): S782.04(1)(a); S787.01(3)(a); and S794.01(a)

CLERK NO.: 162013CF005781AXXXMA

IN THE CIRCUIT COURT OF THE FOURTH JUDICIAL
CIRCUIT OF THE STATE OF FLORIDA, IN AND FOR
DUVAL COUNTY, SPRING TERM, 2013

THE STATE OF FLORIDA

vs.

DONALD JAMES SMITH, SR.

INDICTMENT FOR

MURDER IN THE FIRST DEGREE;
KIDNAPPING A CHILD UNDER THE AGE OF 13 YEARS;
SEXUAL BATTERY ON A CHILD LESS THAN 12 YEARS OLD

A TRUE BILL

Foreperson of the Grand Jury

WITNESS FOR THE STATE

D. V. Alexander, #5284, Jacksonville Sheriff's Office

Presented in open Court by the Grand Jury and filed

this 2nd day of July, 2013.

RONNIE FUSSELL

Clerk Circuit Court

By: _____
Deputy Clerk

ANGELA B. COREY
STATE ATTORNEY

First Appearance:	Continued:	Continued:	Continued:	Continued:
Continued:	Continued:	Continued:	Continued:	Continued:

Arrest And Booking Report
Jacksonville Sheriff's Office
Jacksonville Florida

ADULT

Yr: 2013 Inc # 422457 — Amend #

Prev Juv Jail #

Jail # 2013016727 — 7/2/2013 14:13 — File Direct: YES

JSO ID # — Court: Circuit

SSN — OBTS #

5015134

~~Arresting Agency~~ Jacksonville Sheriff's Office

Route To:
Homicide
N.C.I.C.
Det DV Alexander

Day/Date/Time Arrested: Tuesday 7/2/2013 13:00

Name: SMITH, DONALD JAMES
Aliases: DON

FELONY MD-CM

Nickname(s):

Arrestee's Home Address: 2495 SEGOVIA AVE Apt./Lot #: ORIGINAL Sub-Sector: G2
City: JACKSONVILLE State: FLORIDA Zip: 32217
Taz: 689 Crossstreet:

OC deployed prior to/during Arrest: NO

DOB: 9/4/1956 Age: 56

Height: 5' 10" Weight (lbs): 160

Race: WHITE Ethnicity: NOT OF HISPANIC ORIGIN Sex: Male
Eye Color: BROWN Hair Color: GRAY/SALT & PEPPER Complexion: FAIR / LIGHT Build: Medium
ECD Usage: NOT APPLICABLE

CLERK COPY

RTR written related to this incident? NO RTR Incident Yr: RTR Incident #:
Is an Offense a hate crime? NO Is an Offense a dating violence crime? NO Required to register as a sex offender? YES
Suspect Invoke Miranda? YES Arrestee needs ADA Consideration? NO Arrestee Confessed? Miranda Rights Given? YES

Disability or Special Consideration:

JUL 03 2013

Accommodations Requested:

Driver's License # S530190563240 State: FLORIDA Subject's Resident Type: CITY
Hm Phone # (904)-737-5215 Bus. Phone # Phone Ext.
Cell Phone # (904)-405-8643 Cell Phone Provider metro PCS E-mail
Is Vagrant? NO

Arrest Made On: CALL

Subject's Residence Status: RESIDENT Armed With: PERSONAL WEAPONS (HANDS/ FIST/ FEET/TEETH/ETC.)
Distinguishing Marks:
Employer: NONE Place of Birth: Atlanta Cobb GEORGIA UNITED STATES Country of Citizenship: UNITED STATES
School Last Attended: GED

US Citizen: YES

Domestic Violence Involved: NO Children under 18 Present: YES If No is it Domestic Related: NO

Day/Date/Time of Incident-From: Friday 6/21/2013 22:41 Day/Date/Time of Incident-To: Saturday 6/22/2013 07:15
Incident Address: 12100 LEM TURNER RD Apt./Lot #: Sub-Sector: P2
City: JACKSONVILLE State: FLORIDA Zip: 32218
Taz: 275 Crossstreet:
Offense Location Type: Department/Disc. Store Interviewed by: Interviewer ID:
Where Arrested: 501 BAY ST E Apt./Lot #: Sub-Sector: A3
City: JACKSONVILLE State: FLORIDA Zip: 32202
Taz: 97 Crossstreet:
Involved in Traffic Accident: NO Injuries from Accident: Is Incident Gang Related: NO Is Arrestee a Gang member? NO

Statute or Ordinance Number(s): #1
Statute No: 787.01(3)(A)2 Degree: LF UCR Code: 1000 Attempt Code: Commit 7/2/2013-13:47 Updated:

ORIGINAL

KIDNAPPING / CHILD UNDER 13 A COMMITS SEXUAL BATTERY AGAINST ILD

Citation #	*SA#*	*Warrant Type:* **Not Applicable**
Jso Control #	*Warrant/Case #* 13CF 5781	*No. of Counts:*

Jurisdiction: *CT. Location/Div.:*

Purge/Bond Type: *Bond Amount:* *Date of Issue:* *Date of Return:* *Judge:*

Disposition: *Disposition Date:*

Blanket Bond:

VOP/FTA ONLY

Original Statute No: *Degree:* *UCR Code:* *Attempt Code:* **Commit**

Description:

Statute or Ordinance Number(s): #2

Statute No: **782.04(1)(A)(1)** *Degree:* **CF** *UCR Code:* **090A** *Attempt Code:* **Commit** **7/2/2013 - 13:47**

MURDER / PREMEDITATED / FIRST DEGREE

Citation #	*SA#*	*Warrant Type:* **Not Applicable**
Jso Control #	*Warrant/Case #*	*No. of Counts:*

Jurisdiction: *CT. Location/Div.:*

Purge/Bond Type: *Bond Amount:* *Date of Issue:* *Date of Return:* *Judge:*

Disposition: *Disposition Date:*

Blanket Bond:

VOP/FTA ONLY

Original Statute No: *Degree:* *UCR Code:* *Attempt Code:* **Commit**

Description:

Statute or Ordinance Number(s): #3

Statute No: **794.011(2)(A)** *Degree:* **CF** *UCR Code:* **110A** *Attempt Code:* **Commit** **7/2/2013 - 13:47**

SEXUAL BATTERY (CAPITAL FELONY; SUSP >18, VIC<12; OR ATT W INJ TO SEX ORGANS)

Citation #	*SA#*	*Warrant Type:* **Not Applicable**
Jso Control #	*Warrant/Case #*	*No. of Counts:*

Jurisdiction: *CT. Location/Div.:*

Purge/Bond Type: **Bond** *Bond Amount:* *Date of Issue:* *Date of Return:* *Judge:*

Disposition: *Disposition Date:*

Blanket Bond:

VOP/FTA ONLY

Original Statute No: *Degree:* *UCR Code:* *Attempt Code:* **Commit**

Description:

ADDITIONAL INFORMATION **1** *Reporting Officer:* **D.V.ALEXANDER 5284**

On 07/02/2013, the Duval County Grand Jury met and indicted the defendant on one count of Murder in the First

Degree, one count of Kidnapping of a Child Under the Age of 13, and one count of Sexual Battery on a Child Less Than 12 Years Old.

Transported By: **D.V.ALEXANDER #5284** *Approving Supervisor:* **L.J.MILLS #5443**
Arresting Officer(s) #1: **D.V.ALEXANDER #5284** *#2:* **#0**
Div/Zone or Unit: DETECTIVE ZONE 2 *# of Cases Cleared:*

State of Florida, County of Duval *Arresting / Transporting Officer's Signature:* 5284

Sworn to (or affirmed) and subscribed before me this 2 *day of* July, 20 13, *by*

Personally Known X *or Produced Identfication* ____ *Type of Identification produced:* ____

K. PARKER
Print,Type, or Stamp, Commissioned name of Notary Public

Signature of Notary - State of Florida Certified Law Enforcement Officer or Corrections Officer: 570

Drug Activity: **NOT APPLICABLE** *Drug Type:* **NOT APPLICABLE**
Alcohol Related: **UNKNOWN (OR N/A)** *Drug Related:* **UNKNOWN (OR N/A)**

***Vehicle:* #1** *Status:* **SUSPECT**
Year: **0** *Type:* **TRUCK/VAN/SUV** *Make:* **UNKNOWN** *Model:* **UNKNOWN**
Primary Color: **WHITE** *Top Color:* **WHITE** *Year:* **0** *State:* *Tag:*
Last Driver of Vehicle: **Arrestee ,**
Vehicle Released To: **NA ,**
Location Vehicle Towed to or Left at:

VICTIM: #1 *Relationship to Suspect:* **STRANGER**
Race: **WHITE** *Ethnicity:* **NOT OF HISPANIC ORIGIN**
Sex: **Female**
DOB: **12/24/2004** *Age:* **8**
Name: **PERRYWINKLE CHERISH LILLY**
Address: **7032 ALAN AVE** *Apt./Lot #:* *Sub-Sector:* **N2**
City: **JACKSONVILLE** *State:* **FLORIDA** *Zip:* **32208**
Taz: **145** *Crossstreet:* *Home Phone #* *Bus. Phone #* *Phone Ext.*
Cell Phone # *Cell Phone Provider* *E-mail*
Is Vagrant? **NO**

Jail Information (Back Door) *Date and Time Admitted:* **7/2/2013 14:13**
Jail # **2013016727** *Juvenile/Court Clerk #*

Triage Questions:
Involved in Traffic Accident: **NO** *Injuries from Accident:*
OC deployed prior to/during Arrest: **NO** *Was a hobble restraint used on the arrestee?* **NO**
Does the arrestee exhibit any signs of suicidal behavior or attempts? **NO** *Does the arrested have any observable medical/mental health problems?* **NO**
Has the arrestee shown any escape potential or violence propensity behaviors? **NO**
Is there any other information about the arrestee that jail personnel need to know? **NO**
If yes, what?

Part II of Arrest And Booking Report:

Arrestee Personal Information: How Long in Jax?

ORIGINAL

Chemical Test Data

Specimen:

Blood *Breath* *Urine* *Unable* *None*

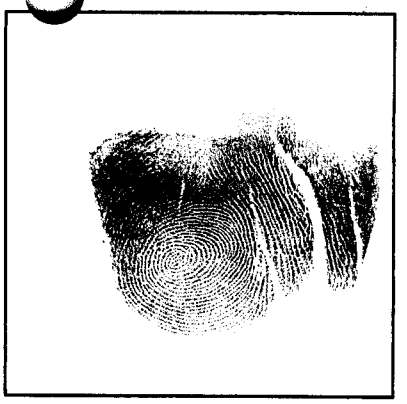
Analysis Results:			*Refused:*
1st	*g/210L*	*TIME:*	*Blood:*
2nd	*g/210L*	*TIME:*	*Urine:*
3rd	*g/210L*	*TIME:*	*Breath:*

Breath Test Instrument:

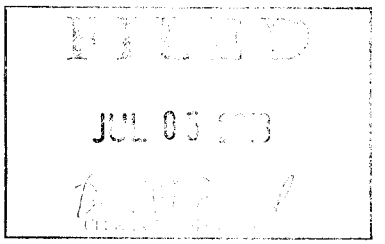
Type: *Machine #*

Operator Name and I.D.# *Date:*

Verification By: _____



Right Thumb Print



Ronnie Fussell
Clerk of Circuit Court

ADD ON DOCKET

Date: JULY 03, 2013 Judge: EMMET FERGUSON P/A: MARGARET GIBBS

DEF ADJ INSOLVENT &
PUBLIC DEFENDER APPT'D

PASS TO: JUL 16 2013
CIRCUIT COURT

PSJ2451

APP FOR CRIMINAL INDIGENT STATUS
DEFT FOUND (X) INDIGENT ( ) NOT INDIGENT

(7)

IN THE CIRCUIT OR COUNTY COURT OF THE 4TH JUDICIAL CIRCUIT IN AND FOR DUVAL COUNTY, FLORIDA

STATE OF FLORIDA vs.

Smith Donald James

Defendant/Minor Child

CASE NO. 13 16727

APPLICATION FOR CRIMINAL INDIGENT STATUS

✓ I AM SEEKING THE APPOINTMENT OF THE PUBLIC DEFENDER

OR

___ I HAVE A PRIVATE ATTORNEY OR AM SELF-REPRESENTED AND SEEK DETERMINATION OF INDIGENCE STATUS FOR COSTS

Notice to Applicant: The provision of a public defender/court appointed lawyer and costs/due process services are not free. A judgment and lien may be imposed against all real or personal property you own to pay for legal and other services provided on your behalf or on behalf of the person for whom you are making this application. There is a $50.00 fee for each application filed. If the application fee is not paid to the Clerk of the Court within 7 days, it will be added to any costs that may be assessed against you at the conclusion of this case. If you are a parent/guardian making this affidavit on behalf of a minor or tax-dependent adult, the information contained in this application must include your income and assets.

1. I have 0 dependents. *(Do not include children not living at home and do not include a working spouse or yourself.)*

2. I have a take home income of $ 0 paid ( ) weekly ( ) bi-weekly ( ) semi-monthly ( ) monthly ( ) yearly. *(Take home income equals salary, wages, bonuses, commissions, allowances, overtime, tips and similar payments, minus deductions required by law and other court ordered support payments.)*

3. I have other income paid ( ) weekly ( ) bi-weekly ( ) semi-monthly ( ) monthly ( ) yearly: *(Circle "Yes" and fill in the amount if you have this kind of income, otherwise circle "No")*

Social Security benefits	Yes $	No	Veterans' benefit	Yes $	No
Unemployment compensation	Yes $	No	Child support or other regular support from family members/spouse	Yes $	No
Union Funds	Yes $	No	Rental income	Yes $	No
Workers compensation	Yes $	No	Dividends or interest	Yes $	No
Retirement/pensions	Yes $	No	Other kinds of income not on the list	Yes $	No
Trusts or gifts	Yes $	No			

4. I have other assets: *(Circle "Yes" and fill in the value of the property, otherwise circle "No." Use the back of this form to provide additional information.)*

Cash	Yes $	No	Savings	Yes $	No
Bank account(s)	Yes $	No	Stocks/bonds	Yes $	No
Certificates of deposit or money market accounts	Yes $	No	*Equity in Real Estate (excluding homestead). *Equity means value minus loans. Also list any expectancy in an interest in such property.	Yes $	No
*Equity in Motor Vehicles/Boats/ Other tangible property	Yes $	No	*List the address of this property:* Address		
List the year/make/model and tag #:			City, State, Zip		
			County of Residence		

5. I have a total amount of liabilities and debts in the amount of $ 0.

6. I receive: *(Circle "Yes" or "No")*

Temporary Assistance for Needy Families-Cash Assistance	Yes No
Poverty-related veterans' benefits	Yes No
Supplemental Security Income (SSI)	Yes No

7. I have been released on bail in the amount of $ _____ Cash _____ Surety _____ Posted by: Self ___ Family ___ Other _____

A person who knowingly provides false information to the clerk or the court in seeking a determination of indigent status under s. 27.52, F.S., commits a misdemeanor of the first degree, punishable as provided in s. 775.082, F.S., or s. 775.083, F.S. **I attest that the information I have provided on this Application is true and accurate to the best of my knowledge.**

Signed, this 3 day of 7, 2013.

X [signature]
Signature of Applicant for Indigent Status

9/4/56
Date of Birth

X Print Full Legal Name
X Address — homeless
X City, State, Zip
X Phone Number

Driver's license or ID number

CLERK'S DETERMINATION

✓ Based on the information in this Application, I have determined the applicant to be ( ) Indigent ( ) Not Indigent

___ The Public Defender is hereby appointed to the case listed above until relieved by the Court.

Dated this 3 day of 7, 2013

FILED
JUL 03 2013
RICHARD W. DAVELL
CLERK CIRCUIT COURT

Clerk of the Circuit Court

This form was completed with the assistance of

Clerk/Deputy Clerk/Other authorized person

APPLICANTS FOUND NOT INDIGENT MAY SEEK REVIEW BY ASKING FOR A HEARING TIME. Sign here if you want the judge to review the clerk's decision of not indigent.

07/11

WHITE COPY - CLERK PINK COPY - PUBLIC DEFENDER GOLDENROD COPY - DEFENDANT PS-1273

FILED

JUL 03 2013

CLERK CIRCUIT COURT

IN THE CIRCUIT OR COUNTY COURT, FOURTH JUDICIAL CIRCUIT, IN AND FOR DUVAL COUNTY, FLORIDA

STATE OF FLORIDA

DIVISION: A

vs.

CASE NO.: 13-CF-5781

SMITH, DONALD JAMES

ORDER DETERMINING ELIGIBILITY FOR COURT-APPOINTED COUNSEL

The above-named defendant appearing before the Court, and said defendant having executed an affidavit of insolvency and financial statement, testimony having been taken by the Court, and the Court being otherwise fully advised in the premises, it is, thereupon,

✓ **ORDERED AND ADJUDGED** that the defendant be declared indigent and that the Office of the Public Defender for the Fourth Judicial Circuit of Florida is hereby appointed to represent said defendant.

___ **ORDERED AND ADJUDGED** that the defendant shall pay an application fee in the amount of $50.00 to the Clerk of the Circuit Court in Room 1223 for misdemeanor cases and Room 2136 for felony cases, Duval County Courthouse, 501 W. Adams Street, Jacksonville, Florida 32202 no later than seven days from the date of this order. If the fee is not paid by that date, the Court will inquire of the defendant concerning the circumstances of the nonpayment. The Court may then order the fee to be paid forthwith or include the fee in any lien subsequently filed in this case.

___ **ORDERED AND ADJUDGED** that pursuant to section 27.512, Florida Statutes, the defendant is charged with a violation of a municipal ordinance or a misdemeanor, the defendant will not be imprisoned if convicted in this case; and, there being no legal requirement for the appointment of counsel, the said defendant has been advised that he/she may proceed without counsel, or, with retained counsel of the defendant's choice.

DONE AND ORDERED this_____day of JUL 03 2013 ,20____

Ernest F. Flynn, III

CIRCUIT/COUNTY JUDGE

WHITE COPY - CLERK YELLOW COPY - PUBLIC DEFENDER PINK COPY - DEFENDANT

PS-2507

S.A. CASE NO.: 13CF039428AD

IN THE CIRCUIT COURT OF THE FOURTH JUDICIAL CIRCUIT, IN AND FOR DUVAL COUNTY, FLORIDA

CLERK NO.: 162013CF005781AXXXMA

DIVISION: CRD

FILED
JUL 16 2013
CLERK CIRCUIT COURT

STATE OF FLORIDA

vs.

DONALD JAMES SMITH, SR.

NOTICE OF INTENT TO SEEK DEATH PENALTY AND
REQUEST FOR STATEMENT OF PARTICULARS OF MENTAL MITIGATION

The State of Florida, by and through the undersigned Assistant State Attorney, does hereby give notice to the Defendant in this case, pursuant to Rule 3.202, Florida Rules of Criminal Procedure, that the State of Florida intends to seek the death penalty for the First Degree Murder(s) charged in this case.

The State of Florida requests that the Defendant provide the State of Florida with a statement of particulars listing the statutory and non-statutory mental mitigating circumstances the Defendant expects to establish through expert testimony and the names and addresses of the mental health experts by whom the Defendant expects to establish these mitigating circumstances.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing motion has been furnished by hand, to Fred Gazaleh, Office of the Public Defender, this 16th day of July, 2013.

ANGELA B. COREY
STATE ATTORNEY

By: _____
Mark Caliel
Bar Number 0105650
Assistant State Attorney

THIS INSTRUMENT IN COMPUTER
Leslie

FILED 07/18/13 PM 04:30 R FUSSELL

STATE ATTORNEY NO.: 13CF039428AD

IN THE CIRCUIT COURT OF THE FOURTH JUDICIAL CIRCUIT, IN AND FOR DUVAL COUNTY, FLORIDA

CASE NO.: 162013CF5781AXXXMA

DIVISION: CR-D

STATE OF FLORIDA

vs.

DONALD JAMES SMITH

STATE'S DISCOVERY EXHIBIT AND
DEMAND FOR RECIPROCAL DISCOVERY

This response meets the requirements of Rule 3.220(b), Florida Rules of Criminal Procedure, and provides answers in the same order as required by the Rule. The State demands reciprocal discovery as required by Rule 3.220(d), Florida Rules of Criminal Procedure.

A. All court reporters used in depositions and prior sworn statements in this cause, and all witnesses whose names are brought out in depositions.

Category A:

D. V. Alexander, #5284, Jacksonville Sheriff's Office,
P. A. Bodine, #7467, Jacksonville Sheriff's Office
Brad Calhoun, 1610 Edgewood Ave. W., Jacksonville, Florida 32208
D. S. Coarsey, #6957, Jacksonville Sheriff's Office
D. G. Crews, #7460, Jacksonville Sheriff's Office
W. P. Cullen, #5875, Jacksonville Sheriff's Office
K. C. Dukes, #7905, Jacksonville Sheriff's Office
N. B. Dunn, #7598, Jacksonville Sheriff's Office
Randy Fort, 1610 Edgewood Ave. W., Jacksonville, Florida 32208
D. A. Green, #6089, Jacksonville Sheriff's Office
R. M. Gupton, #6053, Jacksonville Sheriff's Office
Cristina Howard, 10729 Rutgers Road, Jacksonville, Florida 32218
Marquita Howard, 10729 Rutgers Rd, Jacksonville, Florida 32218
D. L Hughes, #7091, Jacksonville Sheriff's Office
S. K. James, #61118, Jacksonville Sheriff's Office
Nicole Lee, FDLE Biology, 921 North Davis Street, Building E, Jacksonville, Florida 32209
A. Lewis, #61131, Jacksonville Sheriff's Office
R. A. Lind, #66780, Jacksonville Sheriff's Office
R. J. Lisotta, #7780, Jacksonville Sheriff's Office
K. A. Long, #7239, Jacksonville Sheriff's Office
C. E. Moody, #7610, Jacksonville Sheriff's Office
Patricia A Moore, 2495 Segovia Avenue, Jacksonville, Florida 32217
J. D. Palmer, #60234, Jacksonville Sheriff's Office
Rayne Perrywinkle, 7032 Alan Avenue, Jacksonville, Florida 32208
S. L. Pfister, #5972, Jacksonville Sheriff's Office
Dr. Valerie Rao, M.E., Medical Examiner's Office, 2100 Jefferson Street, Jacksonville, Florida 32206
K. F. Reardon, Jr., #5930, Jacksonville Sheriff's Office

Dustin Richards, 5028 Richard Ln, Jacksonville, Florida 32216
Ashley Rozier, 54255 Armstrong Road, Callahan, Florida 32011
Christopher Rozier, 54255 Armstrong Road, Callahan, Florida 32011
C. A. Sames, #63939, Jacksonville Sheriff's Office
Charles Shejen, 2495 Segovia Avenue, Jacksonville, Florida 32217
W. A. Smith, #5213, Jacksonville Sheriff's Office
D. M. Sullivan, #5231, Jacksonville Sheriff's Office
S. B. Taylor, #7256, Jacksonville Sheriff's Office
J. W. Watson, #7487, Jacksonville Sheriff's Office
Janise Wilkerson, 1707 Huron Ave, Commercial Warehousing, Jacksonville, Florida 32254
C. W. Wilkie, #6052, Jacksonville Sheriff's Office
Brenda Fillingim, 10549 Abeline Road, Jacksonville, FL 32218

Category B:

S. D. Grimes, #7788, Jacksonville Sheriff's Office
R. T. Kocik, #7884, Jacksonville Sheriff's Office
H. J. Rivera, #6141, Jacksonville Sheriff's Office
M. H. Sirmons, #7635, Jacksonville Sheriff's Office
F. A. Smith, #6464, Jacksonville Sheriff's Office
M. R. Starling, #7642, Jacksonville Sheriff's Office
Custodian of Records - Walmart (Surveillance Videos)
Custodian of Records - Cell Phone Records and Data (Name/Companies to be Provided).

B. All statements brought out at depositions. Any statements contained on the arrest docket and all police reports. Sworn statements of Patricia Moore and Charles Shejen.

*C. All statements brought out at depositions. Any statements by accused on the arrest docket and all police reports.

D. None known to the State at this time.

E. None known to the State at this time.

*F. All items of evidence obtained from the Accused, which are listed in police reports and property submission/storage cards. .

G. None known to the State at this time.

H. None known to the State at this time. Cell phone records and cell site data.

*I. Yes, search warrants obtained during the course of the investigation..

*J. Any statements brought out at depositions. Autopsy report. FDLE Reports.

*K. Photos, maps, charts, diagrams, rights form, court records, supporting documents, and all items of evidence listed in police reports and property submission/storage cards.

3.220(b)(4) Brady None known to the State at this time.

* Defense may inspect, copy, test or photograph items contained in these paragraphs by appointment.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by Mail, to the Office of the Public Defender, 25 North Market Street, Jacksonville, Florida 32202, this 15th day of July, 2013.

ANGELA B. COREY
STATE ATTORNEY

By: _____
Mark Caliel
Bar Number: 0105650
Assistant State Attorney

/mc

FILED 0724"13PM0412 R FUSSELL

STATE ATTORNEY NO. 13CF039428AD

IN THE CIRCUIT COURT OF THE FOURTH JUDICIAL CIRCUIT, IN AND FOR DUVAL COUNTY, FLORIDA

CASE NO.: 162013CF5781AXXXMA

DIVISION: CR-D

STATE OF FLORIDA

vs.

DONALD JAMES SMITH

STATE'S FIRST SUPPLEMENTAL DISCOVERY EXHIBIT

A. All court reporters used in depositions and prior sworn statements in this cause, and all witnesses whose names are brought out in depositions.

Category A:

D.M. Sullivan #5231 Jacksonville Sheriff's Office
Daniel Jay 9050 Norfolk Blvd., Jacksonville, FL
R.D. Adams #5924 Jacksonville Sheriff's Office
T.L. Henson #6101 Jacksonville Sheriff's Office
M.D. Leavitt #5955 Jacksonville Sheriff's Office
E.W. Parker #6877 Jacksonville Sheriff's Office
D.B. Baker #7436 Jacksonville Sheriff's Office
J.L. Gray #61012 Jacksonville Sheriff's Office

Category B:

D.B. Hall #5368 Jacksonville Sheriff's Office
E. Gonzales #6007 Jacksonville Sheriff's Office
B.E. Baker #6039 Jacksonville Sheriff's Office
C.E. Ayoub #6224 Jacksonville Sheriff's Office
R.A.Beers #6236 Jacksonville Sheriff's Office
S.R. Delano #6316 Jacksonville Sheriff's Office
P.M. Presti #6737 Jacksonville Sheriff's Office
S.C. Putman #7127 Jacksonville Sheriff's Office
S.K. Bridges #7330 Jacksonville Sheriff's Office
W.C. Watkins #7562 Jacksonville Sheriff's Office
J.S. Williams #7923 Jacksonville Sheriff's Office
M.W. Crawford #19207 Jacksonville Sheriff's Office
D.M. Ostertag #30205 Jacksonville Sheriff's Office
J.A. Holderfield #31924 Jacksonville Sheriff's Office
A.A. Wilkerson #61025 Jacksonville Sheriff's Office
E. Solis #61222 Jacksonville Sheriff's Office
D.W. Molina #61370 Jacksonville Sheriff's Office

T.M. Boyd #61660 Jacksonville Sheriff's Office
W.D. Redgate #64624 Jacksonville Sheriff's Office
J.G. Bennett #66417 Jacksonville Sheriff's Office
R.A. Lind #66780 Jacksonville Sheriff's Office
M.L. Albert #66805 Jacksonville Sheriff's Office
J. Cabrera #67535 Jacksonville Sheriff's Office
S.A. Coleman #67872 Jacksonville Sheriff's Office
W.H. Chaires #7342 Jacksonville Sheriff's Office

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by mail, to the Office of the Public Defender, 25 North Market Street, Jacksonville, Florida 32202, this 24th day of July, 2013.

ANGELA B. COREY
STATE ATTORNEY

By: _____
Mark Caliel
Bar Number: 0105650
Assistant State Attorney

/mc

FILED 08-02-13 PM 04:12 R FUSSELL

IN THE CIRCUIT COURT, FOURTH JUDICIAL CIRCUIT, IN AND FOR DUVAL COUNTY, FLORIDA.

CASE NO.: 16-2013-CF-5781
DIVISION: CR-D

STATE OF FLORIDA

VS.

DONALD JAMES SMITH

MOTION FOR PROTECTIVE ORDER

Defendant, by and through the undersigned attorney, the Public Defender for the Fourth Judicial Circuit of Florida, pursuant to Rule 3.220(I)(1). Florida Rules of Criminal Procedure, and Chapter 119, Florida Statutes, respectfully moves this Honorable Court to enter an order prohibiting the public release of the documents described below.

As grounds therefore the Defendant asserts the following:

1. This is a highly publicized case in which the Defendant is charged with murder in the first degree, armed kidnapping and sexual battery. This case has already received extensive pretrial publicity in the print and television media, and on the internet.

2. This case continues to be of great interest to the media as demonstrated by the presence of media at prior court hearings.

3. The State has filed a Notice that it intends to seek the death penalty for the first degree murder charge. As a result, there are certain statutory aggravating circumstances that the State may attempt to prove to the jury that will be impaneled in this case. Prior to the trial, this Court will be asked to rule on the validity of these certain aggravating circumstances. Furthermore, there may be other evidence of prior alleged bad acts, commonly referred to as Williams Rule Evidence, which the State may attempt to introduce at the first phase of the trial of this case. Again, prior to the trial, this Court will be asked to rule on the admissibility of such evidence.

4. The Sixth Amendment to the United States Constitution guarantees an accused the right to a trial by an impartial jury, and the Fourteenth Amendment secures that right to all criminal Defendants in State Court.

5. A trial court has the inherent power to control the conduct of the proceedings before it. State ex rel. Miami Hearld Pub. V. McIntosh, 340 So. 2d 904, 909 (Fla. 1976). This Court has both the right and the affirmative constitutional duty to

minimize the effects of prejudicial pretrial publicity and is obligated to take protective measures "even when they are not strictly and inescapably necessary" to insure that the Defendant (and the State) can receive a fair trial. See Estes v. Texas, 381 U.S. 532, 85 S.Ct. 1628, 14 L. Ed.2d 543 (1965); Sheppard v. Maxwell, 384 U.S. 333, 86 S.Ct. 157, 16 L.Ed.2d 600 (1966).

6. Publication of certain discovery materials described below by means of print media, internet, and/or television news will result in this matter being tried in the press rather than in the court. This could result in an inability to seat a fair and impartial jury in Duval County and other surrounding counties due to the availability of the internet.

7. Under the separation of powers doctrine, it is the responsibility of the judicial branch to ensure that the parties receive a fair trial. A right to a fair trial has been construed by Florida courts to include the right to an impartial jury in the county in which the alleged crime was committed.

8. Until recently, a change of venue would be sufficient to ensure that an impartial jury could be selected because the local print and television media would primarily focus on local news. The majority of case law often provided by the media regarding this issue predates the rise of the use of the internet and blogging. News is now available worldwide and opinions are formulated within hours of any news release. Anyone typing the Defendant's name into Google will come up with numerous headlines regarding this case. This information is made available to the world by both local and nationally based sources. This in turn will make it more and more difficult to ensure an impartial jury as more discovery is released to the media.

9. Publication of specific discovery material such as the names, addresses and telephone numbers of potential witnesses will hamper both parties ability to conduct a fair and independent investigation, and present witnesses at trial. Such disclosure to the media will cause the unintended consequence of preventing other witnesses from coming forward with relevant information for fear that they will be stalked, threatened or otherwise harassed due solely to their status as a witness. See Section 119.071(5)(d) and cases already cited.

10. Active criminal investigative and intelligence information only loses its exempt and confidential status during the discovery process, and only when the defendant triggers that process. Absent a notice to participate in discovery, these materials remain privileged and non-public until the trial.

11. In this case Defendant has filed for discovery under the Florida Rules of Criminal Procedure.

12. However, just because Defendant is entitled to receive information during discovery about the case doesn't automatically mean the media gets everything provided to the Defendant. While there is a constitutional right for the defendant to have a fair trial, there is no First Amendment protection for the public and the press to have access to pretrial hearings.

13. Pursuant to Chapter 119, Florida Statutes, the public is granted access to certain documents produced by the State to defendants in criminal cases. See Florida Freedom Newspapers v. McCrary, 520 So.2d 32 (Fla. 1988). The standard to determine whether closure is appropriate or restriction on the production of documents has been set out in Miami Herald Publishing Company v. Lewis, 426 So.2d 1 (Fla. 1982).

14. In Lewis, the Florida Supreme Court confronted the issue of what circumstances warrant closure of a pretrial suppression hearing. The Court upheld the trial court's exclusion of the media from a suppression hearing upon the court's finding that an open hearing would pose a "reasonable probability of prejudice on these defendants." Id. at 5.

15. In Lewis, the Court modified a three-prong test for closure of judicial proceedings: "1) Closure is necessary to prevent a serious and imminent threat to the administration of justice; 2) No alternatives are available, other than change of venue, which would protect a defendant's right to a fair trial; and 3) Closure would be effective in protecting the rights of the accused, without being broader than necessary to accomplish this purpose." Id. at 6.

16. In Florida Freedom Newspapers v. McCrary, 520 So.2d 32 (Fla. 1988), the Supreme Court of Florida was faced with the issue of whether a trial court could restrict disclosure to the media of pretrial discovery material which was furnished to the defendant pursuant to Florida Rules of Criminal Procedure 3.220. The trial court, after an *in camera* inspection of the discovery materials, entered orders prohibiting release of the existing discovery materials and, pending additional *in camera inspection,* any future discovery materials. The orders were based on the findings that "the discovery material was graphically incriminating, containing materials which may not be admissible at trial, and that the prosecutor, sheriff, and other persons had made no public statements prejudicial to the defendants." Id. at 33.

17. In McCrary, the trial court utilized Rule 3.220(h) to authorize its protective order, and concluded that closure of pretrial discovery materials was necessary because there had been prior pretrial publicity, that public disclosure of this material would further aggravate the prejudicial publicity and that closure was the only measure available to the court until a jury could be selected and sequestered. The Court held that these were essentially the same factors as those set forth in the

Lewis three-prong test, and held that those factors stated in Lewis are relevant to a finding of cause and should be considered in determining whether access to judicial public records should be restricted or deferred. Id. at 35. In so holding, the Court recognized the Lewis test strikes the proper balance between the public's statutory right of access and a defendant's fair trial and due process rights. Id. at 36.

18. Similarly, in Post-Newsweek Stations Florida, Inc. v. Doe, 612 So.2d 549 (Fla. 1992), the Court gave a non-party witness a right to privacy in criminal discovery material and held the witness may obtain a protective order.

19. In Palm Beach Newspapers, Inc. v. Burk, 504 So.2d 378 (Fla. 1987), the Court was confronted with the certified questions of whether the press is entitled to notice and the opportunity and the right to attend pretrial discovery depositions in a criminal case, and whether the press was entitled to access to pretrial discovery deposition in criminal cases which may have been transcribed but not filed with the court. The Florida Supreme Court answered both questions in the negative, holding that the press does not have a qualified right under the First Amendment, under the Florida Rules of Civil or Criminal Procedure, or under the Public Records Law to attend pretrial discovery depositions in criminal cases or to obtain copies of un-filed depositions. The Court stated that discovery rules permit extensive intrusion in the affairs of both parties and non-parties and discovery may be judicially compelled. Liberal discovery produces information which may be irrelevant to the trial which, if publically released, would be damaging to the reputation and privacy of both parties and non-parties. The parties are granted discovery rights as a matter of legislative or judicial grace. Non-parties do not possess discovery rights and cannot compel the disclosure of information. There is no independent right outside the trial process to the information sought. Society in general and the courts specifically have a substantial interest in preventing abuse of judicially compelled discovery. Id. at 382.

20. For these reasons this Honorable court has the right and affirmative constitutional duty to restrict release of specific discovery material to the media cited below and highlighted in discovery material attached to this motion, and the Defendant requests this Court to enter such an Order.

21. The Defense requests that the following discovery materials be sealed:
    a. Names, addresses, telephone numbers and other identifying information of witnesses detailed in police reports and other documents furnished to the Defendant.
    b. Any and all crime scene photos, autopsy photos or other photos showing Victim's body. Said photos are exempt under Section 406.135 and 406.136, Florida Statutes.

c. Any and all photographs allegedly depicting the Defendant and his body as they may be misleading and cause confusion if displayed without context.
d. The 911 telephone recording of the call reporting the incident. Said recording is exempt under Section 406.136(2), Florida Statutes.
e. The Surveillance video taken WalMart.
f. Statements made by Defendant to law enforcement officers.
g. Recordings of jail telephone calls and visitations.
h. Copies of State Attorney case file materials from any prior offenses which may be attempted to be used as aggravating circumstances in the event of a penalty phase, prior to a ruling by this Court as to whether or not evidence of such aggravating circumstances exist and that the jury will be instructed on them, including, but not limited to case number 16-2009-CF-12156.

WHEREFORE, Defendant requests this Honorable Court to grant this motion.

I HEREBY CERTIFY that a copy of the above and foregoing Motion for Protective Order has been furnished to the Office of the State Attorney, by hand, this 2 day of August, 2013.

Respectfully submitted,

MATT SHIRK
PUBLIC DEFENDER

BY: _____
Fred C. Gazaleh, #353787
Assistant Public Defender

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felony Clerk

IN THE CIRCUIT COURT, FOURTH JUDICIAL CIRCUIT, IN AND FOR DUVAL COUNTY, FLORIDA.

CASE NO.: 16-2013-CF-005781

DIVISION: CR-D

STATE OF FLORIDA

VS.

DONALD SMITH

OBJECTION TO PRODUCTION

Defendant, Donald Smith, by and through the undersigned attorney, pursuant to the Florida Rules of Civil Procedure 1.351(b), objects to the issuance of subpoenas to Arlington Psychological Center, Community Behavioral Services and Geo Care, LLC Civil Commitment Center and would show:

1. Dr. Harry Krop has been retained by the Defendant as a confidential expert to assist in his defense. Dr. Krop is employed by Community Behavioral Services. The Defense expert's medical records are not subject to disclosure at this time.
2. Mental health and substance abuse records are confidential and may not be disclosed without a court order and a determination of good cause for disclosure pursuant to Florida Statutes 394.4615 and 397.501.

I HEREBY CERTIFY that a copy of the above and foregoing Objection to Production has been furnished to Mark Caliel, Assistant State Attorney, Div CR-B, by hand, this 5 day of August, 2013.

Respectfully submitted,

MATT SHIRK
PUBLIC DEFENDER

BY: _____

FRED C. GAZALEH, #353787
Assistant Public Defender

FILED
IN COMPUTER
DARLENE

IN THE CIRCUIT COURT, FOURTH JUDICIAL CIRCUIT, IN AND FOR DUVAL COUNTY, FLORIDA

STATE OF FLORIDA,

Plaintiff,

vs.

DONALD JAMES SMITH,

Defendant.

_____/

CASE NO.: 16-2013-CF-5781

DIVISION: CR-D

MORRIS PUBLISHING GROUP, LLC, d/b/a *The Florida Times-Union,*

Intervenor.

_____/

MOTION OF MORRIS PUBLISHING GROUP, LLC TO INTERVENE, AND MEMORANDUM IN OPPOSITION TO DEFENDANT'S MOTION FOR PROTECTIVE ORDER

Intervenor, Morris Publishing Group, LLC, d/b/a *The Florida Times-Union ("The Florida Times-Union")*, moves the Court for leave to intervene in this matter, to be heard, and submits this memorandum in opposition to Defendant's Motion for Protective Order, and in support hereof says:

1. Defendant, Donald James Smith, through his counsel, the Public Defender for the Fourth Judicial Circuit of Florida, has filed a Motion for Protective Order, pursuant to Rule 3.220(I)(l), Florida Rules of Criminal Procedure. In the Motion, Defendant request a broad and sweeping protective order that "discovery materials be sealed: . . ." and then identifies 8 categories of documents.

2. The Motion states in conclusory fashion that "[p]ublication of certain discovery materials . . . will result in this matter being tried in the press rather than in the court" and "could result in an inability to seat a fair and impartial jury in Duval County and other surrounding counties due to the availability of the internet." Motion at paragraph 6.

3. It is well established that the news media has standing to intervene and be heard, in order to oppose an effort to prevent access to judicial records. Morris Communications Company, LLC v. State of Florida and Stephen Lee Edmonds, 844 So.2d 671 (Fla. 1st DCA 2003); WESH Television, Inc. v. Freeman, 691 So.2d 532, 534-35 (Fla. 5th DCA 1997) (holding that the press has the right to be heard prior to the entry of an order closing public records); Times Publishing Co. v. Penick, 433 So.2d 1281, 1284 (Fla. 2nd DCA 1983); News-Press Publishing Co. v. State, 345 So.2d 865, 866 (Fla. 2d DCA 1977) (newspapers entitled to intervene in criminal case to seek access to sealed deposition transcripts); Miami Herald Publishing Co. v. Lewis, 426 So.2d 1, 8 (Fla. 1982); Florida Publishing Company v. Shorstein, 20 Med. L. Rptr. 2102 (Fla. 1st DCA 1992).

4. Likewise, it is beyond dispute that information gathered by the State during a criminal investigation immediately becomes a public record once it is given, or required to be given, to the Defendant in discovery. See Florida Statute §119.011(3)(c)(5) (2005); City of Miami v. Post-Newsweek Stations Fla., Inc., 837 So.2d 1002, 1004 (Fla. 3rd DCA 2003); Florida Freedom Newspapers, Inc. v. McCrary, 520 So.2d 32, 34-35 (Fla. 1988).

5. Public records may only be sealed away from public view under an order that is based on clear and specific findings that:

> (a) Restricting public access to discovery materials is necessary to prevent a serious and imminent threat to the administration of justice;

(b) No alternatives, other than a change in venue, would protect Defendant's right to a fair trial; and

(c) Closure would be effective in protecting the rights of the accused, without being broader than necessary to accomplish this purpose.

Miami Herald Publishing Company v. Lewis, 426 So.2d 1, 6 (Fla. 1982); See also, Florida Rule of Judicial Administration 2.420 (directing that a court may seal court records only if "no less restrictive measures are available"). The Florida Supreme Court has held in no uncertain terms that "there must be a strict and inescapable necessity for closure." Lewis, 426 So.2d at 8. "A finding of cause to restrict or defer disclosure of [public judicial] records cannot rest in air." McCrary, 520 So.2d at 35.

6. In order to satisfy the burden of the *Lewis* test, the party seeking closure must do more than offer the argument of counsel; the proponent of closure must come forward with evidence on which the Court can make findings of fact supporting closure. See, Lewis, 426 So.2d at 7-8. As the Fifth District Court of Appeal has made clear:

> The three-pronged test contemplates an evidentiary hearing. At the hearing, the party seeking closure has the burden of proving by the greater weight of the evidence that closure is necessary to prevent a serious and imminent threat to the administration of justice.
>
> * * *
>
> The court in McCrary also pointed out that [a closure order] "cannot rest in air," but rather, "must be a conclusion reached after considering relevant factors." Here, no evidentiary hearing was conducted and no *in camera* review of the tapes was made. Under Lewis and McCrary, this was error. (internal citation omitted).

See, WESH Television v. Freeman, 691 So.2d 532, 534-35 (Fla. 5th DCA 1997) (citing and quoting McCrary, 520 So.2d at 35; Lewis, 426 So.2d 1).

7. There is no showing here of a serious and imminent threat to the administration of justice. No evidence has been presented to the Court that media publicity has or will affect the Defendant's trial in any way, let alone negatively. Only the gravest circumstances warrant closing off press access to public proceedings and records.

8. Moreover, there has been no showing that less restrictive means, such as individual voir dire, additional peremptory challenges, admonition of the jury and/or sequestration, would be insufficient to protect the rights of the Defendant to a fair trial.

9. As to the third prong of the analysis, there has been no demonstration that the complete closure sought by Defendant would be effective, and no broader than necessary. The Lewis Court, as part of its explanation of the third prong also stated that "where prejudicial information already has been made public, there would be little justification for [closure] in order to prevent only the disclosure of details which had already been publicized." 426 So.2d at 8. In this instance, much of what Defendant seeks to have sealed is already in the public domain.

10. Attached hereto as Exhibit "A" is a copy of an article that was published by *The Florida Times-Union* on June 30, 2013, and which is available on line at jacksonville.com entitled "Man charged in Cherish Perrywinkle slaying grew from childhood bully to feared sex offender." The article details incidents from the life of Defendant, and his many run-ins with law enforcement. It includes interviews of numerous witnesses who knew Defendant over the years. It also includes an extensive outline of Defendant's criminal history from 1974 to the present, along with numerous photographs obtained from the Jacksonville Sheriff's Office's files, including mug shots from 1998, 1999, 2002, 2003, 2006, 2008, 2009, 2012, and a photograph from the Defendant's first appearance in Court in this matter. This article was based on police

reports, court records, and other publicly available information regarding Defendant. *The Florida Times-Union* has published many other articles regarding Defendant.

11. Several cases illustrate the heavy burden faced by a party attempting to seal records in a criminal proceeding, and demonstrate that the Motion at issue should be denied. In Morris Communications Company, LLC v. State of Florida and Stephen Lee Edmonds, 844 So.2d 671 (Fla. 1st DCA 2003), the First District Court of Appeal quashed an order sealing discovery material. That case involved a defendant who allegedly sexually assaulted an underage girl and had lured her over the internet. Although Judge McCaulie of this Court found that the discovery items were "graphic, shocking, damning and distressing" and thus likely to aggravate the adverse publicity already in the media, the Court of Appeal directed the trial court to unseal discovery, and allow access because the release of the materials would not pose a serious and imminent threat to the administration of justice under the standard enunciated in Lewis.

In his order sealing discovery, Judge McCaulie found:

> The information in those items is consistent with the general allegations that have already been published in the news articles yet is so specific that, if published before trial, there is a substantial likelihood that an unbiased jury would be difficult, if not impossible, to obtain. This is especially true of the instant messages and the recorded telephone conversation. I can envision the instant messages and transcript of the recorded telephone conversation on the front page or as a lead television news report just before jury selection begins. It would be an enticing story with a strong and lasting impact.

The First District Court of Appeal ruled that this finding was not a sufficient basis for closure necessary to prevent a serious and imminent threat to the administration of justice.

12. In Florida Publishing Co. v. Shorstein, 20 Med. L. Rptr. 2102 (Fla. 1st DCA 1992), the First District Court of Appeal ordered that discovery materials in the Adrian Crump

case be unsealed. The Court of Appeal ruled that neither the record, nor the trial court's order, supported a finding that publication of the discovery materials would pose a serious and imminent threat to the administration of justice.

The Florida Publishing Co. v. Shorstein case involved the shooting death of a juvenile in which the defendant, Adrian Crump, was accused of manslaughter. Judge Dearing entered a closure order based on the following findings:

(a) The saturation of the northeast Florida market with stories about the case.

(b) The newspapers' "very distressing and judicially disruptive practice of publishing major summary articles about a case on the day before, or the day of, jury selection."

(c) Disclosure of admissions and confessions, the admissibility of which was still a pending issue.

The Court of Appeal reversed and found these factors insufficient to support closure of the public record.

13. The Defendant cannot sustain his burden to satisfy the analysis required by Lewis. There is no showing that restricting access to discovery materials is necessary to prevent a serious and imminent threat to the administration of justice; no showing that there are no alternatives, other than a change of venue, which would protect the Defendant's right to a fair trial; and no showing that the requested closure would be effective, and not broader than necessary. An examination of other high profile cases illustrates not only the extremely high burden faced by a party seeking closure, but also that the burden cannot be met in this case. Furthermore, in this case much of the information sought to be sealed is already in the public domain, and as the Lewis Court explained "where prejudicial information already has been made public, there would be little justification for [closure] in order to prevent only the disclosure of

details which had already been publicized." 426 So.2d at 8. The controlling authority applicable to this matter requires that this Court deny Defendant's Motion.

HOLLAND & KNIGHT, LLP

s/ Timothy J. Conner
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Attorneys for Intervenor, Morris Publishing Group, LLC, d/b/a *The Florida Times-Union*

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been filed with the Clerk of the Court via the State of Florida e-filing portal and furnished via electronic mail this 21st day of August 2013, to the following attorneys of record:

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s/ Timothy J. Conner
Attorney

#25531179_v1

EXHIBIT “A”

jacksonville.com
The Florida Times-Union

Man charged in Cherish Perrywinkle slaying grew from childhood bully to feared sex offender

Posted: June 30, 2013 - 9 31pm | Updated: August 20, 2013 - 3.57pm

View this story on the All-Access Members site

Since 1974, Donald J. Smith has been in and out of trouble, with charges ranging from larceny to lewd and lascivious behavior.

Last arrested in 2009 for impersonating a state official and child abuse, he's now accused of kidnapping and killing 8-year-old Cherish Perrywinkle.

By Jim Schoettler

Kevin Shivar glared at the one-story brick house just across the street. He knew evil lurked there.

Shivar recalled a jolting visit two weeks ago from the man he knew as Donnie, who lived in the home with his mother when not in jail or prison. Shivar warned the sex offender years ago to stay away.

SEE ALSO: A history of Donald Smith's arrests

Shivar and his neighbors in the upper-scale, deeply rooted San Jose Forest community where Donald James Smith grew up knew bits and pieces of his past, primarily through Internet searches and backyard gossip

Smith's sudden appearance as Shivar mowed his lawn began with small talk about Smith's return home, which Shivar knew came after a stint in jail Shivar felt a chill when Smith noted that the man's 16-year-old daughter had grown up.

"I said, 'You can stay the hell away from here,'" said Shivar, 46. He didn't see Smith again.

Four days later, police arrested Smith in the kidnapping and slaying of Cherish Perrywinkle, the 8-year-old girl stolen from a Walmart and later found slain near a church.

Accounts from the 56-year-old man's childhood and adult acquaintances, neighbors and hundreds of pages of court records paint a picture of the career criminal as a young bully and a sexual deviant from at least his early 20s, as well as a lifelong charmer.

Though what triggered Smith's bizarre behavior remains unknown — authorities rejected a plea of insanity in one of his early criminal cases after a psychiatric exam — trouble clearly found him at an early age and never let go

In the beginning

Ron Rhatigan was about 8 when Smith, then about 13, lived two lots away in San Jose Forest. They were close for a few years before both families moved to different streets in the same community.

Rhatigan said he remembers Smith playing with his stepfather's machete and talking about guns Smith periodically bullied him for little or no reason, mimicking professional wrestling moves that hurt

"He picked on little kids and beat my ass a couple of times," said Rhatigan, 51, who now lives in Oregon

Though Smith developed a reputation as a troublemaker, Rhatigan said Smith switched on the charm when necessary

"He was all smiles in front of the parents," Rhatigan said

Other details about Smith's young life, such as his time at Wolfson High School or anything about his biological father, remain a mystery By all accounts his mother, married twice, loved him deeply and spoiled him as he continued living with her until his arrest in Cherish's slaying Neither she nor other family could be reached to comment

His first recorded brush with trouble came in 1974 as a 17-year-old when police charged him with burning a stolen car His crimes against children began three years later when he stopped his mother's green convertible outside a home where two girls, ages 5 and 8, were selling Cokes and masturbated in front of them

"Do you want some of this?" he asked the victims before driving off

Smith failed in his attempt to plead insanity after his arrest A judge deemed him a mentally disordered sex offender and he spent 18 months being treated in a state hospital He was later sentenced to a year in jail and 10 years' probation

Arrests followed for burglary, battery, stealing electricity, theft, worthless checks, auto theft and prowling, the latter which came a day after the out-of-wedlock birth of his only child, a son

Smith's deviance resurfaced in late 1992 when he tried to lure a 13-year-old girl into his van near an elementary school, then hunted her down after she fled and hid in a culvert pipe

"You'll have to come out some time," he said

Smith eventually gave up, but an hour later flashed a pornographic picture at two other girls, ages 13 and 14, and tried to lure them into the van in the same neighborhood They fled and police later arrested Smith, whose 15-year prison sentence for attempted kidnapping and showing obscene materials to minors got cut to six years upon appeal

Failed husband, father

Smith married the mother of his son while in prison in 1994 Police arrested him twice four years later for buying counterfeit crack cocaine from an undercover cop and masturbating in the parking lot of a supermarket In the latter case, police found an open bottle of vodka and a 2-liter bottle of urine in Smith's car

Smith's wife, Francine, told a judge she'd had enough She filed for divorce and got sole custody after detailing her concerns to the judge about Smith's drug use, sex offenses and failure as a father and husband

"I want a better life," she wrote in the divorce papers

Because of his continued trouble, Smith spent 1999 to 2002 under involuntary civil commitment after meeting the criteria of a violent sexual predator as part of the state's Jimmy Ryce Act Prosecutors released Smith instead of holding a civil commitment trial, which could have led to his indefinite detention

Smith spent four years in prison for burglary and a judge recommended he get drug treatment Prosecutors dropped a 2008 child neglect charge after a teen who accused Smith of taking him to a crack den later recanted

In 2009, Smith posed on the phone as a state child welfare worker and told the mother of a 9-year-old girl he was investigating allegations she'd been molested by her grandfather Smith made obscene statements to the girl on the phone and police arrested him after tracing the call

The mother, Stephanie Thornton, refused to let her fearful daughter testify and prosecutors dropped the felony charges to misdemeanors Smith got two years in jail and not the 20-plus years he faced in prison Thornton said she believes Cherish Perrywinkle would be alive if she'd done more to thwart the plea deal

"I hate him," Thornton said of Smith

Scheming all along

Doug Freeman witnessed Smith's scheming while the two men were in adjoining bunks at the local prison farm this year Though inmates often don't take kindly to child sex offenders, Freeman said little was known about Smith's criminal history

Freeman said Smith was a favorite among a group of younger men he'd let sit on his bunk and view smuggled, pornographic adult magazines Nicknamed by inmates as Weezy for his age, Smith had access to such items he'd get from other inmates in exchange for commissary goods paid for by his mother, Freeman said

When Smith wasn't providing others with material enticements for attention, Smith talked a good game by convincing inmates he was someone to be reckoned with

"He's the type of person who can get inside your head and manipulate you," said Freeman, 25, who was doing time for credit card fraud "He was a smooth talker and he was a fast talker "

Many who knew Smith when he wasn't incarcerated described the lanky, talented house painter as likable when sober

Terry Anderson was one of many neighbors who let Smith do work around his home, including a paint job four years ago Anderson said Smith often strolled around the neighborhood barefoot and wearing painter's pants and a T-shirt He said Smith portrayed himself as a sad sack in need of work

"He was pretty eloquent at telling his story and getting people to kind of feel sorry for him," said Anderson, 51

But Smith's dark side was never too far away

Eddie Radford, 60, befriended Smith several years ago as a fellow handyman who worked with him around the neighborhood Radford said Smith told him he had drug connections on the Northside and would periodically disappear on binges

Radford said the last time he saw Smith was on May 31, the day Smith got out of jail in the case for which he posed as the state child welfare investigator Radford, 60, said the two sat on the back porch of Smith's mother's home drinking Bud Lights

"I said, 'Donnie, we're both getting old and you need to clean up your life,' " Radford said "He said, 'Man, you know, I'm straight now ' "

A would-be killer snatched Cherish three weeks later

jim schoettler@jacksonville com, (904) 359-4385

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Donald James Smith through the years

1970s

■ **Arrested:** March 24, 1974
Charge: Larceny from an auto
Disposition: Adjudication withheld

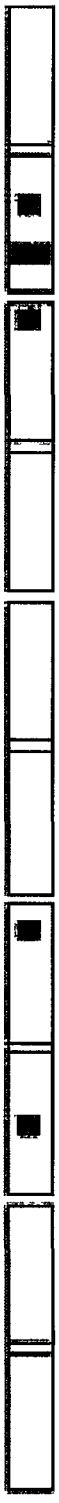
■ **Arrested:** May 7, 1974
Charge: Vehicle theft/Possession of a stolen vehicle/Arson
Disposition: Unavailable

■ **Arrested:** Aug. 18, 1977
Charge: Lewd and lascivious act in the presence of children
Narrative: Smith stopped his vehicle in front of the home of two girls, ages 5 and 8, exposed himself to the girls and masturbated. The girls' baby sitter called police, who tracked Smith to his nearby home and arrested him.
Disposition: (Dec. 1977) Pleaded guilty, adjudicated guilty; sentence deferred. Ordered to Florida State Hospital for sex offender treatment. (June 1979) Returned from hospital (Sept. 1979) Withheld adjudication of guilt, sentenced to 10 years probation with a condition to serve 1 year in jail. (Oct. 1981) Violation of probation. Sentenced to prison for five years with credit for 1 year and 139 days.
Notes: Psychiatric exam ordered after an insanity plea was suggested three weeks after arrest. Found competent to stand trial. Qualified as a mentally disordered sex offender. Ordered committed to Florida State Hospital for sex offender treatment after 18 months.

■ **Arrested:** Sept. 27, 1977
Charge: Escape (fugitive from an unknown Georgia case)
Disposition: Unavailable

■ **Arrested:** May 15, 1981
Charge: Unauthorized use of Jacksonville Sheriff's Office insignia
Narrative: A police officer spotted Smith wearing a pair of jeans that had a Sheriff's Office emblem sewn in the crotch of the pants
Disposition: Pleaded no contest/adjudication withheld/fine

1980s



■ **Arrested:** Oct. 16, 1981
Charge: Grand larceny, removed a boat serial number
Disposition: Dropped

■ **Arrested:** Oct. 27, 1981
Charge: Violation of probation (on 1977 lewd and lascivious conviction)
Disposition: Adjudicated guilty/5 years in prison with credit for 1 year and 139 days

■ **Arrested:** 1/29/82
Charge: Grand larceny/burglary
Disposition: Dropped

■ **Arrested:** Feb. 26, 1986
Charge: Battery
Disposition: Pleaded guilty, adjudicated guilty. Six months' probation; violated probation. Extended 6 months

■ **Arrested:** July 28, 1987
Charge: Unlawful use of electricity from a tampered meter
Disposition: Pleaded no contest/adjudication withheld
Notes: Followed by contempt of court; received a 14-day sentence.

■ **Arrested:** Oct. 8, 1991
Charge: Burglary/auto theft
Narrative: Police stopped Smith and his girlfriend in a stolen car.
Disposition: Dropped

■ **Arrested:** Oct. 8, 1991
Charge: Burglary/grand theft
Disposition: Pleaded guilty; sentenced to 4 months in jail

■ **Arrested:** June 3, 1992
Charge: Loitering/prowling
Disposition: Pleaded guilty; 1 day in jail

Disposition: Pleaded guilty; 1 day in jail

- **Arrested:** Oct. 6, 1992

Charge: Attempted kidnapping; 2 counts of showing obscene material to minors.

Narrative: Smith tried to lure a 13-year-old girl into his gray Chevy van and chased her to a park where she hid until he left. He later approached two other girls, ages 13 and 14, and showed them a pornographic photo in an effort to lure them into the van. They fled and police later obtained his license tag number. Upon arrest him, he admitted showing the pornographic pictures but denied anything else.

Disposition: Pleaded guilty. Designated a habitual violent offender; sentenced to 15 years in prison, which was reduced after Smith sought post-conviction relief. No indication of sex offender treatment. First offense covered by Jimmy Ryce Act. Paroled in 1997.

- **Arrested:** August 15, and Nov. 24

Charge: Petit theft

Disposition: Pleaded no contest/adjudicated guilty, 2 days in jail, 14 days in jail respectively

- **Arrested:** Jan. 24, 1998

Charge: Lewd and lascivious behavior/open container

Narrative: Police called to a man masturbating in a vehicle in a supermarket parking lot found Smith inside a car with his pants open and bare-chested. Police found KY Jelly, an open bottle of vodka and an unexplained 2-liter bottle of urine in the car. They also found drawings of phallic symbols and an obscene note.

Disposition: Pleaded guilty to lewd/lascivious behavior, while the open container charge was dismissed; sentenced to 90 days in jail.

- **Arrested:** Mar. 4, 1998

Charge: Attempted purchase of crack cocaine, tampering with evidence, possession of drug paraphernalia

Narrative: Smith bought $40 in counterfeit crack cocaine from an undercover narcotics officer and police later found a crack pipe in his vehicle. The charge was amended to attempted crack cocaine in a plea bargin.

2000s

Disposition: Pleaded guilty to the drug charge; others dropped; sentenced to five months in jail

- **Arrested:** Feb. 18, 2003

Charge: Dealing in stolen property

Disposition: Dropped

- **Arrested:** June 27, 2003

Charge: Two counts of burglary, dealing in stolen property and false verification of ownership to a pawn shop

Narrative: Smith stole tools from two garages and pawned the items using false information.

Disposition: Pleaded guilty to dealing in stolen property and false verification charges. Designated a habitual felony offender; sentenced to 4 years in prison with a judge recommending drug treatment.

■ **Arrested:** Feb. 1, 2008

Charge: Child neglect with no great bodily harm

Narrative: A 15-year-old male told police Smith took him to a crack house, smoked crack in front of the teen and refused to take him home. The teen told police he wandered the streets before seeking help at a fire station. The teen recanted, telling police he never saw Smith smoke crack.

Disposition: Dropped

■ **Arrested:** Sept. 15, 2009

Charge: Impersonation of a state official/child abuse/extortion

Narrative: Smith posed as a state Department of Children and Families investigator on the phone and told the mother of a 9-year-old Jacksonville girl he was investigating allegations the girl was molested by her grandfather. The mother put Smith in touch with her daughter.

Click to zoom in. Double-click to open the article.

she handed the phone to her grandmother. Police traced the call to Smith via phone records and other evidence.

2010s

Disposition: The girl's mother refused to let her fearful daughter testify and she and another relative didn't show up for a meeting with the prosecutor. Felony charges were dropped to misdemeanors, for which Smith was given the maximum 1 year on each count; the counts ran consecutively. He was facing 20+ years in prison before the plea bargain.

■ **Arrested:** June 22, 2013

Charge: Murder/kidnapping

Narrative: Authorities have accused Smith of kidnapping Cherish Perrywinkle, 8, from a Walmart on Lem Turner Road and dumping her body near a church. He is being held in jail without bond pending trial.

Research compiled by Jim Schoettler, The Times-Union

Steve.Nelson@jacksonville.com

IN THE CIRCUIT COURT, FOURTH JUDICIAL CIRCUIT, IN AND FOR DUVAL COUNTY, FLORIDA

STATE OF FLORIDA

CASE NO.: 16-2012-CF-005781-AXXX-MA
DIVISION: CR-D

vs.

DONALD JAMES SMITH

WJXT-TV4, POST-NEWSWEEK STATIONS FLORIDA, INC.

Intervenor.
_____/

INTERVENOR POST-NEWSWEEK STATIONS FLORIDA, INC.'S MOTION TO INTERVENE AND BE HEARD ON MATTERS OF PUBLIC RECORD

Post-Newsweek Stations Florida, Inc. d/b/a WJXT-TV4 ("WJXT-TV4"), by counsel, seeks leave to intervene to 1) be heard on Defendant's Motion for Protective Order and all subsequent matters pertaining to public records and open access to court in this case, and 2) requests that the Court deny Defendant's motion by allowing public access to judicial branch records pursuant to Art. I, Sec. 24 of the Florida Constitution, Florida Rule of Judicial Administration 2.420, and Chapter 119, *Florida Statutes*. In the alternative to denying Defendant's motion, WJXT-TV4 requests that the Court require Defendant to more precisely identify the materials he seeks to seal, and to submit them for an evidentiary hearing and in camera review.

In support, WJXT-TV4 states:

1) Defendant's motion asks the Court to seal in wholesale fashion a total of eight broad categories of discovery materials in this case.

2) The motion is overbroad in the relief it requests.

3) The motion offers nothing more than bald speculation on the threat of harm to the administration of justice.

4) The motion provides no legal authority for the proposition that the Internet has eliminated all traditional remedies to ensure a defendant's right to a fair trial through empanelling of an impartial jury.

5) The motion does not provide adequate basis for overcoming the presumptive openness of Florida courts, deeply rooted in the Florida Constitution.

6) Moreover, Defendant's motion does not show how the relief requested is essential to prevent a serious and imminent threat to the administration of justice; that no alternatives are available, other than change of venue, to protect a defendant's right to a fair trial; or that closure would be narrowly tailored so that the public's right of access to courts is no more burdened than necessary.

WHEREFORE, Intervenor Post-Newsweek Stations, Inc., d/b/a WJXT-TV4, respectfully moves the Court to grant this motion, deny Defendant's motion, and maintain as public all discovery materials to be produced in this matter.

MEMORANDUM OF LAW

A. Intervention

Public access to court records, through the news media, is key to the public's ability to be informed of proceedings in its court system. State ex rel. Miami Herald Publ'g Co. v. McIntosh, 340 So. 2d 904, 908 (Fla. 1976). WJXT-TV4 has standing to intervene in this action to protect its right to obtain public records and information. See WESH Television, Inc. v. Freeman, 691 So. 2d 532, 534-35 (Fla. 5th DCA 1997); Times Publ'g Co. v. Penick, 433 So. 2d 1281, 1284 (Fla. 2d DCA 1983).

B. Court Proceedings and Records are Presumptively Open

Florida government operates presumptively in the sunshine. See State v. McMillan, 38 So. 666, 667-68 (Fla. 1905). This presumption is codified at the constitutional, statutory, and administrative levels. See Fla. Const. art. I § 24; chapter 119, Florida Statutes; and Fla. R. Jud. Admin. 2.420.

Before a court may block public disclosure of discovery materials, the court **must** find that sealing is necessary to prevent a serious and imminent threat to the administration of justice; no alternatives are available, other than change of venue, to protect a defendant's right to a fair trial; and would protect the rights of the accused, without being broader than necessary to accomplish this purpose. Fla. R. Jud. Admin. 2.420(c)(9); Fla. Freedom Newspapers, Inc. v. McCrary, 520 So. 2d 32, 34-35 (Fla. 1988); Miami Herald Publ'g Co. v. Lewis, 426 So. 2d 1, 6 (Fla. 1982); Post-Newsweek Stations, Fla., Inc. v. Doe, 612 So. 2d 549 (Fla. 1992).

Florida's "public policy favoring open records must be given the broadest expression." Tribune Co. v. Public Records, 493 So. 2d 480, 484 (Fla. 2d DCA 1986). "Exemptions from disclosure are to be construed narrowly and limited to their stated purposes." Id. at 483.

Consequently, the Florida Constitution, the Public Records Act, Florida Rules of Judicial Administration, and related case law all preclude the wholesale closure of unexamined materials as Defendant has requested in this case.

Pretrial publicity, standing alone, will not require a change in venue or justify sealing public records produced in discovery. The court must analyze the extent and nature of pretrial publicity, and the difficulty encountered in actually selecting a jury. Griffin v. State, 866 So. 2d 1 (Fla. 2003). Defendant has offered no evidence of publicity or notoriety of such a degree as to

make impossible the empaneling of an unbiased jury. See State v. Bennett, 19 Med. L Rptr 1383 (Fla. 13th Jud. Cir. Sept. 26, 1991) (denying motion to seal Williams evidence).

C. Internet

Defendant argues, but offers no empirical evidence or case law standing for his assertion that the Internet now makes it impossible to seat an impartial jury any time there is press coverage of a crime and prosecution. Defendant equates dissemination of news via the Internet with dissemination by television, newspapers, and radio. Unlike TV, radio and newspapers, the Internet requires greater affirmative steps to find information on a particular subject. Assuming the jury pool in a particular county is so saturated with pretrial publicity that seating an impartial jury would be impossible, Defendant argues that the Internet would similarly saturate potential jurors in all Florida counties. This argument cannot survive even casual inspection.

To learn about this prosecution, a person in Jacksonville would only have to turn on the radio or television, or pick up a newspaper. A person in South Florida, for example, would have to specifically seek out websites of Jacksonville news media, which contain information about this prosecution, or they would have to seek specific information on this particular prosecution. To state that the Internet "changes everything" fails to take into account these important differences between dissemination of news via traditional media and via the Internet.

D. Defendant's Motion Does Not Meet Its Burden

Defendant's motion seeks to seal the following materials:

1. Names, addresses, telephone numbers and other identifying information of witnesses detailed in police reports and other documents furnished to the Defendant.

2. Any and all crime scene photos, autopsy photos or other photos showing Victim's body. Said photos are exempt under Section 406.135 and 406.136, Florida Statutes.

3. Any and all photographs allegedly depicting the Defendant and his body as they may be misleading and cause confusion if displayed without context.

4. The 911 telephone recording of the call reporting the incident. Said recording is exempt under Section 406.136(2), Florida Statutes.

5. The Surveillance video taken at Wal-Mart.

6. Statements made by Defendant to law enforcement officers.

7. Recordings of jail telephone calls and visitations.

8. Copies of State Attorney case file materials from any prior offenses which may be attempted to be used as aggravating circumstances in the event of a penalty phase, prior to a ruling by this Court as to whether or not evidence of such aggravating circumstances exist and that they jury will be instructed on them, including, but not limited to case number 16-2009-CF-12156.

Def.'s Mot., ¶21(a-h).

1) Names, addresses, telephone numbers and other identifying information of witnesses detailed in police reports and other documents furnished to the Defendant.

Defendant argues this information should be sealed to prevent witnesses from being "stalked, threatened or otherwise harassed" but Defendant provides no basis beyond bald speculation that witnesses are at risk for such treatment. Defendant has proffered no facts, let alone evidence of record, indicating that any witness has been reluctant to come forward or otherwise cooperate. There are no facts or evidence of record that either the State or Defendant have had difficulty interviewing witnesses or preparing their case. *See Times Publ'g Co. v. State*, 903 So. 2d 322 (Fla. 2d DCA 2005) (quashing trial order in case of Joseph P. Smith who was convicted of abducting, sexually assaulting, and murdering Carlie Brucia, an eleven-year-old girl). In *Times Publ'g,* the trial court provided no factual basis for sealing discovery materials to protect privacy rights, to protect the reputation of any person, or that any person's safety was in jeopardy by public disclosure of the challenged materials.

Moreover, some of the information Defendant seeks to seal has already been made public through the exchange of discovery. The Clerk's docket and electronic case file already contain

two arrest and booking reports (June 23, 2013, and July 3, 2013), as well as an initial and subsequent disclosure from the State (July 18, 2013 and July 24, 2013), all of which were filed before Defendant's instant motion on August 2, 2013. All of these documents filed and posted in the public court file contain names and/or addresses of witnesses. Inasmuch as that information was made part of the public record, there is no purpose served by sealing that information from the public. *See Downs v. Austin*, 522 So. 2d 931, 935 (Fla. 1st DCA 1988). *See also Bludworth v. Palm Beach Newspapers, Inc.*, 476 S0. 2d 775 (Fla. 4th DCA 1985).

2) Any and all crime scene photos or other photos showing Victim's body. Said photos are exempt under Section 406.135 and 406.136, Florida Statutes.

Defendant argues "any and all crime scene photos, autopsy photos or other photos showing Victim's body" are exempt from public disclosure by sections 406.135 and .136, Florida Statutes. Defendant overstates the breadth and operation of the two statutes.

The two statutes provide a mandatory exemption for such materials to agencies covered by chapter 119. The statutes do not require that the Court seal such photographs from public view. Rather, the statutes are permissive. Before sealing such photographs, the Court must still undergo an analysis to determine if such photographs should be sealed from public view and how to do so without unnecessarily interfering with the public's right of access to court records. §§ 406.135(7) and 406.136(6)(a), Fla. Stat.

The Court shall consider whether such disclosure: 1) is necessary for the public evaluation of governmental performance; 2) the seriousness of the intrusion into the family's right to privacy and whether such disclosure is the least intrusive means available; and 3) the availability of similar information in other public records, regardless of form. §§ 406.135(4), .136(4), Fla. Stat.

Without examining what each photo or recording purportedly shows, the Court cannot make an informed decision whether such photos meet the elements set forth in the statutes.

Section 406.136 applies to photographs or recordings that depict the "killing of a person." The statute, by its express terms, applies only to recordings of acts or events "immediately preceding or subsequent to the acts or events that were the proximate cause of death." § 406.136(a), Fla. Stat. To ensure the least restrictive level of closure takes place, crime scene photographs and recordings must be inspected. Those that do not record acts or event "immediately preceding or subsequent to" acts or event that were the proximate cause of death must remain available to the public.

In prior cases, courts have permitted members of the news media to view the photos without copying them so that news organizations can at least describe the contents and context of the photos to their viewers. (Defendant expresses concern about context in his next request regarding photographs of his body). No mainstream news organization, and certainly not WJXT-TV4, would publish photographs of Cherish Perrywinkle's violated and brutalized body or other gruesome crime scene photos. Allowing WJXT-TV4 to view the photographs under the watchful control of the Court's designee would prevent any fringe "news" organization or blogger from copying and posting such photographs on the Internet or otherwise publishing them without regard to the sensibilities of the public or family members of Cherish. Accordingly, this option to view but not copy or record the photographs is a less-restrictive means of protecting the interests at stake than blanket sealing of such materials.

3) Any and all photographs allegedly depicting the Defendant and his body as they may be misleading and cause confusion if displayed without context.

Defendant has not identified any such photographs, but presumably the Jacksonville Sheriff's Office or the State Attorney's Office must have photographed portions of Defendant's

body. Nonetheless, Defendant seeks to seal photographs that "**may** be misleading and cause confusion if displayed without context." Neither "may be misleading" nor "may cause confusion" are recognized as legal standards of review for determining whether to seal materials produced in discovery. Defendant cites no authority for this proposition. Similarly, Defendant has provided no basis for concluding that such photographs would make it impossible for the Court to seat an impartial jury.

4) The 911 telephone recording of the call reporting the incident. Said recording is exempt under Section 406.136(2), Florida Statutes.

As discussed above, section 406.136(2) applies an automatic exemption to agencies defined in chapter 119, but for the Court, the statute's power to keep discovery materials secret is permissive and requires an evaluation. The Court must undertake the analysis set forth to determine if such photographs can be sealed from public view. § 406.136(4), Fla. Stat. Moreover, the statute does not expressly identify 911 calls as exempt. Without hearing what the 911 recordings contain, the Court cannot make an informed decision.

5) The Surveillance video taken at WalMart.

Defendant provides no basis for sealing this discovery material. There is no indication that such video shows the "killing of a person," and there no indication that such video includes any acts "immediately preceding or subsequent to the acts or events that were the proximate cause of death," as defined in section 406.135-.136.

6) Statements made by Defendant to law enforcement officers

Defendant provides no basis in his motion for the wholesale sealing of statements he may have made to law enforcement officers. Only statements defined narrowly as the substance of a confession may be sealed.

Section 119.07(3)(k) is an extremely narrow Public Records Act exemption. See Times Publ'g Co. v. State, 2002 WL 31250340, at *2 (Fla. 2d DCA Oct. 9, 2002) (holding trial court departed "from the essential requirements of law" by sealing entirety of defendant's interview with police). The statute applies only to "information revealing the substance of a confession of a person arrested . . . ." § 119.07(3)(k), Fla. Stat. The Legislature's choice of the word "confession" is significant. The Legislature did not exempt every statement made by an arrested person, or even every arrested person's admission. Instead, the exemption applies only to confessions, which have a precise and narrow meaning under Florida law. "[T]he term 'confession,' in its legal sense, is restricted to an acknowledgement of guilt, made by a person after an offense has been committed, and it does not apply to a statement or declaration of an independent fact from which such guilt may be inferred." Louette v. State, 12 So. 2d 168, 172 (Fla. 1943). Accordingly, unless a statement contains an acknowledgement of guilt of the offenses alleged, the statement is not exempt under Section 119.07(3)(k).

7) Recordings of jail telephone call and visitations.

Defendants often rely upon *Bent v. State*, 46 So. 3d 1047 (Fla. 4th DCA 2010) for the proposition that recordings of jail phone calls between inmates and others are not public records and therefore should be sealed even though they have been or will be produced in discovery. This overstates the impact of Bent. The Bent court made clear that the routine recording of jailhouse phone conversations does not in itself create public records subject to disclosure under chapter 119. Bent, 46 So. 3d at 1049-50. The court also indicated, however, that if the recordings are put to use investigating a crime or security risk, they would be transformed from non-public to public records. *Id.* at 1050. "Unless the contents of the call involve a crime or

security risk, 'perpetuating' or maintaining these sound recordings has no connection to any official business of" the sheriff's office.

Now that the recordings and visitor logs have been identified for production in discovery during the prosecution of Defendant, they have become public records because they are being put to use as discovery and could become evidence in the guilt or penalty phases. The burden is on Defendant to identify recordings that should be subjected to in camera review.

8) Copies of State Attorney case file materials from any prior offenses which may be attempted to be used as aggravating circumstances in the event of a penalty phase, prior to a ruling by this Court as to whether or not evidence of such aggravating circumstances exist and that the jury will be instructed on them, including, but not limited to case no. 16-2009-CF-12156.

All of these records are public. Many of them have already been disclosed through the Clerk's website. For instance, in State v. Smith, 16-1977-CF-3161, multiple psychiatric evaluations are available through the Clerk's website. In State v. Smith, 16-2009-CF-12156, among other information, arrest and booking information is available on the Clerk's website. Affidavits in support of an arrest warrant with great detail are available. There is no hiding the fact that Defendant in the 2009 case was prosecuted for impersonating a state child-protection worker for the purpose of kidnapping a child. Sealing such records would serve no further purpose. See Austin, 522 So. 2d at 935. See also Bennett, 19 Med. L. Rptr. at 1383.

F. Conclusion

WHEREFORE, Intervenor Post-Newsweek Stations Florida, Inc., d/b/a as WJXT-TV4, requests the Court enter an order (1) granting WJXT-TV4 leave to intervene, and (2) denying Defendant's Motion for Protective Order in whole or in part; or (3) requiring that Defendant identify more precisely the materials he wishes to seal before submitting such materials to in camera inspection by the Court and evidentiary hearing.

Respectfully submitted this **21st day of August 2013**.

/s Edward L. Birk
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Attorneys for Intervenor Post-Newsweek Stations, Florida, Inc. d/b/a WJXT-TV4

CERTIFICATE OF SERVICE

I CERTIFY that a copy of the foregoing has been furnished this **21st day of August 2013**, via **E-MAIL only to**:

The Honorable Mallory D. Cooper, Circuit Judge;

Fred C. Gazaleh, Assistant Public Defender, and

Mark Caliel, Assistant State Attorney.

/s Edward L. Birk
Attorney

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STATE ATTORNEY NO.: 13CF039428AD

IN THE CIRCUIT COURT OF THE FOURTH JUDICIAL CIRCUIT, IN AND FOR DUVAL COUNTY, FLORIDA

CASE NO.: 162013CF5781AXXXMA

DIVISION: CR-D

STATE OF FLORIDA

vs.

DONALD JAMES SMITH

FILED

AUG 22 2013

RONNIE W. DANIELL

CLERK CIRCUIT COURT

STATE'S SECOND SUPPLEMENTAL DISCOVERY EXHIBIT

A. All court reporters used in depositions and prior sworn statements in this cause, and all witnesses whose names are brought out in depositions.

Category A:

J.A. Carter #6448 JSO

Category B:

S. Bourque #6271 JSO

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by hand, to the Office of the Public Defender, 25 North Market Street, Jacksonville, Florida 32202, this 22nd day of August, 2013.

ANGELA B. COREY
STATE ATTORNEY

By: _____
Mark Caliel
Bar Number: 0105650
Assistant State Attorney

/mc

THIS INSTRUMENT IN COMPUTER
Leslie

IN THE CIRCUIT COURT, FOURTH
JUDICIAL CIRCUIT, IN AND FOR
DUVAL COUNTY, FLORIDA

STATE OF FLORIDA

CASE NO.: 16-2013-CF-005781-AXXX-MA
DIVISION: CR-D

vs.

DONALD JAMES SMITH

WJXT-TV4, POST-NEWSWEEK
STATIONS FLORIDA, INC.

Intervenor.
_____/

INTERVENOR POST-NEWSWEEK STATIONS FLORIDA, INC.'S
NOTICE OF SUPPLEMENTAL AUTHORITY

Intervenor Post-Newsweek Stations Florida, Inc., by counsel, hereby files this Notice of Supplemental Authority providing the Court with copies of case law cited or otherwise referenced during the August 22, 2013 hearing on Defendant's Motion for Protective Order. Attached hereto are true and correct copies of:

1. State v. Robert Lee Bennett, 19 Med. L. Rptr. 1383 (Fla. 13th Jud. Cir., Hillsborough County, Sept. 26, 1991) (denying protective order with regard to "Williams Rule" evidence.)

2. State v. Richard Anthony McTear, 37 Med. L. Rptr. 2209, Case No. 09-CF-7933 (Fla. 13th Jud. Cir., Hillsborough County, June 17, 2009) (denying protective order and finding that *in camera* review was not necessary because defendant did not meet threshold burden of showing evidence of a serious and imminent threat to the administration of justice.)

3. State v. Casey Marie Anthony, Case No. 2008-CF-15606 (Fla. 9th Jud. Cir., Orange County, Jan. 7, 2011) (denying protective order seeking to seal the entire penalty phase

witness list based on bald and conclusory assertion that witnesses may be reluctant to come forward.)

4. State v. Casey Marie Anthony, Case No. 48-2008-CF-15606 (Fla. 9th Cir., Orange County, June 7, 2010) (denying motion seeking to order county jail to seal visitation records on grounds of separation of powers and public records law.)

Also, attached as Exhibit B, are true and correct copies of the State's Discovery Exhibit and Demand for Reciprocal Discovery filed on July 18, 2013, and the State's First Supplemental Discovery Exhibit filed on July 24, 2013. These were filed and thus conferred with public record status before Defendant filed his motion for protective order on August 2, 2013. Intervenor WJXT offers these copies of public records in support of its argument that once documents are conferred with the status of public records there is no purpose served by sealing such records from public view.

WHEREFORE, Intervenor WJXT-TV4 request the Court take into account the foregoing decisional law as well as the arguments and authorities presented in WJXT-TV4's Motion to Intervene and during the August 22 hearing and deny Defendant's motion as premature and insufficient.

Respectfully submitted this 26th **day of August 2013.**

/s Edward L. Birk

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Attorneys for Intervenor Post-Newsweek Stations, Florida, Inc. d/b/a WJXT-TV4

CERTIFICATE OF SERVICE

I CERTIFY that a copy of the foregoing has been furnished this 26th **day of August 2013**, via **E-MAIL only to**:

The Honorable Mallory D. Cooper, Circuit Judge;

Fred C. Gazaleh, Assistant Public Defender, and

Mark Caliel, Assistant State Attorney.

/s Edward L. Birk
Attorney

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IN THE CIRCUIT COURT, FOURTH
JUDICIAL CIRCUIT, IN AND FOR
DUVAL COUNTY, FLORIDA

STATE OF FLORIDA

CASE NO.: 16-2012-CF-005781-AXXX-MA
DIVISION: CR-D

vs.

DONALD JAMES SMITH

WJXT-TV4, POST-NEWSWEEK
STATIONS FLORIDA, INC.

Intervenor.
_____/

EXHIBIT A

TO

INTERVENOR POST-NEWSWEEK STATIONS FLORIDA, INC.'S NOTICE OF SUPPLEMENTAL AUTHORITY

Bloomberg BNA **Media Law Reporter®**

Source: Media Law Reporter Cases > Florida > Florida v. Bennett, 19 Med.L.Rptr. 1383 (Fla. Cir. Ct. 1991)

19 Med.L.Rptr. 1383

Florida v. Bennett

Florida Circuit Court, Thirteenth Judicial Circuit, Hillsborough County

No. 91-7942

September 26, 1991

THE STATE OF FLORIDA v. ROBERT LEE BENNETT

Headnotes

NEWSGATHERING

Access to records—Judicial—Criminal—Pre-trial/discovery (▶38.1505.04)

Criminal defendant who is charged with attempted murder and arson for alleged burning of individual is not entitled to protective order requiring state to file "Williams Rule" notices and evidence under seal until pre-trial determination of admissibility, in view of defendant's failure to show that such closure is necessary to prevent serious and imminent threat to administration of justice.

Case History and Disposition

Motion by criminal defendant for protective order.

Motion denied without prejudice.

Attorneys

Carol Jean LoCicero, of Holland & Knight, Tampa, Fla., for The Tribune Co.

Dale Sisco, Tampa, for the state.

Rochelle A. Reback, Tampa, for defendant.

Opinion Text

Opinion By:

Mitcham, J.:

Full Text of Opinion

This cause came to be heard on Wednesday, September 11, 1991, on Defendant Robert Lee Bennett, Jr.'s ("Bennett") Motion for Protective Order to Require the State to File all Proposed "Williams Rule" Notices and Evidence *In Camera*, Under Seal Until Pre-trial

Page 1384

Determination of Admissibility Pursuant to Rule 3.220(1) and (m), filed August 14, 1991. That motion is denied.

Bennett is charged with attempted murder and arson for the alleged burning of a man. Area media have covered Bennett's arrest and this prosecution.

Because of concerns about publicity, Bennett moved this Court for a protective order. Bennett sought to require the State to file any "Williams Rule" notices in camera and to have any hearing concerning those notices closed. Bennett is concerned that the material contained in any "Williams Rule" notice

EXHIBIT "A"

will be prejudicial and might threaten his right to a fair trial.

The Tribune Company (the "Tribune"), publisher of *The Tampa Tribune* intervened to oppose Bennett's motion based on the First Amendment to the United States Constitution; Article I, Section 4 of the Florida Constitution, the Florida Public Records Act and the common law right of access. The Court finds the Tribune has standing because Bennett's motion impacts on the public right of access to judicial proceedings and the Tribune's newsgathering abilities. *Miami Herald Publishing Co. v. Lewis*, 426 So.2d 1 (Fla. 1982).

The Court also finds that the notice at issue constitutes a public judicial record subject to the public's rights of access. Before the requested closures can occur, Bennett must demonstrate that:

1. closure is necessary to prevent a serious and imminent threat to the administration of justice;

2. no alternatives are available, other than change of venue, which would protect Bennett's right to a fair trial; and

3. closure would be effective in protecting Bennett's rights, without being broader than necessary to accomplish this purpose.

Lewis, 426 So.2d at 3. *See also Florida Freedom Newspapers, Inc. v. McCrary*, 520 So.2d 32 (Fla. 1988).

The Court first finds that this case does not involve the kind of extensive and prejudicial pre-trial publicity which justifies the sealing of judicial records and closure of judicial proceedings. For example, the Tribune has written only seven articles. The last article prior to this hearing was written over five weeks ago, on August 5, 1991.

The Court has tried controversial cases before. The Court was involved in the trial of a Hillsborough County Circuit Judge which received extensive publicity. In that case, the Court had no trouble seating a fair and impartial jury. In addition, this last year the Court tried four high profile first-degree murder cases. There were three acquittals out of those four cases. In none of those instances did this Court have any problem seating a jury.

A significant number of the public does not retain what is disseminated by the media or, simply, does not read newspapers or watch television. As a result, the feared impact on the fair trial rights of criminal defendants often does not occur — even in matters that have received extensive media coverage.

The Court finds that Bennett has simply failed to establish a factual basis to support the present motion. Closure is not necessary to prevent a serious and imminent threat to the administration of justice. Closure is not necessary to achieve the Court's purpose of guaranteeing the defendant a fair and impartial trial. Because the Court is not ordering closure, it need not consider the alternative measure prong of *Lewis* here.

If there is a wave of publicity and an absolute media assault upon the community including very damaging stories, Bennett may renew this motion.

Based on the foregoing, it is

ORDERED AND ADJUDGED that Bennett's motion for protective order is DENIED without prejudice.

- End of Case -

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37 Med.L.Rptr. 2209

State v. McTear
Florida Circuit Court
Thirteenth Circuit
Hillsborough County

No. 09-CF-007933

June 17, 2009

STATE OF FLORIDA v. RICHARD ANTHONY MCTEAR

Headnotes

REGULATION OF MEDIA CONTENT

[1] Prior restraints — Fair trial restraints — In general (►5.1001)

Fair trial, free press — Restrictive orders in criminal proceedings — Pre-trial (►8.0501)

NEWSGATHERING

Access to records — Judicial — Criminal — Pre-trial/discovery (►38.1503.04)

Restraints on access to information — Fair trial (►50.17)

Defendant's motion, in murder, kidnapping, aggravated child abuse, burglary, battery, and false imprisonment case, for temporary protective order with respect to release of discovery material, to prohibit discovery from becoming subject to Public Records Act until either it has been reviewed in camera and found non-prejudicial to defendant's constitutional rights, criminal charges are adjudicated or dismissed, or jury has been selected and sequestered, and defendant's request for gag order prohibiting law enforcement and other state and local government employees from making extrajudicial comments, are denied, despite extensive electronic and print media coverage of events surrounding criminal allegations, since discovery materials in possession of state become available to media and public under Public Records Act when they are furnished to defendant, since requested protective order would constitute prior restraint on speech, since, at this point in proceedings, it is premature to characterize current adverse publicity as serious and imminent threat to administration of justice, since it has not been shown that defendant's right to fair trial is in any reasonable way threatened by reports surrounding trial and parties, since argument that members of public will lack impartiality due to existence of adverse reports in news is not compelling, since court has responsibility to ensure fundamental fairness of proceedings, and possesses inherent authority to take any means necessary to ensure such fairness, since testing impartiality of potential jurors is best left to voir dire process, since in camera review of discovery is not required to ensure fair trial before impartial jury, and since gag order is not necessary, in that officers of court are expected to meet professional obligations.

Case History and Disposition

Criminal prosecution, in which defendant moves for temporary protective order with respect to release of discovery material and to prohibit law enforcement and other state and local government employees from making extrajudicial comments.

Denied.

Attorneys

EXHIBIT "B"

Jalal A. Harb, State Attorney's Office, Tampa, Fla., for State of Florida.

Theda R. James and Mike Peacock, Tampa, for defendant.

Gregg D. Thomas and Rachel E. Fugate, of Thomas & LoCicero, Tampa, Fla., for Tampa Tribune, WFLA-TV, and WTVT-TV.

Alison M. Steele and Layla K. McDonald, of Rahdert Steele Bole & Reynolds, St. Petersburg, Fla., for Times Publishing Co.

Opinion Text

Opinion By:

Holder, J.:

THIS MATTER comes before the Court on this 17th day of June, 2009, on the Defendant's Verified Motion for Temporary Protective Order with Respect to Discovery Material Becoming Subject to Chapter 119 and to Prohibit Agents and Employees of the Hillsborough County State Attorney's Office, the Hillsborough

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County Sheriff's Office, the Hillsborough County Clerk's Office, the Public Defender's Office, the Hillsborough County Medical Examiner's Office and the Florida Department of Law Enforcement from Making Extrajudicial Comments and Motions for Evidentiary Hearing, Request for Judicial *in camera* Review and Memorandum of Law in Support Thereof (the "Defendant's Motion"), filed pursuant to Florida Rule of Criminal Procedure 3.220, on June 11, 2009.

In his motion, the Defendant requests that this Court enter a protective order limiting the availability of discovery under the Public Records Act, Chapter 119, Florida Statutes (the Public Records Act). Defendant requests that no discovery be permitted to become subject to the Public Records Act either:

1. Until it has been reviewed *In camera* and found by the Court to be non-prejudicial to Defendant's constitutional rights;

2. Until such time as the criminal charges against Defendant are finally determined by adjudication, dismissal, or other final disposition; OR,

3. Until such time as a jury has been selected and sequestered.

The Defendant also requests that the Court issue a gag order. More specifically, Defendant requests the Court order the agents and employees of the Hillsborough County State Attorney's Office, the Hillsborough County Sheriff's Office, the Hillsborough County Clerk of Court's Office, the Public Defender's Office, the Hillsborough County Medical Examiner's Office and the Florida Department of Law Enforcement to refrain from making any extrajudicial comment concerning this cause, the parties, or any issue related to these matters during the pendency of this matter and until such time as the case is finally determined by adjudication, dismissal, or other final disposition. The Court having considered the motion and attachments, the court file and record, as well as the argument of counsel for the State of Florida, this Defendant as well as the various local media, finds as follows:

The Defendant in this cause was arrested on May 5, 2009, for Murder in the First Degree, Kidnapping, Aggravated Child Abuse, Burglary of a Dwelling, Felony Battery, False Imprisonment, Burglary of a Dwelling with Assault or Battery, and Battery. The Defendant was indicted in Case No. 09-CF-7933, and arraigned on May 20, 2009, for Murder in the First Degree, Burglary of a Dwelling with Assault or Battery, Aggravated Child Abuse, Kidnapping with Harm or Terrorizing, and Battery Second or Subsequent Offense. By and through Counsel, the Defendant pled not guilty to all charges in 09-CF-7933 and demanded discovery from the Office of the State Attorney pursuant to Rule 3.220, Fla.R.Cr.P.

[1] The Court notes the extensive electronic and print media coverage of the events surrounding these criminal allegations against this Defendant.

The Public Records Act was enacted by the legislative and executive branches of this state government to ensure that the public receives virtual total access to matters which are part of the public record. Discovery materials in the possession of the State become available to the media and the public under the Public Records Act when they are furnished to a defendant. *See Satz v.*

Blankenship, 407 So. 2d 396 [7 Med.L.Rptr. 2576] (Fla. 4th DCA 1981).

The Defendant's requested protective order would constitute a prior restraint on speech which bears the presumption of constitutional invalidity. *See, State ex. rel. Miami Herald Pub. Co. v. McIntosh,* 340 So. 2d 904, 908 [2 Med.L.Rptr. 1328] (Fla. 1977). A member of the press, under certain circumstances, may be properly considered a representative of the public and both the public and the press have both a constitutional and statutory right to see and know what occurs within their courtrooms. *See McIntosh, id.* This Court has long noted the absolute responsibility of the Judiciary as the third "separate but equal" branch of our state government to ensure the rights of all citizens of this great State. As such, the Court must consider the rights of the public to full knowledge of the activities involved within these proceedings. It is only through such public scrutiny and supervision that any branch of government can effectively and honestly function consistent with our obligation and oath to perform our duties as a government of, by, and for the people. It is this transparency with respect to all judicial activities and action that leads to public trust and

Page 2211

confidence in these pre-trial and trial proceedings. It is ultimately this public trust and confidence which ensures fundamental fairness for this Defendant. Against these concerns, a court must balance the rights of a criminal defendant to a fair trial, which include a fair and impartial jury.

The Defendant argues that the publicity in this case has been pervasive and prejudicial to his constitutional rights. He argues that the potential jury pool might become tainted with additional adverse publicity. He states that his ability to receive a fair trial in this county stands in danger of being prejudiced without the requested protective order and a gag order.

In reviewing the motion, this Court has carefully considered and balanced the factors set forth in *Miami Herald Pub. Co. v. Lewis,* 426 So. 2d 1 [8 Med.L.Rptr. 2281] (Fla. 1983). These factors require that this Court consider the following: 1) whether the restriction is necessary to prevent a serious and imminent threat to the administration of justice; 2) whether there are other alternatives available, apart from a change of venue, which would protect a defendant's right to a fair trial; and, 3) whether the restrictions would be effective in protecting the rights of the accused.

At this point in these proceedings, it is premature to characterize the current adverse publicity as a serious and imminent threat to the administration of justice. It has not been shown that Defendant's right to a fair trial is in any reasonable way threatened by the reports surrounding the trial and the parties. The argument that members of the public will lack impartiality due to the existence of adverse reports in the news is not compelling. Moreover, this Court has the responsibility to ensure the fundamental fairness of these proceedings and possesses the inherent authority to take any means necessary to ensure such fairness.

For some members of the public, these matters are an important event and are worthy of public discussion. This does not imply the partiality of these individuals; merely their interest and their absolute right to be informed of these proceedings and this process. For others in the community, the events giving rise to this case may have been noted and dismissed. And yet, for some members of the community, even these reports noted by the Defendant, have drawn no interest or attention. Ignorance of such publicity may yet ensure their impartiality. Testing the impartiality of potential jurors in this case is ultimately best left to the process of voir dire. The fact that new evidence or opinions can be expected to arise during the discovery process does not militate against this conclusion. Further, it is axiomatic that this case will not reach trial in the near future due to the protracted nature of discovery and pretrial matters in cases carrying even the potential of the ultimate penalty.

The Court finds that *in camera* review of discovery is not required to ensure that this Defendant receives a fair trial before an impartial jury. The Court likewise finds that a protective order prohibiting discovery from becoming subject to the Public Records Act is not necessary to ensure that Defendant receives a fair trial before an impartial jury. As for the gag order, the Court notes that Rule 4-3.6 of the Rules Regulating the Florida Bar specifically prohibits an attorney and an attorney's agents or employees from making any prejudicial extrajudicial statements. A gag order is, quite simply, unnecessary at this time as this Court fully expects and hereby Orders all Officers of this Court to meet their professional obligations consistent with their Oath to God, when sworn as members of The Florida Bar.

For the foregoing reasons, it is ORDERED AND ADJUDGED that Defendant's Motion is hereby DENIED.

- End of Case -

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IN THE CIRCUIT COURT OF THE NINTH JUDICIAL CIRCUIT
IN AND FOR ORANGE COUNTY, FLORIDA

STATE OF FLORIDA,

Plaintiff,

vs.

CASEY MARIE ANTHONY,

Defendant.
_____/

CASE NO.: 2008-CF-15606-O
DIVISION: 10

ORDER DENYING MOTION TO SEAL PENALTY PHASE DISCOVERY

THIS CAUSE came before this Court for hearing on December 20, 2010, on the Defendant's Motion to Seal Penalty Phase Discovery filed on December 3, 2010, pursuant to Florida Rule of Criminal Procedure 3.220(l). After carefully considering the Motions, arguments of counsel, and the law, the Court finds and determines as follows:

Counsel for the defense petitions this Court to enter a protective order pursuant to Florida Rule of Criminal Procedure 3.220(l), sealing or exempting from public access certain penalty phase discovery. Specifically, counsel for the defense wishes to preclude the release of the penalty phase witness list, which this Court ordered disclosed on November 30, 2010. Counsel for the *Orlando Sentinel* ("Sentinel"), a local daily newspaper granted standing by the Court, has filed a motion in opposition.

The issue thus presented is whether or not the Court must seal this discovery from public access in order to ensure the Defendant's right to a fair trial. For the reasons discussed *infra*, the Court finds that the requested action is not required.

Rule 3.220(1) provides that *upon a showing of good cause*, the Court may "order specified disclosures be restricted, deferred, or exempted from discovery." Fla. R.

COMPOSITE EXHIBIT "D"

Crim. P. 3.220(1). (Emphasis supplied).

Before court or public records may properly be closed on fair-trial grounds, this Court must specifically identify the factors that threaten the administration of justice and weigh all reasonable alternatives to mitigate the perceived threats. Only then, after development of a full record on these issues, may a court narrowly fashion a remedy that accommodates the public's interest alongside that of the criminal justice system.

Specifically, this Court must apply the three-part test referenced in *Florida Freedom Newspapers v. McCrary*, 520 So. 2d 32 (Fla. 1988), and established in *Miami Herald Publishing Co. v. Lewis*, 426 So. 2d 1 (Fla. 1982). Such findings can only be made after a careful analysis of the following factors:

a. Restricting public access to discovery material is necessary to prevent a serious and imminent threat to the administration of justice;

b. No alternatives, other than a change of venue, would protect the defendant's right to a fair trial; and

c. Closure would be effective in protecting the rights of the accused, without being broader than necessary to accomplish this purpose.

Lewis 426 So. 2d at 6; *McCrary*, 520 So. 2d at 35.

Bearing the preceding principles in mind, the Defendant's claim fails. As a threshold matter, the Court agrees with the Sentinel that the Defense bears the burden of proof in sealing this penalty phase discovery. It is well-settled that the party seeking closure has the burden of proving by the greater weight of the evidence that closure is necessary to prevent a serious and imminent threat to the administration of justice. *WESH Television, Inc. v. Freeman*, 691 So.2d 532, 534 (Fla. 5th DCA 1997).

Although the Defense claims that disclosure of the witness list has a potentially chilling effect, the Court agrees with the Sentinel that this bald assertion is insufficient. A finding of cause to restrict or defer disclosure of such records cannot rest in air. *McCrary*, 520 So. 2d at 35. In order to seal the entire penalty phase witness list, the Defendant must make a much more particularized showing. The Court agrees with the Sentinel that the three-pronged test has not been met in the case *sub judice*.

To the contrary, many potential penalty phase witnesses are presumably already known to the public at large and are already associated with this case. Release of any known individual's name could not possibly deprive the Defendant of her fair trial rights. Moreover, even for witnesses not known, counsel's conclusory assertion that some witnesses may be reluctant to come forward is insufficient to demonstrate a real threat to the Defendant's fair trial rights. Any penalty phase witness will testify in an open courtroom and be publicly identified with this case. If the unknown individuals on the Defendant's witness list are simply reluctant to be associated with this case, the Defendant has not shown how the delayed association of these individuals will protect her fair trial rights. Because the Defense does not satisfy its burden, the Motion to Seal Penalty Phase Discovery is DENIED.

DONE AND ORDERED in chambers at Orlando, Orange County, Florida, this 7th day of January 2011.

BELVIN PERRY, JR.
Chief Judge

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Orange County

IN THE CIRCUIT COURT OF THE NINTH JUDICIAL CIRCUIT
IN AND FOR ORANGE COUNTY, FLORIDA

STATE OF FLORIDA,
Plaintiff,

vs.

CASEY MARIE ANTHONY,
Defendant.
_____/

CASE NO.: 48-2008-CF-15606-O

DIVISION: 99

ORDER DENYING MOTION TO SEAL JAIL VISITATION LOG RECORDS

THIS MATTER came before the Court for hearing on June 1, 2010, on the Defendant's Motion to Seal Jail Visiting Log Records, filed on April 29, 2010. After carefully considering the Motions, arguments of counsel, and the law, the Court finds and determines as follows:

Counsel for the defense petitions the Court to enter an Order directing the Administrator of the Orange County Jail to seal and maintain the confidentiality of all records of visitors to the Defendant, Casey Marie Anthony. Specifically, counsel moves the Court to seal the "jail visitation log," which documents the names of persons who visit the Defendant, an inmate awaiting trial on criminal charges. Of particular concern to the defense is the identification of expert witnesses who will be meeting with the Defendant to assist in the preparation of her case. Counsel for the Defendant argues that the mere identity of these individuals to the news media "will cause unfounded speculation, as well as 'google' inquiries," thus severely hampering her entitlements to due process, equal protection of the law, and effective assistance of counsel.

Counsel for Orange County, on behalf of Orange County Corrections, has filed a Response opposing the Defendant's Motion based upon the Florida Public Records Law as well as Article I, section 24 of the Florida Constitution.

The issue thus presented is whether or not a trial court may rightfully order an administrative agency, in this case the county jail, to seal public records that are within its exclusive possession. For the reasons discussed *infra*, the Court finds that it can not.

First, such an order would amount to a violation of the doctrine of separation of powers set forth in Article II, section 3 of the Florida Constitution, which mandates that no branch of government may encroach upon the powers of another. *Florida Dept. of State, Div. of Elections v. Martin*, 916 So. 2d 763 (Fla. 2005); *Bush v. Schiavo*, 885 So. 2d 321 (Fla. 2004); *Sloban v. Florida Bd. of Pharmacy*, 982 So. 2d 26 (Fla. 1st DCA 2008). In adherence to this basic principle, the judiciary is precluded from interfering with, much less usurping the proper authority of, the executive. *Sharrard v. State*, 998 So. 2d 1188 (Fla. 4th DCA 2009). Moreover, a trial court is forbidden from entering an injunction that requires an administrative agency to perform its duties in a particular way. *Crowley Museum and Nature Center, Inc. v. Southwest Florida Water Management Dist.*, 993. So. 2d 605 (Fla. 2d DCA 2008).

In addition, it is well-established that a trial court may not interfere with and does not have the authority to enter into the decision-making process which is delegated to an executive agency. *Department of Revenue ex rel. Jackson v. Nesbitt*, 975 So. 2d 549 (Fla. 4th DCA 2008); *Agency for Persons with Disabilities v. J.M.*, 924 So. 2d 1 (Fla. 3d DCA 2005), *review denied*, 932 So. 2d 193 (Fla. 2006) The jail visitation log record is an administrative procedure utilized by the Orange County Jail to ensure the safety and security of inmates, jail employees, and the general public by recording the identity of visitors to its facilities. The agency has determined in its discretion that the visitation log is a vital tool in effecting those means.

As such, to require a judge to second guess administrative decisions would place the judicial branch in a supervisory role over basic executive branch, public protection functions in

violation of the separation of powers doctrine. *Strickland v. Department of Agriculture and Consumer Services*, 922 So. 2d 1022 (Fla. 5th DCA 2006). This the Court may not do absent a violation of constitutional or statutory rights. *Miami-Dade County v. Miller*, 19 So. 3d 1037 (Fla. 3d DCA 2009). While counsel for the defense argues that failure to seal the jail visitation log records would violate the Defendant's entitlements to due process, equal protection, and effective assistance of counsel, the Court remains unpersuaded.

First, the Defendant's claim that failure to seal the jail visitation log is violative of her right to equal protection of the law is without merit. "Equal protection of the laws" means that each person is entitled to stand before the law on equal terms with, to enjoy the same rights as belong to, and to bear the same burdens as are imposed on, others in a similar situation. *McDaniel v. Board of Public Instruction for Escambia County, Fla.*, 39 F. Supp. 638 (N.D. Fla. 1941); *Caldwell v. Mann*, 157 Fla. 633, 26 So. 2d 788 (1946); *Riley v. Lawson*, 106 Fla. 521, 143 So. 619 (1932). All *similarly situated* persons are equal under the law and must be treated alike; the rights of all persons or classes must rest on the same rule under *similar circumstances*. (Emphasis supplied). *Ocala Breeders' Sales Co., Inc. v. Florida Gaming Centers, Inc.*, 793 So. 2d 899 (Fla. 2001).

Thus, equal protection is not violated merely because some persons are treated differently than other persons; it only requires that persons similarly situated be treated similarly, and it demands only reasonable conformity in dealing with persons similarly situated. *Duncan v. Moore*, 754 So. 2d 708 (Fla. 2000); *Fredman v. Fredman*, 960 So. 2d 52 (Fla. 2d DCA 2007), *review denied*, 968 So. 2d 556 (Fla. 2007) *and cert. denied*, 128 S. Ct. 1481, 170 L. Ed. 2d 297 (U.S. 2008).

The jail visitation log records the identification of every person that visits an inmate in the Orange County Jail. Consequently, the Defendant's contention that she is being treated disparately from similarly situated persons, i.e., other inmates, is simply unfounded.

Equally implausible is the argument that if the jail visitation log isn't sealed, the Defendant will not receive effective assistance of counsel. Even if the Court was vested with such authority, it is not convinced that the disclosure of the jail logs would give the prosecution any tactical advantage. The disclosure of jail visitors' names does not hold the potential to reveal privileged communications. In fact, the Defendant ultimately will be required to disclose to the prosecution the names of all testifying experts, along with any other reports or statements of experts made in connection with the case. Fla. R. Crim. P. 3.220(d)(1)(A) and (B)(ii). Furthermore, any "unfounded speculation" on the part of the news media is beyond the ambit of the Court.

Lastly, counsel for the defense claims that failure to seal the jail log would result in impingement to the Defendant's entitlement to due process of law. Although the Defendant's Motion contains very general allegations concerning the nature of this alleged due process violation, it fails to cite any authority that stands for the proposition that jail inmates have a fundamental right to seal visitation log records.[1] Perhaps most telling, the Motion is bereft of any citation to legal authority at all. While it is true that during the hearing on the Motion counsel did offer one case to support its position, it is easily distinguishable.

In *Powell v. Foxman*, 528 So. 2d 91 (Fla. 5th DCA 1988), the defendant sought a writ of mandamus to compel the State to produce *recorded testimony* of the minor victim during a dependency hearing (Emphasis supplied). The District Court of Appeal, in granting the writ, held that the defendant was entitled to the prior recorded testimony based on the Confrontation Clause

[1] The issues presented in this case do not broach procedural due process matters.

of the Sixth Amendment of the Unites States Constitution and Article I, section 16, of the Florida Constitution. Clearly, *Foxman* is not analogous to the instant case.

First, the jail log does not constitute any form of "testimonial evidence" which entitles the Defendant a right to confront and cross-examine it. *See Crawford v. Washington*, 541 U.S. 36 (2004). Furthermore, the defendant in *Foxman* sought to have records produced rather than concealed, as in the case *sub judice*. Finally, and perhaps most germane to the disposition of this claim, *Foxman* involved court records. It did not pertain to public records that were in the exclusive possession of a co-equal branch of government.

To the contrary, the Florida Supreme Court has expressly held that the judiciary only has exclusive power and responsibility over court records, and it has further acknowledged the distinction between court records and records that are not in the exclusive possession of the courts. *Johnson v. State,* 336 So. 2d 93 (Fla. 1976); *State v. D.H.W.*, 686 So. 2d 1331). Indeed, the court explicitly ruled that under the separation of powers doctrine, a court's power to order the sealing of nonjudicial criminal history records not in the custody of the courts derives only from a legislative grant by statute. *D.H.W.* 686 at 1334.

Additionally, as counsel for Orange County aptly points out, the Orange County Jail is an agency subject to the Florida Public Records Law. This statute, along with Article I, section 24 of the Florida Constitution, mandates that all public records of county agencies are open for inspection and copying by any person. § 119.01, and 119.011(1), Fla. Stat. (2010).

A "public record" is defined as "all documents, papers, letters, maps, books, tapes, photographs, films, sound recordings, data processing software, or other material, regardless of the physical for, characteristic or means of transmission, made or received pursuant to law or

ordinance or in connection with the transaction of official business by any agency." § 119.011(11), Fla. Stat. (2010).

Clearly, the jail log constitutes a public record that is subject to the statute. As such, Orange County Corrections Department is required to permit inspection of the log upon request by any person, unless it falls into one of the statutory exemptions listed in Section 119.071, Florida Statutes (2010), or is exempt pursuant to any other law.

The Court agrees with the County that a criminal defendant's desire to "maintain the confidentiality of visitors" in a high profile case does not qualify as a lawful exemption. As mentioned *supra*, the Defendant's Motion does not provide any statutory exemption or legal authority for the Court to "seal" documents that constitute public records.

Instead, counsel for the defense entreats the Court to judicially create an exemption in this case. The Court is unable to acquiesce. Any exemption from the Florida Public Records Act must originate in the legislature and not by judicial decision. *Wait v. Florida Power & Light Co.*, 372 So. 2d 420 (Fla. 1979).

Accordingly, the Defendant's Motion to Seal Jail Visitation Log Records is DENIED.

DONE AND ORDERED in chambers at Orlando, Orange County, Florida, this 7th day of June 2010.

BELVIN PERRY, JR.
Chief Judge

IN THE CIRCUIT COURT, FOURTH
JUDICIAL CIRCUIT, IN AND FOR
DUVAL COUNTY, FLORIDA

STATE OF FLORIDA

CASE NO.: 16-2012-CF-005781-AXXX-MA
DIVISION: CR-D

vs.

DONALD JAMES SMITH

WJXT-TV4, POST-NEWSWEEK
STATIONS FLORIDA, INC.

Intervenor.
_____/

EXHIBIT B

TO

INTERVENOR POST-NEWSWEEK STATIONS FLORIDA, INC.'S NOTICE OF SUPPLEMENTAL AUTHORITY

FILED 07/18/13 PM 04:30 R FUSSELL

STATE ATTORNEY NO.: 13CF039428AD

IN THE CIRCUIT COURT OF THE FOURTH JUDICIAL CIRCUIT, IN AND FOR DUVAL COUNTY, FLORIDA

CASE NO.: 162013CF5781AXXXMA

DIVISION: CR-D

STATE OF FLORIDA

vs.

DONALD JAMES SMITH

STATE'S DISCOVERY EXHIBIT AND
DEMAND FOR RECIPROCAL DISCOVERY

This response meets the requirements of Rule 3.220(b), Florida Rules of Criminal Procedure, and provides answers in the same order as required by the Rule. The State demands reciprocal discovery as required by Rule 3.220(d), Florida Rules of Criminal Procedure.

A. All court reporters used in depositions and prior sworn statements in this cause, and all witnesses whose names are brought out in depositions.

Category A:

D. V. Alexander, #5284, Jacksonville Sheriff's Office,
P. A. Bodine, #7467, Jacksonville Sheriff's Office
Brad Calhoun, 1610 Edgewood Ave. W., Jacksonville, Florida 32208
D. S. Coarsey, #6957, Jacksonville Sheriff's Office
D. G. Crews, #7460, Jacksonville Sheriff's Office
W. P. Cullen, #5875, Jacksonville Sheriff's Office
K. C. Dukes, #7905, Jacksonville Sheriff's Office
N. B. Dunn, #7598, Jacksonville Sheriff's Office
Randy Fort, 1610 Edgewood Ave. W., Jacksonville, Florida 32208
D. A. Green, #6089, Jacksonville Sheriff's Office
R. M. Gupton, #6053, Jacksonville Sheriff's Office
Cristina Howard, 10729 Rutgers Road, Jacksonville, Florida 32218
Marquita Howard, 10729 Rutgers Rd, Jacksonville, Florida 32218
D. L Hughes, #7091, Jacksonville Sheriff's Office
S. K. James, #61118, Jacksonville Sheriff's Office
Nicole Lee, FDLE Biology, 921 North Davis Street, Building E, Jacksonville, Florida 32209
A. Lewis, #61131, Jacksonville Sheriff's Office
R. A. Lind, #66780, Jacksonville Sheriff's Office
R. J. Lisotta, #7780, Jacksonville Sheriff's Office
K. A. Long, #7239, Jacksonville Sheriff's Office
C. E. Moody, #7610, Jacksonville Sheriff's Office
Patricia A Moore, 2495 Segovia Avenue, Jacksonville, Florida 32217
J. D. Palmer, #60234, Jacksonville Sheriff's Office
Rayne Perrywinkle, 7032 Alan Avenue, Jacksonville, Florida 32208
S. L. Pfister, #5972, Jacksonville Sheriff's Office
Dr. Valerie Rao, M.E., Medical Examiner's Office, 2100 Jefferson Street, Jacksonville, Florida 32206
K. F. Reardon, Jr., #5930, Jacksonville Sheriff's Office

Dustin Richards, 5028 Richard Ln, Jacksonville, Florida 32216
Ashley Rozier, 54255 Armstrong Road, Callahan, Florida 32011
Christopher Rozier, 54255 Armstrong Road, Callahan, Florida 32011
C. A. Sames, #63939, Jacksonville Sheriff's Office
Charles Shejen, 2495 Segovia Avenue, Jacksonville, Florida 32217
W. A. Smith, #5213, Jacksonville Sheriff's Office
D. M. Sullivan, #5231, Jacksonville Sheriff's Office
S. B. Taylor, #7256, Jacksonville Sheriff's Office
J. W. Watson, #7487, Jacksonville Sheriff's Office
Janise Wilkerson, 1707 Huron Ave, Commercial Warehousing, Jacksonville, Florida 32254
C. W. Wilkie, #6052, Jacksonville Sheriff's Office
Brenda Fillingim, 10549 Abeline Road, Jacksonville, FL 32218

Category B:

S. D. Grimes, #7788, Jacksonville Sheriff's Office
R. T. Kocik, #7884, Jacksonville Sheriff's Office
H. J. Rivera, #6141, Jacksonville Sheriff's Office
M. H. Sirmons, #7635, Jacksonville Sheriff's Office
F. A. Smith, #6464, Jacksonville Sheriff's Office
M. R. Starling, #7642, Jacksonville Sheriff's Office
Custodian of Records - Walmart (Surveillance Videos)
Custodian of Records - Cell Phone Records and Data (Name/Companies to be Provided).

B. All statements brought out at depositions. Any statements contained on the arrest docket and all police reports. Sworn statements of Patricia Moore and Charles Shejen.

*C. All statements brought out at depositions. Any statements by accused on the arrest docket and all police reports.

D. None known to the State at this time.

E. None known to the State at this time.

*F. All items of evidence obtained from the Accused, which are listed in police reports and property submission/storage cards. .

G. None known to the State at this time.

H. None known to the State at this time. Cell phone records and cell site data.

*I. Yes, search warrants obtained during the course of the investigation..

*J. Any statements brought out at depositions. Autopsy report. FDLE Reports.

*K. Photos, maps, charts, diagrams, rights form, court records, supporting documents, and all items of evidence listed in police reports and property submission/storage cards.

3.220(b)(4) Brady None known to the State at this time.

* Defense may inspect, copy, test or photograph items contained in these paragraphs by appointment.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by Mail, to the Office of the Public Defender, 25 North Market Street, Jacksonville, Florida 32202, this 15th day of July, 2013.

ANGELA B. COREY
STATE ATTORNEY

By: _____
Mark Caliel
Bar Number: 0105650
Assistant State Attorney

/mc

FILED 07/24/13 PM 04:12 R FUSSELL

STATE ATTORNEY NO. 13CF039428AD

IN THE CIRCUIT COURT OF THE FOURTH JUDICIAL CIRCUIT, IN AND FOR DUVAL COUNTY, FLORIDA

CASE NO.: 162013CF5781AXXXMA

DIVISION: CR-D

STATE OF FLORIDA

vs.

DONALD JAMES SMITH

STATE'S FIRST SUPPLEMENTAL DISCOVERY EXHIBIT

A. All court reporters used in depositions and prior sworn statements in this cause, and all witnesses whose names are brought out in depositions.

Category A:

D.M. Sullivan #5231 Jacksonville Sheriff's Office
Daniel Jay 9050 Norfolk Blvd., Jacksonville, FL
R.D. Adams #5924 Jacksonville Sheriff's Office
T.L. Henson #6101 Jacksonville Sheriff's Office
M.D. Leavitt #5955 Jacksonville Sheriff's Office
E.W. Parker #6877 Jacksonville Sheriff's Office
D.B. Baker #7436 Jacksonville Sheriff's Office
J.L. Gray #61012 Jacksonville Sheriff's Office

Category B:

D.B. Hall #5368 Jacksonville Sheriff's Office
E. Gonzales #6007 Jacksonville Sheriff's Office
B.E. Baker #6039 Jacksonville Sheriff's Office
C.E. Ayoub #6224 Jacksonville Sheriff's Office
R.A.Beers #6236 Jacksonville Sheriff's Office
S.R. Delano #6316 Jacksonville Sheriff's Office
P.M. Presti #6737 Jacksonville Sheriff's Office
S.C. Putman #7127 Jacksonville Sheriff's Office
S.K. Bridges #7330 Jacksonville Sheriff's Office
W.C. Watkins #7562 Jacksonville Sheriff's Office
J.S. Williams #7923 Jacksonville Sheriff's Office
M.W. Crawford #19207 Jacksonville Sheriff's Office
D.M. Ostertag #30205 Jacksonville Sheriff's Office
J.A. Holderfield #31924 Jacksonville Sheriff's Office
A.A. Wilkerson #61025 Jacksonville Sheriff's Office
E. Solis #61222 Jacksonville Sheriff's Office
D.W. Molina #61370 Jacksonville Sheriff's Office

T.M. Boyd #61660 Jacksonville Sheriff's Office
W.D. Redgate #64624 Jacksonville Sheriff's Office
J.G. Bennett #66417 Jacksonville Sheriff's Office
R.A. Lind #66780 Jacksonville Sheriff's Office
M.L. Albert #66805 Jacksonville Sheriff's Office
J. Cabrera #67535 Jacksonville Sheriff's Office
S.A. Coleman #67872 Jacksonville Sheriff's Office
W.H. Chaires #7342 Jacksonville Sheriff's Office

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by mail, to the Office of the Public Defender, 25 North Market Street, Jacksonville, Florida 32202, this 24th day of July, 2013.

ANGELA B. COREY
STATE ATTORNEY

By: _____
Mark Caliel
Bar Number: 0105650
Assistant State Attorney

/mc

STATE OF FLORIDA

v.

DONALD SMITH

FILED
SEP 04 2013
RONNIE W. POWELL
CLERK CIRCUIT COURT

IN THE CIRCUIT COURT, FOURTH JUDICIAL CIRCUIT, IN AND FOR DUVAL COUNTY, FLORIDA.

CASE NO. 2013CF 5781

DIVISION CRD

WAIVER OF SPEEDY TRIAL

Comes now the defendent - together with attorney - and hereby waives the right of speedy trial as provided by the Constitution of the United States and the State of Florida, Florida Statute 918.015, Rule 3.191 of the Florida Rules of Criminal Procedure and other applicable provisions of the Florida Statutes and F.R.C.P.

This Waiver of Speedy Trial is freely and voluntarily made for the reason that it is considered to be in the best interest of the defendant.

☑ This is an unlimited waiver of speedy trial in this case.

☐ This is a limited waiver of speedy trial for the period of _____

My attorney and I have signed this waiver of speedy trial in Jacksonville, Duval County, Florida, on 4 SEPT 2013.

Attorney for Defendant

Defendant

CIRCUIT JUDGE

My signature as Circuit Judge is certification that the waiver of speedy trial was freely, voluntarily and knowingly made - and it is hereby approved and accepted.

(Hudson Olliff, Circuit Judge, 4th revised Form #12 (10-90), filed with Florida Bar Center)

THIS INSTRUMENT IN COMPUTER
Leslie

PSS-3619

FILED 08/06/13 PM 02:53 R FUDELL

IN THE CIRCUIT COURT, FOURTH JUDICIAL CIRCUIT, IN AND FOR DUVAL COUNTY, FLORIDA.

CASE NO.: 16-2013-CF-05781-AXXX-MA

DIVISION: CR-D

STATE OF FLORIDA,

v.

DONALD JAMES SMITH,
Defendant.
_____/

ORDER ON DEFENDANT'S MOTION FOR PROTECTIVE ORDER

This matter came before the Court on August 2, 2013, upon Defendant's Motion for Protective Order. The Morris Publishing Group, LLC, d/b/a The Florida Times-Union ("The Florida Times-Union") and Post-Newsweek Stations Florida, Inc., d/b/a WJXT-TV4 ("WJXT-TV4") filed Motions to Intervene. A hearing was held on the Motions on August 22, 2013. Having heard the arguments of counsel and reviewed the Motions and pertinent law, the Court finds as follows:

1. The Court must balance the need for open government and public access, through the media, to the judicial process, and the paramount right of a defendant in a criminal proceeding to a fair trial before an impartial jury. Miami Herald Publ'g Co. v. Lewis, 426 So. 2d 1, 6 (Fla. 1982).

2. At the hearing, both Intervenors argued that Defendant's Motion was insufficient in that it was overbroad and lacked specificity. In its Motion, WJXT-TV4 states that Defendant's Motion is "overbroad in the relief that it requests" and "offers nothing more than bald speculation on the threat of harm to the administration of justice." (Mot. 1.) In its Motion,

The Florida Times-Union states that Defendant's Motion is "conclusory." (Mot. 2.)

3. The Court agrees that the relief requested by Defendant is overbroad.

4. The Eighth Judicial Circuit was faced with a similar issue in State v. Rolling, No. 91-3832, 1992 WL 236932, at *1 (Fla. 8th Cir. Ct. Mar. 11, 1992). In Rolling, the defendant sought a broad, general prohibition on public disclosure of information relating to the investigation, prosecution or defense of his case. Id. at *1. The media intervenors objected to closure on the grounds that the defendant's motion was "vague, premature, violated Public Records laws and fail[ed] to meet the appropriate legal test." Id. The media intervenors further objected to any prohibition of statements as "too broad." Id. In seeking a balance of interests, the Rolling trial court found the best possible solution was to "order the State to proceed with disclosure to the defense, while ordering a temporary prohibition against public disclosure." Id. at *5. The Rolling trial court reasoned that "[t]his would allow the Public Defender to review materials and file specific request for in-camera inspection of materials that he finds might deprive his client of a fair trial upon early disclosure." Id.

5. The Court agrees with the Rolling trial court and finds that, at this time, the aforementioned solution best balances the interests of the public and Defendant.

6. In addition, the Court finds that any dependency records related to the victim in this case, or the victim's family members, are and shall remain confidential by statute, without review by the Court. See Fla. R. Jud. Admin. 2.420(d)(2)(d)(B)(i) ("The following information shall be maintained as confidential . . . Chapter 39 records relating to dependency matters, termination of parental rights, guardians ad litem, child abuse, neglect, and abandonment.").

7. When the aforementioned information is disclosed, the parties shall file with the clerk a "Notice of Confidential Information within Court Filing" in order to indicate that confidential information is included within the document being filed. See Fla. R. Jud. Admin. 2.420(d)(2),(4).

ORDERED AND ADJUDGED:

1. There will be a temporary prohibition against public disclosure of discovery materials.

2. The State will provide discovery to Defendant within 10 days of the date this Order is entered.

3. Defendant will review discovery materials, and within 10 days, may file a motion to determine confidentiality. Pursuant to the arguments made at the hearing held on August 22, 2013, all determinations of confidentiality will be made in-camera. Fla. R. Jud. Admin. 2.420(f)(1)(a), (c)(9)(a).

DONE AND ORDERED in Chambers, in Jacksonville, Duval County, Florida this 6 day of September, 2013.

MALLORY D. COOPER
CIRCUIT COURT JUDGE

cc:
Mr. Mark Caliel, Esquire,
Office of the State Attorney

Mr. Fred C. Gazaleh, Esquire,
Office of the Public Defender

Mr. Timothy J. Conner, Esquire,
Holland & Knight
Attorneys for Intervenor
Morris Publishing Group, LLC,
d/b/a The Florida Times-Union
50 North Laura Street
Suite 3900
Jacksonville, Florida 32202

Mr. Edward Birk, Esquire,
Marks Gray
Attorneys for Intervenor Post-Newsweek
Stations, Florida, Inc., d/b/a WJXT-TV4
Post Office Box 447
Jacksonville, Florida 32201

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy hereof has been furnished to Mr. Mark Caliel, Esquire, Office of the State Attorney; Mr. Fred C. Gazaleh, Esquire, Office of the Public Defender; Mr. Timothy J. Conner, Esquire, Holland & Knight, Attorneys for Intervenor Morris Publishing Group, LLC, d/b/a The Florida Times-Union, 50 North Laura Street, Suite 3900, Jacksonville, Florida 32202; Mr. Edward Birk, Esquire, Marks Gray, Attorneys for Intervenor Post-Newsweek Stations, Florida, Inc., d/b/a WJXT-TV4, Post Office Box 447, Jacksonville, Florida 32201 by _____ this 9 day of Sept, 2013.

Deputy Clerk

Case No.: 16-2013-CF-05781-AXXX-MA
/ar

STATE ATTORNEY NO.: 13CF039428AD

IN THE CIRCUIT COURT OF THE FOURTH JUDICIAL CIRCUIT, IN AND FOR DUVAL COUNTY, FLORIDA

CASE NO.: 162013CF5781AXXXMA

DIVISION: CR-D

STATE OF FLORIDA

vs.

DONALD JAMES SMITH

FILED 1001 "13 PM 0304 R FUSSELL

STATE'S THIRD SUPPLEMENTAL DISCOVERY EXHIBIT

A. All court reporters used in depositions and prior sworn statements in this cause, and all witnesses whose names are brought out in depositions.

Category A:

Jerome Burton 11351 West Court Blvd., Jacksonville, FL 32218
Aharon Pearson 7632 Alan Avenue, Jacksonville, FL 32208
Samantha Bray 12100 Lem Turner Road, Jacksonville, FL 32218
Crystal Brookshire 1564 Sairways Acres, Lenoir, NC 28645
Danny Stanton 5144 Trout River Blvd., Jacksonville, FL 32218
Joy L. Gibson (Transient)
B.E. Porter #60852 JSO
B.W. Fussell #6660 JSO

K. Jacksonville Sheriff's Office GOR and Supplemental Reports 1-13, ET Report and Supplemental ET Reports 1-8 (Relating to CCR# 2013-422457).

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by mail, to the Office of the Public Defender, 25 North Market Street, Jacksonville, Florida 32202, this 30th day of Sept., 2013.

ANGELA B. COREY
STATE ATTORNEY

By: _____
Mark Caliel
Bar Number: 0105650
Assistant State Attorney

/mc

STATE OF FLORIDA

VS

DONALD SMITH
Charge: MRD1

ARREST: June 22, 2013

IN THE CIRCUIT COURT, FOURTH JUDICIAL CIRCUIT, IN AND FOR DUVAL COUNTY, FLORIDA.

CASE NO.: 16-2013-CF-005781-AXXX-MA

DIVISION: CR- D

CCR NO: 20130422457

Subpoena
FOR DEPOSITION

The State of Florida:

TO: JANICE WILKERSON
COMMERCIAL WAREHOUSING
1704 HURON AVE V add
JACKSONVILLE, FL 32254

YOU ARE COMMANDED to appear before a person authorized by law to take depositions, at the State Attorney's Office, 220 East Bay Street, City Hall Annex,, Jacksonville, Florida, in the **1st FLOOR DEPOSITION ROOMS**, on November 21, 2013 at 2:30 P.M. for the taking of your deposition in this action.

YOU MUST HAVE PHOTO ID WITH YOU

If you have a **SERIOUS** problem attending the deposition on the date and at the time scheduled, please call the number at the bottom left-hand corner. **REMEMBER**, this is a court order. If we can't reschedule **YOU MUST APPEAR.** Please review any reports or other documents you may have regarding this matter so that your deposition can be expedited.

IN THE EVENT THE SCHEDULED DATE OF YOUR DEPOSITION IS CONTINUED, YOU SHALL REMAIN UNDER SUBPOENA FROM DAY TO DAY, WEEK TO WEEK, UNTIL YOU ARE EXCUSED BY THE BELOW LISTED ATTORNEY. YOU WILL BE NOTIFIED OF THE NEW DEPOSITION DATE IF THE DEPOSITION IS CONTINUED.

You are subpoenaed to appear by the following attorney and unless excused from this subpoena by the attorney or the Court, you must respond to this subpoena as directed. If you fail to appear, you shall be in contempt of Court.

☐ CW

FRED C. GAZALEH 353787
Attorney for Defendant
Office of the Public Defender
407 North Laura Street
Jacksonville, Florida 32202
(904) 255-4650
/BBH

SUBPOENA SERVICE RETURN
MATT SHIRK
PUBLIC DEFENDER
4TH JUDICIAL CIRCUIT
STATE OF FLORIDA

AS

DATE 11/8/13 TIME 9am
SERVED TO Numerical
Does not exist
BY

PLEASE READ THE IMPORTANT NOTICES ON THE BACK OF THIS SUBPOENA

2013011249

AFFIDAVIT OF NON SERVICE
For Public Defenders Office

Case No.: 16-2013-CF-005781-AXXX-MA
Div: CR-D

FOURTH JUDICIAL CIRCUIT
DUVAL COUNTY, FLORIDA

STATE OF FLORIDA

Vs.

DONALD SMITH
Charge: MRD1
_____/

For: Fred Gazaleh

Received by Michael Hurst Criminal Investigations on November 5th 2013, at 3:00 p.m., to be served on JANICE WILKERSON, Commercial Warehousing, 1704 Huron Ave., Jacksonville, Fl 32254

I, Mike Hurst, who, being duly sworn, depose and say that I did attempt to serve a copy of the Subpoena For Deposition, according to state statutes in the manner marked below:

(X) NON SERVICE: November 8th, 2013 - 9:00 a.m. - Unable to locate this numerical. There are various warehouses in this area but not have this address.

MIKE HURST, #777
Special Process Server
Appointed Per 48.021 (2)(A)(3)(4) F.S.

Michael Hurst Criminal Investigations
118 West Adams Street, Suite 500
Jacksonville, Florida 32202
904-354-4499 ext. 101

JACKSONVILLE SHERIFF'S OFFICE
FLORIDA
OFFICE OF THE SHERIFF
JACKSONVILLE POLICE
541672
CIVIL PROCESS UNIT

Electronically Filed 11/20/2013 10:16:36 AM ET

IN THE CIRCUIT COURT, FOURTH JUDICIAL CIRCUIT, IN AND FOR DUVAL COUNTY, FLORIDA.

CASE NO.: 2013-005781-CFA

DIVISION: CRD

STATE OF FLORIDA

VS.

DONALD SMITH

MOTION FOR MORE DEFINITE ADDRESS

Defendant, Donald Smith, by and through the undersigned attorney, the Public Defender for the Fourth Judicial Circuit of Florida, moves this Honorable Court to order the State Attorney to provide a more definite address for the following State witnesses. As grounds Defendant states the following:

1. Defendant attempted to locate the following witnesses listed by the State Attorney:

   Aharon Pearson 7032 Alan Ave Jacksonville, Florida 32208.

   Danny Stanton 5144 Trout River Blvd. Jacksonville, Florida 32208.

   Charles Shehen 2495 Segovia Ave. Jacksonville, Florida 32217.

   Janice Wilkerson 1704 Huron Ave. Jacksonville, Florida 32254.

2. Defendant could not locate said witnesses at the above addresses.

3. In order to prepare a defense, it is necessary for Defendant to locate the above witnesses to discuss their knowledge of the case, or serve a subpoena.

WHEREFORE, Defendant respectfully requests an order compelling the State Attorney to furnish a more definite address as to the above mentioned witnesses.

I HEREBY CERTIFY that a copy of the above and foregoing Motion for More Definite Address has been furnished to the Office of the State Attorney, by hand and/or electronically, this _____ day of November, 2013.

Respectfully submitted,

MATT SHIRK
PUBLIC DEFENDER

BY: _____
Fred C. Gazaleh
Assistant Public Defender

FCG/rls

IN THE CIRCUIT COURT, FOURTH JUDICIAL CIRCUIT, IN AND FOR DUVAL COUNTY, FLORIDA.

CASE NO.: 16 2013 CF 005781 AXXX MA

DIVISION: CR-D

STATE OF FLORIDA

VS.

DONALD JAMES SMITH

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I HEREBY CERTIFY that a copy of the above and foregoing Capital Case Motion Index has been furnished to the Office of the State Attorney, by hand and/or electronically, this 10 day of December, 2013.

Respectfully submitted,

MATT SHIRK
PUBLIC DEFENDER

BY: _____
Fred C. Gazaleh, #353787
Assistant Public Defender

/slc
(CAP000)

IN THE CIRCUIT COURT, FOURTH JUDICIAL CIRCUIT, IN AND FOR DUVAL COUNTY, FLORIDA.

CASE NO.: 16 2013 CF 005781 AXXX MA

DIVISION: CR-D

STATE OF FLORIDA

VS.

DONALD JAMES SMITH

MOTION IN LIMINE RE: GRAND JURY

The Defendant, by and through his undersigned counsel, moves pursuant to Section 90.401 and 90.403 that this Court enter an Order prohibiting the State Attorney, his assistants, witnesses, and agents from commenting on, in the presence of the jury, that the Indictment filed against the Defendant was returned by Grand Jurors of Duval County. As grounds therefore, the Defendant states as follows:

1. That Defendant is charged in the above-styled cause with First Degree Murder.

2. The defense has reason to believe the State and/or its' witnesses may argue or comment on the fact that an Indictment filed against the Defendant was returned by the Grand Jurors of Duval County.

3. Such argument or comment tends to impress upon the jury that their fellow citizens have already determined that the Defendant is guilty.

4. There is no prejudice to the State of Florida in prohibiting such comments.

5. Such argument or comments has no probative value.

6. Such argument or comment is irrelevant and does not tend to prove or disprove a material fact in the above-styled cause.

7. Such argument or comment is highly prejudicial.

8. Such argument or comment will only confuse the Jury. Many members on a jury panel do not understand the difference between a Grand Jury and a Petit Jury.

9. Such argument or comment violates the Defendant's rights to Due Process, a fair trial, effective assistance of counsel and a reliable sentencing determination in violation of the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution and Article I, Sections 2, 9, 16, 17 and 22 of the Florida Constitution.

WHEREFORE, the Defendant requests this Court to enter an Order prohibiting the State Attorney, his assistants, witnesses and agents from commenting, in the present of the Jury, that the Indictment filed against the Defendant was returned by the Grand Jurors of Duval County.

I HEREBY CERTIFY that a true and correct copy of the above Motion In Limine RE: Grand Jury has been furnished to the Office of the State Attorney, by hand and/or electronically, this 10 day of December, 2013.

Respectfully submitted,

MATT SHIRK
PUBLIC DEFENDER

BY: _____
Fred C. Gazaleh, #353787
Assistant Public Defender

/slc

(CAP011)

IN THE CIRCUIT COURT, FOURTH JUDICIAL CIRCUIT, IN AND FOR DUVAL COUNTY, FLORIDA.

CASE NO.: 16 2013 CF 005781 AXXX MA

DIVISION: CR-D

STATE OF FLORIDA

VS.

DONALD JAMES SMITH

DEMAND FOR DISCLOSURE OF FAVORABLE EVIDENCE

Donald James Smith, by and through his undersigned attorney, demands that the State disclose to the defense all evidence favorable to the Defendant that now or in the future is possessed or controlled by the State of Florida and its agents, specifically including but not limited to the following information:

1. All material information in the State's possession or control (constructive or actual) that tends to negate the Defendant's guilt of any crime for which Defendant has been convicted.

2. All material evidence or information in the State's possession or control (constructive or actual) that may reasonably be considered admissible and useful to the defense in the sense that it is probably material and exculpatory regardless of whether such information is deemed to be the work product of the prosecutor or otherwise subject to discovery as a public record.

3. All evidence in the actual or constructive possession of the State that is favorable to Defendant and material to the issue of guilt or punishment in this case, specifically including but not limited to the following material:

A. Any oral, written or recorded statements made by any person(s) to the police, to the State Attorney, or to the Grand Jury that tends to establish the innocence or mitigate the punishment of the Defendant, or that tends to impeach the credibility or contradict the testimony of any witness whom the State will call during this case.

B. Any reports made to the police that tend to establish the innocence or mitigate the punishment of the Defendant, or tends to impeach the credibility or contradict the testimony of any witness whom the State will call as a witness during this case.

C. The names and addresses of witnesses who might establish the innocence or mitigate the punishment of the Defendant, or impeach the credibility or contradict the testimony of any witness whom the State calls as a witness during this case.

D. Any information or material that tends to establish the innocence or mitigate the punishment of the Defendant, or impeach the credibility or contradict the testimony of any witness whom the State calls as a witness in this case.

E. Any scientific or medical report that tends to establish the innocence or mitigate the punishment of the Defendant, or to impeach the credibility or contradict the testimony of any witness whom the State calls as a witness during this case.

F. The substance of any and all statements, agreements, offers or discussions had with any of the State's witnesses, including any suggestion of lenience, compensation, assurance not to prosecute, assurance to proceed only on certain causes, or suggestion of any other benefit accruing to said individual whatsoever in exchange for their cooperation, assistance of testimony in the case herein;

G. The substance of any and all consideration or promise(s) of consideration given to or made on behalf of government witnesses. By "consideration," the Defendant refers to absolutely anything of value or use including but not limited to money, immunity grants, witness fees, special witness fees, transportation assistance, assistance or favorable treatment with respect to any criminal, civil, tax court, or administrative dispute, and anything else which could arguably create an interest, incentive or bias in the witness in favor of the State or against the defense or that could reasonably act as an inducement to testify or to color testimony;

H. Any and all prosecutions, investigations or possible prosecutions pending or which could be brought against any witness that testifies for the State in this case, and any probationary, parole or deferred prosecution status of any State witness;

I. All records and material information revealing felony convictions attributed to State witnesses.

MEMORANDUM OF LAW – STATEMENT OF MATERIAL FACTS:

The State of Florida filed notice under Florida Rule of Criminal Procedure 3.202 that it is here seeking imposition of capital punishment. Defendants are eligible for the death penalty in Florida only if they have committed first-degree murder under §782.04, Fla. Stat., only if there are "sufficient aggravating circumstances" listed in §921.141(5), Fla. Stat., that exist beyond a reasonable doubt, and only if that aggravation is not outweighed by "sufficient mitigating circumstances." §921.141(2) & (3), Fla. Stat.

The process of imposing capital punishment ultimately depends on weighing statutory aggravating circumstances against mitigating circumstances. State v. Dixon, 283 So.2d 1 (Fla. 1973). In that regard, the judge and jury may consider the evidence and testimony presented at trial and the penalty phase. Thus, the information that is required to enable defense counsel to investigate, to present a meaningful defense and to confront accusers under the Fifth, Sixth and Fourteenth Amendments and article I, sections 2, 9, 16 and 22 of the Florida Constitution is dependent on timely receipt of relevant information pertaining to the moral and legal culpability of the Defendant. Disclosure by the State of information relevant and material this Defendant's guilt and/or to mitigate his punishment is required by the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution and article I, sections 2, 9, 16, 17 and 22 of the Florida Constitution.

The Defendant hereby makes an express demand for information that must be disclosed by the government – a mandatory requirement that is now firmly established and widely recognized:

> As long ago as Mooney v. Holohan, 294 U.S. 103, 112, 55 S.Ct. 340, 342, 79 L.Ed. 791 (1935), this Court made clear that deliberate deception of a court and jurors by the presentation of known false evidence is incompatible with "rudimentary demands of justice." This was reaffirmed in Pyle v. Kansas, 317 U.S. 213, 63 S.Ct. 177, 87 L.Ed 214 (1942). In Napue v. Illinois, 360 U.S. 264, 79 S.Ct. 1173, 3 L.Ed.2d 1217 (1959), we said, "(t)he same result obtains when the State, although not soliciting false evidence, allows it to go uncorrected when it appears." *Id*, at 269, 79 S.Ct., at 1177. Thereafter Brady v. Maryland, 373 U.S., at 87, 83 S.Ct., at 1197, held that suppression of material evidence justifies a new trial "irrespective of the good faith or bad faith of the prosecution." See American Bar Association, Project on Standards for Criminal Justice, Prosecution Function and the

> Defense Function s 3.11(a). When the "reliability of a given witness may well be determinative of guilt or innocence," nondisclosure of evidence affecting credibility falls within this general rule. Napue, supra, at 269, 79 S.Ct., at 1177. We do not, however, automatically require a new trial whenever "a combing of the prosecutors' files after the trial has disclosed evidence possibly useful to the defense but not likely to have changed the verdict . . .." United States v. Keogh, 391 F.2d 138, 148 (CA2 1968). A finding of materiality of the evidence is required under Brady, supra, at 87, 83 S.Ct., at 1196, 10 L.Ed.2d 215. A new trial is required if "the false testimony could . . . in any reasonable likelihood have affected the judgment of the jury . . ." Napue, supra, at 271, 79 S.Ct. at 1178.

Giglio v. United States, 405 U.S. 150, 153-154 (1972). See Strickler v. Greene, 527 U.S. 263, 281-282 (1999) (prosecutor's failure to disclose exculpatory information contained within police files violated due process clause of Fourteenth Amendment); Kyles v. Whitley, 514 U.S. 419 (1995) (prosecutor's failure to disclose impeachment information known to prosecutor violated due process clause of Fourteenth Amendment); Brady v. Maryland, 373 U.S. 83, 86 (1963) (prosecutor's suppression of co-defendant's confession violated due process clause of Fourteenth Amendment); Napue v. Illinois, 360 U.S. 264, 269-270 (1959) (prosecutor's failure to correct false testimony of witness that no leniency was promised by the government in return for his testimony violated due process clause of the Fourteenth Amendment).

Florida prosecutors unfortunately have a long track record of *openly* ignoring ethical requirements and engaging in the concealment of information favorable to the accused while prosecuting capital cases despite repeated admonishments from the Florida Supreme Court:

> We do not find the misconduct here to be so outrageous as to taint the validity of the jury's recommendation in light of the evidence of aggravation presented. Nonetheless, we are deeply distrubed [sic] as a Court by the continuing violations of prosecutorial duty, propriety and restraint. We have recently addressed incidents of prosecutorial misconduct in several death penalty cases. Bush v. State, 461 So.2d 936, 942 (Fla. 1984) (Ehrlich, J., specially concurring), Jennings; Teffeteller v. State. As a Court, we are constitutionally charged not only with appellate review but also "to regulate ... the discipline of persons admitted" to the practice of law. Art. V, § 15, Fla. Const. This Court considers this sort of

> prosecutorial misconduct, in the face of repeated admonitions against such overreaching, to be grounds for appropriate disciplinary proceedings. It ill becomes those who represent the state in the application of its lawful penalties to *themselves* ignore the precepts of their profession and their office. Nor may we encourage them to believe that so long as their misconduct can be characterized as "harmless error," it will be without repercussion. However, it is appropriate that individual professional misconduct not be punished at the citizens' expense, by reversal and mistrial, but at the attorney's expense, by professional sanction.

Bertolotti v. State, 476 So.2d 130, 133-134 (Fla.1985) (Emphasis in original). The admonishment given in Bertolotti is typical to others that followed, but they have done little to prevent prosecutors from far exceeding the bounds of ethical conduct:

> The present case is precisely the scenario we feared in Hill [v. State, 477 So.2d 553 (Fla. 1985)] – a bitterly contested swearing match between competing witnesses, including eyewitnesses on both sides, where a defendant's life hangs in the balance.
>
> In spite of our admonishment in Hill and despite subsequent warnings that prosecutorial misconduct will be subject to disciplinary proceedings of The Florida Bar, we nevertheless continue to encounter this problem with unacceptable frequency. The present case follows on the heels of another misconduct case and is one of the worst examples we have encountered. The conduct of prosecutors Cox and Goudie was both egregious and inexcusable. The prosecutors crossed the line of zealous advocacy by a wide margin and compromised the integrity of the proceeding."

Ruiz v. State, 743 So.2d 1, 9-10 (Fla. 1999) (Footnotes omitted).

Florida prosecutors have a long history of *secretly* engaging in improper conduct during the prosecution of capital cases by coaching state witnesses, e.g., Rogers v. State, 782 So.2d 373, 378 (Fla. 2001), withholding material criminal investigation reports of co-defendants who are key witnesses in the State's case, e.g., Cardona v. State, 826 So.2d 968, 981 (Fla. 2002) ("When a particular witness is crucial to the State's case, evidence of coaching is especially material to that witness's credibility."), failing to disclose a witness who comes forward with relevant testimony helpful to the defense during trial, e.g., State v. Huggins, 788 So.2d 238, 244 (Fla. 2001) (suppressing of potentially helpful testimony resulted in a jury verdict not worthy of

confidence), failing to disclose crucial information that would be helpful in cross-examining a key State witness, e.g., Mordenti v. State, 894 So.2d 161 (Fla. 2004) (prosecutor withheld witness's date book as well as crucial information obtained during the State's interview with a key witness); and, even failing to disclose eye-witnesses to a crime who gave different accounts than other witnesses whose names were provided. E.g., Floyd v. Sate, 902 So.2d 775 (Fla. 2005). See also, Giles v. Maryland, 386 U.S. 66 (1967); Napue v. Illinois, 360 U.S. 264 (1959); Giglio v. United States, 405 U.S. 150 (1972); Ashley v. Texas, 319 F.2d 80 (5th Cir.), *cert. denied*, 375 U.S. 931 (1963); State v. Gillespie, 227 So.2d 550 (Fla. 2d DCA 1969); State v. Crawford, 257 So.2d 898 (Fla. 1972); Matera v. State, 254 So.2d 843 (Fla. 3d DCA 1971); Hernandez v. State, 348 So.2d 1224 (Fla. 3d DCA 1977); and Antone v. State, 355 So.2d 777 (Fla. 1978). The prosecution is hereby put on notice that the information here requested must be disclosed.

It is clear that, in the context of imposition of capital punishment, the presentation of evidence that diminishes the weight of an aggravating circumstance is an integral component of the right to effective assistance of counsel and a reliable sentencing determination:

> With every effort to view the facts as a defense lawyer would have done at the time, it is difficult to see how counsel could have failed to realize that without examining the readily available file they were seriously compromising their opportunity to respond to a case for aggravation. *The prosecution was going to use the dramatic facts of a similar prior offense, and Rompilla's counsel had a duty to make all reasonable efforts to learn what they could about the offense. Reasonable efforts certainly included obtaining the Commonwealth's own readily available file on the prior conviction to learn what the Commonwealth knew about the crime, to discover any mitigating evidence the Commonwealth would downplay and to anticipate the details of the aggravating evidence the Commonwealth would emphasize*. Without making reasonable efforts to review the file, defense counsel could have had no hope of knowing whether the prosecution was quoting selectively from the transcript, or whether there were circumstances extenuating the behavior described by the victim.

Rompilla v. Beard, 545 U.S. 374. 125 S.Ct. 2456, 2465 (2005) (Emphasis added). In Rompilla, the Court recognized that there is a duty of defense counsel to obtain information of prior crimes committed by the defendant in order to effectively "downplay" the aggravation if possible.

Therefore, this Demand specifically requests that the State disclose all information that tends to mitigate prior crimes.

WHEREFORE, a specific demand for the above-stated information and the disclosure of this information is constitutionally compelled as a matter of due process, fundamental fairness, the right to a fair trial and an "acute need for reliable fact finding" under article I, sections 2, 9, 16, 17 and 22 of the Florida Constitution and Amendments V, VI, VIII and XIV of the United States Constitution.

I HEREBY CERTIFY that a copy of the above has been furnished to the Office of the State Attorney, by hand and/or electronically, this 10 day of December, 2013 .

Respectfully submitted,

MATT SHIRK
PUBLIC DEFENDER

BY: _____
Fred C. Gazaleh, #359787
Assistant Public Defender

/slc

(CAP015)

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IN THE CIRCUIT COURT, FOURTH JUDICIAL CIRCUIT, IN AND FOR DUVAL COUNTY, FLORIDA.

CASE NO.: 16 2013 CF 005781 AXXX MA

DIVISION: CR-D

STATE OF FLORIDA

VS.

DONALD JAMES SMITH

DEFENDANT'S NOTICE CONCERNING TRIAL OBJECTIONS

Defendant hereby gives notice to the Court and Prosecutor that during trial, whenever he argues or refers to provisions of the Florida Constitution or cases which discuss provisions of the Florida Constitution, he intends that his arguments and references should be interpreted as including the comparable provisions of the United States Constitution, even if those are not specifically mentioned in argument.

In addition, whenever he argues or refers to provisions of the United States Constitution or cases which discuss provisions of the United States Constitution, he intends that his arguments and references should be interpreted as including the comparable provisions of the Florida Constitution, even if those are not specifically mentioned in argument.

By way of example, the rights set out below are protected under both constitutions by the provisions described:

	U.S. Constitution	Florida Constitution
Due Process	5th & 14th Amend.	A. 1, S. 9
Self-incrimination	5th & 14th Amend.	A. 1, S. 9
Equal Protection	14th Amendment	A. 1, S. 2
Fair Trial/Confrontation	6th & 14th Amend.	A. 1, S. 16
Effective Assistance	6th & 14th Amend.	A. 1, S. 16
Jury Trial/Fair Cross Section	6th & 14th Amend.	A. 1, S. 16 & 22
Cruel and Unusual Punishment	8th & 14th Amend.	A. 1, S. 17
Unreasonable Search & Seizure	4th & 14th Amend.	A. 1, S. 12
Double Jeopardy	5th & 14th Amend.	A. 1, S. 9

Defendant further requests that if the Court or Prosecutor object to this notice, a hearing be held.

I HEREBY CERTIFY that a copy of the above and foregoing has been furnished to the Office of the State Attorney, by hand and/or electronically, this 10 day of December, 2013.

Respectfully submitted,

MATT SHIRK
PUBLIC DEFENDER

BY: _____
Fred C. Gazaleh #353787
Assistant Public Defender

/slc

(CAP013)

IN THE CIRCUIT COURT, FOURTH JUDICIAL CIRCUIT, IN AND FOR DUVAL COUNTY, FLORIDA.

CASE NO.: 16 2013 CF 005781 AXXX MA

DIVISION: CR-D

STATE OF FLORIDA

VS.

DONALD JAMES SMITH

REQUEST FOR FAVORABLE
EVIDENCE IN PENALTY PHASE

Defendant requests the State to produce, and/or notify defense of any evidence tending to show favorably for Defendant. Defendant is entitled to this information under the Fifth, Eighth and Fourteenth Amendments to the United States Constitution, Article I Sections 9 and 17, of the Florida Constitution, and the rulings in Brady v. Maryland, 83 S.Ct. 1194 (1963), and United States v. Agurs, 427 U.S. 97 (1976).

I HEREBY CERTIFY that a copy of the above has been furnished to the Office of the State Attorney, by hand and/or electronically, this 10 day of December, 2013.

Respectfully submitted,

MATT SHIRK
PUBLIC DEFENDER

BY: _____
Fred C. Gazaleh, #383787
Assistant Public Defender

/slc

(CAP077)

IN THE CIRCUIT COURT, FOURTH JUDICIAL CIRCUIT, IN AND FOR DUVAL COUNTY, FLORIDA.

CASE NO.: 16 2013 CF 005781 AXXX MA

DIVISION: CR-D

STATE OF FLORIDA

VS.

DONALD JAMES SMITH

MOTION FOR STATEMENT OF PARTICULARS POST-INDICTMENT

Defendant, Donald James Smith, by and through the undersigned attorney, the Public Defender for the Fourth Judicial Circuit of Florida, pursuant to Rule 3.140(n) and Rule 3.140(k)(5) Florida Rules of Criminal Procedure, respectfully moves this Honorable Court to order the State of Florida to file a written statement of particulars with the Court specifying as definitely as possible the place, date, time and any offenses alleged to be underlying offenses for a felony murder charge based upon the First Degree Premeditated Murder Indictment returned against Donald James Smith on July 2, 2013. This information is necessary in order that the Defendant may sufficiently prepare a defense against the charges alleged in the Indictment and reduce any danger of a Defendant being in doubt as to the specifics of his alleged wrongdoing.

I HEREBY CERTIFY that a copy of the above and foregoing Motion for Statement of Particulars has been furnished to the Office of the State Attorney, by hand and/or electronically, this 10 day of December, 2013.

Respectfully submitted,

MATT SHIRK
PUBLIC DEFENDER

BY: _____
Fred C. Gazaleh, #353787
Assistant Public Defender

/slc
(CAP034)

IN THE CIRCUIT COURT, FOURTH JUDICIAL CIRCUIT, IN AND FOR DUVAL COUNTY, FLORIDA.

CASE NO.: 16 2013 CF 005781 AXXX MA

DIVISION: CR-D

STATE OF FLORIDA

VS.

DONALD JAMES SMITH

DEFENDANT'S REQUEST FOR TRIAL COURT TO STATE BASIS OF ITS RULINGS

The Defendant, through undersigned counsel, requests that this Court state on the record and/or include in its written Orders the basis of its rulings when denying the motions and objections filed by the Defendant, including making specific findings of law and/or fact, based on the following:

1. The Defendant is charged with First-Degree Premeditated Murder.

2. The State has filed notice of its intent to seek the death penalty pursuant to Section 921.141, Florida Statutes (2001).

3. There is mandatory appeal of the imposition of capital punishment, and that appellate review cannot be waived. § 921.141(4), Florida Statutes. See Klokoc v. State, 589 So.2d 219 (Fla. 1991) (Florida Supreme Court rejects defendant's attempt to dismiss the direct appeal of his death sentence and requires adversarial briefing by the defendant's counsel).

4. Under § 921.141(3), Florida Statutes, the trial court is required to make findings of fact when it imposes a sentence of death:

> **Findings in support of sentence of death.** -- Notwithstanding the recommendation of a majority of the jury, the court, after weighing the aggravating and mitigating circumstances, shall enter a sentence of life or death, but if the court imposes a sentence of death, it shall set forth in writing its findings upon which the sentence of death is based as to the facts:
>
> (a) that sufficient aggravating circumstances exist as enumerated in subsection (5), and
>
> (b) That there are insufficient mitigating

> circumstances to outweigh the aggravating circumstances.
>
> In each case in which the court imposes the death sentence, the determination of the court shall be supported by specific written findings of fact based upon the circumstances in subsections (5) and 6) and upon the records of the trial and the sentencing proceedings. If the court does not make the findings requiring the death sentence within 30 days after rendition of the judgment and sentence, the court shall impose sentence of life imprisonment in accordance with s. 775.092.

Id. (Emphasis added).

5. The Eighth and Fourteenth Amendments to the United States Constitution proscribe arbitrary, capricious, whimsical and inconsistent imposition of capital punishment.

6. Defendants sentenced to capital punishment in Florida have a liberty interest in receiving Due Process under the Constitution of the State of Florida and Florida Statutes, and that liberty interest includes a meaningful direct appeal of a death sentence.

7. Meaningful, intelligent and consistent appellate review of the imposition of capital punishment includes review of the underlying basis of a trial court's rulings on the constitutionality of Florida's death penalty. Meaningful review cannot occur in the absence of expressly stated findings of fact and conclusions of law by the trial judge, where the Florida Supreme Court demands that specific arguments be made to the trial courts to provide an opportunity for the trial court to cure the putative error. Harrell v. State, 894 So.2d 935, 939-940 (Fla. 2005).

8. The heightened standard of due process and reliability for fact finding required under the Fifth, Eighth and Fourteenth Amendments to the United States Constitution and article I, sections 2, 9, 16 and 17 of the Florida Constitution compel that trial courts, when timely asked, make specific findings of fact when denying motions contesting the constitutionality of Florida's death penalty and the conduct of the trial. See Gardner v. Florida, 430 U.S. 349, 357 (1977); Beck v. Alabama, 447 U.S. 625 (1980); Monge v. California, 524 U.S. 721 (1998).

9. The refusal of a trial court, upon timely and specific request, to state the legal and/or

factual basis of its rulings denies Due Process, is arbitrary and it causes unreliable and inconsistent imposition of capital punishment and prevents meaningful appellate review of trial court rulings in violation of article I, sections 2, 9, 16, 17 and 22 of the Florida Constitution and the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution.

Memorandum of Law and Argument

The United States Supreme Court has explained that "due process" is "flexible" and that it calls for such procedural protections as the particular situation demands:

> We turn, therefore, to the question whether the requirements of due process in general apply to parole revocations. As Mr. Justice Blackmun has written recently, "this Court now has rejected the concept that constitutional rights turn upon whether a governmental benefit is characterized as a 'right' or as a 'privilege.'" Graham v. Richardson, 403 U.S. 365, 374, 91 S.Ct. 1848, 1853, 29 L.E.2d 534 (1971). Whether any procedural protections are due depends on the extent to which an individual will be "condemned to suffer grievous loss." Joint Anti-Fascist Refugee Committee v. McGrath, 341 U.S. 123, 168, 71 S.Ct. 624, 646, 95 L.Ed.2d 817 (1951) (Frankfurter, J., concurring), quoted in Goldberg v. Kelly, 397 U.S. 254, 263, 90 S.Ct. 1011, 1018, 25 L.Ed.2d 287 (1970). The question is not merely the "weight" of the individual's interest, but whether the nature of the interest is one within the contemplation of the "liberty or property" language of the Fourteenth Amendment. Fuentes v. Shevin, 407 U.S. 67, 92 S.Ct. 1983, 32 L.Ed.2d 556 (1972). Once it is determined that due process applies, the question remains what process is due. It has been said so often by this Court and others as not to require citation of authority that due process is flexible and calls for such procedural protections as the particular situation demands. "(C)onsideration of what procedures due process may require under any given set of circumstances must begin with a determination of the precise nature of the government function involved as well as of the private interest that has been affected by governmental action." Cafeteria & Restaurant Workers Uniion V. McElroy, 367 U.S. 886, 895, 81 S.Ct. 1743, 1748, 6 L.Ed.2d 1230 (1961). To say that the concept of due process is flexible does not mean that judges are at large to apply it to any and all relationships. Its flexibility is in its scope once it has been

> determined that some process is due; it is a recognition that not all situations calling for procedural safeguards call for the same kind of procedure.

Morrissey v. Brewer, 408 U.S. 471, 481 (1972). See also, Gagnon v. Scarpelli, 411 U.S. 778, 786 (1973). Where a litigant's life is literally at stake, the highest procedural safeguards are required, as will be explained later. However, as a basic component of due process, every litigant is entitled to an unbiased fact-finder. In that regard, a tribunal that erroneously applies a principle of law to preclude relief is acting under a form of bias that denies due process.

The Florida Supreme Court, as required by Florida statutory law, demand that timely and specific objections be presented to the trial judge to provide an opportunity for error to be corrected in order for error to be preserved for appellate review:

B. The Preservation Requirement

> Both Florida Statutes and our own case law require a defendant to preserve issues for appellate review *by raising them first in the trial court*. Section 924.051, Florida Statutes (2000), addresses the "[t]erms and conditions of appeals and collateral review in criminal cases." It reads in part as follows:
>
> > (3) *An appeal may not be taken from a judgment* or order of a trial court *unless a prejudicial error is alleged and is properly preserved or, if not properly preserved, would constitute fundamental error.* A judgment or sentence may be reversed on appeal only when an appellate court determines after a review of the complete record that prejudicial error occurred and was properly preserved in the trial court, or if not properly preserved, would constitute fundamental error.
>
> § 924.051(3), Fla. Stat. (2000) (emphasis added). Under the statute, "preserved" means an issue or legal argument *timely raised* and ruled on by the trial court, that is "*sufficiently precise that it fairly apprised the trial court of the relief sought and the grounds therefor.*" §

> 924.051(1)(b), Fla. Stat. (2000) (emphasis added).
>
> These statutory provisions are consistent with our holdings requiring preservation of error. Moreover, we consistently have stated that proper preservation entails three components. First, a litigant must make a timely, contemporaneous objection. Second, the party must state a legal ground for that objection. Third, "[i]n order for an argument to be cognizable on appeal, *it must be the specific contention asserted as legal ground* for the objection, exception, or motion below." Steinhorst v. State, 412 So.2d 332, 338 (Fla. 1982) (emphasis added); accord Rodriguez v. State, 609 SO.2d 493, 499 (Fla. 1992) (stating that "the specific legal ground upon which a claim is based must be raised at trial and a claim different than that will not be heard on appeal"). The purpose of this rule is to "place[ ] the trial judge on notice that error may have been committed, and provide[ ] him an opportunity to correct it at an early stage of the proceedings." Castor v. State, 365 So.2d 701, 703 (Fla. 1978). The sole exception to the rule is for fundamental error, which we discuss later.

Harrell v. State, 894 So.2d 935, 939-940 (Fla. 2005). Thus, even where a statute is clearly unconstitutional, the failure of the defendant to make a timely and specific objection on precise grounds waives the issue for direct appeal. See Hodges v. State, 565 So.2d 929 (Fla. 1992) (CCP statute and instruction are not unconstitutionally vague); Hodges v. Florida, 506 U.S. 803 (1992) (remanding case for reconsideration by Florida Supreme Court in light of Espinosa v. Florida, 505 U.S. 1079 (1992); Hodges v. State, 629 So.2d 272 (Fla. 1993) (constitutionality of CCP statute and instruction not preserved by contemporaneous objection, so issue previously rejected on the merits now deemed "waived" due to the absence of a specific objection).

Because the Florida Supreme Court and Florida statutes require that issues be presented to the trial judge, judges must have the authority to grant relief. Otherwise, the requirement to first present an issue to the trial court where no power existed to correct the error is arbitrary, capricious and whimsical in violation of the Eighth and Fourteenth Amendments to the United States Constitution. When a tribunal that has the authority to grant relief but makes a generic ruling of "denied," it is impossible for a reviewing court to determine the underlying basis of the ruling and/or

whether it was an abuse of discretion, a ruling founded on an finding of unsupported fact, or an erroneous application of a legal principle that should not have controlled the exercise of judicial power.

Normally, "it is neither error nor an abuse of discretion for the trial court to fail to include either findings of fact or conclusions of law in its judgment, when not required by statute or rule." Harris v. National Judgment Recovery Agency, Inc., 819 So.2d 850, 854 (Fla. 4th DCA 2002). However, at issue here is the quality of appellate review of capital punishment. But, again, the concept of due process demands that the interests involved be weighed to correctly determine what amount of process is due. Findings of fact and conclusions of law have been required by the Florida Supreme Court to enable meaningful appellate review of far lesser interests than a citizen's life. For example, when the statutory right exists for an award of attorney's fees, e.g., Section 61.16, Florida Statutes, the amount awarded has to be accompanied by specific findings of fact that are mandated by the Florida Supreme Court and not by the statute. See T.G.G. v. P.M.L., 661 So.2d 351, 351 (Fla. 1st DCA 1995) (reversing the judgment of attorney's fees and costs because the trial court failed to make a specific findings required by Florida Patient's Compensation Fund v. Rowe, 472 So.2d 1145 (Fla. 1985) "[e]ven when there is competent, substantial evidence in the record to support a court's award of attorney's fees"); Jones v. Assocs. Fin. Inc. Inc., 565 So.2d 394, 394 (Fla. 1st DCA 1990) (same); Hoffay v. Hoffay, 555 So.2d 1309, 1310 (Fla. 1st DCA 1990) (same); Manuel v. Manuel, 498 So.2d 1369, 1370 (Fla. 1st DCA 1986) (reversing the trial court's order awarding attorney's fees for failure to set forth the specific findings mandated by *Rowe* notwithstanding the fact that the record appeared to contain sufficient evidence to support the trial court's award).

Simply said, appellate courts have required that the lower tribunal articulate findings of fact and conclusions of law because the quality of appellate review is enhanced:

> This case points out a request for assistance that we respectfully wish to make to the trial judges of this district because, uncharacteristically for this trial judge, there were no findings of fact nor conclusions of law in the final judgment. Our request is that findings of fact and

> conclusions of law be included when it is reasonable and feasible to do so. We base this request on our responsibility to provide meaningful appellate review, which is made much more difficult in their absence.

Banks v. Steinhardt, 427 So.2d 1054 (Fla. 4th DCA 1983) (emphasis added).

In the context of the death penalty, the Florida Supreme Court requires trial judges to give notice to defense counsel and to provide them a meaningful opportunity to object to the content of orders being signed by the trial court:

> We confine our review to the issue of whether the circuit court's treatment of Huff's 3.850 motion violated his due process rights. In view of the wide scope of issues raised below and the fact that the death penalty was involved as well as the other circumstances in this case, we agree with Huff that his due process rights were violated. Huff should have been afforded an opportunity to raise objections and make alternative suggestions to the order *before* the judge signed it. As this Court explained in Rose v. State, 601 So.2d 1181, 1183 (Fla. 1992), "[t]he other party should not have to bear the risk of factual oversights or inadvertent negative impressions that might easily be corrected by the chance to present counter arguments."
>
> The State argues that Rose is inapposite to this case because Huff's attorney received a copy of the proposed order. In Rose, the proposed order was sent to Rose's former counsel and his new counsel was never served a copy nor given notice of receipt of the order by the court. *Id.* at 1182 & n. 5. Consequently, Rose was never given an opportunity to review the order or to object to its contents before the court signed the order denying all relief. This Court reversed the order denying Rose's motion for relief. *Id.* at 1184.
>
> Even though the factual circumstances of the instant case are somewhat different from those in Rose, we find that the same due process concerns expressed in *Rose* are also present in this case. Rose was denied due process of law because his counsel was never served a copy of the proposed order; thereby depriving Rose of the

> opportunity to review the order and to object to its contents. In the instant case, CCR received a copy of the proposed order on Friday before the court signed it on Monday. This did not afford Huff a sufficient opportunity to review the order, much less to object to its contents. In fact, according to CCR's presentation at oral argument, Huff's attorneys were in the process of preparing a response to the proposed order when they received the court's signed order. At oral argument, CCR also noted that Huff's attorneys had previously requested a status conference regarding the motion for postconviction relief, but that the court did not grant the conference. "The essence of due process is that fair notice and a reasonable opportunity to be heard must be given to interested parties before judgment is rendered." Scull v. State, 569 So.2d 1251, 1252 (Fla. 1990). We find that Huff was denied due process of law because the court did not give him a reasonable opportunity to be heard.
>
> Because of the severity of punishment at issue in a death penalty postconviction case, we have determined that henceforth the judge must allow the attorneys the opportunity to appear before the court and be heard on an initial 3.850 motion. This does not mean that the judge must conduct an evidentiary hearing in all death penalty postconviction cases. Instead, the hearing before the judge is for the purpose of determining whether an evidentiary hearing is required and to hear legal argument relating to the motion. If this procedure had been followed in the instant case, this Court might not be faced with the issue of whether Huff's due process rights were violated.

Huff v. State, 622 So.2d 982, 983 (Fla. 1993) (All emphasis added) (Footnote omitted).

If a trial court rules incorrectly, the ruling when reviewed by an appellate court is presumed correct and will be disturbed only if it can be demonstrated that error occurred. A ruling can reach a "correct" result albeit through erroneous reasoning, otherwise known as "The Tipsy Coachman" rule. See Robertson v. State, 829 So.2d 901 (Fla. 2002) (Reviewing court finds that the trial court's ruling was correct despite the use of faulty legal reasoning). However, in the absence of stated conclusions of law and findings of fact, an appellate court cannot determine the basis of the trial court's ruling. This denies due process in the first instance because defense counsel is not placed on notice of the

reasoning of the trial court and given a meaningful opportunity to address error. Further, the absence of articulated findings of fact and conclusions of law defeats meaningful appellate review. This process denies Due Process and violates the Fifth and Fourteenth Amendments to the United States Constitution and article I, §§ 2, 9 and 16 of the Florida Constitution. Imposition of capital punishment is rendered unreliable contrary to the Eighth and Fourteenth Amendments to the United States Constitution and article I, § 17 of the Florida Constitution.

The Supreme Court of Florida early on expressly recognized the importance of written findings of fact in the context of imposition of capital punishment:

> The fourth step required by Fla. Stat. §§ 921.141, F.S.A., is that the trial judge justifies his sentence of death in writing, to provide the opportunity for meaningful review by this Court. Discrimination or capriciousness cannot stand where reason is required, and this is an important element added for the protection of the convicted defendant.

State v. Dixon, 283 So.2d 1, 8 (Fla. 1973). See Van Royal v. State, 497 So.2d 625, 628 (Fla. 1986) ("A court's finding of fact as to aggravating and mitigating circumstances constitutes an integral part of the court's decision; they do not merely serve to memorialize it."). Detailed findings of fact and law are now required for all evidentiary hearings in post conviction proceedings of capital cases:

> D) Procedures After Evidentiary Hearing. Immediately following an evidentiary hearing, the trial court shall order a transcript of the hearing which shall be filed within 30 days. Within 30 days of receipt of the transcript, the court shall render its order, ruling on each claim considered at the evidentiary hearing and all other claims raised in the motion, *making detailed findings of fact and conclusions of law with respect to each claim*, and attaching or referencing such portions of the record as are necessary to allow for meaningful appellate review. The order issued after the evidentiary hearing shall resolve all the claims raised in the motion and shall be considered the final order for purposes of appeal. The clerk of the trial court shall promptly serve upon the parties and the attorney general a copy of the final order, with a certificate of service.

Rule 3.851(f)(5)(D), Florida Rules of Criminal Procedure (emphasis added).

The Supreme Court of Florida emphasizes that the same facts should produce the same results. See Slater v. State, 316 So.2d 539, 542 (Fla.1975) ("We pride ourselves in a system of justice that requires equality before the law. Defendants should not be treated differently upon the same or similar facts."). When the underlying factual or legal basis of a court's ruling is not stated, arbitrary and inconsistent results occur.

Even when a trial judge is making *discretionary* rulings, the Supreme Court of Florida is cognizant of the principal that the same facts warrant the same ruling and that a trial court can abuse its discretion by failing to properly consider pertinent facts:

> We cite with favor the following statement of the test for review of a judge's discretionary power:
>
> > Discretion, in this sense, is abused when the judicial action is arbitrary, fanciful, or unreasonable, which is another way of saying that discretion is abused only where no reasonable man would take the view adopted by the trial court. If reasonable men could differ as to the propriety of the action taken by the trial court, then it cannot be said that the trial court abused its discretion.
>
> Delno v. Market Street Railway Company, 124 F.2d 965, 967 (9th Cir. 1942).
>
> In reviewing a true discretionary act, the appellate court must fully recognize the superior vantage point of the trial judge and should apply the "reasonableness" test to determine whether the trial judge abused his discretion. If reasonable men could differ as to the propriety of the action taken by the trial court, then the action is not unreasonable and there can be no finding of an abuse of discretion. The discretionary ruling of the trial judge should be disturbed only when his decision fails to satisfy this test of reasonableness.
>
> The discretionary power that is exercised by a trial judge is not, however, without limitation, *and both appellate and trial judges should recognize the concern which arises from substantial disparities in domestic judgments resulting from basically similar factual circumstances*. The appellate courts have not been helpful in this regard. Our decisions and those of the district courts are difficult, if not impossible, to reconcile. *The trial court's discretionary power is subject only to the test of reasonableness, but that test requires a determination of whether there is logic and justification for the result.* The trial courts' discretionary power was never intended to be exercised in accordance with whim or caprice of the judge nor in an

> inconsistent manner. *Judges dealing with cases essentially alike should reach the same result. Different results reached from substantially the same facts comport with neither logic nor reasonableness.* In this regard, we note the cautionary words of Justice Cardozo concerning the discretionary power of judges:
>
> > The judge, even when he is free, is still not wholly free. He is not to innovate at pleasure. He is not a knight-errant roaming at will in pursuit of his own ideal of beauty or of goodness. He is to draw his inspiration from consecrated principles. He is not to yield to spasmodic sentiment, to vague and unregulated benevolence. He is to exercise a discretion informed by tradition, methodized by analogy, disciplined by system, and subordinated to "the primordial necessity of order in the social life." Wide enough in all conscience is the field of discretion that remains.
>
> B. Cardozo, The Nature of the Judicial Process 141 (1921).

Canakaris v. Canakaris, 382 So.2d 1197, 1203 (Fla. 1980) (Emphasis added). See Files v. State, 586 So.2d 352, 355-356 (Fla. 1st DCA 19910. Insofar as making the findings of fact or law, it is improper for a judge to simply delegate that task. See Patterson v. State, 513 So.2d 1257, 1261 (Fla. 1978). So too, upon a proper request by defense counsel litigating a capital case, where heightened due process is compelled, it becomes unreasonable for any judge to refuse to articulate the factual and legal basis of its rulings and provide defense counsel a meaningful opportunity to address those findings. See Gardner v. Florida, 430 U.S. 349 (1977).

Stating the legal and/or factual basis of a ruling, when asked, is not an onerous task. If a trial court believes that its decision is required by controlling precedent, that precedent can easily be referenced by the court when a motion is granted or denied. If a matter has not been adequately proved to exist, that too can be easily stated. Doing so enables the reviewing court to determine whether the trial court made a correct ruling as a matter of fact or law. If the trial court did not make a correct ruling in the context of imposition of capital punishment, the error deserves meaningful appellate scrutiny and at a minimum the application of a meaningful harmless error analysis.

The Fifth and Fourteenth Amendments to the United States Constitution, article I, §§ 2, 9 and 16 of the Florida Constitution at a minimum guarantee a meaningful opportunity to be heard by an

unbiased finder of fact:

> Fundamental to the concept of due process is the right to be heard. *See* Fuentes v. Shevin, [407 U.S. 67, 80 (1972)]. The right to be heard assures a full hearing before a court having jurisdiction of the matter, the right to introduce evidence at a meaningful time and in a meaningful manner, and judicial findings based upon that evidence. *See, e.g.,* Pine v. State, 921 S.W. 2d 866 (Tex. App.1996). "It includes also an opportunity to cross-examine witnesses, to be heard on questions of law, and the right to have judgment rendered after trial". *Id* at 873.

Brinkley v. County of Flagler, 769 So.2d 468 (Fla. 5th DCA 2000); See Mathews v. Eldridge, 424 U.S. 319, 334 (1976) ("Due process is . . . not a technical conception with a fixed conception unrelated to time, place and circumstances."); Armstrong v. Manzo, 380 U.S. 545 (1965). A meaningful opportunity to be heard is denied if a trial judge erroneously believes that, pursuant to Hoffman v. Jones, 280 So.2d 431 (Fla. 1973) and as a matter of law, the court is bound by a case that is in actuality factually distinct from the one before the court. The defendant is prejudiced by the unnecessary concealment of the fact that the judge who is to rule on an issue in a capital case, with the power to grant relief, is not neutral and is in fact biased. The bias is real because a court that erroneously concludes that it does not have the power to rule because of controlling precedent is absolutely biased against the argument being presented. The prejudice exists because appellate courts presume that trial courts rule correctly and the burden is on the appellant to demonstrate error. See City of West Palm Beach v. Ryder, 73 Fla. 558, 563, 74 So. 603, 604 (1917) ("As we have also frequently held, 'Every presumption is in favor of an order or decree rendered by a circuit court, and the burden rests upon one appealing from such order or decree to overcome this presumption of law.") (Citation omitted).

The presumption of correctness on appeal denies Due Process where an incorrect application of law made by the trial court avoids meaningful appellate review because a finding of fact precluded by a mistake as a matter of law rather than by sufficiency of proof is affirmatively concealed by the

presumption of correctness that attends trial court rulings. Insofar as determinations of fact, the trial judge is in the best position to determine the credibility of witnesses and/or apply the law to the facts it finds. The right to Due Process, a reliable sentence and meaningful appellate review is thwarted when the basis of the trial court's rulings are not articulated on the record when a timely and specific request is made that it be done. Even rulings of law that are erroneous, such as abuses of discretion or infringements on the exercise of constitutional rights, are affirmatively concealed by the absence of the reasons for the ruling being stated.

The heightened procedural due process concerns that attend imposition of capital punishment require that the trial court, when asked, articulate the legal and factual basis of its ruling. Specifically, the state and federal courts recognize that "death is different." See Amendments to Fla.R.Crim.P. & Fla.R.App.P., 875 So.2d 563, 568 (Fla. 2004) (Cantero, J., concurring) ("As we have repeatedly recognized, 'death is different.'"); Chamberlain v. State, 881 So.2d 1087, 1108 (Fla. 2004) ("On this issue as on many others, death is different.").

> "[D]eath is a different kind of punishment from any other which may be imposed in this country. . . . From the point of view of the defendant, it is different in both its severity and its finality. From the point of view of society, the action of the sovereign in taking the life of one of its citizens also differs dramatically from any other legitimate state action. It is of vital importance to the defendant and to the community that any decision to impose the death sentence be, and appear to be, based on reason rather than caprice or emotion." (Citation omitted).

Gardner v. Florida, 430 U.S. 349, 357 (1977). Heightened standards of due process are undoubtedly required by the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution whenever a state seeks to impose capital punishment in order to insure reliable imposition of an irrevocable penalty:

> . . . *Because the death penalty is unique "in both its severity and its finality,"* [Gardner v. Florida, 430 U.S. 349] at 357, 97 S.Ct., at 1204, *we have recognized an acute need for reliability in capital sentencing*

> *proceedings*. See Lockett v. Ohio, 438 U.S. 586, 604, 98 S.Ct. 2954, 2964, 57 L.Ed.2d 973 (1978) (opinion of Burger, C.J.) (stating that the "qualitative difference between death and other penalties calls for a greater degree of reliability when the death sentence is imposed"); see also Strickland v. Washington, 466 U.S. 668, 704, 104 S.Ct. 2052, 2073, 80 L.Ed.2d 674 (1984) (Brennan, J., concurring in part and dissenting in part) ("[W]e have consistently required that capital proceedings be policed at all stages by an especially vigilant concern for procedural fairness and for the accuracy of factfinding").

Monge v. California, 524 U.S. 721, 118 S.Ct. 2246, 2252 (1998) (Emphasis added).

The Florida Supreme Court agrees that courts have a duty to adopt procedural safeguards that promote reliable and consistent imposition of capital punishment. See Arvelaez v. Butterworth, 738 So.2d 326, 326-27 (Fla.1999) ("We acknowledge we have a constitutional responsibility to ensure the death penalty is administered in a fair, consistent *and reliable manner* . . . ") (emphasis added). The enhanced due process requirements apply to the proceedings that initially determine the question of guilt as well as to the proceedings that determine whether the death penalty should be imposed:

> To insure that the death penalty is indeed imposed on the basis of "reason rather than caprice or emotion," we have invalidated procedural rules that tended to diminish the reliability of the sentencing determination. The same reasoning must apply to rules that diminish the reliability of the guilt determination. Thus, if the unavailability of a lesser included offense instruction enhances the risk of an unwarranted conviction, Alabama is constitutionally prohibited from withdrawing that option from the jury in a capital case.

Beck v. Alabama, 447 U.S. 625, 637-638 (1980).

The United States Constitution and the Florida Constitution expressly guarantee that due process will be provided to citizens charged all crimes. Specifically, the Fifth Amendment to the United States Constitution states:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual

> service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

The Fourteenth Amendment to the United States Constitution provides:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Article I, section 9 of the Florida Constitution provides that "No person shall be deprived of life, liberty or property without due process of law, or be twice put in jeopardy for the same offense, or be compelled in any criminal matter to be a witness against oneself."

Article I, section 16(a) of the Florida Constitution states:

> In all criminal prosecutions the accused shall, upon demand, be informed of the nature and cause of the accusation, and shall be furnished a copy of the charges, and shall have the right to have compulsory process for witnesses, to confront at trial adverse witnesses, to be heard in person, by counsel or both, and to have a speedy and public trial by an impartial jury nit he county were the crime was committed. If the county is not known, the indictment or information may charge venue in two or more counties conjunctively and proof that the crime was committed in that area shall be sufficient; but before pleading the accused may elect in which of those counties the trial will take place. Venue for prosecution of crimes committed beyond the boundaries of the state shall be fixed by law.

Article I, section 2, Florida Constitution (1976).

The foregoing are basic constitutional guarantees of due process for criminal defendants in Florida. Fundamental fairness and the increased need for reliability in the fact finding process driven by the Eighth and Fourteenth Amendments to the United States Constitution requires that other fundamental constitutional rights be provided as a component of Due Process in the context of imposition of capital punishment, such as the Sixth Amendment right to effective assistance of counsel. See Gideon v. Wainwright, 372 U.S. 335, 341-345 (1963) (Right to counsel required by due process); see also Rompilla v. Beard, 545 U.S. 387. Case 04-5462 (June 20, 2005); Wiggins v. Smith, 539 U.S. 510 (2003).

As noted, "due process" is not a static concept. Rather, it "is flexible and calls for such procedural protections as the particular situation demands." Morrissey v. Brewer, 408 U.S. 471, 481 (1972). The need for heightened reliability in the context of capital punishment has therefore driven the evolution of proceedings and procedures that have become necessary to satisfy Due Process. For example, in capital cases, states are constitutionally required to provide the jury with an option to convict a defendant of a lesser crime unless that procedure is knowingly, voluntarily and intentionally waived by the defendant. Beck v. Alabama, 447 U.S. 625, 638 (1980). That procedure is not employed in non-capital cases. See Jones v. State, 484 So.2d 577, 579 (Fla. 1986) ("While we acknowledged in *Harris* [*v. State*, 438 So.2d 787 (Fla. 1985)] the fundamentality of the right to such instructions to due process in the capital context, we here decline to apply that case's requirement of an express personal waiver outside of the context in which it was found necessary. As petitioner himself suggests, due process is not a technical conception of fixed content unrelated to time, place and circumstances.").

Unlike mandatory minimums, state legislatures cannot pass laws requiring the "automatic" imposition of capital punishment. Sumner v. Shuman, 483 U.S. 66 (1987); Woodson v. North Carolina, 428 U.S. 280 (1976). Defendants must be given notice and the opportunity to address all evidence upon which imposition of capital punishment is based. Gardner v. Florida, 430 U.S. 349 (1977). The sentencing body cannot be precluded from considering relevant mitigation. See Smith v. Texas, 543

U.S. 37, 45 (2004) (procedure unconstitutional where jury asked to answer "yes" or "no" to two questions in a manner where valid mitigating evidence was not considered); Skipper v. South Carolina, 476 U.S. 1 (1976) (sentencing body cannot be precluded from considering defendant's potential for rehabilitation); Penry v. Lynaugh, 492 U.S.302 (1989) (sentencing body cannot be precluded from considering defendant's intellectual disability as mitigating circumstance).

The evolution of heightened Due Process and what constitutes fundamental fairness under the Fifth and Fourteenth Amendments to the United States Constitution and article I, §§ 2 and 9 of the Florida Constitution is inextricably tied to the heightened reliability demanded by the Eighth Amendment to the United States Constitution. See Caldwell v. Mississippi, 472 U.S. 320, 329, 105 S.Ct. 2633, 2639 (1985) ("This Court has repeatedly said that under the Eighth Amendment 'the qualitative difference of death from all other punishments requires a correspondingly greater degree of scrutiny of the capital sentencing determination.'") (Citation omitted) (Emphasis added).

Aside from heightened requirements of reliability required as a component of Due Process, the Eighth Amendment proscription against cruel and unusual punishments precludes capital punishment where imposition of the death penalty is arbitrary or capricious. See Furman v. Georgia, 408 U.S. 349 (1977) (Arbitrary and capricious imposition of capital punishment is forbidden); Roper v. Simmons, 543 U.S. 551 (2005) (Death penalty for person less than 18 years old unconstitutional); Atkins v. Virginia, 536 U.S. 304(2002) (death penalty impermissible for intellectually disabled); Stanford v. Kentucky, 492 U.S. 361 (1989) (death penalty unconstitutional for person under seventeen years of age); Tison v. Arizona, 481 U.S. 137 (1987) (death penalty unconstitutional for person who lacks sufficient moral culpability).

In summary, the law of capital punishment necessarily evolves, and the procedures necessary to provide due process of law must evolve also. Findings of fact and conclusions of law should be made by the trial court when requested by counsel because a court's "duty to search for constitutional error with painstaking care is never more exacting than it is in a capital case." Burger v. Kemp, 483 U.S. 776, 785 (1987). In the context of imposition of capital punishment, procedures must be used to

limit discretion. See Gregg v. Georgia, 428 U.S. 153, 189 (1976) (plurality opinion) ("Where discretion is afforded a sentencing body on a matter so grave as the determination of whether a human life should be taken or spared, that discretion must be suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action."). The heightened due process that attends imposition of capital punishment is necessary to avoid improper use of capital punishment. In that regard, capital punishment is only an issue here because the State seeks to extinguish human life:

> If the state wishes to authorize capital punishment it has a constitutional responsibility to *tailor* and *apply* its law in a manner that avoids the arbitrary and capricious infliction of the death penalty. Part of a state's responsibility in this regard is to define the crimes for which death may be the sentence in a way that obviates "standardless [sentencing] discretion." (citations omitted). It must channel the sentencer's discretion by "clear and objective" standards and then "make rationally reviewable the process for imposing a sentence of death."

Godfrey v. Georgia, 446 U.S. 420, 428 (1980) (emphasis added).

WHEREFORE, this Court is respectfully asked to state on the record the basis of its rulings and to make appropriate findings of fact to facilitate meaningful appellate review.

I HEREBY CERTIFY that a copy of the above and foregoing motion has been furnished to the Office of the State Attorney, by hand and/or electronically, this 10 day of December, 2013.

Respectfully submitted,

MATT SHIRK
PUBLIC DEFENDER

BY: _____
Fred C. Gazaleh, #353787
Assistant Public Defender

/slc

(CAP112)

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IN THE CIRCUIT COURT, FOURTH JUDICIAL CIRCUIT, IN AND FOR DUVAL COUNTY, FLORIDA.

CASE NO.: 16 2013 CF 005781 AXXX MA

DIVISION: CR-D

STATE OF FLORIDA

VS.

DONALD JAMES SMITH

MOTION TO EXCLUDE CONFUSING OR MISLEADING EVIDENCE

Defendant, by and through the undersigned attorney, the Public Defender for the Fourth Judicial Circuit of Florida, moves this Honorable Court for an order excluding any and all evidence, reference to evidence, testimony, or argument relating to the lack of forensic testing of evidence with the excuse that such testing has a low probability of successful results, therefore the test of said evidence was not administered.

The motion is based upon the ground that there is a substantial danger that the testimony if heard by the jury will confuse the issues or mislead the jury.

The exclusion of confusing or misleading evidence or testimony is supported by Florida Evidence Code Section 90.403 which states: "Relevant evidence is inadmissible if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of issues, misleading the jury, or needless presentation of cumulative evidence." Perper v. Edell, 44 So.2d.78 (Fla. 1950); Hendry v. Zelaya, 841 So.2d.572 (FL 3rd DCA, 2003).

WHEREFORE, Defendant respectfully requests this Honorable Court to prohibit the State from making reference to, introducing, or otherwise making use of any of the above-mentioned evidence or testimony until the Court rules upon its admissibility.

I HEREBY CERTIFY that a copy of the above and foregoing motion has been furnished to the Office of the State Attorney, by hand and/or electronically, this 10 day of December, 2013.

Respectfully submitted,

MATT SHIRK
PUBLIC DEFENDER

BY: _____
Fred C. Gazaleh, #353787
Assistant Public Defender

/slc

(CAP024)

IN THE CIRCUIT COURT, FOURTH JUDICIAL CIRCUIT, IN AND FOR DUVAL COUNTY, FLORIDA.

CASE NO.: 16 2013 CF 005781 AXXX MA

DIVISION: CR-D

STATE OF FLORIDA

VS.

DONALD JAMES SMITH

MOTION IN LIMINE CONCERNING REBUTTAL WITNESSES

Defendant, by and through the undersigned attorney, the Public Defender for the Fourth Judicial Circuit of Florida, moves this Honorable Court to preclude the state from calling witnesses in rebuttal who should have been called by the state in their case-in-chief. The basis for said Motion is as follows:

1. The state, on numerous occasions, during criminal trials will hold back witnesses in their case-in-chief for the purpose of calling these witnesses in rebuttal, in order to have the last word.

2. On many occasions the testimony attempted to be introduced under the guise of "Rebuttal Testimony" is in fact, direct testimony which should have been introduced in the state's case in chief.

3. Evidence offered in rebuttal is required to relate directly to the subject matter of the adverse party's case-in-chief. Buchanan v. State, 116 So. 275 (Fla.1928). It cannot consist of evidence which should have properly been submitted by the plaintiff in his or her case-in-chief. It is not the purpose of rebuttal evidence to add additional facts to those submitted by the plaintiff in his or her case-in-chief unless such additional facts are required by the new matter developed by the defendant. Lockwood v. Baptist Regional Health Services, Inc., 541 So.2d 731 (Fla. 1st DCA 1989); Driscoll v. Morris, 114 So.2d 314 (Fla. 3d DCA 1959).

WHEREFORE, Defendant respectfully requests this Honorable Court to prohibit the State from making reference to, introducing, or otherwise making use of any of the above-mentioned evidence or testimony until the Court rules upon its admissibility.

I HEREBY CERTIFY that a copy of the above and foregoing Motion in Limine has been furnished to the Office of the State Attorney, by hand and/or electronically, this 10 day of December, 2013.

Respectfully submitted,

MATT SHIRK
PUBLIC DEFENDER

BY: _____
Fred C. Gazaleh, #353787
Assistant Public Defender

/slc

(CAP028)

IN THE CIRCUIT COURT, FOURTH JUDICIAL CIRCUIT, IN AND FOR DUVAL COUNTY, FLORIDA.

CASE NO.: 16 2013 CF 005781 AXXX MA

DIVISION: CR-D

STATE OF FLORIDA

VS.

DONALD JAMES SMITH

MOTION FOR STATEMENT OF AGGRAVATING CIRCUMSTANCES

Defendant, by and through the undersigned attorney, the Public Defender for the Fourth Judicial Circuit of Florida, moves this Honorable Court to order the State of Florida to provide the defense with the precise grounds on which the State seeks the death penalty in this case. This motion is filed for the following reasons:

1. Absent the notification of aggravating circumstances, the use of any aggravating circumstances to sentence Defendant to die would violate the Fifth, Sixth and Fourteenth Amendments to the Constitution of the United States and Article I, Sections 9, 15 and 16, of the Constitution of the State of Florida.

a. No notification of particular statutory aggravating circumstances which the State would seek to establish was contained in the Indictment charging Defendant.

b. No notice has been given as to what specific aggravating circumstances this Court or the State intends to consider.

c. Utilization of aggravating circumstances not contained in the Indictment or in any subsequent form of notice deprives Defendant of essential safeguards designed to limit the unbridled exercise of judicial discretion in cases where the ultimate penalty is possible.

d. Failure to give timely and adequate notice of the precise grounds on which the State seeks the death penalty, or on which the Court would consider imposing the death penalty, deprives Defendant of a fair sentencing hearing, with Defendant

> being given a meaningful opportunity to rebut the aggravating circumstances. Thus, Defendant is faced with the prospect of having the Sixth Amendment right to effective assistance of counsel undermined.
>
> e. Without notice, neither Defendant nor defense counsel is able to prepare and present any defense evidence or argument to meet the State's contention as to what is an aggravating circumstance and as to what issues the Court may regard as controlling on the question of life or death.

2. The Florida Standard Penalty Phase Jury Instruction, as promulgated by the Florida Supreme Court, mandates that the trial court instruct the jury to consider the evidence already heard at trial. Therefore, the only way for Defendant to confront and rebut aggravating circumstances during the guilt phase of the trial is to know in advance what they are.

3. A denial of this motion would constitute a violation of the Due Process Clause as interpreted in Gardner v. Florida, 430 U.S. 349, 97 S. Ct. 1197 (1977). If a defendant is entitled to know the contents of a pre-sentence investigation in non-capital cases he is surely entitled to know the aggravation expected to be proved in a capital case.

4. The United States Supreme Court in Gregg v. Georgia, 428 U.S. 153, 96 S. Ct. 2909 (1976), upheld the constitutionality of the Georgia death penalty because it required the following:

> The judge (or jury) shall hear additional evidence in extenuation, mitigation, and aggravation of punishment, including the record of any prior criminal convictions and pleas of guilty or pleas of *nolo contendere* of the defendant, or the absence of any prior conviction and pleas: Provided, however, that only such evidence in aggravation as the State has made known to the defendant prior to his trial shall be admissible. The judge (or jury) shall also hear argument by defendant or his counsel and the prosecuting attorney... regarding the punishment to be imposed. *Id.* at 163, 164. *(Emphasis added.)*

WHEREFORE, Defendant requests this Court to order the State to file a notice declaring what statutory aggravating grounds the State intends to prove to sustain the request for death.

I HEREBY CERTIFY that a copy of the above and foregoing Motion has been furnished to the Office of the State Attorney, by hand and/or electronically, this 10 day of December, 2013.

Respectfully submitted,

MATT SHIRK
PUBLIC DEFENDER

BY: _____
Fred C. Gazaleh, #353787
Assistant Public Defender

/slc

(CAP033)

IN THE CIRCUIT COURT, FOURTH JUDICIAL CIRCUIT, IN AND FOR DUVAL COUNTY, FLORIDA.

CASE NO.: 16 2013 CF 005781 AXXX MA

DIVISION: CR-D

STATE OF FLORIDA

VS.

DONALD JAMES SMITH

MOTION TO PROHIBIT ARGUMENT AND/OR INSTRUCTIONS CONCERNING FIRST DEGREE FELONY MURDER

Defendant hereby moves this Honorable Court to prohibit argument and/or instruction concerning first degree felony murder. As grounds, Defendant would state:

1. Defendant is indicted for First Degree Murder.

2. There is absolutely no mention in the indictment of first degree felony murder.

3. It is well settled that the Sixth Amendment to the United States Constitution requires an indictment or information must state the elements of the offense charged with sufficient clarity to apprise the defendant what he must be prepared to defend against. Russell v. United States, 369 U.S. 749, 763-769 (1962); Government of Virgin Islands v. Pemberton, 813 F.2d 626 (3d Cir. 1987); United States v. Thomas, 444 F.2d 919 (D.C. Cir. 1971); Gray v. Raines, 662 F.2d 569, 570-572 (9th Cir. 1981); United States v. Rojo, 727 F.2d 1415, 1418 (9th Cir. 1983); Givens v. Housewright, 786 F.2d 1378; 1380-1381 (9th Cir. 1986); and United States v. Kurka, 818 F.2d 1427 (9th Cir. 1987).

4. Givens, supra, directly controls this situation. In Givens, the information charged willful murder, a form of first degree murder, in Nevada. Id. at 1380. (This is analogous to our premeditated murder). The jury was also instructed on murder by torture. Id. (This is analogous to our felony-murder). This is another form of first degree murder in Nevada. Like felony murder in Florida, murder by torture in Nevada does not require an intent to kill.

The Ninth Circuit Court of Appeals held that it was a Sixth Amendment violation to allow a jury instruction and prosecutorial argument on murder by torture as a theory of first

degree murder. The Court reached this result even though the information listed a statutory subsection which included both willful murder and murder by torture.

5. The indictment in the present case only charges premeditated murder. There is no mention of felony murder. It would violate Defendant's right to be informed of the charges under the Sixth and Fourteenth Amendments to the United States Constitution and Article I, Section 16, of the Florida Constitution to allow argument or instruction on a felony murder theory.

6. The allowing of a felony murder theory would also deny Defendant due process of law and a fair trial under the Fifth, Eighth and Fourteenth Amendments to the United States Constitution and Article I, Sections 9, 16 and 17, of the Florida Constitution.

WHEREFORE, Defendant respectfully requests this Honorable Court to issue its order prohibiting argument and/or instruction on felony murder.

I HEREBY CERTIFY that a copy of the above and foregoing Motion has been furnished to the Office of the State Attorney, by hand and/or electronically, this 10 day of December, 2013.

Respectfully submitted,

MATT SHIRK
PUBLIC DEFENDER

BY: _____
Fred C. Gazaleh, #353787
Assistant Public Defender

/slc

(CAP036)

IN THE CIRCUIT COURT, FOURTH JUDICIAL CIRCUIT, IN AND FOR DUVAL COUNTY, FLORIDA.

CASE NO.: 16 2013 CF 005781 AXXX MA

DIVISION: CR-D

STATE OF FLORIDA

VS.

DONALD JAMES SMITH

DEFENDANT'S MOTION FOR SPECIAL VERDICT AS TO THEORY OF GUILT

Defendant, by and through the undersigned attorney, the Public Defender for the Fourth Judicial Circuit of Florida, moves that this court require that the jury render a special verdict as to the theory of guilt of first degree murder, and says:

1. This is a capital case in which the prosecution is asking this Court to impose the death penalty. Accordingly, heightened standards of due process apply. See Elledge v. State, 998 (Fla. 1977) ("heightened" standard of review), Mills v. Maryland, 108 S.Ct. 1860, 1866 (1988) ("In reviewing death sentences, the Court has demanded even greater certainty that the jury's conclusions rested on proper grounds."), Proffitt v. Wainwright, 685 F.2d 1227, 1253 (11th Cir.1982) ("Reliability in the factfinding aspect of sentencing has been a cornerstone of [the Supreme Court's death penalty] decisions."), and Beck v. Alabama, 447 U.S. 625, 638, 100 S.Ct. 2382, 65 L.Ed.2d 392 (1988) (same principles apply to guilt determination). "Where a defendant's life is at stake, the Court has been particularly sensitive to insure that every safeguard is observed." Gregg v. Georgia, 428 U.S. 153, 187, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976) (plurality opinion) (citing cases).

2. Although the indictment alleges only murder from a premeditated design, the state may also be proceeding on a theory of felony murder. Without abandoning the argument that proceeding on such an uncharged theory of guilt would violate the Notice and Due Process Clauses of the state and federal constitutions, the defendant argues that the court must require that the jury render a special verdict explicitly stating the theory of guilt if it returns a verdict of guilty of first degree murder.

3. In Schad v. Arizona, 111 S.Ct. 2491 (1991), the Court ruled that, "on the facts of th[e] case," the Due Process Clause did not require special verdicts as to the theory of first degree murder accepted by the jury. The Court specifically did not decide the issue now presented: the effect of a lack of a special verdict on the penalty determination. The plurality wrote at footnote 9: "...Moreover, the dissent's concern that a general verdict does not provide the sentencing judge with sufficient information about the jury's findings to provide a proper premise for the decision whether or not to impose the death penalty...goes only to the permissibility of a death sentence imposed in such circumstances, not to the issue currently before us, which is the permissibility of the conviction." At footnote 4 of his dissent, Justice White noted that "the disparate intent requirements of premeditated murder and felony murder have life-or-death consequences at sentencing." See also U.S. v. McNeese, 901 F.2d 585, 605-606 (7th Cir.1990) (approving use of special verdicts where information sought is relevant to sentencing).

4. The argument presented here is that the life-or-death consequences of the jury's determination of the theory of guilt require special verdicts. Florida requires special verdict findings as to whether, for instance, an armed robber carried a firearm, or as to whether a burglar was armed, because of the effect of that finding at sentencing. In State v. Overfelt, 457 So.2d 1385, 1387 (Fla.1984), the court wrote:

> The question of whether an accused actually possessed a firearm while committing a felony is a factual matter properly decided by the jury. Although a trial judge may make certain findings on matters not associated with the criminal episode when rendering a sentence, it is the jury's function to be the finder of fact with regard to matters concerning the criminal episode. To allow a judge to find that an accused actually possessed a firearm when committing a felony in order to apply the enhancement or mandatory sentencing provisions of section 775.087 would be an invasion of the jury's historical function and could lead to a miscarriage of justice in cases such as this where the defendant was charged with but not convicted of a crime involving a firearm.

It would violate the Equal Protection, Due Process, Jury Trial, and Cruel and Unusual Punishment Clauses of the state and federal constitutions not to require special verdicts in a capital case.

5. The defense acknowledges a conflict with the holding in State v. Steele, 921 So.2d 538 (Fla. 2006); that a Trial Court departs from the essential requirements of law by using a special penalty phase jury form, but maintains that Apprendi v. New Jersey, 120 S.Ct. 2348 (2000), and Ring v. Arizona, 536 U.S. 584 (2002), mandate a finding that such a special verdict form and a unanimous finding as to aggravating circumstances found beyond a reasonable doubt by a unanimous jury are prerequisites to a Constitutional death sentence.

Further grounds will be argued *ore tenus*.

WHEREFORE, the defendant moves that this Court require special verdicts as to the theory of guilt of first degree murder, or grant such other relief as may be appropriate.

I HEREBY CERTIFY that a copy of the above has been furnished to the Office of the State Attorney, by hand and/or electronically, this 10 day of December, 2013.

Respectfully submitted,

MATT SHIRK
PUBLIC DEFENDER

BY: _____
Fred C. Gazaleh, #353787
Assistant Public Defender

/slc

(CAP038)

IN THE CIRCUIT COURT, FOURTH JUDICIAL CIRCUIT, IN AND FOR DUVAL COUNTY, FLORIDA.

CASE NO.: 16 2013 CF 005781 AXXX MA

DIVISION: CR-D

STATE OF FLORIDA

VS.

DONALD JAMES SMITH

MOTION FOR PRE-TRIAL CONFERENCE TO SET MOTION IN LIMINE SCHEDULE AND MOTION IN LIMINE CUT-OFF DATE

The Defendant, by and through the undersigned attorney, the Public Defender for the Fourth Judicial Circuit of Florida and pursuant to rule 3.060 and 3.190 of the Florida Rules of Criminal Procedure, requests that the Court schedule a pretrial conference to establish a Motion in Limine schedule and consider setting a Motion in Limine cut off date, and says:

1. The above-styled cause is presently scheduled for trial on May 12, 2014, on an indictment, returned on July 2, 2013, pertaining to the death of Cherish Perrywinkle.

2. The Florida Rules of Criminal Procedure provide that a copy of any written motion shall be served on the adverse party at a "reasonable time before" the time specified for the hearing.

3. The Defendant requests a cut-off date of two-weeks prior to trial for the filing of any Motions in Limine, if such basis for the motion is known by the Prosecution.

4. The Court, in its discretion may entertain any Motion in Limine where opportunity did not exist or the Prosecution was unaware of the grounds for the motion due to issues arising from newly discovered evidence.

5. The Defendant believes that a court imposed Motion in Limine schedule and cut-off date will promote a fair and expeditious trial in this case.

6. For these reasons, the Defense requests that the Court consider this matter at a pretrial conference.

WHEREFORE, the Defendant respectfully requests that the Court schedule the pretrial conference to impose a Motion In Limine cut-off date, together with any further or alternative relief the court deems proper under the circumstances.

I HEREBY CERTIFY that a copy of the above has been furnished to the Office of the State Attorney, by hand and/or electronically, this 10 day of December, 2013.

Respectfully submitted,

MATT SHIRK
PUBLIC DEFENDER

BY: _____
Fred C. Gazaleh, #353787
Assistant Public Defender

/slc

(CAP039)

IN THE CIRCUIT COURT, FOURTH JUDICIAL CIRCUIT, IN AND FOR DUVAL COUNTY, FLORIDA.

CASE NO.: 16 2013 CF 005781 AXXX MA

DIVISION: CR-D

STATE OF FLORIDA

VS.

DONALD JAMES SMITH

DEMAND FOR NOTICE OF INTENT TO RELY ON HEARSAY

Comes now the Defendant, by and through his undersigned attorney, the Public Defender for the Fourth Judicial Circuit of Florida, and pursuant to Florida Statute Section 921.141(1), hereby moves this Honorable Court to enter an order requiring the State to advise the Defendant with reasonable particularity of any hearsay statements or evidence that it intends to introduce if there are further proceedings to determine sentence in this cause. In support of this motion, the Defendant would show that:

1. The Defendant is charged with murder in the first degree, and the State has indicated that it will seek the death penalty upon conviction. Should there be a conviction, the Court will thereafter conduct a hearing pursuant to Florida Statute Section 921.141(1). That statute allows the Court to receive "any such evidence" which the Court deems to "have probative value" (including hearsay) providing that the defendant be afforded "a fair opportunity to rebut any hearsay statements."

2. The undersigned counsel is familiar with the limited exceptions to the prohibitions against hearsay contained in the Rules of Evidence. Accordingly, he is able to conduct discovery and prepare for trial in such fashion as to anticipate what evidence will be received. However, relaxation of the rule against hearsay wholly undermines his ability to anticipate the evidence to be presented by the State. Persons might be allowed to testify regarding matters as to which they had no direct personal knowledge.

3. If the Defendant is to have a fair opportunity to rebut such evidence, he must have notice of such hearsay well in advance of its presentation.

4. To deny this request would be to the prejudice of the Defendant and would be a violation of the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution.

I HEREBY CERTIFY that a copy of the above and foregoing has been furnished to the Office of the State Attorney, by hand and/or electronically, this 10 day of December, 2013.

Respectfully submitted,

MATT SHIRK
PUBLIC DEFENDER

BY: _____
Fred C. Gazaleh, #353787
Assistant Public Defender

/slc

(CAP042)

IN THE CIRCUIT COURT, FOURTH JUDICIAL CIRCUIT, IN AND FOR DUVAL COUNTY, FLORIDA.

CASE NO.: 16 2013 CF 005781 AXXX MA

DIVISION: CR-D

STATE OF FLORIDA

VS.

DONALD JAMES SMITH

OBJECTION AND MOTION TO PRECLUDE IMPROPER ARGUMENT

The Defendant, by and through the undersigned, objects and moves in limine to prevent improper argument during the guilt and/or penalty phase of trial as follows:

1. Imposition of Florida's death penalty is based solely on the determination that one or more of the statutory aggravating considerations expressly listed in Section 921.141(5), Florida Statutes, has been proved to exist beyond a reasonable doubt, and that the existence of those statutory aggravating factors justify imposition of the death penalty. See Section 921.141(5), Florida Statutes ("Aggravating circumstances *shall be limited* to the following: . . .") (emphasis added). See Elledge v. State, 346 So.2d 998, 1003 (Fla.1977) ("We must guard against any unauthorized aggravating factor going into the equation which might tip the scales of the weighing process in favor of death.").

2. Argument that a verdict should be returned for *any* reason not expressly listed in Section 921.141(5), Fla. Stat., is clearly improper and a denial of Due Process, a fair trial, and a reliable sentencing determination under article I, sections 2, 9, 16, 17 and 22 of the Florida Constitution, the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution, and International Law.

3. "Death is a different kind of punishment from any other which may be imposed in this country." Gardner v. Florida, 430 U.S. 349, 357 (1977). It is the responsibility of the trial court to ensure that the final argument to the jury is kept within proper and legal bounds. United States v. Young, 70 U.S. 1 (1985). "A verdict is an intellectual task to be performed on the basis of the

applicable law and facts." Jones v. State, 569 So.2d 1234, 1239 (Fla. 1990). The State is hereby expressly placed on notice that certain tactics, remarks, arguments and comments are improper.

4. It is improper argument for the State to identify mitigating circumstances as either statutory or non-statutory. The reference to the fact that a valid mitigating consideration is either "statutory" or "non-statutory" is a fact that is not presented to the jury. Unlike aggravating circumstances that are expressly limited to those set forth in the statute, as expressly stated in the standard jury instructions, the term "statutory mitigating consideration" does not appear anywhere in the standard jury instructions. In fact, the express inclusion of "any aspect of the defendant's character, record, or background" and 'any other circumstance of the offense" means that legitimate mitigating circumstances are encompassed as statutory mitigating considerations. Any reference to section 921.141(6)(h) as a "catch all" statutory factor denigrates its importance, distorts the weighing process and otherwise demeans those valid considerations that come within its scope. This practice denies Due Process, fundamental fairness, and a reliable sentencing proceeding guaranteed by article I, sections 2, 9, 16, 17 and 22 of the Florida Constitution and the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution.

5. The Supreme Court of Florida and other state and federal courts have clearly, unambiguously and unequivocally held that it is improper for the State to argue:

> A: that the death penalty should be imposed because the defendant has no remorse. Jones v. State, 569 So.2d 1234, 1240 (Fla.1990) ("This Court has repeatedly stated that lack of remorse has no place in the consideration of aggravating circumstances."
>
> B: that the death penalty should be imposed due to future dangerousness of the defendant. Knight v. State, 746 So.2d 423, 440 fn.10 (Fla.1998) ("Knight is certainly correct that a future dangerousness non-statutory aggravating factor does not exist in Florida.")(citing Kormondy v. State, 703 So.2d 454, 460-463 (Fla.1997)).
>
> C: that, if not sentenced to death, the defendant will kill again. Walker v. State, 707 So.2d 300, 313-314 (Fla.1997); Grant v. State, 194 So.2d 612, 613 (Fla.1967).
>
> D: that the death penalty should be imposed based upon any fact not in evidence. Spencer v. State, 645 So.2d 377, 383 (Fla.1994) ("comments on matters outside the evidence are clearly improper.")

E: that the jurors would have acted differently had they been in the same position as the defendant. Gomez v. State, 751 So.2d 630 (Fla. 3d DCA 1999).

F: using vituperative descriptions and characterizations to describe the defendant. Gore v. State, 719 So.2d 1197, 1201 (Fla.1998) ("It is clearly improper for the prosecutor to engage in vituperative or pejorative characterizations of a defendant or witness."); Reaves v. State, 639 So.2d 1, 5 (Fla.1994).

G: in a manner that needlessly and intentionally urges a verdict of guilty or sentence of death based on inflamed emotion, bias, passion or prejudice of jurors. Edwards v. State, 428 So.2d 357, 359 (Fla. 3d DCA 1983) ("It is the responsibility of the prosecutor to seek a verdict based on the evidence without indulging in appeals to sympathy, bias, passion or prejudice.").

H: that jurors should place themselves in the shoes of the victim or the victim's family. Walker v. State, 707 So.2d 315, 316j-317 (Fla.1997) ("The prosecutor's remarks in this case impugning the defense and later urging the jury to imagine the victim's pain and suffering were improper under Florida case law.").

I: that jurors should show the defendant the same mercy that was showed to the victim. "Thomas v. State, 748 So.2d 970, 985 fn.10 (Fla.1999) ("we reiterate that asking a jury to show as much mercy to a defendant as he showed the victim is a clear example of improper prosecutorial misconduct, which constitutes error and will not be tolerated.")

J: that any of the following are not legal mitigating considerations:

i. the defendant's age at the time of the offense.
ii. a defendant's dysfunctional and abusive childhood
iii. a defendant's emotional distress at the time of an offense.
iv. a defendant's impaired capacity at the time of the offense.

K: that a defendant's intoxication at the time of a homicide is not legally a mitigating consideration.

L: that responsibility for imposing the death penalty lies with the judge.

M: that an appellate court will correct any errors in imposition of the death penalty and that responsibility for correctly applying the death penalty lies elsewhere. Caldwell v. Mississippi, 472 U.S. 320, 105 S.Ct. 2633, 86 L.Ed.2d 331 (1985): Adams v. Wainwright, 804 F.2d 1526 (11th Cir. 1986), *modified*, 816 F.2d 1493 (11th Cir.1987).

N: that the prosecutor personally believes that death is appropriate -

O: that the prosecutor personally believes that a witness is credible or not credible. May v. State, 600 So.2d 1266 (Fla. 5th DCA 1992).

P: that a defendant should be convicted or sentenced to death because the State has even more evidence that was not presented. Ruiz v. State, 743 So.2d 1, 4 (Fla.1999) ("[a prosecutor] may not suggest that evidence which was not presented at trial provides additional grounds for finding the defendant guilty.")

Q: that the prosecutor personally believes that the defendant is guilty. Pacifico v. State, 642 So.2d 1178, 1183-84 (Fla. 1st DCA 1994)("it is improper for a prosecutor to express a personal belief in the guilt of the accused, or in the veracity of the state's witnesses.").

R. That the State does not prosecute innocent people or seek the death penalty for those that do not deserve it. Lavin v. State, 25 FLW D713 (Fla. 3d DCA 2000); Hall v. United States, 419 F.2d 582, 583-584 5th Cir. 1969).

S: that it is the duty of the jurors to impose a verdict of guilty and/or a sentence of death. Alvarez v. State, 574 So.2d 1119, 112001121 (Fla. 3d DCA 1991); Urbin v. State, 714 So.2d 411, 420 (Fla.1998); Garron v. State, 528 So.2d 353, 359, fn.10 (Fla.1988)

T: that the jurors should imagine the victim's last few moments of pain, terror, apprehension, fear and suffering. Bertolotti v. State, 476 So.2d 130, 133 (Fla.1985).

U: that the death penalty or a verdict of guilty should be imposed for religious or Biblical reasons.

V: that the law requires a death sentence when the statutory aggravating circumstances outweigh the mitigating circumstances. Henyard v. State, 689 So.2d 239, 249 (Fla.1996) ("we agree with Henyard that the prosecutor's comments that jurors must recommend death when aggravating circumstances outweigh mitigating circumstances were misstatements of law.").

W: that imposition of a death sentence will deter others from committing murder. Garron v. State, 528 So.2d 353, 361 fn.9 (Fla.1988).

X: that the defendant's demeanor and conduct off the witness stand are reasons to find the defendant guilty or impose the death penalty. Pope v. Wainwright, 496 So.2d 798, 802 (Fla. 1986).

> Y: that a sentence of life imprisonment with no possibility of parole might change and the defendant could someday be released. Urbin v. State, 714 So.2d 411, 420 (Fla.1998)("This type of 'ignore the law' argument has absolutely no place in a trial, especially when asserted by the State.").
>
> Z: that the testimony presented under section 921.41(7), Florida Statutes, commonly referred to as "victim impact evidence," is an aggravating factor that justifies imposition of a death sentence. Windom v. State, 656 So.2d 600 (Fla.1992)

6. A death recommendation from a jury and/or a death sentence imposed by a judge following intentional improper argument over timely and specific objection denies Due Process and fundamental fairness guaranteed by Due Process, fundamental fairness, and results in arbitrary imposition of the death penalty contrary to article I, sections 2, 9, 16, 17 and 22 of the Florida Constitution, the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution, and International law established by *jus cogens*, including but not limited to the International Covenant on Civil and Political Rights, Safeguards Guaranteeing Protection of the Rights of Those Facing the Death Penalty, and the American Convention on Human Rights. In that regard, the "Supremacy Clause" of the United States Constitution elevates international law in treaties to the supreme law of the land, thereby superseding state law:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, and Thing in the constitution or Laws of any State to the Contrary notwithstanding. U.S. Constitution, art. VI, cl.2. Courts are to enforce international law. U.S. Constitution, art. I, § 8, cl.10, and art. III, § 2, cl. 1. Multilateral human rights treaties should have greater force than bilateral treaties because they demonstrate international consensus on fundamental human rights: Although treaties that are mere exchanges of obligations between States allow them to reserve *inter se* applications of rules of general international law, it is otherwise in human rights treaties, which are for the benefit of persons withing their jurisdiction. . . .

U.N. Hum. Rts. Ctte. General Comment 24, U.N. Doc. HRI/GEN/1/Rev.3 ¶8 (1997). See Aloeboetoe *et. al* v. Suriname, Inter-Am. Ct. H.R., Judgment of 10 September 1993, Inter-Am. Ct. H.R. (Ser. C) No. 15 (1994) (holding Dutch-Surinamese slavery treaty violates jus cogens);

Soering v. United Kingdom, 161 Eur. Ct. H.R. (ser. A) (1989) (European Convention on Human Rights supercedes U.K.-U.S. Extradition Agreement of 1972). See Appendix, Amnesty International, "International Standards on the Death Penalty" (August, 1997). "[I]nternational law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction." The Paquete Habana, 157 U.S. 677 (1900).

The existing body of international law requires that any procedure for determining whether a sentence of life or death is to be imposed must provide at the very least the same rights and protections accorded to the initial determination of guilt.

7. Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life.

8. In countries which have not abolished the death penalty, sentence of death may be imposed only for the most serious crimes in accordance with the law in force at the time of the commission of the crime and not contrary to the provisions of the present Covenant and to the Convention on the Prevention and Punishment of the crime of Genocide. This penalty can only be carried out pursuant to a final judgment rendered by a competent court.

International Covenant on Civil and Political Rights, *Article 6.*

9. In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality:

(a) To be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him;

(b) To have adequate time and facilities for the preparation of his defense and to communicate with counsel of his own choosing;

(c) To be tried without undue delay;

(d) To be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it;

(e) To examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;

(f) To have the free assistance of an interpreter if he cannot understand or speak the language used in court;

(g) Not to be compelled to testify against himself or to confess his guilt.

International Covenant on Civil and Political Rights, *Article 14*.

10. The intentional use of improper argument by the State of Florida to secure a death recommendation from the jury and/or imposition of a death sentence by the court fails to meet the required minimum level of Due Process and results in arbitrary and capricious imposition of capital punishment as set forth above and as may be further argued *ore tenus*.

WHEREFORE, the defense objects to the foregoing and moves in limine for an order of the Court directing the State not to engage in any of the foregoing practices.

I HEREBY CERTIFY that a copy of the above and foregoing Motion to Preclude Improper Argument has been furnished to the Office of the State Attorney, by hand and/or electronically, this 10 day of December, 2013.

Respectfully submitted,

MATT SHIRK
PUBLIC DEFENDER

BY: _____
Fred C. Gazaleh, #353787
Assistant Public Defender

/slc

(CAP043)

IN THE CIRCUIT COURT, FOURTH JUDICIAL CIRCUIT, IN AND FOR DUVAL COUNTY, FLORIDA.

CASE NO.: 16 2013 CF 005781 AXXX MA

DIVISION: CR-D

STATE OF FLORIDA

VS.

DONALD JAMES SMITH

MOTION TO COMPEL
DISCOVERY AS TO DNA EVIDENCE

Defendant, by and through the undersigned attorney, the Public Defender for the Fourth Judicial Circuit of Florida, pursuant to Rule 3.220, Florida Rules of Criminal Procedure, moves the Court to enter an order to compel the State to produce for Defendant's inspection and copying the following items, documents and information:

a. Data files from all of the runs for all samples and all controls in electronic format, to include the raw data results.

b. Copies of the original data printouts for all Quantifiler results.

c. High quality photos and/or film, including Polaroid photos, of the original data from the DNA testing done in this cause.

d. All laboratory notes concerning said DNA testing in the laboratory, including all bench notes and data generated in electronic format.

1. All lab submission requests.
2. All chain of custody documentation.
3. All correspondence, emails, telephone messages, written memos, draft reports sent to the prosecutor specific to the testing in this matter, to include changes or other responses by the prosecutor regarding draft reports.

e. The laboratory protocols and Standard Operating Procedures relating to said DNA testing that were in effect at the time of the testing.

f. All statistical worksheets and computer generated population data base test results reached by the laboratory in this cause, including information as to which data bases and frequency tables were used by the laboratory.

g. Data on all the population databases used by the laboratory, including the following information:

1. The genotype of each individual sample.
2. All measures taken to prevent multiple donations by single individuals into the population database.
3. Information concerning any donation to the population database made by persons who were genetically related to one another.
4. Information on any blood transfusions that had been received by individuals prior to their donation to the population database.
5. All information concerning how the ethnicity of the donors for each subpopulation database was determined, including the criteria used to determine ethnicity, and who determined the definition of ethnicity as to each subpopulation group.
6. All biographic information concerning each donor to each and every population database that was used, including the ethnicity of each donor's parent and grandparents if said information is available.

h. All information concerning the general procedures and protocols pertaining to all the tests that were performed by the laboratory in general and specifically:

1. All information regarding each specific PCR and STR test that was done and each step taken to analyze each sample.
2. All information and any inventory regarding all the equipment used to analyze all of the samples, together with the logs for said equipment.
3. All information regarding whether each instrument used in all of the PCR and STR testing was standardized, how often it was standardized, and how often it was checked and calibrated for accuracy.
4. All information regarding the lot numbers of all chemicals used in each DNA testing process, whether PCR or STR.
5. All data concerning any reagent controls used in the DNA testing, including all information regarding how each reagent

and chemical that was used in each DNA testing process, whether PCR or STR, was tested for integrity, quality and purity.

6. All sizing and hybridization information.
7. All information regarding laboratory specific accreditation for all the DNA markers used. This specifically includes the accreditation that the particular laboratory has done for each of the DNA markers, not just the accreditation information supplied by the manufacturers of the DNA markers.
8. The name of the Quality Control officer responsible for compliance involving any certification for any lab used in this matter.
9. All internal audits and reports for the last five years.

i. All information regarding proficiency examinations and blind testing done for the laboratory personnel who did the DNA testing, including information regarding whether the blind testing was externally done or internally done.

j. All information regarding how each analyst who performed the DNA testing was trained and the courses said analysts have taken to stay abreast of current developments in their field of expertise.

k. All information, including names and addresses of relevant personnel, regarding peer reviews done regarding this DNA testing by the laboratory.

l. All information and records from all other laboratory sources, including the FBI, that the laboratory relied upon in its testing.

m. Any and all other documents generated by the laboratory in performing the DNA laboratory procedures, and in determining the allele frequencies of those test results as compared to the allele frequencies of population groups in the database.

n. All information regarding the type of testing kit(s) and probes used by the laboratory in said DNA testing.

o. The resumes or *Curriculum Vitaes* of all personnel involved in the laboratory testing and peer reviews as described above.

p. Any and all reports for any and all lab errors, omissions, contamination or unexpected results for the last five years including for any testing specifically performed in this matter.

As grounds therefore, Defendant would show:

1. It is the policy of some forensic laboratories not to release such information to a criminal defendant absent a court order.

2. Defendant needs this information to adequately prepare for depositions and/or trial testimony of the laboratory personnel.

3. Without examining the above-described information Defendant cannot assess how the laboratory procedures were done, whether they were done correctly by standards or standards generally recognized in the scientific community, or whether the statistical extrapolations from the test results, which would be used as evidence to identify Defendant as the perpetrator of the alleged offenses, are done correctly by standards or standards generally recognized in the scientific community.

4. Any DNA expert retained by Defendant cannot provide any meaningful assistance to Defendant without being able to examine the above-described data, including the raw data in electronic format.

5. Defendant is entitled to the above-requested data under Florida Rules of Criminal Procedure 3.220((b)(l)(J)(K).

6. Further, without such data Defendant would be embarrassed in his discovery and unprepared for trial, and thus be exposed to the infliction of excessive and cruel and unusual punishment and would be denied his rights to a fair trial, to due process, to confront the witnesses against him, and to effective assistance of counsel, in contravention of the guarantees of the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution and Article I, Sections 9, 16 and 17, of the Florida Constitution.

WHEREFORE, Defendant respectfully requests this Honorable Court to grant this motion.

I HEREBY CERTIFY that a copy of the above and foregoing Motion has been furnished to the Office of the State Attorney, by hand and/or electronically, this 10 day of December, 2013.

Respectfully submitted,

MATT SHIRK
PUBLIC DEFENDER

BY: _____
Fred C. Gazaleh, #353787
Assistant Public Defender

/slc

(CAP044)

IN THE CIRCUIT COURT, FOURTH JUDICIAL CIRCUIT, IN AND FOR DUVAL COUNTY, FLORIDA.

CASE NO.: 16 2013 CF 005781 AXXX MA

DIVISION: CR-D

STATE OF FLORIDA

VS.

DONALD JAMES SMITH

DEFENDANT'S MOTION FOR TRIAL COURT TO REFRAIN FROM COMMENTING ON IDENTIFICATION EVIDENCE

Defendant, by and through the undersigned attorney, the Public Defender for the Fourth Judicial Circuit of Florida, pursuant to Section 90.106, Florida Statutes, respectfully moves this Honorable Court to refrain from making any comment in response to any statements by the State as to whether any witness called by the State has identified Defendant in the courtroom as the perpetrator of the alleged offense(s). As grounds therefore, Defendant states:

It is a customary practice in Jacksonville and the Fourth Judicial Circuit for prosecutors to ask trial judges to let the record show that a State witness has identified Defendant in the courtroom as the perpetrator of the offenses. Typically, most judges make some sort of verbal affirmation of that event, such as by saying, "The record shall reflect that the witness has identified Defendant" or, "The record shall so reflect." Defendant asserts that this is an improper practice in that it is an improper judicial comment on the evidence that impermissibly serves to judicially buttress the credibility of State witnesses in the presence of the jury. This is especially true when identification of a defendant is a key legal and factual issue in a case.

As authority for this Motion, Defendant would show:

1. Section 90.106, Florida Statutes, reads as follows:

> A judge may not sum up the evidence or comment to the jury upon the weight of the evidence, the credibility of the witnesses, or the guilt of the accused.

2. In the case of Raulerson v. State, 102 So. 2d 281 (Fla. 1958), the Florida Supreme Court stated, "A trial court should avoid making any remark within the hearing of the jury that is capable directly or indirectly, expressly, and inferentially, or by innuendo of conveying any intimation as to what view he takes of the case or that intimates his opinion as to the weight, character or credibility of any evidence adduced." The Court further said in Raulerson that "(T)he facts are left to the independent and unbiased consideration of the jury and the judge should not enter their sphere or operation else the accused would be deprived of his right to a trial by jury. *Because of the judge's exalted position his appraisal of testimony would likely give such emphasis to it as to influence the jury in their deliberation.*" (Emphasis supplied.)

3. The above-described local practice at least infers to jurors that the trial court is vouching for the accuracy of the in-court identification of Defendant by the witness and suggests that such testimony is weighty and more important than other testimony. It has long been the law in Florida that it is completely improper for a trial court to vouch for the credibility of the witness. Garner v. State, 28 Fla. 113, 9 So. 835 (Fla. 1891); Livingston v. State, 145 So. 761; mandate reissued 152 So. 205 (Fla. 1933). Further, unlike federal court or under British common law, in Florida it is improper for a trial court to comment on the weight of the evidence or to suggest that some evidence may be more important than other evidence. Moton v. State, 659 So. 2d 1269 (Fla. 4th DCA 1995).

4. Cannon Three of the Code of Judicial Conduct, at Subsection B, Paragraph 9, states, "A judge shall not, while a proceeding is pending or impending in any court, make any public comment that might reasonably be expected to effect its outcome or impair its fairness or make any non-public comment that may substantially interfere with a fair trial or a hearing." Commenting on an in-court identification procedure falls within the purview of that Cannon's restrictions.

5. In recent years Florida appellate courts have restricted the use of jury instructions that are considered to be comments on the evidence. For example, in Fenelon v. State, 594 So. 2d 292 (Fla. 1992), the Florida Supreme Court ruled that the standard jury instruction about evidence of flight shall no longer be given. The First District Court of Appeal certified to the Supreme Court of Florida as a matter of great public importance the question as to whether the standard jury instruction on possession of recently stolen property is an impermissible comment on the evidence. Weddell v. State, 780 So.2d 324 (Fla. 1st DCA 2001). However, the Supreme Court has refused to review that question, 813 So.2d 67 (February 28, 2002). The Florida Supreme Court even reversed one of their prior rulings after arriving at the opinion that a jury instruction given in accord with that former case would be an impermissible comment on the evidence. *See* In re: Instructions in Criminal Cases, 652 So.2d 814 (Fla. 1995). A special jury instruction crafted by a court was held to be reversible error and an improper comment on the evidence in the case of Fecske v. State, 757 So.2d 548 (Fla. 4th DCA 2000).

6. It is solely within the province of the jury to decide whether a witness has identified the defendant in court. It is improper for the presiding judge to comment on that event in any way. Even if the sole purpose of the court making any such commentary at all is to perfect the record, that is a role that should be left to counsel. Otherwise, any comment the presiding judge may make may be considered by a member or members of the jury as a comment bolstering the credibility of the witness. This is especially true when, as in the local practice, the court says something in response to the prompting of the prosecutor. Such a comment removes the presiding judge from being the neutral arbiter of the trial and places the judge squarely on the side of the party asking for the favorable notation of the accuracy of the witness for the record.

7. The above-described practice flies in the face of current law and should be abandoned forthwith as nothing more than a bad habit.

WHEREFORE, Defendant respectfully requests this Honorable Court grant this Motion.

I HEREBY CERTIFY that a copy of the above and foregoing Motion has been furnished to the Office of the State Attorney, by hand and/or electronically, this 10 day of December, 2013.

Respectfully submitted,

MATT SHIRK
PUBLIC DEFENDER

BY: _____
Fred C. Gazalen, #353787
Assistant Public Defender

/slc

(CAP032)

IN THE CIRCUIT COURT, FOURTH JUDICIAL CIRCUIT, IN AND FOR DUVAL COUNTY, FLORIDA.

CASE NO.: 16 2013 CF 005781 AXXX MA

DIVISION: CR-D

STATE OF FLORIDA

VS.

DONALD JAMES SMITH

MOTION FOR COURT ORDER DIRECTING CLERK OF COURT TO LIMIT PROSPECTIVE JURORS ACCESS/EXPOSURE TO PRETRIAL LOCAL MEDIA COVERAGE PRIOR TO JURY SELECTION

Defendant, by and through his undersigned attorney, moves this Honorable Court for an Order directing the Clerk of the Court or his designee to limit prospective jurors access/exposure to pretrial local media coverage prior to jury selection, be it newspaper, television, radio or the internet. The basis for said motion is as follows:

1. Each prospective juror receives a jury summons. The jury summons directs the juror to telephone and confirm their needed appearance on the Friday preceding the Monday of their jury duty.

2. As a part of the recorded message each prospective juror receives, the Clerk or his designee should include a provision instructing each potential juror to refrain from watching or listening to local media be it radio, television, newspaper or internet regarding this case.

3. On Monday, the day of jury selection at the juror parking lot, the Clerk should advise all prospective jurors to leave all local newspapers in their automobiles or discard them, prior to the trip to the courthouse annex jury assembly room.

4. On Monday, the day of jury selection, at the welcome and introduction session, the Clerk or his designee should be directed to again emphasize and remind the entire jury pool of this court's Order regarding contact with local media and to refrain from reading, watching or listening to any media coverage regarding this case.

5. The Clerk of the Court or his designee should be authorized to enforce the terms of this order.

WHEREFORE, Defendant respectfully requests this Honorable Court will enter order addressing the issues outlined above.

I HEREBY CERTIFY that a copy of the above and foregoing Motion has been furnished to the Office of the State Attorney, by hand and/or electronically, this 10 day of December 2013.

Respectfully submitted,

MATT SHIRK
PUBLIC DEFENDER

BY: _____
Fred C. Gazaleh, #353787
Assistant Public Defender

/slc

(CAP118)

IN THE CIRCUIT COURT, FOURTH JUDICIAL CIRCUIT, IN AND FOR DUVAL COUNTY, FLORIDA.

CASE NO.: 16 2013 CF 005781 AXXX MA

DIVISION: CR-D

STATE OF FLORIDA

VS.

DONALD JAMES SMITH

MOTION TO PRODUCE
STATE'S WRITTEN PROTOCOL WHEN SEEKING THE DEATH PENALTY

The Defendant, by and through the undersigned attorney, the Public Defender for the Fourth Judicial Circuit of Florida, moves this Honorable Court for an order directing the State Attorney for the Fourth Judicial Circuit of The State of Florida (Clay, Duval, Nassau Counties) to provide Defense Counsel the following:

(1) The State Attorney's Office for the Fourth Judicial Circuit of The State of Florida written protocol regarding when to seek the death penalty in a first degree murder case.

The basis for said motion to produce is as follow:

(1). Three (3) years ago, The American Bar Association released a Florida Death Penalty assessment team report that raised serious concerns about the State's Death Penalty process.

(2) The report expressed concern about socioeconomic and geographic bias. The letter attributable in part to the fact that Florida's 20 State Attorney's Office's do not have uniform protocols to decide when to seek the death penalty. When prosecutors from different Judicial Circuits assess substantially similar criminal cases, prosecutors from another might opt for life without parole. Heighten concerns about whether the death penalty is applied consistently throughout the State.

(3) This bias is reflected when one studies the statistics relating Florida Death Row inmates. As of October 25, 2013, Florida has 405 persons on death row. The Fourth

Judicial, which includes Clay, Duval and Nassau, have a total of sixty-seven (67) persons on death row. The sixty-seven (67) persons include white males (29), black males (36), Hispanic males (1) and one (1) white female. The population of the Fourth Judicial Circuit totals 1,162,054. The Eleventh Circuit, which takes in Miami-Dade and Broward County, has fifty-three (53) persons on death row, white males (24), black males (23), Hispanic (5) and one (1) Hispanic female. The population of the Eleventh Circuit is 2,477,289; twice the population of the people in the Fourth Circuit, yet the Fourth Circuit has the dubious distinction of having more people on Florida's death row and more black males.

(4) In 1988 the American Journal of Criminal Law, *Why Juror's Vote Life or Death; Operative Factors in the Florida Death Penalty Cases*, the author, William Geimer, stated that there was a disproportionate number of death sentences and stated; "Again using death sentences and executions as the criteria, Jacksonville (Duval County) is by far the Death Capital of the United States" and it continues to hold that distinction in 2013.

WHEREFORE, Defendant respectfully requests this Honorable Court to grant this motion to produce.

I HEREBY CERTIFY that a copy of the above and foregoing motion has been furnished to the Office of the State Attorney, by hand and/or electronically, this 10 day of December, 2013.

Respectfully submitted,

MATT SHIRK
PUBLIC DEFENDER

BY: _____
Fred C. Gazaleh, #353787
Assistant Public Defender

/slc

(CAP114)

Electronically Filed 12/10/2013 02:21:07 PM ET

IN THE CIRCUIT COURT, FOURTH JUDICIAL CIRCUIT, IN AND FOR DUVAL COUNTY, FLORIDA.

CASE NO.: 16 2013 CF 005781 AXXX MA

DIVISION: CR-D

STATE OF FLORIDA

VS.

DONALD JAMES SMITH

MOTION TO EXCLUDE GRUESOME OR INFLAMMATORY PHOTOGRAPHS

The Defendant, hereby moves this Court for an order excluding any and all evidence, references to evidence, testimony, or argument relating to photographs depicting the Decedent Cherish Perrywinkle. The motion is based upon the ground that the evidence is unduly gruesome, intended solely to inflame the Juror's emotions and will therefore create a substantial danger of undue prejudice to the Defendant.

(a) Defense Counsel stipulates to the identity of the Decedent.

(b) Defense Counsel has no objections to the Medical Examiner, who performed the autopsy on the Decedent, testifying.

(b) Defense Counsel has no objections to the Medical Examiner making reference to the examination of t Decedent's injuries, but objects to photographs taken in the examination of the injuries including Decedent's head and neck.

This motion is made under the authority of Florida Evidence Code Sections 90.401 and 90.403.

I HEREBY CERTIFY that a copy of the above and foregoing motion has been furnished to the Office of the State Attorney, by hand and/or electronically, this 10 day of December, 2013.

Respectfully submitted,

MATT SHIRK
PUBLIC DEFENDER

BY: _____
Fred C. Gazalen, #353787
Assistant Public Defender

/slc

(CAP121)

IN THE CIRCUIT COURT, FOURTH JUDICIAL CIRCUIT, IN AND FOR DUVAL COUNTY, FLORIDA.

CASE NO.: 16 2013 CF 005781 AXXX MA

DIVISION: CR-D

STATE OF FLORIDA

VS.

DONALD JAMES SMITH

DEFENDANT'S
REQUESTED PRE-VOIR DIRE INSTRUCTION

If, and only if, the Court allows death qualification of the jurors over Defendant's objection, Defendant proposes the following instruction be read to the jury prior to voir dire so the jury will understand why questions are asked about death penalty attitudes before guilt is established. This instruction is requested because there is significant evidence that the process of death qualification renders a jury more conviction prone and leads the jurors to believe that all the participants believe that the proper penalty, and not innocence or guilt, is the real issue in the case. *Haney, on the Selection of Capital Juries: The Biasing Effects of the Death-Qualification Process*, 8 Law and Human Behavior 121 (1984). The proposed instruction attempts to reduce the distorting effects of the death qualification process.

INSTRUCTION

Ladies and Gentlemen of the Jury Panel: DONALD JAMES SMITH is charged in Count One with the crime of Murder in the First Degree.

He may be found:

A) Guilty of Murder in the First Degree, or

B) Guilty of some lesser crime within the charge, or

C) Not Guilty.

If DONALD JAMES SMITH is found not guilty or guilty of a lesser crime, the responsibility of the jury ends there. However, if he is found guilty of first degree murder the responsibility of the jury does not end. It extends to a second phase, or a penalty phase.

If he is found guilty of first degree murder, the sentence could be death or life imprisonment without possibility of parole.

In the event of a first degree murder conviction, evidence will be presented to the same jury at a second phase as to any matters relevant to the sentence, including aggravating and mitigating circumstances, and at that time the State and Defense will present arguments for and against the sentence of death.

After hearing such aggravating and mitigating circumstances and the arguments of the attorneys, the jury will then render an advisory sentencing recommendation to the Court as to whether DONALD JAMES SMITH should be sentenced to death or life imprisonment without possibility of parole.

This advisory sentencing recommendation may be by a majority vote of the jury, and thereafter I will sentence DONALD JAMES SMITH to death or life imprisonment without possibility of parole.

I am not required to follow the advisory sentencing recommendation of the jury. However, I am required to assign great weight to your recommendation, and cannot override it unless reasonable men would not differ on the need to depart from the recommendation.

Because a guilty verdict could lead to a sentence of death, your ability to serve as jurors in this case depends upon your attitude towards rendering a verdict that possibly could result in a death sentence. We must discuss this with you at this point in the trial even though we have not completed the trial, and even though DONALD JAMES SMITH is still presumed to be innocent of the charges.

The basic question is whether your views on capital punishment would prevent or substantially impair the performance of your duty as a juror in accordance with my instructions and your oath as a juror.

In order to be a qualified juror in this case you must be able to be fair and impartial to the State and the Defense in considering a penalty recommendation as well as fair and impartial as to guilt or innocence.

If you would automatically vote against a verdict that might result in a sentence of death, without regard to the evidence that comes out in the trial, or if your attitude towards the death penalty, either for or against, would prevent you from making an impartial decision as to guilt or innocence, then, in that event, you are not qualified to serve as a juror.

Likewise you would not be qualified to serve as a juror if you are so much in favor of the death penalty that, in the event a criminal homicide were proven, you would automatically vote for a verdict of first degree murder without regard to the evidence that comes out in the trial.

Now, measured by those standards, examine your conscience and tell the attorneys and me whether you feel that you are qualified to serve as a juror in this case. If your attitude either for or against the death penalty would prevent you from making an impartial decision as to guilt or innocence, then I ask you to tell the attorneys and me of that attitude when we make inquiry of you.

WHEREFORE, Defendant requests the Court instruct the jury as requested.

I HEREBY CERTIFY that a copy of the above and foregoing Defendant's Requested Pre-Voir Dire Instruction has been furnished to the Office of the State Attorney, by hand and/or electronically, this 10 day of December, 2013.

Respectfully submitted,

MATT SHIRK
PUBLIC DEFENDER

BY: _____
Fred C. Gazaleh, #353787
Assistant Public Defender

/slc
(CAP047)

IN THE CIRCUIT COURT, FOURTH JUDICIAL CIRCUIT, IN AND FOR DUVAL COUNTY, FLORIDA.

CASE NO.: 16 2013 CF 005781 AXXX MA

DIVISION: CR-D

STATE OF FLORIDA

VS.

DONALD JAMES SMITH

MOTION FOR VOIR DIRE AFTER GUILTY VERDICT

COMES NOW the Defendant, by and through his undersigned attorney, and moves this Honorable Court to allow him to voir dire the jury after rendition of the guilty verdict in the guilt or innocence phase in the above-styled cause. As grounds for this motion, the Defendant states:

1. That it would be necessary to determine if any of the attitudes of the jury have changed toward the Defendant and whether or not they could still be fair and impartial in regard to imposition of the sentence in the above-styled cause after the guilt or innocence phase.

2. That should the jurors be predisposed against the Defendant at this stage in the proceeding, he would be denied the right to have a fair and impartial jury as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution, and Article I, §22 of the Florida Constitution.

3. That it would be highly prejudicial to the Defendant to have a jury which could no longer keep an open mind toward him in regard to sentencing.

4. That the ordeal of a lengthy trial in the guilt or innocence phase may result in having jurors who no longer have the patience or the desire to sit on the jury for the penalty phase.

WHEREFORE, the Defendant moves this Court to allow him to voir dire the jury after a guilty verdict is rendered in the above-styled cause and to make additional challenges at that time as to the jury which is composed.

I HEREBY CERTIFY that a copy of this Motion To Voir Dire After Guilty Verdict has been furnished to the Office of the State Attorney, by hand and/or electronically, this 10 day of December, 2013.

Respectfully submitted,

MATT SHIRK
PUBLIC DEFENDER

BY: _____
Fred C. Gazalel, #353787
Assistant Public Defender

/slc

(CAP048)

IN THE CIRCUIT COURT, FOURTH JUDICIAL CIRCUIT, IN AND FOR DUVAL COUNTY, FLORIDA.

CASE NO.: 16 2013 CF 005781 AXXX MA

DIVISION: CR-D

STATE OF FLORIDA

VS.

DONALD JAMES SMITH

MOTION IN LIMINE CONCERNING OTHER CRIMES EVIDENCE

Defendant, by and through the undersigned attorney, the Public Defender for the Fourth Judicial Circuit of Florida, moves this Honorable Court to disallow and suppress at trial all evidence and testimony presented on behalf of the State of Florida pertaining to purported crimes, wrongs, acts or criminal offenses of the defendant which are not specifically alleged in the Indictment filed herein. As grounds therefore, Defendant would show the following:

1. Defendant was arrested on June 22, 2013, and charged with First Degree Murder, Kidnapping and Sexual Battery.

2. Both the Indictment and the Statement of Particulars filed by the State of Florida in this cause allege that the offense occurred on or between June 21, 2013 and June 22, 2013.

3. The State of Florida has not furnished counsel for Defendant with a written notice of certain other purported crimes, wrongs, acts or criminal offenses of Defendant which it intends to offer as evidence in this cause (William's Rule) as required by Section 90.404, Florida Statutes (Florida Evidence Code).

4. Any evidence pertaining to any other purported crimes, wrongs, acts, or criminal offenses of Defendant on dates other than June 21, 2013 and June 22, 2013, would not be relevant to prove criminal intent, guilty knowledge, purpose, plan or design of Defendant in this proceeding.

5. Any evidence pertaining to any other purported crimes, wrongs, acts or criminal offenses of Defendant on dates other than June 21, 2013 and June 22, 2013, would not be

relevant to prove any material fact in issue in this proceeding, but would serve only as an attempt to show possible bad character or criminal tendencies of Defendant.

6. Any possible probative value of evidence pertaining to any other purported crimes, wrongs, acts or criminal offenses of Defendant on dates other than June 21, 2013 and June 22, 2013 would be far outweighed by the prejudice resulting therefrom to Defendant.

7. To allow such evidence to be admitted at trial would be violative of Section 90.404, Florida Statutes, and would be violative of Defendant's due process rights under the Fifth and Fourteenth Amendments to the United States Constitution and Article I, Section 9, Florida Constitution.

8. The Florida Supreme Court has recognized that the special nature of death penalty cases (guilt phase followed by penalty phase) requires that errors be scrutinized for their effect on both phases of the trial. For example, in Jones v. State, 569 So.2d 1234 (Fla. 1990), the court held it was error to allow the victim's brothers and sisters to identify the body during trial. Although the error was not harmful in guilt phase, leaving the conviction of first degree murder intact, it had the effect of a Booth v. Maryland, 482 U.S. 496 (1987), violation (victim impact) in penalty phase, creating a danger of arbitrariness in the jury recommendation. A new sentencing hearing was ordered.

WHEREFORE, Defendant respectfully requests this Honorable Court to enter an order disallowing and suppressing all evidence and testimony presented on behalf of the State of Florida pertaining to purported prior crimes, wrongs, acts or criminal offenses of Defendant, and to order the State to instruct its witnesses to avoid any mention of matters relating thereto.

I HEREBY CERTIFY that a copy of the above and foregoing Motion in Limine has been furnished to the Office of the State Attorney, by hand and/or electronically, this 10 day of December, 2013.

Respectfully submitted,

MATT SHIRK
PUBLIC DEFENDER

BY: _____
Fred C. Gazaleh, #353787
Assistant Public Defender

/slc

(CAP029)

Electronically Filed 12/10/2013 02:21:07 PM ET

IN THE CIRCUIT COURT, FOURTH JUDICIAL CIRCUIT, IN AND FOR DUVAL COUNTY, FLORIDA.

CASE NO.: 16 2013 CF 005781 AXXX MA

DIVISION: CR-D

STATE OF FLORIDA

VS.

DONALD JAMES SMITH

MOTION FOR INDIVIDUAL AND SEQUESTERED VOIR DIRE

Defendant, by and through the undersigned attorney, the Public Defender for the Fourth Judicial Circuit of Florida, respectfully moves this Honorable Court to order that prospective jurors in this cause be questioned in voir dire individually and out of the hearing of other prospective jurors, for the purpose of discerning their attitudes relating to capital punishment (if the Court allows death qualification of the jury), and their knowledge of the case based upon pre-trial publicity. Defendant asserts the following grounds in support of this motion:

A. In order to obtain a fair and impartial jury, it is absolutely essential to inquire of each prospective juror about his or her knowledge of the offense, the parties, and the witnesses. It is necessary to inquire what the venire person's knowledge is and to ask questions to determine how that knowledge will affect his or her deliberations.

1. By explaining what he or she has heard about the charges or what he or she knows about parties or witnesses, a venire person may very likely impart his or her knowledge to the other prospective jurors unless there is individual, sequestered voir dire. Such knowledge, which is often based on opinion, rumors, hearsay, media coverage, and other sources of inadmissible evidence, can taint the entire venire that is exposed to it and serve to deny the defendant a fair trial by an impartial jury. *See* Russ v. State, 95 So.2d 594 (Fla. 1957); Moncur v. State, 262 So.2d 688 (Fla. 2d DCA 1972); Marrero v. State, 343 So.2d 883 (Fla. 2d DCA 1977); Kelly v. State, 371 So.2d 162 (Fla. 1st DCA 1979).

2. Whenever there is believed to be a significant possibility that an individual juror will be ineligible to serve because of exposure to potentially prejudicial material, the examination of each juror with respect to their exposure shall take place outside the presence of other chosen and prospective jurors. Standard No. 8-3.4, American Bar Association, Standards Relating to Fair Trial and Free Press; U.S. ex rel. Doggett v. Yeager, 472 F.2d 229 (3d Cir. 1973).

3. This particular case has been the subject of media coverage. Said media coverage has included information which is clearly inadmissible at the trial of this cause.

B. Prospective jurors in capital cases are routinely questioned by the court, the prosecution, and the defense about their beliefs in the death penalty. Often, this questioning is of a repeated and prolonged nature. Such questioning about the death penalty in the presence of the venire focuses attention on penalty before the defendant has been found guilty. As a result, some jurors may be more likely to believe that the defendant is guilty as charged. The influence of this procedure, however subtle, undermines the constitutional purpose and functioning of the jury in a criminal trial.

1. Jurors undergoing death-qualification would have reason to infer that the judge and the attorneys personally believe the accused to be guilty or expect the jury to come to that conclusion. Only such an inference could serve to explain to the jurors why so much time and energy are devoted to an extensive discussion of penalty before trial. Provided with these cues from people who are not only experts in the courtroom but are also presumably acquainted with all the evidence in the case, the relevant law, and the correct application of the one to the other, death-qualified jurors may themselves become more inclined to believe that the accused is guilty as charged. Hovey v. Superior of Alameda County, 616 P.2d 1301 at 1348 (Cal. 1980).

2. If a juror is predisposed by the very process of the death-qualifying voir dire to believe the accused is guilty, the juror will tend, in consequence of that perspective: (1) to selectively perceive the evidence, for example, forgetting, distorting, or actually failing to perceive evidence which conflicts with his or her preconceptions; (2) to draw only those inferences from the evidence which supported those preconceptions and perhaps to create data to

reinforce those beliefs; and (3) to evaluate the evidence perceived, for example, assess credibility of witnesses, weigh the inferences drawn - in a manner which tends to fulfill his or her expectations. Moreover, a juror who is predisposed to expect a guilty verdict will tend to arrive more readily at the conclusion that the evidence presented amounts to proofs beyond a reasonable doubt. Hovey, supra, at 1348.

3. A capital jury, which has been predisposed by virtue of the very process by which it has been selected to think that the accused is guilty in advance of trial, is unlikely to function properly or maintain its neutrality. As a jury's neutrality decreases, the quantum of evidence necessary to prove guilt also decreases. Hovey, supra, at 1349.

C. In addition to making a capital jury prone to convict, the non-sequestered method of death qualification may alter the states of mind of the jurors in ways which make them more likely to impose a death sentence. Death-qualification of jurors in the presence of other venire persons therefore inhibits the ability of the jury to perform their constitutionally mandated function to "express the conscience of the community on the ultimate question of life or death." Witherspoon v. Illinois, 391 U.S. 510, 88 S. Ct. 1770, at 1775, (1968). The process of non-sequestered death-qualification is constitutionally impermissible because, as in Witherspoon, it produces a jury "uncommonly willing to condemn a man to die." Id.

1. During a death-qualifying voir dire, venire persons are questioned in open court about their attitudes toward the death penalty. The fact that the court dismisses those venire persons who express unequivocal opposition to the death penalty is likely to be interpreted by the remaining jurors as an indication that the judge in particular and the law in general disapprove of such attitudes. Jurors whose scruples against capital punishment are not so irrevocable as to disqualify them under Witherspoon or Witt feel that in the eyes of the law, their attitudes are improper, or at least suspect. Those jurors may in consequence feel less willing to express or rely on such attitudes in their consideration of penalty. Hovey, supra, at 1350.

2. In a capital voir dire, prospective jurors are repeatedly prompted to think about the penalty decision they may later be called upon to make. What was initially regarded as an onerous choice, inspiring caution and hesitation, may be more readily undertaken simply

because of the repeated exposure to the idea of taking a life. Some jurors initially face the penalty decision with reluctance and aversion. This may represent a significant viewpoint in the community. A process which systematically erodes these attitudes would make the jury less representative of the community and more inclined to impose death.

D. The most practical and effective procedure available to minimize the untoward effects of death-qualification is individualized sequestered voir dire. Because jurors would then witness only a single death-qualifying voir dire, each individual juror would be exposed to considerably less discussion about the various aspects of the penalty phase before hearing any evidence of guilt. Such a reduction in the pretrial emphasis on penalty would minimize the tendency of a death-qualified jury to presume guilt and expect conviction. Hovey, supra, at 1353.

E. To deny this motion is to deny Defendant the right to a fair trial by an impartial jury comprised of a representative cross-section of the community, in violation of the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution and Article I, Sections 2, 9, 16,

WHEREFORE, Defendant requests this Honorable Court to grant this motion.

I HEREBY CERTIFY that a copy of the above and foregoing Motion has been furnished to the Office of the State Attorney, by hand and/or electronically, this 10 day of December, 2013.

Respectfully submitted,

MATT SHIRK
PUBLIC DEFENDER

BY: _____
Fred C. Gazaleh, #353787
Assistant Public Defender

/slc
(CAP049)

IN THE CIRCUIT COURT, FOURTH JUDICIAL CIRCUIT, IN AND FOR DUVAL COUNTY, FLORIDA.

CASE NO.: 16 2013 CF 005781 AXXX MA

DIVISION: CR-D

STATE OF FLORIDA

VS.

DONALD JAMES SMITH

MOTION TO PROHIBIT THE PROSECUTOR FROM USING PEREMPTORY CHALLENGES TO STRIKE JURORS WHO ARE DEATH SCRUPLED BUT ARE NOT EXCLUDABLE FOR CAUSE AND MOTION FOR APPROPRIATE RELIEF

Defendant moves the Court for the following reasons to prohibit the prosecutor from using peremptory challenges to strike jurors who are death scrupled but are not excludable for cause:

1. Current decisions of the United States Supreme Court and the Florida Supreme Court allow the prosecutor to challenge for cause jurors whose attitudes against the death penalty would prevent or substantially impair the performance of their duties as jurors in accordance with the instructions and their oaths. Wainwright v. Witt, 105 S.Ct. 844 (1985); Witherspoon v. Illinois, 88 S.Ct. 1770 (1968); Lambrix v. State, 494 So.2d 1143 (Fla. 1986). Those decisions do not allow the prosecutor to challenge for cause jurors who have scruples against the death penalty but who can nevertheless follow the law and their oaths.

2. In the instant case the prosecutor may try to use his peremptory challenges to exclude the death scrupled jurors he could not challenge for cause. He may thereby accomplish what he could not accomplish under Witherspoon, Witt, and Lambrix. He may systematically exclude an identifiable segment of the population who have unfavorable (to the prosecutor) attitudes about the death penalty and thereby deny Defendant his right to a trial by an impartial jury drawn from a representative cross section of the community. This would be in violation of Amendments Six and Fourteen of the United States Constitution and Article I, Section 16, of the

Florida Constitution. This practice was condemned in Brown v. Rice, 693 F.Supp. 381 (W.D.N.C. 1988), where the court reversed a murder conviction and death sentence where the prosecutor had excused nine death scrupled jurors:

> The peremptory challenge is not exempt from scrutiny under the Sixth Amendment. "The prosecutor's historical privilege of peremptory challenge free of judicial control," Batson v. Kentucky, 476 U.S. 79, 91, 106 S.Ct. 1712, 1720, 90 L. Ed. 2d 69 (1986), is an important right for the state as well as the accused, but it is certainly no more important than the accused's Sixth and Fourteenth Amendment rights to be tried by an impartial jury. The Supreme Court has repeatedly recognized, and recently reiterated, that "peremptory challenges are a creature of statute and are not required by the constitution." {*Emphasis added.*} Ross v. Oklahoma, 108 S.Ct. at 2279. Where a constitutional right comes into conflict with the statutory right of peremptory challenges the constitutional right prevails. *See* Gray v. Mississippi, 481 U.S. at 648, 107 S.Ct. at 2053-55.
>
> * * *
>
> When used properly, "{peremptory challenges} are the means to achieve the end of an impartial jury," Ross v. Oklahoma, 108 S.Ct. at 2278, when used improperly to exclude all jurors who indicate even the slightest uncertainty about the death penalty, they become the means for violating the constitution. "{T}he decision whether a man deserves to live or die must be made on scales that are not deliberately tipped toward death." Witherspoon, 391 U.S. at 521-522, n.20, 88 S.Ct. at 1776-1777 n.20. Excluding jurors who would be in the slightest way affected by the prospect of the death penalty, or by their views about such a penalty, tips the scales toward death and deprives the defendant of the impartial jury to which he or she is entitled. *See* Adams v. Texas, 448 U.S. 38, 50, 100 S.Ct. 2521, 2529, 65 L. Ed. 2d 581 (1980). No defendant can constitutionally be put to death at the hands of a tribunal so selected. See Witherspoon, 391 U.S. at 522- 523, 88 S. Ct. at 1777-78.

> I conclude that it is unconstitutional for prosecutors to use peremptory challenges consistently to exclude potential jurors who express reservations about capital punishment so as to produce a jury that is uncommonly willing to condemn a man to death. But see Gray v. Mississippi, 481 U.S. 648, 107 S.Ct. at 2062 (Justice Scalia dissenting, with whom the Chief Justice, Justice White and Justice O'Conner join).
>
> To establish a *prima facie* Sixth Amendment violation the capital defendant must show that the prosecutor has exercised his peremptory challenges to remove from the venire all members who were non-Witherspoon excludables, i.e., opposed to the death penalty but able to uphold the juror's oath and abide by the law as is instructed by the court. The burden then shifts to the state to come forward with a neutral explanation for challenging the jurors. As in *Batson*, "the prosecutor's explanation need not rise to the level justifying exercise of a challenge for cause ... {b}ut the prosecutor may not rebut the defendant's *prima facie* case of {jury partiality} by stating merely that he challenged all the jurors ... on the assumption -- or his intuitive judgment -- that they would be partial to the defendant because of their {convictions against the death penalty}." Batson, 476 U.S. at 97, 106 S.Ct. at 1723.
>
> *Witherspoon* and its progeny are rooted in the Sixth and Fourteenth Amendments constitutional right to an impartial jury, a right which goes to the very integrity of our criminal justice system. If we were to allow the state to achieve through its use of peremptories what for cause is clearly prohibited under *Witherspoon* and its progeny, we would be rendering the capital defendant's right to an impartial jury meaningless, and sanctioning the abusive use of the peremptory challenge.

693 F. Supp. at 392-394.

3. Federal courts and Florida courts have recognized repeatedly that the prosecutor's use of peremptory challenges to exclude blacks is subject to review. *See, e.g.,* Batson v. Kentucky, 106 S.Ct. 1712 (1986); State v. Neil, 457 So.2d 481 (Fla. 1984). The Florida cases

have set up specific procedures to follow when peremptory challenges have been misused. The same procedures should apply in the instant case.

4. The Court should require the prosecutor to state neutral reasons for the use of his peremptory challenges against death scrupled jurors, and, in the absence of acceptable reasons, the Court should dismiss the venire and begin jury selection with a new venire. *See* Carter v. State, 550 So.2d 1130 (Fla. 3d DCA 1989).

5. Defendant is aware of contrary authority in the State of Florida: San Martin v. State, 717 So.2d 462, 467-68 (Fla. 1998), held that "the State may properly exercise its peremptory challenges to strike prospective jurors who are opposed to the death penalty, but not subject to challenge for cause. . . . Both parties have the right to peremptorily strike persons thought to be inclined against their interests." *See* also Walls v. State, 641 So.2d 381 (Fla. 1994), and Morrison v. State, 818 So.2d 432 (Fla. 2002). Defendant believes those cases were wrongly decided.

WHEREFORE, Defendant requests this motion be granted.

I HEREBY CERTIFY that a copy of the above and foregoing Motion has been furnished to the Office of the State Attorney, by hand and/or electronically, this 10 day of December, 2013.

Respectfully submitted,

MATT SHIRK
PUBLIC DEFENDER

BY: _____
Fred C. Gazaleh, #353787
Assistant Public Defender

/slc

(CAP050)

IN THE CIRCUIT COURT, FOURTH JUDICIAL CIRCUIT, IN AND FOR DUVAL COUNTY, FLORIDA.

CASE NO.: 16 2013 CF 005781 AXXX MA

DIVISION: CR-D

STATE OF FLORIDA

VS.

DONALD JAMES SMITH

MOTION FOR ADDITIONAL PEREMPTORY CHALLENGES DUE TO NUMERICAL DISPARITY REGARDING PEREMPTORY CHALLENGES PROVIDED BY RULE 3.350(A), FLORIDA RULES OF CRIMINAL PROCEDURE AND SECTION 913.08, FLORIDA STATUES, AND DUE TO SENSITIVE VOIR DIRE ISSUES IN THIS CASE

The Defendant, DONALD JAMES SMITH, by and through his undersigned counsel, respectfully requests that this Court enter an Order granting unto him additional peremptory challenges. In support of this Motion, the Defendant states:

1. Defendant is charged with the offense of First Degree Murder. Furthermore, the State has indicated to counsel for the Defendant that they will be seeking the death penalty in the event that there is a conviction for First Degree Murder.
2. A capital case is unique in that a twelve (12) person jury is seated as opposed to six (6) persons in all other cases. Fla. R. Crim. P. 3.270.
3. However, rule 3.350(a), Florida Rules of Criminal Procedure, and section 913.08(1)(a), Florida Statutes, provide only ten (10) peremptory challenges.
4. Because a twelve (12) person jury must be selected, the procedural rules actually provide less potency in making peremptory challenges in capital cases than it does in other, less serious cases. For example:
   a. Where the charge is punishable by life imprisonment, ten (10) peremptory challenges are allowed, although only a six (6) person jury is seated. One and two-thirds (1-2/3's) challenges per jury seat are afforded.
   b. In less serious cases, six (6) peremptory challenges are allowed to aid in

selecting a six-person (6) jury, a one-to-one ratio.

c. In capital cases, only ten (10) challenges are allowed in the selection of a twelve (12) person jury, a ratio of less than one challenge to each seat.

5. Authorizing less potency in peremptory challenges in capital cases than is effectively allowed in other cases deprives the Defendant of his right to Equal Protection afforded him by the Fourteenth Amendment to the United States Constitution and by article I, section 2 of the Florida Constitution, and his right against cruel and unusual punishment as guaranteed by the Eighth and Fourteenth Amendments to the United States Constitution and article I, section 17 of the Florida Constitution.

6. Section 913.08(1)(a), Florida Statutes, makes it more difficult for a defendant charged with a capital crime to obtain an acceptable jury than for a defendant charged with any other type of crime. There is neither a compelling interest nor a rational basis for a limitation on peremptory challenges that makes it more difficult to obtain a fair and impartial jury in capital cases.

7. Section 913.08(1)(a) is unconstitutional under the following provisions in the Florida Constitution:

a. Article I, section 1, which provides:

> The enunciation herein of certain rights shall not be construed to deny or impair others retained by the people.

b. Article I, section 2, which provides:

> All natural persons, female and male alike, are equal before the law and have inalienable rights, among which are right to enjoy and defend life and liberty....

c. Article I, section 9, which provides:

> No person shall be deprived of life, liberty or property without due process of law....

d. Article I, section 16, which provides:

> In all criminal prosecutions the accused shall . . . have the right to . . . have a speedy and public trial *by impartial jury* in the county where the crime was committed. (emphasis added).

e. Article I, section 22, which provides:

> The right of trial by jury shall be secure to all and remain inviolate. The qualifications and the number of jurors, not fewer than six, shall be fixed by laws.

8. Section 913.08(1)(a) is unconstitutional under the following provisions of the United States Constitution:

a. Sixth Amendment, which provides:

> In all criminal prosecutions, the Accused shall enjoy the right to a speedy and public trial, *by an impartial jury* of the State and district wherein the crime shall have been committed...and to have the assistance of counsel for his defense. (emphasis added).

b. Fourteenth Amendment, which provides:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of law, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

9. Furthermore, in this case there are several sensitive areas of voir dire which require the need for additional peremptory challenges. First, the publicity in this case has included reference to the fact that Mr. Smith has prior arrests and was designated a sexual offender. This prejudices the Defendant in the eyes of potential jurors who have read about that in connection with this case or at the time of the previous action. Additional peremptory challenges will allow the Defendant to excuse people who have knowledge without having to engage in lengthy individual voir dire to determine whether the juror is prejudiced, and thereby avoids the probable effect that other jurors will become tainted or

prejudiced by the voir dire process. Second, there are other sensitive areas involved in this case and related issues that are of a nature for which additional peremptory challenges are necessary to insure that the Defendant can challenge jurors who may be prejudiced towards him.

WHEREFORE, the Defendant respectfully requests that this Court grant additional peremptory challenges as needed in this Cause.

I HEREBY CERTIFY that a copy of the above and foregoing Motion For Additional Peremptory Challenges or has been furnished to the Office of the State Attorney, by hand and/or electronically, this 10 day of December, 2013.

Respectfully submitted,

MATT SHIRK
PUBLIC DEFENDER

BY: _____
Fred C. Gazaleh, #353787
Assistant Public Defender

/slc
(CAP051)

IN THE CIRCUIT COURT, FOURTH JUDICIAL CIRCUIT, IN AND FOR DUVAL COUNTY, FLORIDA.

CASE NO.: 16 2013 CF 005781 AXXX MA

DIVISION: CR-D

STATE OF FLORIDA

VS.

DONALD JAMES SMITH

MOTION TO PROHIBIT USE OF JURORS' CRIMINAL RECORDS BY THE STATE AND ALTERNATIVE MOTION FOR DISCLOSURE OF CRIMINAL RECORDS OF PROSPECTIVE JURORS

Defendant, by and through the undersigned attorney, the Public Defender for the Fourth Judicial Circuit of Florida, pursuant to the Fifth, Sixth and Fourteenth Amendments to the United States Constitution, Chapter 943, Florida Statutes, and such other laws of the State of Florida as may be applicable, hereby requests this Honorable Court to enter an order prohibiting the use of criminal records of prospective jurors during voir dire or, in the alternative, ordering that the State disclose any and all criminal records of prospective jurors to the defendant prior to voir dire. As grounds for this motion, the defendant would state that:

1. Every week, the State Attorney's Office for Duval County, Florida, is permitted by the Jacksonville Sheriff's Office to obtain copies of criminal arrest records of all prospective jurors for the coming trial week, for the use by assistant state attorneys during jury selection in criminal cases.

2. The Defense is not given access to these records by prosecuting attorneys.

3. The Jacksonville Sheriff's Office will not provide the same service (*i.e.*, providing the criminal history of each venireman) to defense counsel, nor will it permit access to its records for defense counsel to conduct such an investigation independently.

4. For the Defense to duplicate the investigation of the State Attorney's Office in this regard would be both costly and time consuming and would require funds not available to an indigent defendant through the Public Defender's Office.

5. The compiled criminal history data supplied to the State by the Sheriff's Office is not limited to felony convictions or other convictions which would be a valid basis for a challenge for cause under Section 40.013, Florida Statutes.

6. Many assistant state attorneys utilize these copies of criminal arrest records in jury selection to eliminate jurors from the panel for potential bias against the State through peremptory and cause challenges. However, the criminal arrest records of particular jurors challenged by the State and of those not challenged by the State are not normally made part of the record at voir dire.

7. The use of this criminal history information for voir dire is a violation of criminal justice dissemination laws, exceeds the authority of the State Attorney's Office, and should be prohibited. Chapter 943, Florida Statutes.

8. However, if the State Attorney's Office is allowed to use such records during voir dire, fundamental fairness and due process requires disclosure of such information to the defendant prior to voir dire. *See* Thompson v. State, 565 So.2d 1311 (Fla. 1990); State of Iowa v. Bessenecker, 404 N.W.2d 134 (Iowa 1987); People v. Aldridge, 209 N.W.2d 796 (Mich. Ct. of App., Div. 2 1973); Losavio v. Mayber, 496 P.2d 1032 (Colo. 1972); cf. Commonwealth v. Smith, 215 N.E.2d 897 (Mass. Supreme Judicial Ct., Middlesex 1966); People v. Murtishaw, 631 P.2d 446 (Cal. 1981).

WHEREFORE, Defendant respectfully requests this Honorable Court to grant this motion in the above-styled cause.

I HEREBY CERTIFY that a copy of the above and foregoing Motion to Prohibit Use of Jurors' Criminal Records by the State and Alternative Motion for Disclosure of Criminal Records of Prospective Jurors has been furnished to the Office of the State Attorney, by hand and/or electronically, this 10 day of December, 2013.

Respectfully submitted,

MATT SHIRK
PUBLIC DEFENDER

BY: _____
Fred C. Gazaleh, #353787
Assistant Public Defender

/slc

(CAP052)

IN THE CIRCUIT COURT, FOURTH JUDICIAL CIRCUIT, IN AND FOR DUVAL COUNTY, FLORIDA.

CASE NO.: 16 2013 CF 005781 AXXX MA

DIVISION: CR-D

STATE OF FLORIDA

VS.

DONALD JAMES SMITH

MOTION TO PRECLUDE DEATH QUALIFICATIONS OF JURORS IN THE INNOCENCE OR GUILT PHASE OF THE TRIAL AND TO UTILIZE A BIFURCATED JURY, IF A PENALTY PHASE IS NECESSARY

Defendant, by and through the undersigned counsel, moves this Honorable Court to preclude death qualification of jurors in the innocence or guilt phase of the trial, as violative of the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and Article I, Section 22, of the Florida Constitution, and to utilize a bifurcated jury, if a penalty phase is necessary as the process of death qualification disproportionately excludes black persons and women, each of which are recognized as cognizable classes. As grounds for this motion, Defendant states:

1. This issue is one, which was expressly reserved by the United States Supreme Court in Witherspoon v. Illinois, 391 U.S. 510 (1968). The Court in Witherspoon held that the available data, at that time, in (1968) was "too tentative and fragmentary" to determine whether a death qualified jury is prosecution prone. 319 U.S. at 517-518. The Court went on to explicitly state that this issue would have to be reconsidered, if better data was presented.

> Even so, a defendant convicted by such a jury in some future case might still attempt to establish that the jury was less than neutral with respect to guilt. If he were to succeed in that effort, the question would then arise whether the State's interest in submitting the penalty issue to a jury capable of imposing capital punishment may be vindicated at the expense of the defendant's interest in a completely fair determination of guilt or innocence -- given the possibility of accommodating both interests by means of a

> bifurcated trial, using one jury to decide guilt and another to fix punishment. That problem is not presented here, however, and we intimate no view as to its proper resolution. 391 U.S. at 520 n.18.

Thus, the United States Supreme Court has specifically left open the issue involved here. The Court has held that this issue is one which should be revisited if more complete data is presented. The Court has also posited the bifurcated jury as one possible method of harmonizing the interests of the prosecution and the rights of the defendant pursuant to the Sixth and Fourteenth Amendment.

2. Subsequent to the decision of Witherspoon, the Eighth Circuit Court of Appeals has held that this issue requires an evidentiary hearing. Grigsby v. Mabry, 637 F.2d 525, 526-528 (8th Cir. 1980). The federal district court held an evidentiary hearing on this issue and declared the practice of death qualification unconstitutional, on a wide variety of grounds. (The court granted the relief requested by the defendant, in this case.) Grigsby v. Mabry, 569 F.Supp. 1273 (E.D. Ark. 1983).

The Eighth Circuit affirmed the District Court's decision, finding that death qualified juries are unfairly and unconstitutionally prosecution prone. Grigsby v. Mabry, 758 F.2d 226 (8th Cir. 1985) (*en banc*). On October 7, 1985, the United States Supreme Court agreed to review that decision, and to decide, for the first time, whether the death qualification of jurors before the guilt/innocence phase of a bifurcated capital trial violates the Sixth and Fourteenth Amendments to the Constitution. *Cert. Granted sub nom.* Lockhart v. McCree, 476 U.S. 162, 106 S. Ct. 59 (1985). The United States Supreme Court reversed the judgment of the Court of Appeals. Lockhart v. McCree, 476 U.S. 162, 106 S. Ct. 1758 (1986). However, the Court in Lockhart did not deal with the precise issue raised here - the disproportionate exclusion of black persons and women by the process of death qualification. Indeed, the Court in Lockhart reaffirmed the fact that black persons and women are cognizable classes and their exclusion violates the United States Constitution. Id. at 1765-66.

3. The evidence available on this issue, and the evidence reviewed by the Court in Grigsby is far superior to the evidence available in Witherspoon. The Grigsby court described the differences between the data:

> More particularly, the Supreme Court was referred to: (1) W. C. Wilson, Belief, in Capital Punishment and Jury Performance (1964) (Unpublished Manuscript, University of Texas); (2) F. J. Goldberg, Attitude Toward Capital Punishment and Behavior as a Juror in Simulated Capital Cases (undated) (Unpublished Manuscript, Morehouse College); and (3) H. Zeisel, Some Insights Into the Operation of Criminal Juries (Nov. 1957) (Confidential First Draft, University of Chicago), 391 U.S. at 517 n.10, 88 S. Ct. at 1774, n.10. The Supreme Court found this data "too tentative and fragmentary to establish that jurors not opposed to the death penalty tend to favor the prosecution in the determination of guilt." *Id.* Indeed, those data were very "tentative and fragmentary." The Supreme Court noted that in his brief, *Witherspoon* relied only upon the Wilson and Goldberg articles. The Zeisel fragment referred to in Witherspoon's petition for certiorari was apparently withdrawn.
>
> The manuscripts of the Zeisel and Goldberg studies, relied upon by petitioners here are thorough and complete, whereas earlier versions of those studies, which the Supreme Court reviewed in 1968, were both unpublished and incomplete. And the record established that the Supreme Court had only a five-to-eight page fragment of what became a fifty-page monograph by Dr. Zeisel. More importantly, this fragment did not include Mr. Zeisel's depiction and explanation of his data in what became Table 9 of that monograph....
>
> Since 1968, the Zeisel and Goldberg studies have been completed and published. Both have been subjected to intensive peer review. In addition, to meet one of the objections stated by the Supreme Court, the petitioners here in Grigsby have offered extensive expert testimony explaining "the meaning of the terms used in" the Wilson, Zeisel and Goldberg studies which tend to verify the "accuracy of the techniques employed" and to demonstrate "the

> validity of the generalizations made." *See* Witherspoon, 510 at 517, n.11, 83 S.Ct. at 1744, n.11.
>
> More importantly, however, petitioners have not only introduced the end products of the Wilson, Zeisel and Goldberg studies, but they have supplemented same with six more extensive attitude surveys, to-wit, the four Bronson studies, the Harris 1971, and the Ellsworth/Fitzgerald 1979. In addition, even more sophisticated conviction-proneness studies were introduced, to-wit, Harris 1971, Jurow 1971, and the five Ellsworth 1979 studies. In addition, the plaintiffs have introduced national and Arkansas-specific demographic data, as well as the Haney 1979 study (which suggested the ill effects of the process of death qualification) which were not raised or even suggested to the Supreme Court in *Witherspoon*. 569 F.Supp at 1290- 1291. *See also Witherspoon*, 510 at 517-518.

Thus, it is clear that the data before the United States Supreme Court in *Witherspoon* consisted of two unpublished and incomplete manuscripts and a small fragment of an additional manuscript. These studies are now complete, as well as numerous others. The United States Supreme Court's invitation in Witherspoon must be re-examined in light of currently available data.

4. The evidence reviewed by the court in Grigsby reveals that the process of death qualification is constitutionally defective in that it disproportionately excludes black persons and women. Thus the process denies a defendant his right to a cross-section of the community.

5. The right to a fair, representative, cross-sectional jury was originally based solely on the due process and equal protection requirements of the Fourteenth Amendment. The earliest cases dealt with the exclusion of blacks from jury service. Strauder v. West Virginia, 100 U.S. 303 (1880). However, the Court in Strauder made clear that the principles involved would also apply if the group excluded was "white men" or "naturalized Celtic Irishmen" *Id.* at 308. In Hernandez v. Texas, 347 U.S. 475, the Court extended this doctrine to Mexican-Americans.

The Court in Peters v. Kiff, 407 U.S. 493 (1972) held that the exclusion of blacks constitutes a denial of due process to any defendant, black or white.

> When any large and identifiable segment of the community is excluded from jury service, the effect is to remove from the jury room qualities of human nature and varieties of human experience, the range of which is unknown and perhaps unknowable....
>
> It is the nature of the practices here challenged that proof of actual harm, or lack of harm, is virtually impossible to adduce.... In light of the great potential for harm latent in the unconstitutional jury-selection system, and the strong interest of the criminal defendant in avoiding that harm, any doubt should be resolved in favor of giving the opportunity for challenging the jury to too many defendants rather than giving it to too few. 407 U.S. at 503-504 (footnote omitted).

The Court in Duncan v. Louisiana, 391 U.S. 145 (1968), extended the Sixth Amendment to state criminal trials.

> A right to trial is granted to criminal defendants in order to prevent oppression by the Government.... Providing an accused with the right to be tried by a jury of his peers gave him an inestimable safeguard against the corrupt or overzealous prosecutor and against the compliant, biased, or eccentric judge.... The deep commitment of the Nation to the right of the jury trial in serious criminal cases as a defense against arbitrary law enforcement qualifies for protection under the Due Process Clause of the Fourteenth Amendment, and must therefore be respected by the States. 391 U.S. at 155-156.

In Taylor v. Louisiana, 419 U.S. 522 (1975) representativeness became the central consideration:

> We accept the fair cross-section requirement as fundamental to the jury trial guaranteed by the Sixth Amendment and are convinced that the requirement has solid foundation. 419 U.S. at 503.

Duren v. Missouri, 439 U.S. 357 (1979) outlined the requirements for establishing a violation of the fair cross section requirement.

> In order to establish a prima facie violation of the fair- cross-section requirement, the defendant must show (1) that the group

> alleged to be excluded is a "distinctive" group in the community; (2) that the representation of this group in venires from which juries are selected is not fair and reasonable in relation to the number of such persons in the community; and (3) that this under representation is due to systematic exclusion of the group in the jury selection process.

439 U.S. at 364. *Duren* also makes clear that:

> In Sixth Amendment fair-cross- section cases, systematic disproportion itself demonstrates an infringement of the defendant's interest in a jury chosen from a fair community cross-section. The only remaining question is whether there is adequate justification for this infringement.

439 U.S. 368, n.26.

6. The available evidence clearly shows that the process of death qualification disproportionately excluded black persons and women.

7. The currently available evidence indicates that the exclusion of persons who can fairly decide the question of guilt or innocence, but who cannot vote for a death sentence, serves to disproportionately exclude blacks persons and women. It is clear that both black persons and women are cognizable classes and cannot be disproportionately excluded from jury service. Strauder v. West Virginia, supra; Taylor v. Louisiana, supra. The available data demonstrates that those excluded by death qualification are disproportionately black persons and women and that the process of death qualification indirectly denies a defendant a cross section jury. The Court in *Grigsby* summarized the evidence as follows:

> All three of petitioners' experts testified as to the relationship between death penalty attitudes and demographic characteristics. All three expressed the opinion that the process of death qualification has the inevitable effect of decreasing disproportionately and significantly the number of women and blacks eligible to serve as jurors at the guilt-innocence phase of capital trials. They based these opinions, *inter alia*, upon the following studies, all of which are in evidence:

Bronson/Denver, 1970

Bronson/Butte County, 1980

Bronson/Los Angeles, 1980

Goldberg, 1970

Harris, 1971

Ellsworth/Fitzgerald, 1979

and upon national opinion polls. The Precision Research, Inc. Arkansas demographic survey also supports those opinions.

The Court credits and accepts three opinions of petitioners' experts finding that the above studies provide strong support therefor. Taking the studies overall, the Court finds that the differences between the attitudes of blacks and whites with respect to the death penalty is highly statistically significant. For instance Dr. Bronson totalled the attitudes by race for his three studies and found that only 5.8% of blacks strongly favor the death penalty while 30.4% oppose it. This compares with 20.4% of the whites who strongly favored the death penalty while only 9.9% strongly oppose it.

And the Harris 1971 national demographic survey shows that, by virtue of their attitudes toward the death penalty, 46% of blacks would be excluded under the Witherspoon standard as compared with only 29% of the white subjects, a difference which is also highly statistically significant. And 37% of the women were WEs compared to only 24% of the male subjects.

The Arkansas "Precision Survey" used five death penalty positions on its spectrum: "strongly in favor," "somewhat in favor," "neither favor/oppose," "somewhat opposed," and "strongly opposed." Forty-five percent of Arkansas blacks indicated they were strongly opposed compared to 10% of the whites. Twenty-one percent of Arkansas women were strongly opposed compared to 8% of the men. The survey also indicated that even after excluding "nullifiers" 29% of the blacks would never impose the death

> penalty compared to 9% of the whites. And, whereas only 8% of Arkansas men would be *Witherspoon* Excludables (after removing nullifiers), 13% of Arkansas women would fall into that classification. These results are consistent with national surveys over the past 30 years. So it is clear that the death qualification procedures, which permit the removal of fair-minded prospective jurors from the guilt-innocence determination phase of capital trials solely because of their attitudes toward the death penalty will indirectly but inevitably result in the under representation of blacks and women on such juries in Arkansas.
>
> Although the percentage figures differs in the various studies, all confirm the great difference in attitude between blacks and whites and between men and women on the death penalty. And even though such attitudes change back and forth over time the demographic differences referred to have steadily persisted and continue to persist.
>
> Dr. Gerald Shure, the respondent's expert, apparently agrees that death qualification disproportionately excludes blacks. The State offered no credible evidence to the contrary.
>
> Blacks and women constitute significant and distinctive groups of jury-eligible citizens within Arkansas and the Nation. Death qualification results in their systematic disproportionate removal from juries which try the guilt innocence of persons accused of capital crimes, without adequate justification, in violation of the accused's right to a representative jury comprised of a fair cross section of the community.

569 F. Supp. 1293-1294.

8. The requirement of death qualification is particularly senseless in Florida. The first, and perhaps the best measure of the State's interest is the statutory scheme which governs jury selection in this State. Section 913.13, Fla. Stat. provides that "{a} juror who has beliefs which preclude her or him from finding a defendant guilty of an offense punishable by death shall not be qualified as a juror in a capital case." This section does not authorize the disqualification of jurors who can find a defendant guilty if the prosecution carries its burden, but who will not vote

to inflict a death sentence. The Florida legislature, therefore, has not proclaimed any interest in the death qualification procedure followed in this or any other case. The only other relevant statutory authority is Section 913.03(10), Fla. Stat., which authorizes the removal of jurors whose "state of mind regarding the defendant, the case, the person alleged to have been injured by the offense charged, or the person on whose complaint the prosecution was instituted that will prevent him from acting with impartiality...." But reliance on this provision to justify the exclusion of jurors who will be fair to both sides in the guilt phase but not in the penalty phase arises only if the same jury must decide both guilt or innocence and penalty. See, Winick, Witherspoon in Florida: Reflection on the Challenge for Cause of Jurors in Capital Cases in a State in Which the Judge Makes the Sentencing Decision, 37 U. Miami L. Rev. 825, 835-40 (1983).

Section 921.141(1), Fla. Stat., provides, in relevant part:

> Upon conviction or adjudication of guilt of a defendant of a capital felony, the court shall conduct a separate sentencing proceeding to determine whether the defendant should be sentenced to death or life imprisonment as authorized by Section 775.082. The proceeding shall be conducted by the trial jury as soon as practicable. If, through impossibility or inability, the trial jury is unable to reconvene for a hearing on the issue of penalty, having determined the guilt of the accused, the trial judge may summon a special juror or jurors as provided in chapter 913 to determine the issue of the imposition of the penalty.

Nothing in this statute precludes a trial judge from, for example, seating alternate jurors who attended the guilt phase of the trial, on the jury during the sentencing phase in place of jurors who would not consider imposing the death penalty. The substitution of a small number of alternates would be simple, efficient, and fair. The jury would thus be impartial in both the guilt and sentencing phases. Impartiality in the sentencing phase is bought too dearly when the cost is impartiality in the more important determination of guilt or innocence.

This is especially true in Florida for two reasons. First, the verdict in the sentencing phase need not be unanimous. Even if the sentencing jury were less than impartial, it might still reach the same result by a smaller majority. This point is discussed in greater detail below. In general, the determination of guilt or innocence is more important because the cost of an erroneous conviction is surely far higher than the social cost of an erroneous sentence of life imprisonment. See 4W. Blackstone, Commentaries on the Laws of England 358 (better than ten guilty men be free than one innocent person be convicted).

Florida law gives the trial judge the final decision on sentencing in a capital case. Section 921.141(3), Fla. Stat. The jury's recommendation receives "great weight" in the judge's final decision, Tedder v. State, 322 So.2d 908 (Fla. 1975), but judges retain, and not infrequently exercise, the power to override jury recommendations of life imprisonment or death. See Mello and Robson, Judge over Jury: Florida's Practice of Imposing Death Over Life in Capital Cases, 13 Fla. St. Univ. L. Rev. 31 (1985).

> Because the trial judge decides sentence without being bound by a jury recommendation, he may impose capital punishment in an appropriate case even if 'automatic life imprisonment' jurors remain on the capital jury and vote, as inevitably they will, for life imprisonment. Indeed, whatever guidance the judge is provided by the jury's recommendation on the life or death question is still provided by a jury whose members include 'automatic life imprisonment' jurors. Since voir dire questioning will identify those jurors as being 'automatic life imprisonment' jurors, the judge will be aware of the number of such jurors sitting on the capital jury and will be able to give appropriate weight to the jury's advisory vote on sentence.

Winick, supra, 37 U. Miami L. Rev. at 852 (footnotes omitted).

In sum, Florida's statutory procedure already provides ample safeguards against "erroneous" failure to impose a death sentence. For this reason, the State's interest in an impartial jury in the sentencing phase is insubstantial by comparison to the defendant's constitutional right to have an impartial jury decide the question of guilt or innocence.

WHEREFORE, Defendant respectfully requests that this Honorable Court issue its order precluding death qualification.

I HEREBY CERTIFY that a copy of the above and foregoing Motion has been furnished to the Office of the State Attorney, by hand and/or electronically, this 10 day of December, 2013.

Respectfully submitted,

MATT SHIRK
PUBLIC DEFENDER

BY:
Fred C. Gazaleh, #353787
Assistant Public Defender

/slc

(CAP054)

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IN THE CIRCUIT COURT, FOURTH JUDICIAL CIRCUIT, IN AND FOR DUVAL COUNTY, FLORIDA.

CASE NO.: 16 2013 CF 005781 AXXX MA

DIVISION: CR-D

STATE OF FLORIDA

VS.

DONALD JAMES SMITH

MOTION TO DECLARE FLORIDA'S CAPITAL SENTENCING PROCEDURE UNCONSTITUTIONAL UNDER RING v. ARIZONA

Defendant, hereby moves for a ruling as a matter of law that Defendant may not be sentenced to death if Defendant is convicted of first degree murder, because the Florida capital sentencing procedure is unconstitutional under the holding of Ring v. Arizona, 536 U.S. 1103, 122 S.Ct. 2428, 151 L. Ed. 2d 738 (2002), and is in violation of the Fifth, Sixth, Eighth and Fourteenth Amendments to the U.S. Constitution and Article I, Sections 9, 16(a) and 17, of the Florida Constitution. Defendant therefore moves this Court to enter an order precluding imposition of the death penalty as the maximum penalty that can be imposed, because life imprisonment is the only sentence that can constitutionally be imposed now that the procedures embodied in Florida law for imposition of a death sentence have been declared unconstitutional.

I. DEFENDANT FILES THIS MOTION IN SPITE OF THE DECISIONS IN *BOTTOSON* AND *KING.*

In Bottoson v. Moore, 833 So.2d 693 (Fla. 2002), and King v. Moore, 831 So.2d 143 (Fla. 2002), the Florida Supreme Court looked at Ring and concluded that it had to uphold the constitutionality of Florida's death penalty statute until the United States Supreme Court expressly applies Ring to Florida and overrules its own decisions in Hildwin v. Florida, 490 U.S. 638 (1989), and other cases holding Florida's death penalty statute constitutional. The Florida Supreme Court concluded that it could not, on its own, overrule United States Supreme Court

precedent. However, four justices wrote separately to express their opinions that Florida's statute is problematic after Ring. Defendant maintains that the statute is unconstitutional.

II. THE FLORIDA STATUTE IS UNCONSTITUTIONAL UNDER RING BECAUSE IT REQUIRES THE TRIAL JUDGE TO MAKE THE FINDINGS NECESSARY TO IMPOSE A DEATH SENTENCE

In Ring, the U.S. Supreme Court struck down Arizona's capital sentencing statute, holding that it violated the Sixth and Fourteenth Amendments for a judge rather than jury to find the aggravating factors necessary to impose a death sentence. The Court based its holding and analysis in Ring on its earlier decision in Apprendi v. New Jersey, 530 U.S. 466 (2000), where it held that "[i]t is unconstitutional for a legislature to remove from the jury the assessment of facts that increase the prescribed range of penalties to which a criminal defendant is exposed." Id. at 490 (quoting Jones v. United States, 526 U.S. 227, 252-53 (1999) (Stevens, J., concurring)).

Applying that Apprendi test, in Ring the Court noted that "[t]he dispositive question . . . 'is not one of form but of effect.'" Ring, 122 S.Ct. at 2439 (quoting *Apprendi*, 530 U.S. at 494). "If a State makes an increase in a defendant's authorized punishment contingent on the finding of a fact, that fact . . . must be found by a jury beyond a reasonable doubt." Id. at 2440. "All the facts which must exist in order to subject the defendant to a legally prescribed punishment must be found by the jury." Id. (quoting Apprendi, 530 U.S. at 499 (Scalia, J., concurring)).

The Court in Ring agreed with the dissenters in Apprendi that the Arizona death penalty statute could not survive this test: "[a] defendant convicted of first-degree murder in Arizona cannot receive a death sentence unless a judge makes the factual determination that a statutory aggravating factor exists. Without that critical finding, the maximum sentence to which the defendant is exposed is life imprisonment, and not the death penalty." Ring, 122 S.Ct. at 2436 (quoting Apprendi , 530 U.S. at 538 (O'Connor, J., dissenting)). The Court noted that,

under Arizona law, "Defendant's death sentence required the judge's factual findings." Id. (quotation omitted).

The Florida capital sentencing statute suffers from the identical flaw that led the Court in Ring to declare the Arizona statute unconstitutional. Under Florida law, a defendant cannot be sentenced to death unless the judge -- not the jury -- makes specific findings of fact. In particular, before a sentence of death may be imposed, under Florida Statutes Section 921.141(3), the court "shall set forth in writing its findings upon which the sentence of death is based as to the facts . . . [t]hat sufficient aggravating circumstances exist . . . and . . . [t]hat there are insufficient mitigating circumstances to outweigh the aggravating circumstances." (*Emphases added.*) Thus, Section 921.141 explicitly requires two separate findings of fact by the trial judge before a death sentence can be imposed: the judge must find as a fact that (1) "sufficient aggravating circumstances exist" and (2) "there are insufficient mitigating circumstances to outweigh the aggravating circumstances." Id. A defendant thus may be sentenced to death only if the sentencing proceeding "results in findings by the court that such person shall be punished by death." Fla. Stat. § 775.082(1).

The statute is explicit that, without these required findings of fact by the trial judge, the defendant must be sentenced to life imprisonment: "If the court does not make the findings requiring the death sentence within 30 days after the rendition of the judgment and sentence, the court shall impose [a] sentence of life imprisonment." Id. Further, the statute requires the trial court to make a determination independent of the jury -- the jury renders merely an "advisory sentence" and the trial court must impose a sentence of life or death "[n]otwithstanding the recommendation of a majority of the jury." Id. §§ 921.141(2), 921.141(3). *See* Ross v. State, 386 So.2d 1191, 1197-98 (Fla. 1980) (vacating death sentence because the trial judge treated the jury's recommendation as binding and failed to make independent findings in support of the sentence). Further, for purposes of sentencing, the jury's guilt-phase verdict cannot be conclusive as to the existence of any aggravating factor, and the judge is required by the statute to make separate findings at sentencing to support any such factor.

Because Florida law thus requires fact-findings by the trial judge before a death sentence may be imposed, it is unconstitutional under the holding and rationale of Ring. Just as with the Arizona statute, the Florida statute is directly contrary to the rule of law enunciated in Ring and Apprendi that "[i]f a state makes an increase in a defendant's authorized punishment contingent on the finding of a fact, that fact . . . must be found by a jury beyond a reasonable doubt." Ring, 122 S.Ct. at 2439. Just as with the Arizona statute, the Florida statute is explicit that a defendant "cannot receive a death sentence unless a judge makes the factual determination that a statutory aggravating factor exists. Without that critical finding, the maximum sentence to which the defendant is exposed is life imprisonment, and not the death penalty." Id. at 2440. Because the trial judge -- and not the jury -- must make specific findings of fact before a death sentence can be imposed under Florida law, Ring holds squarely that the statute is unconstitutional under the Sixth and Fourteenth Amendments.

Admittedly, unlike the Arizona statute, the Florida statute provides for an advisory jury verdict. But that has no bearing on the analysis set out above. The trial judge is directed by Section 921.141(3) to make the fact findings necessary to support a death sentence "notwithstanding the recommendation of a majority of the jury." And unless the court makes the "findings requiring the death sentence," Id., the defendant must be sentenced to life. The jury's role thus does not alter the essential point -- the controlling point under Ring -- that the Florida statute is unconstitutional because a death sentence cannot be imposed without fact-findings by the trial judge. *See* Ring at 2440. ("All the facts which must exist in order to subject to the defendant to a legally prescribed punishment must be found by the jury.") (quotation omitted).

The Florida Supreme Court has previously sought to distinguish the application of Apprendi to Florida's statutory death penalty scheme by relying on Walton v. Arizona, 497 U.S. 639 (1990), which previously upheld Arizona's capital sentencing statutes. Mills v. Moore, 786 So.2d 532 (Fla. 2001). However, Ring expressly overruled Walton, so Mills is no longer authoritative. Further, in Walton the United States Supreme Court rejected any attempt to distinguish Arizona's scheme from Florida's, emphasizing that:

> It is true that in Florida the jury recommends a sentence, but it does not make specific factual findings with regard to the existence of mitigating or aggravating circumstances and its recommendation is not binding on the trial judge. ***A Florida trial court no more has the assistance of a jury's findings of fact with respect to sentencing issues than does a trial judge in Arizona.*** (emphasis supplied)

Walton v. Arizona, 497 U.S. 639, 648 (1990). The Florida capital sentencing statute suffers from the identical flaw that led the Court in Ring to overrule Walton and to declare the Arizona statute unconstitutional.

III. THE JURY'S ADVISORY SENTENCE CANNOT ESTABLISH THE FACT FINDINGS ON WHICH A DEATH SENTENCE CAN BE BASED

The State perhaps may argue that this Court can avoid the Ring issues raised by the Florida statute simply by relying on the jury's advisory verdict as the basis for imposing a sentence of death. In this way, the State might argue, this Court could avoid making the findings of fact that would run afoul of Ring.

Any such argument is foreclosed, first of all, by the explicit language of the statute. Section 921.141 requires separate findings by the court "notwithstanding the recommendation of a majority of the jury." There is no statutory authority under Florida law that would allow the imposition of a death sentence based on the jury's findings of fact. To the contrary, Florida law provides that the jury's role is merely "advisory" and that the trial court must undertake its own separate findings. The advisory jury in Florida does **not** make findings of fact. *See, e.g.,* Hunter v. State, 660 So.2d 244, 252 & n.13 (Fla. 1995), (Citing Hildwin v. State, 531 So.2d 124, 128 (Fla. 1988), *aff'd*, 490 U.S. 638 (1989); *see also,* Combs v. State, 525 So.2d 853, 859 (Fla. 1988), ("unlike . . . states where the jury is the sentencer," a Florida "jury's advisory recommendation is not supported by findings of fact.... [B]oth [the Florida Supreme Court] and the sentencing judge can only speculate as to what factors the jury found in making

its recommendation....") (Shaw, J., concurring); *accord* Bottoson, 833 So.2d 693 (Anstead, J., and Pariente, J., concurring).

In Florida the trial court is required by Section 921.141(3) to make "specific written findings of fact," and the trial court is required to engage in a separate *Spencer* hearing after the jury recommendation has been made. At that hearing the trial court may receive additional evidence relevant to whether to impose the death penalty. Only then does the trial court have the authority to make the explicit findings in a written order that permit a death sentence to be imposed under current Florida law. It would be a violation of the statutory requirements to base a death sentence upon the jury's verdict when Section 921.141(3) explicitly requires the court to "set forth in writing its findings . . . as to the facts" supporting a death sentence.

Further, it would be impermissible and unconstitutional to rely on the jury's advisory sentence as the basis for the fact-findings required for a death sentence, because the statute requires only a majority vote of the jury in support of that advisory sentence. *See* Id. ("recommendation of a majority of the jury"). In Harris v. United States, 122 S.Ct. 2406 (U.S. June 24, 2002), rendered on the same day as Ring, the U.S. Supreme Court held that under the Apprendi test "those facts setting the outer limits of a sentence, and of the judicial power to impose it, are the elements of the crime for the purposes of the constitutional analysis." Id. at 2419. And in Ring, the Court held that the aggravating factors enumerated under Arizona law operated as "the functional equivalent of an element of a greater offense" and thus had to be found by a jury. Ring, 122 S.Ct. at 2443. In other words, pursuant to the reasoning set forth in Apprendi, Jones, and Ring, aggravating factors are equivalent to elements of the capital crime itself and must be treated as such.

Permitting any such findings of the elements of a capital crime by a mere simple majority is unconstitutional under the Sixth and Fourteenth Amendments. The Sixth and Fourteenth Amendments' right to jury trial recognized in Apprendi and Ring stands upon an

> historical foundation ... [that] extends down centuries into the common law. '[T]o guard against

> a spirit of oppression and tyranny on the part of rulers', and 'as the great bulwark of [our] civil and political liberties,' 2 J. Story, Commentaries on the Constitution of the United States 540-541 (4th ed. 1873), trial by jury has been understood to require that '*the truth of every accusation,* whether preferred in the shape of indictment, information, or appeal, should afterwards be confirmed by the ***unanimous*** suffrage of twelve of [the defendant's] equals and neighbours....' 4 W. Blackstone, Commentaries on the Laws of England 343 (1769) ... (Emphasis added).

Apprendi , 530 U.S. at 477. (Emphasis added). This history is reflected in the fact that *every* jurisdiction in the United States that has jury sentencing in capital cases requires the jury's verdict at the penalty phase to be unanimous.

In the same way that the Constitution guarantees a baseline level of certainty before a jury can convict a defendant, it also constrains the number of jurors who can render a guilty verdict. *See* Apodaca v. Oregon, 406 U.S. 404 (1972) (the Sixth and Fourteenth Amendments require that a criminal verdict must be supported by at least a "substantial majority" of the jurors). Clearly, a mere numerical majority -- which is all that is required under Section 921.141(3) for the jury's advisory sentence -- would not satisfy the "substantial majority" requirement of *Apodaca*. *See, e.g.*, Johnson v. Louisiana, 406 U.S. 356, 366 (1972) (Blackmun, J., concurring) (a state statute authorizing a 7-5 verdict would violate Due Process Clause of Fourteenth Amendment). Relying on a mere numerical majority for the fact findings supporting a death sentence would also be directly inconsistent with the requirement of Florida law that a guilty verdict must be unanimous in all criminal cases. See Fla. R.C.R.P . §3.440; Flanning v. State, 597 So.2d 864 (Fla. 3d DCA 1992).

An additional problem with the Florida Statute is that the jury's advisory sentence does not constitute a finding on any one particular aggravator. The jury is not required to tell which aggravator(s) were found and which were not. The finding of any one particular aggravator is not revealed by their recommendation of a sentence.

Finally, by its terms, the jury's penalty phase "verdict" is, in fact, merely advisory. *See* Bottoson, 833 So.2d 693 (Anstead, C.J., Pariente, J., and Lewis, J., concurring). The jury is told during *voir dire,* and again at the beginning and end of the penalty phase that "the final decision as to what punishment shall be imposed rests solely with the judge of this Court," and that the jury renders only "an advisory sentence." Fla. Std. Jury Instr. (Crim.) – Penalty Proceedings – Capital Cases, quoted in Bottoson. Thus, the advisory jury in Florida does not bear "the same degree of responsibility as that borne by a 'true sentencing jury,'" Pope v. Wainwright, 496 So. 2d 798, 805 (Fla. 1986); *accord* Combs, 525 So.2d at 855 – 858; Burns v. State, 699 So.2d 646, 654 (Fla. 1997), and cases cited therein.

In short, nothing in the existing statute establishes procedures that would allow this Court to avoid or bypass its unconstitutionality under Ring. The statute requires findings by the Court and does not permit a death sentence based on findings by the advisory jury. Further, the advisory jury's majority-based recommendation would itself be unconstitutional as a basis for imposing a sentence of death. The statute as it exists does not allow for a constitutional imposition of a death sentence in Florida.

IV. THE INDICTMENT FAILS TO ALLEGE THE ELEMENTS OF THE OFFENSE NECESSARY TO OBTAIN A SENTENCE OF DEATH

Under Ring, Arizona's aggravating factors operated as "the functional equivalent of an element of a greater offense." Ring, 122 S.Ct. at 2443. In Florida the aggravators operate in precisely the same way. Walton v. Arizona, 497 U.S. 639, 648 (1990), ("A Florida trial court no more has the assistance of a jury's findings of fact with respect to sentencing issues than does a trial judge in Arizona.") As elements of a greater offense (the first degree murder which can be punished by death rather than just by life), the aggravators must be alleged in the indictment. Jones v. United States, 526 U.S. 227, 243, n. 6 (1999), says this is required under the federal constitution:

> Under the due process clause of the Fifth Amendment and the notice and jury trial guarantees of the

> Sixth Amendment, any fact (other than prior conviction) that increases the maximum penalty for a crime must be charged in an indictment, submitted to a jury, and proven beyond a reasonable doubt. The Fourteenth Amendment commands the same answer in this case involving a state statute.

State law also requires the aggravators, as elements of the capital offense, to be alleged in the indictment. Article I, Section 15, of the Florida Constitution provides, "No person shall be tried for capital crime without presentment or indictment by a grand jury." Florida also has its own due process clause in Article I, Section 9: "No person shall be deprived of life, liberty or property without due process of law...." Florida also has a constitutional notice requirement in Article I, Section 16: "In all criminal prosecutions the accused shall, upon demand, be informed of the nature and cause of the accusation against him, and shall be furnished a copy of the charges...." Florida case law clearly requires every "element of the offense" to be alleged in the information or indictment. In State v. Dye, 346 So.2d 538, 541 (Fla. 1977), the court said, "An information must allege each of the essential elements of a crime to be valid. No essential element should be left to inference." In State v. Gray, 435 So.2d 816, 818 (Fla. 1983), the court said, "Where an indictment or information wholly omits to allege one or more of the essential elements of the crime, it fails to charge a crime under the laws of the state." An indictment in violation of this rule cannot support a conviction; the conviction can be attacked at any stage. A conviction on a charge not made by the indictment is a denial of due process of law. State v. Gray, *supra, citing* Thornhill v. Alabama, 310 U.S. 88 (1940), and De Jonge v. Oregon, 299 U.S. 353 (1937). For example, a defendant's sentence for attempted murder may not be enhanced for use of a firearm where the information did not allege use of a firearm, notwithstanding that the jury actually found the uncharged element. Bryant v. State, 744 So.2d 1225 (Fla. 4th DCA 1999); *accord* Gibbs v. State, 623 So.2d 551 (Fla. 4th DCA 1993); Peck v. State, 425 So.2d 664 (Fla. 2d DCA 1983). Similarly, a court cannot reclassify an armed burglary charge from a first degree felony punishable by life to a life felony for burglary with

assault without an allegation in the charging document of an actual assault. *See* Wright v. State, 617 So.2d 837, 841-42 (Fla. 4th DCA 1993).

V. THIS COURT CANNOT CURE THE CONSTITUTIONAL INFIRMITIES IN FLORIDA'S DEATH PENALTY SCHEME BY REVISING THE STANDARD JURY INSTRUCTIONS TO REWRITE THE DEATH PENALTY STATUTE.

The constitutional infirmities in the Florida statute cannot be remedied by altering the standard jury instructions to effectively rewrite the statute. First, Section 921.141(3) expressly allocated the fact-finding function to the trial judge, requiring written findings of fact *by the judge* "notwithstanding the recommendation of a majority of the jury." If the judge does not make the requisite findings, the statute unambiguously directs that the trial court *"shall impose* sentence of life imprisonment." Id. *The statute therefore expressly forbids a trial judge from imposing a sentence of death based solely on the jury's recommendation. See* Bottoson, 833 So.2d 693, n.20 (Anstead, C.J., concurring.)

It is also impermissible and unconstitutional to treat the jury's recommendation as a verdict, because (1) the jury is repeatedly instructed that its verdict is merely "advisory" and a "recommendation" and that the "final decision as to what punishment shall be imposed is the responsibility of the judge" and (2) the statute does not require the jury's recommendation to be unanimous. Section 921.141(3), Fla. Stat.; Fla. Stnd. Jury Instr. (Crim.) – Penalty Proceedings – Capital Cases. As discussed above, a jury's advisory, nonunanimous, recommendation of death is plainly insufficient to constitute a valid verdict under Florida law and under the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution.

Further, individual trial judges are not empowered to craft different or alternative procedures for imposing a death sentence that are not authorized by statute. Just two weeks before Bottoson was decided, the Florida Supreme Court reiterated that a trial court may not modify the standard jury instructions on the statutory mental mitigators to omit the adjectives "extreme" and "substantial" because to do so would "in effect ... rewrite the statutory

description of mental mitigators, which is a violation of the separation of powers doctrine, Art. II, SS. 3, Fla. Const." Barnhill v. State, 27 Fla. L. Weekly S850, S854 (October 10, 2002); *accord* Johnson v. State, 660 So.2d 637, 647 (Fla. 1995); *see also,* State v. Elder, 382 So.2d 687 (Fla. 1980). ("The court is responsible to resolve all doubts as to the validity of the statute in favor of its constitutionality, provided the statute may be given a fair construction that is consistent with the federal and state constitutions as well as with the legislative intent. The court will not, however, abandon judicial restraint and invade the province of the legislature by rewriting its terms."); Brown v. State, 358 So.2d 16, 20 (Fla. 1978), ("When the subject statute in no way suggests a saving construction, we will not abandon judicial restraint and effectively rewrite the enactment."); Kunz v. New York, 340 U.S. 290 (1951), (Frankfurter, J., concurring). ("The judicial body might question with justification whether its interpretation is workable or whether it is consistent with legislative policy which is, as yet, undetermined.") Florida constitutional principles of separation of powers and statutory construction thus preclude this Court from ignoring the plain and unambiguous language of Section 921.141, Florida Statutes. In other words, the intent of the Florida legislature is clear from the statute, and the judiciary is not free to rewrite it.

Moreover, the Florida Supreme Court's splintered decision in Bottoson does not give trial courts coherent guidance as to whether the standard instructions could or should be revised and in what manner. While two justices suggested alternative jury instructions that effectively rewrite the capital sentencing law, another admonished trial judges to adhere to the statute and instructions as currently written. *See* Bottoson, 833 So.2d 693 (Wells, J., concurring).

As individual trial judges attempt to improvise their own remedies for the constitutional infirmities in the statute, capital defendants throughout the state are being sentenced to death under procedures that literally vary from judge to judge. This is the epitome of arbitrary and capricious imposition of the death penalty and a clear violation of the Eighth and Fourteenth Amendments to the United Statutes Constitution as well as Article I, Sections 9 and 17 of the Florida Constitution. *See* Furman, 408 U.S. at 248-49 ("A penalty ... should be

considered 'unusually' imposed if it is administered arbitrarily..."), (Douglas, J., concurring) (citations omitted); accord Id. at 310 (Stewart, J., concurring). Only the Florida legislature can mend the constitutional defects in the statute. Until it does so, there is no constitutionally valid means of imposing a death sentence in Florida.

VI. A LIFE SENTENCE IS THE MAXIMUM PENALTY THAT CAN BE IMPOSED FOR FIRST DEGREE MURDER. THUS, THIS CASE SHOULD BE TREATED AS A FIRST DEGREE MURDER CASE WHERE DEATH IS NOT A POSSIBLE PENALTY.

In 1972, the United States Supreme Court invalidated all then-existing state capital punishment laws, holding that they presented an undue risk that the death penalty would be imposed in an arbitrary and capricious manner. *See* Furman v. Georgia, 408 U.S. 238 (1972). This holding had the effect of rendering Florida's capital sentencing procedures unconstitutional. *See* Donaldson v. Sack, 265 So.2d 499, 502 (Fla. 1972), (holding that Furman abolished the death penalty "as heretofore imposed in this state"); *accord* State v. Whalen, 296 So.2d 678, 679 (Fla. 1972) (held "at the present time that the trial judge does not have the power to impose the death sentence" after Furman, but before new statute enacted; "If there is no capital offense, there can be no capital penalty"); Anderson v. State, 267 So.2d 8 (Fla. 1972) (death sentences imposed under statute in existence at time of Furman were illegal and required imposition of life sentence).

In light of Furman, the Florida Supreme Court held that Florida Statutes Section 775.082(1) mandated life imprisonment upon conviction for capital murder. *See* Donaldson, 265 So.2d at 503; State v. Whalen, *supra*, at 678. Section 775.082(1) provides that a "person who has been convicted of a capital felony shall be punished by death if the proceeding held to determine sentence according to the procedure set forth in Section 921.141 results in findings by the court that such person shall be punished by death, otherwise such person shall be punished by life in prison." In Donaldson, the Florida Supreme Court held that this statutory provision provided for a sentence – life imprisonment – where the provisions for imposition of a death

sentence had been rendered unconstitutional. The Court reasoned that "eliminating the death penalty from the statute does not of course destroy the entire statute," because "we have steadfastly ruled that the remaining consistent portions of statutes shall be held constitutional if there is any reasonable basis for doing so and of course this clearly exists in these circumstances." Id.

That same reasoning applies here. The findings required by Section 921.141 cannot be made, consistent with the requirements of the Sixth and Fourteenth Amendments as established in Ring. In this circumstance, just as in Donaldson and Whalen, the appropriate outcome under Section 775.082(1) is the entry of a life sentence if the defendant is convicted of first degree murder, because as a matter of federal constitutional law the court cannot make the findings "according to the procedure set forth in s. 921.141." As Section 775.082(1) states, without those findings "such person shall be punished by life in prison." The same conclusion is reflected in Section 921.141(3) – the court "shall impose sentence of life imprisonment" if it does not make the "findings requiring the death sentence" – and Ring establishes that it would be unconstitutional and prohibited by the Sixth and Fourteenth Amendment for this Court to make those findings.

If further confirmation of this conclusion is needed, it is provided by Section 775.082(2), a severability clause, which confirms that if portions of the statute are rendered unconstitutional the balance of the statute is to remain in place. *See* Waldrup v. Dugger, 562 So. 2d 687, 693 (Fla. 1990) ("When a part of a statute is declared unconstitutional the remainder of the act will be permitted to stand provided ... [that] the unconstitutional provisions can be separated from the remaining valid provision ... [and] the legislative purpose expressed in the valid provisions can be accomplished independently of those which are void."). Thus, as Donaldson and Whalen establish, the fact that the death penalty procedures of Section 921.141 are now unconstitutional does not preclude the entry of sentence but rather requires the entry of the only remaining sentence available if the death penalty cannot be imposed – namely, a life sentence should the defendant be convicted of first degree murder.

The Supreme Court in Ring did not explicitly address how states like Arizona (and Florida) with facially unconstitutional death penalty statutes should apply the Court's ruling to pending cases. In Florida, that issue is decided by the Florida Supreme Court's holdings in Donaldson and Whalen, which interpreted Section 775.082(1) to require the imposition of a life sentence following the determination that the statutory scheme was unconstitutional. Under Donaldson and Whalen and the specific language of Section 775.082(1), it is not appropriate to engage in a case-by-case inquiry as to whether current law could somehow be lawfully applied in a given case notwithstanding the constitutional defects in the structure of the law. While the Supreme Court in Ring suggested the possibility of harmless error analysis, that point applies only to death sentences that have already been imposed. No authority would permit the prospective application of a statute that suffers from an unconstitutional structure, whatever the facts of a given case.

Since death is not a possible penalty, this case should be treated like any other first degree murder case where death is not a possible penalty. First, the jury should not be given any of the standard jury instructions applicable to capital cases. They are irrelevant, misleading, and prejudicial since death is not a possible penalty. Second, the jury must not be death qualified. *See* Donaldson v. Sack, 265 So.2d 499, 504 (Fla. 1972) (where death penalty statute is unconstitutional, life sentence is only option; "It is also interesting to note that *voir dire* examination apparently does not presently need to include inquiry regarding capital punishment and thus the rule in Witherspoon v. Illinois, 391 U.S. 510, 88 S.Ct. 1770, 20 L. Ed.2d 776 (1968), and its progeny will be of no concern unless 'capital cases' are restored by the Legislature"); Reed v. State, 496 So.2d 213 (Fla. 2d DCA 1986), (State should not have been permitted to inquire into attitude of members of jury panel concerning death penalty, in that there was no basis upon which death penalty could be imposed). Third, there is no need for a bifurcated trial to determine sentence. Whalen, 296 So.2d at 678.

CONCLUSION

Florida's capital sentencing procedure is unconstitutional under the holding and reasoning of Ring v. Arizona, and under Florida law that requires elements of an offense to be alleged in the charging document and found by a jury unanimously and beyond a reasonable doubt. This Court must therefore enter an order precluding imposition of the death penalty in this case because, in the event the defendant is convicted, a life sentence without the possibility of parole is the only sentence that this Court currently may impose under Florida's capital sentencing statute without violating the Sixth, Eighth and Fourteenth Amendments of the U.S. Constitution and Article I, Sections 2, 9, 15(a), 16(a), 17 and 22, of the Florida Constitution.

WHEREFORE, Defendant prays this motion be granted.

I HEREBY CERTIFY that a true and correct copy of the foregoing motion has been furnished to the Office of the State Attorney, by hand and/or electronically, this 10 day of December, 2013.

Respectfully submitted,

MATT SHIRK
PUBLIC DEFENDER

BY: _____
Fred C. Gazaleh, #355787
Assistant Public Defender

/slc

(CAP058)

IN THE CIRCUIT COURT, FOURTH JUDICIAL CIRCUIT, IN AND FOR DUVAL COUNTY, FLORIDA.

CASE NO.: 16 2013 CF 005781 AXXX MA

DIVISION: CR-D

STATE OF FLORIDA

VS.

DONALD JAMES SMITH

MOTION TO PROHIBIT ANY REFERENCE TO THE JURY'S ROLE AT THE PENALTY PHASE AS BEING "ADVISORY" OR TO THE JURY'S PENALTY VERDICT AS BEING A "RECOMMENDATION"

Defendant, by and through the undersigned attorney, the Public Defender for the Fourth Judicial Circuit of Florida, hereby moves this Honorable Court to prohibit any reference to the jury's role as being "advisory" or to the jury's penalty verdict as being a "recommendation". As grounds, he would state:

1. The current version of the Standard Jury Instructions contain numerous references to the jury's role at penalty as being "advisory" or to the jury's penalty verdict as being a "recommendation". These references are incorrect and in violation of the Florida and United States Constitution. They diminish the jury's sense of responsibility for the sentence in violation of Article I, Sections 2, 9, 16, and 17, of the Florida Constitution and the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution. Caldwell v. Mississippi, 472 U.S. 320 (1985).

2. In Ring v. Arizona, 536 U.S.584 (2002), the Court extended the rule of Apprendi v. New Jersey, 530 U.S. 466 (2000), to capital cases. In Bottoson v. Moore, 833 So. 2d 693 (Fla. 2002), the Florida Supreme Court seemed to reject a challenge to the constitutionality of Florida's capital sentencing statute. However, four members of the Court (a majority), Justices Anstead, Shaw, Pariente, and Lewis, wrote concurring opinions in which they advocated prospective changes to Florida's Standard Jury Instructions. All four of the concurring opinions expressed concern about the issue of whether the jury's role was truly

advisory in light of Ring. 833 So.2d at 703-733. Additionally, Justice Quince expressed concern as to whether the jury override procedure is constitutional, but stated that this issue was not before the Court in Bottoson. 833 So.2d at 701-702. Justice Lewis most clearly expressed the need for prospective revisions of the jury instructions in light of Ring. He stated:

> I write separately to express my view that in light of the dictates of Ring v. Arizona, it necessarily follows that Florida's standard penalty phase jury instructions may no longer be valid and are certainly subject to further analysis under the United States Supreme Court's Caldwell v. Mississippi, 472 U.S. 320, 105 S.Ct. 2633, 86 L. Ed. 2d 231 (1985), holding. In Caldwell, the Supreme Court concluded "it is constitutionally impermissible to rest a death sentence on a determination made by a sentencer who has been led to believe that the responsibility for determining the appropriateness of the defendant's death rests elsewhere." *Id.* at 328-29, 105 S.Ct. 2633. There, the Court deemed prosecutorial statements to a jury unconstitutional because the State "sought to minimize the jury's sense of responsibility for determining the appropriateness of death." *Id.* at 341, 105 S.Ct. 2633. Following the decision in *Caldwell*, this Court evaluated the constitutionality of Florida's standard jury instructions. *See* Combs v. State, 525 So.2d 853 (Fla. 1988), (rejecting the petitioner's argument that the standard jury instruction was unconstitutional); *see also* Cook v. State, 792 So.2d 1197, 1201 (Fla. 2001). (same)
>
> I recognize that this Court has held that Florida's standard jury instructions are constitutional under Caldwell. *See* Combs, 525 So. 2d 853. However, in light of the decision in Ring v. Arizona, it is necessary to reevaluate both the validity and, if valid, the wording of these jury instructions. The United States Supreme Court has defined the reach of Caldwell by stating that "Caldwell is relevant only to certain types of comment--those that mislead the jury as to its role in the sentencing process in a way that allows the jury to feel less responsible than it should for the sentencing decision." Darden v. Wainwright, 477 U.S. 168, 183 n. 15, 106 S.Ct. 2464, 91 L. Ed. 2d 144 (1986). In Ring, the high Court made the jury's role in capital sentencing absolutely clear--the jury must find the aggravating factors. *See* Ring, 536 U.S. at 609, 122 S.Ct. at 2443. As the Court in Ring stated, "[T]he right to trial by jury...would be

> senselessly diminished if it encompassed the fact-finding necessary to increase a defendant's sentence by two years, but not the fact-finding necessary to put him to death." *Id.* Clearly, under Ring, the jury plays a vital role in the determination of a capital defendant's sentence through the determination of aggravating factors. However, under Florida's standard penalty phase jury instructions, the role of the jury is minimized, rather than emphasized, as is the necessary implication to be drawn from Ring. Under Florida's standard penalty phase jury instructions, the jury is told, even before evidence is presented in the penalty phase, that its sentence is only advisory and the judge is the final decision-maker. *See* Fla. Std. Jury Instr. (Crim.) 7.11. The words "advise" and "advisory" are used more than ten times in the instructions, while the members of the jury are only told once that they must find the aggravating factors beyond a reasonable doubt. *See id.* The jury is also instructed several times that its sentence is simply a recommendation. *See id.* By highlighting the jury's advisory role, and minimizing its duty under *Ring* to find the aggravating factors, Florida' standard penalty phase jury instructions must certainly be reevaluated under the Supreme Court's Caldwell v. Mississippi decision.
>
> Just as the high Court stated in Caldwell, Florida's standard jury instructions "minimize the jury's sense of responsibility for determining the appropriateness of death." Caldwell, 472 U.S. at 341, 105 S.Ct. 2633. *Ring* clearly requires that the jury play a vital role in determining the factors upon which the sentencing will depend, and Florida's jury instructions tend to diminish that role and could lead the jury members to believe they are less responsible for a death sentence than they actually are. *Ring* has now emphasized the jury's role in this process and may compel Florida's standard penalty phase jury instructions to do the same.

833 So. 2d at 731-733.

3. Justice Lewis is correct in his assertions that the continual references to the jury's penalty being "advisory" and a "recommendation" must be discontinued in light of *Ring*.

4. The denial of this motion would deny Defendant due process of law pursuant to Article I, Sections 2, 9, 16 and 17, of the Florida Constitution and the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution.

WHEREFORE, Defendant hereby moves this Honorable Court to issue its order prohibiting references to the jury's penalty verdict as "advisory" or a "recommendation."

I HEREBY CERTIFY that a true and correct copy of the foregoing motion has been furnished to the Office of the State Attorney, by hand and/or electronically, this 10 day of December, 2013.

Respectfully submitted,

MATT SHIRK
PUBLIC DEFENDER

BY: _____
Fred C. Gazaleh, #353787
Assistant Public Defender

/slc

(CAP059)

IN THE CIRCUIT COURT, FOURTH JUDICIAL CIRCUIT, IN AND FOR DUVAL COUNTY, FLORIDA.

CASE NO.: 16 2013 CF 005781 AXXX MA

DIVISION: CR-D

STATE OF FLORIDA

VS.

DONALD JAMES SMITH

MOTION TO PROHIBIT MISLEADING REFERENCES TO THE ADVISORY ROLE OF THE JURY AT SENTENCING

Defendant respectfully requests this Honorable Court to prohibit misleading references by the State to the advisory role of the jury in sentencing. As grounds, Defendant would state:

1. The United States Supreme Court has stated:

> "It is constitutionally impermissible to rest a death sentence on a determination made by a sentencer who has been led to believe that the responsibility for determining the appropriateness of the defendant's death rests elsewhere."

Caldwell v. Mississippi, 472 U.S. 320, 105 S.Ct. 2633, 2639 (1985).

2. The Eleventh Circuit Court of Appeals held that the *Caldwell* rationale applies to Florida's sentencing scheme. Adams v. Wainwright, 804 F.2d 1526, 1529-1530 (11th Cir. 1986); *reh. den. sub. nom.* Adams v. Dugger, 816 F.2d 1493 (11th Cir. 1987). The Court in Adams granted a petition for writ of habeas corpus, despite the lack of objection. 804 F.2d at 1530-1531.

3. References to the advisory role of the jury would deny Defendant due process of law and a fair trial pursuant to Article I, Sections 9, 16, and 17, of the Florida Constitution and the Fifth, Eighth and Fourteenth Amendment to the United States Constitution, unless such references are accompanied by appropriate explanations of the seriousness of the jury's role and appropriate explanations of the great weight that the court must give their recommendation. If such explanations are not given, the jury is more likely to recommend death. Adams v. Wainwright at 1530.

4. Defendant therefore requests that the Court require that each reference by the prosecutor to the jury's advisory role be accompanied by a statement that the law requires the judge to give great weight to the jury's recommendation and that the judge may reject the recommendation only if the facts are so clear and convincing that virtually no reasonable person could differ. See Mann v. Dugger, 817 F.2d 1471, 1482 (11th Cir. 1987).

WHEREFORE, the defendant respectfully requests this Honorable Court to grant this motion.

I HEREBY CERTIFY that a copy of the above and foregoing Motion has been furnished to the Office of the State Attorney, by hand and/or electronically, this 10 day of December, 2013.

Respectfully submitted,

MATT SHIRK
PUBLIC DEFENDER

BY: _____
Fred C. Gazaleh, #353787
Assistant Public Defender

/slc

(CAP060)

IN THE CIRCUIT COURT, FOURTH JUDICIAL CIRCUIT, IN AND FOR DUVAL COUNTY, FLORIDA.

CASE NO.: 16 2013 CF 005781 AXXX MA

DIVISION: CR-D

STATE OF FLORIDA

VS.

DONALD JAMES SMITH

MOTION IN LIMINE REGARDING REFERENCE TO NON-ENUMERATEDMITIGATING FACTORS

The Defendant, DONALD JAMES SMITH, moves in limine to preclude reference, by counsel, witnesses, or by the court, to mitigating factors not specifically listed in §921.141(6), §§(a) through (g), as "non-statutory" mitigating factors, and as grounds states as follows:

1. The Defendant is charged herein with first degree murder, and the State has announced its intention to seek the death penalty pursuant to Fla.R.Crim.P. 3.202.

2. It is common for prosecutors, judges, expert witnesses and even defense attorneys to informally refer to mitigating factors that are not among those specifically listed in §921.141 (6) as "non-statutory" mitigating factors and to the mitigating circumstances specifically listed in §§(a) through (g) as "statutory" mitigating factors.

3. Referring to mitigating considerations as "non-statutory" mitigating factors in the presence of the jury unfairly, inaccurately and prejudicially implies that mitigating considerations not expressly listed by statute are inferior to those that are expressly listed. Because the process involves weighing of these factors, that inference is prejudicial.

4. Mitigating considerations not specifically enumerated in the statutes have never been held to have different weight than those listed by statute. The jury and judge must fairly consider and weigh any aspect of the offense or of the Defendant's character or record that mitigates the offense. Lockett v. Ohio, 438 U.S. 586 (1978); Eddings v. Oklahoma, 455 U.S. 104 (1982); Penry v. Lynaugh, 492 U.S. 302 (1989). Section 921.141(6)(h), Florida Statute, requires that the jury and judge consider, "the existence of any other factors in the defendant's

background that would mitigate against imposition of the death penalty." In that regard, *anything* that the jury may consider as mitigation falls under this broad statutory language is, therefore, a "statutory" mitigating consideration.

5. Whether law provided to the jury comes from statute or case law is not a proper consideration for the jury and it has no bearing on how the law is to be applied. For that reason, the standard jury instructions in criminal cases do not provide citations to their sources for the jury, although some portions derive from statute and some from case law. The term "non-statutory" is not contained in the standard jury instructions, nor is that information properly presented to the jury by any witness, attorney or judge. Because it is irrelevant and prejudicial, the term "non-statutory" should not be used in a criminal trial proceeding.

6. Referring to valid mitigating considerations which are not specifically enumerated as "non-statutory" has the effect of undermining the validity and reliability of any subsequent death sentence due to the unfounded and improper inference that statutory factors are to be given more weight than other valid mitigating factors. It is exclusively the responsibility of the penalty phase jury, in the penalty phase of a capital case, to assign to each valid mitigating factor the proper weight, as the jury sees fit.

7. Additionally, prosecutors, courts and defense attorneys refer *out of the presence of the jury,* for convenience sake, to the statutory mitigating consideration created by Section 921.141 (6)(h), Florida Statutes, as the "catch-all" mitigating factor. The phrase "catch-all" is likewise demeaning to the factors that fall under the umbrella of this statutory mitigating consideration. For the same reasons as listed above, reference to this mitigating consideration as a "catch-all" by the court, any witness or attorney must not occur in the presence of the jury.

WHEREFORE, the Defendant requests this Honorable Court grant this Motion.

I HEREBY CERTIFY that a true and correct copy of the above Motion In Limine Regarding Reference to Non-Enumerated Mitigating Factors has been furnished to the Office of the State Attorney, by hand and/or electronically, this 10 day of December, 2013.

Respectfully submitted,

MATT SHIRK
PUBLIC DEFENDER

BY: _____
Fred C. Gazaleh, #353787
Assistant Public Defender

/slc

(CAP120)

IN THE CIRCUIT COURT, FOURTH JUDICIAL CIRCUIT, IN AND FOR DUVAL COUNTY, FLORIDA.

CASE NO.: 16 2013 CF 005781 AXXX MA

DIVISION: CR-D

STATE OF FLORIDA

VS.

DONALD JAMES SMITH

DEFENDANT'S MOTION FOR JURY INSTRUCTION DELINEATING ALL MITIGATING FACTORS UNDER FLA. STAT. 921.141(6) (h)

COMES NOW, the Defendant, and moves this Court to instruct the jury as to each of the mitigating circumstances listed by the Defense pursuant to Fla. Stat. Sec. 921.141(6)(h), and in support of this motion provides the following legal authority:

In Downs v. Moore, 801 So.2d 906, 921-922 (Fla. 2001), Justice Anstead (with Justice Pariente concurring) concluded as follows in support of delineating non-statutory mitigation circumstances:

> The bottom line is that juries must be given explicit and adequate instructions as to the factors they must consider in deciding whether to impose a sentence of death. Consistent with the U.S. Supreme Court's repeated concerns, juries should be provided with specific guidance as to the type of non-statutory mitigating factors that they may consider. Because the overly brief "catch all" jury instruction neither mentions nor defines the various categories of non specific mitigation a jury may consider, it may well be inadequate to provide for the type of individualized assessment of mitigation that the Supreme Court has mandated. The fact that the aggravation to be considered by the jury is highly specific underscores the problem....On the other hand, the "catch all" provision by its very brevity and general nature may actually diminish the jury's consideration of particular mitigation...
>
> ...The fact that the Defendant argues for and presents evidence of non statutory mitigators for the jury's consideration does not necessarily mean that the jury will consider and give effect to such evidence if there is no meaningful instruction from the trial court which permits consideration of the mitigation.

> Fortunately, a review of many trial records that come to the Florida Supreme Court reflects that many trial courts in Florida do act when requested to supplement the "catch all" instruction by identifying to the jury certain categories of mitigation that may be claimed by the Defendant in the particular case, and for which evidence has been presented. By giving these supplemental instructions, the trial courts ensure compliance with the U.S. Supreme Court's mandate that juries are properly informed as to the matters they may consider in their deliberations. (Footnotes omitted) (Emphasis added).

In Belcher v. State, 851 So.2d 678 (Fla. 2003), Justice Pariente again urged, in her concurring opinion, that the "catch all" statutory mitigating factor under Section 921.141(6) fails to provide the jury with adequate guidance on how to determine what factors are mitigating. Justice Pariente urged that trial courts follow the example in Duest v. State, 855 So.2d 33 (Fla. 2003), wherein the trial court allowed the list of "catch all" mitigating factors to be included in the penalty phase jury instructions.

The defense is requesting an instruction which lists the mitigating factors under Section 921.141 (6)(h) in order to fully instruct the jury regarding all mitigating factors that must be considered in determining the advisory sentence.

I HEREBY CERTIFY that a copy of the above and foregoing motion has been furnished to the Office of the State Attorney, by hand and/or electronically, this 9 day of December, 2013.

Respectfully submitted,

MATT SHIRK
PUBLIC DEFENDER

BY: _____
Fred C. Gazalch, #353787
Assistant Public Defender

/slc
(CAP119)

IN THE CIRCUIT COURT, FOURTH JUDICIAL CIRCUIT, IN AND FOR DUVAL COUNTY, FLORIDA.

CASE NO.: 16 2013 CF 005781 AXXX MA

DIVISION: CR-D

STATE OF FLORIDA

VS.

DONALD JAMES SMITH

MOTION TO DISMISS AND TO DECLARE DEATH NOT A POSSIBLE PENALTY AND TO DECLARE SECTIONS 782.04 AND 921.141, FLORIDA STATUTES, UNCONSTITUTIONAL FOR A VARIETY OF REASONS

Defendant, by and through the undersigned counsel, moves this Honorable Court to dismiss the Indictment filed in the above-styled cause and to declare Sections 782.04 and 921.141, Florida Statutes, unconstitutional for all of the reasons set forth below:

AGGRAVATORS NOT ALLEGED

1. The Indictment does not properly charge a capital offense because the statutory aggravating circumstances the State will rely on in order to obtain the death penalty are not alleged in the Indictment, in violation of Article I, Sections 15 and 16, Florida Constitution, and the Fourteenth Amendment to the United States Constitution. Defendant has the fundamental constitutional right to notice of the charges against him, including the aggravating circumstances to be considered by the jury in the second phase of the trial. Cole v. Arkansas, 333 U.S. 196 (1948). Cole held that it was unfair to convict a defendant of an offense which was not properly charged in the charging document. Presnell v. Georgia, 439 U.S. 14 (1978), held that the right to notice applies to the penalty phase of a capital case just as it applies to the guilt phase of any criminal trial.

DUE PROCESS/VAGUENESS

2. Sections 782.04, 775.082, and 921.141, Florida Statues, provide for the arbitrary infliction of punishment so as to deprive the defendant of life and liberty without Due Process of law in violation of the Fourteenth Amendment to the Constitution of the United States, and Article I, Sections 2 and 9, of the Florida Constitution.

3. The above-mentioned Sections are so vague, ambiguous and indefinite so as to deprive the Defendant of his right to know the nature of the charges, the differentiation between the degrees of homicide, and to be able to prepare a defense accordingly, in violation of the Fifth, Sixth and Fourteenth Amendments to the Constitution of the United States and Article I, Sections 9 and 16, of the Florida Constitution.

BURDEN OF PROOF/STANDARD OF PROOF

4. Section 921.141 places upon the defendant the burden of proving mitigating circumstances in violation of his rights against self-incrimination as provided in the Fifth and Fourteenth Amendments of the Constitution of the United States and Article I, Sections 2 and 9, of the Florida Constitution.

5. The presumption in favor of death created by the establishment of a single aggravating circumstance has the result of imposing upon the Defendant the burden of establishing why he should live. This impermissible shift in the burden of proof and persuasion contravenes every fundamental principle underlying our system of criminal justice, in violation of Article I, Sections 9, 16, and 17, of the Florida Constitution and the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution. *See* Mullaney v. Wilbur, 421 U.S. 684, 95 S.Ct. 1881 (1975); Sandstrom v. Montana, 442 U.S. 510, 99 S.Ct. 2450 (1979).

6. Section 921.141 does not require the State to prove beyond a reasonable doubt that the statutory aggravating factors in subsection (5) outweigh the mitigating circumstances listed in subsection (6) in each particular capital case. It thus violates the Due Process and Equal Protection clauses of the Fourteenth Amendment to the Constitution of the United States, and Article I, Sections 2 and 9, of the Florida Constitution. The standard of proof beyond and to the exclusion of every reasonable doubt is fundamental to our legal system and applicable to state

criminal prosecutions. In re Winship, 397 U.S. 358 (1970). In phase two of a capital trial, the jury is instructed to find the existence of an aggravating circumstance beyond a reasonable doubt. However, in the jury's ultimate decision as to whether to recommend a life or death sentence, the jury is instructed pursuant to Section 921.141(3), to recommend death unless the mitigating circumstances "outweigh" the aggravating circumstances. The instruction to the jury to weigh the aggravating and mitigating circumstances in arriving at their recommendation to the court gives the jury inadequate guidance. The defendant's right to the reasonable doubt standard applies equally to the ultimate determination of whether he lives or dies as to the determination of his guilt or innocence.

LIFE SENTENCE WITHOUT PAROLE

7. Section 775.082, in requiring a defendant convicted of first degree murder to be sentenced to life imprisonment without possibility of parole, is in violation of the Eighth Amendment and the Due Process and Equal Protection clauses of the Fourteenth Amendment to the Constitution of the United States, and Article I, Sections 2 and 9, of the Florida Constitution, in that no clear and reasonable guidelines exist for the implementation of the punishment and the punishment bears no rational relationship whatsoever to the defendant's acts or background, and cannot be justified to serve any recognized penological purpose. The mandatory life sentence with no parole violates the requirement of individual sentencing laid out in Woodson v. North Carolina, 428 U.S. 280 (1976), Lockett v. Ohio, 438 U.S. 586 (1978), and Gardner v. Florida, 430 U.S. 349 (1977).

NO COMPELLING STATE INTEREST

8. Section 921.141, Florida Statutes, violates the Due Process clause of the Fourteenth Amendment to the Constitution of the United States, and Article I, Sections 2 and 9, of the Florida Constitution in that the fundamental right to life is deprived by imposition of the death penalty without requiring the State to prove beyond a reasonable that there is a compelling State interest for imposition of the death sentence, and that the death sentence is the least restrictive means of achieving that State interest. This is required where a fundamental right, such as human life, is involved. Roe v. Wade, 410 U.S. 113, 93 S.Ct. 705 (1973). Studies indicate that

the death penalty is not an effective deterrent to crime and that there are other less drastic methods of punishment available which serve the same goals of the state.

STATUTE IS PROCEDURAL

9. Section 921.141 provides for the method to be followed in the imposition of the death penalty, which is procedural rather than substantive in nature. It thus violates the separation of powers between the law-making function of the legislature and the rule-making function of the judiciary, in violation of Article V, Section 2, of the Florida Constitution.

IMPROPER PROPORTIONALITY AND APPELLATE REVIEW

10. The Florida death penalty statute is unconstitutional as applied in that the Florida Supreme Court has the obligation to review death sentences and assure that they are being imposed in a uniform and reasonable fashion. However, the Florida Supreme Court opinions have been unconstitutionally inconsistent in dealing with the weighing of the aggravating and mitigating circumstances. The Florida Supreme Court has abrogated the third level of review under Florida's trifurcated death penalty statute and, therefore, the death penalty statute is being applied unconstitutionally. *See* Witt v. State, 342 So.2d 497 (Fla. 1977). The Supreme Court decisions are inconsistent in their review and make the statute unconstitutional as applied, violating the review requirements of Proffitt v. Florida, 428 U.S. 242 (1976); Gregg v. Georgia, 428 U.S. 153 (1976).

FELONY MURDER - LACK OF NOTICE

11. The Florida Statutes, Section 782.02 and Section 921.141 are unconstitutional as applied in that Florida adheres to the felony murder doctrine which allows premeditation to be established through proof of an underlying felony. In the absence of adequate notice as to whether or not the defendant is called upon to defend against a felony murder or a premeditated murder, the statute is unconstitutional.

EXCESSIVE PENALTIES FOR THOSE WHO HAVE NOT KILLED DELIBERATELY

12. Section 921.141, Florida Statutes, is unconstitutional on its face as it allows for excessive and disproportionate penalties to be imposed upon persons who have not deliberately taken the life of another, such as those persons engaged in certain felonies and non-triggermen

convicted as principals. This is in violation of the Eighth and Fourteenth Amendments to the United States Constitution. *See* Lockett v. Ohio, 438 U.S. 586, 98 S.Ct. 2954, concurring opinion of Justice White at 2981, (1978); Gregg v. Georgia, 428 U.S. 153, 96 S.Ct. 2909, at 2932 (1976); Coker v. Georgia, 433 U.S. 584, 97 S.Ct. 2861 (1977); Enmund v. Florida, 458 U.S. 782, 102 S.Ct. 3368, 73 L.Ed.2d 1140 (1982); Tison v. Arizona, 481 U.S. 137, 107 S.Ct. 1676 (1987).

FELONY MURDER AGGRAVATOR

13. The Florida death penalty statute is unconstitutional on its face because it creates a presumption in favor of death for those convicted under the felony-murder rule. Under Section 921.141(5)(d), Florida Statutes, the perpetration of a homicide during the commission of a designated felony constitutes an aggravating circumstance. When one or more statutory aggravating circumstances are proved beyond a reasonable doubt, a presumption arises that death is the appropriate penalty. State v. Dixon, 283 So.2d 1, 9 (Fla. 1973). Therefore, anyone convicted of first degree murder under the felony-murder doctrine is presumptively destined for death, regardless of other facts. There is no such aggravating circumstance applicable in the case of every premeditated murder, since Section 921.141(5)(i), Florida Statutes, utilizes qualifying language to make only certain premeditated acts an aggravating circumstance. The statute, therefore, makes possible a disproportionality higher frequency of death sentences for those convicted of felony murder than those convicted of premeditated murder. There is no rational basis for this disproportionality in sentencing, since in felony- murder the liability can be for aiding and abetting a felony that resulted in death, while in a premeditated murder the defendant can be the actual perpetrator who intended death to result. The Florida death penalty statute therefore violates the defendant's right to equal protection and due process of law, and the right to be free from an arbitrary and capricious sentencing process, as guaranteed by Article I, Sections 2, 9, 16, and 17, of the Florida Constitution and the Fifth, Eighth and Fourteenth Amendments to the United States Constitution. Enmund v. Florida, 458 U.S. 782, 102 S.Ct. 3368, 73 L.Ed.2d 1140 (1982); Tison v. Arizona, 481 U.S. 137, 107 S.Ct. 1676 (1987).

14. A defendant who is convicted of felony murder can be twice penalized for a single aspect of his crime, because the same felony that caused his conviction can be used as an

aggravator in the penalty phase to make him eligible for the death penalty. To punish a defendant in the penalty phase for the same element of the crime which was necessary to prove a conviction in the guilt phase is to violate the double jeopardy and collateral *estoppel* concepts of Article I, Section 9, of the Florida Constitution and the Sixth and Fourteenth Amendments to the United States Constitution. *See* State v. Hegstrom, 401 So.2d 1343 (Fla. 1981); Provence v. State, 337 So.2d 783 (Fla. 1976); State v. Cherry, 298 N. C. 86, 257 S.E.2d 551 (1979).

JURY OVERRIDES

15. Section 921.141, Florida Statutes, is unconstitutional on its face because a jury recommendation of life imprisonment need not be followed by the trial court judge. The standard to be applied by the judge in overruling a life recommendation is that "facts suggesting a sentence of death" are "so clear and convincing that no reasonable person could differ." Tedder v. State, 322 So.2d 908, 910 (Fla. 1975). To sustain a death sentence in the face of a jury life recommendation necessarily requires a determination that the jury's recommendation is unreasonable. This standard is impossible to implement. As the Fifth Circuit Court of Appeals has said, "reasonable persons can differ over the fate of every criminal defendant in every death penalty case." Spinkellink v. Wainwright, 578 F.2d 582, at 605 (5th Cir. 1978). Because reasonable persons can and virtually always do disagree over whether a particular defendant should be sentenced to death, the Tedder standard is not susceptible of rational application, and fosters the arbitrary, unreliable, and capricious imposition of capital punishment, in violation of Article I, Sections 9, 16, and 17, of the Florida Constitution and the Fifth, Eighth, and Fourteenth Amendments to the United States Constitution.

16. Section 921.141, Florida Statutes, is unconstitutional because it permits the trial judge to overrule a jury life recommendation, contrary to the clear expression of the conscience of the community.

"Juries are the conscience of our communities." McCaskill v. State, 344 So.2d 1276, 1280 (Fla. 1977). In determining whether punishment comports with the Eighth Amendment's ban against cruel and unusual punishments, an assessment of contemporary values or "evolving standards of decency" is required. Trop v. Dulles, 356 U.S. 86, 78 S.Ct. 590 (1958); Gregg v.

Georgia, 428 U.S. 153, 96 S.Ct. 2909 (1976). A jury life recommendation reflects a determination that, in an individual case, imposition of the death penalty does not accord with contemporary values. To discard such a determination is to ignore the vital source from which the "cruel and unusual punishment" clause derives its meaning, in violation of Article I, Section 17, of the Florida Constitution and the Eighth and Fourteenth Amendments to the United States Constitution.

17. Since Furman v. Georgia, 408 U.S. 238, 92 S.Ct. 2726 (1972), most states which have enacted capital punishment statutes make jury verdicts of life binding. They also require a unanimous jury to recommend death, so the life vote of one juror alone is binding; the defendant gets a life sentence. Florida, however, permits the trial judge to override a unanimous life recommendation by a jury. The infliction of the death penalty contrary to a jury's verdict of life is repugnant to the representative scheme of checks and balances basic to our government system. As Justice Powell has observed:

> One of the criticisms leveled against our system is the absence of a remedy for an unjustified acquittal by a jury...The founding fathers, in light of history, decided that the balance here should be struck in favor of the individual. To reverse this today would negate the key role of the jury as a popular check on government. It might even unbalance our entire system of constitutional checks and balances. Powell, *"Jury Trial of Crimes,"* 23 Wash. & Lee L. Rev. 1, at 7-8, (1966).

The overruling of a jury life verdict therefore violates the concept of limited and representative government as embodied in the Ninth and Fourteenth Amendments to the United States Constitution.

NON-UNANIMOUS VOTE FOR DEATH

18. Section 921.141, Florida Statutes, is unconstitutional on its face because the jury recommendation of a death sentence need not be unanimous, thereby depriving the Defendant of the right to due process, equal protection of the law, fair trial, and to a unanimous jury verdict, in violation of Article I, Sections 9, 16, 17, 21 and 22, of the Florida Constitution, and the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution. Defendant

recognizes that the Florida Supreme Court has rejected attacks on the statute based upon these grounds. James v. State, 453 So.2d 786 (Fla. 1984). However, Defendant believes James was wrongly decided. In determining guilt of a criminal charge, the United States Supreme Court has declared unconstitutionally unreliable a guilty verdict by less than a "substantial majority" of twelve jurors. Johnson v. Louisiana, 912 S.Ct. 1620 (1972).

In a penalty phase, when a defendant is exposed to death as a possible punishment, there is a need for a heightened reliability, not a relaxed standard. Woodson v. North Carolina, 428 U.S. 280, 305 (1976). Instead of heightened reliability, Florida's statute provides for a constitutionally inadequate standard of a bare majority verdict.

NO JURY FINDINGS ON AGGRAVATORS

19. The death penalty in Florida is unconstitutional because, upon conviction of the Defendant, the jury is not required to list the specific aggravating circumstances they have found beyond a reasonable doubt when they recommend the death penalty. In that situation the trial judge is deprived of the opportunity to know what aggravating circumstances the jury did and did not find. This permits the trial judge to consider and find aggravating circumstances that the jury did not. This results in disproportionate and unreliable imposition of the death penalty, in violation of Article I, Sections 9 and 17, of the Florida Constitution, Section 921.141, Florida Statutes, and holdings of the Florida Supreme Court that uphold the constitutionality of the application of the death penalty in this state. Sullivan v. State, 441 So.2d 609 (Fla. 1983); Brown v. Wainwright, 392 So.2d 1327 (Fla. 1981); State v. Dixon, 283 So.2d 1 (Fla. 1973). It also prevents the Florida Supreme Court from conducting a meaningful review of a particular case relative to other cases in which the death penalty has been imposed. *See* Dixon and Sullivan, *supra.*

20. Section 921.141, Florida Statutes, is unconstitutional because it permits the trial judge to consider aggravating circumstances in imposing the death sentence that the advisory jury may not have considered, or that the jury may have decided did not exist. Furthermore, Section 921.141, Florida Statutes, permits the trial judge to find that aggravating circumstances outweigh any mitigating circumstances despite a jury recommendation of life imprisonment. A

jury recommendation of life instead of death necessarily involves a finding that (a) no aggravating circumstances exist, or (b) the aggravating circumstances do not outweigh any mitigating circumstances. The collateral *estoppel* concept of the prohibition against double jeopardy prevents the trial judge from reconsidering the issues of whether certain aggravating circumstances exist, or whether the aggravating circumstances outweigh any mitigating circumstances. Since Section 921.141, Florida Statutes, permits such factual findings to be twice litigated and twice decided, it violates the Sixth and Fourteenth Amendments to the United States Constitution and Article I, Section 9, of the Florida Constitution.

ARBITRARINESS IN APPLICATION OF STATUTE

21. Although the Florida and United States Supreme Courts have upheld the constitutionality of Section 921.141, Florida Statutes, the death penalty has in fact been administered and applied in a manner which is inconsistent with the premises of these Courts' decisions. The Equal Protection Clause of the Fourteenth Amendment to the United States Constitution requires that harsh punishments be fairly and evenhandedly imposed. Skinner v. Oklahoma, 316 U.S. 535, 62 S.Ct. 1110 (1942). Studies have shown that the race of the victim is the paramount consideration in determining whether a defendant receives the death sentence. The sentencing decision patterns of juries and judges under Section 921.141, Florida Statutes, have exhibited a pattern of arbitrary and capricious sentencing like that found unconstitutional in Furman v. Georgia, 408 U.S. 238, 92 S.Ct. 2726 (1972). Death sentences in Florida are imposed irregularly, unpredictably, and whimsically in cases which are no more deserving of capital punishment, under any rational standard that considers the character of the offender and the offense, than many other cases in which sentences of imprisonment are imposed. Inconsistent and arbitrary jury attitudes and sentencing recommendations, inconsistent and arbitrary prosecutorial practices in seeking or not seeking the death penalty, divergent sentencing policies of trial judges and erratic appellate review by the Florida Supreme Court all contribute to produce an unreliable, irregular and freakish pattern of life or death sentencing results. Therefore, as it has been and is being applied, Section 921.141, Florida Statutes, violates the

Fifth, Eighth and Fourteenth Amendments to the United States Constitution and Article I, Sections 2, 9 and 17, of the Florida Constitution.

PROLIFERATION OF AGGRAVATING CIRCUMSTANCES

22. In State v. Dixon, 283 So.2d 1 (Fla. 1973), and Proffitt v. Florida, 96 S.Ct. 2960 (1976), the Florida Supreme Court and the United States Supreme Court held constitutional the new Florida death penalty statute which contained eight aggravating circumstances. The Dixon court held that the key to a constitutional statute was "reasonable and controlled" discretion, and the legislature had achieved that, in part, by defining the eight aggravating circumstances. 283 So. 2d 7. The Proffitt court noted that there were eight aggravating circumstances in the statute and a weighing process existed to separate the "few cases" in which the death penalty should be imposed from those where it should not. 96 S. Ct. 2966. Other cases have made it clear that the function of death penalty aggravators is to distinguish the few cases in which death is appropriate from the many in which it is not. *See* Furman v. Georgia, 408 U.S. 238 (1972), and Zant v. Stephens, 462 U.S. 862 (1983).

23. Since the decisions in Dixon and Proffitt, the Florida legislature has completely changed the "narrowing" function of the death penalty statute by almost doubling the number of aggravating circumstances. The legislature has added six new aggravating circumstances and has expanded the scope of two of the original aggravators by amendments. The six new aggravating circumstances in Section 921.141(5) are:

> (i) The capital felony was a homicide and was committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification.
>
> (j) The victim of the capital felony was a law enforcement officer engaged in the performance of his or her official duties.
>
> (k) The victim of the capital felony was an elected or appointed public official engaged in the performance of his or her official duties if the motive for the capital felony was related, in whole or in part, to the victim's official capacity.
>
> (l) The victim of the capital felony was a person less than 12 years of age.
>
> (m) The victim of the capital felony was particularly vulnerable due to advanced age or disability, or because the

> defendant stood in a position of familial or custodial authority over the victim.
>
> (n) The capital felony was committed by a criminal street gang member, as defined in s. 874.03.

The amended aggravators are (5)(a), expanded to include defendants who are on community control or felony probation, and (5)(d), expanded to include additional felony murder aggravators: aggravated child abuse, abuse of an elderly person, and abuse of a disabled adult.

24. In addition to the legislative amendments, the Florida Supreme Court has interpreted some aggravators very broadly rather than narrowly, applying them in ways which could not have been foreseen or intended at the time Dixon and Proffitt examined the new Florida Statute. For example, in subsection (5)(b) "previously convicted" of a violent felony has been read to include contemporaneous convictions, and in subsection (5)(c) "many persons" has been read to mean more that three.

25. Since it takes only one aggravating circumstance to make a defendant death eligible and to raise the presumption that death is the appropriate sentence, the changes in the aggravating circumstances since Dixon and Proffitt have greatly expanded, rather than narrowed, the number of cases in which the death penalty can be imposed. The present statute, on its face and as applied, violates the due process clauses of the Florida and United States Constitutions as well as the cruel and unusual punishment clause of the United States Constitution and the cruel or unusual punishment clause of the Florida Constitution. It does not sufficiently channel the discretion of the sentencer and encourages arbitrary and capricious sentencing.

VIOLATION OF INTERNATIONAL LAW

26. Florida's statutory scheme violates the international minimum requirements of Due Process and fundamental fairness in criminal proceedings. Specifically, international law consists of jus cogens (customary international law) and treaties/agreements between countries. "[I]nternational law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction.: *The* Paquete Habana, 175 U.S. 677, 700 (1900). The

Supremacy Clause of the United States Constitution elevates international law to which we have become bound as the supreme law of the land, thereby superceding state law:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the constitution or laws of any State to the Contrary notwithstanding.

U.S. Const., Art. VI, cl.2. Courts are to enforce international law. *See* U.S. Const., Art. I, §8, cl.10; *Id.*, Art. III, §2, cl. 1. Multilateral human rights treaties should have greater force than bilateral treaties because they demonstrate international consensus on fundamental human rights:

> Although treaties that are mere exchanges of obligations between States allow them to reserve *inter se* applications of rules of general international law, it is otherwise in human rights treaties, which are for the benefit of persons within their jurisdiction....

U.N. Human Rights Committee General Comment 24, U.N. Doc. HRI/GEN/1/Rev. 3 ¶8 (1997). *See also Aleobeoteo et al. v. Suriname,* Inter-Am. Ct. H.R., Judgment of 10 September 1993, Inter-Am. Ct. H.R. (Ser. C) No. 15 (1994) (holding Dutch-Surinamese slavery treaty violates jus cogens); Soering v. United Kingdom, 161 Eur. Ct. H.R. (ser. A) (1989) (European Convention on Human Rights supercedes U.K.-U.S. Extradition Agreement of 1972); Appendix, Amnesty International, "International Standards on the Death Penalty" (August 1997).

27. International law requires that any procedure for determining whether a sentence of life or death is to be imposed must provide at the very least the same rights and protections given to the initial determination of guilt. Articles 6 and 14, International Covenant on Civil and Political Rights. Florida's statute allows arbitrary death sentences and does not guarantee that defendants indicted for capital murder are told all the elements of the charges against them, for example, the aggravating circumstances upon which a death sentence is sought, and the particular felonies which underlie the State's theory of felony murder.

WHEREFORE, for all of these reasons Defendant moves this Honorable Court to dismiss the Indictment filed in the above-styled cause and to declare death not a possible penalty and to declare Sections 782.04 and 921.141, Florida Statutes, unconstitutional.

I HEREBY CERTIFY that a copy of the above and foregoing Motion has been furnished to the Office of the State Attorney, by hand and/or electronically, this 10 day of December, 2013.

Respectfully submitted,

MATT SHIRK
PUBLIC DEFENDER

BY: _____
Fred C. Gazaleh, #353787
Assistant Public Defender

/slc

(CAP082)

IN THE CIRCUIT COURT, FOURTH JUDICIAL CIRCUIT, IN AND FOR DUVAL COUNTY, FLORIDA.

CASE NO.: 16 2013 CF 005781 AXXX MA

DIVISION: CR-D

STATE OF FLORIDA

VS.

DONALD JAMES SMITH

MOTION TO DECLARE SECTIONS 921.141, 922.10 AND 922.105, FLORIDA STATUES, UNCONSTITUTIONAL BECAUSE ELECTROCUTION AND LETHAL INJECTION ARE CRUEL AND UNUSUAL PUNISHMENTS

Defendant, by and through the undersigned attorney, the Public Defender for the Fourth Judicial Circuit of Florida, moves this Honorable Court to declare Sections 921.141, 922.10 and 922.105 under the current Florida Statutes unconstitutional. As grounds for this motion, Defendant states:

1. Death sentences in Florida are carried out pursuant to the provisions of Florida Statutes Section 922.10. Prior to January 14, 2000, death sentences in Florida had been carried out exclusively by electrocution for many decades. However, pursuant to an Amendment that went into effect on January 14, 2000, Florida Statutes Section 922.10 was changed to read "a death sentence shall be executed by electrocution or lethal injection in accordance with Section 922.105".

2. Death by electrocution and death by lethal injection are cruel and unusual punishments in light of evolving standards of decency and the availability of less cruel, but equally effective, methods of execution. Thus, it is violative of the Eighth and Fourteenth Amendments to the United States Constitution and Article I, Section 17, of the Florida Constitution to employ those methods of execution.

3. The above statutes were amended after there were several well-publicized, problematic executions by electrocution. See Jones v. State, 701 So.2d 76 (Fla. 1997). It was the bloody execution on July 8, 1999, of Allen Lee Davis, a man who was sentenced to death in Jacksonville, that again caused the courts to consider whether electrocution constituted cruel and unusual punishment. The Florida Legislature amended the statute to allow for lethal injection only after the United States Supreme Court agreed to consider the issue as to whether Florida's method of execution was constitutional.

4. The problematic executions done by electrocution demonstrated why almost all jurisdictions in the world presently reject it as a method for execution. Electrocution is cruel because it inflicts excruciating pain amounting to torture. This is especially true when malfunctions cause tortuous death, as occurred in Jones, supra, and with the execution of Allen Lee Davis. Further, the execution rituals attendant to electrocution increase the condemned person's apprehension of death and increase psychological suffering. Electrocution offends human dignity because of the physical violence to and mutilation of the body which occurs during electrocution. The technology of execution by electrocution has always been seriously flawed and remained flawed until the last time it was used in Florida.

5. Electrocution violates the Eighth Amendment because it is unnecessarily cruel. None of the cruelty and human indignity associated with electrocution is necessary because less-cruel alternatives are available.

6. However, experience with the use of lethal injection shows that it is a method of execution that suffers from some of the same problems that attended the use of electrocution as a means of executing prisoners. It likewise is cruel because it may inflict excruciating pain during the process of injecting the condemned with the lethal drugs. Further, the initial effect of the drugs may cause pain and torture.

7. The technology of execution by lethal injection is seriously flawed in ways analogous to the use of electrocution. The use of lethal injection does not always work the way it is supposed to. There are substantial risks of unnecessary and wanton infliction of pain. For example, it is not uncommon for there to be great difficulty in trying to insert into the prisoner's body the large needles required to transmit the lethal drugs. Sometimes actual surgical cut-downs in the prisoner's groin and legs must be used in order to insert the needles bearing lethal drugs into the prisoner's body. The drug that is initially administered to immobilize the prisoner is the same type that is often used in anesthesia for general surgery, however that drug and others like it cause suffocation unless a respirator is contemporaneously used with the administration of the drug. As a consequence, the condemned may unnecessarily suffer from the effects of suffocation before the lethal drug is administered.

8. The Eighth Amendment "proscribes more than physically barbarous punishments." Estelle v. Gamble, 429 U.S. 97, 102 (1976). It prohibits the *risk* of punishments that "involve the unnecessary and wanton infliction of pain," or "torture or a lingering death". Gregg v. Georgia, 428 U.S. 153, 173 (1976); Louisiana ex. rel Francis v. Resweber, 329 U.S. 459 (1947). "Among the 'unnecessary and wanton' inflictions of pain are those that are 'totally without penological justification.'" Rhodes v. Chapman, 452 U.S. 337, 346 (1981), (quoting Gregg, 428 U.S. at 183; citing Gamble, 429 U.S. at 103). The Eighth Amendment reaches "exercises of cruelty by laws other than those which inflict bodily pain or mutilation." Weems v. United States, 217 U.S. 349, 373 (1909). It forbids laws subjecting a person to "circumstance[s] of degradation," Id. at 366, or to "circumstances of *terror,* pain, *or disgrace"* "superadded" to a sentence of death. Id. at 370 *(*emphasis supplied*)*. See In re Medley, 134 U.S. 160, 171, 172 (1890), (seclusion in solitary confinement and prohibition on telling condemned prisoner date and time of his execution are increased punishments, in violation of *ex post facto* clause, because solitary confinement induces "further terror," while "secrecy [about the time of execution] must

be accompanied by an immense mental anxiety amounting to a great increase in punishment." *See also* Trop v. Dulles, 356 U.S. 86, 101 (1958). A penalty must also accord with 'the dignity of man,' which is the 'basic concept underlying the Eighth Amendment.'" Gregg, 428 U.S. at 173 (citing *Trop,* 356 U.S. at 100).

9. Florida Statutes Section 922.105 provides that a death sentence shall be executed by lethal injection unless the person sentenced to death affirmatively elects to be executed by electrocution. It further provides that the condemned has one opportunity to elect to be executed by electrocution and provides procedures for making that election. The application of this statute is both cruel and unusual. Further, it violates any elementary standard of decency and fairness that is embodied in the concept of due process and in the concept of the prohibition of the application of cruel and unusual punishments. Therefore, it violates Amendments Five, Eight and Fourteen of the United States Constitution and Article I, Sections 9 and 17, of the Constitution of the State of Florida. It is simply unfair and unconscionable to require a condemned to pick the method of his or her execution when it is the government that is requiring that he or she be put to death. The provisions of this statute are a transparent effort by the Legislature to cure any possible constitutional infirmities of the prior execution statute by putting the burden on the condemned to elect how he or she should die. Quite simply put, if the government is to execute people, it should prescribe the method of execution and not try to cure any constitutional infirmities in that prescription by putting that Hobsons choice on the shoulders of the condemned. It simply is not fair. It is barbaric.

10. Sections 922.10 and 922.105, Florida Statutes, leave it to the Department of Corrections to divine what exactly the lethal injection chemical mixture will be, and how it will be administered. The Department of Corrections also decides whether the method of execution has been properly elected or "defaulted" by an inmate. This broad concession of

agency discretion is an unlawful delegation of authority by the legislative to the executive branch of government. Article II, Section 3, of the Florida Constitution provides:

> The powers of the state government shall be divided into legislative, executive and judicial branches. No person belonging to one branch shall exercise any powers appertaining to either of the other branches unless expressly provided herein.

"The prohibition contained in the second sentence of Article II, section 3, of the Florida Constitution could not be plainer, as our cases clearly have held. This Court has stated repeatedly and without exception that Florida's Constitution absolutely requires a 'strict' separation of powers." B.H. v. State, 645 So.2d 987, 991 (Fla. 1994). This "strict separation" means "the legislature is not free to redelegate to an administrative agency so much of its lawmaking power as it may deem expedient." Askew v. Cross Key Waterways, 372 So.2d 913, 924 (Fla. 1978). Here the legislature has charged the Department of Corrections with the authority to put people to death by a lethal injection without further explanation. "The legislature may not delegate open-ended authority such that no one can say with certainty, from the terms of the law itself, what would be deemed an infringement of the law." B.H. v. State, 645 So.2d 987, 993 (quoting Conner v. Joe Hatton, Inc., 216 So.2d 209, 211 (Fla. 1968).

11. The Florida statutes that allow for death by electrocution and lethal injection violate international law, which binds the United States of America and the individual states, including the International Covenant of Civil and Political Rights (Article VII which prohibits cruel, inhuman or degrading treatment), the Covenant Against Torture (Articles I and XVI which prohibit cruel, inhuman or degrading treatment) and the American Declaration of the Rights and Duties of Man (Article XXVI which prohibits cruel and unusual punishment.)

WHEREFORE, Defendant respectfully requests this Honorable Court to grant this Motion.

I HEREBY CERTIFY that a copy of the above and foregoing motion has been furnished to the Office of the State Attorney, by hand and/or electronically, this 10 day of December, 2013.

Respectfully submitted,

MATT SHIRK
PUBLIC DEFENDER

BY: _____
Fred G. Gazaleh, #353787
Assistant Public Defender

/slc

(CAP081)

IN THE CIRCUIT COURT, FOURTH JUDICIAL CIRCUIT, IN AND FOR DUVAL COUNTY, FLORIDA.

CASE NO.: 16 2013 CF 005781 AXXX MA

DIVISION: CR-D

STATE OF FLORIDA

VS.

DONALD JAMES SMITH

MOTION TO DECLARE FLORIDA'S DEATH PENALTY UNCONSTITUTIONAL BECAUSE OF UNRELIABILITY

Defendant, by and through the undersigned counsel, moves to have Florida's death penalty declared unconstitutional under the state and federal constitutions based on the following:

INTRODUCTION

1. This defendant is charged with first-degree murder.

2. In Florida, first-degree murder is a capital crime punishable by life imprisonment without parole, electrocution or lethal injection. *See* Sections 782.04, 921.141, 922.10 and 922.105, Fla. Stat.

3. Capital punishment is unconstitutional if it is arbitrarily or capriciously used by the states. Furman v. Georgia, 408 U.S. 238 (1972). The state legislatures have enacted laws to avoid arbitrary use of the death penalty. The Supreme Court of Florida, when that legislation was first reviewed, upheld Florida's capital punishment statute in the belief it could and would be consistently and reliably applied. State v. Dixon, 283 So.2d 1 (Fla.1973). The United States Supreme Court in 1976, three years after the enactment of Florida's capital legislation, mirrored that determination. Proffitt v. Florida, 428 U.S. 242 (1976).

4. Heightened Due Process is required in capital cases. For capital punishment to meet the heightened Due Process requirements under Article I, Sections 2, 9, 16, 17 and 22, of the Florida Constitution and the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution, there is an "acute" need for reliable fact finding at all stages involved in

imposition of capital punishment:

> Because the death penalty is unique in both its severity and its finality, **we have recognized an acute need for reliability in capital sentencing proceedings**. See Lockett v. Ohio, 438 U.S. 586, 604, 98 S.Ct. 2954, 2964, 57 L.Ed.2d 973 (1978) (opinion of Burger, C.J.) (stating that the "qualitative difference between death and other penalties calls for a greater degree of reliability when the death sentence is imposed"); *see also* Strickland v. Washington, 466 U.S. 668, 704, 104 S.Ct. 2052, 2073, 80 L.Ed.2d 674 (1984) (Brennan, J., concurring in part and dissenting in part) ("[W]e have consistently required that capital proceedings be policed at all stages by an especially vigilant concern for procedural fairness **and for the accuracy of fact-finding"**).

Monge v. California, 524 U.S. 721, 118 S.Ct. 2246, 2252 (1998). (Emphasis added). The constitutional requirement for reliable fact finding in the context of capital punishment has been expressly recognized and embraced by the Florida Supreme Court. *See* Arvelaez v. Butterworth, 738 So.2d 326 (Fla. 1999). ("We acknowledge we have a constitutional responsibility to ensure the death penalty is administered in a fair, consistent **and reliable manner** . . . .") (Emphasis added).

VACILLATION IN APPLICATION OF AGGRAVATORS AND MITIGATORS AND LEGAL STANDARDS FOR THE IMPOSITION OF CAPITAL PUNISHMENT

5. The vacillation in application of the aggravating and mitigating factors and the legal standards for imposition of capital punishment found in Florida's appellate decisions form an unreliable basis for imposition of the death penalty in Florida. The vacillation in holdings at the appellate court level has a direct influence on the manner in which the trial courts determine whether imposition of the death penalty is appropriate. In fact, the overall review of the propriety of imposition of the death penalty vacillates and is unreliable. For example, in 1975, imposition of

the death penalty for Charles Proffitt was upheld. Proffitt v. State, 315 So.2d 461 (Fla. 1975). Thirteen years later, in 1985, the death penalty was found to be inappropriate. Proffitt v. State, 510 So.2d 896 (Fla. 1987). Implicit in that determination is that the underlying facts justifying imposition of the death penalty no longer formed a valid basis for the death penalty. A similar result occurred for Carl Songer. See Songer v. State, 322 So.2d 481 (Fla. 1975), (death penalty approved); Songer v. State, 544 So.2d 1010 (Fla. 1989), (fourteen years later, death penalty "inappropriate"). The determination of the propriety of a death sentence by trial courts during that period of time is called into question by the change in the legal standard as to when it is appropriate to impose a death sentence.

6. Vacillation likewise occurs in the meaning and applicability of the statutory sentencing factors themselves, shown by the following examples that are not intended to be all inclusive, but which are illustrative only:

> Section 921.141(5)(b), Florida Statutes ("The defendant was previously convicted of another capital felony or of a felony involving the use or threat of violence to the person.") - In Meeks v. State, 333 So.2d 186, 190 (Fla. 1976), the Court expressly and unequivocally stated that "contemporaneous convictions do not qualify as an aggravating circumstance ... under Section 921.141(5)(b)." In King v. State, 390 So.2d 315, 320-21 (Fla. 1980), the Florida Supreme Court overruled Meeks by expressly and unequivocally holding that, "The legislative intent is clear that ***any*** violent crime for which there was a conviction ***at the time of sentencing*** should be considered as an aggravating circumstance." (Emphasis added). Eleven years after Meeks, the Florida Supreme Court adjusted the meaning of this aggravating circumstance by holding that Section 921.141(5)(b) cannot be found for contemporaneous crimes committed on one victim. Wasko v. State, 505 So.2d 1314, 1318 (Fla. 1987). *See* Pardo v. State, 536 So.2d 77 (Fla. 1990).
>
> Section 921.141(5)(c), Florida Statutes ("The defendant

knowingly created a great risk of death to many persons.") - In King v. State, 390 So.2d 315, 320 (Fla. 1980), the Florida Supreme Court upheld application of this factor where the defendant set fire to a house occupied by a single person because the defendant "should have reasonably foreseen that the blaze would pose a great risk to the neighbors, as well as the firefighters and the police who responded to the call." Seven years later, in the same case and on the same facts, the court rejected application of the "great risk to many" factor, stating "this case is a far cry from one where this factor could properly be found." King v. State, 514 So.2d 354, 380 (Fla. 1987). In Alvord v. State, 322 So.2d 533, 540 (Fla. 1975), the Florida Supreme Court upheld the "great risk to many" factor where three persons were strangled to death in separate bedrooms of a house. In White v. State, 403 So.2d 331, 333 (Fla. 1981), the Florida Supreme Court disapproved the factor where eight victims were shot in two different rooms of a house.

Section 921.141(5)(h), Florida Statutes ("The capital felony was especially heinous, atrocious or cruel.") Compare Simmons v. State, 419 So.2d 316, 319 (Fla. 1982), ("The fact that the victim was murdered in his own home offers no support for the [HAC] finding.") with Troedel v. State, 462 So.2d 392 (Fla. 1984), (HAC shown because "the fact that the victims were killed in their homes sets the crime apart from the norm") and Perry v. State, 522 So.2d 817, 821 (Fla. 1988), ("We note also that this vicious attack was within the supposed safety of Mrs. Miller's home, a factor we have previously held adds to the atrocity of the crime."). In Proffitt v. State, 315 So.2d 461 (Fla. 1975), the Florida Supreme Court upheld the use of the HAC factor where a man was stabbed to death while asleep in his home. Thirteen years later, in Proffitt v. State, 510 So.2d 896, 897 (Fla. 1987), the HAC factor was not again found to exist based on the same facts.

Section 921.141(6)(a), Florida Statutes ("No significant

history of prior criminal activity.") -- In Ruffin v. State, 397 So.2d 277, 278 (Fla. 1981), the Court expressly and unequivocally held that "in determining the existence or absence of the mitigating circumstance of no significant prior criminal activity, 'prior' means prior to the sentence of the defendant and does not mean prior to the commission of the murder for which he is being sentenced." Seven years later, the Court receded from Ruffin and held that "a 'history' of prior criminal conduct can [not] be established by contemporaneous crimes." Scull v. State, 533 So.2d 1133, 1143 (Fla. 1988).

Section 921.141(6)(g), Florida Statutes ("The age of the defendant at the time of the crime.") Compare State v. Dixon, 283 So.2d 1, 10 (Fla. 1973), ("Thus, the Legislature has chosen to provide for consideration of the defendant - **whether youthful, middle aged, or aged** - in mitigation. The meaning of the Legislature is not vague, and we cannot say that such a consideration is unreasonable *per se*") (Emphasis added.) with Campbell v. State, 679 So.2d 720, 722 (Fla. 1996), ("Chronological age standing alone thus is generally of little import, warranting no special instruction.").

7. The vacillation that occurs in the law concerning the meaning of the statutory factors used to impose capital punishment in Florida, and the changes in the law concerning the procedures for imposition of the death penalty, *see, e.g.,* Sochor v. Florida, 504 U.S. 527 (1992), and Espinosa v. Florida, 505 U.S. 1079 (1992), render imposition of a death sentence at any given time unreliable and constitutionally infirm. As shown by the examples set forth in paragraph 6, the laws and facts used to impose death sentences at one point in time are years later found to be improper. In the interim, lower courts are imposing death sentences in reliance on precedent that changes too much to be constitutionally reliable in the context of capital punishment. The history of the use of Florida's death penalty in the years since its enactment shows that the legal and factual bases for imposition of capital punishment are demonstrably unreliable. The

standards used to impose capital punishment in Florida lack the heightened reliability and stability needed in the context of capital punishment. The death penalty is thus constitutionally infirm under Article I, Sections 2, 9, 16, 17 and 22, of the Florida Constitution and the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution.

UNRELIABLE DETERMINATIONS OF GUILT AND PENALTY AS A RESULT OF PROSECUTORIAL ERRORS AND MISCONDUCT

8. The determination of guilt and the extent of the conduct of the Defendant are not sufficiently reliable to make the imposition of capital punishment constitutional. Improper convictions for first-degree murder and improper death sentences are often the results of inappropriate conduct by prosecutors.

9. In Rogers v. State, 782 So.2d 373 (Fla. 2001), the Florida Supreme Court reversed a conviction for first-degree murder and imposition of a death sentence because the prosecutor suppressed exculpatory evidence. In Rogers, witnesses were coached by a prosecutor and police in a case where the State was seeking imposition a death sentence. The coaching was discovered only because Rogers' defense attorneys eventually obtained a cassette tape that documented the coaching:

> The next category of Brady evidence alleged to have been withheld from Rogers is a cassette tape of a June 19, 1984, telephone conversation among the State's investigator, Flynn Edmonson; the prosecutor, John Whiteman; and McDermid, which Rogers claims revealed substantial coaching of McDermid for his trial testimony. The tape cassette, which was transcribed by an attorney of Covington & Burling, provided two excerpts reflecting the State's attempt to influence McDermid's testimony.
>
> The first excerpt reflects McDermid telling the State that, after the robbery, he had reached the

getaway car first and then laid down on the floorboard in the back seat while his partner, Rogers, lagged behind, shot the store manager, and then entered the car and drove away. The transcript of the tape reflects McDermid stating that Rogers arrived at the car about ten seconds after he had reached the car. After this representation, the transcript reflects the State explaining to McDermid that there were two witnesses who stated that they only saw McDermid run to the getaway car, get into the driver's seat, and drive away. At that point and after suggesting to McDermid that maybe the witnesses were mistaken or that maybe they just had not seen Rogers because he was too close behind, McDermid stated, "[Rogers] wasn't far behind me. I'll say that."

The second excerpt reveals McDermid's response when asked where the getaway car had been parked was that it was parked

> [o]n the other side of the Holiday Inn, about 5 parking spaces down from the office.... It would be somewhere in those first five. Ah, I remember we didn't want to park right next to the stairwell [the first spot] and decided to park a couple down so I could look on both sides you know what I mean, without the stairwell being in the way.... Not being parked too close to the office too was another thing I had in mind.

However, later in the conversation, when again he was asked where he had parked, McDermid responds: "I think it was either the first or the second slot, but I can't be sure." In response, Mr. Edmonson stated that there were several State witnesses who were adamant in their testimony that McDermid had parked the car in the first parking space and that "it

> would probably be a better idea if it was parked in the first spot.... I would think that you would have parked in the first space." In response, McDermid stated, "That's another thing. I mean like you said we might have parked in the first one." At trial McDermid testified that the getaway car was parked in the first spot, next to the stairwell.
>
> This evidence of coaching and conflicting accounts clearly was favorable to Rogers. Whenever the government's case depends almost entirely on the testimony of one witness, without which there can be no conviction, that witness's credibility is an important issue in the case. *See* Giglio v. United States, 405 U.S. 150, 154-55, 92 S.Ct. 763, 31 L. Ed. 2d 104 (1972); United States v. Meros, 866 F. 2d 1304, 1309 (11th Cir.1989); Brown v. Wainwright, 785 F.2d 1457, 1465 (11th Cir.1986); Craig v. State, 685 So.2d 1224, 1226 (Fla. 1996). In this case, McDermid was the State's chief witness, and with the tape, Rogers could have impeached McDermid and shown the degree to which the State had coached him to overcome the inconsistencies between his testimony and that of the other State witnesses. This was especially important because the State did present eyewitnesses who testified that they saw someone drive off who met McDermid's description. This testimony conflicted sharply with that of McDermid, who testified that he laid down in the back seat and waited until Rogers came and got in the driver's seat and drove off.

Rogers v. State, 782 So.2d 373, 384-385 (Fla. 2001).

10. In Rogers the prosecutor did not timely disclose the cassette tape of state witnesses being coached. While it is not improper to go over the testimony with a witness, actually coaching a witness about what to say or not to say is unethical. It is a truism that there are unethical attorneys, just as there are unethical Catholic priests, judges, law enforcement officers, and prison

guards. Crimes happen. Coaching happens. Rogers documents that. However, to the unethical prosecutor who would coach a witness, the lesson learned by Rogers is not to avoid coaching, but instead to avoid recording such coaching sessions.

11. Prosecutors have long been admonished that their conduct must be beyond reproach, and that their duty is not simply to seek convictions, but instead to honor scrupulously the requirements of law. *See* Berger v. United States, 295 U.S. 78, 88, 55 S.Ct. 629, 633, 79 L. Ed. 1314 (1935) ("the representative ... of a sovereignty ... whose interest ... in a criminal prosecution is not that it shall win a case, but that justice shall be done"). Yet, prosecutors in capital cases often suppress evidence favorable to the accused. *See* Kyles v. Whitley, 514 U.S. 419, 442-43, 115 S.Ct. 1555, 131 L. Ed. 2d 490 (1995), (reversible error in capital case to suppress eyewitness statements to police describing assailant as five feet four inches or five feet five inches tall and of medium build that matched description of an alternative suspect who was six feet tall and thin). The practice occurs in Florida, in capital cases. *See* Hoffman v. State, 800 So.2d 174 (Fla. 2001), (prosecutor did not disclose exculpatory results of scientific hair analysis); State v. Huggins, 788 So.2d 238 (Fla. 2001), (prosecutor did not disclose witness who contacted him during trial with testimony favorable to the accused); Rogers, *supra*.

12. Overreaching by prosecutors in death penalty cases is amply demonstrated by a long history of improper arguments intentionally used in death penalty cases. The improper arguments are routinely made in the face of announcements that capital litigation requires heightened Due Process. Improper arguments are made in defiance of admonitions that prosecutors should not make certain arguments because they are improper. *See* Card v. State, 803 So.2d 613 (Fla. 2001), (prosecutor improperly argued that defendant might be paroled if sentenced to life, that victim impact evidence could be weighed as an aggravating consideration, and that jury is the "conscience" of the community); Ruiz v. State, 743 So.2d 1, 5 (Fla. 1999), (argument that prosecutors are representatives of the state "has been soundly rejected by the courts;" argument that defendant was a liar "crossed the line of acceptable advocacy by a wide margin;" prosecutor's

recounting service of her father in the Army was an improper "blatant appeal to jurors' emotions.") Muhammad v. State, 782 So.2d 343, 360 (Fla. 2001), (prosecutor's argument "asked the jury to imagine the victim's fear, anger and terror;" argument previously held to be unacceptable and strongly condemned in Garron v. State, 528 So.2d 353 (Fla. 1988)); Urbin v. State, 714 So.2d 411, 420 (Fla. 1998), (prosecutor's argument was previously condemned in Reddish v. State, 525 So.2d 928 (Fla. 1st DCA 1988).

13. Though it is clearly improper, prosecutors continue to argue that a death sentence is justified because a defendant showed no remorse for his actions. *See* McCampbell v. State, 421 So.2d 1072, 1078 (Fla. 1982), ("Henceforth lack of remorse should have no place in the consideration of aggravating factors. Any convincing evidence of remorse may be properly considered in mitigation of the sentence, but absence of remorse should not be weighed either as an aggravating factor nor as an enhancement of an aggravating factor."); Robinson v. State, 520 So.2d 1, 6 (Fla. 1988), (any consideration of lack of remorse is improper); Jones v. State, 569 So.2d 1234, 1240 (Fla. 1990), ("This Court has repeatedly stated that lack of remorse has no place in the consideration of aggravating circumstances.") Wike v. State, 596 So.2d 1020, 1025 (Fla. 1992), ("In his closing argument, the prosecutor emphasized Wike's lack of remorse to the jury.") Shellito v. State, 701 So.2d 837, 842 (Fla. 1997), (harmless error for prosecutor to argue, "Was he remorseful, was he horrified over having killed Sean Hathorne?").

14. Though clearly improper, prosecutors continue to appeal to jurors' emotions and passion in seeking imposition of the death penalty. See Bertolotti v. State, 476 So.2d 130, 134 (Fla. 1985), ("We are deeply disturbed as a Court by the continuing violations of prosecutorial duty, propriety and restraint. We have recently addressed the incidents of prosecutorial misconduct in several death penalty cases. (Citations omitted). . . . The proper exercise of closing argument is to review the evidence and to explicate those inferences which may reasonably be drawn from the evidence. Conversely, it must not be used to inflame the minds and passions of the jurors so that their verdict reflects an emotional response to the crime or the defendant rather than the logical

analysis of the evidence in light of the applicable law."); Garron v. State, 528 So. 2d 353, 359 (Fla. 1988), ("When comments in closing argument are intended to and do inject elements of emotion and fear into the jury's deliberations, a prosecutor has ventured far outside the scope of proper argument. These statements when taken as a whole and fully considered demonstrate the classic case of an attorney who has overstepped the bounds of zealous advocacy and entered into the forbidden zone of prosecutorial misconduct."); King v. State, 623 So.2d 465, 488 (Fla. 1993), ("We agree with King that the instant prosecutor went too far" by inflaming the minds and passions of the jurors); Taylor v. State, 640 So.2d 1127, 1134 (Fla. 1st DCA 1994), (Prosecutors "activities were designed to evoke an emotional response to the crimes or to the defendant, and fall outside the realm of proper argument."); Urbin v. State, 714 So.2d 411, 421 (Fla. 1998), ("the prosecutor's comments constitute a subtle 'golden rule' argument, a type of emotional appeal we have long held impermissible."); Thomas v. State, 787 So.2d 26, 30 (Fla. 2d DCA 2001), ("Closing argument 'must not be used to inflame the minds and passions of the jurors.' (Citation omitted). It is improper for the State to evoke the jury's sympathy regarding the victim.' (Citation omitted). Although we do not conclude that the error during closing argument was so prejudicial as to vitiate the entire trial, (citation omitted), we are particularly disturbed by the prosecutor's blatant persistence in making improper comments despite a sustained objection, a court warning and a curative instruction."); Lewis v. State, 780 So.2d 125, 129 (Fla. 3d DCA 2001), ("Such appeals to sympathy by the prosecution have long been held to be improper."); Brooks v. State, 762 So.2d 879, 899 (Fla. 2000), ("it appears that many of the comments in this case are the same as those made in Urbin, 'with only the names of the victims and the defendants changed.") (Emphasis added.); Gonzalez v. State, 786 So.2d 559, 570 fn. 4 (Fla. 2001), ("In this instance, the comment was not objected to and thus not preserved for appellate review. We stress, however, that prosecutors should be careful about the language used in these arguments. We certainly do not approve of this type of language.").

15. Prosecutors continue to argue improperly that the jurors should show the

defendant the same mercy shown the victim. *See* Urbin v. State, 714 So.2d 411, 422 (Fla.1998), ("This line of argument is blatantly impermissible under Rhodes v. State, 547 So.2d 1201, 1206 (Fla. 1989), and Richardson v. State, 604 So. 2d 1107, 1109 (Fla. 1992)."); Brooks v. State, 762 So.2d 879, 901 (Fla. 2000), ("Similarly, the prosecutor's 'mercy' argument in this case tracks almost word for word the argument in Urbin which was classified as 'blatantly impermissible' by this Court."); Kearse v. State, 770 So.2d 1119, 1129 (Fla. 2000), (prosecutor improperly urged jury to show "this Defendant the same mercy he showed Officer Parrish."); Thomas v. State, 748 So.2d 970, 985 (Fla. 1999), (continuing to express intolerance for prosecutorial misconduct, Court reaches otherwise moot point to note that prosecutor violated Urbin, Rhodes and Richardson by arguing, "Today is Robert Thomas's day of reckoning. I ask you to show him the same mercy that he showed to Imara Skinner on that day.").

16. Improper prosecutorial argument is a visible tactic that is capable of review by the appellate courts only because it is necessarily a visible part of the record. Hopefully, a valid harmless error analysis can adequately address these serious constitutional errors that are intentionally and repeatedly injected by unethical prosecutors in capital trials. See State v. Diguilio, 491 So. 1129 (Fla. 1986), (holding that constitutional errors such as prosecutor improperly commenting on the exercise of constitutional right to remain silent is subject to harmless error analysis)[1]. The more troubling aspect is that Florida prosecutors so openly ignore their oath and obligation to seek justice and are instead openly using patently improper arguments to achieve convictions and death sentences. The foregoing examples show that, clearly, prosecutors statewide openly and intentionally engage in improper tactics in the context of death penalty prosecutions. Prosecutors are not heeding the ethical constraints precluding improper arguments and/or the

[1] Interestingly, State v. Diguilio, 491 So.2d 1129 (Fla.1986) has been cited more than 1,200 times to review instances of State infringement of a constitutional right. There is no way to know how many times a PCA has been issued based on a determination that *reviewed* constitutional error was harmless.

repeated admonitions of the Florida Supreme Court to refrain from making improper arguments. *See, e.g.*, State v. Murray, 443 So.2d 955 (Fla. 1984), (attorneys engaging in improper argument should be referred to the Florida Bar for disciplinary investigation); Urbin, supra; Ruiz, supra; Bertolloti, supra. The tactic of making improper arguments occurs openly, in seeming defiance of the admonitions of the appellate court and despite higher Due Process requirements for capital litigation. In light of the visible disdain for ethical constraint that is shown by the use of improper arguments, there can be no confidence that undisclosed/concealed conduct of all prosecutors comports with ethical requirements. The lack of confidence in the ethical performance of all prosecutors in Florida serves as another basis to conclude that the highest standard for reliable fact finding in the context of the capital punishment is not being met.

17. The historical improper and unethical performance of Florida prosecutors in capital litigation fully justifies declaring capital punishment in Florida unconstitutional under Article I, Sections 2, 9, 16, 17 and 22, of the Florida Constitution and the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution. The fact finding process cannot be deemed sufficiently reliable to justify imposition of the death penalty because state prosecutors have engaged and continue to engage in a course of conduct that demonstrates blatant disregard for the constitutional requirements of fundamental fairness, Due Process and respect for the requirements of law. The history of prosecutors blatantly making improper arguments indicates that other concealed improprieties, such as coaching witnesses and suppressing favorable evidence as occurred in Rogers, are NOT being timely discovered and reviewed by appellate courts.

UNRELIABILITY OF THE FACT-FINDING PROCESS

18. The fact-finding process itself in the context of capital litigation is so fraught with unreliability that the death penalty is unconstitutional under Article I, Sections 2, 9, 16, 17 and 22, of the Florida Constitution and the Fifth, Sixth, Eighth and Fourteenth Amendments to the

United States Constitution. Wrongful convictions of innocent defendants charged with first-degree murder have undeniably occurred nationwide and in Florida. For example, in Florida, Freddie Lee and Wilbert Pitts were convicted of two first-degree murders and sentenced to death. Their convictions and sentences were upheld by the Courts. See Lee v. State, 166 So.2d 133 (Fla. 1966). Belatedly, exculpatory evidence was unearthed and presented that resulted in their full pardon 27 years after their initial wrongful conviction and confinement on death row. The Florida Legislature enacted special legislation to compensate these men in the sum of $500,000 each. See Chapter 98-431, C.S.H.B No. 3035, ("Maurice Rosen Act"). Compensation by the State of Florida for confining two innocent individuals for 27 years on death row is to be commended. Because of the finality and severity of the death penalty, however, compensation to innocent persons whose wrongful sentence of death is in fact carried out by the State of Florida cannot occur. It is for that very reason that the Constitution requires the heightened Due Process and reliable fact finding before a State can ever be allowed to execute one of its citizens. A death sentence, once carried out, is not reversible. The unreliability of the fact-finding process itself has caused several moratoriums on the use of capital punishment.

19. One independent study reviewing imposition of capital punishment for a period of 23 years, from 1973 until 1995, found that an unacceptably high rate of serious error exists in capital cases across the United States. "Over 90% of American death-sentencing states have overall error rates of 52% or higher. 95% have error rates of 60% or higher. Three-fifths have error rates of 70% or higher." Liebman, Fagan & West, "A Broken System: Error Rates in Capital Cases, 1973-1995," Executive Summary, p.2. The study sets forth exhaustive findings and ultimately concludes that, "the capital punishment system revealed by our 23 year study is not a success, and is not even minimally rational." (*Liebman,* page 122). A follow-up to that study titled, "A Broken System, Part II; Why is There So Much Error in Capital Cases, and What Can Be Done About It" was released February 12, 2002. The exhaustive research spans over 600 pages, and its conclusions generated editorials calling for Florida's death penalty to be re-examined. Statistics

show that Florida leads the nation in its reversal rate of the imposition of capital punishment. Appendix A to that study reflects that, since 1973, there have been 889 death sentences imposed in Florida, and that 36 of those have been carried out. While it is not a court's function to assess the cost-efficiency of legislation, it is the court's duty to determine whether a system is so unreliable that a chance exists that the death penalty will be erroneously imposed and carried out. Such is the case in Florida.

20. The advancement of scientific knowledge has led to the exoneration of innocent persons who have been wrongfully convicted and sentenced to death. Frank Lee Smith died of cancer after being imprisoned on Florida's death row for 14 years and after a unanimous jury recommended the death penalty. Eleven months after dying of cancer, DNA evidence cleared him. The belated exoneration of persons, made possible by DNA, reveals that convictions are not sufficiently reliable to support imposition of capital punishment.

21. In United States v. Quinones, S.D.N.Y., No. 53 00 Cr. 761 (4/25/02), United States District Court Judge Rakoff declared the 1994 federal Death Penalty Act, 18 U.S.C. 3591-98, unconstitutional because of the undue risk of putting innocent people to death. His opinion was reversed by a three-judge panel of the U. S. Court of Appeals for the Second Circuit in December, 2002, but the reasoning of Judge Rakoff makes sense if applied to the situation in Florida. He cited statistics about the release of people from death rows across the country after new evidence, especially DNA evidence, proved their innocence. He wrote that these examples strengthen the inference that "numerous innocent people have been executed whose innocence might otherwise have been similarly established, whether by newly-developed scientific techniques, newly-discovered evidence, or simply renewed attention to their cases." He framed the issue in this way:

> In constitutional terms, the issue is whether – now that we know the fallibility of our system in capital cases – capital punishment is unconstitutional because it creates an undue risk that a meaningful number of innocent persons, by being put to death

> before the emergence of techniques or evidence that will establish their innocence, are thereby effectively deprived of the process that is reasonably due them in these circumstances under the Fifth Amendment.

He concluded that the undue risk of executing innocent people violates the due process clause of the United States Constitution.

WHEREFORE, this Court is asked to declare Florida's death penalty statutes unconstitutional for the reasons set forth in this motion and as may be further articulated by counsel during argument of this motion.

I HEREBY CERTIFY that a true and correct copy of the foregoing motion has been furnished to the Office of the State Attorney, by hand and/or electronically, this 10 day of December, 2013.

Respectfully submitted,

MATT SHIRK
PUBLIC DEFENDER

BY: _____
Fred C. Gazalon, #353787
Assistant Public Defender

/slc

(CAP083)

IN THE CIRCUIT COURT, FOURTH JUDICIAL CIRCUIT, IN AND FOR DUVAL COUNTY, FLORIDA.

CASE NO.: 16 2013 CF 005781 AXXX MA

DIVISION: CR-D

STATE OF FLORIDA

VS.

DONALD JAMES SMITH

MOTION TO DECLARE FLORIDA'S DEATH PENALTY UNCONSTITUTIONAL AS NOW APPLIED

The Defendant moves for rulings on several grounds that Florida's death penalty as now enforced by the courts violates the state and federal constitutions as follows:

1. This Defendant is charged by indictment with first-degree murder by violating §782.04(1), Florida Statutes.

2. The entitlement under the Fifth and Fourteenth Amendments to the United States Constitution and article I, section 15 of the Florida Constitution to be properly charged by indictment in a capital case was here denied because the indictment fails to identify what statutory and factual criteria justify capital punishment.

3. The Fifth, Sixth and Fourteenth Amendments to the United States Constitution and article I, sections 2, 9, 16(a) and 22 of the Florida Constitution guarantee due process and a jury trial. Under Florida law, the right to due process and a jury trial includes a 12-person jury in a capital case and jury unanimity. Fla.R.Crim.P. 3.440; §913.10, Fla. Stat.; Jones v. State, 92 So.2d 261, 261 (Fla. 1956) ("In this state, the verdict of the jury must be unanimous."); Motion to call Circuit Judge to Bench, 8 Fla. 459, 482 (1859) ("The common law wisely requires the verdict of a petit jury to be unanimous.") The right to due process also includes compliance with article II, section 3 of the Florida Constitution, which precludes a member of one branch of government from exercising powers appertaining to a different branch of government. These entitlements are being denied if the judge, alone, makes the factual findings that are necessary and statutorily required to impose the death penalty.

4. The standard set forth in §921.141(3), Florida Statutes, to determine eligibility for capital punishment is not being applied as written by Florida courts and enforcement of this statute by Florida courts violates article II, section 3 of the Florida Constitution..

5. The entitlement to the administration of justice without delay guaranteed by article I, section 21 of the Florida Constitution is violated where Florida courts acknowledge the validity of the analysis by the United States Supreme Court in Apprendi v. New Jersey, 530 U.S. 466, 120 S.Ct. 4348, 147 L.Ed.2d 435 (2000) concerning the procedural due process right to a jury trial and in fact provide that due process right in the context of Florida guideline sentencing but refuse to provide that same due process in the context of capital sentencing, where heightened scrutiny is compelled by the Eighth and Fourteenth Amendments due to the severity and finality of capital punishment. The refusal of Florida courts to timely apply, if not using federal law then using equivalent state law, the basic rights to due process and a unanimous jury determination beyond a reasonable doubt as to the existence of facts upon which imposition of the death penalty statutorily depends is arbitrary and a violation of the Due Process Clause of the Fourteenth Amendment to the United States Constitution.

6. The disparate due process given by Florida courts to the factors set forth in §921.141, Florida Statutes, denies due process and equal protection under the Fifth, Sixth and Fourteenth Amendments to the United States Constitution and article I, §§2, 9, 16 and 22 of the Florida Constitution. More specifically stated, the Florida Supreme Court, and presumably the subservient lower courts, use a verdict form whereby a unanimous 12-person jury in Florida determines the existence of some of the statutory aggravating circumstances listed in §921.141(5), Florida Statutes. E.g., §921.141(5)(b), Florida Statutes (defendant previously convicted of another capital felony or of a felony involving the use or threat of violence to the person); §921.141(5)(d), Florida Statutes (capital felony was committed while the defendant was engaged, or was an accomplice, in the commission of, or an attempt to commit, or flight after committing or attempting to commit, any: robbery, sexual battery; aggravated child abuse; abuse of a n elderly person or disabled adult resulting in great bodily harm, permanent disability, or permanent disfigurement; arson; burglary; kidnapping; aircraft piracy; or unlawful throwing,

placing or discharging of a destructive device or bomb). The Florida Supreme Court has affirmatively *precluded* lower courts from using a similar verdict form to determine the existence of highly subjective and often-used other factors contained in §921.141(5), Florida Statutes, such as the factors set forth in §921.141(5)(h), Florida Statutes (the capital felony was especially heinous, atrocious or cruel) and §921.141(5)(i), Florida Statutes (the capital felony was committed in a cold, calculated and premeditated manner, without pretense of moral or legal justification). See State v. Steele, 921 So.2d 538 (Fla. 2005).

A plain reading of §921.141(2) and (3), Florida Statutes, establishes that the Florida Legislature requires that both the judge and the jury must determine "whether sufficient aggravating circumstances exist as enumerated in subsection (5)" when the death penalty is recommended and imposed. The statute does not contemplate that different procedural due process will be provided to determine the existence of the factors enumerated in subsection (5). Each of the factors listed by the Florida Legislature stands on equal footing. Each, when appropriately proved to exist beyond a reasonable doubt, is to be given independent weight to reach a conclusion of whether "sufficient aggravating circumstances exist" to support imposition of the death penalty. The disparate treatment given the statutory aggravating circumstances in §921.141(5), Florida Statutes, denies Due Process, the right to a jury trial and Equal Protection guaranteed by the Fifth, Sixth and Fourteenth Amendments to the United States Constitution and article I, sections 2, 9, 16 and 22 of the Florida Constitution.

7. Florida is violating Due Process under the Fourteenth Amendments by arbitrarily rendering the mandatory appeal of a death sentence required by §921.141(4), Florida Statutes, meaningless insofar as providing relief for violations of the fundamental right to a jury determination beyond a reasonable doubt of the finding required by §921.141(3), Florida Statutes, upon which imposition of the death penalty in Florida depends. More specifically, §921.141(4), Florida Statutes, requires that all death sentences be reviewed on direct appeal to the Florida Supreme Court. This appeal cannot be voluntarily waived because it is statutorily required and the Florida Supreme Court otherwise professes to require that defendants must "receive a meaningful appeal" of a death sentence. See Klokoc v. State, 589 So.2d 219, 222

(Fla. 1991). The denial of the right to a jury determination of the facts upon which imposition of a sentence depends is error that should be addressed and corrected on appeal. Apprendi v. New Jersey, 530 U.S. 466, 120 S.Ct. 4348, 147 L.Ed.2d 435 (2000). Certainly, the same error should be corrected during the direct appeal of a capital case. Ring v. Arizona, 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002).

By ruling that Florida will not retroactively apply the relief for the denial of the fundamental rights to due process and a jury trial under the Sixth and Fourteenth Amendments, defendants currently being tried on capital cases are denied the right to have a jury make the findings required by §775.082 and §921.141(3), Florida Statutes, upon which imposition of capital punishment in Florida depends. Defendants who are timely and specifically objecting to the denial of the rights to due process and a jury receive the death penalty and appeal to the Florida Supreme Court are not being provided relief by the Florida Supreme Court. The Florida Supreme Court refuses to apply the holding of Ring, supra, to capital cases in Florida despite granting relief to defendants in non-capital cases. Compare: Delgado v. State, 948 So.2d 681, 686 (Fla. 2007) ("we have repeatedly rejected *Ring* claims similar to Delgado's and deny claim (6) without further discussion") and State v. Sigler, 967 So.2d 835 (Fla. 2007) (the meaning of the Sixth Amendment right to trial by jury in a criminal case as articulated in *Apprendi* is binding on the court and *Apprendi* makes it clear that criminal convictions depend on jury findings as to each element of the crime to be punished.) Defendants who have been sentenced to death and then unsuccessfully move through the direct appellate pipeline into the post-conviction status will be foreclosed from the properly-preserved relief when the United States Supreme Court rules that Florida is required to provide these due process rights to capital defendants because Florida has ruled that such relief will not be applied retroactively. Hughes v. State, 901 So.2d 837, 838 (Fla. 2005) ("we hold that *Apprendi* does not apply retroactively"). The procedure required by the Sixth and Fourteenth Amendments to the United States Constitution whereby the jury determines beyond a reasonable doubt the existence of the facts upon which imposition of a punishment depend can be readily provided under the Florida Constitution without doing any insult or injury to the prior decisions from the United States Supreme Court and there is no

impediment to providing capital defendants with the Due Process guaranteed by the Florida Constitution and the Fifth, Sixth and Fourteenth Amendments to the United States Constitution. This delay in the administration of justice is prejudicial in violation of article I, section 21 of the Florida Constitution, which in turn is a denial of due process of law by the State in violation of the Fourteenth Amendment to the United States Constitution.

MEMORANDUM OF LAW

As directed by the Florida Supreme Court, "When called upon to decide matters of fundamental rights, Florida's state courts are bound under federalist principles to give primacy to our state Constitution and to give independent legal import to every phrase and clause contained therein." Traylor v. State, 596 So.2d 957, 962 (Fla. 1992) (Emphasis added). The Court explained: "[T]he federal Constitution ... represents the floor for basic freedoms; the state constitution, the ceiling." *Id.* This is not to say that federal law does not influence the evolution of state law, and state constitutional law also has a "bottom" that must coincide with the bottom reflected in the United States Constitution. A recent example of this is Crawford v. Washington, 541 U.S. 36 (2004), where the United States Supreme Court created a new floor when it modified the legal standard for determining whether the admission of testimonial hearsay against a criminal defendant violates the Sixth Amendment right of confrontation. There was confusion but no hesitancy by Florida courts in applying the Crawford requirement to criminal cases. E.g., Blanton v. State, 2008 WL 657832 (Fla. 2008).

These observations are made to draw attention to the requirement that a state court must enforce the provisions of the state constitution first, and they are duty bound to provide at least the same minimum guarantees contained in the federal constitution. It is instructive to note that Florida applies the holding of Apprendi, supra, in the context of guideline sentencing but not in capital cases, where heightened procedural due process is required due to the finality and severity of the death penalty. The apparent explanation for the continued delay in implementing the Sixth and Fourteenth Amendment requirements encompassed by *Apprendi* to capital sentencing in Florida is that doing so contradicts holdings of stale decisions by the United States

Supreme Court. This was the implied explanation first given by the Florida Supreme Court following Ring, which will be discussed in far more detail later.

At this point, however, it should be appreciated that enforcement of the state guarantees to due process and a jury trial are not dependent on the Sixth and Fourteenth Amendments. If Apprendi, Ring and their federal progeny cannot be overruled by Florida courts, Florida must nonetheless recognize and enforce the entitlements to Due Process and a jury trial guaranteed by the Florida Constitution even when it expressly contradicts a ruling by the United States Supreme Court, so long as it is not being applied to the detriment of a defendant. If a state can take a different view and retroactively apply a newly announced rule of procedure compelled by the federal due process clause contrary to the requirement that federal courts not grant relief retroactively, e.g., Danforth v. Minnesota, 552 U.S. 264, 128 S.Ct. 1029, 169 L.Ed.2d 859. (2008) (state is not constrained from granting broader effect to new rules of procedure under federal constitution than federal courts are permitted) certainly a state can reach the same result based solely on its state constitutional guarantees. The evolution of federal law can be freely applied by the courts to our state constitutional guarantees:

> Federal and state bills of rights thus serve distinct but complementary purposes. The federal Bill of Rights facilitates political and philosophical homogeneity among the basically heterogeneous states by securing, as a uniform minimum, the highest common denominator of freedom that can prudently be administered throughout all fifty states. The state bills of rights, on the other hand, express the ultimate breadth of the common yearnings for freedom of each insular state population within our nation. Accordingly, when called upon to construe their bills of rights, state courts should focus primarily on factors that inhere in their own unique state experience, such as the express language of the constitutional provision, its formative history, both preexisting and developing state law, evolving customs, traditions and attitudes within the state, the state's own general history, and finally any external influences that may have shaped state law.

Traylor, 596 So.2d at 962 (Fla. 1992).

The significance of this introduction will become clearer as this memorandum goes along. Suffice to say at this point that Apprendi v. New Jersey, 530 U.S. 466 (2000) has shaped Florida law and is acknowledged to apply in non-capital cases in Florida. That being so, those due process rights must be applied across the board, to capital and non-capital defendants as well. Indeed, the justification for treating a capital case differently than a non-capital case is that capital cases require *more* procedural safeguards, not less. E.g., Jones v. State, 484 So.2d 577 (Fla. 1986) (constitutional due process right of an accused in a capital case to have jury instructed as to necessarily less-included offenses does not apply to non-capital cases because of the "significant constitutional difference between the death penalty and lesser punishments.") quoting Beck v. Alabama, 447 U.S. 625, 637 (1980). Simply said, as will be shown, it is a denial of equal protection under the 14th Amendment, as well as a denial of due process under the 8th and 14th Amendments, for a state to provide *more* procedural due process to a person accused of a non-capital crime than to one facing the death penalty.

Now to the analysis. Section 782.04(1), Florida Statutes, defines premeditated murder and felony murder and then states that either "is murder in the first degree and constitutes a capital felony, punishable as provided in §775.082." §782.04(1)(a), Florida Statutes (2007). The statute continues and specifies that "In all cases under this section, the procedure set forth in §921.141 shall be followed in order to determine sentence of death or life imprisonment." §782.04(1)(b), Florida Statutes (2007). Thus, simply stated, punishment for persons who are already convicted of first degree murder in Florida is controlled by two statutes. One authorizes a sentence of death or life imprisonment without parole, and the other makes imposition of the death penalty dependent on findings of fact that are to be made in writing by the trial judge. As will be demonstrated, these requirements are not being enforced in accordance with the statutes, the Florida Constitution or the federal constitution.

Specifically, the first statute that must be addressed in detail specifies that the available penalties that can be imposed for a "capital felony" depend on the results of findings "by the court" made in accordance with a second statute. The first statute states:

> **775.082. Penalties; applicability of sentencing structures; mandatory, minimum sentences for certain reoffenders previously released from prison.**
>
> (1) A person who has been convicted of a capital felony shall be punished by *death if the proceeding held to determine sentence according to the procedure set forth in s. 921.141 results in findings by the court* that such person shall be punished by death, otherwise such person shall be punished by life imprisonment and shall be ineligible for parole.

(Emphasis added). Either the death penalty or life without parole for a person *who has been convicted* of a capital felony will be imposed *depending* on the results of findings made "by the court" under the procedure set forth in §921.141. That statute will first be set forth here in its entirety to demonstrate that it contains irrelevant passages that will later be omitted to clarify the issues. The entire statute provides the following:

> **921.141. Sentence of death or life imprisonment for capital felonies; further proceedings to determine sentence**
>
> **(1) Separate proceedings on issue of penalty.** –Upon conviction or adjudication of guilt of a defendant of a capital felony, the court shall conduct a separate sentencing proceeding to determine whether the defendant should be sentenced to death or life imprisonment as authorized by s. 775.082. The proceeding shall be conducted by the trial judge before the trial jury as soon as practicable. If, through impossibility or inability, the trial jury is unable to reconvene for a hearing on the issue of penalty, having determined the guilt of the accused, the trial judge may summon a special juror or jurors as provided in chapter 913 to determine the issue of the imposition of the penalty. If the trial jury has been waived, or if the defendant pleaded guilty, the sentencing proceeding shall be conducted before a jury impaneled for that purpose, unless waived by the defendant. In the proceeding, evidence may be presented as to any matter that the court deems relevant to the nature of the crime and the character of the defendant and shall include matters relating to any of the aggravating or mitigating circumstances enumerated in subsections (5) and (6). Any such evidence which the court deems to have probative value may be received, regardless of its admissibility under the exclusionary rules

of evidence, provided the defendant is accorded a fair opportunity to rebut any hearsay statements. However, this subsection shall not be construed to authorize the introduction of any evidence secured in violation of the Constitution of the United States or the Constitution of the State of Florida. The state and the defendant or the defendant's counsel shall be permitted to present argument for or against sentence of death.

(2) **Advisory sentence by the jury.** –After hearing all the evidence, the jury shall deliberate and render an advisory sentence to the court, based upon the following matters:

(a) Whether sufficient aggravating circumstances exist as enumerated in subsection (5);

(b) Whether sufficient mitigating circumstances exist which outweigh the aggravating circumstances found to exist; and

(c) Based on these considerations, whether the defendant should be sentenced to life imprisonment or death.

(3) **Findings in support of sentence of death.** – Notwithstanding the recommendation of a majority of the jury, the court, after weighing the aggravating and mitigating circumstances, shall enter a sentence of life imprisonment or death, but if the court imposes a sentence of death, it shall set forth in writing its findings upon which the sentence of death is based as to the facts:

(a) That sufficient aggravating circumstances exist as enumerated in subsection (5), and

(b) That there are insufficient mitigating circumstances to outweigh the aggravating circumstances.

In each case in which the court imposes the death sentence, the determination of the court shall be supported by specific written findings of fact based upon the circumstances in subsections (5) and (6) and upon the records of the trial and the sentencing proceedings. If the court does not make the findings requiring the death sentence within 30 days after the rendition of the judgment and sentence, the court shall impose sentence of life imprisonment in accordance with s. 775.082.

(4) Review of judgment and sentence. –The judgment of conviction and sentence of death shall be subject to automatic review by the Supreme Court of Florida and disposition rendered within 2 years after the filing of a notice of appeal. Such review by the Supreme Court shall have priority over all other cases and shall be heard in accordance with rules promulgated by the Supreme Court.

(5) Aggravating circumstances. – Aggravating circumstances shall be limited to the following:

(a) The capital felony was committed by a person previously convicted of a felony and under sentence of imprisonment or placed on community control or on felony probation.

(b) The defendant was previously convicted of another capital felony or of a felony involving the use or threat of violence to the person.

(c) The defendant knowingly created a great risk of death to many persons.

(d) The capital felony was committed while the defendant was engaged, or was an accomplice, in the commission of, or an attempt to commit, or flight after committing or attempting to commit, any: robbery; sexual battery; aggravated child abuse; abuse of an elderly person or disabled adult resulting in great bodily harm, permanent disability, or permanent disfigurement; arson; burglary; kidnapping; aircraft piracy; or unlawful throwing, placing, or discharging of a destructive device or bomb.

(e) The capital felony was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody.

(f) The capital felony was committed for pecuniary gain.

(g) The capital felony was committed to disrupt or hinder the lawful exercise of any governmental function or the enforcement of laws.

(h) The capital felony was especially heinous, atrocious, or cruel.

(i) The capital felony was a homicide and was committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification.

(j) The victim of the capital felony was a law enforcement officer engaged in the performance of his or her official duties.

(k) The victim of the capital felony was an elected or appointed public official engaged in the performance of his or her official duties if the motive for the capital felony was related, in whole or in part, to the victim's official capacity.

(l) The victim of the capital felony was a person less than 12 years of age.

(m) The victim of the capital felony was particularly vulnerable due to advanced age or disability, or because the defendant stood in a position of familial or custodial authority over the victim.

(n) The capital felony was committed by a criminal street gang member, as defined in s. 874.03.

(o) The capital felony was committed by a person designated as a sexual predator pursuant to s. 775.21 or a person previously designated as a sexual predator who had the sexual-predator designation removed.

(p) The capital felony was committed by a person subject to an injunction issued pursuant to s. 741.30 or s. 784.046, or a foreign protection order accorded full faith and credit pursuant to s. 741.315, and was committed against the petitioner who obtained the injunction or protection order or any spouse, child, sibling, or parent of the petitioner.

(6) Mitigating circumstances. – Mitigating circumstances shall be the following:

(a) The defendant has no significant history of prior criminal activity.

(b) The capital felony was committed while the defendant was under the influence of extreme mental or emotional disturbance.

(c) The victim was a participant in the defendant's conduct or consented to the act.

(d) The defendant was an accomplice in the capital felony committed by another person and his or her participation was relatively minor.

(e) The defendant acted under extreme duress or under the substantial domination of another person.

(f) The capacity of the defendant to appreciate the criminality of his or her conduct or to conform his or her conduct to the requirements of law was substantially impaired.

(g) The age of the defendant at the time of the crime.

(h) The existence of any other factors in the defendant's background that would mitigate against imposition of the death penalty.

(7) Victim impact evidence. – Once the prosecution has provided evidence of the existence of one or more aggravating circumstances as described in subsection (5), the prosecution may introduce, and subsequently argue, victim impact evidence to the jury. Such evidence shall be designed to demonstrate the victim's uniqueness as an individual human being and the resultant loss to the community's members by the victim's death. Characterizations and opinions about the crime, the defendant, and the appropriate sentence shall not be permitted as a part of victim impact evidence.

(8) Applicability. –This section does not apply to a person convicted or adjudicated guilty of a capital drug trafficking felony under s. 893.135.

To better demonstrate that the sentencing process for a capital felony depends on findings required by both statutes to be made "by the court" when the death penalty is imposed, the relevant portions of the statutes will be repeated with the extraneous matters excised from §921.141 so that the constitutional issues are better visualized and appreciated. In this regard, it should be appreciated at the onset that there is a distinction in the statute between the jury

making a sentencing "recommendation" and the findings that are otherwise required to be made to impose the death penalty. It is patently clear that imposition of the death penalty in Florida depends on the court making factual findings required by these statutes as follows:

> **§ 775.082(1).**
> A person who has been convicted of a capital felony shall be punished by death *if* the proceeding held to determine sentence according to the procedure set forth in s. 921.141 results in *findings by the court* that such person shall be punished by death, otherwise such person shall be punished by life imprisonment and shall be ineligible for parole.

(Emphasis added) The "findings by the court" alluded to above are expressly contained in §921.141(3), Florida Statutes:

> **§ 921.141(3).**
> Notwithstanding the recommendation of a majority of the jury, the court, after weighing the aggravating and mitigating circumstances, shall enter a sentence of life imprisonment or death, *but if the court imposes a sentence of death, it shall set forth in writing its findings upon which the sentence of death is based as to the facts:*
>
> *(a) That sufficient aggravating circumstances exist as enumerated in subsection (5), and*
>
> *(b) That there are insufficient mitigating circumstances to outweigh the aggravating circumstances.*
>
> In *each* case in which the court imposes the death sentence, the determination of the court *shall be supported by specific written findings of fact based upon the circumstances in subsections (5) and (6) and upon the records of the trial and the sentencing proceedings.* If the court does not make the findings requiring the death sentence within 30 days after the rendition of the judgment and sentence, the court shall impose sentence of life imprisonment in accordance with s. 775.082.

(Emphasis added). As will be developed, the statutory requirement of "sufficient" aggravating circumstances is not now being applied by Florida courts to impose and/or review imposition of

the death penalty. The Florida Supreme Court has deviated from past holdings and is now violating the separation of powers provision in Florida's Constitution. The first part of this analysis will focus on whether such a finding can be made by the court alone, or whether the right to a jury trial as explained by Apprendi v. New Jersey 530 U.S. 466 (2000) and its progeny require that the statutorily-required finding upon which imposition of the death penalty depends must also be made by a jury beyond a reasonable doubt.

A plain and intellectually honest reading of §775.082 and §921.141(3) yields no other rational conclusion but that the finding required to be made by the court when the death penalty is imposed must first be made by a unanimous 12-person in jury beyond a reasonable doubt. By operation of the statute, if the statutory finding is not made, the only sanction that can be imposed is life imprisonment without possibility of parole. Thus, a person convicted of first degree murder following a jury trial or after entry of a guilty or no contest plea cannot receive the death penalty unless and until the factual findings required by §921.141(3) are made by the court. That has become a major constitutional issue.

Specifically, major problems arise when the judge *alone* makes that factual finding because Apprendi v. New Jersey, 530 U.S. 466, 120 S.Ct. 4348, 147 L.Ed.2d 435 (2000) and its progeny squarely hold that the Sixth and Fourteenth Amendments to the United States Constitution guarantee that such statutorily-required factual findings upon which imposition of a sentence depends must be made by the jury and proved beyond a reasonable doubt. The United States Supreme Court has carefully explained why the Sixth and Fourteenth Amendments require a jury determination of such sentencing factors, and one such exhaustive analysis is set forth here. While reading this quoted opinion, please bear in mind that it will be shown that Florida does not now apply the Apprendi analysis in capital cases, but Florida does apply this reasoning in non-capital cases:

> It has been settled throughout our history that the Constitution protects every criminal defendant "against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." In re Winship, 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970). It is equally clear that the "Constitution gives a criminal

defendant the right to demand that a jury find him guilty of all the elements of the crime with which he is charged." United States v. Gaudin, 515 U.S. 506, 511, 115 S.Ct. 2310, 132 L.Ed.2d 444 (1995). These basic precepts, firmly rooted in the common law, have provided the basis for recent decisions interpreting modern criminal statutes and sentencing procedures.

In Jones v. United States, 526 U.S. 227, 230, 119 S.Ct. 1215, 143 L.Ed.2d 311 (1999), we considered the federal carjacking statute, which provides three different maximum sentences depending on the extent of harm to the victim: 15 years in jail if there was no serious injury to a victim, 25 years if there was "serious bodily injury," and life in prison if death resulted. 18 U.S.C. § 2119)1088 ed., Supp. V). In spite of the fact that the statute "at first glance has a look to it suggesting [that the provisions relating to the extent of harm to the victim] are only sentencing provisions," 526 U.S., at 232, 119 S.Ct. 1215, we concluded that the harm to the victim was an element of the crime. That conclusion was supported by the statutory text and structure, and was influenced by our desire to avoid the constitutional issues implicated by a contrary holding, which would have reduced the jury's role "to the relative importance of low-level gatekeeping." *Id.*, at 244, 119 S.Ct. 1215. Foreshadowing the result we reach today, we noted that our holding was consistent with a "rule requiring jury determination of facts that raise a sentencing ceiling" in state and federal sentencing guidelines systems. *Id.*, at 251, n.11, 119 S.Ct. 1215.

In Apprendi v. New Jersey, 530 U.S. 466, 120 S.Ct. 4348, 147 L.Ed.2d 435 (2000), the defendant pleaded guilty to second-degree possession of a firearm for an unlawful purpose, which carried a prison term of 5-to-10 years. Thereafter, the trial court found that his conduct had violated New Jersey' "hate crime" law because it was racially motivated, and imposed a 12-year sentence. This Court set aside the enhanced sentence. We held: "Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." *Id.*, at 490, 120 S.Ct. 2348. The fact that New Jersey labeled the hate crime a "sentence enhancement" rather than a separate criminal act was irrelevant for constitutional purposes. *Id.*, at 478, 120 S.Ct. 2348. As a matter of simple justice, it seemed obvious that the procedural safeguards designed to protect Apprendi from punishment for the possession of a firearm should apply equally to

his violation of the hate crime statute. Merely using the label "sentence enhancement" to describe the latter did not provide a principled basis for treating the two crimes differently. Id., at 476, 120 S.Ct. 2348.

In Ring v. Arizona, 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002), we reaffirmed our conclusion that the characterization of critical facts is constitutionally irrelevant. There, we held that it was impermissible for "the trial judge, sitting alone" to determine the presence or absence of the aggravating factors required by Arizona law for imposition of the death penalty. Id., at 588-589, 122 S.Ct. 2428. "If a State makes an increase in a defendant's authorized punishment contingent on the finding of a fact, that fact--no matter how the State labels it--must be found by a jury beyond a reasonable doubt." Id., at 602, 122 S.Ct. 2428. Our opinion made it clear that ultimately, while the procedural error in Ring's case might have been harmless because the necessary finding was implicit in the jury's guilty verdict, id., at 609, n.7, 122 S.Ct. 2428, "the characterization of a fact or circumstance as an 'element' or a 'sentencing factor' is not determinative of the question 'who decides,' judge or jury," Id., at 605, 122 S.Ct. 2428.

In Blakely v. Washington, 542 U.S. ___, 124 S.Ct. 2531 (2004), we dealt with a determinate sentencing scheme similar to the Federal Sentencing Guidelines. There the defendant pleaded guilty to kidnaping, a class B felony punishable by a term of not more than 10 years. Other provisions of Washington law, comparable to the Federal Sentencing Guidelines, mandated a "standard" sentence of 49-to-53 months, unless the judge found aggravating facts justifying an exceptional sentence. Although the prosecutor recommended a sentence in the standard range, the judge found that the defendant had acted with "'deliberate cruelty'" and sentenced him to 90 months. Id., at __, 124 S.Ct. at 2534. For reasons explained in Jones, Apprendi, and Ring, the requirements of the Sixth Amendment were clear. The application of Washington's sentencing scheme violated the defendant's right to have the jury find the existence of " 'any particular fact' " that the law makes essential to his punishment. 542 U.S., at ___, 124 S.Ct., at 2536. That right is implicated whenever a judge seeks to impose a sentence that is not solely based on "facts reflected in the jury verdict or admitted by the defendant." Id., at ___, 124 S.Ct., at 3537. (emphasis deleted). We rejected the State's argument that the jury verdict was sufficient to authorize a sentence within the

> general 10-year sentence for Class B felonies, noting that under Washington law, the judge was *required* to find additional facts in order to impose the greater 90-month sentence. Our precedents, we explained, make clear "that the 'statutory maximum' for Apprendi purposes is the maximum sentence a judge may impose *solely on the basis of the facts reflected in the jury verdict or admitted by the defendant.*" *Ibid*, at ___, 124 S.Ct., at 2537 (emphasis in original). The determination that the defendant acted with deliberate cruelty, like the determination in Apprendi that the defendant acted with racial malice, increased the sentence that the defendant could have otherwise received. Since this fact was found by a judge using a preponderance of the evidence standard, the sentence violated Blakely's Sixth Amendment rights.

United State v. Booker, 543 U.S 220, 230-232 (2005) (all emphasis in original).

This holding and analysis by the United States Supreme Court is the law to be applied by the states, including Florida. Florida can apply it more broadly than do federal courts, but it must provide at least the same level of procedural due process as required by the Sixth and Fourteenth Amendments. Danforth, supra. As will be seen in a thorough review of Florida cases that have cited Apprendi and/or Ring v. Arizona, 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002), so far Florida has taken a pass on applying Apprendi to any capital case but it is applying Apprendi in the context of guideline sentencing. A state cannot accommodate the rights to due process and a jury finding of such statutorily-required factual findings needed to impose a sentence in a non-capital case but refuse to provide at least that same level of protection in a capital case without running afoul of the constitutional guarantees of due process and equal protection guaranteed by the Fourteenth Amendments to the United States Constitution.

Before reviewing Florida's resistance to applying the Apprendi line of cases, a few observations are in order so that these features can be readily perceived during the review of the many cases that will soon follow. First, the Florida Supreme Court is not directly addressing whether the Florida guarantee of due process and a jury trial under article I, sections 2, 9, 16 and 22 of the Florida Constitution *now* require that the jury also make the findings required by §775.082 and §921.141(3), Florida Statutes. If the Florida Supreme Court feels constrained not to somehow overrule the United States Supreme Court on federal grounds, it can and should

resolve this issue on equivalent state grounds. It also bears pointing out that the statutes do not say that *only* the judge is to make the factual finding upon which the death penalty depends. They state the court must make the findings required by §921.141(3), Florida Statutes. The guarantee to a jury finding beyond a reasonable doubt comes from the constitutional right to procedural due process. It goes without saying that courts do not need a statute to tell them to give the defendant a jury trial in order for that to be required.

A final observation is that the Florida Supreme Court opinions refusing to apply Apprendi and/or Ring in capital cases contain explanations that directly contravene a plain reading of the statutes. This is perhaps done to deflect some of the harshness that accompanies a categorical refusal to apply a decision from the United States Supreme Court. The effect that has on the lower courts of Florida that are supervised and directed by the Florida Supreme Court, however, is to distort the requirements of the statute when it is applied by the lower courts to impose the death penalty. These deviations from the statutory language violate the separation of powers proscription contained in article II, section 3 of the Florida Constitution, as will be developed last. The initial focus is on the due process right for a jury to make all of the findings upon which imposition of the death penalty depends.

As explained in the lengthy Booker quote previously set forth, Apprendi holds that the Sixth and Fourteenth Amendments require a jury determination of all facts needed to impose a particular sentence. It reinforced earlier holdings[1] that a Legislature cannot avoid the right to a jury trial by making a sentence contingent upon factual findings to be made by a judge alone. Because of its obvious application to Florida's capital sentencing scheme, defendants sentenced to death in Florida quickly began raising the issue as soon as Apprendi was decided. The Florida Supreme Court has finally embraced and applied[2] the Apprendi analysis in the context of non-capital cases but has steadfastly resisted applying Apprendi or its holding in any death penalty

[1] E.g., In re Winship, 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970); Mullaney v. Wilbur, 421 U.S. 684, 697-698, 95 S.Ct. 1881, 44 L.Ed.2d 508 (1975).

[2] For instance, in Insko v. State, 969 So.2d 992 (Fla. 2007), the Florida Supreme Court relied on Apprendi to hold that the age of a defendant upon which punishment is based cannot be considered a sentencing "enhancement" but is instead an element of the crime of lewd and lascivious that must be alleged in the charging document. See also State v. Sigler, 967 So.2d 835 (Fla. 2007).

case in Florida. In fact, the Florida Supreme Court affirmatively precludes the right to a jury as explained in Apprendi.

Specifically, a review of all the Florida cases dealing with Apprendi and its progeny demonstrates that the courts of Florida are not applying Apprendi in capital cases but they are applying Apprendi in non-capital cases. The review shows that the Florida Supreme Court has held that the use of special verdict forms in capital cases to determine the jury's findings concerning aggravating circumstances is a departure for the essential requirements of law. The following review also demonstrates that some of the explanations as to why Florida is not applying Apprendi in a particular case results in a violation of article II, section 3 of the Florida Constitution. This follows because §775.082 and §921.141(3)(a), Florida Statutes, are being unlawfully interpreted by the Florida Supreme Court, and thus improperly enforced by all courts, contrary to clearly stated legislative intent. These are the factual predicates that demonstrate the denial of Equal Protection and due process under the Fifth, Sixth and Fourteenth Amendments. These facts also demonstrate that Florida is violating article I, section 21 of the Florida Constitution by its unreasonable delay in administering the requirements of the rights to due process and a jury trial.

The following is a review of Florida's current use Apprendi and enforcement of §§775.082 and 921.141(3), Florida Statutes. A "Westlaw" search on April 1, 2008, of all Florida cases containing the words "Apprendi v. New Jersey" and "death penalty" yielded 141cases. A second search that day containing the words "Ring v. Arizona"[3] and "death penalty" yielded 199 cases. These searches obviously overlap and some of the same cases were contained in both results. The results of this search, however, fairly represent Florida's application and analysis of Apprendi and the right to a jury trial in Florida. The cases document a disturbing misunderstanding of Apprendi, Florida's death penalty statutes, a violation of the separation of powers proscription and a denial of due process. Additionally, they demonstrate an undue delay

[3] Ring v. Arizona, 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002) must be included in the search because it overruled Walton v. Arizona, 497 U.S. 639, 110 S.Ct. 3047, 111 L.Ed.2d 511 (1990) and required that the existence of statutory aggravating circumstances used to impose capital punishment in Arizona be found beyond a reasonable doubt by a jury rather than the judge.

in providing the rights to due process and a jury determination of the finding required by §921.141(3), Florida Statutes in violation of article I, section 21 of the Florida Constitution. The clear contravention of the state constitution and Florida Statutes ultimately denies due process under the Fourteenth Amendment to the United States Constitution.

More specifically, the two Westlaw searches done on April 1, 2008, (hereafter "the search"), produced different categories of cases. These categories involve 1) post conviction cases, 2) miscellaneous cases that mention and/or apply Apprendi in a context other than in the direct capital appeal of imposition of a death sentence, and 3) direct appeals of a death sentence. The entire decision is not relevant to demonstrate the application of Apprendi. Therefore, the facts and other issues are not contained in the following review. The first category of cases involving Florida's use of Apprendi in "post-conviction" cases is addressed first. Most cases are set forth in summary form because Apprendi relief is not applied retroactively. Therefore, the rejection of *Apprendi/Ring* issues can be fully appreciated without detailed analysis. However, some of the more important decisions will be analyzed in detail.

All Post-Conviction Cases Mentioning *Apprendi* and/or *Ring* - *Summarized*

Mills v. Moore, 786 So.2d 532, 537 (Fla. 2001) (Apprendi rejected in successive habeas because "No court has extended Apprendi to capital sentencing schemes, and the plain language of Apprendi indicates that the case is not intended to apply to capital schemes."); Mills v. State, 786 So.2d 547, 548 (Fla. 2001) (appeal of denial 3.850 where Court refers to companion habeas and states, "We held that Apprendi is not applicable to this case since the majority opinion in Apprendi indicates that Apprendi does not affect capital sentencing schemes."); Mann v. Moore, 794 So.2d 595, 599 (Fla. 2001) ("This Court recently rejected the argument that *Apprendi* applied to capital sentencing schemes."); Card v. State, 803 So.2d 613, 628 fn.13 (Fla. 2001) ("The United States Supreme Court indicated that Apprendi does not affect capital sentencing schemes"); Brown v. Moore, 800 So.2d 223, 224-25 (Fla. 2001) (*Apprendi*-related issues summarily rejected in post-conviction); King v. State, 808 So.2d 1237 (Fla. 2002) (successive post conviction, "King's sixth contention, that Apprendi applies to Florida's capital sentencing statute and the maximum sentence under the statute is death, has been decided adversely to

King's position."); Bottoson v. State, 813 So.2d 31, 36 (Fla. 2002) ("In Bottoson's third and final habeas claim, he alleges that the U.S. Supreme Court's holding in [Apprendi], applies to Florida's capital sentencing statute. We have consistently rejected similar claims and have decided this issue adversely to Bottoson's position."); Sireci v. Moore, 825 So.2d 882, 888 (Fla. 2002) (summarily rejecting Apprendi, holding "We have already resolved this issue adversely to Mr. Sireci's claim, and see no need to reconsider our Mills opinion."); Sweet v. Moore, 822 So.2d 1269, 1275 fn.14 (Fla. 2002) (on post conviction review, Court rules "Although the U.S. Supreme Court recently has granted review in State v. Ring, 200 Ariz. 267, 25 P.3d 1139 (2001), *cert. granted,* 534 U.S. 1103, 122 S.Ct. 865, 151 L.Ed.2d 738 (2002), we continue to rely on our precedents on this issue until the United States Supreme Court rules to the contrary."); *King v. Moore,* 824 So.2d 127, 128 (Fla. 2002) (entering stay of execution but no ruling on merits); Bottoson v. Moore, 833 So.2d 693, 695 (Fla. 2002) (In context of post-conviction ,"Although Bottoson contends that he is entitled to relief under *Ring*, we decline to so hold."); King v. Moore, 831 So.2d 143 (Fla. 2002) (successive habeas, court rules "Although King contends that he is entitled to relief under *Ring,* we decline to so hold."); Bruno v. Moore, 838 So.2d 485, 492 (Fla. 2002) (habeas, "As his third habeas claim, Bruno alleges that his sentence violates [Apprendi] and *[Ring*]. In Bottoson v. Moore and King v. Moore, this Court rejected this claim."); State v. Lewis, 838 So.2d 1102, 1119 (Fla. 2002) (*Apprendi* claims moot in light of need for resentencing); Fotopoulos v. State, 838 So.2d 1122, 1136 (Fla. 2002) ("As the claim that the Florida capital sentencing scheme is unconstitutional has been decided adversely to Fotopoulos's contentions, his assertions are without merit."): Porter v. Crosby, 840 So.2d 981 (Fla. 2003) ("Contrary to Porter's claims, we have repeatedly held that the maximum penalty under the statute is death and have rejected the other Apprendi arguments."); Lucas v. State, 841 So.2d 380, 389 (Fla. 2003) (habeas - Ring issues summarily rejected); Spencer v. State, 842 So.2d 52 (Fla. 2003) (In habeas, Apprendi issue rejected because "Spencer's claim has already been addressed by this Court and decided adversely to him. See Bottoson v. Moore, 833 So.2d 693 (Fla. 2002"); Cole v. State, 841 So.2d 409, 429-30 (Fla. 2003) (habeas review, Court rejects claim that counsel was ineffective in failing to raise Apprendi related issues, holding "We have

denied relief for post conviction claims based upon similar arguments."); Jones v. State, 845 So.2d 55, 74 (Fla. 2003) (post conviction decision denying relief because "This Court addressed the contention that Florida's capital sentencing scheme violates the United States Constitution under Apprendi and Ring[], in Bottoson[] and King[], and denied relief. We find that Jones is likewise not entitled to relief on this claim."); Banks v. State, 842 So.2d 788, 793 (Fla. 2003) ("Habeas relief based on Apprendi/ Ring is hereby denied."); Marquard v. State, 850 So.2d 417, 431 fn.12 (Fla. 2002) (habeas – Ring issues summarily rejected based on Bottoson and King); Cooper v. State, 856 So.2d 969, 977 (Fla. 2003) (Court denies Apprendi and Ring issues raised in post conviction and habeas claims); Duest v. State, 855 So.2d 33, 49 (Fla. 2003) (Court "declines" to grant relief under Apprendi and Ring); Wright v. State, 857 So.2d 861, 874 (Fla. 2003) (Court denies habeas relief on Apprendi claim); Allen v. State, 854 So.2d 1255, 1262 (Fla. 2003) (rejecting habeas claim that death penalty unconstitutional under Apprendi); Fennie v. State, 855 So.2d 597, 607 fn.10 (Fla. 2003) (post-conviction rejection of Apprendi claim in context of habeas); Owen v. Crosby, 854 So.2d 182, 193 (Fla. 2003) ("habeas relief based on Apprendi/ Ring is hereby denied."); Henry v. State, 862 So.2d 679, 686-687 (Fla. 2003) (habeas – Ring issues procedurally barred); Cummings-El v. State, 863 So.2d 246 (Fla. 2003) (habeas – Ring issues rejected based on previous denial in post-conviction cases); Jones v. State, 855 So.2d 611, 619 (Fla. 2003) (denying Apprendi / Ring relief in context of habeas); Rivera v. State, 859 So.2d 495, 508 (Fla. 2003) (habeas – Ring claims rejected); Zakrewski v. State, 866 So.2d 688, 698 (Fla. 2003) ("this Court has rejected post conviction challenges to section 921.141 based on Apprendi and Ring."); Guzman v. State, 868 So.2d 498, 511 (Fla. 2003) (post conviction claim that Apprendi rendered his waiver of jury invalid rejected); Davis v. State, 875 So.2d 359, 374 (Fla. 2003) (habeas Apprendi claim rejected - "We have also denied relief to post conviction defendants raising this issue."); Robinson v. State, 865 So.2d 1259, 1265 (Fla. 2004) (rejects Apprendi / Ring issues during habeas review); Reed v. State, 875 So.2d 415, 438-439 (Fla. 2004) (habeas – Ring claim summarily rejected where similar post-conviction claims previously consistently rejected); Power v. State, 886 So.2d 952, 964-65 (Fla. 2004) (Court rejects Apprendi / Ring issue in habeas review); Gamble v. State, 877 So.2d 706 (Fla. 2004) (habeas - "Because

the *Apprendi* and *Ring* issues have already been decided adversely to Gamble's position, relief on this claim is denied."); Windom v. State, 886 So.2d 915, 930 (Fla. 2004) (habeas – "This Court considered similar claims and denied post-conviction relief"); Howell v. State, 877 So.2d 697, 705 (Fla. 2004) (habeas – "this Court has rejected post conviction challenges to section 921.141 that relied on Apprendi and Ring"); Patton v. State, 878 So.2d 368, 377 (Fla. 2004) (habeas – Ring claims rejected based on procedural bar and existence of prior violent felony aggravator); Gudinas v. State, 879 So.2d 616, 617 (Fla. 2004) (post-conviction – "This Court has consistently rejected similar claims."); Stewart v. Crosby, 880 So.2d 529, 531 (Fla. 2004) (post-conviction – "This Court has previously addressed and rejected this claim."); Sochor v. State, 883 So.2d 766, 790 (Fla. 2004) (habeas – Ring claim rejected based on aggravators of a prior violent felony and during the commission of a felony); Henyard v. State, 883 So.2d 753, 765 (Fla. 2004) (habeas – "We have since rejected similar claims on other occasions and find that Henyard is likewise not entitled to relief on this claim."); Hamilton v. State, 875 So.2d 586, 593-594 (Fla. 2004) (habeas – rejects Apprendi / Ring claim); Pietri v. State, 885 So.2d 245, 276 (Fla. 2004) (habeas – *Ring* claim denied based on existence of contemporaneous felony murder found by jury); Kimbrough v. State, 886 So.2d 965, 984 (Fla. 2004) (habeas – "This Court has previously declined to hold that Florida's death penalty scheme is unconstitutional on the basis of Apprendi or Ring."); Burrows v. State, 890 So.2d 286, 287 (Fla. 2d DCA 2004) (Apprendi does not apply to post-conviction cases); Peterka v. State, 890 So.2d 219, 246 (Fla. 2004) (habeas – post convictions *Ring* claims have previously been rejected); Wainwright v. State, 896 So.2d 695, 703-704 (Fla. 2004) (habeas – Apprendi / Ring claims procedurally barred); Monlyn v. State, 894 So.2d 832, 839 (Fla. 2004) (habeas – Apprendi / Ring issues rejected); Orme v. State, 896 So.2d 725, 736-737 (Fla.2005) (post conviction – Ring claims previously addressed and "meritless"); Arbelaez v. State, 898 So.2d 25, 42-43 (Fla. 2005) (post conviction – Ring claim not addressed but in dicta observed that if properly raised it "would certainly fail."); Parker v. State, 904 So.2d 370, 383 (Fla. 2005) (habeas – Apprendi / Ring issues rejected); Johnson v. State, 903 So.2d 888, 900 (Fla. 2005) (post-conviction – Apprendi / Ring claims rejected); Dufour v. State, 905 So.2d 42, 68-69 (Fla. 2005) (post-conviction – Apprendi / Ring issues

rejected); Kokal v. State, 901 So.2d 766, 780 (Fla. 2005) (post conviction – *Ring* claim without merit based on Bottoson and King); Hughes v. State, 901 So.2d 837, 838 (Fla. 2005) (post-conviction – "we hold that Apprendi does *not* apply retroactively."); Green v. State, 907 So.2d 489, 502-503 (Fla. 2005) (post conviction – Apprendi / Ring issues rejected); Johnson v. State, 904 So.2d 400, 412 (Fla. 2005) (post conviction – "We therefore hold that Ring does not apply retroactively in Florida and affirm the denial of Johnson's request for collateral relief under Ring."); Bryant v. State, 901 So.2d 810, 823 (Fla. 2005) (post conviction – "we now have held that *Ring* does not apply retroactively in Florida."); Washington v. State, 907 So.2d 512, 514 (Fla. 2005) (post conviction – "Ring does not apply retroactively in Florida."); Robinson v. State, 913 So.2d 514, 527-528 (Fla. 2005) (habeas – Ring claim procedurally barred); Rodriguez v. State, 919 So.2d 1252, 1288 (Fla. 2005) (habeas – "Rodriguez's Ring and Apprendi claims are procedurally barred in these post conviction proceedings."); Elledge v. State, 911 So.2d 57, 79 (Fla. 2005) (habeas – Ring claim is meritless); Marshall v. Crosby, 911 So.2d 1129, 1135 (Fla. 2005) (habeas - "we will not apply *Ring* retroactively in post conviction cases even assuming it affected Florida law."); Ferrell v. State, 918 So.2d 163, 179 (Fla. 2005) ("Ferrell's Ring and Apprendi claims are procedurally barred in these post conviction proceedings."); Zack v. State, 911 So.2d 1190, 1202 (Fla. 2005) ("this Court has rejected post conviction challenges to section 921.141 that rely on Ring."); Mansfield v. State, 911 So.2d 1160, 1180 (Fla. 2005) ("We recently held that Ring is not retroactive."); Holland v. State, 916 So.2d 750, 760 (Fla. 2005) (habeas – "we have recognized that Ring does not apply retroactively."); Duckett v. State, 918 So.2d 224, 239 (Fla. 2005) (habeas – Apprendi and Ring do not apply retroactively); Davis v. State, 928 So.2d 1089, 1136 (Fla. 2005) (habeas – Ring does not apply retroactively); Johnson v. State, 921 So.2d 490, 509 (Fla. 2005) (post conviction – Ring issues rejected based on Bottoson and King); Knight v. State, 923 So.2d 387 (Fla. 2005) (habeas – Apprendi and Ring do not apply retroactively); Suggs v. State, 923 So.2d 419, 442 (Fla. 2005) (post conviction – Ring does not apply retroactively); Rutherford v. State, 926 So.2d 1100 (Fla. 2006) (post conviction – Ring mentioned while recounting history of case and not otherwise addressed); Walls v. State, 926 So.2d 1156, 1174 (Fla. 2006) ("Wall's Ring claims are procedurally barred in these post

conviction proceedings. This Court has held that Ring does not apply retroactively."); Miller v. State, 926 So.2d 1243, 1259 (Fla. 2006) (post conviction – Ring does not apply retroactively); Jones v. State, 928 So.2d 1178, 1193 (Fla. 2006) (post conviction – Ring does not apply retroactively); Foster v. State, 929 So.2d 524, 531 (Fla. 2006) (post conviction – Ring is not applied retroactively); Smith v. State, 931 So.2d 790, 795 fn.2 (Fla. 2006) (post conviction – Ring mentioned in recounting history of case but not otherwise addressed); Lamarca v. State, 931 So.2d 838, 854 (Fla. 2006) (habeas – Ring does not apply retroactively); Mungin v. State, 932 So.2d 986, 1004 (Fla. 2006) (post conviction – Ring does not apply retroactively); Nixon v. State, 932 So.2d 1009, 1024 (Fla. 2006) ("This Court has held that Ring is not retroactive in Florida"); Johnston v. State, 960 So.2d 757, 759 (Fla. 2006) ("We have recently held that even if Ring were to be applied in Florida, it would not be applied retroactively in post conviction claims. See Johnson v. State, 904 So.2d 400, 412 (Fla. 2005). Hence, we affirm the trial court's denial of Johnston's Ring claim."); Trotter v. State, 932 So.2d 1045, 1053 (Fla. 2006) ("This Court previously has held that neither Apprendi nor Ring applies retroactively."); Henry v. State, 937 So.2d 563, 577 (Fla. 2006) (habeas – "We reject this claim because this Court has held that Ring does not apply retroactively to collateral proceedings."); Raleigh v. State, 932 So.2d 1054, 1067 (Fla. 2006) (habeas – "As both the United States Supreme Court and this Court have recently recognized, Ring does not apply retroactively."); Philmore v. State, 937 So.2d 578, 588 (Fla. 2006) (habeas – "Further, this Court has held that Ring does not apply retroactively."); Farina v. State, 937 So.2d 612 (Fla. 2006) (habeas – Ring claim procedurally barred); Rutherford v. State, 940 So.2d 1112 (Fla. 2006) (habeas – Apprendi /Ring not applied retroactively); Hertz v. State, 941 So.2d 1031 (Fla. 2006) (post conviction – Ring mentioned in reciting background of case but not otherwise addressed); Pardo v. State, 941 So.2d 1057 (Fla. 2006) (Ring mentioned in recounting history of case but not otherwise addressed); Ponticelli v. State, 941 So.2d 1073, 1106 (Fla. 2006) (habeas – Ring does not apply retroactively); Hannon v. State, 941 So.2d 1109, 1147 (Fla. 2006) (habeas – Ring does not apply retroactively); Diaz v. State, 945 So.2d 1136 (Fla. 2006) (post conviction – Ring mentioned in recounting history of case but not otherwise addressed); Blackwood v. State, 946 So.2d 960, 976 (Fla. 2006) ("both the United

States Supreme Court and this Court have held that Ring does not apply retroactively; thus, the claim is otherwise barred."); Garcia v. State, 949 So.2d 980, 990 (Fla. 2006) (habeas – not entitled to retroactive relief under Ring); Melton v. State, 949 So.2d 994, 1020 (Fla. 2006) (habeas – Ring does not apply retroactively); Branch v. State, 952 So.2d 470 (Fla. 2006) (habeas – Ring mentioned in recounting history of case but not otherwise addressed); McDonald v. State, 952 So.2d 484, 498 (Fla. 2006) (habeas – Ring does not apply retroactively); Peede v. State, 955 So.2d 480, 498 (Fla. 2007) (post conviction – Ring does not apply retroactively); Rogers v. State, 957 So.2d 538, 554 (Fla. 2007) (habeas – appellate counsel not ineffective in failing to anticipate Apprendi and Ring); Cherry v. State, 959 So.2d 702 (Fla. 2007) (post conviction – Ring issue mentioned in recounting history of case but not addressed); Williamson v. State, 961 So.2d 229, 233 fn.1 (Fla. 2007) (post-conviction - Williamson did not appeal trial court's denial of Ring claim); Belcher v. State, 961 So.2d 239, 252 (Fla. 2007) (habeas – procedurally barred from raising Apprendi claim again where it was raised on direct appeal); White v. State, 964 So.2d 1278 (Fla. 2007) (post-conviction – Apprendi / Ring issues not addressed); Dillbeck v. State, 964 So.2d 95 (Fla. 2007) (post-conviction – Ring issue mentioned in recounting history of case but not otherwise addressed); Franqui v. State, 965 So.2d 22, 35-36 (Fla. 2007) (habeas – Ring does not apply retroactively); Bell v. State 965 So.2d 48, 79 (Fla. 2007) (habeas – Apprendi claim without merit); Willacy v. State, 967 So.2d 131, 146 fn.14 (Fla. 2007) (habeas – Ring claim fails because it is not applied retroactively); Cox v. State, 966 So.2d 337 (Fla. 2007) (post-conviction – Apprendi / Ring issues not addressed); Gore v. State, 964 So.2d 1257, 1277 (Fla. 2007) (habeas – Apprendi and Ring cannot receive retroactive application); Darling v. State, 966 So.2d 366, 387 (Fla. 2007) (post-conviction – defense counsel cannot be ineffective for failing to raise meritless claim); Grim v. State, 971 So.2d 85, 103 (Fla. 2007) (habeas – Apprendi claim procedurally barred); Barnhill v. State, 971 So.2d 106, 118 fn.6 (Fla. 2007) (post-conviction – Ring claim denied and issue not addressed further); Preston v. State, 970 So.2d 789, 796 fn.10 (Fla. 2007) (post conviction – Ring claim is procedurally barred because Ring does not apply retroactively); Kearse v. State, 969 So.2d 976, 992 (Fla. 207) (habeas – Ring not applied retroactively); Booker v. State, 969 So.2d 148 (Fla. 2007) (post conviction – Ring claim not

addressed); Kormondy v. State, 983 So.2d 418 (Fla. 2007) (post conviction – Apprendi issue not addressed); Evans v. State, 975 So.2d 1035 (Fla. 2008) (habeas – Ring is not retroactive); Connor v. State, 979 So.2d 852 (Fla. 2007) (habeas – Ring and Apprendi do not apply retroactively); Overton v. State, 976 So.2d 536 (Fla. 2007) (habeas – Apprendi does not apply retroactively in Florida); Pooler v. State, 980 So.2d 460 (Fla. 2008) (post conviction – denial of Ring issue summarily affirmed); Green v. State, 975 So.2d 1090 (Fla. 2008) (post conviction - Apprendi moot where new penalty phase required); Doorbal v. State, 983 So.2d 464 (Fla. 2008) (habeas- Apprendi/Ring issues not addressed); Bowles v. State, 979 So.2d 182 (Fla. 2008) (post-conviction – Apprendi/Ring do not apply retroactively); State v. Larzelere, 979 So.2d 195 (Fla. 2008) (post-conviction, Apprendi/Ring issues moot due to new penalty phase).

As mentioned, there is no need to fully analyze each of these decisions. Their relevance as controlling precedent for rejection of Apprendi/Ring issues is controlled by the holding by the United States Supreme Court that Apprendi need NOT be applied retroactively in death penalty cases. See Schriro v. Summerlin, 542 U. S. 348, 355–356 (2004) (rejecting claim that Ring v. Arizona, 536 U. S. 584 (2002), which applied Apprendi to hold that a jury must find the existence of aggravating factors necessary to impose the death penalty, was a watershed rule of criminal procedure); Washington v. Recuenco, 548 U.S. 212, 126 S.Ct. 2546, 2551-52, 165 L.Ed.2d 466 (2006) (clarifying that a constitutional error is not necessarily a structural error requiring reversal and citing Ring as example).

Florida, too, has expressly ruled that denial of the right to a jury trial can be harmless and that such relief will not be retroactively provided. E.g., Galindez v. State, 955 So.2d 517, 518 (Fla. 2007) (harmless error analysis applies to Apprendi / Blakely error); Hughes v. State, 901 So.2d 837, 838 (Fla. 2005) (post-conviction – "we hold that Apprendi does not apply retroactively."). The significance of these holdings is the truism that, if the courts continue waiting to provide the right for a jury to make the findings in §921.141(3), Florida Statutes, upon which imposition of the death penalty depends, until a federal court overturns some troublesome precedent, relief will be forever foreclosed to all defendants who are now properly raising these issues, being denied relief on direct appeal and move into the "post conviction" posture. The

post-conviction defendants will be out of luck despite having properly preserved this fundamental issue because the case that acknowledges the existence of the right will not be applied retroactively by Florida.

However, there are several post-conviction cases that are significant and that deserve further analysis to understand the evolution of the Florida Supreme Court's reasoning that is apparently even now preventing that Court from applying Apprendi to death penalty cases in Florida, even though Florida courts are now freely applying the reasoning in Apprendi outside of the context of the death penalty. The first Florida case that dealt with Apprendi was Mills v. Moore, supra, where the Florida Supreme Court reached a clearly erroneous conclusion that the reasoning in Apprendi was not intended to apply to capital cases but, more importantly, in doing so the Florida Supreme Court observed that the United States Supreme Court has in the past directed lower courts to give it the prerogative of overruling its own decisions. Specifically, in Mills, the Florida Supreme Court addressed and rejected the reasoning in Apprendi as follows:

The Apprendi Issue

> In Apprendi v. New Jersey, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000),[FN2] the Supreme Court announced the general rule that "any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." Id., 120 S.Ct. at 2362-63. The Court specifically stated in the majority opinion that Apprendi does not apply to already challenged capital sentencing schemes that have been deemed constitutional. The Court stated:
>
> > Finally, this Court has previously considered and rejected the argument that the principles guiding our decision today render invalid state capital sentencing schemes requiring judges, after a jury verdict holding a defendant guilty of a capital crime, to find specific aggravating factors before imposing a sentence of death. For reasons we have explained, the capital cases are not controlling:
> >
> > "Neither the cases cited, nor any other case, permits a judge to determine the existence of a

> factor which makes a crime a capital offense. What the cited cases hold is that, once a jury has found the defendant guilty of all the elements of an offense which carries as its maximum penalty the sentence of death, it may be left to the judge to decide whether that maximum penalty, rather than a lesser one, ought to be imposed.... The person who is charged with actions that expose him or her to the death penalty has an absolute entitlement to jury trial on all the elements of the charge."

Id., 120 S.Ct. at 2366 (citations omitted). And one justice, in a separate concurring opinion, indicated that issue was left to be decided in the future. Id., 120 S.Ct. at 2380 (Thomas, J. concurring).

The Court was referring to its earlier decision in Walton v. Arizona, 497 U.S. 639, 110 S.Ct. 3047, 111 L.Ed.2d 511 (1990), wherein it addressed a capital sentencing scheme and held that the presence of an aggravating circumstance in a capital case may constitutionally be determined by a judge rather than a jury. Id. at 647-48, 110 S.Ct. 3047.[FN3] Because Apprendi did not overrule Walton, the basic scheme in Florida is not overruled either.

Mills argues that Apprendi overruled Walton and relies upon the five-to-four split in the Court. Four justices stated in dissent that Apprendi effectively overruled Walton, and another justice in his concurring opinion stated that reconsideration of Walton was left for another day. With the majority of the justices refusing to disturb the rule of law announced in Walton, it is still the law and it is not within this Court's authority to overrule Walton in anticipation of any future Supreme Court action. The Supreme Court has specifically directed lower courts to "leav[e] to this Court the prerogative of overruling its own decisions." Agostini v. Felton, 521 U.S. 203, 237, 117 S.Ct. 1997, 138 L.Ed.2d 391 (1997) (quoting Rodriguez de Quijas v. Shearson/American Express, Inc., 490 U.S. 477, 484, 109 S.Ct. 1917, 104 L.Ed.2d 526 (1989)). The majority opinion in Apprendi forecloses Mills' claim because Apprendi preserves the constitutionality of capital sentencing schemes like Florida's. Therefore, on its face, Apprendi is inapplicable to this case.

No court has extended Apprendi to capital sentencing schemes, and the plain language of Apprendi indicates that the case is not intended to apply to capital schemes. See State v. Hoskins, 199 Ariz. 127, 14 P.3d 997, 1016 (2000) (noting Apprendi did not apply to capital sentencing schemes and did not overrule Walton); Weeks v. State, 761 A.2d 804, 806 (Del.2000) (en banc) ("[W]e are not persuaded that Apprendi's reach extends to 'state capital sentencing schemes' in which judges are required to find 'specific aggravating factors before imposing a sentence of death.' "), cert. denied, 531 U.S. 1004, 121 S.Ct. 476, 148 L.Ed.2d 478 (2000); State v. Golphin, 352 N.C. 364, 533 S.E.2d 168, 193-94 (2000) ("The United States Supreme Court's recent opinion in Apprendi ... does not affect our prior holdings regarding the inclusion of aggravating circumstances in an indictment.... [A]n indictment need not contain the aggravating circumstances the State will use to seek the death penalty ...."), cert. denied, 532 U.S. 931, 121 S.Ct. 1379, 149 L.Ed.2d 305 (2001). Importantly, in Weeks v. Delaware, a capital defendant brought his second habeas petition on October 27, 2000, alleging an Apprendi violation and seeking a stay of his execution which was set for November 17, 2000. The trial court ruled that Apprendi did not apply to Weeks' case. Weeks appealed and the trial court's ruling was affirmed. On November 16, 2000, just one day before the scheduled execution, the United States Supreme Court denied certiorari. Weeks v. Delaware, 531 U.S. 1004, 121 S.Ct. 476, 148 L.Ed.2d 478 (2000). The Supreme Court's denial of certiorari indicates that the Court meant what it said when it held that Apprendi was not intended to affect capital sentencing schemes.

Mills makes two additional arguments that are fact-specific to his case. First, he argues that the statute in effect at the time of the initial trial made the maximum penalty for his crime life imprisonment. Only after the jury verdict and further sentencing proceedings, Mills argues, could death be a possible sentence. This particular scheme, Mills argues, puts the sentence of death outside of the maximum penalty available and triggers Apprendi protection.

With regard to the statute in effect at the time of trial, Mills cites section 775.082(1), Florida Statutes (1979), which provided:

> *A person who has been convicted of a capital felony shall be punished by life imprisonment and shall be required to serve no less than 25 years before becoming eligible for parole unless the proceeding held to determine sentence according to the procedure set forth in s. 921.141 results in finding by the court that such person shall be punished by death, and in the latter event such person shall be punished by death.*

§ 775.082(1) Fla. Stat. (1979). Mills argues that this statute makes life imprisonment the maximum penalty available. Mills argues that the statute allowing the judge to override the jury's recommendation makes it clear that the maximum possible penalty is life imprisonment unless and until the judge holds a separate hearing and finds that the defendant is death eligible.

The plain language of section 775.082(1) is clear that the maximum penalty available for a person convicted of a capital felony is death. When section 775.082(1) is read in pari materia with section 921.141, Florida Statutes, there can be no doubt that a person convicted of a capital felony faces a maximum possible penalty of death.[FN4] Both sections 775.082 and 921.141 clearly refer to a "capital felony." Black's Law Dictionary defines "capital" as "punishable by execution; involving the death penalty." Black's Law Dictionary 200 (7th ed.1999). Merriam Webster's Collegiate Dictionary defines "capital" as "punishable by death ... involving execution." Merriam Webster's Collegiate Dictionary 169 (10th ed.1998). Therefore, a "capital felony" is by definition a felony that may be punishable by death. The maximum possible penalty described in the capital sentencing scheme is clearly death.

Mills is actually attacking the validity of the bifurcated guilt and sentencing phases of a capital trial. That issue was litigated and decided in Proffitt v. Florida, 428 U.S. 242, 96 S.Ct. 2960, 49 L.Ed.2d 913 (1976), and Walton v. Arizona, 497 U.S. 639, 110 S.Ct. 3047, 111 L.Ed.2d 511 (1990). The Apprendi majority clearly did not revisit these rulings.

As for Mills' second argument, Mills argues that the trial judge actually considered additional aggravating factors not presented to

the jury. This consideration, Mills argues, violates Apprendi's requirement that the jury be the trier of fact for all elements of the crime charged.

First, any error that might have occurred when the trial judge considered evidence that the jury did not hear would be harmless in this case because the additional aggravators that the trial judge found were struck by this Court on direct appeal and not considered in any way when we affirmed the death sentence on direct appeal. Furthermore, the evidence supporting the pecuniary gain aggravating factor was in fact heard by the jury because it was based on Mills' contemporaneous burglary conviction.

The essence of this argument was raised and decided on direct appeal. Mills argued on direct appeal that the State's presentation of evidence on two additional aggravators invalidated the judge's override. [FN5] On direct appeal as to the penalty phase, Mills challenged the constitutionality of Florida's capital felony sentencing law, argued that the court found improper aggravating circumstances, argued that the trial court failed to consider certain mitigating evidence, and argued that the trial court failed to give appropriate consideration to the jury's recommendation of life imprisonment. Mills, 476 So.2d at 177-79. In his brief on direct appeal, Mills argued that the State may not reserve additional evidence for the judge's consideration alone after the jury's recommendation. Relying on Presnell v. Georgia, 439 U.S. 14, 99 S.Ct. 235, 58 L.Ed.2d 207 (1978), Mills argued that as a matter of due process, he was entitled to have the existence and validity of aggravating circumstances determined as they were placed before the jury. To allow a "post-jury" determination of aggravating circumstances would deprive him the right of due process and deny him his right to trial by jury. Mills also argued that post-jury determinations of aggravating circumstances would destroy the trifurcated sentencing procedures then in place.

Although we did not address this argument with specificity in Mills' direct appeal, we did address Mills' broader claim that the trial court failed to give appropriate consideration to the jury's recommendation of life imprisonment. On this claim we stated the issue was properly evaluated under Tedder. See Mills, 476 So.2d at 179. Mills' second Apprendi claim, although framed a different way, was raised and decided on direct appeal. It is therefore

procedurally barred. See Harvey v. Dugger, 656 So.2d 1253 (Fla.1995); Rivera v. Dugger, 629 So.2d 105 (Fla.1993); Mendyk v. State, 592 So.2d 1076 (Fla.1992).

FN2. Apprendi involved a New Jersey statute that authorized an enhanced penalty for a crime proven to be a "hate crime" if the judge found by a preponderance of the evidence that the crime was motivated by a purpose to intimidate an individual or group because of race, color, gender, handicap, religion, sexual orientation or ethnicity. The defendant in Apprendi was not charged with a "hate crime" in the indictment. He pled guilty on three counts, and the judge enhanced the penalty on one of the counts beyond the statutory maximum, in accord with the "hate crime" enhancement statute, after he held a hearing to determine the "purpose" of the crime.

FN3. Florida's sentencing scheme was originally upheld in Proffitt v. Florida, 428 U.S. 242, 96 S.Ct. 2960, 49 L.Ed.2d 913 (1976), which observed that the jury's recommendation is advisory only and that the sentence is to be determined by the judge, and held that jury sentencing is not constitutionally required.

FN4. Section 921.141, Florida Statutes (1979), provides: Upon conviction or adjudication of guilt of a defendant of a capital felony, the court shall conduct a separate sentencing proceeding to determine whether the defendant should be sentenced to death or life imprisonment as authorized by s. 775.082.....(3) ... Notwithstanding the recommendation of a majority of the jury, the court, after weighing the aggravating and mitigating circumstances, shall enter a sentence of life imprisonment or death....

FN5. The only additional evidence presented at the presentencing hearing was the presentence investigation report and certified copies of various criminal convictions. Mills argued that he had no significant criminal history in support of mitigation. The trial judge specifically indicated that the evidence of criminal convictions and the information contained in the presentence investigation report was only considered for purposes of mitigation (i.e. to rebut Mills' claim of no significant criminal history) and not as an aggravating factor. Indeed, the two additional aggravating factors the trial court

> found were unrelated to the evidence received at the presentencing hearing.

Mills v. Moore, 786 So.2d 532, 536-539 (Fla. 2001) (Emphasis added). The significance of Moore can be boiled down to a few observations. First, the Florida Supreme Court stated several erroneous conclusions. The first was that Walton is good law and Apprendi was not intended to apply to capital cases. This conclusion went out the window when Walton was overruled by Ring. Another erroneous conclusion was that the maximum possible sentence for a person convicted of first-degree murder in Florida was the death penalty simply because the Florida legislature called it a "capital felony." This reasoning has also gone out with the trash. Cf. United State v. Booker, 543 U.S 220, 230-232 (2005).

The Florida Supreme Court adhered to these erroneous conclusions stated in Mills and reasoned that Apprendi simply did not apply to capital cases when it reviewed several post conviction issues and a few direct appeals until Ring came along on June 24, 2002. The Florida Supreme Court then addressed the claims of two post-conviction defendants whose active death warrants had been temporarily stayed by the United States Supreme Court while it considered Ring. The stays automatically expired when Ring was decided. In hindsight, we know that the United States Supreme Court is not going to retroactively apply the holding of Apprendi and grant relief for the constitutional error that it freely acknowledges occurred when a new procedural due process right is acknowledged to exist by the Court. See, Danforth v. Minnesota, supra. The Florida Supreme Court, however, simply refused to apply the reasoning in Apprendi and denied relief, implying that it was constrained from doing so be existing federal precedent.

Specifically, Bottoson v. Moore, 833 So.2d 693, 695 (Fla. 2002), was a plurality Per Curiam decision that denied relief with no further holding:

> PER CURIAM.
>
> Linroy Bottoson, a prisoner under sentence of death and an active death warrant, petitions this Court for a writ of habeas corpus. [FN1] He seeks relief pursuant to Ring v. Arizona, 536 U.S. 584, ----, 122 S.Ct. 2428, 2443, 153 L.Ed.2d 556 (2002), wherein the United States Supreme Court held unconstitutional the Arizona capital sentencing statute "to the extent that it allows a sentencing judge, sitting without a jury, to find an aggravating circumstance necessary for imposition of the death penalty."
>
> Although Bottoson contends that he is entitled to relief under Ring, we decline to so hold. The United States Supreme Court in February 2002 stayed Bottoson's execution and placed the present case in abeyance while it decided Ring.[FN2] That Court then in June 2002 issued its decision in Ring, summarily denied Bottoson's petition for certiorari, and lifted the stay without mentioning Ring in the Bottoson

order.[FN3] The Court did not direct the Florida Supreme Court to reconsider Bottoson in light of Ring.

Significantly, the United States Supreme Court repeatedly has reviewed and upheld Florida's capital sentencing statute over the past quarter of a century, [FN4] and although Bottoson contends that there now are areas of "irreconcilable conflict" in that precedent, the Court in Ring did not address this issue. In a comparable situation, the United States Supreme Court held:

> If a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the [other courts] should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions.

Rodriguez de Quijas v. Shearson/American Express, 490 U.S. 477, 484, 109 S.Ct. 1917, 104 L.Ed.2d 526 (1989).

We also reject Bottoson's claim that his rights under Atkins v. Virginia, 536 U.S. 304, 122 S.Ct. 2242, 153 L.Ed.2d 335 (2002), were violated. We find Atkins inapplicable in light of the fact that Bottoson already was afforded a hearing on the issue of mental retardation and was permitted to introduce expert testimony on the issue. The evidence did not support his claim. See Bottoson v. State, 813 So.2d 31, 33-34 (Fla.), cert. denied, 536 U.S. 962, 122 S.Ct. 2670, 153 L.Ed.2d 844 (2002).

Accordingly, we deny Bottoson's petition for habeas relief. This Court's stay of execution shall terminate at 5 p.m. on the thirtieth day following the filing of this opinion. No motion for rehearing will be allowed.

It is so ordered.

FN1. We have jurisdiction. See art. V, § 3(b)(9), Fla. Const.

FN2. See Bottoson v. Florida, 534 U.S. 1121, 122 S.Ct. 981, 151 L.Ed.2d 962 (2002).

FN3. See Bottoson v. Florida, 536 U.S. 962, 122 S.Ct. 2670, 153 L.Ed.2d 844 (2002).

FN4. See, e.g., Hildwin v. Florida, 490 U.S. 638, 109 S.Ct. 2055, 104 L.Ed.2d 728 (1989); Spaziano v. Florida, 468 U.S. 447, 104 S.Ct. 3154, 82 L.Ed.2d 340 (1984); Barclay v. Florida, 463 U.S. 939, 103 S.Ct. 3418, 77 L.Ed.2d 1134 (1983); Proffitt v. Florida, 428 U.S. 242, 96 S.Ct. 2960, 49 L.Ed.2d 913 (1976).

Wells and Quince, JJ., and Harding, Senior Justice, concurring.
Harding, Senior Justice, concurs with an opinion.
Wells and Quince, JJ., concurs specially with opinions.
Anstead, C.J., and Shaw, Pariente and Lewis, JJ., concur in result only with opinions.

Bottoson v. Moore, 833 So.2d 693, 694-695 (Fla. 2002) (Per Curiam).

An analysis of the decision shows that Bottoson, under a second active death warrant, first sought certiorari relief in the United States Supreme Court to review the denial by the Florida Supreme Court of a successive motion for post-conviction relief that raised a mental retardation issue under Atkins v. Virginia and a separate habeas petition based on the denial of jury findings of the aggravating circumstances under Apprendi. The United States Supreme Court, then considering Ring, initially granted a stay of execution. That stay automatically terminated when Bottoson's certiorari petition was denied four days after Ring was decided. Bottoson then filed a successive habeas petition with the Florida Supreme Court based on Ring. The actual decision by the Florida Supreme Court denied relief but gave no reason for that ruling. Bottoson thus has no "holding." It implied, however, that the existence of controlling authority from the United States Supreme Court made it improper to apply the Apprendi/Ring line of cases until the United States Supreme Court acts on the issue. If that is so, however, the right to a jury trial can still be provided under Florida's constitution without violating any holding by the United States Supreme Court.

As part of the analysis, it must be noted that there were specially concurring opinions filed by different justices that are not reproduced here because the individual views of a particular justice do not control the law. The importance of the Court's post conviction analysis, however, is more historical than practical because Apprendi/Ring relief will not be given retroactively. This results in prejudice to defendants who are convicted of first-degree murder under §782.04(1), Florida Statutes, and despite timely requests and specific objections under Apprendi/Ring, are now being sentenced to death based on findings solely made by the judge under §921.141(3), Florida Statutes, in clear contradiction of the Sixth and Fourteenth

Amendments. The prejudice in the delay of applying Apprendi/Ring is the non-retroactivity of the relief.

Specifically, these are cases where the correct objections are timely being made but are not being timely sustained. Constitutional error is occurring. The relief to which those defendants are entitled will be precluded after direct appeal when the cases move into the post-conviction context. The requested relief will not be provided based on Schriro, supra, and Johnson. Stated somewhat differently, these cases that are entitled to the remedy provided in Ring will not be "in the pipeline" when the United States Supreme Court decides whatever case overrules the precedent that is preventing Florida from providing capital defendants the rights to due process and a jury trial. Such relief will not be applied retroactively to cases outside the appellate pipeline when that new case is decided. Relief will not extend back to Apprendi. It certainly did not extend back to Ring. The delay in the administration of justice is prejudicial and it violates article I, section 21 of the Florida Constitution. This issue has NOT been addressed yet by the Florida Supreme Court.

The second post-conviction capital case decided by the Florida Supreme Court soon after Ring was King v. Moore, 831 So.2d 143 (Fla.), cert. denied, 537 U.S. 1067 (2002). In King the Court denied relief and wrote even less than it did in Bottoson, but it was just as wrong:

> PER CURIAM.
>
> Amos Lee King, a prisoner under sentence of death and an active death warrant, petitions this Court for a writ of habeas corpus.[FN1] He seeks relief pursuant to Ring v. Arizona, 536 U.S. 584, ----, 122 S.Ct. 2428, 2443, 153 L.Ed.2d 556 (2002), wherein the United States Supreme Court held unconstitutional the Arizona capital sentencing statute "to the extent that it allows a sentencing judge, sitting without a jury, to find an aggravating circumstance necessary for imposition of the death penalty."
>
> Although King contends that he is entitled to relief under Ring, we decline to so hold. The United States Supreme Court in February 2002 stayed King's execution and placed the present case in abeyance while it decided Ring. [FN2] That Court then, in June 2002, issued its decision in Ring, summarily denied King's petition

for certiorari, and lifted the stay without mentioning Ring in the King order.[FN3] The Court did not direct the Florida Supreme Court to reconsider King in light of Ring.

Significantly, the United States Supreme Court has repeatedly reviewed and upheld Florida's capital sentencing statute over the past quarter of a century [FN4] and although King contends that there now are areas of "irreconcilable conflict" in that precedent, the Court in Ring did not address this issue. In a comparable situation, the United States Supreme Court held:

> *If a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the [other courts] should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions.*

Rodriquez De Quijas v. Shearson/American Express, 490 U.S. 477, 484, 109 S.Ct. 1917, 104 L.Ed.2d 526 (1989).

Accordingly, we deny King's petition for habeas relief. This Court's stay of execution shall terminate at 5 p.m. on the thirtieth day following the filing of this opinion. No motion for rehearing will be allowed.

It is so ordered.

FN1. We have jurisdiction. See art. V, § 3(b)(9), Fla. Const.

FN2. See King v. Florida, 534 U.S. 1118, 122 S.Ct. 932, 151 L.Ed.2d 894 (2002).

FN3. See King v. Florida, 536 U.S. 962, 122 S.Ct. 2670, 153 L.Ed.2d 843 (2002).

FN4. See, e.g., Hildwin v. Florida, 490 U.S. 638, 109 S.Ct. 2055, 104 L.Ed.2d 728 (1989); Spaziano v. Florida, 468 U.S. 447, 104 S.Ct. 3154, 82 L.Ed.2d 340 (1984); Barclay v. Florida, 463 U.S. 939, 103 S.Ct. 3418, 77 L.Ed.2d 1134 (1983); Proffitt v. Florida, 428 U.S. 242, 96 S.Ct. 2960, 49 L.Ed.2d 913 (1976).

WELLS, J., and HARDING, Senior Justice, concur.

HARDING, Senior Justice, concurs with an opinion.
WELLS, J., concurs specially with an opinion.

ANSTEAD, C.J., and SHAW and LEWIS, JJ., concur in result only with opinions.

PARIENTE, J., concurs in result only with an opinion, in which ANSTEAD, C.J., concurs.

QUINCE, J., recused.

King v. Moore, 831 So.2d 143, 144-145 (Fla. 2002).

It bears mentioning that the denial of certiorari review is NOT a ruling on the merits. U.S. v. Carver, 482 U.S. 482, 490 (1923) ("The denial of a writ of certiorari imports no expression of opinion for the case, as the bar has been gold many times."); Lucas v. State, 841 So.2d 380, 389 fn.8 (Fla. 2007) (Florida Supreme Court recognizes "that a denial of certiorari does not constitute a ruling on the merits."). However, the implications of the Bottoson and King decisions went far broader. Florida Courts struggled to define the parameters of the Sixth and Fourteenth Amendment guarantees to a jury trial. As will be seen, the holdings of these two cases that actually contain no holding or analysis other than denial of relief became the precedent for continuing to deny relief. For that reasons Bottoson and King need to be fully appreciated, for they are later routinely cited when relief is denied by the Florida Supreme Court to deny relief to capital defendants raising a violation of their rights to due process and a jury trial based on the reasoning contained in Apprendi and Ring. This will be referred to as "the Bottoson/King mantra" fore ease of reference.

The analysis of the application of Apprendi / Ring continues by moving into the next category of cases. To this point, only the decisions presenting Apprendi/Ring issues in the purely post conviction posture have been reviewed. The next category of cases is covers the "miscellaneous" decisions for lack of a better description. Most of the opinions here were

rendered by Florida's district courts of appeal. These decisions are important but most can be adequately understood without a full analysis being performed, such as a sentencing guideline case, the reversal of a death sentence for a life sentence (that moots any issue re Apprendi) or a decision ordering a new penalty phase where the Apprendi issues become moot. A full analysis of the decisions that directly address Apprendi / Ring will be set forth at the end of this category. The "miscellaneous" cases produced by the "search" are here summarized as follows:

Miscellaneous Decisions Mentioning Apprendi and/or Ring:

Stabile v. State, 790 So.2d 1235, 1238 (Fla. 5th 2001) (District Court of Appeal rejects argument that Apprendi requires proof beyond a reasonable doubt of Prison Releasee Re-offender factors)

Bottoson v. Moore, 824 So.2d 115 (Fla. 2002) (Order granting stay and granting oral argument in light of recent decisions from United States Supreme Court)

Washington v. State, 835 So.2d 1083, 1091 fn.21 (Fla. 2003) (habeas – Ring not raised by defendant "and accordingly we do not decide whether Ring is applicable to Florida cases wherein the sentencing judge overrides a jury recommendation of life imprisonment")

Lynch v. State, 841 So.2d 362, 366 fn.1 (Fla. 2003) (Ring issues waived when defendant waived penalty phase recommendation)

Harris v. State, 843 So.2d 856 (Fla. 2003) (Ring issues moot where death penalty vacated and remanded for new penalty phase)

State v. Coney, 845 So.2d 120, 140 fn.25 (Fla. 2003) (Ring issues moot where death sentence vacated and remanded for new penalty phase)

Hall v. State, 853 So.2d 546 (Fla. 1st DCA 2003) (1st DCA certifies question as to whether defendant charged with murder is entitled to 12-person jury when not eligible for death penalty)

Ault v. State, 866 So.2d 674, 683 (Fla. 2003) (Apprendi issues moot where death sentence reversed and remanded for new penalty phase)

State v. Steele, 872 So.2d 364 (Fla. 2d DCA 2004) (certiorari review of trial court order requiring disclosure of aggravating circumstances to be used by State and use of special verdict from concerning jury's finding of aggravating circumstances – certifies questions to Florida Supreme Court)

Hutchison v. State, 882 So.2d 943, 962 (Fla. 2004) (direct appeal of death sentence imposed in quadruple homicide case where penalty phase and jury recommendations waived by defendant -

Ring mentioned by Justice Pariente mentions Ring in specially concurring opinion while explaining why the especially heinous, atrocious or cruel aggravating factor must be narrowly applied)

Phillips v. State, 894 So.2d 28, 43 (Fla. 2004) (post conviction – Ring mentioned in specially concurring opinion by Justice Wells while analyzing a different issue)

Weaver v. State, 894 So.2d 178 (Fla. 2004) (Ring issues moot where death sentence reversed and matter remanded for imposition of life sentence)

Duncan v. State, 894 So.2d 817 (Fla. 2004) (Ring issues moot where death penalty vacated and new penalty proceeding required)

Behl v. State, 898 So.2d 217 (Fla. 2d DCA 2005) (challenge under Apprendi for imposition of victim – injury points in context of guideline sentencing – Apprendi requires resentencing)

Floyd v. State, 902 So.2d 775 (Fla. 2005) (post conviction – Ring claims moot where new trial awarded based on Brady v. Maryland violations)

Chandler v. Crosby, 916 So.2d 728, 730 (Fla. 2005) (Ring mentioned in opinion addressing habeas claim that Crawford v. Washington, 541 U.S. 36 (2004) should be applied retroactively)

State v. Steele, 921 So.2d 538, 540 (Fla. 2005) (Due to the direct application of this decision on death penalty trials, the entire opinion deserves a full analysis that will be set forth at the conclusion of this category of cases. The opinion itself states the following:

> CANTERO, J.
>
> In this case, we consider two issues resulting from the United States Supreme Court's decision concerning capital sentencing in Ring v. Arizona, 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002): whether a trial court may require the state to notify the defendant of the aggravating factors on which it intends to rely, and whether a trial court may require the jury to specify each aggravating factor it finds, and the vote as to each.
>
> In Ring, the Supreme Court held that in capital sentencing schemes where aggravating factors "operate as 'the functional equivalent of an element of a greater offense,' the Sixth Amendment requires that they be found by a jury." Id. at 609, 122 S.Ct. 2428 (quoting Apprendi v. New Jersey, 530 U.S. 466, 494 n. 19, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000)). The effect of that

decision on Florida's capital sentencing scheme remains unclear. In Florida, to recommend a sentence of death for the crime of first-degree murder, a majority of the jury must find that the State has proven, beyond a reasonable doubt, the existence of at least one aggravating circumstance listed in the capital sentencing statute. See § 921.141(2)(a), Fla. Stat. (2004). It must also find that any aggravating circumstances outweigh any mitigating circumstances, also listed in the statute, that may exist. See § 921.141(2)(b), Fla. Stat. (2004). Since Ring, this Court has not yet forged a majority view about whether Ring applies in Florida; and if it does, what changes to Florida's sentencing scheme it requires. See, e.g., Windom v. State, 886 So.2d 915, 936-38 (Fla.2004) (Cantero, J., specially concurring) (explaining the post- Ring jurisprudence of the Court and the lack of consensus about whether Ring applies in Florida). Cf. Johnson v. State, 904 So.2d 400 (Fla.2005) (holding that Ring does not apply retroactively in Florida). That uncertainty has left trial judges groping for answers. This case is an example. The Second District Court of Appeal certified to us two questions of great public importance:

> (1) Does a trial court depart from the essential requirements of law, in a death penalty case, by requiring the state to provide pre-guilt or pre-penalty phase notice of aggravating factors?
>
> (2) Does a trial court depart from the essential requirements of law, in a death penalty case, by using a penalty phase special verdict form that details the jurors' determination concerning aggravating factors found by the jury?

State v. Steele, 872 So.2d 364, 365 (Fla. 2d DCA 2004).

We have jurisdiction. See art. V, § 3(b)(4), Fla. Const. For the reasons that follow, we answer "no" to the first question and "yes" to the second. We hold that under current law, a trial judge presiding over a case in which the death penalty is possible does not depart from the essential requirements of law by requiring the State to provide pretrial notice of the aggravators it intends to prove in the penalty phase. We also hold, however, that a judge does depart from the essential requirements of law by requiring a majority of jurors to agree that a particular aggravator applies.

Such a requirement imposes a substantive burden on the state not contained in the statute and not required by Ring.

I. FACTS AND PROCEDURAL HISTORY

The defendant, Alfredie Steele, was indicted for first-degree murder with a firearm, a crime for which the potential sentence is death. He filed a motion to have Florida's capital sentencing scheme declared unconstitutional under Ring. In a hearing on the motion, the trial court and respective counsel discussed Ring's potential effect on Florida's capital sentencing statute. Defense counsel acknowledged that in considering challenges based on Ring, this Court had not reversed any death sentences or held Florida's capital sentencing scheme constitutionally infirm.

The trial judge denied the motion to preclude imposition of the death penalty, but did impose several requirements to address concerns with Florida's scheme that our post- Ring decisions had left unresolved. The court required the State to provide advance notice of the aggravating factors on which it intended to rely if the case reached a penalty phase. The court also stated that she would submit to the jury a penalty-phase interrogatory verdict form that would require jurors to specify each aggravator found and the vote for that aggravator. The court's subsequent order ruled that the jury would be required to find each aggravator by majority vote.

The State filed a petition for a writ of certiorari with the Second District Court of Appeal, challenging the requirements of pretrial notice and a penalty-phase special verdict. The district court granted the petition in part and denied it in part. The court quashed that portion of the order requiring advance notice of the aggravating factors, relying on this Court's precedent holding that the list of aggravators provided in section 921.141(5), Florida Statutes (2004), is sufficient, and that Ring does not require specific pretrial notice. See Steele, 872 So.2d at 365. However, the court denied the petition as to the trial court's requirement of specific findings of aggravators on the verdict form. It concluded that "Florida law does not specifically prohibit a trial judge from using a special verdict form such as the one ordered here." Id. Anticipating that its ruling "could affect many cases that may ultimately be reviewed by" this Court, the court certified the

foregoing questions of great public importance. Id. Its mandate was stayed pending our review.

II. ANALYSIS

This case comes to us on review of the district court's ruling on a petition for a writ of certiorari challenging a pretrial order in the circuit court. In certifying the two questions of great public importance, the district court appropriately applied the standard of review applicable to pretrial petitions for writ of certiorari-that is, whether the order constitutes a departure from the essential requirements of law. We have stated that

> the phrase "departure from the essential requirements of law" should not be narrowly construed so as to apply only to violations which effectively deny appellate review or which pertain to the regularity of procedure. In granting writs of common-law certiorari, the district courts of appeal should not be as concerned with the mere existence of legal error as much as with the seriousness of the error. Since it is impossible to list all possible legal errors serious enough to constitute a departure from the essential requirements of law, the district courts must be allowed a large degree of discretion so that they may judge each case individually. The district courts should exercise this discretion only when there has been a violation of a clearly established principle of law resulting in a miscarriage of justice.
>
> It is this discretion which is the essential distinction between review by appeal and review by common-law certiorari.

Combs v. State, 436 So.2d 93, 95-96 (Fla.1983); see also Allstate Ins. Co. v. Kaklamanos, 843 So.2d 885, 889 (Fla.2003) (noting that "the departure from the essential requirements of the law necessary for the issuance of a writ of certiorari is something more than a simple legal error"); State v. Pettis, 520 So.2d 250, 254 (Fla.1988) (concluding that although a pretrial ruling was in error, "we cannot say that the ruling was a departure from the essential requirements of law").

We now consider whether the trial court departed from the essential requirements of law in (A) requiring the State to provide pretrial notice of the aggravators on which it would rely; and (B) requiring a special jury verdict form in which, before the jury could recommend a sentence of death, a majority would have to agree that a specific aggravator applied. Finally, in section (C), we compare the current scheme in Florida to those in the other states that impose the death penalty, and suggest revisions to our statute that would render Florida's scheme consistent with that of every other death penalty state.

A. Pretrial Notice of Aggravating Factors

The first certified question asks, Does a trial court depart from the essential requirements of law, in a death penalty case, by requiring the state to provide pre-guilt or pre-penalty phase notice of aggravating factors? The State argues that requiring advance notice of alleged aggravating factors conflicts with our prior holdings that advance notice of aggravators is not required. The State also argues that advance notice is unnecessary in light of the information provided through reciprocal discovery.

The State is correct that we have consistently held that the lack of notice of specific aggravating circumstances does not render a death sentence invalid. See Sireci v. State, 399 So.2d 964, 970 (Fla.1981), overruled on other grounds as recognized in Rutherford v. State, 545 So.2d 853, 856 (Fla.1989). In Hitchcock v. State, 413 So.2d 741, 746 (Fla.1982), we concluded that because "[t]he statutory language limits aggravating factors to those listed, ... there is no reason to require the state to notify defendants of the aggravating factors that the state intends to prove." We reaffirmed this principle both before Ring, see Cox v. State, 819 So.2d 705, 725 (Fla.2002); Vining v. State, 637 So.2d 921, 927 (Fla.1994), and after, see Kormondy v. State, 845 So.2d 41, 54 (Fla.), cert. denied, 540 U.S. 950, 124 S.Ct. 392, 157 L.Ed.2d 283 (2003); Lynch v. State, 841 So.2d 362, 378 (Fla.), cert. denied, 540 U.S. 867, 124 S.Ct. 189, 157 L.Ed.2d 123 (2003). In Kormondy, in fact, we noted that " Ring does not require either notice of the aggravating factors that the State will present at sentencing or a special verdict form indicating the aggravating factors found by the jury." 845 So.2d at 54. In concluding that requiring the State to

provide advance notice of aggravators constitutes a departure from the essential requirements of law, the district court relied on our statement in Vining that there "is no reason to require" the notice, and on our reiteration in Kormondy, after Ring, that notice was not required. Steele, 872 So.2d at 365. But that is not the precise question here.

The question we address in this case is really the other side of the coin from the one we addressed in Kormondy, Vining, and other cases. In those cases, the defendants alleged that, to comply with constitutional requirements, judges must require the State to provide notice of the aggravating factors on which it intends to rely. We rejected that argument. Here, on the other hand, we consider whether a judge may require such notice without violating a clearly established principle of law.

Although it is clear that no statute, rule of procedure, or decision of this Court or the United States Supreme Court compels a trial court to require advance notice of aggravating factors, it is equally clear that none prohibits it, either. Moreover, the justification for it is stronger now than when we decided Hitchcock and Sireci. At the time we decided those cases, the capital sentencing statute contained only six aggravators. Since then, the Legislature has added eight more. See § 921.141(5)(i), Fla. Stat. (2004) (murder was cold, calculated, and premeditated); § 921.141(5)(j) (victim was law enforcement officer engaged in performance of duties); § 921.141(5)(k) (victim was elected or appointed public official engaged in performance of duties); § 921.141(5)(l) (victim was less than twelve years of age); § 921.141(5)(m) (victim was especially vulnerable because of advanced age or because defendant stood in position of familial or custodial authority); § 921.141(5)(n) (perpetrator was criminal street gang member). Other aggravators have been given broader scope. For example, the aggravating factor in section 921.141(5)(a) now applies to defendants who commit murder while on probation or community control, not merely while under a sentence of imprisonment. See ch. 96-290, § 5, Laws of Fla. (adding community controllees); ch. 91-270, § 1, Laws of Fla. (adding probationers). Also, aggravated child abuse and elder abuse have been made crimes qualifying a capital defendant for the "prior violent felony" aggravator in section 921.141(5)(d). See ch. 96-302, § 1, Laws of Fla. (adding elder abuse); ch. 95-159, § 1, Laws

of Fla. (adding aggravated child abuse). Thus, the notice provided by the list of aggravators in the statute is broader, and therefore less specific, than when we addressed the issue in Hitchcock and Sireci. Because of the expansion in available aggravating circumstances, as well as the absence of any express prohibition on requiring advance notice of aggravators, we conclude that a trial court does not violate a clearly established principle of law in requiring the State to provide such notice. Whether to require the State to provide notice of alleged aggravators is within the trial court's discretion.

Nor does the requirement of advance notice constitute a miscarriage of justice. Under Florida's broad discovery rule, the State already must disclose the names of witnesses, statements, test results, and other information about its case. See Fla. R.Crim. P. 3.220(b)(1). A list of the aggravators the State plans to establish during the penalty phase does not impose a substantial-or substantive-additional burden.

The State argues that a notice requirement is inequitable because the defense is not required to notify the State of mitigating circumstances. We note substantive differences, however, between proving aggravating circumstances and proving mitigators. To obtain a death sentence, the State must prove beyond a reasonable doubt at least one aggravating circumstance, whereas to obtain a life sentence the defendant need not prove any mitigating circumstances at all. Cf. Henyard v. State, 689 So.2d 239, 249-50 (Fla.1996) (holding that a jury is not compelled to recommend death where aggravating factors outweigh mitigating factors). Moreover, the defendant may invoke "[t]he existence of any other factors in the defendant's background that would mitigate against the imposition of the death penalty." § 921.141(6)(h), Fla. Stat. (2004); see also Ford v. State, 802 So.2d 1121, 1138 (Fla.2001) ("We adopted the [U.S. Supreme Court's] definition of a mitigating circumstance: 'any aspect of a defendant's character or record and any of the circumstances of the offense' that reasonably may serve as a basis for imposing a sentence less than death") (Pariente, J., concurring in result only) (quoting Campbell v. State, 571 So.2d 415, 419 n. 4 (Fla.1990), receded from in part by Trease v. State, 768 So.2d 1050 (Fla.2000)). The State, on the other hand, is limited to the specific aggravating factors listed in section 921.141(5). See Miller v. State, 373 So.2d 882, 885 (Fla.1979)

(noting that "[t]he aggravating circumstances specified in the [Florida] statute are exclusive, and no others may be used for that purpose") (citing Purdy v. State, 343 So.2d 4, 7 (Fla.1977)). Therefore, even if it could be required, pretrial notice of specific nonstatutory mitigation could prove unwieldy. Nevertheless, because in this case the State did not request pretrial notice of the mitigating factors on which the defendant would rely (instead arguing that the State should not be required to provide notice), we need not decide here whether a trial judge's refusal to require reciprocal discovery would violate the essential requirements of the law.

For these reasons, our answer to the first certified question is "no." A trial judge does not depart from the essential requirements of the law by requiring the State to provide notice of the aggravators on which it intends to rely. We add, however, that under current law the trial court cannot prohibit the State from relying on an aggravator that was either undisclosed or disclosed beyond the deadline. As counsel for the respondent acknowledged at oral argument, any violation will at most justify a continuance to allow the defendant to rebut or impeach the State's evidence.

B. Special Verdict on Aggravating Factors

The second certified question asks, Does a trial court depart from the essential requirements of law, in a death penalty case, by using a penalty phase special verdict form that details the jurors' determination concerning aggravating factors found by the jury? Again, because of the narrow standard of review, we must determine whether the order violates a clearly established principle of law resulting in a miscarriage of justice.

We begin to answer this question by reviewing the applicable law. Section 921.141 does not require jury findings on aggravating circumstances, and we have held that Ring does not require special verdicts on aggravators. See Kormondy, 845 So.2d at 54. Nevertheless, the trial court ruled that jurors would receive a special verdict form on which they would specify the aggravators they found to exist and the vote on each aggravator. The court established this procedure to protect against reversal of a death sentence based on Ring, to obtain the jury's guidance in fulfilling

the court's independent statutory duty to consider and weigh the proposed aggravators, and to facilitate appellate review.

The preliminary special interrogatory verdict form the trial court prepared requires the jury to record its vote on each aggravating circumstance submitted. In its order, the court required that, as to each aggravating circumstance alleged, the jury determine by majority vote whether a particular aggravator existed. The court noted that it would develop jury instructions later. The district court, in declining to quash the order, observed that "Florida law does not specifically prohibit a trial judge from using a special verdict form such as the one ordered here." Steele, 872 So.2d at 365.

The State argues that the special verdict conflicts with Florida's capital sentencing statute and the standard jury instructions, which only require that, to recommend a sentence of death, a majority of the jury conclude that at least one aggravating circumstance exists-not necessarily the same one. Thus, the State contends, the trial court's special verdict imposes an extra statutory requirement for imposition of the death penalty. The State also argues that because we have held that a special verdict is not required and have not ruled any aspect of Florida's capital sentencing statute unconstitutional under Ring, the trial court's action constituted a departure from the essential requirements of law. We think the State's argument well taken.

Section 921.141, Florida Statutes (2004), establishes the obligations of the judge and jury concerning aggravating circumstances during a capital penalty phase:

> (2) Advisory sentence by the jury.-After hearing all the evidence, the jury shall deliberate and render an advisory sentence to the court, based upon the following matters:
>
> (a) Whether sufficient aggravating circumstances exist as enumerated in subsection (5);
>
> (b) Whether sufficient mitigating circumstances exist which outweigh the aggravating circumstances found to exist; and

> (c) Based on these considerations, whether the defendant should be sentenced to life imprisonment or death.
>
> (3) Findings in support of sentence of death.- Notwithstanding the recommendation of a majority of the jury, the court, after weighing the aggravating and mitigating circumstances, shall enter a sentence of life imprisonment or death, but if the court imposes a sentence of death, it shall set forth in writing its findings upon which the sentence of death is based as to the facts:
>
> (a) That sufficient aggravating circumstances exist as enumerated in subsection (5), and
>
> (b) That there are insufficient mitigating circumstances to outweigh the aggravating circumstances.

§ 921.141(2)-(3), Fla. Stat. (2004). Consistent with these provisions, the standard jury instructions require the jury to determine whether one or more aggravating circumstances exists, and if so, to weigh any aggravators against any mitigating circumstances. See Fla. Std. Jury Instr. (Crim.) 7.11, at 132-33. The instructions also provide that the jury's advisory sentence need not be unanimous, that a majority vote is necessary for a death recommendation, and that a vote of six or more jurors is necessary for a life recommendation. See id. at 133.

Under the law, therefore, the jury may recommend a sentence of death so long as a majority concludes that at least one aggravating circumstance exists. Nothing in the statute, the standard jury instructions, or the standard verdict form, however, requires a majority of the jury to agree on which aggravating circumstances exist. Under the current law, for example, the jury may recommend a sentence of death where four jurors believe that only the "avoiding a lawful arrest" aggravator applies, see § 921.141(5)(e), while three others believe that only the "committed for pecuniary gain" aggravator applies, see § 921.141(5)(f), because seven jurors believe that at least one aggravator applies.

The order in this case, however, requires a majority vote for at least one particular aggravator. This requirement imposes on the capital sentencing process an extra statutory requirement. Unless and until a majority of this Court concludes that Ring applies in Florida, and that it requires a jury's majority (or unanimous) conclusion that a particular aggravator applies, or until the Legislature amends the statute (see our discussion at section C below), the court's order imposes a substantive burden on the state not found in the statute and not constitutionally required.

Even if they did not impose an additional substantive burden, specific jury findings on aggravators without guidance about their effect on the imposition of a sentence could unduly influence the trial court's own determination of how to sentence the defendant. Under section 921.141(3), Florida Statutes, the trial court must independently determine the existence of aggravating and mitigating circumstances, and the weight to be given each. See Blackwelder v. State, 851 So.2d 650, 653 (Fla.2003) (reminding judges of their duty to independently weigh aggravating and mitigating circumstances and noting that a "sentencing order should reflect the trial judge's independent judgment about the existence of aggravating and mitigating factors and the weight each should receive"); Bouie v. State, 559 So.2d 1113, 1116 (Fla.1990) (holding that a trial court order must reflect the independent determination of the existence and weight of aggravating and mitigating circumstances). Our current system fosters independence because the trial court alone must make detailed findings about the existence and weight of aggravating circumstances; it has no jury findings on which to rely. Individual jury findings on aggravating factors would contradict this settled practice. Even assuming such a requirement was properly the province of the trial court, jury instructions about specific findings would have to be accompanied by clear directions about their effect, if any, on the trial court's own findings in determining the sentence. Such directions are more appropriately crafted in a rules proceeding than in an individual capital case.

The requirement of a majority vote on each aggravator is also an unnecessary expansion of Ring. The Court in Ring concluded that under Arizona's capital sentencing scheme, aggravating factors operate as the "functional equivalent of an element of a greater offense." 536 U.S. at 609, 122 S.Ct. 2428 (quoting

Apprendi, 530 U.S. at 494 n. 19, 120 S.Ct. 2348). Therefore, the Court held, the Sixth Amendment required that they be found by the jury. Id. Even if Ring did apply in Florida-an issue we have yet to conclusively decide-we read it as requiring only that the jury make the finding of "an element of a greater offense." Id. That finding would be that at least one aggravator exists-not that a specific one does. But given the requirements of section 921.141 and the language of the standard jury instructions, such a finding already is implicit in a jury's recommendation of a sentence of death. Our interpretation of Ring is consistent with the United States Supreme Court's assessment of Florida's capital sentencing statute. In Jones v. United States, 526 U.S. 227, 250-51, 119 S.Ct. 1215, 143 L.Ed.2d 311 (1999), the Court noted that in its decision in Hildwin v. Florida, 490 U.S. 638, 109 S.Ct. 2055, 104 L.Ed.2d 728 (1989), in which it concluded that the Sixth Amendment does not require explicit jury findings on aggravating circumstances, "a jury made a sentencing recommendation of death, thus necessarily engaging in the factfinding required for imposition of a higher sentence, that is, the determination that at least one aggravating factor had been proved." In requiring the jury to consider by majority vote each particular aggravator submitted rather than merely specifying whether one or more aggravators exist, the trial court in this case imposed a greater burden than the one the Supreme Court imposed in reviewing Arizona's judge-only capital sentencing scheme in Ring. But cf. State v. Timmons, 209 Ariz. 403, 103 P.3d 315, 318 (Ct.App.2005) (observing that in State v. Ring, 204 Ariz. 534, 65 P.3d 915 (2003), the Arizona Supreme Court construed the United States Supreme Court decision in Ring as requiring a jury finding on each aggravating factor supporting a death sentence).[FN1]

Allowing a trial court to require jury findings on individual aggravators also creates a potential inconsistency in capital sentencing proceedings. The State would face different burdens for obtaining a sentence of death in different courts, or even in the same court before different judges. Innovation regarding the jury's penalty-phase determinations cannot be accomplished with such an ad hoc approach. One critical concern reflected in the United States Supreme Court's capital sentencing jurisprudence is consistency. See, e.g., Lewis v. Jeffers, 497 U.S. 764, 774, 110 S.Ct. 3092, 111 L.Ed.2d 606 (1990) (stating that the principle that the death penalty cannot be arbitrarily or capriciously imposed

requires a State to "channel the sentencer's discretion by 'clear and objective standards' that provide 'specific and detailed guidance,' and that 'make rationally reviewable the process for imposing a sentence of death' ") (quoting Godfrey v. Georgia, 446 U.S. 420, 428, 100 S.Ct. 1759, 64 L.Ed.2d 398 (1980) (plurality opinion)); see also Barclay, 463 U.S. at 960, 103 S.Ct. 3418 (Stevens, J., concurring in the judgment) ("A constant theme of our cases ... has been emphasis on procedural protections that are intended to ensure that the death penalty will be imposed in a consistent, rational manner."). In Proffitt v. Florida, 428 U.S. 242, 96 S.Ct. 2960, 49 L.Ed.2d 913 (1976), the Court upheld the Florida capital sentencing scheme still in use today, rejecting a claim that our appellate review process is "ineffective or arbitrary." Id. at 258, 96 S.Ct. 2960. Were we to permit the special penalty-phase verdict ordered in this case, the disparity in procedures from case to case could result in a determination that the State is administering section 921.141 arbitrarily, contrary to the Eighth Amendment's ban on cruel and unusual punishments.

We cannot predict all the consequences of approving the trial court's order, but we are unwilling to approve ad hoc innovations to a capital sentencing scheme that both the United States Supreme Court and this Court repeatedly have held constitutional. See, e.g., Hildwin, 490 U.S. at 640-41, 109 S.Ct. 2055; Spaziano v. Florida, 468 U.S. 447, 467, 104 S.Ct. 3154, 82 L.Ed.2d 340 (1984); Barclay, 463 U.S. at 958, 103 S.Ct. 3418; Proffitt, 428 U.S. at 259, 96 S.Ct. 2960; Kormondy, 845 So.2d at 54; State v. Dixon, 283 So.2d 1, 11 (Fla.1973). Moreover, any special verdict on aggravators would have to be accompanied by clear instructions on how these changes affect the jury's role in rendering its advisory sentence and the trial court's role in determining whether to impose a sentence of death. To maintain consistency in our capital sentencing procedures, any changes should be made systematically.[FN2] Therefore, unless and until a material change occurs in section 921.141, the decisional law, the applicable rules of procedure, or the standard instructions and verdict form, a trial court departs from the essential requirements of law in requiring a special verdict form that details the jurors' votes on specific aggravating circumstances.

We therefore answer "yes" to the second certified question. We hold that a trial court departs from the essential requirements of

> law in a death penalty case by using a penalty phase special verdict form that details the jurors' determination concerning aggravating factors found by the jury.
>
> * * *
>
> FN1. We note that after Ring, Arizona amended its capital sentencing statute to require jury findings on individual aggravators. See Ariz.Rev.Stat. § 13-703.01(E) (Supp.2003), as amended by 2002 Ariz. Sess. Laws 5th Spec. Sess., ch. 1, § 3.
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> FN2. We note that, at the request of the Court, the Committee on Standard Jury Instructions in Criminal Cases and the Criminal Court Steering Committee have filed reports recommending amendments to the standard penalty-phase instructions and verdict form. We will give these recommendations careful consideration.

State v. Steele 921 So.2d 538, 540 -550 (Fla. 2005). (A full analysis of this decision will be set forth following the review of "miscellaneous" Apprendi cases)

Snelgrove v. State, 921 So.2d 560 (Fla. 2005) (Ring issues are moot where death sentences reversed and remanded for new penalty phase)

Sanders v. State, 912 So.2d 1286 (Fla. 2d DCA 2005) (non-death penalty decision by district court of appeal in context of offenses required to be set forth on verdict form)

Florida Dept. of Financial Services v. Freeman, 921 So.2d 598 (Fla. 2006) (Ring mentioned in context of review of payment for extraordinary services in capital case)

Penalver v. State, 926 So.2d 1118 (Fla. 2006) (Apprendi issues moot following reversal of conviction and remand for new trial)

Luton v. State, 934 So.2d 7 (Fla. 3d DCA 2006) (trial court finding that defendant convicted of violent felony within 5 years does not violate Apprendi)

Looney v. State, 941 So.2d 1017, 1022 fn.3 (Fla. 2006) (post conviction proceeding mentions Ring and Apprendi in the context of reviewing past history of case but issue not otherwise presented)

Coppola v. State, 938 So.2d 507, 510 fn. 1 (Fla. 2006) (reference to Ring and Apprendi as example during analysis concerning retroactive application of statutes)

Evans v. State, 946 So.2d 1, 15 -16 (Fla. 2006) (Ring raised in the context of post conviction – issue was raised on direct appeal and case was in the "appellate pipeline" but the issue is procedurally barred due to failure to make proper objection at trial)

Galindez v. State, 955 So.2d 517, 518 (Fla. 2007) (harmless error analysis applies to Apprendi/Blakely error) (Full analysis to follow this category of cases)

Thompson v. State, 949 So.2d 1169, 1173 (Fla. 1st DCA 2007) (Apprendi relief is not applied retroactively)

Jones v. State, 963 So.2d 180 (Fla. 2007) (Apprendi/Ring issues moot where death sentence reversed and remanded for imposition of life sentence)

Sims v. State, 967 So.2d 148, 154 (Fla. 2007) (Apprendi/Ring issues moot where conviction reversed and remanded for new trial)

Insko v. State, 969 So.2d 992 (Fla. 2007) (age is element of lewd and lascivious that must be alleged in indictment under Apprendi but requirement waived by lack of timely objection) (Full analysis to follow this category of cases)

State v. Sigler, 967 So.2d 835 (Fla. 2007) (the meaning of the Sixth Amendment right to trial by jury in a criminal case as articulated in Apprendi is binding on the court and Apprendi makes it clear that criminal convictions depend on jury findings as to each element of the crime.) (Full analysis to follow this category of cases)

Williams v. State, 33 FLW S32, 13 (Fla. January 10, 2008) (Apprendi/Ring issues moot where death sentence reversed and matter remanded for life sentence)

Green v. State, 33 FLW S73 (Fla. January 31, 2008) (Apprendi/Ring issues moot after Court reverses death sentence and remands for imposition of life sentence)

The analysis of State v. Steele, 921 So.2d 538 (Fla. 2005) reveals that in 2005 the Florida Supreme Court acknowledged that "Since Ring, this Court has not yet forged a majority view about whether Ring applies in Florida; and if it does, what changes to Florida's sentencing scheme it requires." Florida has since made that leap in the context of non-capital cases, but not with capital case. Yet, the question should logically depend on the wording of the statute rather than the existence of a prior federal case decided when the United States Supreme Court such as Walton v. Arizona, which obviously did not appreciate the problem with a judge alone finding a

"sentencing factor." The question about whether Ring applies to capital cases in Florida depends on Florida's statutory scheme and not on a prior decisions of the United States Supreme Court that was not recognizing the right to a jury determination of sentencing factors, but now is. However, the Florida Supreme Court, the district courts of appeal and the trial courts have been applying Apprendi to non-capital cases in Florida, as will be demonstrated when Galindez and Insko are next analyzed.

Before leaving Steele, it must be noted that the Florida Supreme Court also stated, "Consistent with these provisions, the standard jury instructions require the jury to determine whether one or more aggravating circumstances exists, and if so, to weigh any aggravators against any mitigating circumstances." (Underlining added for emphasis). That is an erroneous statement as will be developed later. Briefly, §§ 921.141(2) and/or (3), Florida Statutes, the statutory provisions to which the Court was referring, do NOT state that the jury must determine whether one or more aggravating circumstances exists. The statutes require that for the death penalty to be imposed there must be a finding that "sufficient aggravating circumstances exist, as enumerated in subsection (5)." The standard advanced by the Florida Supreme Court substantially deviates from that statutory language as will be developed later to show that article II, section 3 of the Florida Constitution is violated by the courts' deviation from these statutory requirements. This language is pointed out here so the distinction can be appreciated as it appears in the decisions of the Court.

Another significant problem with Steele is that it now stands as controlling precedent that precludes trial courts from using special verdict forms to provide the procedural due process to which capital defendants are entitled. This will be more fully developed later in this memorandum, but for now it bears mentioning that due process is flexible and the procedures that are required by the courts to be used re driven by the Due Process Clause of the Fourteenth Amendment. Morrissey v. Brewer, 408 U.S. 471, 481, 92 S.Ct. 2593, 33 L.Ed.2d 484 (1972). It matters not that statutes fail to specify that a particular finding is actually an element of the offense. Mullaney v. Wilbur, 421 U.S. 684, 697-98, 95 S.Ct. 1881, 44 L.Ed.2d 508 (1975). It

matters not that a statute fails to state that a defendant's guilt must be proved beyond a reasonable doubt. In re Winship, 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970). It matters not that a statute says that a finding of fact is to be made by the judge alone. Apprendi, supra; Cunningham v. California, 549 U.S.270, 127 S.Ct. 856, 166 L.Ed.2d 856 (2007). A court's responsibility to first enforce the rights guaranteed by the state and federal constitutions is not dependent on the statute telling the court to provide a jury or proof beyond a reasonable doubt. The court's enforcement of statutes is necessarily constrained to the parameters of the Constitution and is not dependent on the whims of the Legislature when statutes are drafted.

There are three other significant "miscellaneous" cases that deserve full analysis in this memorandum, and they are Galindez and Insko, and Sigler. Read together, they conclusively acknowledge that the reasoning in the Apprendi line of cases applies to non-capital cases in Florida and that the denial of the right to a jury finding beyond a reasonable doubt of an element of a criminal offense can be both harmless error and waived. Specifically, the cases state the following:

> PER CURIAM.
>
> In Galindez v. State, 910 So.2d 284, 285 (Fla. 3d DCA 2005), the Third District Court of Appeal certified conflict with the First District Court of Appeal's decision in Isaac v. State, 911 So.2d 813 (Fla. 1st DCA 2005), which held that Apprendi v. New Jersey, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000), and Blakely v. Washington, 542 U.S. 296, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004), decided after the defendant's conviction was final, apply to a subsequent resentencing. We have jurisdiction. See art. V, § 3(b)(4), Fla. Const.; Galindez v. State, 925 So.2d 1030 (Fla.2006) (granting review). As we explain below, we find that any failure to apply Apprendi and Blakely in this case constitutes harmless error. Accordingly, we need not determine whether these Supreme Court cases apply in such resentencings and we decline to resolve the conflict at this time.
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> I. APPRENDI AND BLAKELY AND THE CONFLICT IN THE DISTRICT COURTS

Below we first explain the holdings in Apprendi and Blakely and the pertinent facts of Galindez and briefly describe the conflict between the district courts. We then apply the Supreme Court's recent decision in Washington v. Recuenco, 548 U.S. 212, 126 S.Ct. 2546, 165 L.Ed.2d 466 (2006), to the facts of this case and conclude that any error in applying Apprendi and Blakely is harmless.

A. Apprendi and Blakely and Sentencing

The Supreme Court's decisions in Apprendi and Blakely have significantly affected criminal sentencing procedure at both the state and federal levels. In 2000, the Court held in Apprendi that "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." 530 U.S. at 490, 120 S.Ct. 2348. Four years later, the Court applied Apprendi in examining a sentence imposed upon the defendant's guilty plea. Blakely, 542 U.S. at 301; 124 S.Ct. 2531. Addressing the State's claim that the sentence fell within the statutory maximum, the Court stated the following:

> Our precedents make clear, however, that the "statutory maximum" for Apprendi purposes is the maximum sentence a judge may impose solely on the basis of the facts reflected in the jury verdict or admitted by the defendant. In other words, the relevant "statutory maximum" is not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose without any additional findings. When a judge inflicts punishment that the jury's verdict alone does not allow, the jury has not found all the facts "which the law makes essential to the punishment," and the judge exceeds his proper authority.

Id. at 303-04, 124 S.Ct. 2531 (citations omitted).

The Supreme Court recently applied the principles of Apprendi and Blakely to a determinate sentencing statute. Cunningham v. California, 549 U.S. 270, 127 S.Ct. 856, 166 L.Ed.2d 856 (2007). California's sentencing scheme granted trial courts discretion to

sentence defendants to one of three terms of years. The middle term was the designated default, but the trial court could impose the upper term upon its own finding of aggravating factors that the Supreme Court concluded were "neither inherent in the jury's verdict nor embraced by the defendant's plea." Id. at 860. Concluding that the middle term constituted the statutory maximum, the Court held that "[b]ecause the [statute] allocates to judges the sole authority to find facts permitting the imposition of an upper term sentence, the system violates the Sixth Amendment." Id. at 859.

With these three decisions, the Court effectively eliminated most judicial factfinding that would increase a sentence. Except for the fact of a prior conviction, a judge may not find any fact that exposes a defendant to a sentence exceeding the relevant statutory maximum, unless that fact inheres in the verdict, the defendant waives the right to a jury finding, or the defendant admits the fact. Under Apprendi, Blakely, and Cunningham, such sentence-elevating facts must be found by a jury, not a judge, and established beyond a reasonable doubt.

B. The Facts of the Case

Based on the evidence, including the twenty-four-year-old Galindez's admissions that he repeatedly had sexual relations with a twelve-year-old girl over a period of several months and impregnated her and the pregnant victim's testimony confirming those facts, a jury found Galindez guilty of two counts of lewd and lascivious assault on a minor and one count of child abuse by impregnating the victim. See §§ 800.04, 827.04(3), Fla. Stat. (1997). Galindez's sentencing scoresheet assessed 240 victim injury points (3 x 80) for sexual penetration, and the trial court sentenced Galindez to a guidelines sentence of thirty years in prison. The Third District affirmed. Galindez v. State, 728 So.2d 333 (Fla. 3d DCA 1999).

Galindez then filed a motion under Florida Rule of Criminal Procedure 3.800(a), alleging scoresheet error. See Galindez v. State, 831 So.2d 780, 780 (Fla. 3d DCA 2002). On rehearing, the district court held that Galindez's scoresheet "erroneously reflect[ed] an assessment of 80 victim injury points" for his conviction on one of the lewd and lascivious assault counts. Id.

Because "the conviction was for sexual union without penetration" and sexual penetration was not charged, the court held he should have been assessed only 40 points. Id. The Third District reversed and remanded for resentencing.

On October 30, 2003, the circuit court used a revised guidelines scoresheet assessing 200 victim injury points to sentence Galindez to 24 years in prison: 18 years on Count I (lewd assault on a minor); a consecutive sentence of six years on Count IV (lewd assault on a minor); and, concurrent with Count IV, a five-year sentence on Count V (child abuse by impregnation).

Almost immediately, Galindez filed a motion for resentencing, which the circuit court denied on November 21, 2003. Galindez appealed to the Third District. During the pendency of that appeal, he filed a motion in the circuit court under Florida Rule of Criminal Procedure 3.800(b), arguing for the first time that the assessment of victim injury points violated Apprendi because the jury did not make the victim injury findings. The circuit court denied the motion.

The following month, the United States Supreme Court decided Blakely. In considering Galindez's appeal, the Third District stated that the "primary issue" was whether Apprendi and Blakely "require the invalidation of any points for penetration because they were assessed by the court, rather than by the jury." Galindez, 910 So.2d at 284-85. The court held that to apply Apprendi and Blakely to the resentencing in this case would constitute their retroactive application and thus "alter the effect of a jury verdict and conviction." Id. at 285. The court certified conflict with the First District's contrary decision in Isaac.

C. The Conflict with Isaac

In light of our decision in Hughes v. State, 901 So.2d 837, 838 (Fla.2005), that Apprendi does not apply retroactively to cases that were final when it was decided, the Third District in Galindez held that to apply Apprendi and Blakely in a resentencing held after those opinions issued, when the conviction and original sentence were final before they issued, would constitute retroactive application. Galindez, 910 So.2d at 285. In the conflict case,

however, the First District held the opposite. See Isaac, 911 So.2d at 814.

Isaac's conviction was final in 1998, and his sentence was final the next year. See id. Subsequently, pursuant to a rule 3.800(a) motion, Isaac's sentence was vacated, and he was resentenced. During the pendency of his appeal from resentencing, he filed motions under Florida Rules of Criminal Procedure 3.850 and 3.800(b) raising claims of Apprendi error. See Isaac, 911 So.2d at 814; Isaac v. State, 826 So.2d 396, 396 (Fla. 1st DCA 2002). In considering the circuit court's denial of Isaac's 3.850 motion, the First District stated that the "heart" of Isaac's claim was that, by making the factual determination of an escalating pattern of criminal activity in imposing a departure sentence at resentencing, the trial court violated Apprendi, as clarified by Blakely. 911 So.2d at 814. The First District concluded that

> as Apprendi was decided prior to the appellant's resentencing, the trial court was bound by its holding. Although this Court previously affirmed the appellant's departure sentence on the basis that Apprendi does not apply so long as a sentence does not exceed the statutory maximum set forth in section 775.082, Isaac, 826 So.2d at 396, the statutory maximum has since been revealed to mean "the maximum sentence a judge may impose solely on the basis of the facts reflected in the jury verdict or admitted by the defendant." Blakely, 124 S.Ct. at 2537. Therefore, a departure sentence imposed pursuant to the trial court determining a fact by merely a preponderance of the evidence violates the holding of Apprendi as explained by Blakely.

Id. at 814-15; accord Moline v. State, 31 Fla. L. Weekly D701, --- So.2d ----, 2006 WL 504028 (Fla. 1st DCA Mar.3, 2006), notice invoking discretionary review filed, No. SC06-482 (Fla. Mar. 13, 2006).

Although these two district court decisions clearly conflict regarding the application of Apprendi and Blakely in resentencings held after a conviction is final, we express no opinion on this issue. As we explain below, if it was error not to apply these cases at the resentencing hearing, the error is harmless.

II. APPRENDI AND HARMLESS ERROR

We agree with the State that even if Apprendi and Blakely apply to Galindez's resentencing, any error is harmless beyond a reasonable doubt in this case. Although we have not previously addressed whether Apprendi error may be harmless, we have previously held that it is not fundamental error, and that the error must be preserved for appellate review in order to obtain relief. Hughes, 901 So.2d at 844 ("Finally, concerning Apprendi, we [have] held ... that a claim of Apprendi error must be preserved for review and we expressly rejected the assertion that such error is fundamental."). Recently, however, the United States Supreme Court addressed the harmless error issue directly. Below, we address (A) the applicable harmless error test, and (B) our conclusion that any error is harmless in Galindez's case.

A. The Applicable Harmless Error Test

The United States Supreme Court has recently addressed whether an Apprendi error can be harmless. In Washington v. Recuenco, 548 U.S. 212 126 S.Ct. 2546, 2549, 165 L.Ed.2d 466 (2006), the jury found the defendant guilty of assaulting his wife with a deadly weapon, which the information charged was "a handgun." At sentencing, the judge found that the defendant was armed with a "firearm" and imposed the three-year mandatory sentence enhancement attendant to that finding, rather than the one-year enhancement attendant to the jury's "deadly weapon" finding. On appeal, the State conceded that this violated Blakely and Apprendi, but argued the error was harmless. Id. at 2549-50. The Washington Supreme Court, however, had previously concluded that Apprendi/Blakely error could never be harmless. Id. at 2550 (quoting State v. Hughes, 154 Wash.2d 118, 110 P.3d 192, 205 (2005), which held that Blakely error was structural error requiring reversal). The Supreme Court granted review solely to determine whether harmless error analysis applies to such error.

The Court acknowledged that under Apprendi it "ha[d] treated sentencing factors, like elements, as facts that have to be tried to the jury and proved beyond a reasonable doubt." 126 S.Ct. at 2552. Accordingly, the Court found the case before it in Recuenco "indistinguishable from" Neder v. United States, 527 U.S. 1, 8, 119 S.Ct. 1827, 144 L.Ed.2d 35 (1999), explaining:

> The only difference between this case and Neder is that in Neder, the prosecution failed to prove the element of materiality to the jury beyond a reasonable doubt, while here the prosecution failed to prove the sentencing factor of "armed with a firearm" to the jury beyond a reasonable doubt. Assigning this distinction constitutional significance cannot be reconciled with our recognition in Apprendi that elements and sentencing factors must be treated the same for Sixth Amendment purposes.

Recuenco, 126 S.Ct. at 2552.

Because the question of Apprendi/Blakely error also involved judicial factfinding versus jury factfinding, the Court concluded that the harmless error analysis applied in Neder also applied to the error in Recuenco. Id. In Neder, the Court framed the test as follows: "Is it clear beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error?" Neder, 527 U.S. at 18, 119 S.Ct. 1827. The Court concluded that the same harmless error analysis developed in Chapman v. California, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967), and applied in cases concerning the erroneous admission of evidence under the Fifth and Sixth Amendments, also applied to infringement of the jury's factfinding role under the Sixth Amendment. Neder, 527 U.S. at 18, 119 S.Ct. 1827. The Court explained that

> a court, in typical appellate-court fashion, asks whether the record contains evidence that could rationally lead to a contrary finding with respect to the omitted element. If the answer to that question is "no," holding the error harmless does not "reflec[t] a denigration of the constitutional rights involved." Rose [v. Clark], 478 U.S. [570, 577, 106 S.Ct. 3101, 92 L.Ed.2d 460 (1986)].

527 U.S. at 19, 119 S.Ct. 1827. For example, in Neder, the jury instructions omitted the element of materiality, a fact which was improperly found by the judge in violation of the right to jury trial. Id. at 18, 119 S.Ct. 1827. The Court found that strong evidence supported the judicial finding and explained that "[i]n a case such

as this one, where a defendant did not, and apparently could not, bring forth facts contesting the omitted element, answering the question whether the jury verdict would have been the same absent the error does not fundamentally undermine the purposes of the jury trial guarantee." Id. at 19, 119 S.Ct. 1827.

This Court has long applied Chapman's harmless error analysis, which we outlined in State v. DiGuilio, 491 So.2d 1129 (Fla.1986), to claims of failure to instruct on an undisputed element. See Glover v. State, 863 So.2d 236, 237-38 (Fla.2003) (approving the district court's holding that the age of the defendant is an element of capital sexual battery but that any error in failing to instruct on this undisputed element was harmless); see also State v. Delva, 575 So.2d 643, 645 (Fla.1991) (stating that the failure "to instruct on an element of the crime over which the record reflects there was no dispute is not fundamental error" and is subject to the contemporaneous objection rule).

Finally, in Recuenco, the Supreme Court reversed the Washington Supreme Court's holding that harmless error analysis does not apply to Apprendi error. Accordingly, to the extent some of our pre- Apprendi decisions may suggest that the failure to submit factual issues to the jury is not subject to harmless error analysis, Recuenco has superseded them. See, e.g., State v. Estevez, 753 So.2d 1, 7 (Fla.1999) (holding that even where the evidence is uncontroverted, to sentence a defendant to a minimum mandatory sentence for trafficking, the jury must make express findings of the amount of cocaine involved); State v. Hargrove, 694 So.2d 729, 730 (Fla.1997) (holding that even where evidence regarding the use of a firearm is unrebutted, to impose mandatory minimum sentence, a jury must make that finding); State v. Overfelt, 457 So.2d 1385, 1387 (Fla.1984) (holding that to enhance a sentence because of the defendant's use of a firearm, the jury must find the defendant guilty of a crime involving a firearm or otherwise specifically find that a firearm was used).

We now turn to the question of harmless error in this case.

B. Apprendi Error Is Harmless in this Case

At resentencing, the trial court assessed 200 points for victim injury with regard to Counts I and IV (lewd and lascivious assault)

and Count V. Galindez contends that the trial court erred in assessing 80 points as to Count I. Count I charged that "on various occasions" in a four-month period, Galindez "committed an act defined as sexual battery" on a child "by placing his penis in union with ... and/or penetrating the vagina of A.M. (a minor) with his penis." Galindez claims that because the charge was made in the alternative (and therefore the jury did not specifically find that penetration was involved), the trial court could assess only 40 points for victim injury. [FN1] The exception in Blakely does not apply because Galindez did not waive the right to factfinding by a jury and did not admit the facts. Blakely, 542 U.S. at 303-304, 124 S.Ct. 2531.[FN2] Therefore, assuming Apprendi applies to Galindez's resentencing, for purposes of our harmless error analysis the issue is whether the failure to have the jury make the victim injury finding as to Count I contributed to the conviction or sentence-in other words, whether the record demonstrates beyond a reasonable doubt that a rational jury would have found penetration. Cf. Delvalle v. State, 653 So.2d 1078, 1079 (Fla. 5th DCA 1995) (citing DiGuilio and holding that where the defendant alleged that error regarding a lesser included offense deprived him of a jury pardon, "[g]iven the evidence adduced at trial, the error also was harmless, since it is inconceivable that any rational jury could have returned a verdict finding that there was no firearm involved in the commission of the charged offenses").

FN1. Although in his rule 3.800(b) motion Galindez disputed the trial court's assessing any victim injury points, he does not repeat that claim here.

FN2. Galindez's confession, which was admitted at trial, would not be an "admission" as contemplated in Blakely. The admissions to which the Court alluded were facts the defendant admits in a guilty plea. Blakely, 542 U.S. at 304, 124 S.Ct. 2531; cf. Shepard v. United States, 544 U.S. 13, 16, 125 S.Ct. 1254, 161 L.Ed.2d 205 (2005) (noting that in determining the nature of the defendant's prior conviction for sentence-enhancing purposes, the sentencer is "generally limited to examining the statutory definition [of the crime], charging document, written plea agreement, transcript of plea colloquy, and any explicit factual finding by the trial judge to which the defendant assented ") (emphasis added). Courts have included a defendant's testimony at sentencing and stipulations at trial in this category. See, e.g., United States v. Collier, 413 F.3d

858, 860-61 (8th Cir.2005) (holding "no Sixth Amendment violation" occurred because the defendant "chose to testify [at sentencing] and admitted the facts upon which the court imposed sentence"); United States v. Champion, 234 F.3d 106, 110 (2d Cir.2000) (finding that at trial the defendant stipulated to the quantity of drugs involved in the crime and "he would have been subject to a mandatory minimum sentence of 10 years, in any event"). Galindez's confession at arrest does not constitute an express agreement to a jury or judicial finding.

At trial the young victim, then pregnant by Galindez, testified that she and Galindez engaged in sexual intercourse on multiple occasions over a period of several months. Galindez's confession confirming these facts, including his admission that they repeatedly had sexual intercourse, was admitted at trial. Finally, Galindez's defense at trial was that the twelve-year-old victim consented. Thus, Galindez did not dispute the facts of the sexual relationship at trial, and he did not contest them at resentencing, either.

In light of the clear and uncontested record evidence of penetration regarding Count I, we hold that no reasonable jury would have returned a verdict finding there was no penetration. See Neder, 527 U.S. at 19, 119 S.Ct. 1827 ("[W]here a defendant did not, and apparently could not, bring forth facts contesting the omitted element, answering the question whether the jury verdict would have been the same absent the error does not fundamentally undermine the purposes of the jury trial guarantee."). Accordingly, we find the error in this case harmless beyond a reasonable doubt.

III. CONCLUSION

For the foregoing reasons, we hold that harmless error analysis applies to Apprendi and Blakely error. Accordingly, we approve the result but not the reasoning of the decision below.

It is so ordered.

LEWIS, C.J., and ANSTEAD, PARIENTE, QUINCE, and CANTERO, JJ., concur.

CANTERO, J., specially concurs with an opinion, in which WELLS and BELL, JJ., concur.

WELLS and BELL, JJ., concur in result only.

Galindez v. State, 955 So.2d 517, 518-524 (Fla. 2007). What is clear immediately following Galindez is that Florida's District Courts of Appeal and trial courts are applying the holdings of Apprendi and Blakely and Cunningham and the Florida Supreme Court is not preventing that from occurring, as it did when trial courts attempted to apply the reasoning in Apprendi in the context of capital proceedings in Florida. After the Court's holding in Insko, it is clear that the Sixth and Fourteenth Amendment rights to a jury trial as explained in Apprendi ARE being applied in non-capital cases in Florida with the blessing of the Florida Supreme Court.

Specifically, the Florida Supreme Court in Insko wrote the following:

> CANTERO, J.
>
> We must decide whether, for purposes of a statute outlawing lewd or lascivious conduct, the defendant's age is an element of the crime or a potential sentencing enhancement. If age is an element of the crime, then it must be alleged in the indictment or information, proven at trial, and found by the jury. If it is a potential sentencing enhancement, then, after the jury's verdict on guilt, a judge may consider it in determining whether to enhance the sentence. The Second District Court of Appeal held that it was a potential sentencing enhancement, see Insko v. State, 933 So.2d 679 (Fla. 2d DCA 2006) (Insko II), but certified to us a question of great public importance. Id. at 682-83. We granted review to answer the question. See Insko v. State, 937 So.2d 122 (Fla.2006). As we explain below, we hold that the age of the defendant is an element of the crime. Because we find that Insko waived the issue, however, we approve of the Second District's affirmance of the judgment in this case.
>
> I. STATEMENT OF FACTS AND PROCEDURE
>
> Insko was charged with lewd or lascivious conduct, in violation of section 800.04(6)(a)(2) and (b), Florida Statutes (2001). Under this provision, a person age eighteen or older who solicits a person under age sixteen to commit a lewd or lascivious act commits a second-degree felony punishable by up to fifteen years'

imprisonment. The jury was instructed that the State had to prove two elements beyond a reasonable doubt: that the victim was under age sixteen and that Insko solicited the victim to commit a lewd or lascivious act. The court also instructed the jury as follows:

> The punishment provided by law for the crime of lewd or lascivious conduct is greater depending on the age of the defendant. Therefore, if you find the defendant is guilty of lewd or lascivious conduct, you must determine by your verdict whether at the time of the offense: (a) the defendant was eighteen years of age or older; (b) the defendant was under the age of eighteen years.

The verdict form provided four alternatives: (1) guilty of Lewd or Lascivious Conduct (Solicit) (defendant eighteen years of age or older) as charged, a second-degree felony; (2) guilty of Lewd or Lascivious Conduct (Solicit) (defendant under eighteen years of age), a third-degree felony; (3) assault, a lesser-included offense Insko requested; and (4) not guilty. The jury chose the second alternative (defendant under eighteen years of age), and the court sentenced Insko to five years in prison.

Insko appealed, arguing that he was entitled to a new trial because the trial court allowed prejudicial evidence of prior bad acts. Insko v. State, 884 So.2d 312, 313-14 (Fla. 2d DCA 2004) (Insko I). The district court agreed and reversed for a new trial. Id. On remand, double jeopardy principles prevented a retrial for the offense of which Insko had been acquitted-lewd or lascivious conduct by a defendant at least eighteen years old. Before the retrial, Insko filed a motion to dismiss. Presenting a birth certificate showing that he was thirty-three years old at the time of the offense, Insko argued he could not be retried for the offense of which he had been convicted-lewd or lascivious conduct by a defendant under eighteen. The trial court concluded, however, that the age of the defendant was a potential sentencing enhancement, not an element of the crime, and therefore the fact that he was thirty-three years old did not prevent a retrial. Insko entered a plea to the third-degree offense, reserving the right to appeal the issue.

On appeal, the Second District followed "the determination made in Desbonnes[v. State, 846 So.2d 565 (Fla. 4th DCA 2003)],

which concludes that the age of the offender is not an element of the offense of lewd or lascivious conduct." Insko II, 933 So.2d at 682-83. The court certified the following question as one of great public importance: "In light of the ruling in Glover v. State, 863 So.2d 236 (Fla.2003), is the age of the offender an element of the offense of lewd or lascivious conduct under section 800.04(6), Florida Statutes?"

Below, we first consider the certified question. We then address Insko's claim of entitlement to a discharge.

II. ELEMENT OR SENTENCING FACTOR?

In this case, we consider whether the age of the defendant is an element of the crime of lewd or lascivious conduct or a sentencing factor. In criminal law, whether a fact constitutes an element of a crime carries constitutional implications. Historically, the "elements of a crime" are the facts " 'legally essential to the punishment to be inflicted.' " Harris v. United States, 536 U.S. 545, 561, 122 S.Ct. 2406, 153 L.Ed.2d 524 (2002) (plurality opinion) (quoting United States v. Reese, 92 U.S. 214, 232, 23 L.Ed. 563 (1876) (Clifford, J., dissenting)). Thus, to apprise the accused of the specific charges against him, an information or indictment must contain all facts essential to the "offence intended to be punished." United States v. Carll, 105 U.S. 611, 612-13, 26 L.Ed. 1135 (1881) (noting that the indictment should "set forth all the elements necessary to constitute the offence intended to be punished"); State v. Dye, 346 So.2d 538, 541 (Fla.1977) ("An information must allege each of the essential elements of a crime to be valid."); Fla. R.Crim. P. 3.140(d)(1) ("Each count of an indictment or information on which the defendant is to be tried shall allege the essential facts constituting the offense charged."); see also Hamling v. United States, 418 U.S. 87, 117, 94 S.Ct. 2887, 41 L.Ed.2d 590 (1974) (stating that although the language of a statute may be sufficient to generally describe an offense, the indictment must contain the facts and circumstances of the specific offense charged). Further, the "Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." In re Winship, 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970).

Of course, the legislature has full authority to define the elements of a crime. See State v. Giorgetti, 868 So.2d 512, 516 (Fla.2004). In doing so, however, it "must still 'act within any applicable constitutional constraints in defining criminal offenses.' " Id. (quoting Liparota v. United States, 471 U.S. 419, 424 n. 6, 105 S.Ct. 2084, 85 L.Ed.2d 434 (1985)). Thus, for example, the legislature may not evade these constitutional requirements by redefining elements and denominating them as "factors that bear solely on the extent of punishment." Mullaney v. Wilbur, 421 U.S. 684, 697-98, 95 S.Ct. 1881, 44 L.Ed.2d 508 (1975) (noting that the criminal law is "concerned not only with guilt or innocence in the abstract but also with the degree of criminal culpability" and finding unconstitutional Maine's requirement that the defendant prove that a killing occurred in the heat of passion).

The issue of whether a particular fact is an element of the crime or a sentencing factor has been rendered somewhat academic after Apprendi v. New Jersey, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000). Before that case, as stated above, if a fact was an element of the crime, it had to be submitted to the jury and proven beyond a reasonable doubt. If it was a sentencing factor, however, a judge could determine the fact at sentencing. In Apprendi, the Court noted that "[a]ny possible distinction between an 'element' of a felony offense and a 'sentencing factor' was unknown to the practice of criminal indictment, trial by jury, and judgment by court as it existed during the years surrounding our Nation's founding." Apprendi, 530 U.S. at 478, 120 S.Ct. 2348 (footnote omitted). Based on American jurisprudence, the Court stated that "[t]he judge's role in sentencing is constrained at its outer limits by the facts alleged in the indictment and found by the jury," meaning that "facts that expose a defendant to a punishment greater than that otherwise legally prescribed were by definition 'elements' of a separate legal offense." Id. at 483 n. 10, 120 S.Ct. 2348. Rejecting New Jersey's argument that the finding under the statute in that case was a sentencing factor, the Court stated that the legislature's placement of the provision in its sentencing provisions was not determinative and noted that the effect of the "enhancement" was "to turn a second-degree offense into a first degree offense, under the State's own criminal code." Id. at 494, 120 S.Ct. 2348. Accordingly, the Court held that "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted

to a jury, and proved beyond a reasonable doubt." Id. at 490, 120 S.Ct. 2348 (citing Jones v. United States, 526 U.S. 227, 119 S.Ct. 1215, 143 L.Ed.2d 311 (1999)). Regarding facts that form the basis for sentencing a defendant, the Court warned that "when the term 'sentence enhancement' is used to describe an increase beyond the maximum authorized statutory sentence, it is the functional equivalent of an element of a greater offense than the one covered by the jury's guilty verdict." Id. at 494 n. 19, 120 S.Ct. 2348. As a plurality of the Court later explained, "Read together, McMillan[v. Pennsylvania, 477 U.S. 79, 106 S.Ct. 2411, 91 L.Ed.2d 67 (1986)] and Apprendi mean that those facts setting the outer limits of a sentence, and of the judicial power to impose it, are the elements of the crime for the purposes of the constitutional analysis." Harris, 536 U.S. at 567, 122 S.Ct. 2406.

The Court subsequently clarified that the " 'statutory maximum' for Apprendi purposes is the maximum sentence a judge may impose solely on the basis of the facts reflected in the jury verdict or admitted by the defendant." Blakely v. Washington, 542 U.S. 296, 303, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004).[FN1] The Court explained that "the relevant 'statutory maximum' is not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose without any additional findings." Id. at 303-04, 124 S.Ct. 2531; see also Ring v. Arizona, 536 U.S. 584, 605, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002) (noting that Arizona's argument based on the distinction between an offense's elements and sentencing factors is rendered "untenable" by Apprendi's repeated instruction "that the characterization of a fact or circumstance as an 'element' or a 'sentencing factor' is not determinative of the question 'who decides,' judge or jury").

In this case, the issue of the defendant's age was submitted to the jury. The jury had a choice between, among other things, finding the defendant guilty of lewd or lascivious conduct (defendant eighteen years of age or older) and lewd or lascivious conduct (defendant under eighteen years of age). Therefore, Apprendi is not implicated.

As we noted earlier, Apprendi renders moot most discussions of whether a particular fact is an element of the crime or a potential sentencing enhancement. Both must now be submitted to the jury

and found beyond a reasonable doubt. Whether a fact is an element, however, remains important to whether it must be alleged in indictments and informations. And it is pertinent here-where a defendant must be retried after a conviction is reversed. Insko correctly notes, and the State does not dispute, that because the jury acquitted him of the greater crime-lewd or lascivious conduct on a person under sixteen by one eighteen or older-he cannot be retried for that crime. See, e.g., Brock v. State, 954 So.2d 87, 88 (Fla. 1st DCA 2007) (stating that "[b]y finding appellant guilty of the lesser-included offense of attempted sexual battery, the jury necessarily found appellant not guilty of the charged sexual battery," and "double jeopardy prohibits" the state again trying the defendant on the greater charge). On remand, the most Insko could be convicted of was lewd or lascivious conduct by a defendant under eighteen. Insko argues, however, that his age is an element of the offense that the State must prove at a retrial; and because the State cannot possibly prove that he was under eighteen years old-he was in fact thirty-three years old at the time of the crime-his case must be dismissed. We now address that issue.

III. THE CERTIFIED QUESTION

The certified question presents a pure legal issue. Therefore, our review is de novo. See, e.g., Kephart v. Hadi, 932 So.2d 1086, 1089 (Fla.2006) ("The interpretation of a statute is a purely legal matter and therefore subject to the de novo standard of review."), cert. denied, --- U.S. ----, 127 S.Ct. 1268, 167 L.Ed.2d 92 (2007). The question asks, "In light of the ruling in Glover v. State, 863 So.2d 236 (Fla.2003), is the age of the offender an element of the offense of lewd or lascivious conduct under section 800.04(6), Florida Statutes?" In other words, is the age of the offender a fact essential to the specific statutory offense?

We first review the statute, and then compare it to the one we considered in Glover.

The statute at issue provides as follows in pertinent part:

(6) LEWD OR LASCIVIOUS CONDUCT.-

(a) A person who:

> 1. Intentionally touches a person under 16 years of age in a lewd or lascivious manner; or
>
> 2. Solicits a person under 16 years of age to commit a lewd or lascivious act commits lewd or lascivious conduct.
>
> (b) An offender 18 years of age or older who commits lewd or lascivious conduct commits a felony of the second degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.
>
> (c) An offender less than 18 years of age who commits lewd or lascivious conduct commits a felony of the third degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.

§ 800.04(6), Fla. Stat. (2001).

Applying a plain language analysis, the Second District observed that paragraph (a) defines lewd or lascivious conduct and paragraphs (b) and (c) establish the offense level based on the defendant's age. The court concluded that "the wording and structure of the statute alone would lead us to conclude that the age of the offender is a sentencing consideration rather than an element of the offense itself." Insko II, 933 So.2d at 681. Our examination of the statute, however, leads us to the opposite conclusion.

We begin with paragraph (6)(a) of the statute, which defines "lewd or lascivious conduct." § 800.04(6)(a), Fla. Stat. (2001). That definition does not itself criminalize the conduct. To be sure, the paragraph states that the person engaging in the conduct "commits lewd or lascivious conduct." But it does not go further to provide that the conduct "is unlawful," see, e.g., § 810.13(4), Fla. Stat. (2005), or that the person who engages in the conduct "shall be guilty of," see, e.g., id. § 806.101, or "commits a felony," see, e.g., id. § 790.161(1). Standing alone, the definition "merely describe [s] some obnoxious behavior, leaving any reader assuming that it must be a crime, but never being actually told that it is." Jones, 526 U.S. at 233, 119 S.Ct. 1215.

Paragraphs (6)(b) and (c) of section 800.04 fill in the missing terms. Paragraph (6)(b) provides that "[a]n offender 18 years of age or older who commits lewd or lascivious conduct commits a felony of the second degree." This sentence makes lewd or lascivious conduct a crime. The person engaging in the conduct "commits a felony." Paragraph (c) also makes lewd or lascivious conduct a crime. It provides that "an offender less than 18 years of age who commits lewd or lascivious conduct commits a felony of the third degree." Accordingly, paragraph (a) is, in a sense, incomplete without paragraph (b) or (c).

Paragraphs (b) and (c), however, are independent of each other. A person eighteen or older "commits a felony of the second degree," but a person under age eighteen "commits a felony of the third degree." In each paragraph, the legislature has made the conduct a crime and provided different penalties conditioned on an additional fact, the age of the defendant. This structure more than suggests that the defendant's age is an element of the crime, not a sentencing factor.

Further, we note that it is not uncommon for the age of the defendant to be an element of sexual offenses. In similar statutes, other states have held the defendant's age to be an element. See, e.g., Staton v. State, 853 N.E.2d 470, 471, 472 n. 1 (Ind.2006) (holding that the defendant's age was an element of the crime in a statute providing that a person at least eighteen years of age who, with a child at least fourteen years of age but less than sixteen years of age, performs or submits to sexual intercourse or deviate sexual conduct commits sexual misconduct with a minor, a Class C felony); State v. Watson, 900 So.2d 325, 331 (La.Ct.App.2005) (stating that the essential elements of the crime of molesting a juvenile include that "the accused was over the age of seventeen"); Robinson v. State, 904 So.2d 203, 206 (Miss.Ct.App.2005) (stating that, under a subsection providing that the victim be under the age of fourteen and the accused be twenty-four months older than the child, the age of the defendant is an element of sexual battery).

Florida courts also have found the defendant's age to be an element in such statutes. In considering a similar statute, we held that the age of the defendant was an element of sexual battery. In Glover, the defendant was convicted of capital sexual battery. Like the statute here, that statute did not criminalize sexual battery

within the definition. The statute defined sexual battery as "oral, anal, or vaginal penetration by, or union with, the sexual organ of another or the anal or vaginal penetration of another by any other object; however, sexual battery does not include an act done for a bona fide medical purpose." § 794.011(1)(h), Fla. Stat. (1999). The statute then declared sexual battery a crime in certain circumstances, including the following:

> (2)(a) A person 18 years of age or older who commits sexual battery upon, or in an attempt to commit sexual battery injures the sexual organs of, a person less than 12 years of age commits a capital felony, punishable as provided in ss. 775.082 and 921.141.
>
> (b) A person less than 18 years of age who commits sexual battery upon, or in an attempt to commit sexual battery injures the sexual organs of, a person less than 12 years of age commits a life felony, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.

§ 794.011(2), Fla. Stat. (1999). The Fifth District held that because the victim's age was an element of the crime, "the age of the defendant, set out in the same section of the statute creating the offense, should also be." Glover v. State, 815 So.2d 698, 699 (Fla. 5th DCA 2002). We agreed. Glover, 863 So.2d at 238.

The State argues that the sexual battery statute is different because section 794.011(1)(h) does not make sexual battery a crime; only later subsections do so. The State contends that, in contrast, section 800.04(6) (that is, paragraphs (a), (b), and (c)) itself defines lewd or lascivious conduct and provides the punishment depending on the defendant's age. Stated a different way, the sexual battery statute makes sexual battery a crime only under certain enumerated circumstances, while under the statute in this case lewd or lascivious conduct is always a crime; the age of the defendant determines only the degree of the offense. While we understand the distinction, we disagree that it makes the defendant's age a sentencing factor instead of an element of the offense.

Section 800.04(6) is similar to the statute we considered in Glover: one paragraph defines the offense, while others make the conduct a crime and establish the degree of the crime. As we explained above, the definition of lewd or lascivious conduct does not make such conduct a crime. See § 800.04(6)(a), Fla. Stat. (2001). Paragraph (a) defines lewd or lascivious conduct for purposes of paragraphs (b) and (c). Similarly, paragraph (1)(h) of section 794.011 defines "sexual battery" for purposes of subsection (2)(a) and (b), which then criminalize the conduct and designate capital and life felonies depending on the defendant's and the victim's ages.

Comparing these statutes, other Florida courts have concluded that the age of the defendant is an element of lewd or lascivious conduct. In State v. D.A., 939 So.2d 149 (Fla. 5th DCA 2006), the Fifth District considered the question in the context of the lewd or lascivious molestation statute. See § 800.04(5), Fla. Stat. (2001). Section 800.04(5) is structured similarly to subsection (6). Paragraph (5)(a) describes the conduct of lewd or lascivious molestation and paragraphs (b), (c), and (d) criminalize the conduct and ascribe the classification and degree of the offense based on both the offender's age and the victim's age. Before our decision in Glover, the Fourth District had considered section 800.04(5) and held that the age of the offender was a sentencing factor. Desbonnes v. State, 846 So.2d 565, 566 (Fla. 4th DCA 2003). In D.A., however, the Fifth District concluded, based on Glover, that the age of the defendant was an element of lewd or lascivious molestation. The court commented on the Second District's decision in this case to follow Desbonnes:

> While we agree with the Second District's conclusion that under a "plain reading" of the statute, the age of the defendant is probably more properly viewed as a sentencing consideration, and not an element of the offense, we do not believe that Glover can be distinguished. The very reason that the Fourth District applied its analysis and holding from Jesus[v. State, 565 So.2d 1361 (Fla. 4th DCA 1990)] in Desbonnes was that the two statutes are "virtually identical." This being true, we believe that we are compelled by Glover to conclude that

> the age of the defendant is also an element of the crime of lewd or lascivious molestation.

D.A., 939 So.2d at 152-53.[FN2]

The State's contention that the age of the defendant is not an element in subsection 800.04(6) fails to recognize the integral role the fact plays in defining the crime. As stated above, an element is a fact essential to the offense charged. This includes material facts necessary to determine the degree of the offense.

An example from a different statute is instructive. Section 812.014(1), Florida Statutes (2001), defines "theft." Subsection (2) provides various degrees and classifications of grand theft (and thus varying punishments), that are largely, though not exclusively, based on property value. If the property stolen is valued at $300 or more, grand theft is a felony of the third degree. Id. § 812.014(2)(c). Thus, in a prosecution for the crime of third-degree grand theft, one of the elements is the value of the items taken. See V.W. v. State, 870 So.2d 102, 103 (Fla. 2d DCA 2003) ("With certain exceptions not material here, one of the elements of grand theft of the third degree is that the value of the property stolen is $300 or more."); cf. Peoples v. State, 760 So.2d 1141, 1143 (Fla. 5th DCA 2000) (holding that proof of the value of a fire extinguisher was not required where the statute provided that the theft of "[a]ny fire extinguisher" was a third-degree grand theft). Accordingly, courts have held that where a timely motion or objection is raised that the evidence does not support the value required for the degree of the crime charged, a conviction for that specific theft offense cannot stand. See Pickett v. State, 839 So.2d 860, 862 (Fla. 2d DCA 2003) (reversing the trial court's denial of a motion for judgment of acquittal because the State failed to prove that the value of stolen property exceeded $300, and remanding for "entry of conviction and sentence for petit theft of the second degree"); see also Pena v. State, 901 So.2d 781, 785-86 (Fla.2005) (holding that the defendant's age was an element of first-degree murder by drug distribution, but that this was not a situation where the charge was totally unsupported by the evidence or "the State had to prove the value of items when such value was necessary to sustain a higher-grade offense"); State v. Rodriguez, 575 So.2d 1262, 1264 (Fla.1991) (holding that prior DUI convictions are an essential element of felony DUI); State v. Harris, 356 So.2d 315,

316 (Fla.1978) (stating that the statute's requirement of prior petit larceny convictions was an element of the offense raising the offense level from a second-degree misdemeanor to a third-degree felony).

The statute in this case is similar. That is, the age of the defendant under section 800.04(6) is necessary to the provision criminalizing the conduct and ascribing the degree of the crime. It is therefore an element of second- and third-degree felony lewd or lascivious conduct. Unless a defendant who commits lewd or lascivious conduct is at least eighteen years old at the time of the offense, he cannot be convicted of a second-degree felony. Thus, the definition of the crime is integrally linked to the defendant's age. In other words, to establish a second-degree felony, the State must prove that the defendant is at least eighteen years old. Otherwise, the crime is only a third-degree felony. Thus, under Glover the defendant's age is an element of the crime. In this statute, the defendant's age does not enhance a separately prescribed sentence; it determines the statutory maximum of the offense. The fact of the defendant's age functions this same way in the sexual battery statute.

Accordingly, we hold that the defendant's age is an element of the offense of lewd or lascivious conduct under section 800.04(6), Florida Statutes (2001).

IV. THE DEFENDANT'S WAIVER

Although we agree with Insko that a defendant's age is an element of the offense of lewd or lascivious conduct, we nevertheless conclude that he is entitled to no relief. Insko waived any claim to relief long before the retrial.

Under the contemporaneous objection rule, to preserve error for review a litigant must object at trial. This requirement is "based on practical necessity and basic fairness in the operation of a judicial system." Castor v. State, 365 So.2d 701, 703 (Fla.1978). The rule "not only affords trial judges the opportunity to address and possibly redress a claimed error, it also prevents counsel from allowing errors in the proceedings to go unchallenged and later

using the error to a client's tactical advantage." F.B. v. State, 852 So.2d 226, 229 (Fla.2003).

Jury instructions are subject to the rule. State v. Delva, 575 So.2d 643, 644 (Fla.1991). Thus, unless fundamental error occurred, to obtain appellate review of a claimed error in instructing the jury, a party must have preserved the error by timely objection. Id. Both the erroneous omission of instruction on an uncontested element of an offense, id. at 645, and the erroneous inclusion of instruction on an element that "the State does not argue is present and about which it presents no evidence," must be preserved by contemporaneous objection. State v. Weaver, 957 So.2d 586, 588 (Fla.2007); see also Pena v. State, 901 So.2d 781, 784 (Fla.2005) (holding that the failure to instruct the jury that the defendant's age is an element of first-degree murder by drug distribution was not fundamental, and noting that the element was undisputed and no timely objection was raised); Glover, 863 So.2d at 238 (holding that the defendant's age is an element of capital sexual battery, but affirming the conviction because the failure to so instruct the jury was not fundamental where the element was undisputed). So, too, must almost all claims that the evidence was insufficient. F.B., 852 So.2d at 230.

As noted earlier, the verdict form in this case gave the jury several options: it could find Insko guilty of lewd or lascivious conduct by a person age eighteen or older, a second-degree felony; it could find Insko guilty of the lesser crime of lewd or lascivious conduct by a defendant less than eighteen, a third-degree felony; it could find Insko guilty of simple assault, a misdemeanor; or it could acquit Insko altogether. Although it was apparently obvious that Insko was eighteen or older (he was thirty-four years old at the time of the trial), the jury exercised its pardon power and found him guilty of only the third-degree felony, reducing the maximum possible prison term from fifteen years to five.[FN3]

At the original trial, the defendant reviewed the jury instructions, which included an instruction on lewd or lascivious conduct by a defendant under age eighteen. He also reviewed the verdict form providing this alternative. He specifically stated that he did not object to them. He also did not object when the court instructed the jury on the lesser felony and did not object when the jury found him guilty of the lesser crime. Nor, on appeal, did he

raise any argument about his age and the offense of which the jury found him guilty. See Insko I, 884 So.2d at 313; Insko II, 933 So.2d at 683 (Wallace, J., concurring) ("Following his initial conviction in the trial court, Insko did not challenge the jury's verdict on the ground that he could not be convicted of the third-degree felony offense of lewd or lascivious conduct because he was eighteen years of age or older at the time of the offense."). In any event, such an argument would have had little chance of success. See Jones v. State, 492 So.2d 1124, 1126 (Fla. 3d DCA 1986) (stating, in response to the defendant's argument he could not be retried for attempt because the evidence showed a completed burglary, that "[a]n accused who is convicted of an attempt as the lesser of a charged offense will not be heard to complain that he should be set free merely because the evidence shows that he was guilty of the greater offense").

Instead, Insko raised this claim for the first time after the Second District reversed his conviction on other grounds and remanded for a new trial. We recently held that a similar argument was waived in the context of a theft claim where the State failed to prove the amount stolen. In F.B. v. State, the defendant had been adjudicated delinquent for petit theft of items valued between $100 and $300. F.B., 852 So.2d at 227. The State presented evidence of the items stolen, but not about their value. Id. The defendant did not object. Instead, he claimed on appeal that the State's failure to prove an essential element of the crime was fundamental error. We held "that, with two exceptions, a defendant must preserve a claim of insufficiency of the evidence through timely challenge in the trial court." Id. at 230. The first exception is in death penalty cases, in which our review of the sufficiency of the evidence is required by rule; the second "occurs when the evidence is insufficient to show that a crime was committed at all." Id. Insko's case does not fall within either exception. He is not a death-sentenced prisoner, and the evidence is not insufficient to show that a crime was committed. Accordingly, Insko was required to object to preserve the error and, having failed to do so, waived it.

V. CONCLUSION

In light of the foregoing, we hold that the age of the defendant is an element of the offense of lewd or lascivious conduct under section 800.04(6). By failing to object to the instruction allowing

> the jury to find that he was under eighteen when he committed the offense, however, Insko waived the claim. We therefore approve the judgment below affirming Insko's conviction and sentence.
>
> It is so ordered.
>
> FN1. The Court distinguished indeterminate sentencing schemes and those that impose statutory minimum sentences because they do not involve imposition of a sentence greater than state law authorizes. Blakely, 542 U.S. at 304-05, 308-09, 124 S.Ct. 2531.
>
> FN2. In Glover, we disapproved of the Fourth District's decision in Jesus. Glover, 863 So.2d at 238.
>
> FN3. As we recently explained, the jury's "pardon power" is its ability to convict a defendant of a lesser offense despite evidence supporting the greater one. Sanders v. State, 946 So.2d 953, 957-58 (Fla.2006).
>
> LEWIS, C.J., and WELLS, ANSTEAD, PARIENTE, QUINCE, and BELL, JJ., concur.

Insko v. State, 969 So.2d 992, 994-1003 (Fla. 2007).

The Florida Supreme Court in Insko leaves no room to doubt the applicability of the analysis of the United States Supreme Court in Apprendi to non-capital cases in Florida. The Court acknowledged that the Apprendi analysis "renders somewhat academic" whether a statutorily required finding is an element of the offense or a sentencing factor – both must be submitted to the jury and proved beyond a reasonable doubt. The Court in Insko goes further, though, and holds that the factual distinction must be alleged in the charging document. At least the same procedural due process that the Florida courts are providing non-capital defendants must be provided to defendants facing the death penalty.

Any remaining doubt as to whether Florida courts are applying the reasoning in Apprendi to non-capital cases in Florida is removed by Sigler, where the Court applied the analysis in Apprendi and Blakely to hold that §924.34, Florida Statutes, is unconstitutional under the Sixth

and Fourteenth Amendments to the extent that it allows a court to direct entry of a verdict of guilt for a lesser included offense containing elements that have not been passed upon by the jury:

> QUINCE, J.
>
> We have on appeal a decision from the Fourth District Court of Appeal declaring invalid a state statute. Sigler v. State, 881 So.2d 14 (Fla. 4th DCA 2004). We have jurisdiction. See art. V, § 3(b)(1), Fla. Const. For the reasons that follow, we affirm the district court's determination that application of section 924.34, Florida Statutes (2001), in this instance, is contrary to the Sixth Amendment right to jury trial. We remand the issue of whether the defendant is guilty of third-degree murder for resolution by a jury.
>
> FACTUAL AND PROCEDURAL HISTORY
>
> The Fourth District Court of Appeal summarized the facts of this case in Sigler's first appearance before that court as follows:
>
> > While appellant was serving a lawful twenty year prison sentence, he, with the aid of his mother and three of his friends, including Christopher Michelson, crafted and successfully carried out an elaborate scheme for appellant's escape from the state prison in Miami-Dade County. At an agreed time, one cohort drove a stolen semi-tractor trailer through the prison's perimeter fence, and simultaneously the other three arrived in two, possibly three, getaway cars. During the commotion, appellant ran through the breach in the prison fence and entered one of the getaway cars, whereupon all sped away to a rendezvous point. There, an exchange of cars and drivers occurred as police were approaching. Although the others were apprehended on the spot, appellant and Michelson successfully fled the scene in a Saturn automobile owned by appellant's mother. The two drove to the City of Lake Worth where they stayed overnight in a motel. There they watched television reports of

> the escape, and became aware that the police were on the lookout for the Saturn.
>
> Around noon of the following day, the two left the motel in the Saturn, with Michelson driving. En route to Ft. Lauderdale to visit Michelson's family, they were spotted by a police officer. A high speed chase ensued with Michelson accelerating to speeds estimated as high as eighty miles an hour. Eventually, he turned into a narrow alley, at the end of which he ran a stop sign, crossed the transverse street, and entered the alley in the next block. Continuing at high speed, he ran a stop sign at the next transverse street where, tragically, he crashed into another car, killing its driver. Appellant and Michelson were arrested at the scene of the fatal collision.

See Sigler v. State, 805 So.2d 32, 33-34 (Fla. 4th DCA 2001) (Sigler I).

Sigler was indicted and tried for first-degree felony murder which the State alleged was committed while he was engaged in an escape. At the request of the State and over Sigler's objection, the jury was instructed on first-degree felony murder as charged, as well as the lesser-included offenses of second-degree murder and third-degree felony murder. The jury found Sigler guilty of the lesser-included offense of second-degree murder,[FN1] and he was sentenced to life in prison.

Sigler appealed, raising the issue of whether there was sufficient evidence to sustain his conviction of second-degree murder. The district court reasoned that "[s]ince appellant was neither the driver, owner, nor in control of the car which crashed into and killed the victim, his criminal liability, if any, normally would have to be established under a principal theory." Sigler I, 805 So.2d at 34. Finding no evidence of ill will, hatred, spite or evil intent directed at the victim by the driver of the car, Michelson, the court opined they did not need to decide whether Sigler, a passenger, could be convicted as a principal. Therefore, the district court reversed the conviction for depraved mind

second-degree murder based on a lack of evidentiary support. See Sigler I, 805 So.2d at 35.

The Fourth District indicated that section 924.34, Florida Statutes (2001), allows an appellate court to reverse a judgment and direct the trial court to enter a judgment for a necessarily lesser-included offense. See Sigler I, 805 So.2d at 35 (citing I.T. v. State, 694 So.2d 720 (Fla.1997)). In directing the entry of judgment for third-degree murder, the district court reasoned that "the underlying crime supporting the third-degree felony murder charge was the offense of harboring, concealing or aiding an escaped prisoner" as defined by section 944.46, Florida Statutes (2001). Id.

The district court opined that it was clear that Michelson could be convicted of third-degree felony murder committed in furtherance of the crime harboring an escaped prisoner, i.e., Sigler. However, the question for the court was whether Sigler, the escapee, could be guilty of concealing, assisting, or giving aid to himself. See Sigler I, 805 So.2d at 35. In finding that Sigler could be guilty of third-degree murder based on harboring himself, the district court reasoned that under section 777.011, Florida Statutes (1997), both the person who aids and abets in the commission of the crime and the person who otherwise procures the commission of the crime are principals in the first degree. See Sigler I, 805 So.2d at 36. The Fourth District said, "[i]n order to be guilty as a principal for a crime physically committed by another, one must intend that crime be committed and do some act to assist the other person in actually committing the crime." Id. (quoting Staten v. State, 519 So.2d 622, 624 (Fla.1988)); see also Arroyo v. State, 705 So.2d 54 (Fla. 4th DCA 1997) (indicating that in order to be guilty as a principal or as an aider and abetter to a crime, the defendant must intend that the crime take place and must do some act which did or was intended to incite, cause, encourage, assist, or advise in the commission of the crime).

The district court concluded that the evidence supported a finding that the defendant was a perpetrator of the underlying felony of harboring, and thus a principal in the homicide committed to further the common criminal design. Sigler, 805 So.2d at 36. The judgment and sentence for second-degree murder was reversed and vacated, and the trial court was directed to "enter

a judgment of third-degree felony murder as a lesser-included offense of that charged in the indictment, and to sentence appellant thereon accordingly." Id. at 37.

On remand, Sigler filed a motion for discharge in the trial court arguing that a third-degree felony murder conviction "would be illegal because the jury had not found him guilty of an essential element of the offense, namely the underlying offense of harboring an escapee." Sigler v. State, 881 So.2d 14, 16 (Fla. 4th DCA 2004) (Sigler II). The motion was denied, and the trial court followed the mandate and entered the conviction for third-degree felony murder. On appeal, the State cited to Greene v. Massey, 384 So.2d 24, 28 (Fla.1980), for the proposition that the correctness of the third-degree felony murder conviction is the law of this case because the Fourth District confronted the issue in Sigler I and concluded that such a conviction was proper. Sigler, however, countered that pursuant to Zolache v. State, 687 So.2d 298, 299 (Fla. 4th DCA 1997), appellate courts have the power to correct significant mistakes in spite of the law of the case doctrine. See Sigler II, 881 So.2d at 17.

The Fourth District examined the defendant's argument that when the jury convicted him of second-degree murder, it did not have to determine beyond a reasonable doubt whether he had committed any felony, much less the felony of harboring an escapee. See Sigler II, 881 So.2d at 17. Thus, the jury could not have found him guilty of any underlying felony. While the Fourth District took notice that the jury actually exonerated the defendant of the first-degree felony murder charge, which required proof of an underlying felony, it reasoned that "[b]ecause the verdict in this case is general, we have no way of ascertaining which element of first-degree felony murder was not proved beyond a reasonable doubt." Id. Assuming that the "jury could well have based its decision on the failure of the evidence to prove an underlying felony," the Fourth District concluded "a conviction for third degree felony murder may actually conflict with that precise finding by the jury." Id. The court opined that the original jury verdict could in no way be read to include a determination on any predicate felony, and the jury's verdict did not include a determination beyond a reasonable doubt of all of the elements necessary to prove third-degree murder. The Fourth District further reasoned that the question of Sigler's guilt for third-degree murder

had to be submitted and determined by a jury and reasoned that "the decision by the Judges of this Court in Sigler I was not a 'constitutionally acceptable substitute' for such a jury determination." Id. at 18.

In reaching this conclusion the Fourth District cited with approval the First District's decision in Pratt v. State, 668 So.2d 1007 (Fla. 1st DCA), approved, 682 So.2d 1096 (Fla.1996). The defendant in Pratt was convicted of attempted third-degree felony murder, which was no longer a crime after this Court's decision in State v. Gray, 654 So.2d 552 (Fla.1995). On appeal the State argued that the defendant was not entitled to a new trial but that pursuant to section 924.34, the appellate court should direct the trial court to enter a conviction on the offense of attempted manslaughter, a necessarily lesser-included offense to the charged offense of attempted second-degree murder with a weapon. The district court rejected the State's argument and said:

> Were we to adopt the state's position and direct entry of judgment for attempted manslaughter (an intent crime) pursuant to section 924.34, we necessarily would be acting as the fact-finder and would have to assume the presence of the requisite intent. Such a result would encroach impermissibly upon the province of the jury. We conclude that the appellant would be effectively denied his constitutional right to trial by a jury if we, sitting in an appellate capacity, were to presume a finding of intent that the jury itself did not have to make.

Pratt, 668 So.2d at 1009. On discretionary review in this Court, we approved the decision of the district court and remanded the case for proceedings based on any lesser offense that had been instructed on at trial.

Likewise, the Fourth District opined that section 924.34 did not control the case because the statute does not control over the United States Supreme Court decision of Apprendi v. New Jersey, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000). The court indicated that the meaning of the Sixth Amendment right to trial by jury in a criminal case as articulated in Apprendi was binding on the court, and that Apprendi made it clear that criminal convictions

depend on jury findings as to each element of the crime. Sigler II, 881 So.2d at 19. Then, citing to Blakely v. Washington, 542 U.S. 296, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004), the court said that the Supreme Court reiterated the importance of the jury's determination of all of the elements of a crime. Thus, the court concluded that "these later decisions [Apprendi and Blakely] make it clear beyond any doubt that section 924.34 as interpreted in I.T. is contrary to the Sixth Amendment when the previous jury determination cannot be deemed to have necessarily found the defendant guilty as to every element of the permissive lesser-included offense." Sigler II, 881 So.2d at 20. We agree and affirm this decision.

DISCUSSION

I

Law of the Case/Manifest Injustice

As a threshold issue, the Fourth District Court of Appeal addressed the matter of whether it could consider the issue of the defendant's conviction for third-degree murder based on the fact that the district court had directed the trial court, in its prior opinion, to enter a conviction for third-degree murder. Thus, the State argued that the law of the case doctrine precluded relitigation of that issue, citing to this Court's opinions of Greene v. Massey, 384 So.2d 24 (Fla.1980), and Strazzulla v. Hendrick, 177 So.2d 1 (Fla.1965). The State makes the same argument to this Court, albeit in a summary fashion, and says there would be no manifest injustice if the defendant is convicted of third-degree murder. We have said, and the State acknowledges, that issues which have previously been addressed by the court may be reconsidered where there have developed material changes in the evidence or where reliance on the prior decision would result in manifest injustice. See Henry v. State, 649 So.2d 1361, 1364 (Fla.1994) (citing Preston v. State, 444 So.2d 939, 942 (Fla.1984); Greene v. Massey, 384 So.2d at 28; Steele v. Pendarvis Chevrolet, Inc., 220 So.2d 372, 376 (Fla.1969)).

The Fourth District indicated that it would reconsider the issue that was decided in its Sigler I opinion because, "[i]f an illegal conviction is not well within the concept of exceptional

circumstances and manifest injustice requiring a relaxation of the law of the case, it is not easy to imagine what would be." Sigler II, 881 So.2d at 17. While the State argues a third-degree murder conviction would not be manifest injustice, the State has failed to demonstrate why the Fourth District's holding in this instance is error. Therefore, we affirm the Fourth District on this issue.

II

Constitutionality of Section 924.34

The real thrust of the State's argument to us is that the Fourth District erred in not applying section 924.34 and the decision in I.T. to this case. The State maintains that application of this statutory provision and case law allows the appellate court to direct a conviction for the lesser offense of third-degree murder. Sigler, on the other hand, argues that the district court correctly held section 924.34 unconstitutional as applied to him. Sigler further asserts the district court incorrectly held that an escaped prisoner can be guilty of harboring himself under a principal theory, and that he cannot be convicted of third-degree felony murder with harboring as the underlying felony.

Thus, the issue before this Court is whether application of section 924.34, Florida Statutes, to the facts of this case is a violation of Sigler's right to a trial by jury. We hold that to the extent that section 924.34 can be interpreted to allow entry of a conviction by an appellate court for a crime where the jury has not determined all of the elements of that crime beyond a reasonable doubt, section 924.34 is a violation of the Sixth Amendment right to a trial by jury. The courts of this state have consistently held that judicial interpretation of statutes and determinations concerning the constitutionality of statutes are pure questions of law subject to the de novo standard of review. See City of Miami v. McGrath, 824 So.2d 143 (Fla.2002); Dep't of State v. Martin, 885 So.2d 453, 456 (Fla. 1st DCA 2004) (citing Racetrac Petroleum, Inc. v. Delco Oil, Inc., 721 So.2d 376, 377 (Fla. 5th DCA 1998)), aff'd, 916 So.2d 763 (Fla.2005). We apply this standard in interpreting section 924.34.

Section 924.34, Florida Statutes,[FN2] entitled "When evidence sustains only conviction of lesser offense," provides:

> When the appellate court determines that the evidence does not prove the offense for which the defendant was found guilty but does establish guilt of a lesser statutory degree of the offense or a lesser offense necessarily included in the offense charged, the appellate court shall reverse the judgment and direct the trial court to enter judgment for the lesser degree of the offense or for the lesser-included offense.

In this Court's earlier interpretation of section 924.34, we held this section was only applicable when the crime charged has lesser statutory degrees or where there are necessarily lesser-included offenses of the crime charged. See Gould v. State, 577 So.2d 1302 (Fla.1991). However, in 1997, we receded from Gould, and we held, in I.T. v. State, 694 So.2d 720, 724 (Fla.1997), the term "lesser offense necessarily included in the offense charged" not only includes necessarily lesser-included offenses but also permissive lesser-included offenses. The State relies on our decision in I.T. to support its argument that Sigler was properly convicted of third-degree murder in the trial court.

The State's reliance on I.T. is misplaced as the situation addressed in I.T. is distinguishable from the facts and circumstances of this case. In I.T. this Court was asked to determine whether the district court could direct the trial court to enter a judgment pursuant to section 924.34 for a permissive lesser-included offense. The juveniles involved in that case had in fact been adjudicated delinquent of the offense charged-grand theft of a motor vehicle. The Second District Court of Appeal determined that the evidence did not support a charge of grand theft. See I.T. v. State, 657 So.2d 1241 (Fla. 2d DCA 1995), quashed, 694 So.2d 720 (Fla.1997). The Second District directed the trial court, however, to enter an adjudication for the lesser offense of trespass in a conveyance, an offense which is not a necessarily lesser-included offense of grand theft of a motor vehicle. In directing adjudication for trespass in a conveyance, the district court relied on State v. G.C., 572 So.2d 1380 (Fla.1991), a case where we affirmed an adjudication for trespass in a conveyance, under similar circumstances.

The Second District certified conflict between its decision and the Fourth District's decision in N.C. v. State, 581 So.2d 647 (Fla. 4th DCA 1991). The Fourth District in N.C. followed this Court's Gould decision and held an appellate court could only direct adjudication for a necessarily lesser-included offense not a permissive lesser-included offense. On review, while finding the petition in I.T. insufficient to include a charge of trespass, we nonetheless held that section 924.34 does allow an appellate court to direct a trial court to enter an adjudication or judgment for a permissive lesser-included offense where supported by the allegations in the charging document and the proof at trial. See I.T., 694 So.2d at 724.

However, in I.T. we were not confronted with the situation that is now before this Court-a situation that involves an acquittal by the jury of the charged offense (first-degree murder), a conviction by the jury of a lesser offense (second-degree murder), and the appellate court's determination that the evidence did not support a conviction for second-degree murder. See Sigler II. Moreover, we were not asked to address in I.T. the issue of whether each element of a lesser-included offense must be found by the jury beyond a reasonable doubt. And, finally, at the time I.T. was decided the United States Supreme Court had not issued its opinions in Blakely v. Washington, 542 U.S. 296, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004), Apprendi v. New Jersey, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000), and Jones v. United States, 526 U.S. 227, 119 S.Ct. 1215, 143 L.Ed.2d 311 (1999). These Supreme Court decisions have changed the landscape in our analysis of issues involving the defendant's right to a trial by jury.

In Apprendi the Supreme Court addressed the issue of whether a defendant in a state court could be sentenced to an extended sentence on facts that were not included in his guilty plea. Apprendi pled guilty to possession of a firearm for an unlawful purpose and unlawful possession of a prohibited weapon. He was given an enhanced sentence pursuant to the state's hate crime statute. The state appellate courts affirmed. However, on certiorari review, the Supreme Court held that any factor that increased a sentence beyond the statutory maximum must be submitted to the jury and determined to exist beyond a reasonable doubt before it can be used to enhance a defendant's sentence. See Apprendi, 530 U.S. at 490, 120 S.Ct. 2348. In reaching this conclusion, the

Supreme Court began with the proposition that the right to due process of law and the right to a jury trial are rights that entitle a criminal defendant to have the jury determine his or her guilt on every element of a crime and that the determination of guilt must be beyond a reasonable doubt. Id. at 477, 120 S.Ct. 2348; accord Blakely v. Washington, 542 U.S. 296, 304, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004) (finding that a judge exceeds his authority when he imposes a sentence that is not supported by the jury verdict alone).

Importantly, the Supreme Court in Apprendi endorsed the statement from the concurring opinion in Jones v. United States, 526 U.S. 227, 252-53, 119 S.Ct. 1215, 143 L.Ed.2d 311 (1999), that "[i]t is unconstitutional for a legislature to remove from the jury the assessment of facts that increase the prescribed range of penalties to which a criminal defendant is exposed. It is equally clear that such facts must be established by proof beyond a reasonable doubt." Jones, 526 U.S. at 252-53, 119 S.Ct. 1215 (Stevens, J., concurring). Jones supports the Fourth District's conclusion and our conclusion that criminal convictions can only be sustained if the jury has found all of the elements of that crime beyond a reasonable doubt. In Jones the defendant was charged with and convicted of use of a firearm during the commission of a violent carjacking, an offense which carried a maximum sentence of fifteen years. Jones was sentenced, however, to twenty-five years based on the judge's determination that one of the victims of the carjacking was seriously injured.

The statutory scheme for carjacking provided for three separate carjacking offenses. The least serious of the three offenses and the one the defendant was charged under provided for a fifteen-year sentence when a defendant possessed a firearm during a carjacking. The second of the offenses provided for a twenty-five-year sentence if serious bodily injury resulted from the carjacking, and the third carjacking offense provided for imprisonment for any number of years up to life if death occurred during the carjacking. In reversing the lower court's affirmance of Jones's twenty-five year sentence, the Supreme Court found that the provisions of the carjacking statute that allowed greater penalties where serious bodily injury or death occurred set forth additional elements, and those additional elements needed to be charged in the indictment,

proved beyond a reasonable doubt, and submitted to the jury for a determination.

Read together, these Supreme Court decisions mean exactly what the court in Franks v. Alford, 820 F.2d 345 (10th Cir.1987), articulated twenty years ago. The state appellate court in Franks vacated the defendant's conviction of first-degree felony murder because one of the alleged felonies (escape) was not supported by the evidence and because the other felonies (two robberies) were not causally connected to the homicide. But the court entered a judgment for second-degree depraved mind murder. In federal habeas proceedings the judgment and resulting sentence were affirmed by the district court. On appeal the Tenth Circuit found that the jury's conviction for first-degree felony murder did not include a determination on the issue of a depraved mind. The court said:

> As opposed to first degree felony murder, the second degree murder statute at issue requires "an act imminently dangerous to another person and evincing a depraved mind." Okla. Stat. tit. 21, § 701.-8(1). Although the jury was correctly instructed that it had to find this element to convict Franks of second degree murder, once it found Franks guilty of first degree murder it was precluded under the court's instructions from considering whether the evidence established this element of second degree murder.
>
> ....
>
> As we have noted, Franks' conviction for felony murder did not require the jury to determine beyond a reasonable doubt whether the act causing the death evinced a depraved mind, as required for the second degree murder conviction imposed by the Court of Criminal Appeals. The appellate court's determination of this issue is not a constitutionally acceptable substitute. See Cabana,[FN3] 106 S.Ct. at 696. Because Franks was denied his right under the Sixth and Fourteenth Amendments to have his guilt determined by a jury, his conviction is constitutionally infirm.

Franks, 820 F.2d at 347. Based in part on this holding in Franks, the Fourth District correctly found an appellate court cannot direct a judgment for a permissive lesser-included offense if the jury verdict did not necessarily include a finding on every element of that offense.

In this case, the jury convicted Sigler of second-degree murder. Pursuant to section 782.04(2), Florida Statutes (1997), a conviction of second-degree murder requires findings that there was an unlawful killing of a human being, perpetrated by an act that was eminently dangerous evincing a depraved mind, and not perpetrated with any premeditated intent to cause death. Although the district court found the evidence did not support a finding that the defendant had a depraved mind, such a conviction would necessarily not include a finding that any felony was committed during the act that led to the victim's death. Thus, despite the fact that the conviction was reversed, the jury did not find that any felony was committed.

However, a conviction for third-degree murder requires an underlying felony and a jury determination of the existence of such a felony. Section 782.04(4), Florida Statutes, defines third-degree murder as a murder committed during the perpetration or attempted perpetration of any felony that is not one of the felonies enumerated in the statute. In order for the district court to direct the trial court to enter judgment for third-degree murder, there must be a finding of a felony. Because the jury verdict under the facts of this case did not include such a finding, the appellate court could not direct the trial court to enter a judgment for third-degree murder. Any such judgment would be a violation of the defendant's right to a trial by jury in violation of the Sixth Amendment. To the extent that section 924.34 can be read to provide for conviction of an offense whose elements have not been determined by the jury, it would be unconstitutional. Otherwise, when all of the elements of a lesser offense have been determined by the jury, section 924.34 is a valid exercise of the legislative prerogative allowing appellate courts to direct a judgment for such an offense.

III

Other Issues Raised

This case came to this Court based on the fact that the district court expressly held section 924.34 invalid. The defendant cross-appealed and now argues the district court erred in holding that the defendant could be found guilty as a principal to the crime of harboring himself. The district court did not specifically, in the decision that is now before us, rule on this issue. The district court merely, in its outline of the factual and procedural history of the case, indicated that in Sigler I it held that the defendant could be convicted as an aider and abettor to the crime of harboring. Sigler did not raise this issue as a ground for dismissal in the trial court or in his second appeal in the district court. Therefore, we do not address this issue here.[FN4] The State also argues that at the very least we should remand this case for entry of a conviction for manslaughter by culpable negligence. This issue likewise was not addressed by the district court, and we decline to do so in this appeal.

CONCLUSION

For all of the reasons expressed above, we affirm the decision in Sigler II and hold section 924.34, Florida Statutes, unconstitutional only to the extent that it can be read to allow the appellate court to direct entry of judgment for a lesser-included offense when all of the elements of the lesser-included offense have not been found by a jury beyond a reasonable doubt.

It is so ordered.

FN1. The Fourth District noted that by returning the verdict for the lesser offense, the jury necessarily found that the homicide did not occur while appellant was committing an escape. See Sigler I, 805 So.2d at 34.

FN2. This section was rewritten in 1970; it formerly read: In a case where the offense is divided into degrees or necessarily includes lesser offenses, and the appellate court is of the opinion that the evidence does not prove the degree or offense of which the defendant is found guilty, but does establish his guilt of some lesser degree or offense necessarily included therein, then the appellate court shall reverse the judgment of the trial court with

> directions to the trial court to enter judgment for such lesser degree or offense necessarily included in the charge and pass sentence accordingly, unless some other matter or thing appearing in the record makes it advisable that a new trial be had.§ 924.34, Fla. Stat. (1969).
>
> FN3. Cabana v. Bullock, 474 U.S. 376, 106 S.Ct. 689, 88 L.Ed.2d 704 (1986).
>
> FN4. While we acknowledge the principle that once we have jurisdiction of a case we can address any issue that may affect the case, in this instance, the defendant has not been convicted of the crime of harboring.
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> LEWIS, C.J., and WELLS, ANSTEAD, and CANTERO, JJ., concur.
>
> BELL, J., concurs in result only with an opinion.
>
> PARIENTE, J., recused.

State v. Sigler, 967 So.2d 835, 837-845 (Fla. 2007).

The language and holding of the Court in Sigler leave no room to doubt that the application of the Sixth and Fourteenth Amendments as analyzed by Apprendi and the Apprendi line of cases has definitively become a part of Florida's jurisprudence. It was used by the Fourth District Court of Appeal to analyze and strike down § 924.34 Florida Statutes. The Florida Supreme Court not only agreed with the analysis of the Fourth District, it went further and explained that "the Supreme Court in Apprendi endorsed the statement from the concurring opinion in Jones v. United States, 526 U.S. 227, 252-53, 119 S.Ct. 1215, 143 L.Ed.2d 311 (1999), that '[i]t is unconstitutional for a legislature to remove from the jury the assessment of facts that increase the prescribed range of penalties to which a criminal defendant is exposed. It is equally clear that such facts must be established by proof beyond a reasonable doubt.'" Simply said, Florida courts are currently applying the analysis contained in Apprendi to determine and provide the rights to due process and a jury trial in non-capital criminal cases.

The analysis now moves to capital cases, where the Florida Supreme Court has precluded trial courts from using a verdict form that accommodates the right to due process and a jury trial under the Apprendi line of cases.

The current unconstitutional application of the death penalty is shown where the Florida Supreme Court squarely confronts the application of Apprendi and Ring during its direct appellate review of the imposition of a death sentence and upholds the death penalty despite the absence of a jury finding that "sufficient circumstances exist" as required by §921.141(3), Florida Statutes. The following cases are in the direct appeal posture, where the death penalty was upheld and the Court addressed but rejected the Apprendi/Ring issues. Each case will be analyzed. The separation of powers issue will be identified during the review of the cases, but it will be more fully argued after all of the cases are reviewed.

Direct Appeal Cases Resolving Apprendi and/or Ring Issues

This Court must take mandatory judicial notice pursuant to §§90.201, 90.202(12) and 90.203 of the direct quotes taken verbatim from the appellate decisions as published in the Southern Second Reporter and stated in this memorandum. These quotes are and the holdings are the factual predicates that demonstrate the unconstitutionality of Florida's death penalty as applied and as §921.141 is currently enforced.

The first capital appellate decision addressing Apprendi was the appropriately named Looney v. State, 803 So.2d 656 (Fla. 2001). The facts of the crimes are not relevant to the legal analysis insofar as application of the right to a jury determination of a statutorily required finding upon which imposition of the death penalty depends. Accordingly, in this case an in the analysis of the cases that follow, only the Court's complete analysis of the Apprendi and/or Ring issue is set forth. The portions of the opinions that follow is the manner in which the Florida Supreme Court is applying the holding of Apprendi and/or Ring in the context of the direct appeal of imposition of the death sentence. In that regard, it can be safely presumed that the trial courts are following the holdings issued by the Florida Supreme Court.

In Looney, the Court's brief discussion of Apprendi is now obviously erroneous:

Jury Verdict

> Looney raises seven issues relating to the penalty phase proceedings. First, Looney argues that, in light of the United States Supreme Court's decision in Apprendi v. New Jersey, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000), the trial court erred in denying Looney's motion to require unanimity in the jury's sentencing recommendation. This Court, however, recently addressed whether Florida's death penalty sentencing scheme violates the principles espoused in Apprendi. See Mills v. Moore, 786 So.2d 532 (Fla. 2001). In holding that it does not, this Court stated, "[T]he plain language of Apprendi indicates that the case is not intended to apply to capital schemes." Id. at 537. Therefore, "Apprendi preserves the constitutionality of capital sentencing schemes like Florida's." Id. This Court's decision in Mills forecloses Looney's claim and, therefore, it is denied.

Looney v. State, 803 So.2d 656, 675 (Fla. 2001) (10-2 jury recommendation). Looney was the first appellate decision issued by the Florida Supreme Court addressing the application of Apprendi to capital proceedings in Florida. Apparently the issue was properly preserved, and the precise issue identified by the Court was the contention that the jury recommendation was compelled by Apprendi. It must be immediately noted that the recommendation procedure set forth in §921.141(2), Florida Statutes, is not the issue. The jury recommendation is a statutory right as opposed to a constitutional right. The distinction is critical and easily overlooked. In Looney, the Court ruled broadly that "Apprendi was not intended to apply to capital schemes" and did not distinguish between the recommendation and the need for a finding upon which imposition of the death penalty depends. The broad holding that Apprendi was not intended to apply to capital sentencing is wrong and was squarely rejected by Ring v. Arizona, 536 U.S. 584, 122 S.Ct. 2428 (2002), which held that, indeed, Apprendi does apply to capital cases.

The second appellate decision dealing with Apprendi was Hertz v. State, 803 So.2d 629 (Fla. 2001) where the appellant again argued that Apprendi required that the jury recommendation be unanimous. The Florida Supreme Court again relies on the erroneous conclusion made in Mills that Apprendi does not apply to capital cases:

Jury Verdict

> Hertz next argues that, in light of the United States Supreme Court's decision in Apprendi v. New Jersey, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000), the trial court erred in denying Hertz's motion to require unanimity in the jury's sentencing recommendation. This Court, however, recently addressed whether Florida's death penalty sentencing scheme violates the principles espoused in Apprendi. See Mills v. Moore, 786 So.2d 532 (Fla.2001). In holding that it does not, this Court stated, "[T]he plain language of Apprendi indicates that the case is not intended to apply to capital schemes." Id. at 537. Thus, "Apprendi preserves the constitutionality of capital sentencing schemes like Florida's." Id. This Court's decision in Mills forecloses Hertz's claim and, therefore, it is denied. See id.

Hertz, 803 So.2d at 648 (Fla. 2001) (10-2 jury recommendation)

In Hertz the Court is again faced with a claim that Apprendi requires that the jury recommendation must be unanimous. The statutory right to a jury recommendation under §921.141(2), Florida Statutes, simply does not implicate the Sixth and Fourteenth Amendment right to a jury. This is not to say that the jury recommendation has no function, and the law remains that the jury must be fully and correctly instructed on the law in order to reach its recommendation because the judge in Florida relies so heavily on it when the sentence is imposed. See Espinosa v. Florida, 505 U.S. 1079 (1992); Tedder v. State, 322 So.2d 908 (Fla. 1975). The jury recommendation process used in Florida is a statutory right that does not control the defendant's eligibility for the death penalty, as does the factual finding required by §921.141(3), Florida Statutes. That distinction is set forth in the statute and it becomes a matter of applying the statute as written.

The Florida Supreme Court in Hertz, however, simply repeats in summary form the broad statement erroneously made in Mills that Apprendi was not intended to apply to capital cases. It also bears pointing out that the Court's entire analysis set forth in the opinion is to simply repeating a prior holding without explanation. This practice becomes apparent as the Court deals with Apprendi claims in the future. This is especially troublesome when the cases cited by the

Court as being dispositive of the appellate issues are rulings that denied relief without any explanation in the context of a post-conviction case.

The third appellate decision addressing Apprendi was Hurst v. State, 819 So.2d 689 (Fla. 2002). The appellant did a good job of framing the issues arguable implicated by Apprendi and specifically argued that he was entitled to a jury determination of his eligibility for the death penalty based on Apprendi. The Florida Supreme Court, however, again refused to grant relief based on the erroneous conclusion set forth in Mills that Apprendi was not intended to apply to capital sentencing. Specifically, the Court stated the following in Hurst:

"Apprendi" Claim

> In his final claim, Hurst argues that "imposition of the death sentence in the absence of notice of the aggravating circumstances to be considered or of jury findings on the aggravators and death eligibility, violates due process and the protection against cruel and/or unusual punishment." In making this argument, Hurst relies primarily on the United States Supreme Court's opinion in Apprendi v. New Jersey, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000). Subsequent to the filing of Hurst's initial brief, this Court decided this issue and has rejected the argument that the Apprendi case applies to Florida's capital sentencing scheme. See Mills v. Moore, 786 So.2d 532 (Fla.), cert. denied, 532 U.S. 1015, 121 S.Ct. 1752, 149 L.Ed.2d 673 (2001); Mann v. Moore, 794 So.2d 595 (Fla.2001). In his reply brief, Hurst requests that this Court revisit the Mills decision and find that Apprendi does apply to capital sentencing schemes. Having considered the cases Hurst cited and his additional arguments, this Court finds no reason to revisit the Mills decision, and thus we reject Hurst's final claim.

Hurst, 819 So.2d at 702 -703 (Fla. 2002) (11-1 jury recommendation). One again, the Florida Supreme Court denies relief in a capital case based on what turns out to be clearly erroneous reasoning. It should be appreciated at this time, however, that these appellants who properly raise the contention that the Sixth and Fourteenth Amendments are violated when the judge alone finds the statutory facts upon which imposition of the death penalty depends are no longer entitled to relief, even though it is clear that they are entitled to relief. This follows because the

courts are not providing retroactive relief for Apprendi violations, and these defendants are now in the post-conviction posture simply because the Florida Supreme Court erroneously denied relief despite the meritorious issues being properly preserved and presented.

The fourth appellate decision was Cox v. State, 819 So.2d 705 (Fla. 2002), where the Florida Supreme Court again denied relief based on its prior reasoning in Mills as follows:

> X. Constitutionality of the Florida Death Penalty
>
> The appellant asserts that the United States Supreme Court's decision in Apprendi v. New Jersey, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000), requires this Court to engage in a wholesale reevaluation of the Florida death penalty scheme. He argues that Florida's death penalty scheme is unconstitutional because it does not require notice to the defendant by the State of the aggravating circumstances it plans to pursue at trial, does not require specific jury findings regarding sentencing factors, permits a non-unanimous recommendation of death, and improperly shifts the burden and standard of proof during the penalty phase.
>
> The appellant's claim, however, was resolved by this Court in Mills v. Moore, 786 So.2d 532 (Fla.2001).[FN17] Therein, we held:
>
> > The majority opinion in Apprendi forecloses Mills' claim because Apprendi preserves the constitutionality of capital sentencing schemes like Florida's. Therefore, on its face, Apprendi is inapplicable to this case.
>
> Id. at 537.

Cox, 819 So.2d at 724 (Fla. 2002) (jury recommendation 10-2).

The interesting thing that comes from Cox is found in footnote 17, where the Florida Supreme Court, now on notice that its reasoning in Mills was suspect, stated, "We note that the United States Supreme Court has granted certiorari in State v. Ring, 200 Ariz. 267, 25 P.3d 1139 (2001), cert. granted, 534 U.S. 1103, 122 S.Ct. 865, 151 L.Ed.2d 738 (2002). However, unless and until the United States Supreme Court recedes from Walton v. Arizona, 497 U.S. 639, 110 S.Ct. 3047, 111 L.Ed.2d 511 (1990), and Proffitt v. Florida, 428 U.S. 242, 96 S.Ct. 2960, 49

L.Ed.2d 913 (1976), we see no need to revisit our Mills decision and will follow precedent." Cox, Id at 724. Apparently, the Florida Supreme Court is going to follow Proffitt until the United States Supreme Court recedes from it.

It is important to now recognize and fully appreciate that the United States Supreme Court here, after Cox, decides Ring v. Arizona and rules that the reasoning in Apprendi DOES apply to capital cases. Walton v. Arizona is overruled. That leaves Proffitt v. Florida, which is not before the Court when Ring is decided. What is so important about Ring v. Arizona is that it squarely holds that the analysis set forth in Apprendi applies the Sixth and Fourteenth right to a jury trial to the factual findings upon which imposition of the death penalty depends. The rights are not a one size fits all. Instead, the finding that is so protected requires a thorough analysis of the particular statute involved. As will be developed later, there is a significant distinction between Florida's death penalty statute and Arizona's.

More specifically, in Florida imposition of the death penalty is dependent on a finding that "sufficient aggravating circumstances exist as enumerated in subsection (5)" whereas in Arizona the statute requires only one or more aggravating circumstance. This distinction is so important it will be repeated. There is a significant distinction between Florida's death penalty statute and Arizona's – specifically, in Florida imposition of the death penalty is dependent on a finding that "sufficient aggravating circumstances exist as enumerated in subsection (5)" whereas in Arizona the statute requires only one or more aggravating circumstance. We know after Ring that it matters not that Florida's statute says in §921.141(3), Florida Statutes, that the finding is to be made by the judge because Apprendi explains that the finding must be made by the jury and not by the judge alone. Apprendi is NOT satisfied simply because a valid prior felony conviction exists in Florida because the death penalty is not dependent on a finding that one or aggravating circumstances exist, but instead on a finding that "sufficient aggravating circumstances exist as enumerated in subsection (5)."

The fifth appellate decision concerning Apprendi and the first after Ring was decided was Chavez v. State, 832 So.2d 730 (Fla. 2002):

> On rehearing, Chavez has asserted that Florida's capital sentencing scheme violates the United States Constitution under the holding of Ring v. Arizona, 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002). This Court addressed a similar contention in Bottoson v. Moore, 833 So.2d 693 (Fla.2002), and King v. Moore, 831 So.2d 143 (2002), and denied relief. We find that Chavez is likewise not entitled to relief on this claim.

Chavez, 832 So.2d at 767 (Fla. 2002) (12-0 jury recommendation). Chavez is the first appellate decision after Ring was decided. The Court summarily relies on its decisions rendered in the post conviction cases of Bottoson and King. Just as in those cases, there is neither reasoning nor analysis contained in this decision – only the bare finding "that Chavez is likewise not entitled to relief." The Court neglects to set forth precisely what arguments Chavez made on direct appeal, and does not acknowledge or address the substantial difference in the procedural postures of these cases – reviewing a post-conviction ruling is controlled by different considerations than reviewing a properly preserved and timely objection raised on direct appeal. The short shrift given Apprendi / Ring is cryptic and, as will be seen, it becomes recurrent.

The second appellate decision in a capital case after Ring was Doorbal v. State, 837 So.2d 940 (Fla. 2003), where the issues are more specifically identified in the decision but not with the specificity needed to established controlling precedent for any ruling other than that Ring will not be applied to capital cases in Florida:

> On rehearing, Doorbal has asserted that Florida's capital sentencing scheme violates both the United States and Florida Constitutions under the holding of Ring v. Arizona, 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002). This Court addressed a similar contention in Bottoson v. Moore, 833 So.2d 693 (Fla.2002), cert. denied, 537 U.S. 1070, 123 S.Ct. 662, 154 L.Ed.2d 564 (2002), and King v. Moore, 831 So.2d 143 (Fla.2002), cert. denied, 537 U.S. 1067, 123 S.Ct. 657, 154 L.Ed.2d 556 (2002), and denied relief. We find that Doorbal is likewise not entitled to relief on this claim. Of note, Doorbal argues that his death sentences were unconstitutionally imposed because Florida's capital sentencing scheme violates the United States and Florida

> Constitutions by failing to require that aggravating circumstances be enumerated and charged in the indictment and by further failing to require specific, unanimous jury findings of aggravating circumstances. These arguments must fail because here, one of the aggravating circumstances found by the trial judge to support the sentences of death was that Doorbal had been convicted of a prior violent felony, namely the contemporaneous murders of Griga and Furton, and the kidnaping, robbery, and attempted murder of Schiller. Because these felonies were charged by indictment, and a jury unanimously found Doorbal guilty of them, the prior violent felony aggravator alone clearly satisfies the mandates of the United States and Florida Constitutions, and therefore imposition of the death penalty was constitutional.

Doorbal v. State, 837 So.2d 940, 963 (Fla. 2003) (8-4 jury recommendation).

Relief is again denied because "This Court addressed a similar contention in Bottoson and King and denied relief." That mantra becomes commonplace, even though those were post conviction cases. Of further note is the statement that Doorbal raised the claim based on Ring that Florida's sentencing scheme was unconstitutional under Florida's constitution. In this regard, the precise issues raised and rejected were apparently that the aggravating circumstances were not contained in the charging document and the jury did not unanimously find the aggravating circumstances. This is distinguishable at least in part from the claims raised by this Defendant, who additionally contends that at a minimum he is entitled under the Sixth and Fourteenth Amendments to the United States Constitution and article I, sections 16(a) and 22 of the Florida Constitution to a jury finding and notice that "sufficient aggravating circumstances exist as set forth in subsection (5)" as required by §921.141(3), Florida Statutes.

Further analysis is needed of the Court's summary assertion in Doorbal that the prior violent felony aggravator alone clearly satisfies the mandates of the United States and Florida Constitutions." This is the first appearance of that conclusion by the Florida Supreme Court in an appellate opinion and it is clearly wrong. The Court does not bother to explain why one aggravating factor satisfies the required finding under §921.141(3) that "sufficient aggravating circumstances exist as enumerated in subsection (5)."

It is also important to note that this reasoning is not a proper application of the reasoning in Apprendi which, if applied properly, explains that the Fifth, Sixth and Fourteenth Amendments require that the jury find that "sufficient aggravating circumstances exist as enumerated in subsection (5)" rather than just one aggravating circumstance. Apprendi holds that under the Sixth and Fourteenth Amendments require that the finding upon which imposition of a sentence depends cannot be made by a judge alone. The reasoning of the Florida Supreme Court that one aggravating circumstance necessarily equates with the finding required by §921.141(3), Florida Statutes, is clearly erroneous. This will be addressed in more detail later during the analysis of how this ruling by the Florida Supreme Court denies due process, equal protection and violates the separation of powers proscription contained in article II, section 3 of the Florida Constitution. At this point, it should suffice to explain that Apprendi allows a judge to make the finding of the existence of a prior felony because that is a historic fact that has been established only after the defendant has received the rights to due process and a jury determination of guilt beyond a reasonable doubt.

Imposition of capital punishment in Florida is not dependent on the existence of one statutory aggravating factor. The statute requires a finding of sufficient aggravating circumstances. This needs to be fully appreciated. The conclusion of the Supreme Court of Florida in Doorbal that the existence of one factor satisfies the constitutional analysis required by the holding in Apprendi is erroneous. This is the first example of the Court failing to appreciate and correctly apply the holding of Ring where a prior felony exists, but it will no the last. This construction of Florida's statute violates the separation of powers proscription set forth in article II, section 3 of the Florida Constitution, as will be more fully analyzed in this memorandum after the review of these direct appeal decisions. It should suffice to say at this point that, by relying and focusing on the existence of only one aggravating circumstance, the Court is not giving effect to the requirement that there be "sufficient" aggravating circumstances. The Court is no longer applying the weighing standard expounded in State v. Dixon, 283 So.2d 1 (Fla. 1973) and has converted the weighing process required by Florida's statute and implicit in the word "sufficient" with the establishment of one aggravating circumstance.

Florida's third appellate decision in a capital case after Ring was Israel v. State, 837 So.2d 381 (Fla. 2002), where the majority opinion did not directly mention either Apprendi or Ring, in the main opinion that rejected an issue concerning the constitutionality of Florida's death penalty:

> Next, Israel attacks the constitutionality of his death sentence because the jury recommended death by a split vote of eleven to one. We have previously rejected this argument and do so again in this case. See Sexton v. State, 775 So.2d 923, 936 (Fla.2000); Hunter v. State, 660 So.2d 244, 252-53 (Fla.1995) (citing James v. State, 453 So.2d 786, 792 (Fla.1984)).

Israel, 837 So.2d at 392 (Fla. 2002) (11-1 jury recommendation). The search performed on February 29, 2008, picked up a reference to Ring in a specially concurring opinion by Justice Pariente, who noted that Ring "compels us to recede from our statement in Mills v. Moore, 786 So.2d 532, 537-38 (Fla. 2001), that death is the maximum penalty authorized for a first-degree murder verdict under Florida law[.]"). Israel, 837 So.2d at 382. The Court, however, has not as a body receded from its faulty reasoning in Mills.

Florida's fourth appellate decision in a capital case after Ring was decided was Conahan v. State, 844 So.2d 629 (Fla. 2003), which summarily rejected an Apprendi issue in a footnote:

> FN9. In supplemental briefing and a notice of supplemental authority, Conahan asserts that he is entitled to relief pursuant to the United States Supreme Court's recent opinions in Apprendi v. New Jersey, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000), and Ring v. Arizona, 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002). This Court addressed a similar contention in Bottoson v. Moore, 833 So.2d 693, (Fla. 2002), cert. denied, 123 S.Ct. 662(2002), and King v. Moore, 831 So.2d 143 (Fla.2002), cert. denied, 123 S.Ct. 657 (2002), and denied relief. We therefore find that Conahan is likewise not entitled to relief.

Conahan, 844 So.2d at 642 fn. 9 (Fla. 2003). This explanation is so generic that it provides no insight into what precise issues were raised by Conahan. The summary reference that "this Court" addressed a similar contention in Bottoson and King and denied relief will hereafter be referred to as the "Bottoson/King mantra." It bears noting, however, that the highest court of

Florida should not give such short shrift to the analysis of an issue presented on direct appeal in a death case by simply citing in a footnote the resolution of "similar" issues raised in a post conviction proceeding.

Anderson v. State, 841 So.2d 390 (Fla. 2003) is the fifth appeal of a capital case decided by the Florida Supreme Court after Ring was decided. Anderson apparently presented only the claim that was presented by Bottoson, but at least his denial of relief is not relegated to a footnote:

> In claim twelve, Anderson argues that his sentence violates Apprendi v. New Jersey, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000), in which the United States Supreme Court held that any fact that increases the penalty for a crime beyond the statutory maximum must be submitted to a jury and proven beyond a reasonable doubt, and Ring v. Arizona, 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002), in which the Supreme Court ruled that Apprendi is applicable in the death penalty context. In Ring, the Supreme Court found the Arizona capital sentencing statute to be unconstitutional "to the extent that it allows a sentencing judge, sitting without a jury, to find an aggravating circumstance necessary for the imposition of the death penalty." Ring, 536 U.S. at 609, 122 S.Ct. at 2443. Anderson contends that Florida's capital sentencing statute suffers the same constitutional infirmity. However, Anderson's claim has already been addressed by this Court and decided adversely to him. See Bottoson v. Moore, 833 So.2d 693 (Fla.2002) (concluding that Bottoson was not entitled to relief under Ring).

Anderson, 841 So.2d at 408-409 (Fla. 2003) (8-4 jury recommendation). This is not an explanation of why relief was denied – only an reminder that others suffer the same fate.

The Florida Supreme Court next decided Grim v. State, 841 So.2d 455 (Fla. 2003), which is the sixth appellate decision following the appearance of Ring:

> On rehearing, Grim has asserted that Florida's capital sentencing scheme violates the United States Constitution under the holding of Ring v. Arizona, 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002). This Court addressed a similar contention in

> Bottoson v. Moore, 833 So.2d 693 (Fla.), cert. denied, 537 U.S. 1070, 123 S.Ct. 662, 154 L.Ed.2d 564 (2002), and King v. Moore, 831 So.2d 143 (Fla.), cert. denied, 537 U.S. 1067, 123 S.Ct. 657, 154 L.Ed.2d 556 (2002), and denied relief. We likewise find that Grim is not entitled to relief on this claim. The aggravating circumstances which were present in this case included multiple convictions for prior violent felonies and a contemporaneous felony of a sexual battery, both of which were found unanimously by a jury. Moreover, by a twelve-to-zero vote, the jury recommended that the defendant be sentenced to death.

Grim v. State, 841 So.2d at 465 (Fla. 2003) (12-0 jury recommendation). The Court incants the "Bottoson/King" mantra before denying relief, and notes the existence of contemporaneous convictions. Hereafter, this will be referred to as the "Bottoson/King Mantra with misapplication of the Apprendi caveat."

What is of more significance is the fact that the jury issued a unanimous jury recommendation. This under Florida law is the only true exception to Apprendi, where in order for the jury to issue a 12-0 death recommendation the jury, following the standard jury instructions that currently exist, would necessarily had to have found beyond a reasonable doubt that "sufficient aggravating circumstances exist as enumerated in subsection (5)" to support imposition of the death penalty. The issue that remains unaddressed in that instance is the possible omission in the charging document of that allegation. If that was not raised as an issue on direct appeal, it was resolved. It otherwise may constitute harmless error. Those questions exist for future resolution.

Doorbal v. State, 837 So.2d 940 (Fla. 2003) appears again as the seventh direct appeal case decided by the Florida Supreme Court after Ring.

> On rehearing, Doorbal has asserted that Florida's capital sentencing scheme violates both the United States and Florida Constitutions under the holding of Ring v. Arizona, 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002). This Court addressed a similar contention in Bottoson v. Moore, 833 So.2d 693 (Fla.2002), cert. denied, 537 U.S. 1070, 123 S.Ct. 662, 154 L.Ed.2d 564 (2002), and King v. Moore, 831 So.2d 143 (Fla.2002), cert. denied, 537 U.S. 1067, 123 S.Ct. 657, 154 L.Ed.2d 556

> (2002), and denied relief. We find that Doorbal is likewise not entitled to relief on this claim. Of note, Doorbal argues that his death sentences were unconstitutionally imposed because Florida's capital sentencing scheme violates the United States and Florida Constitutions by failing to require that aggravating circumstances be enumerated and charged in the indictment and by further failing to require specific, unanimous jury findings of aggravating circumstances. These arguments must fail because here, one of the aggravating circumstances found by the trial judge to support the sentences of death was that Doorbal had been convicted of a prior violent felony, namely the contemporaneous murders of Griga and Furton, and the kidnaping, robbery, and attempted murder of Schiller. Because these felonies were charged by indictment, and a jury unanimously found Doorbal guilty of them, the prior violent felony aggravator alone clearly satisfies the mandates of the United States and Florida Constitutions, and therefore imposition of the death penalty was constitutional.

Doorbal v. State, 837 So.2d at 963 (Fla. 2003) (8-4 jury recommendation).

Here the Court denies relief after incanting the Bottoson/King mantra with misapplication of the Apprendi caveat. The Court points to the existence of convictions for contemporaneous felonies that were charged in the indictment. The decision's language about "the prior violent felony aggravator alone satisfies the mandates of the United States and Florida Constitutions" simply fails to construe Florida's statute as written. "Sufficient" is not commonly understood to mean just one. It is instead a term that connotes a weighing process. One could be enough, but not necessarily.

The eighth appellate decision since Ring was Kormondy v. State, 845 So.2d 41 (Fla. 2003), where the Court acknowledges that Apprendi applies to death penalty cases but it does not require notice or specific jury findings of the aggravators:

> Apprendi Issue
>
> Kormondy argues that this case should be governed by Apprendi v. New Jersey, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000). In Apprendi, the United States Supreme Court held that, other than a prior conviction,[FN3] any fact that increases the punishment for a crime beyond the prescribed statutory maximum must be submitted to a jury and proved

> beyond a reasonable doubt. Kormondy argues that the absence of any notice of the aggravating circumstances that the State will present to the jury and the absence of specific jury findings of any aggravating circumstances offends due process and the proscription against cruel and unusual punishment under Apprendi.
>
> Although we have previously held that the Supreme Court's decision in Apprendi was not applicable to death penalty cases, the Supreme Court recently ruled in Ring v. Arizona, 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002), that the principle of law announced in Apprendi had application in the death penalty context. In so holding, the Supreme Court found unconstitutional a death penalty scheme where the jury did not participate in the penalty phase of a capital trial. That, of course, is not the situation in Florida where the trial court and the jury are cosentencers under our capital scheme. See Espinosa v. Florida, 505 U.S. 1079, 112 S.Ct. 2926, 120 L.Ed.2d 854 (1992). While Ring makes Apprendi applicable to death penalty cases, Ring does not require either notice of the aggravating factors that the State will present at sentencing or a special verdict form indicating the aggravating factors found by the jury. See, e.g., Bottoson v. Moore, 833 So.2d 693 (Fla.2002), cert. denied, 537 U.S. 1070, 123 S.Ct. 662, 154 L.Ed.2d 564 (2002); King v. Moore, 831 So.2d 143 (Fla.2002), cert. denied, 537 U.S. 1067, 123 S.Ct. 657, 154 L.Ed.2d 556 (2002). Because neither Apprendi nor Ring requires a finding that the Florida capital sentencing scheme is unconstitutional, we deny relief on this issue.

Kormondy v. State , 845 So.2d 41, 54 (Fla. 2003) (8-4 jury recommendation) Footnote 3 states, "FN3. It should be noted that contemporaneous with Kormondy's conviction for first-degree murder he was also convicted of other violent felonies, robbery and sexual battery. Additionally, the murder was committed during the course of a burglary. Thus, the sentence of death in this case could be imposed based on these convictions by the same jury." Kormondy, 845 So.2d at 54.

The Court's discussion in Kormondy is erroneous. The principle announced in Apprendi is as stated by the Court that "any fact that increases the punishment for a crime beyond the prescribed statutory maximum must be submitted to a jury and proved beyond a reasonable doubt." The "fact" that a prior violent felony exists does not establish that sufficient aggravating circumstances exist, and that is the factual finding that is required under §921.141(3), Florida

Statutes. The analysis may satisfy Furman v. Georgia, 408 U.S. 238 (1972), where the existence of one aggravating factor will genuinely limit the class of persons eligible for the death penalty. See Zant v. Stephens, 462 U.S. 862, 877 (1983) ("[A]n aggravating circumstance must genuinely limit the class of persons eligible for the death penalty and must reasonable justify the imposition of a more severe sentence on the defendant compared to others found guilty of murder."). However, that is not the Sixth Amendment analysis that is required by Apprendi and which depends on the application of a statute in accordance with due process rights guaranteed under the Fifth, Sixth and Fourteenth Amendments to the United States Constitution.

As noted by Justice Scalia in Ring, it does not matter what the legislature labels such facts, and they could as easily be called maryjane and the Sixth and Fourteenth Amendments would still require their finding based on the Apprendi analysis:

> On the other hand, as I wrote in my dissent in Almendarez-Torres v. United States, 523 U.S. 224, 248, 118 S.Ct. 1219, 140 L.Ed.2d 350 (1998), and as I reaffirmed by joining the opinion for the Court in Apprendi, I believe that the fundamental meaning of the jury-trial guarantee of the Sixth Amendment is that all facts essential to imposition of the level of punishment that the defendant receives-whether the statute calls them elements of the offense, sentencing factors, or Mary Jane-must be found by the jury beyond a reasonable doubt.

Ring v. Arizona, 536 U.S. 584, 610, 122 S.Ct. 2428, 2444 (U.S. 2002). That analysis does not comport with a court to myopically zooming in on part of what the statute requires and claim that it satisfies the constitutional analysis required by Apprendi. An example is in order, and it is one that the reader should remember and appreciate because IT WILL BE REFERRED TO and the court will be asked to recall it during the hearing of this motion. Presume that a statute expressly states that a finding is required that "sufficient colors exist as set forth in subsection (5)" to impose the death penalty. The colors are set forth in subsection (5) are the following: red, white, blue, green, brown, black, orange, pink, violet, purple, tan, cream, silver, gold, and teal. Red is set forth in the indictment and during the trial the government proves beyond a reasonable doubt that red exists and the jury unanimously so concludes it its verdict. An express

finding that red is there does not satisfy the statutory requirement that "sufficient colors exist as enumerated in subsection (5)." Similarly, the Apprendi analysis requires that the jury find that "sufficient colors exist" even if the jury unanimously found red, white and blue and those colors were alleged in the indictment. The focus is on what the statute says. The statute requires "sufficient colors" and not one color. The operative term is "sufficient." The same applies to a statutory requirement for a finding that "sufficient aggravating circumstances exist as enumerated in subsection (5)" as stated in §921.141(3), Florida Statutes.

The Florida Supreme Court in Kormondy otherwise tries to distinguish Florida's capital sentencing scheme from the Arizona, observing that "the Supreme Court recently ruled in Ring[], that the principle of law announced in Apprendi had application in the death penalty context. In so holding, the Supreme Court found unconstitutional a death penalty scheme where the jury did not participate in the penalty phase of a capital trial. That, of course, is not the situation in Florida where the trial court and the jury are cosentencers under our capital scheme. See Espinosa v. Florida,[]." (Underlining added) The observation equates the Sixth and Fourteenth Amendment guarantees to a 12-person jury returning a unanimous verdict based on proof beyond a reasonable doubt during a trial to a majority sentencing recommendation. The United States Supreme Court rejected that same contention when it was advanced by Walton:

> We repeatedly have rejected constitutional challenges to Florida's death sentencing scheme, which provides for sentencing by the judge, not the jury. Hildwin v. Florida, 490 U.S. 638, 109 S.Ct. 2055, 104 L.Ed.2d 728 (1989) (per curiam); Spaziano v. Florida, 468 U.S. 447, 104 S.Ct. 3154, 82 L.Ed.2d 340 (1984); Proffitt v. Florida, 428 U.S. 242, 96 S.Ct. 2960, 49 L.Ed.2d 913 (1976). In Hildwin, for example, we stated that "[t]his case presents us once again with the question whether the Sixth Amendment requires a jury to specify the aggravating factors that permit the imposition of capital punishment in Florida," 490 U.S., at 638, 109 S.Ct., at 2056, and we ultimately concluded that "the Sixth Amendment does not require that the specific findings authorizing the imposition of the sentence of death be made by the jury." Id., at 640-641, 109 S.Ct., at 2057.

> The distinctions Walton attempts to draw between the Florida and Arizona statutory schemes are not persuasive. It is true that in Florida the jury recommends a sentence, but it does not make specific factual findings with regard to the existence of mitigating or aggravating circumstances and its recommendation is not binding on the trial judge. A Florida trial court no more has the assistance of a jury's findings of fact with respect to sentencing issues than does a trial judge in Arizona.

Walton v. Arizona, 497 U.S. 639, 647-648, 110 S.Ct. 3047, 3054 (1990), reversed, Ring v. Arizona, 536 U.S. 584 (2002).

After providing some additional analysis in Kormondy, the Florida Supreme Court reverted to its summary disposition of the Ring issues in the ninth capital appellate decision that followed Ring. Specifically, in Lugo v. State, 845 So.2d 74 (Fla. 2003), the Court wrote:

> Although the United States Supreme Court's recent decision in Ring v. Arizona, 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002), makes it clear that Apprendi v. New Jersey, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000), does have application in the capital punishment context, we have recently rejected Lugo's contentions regarding the constitutionality of Florida's death penalty scheme in Bottoson v. Moore, 833 So.2d 693 (Fla.2002), cert. denied, 537 U.S. 1070, 123 S.Ct. 662, 154 L.Ed.2d 564 (2002), and King v. Moore, 831 So.2d 143 (Fla.), cert. denied, 537 U.S. 1067, 123 S.Ct. 657, 154 L.Ed.2d 556 (2002). Thus, Lugo's assertions are without merit. Additionally, Lugo was convicted by a unanimous jury vote of armed robbery and armed kidnaping among other felonies charged. The existence of prior violent felonies was also established.

Lugo, 845 So.2d at 119 fn.79 (Fla. 2003) (11-1 jury recommendation). Thus, the Court again summarily used the Bottoson/King mantra with the Apprendi caveat to deny relief. This type of decision has previously been analyzed, so this review will move on to the tenth capital appeal decided by the Florida Supreme Court after Ring.

In Lawrence v. State, 846 So.2d 440 (Fla. 2003), the Florida Supreme Court again employs the Bottoson/King mantra when relief is denied and it rejects an additional "blanket claim" that Florida's death penalty is unconstitutional under state, federal and international as

written and applied. As will be seen in the decision, the Court totally fails to identify with specificity what the basis of Lawrence's argument was and precisely why Lawrence contended that Florida's death penalty is unconstitutional on its face and as applied. In the absence of that information, the following language and holding in Lawrence is not sufficiently specific to be applied as precedent to deny relief on the precise grounds contained in the motion now being presented to this Court. More specifically, in Lawrence the Court wrote the following:

> ISSUE 5. CONSTITUTIONALITY OF THE DEATH PENALTY
>
> Lawrence raises numerous constitutional challenges to the death penalty, including the claim that the imposition of the death penalty violates Apprendi v. New Jersey, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000). This Court addressed similar arguments in Bottoson v. Moore, 833 So.2d 693 (Fla.2002), cert. denied, 537 U.S. 1070, 123 S.Ct. 662, 154 L.Ed.2d 564 (2002), and King v. Moore, 831 So.2d 143 (Fla.2002), cert. denied, 537 U.S. 1067, 123 S.Ct. 657, 154 L.Ed.2d 556 (2002), and denied relief. We find that Lawrence is likewise not entitled to relief on this claim. We further deny Lawrence's blanket claims that Florida's death penalty statute violates Florida, federal, and international law. See San Martin, 705 So.2d at 1350 (rejecting argument "that the death penalty is unconstitutional both facially and as applied").

Lawrence, 846 So.2d at 451 (Fla. 2003) (guilty plea, 11-1 jury recommendation). Thus, relief is denied based on the Bottoson / King mantra. Recall that there was no holding or analysis in either Bottoson or King – only the denial of relief with an observation that the United States Supreme Court has the prerogative of overruling its own cases.

The eleventh capital appellate decision in Florida since Ring was Butler v. State, 842 So.2d 817 (Fla. 2003):

> On rehearing, Butler asserts that Florida's capital sentencing scheme violates the United States Constitution under the holding in Ring v. Arizona, 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002). We recently denied a similar claim in Bottoson v. Moore, 833 So.2d 693 (Fla.), cert. denied, 537 U.S.

> 1070, 123 S.Ct. 662, 154 L.Ed.2d 564 (2002), and King v. Moore, 831 So.2d 143 (Fla.), cert. denied, 537 U.S. 1067, 123 S.Ct. 657, 154 L.Ed.2d 556 (2002). We likewise deny relief in this case.

Butler, 842 So.2d at 834 (Fla. 2003) (11-1 jury recommendation). Relief is denied based on the bare Bottoson/King mantra.

The twelfth Florida appellate decision in a capital case since Ring was Belcher v. State, 851 So.2d 678 (Fla. 2003):

> CONSTITUTIONALITY OF FLORIDA'S DEATH PENALTY SCHEME
>
> Belcher challenges the trial court's denial of the defendant's motion to declare sections 782.04 and 921.141, Florida Statutes (2002), unconstitutional under the Sixth and Fourteenth Amendments and the U.S. Supreme Court's decision in Apprendi v. New Jersey, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000). Belcher claims that his death sentence should be vacated because (1) the indictment did not give notice of the aggravating circumstances on which the State would rely to attempt to establish eligibility for the death penalty; (2) the jury in this case was not told that the existence of any aggravating circumstance had to be agreed upon by all jurors; and (3) the jury's nonbinding recommendation was not unanimous. However, as the State points out, two of the three aggravators found in this case are exempted from an Apprendi analysis: prior violent felony and murder committed in the course of a sexual battery. Regarding the prior violent felony aggravator, in Apprendi, the U.S. Supreme Court exempted prior convictions from facts that must be submitted to a jury because they increase the penalty for a crime. Id. at 490, 120 S.Ct. 2348. The recent decision of Ring v. Arizona, 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002), did not disturb that particular holding. See id. at 597 n. 4, 122 S.Ct. 2428 (noting that Ring did not challenge Almendarez-Torres v. United States, 523 U.S. 224, 118 S.Ct. 1219, 140 L.Ed.2d 350 (1998), and that none of the aggravators in his case related to past convictions). Regarding the murder being committed in the course of a sexual battery aggravator, the fact remains that a unanimous jury found Belcher guilty of both murder and sexual battery, and therefore the guilt phase verdicts reflect that the jury independently found the

> aggravator of the murder being committed in the course of a sexual battery.
>
> As for Belcher's challenge to Florida's death penalty scheme and how it relates to the remaining aggravator of HAC, we find that Belcher is not entitled to relief under the holding of Ring. This Court addressed a similar contention in Bottoson v. Moore, 833 So.2d 693 (Fla.), cert. denied, 537 U.S. 1070, 123 S.Ct. 662, 154 L.Ed.2d 564 (2002), and King v. Moore, 831 So.2d 143 (Fla.), cert. denied, 537 U.S. 1067, 123 S.Ct. 657, 154 L.Ed.2d 556 (2002), and denied relief. We find that Belcher is likewise not entitled to relief on this claim.

Belcher, 851 So.2d at 685 (Fla. 2003). The analysis performed by the Florida Supreme Court is a vast improvement over its prior summary rejections of the Apprendi issue, but it is still wrong in not addressing the particular finding required by §921.141(3), Florida Statutes, that "sufficient aggravating circumstances exist" and the Court ultimately reverts to the Bottoson/King mantra to conclude its analysis.

The thirteenth appellate decision was McCoy v. State, 853 So.2d 396 (Fla. 2003):

> Finally, McCoy contends that Florida's death penalty scheme is unconstitutional on a variety of grounds. Having examined his assertions, we conclude that each of them has failed in previous cases before this Court, and McCoy advances no basis to justify revisiting settled jurisprudence. Of note, McCoy has asserted that Florida's capital sentencing scheme violates both the United States and Florida Constitutions under the holding of Ring v. Arizona, 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002). This Court addressed a similar contention in Bottoson v. Moore, 833 So.2d 693 (Fla.), cert. denied, 537 U.S. 1070, 123 S.Ct. 662, 154 L.Ed.2d 564 (2002), and King v. Moore, 831 So.2d 143 (Fla.), cert. denied, 537 U.S. 1067, 123 S.Ct. 657, 154 L.Ed.2d 556 (2002), and denied relief. We conclude that McCoy is likewise not entitled to relief on this claim. Additionally, with regard to aggravating factors, a jury unanimously found McCoy guilty of armed robbery here, and it is undisputed that he was previously convicted of violent felonies and was under a sentence of imprisonment at the time of the instant murder.

McCoy, 853 So.2d at 409 (Fla. 2003) (7-5 jury recommendation). Interestingly, the Court begins its analysis by concluding that McCoy "advances no basis to justify revisiting settled jurisprudence." (Emphasis added). The Court apparently concludes here that the Apprendi issue is indeed settled and it simply incants the Bottoson/King mantra to deny relief to McCoy.

This review is still in the year of 2003, only one year after Ring was decided, and the Florida Supreme Court decides its fourteenth direct capital appeal, Taylor v. State, 855 So.2d 1 (Fla. 2003):

> Subsequent to the filing of briefs in this case, we allowed the parties to file supplemental briefing on whether Florida's death penalty sentencing scheme is unconstitutional in light of the United States Supreme Court's holding in Apprendi v. New Jersey, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000). This Court addressed similar contentions in Bottoson v. Moore, 833 So.2d 693 (Fla.2002), cert. denied, 537 U.S. 1070, 123 S.Ct. 662, 154 L.Ed.2d 564 (2002), and King v. Moore, 831 So.2d 143 (Fla.2002), cert. denied, 537 U.S. 1067, 123 S.Ct. 657, 154 L.Ed.2d 556 (2002), and denied relief. We find that Taylor is likewise not entitled to relief on this supplemental claim.

Taylor, 855 So.2d at 14 fn. 11 (Fla. 2003) (10-2 jury recommendation). Relief is denied based on the bare Bottoson/King mantra.

The fifteenth capital appellate decision in Florida after Ring was Blackwelder v. State, 851 So.2d 650 (Fla. 2003):

> V. RING ISSUES
>
> Finally, Blackwelder argues that Florida's capital sentencing scheme is unconstitutional in light of Ring v. Arizona, 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002). This Court, considering the effect of Ring, denied relief in Bottoson v. Moore, 833 So.2d 693 (Fla.), cert. denied, 537 U.S. 1070, 123 S.Ct. 662, 154 L.Ed.2d 564 (2002), and King v. Moore, 831 So.2d 143 (Fla.), cert. denied, 537 U.S. 1067, 123 S.Ct. 657, 154 L.Ed.2d 556 (2002), which, like Blackwelder's case, involved a prior-felony-conviction aggravator. Ring rests on Apprendi v. New Jersey, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000), which held that, "[o]ther than the fact of a prior conviction, any fact that

> increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." Id. at 490, 120 S.Ct. 2348. We have previously rejected claims under Apprendi and Ring in cases involving the prior-felony-conviction aggravator. See Lugo v. State, 845 So.2d 74, 119 n. 79 (Fla.2003) (noting rejection of Apprendi/Ring claims in postconviction appeals, unanimous guilty verdict on other felonies, and "existence of prior violent felonies"); Doorbal v. State, 837 So.2d 940, 963 (Fla.2003) (stating that prior violent felony aggravator based on contemporaneous crimes charged by indictment and on which defendant was found guilty by unanimous jury "clearly satisfies the mandates of the United States and Florida Constitutions").
>
> Blackwelder argues specifically that aggravating circumstances must be alleged in the indictment, submitted to the jury, and individually found by a unanimous jury verdict. We recently rejected this same argument. Porter v. Crosby, 840 So.2d 981 (Fla.2003).

Blackwelder, 851 So.2d at 653-654 (Fla. 2003) (guilty plea, 12-0 jury recommendation).

Because the jury recommendation in Blackwelder was unanimous, the jury necessarily found the existence of "sufficient aggravating circumstances as enumerated in subsection (5)" to justify imposition of the death penalty. This effectively satisfies the requirements of a unanimous jury finding of the existence of "sufficient aggravating circumstances" but it does not accommodate the right to have the indictment provide the necessary allegations as guaranteed by the Fifth Amendment to the United States Constitution and article I, section 15 of the Florida Constitution. It also bears noting that, except for the unanimity in the recommendation, none of the cases cited in the Blackwelder decision to resolve the Ring issues have an analysis other than the Bottoson /King mantra with the Apprendi caveat.

The sixteenth Florida capital appeal decided after Ring was Nelson v. State, 850 So.2d 514 (Fla. 2003), still only a year out from Ring and in the context of a motion for rehearing, where the Florida Supreme Court repeats the bare Bottoson/King mantra and summarily denies relief with no additional reasoning or identification of the precise appellate issues raised by Nelson:

CONSTITUTIONALITY OF FLORIDA DEATH PENALTY SCHEME

> On rehearing, Nelson has asserted that Florida's capital sentencing scheme violates the United States Constitution under the holding of Ring v. Arizona, 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002). This Court addressed a similar contention in Bottoson v. Moore, 833 So.2d 693 (Fla.), cert. denied, 537 U.S. 1070, 123 S.Ct. 662, 154 L.Ed.2d 564 (2002), and King v. Moore, 831 So.2d 143 (Fla.), cert. denied, 537 U.S. 1067, 123 S.Ct. 657, 154 L.Ed.2d 556 (2002), and denied relief. We find that Nelson is likewise not entitled to relief on this claim.

Nelson, 850 So.2d at 533 (Fla. 2003) (9-3 jury recommendation). The Bottoson / King mantra is now the Court's common response to Apprendi / Ring issues.

The seventeenth post-Ring capital appeal decided by the Florida Supreme Court was Caballero v. State, 851 So.2d 655 (Fla. 2003). As will be seen, in Caballero, the Court refreshingly refers to new precedent - Jones v. State, 845 So.2d 55 (Fla. 2003). A little checking reveals, however, that Jones was a post-conviction case and where relief was denied based on recital of the Bottoson/King mantra with the Apprendi caveat. See Jones v. State, 845 So.2d 55, 74 (Fla. 2003). Specifically, in Caballero, the Court wrote the following:

VII. Constitutionality of Florida's Capital Sentencing System

> In his final claim, Caballero asserts that Florida's capital sentencing scheme violates the United States Constitution under the holdings of Ring v. Arizona, 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002), and Apprendi v. New Jersey, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000). This Court has recently addressed this argument and denied relief. See Jones v. State, 845 So.2d 55 (Fla.2003). Additionally, one of the aggravating circumstances the judge considered was that Caballero committed the murder during the commission of a burglary and kidnapping. These crimes were charged in the indictment and found by a unanimous jury beyond a reasonable doubt. The trial judge determined that any one of the aggravating factors, standing alone, would be sufficient to outweigh the mitigating circumstances. Caballero is not entitled to relief on this claim.

Caballero, 851 So.2d at 663-664 (Fla. 2003) (8-4 jury recommendation). This decision contains nothing new – the reference to Jones is an indirect reference to the Bottoson/King mantra with the Apprendi caveat. The Florida Supreme Court has now developed a line of cases rejecting Apprendi and Ring that can be cited without further analyzing the issue.

The eighteenth Florida capital appeal since Ring was Davis v. State, 859 So.2d 465 (Fla. 2003):

> ISSUE 9. CONSTITUTIONALITY OF THE DEATH PENALTY
>
> Davis next asserts that Florida's death penalty statute is unconstitutional for several reasons, including the United States Supreme Court's recent opinion in Ring v. Arizona, 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002). Each of Davis's arguments regarding the constitutionality of Florida's death penalty statute have been rejected by this Court. See Chavez v. State, 832 So.2d 730 (Fla.2002), cert. denied, 539 U.S. 947, 123 S.Ct. 2617, 156 L.Ed.2d 637 (2003).

Davis, 859 So.2d at 479-480 (Fla. 2003) (7-5 jury recommendation). Chavez was the first appellate decision in a capital case by the Florida Supreme Court after Ring was decided. A refresher on Chavez is appropriate because it was a direct appeal and certiorari review was denied by the United States Supreme Court. The Florida Supreme Court denied relief in Chavez as follows:

> On rehearing, Chavez has asserted that Florida's capital sentencing scheme violates the United States Constitution under the holding of Ring v. Arizona, 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002). This Court addressed a similar contention in Bottoson v. Moore, 833 So.2d 693 (Fla.2002), and King v. Moore, 831 So.2d 143 (2002), and denied relief. We find that Chavez is likewise not entitled to relief on this claim.

Chavez, 832 So.2d at 767 (Fla. 2002) (12-0 jury recommendation). Two things of major importance must be noted. First is that the denial of certiorari review is NOT a ruling on the merits. U.S. v. Carver, 482 U.S. 482, 490 (1923) ("The denial of a writ of certiorari imports no expression of opinion for the case, as the bar has been gold many times."); Lucas v. State, 841

So.2d 380, 389 fn.8 (Fla. 2007) (Florida Supreme Court recognizes "that a denial of certiorari does not constitute a ruling on the merits.").

Second, the jury recommendation in Chavez was unanimous, which necessarily embodies a unanimous determination beyond a reasonable doubt by a twelve-person jury that "sufficient aggravating circumstances exist as enumerated in subsection (5)." There can be no death recommendation by the jury without an initial finding that "sufficient aggravating circumstances" exist. The standard jury instructions so state:

> If you find that sufficient aggravating circumstances do not justify the death penalty, your advisory sentence should be one of life imprisonment, without possibility of parole.

Florida Standard Jury Instruction (Criminal) 7.11. See §921.141(2), Florida Statutes.

The nineteenth capital appellate decision after Ring was Conde v. State, 860 So.2d 930 (Fla. 2003):

> Constitutionality of Florida's Capital Sentencing Scheme
>
> Conde asserts that Florida's capital sentencing scheme violates the United States Constitution under the holding of Ring v. Arizona, 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002). This Court addressed a similar contention in Chavez v. State, 832 So.2d 730, 767 (Fla.2002), cert. denied, 539 U.S. 947, 123 S.Ct. 2617, 156 L.Ed.2d 637 (2003), and denied relief. We find that Conde is likewise not entitled to relief on this claim. We specifically note that one of the aggravating circumstances present in this matter is a prior violent felony conviction.

Conde, 860 So.2d at 959 (Fla. 2003) (9-3 jury recommendation). The reference to Chavez, even with the denial of certiorari affixed, is nothing more than incantation of the Bottoson/King mantra with the Apprendi caveat.

Owen v. State, 862 So.2d 687 (Fla. 2003) was the twentieth capital appeal decided in Florida after Ring:

> CONSTITUTIONAL VALIDITY OF FLORIDA'S DEATH PENALTY SCHEME

> Owen next challenges the constitutional validity of Florida's death penalty scheme. We recently addressed Owen's contention that the Florida death penalty scheme is unconstitutional in Bottoson v. Moore, 833 So.2d 693 (Fla.), cert. denied, 537 U.S. 1070, 123 S.Ct. 662, 154 L.Ed.2d 564 (2002), and King v. Moore, 831 So.2d 143 (Fla.), cert. denied, 537 U.S. 1067, 123 S.Ct. 657, 154 L.Ed.2d 556 (2002), and denied relief. Owen is likewise not entitled to relief on this claim. Further, Owen's specific argument that his death sentence was unconstitutionally imposed because Florida's capital sentencing scheme fails to require that aggravating circumstances be enumerated and charged in the indictment and by further failing to require specific, unanimous jury findings of aggravating circumstances is unquestionably without merit. Recently, in Doorbal v. State, 837 So.2d 940 (Fla.), cert. denied, 539 U.S. 962, 123 S.Ct. 2647, 156 L.Ed.2d 663 (2003), we held, "Because [the prior violent felonies] were charged by indictment, and a jury unanimously found Doorbal guilty of them, the prior violent felony aggravator alone clearly satisfies the mandates of the United States and Florida Constitutions, and therefore imposition of the death penalty was constitutional." Id. at 963. As in Doorbal, the death penalty was constitutionally imposed upon Owen in light of the fact that the trial court properly applied the prior violent felony aggravating factor. Notably, the trial court highlighted the fact that Owen conceded that the prior violent felony aggravator was applicable in his case.

Owen, 862 So.2d at 703-704 (Fla. 2003) (10-2 jury recommendation). In Owen, the Court applied the Bottoson/King mantra, with the Apprendi caveat. It cited Doorbal which also avoided certiorari review by the United States Supreme Court. Doorbal was an 8-4 jury recommendation, that rejected the issues that "Florida's capital sentencing scheme violates the United States and Florida Constitutions by failing to require that aggravating circumstances be enumerated and charged in the indictment and by further failing to require specific, unanimous jury findings of aggravating circumstances." Doorbal v. State, 837 So.2d 940, 963 (Fla. 2003). The specific issues identified by the Florida Supreme Court are not the same as brought here. The difficulties with these rationales has previously been addressed, and as will be developed later a violation of the state proscription of separation of powers contained in article II, section 3

of the Florida Constitution results from applying Apprendi in this fashion. Further, the argument that Florida's avoidance of properly applying Ring and / or the failure of the Florida Supreme Court to properly apply the analysis of the right to a jury trial under Florida's Constitution is a separate violation of article I, section 21 of the Florida Constitution.

The twenty-first capital Florida appeal since Ring was Anderson v. State, 863 So.2d 169 (Fla. 2003):

APPRENDI CLAIM

> Finally, Anderson asserts that Florida's death penalty sentencing scheme is unconstitutional pursuant to the United States Supreme Court's holding in Apprendi v. New Jersey, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000). In a notice of supplemental authority, Anderson filed the United States Supreme Court's opinion in Ring v. Arizona, 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002), in support of his argument on this point. This Court has addressed similar contentions in previous cases and denied relief. See, e.g., Duest v. State, 855 So.2d 33 (Fla. 2003); Lawrence v. State, 846 So.2d 440, 451 (Fla.2003), petition for cert. filed, No. 03-5708 (U.S. July 30, 2003); Chavez v. State, 832 So.2d 730, 767 (Fla.2002), cert. denied, 539 U.S. 947, 123 S.Ct. 2617, 156 L.Ed.2d 637 (2003). We find that Anderson is likewise not entitled to relief on this claim. We specifically note that the jury recommended the death sentence by a unanimous vote and one of the aggravating circumstances found by the trial judge was that Anderson had been convicted of a prior violent felony for the contemporaneous conviction of the attempted murder of Scott.

Anderson, 863 So.2d at 189 (Fla. 2003) (12-0 jury recommendation). There is no new analysis conducted by the Florida Supreme Court, other than the express observation that the jury unanimously recommended the death penalty. The Court did not explain why that satisfied the Apprendi analysis, but that has previously been adequately addressed in this memorandum.

The twenty-second capital appeal decided by the Florida Supreme Court after Ring was Johnston v. State, 863 So.2d 271 (Fla. 2003):

V. CONSTITUTIONALITY OF FLORIDA'S CAPITAL SENTENCING SCHEME

> In his final claim, Johnston asserts that Florida's capital sentencing scheme violates the United States Constitution under the holdings of Ring v. Arizona, 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002), and Apprendi v. New Jersey, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000). This Court has recently addressed this argument and denied relief. See Jones v. State, 845 So.2d 55 (Fla.2003). Additionally, one of the aggravating circumstances the judge considered was Johnston's previous first-degree murder conviction. This prior violent felony conviction alone satisfies constitutional mandates because the conviction was heard by a jury and determined beyond a reasonable doubt. See Doorbal v. State, 837 So.2d 940, 963 (Fla.), cert. denied, 539 U.S. 962, 123 S.Ct. 2647, 156 L.Ed.2d 663 (2003). Accordingly, Johnston is not entitled to relief on this claim.

Johnston, 863 So.2d at 286 (Fla. 2003) (7-5 jury recommendation). This is the back-hand reference to the Bottoson/King mantra with the Apprendi caveat.

Smith v. State, 866 So.2d 51 (Fla. 2004) was the twenty-third capital appeal decided by the Florida Supreme Court after Ring:

> G. Constitutionality of Florida's Death Penalty Statute
>
> Smith asserts that Florida's capital sentencing scheme violates the United States Constitution under the holding of Ring v. Arizona, 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002). This Court addressed a similar contention in Chavez v. State, 832 So.2d 730, 767 (Fla.2002), cert. denied, 539 U.S. 947, 123 S.Ct. 2617, 156 L.Ed.2d 637 (2003), and denied relief. We find that Smith is not entitled to relief on this claim. We specifically note that one of the aggravating factors present in this matter is a prior violent felony conviction.

Smith, 866 So.2d at 68 (Fla. 2004) (8-4 jury recommendation). Again, nothing new, and the reference to Chavez is a back-hand reference to the Bottoson/King mantra with the Apprendi caveat. The fallacy of the Court's reliance on one aggravating circumstance to satisfy the statute's requirement of sufficient aggravating circumstances is a violation of the separation of powers and denial of due process that will be fully addressed later in this memorandum.

The twenty-fourth Florida capital appellate decision following Ring was Stewart v. State, 872 So.2d 226 (Fla. 2003):

> II. ISSUES ON APPEAL
>
> Stewart raises five issues on appeal. We summarily reject the first three because we have repeatedly addressed the same issues.[FN2] Therefore, we address only claims 4 and 5, asserting that the trial court failed to properly weigh the mitigation and that Stewart's death sentence is disproportionate.
>
> FN2. Stewart first argues that he was entitled to a special jury instruction on the nonstatutory mitigation presented. We have repeatedly rejected this argument. See, e.g., San Martin v. State, 705 So.2d 1337, 1349 (Fla.1997). Second, Stewart argues that death-qualifying aggravators must be alleged in the indictment and individually found by a jury. We have repeatedly rejected this argument as well. See, e.g., Kormondy v. State, 845 So.2d 41 (Fla.2003). Finally, Stewart argues that Florida's death penalty statute is unconstitutional because it permits a jury recommendation of death by a bare majority vote. When the defendant has been convicted of a prior violent felony, as Stewart has, we have rejected the argument that a jury's recommendation of death must be unanimous. See, e.g., Doorbal v. State, 837 So.2d 940, 963 (Fla.) cert. denied, 539 U.S. 962, 123 S.Ct. 2647, 156 L.Ed.2d 663 (2003).

Stewart, 872 So.2d at 227-228 (Fla. 2003) (7-5 jury recommendation). In a specially concurring in part, dissenting in part opinion, Justice Anstead wrote, "I also cannot agree with the majority's decision to summarily reject the defendant's claims based on Ring v. Arizona, 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002). The rejection of the issues under Ring was accomplished via footnote with references to Kormandy and Doorbal, both of which relied on the Bottoson/King mantra with the Apprendi caveat to deny relief. What has evolved is a new line of precedent that traces back to the Bottoson / King mantra and the Apprendi caveat, without anything new being added to the analysis Therefore, during this review and analysis of the Florida Supreme Court's decisions dealing with Apprendi and/or Ring, this line of cases will be referred to as the "the indirect Bottoson/King mantra."

The twenty-fifth capital appeal decided in Florida after Ring was Parker v. State, 873 So.2d 270 (Fla. 2004):

XII. APPRENDI and RING

> Finally, Parker argues that under the United States Supreme Court's decisions in Apprendi v. New Jersey, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000), and Ring v. Arizona, 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002), the Florida death penalty statute violates the Sixth Amendment of the United States Constitution. However, in addition to a conviction for first-degree murder, Parker was convicted by a unanimous jury of kidnapping and robbery. One of the aggravating factors found by the trial court was that Parker committed the murder in the course of a kidnapping. We recently denied relief on this issue in a direct appeal where the murder occurred in the course of the enumerated felonies of robbery and kidnapping, which were supported by separate guilty verdicts. See Caballero v. State, 851 So.2d 655, 663-64 (Fla.2003). Parker is likewise not entitled to relief.

Parker, 873 So.2d at 294 (Fla. 2004) (11-1 jury recommendation). This analysis uses the indirect incantation of the Bottoson / King mantra with the Apprendi caveat.

The twenty-sixth capital appeal decided in Florida after Ring was Douglas v. State, 878 So.2d 1246 (Fla. 2004)

V. Ring v. Arizona

> In his last issue on appeal, Douglas argues that Florida's death penalty statute, section 921.141, Florida Statutes (1999), is unconstitutional under Ring v. Arizona, 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002). We have previously addressed this contention on direct appeal and have concluded that there is no basis for declaring Florida's statute facially unconstitutional. See, e.g., Lawrence v. State, 846 So.2d 440, 451 (Fla.), cert. denied, 540 U.S. 952, 124 S.Ct. 394, 157 L.Ed.2d 286 (2003); Butler v. State, 842 So.2d 817, 834 (Fla.2003).
>
> Further, section 921.141 is constitutional as applied in this case because one of the aggravating circumstances found by the trial court is that the murder was committed in the course of a

> sexual battery. The jury unanimously found Douglas guilty of the crime of sexual battery and expressly found, in a special verdict, that Douglas committed the murder during the commission or attempted commission of a sexual battery. Thus, Douglas is not entitled to relief under Ring, which exempts aggravators relying on other convictions from the requirement of jury findings on any fact necessary to impose a sentence of death. See Caballero v. State, 851 So.2d 655, 663-64 (Fla.2003) (rejecting a Ring claim on direct appeal where one of the aggravating circumstances the judge considered was that the defendant committed the murder during the commission of a burglary and kidnapping); Doorbal v. State, 837 So.2d 940, 963 (Fla.) (stating that prior violent felony aggravator based on contemporaneous crimes charged by indictment and on which defendant was found guilty by unanimous jury "clearly satisfies the mandates of the United States and Florida Constitutions"), cert. denied, 539 U.S. 962, 123 S.Ct. 2647, 156 L.Ed.2d 663 (2003).

Douglas, 878 So.2d at 1263-264 (Fla. 2004) (11-1 jury recommendation). This analysis is nothing more than an indirect Bottoson/King mantra with an attempt to explain the Apprendi caveat in a way that violates Florida's separation of powers provision contained in article II, section 3 of the Florida Constitution.

More specifically, the Court, in attempting to explain why one valid circumstance satisfies Ring, states, "Douglas is not entitled to relief under Ring, which exempts aggravators relying on other convictions from the requirement of jury findings on any fact necessary to impose a sentence of death." (Emphasis added). Ring does not "exempt" aggravators relying on other convictions. Rather, Ring requires that a jury find the facts upon which imposition of the death penalty is dependent. That is not one aggravating circumstance in Florida because the statute requires "sufficient aggravating circumstances as enumerated in subsection (5)." Section 921.141(3), Florida Statutes.

Globe v. State, 877 So.2d 663 (Fla. 2004) is the twenty-seventh direct appeal of a capital case in Florida after Ring:

> III. PENALTY PHASE INSTRUCTIONS

> Globe argues that the trial court erred by instructing the jury that it was giving an "advisory sentence," in violation of Caldwell v. Mississippi, 472 U.S. 320, 105 S.Ct. 2633, 86 L.Ed.2d 231 (1985), and Ring v. Arizona, 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002). Caldwell and Ring involve independent concerns. Ring's focus is on jury findings that render a defendant eligible for the death penalty, while Caldwell centers on the jury's role in the decision to impose death upon death-eligible defendants. Defense counsel raised the Caldwell argument but did not raise the Ring argument before the trial court. Therefore, Ring does not affect our analysis on the Caldwell issue raised in this case. Additionally, the instructions given to the jury in this case were from Florida Standard Jury Instruction (Criminal) 7.11. This Court has repeatedly held that the Florida Standard Jury Instructions are in compliance with Caldwell. See Floyd v. State, 850 So.2d 383 (Fla.2002), cert. denied, --- U.S. ----, 124 S.Ct. 1040, 157 L.Ed.2d 902 (2004); Brown v. State, 721 So.2d 274 (Fla.1998); Burns v. State, 699 So.2d 646 (Fla.1997). Accordingly, Globe's claim is without merit.
>
> IV. RING CLAIMS
>
> Globe argues that Florida's capital sentencing statute and his death sentence violate the Sixth and Fourteenth Amendments under Ring. This Court has recently addressed this argument in another case and denied relief. See Jones v. State, 845 So.2d 55 (Fla.2003). Additionally, the aggravating factors in this case included Globe's prior violent felony convictions. Globe committed the Ard murder while serving prison sentences for his 1985 convictions on two counts of sexual battery, one count of kidnaping, and two counts of robbery. Because these felonies were charged by indictment and a jury unanimously found Globe guilty of them, the prior violent felony aggravator alone clearly satisfies the mandates of the United States and Florida Constitutions. See Doorbal v. State, 837 So.2d 940, 963 (Fla.), cert. denied 539 U.S. 962, 123 S.Ct. 2647, 156 L.Ed.2d 663 (2003). Globe's claim is without merit.

Globe, 877 So.2d at 673-674 (Fla. 2004) (9-3 jury recommendation). The jury recommendation portion of this decision finds that the Ring argument was not properly before the Court due to

procedural default caused by the failure to make the same argument at the trial level. The second part of the analysis is an indirect Bottoson/King mantra with the Apprendi caveat. This is a routine denial of relief.

The twenty-eighth capital decision by Florida after Ring was Hernandez-Alberto v. State, 889 So.2d 721 (Fla. 2004):

> Issue 7: Ring Claim
>
> Lastly, Hernandez-Alberto asserts that Florida's capital sentencing statute is unconstitutional. We have repeatedly rejected such challenges. See, e.g., Bottoson v. Moore, 833 So.2d 693 (Fla.), cert. denied, 537 U.S. 1070, 123 S.Ct. 662, 154 L.Ed.2d 564 (2002). Hernandez-Alberto specifically argues that Florida's capital sentencing scheme is unconstitutional because (1) the State is not required to provide notice of the aggravating circumstances it intends to establish at the penalty phase; (2) the jury is not required to make any specific findings regarding the existence of aggravating circumstances, or even of a defendant's eligibility for the death penalty; (3) there is no requirement of jury unanimity for finding individual aggravating circumstances or for making a recommendation of death; and (4) the State is not required to prove the appropriateness of the death penalty. We have rejected each of these assertions. See, e.g., Porter v. Crosby, 840 So.2d 981, 986 (Fla.2003) (rejecting argument that aggravating circumstances must be alleged in the indictment, submitted to the jury, and individually found by a unanimous jury verdict); Kormondy v. State, 845 So.2d 41, 54 (Fla.) ("While Ring makes Apprendi applicable to death penalty cases, Ring does not require either notice of the aggravating factors that the State will present at sentencing or a special verdict form indicating the aggravating factors found by the jury."), cert. denied, 540 U.S. 950, 124 S.Ct. 392, 157 L.Ed.2d 283 (2003). Additionally, the assertion that the State does not have to prove the appropriateness of the death penalty is simply without merit. In a criminal prosecution the State always has the burden of proof, and in the sentencing context the State bears that burden by proving the existence of each aggravating circumstance beyond a reasonable doubt. See Clark v. State, 443 So.2d 973, 976 (Fla.1983) ("The burden is upon the state in the sentencing portion of a capital felony trial to prove

> every aggravating circumstance beyond a reasonable doubt."). Therefore, this claim is without merit.

Hernandez-Alberto, 889 So.2d at 733-734 (Fla. 2004) (footnotes omitted) (10-2 jury recommendation).

Hernandez-Alberto is a very interesting case for several reasons. First, the Court returns to directly citing Bottoson. The Court goes further, however, and states several things that require attention. The Court does NOT address the claim that in Florida the jury does not determine a defendant's eligibility for the death penalty. The Court sidesteps the issue and remarkably observes that the State "bears the burden by proving the existence of each aggravating circumstance beyond a reasonable doubt." The Court is repeating the same error it first made in State v. Dixon, 283 So.2d 1 (Fla. 1973), where it acknowledges that due process requires that the statutory considerations upon which imposition of the death penalty depends is protected by due process concerns, yet for some inexplicable reason the court stops short of providing capital defendants the full procedural due process protections to which they are entitled.

More specifically, the United States Supreme Court has squarely held that the due process that is provided to defendants is not a rigid concept but instead a flexible one that essentially morphs to provide such procedural protections as the particular situation demands:

> We turn, therefore, to the question whether the requirements of due process in general apply to parole revocations. As Mr. Justice Blackmun has written recently, "this Court now has rejected the concept that constitutional rights turn upon whether a governmental benefit is characterized as a 'right' or as a 'privilege.'" Graham v. Richardson, 403 U.S. 365, 374, 91 S.Ct. 1848, 1853, 29 L.E.2d 534 (1971). Whether any procedural protections are due depends on the extent to which an individual will be "condemned to suffer grievous loss." Joint Anti-Fascist Refugee Committee v. McGrath, 341 U.S. 123, 168, 71 S.Ct. 624, 646, 95 L.Ed.2d 817 (1951) (Frankfurter, J., concurring), quoted in Goldberg v. Kelly, 397 U.S. 254, 263, 90 S.Ct. 1011, 1018, 25 L.Ed.2d 287 (1970). The question is not merely the "weight" of the individual's interest, but whether the nature of the interest is one within the contemplation of the "liberty or property" language of

> the Fourteenth Amendment. Fuentes v. Shevin, 407 U.S. 67, 92 S.Ct. 1983, 32 L.Ed.2d 556 (1972). Once it is determined that due process applies, the question remains what process is due. It has been said so often by this Court and others as not to require citation of authority that due process is flexible and calls for such procedural protections as the particular situation demands. "(C)onsideration of what procedures due process may require under any given set of circumstances must begin with a determination of the precise nature of the government function involved as well as of the private interest that has been affected by governmental action." Cafeteria & Restaurant Workers Uniion V. McElroy, 367 U.S. 886, 895, 81 S.Ct. 1743, 1748, 6 L.Ed.2d 1230 (1961). To say that the concept of due process is flexible does not mean that judges are at large to apply it to any and all relationships. Its flexibility is in its scope once it has been determined that some process is due; it is a recognition that not all situations calling for procedural safeguards call for the same kind of procedure.

Morrissey v. Brewer, 408 U.S. 471, 481, 92 S.Ct. 2593, 33 L.Ed.2d 484 (1972). The proof beyond a reasonable doubt standard is enforced by courts as the minimum standard of proof that comports with due process in a criminal trial. In re Winship, 397 U.S. 358, 364 (1970) ("Lest there remain any doubt about the constitutional stature of the reasonable-doubt standard, we explicitly hold that the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged.").

There exists under the Sixth and Fourteenth Amendments a separate due process right to a jury trial. The United States Supreme Court has specifically noted that "the penalty authorized for a particular crime is of major relevance in determining whether it is serious or not and may in itself, if severe enough, subject the trial to the mandates of the Sixth Amendment." Duncan v. Louisiana, 391 U.S. 145, 159 (1968). The Florida Supreme Court in 1972 determined that due process attached to the findings of the requirements under §921.141(5), Florida Statutes:

> The aggravating circumstances of Fla.Stat. §921.141(6), F.S.A., actually define those crimes-when read in conjunction with Fla.Stat. §§782.04(1) and 794.01(1), F.S.A.-to which the death

> penalty is applicable in the absence of mitigating circumstances. As such, they must be proved beyond a reasonable doubt before being considered by judge or jury.

State v. Dixon, 283 So.2d 1, 9 (Fla. 1973). In essence, this is what Apprendi and Ring are about. The entitlement to a jury determination of statutory factors under due process depends on what the statute says, not what the Court says it says. Florida's statute does not say "one." It requires a conviction for first degree murder AND "sufficient aggravating circumstances as enumerated in subsection (5)." §921.141(3), Florida Statutes to impose the death penalty. Recognition by the Florida Supreme Court again now in Hernandez-Alberto that the separate aggravating circumstances must be proved "beyond a reasonable doubt" is actually a reaffirmation that the finding of their existence is entitled to due process under the Fourteenth Amendment.

The twenty-ninth capital decision after Ring in Florida was Huggins v. State, 889 So.2d 743 (Fla. 2004):

> In Huggins' final point of appeal, he argues that Florida's death penalty sentencing scheme is unconstitutional under Ring v. Arizona, 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002), and that the trial court's use of special verdict forms in the penalty phase was inconsistent with the requirements of section 921.141, Florida Statutes (2002), and violated his constitutional rights. With regard to the former, we deny this claim, as we have denied similar claims. See, e.g., Globe v. State, 877 So.2d 663 (Fla.2004); Smith v. State, 866 So.2d 51 (Fla.2004); Johnston v. State, 863 So.2d 271 (Fla.2003), cert. denied, 541 U.S. 946, 124 S.Ct. 1676, 158 L.Ed.2d 372 (2004); Jones v. State, 845 So.2d 55 (Fla.2003); Chavez v. State, 832 So.2d 730, 767 (Fla.2002). In particular, we note that one of the aggravating factors found in this case is based on Huggins' prior violent felony convictions.
>
> Pretrial, Huggins filed various motions based on Ring, one of which requested specific jury findings of penalty-phase facts. The trial court denied that motion, but later utilized, in addition to the normal verdict form for the penalty phase, special verdict forms on which the jury was to indicate the aggravating and mitigating factors found and the number of jurors finding those factors. Prior to penalty-phase jury instructions, Huggins objected

> to the use of the special verdict forms and argued that the forms had the effect of changing the statutory scheme of Florida's death penalty sentencing. In this appeal, Huggins claims that the use of the forms violated his rights under the Eighth and Fourteenth Amendments to the United States Constitution and under article 1, sections 9 and 17 of the Florida Constitution. However, Huggins fails to allege any prejudice from the use of the forms. Therefore, without determining whether the use of these special verdict forms constituted error, we find that any error was harmless under State v. DiGuilio, 491 So.2d 1129 (Fla.1986).

Huggins v. State, 889 So.2d 743, 772 (Fla. 2004) (9-3 jury recommendation). This rather cryptic decision is an indirect reference to the Bottoson/King mantra, with the matter complicated somewhat by the trial court's use of an unauthorized special verdict form that was deemed to be "harmless error" with the express disavowal of a finding that it was error. It seems anomalous to find that something is "harmless error" while expressly not determining whether it is error. In any event, the decision adds nothing to the analysis except confusion.

The thirtieth appellate decision in a capital case to be decided after Ring was Crain v. State, 894 So.2d 59 (Fla. 2004):

> V. CONSTITUTIONALITY OF DEATH PENALTY
>
> In a supplemental brief, Crain raises the issue of the constitutionality of Florida's death penalty scheme in the wake of Ring v. Arizona, 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002), and Apprendi v. New Jersey, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000). This Court addressed the contention that Florida's capital sentencing scheme violates the United States Constitution under Apprendi and Ring in postconviction appeals in Bottoson v. Moore, 833 So.2d 693 (Fla.2002), and King v. Moore, 831 So.2d 143 (Fla.2002), and denied relief. We have also denied relief in direct appeals where, as in this case, the trial judge has found the aggravating factor of

> previous conviction of a violent felony. See Duest v. State, 855 So.2d 33, 49 (Fla.2003), cert denied, 541 U.S. 993, 124 S.Ct. 2023, 158 L.Ed.2d 500 (2004); see also Doorbal v. State, 837 So.2d 940, 963 (Fla.) (stating that prior violent felony aggravator based on contemporaneous crimes charged by indictment and on which defendant was found guilty by unanimous jury "clearly satisfies the mandates of the United States and Florida Constitutions"), cert. denied, 539 U.S. 962, 123 S.Ct. 2647, 156 L.Ed.2d 663 (2003). Additionally, the advisory sentence of death in this case was by a unanimous vote. In Anderson v. State, 863 So.2d 169, 189 (Fla.2003), cert. denied, 541 U.S. 940, 124 S.Ct. 1662, 158 L.Ed.2d 363 (2004), we pointed to the unanimous death recommendation as well as a prior violent felony aggravator in rejecting an Apprendi/Ring claim in direct death appeal. We have also rejected Apprendi/Ring claims in other direct death appeals involving unanimous death recommendations. See Conahan v. State, 844 So.2d 629, 642 n. 9 (Fla.), cert. denied, 540 U.S. 895, 124 S.Ct. 240, 157 L.Ed.2d 172 (2003); Chavez v. State, 832 So.2d 730, 767 (Fla.2002), cert. denied, 539 U.S. 947, 123 S.Ct. 2617, 156 L.Ed.2d 637 (2003). Accordingly, we conclude that Crain is also not entitled to relief.

Crain, 894 So.2d at 78 (Fla. 2004) (12-0 jury recommendation). The Court in Crain directly relied on the Bottoson/King mantra with the Apprendi caveat, and concluded with the observation that the jury's unanimous recommendation carried the day. There is nothing new to this analysis, and it simply restates what has previously been stated.

The thirty-first capital appellate decision was Everett v. State, 893 So.2d 1278 (Fla. 2004):

> In his third claim, Everett challenges his sentence as unconstitutional under Ring v. Arizona, 536 U.S. at 584, 122 S.Ct. 2428, which requires that, other than the fact of a prior conviction, the jury must find the facts supporting the aggravating factors used to impose the death penalty. In this case, the jury unanimously recommended death, and one of the aggravating factors found was that the murder was committed during the course of a sexual battery or burglary, two crimes of which the jury also found Everett guilty. Accordingly, we reject his claim as we have rejected similar ones. See, e.g., Caballero v. State, 851 So.2d 655, 663-64 (Fla.2003) (denying relief under Ring where one aggravating factor was that the murder was committed during the commission of a burglary and kidnapping, charges on which defendant also was convicted, and the court determined that any one aggravator outweighed all the mitigation). We also have rejected the claim that the jury must unanimously specify each aggravator found. See Owen v. Crosby, 854 So.2d 182, 193 (Fla.2003); Duest v. State, 855 So.2d 33, 48-49 (Fla.2003), cert. denied, 541 U.S. 993, 124 S.Ct. 2023, 158 L.Ed.2d 500 (2004).

Everett, 893 So.2d at 1282 (Fla. 2004) (12-0 jury recommendation). Relief is denied based on the Bottoson/King mantra with the Apprendi caveat.

The thirty-second appellate decision in a capital case since Ring was Winkles v. State, 894 So.2d 842 (Fla. 2005)

> The Constitutional Issues
>
> Winkles argues that Florida's death penalty statute is unconstitutional on two grounds: (1) contrary to the statute, the Supreme Court's decisions in Apprendi v. New Jersey, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000), and Ring v. Arizona, 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002), require that a jury must find the aggravating circumstances necessary to impose the death penalty; and (2) the statute does not require that aggravating circumstances be charged in the indictment. We address each claim in turn.
>
> First, Winkles contends that under Apprendi and Ring, a jury must find the aggravating circumstances required to impose the death penalty.[FN3] In Apprendi the United States Supreme Court held that "[o]ther than the fact of a prior conviction, any fact that

increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." 530 U.S. at 490, 120 S.Ct. 2348. In Ring, the Court applied this rule to death penalty cases, holding that "[c]apital defendants, no less than noncapital defendants ... are entitled to a jury determination of any fact on which the legislature conditions an increase in their maximum punishment." Ring, 536 U.S. at 589, 122 S.Ct. 2428.

As appellant admits, at least in cases, such as this one, that include a prior violent felony conviction as an aggravating circumstance, this Court has repeatedly rejected the argument that Apprendi and Ring require the jury, rather than the judge, to find the remaining aggravators. See, e.g., Duest v. State, 855 So.2d 33, 49 (Fla.2003) ("We have previously rejected claims under Apprendi and Ring in cases involving the aggravating factor of a previous conviction of a felony involving violence."), cert. denied, 541 U.S. 993, 124 S.Ct. 2023, 158 L.Ed.2d 500 (2004); Kormondy v. State, 845 So.2d 41, 54 (Fla.) (" Ring does not require either notice of the aggravating factors that the State will present at sentencing or a special verdict form indicating the aggravating factors found by the jury."), cert. denied, 540 U.S. 950, 124 S.Ct. 392, 157 L.Ed.2d 283 (2003). Accordingly, we affirm the trial court's denial of relief on this issue.

Second, Winkles contends that Florida's death penalty statute is unconstitutional because it does not require that aggravating circumstances be charged in the indictment. Again, this Court has regularly rejected such claims where, as here, one of the aggravators is a prior violent felony conviction. For example, in Doorbal v. State, 837 So.2d 940, 963 (Fla.), cert. denied, 539 U.S. 962, 123 S.Ct. 2647, 156 L.Ed.2d 663 (2003), we rejected this same claim, concluding that one of the aggravating circumstances found by the trial judge to support the sentences of death was that Doorbal had been convicted of a prior violent felony, namely the contemporaneous murders of Griga and Furton, and the kidnapping, robbery, and attempted murder of Schiller. Because these felonies were charged by indictment, and a jury unanimously found Doorbal guilty of them, the prior violent felony aggravator alone satisfies the mandates of the United States and Florida Constitutions, and therefore, imposition of the death penalty was constitutional. Accord Blackwelder v. State, 851 So.2d 650, 654

> (Fla.2003) (rejecting claim that aggravating circumstances must be alleged in indictment); see also Lynch v. State, 841 So.2d 362, 378 (Fla.) (rejecting a claim that Florida's death penalty statute is unconstitutional because it does not require notice of aggravating circumstances), cert. denied, 540 U.S. 867, 124 S.Ct. 189, 157 L.Ed.2d 123 (2003). As we have said before, "[t]he aggravating factors to be considered in determining the propriety of a death sentence are limited to those set out in [the statute]. Therefore, there is no reason to require the State to notify defendants of the aggravating factors that it intends to prove." Vining v. State, 637 So.2d 921, 927 (Fla.1994). The trial court in this case found, and we agree, that each murder charged in the indictment to which Winkles pled guilty constituted a prior violent felony conviction as to the other murder conviction. See Pardo v. State, 563 So.2d 77, 80 (Fla.1990) ("We have consistently held that the contemporaneous conviction of a violent felony may qualify as an aggravating circumstance, so long as the two crimes involved multiple victims or separate episodes."). The prior violent felony aggravator also was supported by appellant's 1982 convictions for kidnapping, armed robbery, and aggravated assault and his 1963 convictions for assault and attempted robbery. Accordingly, we affirm the court's denial of Winkles's motion on this issue as well.

Winkles, 894 So.2d at 845-847 (Fla. 2005) (jury recommendation waived).

Compared to the other appellate decisions, Wiknles presents a fairly lengthy analysis. However, it provides nothing that has not previously been stated in the Court's other decisions. There were only two issues raised – one dealing with the jury's finding of aggravating circumstances, and the second dealing with the sufficiency of the indictment for failing to list the aggravating circumstances. Relief is denied based on the indirect Bottoson/King mantra with the Apprendi caveat. The "regular" denial of relief where one of the aggravating circumstances found and used by the judge to impose the death penalty was a contemporaneous violent felony of which he was convicted by the jury. This fails to apply Apprendi correctly and violates the separation of powers provision contained in article II section 3 of the Florida Constitution.

Fitzpatrick v. State, 900 So.2d 495 (Fla. 2005) is Florida's thirty-third post-Ring capital appellate decision:

FLORIDA'S DEATH PENALTY STATUTE

> Fitzpatrick asserts that Florida's capital sentencing scheme violates the United States Constitution under the holdings of Ring v. Arizona, 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002), and Apprendi v. New Jersey, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000). This Court has addressed this argument and denied relief. See Jones v. State, 845 So.2d 55, 74 (Fla.2003). We conclude that Fitzpatrick is likewise not entitled to relief on this claim. Additionally, one of the aggravating circumstances the trial judge in this action considered was Fitzpatrick's previous aggravated battery conviction. This prior violent felony conviction alone satisfies constitutional mandates because the conviction was heard by a jury and determined beyond a reasonable doubt. See Doorbal v. State, 837 So.2d 940, 963 (Fla.), cert. denied, 539 U.S. 962, 123 S.Ct. 2647, 156 L.Ed.2d 663 (2003). Accordingly, Fitzpatrick is not entitled to relief on this claim.

Fitzpatrick, 900 So.2d at 525 (Fla. 2005) (10-2 jury recommendation). Once again, the indirect Bottoson/King mantra and Apprendi caveat are used to deny relief.

The review of the capital decisions dealing with Apprendi and Ring is just over half-way completed. A quick review of the two cases that are now being routinely cited by the Florida Supreme Court to deny relief for claims alleging a violation of Ring is appropriate to fully appreciate why these cases are not valid precedent:

> PER CURIAM.
>
> Linroy Bottoson, a prisoner under sentence of death and an active death warrant, petitions this Court for a writ of habeas corpus. [FN1] He seeks relief pursuant to Ring v. Arizona, 536 U.S. 584, ----, 122 S.Ct. 2428, 2443, 153 L.Ed.2d 556 (2002), wherein the United States Supreme Court held unconstitutional the Arizona capital sentencing statute "to the extent that it allows a sentencing judge, sitting without a jury, to find an aggravating circumstance necessary for imposition of the death penalty."
>
> Although Bottoson contends that he is entitled to relief under Ring, we decline to so hold. The United States Supreme Court in February 2002 stayed Bottoson's execution and placed the present case in abeyance while it decided Ring.[FN2] That Court then in June 2002 issued its decision in Ring, summarily denied Bottoson's petition for certiorari, and lifted the stay without mentioning Ring in the Bottoson

order.[FN3] The Court did not direct the Florida Supreme Court to reconsider Bottoson in light of Ring.

Significantly, the United States Supreme Court repeatedly has reviewed and upheld Florida's capital sentencing statute over the past quarter of a century, [FN4] and although Bottoson contends that there now are areas of "irreconcilable conflict" in that precedent, the Court in Ring did not address this issue. In a comparable situation, the United States Supreme Court held:

> If a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the [other courts] should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions.

Rodriguez de Quijas v. Shearson/American Express, 490 U.S. 477, 484, 109 S.Ct. 1917, 104 L.Ed.2d 526 (1989).

We also reject Bottoson's claim that his rights under Atkins v. Virginia, 536 U.S. 304, 122 S.Ct. 2242, 153 L.Ed.2d 335 (2002), were violated. We find Atkins inapplicable in light of the fact that Bottoson already was afforded a hearing on the issue of mental retardation and was permitted to introduce expert testimony on the issue. The evidence did not support his claim. See Bottoson v. State, 813 So.2d 31, 33-34 (Fla.), cert. denied, 536 U.S. 962, 122 S.Ct. 2670, 153 L.Ed.2d 844 (2002).

Accordingly, we deny Bottoson's petition for habeas relief. This Court's stay of execution shall terminate at 5 p.m. on the thirtieth day following the filing of this opinion. No motion for rehearing will be allowed.

It is so ordered.

FN1. We have jurisdiction. See art. V, § 3(b)(9), Fla. Const.

FN2. See Bottoson v. Florida, 534 U.S. 1121, 122 S.Ct. 981, 151 L.Ed.2d 962 (2002).

FN3. See Bottoson v. Florida, 536 U.S. 962, 122 S.Ct. 2670, 153 L.Ed.2d 844 (2002).

FN4. See, e.g., Hildwin v. Florida, 490 U.S. 638, 109 S.Ct. 2055, 104 L.Ed.2d 728 (1989); Spaziano v. Florida, 468 U.S. 447, 104 S.Ct. 3154, 82 L.Ed.2d 340 (1984); Barclay v. Florida, 463 U.S. 939, 103 S.Ct. 3418, 77 L.Ed.2d 1134 (1983); Proffitt v. Florida, 428 U.S. 242, 96 S.Ct. 2960, 49 L.Ed.2d 913 (1976).

Wells and Quince, JJ., and Harding, Senior Justice, concurring.
Harding, Senior Justice, concurs with an opinion.
Wells and Quince, JJ., concurs specially with opinions.
Anstead, C.J., and Shaw, Pariente and Lewis, JJ., concur in result only with opinions.

Bottoson v. Moore, 833 So.2d 693, 694-695 (Fla. 2002) (Per Curiam). A close reading of the foregoing reveals that the case has no holding other than the denial of relief. The Court in King stated essentially the same and achieved the same result.

PER CURIAM.

Amos Lee King, a prisoner under sentence of death and an active death warrant, petitions this Court for a writ of habeas corpus.[FN1] He seeks relief pursuant to Ring v. Arizona, 536 U.S. 584, ----, 122 S.Ct. 2428, 2443, 153 L.Ed.2d 556 (2002), wherein the United States Supreme Court held unconstitutional the Arizona capital sentencing statute "to the extent that it allows a sentencing judge, sitting without a jury, to find an aggravating circumstance necessary for imposition of the death penalty."

Although King contends that he is entitled to relief under Ring, we decline to so hold. The United States Supreme Court in February 2002 stayed King's execution and placed the present case in abeyance while it decided Ring. [FN2] That Court then, in June 2002, issued its decision in Ring, summarily denied King's petition for certiorari, and lifted the stay without mentioning Ring in the King order.[FN3] The Court did not direct the Florida Supreme Court to reconsider King in light of Ring.

Significantly, the United States Supreme Court has repeatedly reviewed and upheld Florida's capital sentencing statute over the past quarter of a century [FN4] and although King contends that there now are areas of "irreconcilable conflict" in that precedent, the Court in Ring did not address this issue. In a comparable situation, the United States Supreme Court held:

> If a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the [other courts] should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions.

Rodriquez De Quijas v. Shearson/American Express, 490 U.S. 477, 484, 109 S.Ct. 1917, 104 L.Ed.2d 526 (1989).

Accordingly, we deny King's petition for habeas relief. This Court's stay of execution shall terminate at 5 p.m. on the thirtieth day following the filing of this opinion. No motion for rehearing will be allowed.

It is so ordered.

FN1. We have jurisdiction. See art. V, § 3(b)(9), Fla. Const.

FN2. See King v. Florida, 534 U.S. 1118, 122 S.Ct. 932, 151 L.Ed.2d 894 (2002).

FN3. See King v. Florida, 536 U.S. 962, 122 S.Ct. 2670, 153 L.Ed.2d 843 (2002).

FN4. See, e.g., Hildwin v. Florida, 490 U.S. 638, 109 S.Ct. 2055, 104 L.Ed.2d 728 (1989); Spaziano v. Florida, 468 U.S. 447, 104 S.Ct. 3154, 82 L.Ed.2d 340 (1984); Barclay v. Florida, 463 U.S. 939, 103 S.Ct. 3418, 77 L.Ed.2d 1134 (1983); Proffitt v. Florida, 428 U.S. 242, 96 S.Ct. 2960, 49 L.Ed.2d 913 (1976).

WELLS, J., and HARDING, Senior Justice, concur.

HARDING, Senior Justice, concurs with an opinion.

WELLS, J., concurs specially with an opinion.

ANSTEAD, C.J., and SHAW and LEWIS, JJ., concur in result only with opinions.

PARIENTE, J., concurs in result only with an opinion, in which ANSTEAD, C.J., concurs.

QUINCE, J., recused.

King v. Moore, 831 So.2d 143, 144-45 (Fla. 2002).

Both Bottoson and King denied relief but gave no express reason why. The Court implied that precedent from the United States Supreme Court (Hildwin, Spaziano and Barclay) contradicts Apprendi and Ring. The decisions rely on Bottoson and King when relief is denied.

This implies that relief under Apprendi and/or Ring will not be given to capital defendants in Florida until the United States Supreme Court overrules its existing precedent and compels that Florida apply the analysis in Apprendi to Florida's capital cases. It is clear that the trial courts are not providing defendants the right to a jury determination of the requirements of §921.141(3), Florida Statutes, and they are otherwise precluded from doing so by the Florida Supreme Court. See State v. Steele, 921 So.2d 538, 546 (Fla. 2005) ("Our current system fosters independence because the trial court alone must make detailed findings about the existence . . . of aggravating circumstances; it has no jury findings on which to rely.").

Now, back to the countdown. The thirty-fourth Florida capital appellate decision after Ring was Cave v. State, 899 So.2d 1042 (Fla. 2005)

> B. Florida's Capital-Sentencing Scheme
>
> Cave argues that Florida's capital-sentencing scheme is unconstitutional under Ring v. Arizona, 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002). We previously have addressed similar claims and denied relief. See, e.g., Jones v. State, 845 So.2d 55, 74 (Fla.2003); Bottoson v. Moore, 833 So.2d 693 (Fla.), cert. denied, 537 U.S. 1070, 123 S.Ct. 662, 154 L.Ed.2d 564 (2002); King v. Moore, 831 So.2d 143 (Fla.), cert. denied, 537 U.S. 1067, 123 S.Ct. 657, 154 L.Ed.2d 556 (2002). For the same reasons, we deny relief here. Furthermore, one of the aggravating circumstances found by the trial court was that the murder was committed in the course of two felonies. Cave was found, by a unanimous jury, guilty beyond a reasonable doubt of both felonies. Cf. Belcher v. State, 851 So.2d 678, 685 (Fla.), cert. denied, 540 U.S. 1054, 124 S.Ct. 816, 157 L.Ed.2d 706 (2003); Kormondy v. State, 845 So.2d 41, 54 n. 3 (Fla.), cert. denied, 540 U.S. 950, 124 S.Ct. 392, 157 L.Ed.2d 283 (2003); Doorbal v. State, 837 So.2d 940, 963 (Fla.), cert. denied, 539 U.S. 962, 123 S.Ct. 2647, 156 L.Ed.2d 663 (2003). Cave is not entitled to relief on this claim.

Cave, 899 So.2d at 1052 (Fla. 2005) (7-5 jury recommendation). The Court denies relief based upon the Bottoson/King mantra with the Apprendi caveat.

The thirty-fifth decision decided by the Florida Supreme Court after Ring was Floyd v. State, 913 So.2d 564 (Fla. 2005).

G. The Ring Claim

> The court denied Floyd's "Motion to Bar Imposition of the Death Penalty," which alleged that Florida's capital sentencing procedure violated Ring v. Arizona, 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002). On appeal, Floyd acknowledges that this Court has rejected the contention on numerous occasions and presents no argument on the issue. See Duest v. Dugger, 555 So.2d 849, 852 (Fla.1990) ("The purpose of an appellate brief is to present arguments in support of the points on appeal. Merely making reference to arguments below without further elucidation does not suffice to preserve issues, and these claims are deemed to have been waived.").
>
> The jury in this case unanimously recommended death, and the trial court so sentenced appellant, finding three aggravators. As appellant concedes, this Court has repeatedly upheld the constitutionality of Florida's capital sentencing procedures in cases, such as this one, that include the prior violent felony aggravator. See Duest v. State, 855 So.2d 33, 49 (Fla.2003) ("We have previously rejected claims under Apprendi [v. New Jersey, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000)] and Ring in cases involving the aggravating factor of a previous conviction of a felony involving violence."), cert. denied, 541 U.S. 993, 124 S.Ct. 2023, 158 L.Ed.2d 500 (2004). In addition, this case involved the aggravator of murder committed while under sentence of imprisonment, which this Court has held may be found by the judge alone. See Allen v. State, 854 So.2d 1255, 1262 (Fla.2003) ("Moreover, one of the aggravating factors in this case was that the murder was committed while Allen was under a sentence of imprisonment. Such an aggravator need not be found by the jury."). Appellant stipulated that he had absconded from federal parole and was a fugitive at the time of the murder. Accordingly, we affirm on this issue.

Floyd, 913 So.2d at 577-578 (Fla. 2005) (12-0 jury recommendation). This is another instance of the indirect Bottoson/King mantra, with the Apprendi caveat. What is instructive in analysis provided by the Court, however, it the observation that "Floyd . . . presents no argument on the issue." The Court cites Duest v. Dugger for the premise that making reference to arguments below "without elucidation" does not preserve an issue and it is deemed to be waived. By the

same token, the Court's rejection of arguments without elucidation likewise cannot be binding precedent when the precise argument that is being summarily denied is not set forth.

Perez v. State, 919 So.2d 347 (Fla. 2005) is the thirty-sixth capital appellate decision in Florida since Ring:

> IV. Constitutionality of Florida's Death Penalty
>
> Perez asserts that Florida's capital sentencing scheme violates his Sixth Amendment right and his right to due process under the holding of Ring v. Arizona, 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002). This Court addressed the contention that Florida's capital sentencing scheme violates the United States Constitution under Apprendi v. New Jersey, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000), and Ring, in Bottoson v. Moore, 833 So.2d 693 (Fla.2002), and King v. Moore, 831 So.2d 143 (Fla.2002), and denied relief. See also Jones v. State, 845 So.2d 55, 74 (Fla.2003). Perez is likewise not entitled to relief on this claim. Furthermore, one of the aggravating circumstances found by the trial court in this case was a prior conviction of a violent felony, "a factor which under Apprendi and Ring need not be found by the jury." Jones v. State, 855 So.2d 611, 619 (Fla.2003); see also Doorbal v. State, 837 So.2d 940, 963 (Fla.) (rejecting Ring claim where one of the aggravating circumstances found by the trial judge was defendant's prior conviction for a violent felony), cert. denied, 539 U.S. 962, 123 S.Ct. 2647, 156 L.Ed.2d 663 (2003).

Perez, 919 So.2d at 377 (Fla. 2005) (9-3 jury recommendation). The Court uses a direct incantation of the Bottoson/King mantra to deny relief, combined with the Apprendi caveat. To follow up on the preservation aspect of the prior analysis, the assertion that Florida's capital sentencing scheme denies the Sixth and Fourteenth Amendment rights under Apprendi does not state with specificity how and why Florida's capital sentencing scheme denies the Sixth and Fourteenth Amendments. None of the cases cited to this point deal with the required finding under §921.141(3), Florida Statutes, that sufficient aggravating circumstances exist as enumerated in subsection (5).

The thirty-seventh capital appellate decision in Florida after Ring was Seibert v. State, 923 So.2d 460 (Fla. 2006):

> ISSUE 6. RING CLAIM
>
> The final issue Seibert raises is that Florida's capital sentencing scheme violates Ring v. Arizona, 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002), because it permits the imposition of the death penalty without requiring that the jury unanimously find the existence of aggravating factors beyond a reasonable doubt and because a unanimous jury verdict is not required. Specifically, he asserts that his sentence was unconstitutional because there was no jury finding on the aggravating factors and because the vote for the death sentence was nine to three. As Seibert admits, the presence of a prior violent felony among the aggravating factors fulfills the mandate of Ring. Doorbal v. State, 837 So.2d 940, 963 (Fla.2003). Seibert pled guilty to attempted murder, kidnapping, and burglary charges in 1986. Because of the presence of the prior violent felony aggravator and because we continue to find that the necessary requirements of Ring have been met in such circumstances, see, e.g., Monlyn v. State, 894 So.2d 832, 839 (Fla.2004), we affirm the trial court's denial of Seibert's motion to declare Florida's sentencing statute unconstitutional.

Seibert, 923 So.2d at 474 (Fla. 2006) (9-3 jury recommendation). The Court denies relief by using the indirect Bottoson/Mantra with the Apprendi caveat. Nothing new is stated.

The Florida Supreme Court expressly used the Bottoson/King mantra in Buzia v. State, 926 So.2d 1203 (Fla. 2006), its thirty-eighth appellate decision denying relief in a capital case after Ring:

> F. The Ring Claim
>
> In his final claim, Buzia argues that Florida's capital sentencing procedures violate Ring v. Arizona, 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002). We have previously rejected this contention. See Jones v. State, 845 So.2d 55, 74 (Fla.2003) (citing Bottoson v. Moore, 833 So.2d 693 (Fla.2002), and King v. Moore, 831 So.2d 143 (Fla.2002)). Additionally, we have repeatedly upheld the constitutionality of Florida's capital

> sentencing procedures in cases, such as this one, that include the prior violent felony aggravator. See Robinson v. State, 865 So.2d 1259, 1265 (Fla.2004) ("[A] prior violent felony involve[s] facts that were already submitted to a jury during trial and, hence, [is] in compliance with Ring.") (citing Owen v. Crosby, 854 So.2d 182, 193 (Fla.2003)). Accordingly, Buzia is not entitled to relief.

Buzia, 926 So.2d at 1217 (Fla. 2006) (8-4 jury recommendation). In addition to the Bottoson/King mantra, the Court asserts that relief is not warranted based on the Apprendi caveat. There is nothing new in Buzia.

The thirty-ninth capital appeal decided by the Florida Supreme Court after Ring was Simmons v. State, 934 So.2d 1100 (Fla. 2006):

> VII. The Constitutionality of Florida's Death Penalty Statute
>
> In his next issue on appeal, Simmons argues that Florida's death penalty statute, section 921.141, Florida Statutes (2003), is unconstitutional under Ring v. Arizona, 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002). We have previously addressed this contention on direct appeal and have concluded that there is no basis for declaring Florida's statutory scheme facially unconstitutional. See, e.g., Lawrence v. State, 846 So.2d 440, 451 (Fla.2003), cert. denied, 540 U.S. 952, 124 S.Ct. 394, 157 L.Ed.2d 286 (2003); Butler v. State, 842 So.2d 817, 834 (Fla.2003). Further, in this case, by use of a special interrogatory verdict, the jury expressly and unanimously found all of the aggravating factors later relied upon by the trial court to impose a death sentence. See Ring, 536 U.S. at 609, 122 S.Ct. 2428 (finding that the Sixth Amendment right to a jury trial precludes a procedure by which a sentencing judge alone and without a jury finds aggravating factors sufficient to invoke the death penalty); see also Everett v. State, 893 So.2d 1278, 1282 (Fla.2004) (rejecting the defendant's Ring claim because the jury unanimously recommended death, and one of the aggravating factors was that the murder was committed during the course of a sexual battery or burglary, crimes of which the jury also found the defendant guilty), cert. denied, 544 U.S. 987, 125 S.Ct. 1865, 161 L.Ed.2d 747 (2005); Caballero v. State, 851 So.2d 655, 663-64 (Fla.2003) (rejecting a Ring claim on direct appeal where one of the

> aggravating circumstances the judge considered was that the defendant committed the murder during the commission of a burglary and kidnapping).

Simmons, 934 So.2d at 1120-1121 (Fla. 2006) (12-0 jury recommendation). Based on the use of special verdict forms and the fact that the jury unanimously recommended that Simmons receive the death penalty, the issues under Ring and Apprendi are foreclosed. However, the issue as to whether Simmons' indictment properly alleged the elements of the capital crime was apparently not advanced by Simmons and it obviously was not addressed by the Florida Supreme Court.

The fortieth Florida capita appellate decision after Ring was Reynolds v. State, 934 So.2d 1128 (Fla. 2006):

> H. Constitutionality of Florida's Death Penalty
>
> Reynolds next asserts that Florida's capital sentencing scheme violates his Sixth Amendment right and his right to due process under the holding of Ring v. Arizona, 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002). This Court addressed the contention that Florida's capital sentencing scheme violates the United States Constitution under Apprendi v. New Jersey, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000), and Ring in Bottoson v. Moore, 833 So.2d 693 (Fla.2002), and King v. Moore, 831 So.2d 143 (Fla.2002), and denied relief. See also Jones v. State, 845 So.2d 55, 74 (Fla.2003). We conclude that Reynolds is likewise not entitled to relief on this claim. Furthermore, one of the aggravating circumstances found by the trial court in this case was prior convictions of a violent felony, "a factor which under Apprendi and Ring need not be found by the jury." Jones v. State, 855 So.2d 611, 619 (Fla.2003); see also Doorbal v. State, 837 So.2d 940, 963 (Fla.) (rejecting Ring claim where one of the aggravating circumstances found by the trial judge was defendant's prior conviction for a violent felony), cert. denied, 539 U.S. 962, 123 S.Ct. 2647, 156 L.Ed.2d 663 (2003). Accordingly, Reynolds' claim is denied.

Reynolds, 934 So.2d at 1160 (Fla. 2006) (12-0 jury recommendation). The Court states the Bottoson/King directly and also states the Apprendi caveat. The fact that Reynolds' jury unanimously recommended the death penalty implicitly satisfied the requirements under

Apprendi because the jury would necessarily have had to have unanimously found the existence of "sufficient aggravating circumstances as enumerated in subsection (5)" to make a unanimous jury recommendation. See Florida Standard Jury Instruction (Criminal) 7.11. See §921.141(2), Florida Statutes.

The forty-first capital appellate decision in Florida after Ring was Taylor v. State, 937 So:2d 590 (Fla. 2006):

> II. Ring Claims
>
> Taylor claims that the United States Supreme Court's decision in Ring v. Arizona, 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002), invalidated Florida's capital sentencing procedures. Taylor also argues that Ring requires that: (1) the recommendation of death be unanimous; (2) the aggravators be alleged in the indictment; and (3) the aggravators be individually found by a unanimous jury verdict.
>
> This Court has rejected each of Taylor's arguments in prior decisions. In Jones v. State, 845 So.2d 55 (Fla.2003), we rejected the claim that Florida's capital sentencing scheme violates the United States Constitution under Ring. See id. at 74 (citing Bottoson v. Moore, 833 So.2d 693 (Fla.), cert. denied, 537 U.S. 1070, 123 S.Ct. 662, 154 L.Ed.2d 564 (2002), and King v. Moore, 831 So.2d 143 (Fla.), cert. denied, 537 U.S. 1067, 123 S.Ct. 657, 154 L.Ed.2d 556 (2002)). Furthermore, one of the aggravating factors found by the trial court in this case was a prior conviction of a violent felony, a factor "which under Apprendi and Ring need not be found by the jury." Jones v. State, 855 So.2d 611, 619 (Fla.2003). [FN5] Finally, this Court has rejected Ring claims in direct death appeals where the recommendations for the imposition of death were unanimous, as occurred in the instant case. See Crain v. State, 894 So.2d 59, 78 (Fla.2004), cert. denied, --- U.S. ----, 126 S.Ct. 47, 163 L.Ed.2d 79 (2005).
>
> FN5. We reject Taylor's claim that the existence of a prior violent felony aggravator should not bar the application of Ring to death sentences.
>
> Taylor's remaining challenges have already been rejected by this Court in prior decisions. See Parker v. State, 904 So.2d

> 370, 383 (Fla.2005) ("This Court has repeatedly held that it is not unconstitutional for a jury to recommend death on a simple majority vote ... [and] has rejected claims that Ring v. Arizona ... requires aggravating circumstances to be individually found by a unanimous jury verdict."); Brown v. Moore, 800 So.2d 223, 224-25 (Fla.2001) (rejecting constitutional challenge predicated on the failure to list aggravating factors in the indictment). Accordingly, we conclude that Taylor's claims are without merit.

Taylor v. State, 937 So.2d 590, 600-601 (Fla. 2006) (12-0 jury recommendation). The Bottoson/King mantra was directly stated, as was the Apprendi caveat. The fact that Taylor's jury unanimously recommended the death penalty implicitly satisfied the requirements under Apprendi because the jury would necessarily have had to have unanimously found the existence of "sufficient aggravating circumstances as enumerated in subsection (5)" to make a unanimous jury recommendation. See Florida Standard Jury Instruction (Criminal) 7.11. See §921.141(2), Florida Statutes.

Ibar v. State, 938 So.2d 451 (Fla. 2006) is Florida's forty-second capital appellate decision after Ring applied Apprendi to capital cases:

> Ibar argues that the Florida system unconstitutionally relies upon judicial fact-finding and not jury fact-finding. This claim, and variations of this claim, have been addressed and decided adversely to Ibar. See Duest v. State, 855 So.2d 33, 49 (Fla.2003); Blackwelder v. State, 851 So.2d 650, 654 (Fla.2003). Ibar also claims that the advisory role of the jury is unconstitutional and that the jury misunderstands its role. These claims have also been addressed and decided adversely to Ibar. See Jones v. State, 855 So.2d 611, 619 n. 5 (Fla.2003).
>
> Ibar also takes exception to the limitation the trial court put on defense counsel's arguments to the jury and argues that it was unconstitutional to prohibit defense counsel from asking the jury for mercy, asking for a jury pardon, discussing whether the jury had lingering doubt, or eliciting personal opinions about the death penalty from witnesses. Ibar argues that these prohibitions should be revisited in light of Ring v. Arizona, 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002). It is improper for the court to consider lingering doubt or residual doubt as a mitigating factor.

> See Darling v. State, 808 So.2d 145, 162 (Fla.2002); Sims v. State, 681 So.2d 1112, 1117 (Fla.1996); Preston v. State, 607 So.2d 404-411 (Fla.1992); Aldridge v. State, 503 So.2d 1257, 1259 (Fla.1987). Moreover, it is improper for a defendant to relitigate the determination of his guilt by presenting evidence of or arguing lingering doubt. See Duest v. State, 855 So.2d at 40. This principle has not changed since Ring, and there is nothing in the Ring decision that would require a different result.
>
> Ibar argues that the lack of unanimity in the jury recommendation is unconstitutional. This claim has been addressed and decided adversely to Ibar. See Blackwelder 851 So.2d at 654. Ibar also argues that the indictment was defective because it did not provide notice of the aggravators, and he argues that the verdict forms should have indicated which aggravators were found by the jury. These claims have also been addressed adversely to Ibar. See Kormondy v. State, 845 So.2d 41, 54 (Fla.2003) ("Ring does not require either notice of the aggravating factors that the State will present at sentencing or a special verdict form indicating the aggravating factors found by the jury.").

Ibar, 938 So.2d at 472-473 (Fla. 2006) (9-3 jury recommendations). The Court denies relief with indirect references to the Bottoson/King mantra. It bears mentioning that the instant motions filed by the defendant do not challenge the application of §921.141 in the context of a jury recommendation, and it is acknowledged that the entitlement to a jury recommendation is totally statutorily based, whereas the entitlement to a jury finding of the facts upon which imposition depends is constitutionally based.

The forty-third capital appellate decision in Florida after Ring was England v. State, 940 So.2d 389 (Fla. 2006):

> M. Ring Claims
>
> England makes two arguments related to Ring v. Arizona, 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002). First, he argues that his individual death sentence is unconstitutional. Second, he argues that Florida's statutory scheme itself violates Ring. Both arguments are without merit.

> England gives three reasons why his individual death sentence is unconstitutional: (1) the jury did not unanimously find him death-eligible; (2) the aggravating circumstances were not charged in the indictment; and (3) the aggravating circumstances were not found beyond a reasonable doubt by the jury. We address each reason sequentially. First, "[t]his Court has repeatedly held that it is not unconstitutional for a jury to recommend death on a simple majority vote." Parker v. State, 904 So.2d 370, 383 (Fla.2005); see also Whitfield v. State, 706 So.2d 1 (Fla.1997); Thompson v. State, 648 So.2d 692, 698 (Fla.1994); Brown v. State, 565 So.2d 304, 308 (Fla.1990); Alvord v. State, 322 So.2d 533, 536 (Fla.1975). Second, "we have rejected claims that Ring requires the aggravating circumstances to be alleged in the indictment." Ferrell v. State, 918 So.2d 163, 180 (Fla.2005). A defendant is not entitled to notice of every aggravator in the indictment because the aggravators are clearly listed in the statutes. Lynch v. State, 841 So.2d 362, 378 (Fla.2003) (citing Vining v. State, 637 So.2d 921, 928 (Fla.1994)). Third, one of the aggravators in this case is the prior violent felony aggravator, which both the United States Supreme Court and this Court have recognized as an exception to the requirement that the jury must make all the findings necessary to enhance a defendant's sentence. Ring, 536 U.S. at 597 n. 4, 122 S.Ct. 2428; see also Patton v. State, 878 So.2d 368, 377 (Fla.2004) ("The existence of this prior violent felony aggravator satisfies the mandates of the United States and Florida constitutions...."); Kormondy v. State, 845 So.2d 41, 54 n. 3 (Fla.2003) (finding the prior violent felony aggravator through contemporaneous charges of robbery, sexual assault, and battery included in the indictment and affirmed by the jury satisfies Ring's requirements).
>
> England next argues that Florida's statutory scheme itself violates Ring. This Court has previously addressed and rejected this claim. See, e.g., Bottoson v. Moore, 833 So.2d 693 (Fla.2002); King v. Moore, 831 So.2d 143 (Fla.2002).

England, 940 So.2d at 407 (Fla. 2006) (8-4 jury recommendation). The focus of England's arguments appears to have been based on the aggravating circumstances themselves rather that the statutory requirement that there be "sufficient" aggravating circumstances. The

Bottoson/King mantra is found at the conclusion of the decision, and relief is otherwise denied based on the Apprendi caveat.

The forty-fourth capital appeal decided by Florida after Ring was Coday v. State, 946 So.2d 988 (Fla. 2006):

> Constitutionality of Florida's Death Penalty Statute/ Ring [FN6] Claims
>
> Coday claims Florida's death penalty statute is unconstitutional because Florida law requires findings of fact (in particular, aggravating circumstances) be made by the trial judge and not the jury. Therefore, he alleges his sentence is unconstitutional under Ring v. Arizona, 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002). As this Court explained in State v. Steele, 921 So.2d 538 (Fla.2005), the Supreme Court's decisions in Apprendi v. New Jersey, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000), and Ring v. Arizona do not require a finding that the Florida capital sentencing scheme is unconstitutional. In Steele, we not only concluded, consistent with prior caselaw, that section 921.141, Florida Statutes, does not require jury findings on aggravating circumstances, we specifically held that it is a departure from the essential requirements of law to use a special verdict form detailing the jury's determination on the aggravating circumstances. Thus, we have rejected Coday's argument that the Apprendi and Ring decisions require a different result.
>
> Coday also claims that because the jury's death sentence recommendation was not unanimous but only by a vote of nine to three, his sentence is unconstitutional under Ring. However, under Florida law, the jury need not be unanimous in its recommendation of a death sentence. This Court has repeatedly held that it is not unconstitutional for a jury to be allowed to recommend death on a simple majority vote. See Whitfield v. State, 706 So.2d 1 (Fla.1997); Thompson v. State, 648 So.2d 692 (Fla.1994); Brown v. State, 565 So.2d 304 (Fla.1990); Alvord v. State, 322 So.2d 533 (Fla.1975). This Court has not receded from this holding that a nonunanimous advisory sentence is constitutional.
>
> Lastly, Coday claims that the failure to allege the aggravating circumstances in the indictment renders his sentence unconstitutional under Ring. This Court has rejected similar claims

> that Ring requires aggravating circumstances be alleged in the indictment. See Blackwelder v. State, 851 So.2d 650, 654 (Fla.2003) (rejecting Blackwelder's argument that aggravating circumstances should be alleged in the indictment, submitted to the jury, and individually found by a unanimous jury verdict); Hodges v. State, 885 So.2d 338, 359 (Fla.2004); Porter v. Crosby, 840 So.2d 981 (Fla.2003).[FN7]
>
> FN7. In Steele, we reiterated that there is no statute, rule of procedure, or decision from this Court or the United States Supreme Court that compels a trial court to require advance notice of the aggravating circumstances the State will rely on to support imposition of a sentence of death. However, we nonetheless found that a trial court does not depart from the essential requirements of the law by requiring the prosecutor to give advance notice of the aggravating circumstances.

Coday, 946 So.2d at 1005-1006 (Fla. 2006) (9-3 jury recommendation). The Court here acknowledges that trial courts cannot use special verdict forms without violating its decision in State v. Steele, which asks the Florida Legislature to revisit Florida's capital sentencing procedure in light of the new decisions by the United States Supreme Court. The Legislature declined to require juror unanimity in the recommendation process. See House Resolution 1627. The Court continued to deny relief, using the indirect Bottoson/King mantra, but specifically noted that the argument presented by Coday relied on the finding and notice of the specific statutory aggravating circumstances, and the non-unanimity recommendation authorized by Florida's statute.

The next capital appellate decision, the forty-fifth since Ring was decided, was Rodgers v. State, 948 So.2d 655 (Fla. 2006), which denied relief as follows:

> G. Unconstitutionality under Ring
>
> In the trial court, Rodgers argued on various grounds that Florida's death penalty statute is unconstitutional under Ring v. Arizona, 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002), and Apprendi v. New Jersey, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000). On appeal, however, Rodgers acknowledges that we have repeatedly rejected these claims in cases such as this

> one in which one of the aggravating factors is a prior violent felony conviction. See Duest v. State, 855 So.2d 33, 49 (Fla.2003) (We have previously rejected claims under Apprendi and Ring in cases involving the aggravating factor of a previous conviction of a felony involving violence.), cert. denied, 541 U.S. 993, 124 S.Ct. 2023, 158 L.Ed.2d 500 (2004). We also have rejected Rodgers's related claims that Ring requires aggravators be alleged in the indictment and that the jury recommend death unanimously. Parker v. State, 904 So.2d 370, 383 (Fla.2005) ("This Court has repeatedly held that it is not unconstitutional for a jury to recommend death on a simple majority vote.") (citing Whitfield v. State, 706 So.2d 1 (Fla.1997)); Kormondy v. State, 845 So.2d 41, 54 (Fla.2003) (Ring does not require either notice of the aggravating factors that the State will present at sentencing or a special verdict form indicating the aggravating factors found by the jury.).
>
> Finally, Rodgers alleges error in the trial court's use of an interrogatory verdict form in which the jurors returned findings as to the aggravator and the mitigators. We have previously stated that we are "unwilling to approve ad hoc innovations to a capital sentencing scheme that both the United States Supreme Court and this Court repeatedly have held constitutional." State v. Steele, 921 So.2d 538, 547 (Fla.2005). However, we have found use of special verdict forms to constitute harmless error where, as here, no prejudice is alleged. See Huggins v. State, 889 So.2d 743, 772 (Fla.2004) (finding that use of a special verdict form in the penalty phase was harmless error), cert. denied, 545 U.S. 1107, 125 S.Ct. 2546, 162 L.Ed.2d 280 (2005). Accordingly, we deny relief on this issue.

Rodgers, 948 So.2d 655 at 673 (Fla. 2006) (8-4 jury recommendation). Analysis reveals that relief was denied using the indirect Bottoson/King mantra with the Apprendi caveat due to the existence of a prior violent felony that was found and used by the trial judge to impose the death penalty.

The forty-sixth Florida capital appellate decision after Ring was Delgado v. State, 948 So.2d 681 (Fla. 2006):

> ISSUES ON APPEAL

Delgado raises eight issues in this appeal: (1) whether retrying him for first-degree premeditated murder violated his right to be free from double jeopardy based on this Court's holding in Delgado I; (2) whether the trial court erred in denying a mistrial based on the prosecutor's comments to the jury and at sidebar during closing argument; (3) whether the trial court abused its discretion in allowing the pen register tape to be admitted into evidence without a foundation laid by a technical expert and the officer who employed the pen register device; (4) whether the trial court committed reversible error when it repeated the jury instructions concerning the definition and elements of first-degree murder; (5) whether the trial court committed reversible error by instructing the jury panels during voir dire that they "will" rather than "may" hear mitigation evidence if they returned a guilty verdict even though there was no contemporaneous objection; (6) whether Florida's capital sentencing scheme violates Delgado's Sixth Amendment right under Apprendi v. New Jersey, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000), and Ring v. Arizona, 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002), by authorizing imposition of the death sentence without a unanimous jury verdict; (7) whether the trial court committed reversible error when it sustained the State's objection to defense counsel's comments during closing argument regarding the State's failure to present DNA evidence; and (8) whether there is a reasonable probability that the cumulative errors at trial contributed to the jury's verdict regardless of whether evidence of guilt was otherwise substantial. In addition, we also consider whether the evidence was sufficient to sustain Delgado's convictions and whether his sentences are proportionate.

After fully examining this record, we find that claims (4), (5), (7), and (8) are without merit and require no further discussion. In addition, we have repeatedly rejected Ring claims similar to Delgado's and deny claim (6) without further discussion. In the analysis that follows, we analyze Delgado's first three claims and ultimately affirm Delgado's convictions and death sentences.

Delgado, 948 So.2d at 685-686 (Fla. 2006) (7-5 jury recommendation). In this appeal, the Florida Supreme Court simply acknowledged that Delgado raised the denial of his Sixth Amendment rights under Apprendi and Ring and denied relief without any analysis other than that those issues, whatever they were, had been repeatedly rejected in other decisions the Court did not deign to mention.

The forty-seventh Florida capital appellate decision denying relief in a capital case for the denial of the Sixth and Fourteenth Amendment rights to a jury after Apprendi and Ring were decided was Troy v. State, 948 So.2d 635 (Fla. 2006):

> 7. Relief Pursuant to Ring v. Arizona, 536 U.S. 584 (2002)
>
> > Troy next argues that Florida's death penalty statute is unconstitutionally invalid because it does not require the findings of each aggravating factor to be made by the jury, pursuant to Ring v. Arizona, 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002). This Court has denied relief in appeals where the trial judge has found the "during the course of a felony" aggravator. See Robinson v. State, 865 So.2d 1259, 1265 (Fla.2004) ("This Court has held that the aggravators of murder committed 'during the course of a felony' and prior violent felony involve facts that were already submitted to a jury during trial and, hence, are in compliance with Ring.") (citing Owen v. Crosby, 854 So.2d 182, 193 (Fla.2003)). Given that Troy was convicted of this crime simultaneously with two counts of armed burglary, two counts of armed robbery, and attempted sexual battery, relief on this Ring claim is denied.

Troy, 948 So.2d at 653-654 (Fla. 2006) (11-1 jury recommendation). Here, the Florida Supreme Court rejects the Ring issues based solely on the Apprendi caveat, where the trial judge found and imposed the death sentence based on a prior violent felony aggravating circumstance. This, again, is a conclusion that one aggravating circumstance necessarily constitutes "sufficient aggravating circumstances" contrary to the plain and commonly understanding of what is meant by the phrase "sufficient aggravating circumstances."

Hoskins v. State, 965 So.2d 1 (Fla. 2007) is Florida's forty-eighth capital appeal decided since Ring:

> F. Constitutionality of Death Penalty
>
> Hoskins next argues that his sentence is unconstitutional under Ring and Apprendi. We have previously addressed this argument and denied relief. See e.g., Dufour v. State, 905 So.2d 42, 68 (Fla.2005); Fitzpatrick v. State, 900 So.2d 495, 525 (Fla.2005); Douglas v. State, 878 So.2d 1246, 1264 (Fla.2004). Further, one of the aggravators found by the trial court (and unanimously by the jury) is commission during a robbery, sexual battery, and kidnapping.[FN7] The jury found Hoskins guilty of these crimes as charged in the indictment and we affirmed those convictions. Hoskins, 702 So.2d at 203. The trial judge determined that any one of the aggravating circumstances alone far outweighed all of the mitigating circumstances. Accordingly, we reject this claim as we have similar claims.
>
> FN7. We have disapproved of special verdict forms detailing jurors' determinations concerning aggravating factors. State v. Steele, 921 So.2d 538, 544 (Fla.2005). However, here, the parties agreed to their use and neither party has raised it as an issue on appeal.

Hoskins, 965 So.2d at 21-22 (Fla. 2007) (11-1 jury recommendation). Dufour was a post conviction case where relief was denied based on the Bottoson/King mantra with the Apprendi caveat. Both Fitzpatrick and Douglas are direct appeals that denied relief under Ring based on incantation of the indirect Bottoson/King mantra and the Apprendi caveat. Also directly stated in Hoskins is the Apprendi caveat. The notation in footnote seven that "special verdict forms detailing the jurors' determinations concerning aggravating factors" continues the position of the Florida Supreme Court stated in Steele tbat the use of special verdict forms is a departure from the essential requirements of law because it imposes a burden on the state not contained in Florida's statute.

The forty-ninth capital appellate decision in Florida after Ring was Walker v. State, 957 So.2d 560 (Fla. 2007):

2. Constitutionality of Florida's Capital Sentencing Scheme

> Walker claims that Florida's capital sentencing scheme, section 921.141, Florida Statutes (2004), is unconstitutional under Apprendi and Ring because it allows a judge rather than a unanimous jury to sentence a capital defendant to death. This claim is without merit. Ring does not apply to the facts of this case because the "course of a felony" aggravator based on Walker's conviction of kidnapping, resting on a unanimous guilt-phase verdict, is present. See Troy v. State, 948 So.2d 635, 653 (Fla.2006) (denying Ring relief because the trial court found the "course of a felony aggravator" based on the jury's verdict finding defendant guilty of two counts of armed burglary, two counts of armed robbery, and attempted sexual battery in addition to first-degree murder); Robinson v. State, 865 So.2d 1259, 1265 (Fla.2004) ("This Court has held that the aggravator[ ] of murder committed 'during the course of a felony' ... [was] already submitted to a jury during trial and, hence, [is] in compliance with Ring."). [FN28] We also note that the jury found the defendant guilty of first-degree murder solely on a premeditation theory, precluding any overlap between the elements of the murder conviction and the aggravator. See generally Blanco v. State, 706 So.2d 7, 11 (Fla.1997).
>
> FN28. We do not reach Walker's related equal protection argument based on Ring because the "course of a felony" aggravator rests on a unanimous jury verdict finding him guilty of kidnapping in addition to premeditated murder. This placed him in a class of persons subject to capital sentencing under the Sixth and Eighth Amendments.

Walker, 957 So.2d at 576 (Fla. 2007) (7-5 jury recommendation). The Florida Supreme Court here relies solely on the Apprendi caveat to deny relief. More interestingly, however, the Court concludes that the existence of the sole "course of a felony" aggravating circumstances satisfied the requirements of Ring so there was no need for them to address Walker's equal protection argument. Precisely what Walker's equal protection claim was not further identified. The reference in the body of the opinion to Blanco presumably is to address the concern that a finding of felony murder alone fails to satisfy the requirement that "an aggravating circumstance

must genuinely limit the class of persons eligible for the death penalty and must reasonable justify the imposition of a more severe sentence on the defendant compared to others found guilty of murder."). Zant v. Stephens, 462 U.S. 862, 877 (1983) (Emphasis added). Imposing the death penalty for a first-degree felony murder, where a homicide may not have been intended, does not reasonably justify the more severe sentence when capital punishment is not available following a conviction solely on first-degree premeditated murder.

The fiftieth capital appellate decision after Ring was Tanzi v. State, 964 So.2d 106 (Fla. 2007), which where the Ring issue was resolved in a footnote:

> FN2. Tanzi also claims that Florida's death sentencing statute violates Ring v. Arizona, 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002). However, we need not reach this issue because in this case the jury unanimously recommended a death sentence, and Tanzi pled guilty to kidnapping, robbery, and carjacking, thereby establishing the aggravators of a murder committed during the course of a felony.

Tanzi, 964 So.2d at 112 (Fla. 2007) (12-0 jury recommendation). The unanimous jury recommendation for death does satisfy the Sixth and Fourteenth Amendment requirements analyzed in Apprendi and Ring, where the jury necessarily would have to have unanimously found that "sufficient aggravating circumstances exist as enumerated in subsection (5)" to unanimously recommend the death penalty. However, Florida's requirement of indictment for capital cases is not satisfied by a jury verdict.

The fifty-first capital appeal decided in Florida after Ring was Franklin v. State, 965 So.2d 79 (Fla. 2007):

> Ring Claims
>
> Franklin contends that Florida's capital sentencing statute is facially unconstitutional under Ring v. Arizona, 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002). He filed pretrial motions raising this claim as well as arguing that Ring requires a statement of particulars as to the aggravating factors and a unanimous jury recommendation as to penalty. At trial, defense counsel also challenged the sufficiency of the indictment charging Franklin with first-degree murder based on the failure to include the aggravating

factors in the indictment. Franklin now also claims that judges throughout the state are violating the separation of powers doctrine by "improvising" remedies to the capital sentencing statute's "constitutional infirmities" under Ring.

In over fifty cases since Ring's release, this Court has rejected similar Ring claims. See Marshall v. Crosby, 911 So.2d 1129, 1134 n. 5 (Fla.2005), cert. denied, --- U.S. ----, 126 S.Ct. 2059, 164 L.Ed.2d 807 (2006). As the Court's plurality opinion in Bottoson v. Moore, 833 So.2d 693 (Fla.2002), noted, "the United States Supreme Court repeatedly has reviewed and upheld Florida's capital sentencing statute over the past quarter of a century." Id. at 695 & n. 4 (listing as examples Hildwin v. Florida, 490 U.S. 638, 109 S.Ct. 2055, 104 L.Ed.2d 728 (1989), Spaziano v. Florida, 468 U.S. 447, 104 S.Ct. 3154, 82 L.Ed.2d 340 (1984), Barclay v. Florida, 463 U.S. 939, 103 S.Ct. 3418, 77 L.Ed.2d 1134 (1983), and Proffitt v. Florida, 428 U.S. 242, 96 S.Ct. 2960, 49 L.Ed.2d 913 (1976)). See also King v. Moore, 831 So.2d 143 (Fla.2002) (denying relief under Ring).

Additionally, Ring did not alter the express exemption in Apprendi v. New Jersey, 530 U.S. 466, 490, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000), that prior convictions are exempt from the Sixth Amendment requirements announced in the two cases.[FN10] This Court has repeatedly relied on the presence of the prior violent felony aggravating circumstance in denying Ring claims. See, e.g., Smith v. State, 866 So.2d 51, 68 (Fla.2004) (denying relief on Ring claim and "specifically not[ing] that one of the aggravating factors present in this matter is a prior violent felony conviction"); Davis v. State, 875 So.2d 359, 374 (Fla.2003) (stating that "[w]e have denied relief in direct appeals where there has been a prior violent felony aggravator"); Johnston v. State, 863 So.2d 271, 286 (Fla.2003) (stating that the existence of a "prior violent felony conviction alone satisfies constitutional mandates because the conviction was heard by a jury and determined beyond a reasonable doubt"), cert. denied, 541 U.S. 946, 124 S.Ct. 1676, 158 L.Ed.2d 372 (2004); Henry v. State, 862 So.2d 679, 687 (Fla.2003) (stating in postconviction case that this Court has previously rejected Ring claims "in cases involving the aggravating factor of a previous violent felony conviction").

In the instant case, the trial court found the aggravating circumstance of a prior violent felony conviction, based on Franklin's convictions for the 1993 robbery of Martin, the December 2001 murder, kidnapping, and armed robbery of Horan, and the December 2001 burglary, robbery with a deadly weapon, and attempted felony murder of Johnson. Additionally, we have rejected similar claims that Ring requires aggravating circumstances to be alleged in the indictment or to be individually found by a unanimous jury verdict. See Hodges v. State, 885 So.2d 338, 359 nn. 9-10 (Fla.2004); Blackwelder v. State, 851 So.2d 650, 654 (Fla.2003); Porter v. Crosby, 840 So.2d 981, 986 (Fla.2003).

Finally, we note that the trial court, at Franklin's request, gave the jury a special interrogatory verdict form regarding the aggravating factors. The jury unanimously found the four aggravating factors that the trial judge subsequently found applicable in Franklin's case. We recently held that "a trial court departs from the essential requirements of law in a death penalty case by using a penalty phase special verdict form that details the jurors' determination concerning aggravating factors found by the jury." State v. Steele, 921 So.2d 538, 548 (Fla.2005). We reached this conclusion because such a penalty phase special verdict form imposes a substantive burden on the State that is not found in the Florida statute and not constitutionally required. Id. at 546. However, even without this additional burden, requiring "specific jury findings on aggravators without guidance about their effect on the imposition of a sentence could unduly influence the trial court's own determination of how to sentence the defendant," thereby harming the trial court's independent determination of the existence of the aggravating and mitigating circumstances and the weight to be given each. Id. We further explained that the requirement of a majority vote on each aggravator is "an unnecessary expansion of Ring" and "creates a potential inconsistency in capital sentencing proceedings" in different courts. Id. at 546-47.

However, in light of Franklin's request for the special verdict form and the State's agreement to its use, the unanimous jury finding as to the four aggravating circumstances, and the jury's unanimous recommendation of a death sentence, we find no reversible error on this point. Thus, Franklin is not entitled to relief on any of his Ring claims.

> FN10. In Apprendi, the Supreme Court held that "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to the jury, and proved beyond a reasonable doubt." 530 U.S. at 490, 120 S.Ct. 2348 (emphasis added).

Franklin, 965 So.2d at 101-102 (Fla. 2007) (12-0 jury recommendation).

A thorough analysis of Franklin is warranted. The Court first observes that it has decided over fifty cases since Ring was decided. That is true. The Court next referred to its plurality decisions in Bottoson and King, (both post-conviction cases), and noted that the United States Supreme Court has reviewed and approved Florida's death penalty statutes in Hildwin, Spaziano, Barclay and Proffitt for a quarter of a century. That, too, is true, but the United States Supreme Court has NOT reviewed Florida's statute since overruling Walton, which directly referred to Florida's scheme. A few comments about these United States Supreme Court decisions is otherwise warranted.

In Hildwin, a case involving a unanimous jury recommendation for death, the United States Supreme Court granted certiorari and summarily affirmed without allowing the issues to be briefed. The entire opinion of the Court stated the following:

> This case presents us once again with the question whether the Sixth Amendment requires a jury to specify the aggravating factors that permit the imposition of capital punishment in Florida. Petitioner, Paul C. Hildwin, Jr., was indicted for, and convicted of, first-degree murder. Under Florida law, that offense is a capital felony punishable by death or life imprisonment. Fla.Stat. § 782.04(1)(a) (1987). Upon a defendant's conviction of a capital felony, the court conducts a separate sentencing proceeding after which the jury renders an advisory verdict. Fla.Stat. § 921.141 (Supp.1988). The ultimate decision to impose a sentence of death, however, is made by the court after finding at least one aggravating circumstance. Ibid. If the court imposes a sentence of death, it must "set forth in writing its findings upon which the sentence of death is based." Ibid. In petitioner's case, the jury returned a unanimous advisory verdict of death, and the judge imposed the death sentence. In the order imposing the death sentence, the trial judge found four aggravating circumstances: petitioner had previous

convictions for violent felonies, he was under a sentence of imprisonment at the time of the murder, the killing was committed for pecuniary gain, and the killing was especially heinous, atrocious, and cruel. The trial judge found nothing in mitigation.

On appeal to the Florida Supreme Court, petitioner argued that the Florida capital sentencing scheme violates the Sixth Amendment because it permits the imposition of death without a specific finding by the jury that sufficient aggravating circumstances exist to qualify the defendant for capital punishment. The court rejected this argument without discussion and affirmed petitioner's conviction and sentence of death. 531 So.2d 124 (1988). FN*

FN* Petitioner did not present this issue to the trial court, but raised it for the first time in the Florida Supreme Court. Respondent therefore argues that the decision below rests on an adequate and independent state ground. The Florida Supreme Court, however, did not rest its decision on this procedural argument, finding instead that there was "no merit" to petitioner's claim. 531 So.2d, at 129. In these circumstances, we have jurisdiction to reach the merits. See Caldwell v. Mississippi, 472 U.S. 320, 327, 105 S.Ct. 2633, 2639, 86 L.Ed.2d 231 (1985).

In Spaziano v. Florida, 468 U.S. 447, 104 S.Ct. 3154, 82 L.Ed.2d 340 (1984), we rejected the claim that the Sixth Amendment requires a jury trial on the sentencing issue of life or death. In that case, we upheld against Sixth Amendment challenge the trial judge's imposition of a sentence of death notwithstanding that the jury had recommended a sentence of life imprisonment. We stated: "The fact that a capital sentencing is like a trial in the respects significant to the Double Jeopardy Clause ... does not mean that it is like a trial in respects significant to the Sixth Amendment's guarantee of a jury trial." Id., at 459, 104 S.Ct., at 3161. We did not specifically note that the death sentence may only be imposed if the judge makes a written finding of an aggravating circumstance. If the Sixth Amendment permits a judge to impose a sentence of death when the jury recommends life imprisonment, however, it follows that it does not forbid the judge to make the written findings that authorize imposition of a death sentence when the jury unanimously recommends a death sentence.

> Nothing in our opinion in McMillan v. Pennsylvania, 477 U.S. 79, 106 S.Ct. 2411, 91 L.Ed.2d 67 (1986), suggests otherwise. We upheld a Pennsylvania statute that required the sentencing judge to impose a mandatory minimum sentence if the judge found by a preponderance of the evidence that the defendant visibly possessed a firearm. We noted that the finding under Pennsylvania law "neither alters the maximum penalty for the crime committed nor creates a separate offense calling for a separate penalty; it operates solely to limit the sentencing court's discretion in selecting a penalty within the range already available to it." Id., at 87-88, 106 S.Ct., at 2417-2418. Thus we concluded that the requirement that the findings be made by a judge rather than the jury did not violate the Sixth Amendment because "there is no Sixth Amendment right to jury sentencing, even where the sentence turns on specific findings of fact." Id., at 93, 106 S.Ct., at 2420. Like the visible possession of a firearm in McMillan, the existence of an aggravating factor here is not an element of the offense but instead is "a sentencing factor that comes into play only after the defendant has been found guilty." Id., at 86, 106 S.Ct., at 2417. Accordingly, the Sixth Amendment does not require that the specific findings authorizing the imposition of the sentence of death be made by the jury.
>
> The motion for leave to proceed in forma pauperis and the petition for a writ of certiorari are granted, and the judgment of the Supreme Court of Florida is
>
> Affirmed.

Hildwin v. Florida, 490 U.S. 638, 638-641 (May 30, 1989). The danger of summary resolution of this important issue was noted by Justice Marshall in his dissenting opinion:

> Adhering to my view that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, Gregg v. Georgia, 428 U.S. 153, 231, 96 S.Ct. 2909, 2973, 49 L.Ed.2d 859 (1976), (MARSHALL, J., dissenting), I would grant the petition for certiorari and vacate the death sentence in this case.
>
> Even if I did not hold this view, I would dissent from the Court's decision today to affirm summarily the decision below. I

> continue to believe that summary dispositions deprive litigants of a fair opportunity to be heard on the merits and create a significant risk that the Court is rendering an erroneous or ill-advised decision that may confuse the lower courts. See Pennsylvania v. Bruder, 488 U.S. 9, 11, 109 S.Ct. 205, 207, 102 L.Ed.2d 172 (1988) (MARSHALL, J., dissenting); Rhodes v. Stewart, 488 U.S. 1, 4, 109 S.Ct. 202, 204, 102 L.Ed.2d 1 (1988) (MARSHALL, J., dissenting); Buchanan v. Stanships, Inc., 485 U.S. 265, 269, 108 S.Ct. 1130, 1132, 99 L.Ed.2d 289 (1988) (MARSHALL, J., dissenting); Commissioner v. McCoy, 484 U.S. 3, 7, 108 S.Ct. 217, 219, 98 L.Ed.2d 2 (1987) (MARSHALL, J., dissenting). This risk of error is particularly unacceptable in capital cases where a man's life is at stake. I dissent.

Hildwin v. Florida, 490 U.S. 638, 641, 109 S.Ct. 2055, 2057 (1989).

It is also important to understand the timing of Hildwin and why that impacts on the quality of the Court's review of this issue as a matter of Florida's statute. When the Court summarily dealt with the issue in Hildwin on May 30, 1989, the Court had accepted jurisdiction to review Adamson v. Ricketts, 865 F.2d 1011 (9th Cir. December 22, 1988) (en banc), a case where Arizona's death penalty was found to be unconstitutional under the Sixth and Fourteenth Amendments but which presented several other complex and cumbersome constitutional issues:

> The issues before this court are: (1) whether seeking or imposing the death penalty following Adamson's assertion of his Fifth Amendment right constitutes prosecutorial or judicial vindictiveness, respectively; (2) whether imposition of a death sentence by the judge who earlier found imprisonment an appropriate penalty for the same acts violated the Eighth Amendment prohibition against arbitrary and capricious sentencing in capital cases; (3) whether the Arizona statute violates the Sixth Amendment right to a jury determination of the elements of an offense by requiring the judge to make factual findings regarding aggravating circumstances; (4) whether the Arizona statute's aggravating factor that the offense was committed in an especially heinous, cruel or depraved manner is unconstitutionally vague as construed by the Arizona Supreme Court; (5) whether the Arizona statute violates the Eighth Amendment by precluding meaningful consideration of all mitigating evidence and by imposing a

> presumption of death; and (6) whether the admission of certain evidence at trial violated the Confrontation Clause.

Adamson v. Ricketts, 865 F.2d 1011, 1016-1017 (9th Cir.1988). Insofar as the Adamson's Sixth and Fourteenth Amendments arguments, the Ninth Circuit sitting en banc ruled, "Adamson also contends that the Arizona statutory scheme for imposing the death penalty erroneously lists elements of the offense as factors to be determined by the sentencing judge, thus depriving him of his right to a jury decision on the elements of the crime in violation of the Sixth and Fourteenth Amendments. We agree." Adamson, 865 F.2d at 1023. The United States Supreme Court accepted jurisdiction but denied certiorari and left unaddressed one day after Walton v. Arizona, 497 U.S. 639 (June 27, 1990) was decided. Lewis v. Adamson, 497 U.S. 1031 (June 28, 1990). There can be no doubt but that the Court was looking at the Sixth and Fourteenth Amendment right in the context of aggravating circumstances in a capital case when Hildwin was summarily affirmed because the United States Supreme Court in Walton expressly mentioned the Adamson holding in Walton:

> Because the United States Court of Appeals for the Ninth Circuit has held the Arizona death penalty statute to be unconstitutional for the reasons submitted by Walton in this case, see Adamson v. Ricketts, 865 F.2d 1011 (1988) (en banc), we granted certiorari, 493 U.S. 808, 110 S.Ct. 49, 107 L.Ed.2d 18 (1989), to resolve the conflict and to settle issues that are of importance generally in the administration of the death penalty. We now affirm the judgment of the Arizona Supreme Court.

Walton v. Arizona, 497 U.S. 636, 647 (1990), REVERSED Ring v. Arizona, 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002).

The Court's summary approval of Florida's sentencing scheme in Hildwin is suspect, especially where it relied so heavily on McMillan v. Pennsylvania, 477 U.S. 79 (1986). Apprendi dealt with McMillan as follows: "The principal dissent accuses us of today "overruling McMillan." Post,at 2385. We do not overrule McMillan. We limit its holding to cases that do not involve the imposition of a sentence more severe than the statutory maximum for the offense established by the jury's verdict--a limitation identified in the McMillan opinion itself.

Conscious of the likelihood that legislative decisions may have been made in reliance on McMillan we reserve for another day the question whether stare decisis considerations preclude reconsideration of its narrower holding." Apprendi v. New Jersey, 530 U.S. at 487 fn.13 (2000). The law in Florida is clear – the death penalty cannot be imposed in the absence of "sufficient aggravating circumstances as enumerated in subsection (5)." §921.141(3), Florida Statutes. Enough said.

Returning to the review of Florida appellate capital decisions since Ring, the fifty-second such decision was Guardado v. State, 965 So.2d 108 (Fla. 2007)

> Ring Issue
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> Guardado argues the trial court erred in denying his motion to dismiss because the death penalty statute is unconstitutional pursuant to Ring v. Arizona, 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002). Guardado asks this Court to reconsider its position in Bottoson v. Moore, 833 So.2d 693 (Fla.), cert. denied, 537 U.S. 1070, 123 S.Ct. 662, 154 L.Ed.2d 564 (2002) and King v. Moore, 831 So.2d 143 (Fla.), cert. denied, 537 U.S. 1067, 123 S.Ct. 657, 154 L.Ed.2d 556 (2002), because Ring represents a major change in the law. The State argues that this Court has repeatedly rejected Ring claims and that Guardado is asking this Court to reconsider Bottoson and King in general and not based on the specifics of his case. The State maintains there was no violation of Guardado's Sixth Amendment right to a jury trial because he pled guilty to the charges, and Guardado had a jury in the penalty phase that unanimously recommended death. We deny relief based on precedent from this Court and based on the fact that one of the aggravating circumstances found in this case is a prior violent felony.
>
> In numerous cases that have been decided since the Ring decision, this Court has rejected similar arguments that Florida's death penalty statute is unconstitutional based on Ring. See Marshall v. Crosby, 911 So.2d 1129, 1134 n. 5 (Fla.2005). In addition, this Court has repeatedly found that the prior violent felony aggravator takes a case outside the scope of Ring. See Marshall, 911 So.2d at 1135 & n. 6; see also Smith v. State, 866 So.2d 51, 68 (Fla.2004) (denying relief on a Ring claim and noting that one of the aggravating factors present in the case was a prior

> violent felony); Johnston v. State, 863 So.2d 271, 286 (Fla.2003) (finding that the existence of a prior violent felony conviction satisfies the constitutional mandates because the conviction was heard by a jury and determined beyond a reasonable doubt).
>
> Guardado is not entitled to relief based on the Ring decision.

Guardado, 965 So.2d at 117-118 (Fla. 2007) (12-0 jury recommendation).

In Guardado, relief is denied under Apprendi based on the indirect Bottoson/King mantra, with the Apprendi caveat. The Sixth and Fourteenth Amendments were not violated here because the jury unanimously recommended the death penalty, which necessarily included a unanimous finding that sufficient aggravating circumstances exist and upon which imposition of the death penalty statutorily depends.

The fifty-third capital appellate decision in Florida after Ring was Williams v. State, 967 So.2d 735 (Fla. 2007):

> 16. Constitutionality of the Death Penalty
>
> In his final challenge, Williams asserts that the death penalty in the instant case violates Ring v. Arizona, 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002). Williams further asserts that Florida's sentencing structure unconstitutionally fails to narrow the category of death-eligible persons as mandated by the United States Supreme Court's decision in Furman v. Georgia, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972), because a conviction for first-degree murder, without more, makes a defendant eligible for the death penalty in Florida.
>
> This Court has already rejected Williams's assertions in prior decisions, and, therefore, he is not entitled to relief. This Court has held that Florida's capital sentencing scheme does not violate the United States Constitution under Ring. See Jones v. State, 845 So.2d 55, 74 (Fla.2003). Furthermore, one of the aggravating factors found by the trial court in this case was Williams's prior convictions for two violent felonies, and this is a factor "which under Apprendi and Ring need not be found by the jury." Jones v. State, 855 So.2d 611, 619 (Fla.2003). Finally, this

> Court has "rejected the claim that the death penalty system is unconstitutional as being arbitrary and capricious because it fails to limit the class of persons eligible for the death penalty." Miller v. State, 926 So.2d 1243, 1260 (Fla.2006) (quoting Lugo v. State, 845 So.2d 74, 119 (Fla.2003)). Therefore, we reject Williams's challenges as being without merit.

Williams, 967 So.2d at 767 (Fla. 2007) (10-2 jury recommendation).

There is nothing exceptional contained in the Williams decision. The Court again uses the indirect Bottoson/King incantation with the Apprendi caveat to deny relief.

The fifty-fourth capital appellate decision since Ring was Johnson v. State, 969 So.2d 938 (Fla. 2007)

> IX. Constitutional Challenges to Capital Sentencing
>
> Johnson claims Florida's capital sentencing law, section 921.141, Florida Statutes, and standard jury instructions in capital cases are unconstitutional on six grounds: (1) the defendant bears the burden of proving death is inappropriate; (2) a death sentence can rest on a nonunanimous jury recommendation based on facts that are not found beyond a reasonable doubt, contrary to Ring v. Arizona, 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002); (3) Florida's capital sentencing statute violates Furman v. Georgia, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972), because a conviction of first-degree murder without more makes a defendant eligible for the death penalty, which fails to adequately narrow the field of first-degree murderers sentenced to death; (4) the instruction that a jury should find a mitigator only if it is "reasonably convinced" of its existence violates separation of powers; (5) an instruction to the jury that its role is advisory denigrates its responsibility, contrary to Caldwell v. Mississippi, 472 U.S. 320, 105 S.Ct. 2633, 86 L.Ed.2d 231 (1985); and (6) no specific number of votes is required for jurors to find aggravators or mitigators.
>
> We reject each of these arguments.
>
> [The portions of decision dealing with issues not related to Apprendi / Ring are here omitted]

> Second, Johnson is not entitled to relief under Ring because the "murder in the course of a felony aggravator" rests on the separate convictions of kidnapping and sexual battery, which satisfies Sixth Amendment requirements. See Douglas, 878 So.2d at 1264 (concluding that the defendant was not entitled to relief under Ring where the jury found him guilty of both sexual battery and felony murder during the commission or attempted commission of a sexual battery). Third, this Court has previously rejected the Furman claim raised by Johnson. See Blanco v. State, 706 So.2d 7, 11 (Fla.1997) (rejecting the argument that Florida's capital felony sentencing statute is unconstitutional because every person who is convicted of first-degree felony murder automatically qualifies for the death penalty). We also note that in this case, the jury's special verdict finding that the murder was both premeditated and felony murder and its separate verdicts of guilty of kidnapping and robbery further weaken his claim that the murder conviction alone qualified him for death.

Johnson, 969 So.2d at 961-962 (Fla. 2007) (11-1 jury recommendation). The Court denies relief under Ring because the jury found Johnson guilty of sexual battery as well as felony murder, thereby establishing the Apprendi caveat. There was nothing new in Johnson.

The fifty-fifth Florida capital appellate decision decided after Ring was Frances v. State, 970 So.2d 806 (Fla. 2007):

> Ring Claims
>
> > Frances contends that Florida's capital sentencing statute is facially unconstitutional under Ring v. Arizona, 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002), because the judge rather than the jury makes the findings of fact necessary to impose the death sentence. Frances filed a pretrial motion challenging the legality of Florida's death penalty under Ring because the judge rather than the jury imposes sentence and jury unanimity is not required as to the sentence recommendation. He also claimed that Florida's standard jury instructions minimize the role of the jury.
> >
> > However, in over fifty cases since Ring's release, this Court has rejected similar Ring claims. See Marshall v. Crosby, 911 So.2d 1129, 1134 n. 5 (Fla.2005), cert. denied, --- U.S. ----, 126 S.Ct. 2059, 164 L.Ed.2d 807 (2006). As the Court's plurality

opinion in Bottoson v. Moore, 833 So.2d 693 (Fla.2002), noted, "the United States Supreme Court repeatedly has reviewed and upheld Florida's capital sentencing statute over the past quarter of a century." Id. at 695 & n. 4 (listing as examples Hildwin v. Florida, 490 U.S. 638, 109 S.Ct. 2055, 104 L.Ed.2d 728 (1989), Spaziano v. Florida, 468 U.S. 447, 104 S.Ct. 3154, 82 L.Ed.2d 340 (1984), Barclay v. Florida, 463 U.S. 939, 103 S.Ct. 3418, 77 L.Ed.2d 1134 (1983), and Proffitt v. Florida, 428 U.S. 242, 96 S.Ct. 2960, 49 L.Ed.2d 913 (1976)); see also King v. Moore, 831 So.2d 143 (Fla.2002) (denying relief under Ring).

Frances' claim is without merit. Ring did not alter the express exemption in Apprendi v. New Jersey, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000), that prior convictions are exempt from the Sixth Amendment requirements announced in the cases. Id. at 490, 120 S.Ct. 2348.[FN5] This Court has repeatedly relied on the presence of the prior violent felony aggravating circumstance in denying Ring claims. See, e.g., Smith v. State, 866 So.2d 51, 68 (Fla.2004) (denying relief on Ring claim and "specifically not[ing] that one of the aggravating factors present in this matter is a prior violent felony conviction"); Davis v. State, 875 So.2d 359, 374 (Fla.2003) ("We have denied relief in direct appeals where there has been a prior violent felony aggravator."); Johnston v. State, 863 So.2d 271, 286 (Fla.2003) (stating that the existence of a "prior violent felony conviction alone satisfies constitutional mandates because the conviction was heard by a jury and determined beyond a reasonable doubt"); Henry v. State, 862 So.2d 679, 687 (Fla.2003) (stating in postconviction case that this Court has previously rejected Ring claims "in cases involving the aggravating factor of a previous violent felony conviction").

Additionally, this Court has rejected claims that Ring requires the aggravating circumstances to be individually found by a unanimous jury verdict. See Hodges v. State, 885 So.2d 338, 359 nn. 9-10 (Fla.2004); Blackwelder v. State, 851 So.2d 650, 654 (Fla.2003); Porter v. Crosby, 840 So.2d 981, 986 (Fla.2003). The Court has also repeatedly rejected challenges to Florida's standard jury instructions based on Caldwell v. Mississippi, 472 U.S. 320, 105 S.Ct. 2633, 86 L.Ed.2d 231 (1985). See Mansfield v. State, 911 So.2d 1160, 1180 (Fla.2005); Sochor v. State, 619 So.2d 285, 291 (Fla.1993); Turner v. Dugger, 614 So.2d 1075, 1079 (Fla.1992).

> In the instant case, the trial court found the aggravating circumstances of a prior violent felony conviction, based on Frances' contemporaneous convictions for the murder of the two victims, and the murder was committed during a robbery. In the guilt phase, a unanimous jury found Frances guilty beyond a reasonable doubt of two counts of premeditated murder and one count of robbery, thereby satisfying the mandates of the United States and Florida Constitutions. See Kimbrough v. State, 886 So.2d 965, 984 (Fla.2004); Doorbal v. State, 837 So.2d 940, 963 (Fla.2003). Thus, Frances is not entitled to relief on this claim.
>
> FN5. In Apprendi, the Supreme Court held that " [o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to the jury, and proved beyond a reasonable doubt." 530 U.S. at 490, 120 S.Ct. 2348 (emphasis added).

Frances, 970 So.2d at 821-823 (Fla. 2007) (9-3 & 10-2 jury recommendations). This decision is, for all practical purposes identical to its decision in Franklin v. State, 965 So.2d 79 (Fla. 2007). The Court directly refers to its post conviction, plurality decisions in Bottoson and King. The Court notes the Apprendi caveat, based on the contemporaneous convictions of murder and robbery. There is nothing new here.

The fifty-sixth capital appellate decision in Florida after Ring made Apprendi applicable to capital sentencing was Merck v. State 32 FLW S789 (Fla. December 6, 2007):

> VI. RING CLAIM
>
> Finally, Merck asserts that Florida's capital sentencing scheme is unconstitutional under Ring v. Arizona, 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002), and Apprendi v. New Jersey, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000). This Court addressed the constitutionality of Florida's capital sentencing scheme in light of those decisions in Bottoson v. Moore, 833 So.2d 693 (Fla.2002), and King v. Moore, 831 So.2d 143 (Fla.2002), and denied relief. Moreover, we have previously rejected each of Merck's specific arguments regarding the constitutionality of Florida's capital sentencing scheme. See State v. Steele, 921 So.2d 538, 543 (Fla.2005) (stating State must prove at least one aggravating circumstance beyond reasonable doubt to

> support death sentence); Parker v. State, 904 So.2d 370, 383 (Fla.2005) (holding jury may recommend death by majority vote); Lynch v. State, 841 So.2d 362, 378 (Fla.2003) (holding defendant not entitled to notice of aggravators in indictment because aggravators are clearly listed in statutes); Porter v. Crosby, 840 So.2d 981, 986 (Fla.2003) (holding jury not required to make specific findings of aggravating circumstances). Finally, one of the aggravating circumstances found by the trial court in this case was Merck's prior conviction of a violent felony. This Court has held that the requirement that the jury make all of the findings necessary to enhance a defendant's sentence is satisfied where one of the aggravators is the prior violent felony aggravator. See Patton v. State, 878 So.2d 368, 377 (Fla.2004) ("The existence of this prior violent felony aggravator satisfies the mandates of the United States and Florida Constitutions...."). Thus, Merck is not entitled to relief.

Merck 32 FLW at p. 8 -9 (Fla. December 6, 2007) (9-3 jury recommendation). The Court uses the Bottoson/King mantra to deny relief and applies the Apprendi caveat. The Court clearly and unequivocally asserts that "This Court has held that the requirement that the jury make all of the findings necessary to enhance a defendant's sentence is satisfied where one of the aggravators is the prior violent felony aggravator." This holding runs directly afoul of the plain language in §921.141(3), Florida Statutes, that makes imposition of the death penalty in Florida dependent on a finding that "sufficient aggravating circumstances exist as enumerated in subsection (5)." The Courts actions constitute a violation of the separation of powers provision set forth in article II, section 3 of the Florida Constitution as will be discussed after the cases are reviewed.

The fifty-seventh capital appellate decision from the Florida Supreme Court after Ring applied Apprendi to capital sentencing schemes was Carter v. State, 33 Fla. L. Weekly S102 (Fla. February 14, 2008):

> E. Ring v. Arizona Claim
>
> Next, Carter argues that his sentence is unconstitutional under the United States Supreme Court's decision in Ring v. Arizona, 536 U.S. 584, 609, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002). We disagree. The three contemporaneous murders were

> charged in the indictment, and Carter was convicted on each count by a unanimous jury. See Doorbal v. State, 837 So.2d 940, 963 (Fla.2003). These convictions formed the basis for the trial court's finding of the prior violent felony conviction aggravator. See Overton v. State, 32 Fla. L. Weekly S775 (Fla. Nov. 29, 2007) (rejecting Ring claim where one of the aggravating circumstances was defendant's prior convictions for contemporaneous murders); Hannon v. State, 941 So.2d 1109, 1147 (Fla.2006); Patton v. State, 878 So.2d 368, 377 (Fla.2004); see also Jones v. State, 855 So.2d 611, 619 (Fla.2003) (holding that the prior violent felony conviction aggravator is "a factor which under Apprendi and Ring need not be found by the jury").

Carter, 33 Fla. L. Weekly S102, p7 (Fla. February 14, 2008) (9-3 & 8-4 jury recommendations). Relief is denied based on the Apprendi caveat. It is interesting to note that the Florida Supreme Court included in its opinion that the contemporaneous first-degree murders were alleged in the indictment. That would satisfy article I, section 15 of the Florida Constitution if imposition of the death penalty depended on a finding of only one aggravating circumstance. However, Florida's statute expressly mandates a finding that "sufficient aggravating circumstances exist as enumerated in subsection (5)." § 921.141(3), Florida Statutes. The avoidance of this language by the Florida Supreme Court violates the separation of powers provision set forth in article II, section 3 of the Florida Constitution, as will be further explained after the review of Florida's capital decisions that occurred after Ring was decided is concluded.

The fifty-eighth and final decision contained in this review of the capital cases decided by the Florida Supreme Court after Apprendi and/or Ring was decided was Carter v. State, 33 Fla. L. Weekly S102 (Fla. 2008). Carter involved a multiple homicide and the Court rejects Carter's claim that his sentence is unconstitutional under Ring based solely on the Apprendi caveat as follows:

> E. Ring v. Arizona Claim
>
> Next, Carter argues that his sentence is unconstitutional under the United States Supreme Court's decision in Ring v. Arizona, 536 U.S. 584, 609, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002). We disagree. The three contemporaneous murders were charged in the

> indictment, and Carter was convicted on each count by a unanimous jury. See Doorbal v. State, 837 So.2d 940, 963 (Fla.2003). These convictions formed the basis for the trial court's finding of the prior violent felony conviction aggravator. See Overton v. State, 32 Fla. L. Weekly S775, --- So.2d ----, 2007 WL 4191990 (Fla. Nov. 29, 2007) (rejecting Ring claim where one of the aggravating circumstances was defendant's prior convictions for contemporaneous murders); Hannon v. State, 941 So.2d 1109, 1147 (Fla.2006); Patton v. State, 878 So.2d 368, 377 (Fla.2004); see also Jones v. State, 855 So.2d 611, 619 (Fla.2003) (holding that the prior violent felony conviction aggravator is "a factor which under Apprendi and Ring need not be found by the jury").

Carter, 33 FLW 7 (Fla. 2008) (life, 9-3 & 8-4 jury recommendations). The Florida Supreme Court does not address the "sufficient aggravating circumstances" requirement and upholds the imposition of the death penalty based on the presence of a single valid aggravating circumstance, that being the existence of a prior violent felony. Interestingly, the Court again notes that the other contemporaneous violent felonies were alleged in the indictment, which implies compliance with article I, section 15(a) of the Florida Constitution but which also fails to recognize that §921.141(3), Florida Statutes, requires "sufficient" aggravating circumstances rather than one or more.

The results of the foregoing analysis establish several facts. First, Florida trial courts are not applying the reasoning in Apprendi and Ring when conducting the penalty phase of a capital case. Jurors may by happenstance unanimously find the defendant guilty beyond a reasonable doubt of a contemporaneous felony that will qualify as a prior violent felony or establish that the homicide was committed during the commission of an enumerated felony. The other aggravating circumstances are being used to sentence defendants to the death penalty based on their weight, where the statute requires that they be weighed against the mitigating circumstances, yet they are not being found in accordance with due process and the right to a jury trial under the state and federal constitutions. A defendant's Sixth and Fourteenth Amendment rights to a unanimous jury finding beyond a reasonable doubt as to the other statutory aggravating circumstances are not being honored and special verdict forms in penalty

phases are not and cannot be used, as dictated by the Florida Supreme Court. See State v. Steele, 921 So.2d 538, 546 (Fla. 2005) ("the trial court alone must make detailed findings about the existence and weight of aggravating circumstances.).

Second, the findings required by the Sixth and Fourteenth Amendments, as explained by Apprendi, are being made by trial courts in Florida in the context of Florida's sentencing guidelines, but not in the context of imposition of capital punishment, where heightened procedural due process is demanded due to the severity and finality of the death penalty. This is a denial of Equal Protection and due process under the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution and article I, sections 2, 9, 15, 16, 17 and 22 of the Florida Constitution.

The arbitrary delay in applying the right to a jury trial guaranteed by article I, sections 16(a) and 22 of the Florida Constitution to find beyond a reasonable doubt the existence of the criteria required by §921.141(3), Florida Statutes, where that same procedural safeguard is granted defendants in non-capital cases in Florida violates article I, section 21 of the Florida Constitution.

Additionally, the Florida Supreme Court is not applying §921.141(3), Florida Statutes, as written and is in fact violating article II, section 3 of the Florida Constitution in requiring only that one aggravating circumstance be established to render a person convicted of first-degree murder eligible for the death penalty. This constitutes a violation of article II, section 3 of the Florida Constitution, as will now be addressed.

SEPARATION OF POWERS:

Up to this point, the analysis has focused on the rights to due process and a jury to make the findings upon which imposition of a punishment depends. That analysis included the state guarantees to indictment for a capital crime required by article I, section 15 of the Florida Constitution and the entitlement to a 12 person jury and a unanimous jury verdict guaranteed by Florida's statutes and rules of procedure. These due process rights must be provided as a matter of due process under the Fourteenth Amendment before Florida may take the life or liberty of this defendant.

The analysis now turns to precisely what those rights apply to. It is accepted that the jury must unanimously find that a defendant committed first-degree murder under §782.04((1), Florida Statutes, in order to commit a "capital felony." The punishments for a capital felony are set forth in §775.082, Florida Statutes:

> 775.082. Penalties; applicability of sentencing structures; mandatory, minimum sentences for certain reoffenders previously released from prison.
>
> (1) A person who has been convicted of a capital felony shall be punished by death if the proceeding held to determine sentence according to the procedure set forth in s. 921.141 results in findings by the court that such person shall be punished by death, otherwise such person shall be punished by life imprisonment and shall be ineligible for parole.

(Emphasis added). Either the death penalty or life without parole for a person who has been convicted of a capital felony will be imposed depending on the results of findings made "by the court" under the procedure set forth in §921.141, Florida Statutes. We know at this point that, despite it being classified as a "capital" felony the death penalty cannot be imposed and that the death penalty is not an immediately available sentence for a person convicted of first-degree murder because an additional finding of fact is required by this statute and by §921.141(3), Florida Statutes. See Blakely v. Washington, 542 U.S. ___, 124 S.Ct. 2531, 2537 (2004) ("Our precedents, we explained, make clear "that the 'statutory maximum' for Apprendi purposes is the maximum sentence a judge may impose solely on the basis of the facts reflected in the jury verdict or admitted by the defendant."); Galindez v. State, 955 So.2d 517, 518 (Fla. 2007) ("Except for the fact of a prior conviction, a judge may not find any fact that exposes a defendant to a sentence exceeding the relevant statutory maximum, unless that fact inheres in the verdict, the defendant waives the right to a jury finding, or the defendant admits the fact.").

The central question becomes what must be found by the court (and the jury) "according to the procedure set forth in §921.141?" The pertinent portion of this statute states:

> (3) Findings in support of sentence of death. – Notwithstanding the recommendation of a majority of the jury, the court, after weighing the aggravating and mitigating circumstances, shall enter a sentence of life imprisonment or death, but if the court imposes a sentence of death, it shall set forth in writing its findings upon which the sentence of death is based as to the facts:
>
> (a) That sufficient aggravating circumstances exist as enumerated in subsection (5), and
>
> (b) That there are insufficient mitigating circumstances to outweigh the aggravating circumstances.
>
> In each case in which the court imposes the death sentence, the determination of the court shall be supported by specific written findings of fact based upon the circumstances in subsections (5) and (6) and upon the records of the trial and the sentencing proceedings. If the court does not make the findings requiring the death sentence within 30 days after the rendition of the judgment and sentence, the court shall impose sentence of life imprisonment in accordance with s. 775.082.

§921.141(3), Florida Statutes (2007). The language is not ambiguous. Courts that do not apply statutes as written violate article II, § 3 of the Florida Constitution, which states: "The powers of the state government shall be divided into legislative, executive and judicial branches. No person belonging to one branch shall exercise any powers appertaining to either of the other branches unless expressly provided herein."

"The prohibition contained in the second sentence of Article II, section 3 of the Florida Constitution could not be plainer, as our cases clearly have held. This Court has stated repeatedly and without exception that Florida's Constitution absolutely requires a 'strict' separation of powers." B.H. v. State, 545 So.2d 987, 991 (Fla. 1994). It is the sole responsibility of the Florida Legislature to enact legislation and create substantive law. That duty cannot be directly delegated to another branch of government. E.g., Askew v. Cross Key Waterways, 372 So.2d 913, 925 (Fla. 1978) ("Accordingly, until the provisions of Article II, Section 3 of the Florida Constitution are

altered by the people we deem the doctrine of nondelegation of legislative power to be viable in this State.") What cannot be done directly cannot be done indirectly.

Where statutory language is clear and applying it as written does not produce an absurd result, there is no authority for a court to indulge in "interpreting" clear statutory language to reach a result not encompassed by a plain reading of the statute. BedRoc Ltd., v. United States, 541 U.S. 176, 183 (2004) (plurality opinion); Connecticut v. Nat'l Bank v. Germain, 503 U.S. 249, 253-54 (1992). Doing so exceeds the court's power, responsibility and constitutional authority. This has long been the law in Florida:

> Our task is to determine whether, based on the language of the statute, the Legislature intended to limit section 626.906(4) to Florida residents. It is a fundamental principle of statutory interpretation that legislative intent is the "polestar" that guides this Court's interpretation. See State v. J.M., 824 So.2d 105, 109 (Fla.2002); Reynolds v. State, 842 So.2d 46, 49 (Fla.2002). We endeavor to construe statutes to effectuate the intent of the Legislature. See White, 568 So.2d at 889. To discern legislative intent, we look "primarily" to the actual language used in the statute. See Golf Channel v. Jenkins, 752 So.2d 561, 564 (Fla.2000). Further, "[w]hen the statute is clear and unambiguous, courts will not look behind the statute's plain language for legislative intent or resort to rules of statutory construction to ascertain intent." Daniels v. Fla. Dep't of Health, 898 So.2d 61, 64 (Fla.2005).

Borden v. East-European Ins. Co., 921 So.2d 587, 595 (Fla. 2006). Simply said, a court cannot rewrite, distort or otherwise avoid a statute's unambiguous terms even if the judges or justices disagree with the wisdom of what is stated. Doing so violates the separation of powers proscription contained in article II, § 3 of the Florida Constitution. A violation of the state separation of powers in turn violates the Fourteenth Amendment to the United States Constitution because a state that fails to fairly follow its own laws denies due process of law in the taking of life, liberty or property.

The precise question as to what the court (and the jury) must find §921.141(3) to impose a death sentence is found in the plain language emphasized below:

> (3) Findings in support of sentence of death. – Notwithstanding the recommendation of a majority of the jury, the court, after weighing the aggravating and mitigating circumstances, shall enter a sentence of life imprisonment or death, but if the court imposes a sentence of death, it shall set forth in writing its findings upon which the sentence of death is based as to the facts:
>
> (a) That sufficient aggravating circumstances exist as enumerated in subsection (5), and
>
> (b) That there are insufficient mitigating circumstances to outweigh the aggravating circumstances.
>
> In each case in which the court imposes the death sentence, the determination of the court shall be supported by specific written findings of fact based upon the circumstances in subsections (5) and (6) and upon the records of the trial and the sentencing proceedings. If the court does not make the findings requiring the death sentence within 30 days after the rendition of the judgment and sentence, the court shall impose sentence of life imprisonment in accordance with s. 775.082.

The terms of this statute are not ambiguous. The first requirement is that if the court imposes a sentence if death, "it shall set forth in writing its findings . . . that sufficient aggravating circumstances exist as enumerated in subsection (5)." As demonstrated in the previous review of the cases, the Florida Supreme Court is neither acknowledging the existence of nor applying this statutory standard. The Court is mired in the analysis required by the Eighth and Fourteenth Amendment requirements that an aggravating circumstance must genuinely limit the class of persons eligible for the death penalty. The Court is not applying the correct analysis to decide the due process concerns under the Fifth, Sixth and Fourteenth Amendments, as explained by Apprendi.

The Court has certainly grasped the exception to Apprendi, which has previously been referred to as the "Apprendi caveat." See Galindez v. State, 955 So.2d 517, 518 (Fla. 2007) ("Except for the fact of a prior conviction, a judge may not find any fact that exposes a defendant to a sentence exceeding the relevant statutory maximum, unless that fact inheres in the verdict,

the defendant waives the right to a jury finding, or the defendant admits the fact."). The Florida Supreme Court has cited this caveat numerous times while reviewing the direct appeal of the death penalty and squarely stated that the existence of a prior violent felony or the commission of a contemporaneous felony that was found by the jury satisfies the requirements of Apprendi because of this exception. One example should suffice for illustrative purposes:

> On rehearing, Doorbal has asserted that Florida's capital sentencing scheme violates both the United States and Florida Constitutions under the holding of Ring v. Arizona, 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002). This Court addressed a similar contention in Bottoson v. Moore, 833 So.2d 693 (Fla.2002), cert. denied, 537 U.S. 1070, 123 S.Ct. 662, 154 L.Ed.2d 564 (2002), and King v. Moore, 831 So.2d 143 (Fla.2002), cert. denied, 537 U.S. 1067, 123 S.Ct. 657, 154 L.Ed.2d 556 (2002), and denied relief. We find that Doorbal is likewise not entitled to relief on this claim. Of note, Doorbal argues that his death sentences were unconstitutionally imposed because Florida's capital sentencing scheme violates the United States and Florida Constitutions by failing to require that aggravating circumstances be enumerated and charged in the indictment and by further failing to require specific, unanimous jury findings of aggravating circumstances. These arguments must fail because here, one of the aggravating circumstances found by the trial judge to support the sentences of death was that Doorbal had been convicted of a prior violent felony, namely the contemporaneous murders of Griga and Furton, and the kidnaping, robbery, and attempted murder of Schiller. Because these felonies were charged by indictment, and a jury unanimously found Doorbal guilty of them, the prior violent felony aggravator alone clearly satisfies the mandates of the United States and Florida Constitutions, and therefore imposition of the death penalty was constitutional.

Doorbal v. State, 837 So.2d at 963 (Fla. 2003) (8-4 jury recommendation).

This reasoning that one aggravating circumstance "alone clearly satisfies the mandates of the United States and Florida Constitutions" is a one foot leap in legal analysis over a five foot constitutional problem. This approach totally fails to address and/or satisfy the unambiguous statutory requirement that "sufficient aggravating circumstances exist" when the death penalty is imposed.

Section 921.141(3), Florida Statutes, does not require "one or more" aggravating circumstances, as do the death penalty statutes of some other states. The Florida Legislature chose language in the plural form and a plain reading of those plural references establishes that, in Florida, MORE than one statutory aggravating circumstance is required to impose the death penalty. More specifically, the statute requires that "sufficient aggravating circumstances exist" and that, if so found, then it must be determined if there are insufficient mitigating circumstances to outweigh "the aggravating circumstances." The term is twice stated in the plural form and application of the statute in that way does not produce an absurd result. The Legislature is presumed to know the plain meaning of the words it uses. The Legislature, in writing §921.141(2) and (3), restricted the consideration of aggravating circumstances to those expressly set forth in subsection (5), as was within its prerogative. It was also within the prerogative of the Florida Legislature to require more than one statutory aggravating circumstance to impose the death penalty. Had the Florida Legislature intended that one statutory aggravating circumstance was all that needed to exist to impose the death penalty, the Legislature presumably would have so stated.

If the term "sufficient" is deemed to be ambiguous, it yet remains that the statute should be construed to necessarily require more than one statutory aggravating circumstance to support imposition of the death penalty. Consider the holding of the Florida Supreme Court in Wallace v. State, 724 So.2d 1126 (Fla. 1998) that dealt with the ambiguity created by use of the word "any" officer. The Court there perceived ambiguity and applied §775.021(4), Florida Statutes, to construe the phrase most beneficially to the defendant:

> PER CURIAM.
>
> We have for review Wallace v. State, 689 So.2d 1159 (Fla. 4th DCA 1997), which certified conflict with the decision in Pierce v. State, 681 So.2d 873 (Fla. 1st DCA 1996), on the issue of whether section 843.01, Florida Statutes (1993), permits more than one conviction predicated on a single incident during which a person resists multiple officers attempting to effect a single arrest. We have jurisdiction. Art. V, § 3(b)(4), Fla. Const. For the reasons expressed herein, we hold that only one conviction may be

obtained. We approve the reasoning of Pierce and quash the decision in Wallace.

Wallace was charged with and convicted of numerous offenses including two counts of resisting an officer with violence under section 843.01, Florida Statutes (1993), arising out of an altercation between Wallace and two police officers who were called to Wallace's home by his sister.[FN1] When the first officer on the scene saw Wallace strike his sister with a rake, the officer ordered Wallace to drop the rake and informed him he was under arrest. Wallace resisted and threatened to strike the officer with the rake, and when the officer pulled his nightstick, Wallace unsuccessfully attempted to punch him. When a second officer attempted to handcuff Wallace, Wallace again resisted, pulled away, and punched the officer in the face. Wallace thereafter continued to resist the officers and stopped only when he noticed his hand was bleeding.

Wallace was arrested and charged with numerous offenses, including multiple counts of battery on a law enforcement officer, aggravated assault on a law enforcement officer, aggravated battery, and two counts of resisting an officer with violence under section 843.01.[FN2] Upon conviction,[FN3] Wallace appealed, contending that section 843.01 permitted only one charge and conviction for resisting the officers in their attempt to arrest him, regardless of whether more than one officer was involved, since the evidence showed continuous resistance of the attempted arrest in a single incident. The Fourth District rejected his appeal, holding that section 843.01 allows separate convictions for each individual officer actually present and resisted at the scene. Wallace, 689 So.2d at 1163. In so holding, however, the district court recognized and certified conflict with Pierce v. State, 681 So.2d 873 (Fla. 1st DCA 1996). Id.

PIERCE

Only petitioner's convictions for two counts of resisting an officer in the execution of a legal duty under section 843.01 are at issue in this proceeding. In a situation similar to that presented here, the defendant in Pierce was charged with three counts of resisting an officer predicated on one episode of an attempted arrest during which he resisted three officers. 681 So.2d at 873.

The First District held that only one conviction was permitted in connection with this single episode, relying upon this Court's decision in State v. Watts, 462 So.2d 813 (Fla.1985). Pierce, 681 So.2d at 874. Citing Watts, the court in Pierce held that because section 843.01 prohibits resisting "any" officer, as opposed to "an" officer, "and the three counts ... [were] predicated on one incident during which the appellant resisted or opposed three officers, only one conviction [was] permitted." Id.

GRAPPIN AND WATTS [FN4]

We find that this conflict may be resolved in accordance with our decisions in Grappin v. State, 450 So.2d 480 (Fla.1984), and Watts. In Grappin the defendant was convicted of five separate acts of larceny for stealing five firearms during the commission of a burglary. Focusing on the language of the statute at issue, particularly the word "a" in prefacing the word "firearm," we held that use of the term " 'a firearm' ... clearly shows that the legislature intended to make each firearm a separate unit of prosecution." 450 So.2d at 482. In so holding, we recognized that federal courts have held that use of the word "any," on the other hand, renders the meaning of the statute ambiguous, and in that instance, "several firearms taken at the same time must be treated as a single offense." Id. (citing United States v. Rosenbarger, 536 F.2d 715 (6th Cir.1976), and United States v. Kinsley, 518 F.2d 665 (8th Cir.1975)). Thus, we acknowledged a critical difference between the use of the words "a" and "any" in construing the legislative intent of a statute.

In Watts we followed the reasoning and analysis in Grappin. In Watts, the defendant was charged with two counts of possessing two prison-made knives at the same time. The statute made it unlawful for any person to "introduce" or "possess" while upon the grounds of any state correctional institution "any firearm or weapon of any kind." Watts, 462 So.2d at 814 (quoting § 944.47, Fla. Stat. (1981)). In interpreting the language of the statute, we recognized the ambiguity in the legislature's use of the language "any firearm or weapon." Id. In accordance with our decision in Grappin, we concluded that such ambiguity required construction of the statute most favorably for the accused and that such a favorable construction prohibited Watts from being convicted of multiple offenses for the possession of two prison-made knives.[FN5]

Id. The meaning of Watts is clear; although Watts possessed two knives, he was subject to only one conviction under an ambiguous statute, absent a clearer statement of legislative intent to the contrary.

SIMILAR FEDERAL STATUTE

The United States Supreme Court has reached a result similar to that reached in Pierce and consistent with our opinions in Grappin and Watts, in construing the federal statutory equivalent to the statute in this case, 18 U.S.C.A. § 111 (Supp.1998) (formerly 18 U.S.C. § 254 (1946) (assault or interference with a federal officer)). In Ladner v. United States, 358 U.S. 169, 79 S.Ct. 209, 3 L.Ed.2d 199 (1958), the defendant was convicted of two counts of assault upon federal officers in violation of 18 U.S.C. § 254 (1940) when he fired a shotgun at two officers while they were seated in their automobile. Similar to the statute at issue in the instant case, section 254 provided: " 'Whoever shall forcibly resist, oppose, impede, intimidate, or interfere with any person ... [if he is a federal officer designated in § 253] while engaged in the performance of his official duties, or shall assault him on account of the performance of his official duties, shall be ... imprisoned not more than three years. ....' " 358 U.S. at 171 n. 1, 79 S.Ct. 209 (quoting 18 U.S.C. § 254 (1940)) (emphasis supplied). In concluding that only one conviction under section 254 was permitted, the Court reasoned that to permit as many offenses as there are federal officers affected "would produce incongruous results" because the cumulative punishment imposed would be disproportionate to the actual crime committed. 358 U.S. at 177, 79 S.Ct. 209.

In analyzing the intent of the statute, the Court found it susceptible to two equally plausible constructions with regard to the purpose the statute was intended to achieve: preventing hindrance of the government and protection of individual officers. Id. at 173, 79 S.Ct. 209. In support of the view that the statute's primary purpose was to prevent the hindrance of government duty, and not to prevent assault upon federal officers, the court stated: FN6

> [Section] 254 makes it unlawful not only to assault federal officers engaged on official duty but

> also forcibly to resist, oppose, impede, intimidate or interfere with such officers. Clearly one may resist, oppose, or impede the officers or interfere with the performance of their duties without placing them in personal danger. Such a congressional aim would, of course, be served by considering the act of hindrance as the unit of prosecution without regard to the number of federal officers affected by the act. For example, the locking of the door of a building to prevent the entry of officers intending to arrest a person within would be an act of hindrance denounced by the statute. We cannot find clearly from the statute, even when read in the light of its legislative history, that the Congress intended that the person locking the door might commit as many crimes as there are officers denied entry. And if we cannot find this meaning in the supposed case, we cannot find that Congress intended that a single act of assault affecting two officers constitutes two offenses under the statute.

Id. at 176, 79 S.Ct. 209. Because the meaning of the statute could not be discerned from the wording of the statute or its legislative history, the Court construed the statute in favor of the accused individual:

> "(W)hen choice has to be made between two readings of what conduct Congress has made a crime, it is appropriate, before we choose the harsher alternative, to require that Congress should have spoken in language that is clear and definite. We should not derive criminal outlawry from some ambiguous implication." United States v. Universal C.I.T. Credit Corp., 344 U.S. 218, 221-222, 73 S.Ct. 227, 97 L.Ed. 260. And in Bell v. United States, 349 U.S. 81, 83, 75 S.Ct. 620, 99 L.Ed. 905, the Court expressed this policy as follows: "When Congress leaves to the Judiciary the task of imputing to Congress an undeclared will, the ambiguity should be resolved in favor of lenity." This policy of lenity means that the Court will not interpret a federal criminal statute so as to increase the penalty that it

> places on an individual when such an interpretation can be based on no more than a guess as to what Congress intended.

Id. at 177-78, 79 S.Ct. 209 (citations omitted). Other courts have similarly found that the use of the plural adjective "any" in connection with a singular noun or pronoun (i.e., officer, firearm, etc.) typically renders the meaning of a statute ambiguous. See United States v. Coiro, 922 F.2d 1008, 1014 (2d Cir.1991); Kinsley, 518 F.2d at 667-68; United States v. Deaton, 468 F.2d 541, 546 (5th Cir.1972).

This Court's prior holdings in Grappin and Watts and the First District's holding in Pierce are consistent with the U.S. Supreme Court's opinion in Ladner and the federal circuit decisions cited above. Here, as in those cases, the use of the phrase "any officer" in section 843.01 renders the statute in question ambiguous. Indeed, chapter 843 is entitled "obstructing justice" which, as the Supreme Court concluded in Ladner, indicates a concern over the obstruction of justice by resisting arrest and not just the physical protection of law enforcement officers. [FN7] Indeed, section 843.01 specifically focuses on someone who "resists, obstructs, or opposes any officer" in the execution of any legal duty. At the very least, under the analysis in the cases set out above, the language and purpose of the statute is ambiguous and susceptible to different interpretations. And, of course, both this Court and the legislature have mandated that criminal statutes be strictly construed most favorably to the accused. See § 775.021(1), Fla. Stat. (1993); Perkins v. State, 576 So.2d 1310, 1312 (Fla.1991); State ex rel. Lee v. Buchanan, 191 So.2d 33, 36 (Fla.1966). Accordingly, absent a clearer statement of legislative intent to the contrary, this Court must apply the same analysis as we did in Watts, and as the U.S. Supreme Court did in Ladner.

As noted above, the Ladner Court concluded that allowing as many charges as there were officers threatened or resisted in a single incident could produce absurd results. Indeed, the petitioner has similarly warned of the absurd consequences that potentially could flow from a contrary construction of the statute here:

> [D]efining the unit of prosecution by the number of officers involved in executing the legal duty

> would lead to an absurd result. Imagine an armed individual waiving his gun in the direction of the 100 officers unsuccessfully attempting to induce his surrender. Or imagine the motorist who continues driving despite an order to pull-over, resulting in a chase involving 100 squad cars, each occupied by two officers. Is it reasonable to believe that the legislature contemplated the single acts of resistance to constitute 100 counts of resisting an officer with violence and 200 counts of resisting an officer without violence?

Petitioner's Reply Brief on the Merits at 8 n. 3. We note that if multiple prosecutions were allowed, a defendant could be prosecuted for numerous other charges such as aggravated assault and aggravated battery upon a police officer as was Wallace here, in addition to an endless number of counts of resisting simply depending upon the number of officers present. We do not believe the legislature intended such consequences. While the defendant may have committed more than one offense in his altercation with the officers, including possibly multiple assaults or batteries, or both, on law enforcement officers as were separately charged here, we conclude that his continuous resistance to the ongoing attempt to effect his arrest constitutes a single instance of obstruction under section 843.01. Of course, our opinion does not affect Wallace's convictions for the other offenses arising out of the same altercation.

Accordingly, we quash Wallace and approve Pierce.

It is so ordered.

FN1. The Fourth District's opinion notes: The defendant was initially charged with [two counts of] battery on a law enforcement officer, aggravated assault on a law enforcement officer, and aggravated battery. Following jury selection, defendant was granted a continuance to locate witnesses. After the continuance was granted, the State amended the information to add two counts of battery on a law enforcement officer, and two counts of resisting an officer with violence. The trial court denied a defense motion to dismiss the additional counts on grounds of prosecutorial vindictiveness, and the case thus proceeded to trial on the amended information. At the conclusion of the State's case, the trial court

reserved ruling on defendant's motion for a judgment of acquittal on all counts. The State then proceeded to nolle prosse the two counts of battery on a law enforcement officer. The remaining charges were submitted to the jury, and the defendant was found guilty on all six. Wallace, 689 So.2d at 1160.

FN2. Section 843.01 provides: 843.01 Resisting officer with violence to his person.-Whoever knowingly and willfully resists, obstructs, or opposes any officer as defined in s. 943.10(1), (2), (3), (6), (7), (8), or (9); member of the Parole Commission or any administrative aide or supervisor employed by the commission; parole and probation supervisor; county probation officer; personnel or representative of the Department of Law Enforcement; or other person legally authorized to execute process in the execution of legal process or in the lawful execution of any legal duty, by offering or doing violence to the person of such officer or legally authorized person, is guilty of a felony of the third degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.

FN3. See supra note 1.

FN4. That the Wallace decision conflicts with our prior decisions in Watts and Grappin v. State, 450 So.2d 480 (Fla.1984), is made clear in a recent analysis of the issue by Judge Webster of the First District: In Pierce v. State, 681 So.2d 873 (Fla. 1st DCA 1996), this court held that multiple convictions for resisting an officer with violence in violation of section 843.01, Florida Statutes, which all arose during a single incident were precluded by the double jeopardy clause because that statute prohibits resisting, obstructing or opposing "any officer." We reached that conclusion by applying the Grappin/Watts "a/any test." In Wallace, the Fourth District affirmed convictions for two counts of resisting an officer with violence, notwithstanding the fact that both charges arose out of a single incident during which two different officers were involved. In a lengthy opinion, the Wallace court noted its disagreement with Pierce, apparently because it believed that, as used in section 843.01, " any does not define the 'allowable unit of prosecution'-merely the class of officers to whom the statute's protection is intended." 689 So.2d at 1163. Apparently for the same reason, the court was able to distinguish and, thereby, to avoid what would have otherwise been its obligation to follow

Grappin and Watts. See Hoffman v. Jones, 280 So.2d 431 (Fla.1973) (district courts of appeal may state their reasons for advocating that the supreme court recede from established precedent, but are bound to follow such precedent until overruled). In dicta, the Wallace court suggests that the legislature's adoption in 1988 of section 775.021(4)(b), Florida Statutes, had effectively overruled the holdings in Grappin and Watts. 689 So.2d at 1162-63. The state here relies on that dicta to support its argument that the Grappin/Watts "a/any test" is no longer good law.....It seems to us that section 775.021(4)(b) was intended merely to make clear that multiple punishments are to be imposed for separate offenses regardless of whether they all arose out of a single act. We fail to see how that amendment has any bearing on questions such as that posed by this appeal-what the legislature intends the proper unit of prosecution to be when it uses ambiguous language, i.e., whether the language used is intended to make multiple acts occurring at the same time one offense or separate offenses. Accordingly, we do not agree that the adoption of section 775.021(4)(b) has any bearing on the continued vitality of the Grappin/Watts "a/any test" as a means by which to arrive at an answer to such questions. Hill v. State, 711 So.2d 1221, 1223-24 (Fla. 1st DCA 1998).

FN5. Although this Court approved the district court's decision in Watts v. State, 440 So.2d 505 (Fla. 1st DCA 1983), on different grounds, the district court aptly noted: [D]istinguishing single from multiple units of prosecution is a matter for the legislature, not for adroit prosecutors or for wondering courts. Legislation defining crimes must therefore be read as strictly and as narrowly as reasonably possible, avoiding multiple charges for coterminous conduct unless the legislature's contrary purpose is clear.... This skeptical view of multiple prosecutions merely reinforces traditional judicial attitudes toward the construction of criminal statutes. Id. at 511.

FN6. The Supreme Court, in United States v. Feola, 420 U.S. 671, 95 S.Ct. 1255, 43 L.Ed.2d 541 (1975), effectively limited the holding in Ladner to the facts in its case. In doing so, the Court gave weight to both purposes of the statute instead of choosing one interpretation over the other. However, Feola did not involve a "unit of prosecution" issue but, rather, focused on whether conviction under section 254 requires knowledge of the federal officer's identity.

FN7. As noted earlier, Wallace was also charged and convicted of multiple counts of battery as well as assault upon a police officer based upon the same conduct underlying the alleged violation of section 843.01.

SHAW, KOGAN, ANSTEAD and PARIENTE, JJ., concur.

HARDING, C.J., dissents with an opinion, in which OVERTON and WELLS, JJ., concur.

HARDING, C.J., dissenting.

I dissent because I conclude that the statute, read as a whole, reveals clear legislative intent that the allowable unit of prosecution is each officer resisted. The statute reads:

843.01. Resisting officer with violence to his person.

Whoever knowingly and willfully resists, obstructs, or opposes any officer as defined in s. 943.10(1), (2), (3), (6), (7), (8), or (9); member of the Parole Commission or any administrative aide or supervisor employed by the commission; parole and probation supervisor; county probation officer; personnel or representative of the Department of Law Enforcement; or other person legally authorized to execute process in the execution of legal process or in the lawful execution of any legal duty, by offering or doing violence to the person of such officer or legally authorized person, is guilty of a felony of the third degree....

While simple application of the "a/any" test set out in Grappin and Watts, without a complete reading of the statute, may suggest that this section is ambiguous as to the allowable unit of prosecution, a full and plain reading of the statute shows that it clearly prohibits violently resisting the officer, rather than the arrest. The phrase "any officer" must be read with the subsequent singular reference to "the person of such officer." Because the statute read as a whole is unambiguous, I would hold that the allowable unit of prosecution under section 843.01 is each individual officer resisted with violence and that the statute permits multiple charges and convictions when a suspect resists multiple officers in an attempt to effect a single arrest. Accordingly, I would

> approve the decision below and disapprove Pierce v. State, 681 So.2d 873 (Fla. 1st DCA 1996).
>
> OVERTON and WELLS, JJ., concur.

Wallace v. State, 724 So.2d 1176, 1177-1181 (Fla. 1998). Applying the reasoning of the dissent, the Florida Legislatures repeated use of the term "circumstances" in both §921.141(3)(a) and (b) reinforces the presumption that the legislature intended that more than one aggravating circumstance exist before the death penalty could be justified.

However, even if that analysis is not accepted, it is yet clear that the term "sufficient" does NOT necessarily mean one. The statute, as previously construed by the Florida Supreme Court, clearly contemplates that the finding of these considerations involves a weighing process and not a counting process:

> It must be emphasized that the procedure to be followed by the trial judges and juries is not a mere counting process of X number of aggravating circumstances and Y number of mitigating circumstances, but rather a reasoned judgment as to what factual situations require the imposition of death and which can be satisfied by life imprisonment in light of the totality of the circumstances present. Review by this Court guarantees that the reasons present in one case will reach a similar result to that reached under similar circumstances in another case. No longer will one man die and another live on the basis of race, or a woman live and a man die on the basis of sex. If a defendant is sentenced to die, this Court can review that case in light of the other decisions and determine whether or not the punishment is too great. Thus, the discretion charged in Furman v. Georgia, Supra, can be controlled and channeled until the sentencing process becomes a matter of reasoned judgment rather than an exercise in discretion at all.

State v. Dixon, 283 So.2d 1, 10 (Fla. 1973). Converting the statutory requirement that "sufficient aggravating circumstances exist as enumerated in subsection (5)" means a requirement of finding just one factor, and the conclusion that a finding of a prior violent felony is all that is required, cannot withstand meaningful scrutiny.

As shown the Sixth and Fourteenth Amendments require that findings upon which a sanction depends must be found by a jury beyond a reasonable doubt. The statutory finding upon which imposition of the death penalty depends is clearly set forth in §921.141(3), Florida Statutes.. The Fourteenth Amendment guarantees that a state shall not deprive any person of life or liberty without due process of law:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. *No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.*

Amend. XIV, U.S. Constitution (emphasis added). This guarantee is being violated and due process is being denied without redress when the finding required by §921.141(3), Florida Statutes, is made by the court alone. Florida is also denying due process and equal protection when it provides more due process to an equivalent finding in non-capital cases yet refuses than it provides in capital cases.

WHEREFORE, this Court is asked to rule that Florida's death penalty is being applied unconstitutionally as set forth in the foregoing motion and memorandum of law.

I HEREBY CERTIFY that a copy of the above Motion and Memorandum has been furnished to the Office of the State Attorney, by hand and/or electronically, this 10 day of December, 2013.

Respectfully submitted,

MATT SHIRK
PUBLIC DEFENDER

BY: _____
Fred C. Gazaleh, #353787
Assistant Public Defender

/slc

(CAP084)

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IN THE CIRCUIT COURT, FOURTH JUDICIAL CIRCUIT, IN AND FOR DUVAL COUNTY, FLORIDA.

CASE NO.: 16 2013 CF 005781 AXXX MA

DIVISION: CR-D

STATE OF FLORIDA

VS.

DONALD JAMES SMITH

MOTION TO DECLARE SECTIONS 782.04 AND 921.141, FLORIDA STATUTES, UNCONSTITUTIONAL BECAUSE OF TREATMENT OF MITIGATING CIRCUMSTANCES

Defendant, by and through the undersigned counsel, moves this Honorable Court to dismiss the Indictment filed in the above-styled cause and to declare Sections 782.04 and 921.141, Florida Statutes, unconstitutional.

As grounds for this Motion, the Defendant states:

1. The circumstances to be considered in mitigation under Section 921.141 are insufficient, in violation of the Due Process and Equal Protection Clauses of the Fifth and Fourteenth Amendments to the Constitution of the State of Florida. Section 921.141 also provides for cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments to the Constitution of the United States and Article I, Section 17, of the Florida State Constitution. Florida Statute Section 921.141 is unconstitutional, on its face, in that the mitigating circumstances contain language which is unnecessarily restrictive, and the enumerated mitigating circumstances are restrictive in scope and unconstitutionally restrictive in their language. The statutory mitigating circumstances in Section 921.141 are inadequate, in that, they unduly emphasize certain mitigating circumstances to the jury, to the exclusion of other mitigating circumstances, on which the Defendant may introduce evidence. Because the statute singles out certain mitigating circumstances and raises them to the dignity of a legally stated instruction, it diminishes the forcefulness and effect of other mitigating circumstances which are not dignified by statutory language and judicial instruction. This is akin to instructing on the law

of self-defense, in a murder case, where the defense is insanity, and failing to instruct the jury on the law of insanity, but letting the evidence of insanity go to the jury. Lockett v. Ohio, 438 U.S. 586 (1978), requires that the sentencing body, the judge and jury, be allowed to give independent, mitigating weight to any aspect of a Defendant's character or record, and to circumstances of the offense, that the Defendant proffers as a basis for a sentence. The United States Supreme Court has consistently reaffirmed and strengthened this principle. Eddings v. Oklahoma, 455 U.S. 104 (1982); Skipper v. South Carolina, 476 U.S. 1, 106 S.Ct. 1669 (1986).

2. The United States Supreme Court has reaffirmed, in a Florida case, the principal that jury instructions must not directly, or indirectly, limit the jury's consideration of mitigating evidence. Hitchcock v. Dugger, 481 U.S. 393, 107 S.Ct. 1821 (1987).

3. The instruction on the statutory mitigating circumstances could easily lead the jury to denigrate the importance of non-statutory mitigating circumstances since only the statutory mitigating circumstances are listed in the Standard Jury Instructions. Florida Standard Jury Instructions In Criminal Cases. This subverts the mandate of Lockett, supra; Eddings, supra; Skipper, supra; and Hitchcock, supra.

4. The modifiers in Section 921.141(6)(b), (e) and (f) also unconstitutionally restrict the consideration of mitigating evidence. These circumstances are:

MITIGATING CIRCUMSTANCES

Mitigating circumstances shall be the following:

> (b) The capital felony was committed while the Defendant was under the influence of extreme mental or emotional disturbance.
>
> (e) The Defendant acted under extreme duress or under the substantial domination of another person.
>
> (f) The capacity of the Defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired.

(*Emphasis supplied.*) Fla. Stat. Section 921.141(6)(b), (e) and (f).

5. In each case, the mitigating circumstance is limited by modifiers "extreme," "substantial" or "substantially."

6. This limiting language could lead a jury to give absolutely no mitigating weight to mitigating evidence that does not rise to the "extreme" or "substantial" test. For example, there could be evidence that a Defendant suffered from a mental or emotional disturbance, but the jury may not be convinced that it is extreme, and thus give it absolutely no weight. This directly violates the requirement that the sentencer be free to give:

> "independent mitigating weight to aspects of the Defendant's character and record and to circumstances of the offense proffered in mitigation."

Lockett v. Ohio, 438 U.S. 586, 605 (1978); Eddings v. Oklahoma, 455 U.S. 104, 110 (1982).

WHEREFORE, Defendant moves this Honorable Court to declare Sections 782.04 and 921.141, Florida Statutes, unconstitutional because of treatment of mitigating circumstances.

I HEREBY CERTIFY that a copy of the above and foregoing Motion has been furnished to the Office of the State Attorney, by hand and/or electronically, this 10 day of December, 2013.

Respectfully submitted,

MATT SHIRK
PUBLIC DEFENDER

BY: _____
Fred C. Gazaleh, #353787
Assistant Public Defender

/slc

(CAP085)

IN THE CIRCUIT COURT, FOURTH JUDICIAL CIRCUIT, IN AND FOR DUVAL COUNTY, FLORIDA.

CASE NO.: 16 2013 CF 005781 AXXX MA

DIVISION: CR-D

STATE OF FLORIDA

VS.

DONALD JAMES SMITH

MOTION TO DECLARE SECTION 921.141, FLORIDA STATUTES, UNCONSTITUTIONAL AS APPLIED BECAUSE OF ARBITRARINESS IN JURY OVERRIDES AND SENTENCING

Defendant, by and through the undersigned counsel, respectfully requests this Honorable Court to enter an Order declaring Section 921.141, Florida Statutes, unconstitutional, and as grounds therefor would show:

1. The United States Supreme Court upheld the facial constitutionality of Florida's capital punishment statute in Proffitt v. Florida, 428 U.S. 242 (1976). The court, in upholding the statute, relied primarily on two Florida Supreme Court cases: State v. Dixon, 283 So.2d 1 (Fla. 1973), and Tedder v. State, 322 So.2d 908 (Fla. 1975). Quoting Dixon, the court stated:

> That (new) legislation provides that after a person is convicted of first degree murder, there shall be an informed, focused, guided, and objective inquiry into the question as to whether he should be sentenced to death. If a death sentence is imposed, the sentencing authority articulates in writing the statutory reasons that led to its decision. Those reasons, and the evidence supporting them, are conscientiously reviewed by a court which, because of its statewide jurisdiction, can assure consistency, fairness, and rationality in the evenhanded operation of the state law. {T}his system serves to assure that sentence of death

will not be "wantonly" or "freakishly" imposed.

428 U.S. 242.

2. Contrary to the court's belief, the sentencing process in Florida is far from "informed, focused, guided, and objective" and the court's review process, in the years since Proffitt has not assured "consistency, fairness, and rationality in the evenhanded operation of the state law."

3. The lack of objectivity and consistency in the interpretation of Florida's capital sentencing law has resulted in an arbitrary and capricious application of the statute, thus rendering it unconstitutional under the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution and Article I, Sections 2, 9, 16 and 17, of the Florida Constitution.

WHEREFORE, Defendant moves this Honorable Court to declare Section 921.141, Florida Statutes, unconstitutional.

I HEREBY CERTIFY that a copy of the above and foregoing Motion has been furnished to the Office of the State Attorney, by hand and/or electronically, this 10 day of December, 2013.

Respectfully submitted,

MATT SHIRK
PUBLIC DEFENDER

BY: _____
Fred C. Gazaleh, #353787
Assistant Public Defender

/slc

(CAP086)

IN THE CIRCUIT COURT, FOURTH JUDICIAL CIRCUIT, IN AND FOR DUVAL COUNTY, FLORIDA.

CASE NO.: 16 2013 CF 005781 AXXX MA

DIVISION: CR-D

STATE OF FLORIDA

VS.

DONALD JAMES SMITH

MOTION TO DECLARE FLORIDA STATUTES 782.04 AND 921.141 UNCONSTITUTIONAL

The Defendant, DONALD JAMES SMITH by and through the undersigned attorney, the Public Defender for the Fourth Judicial Circuit of Florida, moves this Honorable Court for an order Declaring Florida's Death Penalty Statutes 782.04 and 921.141 unconstitutional, therefore precluding the death penalty to be a sentencing option if convicted of First Degree Murder. The basis for said motion is as follows:

1. In 1972 the United States Supreme Court invalidated all existing capital statutes in Furman v. Georgia, 408 U.S. 238 (1972). Furman raised concerns about the arbitrary and discriminatory administration of the death penalty.

2. After Furman, states sought to resuscitate their capital statutes by revising them to address the concerns raised in Furman. Many of the states, including Florida, turned to Section 210.6 of the Model Penal Code promulgated in 1962, as a template for their revised statutes, hoping in part that the prestige of the American Law Institute (Institute) would help validate these new efforts.

3. The main provision of the Model Penal Code concerning capital punishment 210.6 defines cases appropriate for capital punishment as follows:

> only murder, then only if there are "aggravating circumstances", and even then not if "substantial mitigating circumstances call for leniency" or if the evidence at trial "does not foreclose all doubt respecting ..... guilt". The section also proscribes the death penalty sentence for those under the age of eighteen (18) at the time of the murder and for those whose "physical or mental condition calls for leniency".

4. Section 210.6 then mandates a special sentencing procedure in capital cases and allocates sentencing authority between judge and jury. Specifically, the Section laid out two formulations from which states adopting the Model Penal Code (MPC) would choose. The one preferred by the Institute is for use of a jury in contested cases but with the judge retaining discretion to reject a jury verdict of death. (Florida Death Penalty Statute). Under both procedures, final discretion to sentence a defendant to death lies with the judge. Additionally, the section requires the judge, and when aided by a jury, also the jury, to consider the aggravating circumstances and mitigating circumstances.

5. In the 1976 cases addressing five of the revised statutes, state advocates drew particular attention to the fact that many of their provisions were modeled on 210.6. The court in turn relied on the expertise of the Institute – particularly it's view that guided discretion could improve capital decision making when it upheld the Georgia, Florida and Texas statutes.

6. In Gregg v. Georgia, 428 U.S. (1976), the first capital sentencing statute the United States reviewed after Furman the court stated:

> "While some have suggested that standards to guide a capital jury's sentencing deliberations are impossible to formulate, the fact is that such standards have been developed, when the drafters of the Model Penal Code faced this problem, they concluded that it is within the realm of possibility to point to the main circumstances of aggravation and of mitigation that should be weighted and weighed against each other when they are presented in a concrete case."

7. In response to Furman v. Georgia, the Florida Legislature, in 1972, enacted its new death penalty statute which attempted to satisfy the objections the United States Supreme Court had found in the previous death sentencing laws. The new death penalty statute was patterned after the death penalty scheme advocated by the drafters of the Model Penal Code. Florida's new statute sought to channel or limit unbridled discretion sentencers had normally exercised.

8. In Proffitt v. Florida, 428 U.S. 242 (1976) the opinion of Stewart, Powell and Stevens described Florida's statute "patterned in large part on the Model Penal Code".

9. In Jurek v. Texas, 428 U.S. 262 (1976) the Supreme court again cited the Model Penal Code to support its conclusion that the narrowing of capital murder in the Texas statute serves much the same purpose as the use of aggravating factors in Florida and Georgia.

10. In Florida, despite repeated attacks upon the statute's facial constitutionality, the statute has been found valid. Proffitt, Barclay v. Florida, 463 U.S. 989 (1983); Spazlano v. Florida, 468 U.S. 447 (1984). The key to this statutory scheme is the list of aggravating and mitigating factors. Florida v. Dixon, 283 So.2d 1 (1973).

11. 921.141(5) Florida Statute, lists sixteen (16) aggravating circumstances. The first 8 aggravating circumstances listed in the statute were included in the 1972 revised death penalty statute. Since 1972 Florida politicians have added 8 additional aggravators thus making it easier for the state to find circumstances.

12. The stance that the United States Supreme Court took in 1976 was provisional; it then adopted a rule of continuing Constitutional oversight of the administration of capital punishment. Each year the Court has granted review in a substantial number of capital cases, and the Court has continually adjusted its regulatory approach to prevailing capital practices. It is clear that the Supreme Court's attempt to regulate capital punishment, largely on the Model provided by the Model Penal Code – has been unsuccessful on its own terms. The guided discretion experiment has not solved the problems of arbitrariness and discrimination that figured so prominently in Furman; nor has the Court's regulation proven able to ensure the reliability of verdicts or the protection of fundamental due process in capital cases.

13. On May 19, 2009, the American Law Institute voted to withdraw Section 210.6 from the Model Penal Code. The reasons for the concerns of the Institute members are summed up in a lack of fairness in the process and outcome. These include (a) the tension between clear statutory identification of which murders should command the death penalty and the Constitutional requirement of individualized determination; (b) the difficulty of limiting the list of aggravating factors so that they do not cover as they do in Florida a large percentage of the murders; (c) the near impossibility of addressing by legal rule the conscious or unconscious racial bias within the criminal justice system that has resulted in statistical disparity in death sentences based on the race; (d) the enormous economic costs of administering a death penalty

regime; and the politicization of judicial and state attorney elections, even though all state judges perform their tasks conscientiously – candidate statements of personal views on the death penalty and incumbent judge's actions in death penalty cases become campaign issues.

14. The vast majority of death penalty jurisdictions within the United States have elected rather than appointed state attorneys, as we have in Florida, and these prosecutors are usually autonomous decision makers in their own small locales (counties). There is no state or regional review of local decision making or coordination of capital prosecutions. These simple facts of institutional organization generate enormous geographic disparities within most death penalty jurisdictions, including Florida.

15. The State of Georgia completed a study released in 2002. The study shows the death sentencing rate ranges from four death verdicts per thousand homicides in Fulton County (Atlanta) to thirty-three (33) in rural Muscogee County a difference of more than 700%, another strong indicator of geographic disparity.

16. Jury confusion. Another significant post-Furman effort to solve the problem of arbitrariness and discrimination has been to impose structures and order on the ultimate life-death decision. The solution, the Bifurcated Proceeding. The Capital Jury Project (CJP), over the last eighteen (18) years has collected data from thousands of jurors. The findings include propensity of jurors to decide punishment during the guilt-innocence phase of the trial, their frequent misapprehension of the standards governing their consideration of mitigating evidence and jurors tending to misunderstand the consequences of a life without possibility of parole verdict.

A significant number of jurors serve in capital cases notwithstanding their unwillingness to consider a life verdict. The empirical findings of the CJP are disheartening because they reflect widespread, fundamental misunderstanding on the part of capital jurors.

17. The Institute is of the opinion that the system is broken, to the point that they do not believe a new law reform project on capital punishment, either in the form of a new draft of 210.6 or a more extensive set of proposals will resolve the dilemma. The preconditions for an adequately administered regime of capital punishment does not currently exist and cannot reasonably be expected to be achieved.

18. As of October 25, 2013, Florida has 405 persons on death row. The Fourth Judicial, which includes Clay, Duval and Nassau, have a total of sixty-seven (67) persons on death row. The sixty-seven (67) persons include white males (29), black males (36), Hispanic males (1) and one (1) white female. The population of the Fourth Judicial Circuit totals 1,162,054. The Eleventh Circuit, which takes in Miami-Dade and Broward County, has fifty-three (53) persons on death row, white males (24), black males (23), Hispanic (5) and one (1) Hispanic female. The population of the Eleventh Circuit is 2,477,289; twice the population of the people in the Fourth Circuit, yet the Fourth Circuit has the dubious distinction of having more people on Florida's death row and more black males.

19. In 1988 the American Journal of Criminal Law, *Why Juror's Vote Life or Death; Operative Factors in the Florida Death Penalty Cases*, the author, William Geimer, stated that there was a disproportionate number of death sentences and stated; "Again using death sentences and executions as the criteria, Jacksonville (Duval County) is by far the Death Capital of the United States" and it continues to hold that distinction in 2013.

WHEREFORE, Defendant respectfully requests this Honorable Court to grant this Motion.

I HEREBY CERTIFY that a copy of the above and foregoing Motion to Declare Florida Statutes 782.04 and 921.141 Unconstitutional has been furnished to the Office of the State Attorney, by hand and/or electronically, this 10 day of December, 2013.

Respectfully submitted,

MATT SHIRK
PUBLIC DEFENDER

BY: _____
Fred C. Gazaleh, #353787
Assistant Public Defender

/slc

(CAP116)

IN THE CIRCUIT COURT, FOURTH JUDICIAL CIRCUIT, IN AND FOR DUVAL COUNTY, FLORIDA.

CASE NO.: 16 2013 CF 005781 AXXX MA

DIVISION: CR-D

STATE OF FLORIDA

VS.

DONALD JAMES SMITH

MOTION TO DECLARE SECTION 921.141, FLORIDA STATUTES, UNCONSTITUTIONAL BECAUSE ONLY A BARE MAJORITY OF JURORS IS SUFFICIENT TO RECOMMEND A DEATH SENTENCE

The Defendant, moves this Court to enter its order declaring section 921.141, Florida Statutes, unconstitutional for the reasons stated below:

1. Under our state's death penalty jurisprudence, the jury's vote of seven to five favoring death is sufficient to constitute a death recommendation. Rose v. State, 425 So.2d 521 (Fla. 1983).

2. The jury's role is advisory, Combs v. State, 525 So.2d 853 (Fla. 1988), but its advice is of considerable import. If the jury returns a death recommendation, the sentencing court is required to give it "great weight," and a life recommendation is to be followed unless "no reasonable person could differ" that only death is the appropriate sentence. Grossman v. State, 525 So.2d 833 (Fla. 1988); Tedder v. State, 322 So.2d 908 (Fla. 1975).

3. In determining guilt of a criminal charge, the United States Supreme Court has declared unconstitutionally unreliable a guilty verdict by less than a "substantial majority" of twelve jurors, Johnson v. Louisiana, 406 U.S. 356, 92 S.Ct. 1620,32 L.Ed.2d 152 (1972) (guilty verdict by nine members of twelve-person jury not unconstitutional). Although Johnson involved a sixth amendment claim, it incorporates due process and equal protection analysis.

4. When a defendant is exposed to death as a possible punishment, "there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case." Woodson v. North Carolina, 428 U.S. 280, 305

(1976). But instead of heightened reliability, Florida's statutory scheme invites error by using the constitutionally inadequate fact-finding procedure of a bare majority verdict.

5. The defense recognizes that the Florida Supreme Court has rejected attacks on the statute based on lack of unanimity in the jury recommendation. James v. State, 453 So.2d 786 (Fla. 1984). The case law of the United States Supreme Court teaches that it is, as does state practice nationwide. Of all the states which employ juries in capital sentencing, only one, Florida, allows a death penalty recommendation by a bare majority.

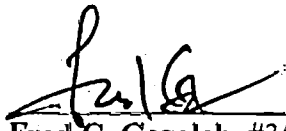
6. For the foregoing reasons, section 921.141, as applied, violates the fifth, sixth, eighth and fourteenth amendments to the United States Constitution, and Article I, sections 9, 16, 17, 21 and 22 of the Florida Constitution. *See* Ring v. Arizona, 536 U.S. 534 *(2002)[Any fact that increases a defendant's sentence must be found by a jury beyond a reasonable doubt).*

WHEREFORE, the Defendant moves that this Court enter its order declaring section 921.141 unconstitutional, and precluding the death penalty in this cause; or Granting such other relief as may be appropriate.

I HEREBY CERTIFY that a copy of the foregoing has been furnished to the Office of the State Attorney, by hand and/or electronically, this 10 day of December, 2013.

Respectfully submitted,

MATT SHIRK
PUBLIC DEFENDER

BY: 
Fred C. Gazaleh, #353787
Assistant Public Defender

/slc

(CAP115)

IN THE CIRCUIT COURT, FOURTH JUDICIAL CIRCUIT, IN AND FOR DUVAL COUNTY, FLORIDA.

CASE NO.: 16 2013 CF 005781 AXXX MA

DIVISION: CR-D

STATE OF FLORIDA

VS.

DONALD JAMES SMITH

MOTION TO DECLARE FLORIDA'S DEATH PENALTY UNCONSTITUTIONAL UNDER EVANS VS. MCNEIL

The Defendant, by and through the undersigned attorney, the Public Defender for the Fourth Judicial Circuit of Florida, submits this Motion To Declare Florida's Death Penalty Unconstitutional Under Evans vs. McNeil, and in violation of the sixth and fourteenth amendments to the United States Constitution and Article 1, Sections 2, 9,15 (a), 16(a), 17, and of the Florida Constitution. In support thereof, the Defendant alleges the following:

1 The Defendant previously filed a Motion To Declare Florida Statute Section 921.141 Unconstitutional Under Ring v. Arizona, which this Court denied.

2 On June 20, 2011, a Federal Court in Florida declared the Florida Death Penalty Statute Unconstitutional. (See Evans V. McNeal, 08 cv 14402, attached as Appendix to this Motion.)

3 Ring v. Arizona held that "all the facts which must exist in order to subject the Defendant to a legally prescribed punishment must be found by the jury." Ring, 536 U.S at 602 (quoting Apprendi v. New Jersey, 530 U.S. 466, 499 (2000) (Scalia J. Concurring). Evans v. McNeil held that Florida's Death Penalty Statute 921.141 is unconstitutional because it does not require a jury to make the findings of fact necessary to impose a death sentence.

4 Under Ring v. Arizona, the Florida Statutes enumerating aggravating factors operate as the functional equivalent of an element of an offense authorizing the death penalty. Because Florida's death penalty procedure is unconstitutional, a death penalty should be precluded as a potential sentence.

In support of this motion, the Defendant presents the attached memorandum of law.

Wherefore, in the interest of Defendant's Constitutional Rights, the Defense respectfully asks this Honorable Court to:

a. Order the Prosecution to file a response and memorandum of law.

b. Hold a hearing on this matter within ten (10) days.

c. Protect Defendant's right to due process under Article 1, Section 9 and 16 of the Florida Constitution as well as the Sixth, Eight, and Fourteenth Amendments to the United States Constitution by declaring Florida Statute Section 912.141 unconstitutional.

d. Strike the State's Notice Of Intent To Seek The Death Penalty.

WHEREFORE, Defendant respectfully requests this Honorable Court grant this motion.

I HEREBY CERTIFY that a copy of the above and foregoing Motion To Declare Florida's Death Penalty Unconstitutional Under Evans v. McNeil has been furnished to the Office of the State Attorney, by hand and/or electronically, this 10 day of December, 2013.

Respectfully submitted,

MATT SHIRK
PUBLIC DEFENDER

BY: _____
Fred C. Gazaleh, #353787
Assistant Public Defender

/slc
(CAP122A)

Electronically Filed 12/10/2013 02:21:07 PM ET

IN THE CIRCUIT COURT, FOURTH JUDICIAL CIRCUIT, IN AND FOR DUVAL COUNTY, FLORIDA.

CASE NO.: 16 2013 CF 005781 AXXX MA

DIVISION: CR-D

STATE OF FLORIDA

VS.

DONALD JAMES SMITH

MEMORANDUM OF LAW IN SUPPORT OF DEFENDANT'S MOTION TO DECLARE FLORIDA'S DEATH PENALTY UNCONSTITUTIONAL UNDER EVANS V. MCNEIL

Defendant, by and through his undersigned attorney, the Office of the Public Defender, respectfully submits this Memorandum of Law in Support of Defendant's Motion to Declare Florida's Death Penalty Unconstitutional Under Evans v. McNeil.

Specifically, Defendant moves for a ruling as a matter of law that the Florida's capital sentencing procedure is in violation of the Sixth, Eighth and Fourteenth Amendments to the United States Constitution, and Article 1 Section, 2, 9, 15 (a), 16 (a), 17 and 22 of the Florida Constitution. In support where of, the Defendant states as follows upon information and belief:

Argument

I. Florida's Capital Sentencing Scheme Is Unconstitutional Because It Does Not Require the Jury to Make the Findings of Fact Necessary to Impose a Death Sentence.

Ring v. Arizona, 536 U.S. 584 (2002), prohibits a trial judge, sitting without a jury, from finding an aggravating circumstance necessary for imposition of the death penalty. Florida's capital sentencing scheme allows a judge, regardless of the jury's recommendation, to impose the death penalty based on aggravating factors not found beyond a reasonable doubt by a jury. On June 20, 2011 in Evans v. McNeil, 08 cv 14402 (appended to this motion) the Federal District Court for the Southern District of Florida agreed with this position, holding that the Florida Death Penalty Statute is unconstitutional.

A. Ring v. Arizona Review

In Ring, the Supreme Court held unconstitutional an Arizona capital sentencing scheme that assigned to the judge rather than the jury the responsibility for the findings of fact necessary to find a defendant eligible for a potential death sentence. 536 U.S. 584 (2002). In so holding, the Court extended and clarified its decision in Apprendi v. New Jersey, 530 U.S. 466 (2000), where it held that "[i]t is unconstitutional for a legislature to remove from the jury the assessment of facts that increase the prescribed range of penalties to which a criminal defendant is exposed." Id at 490 (quoting *Jones v. United States*, 526 U.S. 227,252-53 (1999) (Stevens, J. concurring). Thus, because aggravating factors operate as "the functional equivalent of an element of a greater offense, the Sixth Amendment requires that they be found by a jury." See Ring, 536 U.S. at 609 (quoting *Apprendi*, 530 U.S. at 494, n. 19).

The Ring Court stressed that in applying Apprendi, "[t]he dispositive question ... is one not of form, but of effect." *Id.* at 602 (quotation omitted). The proper inquiry cannot be not whether a first degree murder conviction carried a maximum sentence of death or whether aggravating circumstances are "sentencing factors" or "elements" - otherwise, *Apprendi* "would be reduced to a 'meaningless and formalistic' rule of statutory drafting." Id. at 604 (quoting *Apprendi*, 530 U.S. at 541 (O'Connor, J., dissenting)). Instead, the dispositive question must be whether the "facts increasing punishment beyond the maximum authorized by a guilty verdict standing alone" are found by a jury. Id. at 605.

B. Ring Applied to Florida's Sentencing Scheme.

Both the current Florida statute and the Arizona statute at issue in Ring require that a death sentence be supported by factual findings of the judge - not those of the jury. Section 775.082(1), Florida Statutes, provides that a defendant convicted of first-degree murder must be sentenced to life imprisonment "unless the proceedings held to determine sentence according to the procedure set forth in § 921.141 result in finding by the court that such person shall be punished by death...." *Cf.* Ring, 536 U.S. at 592-93 (describing the Arizona death penalty statute). Section 921.141(3), Florida Statutes, provides that "notwithstanding the recommendation of a majority of the jury, the court, after weighing the aggravating and mitigating circumstances, shall enter a sentence of life imprisonment or death."

Fla. Stat. § 921.141(3). To enter a sentence of death, *the judge* must make "*specific written findings of fact* based upon the circumstances in subsections (5) [aggravating circumstances] and (6) [mitigating circumstances] and upon the records of the trial and the sentencing proceedings." Id. (Emphasis provided). If the judge fails to "make the findings requiring the death sentence" within a specified period of time "the court shall impose a sentence of life." *Id.* Thus, in Florida, although the maximum possible sentence for first-degree murder is death, a defendant convicted of first-degree murder cannot be sentenced to death without additional findings of fact that must be made by a judge - not by a jury. See Bottoson v. Moore, 833 So. 2d 693 (Fla. 2002).

It is taught in law school and well known that a state court must enforce the provisions of the state constitution first, and they are duty bound to provide at least the same minimum guarantees contained in the federal Constitution. It is instructive to note that Florida applies the holding in Apprendi in the context of guideline sentencing but not in capital cases, where heightened procedural due process is required due to the finality and severity of the death penalty.

The Florida Supreme Court opinions since Apprendi was handed down by the United States Supreme Court in 2000 followed by Ring in 2002, refuse to apply Apprendi and/or Ring in capital cases, which amount to a categorical refusal to apply a decision from the United States Supreme Court.

The current unconstitutional application of the death penalty is shown when the Florida Supreme Court squarely confronts the application of Apprendi and Ring during its direct appellate review of the imposition of a death penalty and upholds the death penalty despite the absence of a jury finding that "sufficient circumstances exist" as recorded by Florida Statute section 921.141(3).

Relief under Apprendi and/or Ring will not be given to capital defendants in Florida until the United States Supreme Court overrules its existing precedent and compels Florida to apply the analysis in Apprendi to Florida capital cases. It is clear that the trial courts are not providing defendants the right to a jury determination of the requirements of s. 921.141(3). In fact, the Florida Supreme Court went so far that in State v. Steele, 921 So. 2d 528 (Fla. 2005), the Court stated: "Our current system fosters independence because the trial court alone must make detailed findings about the existence . . .

of aggravating circumstances; it has no jury findings on which to rely." This comment is in direct conflict with Apprendi and Ring.

C. The Holding in Evans v. McNeil

In Evans v. McNeil the Federal District Court held that Florida's sentencing scheme does in fact violate Ring v. Arizona. It found that there was no way to judge whether even a majority of the nine jurors who recommended death had found one of the two aggravating factors, nor which, if any, they found. (Evans at p.84). The Court found that the statute violates the strictures of Ring:

> "Without a special verdict form, it is possible that the trial judge found the existence of one aggravating factor while the jury found the existence of another, resulting in a sentence of death for a defendant based on an invalid aggravator, i.e., an aggravator not found by the jury. This cannot be reconciled with *Ring*.

(Evans at p.91).

The Court also noted in footnote 35 on page 93:

> Further, under the current Florida statute, the judge can reject the jury's recommendation and find for death even when the jury finds the existence of facts that do not support a death sentence. This emphasizes how the jury's "factual findings" at the sentencing phase - to the extent they are findings - are meaningless. The jury could fail to find any aggravating circumstances at all, and the judge could nevertheless find the jury's recommendation unreasonable, make findings, and impose a death sentence based on those findings. See Fla. Stat. § 921.141(3). This too cannot be reconciled with the Constitutional requirements of Ring because a defendant is entitled to a jury determination of any fact on which the legislature conditions an increase in their maximum punishment. However, as this is not the factual scenario before the Court, that issue is left for another day."

The "hybrid" nature of Florida's death penalty procedure does not satisfy the Sixth Amendment jury-trial requirement. In particular, a Florida jury's recommendation is not a verdict for Sixth Amendment purposes: the jury's recommendation is not binding; the advisory jury does not make findings of fact; the jury's recommendation need not be unanimous; and the jury's recommendation

need not be made beyond a reasonable doubt. Moreover, the Florida jury's role during sentencing violates the evolving standards of decency doctrine under the Eighth Amendment.

Conclusion

Florida's capital sentencing procedure is unconstitutional under the holding and reasoning of Ring v. Arizona and under Florida law that requires elements of an offense to be alleged in the charging document and found by a jury unanimously and beyond a reasonable doubt. Because Florida Statute Section 921.141 is invalid, death is not a possible sentence. This was Defendant's position before trial, and Defendant reasserts it here and in the light of the new decision in Evans v. McNeil this Court must therefore enter an order precluding imposition of the death penalty in this case, because, in the event Defendant is convicted, a life sentence without the possibility of parole is the maximum penalty this Court may impose without violating the Sixth, Eighth, and Fourteenth Amendments of the U.S. Constitution and Article I, Sections 9 and 16(a) of the Florida Constitution.

WHEREFORE, in the interests of constitutional rights, the Defendant respectfully asks this Honorable Court to

a. Order the prosecution to file a response and memorandum of law.

b. Hold a hearing on this matter within ten (10) days.

c. Protect Defendant's right to due process under Article I, Sections 9 and 16 of the Florida Constitution as well as the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution by declaring Florida Statute Section 912.141 unconstitutional.

I HEREBY CERTIFY that a copy of the above and foregoing Memorandum Of Law In Support Of Motion To Declare Florida's Death Penalty Unconstitutional under Evans v. McNeil has been furnished to the Office of the State Attorney, by hand and/or electronically, this 10 day of December, 2013.

Respectfully submitted,

MATT SHIRK
PUBLIC DEFENDER

BY: _____
Fred C. Gazaleh, #353787
Assistant Public Defender

/slc

(CAP122C)

UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF FLORIDA
Miami Division

Case Number: 08-14402-CIV-MARTINEZ

PAUL H. EVANS,
Petitioner,

vs.

WALTER A. MCNEIL, Secretary, Florida Department of Corrections,
Respondent.
_____/

ORDER ON EVANS'S PETITION FOR WRIT OF HABEAS CORPUS

THIS CAUSE came before the Court upon Petitioner Paul H. Evans's Petition for Writ of Habeas Corpus (D.E. 1). After careful consideration of Mr. Evans's petition, the State's response to the petition (D.E. 9), the Petitioner's Reply (D.E. 15) and for the reasons set forth below, Mr. Evans's petition for writ of habeas corpus is **GRANTED** in part and **DENIED** in part.

I. Factual and Procedural Background

The factual summary in this section is quoted from the opinion of the Florida Supreme Court:

> This is a murder-for-hire case involving four coconspirators: Evans, who was nineteen at the time of the crime; Sarah Thomas, Evans's girlfriend; Donna Waddell, Evans's and Thomas's roommate; and Connie Pfeiffer, the wife of the victim. At trial, the sequence of events regarding the murder, and Evans's role in the murder, were provided predominantly by Thomas and Waddell, who both testified on behalf of the State. FN1 Waddell signed a deal with the State in which she agreed to plead guilty to second-degree murder in exchange for giving a sworn statement explaining her involvement in the murder and agreeing to testify in any

proceeding. Thomas was never charged with any crime. The evidence at trial demonstrated that the victim and Connie had a "rocky" marriage, and that each were dating other people while they were married. A few weeks before the murder, Connie approached several individuals about killing her husband, but each person refused. Connie then asked Waddell if she knew anyone who would be willing to kill her husband, and Waddell suggested that Evans might be willing to commit the murder. Thomas testified at trial that Evans told her that he would kill Alan in exchange for a camcorder, a stereo, and some insurance money.

FN1. Connie never testified at Evans's trial because she invoked her Fifth Amendment rights. Connie was ultimately convicted of first-degree murder, the jury recommended a life sentence, and the trial court imposed a life sentence.

Waddell stated at trial that she, Evans, Connie, and Thomas all collaborated to come up with the plan to kill the victim. Testimony also established that Evans initiated the plan to commit murder and that he was the "mastermind" behind the plot. Pursuant to the agreement, on Saturday morning, March 23, 1991, Waddell, Connie, and Evans all participated in arranging the Pfeiffers' trailer to make it look like a robbery had taken place. Waddell testified that it was Evans's idea to stage the robbery. They stacked electronic equipment near the back door. During the staging of the robbery, Evans wore gloves.

After the trailer was arranged, Waddell and Evans went to her parents' house to steal Waddell's father's gun. Evans broke into the house through a window to steal the gun and also stole a jar of quarters from Waddell's father's bedroom. Waddell and Evans disposed of the jar, keeping the quarters, and then Waddell, Evans, and Thomas went to test-fire the gun.

Waddell testified that after firing the gun, she, Evans, and Thomas went back to the trailer to go over the alibi with Connie, and Evans told the other three what to say. Waddell stated that Evans explained that he was going to hide behind furniture and shoot Alan when he entered the trailer.

Waddell testified that she, Evans, and Thomas were at the fair that evening but left the fair and arrived at the trailer at dusk. They went in the front door. Evans had a bag containing the gun and dark clothing. Waddell and Thomas left Evans in the trailer, locked the door, and went back to the fair. FN2 They paid for the fair with the quarters stolen from Waddell's parents' house.

FN2. Although Waddell did not remember whether she went back to the fair after dropping Evans off at the trailer, Thomas testified that they did go back to the fair

after dropping Evans off at the trailer.

Thomas testified that she and Waddell paid with quarters to avoid having their hands stamped, so it would not look like they left the fair and later returned. Thomas also testified that she and Waddell stayed at the fair for approximately one to two hours before returning to the trailer. According to Thomas, it was Evans who told them to wait at the fair before returning to the trailer.

Between 7 p.m. and 7:15 p.m. that evening, Alan's girlfriend, Linda Tustin, met Alan at the store where he worked. She observed that Alan was agitated and talking on the phone to Connie. When Alan got off of the phone, he told Tustin that "his wife and her biker friends were going to clean him out." He left work to drive back to the trailer at approximately 7:30 p.m. Alan worked thirty minutes away from the trailer.

Although there is some dispute between the testimony of Waddell and Thomas as to the following sequence of events,FN3 both witnesses agreed that they returned to the pickup site, where Evans got into the back of the car and said, "It's done." Waddell stated that Evans told her that he turned the stereo up loud so that nobody would hear the gunshots, then hid behind some furniture and shot Alan when he came into the trailer. Leo Cordary, one of the Pfeiffers' neighbors, testified that he heard gunshots between 8 p.m. and 8:30 p.m., but did not recall anyone running from the trailer.

FN3. Thomas testified that when she and Waddell originally went to the pickup spot for Evans, he was not there. Thomas stated that they proceeded to drive around and parked at a gravel parking lot. She testified that they did not see Evans, so they went back to the fair and waited another 30 to 45 minutes before leaving again to meet Evans at the pickup spot.

Waddell also testified that Evans did not want to tell her or Thomas too much about the murder so that they would not be able to tell the authorities anything if they were caught. Evans told Waddell, "Just stick to the story that we were at the fair and just we were all together all night at the fair." Thomas and Waddell both testified that they disposed of the gun in a canal near Yeehaw Junction.FN4 They then went back to the fair to meet up with Connie.

FN4. Thomas stated that she and Evans disposed of the gun a few days after the murder in a canal so that fingerprints would be hard to find. By contrast, Waddell testified that the three of them disposed of the gun in a canal that night after shooting off the rest of the bullets. Moreover, according to Waddell, after they disposed of the gun, they went to a dirt road where Evans changed clothes and discarded the dark colored shirt and his shoes. He kept the dark colored pants.

Although there is a dispute in the testimony of Waddell and Thomas as to the timing and specific circumstances, both women stated that Evans tried to burn his pants in the bathtub following the murder.FN5 Thomas testified that shortly after the murder, Evans took the camcorder apart and threw the pieces in a dumpster because he was afraid this could implicate him. Moreover, Waddell testified that she, Thomas, and Evans smashed the television and that Thomas and Evans disposed of the pieces.

FN5. Waddell testified that this occurred the next day, and that they used pool chemicals. They also tried to burn the gun carrying case. According to Waddell, she, Evans, and Thomas were present when they tried to burn the pants. However, according to Thomas, she and Evans tried to burn Evans's pants after they got home from Denny's.

In the early morning on March 23, 1991, the Vero Beach Police Department was summoned to the trailer that the victim shared with Connie, due to a complaint of loud music. The police found the south door of the trailer ajar and, upon entering, discovered the victim's body on the living room floor. The police noticed that the interior of the residence was illuminated by a dim kitchen light. Moreover, the police discovered that the dining area paddle fan light had been disabled. There were no signs of a forced entry or a struggle within the trailer, but the trailer was in a state of disarray, with electronic equipment and other items stacked near the south door. The victim was wearing two gold chains and had $48 in his pocket when the police found him. Moreover, the police found the victim's life insurance policies which were worth approximately $120,000 lying on the table. Each policy listed Connie as the beneficiary.

The police also discovered a marijuana roach on the end table in the living room and found a crack pipe and roach clip on the bedroom dresser. The roach in the living room had lipstick on it, but the police never sent it for DNA analysis. A television, camcorder, and VCR were reported missing from the trailer and never recovered. These items were rented from Alan's place of work.

Three bullets were recovered from the victim, one from his spine, and two from his head. The testimony at trial identified the bullets as .38 special Nyclad bullets that were fired from the same gun, and that the shots likely occurred from a distance of more than two feet away. Moreover, spent casings found in Waddell's father's home were consistent with those which would have held the Nyclad bullets.

The police did not speak with Connie until she arrived at the station the following afternoon. Detective Elliot testified at trial that Connie was uncooperative throughout the investigation. Connie told Detective Elliot that she was at the fair

> with Evans, Waddell, and Thomas on the evening of the murder. Waddell stated that they stayed at the fair "long enough to be seen." Waddell, Thomas, and Evans each confirmed this alibi.
>
> Thomas broke up with Evans about a month after the murder. Evans told her that he did not actually kill Alan, but that he had three African-American men do it. Moreover, Evans called Thomas some time after the murder and told her to "stick to the story."
>
> Following the murder of her husband, Connie moved out of Vero Beach and purchased a horse farm near Ocala worth approximately $120,000, which was the same amount as the life insurance proceeds. Although Waddell testified that she never received anything for the death of Alan, Waddell acquired a taxi company some time after the murder. About three years after the murder, Waddell met with Evans. Evans told Waddell that she better keep quiet or his "old family members [were] going to kill" her. Evans also told Waddell that the person who killed Alan was dead. Evans told Waddell that he went and got the gun, took it apart, and took a bus to the woods in Ocala to dispose of the pieces. At the end of the conversation, Evans threatened to kill Waddell and her son if she talked to the police.
>
> Ultimately, the case grew cold and was closed. However, in 1997, the Vero Beach Police Department reopened the case and Detective Daniel Cook focused his investigation upon Evans, Connie, Waddell, and Thomas. Thomas was the first suspect the police interviewed. Thomas explained the events surrounding the homicide and agreed to wear a wire and contact Waddell. At the meeting between Thomas and Waddell, Thomas stated: "We helped." Waddell responded: "I know. I think about it every day." The police arrested Waddell and, after the police showed Waddell the statement that she gave to Thomas, Waddell agreed to cooperate with the police and provide a statement. Based on Thomas and Waddell's cooperation, Connie and Evans were arrested for their alleged involvement in the murder.

Evans v. State, 808 So.2d 92, 95-98 (Fla. 2002).

On August 6, 1997, Mr. Evans was indicted on one count of first-degree murder. On February 11, 1999, a jury found Mr. Evans guilty. At a separate sentencing proceeding, the same jury, by a vote of nine to three, recommended a death sentence for Mr. Evans. On June 16, 1999, the trial judge ordered Mr. Evans sentenced to death. The trial court found two statutory

aggravators: (1) Evans had committed the crime for pecuniary gain (great weight); and (2) the murder was committed in a cold, calculated, and premeditated manner without any pretense of legal or moral justification ("CCP") (great weight). *Evans v. State*, 808 So.2d 92 (Fla. 2001). The court found only one statutory mitigator: Evans's age of nineteen when he committed the murder (little weight). *Id.* In addition, the trial court found and gave weight to the following nonstatutory mitigators: (1) Evans's good conduct while in jail (little weight); (2) Evans's good attitude and conduct while awaiting trial (little weight); (3) Evans had a difficult childhood (little weight); (4) Evans was raised without a father (little weight); (5) Evans was the product of a broken home (little weight); (6) Evans suffered great trauma during childhood (moderate weight); (7) Evans suffered from hyperactivity and had a prior psychiatric history and a history of hospitalization for mental illness (moderate weight); (8) Evans was the father of two young girls (very little weight); (9) Evans believes in God (very little weight); (10) Evans will adjust well to life in prison and is unlikely to be a danger to others while serving a life sentence (very little weight); (11) Evans loves his family and Evans's family loves him (very little weight). The trial court found that Evans failed to establish that he was immature, and therefore gave this proposed mitigator no weight. Moreover, the court refused to recognize Evans's artistic ability as a mitigating circumstance and therefore gave this no weight. Concluding that the aggravation outweighed the mitigation, the trial court imposed the death penalty. *Id.* at 100.

On direct appeal of his conviction and sentence, Mr. Evans raised fourteen claims: (1) the trial court erred in denying Evans's motion to quash the indictment or dismiss the charge; (2) reversal is required under *Anderson v. State*, 574 So.2d 87 (Fla.1991), because the State's testimony at trial contradicted the case it presented to the grand jury; (3) the trial court erred in

excluding the testimony concerning cannabanoids in the victim's blood; (4) the trial court erred in limiting the cross-examination of Detective Brumley to exclude hearsay; (5) the trial court erred in closing individual voir dire to Evans's family; (6) the trial court erred in denying Evans's motion for a statement of particulars and in allowing the State to argue in the alternative that Evans was the shooter or a principal; (7) the State's closing argument comments during the guilt phase were reversible error; (8) the State's voir dire examination of the jury regarding the testimony of coconspirators or codefendants constituted fundamental error; (9) Evans's death sentence is disproportionate; (10) Evans's death sentence is either disproportionate or unconstitutional because the State presented the jury with the alternative theories that Evans was either the shooter or a principal; (11) the State's closing argument comments during the penalty phase were fundamental error; (12) the trial court erred in giving no weight to valid mitigation; (13) the trial court erred in imposing the death penalty when the jury made no unanimous findings of fact as to death eligibility; (14) the trial court erred in finding that the murder was both cold, calculated, and premeditated and that the murder was committed for pecuniary gain (improper doubling). The Florida Supreme Court affirmed Mr. Evans's conviction and sentence. *Id.* Mandate issued on February 12, 2002. Thereafter, Mr. Evans filed a petition for writ of certiorari in the United States Supreme Court which was denied on October 15, 2002.

On October 2, 2003, Mr. Evans filed his Rule 3.851 motion for postconviction relief. He raised six claims fo relief: (1) several instances of ineffective assistance of counsel during the guilt phase and the State's withholding exculpatory and impeachment evidence in violation of *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963); FN8 (2) several instances of ineffective assistance of counsel during the penalty phase; FN9 (3) ineffective

assistance for failing to object to several objectionable jurors and failing to object to a limitation on backstriking; (4) cumulative error; (5) denial of due process by rules prohibiting juror interviews to uncover constitutional error; and (6) Evans's sentence violates *Ring v. Arizona*, 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002), and *Apprendi v. New Jersey*, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000). *Evans v. State*, 995 So.2d 933, 939 (Fla. 2008).[1] The trial court held an evidentiary hearing on three of his six claims. The trial court denied relief and Mr. Evans appealed. Simultaneously, Mr. Evans filed a petition for writ of habeas corpus. He raised three claims: 1) ineffective assistance of appellate counsel for failing to raise meritorious issues on direct appeal, including the denial of Evans's motion for a mistrial and request for a *Richardson* hearing based on *Brady* and discovery violations, and the denial of Evans's motion for a mistrial and *Richardson* hearing when the State's witness improperly and without prior notice testified as to the character of Evans; (2) Evans's sentence of death constitutes cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments to the U.S. Constitution because of his mental impairments and his age at the time of the crime; and (3)

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FN8. Evans alleged the following ineffective assistance of counsel claims: (1) failing to object to an individual juror's participation in trial; (2) failing to timely request a hearing pursuant to Richardson v. State, 246 So.2d 771 (Fla.1971); (3) failing to object to inflammatory and prejudicial comments elicited by the State; (4) failing to object to improper bolstering of witness credibility; (5) failing to object during the State's closing argument regarding mutually exclusive factual theories of prosecution; and (6) failing to present evidence.

FN9. Evans alleged the following ineffective assistance of counsel claims during the penalty phase: (1) failing to present mitigation; and (2) failing to object to serious misstatements of the law, including that the jury's role was merely advisory and that the burden of proof rested with Evans to prove that mitigation outweighed aggravation.

Florida's capital sentencing procedure deprived Evans of due process rights to notice and a jury trial under *Ring* and *Apprendi.*

On August 28, 2008, the Florida Supreme Court affirmed the denial of postconviction relief and denied the habeas petition. *Evans v. State*, 995 So.2d 933 (Fla. 2008). Mandate issued on December 8, 2008.

On December 1, 2008, Mr. Evans filed the instant petition under 28 U.S.C. §2254 for writ of habeas corpus by a person in state custody with the Court. (D.E. 1.) On July 20, 2010, the State filed its response. On September 13, 2010, Mr. Evans filed his reply. This matter is now ripe. In total, seventeen claims for relief are pending before the Court.

II. Standard of Review

Mr. Evans has filed a petition for writ of habeas corpus challenging his state court conviction and sentence. "[A] district court shall entertain an application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or law or treaties of the United States." 28 U.S.C. § 2254(a). The Court's review of Mr. Evans's petition is limited by the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"). The AEDPA, as incorporated in the federal habeas corpus statute for persons in custody pursuant to a state court judgment, provides:

> An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim–
>
> > (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.

Id. § 2254(d).

"The 'contrary to' and 'unreasonable application' clauses of §2254(d)(1) are separate bases for reviewing a state court's decisions." *Putman v. Head*, 268 F. 3d 1223, 1241 (11th Cir. 2001). "A state court decision is 'contrary to' clearly established federal law if either (1) the state court applied a rule that contradicts the governing law set forth by Supreme Court case law, or (2) when faced with materially indistinguishable facts, the state court arrived at a result different from that reached in a Supreme Court case.'" *Id.* The relevant Supreme Court case law for this analysis are the "holdings, as opposed to the dicta . . . of [the United States Supreme Court's] decisions as of the time of the relevant state-court decision." *Williams v. Taylor*, 529 U.S. 362, 412 (2000). Moreover, "[a] federal court may not overrule a state court for simply holding a view different from its own, when the precedent from this Court is, at best, ambiguous." *Mitchell v. Esparza*, 540 U.S. 12, 17 (2003).

"A state court conducts an 'unreasonable application' of clearly established federal law if it identifies the correct legal rule from Supreme Court case law but unreasonably applies that rule to the facts of the petitioner's case." *Putman*, 268 F. 3d at 1241. An unreasonable application may also occur where "a state court unreasonably extends, or unreasonably declines to extend a legal principle from Supreme Court case law to a new context." *Id.* The Supreme Court has stated with respect to the term "unreasonable" that:

> The term " 'unreasonable' " is "a common term in the legal world and, accordingly, federal judges are familiar with its meaning." At the same time,

> the range of reasonable judgment can depend in part on the nature of the relevant rule. If a legal rule is specific, the range may be narrow. Applications of the rule may be plainly correct or incorrect. Other rules are more general, and their meaning must emerge in application over the course of time. Applying a general standard to a specific case can demand a substantial element of judgment. As a result, evaluating whether a rule application was unreasonable requires considering the rule's specificity. The more general the rule, the more leeway courts have in reaching outcomes in case-by-case determinations.

Yarborough v. Alvarado, 541 U.S. 652, 663-64 (2004) (citation omitted).

III. Timeliness

The Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") imposed a one-year limitations period for the filing of an application for relief under § 2254. Accordingly, 28 U.S.C. § 2244(d) provides:

(1) A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of State court. The limitation period shall run from the latest of -

(A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;

(B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented form filing by such State action;

(C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or

(D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.

(2) The time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending

shall not be counted toward any period of limitation under this subsection.

In most cases, including the present case, the limitation period begins to run pursuant to §2244(d)(1)(A). The Eleventh Circuit has decided that the judgment becomes "final" within the meaning of § 2244(d)(1)(A) as follows: (1) "if the prisoner files a timely petition for certiorari, the judgment becomes 'final' on the date on which the Supreme Court issues a decision on the merits or denies certiorari, or (2) the judgment becomes 'final' on the date on which the defendant's time for filing such a petition expires." *Bond v. Moore*, 309 F.3d 770, 773-74 (11th Cir. 2002). Under § 2244(d)(2), AEDPA's statutory tolling provision, the word "pending" covers the time between a lower court's decision and the filing of a notice of appeal to a higher state court. *Carey v. Saffold*, 536 U.S. 214, 215 (2002).

The State concedes that the Petition is timely. Therefore, the Court analyzes Petitioner's claims below.

IV. Exhaustion and Procedural Bars

In response to Mr. Evans's petition, the State has argued that certain of his claims are unexhausted and procedurally barred from federal review. To exhaust state remedies, a petitioner must fairly present every issue raised in his federal petition to the *state's highest court. Castille v. Peoples*, 489 U.S. 346, 351 (1989)(emphasis added). "When a petitioner fails to properly raise his federal claims in state court, he deprives the State of 'an opportunity to address those claims in the first instance' and frustrates the State's ability to honor his constitutional rights." *Cone v. Bell*, 129 S.Ct. 1769, 1780 (2009) (internal citations omitted). Therefore, these types of claims are unexhausted and barred from federal habeas review. *Id.*

Ordinarily, a federal habeas corpus petition which contains unexhausted claims is

dismissed pursuant to *Rose v. Lundy*, 455 U.S. 509 (1982), allowing Mr. Evans to return to the state forum to present his unexhausted claim or claims. However, such a result in this instance would be futile, since Mr. Evans's unexhausted claim is now incapable of exhaustion at the state level and would be procedurally barred under Florida law. Mr. Evans has already pursued a direct appeal and filed his Rule 3.851 motion in state court, with the denial of the motions affirmed on appeal.[2] Because there are no procedural avenues remaining available in Florida which would allow the Mr. Evans to return to the state forum and exhaust the subject claim, the claim is likewise procedurally defaulted from federal review. *Collier v. Jones*, 910 F.2d 770, 773 (11th Cir. 1990) (where dismissal to allow exhaustion of unexhausted claims would be futile due to state procedural bar, claims are procedurally barred in federal court as well).

Claims that are unexhausted and procedurally defaulted in state court are not reviewable by the Court unless the petitioner can demonstrate cause for the default and actual prejudice, *Wainwright v. Sykes*, 433 U.S. 72 (1977), or establish the kind of fundamental miscarriage of justice occasioned by a constitutional violation that resulted in the conviction of a defendant who was "actually innocent," as contemplated in *Murray v. Carrier*, 477 U.S. 478 (1986). *See House v. Bell*, 547 U.S. 518 (2006); *Dretke v. Haley*, 541 U.S. 386 (2004). *See also United States v. Frady*, 456 U.S. 152, 168 (1982). Since Mr. Evans has not established cause to excuse his

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[2]In Florida, issues which could be but are not raised on direct appeal may not be the subject of a subsequent Rule 3.850 motion for post-conviction relief. *Kennedy v. State*, 547 So.2d 912 (Fla. 1989). Further, even if the subject claim was amenable to challenge pursuant to a Rule 3.850 motion, it cannot now be raised in a later Rule 3.850 motion because, except under limited circumstances not present here, Florida law bars successive Rule 3.850 motions. *See* Fla.R.Crim.P. 3.850(f). *See also Moore v. State*, 820 So.2d 199, 205 (Fla. 2002) (holding that a second or successive motion for post-conviction relief can be denied on the ground that it is an abuse of process if there is no reason for failing to raise the issues in the previous motion).

default, it need not be determined whether he suffered actual prejudice. *See Glover v. Cain*, 128 F.3d 900, 904 n.5 (5th Cir. 1997).

V. Analysis

I. The State's Withholding of Material Impeachment Evidence Denied the Petitioner a Full and Fair Evidentiary Hearing.

Mr. Evans argues that he was denied a full and fair evidentiary hearing when the trial court denied his public records request. (D.E. 1 at 23.) In advance of the evidentiary hearing on Mr. Evans's Rule 3.851 hearing, the assistant state attorney drafted written correspondence in preparation for certain witness testimony. After preparation, the state sent this correspondence to the witnesses. The two witnesses at issue were trial counsel for Mr. Evans who testified at the evidentiary hearing on his claims of ineffective assistance of counsel.[3] The letter purportedly contained responses to areas of questioning to be asked by post-conviction counsel at the evidentiary hearing. Upon discovery that such correspondence existed, Mr. Evans filed a Demand for Additional Public Records pursuant to Fla. R. Crim. P. 3.852(I). After hearing, this motion was denied. The trial court found that this document was attorney work product and exempt from disclosure by Fla. Stat. §119.07(6)(1). On appeal, the Florida Supreme Court affirmed as follows:

> Contrary to Evans's contention that the letter went beyond mere witness preparation, the State is correct that the letter contains nothing more than the state attorney's impressions of the pending litigation. As in *Kearse*, the letter here was written by an agency attorney, contained his mental impressions about the claims raised in the postconviction motion, and was produced exclusively for the pending evidentiary hearing as contemplated in section 119.071(1)(d) 1, Florida Statutes

[3] The Court makes no comment on the appropriateness of the Assistant State Attorney sending a letter of this kind to former defense counsel prior to an evidentiary hearing because the substance of the letter is not the crux of this claim.

(2007).

Evans, 995 So.2d 933, 941 (Fla. 2008). While Mr. Evans tries to couch this claim under the guise of a constitutional protection, at its core, it is really a claim challenging the state court's interpretation of state law. At the trial court, Mr. Evans filed a Demand for Additional Public Records. (D.E. 12, Ex. C, Vol. 6 at 1143-44). This request was made pursuant to a state rule of criminal procedure. Mr. Evans argues that his due process rights were violated despite the fact that he did not even mention due process in his demand. *Id.* The trial court held a hearing and after an *in camera* inspection determined that the letter was exempt from disclosure as a public record pursuant to Fla. Stat. §119.07(6)(1). *Id.* Therefore, this claim is not cognizable in Mr. Evan's federal habeas petition. "A state's interpretation of its own laws or rules provides no basis for federal habeas corpus relief, since no question of a constitutional nature is involved." *McCullough v. Singletary*, 967 F.2d 530, 535 (11th Cir.1992).

Assuming *arguendo* that Mr. Evans could assert that he is entitled to a new evidentiary hearing because the evidentiary hearing in state court was not a "full and fair" hearing, this claim lacks merit.[4] At the start of the postconviction evidentiary hearing, former trial counsel for Mr. Evans, Mark Harllee, Esq., testified that in preparing for the hearing he reviewed certain documents, one of which was "some work product of the state attorney who prepared some responses to the things he anticipated would be asked of me." (D.E. 12, Ex. C, Vol. 10 at 210). In fact, Mr. Harllee testified that he had the very document in front of him in his files during his testimony. *Id.* Counsel for Mr. Evans did not ask one question or make a single inquiry

[4] This does not imply that the Court thinks the document in question was attorney work product. The document was sealed and has not been made part of this record. The Court makes no determination as to the application of the privilege.

regarding this document during the hearing. In fact, defense counsel notified the court that "we would have no objection to Mr. Harllee refreshing his recollection [with the documents he brought with him on the witness stand] as long as he would let us know what he it is utilizing." (D.E. 12, Ex. C, Vol. 10 at 211). It was not until six months after the evidentiary hearing that counsel even made its request for the document that Mr. Harllee testified that not only he reviewed but, in fact, had them with him while he was on the witness stand. On these facts, Mr. Evans would not be entitled to an evidentiary hearing even if he had a cognizable claim. If the petitioner was not diligent in his efforts to develop his claim in state court, he may not receive an evidentiary hearing unless he can satisfy the provisions of § 2254(e)(2)(A) and (B). *See Williams v. Taylor*, 529 U.S. 420, 437, 120 S.Ct. 1479, 1491, 146 L.Ed.2d 435 (2000). Habeas relief is denied.

II. Ineffective Assistance of Counsel at the Guilt Phase.

In *Strickland v. Washington*, 466 U.S. 668 (1984), the United States Supreme Court set forth the two-prong test that a convicted defendant must meet to demonstrate that his or her counsel rendered ineffective assistance. First, a defendant "must show that counsel's representation fell below an objective standard of reasonableness" "under prevailing professional norms." *Strickland*, 466 U.S. at 688. "The test for ineffectiveness is not whether counsel could have done more; perfection is not required. Nor is the test whether the best criminal defense attorneys might have done more. Instead the test is whether some reasonable attorney could have acted in the circumstances . . . [as this attorney did]-whether what . . . [this attorney] did was within the 'wide range of reasonable professional assistance.'" *Waters v. Thomas*, 46 F.3d 1506, 1518 (11th Cir. 1995) (en banc) (quoting *Strickland*, 466 U.S. at 689) (citation omitted). *See*

also Provenzano v. Singletary, 148 F.3d 1327, 1332 (11th Cir. 1998) (stating that to show unreasonableness "a petitioner must establish that no competent counsel would have made such a choice."). "Because of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.'" *Strickland*, 466 U.S. at 689 (quoting *Michel v. Louisiana*, 350 U.S. 91, 101 (1955)); *see also Chandler v. United States*, 218 F.3d 1305, 1314 (11th Cir. 2000) (en banc). "Given the strong presumption in favor of competence, the petitioner's burden of persuasion-though the presumption is not insurmountable-is a heavy one." *Chandler*, 218 F.3d at 1314.

Second, a defendant "must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694. The Court defines a "reasonable probability" as one "sufficient to undermine confidence in the outcome." *Id.* "It is not enough for the defendant to show that the errors had some conceivable effect on the outcome of the proceeding." *Id.* at 693. Each ineffective assistance claim is addressed below.

A. Failure to Present Evidence.

In his second claim for relief, Mr. Evans argues that he received ineffective assistance of counsel when his attorneys failed to adequately interview and prepare certain witnesses for trial. (D.E. 1 at 30). Mr. Evans identifies seven witnesses whose testimony, had they been properly investigated and interviewed, would have changed the outcome of the trial. *Id.* The trial court held an evidentiary hearing on this issue. At the hearing, Mark Harllee, Esq. (lead counsel for

Mr. Evans during the guilt phase), Diamond Littty (lead counsel for Mr. Evans during the penalty phase), Rosa Hightower, Jesus Cruz, Christopher Evers, Mindy McCormick, and Anthony Kovaleski testified for the defense. (D.E. 12, 38-40, Ex.C., Vol. 10-12). After hearing, the trial court denied Mr. Evans's postconviction motion and he appealed. The Florida Supreme Court affirmed finding:

> In sum, counsel clearly made an informed decision about not presenting any witnesses during the guilt phase, which is exactly what he told the judge at the guilt phase: "After a year-and-a-half of consultation, followed by the last few minutes here, we're going to rest...." Because the trial court's findings are supported by competent substantial evidence and counsel's decision not to present these witnesses was reasonable, we affirm the trial court's denial.FN16 Because counsel's failure to present these witnesses was not deficient, we do not address the prejudice prong of Strickland. *Nixon v. State*, 932 So.2d 1009, 1018 (Fla.2006).

Evans v. State, 995 So.2d 933, 945 (Fla. 2008). The uncalled witnesses for which Mr. Evans claims error fall into three categories: 1) contradictory testimony regarding timing of gun shots, 2) alibi witnesses and 3) a reasonable doubt witness. Underlying Mr. Evans's assertion that these witnesses should have been called in his defense at trial was the practice in Florida of what it is called a "sandwich."[5] If Mr. Evans decided not to call any witnesses in his defense, he was entitled to give the first closing argument to the jury and also a rebuttal closing after the State's closing argument. Defense counsel often weigh the value of the testimony to be offered against losing the opportunity to be the final person to address the jury prior to deliberations. Such was the case with Mr. Evans. As to the contradictory testimony and the alibi witnesses, Mr. Evans's arguments lack merit and warrant little discussion.

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[5] In 2007, the Florida legislature enacted section 918.19 which provides that the State shall have opening and rebuttal closing arguments regardless of whether or not the defense presents any witnesses. *See Evans*, 995 So.2d at 945, n.16.

Contradictory Witnesses

The three contradictory witnesses were either unavailable at the time of trial or had serious credibility issues. Therefore, Mr. Harllee testified that it was a strategic decision to not call these witnesses because any value of their testimony was outweighed by the loss of presenting a rebuttal closing argument. *See* (D.E. 12, Ex. C, Vol. 10 at 224-25). The Florida Supreme Court affirmed finding that "[t]rial counsel clearly had tactical reasons for not calling Magia and Cruz to testify, including the fact that both had questionable credibility and were admittedly drunk on the night of the murder, and Cruz had a memory lapse about when he heard the gunshots; thus, counsel's decision not to present their testimony does not constitute ineffective assistance." Further, in regards to the witness that was unavailable, Mr. Harllee testified that he attempted to find the witness and also filed a motion to quash the indictment for undue delay base on an inability to locate witnesses. *See* (D.E. 12, Ex. C, Vol. 10 at 254-55). Accordingly, the Florida Supreme Court denied the claim "[b]ecause it is clear from the record that counsel made reasonable attempts to locate Lynch but was unable to find him, Evans cannot establish that counsel was ineffective for failing to call him at trial." *Evans*, 995 So.2d at 943.

Based on the testimony of counsel at the evidentiary hearing, Mr. Evans's counsel did not present these witnesses for either strategic reasons or due to unavailability. The Court will not second guess Mr. Harllee's decisions after he conducted an appropriate investigation of the facts. Nor will the Court reverse the Florida Supreme Court's determination of this issue absent a finding of unreasonableness. Review of counsel's conduct is to be highly deferential. *Spaziano v. Singletary*, 36 F.3d 1028, 1039 (11th Cir. 1994). Second-guessing of an attorney's performance is not permitted. *White v. Singletary*, 972 F.2d 1218, 1220 (11th Cir. 1992)

("Courts should at the start presume effectiveness and should always avoid second-guessing with the benefit of hindsight."); *Atkins v. Singletary*, 965 F.2d 952, 958 (11th Cir. 1992). Therefore, the foregoing resolution of his assertion of ineffectiveness of counsel was reasonable and in accord with applicable federal authority, and should not be disturbed. *Williams v. Taylor,* 529 U.S. 362 (2000), *supra.*

Alibi Witnesses

The second group of uncalled witnesses were alibi witnesses. At the hearing, Mr. Harllee testified that he did interview two of the three witnesses and that they did not establish a complete alibi for Mr. Evans. Both witnesses remember seeing Mr. Evans before 7pm but did not remember seeing him after 7pm which was well before the time of the murder. Therefore, the Florida Supreme Court found that "[b]ecause the testimony of both witnesses, as known to Harllee at the time of trial, offered an incomplete alibi and counsel made a strategic decision not to present their testimony, counsel's performance was not deficient." *Evans*, 995 So.2d at 944.

The third uncalled witness was the then twelve-year-old son of a co-conspirator, Christopher Evers. Mr. Harllee testified that he did not recall if he spoke to Mr. Evers and did not recall if Mr. Evers' fingerprints were in the trailer or if Mr. Evers attended the fair with his mother. *See* (D.E. 12 Ex. C, Vol. 11 at 324-25). At the postconviction hearing, Mr. Evers testified. He testified that he had been to the fair on the night of the murder and had seen Mr. Evans. Mr. Evers was not clear on the time he saw Mr. Evans or for how long he was at the fair. He also testified that he was not with Mr. Evans the entire time he was at the fair. *See* (D.E. 12, Ex. C, Vol. 11 at 436-37). The Florida Supreme Court affirmed the denial of this claim finding:

Counsel's failure to interview this single witness, Connie's twelve-year old son,

> does not render his entire investigation and representation deficient. This is especially so where the only information that might have led counsel to interview Evers was a single fingerprint alleged to have been found in Pfeiffer's trailer,FN15 which would neither have established an alibi defense for Evans nor contradicted Waddell's testimony concerning the events of that night.
>
> FN15. Although Evans questioned counsel about his failure to interview Evers, specifically citing the fact that he was listed as a source of a fingerprint inside of Pfeiffer's trailer, the record does not confirm that Evers' fingerprint was actually lifted from the trailer. In fact, detective Allan Elliot testified at trial that several prints were lifted from the trailer, but he was unsure whether a print on a glass inside the trailer was identified as Evers' or whether it was just a small child or petite person. Moreover, counsel's failure to investigate Evers based on a single fingerprint found in the victim's trailer, which happened to belong to his mother's husband, should not render his assistance deficient.

Evans, 995 So.2d at 944. This was the conclusion of the Florida Supreme Court as to this claim. Giving the state courts a high level of deference, which the Court is required to do, the conclusion reached by both the trial court and the Florida Supreme Court was not contrary to or an unreasonable application of federal law. After a careful review of the record, including the evidence presented at trial and the postconviction hearing, the Court concurs with the state court and finds that Mr. Evans has failed to meet the first prong of *Strickland.*

Reasonable Doubt Witness

The final uncalled witness that is the subject of this claim is Mindy McCormick. Ms. McCormick had befriended Connie Pfeiffer approximately two weeks after the murder. At the evidentiary hearing Ms. McCormick testified that she saw electronic items (a TV and camcorder) in a storage facility occupied by Ms. Pfeiffer. These two items were the same type of items promised to Mr. Evans by Ms. Pfeiffer if he murdered her husband. Ms. McCormick also testified that she witnessed an unidentified man give Ms. Pfeiffer a manilla envelope which she later threw into a river. Mr. Evans argues that had she testified, she could have provided the

reasonable doubt necessary to secure an acquittal. Accordingly, Mr. Evans asserts that his counsel was ineffective for failing to have her testify at trial.

At the postconviction hearing both Mr. Harllee and Ms. McCormick testified. Mr. Harllee had taken Ms. McCormick's deposition back on May 27, 1998. When questioned about why he had not called Ms. McCormick to testify at trial when she testified during deposition that she had seen the items in Ms. Pfeiffer's storage facility which would contradict the co-defendant's testimony, Mr. Harllee responded:

> Um, I'm not sure it would. Um, I'm not sure how specific Ms. McCormick could describe the items to see if they were in fact the same items that were alleged to have been the subject of the payoff. Um, and also the timing. I don't know when she went to the storage shed, how long after the shooting, but I seem to recall the trial testimony is that the TV and camcorder and all of that were at Paul's house or Sarah's house for a very short period of time and then were gone, so I don't know that it would in fact contradict trial testimony.

(D.E. 12, Ex.C, Vol. 12 at 238-39). However, Mr. Harllee later conceded that "it may have negated somewhat the allegation of a payoff with these goods, but I'm not sure it's a direct contradiction." *Id.* at 241.

Additionally, Mr. Harllee was questioned about the package that Ms. McCormick witnessed being given to Ms. Pfeiffer and later discarded. Mr. Harllee testified that he did not remember knowing about this but testified that had he known he "probably" would have followed up with an investigation regarding possible defenses. (D.E. 12, Ex.C, Vol. 12 at 241). While it appeared from the record that Mr. Harllee was provided with Ms. McCormick's statement in discovery, he had no recollection of the package and seem to have failed to inquire about it in her deposition. *See id.* When questioned during the hearing, Mr. Harllee testified that "[t]his is not ringing a bell at all." *Id.* at 242. Mr. Evans argues that Ms. McCormick could have

been a key defense witness and Mr. Harllee's failure to investigate her statements to police and present her testimony was a deficient performance and he was prejudiced by this failure.

When Mr. Evans argued this claim during his postconviction proceedings, the Florida Supreme Court rejected it finding:

> The last witness that Evans asserts should have been presented is Mindy McCormick, a friend of Connie's who saw electronic items in Connie's storage facility shortly after the murder and witnessed an unidentified man give Connie a manila envelope. However, Evans cannot demonstrate that counsel was deficient on these grounds. As to the electronic items in Connie's storage facility, counsel testified at the evidentiary hearing that he remembers questioning McCormick at the pretrial deposition about the items she saw in the storage facility, but did not investigate further or present her testimony because she was unable to identify the items with any specificity. Counsel is correct that without a more specific identification of the items she saw, it is difficult to ascertain whether these unidentified items were even relevant to the murder. Because her testimony would not have directly contradicted Thomas and Waddell's testimony that before the murder Connie had given Evans similar electronic items as partial payment for the murder, counsel's decision not to present her testimony was strategic and that decision is not unreasonable or outside the realm of professional norms. *See Occhicone v. State*, 768 So.2d 1037, 1048 (Fla.2000).
>
> As to McCormick's testimony about the package and the description of the man she had given to the police, counsel testified that he did not recall being told about this information, but that he would have investigated further had he known. Conversely, McCormick testified at the evidentiary hearing that she informed defense counsel during a deposition that she had given a taped statement to the police, described the unidentified man who had given Connie the package, and even went with the police to Pfeiffer's electronics store to identify the items she saw in the storage facility. However, without introducing the deposition into the record, which would enable the Court to determine whether counsel was aware of this information, Evans cannot demonstrate that counsel was deficient for failing to investigate further. *See, e.g., Freeman v. State*, 761 So.2d 1055, 1062 (Fla.2000) (stating that it is defendant's burden to establish both prongs of *Strickland*).

Evans, 995 So.2d at 944-45. The Court agrees with the ultimate conclusion of the state supreme court but disagrees with the rationale for how it concludes that Mr. Evans was provided effective

assistance of counsel. As to the items seen in Ms. Pfeiffer's storage unit, the Court finds the Florida Supreme Court's determination reasonable. Mr. Harllee testified that he deposed Ms. McCormick and found her lack of detail to be a detriment when it came to her testimony. While it may be that her testimony would have been helpful to Mr. Evans, counsel clearly decided that it was not to his utmost benefit to put her on the stand. This is clearly a strategic decision which will go undisturbed by the Court. "The test for ineffectiveness is not whether counsel could have done more; perfection is not required. Nor is the test whether the best criminal defense attorneys might have done more. Instead the test is whether some reasonable attorney could have acted in the circumstances . . . [as this attorney did]-whether what . . . [this attorney] did was within the 'wide range of reasonable processional assistance.'" *Waters v. Thomas*, 46 F.3d 1506, 1518 (11th Cir. 1995) (en banc) (quoting *Strickland*, 466 U.S. at 689) (citation omitted). *See also Provenzano v. Singletary*, 148 F.3d 1327, 1332 (11th Cir. 1998) (stating that to show unreasonableness "a petitioner must establish that no competent counsel would have made such a choice.").

However, the Court finds the Florida Supreme Court's determination regarding the envelope and its subsequent destruction unreasonable. The Florida Supreme Court found that because Mr. Harllee could not recall whether or not he knew of this information and because Mr. Evans's counsel, at the evidentiary hearing, did not admit a deposition transcript into evidence which may have shown that Mr. Harllee did know, this claim must be denied because Mr. Evans "cannot demonstrate that counsel was deficient for failing to investigate further." This misses the point. There is evidence in the record that Mr. Harllee should have known about this evidence, given that he was principally responsible for the investigation which would have yielded this

information to begin with. "In judging the defense's investigation, as in applying *Strickland* generally, hindsight is discounted by pegging adequacy to 'counsel's perspective at the time' investigative decisions are made, and by giving a 'heavy measure of deference to counsel's judgments.'" *Rompilla v. Beard,* 545 U.S. 374, 380-81 (2005)(citations omitted). Here, the record is not entirely clear about whether or not Mr. Harllee knew the details of this claim and Ms. McCormick's deposition was not admitted into evidence at the hearing. But, the statement given by Ms. McCormick to the police which was admitted into evidence (Defense Exhibit 7) and was arguably in the possession of defense counsel when turned over by the State in discovery is not in the record before the Court.[6] Not only did Ms. McCormick tell the police about this event but she gave information to a police sketch artist who drew a composite of the person alleged to have delivered the envelope. This too should have been given to counsel in discovery. Mr. Harllee had countless opportunities to have been made aware of this information. The most compelling inference that Mr. Harllee should have known came from the State on cross examination of Ms. McCormick:

> Q: So you gave a deposition?
>
> A: I did give a deposition.
>
> Q: To Mr. Evans's lawyer?
>
> A: Okay
>
> Q: And in that deposition there was mention made of the statement that you gave to the police, the taped statement; do you recall that?

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[6] The record does show that Mr. Evan's counsel moved the statement into evidence but the clerk of the court in Indian River County, when preparing the record for appellate review, filed a notice that "after a diligent and thorough search of the court records" that "[a]ll evidence submitted by Mr. Evans and by the State during the evidentiary hearing 11-08, 11-09 and 11-22-05" could not be "located for inclusion in this supplement." (D.E. 12, Ex.C, Vol. Supp. 1 at 14). Therefore, the Court has not reviewed the statement.

A: Yes.

Q: So everyone knew that you gave a statement to the police?

A: Right.

Q: And that statement was recorded?

A: Right.

Q: There was a transcript of that statement?

A: Okay.

Q: Correct?

A: Correct.

Q: And then you then spoke to Mr. Evans's lawyers?

A: Yes, I guess I did.

(D.E. 12, Ex.C, Vol. 12 at 445-46.) While this is not conclusive of Mr. Harllee's knowledge, the proper question is not did Mr. Harllee know about the package and its destruction but should he have known. It is not an insignificant detail that another person—not Mr. Evans—approached the victim's wife (and co-conspirator) after the murder and gave her an envelope which she discarded later that evening by throwing it into a river. At trial Mr. Evans's defense was that he was innocent. This information certainly could have cast doubt on his guilt. Clearly, it should have been investigated by defense counsel. Therefore, the Court finds counsel's performance deficient and the Florida Supreme Court's decision to the contrary was unreasonable.

But, the Court finds that while Mr. Evans has shown that his counsel's performance was deficient, he has not shown prejudice. To show prejudice, Mr. Evans would need to establish that his counsel's conduct rendered his trial "fundamentally unfair" or that "there is a reasonable probability that, but for counsel's unprofessional errors that the result of the proceeding would have been different." *Devier v. Zant*, 3 F.3d 1445, 1451 (11th Cir. 1993); *Strickland*, 466 U.S. at 694. "[T]he absence of exculpatory witness testimony from a defense is more likely prejudicial

when a conviction is based on little record evidence of guilt." *Fortenberry v. Haley*, 297 F.3d 1213, 1228 (11th Cir.2002). At trial, Mr. Evans's co-conspirators testified against him. The defense put on no witnesses instead arguing that the State did not meet its burden to prove Mr. Evans's guilt beyond a reasonable doubt. This argument was obviously rejected by the jury. In order to be prejudiced, Mr. Evans would have to show that there is at least a reasonable probability that the outcome of the proceeding would have been different had Ms. McCormick testified. *See Crawford v. Head,* 311 F.3d 1288, 1327-28 (11th Cir. 2002). Mr. Evans has not done so.

At trial, the State's witnesses testified that Mr. Evans killed Alan Pfeiffer. Both witnesses testified that they drove Mr. Evans to the crime scene during the time in question, later picked him up, disposed of the gun used in the murder, discarded/destroyed the clothes Mr. Evans wore on the night of the murder and numerous other inculpatory details. On the other hand, nothing in Ms. McCormick's testimony directly or explicitly linked the man she saw or the envelope Pfeiffer's wife threw away to Alan Pfeiffer's murder. As discussed above, testimony did explicitly link Mr. Evans to Alan Pfeiffer's murder. During Mr. Evans's trial, the defense rigorously cross-examined the State's witnesses and pointed out multiple inconsistencies in their testimony. The jury, having heard issues which could have raised a reasonable doubt in their minds, nonetheless convicted Mr. Evans. Mr. Evans has failed to put forth a compelling argument that if Ms. McCormick had testified that there was a reasonable probability that the result would have been different. Habeas relief is denied.

B. Failure to Object to an Individual Juror's Participation in Trial.

Mr. Evans second claim for relief is that his counsel was ineffective for failing to object

to a comment made by a juror during open court in front of the other jurors. The record is less than clear but it appears that Juror Taylor—from the jury box—responded "yes or no" to a question posed to a witness on the stand. At the end of the witness' testimony, the court instructed this juror to not "make any comments to help the witnesses answer questions." *See* (D.E. 12, Ex.A, Vol. 31 at 3180-81). The court then asked counsel for Mr. Evans if he heard what the juror said. Mr. Harllee responded "[s]omething about the light at the intersection." The court then responded that she "just said 'yes' or 'no' or something like that.'" *Id.* at 3181. At the evidentiary hearing on Mr. Evans's postconviction motion, Mr. Harllee testified that he believed that he did not consider having her removed from the jury because she was viewed as a better defense juror. *See* (D.E. 12, Ex.C, Vol. 38 at 280). Accordingly, the trial court denied relief on this claim.

On appeal, the Florida Supreme Court affirmed, in relevant part, as follows:

> Based on this testimony, we agree that counsel strategically decided not to object to a juror's single comment, where the juror was admonished by the trial judge and the comment appears to have had minimal relevance in relation to the trial as a whole, because he believed she was a good defense juror. Because "strategic decisions do not constitute ineffective assistance" and counsel's decision here is reasonable considering the circumstances, counsel cannot be deficient for failing to further object. *See Occhicone*, 768 So.2d at 1048.

Evans, 995 So.2d at 946. Upon review of the record, there is nothing to suggest that the state court's decision was contrary to, or involved an unreasonable application of, clearly established Federal law as determined by the Supreme Court or that there was an unreasonable determination of the facts. *See Fotopoulos*, 516 F.3d at 1232. Mr. Harllee testified that he had considered his options and determined that this juror was favorable for the defense. Given the minor impact, if any, that the juror's statement may have had on the jury, this was not an unreasonable strategic

decision. Review of counsel's conduct is to be highly deferential. *Spaziano v. Singletary*, 36 F.3d 1028, 1039 (11th Cir. 1994). Second-guessing of an attorney's performance is not permitted. *White v. Singletary*, 972 F.2d 1218, 1220 (11th Cir. 1992)("Courts should at the start presume effectiveness and should always avoid second-guessing with the benefit of hindsight."); *Atkins v. Singletary*, 965 F.2d 952, 958 (11th Cir. 1992). Therefore, the foregoing resolution of his assertion of ineffectiveness of counsel was reasonable and in accord with applicable federal authority, and should not be disturbed. *Williams v. Taylor,* 529 U.S. 362 (2000). Habeas relief is denied as to this claim.

C. Failure to Timely Request a Richardson Hearing.

At trial, the crux of Mr. Evans's defense was that he could not have committed the murder at the time that the State alleges it was committed. Therefore, someone else must have committed the crime. In support of that theory, Mr. Evans planned to rely on the testimony of Charles Cannon. Mr. Cannon had previously testified at Mr. Evans's first trial and had given sworn statements. At Mr. Evans's third trial, Mr. Cannon's recollection differed from his prior recollection of events. Previously, Mr. Cannon testified that he did not see the victim's car in the driveway or he didn't remember seeing a car in the driveway. At the third trial, Mr. Cannon's testimony was that he did not remember seeing the victim's car. *See* (D.E. 12, Ex.A, Vol. 33 at 3515-18). He also testified that he had spoken to the State Attorney about this issue and was advised that if he did not remember—he did not remember—he should testify truthfully. As Mr. Harllee cross-examined him on this issue, Mr. Cannon inadvertently informed the jury that he had also testified at Mr. Evans's first trial. *See id.* It was at this point that the court sent out the jury and had Mr. Cannon's testimony proffered. After the conclusion of Mr. Cannon's testimony

and before the next witness testified, Mr. Harllee moved for a *Richardson*[7] hearing. *See* (D.E. 12, Ex.A, Vol. 34 at 3587). The court listened to argument and denied the motion finding that no discovery violation occurred. *Id.* at 3587.

Later, in his postconviction motion, Mr. Evans argued that his counsel was ineffective for failing to timely request a *Richardson* hearing. The claim was denied and the Florida Supreme Court affirmed "because the trial record completely refutes this claim." *Evans*, 995 So.2d at 933. The Court finds this claim to be entirely without merit and agrees with the Florida Supreme Court. After Mr. Cannon's testimony and before the next witness testified, Mr. Harllee moved for a *Richardson* hearing. His performance was not deficient nor was Mr. Evans prejudiced. While Mr. Evans may object to the disposition of the motion by the trial court, he cannot convert that into an ineffective assistance of counsel claim. Further, Mr. Evans failed to satisfy either prong of *Strickland.* Habeas relief is denied.

D. Failure to Object to Inflammatory and Prejudicial Comments Elicited by the State.

Mr. Evans argues that his counsel was ineffective when he failed to object to certain objectionable comments elicited by the state. Those comments are as follows: 1) the age of Sarah Thomas, the petitioner's ex-girlfriend and witness for the state; 2) that Mr. Evans was part of a gang and 3) the State's reference to the murder being "execution style". (D.E. 1 at 54-57).

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[7] *Richardson v. State*, 346 So.2d 771 (Fla. 1971). Under *Richardson*, a trial court must determine "(1) whether [a] discovery violation was willful or inadvertent; (2) whether it was trivial or substantial; and (3) whether it had a prejudicial effect on the opposing party's trial preparation." *Id.*

I. Sarah Thomas

Ms. Thomas was a minor during the time that she had a sexual relationship with Mr. Evans which resulted in the birth of a child. The two ended their relationship after the murder of Alan Pfeiffer and Ms. Thomas testified against Mr. Evans at trial. Mr. Evans asserts that his counsel's performance was deficient for not objecting to the State eliciting information regarding her age and teen pregnancy because it painted Mr. Evans in a bad light and exposed criminal (impregnation of a minor) behavior on his part. Mr. Harllee testified at the evidentiary hearing that this information was helpful in Mr. Evans's defense because it gave her a motive to lie. Underlying this defense was that Ms. Thomas was lying to get Mr. Evans out of her and her child's life. Mr. Evans argues that this was an unreasonable strategy. The Florida Supreme Court rejected this argument and agreed with the trial court that "neither deficiency nor prejudice has been demonstrated." *Evans*, 995 So.2d 933. At first glance this seemed a reasonable trial strategy on the part of Mr. Harllee. However, Mr. Evans argues before the Court that this could not have been a sound trial strategy on the part of Mr. Harllee because "[t]here is no basis for this finding. At trial there was ***no questioning***, nor ***any mention*** of a 'custody battle.' The ***only testimony*** elicited at trial by counsel included Sarah's marital status and her admission that she does not care for Paul. She merely stated that it did not matter to her whether Paul is around or not." (D.E. 1 at 55-56) (emphasis added) (internal citations omitted). This seemed illogical given the testimony of Mr. Harllee at the evidentiary hearing, and the decisions of both the trial and state supreme courts. So, this Court reviewed the testimony of Ms. Thomas for second time—only to find that not only were these statements in Mr. Evans's habeas petition misleading, they were completely false. In fact, during cross-examination of Ms. Thomas, the following

exchange occurred:

> Q: Now, you had problems on and off with Paul about your child, Courtney, over the years, haven't you?
>
> A: He's made threats.
>
> Q: And you've withheld visitation.
>
> A: Just when I was not able to take her over there.
>
> Q: Okay. Did you ever say that you took her over there only when you wanted to?
>
> A: When I was able to, yes.
>
> Q: There's been problems about ***custody*** as well, has there not?
>
> A: Just the threats that he's made.
>
> Q: Now, actually what happened when you went over to Paul's house that day, on that tape, is that he wanted to talk with you about joint ***custody*** of Courtney; isn't that true?
>
> A: No, that's not.
>
> Q: And he was writing out the terms of the ***custody*** or the visitation with you; isn't that accurate?
>
> A: No, he was not.

3775-77) (emphasis added)[8]. Accordingly, the Court finds that this was a reasonable defense strategy and the Florida Supreme Court's determination was reasonable. "A determination of a factual issue made by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence." 28 U.S.C. §2254(e). Under the applicable AEDPA standards, Mr. Evans is not entitled to habeas relief. The Florida Supreme Court's ruling on Mr. Evans's ineffective assistance of claim was not contrary to, or an unreasonable application, of clearly established federal law. Nor was the ruling

[8] This not the only complete misstatement of the record in Mr. Evans's petition, there are more. *See* (D.E. 1 at 59). However, the Court does not find it productive to catalog them all here. Suffice it to say that the Court questions the accuracy of the allegations in the Petition.

based on an unreasonable determination of the facts. The Court has reviewed the testimony presented at the evidentiary hearing before the state court, and finds that Mr. Evans has not overcome the presumption prescribed by 28 U.S.C. §2254(e). Habeas relief is denied.

ii. Gang Reference

Mr. Evans asserts that his counsel was ineffective for failing to request a *Richardson* hearing after the State's witness testified that Mr. Evans had been in a gang. At trial, Ms. Waddell testified that Mr. Evans had threatened her that if she told anyone about their involvement in the murder that "the old family will kill you." *See* (D.E. 12, Ex.A, Vol. 37 at 3855). When the state attorney inquired as to what that meant, Ms. Waddell said "[i]t was just a gang he was in, I guess, called the -- his old family. *Id.* At that point, outside the presence of the jury, Mr. Harllee moved for a mistrial. The trial court denied the motion and Mr. Harllee moved for a curative instruction. The trial judge instructed the jury that there was no evidence that Mr. Evans was in a gang and they should disregard Ms. Waddell's testimony. Now, Mr. Evans argues that his counsel was ineffective for failing to ask for a *Richardson* inquiry and waiving the motion for mistrial by accepting a curative instruction. Mr. Evans first raised this claim in his postconviction motion. The Florida Supreme Court affirmed the denial finding that:

> Although counsel never requested a *Richardson* hearing based upon the State's failure to inform the defense about this testimony, the colloquy that followed his objection to the remark and motion for a mistrial confirms that the State was unaware of this information and did not willfully withhold it from the defense or otherwise violate a discovery rule that would have required a *Richardson* hearing. Because counsel took immediate action to rectify the improper testimony and there was no basis to conclude that the State violated a discovery rule, counsel's decision to move for a mistrial rather than request a *Richardson* hearing was reasonable "under the norms of professional conduct." *Occhicone*, 768 So.2d at 1048.

Evans, 995 So.2d at 947. The decision of the Florida Supreme Court was reasonable. The record does not indicate that a *Richardson* inquiry was warranted but even so, there is no indication that trial counsel's failure to request a *Richardson* hearing rendered Mr. Evans's trial "fundamentally unfair" or that "there is a reasonable probability that, but for counsel's unprofessional errors that the result of the proceeding would have been different." *Devier*, 3 F.3d at 1451; *Strickland*, 466 U.S. at 694. Habeas relief is denied.

iii. "Execution Style"

Mr. Evans final sub-claim is that his counsel was ineffective when he failed to object during closing statements when the prosecution referred to the homicide as "a cold-blooded killing, execution style. . ." *See* (D.E. 12, Ex.A, Vol. 38 at 4205). Mr. Evans first raised this claim in his Rule 3.850 postconviction motion. It was denied. The Florida Supreme Court affirmed the denial determining:

> Evans also claims that counsel was deficient for failing to object to the State's comment during closing argument that the murder was "execution-style." This Court has previously held that a murder involving a gunshot to the head can be classified as an "execution-style" killing. *See Ford v. State*, 802 So.2d 1121, 1133 (Fla.2001). Here, evidence was presented that Pfeiffer was shot three times, once in the back and twice in the head, at a distance of at least two feet. Because the facts in evidence support the inference that this was an "execution-style" murder and the prosecutor's comment was therefore not improper, counsel cannot be deemed ineffective for failing to object. *See Rogers v. State*, 957 So.2d 538, 549 (Fla. 2007). Thus, we affirm the trial court's denial.

Evans, 995 So.2d at 947 (footnote omitted). Given the record below, the Florida Supreme Court's assessment is certainly reasonable. Further, since the argument "did not manipulate or misstate evidence, nor did it implicate other specific rights of the accused such as the right to remain silent," Mr. Harllee should not have objected. *Darden*, 477 U.S. at 182. Counsel cannot

be ineffective for not making a frivolous argument. Habeas relief is denied.

E. Failure to Object to Improper Bolstering of Witness Credibility.

Mr. Evans's fifth claim for habeas relief is based on the effectiveness of counsel when failing to object to the improper bolstering of witnesses Sarah Thomas and Donna Waddell. Mr. Evans argues that Detective Cook improperly bolstered the witnesses credibility when he testified that no promises were made to the witnesses in exchange for the testimony. He also argues that the bolstering continued during the State's closing argument. Mr. Evans claims that his counsel was ineffective for failing to object. Mr. Evans raised this claim in his postconviction motion which was denied. The Florida Supreme Court affirmed finding that "the record confirms that the comments elicited from Detective Cook during direct examination occurred in close proximity to each other and counsel objected five times during this period, ultimately moving for a mistrial based on improper bolstering" and also "when Detective Cook confirmed on cross-examination that Thomas was not arrested and commented that 'the Grand Jury made that final decision,' counsel immediately requested a sidebar conference and the court issued a curative instruction directing the witness to answer the question as posed without any additional comment." *Evans*, 995 So.2d at 948. Further, when Mr. Harllee failed to object during closing arguments the court found no deficiency because "the prosecutor's statement during closing argument was a legitimate comment on the evidence presented at trial and proper rebuttal to the defense's closing argument, counsel cannot be ineffective for failing to object." *Id.* The Court agrees. The record reflects that Mr. Harllee objected several times and requested a mistrial. After careful review of Mr. Evans's claim for ineffective assistance of counsel, there is nothing in the record to suggest that the state court's decision was contrary to, or involved an

unreasonable application of, clearly established Federal law as determined by the Supreme Court or that there was an unreasonable determination of the facts. *See Fotopoulos*, 516 F.3d at 1232. Habeas relief is denied.

F. Failure to Object during State's Closing Argument.

Mr. Evans's final claim for ineffective assistance of counsel is that his counsel's performance was deficient for failing to object when the State argued during closing argument that the jury did not have to agree as to which theory of the crime Mr. Evans was guilty of. *See* (D.E. 1 at 62). During closing argument the State advised the jury that "[h]alf of you could go back there and think that Paul Evans is the shooter and half of you could believe that he is so actively involved as a principal, that you can find him guilty of first degree murder. You don't have to agree as to which theory. You just have to agree to the verdict." *See* (D.E. 12, Ex.A, Vol. 38 at 4173-74). When Mr. Evans made this claim to the trial court, it was denied because he had failed to show prejudice. On appeal, the Florida Supreme Court affirmed finding that "[t]his Court has never specifically decided whether a jury must unanimously find a defendant guilty under either a principal or shooter theory or whether the jury may be split between the two. Because this Court has neither prohibited the State from arguing to jurors that they can be split on the principal or shooter factual theories nor required the use of special verdict forms in such situations, counsel's failure to object to this comment cannot be deemed deficient performance." *Evans*, 995 So.2d at 949 (citations omitted). This claim is one of ineffective assistance of counsel. Perhaps the result would be different if this was a claim regarding the constitutionality of allowing the State to argue dual theories of the crime, but it is not. The Court has to determine if the Florida Supreme Court's determination of the law and facts was unreasonable. Given that

the court had not prohibited the State from doing exactly what they did here, Mr. Harllee's failure to object was not deficient. *See Strickland*, 466 U.S. at 688. Mr. Harllee was not obligated to make frivolous objections. Habeas relief is denied.

III. The State Withheld Material Exculpatory or Impeachment Evidence.

In his third claim for relief, Mr. Evans argues that the State withheld key information regarding three witnesses. Mr. Evans asserts that the withholding of this information was in violation of *Brady v. Maryland*, 373 U.S. 83 (1963).

In *Brady*, the Supreme Court established three criteria a criminal defendant must prove in order to establish a violation of due process resulting from the prosecution's withholding of evidence. Specifically, the defendant alleging a *Brady* violation must demonstrate: (1) that the prosecution suppressed evidence, (2) that the evidence suppressed was favorable to the defendant or exculpatory, and (3) that the evidence suppressed was material. *United States v. Severdija*, 790 F.2d 1556, 1558 (11th Cir. 1986). Evidence is material "only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." *United States v. Stewart*, 820 F.2d 370, 374 (11th Cir. 1987) (quoting *United States v. Bagley*, 473 U.S. 667, 682 (1985)).

As an initial matter, the Court finds that Mr. Evans has not cited the appropriate standard for successfully making a *Brady* claim. Mr. Evans argues that he is entitled to a new trial because "[w]hether the prosecutor failed to disclose this significant or material evidence or whether defense counsel failed to do his job, the jury did not hear the evidence in question." (D.E. 1 at 71). The Court notes that if the jury did not hear exculpatory or impeachment evidence because "his counsel failed to do his job," this is not a *Brady* claim. The Court can only

surmise that Mr. Evans made this argument as part of his *Brady* claim because, as greater detailed below, his counsel failed to ask the questions during the postconviction hearing which could have established Mr. Evans's entitlement to such a claim.

A. Leo Cordary

Mr. Evans asserts that the State withheld information that Mr. Cordary received a benefit from the State for his testimony at Mr. Evans's trial. At the time of his testimony, Mr. Cordary was in custody on a probation violation charge. At some point, the State arranged for a bond hearing and did not object to a $10,000 bond for Mr. Cordary. It is this benefit that Mr. Evans argues was wrongfully withheld from him. Mr. Evans first made this claim in his Rule 3.850 motion. At the evidentiary hearing, the prosecutor testified that after Mr. Cordary testified, she agreed to reduction in bond. She also testified that she did not enter into any agreements with Mr. Cordary regarding his bond before his testimony. *See* (D.E. 12, Ex. C., Vol. 12 at 596). She was unclear if this occurred during Mr. Evans trial or shortly after but she was clear that it did not occur prior to Mr. Cordary's testimony. The Florida Supreme Court rejected this claim finding that "[b]ecause the decision on the bond reduction was not made until after Cordary testified and he was thus unaware of the benefit he was receiving, there is no 'favorable' or impeachment evidence. Therefore, Evans fails to meet the first prong of *Brady*." *Evans*, 995 So.2d at 951.

To be sure, "[t]he United States Supreme Court has clearly held, however, that evidence that could be useful in impeaching prosecution witnesses must be disclosed under *Brady*. *See Bagley*, 473 U.S. at 676, 105 S.Ct. at 3380. And the Court has held that evidence of motivation to testify, especially for key prosecution witnesses, is impeachment evidence that must be disclosed. *See Giglio*, 405 U.S. at 154-55, 92 S.Ct. at 767 ("Taliento's credibility as a witness

was therefore an important issue in the case, and evidence of any understanding or agreement as to a future prosecution would be relevant to his credibility and the jury was entitled to know of it."); *Kyles*, 514 U.S. at 442 n. 13, 115 S.Ct. at 1569 n. 13 (evidence showing the motive for an important government witness to come forward is impeachment evidence covered by the *Brady* rule); *Napue v. Illinois*, 360 U.S. 264, 269, 79 S.Ct. 1173, 1177, 3 L.Ed.2d 1217 (1959) ("The jury's estimate of the truthfulness and reliability of a given witness may well be determinative of guilt or innocence, and it is upon such subtle factors as the possible interest of the witness in testifying falsely that a defendant's life or liberty may depend.")." *Smith v. Sec'y, Dep't. of Corr.*, 572 F.3d 1327, 1343 (11th Cir. 2009).

However, in the instant case, Mr. Cordary was not conveyed any benefit by the State until after he testified. Simply, there was no information to impeach him with at the time he testified. Therefore, the *Brady* rule was not implicated.[9] The record before the Court shows that Mr. Cordary was questioned while on the stand during Mr. Evans trial about any benefits given to him by the State in exchange for his testimony. He unequivocally testified that he had not received any benefit from the State. Further, at the postconviction hearing, the prosecutor testified that she had not made any agreement with Mr. Cordary or his counsel regarding bond until after he had testified. Given the record before the Court, the determination of the Florida

[9] At the evidentiary hearing, the prosecutor testified that she did not remember if bond was granted to Mr. Cordary while Mr. Evans's trial was ongoing or if it was after the close of the penalty phase. This could have been an important fact to know. "*Brady* concerned the suppression of evidence *prior to and during* trial that was material to the proceedings and denied the defendant a fair trial." *Grayson v. King*, 460 F.3d 1328, 1337 (11th Cir. 2006). Nonetheless, the prosecutor was clear that she did not reach an agreement regarding the bond until after Mr. Corday testified. Although clearer testimony regarding the timing of the sequence of events would have been helpful, the evidence before the Court is sufficient to conclude there was no *Brady* violation.

Supreme Court that there was no "favorable" information to disclose to the defense is not an unreasonable one. Without having met the second prong of *Brady*, habeas relief cannot be granted.

B. Donna Waddell

Mr. Evans asserts that the State was in possession of two letters detailing Ms. Waddell's psychological instability at the time of the crime and at Mr. Evans's trial. Mr. Evans argues that had he known of Ms. Waddell's instability, his counsel could have challenged the veracity of her testimony. At the evidentiary hearing, both prosecutors from Mr. Evans trial testified. Postconviction counsel did not ask a single question to either prosecutor about when or if they were in possession of these two letters. In affirming the denial of this claim on appeal, the Florida Supreme Court found:

> Although it was his burden to prove that the State withheld this information, Evans never questioned either prosecutor at the evidentiary hearing to ascertain whether they knew about Waddell's mental status at the time of the trial. Further, one letter was clearly not yet in existence, as it was dated several months after Evans's trial, and Evans cannot establish when the other letter was written. Because Evans cannot demonstrate that either of the letters was in existence at the time of his trial, there can be no *Brady* violation.

Evans, 995 So.2d at 951. Based on the record before it, the Florida Supreme Court's determination was not unreasonable. The United States Supreme Court established three criteria a criminal defendant must prove in order to establish a violation of due process resulting from the prosecution's withholding of evidence. Mr. Evans has failed to do so. Habeas relief is denied.

C. Mindy McCormick

Mr. Evans final sub-claim is that exculpatory evidence was withheld from him. Ms. McCormick testified that she was with Ms. Pfeiffer the day a man gave her a package which Ms.

Pfeiffer discarded by throwing in a river. Ms. McCormick testified that she gave a statement to the police and also provided them with a description of this person so they could make a sketch. Mr. Evans first raised this claim in his postconviction motion, the Florida Supreme Court affirmed as follows:

> However, Evans failed to demonstrate that the unidentified man and the contents of the package were exculpatory because the incident occurred several weeks after the murder and may not have been relevant to the case, and McCormick confirmed at the evidentiary hearing that she still had no specific details about the incident. Thus, the information was neither exculpatory nor impeachment evidence subject to *Brady* and we deny relief on this issue.

Evans, 995 So.2d at 951. The Court disagrees that Ms. McCormick's statements to the police were not exculpatory. Evidence is exculpatory when it is "favorable to an accused." *See Brady*, 373 U.S. at 87. Mr. Evans's defense was that someone else committed the crime. The Court finds that evidence regarding an unidentified male who gave a package to the victim's wife which she later then discarded in a river is favorable to the accused. However, Mr. Evans claims must fail because he has failed to show that this information was suppressed by the government.[10] The record fails to show that the government withheld this information as opposed to Mr. Evans's counsel either ignoring it or deciding not to use it at trial for whatever reason. The record shows that Mr. Evans took Ms. McCormick's deposition on May 27, 1998. *See* (D.E. 12, Ex. C, Vol. 10 at 234). At the evidentiary hearing on Mr. Evans Rule 3.850 hearing, his counsel was asked about Ms. McCormick's meeting with police and sketch of the

[10] Mr. Evans would also have to show that this information was material for *Brady* purposes but since he has failed to establish the first prong of the three prong *Brady* analysis, the Court need not determine if this information was material. "Materiality is determined by asking whether the government's evidentiary suppressions, viewed cumulatively, undermine confidence in the guilty verdict." *See Kyles v. Whitley*, 514 U.S. 419, 436-37 (1995).

person who she saw Connie Pfeiffer with at the time of the package transfer. Mr. Harllee testified as follows:

> Q: Now, did Ms. McCormick or anyone else from the State Attorney's office ever talk to you about - - were you ever made aware of Ms. McCormick saying that a package containing a gun had been delivered to Ms. Pfeiffer - - just a package. I'm sorry. A package had been delivered to Ms. Pfeiffer and that that package was disposed of?
>
> A: I do not remember that.
>
> Q: Were you ever made aware of there being a sketch of anyone who delivered this package to Connie Pfeiffer?
>
> A: I don't remember that either.
>
> * * *
>
> Q: First of all, were you provided with that statement [Ms. McCormick's statement to police] in discovery?
>
> A: I didn't [sic] know. I would have to go back and go through every item of discovery. I think you got a copy of our file so if it's in there, it's in there. I don't have any independent recollection of this.
>
> Q: Now, regarding the issue of the package, do you believe you had the statement before you took her deposition?
>
> A: This is not ringing a bell at all.
>
> Q: Had you known anything about a package, would you have sent your investigator to go find out further information about it, to see if it was connected to the case of Paul Evans?
>
> A: Probably, and I probably would have asked her about it in the deposition as well.
>
> * * *
>
> Q: Now, this guy that delivered the package. You were never made aware that there was a composite sketch made by police of this guy that delivered the package that Ms. McCormick refers to?
>
> A: I do not recall that at all.

(D.E. 12, Ex. C, Vol. 10 at 242-44). There is nothing conclusive in the record to show that the

State improperly withheld this evidence. Mr. Evans has failed to show that this evidence was withheld from his counsel, as opposed to his counsel simply failing to remember that he had seen this information in his files. If the evidence could have been obtained by defense counsel with reasonable diligence, it is not a *Brady* violation. *See Baxter v. Thomas*, 45 F.3d 1501, 1506 (11th Cir. 1995). Mr. Evans has not shown that the State suppressed this information such that his counsel would have been unable to obtain the information, and it is Mr. Evans burden to show that. *See Baxter v. Thomas*, 45 F.3d 1501, 1506 (11th Cir. 1995). Habeas relief is denied.

IV. Ineffective Assistance of Counsel at the Penalty Phase.

In his fourth claim for relief, Mr. Evans argues that his counsel was ineffective for failing to properly investigate, prepare and present mitigation evidence. (D.E. 1 at 72). Mr. Evans asserts that he has a long history of psychological instability which should have been presented to the jury.[11] The State responds that the trial court correctly determined that counsel's performance may not be deemed deficient "because a more favorable diagnosis is developed years later." (D.E. 9 at 85). Further, the State asserts that the Florida Supreme Court's determination was reasonable because counsel for Mr. Evans made appropriate strategy decisions given the defense theory. *Id.* at 88. Mr. Evans replies that applying all the facts relevant to the analysis shows that counsel's investigation and presentation of mitigation was deficient. *See* (D.E. 15 at 15). Mr. Evans first raised this claim in his Rule 3.850 motion. The Florida Supreme Court affirmed the denial of this claim finding as follows:

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[11] Mr. Evans also, in a singular sentence, appears to also be making a claim pursuant to *Ake v. Oklahoma*, 470 U.S. 68 (1985). *See* (D.E. 1 at 80). If that was Mr. Evans's intention, the claim is denied as insufficiently plead. "Conclusory allegations which are not supported by a statement of specific facts do not warrant habeas relief." *James v. Borg*, 24 F.3d 20 (9th Cir. 1994).

> Despite the fact that Evans has now found more favorable experts to testify to additional mitigation, our confidence in the outcome is not undermined because the testimony adduced at the evidentiary hearing may not have supported any of the statutory mitigators. Neither expert testified at the evidentiary hearing that Evans was in fact suffering from extreme mental or emotional disturbance at the time of the crime. Although one expert testified that Evans's cognitive impairments were detectable at a young age and "are very likely to have been operative at the point in time of his crime," this does not appear to contain the specificity that is required to support statutory mitigation. *See Jones v. State*, 949 So.2d 1021, 1030 (Fla. 2006) (rejecting claim of ineffective assistance of penalty-phase counsel where defendant failed to present expert evidence that he was suffering from any cognitive impairment at the time of the crime that would have supported any statutory mental health mitigation, other than expert testimony that "he thought both of the statutory mental health mitigators applied").
>
> Further, the trial court gave moderate weight to nonstatutory mitigation based on Evans's cognitive impairments, including a difficult childhood (little weight), that Evans suffered great trauma during childhood (moderate weight), and that he suffered from hyperactivity and a history of hospitalization for mental illness (moderate weight), notwithstanding the fact that expert testimony was limited on that issue at the penalty phase. Thus, although Evans asserts that the testimony of Dr. Harvey and Dr. Silverman would have supported additional nonstatutory mitigation, the trial court had already given moderate weight to his cognitive impairments as nonstatutory mitigation without this expert testimony and found it insufficient to outweigh two weighty aggravators, pecuniary gain and CCP, which were assigned "great weight" by the trial court. We therefore deny relief on this claim.

Evans, 995 So.2d at 950. In order for Mr. Evans to prevail on this claim, he must establish that his counsel's performance was deficient and that he was prejudiced under the *Strickland* standard. He has not done so. At the evidentiary hearing on Mr. Evans's postconviction motion, penalty phase counsel, Diamond Litty testified that the witnesses were chosen carefully based on the defense presented at trial and after an investigation into possible mitigation determined that having expert witnesses testify to historical events in Mr. Evans's life could put negative testimony in front of the jury unnecessarily. *See* (D.E. 12, Ex. C, Vol. 11 at 378, 384, 393).

During the penalty phase of the trial, Mr. Evans presented seven witnesses in mitigation. Both of his parents testified about his troubled childhood and difficult family history. The defense also presented two expert witnesses, Drs. Gregory Landrum and Laurence Levine, who testified about Mr. Evans ability to adapt to life in a structured environment like prison. Finally, the defense presented the three lay witnesses who testified that Mr. Evans had not been a disciplinary problem during his incarceration and that he had become a Jehovah's Witness and devoted to God. *See* (D.E. 12, Ex. A, Vol. 29 at 4289).

Mr. Evans argues that there were many more witnesses who could have and should have been called. In particular, he asserts that the defense should have retained an expert to conduct testing to confirm a frontal lobe injury, should have presented expert testimony about medications that Mr. Evans had been prescribed throughout his life, and informed the jury about a long series of hospitalizations from the time Mr. Evans was a child. At the evidentiary hearing, Mr. Evans presented the testimony of multiple witnesses who could corroborate these events. Mr. Evans concludes that had these witnesses testified, "there is a reasonable probability that the jury would have recommended life and the judge would have given the recommendation great weight." (D.E. 1 at 91). Having reviewed the entire record in this case, the Court disagrees. However, the Court does not need to analyze the prejudice prong because Mr. Evans's penalty phase counsel's performance was not deficient.

At the penalty phase, trial counsel made a strategic determination to not put on a testimony about Mr. Evans's past hospitalizations and medications through mental health experts rather this information was testified to by his parents. This strategic decision was made because defense counsel thought it was "more compelling to have it come in from the parents and more of

a layman's term type way than to get experts that so many times people are critical of and think it's psycho babble or whatever and think you're trying to pull something over on them." (D.E. 12, Ex. C, Vol. 11 at 378). The Court does not find this strategy unreasonable. Review of counsel's conduct is to be highly deferential. *Spaziano v. Singletary*, 36 F.3d 1028, 1039 (11th Cir. 1994). Second-guessing of an attorney's performance is not permitted. *White v. Singletary*, 972 F.2d 1218, 1220 (11th Cir. 1992) ("Courts should at the start presume effectiveness and should always avoid second-guessing with the benefit of hindsight."); *Atkins v. Singletary*, 965 F.2d 952, 958 (11th Cir. 1992).

Further, what is clear from the record is that defense counsel did conduct an investigation into mitigation evidence. Ms. Litty testified that their investigation revealed one problem after another. *See* (D.E. 12, Ex. C, Vol. 11 at 384. "Every time we would think we'd have something that we would present, it would just open the door to five bad things. Everything we found was - - it was horrible. It never seemed - - you know. We'd find something that we thought through a psychologist or whatever we could elicit, it would be good to put that expert on the - - um, have that expert testify, but then there would be five or six incidents of things that he would either do at the hospitals or the institutions or the schools that were more damaging than anything good we could elicit." *Id.* at 384. These "bad things" included, but were not limited to: 1) his medical records which showed that he exhibited little remorse over the accidental shooting of his brother and, in fact, had shown hostility towards him; 2) as a youth he started a brush fire and when he was jailed by police in an effort to scare him, he simply laughed; 3) a medical diagnosis of a conduct disorder; 4) Mr. Evans's prior preoccupation with violence, including murder; 5) Mr. Evans's prior stabbing of boy (with a butter knife) who was making fun of him; and 6) a variety

of notations in his prior medical records which indicated Mr. Evans's poor conduct and prone to violence. *See* (D.E. 12, Ex. A, Vol. 11 at 70). Faced with the potential of this information being presented to the jury, who could have construed Mr. Evans's conduct to be sociopathic, it was not unreasonable for defense counsel to limit expert testimony and get Mr. Evans's life story in front of the jury through his parents. Counsel's performance was not deficient. "[S]trategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable ...." *Strickland*, 466 U.S. at 690. Habeas relief is denied.

V. CLAIM V

Mr. Evans did not argue a fifth claim for relief. He did, however, argue his fourth claim for relief twice. *See* (D.E. 1 at 92-112). The State noted this in its Response but Mr. Evans failed to address the issue in his Reply. *See* (D.E. 9 at 80, n.43); (D.E. 15).

VI. Rule Regulating the Florida Bar 4-3.5(d)(4) is Unconstitutional.

In his sixth claim for relief, Mr. Evans argues that because the Florida Bar prohibits attorneys from contacting jurors, his First, Fifth Sixth, Eighth and Fourteenth Amendment rights were violated. *See* (D.E. 1 at 112-13). In particular, Mr. Evans asserts that because Juror Taylor "assisted a witness in answering a question pertaining to the existence of a traffic light" that juror misconduct occurred which warranted interviews of the jury. *See id.* The State responds that juror interviews are permitted when a sufficient showing of misconduct is alleged, and Mr. Evans did not meet that criteria. *See* (D.E. 9 at 96). The Florida Supreme Court denied this claim as follows:

> Evans next asserts that Rule Regulating the Florida Bar 4-3.5(d)(4) is unconstitutional because it denies him the right to effective assistance of counsel in pursuing postconviction relief by preventing the defense from interviewing

> jurors for possible misconduct. However, this Court has repeatedly rejected challenges to the constitutionality of rule 4-3.5(d)(4). *See, e.g., Barnhill*, 971 So.2d at 116-17. Furthermore, where the defendant merely complains about the "inability to conduct 'fishing expedition' interviews," the claim is without merit. *Johnson v. State*, 804 So.2d 1218, 1225 (Fla.2001) (quoting *Arbelaez v. State*, 775 So.2d 909, 920 (Fla.2000)). Here, although Evans asserts that juror Taylor commented during a witness's testimony about a light at an intersection, Evans presented no sworn allegations that the juror's comment "fundamental[ly] and prejudicial[ly] ... vitiate[d] the entire proceedings." *Power v. State*, 886 So.2d 952, 957 (Fla.2004). Without more substantial allegations of how juror Taylor's single "yes or no" response prejudiced the entire proceeding, this appears to be a "fishing expedition" after a guilty verdict has been returned. *See Arbelaez*, 775 So.2d at 920. Thus, we affirm the trial court's summary denial.

Evans, 995 So.2d at 952 (footnote omitted). There is no need to turn to the particular substance of Mr. Evans's claim because it suffers a fatal flaw. Mr. Evans has failed to allege that he made a request to interview jurors and that request was denied. Rather, he argues, in the abstract, that his Constitutional rights were violated by the very existence of Florida Bar Rule 4-3.5(d)(4). This argument is disingenuous. Mr. Evans mischaracterizes the rule as being an across the board prohibition of juror interviews. This is simply not so.

> Rule 4-3.5(d)(4) states: "A lawyer shall not ... after dismissal of the jury in a case with which the lawyer is connected, initiate communication with or cause another to initiate communication with any juror regarding the trial except to determine whether the verdict may be subject to legal challenge; provided, a lawyer may not interview jurors for this purpose *unless the lawyer has reason to believe that grounds for such challenge may exist; and provided further, before conducting any such interview the lawyer must file in the cause a notice of intention to interview setting forth the name of the juror* ... to be interviewed."

Evans, 955 So.2d at 952 n. 27. (emphasis added). Clearly, there is a procedural mechanism in place which Mr. Evans could have used to attempt to interview the jurors in his case. He chose not to do so. Mr. Evans does not argue that this procedure had some sort of chilling effect on his rights but rather he misinforms the Court of the true operation of Rule 4-3.5(d)(4). However,

even if Mr. Evans had argued the procedure in place was unconstitutional, his claim would be denied. Rule 4-3.5(d)(4) operates in a similar manner to S.D. Fla. L.R. 11.1(e) which has been previously found to be constitutional. *See United States v. Hooshmand*, 931 F.2d 725 (11th Cir. 1991); *see also United States v. Griek*, 920 F.2d 840 (11th Cir. 1991). Therefore, Mr. Evans's claim is denied.

VII. Ineffective Assistance of Appellate Counsel

Mr. Evans asserts two sub-claims of ineffective assistance of appellate counsel. As an initial matter, if the trial court did not err, then appellate counsel cannot be faulted for not raising this issue on appeal. *See Jones v. Campbell*, 436 F.3d 1285, 1304 (11th Cir. 2006) (finding it *fortiori* that appellate counsel was not ineffective for failing to raise an issue on appeal when the trial counsel's inactions were not deemed ineffective assistance of counsel for initially failing to object). Mr. Evans asserts two claims of trial error that appellate counsel failed to assert on direct appeal of his conviction and sentence. Mr. Evans argues that both constitutional violations were "obvious on the record" and "leaped out upon even a casual reading of the transcript." (D.E. 1 at 115). They are as follows:

A. Failure to Appeal the Denial of Mr. Evans's Motion for a Mistrial and Request for a Richardson Hearing and Brady Violations.

At trial, Mr. Evans defense was that "Alan Pfeiffer was not at his trailer when the Government says he was killed." (D.E. 1 at 119). In support of that argument, Mr. Evans called C.J. Cannon to testify. Mr. Cannon had given a prior statement to the police, a deposition, and had testified at Mr. Evans's first trial. During his prior statements, Mr. Cannon indicated that he returned home between 9:30-9:45pm and that the victim's car was not at his home. This

testimony would have refuted the State's theory that Mr. Pfieffer was murdered between 8:00pm and 8:30pm. However, at Mr. Evans's third trial (at issue here), Mr. Cannon testified that he didn't remember whether he looked over at the victim's house and didn't know if anyone was parked at the home. *See* (D.E. 12-4, Vol. 33 at 3506). After defense objection, the trial court sent out the jury and make inquiry. Mr. Cannon then testified that, prior to his testimony, he had notified the State that he was concerned about his recollection of events. He testified that the Assistant State Attorney advised in him to not "make up something or don't force a memory. If you don't remember, you don't remember." *Id.* at 3520. At that point the defense made a motion for a mistrial and a request for a *Richardson* hearing. The trial court denied the motions. Mr. Evans did not appeal the denial of these motions on direct appeal. Mr. Evans argued in his state petition for writ of habeas corpus that this constituted ineffective assistance of appellate counsel. The Florida Supreme Court denied this claim.

> This Court applies an abuse of discretion standard to both denials of a motion for a mistrial, *see England v. State*, 940 So.2d 389, 402 (Fla. 2006), and to denials of a request for a *Richardson* hearing. *See Conde v. State*, 860 So.2d 930, 958 (Fla. 2003). Here, the trial court was well within its discretion to deny the motion for a mistrial and the request for a *Richardson* hearing because Cannon's testimony had not changed in any material way. When he spoke to the police immediately after the incident, Cannon said that he was "trying to think" if he remembered seeing the TransAm. Then, about seven years later, Cannon gave a deposition that completely contradicted both his first statement to the police and his testimony from the first trial, stating that the TransAm was parked outside the trailer. Subsequently, at Evans's first trial, Cannon said that he did not remember seeing the TransAm that night. Lastly, at the retrial, Cannon testified that he did not remember if he saw the TransAm. As noted by the trial court, Cannon's consistently equivocal statements evidence an individual who could not exactly remember what he saw that night, even when asked in close proximity to the murder. Thus, the trial court was within its discretion in denying the motion for a mistrial and *Richardson* inquiry because no discovery violation occurred and appellate counsel cannot be deficient for failing to raise the issue on direct appeal.

Evans, 995 So.2d at 953. In Florida, a defendant "who has established the existence of a discovery violation is entitled to a hearing as a matter of law." *Curry v. State*, 1 So.3d at 398. This is not discretionary. *See id.* However, a discovery violation must be established. Here, the trial court found that the State had not committed a discovery violation when it failed to notify the defense that Mr. Cannon had been in contact with them and indicated that he may not be able to remember certain facts during his testimony. The Florida Supreme Court concurred. Given the inconsistencies in Mr. Cannon's testimony over the years, the Court agrees. Mr. Cannon's memory has seemed to wane during the time of the crime and Mr. Evans's third trial. Therefore, when he discussed his inability to remember certain details with the State's Attorney, it is not entirely clear that this would have been a discovery violation when the State did not disclose this information to the defense as he had the inability to remember certain information on previous occasions. In order to prevail on his claim here, Mr. Evans must establish the two prongs of the *Strickland* standard. He has not done so. "The test for ineffectiveness is not whether counsel could have done more; perfection is not required. Nor is the test whether the best criminal defense attorneys might have done more. Instead the test is whether some reasonable attorney could have acted in the circumstances . . . [as this attorney did]—whether what . . . [this attorney] did was within the 'wide range of reasonable processional assistance.'" *Waters v. Thomas*, 46 F.3d 1506, 1518 (11th Cir. 1995) (en banc) (quoting *Strickland*, 466 U.S. at 689) (citation omitted); *see also Provenzano v. Singletary*, 148 F. 3d 1327, 1332 (11th Cir. 1998) (stating that to show unreasonableness "a petitioner must establish that no competent counsel would have made such a choice."). Further, even if Mr. Evans could show deficiency, he must also show prejudice. Prejudice exists if "'there is a reasonable probability that, but for counsel's

unprofessional errors, the result of the proceeding [i.e., the sentencing hearing] would have been different [i.e., resulted in something other than a sentence of death].'" *Id.* at 390 (citations omitted). Mr. Evans bears the burden of establishing both deficient performance and prejudice. *See, e.g., Dill v. Allen,* 488 F.3d 1344, 1354 (11th Cir. 2007).

The Florida Supreme Court's determination that the trial court did not err was not unreasonable. If the trial court did not err, then appellate counsel cannot be faulted for not raising this issue on appeal. *See Jones,* 436 F.3d at 1304. Habeas relief is denied.

B. Failure to Appeal the Denial of Mr. Evans's Motion for Mistrial and Richardson Hearing Where Witness Testified to Mr. Evans's Character.

Mr. Evans further argues that his appellate counsel was ineffective for failing to appeal the denial of Mr. Evans's motion for mistrial and *Richardson* hearing when Donna Waddell, the state's witness, testified that she believed Mr. Evans had been in a gang. *See* (D.E. 1 at 125-27). The State responds that the Florida Supreme Court correctly determined that because there was no discovery violation, appellate counsel was not ineffective for not raising the issue on direct appeal. *See* (D.E. 9 at 106.) Mr. Evans first raised this claim in his state petition for writ of habeas corpus. The Florida Supreme Court denied this claim.

> Evans also asserts that appellate counsel was ineffective for failing to challenge on direct appeal the trial court's denial of a motion for a mistrial based upon Waddell's testimony that Evans was in a gang. However, the claim would likely have been found to be without merit even if it had been raised on direct appeal because this Court has previously held that a trial court did not abuse its discretion in similar circumstances. *See, e.g., Mendoza v. State*, 964 So.2d 121, 130-31 (Fla.2007) (holding that trial court did not abuse its discretion in denying motion for mistrial because it gave a curative instruction following an improper comment on the jury's responsibility). Because Evans cannot demonstrate that the trial court abused its discretion in denying the motion, appellate counsel cannot be ineffective for failing to raise the meritless issue on direct appeal.

Evans, 995 So.2d at 953-54 (footnote omitted). Mr. Evans argues that because the trial court denied his motion, his right to a fair trial and due process under both the State and Federal constitutions was violated.

At trial, Ms. Waddell was testifying on direct examination about Mr. Evans "threat" to her if she told the authorities about his involvement in the crime. She testified that Mr. Evans said if she told the police that "the old family will kill you." *See* (D.E. 12-7, Vol. 36 at 3855). The prosecutor asked what did he mean by "the old family?" Ms. Waddell responded "[i]t was just a gang he was in, I guess, called the – his old family." *Id.* The defense made a motion for mistrial. Outside the presence of the jury, the State proceeded by proffer. Ms. Waddell testified that she just "assumed" he was in a gang. *Id.* at 3585. The State advised the judge that they "don't know where she got the gang." *Id.* at 3856. After her proffered testimony, the defense renewed its motion for mistrial. The trial court denied it and the defense asked for a curative instruction which was given. *Id.* at 3862. It was as follows:

> All right. Members of the jury, there is no evidence that the defendant was in a gang. That was pure speculation on the part of Ms. Waddell. The Jury should disregard that statement in its entirety.

See (D.E. 12-7, Vol. 36 at 3855).

The Florida Supreme Court's opinion has not "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 "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)(1)-(2). There is nothing in the record to suggest that a discovery violation occurred. Ms. Waddell was simply testifying to her assumption. Further,

even if appellate counsel performance was deficient, Mr. Evans would also have to show prejudice. In order to establish prejudice, Mr. Jones "must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694. The Court cannot find that had appellate counsel raised this claim on direct appeal that the result of his conviction would have been different. Habeas relief is denied.

VIII. Trial Court Erred in Denying Mr. Evans's Motion to Quash the Indictment or Dismiss the Charge Due to Pre-indictment Delay.

In his eighth claim for habeas relief, Mr. Evans argues that the trial court erred when it denied his motion to quash the indictment or dismiss the charges based on the "delay between the March 1991 murder and his August 1997 indictment." (D.E. 1 at 127). The State responds that the Florida Supreme Court correctly affirmed the denial of the motion because Mr. Evans had not shown actual prejudice. *See* (D.E. 9 at 107).

On January 6, 1999, the trial court held a hearing on Mr. Evans's Motion to Quash the Indictment and to Dismiss the Charges. *See* (D.E. 10-24, Vol. 19 at 1808). In his motion, Mr. Evans lists several witnesses who could have provided either an alibi or who would have testified that Mr. Evans was not the perpetrator of the crime. After hearing, the trial court denied the motion based on Mr. Evans failure to demonstrate actual prejudice. *Id.* Mr. Evans first raised this claim on direct appeal. The Florida Supreme Court affirmed.

> In this case, although Evans made a particularized claim that key witnesses had become unavailable to the defense, and also made a generalized claim that the physical evidence was so stale that it was of no evidentiary value, Evans did not submit any evidence to support these claims. We conclude that the mere assertion that particular witnesses helpful to the defense are unavailable, absent record evidence, precludes a finding of actual prejudice under these circumstances.

> Because we find that Evans has failed to demonstrate actual prejudice in this case, we need not "balance the demonstrable reasons for the delay against the gravity of the particular prejudice." *Rogers*, 511 So.2d at 531. Accordingly, we deny relief on this claim.

Evans, 808 So.2d at 101. At the outset, the Court must note that Mr. Evans does not cite a single case in support of his argument. *See* (D.E. 1 at 127-132). To be clear, Mr. Evans claim is not that there was an unconstitutional delay between his indictment and his trial; rather his claim is that the delay between the crime occurring and the indictment and arrest unconstitutionally prejudiced him. *See id.* The United States Supreme Court addressed this issue in *United States v. Lovasco*, 431 U.S. 783 (1977). In *Lovasco*, the Court held "that to prosecute a defendant following investigative delay does not deprive him of due process, even if his defense might have been somewhat prejudiced by the lapse of time." *Id.* at 796.

Here, Mr. Evans alleges trial error. In his petition, Mr. Evans alleged the unavailability of certain witnesses of alibi witnesses, in particular three witnesses who could have placed him at the fair during the time of the murder. *See* (D.E. 1 at 128). He also alleges that he was prejudiced by the delay because he did not have access to the 911 emergency calls or the dispatcher to lay the proper predicate. Mr. Evans also argues that the delay caused him an inability to show that he was an abettor and then he could illustrate that his sentence was disparate in comparison to the others involved in the crime. *See* (D.E. 1 at 132). In order to show that the State's delay amounted to a denial of due process, Mr. Evans points to the fact that the police could have obtained Sarah Thomas's cooperation earlier then it did. Mr. Evans avers that the "police merely left the file inactive for many years before assigning it to a new detective." This is the singular explanation offered by Mr. Evans for the State's delay. *See* (D.E. 1 at 128-

132).

A petitioner making a claim before a federal habeas court "may obtain plenary review of their constitutional claims, but they are not entitled to habeas relief based on trial error unless they can establish that it resulted in 'actual prejudice.'" *Vining v. Sec'y, Dep't. of Corr.*, 610 F.3d 568 (11th Cir. 2010)(citing *Brecht v. Abrahamson*, 507 U.S. 619 (1993)). To establish actual prejudice, Mr. Evans "must shoulder the burden of showing, not merely that the errors at his trial created a possibility of prejudice, but that they worked to his actual and substantial disadvantage, infecting his entire trial with error of constitutional dimensions." *United States v. Frady*, 456 U.S. 152, 170 (1982). Mr. Evans's claim fails to specifically allege, let alone establish, actual prejudice. Further, there is nothing in the record to suggest that the state court's decision was contrary to, or involved an unreasonable application of, clearly established Federal law as determined by the Supreme Court or that there was an unreasonable determination of the facts. *See Fotopoulos*, 516 F.3d at 1232. Habeas corpus relief is denied.

IX. The State Presented Testimony at Trial that Contradicted Evidence Presented to the Grand Jury.

Mr. Evans asserts that he was denied his constitutional rights "when his case went to trial on an indictment based on materially false testimony." (D.E. 1 at 132). Specifically, Mr. Evans argues that the State's "case at the time of the indictment, as set out in the 'complaint Affidavit', and its case at trial were materially different from each other." (D.E. 1 at 133). Mr. Evans cites to multiple examples of inconsistencies between the affidavit and the trial testimony in support of this claim.[12]

[12] Mr. Evans claims the discrepancies involve (1) the time of the murder, (2) whether or not the front door was ajar, (3) whether he attended the fair and dined at Denny's, and (4) how

The State argues that the claim was not preserved below and that the case law cited[13] by Mr. Evans is not "clearly established law" such that the Florida Supreme Court's findings could be found to have been an unreasonable application. *See* (D.E. 9 at 118).

In reply, Mr. Evans asserts that "any procedural bar found by the Courts cannot preclude federal review of his claims under independent and adequacy principles. In the alternative, Mr. Evans has clearly demonstrated cause and prejudice for any procedural bar asserted by the State." (D.E. 15 at 23). Mr. Evans first argued this claim on direct appeal. The Florida Supreme Court rejected the claim finding that the matter was not preserved for appeal but, even so, that the allegations do not amount "to error, let alone fundamental error." *Evans*, 808 So.2d at 101. The problem with Mr. Evans's claim, in large part, is that he failed to allege that the State "deliberately presented false testimony to the grand jury, and there is no indication that the State did present false testimony to the grand jury." *Id.* The court determined that without a showing that the State knowingly put forth false testimony "Evans's claim that reversal is justified based on alleged inconsistencies between the complaint and the trial testimony" is rejected. *Id.* at 102.

Procedural Bar

> A State's procedural rules are of vital importance to the orderly administration of its criminal courts; when a federal court permits them to be readily evaded, it undermines the criminal justice system. We do not mean to suggest that the procedural-bar issue must invariably be resolved first; only that it ordinarily should be. Judicial economy might counsel giving the *Teague* question priority, for example, if it were easily resolvable against the habeas petitioner, whereas the procedural-bar issue involved complicated issues of state law.

Lambrix v. Singletary, 520 U.S. 518, 525 (1997) (citing 28 U.S.C. § 2254(b)(2)). As this claim

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long he was at the fair without being with other people. *See* (D.E. 1 at 133-135).

[13] *United States v. Basurto*, 497 F.2d 781 (9th Cir. 1974).

is more easily resolved on the lack of merit, the Court declines to review the procedural bar issue.

Merits

As an initial matter, it should be noted that Mr. Evans cites an opinion from the Ninth Circuit Court of Appeals, *United States v. Basurto*, 497 F.2d 781 (1974), as his primary support for this claim. This opinion offers him little, if any, assistance before a federal habeas court reviewing his claim for relief.

> Under AEDPA, a petitioner must show the state court's decision denying his claim "was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." 28 U.S.C. § 2254(d)(1). The phrase "clearly established Federal law" refers "to the holdings, as opposed to the dicta, of the Supreme Court's decisions as of the time of the relevant state-court decision." *Spencer v. Sec'y, Dep't of Corr.*, 609 F.3d 1170, 1178 (11th Cir.2010) (brackets omitted).

Puiatti v. Mc Neil, Case No. 09–15514, 2010 WL 4813715, at *32 n. 30. (11th Cir. Nov. 29, 2010). Accordingly, the Ninth Circuit's opinion in *Basurto* is of little consequence here. Regardless, the Court is not convinced that Mr. Evans would prevail even if *Basurto* controlled because the facts here are quite different. In *Basurto,* the witness came forward and informed the prosecutor—in advance of trial—that he had lied during his grand jury testimony. The prosecutor informed the court and the defense but refused to dismiss the indictment. There is no evidence here that the state's attorney knew that the testimony given to the grand jury was false. While it later appeared that the witnesses had different recollections of events at trial then they did during their statements to the police and in the complaint affidavit, it certainly could have been the result in a changed recollection or some other less nefarious reason. The Court has no real way of knowing but what is clear is that there is no evidence to suggest that the State knew that the testimony was false. As such, Mr. Evans's claim is materially distinguishable from

Basurto.

Also, the record reflects that Mr. Evans's counsel was aware of these "changes" in testimony in advance of trial and cross-examined those witnesses about those changes. For example, Leo Cordary testified that he told the police officer to whom he gave his original statement that he believed he heard shots at 8:00, 8:30. *See* (D.E. 12-3, Vol. 32 at 3401). At trial, Mr. Harllee cross-examined him about a sworn statement that he gave to defense counsel about a year prior to trial wherein he stated under oath that he thought he heard the shots at 10:30, 11:00. Mr. Cordary testified, when confronted with the change in his testimony, that he "did the best he could."[14] He reiterated that it was his current belief that he heard the shots at 8:00pm; that was what he originally told the police and that was what he testified to at trial. While the Court would agree that Mr. Cordary has credibility issues, it does not find that the State knowingly put on perjured material testimony in violation of Mr. Evans constitutional rights. In fact, it is unclear that the State put forth perjured testimony at all.

Finally, what is clear here is that Mr. Evans has either forgotten or simply failed to meet his burden under the AEDPA. In his claim, he not only fails to articulate why the Florida Supreme Court's determination unreasonably extended, or unreasonably declined to extend a legal principle from Supreme Court case law to a new context, he also failed to even cite their opinion denying his claim on direct appeal. Habeas relief is denied.

X. Deprivation of the Constitutional Right to Cross-Examine State Witnesses and Present Evidence.

In his tenth claim for relief, Mr. Evans argues that the "trial court improperly denied Mr.

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[14] The investigation of this crime spanned approximately eight years.

Evans the right to question the medical examiner about the presence of cannabis in the victim's blood." (D.E. 1 at 136). The State responds that the Florida Supreme Court correctly determined that the trial court "did not abuse its discretion in sustaining the State's objection because Evans failed to lay the proper predicate for the questioning of the medical examiner." (D.E. 9 at 124). Mr. Evans asserts no argument in reply.

At trial, during the testimony of the medical examiner, defense counsel inquired as to a toxicology report performed on the victim during the course of his autopsy. *See* (D.E. 12-1 at 3250). The State objected because the medical examiner was not the person who performed the actual test and therefore the defense had not laid the proper foundation for the question. *Id.* at 3251. The Court sustained the objection and struck the question from the record with a jury instruction to disregard.

Mr. Evans first asserted this claim on direct appeal. In support of his claim then and again here, Mr. Evans cites to *Capehart v. State*, 583 So.2d 1009 (Fla. 1991). The Florida Supreme Court rejected this argument finding:

> In contrast to *Capehart*, in this case, Evans never attempted to establish that the toxicology report was of the type reasonably relied upon by Dr. Bell or that Dr. Bell formed his opinion based upon the toxicology report. Therefore, we conclude that Evans failed to establish a proper foundation for Dr. Bell to testify regarding the cannabanoids found in the victim's blood and that the trial court did not abuse its discretion in refusing to allow this testimony at trial.

Evans, 808 So.2d at 103. A federal habeas court may review state court evidentiary rulings to determine if the petitioner's due process were violated.

> The standard of review for state evidentiary rulings in federal habeas corpus proceedings is a narrow one. Only when evidentiary errors "so infused the trial with unfairness as to deny due process of law" is habeas relief warranted. *Lisenba v. California*, 314 U.S. 219, 228, 62 S.Ct. 280, 286, 86 L.Ed. 166 (1941), quoted

> and applied in, *Estelle v. McGuire*, 502 U.S. 62, 75, 112 S.Ct. 475, 484, 116 L.Ed.2d 385 (1991); *accord Baxter v. Thomas*, 45 F.3d 1501, 1509 (11th Cir. 1995)(evidentiary ruling claims reviewed only to determine whether the error "was of such magnitude as to deny fundamental fairness"), *cert. denied*, 516 U.S. 946, 116 S.Ct. 385, 133 L.Ed.2d 307 (1995); *Kight v. Singletary*, 50 F.3d 1539, 1546 (11th Cir.1995), *cert. denied*, 516 U.S. 1077, 116 S.Ct. 785, 133 L.Ed.2d 735 (1996). Such a determination is to be made in light of the evidence as a whole.

Felker v. Turpin, 83 F.3d 1303, 1311-12 (11th Cir. 1996). A review of the record reveals that the defense asked the medical examiner a question without laying the proper foundation. When the trial court sustained the objection, the defense did not attempt to go back and lay the proper foundation such that the question could be answered. The defense, in response to the objection, stated "Well, Judge, this is in his autopsy report. He testified to this in the last trial. It's in his deposition as well. He ordered the test. He's qualified to interpret the results, and he has the results in his report." (D.E. 12-1, Vol. 31 at 3251). The State responded that this information was not in his report; that it was in a separate report. The trial court asked to see the report and then sustained the objection. Counsel for Mr. Evans made no further argument and proceeded with an entirely different line of questioning. The Court agrees with the Florida Supreme Court that the "trial court did not abuse it discretion in sustaining the State's objection because Evans failed to lay the proper predicate for the questioning of the medical examiner." *Evans*, 808 So.2d at 102. As no evidentiary ruling error exists, habeas relief is denied.

XI. Deprivation of Constitutional Right when the Trial Court Closed Individual Voir Dire to Mr. Evans's Parents.

Here, Mr. Evans asserts that his Sixth Amendment rights were violated because the "[e]xclusion of the defendant's family from jury selection is unconstitutional." (D.E. 1 at 141). The State responds that "[d]ue to the fact that Evans's second trial ended in a mistrial when

prejudicial information was disseminated by a juror and tainted the entire panel; causing the panel to be struck and a new venire called, the judge took additional steps to guard against the error recurring in the third trial including conducting individual voir dire in a separate hearing room." (D.E. 9 at 130-31).

During jury selection in Mr. Evans's trial, the judge decided to conduct individual questioning of the jury in a smaller room and not in the main courtroom. This resulted in there being less space for the public to observe the voir dire. At the outset, trial counsel asked if Mr. Evans's parents could be present in the hearing room. The court stated "[p]robably not, I made room in the courtroom for everybody, but not in the individual questioning sessions." (D.E. 10, Ex. A, Vol. 23 at 2161). However, later during the questioning, a reporter was allowed to observe and the next day a student working with the Public Defender's Office was allowed to observe also. Mr. Evans argues that this denial of a public trial is a structural error that cannot be harmless. *See* (D.E. 1 at 142). Mr. Evans first made this claim on direct appeal. The Florida Supreme Court denied the claim:

> Evans next contends that the trial court's closure of individual voir dire to his parents violated his right to a public trial under the Sixth Amendment of the United States Constitution and article 1, section 16 of the Florida Constitution. Evans did not object to this issue and we hold that any closure during voir dire was partial in nature.
>
> The trial court in this case utilized the hearing room rather than the courtroom for individual voir dire because it did not want to contaminate the jury pool by having a potential juror state his or her knowledge about the case, which was the reason for the second mistrial in this case.FN9 Moreover, the record in this case indicates that throughout the individual voir dire questioning, both members of the press and a student "shadowing" one of the defense attorneys were allowed to observe the proceedings.
>
> FN9. This case had resulted in a mistrial two times before the instant trial. The first trial ended in a mistrial when the jury could not agree upon a verdict. Evans's second trial

> ended in a mistrial due to prejudicial information regarding the first trial disseminated by a juror during voir dire questioning.
>
> Therefore, given the limited nature of the exclusion of Evans's parents, the fact that other members of the public were allowed to observe individual voir dire, and the fact that Evans did not object when the trial court stated that there was not enough room in the hearing room for Evans's parents, we conclude that there is no reversible error.

Evans, 808 So.2d at 105.

In January of 2010, the United States Supreme Court issued its opinion in *Presley v. Georgia*, 130 S.Ct. 721 (2010).[15] The facts are similar. In *Presley*, the defendant's uncle was ordered out of the courtroom before the beginning of jury selection because the prospective jurors would be occupying all the rows in the courtroom and his uncle "cannot sit and intermingle with members of the jury panel." *Id.* at 722. Mr. Presley's counsel objected to the closure of the courtroom at the start of jury selection but did not offer any reasonable alternatives to the trial judge as to how to accomplish the goal of having numerous jurors in the courtroom and also have Mr. Presley's uncle present. The trial proceeded without the public having been present during the voir dire. Mr. Presley was convicted of a cocaine trafficking offense. The United States Supreme Court granted *certiorari.* The Court reversed and remanded holding that "[t]rial courts are obligated to take every reasonable measure to accommodate public attendance at criminal trials." *Id.* at 725. The Court further held that "[t]he public has a right to be present

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[15] This decision was issued on January 19, 2010. The State filed its Response to Mr. Evan's petition on July 20, 2010. *See* (D.E. 9). The case was not cited or discussed by the State—not even in an attempt to distinguish it factually or argue that it was inapplicable. Worse yet, the case was also not cited by the Mr. Evans in his Reply filed September 13, 2010, despite the fact that this case strongly supports Mr. Evans's argument. *See* (D.E. 15). Therefore, the Court ordered the parties to file supplemental briefs addressing the impact of *Presley*. *See* (D.E. 16).

whether or not any party has requested the right." *Id.* at 724-25.

Mr. Evans was first tried for the first degree murder of Alan Pfeiffer on October 26, 1998. The process that the court utilized for jury selection was: first, the court had the State read the indictment. *See* (D.E. 10, Ex. A, Vol. 7 at 238). Then, the court inquired as to whether anyone had knowledge of the case either personally or through the news media. Next, the jurors were asked if they knew any of the lawyers or potential witnesses. Those jurors who responded affirmatively to knowledge of the case were later questioned in the courtroom individually (and outside the presence of any other jurors) while the jurors who responded negatively had a longer lunch period. After the individual questioning, the entire panel was questioned by both the State and the defense. The record indicates that Mr. Evans's parents were in the courtroom at that point in time.[16] *See* (D.E. 10, Ex. A, Vol. 8 at 440). Using this process, a jury was impaneled and Mr. Evans trial ended in a mistrial as the result of a hung jury.

On January 11, 1999, Mr. Evans's second trial began. During jury selection, the court followed the same procedure as the first trial. The record indicates that at a certain point in time, Mr. Evans's parents were not allowed to be present in the courtroom.[17] *See* (D.E. 10, Ex. A, Vol. 22 at 2095). The case ended in a mistrial because a juror, who was assumed to be hearing

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[16] The record is silent as to whether or not they were present during the initial voir dire of the jury, but they were present when the defense counsel began its questioning of the jurors because counsel for Mr. Evans introduced them to the jury. *See* (D.E. 10, Ex. A, Vol. 8 at 440).

[17] The record seems to indicate that Mr. Evans parents were required to sit in a separate room and somehow observe the voir dire. However, there is nothing in the record to indicate why or how that decision was made by the trial judge. It appears that there may have been a space issue inside the courtroom. *See* (D.E. 10, Ex. A, Vol. 22 at 2095). At the second trial defense counsel wanted them present in the courtroom to introduce to the jury but that request was denied. *Id.* at 2095.

impaired, *waited until the general questioning* by the State and in front of the entire jury panel to make a statement about his knowledge of a witness who had testified at the "first trial." After which the judge excused the entire panel and declared a mistrial.

On February 1, 1999, Mr. Evans's third trial began. At the beginning of jury selection, the judge made the following decision:

> So, those are the questions that we'll do on individual voir dire examination. What I'm going to do is I'm going to leave the panel - - I'm going to use a numbering scheme to isolate the jurors that we need to question individually. We're going to let the ones that don't have any problems with those seven items go for the rest of the day, come back tomorrow.
> We're going to keep the rest of the panel here and we're going to go into the jury room and we're going to question them individually with the court reporter there. And that way the bailiffs can keep these jurors isolated and not talking about the case, things of that nature.
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> * * *
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> So what I'm going to do is go with - - we're going to isolate knowledge of the case, knowledge of the Defendant and/or attorneys, knowledge of the witnesses, physical impairments, conscientious beliefs, and hardships. Those will be the issues that will be discussed during individual questioning.
>
> What we've done, we looked at the jury room; the jury room is not set up. It's not conducive to individual questioning. So we're going to go into the hearing room, which is right around the corner. And what we'll do is escort each juror around to the hearing room, and we've set it up where we have the State Attorneys on one side, we have the Public Defenders and your client on the other side, and the juror at the end of the table. And at the main bench we'll have a clerk and we'll have myself up there and the court reporter will be right around between the juror and the parties. So we've got that all set up. We think there's plenty of room in there for that and that's what we're going to use.
>
> I will have a bailiff in here to make sure that the jurors don't discuss the case among themselves. Basically they're just going to have to be quiet while they sit in here. They can move around; we're going to let them use the facilities if they need to, but they need to stay here and await their turn at the questioning.
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> * * *

> After I go through my questions, I'll call you up and verify that we all have the same number of jurors that we need to question individually. Then I'm going to separate the ones that we do not need to question individually and I'm going to advise them not to read the newspapers and discuss the case and discuss it with other jurors. Then I'm going to let them go and have them come back tomorrow at 9:30, and hopefully we'll finish all the individual questions this afternoon. If we don't, they can remain downstairs and we'll finish up with everybody tomorrow.

(D.E. 10, Ex. A, Vol. 24 at 2146, 2159-60). It was at this point that Mr. Evans's counsel inquired as to whether to not Mr. Evans's parents could observe the proceedings. The trial judge responded:

> Probably not. I made room in the courtroom for everybody, but not in the individual questioning sessions. We'll have to do that in the courtroom, and then we have to move all the jurors outside, and I don't really think that is going to work out. So I don't know how we could accommodate that other than to do the individual questioning inside the courtroom.

(D.E. 10, Ex. A, Vol. 24 at 2146, 2161).

Jury selection began on February 1, 1999, at approximately 1:00 p.m. (D.E. 10, Ex. A, Vol. 24 at 2164). The record is unclear as to what time the general questioning ended and the individual questioning in the hearing room began but it was some time during the afternoon of February 1, 1999. The proceedings adjourned at 5:00 p.m. (D.E. 10, Ex. A, Vol. 25 at 2360). It was during that day that the court allowed a reporter to attend a portion of the proceedings in the hearing room. At that time, the photographer was denied access, however, because there was not enough room. The record indicates, however, that the photographer was later permitted to sit in a corner of the hearing room. (D.E. 10, Ex. A, Vol. 25 at 2330-31.) The proceedings reconvened in the hearing room at 9:00 a.m. on February 2, 1999. (D.E. 10, Ex. A, Vol. 26 at 2362). It was then that counsel for Mr. Evans requested that a high school student who was shadowing an

attorney from the public defender's office be allowed to attend. *Id.* The State did not object, stating, "I think the jury process is open to the public. So we can't really stop anybody." *Id.* At 10:30 a.m., for reasons unknown, the proceedings resumed in the main courtroom. (D.E. 10, Ex. A, Vol. 24 at 2146, 2414). In fact, the court conducted more *individual* questioning of the remaining jurors in the courtroom the remainder of that day. *See id.* On the third day of jury selection, the court decided to go back to the hearing room but this time to individually question all the jurors including those who had not indicated that they knew anything about the case or the witnesses. *See* (D.E. 10, Ex. A, Vol. 28 at 2725). Yet, in the afternoon, the court conducted the individual questioning in the courtroom again. In total, the *voir dire* lasted three full days. Based on the record, it is difficult to assign a precise amount of time to questioning done in the courtroom versus in the hearing room.

The initial, preliminary question before the Court is whether the voir dire proceedings were open to the public. When Mr. Evans's attorney initially asked the Court about permitting Mr. Evans's parents to see the individual questioning, the trial judge did not issue a definitive ruling. Instead, the judge said, "Probably not," and went on to discuss the limited accommodations in the hearing room. Subsequently, once the individual voir dire questioning began, the trial judge permitted access by single individual members of the public. He permitted a reporter and a photographer to enter the room. Later, in response to another request by Mr. Evans's attorney, he permitted a high school student to observe the proceedings. In other words, having perceived what the hearing room would accommodate, the trial judge did permit members of the public to observe the proceedings. The trial judge never explicitly barred the public from observing the proceedings, and he also never sealed the record of those proceedings. Therefore,

this case is distinct from *Press Enterprise Co. v. Superior Court of Ca.*, 464 U.S. 501 (1984) ("Press-Enterprise I"), where the individual voir dire questioning was conducted without any members of the press or public permitted to attend and the record of that questioning was sealed, and *Presley*, where the sole member of the public who wished to view voir dire was barred from the courtroom. In this case, at least three members of the public attended voir dire.

Nothing in the record indicates that Mr. Evans's parents sought to attend the individual voir dire at the time that individual voir dire began, when the trial judge determined that there was room for one or two[18] members of the public inside the hearing room. Although Mr. Evans's parents' right to attend was not contingent on any request or objection by defense counsel, *see Presley*, 130 S.Ct. at 725 (citing *Press Enterprise I.*, 464 U.S. at 503-04) ("[t]he public has a right to be present whether or not any party has asserted the right"), if spaces are made available and thereafter they never attempt to avail themselves of those spaces, then the Defendant cannot maintain a claim that voir dire was closed to the public.

Controlling cases on the issue of the public's right to be present at voir dire proceedings do not specify a certain number of members of the public that have to be permitted to observe in order for the proceeding to be considered open to the public. *See Waller v. Georgia*, 467 U.S. 39 (1984); *Press Enterprise Co. v. Superior Court of Ca.*, 464 U.S. 501 (1984). In other words, "clearly established Federal law, as determined by the Supreme Court of the United States" does not hold that permitting one member of the public at a time to observe voir dire amounts to closing the proceedings in violation of a defendant's Sixth Amendment right to a public trial.

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[18] It is not clear from the record whether the photographer went into the hearing room in addition to the reporter, or whether he replaced the reporter in the hearing room.

See 28 U.S.C. § 2254(d).[19] Therefore, the trial judge's decision regarding the public's observation of voir dire in this case, as well as the Florida Supreme Court's ruling regarding the same, was not contrary to clearly established federal law and does not give rise to habeas relief.

XII. State's *Voir Dire* of Jury Violated Mr. Evans's Constitutional Rights.

In his twelfth claim for relief, Mr. Evans argued that his constitutional rights were violated when the State "assured jurors [during *voir dire*] that it vouched for the credibility of the witnesses by making sure that their testimony was fully substantiated and that the state considered them to be lesser participants in the crime." *See* (D.E. 1 at 143). The State responds that "the prosecutor did not request a commitment from the jurors to return a certain verdict, but merely inquired as to potential bias. The State was not preconditioning jurors or lending credibility to its witnesses." (D.E. 9 at 141). The Florida Supreme Court agreed with the State and "conclude[d] that the trial court did not abuse its discretion in allowing the State to interrogate the potential jurors about whether they harbored any biases against a witness who had accepted a plea bargain." *Evans*, 808 So.2d at 105. The Court agrees. The State's case rested primarily on the direct testimony of Mr. Evans's co-conspirators who had taken a plea deal or who were not prosecuted. It is not unreasonable for the State to inquire as to a juror's bias against a person who was testifying pursuant to a plea agreement. "The conduct of voir dire of a jury panel is a matter directed to the sound discretion of the trial judge, subject to the essential demands of fairness." *United States v. Brooks*, 670 F.2d 148, 152 (11th Cir. 1982), *cert. denied*, 457 U.S. 1124, 102 S.Ct. 2943, 73 L.Ed.2d 1339 (1982); *United States v. Booher*, 641 F.2d 218,

[19] If voir dire was not closed to the public, then it follows naturally that the trial judge had no obligation to consider alternatives to closure.

219 (5th Cir.1981). Mr. Evans has failed to show that the State's question resulted in the an unfair advantage being conveyed upon the State. The Florida Supreme Court's determination was not an unreasonable one.

Further, as Mr. Evans has claimed his counsel objected and the objection was sustained but the State continued to ask objectionable questions, his claim is one of prosecutorial misconduct. The standard for federal habeas corpus review of a claim of prosecutorial misconduct is whether the alleged actions rendered the entire trial fundamentally unfair. *Donnelly v. DeChristoforo*, 416 U.S. 637, 642-45 (1974); *Hall v. Wainwright*, 733 F.2d 766, 733 (11th Cir. 1984). In assessing whether the fundamental fairness of the trial has been compromised, such a determination depends on whether there is a reasonable probability that, in the absence of the improper remarks, the outcome of the trial would have been different. *See Williams v. Weldon*, 826 F.2d 1018, 1023 (11th Cir. 1987), *cert. denied*, 485 U.S. 964 (1988).

Given the standard of review and in conjunction with the deference the Court must give the state court's determination pursuant to the AEDPA, Mr. Evans's claim fails. Mr. Evans has not shown how the statements of the prosecutor during voir dire rendered his trial fundamentally unfair. Habeas relief is denied.

XIII. Trial Court Erred in Denying Mr. Evans's Motion for Statement of Particulars.

Mr. Evans asserts that the trial court erred when it denied the defense motion for a statement of particulars which would have required the state to choose its theory of prosecution. *See* (D.E. 1 at 144). The denial of this motion, Mr. Evans argues, resulted in a violation of due process because the jury could convict Mr. Evans of murder under alternate theories of the crime. *Id.* The State responds that the Florida Supreme Court found that this issue had not been

preserved for appeal and that was an independent state ground which prohibits the federal courts from addressing the merits of this claim. *See* (D.E. 9 at 142). On direct appeal, Mr. Evans made this claim to the Florida Supreme Court.

> Evans next asserts that the trial court erred in denying his motion for a statement of particulars. At trial, Evans's motion for statement of particulars sought to commit the State to either a theory that Evans was the shooter or that he was the principal, arguing that the State should not be allowed to present alternative theories that Evans was the shooter or a principal. Specifically, Evans contended that the State "must specify which theory of prosecution it intends to proceed under to obtain a conviction for First Degree Murder in order to permit the Defendant to properly prepare and present a defense." The trial court denied the motion.
>
> The State's theory of the case was that, in fact, Evans was the shooter and the trial court so found in its sentencing order. Evans does not contend on appeal that there was not substantial competent evidence to support the conclusion that Evans was the shooter. During closing argument, the State did argue: "Six of you may agree that he is the actual shooter. Six of you may agree he's a principal. Under either theory he is guilty of first degree murder." Evans did not object to this statement nor did he request a jury instruction or special verdict form that would have required jury unanimity on whether he was the shooter or the principal.
>
> On appeal, Evans raises for the first time that the State's use, in a capital case, of two mutually exclusive factual theories so that the jury may be divided as to the elements of the crime violates both the state and federal constitutions based on the United States Supreme Court's decisions in *Schad v. Arizona*, 501 U.S. 624, 111 S.Ct. 2491, 115 L.Ed.2d 555 (1991), and *Richardson v. United States*, 526 U.S. 813, 119 S.Ct. 1707, 143 L.Ed.2d 985 (1999). We conclude that this claim was not preserved.

Evans, 808 So.2d 92, 106 (Fla. 2001). Under Florida law, besides filing the motion for a statement of particulars, the defendant should also later object in order to preserve this issue for appeal. *See Shamburger v. State*, 559 So.2d 455 (1st DCA 1990). Here, the record shows that trial counsel filed a Motion for Statement of Particulars under Florida Rule of Criminal

Procedure 3.140(n). On February 1, 1999, the first day of trial, the court denied the motion.[20] However, this was not the end of the issue. The record shows that counsel again raised this issue in the form of a motion for judgment of acquittal at both the end of the State's case and a renewed motion at the close of evidence *and* as an objection as to the jury instructions. *See* (D.E. 12-9, Ex. Vol. 37 at 4089, 4091, 4099, 4112, 4115); *see also* (D.E. 12-11, Ex. A, Vol. 38 at 4269-70). As such, the Court is not convinced that Mr. Evans failed to preserve this issue for appeal. Regardless, his claim is denied.

As Mr. Evans has not properly alleged that the denial of his Motion for Statement of Particulars caused him surprise at trial causing him to be prejudiced, he cannot meet the requirements to prevail on this claim. Mr. Evans clearly was not surprised because this was the second time he was tried on these charges; the first ending with a hung jury and resulting in a mistrial.[21] At the hearing on the Motion for Statement of Particulars, trial counsel argued that this had been an issue at the initial trial and during the initial charge conference on jury instructions. *See* (D.E. 10-27, Ex. A, Vol.23 at 2137, 2148-55).

> Mr. Harllee: We have a couple of motions, Judge, very brief. Present an *ore tenus* motion under 3.140N, motion for statement of particulars. In the complete trial

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[20] The Eleventh Circuit has stated that it "views this claim primarily as an issue of state law. Issues of state law are ordinarily immune from federal review. . . . The ultimate source of any state's law is found in the decisions of its highest court." *Knight v. Dugger*, 863 F.2d 705, 725 (11th Cir. 1988) (citing *Francois v. Wainwright*, 741 F.2d 1275, 1281 (11th Cir.1984) and *Ford v. Strickland*, 696 F.2d 804, 810 (11th Cir.1983)).

[21] As stated previously, Evans's first trial resulted in a hung jury and the judge declared a mistrial during voir dire during his second trial. Evans was finally convicted at his third trial, which is the subject of the postconviction motion at issue in this case. *Evans v. State*, 995 So.2d 933, 938 n.2 (Fla. 2008).

> that we tried last year, the State argued both that Mr. Evans was the shooter in the case and also a principal. We're asking at this time that the State commit to one theory or the other. It's very difficult, if not impossible, to defend this case, as in the first trial, with all the evidence presented by the case that Mr. Evans is the shooter. And at the tail end of the case to throw in, if you don't believe that, he might be a principal.
>
> So we're asking the Court on motion for statement of particulars and also a motion in limine that the State commit itself to on theory or the other.
>
> What brought this about is the contradiction in the jury instructions between principal and alibi. Under the principal it says the defendant does not have to be present in order to be found guilty. Under the alibi instruction it says if you find this defendant was not present, you must find him not guilty, a direct contradiction which forced us to amend the alibi instruction except if you find him to be a principal.
>
> It's confusing. There is no evidence presented by the State that he is a principal. We're asking the Court to force the State to pick one theory or the other.

(D.E. 10-28, Ex. A, Vol. 23 at 2137-38).

Mr. Evans was not surprised by the testimony of witnesses, as he had heard already heard them testify at his first trial. Nor was he surprised by the State's theory at trial as it was largely unchanged from the previous trial. Mr. Evans knew what to expect at, this, his third trial.

> At any rate, a refusal by a court to grant a bill of particulars is reversible error only if it can be shown that the defendant was actually surprised at trial and thereby suffered prejudice to his substantial rights. *See, e.g., United States v. Cole*, 755 F.2d 748 (11th Cir.1985); *United States v. Williams*, 679 F.2d 504,510 (5th Cir.1982) (citing *United States v. Colson*, 662 F.2d 1389, 1391 (11th Cir.1981)).

Knight v. Dugger, 863 F.2d 705, 725 (11th Cir. 1988). Habeas relief is denied.

XIV. Florida Supreme Court Failed to Conduct a Meaningful Proportionality Review.

In his fourteenth claim for relief, Mr. Evans argues that the Florida Supreme Court failed to conduct a meaningful proportionality review under the Florida sentencing scheme. *See* (D.E. 1 at 148). This claim is premised on the fact that his co-defendant, Connie Pfeiffer received a life

sentence despite the fact that she was equally as culpable as Mr. Evans. The State responds that this claim is not cognizable in a federal habeas petition.[22] *See* (D.E. 9 at 148). The State is correct. Indeed, it has been the law since the mid 1980's that the Constitution does not require proportionality review of capital sentences. *Pulley v. Harris*, 465 U.S. 37 (1984). "Under 28 U.S.C. § 2241, a writ of habeas corpus disturbing a state-court judgment may issue only if it is found that a prisoner is in custody 'in violation of the Constitution or laws or treaties of the United States.' 28 U.S.C. § 2241(c)(3) (1976). A federal court may not issue the writ on the basis of a perceived error of state law." *Pulley,* 465 U.S. at 41. Mr. Evans offers no reason for why this determination is inapplicable to him, in fact, he fails to even acknowledge that this is the law. Habeas relief is denied.

XV. Trial Court Erred in Giving No Weight to Valid Mitigation

Mr. Evans next argues that the trial court acted unreasonably when it failed to give any weight to his immaturity and artistic ability as mitigating factors. *See* (D.E. 1 at 163). Mr. Evans does not allege that the trial court excluded or failed to consider mitigation evidence but rather argues that the court erred when it rejected the evidence by giving it no weight. The State responds that the Constitution does not mandate that a particular fact constitutes a mitigating evidence or dictate the particular weight that that evidence must be given. *See* (D.E. 9 at 152). The Florida Supreme Court affirmed the denial of this claim on appeal finding that the trial court's rejection of Mr. Evans's alleged immaturity as a mitigating factor was "supported by competent, substantial evidence" because no testimony on this factor was presented during the

[22] However, the State also responds that the Florida Supreme Court did conduct a proportionality review in this case, as required by Florida law. See (D.E. 9] at 146).

penalty phase. *Evans*, 808 So.2d at 108. The court, however, found that the trial court erred when it concluded that artistic ability was "not a relevant mitigating factor" but determined that "[g]iven the likelihood that the mitigator would have been assigned little weight, given the fact that the trial court engaged in a careful weighing of much more significant mitigation and given the aggravators found to exist by the trial court, we conclude that the any error in failing to weigh this mitigator is harmless beyond a reasonable doubt." *Id.* at 108. The Court agrees.

As to the immaturity mitigation, Mr. Evans did not present testimony at to this factor at the penalty phase. Despite that failure, the trial court did address his young age in the sentencing order but gave it little weight finding that Mr. Evans was legally an adult, was the "mastermind" in planning, organizing and carrying out the murder, and that he committed the crime "like a professional executioner." *Id.* The Eleventh Circuit addressed this issue in *Puiatti v. McNeil*, 626 F.3d 1283 (11th Cir. 2010), writing that

> [In] *Lockett v. Ohio*, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978), . . . the Supreme Court vacated a death sentence because the Ohio statute narrowly limited the type of mitigating factors the sentencer could consider. A Supreme Court plurality discussed "the concept of individualized sentencing," stressing "[t]he need for treating each defendant in a capital case with that degree of respect due the uniqueness of the individual."

Puiatti v. McNeil, 626 F.3d 1283, 1311 (11th Cir. 2010). Following *Lockett*, the Supreme Court, in *Eddings v. Oklahoma* reasoned "[j]ust as the State may not by statute preclude the sentencer from considering any mitigating factor, neither may the sentencer refuse to consider, *as a matter of law*, any relevant mitigating evidence." *Id.* at 1312 (citing *Eddings v. Oklahoma*, 455 U.S. 104, 113-14 (1982)) (emphasis in original). "Further, the sentencer 'may determine the weight to be given relevant mitigating evidence,' but 'may not give it no weight by excluding such

evidence from their consideration.'" *Id.* (citing *Eddings*, 455 U.S. at 114-15). Accordingly, as Mr. Evans presented no specific evidence regarding his immaturity[23], the trial court did not violate his constitutional rights by failing to consider this as a non statutory mitigating factor. In addition, the trial court did consider his age (arguably related to his maturity) as a statutory mitigator and gave it little weight. That is all that is required by the Eighth Amendment. The Court finds, after careful review of the record, that the Florida Supreme Court's ruling was not contrary to, and did not involve an unreasonable application of, clearly established federal law, as determined by the Supreme Court. Nor was it based on an unreasonable determination of the facts in light of the evidence presented. Habeas relief is denied.

As to his artistic ability, Mr. Evans did present evidence that he was a good artist. This testimony was before the trial court, however, the court concluded that this was not a relevant mitigating factor. The Florida Supreme Court disagreed but found that this error was harmless. This was not an unreasonable interpretation of the facts or law. Given that the court found two aggravators which were given great weight, it is unlikely that Mr. Evans's artistic ability would have been given such weight that it would have changed the outcome of his penalty phase.

> Under the strict criterion of *Chapman v. California*, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967), which governs harmless error analysis, "[t]he error must be harmless beyond a reasonable doubt." *Demps v. Dugger*, 874 F.2d 1385, 1389-90 (11th Cir.1989), cert. denied, 494 U.S. 1090, 110 S.Ct. 1834, 108 L.Ed.2d 963 (1990). For a *Hitchcock* error to be harmless under this standard, "the court must determine beyond a reasonable doubt that the proposed mitigating evidence ... would not have influenced the jury to recommend [or the trial judge to impose] a life sentence." *Id.* at 1390; *see Jones v. Dugger*, 867 F.2d 1277, 1279 (11th Cir.1989) (state must prove beyond reasonable doubt that error "did not contribute

[23] In his petition, Mr. Evans argues that "overwhelming" evidence existed that showed that a "profoundly troubled adolescence" caused Mr. Evans's immaturity. *See* (D.E. 1 at 164). This was generally in the form of anecdotal evidence.

> to the jury's sentencing recommendation"); *Clark v. Dugger*, 834 F.2d 1561, 1569 (11th Cir.1987) (error "could not have affected" sentence), cert. denied, 485 U.S. 982, 108 S.Ct. 1282, 99 L.Ed.2d 493 (1988); *Magill v. Dugger*, 824 F.2d 879, 894 (11th Cir.1987) (errors must have "had no effect" on decision).

Booker v. Dugger, 922 F.2d 633, 637-38 (11th Cir. 1991) (J. Tjoflat, specially concurring). Here, the Florida Supreme Court properly applied federal law to the facts of the case. Habeas relief is denied.

XVI. Mr. Evan's Death Sentence Constitutes Cruel and Unusual Punishment

In his sixteen claim for relief, Mr. Evans argues that because of his mental and emotional impairments, in combination with his age at the time of the offense makes his death sentence unconstitutional. *See* (D.E. 1 at 165). The State responds that because Mr. Evans is not mentally retarded nor was he a minor at the time the crime was committed, his death sentence does not violate the Eighth Amendment. *See* (D.E. 9 at 154). Mr. Evans first raised this claim in his state petition for writ of habeas corpus. The Florida Supreme Court denied his claim finding that Mr. Evans has never been "diagnosed as mentally retarded and, in fact, the record reflects that he has previously received verbal and performance IQ scores of 91 and 110, respectively" making him ineligible for relief under *Atkins v. Virginia* 536 U.S. 304 (2002). *Evans*, 995 So.2d at 954. Further, "[b]ecause Evans was nineteen at the time of the crime, his death sentence cannot be unconstitutional under *Roper*." The Florida Supreme Court is correct.

Here, Mr. Evans does not assert that he is mentally retarded or that he was under the age of eighteen at the time of a crime. Rather, he argues that the reasoning behind the United States Supreme Court's decisions in *Atkins* and *Roper* should make those decisions applicable to him. Mr. Evans is wrong. Mr. Evans's claim is premised on the argument that *Atkins* stands for

something other than what is explicitly stated which is that the execution of mentally retarded offenders is categorically prohibited by the Eighth Amendment to the U.S. Constitution. *Atkins*, 536 U.S. at 321. Likewise, Mr. Evans would like the Court to make broaden the holding of *Roper v. Simmons*, 543 U.S. 551 (2005), to stand for something other than the clearly defined rule of law "that execution of individuals who were under 18 years of age at time of their capital crimes is prohibited by Eighth and Fourteenth Amendments." *Id.* Mr. Evans urges the Court, absent precedent, to create a class of persons (or perhaps just make a limited exception in Mr. Evans's case) who don't met the age and retardation criteria but who are still ineligible for the death penalty based on immaturity and emotional intelligence. The Court declines to do so. Mr. Evans meets neither criteria established by the Supreme Court where his death sentence would be cruel and unusual punishment. Habeas relief is denied.

XVII. Florida's Capital Sentencing Statute Violates *Ring v. Arizona.*

Mr. Evans contends that Florida's death penalty scheme—in which a jury recommends a sentence of life imprisonment or death but the trial court actually decides what sentence to impose—and his death sentence are unconstitutional in light of *Ring v. Arizona,* 536 U.S. 584 (2002). *Ring* held that, under the Sixth Amendment, a sentencing court cannot, over a defendant's objections, make factual findings with respect to aggravating circumstance necessary for the imposition of the death penalty. Such findings must, as a constitutional matter, be made by a jury. *Id.* at 609. Mr. Evans argues that his death sentence must be set aside under *Ring* because it was imposed by the trial court, which made factual findings as to the existence of aggravating factors. (D.E. 1 at 176-77).

Mr. Evans first argued this claim in his Rule 3.851 post-conviction motion.[24] On appeal of the denial of that motion, the Florida Supreme Court found that

> [i]n *Johnson v. State*, 904 So.2d 400 (Fla. 2005), which was the seminal Florida decision on the issue of the retroactivity of *Ring*, we held that a death sentence becomes final for purposes of *Ring* once the Court has affirmed the conviction and sentence on direct appeal and issued the mandate. *Id.* at 407. Thus, Evans's death sentence became final after this Court both affirmed on direct appeal and issued the mandate in February 2002. Because *Ring* was not decided until June 2002, Evans cannot rely on it to vacate his death sentence.

Evans, 995 So.2d at 952. As to the retroactivity issue, the Florida Supreme Court is correct. In *Schiro v. Summerlin,* 542 U.S. 348, 355-57 (2004), the Supreme Court ruled that *Ring* would not be retroactively applied to cases which had become final before *Ring* was decided.

However, the Court finds that the Florida Supreme Court made an "unreasonable application of clearly established federal law" when it identified the correct legal rule from Supreme Court case law but unreasonably applied it to the facts of Mr. Evans's case. *See Putman*, 268 F. 3d at 1241. Here, the court determined that Mr. Evans's "sentence became final after this Court both affirmed on direct appeal and issued the mandate in February 2002." *Evans*, 995 So.2d at 952. This is incorrect. Mr. Evans's death sentence became final (for retroactivity purposes) in October of 2002, when the Supreme Court denied certiorari in *Evans v. Florida,* 537 U.S. 951 (2002). *Ring* was decided in June of 2002 which makes it applicable to Mr. Evans's petition because his sentence was not final on direct review until October of 2002. *See Nix v. Sec'y, Dep't. of Corr.*, 393 F.3d 1235, 1237 (11th Cir. 2004); *see also Newland v. Hall*, 527 F.3d 1162, 1196 (11th Cir. 2008). Thus, *Ring* is to be applied to his case and the Court will review

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[24] Mr. Evans also argued this claim in his petition for writ of habeas corpus filed with the Florida Supreme Court. *Evans*, 995 So.2d at 952.

Mr. Evans's claim de *novo*. *See Mason v. Allen*, 605 F.3d 1114 (11th Cir. 2010) ("When, however, a claim is properly presented to the state court, but the state court does not adjudicate it on the merits, we review *de novo*. *Cone v. Bell*, -- U.S. --, 129 S.Ct. 1769, 1784, 173 L.Ed.2d 701 (2009).").[25]

On February 12, 1999, the penalty phase of Mr. Evans's trial began. The jury recommended death by a vote of nine to three. *See* (D.E. 12-13, Vol. 39 at 4460). They did so after the court explained which aggravating factors they might find based upon the evidence presented. The jury did not articulate which, if any, mitigating or aggravating circumstances they found in reaching their ultimate conclusion that Mr. Evans should be sentenced to death. *Id.* Thereafter, on March 8, 1999, the trial court conducted a *Spencer*[26] hearing. Each side presented the court with sentencing memoranda. *See* (D.E. 12-14, Vol. 40 at 4469). The State submitted additional letters from both of the victim's parents. *Id.* The defense presented the testimony of the defendant's mother, Sandra Kipp. *Id.* at 4479. Mr. Evans also addressed the court and made a statement declaring his innocence. *Id.* at 4491. On June 16, 1999, the trial court entered a detailed order outlining its findings.

The trial court found the following in aggravation: (1) Evans had committed the

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[25] In conducting the *de novo* review of Mr. Evans's claim, the Court notes that the Florida Supreme Court has "yet to conclude that a death sentence unsupported by a separate-conviction aggravator exempt from *Ring* or a unanimous penalty-phase finding of an aggravator—implicitly in a death recommendation or explicitly in a special verdict—violates neither the state nor federal constitutional right to trial by jury." *Coday v. State*, 946 So.2d 988, 1023 (Fla. 2006) (Pariente, J., *concurring*, in part, *dissenting*, in part). This is the factual scenario before the Court here.

[26] *Spencer v. State*, 615 So.2d 688 (Fla. 1993).

> crime for pecuniary gain (great weight)[27]; and (2) the murder was committed in a cold, calculated, and premeditated manner without any pretense of legal or moral justification ("CCP") (great weight). The trial court found only one statutory mitigator: Evans's age of nineteen when he committed the murder (little weight).FN7
>
> FN7. The defense waived the following statutory mitigators: (1) lack of significant prior criminal history; (2) the defendant acted under the influence of another; (3) the defendant acted under any strong emotional duress; (4) impaired capacity of the defendant to appreciate the criminality of his conduct or conform his conduct to the requirements of the law; and (5) the victim's participation in or consent to the defendant's conduct.
>
> In addition, the trial court found and gave weight to the following nonstatutory mitigators: (1) Evans's good conduct while in jail (little weight); (2) Evans's good attitude and conduct while awaiting trial (little weight); (3) Evans had a difficult childhood (little weight); (4) Evans was raised without a father (little weight); (5) Evans was the product of a broken home (little weight); (6) Evans suffered great trauma during childhood (moderate weight); (7) Evans suffered from hyperactivity and had a prior psychiatric history and a history of hospitalization for mental illness (moderate weight); (8) Evans was the father of two young girls (very little weight); (9) Evans believes in God (very little weight); (10) Evans will adjust well to life in prison and is unlikely to be a danger to others while serving a life sentence (very little weight); (11) Evans loves his family and Evans's family loves him (very little weight).

Evans, 808 So.2d at 99-100. Ultimately, the trial court adopted the jury's recommendation and sentenced Mr. Evans to death. *Id.* The trial court found that the two identified aggravating factors outweighed the mitigating factors as such a finding is required for the imposition of the death penalty. It is from this sentence that Mr. Evans seeks habeas corpus relief.

Florida's death penalty statute, in place at the time of Mr. Evans's resentencing, provided as follows:

> A person who has been convicted of a capital felony shall be punished by life

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[27] Mr. Evans was convicted solely of one count first-degree murder. *See* (D.E. 1 at 3). Therefore, the jury did not make any findings during the guilt phase that Mr. Evans had committed this crime for pecuniary gain.

> imprisonment and shall be required to serve no less than 25 years before becoming eligible for parole unless the proceeding held to determine sentence according to the procedure set forth in § 921.141 results in finding by the court that such person shall be punished by death, and in the latter event such person shall be punished by death.

FLA. STAT. § 775.082(1). After Mr. Evans was convicted, a separate sentencing proceeding was conducted before a jury pursuant to § 921.141. Mr. Evans contends that Florida's sentencing statute violates the Sixth and Fourteenth Amendments under *Ring v. Arizona.* (D.E. 1 at 176-77).

At the penalty phase, the trial court instructed the jury as follows:

> If you find the aggravating circumstances do not justify the death penalty, your advisory sentence should be one of life imprisonment without possibility of parole for twenty-five years.
>
> Should you find sufficient aggravating circumstances do exist, it will then be your duty to determine whether mitigating circumstances exist that outweigh the aggravating circumstances.
>
> Among the mitigating circumstances you may consider, if established by the evidence, are age of the Defendant at the time of the crime, any other aspect of the Defendant's character, record, or background that would mitigate against the imposition of the death penalty.
>
> Each aggravating circumstance must be established beyond a reasonable doubt before it may be considered by you in arriving at your decision. If one or more aggravating circumstances are established, you should consider all the evidence tending to establish one or more mitigating circumstances and give that evidence such weight as you feel it should receive in reaching your conclusion as to the sentence that should be imposed.
>
> A mitigating circumstance need not be proved beyond a reasonable doubt by the Defendant. If you are reasonably convinced that a mitigating circumstance exists, you may consider it established.
>
> The sentence that you recommend to the Court must be based upon the facts as you find them from the evidence and the law. You should weigh the aggravating circumstances against the mitigating circumstances, and your advisory sentence must be based on these considerations.

> In these proceedings, it is not necessary that the advisory sentence of the Jury be unanimous. The fact that the determination of whether you recommend a sentence of death or sentence of life imprisonment in this case can be reached by a single ballot should not influence you to act hastily or without due regard to the gravity of these proceedings.
>
> Before you ballot, you should carefully weigh, sift, and consider the evidence, and all of it, realizing that a human life is at stake and bring to bear your best judgment in reaching your advisory sentence.
>
> If a majority of the jury determines that Paul Hawthorne Evans should be sentenced to death, your advisory sentence will be "A majority of the Jury, by a vote of 'blank,' advises and recommend to the Court that it impose the death penalty upon Paul Hawthorne Evans."
>
> On the other hand, if by six or more votes the Jury determines that Paul Hawthorne Evans should not be sentenced to death, your advisory sentence will be, "The Jury advises and recommends to the Court that it impose a sentence of life imprisonment upon Paul Hawthorne Evans without possibility of parole for twenty-five years."
>
> You will now retire to consider your recommendation. When you have reached an advisory sentence in conformity with these instructions, that Form of Recommendation should be signed by your foreperson and returned to the Court.

(D.E. 12, Vol. 39 at 4441-43). If the jury had found that the state failed to prove a statutory aggravating circumstance beyond a reasonable doubt or that the aggravating circumstances proven were not sufficient enough to justify the death penalty, the jury was instructed not to recommend a death sentence. § 921.141(2). Next, when the jury decided that sufficient aggravating circumstances existed beyond a reasonable doubt, it then had to determine whether any mitigating circumstances outweighed the aggravating circumstances. *Id.* Pursuant to the considerations listed in § 921.141(2), the jury heard evidence relevant to the nature of the crime and Mr. Evans's character; following deliberations, the jury rendered an advisory sentence of

death by a vote of nine-to-three.[28]

Pursuant to state law, the jury was only required to make a recommendation as to Mr. Evans's sentence; the jury did not answer any interrogatories as to the finding of the existence of specific aggravating or mitigating circumstances, the vote of the jury as to each of them, or how the various circumstances were weighed.[29] *See State v. Steele*, 921 So.2d 538, 545-48 (Fla. 2005) (holding that Florida law does not presently permit a trial judge to require the jury to make findings about particular aggravating factors through a verdict form containing special interrogatories). The jury's recommendation was advisory.[30] Here, the sentencing judge, after weighing the statutory aggravating circumstances and both statutory and nonstatutory mitigating circumstances, adopted the jury's recommendation of a death sentence. *Evans*, 808 So.2d at 99-100; *see also* Fla. Stat. § 921.141(3). Mr. Evans argues that this process is unconstitutional under

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[28] Under Florida's sentencing scheme for capital felonies, if six or more jurors determine that the defendant should be sentenced to death, the jury *may* recommend a death sentence instead of life imprisonment. FLA. STANDARD JURY INSTRUCTIONS IN CRIMINAL CASES § 7.11 (5th ed. 2005). On the other hand, if six or more jurors determine that the defendant should not be sentenced to death, the jury *must* recommend life imprisonment instead of a death sentence. *Id.*

[29] The jury did not have to find the existence of an aggravating circumstance unanimously; a majority of the jurors had to find at least one statutory aggravating circumstance beyond a reasonable doubt in order to ultimately recommend the death penalty. *State v. Steele*, 921 So.2d 538, 547-48 (Fla. 2005). In fact, the trial judge is explicitly prohibited by law from requiring the jury to make findings about aggravating factors through a verdict containing special interrogatories. *Id.* In *Steele*, the Florida Supreme Court implored the Florida Legislature to amend the death penalty statute to allow for unanimous jury findings of aggravators and the use of special verdict forms. *Id.* at 548-49. Despite that plea, no such legislative action has been taken to date.

[30] Although the jury's recommendation was advisory, the sentencing judge had to give it "great weight." *Tedder v. State*, 322 So.2d 908, 910 (Fla. 1975). The sentencing judge could not have overriden a jury recommendation of life imprisonment if the jury recommendation had a "reasonable basis." *Hall v. State*, 541 So.2d 1125, 1128 (Fla. 1989).

Ring.

In *Ring v. Arizona*, the United States Supreme Court held that capital defendants "are entitled to a jury determination of any fact on which the legislature conditions an increase in their maximum punishment." 536 U.S. 584, 587 (2002). In that case, the trial jury convicted Ring of first-degree murder in Arizona. Under Arizona law, he could not have been sentenced to death, the statutory maximum penalty for first-degree murder, unless the trial judge, sitting alone, conducted a separate sentencing hearing and determined that at least one statutory aggravating factor existed beyond a reasonable doubt. *Ring*, 536 U.S. at 592, 597. State law authorized the judge to sentence a first-degree murder defendant to death *only* if there was at least one aggravating factor and no mitigating circumstances sufficiently substantial to call for leniency. *Ring*, 536 U.S. at 593. Otherwise, the sentence would be life imprisonment. *Ring*, 536 U.S. at 596. In other words, based solely on the jury verdict finding Ring guilty of first-degree murder, the maximum punishment Ring could have received was life imprisonment. *Ring*, 536 U.S. at 597. The trial judge found two aggravating factors and one nonstatutory mitigating factor that was insufficiently substantial to call for leniency: the trial judge sentenced Ring to death.[31] *Ring*, 536 U.S. at 595.

On appeal, Ring argued that Arizona's capital sentencing scheme violated the Sixth and Fourteenth Amendments to the United States Constitution because it entrusted to a judge the finding of a fact raising the defendant's maximum penalty. *Ring*, 536 U.S. at 595. The Court

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[31] The two aggravating factors found by the judge were that Ring committed the offense in expectation of receiving something of pecuniary value, and the offense was committed in an especially heinous, cruel or depraved manner. The one nonstatutory mitigating factor was that Ring had a minimal criminal record. *Ring*, 536 U.S. at 595.

framed the question presented as whether, given that in "in Arizona, a death sentence may not legally be imposed . . . unless at least one aggravating factor is found to exist beyond a reasonable doubt, . . . the Sixth Amendment's jury trial guarantee, made applicable to the States by the Fourteenth Amendment, requires that the aggravating factor determination be entrusted to the jury." *Ring*, 536 U.S. at 597 (internal quotations omitted). The Court noted that Ring presented a narrow claim. First, as no aggravating circumstance related to past convictions in his case, he was not challenging *Almendarez-Torres v. United States*, 523 U.S. 224 (1998), which held that the fact of a prior conviction may be found by the judge even if it increases the statutory maximum sentence. *Ring*, 536 U.S. at 597 n.4. Second, Ring made no Sixth Amendment claim with respect to mitigating circumstances. *Id.* Finally, Ring did not argue that the Sixth Amendment required the jury to ultimately decide whether the death penalty should be imposed; Ring did not challenge judicial re-weighing of factors found by the jury. *Id.; see also Clemons v. Mississippi*, 494 U.S. 738, 745 (1990) (holding that "an appellate court [may] invalidate[] one of two or more aggravating circumstances found by the jury, but affirm[] the death sentence after itself finding that the one or more valid remaining aggravating factors outweigh the mitigating evidence."). It is important to note what *Ring* is and what it is not, as discussed in more detail below.

In *Ring*, the Supreme Court decided to overrule its decision in *Walton v. Arizona*, 497 U.S. 639 (1990), to the extent that it allowed a sentencing judge, sitting without a jury, to find an aggravating circumstance necessary for imposition of the death penalty. *Ring*, 536 U.S. at 609. Under the then-current Arizona law, the finding of one aggravating circumstance exposed the defendant to a greater punishment (death) than that authorized by the jury's guilty verdict alone

(life imprisonment). "Because Arizona's enumerated aggravating factors operate as 'the functional equivalent of an element of a greater offense,' the Sixth Amendment requires that they be found by a jury." *Ring*, 536 U.S. at 609 (quoting *Apprendi v. New Jersey*, 530 U.S. at 494 n.19). This is the foundation upon which Mr. Evans makes his *Ring* claim.

The *Ring* Court held that *Walton v. Arizona* and *Apprendi v. New Jersey* were irreconcilable and that its Sixth Amendment jurisprudence could not be home to both: "Capital defendants, no less than noncapital defendants . . . are entitled to a jury determination of any fact on which the legislature conditions an increase in their maximum punishment." 536 U.S. at 589.

In *Walton v. Arizona*, the Court held that Arizona's sentencing scheme was compatible with the Sixth Amendment because the additional facts found by the judge, which authorized the imposition of death, qualified as sentencing considerations, not as "element[s] of the offense of capital murder." 497 U.S. 639, 649 (1990). In *Apprendi v. New Jersey*, the defendant-petitioner was convicted of second-degree possession of a firearm, an offense carrying a maximum penalty of ten years under New Jersey law. 530 U.S. 466, 469-70 (2000). The sentencing judge's finding that the crime had been motivated by racial animus triggered application of New Jersey's hate crime enhancement, which doubled Apprendi's maximum authorized sentence. The judge sentenced Apprendi to twelve years in prison, two years over the maximum that would have applied but for the enhancement. The *Apprendi* Court held that the sentence violated Apprendi's right to a "jury determination that [he] is guilty of every element of the crime with which he is charged, beyond a reasonable doubt." 530 U.S. at 477. According to the Court, that right attached not only to Apprendi's weapons offense but also to the hate crime enhancement (the aggravating circumstance in that case). The *Apprendi* Court held that the Sixth Amendment does

not permit a defendant to be "expose[d] . . . to a penalty *exceeding* the maximum he would receive if punished according to the facts reflected in the jury verdict alone." 530 U.S. 466, 483 (2000). The *Apprendi* Court held that this prescription governs even if the State characterizes the additional findings made by the judge as "sentencing factor[s]." *Id.* at 492. "Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." 530 U.S. at 490. Thus, according to *Apprendi*, if a State makes an increase in a defendant's punishment contingent on a finding of fact, that fact, no matter how the State labels it, must be found by a jury beyond a reasonable doubt. 530 U.S. at 482-83.

The *Apprendi* Court asserted that *Walton* could be reconciled with *Apprendi*: the key distinction was that a conviction of first-degree murder in Arizona carried a maximum sentence of death. "[O]nce a jury has found the defendant guilty of all the elements of an offense which carries as its maximum penalty the sentence of death, it may be left to the judge to decide whether that maximum penalty, rather than a lesser one, ought to be imposed." 530 U.S. at 497.

The *Apprendi* dissent called the Court's distinction of *Walton* "baffling": a defendant convicted of first-degree murder could not receive a death sentence unless a judge made the factual determination that a statutory aggravating factor existed. 530 U.S. at 538. Without that critical finding, the maximum sentence was life imprisonment. *Id.* According to *Apprendi*'s dissenters, "If a State can remove from the jury a factual determination that makes the difference between life and death, as *Walton* holds it can, it is inconceivable why a State cannot do the same with respect to a factual determination that results in only a 10-year increase in the maximum sentence to which a defendant is exposed." 530 U.S. at 537 (opinion of O'Connor, J.).

Ultimately, the *Ring* court held "that *Walto*n and *Apprendi* are irreconcilable; our Sixth Amendment jurisprudence cannot be home to both. Accordingly, we overrule *Walton* to the extent that it allows a sentencing judge, sitting without a jury, to find an aggravating circumstance necessary for imposition of the death penalty." *Ring*, 536 U.S. at 609.

While *Ring* in certain respects has a limited holding, it does clearly provide that the Constitution requires that the jury find, beyond a reasonable doubt, any aggravating factor that must be found before the death penalty may be imposed. Implicit in this holding is that the jury's fact finding be meaningful. As the Florida sentencing statute currently operates in practice, the Court finds that the process completed before the imposition of the death penalty is in violation of *Ring* in that the jury's recommendation is not a factual finding sufficient to satisfy the Constitution; rather, it is simply a sentencing recommendation made without a clear factual finding. In effect, the only meaningful findings regarding aggravating factors are made by the judge.

Here, the death penalty is a penalty exceeding the maximum penalty (of life imprisonment without the possibility of parole until after 25 years) and, therefore, requires that the additional fact finding required to "enhance" Mr. Evans's sentence must be made by a jury. As the United States Supreme Court instructed in *Apprendi* and reaffirmed in *Ring*, "the relevant inquiry is one not of form but of effect." *Ring*, 536 U.S. at 604. Here, like the Arizona sentencing scheme in *Ring*, the statute authorizes "a maximum penalty of death only in a formal sense for it explicitly cross-references the statutory provision requiring the finding of an aggravating circumstance before imposition of the death penalty." *Id.* Simply put, without a separate hearing and a finding that aggravating factors exist and outweigh any mitigating factors,

the defendant cannot be sentence to death. It is that critical finding—the finding of an aggravating factor—which increases the maximum authorized punishment. This requires a jury determination.[32] "[T]he relevant 'statutory maximum,' this Court has clarified, 'is not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose without any additional findings.'" *Cunningham v. California*, 549 U.S. 270, 290 (2007) (quoting *Blakely*, 542 U.S. at 303-04). Accordingly, the death penalty is an "enhanced" sentence under Florida law and the Sixth Amendment requires that the enumerated aggravating factors be found by a jury. *See Ring*, 536 U.S. at 609.

In Florida, a separate sentencing hearing is conducted in front of a jury. The jury returns its recommendation as to life imprisonment or death based on the existence of an aggravating circumstance which then outweighs any mitigating circumstances. There are no specific findings of fact made by the jury. Indeed, the reviewing courts never know what aggravating or mitigating factors the jury found. *See State v. Steele*, 921 So.2d at 545-48. It is conceivable that some of the jurors did not find the existence of an aggravating circumstance, or that each juror found a different aggravating circumstance, or perhaps all jurors found the existence of an aggravating circumstance but some thought that the mitigating circumstances outweighed them. There need not be anything more than a simple majority vote to recommend the death sentence to the judge. After the jury's recommendation, there is a separate sentencing hearing conducted

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[32] As noted elsewhere in this Order, there are certain exceptions to this rule, such as where the aggravating factor relates to the existence of prior convictions. The Court notes, however, that this case does not fall within that exception or within any of the limitations on the holding in *Ring* that the Supreme Court listed in footnote 4 of the *Ring* decision. *See Ring*, 536 U.S. at 597 n.4. None of the aggravating factors in this case related to prior convictions. Furthermore, as noted above, the jury did not make a unanimous finding regarding an aggravating factor during the penalty phase of Evans's trial.

before the judge only. At that hearing both the State and the defendant may put on additional evidence not presented to the jury. The judge then determines and imposes the sentence. The defendant has no way of knowing whether or not the jury found that same aggravating factors as the judge. Indeed, the judge, unaware of the aggravating factor or factors found by the jury, may find an aggravating circumstance that was not found by the jury while failing to find the aggravating circumstance that was found by the jury. Under the current statute, the State could have presented additional evidence that Mr. Evans qualified for an entirely different aggravating factor which the jury had never considered. *See generally Williams v. State*, 967 So.2d 735, 765 (Fla. 2007) (striking an aggravating factor found by a sentencing judge not on the basis that the factor was not presented to the jury in the sentencing phase—which it was not—but instead on the basis that the factor was not supported by competent, substantial evidence). Moreover, the trial judge did not merely re-weigh aggravating factors found by the jury; he made his own separate findings. Without a special verdict form, it is possible that the trial judge found the existence of one aggravating factor while the jury found the existence of another, resulting in a sentence of death for a defendant based on an invalid aggravator, i.e., an aggravator not found by the jury.[33] This cannot be reconciled with *Ring*.

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[33] The Florida Supreme Court reviewed this issue on a very limited certified question from the Second District Court of Appeal of an order from the trial court requiring a majority of jurors to agree on existence of particular statutory aggravating factor. The Court found that "[u]nless and until a majority of this Court concludes that *Ring* applies in Florida, *and* that it requires a jury's majority (or unanimous) conclusion that a particular aggravator applies, or until the Legislature amends the statute (see our discussion at section C below), the court's order imposes a substantive burden on the state not found in the statute and not constitutionally required." *State v. Steele*, 921 So.2d 538,545-46 (Fla. 2006). Section C is entitled: "The Need for Legislative Action." *Id.* at 548. In Section C, the court begins with the fact that Florida is "now the only state in the country that allows a jury to decide that aggravators exist *and* to recommend a sentence of death by a mere majority vote." *Id.* Here, the Court finds that *Ring*

More troubling is that there is nothing in the record to show that Mr. Evans's jury found the existence of a single aggravating factor by even a simple majority. The jury was presented with two aggravating factors for its consideration. (D.E. 12, Ex. A.,Vol. 39 at 4439-41). As the final vote was nine to three, it is possible that the nine jurors who voted for death reached their determination by having four jurors find one aggravator while five jurors found another. Either of these results would have the aggravator found by less than a majority of the jurors. Although the Court concedes that unanimity may not be required, it cannot be that Mr. Evans's death sentence is constitutional when there is no evidence to suggest that even a simple majority found the existence of any one aggravating circumstance. *See generally Apodaca v. Oregon*, 406 U.S. 404 (1972) (unanimous jury verdicts required in federal trials but not in state trials). Any one singular aggravating factor may not have been found beyond a reasonable doubt by a majority of the jury. The Court's interpretation of *Ring* is such that, at the very minimum, the defendant is entitled to a jury's majority fact finding of the existence of an aggravating factor; not simply a majority of jurors finding the existence of any unspecified combination of aggravating factors upon which the judge may or may not base the death sentence.[34] Because the jury may have not

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does apply in Florida and the Florida sentencing statute is unconstitutional.

[34] The Court notes that in *Ring*, the Supreme Court identified four states with "hybrid" death penalties similar to but not identical to Arizona's. *Ring*, 536 U.S. at 608 n. 6. The "hybrid" states provided for advisory verdicts from juries but left ultimate sentencing determinations to the judge. *Ring*, 536 U.S. at 608 n. 6. Those states were Florida, Alabama, Delaware, and Indiana. *Id.* Of those four states, two—Delaware and Indiana—require that juries make unanimous findings regarding particular, specified aggravating factors. *See* 11 Del. Code. § 4209 ("In order to find the existence of a statutory aggravating circumstance . . . beyond a reasonable doubt, the jury must be unanimous as to the existence of *that* statutory aggravating circumstance. As to any statutory aggravating circumstances . . . which were alleged but for which the jury is not unanimous, the jury shall report the number of the affirmative and negative votes on *each such circumstance*. . . . the Court shall discharge that jury after it has reported its

reached a majority finding as to any one aggravating factor, the Florida sentencing statute leaves open the very real possibility that in substance the judge still makes the factual findings necessary for the imposition of the death penalty as opposed to the jury as required by *Ring.*[35] Habeas relief is granted.

VI. Conclusion

It is **ORDERED and ADJUDGED** that

1. Petitioner's Petition for Writ of Habeas Corpus (D.E. No. 1) is **GRANTED** in part and **DENIED** in part. A Writ of Habeas Corpus shall issue upon the bases stated in Mr. Evans's seventeenth claim for habeas relief, Florida's Capital Sentencing Statute Violates *Ring v. Arizona.* It is the Order of the Court that Petitioner, Paul Hawthorne Evans, should receive a new sentencing hearing consistent with the decision of the Court before an untainted

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findings *and* recommendation") (emphasis added); Ind. Code Ann. § 35-50-2-9 ("The court shall instruct the jury that, in order for the jury to recommend to the court that the death penalty or life imprisonment without parole should be imposed, the jury must find at least one (1) aggravating circumstance beyond a reasonable doubt . . . and shall provide a special verdict form for each aggravating circumstance alleged"). Alabama, which presently requires at least ten jurors to recommend the death penalty, has proposed legislation pending that would commit the sentencing decision entirely to the jury. *See* 2011 Alabama Senate Bill No. 247. Florida law, which requires a mere majority for a death penalty recommendation and forecloses special verdict forms to record specific findings by the jury, is an outlier.

[35] Further, under the current Florida statute, the judge can reject the jury's recommendation and find for death even when the jury finds the existence of facts that do not support a death sentence. This emphasizes how the jury's "factual findings" at the sentencing phase—to the extent they are findings—are meaningless. The jury could fail to find any aggravating circumstance at all, and the judge could nevertheless find the jury's recommendation unreasonable, make findings, and impose a death sentence based on those findings. *See* Fla. Stat. § 921.141(3). This too cannot be reconciled with the Constitutional requirements of *Ring* because a defendant is entitled to a jury determination of any fact on which the legislature conditions an increase in their maximum punishment. However, as this is not the factual scenario before the Court, that issue is left for another day.

jury within ninety (90) days of the date of this Order, unless Respondent files a timely appeal and obtains a stay of this Order.

2. This case is **CLOSED** and all pending motions are **DENIED** as **MOOT**.

DONE AND ORDERED in Chambers at Miami, Florida, this 20 day of June, 2011.

JOSE E. MARTINEZ
UNITED STATES DISTRICT JUDGE

Copies provided to:
All Counsel of Record

IN THE CIRCUIT COURT, FOURTH JUDICIAL CIRCUIT, IN AND FOR DUVAL COUNTY, FLORIDA.

CASE NO.: 16 2013 CF 005781 AXXX MA

DIVISION: CR-D

STATE OF FLORIDA

VS.

DONALD JAMES SMITH

MOTION TO DECLARE §921.141(7), FLORIDA STATUTE UNCONSTITUTIONAL AND FOR PRETRIAL DETERMINATION OF ADMISSIBILITY OF ALL "VICTIM IMPACT" EVIDENCE UNDER §§90.104(2), 90.105, 90.403, FLA. STAT.

The Defendant, through undersigned counsel, moves for an Order declaring §921.141(7), Fla.Stat., unconstitutional under Art. I, §§ 2, 9, 16, 17 & 22 of the Florida Constitution and the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution and, pursuant to §§90.104(2), 90.105 and 90.403, Florida Statutes, requests a pretrial determination of the admissibility of all "victim impact evidence" that the State seeks to present, as follows:

1. The State of Florida charged DONALD JAMES SMITH with first-degree murder and filed notice that it seeks capital punishment pursuant to Fla.R.Crim.P. 3.202 and Section 921.141, Florida Statute.

2. Section 921.141(7), Florida Statutes, is unconstitutional and violates the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution and article I, Sections 2, 9, 16, 17 and 22 of the Florida Constitution for the reasons more specifically set forth in the accompanying memorandum of law.

3. A pretrial evidentiary hearing is required under Sections 90.104, 90.105 and 90.403, Florida Statutes, because evidence arguably relevant under Section 921.141(7), Florida Statute, is nonetheless inadmissible where, as here, the danger of unfair prejudice substantially outweighs its probative value.

MEMORANDUM OF LAW

Initially, it is stressed that imposition of the death penalty entails heightened procedural due process requirements because of the severity and finality of the death penalty:

> [D]eath is a different kind of punishment from any other which may be imposed in this country. . . . From the point of view of the defendant, it is different in both its severity and its finality. From the point of view of society, the action of the sovereign in taking the life of one of its citizens also differs dramatically from any other legitimate state action. It is of vital importance to the defendant and to the community that any decision to impose the death sentence be, and appear to be, based on reason rather than caprice or emotion." (Citation omitted).

Gardner v. Florida, 430 U.S. 349, 357 (1977). See Amendments to Fla.R.Crim.P. & Fla.R.App.P., 875 So.2d 563, 568 (Fla. 2004) (Cantero, J., concurring) ("As we have repeatedly recognized, 'death is different.'"); Chamberlain v. State, 881 So.2d 1087, 1108 (Fla. 2004) ("On this issue as on many others, death is different."). Heightened standards of due process are required by the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution whenever a state government seeks to impose capital punishment. There is an "acute need for reliable decision making when the death penalty is at issue." Deck v. Missouri, 544 U.S. 544, 622 (2005).

> . . . *Because the death penalty is unique "in both its severity and its finality,"* [Gardner v. Florida, 430 U.S. 349] at 357, 97 S.Ct., at 1204, *we have recognized an acute need for reliability in capital sentencing proceedings.* See Lockett v. Ohio, 438 U.S. 586, 604, 98 S.Ct. 2954, 2964, 57 L.Ed.2d 973 (1978) (opinion of Burger, C.J.) (stating that the "qualitative difference between death and other penalties calls for a greater degree of reliability when the death sentence is imposed"); see also Strickland v. Washington, 466 U.S. 668, 704, 104 S.Ct. 2052, 2073, 80 L.Ed.2d 674 (1984) (Brennan, J., concurring in part and dissenting in part) ("[W]e have consistently required that capital proceedings be policed at all stages by an especially vigilant concern for procedural fairness and for the accuracy of factfinding").

Monge v. California, 524 U.S. 721, 118 S.Ct. 2246, 2252 (1998) (emphasis added). The Florida Supreme Court agrees that courts have a duty to use procedures that "ensure" reliable imposition of capital punishment. See Arvelaez v. Butterworth, 738 So.2d 326, 326-27 (Fla.1999) ("We

acknowledge we have a constitutional responsibility to ensure the death penalty is administered in a fair, consistent *and reliable manner* . . . ") (emphasis added); Deck, supra.

At issue here is Section 921.141(7), Florida Statutes, which provides the following:

> **(7) Victim impact evidence.** - Once the prosecution has provided evidence of the existence of one or more aggravating circumstances as described in subsection (5), the prosecution may introduce, and subsequently argue, victim impact evidence. Such evidence shall be designed to demonstrate the victim's uniqueness as an individual human being and the resultant loss to the community's members by the victim's death. Characterizations and opinions about the crime, the defendant, and the appropriate sentence shall not be permitted as a part of victim impact evidence.

In Windom v. State, 656 So.2d 432 (Fla.1992), the Florida Supreme Court approved use of victim impact evidence as follows: "Victim impact evidence must be limited to that which is relevant as specified in section 921.141(7)." Windom at 438. The defendant respectfully submits that Windom was wrongly decided. The introduction of evidence and/or argument concerning the impact of the victim's death, even as limited by the holding in Windom, violates art. I, §§ 2, 9, 16, 17 and 22 of the Florida Constitution and the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution. In the abstract and in other specific statutory schemes involving imposition of the death penalty, the introduction of victim impact evidence may not violate the Eighth or Fourteenth Amendments. Payne v. Tennessee, 501 U.S. 808 (1991). In Florida, however, the death penalty is imposed based *solely* on a determination of whether specific statutory aggravating factors are outweighed by mitigating considerations. The sentencer is precluded from using an aggravating consideration not contained in Section 921.141(5), Florida Statute, as a basis for imposing capital punishment. See Zack v. State, 911 So.2d 1190, 1208 (Fla. 2005) ("[t]he *only* matters that may be considered in aggravation are those set out in the death penalty statute.").

This type evidence under Florida's statutory scheme is not relevant to determine a defendant's eligibility for capital punishment, nor is it relevant to determine whether a defendant should receive capital punishment after eligibility is determined. Presentation of "victim impact"

evidence is not a part of that weighing process at all. See Alston v. State, 723 So.2d 148 (Fla.1998). Rather, the presentation of victim impact evidence is authorized by §921.141(7), Fla.Stat., without any explanation as to how the evidence is to be used and apparently the legislation was passed solely to accommodate the "right" of the victim provided by article I, section 16(b) of the Florida Constitution. Significantly, however, by the very language that confers a constitutional right to the victims, the rights of the victims exist only "to the extent that these rights do not interfere with the constitutional rights of the accused." Art. I, section 16(b), Florida Constitution. The exposure to such prejudicial evidence to the jury and the sentencer without guidance as to how it is to be used in the sentencing determination renders imposition of the death penalty unreliable, inconsistent, arbitrary and capricious and a violation of the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution.

The death penalty requires Due Process, consistency and reliability to comport with Art. I, §§ 2, 9, 16, 17 and 22 of the Florida Constitution and the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution. A statutory capital sentencing scheme must genuinely limit the discretion on imposition of the death penalty by clear and objective standards that are capable of consistent application and meaningful appellate review. Zant v. Stephens, 462 U.S. 862, 877 (1983) ("An aggravating circumstance must genuinely limit the class of persons eligible for the death penalty and must reasonably justify the imposition of a more severe sentence on the defendant compared to others found guilty of murder."). Admission of evidence "designed to demonstrate the victim's uniqueness as an individual human being and the resultant loss to the community's members by the victim's death" presents a broad range of vague and prejudicial considerations that foster inconsistent and discriminatory use of the death penalty. Basing imposition of the death penalty on evidence and argument that is "designed to demonstrate the victim's uniqueness as an individual human being and the resultant loss to the community's members by the victim's death" denies Due Process, equal protection and it demeans the value of every human life. Such evidence evokes an emotional response. The absence of objective criteria explaining how to use the evidence prevents any meaningful appellate review of how the evidence was used by jurors. This procedure encourages

consideration of such factors as a victim's race, ethnic origin, religion sex and sexual preference. Victim impact evidence is not to be weighed as an aggravating factor. Presentation of this type evidence is likely to confuse jurors and lead to imposition of the death penalty based on inflamed emotion and unconstitutional considerations rather than calm reflection of specific law and the material facts.

In the event this motion is denied and the Court permits the introduction of evidence concerning victim impact under §921.141(7), Fla.Stat., the defendant respectfully objects and moves under §90.403 Fla.Stat. for a determination as to the admissibility of the evidence that is to be presented. A proffer is required so that this Court can determine the propriety and admissibility of the specific evidence sought to be presented based on the standard set forth in Windom, supra. Pursuant to § 90.104(2), Florida Statute, "In cases tried by a jury, a court shall conduct proceedings, to the maximum extent practicable, in such a manner as to prevent inadmissible evidence from being suggested to the jury by any means." Except in circumstances not present here, "the court shall determine preliminary questions concerning the . . . admissibility of evidence." Section 90.105(1), Florida Statute. Hearings on the admissibility of evidence shall be conducted out of the hearing of the jury. Section 90.105(3), Florida Statute.

Under Section 90.403, Florida Statute, *even if otherwise relevant*, victim impact evidence is *inadmissible* if the danger of unfair prejudice outweighs its probative value. A hearing is thus required to determine the admissibility of this evidence that has long been recognized by various courts as being highly emotional and potentially unfairly prejudicial. In that regard, unfair prejudice is the type of evidence that logically tends to inflame emotions and which tends to distract jurors or the court from conducting an impartial sentencing analysis:

> A verdict is an intellectual task to be performed on the basis of the applicable law and facts. It is difficult to remain unmoved by the understandable emotions of the victim's family and friends, even when the testimony is limited to identifying the victim. Thus, the law insulates jurors from the emotional distraction which might result in a verdict based on sympathy and not on the evidence presented.

Jones v. State, 569 So.2d 1234, 1239 (Fla.1990). See Urbin v. State, 714 So.2d 411, 419 (Fla.1998) (Court has responsibility to monitor practices and control improper influences in imposing death penalty, noting, "Although this legal precept, and indeed the rule of objective, dispassionate law in general may sometimes be hard to abide, the alternative, a court ruled by emotion, is far worse."). Particularly when presiding over a capital trial, judges are cautioned to be "vigilant [in the] exercise of their responsibility to insure a fair trial." Bertolotti v. State, 476 So.2d 130, 134 (Fla.1985).

Generally, victim impact testimony presents a broad umbrella of various types of information that does not pertain to the weighing of statutory aggravating considerations or mitigating considerations:

> Clearly, the boundaries of relevance under the statute include evidence concerning the impact to family members. Family members are unique to each other by reason of the relationship and role each has in the family. A loss to the family is a loss to both the community of the family and to the larger community outside the family. Therefore, we find this testimony relevant.

Bonifay v. State, 680 So.2d 413, 419-20 (Fla.1996). An abuse of discretion in presenting this type evidence occurs where the presentation of victim impact evidence is allowed to become a feature of the trial. The use of victim impact evidence has been carefully monitored by trial courts that were vigilant to guard against the possibility of improper emotional influences impacting on the jury's sentencing determination. See Alston v. State, 723 So.2d 148 (Fla.1998) (approved where victim's mother testified); Benedith v. State, 717 So.2d 472 (Fla.1998) (approved where victim's sister testified); Davis v. State, 703 So.2d 1055 (Fla.1997) (approved where written statement of victim's mother introduced); Hauser v. State, 701 So.2d 329 (Fla.1997) (approved where victim's mother and grandmother testified); Moore v. State, 701 So.2d 701 So.2d 545 (Fla.1997) (approved where victim's daughter testified); Cole v. State, 701 So.2d 845 (Fla.1997) (approved where teacher of victim testified); Burns v. State, 699 So.2d 646, 652-53 (Fla.1997) (approved where victim's father testified in addition to "a fellow officer of the victim who made a brief reference to the victim's wife"); Consalvo v. State, 697 So.2d 805

(Fla.1996) (approved where victim's brother testified); Willacy v. State, 696 So.2d 693 (Fla.1997) (approved where victims son and two daughters testified); Damren v. State, 696 So.2d 709, 712-713 (Fla.1997) (approved where victim's wife and daughter read prepared statements to the jury); Branch v. State, 685 So.2d 1250, 1253 (Fla.1996) (approved where trial court allowed photograph of victim taken several weeks before she was murdered); Bonifay, 680 So.2d 413, 419-20 (Fla.1996) (approved where victim's wife testified; Windom v. State, 656 So.2d 432, 438 (Fla.1995) (approved where one police officer testified about the impact of three victims' death on their family and on school children).

The determination of the admissibility of victim impact evidence, as with all evidence, is within the sound discretion of a trial court. State v. Maxwell, 647 So.2d 871 (Fla. 4th DCA 1994), affirmed, 657 So.2d 1157 (Fla.1995). Trial courts should exclude victim impact evidence if it will become a feature to the extent that it denies a fair proceeding. Just as a judge may not, without first hearing the evidence, enter "a blanket order forbidding its admission without regard to the character of the evidence that the State intended to present to the jury," State v. Johnston, 743 So.2d 22 (Fla. 2d DCA 1999), neither can a judge make a blanket ruling that all such evidence is admissible. A judge's exposure to improper victim impact evidence is a necessity in order to obtain a ruling on its admissibility. In that regard, a trial court's use of improper victim impact evidence to sentence a defendant to death may be harmless error based on the analysis that can be performed by the appellate court of the trial court's sentencing order. See Walls v. State, 31 FLW S101 (Fla. February 9, 2006); Card v. State, 803 So.2d 613, 628 (Fla. 2001). If such evidence is improperly presented to the jury, the State will be unable to meet its burden of showing the exposure to such inflammatory and improper evidence did not influence the jury sentencing recommendation due to the absence of specific findings as to the weighing analysis performed by the jury.

An analogous situation occurs with collateral crime evidence that may be relevant to prove identity, plan, motive, common scheme, etc.. In Williams v. State 110 So.2d 654, 662 (Fla.1959), the Court ruled that, while evidence of unrelated criminal activity may be relevant to prove a defendant's guilt, "we emphasize that the question of the relevancy of this type of

evidence should be cautiously scrutinized *before* it is determined to be admissible." (Emphasis added). See also State v. Johnston, 712 So.2d 1160 (Fla. 2d DCA 1998)("trial judges must scrupulously examine the probative and prejudicial value of [victim impact] evidence before permitting its introduction." The danger of William's Rule evidence, as with victim impact evidence, is that it tends to distract jurors from the task at hand and invite a verdict for reasons other than impartial application of the law to the facts. See Davis v. State, 276 So.2d 846 (Fla. 2d DCA 1973) (fundamental error to present Williams Rule evidence); Green v. State, 228 So.2d 397 (Fla. 2d DCA 1969) (absence of limiting instruction on proper use of Williams Rule evidence was prejudicial error).

The advantage of requiring an advance ruling on the admissibility of victim impact evidence is that, in the event of an adverse ruling, the state can timely seek discretionary review of the exclusion of its evidence and demonstrate why the court abused its discretion by excluding it. See State v. Johnston, 743 So.2d 22 (Fla. 2d DCA 1999); Wike v. State, 698 So.2d 817 (Fla.1997) (state failed to preserve for appeal the trial court's exclusion of, as too prejudicial, the victim impact testimony from the victim's parents). If a pre-trial ruling is not made, the introduction of such evidence cannot be effectively monitored or controlled by the Court.

WHEREFORE, the defendant objects to the introduction of Victim Impact Evidence, asks that Section 921.141(7), Florida Statutes, be declared unconstitutional under Article I, Sections 2, 9, 16, 17 and 22 of the Florida Constitution and/or the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution, and otherwise moves for a hearing to determine the admissibility of all victim/impact evidence.

I HEREBY CERTIFY that a copy of the above and foregoing Motion To Declare §921.141(7), Fla. Stat., Unconstitutional And For Pretrial Determination Of Admissibility Of All "Victim Impact" Evidence Under §§90.104(2), 90.105, 90.403, Fla. Stat., has been furnished to the Office of the State Attorney, by hand and/or electronically, this 10 day of December, 2013.

Respectfully submitted,

MATT SHIRK
PUBLIC DEFENDER

BY: _____
Fred C. Gazaleh, #353787
Assistant Public Defender

/slc

(CAP108)

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IN THE CIRCUIT COURT, FOURTH JUDICIAL CIRCUIT, IN AND FOR DUVAL COUNTY, FLORIDA.

CASE NO.: 16 2013 CF 005781 AXXX MA

DIVISION: CR-D

STATE OF FLORIDA

VS.

DONALD JAMES SMITH

MOTION TO EXCLUDE EVIDENCE OR ARGUMENT DESIGNED TO CREATE SYMPATHY FOR THE DECEASED (VICTIM IMPACT EVIDENCE)

Defendant, by and through the undersigned counsel, the Public Defender for the Fourth Judicial Circuit of Florida, hereby moves this Honorable Court to prohibit evidence or argument designed to create sympathy for the deceased (victim impact evidence) including, but not limited to, the impact of the offense on the friends and/or family of the deceased, the impact of the offense on the community, the life history of the deceased, or any personal characteristics of the deceased. It is also requested that the Court prohibit such evidence or argument in the guilt-innocence phase, the penalty phase before the jury, and sentencing before the judge. As grounds, Defendant would state:

A. GUILT-INNOCENCE PHASE

1. Florida law has consistently held that evidence designed to create sympathy for the deceased is inadmissible in the guilt-innocence phase in homicide cases. Jones v. State, 569 So. 2d 1234 (Fla. 1990); Lewis v. State, 377 So. 2d 640 (Fla. 1979); Rowe v. State, 120 Fla. 649, 163 So. 22 (1935); Ashmore v. State, 214 So. 2d 67 (Fla. 1st DCA 1968); Hathaway v. State, 100 So. 2d 682 (Fla. 3d DCA 1958). This type of evidence is not relevant to any issue in the guilt- innocence phase. It is virtually always highly inflammatory and prejudicial. Assuming, *arguendo*, that such evidence is relevant, its prejudice outweighs any possible probative value. Section 90.403, Fla. Stat. The admission of such evidence in this case would violate the Defendant's fundamental rights pursuant to Article I, Sections 2, 9, 16 and 17, of the Florida Constitution and the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution.

B. PENALTY PHASE BEFORE JURY AND JUDGE

2. The admission of evidence concerning the victim is also inadmissible at the penalty phase or before the judge. Section 921.141, Fla. Stat., specifically limits the prosecution to the aggravating circumstances listed in the statute. None of those aggravating circumstances relate to the character or personal characteristics of the deceased or the impact of the death on the friends and family of the deceased. The Florida Supreme Court has recognized that the statutory limit on aggravating circumstances forbids the introduction of this kind of evidence. Grossman v. State, 525 So. 2d 833 (Fla. 1988), held as follows:

> "Florida's death penalty statute, Section 921.141, limits the aggravating circumstances on which a sentence of death may be imposed to the circumstances listed in the statute. Section 921.141 (5). The impact of the murder on family members and friends is not one of these aggravating circumstances. Thus, victim impact is a non-statutory aggravating circumstance which would not be an appropriate circumstance on which to base a death sentence. *Blair v. State*, 406 So. 2d 1103 (Fla. 1981); Miller v. State, 373 So. 2d 882 (Fla. 1979); Riley v. State, 366 So. 2d 19 (Fla. 1979)."

525 So. 2d at 842. This type of evidence is inadmissible as it does not fall within any of the statutory aggravating circumstances.

3. The Florida Supreme Court has specifically disapproved the introduction of this kind of evidence before the judge alone. Grossman, supra; Patterson v. State, 513 So. 2d 1257, 1263 (Fla. 1978); Owen v. State, 560 So. 2d 207, 211 (Fla. 1990).

4. Section 921.143, Fla. Stat., does not allow this type of evidence in capital cases. Although this statute allows the victim or next of kin to speak at sentencing, the Florida Supreme Court has specifically held in Grossman, supra, that this statute does not apply to capital cases. The Court stated:

> Accordingly, we hold that the provisions of Section 921.143 are invalid insofar as they permit the introduction of victim impact evidence as an aggravating factor in death sentencing.

525 So. 2d at 842. (Footnotes omitted).

5. Payne v. Tennessee, 111 S. Ct. 2597 (1991), does not authorize the introduction of this type of evidence. First, Payne only deals with whether "the Eighth Amendment bars victim impact evidence during the penalty phase of a capital trial." Id. at 2601. Payne does not deal with Florida law at all. Payne also recognizes that in some specific circumstances victim impact evidence can be "so unduly prejudicial" that its introduction violates the Due Process Clause of the Fourteenth Amendment. 111 S. Ct. at 2608. Secondly, Payne, itself continues to prohibit "the admission of a victim's family members' characterizations and opinions about the crime, the defendant, and the appropriate sentence." Id. at 2611, n.2.

6. The Florida Supreme Court has implicitly recognized that Payne has no impact on state law cases such as Jones and Grossman. In Taylor v. State, 583 So. 2d 323 (Fla. 1991), the Florida Supreme Court reversed for a new penalty phase because the prosecutor made an argument designed to evoke sympathy for the deceased. 583 So. 2d at 329-330. The Court relied on its prior opinion in Hudson v. State, 522 So.2d 802 (Fla. 1988), in which it held such argument to be improper "because it urged consideration of factors outside the scope of the jury's deliberation." 522 So,2d at 809. The opinion in Taylor was issued on June 27, 1991; the same day as Payne. Compare 583 So.2d 323 with 111 S.Ct. 2597. The Florida Supreme Court denied rehearing without modifying the opinion, on August 20, 1991, well after Payne. Id. at 323. This is an implicit recognition that Florida law continues to prohibit this type of evidence.

7. Section 921.141(7), Fla. Stat., does not allow the introduction of this type of evidence. This is true for three separate reasons.

First, this evidence does not tend to prove any of the statutory aggravating factors. Thus, it is inadmissible as irrelevant.

Second, the statute is unconstitutional in three ways under the Florida and United States Constitution:

a) The Legislature had no authority to pass such a law as it violates the exclusive right of the Florida Supreme Court to regulate practice and procedure, pursuant to Article V, Section 2, of the Florida Constitution.
b) The statute is unconstitutional pursuant to Article I, Sections 2, 9, 17, and 21, of the Florida Constitution and the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution.
c) The statute is violative of the Florida and United States Constitutions as vague and overbroad.

Third, the admission of this type of evidence would render Florida's capital felony statute unconstitutional under the Florida and United States Constitutions as it would leave the jury without any guidance as to how to evaluate this very emotional type of evidence.

Section 921.141(7), Fla. Stat., does not change the traditional rule that evidence must be relevant to be admissible. The statute states:

> (7) **VICTIM IMPACT EVIDENCE**. -- Once the prosecution has provided evidence of the existence of one or more aggravating circumstances as described in subsection (5), the prosecution may introduce, and subsequently argue, victim impact evidence. Such evidence shall be designed to demonstrate the victim's uniqueness as an individual human being and the resultant loss to the community's members by the victim's death. Characterizations and opinions about the crime, the defendant, and the appropriate sentence shall not be permitted as a part of victim impact evidence.

This section must be read in conjunction with Section 5 of the same statute which states: "Aggravating circumstances shall be limited to the following" and then lists the statutory aggravators. The Florida Supreme Court has consistently held that the prosecution is limited to the statutory aggravating circumstances. Elledge v. State, 346 So.2d 998, 1002-1003 (Fla. 1977). The United States Supreme Court relied, in part, on this limitation in upholding the Florida Statute in Proffitt v. Florida, 96 S.Ct. 2960 (Fla. 1976). The evidence described is clearly not an aggravating circumstance. Aggravating circumstances are listed in a different section and this section makes clear that this evidence is admissible only after the introduction of evidence which

shows an aggravating circumstance. The only way to read Section 7 to be consistent with Section 5 is to read it to mean that the evidence described in Section 7 is admissible if it is relevant to prove an aggravating circumstance. Any other reading would be contrary to the plain language of Section 5, an extensive body of Florida law, and the United States Supreme Court's opinion in Proffitt.

The reasoning of Grossman, supra, that Section 921.143, Fla. Stat., does not authorize the introduction of this evidence as it is irrelevant to any statutory aggravating circumstance applies equally to Section 7. As the Court stated in Grossman:

> Florida's death penalty statute, Section 921.141, limits the aggravating circumstances on which a sentence of death may be imposed to the circumstances listed in the statute. ss.921.141(5). The impact of the murder on family members and friends is not one of these aggravating circumstances. Thus, victim impact is a non-statutory aggravating circumstance which would not be an appropriate circumstance on which to based a death sentence. Blair v. State, 406 So.2d 1103 (Fla. 1981); Miller v. State, 373 So. 2d 882 (Fla. 1979); Riley v. State, 366 So.2d 19 (Fla. 1979).

525 So. 2d at 842.

This reading of the amended version of the statute is also consistent with well-established principles of statutory construction. It is an established rule of construction that the legislature is presumed to be aware of prior interpretations of a statute. Burdick v. State, 594 So.2d 267, 271 (Fla. 1992). The legislature is also presumed to have "at least tacitly approved" the prior interpretation. Id. at 271. Thus, we must presume that the legislature was aware that the Florida Supreme Court had consistently held that the prosecution is limited to the aggravating circumstances listed in Section 5. We must also presume that the legislature "at least tacitly approved" of this interpretation. The only way to interpret Section 7 and fulfill this principle is to interpret it to hold that it merely makes this evidence admissible if it is relevant to prove an aggravating circumstance or to rebut a mitigating circumstance introduced by the defense. This interpretation is also consistent with the general rule that any ambiguities in statutory

construction "must be construed in the manner most favorable to the accused." Perkins v. State, 576 So.2d 1310, 1312 (Fla. 1991).

This evidence is not relevant to any aggravating circumstance, with the possible exception of 921.141(5)(h) the "especially heinous, atrocious, or cruel" aggravating circumstance. However, the Florida Supreme Court has specifically rejected its relevance to HAC:

> Moreover, the trial court justified its finding that the murder was especially cruel by reference to a plurality of patently improper factors. These factors included the fact that the victim was married; ran the store alone; had led an honest and good life; would be missed by the community; was an immigrant who had made a good life; and was a kind and likeable man. The trial court erred by considering these factors. The lifestyle, character traits, and community standing of the victim are not relevant to the determination of whether a given homicide was especially heinous, atrocious, or cruel. In light of the facts revealed in the record on appeal, we conclude that there is no evidentiary basis for a finding that the murder was especially heinous, atrocious, or cruel.

Jackson v. State, 498 So.2d 906, 910 (Fla. 1986). It must also be noted that the opinion in Jackson was decided before the decision in Booth v. Maryland, 482 U.S. 496 (1987). The opinion was solely based on traditional state law relevancy grounds and was not based on the United States Constitution.

Section 7 is also unconstitutional on a variety of grounds. First, the legislature had no authority to pass this statute as it violates Article V, Section 2(a), of the Florida Constitution, which states, in part, "The Supreme Court shall adopt rules for the practice and procedure in all courts." See R.J.A. v. Foster, 603 So.2d 1167 (Fla. 1992); Haven Federal Savings and Loan Association v. Kirian, 579 So.2d 730 (Fla. 1991); State v. Garcia, 229 So.2d 236 (Fla. 1969). The matters at issue in Section 7 are clearly procedural.

> Practice and procedure "encompass the course, form, manner, means, method, mode, order, process or steps by which a party enforces substantive rights or obtains redress for their

> invasion. 'Practice and procedure' may be described as the machinery of the judicial process as opposed to the product thereof." In re Florida Rules of Criminal Procedure, 272 So. 2d 65, 66 (Fla. 1972) (Adkins, J., concurring). It is the method of conducting litigation involving rights and corresponding defenses. Skinner v. City of Eustis, 147 Fla. 22, 2 So.2d 116 (1941).

Haven, supra, 579 So.2d at 730.

The Florida Supreme Court has also recently stated: "How (a lawsuit) is to be tried in an orderly manner is procedural." R.J.A., supra, at 1172. The Florida Supreme Court has relied on these principles to invalidate a wide variety of statutes, involving such topics as juvenile speedy trial (R.J.A., *supra*), severance of trials involving counterclaims against foreclosing mortgagee (Haven, *supra*), waiver of a jury trial in a capital case (Garcia, supra), and the regulation of voir dire examination (In Re Clarification of Florida Rules of Practice and Procedure, 281 So.2d 204, 205 (Fla. 1973). The statute at issue here is an attempt to regulate "practice and procedure." It deals with "the method of conducting litigation," just as surely as the regulation of voir dire, waiver of jury trial, or severance. Haven, supra, at 732. The Florida Supreme Court has recognized that rules of evidence "may be procedural" and thus the sole responsibility of the Florida Supreme Court. In Re Evidence Code, 372 So.2d 1369. The Florida Supreme Court adopted the evidence code as a rule of procedure out of its concern for this constitutional provision. Section 7 violates this provision and is unconstitutional.

The Florida Constitution also requires that this type of evidence be prohibited, since it provides broader protection than the United States Constitution for the rights of a capital defendant. The Florida Supreme Court has recently noted that Article I, Section 17, of the Florida Constitution prohibits "cruel or unusual punishment." Tillman v. State, 591 So.2d 167, 169 (Fla. 1991). (This wording is in sharp contrast to the ban on "cruel and unusual punishment" in the Eighth Amendment to the United States Constitution.) The Court in Tillman explicitly held that a punishment, in a given case, is unconstitutional under the Florida Constitution if it is "unusual" due to the procedures involved. The allowance of this sort of victim sympathy evidence would

violate Article I, Section 17. The existence of this evidence would be totally random; depending upon the extent of the deceased's family and friends, and their willingness to testify. The strength of this evidence could also depend on the articulateness of the friends and family.

The admission of this evidence would also violate the Due Process Clause of Article I, Section 9, of the Florida Constitution. In Tillman, supra, the Court states that Article I, Section 9, holds "that death is a uniquely irrevocable penalty, requiring a more intensive level of judicial scrutiny or process than lesser penalties." Id. at 169. The Florida Supreme Court's recent opinion in Tillman is clear indication that this type of evidence violates Article I, Sections 9 and 17, of the Florida Constitution in a capital case, even if it is permitted in other cases.

The admission of this evidence violates Article I, Sections 9 and 17, for four interrelated reasons. First, such evidence intrudes into the penalty decision considerations that have no rational bearing on any legitimate aim of capital sentencing. Second, this proof is highly emotional and inflammatory, subverting the reasoned and objective inquiry which the courts have required to guide and regularize the choice between death and lesser punishments. Third, victim impact evidence cannot conceivably be received without opening the door to proof of a similar nature in rebuttal or in mitigation, further upsetting the delicate balance the courts have painstakingly achieved in this area. Fourth, the evidence invites the jury to impose the death sentence on the basis of race, class and other clearly impermissible grounds.

This type of evidence portrays grief-stricken relatives expressing their extreme sorrow, sense of loss, and anger over their bereavement -- often in highly emotional terms. They relate somatic and psychological symptoms of distress attributed by them to the murder, such as physical ailments, effects on pregnancy, lack of appetite, sleeplessness, nightmares, fears, and depression. Frequently, too, the adult survivors describe these conditions in their children. These conditions have no relation to the particular circumstances of the crime or the Defendant. Frequently, family members were not present at the time of the killing and have no relationship with the killer. Hence, they tend to dwell upon general good character traits and achievements of the deceased.

Unintended physical, emotional and psychological after- effects on relatives do not increase the moral blameworthiness of the killer beyond the onus he already bears for committing the murder, and are irrelevant. Allowing this type of evidence would inevitably make the entire system freakish and arbitrary and thus violative of Article I, Sections 9 and 17.

What principle of logic or fairness could deem it relevant that the deceased was a good person and at the same time irrelevant that he or she was bad? If the state is permitted to prove that a victim was educated and hardworking, a defendant should be permitted to show that a victim was a sixth-grade dropout, who never worked a day in his life. Similarly, if it "matters" in the context of capital sentencing that a victim's family loved her, it also "matters" that another victim was hated by surviving relatives -- or, indeed, left no family at all. Does having a victim with a "bad" character somehow become a mitigating circumstance? The admission of this type of evidence inevitably leads to and highlights the race and class status of the victim.

This will be true because the family and friends of the deceased will inevitably tend to be of the same race and class as the deceased. This will inevitably lead to more educated and articulate white, middle class victim family members having more impact on judge and jury than poorer, minority, and less educated victim's family members. Thus, this statute violates Article I, Sections 9 and 17.

The statute at issue here is also unconstitutional under the Eighth and Fourteenth Amendments to the United States Constitution. In Payne v. Tennessee, 111 S.Ct. 2597 (1991), the Court overruled its prior opinion in Booth v. Maryland, in very limited circumstances.

> "We thus hold that if the State chooses to permit the admission of victim impact evidence and prosecutorial evidence on that subject, the Eighth Amendment erects no *per se* bar. A State may legitimately conclude that evidence about the impact of the murder of the victim's family is relevant."

Id. at 2609. The Court also stated that even this generally permitted evidence may be so "unduly prejudicial" that it violates the Due Process Clause of the Fourteenth Amendment. Id. at 2608. There is nothing in Payne that permits evidence concerning such unlimited and undefined

evidence as that designed to show "uniqueness as a human being" and "loss to the community". This goes way beyond the scope of Payne and violates the Eighth and Fourteenth Amendments.

It must also be noted that Section 7 is far broader and vaguer than Fla. Stat., 921.143 which the Florida Supreme Court has held does not apply to capital sentencing. Grossman v. State, 525 So.2d 833, 842 (Fla. 1988). 921.143 limits the testimony to the victim's family. Section 7 states: "such evidence shall be designed to demonstrate the victim's uniqueness as a human being and the resultant loss to the community." This sets absolutely no limit on who can testify or what they can testify to. The phrase "loss to the community" contains no definition of community or limits on its membership. This could lead to anyone testifying or even to death sentencing by petition or public opinion poll. The phrase "uniqueness as a human being" places absolutely no limit on the evidence. This statute clearly does not meet the higher standard or due process in capital cases required by Article I, Sections 9 and 17.

It is clear that a statute, especially a penal statute, must be definite to be valid. Locklin v. Pridgeon, 30 So.2d 102 (Fla. 1947). An attack on a statute's constitutionality must "necessarily succeed" if its language is indefinite. D'Alemberte v. Anderson, 349 So.2d 164 (Fla. 1977). Thus, definiteness is essential to the constitutionality of a statute.

The statute at issue here clearly fails under any standard of definiteness under the United States and Florida Constitutions. The term "community" contains a wide variety of meanings. It can mean geographic community or it can mean people with perceived common interests. See Black's Law Dictionary (containing several different definitions of the term). Even within the concept of a geographic community, it can mean anything from a neighborhood up to the "community of nations." The term "community" when applied to community of interest can mean virtually anything; including common hobbies, jobs, sports teams, political beliefs, religion, race, or ethnicity. One of the most common ways in which the term "community" is in the racial or ethnic sense. The phrases "Black Community", "Hispanic Community," etc., are widely used in the media. Testimony of the loss to members of a racial or ethnic community would clearly be forbidden under the Florida and United States Constitutions. The terms of

Section 7 are vague and overbroad and are capable of a wide variety of clearly impermissible uses. This section gives a defendant virtually no notice of the type of evidence which he is to defend against.

The introduction of this type of evidence would render the entire statutory scheme unconstitutional. The admission of this type of evidence would leave the judge and jury without any guidance as to how to use this evidence. As noted previously, this evidence does not constitute an aggravating circumstance. The jury is told that they are limited to the statutory aggravating circumstances. See Standard Jury Instructions in Criminal Cases. They are then told that they are to weigh this evidence against that presented in mitigation. Id. Victim impact evidence clearly is not mitigating and it is not within the statutory aggravating circumstances. Thus, neither the judge nor the jury is left with any guidance as to how to weigh this evidence.

The admission of this evidence without any guidance as to how to use it is unconstitutional pursuant to the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution and Article I, Sections 2, 9, 16, and 17, of the Florida Constitution. The failure to sufficiently guide discretion, with the possibility of arbitrary and discriminatory results, was a theme running throughout the opinion in Furman v. Georgia, 92 S.Ct. 2726 (1972). The guiding of the judge and jury's discretion was a critical factor to both the Florida Supreme Court and the United States Supreme Court in upholding the facial constitutionality of the Florida statute. Proffitt v. Florida, 96 S.Ct. 2960, 2969 (1976). State v. Dixon, 283 So.2d 1 (Fla. 1973). The United States Supreme Court has reversed several cases for jury instructions which fail to sufficiently define an aggravating circumstance. Espinosa v. Florida, 505 U.S. 1079, 112 S.Ct. 2926 (1992); Shell v. Mississippi, 111 S.Ct. 313 (1990); Maynard v. Cartwright, 108 S.Ct. 1853 (1988), (all three cases reversing for failure to adequately define the "heinous, atrocious, or cruel" aggravating circumstance). In Mills v. Maryland, 108 S.Ct. 1860 (1988), the Court reversed because there was a "substantial possibility" the jury would misunderstand how to consider mitigating evidence. Id. at 1867. Florida juries are given absolutely no guidance how to handle this highly explosive and emotional victim impact evidence. This is far worse than

merely being given inadequate guidance as to an aggravator as in Espinosa, Shell and Maynard. This is unconstitutional under the Florida and United States Constitutions.

8. The prejudice from this evidence would virtually always outweigh its probative value, thus violating Section 90.403, Fla. Stat. This type of evidence is almost always a tearful, emotional recounting of the loss of a friend or loved one. As previously noted, this type of evidence has no relevance to any statutory aggravating factor. It will inevitably shift the judge's and jury's attention away from a reasoned weighing of aggravating and mitigating factors to a naked cry for vengeance.

WHEREFORE, Defendant, hereby moves this Honorable Court to issue its order to prohibit evidence or argument designed to create sympathy for the deceased; including, but not limited to, the impact of the offense on the friends and/or family of the deceased, the loss to the community, the life history of the deceased, or any personal characteristics of the deceased, in the guilt-innocence phase, the penalty phase before the jury, and sentencing before the judge.

I HEREBY CERTIFY that a copy of the above and foregoing has been furnished to the Office of the State Attorney, by hand and/or electronically, this 10 day of December, 2013.

Respectfully submitted,

MATT SHIRK
PUBLIC DEFENDER

BY: _____
Fred C. Gazaleh, #353787
Assistant Public Defender

/slc

(CAP107)

IN THE CIRCUIT COURT, FOURTH JUDICIAL CIRCUIT, IN AND FOR DUVAL COUNTY, FLORIDA.

CASE NO.: 16 2013 CF 005781 AXXX MA

DIVISION: CR-D

STATE OF FLORIDA

VS.

DONALD JAMES SMITH

DEFENDANT'S ALTERNATIVE MOTION TO LIMIT PRESENTATION AND ARGUMENT OF VICTIM IMPACT EVIDENCE TO JUDGE ALONE

Defendant, by and through the undersigned attorney, the Public Defender for the Fourth Judicial Circuit of Florida, hereby moves this Honorable Court to limit the presentation and argument of victim impact evidence to the Judge alone, and not to allow it to be presented to the jury. This alternative motion is filed for the following reasons:

1. In the "Motion to Exclude Evidence or Argument Designed to Create Sympathy for the Deceased (Victim Impact Evidence)," Defendant has asked the Court to exclude victim impact evidence entirely. If that motion is denied, this alternative motion asks the Court to allow victim impact evidence to be presented only to the Court, not to the jury. Defendant believes there is persuasive authority for this procedure.

2. Section 921.141(1), Florida Statutes, provides that, upon conviction of a capital felony, the Court shall conduct a sentencing proceeding before the trial jury to determine whether to sentence the Defendant to life imprisonment or death. At such proceeding, evidence may be presented as to any matter the Court deems relevant to the nature of the crime and the character of the Defendant, and shall include matters relative to aggravating and mitigating circumstances in subsections (5) and (6).

3. Section 921.141(2), Florida Statutes, provides that the relevant jury issues at the sentencing proceeding are: (a) whether sufficient aggravating circumstances exist; (b) whether sufficient mitigating circumstances exist which outweigh the aggravating circumstances found to

exist; and (c) based on these considerations, whether the Defendant should be sentenced to life imprisonment or death. See Kormondy v. State, 703 So.2d 454 (Fla. 1997); and Geralds v. State, 601 So.2d 1157 (Fla. 1992). This section does not provide for consideration by the jury of victim impact evidence, and the standard jury instructions, which explain the weighing process for aggravating and mitigating circumstances, do not give the jury any guidance as to how to consider such evidence. Subsections (5) and (6) list those aggravating and mitigating circumstances the jury may consider. The aggravating circumstances are limited to those contained in subsection (5). See Kormondy, supra; Geralds, supra; and Miller v. State, 373 So. 2d 882 (Fla. 1979).

4. Section 921.141(7), Florida Statutes, provides that once the prosecution produces evidence of one or more aggravating circumstances, the prosecution may introduce, and subsequently argue, victim impact evidence designed to demonstrate the victim's uniqueness as an individual human being and the resultant loss to the community's members by the victim's death. Characterizations and opinions about the crime, the Defendant and the appropriate sentence shall not be permitted as part of victim impact evidence. Section 921.141(7) does not say whether this "victim impact" evidence is to be presented to the jury or the judge.

5. The only way to give effect to subsections (1), (2) and (7) is to allow victim impact evidence to be presented to the judge alone, not to the jury. Presenting such evidence to the jury encourages a violation of the law that the only aggravators are those listed in subsection (5).

6. In Payne v. Tennessee, 501 U.S. 808 (1991), the Supreme Court held that victim impact evidence in capital cases is permissible under the long tradition of criminal law that allows the sentencer to consider the effect the crime had on the victim and the victim's family in determining the proper sentence. The Court further held that where a State determines that victim impact evidence is appropriately considered in a capital sentencing, the Eighth Amendment will not prohibit it. Tennessee's capital sentencing scheme makes the jury, not the judge, the sentencer. *See* Tenn. Code Ann. Section 39-13-204 (1997). For that reason the jury, the sentencer, was allowed to hear the victim impact evidence.

7. Section 90.403, Florida Statutes, provides that relevant evidence is inadmissible if its probative value is substantially outweighed by the danger of confusing the issues or misleading the jury. Because there is no conceivable jury instruction which could explain to the jury how to consider, weigh or apply victim impact evidence, and because such evidence is not relevant to the issues the jury must resolve, such evidence will confuse the issues and mislead the jury in the sentencing phase. See Hodges v. State, 595 So.2d 929 (Fla. 1992).

8. Defendant recognizes the precedents of Windom v. State, 656 So.2d 432 (Fla. 1995); Bonifay v. State, 680 So.2d 413 (Fla. 1996); Damren v. State, 696 So.2d 709 (Fla. 1997); Johnson v. Singletary, 612 So.2d 575 (Fla. 1993); Kennedy v. Singletary, 602 So.2d 1285 (Fla. 1992); State v. Maxwell, 647 So.2d 871 (Fla. 4th DCA 1994), *approved,* Maxwell v. State, 657 So.2d 1157 (Fla. 1995); and Hodges v. State, 595 So.2d 929 (Fla. 1992). However, principles of statutory construction, relevance, materiality and lenity should control the analysis. Defendant believes there is no Florida appellate case in which the courts have analyzed the admissibility of victim impact evidence on all of these bases. *See* Sections 90.104(2), 90.401, 90.403 and 775. 021, Florida Statutes.

9. This issue had been decided in favor of two defendants in circuit court in two Tampa cases: State of Florida v. Ray Lamar Johnston, Case No. 97-13379, Division C (Judge Allen), and State of Florida v. Jonathan Lundin, Case No. 96-17858, Division E (Judge Fuente). However, in the Johnston case, the Second District Court of Appeal reversed the trial court and issued an opinion contrary to Defendant's position in this matter. See State v. Johnston, 743 So. 2d 22 (Fla. 2d DCA 1999).

WHEREFORE, the Defendant respectfully requests this Honorable Court to limit presentation and argument of the victim impact evidence to the Judge alone.

I HEREBY CERTIFY that a copy of the above and foregoing motion has been furnished to the Office of the State Attorney, by hand and/or electronically, this 10 day of December, 2013.

Respectfully submitted,

MATT SHIRK
PUBLIC DEFENDER

BY: _____
Fred C. Gazaleh, #353787
Assistant Public Defender

/slc

(CAP110)

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IN THE CIRCUIT COURT, FOURTH JUDICIAL CIRCUIT, IN AND FOR DUVAL COUNTY, FLORIDA.

CASE NO.: 16 2013 CF 005781 AXXX MA

DIVISION: CR-D

STATE OF FLORIDA

VS.

DONALD JAMES SMITH

MOTION REQUESTING
PROFFER OF "VICTIM IMPACT EVIDENCE"

Comes now the Defendant, by and through his undersigned attorney, the Public Defender for the Fourth Judicial Circuit of Florida, and hereby moves this Honorable Court to require the State to proffer any evidence pertaining to "victim impact" outside the hearing of the jury, for the purpose of making a preliminary determination of its admissibility. In support of this motion, the Defendant would state that:

1. Section 921.141, Florida Statutes, has been amended to allow the State to admit certain types of "victim impact" evidence during the penalty phase of capital cases.

2. This Court has previously denied the Defendant's motions attacking the constitutionality of that amendment and the Defendant's motions to exclude evidence or argument designed to create sympathy for the deceased in penalty phase.

3. Section 921.141(7), Florida Statutes, allows "victim impact" evidence only if it "demonstrates the victim's uniqueness as a human being and the resultant loss to the community's members by the victim's death." Counsel would submit that, prior to allowing such evidence, this Court should make a preliminary determination as to whether the evidence falls within the meaning of Section 921.141(7). Such evidence is highly emotional and inflammatory, and a preliminary determination by the Court as to its admissibility under the statute would be advisable so as to ensure a fair proceeding in this cause.

I HEREBY CERTIFY that a copy of the above and foregoing motion has been furnished to the Office of the State Attorney, by hand and/or electronically, this 10 day of December, 2013.

Respectfully submitted,

MATT SHIRK
PUBLIC DEFENDER

BY: _____
Fred C. Gazalen, #353787
Assistant Public Defender

/slc

(CAP109)

IN THE CIRCUIT COURT, FOURTH JUDICIAL CIRCUIT, IN AND FOR DUVAL COUNTY, FLORIDA.

CASE NO.: 16 2013 CF 005781 AXXX MA

DIVISION: CR-D

STATE OF FLORIDA

VS.

DONALD JAMES SMITH

MOTION TO DECLARE SECTIONS 921.141 AND/OR 921.141(5)(b) FLORIDA STATUTES AND/OR THE STANDARD (5)(b) INSTRUCTION UNCONSTITUTIONAL FACIALLY AND AS APPLIED WITH MEMORANDUM OF LAW

The Defendant moves that this Court enter its order declaring section 921.141 and/or section 921.141(5)(b) Florida Statutes, and the corresponding (5)(b) standard instruction unconstitutional, and precluding their application at bar for the following reasons:

1. The "prior violent felony" aggravating factor of section 921.141(5)(b),[1] and its corresponding standard instruction is unconstitutionally vague and overbroad, has been applied in an overbroad fashion, and in an arbitrary and inconsistent manner.

2. Because this unconstitutional circumstance has been and continues to be used as a basis for imposing a number of death sentences in this state, because its unlawful use makes proportionality review arbitrary, and because its bare terms are all that is required to be read to sentencing juries, section 921.141, Florida Statutes as a whole is unconstitutional. See Herring v. State, 446 So.2d 1049, 1058 (Fla. 1984) (Ehrlich, J., dissenting in part).

3. Section 921.141(5)(b), its standard instruction, and the death penalty as applied in Florida thus violate the fifth, sixth, eighth and fourteenth amendments to the United States Constitution and Article I, Sections 9, 16, 17, 21 and 22 of the Florida Constitution.

4. Further grounds will be argued *ore tenus*.

WHEREFORE, the Defendant moves that this Court enter its order:

---

[1] "The defendant was previously convicted of another capital felony or of a felony involving the use or threat of violence to the person."

1. Declaring section 921.141 and/or section 921.141(5)(b), Florida Statutes unconstitutional, and precluding their application at bar; or

2. Granting such other relief as may be appropriate.

MEMORANDUM OF LAW

This is a capital case in which the prosecution is asking this Court to impose the death penalty. Accordingly, heightened standards of due process apply. See Elledge v. State, 346 So.2d 998 (Fla. 1977) ("heightened" standard of review), Mills v. Maryland, 108 S.Ct. 1860, 1866 (1988) ("In reviewing death sentences, the Court has demanded even greater certainty that the jury's conclusions rested on proper grounds."), Proffitt v. Wainwright, 685 F.2d 1227, 1253 (11th Cir.1982) ("Reliability in the fact finding aspect of sentencing has been a cornerstone of [the Supreme Court's death penalty] decisions."), and Beck v. Alabama, 447 U.S. 625, 638, 100 S.Ct. 2382, 65 L.Ed.2d 392 (1988) (same principles apply to guilt determination). "Where a defendant's life is at stake, the Court has been particularly sensitive to insure that every safeguard is observed." Gregg v. Georgia, 428 U.S. 153, 187, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976) (plurality opinion) (citing cases).

A death penalty statute is unconstitutional if it has "standards so vague that they would fail adequately to channel the sentencing decision patterns of juries with the result that a pattern of arbitrary and capricious sentencing" could occur. Godfrey v. Georgia, 446 U.S., 420, 428, 100 S.Ct. 1759, 64 L.Ed.2d 398 (1980) (plurality opinion). A capital sentencing scheme must genuinely narrow the class of persons eligible for the death penalty and must reasonably justify the imposition of a more severe sentence on the defendant compared to others found guilty of murder. Porter v. State, 564 So.2d 1060, 1063-64 (Fla.1990), Lowenfield v. Phelps, 108 S.Ct. 546, 554 (1988).

Section 775.021(1), Florida Statutes, sets out the rule for construing provisions of the Florida Criminal Code:

> The provisions of this code and offenses defined by other statutes shall be strictly construed; when the language is susceptible of differing constructions, it shall be construed most favorably to the accused.

This principle of strict construction is not merely a maxim of statutory interpretation: it is rooted in fundamental principles of due process. Dunn v. United States, 442 U.S. 100, 112, 99 S.Ct. 2190, 60 L.Ed.2d 743 (1979) (rule "is rooted in fundamental principles of due process which mandate that no individual be forced to speculate, at peril of indictment, whether his conduct is prohibited. [Cit.] Thus, to ensure that a legislature speaks with special clarity when marking the boundaries of criminal conduct, courts must decline to impose punishment for actions that are not '"plainly and unmistakably"' proscribed. [Cit.]"). This principle of strict construction of penal laws applies not only to interpretations of the substantive ambit of criminal prohibitions, but also to the penalties they impose. Bifulco v. United States, 447 U.S. 381, 100 S.Ct. 2247, 65 L.Ed.2d 205 (1980). It applies to Florida capital proceedings. Trotter v. State, 576 So.2d 691, 694 (Fla.1990) (sentence of imprisonment aggravating circumstance).

Great care is needed in construing aggravating circumstances. In Maynard v. Cartwright, 108 S.Ct. 1853, 1857-58 (1988), the Court wrote:

> The difficulty with the State's argument is that it presents a Due Process Clause approach to vagueness and fails to recognize the rationale of our cases construing and applying the Eighth Amendment. Objections to vagueness under the Due Process Clause rest on the lack of notice, and hence may be overcome in any specific case where reasonable persons would know that their conduct is at risk. Vagueness challenges to statutes not threatening First Amendment interests are examined in light of the facts of the case at hand; the statute is judged on an as-applied basis. [Cit.] Claims of vagueness directed at aggravating circumstances defined in capital punishment statutes are analyzed under the Eighth Amendment and characteristically assert that the challenged provision fails adequately to inform juries what they must find to impose the death penalty and as a result leaves them and appellate courts with the kind of open-ended discretion which was held invalid in Furman v. Georgia, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972).

The Court held in Maynard that jury instructions which violate these principles are unconstitutional.

Substantive due process and equal protection principles require a provision of law, including criminal statutes, be rationally related to its purpose. Reed v. Reed, 404 U.S. 71

(1971); Potts v. State, 526 So.2d 104 (Fla. 4th DCA 1987), aff'd., State v. Potts, 526 So.2d 63 (Fla. 1988). The prior violent felony circumstance, as it has been interpreted, does not satisfy any of these constitutional concerns.

The first problem with the Florida Supreme Court's application of the circumstance is that it does not require the "prior" conviction be used as a basis for imposing a death sentence to be final. Even a conviction pending on appeal may be used as a circumstance. See, e.g., Ruffin v. State, 397 So.2d 277, 282-83 (Fla. 1981); Peek v. State, 395 So.2d 492, 499 (Fla. 1981). Such an interpretation violates the due process and equal protection rights to an appeal and the eighth amendment narrowing requirement and proscription that death sentences "cannot be predicated on mere 'caprice' or on 'factors that are constitutionally impermissible or totally irrelevant to the sentencing process,'" or on "materially inaccurate" information. Johnson v. Mississippi, 108 S.Ct. 1981, 1986, 1989 (1988) (reversing affirmance of death sentence where sentence based on prior violent felony which was later vacated).

The second problem is the expansion of the circumstance to permit contemporaneous violent felony convictions to be treated as a "prior violent felony". Florida permits any conviction prior to sentencing to be treated as a prior violent felony, even if that conviction arises from the same criminal episode as the capital felony, and even if the capital and other charges are tried together. Lucas v. State, 376 So.2d 1149, 1152 (Fla. 1979). While the Court has limited the contemporaneous conviction gloss on the circumstance to preclude its use where there is a single victim, Wasko v. State, 505 So.2d 1314, 1317-18 (Fla. 1987), that limitation does not save the circumstance. The Court's interpretation is not related to the purpose of the circumstance -- to punish more severely those who have committed violent crimes in the past. "[T]he individualized assessment of the appropriateness of the death penalty is a moral inquiry into the culpability of the defendant." California v. Brown, 107 S.Ct. 837, 841 (1987) (O'Connor, J., concurring). Use of a contemporaneous conviction ignores the legitimate inquiry into whether a person convicted of first degree murder has a history of violence, and exposes those who have no history of conviction for a violent felony to a greater likelihood of receiving death. The broad application of the circumstance thus fails to "genuinely narrow" the class of death eligible, is

"wholly unrelated to the blameworthiness of the particular defendant," and relies on conduct that is "irrelevant to the sentencing process." Zant v. Stephens, 462 U.S. 862, 885 (1983).

The standard instruction is unconstitutionally vague, and similarly misleads jurors into considering unlawful and constitutionally irrelevant factors in deciding whether death is the appropriate sentence. The standard instructions instruct the trial judge as follows:

> Since the character of a crime involving violence or threat of violence is a matter of law, when the State offers evidence under aggravating circumstance "2" the court should instruct the jury of the following, as applicable:
> (Give a or b as applicable):
>
> a. The crime of (previous crime) is a capital felony.
> b. The crime of (previous crime) is a felony involving the [use] [threat] of violence to another person.

The trial court is thus required to direct the sentencing jurors to find a contemporaneous violent felony is actually "prior" under the Florida Supreme Court's case law, an instruction which is misleading, and unconstitutional, as discussed above. The (5)(b) standard instruction is thus also unconstitutional for the same reasons as is the circumstance, under the teachings of Maynard.

WHEREFORE, the defense hereby respectfully requests the court grant this motion.

I HEREBY CERTIFY that a copy of the above and foregoing Motion has been furnished to the Office of the State Attorney, by hand and/or electronically, this 10 day of December, 2013.

Respectfully submitted,

MATT SHIRK
PUBLIC DEFENDER

BY: _____
Fred C. Gazaleh, #353787
Assistant Public Defender

/slc
(CAP089)

IN THE CIRCUIT COURT, FOURTH JUDICIAL CIRCUIT, IN AND FOR DUVAL COUNTY, FLORIDA.

CASE NO.: 16 2013 CF 005781 AXXX MA

DIVISION: CR-D

STATE OF FLORIDA

VS.

DONALD JAMES SMITH

MOTION TO DECLARE SECTION 921.141(5)(d) FLORIDA STATUTES UNCONSTITUTIONAL AS WRITTEN AND APPLIED WITH MEMORANDUM OF LAW

The Defendant moves for an Order declaring §921.141(5)(d), Fla. Stat., unconstitutional based on violations of the Fifth, Sixth, Eighth and Fourteenth Amendments to the United State Constitution and article I, §§2, 9, 16, 17 and 22 of the Florida Constitution and various international treaties based on the following:

1. The Defendant is charged with committing first-degree murder.

2. The State has filed notice that it seeks imposition of capital punishment

3. To be eligible for capital punishment in Florida a person must be convicted of first-degree murder under §782.04, Fla.Stat., and there must be "sufficient aggravating circumstances" of *only* those factors listed in §921.141(5), Fla.Stat., to justify imposition of capital punishment. §921.141, Fla.Stat..

4. In that regard, one of the statutory aggravating circumstances is §921.141(5)(d), Fla.Stat., which provides as follows:

> (d) The capital felony was committed while the defendant was engaged, or was an accomplice, in the commission of, or an attempt to commit, or flight after committing or attempting to commit, any robbery, sexual battery, aggravated child abuse, abuse of an elderly or disabled adult resulting in great bodily harm, permanent disability, or permanent disfigurement, arson, burglary, kidnapping, aircraft piracy or unlawful throwing, placing, or discharging of a destructive device or bomb.

5. This statutory aggravating circumstance is unconstitutional as written under the Constitution of Florida and the United States Constitution, because the least culpable form of first-degree murder is being used as the sole basis to impose capital punishment in Florida in a manner that denies Due Process and a fair jury trial. As written and applied, §921.141(5)(d), Fla. Stat. violates article I, sections 2, 9, 16(a), 17, 21 and 22 of the Florida Constitution, and the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution, as set forth in the memorandum of law that accompanies this motion. Further, this factor denies due process guaranteed by international agreements and treaties to which the United States is a party, including but not limited to the International Covenant on Civil and Political Rights, Safeguards Guaranteeing Protection of the Rights of Those Facing the Death Penalty, and the American Convention on Human Rights.

MEMORANDUM OF LAW

The United States Constitution and the Florida Constitution guarantee *minimum* protections that must be provided by the States when a citizen is prosecuted by the government. Specifically, the Fifth Amendment to the United States Constitution directs:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

These rights apply to Florida and this Defendant. Malloy v. Hogan, 378 U.S. 1 (1964). Rights associated with the Fifth Amendment not expressly mentioned also apply here. See Israel v. State, 837 So.2d 381 (Fla. 2002), citing Snyder v. Massachusetts, 291 U.S. 97 (1937). The right to indictment by a grand jury is also implicated in that there can be no more "infamous" crime than a capital crime. But see, Hurtado v. California, 110 U.S. 516 (1884). To the extent that Florida has a State constitutional guarantee for indictment of a capital crime, the denial of that State right denies due process of law in violation of the Fourteenth Amendment to the United States Constitution.

The Sixth Amendment to the United States Constitution states:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

The Sixth Amendment to the United States Constitution applies to Florida and to this Defendant through operation of the Fourteenth Amendment to the United States Constitution. These rights "are constitutional protections of surpassing importance: the proscription of any deprivation of liberty without 'due process of law,'" Amdt. 14, and the guarantee that '[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury,' Amdt. 6. Taken together, these rights indisputably entitle a criminal defendant to "a jury determination that [he] is guilty of every element of the crime with which he is charged, beyond a reasonable doubt." Apprendi v. New Jersey, 530 U.S. 466, 476-477 (2000) (Citations omitted). See Gideon v. Wainwright, 372 U.S. 335 (1963) (right to counsel); Crawford v. Washington, 541 U.S. 36 (2004) (right to confront adverse witnesses); Waller v. Georgia, 467 U.S. 39, 44-48 (1984) (right to public trial); Ring v. Arizona, 536 U.S. 584 (2002) (right to jury determination of facts authorizing imposition of the death penalty); In re Winship,397 U.S. 358 (1970) (burden on the State to prove guilt beyond a reasonable doubt); Duncan v. Louisiana, 391 U.S. 145 (1968) (same); Mullaney v. Wilbur, 421 U.S. 684 (1975).

The Eighth Amendment to the United States Constitution provides "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." The Eighth Amendment applies to Florida and this Defendant through article I, section 17 of the Florida Constitution. See also, Cooper Industries, Inc. v. Leatherman Tool Group, Inc., 532 U.S. 424, 433-434 (2001) ("Despite the broad discretion that States possess with respect to the imposition of criminal penalties and punitive damages, the Due Process Clause of the Fourteenth Amendment to the Federal Constitution imposes substantive limits on that discretion. That Clause makes the Eighth Amendment's prohibition against excessive fines and cruel and unusual

punishments applicable to the States. *Furman v. Georgia*, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972) (*per curiam*).") (Footnote omitted).

The Eighth Amendment precludes excessive forms of punishment, e.g., Roper v. Simmons, 543 U.S 551 (2005) (death penalty for person less than 18 years old unconstitutional); Atkins v. Virginia, 536 U.S. 304 (2002) (death penalty impermissible for intellectually disabled); Enmund v. Florida, 458 U.S. 782, 787, 801 (1982) (Eighth and Fourteenth Amendments prohibit death penalty for one who neither took life, attempted to take life, nor intended to take life); Louisiana ex rel. Francis v. Resweber, 329 U.S. 459, 463 (1947) ("The traditional humanity of modern Anglo-American law forbids the infliction of unnecessary pain in the execution of the death sentence."), and cruel and unusual punishments such as arbitrary and capricious imposition of capital punishment. Furman v. Georgia, 408 U.S. 238 (1972).

The Fourteenth Amendment to the United States Constitution provides:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

The Fourteenth Amendments applies the basic constitutional guarantees to the States, including Florida, and otherwise compels that State's provide minimal due process protections to all citizens prosecuted by the government, including this Defendant.

The guarantees found in Florida's Constitution include article I, sections 2, 9, 15(a), 16, 17 and 22, article II, section 3. To the extent that the State of Florida violates the express mandates of its own constitution, Due Process of law under Clause 1 of the Fourteenth Amendment to the United States Constitution is violated. More specifically, article I, section 2 of the Florida Constitution enumerates the following basic rights: "All natural persons, female and male alike, are equal before the law and have inalienable rights, among which are the right to enjoy and defend life and liberty, to pursue happiness, to be rewarded for industry, and to acquire, possess and protect property; except that the ownership, inheritance, disposition and possession of real property by aliens ineligible for citizenship may be regulated or prohibited by law. No person shall be deprived of any

right because of race, religion, national origin, or physical disability." Article I, section 9 of the Florida Constitution provides that "No person shall be deprived of life, liberty or property without due process of law, or be twice put in jeopardy for the same offense, or be compelled in any criminal matter to be a witness against oneself." Article I, section 15(a), Florida Constitution, provides that "No person shall be tried for a capital crime without presentment or indictment by a grand jury, or for other felony without such presentment or indictment or an information under oath filed by the prosecuting officer of the court, except persons on active duty in the militia when tried by courts martial." Article I, section 16(a) of the Florida Constitution states:

> In all criminal prosecutions the accused shall, upon demand, be informed of the nature and cause of the accusation, and shall be furnished a copy of the charges, and shall have the right to have compulsory process for witnesses, to confront at trial adverse witnesses, to be heard in person, by counsel or both, and to have a speedy and public trial by an impartial jury nit he county were the crime was committed. If the county is not known, the indictment or information may charge venue in two or more counties conjunctively and proof that the crime was committed in that area shall be sufficient; but before pleading the accused may elect in which of those counties the trial will take place. Venue for prosecution of crimes committed beyond the boundaries of the state shall be fixed by law.

Article I, section 17 of the Florida Constitution has now been amended to reflect the same considerations of the Eighth Amendment to the United States Constitution, such that it probably fails to provide protections not already conferred by the Eighth Amendment. Article I, section 22 of the Florida Constitution specifies that, "The right of trial by jury shall be secure to all and remain inviolate. The qualifications and the number of jurors, not fewer than six, shall be fixed by law." In that regard, Section 913.13, Florida Statutes, expressly states that, "Twelve persons shall constitute a jury to try all capital cases, and six persons shall constitute a jury to try all other criminal cases."

Finally, article II, section 3 of the Florida Constitution prohibits a person in one branch of government from exercising powers belonging to another branch of government. If the substance of Florida's death penalty scheme is coming from the Supreme Court of Florida rather the from the Florida Legislature, this constitutional provision is being denied, and a violation of the Fourteenth Amendment to the United States Constitution occurs. See Barnhill v. State, 834 So.2d 836, 849

(Fla. 2002) (judge cannot delete the term "extreme" from the jury instruction regarding a homicide committed while under "extreme mental or emotional distress" due to separation of powers rule).

Florida's death penalty scheme:

In Florida, "[t]he *only* matters that may be considered in aggravation are those set out in the death penalty statute." Zack v. State, 911 So.2d 1190, 1208 (Fla. 2005) (Emphasis added); See §921.141(5), Fla.Stat. (2005) ("Aggravating circumstances *shall* be limited to the following"). In Florida, the aggravating circumstances set forth in §921.141(5), Fla.Stat., actually "define" the crimes for which capital punishment may be imposed. State v. Dixon, 283 So.2d 1, 10 (Fla.1973). A defendant is *not* eligible for the death penalty if there are no statutory aggravating circumstances because the Florida death penalty statutory scheme expressly requires that "*sufficient* aggravating circumstances" exist before a defendant is eligible for imposition of capital punishment. §§921.141 (2) & (3), Fla.Stat.. (Emphasis added). Unlike some states where a defendant's eligibility for the death penalty is determined based on a unanimous jury finding of a single aggravating factor, Florida expressly requires that "sufficient aggravating circumstances" exist before a death penalty may be imposed. Therefore, each statutory aggravating circumstance upon which imposition of capital punishment rests is a component of whether a defendant is "eligible" for capital punishment in Florida. A jury could find that one or more statutory circumstances are not "sufficient" to justify imposition of capital punishment by the judge. A defendant is entitled to a unanimous jury determination beyond a reasonable doubt as to whether "sufficient aggravating circumstances" exist that legally and factually authorize capital punishment. In Florida there is no determination made by the jury that a defendant is eligible for the death penalty, and trial courts are forbidden from using a verdict form that accommodates the Sixth Amendment right to such a jury determination. State v. Steele, 31 FLW S74 (Fla. October 12, 2005).

The Florida Legislature passed laws in the wake of Furman v. Georgia, 408 U.S. 238 (1977) in an effort to accommodate the citizens' constitutional rights and yet establish a constitutional death penalty scheme. Some states, such as Louisiana, enacted statutes that make a defendant eligible for capital punishment when the jury finds beyond a reasonable doubt that only one statutory aggravating circumstance exists. E.g., Lowenfeld v. Phelps, 284 U.S. 231, 244 (1988)

(Approving La.Code Crim.Proc.Ann., Art. 905.3 (West 1984), which states, "A sentence of death shall not be imposed unless the jury finds beyond a reasonable doubt that at least one statutory aggravating circumstance exists and, after consideration of any mitigating circumstances, recommends that the sentence of death be imposed.").

Florida's capital sentencing scheme[1], however, is substantially different. It requires the existence of a predicate conviction for first-degree murder under §782.04, Fla.Stat., and "*sufficient* aggravating circumstances" listed in §921.141(5), Fla.Stat., for a person to be eligible for capital punishment. The determination of whether a death sentence is actually imposed for a defendant who is eligible for the death penalty then depends on weighing the factors contained in §921.141(5), Fla. Stat., against the factors set forth in §921.141(6), Fla.Stat.. The jury does not render an express finding that there are sufficient aggravating circumstances for imposition of capital punishment.

The predicate conviction for a "capital" offense occurs in Florida when a jury finds the defendant guilty of first-degree murder, defined by the Florida Legislature as follows:

> **782.04. Murder**
>
> (1)(a) The unlawful killing of a human being:
>
> 1. When perpetrated from a premeditated design to effect the death of the person killed or any human being;
>
> 2. When committed by a person engaged in the perpetration of, or in the attempt to perpetrate, any: a. Trafficking offense prohibited by § 893.135(1), b. Arson, c. Sexual battery, d. Robbery, e. Burglary, f. Kidnapping, g. Escape, h. Aggravated child abuse, i.

[1] Florida's sentencing scheme based on Section 921.141, Fla.Stat. (1973), received initial approval in Proffitt v. Florida, 428 U.S. 242 (1976). Since then, several unconstitutional practices implemented under that statute have been more fully appreciated and expressly condemned by the United State Supreme Court. E.g., Espinosa v. Florida, 505 U.S. 1079, 1082 (1992) ("We merely hold that, if a weighing State decides to place capital sentencing authority in two actors rather than one, neither actor must be permitted to weigh invalid aggravating circumstances."); Hitchcock v. Dugger, 481 U.S. 393, 398 (1987) ("We think it could not be clearer that . . . the proceedings did not comport with the requirements of Skipper v. South Carolina, Eddings v. Oklahoma, and Lockett v. Ohio) (Citations omitted); Gardner v. Florida, 430 U.S. 349, 362 (1977) (We conclude that petitioner was denied due process of law when the death sentence was imposed, at least in part, on the basis of information which he had no opportunity to deny or explain.").

> Aggravated abuse of an elderly person or disabled adult, j. Aircraft piracy, k. Unlawful throwing, placing, or discharging of a destructive device or bomb, *l.* Carjacking, m. Home-invasion robbery, n. Aggravated stalking, *o.* Murder of another human being, p. Resisting an officer with violence to his or her person, q. Felony that is an act of terrorism or is in furtherance of an act of terrorism; or
>
> 3. Which resulted from the unlawful distribution of any substance controlled under § 893.03(1), cocaine as described in § 893.03(2)(a)4., or opium or any synthetic or natural salt, compound, derivative, or preparation of opium by a person 18 years of age or older, when such drug is proven to be the proximate cause of the death of the user,
>
> is murder in the first degree and constitutes a capital felony, punishable as provided in § 775.082.
>
> (b) In all cases under this section, the procedure set forth in §921.141 shall be followed in order to determine sentence of death or life imprisonment.

At the conclusion of the guilt phase of trial, the jury must return a unanimous verdict of guilt finding that the defendant committed first-degree murder to obtain a conviction for that crime based on a felony-murder theory, a premeditated-murder theory, or both. A conviction for first-degree murder, however, does NOT render a defendant eligible for the death penalty because in Florida the death penalty cannot be imposed in the absence of "*sufficient* aggravating circumstances."

Specifically, the eligibility of a defendant to receive the death penalty in Florida is based on a determination that "sufficient aggravating circumstances" exist to impose capital punishment as required under the procedure set forth in §921.141, Fla. Stat.:

> **921.141. Sentence of death or life imprisonment for capital felonies; further proceedings to determine sentence**
>
> **(1) Separate proceedings on issue of penalty.**--Upon conviction or adjudication of guilt of a defendant of a capital felony, the court shall conduct a separate sentencing proceeding to determine whether the defendant should be sentenced to death or life imprisonment as authorized by §775.082. The proceeding shall be conducted by the trial judge before the trial jury as soon as practicable. If, through impossibility or inability, the trial jury is

unable to reconvene for a hearing on the issue of penalty, having determined the guilt of the accused, the trial judge may summon a special juror or jurors as provided in chapter 913 to determine the issue of the imposition of the penalty. If the trial jury has been waived, or if the defendant pleaded guilty, the sentencing proceeding shall be conducted before a jury impaneled for that purpose, unless waived by the defendant. In the proceeding, evidence may be presented as to any matter that the court deems relevant to the nature of the crime and the character of the defendant and shall include matters relating to any of the aggravating or mitigating circumstances enumerated in subsections (5) and (6). Any such evidence which the court deems to have probative value may be received, regardless of its admissibility under the exclusionary rules of evidence, provided the defendant is accorded a fair opportunity to rebut any hearsay statements. However, this subsection shall not be construed to authorize the introduction of any evidence secured in violation of the Constitution of the United States or the Constitution of the State of Florida. The state and the defendant or the defendant's counsel shall be permitted to present argument for or against sentence of death.

(2) Advisory sentence by the jury.--After hearing all the evidence, the jury shall deliberate and render an advisory sentence to the court, based upon the following matters:

(a) ***Whether sufficient aggravating circumstances exist as enumerated in subsection*** (5);

(b) Whether sufficient mitigating circumstances exist which outweigh the aggravating circumstances found to exist; and

(c) Based on these considerations, whether the defendant should be sentenced to life imprisonment or death.

(3) Findings in support of sentence of death.--Notwithstanding the recommendation of a majority of the jury, the court, after weighing the aggravating and mitigating circumstances, shall enter a sentence of life imprisonment or death, but if the court imposes a sentence of death, it shall set forth in writing its findings upon which the sentence of death is based as to the facts:

(a) **That sufficient aggravating circumstances exist as enumerated in subsection** (5), and

(b) That there are insufficient mitigating circumstances to outweigh the aggravating circumstances.

In each case in which the court imposes the death sentence, the determination of the court shall be supported by specific written findings of fact based upon the circumstances in subsections (5) and (6) and upon the records of the trial and the sentencing proceedings. If the court does not make the findings requiring the death sentence within 30 days after the rendition of the judgment and sentence, the court shall impose sentence of life imprisonment in accordance with § 775.082.

(4) Review of judgment and sentence.--The judgment of conviction and sentence of death shall be subject to automatic review by the Supreme Court of Florida and disposition rendered within 2 years after the filing of a notice of appeal. Such review by the Supreme Court shall have priority over all other cases and shall be heard in accordance with rules promulgated by the Supreme Court.

(5) Aggravating circumstances.--Aggravating circumstances shall be limited to the following:

(a) The capital felony was committed by a person previously convicted of a felony and under sentence of imprisonment or placed on community control or on felony probation.

(b) The defendant was previously convicted of another capital felony or of a felony involving the use or threat of violence to the person.

(c) The defendant knowingly created a great risk of death to many persons.

(d) The capital felony was committed while the defendant was engaged, or was an accomplice, in the commission of, or an attempt to commit, or flight after committing or attempting to commit, any: robbery; sexual battery; aggravated child abuse; abuse of an elderly person or disabled adult resulting in great bodily harm, permanent disability, or permanent disfigurement; arson; burglary; kidnapping; aircraft piracy; or unlawful throwing, placing, or discharging of a destructive device or bomb.

(e) The capital felony was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody.

(f) The capital felony was committed for pecuniary gain.

(g) The capital felony was committed to disrupt or hinder the lawful exercise of any governmental function or the enforcement of laws.

(h) The capital felony was especially heinous, atrocious, or cruel.

(i) The capital felony was a homicide and was committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification.

(j) The victim of the capital felony was a law enforcement officer engaged in the performance of his or her official duties.

(k) The victim of the capital felony was an elected or appointed public official engaged in the performance of his or her official duties if the motive for the capital felony was related, in whole or in part, to the victim's official capacity.

(*l*) The victim of the capital felony was a person less than 12 years of age.

(m) The victim of the capital felony was particularly vulnerable due to advanced age or disability, or because the defendant stood in a position of familial or custodial authority over the victim.

(n) The capital felony was committed by a criminal street gang member, as defined in §874.03.

(*o*) The capital felony was committed by a person designated as a sexual predator pursuant to § 775.21 or a person previously designated as a sexual predator who had the sexual predator designation removed.

(6) Mitigating circumstances.--Mitigating circumstances shall be the following:

(a) The defendant has no significant history of prior criminal activity.

(b) The capital felony was committed while the defendant was under the influence of extreme mental or emotional disturbance.

(c) The victim was a participant in the defendant's conduct or consented to the act.

(d) The defendant was an accomplice in the capital felony committed by another person and his or her participation was relatively minor.

(e) The defendant acted under extreme duress or under the substantial domination of another person.

(f) The capacity of the defendant to appreciate the criminality of his or her conduct or to conform his or her conduct to the requirements of law was substantially impaired.

(g) The age of the defendant at the time of the crime.

(h) The existence of any other factors in the defendant's background that would mitigate against imposition of the death penalty.

(7) Victim impact evidence.--Once the prosecution has provided evidence of the existence of one or more aggravating circumstances as described in subsection (5), the prosecution may introduce, and subsequently argue, victim impact evidence to the jury. Such evidence shall be designed to demonstrate the victim's uniqueness as an individual human being and the resultant loss to the community's members by the victim's death. Characterizations and opinions about the crime, the defendant, and the appropriate sentence shall not be permitted as a part of victim impact evidence.

(8) Applicability.--This section does not apply to a person convicted or adjudicated guilty of a capital drug trafficking felony under § 893.135.

(Footnote omitted) (Emphasis added). Under the current procedure, the jury does not render a verdict as to whether there are "*sufficient* aggravating circumstances" to justify imposition of capital punishment. Instead the jury provides a recommendation to the judge as to what sentence

should be imposed. The judge is precluded from using a verdict form other than the standard jury form. State v. Steele, 31 FLW S74 (Fla. October 12, 2005).

This procedure denies the right to a jury trial. Florida law requires a written waiver of the right to a jury. Fla.R.Crim.P. 3.260. See Solis v. State, 801 So.2d 208, 209 (Fla. 4th DCA 2001). There is a presumption against the waiver of a constitutional right, and the waiver of the right to a jury trial guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and article I, section 22 of the Florida Constitution otherwise requires a knowing, voluntary and express waiver to be effective. Brookhart v. Janis, 394 U.S. 1 (1966); Johnson v. Zerbst, 304 U.S. 458 (1938).

Application of Law to Florida's Scheme

At the onset, it must be noted that the State has the burden to create law that comports with the requirements of the United States Constitution:

> If the state wishes to authorize capital punishment it has a constitutional responsibility to *tailor* and *apply* its law in a manner that avoids the arbitrary and capricious infliction of the death penalty. Part of a state's responsibility in this regard is to define the crimes for which death may be the sentence in a way that obviates "standardless [sentencing] discretion." (citations omitted). It must channel the sentencer's discretion by "clear and objective" standards and then "make rationally reviewable the process for imposing a sentence of death."

Godfrey v. Georgia, 446 U.S. 420, 428 (1980) (Emphasis added). In the context of capital punishment, greater due process requirements are required than the constitution commands for lesser punishments. See Amendments to Fla.R.Crim.P. & Fla.R.App.P., 875 So.2d 563, 568 (Fla. 2004) (Cantero, J., concurring) ("As we have repeatedly recognized, 'death is different.'"); Chamberlain v. State, 881 So.2d 1087, 1108 (Fla. 2004) ("On this issue as on many others, death is different."). Death is different because of the "acute need" for reliability in carrying out a sentence unique in its severity and finality:

> "[D]eath is a different kind of punishment from any other which may be imposed in this country. . . . From the point of view of the defendant, it is different in both its severity and its finality. From the point of view of society, the action of the sovereign in taking the life of one of its citizens also differs dramatically from

> any other legitimate state action. It is of vital importance to the defendant and to the community that any decision to impose the death sentence be, and appear to be, based on reason rather than caprice or emotion." (Citation omitted).

Gardner v. Florida, 430 U.S. 349, 357 (1977).

The "acute need for reliable decision making" was recognized early-on by the United States Supreme Court:

> . . . The penalty phase of a capital trial is undertaken to assess the gravity of a particular offense and to determine whether it warrants the ultimate punishment; it is in many respects a continuation of the trial on guilt or innocence of capital murder. "*Because the death penalty is unique "in both its severity and its finality,"* [Gardner v. Florida, 430 U.S. 349] at 357, 97 S.Ct., at 1204, *we have recognized an acute need for reliability in capital sentencing proceedings.* See Lockett v. Ohio, 438 U.S. 586, 604, 98 S.Ct. 2954, 2964, 57 L.Ed.2d 973 (1978) (opinion of Burger, C.J.) (stating that the "qualitative difference between death and other penalties calls for a greater degree of reliability when the death sentence is imposed"); see also Strickland v. Washington, 466 U.S. 668, 704, 104 S.Ct. 2052, 2073, 80 L.Ed.2d 674 (1984) (Brennan, J., concurring in part and dissenting in part) ("[W]e have consistently required that capital proceedings be policed at all stages by an especially vigilant concern for procedural fairness and for the accuracy of factfinding").

Monge v. California, 524 U.S. 721, 731-732 (1998) (Emphasis added). See Deck v. Missouri, 544 U.S. 622, (2005) (slip op., at 10) (same); Arvelaez v. Butterworth, 738 So.2d 326, 326-27 (Fla.1999) ("We acknowledge we have a constitutional responsibility to ensure the death penalty is administered in a fair, consistent *and reliable manner* . . . ") (Emphasis added).

> To insure that the death penalty is indeed imposed on the basis of "reason rather than caprice or emotion," we have invalidated procedural rules that tended to diminish the reliability of the sentencing determination. The same reasoning must apply to rules that diminish the reliability of the guilt determination. Thus, if the unavailability of a lesser included offense instruction enhances the risk of an unwarranted conviction, Alabama is constitutionally prohibited from withdrawing that option from the jury in a capital case.

Beck v. Alabama, 447 U.S. 625, 637-638 (1980).

Unlike some mandatory sanctions, state legislatures cannot require "automatic" imposition of capital punishment. Sumner v. Shuman, 483 U.S. 66 (1987); Woodson v. North Carolina, 428 U.S. 280 (1976). Defendants must be given notice and the opportunity to address all evidence upon which imposition of capital punishment is based. Gardner v. Florida, 430 U.S. 349 (1977). The sentencing body cannot be precluded from considering and giving effect to relevant mitigation. See Smith v. Texas, 543 U.S. 37 (2004) (procedure unconstitutional where jury asked to answer "yes" or "no" to two questions in a manner where valid mitigating evidence was not considered); Skipper v. South Carolina, 476 U.S. 1 (1976) (sentencing body cannot be precluded from considering defendant's potential for rehabilitation); Penry v. Lynaugh, 492 U.S.302 (1989) (sentencing body cannot be precluded from considering defendant's intellectual disability as mitigating circumstance).

The analysis to be applied by the courts is far more complex when a death penalty statutes is being analyzed, for not only must the statute satisfy ordinary due process requirements, but it also must satisfy an Eighth Amendment analysis that compels heightened due process to ensure reliable sentencing:

> The difficulty with the State's argument is that it presents a Due Process Clause approach to vagueness and fails to recognize the rationale of our cases construing and applying the Eighth Amendment. Objections to vagueness under the Due Process Clause rest on the lack of notice, and hence may be overcome in any specific case where reasonable persons would know that their conduct is at risk. Vagueness challenges to statutes not threatening First Amendment interests are examined in light of the facts of the case at hand; the statute is judged on an as-applied basis. [Cit.] Claims of vagueness directed at aggravating circumstances defined in capital punishment statutes are analyzed under the Eighth Amendment and characteristically assert that the challenged provision fails adequately to inform juries what they must find to impose the death penalty and as a result leaves them and appellate courts with the kind of open-ended discretion which was held invalid in Furman v. Georgia, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972).

Maynard v. Cartwright, 486 U.S. 356, 361-362 (1988).

Due Process and fundamental fairness considerations under the Fifth and Fourteenth Amendments to the United States Constitution and article I, sections 2 and 9 of the Florida

Constitution are inextricably tied to the heightened reliability demanded by the Eighth Amendment to the United States Constitution. See Caldwell v. Mississippi, 472 U.S. 320, 329 (1985) ("This Court has repeatedly said that under the Eighth Amendment 'the qualitative difference of death from all other punishments requires a correspondingly greater degree of scrutiny of the capital sentencing determination.'") (Citation omitted - emphasis added). Aside from heightened requirements of reliability required as a component of Due Process, the Eighth Amendment proscription against cruel and unusual punishments precludes capital punishment where imposition of the death penalty is contrary to contemporary standards of decency. See Roper v. Simmons, 543 U.S 551 (2005) (death penalty for person less than 18 years old unconstitutional); Atkins v. Virginia, 536 U.S. 304 (2002) (death penalty impermissible for intellectually disabled); Stanford v. Kentucky, 492 U.S. 361 (1989) (death penalty unconstitutional for person under seventeen years of age); Tison v. Arizona, 481 U.S. 137 (1987) (death penalty unconstitutional for person who lacks sufficient moral culpability).

In summary, a court's "duty to search for constitutional error with painstaking care is never more exacting than it is in a capital case." Burger v. Kemp, 483 U.S. 776, 785 (1987). Arbitrary and capricious imposition of capital punishment is forbidden. Furman v. Georgia, 408 U.S. 238 (1977). "Where discretion is afforded a sentencing body on a matter so grave as the determination of whether a human life should be taken or spared, that discretion must be suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action." Gregg v. Georgia, 428 U.S. 153, 189 (1976) (plurality opinion).

Florida's statute is unique, in that in Florida a defendant convicted of first-degree murder *cannot* receive the death penalty in the absence of "*sufficient* aggravating circumstances." Section 921.141(2) & (3), Fla.Stat.. Holdings by the United States Supreme Court make clear that the statutory aggravating circumstances that authorize imposition of capital punishment are entitled to the full protections of the Fifth, Sixth and Fourteenth Amendments to the United States Constitution. See Shepard v. United States, 544 U.S. 13 (2005); United States v. Booker, 543 U.S. 220 (2005), Ring v. Arizona, 536 U.S. 584 (2002), Apprendi v. New Jersey, 530 U.S. 466 (2001); Jones v. United States, 526 U.S. 227 (1999); Gardner v. Florida, 430 U.S. 349, 357 (1977). But see, Winkles v. State, 894 So.2d 842 (Fla. 2005); Bottoson v. Moore, 833 So.2d 693, 732-733 (Fla. 2002). Thus, since in Florida a defendant's eligibility for capital punishment is

statutorily based on a factual and legal determination that there are "*sufficient* aggravating circumstances," due process demands that the jury make that determination beyond a reasonable doubt. Further, because Florida requires a unanimous jury determination before a verdict can be rendered, the determination that there are "sufficient aggravating circumstances" to render a defendant eligible for the death penalty must be made by a unanimous jury. Anything less than a unanimous jury denies due process under the Fourteenth Amendment to the United States Constitution and is otherwise an arbitrary and irrational diminution of the standard of proof that violates the due process and reliability requirements commanded by the Eighth Amendment to the United States Constitution.

At first blush, the *individual* components that make up the "*sufficient* aggravating circumstances" may not be entitled to Sixth Amendment protection if the analysis set forth in Schad v. Arizona, 501 U.S. 624, 645 (1991) is applied. Even so, a Sixth Amendment right definitely attaches for the jury to make the determination beyond a reasonable doubt that there are "*sufficient* aggravating circumstances" because that is the standard that was set by the State Legislature. The absence of an itemized verdict form becomes problematic insofar as determination of prejudicial versus harmless error when improper aggravating circumstances are used – circumstances that authorize the sentencer to consider the exercise of a constitutional right in determining whether a citizen is eligible for capital punishment, see Griffin v. U.S., 502 U.S. 46, 54 (1991); Stromberg v. California, 283 U.S. 319 (1931), or when determining that capital punishment should be imposed on an eligible defendant. See Brown v. Sanders, 546 U.S. 212, 126 S.Ct. 884 (2006). And this is not a situation where a general verdict form was used. Instead, this is an instance where *there is no verdict form used at all*. The jury never openly makes the finding that "*sufficient* aggravating circumstances" exist to impose the death penalty, and the jury "recommendation" form cannot suffice for this purpose unless the jury unanimously recommends imposition of the death penalty. Any other recommendation leaves the very real chance that there was never a finding by the jury that *sufficient* aggravating circumstances exist to justify imposition of capital punishment, and the jury as a body is thus denied a meaningful opportunity to say that this poor devil that committed first-degree murder ought not receive the death penalty. This is the very essence of the interplay between the Sixth, Eighth and Fourteenth Amendments to the United States Constitution.

In the context of the individual aggravating circumstances that in concert comprise the "*sufficient*" aggravating circumstances, if one factor is too vague to genuinely limit the class of persons eligible for the death penalty and the jury fails to make the requisite statutory finding that "sufficient aggravating circumstances" exist, the appellate court must guess at what determinations were made by the jurors when applying a harmless error analysis. Applying that analysis here, it is at once apparent that §921.141(5)(d), Fla.Stat., (the "felony murder factor"), is used in a manner that denies due process. Its unanimous finding at the guilt phase of trial improperly and affirmatively conceals the unconstitutional use of other improper aggravating circumstances that have resulted in a death sentence being approved following a non-unanimous jury recommendation in the absence of an express jury finding that "sufficient aggravating circumstances" exist that render the defendant eligible for capital punishment.

Specifically, it is well established now that a capital sentencing scheme must genuinely narrow the class of persons eligible for the death penalty and must reasonably justify the imposition of a more severe sentence on the defendant compared to others found guilty of murder. Loving v. United States, 517 U.S. 748, 755 (1996); Lowenfield v. Phelps, 484 U.S. 231 (1988); Zant v. Stephens, 462 U.S. 862, 877 (1993); Porter v. State, 564 So.2d 1060, 1063-64 (Fla.1990). Where the eligibility for the death penalty depends on finding "*sufficient* aggravating circumstances," the felony murder circumstance becomes an automatic factor following a conviction of first-degree felony murder and serves no purpose in genuinely narrowing the class of persons eligible for capital punishment. Cf. Collins v. Lockhart, 754 F.2d 258, 264 (8th Cir. 1985) ("We see no escape from the conclusion that an aggravating circumstance which merely repeats an element of the underlying crime cannot perform this narrowing function."). If there is a non-unanimous death recommendation by the jury following the commission of a felony first-degree murder, presently the issues under Ring v. Arizona are deemed moot by the Florida Supreme Court without appreciation of the requirement that, to satisfy the Sixth, Eighth and Fourteenth Amendments, the jury must find the existence of "sufficient aggravating circumstances" to render a citizen eligible for the death penalty.

The felony murder circumstance simply repeats the offense of felony murder, and that improperly results in an unconstitutional presumption that death is the appropriate sentence. See Jackson v. State, 502 So.2d 409, 413 (Fla. 1986) ("When there are one or more valid factors in

aggravation and none in mitigation, death is presumed to be the appropriate penalty"); compare Jackson v. Dugger, 837 F.2d 1469, 1473 (11th Cir. 1988) ("Such a presumption, if employed at the level of the sentencer, vitiates the individualized sentencing determination required by the Eighth Amendment"). This unconstitutionally skews the harmless error analysis used by the Supreme Court of Florida to review constitutional error.

Specifically, the Florida Supreme Court is approving the imposition of the death penalty based on statutory aggravating factors found by the judge and not by the jury under the rationale that the contemporaneous conviction of felony murder *alone* satisfies the Sixth Amendment requirements under Ring v. Arizona, supra. For instance, in Douglas v. Stae, 878 So.2d 1246 (Fla. 2004), a defendant received the death penalty where there was an 11-1 recommendation by the jury and a finding by the trial judge that *two* aggravating circumstances were sufficient of sufficient weight, (in comparison to the weight of the mitigating factors), to impose the death penalty. The aggravating factors used by the judge were an especially heinous, atrocious or cruel homicide (for which there was no jury finding) and a homicide committed during the commission of an attempted sexual battery (as shown on the trial verdict). On direct appeal of the death sentence, the Court totally disregarded the fact that the jury did not unanimously recommend the death penalty and thus did not necessarily render a unanimous jury finding that "*sufficient* aggravating circumstances" exist to render this citizen eligible for the death penalty. Instead, the Court reasoned as follows:

> In his last issue on appeal, Douglas argues that Florida's death penalty statute, section 921.141, Florida Statutes (1999), is unconstitutional under Ring v. Arizona, 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002). We have previously addressed this contention on direct appeal and have concluded that there is no basis for declaring Florida's statute facially unconstitutional. *See, e.g.*, Lawrence v. State, 846 So.2d 440, 451 (Fla.), *cert. denied*, 540 U.S. 952, 124 S.Ct. 394, 157 L.Ed.2d 286 (2004); Butler v. State, 842 So.2d 817, 834 (Fla. 2003).
>
> Further, section 921.141 is constitutional as applied in this case because *one* of the aggravating circumstances found by the trial court is that the murder was committed in the course of a sexual battery. The jury unanimously found Douglas guilty of the crime of sexual battery and expressly found, in a special verdict, that Douglas committed the murder during the commission or attempted commission of a sexual battery. Thus, Douglas is not

> entitled to relief under *Ring,* which exempts aggravators relying on other convictions from the requirement of jury findings on any fact necessary to impose a sentence of death. *See* Caballero v. State, 851 So.2d 655, 663-64 (Fla. 2003) (rejecting a *Ring* claim on direct appeal where one of the aggravating circumstances the judge considered was that the defendant committed the murder during the commission of a burglary and kidnapping); Doorbal v. State, 837 So.2d 940, 963 (Fla.) (stating that prior violent felony aggravator based on contemporaneous crimes charged by indictment and on which defendant was found guilty by unanimous jury "clearly satisfies the mandates of the United States and Florida Constitutions"), *cert. denied*, 539 U.S. 962, 123 S.Ct. 6247, 156 L.Ed.2d 663 (2003).

Douglas, 878 So.2d at 1263-64 (Fla. 2004) (Emphasis added).

This analysis must be placed in the context of the Florida Legislature enacting a statute requiring that "*sufficient* aggravating circumstances" exist to justify imposition of the death penalty. The Florida Legislature *could* have stated that one or more factor should be weighed to determine whether capital punishment should be imposed. At least that would imply that the Florida Legislature made a conscious determination that a person who commits first-degree felony murder is as morally culpable as the person who commits first-degree premeditated murder. That is what the Louisiana Legislature did. The Florida Legislature did not. Yet, that factor is now used so that a person who commits a conscious, premeditated murder cannot receive the death penalty in the absence of an aggravating circumstance, yet felony murder is automatically punishable by capital punishment due to the existence of a built in aggravating factor – a factor that creates a presumption in favor of death *for the least aggravated form of first-degree murder.* It does the opposite of what the Constitution requires of an aggravating circumstance. An accidental killing during the commission, attempted commission or escape after committing an enumerated felony converts a non-criminal act into a first-degree murder and automatically authorizes imposition of capital punishment. The circumstance thus does not serve the constitutionally mandated channeling function required by the Eighth Amendment. See Zant v. Stephens, 462 U.S. 862, 877 (1983).

The felony murder aggravating circumstance, when applied to unpremeditated murder turns a mitigating circumstance into an aggravating circumstance, which is not rational and is

otherwise a violation of the Eighth Amendment. Lack of premeditation is a mitigating circumstance. See Lockett v. Ohio, 438 U.S. 586, 608 (1978) (death sentence set aside where state death penalty statute did not provide for full consideration of the mitigating consideration of lack of intent to cause death). Because this automatic factor in a felony-murder prevents the meaningful consideration of lack of intent to kill as a mitigating consideration, the felony murder circumstance violates Hitchcock v. Dugger, 481 U.S. 983 (1987) (Florida death penalty statute improperly limited full consideration of mitigating circumstances despite being initially approved in Proffitt v. Florida).

In Lowenfield v. Phelps, 484 U.S. 231 (1988), the Court rejected a challenge to the portion of the Louisiana death penalty statute which called for the death penalty for a premeditated murder committed during the course of a violent felony, but in doing so distinguished Florida's statutory scheme. Louisiana's statute, the Court held, narrows the class of death eligible by narrowing the statutory definition of capital offenses and makes a defendant eligible for capital punishment if the jury unanimously finds "one or more" aggravating circumstances to have been proved beyond a reasonable doubt. Florida, on the other hand, defines first-degree murder broadly and uses a determination of whether there are "sufficient aggravating circumstances" to narrow the class of death eligible defendants. Further, Lowenfield did not involve the Lockett/Hitchcock problem that exists here.

Section 921.141(5)(d), Fla.Stat., as applied through the standard instruction and verdict form, do not accommodate the Sixth Amendment right to a jury trial, nor do they meet the constitutional requirement of narrowing the class of persons eligible for the death penalty. In fact, this factor as it is now applied has the opposite effect. See Barnard, "Death Penalty," 13 Nova L.Rev. 907, 917-22 (1989). The Florida felony murder circumstance is therefore unconstitutional. In the context of a homicide committed during the commission of an enumerated felony, there is no genuine limiting of the class of persons eligible for the death penalty. The culpability of a homicide committed during the commission of a felony is certainly no more than that found in premeditated murder, yet it is automatically punishable by capital punishment in the complete absence of a jury finding that this factor and/or others constitute "*sufficient* aggravating circumstances" to make the defendant eligible for capital punishment. Thus, in addition to denying due process and the right to a jury trial, this consideration fails to

"reasonably justify the imposition of a more severe sentence on the defendant compared to others found guilty of murder." Zant, 462 U.S. 862, 877 (1983)

The Florida Supreme Court has commented as follows:

> Mansfield first claims that appellate counsel was ineffective for failing to challenge the jury instructions that allowed the jury to find him guilty of first-degree murder if he was found guilty of either felony or premeditated murder. This Court and the United States Supreme Court have repeatedly rejected relief on this issue. In Schad v. Arizona, 501 U.S. 624, 645, 111 S.Ct. 2491, 115 L.Ed.2d 555 (1991), the Supreme Court held that the United States Constitution did not require the jury to come to a unanimous decision on the theory of first-degree murder and that separate verdict forms for felony and premeditated murder were not required. "It is well established that an indictment which charges premeditated murder permits the State to prosecute under both the premeditated and felony murder theories." Parker v. State, 904 So.2d 370 (Fla. 2005). Furthermore "[b]ecause the State has no obligation to charge felony murder in the indictment, it similarly has no obligation to give notice of the underlying felonies that it will rely upon to prove felony murder." Kearse v. State, 662 So.2d 677, 682 (Fla. 1995). Mansfield's appellate counsel was not ineffective for failing to raise a claim which we have repeatedly rejected. Floyd v. State, 808 So.2d 175, 185 (Fla. 2002). To the extent that Mansfield raises a substantive claim on this issue, this claim is without merit under this prior case law.

Mansfield v. State, 911 So.2d 1160, 1170 (Fla. 2005). Instead of genuinely narrowing the class of persons eligible for the death penalty, the felony murder aggravating circumstance automatically expands the class of those eligible for the death penalty for no rational reason, since an accidental homicide committed during a robbery is not as culpable as is a premeditated homicide. See Collins v. Lockhart, 754 F.2d 258, 264 (8th Cir. 1985) ("We see no escape from the conclusion that an aggravating circumstance which merely repeats an element of the underlying crime cannot perform this narrowing function."). The felony murder circumstance repeats an element of the offense of felony murder and/or premeditated murder, because those legal concepts are interchangeable, and creates an unlawful presumption that death is an appropriate sentence. See Jackson v. State, 502 So.2d 409, 413 (Fla. 1986) ("When there are one or more valid factors in aggravation and none in mitigation, death is presumed to be the

appropriate penalty"); compare Jackson v. Dugger, 837 F.2d 1469, 1473 (11th Cir. 1988) ("Such a presumption, if employed at the level of the sentencer, vitiates the individualized sentencing determination required by the Eighth Amendment").

Felony murder is the least aggravated form of first-degree murder since it does not require a premeditated design to kill. Therefore, the felony murder aggravating circumstance authorizes a sentence of death for the least aggravated form of first-degree murder, whereas an additional circumstance is required to authorize imposition of death for first-degree premeditated murder. Even assuming that felony murder and premeditated murder are equally culpable, the finding of essentially the same culpability does not genuinely limit the class of persons eligible for the death penalty for a rational reason. Thus, this factor violates the Constitutional requirement that an aggravating circumstance genuinely limit the class of persons eligible for the death penalty for a rational reason, where even an accidental killing committed during the commission of an enumerated felony converts a non-criminal accident into a first-degree murder where imposition of capital punishment is authorized. The circumstance thus does not serve the constitutionally mandated channeling function required by the Eighth Amendment. See Zant, 462 U.S. 862, 877 (1983).

The observations of Justice Anstead concerning this factor are adopted here in total as expressing why this statutory aggravating factor is unconstitutional. In Blanco v. State, 706 So.2d 7, 12-13 (Fla. 1997), Justice Anstead explained that, "While I recognize that the appellant's contention must fail in this case, and that this Court has previously rejected the claim concerning the unconstitutional application of Florida's felony murder aggravator, I write separately to express my disagreement with the reasoning of the majority opinion. This aggravator, as contained in section 921.141(5)(d), Florida Statutes (1995), may well be unconstitutional when applied to a defendant convicted of felony murder. When the same felony used to establish guilt of first-degree felony murder is again used as an aggravator to justify the imposition of the death penalty, Florida's felony murder aggravator may well fail to meet the U.S. Supreme Court's mandate that aggravating circumstances in a state's death penalty scheme must 'genuinely narrow the class of persons eligible for the death penalty' and 'reasonably justify the imposition of a more severe sentence compared to others found guilty of murder.'

Zant v. Stephens, 462 U.S. 862, 877, 103 S.Ct. 2733, 77 L.Ed.2d 235 (1983)." Blanco, 706 So.2d 7, 12-13 (Fla. 1997) (Anstead, J., concurring) (Footnotes omitted).

Justice Anstead correctly reasoned:

> The concept of narrowing requires that once it has been established that a defendant is guilty of first-degree murder the sentencer may properly consider only *additional* factors, termed aggravators, that genuinely *narrow* the class of convicted murderers who may be eligible for the death penalty. For example, if a person is guilty of premeditated murder and is shown to have been guilty of *additional* aggravating misconduct, then he becomes part of a narrower, less numerous class of persons eligible for the death penalty. But a person convicted of felony murder who then has the same felony used against her as an aggravator does *not* become a member of a smaller group. Rather, the felony aggravator used there would make the *entire* larger group of felony murderers *automatically* eligible for the death penalty without proof of any additional aggravating misconduct. Hence, the felony aggravator serves no legitimate narrowing function in such a case.
>
> In fact, when used to aggravate a felony murder, Florida's felony murder aggravator impermissibly favors, for sentencing purposes, a more culpable defendant convicted of intentional, premeditated murder over a defendant convicted of unpremeditated, felony murder. Hence, it provides for a "more severe sentence compared to others" on a patently irrational basis. There simply is no rational basis for treating a felony-murder offender more harshly than a premeditated killer.
>
> Under Florida's death penalty scheme, a convicted defendant cannot qualify for the death sentence unless one or more statutory aggravators are found to exist in addition to the conviction for first-degree murder. *See* Elam v. State, 636 So.2d 1312 (Fla. 1994). Hence, a defendant convicted of intentional premeditated murder will not be eligible for the death penalty unless some additional aggravating circumstance, in addition to the premeditated murder, is found to exist. On the other hand, a person found guilty of felony murder *automatically* becomes eligible for a death sentence. By reason of the felony murder aggravator, the underlying felony is used not only as a legal substitute for premeditation to support a first-degree murder conviction; but is also used as a statutory aggravator to immediately make the defendant eligible for the death sentence. In other words, Florida's

felony murder aggravator permits a defendant convicted of felony murder to be sentenced to death by virtue of his conviction for felony murder alone.

Common sense alone tells us the scheme described above is patently inconsistent with the United States Supreme Court's strict requirements in Zant v. Stephens for a rational and narrowing scheme for selecting those who will be subject to the death penalty. Recently, the U.S. Supreme Court reiterated the requisite narrowing function that must be served by proper aggravating factors, explaining again that where a weighing state, like Florida, uses aggravating factors to determine who is eligible for the death penalty, "it cannot use factors which as a practical matter fail to guide the sentencer's discretion." Stringer v. Black, 503 So.2d 222, 235, 112 S.Ct. 1130, 1139, 117 L.Ed.2d 367 (1992). By making a defendant convicted of felony murder automatically eligible for the death penalty based upon the same felony that was used to establish the defendant's conviction for murder, this scheme simply does not *narrow* the class of convicted persons who become eligible for the death penalty. Rather, if anything, it clearly *enlarges* the eligible class in an irrational way.

The Tennessee Supreme Court in State v. Middlebrooks, 840 S.W.2d 317, 341-346 (Tenn. 1992) struck the felony murder aggravator from the sentencing scheme in Tennessee, a weighing state just like Florida, and explained:

> In Zant v. Stephens, the United States Supreme Court said that in order to comply with the Eighth Amendment, aggravating circumstances must "genuinely narrow the class of persons eligible for the death penalty and must reasonably justify the imposition of a more severe sentence on the defendant compared to others found guilty of murder." It seems obvious that Tennessee's statute fails to narrow the class of persons eligible for the death penalty because: Automatically instructing the sentencing body on the underlying felony in a felony-murder case does nothing to aid the jury in its task of distinguishing between first-degree homicides and defendants for the purpose of imposing the death penalty. Relevant distinctions dim, since all participants in a felony-murder, regardless of varying degrees of culpability, enter

> the sentencing stage with at least one aggravating factor against them. .... A comparison of the sentencing treatments afforded first-degree murder defendants further highlights the impropriety of using the underlying felony to aggravate felony-murder. The felony murderer, in contrast to the premeditated murderer, enters the sentencing stage with one aggravating circumstance automatically charged against him. This disparity in sentencing treatment bears no relationship to legitimate distinguishing features upon which the death penalty might constitutionally rest.

840 S.W.2d at 342 (citations omitted) (quoting Enbergerg v. State, 686 P.2d 541, 560 (Wyo. 1984) (Rose, J., dissenting)). Other courts have come to the same conclusion. In prohibiting the application of a felony murder statutory aggravator, the North Carolina Supreme Court has declared:

> A defendant convicted of a felony murder, nothing else appearing, will have one aggravating circumstance "pending" for no other reason than the nature of the conviction. On the other hand, a defendant convicted of a premeditated and deliberated killing, nothing else appearing, enters the sentencing phase with no strikes against him. This is highly incongruous, particularly in light of the fact that the felony murder may have been unintentional, whereas, a premeditated murder is, by definition, intentional and preconceived. State v. Cherry, 298 N.C. 86, 257 S.E.2d 551, 567 (1979). Similarly, the Wyoming Supreme Court echoed these holdings in a case where the same underlying felony was actually used to aggravate the defendant's crime in three different ways: In this case, the enhancing effect of the underlying felony (robbery) provided two of the aggravating circumstances which led to Engberg's death sentence: (1) murder during commission of a felony, and (2) murder for pecuniary gain. As a result, the underlying robbery was used not once but *three* times to convict and then enhance the seriousness of Engberg's crime to a death sentence. *All* felony murders involving robbery, by definition, contain at least the two aggravating circumstances detailed above. This places the felony murder defendant in a worse position than the defendant convicted of premeditated murder, simply because his crime was committed in conjunction with

> another felony. This is an arbitrary and capricious classification, in violation of the Furman v. Georgia, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972)]]/Gregg[v. State, 428 U.S. 153, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976)] narrowing requirement.
>
> Enberg v. Meyer, 820 P.2d 70, 89 (Wyo. 1991). Florida, too, has a separate pecuniary gain aggravator like the Wyoming statute. These cases from our sister courts demonstrate a potentially serious and unconstitutional flaw in the application of Florida's statutory death penalty scheme.

Blanco v. State, 706 So.2d 7, 12-13 (Fla. 1997) (Anstead, J., concurring) (footnotes omitted).

The analysis of Justice Anstead is adopted here. Section 921.141(5)(d), Fla.Stat., and the standard instruction do not meet the constitutional requirement of narrowing the class of persons eligible for the death penalty, and in fact has the opposite effect. The Florida felony murder circumstance is unconstitutional as explained above.

WHEREFORE, based on the argument set forth in the Memorandum of Law and as may be further argued during the hearing of this motion, this Court is respectfully moved to declare Section 921.141(5)(d), Fla. Stat. unconstitutional under article I, sections 2, 9, 16, 17, 21 and 22 of the Florida Constitution and the Fifth, Sixth, United States Constitution.

I HEREBY CERTIFY that a copy of the above and foregoing Motion has been furnished to the Office of the State Attorney, by hand and/or electronically, this 10 day of December, 2013.

Respectfully submitted,

MATT SHIRK
PUBLIC DEFENDER

BY: _____
Fred C. Gazaleh, #353787
Assistant Public Defender

/slc
(CAP091)

IN THE CIRCUIT COURT, FOURTH JUDICIAL CIRCUIT, IN AND FOR DUVAL COUNTY, FLORIDA.

CASE NO.: 16 2013 CF 005781 AXXX MA

DIVISION: CR-D

STATE OF FLORIDA

VS.

DONALD JAMES SMITH

MOTION TO DECLARE SECTION 921.141(5)(e), FLORIDA STATUTES UNCONSTITUTIONAL AS WRITTEN AND APPLIED

The Defendant, by and through undersigned counsel, moves for an order declaring Section 921.141(5)(e), Florida Statutes, unconstitutional under the Constitution of the State of Florida and the Constitution of the United States and applicable international treaties as follows:

1. The Defendant has been charged with first-degree murder and the State of Florida has filed notice that it seeks imposition of capital punishment pursuant to Fla.R.Crim.P. 3.202.

2. Eligibility for capital punishment in Florida requires a conviction for first-degree murder under §782.04, Fla.Stat., and "sufficient aggravating circumstances" of *only* those factors listed in §921.141(5), Fla.Stat., that justify imposition of capital punishment. §921.141, Fla.Stat..

3. "An aggravating circumstance must genuinely limit the class of persons eligible for the death penalty and must reasonably justify the imposition of a more severe sentence on the defendant compared to others found guilty of murder." Zant v. Stephens, 462 U.S. 862, 877 (1983). A statutory aggravating factor that does not genuinely limit the class of persons eligible for the death penalty or one that fails to reasonably justify imposition of the death penalty as compared to others convicted of first-degree murder, or one that authorizes the sentencer to impose the death penalty based on the exercise of a constitutional right by the defendant is unconstitutional under the First, Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution. Brown v. Sanders, 546 U.S. 212, 126 S.Ct. 884 (2006); Zant v. Stephens, supra.

4. One of the aggravating circumstances set forth in §921.141(5), Fla.Stat., states, "The capital felony was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody." §921.141(5)(e), Fla.Stat.. This factor, sometimes referred to as the "witness

elimination" factor, allows various considerations to be used in the determination of whether defendants are eligible for capital punishment and to be weighed in the determination of whether capital punishment should be imposed.

5. The use of the this aggravating circumstance by the judge to impose capital punishment in Florida violates the right to a jury trial guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and article I, section 22 of the Florida Constitution, because this factor, individually and in conjunction with other aggravating circumstances, increases the punishment that may be imposed on the defendant after the jury determines that a first-degree murder has been committed as set forth in the accompanying memorandum of law and as may be further argued during the hearing of this motion.

6. Because the substance of this factor is controlled by the Florida Supreme Court on an *ad hoc* basis, this factor violates the separation of powers proscription contained in article II, section 3 of the Florida Constitution, which in turn violates the Fourteenth Amendment to the United States Constitution as set forth with more particularity in the accompanying memorandum of law and as may be further argued when this motion is heard.

7. Because this factor is arbitrarily and capriciously used to determine the eligibility of defendants to receive capital punishment and to determine whether capital punishment should be imposed, this factor violates the Eighth and Fourteenth Amendments to the United States Constitution and article I, section 17 of the Florida Constitution, as set forth with more particularity in the accompanying memorandum of law and as may be further argued when this motion is heard.

8. Because this factor is applied in a manner that punishes a defendant for exercising fundamental constitutional rights, this factor violates the First, Fifth, Sixth and Fourteenth Amendments to the United States Constitution and article I, sections 2, 4, 16, 17 and 22 of the Florida Constitution, as set forth with more particularity in the accompanying memorandum of law and as may be further argued when this motion is heard.

9. A death recommendation from a jury and/or a death sentence imposed by a judge using this aggravating circumstance over timely and specific objections as articulated in the accompanying memorandum of law denies Due Process, fundamental fairness, a reliable

sentence and basic rights guaranteed by the First, Fifth, Sixth and Fourteenth Amendments to the United States Constitution and article I, sections 2, 4, 16, 17 and 22 of the Florida Constitution, International Law, *jus cogens* and binding international agreements and treaties, including but not limited to the International Covenant on Civil and Political Rights, Safeguards Guaranteeing Protection of the Rights of Those Facing the Death Penalty, and the American Convention on Human Rights.

MEMORANDUM OF LAW

The state and federal constitutions guarantee *minimum* protections that must be provided by the States whenever a citizen is prosecuted by the government. Specifically, the Fifth Amendment to the United States Constitution directs:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

These rights apply to Florida and this Defendant. Malloy v. Hogan, 378 U.S. 1 (1964). Rights associated with the Fifth Amendment not expressly mentioned but which are necessary to make the right to due process of law meaningful, such as the right to be present during critical stages of a trial, also apply here. See Israel v. State, 837 So.2d 381 (Fla. 2002), citing Snyder v. Massachusetts, 291 U.S. 97 (1937). The right to indictment by a grand jury is also implicated in that there can be no more "infamous" crime than a capital crime. But see, Hurtado v. California, 110 U.S. 516 (1884). To the extent that Florida's constitution guarantees indictment for a capital crime, the denial of that State right denies due process of law in violation of the Fourteenth Amendment to the United States Constitution.

The Sixth Amendment to the United States Constitution states:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and

> district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

The Sixth Amendment to the United States Constitution applies to Florida and to this Defendant through operation of the Fourteenth Amendment to the United States Constitution. These rights "are constitutional protections of surpassing importance: the proscription of any deprivation of liberty without 'due process of law,'" Amdt. 14, and the guarantee that '[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury,' Amdt. 6. Taken together, these rights indisputably entitle a criminal defendant to "a jury determination that [he] is guilty of every element of the crime with which he is charged, beyond a reasonable doubt." Apprendi v. New Jersey, 530 U.S. 466, 476-477 (2000) (Citations omitted). See Gideon v. Wainwright, 372 U.S. 335 (1963) (right to counsel); Crawford v. Washington, 541 U.S. 36 (2004) (right to confront adverse witnesses); Waller v. Georgia, 467 U.S. 39, 44-48 (1984) (right to public trial); Ring v. Arizona, 536 U.S. 584 (2002) (right to jury determination of facts authorizing imposition of the death penalty); In re Winship,397 U.S. 358 (1970) (burden on the State to prove guilt beyond a reasonable doubt); Duncan v. Louisiana, 391 U.S. 145 (1968) (same); Mullaney v. Wilbur, 421 U.S. 684 (1975).

The Eighth Amendment to the United States Constitution provides "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." The Eighth Amendment applies to Florida and this Defendant through article I, section 17 of the Florida Constitution. See also, Cooper Industries, Inc. v. Leatherman Tool Group, Inc., 532 U.S. 424, 433-434 (2001) ("Despite the broad discretion that States possess with respect to the imposition of criminal penalties and punitive damages, the Due Process Clause of the Fourteenth Amendment to the Federal Constitution imposes substantive limits on that discretion. That Clause makes the Eighth Amendment's prohibition against excessive fines and cruel and unusual punishments applicable to the States. Furman v. Georgia, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972) (*per curiam*).") (Footnote omitted).

The Eighth Amendment precludes excessive forms of punishment, e.g., Roper v. Simmons, 543 U.S 551 (2005) (death penalty for person less than 18 years old unconstitutional); Atkins v. Virginia, 536 U.S. 304 (2002) (death penalty impermissible for intellectually disabled); Enmund v. Florida, 458 U.S. 782, 787, 801 (1982) (Eighth and Fourteenth Amendments prohibit death penalty for one who neither took life, attempted to take life, nor intended to take life); Louisiana ex rel. Francis v. Resweber, 329 U.S. 459, 463 (1947) ("The traditional humanity of modern Anglo-American law forbids the infliction of unnecessary pain in the execution of the death sentence."), and cruel and unusual punishments such as arbitrary and capricious imposition of capital punishment. Furman v. Georgia, 408 U.S. 238 (1972).

The Fourteenth Amendment to the United States Constitution provides:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

The Fourteenth Amendments applies the basic constitutional guarantees to the States, including Florida, and otherwise compels that State's provide minimal due process protections to all citizens prosecuted by the government, including this Defendant.

The Florida Constitution confers rights under article I, sections 2, 9, 15(a), 16, 17 and 22, and article II, section 3. To the extent that the State of Florida violates the express mandates of its own constitution, the Due Process Clause the Fourteenth Amendment to the United States Constitution is violated. Specifically, article I, section 2 of the Florida Constitution states:

> All natural persons, female and male alike, are equal before the law and have inalienable rights, among which are the right to enjoy and defend life and liberty, to pursue happiness, to be rewarded for industry, and to acquire, possess and protect property; except that the ownership, inheritance, disposition and possession of real property by aliens ineligible for citizenship may be regulated or prohibited by law. No person shall be deprived of any right because of race, religion, national origin, or physical disability.

Article I, section 9 of the Florida Constitution provides that "No person shall be deprived of life, liberty or property without due process of law, or be twice put in jeopardy for the same offense, or be compelled in any criminal matter to be a witness against oneself." Article I, section 15(a), Florida Constitution, provides that "No person shall be tried for a capital crime without presentment or indictment by a grand jury, or for other felony without such presentment or indictment or an information under oath filed by the prosecuting officer of the court, except persons on active duty in the militia when tried by courts martial." Article I, section 16(a) of the Florida Constitution states:

> In all criminal prosecutions the accused shall, upon demand, be informed of the nature and cause of the accusation, and shall be furnished a copy of the charges, and shall have the right to have compulsory process for witnesses, to confront at trial adverse witnesses, to be heard in person, by counsel or both, and to have a speedy and public trial by an impartial jury nit he county were the crime was committed. If the county is not known, the indictment or information may charge venue in two or more counties conjunctively and proof that the crime was committed in that area shall be sufficient; but before pleading the accused may elect in which of those counties the trial will take place. Venue for prosecution of crimes committed beyond the boundaries of the state shall be fixed by law.

Article I, section 17 of the Florida Constitution as amended now guarantees the same protections contained in the Eighth Amendment to the United States Constitution. Article I, section 22 of the Florida Constitution specifies that, "The right of trail by jury shall be secure to all and remain inviolate. The qualifications and the number of jurors, not fewer than six, shall be fixed by law." In that regard, Section 913.13, Florida Statutes, expressly states that, "Twelve persons shall constitute a jury to try all capital cases, and six persons shall constitute a jury to try all other criminal cases." Thus, in Florida there is a due process right to a unanimous guilty verdict by a 12-member person before a defendant may be convicted of a capital crime.

Finally, article II, section 3 of the Florida Constitution prohibits a person in one branch of government from exercising powers belonging to another branch of government. If the substance of Florida's death penalty scheme is coming from the Supreme Court of Florida rather than from the Florida Legislature, this constitutional provision is being denied, and a violation of the Fourteenth Amendment to the United States Constitution occurs. See Barnhill v. State, 834 So.2d 836, 849

(Fla. 2002) (judge cannot delete the term "extreme" from the jury instruction regarding a homicide committed while under "extreme mental or emotional distress" due to separation of powers rule).

Florida's Statutory Death Penalty Scheme:

The Florida Legislature passed laws in the wake of Furman v. Georgia, 408 U.S. 238 (1977) trying to accommodate the citizens' constitutional rights and yet establish a valid death penalty scheme. Some states, such as Louisiana, enacted statutes that make defendants eligible for capital punishment when the jury finds beyond a reasonable doubt that only one statutory aggravating circumstance exists. E.g., Lowenfeld v. Phelps, 284 U.S. 231, 244 (1988) (Approving La.Code Crim.Proc.Ann., Art. 905.3 (West 1984), which states, "A sentence of death shall not be imposed unless the jury finds beyond a reasonable doubt that at least one statutory aggravating circumstance exists and, after consideration of any mitigating circumstances, recommends that the sentence of death be imposed.").

Florida's capital sentencing scheme,[1] however, is substantially different. It requires the existence of a predicate conviction by a 12-person jury for first-degree murder under §782.04, Fla.Stat., and then requires that "*sufficient* aggravating circumstances" exist[2] before a person is

[1] Florida's sentencing scheme based on Section 921.141, Fla.Stat. (1973), received initial approval in Proffitt v. Florida, 428 U.S. 242 (1976). Since then, several unconstitutional practices implemented under that statute have been more fully appreciated and expressly condemned by the United State Supreme Court. E.g., Espinosa v. Florida, 505 U.S. 1079, 1082 (1992) ("We merely hold that, if a weighing State decides to place capital sentencing authority in two actors rather than one, neither actor must be permitted to weigh invalid aggravating circumstances."); Hitchcock v. Dugger, 481 U.S. 393, 398 (1987) ("We think it could not be clearer that . . . the proceedings did not comport with the requirements of Skipper v. South Carolina, Eddings v. Oklahoma, and Lockett v. Ohio) (Citations omitted); Gardner v. Florida, 430 U.S. 349, 362 (1977) (We conclude that petitioner was denied due process of law when the death sentence was imposed, at least in part, on the basis of information which he had no opportunity to deny or explain.").

[2] In Florida, "[t]he *only* matters that may be considered in aggravation are those set out in the death penalty statute." Zack v. State, 911 So.2d 1190, 1208 (Fla. 2005) (Emphasis added); See §921.141(5), Fla.Stat. (2005) ("Aggravating circumstances *shall* be limited to the following"). In Florida, the aggravating circumstances set forth in §921.141(5), Fla.Stat., actually "define" the crimes for which capital punishment may be imposed. State v. Dixon, 283 So.2d 1, 10 (Fla.1973). See Zant v. Stephens, 462 U.S. 862, 878 (1983) ("statutory aggravating

eligible for capital punishment. The determination of whether a death sentence is imposed depends on a weighing process of the factors contained in §921.141(5), Fla.Stat., against the factors set forth in §921.141(6), Fla.Stat.. A Florida jury, however, does not render any finding that "sufficient aggravating circumstances" exist for imposition of capital punishment, nor is the jury required to make a unanimous finding as to the existence of other statutory aggravating circumstances, including whether §921.141(5)(e), Fla.Stat., exists. This denies the right to a jury trial.

More specifically, the power to enact substantive legislation is vested solely in the Florida Legislature. "The legislative power of the state shall be vested in a legislature of the State of Florida, consisting of a senate composed of one senator elected from each senatorial district and a house of representatives composed of one member elected from each representative district." Article III, section I, Florida Constitution. Article II, section 3 of the Florida Constitution guarantees that, "The power of the state government shall be divided into legislative, executive and judicial branches. No person belonging to one branch shall exercise any powers appertaining to either of the other branches unless expressly provided herein." Thus, it is for elected Florida legislators, in the ordinary exercise of their investigative and legislative functions, to enact clear, unambiguous statutory aggravating factors that comport with article I, section 17 of the Florida Constitution and/or the eighth and fourteenth amendments to the United States Constitution. When the meaning and substance of Florida's death penalty scheme is provided by Justices of the Supreme Court of Florida on an *ad hoc* basis while reviewing imposition of the death penalty in specific cases, the separation of powers clause is violated. The individual aggravating circumstances so given substance by the Court violate requirements of fair notice and input by the electorate in violation of article I, sections 2, 9, 16 and 22 of the Florida Constitution and the Fifth, Sixth, Eighth and Fourteenth amendments to the United States Constitution.

Even after being found guilty of first-degree murder, a defendant is <u>*not*</u> eligible for the death penalty in Florida unless "*sufficient* aggravating circumstances" exist. Unlike some states where eligibility for the death penalty is based on a unanimous jury finding of a single

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circumstances play a constitutionally necessary function at the stage of legislative definition: they circumscribe the class of persons eligible for the death penalty.").

aggravating factor, Florida expressly requires that "*sufficient* aggravating circumstances" exist before a death penalty may be imposed. Therefore, each statutory aggravating circumstance upon which imposition of capital punishment rests is but a component of whether a defendant is "eligible" for capital punishment in Florida. A jury could reasonably find that one or more aggravating circumstances are not "sufficient" to justify imposition of capital punishment. Under the statute, a defendant is entitled to a unanimous jury determination beyond a reasonable doubt as to whether "*sufficient* aggravating circumstances" exist that legally and factually authorize capital punishment because that is the class of persons eligible for capital punishment. The Florida Supreme Court expressly recognized that the jury may not reach a unanimous decision as to the existence of aggravating circumstances (and thus implicitly a unanimous decision as to the eligibility of the defendant for capital punishment) yet that Court forbids the use of a verdict form that would accommodate the Sixth Amendment right to the unanimous jury determination as to the eligibility of a defendant for capital punishment as apparently mandated by Ring v. Arizona:

> Under the law, therefore, the jury may recommend a sentence of death so long as a majority concludes that at least one aggravating circumstance exists. Nothing in the statute, the standard jury instructions, or the standard verdict form, however, requires a majority of the jury to agree on *which* aggravating circumstances exist. Under the current law, for example, the jury may recommend a sentence of death where four jurors believe that only the "avoiding a lawful arrest" aggravator applies, *see* § 921.141(5)(e), while three others believe that only the "committed for pecuniary gain" aggravator applies, *see* §291.141(5)(f), because seven jurors believe that at least one aggravator applies. The order in this case, however, requires a majority vote for at least one particular aggravator. This requirement imposes on the capital sentencing process an extra statutory requirement. Unless and until a majority of this Court concludes that Ring applies in Florida, *and* that it requires a jury's majority (or unanimous) conclusion that a particular aggravator applies, or until the Legislature amends the statute (see our discussion at section C below), the court's order imposes a substantive burden on the state not found in the statute and not constitutionally required.

State v. Steele, 31 FLW S74 (Fla. October 12, 2005). It is up to the judiciary to safeguard the due process rights of citizens. It is up to the Legislature to pass constitutional legislation. Neither branch of government is fulfilling its obligations in the context of capital punishment in Florida.

Specifically, the Florida Legislature, in the exercise of its constitutional power, enacted interrelated statutes that established Florida's death penalty scheme. The scheme requires first that there be a conviction of a "capital" offense. For that to occur, a 12-person jury must unanimously find beyond any reasonable doubt that a defendant committed first-degree murder. [3] The Florida Legislature defines first-degree murder as:

> **782.04. Murder**
>
> (1)(a) The unlawful killing of a human being:
>
> 1. When perpetrated from a premeditated design to effect the death of the person killed or any human being;
>
> 2. When committed by a person engaged in the perpetration of, or in the attempt to perpetrate, any: a. Trafficking offense prohibited by § 893.135(1), b. Arson, c. Sexual battery, d. Robbery, e. Burglary, f. Kidnapping, g. Escape, h. Aggravated child abuse, i. Aggravated abuse of an elderly person or disabled adult, j. Aircraft piracy, k. Unlawful throwing, placing, or discharging of a destructive device or bomb, *l.* Carjacking, m. Home-invasion robbery, n. Aggravated stalking, *o.* Murder of another human being, p. Resisting an officer with violence to his or her person, q. Felony that is an act of terrorism or is in furtherance of an act of terrorism; or
>
> 3. Which resulted from the unlawful distribution of any substance controlled under § 893.03(1), cocaine as described in § 893.03(2)(a)4., or opium or any synthetic or natural salt, compound, derivative, or preparation of opium by a person 18

[3] It should be noted that one form of sexual battery in Florida is also specified to be a "capital crime," punishable by the death penalty as controlled by Section 921.141, Fla.Stat. See Section 794.011(2)(a), Fla.Stat. (2005) ("A person 18 years of age or older who commits sexual battery upon, or in an attempt to commit sexual battery injures the sexual organs of, a person less than 12 years of age commits a capital felony, punishable as provided in §§ 775.082 and 921.141.").

> years of age or older, when such drug is proven to be the proximate cause of the death of the user,
>
> is murder in the first degree and constitutes a capital felony, punishable as provided in § 775.082.
>
> (b) In all cases under this section, the procedure set forth in §921.141 shall be followed in order to determine sentence of death or life imprisonment.

At the conclusion of the guilt phase of a murder trial, the 12-person jury must return a unanimous verdict of guilt finding that the defendant committed first-degree murder based on a felony-murder theory, a premeditated-murder theory, or both. A conviction for first-degree murder, however, does NOT render a defendant eligible for the death penalty because in Florida the death penalty cannot be imposed in the absence of "*sufficient* aggravating circumstances."

Specifically, the eligibility of a defendant to receive the death penalty in Florida is based on a determination that "sufficient aggravating circumstances" exist to impose capital punishment as required under the procedure set forth in §921.141, Fla.Stat.:

> **921.141. Sentence of death or life imprisonment for capital felonies; further proceedings to determine sentence**
>
> **(1) Separate proceedings on issue of penalty.**--Upon conviction or adjudication of guilt of a defendant of a capital felony, the court shall conduct a separate sentencing proceeding to determine whether the defendant should be sentenced to death or life imprisonment as authorized by §775.082. The proceeding shall be conducted by the trial judge before the trial jury as soon as practicable. If, through impossibility or inability, the trial jury is unable to reconvene for a hearing on the issue of penalty, having determined the guilt of the accused, the trial judge may summon a special juror or jurors as provided in chapter 913 to determine the issue of the imposition of the penalty. If the trial jury has been waived, or if the defendant pleaded guilty, the sentencing proceeding shall be conducted before a jury impaneled for that purpose, unless waived by the defendant. In the proceeding, evidence may be presented as to any matter that the court deems relevant to the nature of the crime and the character of the defendant and shall include matters relating to any of the aggravating or mitigating circumstances enumerated in subsections

(5) and (6). Any such evidence which the court deems to have probative value may be received, regardless of its admissibility under the exclusionary rules of evidence, provided the defendant is accorded a fair opportunity to rebut any hearsay statements. However, this subsection shall not be construed to authorize the introduction of any evidence secured in violation of the Constitution of the United States or the Constitution of the State of Florida. The state and the defendant or the defendant's counsel shall be permitted to present argument for or against sentence of death.

(2) Advisory sentence by the jury.--After hearing all the evidence, the jury shall deliberate and render an advisory sentence to the court, based upon the following matters:

(a) ***Whether sufficient aggravating circumstances exist as enumerated in subsection*** (5);

(b) Whether sufficient mitigating circumstances exist which outweigh the aggravating circumstances found to exist; and

(c) Based on these considerations, whether the defendant should be sentenced to life imprisonment or death.

(3) Findings in support of sentence of death.--Notwithstanding the recommendation of a majority of the jury, the court, after weighing the aggravating and mitigating circumstances, shall enter a sentence of life imprisonment or death, but if the court imposes a sentence of death, it shall set forth in writing its findings upon which the sentence of death is based as to the facts:

(a) **That sufficient aggravating circumstances exist as enumerated in subsection** (5), and

(b) That there are insufficient mitigating circumstances to outweigh the aggravating circumstances.

In each case in which the court imposes the death sentence, the determination of the court shall be supported by specific written findings of fact based upon the circumstances in subsections (5) and (6) and upon the records of the trial and the sentencing proceedings. If the court does not make the findings requiring the death sentence within 30 days after the rendition of the judgment

and sentence, the court shall impose sentence of life imprisonment in accordance with § 775.082.

(4) Review of judgment and sentence.--The judgment of conviction and sentence of death shall be subject to automatic review by the Supreme Court of Florida and disposition rendered within 2 years after the filing of a notice of appeal. Such review by the Supreme Court shall have priority over all other cases and shall be heard in accordance with rules promulgated by the Supreme Court.

(5) Aggravating circumstances.--Aggravating circumstances shall be limited to the following:

(a) The capital felony was committed by a person previously convicted of a felony and under sentence of imprisonment or placed on community control or on felony probation.

(b) The defendant was previously convicted of another capital felony or of a felony involving the use or threat of violence to the person.

(c) The defendant knowingly created a great risk of death to many persons.

(d) The capital felony was committed while the defendant was engaged, or was an accomplice, in the commission of, or an attempt to commit, or flight after committing or attempting to commit, any: robbery; sexual battery; aggravated child abuse; abuse of an elderly person or disabled adult resulting in great bodily harm, permanent disability, or permanent disfigurement; arson; burglary; kidnapping; aircraft piracy; or unlawful throwing, placing, or discharging of a destructive device or bomb.

(e) The capital felony was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody.

(f) The capital felony was committed for pecuniary gain.

(g) The capital felony was committed to disrupt or hinder the lawful exercise of any governmental function or the enforcement of laws.

(h) The capital felony was especially heinous, atrocious, or cruel.

(i) The capital felony was a homicide and was committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification.

(j) The victim of the capital felony was a law enforcement officer engaged in the performance of his or her official duties.

(k) The victim of the capital felony was an elected or appointed public official engaged in the performance of his or her official duties if the motive for the capital felony was related, in whole or in part, to the victim's official capacity.

(*l*) The victim of the capital felony was a person less than 12 years of age.

(m) The victim of the capital felony was particularly vulnerable due to advanced age or disability, or because the defendant stood in a position of familial or custodial authority over the victim.

(n) The capital felony was committed by a criminal street gang member, as defined in §874.03.

(*o*) The capital felony was committed by a person designated as a sexual predator pursuant to § 775.21 or a person previously designated as a sexual predator who had the sexual predator designation removed.

(6) Mitigating circumstances.--Mitigating circumstances shall be the following:

(a) The defendant has no significant history of prior criminal activity.

(b) The capital felony was committed while the defendant was under the influence of extreme mental or emotional disturbance.

(c) The victim was a participant in the defendant's conduct or consented to the act.

(d) The defendant was an accomplice in the capital felony

committed by another person and his or her participation was relatively minor.

(e) The defendant acted under extreme duress or under the substantial domination of another person.

(f) The capacity of the defendant to appreciate the criminality of his or her conduct or to conform his or her conduct to the requirements of law was substantially impaired.

(g) The age of the defendant at the time of the crime.

(h) The existence of any other factors in the defendant's background that would mitigate against imposition of the death penalty.

(7) Victim impact evidence.--Once the prosecution has provided evidence of the existence of one or more aggravating circumstances as described in subsection (5), the prosecution may introduce, and subsequently argue, victim impact evidence to the jury. Such evidence shall be designed to demonstrate the victim's uniqueness as an individual human being and the resultant loss to the community's members by the victim's death. Characterizations and opinions about the crime, the defendant, and the appropriate sentence shall not be permitted as a part of victim impact evidence.

(8) Applicability.--This section does not apply to a person convicted or adjudicated guilty of a capital drug trafficking felony under § 893.135.

(Footnote omitted) (Emphasis added). Under the current procedure, the jury does not render a verdict as to whether there are "*sufficient* aggravating circumstances" to justify imposition of capital punishment. Instead the jury provides a recommendation to the judge as to what sentence should be imposed. The judge is precluded from using a verdict form other than the standard jury form. State v. Steele, 31 FLW S74 (Fla. October 12, 2005).

This procedure denies the right to a jury trial. Florida law requires a written waiver of the right to a jury. Fla.R.Crim.P. 3.260. See Solis v. State, 801 So.2d 208, 209 (Fla. 4th DCA 2001). There is a presumption against the waiver of a constitutional right, and the waiver of the right to a jury trial guaranteed by the Sixth and Fourteenth Amendments to the United States

Constitution and article I, section 22 of the Florida Constitution otherwise requires a knowing, voluntary and express waiver to be effective. Brookhart v. Janis, 394 U.S. 1 (1966); Johnson v. Zerbst, 304 U.S. 458 (1938).

Application of Law to Florida's Scheme

At the onset, it must be noted that the State has the burden to create law that comports with the requirements of the United States Constitution:

> If the state wishes to authorize capital punishment it has a constitutional responsibility to *tailor* and *apply* its law in a manner that avoids the arbitrary and capricious infliction of the death penalty. Part of a state's responsibility in this regard is to define the crimes for which death may be the sentence in a way that obviates "standardless [sentencing] discretion." (citations omitted). It must channel the sentencer's discretion by "clear and objective" standards and then "make rationally reviewable the process for imposing a sentence of death."

Godfrey v. Georgia, 446 U.S. 420, 428 (1980) (Emphasis added). It is a fundamental premise that the judicial branch of government is the enforcer of the due process commanded by the Constitution. In the context of capital punishment, greater due process is required than that commanded for lesser punishments. See Amendments to Fla.R.Crim.P. & Fla.R.App.P., 875 So.2d 563, 568 (Fla. 2004) (Cantero, J., concurring) ("As we have repeatedly recognized, 'death is different.'"); Chamberlain v. State, 881 So.2d 1087, 1108 (Fla. 2004) ("On this issue as on many others, death is different."). Death is different because of the "acute need" for reliability in carrying out a sentence unique in its severity and finality:

> "[D]eath is a different kind of punishment from any other which may be imposed in this country. . . . From the point of view of the defendant, it is different in both its severity and its finality. From the point of view of society, the action of the sovereign in taking the life of one of its citizens also differs dramatically from any other legitimate state action. It is of vital importance to the defendant and to the community that any decision to impose the death sentence be, and appear to be, based on reason rather than caprice or emotion." (Citation omitted).

Gardner v. Florida, 430 U.S. 349, 357 (1977).

The "acute need for reliable decision making" was recognized early-on by the United States Supreme Court:

> . . . The penalty phase of a capital trial is undertaken to assess the gravity of a particular offense and to determine whether it warrants the ultimate punishment; it is in many respects a continuation of the trial on guilt or innocence of capital murder. "*Because the death penalty is unique "in both its severity and its finality,"* [Gardner v. Florida, 430 U.S. 349] at 357, 97 S.Ct., at 1204, *we have recognized an acute need for reliability in capital sentencing proceedings*. See Lockett v. Ohio, 438 U.S. 586, 604, 98 S.Ct. 2954, 2964, 57 L.Ed.2d 973 (1978) (opinion of Burger, C.J.) (stating that the "qualitative difference between death and other penalties calls for a greater degree of reliability when the death sentence is imposed"); see also Strickland v. Washington, 466 U.S. 668, 704, 104 S.Ct. 2052, 2073, 80 L.Ed.2d 674 (1984) (Brennan, J., concurring in part and dissenting in part) ("[W]e have consistently required that capital proceedings be policed at all stages by an especially vigilant concern for procedural fairness and for the accuracy of factfinding").

Monge v. California, 524 U.S. 721, 731-732 (1998) (Emphasis added). See Deck v. Missouri, 544 U.S. 622, (2005) (slip op., at 10) (same); Arvelaez v. Butterworth, 738 So.2d 326, 326-27 (Fla.1999) ("We acknowledge we have a constitutional responsibility to ensure the death penalty is administered in a fair, consistent *and reliable manner* . . . ") (Emphasis added).

The procedures required to ensure due process in the context of imposition of capital punishment may not be explicitly provided for by statute. Nonetheless, the Constitution compels courts to adopts procedures that accommodate the due process requirements compelled by the Constitution:

> To insure that the death penalty is indeed imposed on the basis of "reason rather than caprice or emotion," we have invalidated procedural rules that tended to diminish the reliability of the sentencing determination. The same reasoning must apply to rules that diminish the reliability of the guilt determination. Thus, if the unavailability of a lesser included offense instruction enhances the risk of an unwarranted conviction, Alabama is constitutionally prohibited from withdrawing that option from the jury in a capital case.

Beck v. Alabama, 447 U.S. 625, 637-638 (1980). Thus, unlike some mandatory sanctions, state legislatures cannot require "automatic" imposition of capital punishment. Sumner v. Shuman, 483 U.S. 66 (1987); Woodson v. North Carolina, 428 U.S. 280 (1976). Defendants must be given notice and the opportunity to address all evidence upon which imposition of capital punishment is based. Gardner v. Florida, 430 U.S. 349 (1977). The sentencing body cannot be precluded from considering and giving effect to relevant mitigation. See Smith v. Texas, 543 U.S. 37 (2004) (procedure unconstitutional where jury asked to answer "yes" or "no" to two questions in a manner where valid mitigating evidence was not considered); Skipper v. South Carolina, 476 U.S. 1 (1976) (sentencing body cannot be precluded from considering defendant's potential for rehabilitation); Penry v. Lynaugh, 492 U.S.302 (1989) (sentencing body cannot be precluded from considering defendant's intellectual disability as mitigating circumstance).

The analysis to be applied by the courts is far more complex when a death penalty statute is being analyzed, for not only must the statute satisfy ordinary due process requirements, it also must satisfy an Eighth Amendment analysis that compels heightened due process to ensure reliable sentencing. The United States Supreme Court has expressly alluded to the analysis that must be conducted when a court reviews the constitutionality of a statutory aggravating circumstance that is used to impose capital punishment:

> The difficulty with the State's argument is that it presents a Due Process Clause approach to vagueness and fails to recognize the rationale of our cases construing and applying the Eighth Amendment. Objections to vagueness under the Due Process Clause rest on the lack of notice, and hence may be overcome in any specific case where reasonable persons would know that their conduct is at risk. Vagueness challenges to statutes not threatening First Amendment interests are examined in light of the facts of the case at hand; the statute is judged on an as-applied basis. [Cit.] Claims of vagueness directed at aggravating circumstances defined in capital punishment statutes are analyzed under the Eighth Amendment and characteristically assert that the challenged provision fails adequately to inform juries what they must find to impose the death penalty and as a result leaves them and appellate courts with the kind of open-ended discretion which was held invalid in Furman v. Georgia, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972).

Maynard v. Cartwright, 486 U.S. 356, 361-362 (1988).

Due Process and fundamental fairness considerations under the Fifth and Fourteenth Amendments to the United States Constitution and article I, sections 2 and 9 of the Florida Constitution are inextricably tied to the heightened reliability demanded by the Eighth Amendment to the United States Constitution. See Caldwell v. Mississippi, 472 U.S. 320, 329 (1985) ("This Court has repeatedly said that under the Eighth Amendment 'the qualitative difference of death from all other punishments requires a correspondingly greater degree of scrutiny of the capital sentencing determination.'") (Citation omitted - emphasis added). Aside from heightened requirements of reliability required as a component of Due Process, the Eighth Amendment proscription against cruel and unusual punishments precludes capital punishment where imposition of the death penalty is contrary to contemporary standards of decency. See Roper v. Simmons, 543 U.S 551 (2005) (death penalty for person less than 18 years old unconstitutional); Atkins v. Virginia, 536 U.S. 304 (2002) (death penalty impermissible for intellectually disabled); Stanford v. Kentucky, 492 U.S. 361 (1989) (death penalty unconstitutional for person under seventeen years of age); Tison v. Arizona, 481 U.S. 137 (1987) (death penalty unconstitutional for person who lacks sufficient moral culpability).

In summary, a court's "duty to search for constitutional error with painstaking care is never more exacting than it is in a capital case." Burger v. Kemp, 483 U.S. 776, 785 (1987). Arbitrary and capricious imposition of capital punishment is forbidden. Furman v. Georgia, 408 U.S. 238 (1977). "Where discretion is afforded a sentencing body on a matter so grave as the determination of whether a human life should be taken or spared, that discretion must be suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action." Gregg v. Georgia, 428 U.S. 153, 189 (1976) (plurality opinion).

Florida's statute is unique. By express legislation, a defendant convicted of first-degree murder *cannot* receive the death penalty in the absence of "*sufficient* aggravating circumstances." Section 921.141(2) & (3), Fla.Stat.. Holdings by the United States Supreme Court make clear that the statutory aggravating circumstances that authorize and that render a defendant eligible for imposition of capital punishment are entitled to the full protections of the Fifth, Sixth and Fourteenth Amendments to the United States Constitution. See Shepard v.

United States, 544 U.S. 13 (2005); United States v. Booker, 543 U.S. 220 (2005), Ring v. Arizona, 536 U.S. 584 (2002), Apprendi v. New Jersey, 530 U.S. 466 (2001); Jones v. United States, 526 U.S. 227 (1999); Gardner v. Florida, 430 U.S. 349, 357 (1977). But see, Winkles v. State, 894 So.2d 842 (Fla. 2005); Bottoson v. Moore, 833 So.2d 693, 732-733 (Fla. 2002). Thus, since in Florida a defendant's eligibility for capital punishment is expressly and statutorily based on a factual and legal determination that there are "*sufficient* aggravating circumstances," due process demands that the jury make that determination beyond a reasonable doubt. Further, because Florida requires a unanimous 12-person jury determination before a verdict of guilt for first-degree murder can be rendered, the determination that there are "*sufficient* aggravating circumstances" to render a defendant eligible for the death penalty must also be made by a unanimous jury. Anything less than a unanimous jury denies due process under the Fourteenth Amendment to the United States Constitution and is otherwise an arbitrary and irrational diminution of the standard of proof that violates the due process and reliability requirements commanded by the Eighth Amendment to the United States Constitution.

At first blush, the *individual* components that make up the "*sufficient* aggravating circumstances" may not be entitled to Sixth Amendment protection if the analysis set forth in Schad v. Arizona, 501 U.S. 624, 645 (1991) is applied. Clearly, there is here a Sixth Amendment right for the jury to make a unanimous determination beyond a reasonable doubt that there are "*sufficient* aggravating circumstances" because that is the standard that was expressly set by the State Legislature. The absence of an itemized verdict form becomes problematic insofar as the determination of prejudicial versus harmless error when improper aggravating circumstances are used. The procedure currently in Florida is that the judge determines eligibility of a defendant and sentences the defendant. Whether used by the judge or jury, aggravating circumstances that are too vague or imprecise or that support imposition of capital punishment based on the exercise of a constitutional right are unconstitutional. See Griffin v. U.S., 502 U.S. 46, 54 (1991); Stromberg v. California, 283 U.S. 319 (1931) (unconstitutional if aggravating factor used by jury to determine eligibility); Brown v. Sanders, 546 U.S. 212, 126 S.Ct. 884 (2006) (unconstitutional if used by sentencer to impose capital punishment).

In Florida, the process does not require the jury issue even a general verdict as to whether sufficient aggravating circumstances exist based on the existence of one or more aggravating circumstances. Instead, *there is no verdict form used at all.* The jury never overtly makes a reviewable finding beyond a reasonable doubt that "*sufficient* aggravating circumstances" exist to impose the death penalty, and the jury "recommendation" form cannot suffice for this purpose unless the jury unanimously recommends imposition of the death penalty. A unanimous death recommendation by the jury necessarily entails an implicit finding that there are sufficient aggravating circumstances to impose capital punishment, whether as a matter of "eligibility" or a matter of moral judgment after weighing all the factors. However, every non-unanimous jury recommendation presents the very real and constitutionally unacceptable chance that there was never a finding by the jury that *sufficient* aggravating circumstances exist to justify imposition of capital punishment, and the jury as a body is thus denied a meaningful opportunity to say that this poor devil that committed first-degree murder ought not receive the death penalty. This is the very essence of the interplay between the Sixth, Eighth and Fourteenth Amendments to the United States Constitution.

Even with a unanimous death recommendation, a "bad" individual aggravating circumstance is unconstitutional where the jury fails to make an express finding of the existence of all statutory elements that comprise requisite "sufficient aggravating circumstances" that render the defendant eligible for the death penalty and that authorize imposition of capital punishment. This is so because the appellate court must apply a harmless error analysis that is not meaningful – the court can only guess at what effect the bad factor played in imposition of the death penalty. This is shown by the results of the analysis used by the Court in dealing with the "witness elimination" aggravating circumstance from its enactment to the present.

Specifically, this aggravating circumstance was contained in Florida's death penalty statutory scheme that was passed in the wake of Furman v. Georgia, 408 U.S. 238 (1972) (*per curiam*). The statute seemingly creates the following specific aggravating consideration that may be used in conjunction with other aggravating circumstances to determine a defendant's eligibility to receive the death penalty: "The capital felony was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody." §921.141(5)(e),

Fla.Stat.. This statute has been widely interpreted on an *ad hoc* basis by the Florida Supreme Court in a manner that allows defendants to receive capital punishment based on the exercise of rights secured by the First Amendment to the United States Constitution and article I, section 4 of the Florida Constitution. The legal standard for finding the existence of this aggravating circumstance has vacillated wildly on an *ad hoc* basis, rendering the capital sentencing process inconsistent and unreliable in violation of the Eighth and Fourteenth Amendments to the United States Constitution.

Initially, the Defendant objects to the use of this aggravating circumstance as a basis to impose capital punishment because its existence is not determined by a unanimous jury beyond all reasonable doubt. However stated, the question of whether a person was killed to "eliminate" a witness or to "avoid arrest" is a factual question concerning motive that falls squarely within the Sixth and Fourteenth Amendment guarantee of jury determination beyond all reasonable doubt, based on the following analysis set forth in Ring v. Arizona, 536 U.S. 584 (2002):

> Arizona also supports the distinction relied upon in Walton between elements of an offense and sentencing factors. See supra, at 2437-2438; Tr. of Oral Arg. 28-29. As to elevation of the maximum punishment, however, Apprendi renders the argument untenable; Apprendi repeatedly instructs in that context that the characterization of a fact or circumstance as an "element" or a "sentencing factor" is not determinative of the question "who decides," judge or jury. See, e.g., 530 U.S., at 492, 120 S.Ct. 2348 (noting New Jersey's contention that "[t]he required finding of biased purpose is not an 'element' of a distinct hate crime offense, but rather the traditional 'sentencing factor' of motive," and calling this argument "nothing more than a disagreement with the rule we apply today"); id., at 494, n. 18, 20 S.Ct. 2348 ("[W]hen the term 'sentence enhancement' is used to describe an increase beyond the maximum authorized statutory sentence, it is the functional equivalent of an element of a greater offense than the one covered by the jury's guilty verdict."); id., at 495, 120 S.Ct. 2348 ("[M]erely because the state legislature placed its hate crime sentence enhancer within the sentencing provisions of the criminal code does not mean that the finding of a biased purpose to intimidate is not an essential element of the offense." (internal quotation marks omitted)); see also id., at 501, 120 S.Ct. 2348 (THOMAS, J., concurring) ("[I]f the legislature defines some core

crime and then provides for increasing the punishment of that crime upon a finding of some aggravating fact[,] ... the core crime and the aggravating fact together constitute an aggravated crime, just as much as grand larceny is an aggravated form of petit larceny. The aggravating fact is an element of the aggravated crime.").

Even if facts increasing punishment beyond the maximum authorized by a guilty verdict standing alone ordinarily must be found by a jury, Arizona further urges, aggravating circumstances necessary to trigger a death sentence may nonetheless be reserved for judicial determination. As Arizona's counsel maintained at oral argument, there is no doubt that "[d]eath is different." Tr. of Oral Arg. 43. States have constructed elaborate sentencing procedures in death cases, Arizona emphasizes, because of constraints we have said the Eighth Amendment places on capital sentencing. Brief for Respondent 21-25 (citing Furman v. Georgia, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972) (per curiam)); see also Maynard v. Cartwright, 486 U.S. 356, 362, 108 S.Ct. 1853, 100 L.Ed.2d 372 (1988) ("Since Furman, our cases have insisted that the channeling and limiting of the sentencer's discretion in imposing the death penalty is a fundamental constitutional requirement for sufficiently minimizing the risk of wholly arbitrary and capricious action."); Apprendi, 530 U.S., at 522-523, 120 S.Ct. 2348 (THOMAS, J., concurring) ("[I]n the area of capital punishment, unlike any other area, we have imposed special constraints on a legislature's ability to determine what facts shall lead to what punishment--we have restricted the legislature's ability to define crimes.").

Apart from the Eighth Amendment provenance of aggravating factors, Arizona presents "no specific reason for excepting capital defendants from the constitutional protections ... extend[ed] to defendants generally, and none is readily apparent." *Id.*, at 539, 120 S.Ct. 2348 (O'CONNOR, J., dissenting). The notion "that the Eighth Amendment's restriction on a state legislature's ability to define capital crimes should be compensated for by permitting States more leeway under the Fifth and Sixth Amendments in proving an aggravating fact necessary to a capital sentence ... is without precedent in our constitutional jurisprudence." *Ibid.*

In various settings, we have interpreted the Constitution to require the addition of an element or elements to the definition of a criminal offense in order to narrow its scope. See, e.g., United States v. Lopez, 514 U.S. 549, 561-662, 115 S.Ct. 1264, 131 L.Ed.2d 626 (1995) (suggesting that addition to federal gun possession statute of "express jurisdictional element" requiring connection between weapon and interstate commerce would render statute constitutional under Commerce Clause); Brandenburg v. Ohio, 395 U.S. 444, 447, 89 S.Ct. 1827, 23 L.Ed.2d 430 (1969) (per curiam) (First Amendment prohibits States from "proscrib[ing] advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action"); Lambert v. California, 355 U.S. 225, 229, 78 S.Ct. 240, 2 L.Ed.2d 228 (1957) (Due Process Clause of Fourteenth Amendment requires "actual knowledge of the duty to register or proof of the probability of such knowledge" before ex-felon may be convicted of failing to register presence in municipality). If a legislature responded to one of these decisions by adding the element we held constitutionally required, surely the Sixth Amendment guarantee would apply to that element. We see no reason to differentiate capital crimes from all others in this regard. Arizona suggests that judicial authority over the finding of aggravating factors "may ... be a better way to guarantee against the arbitrary imposition of the death penalty." Tr. of Oral Arg. 32. The Sixth Amendment jury trial right, however, does not turn on the relative rationality, fairness, or efficiency of potential factfinders. Entrusting to a judge the finding of facts necessary to support a death sentence might be "an admirably fair and efficient scheme of criminal justice designed for a society that is prepared to leave criminal justice to the State. ... The founders of the American Republic were not prepared to leave it to the State, which is why the jury-trial guarantee was one of the least controversial provisions of the Bill of Rights. It has never been efficient; but it has always been free." Apprendi, 530 U.S., at 498, 120 S.Ct. 2348 (SCALIA, J., concurring).

In any event, the superiority of judicial factfinding in capital cases is far from evident. Unlike Arizona, the great majority of States responded to this Court's Eighth Amendment decisions requiring the presence of aggravating circumstances in capital cases by entrusting those determinations to the jury.

> Although " 'the doctrine of stare decisis is of fundamental importance to the rule of law[,]' ... [o]ur precedents are not sacrosanct." Patterson v. McLean Credit Union, 491 U.S. 164, 172, 109 S.Ct. 2363, 105 L.Ed.2d 132 (1989) (quoting Welch v. Texas Dept. of Highways and Public Transp., 483 U.S. 468, 494, 107 S.Ct. 2941, 97 L.Ed.2d 389 (1987).). "[W]e have overruled prior decisions where the necessity and propriety of doing so has been established." 491 U.S., at 172, 109 S.Ct. 2363. We are satisfied that this is such a case.
>
> For the reasons stated, we hold that Walton and Apprendi are irreconcilable; our Sixth Amendment jurisprudence cannot be home to both. Accordingly, we overrule Walton to the extent that it allows a sentencing judge, sitting without a jury, to find an aggravating circumstance necessary for imposition of the death penalty. See 497 U.S., at 647-649, 110 S.Ct. 3047. Because Arizona's enumerated aggravating factors operate as "the functional equivalent of an element of a greater offense," Apprendi, 530 U.S., at 494, n.19, 120 S.Ct. 2348, the Sixth Amendment requires that they be found by a jury.
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> * * *
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> "The guarantees of jury trial in the Federal and State Constitutions reflect a profound judgment about the way in which law should be enforced and justice administered. ... If the defendant preferred the common-sense judgment of a jury to the more tutored but perhaps less sympathetic reaction of the single judge, he was to have it." Duncan v. Louisiana, 391 U.S. 145, 155-156, 88 S.Ct. 1444, 20 L.Ed.2d 491 (1968).
>
> The right to trial by jury guaranteed by the Sixth Amendment would be senselessly diminished if it encompassed the factfinding necessary to increase a defendant's sentence by two years, but not the factfinding necessary to put him to death. We hold that the Sixth Amendment applies to both. The judgment of the Arizona Supreme Court is therefore reversed, and the case is remanded for further proceedings not inconsistent with this opinion.

Ring v. Arizona, 536 U.S. 584, 604-609 (2002) (Footnotes omitted).

The Sixth and Fourteenth Amendment rights to a unanimous jury determination aside, the considerations set forth in §921.141(5)(e), Fla.Stat., deny due process, basic rights under the First Amendment, and otherwise result in arbitrary and capricious imposition of capital

punishment. These considerations are shown by the arbitrary use of this circumstance in Buzia v. State, SC04-582 (2006WL721612) (Fla. March 23, 2006)(slip opinion, pages 9-13). Bearing in mind that the jury did not make a unanimous finding as to the existence of this factor, either in the rendition of the guilty verdict for first-degree (premeditated *and* felony) murder or during the penalty phase, where the recommendation of the jury was eight to four in favor of capital punishment. Under this recommendation, it is not even established that Buzia's jury made a unanimous determination that there were "*sufficient* aggravating circumstances" to make Buzia eligible for capital punishment. Yet the trial judge used the "avoid arrest" circumstance to impose capital punishment and the Florida Supreme Court applied its own analysis to approve the trial court's use of this factor.

In footnote 4, rejecting as irrelevant the fact that the victims were alive when Buzia left, the Court noted that, "The question, again, is whether [Bruzia] killed [the victim] to eliminate him as a witness." Slip opinion, p.10, fn4. That question is a classic jury question entitled to protection under the Sixth and Fourteenth Amendments to the United States Constitution because its answer, individually and/or in conjunction with the presence of other statutory aggravating circumstances, render Buzia eligible for the death penalty. See Ring, *supra*. It is not known whether the jury in Buzia found the existence of this aggravating circumstance. However, the Court upheld the *judge's* use of this factor based on the analysis contained in Parker v. State, 873 So.2d 270, 289 (Fla. 2004):

> Where the victim is not a police officer, "the evidence [supporting the avoid arrest aggravator] must prove that the sole or dominant motive for the killing was to eliminate a witness," and "[m]ere speculation on the part of the state that witness elimination was the dominant motive behind a murder cannot support the avoid arrest aggravator." However, this factor may be proved by circumstantial evidence from which the motive for the murder may be inferred, without direct evidence of the offender's thought processes.
>
> In other cases, this Court has found it significant that the victim's knew and could identify their killer. While this fact alone is insufficient to prove the avoid arrest aggravator, we have looked at any further evidence presented, such as whether the defendant used gloves, wore a mask, or made any incriminating statements about witness elimination; whether the victims offered resistance;

> and whether the victims were confined or were in a position to pose a threat to the defendant.

Parker, 873 So.2d at 289 (Fla. 2004) (emphasis in original).

The consideration that a defendant's prior association with a victim supports imposition of capital punishment under this factor violates the right First Amendment right of association. The legal standard otherwise is inconsistent with the due process requirement that the State bears the burden of proving the existence of elements of an offense beyond a reasonable doubt. Circumstantial evidence is not legally sufficient proof if it fails to exclude all reasonable hypothesis of innocence. In Buzzia, the Court rules that the fact the victims were initially left alive by Buzzia irrelevant. The jury's determination that a premeditated murder occurred did not establish that the motive for the murder was elimination of a witness any more than it established the victims were intentionally killed because they were Jewish, or Catholic, or Asian, or American Indian.

The analysis used by the Court otherwise produces inconsistent results. The "avoid arrest or to escape" aggravating circumstance is unconstitutionally vague and overbroad under the teachings of Maynard, where it is silent as to whether the arrest must be imminent, and makes no provision as to whether the person being arrested or escaping must be the defendant or whether it could be someone else. It fails to state whether the escape must be from actual or imminent custody or whether the custody must be legal. Hence, the aggravating circumstance is subject to variable and uneven application depending on whether the sentencer uses a strict or a liberal construction of it.

This aggravating circumstance has been applied in an inconsistent and arbitrary manner. Specifically, in Nelson v. State, 850 So.2d 514 (Fla. 2003), the Court analyzed the use of this factor and the trial court's denial of a special jury instruction as follows:

> Nelson makes a two-part claim regarding the avoid arrest aggravator. He alleges that (1) the trial court erred by not informing the jurors that when the victim is not a police officer, the primary or dominant motive must be to eliminate the witness or that the State's proof must be very strong; and (2) the trial court erred by finding the avoid arrest aggravator.

As to the avoid arrest aggravator instruction, we agree with the State that Nelson did not properly preserve this issue for review. Although the record reflects that Nelson filed a motion to declare sections 921.141 and 921.141(5)(e), Florida Statutes (1997), unconstitutional, Nelson did not specifically address the avoid arrest jury instruction in that motion. Further, Nelson did not object to the adequacy of the avoid arrest jury instruction at trial. This Court has held that the contemporaneous objection rule applies to Espinosa challenges. See Hodges v. State, 629 So.2d 272, 273 (Fla. 1993). Failure to make an objection at trial about a jury instruction will render it procedurally barred. See id. Because the record reflects that Nelson did not object to the avoid arrest aggravator jury instruction at trial, we find this issue procedurally barred.

The trial court found that Nelson's sole or dominant motive for the murder (of a victim who was not a law enforcement officer) was for the purpose of avoiding or preventing a lawful arrest. The trial court found that the aggravator was proven beyond a reasonable doubt and listed four factors that supported it as being Nelson's sole murder motive:

> (1) The Defendant in his confession to the police said he killed the victim because he was afraid that Virginia Brace could identify him, "because she saw his face."
> (2) Once he removed her from her home and placed her in the trunk of her car, she was no longer a threat to his escape.
> (3) The Defendant placed the victim in the trunk of her car and drove her around over six hours. Thus he had ample opportunity to release the victim or simply leave her in the trunk. See Alston v. State, 723 So.2d 148, 160 (Fla. 1998).
> (4) The victim was abducted from her home and transported to an isolated area where she was killed.

We conclude that Nelson's claim that the trial court erred in finding the avoid arrest aggravator is refuted by the record, including his own admissions. After Brace's body was found, Nelson agreed to waive his rights and to speak with police. When Detective Sergeant Robinson asked why this happened, Nelson responded that he was mad at the world and mad about his life. When Nelson was describing his encounter with Brace in her bedroom, he related that she was screaming and when Sergeant Robinson asked, "And you were saying you didn't want to leave because of what reason?" Nelson replied, "(Inaudible) she would

call the police." Sergeant Robinson then asked, "So you were worried about her calling the police if you left?" Nelson replied, "Yes." Sergeant Robinson asked Nelson, "Why did you put her in the trunk?" Nelson replied, "So no one would see." Nelson expressly agreed with the police when they asked him if he killed Brace because he felt like she could identify him. In fact, when Nelson was asked how Brace could identify him in the dark, he replied, "From the bathroom light." Later on in the interview, Sergeant Robinson asked Nelson, "So what made you kill Ms. Brace?" Nelson answered, "I got scared." Thus, the record reflects that Nelson's own explanations about why he killed Brace consistently related his concerns about her identifying him. See Walls v. State, 641 So.2d 381, 390 (Fla. 1994) (stating that the defendant's argument that the avoid arrest aggravator was improperly found was without merit "because it is directly refuted by the record and Walls' own words").

Although Nelson's admissions to police alone support his intentional elimination of Brace as a witness, other considerations also support the avoid arrest aggravator in this case. For example, when evaluating the avoid arrest aggravator, this Court has stated that it will look at whether the victims knew and could identify their killer, but that this fact alone is insufficient to prove the aggravator beyond a reasonable doubt. See Farina, 801 So.2d 44, 54 (Fla. 2001). We have held that the following evidence is also pertinent when reviewing this aggravator: "[W]hether the defendant used gloves, wore a mask, or made any incriminating statements about witness elimination; whether the victims offered resistance; and whether the victims were confined or were in a position to pose a threat to the defendant." Id. The evidence in this case indicates that Nelson probably could have accomplished the burglary of Brace's home and sexual battery without killing her since Brace likely posed little physical resistance to Nelson: she was 78 years old; she was awakened from her bed in the middle of the night when she was wearing only a nightgown; and at that time her eyeglasses and hearing aids were on her night stand. Further, Nelson easily obtained access to her car. Therefore, it appears that once Nelson immobilized Brace by putting her in the trunk, he secured an uncontested getaway and there was no reason for him to kill her except to eliminate her as a witness. See Looney v. State, 803 So.2d 656, 677-78 (Fla. 2001) (finding that once the defendants immobilized the victims, gained access to the victims' property and vehicles, and secured an uncontested getaway, the only remaining reason to kill the victims was to eliminate them as

witnesses), *cert. denied,* 536 U.s. 966, 122 S.Ct. 2678, 153 L.Ed.2d 2002).

Nelson's act of taking Brace to a remote area to kill her also lends support to the finding of the avoid arrest aggravator in this case. The evidence at trial was that Nelson drove to an isolated orange grove to kill Brace, but his plan was stymied when the car became stuck in the sand and he needed the assistance of other people to extricate the car. Nelson then drove to another orange grove where he killed Brace. The record reflects that Nelson's journey to two different orange groves was intended to find an isolated place to kill Brace, the sole witness to his crimes. See Knight v. State, 746 So.2d 423, 435 (Fla. 1998); Preston v. State, 607 So.2d 404, 409 (Fla. 1992); Cave v. State, 476 So.2d 180, 188 (Fla. 1985); Martin v. State, 420 So.2d 583, 585 n. 3 (Fla. 1982).

We find no error in the trial court's finding of the avoid arrest aggravator because the defendant's own statements and actions corroborate evidence that the sole or dominant murder motive in this case was to silence Brace as the sole witness against him.

Nelson v. State, 850 So.2d 514, 524-526 (Fla. 2003) (Footnotes omitted). See Floyd v. State, 850 So.2d 383, 406 (Fla. 2002) ("Although issue may be debated and contested," the circumstantial evidence that witness elimination was not the dominant motive is overcome by direct evidence of defendant stating he shot the victim because she "threatened to call the police on me."); Philmore v. State, 820 So.2d 919, 935 (Fla. 2002) (same).

While this reasoning appears consistent with that in Brucia, supra, it is wholly inconsistent with the reasoning and results in other cases with similar facts: See Anderson v. State, 841 So.2d 390, 405 (Fla. 2003)(Possibility that defendant murdered person whom he knew and who could turn him in for crime out of anger precluded finding victim was killed to eliminate a witness); Bell v. State, 841 So.2d 329, 336 (Fla. 2002) (Possibility that victim killed out of anger precluded finding that victim was killed to eliminate witness); Hurst v. State, 819 So.2d 689, 695-696 (Fla. 2002) (Witness elimination circumstance disallowed in robbery that could have been completed without killing the victim and despite the defendant's statement that he did not want the victim, whom he knew, "to see his face."); Urbin v. State, 714 So.2d 411, 415-16 (Fla. 1998) (witness elimination circumstance disallowed where defendant said he shot the victim because he bucked and because he saw [Urbin's] face, thereby establishing multiple motives for

the murder rather than a "sole" or "dominant" motive); Livingston v. State, 565 So.2d 1288, 1292 (Fla. 1988) (witness elimination factor disallowed because defendant's statement after shooting first victim that, "now I'm going to get the one in the back [of the store] did not establish witness elimination was the sole or dominant motive for the shooting).

The factor was approved in the case of Thompson v. State, 648 So.2d 692 (Fla. 1994). To understand the analysis used by the Court, the facts cited in the opinion must also be repeated here:

> Charlie Thompson appeals his convictions of two counts of first-degree murder and his two death sentences. We have jurisdiction pursuant to article V, section 3(b)(1), of the Florida Constitution. For the reasons expressed in this opinion, we affirm the convictions and death sentences.
>
> The record reveals the following facts. The appellant, Charlie Thompson, was a groundskeeper at Myrtle Hill Cemetery in Tampa. Although he was a large man, about six feet tall and weighing 220 pounds, Thompson injured his back while digging a grave and began collecting workers' compensation benefits through the cemetery's office. After the workers' compensation benefits ran out, Thompson persisted in his belief that the cemetery owed him $150 more than he had collected. Thompson was fired from his job at the cemetery in July of 1986 for failing to show up for work. In the early afternoon of August 27, 1986, the bodies of Russell Swack and Nancy Walker were found in a wooded area near the Myrtle Hill Cemetery. Swack was the bookkeeper for the cemetery and Walker was his assistant. A medical examination revealed that Swack had been stabbed nine times and shot once in the face. All of the injuries had been inflicted while Swack was alive. The medical examination of Walker established that she had been shot once in the back of the head. A watch and ring were missing from Swack's body.
>
> One of the managers of the cemetery testified that he had last seen Swack and Walker at about ten o'clock on that same morning and that the victims were speaking with a large unidentified man in the cemetery's business office. The witness also stated that he left the office and that, when he returned about fifteen minutes later, the victims were gone and the office door was locked.
>
> A search of the office revealed that Walker's purse was under her desk and her typewriter was still turned on. In addition, Swack's adding machine was left on and a bookkeeping ledger was

> on Swack's desk. The last entry in the ledger, dated that same day, was for a check payable to Charlie Thompson in the amount of $1,500.
>
> Several witnesses, including the mother of Thompson's children, testified that Thompson had a watch and a ring in his possession on the afternoon and evening of the crime. The watch and ring were recovered and identified as belonging to Swack. Two days after the crime, Thompson was arrested when an alert car salesman contacted the police after Thompson and three others attempted to purchase a used car with the $1,500 check from Myrtle Hill Cemetery.
>
> At Thompson's trial for the murders, the State presented this and other evidence to the jury, including the testimony of a jailhouse informant who stated that Thompson admitted killing Swack and Walker. Thompson presented no witnesses in his defense. The jury found Thompson guilty of two counts of first-degree murder and two counts of kidnapping. In the penalty phase of the trial, the defense presented two psychologists who testified as to Thompson's mental deficiencies. Thompson's sister also testified to a history of mental illness in the family. After hearing this testimony, the jury recommended the death penalty for each murder by a 7-to-5 vote. The court found the following six aggravating factors: prior felony conviction; murder committed while engaged in a kidnapping; murder committed to avoid arrest; murder committed for pecuniary gain; murder especially heinous, atrocious, or cruel; and murder committed in a cold, calculated, and premeditated manner. The court found that the evidence failed to establish extreme mental or emotional disturbance and substantially impaired capacity, but did give some weight to nonstatutory mitigating factors including chronic mental illness, moderate disturbance, symptoms of mental illness, family background, and mental retardation.
>
> The court sentenced Thompson to death for each murder and to consecutive life sentences for each kidnapping. Thompson appeals seven issues to this Court.

Thompson v. State, 648 So.2d 692, 693-694 (Fla. 1994). The Court approved the trial court's finding of a murder committed to eliminate a witness based on the following analysis, which is repeated here in full:

> To establish the avoid arrest aggravator in this case, "the State must show that the sole or dominant motive for the murder[s] was the elimination of ··· witness[es]." Preston v. State, 607 So.2d 404,

> 409 (Fla. 1992), *cert. denied*, 507 U.S. 999, 113 S.Ct. 1619, 123 L.Ed.2d 179 (1993). "[T]his factor may be proved by circumstantial evidence from which the motive for the murder[s] may be inferred." *Id.* Once Thompson had obtained the $1,500 check from Swack and Walker, there was little reason to kill them other than to eliminate the sole witnesses to his actions. This factor is clearly supported by the evidence. We also reject Thompson's argument that the pecuniary gain aggravator does not apply in this case and that this factor is inconsistent with the avoid arrest aggravator. There is ample evidence in the record to prove that Thompson benefitted [sic] financially from these murders. Furthermore, we have previously held that it is proper for a trial court to utilize both the pecuniary gain and avoid arrest aggravators. *See* Prestion, 607 So.2d at 409.

Thompson, 648 So.2d at 695 (Fla. 1994). The presence of the "pecuniary gain" motive for a homicide apparently does not provide a sufficient motive to render witness elimination a secondary or non-dominant motive.

The cases where the "witness elimination" factor have been disapproved had essentially the same factual elements as those where the factor is approved, and the analysis used to either approve or reject the circumstance allows arbitrary results. Compare Zack v. State, 753 So.2d 9, 20 (Fla. 2000) (factor disapproved where, "While it is true that Smith was able to identify Zack, this alone is insufficient to support application of this aggravator. . . . The record suggests only that Smith's murder was part of Zack's premeditated plan to kill her and take her car and possessions. While it is true that Zack did not have to murder Smith to accomplish his monetary goals, this alone does not make Zack's dominant motive the desire to avoid arrest.") with Knight v. State, 746 So.2d 423, 435 (Fla. 1998) (factor approved where, "In finding that the State had met that burden in this case, the trial court observed: 'Had the sole motive for the murders been financial gain, the defendant's purpose would have been accomplished upon the receipt of the money. Even if he had wanted to perfect his get-away he could have taken the car after he asked the Ganses to exit the vehicle and driven away. His actions clearly indicate however that he ordered them back into the car, told them to drive to an even more secluded area and executed them.' Obviously, Knight had some purpose in mind, regardless of the state of his mental faculties, in killing the victims execution style at the end of his rambling journey to a remote

location. We conclude that although the issue may be contested, there is sufficient evidence, including circumstantial evidence, to support the trial court's finding. Hence, we affirm the trial court's finding of the avoid arrest aggravator.").

As part of its analysis, the Court states that, "Where the victim is not a police officer, 'the evidence [supporting the avoid arrest aggravator] must prove that the sole or dominant motive for the killing was to eliminate a witness.'" Parker v. State, 873 So.2d 270, 289 (Fla. 2004) (Emphasis in original). The Court feels comfortable in deciding whether witness elimination is a dominant motive, e.g., Howell v. State, 707 So.2d 674, 682 (Fla. 1998) ("The fact that Howell may have had other motives for murdering Bailey does not preclude the application of this aggravator") or only a secondary motivation that is not dominant. E.g., Urbin v. State, 714 So.2d 411, 416 (Fla. 1998) (The evidence suggests that Urbin shot the victim because he saw his face at most a corollary, or secondary motive, not the dominant one).

The Court at times writes that this circumstance is sufficiently proved where the victim knew the defendant. E.g., Wike v. State, 698 So.2d 817, 822 (Fla.1997) ("Evidence that a victim knew the Defendant and could later identify him is sufficient to prove this aggravating circumstance.") (citing Correll v. State, 523 So.2d 562 (Fla. 1988); Welty v. State, 402 So.2d 1159 (Fla. 1981). At other times, the Court writes that knowledge of the defendant's identity alone does not prove this factor. E.g., Consalvo v. State, 697 So.2d 805, 819 (Fla. 1996) ("Likewise, the mere fact that the victim knew and could identify defendant, without more, is insufficient to prove this aggravator.") (citing Geralds v. State, 601 So.2d 1157, 1164 (Fla. 1992); Davis v. State, 604 So.2d 794, 798 (Fla. 1992). Either line of cases can be applied by the Court to either approve or reject the trial court's use of this circumstance of motive that has not been found by a unanimous jury.

The arbitrary use of this factor to impose capital punishment by the Courts absent an express, unanimous finding by the jury that the sole or dominant motive for a murder was to eliminate a witness denied due process and the right to a jury trial, a reliable sentencing determination, meaningful appellate review and separation of powers where the Florida Supreme Court is providing the substance of this aggravating circumstance on an ad hoc basis from a cold record. The Courts use this circumstance to impose the death penalty under the same facts where

this circumstance is rejected. E.g., Bates v. State, 465 So.2d 490 (Fla. 1985) (avoid arrest circumstance rejected where defendant abducted woman from her office, took her into woods, sexually battered and then killed her); Hall v. State, 614 So.2d 473, 475, 477-478 (Fla. 1993) (avoid arrest circumstance approved where defendant abducted woman from parking lot, took her into woods, sexually battered then killed her).

The foregoing cases have arbitrary and capricious results because the legal standard to apply the "avoid arrest" factor vacillates on an ad hoc basis. Arbitrary" is defined as "depending on choice or discretion: determined by decision of a judge or tribunal rather than defined by statute." Webster's Third New International Dictionary (1981). "Capricious" is likewise defined as "marked or guided by caprice: given to changes of interest or attitude according to whims or passing fancies: not guided by steady judgment, intent or purpose." Webster's Third New International Dictionary (1981).

The foregoing examples show that the "avoid arrest" aggravating factor in Florida does not meet the requirements of strict construction, due process, or a meaningful standard by which the death penalty can be consistently and reliably imposed as required. The arbitrariness of the court's use of this factor is exacerbated here because a unanimous jury does not determine the existence of this statutory element that renders the defendant eligible for capital punishment. Use of this factor does not survive scrutiny and application of time-honored requirements under the United States Constitution. The Constitution requires that capital sentencing discretion must be directed and limited by considerations sufficiently limited in their application to provide principled, objective bases for determining the presence of the circumstance in some cases and its absence in others, in order to provide consistent and rational imposition of the death penalty. The Florida Legislature failed to adequately define what the "avoid arrest" aggravating circumstance entails, and the interpretation provided by the Florida Supreme Court has produced widespread and inconsistent results under the same facts. In violation of the separation of powers proscription contained in article II, section 3 of the Florida Constitution, the Florida Supreme Court has attempted to provide the substance of this factor but has failed to do so consistently and in a manner that is capable of reliable application by the trial courts and juries in Florida, as shown by the foregoing analysis. If Florida is going to have a valid death penalty, it is

incumbent on the Legislature to adequately establish it substantively and for the courts to meaningfully enforce the Constitutional requirements:

> [I]f the state wishes to authorize capital punishment it has a constitutional responsibility to tailor and apply its law in a manner that avoids the arbitrary and capricious infliction of the death penalty. Part of a state's responsibility in this regard is to define the crimes for which death may be the sentence in a way that obviates "standardless [sentencing] discretion." (citations omitted). It must channel the sentencer's discretion by "clear and objective" standards and then "make rationally reviewable the process for imposing a sentence of death."

Godfrey v. Georgia, 446 U.S. 420, 428 (1980). This factor cannot stand judicial scrutiny.

Simply said, Section 921.141(5)(e), Florida Statutes, is unconstitutionally vague, overly broad, and it is applied in an arbitrary and capricious manner in violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and article I, sections 2, 9 and 16 of the Florida Constitution as discussed above.

I HEREBY CERTIFY that a copy of the above and foregoing Motion has been furnished to the Office of the State Attorney, by hand and/or electronically, this 12 day of December, 2013.

Respectfully submitted,

MATT SHIRK
PUBLIC DEFENDER

BY: _____
Fred C. Gazaleh, #353787
Assistant Public Defender

/slc

(CAP092)

IN THE CIRCUIT COURT, FOURTH JUDICIAL CIRCUIT, IN AND FOR DUVAL COUNTY, FLORIDA.

CASE NO.: 16 2013 CF 005781 AXXX MA

DIVISION: CR-D

STATE OF FLORIDA

VS.

DONALD JAMES SMITH

MOTION TO DECLARE SECTION 921.141(5)(h), FLORIDA STATUTES, UNCONSTITUTIONAL AS WRITTEN AND AS APPLIED

The Accused, through the undersigned attorney, moves for an order declaring §921.141(5)(h), Florida Statutes, unconstitutional based on violations of art. I, sections 2, 9, 16, 17 and 22 of the Florida Constitution, article II, section 3 of the Florida Constitution and the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution as follows:

1. The constitutional power and authority to create substantive legislation is vested solely in the Florida Legislature. Article III, section 1, Fla. Const. (1976). Persons belonging to one branch of government are constitutionally proscribed from exercising any powers appertaining to another branch. Art. II, section 3, Fla. Const. (1976).

2. In the valid exercise of its constitutional duty and power, the Florida Legislature enacted §921.141(5)(h), Fla. Stat., which states, "The capital felony was especially heinous, atrocious, or cruel." This statutory aggravating circumstance authorizes imposition of capital punishment in Florida if, in conjunction with other aggravating factors set forth in §921.141, Fla.Stat., there are sufficient aggravating circumstances to justify imposition of capital punishment.

3. In the context of capital punishment, a statutory aggravating factor must genuinely limit the class of persons eligible for the death penalty and it must reasonably justify the imposition of the more severe sanction for that defendant compared to others found guilty of murder. Zant v. Stephens, 462 U.S. 862, 877 (1993); Lowenfield v. Phelps, 484 U.S. 321 (1988). §921.141(5)(h), Florida Statutes, does neither.

4. As written and enacted, §921.141(5)(h), Fla. Stat., is overly broad and vague. Espinosa v. Florida, 505 U.S. 1079 (1992); Shell v. Mississippi, 498 U.S. 1 (1990); Maynard v. Cartwright, 486 U.S. 356 (1988). The terms "heinous," "atrocious" and "cruel," either singularly or when combined, do not genuinely narrow the class of persons eligible for the death penalty and otherwise allow constitutionally protected considerations to be used in imposition of capital punishment. These are broad and subjective terms that arguable exist in the context of every first-degree murder to the extent that this statutory aggravating factor can be applied to virtually any murder in which the defendant exercise rights guaranteed by the state and federal Constitutions. This factor as written promotes arbitrary, capricious, and unfettered imposition of the death penalty in violation of the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution and article I, sections 2, 9, 16, 17 and 22 of the Florida Constitution. The vague statutory language allows imposition of the death penalty for improper and unconstitutional reasons such as race, gender, ethnicity, religion and social status. This factor can be found based on the exercise of the right to a trial and to remain silent. The standard jury instructions for this statutory aggravating factor are likewise unconstitutional for these same reasons.

5. Florida juries, trial courts and the Supreme Court of Florida have applied § 921.141(5)(h), Fla. Stat., in arbitrary, capricious, unreasonable, inconsistent and frivolous ways. Use of this statutory aggravating factor in this manner violates article I, sections 2, 9, 16, 17 and 22 of the Florida Constitution and the fifth, sixth, eighth and fourteenth amendments to the United Stated Constitution. This is shown in the case law that guides use of the HAC factor in Florida. This Court is asked pursuant to §§ 90.202(2) & (11), Florida Statutes, and is therefore compelled pursuant to §90.203, Florida Statutes, to take judicial notice of the reported decisions of the Florida courts which have applied, discussed or analyzed §921.141(5)(h), Florida Statutes. In that regard, the following cases constitute evidence that demonstrates the unconstitutional, arbitrary and capricious use of this statutory aggravating factor: Elledge v. State, 911 So.2d 57 (Fla. 2005); Marshall v. Crosby, 911 So.2d 1129 (Fla. 2005); Rodriguez v. State, 919 So.2d 1252 (Fla. 2005); Washington v. State, 907 So.2d 512 (Fla. 2005); Green v. State, 30 FLW S318 (Fla. April 18, 2005); Boyd v. State, 30 FLW S87 (Fla. Feb. 10, 2005); Cave v. State, 899 So.2d 1042 (Fla. 2005); Fitzpatrick v. State, 900 So.2d 495 (Fla. 2005); Arbelaez v. State, 898 So.2d 25 (Fla. 2005); Brown v. State,

894 So.2d 137 (Fla. 2004); Huggins v. State, 889 So.2d 743 (Fla. 2004); Monlyn v. State, 894 So.2d 832 (Fla. 2004); Cole v. State, 29 FLW S712 (Fla. November 24, 2004); Everett v. State, 893 So.2d 1278 (Fla. 2004); Thomas v. State, 894 So.2d 126 (Fla. 2004); Phillips v. State, 894 So.2d 28 (Fla. 2004); Hodges v. State, 885 So.2d 338 (Fla. 2004); Dillbeck v. State, 882 So.2d 969 (Fla. 2004); Sochor v. State, 883 So.2d 766 (Fla. 2004); Hutchinson v. State, 882 So.2d 943 (Fla. 2004); Henyard v. State, 883 So.2d 753 (Fla. 2004); Power v. State, 886 So.2d 952 (Fla. 2004); Douglas v. State, 878 So.2d 1246 (Fla. 2004); Reed v. State, 875 So.2d 415 (Fla. 2004); Davis v. State, 875 So.2d 359 (Fla. 2003); Guzman v. State, 868 So.2d 498 (Fla. 2003); Zakrzewski v. State, 866 So.2d 688 (Fla. 2003); Owen v. State, 862 So.2d 687 (Fla. 2003); Parker v. State, 873 So.2d 270 (Fla. 2004); Tompkins v. State, 872 So.2d 230 (Fla. 2003); Johnston v. State, 863 So.2d 271 (Fla. 2004); Diaz v. State, 860 So.2d 960 (Fla. 2003); Conde v. State, 860 So.2d 930 (Fla. 2003); Owen v. Crosby, 854 So.2d 182 (Fla. 2003); Caballero v. State, 851 So.2d 655 (Fla. 2003); Belcher v. State, 851 So.2d 678 (Fla. 2003); Allen v. State, 854 So.2d 1255 (Fla. 2003); Nelson v. State, 850 So.2d 514 (Fla. 2003); Wright v. State, 857 So.2d 861 (Fla. 2003); Blackwelder v. State, 851 So.2d 650 (Fla. 2003); Harvey v. State, 28 FLW S513 (Fla. July 3, 2003); Duest v. State, 855 So.2d 33 (Fla. 2003); Marshall v. State, 854 So.2d 1235 (Fla. 2003); Walton v. State, 847 So.2d 438 (Fla. 2003); Randolph v. State, 853 So.2d 1051 (Fla. 2003); Butler v. State, 842 So.2d 817 (Fla.. 2003); Lawrence v. State, 846 So.2d 440 (Fla. 2003); State v. Coney, 845 So.2d 120 (Fla. 2003); Thomas v. State, 838 So.2d 535 (Fla. 2003); Damren v. State, 838 So.2d 512 (Fla. 2003); Anderson v. State, 841 So.2d 390 (Fla. 2003); Lynch v. State, 841 So.2d 362 (Fla. 2003); Reaves v. Crosby, 837 So.2d 396 (Fla. 2003); Israel v. State, 837 So.2d 381 (Fla. 2002); Johnston v. State, 841 So.2d 349 (Fla. 2002); Roberts v. State, 840 So.2d 962 (Fla. 2002); Marquard v. State, 850 So.2d 417 Fla. 2002); Chavez v. State, 832 So.2d 730 (Fla. 2002); Washington v. State, 835 So.2d 1083 (Fla. 2002); Bottoson v Moore, 833 So.2d 693 (Fla. 2002); Barnhill v. State, 834 So.2d 836 (Fla. 2002); Finney v. State, 831 So.2d 651 (Fla. 2002); Rimmer v. State, 825 So.2d 304 (Fla. 2002); Ocha v. State, 826 So.2d 956 (Fla. 2002); Reaves v. State, 826 So.2d 932 (Fla. 2002); Cox v. State, 819 So.2d 705 (Fla. 2002); Smithers v. State, 826 So.2d 916 (Fla. 2002); Hurst v. State, 819 So.2d 689 (Fla. 2002); Gorby v. State, 819 So.2d 684 (Fla. 2002); Schwab v. State, 814 So.2d 402 (Fla. 2002); Gudinas

v. State, 816 So.2d 1095 (Fla. 2002); Morrison v. State, 818 So.2d 432 (Fla. 2002); Carroll v. State, 815 So.2d 601 (Fla. 2002); Crook v. State, 813 So.2d 68 (Fla. 2002); Morris v. State, 811 So.2d 661 (Fla. 2002); Foster v. State, 810 So.2d 910 (Fla. 2002); Dennis v. State, 817 So.2d 741 (Fla. 2002); Woodel v. State, 804 So.2d 316 (Fla. 2001); Francis v. State, 808 So.2d 110 (Fla. 2001); Looney v. State, 803 So.2d 656 (Fla. 2001); Hertz v. State, 803 So.2d 629 (Fla. 2001); Perry v. State; 801 So,.2d 78 (Fla. 2001); Ragsdale v. State, 798 So.2d 713 (Fla. 2001); Card v. State, 803 So.2d 613 (Fla. 2001); Evans v. State, 800 So.2d 182 (Fla. 2001); Ford v. State, 802 So.2d 1121 (Fla. 2001); Jeffries v. State, 797 So.2d 573 (Fla. 2001); Slawson v. State, 796 So.2d 491 (Fla. 2001); Cook v. State, 792 So.2d 1197 (Fla. 2001); Morton v. State, 789 So.2d 324 (Fla. 2001); Happ v. Moore, 784 So.2d 1091 (Fla. 2001); Porter v. State, 788 So.2d 917 (Fla. 2001); Mills v. Moore, 786 So.2d 532 (Fla. 2001); Rose v. State, 787 So.2d 786 (Fla. 2001); Carpenter v. State, 785 So.2d 1182 (Fla. 2001); Rogers v. State, 783 So.2d 980 (Fla. 2001); Bradley v. State, 787 So.2d 732 (Fla. 2001); Singleton v. State, 783 So.2d 970 (Fla. 2001); Beasely v. State, 774 So.2d 649 (Fla. 2000); Booker v. State, 773 So.2d 1079 (Fla. 2000); Keen v. State, 775 So.2d 263 (Fla. 2000); Cherry v. State, 781 So.2d 1040 (Fla. 2000); Sireci v. State, 773 So.2d 34 (Fla. 2000); Merck v. State, 763 So.2d 295 (Fla. 2000); Thompson v. State, 759 So.2d 650 (Fla. 2000); Mansfield v. State, 758 So.2d 636 (Fla. 2000); Hitchcock v. State, 755 So.2d 638 (Fla. 2000); Zack v. State, 753 So.2d 9 (Fla. 2000); Bates v. State, 750 So.2d 6 (Fla. 1999); Brennan v. State, 754 So.2d 1 (Fla. 1999); Nelson v. State, 748 So.2d 237 (Fla. 1999); Thomas v. State, 748 So.2d 970 (Fla. 1999); Bryan v. State, 748 So.2d 1003 (Fla. 1999); Jones v. State, 748 So.2d 1012 (Fla. 1999); Knight v. State, 746 So.2d 423 (Fla. 1998); McDonald v. State, 743 So.2d 501 (Fla. 1999); Shere v. State, 742 So.2d 215 (Fla. 1999); Davis v. State, 742 So.2d 233 (Fla. 1999); Lightbourne v. State, 742 So.2d 238 (Fla. 1999); Larkins v. State, 739 So.2d 90 (Fla. 1999); Gaskin v. State, 737 So.2d 509 (Fla. 1999); Bolin v. State, 736 So.2d 1160 (Fla. 1999); Hildwin v. State, 727 So.2d 193 (Fla. 1998); Rutherford v. State, 727 So.2d 216 (Fla. 1998); Cave v. State, 727 So.2d 227 (Fla. 1998); Alston v. State, 723 So.2d 148 (Fla. 1998); Donaldson v. State, 722 So.2d 177 (Fla. 1998); Brown v. State, 721 So.2d 274 (Fla. 1998); Knight v. State, 721 So.2d 287 (Fla. 1998); State v. Parker, 721 So.2d 1147 (Fla. 1987); Guzman v. State, 721 So.2d 1155 (Fla. 1998); Ragsdale v. State, 720 So.2d 203 (Fla. 1998); Kokal v. Dugger, 718 So.2d 138 (Fla. 1998); Hawk v. State, 718 So.2d 159 (Fla.

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Cave v. State, 476 So.2d 180 (Fla. 1985); Phillips v. State, 476 So.2d 194 (Fla. 1985); Hooper v. State, 476 So.2d 1253 (Fla. 1985); Roman v. State, 475 So.2d 1228 (Fla. 1985); Valle v. State, 474 So.2d 796 (Fla. 1985); Ross v. State, 474 So.2d 1170 (Fla. 1985); Hoffman v. State, 474 So.2d 1178 (Fla. 1985); Trawick v. State, 473 So.2d 1235 (Fla. 1985); Brown v. State, 473 So.2d 1260 (Fla. 1985); Wright v. State, 473 So.2d 1277 (Fla. 1985); Bundy v. State, 471 So.2d 9 (Fla. 1985); Barclay v. State, 470 So.2d 691 (Fla. 1985); Bates v. State, 465 So.2d 490 (Fla. 1985); Johnson v. State, 465 So.2d 499 (Fla. 1985); Randolph v. State, 463 So.2d 186 (Fla. 1984); Henderson v. State, 463 So.2d 196 (Fla. 1985); Troedel v. State, 462 So.2d 392 (Fla. 1984); Duest v. State, 462 So.2d 446 (Fla. 1985); Mills v. State, 462 So.2d 1075 (Fla. 1985); Doyle v. State, 460 So.2d 353 (Fla. 1984); Groover v. State, 458 So.2d 226 (Fla. 1984); Parker v. State, 458 So.2d 750 (Fla. 1984); Eutzy v. State, 458 So.2d 755 (Fla. 1984); Copeland v. State, 457 So.2d 1012 (Fla. 1984); Thomas v. State, 456 So.2d 454 (Fla. 1984); Lemon v. State, 456 So.2d 885 (Fla. 1984); Bundy v. State, 455 So.2d 330 (Fla. 1984); Kennedy v. State, 455 So.2d 351 (Fla. 1984); Gorham v. State, 454 So.2d 556 (Fla. 1984); Card v. State, 453 So.2d 17 (Fla. 1984); Mann v. State, 453 So.2d 784 (Fla. 1984); James v. State, 453 So.2d 786 (Fla. 1984); Blanco v. State, 452 So.2d 520 (Fla. 1984); Jackson v. State, 451 So.2d 458 (Fla. 1984); Squires v. State, 450 So.2d 208 (Fla. 1984); Bassett v. State, 449 So.2d 803 (Fla. 1984); Funchess v. State, 449 So.2d 1283 (Fla. 1984); Oats v. State, 446 So.2d 90 (Fla. 1984); Lusk v. State, 446 So.2d 1038 (Fla. 1984); Rembert v. State, 445 So.2d 337 (Fla. 1984); Sims v. State, 444 So.2d 922 (Fla. 1983); Preston v. State, 444 So2d 939 (Fla. 1984); Bottoson v. State, 443 So.2d 962 (Fla. 1983); Maxwell v. State, 443 So.2d 967 (Fla. 1983); Clark v. State, 443 So.2d 973 (Fla. 1983); Booker v. State, 441 So.2d 148 (Fla. 1983); Pope v. State, 441 So.2d 1073 (Fla. 1983); Livingston v. State, 441 So.2d 1083 (Fla. 1983); Routly v. State, 440 So.2d 1257 (Fla. 1983); Teffeteller v. State, 439 So.2d 840 (Fla. 1983); Herzog v. State, 439 So.2d 1372 (Fla. 1983); Mason v. State, 438 So.2d 374 (Fla. 1983); Lightbourne v. State, 438 So.2d 380 (Fla. 1983); Harris v. State, 438 So.2d 787 (Fla. 1983); Engle v. State, 438 So.2d 803 (Fla. 1983); Harich v. State, 437 So.2d 1082 (Fla. 1983); Arango v. State, 437 So.2d 1099 (Fla. 1983); Hawkins v. State, 436 So.2d 44 (Fla. 1983); King v. State, 436 So.2d 50 (Fla. 1983); Wilson v. State, 436 So.2d 908 (Fla. 1983); Porter v. State, 429 So.2d 293 (Fla. 1983); Waterhouse v. State, 429 So.2d 301 (Fla. 1983); O'Callaghan v. State, 429 So.2d 691 (Fla. 1983); Magill v. State, 428 So.2d 649 (Fla. 1983);

Middleton v. State, 426 So.2d 548 (Fla. 1982); Smith v. State, 424 So.2d 726 (Fla. 1982); Francois v. State, 423 So.2d 357 (Fla. 1982); Hill v. State, 422 So.2d 816 (Fla. 1982); Bolender v. State, 422 So.2d 833 (Fla. 1982); Thomas v. State, 421 So.2d 160 (Fla. 1982); Raulerson v. State, 420 So.2d 567 (Fla. 1982); Mann v. State, 420 So.2d 578 (Fla. 1982); Martin v. State, 420 So.2d 583 (Fla. 1982); Simmons v. State, 419 So.2d 316 (Fla. 1982); Stevens v. State, 419 So.2d 1058 (Fla. 1982); Coler v. State, 418 So.2d 238 (Fla. 1982); Moody v. State, 418 So.2d 989 (Fla. 1982); Gilvin v. State, 418 So.2d 996 (Fla. 1982); Lucas v. State, 417 So.2d 250 (Fla. 1982); Ferguson v. State, 417 So.2d 631 (Fla. 1982); Ferguson v. State, 417 So.2d 639 (Fla. 1982); McCray v. State, 416 So.2d 804 (Fla. 1982); Morgan v. State, 415 So.2d 6 (Fla. 1982); Griffin v. State, 414 So.2d 1025 (Fla. 1982); Harvard v. State, 414 So.2d 1032 (Fla. 1982); Hitchcock v. State, 413 So.2d 741 (Fla. 1982); Steinhorst v. State, 412 So.2d 332 (Fla. 1982); Adams v. State, 412 So.2d 850 (Fla. 1982); Jones v. State, 411 So.2d 165 (Fla. 1982); Arango v. State, 411 So.2d 172 (Fla. 1982); Vaught v. State, 410 So.2d 147 (Fla. 1982); Dobbert v. State, 409 So.2d 1053 (Fla. 1982); Elledge v. State, 408 So.2d 1021 (Fla. 1981); Jent v. State, 408 So.2d 1024 (Fla. 1981); Francois v. State, 407 So.2d 885 (Fla. 1981); Smith v. State, 407 So.2d 894 (Fla. 1981); White v. State, 403 So.2d 331 (Fla. 1981); Odom v. State, 403 So.2d 936 (Fla. 1981); Buford v. State, 403 So.2d 943 (Fla. 1981); Hall v. State, 403 So.2d 1321 (Fla. 1981); Zeigler v. State, 402 So.2d 365 (Fla. 1981); Welty v. State, 402 So.2d 1159 (Fla. 1981); Armstrong v. State, 399 So.2d 953 (Fla. 1981); Sireci v. State, 399 So.2d 964 (Fla. 1981); Maggard v. State, 399 So.2d 973 (Fla. 1981); Enmund v. State, 399 So.2d 1362 (Fla. 1981); Lewis v. State, 398 So.2d 432 (Fla. 1981); Ruffin v. State, 397 So.2d 277 (Fla. 1981); Palmes v. State, 397 So.2d 648 (Fla. 1981); Straight v. State, 397 So.2d 903 (Fla. 1981); Booker v. State, 397 So.2d 910 (Fla. 1981); Jacobs v. State, 396 So.2d 1113 (Fla. 1981); Peek v. State, 395 So.2d 492 (Fla. 1980); Demps v. State, 395 So.2d 501 (Fla. 1981); McCrae v. State, 395 So.2d 1145 (Fla. 1980); Spaziano v. State, 393 So.2d 1119 (Fla. 1981); King v. State, 390 So.2d 315 (Fla. 1980); Mines v. State, 390 So.2d 332 (Fla. 1980); Phippen v. State, 389 So.2d 991 (Fla. 1980); Gafford v. State, 387 So.2d 333 (Fla. 1980); Williams v. State, 386 So.2d 538 (Fla. 1980); Downs v. State, 386 So.2d 788 (Fla. 1980); Ross v. State, 386 So.2d 1191 (Fla. 1980); Neary v. State, 384 So.2d 881 (Fla. 1980); Antone v. State, 382 So.2d 1205 (Fla. 1980); Hall v. State, 381 So.2d 683 (Fla. 1980); Brown v. State, 381 So.2d 690 (Fla. 1980); Clark v. State, 379 So.2d 97 (Fla. 1979); Stone v.

State, 378 So.2d 765 (Fla. 1979); Lewis v. State, 377 So.2d 640 (Fla. 1979); Lucas v. State, 376 So.2d 1149 (Fla. 1979); Dobbert v. State, 375 So.2d 1069 (Fla. 1979); Ford v. State, 374 So.2d 496 (Fla. 1979); Thomas v. State, 374 So.2d 508 (Fla. 1979); Fleming v. State, 374 So.2d 954 (Fla. 1979); Rutledge v. State, 374 So.2d 975 (Fla. 1979); Miller v. State, 373 So.2d 882 (Fla. 1979); Spenkelink v. State, 372 So.2d 65 (Fla. 1979); Kampff v. State, 371 So.2d 1007 (Fla. 1979); Foster v. State, 369 So.2d 928 (Fla. 1979); Menendez v. State, 368 So.2d 1278 (Fla. 1979); Brown v. State, 367 So.2d 616 (Fla. 1979); Hargrave v. State, 366 So.2d 1 (Fla. 1978); Riley v. State, 366 So.2d 19 (Fla. 1978); Shue v. State, 366 So.2d 387 (Fla. 1978); Salvatore v. State, 366 So.2d 745 (Fla. 1978); Jackson v. State, 366 So.2d 752 (Fla. 1978); LeDuc v. State, 365 So.2d 149 (Fla. 1978); Washington v. State, 362 So.2d 658 (Fla. 1978); Raulerson v. State, 358 So.2d 826 (Fla. 1978); Hoy v. State, 353 So.2d 826 (Fla. 1977); Gibson v. State, 351 So.2d 948 (Fla. 1977); Elledge v. State, 346 So.2d 998 (Fla. 1977); Purdy v. State, 343 So.2d 4 (Fla. 1977); Burch v. State, 343 So.2d 831 (Fla. 1977); Adams v. State, 341 So.2d 765 (Fla. 1976); Chambers v. State, 339 So.2d 204 (Fla. 1976); Knight v. State, 338 So.2d 201 (Fla. 1976); Cooper v. State, 336 So.2d 1133 (Fla. 1976); Douglas v. State, 328 So.2d 18 (Fla. 1976); Dobbert v. State, 328 So.2d 433 (Fla. 1976); Halliwell v. State, 323 So.2d 557 (Fla. 1975); Swan v. State, 322 So.2d 485 (Fla. 1975); Alvord v. State, 322 So.2d 533 (Fla. 1975); Tedder v. State, 322 So.2d 908 (Fla. 1975); Slater v. State, 316 So.2d 539 (Fla. 1975); Proffitt v. State, 315 So.2d 461 (Fla. 1975); Spinkellink v. State, 313 So.2d 666 (Fla. 1975); Gardner v. State, 313 So.2d 675 (Fla. 1975); Alford v. State, 307 So.2d 433 (Fla. 1975); Hallman v. State, 305 So.2d 180 (Fla. 1974); State v. Dixon, 283 So.2d 1 (Fla. 1973).

6. "Arbitrary" is defined as "depending on choice or discretion: determined by decision of a judge or tribunal rather than defined by statute." Webster's Third New International Dictionary (1981). "Capricious" is likewise defined as "marked or guided by caprice: given to changes of interest or attitude according to whims or passing fancies: not guided by steady judgment, intent or purpose." Websters Third New International Dictionary (1981). The wholly arbitrary, capricious, whimsical and inconsistent use of §921.141(5)(h), Florida Statutes, is shown by the following analysis and examples: In State v. Dixon, 283 So.2d 1, 9 (Fla. 1973), cert. denied, 416 U.S. 943 (1973), the Florida Supreme Court defined the unconstitutionally vague terms contained in § 921.141(5)(h), Florida Statutes (1973), as follows:

> The crime for which the defendant is to be sentenced was especially heinous, atrocious, or cruel. Heinous means extremely wicked or shockingly evil. Atrocious means outrageously wicked and vile. Cruel means that designed to inflict a high degree of pain with utter indifference to, or even enjoyment of the suffering of others. The kind of crime intended to be included as heinous, atrocious, or cruel is one that is accompanied by additional acts that show that the crime was conscienceless or pitiless and was unnecessarily torturous to the victim.

In conducting thirty years of appellate review of death sentences since Dixon, this standard has proved to be unconstitutionally vague and malleable. It changes at the whim of the justices.

The definitions authored by the Florida Supreme Court allow vague, capricious and inconsistent use of the death penalty because they are as vague and unconstitutional as are the bare terms of the statute condemned in Maynard, supra, and Espinosa v. Florida, 505 U.S. 1079 (1992). For example, in Raulerson v. State, 358 So.2d 826 (Fla. 1978), the Florida Supreme Court approved the trial court's application of the HAC factor. After re-sentencing was ordered by the Middle District of Florida, Raulerson v. Wainwright, 408 F.Supp. 381 (M.D. Fla. 1980), the HAC factor was again found by the trial judge - the same facts were present and the Florida Supreme Court had previously approved its use based on those same facts. However, in the next appeal, the HAC factor was rejected by the Florida Supreme Court. The Court explained, "We have held that killings similar to this one were not heinous, atrocious, and cruel." Raulerson v. State, 420 So.2d 567, 571 (Fla. 1982).

The bare terms in Section 921.141(5)(h), Florida Statutes, were found to be unconstitutionally vague in 1988 by the United States Supreme Court. See, Maynard v. Cartwright, 486 U.S. 356 (1988). Use of the HAC statutory factor varies arbitrarily because the vague standard to apply the factor was improperly created by the Florida Supreme Court, and the court changes that standard on an ad hoc basis even though the statutory language has never been modified. For instance, in Hitchcock v. State, 578 So.2d 685 (Fla. 1990), cert. denied, 502 U.S. 912 (1991), the Florida Supreme Court explained that the focus for use of this factor is on the victim's perception of the circumstances and not on the perpetrator's intent:

> That Hitchcock might not have meant the killing to be unnecessarily torturous does not mean that it actually was not unnecessarily torturous and, therefore, not heinous, atrocious or cruel. This aggravator pertains more to the victim's perception of the circumstances than to the perpetrator's. See, Stano v. State, 460 So.2d 890 (Fla. 1984), cert. denied, 471 U.S. 1111, 105 S.Ct. 2347, 85 L.Ed.2d 863 (1985).

Hitchcock, 578 So.2d at 692. Thus, under this line of cases, the victim's perception controls over the defendant's intentions.

On the other extreme is Omelus v. State, 584 So.2d 563, 566 (Fla. 1991), where the Supreme Court of Florida applied a different standard and held that the vicious, prolonged knifing and beating of a victim and the victim's perception of what was occurring was not the controlling consideration for applying the HAC factor. The torturous murder in Omelus did not support the HAC factor because the defendant did not intend that the victim suffer. Similarly, in Teffeteller v. State, 439 So.2d 840, 847 (Fla. 1983), the Florida Supreme Court rejected application of this factor where a victim languished for hours in terrible pain after being shot with a shotgun. The Florida Supreme Court explained, "The fact that the victim lived for a couple of hours in undoubted pain and knew that he was facing imminent death, horrible as this prospect may have been, does not set this senseless murder apart from the norm." The rejection of this factor was based solely on the fact that neither Omelus nor Teffeteller intended that a torturous murder occur. In (John) Mills v. State, 462 So.2d 1075, 1081 (Fla. 1985), the Court upheld use of this factor where the trial court's "findings of fact set out the proof necessary to establish the victim's mental anguish for the aggravating circumstance of heinous, atrocious, or cruel[.]" In (Gregory) Mills v. State, 476 So.2d 172, 178 (Fla. 1985), decided the same year as the other Mills decision, the Court rejected the factor and explained, "Whether the death is immediate or whether the victim lingers and suffers is pure fortuity. The intent and method employed by the wrongdoers is what needs to be examined." (emphasis added).

In Francois v. State, 407 So.2d 889 (Fla. 1981), where death was instantaneously caused by a shotgun blast to the head, the Court approved use of the factor and held "that the finding can be sustained on the basis of the mental anguish inflicted on the victims as they waited for their 'executions' to be carried out." However, in Porter v. State, 564 So.2d 1060, 1063 (Fla. 1990) the

factor was rejected because the crime "was not meant to be deliberately and extraordinarily painful." And in Amoros v. State, 531 So.2d 1256, 1260 (Fla. 1988), this factor was rejected because the defendant did not intend to cause the mental anguish suffered by the victim, who was shot three times after making "a futile attempt to save his life by running to the rear of the apartment, only to find himself trapped at the back door." These results are patently at odds with each other. They are arbitrary. The results are arbitrary because the Dixon definitions are vague, as malleable and elusive as are the bare statutory terms "heinous, atrocious or cruel."

The court's definitions for the statutory terms "heinous" and "atrocious" allow consideration of anything that makes the crime "extremely wicked" or "shocking evil" or "outrageously wicked and vile." Thus, the murder of a white woman by a black defendant is to some "extremely wicked, shockingly evil and outrageously wicked and vile." The instantaneous killing of a person by a homosexual or a Muslim qualifies as more heinous and atrocious. The killing of a person in public may be heinous and atrocious. On the other hand, the killing of a person in the sanctity of a home can be heinous and atrocious. Conversely, transporting a person to a deserted area may be heinous and atrocious. These disjunctive terms are so broad that, even with the court's definitions, they fail to genuinely limit the class of persons eligible for the death penalty.

The concluding portion of the Dixon standard states, "The kind of crime intended to be included as heinous, atrocious, or cruel is one that is accompanied by additional acts that show that the crime was conscienceless or pitiless and was unnecessarily torturous to the victim." The "accompanied by additional acts" language is a nebulous catch-all that permits unconstitutional considerations to invade the sentencing equation. It has been widely used to justify use of this factor, even where the additional acts have nothing to do with showing that "the crime was conscienceless or pitiless and was unnecessarily torturous to the victim."

The instruction that, in deciding the appropriate sentence, a consideration is whether the murder is "accompanied by additional acts that show that the crime was conscienceless or pitiless and was unnecessarily torturous to the victim" further injects arbitrariness and indefiniteness into the sentencing determination. This is so because the "additional acts" language encompasses virtually everything and anything that subjectively makes a death sentence more heinous, atrocious or cruel to anyone, based on characteristics of ether the defendant, the victim or both. Those

nebulous considerations also include bias, race, gender and/or nationality. Virtually anything can be, and often is, an "additional" act to be considered. By using such an open-ended and all encompassing description of conduct that can be punished, the "limiting" construction becomes unconstitutionally overbroad. See Herndon v. Lowry, 301 U.S. 242 (1937) (where a statute is so vague and uncertain as to make criminal an utterance or an act which may be innocently said or done with no intent to induce resort to violence or on the other hand may be said or done with a purpose violently to subvert government, a conviction under such a law cannot be sustained.).

The factual considerations that fall under the "additional act" language allow endless and uncontrolled considerations to be used to impose a death sentence. For instance, where (geographically) a person is killed is irrelevant to whether the killing itself was "conscienceless, pitiless or unnecessarily torturous to the victim." Apparently for that reason, the Supreme Court of Florida expressly disapproved use of this factor when it was based on the fact that a victim was at home when killed. Simmons v. State, 419 So.2d 316, 319 (Fla. 1982) ("The finding that the victim was murdered in his own home offers no support for the finding."). Two years later, in Troedel v. State, 462 So.2d 392, 398 (Fla. 1984), the Court wrote, "the fact that the victims were killed in their home sets the crime apart from the norm." See Perry v. State, 522 So.2d 817, 821 (Fla. 1988) ("We note also that this vicious attack was within the supposed safety of Mrs. Miller's own home, a factor we have previously held adds to the atrocity of the crime."). This inexplicable vacillation is an arbitrary result made possible by loose definition of a murder "accompanied by additional acts that show that the crime was conscienceless or pitiless and was unnecessarily torturous to the victim." Succinctly stated, in one case being killed in his own home was an additional act showing that the crime was conscienceless or pitiless and unnecessarily torturous to the victim - in another case being killed in one's own home is not an aggravating consideration. Under the standard of the Supreme Court of Florida, this factor can be justified for wherever a person is killed. Accordingly, that portion of standard for applying this factor fails to genuinely restrict the class of persons eligible for the death penalty.

The arbitrariness of the standard used by the Florida Supreme Court also arises when the factor is not found. For example, in Proffitt v. State, 315 So.2d 461 (Fla. 1975), affirmed, Proffitt v. Florida, 428 U.S. 242 (1976), the factor was found by the trial court and approved on

appeal because a man was stabbed and killed while lying in his bed. The HAC factor was not found when the new penalty phase occurred. Proffitt v. State, 510 So.2d 896, 897 (Fla. 1987). The same facts were present - the same man was stabbed and killed while he slept in his bed in his own house. Yet, different results occurred. Proffitt received a life sentence from the Supreme Court of Florida after stabbing a man who was lying in his bed, after first being sentenced to death on the same facts. This is obviously arbitrary for Proffitt. It is also arbitrary for those lower courts that try to consistently apply the law to the facts of the cases tried in the face of a wobbling standard.

The "additional acts" language is unconstitutionally vague based on its use of "defensive" wounds. At times, the Supreme Court of Florida concludes that the fortuitous position of a victim's hands when he or she was assaulted is irrelevant to find this factor. See, Menendez v. State, 368 So.2d 1278, 1282 (Fla. 1979) ("Although his arms may have been in a submissive position at the time when he was shot - a fact which is subject to other reasonable interpretations - there is nothing to set this execution murder 'apart from the norm of capital felonies.'"). At other times, the factor is based on the infliction of "defensive" wounds. See Perry v. State, 522 So.2d 817, 821 (Fla. 1988) ("Evidence that a victim was severely beaten while warding off blows before being fatally shot has been held sufficient to support a finding that the murder was especially heinous, atrocious and cruel.").

By allowing "other additional acts" to be used to apply this statutory factor, there is no way that the factor can genuinely limit the class of persons eligible for the death penalty because each case has its own unique, additional facts. If "defensive wounds" exist, then logically the victim struggled and more force was "necessary" to accomplish a premeditated killing. Hence, the mere presence of defensive wounds should not be determinative of whether a particular killing was "especially heinous, atrocious or cruel." Yet, the very presence of wounds that can be characterized as (but which may in fact not be) "defensive wounds" has justified using this factor, irrespective of whether other evidence existed which tended to negate prolonged "unnecessary" suffering:

> [W]e affirm the finding that the murder was heinous, atrocious, and cruel. The victim had a defensive wound. He was struck six times in the head with a claw hammer. Even though Lamb delivered each blow with sufficient force to penetrate the skull, the victim did not die instantaneously. The evidence shows that he fell to his knees and then to the floor after Lamb pulled his feet out from under him.

> The victim moaned, rolling his head from side to side, until Lamb kicked him in the face. This evidence supports the court's finding that the murder was heinous, atrocious, and cruel. *See, e.g., Roberts v. State*, 510 So.2d 885 (Fla. 1987) (defensive wounds with blows to back of head support finding that the murder was heinous, atrocious, and cruel), cert. denied, ___ U.S. ___, 108 S.Ct. 1123, 99 L.Ed.2d 284 (1988); *Wilson v. State*, 493 So.2d 1019 (Fla. 1986) (defensive wounds and brutal beating with blows to head supports finding that murder was heinous, atrocious, and cruel); *Thomas v. State*, 456 So.2d 454 (Fla. 1984) (bludgeoned skull supports finding that murder was heinous, atrocious, and cruel); *Heiney v. State*, 447 So.2d 210 (Fla.) (seven claw hammer blows to victim's head and defensive wounds support finding that murder was heinous, atrocious, and cruel), *cert. denied*, 469 U.S. 920, 105 S.Ct. 303, 83 L.Ed.2d 237 (1984).

Lamb v. State, 532 So.2d 1051, 1053 (Fla. 1988) (emphasis added).

A murder is not, logically, more heinous, atrocious or cruel because a victim's hands are extended outward rather than upward. See Shere v. State, 579 So.2d 86, 96 (Fla. 1991); McKinney v. State, 579 So.2d 80, 84 (Fla. 1991). These distinctions are illogical and they cannot withstand reasoned analysis. In short, the definitions provided in Dixon by the Florida Supreme Court have failed to genuinely narrow the discretion of when the heinous, atrocious or cruel statutory aggravating factor is properly applied in support of a death sentence. This standard, first articulated in Dixon, frustrates the clear import of Maynard v. Cartwright, 486 U.S. 356 (1988) and Espinosa v. Florida, 505 U.S. 1079 (1992). It violates article I, sections 9, 16, 17 and 22 of the Florida Constitution and the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution.

These examples show that Florida's HAC factor does not meet the requirements of strict construction and due process required by the State and Federal Constitutions. Godfrey v. Georgia, 446 U.S. 420 (1980) explains that capital sentencing discretion must be directed and limited by considerations that are sufficiently limited in their application to provide principled, objective bases for determining the presence of the circumstances in some cases and their absence in others, in order to provide consistent and rational imposition of the death penalty:

> [I]f the state wishes to authorize capital punishment it has a constitutional responsibility to tailor and apply its law in a manner that

> avoids the arbitrary and capricious infliction of the death penalty. Part of a state's responsibility in this regard is to define the crimes for which death may be the sentence in a way that obviates "standardless [sentencing] discretion." (citations omitted). It must channel the sentencer's discretion by "clear and objective" standards and then "make rationally reviewable the process for imposing a sentence of death."

Godfrey v. Georgia, 446 U.S. 420, 428 (1980) (emphasis added).

Section921.141(5)(h) is unconstitutionally vague, overly broad, and it is applied in an arbitrary and capricious manner in violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and article I, sections 2, 9, 16, 17 and 22 of the Florida Constitution. Gregg v. Georgia, 428 U.S. 153 (1976); Furman v. Georgia, 408 U.S. 238 (1972); Maynard v. Cartwright, 486 U.S. 356 (1988).

7. Present use of the Section 921.141(5)(h), Florida Statutes, factor violates the "Separation of Powers" doctrine set forth in Article II, Section 3 of the Florida Constitution. Chiles v. A, B, C, D, E and F, etc., 589 So.2d 260 (Fla. 1991). The substance of the bare terms of Florida Statute 921.141(5)(h) is not in the legislation. The substance is instead established and/or defined by the Supreme Court of Florida, on a case-by-case basis, without legislative or constitutional authority and in a manner that avoids Due Process and constitutional requirements for the passage of legislation. There is no consistency in this statute's application. There is no prior notice of precisely what this statute means and no rational basis, as determined by the legislators of Florida, for the way it is to be applied in any given case. The HAC factor has been and is being modified and enforced through judicial fiat in violation of requirements of fair notice and input by the electorate in violation of article I, sections 2, 9, 16 and 22 of the Florida Constitution, article II, section 3 of the Florida Constitution and the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution. The requirement that a statutory aggravating circumstance must genuinely limit the class of persons eligible for the death penalty is not met when the Florida Supreme Court applies a harmless error analysis based on its own perception of what qualifies as an especially heinous, atrocious or cruel murder. See, State v. Salmon, 636 So.2d 16 (Fla. 1994) ("the acts perpetrated by Stewart on his victim clearly were heinous, atrocious, and cruel under any definition."); Johnson v. State, 660 So.2d 637, 648 (Fla. 1995) (same); Slawson v. State, 619

So.2d 255, 261 (Fla. 1993) (same). It is not for the Florida Supreme Court to opine that a particular murder falls under a statutory provision that has been expressly held to be unconstitutionally vague in Espinosa v. Florida, 505 U.S. 1079 (1992). Rather, the Court should declare the language unconstitutionally vague and insist that Florida's Legislature perform its function in compliance with the State and Federal Constitutions.

8. The standard jury instruction is unconstitutionally vague under the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution and article I, sections 2, 9, 16, 17 and 22 of the Florida Constitution. The evolution of Florida's current standard jury instruction shows the problem with a judicially created definition of unconstitutionally vague terms of a statute. The Florida Supreme Court first discussed the standard jury instruction as follows:

> The trial court, in finding the murder especially heinous atrocious or cruel commented that "the Defendant has [not] shown any remorse, having elected to steadfastly deny his guilt." This proposition merits some discussion. We agree that Sireci v. State, 399 So.2d 964 (Fla.1981), cert. denied, 456 U.S. 984, 102 S.Ct. 2257, 72 L.Ed.2d 862 (1982), as cited by the trial court, stands for the proposition that lack of remorse may be considered in finding that a murder was especially heinous, atrocious and cruel. However, in that case the trial court inferred lack of remorse which may be considered in weighing an aggravating circumstance in support of imposition of the death penalty would in effect punish the defendant for exercising his rights of due process.
>
> Furthermore, this misapplication of this earlier case has called to our attention a basic contradiction between the consideration of lack of remorse in the context of this particular aggravating factor and all other considerations appropriate to this factor. An especially heinous, atrocious or cruel homicide is one which is "accompanied by such additional acts as to set the crime apart from the norm of capital felonies." *State v. Dixon*, 283 So.2d 9. This definition focuses on the manner in which the crime was accomplished -- on the act itself -- rather than on the perpetrator of the act. However, the definition continues, describing an especially heinous, atrocious or cruel crime as "the conscienceless or pitiless crime which is unnecessarily torturous of the victim." Id. While still focusing on the crime and experience of the victim, this definition also tended to focus attention on the mindset of the murderer -- his consciencelessness [sic] or pitilessness. This aspect of the

aggravating factor was recognized in the jury instructions adopted by this Court in 1975.

> "Heinous" means extremely wicked or shockingly evil.
>
> "Atrocious" means outrageously wicked and vile.
>
> "Cruel" means designed to inflict a high degree of pain; utter indifference to, or enjoyment of, the suffering of others; pitiless.

Standard Jury Instructions in Criminal Cases, 78 (1975) (emphasis added). Because juries were invited to consider evidence tending to show a lack of pity, lack of remorse came to be considered relevant to the determination under this aggravating factor.

In 1981 the Supreme Court adopted a completely revised set of Standard Jury Instructions in Criminal Cases, "intended as a definitive statement of the law on which a trial jury is required to be instructed." Notes on the Scope, Organization and Use of These Instructions, Florida Standard Jury Instructions in Criminal Cases xxi (1981). The new jury instruction on finding a homicide to be especially heinous, atrocious or cruel now reads: "The crime for which the defendant is to be sentenced was especially wicked, evil, atrocious or cruel." No further definitions of the terms are offered, nor is the defendant's mindset ever at issue. Thus, we find any consideration of defendant" remorse extraneous to the question of whether the murder of which he was convicted was especially heinous, atrocious or cruel."

Pope v. State, 441 So.2d 1073, 1077 (Fla.1983) (emphasis added) (footnote omitted).

Accordingly, after Pope, jurors in Florida were instructed solely in the bare terms of Section 921.141(5)(h), Florida Statutes. Then, Maynard v. Cartwright, 486 U.S. 356, 108 S.Ct. 1853, 100 L.Ed.2d 372 (1988), those same bare terms were found to be unconstitutionally vague. The Florida Supreme Court thereafter adopted the same language that was previously, expressly condemned in Pope as improperly inviting the jury to consider the Defendant's exercise of fundamental Constitutional rights as evidence of an especially heinous, atrocious or cruel murder:

> Your committee on Standard Jury Instructions (Criminal) recommends that The Florida Bar be authorized to publish and amendment to FLORIDA STANDARD JURY INSTRUCTIONS IN

> CRIMINAL CASES. The amendment changes the wording of paragraph 8 on page 79 of the jury instructions manual as follows:
>
> > 8. The crime for which the defendant is to be sentenced was especially heinous, atrocious or cruel. "Heinous" means extremely wicked or shockingly evil. "Atrocious" means outrageously wicked and vile. "Cruel" means designed to inflict a high degree of pain with utter indifference to, or even enjoyment of, the suffering of others. The kind of crime intended to be included as heinous, atrocious, or cruel is on accompanied by additional acts that show that the crime was conscienceless or pitiless and was unnecessarily torturous to the victim.
>
> The committee has decided that that additional language, which is based on State v. Dixon, 283 So.2d 1 (Fla. 1973), improves the instruction and that it adequately addresses any problem the paragraph may present in light of Maynard v. Cartwright, 486 U.S. 356, 108 S.Ct. 1853, 100 L.Ed.2d 372 (1988).

In re Standard Jury Instructions in Criminal Cases No 90-1, 579 So.2d 75 (Fla. 1990). Thus, the present standard jury instruction contains unconstitutionally vague definitions of the unconstitutionally vague statutory terms that invites jurors to impose the death penalty because the defendant exercised a constitutional right to remain silent, as expressly found by the Florida Supreme Court.

The judicially created definitions of "heinous," "atrocious," and "cruel" do not provide a principled way to determine when this statutory aggravating factor applies and when it does not, and the instruction fails to genuinely limit the class of person eligible for the death penalty. Further, the present standard jury instruction mandates the jury to consider additional acts to show that the crime was pitiless or conscienceless, which includes the exercise of fundamental constitutional rights. The HAC statute penalizes a defendant for exercising his constitutional rights to a jury trial, confrontation of witnesses, effective assistance of counsel, Due Process, to present witnesses and evidence in his own behalf, and/or the right to remain silent. This is done in an insidious way that avoids detection, meaningful appellate review and application of a legitimate harmless error analysis.

The Florida Supreme Court further requires that defendants object to a standard jury instruction and propose a proper instruction in order to preserve the issue for appellate review. The undersigned counsel, on behalf of the accused, objects to the Standard Jury Instruction for the reasons articulated above. It is as improper for a lawyer to attempt to divine the meaning of vague Legislative language in the context of the death penalty as it is for the Florida Supreme Court to endeavor to do so. §921.141(5)(h), Florida Statutes, and the respective standard jury instruction violate article I, sections 2, 9, 16, 17 and 22 of the Florida Constitution, article II, section 3 of the Florida Constitution, and the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution. The substance of legislation is to come from the Legislature. Requiring defense counsel to propose an instruction is an unconstitutional catch-22 that results in a waiver of the issues due to the "invited error" doctrine and it is otherwise a procedure that violates the separation of powers proscription contained in article II, section 3 of the Florida Constitution. A violation of the state constitution is a denial of due process of law by the State of Florida that violates section 1 of the Fourteenth Amendment to the United States Constitution.

WHEREFORE, for the foregoing reasons and as argued ore tenus, the defendant contests the constitutionality of Florida's HAC statutory aggravating circumstance and respectfully asks that the standard jury instruction and §921.141(5)(h), Florida Statutes, be declared unconstitutional under the state and federal constitutions.

I HEREBY CERTIFY that a copy of the above and foregoing motion has been furnished to the Office of the State Attorney, by hand and/or electronically, this 10 day of December, 2013.

Respectfully submitted,

MATT SHIRK
PUBLIC DEFENDER

BY: _____
Fred C. Gazaleh, #353787
Assistant Public Defender

/slc

(CAP095)

IN THE CIRCUIT COURT, FOURTH JUDICIAL CIRCUIT, IN AND FOR DUVAL COUNTY, FLORIDA.

CASE NO.: 16 2013 CF 005781 AXXX MA

DIVISION: CR-D

STATE OF FLORIDA

VS.

DONALD JAMES SMITH

MOTION TO DECLARE SECTION 921.141(5)(i), FLORIDA STATUTE, UNCONSTITUTIONAL AS WRITTEN AND AS APPLIED

The Defendant, by and through undersigned counsel, moves for an order declaring Section 921.141(5)(i), Florida Statutes, unconstitutional under the Constitution of the State of Florida and/or the Constitution of the United States and applicable international treaties as follows:

1. The Defendant has been charged with first-degree murder and the State of Florida has filed notice that it seeks imposition of capital punishment pursuant to Fla.R.Crim.P. 3.202.

2. To be eligible for capital punishment in Florida a person must be convicted of first-degree murder under Section 782.04, Fla. Stat., and there must be "sufficient aggravating circumstances" of *only* those factors listed in Section 921.141(5), Fla. Stat., to justify imposition of capital punishment. Section 921.141, Fla. Stat.

3. "An aggravating circumstance must genuinely limit the class of persons eligible for the death penalty and must reasonably justify the imposition of a more severe sentence on the defendant compared to others found guilty of murder." Zant v. Stephens, 462 U.S. 862, 877 (1983). A statutory aggravating factor that does not genuinely limit the class of persons eligible for the death penalty or one that fails to reasonably justify imposition of the death penalty as compared to others convicted of first-degree murder, or one that authorizes the sentencer to impose the death penalty based on the exercise of a constitutional right by the defendant is unconstitutional under the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution. Brown v. Sanders, 546 U.S. 212, 126 S.Ct. 884 (2006); Zant v. Stephens, supra.

4. The "CCP" aggravating factor in Florida states, "The capital felony was a homicide and was committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification." Section 921.141(5)(i), Fla.Stat..

5. As written, the CCP statutory aggravating factor is vague and overly broad because it fails to set forth an objective standard capable of consistent application and meaningful appellate review and otherwise authorizes the sentencer to impose capital punishment based on the exercise of fundamental constitutional rights and is thus unconstitutional under article I, sections 2, 9, 16, 17 and 22 of the Florida Constitution and the Fifth, Sixth, Eighth and Fourteenth Amendments, as set forth in the accompanying memorandum of law and as may be argued during the hearing of this motion.

6. As applied by trial courts, appellate courts and presumably by the juries of the State of Florida, the "CCP" statutory aggravating factor has been applied in an arbitrary, inconsistent and capricious manner and in violation of the separation of powers and is thus unconstitutional under article I, sections 2, 9, 16, 17 and 22 of the Florida Constitution, article II, section 3 of the Florida Constitution, and the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution, as forth in the accompanying memorandum of law and as may be argued during the hearing of this motion.

7. The use of the CCP circumstance by the judge to impose capital punishment in Florida violates the right to a jury trial guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and article I, section 22 of the Florida Constitution, because this factor, individually and in conjunction with other aggravating circumstances, increases the punishment that may be imposed on the defendant after the jury determines that a first-degree murder has been committed as set forth in the accompanying memorandum of law and as may be further argued during the hearing of this motion.

8. The evidentiary basis showing the "CCP" aggravating factor is applied unconstitutionally is proved by, and this Court is asked pursuant to §§90.202(2)&(11) & §90.203, Fla.Stat., to take compulsory judicial notice of the reported decisions of Florida courts applying Section 921.141(5)(i), Fla.Stat., expressly including but not limited to the following: Ibar v. State, 938 So. 2d 451 (Fla. 2006); Walls v. State, 926 So. 2d 1156 (Fla. 2006); Penalver v. State, 926 So. 2d 1118 (Fla. 2006); Happ v. State, 922 So.2d 182 (Fla. 2005); Suggs v. State, 923 So.2w 419 (Fla.

2005); Snelgrove v. State, 921 So.2d 560 (Fla. 2005); State v. Steele, 921 So.2d 538 (Fla. 2005); Knight v. State, 923 So.2d 387(Fla. 2005); Perez v. State, 919 So.2d 347 (Fla. 2005); Brooks v. State, 918 So.2d 181 (Fla. 2005); Robinson v. State, 913 So.2d 514 (Fla. 2005); Crook v. State, 908 So.2d 350 (Fla. 2005); Hendrix v. State, 908 So.2d 412 (Fla. 2005); Green v. State, 907 So.2d 489 (Fla. 2005); Sireci v. State, 908 So.2d 321 (Fla. 2005); Dufour v. State, 905 So.2d 42 (Fla. 2005); Johnson v. State, 903 So.2d 888 (Fla. 2005); Cave v. State, 899 So.2d 1042 (Fla. 2005); Arbalaez v. State, 898 So.2d 25 (Fla. 2005); Winkles v. State, 894 So.2d 842 (Fla. 2005); Mordenti v. State, 894 So.2d 161 (Fla. 2004); Brown v. State, 894 So.2d 137 (Fla. 2004); Monlyn v. State, 894 So.2d 832 (Fla. 2004); Busby v. State, 894 So.2d 88 (Fla. 2004); Phillips v. State, 894 So.2d 28 (Fla. 2004); Hodges v. State, 885 So.2d 338 (Fla. 2004); Peterka v. State, 890 So.2d 219 (Fla. 2004); Hernandez-Alberto v. State, 889 So.2d 721 (Fla. 2004); Pietri v. State, 885 So.2d 245 (Fla. 2004); Sochor v. State, 883 So.2d 766 (Fla. 2004); Hutchison v. State, 882 So.2d 943 (Fla. 2004); Pearce v. State, 880 So.2d 561 (Fla. 2004); Chamberlain v. State, 881 So.2d 1087 (Fla. 2004); Howell v. State, 877 So.2d 697 (Fla. 2004); Windom v. State, 886 So.2d 915 (Fla. 2004); Gamble v. State, 877 So.2d 706 (Fla. 2004); Power v. State, 886 So.2d 952 (Fla. 2004); Reed v. State, 875 So.2d 415 (Fla. 2004); Globe v. State, 877 So.2d 663 (Fla. 2004); Smith v. State, 866 So.2d 51 (Fla. 2004); Parker v. State, 873 So.2d 270 (Fla. 2004); Guzman v. State, 868 So.2d 498 (Fla. 2003); Zakrzewski v. State, 866 So.2d 688 (Fla. 2003); Owen v. State, 862 So.2d 687 (Fla. 2003); Cummings-El v. State, 863 So.2d 246 (Fla. 2003); Henry v. State, 862 So.2d 679 (Fla. 2003); Anderson v. State, 863 So.2d 169 (Fla. 2003); Griffin v. State, 866 So.2d 1 (Fla. 2003); Davis v. State, 859 So.2d 465 (Fla. 2003); Diaz v. State, 860 So.2d 960 (Fla. 2003); Rivera v. State, 859 So.2d 495 (Fla. 2003); Conde v. State, 860 So.2d 930 (Fla. 2003); McCoy v. State, 853 So.2d 396 (Fla. 2003); Owens v. Crosby, 854 So.2d 182 (Fla. 2003); Fennie v. State, 855 So.2d 597 (Fla. 2003); Caballero v. State, 851 So.2d 655 (Fla. 2003); Belcher v. State, 851 So.2d 678 (Fla. 2003); Nelson v. State, 850 So.2d 514 (Fla. 2003); Wright v. State, 857 So.2d 861 (Fla. 2003); Blackwelder v. State, 851 So.2d 650 (Fla. 2003); Duest v. State, 855 So.2d 33 (Fla. 2003); Cooper v. State, 856 So.2d 969 (Fla. 2003); Walton v. State, 847 So.2d 436 (Fla. 2003); Pace v. State, 854 So.2d 167 (Fla. 2003); Brown v. State, 846 So.2d 1114 (Fla. 2003); Gore v. State, 846 So.2d 461 (Fla. 2003); Spann v. State, 857 So.2d 845 (Fla. 2003);

Butler v. State, 842 So.2d 817 (Fla. 2003); Harris v. State, 843 So.2d 856 (Fla. 2003); Lawrence v. State, 846 So.2d 440 (Fla. 2003); Kormondy v. State, 845 So.2d 41 (Fla. 2003); Lugo v. State, 845 So.2d 74 (Fla. 2003); Jones v. State, 845 So.2d 55 (Fla. 2003); Doorbal v. State, 837 So.2d 940 (Fla. 2003); Thomas v. State, 838 So.2d 535 (Fla. 2003); Damren v. State, 838 So.2d 512 (Fla. 2003); Anderson v. State, 841 So.2d 390 (Fla. 2003); Conahan v. State, 844 So.2d 629 (Fla. 2003); Lightbourne v. State, 841 So.2d 431 (Fla. 2003); Spencer v. State, 842 So.2d 52 (Fla. 2003); Lynch v. State, 841 So.2d 362 (Fla. 2003); Israel v. State, 837 So.2d 381 (Fla. 2002); Bruno v. Moore, 838 So.2d 485 (Fla. 2002); Marquard v. State, 850 So.2d 417 (Fla. 2002); Chavez v. State, 832 So.2d 730 (Fla. 2002); Evans v. State, 838 So.2d 1090 (Fla. 2002); Bell v. State, 841 So.2d 329 (Fla. 2002); Lawrence v. State, 831 So.2d 121 (Fla. 2002); Barnhill v. State, 834 So.2d 836 (Fla. 2002); Johnson v. Moore, 837 So.2d 343 (Fla. 2002); Shere v. Moore, 830 So.2d 56 (Fla. 2002); Valle v. Moore, 837 So.2d 904 (Fla. 2002); Floyd v. State, 850 So.2d 383 (Fla. 2002); Swafford v. State, 828 So.2d 968 (Fla. 2002);Hurst v. State, 819 So.2d 689 (Fla. 2002); Vining v. State, 827 So.2d 201 (Fla. 2002); Rimmer v. State, 825 So.2d 304 (Fla. 2002); Ocha v. State, 826 So.2d 956 (Fla. 2002); Gaskin v. State, 822 So.2d 1243 (Fla. 2002); Asay v. Moore, 828 So.2d 985 (Fla. 2002); Anderson v. State, 822 So.2d 1261 (Fla. 2002); Philmore v. State, 820 So.2d (Fla. 2002); Griffin v. State, 819 So.2d 705 (Fla. 2002); Cox v. State, 819 So.2d 705 (Fla. 2002); Smithers v. State, 826 So.2d 916 (Fla. 2002); Garcia v. State, 816 So.2d 554 (Fla. 2002); White v. State, 817 So.2d 799 (Fla. 2002); Hunter v. State, 817 So.2d 786 (Fla. 2002); Pagan v. State, 830 So.2d 792 (Fla. 2002); Morrison v. State, 818 So.2d 432 (Fla. 2002); Sireci v. Moore, 825 So.2d 882 (Fla. 2002); Foster v. State, 810 So.2d 910 (Fla. 2002); Sweet v. State, 810 So.2d 854 (Fla. 2002); Darling v. State, 808 So.2d 145 (Fla. 2002); Dennis v. State, 817 So.2d 741 (Fla. 2002); Wike v. State, 813 So.2d 12 (Fla. 2002); Floyd v. State, 808 So.2d 175 (Fla. 2002); Francis v. State, 808 So.2d 110 (Fla. 2001); Evans v. State, 808 So.2d 92 (Fla. 2001); Hertz v. State, 803 So.2d 629 (Fla. 2001); Looney v. State, 803 So.2d 656 (Fla. 2001); Perry v. State, 801 So.2d 78 (Fla. 2001); Bowles v. State, 804 So.2d 1173 (Fla. 2001); Card v. State, 803 So.2d 613 (Fla. 2001); Evans v. State, 800 So.2d 182 (Fla. 2001); Thompson v. State, 796 So.2d 511 (Fla. 2001); Overton v. State, 801 So.2d 877 (Fla. 2001); Ford v. State, 802 So.2d 1121 (Fla. 2001); O'Connor v. State, 803 So.2d 598 (Fla. 2001); Connor v. State, 803 So.2d 598

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(Fla. 1997); Lawrence v. State, 691 So.2d 1068 (Fla.1997); Jones v. State, 690 So.2d 568 (Fla.1997); Clark v. State, 690 So.2d 1280 (Fla.1997); Morton v. State, 689 So.2d 259 (Fla.1997); Long v. State, 689 So.2d 1055 (Fla.1997); Valentine v. State, 688 So.2d 313 (Fla.1996); Boyett v. State, 688 So.2d 308 (Fla.1996); Mills v. State, 684 So.2d 801 (Fla.1996); Hill v. State, 688 So.2d 901 (Fla.1996); Robinson v. State, 684 So.2d 175 (Fla.1996); Bush v. State, 682 So.2d 85 (Fla.1996); Strausser v. State, 682 So.2d 539 (Fla.1996); Hartley v. State, 686 So.2d 1316 (Fla. 1996); Ferrell v. State, 686 So.2d 1324 (Fla. 1996); Craig v. State, 685 So.2d 1224 (Fla. 1996); Cummings-El v. State, 684 So.2d 729 (Fla.1996); Williamson v. State, 681 So.2d 688 (Fla.1996); Farina v. State, 680 So.2d 392 (Fla.1996); Bonifay v. State, 680 So.2d 413 (Fla.1996); Campbell v. State, 679 So.2d 720 (Fla.1996); Foster v. State, 679 So.2d 747 (Fla.1996); Farina v. State, 679 So.2d 1151 (Fla.1996); Hamilton v. State, 678 So.2d 1228 (Fla.1996); Larzelere v. State, 676 So.2d 394 (Fla.1996); Wournos v. State, 676 So.2d 966 (Fla.1996); Wournos v. State, 676 So.2d 972 (Fla.1996); Geralds v. State, 674 So.2d 96 (Fla.1996); Archer v. State, 673 So.2d 17 (Fla.1996); State v. Gunsby, 670 So.2d 920 (Fla.1996); Hunter v. State, 660 So.2d 244 (Fla.1996); Barwick v. State, 660 So.2d 685 (Fla.1995); Cave v. State, 660 So.2d 705 (Fla.1996); Gamble v. State, 659 So.2d 242 (Fla.1996); Windom v. State, 656 So.2d 432 (Fla.1995); Besaraba v. State, 656 So.2d 441 (Fla.1995); Lockhart v. State, 655 So.2d 69 (Fla.1995); Foster v. State, 654 So.2d 112 (Fla.1995); Crump v. State, 654 So.2d 545 (Fla.1995); Barrett v. State, 649 So.2d 219 (Fla.1995); Jackson v. State, 648 So.2d 85 (Fla.1994); Fennie v. State, 648 So.2d 95 (Fla.1994); Perez v. State, 648 So.2d 715 (Fla.1995); Spencer v. State, 645 So.2d 377 (Fla.1994); Caruso v. State, 645 So.2d 389 (Fla.1994); Turner v. State, 645 So.2d 444 (Fla.1994); Suggs v. State, 644 So.2d 44 (Fla.1994); Castro v. State, 644 So.2d 987 (Fla.1994); Wournos v. State, 644 So.2d 1000 (Fla.1994); Pietri v. State, 644 So.2d 1347 (Fla. 1994); Parker v. State, 643 So.2d 1032 (Fla.1994); Esty v. State, 642 So.2d 1074 (Fla.1994); Walls v. State, 641 So.2d 381 (Fla.1994); Peterka v. State, 640 So.2d 59 (Fla.1994); Griffin v. State, 639 So.2d 966 (Fla.1994); Vining v. State, 637 So.2d 921 (Fla.1994); Aberlaez v. State, 626 So.2d 169 (Fla.1993); Atwater v. State, 626 So.2d 1325 (Fla.1993); Sweet v. State, 624 So.2d 1138 (Fla.1993); Remeta v. Dugger, 622 So.2d 452 (Fla.1993); Williams v. State, 622 So.2d 456 (Fla.1993); Crump v. State, 622 So.2d 963 (Fla.1993); Trepal v. State, 621 So.2d 1361 (Fla.1993); Cannady v. State, 620 So.2d 165 (Fla.1993); Thompson v. State, 619 So.2d 261

(Fla.1993); Sochor v. State, 619 So.2d 285 (Fla.1993); Padilla v. State, 618 So.2d 165 (Fla.1993); Maulden v. State, 617 So.2d 298 (Fla.1993); White v. State, 616 So.2d 21 (Fla.1993); DeAngelo v. State, 616 So.2d 440 (Fla.1993); Gaskin v. State, 615 So.2d 679 (Fla.1993); Foster v. State, 614 So.2d 455 (Fla.1992); Hall v. State, 614 So.2d 473 (Fla.1993); Hunt v. State, 613 So.2d 893 (Fla.1992); Jones v. State, 612 So.2d 1370 (Fla.1992); Long v. State, 610 So.2d 1268 (Fla.1992); Clark v. State, 609 So.2d 513 (Fla.1992); Phillips v. State, 608 So.2d 778 (Fla.1992); Fotopoulos v. State, 608 So.2d 784 (Fla.1992); Power v. State, 605 So.2d 856 (Fla.1992); Durocher v. State, 604 So.2d 810 (Fla.1992); Geralds v. State, 601 So.2d 1157 (Fla.1992); Jackson v. State, 599 So.2d 103 (Fla.1992); Gore v. State, 599 So.2d 978 (Fla.1992); Castro v. State, 597 So.2d 259 (Fla.1992); Maharaj v. State, 597 So.2d 786 (Fla.1992); Durocher v. State, 596 So.2d 997 (Fla. 1992); Wike v. State, 596 So.2d 1020 (Fla.1992); Dougan v. State, 595 So.2d 1 (Fla.1992); Ponticelli v. State, 593 So.2d 483 (Fla.1991); Santos v. State, 591 So.2d 160 (Fla. 1991); Gaskin v. State, 591 So.2d 917 (Fla.1991); Klokoc v. State, 589 So.2d 219 (Fla.1991); Bedford v. State, 589 So.2d 245 (Fla.1991); Cruse v. State, 588 So.2d 983 (Fla.1991); Wright v. State, 586 So.2d 1024 (Fla.1991); Davis v. State, 586 So.2d 1038 (Fla.1991); Omelus v. State, 584 So.2d 563 (Fla.1991); Green v. State, 583 So.2d 647 (Fla.1991); Capehart v. State, 583 So.2d 1009 (Fla.1991); Hayes v. State, 581 So.2d 121 (Fla.1991); Derrick v. State, 581 So.2d 31 (Fla.1991); Riechmann v. State, 581 So.2d 133 (Fla.1991); Scott v. State, 581 So.2d 887 (Fla. 1991); Sochor v. State, 580 So.2d 595 (Fla.1991); Asay v. State, 580 So.2d 610 (Fla.1991); McKinney v. State, 579 So.2d 80 (Fla.1991); Shere v. State, 579 So.2d 86 (Fla.1991); Douglas v. State, 575 So.2d 165 (Fla.1991); Hegwood v. State, 575 So.2d 170 (Fla.1991); Bruno v. State, 574 So.2d 76 (Fla.1991); Anderson v. State, 574 So.2d 87 (Fla.1991); Robinson v. State, 574 So.2d 108 (Fla.1991); Penn v. State, 574 So.2d 1079 (Fla.1991); Gunsby v. State, 574 So.2d 1085 (Fla.1991); Holton v. State, 573 So.2d 284 (Fla.1990); Nixon v. State, 572 So.2d 1336 (Fla.1990); Occhicone v. State, 570 So.2d 902 (Fla.1990); Farinas v. State, 569 So.2d 425 (Fla. 1990); Jones v. State, 569 So.2d 1234 (Fla.1990); Lucas v. State, 568 So.2d 18 (Fla. 1990); Hall v. State, 568 So.2d 882 (Fla.1990); Thompson v. State, 565 So.2d 1311 (Fla.1990); Preston v. State, 564 So.2d 120 (Fla.1990); Porter v. State, 564 So.2d 1060 (Fla.1990); Haliburton v. State, 561 So.2d 248 (Fla.1990); Blakely v. State, 561 So.2d 560 (Fla.1990); Reed v. State, 560 So.2d 203 (Fla.1990); Boenoano v. Dugger, 559 So.2d 1116 (Fla.1990); Burr v. State, 550 So.2d 444

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(Fla.1985); Henderson v. State, 463 So.2d 196 (Fla.1985); Troedel v. State, 462 So.2d 392 (Fla.1984); Duest v. State, 462 So.2d 446 (Fla.1985); Mills v. State, 462 So.2d 1075 (Fla.1985); Parker v. State, 456 So.2d 436 (Fla.1984); Thompson v. State, 456 So.2d 444 (Fla.1984); Thomas v. State, 456 So.2d 454 (Fla.1984); Kennedy v. State, 455 So.2d 351 (Fla.1984); Card v. State, 453 So.2d 17 (Fla.1984); Jennings v. State, 453 So.2d 1109 (Fla.1984); Herring v. State, 446 So.2d 1049 (Fla.1984); Preston v. State, 444 So.2d 939 (Fla.1984); Maxwell v. State, 443 So.2d 967 (Fla.1983); Clark v. State, 443 So.2d 973 (Fla.1983); Pope v. State, 441 So.2d 1073 (Fla.1983); Drake v. State, 441 So.2d 1079 (Fla.1983); Livingston v. State, 441 So.2d 1083 (Fla.1983); Jones v. State, 440 So.2d 570 (Fla. 1983); Routly v. State, 440 So.2d 1257 (Fla.1983); Herzog v. State, 439 So.2d 11372 (Fla.1983); Justus v. State, 438 So.2d 358 (Fla.1983); Mason v. State, 438 So.2d 374 (Fla.1983); Lightbourne v. State, 438 So.2d 380 (Fla.1983); Johnson v. State, 438 So.2d 774 (Fla.1983); Harich v. State, 437 So.2d 1082 (Fla.1983); Hawkins v. State, 436 So.2d 44 (Fla.1983); King v. State, 436 So.2d 50 (Fla.1983); Washington v. State, 432 So.2d 44 (Fla.1983); O'Callaghan v. State, 429 So.2d 691 (Fla.1983); Cannady v. State, 427 So.2d 723 (Fla.1983); Middleton v. State, 426 So.2d 548 (Fla.1982); Smith v. State, 424 So.2d 726 (Fla.1982); Hill v. State, 422 So.2d 816 (Fla.1982); Bolender v. State, 422 So.2d 833 (Fla.1982); Mann v. State, 420 So.2d 578 (Fla. 1982); Gilvin v. State, 418 So.2d 996 (Fla.1982); McCray v. State, 416 So.2d 804 (Fla.1982); Miller v. State, 415 So.2d 1262 (Fla.1982); Jent v. State, 408 So.2d 1024 (Fla.1981); Blair v. State, 406 So.2d 1103 (Fla.1981); White v. State, 403 So.2d 331 (Fla.1981); Combs v. State, 403 So.2d 418 (Fla.1981).

MEMORANDUM OF LAW

A constitution takes precedence over any statute and guarantees the minimum protections that must be provided by the States whenever a citizen is prosecuted by the government. Specifically, the Fifth Amendment to the United States Constitution directs:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or

> property, without due process of law; nor shall private property be taken for public use, without just compensation.

These provisions apply to Florida in general and to this Defendant specifically. Malloy v. Hogan, 378 U.S. 1 (1964). Rights associated with the Fifth Amendment not expressly mentioned but which are necessary to make the right to due process of law meaningful, such as the right to be present during critical stages of a trial, also apply here. See Israel v. State, 837 So.2d 381 (Fla. 2002), citing Snyder v. Massachusetts, 291 U.S. 97 (1937). The right to indictment by a grand jury is also implicated in that there can be no more "infamous" crime than a capital crime. But see, Hurtado v. California, 110 U.S. 516 (1884). To the extent that Florida's constitution guarantees indictment for a capital crime, the denial of that State right denies due process of law in violation of the Fourteenth Amendment to the United States Constitution.

The Sixth Amendment to the United States Constitution states:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

The Sixth Amendment to the United States Constitution applies to Florida and to this Defendant through operation of the Fourteenth Amendment to the United States Constitution. These rights "are constitutional protections of surpassing importance: the proscription of any deprivation of liberty without 'due process of law,'" Amdt. 14, and the guarantee that '[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury,' Amdt. 6. Taken together, these rights indisputably entitle a criminal defendant to "a jury determination that [he] is guilty of every element of the crime with which he is charged, beyond a reasonable doubt." Apprendi v. New Jersey, 530 U.S. 466, 476-477 (2000) (Citations omitted). See Gideon v. Wainwright, 372 U.S. 335 (1963) (right to counsel); Crawford v. Washington, 541 U.S. 36 (2004) (right to confront adverse witnesses); Waller v. Georgia, 467 U.S. 39, 44-48

(1984) (right to public trial); Ring v. Arizona, 536 U.S. 584 (2002) (right to jury determination of facts authorizing imposition of the death penalty); In re Winship, 397 U.S. 358 (1970) (burden on the State to prove guilt beyond a reasonable doubt); Duncan v. Louisiana, 391 U.S. 145 (1968) (same); Mullaney v. Wilbur, 421 U.S. 684 (1975).

The Eighth Amendment to the United States Constitution provides "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." The Eighth Amendment applies to Florida and this Defendant through article I, section 17 of the Florida Constitution. See also, Cooper Industries, Inc. v. Leatherman Tool Group, Inc., 532 U.S. 424, 433-434 (2001) ("Despite the broad discretion that States possess with respect to the imposition of criminal penalties and punitive damages, the Due Process Clause of the Fourteenth Amendment to the Federal Constitution imposes substantive limits on that discretion. That Clause makes the Eighth Amendment's prohibition against excessive fines and cruel and unusual punishments applicable to the States. Furman v. Georgia, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972) (per curiam).") (Footnote omitted).

The Eighth Amendment precludes excessive forms of punishment, e.g., Roper v. Simmons, 543 U.S 551 (2005) (death penalty for person less than 18 years old unconstitutional); Atkins v. Virginia, 536 U.S. 304 (2002) (death penalty impermissible for intellectually disabled); Enmund v. Florida, 458 U.S. 782, 787, 801 (1982) (Eighth and Fourteenth Amendments prohibit death penalty for one who neither took life, attempted to take life, nor intended to take life); Louisiana ex rel. Francis v. Resweber, 329 U.S. 459, 463 (1947) ("The traditional humanity of modern Anglo-American law forbids the infliction of unnecessary pain in the execution of the death sentence."), and cruel and unusual punishments such as arbitrary and capricious imposition of capital punishment. Furman v. Georgia, 408 U.S. 238 (1972).

The Fourteenth Amendment to the United States Constitution provides:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty,

> or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

The Fourteenth Amendments applies the basic constitutional guarantees to the States, including Florida, and otherwise compels that State's provide minimal due process protections to all citizens prosecuted by the government, including this Defendant.

The Florida Constitution confers rights under article I, sections 2, 9, 15(a), 16, 17 and 22, and article II, section 3. To the extent that the State of Florida violates the express mandates of its own constitution, the Due Process Clause the Fourteenth Amendment to the United States Constitution is violated. Specifically, article I, section 2 of the Florida Constitution states:

> All natural persons, female and male alike, are equal before the law and have inalienable rights, among which are the right to enjoy and defend life and liberty, to pursue happiness, to be rewarded for industry, and to acquire, possess and protect property; except that the ownership, inheritance, disposition and possession of real property by aliens ineligible for citizenship may be regulated or prohibited by law. No person shall be deprived of any right because of race, religion, national origin, or physical disability.

Article I, section 9 of the Florida Constitution provides that "No person shall be deprived of life, liberty or property without due process of law, or be twice put in jeopardy for the same offense, or be compelled in any criminal matter to be a witness against oneself." Article I, section 15(a), Florida Constitution, provides that "No person shall be tried for a capital crime without presentment or indictment by a grand jury, or for other felony without such presentment or indictment or an information under oath filed by the prosecuting officer of the court, except persons on active duty in the militia when tried by courts martial." Article I, section 16(a) of the Florida Constitution states:

> In all criminal prosecutions the accused shall, upon demand, be informed of the nature and cause of the accusation, and shall be furnished a copy of the charges, and shall have the right to have compulsory process for witnesses, to confront at trial adverse witnesses, to be heard in person, by counsel or both, and to have a speedy and public trial by an impartial jury nit he county were the crime was committed. If the county is not known, the indictment or information may charge venue in two or more counties conjunctively and proof that the crime was committed in that area shall be sufficient; but before pleading the accused may elect in which of

> those counties the trial will take place. Venue for prosecution of crimes committed beyond the boundaries of the state shall be fixed by law.

Article I, section 17 of the Florida Constitution as amended now guarantees the same protections contained in the Eighth Amendment to the United States Constitution. Article I, section 22 of the Florida Constitution specifies that, "The right of trail by jury shall be secure to all and remain inviolate. The qualifications and the number of jurors, not fewer than six, shall be fixed by law." In that regard, Section 913.13, Florida Statutes, expressly states that, "Twelve persons shall constitute a jury to try all capital cases, and six persons shall constitute a jury to try all other criminal cases." Thus, in Florida there is a due process right to a unanimous guilty verdict by a 12-member person before a defendant may be convicted of a capital crime.

Finally, article II, section 3 of the Florida Constitution prohibits a person in one branch of government from exercising powers belonging to another branch of government. If the substance of Florida's death penalty scheme is coming from the Supreme Court of Florida rather the from the Florida Legislature, this constitutional provision is being denied, and a violation of the Fourteenth Amendment to the United States Constitution occurs. See Barnhill v. State, 834 So.2d 836, 849 (Fla. 2002) (judge cannot delete the term "extreme" from the jury instruction regarding a homicide committed while under "extreme mental or emotional distress" due to separation of powers rule).

Florida's statutory death penalty scheme:

The Florida Legislature passed laws in the wake of Furman v. Georgia, 408 U.S. 238 (1977) trying to accommodate the citizens' constitutional rights and yet establish a valid death penalty scheme. Some states, such as Louisiana, enacted statutes that make defendants eligible for capital punishment when the jury finds beyond a reasonable doubt that only one statutory aggravating circumstance exists. E.g., Lowenfeld v. Phelps, 284 U.S. 231, 244 (1988) (Approving La.Code Crim.Proc.Ann., Art. 905.3 (West 1984), which states, "A sentence of death shall not be imposed unless the jury finds beyond a reasonable doubt that at least one statutory aggravating circumstance exists and, after consideration of any mitigating circumstances, recommends that the sentence of death be imposed.").

Florida's capital sentencing scheme,[1] however, is substantially different. It requires the existence of a predicate conviction by a 12-person jury for first-degree murder under §782.04, Fla.Stat., and then requires that "*sufficient* aggravating circumstances" exist[2] before a person is eligible for capital punishment. The determination of whether a death sentence is imposed depends on a weighing process of the factors contained in §921.141(5), Fla.Stat., against the considerations set forth in §921.141(6), Fla.Stat.. A Florida jury, however, is not required to render a finding that "sufficient aggravating circumstances" exist for imposition of capital punishment, nor is the jury required to make a unanimous finding as to the existence of other statutory aggravating circumstances, including whether the CCP aggravating circumstances exists. This denies the right to a jury trial.

More specifically, the power to enact substantive legislation is vested solely in the Florida Legislature. "The legislative power of the state shall be vested in a legislature of the State of Florida, consisting of a senate composed of one senator elected from each senatorial district and a house of

[1] Florida's sentencing scheme based on Section 921.141, Fla.Stat. (1973), received initial approval in Proffitt v. Florida, 428 U.S. 242 (1976). Since then, several unconstitutional practices implemented under that statute have been more fully appreciated and expressly condemned by the United State Supreme Court. E.g., Espinosa v. Florida, 505 U.S. 1079, 1082 (1992) ("We merely hold that, if a weighing State decides to place capital sentencing authority in two actors rather than one, neither actor must be permitted to weigh invalid aggravating circumstances."); Hitchcock v. Dugger, 481 U.S. 393, 398 (1987) ("We think it could not be clearer that . . . the proceedings did not comport with the requirements of Skipper v. South Carolina, Eddings v. Oklahoma, and Lockett v. Ohio) (Citations omitted); Gardner v. Florida, 430 U.S. 349, 362 (1977) (We conclude that petitioner was denied due process of law when the death sentence was imposed, at least in part, on the basis of information which he had no opportunity to deny or explain.").

[2] In Florida, "[t]he only matters that may be considered in aggravation are those set out in the death penalty statute." Zack v. State, 911 So.2d 1190, 1208 (Fla. 2005) (Emphasis added); See §921.141(5), Fla.Stat. (2005) ("Aggravating circumstances shall be limited to the following"). In Florida, the aggravating circumstances set forth in §921.141(5), Fla.Stat., actually "define" the crimes for which capital punishment may be imposed. State v. Dixon, 283 So.2d 1, 10 (Fla.1973). See Zant v. Stephens, 462 U.S. 862, 878 (1983) ("statutory aggravating circumstances play a constitutionally necessary function at the stage of legislative definition: they circumscribe the class of persons eligible for the death penalty.").

representatives composed of one member elected from each representative district." Article III, section I, Florida Constitution. Article II, section 3 of the Florida Constitution guarantees that, "The power of the state government shall be divided into legislative, executive and judicial branches. No person belonging to one branch shall exercise any powers appertaining to either of the other branches unless expressly provided herein." Thus, it is for elected Florida legislators, in the ordinary exercise of their investigative and legislative functions, to enact clear, unambiguous statutory aggravating factors that comport with article I, section 17 of the Florida Constitution and/or the eighth and fourteenth amendments to the United States Constitution. When the meaning and substance of Florida's death penalty scheme is provided by Justices of the Supreme Court of Florida on an *ad hoc* basis while reviewing imposition of the death penalty in specific cases, the separation of powers clause is violated. The individual aggravating circumstances so given substance by the Court violate requirements of fair notice and input by the electorate in violation of article I, sections 2, 9, 16 and 22 of the Florida Constitution and the Fifth, Sixth, Eighth and Fourteenth amendments to the United States Constitution.

Even after being found guilty of first-degree murder, a defendant is *not* eligible for the death penalty in Florida unless "*sufficient* aggravating circumstances" exist. Unlike some states where eligibility for the death penalty is based on a unanimous jury finding of a single aggravating factor, Florida expressly requires that "*sufficient* aggravating circumstances" exist before a death penalty may be imposed. Therefore, each statutory aggravating circumstance upon which imposition of capital punishment rests is but a component of whether a defendant is "eligible" for capital punishment in Florida. A jury could reasonably find that one or more aggravating circumstances are not "sufficient" to justify imposition of capital punishment. Under the statute, a defendant is entitled to a unanimous jury determination beyond a reasonable doubt as to whether "*sufficient* aggravating circumstances" exist that legally and factually authorize capital punishment because that is the class of persons eligible for capital punishment. Yet, in Florida there is no determination made by the jury that a defendant is eligible for the death penalty, and trial courts are forbidden from using a verdict form that accommodates the Sixth Amendment right to such a jury determination. State v. Steele, 31 FLW S74 (Fla. October 12, 2005).

The Florida Legislature, in the exercise of its constitutional power, enacted interrelated statutes that established Florida's death penalty scheme. The scheme requires first that there be a conviction of a "capital" offense. For that to occur, a 12-person jury must unanimously find beyond any reasonable doubt that a defendant committed first-degree murder. [3] The Florida Legislature defines first-degree murder as:

> 782.04. Murder
>
> (1)(a) The unlawful killing of a human being:
>
> 1. When perpetrated from a premeditated design to effect the death of the person killed or any human being;
>
> 2. When committed by a person engaged in the perpetration of, or in the attempt to perpetrate, any: a. Trafficking offense prohibited by § 893.135(1), b. Arson, c. Sexual battery, d. Robbery, e. Burglary, f. Kidnapping, g. Escape, h. Aggravated child abuse, i. Aggravated abuse of an elderly person or disabled adult, j. Aircraft piracy, k. Unlawful throwing, placing, or discharging of a destructive device or bomb, *l.* Carjacking, m. Home-invasion robbery, n. Aggravated stalking, *o.* Murder of another human being, p. Resisting an officer with violence to his or her person, q. Felony that is an act of terrorism or is in furtherance of an act of terrorism; or
>
> 3. Which resulted from the unlawful distribution of any substance controlled under § 893.03(1), cocaine as described in § 893.03(2)(a)4., or opium or any synthetic or natural salt, compound, derivative, or preparation of opium by a person 18 years of age or older, when such drug is proven to be the proximate cause of the death of the user,
>
> is murder in the first degree and constitutes a capital felony, punishable as provided in § 775.082.

[3] It should be noted that one form of sexual battery in Florida is also specified to be a "capital crime," punishable by the death penalty as controlled by Section 921.141, Fla.Stat. See Section 794.011(2)(a), Fla.Stat. (2005) ("A person 18 years of age or older who commits sexual battery upon, or in an attempt to commit sexual battery injures the sexual organs of, a person less than 12 years of age commits a capital felony, punishable as provided in §§ 775.082 and 921.141.").

> (b) In all cases under this section, the procedure set forth in §921.141 shall be followed in order to determine sentence of death or life imprisonment.

At the conclusion of the guilt phase of a murder trial, the 12-person jury must return a unanimous verdict of guilt finding that the defendant committed first-degree murder based on a felony-murder theory, a premeditated-murder theory, or both. A conviction for first-degree murder, however, does NOT render a defendant eligible for the death penalty because in Florida the death penalty cannot be imposed in the absence of "*sufficient* aggravating circumstances."

Specifically, the eligibility of a defendant to receive the death penalty in Florida is based on a determination that "sufficient aggravating circumstances" exist to impose capital punishment as required under the procedure set forth in §921.141, Fla.Stat.:

> 921.141. Sentence of death or life imprisonment for capital felonies; further proceedings to determine sentence
>
> (1) Separate proceedings on issue of penalty.--Upon conviction or adjudication of guilt of a defendant of a capital felony, the court shall conduct a separate sentencing proceeding to determine whether the defendant should be sentenced to death or life imprisonment as authorized by §775.082. The proceeding shall be conducted by the trial judge before the trial jury as soon as practicable. If, through impossibility or inability, the trial jury is unable to reconvene for a hearing on the issue of penalty, having determined the guilt of the accused, the trial judge may summon a special juror or jurors as provided in chapter 913 to determine the issue of the imposition of the penalty. If the trial jury has been waived, or if the defendant pleaded guilty, the sentencing proceeding shall be conducted before a jury impaneled for that purpose, unless waived by the defendant. In the proceeding, evidence may be presented as to any matter that the court deems relevant to the nature of the crime and the character of the defendant and shall include matters relating to any of the aggravating or mitigating circumstances enumerated in subsections (5) and (6). Any such evidence which the court deems to have probative value may be received, regardless of its admissibility under the exclusionary rules of evidence, provided the defendant is accorded a fair opportunity to rebut any hearsay statements. However, this subsection shall not be construed to authorize the introduction of any evidence secured in violation of the

Constitution of the United States or the Constitution of the State of Florida. The state and the defendant or the defendant's counsel shall be permitted to present argument for or against sentence of death.

(2) Advisory sentence by the jury.--After hearing all the evidence, the jury shall deliberate and render an advisory sentence to the court, based upon the following matters:

(a) *Whether sufficient aggravating circumstances exist as enumerated in subsection* (5);

(b) Whether sufficient mitigating circumstances exist which outweigh the aggravating circumstances found to exist; and

(c) Based on these considerations, whether the defendant should be sentenced to life imprisonment or death.

(3) Findings in support of sentence of death.--Notwithstanding the recommendation of a majority of the jury, the court, after weighing the aggravating and mitigating circumstances, shall enter a sentence of life imprisonment or death, but if the court imposes a sentence of death, it shall set forth in writing its findings upon which the sentence of death is based as to the facts:

(a) That sufficient aggravating circumstances exist as enumerated in subsection (5), and

(b) That there are insufficient mitigating circumstances to outweigh the aggravating circumstances.

In each case in which the court imposes the death sentence, the determination of the court shall be supported by specific written findings of fact based upon the circumstances in subsections (5) and (6) and upon the records of the trial and the sentencing proceedings. If the court does not make the findings requiring the death sentence within 30 days after the rendition of the judgment and sentence, the court shall impose sentence of life imprisonment in accordance with § 775.082.

(4) Review of judgment and sentence.--The judgment of conviction and sentence of death shall be subject to automatic review by the Supreme Court of Florida and disposition rendered

within 2 years after the filing of a notice of appeal. Such review by the Supreme Court shall have priority over all other cases and shall be heard in accordance with rules promulgated by the Supreme Court.

(5) Aggravating circumstances.--Aggravating circumstances shall be limited to the following:

(a) The capital felony was committed by a person previously convicted of a felony and under sentence of imprisonment or placed on community control or on felony probation.

(b) The defendant was previously convicted of another capital felony or of a felony involving the use or threat of violence to the person.

(c) The defendant knowingly created a great risk of death to many persons.

(d) The capital felony was committed while the defendant was engaged, or was an accomplice, in the commission of, or an attempt to commit, or flight after committing or attempting to commit, any: robbery; sexual battery; aggravated child abuse; abuse of an elderly person or disabled adult resulting in great bodily harm, permanent disability, or permanent disfigurement; arson; burglary; kidnapping; aircraft piracy; or unlawful throwing, placing, or discharging of a destructive device or bomb.

(e) The capital felony was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody.

(f) The capital felony was committed for pecuniary gain.

(g) The capital felony was committed to disrupt or hinder the lawful exercise of any governmental function or the enforcement of laws.

(h) The capital felony was especially heinous, atrocious, or cruel.

(i) The capital felony was a homicide and was committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification.

(j) The victim of the capital felony was a law enforcement officer engaged in the performance of his or her official duties.

(k) The victim of the capital felony was an elected or appointed public official engaged in the performance of his or her official duties if the motive for the capital felony was related, in whole or in part, to the victim's official capacity.

(*l*) The victim of the capital felony was a person less than 12 years of age.

(m) The victim of the capital felony was particularly vulnerable due to advanced age or disability, or because the defendant stood in a position of familial or custodial authority over the victim.

(n) The capital felony was committed by a criminal street gang member, as defined in §874.03.

(*o*) The capital felony was committed by a person designated as a sexual predator pursuant to § 775.21 or a person previously designated as a sexual predator who had the sexual predator designation removed.

(6) Mitigating circumstances.--Mitigating circumstances shall be the following:

(a) The defendant has no significant history of prior criminal activity.

(b) The capital felony was committed while the defendant was under the influence of extreme mental or emotional disturbance.

(c) The victim was a participant in the defendant's conduct or consented to the act.

(d) The defendant was an accomplice in the capital felony committed by another person and his or her participation was relatively minor.

(e) The defendant acted under extreme duress or under the substantial domination of another person.

> (f) The capacity of the defendant to appreciate the criminality of his or her conduct or to conform his or her conduct to the requirements of law was substantially impaired.
>
> (g) The age of the defendant at the time of the crime.
>
> (h) The existence of any other factors in the defendant's background that would mitigate against imposition of the death penalty.
>
> (7) Victim impact evidence.--Once the prosecution has provided evidence of the existence of one or more aggravating circumstances as described in subsection (5), the prosecution may introduce, and subsequently argue, victim impact evidence to the jury. Such evidence shall be designed to demonstrate the victim's uniqueness as an individual human being and the resultant loss to the community's members by the victim's death. Characterizations and opinions about the crime, the defendant, and the appropriate sentence shall not be permitted as a part of victim impact evidence.
>
> (8) Applicability.--This section does not apply to a person convicted or adjudicated guilty of a capital drug trafficking felony under § 893.135.

(Footnote omitted) (Emphasis added). Under the current procedure, the jury does not render a verdict as to whether there are "*sufficient* aggravating circumstances" to justify imposition of capital punishment. Instead the jury provides a recommendation to the judge as to what sentence should be imposed. The judge is precluded from using a verdict form other than the standard jury form. *State v. Steele*, 31 FLW S74 (Fla. October 12, 2005).

This procedure denies the right to a jury trial. Florida law requires a written waiver of the right to a jury. Fla.R.Crim.P. 3.260. See Solis v. State, 801 So.2d 208, 209 (Fla. 4th DCA 2001). There is a presumption against the waiver of a constitutional right, and the waiver of the right to a jury trial guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and article I, section 22 of the Florida Constitution otherwise requires a knowing, voluntary and express waiver to be effective. Brookhart v. Janis, 394 U.S. 1 (1966); Johnson v. Zerbst, 304 U.S. 458 (1938).

Application of Law to Florida's Scheme

At the onset, it must be noted that the State has the burden to create law that comports with the requirements of the United States Constitution:

> If the state wishes to authorize capital punishment it has a constitutional responsibility to *tailor* and *apply* its law in a manner that avoids the arbitrary and capricious infliction of the death penalty. Part of a state's responsibility in this regard is to define the crimes for which death may be the sentence in a way that obviates "standardless [sentencing] discretion." (citations omitted). It must channel the sentencer's discretion by "clear and objective" standards and then "make rationally reviewable the process for imposing a sentence of death."

Godfrey v. Georgia, 446 U.S. 420, 428 (1980) (Emphasis added). It is a fundamental premise that the judicial branch of government is the enforcer of the due process commanded by the Constitution. In the context of capital punishment, greater due process is required than that commanded for lesser punishments. See Amendments to Fla.R.Crim.P. & Fla.R.App.P., 875 So.2d 563, 568 (Fla. 2004) (Cantero, J., concurring) ("As we have repeatedly recognized, 'death is different.'"); Chamberlain v. State, 881 So.2d 1087, 1108 (Fla. 2004) ("On this issue as on many others, death is different."). Death is different because of the "acute need" for reliability in carrying out a sentence unique in its severity and finality:

> "[D]eath is a different kind of punishment from any other which may be imposed in this country. . . . From the point of view of the defendant, it is different in both its severity and its finality. From the point of view of society, the action of the sovereign in taking the life of one of its citizens also differs dramatically from any other legitimate state action. It is of vital importance to the defendant and to the community that any decision to impose the death sentence be, and appear to be, based on reason rather than caprice or emotion." (Citation omitted).

Gardner v. Florida, 430 U.S. 349, 357 (1977).

The "acute need for reliable decision making" was recognized early-on by the United States Supreme Court:

> . . . The penalty phase of a capital trial is undertaken to assess the gravity of a particular offense and to determine whether it warrants the ultimate punishment; it is in many respects a continuation of the trial on guilt or innocence of capital murder. *"Because the death penalty is unique "in both its severity and its finality,"* [Gardner v. Florida, 430 U.S. 349] at 357, 97 S.Ct., at 1204, *we have recognized an acute need for reliability in capital sentencing proceedings.* See Lockett v. Ohio, 438 U.S. 586, 604, 98 S.Ct. 2954, 2964, 57 L.Ed.2d 973 (1978) (opinion of Burger, C.J.) (stating that the "qualitative difference between death and other penalties calls for a greater degree of reliability when the death sentence is imposed"); see also Strickland v. Washington, 466 U.S. 668, 704, 104 S.Ct. 2052, 2073, 80 L.Ed.2d 674 (1984) (Brennan, J., concurring in part and dissenting in part) ("[W]e have consistently required that capital proceedings be policed at all stages by an especially vigilant concern for procedural fairness and for the accuracy of factfinding").

Monge v. California, 524 U.S. 721, 731-732 (1998) (Emphasis added). See Deck v. Missouri, 544 U.S. 622, 632-633 (2005) (same); Arvelaez v. Butterworth, 738 So.2d 326, 326-27 (Fla.1999) ("We acknowledge we have a constitutional responsibility to ensure the death penalty is administered in a fair, consistent and reliable manner . . . ") (Emphasis added).

The procedures required to ensure due process in the context of imposition of capital punishment may not be explicitly provided for by statute. Nonetheless, the Constitution compels courts to adopts procedures that a accommodate the due process requirements compelled by the Constitution:

> To insure that the death penalty is indeed imposed on the basis of "reason rather than caprice or emotion," we have invalidated procedural rules that tended to diminish the reliability of the sentencing determination. The same reasoning must apply to rules that diminish the reliability of the guilt determination. Thus, if the unavailability of a lesser included offense instruction enhances the risk of an unwarranted conviction, Alabama is constitutionally prohibited from withdrawing that option from the jury in a capital case.

Beck v. Alabama, 447 U.S. 625, 637-638 (1980). Thus, unlike some mandatory sanctions, state legislatures cannot require "automatic" imposition of capital punishment. Sumner v. Shuman, 483

U.S. 66 (1987); Woodson v. North Carolina, 428 U.S. 280 (1976). Defendants must be given notice and the opportunity to address all evidence upon which imposition of capital punishment is based. Gardner v. Florida, 430 U.S. 349 (1977). The sentencing body cannot be precluded from considering and giving effect to relevant mitigation. See Smith v. Texas, 543 U.S. 37 (2004) (procedure unconstitutional where jury asked to answer "yes" or "no" to two questions in a manner where valid mitigating evidence was not considered); Skipper v. South Carolina, 476 U.S. 1 (1976) (sentencing body cannot be precluded from considering defendant's potential for rehabilitation); Penry v. Lynaugh, 492 U.S.302 (1989) (sentencing body cannot be precluded from considering defendant's intellectual disability as mitigating circumstance).

The analysis to be applied by the courts is far more complex when a death penalty statute is being analyzed, for not only must the statute satisfy ordinary due process requirements, it also must satisfy an Eighth Amendment analysis that compels heightened due process to ensure reliable sentencing. The United States Supreme Court has expressly alluded to the analysis that must be conducted when a court reviews the constitutionality of a statutory aggravating circumstance that is used to impose capital punishment:

> The difficulty with the State's argument is that it presents a Due Process Clause approach to vagueness and fails to recognize the rationale of our cases construing and applying the Eighth Amendment. Objections to vagueness under the Due Process Clause rest on the lack of notice, and hence may be overcome in any specific case where reasonable persons would know that their conduct is at risk. Vagueness challenges to statutes not threatening First Amendment interests are examined in light of the facts of the case at hand; the statute is judged on an as-applied basis. [Cit.] Claims of vagueness directed at aggravating circumstances defined in capital punishment statutes are analyzed under the Eighth Amendment and characteristically assert that the challenged provision fails adequately to inform juries what they must find to impose the death penalty and as a result leaves them and appellate courts with the kind of open-ended discretion which was held invalid in Furman v. Georgia, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972).

Maynard v. Cartwright, 486 U.S. 356, 361-362 (1988).

Due Process and fundamental fairness considerations under the Fifth and Fourteenth Amendments to the United States Constitution and article I, sections 2 and 9 of the Florida Constitution are inextricably tied to the heightened reliability demanded by the Eighth Amendment to the United States Constitution. See Caldwell v. Mississippi, 472 U.S. 320, 329 (1985) ("This Court has repeatedly said that under the Eighth Amendment 'the qualitative difference of death from all other punishments requires a correspondingly greater degree of scrutiny of the capital sentencing determination.'") (Citation omitted - emphasis added). Aside from heightened requirements of reliability required as a component of Due Process, the Eighth Amendment proscription against cruel and unusual punishments precludes capital punishment where imposition of the death penalty is contrary to contemporary standards of decency. See Roper v. Simmons, 543 U.S 551 (2005) (death penalty for person less than 18 years old unconstitutional); Atkins v. Virginia, 536 U.S. 304 (2002) (death penalty impermissible for intellectually disabled); Stanford v. Kentucky, 492 U.S. 361 (1989) (death penalty unconstitutional for person under seventeen years of age); Tison v. Arizona, 481 U.S. 137 (1987) (death penalty unconstitutional for person who lacks sufficient moral culpability).

In summary, a court's "duty to search for constitutional error with painstaking care is never more exacting than it is in a capital case." Burger v. Kemp, 483 U.S. 776, 785 (1987). Arbitrary and capricious imposition of capital punishment is forbidden. Furman v. Georgia, 408 U.S. 238 (1977). "Where discretion is afforded a sentencing body on a matter so grave as the determination of whether a human life should be taken or spared, that discretion must be suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action." Gregg v. Georgia, 428 U.S. 153, 189 (1976) (plurality opinion).

Florida's statute is unique. By express legislation, a defendant convicted of first-degree murder *cannot* receive the death penalty in the absence of "*sufficient* aggravating circumstances." Section 921.141(2) & (3), Fla.Stat. Holdings by the United States Supreme Court make clear that the statutory aggravating circumstances that authorize and that render a defendant eligible for imposition of capital punishment are entitled to the full protections of the Fifth, Sixth and Fourteenth Amendments to the United States Constitution. See Shepard v. United States, 544 U.S. 13 (2005); United States v. Booker, 543 U.S. 220 (2005), Ring v.

Arizona, 536 U.S. 584 (2002), Apprendi v. New Jersey, 530 U.S. 466 (2001); Jones v. United States, 526 U.S. 227 (1999); Gardner v. Florida, 430 U.S. 349, 357 (1977). But see, Winkles v. State, 894 So.2d 842 (Fla. 2005); Bottoson v. Moore, 833 So.2d 693, 732-733 (Fla. 2002). Thus, since in Florida a defendant's eligibility for capital punishment is expressly and statutorily based on a factual and legal determination that there are "*sufficient* aggravating circumstances," due process demands that the jury make that determination beyond a reasonable doubt. Further, because Florida requires a unanimous 12-person jury determination before a verdict of guilt for first-degree murder can be rendered, the determination that there are "*sufficient* aggravating circumstances" to render a defendant eligible for the death penalty must also be made by a unanimous jury. Anything less than a unanimous jury denies due process under the Fourteenth Amendment to the United States Constitution and is otherwise an arbitrary and irrational diminution of the standard of proof that violates the due process and reliability requirements commanded by the Eighth Amendment to the United States Constitution.

At first blush, the *individual* components that make up the "*sufficient* aggravating circumstances" may not be entitled to Sixth Amendment protection if the analysis set forth in Schad v. Arizona, 501 U.S. 624, 645 (1991) is applied. Clearly, there is here a Sixth Amendment right for the jury to make a unanimous determination beyond a reasonable doubt that there are "*sufficient* aggravating circumstances" because that is the standard that was expressly set by the State Legislature. The absence of an itemized verdict form becomes problematic insofar as the determination of prejudicial versus harmless error when improper aggravating circumstances are used. The procedure currently in Florida is that the judge determines eligibility of a defendant and sentences the defendant. Whether used by the judge or jury, aggravating circumstances that are too vague or imprecise or that support imposition of capital punishment based on the exercise of a constitutional right are unconstitutional. See Griffin v. U.S., 502 U.S. 46, 54 (1991); Stromberg v. California, 283 U.S. 319 (1931) (unconstitutional if aggravating factor used by jury to determine eligibility); Brown v. Sanders, 546 U.S. ___, 126 S.Ct. 884 (2006) (unconstitutional if used by sentencer to impose capital punishment).

In Florida, the process does not require the jury issue a even a general verdict as to whether sufficient aggravating circumstances exist based on the existence of one or more

aggravating circumstances. Instead, *there is no verdict form used at all*. The jury never overtly makes a finding beyond a reasonable doubt that "*sufficient* aggravating circumstances" exist to impose the death penalty, and the jury "recommendation" form cannot suffice for this purpose unless the jury unanimously recommends imposition of the death penalty. A unanimous death recommendation by the jury necessarily entails a finding that there are sufficient aggravating circumstances to impose capital punishment, whether as a matter of "eligibility" or a matter of moral judgment after weighing all the factors. However, every non-unanimous jury recommendation presents the very real and constitutionally unacceptable chance that there was never a finding by the jury that *sufficient* aggravating circumstances exist to justify imposition of capital punishment, and the jury as a body is thus denied a meaningful opportunity to say that this poor devil that committed first-degree murder ought not receive the death penalty. This is the very essence of the interplay between the Sixth, Eighth and Fourteenth Amendments to the United States Constitution.

Even with a unanimous death recommendation, a "bad" individual aggravating circumstance is unconstitutional where the jury fails to make an express finding of the existence of all statutory elements that comprise requisite "sufficient aggravating circumstances" that render the defendant eligible for the death penalty and that authorize imposition of capital punishment. This is so because the appellate court must apply a harmless error analysis and can only guess at what effect the bad factor played in imposition of the death penalty. This is shown by the results of the analysis used by the Court in dealing with the CCP aggravating factor from its enactment to the present.

As a threshold matter, it is clear that a jury that finds a defendant guilty of first-degree premeditated murder has *not* made the requisite unanimous jury finding that the CCP aggravating circumstance exists beyond a reasonable doubt. The Florida Supreme Court conclusively explained this in the context of holding that the initial CCP jury instruction that merely tracked the language[4] of the statute was unconstitutionally vague:

[4] This is necessarily an acknowledgement by the Florida Supreme Court that the CCP factor as written is unconstitutionally vague. It is only saved by the "limiting construction" this is placed on it by the Florida Supreme Court. As shown by the following analysis, because that limiting

Because the challenge to the CCP instruction has been properly preserved in this case and because *Brown* and its progeny can no longer serve as authority for summarily rejecting this claim, we must reconsider the constitutionality of the standard CCP instruction. As noted above, the jury in this case was instructed that it could consider, if established by the evidence, that "the crime for which the defendant is to be sentenced was committed in a cold, calculated and premeditated manner without a[ny] pretense of moral or legal justification." This standard instruction simply mirrors the words of the statute. Yet, this Court has found it necessary to explain that the CCP statutory aggravator applies to "murders more cold-blooded, more ruthless, and more plotting than the ordinarily reprehensible crime of premeditated first-degree murder," Porter v. State, 564 So.2d 1060, 1064 (Fla. 1990), cert. denied, 498 U.S. 1110, 111 S.Ct. 1024, 112 L.Ed.2d 1106 (1991), and where the killing involves "calm and cool reflection." Richardson v. State, 604 So.2d 1107, 1109 (Fla. 1992). The Court has adopted the phrase "heightened premeditation" to distinguish this aggravating circumstance from the premeditation element of first-degree murder. Id.; Rogers v. State, 511 So.2d 526, 533 (Fla. 1987), cert. denied, 484 U.S. 1020, 108 S.Ct. 733, 98 L.Ed.2d 681 (1988). The Court has also explained that "calculation" constitutes a careful plan or a prearranged design. Rogers, 511 So.2d at 533. These explications by the Court make it clear that CCP encompasses something more than premeditated first-degree murder.

A vagueness challenge to an aggravating circumstance will be upheld if the provision fails to adequately inform juries what they must find to recommend the death penalty and as a result leaves the jury and the appellate courts with the kind of open-ended discretion which was held invalid in Furman v. Georgia, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972). Maynard, 486 U.S. at 361, 108 S.Ct. 15 1857.. The Supreme Court has found HAC-type instructions unconstitutionally vague because "[a] person of ordinary sensibility could fairly characterize almost every murder as 'outrageously or wantonly vile, horrible and inhuman.' " Godfrey v. Georgia, 446 U.S. 420, 428-29, 100 S.Ct. 1759, 1764065, 64 L.Ed.2d 398 (1980); see also Maynard, 486

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construction vacillates on an *ad hoc* basis and otherwise produces arbitrary and capricious results, Section 921.141(5)(i), Florida Statutes, even with the limiting construction violates the Eighth and Fourteenth Amendments to the United States Constitution. Maynard v. Cartwright, supra.

U.S. at 364, 108 S.Ct. 1t 1859 ("an ordinary person could honestly believe that every unjustified, intentional taking of human life is 'especially heinous' ").

The premeditated component of Florida's standard CCP instruction poses the same problem. Where a defendant is convicted of premeditated first-degree murder, the jury has already been instructed that:

> "Killing with premeditation" is killing after consciously deciding to do so. The decision must be present in the mind at the time of the killing. The law does not fix the exact period of time that must pass between the formation of the premeditated intent to kill and the killing. The period of time must be long enough to allow reflection by the defendant. The premeditated intent to kill must be formed before the killing.

Fla.Std.Jury Instr. (Crim.) 63. Without the benefit of an explanation that some "heightened" form of premeditation is required to find CCP, a jury may automatically characterize every premeditated murder as involving the CCP aggravator. It would also be reasonable for the general public to consider premeditated first-degree murder as "cold-blooded murder." Without legal guidance that the coldness element is only present when the killing involves "calm and cool reflection," *Richardson,* or when the murder is "more cold-blooded, more ruthless, and more plotting than the ordinarily reprehensible crime of premeditated first-degree murder," *Porter,* the average juror may automatically characterize all premeditated murders as CCP. This Court has also explained that calculation must involve a "careful plan or prearranged design." Rogers, 511 So.2d at 533. Yet, the jury receives no instruction to illuminate the meaning of the terms "cold," "calculated," or "premeditated." Moreover, the meaning of each of these terms is particularly important because the CCP factor is not applicable unless the crime was "cold, calculated, *and* premeditated."

Thus, in order to find the CCP aggravating factor under our case law, the jury must determine that the killing was the product of cool and calm reflection and not an act prompted by emotional frenzy, panic, or a fit of rage (cold), Richardson, 604 So.2d at 1109; and that the defendant had a careful plan or prearranged design to commit murder before the fatal incident (calculated), Rogers, 511 So.2d at 533; and that the defendant exhibited heightened premeditation (premeditated), Id.; and that the

> defendant had no pretense of moral or legal justification. Banda v. State, 536 So.2d 221, 224-25 (Fla. 1988), cert. denied, 489 U.S. 1087, 109 S.Ct. 1548, 103 L.Ed.2d 852 (1989). Certainly these requirements call for more expansive instructions to give content to the CCP statutory factor. Otherwise, the jury is likely to apply CCP in an arbitrary manner, which is the defect cited by the United States Supreme Court in striking down HAC instructions. See, e.g., Godfrey, 446 U.S. at 428-29, 100 S.Ct. at 1764-65. We do not suggest that every court construction of an aggravating factor must be incorporated into a jury instruction defining that aggravator. However, because the CCP factor is so susceptible of misinterpretation and has been the subject of so many explanatory decisions, we cannot say that the current instruction sufficiently informs the jury of the nature of this aggravator.

Jackson v. State, 648 So.2d 85, 88-90 (Fla. 1994) (Emphasis added) (Footnote omitted). Thus, insofar as the right to a unanimous jury determination of the existence of the CCP aggravating circumstance, the determination of a jury that the defendant committed first-degree premeditated murder is inadequate to satisfy the right to a jury because there are more considerations to the CCP circumstance than for a determination that a homicide was simply premeditated.

The CCP factor, either alone or in conjunction with other factors, may constitute "sufficient" aggravation to render a defendant eligible for capital punishment. Section 921.141(5)(i), Fla.Stat., can be used to impose the death penalty in Florida where the "capital felony was a homicide and was committed in a cold, calculated and premeditated manner, without any pretense of moral or legal justification." However, the actual use of this factor has been arbitrary and inconsistent. For example, the CCP factor has been approved where "the evidence does reflect that appellant first shot the store clerk in response to what appellant believed was a threatening movement by the clerk and then shot him a second time after the clerk had fallen to the floor. The facts of this case are sufficient to show the heightened premeditation required for the application of this aggravating circumstance." Herring v. State, 446 So.2d 1049, 1075 (Fla. 1984). A year later its use was disapproved where a store clerk was shot three times. See Caruthers v. State, 465 So.2d 496, 498 (Fla. 1985) (CCP rejected because "[T]he cold, calculated and premeditated factor applies to a manner of killing characterized *by heightened premeditation* b*eyond that required to establish premeditated murder.*") (Emphasis added). In the next reported decision, however, use of the CCP

factor was approved because "this factor focuses more on the perpetrator's state of mind than on the method of killing." Johnson v. State, 465 So.2d 499, 507 (Fla. 1986). This analysis, however, obviously does not give effect to the consideration of whether a pretense of moral or legal justification existed. However, the legal standard changed from "focusing on the perpetrator's state of mind" to focusing on the manner in which the crime was committed. *See Provenzano v. State,* 497 So.2d 1177, 1183 (Fla. 1986), ("as the statute indicates, if the murder was committed in a *manner* that was cold and calculated, the aggravating circumstance of heightened premeditation is applicable." (Emphasis in original).

Insofar as the state of mind of the defendant, one line of cases holds that the doctrine of transferred intent applies and that a person's planning to kill one person can readily be transferred to another victim. E.g., Diaz v. State, 860 So.2d 960, 969 (Fla. 2003) ("Because it is clear that the heightened premeditation necessary to find the CCP factor need not be directed toward the specific victim, we find that the trial court did not err by using the theory of transferred intent in this case."); Provenzano, supra. Another line of cases holds that despite the planning and intent to kill another person, the doctrine of transferred intent, CCP cannot be used. E.g. Amoros v. State, 531 So.2d 1256 (Fla.1988) (defendant's plan to kill his ex-girlfriend could not be transferred to include the death of her current boyfriend who was chased by Amoros and shot three times); Banda v. State, 536 So.2d 221, 225 (Fla. 1988).

The standards set by the Florida Supreme Court governing use of this factor are inconsistent. They fail to provide any guidance as to when the CCP factor is to be properly found and weighed by the judge and/or jury. The constitutional principles of substantive due process and equal protection require that a provision of law be rationally related to its purpose. Reed v. Reed, 404 U.S. 71 (1971). See also Moore v. City of East Cleveland, 431 U.S. 494 (1977). This principle applies to criminal laws. See State v. Walker, 461 So.2d 108 (Fla. 1984). Thus, criminal statutes "must bear a reasonable relationship to the legislative objective and must not be arbitrary." Potts v. State, 526 So.2d 104 (Fla. 4th DCA 1987), Aff'd., State v. Potts, 526 So.2d 63 (Fla. 1988). Due process requires that criminal provisions be strictly construed. Bifulco v. United States, 447 U.S. 381 (1980); Dunn v. United States, 442 U.S. 100, 112 (1979). Florida otherwise expressly directs the

strict construction of penal statutes, with ambiguous statutes to be construed most favorably to the accused. See Section 775.021, Fla. Stat. All of these principles are violated by the CCP factor.

Specifically, the Legislature expressly created the "CCP" statutory aggravating circumstance in 1979 "to include execution-type killings as one of the enumerated aggravating circumstances." Senate Staff Analysis and Economic Impact Statement, SB 523 (May 9, 1979, revised). See also, Barnard, "Death Penalty (1988 Survey of Florida Law), 13 Nova L. Rev. 907, 936-37 (1989). The standard construction is that it "ordinarily applies in those murders which are characterized as executions or contract murders, although that description is not intended to be all-inclusive." See McCray v. State, 416 So.2d 804, 807 (Fla. 1982). The qualifier "ordinarily" thus opens the use of this factor to areas other than executions or contract murders. E.g., Duest v. State, 462 So.2d 446 (Fla. 1985) (killing during course of robbery without more); Herring v. State, 446 So.2d 1049 (Fla.), cert. denied, 469 U.S. 989 (1984) (defendant shot store clerk who made threatening move); Phillips v. State, 476 So.2d 194 (Fla. 1985) (defendant had to reload before firing final shot).

The CCP statute became effective July 1, 1979 and was capable of being applied retroactively under the absurd rational that it *benefited* defendants in the weighing process by *narrowing* the class of persons eligible for the death penalty. See Combs v. State, 404 So.2d 418 (Fla. 1981). This totally ignored the requirement under Section 921.141, Fla.Stat., that the aggravating circumstances be weighed against the mitigating circumstances to determine whether a death penalty should be imposed, and the addition of an additional aggravating circumstance added to the aggravation side of the scale in that weighing process. By 1987, 80% of cases in which CCP was applied did *not* involve execution-style killings. J. Kennedy, Florida's "Cold, Calculated and Premeditated" Aggravating Circumstance in Death Penalty Cases, XVII Stetson Law Review 47, 96-97 (1987).

The CCP circumstance has been applied in a manner inconsistent with its stated legislative purpose and without regard to the requirement of strict construction of penal statutes. The Eighth Amendment requires that aggravating circumstances "must be construed to permit a principled distinction between those who deserve the death penalty and those who do not." Lewis v. Jeffers, 110 S.Ct. 3092, 3099 (1990). How much "additional" premeditation over that needed to

convict of premeditated murder has never been set. It is not quantifiable and it is not an objective standard, but if it is, that distinction must be created by the legislative branch of government rather than by the judicial branch, as is occurring with absurd results.

For instance, in Herring v. State, 446 So.2d 1049 (Fla.), cert. denied, 469 U.S. 989 (1984), the CCP factor was upheld where the defendant shot a store clerk a second time after he fell to the floor. The interval between the first and second shot alone appeared to be the legal standard used by the Florida Supreme Court and to be applied by the lower courts and juries when the CCP factor was an issue. In Rogers v. State, 511 So.2d 526 (Fla. 1987), the legal standard changed:

> Where there is ample evidence to support simple premeditation, we must conclude that there is insufficient evidence to support the heightened premeditation described in the statute, which must bear the indicia of "calculation." Since we conclude that "calculation" consists of a careful plan or pre-arranged design, we recede from our holding in Herring v. State, 446 So.2d 1049, 1057 (Fla.), cert. denied, 469 U.S. 989, 105 S.Ct. 396, 83 L.Ed.2d 330 (1984), to the extent it dealt with this question.

Id. at 533. Then, in Swafford v. State, 533 So.2d 270, 277 (Fla.1988), the Herring analysis was resurrected and the legal analysis changed again, from focusing on the defendant's "careful plan or prearranged design" to "the time for reflection" – equivalent to the time required to reload a firearm:

> The evidence showed, however, that Swafford shot the victim nine times including two shots to the head at close range and that he had to stop and reload his gun to finish carrying out the shootings. This aggravating factor can be found when the evidence shows such reloading, Phillips v. State, 476 So.2d 194, 197 (Fla. 1985), because reloading demonstrates more time for reflection and therefore "heightened premeditation." See Herring v. State, 447 So.2d 1049, 1057 (Fla.), cert. denied, 469 U.S. 989, 105 S.Ct. 396, 83 L.Ed.2d 330 (1984).

Then in 1990 the legal standard inexplicably changed back:

> The state's reliance upon Phillips v. State, 476 So.2d 194 (Fla. 1985), is misplaced. In Phillips, this Court held that because appellant had to reload his revolver in order for all of the shots to be fired, he was afforded ample time to contemplate his actions and choose to kill his victim, and the record therefore amply supported the finding that the murder was cold, calculated, and premeditated. Our decision in Phillips however was predicated on Herring v. State, 446 So.2d 1049 (Fla.), cert. denied, 469 U.S. 989 (1984). We receded from this

> portion of Herring in our decision in Rogers v. State, 511 So.2d 526 (Fla. 1986), cert. denied, 108 S.Ct. 733 (1988).

Farinas v. State, 569 So.2d 425, 431 fn 8 (Fla. 1990). This is arbitrary.

The cases are wildly inconsistent as to whether bringing the murder weapon to the scene in and of itself establishes the CCP circumstance. Compare Swafford v. State, 533 So.2d 270 (Fla. 1988), Lamb v. State, 532 So.2d 1051, 1053 (Fla.1988) and Huff v. State, 495 So.2d 145 (Fla.1986) (weapon brought to scene; CCP found) with Amoros v. State, 531 So.2d 1256 (Fla.1988), Hamblen v. State, 527 So.2d 800 (Fla.1988) and Lloyd v. State, 524 So.2d 396 (Fla.1988) (weapon brought to scene; CCP rejected)[5]. Cases differ as to whether moving the victim to a remote location prove the CCP factor. Compare Preston v. State, 444 So.2d 939 (Fla.1984) (store clerk moved one-and-a-half miles, then stabbed to death; CCP disallowed) and Cannady v. State, 427 So.2d 723 (Fla.1983) (hotel night auditor taken to remote location and killed by five gunshots; CCP disallowed) with Card v. State, 453 So.2d 17 (Fla.1984) (trial court finding upheld where defendant drove office clerk eight miles to wooded area and cut her throat; "The appellant had ample time during this series of events to reflect on his actions and their attendant consequences") *and Herring v. State, 446 So2d 1049 (Fla.1984) (CCP found where clerk shot twice after making threatening move during robbery).*

The cases using the CCP factor fail to recognize as a pretense of justification the defense of unborn children and the protection of life contrary to the express terms of the factor that it is not to be applied if "a pretense" or moral or legal justification exists. See Hill v. State, 688 So.2d 901 (Fla.1996). Such a narrow construction of the CCP aggravating factor is not proper where the factor was intended to address execution and contract killings. By a common understanding of the express terms of the statute as passed, a pretense of moral justification would include defending the life of unborn children solely for the purpose of defending the life of the fetus that cannot defend itself.

[5] In Lloyd, the defendant arrived at the victim's house with a .38 caliber pistol, demanded money and ordered the victim and her daughter into the bathroom. The victim was shot twice, the fatal shot being fired with the pistol in contact with her head. The CCP circumstance was disallowed because, while there was a "suspicion that this was a contract killing," such was not proven beyond a reasonable doubt. There was no discussion or analysis as to why bringing the gun to the scene did not support the CCP finding, as it had in other cases.

Even if the statute was considered ambiguous, the court's narrow use violates Section 775.021, Florida Statute.

The foregoing cases have arbitrary and capricious results because the legal standard to apply the CCP factor vacillates on an *ad hoc* basis. Arbitrary" is defined as "depending on choice or discretion: determined by decision of a judge or tribunal rather than defined by statute." Webster's Third New International Dictionary (1981). "Capricious" is likewise defined as "marked or guided by caprice: given to changes of interest or attitude according to whims or passing fancies: not guided by steady judgment, intent or purpose." Websters Third New International Dictionary (1981). The foregoing examples show that the CCP aggravating factor in Florida does not meet the requirements of strict construction, due process, or a meaningful standard by which the death penalty can be consistently and reliably imposed as required.

The Constitution requires that capital sentencing discretion must be directed and limited by considerations that are sufficiently limited in their application to provide principled, objective bases for determining the presence of the circumstance in some cases and its absence in others, in order to provide consistent and rational imposition of the death penalty. The Florida Legislature failed to adequately define what the CCP aggravating circumstance entails. This is evident because the Florida Supreme Court ultimately conceded[6] that fact in Jackson v. State, 648 So.2d 85, 88-90 (Fla. 1994). In violation of the separation of powers proscription contained in article II, section 3 of the Florida Constitution, the Florida Supreme Court has attempted to provide the substance of this factor but has failed to do so consistently and in a manner that is capable of reliable application by the trial courts and juries in Florida, as shown by the foregoing analysis. If Florida is going to have a valid death penalty, it is incumbent on the Legislature to adequately establish it substantively and for the courts to meaningfully enforce the Constitutional requirements:

> [I]f the state wishes to authorize capital punishment it has a constitutional responsibility to tailor and apply its law in a manner that avoids the arbitrary and capricious infliction of the death penalty. Part of a state's responsibility in this regard is to define the crimes for

[6] If the standard jury instruction that tracked the statute *verbatim* was unconstitutionally vague, the statute also was necessarily unconstitutionally vague.

> which death may be the sentence in a way that obviates "standardless [sentencing] discretion." (citations omitted). It must channel the sentencer's discretion by "clear and objective" standards and then "make rationally reviewable the process for imposing a sentence of death."

Godfrey v. Georgia, 446 U.S. 420, 428 (1980). This factor cannot stand judicial scrutiny.

Simply said, Section 921.141(5)(i), Florida Statutes, is unconstitutionally vague, overly broad, and it is applied in an arbitrary and capricious manner in violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and article I, sections 2, 9 and 16 of the Florida Constitution as discussed above.

WHEREFORE, based on the argument and authorities set forth in the foregoing memorandum of law and as may be further argued when this motion is heard, this Court is respectfully asked to declare Section 921.141(5)(i), Florida Statute, unconstitutional as written and as applied.

I HEREBY CERTIFY that a copy of the above and foregoing Motion has been furnished to the Office of the State Attorney, by hand and/or electronically, this 10 day of December, 2013.

Respectfully submitted,

MATT SHIRK
PUBLIC DEFENDER

BY: _____
Fred C. Gazaleh, #353787
Assistant Public Defender

/slc

(CAP096)

IN THE CIRCUIT COURT, FOURTH JUDICIAL CIRCUIT, IN AND FOR DUVAL COUNTY, FLORIDA.

CASE NO.: 16 2013 CF 005781 AXXX MA

DIVISION: CR-D

STATE OF FLORIDA

VS.

DONALD JAMES SMITH

DEFENDANT'S MOTION TO DECLARE SECTION 921.141(5)(l), FLORIDA STATUTES, UNCONSTITUTIONAL (THE "VICTIM UNDER AGE OF 12" AGGRAVATOR) AND MEMORANDUM OF LAW

Defendant moves the Court to declare unconstitutional Section 921.141(5)(l), Florida Statutes, the "victim under age of 12" aggravator, for the following reasons:

1. Section 921.141(5)(l), Florida Statutes, establishes this aggravating circumstance:

> The victim of the capital felony was a person less than 12 years of age.

2. This aggravator was added to the statute in 1995.

3. This aggravator violates the Eighth and Fourteenth Amendments to the United States Constitution and Article I, Sections 9, 16 and 17, of the Florida Constitution because it violates due process and equal protection, it is overinclusive and arbitrary, it fails to perform the narrowing function required of aggravating circumstances in death penalty statutes, and it applies automatically to homicides committed against a huge portion of the population, regardless of the circumstances.

MEMORANDUM OF LAW

Only a few aggravating circumstances are based on the status of the victim. Section 921.141(5)(j), Florida Statutes, applies only to law enforcement officers killed while engaged in

their official duties. Section 921.141(5)(k), Florida Statutes, applies only to elected or appointed public officials killed while engaged in their official duties and killed because of their official capacity. Section 921.141(5)(m) Florida Statutes, applies only to victims who are particularly vulnerable due to advanced age or disability, or because the defendant stood in a position of familial or custodial authority over the victim. Contrary to those narrow provisions, which apply in specific fact situations to very few people, Section 921.141(5)(l), Florida Statutes, making the killing of a person under the age of 12 an automatic aggravating circumstance, is vast, undiscriminating, and overinclusive. The statute does not require the Defendant to know the victim's age, to intend to kill because of the victim's age, or even to know the victim is present. The statute does not require a showing that the victim had an age-based vulnerability that played a role in the homicide. The arbitrary age of 12 is not reasonably related to increased culpability or death – worthiness. In no other area of the law or everyday life is that particular age considered to be significant. The jury and judge are given no discretion in finding this circumstance; it automatically applies. Even an unintended, accidental killing of a child under 12 during a felony murder qualifies for this aggravator. The aggravator is a strict liability determinant of life or death, contrary to the common law tradition requiring some knowledge or intent on the part of the Defendant and disfavoring strict liability in imposing severe punishments.

Additionally, every person fits within this aggravator for 12 years of his life, and roughly a fifth of the population are under the age of 12. Although statistics based on the age of 12 do not exist, census data for 2000 show that children under 14 years of age were 19.00% of the estimated population of Florida. *See United States Census (2000): Table DP-1. Profile of General Demographic Characteristics: 2000 Geographic Area: Florida.* Nationwide, children under 14 years of age were 21.4% of the population in 2000. *See United States Census (2000): Table DP-1. Profile of General Demographic Characteristics: 2000 Geographic Area: United States.* Thus, a first-degree murder against anyone in approximately one-fifth of the population

automatically qualifies a Defendant for the death penalty, irrespective of the circumstances surrounding the death.

This overbroad, overinclusive, automatically applicable factor, on its face, fails to "genuinely narrow the class of persons eligible for the death penalty," or "reasonably justify the imposition of a more severe sentence compared to others found guilty of murder." Zant v. Stephens, 462 U.S. 862, 877 (1983). It therefore violates Defendant's rights to due process and equal protection, and it violates Defendant's protection against cruel and/or unusual punishment, all in violation of Amendments Eight and Fourteen to the United States Constitution and Article I, Sections 9, 16 and 17, of the Florida Constitution. *See also* Shriners Hospitals for Crippled Children v. Zrillic, 563 So. 2d 64, 70 (Fla. 1990) (overinclusive legislative classification violates Florida's equal protection clause).

WHEREFORE, Defendant prays this motion will be granted.

I HEREBY CERTIFY that a copy of the above and foregoing Motion has been furnished to the Office of the State Attorney, by hand and/or electronically, this 10 day of December, 2013.

Respectfully submitted,

MATT SHIRK
PUBLIC DEFENDER

BY: _____
Fred C. Gazaleh, #353787
Assistant Public Defender

/slc

(CAP099)

IN THE CIRCUIT COURT, FOURTH JUDICIAL CIRCUIT, IN AND FOR DUVAL COUNTY, FLORIDA.

CASE NO.: 16 2013 CF 005781 AXXX MA

DIVISION: CR-D

STATE OF FLORIDA

VS.

DONALD JAMES SMITH

RULE 3.112(i), FLORIDA RULES
OF CRIMINAL PROCEDURE - CERTIFICATION BY PUBLIC DEFENDER

Comes now MATT SHIRK, the Public Defender for the Fourth Judicial Circuit of Florida, pursuant to Rule 3.112(i), Florida Rules of Criminal Procedure, and certifies that Fred C. Gazaleh, #353787 and James Armstrong, #0821071, are qualified to serve as lead counsel and co-counsel, respectively, having met the requirements set forth in Rule 3.112.

Respectfully submitted,

MATT SHIRK
PUBLIC DEFENDER

BY: _____
MATT SHIRK, #0195911
PUBLIC DEFENDER

/slc

(CAP001)

STATE ATTORNEY NO.: 13CF039428AD

IN THE CIRCUIT COURT OF THE FOURTH JUDICIAL CIRCUIT, IN AND FOR DUVAL COUNTY, FLORIDA

CASE NO.: 162013CF5781AXXXMA

DIVISION: CR-D

STATE OF FLORIDA

vs.

DONALD JAMES SMITH

STATE'S FOURTH SUPPLEMENTAL DISCOVERY EXHIBIT

A. All court reporters used in depositions and prior sworn statements in this cause, and all witnesses whose names are brought out in depositions.

Category A:

Aharon Pearson 1120 Hubbard Street, Jacksonville, FL 32206
Danny Stanton 5035 N. Main Street, #106, , Jacksonville, FL 32208
Charles Shejen 148 Vernner Road, Kittery, ME 03094
Janice Wilkerson 6710 Collins Road, Jacksonville, FL 32244

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by Mail, to the Office of the Public Defender, 25 North Market Street, Jacksonville, Florida 32202, this 10th day of December, 2013.

ANGELA B. COREY
STATE ATTORNEY

By: _____
Mark Caliel
Bar Number: 0105650
Assistant State Attorney

/mc

COPY

STATE ATTORNEY NO.: 13CF039428AD

FILED 0128 '14 PM 0410 R FUSSELL

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IN THE CIRCUIT COURT OF THE FOURTH JUDICIAL CIRCUIT, IN AND FOR DUVAL COUNTY, FLORIDA

CASE NO.: 162013CF5781AXXXMA

DIVISION: CR-D

STATE OF FLORIDA

vs.

DONALD JAMES SMITH

STATE'S FIFTH SUPPLEMENTAL DISCOVERY EXHIBIT

A.

Category A:

Potential Penalty Phase Witnesses :

Kerrianne Buck 2247 US Route 11, Parish, NY 13131
Lt. J. A. Parker St. Augustine Beach Police Dept., 2300 A1A South, St. Augustine, FL 32080

K. Police reports pertaining to Attempted Kidnapping (CCR# 1992-655605), including the Arrest Docket, General Offense Report, and Supplement Report. Photographs.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by Mail, to the Office of the Public Defender, this 28th day of January, 2014.

ANGELA B. COREY
STATE ATTORNEY

By: _____
Mark Caliel
Bar Number: 0105650
Assistant State Attorney

/mc

IN THE CIRCUIT COURT, FOURTH JUDICIAL CIRCUIT, IN AND FOR DUVAL COUNTY, FLORIDA

CASE: 16-2013-CF-005781-AXXX-MA

DIVISION: CR-D (CIRCUIT)

STATE OF FLORIDA

vs.

DONALD JAMES SMITH, DEFENDANT

FILED
SEP 03 2014
CLERK CIRCUIT COURT

ORDER

THIS CAUSE COMING ON BEFORE THE COURT UPON THE ☒DEFENDANT'S ☐STATE'S

MOTION FOR CONTINUANCE

FILED HEREIN ON THE 3rd day of SEPTEMBER, 2014 AND THE COURT HAVING HEARD ARGUMENTS OF THE STATE'S ATTORNEY AND OF COUNSEL FOR DEFENSE, AND BEING FULLY ADVISED IN THE PREMESIS THEREOF, IT IS THEREUPON

ORDERED AND ADJUDGED THAT THE AFORESAID MOTION SHALL BE AND THE SAME IS HEREBY:

GRANTED — NO OBJECTION BY STATE

DONE AND ORDERED IN OPEN COURT AT JACKSONVILLE, DUVAL COUNTY, FLORIDA, THIS 3 day of Sept, 2014.

MALLORY D COOPER
Circuit Judge

THIS INSTRUMENT IS NOT IN COMPUTER
Leslie

IN THE CIRCUIT COURT, FOURTH JUDICIAL CIRCUIT, IN AND FOR DUVAL COUNTY, FLORIDA.

CASE NO.: 16-2013-CF-5781

DIVISION: CR-D

STATE OF FLORIDA

VS.

DONALD J. SMITH

FILED
SEP 03 2014
CLERK CIRCUIT COURT

MOTION FOR CONTINUANCE

Defendant, DONALD J. SMITH, by and through the undersigned attorney, the Public Defender for the Fourth Judicial Circuit of Florida, pursuant to Rule 3.190(g), Florida Rules of Criminal Procedure, respectfully moves this Court to grant a continuance of the trial currently scheduled. As grounds Defendant states the following:

1. The above styled cause is currently scheduled for jury selection on October 16, 2014.
2. The undersigned has made every effort to be prepared to try the case as scheduled.
3. The complicated nature of the case as well as the potential consequences in the event of a conviction will require additional time for preparation.
4. The Defendant consents to the filing of this motion .

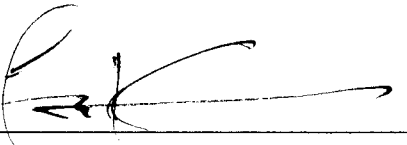
WHEREFORE, Defendant respectfully requests this Court grant this motion and order a continuance in the above-styled cause.

I HEREBY CERTIFY that a copy of the above and foregoing Motion for Continuance has been furnished to the Office of the State Attorney, by hand and/or electronically, this 3 day of September, 2014.

THIS INSTRUMENT IS CLEAR AND LEGIBLE

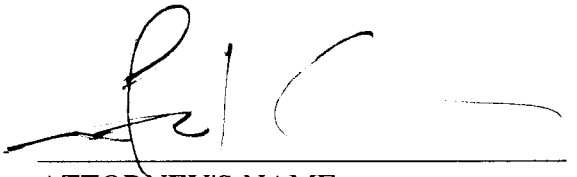
Respectfully submitted,

MATT SHIRK
PUBLIC DEFENDER

BY: 
Fred C. Gazaleh FBN: 353787
Assistant Public Defender

CERTIFICATE OF GOOD FAITH

I HEREBY CERTIFY that the foregoing Motion for Continuance is filed in good faith and is not interposed merely for the purpose of unnecessary delay.


ATTORNEY'S NAME

IN THE CIRCUIT COURT, FOURTH JUDICIAL CIRCUIT, IN AND FOR DUVAL COUNTY, FLORIDA.

CASE NO.: 16-2013-CF-005781

DIVISION: CR-D

FILED
NOV 04 2014
RONNIE W. FUSSELL
CLERK CIRCUIT COURT

STATE OF FLORIDA

VS.

DONALD JAMES SMITH

WAIVER OF SEQUESTRATION OF JURY BETWEEN THE FIRST AND SECOND PHASES OF TRIAL

I, Donald James Smith, Defendant herein, upon advice of counsel, hereby freely and voluntarily waive my right to have the jury empanelled in my trial sequestered between the first phase and the second phase (if necessary). I have a full understanding of the consequences of this waiver. This waiver is executed after I was apprised of my right to seek sequestration of the jury between the first and second phase of my trial, in private by my attorney.

This waiver is done with a full understanding of the consequences and for the reason that it is my best interest.

Donald James Smith
Defendant
November 4, 2014

Fred Gazaleh, FBN 353787
Attorney for Defendant
November 4, 2014

Mark Caliel, FBN
Assistant State Attorney
November 4, 2014

Honorable Mallory D. Cooper
Circuit Judge
November 4, 2014

Filing # 20621839 Electronically Filed 11/17/2014 10:28:29 AM

IN THE FOURTH COURT, FOURTH JUDICIAL CIRCUIT, IN AND FOR DUVAL COUNTY, FLORIDA.

CASE NO.: 2013-CF-5781

DIVISION: CR-D

STATE OF FLORIDA

VS.

DONALD JAMES SMITH

CERTIFICATE OF CONFLICT AND MOTION TO WITHDRAW

The undersigned attorney, pursuant to Section 27.5303, Florida Statutes, certifies that a conflict exists between Defendant, Donald James Smith, and the Office of the Public Defender for the Fourth Judicial Circuit of Florida. The undersigned attorney further states the following:

1. Pursuant to Rule 4-1.7 (a)(1) Florida Rules of Professional Conduct, a lawyer must not represent a client if the representation of one client will be directly adverse to another client and where the lawyer's responsibilities of loyalty and confidentiality of the other client might be compromised.

2. Rule 4-1.16 provides that ...a lawyer shall withdraw from representation of a client if: (1) the representation will result in a violation of the Rules of Professional Conduct, or law.

3. Loyalty to a client prohibits representation directly adverse to that client's or another client's interests. Loyalty is also impaired when a lawyer cannot carry out an appropriate course of action for the client because of the lawyer's other responsibilities.

4. The undersigned cannot provide more details without violating the attorney/client privilege.

5. The Office of the Public Defender cannot counsel Defendant without an actual conflict or without the appearance of impropriety.

WHEREFORE, the undersigned attorney respectfully requests this Honorable Court to allow the Office of the Public Defender to withdraw as counsel of record.

I HEREBY CERTIFY that a copy of the above and foregoing Certificate of Conflict and Motion to Withdraw has been furnished to the Office of the State Attorney, by hand and/or electronically, this 17 day of November, 2014.

Respectfully submitted,

MATT SHIRK
PUBLIC DEFENDER

BY:
Fred C. Gazaleh, FBN 353787
Assistant Public Defender

NOTIFICATION OF ATTORNEY CONFLICT

DATE: 11/17/2014 DATE OF CONFLICT: TIME:

SECTION I: CASE IDENTIFICATION

DEFENDANT'S NAME **DONALD JAMES SMITH** DIVISION **CR-D (Circuit)**

DATE OF BIRTH: **September 4, 1956** RACE: **WHITE** SEX: **FEMALE**

UNIFORM CASE NUMBER: **16-2013-CF-005781-AXXX-MA** JUDGE: **MALLORY COOPER**

NEXT COURT DATE: **December 11, 2014**

CHARGES:

S782.04(1)(A) MURDER - FIRST DEGREE
S787.01(3)(A) KIDNAPPING A CHILD UNDER THE AGE OF 13 YEARS
S794.011(2)(A) SEXUAL BATTERY: DEFENDANT 18 OR OLDER VICTIM LESS THAN 12

SECTION II: REGIONAL CONFLICT COUNSEL ACCEPTANCE/NON -ACCEPTANCE

PLEASE CHECK APPROPRIATE BOX

REGIONAL CONFLICT COUNSEL ACCEPTANCE OF CASE: **YES** ☐

REGIONAL CONFLICT ATTORNEY ASSIGNED TO CASE _____

REGIONAL CONFLICT ATTORNEY NON-ACCEPTANCE OF CASE: **NO** ☐

REASON FOR NON-ACCEPTANCE _____

_____

SECTION III: NEXT AVAILABLE NON- RCC ATTORNEY AVAILABLE FROM "THE WHEEL"

THIS SECTION TO BE USED IF REGIONAL CONFLICT COUNSEL CANNOT ACCEPT CASE

ATTORNEY'S NAME: _____

ATTORNEY'S TELEPHONE NUMBER: _____

ATTORNEY'S ADDRESS: _____

_____

_____

_____Buffy Stagg_____

Deputy Clerk

Stagg,Buffy L

From: Lively, Ceylone (RC1) <ceylone.lively@rc1.myflorida.com>
Sent: Tuesday, November 18, 2014 8:30 AM
To: Stagg,Buffy L; Tipton, Melissa (RC1); Weaver, Nan (RC1); Ross, Shiela (RC1); Davis, Tonia (RC1); Sloan, Traci (RC1); Hanania, Waffa (RC1)
Subject: RE: aptic.tmpFC5D.tmp.Notification of Attorney Conflict
Attachments: image001.png; image002.png

Can not accept

NOTIFICATION OF ATTORNEY CONFLICT

DATE: 11/17/2014 DATE OF CONFLICT: TIME:

SECTION I: **CASE IDENTIFICATION**

DEFENDANT'S NAME **DONALD JAMES SMITH** DIVISION **CR-D (Circuit)**

DATE OF BIRTH: **September 4, 1956** RACE: **WHITE** SEX: **FEMALE**

UNIFORM CASE NUMBER: **16-2013-CF-005781-AXXX-MA** JUDGE: **MALLORY COOPER**

NEXT COURT DATE: **December 11, 2014**

CHARGES:

S782.04(1)(A) MURDER - FIRST DEGREE
S787.01(3)(A) KIDNAPPING A CHILD UNDER THE AGE OF 13 YEARS
S794.011(2)(A) SEXUAL BATTERY: DEFENDANT 18 OR OLDER VICTIM LESS THAN 12

SECTION II: **REGIONAL CONFLICT COUNSEL ACCEPTANCE/NON -ACCEPTANCE**

PLEASE CHECK APPROPRIATE BOX

REGIONAL CONFLICT COUNSEL ACCEPTANCE OF CASE: **YES**

REGIONAL CONFLICT ATTORNEY ASSIGNED TO CASE _____

REGIONAL CONFLICT ATTORNEY NON-ACCEPTANCE OF CASE: **NO x**

REASON FOR NON-ACCEPTANCE _____rep witness in case

_____

SECTION III: **NEXT AVAILABLE NON- RCC ATTORNEY AVAILABLE FROM "THE WHEEL"**

THIS SECTION TO BE USED IF REGIONAL CONFLICT COUNSEL CANNOT ACCEPT CASE

ATTORNEY'S NAME: _____

ATTORNEY'S TELEPHONE NUMBER: _____

ATTORNEY'S ADDRESS: _____

_____

_____

Buffy Stagg

Deputy Clerk

Ceylone' Lively
Office of Criminal Conflict & Civil Regional Counsel
Legal Assistant
100 West Bay Street, Ste 600
Jacksonville, Fl 32202
Office: (904) 301-1112 ext. 1012
Fax: (904) 301-1120
ceylone.lively@rc1.myflorida.com
Confidentiality Notice: Please be advised that Florida has a broad public records law and all electronic communications are subject to disclosure.

From: Stagg,Buffy L [mailto:Buffy.Stagg@DuvalClerk.com]
Sent: Monday, November 17, 2014 12:29 PM
To: Lively, Ceylone (RC1); Tipton, Melissa (RC1); Weaver, Nan (RC1); Ross, Shiela (RC1); Davis, Tonia (RC1); Sloan, Traci (RC1); Hanania, Waffa (RC1)
Subject: aptic.tmpFC5D.tmp.Notification of Attorney Conflict

Filing # 20986610 Electronically Filed 11/25/2014 04:05:02 PM

S.A. CASE NO.: 2013-39428

IN THE CIRCUIT COURT OF THE FOURTH JUDICIAL CIRCUIT, IN AND FOR DUVAL COUNTY, FLORIDA

CLERK NO.: 162013CF5781AXXXMA

STATE OF FLORIDA

DIVISION: CR-D

vs.

DONALD JAMES SMITH

STATE'S FIRST MOTION IN LIMINE

The State of Florida, by and through the undersigned Assistant State Attorney, files this Motion in Limine and requests this Honorable Court to prohibit any and all argument, testimony, cross examination, or evidence relating to the personal history or character of Rayne Perrywinkle. In support thereof, the State would allege as follows:

1. The case has been set for trial.

2. The State believes that, at the trial, the Defendant will attempt to introduce evidence, make reference to, argue, or otherwise bring forward testimony regarding the personal history or character of Rayne Perrywinkle, including irrelevant information regarding her prior employment and personal relationships.

3. The prejudicial effect of such evidence or inference outweighs its probative value.

4. It is contrary to the rules and laws governing the Courts of the State of Florida to permit such evidence or inference, and would be highly prejudicial to the State in the minds of the jury in that said evidence and testimony is not probative to prove any material fact at bar or to establish bias.

5. An ordinary objection during the course of trial, even if sustained with proper instructions to the jury, will not remove such a prejudicial effect from the jury.

WHEREFORE, the State prays this Honorable Court will grant the State's Motion in Limine.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing motion has been furnished by electronic mail, to Fred Gazaleh, Esquire, Office of the Public Defender, this 25th day of November, 2014.

ANGELA COREY
STATE ATTORNEY

By: _____
Mark Caliel
Bar Number: 0105650
Assistant State Attorney

/mc

S.A. CASE NO.: 2013-39428

IN THE CIRCUIT COURT OF THE FOURTH JUDICIAL CIRCUIT, IN AND FOR DUVAL COUNTY, FLORIDA

CLERK NO.: 162013CF5781AXXXMA

DIVISION: CR-D

STATE OF FLORIDA

vs.

DONALD JAMES SMITH

STATE'S SECOND MOTION IN LIMINE

The State of Florida, by and through the undersigned Assistant State Attorney, files this Motion in Limine and requests this Honorable Court to prohibit any and all argument, testimony, cross examination, or evidence relating to the Internal Affairs investigation conducted by the Jacksonville Sheriff's Office regarding the police response to the abduction of the victim. In support thereof, the State would allege as follows:

1. The case has been set for trial.

2. The State believes that, at the trial, the Defendant will attempt to introduce evidence, make reference to, argue, or otherwise bring forward testimony relating to the Internal Affairs investigation conducted by the Jacksonville Sheriff's Office regarding the police response to the abduction of the victim .

3. The prejudicial effect of such evidence or inference outweighs its probative value.

4. It is contrary to the rules and laws governing the Courts of the State of Florida to permit such evidence or inference, and would be highly prejudicial to the State in the minds of the jury in that said evidence and testimony is not probative to prove any material fact at bar or to establish bias of a testifying witness.

5. An ordinary objection during the course of trial, even if sustained with proper instructions to the jury, will not remove such a prejudicial effect from the jury.

WHEREFORE, the State prays this Honorable Court will grant the State's Motion in Limine.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing motion has been furnished by electronic mail, to Fred Gazaleh, Esquire, Office of the Public Defender, this 25th day of November, 2014.

ANGELA COREY
STATE ATTORNEY

By: _____
Mark Caliel
Bar Number: 0105650
Assistant State Attorney

/mc

FILED 12/2/14 4PM 0300 R FUSSELL

IN THE CIRCUIT COURT, FOURTH JUDICIAL CIRCUIT, IN AND FOR DUVAL COUNTY, FLORIDA

CASE NO.: 16-2013-CF-05781-AXXX-MA

DIVISION: CR-D

STATE OF FLORIDA

v.

DONALD JAMES SMITH,
Defendant.
_____/

ORDER DENYING DEFENDANT'S CERTIFICATE OF CONFLICT AND MOTION TO WITHDRAW

This matter came before this Court on Defendant's Certificate of Conflict and Motion to Withdraw, filed through court-appointed counsel[1] on November 17, 2014.

On June 22, 2013, Defendant was arrested by the Jacksonville Sheriff's Office. On June 23, 2013, the Office of the Public Defender for the Fourth Judicial Circuit of Florida was appointed to represent Defendant. On July 2, 2013, a grand jury returned an Indictment against Defendant charging him with one count of Murder in the First Degree (Count One), one count of Kidnapping a Child Under the Age of 13 Years (Count Two), and one count of Sexual Battery on a Child Less Than 12 Years Old (Count Three). This case is currently set for trial, specifically as follows: final pre-trial on January 15, 2015; jury selection to begin on January 20, 2015; the guilt phase to commence on January 26, 2015; and the penalty phase, should one be necessary, on February 9, 2015, and February 10, 2015.

[1] Court-appointed counsel are employed by the Office of the Public Defender, in and for the Fourth Judicial Circuit of Florida.

On November 19, 2014, this Court conducted a hearing on Defendant's instant Motion, during which the following parties were present: Assistant State Attorneys Mr. Mark Caliel, Esq., Mr. Bernie de la Rionda, Esq., and Mr. Jeff Moody, Esq.; Assistant Public Defenders and attorneys for Defendant Mr. Fred Gazaleh, Esq., and Ms. Tricia Rado, Esq.; Defendant, Mr. Donald Smith; a representative from Official Court Reporters, Inc.; a representative from the Clerk of Court; and a representative from the Office of the Judicial Staff Attorneys.

In the instant Motion, Mr. Gazaleh argues that because a conflict of interest with another client of the Public Defender's Office exists, the Office of the Public Defender "cannot counsel Defendant without an actual conflict or without the appearance of impropriety." (Def.'s Mot. 1.) Specifically, Mr. Gazaleh contends that his representation of Defendant would be "directly adverse to another client" of the Office of the Public Defender, in violation of rule 4-1.7(a)(1), Florida Rules of Professional Conduct. (Def.'s Mot. 1.)

Based on the allegations raised in Defendant's Motion, this Court conducted an *in-camera* hearing on November 19, 2014, during which all attorneys present from the Office of the State Attorney left the courtroom and did not return until the conclusion of the *in-camera* portion of the hearing.[2] After the *in-camera* hearing concluded, both parties then presented argument in support of their respective positions. The State represented that it has no interest in using any inmate testimony against Defendant during trial. Indeed, the State argued, it is not aware of a single public defender client who would testify as a witness in the instant case and thus create a conflict. Mr. Gazaleh argued he has a duty to inform Defendant of all the information he knows about Defendant's case, and he cannot tell Defendant the information he learned from the other public defender client

[2] This portion of the hearing was transcribed and has been placed under seal.

without breaching that client's confidence. In response, the State replied that Mr. Gazaleh is not prohibited from counseling his client by failing to inform him of something *Defendant* told to another inmate, as Defendant already knows what he said. Further, the State argued, Defendant undoubtedly talks with multiple defendants everyday, all whom could potentially have an interest in sharing information about Defendant's case.

Rule 4-1.7 of the Florida Rules of Professional Conduct governs an attorney's actions when conflict of interest arises while representing current clients. That rule reads as follows:

> **(a) Representing Adverse Interests.** Except as provided in subdivision (b), a lawyer must not represent a client if:
>
> (1) the representation of 1 client will be directly adverse to another client; or
>
> (2) there is a substantial risk that the representation of 1 or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.

R. Regulating Fla. Bar 4-1.7(a) (2014). In referencing a previous version of rule 4-1.7, the Florida Supreme Court has stated, "[t]o mandate withdrawal, however, the prejudice caused by continued representation must be more than de minimis, and the party seeking withdrawal bears the burden of demonstrating that substantial prejudice will result if withdrawal is not allowed." Schwab v. State, 636 So. 2d 3, 5-6 (Fla. 1994) (citations omitted).

When the attorney involved is a public defender, section 27.5303, Florida Statutes, is also implicated in the case of a conflict of interest between current clients. That section relevantly states:

> If, at any time during the representation of two or more defendants, a public defender determines that the interests of those accused are so adverse or hostile that they cannot all be counseled by the public defender or his or her staff without conflict of interest, or that none

> can be counseled by the public defender or his or her staff because of a conflict of interest, then the public defender shall file a motion to withdraw and move the court to appoint other counsel. The court shall review and may inquire or conduct a hearing into the adequacy of the public defender's representations regarding a conflict of interest without requiring the disclosure of any confidential communications. **The court shall deny the motion to withdraw if the court finds the grounds for withdrawal are insufficient or the asserted conflict is not prejudicial to the indigent client.**

§ 27.5303(1)(a), Fla. Stat. (2014) (emphasis added). The Florida Supreme Court recently clarified, stating "[t]he court shall permit withdrawal unless the court determines that the asserted conflict is not prejudicial to the indigent client." Johnson v. State, 78 So. 3d 1305, 1312 (Fla. 2012). See Scott v. State, 991 So. 2d 971, 973-74 & n.4 (Fla. 1st DCA 2008) (discussing Florida Legislature's 2004 amendment to section 27.5303, Florida Statutes, and impact that amendment has on motions to withdraw filed by public defenders). Furthermore, such withdrawal applies to all of the attorneys of each public defender's office because of each circuit's Office of the Public Defender is "the functional equivalent of a law firm. Different attorneys in the same public defender's office cannot represent defendants with conflicting interests." Bouie v. State, 559 So. 2d 1113, 1115 (Fla. 1990) (citing Turner v. State, 340 So. 2d 132 (Fla. 2d DCA 1976)). See Ward v. State, 753 So. 2d 705, 708 (Fla. 1st DCA 2000) (quoting Turner, 340 So. 2d at 133) (finding constitutional right to counsel "includes the right to counsel whose loyalty is not divided between clients with conflicting interests").

In the instant case, however, the Fourth Circuit Office of the Public Defender has not presented evidence sufficiently establishing the existence of an actual conflict. Indeed, the State is not using any other public defender client as a State witness during trial and the State has no intention on seeking to learn the information at issue from the other public defender client. The two

clients at issue do not have adverse interests, nor would representation of both clients be directly adverse to each client. See R. Regulating Fla. Bar 4-1.7(a). Therefore, because there exist no conflicting, adverse interests between the other public defender client and Defendant, the asserted conflict, as argued, is insufficient to warrant withdrawal of the Office of the Public Defender from Defendant's case. See § 27.5303(1)(a).

Furthermore, this Court finds Mr. Gazaleh's representation of Defendant is not materially limited by the information/communication concerning the other public defender client. This Court has received only representations that another, unknown public defender client indicated to another Assistant Public Defender that he received information from Defendant. This Court notes the information given to the other client, asserted as a conflict of interest, was information given *by Defendant himself.* Therefore, this Court finds there is no substantial risk that Mr. Gazaleh's ability to counsel Defendant is materially limited by the Office of the Public Defender's responsibilities to their other client; Defendant knows the information he told the other public defender client. See R. Regulating Fla. Bar 4-1.7(a). Therefore, this Court finds there is no conflict, the asserted conflict is not prejudicial to Defendant, and the asserted conflict will not result in substantial prejudice to the Public Defender's Office's representation of Defendant. See § 27.5303(1)(a); Johnson, 78 So. 3d at 1312; Schwab, 636 So. 2d at 5-6.

In closing, this Court finds the instant Motion and argument during the *in-camera* inspection fail to allege grounds sufficient to mandate withdrawal and do not demonstrate a conflict of interest which would prejudice Defendant. Therefore, this Court finds the Office of the Public Defender has failed to meet its burden to warrant withdrawal from Defendant's case and shall not be permitted to withdraw as Defendant's counsel. See Schwab, 636 So. 2d at 5-6.

In view of the above, it is:

ORDERED AND ADJUDGED that Defendant's Certificate of Conflict and Motion to Withdraw, filed through court-appointed counsel on November 17, 2014, is **DENIED**.

DONE AND ORDERED in Chambers, in Jacksonville, Duval County, Florida, on this 2 day of December, 2014.

MALLORY D. COOPER
Circuit Judge

Copies to:

Mr. Mark Caliel, Esq.
Mr. Bernie de la Rionda, Esq.
Mr. Jeff Moody, Esq.
Office of the State Attorney
220 E. Bay St.
Jacksonville, FL 32202

Mr. Fred Gazaleh, Esq.
Ms. Tricia Rado, Esq.
Attorneys for Defendant
Office of the Public Defender
407 N. Laura St.
Jacksonville, FL 32202

Case No.: 16-2013-CF-05781-AXXX-MA

IN THE DISTRICT COURT OF APPEAL,
FIRST DISTRICT, STATE OF FLORIDA

APPEAL NO:

IN THE CIRCUIT COURT, FOURTH
JUDICIAL CIRCUIT, IN AND FOR
DUVAL COUNTY, FLORIDA

CASE NO: 16-2013-CF-5781

DONALD JAMES SMITH,
Petitioner,

vs.

STATE OF FLORIDA,
Respondent.
_____/

EMERGENCY PETITION FOR A WRIT OF CERTIORARI

COMES NOW Petitioner, Donald James Smith, by and through his undersigned attorney, the Public Defender for the Fourth Judicial Circuit of Florida, pursuant to Article V, section 4(b)(3) and of the Constitution of the State of Florida and Rule 9.030(b)(2), Fla. R. App. P., and moves this Honorable Court to issue a Writ of Certiorari to command the lower court to quash its Order Denying Defendant's Certificate of Conflict and Motion to Withdraw. (App. I.). As ground therefore, Petitioner states:

I. Basis of Jurisdiction

Petitioner invokes the jurisdiction of the Court to issue a Writ of Certiorari pursuant to Article V, Section 4(b)(3) of the Florida Constitution and Rules

9.030(b)(2) and 9.100 of the Florida Rules of Appellate Procedure. Petitioner is an indigent defendant who is currently being prosecuted for Murder in the First Degree, Kidnapping a Child Under the Age of 13 Years, and Sexual Battery on a Child Less Than 12 Years. Respondent, the State of Florida (hereinafter the "State" or Respondent), is the prosecutor below.

II. Facts Upon Which Petitioner Relies

1. Petitioner was arrested on June 22, 2013 and the Office of the Public Defender, Fourth Judicial Circuit, was appointed to represent Petitioner on June 23, 2013.

2. On July 2, 2013, the State charged Petitioner by Indictment with first degree murder, pursuant to sec. 782.04(1)(a), Fla. Stat., kidnapping a child under the age of 13, pursuant to 787.01(3)(a), and sexual battery on a victim less than 12, pursuant to sec. 794.011(2)(a), Fla. Stat. (App. II)

3. On July 16, 2013, the State filed a Notice of Intent to Seek Death Penalty and Request for Statement of Particulars of Mental Mitigation. (App. III).

4. This case is currently set for trial with jury selection scheduled for January 20, 2015 and the guilt phase of the trial scheduled for January 26, 2015.

5. Petitioner's counsel filed Defendant's Certificate of Conflict and Motion to Withdraw on November 17, 2014 and a hearing was held on the motion on November 19, 2014. (App. IV & V.).

6. In the motion, Petitioner alleged the Office of the Public Defender cannot counsel Smith without an actual conflict or appearance of impropriety, citing Rules 4-1.7 and 4-1.16, Florida Rules of Professional Conduct. Such rules hold a lawyer must not represent a client if the representation of one client will be directly adverse to another client and where the lawyer's responsibilities of loyalty and confidentiality of the other client might be compromised. The rules, thus, mandate a lawyer withdraw from representation if the representation will result in such violation of the rules.

7. Moreover, because of rules regulating the client-lawyer relationship and the confidentiality of communications and information, counsel was unable to fully express the nature of the conflict that is directly adverse to the interests of another client of the Office of the Public Defender.

8. Nevertheless, based on the sensitivity of such communications, the circuit court conducted an *in camera* hearing on November 19, 2014 during which all the attorneys from the Office of the State Attorney left the courtroom. This portion of the hearing was transcribed by a court reporter and placed under seal. After the *in camera* hearing, the State argued it is not aware of any public defender clients who would testify as a witness in the instant case, thereby creating a conflict. Counsel for Petitioner argued that because of the confidentiality rules, he cannot inform Petitioner of certain information regarding his case by way of the other public

defender client, which breaches his duty of loyalty to Petitioner. The State countered that because the alleged confidential information arose from a conversation Petitioner had with another client, Petitioner already knew the content of the communication.

9. Despite this quandary, the circuit court issued an oral ruling denying the motion to withdraw on November 24, 2014 because there is "no substantial risk of any material limitation to the Public Defender's responsibility to Mr. Smith or to whomever the other client is, as well as there can be no prejudice for Mr. Smith not to be informed of the words that Mr. Smith spoke to whoever this other individual was. He already knows those words. He doesn't have to be informed of them." (App. VI) The court also relied on the assertions of the State that they did not intend to call as a witness "whoever this other person is no matter what the information is" and, therefore, no prejudice exists.

10. The court then issued a written Order Denying Defendant's Certificate of Conflict and Motion to Withdraw on December 2, 2014. (App. I). In the written order, the court found that the Office of the Public Defender did not present evidence sufficiently establishing the existence of an actual conflict, and the "representation of Defendant is not materially limited by the information/communication concerning the other public defender client." The court, thus, found "there is no conflict, the asserted conflict is not prejudicial to

Defendant, and the asserted conflict will not result in substantial prejudice to the Public Defender's Office's representation of Defendant." The court, therefore, ruled the Office of the Public Defender "failed to meet its burden to warrant withdrawal from Defendant's case and shall not be permitted to withdraw as Defendant's counsel."

III. Nature of Relief Sought

Petitioner petitions this Honorable Court for a writ of certiorari directed to Circuit Court Judge Mallory Cooper's December 2, 2014 Order Denying Defendant's Certificate of Conflict and Motion to Withdraw. Such Order violated clearly established principles of law resulting in a miscarriage of justice which will cause material injury to Petitioner throughout the remainder of the proceedings. Petitioner does not have an adequate remedy on appeal as time is of the essence in this matter since jury selection is set for the week of January 20, 2015. *Bailey v. State,* 100 So. 3d. 213 (Fla. 3d DCA 2012). Petitioner respectfully requests this Honorable Court to grant this petition, quash the December 2, 2014 circuit court order, and, remand the case to grant the public defender leave to withdraw from this case and appoint conflict-free counsel for Petitioner. Moreover, and by separate motion, Petitioner further respectfully requests this Honorable Court to order the circuit court to stay the proceedings below pending a decision on the instant petition.

IV. Argument and Authority

This court has the authority to conduct certiorari review of trial court rulings on motions to withdraw from representation. *Kolker v. State*, 649 So. 2d 250 (Fla. 3d DCA 1995); *Hunter v. State,* 770 So. 2d 232 (Fla. 4th DCA 2000). Such writ is necessary to quash the lower court's order in the instant case because it departs from the essential requirements of the law, causes irreparable harm, and no adequate remedy on appeal exists. This Honorable Court has held that a trial court's ruling to require an "ethically conflicted attorney from the Office [of the Public Defender] to represent the petitioner . . . would be denying effective assistance of counsel . . . and constitutes a departure from the essential requirements of the law that would result in irreparable, material harm to the petitioner that cannot be remedied on final appeal." *Ward v. State*, 753 So. 2d 705 (Fla. 1st DCA 2000), citing *Combs v. State*, 436 So. 2d 93 (Fla. 1983).

A. The circuit court's December 2, 2014 Order Denying Defendant's Certificate of Conflict and Motion to Withdraw departs from the essential requirements of the law because it compromises Petitioner's Sixth Amendment right to assistance of counsel.

The Sixth Amendment to the United States Constitution and Article I, Section 16 of the Florida Constitution guarantee the right to the assistance of counsel that is "effective and unimpaired by the existence of conflicting interests being represented by a single attorney." *Foster v. State,* 387 So. 2d 344 (Fla. 1980), citing *Glasser v. United States,* 315 U.S. 60, 62 (1942). Indeed, this

guarantee is so fundamental to our criminal justice system that the Supreme Court recognized the trial court's "duty of seeing that the trial is conducted with solicitude for the essential rights of the accused . . . The trial court should protect the right of an accused to have the assistance of counsel." *Glasser* at 71.

The Florida courts have, thus, recognized that a trial court's denial of a motion for separate representation is reversible error when there is a risk of conflicts of interest. *Ortiz v. State,* 844 So. 2d 824 (Fla. 5th DCA 2003); *Bellows v. State*, 508 So. 2d 1330 (Fla. 2d DCA 1987); *Foster, supra,* at 345. This is significant because the courts did not hold courts must grant a motion to withdraw and appoint conflict-free counsel only when there is an **actual** conflict—rather such motions must be granted when there is a **risk** of such a conflict. *See Lee v. State,* 690 So. 2d 664 (Fla. 1st DCA 1997) (holding that when defense counsel makes a pretrial disclosure of a possible conflict of interest with the defendant, the trial court must either conduct an inquiry to determine whether the asserted conflict of interest will impair the defendant's right to the effective assistance of counsel or appoint separate counsel). Amplifying the significance of the risk of a conflict in the instant case is the fact that it is a capital case and Petitioner is facing the ultimate penalty. Great care should be taken to ensure his constitutional right to assistance of counsel is not jeopardized. Because, in fact, a substantial risk of a

conflict exists in the instant case, the trial court's denial of the motion to withdraw departed from the essential requirements of the law.

B. The circuit court's order departs from the essential requirements of the law because it places the Office of the Public Defender in a position to violate the Rules of Professional Conduct.

The Certificate of Conflict and Motion to Withdraw that is the subject of the instant petition was brought pursuant to sec. 27.5303, Fla. Stat., which states in pertinent part:

> (1)(a) If, at any time during the representation of two or more defendants, a public defender determines that the interests of those accused are so adverse or hostile that they cannot all be counseled by the public defender or his or her staff without conflict of interest, or that none can be counseled by the public defender or his or her staff because of a conflict of interest, then the public defender shall file a motion to withdraw and move the court to appoint other counsel. The court shall review and may inquire or conduct a hearing into the adequacy of the public defender's representations regarding a conflict of interest without requiring the disclosure of any confidential communications. The court shall deny the motion to withdraw if the court finds the grounds for withdrawal are insufficient or the asserted conflict is not prejudicial to the indigent client. . .

In the motion, counsel then cited two rules of the Florida Rules of Professional Conduct which formed the basis of the conflict of interest in this case and are the grounds upon which the motion is based.[1] First, the motion cites Rule 4-1.7(a) which precludes a lawyer from representing a client if the representation of one client will be directly adverse to another client and where the lawyer's

[1] It is well-established Florida law that attorneys within the same public defender's office cannot represent defendants with conflicting interests. *Bouie v. State*, 559 So. 2d 1113 (Fla. 1990); *Ward v. State*, 753 So. 2d 705 (Fla. 1st DCA 2000).

responsibilities of loyalty and confidentiality of the other client might be compromised or materially limited.[2] Second, the motion cites Rule 4-1.16 which requires a lawyer to withdraw from representation of a client if the representation will result in a violation of the Rules of Professional Conduct or law. The motion then states that counsel cannot provide more information without violating ethical rules regarding the attorney/client privilege but that the Office of the Public Defender cannot counsel Petitioner without an actual conflict or appearance of impropriety.

The trial court denied the motion primarily because it found insufficient evidence to establish the existence of an actual conflict. As noted above, an actual conflict is not necessary to require withdrawal; rather the risk of a conflict is enough to impact a defendant's constitutional rights to assistance of counsel. Nevertheless, this case poses a grave ethical quandary because inherent in this motion is the fact counsel cannot disclose the communication forming the basis of the conflict without violating attorney/client privilege.

Indeed, this Honorable Court has contemplated this quandary in *Scott v. State*, 991 So. 2d 971 (Fla. 1st DCA 2008). This Court said:

[2] The Comments to Rule 4-1.7, Florida Rules of Professional Conduct, state, "[l]oyalty to a client is also impaired when a lawyer cannot consider, recommend, or carry out an appropriate course of action for the client because of the lawyer's other responsibilities or interests." Such loyalty is compromised in this case.

> Where circumstances preclude the trial court's learning whether a conflict of interest has had or will have an impermissible effect, moreover, the motion for leave to withdraw should be granted. The statute is designed to protect the constitutional right to counsel. It recognizes that the trial court may not be able to ascertain whether a conflict of interest has proven, or may yet prove, harmful to the client or the client's representation. After all, the statute acknowledges the existence of confidential communications, and does not purport to abolish the attorney-client privilege or the work product privilege, both of which limit the trial court's ability to learn all the facts.

Scott at 974. In the instant case, counsel is precluded from revealing the extent of the conflict but avers the conflict is genuine. The trial court should have, therefore, granted the motion for leave to withdraw and it is a departure from the essential requirements of the law to have denied the motion.

Counsel did not file this motion without great thought and consideration and understands the need to tread carefully to ensure compliance with ethical and professional responsibilities. Counsel consulted with attorneys with the Florida Bar who advised that failure to withdraw from representation would violate the rules of ethics and could result in bar discipline. As an officer of the court, counsel's assertion that a substantial risk of conflict of interest exists, albeit without disclosing confidential communications, should be honored as being truthful. The trial court's requirement that counsel cannot withdraw without showing an actual conflict, which counsel is prohibited from doing due to privilege considerations, is putting counsel in the position of violating either the conflict rules or the attorney/client privilege rule. Such an untenable position is created

because if counsel discloses the conflict, he would violate the Rules of Professional Conduct by disclosing confidential communications. If he does not disclose the communication forming the basis of the conflict, and is not permitted to withdraw from the case because of "insufficient evidence" of the conflict, then he also violates the Rules of Professional Conduct by representing a client with interests adverse to another public defender client. The only feasible solution to this quandary is to allow the Office of the Public Defender to withdraw from the case and honor counsel's word that a conflict, or at least substantial risk of a conflict, exists.

C. The trial court's order departs from the essential requirements of the law because it relied on a more stringent standard than is required under sec. 27.5303, Fla. Stat.

The trial court held that the Office of the Public Defender failed to meet its burden to warrant withdrawal because it did not allege sufficient grounds and did not demonstrate a conflict which would prejudice Petitioner. However, the reasoning set forth in the order to support this holding does not take into account the entirety of sec. 27.5303, Fla. Stat. and places the burden on the defendant to expose more than is ethically permitted.

First, it must be underscored that sec. 27.5303 specifically precludes the court from requiring the disclosure of confidential communications. Evidently, then, the legislature contemplated that public defenders would be permitted to

withdraw without jeopardizing such confidential communications. However, it is evident in the order that the circuit court would not permit such withdrawal without such disclosure. The court greatly considered the State's representations that "it has no interest in using any inmate testimony against Defendant during trial . . .[and] it is not aware of a single public defender client who would testify as a witness in the instant case and thus create a conflict," as well as the further State representation that the public defender "is not prohibited from counseling his client by failing to inform him of something *Defendant* told to another inmate, as Defendant already knows what he said." [emphasis supplied] Such logic is faulty and misapprehends the ethical considerations in this case. Indeed, those assertions are not relevant to the inquiry at hand. It is certainly not up to the State to determine the efficacy of counsel's legal advice to his client by assessing whether counsel needs to disclose the information he learned to his client—whether or not the Defendant is the one who is alleged to have originally communicated the information. The assertions made by the State questioning such defendant counsel advice should have no bearing on this analysis.

Next, the court incorrectly cites to *Schwab v. State*, 636 So. 2d 3 (Fla. 1994) to illustrate the burden attorneys have to demonstrate a conflict of interest under Rule 4-1.7, Florida Rules of Professional Conduct and requiring the demonstration of "substantial prejudice." The *Schwab* decision pre-dates the enactment of sec.

27.5303, Fla. Stat. and its predecessor sec. 27.53(3), Fla. Stat. specifically dealing with public defenders and their clients which permits withdrawal if sufficient grounds are alleged and the alleged conflict is prejudicial to the client. Significantly, the statute allows for a hearing on the public defender's representations of the conflict but "without requiring the disclosure of confidential communications." Certainly, such statute recognizes the thorny position public defenders can encounter when they, in their professional opinion, recognize a conflict but cannot explain the conflict to the court without violating the attorney/client privilege. *See also The Florida Bar v. Lange*, 711 So. 2d 518 (Fla. 1998) (attorney's disclosure to the trial court of confidential communications made to him by former client to demonstrate possible conflict of interest in representing a subsequent criminal defendant violated the Rules of Professional Conduct and resulted in bar discipline).

Indeed, the trial court's order cites the Florida Supreme Court case *Johnson v. State*, 78 So. 3d 1305 (Fla. 2012) and the First DCA case *Scott, supra,* to further elucidate the requirements of sec. 27.5303. [3] However, the court then relies on these cases to hold the "Office of the Public Defender has not presented evidence sufficiently establishing the existence of an actual conflict." But, the cited cases—

[3] Please note the quote cited on p. 4 of the Order "the court shall permit withdrawal unless the court determines that the asserted conflict is not prejudicial to the indigent client," is attributed to *Johnson, supra,* by the trial court. However, this is not a holding of *Johnson* but was a quote in the *Johnson* opinion of *Guzman v. State*, 644 So. 2d 996 (Fla. 1994), which explained the legislative and case history of such conflicts and motions to withdraw.

or the rules or the statute—do not require the public defender to prove the existence of the actual conflict. Interestingly, the *Scott* case, *supra*, even contemplates the scenario present in the instant case and holds the trial courts should grant motions to withdraw when "circumstances preclude the trial court's learning whether a conflict of interest has had or will have an impermissible effect." *Scott* at 974. That is precisely what has occurred in the instant case—counsel is precluded from exposing the extent of the conflict due to privileged communications but is being penalized for such adherence to his ethical obligations. This court recognized such a predicament as encountered in the instant case and held that in such situations the motion for leave to withdraw should be granted. As such, the trial court's ruling that the public defender's failure to present evidence to establish the existence of an actual conflict is a misapplication of the standard to be applied in evaluating the motion to withdraw and is, therefore, a departure from the essential requirements of the law.

Moreover, the trial court's finding that there can be no actual conflict and no prejudice to Petitioner because the information was provided by Defendant himself to the other public defender client is incorrect. The reliance on this fact is misplaced because a number of scenarios can occur which would make the privileged communications significant and material to Petitioner's defense. The trial court appears to be stating that Petitioner should already know what can be

brought against him. Yet this presupposes Petitioner only told the other client this information and remembers saying what he is purported to having said, if he even said it in the first place. It also precludes his attorney from giving him advice and counsel regarding the communication and information. This is precisely the reason this is a conflict and precisely why it puts the public defender in the position of representing clients with adverse interests.

Additionally, the trial court's finding that the Motion to Withdraw and argument during the *in camera* proceedings "fail to allege grounds sufficient to mandate withdrawal" misstates the requirements of sec. 27.5303. Although counsel for Petitioner could not ethically produce the circumstances and facts pertaining to the grounds for withdrawal due to privileged communications, the grounds set forth are valid. Specifically, the grounds are that a conflict of interest exists under Rule 4-1.7(a)(1), Florida Rules of Professional Conduct and that he must withdraw for representation under Rule 4-1.16, Florida Rules of Professional Conduct. The court seems to conclude that because counsel could not fully explain the circumstances of the grounds, that the grounds are, thus, invalid. Such is not the case.

Therefore, because the trial court departed from the essential requirements of the law by compromising Petitioner's Sixth Amendment right to counsel and misapplying sec. 27.5303, Fla. Stat. in its denial of the motion to withdraw in this

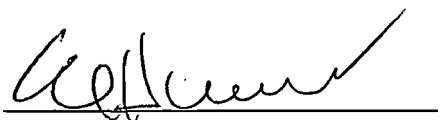
case, the undersigned respectfully requests this Honorable Court grant the writ of certiorari.

V. Relief

WHEREFORE, Petitioner respectfully requests this Honorable Court to issue a writ of certiorari requiring the circuit court below to quash its December 2, 2014 Order Denying Defendant's Certificate of Conflict and Motion to Withdraw and remand the case to grant the Office of the Public Defender, Fourth Judicial Circuit leave to withdraw from this case. Further, and by separate motion, Petitioner further requests this Honorable Court to order the circuit court to stay the proceedings below pending a decision in the instant petition.

Respectfully submitted,

MATT SHIRK
PUBLIC DEFENDER



ELIZABETH H. WEBB
ASSISTANT PUBLIC DEFENDER
407 NORTH LAURA STREET
JACKSONVILLE, FL 32202
(904) 255-4727
FLORIDA BAR NO.: 0853089

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the above and foregoing has been furnished by e-mail to the Office of the Attorney General at criminalappealsintake@myfloridalegal.com, representing the State of Florida, by e-service to the Office of the State Attorney, representing the State of Florida, and by e-mail to The Honorable Mallory Cooper, Circuit Court Judge, at dvail@coj.net, this 10th day of December. 2014.

ELIZABETH H. WEBB
ASSISTANT PUBLIC DEFENDER

IN THE DISTRICT COURT OF APPEAL,
FIRST DISTRICT, STATE OF FLORIDA

APPEAL NO:

IN THE CIRCUIT COURT, FOURTH
JUDICIAL CIRCUIT, IN AND FOR
DUVAL COUNTY, FLORIDA

CASE NO: 16-2013-CF-5781

DONALD JAMES SMITH,
Petitioner,

vs.

STATE OF FLORIDA,
Respondent.
_____/

APPENDICES

APPENDIX I	ORDER DENYING DEFENDANT'S CERTIFICATE OF CONFLICT AND MOTION TO WITHDRAW
APPENDIX II	INDICTMENT
APPENDIX III	NOTICE OF INTENT TO SEEK DEATH PENALTY
APPENDIX IV	CERTIFICATE OF CONFLICT AND MOTION TO WITHDRAW
APPENDIX V	TRANSCRIPTS OF COURT PROCEEDINGS HELD NOVEMBER 19, 2014
APPENDIX VI	TRANSCRIPTS OF COURT PROCEEDINGS HELD NOVEMBER 24, 2014

IN THE DISTRICT COURT OF APPEAL,
FIRST DISTRICT, STATE OF FLORIDA

APPEAL NO:

IN THE CIRCUIT COURT, FOURTH
JUDICIAL CIRCUIT, IN AND FOR
DUVAL COUNTY, FLORIDA

CASE NO: 16-2013-CF-5781

DONALD JAMES SMITH,
Petitioner,

vs.

STATE OF FLORIDA,
Respondent.
_____/

APPENDIX I ORDER DENYING DEFENDANT'S CERTIFICATE OF CONFLICT AND MOTION TO WITHDRAW

FILED 12/2/2014 03:00 R FUSSELL

IN THE CIRCUIT COURT, FOURTH JUDICIAL CIRCUIT, IN AND FOR DUVAL COUNTY, FLORIDA

CASE NO.: 16-2013-CF-05781-AXXX-MA

DIVISION: CR-D

STATE OF FLORIDA

v.

DONALD JAMES SMITH,
Defendant.
_____/

ORDER DENYING DEFENDANT'S CERTIFICATE OF CONFLICT AND MOTION TO WITHDRAW

This matter came before this Court on Defendant's Certificate of Conflict and Motion to Withdraw, filed through court-appointed counsel[1] on November 17, 2014.

On June 22, 2013, Defendant was arrested by the Jacksonville Sheriff's Office. On June 23, 2013, the Office of the Public Defender for the Fourth Judicial Circuit of Florida was appointed to represent Defendant. On July 2, 2013, a grand jury returned an Indictment against Defendant charging him with one count of Murder in the First Degree (Count One), one count of Kidnapping a Child Under the Age of 13 Years (Count Two), and one count of Sexual Battery on a Child Less Than 12 Years Old (Count Three). This case is currently set for trial, specifically as follows: final pre-trial on January 15, 2015; jury selection to begin on January 20, 2015; the guilt phase to commence on January 26, 2015; and the penalty phase, should one be necessary, on February 9, 2015, and February 10, 2015.

[1] Court-appointed counsel are employed by the Office of the Public Defender, in and for the Fourth Judicial Circuit of Florida.

On November 19, 2014, this Court conducted a hearing on Defendant's instant Motion, during which the following parties were present: Assistant State Attorneys Mr. Mark Caliel, Esq., Mr. Bernie de la Rionda, Esq., and Mr. Jeff Moody, Esq.; Assistant Public Defenders and attorneys for Defendant Mr. Fred Gazaleh, Esq., and Ms. Tricia Rado, Esq.; Defendant, Mr. Donald Smith; a representative from Official Court Reporters, Inc.; a representative from the Clerk of Court; and a representative from the Office of the Judicial Staff Attorneys.

In the instant Motion, Mr. Gazaleh argues that because a conflict of interest with another client of the Public Defender's Office exists, the Office of the Public Defender "cannot counsel Defendant without an actual conflict or without the appearance of impropriety." (Def.'s Mot. 1.) Specifically, Mr. Gazaleh contends that his representation of Defendant would be "directly adverse to another client" of the Office of the Public Defender, in violation of rule 4-1.7(a)(1), Florida Rules of Professional Conduct. (Def.'s Mot. 1.)

Based on the allegations raised in Defendant's Motion, this Court conducted an *in-camera* hearing on November 19, 2014, during which all attorneys present from the Office of the State Attorney left the courtroom and did not return until the conclusion of the *in-camera* portion of the hearing.[2] After the *in-camera* hearing concluded, both parties then presented argument in support of their respective positions. The State represented that it has no interest in using any inmate testimony against Defendant during trial. Indeed, the State argued, it is not aware of a single public defender client who would testify as a witness in the instant case and thus create a conflict. Mr. Gazaleh argued he has a duty to inform Defendant of all the information he knows about Defendant's case, and he cannot tell Defendant the information he learned from the other public defender client

[2] This portion of the hearing was transcribed and has been placed under seal.

without breaching that client's confidence. In response, the State replied that Mr. Gazaleh is not prohibited from counseling his client by failing to inform him of something *Defendant* told to another inmate, as Defendant already knows what he said. Further, the State argued, Defendant undoubtedly talks with multiple defendants everyday, all whom could potentially have an interest in sharing information about Defendant's case.

Rule 4-1.7 of the Florida Rules of Professional Conduct governs an attorney's actions when conflict of interest arises while representing current clients. That rule reads as follows:

> **(a) Representing Adverse Interests.** Except as provided in subdivision (b), a lawyer must not represent a client if:
>
> (1) the representation of 1 client will be directly adverse to another client; or
>
> (2) there is a substantial risk that the representation of 1 or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.

R. Regulating Fla. Bar 4-1.7(a) (2014). In referencing a previous version of rule 4-1.7, the Florida Supreme Court has stated, "[t]o mandate withdrawal, however, the prejudice caused by continued representation must be more than de minimis, and the party seeking withdrawal bears the burden of demonstrating that substantial prejudice will result if withdrawal is not allowed." Schwab v. State, 636 So. 2d 3, 5-6 (Fla. 1994) (citations omitted).

When the attorney involved is a public defender, section 27.5303, Florida Statutes, is also implicated in the case of a conflict of interest between current clients. That section relevantly states:

> If, at any time during the representation of two or more defendants, a public defender determines that the interests of those accused are so adverse or hostile that they cannot all be counseled by the public defender or his or her staff without conflict of interest, or that none

> can be counseled by the public defender or his or her staff because of a conflict of interest, then the public defender shall file a motion to withdraw and move the court to appoint other counsel. The court shall review and may inquire or conduct a hearing into the adequacy of the public defender's representations regarding a conflict of interest without requiring the disclosure of any confidential communications. **The court shall deny the motion to withdraw if the court finds the grounds for withdrawal are insufficient or the asserted conflict is not prejudicial to the indigent client.**

§ 27.5303(1)(a), Fla. Stat. (2014) (emphasis added). The Florida Supreme Court recently clarified, stating "[t]he court shall permit withdrawal unless the court determines that the asserted conflict is not prejudicial to the indigent client." Johnson v. State, 78 So. 3d 1305, 1312 (Fla. 2012). See Scott v. State, 991 So. 2d 971, 973-74 & n.4 (Fla. 1st DCA 2008) (discussing Florida Legislature's 2004 amendment to section 27.5303, Florida Statutes, and impact that amendment has on motions to withdraw filed by public defenders). Furthermore, such withdrawal applies to all of the attorneys of each public defender's office because of each circuit's Office of the Public Defender is "the functional equivalent of a law firm. Different attorneys in the same public defender's office cannot represent defendants with conflicting interests." Bouie v. State, 559 So. 2d 1113, 1115 (Fla. 1990) (citing Turner v. State, 340 So. 2d 132 (Fla. 2d DCA 1976)). See Ward v. State, 753 So. 2d 705, 708 (Fla. 1st DCA 2000) (quoting Turner, 340 So. 2d at 133) (finding constitutional right to counsel "includes the right to counsel whose loyalty is not divided between clients with conflicting interests").

In the instant case, however, the Fourth Circuit Office of the Public Defender has not presented evidence sufficiently establishing the existence of an actual conflict. Indeed, the State is not using any other public defender client as a State witness during trial and the State has no intention on seeking to learn the information at issue from the other public defender client. The two

clients at issue do not have adverse interests, nor would representation of both clients be directly adverse to each client. See R. Regulating Fla. Bar 4-1.7(a). Therefore, because there exist no conflicting, adverse interests between the other public defender client and Defendant, the asserted conflict, as argued, is insufficient to warrant withdrawal of the Office of the Public Defender from Defendant's case. See § 27.5303(1)(a).

Furthermore, this Court finds Mr. Gazaleh's representation of Defendant is not materially limited by the information/communication concerning the other public defender client. This Court has received only representations that another, unknown public defender client indicated to another Assistant Public Defender that he received information from Defendant. This Court notes the information given to the other client, asserted as a conflict of interest, was information given *by Defendant himself.* Therefore, this Court finds there is no substantial risk that Mr. Gazaleh's ability to counsel Defendant is materially limited by the Office of the Public Defender's responsibilities to their other client; Defendant knows the information he told the other public defender client. See R. Regulating Fla. Bar 4-1.7(a). Therefore, this Court finds there is no conflict, the asserted conflict is not prejudicial to Defendant, and the asserted conflict will not result in substantial prejudice to the Public Defender's Office's representation of Defendant. See § 27.5303(1)(a); Johnson, 78 So. 3d at 1312; Schwab, 636 So. 2d at 5-6.

In closing, this Court finds the instant Motion and argument during the *in-camera* inspection fail to allege grounds sufficient to mandate withdrawal and do not demonstrate a conflict of interest which would prejudice Defendant. Therefore, this Court finds the Office of the Public Defender has failed to meet its burden to warrant withdrawal from Defendant's case and shall not be permitted to withdraw as Defendant's counsel. See Schwab, 636 So. 2d at 5-6.

In view of the above, it is:

ORDERED AND ADJUDGED that Defendant's Certificate of Conflict and Motion to Withdraw, filed through court-appointed counsel on November 17, 2014, is **DENIED.**

DONE AND ORDERED in Chambers, in Jacksonville, Duval County, Florida, on this 2 day of December, 2014.

MALLORY D. COOPER
Circuit Judge

Copies to:

Mr. Mark Caliel, Esq.
Mr. Bernie de la Rionda, Esq.
Mr. Jeff Moody, Esq.
Office of the State Attorney
220 E. Bay St.
Jacksonville, FL 32202

Mr. Fred Gazaleh, Esq.
Ms. Tricia Rado, Esq.
Attorneys for Defendant
Office of the Public Defender
407 N. Laura St.
Jacksonville, FL 32202

Case No.: 16-2013-CF-05781-AXXX-MA

IN THE DISTRICT COURT OF APPEAL,
FIRST DISTRICT, STATE OF FLORIDA

APPEAL NO:

IN THE CIRCUIT COURT, FOURTH
JUDICIAL CIRCUIT, IN AND FOR
DUVAL COUNTY, FLORIDA

CASE NO: 16-2013-CF-5781

DONALD JAMES SMITH,
Petitioner,

vs.

STATE OF FLORIDA,
Respondent.
_____/

APPENDIX II INDICTMENT

S. A. CASE NO.: 13CF039428AD

CLERK NO.: 162013CF005781AXXXMA
DIVISION: CRD

IN THE CIRCUIT COURT OF THE FOURTH JUDICIAL CIRCUIT
OF THE STATE OF FLORIDA, IN AND FOR DUVAL COUNTY,
SPRING TERM, IN THE YEAR TWO THOUSAND THIRTEEN

STATE OF FLORIDA

vs.

DONALD JAMES SMITH

INDICTMENT FOR:

MURDER IN THE FIRST DEGREE;
KIDNAPPING A CHILD UNDER THE AGE OF 13 YEARS;
SEXUAL BATTERY ON A CHILD LESS THAN 12 YEARS OLD

IN THE NAME OF AND BY AUTHORITY OF THE STATE OF FLORIDA

The Grand Jurors of the State of Florida and County of Duval, empaneled and sworn to inquire and true presentment make in and for the body of the County of Duval, upon their oaths, do present and charge that DONALD JAMES SMITH, on or between the 21st day of June, 2013 and the 22nd day of June, 2013, in the County of Duval and the State of Florida, did unlawfully and from a premeditated design to effect the death of Cherish Perrywinkle, did then and there kill the said Cherish Perrywinkle, a human being, by strangling the said victim, contrary to the provisions of Section 782.04(1)(a), Florida Statutes.

COUNT 2

The Grand Jurors of the State of Florida and County of Duval, empaneled and sworn to inquire and true presentment make in and for the body of the County of Duval, upon their oaths, do present and charge that DONALD JAMES SMITH, on or between the 21st day of June, 2013, and the 22nd day of June, 2013, in the County of Duval and the State of Florida, did confine, abduct or imprison Cherish Perrywinkle, a child under the age of 13, forcibly, secretly, or by threat against her will and without lawful authority, with intent to commit or facilitate the commission of a felony, to-wit: Sexual Battery, and did commit a Sexual Battery upon Cherish Perrywinkle, contrary to the provisions of Section 787.01(3)(a), Florida Statutes.

COUNT 3

The Grand Jurors of the State of Florida and County of Duval, empaneled and sworn to inquire and true presentment make in and for the body of the County of Duval, upon their oaths, do present and charge that DONALD JAMES SMITH, on or between the 21st day of June, 2013 and the 22nd day of June, 2013, in the County of Duval and the State of Florida, being a person 18 years of age or older, did commit a Sexual Battery upon Cherish Perrywinkle, or in an attempt to commit Sexual Battery, injured the sexual organs of Cherish Perrywinkle, a person less than 12 years of age, contrary to the provisions of Section 794.011(2)(a), Florida Statutes.

Foreperson of the Duval County Grand Jury

ANGELA B. COREY, STATE ATTORNEY
FOURTH JUDICIAL CIRCUIT

Angela B. Corey
Bar Number 0300942
State Attorney
Fourth Judicial Circuit in and for Duval County, Florida,
Prosecuting for said State

I, Angela B. Corey, State Attorney for the Fourth Judicial Circuit of the State of Florida, in and for Duval County, hereby certify that I, as such Prosecuting Officer and as authorized and required by law, have advised the Grand Jury which returned this Indictment this 2nd day of July, 2013.

Angela B. Corey
Bar Number 0300942
State Attorney

IN THE DISTRICT COURT OF APPEAL,
FIRST DISTRICT, STATE OF FLORIDA

APPEAL NO:

IN THE CIRCUIT COURT, FOURTH
JUDICIAL CIRCUIT, IN AND FOR
DUVAL COUNTY, FLORIDA

CASE NO: 16-2013-CF-5781

DONALD JAMES SMITH,
Petitioner,

vs.

STATE OF FLORIDA,
Respondent.
_____/

APPENDIX III NOTICE OF INTENT TO SEEK DEATH PENALTY

S.A. CASE NO.: 13CF039428AD

IN THE CIRCUIT COURT OF THE FOURTH JUDICIAL CIRCUIT, IN AND FOR DUVAL COUNTY, FLORIDA

CLERK NO.: 162013CF005781AXXXMA

DIVISION: CRD

FILED
JUL 16 2013
CLERK CIRCUIT COURT

STATE OF FLORIDA

vs.

DONALD JAMES SMITH, SR.

NOTICE OF INTENT TO SEEK DEATH PENALTY AND
REQUEST FOR STATEMENT OF PARTICULARS OF MENTAL MITIGATION

The State of Florida, by and through the undersigned Assistant State Attorney, does hereby give notice to the Defendant in this case, pursuant to Rule 3.202, Florida Rules of Criminal Procedure, that the State of Florida intends to seek the death penalty for the First Degree Murder(s) charged in this case.

The State of Florida requests that the Defendant provide the State of Florida with a statement of particulars listing the statutory and non-statutory mental mitigating circumstances the Defendant expects to establish through expert testimony and the names and addresses of the mental health experts by whom the Defendant expects to establish these mitigating circumstances.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing motion has been furnished by hand, to Fred Gazaleh, Office of the Public Defender, this 16th day of July, 2013.

ANGELA B. COREY
STATE ATTORNEY

By: _____
Mark Caliel
Bar Number 0105650
Assistant State Attorney

THIS INSTRUMENT IN COMPUTER
Leslie

IN THE DISTRICT COURT OF APPEAL,
FIRST DISTRICT, STATE OF FLORIDA

APPEAL NO:

IN THE CIRCUIT COURT, FOURTH
JUDICIAL CIRCUIT, IN AND FOR
DUVAL COUNTY, FLORIDA

CASE NO: 16-2013-CF-5781

DONALD JAMES SMITH,
Petitioner,

vs.

STATE OF FLORIDA,
Respondent.
_____/

APPENDIX IV CERTIFICATE OF CONFLICT AND MOTION TO WITHDRAW

Filing # 20621839 Electronically Filed 11/17/2014 10:28:29 AM

IN THE FOURTH COURT, FOURTH JUDICIAL CIRCUIT, IN AND FOR DUVAL COUNTY, FLORIDA.

CASE NO.: 2013-CF-5781

DIVISION: CR-D

STATE OF FLORIDA

VS.

DONALD JAMES SMITH

CERTIFICATE OF CONFLICT AND MOTION TO WITHDRAW

The undersigned attorney, pursuant to Section 27.5303, Florida Statutes, certifies that a conflict exists between Defendant, Donald James Smith, and the Office of the Public Defender for the Fourth Judicial Circuit of Florida. The undersigned attorney further states the following:

1. Pursuant to Rule 4-1.7 (a)(1) Florida Rules of Professional Conduct, a lawyer must not represent a client if the representation of one client will be directly adverse to another client and where the lawyer's responsibilities of loyalty and confidentiality of the other client might be compromised.

2. Rule 4-1.16 provides that ...a lawyer shall withdraw from representation of a client if: (1) the representation will result in a violation of the Rules of Professional Conduct, or law.

3. Loyalty to a client prohibits representation directly adverse to that client's or another client's interests. Loyalty is also impaired when a lawyer cannot carry out an appropriate course of action for the client because of the lawyer's other responsibilities.

4. The undersigned cannot provide more details without violating the attorney/client privilege.

5. The Office of the Public Defender cannot counsel Defendant without an actual conflict or without the appearance of impropriety.

WHEREFORE, the undersigned attorney respectfully requests this Honorable Court to allow the Office of the Public Defender to withdraw as counsel of record.

I HEREBY CERTIFY that a copy of the above and foregoing Certificate of Conflict and Motion to Withdraw has been furnished to the Office of the State Attorney, by hand and/or electronically, this 17 day of November, 2014.

Respectfully submitted,

MATT SHIRK
PUBLIC DEFENDER

BY: _____
Fred C. Gazaleh, FBN 353787
Assistant Public Defender

IN THE DISTRICT COURT OF APPEAL,
FIRST DISTRICT, STATE OF FLORIDA

APPEAL NO:

IN THE CIRCUIT COURT, FOURTH
JUDICIAL CIRCUIT, IN AND FOR
DUVAL COUNTY, FLORIDA

CASE NO: 16-2013-CF-5781

DONALD JAMES SMITH,
Petitioner,

vs.

STATE OF FLORIDA,
Respondent.
_____/

APPENDIX V TRANSCRIPTS OF COURT PROCEEDINGS HELD NOVEMBER 19, 2014

IN THE CIRCUIT COURT OF THE
FOURTH JUDICIAL CIRCUIT, IN
AND FOR DUVAL COUNTY, FLORIDA

CASE NO.: 2013-CF-005781
DIVISION: CR-D

STATE OF FLORIDA

VS.

DONALD SMITH,

Defendant.

_____/

STATE OF FLORIDA)

COUNTY OF DUVAL)

Transcript of Hearing on Motions

Proceedings before the HONORABLE JUDGE MALLORY COOPER, Circuit Court Judge, in open court, at the Duval County Courthouse, Jacksonville, Florida, on the 19th day of November, 2014, commencing at 11:9 a.m., as reported by Gretchen Lee Chatley, Florida Professional Reporter Notary Public in and for the State of Florida at Large.

OFFICIAL REPORTERS
421 WEST CHURCH STREET, SUITE 430
JACKSONVILLE, FLORIDA 32202

A P P E A R A N C E S

MARK CALIEL, Esquire
&
JEFFERY M. MOODY, Esquire

Assistant State Attorneys
Fourth Judicial Circuit
220 East Bay Street
Jacksonville, Florida 32202

Attorneys for the State of Florida.

FRED C. GAZALAH, Esquire
&
TRISHA A. RADO, Esquire

Assistant Public Defenders
Fourth Judicial Circuit
407 North Laura Street
Jacksonville, Florida 32202

Attorneys for the Defendant.

- - -

I N D E X

WITNESS PAGE NO.

CERTIFICATE OF REPORTER 24

(N O E X H I B I T S)

P R O C E E D I N G S

November 19, 2014 11:46 a.m.

MR. CALIEL: Your Honor, the State would call the case of Donald Smith.

THE COURT: Donald Smith, top of Page 14.

(The defendant is present in open court with counsel.)

MR. GAZALEH: Good morning, Your Honor. For the record, Fred Gazaleh for Donald Smith. We're here today to hear a motion or have hearing on motion that I filed, a certificate of conflict and motion to withdraw.

I have set forth what facts that I could set forth in my motion. I cited the rules of professional responsibility that I feel make it necessary for me to file this motion. I would advise the Court that before filing the motion, my office talked to the Florida Bar Ethics Department and it was their advice that we should file a motion to withdraw.

THE COURT: I don't know how long this is going to take, but if you wish, Mr. Smith can sit instead of stand.

MR. CALIEL: Your Honor, I think procedurally, first -- and whether or not it needs to be made

part of the record in open court or whether or not the Court needs to meet in camera with Mr. Gazaleh and the defendant, I think a specific factual basis outlined in the conflict needs to be part of the record for any appellate review.

And I'm not sure if the -- and perhaps the Court can get some feedback on this as to whether or not the boilerplate nature of the motion is sufficient in outlining this specific conflict. But I think that once all the factual circumstances are outlined with the defendant and defense counsel and the Court being present and then whatever information can be relayed to the Court, the next step, which is always a possibility, Mr. Smith has the right to waive that conflict.

And then an inquiry, once he has been fully apprised of the facts and circumstances surrounding the conflict, then the Court can, on the record, inquire of the defendant as to whether or not he intends or has a desire to waive that conflict, because he's has a Constitutional right to counsel of his choice.

And if he believes, after he has been fully apprised of the facts and circumstances to what degree Mr. Gazaleh can outline them, if he's

willing to waive that conflict, then I think the issue is moot at that point.

THE COURT: I don't think the certificate of conflict of motion to withdraw is sufficient for the Court to rule on, so I do think we do have to go to the next step under the rule or under the Statute 27.5303(1)(a), midway through the paragraph, "Once the motion's been filed, the Court shall review and may inquire" -- obviously, I can't just inquire, because you've indicated to the Court it's matters that should not be disclosed on the record at least at this point through your motion or the inquiry.

"So may inquire or conduct a hearing into the adequacy of the Public Defender's representations regarding the conflict of interest without requiring disclosure of any confidential communication."

Then it goes on to say what the Court should do next, but the in camera hearing, I'm not sure, I think it does have to be an in camera hearing based on what you alleged in your conflict and motion to withdraw, but I'm not sure who is required to be present. I know it would be me and I know it would be you.

MR. GAZALEH: Right.

THE COURT: I don't know if it's even your client. I think it is. And the court reporter, I think it has to be recorded --

MR. GAZALEH: I agree with that.

THE COURT: -- for appellate purposes. And I'm not sure -- I know it's not the State, not now anyway.

MR. GAZALEH: I think they agree.

MR. CALIEL: And I do agree with that, Your Honor, at this point in time, but I think that's the next procedural step that we have to hurdle first before we go to any argument or any seeking of a waiver of any potential conflict from the defendant.

THE COURT: So are you prepared to do that today?

MR. GAZALEH: Yes, Your Honor. And it shouldn't take very long.

THE COURT: And so can I excuse the State --

MR. CALIEL: We can step out.

THE COURT: -- but we can do it here with the bailiffs and the clerk with everybody present or --

MR. GAZALEH: Yeah, as long as -- yes, as long as everybody here is either with my office -- well,

anybody that works for the State --

THE COURT: Everybody that work for the State needs to be excused and wait in the hall. I agree with that. I'm not sure --

MR. GAZALEH: She works with us.

THE COURT: She's with you?

MR. GAZALEH: She's a new attorney.

THE COURT: Okay.

(REPORTER'S NOTE: (The following proceedings held in camera are not transcribed herein.)

(The State is now present in open court.)

THE COURT: Okay. So we have finished our in camera hearing and Mr. Gazaleh has made his argument to the Court as to why a conflict exists with his representation of Mr. Smith.

After that, we agreed that the State could present their argument, hypothetically, if, in fact, such and such, then there is or there is not a conflict. And I don't intend to rule today. Since I don't intend to rule today, I informed Mr. Gazaleh I wouldn't question Mr. Smith today, because I would have to find there is a conflict before he could waive a conflict. So we've agreed that I would not question him today about the potential of waiving a conflict, if, in fact, a

conflict exists.

That's where we are at. Madam Court Reporter has the in camera portion separated out, not literally, but she's -- we know where it is in case it's needed for any purpose and you can go ahead and proceed with the State's argument.

MR. CALIEL: And, Your Honor, and correct me if I'm wrong, Mr. Mr. Gazaleh, I think, hypothetically, the issue that posed the conflict is that there is another client of the Public Defender's Office, who is currently incarcerated awaiting trial, who wishes to provide information against Mr. Smith in some sort of criminal capacity and to what capacity, we do not know.

What I can place on the record at this point in time is the State of Florida has absolutely no interest in utilizing an inmate witness regardless of their identity or regardless of the charges against Mr. Smith at his trial on January 20th.

We have reviewed all of our evidence and the forensic evidence and the testimony evidence that we have and there is no strategic value or inherent value whatsoever placing a person charged with an offense on the witness stand to testify against Mr. Smith.

And based upon that, we are firmly stating on the record that we have no interest speaking with this client, whomever they may be, and we intend on proceeding to trial January 20th as planned. By doing so, I'm not aware, obviously, of what the Court's prior conversation with counsel is, but when it comes to having conflict in our proceedings, if there is no Public Defender witness who takes the witness stand there would be no conflict, because there would be no limitations on cross-examining that witness.

So we have no interest whatsoever in speaking to that individual and we're basically declining any offers to do so. I'm not sure that any actual conflict actually arises.

THE COURT: Let me just ask, Mr. Gazaleh, I've got a few cases myself, which I'll review and I'll put on the record later when we conclude or before we conclude, but Mr. Gazaleh did provide the Court with the case of *Valle*, V-a-l-l-e, *vs. State*, 763 So. 2d 1175. It's factually different. It's a case where the Public Defender's Office represented a defendant as well as had previously represented some of the witnesses in the case, but he has grounded his argument on the last sentence on the

last page.

In quotes, "The Public Defender's Office is the functional equivalent of a law firm. Different attorneys in the same Public Defender's Office cannot represent defendants with conflicting interests."

And I'll let him respond by telling you their position on what that conflicting interest is, even with the knowledge that the State did not intend to speak to whoever this person is, use him, have him testify, or in any way have contact with him regarding Mr. Smith's case.

So I'll let you respond.

MR. GAZALEH: Thank you, Your Honor. Where that creates a problem, as I see it, is that I have a duty to Mr. Smith to disclose to him what I know and I cannot perform that duty without violating the confidence of another Public Defender client, which is, according to *Valle*, my client.

And for that reason, I cannot -- let me see how it's -- I cannot be a completely effective advocate without telling him what I know and give him advice on what he should not be doing in the future.

And there is one other case, which I didn't

bring a copy of, but it's *U.S. vs. Culp.* It's a Middle District case from 1996, which is 934 F. Supp. 394. And what that says is that the lawyer as an obligation to make sure that the client's Sixth Amendment right to an effective advocate is not violated. And if I can't tell him what I know, I don't know how I can be an effective advocate in this case. And that's the only other thing that I've got to provide.

But there is one other thing. I would like to respond to something Mr. Caliel said earlier. A client doesn't have a Constitutional right to a particular attorney. I think Mr. Caliel said he has the right to have the attorney that he wants to represent him, but there is plenty of cases where the State has moved to disqualify the defense attorney and the cases are all clear that if there is a conflict that he doesn't have the right to have who he wants. He has the right to have an effective and competent attorney, but he doesn't have the right to pick and choose whichever one he wants.

THE COURT: And what was the second case that you said you didn't have a copy of, if I could just get a cite?

MR. GAZALEH: Sure, Judge. It's *United States vs. Culp*, C-u-l-p. It's at 934 F. Supp. 394 and it's from the Middle District of Florida in 1996.

THE COURT: Okay. Thank you.

MR. CALIEL: Your Honor, my only response to the last argument made by Mr. Gazaleh in regards to his inability to appropriately counsel and confer Mr. Smith based upon his firm's knowledge of this other person, Mr. Smith comes into contact with multiple individuals. He's come into contact with individuals here today. He will probably be shipped back to the jail with other individuals. He will probably be brought back to his holding cell and come into contact with other individuals, both law enforcement and currently incarcerated inmates, all of whom may have an interest in sharing any conversation that Mr. Smith has with them.

And it's very common and I'm sure Mr. Gazaleh has already had this conversation don't discuss your case with anybody, any visitors who come to see you in jail, anybody over the telephone, the bailiffs when they walk you into the courtroom, and I think a simple admonition to Mr. Smith, shut up, stop talking, and don't talk to anybody about your

case or anything else, cures that issue with creating, you know, how this issue came about.

And so without even divulging who it was that came forward with this information and divulging that person's confidence, a common attorney admonition to their client, which is do not discuss your case or anything with anybody, because everybody you come into contact with may have an interest in sharing the substance of those conversations, I think adequately represents the interest of Mr. Smith without divulging the confidence of the other Public Defender client, regardless who that person may be.

I'm not sure why the specific nature of the conversation that has been divulged to another Public Defender, specifically, is important to share with that individual, other than be quiet, don't talk to anybody. And so I'm not sure as to what more or what details about the substance that has been divulged allegedly, what more information needs to be with Mr. Smith about that other than an admonition to stop talking, because people you talk to have an interest coming forward and sharing that information with the State of Florida.

And he knows, the defendant himself knows, who

he's had conversations with. He's a party to those and he knows who to talk to and who not to talk to.

MR. GAZALEH: I don't have anything further, Your Honor.

THE COURT: Okay. Well, I guess, we need to schedule this again.

MR. GAZALEH: I think we're on your calendar next week, but I'm not sure.

THE COURT: On the 24th?

MR. CALIEL: Are we? I thought our next date was the scheduled --

THE CLERK: The 11th.

MR. CALIEL: -- the December 11th hearing date for the motion that I will be filing.

MR. GAZALEH: That's right.

MR. CALIEL: And, obviously, I think we need to resolve this before we handle any motions of that nature.

THE COURT: What was that motion hearing that was scheduled?

MR. CALIEL: December 11 at 1 o'clock.

THE COURT: I don't remember what the motion was.

MR. CALIEL: Your Honor, what we had discussed -- I'd think I can openly discuss today, during the

course of the deposition from the victim --

THE COURT: I recall regarding the victim's mother, okay, about what is and what's not admissible. That's going to be an interesting week, because I've got so much. We'll do it when we said we would do it, but this issue, first of all, there has not been any other motions filed that I'm aware of.

MR. GAZALEH: And there was a reason for that. Mr. De La Rionda and I spoke on Friday and he asked me to wait on the second one until after you had ruled on the first one. I agreed with him and I thought that was the appropriate thing to do, so the other attorney will be filing a motion, regardless of what your ruling is in this case, she'll be filing a motion.

THE COURT: Okay. So I'm thinking we need to have this resolved for Monday the 24th. Now, that's the Monday of Thanksgiving week, I don't know if --

MR. CALIEL: Your Honor, I have a similar conflict in the morning. I have some depositions scheduled in a capital 3.850 starting at 9 o'clock going to 11:00, but I can get somebody to cover those for me. They're not material depositions

that I necessarily need to be present for, so I can plug somebody in and handle those.

THE COURT: I don't think we'll be in here but a minute.

MR. GAZALEH: I don't think it would be long.

THE COURT: Where are the depositions to be held?

MR. CALIEL: The depositions are, ironically, will be held in the courthouse. They are one of the clerk's staff and one additional witness.

THE COURT: Here in the courthouse?

MR. CALIEL: Yes, Your Honor.

THE COURT: Well, can't we just start court a quarter to 9:00 and run up and do this or run to those or do you have preparations to make for the depos?

MR. CALIEL: The depos, no, and I'm less worried about the depos. I have a physical therapy appointment at 8:15 on Monday morning that lasts until about 9:30 that's why I requested the 10:30 time today.

THE COURT: Okay.

MR. CALIEL: Would 10:30 work as well or 10 o'clock on Monday?

THE COURT: Oh, yeah. We're going to be in

court. We have a huge calendar.

MR. CALIEL: If we could have the 10:30 timeframe and I'll just step out of the depos. Ms. Carbula is also assisting me with those in a post-conviction matter. She can stand in on those while I'm handling this.

THE COURT: Okay. So we'll keep the days that are already scheduled for Mr. Smith, December 11th at 1:30 for pretrial and hearing on motion, time and date certain; January 20th for jury selection; January 26th for trial; if necessary, February 9th and, if necessary, February 10th for the penalty phase; and now November 24th at 10:30 for pretrial and ruling on motion.

And while I have y'all here, understanding things could change based on your motion, but assuming for a moment just for purposes of my question. If we pick the jury on January to the week of January 20th, which is a Tuesday with a Monday holiday, and I believe we had anticipated not starting the trial to the following Monday the 26 --

MR. CALIEL: Yes, ma'am.

THE COURT: -- what do we do with the jury from the time they are selected and the time we

start the trial?

Because if you're requesting that they be sequestered, I don't think -- I mean, we could get a jury by Wednesday or Thursday or even if it was Friday, I'm not sure about sequestering a jury at that point and not starting a trial for them.

I don't think that's something that anyone would understand really, until two or three or four days later.

MR. CALIEL: Right.

THE COURT: So you don't have to tell me today. You can tell me Monday. And I'm not trying to get a change of whether or not the jury is sequestered for the guilt phase, I'm just trying to figure out logistically how we accomplish that without having them give up time that we're not accomplishing anything, but that's my only question, so y'all can discuss it.

MR. GAZALEH: I'll talk to my client about it, Your Honor.

THE COURT: We may need to start right away. I don't know. That's certainly one solution to select the jury and send them home and get them settled and start the trial the very next day. Without knowing what day that will be that's hard

to see, but I think we do need to consider how we're going to have them come back and go to wherever they're going to go and stay there for two, three, or four days to start testimony. So you may need to kind of regroup. I'll let y'all talk about that part.

Are you allowed to do that while this is pending?

MR. GAZALEH: Sure.

THE COURT: Procedural issues?

MR. GAZALEH: Yes, Your Honor.

THE COURT: Not substantive issues?

MR. GAZALEH: I feel like I can do that.

MR. CALIEL: And, Judge, what we can do after Mr. Gazaleh discusses it with his client, I've already outlined my order of proof. The majority of the witnesses are local. Not all of them are local. A good bulk of them are law enforcement. And given the nature of some of the testimony, the first day those individuals we could have on standby and combining opening statements and the first few witnesses that we know we would call and get through in the first day, we probably could have them available sort of in limbo if need be. Obviously, it would be easier to have date and time

set, because of the uncertainty of --

THE COURT: That's kind of what we had planned, but then it was brought to my attention that I never had a sequestered jury, but I didn't think about the fact that typically they're sequestered once they're selected and that would procedurally talked about not starting to the following week. We just need to discuss it and come up with whatever plan is appropriate under the circumstances.

MR. GAZALEH: And I hate to throw another monkey wrench into the machine, but I haven't ruled out the possibility that if you rule that there is no conflict that I might have to take a writ, which would maybe change everything as far as the dates are concerned.

THE COURT: Do you do you have any rule on that other writ you wrote them?

MR. GAZALEH: I do not, but the last writ that we filed was on a stand your ground motion, which was probably more fact complicated, I mean, obviously, more fact complicated than this and that took five to six months I'd say to get something back from the DCA. But it was different, it was a writ of prohibition not a writ of certiorari.

THE COURT: I don't know what the standard -- not the standard, but what the typical turnaround time is for that. I have no idea.

MR. GAZALEH: And I'm not saying I'm definitely going to do it, but it's just I haven't ruled that out yet.

THE COURT: Of course not, I would not expect you to. Anything else we needed to consider today?

MR. CALIEL: Only just to put it on everyone's radar and perhaps after we have this motion hearing on December 11th and all this is resolved, is I know the Court discussed perhaps maybe having some sort of questionnaire the parties could agree upon on the publicity issues that play in the case for the individual voir dire. We might need to start working towards that. I'm sure we'll have a couple of drafts that we'll exchange between the parties and then the Court as to what would be appropriate, but obviously, we have to get past this issues.

THE COURT: Yes, I think so for that.

MR. GAZALEH: And we discussed talking about a questionnaire that we would be comfortable with, but we haven't delved into it too deeply.

MR. CALIEL: Yes.

MR. GAZALEH: Thank you.

THE COURT: All right. Thank y'all very much. See you Monday at 10:30.

MR. GAZALEH: Thank you.

(The proceedings were adjourned at 12:33.)

CERTIFICATE OF REPORTER

STATE OF FLORIDA)

COUNTY OF DUVAL)

I, Gretchen Lee Chatley, Florida Professional Reporter, certify that I was authorized to and did stenographically report the proceeding; and that the foregoing pages are a true and complete record of my stenographic notes taken during said proceeding.

I further certify that I am not a relative, employee, attorney, or counsel of any of the parties, nor am I a relative or employee of any of the parties' attorneys or counsel connected with the action, nor am I financially interested in the action.

Dated this 19th day of November, 2014.

GRETCHEN LEE CHATLEY, FPR

* * *

IN THE DISTRICT COURT OF APPEAL,
FIRST DISTRICT, STATE OF FLORIDA

APPEAL NO:

IN THE CIRCUIT COURT, FOURTH
JUDICIAL CIRCUIT, IN AND FOR
DUVAL COUNTY, FLORIDA

CASE NO: 16-2013-CF-5781

DONALD JAMES SMITH,
Petitioner,

vs.

STATE OF FLORIDA,
Respondent.
_____/

APPENDIX VI TRANSCRIPTS OF COURT PROCEEDINGS HELD NOVEMBER 24, 2014

IN THE CIRCUIT COURT OF THE
FOURTH JUDICIAL CIRCUIT, IN
AND FOR DUVAL COUNTY, FLORIDA.

Case No: 2013-CF-005781-AXXX-MA

Division CR-D

STATE OF FLORIDA

-vs-

DONALD SMITH,

Defendant,

PROCEEDINGS taken before the Honorable Mallory D. Cooper, Judge of the Circuit Court, on November 24, 2014, and as reported by Faye M. Gay, Certified Realtime Reporter, Registered Merit Reporter, and Certified Legal Video Specialist.

OFFICIAL REPORTERS, INC.
201 E. Adams St.
Jacksonville Florida 32202
904-358-2090

APPEARANCES:

MARK CALIEL, Esquire,

Assistant State Attorney,
Appearing on behalf of the State of Florida.

FRED GAZALEH, Esquire,

Assistant Public Defender,
Appearing on behalf of the Defendant.

PROCEEDINGS

PROCEEDING PAGE

Ruling on Defense Motion to Withdraw.....4

MR. CALIEL: Your Honor, we would call the case of Donald Smith located on the bottom of page 17 on the morning calendar.

(Defendant present.)

THE COURT: Okay. Mr. Smith is present.

We passed the case from last week on a filing by the Office of the Public Defender of a Certificate of Conflict and Motion to Withdraw.

I do not have the written order finished, but I am denying the Public Defender's Office motion to withdraw. The basis of the ruling is that I find there's no substantial risk of any material limitation to the Public Defender's responsibility to Mr. Smith or to whomever the other client is, as well as there can be no prejudice for Mr. Smith not to be informed of the words that Mr. Smith spoke to whoever this other individual was. He already knows those words. He doesn't have to be informed of them.

The State has indicated they absolutely, and they were clear on this, have no intention to use whoever this other person is no matter what the information is. They won't even know what the information is. So Mr. Smith, knowing the information, there's no prejudice, therefore

there's no substantial risk to materially limit the responsibility to either one of the clients, actually.

So that's the basis of my ruling. I will have an written order for purposes of whatever you want to do, however you want to proceed. And it should be out either today or Monday.

He's already set December 11th for pretrial and hearing on motions at 1:30, is that correct?

MR. GAZALEH: That's correct.

MR. CALIEL: That's correct.

THE COURT: January 26th to start jury selection. We had anticipated starting the trial on the 26th and carrying over to the following week, if necessary, the first week of February, with a potential penalty phase February 9th and February 10th, if that becomes necessary.

However, we're still -- still need to resolve what we will do as far as sequestration if we pick the jury starting on the 20th, but don't start the trial until the 26th, unless it takes that long to get the jury. But assuming as we have that we may be able to select a jury during the week of the 26th and have one by that Friday afternoon, we would need to know, or earlier, what it is we're

going to do. So you all can talk about that.

MR. CALIEL: We will, Your Honor. And one thing I might suggest, Your Honor, is an intervening pretrial date perhaps next Thursday, December 4th. Mr. Gazaleh informed me of his intent to seek appellate remedies and my research of that issue is that a stay of the proceedings, even if the Court determines they're going to hear the issue, is not mandatory, but if the Court does grant a stay that would affect the December 11th hearing date, and although I don't believe any of it's evidentiary in nature, but perhaps if we were just to come back to court next Thursday, the 4th, we may have some more insight as to the defense's position and the Court's position on that before we proceed to the evidentiary hearings that would affect the trial.

THE COURT: Okay. December 4th will be added to those dates for a pretrial.

MR. GAZALEH: Thank you, Your Honor.

THE COURT: Thank you.

(Thus the proceedings ended.)

C E R T I F I C A T E

I, Faye M. Gay, hereby certify that the foregoing transcript is a true and accurate transcription of my Stenograph notes taken at the time and date stated herein.

Dated this _____ day of _____ 2014.

_____

Faye M. Gay, CRR, RMR, RPR, CLVS

IN THE DISTRICT COURT OF APPEAL,
FIRST DISTRICT, STATE OF FLORIDA

APPEAL NO: 1D14-5647

IN THE CIRCUIT COURT, FOURTH
JUDICIAL CIRCUIT, IN AND FOR
DUVAL COUNTY, FLORIDA

CASE NO: 16-2013-CF-5781

DONALD JAMES SMITH,
Petitioner,

vs.

STATE OF FLORIDA,
Respondent.
_____/

EMERGENCY MOTION TO STAY PROCEEDINGS

The Public Defender for the Fourth Judicial Circuit of Florida, pursuant to Florida Rule of Criminal Procedure 3.190(a) and moves this Court to stay the current underlying proceeding until this Honorable Court has ruled upon the pending Petition for Writ of Certiorari. As grounds therefore:

1. Defendant is charged in the instant case with Murder in the First Degree, Kidnapping a Child Under the Age of 13 Years, and Sexual Battery on a Child Less Than 12 Years.
2. On July 16, 2014, the State filed a Notice to Seek Death Penalty and request for Statement of Particulars of Mental Mitigation.
3. Petitioner's counsel filed Defendant's Certificate of Conflict and Motion to Withdraw on November 17, 2014 and a hearing was held on the motion on November 19, 2014.
4. On November 24, 2014, the circuit court issued an oral ruling denying the motion

to withdraw and issued a written order on December 2, 2014.

5. The undersigned filed an Emergency Petition for Writ of Certiorari on this denial to this Honorable Court on December 10, 2014.

6. A ruling by this Honorable Court is critical to the preparation of Defendant's case and would greatly impact decision-making going forward.

7. However, this case is currently set for trial with jury selection scheduled for January 20, 2015 and the guilt phase of the trial scheduled for January 26, 2015. In the interests of justice and judicial economy, Defendant respectfully requests this Honorable Court to order a stay in the lower tribunal proceedings pending a decision on the Petition for Writ of Certiorari.

8. The Motion to Stay Proceedings is entered for no dilatory purpose as Defendant and his currently appointed counsel seek to have the legitimately contested issue with regard to the certificate of conflict reviewed by this Honorable Court.

Wherefore, the Public Defender asks this Court to grant this motion, and order a stay of the proceedings in the Circuit Court until this Honorable Court has rendered a decision on the Emergency Petition for Writ of Certiorari.

Respectfully submitted,

MATT SHIRK
PUBLIC DEFENDER

ELIZABETH H. WEBB
ASSISTANT PUBLIC DEFENDER
Fourth Judicial Circuit
407 North Laura Street
Jacksonville, Florida 32202
(904) 255-4727
FLORIDA BAR NO: 0853089
Primary Email: PD4DuvalAppeal@pd4.coj.net

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the above and foregoing has been furnished by e-mail to the Office of the Attorney General at criminalappealsintake@myfloridalegal.com, representing the State of Florida, by e-service to the Office of the State Attorney, representing the State of Florida, and by e-mail to The Honorable Mallory Cooper, Circuit Court Judge, at dvail@coj.net, this 10 day of December. 2014.

ELIZABETH H. WEBB
ASSISTANT PUBLIC DEFENDER

IN THE CIRCUIT COURT, FOURTH JUDICIAL CIRCUIT, IN AND FOR DUVAL COUNTY, FLORIDA

CASE: 16-2013-CF-005781-AXXX-MA

DIVISION: CR-D (CIRCUIT)

STATE OF FLORIDA

vs.

DONALD JAMES SMITH, DEFENDANT

FILED
DEC 11 2014
CLERK CIRCUIT COURT

ORDER

THIS CAUSE COMING ON BEFORE THE COURT UPON THE ☐DEFENDANT'S ☒STATE'S

SECOND MOTION IN LIMINE

FILED HEREIN ON THE 25th day of NOVEMBER, 2014 AND THE COURT HAVING HEARD ARGUMENTS OF THE STATE'S ATTORNEY AND OF COUNSEL FOR DEFENSE, AND BEING FULLY ADVISED IN THE PREMESIS THEREOF, IT IS THEREUPON

ORDERED AND ADJUDGED THAT THE AFORESAID MOTION SHALL BE AND THE SAME IS HEREBY: Granted - No objection by Defense

DONE AND ORDERED IN OPEN COURT AT JACKSONVILLE, DUVAL COUNTY, FLORIDA, THIS 11TH day of December, 20 14.

MALLORY D COOPER
Circuit Judge

THIS INSTRUMENT IN COMPUTER
Leslie

Filing # 20986618 Electronically Filed 11/25/2014 04:05:04 PM

S.A. CASE NO.: 2013-39428

IN THE CIRCUIT COURT OF THE FOURTH JUDICIAL CIRCUIT, IN AND FOR DUVAL COUNTY, FLORIDA

CLERK NO.: 162013CF5781AXXXMA

DIVISION: CR-D

STATE OF FLORIDA

vs.

DONALD JAMES SMITH

STATE'S SECOND MOTION IN LIMINE

The State of Florida, by and through the undersigned Assistant State Attorney, files this Motion in Limine and requests this Honorable Court to prohibit any and all argument, testimony, cross examination, or evidence relating to the Internal Affairs investigation conducted by the Jacksonville Sheriff's Office regarding the police response to the abduction of the victim. In support thereof, the State would allege as follows:

1. The case has been set for trial.

2. The State believes that, at the trial, the Defendant will attempt to introduce evidence, make reference to, argue, or otherwise bring forward testimony relating to the Internal Affairs investigation conducted by the Jacksonville Sheriff's Office regarding the police response to the abduction of the victim .

3. The prejudicial effect of such evidence or inference outweighs its probative value.

4. It is contrary to the rules and laws governing the Courts of the State of Florida to permit such evidence or inference, and would be highly prejudicial to the State in the minds of the jury in that said evidence and testimony is not probative to prove any material fact at bar or to establish bias of a testifying witness.

5. An ordinary objection during the course of trial, even if sustained with proper instructions to the jury, will not remove such a prejudicial effect from the jury.

WHEREFORE, the State prays this Honorable Court will grant the State's Motion in Limine.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing motion has been furnished by electronic mail, to Fred Gazaleh, Esquire, Office of the Public Defender, this 25th day of November, 2014.

ANGELA COREY
STATE ATTORNEY

By: _____
Mark Caliel
Bar Number: 0105650
Assistant State Attorney

/mc

FILED 12-12-14 PM 02:50 R FUSSELL

IN THE CIRCUIT COURT, FOURTH JUDICIAL CIRCUIT, IN AND FOR DUVAL COUNTY, FLORIDA

CASE NO.: 16-2013-CF-05781-AXXX-MA

DIVISION: CR-D

STATE OF FLORIDA

v.

DONALD JAMES SMITH,
Defendant.
_____/

ORDER ON STATE'S FIRST MOTION *IN LIMINE*

This matter came before this Court on the State's First Motion *in Limine*, filed on November 25, 2014. In its Motion, the State seeks to exclude any evidence pertaining to the personal history or character of Rayne Perrywinkle, including irrelevant information such as her prior employment and personal relationships. On December 11, 2014, this Court held a hearing addressing the State's instant Motion, during which the following parties were present: Assistant State Attorneys Mr. Mark Caliel, Esq. and Mr. Jeff Moody, Esq.; Assistant Public Defenders and attorneys for Defendant Mr. Fred Gazaleh, Esq., Ms. Tricia Rado, Esq., and Mr. James Armstrong, Esq.; Defendant, Mr. Donald Smith; a representative from Official Court Reporters, Inc.; a representative from the Clerk of Court; and a representative from the Office of the Judicial Staff Attorneys.

During the hearing, this Court heard argument pertaining to evidence found within specific portions of Ms. Perrywinkle's deposition. The State seeks to exclude evidence found on pages 6, 7, 10-22, 29-31, 33-42, 46-48, 51, 53, 60-61, 65, 68, 70, and 72 of Ms. Perrywinkle's deposition. Attorneys for Defendant object to the exclusion of evidence contained on pages 6, 7, 21, 34, 36-40,

46-48, and 53 of Ms. Perrywinkle's deposition. Accordingly, this Court will refer to said pages in making its rulings as to whether the evidence at issue will be admissible or excluded:

1. Evidence on page 6, line 3: **EXCLUDED**. This Court does not find this evidence is relevant and it is, thus, inadmissible.

2. Evidence on page 7, line 6: **ADMISSIBLE** only as to the victim's father's identity and the spelling of his name.

3. Evidence on page 21, line 5 and page 22, line 1: **EXCLUDED**. This Court does not find this evidence is relevant to the instant offenses because of the timing involved and, thus, it is inadmissible.

4. Evidence on page 34, line 7: **EXCLUDED**. This Court does not find this evidence is relevant and it is, thus, inadmissible.

5. Evidence on pages 36-40: This evidence shall be **PROFFERED** at trial. At that time, this Court will make a ruling as to its admissibility.

6. Evidence on page 40, line 13: This evidence shall be **PROFFERED** at trial. At that time, this Court will issue its ruling as to its admissibility.

7. Evidence on pages 46-48; page 53, lines 8-16; and page 53, line 24: Although this Court currently sees no relevance to this evidence, this Court will allow this evidence to be **PROFFERED** at trial. At that time, this Court will make its ruling.

DONE AND ORDERED in Chambers, in Jacksonville, Duval County, Florida, on this 12 day of December, 2014.

MALLORY D. COOPER
Circuit Judge

Copies to:

Mr. Mark Caliel, Esq.
Mr. Jeff Moody, Esq.
Office of the State Attorney
220 E. Bay St.
Jacksonville, FL 32202

Mr. Fred Gazaleh, Esq.
Ms. Tricia Rado, Esq.
Attorneys for Defendant
Office of the Public Defender
407 N. Laura St.
Jacksonville, FL 32202

Case No.: 16-2013-CF-05781-AXXX-MA

FILED 12-12-14 PM 02:51 R FUSSELL

IN THE CIRCUIT COURT, FOURTH
JUDICIAL CIRCUIT, IN AND FOR
DUVAL COUNTY, FLORIDA

CASE NO.: 16-2013-CF-05781-AXXX-MA

DIVISION: CR-D

STATE OF FLORIDA

v.

DONALD JAMES SMITH,
Defendant.
_____/

ORDER ON DEFENDANT'S CAPITAL CASE MOTIONS

This matter came before this Court on Defendant's fifty-two (52) numbered Capital Case Motions filed on December 10, 2013. On January 9, 2014, this Court held a hearing addressing Defendant's Motions, during which the following parties were present: Assistant State Attorney Mr. Mark Caliel, Esq.; Assistant Public Defender and attorney for Defendant Mr. Fred Gazaleh, Esq.; and Mr. Donald Smith, the Defendant.

This Court, having considered the motions and the arguments of the parties, rules as follows:

1. Rule 3.112(I), Florida Rule of Criminal Procedure–Certification By Public Defender.

   This filing solely certifies that Defense Counsel is qualified to represent Defendant. Therefore, no ruling is necessary.

2. Motion in Limine Re: Grand Jury.

   GRANTED, but the State reserves the right to read the Indictment as written. However, the State indicates it has no intention of commenting on the Grand Jury returning an indictment in this case.

3. Defendant's Notice Concerning Trial Objections.

This is not a motion, therefore, no ruling is necessary.

4. Demand for Disclosure of Favorable Evidence.

GRANTED, to the extent that the State must comply with: Rule 3.220, Florida Rules of Criminal Procedure; Brady v. Maryland, 373 U.S. 83 (1963); and Giglio v. United States, 405 U.S. 150 (1972). The State indicates it will do so.

5. Request for Favorable Evidence in Penalty Phase.

GRANTED, to the extent that the State must comply with: Rule 3.220, Florida Rules of Criminal Procedure; Brady v. Maryland, 373 U.S. 83 (1963); and Giglio v. United States, 405 U.S. 150 (1972). The State indicates it will do so.

6. Motion for Statement of Particulars Post-Indictment.

GRANTED IN PART, as to the place, date, and time of the offenses.

DENIED IN PART, as to the underlying offenses for a felony murder charge based upon the First-Degree Premeditated Murder Indictment.

7. Defendant's Request for Trial Court to State Basis of Its Rulings.

DENIED. See Harris v. Nat'l Judgment Recovery Agency, Inc., 819 So. 2d 850, 854 (Fla. 4th DCA 2002) (citing Murphy v. Murphy, 621 So. 2d 455 (Fla. 4th DCA 1993), rev. denied, 640 So. 2d 1107 (Fla. 1994)).

8. Motion to Exclude Confusing or Misleading Evidence.

DEFERRED RULING, as the issue is not yet ripe.

9. Motion in Limine Concerning Rebuttal Witnesses.

DEFERRED RULING, as the issue is not yet ripe.

10. Motion for Statement of Aggravating Circumstances.

GRANTED. During the hearing on the instant Motions, the parties agreed to furnish one another with expert evidence, as well as their respective statements of aggravating and mitigating circumstances, **two weeks** prior to trial commencing. Therefore, since jury selection is set for January 20, 2015, the parties must submit their statements **no later than January 6, 2015.**

11. Motion to Prohibit Argument and/or Instructions Concerning First Degree Felony Murder.

DENIED. See Hannon v. State, 941 So. 2d 1109, 1148-49 (Fla. 2006) (there is no error in allowing the State to proceed under a felony murder theory where the indictment only charges first-degree murder); Gudinas v. State, 693 So. 2d 953, 964 (Fla. 1987).

12. Defendant's Motion for Special Verdict as to Theory of Guilt.

GRANTED.

13. Motion for Pre-Trial Conference to Set Motion in Limine Schedule and Motion in Limine Cut-off Date.

GRANTED. During the hearing on the instant Motions, this Court set the deadline for the parties to file motions *in limine* **two weeks** prior to trial commencing. Therefore, since jury selection is set for January 20, 2015, the parties shall file any such motions **no later than January 6, 2015.**

14. Demand for Notice of Intent to Rely On Hearsay.

GRANTED. Fifteen (15) days prior to trial, the State shall provide Defendant with notice of any hearsay statements or evidence that it intends to introduce. Fifteen (15) days prior to trial, Defendant shall provide the State with notice of any hearsay statements or evidence that he intends to introduce.

15. Objection and Motion to Preclude Improper Argument.

DEFERRED RULING, until improper argument becomes an issue, if at all.

16. Motion to Compel Discovery as to DNA Evidence.

DEFERRED RULING. Defendant, after reviewing the discovery the State has provided or has agreed to provide, is instructed to advise this Court if there is further discovery, as to DNA evidence, to which Defendant believes he is entitled.

17. Defendant's Motion for Trial Court to Refrain From Commenting on Identification Evidence.

WITHDRAWN BY DEFENDANT.

18. Motion for Court Order Directing Clerk of Court to Limit Prospective Jurors Access/Exposure to Pretrial Local Media Coverage Prior to Jury Selection.

DEFERRED RULING. This Court will discuss this issue with the Clerk of Court.

19. Motion to Produce State's Written Protocol When Seeking the Death Penalty.

DENIED.

20. Motion to Exclude Gruesome or Inflammatory Photographs.

DEFERRED RULING. During the hearing on the instant Motions, the parties agreed to, **one week prior to trial**, narrow down the number of photographs which will be introduced during trial. After the parties confer and present argument to this Court as to the photographs, this Court will issue its ruling.

21. Defendant's Requested Pre-Voir Dire Instruction.

DEFERRED RULING. This Court's pre-voir dire instruction given in death cases will be tailored to Defendant's case. This Court will provide the instruction to the parties to review prior to voir dire. At that time, the Defense will be given an opportunity to offer any objections or suggestions as to this Court's instruction.

22. Motion for Voir Dire After Guilty Verdict.

DENIED.

23. Motion in Limine Concerning Other Crimes Evidence.

DENIED, but the State agrees to furnish the Defense with such evidence it intends to offer.

24. Motion for Individual and Sequestered Voir Dire.

DEFERRED RULING. During the hearing on the instant Motions, the State indicated it does not object to individual voir dire concerning pre-trial publicity. This Court determined that the parties shall decide the manner in which they wish to conduct voir dire, and notify this Court of such.

25. Motion to Prohibit the Prosecutor From Using Peremptory Challenges to Strike Jurors Who are Death Scrupled but are Not Excludable For Cause and Motion for Appropriate Relief.

DENIED. See San Martin v. State, 717 So. 2d 462, 467 (Fla. 1998) (citing San Martin v. State, 705 So. 2d 1337, 1343)) (holding the State may properly exercise its peremptory challenges to strike prospective jurors who are opposed to the death penalty, but not subject to challenge for cause, because both parties have the right to strike persons thought to be inclined against their interests).

26. Motion for Additional Peremptory Challenges Due to Numerical Disparity Regarding Peremptory Challenges Provided By Rule 3.350(A), Florida Rules of Criminal Procedure and Section 913.08, Florida Statutes, and Due to Sensitive Voir Dire Issues in this Case.

DEFERRED RULING, until jury selection and a request is made.

27. Motion to Prohibit Use of Jurors' Criminal Records By the State and Alternative Motion for Disclosure of Criminal Records of Prospective Jurors.

GRANTED IN PART, as the State shall disclose any juror criminal history records to the Defense. The State indicates it will provide the Defense with a detailed background of each prospective juror.

DENIED IN PART, as to Defendant's request to prohibit the State from using the jurors' criminal history records.

28. Motion to Preclude Death Qualifications of Jurors in the Innocence or Guilt Phase of the Trial and to Utilize a Bifurcated Jury, if Penalty Phase is Necessary.

DENIED. See San Martin v. State, 705 So. 2d 1337, 1343 (Fla. 1997) (citing Lockhart v. McCree, 476 U.S. 162, 173 (1986)) (holding the Constitution does not prohibit the State from death qualifying juries in capital cases); Wade v. State, 41 So. 3d 857, 874 (Fla. 2010) (citing Gregg v. Georgia, 428 U.S. 153, 195 (1976)) (approving bifurcated guilt and penalty proceedings before a single jury in death penalty cases).

29. Motion to Declare Florida's Capital Sentencing Procedure Unconstitutional Under Ring v. Arizona.

DENIED. See Wright v. State, 19 So. 3d 277, 297-98 (Fla. 2009).

30. Motion to Prohibit Any Reference to the Jury's Role at Penalty Phase as Being "Advisory" or to the Jury's Penalty Verdict as Being a "Recommendation."

DENIED. See Francis v. State, 970 So. 2d 806, 822 (Fla. 2007); Card v. State, 803 So. 2d 613, 628 (Fla. 2001); see also Dufour v. State, 905 So. 2d 42, 67 (Fla. 2005) (reaffirming prior holdings that the standard capital jury instructions do not denigrate the role of the jury).

31. Motion to Prohibit Misleading References to the Advisory Role of the Jury at Sentencing.

DENIED, provided any statements made regarding a juror's role in sentencing align with Florida Standard Jury Instruction 7.11. See Francis v. State, 970 So. 2d 806 (Fla. 2007); Dufour v. State, 905 So. 2d 42, 67 (Fla. 2005).

32. Motion in Limine Regarding Reference to Non-Enumerated Mitigating Factors.

DENIED. See Fla. Std. Jury Instr. (Crim.) 7.11 (2014); Belcher v. State, 851 So. 2d 678, 684-85 (Fla. 2003); Floyd v. State, 850 So. 2d 383, 404 (Fla. 2002).

33. Defendant's Motion for Jury Instruction Delineating All Mitigating Factors Under Fla. Stat. 921.141(6)(h).

DENIED. See Belcher v. State, 851 So. 2d 678, 684-85 (Fla. 2003).

34. Motion to Dismiss and to Declare Death Not a Possible Penalty and to Declare 782.04 and 921.141 Unconstitutional For a Variety of Reasons.

DENIED.

35. Motion to Declare Sections 921.141, 922.10, and 922.105, Florida Statutes, Unconstitutional Because Electrocution and Lethal Injection are Cruel and Unusual Punishments.

DENIED. See Farina v. State, 801 So. 2d 44, 55 (Fla. 2001).

36. Motion to Declare Florida's Death Penalty Unconstitutional Because of Unreliability.

DENIED.

37. Motion to Declare Florida's Death Penalty Unconstitutional as Now Applied.

DENIED.

38. Motion to Declare Sections 782.04 & 921.141, Florida Statutes, Unconstitutional Because of Treatment of Mitigating Circumstances.

DENIED.

39. Motion to Declare Section 921.141, Florida Statutes, Unconstitutional as Applied Because of Arbitrariness in Jury Overrides and Sentencing.

DENIED. See Marshall v. Crosby, 911 So. 2d 1129, 1135 (Fla. 2005); Ross v. State, 386 So. 2d 1191, 1197-98 (Fla. 1980).

40. Motion to Declare Florida Statutes 782.04 and 921.41 Unconstitutional.

DENIED.

41. Motion to Declare Section 921.141, Florida Statutes, Unconstitutional Because Only a Bare Majority of Jurors is Sufficient to Recommend a Death Sentence.

DENIED. See Hayward v. State, 24 So. 3d 17, 43 (Fla. 2009); Aguirre-Jarquin v. State, 9 So. 3d 593, 601 n.8 (Fla. 2009).

42. Motion to Declare Florida's Death Penalty Unconstitutional Under Evans v. McNeil and Memorandum of Law.

DENIED. See Peterson v. State, 94 So. 3d 514, 538 (Fla. 2012); Bottoson v. Moore, 833 So. 2d 693, 695 (Fla. 2002).

43. Motion to Declare § 921.141(7), Florida Statute Unconstitutional and for Pretrial Determination of Admissibility of All "Victim Impact" Evidence Under §§ 90.104(2), 90.105, 90.403, Fla. Stat.

DENIED, as to the Motion to Declare Section 921.141(7), Fla. Stat., unconstitutional. See Maxwell v. State, 657 So. 2d 1157 (Fla. 1995).

DENIED, as to the pre-trial determination of admissibility of all victim impact

evidence. See Wheeler v. State, 4 So. 3d 599, 607-09 (Fla. 2009); Sexton v. State, 775 So. 2d 923, 931-32 (Fla. 2000).

44. Motion to Exclude Evidence or Argument Designed to Create Sympathy for the Deceased (Victim Impact Evidence).

DEFERRED RULING.

45. Defendant's Alternative Motion to Limit Presentation and Argument of Victim Impact Evidence to Judge Alone.

DENIED. See McGirth v. State, 48 So. 3d 777, 791 (Fla. 2010) (clarifying the Florida Supreme Court has never drawn a bright line rule delineating the allowed number of victim impact witnesses, and noting the presentation of twelve such witnesses has been upheld); Wheeler v. State, 4 So. 3d 599, 608-09 (Fla. 2009).

46. Motion Requesting Proffer of "Victim Impact Evidence."

DEFERRED RULING, until after the State provides its victim impact statements to Defendant. See Wheeler v. State, 4 So. 3d 599, 608-09 (Fla. 2009).

47. Motion to Declare Sections 921.141 and/or 921.141(5)(b) Florida Statutes and/or the Standard (5)(b) Instruction Unconstitutional Facially and as Applied with Memorandum of Law.

DENIED. See Francis v. State, 808 So. 2d 110, 136 (Fla. 2001); Kilgore v. State, 688 So. 2d 895, 900 (Fla. 1996).

48. Motion to Declare Section 921.141(5)(d) Florida Statutes Unconstitutional as Written and Applied with Memorandum of Law.

DENIED. See Parker v. State, 873 So. 2d 270, 286 n.12 (Fla. 2004); Francis v. State, 808 So. 2d 110, 136 (Fla. 2001).

49. Motion to Declare Section 921.141(5)(e), Florida Statutes Unconstitutional as Written and Applied.

DENIED. See Whitton v. State, 649 So. 2d 861, 867 & n.10 (Fla. 1994).

50. Motion to Declare Section 921.141(5)(h), Florida Statutes, Unconstitutional as Written and as Applied.

DENIED. See Randolph v. State, 853 So. 2d 1051, 1064-65 (Fla. 2003);

Washington v. State, 653 So. 2d 362, 366 (Fla. 1994); Dobbert v. Strickland, 532 F. Supp. 545, 557 (M.D. Fla. 1982).

51. Motion to Declare Section 921.141(5)(i), Florida Statute, Unconstitutional as Written and as Applied.

DENIED. See Victorino v. State, 23 So. 3d 87, 105 (Fla. 2009); Donaldson v. State, 722 So. 2d 177, 187 n.12 (Fla. 1998).

52. Defendant's Motion to Declare Section 921.141(*l*), Florida Statutes, Unconstitutional (The "Victim Under Age of 12" Aggravator) and Memorandum of Law.

DENIED. See Smith v. State, 28 So. 3d 838, 864-65 (Fla. 2009).

DONE AND ORDERED in Chambers at Jacksonville, Duval County, Florida, this 12 day of December, 2014.

MALLORY D. COOPER,
Circuit Judge

Copies to:

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Mr. Jeff Moody, Esq.
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Mr. Fred Gazaleh, Esq.
Mr. James Armstrong, Esq.
Ms. Tricia Rado, Esq.
Attorneys for Defendant
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Case No.: 16-2013-CF-05781-AXXX-MA

IN THE CIRCUIT COURT, FOURTH JUDICIAL CIRCUIT, IN AND FOR DUVAL COUNTY, FLORIDA

CASE NO: 16-2013-CF-5781

DONALD JAMES SMITH,
Petitioner,

vs.

STATE OF FLORIDA,
Respondent.
_____/

EMERGENCY MOTION TO STAY PROCEEDINGS

COMES NOW The Public Defender for the Fourth Judicial Circuit of Florida, pursuant to Florida Rule of Criminal Procedure 3.190(a) and moves this Court to stay the current underlying proceeding until the First District Court of Appeal has as ruled upon the pending Petition for Writ of Certiorari. As grounds therefore:

1. Defendant is charged in the instant case with Murder in the First Degree, Kidnapping a Child Under the Age of 13 Years, and Sexual Battery on a Child Less Than 12 Years.
2. On July 16, 2014, the State filed a Notice to Seek Death Penalty and request for Statement of Particulars of Mental Mitigation.
3. Petitioner's counsel filed Defendant's Certificate of Conflict and Motion to Withdraw on November 17, 2014 and a hearing was held on the motion on November 19, 2014.
4. On November 24, 2014, this Honorable Court issued an oral ruling denying the motion to withdraw and issued a written order on December 2, 2014.

5. The undersigned filed an Emergency Petition for Writ of Certiorari on this denial to the First District Court of Appeal of Florida on December 10, 2014.

6. A ruling by the First District Court of Appeal is critical to the preparation of Defendant's case and would greatly impact decision-making going forward.

7. However, this case is currently set for trial with jury selection scheduled for January 20, 2015 and the guilt phase of the trial scheduled for January 26, 2015. In the interests of justice and judicial economy, Defendant respectfully requests this Honorable Court to order a stay in these proceedings pending a decision on the Petition for Writ of Certiorari by the First District Court of Appeal.

8. The Motion to Stay Proceedings is entered for no dilatory purpose as Defendant and his currently appointed counsel seek to have the legitimately contested issue with regard to the certificate of conflict reviewed by the First District Court of Appeal. The denial of the motion to withdraw implicates Defendant's Sixth Amendment right to the assistance of counsel. *Glasser v. United States,* 315 U.S. 60 (1942); *Foster v. State*, 387 So. 2d 344 (Fla. 1980). Moreover, Florida courts have recognized a trial court's denial of a motion for separate representation is reversible error when there is a risk of potential conflicts of interest. *Ortiz v. State*, 844 So. 2d 824 (Fla. 5th DCA 2003); *Bellows v. State,* 508 So. 2d 1330 (Fla. 2d DCA 1987); *Foster, supra,* at 345.

9. Therefore, because of the important constitutional considerations at stake in this case, and because of the gravity of the charges and potential sentence in this case, and in the interests of judicial economy, the undersigned respectfully requests a stay pending a decision on the Petition for Writ of Certiorari filed in the First

District Court of Appeal.

Wherefore, the Public Defender asks this Court to grant this motion, and order a stay of the proceedings in the Circuit Court until the First District Court of Appeal has rendered a decision on the Emergency Petition for Writ of Certiorari.

Respectfully submitted,

MATT SHIRK
PUBLIC DEFENDER

FRED C. GAZALEH
Fourth Judicial Circuit
407 North Laura Street
Jacksonville, Florida 32202
(904) 255-4673
FLORIDA BAR NO: 353787
Primary Email: PD4DuvalAppeal@pd4.coj.net

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the above and foregoing has been furnished by e-mail to the Office of the Attorney General at criminalappealsintake@myfloridalegal.com, representing the State of Florida, by e-service to the Office of the State Attorney, representing the State of Florida, and by e-mail to The Honorable Mallory Cooper, Circuit Court Judge, at dvail@coj.net, this 12 day of December. 2014.

FRED C. GAZALEH

IN THE DISTRICT COURT OF APPEAL,
FIRST DISTRICT, STATE OF FLORIDA

APPEAL NO: 1D14-5647

IN THE CIRCUIT COURT, FOURTH
JUDICIAL CIRCUIT, IN AND FOR
DUVAL COUNTY, FLORIDA

CASE NO: 16-2013-CF-5781

DONALD JAMES SMITH,
Petitioner,

vs.

STATE OF FLORIDA,
Respondent.
_____/

REPLY TO STATE'S RESPONSE IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

COMES NOW Petitioner, Donald James Smith, by and through his undersigned attorney, the Public Defender for the Fourth Judicial Circuit of Florida, pursuant to this Honorable Court's December 11, 2014 order, and replies to Respondent's Response in Opposition to Petition for a Writ of Certiorari as follows:

Argument and Authority

At the outset, the State argues that a writ of certiorari is inappropriate in the instant circumstances because of the limited nature of certiorari review. However, it is well-established Florida law that such review is appropriate and necessary in

cases involving review of rulings on motions for leave to withdraw from representation. *Freeman v. State*, 503 So. 2d 997 (Fla. 3d DCA 1987); *Hunter v. State,* 770 So. 2d 232 (Fla. 4th DCA 2000); *Kolker v. State,* 649 So. 2d 250 (Fla. 3d DCA 1994). The State advocates a retreat from this established means of review although it is evident that in cases such as the instant case no adequate remedy at appeal exists. To await review of the order denying the motion to withdraw until after conclusion of the trial case could result in the reversal of a murder case after considerable time and judicial resources have been expended. The interests of judicial economy and the protection of Petitioner's constitutional rights to effective counsel require review at this juncture of the proceedings.

Next, the State incorrectly disputes Petitioner's argument that motions to withdraw "must be granted when there is a **risk** of such a conflict." The State claims that a "potential conflict of interest is not, alone, sufficient to mandate withdrawal." However, it is apparent from a review of all the cases cited by Respondent that the State is looking at this issue through an inappropriate lens because such cases are at a different procedural posture than the instant case. All of the cases cited by Respondent are reviewing the conflict of interest issue after the cases have concluded to determine whether counsel was ineffective. The analysis in such cases applying the factors set forth in *Strickland v. Washington*,

466 U.S. 668 (1984) is not the appropriate analysis when reviewing such conflicts during the pendency of the proceedings.

In fact, in the cases cited by the State—*Mickens v. Taylor*, 535 U.S. 162 (2002) and *Cuyler v. Sullivan*, 446 U.S. 335 (1980)–counsel did not object to the conflict situation and, therefore, the review was to determine if such failure to object rendered counsel's performance ineffective and the verdict unreliable.[1] This is not the issue in the instant case and such is not the lens through which this Court must review the circuit court's order. Respondent's improper vantage point is most apparent in its argument that "the issue is whether Petitioner has demonstrated 'a conflict *that affected counsel's performance*—as opposed to a mere theoretical division of loyalties,'" citing *Mickens*, 535 U.S. at 171. The *Mickens* court explicitly analyzes whether counsel's failure to move to withdraw due to the conflict was harmful to the case. Again, that is not the vantage point that involves the instant situation and is not the appropriate standard to apply in a review of the trial court's order.

Indeed, Respondent's Response completely overlooks all of the cases that actually review orders on motions to withdraw, as is the case here. The cases cited by the State involve situations in which motions to withdraw were not filed and the conflict issue was only raised on collateral post-conviction motions. This

[1] Respondent quotes *Mickens* which qualifies the need to demonstrate an actual conflict of interest only when a defendant "raised no objection at trial." Since Petitioner does object in this case, this does not apply here.

distinction is significant and invalidates Respondent's assertion that **actual** conflict must be proved to mandate withdrawal. In fact, that is not the holding of any of the State's cited cases. Those cases, rather, only hold that actual conflict must be demonstrated to reverse cases in which no objection to continued representation was made at the trial level, and, therefore, do not apply here as this case is in a completely different procedural posture.

Interestingly, Respondent does not address *Scott v. State*, 991 So. 2d 971 (Fla. 1st DCA 2008) which is most applicable to the instant situation. In *Scott*, this court cited *Foster v. State*, 387 So. 2d 344 (Fla. 1989), which held "[t]o deny a motion for separate representation, where a risk of conflicting interests exists, is reversible error." *Foster* at 345. The *Scott* court dealt with the situation present here in which the extent of the conflict was not determinative because counsel was precluded from fully explaining it to the court due to ethical concerns of confidentiality. This Honorable Court thus recognized, "Where circumstances preclude the trial court's learning whether a conflict of interest has had or will have an impermissible effect, moreover, the motion for leave to withdraw should be granted . . . the statute acknowledges the existence of confidential communications, and does not purport to abolish the attorney-client privilege or the work product privilege, both of which limit the trial court's ability to learn all the facts." *Scott* at 974. Despite Petitioner's inability to fully explain the conflict due to such

privileged communications and ethical limitations, Respondent goes to great lengths to attempt to "read between the lines" to gauge the extent of the potential conflict. Respondent then contends such possible conflict situations do not constitute actual conflicts. Again, this is not the proper analysis before this Honorable Court. Also, Respondent's refutation is only speculative because Petitioner is precluded from fully explaining the conflict. Notwithstanding such speculation by the State, Respondent admits "when an attorney has one client that has confidential information that is adverse to another client, then that presents a potential conflict of interest for the attorney." Therefore, Respondent's entire argument regarding its perception of the conflicts in this case should be disregarded.

Further, Respondent's reliance on the Assistant State Attorney's representations that he does not intend to utilize any information gleaned or gathered from another inmate being represented by the Office of the Public Defender is misplaced. The State's projections as to the utility of the information–the particulars of which it does not know–should have no bearing on this review. Legal and strategic avenues, other than what is speculated by the State, cannot be explored because of ethical considerations which hamper Petitioner's (as well as the other client's) defense. This Honorable Court has said, "[c]ounsel does not have the burden to prove the ill effects of a conflict of interest in order to

demonstrate entitlement to leave to withdraw from a case. The court must grant a public defender's motion for leave to withdraw unless it can rule out prejudice in fact and any substantial risk of prejudice to the client(s) going forward. Sec. 27.5303, Fla. Stat. (2006)." *Scott* at 975 n.8. Therefore, because Respondent cannot rule out such prejudice and risk of prejudice, the Order Denying the Motion to Withdraw was in error.

Relief

Therefore, Petitioner respectfully requests this Honorable Court to issue a writ of certiorari requiring the circuit court below to quash its December 2, 2014 Order Denying Defendant's Certificate of Conflict and Motion to Withdraw and remand the case to grant the Office of the Public Defender, Fourth Judicial Circuit leave to withdraw from this case.

Respectfully submitted,

MATT SHIRK
PUBLIC DEFENDER

ELIZABETH H. WEBB
ASSISTANT PUBLIC DEFENDER
407 NORTH LAURA STREET
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FLORIDA BAR NO.: 0853089

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the above and foregoing has been furnished by e-mail to the Office of the Attorney General at criminalappealsintake@myfloridalegal.com, representing the State of Florida, by e-service to the Office of the State Attorney, representing the State of Florida, and by e-mail to The Honorable Mallory Cooper, Circuit Court Judge, at dvail@coj.net, this 17th day of December. 2014.

ELIZABETH H. WEBB
ASSISTANT PUBLIC DEFENDER

IN THE CIRCUIT COURT, FOURTH JUDICIAL CIRCUIT, IN AND FOR DUVAL COUNTY, FLORIDA

CASE: 16-2013-CF-005781-AXXX-MA

DIVISION: CR-D (CIRCUIT)

STATE OF FLORIDA

vs.

DONALD JAMES SMITH, DEFENDANT

FILED
DEC 19 2014
RONNIE W. POWELL
CLERK CIRCUIT COURT

ORDER

THIS CAUSE COMING ON BEFORE THE COURT UPON THE ☒DEFENDANT'S ☐STATE'S

MOTION FOR CONTINUANCE

FILED HEREIN ON THE 19TH day of DECEMBER, 2014 AND THE COURT HAVING HEARD ARGUMENTS OF THE STATE'S ATTORNEY AND OF COUNSEL FOR DEFENSE, AND BEING FULLY ADVISED IN THE PREMESIS THEREOF, IT IS THEREUPON

ORDERED AND ADJUDGED THAT THE AFORESAID MOTION SHALL BE AND THE SAME IS HEREBY: Granted – No objection by State

DONE AND ORDERED IN OPEN COURT AT JACKSONVILLE, DUVAL COUNTY, FLORIDA, THIS 19 day of December, 2014.

MALLORY D COOPER
Circuit Judge

IN THE CIRCUIT COURT, FOURTH JUDICIAL CIRCUIT, IN AND FOR DUVAL COUNTY, FLORIDA.

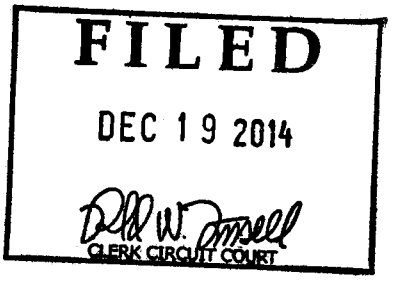
CASE NO.: 16-2013-CF-5781

DIVISION: CR-D

STATE OF FLORIDA

VS.

DONALD JAMES SMITH



MOTION FOR CONTINUANCE

Defendant, DONALD JAMES SMITH, by and through the undersigned attorney, the Public Defender for the Fourth Judicial Circuit of Florida, pursuant to Rule 3.190(g), Florida Rules of Criminal Procedure, respectfully moves this Court to grant a continuance of the trial currently scheduled to commence jury selection on January 20, 2015. As grounds Defendant states the following:

1. Defendant has retained a mitigation expert, Dr. Brooke Butler, Ph.D to assist in the area of mental health mitigation.
2. Dr. Butler was retained several months ago and was advised that time is of the essence as the trial was scheduled as set forth above.
3. Dr. Butler has been working diligently to prepare for the potential penalty phase scheduled to commence on February 9, 2015. The records that she has reviewed exceed the size of a bankers box. During her investigation she has determined that there are additional records to be recovered and certain testing that will be required to properly assist in the mental health mitigation.
4. The Office of the Public Defender cannot effectively present adequate mitigation without the testing by a qualified expert. Dr. Butler advises the undersigned that the additional records need to be collected to determine whom the appropriate expert would be in this case.

WHEREFORE, Defendant respectfully requests this Court grant this motion and order a continuance in the above-styled cause.

I HEREBY CERTIFY that a copy of the above and foregoing Motion for Continuance has been furnished to the Office of the State Attorney, by hand and/or electronically, this 19 day of December, 2014.

Respectfully submitted,

MATT SHIRK
PUBLIC DEFENDER

BY: _____
FRED C. GAZALEH, FBN353787
Assistant Public Defender

CERTIFICATE OF GOOD FAITH

I HEREBY CERTIFY that the foregoing Motion for Continuance is filed in good faith and is not interposed merely for the purpose of unnecessary delay.

_____
FRED C. GAZALEH

FILED 12/19/14 PM 03:47 R FUSSELL

IN THE CIRCUIT COURT,
FOURTH JUDICIAL CIRCUIT,
IN AND FOR DUVAL COUNTY, FLORIDA

CASE NO.: 16-2013-CF-005781-AXXX-MA
DIVISION: CR-D

STATE OF FLORIDA

v.

DONALD JAMES SMITH,
Defendant.
_____/

ORDER DENYING DEFENDANT'S
EMERGENCY MOTION TO STAY PROCEEDINGS

This matter came before this Court on Defendant's "Emergency Motion to Stay Proceedings," filed by and through court-appointed counsel on December 12, 2014. This Court conducted a hearing on the Motion on December 19, 2014, at which the following parties were present: Assistant State Attorneys Mark Caliel, Esq., and Jeff Moody, Esq.; Assistant Public Defenders Fred Gazaleh, Esq., and Tricia Rado, Esq.; and Defendant.

The above-captioned capital case is currently set for trial. Defendant has been charged by Indictment with one count of Murder in the First Degree (Count One), one count of Kidnapping a Child Under the Age of 13 Years (Count Two), and one count of Sexual Battery on a Child Less than 12 Years Old (Count Three). On July 16, 2014, the State filed a Notice of Intent to Seek the Death Penalty. The final pre-trial is set for January 15, 2015, jury selection is set to begin on January 20, 2015, the guilt phase is set to commence on January 26, 2015, and the penalty phase, should one be necessary, is set for February 9 and 10, 2015.

On November 17, 2014, Defendant, though court-appointed counsel, filed a Certificate of Conflict and Motion to Withdraw, alleging a conflict of interest in representing Defendant

and another client of the Public Defender's Office. On November 19, 2014, this Court conducted a hearing and took the motion under advisement. At the next court proceeding on November 24, 2014, this Court orally denied the motion, issuing a written order to that effect on December 2, 2014. On December 10, 2014, Defendant filed an Emergency Petition for Writ of Certiorari with the First District Court of Appeal ("First DCA"), which remains pending. In its Petition, Defendant requested that the First DCA quash this Court's December 2, 2014 Order. The instant Motion followed.

In the instant Motion, Defendant asks this Court to stay the proceedings until the First DCA rules on his pending Petition. The trial court has broad discretion and considerable latitude in deciding when proceedings may be stayed pending review of a trial court order. City of Sarasota v. AFSCME Council '79, 563 So. 2d 830, 830 (Fla. 1st DCA 1990); Pabian v. Pabian, 469 So. 2d 189, 191 (Fla. 4th DCA 1985). In determining whether to grant such a stay, the trial court should consider the following factors: (1) a likelihood of success on the merits, and (2) a likelihood of harm absent the entry of a stay. Campbell v. Chitty, 147 So. 3d 4, 4 (Fla. 1st DCA 2012) (Thomas, J., dissenting) (citing Perez v. Perez, 769 So. 2d 389, n. 4 (Fla. 3d DCA 1999)).

Upon review, this Court finds Defendant's Motion fails to allege facts sufficient to satisfy either of the above-listed factors. Indeed, Defendant not raised any arguments in the instant Motion or during the hearing pertaining to these factors. Accordingly, this Court finds Defendant has not demonstrated a likelihood of success or a likelihood of harm absent the entry of a stay. Therefore, Defendant is not entitled to a stay and the instant Motion is denied.

ORDERED AND ADJUDGED that Defendant's "Emergency Motion to Stay Proceedings" is **DENIED**.

DONE AND ORDERED in Chambers, in Jacksonville, Duval County, Florida, on this 19 day of December 2014.

MALLORY D. COOPER
Circuit Court Judge

Copies to:

Mr. Mark Caliel, Esq.,
Mr. Jeff Moody, Esq.
Assistant State Attorneys
Office of the State Attorney
220 E. Bay St.
Jacksonville, FL 32202

Mr. Fred Gazaleh, Esq.
Ms. Tricia Rado, Esq.
Attorneys for Defendant
Office of the Public Defender
407 N. Laura St.
Jacksonville, FL 32202

Case No.: 16-2013-CF-005781-AXXX-MA
/klb

IN THE CIRCUIT COURT, FOURTH JUDICIAL CIRCUIT, IN AND FOR DUVAL COUNTY, FLORIDA

CASE: 16-2013-CF-005781-AXXX-MA

DIVISION: CR-D (CIRCUIT)

STATE OF FLORIDA

vs.

DONALD SMITH, DEFENDANT

FILED
DEC 29 2014
CLERK CIRCUIT COURT

ORDER

THIS CAUSE COMING ON BEFORE THE COURT UPON THE ☒DEFENDANT'S ☐STATE'S ORAL MOTION TO ALLOW CLERKS OFFICE TO SEND SEALED TRANSCRIPT OF IN CAMERA HEARING TO 1ST DCA

FILED HEREIN ON THE 29th day of DECEMBER, 2014 AND THE COURT HAVING HEARD ARGUMENTS OF THE STATE'S ATTORNEY AND OF COUNSEL FOR DEFENSE, AND BEING FULLY ADVISED IN THE PREMESIS THEREOF, IT IS THEREUPON

ORDERED AND ADJUDGED THAT THE AFORESAID MOTION SHALL BE AND THE SAME IS HEREBY:

GRANTED.

DONE AND ORDERED IN OPEN COURT AT JACKSONVILLE, DUVAL COUNTY, FLORIDA, THIS 29 day of December, 2014.

MALLORY D COOPER
Circuit Judge

THIS INSTRUMENT IN COMPUTER
Leslie

IN THE DISTRICT COURT OF APPEAL,
FIRST DISTRICT, STATE OF FLORIDA

DONALD JAMES SMITH APPEAL NO: 1D14-5647

vs.

STATE OF FLORIDA,
_____/

RANDALL DEVINEY, APPEAL NO. 1D14-5730

vs.

STATE OF FLORIDA,
_____/

PETITIONERS' SUPPLEMENTAL BRIEF

COME NOW PETITIONERS, by and through their undersigned attorney, the Public Defender, Fourth Judicial Circuit, and hereby file their supplemental brief pursuant to this Honorable Court's January 13, 2015 order and hereby state as follows:

This Honorable Court has requested the parties address whether new information that has become publicly available "is relevant in these cases and what effect, if any, it may have on their resolution of the issues presented on appeal." In short, although the new information sheds some light on the substance of the conflict and provides some basis for analyzing actual conflict or the substantial risk of conflict, it does not negate the sanctity of the confidential communications

between lawyer and client and underscores the ethical problems at issue in these cases.

I. New Information Made Known After Petitions Filed

In the December 28, 2014 letter published in the January 11, 2015 edition of the Florida Times-Union, Petitioner Deviney states[1] that he has "valuable information" about a "'cold case', kidnapping, rape and murder" allegedly committed by Petitioner Smith. He then asks the State to allow him to use this information to negotiate a favorable sentence should the information result in a conviction. He also expresses incredulity that the State would not be interested in this information considering the potential importance it might bear for the victim's family. Also noteworthy, is the fact that although a representative from the State Attorney's Office is quoted in the article dismissing Petitioner Deviney's offer, Jacksonville Sheriff John Rutherford said he was aware of Deviney's offer but had "no comment."

II. Relevance of Information and Effect on Instant Issues

As asserted in the responses and at oral argument, the State's argument in opposition to the petitions hinges on Assistant State Attorneys Caliel and De la Rionda's promises that they do not want to know the information posed by Petitioner Deviney and will not use such information. However, as explained

[1] The authenticity of the document is not being contested for the limited purpose of this brief.

infra, such promises only tangentially affect the conflict issue and should not have been the basis for the trial court's order denying the motion to withdraw.

A. Confidentiality

Although Petitioner Deviney has chosen to disclose certain information which is adverse to Petitioner Smith, his assistant public defender is nevertheless not at liberty to reveal whether this is the substance or the entirety of the conversation that transpired between lawyer and client. Rule 4-1.6 of the Rules of Professional Conduct requires confidentiality of this information except under limited circumstances which do not apply here. As such, the undersigned will address the court's inquiry with respect to the information that Petitioner Deviney has revealed but does not concede that this was the substance or the entirety of the confidential communications between lawyer and client.

B. Conflict

Next, the undersigned will address this Honorable Court's question as to the effect, if any, this new information may have on the resolution of the issues presented in this appeal. First, the conflict issue will be addressed generally and then, in order to underscore the substantial risks of conflicts in each case, each Petitioner will be addressed separately.

1. Overview

At the outset, it is important to recall the ethical boundaries at issue in this case. Rule 4-1.7, Rules of Professional Conduct, states that with limited exceptions, "a lawyer must not represent a client if . . . the representation of 1 client will be directly adverse to another client; or . . . there is a substantial risk that the representation of 1 or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer." The comments section of this rule states, "Loyalty and independent judgment are essential elements in the lawyer's relationship to a client."

Moreover, Rule 4-2.1, Rules of Professional Conduct, dealing with the lawyer as adviser, states, "In representing a client, a lawyer shall exercise independent professional judgment and render candid advice. In rendering advice, a lawyer may refer not only to law but to other considerations such as moral, economic, social, and political factors that may be relevant to the client's situation." The comments section to this rule highlights the importance of lawyerly advice: "A client is entitled to straightforward advice expressing the lawyer's honest assessment. Legal advice often involves unpleasant facts and alternatives that a client may be disinclined to confront. In presenting advice, a lawyer endeavors to sustain the client's morale and may put advice in as acceptable

a form as honesty permits. However, a lawyer should not be deterred from giving candid advice by the prospect that the advice will be unpalatable to the client."

Additionally, Rule 4-1.3, Rules of Professional Conduct, requires a lawyer to "act with reasonable diligence and promptness in representing a client." The comment section states that a "lawyer should pursue a matter on behalf of a client despite opposition, obstruction, or personal inconvenience to the lawyer and take whatever lawful and ethical measures are required to vindicate a client's cause or endeavor. A lawyer must also act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client's behalf." Rule 4-1.16, Rules of Professional Conduct, then requires a lawyer to terminate representation when "the representation will result in violation of the Rules of Professional Conduct or law . . ."

Section 27.5303, Fla. Stat., allowing the trial court to review the adequacy of a public defender's representations regarding conflicts of interest must be applied in accordance with the above Rules of Professional Conduct. "To deny a motion for separate representation, where a risk of conflicting interests exists, is reversible error." Foster v. State, 387 So. 2d 344 (Fla. 1980), citing Holloway v. Arkansas, 435 U.S. 475, 98 S.Ct. 1173, 55 L.Ed.2d 426 (1978). Interestingly, the Supreme Court in Holloway, recognized that such a conflict may be difficult to demonstrate because "in a case of joint representation of conflicting interests the

evil – it bears repeating – is in what the advocate finds himself compelled to *refrain* from doing, not only at trial but also as to possible pretrial plea negotiations and in the sentencing process." Id. at 490. See also Glasser v. U.S., 315 U.S. 60, 62 S.Ct. 457, 86 L.Ed. 680 (1942) (the High Court found it was unnecessary to determine the degree of prejudice resulting from the actual conflict of interest because the conflict was per se denial of the Sixth Amendment right to counsel and thus mandated reversal.)

It is precisely this rather elusive concept of conflict (but conflict nonetheless) that must be considered in light of the exclusive relationship between lawyer and client in all stages of the cases of both instant petitioners—who are both current public defender clients. See also Lee v. State, 690 So. 2d 664 (Fla. 1st DCA 1997) (defense counsel had an actual conflict because of his prior representation of a key witness against the defendant and the recent representation of that witness and, thus, this Honorable Court reversed, citing Glasser and Holloway, supra). The conflicts materially limit public defender representation of both clients by impacting their ability to advise them and diligently and zealously advocate for them in all stages, including pretrial, jury selection, trial and sentencing.

2. Petitioner Deviney

In light of the aforementioned disclosure by Petitioner Deviney, therefore, it is evident that the public defender is materially limited by the representation of conflicting interests from fulfilling the ethical responsibilities required under the Rules of Professional Conduct. Initially, the lawyer is precluded from advising Petitioner Deviney as to the whether this information should be disclosed, and the timing and manner of any possible disclosure, among other things. She is precluded from acting diligently on behalf of her client and addressing the information with the State in possible plea negotiations. She would also be precluded from using Petitioner Deviney's willingness to cooperate in such investigation in a potential Spencer[2] hearing at sentencing. All such instances highlight the many ways the public defender attorney may feel compelled to refrain from acting, the concern of the Holloway court.

Nevertheless, the State's promises that it will not use the information disclosed by Petitioner Deviney must also be placed in proper perspective since its entire argument (and to a large extent the trial court's order) is based on such assertions. At this juncture, it is truly premature to make such an assertion, despite the State's desire to proceed quickly to trial on both of the instant cases. Consequently, considering the State's ethical and statutory obligations, it becomes

[2] Pursuant to Spencer v. State, 615 So. 2d 688 (Fla. 1993) (affording a capital defendant an opportunity to be heard and if necessary present additional or rebuttal evidence prior to the trial court's pronouncement of sentence.)

questionable whether the State can even make such a blanket promise to refrain from using such information and thus, whether that promise should be the basis for a ruling.

First, Petitioner Deviney's reference to a "girl" and a "'cold case', kidnapping, rape and murder" is arguably sufficient to trigger statutory notice requirements under Chapter 39, Florida Statutes. Rather than dismissing such information out of hand, a more thoughtful response to this information is required to determine if this information falls within these requirements.[3]

Second, the State's dismissing of such information is also called into question in light of the special role a prosecutor plays in the public context. Pursuant to the comment to Rule 4-3.8, Rules of Professional Conduct, regarding the Special Responsibilities of a Prosecutor, a "prosecutor has the responsibility of a minister of justice and not simply that of an advocate." It is also a possibility that law enforcement agencies (the Jacksonville Sheriff said he had no comment as to this information) will pursue the information Petitioner Deviney has revealed and such may lead to an arrest, requiring the State Attorney to prosecute, pursuant to sec. 27.02, Fla. Stat. Indeed, no basis exists for the assertion that the statements made by two assistant state attorneys are legally binding upon another prosecutor or the elected state attorney (or subsequently elected state attorney), thereby

[3] The undersigned has reservations concerning exploring such obligations in this brief due to the continuing duty of loyalty to Petitioner Smith, further highlighting the conflict issue and does so only to answer this Honorable Court's inquiry as to the issues at hand.

diminishing the import of these promises. As such, the State's assertions that such information will not be used in any way should not be regarded as inviolate and should not be the basis for the denial of the motions to withdraw. Therefore, with regard to Petitioner Deviney, the new information that became publicly available underscores the public defender conflict in this case and the constraints it places on the attorneys' ethical responsibilities.

3. Petitioner Smith

The new information that became publicly available equally impacts public defender representation of Petitioner Smith. Petitioner Smith's attorney is prohibited from addressing the handling of this information divulged by Petitioner Deviney with Petitioner Smith. He is prohibited from discussing whether he even spoke with Petitioner Deviney, or whether this information is, in fact, true. He is prohibited from advising and consulting with Petitioner Smith about this information, is prohibited from raising the effect of the tainting of a potential jury pool because of the disclosure of this information and if it does become the subject of testimony, he would be prohibited from cross examining Petitioner Deviney on this information. Clearly, the attorney is hamstrung from fulfilling his role as adviser and zealous advocate in dealing with the public disclosure of this information.

III. Conclusion

Therefore, the new information manifests the underlying conflicts of interest in both Petitioner Deviney's and Petitioner Smith's cases, materially impacting the public defender's representation and the ability to uphold the ethical responsibilities outlined in the Rules of Professional Conduct.

Respectfully submitted,

MATT SHIRK
PUBLIC DEFENDER

ELIZABETH H. WEBB
ASSISTANT PUBLIC DEFENDER
407 N. Laura Street
Jacksonville, Florida 32202
(904) 255-4727
Florida Bar No. 0853089
Email: PD4DuvalAppeal@pd4.coj.net

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the above and foregoing has been furnished by e-mail to the Office of the Attorney General at criminalappealsintake@myfloridalegal.com, representing the State of Florida, by e-service to the Office of the State Attorney, representing the State of Florida, and by e-mail to The Honorable Mallory Cooper, Circuit Court Judge, at dvail@coj.net, this 23rd day of January, 2015.

ELIZABETH H. WEBB

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this brief is printed in 14-point Times New Roman font, which conforms to type-size and spacing requirements of Rule 9.210, Florida Rules of Appellate Procedure.

ELIZABETH H. WEBB

IN THE CIRCUIT COURT, FOURTH JUDICIAL CIRCUIT, IN AND FOR DUVAL COUNTY, FLORIDA

CASE NO.: 162013CF05781AXXXMA
DIVISION: CR-D

STATE OF FLORIDA

v.

DONALD JAMES SMITH
_____/

ORDER APPOINTING COURT-APPOINTED COUNSEL

The Defendant was previously adjudged insolvent, and the Office of the Public Defender was appointed to represent such Defendant. The Office of the Public Defender and Regional Conflict Counsel have declared a conflict and are unable to represent this Defendant. Therefore, the Court is required to appoint a private attorney from the Fourth Judicial Circuit's Registry List as an alternative counsel for the Defendant.

This Court finds that:

1) Julie Schlax, Esq., (hereinafter, "Counsel") is available and has agreed to represent the Defendant in this case.

2) Counsel is a Florida Bar attorney in good standing and is practicing before this Court.

3) Currently, **Counsel has executed a contract** with the Justice Administrative Commission (JAC).

4) Counsel is **listed on the *Limited* Registry List for the Fourth Judicial Circuit** in the Criminal Division, which includes names of court-appointed attorneys who are authorized to serve in cases involving: Felony in the First, Second, and Third Degree; Felony Capital; Death; ROC; and Misdemeanor cases.

Upon consideration thereof, it is

ORDERED AND ADJUDGED that:

A. The defense counsel who is currently representing the Defendant is permitted to

FILED 02/19/15 AM 10:27 R RUSSELL

withdraw as the attorney for the Defendant and is relieved of any further responsibility in this case, effective as of the date that this Order is signed.

B. Julie Schlax, Esq., who is an attorney listed **on the *Limited* Registry List for the Fourth Judicial Circuit** in the Criminal Division, is hereby appointed as counsel to represent the Defendant in this case, effective on the date that this Order is signed.

DONE AND ORDERED in Chambers, in Jacksonville, Duval County, Florida, on this 18th day of February, 2015.

MALLORY D. COOPER
CIRCUIT JUDGE

cc: The Honorable Mark H. Mahon, Chief Judge
Julie Schlax, Esquire, Counsel for Defendant- by electronic mail
SAO
Caroline C. Emery, Court Counsel

Justice Administrative Commission
pleadings@justiceadmin.org
Cris Martinez, Esq.
P.O. Box 1654
Tallahassee, Florida 32302

Office of the Attorney General
The Capitol, PL-01
Tallahassee, Florida 32399-1050

IN THE CIRCUIT COURT, FOURTH JUDICIAL CIRCUIT, IN AND FOR DUVAL COUNTY, FLORIDA

CASE: 16-2013-CF-005781-AXXX-MA

DIVISION: CR-D (CIRCUIT)

STATE OF FLORIDA

vs.

DONALD JAMES SMITH, DEFENDANT

ORDER

THIS CAUSE COMING ON BEFORE THE COURT UPON THE ☒DEFENDANT'S ☐STATE'S

CERTIFICATE OF CONFLICT AND MOTION TO WITHDRAW

FILED HEREIN ON THE 17TH day of NOVEMBER, 2014 AND THE COURT HAVING HEARD ARGUMENTS OF THE STATE'S ATTORNEY AND OF COUNSEL FOR DEFENSE, AND BEING FULLY ADVISED IN THE PREMESIS THEREOF, IT IS THEREUPON

ORDERED AND ADJUDGED THAT THE AFORESAID MOTION SHALL BE AND THE SAME IS HEREBY:

GRANTED.

DONE AND ORDERED IN OPEN COURT AT JACKSONVILLE, DUVAL COUNTY, FLORIDA, THIS **20TH** day of **FEBRUARY**, 2015.

MALLORY D COOPER
Circuit Judge

THIS INSTRUMENT IS NOT TO BE RECORDED IN OFFICIAL RECORDS

FILED
FEB 20 2015
RONALD W. AMSELL
CLERK CIRCUIT COURT

IN THE CIRCUIT COURT, FOURTH JUDICIAL CIRCUIT, IN AND FOR DUVAL COUNTY, FLORIDA

CASE NO.: 162013CF05781AXXXMA
DIVISION: CR-D

STATE OF FLORIDA

v.

DONALD JAMES SMITH
_____/

ORDER APPOINTING COURT-APPOINTED COUNSEL

The Defendant was previously adjudged insolvent, and the Office of the Public Defender was appointed to represent such Defendant. The Office of the Public Defender and Regional Conflict Counsel have declared a conflict and are unable to represent this Defendant. Therefore, the Court is required to appoint a private attorney from the Fourth Judicial Circuit's Registry List as an alternative counsel for the Defendant.

This Court finds that:

1) W. Charles Fletcher, Esq., (hereinafter, "Counsel") is available and has agreed to represent the Defendant in this case.

2) Counsel is a Florida Bar attorney in good standing and is practicing before this Court.

3) Currently, **Counsel has executed a contract** with the Justice Administrative Commission (JAC).

4) Counsel is **listed on the *Limited* Registry List for the Fourth Judicial Circuit** in the Criminal Division, which includes names of court-appointed attorneys who are authorized to serve in cases involving: Felony in the First, Second, and Third Degree; Felony Capital; Death cases; ROC; and Misdemeanor cases.

Upon consideration thereof, it is

ORDERED AND ADJUDGED that:

A. The defense counsel who is currently representing the Defendant is permitted to

FILED 09/03/2015 AM 10:31 RUSSELL

withdraw as the attorney for the Defendant and is relieved of any further responsibility in this case, effective as of the date that this Order is signed.

B. W. Charles Fletcher, Esq., who is an attorney listed **on the *Limited* Registry List for the Fourth Judicial Circuit** in the Criminal Division, is hereby appointed as counsel to represent the Defendant in this case, effective on the date that this Order is signed.

DONE AND ORDERED in Chambers, in Jacksonville, Duval County, Florida, on this 2nd day of March, 2015 *nunc pro tunc* February 19, 2105.

MALLORY D. COOPER
CIRCUIT JUDGE

cc: The Honorable Donald R. Moran, Jr., Chief Judge
Counsel for Defendant, W. Charles Fletcher, Esquire- by electronic mail
SAO
Caroline C. Emery, Court Counsel

Justice Administrative Commission
pleadings@justiceadmin.org
Cris Martinez, Esq.
P.O. Box 1654
Tallahassee, Florida 32302

Office of the Attorney General
The Capitol, PL-01
Tallahassee, Florida 32399-1050

IN THE CIRCUIT COURT OF THE FOURTH JUDICIAL CIRCUIT,
IN AND FOR DUVAL COUNTY, FLORIDA

STATE OF FLORIDA

VS.

DONALD SMITH
_____/

CASE NO.: 16-2013-CF-5781
DIVISION: CR-D

MOTION TO APPOINT ADDITIONAL COUNSEL FOR PURPOSES OF TRIAL AND PENALTY PHASE

Julie Agent Schlax, court appointed counsel for the Defendant, requests this Court to appoint additional counsel to represent the Defendant and in support of this motion says as follows:

1. The defendant was found to be insolvent by the Court;

2. The undersigned counsel was appointed to represent the defendant;

3. The Defendant is currently charged with First Degree Murder, Kidnapping a Child Under the Age of 13 Years, and Sexual Battery on a Child Less Than 12 Years Old.

4. The State has filed their Notice of Intent to Seek the Death Penalty;

5. A First Degree Murder trial will be a bifurcated trial wherein the determination of guilt is made first and, if necessary, a decision on a sentencing recommendation is made in the second part of the trial;

6. The undersigned counsel requests the appointment of additional counsel to assist in preparing for the defense in both the guilt phase and penalty phase, if necessary, of the trial;

7. The undersigned counsel respectfully requests that this Court appoint attorney W. Charles Fletcher to assist the undersigned during the trial and penalty phase in this case:

WHEREFORE, the Defendant, Ruben Palmer, requests this Honorable Court appoint co-counsel for purposes of the trial and penalty phase, if necessary, of the aforementioned Defendant.

CERTIFICATE OF SERVICE

I hereby certify that a copy of the above Motion to Appoint Additional Counsel for Purposes of Trial and Penalty Phase has been delivered via hand delivery to the Office of the State Attorney, Duval County, Jacksonville, Florida 32202 this 2nd day of March, 2015.

Respectfully submitted,

/s/ Julie Agent Schlax

Julie Agent Schlax
Florida Bar No.: 0093040
200 East Forsyth Street
Jacksonville, Florida 32202
Tel: (904) 674-0717
Fax: (904) 674-0737
Attorney for Defendant

Doc # 2015051442, OR BK 17087 Page 1643, Number Pages: 15, Recorded 03/05/2015 03:17 PM, Ronnie Fussell CLERK CIRCUIT COURT DUVAL COUNTY RECORDING $0.00

M A N D A T E

From

DISTRICT COURT OF APPEAL OF FLORIDA

FIRST DISTRICT

To the Honorable Judges of the Circuit Court for Duval County

WHEREAS, in the certain cause filed in this Court styled:

DONALD JAMES SMITH — **Case No : 1D14-5647**

v. — **Lower Tribunal Case No : 16-2013-CF-5781 — AXXX**

CR-D

STATE OF FLORIDA

The attached opinion was issued on February 17, 2015.

YOU ARE HEREBY COMMANDED that further proceedings, if required, be had in accordance with said opinion, the rules of Court, and the laws of the State of Florida.

WITNESS the Honorable Joseph Lewis, Jr., Chief Judge

of the District Court of Appeal of Florida, First District,

and the Seal of said Court done at Tallahassee, Florida,

on this 5th day of March 2015.

DISTRICT COURT OF APPEAL * STATE OF FLORIDA * FIRST DISTRICT * SAT CITO SI RECTE

JON S. WHEELER, Clerk
District Court of Appeal of Florida, First District

FILED03/05/2015@02:36FUSSELL

IN THE DISTRICT COURT OF APPEAL
FIRST DISTRICT, STATE OF FLORIDA

DONALD JAMES SMITH,

Petitioner,

v.

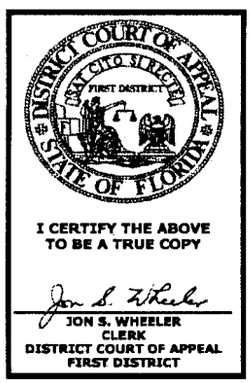
STATE OF FLORIDA,

Respondent.

_____/

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

CASE NO. 1D14-5647



RANDALL DEVINEY,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

_____/

CASE NO. 1D14-5730

Opinion filed February 17, 2015.

Petition for Writ of Certiorari -- Original Jurisdiction.

Nancy A. Daniels, Public Defender, and Steven L. Seliger, Assistant Public Defender, Tallahassee; Matt Shirk, Public Defender, and Elizabeth H. Webb, Assistant Public Defender, Jacksonville, for Petitioners.

Pamela Jo Bondi, Attorney General, and Joshua R. Heller, Assistant Attorney General, Tallahassee, for Respondent.

PER CURIAM.

Petitioners are two criminal defendants facing capital murder charges in Duval County, Florida. Via two separate petitions for writ of certiorari, the petitioners sought review of the denial of two motions filed by the Fourth Circuit Public Defender's office, seeking to withdraw from each case on the basis of a conflict of interest. Throughout the course of this litigation, it became clear that the conflicts were related and the issues identical, and we consolidated these petitions for all purposes. We now write, via this consolidated opinion, to quash the trial court's orders denying the motions to withdraw, and to explain our reasons for so doing.

Deviney

Randall Deviney was charged by information on November 20, 2008, with the first-degree murder of Delores Futrell, an elderly neighbor. A jury convicted Deviney as charged, and he was sentenced to death on June 11, 2010. He appealed his conviction and sentence, and the Florida Supreme Court reversed and remanded for a new trial. *Deviney v. State*, 112 So. 3d 57 (Fla. 2013).

On November 24, 2014, six weeks from the date of Deviney's retrial, counsel moved to withdraw from the case. She argued that her representation of Deviney would be materially limited by her responsibilities of loyalty and confidentiality to another unnamed client, pursuant to Rule 4-1.7 of the Rules Regulating The Florida Bar. A hearing was held on the motion to withdraw, at which Deviney's attorney,

Senovia Portis, stated that she was unable to disclose the nature of the conflict in any significant detail, beyond affirming that the conflict related to the office's representation of both Deviney and Donald James Smith, another felony defendant who was also awaiting trial. Ms. Portis stated that she had contacted the Florida Bar's ethics hotline three times, and each time, when she described the nature of the conflict, she was advised to withdraw from representation. She represented that she was unable to reveal the full nature of the conflict to the trial judge, who is serving as the trial judge in both Smith and Deviney's cases, without breaching her duty to one or both clients.

Assistant State Attorney (ASA) Bernie de la Rionda argued at the hearing on the motion to withdraw that Deviney had manufactured the conflict in order to delay his retrial, and that Deviney was, through this contrived conflict of interest, committing a fraud upon the court. Mr. de la Rionda asserted that the State would waive any interest it had in Deviney's potential testimony against another defendant, concluding, "If he's got information that he wants to provide about somebody else, we are not interested." Mr. de la Rionda again asserted this position later in the hearing, stating: "I am not interested. I don't want to create an issue of conflict . . . . No matter what Mr. Deviney would be willing to present to us, we are not interested. . . . So if that's the case, that Mr. Deviney has information against somebody else, we are not interested. We don't need it. So I don't know how much clearer we can be about that."

The trial judge entered an order denying Ms. Portis' motion to withdraw on December 10, 2014. She found that Ms. Portis had "not presented evidence sufficiently establishing the existence of an actual conflict." As grounds for this conclusion, the court noted that "[t]he State is not using Defendant's testimony against any other public defender client and the State is not going to use any other public defender client as a State witness during Defendant's trial." Thus, the trial judge concluded, withdrawal of the public defender's office was not required. She also found that Deviney's knowledge of the information itself did not warrant withdrawal, because the information was known to the second public defender client who had disclosed the information to Deviney. Accordingly, there was no conflict arising from the office's inability to share the information with the second client.

After apparently failing to receive the reaction he sought from the State Attorney's office, Deviney sent a letter to several news outlets, stating that he has information about a "cold case" – a second kidnapping, rape and murder Deviney asserts were committed by Smith. *See, e.g.*, Larry Hannan, Murderer Implicates Smith in Cold Case, Florida Times Union, January 11, 2015, at A-1. Deviney seeks to negotiate a plea deal in exchange for his information on Smith. *See id.*

Smith

Donald James Smith stands charged with the kidnapping, rape, and murder of Cherish Perrywinkle, an eight-year-old girl. The motion to disqualify in Smith's case

was substantially similar to the motion filed in Deviney's case and was filed by Fred Gazaleh, an attorney working in Ms. Portis' office. At the hearing on the motion to withdraw in Smith's case, ASA Mark Caliel asserted that the State had no interest in using any information that any other criminal defendant might have at Smith's trial.

As in Deviney's case, the trial judge denied the motion to withdraw in Smith's case, finding that the public defender's office had "not presented evidence sufficiently establishing the existence of an actual conflict." Again, the order noted, "the State is not using any other public defender client as a State witness during trial and the State has no intention on seeking to learn the information at issue from the other public defender client."

Analysis

Certiorari is an appropriate vehicle for review of an order denying a motion to withdraw in a criminal matter. *See, e.g.*, *Hunter v. State*, 770 So. 2d 232 (Fla. 2d DCA 2002); *Kolker v. State*, 649 So. 2d 250 (Fla. 3d DCA 1994). Pursuant to the Florida Statutes:

> If, at any time during the representation of two or more defendants, a public defender determines that the interests of those accused are so adverse or hostile that they cannot all be counseled by the public defender or his or her staff without conflict of interest, or that none can be counseled by the public defender or his or her staff because of a conflict of interest, then the public defender shall file a motion to withdraw and move the court to appoint other counsel. The court shall review and may inquire or conduct a hearing into

> the adequacy of the public defender's representations regarding a conflict of interest *without requiring the disclosure of any confidential communications*. The court shall deny the motion to withdraw if the court finds the grounds for withdrawal are insufficient or the asserted conflict is not prejudicial to the indigent client.

Fla. Stat. § 27.5303(1)(a) (2014) (emphasis added). In the instant petitions, the public defender argues that the circuit court's finding that the public defender's office "has not presented evidence sufficiently establishing the existence of an actual conflict" increases the burden on that office beyond what section 27.5303(1)(a) requires, by undermining the portion of that section precluding the trial court from "requiring the disclosure of any confidential communications." We agree.

In opposition to these petitions, the State argues that a showing of actual prejudice is required for withdrawal to be permitted, relying on *Cuyler v. Sullivan*, 446 U.S. 335, 350 (1980), for the proposition that "the possibility of a conflict is insufficient to impugn a criminal conviction." While conceding that a defendant need not show actual prejudice in cases where an attorney "actively represented conflicting interests," *Mickens v. Taylor*, 535 U.S. 162, 166 (2002), the State argues that an active conflict of interest is necessarily "a conflict *that affected counsel's performance* – as opposed to a mere theoretical division of loyalties." *Id.* at 171 (emphasis in original).

We disagree with the State's premise that actual prejudice to the defendant is required before withdrawal of counsel will be permitted in the pretrial context. All of

the cases relied upon by the State for this point are in the post-trial, post-judgment posture. Here, by contrast, both cases are in the pretrial stage. As to evaluating conflicts of interest *before* trial,

> Even though this matter is in the pretrial stages and an actual conflict may yet not be apparent, the case is rife with the potential for such conflict. "In the murkier pre-trial context when relationships between parties are seen through a glass, darkly," the court is accorded broad discretion in determining whether the *potential* for conflict exists.

Kolker, 649 So. 2d at 251-52 (emphasis in original) (*quoting Wheat v. U.S.*, 486 U.S. 153 (1988)). "Viewed prospectively, any substantial risk of harm is deemed prejudicial." *Scott v. State*, 991 So. 2d 971, 972 (Fla. 1st DCA 2008). "Section 27.5303(1)(a) requires denial of a legally sufficient motion only if the trial court affirmatively finds that an indigent client or his or her representation has not been *and is unlikely to be* prejudiced by the public defender's representation of the other client(s) . . . i.e., that 'the asserted conflict is not prejudicial to the indigent client.'" *Id.* at 975 (*quoting* Fla. Stat. § 27.5303(1)(a) (2006)) (footnote omitted) (emphasis added).

Under Rule 4-1.7(a) of the Rules Regulating the Florida Bar,

> [A] lawyer *must not* represent a client if:
>
> (1) the representation of 1 client will be directly adverse to another client; *or*
>
> (2) *there is a substantial risk* that the representation of 1 or more clients will be materially limited by the lawyer's

> responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.

R. Regulating Florida Bar 4-1.7(a) (emphasis added).[1] Where one public defender has a conflict of interest, that conflict is imputed to the entire public defender's office. *Ward v. State*, 753 So. 2d 705 (Fla. 1st DCA 2000). "As a general rule, a public defender's office is the functional equivalent of a law firm. Different attorneys in the same public defender's office cannot represent defendants with conflicting interests." *Bouie v. State*, 559 So. 2d 1113, 1115 (Fla. 1990) (*citing Turner v. State*, 340 So. 2d 132 (Fla. 2d DCA 1976)).

As this court noted in *Scott*, the trial court "is no longer bound to accept the public defender's factual representations at face value" under section 27.5303, and may conduct an evidentiary hearing into the basis for the public defender's motion to withdraw. *Scott*, 991 So. 2d at 973. However, the court in *Scott* noted that section 27.5303 recognizes that there may be situations in which the trial court is precluded by a public defender's ethical duty to his or her client from learning all the facts relating to a conflict of interest:

> *Where circumstances preclude the trial court's learning whether a conflict of interest has had or will have an impermissible effect, moreover, the motion for leave to withdraw should be granted.* The statute is designed to protect the constitutional right to counsel. It recognizes that

[1] A conflict of interest may be waived via informed consent, which has not been given in this case. See R. Regulating Fla. Bar 4-1.7(b).

> *the trial court may not be able to ascertain whether a conflict of interest has proven, or may yet prove, harmful to the client or the client's representation.* After all, the statute acknowledges the existence of confidential communications, and does not purport to abolish the attorney-client privilege or the work product privilege, both of which limit the trial court's ability to learn all the facts.

Scott v. State, 991 So. 2d at 974 (footnote omitted) (emphasis added). This is such a situation, as all parties readily concede.

We conclude that in this instance, the State's promise not to use the alleged information was not sufficiently broad to destroy the conflict of interest so thoroughly that the need for the withdrawal of counsel would be obviated. Specifically, at the hearing on the motion to withdraw in petitioner Smith's case, ASA Mark Caliel stated:

> What I can place on the record *at this point in time* is that the State of Florida has absolutely no interest in utilizing an inmate witness regardless of their identity or regardless of the charges against Mr. Smith *at his trial on January 20th.*
>
> We have reviewed all the evidence and the forensic evidence and the testimony evidence that we have and there is no strategic value or inherent value whatsoever *placing a person charged with an offense on the witness stand to testify against Mr. Smith.*
>
> And based upon that, we are firmly stating on the record that we have no interest speaking with this client, whomever they may be, *and we intend on proceeding to trial January 20th as planned.* By doing so, I'm not aware, obviously, of what the Court's prior conversation with counsel is, but when it comes to having conflict in our proceedings, *if there is no Public Defender witness who takes the witness stand there would be no conflict*, because there would be no

> limitations on cross-examining that witness.
>
> So we have no interest whatsoever in speaking to that individual and we're basically declining any offers to do so. I'm not sure that any actual conflict actually arises.

(Emphasis added). It is clear from these statements that the extent of the State's promise was not to use any potential information against Smith at the trial of the *current* charges against him. The State's promise did not cover the use of information against Mr. Smith relating to a new and uncharged crime. The State would be free, for example, to seek out and utilize the potential information against Mr. Smith to bring new criminal charges against him unrelated to those that are currently pending. Accordingly, the promises made by the State at the hearing on the motion to withdraw were insufficient to do away with the potential conflict of interest herein.[2] "To deny a motion for separate representation, where a risk of conflicting interests exists, is reversible error." *Foster v. State*, 387 So. 2d 344, 345 (Fla. 1980) (*citing Holloway v. Arkansas*, 435 U.S. 475 (1978)).

"Although the rule was once otherwise, section 27.5303, Florida Statutes . . . now permits a trial court to inquire into the factual basis of a legally sufficient motion for

[2] Nor have Deviney's statements to the media destroyed the conflict of interest in these cases. While Deviney's letters to various media outlets may have waived his attorney-client privilege under section 90.507, Florida Statutes, the conflict of interest still exists because Deviney has not disclosed the information in any real substance to law enforcement or to the ASA. Thus, Deviney still holds information that could be adverse to Smith and could lead to his subsequent prosecution.

leave to withdraw on conflict of interest grounds that arise from the public defender's representation of multiple defendants." *Scott v. State*, 991 So. 2d 971, 973 (Fla. 1st DCA 2008) (footnote omitted). The amendment of this provision to allow for a factual inquiry into a motion to withdraw, however, does not give a trial court free rein to inquire into matters which are privileged by law. *See* Fla. Stat. § 27.5303(1)(a) (2014) ("The court shall review and may inquire or conduct a hearing into the adequacy of the public defender's representations regarding a conflict of interest *without requiring the disclosure of any confidential communications*") (emphasis added).

Pursuant to that section, in the very narrow circumstance presented here – where a public defender represents that a conflict of interest exists, but is precluded from revealing the nature of the conflict to the trial court based upon his or her ethical duty to the client – *Guzman v. State*, 644 So. 2d 996, 999 (Fla. 1994) (mandating withdrawal upon the basis of a public defender's representation of a conflict due to adverse interests between two clients), remains intact. This is notwithstanding the fact that *Guzman* was in all other respects superseded by Chapter 99-282, §1, Laws of Fla., as recognized in *Snelgrove v. State*, 921 So. 2d 560, 566 n.11 (Fla. 2005). *Guzman* still stands, but only in the extremely narrow circumstance presented in these cases. Once a public defender has certified a conflict, and where it becomes clear that the trial court cannot learn the basis for the conflict "without requiring the disclosure of . . . confidential communications," the trial court must grant the motion under section

27.5303(1)(a).

In these cases, the trial judge's finding that the public defender's office "has not presented evidence sufficiently establishing the existence of an actual conflict" runs contrary to section 27.5303(1)(a), because for the public defender's office to present such evidence, it would be forced to reveal confidential and privileged client information. The portion of the order requiring the public defender to "present[] evidence sufficiently establishing the existence of an actual conflict," where the public defender had signified that she could not do so without breaching her duties to these clients, left counsel for these defendants two options: either (1) disclose the information to the trial court, thus revealing privileged communications and violating the office's duty of loyalty to the clients, or (2) proceed to trial in both cases with a conflict of interest. In encumbering the public defender with this dilemma, "the trial court impermissibly obligated the public defender to 'serve a dual and adverse stewardship.'" *Scott*, 991 So. 2d at 976 (*citing Bellows v. State*, 508 So. 2d 1330, 1331-32 (Fla. 2d DCA 1987)).

"[B]y requiring an ethically conflicted attorney from the [Public Defender's] Office to represent the petitioner, the trial court would be denying effective assistance of counsel." *Ward v. State*, 753 So. 2d 705, 708 (Fla. 1st DCA 2000). Such a ruling "constitutes a departure from the essential requirements of law that would result in an irreparable, material harm to the petitioner that cannot be remedied on final appeal."

Id. (*citing Combs v. State*, 436 So. 2d 93) (Fla. 1983)).

We close by noting that the well-regarded and experienced trial judge did everything that she could to achieve a just and fair result given the statutory conundrum she faced and the gravity of the trials at issue. Her efforts were commendable. We recognize the difficulty that section 27.5303(1)(a)'s specific limitation on the disclosure of confidential information creates for trial judges and attorneys, and the potential for the unscrupulous criminal defendant to attempt to exploit this statutory exception by manufacturing a conflict of interest and thus creating a fraud upon the court. The potential for mischief is tempered by the fact that any motion to withdraw based upon such a conflict will be based upon a public defender's "representations as an officer of the court." *Bouie*, 435 U.S. at 485. Perhaps other mechanisms exist for handling situations involving confidential information, ones that provide for more direct means of verifying that an actual conflict exists; but that is a legislative question for another day.

In conclusion, the language of section 27.5303(1)(a) requires that the trial court's inquiry into the nature of a conflict of interest based on confidential information stops where attorney-client privilege begins. Accordingly, we are constrained to hold that, under the narrow facts presented in these cases, withdrawal was and continues to be required. The orders of the trial court denying the public defender's motions to withdraw are hereby QUASHED, and this matter is REMANDED to the trial court for

further proceedings consistent with this opinion.

Finally, in view of the issue of great public importance presented in these cases, we hereby certify the following question to the Supreme Court of Florida:

> IN CASES WHERE A PUBLIC DEFENDER MOVES TO WITHDRAW FROM THE REPRESENTATION OF A CRIMINAL DEFENDANT ON THE BASIS OF A CLIENT CONFLICT, BUT CERTIFIES TO THE TRIAL COURT, AS AN OFFICER OF THE COURT, THAT HE OR SHE IS UNABLE TO REVEAL THE CIRCUMSTANCES SURROUNDING THE CONFLICT WITHOUT REVEALING PRIVILEGED COMMUNICATIONS, IS A TRIAL JUDGE REQUIRED TO GRANT THE MOTION TO WITHDRAW?

ORDERS QUASHED and CASES REMANDED.

ROBERTS, RAY, and MAKAR, JJ., concur.

IN THE CIRCUIT COURT OF THE FOURTH JUDICIAL CIRCUIT,
IN AND FOR DUVAL COUNTY, FLORIDA

STATE OF FLORIDA

VS.

DONALD SMITH
_____/

CASE NO.: 16-2013-CF-5781
DIVISION: CR-D

ORDER GRANTING MOTION TO APPOINT ADDITIONAL COUNSEL FOR PURPOSES OF TRIAL AND PENALTY PHASE

THIS CAUSE came to be heard on Defendant's, Donald Smith's, court-appointed attorney's Motion to Appoint Additional Counsel for Purposes of Trial and Penalty Phase. The Court, being fully advised in the premises, finds that appointment of additional counsel for purposes of trial and penalty phase in this case is necessary. Accordingly, it is:

ORDERED AND ADJUDGED:

1. Defendant's Motion is **GRANTED.**

2. The Court hereby appoints attorney W. Charles Fletcher as additional counsel to assist Defendant's court appointed counsel in the above captioned action.

ORDERED in Duval County, Jacksonville, Florida this 5 day of March, 2015.

THE HONORABLE MALLORY COOPER,
CIRCUIT JUDGE

Copies furnished to:

Julie Agent Schlax, Esquire
Office of the State Attorney
W. Charles Fletcher, Esquire
Justice Administrative Commission

FILED
MAR 05 2015
RONNIE W. ONSELL
CLERK CIRCUIT COURT

IN THE CIRCUIT COURT, FOURTH JUDICIAL CIRCUIT, IN AND FOR DUVAL COUNTY, FLORIDA

CASE NO: 16-2013-CF-5781-AXXX-MA
DIVISION: CR-D

STATE OF FLORIDA

vs.

DONALD SMITH
_____/

MOTION FOR APPOINTMENT AND AUTHORITY TO INCUR COSTS OF MITIGATION COORDINATOR/ INVESTIGATOR AND MITIGATION EXPENSES

COMES NOW the Defendant, Donald Smith, by and through his court-appointed attorney, and pursuant to Florida Laws of Criminal Procedure, moves this Honorable Court for the entry of an Order appointing a mitigation coordinator/investigator and authorizing the incurring of costs of a mitigation coordinator/investigator, and as grounds hereby states:

1. The Defendant was indicted for Murder in the First Degree, Kidnapping a Child Under the Age of 13 Years, and Sexual Battery on a Child Less than 12 Years; followed by the filing of the State's Notice of Intent to Seek the Death Penalty;

2. The Defendant has been previously adjudged insolvent by this Court;

3. The undersigned was appointed to represent the Defendant in this matter;

4. Due to of the unusual and extraordinary facts of this case and the fact that the State has filed their notice of intent to seek the death penalty, a mitigation coordinator/investigator is necessary in the preparation of a defense in this cause;

5. The American Bar Association Guidelines (2003) regarding the performance of attorneys representing death eligible Defendants required at a minimum the services of two attorneys, investigators, appropriate staff, and a mitigation coordinator/investigator , as the bare minimum for a defense team;

6. The American Bar Association standards were held to be minimum requirements in *Rompilla v. Beard*, 125 S. Ct. 2456;

7. Defense counsel wishes to retain the services of Brooke Butler, Ph.D., P.A., as a mitigation coordinator/investigator in this cause;

8. Counsel does not believe she can provide Defendant with proper representation to which he is entitled unless the Court appoints a mitigation expert who will report her findings directly to the undersigned counsel;

FILED
MAR 24 2015
RONALD W. DAMSELL
CLERK CIRCUIT COURT

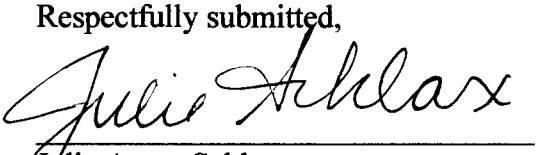
9. It is estimated that a minimum of $5,000.00 will be spent in mitigation/investigative costs.

WHEREFORE, the Defendant respectfully requests this Honorable Court for entry of an Order appointing a mitigation coordinator/investigator and authorizing the incurring of costs of a mitigation coordinator/investigator to assist with the preparation of a defense in this cause.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the Motion for Appointment and Authority to Incur Costs of Mitigation Coordinator/Investigator and Mitigation Expenses has been provided to the Justice Administrative Commission via e-mail delivery this 24th day of March, 2015.

Respectfully submitted,



Julie Agent Schlax
200 East Forsyth Street
Jacksonville, Florida 32202
(904) 674-0717Telephone
(904) 674-0737 Facsimile
Attorney for Defendant

IN THE CIRCUIT COURT, FOURTH JUDICIAL CIRCUIT, IN AND FOR DUVAL COUNTY, FLORIDA

CASE NO: 16-2013-CF-5781-AXXX-MA
DIVISION: CR-D

STATE OF FLORIDA

vs.

DONALD SMITH
_____/

ORDER OF APPOINTMENT AND AUTHORITY TO INCUR COSTS OF MITIGATION COORDINATOR/INVESTIGATOR AND MITIGATION EXPENSES

THIS CAUSE, came on to be heard upon the Defendant's Motion for Appointment and Authority to Incur Costs of Mitigation Coordinator/Investigator and Mitigation Expenses, and the Court having been fully advised in the premises, and finding that a Mitigation Coordinator/Investigator is both necessary and essential to the defense in this cause, it is

ORDERED as follows:

1. That this Court hereby appoints Brooke Butler, Ph.D., P.A., as mitigation experts in this case;

2. That Julie Agent Schlax, Esquire is hereby authorized to incur the reasonable expenses of Brooke Butler, Ph.D., P.A.;

3. That the Justice Administration Commission, shall pay the costs of the invoices submitted by Brooke Butler, Ph.D., P.A., at an hourly rate of $75.00 and not to exceed $ 5,000.00 without further Order.

DONE AND ORDERED in Duval County, Jacksonville, Florida on this 24 day of March, 2015.

THE HONORABLE MALLORY D. COOPER
CIRCUIT JUDGE

Copies to: Julie Agent Schlax
Justice Administration Commission
Brooke Butler, Ph.D., P.A.

THIS INSTRUMENT IN COMPUTER

FILED
MAR 24 2015
RONNIE W. FOSSELL
CLERK CIRCUIT COURT

IN THE CIRCUIT COURT,
FOURTH JUDICIAL CIRCUIT,
IN AND FOR DUVAL COUNTY,
FLORIDA

CASE NO.: 162013CF5781AXXXMA

DIVISION: CR-D

STATE OF FLORIDA,
Petitioner,

vs.

DONALD JAMES SMITH,
Defendant
_____/

STATE'S MOTION FOR DEPOSITION TO PERPETUATE TESTIMONY

Comes now the State of Florida, by and through the undersigned Assistant State Attorney, and in the above-captioned matter requests an Order of this Court for issuance of a commission to take the deposition of Patricia Moore in the instant case for the purpose of perpetuating the witness's testimony, pursuant to Florida Rule of Criminal Procedure 3.190(j). In support of its application, the State submits the following:

(1) Patricia Moore, the mother of the Defendant, is a material witness in the instant case. Ms. Moore is 76 years-old. At this time, Ms. Moore has no obvious health issues. However, given her advanced age and the uncertainty as to a trial date, the State seeks to perpetuate Ms. Moore's trial testimony.

(2) The witness's testimony is material and it is necessary to perpetuate the witness's testimony to prevent a failure of justice.

(3) The State only intends to introduce the perpetuated testimony of the witness during trial

in the instant case if Ms. Moore becomes unavailable prior to trial. If Ms. Moore is available at trial, the State would present her live testimony.

(4) Florida law is clear that, unless that deposition was specifically taken in compliance with Florida Rule of Criminal Procedure 3.190 (*i.e.*, taken as a deposition to perpetuate testimony), it *may not be introduced as substantive evidence at trial.* State v. Green, 667 So.2d 756 (Fla. 1995); State v. James, 402 So.2d 1169 (Fla. 1981); State v. Skolar, 692 So.2d 309 (Fla. 5th DCA 1997); Smith v. State, 606 So.2d 641 (Fla. 1st DCA 1992).

Wherefore, the State of Florida requests the Court permit the taking of the deposition of Patricia Moore for the purpose of perpetuating her testimony.

Respectfully submitted,

Mark Caliel
Assistant State Attorney
Florida Bar #0105650

STATE OF FLORIDA)
COUNTY OF DUVAL)
Before me personally appeared Mark Caliel, Assistant State Attorney, who is personally known to me and who, upon being duly sworn, states that the allegations as set forth in the foregoing are true and correct and submitted in good faith.
Sworn and subscribed before me this 11 day of MAY, 2015.

Notary Public
My commission expires:

Copies to:
Julie Schlax, Esq.
Attorney for Defendant

DEVIN KILGORE
Commission # FF 035240
Expires July 10, 2017
Bonded Thru Troy Fain Insurance 800-385-7019

IN THE CIRCUIT COURT, FOURTH JUDICIAL CIRCUIT, IN AND FOR DUVAL COUNTY, FLORIDA

CASE: 16-2013-CF-5781-AXXX-MA

DIVISION: CR-D (CIRCUIT)

STATE OF FLORIDA

vs.

DONALD JAMES SMITH, DEFENDANT

ORDER

THIS CAUSE COMING ON BEFORE THE COURT UPON THE ☐DEFENDANT'S ☒STATE'S

MOTION FOR DEPOSITION TO PERPETUATE TESTIMONY

FILED HEREIN ON THE 11TH day of MAY, 2015 AND THE COURT HAVING HEARD ARGUMENTS OF THE STATE'S ATTORNEY AND OF COUNSEL FOR DEFENSE, AND BEING FULLY ADVISED IN THE PREMESIS THEREOF, IT IS THEREUPON

ORDERED AND ADJUDGED THAT THE AFORESAID MOTION SHALL BE AND THE SAME IS HEREBY:

Granted

DONE AND ORDERED IN OPEN COURT AT JACKSONVILLE, DUVAL COUNTY, FLORIDA, THIS 12 day of May, 2015.

MALLORY D COOPER
Circuit Judge

FILED
MAY 12 2015
RONALD W. AMSELL
CLERK CIRCUIT COURT

THIS INSTRUMENT IN COMPUTER MW

IN THE CIRCUIT COURT,
FOURTH JUDICIAL CIRCUIT,
IN AND FOR DUVAL COUNTY,
FLORIDA

CASE NO.: 162013CF5781AXXXMA

DIVISION: CR-D

STATE OF FLORIDA,
Petitioner,

vs.

DONALD JAMES SMITH,
Defendant
_____/

STATE'S MOTION FOR DEPOSITION TO PERPETUATE TESTIMONY

Comes now the State of Florida, by and through the undersigned Assistant State Attorney, and in the above-captioned matter requests an Order of this Court for issuance of a commission to take the deposition of Patricia Moore in the instant case for the purpose of perpetuating the witness's testimony, pursuant to Florida Rule of Criminal Procedure 3.190(j). In support of its application, the State submits the following:

(1) Patricia Moore, the mother of the Defendant, is a material witness in the instant case. Ms. Moore is 76 years-old. At this time, Ms. Moore has no obvious health issues. However, given her advanced age and the uncertainty as to a trial date, the State seeks to perpetuate Ms. Moore's trial testimony.

(2) The witness's testimony is material and it is necessary to perpetuate the witness's testimony to prevent a failure of justice.

(3) The State only intends to introduce the perpetuated testimony of the witness during trial

in the instant case if Ms. Moore becomes unavailable prior to trial. If Ms. Moore is available at trial, the State would present her live testimony.

(4) Florida law is clear that, unless that deposition was specifically taken in compliance with Florida Rule of Criminal Procedure 3.190 (*i.e.*, taken as a deposition to perpetuate testimony), it *may not be introduced as substantive evidence at trial.* State v. Green, 667 So.2d 756 (Fla. 1995); State v. James, 402 So.2d 1169 (Fla. 1981); State v. Skolar, 692 So.2d 309 (Fla. 5th DCA 1997); Smith v. State, 606 So.2d 641 (Fla. 1st DCA 1992).

Wherefore, the State of Florida requests the Court permit the taking of the deposition of Patricia Moore for the purpose of perpetuating her testimony.

Respectfully submitted,

Mark Caliel
Assistant State Attorney
Florida Bar #0105650

STATE OF FLORIDA)
COUNTY OF DUVAL)
Before me personally appeared Mark Caliel, Assistant State Attorney, who is personally known to me and who, upon being duly sworn, states that the allegations as set forth in the foregoing are true and correct and submitted in good faith.
Sworn and subscribed before me this 11 day of May, 2015.

Notary Public
My commission expires:

Copies to:
Julie Schlax, Esq.
Attorney for Defendant

DEVIN KILGORE
Commission # FF 035240
Expires July 10, 2017
Bonded Thru Troy Fain Insurance 800-385-7019

IN THE CIRCUIT COURT, FOURTH JUDICIAL CIRCUIT, IN AND FOR DUVAL COUNTY, FLORIDA

CASE NO: 16-2013-CF-5781-AXXX-MA
DIVISION: CR-D

STATE OF FLORIDA

vs.

DONALD SMITH
_____/

AMENDED MOTION FOR APPOINTMENT AND AUTHORITY TO INCUR COSTS OF MITIGATION COORDINATOR/ INVESTIGATOR AND MITIGATION EXPENSES

COMES NOW the Defendant, Donald Smith, by and through his court-appointed attorney, and pursuant to Florida Laws of Criminal Procedure, moves this Honorable Court for the entry of an Order appointing a mitigation coordinator/investigator and authorizing the incurring of costs of a mitigation coordinator/investigator, and as grounds hereby states:

1. The Defendant was indicted for Murder in the First Degree, Kidnapping a Child Under the Age of 13 Years, and Sexual Battery on a Child Less than 12 Years; followed by the filing of the State's Notice of Intent to Seek the Death Penalty;

2. The Defendant has been previously adjudged insolvent by this Court;

3. The undersigned was appointed to represent the Defendant in this matter;

4. Due to of the unusual and extraordinary facts of this case and the fact that the State has filed their notice of intent to seek the death penalty, a mitigation coordinator/investigator is necessary in the preparation of a defense in this cause;

5. The American Bar Association Guidelines (2003) regarding the performance of attorneys representing death eligible Defendants required at a minimum the services of two attorneys, investigators, appropriate staff, and a mitigation coordinator/investigator , as the bare minimum for a defense team;

6. The American Bar Association standards were held to be minimum requirements in *Rompilla v. Beard*, 125 S. Ct. 2456;

7. Defense counsel wishes to retain the services of Brooke Butler, Ph.D., P.A., as a mitigation coordinator/investigator in this cause;

8. Counsel does not believe she can provide Defendant with proper representation to which he is entitled unless the Court appoints a mitigation expert who will report her findings directly to the undersigned counsel;

9. It is estimated that a minimum of $5,000.00 will be spent in mitigation/investigative costs and that reasonable and necessary travel expenses will be incurred.

10. The reasonable associated fees for mitigation/investigative costs and reasonable travel expenses should be paid by the State of Florida, Justice Administrative Commission

WHEREFORE, the Defendant respectfully requests this Honorable Court for entry of an Order appointing a mitigation coordinator/investigator and authorizing the incurring of costs of a mitigation coordinator/investigator to assist with the preparation of a defense in this cause.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the Motion for Appointment and Authority to Incur Costs of Mitigation Coordinator/Investigator and Mitigation Expenses has been provided to the Justice Administrative Commission via e-mail delivery this 8th day of July, 2015.

Respectfully submitted,

/s/ Julie Agent Schlax

Julie Agent Schlax
200 East Forsyth Street
Jacksonville, Florida 32202
(904) 674-0717Telephone
(904) 674-0737 Facsimile
Attorney for Defendant

From: JAC Pleadings <pleadings@justiceadmin.org>

To: Julie@esalawgroup.com
Cc:
Date: Thursday, July 09, 2015 10:11 am
Subject: RE: Donald Smith
Attachments:

JAC has received and reviewed the Amended Motion for Appointment and Authority to Incur Costs of Mitigation Coordinator/Investigator and Mitigation Expenses as to the above-referenced matter. JAC will not be filing a formal response and takes no position as to your motion. You may utilize this email in lieu of a formal response and should attach it to your motion when you provide it to the court.

Buddy Aspy
Senior Management Analyst
Justice Administrative Commission
227 Bronough St.
Tallahassee, Fl. 32301
866.355.7902 Ext 243

PLEASE NOTE: All e-mail is potentially available as a public record.

From: sherri@esalawgroup.com [mailto:sherri@esalawgroup.com]
Sent: Wednesday, July 08, 2015 3:50 PM
To: JAC Pleadings
Subject: Donald Smith

Please see the attached amended order authorizing travel expenses.

IN THE CIRCUIT COURT, FOURTH JUDICIAL CIRCUIT, IN AND FOR DUVAL COUNTY, FLORIDA

CASE NO: 16-2013-CF-5781-AXXX-MA
DIVISION: CR-D

STATE OF FLORIDA

vs.

DONALD SMITH
_____/

MOTION FOR AUTHORITY TO INCUR COSTS ADDITIONAL COSTS OF MITIGATION COORDINATOR/ INVESTIGATOR AND MITIGATION EXPENSES

COMES NOW the Defendant, Donald Smith, by and through his court-appointed attorney, and pursuant to Florida Laws of Criminal Procedure, moves this Honorable Court for the entry of an Order authorizing the incurring of additional costs of a mitigation coordinator/investigator, and as grounds hereby states:

1. The Defendant was indicted for Murder in the First Degree, Kidnapping a Child Under the Age of 13 Years, and Sexual Battery on a Child Less than 12 Years; followed by the filing of the State's Notice of Intent to Seek the Death Penalty;

2. The Defendant has been previously adjudged insolvent by this Court;

3. The undersigned was appointed to represent the Defendant in this matter;

4. Due to of the unusual and extraordinary facts of this case and the fact that the State has filed their notice of intent to seek the death penalty;

5. A mitigation coordinator/investigator is necessary in the preparation of a defense in this cause;

6. The American Bar Association Guidelines (2003) regarding the performance of attorneys representing death eligible Defendants required at a minimum the services of two attorneys, investigators, appropriate staff, and a mitigation coordinator/investigator , as the bare minimum for a defense team;

7. The American Bar Association standards were held to be minimum requirements in *Rompilla v. Beard*, 125 S. Ct. 2456;

8. Counsel does not believe she can provide Defendant with proper representation to which he is entitled unless the Court authorizes additional fees for a mitigation expert who will report her findings directly to the undersigned counsel;

9. Brooke Butler, Ph.D., P.A., was previously appointed as a mitigation coordinator/investigator in this cause and counsel was authorized fees up to $5,000.00 without further order;

10. The appointed mitigation coordinator/investigator, Brooke Butler, Ph.D., P.A., has exhausted the initial $5,000.00 authorized thus counsel is requesting authority to incur an additional amount of $5,000.00, with the authority to submit a motion for additional fees if necessary;

11. Reasonable and necessary travel expenses will be incurred by Brooke Butler, Ph.D., P.A., and the reasonable associated fees for mitigation/investigative costs and reasonable travel expenses should be paid by the State of Florida, Justice Administrative Commission

WHEREFORE, the Defendant respectfully requests this Honorable Court for entry of an Order appointing a mitigation coordinator/investigator and authorizing the incurring of costs of a mitigation coordinator/investigator to assist with the preparation of a defense in this cause.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the Motion for Appointment and Authority to Incur Costs of Mitigation Coordinator/Investigator and Mitigation Expenses has been provided to the Justice Administrative Commission via e-mail delivery this 8th day of July, 2015.

Respectfully submitted,

/s/ Julie Agent Schlax

Julie Agent Schlax
200 East Forsyth Street
Jacksonville, Florida 32202
(904) 674-0717Telephone
(904) 674-0737 Facsimile
Attorney for Defendant

From: JAC Pleadings <pleadings@justiceadmin.org>

To: Julie@esalawgroup.com
Cc:

Date: Thursday, July 09, 2015 10:19 am
Subject: RE: 2 Donald Smith
Attachments: Motion and Order for Appointment of Mitigation Specialist (Donald Smith)....pdf (120KB)

JAC has received and reviewed the Motion for Authority to Incur Additional Costs of Mitigation Coordinator/Investigator and Mitigation Expenses as to the above-referenced matter. JAC will not be filing a formal response and takes no position as to your motion. You may utilize this email in lieu of a formal response and should attach it to your motion when you provide it to the court.

Buddy Aspy
Senior Management Analyst
Justice Administrative Commission
227 Bronough St.
Tallahassee, Fl. 32301
866.355.7902 Ext 243

PLEASE NOTE: All e-mail is potentially available as a public record.

From: sherri@esalawgroup.com [mailto:sherri@esalawgroup.com]
Sent: Wednesday, July 08, 2015 3:56 PM
To: JAC Pleadings
Subject: 2 Donald Smith

Please see the attached motion for additional fees for defendant Donald Smith.

IN THE CIRCUIT COURT, FOURTH JUDICIAL CIRCUIT, IN AND FOR DUVAL COUNTY, FLORIDA

CASE NO: 16-2013-CF-5781-AXXX-MA
DIVISION: CR-D

STATE OF FLORIDA

vs.

DONALD SMITH
_____/

ORDER AUTHORIZING ADDITIONAL COSTS
OF MITIGATION COORDINATOR/INVESTIGATOR AND MITIGATION EXPENSES

THIS CAUSE, came on to be heard upon the Defendant's Motion for Authority to Incur Additional Costs of Mitigation Coordinator/Investigator and Mitigation Expenses, and the Court having been fully advised in the premises, and finding that a Mitigation Coordinator/Investigator is both necessary and essential to the defense in this cause, it is

ORDERED as follows:

1. That Julie Agent Schlax, Esquire is hereby authorized to incur additional reasonable expenses of Brooke Butler, Ph.D., P.A.;

3. That the Justice Administrative Commission, shall pay the costs of the invoices submitted by Brooke Butler, Ph.D., P.A., at an hourly rate of $75.00 and not to exceed an additional amount of $5,000.00 ($10,000.00 total) without further Order.

4. It is further ordered that the Justice Administrative Commission shall pay the reasonable and necessary travel expenses incurred by Brooke Butler, Ph.D., P.A.

DONE AND ORDERED in Duval County, Jacksonville, Florida on this 16 day of July, 2015.

Mallory D. Cooper

THE HONORABLE MALLORY D. COOPER
CIRCUIT JUDGE

Copies to: Julie Agent Schlax
Justice Administrative Commission
Brooke Butler, Ph.D., P.A.

FILED 07/17/2015 AM 10:22 RUSSELL

IN THE CIRCUIT COURT, FOURTH JUDICIAL CIRCUIT, IN AND FOR DUVAL COUNTY, FLORIDA

CASE NO: 16-2013-CF-5781-AXXX-MA
DIVISION: CR-D

STATE OF FLORIDA

vs.

DONALD SMITH
_____/

AMENDED ORDER OF APPOINTMENT AND AUTHORITY TO INCUR COSTS OF MITIGATION COORDINATOR/INVESTIGATOR AND MITIGATION EXPENSES

THIS CAUSE, came on to be heard upon the Defendant's Motion for Appointment and Authority to Incur Costs of Mitigation Coordinator/Investigator and Mitigation Expenses, and the Court having been fully advised in the premises, and finding that a Mitigation Coordinator/Investigator is both necessary and essential to the defense in this cause, it is

ORDERED as follows:

1. That this Court hereby appoints Brooke Butler, Ph.D., P.A., as mitigation experts in this case;

2. That Julie Agent Schlax, Esquire is hereby authorized to incur the reasonable expenses of Brooke Butler, Ph.D., P.A.;

3. That the Justice Administrative Commission, shall pay the costs of the invoices submitted by Brooke Butler, Ph.D., P.A., at an hourly rate of $75.00 and not to exceed $5,000.00 without further Order.

4. It is further ordered that the Justice Administrative Commission shall pay the reasonable and necessary travel expenses incurred by Brooke Butler, Ph.D., P.A.

DONE AND ORDERED in Duval County, Jacksonville, Florida on this 15 day of July, 2015.

THE HONORABLE MALLORY D. COOPER
CIRCUIT JUDGE

Copies to: Julie Agent Schlax
Justice Administrative Commission
Brooke Butler, Ph.D., P.A.

FILED 07/17/2015 @ 10:22 RUSSELL

IN THE CIRCUIT COURT, FOURTH
JUDICIAL CIRCUIT, IN AND FOR
DUVAL COUNTY, FLORIDA

CASE NO: 16-2013-CF-5781-AXXX
DIVISION: CR-D

STATE OF FLORIDA

VS.

DONALD SMITH
_____/

MOTION TO INCUR COSTS OF SELECT DEPOSITION TRANSCRIPTS

Defendant, Donald Dickerson, through his undersigned attorney, Julie Agent Schlax, pursuant to Sections 27.54, 914.11 and 939.07, Florida Statutes and Rule 3.220(o), Florida Rules of Criminal Procedure, respectfully moves this Honorable Court to enter an order authorizing Defendant's attorney to incur the costs for the transcripts of the deposition testimony of the following witness(es) to assist with the preparation of the defense.

Date of Deposition	**Name of Witness**
June 4, 2015	Nikki Lee
July 2, 2015	Patricia Moore (in-court deposition)

Defendant further moves this Honorable Court to order the State of Florida, Judicial Administrative Commission (JAC), to pay the reasonable costs of said transcription at the rate of $4.00 per page. As grounds, Defendant states:

1. The Defendant is charged with First Degree Murder, Kidnapping a Child Under the Age of 13 Years, and Sexual Battery – Defendant 18 or Older Victim Less Than 12.

2. The Defendant has been found indigent and counsel is court appointed.

3. The deposition transcript(s) of the above listed witness(es) is/are necessary for impeachment of that/those witness(es) at trial and/or to fully prepare for trial.

WHEREFORE, Defendant respectfully requests this Honorable Court authorize the defense to incur the costs of the transcript(s) of the deposition testimony of the above listed witness(es), and order that the reasonable costs of transcript(s) be paid by the State of Florida, Judicial Administrative Commission (JAC).

Respectfully submitted, this 22nd day of July, 2015.

ESPENSHIP, SCHLAX & ALBEE, LLC

/s/ Julie Agent Schlax

Julie Agent Schlax, Esquire
Florida Bar No.: 093040
200 E. Forsyth Street
Jacksonville, Florida 32202
Tel: (904) 674-0717
Fax: (904) 674-0737
Attorney for Defendant

CERTIFICATE OF SERVICE

I HEREBY CERTIFY, that a copy of the foregoing was furnished to the Justice Administrative Commission, by email, on this 22nd day of July, 2015.

/s/ Julie Agent Schlax

Julie Agent Schlax, Esquire

From: Cole, Joshua <joshua.cole@justiceadmin.org>

To: Julie@esalawgroup.com
Cc:

Date: Wednesday, July 22, 2015 12:34 pm
Subject: 13 CF 5781; State v. Smith - JAC Response
Attachments:

JAC has received and reviewed the Motion to Incur Costs of Select Deposition Transcripts as to the above-referenced matter. JAC will not be filing a formal response and takes no position as to your motion. You may utilize this email in lieu of a formal response and should attach it to your motion when you provide it to the court.

Joshua Cole
Management Review Analyst
Justice Administrative Commission
P: 866.355.7902
Please visit our website at www.justiceadmin.org

Please do not respond to this account with additional pleadings.
All pleadings should be sent to pleadings@justiceadmin.org ONLY

PLEASE NOTE: All e-mail is potentially available as a public record.

IN THE CIRCUIT COURT, FOURTH
JUDICIAL CIRCUIT, IN AND FOR
DUVAL COUNTY, FLORIDA

CASE NO: 16-2013-CF-5781-AXXX
DIVISION: CR-D

STATE OF FLORIDA

VS.

DONALD SMITH
_____/

ORDER GRANTING MOTION TO INCUR COSTS OF SELECT DEPOSITION TRANSCRIPTS

THIS CAUSE having come before the court upon the Defendant's Motion, and the Court having been fully advised in the premises, and finding that the transcripts are both necessary and essential to the defense in this cause, it is

ORDERED AND ADJUDGED as follows:

Julie Agent Schlax, Esquire is hereby authorized to incur the reasonable costs of obtaining the transcripts of the depositions of the following witnesses:

Date of Proceeding	**Type of Proceeding**	**Name of Witness**
June 4, 2015	Deposition	Nikki Lee
July 2, 2015	In-court deposition	Patricia Moore

IT IS FURTHER ORDERED AND ADJUDGED that the Justice Administrative Commission shall pay these reasonable costs upon submission of the proper invoice(s) and that the rate shall be $4.00 per page transcribed for depositions, $5.00 per page transcribed for hearings, and $0.50 per page for copies of transcriptions.

DONE AND ORDERED at the Duval County Courthouse, Jacksonville, Florida on this 28 day of July 2015.

Circuit Judge

Copies to:
Julie Agent Schlax, Esquire
Justice Administrative Commission

FILED 07/29/2015 PM 03:07 RUSSELL

IN THE CIRCUIT COURT, FOURTH JUDICIAL CIRCUIT, IN AND FOR DUVAL COUNTY, FLORIDA

CASE NO: 16-2013-CF-5781-AXXX-MA
DIVISION: CR-D

STATE OF FLORIDA

vs.

DONALD SMITH
_____/

ORDER APPOINTING MENTAL HEALTH EXPERT

THIS CAUSE, came on to be heard upon the Defendant's Motion for Appointment of Mental Health Expert, and the Court having been fully advised in the premises, and finding that a Mental Health Expert is both necessary and essential to the defense in this cause, it is

ORDERED as follows:

1. That Dr. Heather Holmes, Forensic Psychologist, is hereby appointed as an expert in this matter.

2. The initial fee cap of $10,000.00 at an hourly rate of $200.00 is approved; travel rate is also approved at an hourly rate of $200.00. The expert is further authorized to incur travel related expenses to include mileage, air fare and hotel.

3. That the Justice Administrative Commission shall be responsible for payment to Dr. Holmes upon submission of proper invoices.

4. That should the Defendant need to exceed said cap, the Defendant shall seek leave of the Court prior to incurring any additional fees.

DONE AND ORDERED in Duval County, Jacksonville, Florida on this 16 day of September, 2015.

THE HONORABLE MALLORY D. COOPER
CIRCUIT JUDGE

Copies to: Julie Agent Schlax
Justice Administrative Commission
Heather Holmes, Forensic Psychologist

FILED 09/17/2015 10:25 RUSSELL

IN THE CIRCUIT COURT, FOURTH JUDICIAL CIRCUIT, IN AND FOR DUVAL COUNTY, FLORIDA

CASE NO: 16-2013-CF-5781-AXXX-MA
DIVISION: CR-D

STATE OF FLORIDA

vs.

DONALD SMITH
_____/

SECOND ORDER AUTHORIZING ADDITIONAL COSTS OF MITIGATION COORDINATOR/INVESTIGATOR AND MITIGATION EXPENSES

THIS CAUSE, came on to be heard upon the Defendant's Motion for Authority to Incur Additional Costs of Mitigation Coordinator/Investigator and Mitigation Expenses, and the Court having been fully advised in the premises, and finding that a Mitigation Coordinator/Investigator is both necessary and essential to the defense in this cause, it is

ORDERED as follows:

1. That Julie Agent Schlax, Esquire is hereby authorized to incur additional reasonable expenses of Brooke Butler, Ph.D., P.A.;

3. That the Justice Administrative Commission, shall pay the costs of the invoices submitted by Brooke Butler, Ph.D., P.A., at an hourly rate of $75.00 and not to exceed an additional amount of $10,000.00 without further Order.

4. It is further ordered that the Justice Administrative Commission shall pay the reasonable and necessary travel expenses incurred by Brooke Butler, Ph.D., P.A.

DONE AND ORDERED in Duval County, Jacksonville, Florida on this 16 day of September, 2015.

THE HONORABLE MALLORY D. COOPER
CIRCUIT JUDGE

Copies to: Julie Agent Schlax
Justice Administrative Commission
Brooke Butler, Ph.D., P.A.

FILED 09/17/2015 10:25 RUSSELL

IN THE CIRCUIT COURT OF THE FOURTH JUDICIAL CIRCUIT IN AND FOR DUVAL COUNTY, FLORIDA

CASE NO.: 16-2013-CF-5781-AXXX
DIVISION: CR-D

STATE OF FLORIDA,
Plaintiff,
v.

DONALD JAMES SMITH,
Defendant.
_____/

MOTION FOR CHANGE OF VENUE

NOW COMES the Defendant, Donald James Smith, by and through undersigned counsel and pursuant to Fla. R. Crim. P. 3.240, and moves this Honorable Court to enter an order changing venue from this county to Miami-Dade County in the State of Florida in the above-styled cause. In support thereof, the defendant would assert as follows:

FACTS

The Defendant, Donald Smith, stands accused of First Degree Murder, Capital Sexual Battery, and Kidnapping of a Child.

The media coverage of Mr. Smith began on June 22, 2013. Throughout the months we have been able to recover a sample of this coverage. The coverage is grouped into three categories: television reports, newspapers/articles, and blogs. In all of these forums, the coverage has been overwhelmingly negative for Mr. Smith.

First, local television networks have reported on all aspects of the case. In a sampling of more than 175 reports, reporters and commentators have discussed everything from breaking news reports on "new evidence" released, to confidential conversations between Mr. Smith and

his mother. A summary and assortment of such videos will be provided to the Court and State Attorney's Office as Exhibit A prior to hearing on this matter.

Second, the local news in Jacksonville has written thousands of articles on the case. In the modern Internet age, these articles are easily accessible to the public. For instance, a search of the case on the Florida Times Union website (Jacksonville's newspaper) brings up 1,291 stories. Moreover, every Jacksonville news station has a web page dedicated to the case. On www.news4jax.com a simple search of "Donald Smith" brings up 165 articles, and on www.actionnewsjax.com the same search brings up 184 articles.

In addition to the local news in Duval County, other news outlets across the state have covered this case including Panama City, Tallahassee, Orlando, Tampa and Miami. Additionally, national publications covered the case including such publications as CNN, Fox News, Yahoo! News and The Huffington Post. Furthermore, this case was even covered internationally by MailOnline.com out of the United Kingdom. A summary and assortment of such news articles will be provided to the Court and State Attorney's Office as Exhibit B prior to hearing on this matter.

Finally, there are numerous social media sites that call for justice in the case. Specifically, these blog sites call for users to express their opinions on the case, all of which are negative towards Mr. Smith. There are four different Facebook pages with more than 2,894 "likes" and there is a petition to strengthen Florida sex offender laws for Cherish Perrywinkle, which has more than 2,564 commentators. Nearly every poster has fans, or people who support the poster, so this causes exponential distribution of the posts. A summary and assortment of such social media will be provided to the Court and State Attorney's Office as Exhibit C prior to hearing on this matter.

The scope of this prejudice and bias, as well as the extent this news reaches the population, can only be measured by what has been reported. There have been ***seven*** consistent themes expressly repeated by the local media and public in Jacksonville.

1. Mr. Smith is Guilty

The media and the public believe Mr. Smith is guilty. In almost every news report Mr. Smith is discussed as the person who killed Cherish Perrywinkle. Although many reporters couched their negative coverage of Mr. Smith with "alleged murderer," some have even flat out said he is guilty.

For example, while discussing the past civil commitment of Mr. Smith, a reporter said "He would have been kept civilly committed indefinitely, instead of being in a Wal-Mart where he kidnapped Cherish." *Sex Offender Should Have Been Behind Bars*, WJHG NEWS (June 24, 2013, 6:39 PM), http://www.wjhg.com/home/headlines/Sex-Offender-Should-Have-Been-Behind-Bars-212821791.html.

News 4 Jax crime expert, Ken Jefferson, announced Mr. Smith's guilt on multiple occasions: "This incident is all over the map now, it's gone viral, because of the heinous act by Mr. Smith." *The Abduction and Killing of Cherish Perrywinkle*, NEWS 4 JAX (June 30, 2013, 8:07 AM), http://www.news4jax.com/politics/The-abduction-and-killing-of-Cherish-Perrywinkle/-/1875986/20777420/-/bll0soz/-/index.html; "The way he murdered this child, and then tried to conceal her body, is sickening." *Evidence Released in Murder Case Against Donald Smith*, NEWS 4 JAX (Oct. 28, 2013, 7:25 PM), http://www.news4jax.com/news/evidence-released-in-murder-case-against-donald-smith/-/475880/22680018/-/qn49cqz/-/index.html.

With the constant media reports relating to Mr. Smith's guilt, it's no wonder adults in Jacksonville began believing Mr. Smith was guilty too. An Action News Jax reporter stated,

"Parents want to know why he was allowed back on the streets to prey on children like Cherish again." *State Lawmakers Push for Changes to Sex Offender Regulations*, ACTION NEWS JAX (June 25, 2013, 6:26 PM), http://www.actionnewsjax.com/content/topstories/story/State-lawmakers-push-for-changes-to-sex-offender/RoE6tP_QQEeJ2c15DMqdFA.cspx.

The community has made it known through social media that they believe Mr. Smith is guilty. A Facebook page titled "In Memory of Cherish Perrywinkle" has more than 2,250 "likes" and nearly every post has been "shared" exponentially. A typical post reads as follows, "This Donald Smith scumbag was living with his mother and within view of a middle school;" or "I'm sorry but she raised a monster and she should be ashamed of herself." *See In Memory of Cherish Perrywinkle*, FACEBOOK BLOG, (Mar. 11, 2014, 10:30 AM), https://www.facebook.com/InMemoryOfCherishPerrywinkle.

2. Character Denigration

Mr. Smith is presumed guilty by the media, thus it has made no attempt to protect his character. The media did everything in its power to find and tell its audience anything and everything negative about Mr. Smith's past, without presenting Mr. Smith's side of the story.

First, television stations interviewed neighbors to find out any information they could about Mr. Smith. News 4 Jax said that neighbors were always "cautious around Smith" and that anytime Smith was in the area they were "on guard." *Organizations React to A Child's Murder*, NEWS 4 JAX (June 24, 2014, 11:28 PM), http://www.news4jax.com/news/Organizations-react-to-a-child-s-murder/-/475880/20701180/-/m0mtxmz/-/index.html. A reporter for First Coast News said, "Neighbors who know Donald Smith call him a smooth talker, and they describe him as having an answer for everything…Sadly people in Smith's neighborhood knew to keep their kids away from him, a warning they wish they could have given to Cherish's family." *Safety Experts*

Offer Insight into Habits of Sexual Offenders, FIRST COAST NEWS (June 26, 2013, 4:22 PM), http://archive.firstcoastnews.com/news/local/story.aspx?storyid=317882. One neighbor, Mary Gagliardi, told Action News Jax, "He bought a little stuffed horse and put it right by the driver's dash. I said to my husband. He's doing that to attract kids." *Smith's Neighbors Recall Odd Behavior*, ACTION NEWS JAX (June 22, 2013, 8:35 PM), http://www.actionnewsjax.com/content/topstories/story/Smiths-neighbors-recall-odd-behavior/xcCOhWVFbE2ckuPPVlsGvw.cspx.

The local news networks also interviewed people who knew or had encountered Mr. Smith over the years. News 4 Jax interviewed Mr. Smith's former cellmate, who talked about Mr. Smith's deception while in prison. The reporter started the segment by saying, "Smith even conned the cons into thinking he was someone he wasn't." He said that Mr. Smith lied to other inmates about his charges and that no one knew whom he really was. *Former Inmate Remembers Donald Smith*, NEWS 4 JAX (July 5, 2013, 7:02 PM), http://www.news4jax.com/news/Former-inmate-remembers-Donald-Smith/-/475880/20857560/-/1161imi/-/index.html.

Action News Jax interviewed a man who also had kids with Mr. Smith's ex-wife. The reporter said that something made the man, Hasty, feel uncomfortable leaving his daughter alone with Mr. Smith. "Every time I caught him in the same vicinity as her, I caught him looking at her, and she was only 2 or 3 at the time." Hasty never let his daughter see Mr. Smith again. *Justice for Cherish: Donald Smith's Past*, ACTION NEWS JAX (July 1, 2013, 11:02 PM), http://archive.firstcoastnews.com/news/local/story.aspx?storyid=317709.

After interviewing people who knew Mr. Smith, the news media then made an event out of Mr. Smith's criminal history. For instance, Action News Jax ran a story "live from Windy

Hill Elementary Park," the place of one of Mr. Smith's alleged sex crimes. The story went on to report all of Mr. Smith's prior crimes including: siphoning gas, driving a stolen vehicle, grand theft, violation of probation, high-speed chase in a stolen car, unauthorized use of a sheriff's office insignia, a suspended license and burglary. *New Documents Trace Donald Smith's Past to his Teens*, ACTION NEWS JAX (Mar. 6, 2014, 9:12 PM), http://www.actionnewsjax.com/content/topstories/story/New-documents-track-Donald-Smith-s-criminal-past/BNH0xlVXbUu4OSjBTveHtg.cspx. Most of these convictions are more than ten years old, thus they will not even be admitted into evidence.

Almost every nightly news report emphasized Mr. Smith's sex crime convictions in 1977, 1992, and 2009. *Id; Donald Smith did not Meet "Sexual Predator" Criteria*, NEWS 4 JAX (July 23, 2013, 7:50 PM), http://www.news4jax.com/news/Donald-Smith-did-not-meet-sexual-predator-criteria/-/475880/21134736/-/14tle1i/-/index.html; *Sex Offender Should Have Been Behind Bars*, *supra* page 3. *The Abduction and Killing of Cherish Perrywinkle*, *supra* page 3.

News 4 Jax ran an entire segment on Mr. Smith's 2009 conviction for posing as a DCF worker. It interviewed the mother of the alleged victim who said that Donald asked her daughter if she "had hair down there," and if she was "wearing a bra." The reporter mentions that when Mr. Smith was asked about this, he said he remembers making the phone calls, but he cannot remember why he had the girl in his phone under favorites. *Victim's Mother Speaks*, NEWS 4 JAX (June 25, 2013, 11:24 PM), http://www.news4jax.com/Victim-s-mother-speaks/-/475982/20717282/-/m1s119/-/index.html.

Once the news media reported Mr. Smith's criminal history, many segments would have an "expert" on air to help "review" Mr. Smith's criminal history. For instance, News 4 Jax interviewed former Prosecutor Rick Alexander who said that Mr. Smith developed the ability to

become a "con artist" based upon his former convictions of writing worthless checks and that Mr. Smith has a "pattern of interest in children," going all the way back to the 70s. *The Abduction and Killing of Cherish Perrywinkle*, *supra* page 3. Alexander told a later program that someone made a major error in not deeming Mr. Smith a sexual predator because there were a lot of red flags in his report. *Donald Smith did not meet "Sexual Predator" Criteria*, *supra* page 6.

News reports also analyzed Mr. Smith's alleged behavior during his time in prison. According to the news media, Mr. Smith was always in trouble in jail. He broke rules, and "was sighted nearly a dozen times for possessing drugs and disobeying orders." *Id.* First Coast News says he lied to prison officials and his answers changed by the day. *New Documents Released on Donald Smith*, FIRST COAST NEWS (July 22, 2013, 10:27 PM), http://www.firstcoastnews.com/story/local/2013/07/22/4612003/.

Moreover, the news media painted Mr. Smith as someone who was not willing to help himself while in jail. It mentioned that Mr. Smith "refused to participate in his own treatment several times" and that "he declined to be interviewed or attend therapy." *Id.* He explained that he did not want to be treated while he was incarcerated because "this program will never touch the modalities I've been through." *Id.* This was mentioned without discussing any legitimate reason Mr. Smith would choose not to participate or make these statements.

Even current congressmen have weighed in on Mr. Smith's past to the media. Representative Janet Atkins said, "From the news reports it looks like he's been engaged with the laws since the 70's, so you're looking at 40 years where he has been engaged with some criminal behavior or another, the reports that three felony charges were reduced to misdemeanor charges certainty has me concerned." Additionally, State Senator Aaron Bean pondered to News 4 Jax whether Donald Smith was properly reviewed under the Jimmy Ryce Act. *Lawmakers*

Scramble for Answers, NEWS 4 JAX (June 26, 2013, 11:35 PM), http://www.news4jax.com/news/Lawmakers-scramble-for-answers/-/475880/20733620/-/vscr2z/-/index.html.

3. Mr. Smith is a Sexual Predator?

A sexual predator is defined in Florida as an individual who has committed *a sexually violent offense* as defined in § 775.21, Fla. Stat. (2013), whereas a sexual offender is someone who may have just engaged in simple sexual misconduct. Until this alleged incident, Mr. Smith has never engaged in or been charged with violent conduct towards a minor. Thus, Mr. Smith was never labeled a sexual predator.

Despite these facts, the media has repeatedly labeled Mr. Smith as a sexual predator. *See* Brandon Jones, *Cherish Perrywinkle Laid To Rest As Her Mother, Rayne Perrywinkle Blames Herself,* THE GLOBAL DISPATCH (June 28, 2013, 3:26 PM), http://www.theglobaldispatch.com/cherish-perrywinkle-laid-to-rest-as-her-mother-rayne-perrywinkle-blames-herself-17423/; ("Smith was a predator who seized the opportunity to snatch the woman's daughter and kill her."); Tamara Rush, THE HUFFINGTON POST (June 28, 2013, 3:26 PM); http://www.huffingtonpost.com/2013/06/28/cherish-perrywinkle_n_3516998.html*Rayne Perrywinkle Tries to Regain Custody of Her Daughters*, FIRST COAST NEWS (Aug. 8, 2013, 6:11 PM), http://beaches.firstcoastnews.com/news/news/121133-rayne-perrywinkle-tries-regain-custody-daughters ("Convicted sexual predator Donald Smith is now facing charges."); *New Documents Describe Murder Suspect's State of Mind*, ACTION NEWS JAX (Dec. 6, 2013, 4:59 PM), http://www.actionnewsjax.com/content/topstories/story/New-documents-describe-murder-suspects-apparent/tDeEkRAsyU-AjOYQ0MlW_g.cspx ("Convicted sexual predator Donald Smith is now facing charges.").

4. Community Exposure

The purpose of this section is not to condemn the outpouring of support for Cherish Perrywinkle and her family. Rather, the goal is to show the extent to which Jacksonville as a community is invested in Cherish, leading to bias on behalf of the entire area.

From the moment Cherish Perrywinkle was announced missing in June, the news media began documenting the communities' support. In describing the search for Cherish Perrywinkle, an Action News Jax reporter said, "Nearly all of Jacksonville was looking for Cherish Saturday morning." *Memorial Growing Outside of Highlands Baptist Church*, ACTION NEWS JAX (June 22, 2013, 10:57 PM), http://www.actionnewsjax.com/content/topstories/story/Memorial-growing-outside-of-Highlands-Baptist/oT9WC_Sw0kG2fhwfCYpblQ.cspx. After Mr. Smith's initial arrest the Perrywinkle family released a statement to Action News Jax thanking the community for its help: "No words can describe how I feel right now. The support from those I don't even know in Jacksonville is overwhelming." *Family Overwhelmed by Support*, ACTION NEWS JAX (June 26, 2013, 5:03 PM), http://www.actionnewsjax.com/content/topstories/story/Cherish-Perrywinkles-family-receives-donations/qoaMZdsma0Ce2IrRK96iFA.cspx. According to another reporter, "the outpouring of support has been constant. I'm told it has only brought this tight knit community closer." *Community in Mourning*, ACTION NEWS JAX (June 24, 2013, 5:29 PM), http://www.actionnewsjax.com/content/topstories/story/Witness-saw-Cherishs-family-minutes-before/AXhn_b114kuweqyrx0vMVg.cspx.

A News 4 Jax reporter described it best, "When Cherish Perrywinkle was abducted and found dead, the whole community wept. Most didn't know the 8-year-old girl, but so many wanted to help." *Help for Cherish's Funeral*, NEWS 4 JAX (June 26, 2013, 5:59 PM),

http://www.news4jax.com/news/Help-for-Cherish-s-funeral/-/475880/20728992/-/du8jj4/-/index.html. Families that did not even know the Perrywinkles stopped by to bring groceries and fix their air condition unit. *Vigil for Murdered 8-Year-Old Girl*, ACTION NEWS JAX (June 24, 2013, 2:26 AM), http://www.actionnewsjax.com/content/topstories/story/Vigil-for-murdered-Jacksonville-8-year-old/nBAwpg09hUqUdJXa7hnBig.cspx.

According to News 4 Jax, there were between eighteen and nineteen *hundred* people estimated to have signed the guest book at Cherish's viewing. As one reporter recalled, "While almost 2000 showed up, only about 30 knew her." *Preparing to Say Goodbye*, NEWS 4 JAX (June 27, 2013, 11:24 PM), http://www.news4jax.com/news/Preparing-to-say-goodbye/-/475880/20752000/-/10miury/-/index.html.

At Cherish's memorial hundreds of people were present at the Highlands Baptist Church where the pews of the church were filled. Karen Feagins, *Cherish Perrywinkle Memorial*, WGCU NEWS (June 24, 2013), http://news.wgcu.org/post/cherish-perrywinkle-memorial. Additionally, Cherish's funeral was televised live for all of Jacksonville to see on News 4 Jax. *Uncut: Funeral Service for Cherish Perrywinkle*, NEWS 4 JAX (June 28, 2013, 5:42 PM), http://www.news4jax.com/news/uncut-funeral-service-for-cherish-perrywinkle/-/475880/20765136/-/m2hc88/-/index.html.

The community has not forgotten about Cherish. Nearly eight months after the tragedy, a News 4 Jax reporter said, "Everyone in Jacksonville remembers the kidnapping and murder of 8-year old Cherish Perrywinkle last summer." *RAD Kid Program Teaches Self Defense*, NEWS 4 JAX (Feb. 21, 2014, 9:54 AM), http://www.news4jax.com/news/RAD-kids-program-teaches-self-defense/-/475880/24599178/-/13wdk5f/-/index.html.

Cherish is remembered not only in Jacksonville, but also across the State. Recently, Florida State Senator Eleanor Sobel said this on the Senate floor: "We all remember innocent children like Cherish Perrywinkle. Who at the age of 8 was abducted from Wal-Mart, raped, strangled, and her 60 pound body found behind a church." *Legislative Session Begins with Sexual Predator Law*, NEWS 4 JAX (Mar. 4, 2014, 8:03 PM), http://www.news4jax.com/news/Legislative-session-begins-with-sexual-predator-law/-/475880/24804348/-/f4j7ssz/-/index.html.

5. Our System Let us Down

Since Mr. Smith's arrest, the news media has relentlessly told viewers that the criminal justice system failed the community by letting Mr. Smith out of jail. News 4 Jax and Action News Jax interviewed dozens of criminal defense attorneys, prosecutors, FBI agents, etc., who all made this same point. Below are just a few examples:

Dale Carson, criminal defense attorney and former FBI agent: "It's just a failure of the system." "He should have been designated as a sexual predator." *New Documents Trace Donald Smith's Past to his Teens*, *supra* page 6.

Dr. Marcus DeCarvalho, psychiatrist that treats sex offenders: "This is a mental illness. He should not have been released to the public. You can't rehabilitate someone who is a pedophile and a sociopath." *Smith's Criminal History*, NEWS 4 JAX (June 24, 2013, 6:26 PM), http://www.news4jax.com/news/Smith-s-criminal-history/-/475880/20698168/-/6oyqi/-/index.html.

Ann Dugger, Justice Coalition: "They don't need to be in society, they don't need to be around children, they don't need to be around their prey." *Lunsford Reacts to Perrywinkle*

Murder, NEWS 4 JAX (June 25, 2013, 5:51 PM), http://www.news4jax.com/news/Lunsford-reacts-to-Perrywinkle-murder/-/475880/20713192/-/2958wkz/-/index.html.

Ken Jefferson, News 4 Jax Crime Expert: "The system failed by allowing Smith to be released to the public." "We need to look at the process where we release those criminals, because chances are, they are going to strike again." *Id.*

David Rowe, founder of No Peace for Predators: "They like children. You can't fix that. They need to stop letting these people out of jail. It's an epidemic. It's getting worse and worse and worse." *Organizations React to A Child's Murder*, *supra* page 4.

It is no wonder the public, and potential jurors also believe Mr. Smith should never have been released from prison. An Action News Jax reporter said, "Donald Smith's run ins with the law over the years highlight the *public sentiment* that questions why he was running free to begin with." *New Documents Trace Donald Smith's Past to his Teens*, *supra* page 6. A woman from the community highlighted the cities' frustration when she said, "He should have never been released. Ever. I know, it's no one's fault." *JSO Releases Timeline of Events*, NEWS 4 JAX (June 25, 2013, 11:28 PM), http://www.news4jax.com/news/JSO-releases-timeline-of-events/-/475880/20717358/-/v6trhqz/-/index.html.

Ultimately, this community anger fueled a campaign to change the laws. In almost every interview, memorial, or speaking opportunity, Jacksonville citizens made it clear they wanted sex offender laws changed. *See generally* Patrick Donges, *Hearing On Sex Offenders Law Planned As Momentum Builds for "Cherish's Law,"* WJCT NEWS, (Sep. 3, 2013), http://news.wjct.org/post/hearing-sex-offender-laws-planned-momentum-builds-cherishs-law. At Cherish's funeral, Cherish's pastor said "Let's not let another guy like this walk free so we lose another one of our babies." *Uncut: Funeral Service for Cherish Perrywinkle*, *supra* page 10.

A petition was started to pass a law called "Cherish's Law." Almost 3,000 individuals signed the petition. *Cherish's Law*, CARE 2 PETITION (Mar. 11, 2014 11:46 AM), http://www.thepetitionsite.com/735/993/920/cherishs-law/. Additionally, residents created a Facebook page dedicated to passing Cherish's law entitled *Justice For Cherish*, FACEBOOK BLOG (Mar. 11, 2014, 11:00 AM), https://www.facebook.com/justiceforcherish. The page had over 580 "likes," and nearly all of the posts to the page were shared. A common post on this page reads, "The monster that killed her should have never been let you of jail! It's time we rise up in outrage!" *Id.*

Unlike most citizen complaints to Congress, the people of Jacksonville were heard. Florida Representative Adkins of Jacksonville told News 4 Jax "the kidnapping and murder of 8-year-old Cherish Perrywinkle is proof that laws related to sex offender crimes against children need to be discussed and adjusted." *Hearing on Sex Offender Laws*, NEWS 4 JAX (Sep. 4, 2013, 8:34 AM), http://www.news4jax.com/news/Hearing-on-sex-offender-laws/-/475880/21771974/-/2wabwc/-/index.html.

The community was so active in its fight for Cherish that the Florida Senate passed four different bills to better protect children from "alleged offenders like Mr. Smith." *Legislative Session Begins With Sexual Predator Law*, *supra* page 11.

At a time when the Florida Legislature agrees on next to nothing, all four bills passed forty to zero. Jacksonville Sheriff John Rutherford was in Tallahassee to support the legislation and he said, "This has been the most bipartisan initiative I have ever seen here in Tallahassee." *Sex Offender Law up for Discussion*, NEWS 4 JAX (Mar. 4, 2014, 8:37 AM), http://www.news4jax.com/news/Sex-offender-law-up-for-discussion/-/475880/24792438/-/a93v9d/-/index.html.

The discussion and ultimate passage of the bill has led to continuous negative conversation about Mr. Smith. Anytime "Cherish's Law" is mentioned, the media points out that Mr. Smith was the cause of the law. Even after the passage of the bill, Florida Representative Charles McBurney reminded television viewers that this law was "too late" to save Cherish Perrywinkle. *Sexually Violent Predators Going Nowhere*, WJHG NEWS (Mar. 12, 2014, 7:11 AM), http://www.wjhg.com/home/headlines/249640001.html.

6. Indoctrination of the State's Theory

The media has slowly been building its case against Donald Smith. Every week, new evidence is leaked that can further "prove" the states theory. Even though the media admits that much of this "evidence" will not make it into Court, it has not stopped the media from reporting vigorously to prove Mr. Smith's guilt. *See New Evidence in Donald Smith Case*, NEWS 4 JAX (Dec. 6, 2013, 7:16 PM), http://www.news4jax.com/news/New-evidence-in-Donald-Smith-case/-/475880/23363620/-/kw3yfl/-/index.html (Reporter says that he has been told most of the newly released evidence will not be allowed in Court).

Beginning with the physical evidence, the media set the scene for viewers. "The details are nauseating, and the pictures, heart breaking." *Evidence Released in Murder Case Against Donald Smith*, *supra* page 3. A reporter for First Coast News showed pictures from inside Mr. Smith's mom's van that appeared to be "dark hairs" on the seats. It showed pictures of Mr. Smith, and in the words of the reporter what appear to be "scratches, lacerations and bruises on his legs, arms, and back, and an open wound on his thigh." The reporter continues saying that the bruises could be consistent with sexual assault, while not mentioning that the bruises could be consistent with a number of other things. *Flood of Documents in Cherish Perrywinkle Case*

Offers Graphic Look at the State's Evidence, FIRST COAST NEWS (Oct. 29, 2013, 2:54 PM), http://archive.firstcoastnews.com/news/local/story.aspx?storyid=333522.

All three major news networks let the viewers know that DNA evidence links Donald Smith to Cherish Perrywinkle and "what that means" for the case. For example, "Investigators found Mr. Smith's DNA all over Cherish's body, and the likelihood that it is someone else's, is 35 quintillion to 1." *Evidence Released in Murder Case Against Donald Smith*, *supra* page 3; *Flood of Documents in Cherish Perrywinkle Case Offers Graphic Look at the State's Evidence*, supra page 15; *New Evidence links Donald Smith to Cherish Perrywinkle*, ACTION NEWS JAX (Oct. 28, 2013, 11:00 PM), http://www.actionnewsjax.com/content/topstories/story/New-evidence-links-Donald-Smith-to-Cherish/_8KyrhbWMkaJm_ut8DeSLQ.cspx.

Next the news media set out to prove that Mr. Smith premeditated this alleged crime. News 4 Jax Crime Expert Ken Jefferson said, "This person's intention probably by putting the body in water or near water was in hopes the water would wash away some of the evidence that was on her body that he left there after he sexually assaulted her and then murdered her." *Evidence Released in Murder Case Against Donald Smith*, *supra* page 3.

One report discussed allegations that Donald Smith went to a homeless park to take pictures three straight days before the kidnapping. At the park, Mr. Smith asked a woman about a lake just miles from where authorities found Cherish Perrywinkle. A local attorney, Eric Friday explained that this was typical behavior for sex offenders like Smith. "When you have a sexual predator like Mr. Smith, they are always looking for their next victim." The report then discusses evidence that Mr. Smith's former cellmate admitted to helping Smith take the rear seats out of his mother's van the day before Smith used it "to kidnap Cherish Perrywinkle." The

reporter concludes saying, "It's obvious he was making plans." *New Documents Describe Murder Suspect's State of Mind*, *supra* page 8.

Next the news media released Mr. Smith and his mother's jail conversations- or more accurately, the portions of the conversation that favored the State. Specifically, the media reported that Mr. Smith asked his mother to get him a DS M-4 Book, a book that highlights psychiatric problems. Mr. Smith said he would use that to find out what level he needs to qualify for treatment. He stated, "It's a one-shot deal. I need to know what I have." *New Evidence in Donald Smith Case*, *supra* page 14.

The media did touch on Mr. Smith's potential alibi defense, but only to argue that it would fail. Multiple media outlets summarized Mr. Smith's police interrogation as follows:

> He told his mom he was going to an alcoholic anonymous meeting in San Marco. He told investigators he was smoking crack with prostitutes. When they asked him why he was soaking wet, he told investigators I sweat a lot when I smoke drugs. Then once the Sergeant said we have you on surveillance with Cherish, and we see her going out of the store and into the van with you, he says oh yea she was with me but got out at a red light and ran away. That is when he asked for that lawyer.

Evidence Released in Murder Case Against Donald Smith, *supra* page 3; *see generally Flood of Documents in Cherish Perrywinkle Case Offers Graphic Look at the State's Evidence*, *supra* page 15.

In addition to "new evidence released," the news media allowed Cherish's mother Rayne Perrywinkle to make many unsubstantiated claims to the media. Ms. Perrywinkle told News 4 Jax that if it had not been her daughter, it would have been someone else's child and that "this man was trolling." *Remembering Cherish*, NEWS 4 JAX (June 24, 2013, 6:44 PM), http://www.news4jax.com/Remembering-Cherish/-/475982/20699226/-/bddy59z/-/index.html. She told First Coast News, "This monster knew where we lived. He was seen in my neighborhood earlier that week and on my street. He was seen in the Moncrief area two weeks

before my daughter was taken, that is where my daughters went to school." *Rayne Perrywinkle*: "*Cherish Would be Here*," First Coast News (Sept. 19, 2013, 10:32 PM), http://archive.firstcoastnews.com/news/local/story.aspx?storyid=328582. In neither of these reports was Ms. Perrywinkle asked to explain her assertions, despite the fact that there was no evidence to support them.

7. Mr. Smith is a Monster and Should be Executed

A beautiful little girl was taken from her family and killed. These are powerful facts that would elicit emotion in anyone. The reaction in Jacksonville has been passionate to say the least.

An Action News Jax reporter led off a segment on Cherish Perrywinkle by saying, "the 8 year old was stolen from us Friday. She was lured from a local Wal-Mart by a *monster*." Police say Donald Smith is responsible. *Family Overwhelmed by Support*, *supra* page 9.

One segment by Action News Jax began by showing a picture of Donald Smith with the reporter saying in the background "Parents call him the face of pure evil." The report then switches to a random woman who says: "It makes me mad every time I see his face, because, how could you do that to a child." *State Lawmakers Push for Changes to Sex Offender Regulations*, *supra* page 4.

Criminal Defense attorney Dale Carson told Action News Jax, "These are the people that when you lay your head down on your pillow at night, you worry about." *New Documents Trace Donald Smith's Past to his Teens*, *supra* page 6.

After hearing this language, along with the alleged facts of the case, coupled by the media's relentless coverage of Mr. Smith's criminal history and many unsubstantiated claims about Mr. Smith's character- many people in Jacksonville want Mr. Smith killed.

Action News Jax interviewed the mother of one of Mr. Smith's alleged victims, who said, "I wish he was dead. I wish he was dead . . . He's sick. They need to electrocute him." *Victim of Donald Smith Says She was not Notified he was Released From Jail*, ACTION NEWS JAX (June 23, 2013, 4:29 PM), http://www.actionnewsjax.com/content/topstories/story/Victim-of-Donald-Smith-says-she-was-not-notified/lVgilmS7-EmjtFVW8Yr0Yg.cspx.

Ms. Perrywinkle told Action News Jax that she agrees Mr. Smith needs to be killed because it is the only way to keep him from harming a child again. *Questions About Donald Smith's Previous Sentence*, ACTION NEWS JAX (July, 3, 2013, 8:03 AM), http://www.actionnewsjax.com/content/topstories/story/Questions-about-Donald-Smiths-previous-sentence/Ya_YgivkBUyCe2fvot7pag.cspx.

Moreover, the effect of the media coverage on the public view of Mr. Smith is best evidenced through social media. On the petition site to pass tougher sex offender laws for Cherish, there are over 2,500 signatures in support of this bill. The people who sign the petition online have the ability to write a comment along with their signature. These comments express the bias, prejudice, preconceptions, and wrath of the population. Generally, the comments show a hate for sex offenders/ predators, and show how willing the population is to give these criminals the death penalty. For example, "It's time we stand together as a nation and protect our children. It's time for there to be a REAL punishment. Not just years in jail. They take a life they lose a life!" Another comment states, "[R]epeat offenders should be dragged through the street and then shot with a .22!" Another commentator posts, "I personally recommend execution. A child never deserves or asks for this. The only cure for a child molester is death." *Cherish's Law*, *supra* page 13.

Blog sites also show the communities negative opinion towards Mr. Smith. Nearly every poster has fans, or people who support the poster, so this causes exponential distribution of the posts. Many citizens believe that Donald Smith specifically should receive the death penalty, although he has yet to be found guilty.

> This creature willing[ly] gave up his humanity. Although entitled to a trial by a jury of his peers, the facts seem fairly straightforward. There are no mitigating circumstances that could or should lessen the severity of his sentence. I'm a liberal to the extreme, but we as a society have the right and the duty to protect our children from monsters like this. There is no redemption for men that commit this sort of crime.

Donald James Smith, Charged In Cherish Perrywinkle's Kidnapping, Murder, Has Long Criminal History, Article with Blog (Mar. 18, 2014 12:36 A.M.), http://www.huffingtonpost.com/2013/06/24/donald-james-smith_n_3491034.html.

Another poster says, "Florida is known for its executions. Too bad they didn't execute this monster years ago." Furthermore, even a poster that is generally against the death penalty, with 2,063 "fans," stated, "I am not a believer in the death penalty, but I would not lose any sleep if guys like [Donald Smith] received it." Another post turns our legal system around, "Given this depraved pig's track record, he should be considered guilty and have to prove his innocence, then summarily executed if he fails to do so." *Id.*

Finally, many citizens want personal vengeance upon Mr. Smith; "I've never seen a better case for vigilante justice, ever." That poster has 3,688 "fans." Another includes the desire to "Burn the savage rapist to death." This poster has 1,111 "fans." Some citizens even wish to see a spectacle of his execution, "I wish people like this could be thrown to lions…;" or "[Donald Smith] deserve[s] to be skinned alive in the town square and then set on fire." *Id.*

ARGUMENT

An accused in a criminal case has a Sixth Amendment right to a fair and impartial trial. *Singer v. U.S., 380 U.S. 24, 85 (1965).* The defendant must be "fairly tried in a public tribunal

free of prejudice, passion, excitement, and tyrannical power," in order to guarantee this right. *Sheppard v. Maxwell, 384 U.S. 333 (1966).* *Sheppard* depicts how extensive pre-trial and trial publicity can deprive a defendant of a fair trial, thus in *Sheppard*, the Court reverses the conviction for first-degree murder. In the majority opinion J. Clark quotes J. Bell from the Ohio Supreme Court:

> 'Murder and mystery, society, sex and suspense were combined in this case in such a manner as to intrigue and captivate the public fancy to a degree perhaps unparalleled in recent annals. Throughout the preindictment investigation, the subsequent legal skirmishes and the nine-week trial, circulation-conscious editors catered to the insatiable interest of the American public in the bizarre. * * * In this atmosphere of a 'Roman holiday' for the news media, Sam Sheppard stood trial for his life.'

Id. at 356.

The sensational and prejudicial nature of the coverage only heightened with the addition of State-slanted coverage of statements Mr. Smith had made to his mother, which the State will undoubtedly argue are admissions of guilt. *See Skilling v. U.S.,* __ U.S. __, 130 S.Ct. 2896, 2916 (2010) ("[A]lthough news stories about Skilling were not kind, *they contained no confession or other blatantly prejudicial information* of the type readers or viewers could not reasonably be expected to shut from sight") (emphasis added); *Parker v. Randolph*, 442 U.S. 62, 72 (1979) (plurality opinion) ("[T]he defendant's own confession [is] probably the most probative and damaging evidence that can be admitted against him.") (internal quotation marks omitted); *Rideau v. Louisiana*, 373 U.S. 723, 726-27 (1963) (presuming prejudice where public repeatedly exposed to spectacle of defendant's confession); *United States v. Thompson*, 908 F.2d 648, 650 (10th Cir. 1990)(holding that a media report "containing information concerning a prior plea agreement signed by [the defendant] was highly prejudicial").

The Florida Supreme Court has stated that defendant has the burden on a change of venue motion, however, the court is "bound to grant a motion for a change of venue when the evidence presented reflects that the community is so pervasively exposed to the circumstances of the incident that prejudice, bias, and preconceived opinions are the natural result." *Manning v. State, 378 So. 2d 274 (Fla. 1979)*. A judge may order a change of venue before the case has commenced or after attempting to empanel an impartial jury. *Id.* Community hostility may be established by inflammatory publicity or great difficulty in selecting a jury. *Holsworth v. State, 522 So. 2d 348 (Fla. 1997)*. Prejudice from a pre-trial publicity is presumed, however, when the publicity is sufficiently prejudice and inflammatory that it pervades the community where the trial is to be held. *Murphy v. Florida, 421 U.S. 794 (1975)*. So dangerous is the effect of pervasive pretrial publicity on a potential juror's mind that the Supreme Court has found that when the pretrial publicity in one case is so great, the court may disregard prospective jurors' assurances of impartiality. *See generally, Irvin v. Dowd 366 U.S. 717 (1961).*

Recent venue-change analysis in the United States Supreme Court turns in part on the size of the community around which the publicity swirls and where the accused will stand trial. Large populations in our Nation's metropolises afford more opportunities to find citizens who have not heard the publicity. Smaller communities risk the opposite. For example, as the Court held in Skilling, 130 S. Ct. at 2915, "more than 4.5 million individuals eligible for jury duty resided in the Houston area. App. 627a. Given this large, diverse pool of potential jurors, the suggestion that 12 impartial individuals could not be empaneled is hard to sustain." *Id.* Duval County has less than nine hundred thousand people. But the population of the proposed venue, Miami-Dade County, is over 2.5 million, creating a far better opportunity to empanel a fair and impartial jury.

Finally, the Florida Supreme Court has offered further guidance to courts confronted with a motion for change of venue:

> We take and make clear . . . that every trial court in considering a motion for change of venue must liberally resolve in favor of the defendant any doubt as to the ability of the State to furnish a defendant a trial by fair and impartial jury, Every reasonable precaution should be taken to preserve to a defendant trial by such a jury and to this end if there is reasonable basis shown for a change of venue a motion therefor properly made should be granted.
>
> A change of venue may sometimes inconvenience the State, yet we can see no way in which it can cause any real damage to it. On the other hand, granting a change of venue in a questionable case is certain to eliminate a possible error and to eliminate a costly retrial if it be determined that the venue should have been changed. More important is the fact that real impairment of the right of a defendant to trial by a fair and impartial jury can result from the failure to grant change of venue.

Singer v. State, 109 So. 2d 7 (Fla. 1959).

In the instant case, the defendant has shown a clear, pervasive, inflammatory and prejudicial coverage of his case by the pretrial publicity. The examples listed in this motion are but a very small sampling of stories and bylines incessantly reported ever since June 22, 2013. It is extremely difficult to keep track of all the prejudicial, false and inadmissible evidence that has been aired, publicized, and spread throughout the public arena. The effects of the negative coverage are best summarized by the themes expressly repeated by the media. The fact that the media purports Mr. Smith's guilt goes to the fact that the media has been skewed in favor of the prosecution's side. Mr. Smith's character being denigrated, and his mislabeling of a "sexual predator", has shown that the media was used to spread inflammatory stories, not impartial facts. Moreover, the advent of the Internet and its potential for interactive communication with the public has captured and cultivated already negative and pervasive coverage to an entirely new level. All who have posted on social media, blogs, and websites indicate the size of the community that was exposed to this negative publicity. So much, and so frequent, was the

exposure of all this negative publicity that it has culminated in changing Florida law. The amount of distracting and irrelevant information that is also reported, since the onset of this case, further distorts the public's perception of this case, which has engrained in the public a desire to execute Donald J. Smith.

This Court has the ability to grant the Change of Venue based on the evidence presented in this case prior to the commencement of the jury selection process. *Manning 378 So. 2d 274* at 276. It will be futile to attempt to select a jury in Duval County for the current case. Because of the pervasive, inflammatory, and prejudicial nature of the media this, Court will discover the inevitable, selecting a jury in Duval County is impossible. The jury selection process will come at great expense in both time and capital for all parties involved simply to conclude that an impartial jury cannot be found. This honorable Court should grant the motion for a change of venue without the need to search for an impartial jury in Duval County.

The defense believes that it has more than carried its burden and therefore wishes to avoid/ reduce the risk of creating any further prejudice via the listing in this pleading of additional examples. In the event that the court does not agree that a sufficient showing has been made, the Defendant requests leave to submit further prejudicial coverage and comments to the Court.

Finally, the defense requests that this case be transferred specifically to Miami-Dade County. There are several reasons for this specific request. First, the publicity in the defendant's case has had pervasive effects not only in the immediate community of Jacksonville, but also in the surrounding areas as well. The Defense feels confident in expressing to this court that the same concerns expressed herein as to Mr. Smith's ability to receive a fair trial in this county are also true of all counties in Northeast Florida. Second, Miami-Dade County is sufficiently

removed geographically to have a real effect on the defendant's ability to obtain an impartial jury. Local coverage there has not been anywhere near what it has been in, or around, Duval County. In fact, relative to its size, Miami-Dade County area was exposed to only a small percentage of all stories from June 22, 2013 to October 16, 2015. Finally, because of its population, Miami-Dade County offers a large and diverse enough jury pool to facilitate the empaneling of a fair and impartial jury in this case. Moreover, Miami-Dade County area would be better able to absorb and deal with intense media attention during the pendency as opposed to smaller communities such as those not requested.

CONVENIENCE

The court should also consider convenience in granting the motion for a change of venue. Miami-Dade County has a large population in the State of Florida, as such it can handle a case of this magnitude. This will eliminate any logistical issues such as lodging, travel and the court infrastructure or all parties involved.

Another factor the court should consider is the significant media attention that this trial will garner. This raises several issues and potential problems for the court and all parties involved. A larger city will provide more opportunities for sequestration of jurors and lower the probability of improper contact or media interference.

Miami-Dade County also has a significant flight activity, which offers an abundant amount of flights and ease of access to not only those situated in Northern Florida, but also those witnesses who may be called to testify from out of state.

Additionally, court logistics play a role. This must be considered when selecting a Change of Venue site. Miami-Dade County is no stranger to high profile cases and is fully equipped to handle such a case.

In the alternative, Miami-Dade County is also close to another county that is far enough geographically and still has many of the same options as the first, Broward County. While Miami-Dade County is preferred by the Defense because of its' size and logistical capabilities, Broward County serves as a viable back up.

CONCLUSION

For the reasons stated, the Defendant respectfully requests that this honorable court will enter an order changing venue in the above action. Given the unique situation presented by the Defendant's case, if it remains in Duval County, his Sixth Amendment right to a trial by a fair and impartial jury will undoubtedly be violated. This court should transfer venue to Miami-Dade County, or in the alternative, to Broward County.

CERTIFICATE OF GOOD FAITH

Undersigned counsel hereby certifies that this motion for change of venue is made in good faith on the part of counsel.

Respectfully submitted,

/s/ Julie Agent Schlax

Julie Agent Schlax
Florida Bar No.: 0093040
200 East Forsyth Street
Jacksonville, Florida 32202
Counsel for Defendant

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished to the Office of the State Attorney, Mr. Mark Caliel, via electronic delivery on 16th day of October, 2015

/s/ Julie Agent Schlax

Julie Agent Schlax

IN THE CIRCUIT COURT OF THE FOURTH JUDICIAL CIRCUIT IN AND FOR DUVAL COUNTY, FLORIDA

CASE NO.: 16-2013-CF-5781-AXXX
DIVISION: CR-D

STATE OF FLORIDA,
Plaintiff,
v.

DONALD JAMES SMITH,
Defendant.
_____/

AMENDED MOTION FOR CHANGE OF VENUE

NOW COMES the Defendant, Donald James Smith, by and through undersigned counsel and pursuant to Fla. R. Crim. P. 3.240, and moves this Honorable Court to enter an order changing venue from this county to Miami-Dade County in the State of Florida in the above-styled cause. In support thereof, the defendant would assert as follows:

FACTS

The Defendant, Donald Smith, stands accused of First Degree Murder, Capital Sexual Battery, and Kidnapping of a Child.

The media coverage of Mr. Smith began on June 22, 2013. Throughout the months we have been able to recover a sample of this coverage. The coverage is grouped into three categories: television reports, newspapers/articles, and blogs. In all of these forums, the coverage has been overwhelmingly negative for Mr. Smith.

First, local television networks have reported on all aspects of the case. In a sampling of more than 175 reports, reporters and commentators have discussed everything from breaking news reports on "new evidence" released, to confidential conversations between Mr. Smith and

his mother. A summary and assortment of such videos will be provided to the Court and State Attorney's Office as Exhibit A prior to hearing on this matter.

Second, the local news in Jacksonville has written thousands of articles on the case. In the modern Internet age, these articles are easily accessible to the public. For instance, a search of the case on the Florida Times Union website (Jacksonville's newspaper) brings up 1,291 stories. Moreover, every Jacksonville news station has a web page dedicated to the case. On www.news4jax.com a simple search of "Donald Smith" brings up 165 articles, and on www.actionnewsjax.com the same search brings up 184 articles.

In addition to the local news in Duval County, other news outlets across the state have covered this case including Panama City, Tallahassee, Orlando, Tampa and Miami. Additionally, national publications covered the case including such publications as CNN, Fox News, Yahoo! News and The Huffington Post. Furthermore, this case was even covered internationally by MailOnline.com out of the United Kingdom. A summary and assortment of such news articles will be provided to the Court and State Attorney's Office as Exhibit B prior to hearing on this matter.

Finally, there are numerous social media sites that call for justice in the case. Specifically, these blog sites call for users to express their opinions on the case, all of which are negative towards Mr. Smith. There are four different Facebook pages with more than 2,894 "likes" and there is a petition to strengthen Florida sex offender laws for Cherish Perrywinkle, which has more than 2,564 commentators. Nearly every poster has fans, or people who support the poster, so this causes exponential distribution of the posts. A summary and assortment of such social media will be provided to the Court and State Attorney's Office as Exhibit C prior to hearing on this matter.

The scope of this prejudice and bias, as well as the extent this news reaches the population, can only be measured by what has been reported. There have been ***seven*** consistent themes expressly repeated by the local media and public in Jacksonville.

1. Mr. Smith is Guilty

The media and the public believe Mr. Smith is guilty. In almost every news report Mr. Smith is discussed as the person who killed Cherish Perrywinkle. Although many reporters couched their negative coverage of Mr. Smith with "alleged murderer," some have even flat out said he is guilty.

For example, while discussing the past civil commitment of Mr. Smith, a reporter said "He would have been kept civilly committed indefinitely, instead of being in a Wal-Mart where he kidnapped Cherish." *Sex Offender Should Have Been Behind Bars*, WJHG NEWS (June 24, 2013, 6:39 PM), http://www.wjhg.com/home/headlines/Sex-Offender-Should-Have-Been-Behind-Bars-212821791.html.

News 4 Jax crime expert, Ken Jefferson, announced Mr. Smith's guilt on multiple occasions: "This incident is all over the map now, it's gone viral, because of the heinous act by Mr. Smith." *The Abduction and Killing of Cherish Perrywinkle*, NEWS 4 JAX (June 30, 2013, 8:07 AM), http://www.news4jax.com/politics/The-abduction-and-killing-of-Cherish-Perrywinkle/-/1875986/20777420/-/bll0soz/-/index.html; "The way he murdered this child, and then tried to conceal her body, is sickening." *Evidence Released in Murder Case Against Donald Smith*, NEWS 4 JAX (Oct. 28, 2013, 7:25 PM), http://www.news4jax.com/news/evidence-released-in-murder-case-against-donald-smith/-/475880/22680018/-/qn49cqz/-/index.html.

With the constant media reports relating to Mr. Smith's guilt, it's no wonder adults in Jacksonville began believing Mr. Smith was guilty too. An Action News Jax reporter stated,

"Parents want to know why he was allowed back on the streets to prey on children like Cherish again." *State Lawmakers Push for Changes to Sex Offender Regulations*, ACTION NEWS JAX (June 25, 2013, 6:26 PM), http://www.actionnewsjax.com/content/topstories/story/State-lawmakers-push-for-changes-to-sex-offender/RoE6tP_QQEeJ2c15DMqdFA.cspx.

The community has made it known through social media that they believe Mr. Smith is guilty. A Facebook page titled "In Memory of Cherish Perrywinkle" has more than 2,250 "likes" and nearly every post has been "shared" exponentially. A typical post reads as follows, "This Donald Smith scumbag was living with his mother and within view of a middle school;" or "I'm sorry but she raised a monster and she should be ashamed of herself." *See In Memory of Cherish Perrywinkle*, FACEBOOK BLOG, (Mar. 11, 2014, 10:30 AM), https://www.facebook.com/InMemoryOfCherishPerrywinkle.

2. Character Denigration

Mr. Smith is presumed guilty by the media, thus it has made no attempt to protect his character. The media did everything in its power to find and tell its audience anything and everything negative about Mr. Smith's past, without presenting Mr. Smith's side of the story.

First, television stations interviewed neighbors to find out any information they could about Mr. Smith. News 4 Jax said that neighbors were always "cautious around Smith" and that anytime Smith was in the area they were "on guard." *Organizations React to A Child's Murder*, NEWS 4 JAX (June 24, 2014, 11:28 PM), http://www.news4jax.com/news/Organizations-react-to-a-child-s-murder/-/475880/20701180/-/m0mtxmz/-/index.html. A reporter for First Coast News said, "Neighbors who know Donald Smith call him a smooth talker, and they describe him as having an answer for everything...Sadly people in Smith's neighborhood knew to keep their kids away from him, a warning they wish they could have given to Cherish's family." *Safety Experts*

Offer Insight into Habits of Sexual Offenders, FIRST COAST NEWS (June 26, 2013, 4:22 PM), http://archive.firstcoastnews.com/news/local/story.aspx?storyid=317882. One neighbor, Mary Gagliardi, told Action News Jax, "He bought a little stuffed horse and put it right by the driver's dash. I said to my husband. He's doing that to attract kids." *Smith's Neighbors Recall Odd Behavior*, ACTION NEWS JAX (June 22, 2013, 8:35 PM), http://www.actionnewsjax.com/content/topstories/story/Smiths-neighbors-recall-odd-behavior/xcCOhWVFbE2ckuPPVlsGvw.cspx.

The local news networks also interviewed people who knew or had encountered Mr. Smith over the years. News 4 Jax interviewed Mr. Smith's former cellmate, who talked about Mr. Smith's deception while in prison. The reporter started the segment by saying, "Smith even conned the cons into thinking he was someone he wasn't." He said that Mr. Smith lied to other inmates about his charges and that no one knew whom he really was. *Former Inmate Remembers Donald Smith*, NEWS 4 JAX (July 5, 2013, 7:02 PM), http://www.news4jax.com/news/Former-inmate-remembers-Donald-Smith/-/475880/20857560/-/1161imi/-/index.html.

Action News Jax interviewed a man who also had kids with Mr. Smith's ex-wife. The reporter said that something made the man, Hasty, feel uncomfortable leaving his daughter alone with Mr. Smith. "Every time I caught him in the same vicinity as her, I caught him looking at her, and she was only 2 or 3 at the time." Hasty never let his daughter see Mr. Smith again. *Justice for Cherish: Donald Smith's Past*, ACTION NEWS JAX (July 1, 2013, 11:02 PM), http://archive.firstcoastnews.com/news/local/story.aspx?storyid=317709.

After interviewing people who knew Mr. Smith, the news media then made an event out of Mr. Smith's criminal history. For instance, Action News Jax ran a story "live from Windy

Hill Elementary Park," the place of one of Mr. Smith's alleged sex crimes. The story went on to report all of Mr. Smith's prior crimes including: siphoning gas, driving a stolen vehicle, grand theft, violation of probation, high-speed chase in a stolen car, unauthorized use of a sheriff's office insignia, a suspended license and burglary. *New Documents Trace Donald Smith's Past to his Teens*, ACTION NEWS JAX (Mar. 6, 2014, 9:12 PM), http://www.actionnewsjax.com/content/topstories/story/New-documents-track-Donald-Smith-s-criminal-past/BNH0xlVXbUu4OSjBTveHtg.cspx. Most of these convictions are more than ten years old, thus they will not even be admitted into evidence.

Almost every nightly news report emphasized Mr. Smith's sex crime convictions in 1977, 1992, and 2009. *Id; Donald Smith did not Meet "Sexual Predator" Criteria*, NEWS 4 JAX (July 23, 2013, 7:50 PM), http://www.news4jax.com/news/Donald-Smith-did-not-meet-sexual-predator-criteria/-/475880/21134736/-/14tle1i/-/index.html; *Sex Offender Should Have Been Behind Bars*, *supra* page 3. *The Abduction and Killing of Cherish Perrywinkle*, *supra* page 3.

News 4 Jax ran an entire segment on Mr. Smith's 2009 conviction for posing as a DCF worker. It interviewed the mother of the alleged victim who said that Donald asked her daughter if she "had hair down there," and if she was "wearing a bra." The reporter mentions that when Mr. Smith was asked about this, he said he remembers making the phone calls, but he cannot remember why he had the girl in his phone under favorites. *Victim's Mother Speaks*, NEWS 4 JAX (June 25, 2013, 11:24 PM), http://www.news4jax.com/Victim-s-mother-speaks/-/475982/20717282/-/m1s119/-/index.html.

Once the news media reported Mr. Smith's criminal history, many segments would have an "expert" on air to help "review" Mr. Smith's criminal history. For instance, News 4 Jax interviewed former Prosecutor Rick Alexander who said that Mr. Smith developed the ability to

become a "con artist" based upon his former convictions of writing worthless checks and that Mr. Smith has a "pattern of interest in children," going all the way back to the 70s. *The Abduction and Killing of Cherish Perrywinkle*, *supra* page 3. Alexander told a later program that someone made a major error in not deeming Mr. Smith a sexual predator because there were a lot of red flags in his report. *Donald Smith did not meet "Sexual Predator" Criteria*, *supra* page 6.

News reports also analyzed Mr. Smith's alleged behavior during his time in prison. According to the news media, Mr. Smith was always in trouble in jail. He broke rules, and "was sighted nearly a dozen times for possessing drugs and disobeying orders." *Id.* First Coast News says he lied to prison officials and his answers changed by the day. *New Documents Released on Donald Smith*, FIRST COAST NEWS (July 22, 2013, 10:27 PM), http://www.firstcoastnews.com/story/local/2013/07/22/4612003/.

Moreover, the news media painted Mr. Smith as someone who was not willing to help himself while in jail. It mentioned that Mr. Smith "refused to participate in his own treatment several times" and that "he declined to be interviewed or attend therapy." *Id.* He explained that he did not want to be treated while he was incarcerated because "this program will never touch the modalities I've been through." *Id.* This was mentioned without discussing any legitimate reason Mr. Smith would choose not to participate or make these statements.

Even current congressmen have weighed in on Mr. Smith's past to the media. Representative Janet Atkins said, "From the news reports it looks like he's been engaged with the laws since the 70's, so you're looking at 40 years where he has been engaged with some criminal behavior or another, the reports that three felony charges were reduced to misdemeanor charges certainty has me concerned." Additionally, State Senator Aaron Bean pondered to News 4 Jax whether Donald Smith was properly reviewed under the Jimmy Ryce Act. *Lawmakers*

Scramble for Answers, NEWS 4 JAX (June 26, 2013, 11:35 PM), http://www.news4jax.com/news/Lawmakers-scramble-for-answers/-/475880/20733620/-/vscr2z/-/index.html.

3. Mr. Smith is a Sexual Predator?

A sexual predator is defined in Florida as an individual who has committed *a sexually violent offense* as defined in § 775.21, Fla. Stat. (2013), whereas a sexual offender is someone who may have just engaged in simple sexual misconduct. Until this alleged incident, Mr. Smith has never engaged in or been charged with violent conduct towards a minor. Thus, Mr. Smith was never labeled a sexual predator.

Despite these facts, the media has repeatedly labeled Mr. Smith as a sexual predator. *See* Brandon Jones, *Cherish Perrywinkle Laid To Rest As Her Mother, Rayne Perrywinkle Blames Herself,* THE GLOBAL DISPATCH (June 28, 2013, 3:26 PM), http://www.theglobaldispatch.com/cherish-perrywinkle-laid-to-rest-as-her-mother-rayne-perrywinkle-blames-herself-17423/; ("Smith was a predator who seized the opportunity to snatch the woman's daughter and kill her."); Tamara Rush, THE HUFFINGTON POST (June 28, 2013, 3:26 PM); http://www.huffingtonpost.com/2013/06/28/cherish-perrywinkle_n_3516998.html*Rayne Perrywinkle Tries to Regain Custody of Her Daughters*, FIRST COAST NEWS (Aug. 8, 2013, 6:11 PM), http://beaches.firstcoastnews.com/news/news/121133-rayne-perrywinkle-tries-regain-custody-daughters ("Convicted sexual predator Donald Smith is now facing charges."); *New Documents Describe Murder Suspect's State of Mind*, ACTION NEWS JAX (Dec. 6, 2013, 4:59 PM), http://www.actionnewsjax.com/content/topstories/story/New-documents-describe-murder-suspects-apparent/tDeEkRAsyU-AjOYQ0MlW_g.cspx ("Convicted sexual predator Donald Smith is now facing charges.").

4. Community Exposure

The purpose of this section is not to condemn the outpouring of support for Cherish Perrywinkle and her family. Rather, the goal is to show the extent to which Jacksonville as a community is invested in Cherish, leading to bias on behalf of the entire area.

From the moment Cherish Perrywinkle was announced missing in June, the news media began documenting the communities' support. In describing the search for Cherish Perrywinkle, an Action News Jax reporter said, "Nearly all of Jacksonville was looking for Cherish Saturday morning." *Memorial Growing Outside of Highlands Baptist Church*, ACTION NEWS JAX (June 22, 2013, 10:57 PM), http://www.actionnewsjax.com/content/topstories/story/Memorial-growing-outside-of-Highlands-Baptist/oT9WC_Sw0kG2fhwfCYpblQ.cspx. After Mr. Smith's initial arrest the Perrywinkle family released a statement to Action News Jax thanking the community for its help: "No words can describe how I feel right now. The support from those I don't even know in Jacksonville is overwhelming." *Family Overwhelmed by Support*, ACTION NEWS JAX (June 26, 2013, 5:03 PM), http://www.actionnewsjax.com/content/topstories/story/Cherish-Perrywinkles-family-receives-donations/qoaMZdsma0Ce2IrRK96iFA.cspx. According to another reporter, "the outpouring of support has been constant. I'm told it has only brought this tight knit community closer." *Community in Mourning*, ACTION NEWS JAX (June 24, 2013, 5:29 PM), http://www.actionnewsjax.com/content/topstories/story/Witness-saw-Cherishs-family-minutes-before/AXhn_b114kuweqyrx0vMVg.cspx.

A News 4 Jax reporter described it best, "When Cherish Perrywinkle was abducted and found dead, the whole community wept. Most didn't know the 8-year-old girl, but so many wanted to help." *Help for Cherish's Funeral*, NEWS 4 JAX (June 26, 2013, 5:59 PM),

http://www.news4jax.com/news/Help-for-Cherish-s-funeral/-/475880/20728992/-/du8jj4/-/index.html. Families that did not even know the Perrywinkles stopped by to bring groceries and fix their air condition unit. *Vigil for Murdered 8-Year-Old Girl*, ACTION NEWS JAX (June 24, 2013, 2:26 AM), http://www.actionnewsjax.com/content/topstories/story/Vigil-for-murdered-Jacksonville-8-year-old/nBAwpg09hUqUdJXa7hnBig.cspx.

According to News 4 Jax, there were between eighteen and nineteen *hundred* people estimated to have signed the guest book at Cherish's viewing. As one reporter recalled, "While almost 2000 showed up, only about 30 knew her." *Preparing to Say Goodbye*, NEWS 4 JAX (June 27, 2013, 11:24 PM), http://www.news4jax.com/news/Preparing-to-say-goodbye/-/475880/20752000/-/10miury/-/index.html.

At Cherish's memorial hundreds of people were present at the Highlands Baptist Church where the pews of the church were filled. Karen Feagins, *Cherish Perrywinkle Memorial*, WGCU NEWS (June 24, 2013), http://news.wgcu.org/post/cherish-perrywinkle-memorial. Additionally, Cherish's funeral was televised live for all of Jacksonville to see on News 4 Jax. *Uncut: Funeral Service for Cherish Perrywinkle*, NEWS 4 JAX (June 28, 2013, 5:42 PM), http://www.news4jax.com/news/uncut-funeral-service-for-cherish-perrywinkle/-/475880/20765136/-/m2hc88/-/index.html.

The community has not forgotten about Cherish. Nearly eight months after the tragedy, a News 4 Jax reporter said, "Everyone in Jacksonville remembers the kidnapping and murder of 8-year old Cherish Perrywinkle last summer." *RAD Kid Program Teaches Self Defense*, NEWS 4 JAX (Feb. 21, 2014, 9:54 AM), http://www.news4jax.com/news/RAD-kids-program-teaches-self-defense/-/475880/24599178/-/13wdk5f/-/index.html.

Cherish is remembered not only in Jacksonville, but also across the State. Recently, Florida State Senator Eleanor Sobel said this on the Senate floor: "We all remember innocent children like Cherish Perrywinkle. Who at the age of 8 was abducted from Wal-Mart, raped, strangled, and her 60 pound body found behind a church." *Legislative Session Begins with Sexual Predator Law*, NEWS 4 JAX (Mar. 4, 2014, 8:03 PM), http://www.news4jax.com/news/Legislative-session-begins-with-sexual-predator-law/-/475880/24804348/-/f4j7ssz/-/index.html.

5. Our System Let us Down

Since Mr. Smith's arrest, the news media has relentlessly told viewers that the criminal justice system failed the community by letting Mr. Smith out of jail. News 4 Jax and Action News Jax interviewed dozens of criminal defense attorneys, prosecutors, FBI agents, etc., who all made this same point. Below are just a few examples:

Dale Carson, criminal defense attorney and former FBI agent: "It's just a failure of the system." "He should have been designated as a sexual predator." *New Documents Trace Donald Smith's Past to his Teens*, *supra* page 6.

Dr. Marcus DeCarvalho, psychiatrist that treats sex offenders: "This is a mental illness. He should not have been released to the public. You can't rehabilitate someone who is a pedophile and a sociopath." *Smith's Criminal History*, NEWS 4 JAX (June 24, 2013, 6:26 PM), http://www.news4jax.com/news/Smith-s-criminal-history/-/475880/20698168/-/6oyqi/-/index.html.

Ann Dugger, Justice Coalition: "They don't need to be in society, they don't need to be around children, they don't need to be around their prey." *Lunsford Reacts to Perrywinkle*

Murder, NEWS 4 JAX (June 25, 2013, 5:51 PM), http://www.news4jax.com/news/Lunsford-reacts-to-Perrywinkle-murder/-/475880/20713192/-/2958wkz/-/index.html.

Ken Jefferson, News 4 Jax Crime Expert: "The system failed by allowing Smith to be released to the public." "We need to look at the process where we release those criminals, because chances are, they are going to strike again." *Id.*

David Rowe, founder of No Peace for Predators: "They like children. You can't fix that. They need to stop letting these people out of jail. It's an epidemic. It's getting worse and worse and worse." *Organizations React to A Child's Murder*, *supra* page 4.

It is no wonder the public, and potential jurors also believe Mr. Smith should never have been released from prison. An Action News Jax reporter said, "Donald Smith's run ins with the law over the years highlight the *public sentiment* that questions why he was running free to begin with." *New Documents Trace Donald Smith's Past to his Teens*, *supra* page 6. A woman from the community highlighted the cities' frustration when she said, "He should have never been released. Ever. I know, it's no one's fault." *JSO Releases Timeline of Events*, NEWS 4 JAX (June 25, 2013, 11:28 PM), http://www.news4jax.com/news/JSO-releases-timeline-of-events/-/475880/20717358/-/v6trhqz/-/index.html.

Ultimately, this community anger fueled a campaign to change the laws. In almost every interview, memorial, or speaking opportunity, Jacksonville citizens made it clear they wanted sex offender laws changed. *See generally* Patrick Donges, *Hearing On Sex Offenders Law Planned As Momentum Builds for "Cherish's Law,"* WJCT NEWS, (Sep. 3, 2013), http://news.wjct.org/post/hearing-sex-offender-laws-planned-momentum-builds-cherishs-law. At Cherish's funeral, Cherish's pastor said "Let's not let another guy like this walk free so we lose another one of our babies." *Uncut: Funeral Service for Cherish Perrywinkle*, *supra* page 10.

A petition was started to pass a law called "Cherish's Law." Almost 3,000 individuals signed the petition. *Cherish's Law*, CARE 2 PETITION (Mar. 11, 2014 11:46 AM), http://www.thepetitionsite.com/735/993/920/cherishs-law/. Additionally, residents created a Facebook page dedicated to passing Cherish's law entitled *Justice For Cherish*, FACEBOOK BLOG (Mar. 11, 2014, 11:00 AM), https://www.facebook.com/justiceforcherish. The page had over 580 "likes," and nearly all of the posts to the page were shared. A common post on this page reads, "The monster that killed her should have never been let you of jail! It's time we rise up in outrage!" *Id.*

Unlike most citizen complaints to Congress, the people of Jacksonville were heard. Florida Representative Adkins of Jacksonville told News 4 Jax "the kidnapping and murder of 8-year-old Cherish Perrywinkle is proof that laws related to sex offender crimes against children need to be discussed and adjusted." *Hearing on Sex Offender Laws*, NEWS 4 JAX (Sep. 4, 2013, 8:34 AM), http://www.news4jax.com/news/Hearing-on-sex-offender-laws/-/475880/21771974/-/2wabwc/-/index.html.

The community was so active in its fight for Cherish that the Florida Senate passed four different bills to better protect children from "alleged offenders like Mr. Smith." *Legislative Session Begins With Sexual Predator Law*, *supra* page 11.

At a time when the Florida Legislature agrees on next to nothing, all four bills passed forty to zero. Jacksonville Sheriff John Rutherford was in Tallahassee to support the legislation and he said, "This has been the most bipartisan initiative I have ever seen here in Tallahassee." *Sex Offender Law up for Discussion*, NEWS 4 JAX (Mar. 4, 2014, 8:37 AM), http://www.news4jax.com/news/Sex-offender-law-up-for-discussion/-/475880/24792438/-/a93v9d/-/index.html.

The discussion and ultimate passage of the bill has led to continuous negative conversation about Mr. Smith. Anytime "Cherish's Law" is mentioned, the media points out that Mr. Smith was the cause of the law. Even after the passage of the bill, Florida Representative Charles McBurney reminded television viewers that this law was "too late" to save Cherish Perrywinkle. *Sexually Violent Predators Going Nowhere*, WJHG NEWS (Mar. 12, 2014, 7:11 AM), http://www.wjhg.com/home/headlines/249640001.html.

6. Indoctrination of the State's Theory

The media has slowly been building its case against Donald Smith. Every week, new evidence is leaked that can further "prove" the states theory. Even though the media admits that much of this "evidence" will not make it into Court, it has not stopped the media from reporting vigorously to prove Mr. Smith's guilt. *See New Evidence in Donald Smith Case*, NEWS 4 JAX (Dec. 6, 2013, 7:16 PM), http://www.news4jax.com/news/New-evidence-in-Donald-Smith-case/-/475880/23363620/-/kw3yfl/-/index.html (Reporter says that he has been told most of the newly released evidence will not be allowed in Court).

Beginning with the physical evidence, the media set the scene for viewers. "The details are nauseating, and the pictures, heart breaking." *Evidence Released in Murder Case Against Donald Smith*, *supra* page 3. A reporter for First Coast News showed pictures from inside Mr. Smith's mom's van that appeared to be "dark hairs" on the seats. It showed pictures of Mr. Smith, and in the words of the reporter what appear to be "scratches, lacerations and bruises on his legs, arms, and back, and an open wound on his thigh." The reporter continues saying that the bruises could be consistent with sexual assault, while not mentioning that the bruises could be consistent with a number of other things. *Flood of Documents in Cherish Perrywinkle Case*

Offers Graphic Look at the State's Evidence, FIRST COAST NEWS (Oct. 29, 2013, 2:54 PM), http://archive.firstcoastnews.com/news/local/story.aspx?storyid=333522.

All three major news networks let the viewers know that DNA evidence links Donald Smith to Cherish Perrywinkle and "what that means" for the case. For example, "Investigators found Mr. Smith's DNA all over Cherish's body, and the likelihood that it is someone else's, is 35 quintillion to 1." *Evidence Released in Murder Case Against Donald Smith*, *supra* page 3; *Flood of Documents in Cherish Perrywinkle Case Offers Graphic Look at the State's Evidence*, supra page 15; *New Evidence links Donald Smith to Cherish Perrywinkle*, ACTION NEWS JAX (Oct. 28, 2013, 11:00 PM), http://www.actionnewsjax.com/content/topstories/story/New-evidence-links-Donald-Smith-to-Cherish/_8KyrhbWMkaJm_ut8DeSLQ.cspx.

Next the news media set out to prove that Mr. Smith premeditated this alleged crime. News 4 Jax Crime Expert Ken Jefferson said, "This person's intention probably by putting the body in water or near water was in hopes the water would wash away some of the evidence that was on her body that he left there after he sexually assaulted her and then murdered her." *Evidence Released in Murder Case Against Donald Smith*, *supra* page 3.

One report discussed allegations that Donald Smith went to a homeless park to take pictures three straight days before the kidnapping. At the park, Mr. Smith asked a woman about a lake just miles from where authorities found Cherish Perrywinkle. A local attorney, Eric Friday explained that this was typical behavior for sex offenders like Smith. "When you have a sexual predator like Mr. Smith, they are always looking for their next victim." The report then discusses evidence that Mr. Smith's former cellmate admitted to helping Smith take the rear seats out of his mother's van the day before Smith used it "to kidnap Cherish Perrywinkle." The

reporter concludes saying, "It's obvious he was making plans." *New Documents Describe Murder Suspect's State of Mind, supra* page 8.

Next the news media released Mr. Smith and his mother's jail conversations- or more accurately, the portions of the conversation that favored the State. Specifically, the media reported that Mr. Smith asked his mother to get him a DS M-4 Book, a book that highlights psychiatric problems. Mr. Smith said he would use that to find out what level he needs to qualify for treatment. He stated, "It's a one-shot deal. I need to know what I have." *New Evidence in Donald Smith Case, supra* page 14.

The media did touch on Mr. Smith's potential alibi defense, but only to argue that it would fail. Multiple media outlets summarized Mr. Smith's police interrogation as follows:

> He told his mom he was going to an alcoholic anonymous meeting in San Marco. He told investigators he was smoking crack with prostitutes. When they asked him why he was soaking wet, he told investigators I sweat a lot when I smoke drugs. Then once the Sergeant said we have you on surveillance with Cherish, and we see her going out of the store and into the van with you, he says oh yea she was with me but got out at a red light and ran away. That is when he asked for that lawyer.

Evidence Released in Murder Case Against Donald Smith, supra page 3; *see generally Flood of Documents in Cherish Perrywinkle Case Offers Graphic Look at the State's Evidence, supra* page 15.

In addition to "new evidence released," the news media allowed Cherish's mother Rayne Perrywinkle to make many unsubstantiated claims to the media. Ms. Perrywinkle told News 4 Jax that if it had not been her daughter, it would have been someone else's child and that "this man was trolling." *Remembering Cherish*, NEWS 4 JAX (June 24, 2013, 6:44 PM), http://www.news4jax.com/Remembering-Cherish/-/475982/20699226/-/bddy59z/-/index.html. She told First Coast News, "This monster knew where we lived. He was seen in my neighborhood earlier that week and on my street. He was seen in the Moncrief area two weeks

before my daughter was taken, that is where my daughters went to school." *Rayne Perrywinkle*: "*Cherish Would be Here*," First Coast News (Sept. 19, 2013, 10:32 PM), http://archive.firstcoastnews.com/news/local/story.aspx?storyid=328582. In neither of these reports was Ms. Perrywinkle asked to explain her assertions, despite the fact that there was no evidence to support them.

7. Mr. Smith is a Monster and Should be Executed

A beautiful little girl was taken from her family and killed. These are powerful facts that would elicit emotion in anyone. The reaction in Jacksonville has been passionate to say the least.

An Action News Jax reporter led off a segment on Cherish Perrywinkle by saying, "the 8 year old was stolen from us Friday. She was lured from a local Wal-Mart by a *monster*." Police say Donald Smith is responsible. *Family Overwhelmed by Support*, *supra* page 9.

One segment by Action News Jax began by showing a picture of Donald Smith with the reporter saying in the background "Parents call him the face of pure evil." The report then switches to a random woman who says: "It makes me mad every time I see his face, because, how could you do that to a child." *State Lawmakers Push for Changes to Sex Offender Regulations*, *supra* page 4.

Criminal Defense attorney Dale Carson told Action News Jax, "These are the people that when you lay your head down on your pillow at night, you worry about." *New Documents Trace Donald Smith's Past to his Teens*, *supra* page 6.

After hearing this language, along with the alleged facts of the case, coupled by the media's relentless coverage of Mr. Smith's criminal history and many unsubstantiated claims about Mr. Smith's character- many people in Jacksonville want Mr. Smith killed.

Action News Jax interviewed the mother of one of Mr. Smith's alleged victims, who said, "I wish he was dead. I wish he was dead . . . He's sick. They need to electrocute him." *Victim of Donald Smith Says She was not Notified he was Released From Jail*, ACTION NEWS JAX (June 23, 2013, 4:29 PM), http://www.actionnewsjax.com/content/topstories/story/Victim-of-Donald-Smith-says-she-was-not-notified/lVgilmS7-EmjtFVW8Yr0Yg.cspx.

Ms. Perrywinkle told Action News Jax that she agrees Mr. Smith needs to be killed because it is the only way to keep him from harming a child again. *Questions About Donald Smith's Previous Sentence*, ACTION NEWS JAX (July, 3, 2013, 8:03 AM), http://www.actionnewsjax.com/content/topstories/story/Questions-about-Donald-Smiths-previous-sentence/Ya_YgivkBUyCe2fvot7pag.cspx.

Moreover, the effect of the media coverage on the public view of Mr. Smith is best evidenced through social media. On the petition site to pass tougher sex offender laws for Cherish, there are over 2,500 signatures in support of this bill. The people who sign the petition online have the ability to write a comment along with their signature. These comments express the bias, prejudice, preconceptions, and wrath of the population. Generally, the comments show a hate for sex offenders/ predators, and show how willing the population is to give these criminals the death penalty. For example, "It's time we stand together as a nation and protect our children. It's time for there to be a REAL punishment. Not just years in jail. They take a life they lose a life!" Another comment states, "[R]epeat offenders should be dragged through the street and then shot with a .22!" Another commentator posts, "I personally recommend execution. A child never deserves or asks for this. The only cure for a child molester is death." *Cherish's Law*, *supra* page 13.

Blog sites also show the communities negative opinion towards Mr. Smith. Nearly every poster has fans, or people who support the poster, so this causes exponential distribution of the posts. Many citizens believe that Donald Smith specifically should receive the death penalty, although he has yet to be found guilty.

> This creature willing[ly] gave up his humanity. Although entitled to a trial by a jury of his peers, the facts seem fairly straightforward. There are no mitigating circumstances that could or should lessen the severity of his sentence. I'm a liberal to the extreme, but we as a society have the right and the duty to protect our children from monsters like this. There is no redemption for men that commit this sort of crime.

Donald James Smith, Charged In Cherish Perrywinkle's Kidnapping, Murder, Has Long Criminal History, Article with Blog (Mar. 18, 2014 12:36 A.M.), http://www.huffingtonpost.com/2013/06/24/donald-james-smith_n_3491034.html.

Another poster says, "Florida is known for its executions. Too bad they didn't execute this monster years ago." Furthermore, even a poster that is generally against the death penalty, with 2,063 "fans," stated, "I am not a believer in the death penalty, but I would not lose any sleep if guys like [Donald Smith] received it." Another post turns our legal system around, "Given this depraved pig's track record, he should be considered guilty and have to prove his innocence, then summarily executed if he fails to do so." *Id.*

Finally, many citizens want personal vengeance upon Mr. Smith; "I've never seen a better case for vigilante justice, ever." That poster has 3,688 "fans." Another includes the desire to "Burn the savage rapist to death." This poster has 1,111 "fans." Some citizens even wish to see a spectacle of his execution, "I wish people like this could be thrown to lions...;" or "[Donald Smith] deserve[s] to be skinned alive in the town square and then set on fire." *Id.*

ARGUMENT

An accused in a criminal case has a Sixth Amendment right to a fair and impartial trial. *Singer v. U.S., 380 U.S. 24, 85 (1965).* The defendant must be "fairly tried in a public tribunal

free of prejudice, passion, excitement, and tyrannical power," in order to guarantee this right. *Sheppard v. Maxwell, 384 U.S. 333 (1966).* *Sheppard* depicts how extensive pre-trial and trial publicity can deprive a defendant of a fair trial, thus in *Sheppard*, the Court reverses the conviction for first-degree murder. In the majority opinion J. Clark quotes J. Bell from the Ohio Supreme Court:

> 'Murder and mystery, society, sex and suspense were combined in this case in such a manner as to intrigue and captivate the public fancy to a degree perhaps unparalleled in recent annals. Throughout the preindictment investigation, the subsequent legal skirmishes and the nine-week trial, circulation-conscious editors catered to the insatiable interest of the American public in the bizarre. * * * In this atmosphere of a 'Roman holiday' for the news media, Sam Sheppard stood trial for his life.'

Id. at 356.

The sensational and prejudicial nature of the coverage only heightened with the addition of State-slanted coverage of statements Mr. Smith had made to his mother, which the State will undoubtedly argue are admissions of guilt. *See Skilling v. U.S.,* __ U.S. __, 130 S.Ct. 2896, 2916 (2010) ("[A]lthough news stories about Skilling were not kind, *they contained no confession or other blatantly prejudicial information* of the type readers or viewers could not reasonably be expected to shut from sight") (emphasis added); *Parker v. Randolph*, 442 U.S. 62, 72 (1979) (plurality opinion) ("[T]he defendant's own confession [is] probably the most probative and damaging evidence that can be admitted against him.") (internal quotation marks omitted); *Rideau v. Louisiana*, 373 U.S. 723, 726-27 (1963) (presuming prejudice where public repeatedly exposed to spectacle of defendant's confession); *United States v. Thompson*, 908 F.2d 648, 650 (10th Cir. 1990)(holding that a media report "containing information concerning a prior plea agreement signed by [the defendant] was highly prejudicial").

The Florida Supreme Court has stated that defendant has the burden on a change of venue motion, however, the court is "bound to grant a motion for a change of venue when the evidence presented reflects that the community is so pervasively exposed to the circumstances of the incident that prejudice, bias, and preconceived opinions are the natural result." *Manning v. State, 378 So. 2d 274 (Fla. 1979).* A judge may order a change of venue before the case has commenced or after attempting to empanel an impartial jury. *Id.* Community hostility may be established by inflammatory publicity or great difficulty in selecting a jury. *Holsworth v. State, 522 So. 2d 348 (Fla. 1997).* Prejudice from a pre-trial publicity is presumed, however, when the publicity is sufficiently prejudice and inflammatory that it pervades the community where the trial is to be held. *Murphy v. Florida, 421 U.S. 794 (1975).* So dangerous is the effect of pervasive pretrial publicity on a potential juror's mind that the Supreme Court has found that when the pretrial publicity in one case is so great, the court may disregard prospective jurors' assurances of impartiality. *See generally, Irvin v. Dowd 366 U.S. 717 (1961).*

Recent venue-change analysis in the United States Supreme Court turns in part on the size of the community around which the publicity swirls and where the accused will stand trial. Large populations in our Nation's metropolises afford more opportunities to find citizens who have not heard the publicity. Smaller communities risk the opposite. For example, as the Court held in Skilling, 130 S. Ct. at 2915, "more than 4.5 million individuals eligible for jury duty resided in the Houston area. App. 627a. Given this large, diverse pool of potential jurors, the suggestion that 12 impartial individuals could not be empaneled is hard to sustain." *Id.* Duval County has less than nine hundred thousand people. But the population of the proposed venue, Miami-Dade County, is over 2.5 million, creating a far better opportunity to empanel a fair and impartial jury.

Finally, the Florida Supreme Court has offered further guidance to courts confronted with a motion for change of venue:

> We take and make clear . . . that every trial court in considering a motion for change of venue must liberally resolve in favor of the defendant any doubt as to the ability of the State to furnish a defendant a trial by fair and impartial jury, Every reasonable precaution should be taken to preserve to a defendant trial by such a jury and to this end if there is reasonable basis shown for a change of venue a motion therefor properly made should be granted.
>
> A change of venue may sometimes inconvenience the State, yet we can see no way in which it can cause any real damage to it. On the other hand, granting a change of venue in a questionable case is certain to eliminate a possible error and to eliminate a costly retrial if it be determined that the venue should have been changed. More important is the fact that real impairment of the right of a defendant to trial by a fair and impartial jury can result from the failure to grant change of venue.

Singer v. State, 109 So. 2d 7 (Fla. 1959).

In the instant case, the defendant has shown a clear, pervasive, inflammatory and prejudicial coverage of his case by the pretrial publicity. The examples listed in this motion are but a very small sampling of stories and bylines incessantly reported ever since June 22, 2013. It is extremely difficult to keep track of all the prejudicial, false and inadmissible evidence that has been aired, publicized, and spread throughout the public arena. The effects of the negative coverage are best summarized by the themes expressly repeated by the media. The fact that the media purports Mr. Smith's guilt goes to the fact that the media has been skewed in favor of the prosecution's side. Mr. Smith's character being denigrated, and his mislabeling of a "sexual predator", has shown that the media was used to spread inflammatory stories, not impartial facts. Moreover, the advent of the Internet and its potential for interactive communication with the public has captured and cultivated already negative and pervasive coverage to an entirely new level. All who have posted on social media, blogs, and websites indicate the size of the community that was exposed to this negative publicity. So much, and so frequent, was the

exposure of all this negative publicity that it has culminated in changing Florida law. The amount of distracting and irrelevant information that is also reported, since the onset of this case, further distorts the public's perception of this case, which has engrained in the public a desire to execute Donald J. Smith.

This Court has the ability to grant the Change of Venue based on the evidence presented in this case prior to the commencement of the jury selection process. *Manning 378 So. 2d 274* at 276. It will be futile to attempt to select a jury in Duval County for the current case. Because of the pervasive, inflammatory, and prejudicial nature of the media this, Court will discover the inevitable, selecting a jury in Duval County is impossible. The jury selection process will come at great expense in both time and capital for all parties involved simply to conclude that an impartial jury cannot be found. This honorable Court should grant the motion for a change of venue without the need to search for an impartial jury in Duval County.

The defense believes that it has more than carried its burden and therefore wishes to avoid/ reduce the risk of creating any further prejudice via the listing in this pleading of additional examples. In the event that the court does not agree that a sufficient showing has been made, the Defendant requests leave to submit further prejudicial coverage and comments to the Court.

Finally, the defense requests that this case be transferred specifically to Miami-Dade County. There are several reasons for this specific request. First, the publicity in the defendant's case has had pervasive effects not only in the immediate community of Jacksonville, but also in the surrounding areas as well. The Defense feels confident in expressing to this court that the same concerns expressed herein as to Mr. Smith's ability to receive a fair trial in this county are also true of all counties in Northeast Florida. Second, Miami-Dade County is sufficiently

removed geographically to have a real effect on the defendant's ability to obtain an impartial jury. Local coverage there has not been anywhere near what it has been in, or around, Duval County. In fact, relative to its size, Miami-Dade County area was exposed to only a small percentage of all stories from June 22, 2013 to October 16, 2015. Finally, because of its population, Miami-Dade County offers a large and diverse enough jury pool to facilitate the empaneling of a fair and impartial jury in this case. Moreover, Miami-Dade County area would be better able to absorb and deal with intense media attention during the pendency as opposed to smaller communities such as those not requested.

CONVENIENCE

The court should also consider convenience in granting the motion for a change of venue. Miami-Dade County has a large population in the State of Florida, as such it can handle a case of this magnitude. This will eliminate any logistical issues such as lodging, travel and the court infrastructure or all parties involved.

Another factor the court should consider is the significant media attention that this trial will garner. This raises several issues and potential problems for the court and all parties involved. A larger city will provide more opportunities for sequestration of jurors and lower the probability of improper contact or media interference.

Miami-Dade County also has a significant flight activity, which offers an abundant amount of flights and ease of access to not only those situated in Northern Florida, but also those witnesses who may be called to testify from out of state.

Additionally, court logistics play a role. This must be considered when selecting a Change of Venue site. Miami-Dade County is no stranger to high profile cases and is fully equipped to handle such a case.

In the alternative, Miami-Dade County is also close to another county that is far enough geographically and still has many of the same options as the first, Broward County. While Miami-Dade County is preferred by the Defense because of its' size and logistical capabilities, Broward County serves as a viable back up.

CONCLUSION

For the reasons stated, the Defendant respectfully requests that this honorable court will enter an order changing venue in the above action. Given the unique situation presented by the Defendant's case, if it remains in Duval County, his Sixth Amendment right to a trial by a fair and impartial jury will undoubtedly be violated. This court should transfer venue to Miami-Dade County, or in the alternative, to Broward County.

CERTIFICATE OF GOOD FAITH

Undersigned counsel hereby certifies that this motion for change of venue is made in good faith on the part of counsel.

Respectfully submitted,

/s/ Julie Agent Schlax

Julie Agent Schlax
Florida Bar No.: 0093040
200 East Forsyth Street
Jacksonville, Florida 32202
Counsel for Defendant

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished to the Office of the State Attorney, Mr. Mark Caliel, via electronic delivery on 16th day of October, 2015

/s/ Julie Agent Schlax

Julie Agent Schlax

AFFIDAVIT OF CHAD BOYD

I Chad Boyd, do hereby swear or affirm that I do not believe Mr. Donald Smith can receive a fair and impartial trial in Duval County due to the amount of pre-trial publicity giving the defendant's prior violent arrest record including sexual assault and children, extensive prison record, detailed statements of prior abuse towards children, that he is a sexual predator, and detailed explanation of the evidence against him in the killing of a young, innocent child, in addition the photograph of Cherish Perrywinkle.

Chad Boyd

STATE OF FLORIDA

COUNTY OF DUVAL

Sworn to or affirmed and signed before me on 10/29/15 by Chad Boyd.

NOTARY PUBLIC or DEPUTY CLERK

JANZELI ROMAN
Notary Public - State of Florida
My Comm. Expires Jan 12, 2018
Commission # FF 082576

[Print, type, or stamp commissioned name of notary or deputy clerk.]

✓ Personally known

___ Produced identification

Type of identification produced_____

AFFIDAVIT OF DONALD SMITH

I, Donald Smith, the defendant in this case do hereby swear that I do not believe I can receive a fair and impartial trial in Duval County due to the amount of pre-trial publicity in this case as evidenced by the attachments of this motion and the reasons set forth in this motion.

Donald Smith

STATE OF FLORIDA

COUNTY OF DUVAL

Sworn to or affirmed and signed before me on 10/29/15 by Donald Smith.

SHERRI BOYD
MY COMMISSION # FF209521
EXPIRES March 29, 2019
(407) 398-0153 FloridaNotaryService.com

NOTARY PUBLIC or DEPUTY CLERK

[Print, type, or stamp commissioned name of notary or deputy clerk.]

X Personally known

___ Produced identification

Type of identification produced_____

AFFIDAVIT OF JANET SHORT

I Chad Boyd. do hereby swear or affirm that I do not believe Mr. Donald Smith can receive a fair and impartial trial in Duval County due to the amount of pre-trial publicity giving the defendant's prior violent arrest record including sexual assault and children. extensive prison record. detailed statements of prior abuse towards children. that he is a sexual predator. and detailed explanation of the evidence against him in the killing of a young. innocent child. in addition the photograph of Cherish Perrywinkle.

Janet E. Short

Janet Short

STATE OF FLORIDA

COUNTY OF DUVAL

Sworn to or affirmed and signed before me on 29th of October 2015 by Janet Short.

NOTARY PUBLIC or DEPUTY CLERK

NANCY LANAUZE-ALEMAN
MY COMMISSION # FF 916196
EXPIRES: November 20, 2019
Bonded Thru Notary Public Underwriters

[Print. type. or stamp commissioned name of notary or deputy clerk.]

✓ Personally known

___ Produced identification

Type of identification produced_____

IN THE CIRCUIT COURT, FOURTH JUDICIAL CIRCUIT, IN AND FOR DUVAL COUNTY, FLORIDA

CASE NO: 16-2013-CF-5781-AXXX-MA
DIVISION: CR-D

STATE OF FLORIDA

vs.

DONALD SMITH
_____/

MOTION FOR THE APPOINTMENT OF A PRIVATE INVESTIGATOR

COMES NOW the Defendant, Donald Smith, by and through his court-appointed attorney, and pursuant to Florida Laws of Criminal Procedure, moves this Honorable Court for the entry of an Order appointing a private investigator and authorizing the incurring of costs of a private investigator, and as grounds hereby states:

1. The Defendant was indicted for Murder in the First Degree, Kidnapping a Child Under the Age of 13 Years, and Sexual Battery on a Child Less than 12 Years; followed by the filing of the State's Notice of Intent to Seek the Death Penalty;

2. The Defendant has been previously adjudged insolvent by this Court and the undersigned was appointed to represent the Defendant in this matter;

3. Based on limited investigation in this case, the undersigned counsel knows there are a number of detailed and technical issues which must be investigated and explored. Counsel does not possess the knowledge or expertise to address all the issues involved in this investigation which it is believed can only be done properly and effectively through the use of a private investigator.

4. Appointment of a Private Investigator is necessary to insure that Defendant receives his rights to effective assistance of counsel, cross-examination and confrontation of witnesses, and compulsory process, guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and Section 16 of the Florida Constitution; also his rights to due process and due course of law, guaranteed by the Fourteenth Amendment to the United States Constitution and Section 9 of the Florida Constitution; and, his right to the equal protection of the law, guaranteed by the Fourteenth Amendment to the United States Constitution and Section 2 of the Florida Constitution.

5. An indigent defendant is entitled to reimbursement for reasonable costs incurred Fla. R Crim. P3.220(o). Defendant is indigent for costs. This indigence prevents defendant from hiring a Private Investigator to assist in the defense.

FILED
NOV 05 2015
CLERK CIRCUIT COURT

6. Defendant requests that the Court appoint Jonathan Ruda, Investigator License C1000319, of One Step Ahead Investigations, as the Private Investigator in this matter.

WHEREFORE, Defendant prays that this Court appoint Jonathan Ruda to assist in the preparation of a defense and the Court order the Justice Administration Commission to pay the costs of the investigator's services.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been provided to the Justice Administrative Commission via e-mail delivery this 3rd day of November, 2015.

Respectfully submitted,

/s/ Julie Agent Schlax

Julie Agent Schlax
200 East Forsyth Street
Jacksonville, Florida 32202
(904) 674-0717Telephone
(904) 674-0737 Facsimile
Attorney for Defendant

IN THE CIRCUIT COURT, FOURTH JUDICIAL CIRCUIT, IN AND FOR DUVAL COUNTY, FLORIDA

CASE NO: 16-2013-CF-5781-AXXX-MA
DIVISION: CR-D

STATE OF FLORIDA

vs.

DONALD SMITH
_____/

ORDER APPOINTING PRIVATE INVESTIGATOR

THIS CAUSE came to be heard upon the Defendant's Motion For Appointment of a Private Investigator to assist in the defense, the Court having been fully advised in the premise, and finding that a Private Investigator to assist in the defense is both necessary and essential due to the magnitude of discovery and complexity of the issues, it is:

ORDERED as follows:

Julie Schlax is hereby authorized to incur the reasonable expenses of obtaining Jonathan Ruda, of One Step Ahead Investigations, to assist in the preparation of a defense in this cause, not to exceed initial costs of $6,000.00.

IT IS FURTHER ORDERED that the Justice Administrative Commission shall pay the costs of said Jonathan Ruda upon submission of the Private Investigator's invoices which shall be shall be in accordance with the rates, terms and conditions approved by the 4th Judicial Circuit's ISC, Laws of Florida, applicable Florida Statutes and the JAC contract, policies and procedures. The rate for the Private Investigator shall be $40.00 per hour.

DONE AND ORDERED at the Duval County Courthouse, Jacksonville, Florida on this 5 day of November, 2015.

THE HONORABLE MALLORY D. COOPER
CIRCUIT JUDGE

Copies to: Julie Agent Schlax
Justice Administration Commission
Jonathan Ruda, Private Investigator

FILED
NOV 05 2015
RONALD W. DAMELL
CLERK CIRCUIT COURT

From: JAC Pleadings <pleadings@justiceadmin.org>

To: 'Julie@esalawgroup.com' <Julie@esalawgroup.com>
Cc:

Date: Wednesday, November 04, 2015 08:27 am
Subject: RE: Donald Smith - Mtn for Investigator
Attachments: Motion and Order for Appointment of Investigator (Donald Smith).pdf (69KB)

JAC has received and reviewed the Motion for the Appointment of a Private Investigator as to the above-referenced matter. JAC will not be filing a formal response and takes no position as to your motion. You may utilize this email in lieu of a formal response and should attach it to your motion when you provide it to the court.

Buddy Aspy
Senior Management Analyst
Justice Administrative Commission
227 Bronough St.
Tallahassee, Fl. 32301
866.355.7902 Ext 243

PLEASE NOTE: All e-mail is potentially available as a public record.

From: sherri@esalawgroup.com [mailto:sherri@esalawgroup.com]
Sent: Tuesday, November 03, 2015 3:10 PM
To: JAC Pleadings <pleadings@justiceadmin.org>
Subject: Donald Smith - Mtn for Investigator

Please see the attached Motion for Appointment of Private Investigator for def. Donald Smith.

Sherri Boyd
Paralegal

ESPENSHIP, SCHLAX & ALBEE, LLC
200 E. Forsyth Street
Jacksonville, Florida 32202
P: (904) 674-0717
F: (904) 674-0737

IN THE CIRCUIT COURT, FOURTH JUDICIAL CIRCUIT, IN AND FOR DUVAL COUNTY, FLORIDA

CASE NO: 16-2013-CF-5781-AXXX-MA
DIVISION: CR-D

STATE OF FLORIDA

vs.

DONALD SMITH
_____/

MOTION FOR THE APPOINTMENT OF A PRIVATE INVESTIGATOR

COMES NOW the Defendant, Donald Smith, by and through his court-appointed attorney, and pursuant to Florida Laws of Criminal Procedure, moves this Honorable Court for the entry of an Order appointing a private investigator and authorizing the incurring of costs of a private investigator, and as grounds hereby states:

1. The Defendant was indicted for Murder in the First Degree, Kidnapping a Child Under the Age of 13 Years, and Sexual Battery on a Child Less than 12 Years; followed by the filing of the State's Notice of Intent to Seek the Death Penalty;

2. The Defendant has been previously adjudged insolvent by this Court and the undersigned was appointed to represent the Defendant in this matter;

3. Based on limited investigation in this case, the undersigned counsel knows there are a number of detailed and technical issues which must be investigated and explored. Counsel does not possess the knowledge or expertise to address all the issues involved in this investigation which it is believed can only be done properly and effectively through the use of a private investigator.

4. Appointment of a Private Investigator is necessary to insure that Defendant receives his rights to effective assistance of counsel, cross-examination and confrontation of witnesses, and compulsory process, guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and Section 16 of the Florida Constitution; also his rights to due process and due course of law, guaranteed by the Fourteenth Amendment to the United States Constitution and Section 9 of the Florida Constitution; and, his right to the equal protection of the law, guaranteed by the Fourteenth Amendment to the United States Constitution and Section 2 of the Florida Constitution.

5. An indigent defendant is entitled to reimbursement for reasonable costs incurred Fla. R Crim. P3.220(o). Defendant is indigent for costs. This indigence prevents defendant from hiring a Private Investigator to assist in the defense.

FILED
NOV 05 2015
CLERK CIRCUIT COURT

6. Defendant requests that the Court appoint Jonathan Ruda, Investigator License C1000319, of One Step Ahead Investigations, as the Private Investigator in this matter.

WHEREFORE, Defendant prays that this Court appoint Jonathan Ruda to assist in the preparation of a defense and the Court order the Justice Administration Commission to pay the costs of the investigator's services.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been provided to the Justice Administrative Commission via e-mail delivery this 3rd day of November, 2015.

Respectfully submitted,

/s/ Julie Agent Schlax

Julie Agent Schlax
200 East Forsyth Street
Jacksonville, Florida 32202
(904) 674-0717Telephone
(904) 674-0737 Facsimile
Attorney for Defendant

IN THE CIRCUIT COURT, FOURTH JUDICIAL CIRCUIT, IN AND FOR DUVAL COUNTY, FLORIDA

CASE NO: 16-2013-CF-5781-AXXX-MA
DIVISION: CR-D

FILED
NOV 05 2015
CLERK CIRCUIT COURT

STATE OF FLORIDA

vs.

DONALD SMITH
_____/

MOTION FOR APPOINTMENT OF PRISON EXPERT

COMES NOW the Defendant, Donald Smith, by and through his court-appointed attorney, and pursuant to Florida Laws of Criminal Procedure, moves this Honorable Court for the entry of an Order appointing a prison expert as a consultant and to evaluate defendant, and as grounds hereby states:

1. The Defendant was indicted for Murder in the First Degree, Kidnapping a Child Under the Age of 13 Years, and Sexual Battery on a Child Less than 12 Years; followed by the filing of the State's Notice of Intent to Seek the Death Penalty;

2. The Defendant has been previously adjudged insolvent by this Court;

3. The undersigned was appointed to represent the Defendant in this matter;

4. Due to of the unusual and extraordinary facts of this case and the fact that the State has filed their notice of intent to seek the death penalty;

5. Counsel believes that a prison expert is necessary in this cause;

6. Counsel does not believe she can properly represent the defendant absent a prison expert.

7. Counsel is seeking to have James E. Aiken, of Jamed E. Aiken & Associates Inc., a prison expert, appointed as a consultant and expert witness in this cause and to report his findings directly to the undersigned counsel;

8. James E. Aiken has a contract with the Justice Administrative Commission;

9. Mr. Aiken's hourly rate is $150.00 and it is estimated that $7,500.00 will be necessary and is requesting authority to submit a motion for additional fees if necessary;

10. Reasonable and necessary travel expenses will be incurred by James E. Aiken, and the reasonable associated fees incurred for travel including mileage, air fare,

and hotel should be paid by the State of Florida, Justice Administrative Commission in addition to expert witness fees.

WHEREFORE, the Defendant respectfully requests this Honorable Court for entry of an Order appointing a prison expert and authorizing the incurring of costs of a prison expert to assist with the preparation of the defense in this cause.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the Motion for Appointment of Prison Expert has been provided to the Justice Administrative Commission via e-mail delivery this 30th day of October, 2015.

Respectfully submitted,

/s/ Julie Agent Schlax

Julie Agent Schlax
200 East Forsyth Street
Jacksonville, Florida 32202
(904) 674-0717Telephone
(904) 674-0737 Facsimile
Attorney for Defendant

From: Cole, Joshua <joshua.cole@justiceadmin.org>

To: Julie@esalawgroup.com
Cc:

Date: Friday, October 30, 2015 10:17 am
Subject: 13 CF 5781; State v. Smith - JAC Response
Attachments:

JAC has received and reviewed the Motion for Appointment of Prison Expert as to the above-referenced matter. JAC will not be filing a formal response and takes no position as to your motion. You may utilize this email in lieu of a formal response and should attach it to your motion when you provide it to the court.

Joshua Cole
Management Review Analyst
Justice Administrative Commission
P: 866.355.7902
Please visit our website at www.justiceadmin.org

Please do not respond to this account with additional pleadings.
All pleadings should be sent to pleadings@justiceadmin.org ONLY

PLEASE NOTE: All e-mail is potentially available as a public record.

IN THE CIRCUIT COURT, FOURTH JUDICIAL CIRCUIT, IN AND FOR DUVAL COUNTY, FLORIDA

CASE NO: 16-2013-CF-5781-AXXX-MA
DIVISION: CR-D

STATE OF FLORIDA

vs.

DONALD SMITH
_____/

ORDER APPOINTING PRISON EXPERT

THIS CAUSE, came on to be heard upon the Defendant's Motion for Appointment of Prison Expert, and the Court having been fully advised in the premises, and finding that a Prison Expert is both necessary and essential to the defense in this cause, it is

ORDERED as follows:

1. That James E. Aiken, of James E. Aiken & Associates Inc., is hereby appointed as a prison expert in this matter.

2. The initial fee cap of $7,500.00 at an hourly rate of $150.00 is approved. The expert is further authorized to incur travel related expenses to include mileage, air fare, hotel, and car rental.

3. That the Justice Administrative Commission shall be responsible for payment to James E. Aiken upon submission of proper invoices.

4. That should the Defendant need to exceed said cap, the Defendant shall seek leave of the Court prior to incurring any additional fees.

DONE AND ORDERED in Duval County, Jacksonville, Florida on this 5 day of November, 2015.

THE HONORABLE MALLORY D. COOPER
CIRCUIT JUDGE

Copies to: Julie Agent Schlax
Justice Administrative Commission
James E. Aiken, Expert Witness

FILED
NOV 05 2015
RONNIE W. FUSSELL
CLERK CIRCUIT COURT

IN THE CIRCUIT COURT, FOURTH JUDICIAL CIRCUIT, IN AND FOR DUVAL COUNTY, FLORIDA

CASE NO: 16-2013-CF-5781-AXXX-MA
DIVISION: CR-D

FILED
NOV 05 2015
CLERK CIRCUIT COURT

STATE OF FLORIDA

vs.

DONALD SMITH
_____/

MOTION FOR APPOINTMENT OF PRISON EXPERT

COMES NOW the Defendant, Donald Smith, by and through his court-appointed attorney, and pursuant to Florida Laws of Criminal Procedure, moves this Honorable Court for the entry of an Order appointing a prison expert as a consultant and to evaluate defendant, and as grounds hereby states:

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2. The Defendant has been previously adjudged insolvent by this Court;

3. The undersigned was appointed to represent the Defendant in this matter;

4. Due to of the unusual and extraordinary facts of this case and the fact that the State has filed their notice of intent to seek the death penalty;

5. Counsel believes that a prison expert is necessary in this cause;

6. Counsel does not believe she can properly represent the defendant absent a prison expert.

7. Counsel is seeking to have James E. Aiken, of Jamed E. Aiken & Associates Inc., a prison expert, appointed as a consultant and expert witness in this cause and to report his findings directly to the undersigned counsel;

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9. Mr. Aiken's hourly rate is $150.00 and it is estimated that $7,500.00 will be necessary and is requesting authority to submit a motion for additional fees if necessary;

10. Reasonable and necessary travel expenses will be incurred by James E. Aiken, and the reasonable associated fees incurred for travel including mileage, air fare,

and hotel should be paid by the State of Florida, Justice Administrative Commission in addition to expert witness fees.

WHEREFORE, the Defendant respectfully requests this Honorable Court for entry of an Order appointing a prison expert and authorizing the incurring of costs of a prison expert to assist with the preparation of the defense in this cause.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the Motion for Appointment of Prison Expert has been provided to the Justice Administrative Commission via e-mail delivery this 30th day of October, 2015.

Respectfully submitted,

/s/ Julie Agent Schlax

Julie Agent Schlax
200 East Forsyth Street
Jacksonville, Florida 32202
(904) 674-0717Telephone
(904) 674-0737 Facsimile
Attorney for Defendant

From: Cole, Joshua <joshua.cole@justiceadmin.org>

To: Julie@esalawgroup.com
Cc:

Date: Friday, October 30, 2015 10:17 am
Subject: 13 CF 5781; State v. Smith - JAC Response
Attachments:

JAC has received and reviewed the Motion for Appointment of Prison Expert as to the above-referenced matter. JAC will not be filing a formal response and takes no position as to your motion. You may utilize this email in lieu of a formal response and should attach it to your motion when you provide it to the court.

Joshua Cole
Management Review Analyst
Justice Administrative Commission
P: 866.355.7902
Please visit our website at www.justiceadmin.org

Please do not respond to this account with additional pleadings.
All pleadings should be sent to pleadings@justiceadmin.org ONLY

PLEASE NOTE: All e-mail is potentially available as a public record.

IN THE CIRCUIT COURT, FOURTH JUDICIAL CIRCUIT, IN AND FOR DUVAL COUNTY, FLORIDA

CASE NO: 16-2013-CF-5781-AXXX-MA
DIVISION: CR-D

STATE OF FLORIDA

vs.

DONALD SMITH
_____/

ORDER APPOINTING A NEUROPSYCHOLOGIST

THIS CAUSE, came on to be heard upon the Defendant's Motion for Appointment of a Neuropsychologist, and the Court having been fully advised in the premises, and finding that a Neuropsychologist is both necessary and essential to the defense in this cause, it is

ORDERED as follows:

1. That Dr. Joseph Sesta, a Neuropsychologist with Suncoast Neuropsychology, LLC, is hereby appointed as an expert in this matter.

2. The initial fee cap of $7,500.00 at an hourly rate of $300.00 is approved; travel rate is also approved at an hourly rate of $100.00.

3. That the Justice Administrative Commission shall be responsible for payment to Dr. Sesta upon submission of proper invoices.

4. That should the Defendant need to exceed said cap, the Defendant shall seek leave of the Court prior to incurring any additional fees.

DONE AND ORDERED in Duval County, Jacksonville, Florida on this 5 day of November, 2015.

THE HONORABLE MALLORY D. COOPER
CIRCUIT JUDGE

Copies to: Julie Agent Schlax
Justice Administrative Commission
Joseph Sesta, Neuropsychologist

FILED 11/06/2015 AM 10:37 RUSSELL

IN THE CIRCUIT COURT, FOURTH JUDICIAL CIRCUIT, IN AND FOR DUVAL COUNTY, FLORIDA

CASE NO: 16-2013-CF-5781-AXXX-MA
DIVISION: CR-D

STATE OF FLORIDA

vs.

DONALD SMITH
_____/

MOTION FOR APPOINTMENT OF A NEUROPSYCHOLOGIST

COMES NOW the Defendant, Donald Smith, by and through his court-appointed attorney, and pursuant to Florida Laws of Criminal Procedure, moves this Honorable Court for the entry of an Order appointing a neuropsychologist to evaluate defendant, and as grounds hereby states:

1. The Defendant was indicted for Murder in the First Degree, Kidnapping a Child Under the Age of 13 Years, and Sexual Battery on a Child Less than 12 Years; followed by the filing of the State's Notice of Intent to Seek the Death Penalty;

2. The Defendant has been previously adjudged insolvent by this Court and the undersigned was appointed to represent the Defendant in this matter;

3. Due to of the unusual and extraordinary facts of this case and the fact that the State has filed their notice of intent to seek the death penalty;

4. Counsel believes that a neuropsychologist is necessary in the preparation of a defense in this cause;

5. Counsel does not believe she can properly represent the defendant absent a forensic neuropsychological evaluation.

6. Counsel is seeking to have Joseph Sesta, of Suncoast Neuropsychology, LLC, appointed to conduct a confidential forensic neuropsychological work up, inclusive of exam, record review, scoring, data analysis and a written report and report his findings directly to the undersigned counsel;

7. Dr. Joseph Sesta, of Suncoast Neuropsychology, LLC, has a contract with the Justice Administrative Commission;

8. Dr. Joseph Sesta's hourly rate is $300.00 and it is estimated that a minimum fee of $7,500.00 will be necessary thus counsel is requesting authority to submit a motion for additional fees if necessary;

9. Dr. Joseph Sesta will not be seeking reimbursement for travel expenses such as accommodations or mileage; rather, his hourly rate for travel is $100.00. The reasonable associated fees for travel time should be paid by the State of Florida, Justice Administrative Commission in addition to expert witness fees.

WHEREFORE, the Defendant respectfully requests this Honorable Court for entry of an Order appointing a neuropsychologist and authorizing the incurring of costs of a neuropsychologist to assist with the preparation of a defense in this cause.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the Motion for Appointment of a Neuropsychologist has been provided to the Justice Administrative Commission via e-mail delivery this 4th day of November, 2015.

Respectfully submitted,

/s/ Julie Agent Schlax

Julie Agent Schlax
200 East Forsyth Street
Jacksonville, Florida 32202
(904) 674-0717Telephone
(904) 674-0737 Facsimile
Attorney for Defendant

IN THE CIRCUIT COURT, FOURTH JUDICIAL CIRCUIT, IN AND FOR DUVAL COUNTY, FLORIDA

CASE NO: 16-2013-CF-5781-AXXX-MA
DIVISION: CR-D

STATE OF FLORIDA

vs.

DONALD SMITH
_____/

MOTION FOR APPOINTMENT OF A PHARMACOLOGIST

COMES NOW the Defendant, Donald Smith, by and through his court-appointed attorney, and pursuant to Florida Laws of Criminal Procedure, moves this Honorable Court for the entry of an Order appointing a neuropsychologist to evaluate defendant, and as grounds hereby states:

1. The Defendant was indicted for Murder in the First Degree, Kidnapping a Child Under the Age of 13 Years, and Sexual Battery on a Child Less than 12 Years; followed by the filing of the State's Notice of Intent to Seek the Death Penalty;

2. The Defendant has been previously adjudged insolvent by this Court and the undersigned was appointed to represent the Defendant in this matter;

3. Due to of the unusual and extraordinary facts of this case and the fact that the State has filed their notice of intent to seek the death penalty;

4. Counsel believes that a pharmacologist is necessary in the preparation of a defense in this cause;

5. Counsel does not believe she can properly represent the defendant absent the expertise of a recognized pharmacologist.

6. Counsel is seeking to have Dr. Daniel E. Buffington, of Clinical Pharmacology Services, Inc. appointed to conduct a confidential pharmacological work up, inclusive of exam, record review, scoring, data analysis and a written report and report his findings directly to the undersigned counsel;

7. Dr. Daniel E. Buffington, of Clinical Pharmacology Services, Inc., has a contract with the Justice Administrative Commission;

8. Dr. Buffington's hourly rate is $400.00 and it is estimated that a minimum fee of $10,000.00 will be necessary thus counsel is requesting authority to submit a motion for additional fees if necessary;

9. Dr. Buffington will have to incur travel related expenses including airfare, auto rental, mileage, baggage, change fees, lodging, meals and incidentals and would seek compensation of these expenses to be paid by the Justice Administration Commission.

WHEREFORE, the Defendant respectfully requests this Honorable Court for entry of an Order appointing a pharmacologist and authorizing the incurring of costs of a pharmacologist to assist with the preparation of a defense in this cause.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the Motion for Appointment of a Pharmacologist has been provided to the Justice Administrative Commission via e-mail delivery this 6th day of November, 2015.

Respectfully submitted,

/s/ Julie Agent Schlax

Julie Agent Schlax
200 East Forsyth Street
Jacksonville, Florida 32202
(904) 674-0717Telephone
(904) 674-0737 Facsimile
Attorney for Defendant

IN THE CIRCUIT COURT, FOURTH JUDICIAL CIRCUIT, IN AND FOR DUVAL COUNTY, FLORIDA

CASE NO: 16-2013-CF-5781-AXXX-MA
DIVISION: CR-D

STATE OF FLORIDA

vs.

DONALD SMITH
_____/

MOTION FOR APPOINTMENT OF A PHARMACOLOGIST

COMES NOW the Defendant, Donald Smith, by and through his court-appointed attorney, and pursuant to Florida Laws of Criminal Procedure, moves this Honorable Court for the entry of an Order appointing a neuropsychologist to evaluate defendant, and as grounds hereby states:

1. The Defendant was indicted for Murder in the First Degree, Kidnapping a Child Under the Age of 13 Years, and Sexual Battery on a Child Less than 12 Years; followed by the filing of the State's Notice of Intent to Seek the Death Penalty;

2. The Defendant has been previously adjudged insolvent by this Court and the undersigned was appointed to represent the Defendant in this matter;

3. Due to of the unusual and extraordinary facts of this case and the fact that the State has filed their notice of intent to seek the death penalty;

4. Counsel believes that a pharmacologist is necessary in the preparation of a defense in this cause;

5. Counsel does not believe she can properly represent the defendant absent the expertise of a recognized pharmacologist.

6. Counsel is seeking to have Dr. Daniel E. Buffington, of Clinical Pharmacology Services, Inc. appointed to conduct a confidential pharmacological work up, inclusive of exam, record review, scoring, data analysis and a written report and report his findings directly to the undersigned counsel;

7. Dr. Daniel E. Buffington, of Clinical Pharmacology Services, Inc., has a contract with the Justice Administrative Commission;

8. Dr. Buffington's hourly rate is $400.00 and it is estimated that a minimum fee of $10,000.00 will be necessary thus counsel is requesting authority to submit a motion for additional fees if necessary;

FILED 11/25/2015 AM 10:37 RUSSELL

9. Dr. Buffington will have to incur travel related expenses including airfare, auto rental, mileage, baggage, change fees, lodging, meals and incidentals and would seek compensation of these expenses to be paid by the Justice Administration Commission.

WHEREFORE, the Defendant respectfully requests this Honorable Court for entry of an Order appointing a pharmacologist and authorizing the incurring of costs of a pharmacologist to assist with the preparation of a defense in this cause.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the Motion for Appointment of a Pharmacologist has been provided to the Justice Administrative Commission via e-mail delivery this 6th day of November, 2015.

Respectfully submitted,

/s/ Julie Agent Schlax

Julie Agent Schlax
200 East Forsyth Street
Jacksonville, Florida 32202
(904) 674-0717Telephone
(904) 674-0737 Facsimile
Attorney for Defendant

From: Ray, Sharon <sharon.ray@justiceadmin.org>

To: Julie@esalawgroup.com
Cc:

Date: Monday, November 09, 2015 11:35 am
Subject: 13-5781; State v. Smith; JAC response
Attachments:

Dear Ms. Schlax:

The Justice Administrative Commission (JAC) has received and reviewed the Motion for Appointment of a Pharmacologist as to the above-referenced matter. JAC will not be filing a formal response and takes no position as to your motion except JAC objects to any rate in excess of the established rates absent a showing to exceed those rates. JAC does not request to participate in any hearing set in this matter. You may utilize this email in lieu of a formal response and should attach it to your motion when you provide it to the court.

Bes regards,
Sharon L. Ray
Assistant General Counsel
Justice Administrative Commission
P. O. Box 1654
Tallahassee, Florida 32302
Telephone (866) 355-7902
sharon.ray@justiceadmin.org

Please note: All e-mail is potentially available as a public record. This e-mail or any attachments provided may contain confidential information intended for the use of the designated recipients named above. If you are not the intended recipient and have received this e-mail in error, please notify the sender immediately by returning the e-mail and deleting the message and ***be aware that any review, dissemination, distribution or copying of this communication is strictly prohibited.***

FILED 11/25/2015 AM 10:37 FUSSELL

IN THE CIRCUIT COURT, FOURTH JUDICIAL CIRCUIT, IN AND FOR DUVAL COUNTY, FLORIDA

CASE NO: 16-2013-CF-5781-AXXX-MA
DIVISION: CR-D

STATE OF FLORIDA

vs.

DONALD SMITH
_____/

ORDER APPOINTING A PHARMACOLOGIST

THIS CAUSE, came on to be heard upon the Defendant's Motion for Appointment of a Neuropsychologist, and the Court having been fully advised in the premises, and finding that a Neuropsychologist is both necessary and essential to the defense in this cause, it is

ORDERED as follows:

1. That Dr. Daniel E. Buffington, of Clinical Pharmacology Services, Inc., is hereby appointed as an expert in this matter.

2. The initial fee cap of $10,000.00 at an hourly rate of $400.00 is approved along with all travel expenses.

3. That the Justice Administrative Commission shall be responsible for payment to Dr. Daniel E. Buffington upon submission of proper invoices.

4. That should the Defendant need to exceed said cap, the Defendant shall seek leave of the Court prior to incurring any additional fees.

DONE AND ORDERED in Duval County, Jacksonville, Florida on this 23 day of November, 2015.

THE HONORABLE MALLORY D. COOPER
CIRCUIT JUDGE

Copies to: Julie Agent Schlax
Justice Administrative Commission
Daniel E. Buffington, Pharmacologist

FILED 11/25/2015 AM 10:37 RUSSELL

IN THE CIRCUIT COURT OF THE FOURTH JUDICIAL CIRCUIT
IN AND FOR DUVAL COUNTY, FLORIDA

STATE OF FLORIDA CASE NO.: 2013 CF 5781 A

vs DIV: CR-D

DONALD SMITH,
Defendant.
_____/

JUSTICE ADMINISTRATIVE COMMISSION'S RESPONSE TO MOTION FOR APPOINTMENT OF OUT OF STATE EXPERT AND REQUEST TO APPEAR TELEPHONICALLY

COMES NOW, the Justice Administrative Commission ("JAC"), by and through the undersigned attorney files this response to the above-cited motions as follows:

1. Julie Schlax (Counsel) is seeking authorization for $10,000 at an unspecified rate for a defense forensic expert located out-of-state.

2. JAC can only pay due process costs pursuant to sections 29.007, 27.40, and 27.5304, Florida Statutes.

3. As directed by section 27.425, Florida Statutes, and the General Appropriations Act, all due process services should be subject to the rates, terms and conditions approved by the Florida Statutes, and the JAC contract, policies and procedures. **JAC objects to any rate in excess of the established rates.**

4. There are no established rates for experts in this circuit. In such circumstances, JAC relies on the rates recommended by the Indigent Services Advisory Board (ISAB). For general experts, the ISAB recommended a rate from $150 to $200 per hour. JAC objects to any rate in excess of this rate range.

5. Counsel has the burden to establish the particularized need for expert services. Counsel needs to show the expert is necessary for the defense of the case.

6. Counsel also has the burden to establish diligent efforts to obtain services within the rates established by law. In the motion, Counsel suggests the expert will require a higher rate but fails to disclose that rate.

7. **As to the appointment of an out-of-state expert, JAC objects.** While an indigent defendant has a due process right to the assistance of experts in his or her defense, that right is not unfettered. See Lavender v. State, 889 So.2d 882, 885 (5th DCA 2004). The right is limited to experts that are relevant and necessary to the defense of the case. See id. The defendant is not entitled to a specific expert or one of his or her "personal liking", but is only entitled to the services of a competent expert. See Walls v. State, 926 So.2d 1156, 1177 (Fla. 2006). The use of out of state providers is unnecessary and unreasonable where there are competent experts in the field available within the state.

8. The JAC Agreement for Attorney Services specifically addresses this issue. Paragraph IV(15) provides as follows:

> Attorney shall not seek authorization from the court for out-of-state experts or mitigation specialists, absent a showing that there are no such providers with appropriate skills or expertise available, first, in the county in which the case was filed and, second, in any other county in the State of Florida. If Attorney obtains an out-of-state due process provider without making such a showing, Attorney agrees not to request reimbursement for any travel expenses including compensation for travel time on behalf of the due process provider. An order authorizing the employment must be in writing and contain specific findings regarding the unavailability of a qualified in-state expert or mitigation specialist. The attorney shall submit a copy of the order to JAC.

See also § 27.5305, Fla. Stat. As directed by the JAC Agreement and section 27.5305, absent a showing that there are no competent experts available within Florida, this Court should not authorize the retention of an out-of-state expert.

9. Based on past experience, there are competent experts located in Florida with the requested expertise. The use of out-of-state experts may be a wasteful use of limited state resources where there are competent experts located in Florida. The additional costs associated with out-of-state experts such as travel time and travel expenses can dramatically increase the amount incurred for the expert services.

10. Although the defense may desire the services of the requested expertise because of his preeminence in the field, the standard is whether there are competent experts within Florida who can address the concerns indicated in Counsel's motion. In that there are numerous experts within Florida who perform the type of evaluation set forth in Counsel's motion, JAC anticipates Counsel cannot meet the substantial burden set forth in section 27.5305, Florida Statutes, and the JAC contract executed by Counsel. This is particularly true since Counsel has failed to include any specific allegations about the need for the requested expert other than conclusory statements.

11. Moreover, the Court already appointed an expert with similar expertise on November 5, 2015. The Court also appointed another mental health expert on September 16, 2015. Absent a showing that the existing experts cannot meaningfully and competently address the issue raised in Counsel's motion, the Court should not appoint another expert with the same specialty. The defense is not entitled to multiple experts absent a showing that the existing experts cannot meaningfully and competently address the issues necessary for the defense of the case.

12. If any due process providers desire direct payment, the JAC's policies and procedures require the vendor to execute the appropriate contract and follow JAC's billing and audit procedures to obtain payment.

13. Pursuant to the JAC Agreement, any direct payment to a due process vendor is contingent upon Counsel providing any and all necessary documentation in support of a billing to JAC in an expeditious fashion. Counsel shall promptly review any billing for direct payment to a due process vendor for accuracy and completeness and must certify that the work was satisfactorily performed. In the event JAC issues a deficiency notice regarding any billing, Counsel or the due process provider shall promptly resolve the deficiency so that JAC can process the billing for payment. The order should reflect that Counsel must comply with all JAC policies and procedures in the submission of billings to JAC for direct payment to a due process vendor.

14. The Defendant is liable to pay the amount of any due process costs provided by the state and the clerk of court as directed by sections 27.52 and 938.29, Florida Statutes. If the Defendant is convicted, the Court is responsible for determining the amount of the obligation to be imposed as a lien against the Defendant.

15. JAC requests that this matter be set for hearing. JAC requests to appear telephonically and may be reached toll-free at (866) 355-7902.

WHEREFORE, the JAC requests this Court, should it grant the Defendant's motion, also include in its order the specific due process services authorized, as well as hourly or per unit rates and maximum fees approved, and that the provider be paid in accordance with the rates, terms, and conditions approved by the Florida Statutes, JAC contract, and JAC policies and procedures.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been sent by facsimile, email and/or U.S. Mail on this 10th day of December, 2015 to:

Julie Schlax, Esq.
Sent via email

Respectfully submitted,

ANA CRISTINA MARTINEZ
GENERAL COUNSEL

/s/ Christian D. Lake
CHRISTIAN D. LAKE
Assistant General Counsel
Justice Administrative Commission
P.O. Box 1654
Tallahassee, FL 32302
Tel.: 850-488-2415
pleadings@justiceadmin.org
Florida Bar No.: 0134831

IN THE CIRCUIT COURT, FOURTH JUDICIAL CIRCUIT, IN AND FOR DUVAL COUNTY, FLORIDA

CASE NO: 16-2013-CF-5781-AXXX-MA
DIVISION: CR-D

STATE OF FLORIDA

vs.

DONALD SMITH
_____/

MOTION TO DIRECT DEPARTMENT OF CORRECTIONS TO PERMIT TESTING

COMES NOW the Defendant, Donald Smith, by and through his court-appointed attorney, and pursuant to Florida Laws of Criminal Procedure, moves this Honorable Court for the entry of an Order directing the Department of Corrections to permit neuropsychological testing, and as grounds hereby states:

1. Dr. Joseph Sesta, of Suncoast Neuropsychology, LLC, has been appointed to conduct a confidential forensic neuropsychological work up, inclusive of exam, record review, scoring, data analysis and a written report and report his findings directly to the undersigned counsel.

2. Dr. Sesta is scheduled to conduct testing on the Defendant on December 29, 2015 and possibly December 30, 2015, if further time is needed.

3. Dr. Sesta is traveling from out of town to conduct the requested/required testing.

4. Dr. Sesta needs to conduct the scheduled testing in a classroom setting without a guard in the room at the Duval County Jail. As well, the defendant must have shackles off of his hands to be able to partake in the testing.

5. Counsel has been advised that the testing can only be properly completed with the specific requests herein which are reasonable and necessary.

WHEREFORE, the Defendant respectfully requests this Honorable Court for entry of an Order Directing the Department of Corrections to Permit Testing.

Respectfully submitted,

/s/ Julie Agent Schlax

Julie Agent Schlax
200 East Forsyth Street
Jacksonville, Florida 32202
(904) 674-0717Telephone
(904) 674-0737 Facsimile
Attorney for Defendant

IN THE CIRCUIT COURT, FOURTH JUDICIAL CIRCUIT, IN AND FOR DUVAL COUNTY, FLORIDA

CASE NO: 16-2013-CF-5781-AXXX-MA
DIVISION: CR-D

STATE OF FLORIDA

vs.

DONALD SMITH
_____/

ORDER DIRECTING DEPARTMENT OF CORRECTIONS TO PERMIT TESTING

THIS CAUSE, came on to be heard upon the Defendant's Motion to Direct Department of Corrections to permit Testing, and the Court having been fully advised in the premises, and finding that the testing is both necessary and essential to the defense in this cause, it is

ORDERED as follows:

1. That Dr. Joseph Sesta, a Neuropsychologist with Suncoast Neuropsychology, LLC, shall be allowed to conduct neuropsychological testing of the defendant on December 29, 2015, and possibly December 30, 2015 (if additional time is needed).

2. The Department of Corrections, Duval County Jail, shall make reasonable accommodations to allow the testing to occur.

3. Dr. Sesta shall be allowed to conduct said testing in a classroom setting without a guard, and without hand shackles on the Defendant.

DONE AND ORDERED in Duval County, Jacksonville, Florida on this 15 day of December, 2015.

_____
THE HONORABLE MALLORY D. COOPER
CIRCUIT JUDGE

Copies to: Julie Agent Schlax
Justice Administrative Commission
Joseph Sesta, Neuropsychologist

FILED
DEC 15 2015
D.W. Daniel
CLERK CIRCUIT COURT

IN THE CIRCUIT COURT OF THE FOURTH JUDICIAL CIRCUIT, IN AND FOR DUVAL COUNTY, FLORIDA.

CASE NO.: 16-2013-CF-5781 AXXX

DIVISION: CR-D

STATE OF FLORIDA

VS.

DONALD SMITH

MOTION TO STRIKE NOTICE OF INTENT TO SEEK THE DEATH PENALTY AND BAR THE STATE FROM SEEKING THE DEATH PENALTY BASED ON U.S. SUPREME COURT'S DECISION IN *HURST V. FLORIDA*

COMES NOW, Defendant DONALD SMITH, by and through the undersigned counsel, and moves for an order requiring the State to strike its notice of intent to seek the Death Penalty in this case and bar imposition of any proceedings subjecting the Defendant to the Death Penalty under current Florida law. Defendant would state the following:

1. This case is set for trial on April 4,2016, and the State has filed a Notice to Seek the Death Penalty pursuant to Florida Rule of Criminal Procedure 3.202. The undersigned counsel has been appointed by this Honorable Court as lead death qualified counsel under Florida Rule of Criminal Procedure 3.112. As such, the undersigned counsel has sought approval and been granted numerous experts in order to proceed for the possible imposition of the Death Penalty.

2. On January 12, 2016, the United States Supreme Court in *Hurst v. Florida*, Docket No. 14-7505, found the Florida Statutes permitting the imposition of the Death Penalty in the State of Florida to be unconstitutional as a violation of the Sixth Amendment to the Constitution. The Court answered the following important question: "Whether Florida's death sentencing scheme violates the Sixth Amendment in light of this Court's decision in *Ring v. Arizona*, 536 U.S. 584 (2002)." The Supreme Court, in an 8-1 decision, found that the current sentencing scheme in Florida was a violation of the Sixth Amendment

in that it permitted a Judge, not a jury, to make factual findings in support of the imposition of the Death Penalty. As such, until such time as a new sentencing scheme is passed by the Florida Legislature, the only possible penalty for First Degree Murder is Life Imprisonment without the possibility of parole.

4. This Court should strike the Death Notice, and move to protect Mr. Smith from a trial under a scheme which the Supreme Court has found unconstitutional.

WHEREFORE, the Defendant moves this Court to strike the Death Notice in this case and proceed to trial with the only lawful penalty applicable to a guilty verdict as charged to be Life Imprisonment without the possibility of parole.

I HEREBY CERTIFY that a copy of the foregoing has been furnished to the Office of the State Attorney, electronically, this 16th day of January, 2016.

Respectfully submitted,

/s/ Julie Schlax

Julie Agent Schlax
200 E. Forsyth Street
Jacksonville, Florida 32202
(904) 674-0717
julie@esalawgroup.com
Attorney for Defendant

STATE ATTORNEY NO.: 13CF039428AD

IN THE CIRCUIT COURT OF THE FOURTH JUDICIAL CIRCUIT, IN AND FOR DUVAL COUNTY, FLORIDA

CASE NO.: 162013CF5781AXXXMA

DIVISION: CR-D

STATE OF FLORIDA

vs.

DONALD JAMES SMITH

STATE'S SIXTH SUPPLEMENTAL DISCOVERY EXHIBIT

A.

Category A:

Investigator Robert Hinson - State Attorney's Office
C. Carter #69044 Jacksonville Sheriff's Office
Detective D.C. Gonzalez #6462 Jacksonville Sheriff's Office
Christopher Iber- Forensic Photographic Technologist
FBI Lab FAVIAU, ERF-E Building 27958A, Quantico, VA 22135

C. Recorded conversations between Donald Smith and Randall Deviney while incarcerated at the Pretrial Detention Facility in June 2015 (see attached recording of the statements and the summary of the statements contained in Investigator Hinson's memorandum dated January 20th, 2016).

K. Memorandum from Investigator Hinson dated January 20th, 2016. Photographs of the isolation cells on the 6th floor of the Pretrial Detention Facility. Edited surveillance video from Walmart and Dollar General (to be provided when completed by the FBI).

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by mail/efile, to Julie Schlax, Esquire, 200 East Forsyth Street, Jacksonville, FL 32202 this 21st day of January, 2016.

ANGELA B. COREY
STATE ATTORNEY

By: _____
Mark Caliel
Bar Number: 0105650
Assistant State Attorney

IN THE CIRCUIT COURT, FOURTH JUDICIAL CIRCUIT, IN AND FOR DUVAL COUNTY, FLORIDA

CASE NO: 16-2013-CF-5781-AXXX-MA
DIVISION: CR-D

STATE OF FLORIDA

vs.

DONALD SMITH
_____/

MOTION FOR AUTHORITY TO INCUR COSTS ADDITIONAL COSTS OF MITIGATION COORDINATOR/ INVESTIGATOR AND MITIGATION EXPENSES

COMES NOW the Defendant, Donald Smith, by and through his court-appointed attorney, and pursuant to Florida Laws of Criminal Procedure, moves this Honorable Court for the entry of an Order authorizing the incurring of additional costs of a mitigation coordinator/investigator, and as grounds hereby states:

1. The Defendant was indicted for Murder in the First Degree, Kidnapping a Child Under the Age of 13 Years, and Sexual Battery on a Child Less than 12 Years; followed by the filing of the State's Notice of Intent to Seek the Death Penalty;

2. The Defendant has been previously adjudged insolvent by this Court;

3. The undersigned was appointed to represent the Defendant in this matter;

4. Due to of the unusual and extraordinary facts of this case and the fact that the State has filed their notice of intent to seek the death penalty;

5. A mitigation coordinator/investigator is necessary in the preparation of a defense in this cause;

6. The American Bar Association Guidelines (2003) regarding the performance of attorneys representing death eligible Defendants required at a minimum the services of two attorneys, investigators, appropriate staff, and a mitigation coordinator/investigator , as the bare minimum for a defense team;

7. The American Bar Association standards were held to be minimum requirements in *Rompilla v. Beard*, 125 S. Ct. 2456;

8. Counsel does not believe she can provide Defendant with proper representation to which he is entitled unless the Court authorizes additional fees for a mitigation expert who will report her findings directly to the undersigned counsel;

9. Brooke Butler, Ph.D., P.A., was previously appointed as a mitigation coordinator/investigator in this cause and counsel was authorized fees up to $20,000.00;

10. The appointed mitigation coordinator/investigator, Brooke Butler, Ph.D., P.A., has exhausted the previous $20,000.00 authorized thus counsel is requesting authority to incur an additional amount of $15,000.00, with the authority to submit a motion for additional fees if necessary;

11. Defendant is 59 years old. He has an extensive criminal and psychiatric history within the Department of Corrections including being evaluated and forced into the Jimmy Rice Involuntary Commitment Center.

12. Defense counsel has received over 10,000 pages of discovery in our public records request, which must be thoroughly reviewed.

13. Reasonable and necessary travel expenses will be incurred by Brooke Butler, Ph.D., P.A., and the reasonable associated fees for mitigation/investigative costs and reasonable travel expenses should be paid by the State of Florida, Justice Administrative Commission

WHEREFORE, the Defendant respectfully requests this Honorable Court for entry of an Order appointing a mitigation coordinator/investigator and authorizing the incurring of costs of a mitigation coordinator/investigator to assist with the preparation of a defense in this cause.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the Motion for Appointment and Authority to Incur Costs of Mitigation Coordinator/Investigator and Mitigation Expenses has been provided to the Justice Administrative Commission via e-mail delivery this 28th day of January, 2016.

Respectfully submitted,

/s/ Julie Agent Schlax

Julie Agent Schlax
200 East Forsyth Street
Jacksonville, Florida 32202
(904) 674-0717Telephone
(904) 674-0737 Facsimile
Attorney for Defendant

IN THE CIRCUIT COURT OF THE FOURTH JUDICIAL CIRCUIT, IN AND FOR DUVAL COUNTY, FLORIDA.

CASE NO.: 16-2013-CF-5781 AXXX

DIVISION: CR-D

STATE OF FLORIDA

VS.

DONALD SMITH

STATE'S RESPONSE TO DEFENDANT'S MOTION TO STRIKE NOTICE OF INTENT TO SEEK THE DEATH PENALTY AND BAR THE STATE FROM SEEKING THE DEATH PENALTY BASED ON U.S. SUPREME COURT'S DECISION IN *HURST V. FLORIDA*

COMES NOW, the State, by and through the undersigned Assistant State Attorney, and files this response in opposition to the Defendant's motion to strike notice of intent to seek the death penalty and to bar the State from seeking the death penalty as follows:

1. In his motion, Smith acknowledges that he has been put on notice that the State will seek the death penalty in his case. Smith claims, however, that as a result of the United States Supreme Court's decision in Hurst v. Florida, the only possible penalty for first degree murder in Florida, now, is life without the possibility of parole. Smith's motion is due to be denied for two reasons.

2. First, a trial court is not at liberty to strike the State's notice of intent to seek the death penalty prior to trial. State v. Bloom, 497 So.2d 2 (Fla. 1986)(a

circuit judge lacks authority to decide pre-trial whether the death penalty will be imposed in a first-degree murder case.). This is so because the decision to seek the death penalty is solely within the purview of the prosecutor. [1]

3. Rather than striking the State's notice of intent to seek the death penalty, the appropriate time to determine whether the defendant may be lawfully sentenced to death is during the separate proceedings on the issue of penalty conducted pursuant to Section 921.141(1), Florida Statutes. [2] In accord with the Florida Supreme Court's decision in Bloom, Smith's motion should be denied.

4. Second, this Court should deny Smith's motion because his motion rests on the assumption that Florida's death penalty sentencing statute has been declared unconstitutional in its entirety. It has not.

5. Instead, in Hurst, the Court determined that Florida's capital sentencing statute, Section 921.141, is unconstitutional because it permits a trial judge to make death eligibility findings of fact, specifically the existence of statutory aggravators set forth in Section 921.141(5), that were not found by the jury. [3]

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[1] There is a narrow exception to this rule not applicable in this case. State v. Donner, 500 So.2d 532 (Fla. 1987) (prosecutorial discretion can be curbed when it is based on impermissible motives such as race, religion, or a desire to prevent the exercise of the defendant's constitutional rights).

[2] Logically, this determination could not even be made until after the jury makes the requisite findings of fact and recommendation. Only then, could the Court, under the current statute, determine whether imposition of a death sentence would be lawful.

[3] Nothing in Hurst altered the exception set forth in Ring that a prior conviction for a violent felony is a fact that need not be found by the jury. Moreover, while Hurst spoke generally in terms of facts that need to be found by the jury, it is clear these facts are limited to the aggravating factors proven by the State to exist and do not include the selection factors set forth in Section 921.141(2), Florida Statutes. Kansas v. Carr, 136 S.Ct. 633 (2016)(noting that aggravating factors are "purely factual determination(s)" and observing, in contrast, that whether mitigation exists is "largely a judgment call (or perhaps a valuecall)" and that "of course, the ultimate question whether mitigating

6. In reality, Hurst is all about the procedure Florida uses to sentence a defendant to death and not about the substance of the statute. Importantly, Hurst did not abolish the death penalty in Florida nor did it declare the death penalty unconstitutional.

7. Accordingly, should Smith go to trial before the Legislature amends Section 921.141 to make it Hurst compliant, the trial judge may remedy any procedural infirmity in the statute by way of an appropriate jury instruction and verdict form whereby the jury makes findings of fact as to the aggravators and the trial judge limits its aggravation findings to the aggravators found to exist by the jury. [4] Nothing in the statute precludes this court from crafting such a remedy.

8. Leaving the remedy to the trial court in the face of an unconstitutional application of an otherwise valid statute has been done recently, albeit in another context. In Miller v. Alabama, 132 S.Ct. 2455 (2012), the United States Supreme Court ruled that, for juvenile offenders, a mandatory life sentence without the possibility of parole was unconstitutional. [5] At the time Miller was decided, the only statutorily permissible punishment for juvenile offenders

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circumstances outweigh aggravating circumstances is mostly a question of mercy—the quality of which, as we know, is not strained."

[4] The State will be prepared to propose Hurst compliant jury instructions and a verdict form.

[5] The State uses the term "juvenile offenders" or "juvenile" in this response to mean a defendant who was under the age of 18 at the time he committed the murder.

convicted of first degree murder in Florida was mandatory life without the possibility of parole or death. *Section 775.082(1), Florida Statutes (2011).*

9. Not until July 1, 2014 did the Florida Legislature address Miller by amending Section 775.082, Florida Statutes and enacting Sections 921.1401 and 921.1402, Florida Statutes. [6]

10. In the two year interval between the time Miller was decided and the Legislature acted to address the decision in Miller, the question of how to constitutionally apply Section 775.082(1), Florida Statutes to juvenile murderers was left to Florida's courts. In turn, some appeals courts, including the First District Court of Appeal, left the task of crafting a constitutional sentence and sentencing procedure to the trial courts, subject, of course, to appellate review. *See* Washington v. State, 103 So.3d 917, 920 (Fla. 1st DCA 2012)(reversing and remanding Washington's mandatory life sentence in light of Miller but leaving the potential range of sentencing options to the trial court). [7] *See also* Ortiz v. State, 119 So.3d 494, 496 (Fla. 1st DCA 2013)(Makar J. concurring)(noting that the First District Court of Appeal has determined that it is appropriate for the

[6] These three statutes set forth procedures by which a juvenile could be sentenced to life, a term of years equal to life or a term of years short of a life sentence, as well as a review process whereby, with the exception of prior violent offenders, juvenile killers could get their sentence reduced after a period of time.

[7] The Fourth District Court of Appeal was of the same view as the First District Court of Appeal while two other courts of appeal believed that the previous statute, calling for a sentence of life with the possibility of parole after 25 years, provided a lawful sentence. See Orange v. State, 149 So.3d 74 (Fla. 4th DCA 2014) *disapproved on other grounds by* Lawton v. State, 2015 WL 156572540 (Fla. 2015).

trial courts to get the first crack at determining a lawful sentence for juvenile murderers in light of Miller). [8]

11. Implicit in both Washington and Ortiz, is the First District Court of Appeal's determination that a trial court has the inherent authority to craft procedures designed to cure constitutional defects in a statute even before the Legislature steps in to repair it.

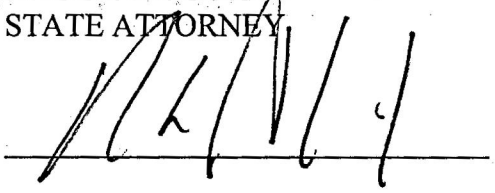
12. Because Florida's death penalty statute has only been declared unconstitutional on narrow grounds and because the trial court has the ability to remedy any constitutional infirmity within the parameters of the current statute, Smith is not entitled to the relief he seeks and his motion should be denied.

[8] Eventually, the Florida Supreme Court determined that juvenile offenders, whose sentences were found to be unconstitutional under Miller, would be subject to the juvenile sentencing statute enacted by the legislature effective July 1, 2014 even though the statute, on its face, limited its applicability to offenses committed on or after the effective date of the statute. See Horsley v. State, 160 So.3d 393 (Fla. 2015).

BASED ON THE FOREGOING, the State respectfully requests this Court deny Smith's motion to strike notice of intent to seek the death penalty as well as his request to bar the State from seeking death in this case.

Respectfully submitted,

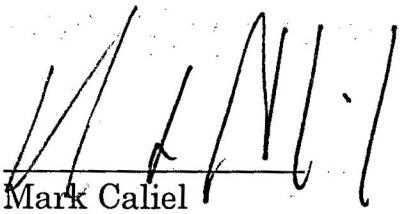
ANGELA B. COREY
STATE ATTORNEY



Mark Caliel
Assistant State Attorney
Florida Bar No: 105650
311 W. Monroe Street
Jacksonville, Florida 32202
(904) 674-0717
mcaliel@coj.net
Attorney for the State of Florida

CERIFICATE OF SERVICE

I certify that a copy of the foregoing response has been furnished to counsel for the defendant by E-service this 2nd day of February 2016.



Mark Caliel
Assistant State Attorney

IN THE CIRCUIT COURT OF THE FOURTH JUDICIAL CIRCUIT, IN AND FOR DUVAL COUNTY, FLORIDA.

CASE NO.: 16-2013-CF-5781 AXXX

DIVISION: CR-D

STATE OF FLORIDA

VS.

DONALD SMITH

NOTICE OF INTENT TO FILE MOTION FOR PROTECTIVE ORDER AND REQUEST FOR REASONABLE TIME

COMES NOW, Defendant, by and through the undersigned attorney, pursuant to Florida Rule of Criminal Procedure, 3.220(I) and Chapter 119, Florida Statutes, and files this Notice of Intent to Seek a Protective Order prohibiting the public release of the discovery material documented in the State's Sixth Supplemental Discovery Exhibit and seeking reasonable time for the filing of this Motion. As grounds therefore the Defendant asserts the following:

1. On January 22, 2016 the State of Florida filed the State's Sixth Supplemental Discovery Exhibit.

2. The Defense has become aware this Supplemental Discovery encompasses purported recorded conversations of the Defendant over a seventy two (72) hour period. The Defense has not received the seventy two hour recording, but has only received a small portion.

3. The Defense seeks an opportunity to review the full supplemental discovery and file a Motion for Protective Order with specificity as to the necessity of this Protective Order.

4. The Defense has become aware that media outlets seek this information thru a Public Records request. The Defense seeks a reasonable time to review the full discovery materials.

WHEREFORE, Defendant requests this Honorable Court to grant a reasonable amount of time to review and file for appropriate relief.

I HEREBY CERTIFY that a copy of the foregoing has been furnished to the Office of the State Attorney, electronically, this _2nd day of February, 2016.

Respectfully submitted,

/s/ Julie Schlax

Julie Agent Schlax
200 E. Forsyth Street
Jacksonville, Florida 32202
(904) 674-0717
julie@esalawgroup.com
Attorney for Defendant

IN THE CIRCUIT COURT, FOURTH JUDICIAL CIRCUIT, IN AND FOR DUVAL COUNTY, FLORIDA

CASE NO: 16-2013-CF-5781-AXXX-MA
DIVISION: CR-D

STATE OF FLORIDA

vs.

DONALD SMITH
_____/

ORDER AUTHORIZING ADDITIONAL COSTS
OF MITIGATION COORDINATOR/INVESTIGATOR AND MITIGATION EXPENSES

THIS CAUSE, came on to be heard upon the Defendant's Motion for Authority to Incur Additional Costs of Mitigation Coordinator/Investigator and Mitigation Expenses, and the Court having been fully advised in the premises, and finding that a Mitigation Coordinator/Investigator is both necessary and essential to the defense in this cause, it is

ORDERED as follows:

1. That Julie Agent Schlax, Esquire is hereby authorized to incur additional reasonable expenses of Brooke Butler, Ph.D., P.A.;

3. That the Justice Administrative Commission, shall pay the costs of the invoices submitted by Brooke Butler, Ph.D., P.A., at an hourly rate of $75.00 and not to exceed an additional amount of $15,000.00 (total of $35,000.00) without further Order.

4. It is further ordered that the Justice Administrative Commission shall pay the reasonable and necessary travel expenses incurred by Brooke Butler, Ph.D., P.A.

DONE AND ORDERED in Duval County, Jacksonville, Florida on this 2 day of February, 2016.

Mallory D Cooper

THE HONORABLE MALLORY D. COOPER
CIRCUIT JUDGE

Copies to: Julie Agent Schlax
Justice Administrative Commission
Brooke Butler, Ph.D., P.A.

FILED
FEB - 2 2016
Derk W. Orrell
CLERK CIRCUIT COURT

IN THE CIRCUIT COURT, FOURTH JUDICIAL CIRCUIT, IN AND FOR DUVAL COUNTY, FLORIDA

CASE NO: 16-2013-CF-5781-AXXX-MA
DIVISION: CR-D

STATE OF FLORIDA

vs.

DONALD SMITH
_____/

ORDER GRANTING MOTION FOR INTERIM REIMBURSEMENT FOR COSTS

THIS CAUSE, having come before the Court upon appointed counsel's Motion for Interim Reimbursement for Costs, and the Court being fully advised in the premises, it is therefore, upon consideration,

ORDERED:

1. That the State of Florida Justice Administrative Commission shall pay to Julie Agent Schlax, 200 East Forsyth Street, Jacksonville, Florida, 32202, the amount of one thousand forty dollars and four cents ($1,040.04) for costs in the above-styled case.

DONE AND ORDERED at Jacksonville, Florida this 2 day of February, 2016.

CIRCUIT COURT JUDGE

FILED
FEB - 2 2016
CLERK CIRCUIT COURT

IN THE CIRCUIT COURT, FOURTH JUDICIAL CIRCUIT, IN AND FOR DUVAL COUNTY, FLORIDA

CASE NO: 16-2013-CF-5781-AXXX-MA
DIVISION: CR-D

STATE OF FLORIDA

vs.

DONALD SMITH
_____/

ORDER GRANTING MOTION TO DETERMINE CONFIDENTIALITY OF COURT RECORDS

THIS CAUSE, came before the Court on the 2nd day of February, 2016, on the Defendant's Motion to Appoint expert and ore tenus Motion to Determine Confidentiality of Court Records and for an order sealing the same. Present at the hearing were attorney Julie Schlax, Dr. Brooke Butler, and Sharon Ray via phone representing the Justice Administrative Commission. The Defendant was not present. The Court, having reviewed the pleading, heard the testimony of the parties and the argument of counsel and being otherwise duly advised in the premises,

ORDERS and ADJUDGES as follows:

1. This Court has jurisdiction of the parties and subject matter hereto.

2. The court finds that the Motion to Appoint expert and the ore tenus Motion to Determine Confidentiality of Court Records are, pursuant to Judicial Administrative Rule 2.420(c)(9)(vi) court records determined to be confidential on the grounds that confidentiality is required to protect the following interests: preventing a serious and imminent threat to the fair, impartial, and orderly administrative of justice, specifically confidential psychiatric of the Defendant to

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determine the legal issues in a case; and avoiding substantial injury to a party by disclosure of matter protected by a common low or privacy right not generally inherent in the specific type of proceeding sought to be closed.

3. The entire documents shall remain confidential.

4. The court finds that the degree, duration and manner of confidentiality ordered by the court are no broader than necessary to protect the interests set forth in Rule 2.420(c) and no less restrictive measures are available to protect the interest set forth in said Rule.

5. The Clerk of the Circuit Court is directed to publish the order in accordance with subdivision Judicial Administrative Rule 2.420(e)(4).

6. This Court specifically retains jurisdiction of the parties and the subject matter hereto for all legal purposes.

DONE AND ORDERED at Jacksonville, Florida this 8 day of February, 2016.

CIRCUIT COURT JUDGE

IN THE CIRCUIT COURT, FOURTH JUDICIAL CIRCUIT, IN AND FOR DUVAL COUNTY, FLORIDA

CASE NO: 16-2013-CF-5781-AXXX
DIVISION: CR-D

STATE OF FLORIDA

VS.

DONALD SMITH
_____/

AMENDED ORDER GRANTING MOTION TO INCUR COSTS OF SELECT DEPOSITION TRANSCRIPTS

THIS CAUSE having come before the court upon the Defendant's Motion, and the Court having been fully advised in the premises, and finding that the transcripts are both necessary and essential to the defense in this cause, it is

ORDERED AND ADJUDGED as follows:

Julie Agent Schlax, Esquire is hereby authorized to incur the reasonable costs of obtaining the transcripts of the depositions of the following witnesses:

Date of Proceeding	**Type of Proceeding**	**Name of Witness**
June 4, 2015	Perpetuated Testimony	Nicole Lee
July 2, 2015	In-court deposition	Patricia Moore

IT IS FURTHER ORDERED AND ADJUDGED that the Justice Administrative Commission shall pay these reasonable costs upon submission of the proper invoice(s) and that the rate shall be $4.00 per page transcribed for depositions, $5.00 per page transcribed for hearings, and $0.50 per page for copies of transcriptions.

DONE AND ORDERED at the Duval County Courthouse, Jacksonville, Florida on this 9 day of February 2015.

Circuit Judge

Copies to:
Julie Agent Schlax, Esquire
Justice Administrative Commission

FILED 02/11/16 PM 02:56 FUSSELL

IN THE CIRCUIT COURT, FOURTH
JUDICIAL CIRCUIT, IN AND FOR
DUVAL COUNTY, FLORIDA

CASE NO: 16-2013-CF-5781-AXXX
DIVISION: CR-D

STATE OF FLORIDA

VS.

DONALD SMITH
_____/

AMENDED ORDER GRANTING MOTION TO INCUR COSTS OF SELECT DEPOSITION TRANSCRIPTS

THIS CAUSE having come before the court upon the Defendant's Motion, and the Court having been fully advised in the premises, and finding that the transcripts are both necessary and essential to the defense in this cause, it is

ORDERED AND ADJUDGED as follows:

Julie Agent Schlax, Esquire is hereby authorized to incur the reasonable costs of obtaining the transcripts of the depositions of the following witnesses:

Date of Proceeding	**Type of Proceeding**	**Name of Witness**
June 4, 2015	Deposition	Nicole Lee
July 2, 2015	Perpetuated testimony	Patricia Moore

IT IS FURTHER ORDERED AND ADJUDGED that the Justice Administrative Commission shall pay these reasonable costs upon submission of the proper invoice(s) and that the rate shall be $4.00 per page transcribed for depositions, $5.00 per page transcribed for hearings, and $0.50 per page for copies of transcriptions.

DONE AND ORDERED at the Duval County Courthouse, Jacksonville, Florida on this 16 day of January 2015.2016

Circuit Judge

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Copies to:
Julie Agent Schlax, Esquire
Justice Administrative Commission

IN THE CIRCUIT COURT, FOURTH
JUDICIAL CIRCUIT, IN AND FOR
DUVAL COUNTY, FLORIDA

CASE NO.: 16-13-CF-05781-XXXX
DIVISION: CR-D

STATE OF FLORIDA,

vs.

DONALD SMITH,
Defendant. /

NOTICE OF SEALING DOCUMENT

TAKE NOTICE that the enclosed herein is the Ex Parte Order Appointing Doctor Fred Berlin dated February 9, 2016, which has been sealed by direction of the Court upon a finding that portions of this record are exempt from Section 119.07(1) and Section 24(a), Art. 1 of the State Constitution, pursuant to Section 39.0132, Florida Statutes. The Court finds that the measure of limiting access to this record is necessary to prevent a serious and imminent threat to the administration of justice, no less restrictive alternative measures are available which would mitigate the danger, and such measure achieves the Court's protective purpose.

DONE AND ORDERED in Jacksonville, Duval County, Florida on this 16 day of February, 2016.

Mallory D. Cooper
Circuit Court Judge

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IN THE CIRCUIT COURT OF THE FOURTH JUDICIAL CIRCUIT, IN AND FOR DUVAL COUNTY, FLORIDA.

CASE NO.: 16-2013-CF-5781 AXXX

DIVISION: CR-D

STATE OF FLORIDA

VS.

DONALD SMITH

MOTION TO MAKE COURT RECORDS CONFIDENTIAL AND MOTION FOR PROTECTIVE ORDER SEALING SPECIFIC COURT DOCUMENTS AND RECORDS

COMES NOW, Defendant, by and through the undersigned attorney, pursuant to Florida Rule of Criminal Procedure, 3.220(I) and Chapter 119, Florida Statutes, and Rule 2.420 of the Florida Rules of Judicial Administration, and files this Motion to Make Court Records Confidential and Motion for Protective Order Sealing Specific Court Documents and Records. As grounds therefore the Defendant asserts the following:

1. On February 2, 2016 the undersigned attorney tendered to the Court *ex parte* and *in camera* a Motion to Appoint Dr. Fred Berlin. At the hearing on the same day, Defense counsel tendered to the Court as well as Ms. Sharon Ray, attorney for the Justice Administration Commission, confidential psychiatric history summaries of the Defendant.

2. The undersigned counsel was Court appointed to represent Defendant in a Death Penalty case. The Justice Administration Commission has oversight as to all vendors and experts necessary for the proper defense of indigent clients represented by private attorneys appointed by the Court. The State Attorney's Office does not have standing to contest or litigate any Motions for appointment of Due Process Vendors or Experts.

3. The Motion to appoint Dr. Fred Berlin was sought to seek approval for compensation of an out-of-state expert. The hearing on February 2, 2016 required presentation of confidential trial strategies and psychiatric summaries of the Defendant to justify the appointment and compensation of the requested expert, Dr. Fred Berlin. If Defendant were represented by the Office of the Public Defender or Regional Conflict Counsel, such hearing would be unnecessary as these agencies have their own due process budgets.

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RONALD W. DAMSELL
CLERK CIRCUIT COURT

4. The Defense requests all materials tendered to the Court on the Motion to Appoint Dr. Fred Berlin including all psychiatric summaries, the Motion to Appoint Dr. Fred Berlin, the Order granting or denying such appointment be sealed.

5. This request is sought to ensure a fair trial in the county where the crime was committed as contemplated by Florida Statutes and the Florida Constitution, as well to ensure the Defendant's privacy rights.

6. The Justice Administration Commission has no objection to this Motion.

WHEREFORE, the Defendant, through the undersigned Counsel, respectfully requests this Honorable Court to grant a Protective Order and Seal all documents related to the hearing for Appointment of Dr. Fred Berlin in chambers on February 2, 2016.

I HEREBY CERTIFY that a copy of the foregoing has been furnished to the Justice Administration Commission, electronically, this 11th day of February, 2016.

Respectfully submitted,

/s/ Julie Schlax

Julie Agent Schlax
200 E. Forsyth Street
Jacksonville, Florida 32202
(904) 674-0717
julie@esalawgroup.com
Attorney for Defendant

CERTIFICATE OF GOOD FAITH

I HEREBY CERTIFY that the foregoing Motion is filed in good faith and is supported by a sound factual and legal basis.

/s/ Julie Agent Schlax

Julie Agent Schlax, Esquire

IN THE CIRCUIT COURT, FOURTH JUDICIAL CIRCUIT, IN AND FOR DUVAL COUNTY, FLORIDA

CASE NO: 16-2013-CF-5781-AXXX-MA
DIVISION: CR-D

STATE OF FLORIDA

vs.

DONALD SMITH
_____/

ORDER SEALING SPECIFIC COURT DOCUMENTS AND RECORDS

THIS CAUSE, came before the Court on the Defendant's Motion to Make Court Records confidential and Motion for Protective Order Sealing Specific Court Documents and Records, specifying the Defendant's request to seal all documents and records pertaining to the February 2, 2016 hearing on the Defendant's Motion to Appoint Expert Dr. Fred Berlin. Present at the hearing were attorney Julie Schlax, Dr. Brooke Butler, and Sharon Ray via phone representing the Justice Administrative Commission. The Defendant was not present. The Court, having reviewed the pleading, heard the testimony of the parties and the argument of counsel and being otherwise duly advised in the premises,

ORDERS and ADJUDGES as follows:

1. This Court has jurisdiction of the parties and subject matter hereto.

2. The Court finds that the Motion for Protective Order Sealing Specific Court Documents and Records is **GRANTED. P**ursuant to Judicial Administrative Rule 2.420(c)(9), the court records requested are determined to be confidential on the grounds that confidentiality is required to protect the following interests: preventing a serious and imminent threat to the fair, impartial, and orderly administrative of justice, specifically confidential psychiatric medical records of the Defendant to

FILED
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RONALD W. DAMSELL
CLERK CIRCUIT COURT

determine the legal issues in a case; and avoiding substantial injury to a party by disclosure of matter protected by a common low or privacy right not generally inherent in the specific type of proceeding sought to be closed.

3. The entire documents shall remain sealed. Specifically, the Motion to Appoint Dr. Fred Berlin, the Order granting the appointment of Dr. Fred Berlin, and all materials and records supplied during the *ex parte and in camera* hearing held in Chambers on February 2, 2016.

4. The Court finds that the degree, duration and manner of confidentiality ordered by the Court are no broader than necessary to protect the interests set forth in Rule 2.420(c) and no less restrictive measures are available to protect the interest set forth in said Rule.

5. The Clerk of the Circuit Court is directed to seal the above specified documents and permit only the Defendant's attorneys, Julie Schlax and Charles Fletcher, as well as the Justice Administrative Commission access to these documents.

6. This Court specifically retains jurisdiction of the parties and the subject matter hereto for all legal purposes.

DONE AND ORDERED at Jacksonville, Florida this 17 day of February, 2016.

CIRCUIT COURT JUDGE

IN THE CIRCUIT COURT, FOURTH JUDICIAL CIRCUIT, IN AND FOR DUVAL COUNTY, FLORIDA

STATE OF FLORIDA,

Plaintiff,

vs.

DONALD JAMES SMITH,

Defendant.

_____/

CASE NO.: 16-2013-CF-5781

DIVISION: CR-D

MORRIS PUBLISHING GROUP, LLC, d/b/a *The Florida Times-Union,*

Intervenor.

_____/

MOTION OF MORRIS PUBLISHING GROUP, LLC TO INTERVENE, AND MEMORANDUM IN OPPOSITION TO DEFENDANT'S NOTICE OF INTENT TO FILE MOTION FOR PROTECTIVE ORDER AND REQUEST FOR REASONABLE TIME

Intervenor, Morris Publishing Group, LLC, d/b/a *The Florida Times-Union ("The Florida Times-Union"),* moves the Court for leave to intervene in this matter, to be heard, and submits this memorandum in opposition to Defendant's Notice of Intent to File Motion for Protective Order and Request for Reasonable Time ("Notice of Intent") filed on February 2, 2016, and in support hereof says:

1. Defendant, Donald James Smith, through his counsel, has filed the Notice of Intent indicating that a motion for protective order may be filed with respect to the State's Sixth Supplemental Discovery Exhibit which includes recorded conversations of Defendant. It is unclear what the substance of the recorded conversations may be.

2. In the Notice of Intent, Defendant request a reasonable time to review the recorded conversations and to file a motion for protective order, presumably if it is felt such a motion is necessary. In the meantime, the public's right of access is being systematically thwarted in violation of Florida law.

3. The State's Sixth Supplemental Discovery Exhibit was filed January 22, 2016, and Defendant's Notice of Intent was filed February 2, 2016. *The Florida Times-Union* made its public records request to the State for "all discovery in the State's sixth supplemental discovery exhibit in th[is] case ..." on February 3, 2016. A copy of the public records request is attached hereto as **Exhibit A**. The only response that has been received is an acknowledgement of the public records request.

4. As of the filing of this Motion it has been 27 days since the State filed its Sixth Supplemental Discovery Exhibit, and 15 days since *The Florida Times-Union* made its public records request. It is the understanding of undersigned counsel that there are other public records requests that have been made and are outstanding as well.

5. The Defendant's Notice of Intent – which *The Florida Times-Union* contends is improper in any event – is effectively being used as a means to postpone and delay any resolution of whether the discovery should be released as public record. The Notice of Intent states no legal basis whatsoever for a potential protective order to be issued, and merely request an opportunity to review the supplemental discovery at issue for an undefined period of time. This process clearly violates Florida law.

6. It is well established that the news media has standing to intervene and be heard, in order to oppose an effort to prevent access to judicial records. Morris Communications Company, LLC v. State of Florida and Stephen Lee Edmonds, 844 So.2d 671 (Fla. 1st DCA

2003); WESH Television, Inc. v. Freeman, 691 So.2d 532, 534-35 (Fla. 5th DCA 1997) (holding that the press has the right to be heard prior to the entry of an order closing public records); Times Publishing Co. v. Penick, 433 So.2d 1281, 1284 (Fla. 2nd DCA 1983); News-Press Publishing Co. v. State, 345 So.2d 865, 866 (Fla. 2d DCA 1977) (newspapers entitled to intervene in criminal case to seek access to sealed deposition transcripts); Miami Herald Publishing Co. v. Lewis, 426 So.2d 1, 8 (Fla. 1982); Florida Publishing Company v. Shorstein, 20 Med. L. Rptr. 2102 (Fla. 1st DCA 1992).

7. Likewise, it is beyond dispute that information gathered by the State during a criminal investigation immediately becomes a public record once it is given, or required to be given, to the Defendant in discovery. See Florida Statute §119.011(3)(c)(5) (2005); City of Miami v. Post-Newsweek Stations Fla., Inc., 837 So.2d 1002, 1004 (Fla. 3rd DCA 2003); Florida Freedom Newspapers, Inc. v. McCrary, 520 So.2d 32, 34-35 (Fla. 1988).

8. Public records may only be sealed away from public view under an order that is based on clear and specific findings that:

> (a) Restricting public access to discovery materials is necessary to prevent a serious and imminent threat to the administration of justice;
>
> (b) No alternatives, other than a change in venue, would protect Defendant's right to a fair trial; and
>
> (c) Closure would be effective in protecting the rights of the accused, without being broader than necessary to accomplish this purpose.

Miami Herald Publishing Company v. Lewis, 426 So.2d 1, 6 (Fla. 1982); See also, Florida Rule of Judicial Administration 2.420 (directing that a court may seal court records only if "no less restrictive measures are available"). The Florida Supreme Court has held in no uncertain terms that "there must be a strict and inescapable necessity for closure." Lewis, 426 So.2d at 8. "A

finding of cause to restrict or defer disclosure of [public judicial] records cannot rest in air." McCrary, 520 So.2d at 35.

9. In order to satisfy the burden of the *Lewis* test, the party seeking closure must do more than offer the argument of counsel; the proponent of closure must come forward with evidence on which the Court can make findings of fact supporting closure. See, Lewis, 426 So.2d at 7-8. As the Fifth District Court of Appeal has made clear:

> The three-pronged test contemplates an evidentiary hearing. At the hearing, the party seeking closure has the burden of proving by the greater weight of the evidence that closure is necessary to prevent a serious and imminent threat to the administration of justice.
>
> * * *
>
> The court in McCrary also pointed out that [a closure order] "cannot rest in air," but rather, "must be a conclusion reached after considering relevant factors." Here, no evidentiary hearing was conducted and no *in camera* review of the tapes was made. Under Lewis and McCrary, this was error. (internal citation omitted).

See, WESH Television v. Freeman, 691 So.2d 532, 534-35 (Fla. 5th DCA 1997) (citing and quoting McCrary, 520 So.2d at 35; Lewis, 426 So.2d 1).

10. There is no showing here of a serious and imminent threat to the administration of justice. No evidence has been presented to the Court that media publicity has or will affect the Defendant's trial in any way, let alone negatively. Only the gravest circumstances warrant closing off press access to public proceedings and records.

11. Moreover, there has been no showing that less restrictive means, such as individual voir dire, additional peremptory challenges, admonition of the jury and/or sequestration, would be insufficient to protect the rights of the Defendant to a fair trial.

12. As to the third prong of the Lewis analysis, there has been no demonstration that the closure sought by Defendant would be effective, and no broader than necessary.

13. *The Florida Times-Union* previously intervened in this case in August 2013. At that time, the Defendant was asking for a broad sealing order regarding the discovery then at issue. The Court entered an Order on Defendant's Motion for Protective Order on September 6, 2013, a copy of which is attached hereto for the Court's convenience as **Exhibit B**. The Court agreed that the Defendant's requested relief was overbroad. The Court determined that it would (i) impose a temporary prohibition against public disclosure of discovery materials, (ii) require the State to provide the discovery at issue to the Defendant within 10 days of the Order, and (iii) provide 10 days for the Defendant to review the discovery and to file a motion for protective order if determined to be necessary. The Court ordered that determinations of confidentiality would then be made *in camera*. The Order was directed at the then pending discovery, although at the time the case was on the front end of the discovery process, and it would be anticipated that additional discovery would be made and would be subject to this Order. The Defendant has not even attempted to adhere to the Order in any way with respect to the State's Sixth Supplemental Discovery Exhibit. The intent behind this Order was that in the event the Defendant did not file a motion for protective order within 10 days, the material would be released as public record. As noted above, we are well beyond 10 days at this point.

14. *The Florida Times-Union* believes that the approach taken in this Court's earlier Order of September 6, 2013, is not consistent with the requirements of Florida law in that it effectively imposes an arbitrary time period on the disclosure of public records, among other things. Since that Order, the First District Court of Appeal has addressed this issue. In State v. Dunn, 42 Med.L.Rptr. 1023 (Fla. 1st DCA 2013), the trial court entered a Restrictive Order

Regarding Pretrial Discovery Materials. The trial court stated that it must "balance the need for open government and public access to the judicial process, and the paramount right of a defendant in a criminal proceeding to a fair trial before an impartial jury." The trial court found that the "future release of any materials such as jail letters, videos, audio records, photographs, and witness statements would gravely risk Defendant's right to a fair trial and could easily taint the jury pool." Accordingly, the trial court ordered that "[a]ny and all information or materials that either the State or Defendant, by and through counsel, intends for release to the public must be provided to the Court ***prior*** to its release in order for [the court] to conduct an in-camera inspection." The First District Court of Appeal vacated the order. The First District instructed that, upon motion to determine confidentiality, it was to immediately convene an evidentiary hearing, after providing appropriate notice to the media, for the purpose of determining whether closure — including deferral of public access to pretrial discovery materials — is warranted by the Lewis standard. Here, however, there is no motion for protective order pending. As stated, the Defendant appears to be using the Notice of Intent as an illegal delay tactic – one that has been going on for 27 days as of the date of this filing. Even under this Court's Order of September 6, 2013, the Defendant has waived any right to file a motion for protective order at this point.

15. Beyond the procedural issues, several cases illustrate the heavy burden faced by a party attempting to seal records in a criminal proceeding, and demonstrate that the Motion at issue should be denied. In Morris Communications Company, LLC v. State of Florida and Stephen Lee Edmonds, 844 So.2d 671 (Fla. 1st DCA 2003), the First District Court of Appeal quashed an order sealing discovery material. That case involved a defendant who allegedly sexually assaulted an underage girl and had lured her over the internet. Although Judge

McCaulie of this Court found that the discovery items were "graphic, shocking, damning and distressing" and thus likely to aggravate the adverse publicity already in the media, the Court of Appeal directed the trial court to unseal discovery, and allow access because the release of the materials would not pose a serious and imminent threat to the administration of justice under the standard enunciated in Lewis.

In his order sealing discovery, Judge McCaulie found:

> The information in those items is consistent with the general allegations that have already been published in the news articles yet is so specific that, if published before trial, there is a substantial likelihood that an unbiased jury would be difficult, if not impossible, to obtain. This is especially true of the instant messages and the recorded telephone conversation. I can envision the instant messages and transcript of the recorded telephone conversation on the front page or as a lead television news report just before jury selection begins. It would be an enticing story with a strong and lasting impact.

The First District Court of Appeal ruled that this finding was not a sufficient basis for closure necessary to prevent a serious and imminent threat to the administration of justice.

16. In Florida Publishing Co. v. Shorstein, 20 Med. L. Rptr. 2102 (Fla. 1st DCA 1992), the First District Court of Appeal ordered that discovery materials in the Adrian Crump case be unsealed. The Court of Appeal ruled that neither the record, nor the trial court's order, supported a finding that publication of the discovery materials would pose a serious and imminent threat to the administration of justice.

The Florida Publishing Co. v. Shorstein case involved the shooting death of a juvenile in which the defendant, Adrian Crump, was accused of manslaughter. Judge Dearing entered a closure order based on the following findings:

> (a) The saturation of the northeast Florida market with stories about the case.

(b) The newspapers' "very distressing and judicially disruptive practice of publishing major summary articles about a case on the day before, or the day of, jury selection."

(c) Disclosure of admissions and confessions, the admissibility of which was still a pending issue.

The Court of Appeal reversed and found these factors insufficient to support closure of the public record.

17. The Defendant cannot sustain his burden to satisfy the analysis required by Lewis. There is no showing that restricting access to discovery materials is necessary to prevent a serious and imminent threat to the administration of justice; no showing that there are no alternatives, other than a change of venue, which would protect the Defendant's right to a fair trial; and no showing that the requested closure would be effective, and not broader than necessary. An examination of other high profile cases illustrates not only the extremely high burden faced by a party seeking closure, but also that the burden cannot be met in this case. Furthermore, in this case much of the information sought to be sealed is already in the public domain, and as the Lewis Court explained "where prejudicial information already has been made public, there would be little justification for [closure] in order to prevent only the disclosure of details which had already been publicized." 426 So.2d at 8.

CONCLUSION

For the foregoing reasons, *The Florida Times-Union* requests that the Court allow it to intervene herein, to enter an appropriate order denying Defendant's Notice of Intent, and ordering that the State's Sixth Supplemental Discovery Exhibit which includes recorded conversations of Defendant be released immediately as public record pursuant to applicable Florida law.

HOLLAND & KNIGHT, LLP

s/ Timothy J. Conner
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Attorneys for Intervenor, Morris Publishing Group, LLC, d/b/a *The Florida Times-Union*

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been filed with the Clerk of the Court via the State of Florida e-filing portal and furnished via electronic mail this 18th day of February 2016, to the following attorneys of record:

Mark Caliel, Esquire
Assistant State Attorney
State Attorney's Office
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Julie Agent Schlax
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s/ Timothy J. Conner
Attorney

#39169627_v1

EXHIBIT "A"

Conner, Timothy (JAX - X27362)

From: Hannan, Lawrence
Sent: Wednesday, February 03, 2016 1:55 PM
To: SAO4PRR@COJ.NET
Subject: Public records request from the Florida Times-Union

Under Florida Public Records law I request all discovery in the State's sixth supplemental discovery exhibit in the case of Donald James Smith, case # 2013-CF-005781.

Please let me know the cost of proceeding with this request before proceeding.

Thank you.

Larry Hannan
Staff Writer
Florida Times-Union
(904) 359-4470

EXHIBIT "B"

IN THE CIRCUIT COURT, FOURTH
JUDICIAL CIRCUIT, IN AND FOR
DUVAL COUNTY, FLORIDA.

CASE NO.: 16-2013-CF-05781-AXXX-MA

DIVISION: CR-D

STATE OF FLORIDA,

v.

DONALD JAMES SMITH,
Defendant.
_____/

ORDER ON DEFENDANT'S MOTION FOR PROTECTIVE ORDER

This matter came before the Court on August 2, 2013, upon Defendant's Motion for Protective Order. The Morris Publishing Group, LLC, d/b/a The Florida Times-Union ("The Florida Times-Union") and Post-Newsweek Stations Florida, Inc., d/b/a WJXT-TV4 ("WJXT-TV4") filed Motions to Intervene. A hearing was held on the Motions on August 22, 2013. Having heard the arguments of counsel and reviewed the Motions and pertinent law, the Court finds as follows:

1. The Court must balance the need for open government and public access, through the media, to the judicial process, and the paramount right of a defendant in a criminal proceeding to a fair trial before an impartial jury. Miami Herald Publ'g Co. v. Lewis, 426 So. 2d 1, 6 (Fla. 1982).

2. At the hearing, both Intervenors argued that Defendant's Motion was insufficient in that it was overbroad and lacked specificity. In its Motion, WJXT-TV4 states that Defendant's Motion is "overbroad in the relief that it requests" and "offers nothing more than bald speculation on the threat of harm to the administration of justice." (Mot. 1.) In its Motion,

The Florida Times-Union states that Defendant's Motion is "conclusory." (Mot. 2.)

3. The Court agrees that the relief requested by Defendant is overbroad.

4. The Eighth Judicial Circuit was faced with a similar issue in State v. Rolling, No. 91-3832, 1992 WL 236932, at *1 (Fla. 8th Cir. Ct. Mar. 11, 1992). In Rolling, the defendant sought a broad, general prohibition on public disclosure of information relating to the investigation, prosecution or defense of his case. Id. at *1. The media intervenors objected to closure on the grounds that the defendant's motion was "vague, premature, violated Public Records laws and fail[ed] to meet the appropriate legal test." Id. The media intervenors further objected to any prohibition of statements as "too broad." Id. In seeking a balance of interests, the Rolling trial court found the best possible solution was to "order the State to proceed with disclosure to the defense, while ordering a temporary prohibition against public disclosure." Id. at *5. The Rolling trial court reasoned that "[t]his would allow the Public Defender to review materials and file specific request for in-camera inspection of materials that he finds might deprive his client of a fair trial upon early disclosure." Id.

5. The Court agrees with the Rolling trial court and finds that, at this time, the aforementioned solution best balances the interests of the public and Defendant.

6. In addition, the Court finds that any dependency records related to the victim in this case, or the victim's family members, are and shall remain confidential by statute, without review by the Court. See Fla. R. Jud. Admin. 2.420(d)(2)(d)(B)(i) ("The following information shall be maintained as confidential . . . Chapter 39 records relating to dependency matters, termination of parental rights, guardians ad litem, child abuse, neglect, and abandonment.").

7. When the aforementioned information is disclosed, the parties shall file with the clerk a "Notice of Confidential Information within Court Filing" in order to indicate that confidential information is included within the document being filed. See Fla. R. Jud. Admin. 2.420(d)(2),(4).

ORDERED AND ADJUDGED:

1. There will be a temporary prohibition against public disclosure of discovery materials.
2. The State will provide discovery to Defendant within 10 days of the date this Order is entered.
3. Defendant will review discovery materials, and within 10 days, may file a motion to determine confidentiality. Pursuant to the arguments made at the hearing held on August 22, 2013, all determinations of confidentiality will be made in-camera. Fla. R. Jud. Admin. 2.420(f)(1)(a), (c)(9)(a).

DONE AND ORDERED in Chambers, in Jacksonville, Duval County, Florida this 6 day of September, 2013.

MALLORY D. COOPER
CIRCUIT COURT JUDGE

cc:
Mr. Mark Caliel, Esquire,
Office of the State Attorney

Mr. Fred C. Gazaleh, Esquire,
Office of the Public Defender

Mr. Timothy J. Conner, Esquire,
Holland & Knight
Attorneys for Intervenor
Morris Publishing Group, LLC,
d/b/a The Florida Times-Union
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Suite 3900
Jacksonville, Florida 32202

Mr. Edward Birk, Esquire,
Marks Gray
Attorneys for Intervenor Post-Newsweek
Stations, Florida, Inc., d/b/a WJXT-TV4
Post Office Box 447
Jacksonville, Florida 32201

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy hereof has been furnished to Mr. Mark Caliel, Esquire, Office of the State Attorney; Mr. Fred C. Gazaleh, Esquire, Office of the Public Defender; Mr. Timothy J. Conner, Esquire, Holland & Knight, Attorneys for Intervenor Morris Publishing Group, LLC, d/b/a The Florida Times-Union, 50 North Laura Street, Suite 3900, Jacksonville, Florida 32202; Mr. Edward Birk, Esquire, Marks Gray, Attorneys for Intervenor Post-Newsweek Stations, Florida, Inc., d/b/a WJXT-TV4, Post Office Box 447, Jacksonville, Florida 32201 by _____ this 9 day of Sept, 2013.

_____,
Deputy Clerk

Case No.: 16-2013-CF-05781-AXXX-MA
/ar

STATE OF FLORIDA
DUVAL COUNTY
I, UNDERSIGNED Clerk of the Circuit & County Courts, Duval County, Florida, DO HEREBY CERTIFY the foregoing, consisting of ____ pages, is a true and correct copy of the original as it appears on record and file in the office of the Clerk of Circuit & County Courts of Duval County, Florida.
WITNESS my hand and seal of Clerk of Circuit & County Courts at Jacksonville, Florida, this the 9 day of Sept A.D., 2013.
RONNIE FUSSELL
Clerk, Circuit and County Courts
Duval County, Florida
By _____
Deputy Clerk

IN THE CIRCUIT COURT OF THE FOURTH JUDICIAL CIRCUIT, IN AND FOR DUVAL COUNTY, FLORIDA.

CASE NO.: 16-2013-CF-5781 AXXX
DIVISION: CR-D

STATE OF FLORIDA

VS.

DONALD SMITH
_____/

DEFENDANT'S MOTION TO DETERMINE CONFIDENTIALITY AND MOTION FOR PROTECTIVE ORDER REGARDING THE STATE'S SIXTH SUPPLEMENTAL DISCOVERY EXHIBIT AND REQUEST FOR INCAMERA REVIEW

COMES NOW, Defendant, by and through the undersigned attorney, pursuant to Florida Rule of Criminal Procedure, 3.220(I)1, Chapter 119, Florida Statutes, and Rule 2.420 of the Florida Rules of Judicial Administration, and files this Motion for Protective Order prohibiting the public release of specific discovery material documented in the State's Sixth Supplemental Discovery Exhibit and asserts the following:

1. Defendant is indicted for First Degree Murder, Kidnapping and Capital Sexual Battery. The State is seeking the Death Penalty.

2. On August 2, 2013, prior Counsel for Defendant filed a Motion for Protective Order seeking a prohibition of release for essentially all discovery materials regarding this case. After full hearing, this Honorable Court on September 6, 2013 denied a blanket prohibition against public disclosure, instead permitting Counsel for Defendant to file specific Motions for Confidentiality upon inspection of the Discovery Materials. No further Motions were filed and to the undersigned attorney's knowledge, any public records sought have been appropriately tendered.

3. This case has received extensive pre-trial publicity. The pre-trial publicity has been overwhelmingly negative towards the Defendant. This negative publicity has permeated the prospective jury pool to such an extent the Defense filed a Motion for Change of Venue on October 16, 2015. After full hearing, this Honorable Court determined the parties will seek a fair and impartial jury in Duval County, and only if unsuccessful would the Motion for Change of Venue be granted. The State of Florida, this Honorable Court, and the Defendant have a vested interest in seeking a fair and impartial jury to render appropriate verdicts in this case.

4. On January 22, 2016, the State of Florida filed the State's Sixth Supplemental Discovery Exhibit. Upon review, this Supplemental Discovery encompasses four things:

    a. (1) A surreptitious recording of the Defendant within his individual isolation cell over a seventy-two (72) hour continuous period beginning June 23, 2015. Contained within this recording are the personal, private sounds of Defendant living within the confines of his cell including: sniffing, water running, sleeping, using the restroom, as well as other private matters. Additionally, the recording captures purported statements of Defendant with other persons including inmates and correctional officers.
    b. (2) photographs of an isolation cell which purportedly is identical to the isolation cell where Defendant was housed during the time of the recording.
    c. (3) A memorandum by Investigator Robert Hinson summarizing twenty minutes of alleged statements surreptitiously recorded within the Defendant's private isolation cell.
    d. (4) A shortened recording which captures approximately twenty minutes of alleged conversations surreptitiously recorded within his isolation cell out of the seventy two hour continuous recording.

5. The Defense concedes the photographs of the isolation cell are not subject to Protective Order, and does not request an order preventing their disclosure.

6. The Defense seeks a Protective Order as to the entire seventy-two hour surreptitious recording of the Defendant's private isolation cell, including the shortened recording, and the summary memorandum of Investigator Robert Hinson. The Defense seeks an *in camera* review of said materials as they contain alleged inculpatory, irrelevant and prejudicial statements which could be sensationalized and taken out of context to create further negative publicity against the Defendant. Additionally, the Defense will be seeking suppression of this surreptitious recording as a violation of his Constitutional Rights. If granted, the disclosure of this recording would ensure the Defendant's inability to receive a fair trial.

7. The Sixth Amendment to the United States Constitution guarantees an accused the right to a trial by an impartial jury, and the Fourteenth Amendment secures that right to all criminal Defendants in State Court. This motion is sought to prevent a serious and imminent threat to the fair, impartial, and orderly administration of justice, to protect a compelling governmental interest, and to comply with established state and federal constitutional law and cases.

8. A trial court has the inherent power to control the conduct of the proceedings before it. State ex rel. Miami Herald Pub. V. McIntosh, 340 So. 2d 904, 909 (Fla. 1976). This Court has both the right and the affirmative constitutional duty to minimize the effects of prejudicial pretrial publicity and is obligated to take protective measures "even when they are not strictly and inescapably necessary" to insure that the Defendant (and the State) can receive a fair trial. See Estes v. Texas. 381 U.S. 532. 85 S.Ct. 1628. 14 L. Ed.2d 543 (1965); Sheppard v. Maxwell, 384 U.S. 333, 86 S.Ct. 157, 16 L.Ed.2d 600 (1966).

9. Under the separation of powers doctrine, it is the responsibility of the judicial branch to ensure that the parties receive a fair trial. A right to a fair trial has been construed by Florida courts to include the right to an impartial jury in the county in which the alleged crime was committed.

10. However, just because Defendant is entitled to receive information during discovery about the case doesn't automatically mean the media gets everything provided to the Defendant. While there is a constitutional right for the defendant to have a fair trial, there is no First Amendment protection for the public and the press to have access to pretrial hearings.

11. Pursuant to Chapter 119, Florida Statutes, the public is granted access to certain documents produced by the State to defendants in criminal cases. See Florida Freedom Newspapers v. McCrary, 520 So.2d 32 (Fla. 1988). The standard to determine whether closure is appropriate or restriction on the production of documents has been set out in Miami Herald Publishing Company v. Lewis, 426 So.2d 1 (Fla. 1982).

12. In Lewis the Florida Supreme Court confronted the issue of what circumstances warrant closure of a pretrial suppression hearing. The Court upheld the trial court's exclusion of the media from a suppression hearing upon the court's finding that an open hearing would pose a "reasonable probability of prejudice on these defendants." Id. at *5.*

13. In Lewis the Court modified a three-prong test for closure of judicial proceedings: "l) Closure is necessary to prevent a serious and imminent threat to the administration of justice; 2) No alternatives are available, other than change of venue, which would protect a defendant's right to a fair trial; and 3) Closure would be effective in protecting the rights of the accused, without being broader than necessary to accomplish this purpose." Id. at 6.

14. In Florida Freedom Newspapers v. McCray, 520 So.2d 32 (Fla. 1988), the Supreme Court of Florida was faced with the issue of whether a trial court could restrict disclosure to the media of pretrial discovery material which was furnished to the defendant pursuant to Florida Rules of Criminal Procedure 3.220. The trial court, after an *in camera* inspection of the discovery materials, entered orders prohibiting release of the existing discovery materials and, pending additional *in camera inspection,* any future discovery materials. The orders were based on the findings that "the discovery material was graphically incriminating, containing materials which may not be admissible at trial, and that the prosecutor, sheriff, and other persons had made no public statements prejudicial to the defendants." Id. at 33.

15. In McCrary, the trial court utilized Rule 3.220(h) to authorize its protective order, and concluded that closure of pretrial discovery materials was necessary because there had been prior pretrial publicity, that public disclosure of this material would further aggravate the prejudicial publicity and that closure was the only measure available to the court until a jury could be selected and sequestered. The Court held that these were essentially the same factors as those set forth in the Lewis three-prong test, and held that those factors stated in Lewis are relevant to a finding of cause and should be considered in determining whether access to judicial public records should be restricted or deferred. Id. at 35. In so holding, the Court recognized the Lewis test strikes the proper balance between the public's statutory right

of access and a defendant's fair trial and due process rights. Id. at 36.

16. Similarly, in Post-Newsweek Stations Florida, Inc. v. Doe. 612 So.2d 549 (Fla. 1992), the Court gave a non-party witness a right to privacy in criminal discovery material and held the witness may obtain a protective order.

17. In Palm Beach Newspapers, Inc. v. Burk, *504* So.2d 378 (Fla. 1987), the Court was confronted with the certified questions of whether the press is entitled to notice and the opportunity and the right to attend pretrial discovery depositions in a criminal case, and whether the press was entitled to access to pretrial discovery deposition in criminal cases which may have been transcribed but not filed with the court. The Florida Supreme Court answered both questions in the negative, holding that the press does not have a qualified right under the First Amendment, under the Florida Rules of Civil or Criminal Procedure, or under the Public Records Law to attend pretrial discovery depositions in criminal cases or to obtain copies of un-filed depositions. The Court stated that discovery rules permit extensive intrusion in the affairs of both parties and non-parties and discovery may be judicially compelled. Liberal discovery produces information which may be irrelevant to the trial which, if publically released, would be damaging to the reputation and privacy of both parties and non-parties. The parties are granted discovery rights as a matter of legislative or judicial grace. Non-parties do not possess discovery rights and cannot compel the disclosure of information. There is no independent right outside the trial process to the information sought. Society in general and the courts specifically have a substantial interest in preventing abuse ofjudicially compelled discovery. Id. at 382.

WHEREFORE, Defendant requests this Honorable Court to grant this Motion.

I HEREBY CERTIFY that a copy of the foregoing has been furnished to the Office of the State Attorney, electronically, this 19th day of February, 2016.

Respectfully submitted,

/s/ Julie Schlax

Julie Agent Schlax
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julie@esalawgroup.com
Attorney for Defendant

FILED
FEB 22 2016
David W. Ansell
CLERK CIRCUIT COURT

AFFIDAVIT OF EMILY M. OLSON-GAULT

1. I, the undersigned affiant, Emily M. Olson-Gault am an attorney licensed to practice law in the State of New York and the U.S. Supreme Court. I am currently the Director and Chief Counsel of the American Bar Association Death Penalty Representation Project, which is based in Washington, D.C.

2. The American Bar Association ("ABA") created the Death Penalty Representation Project (the "Project") in 1986 to address the lack of qualified counsel available to those facing a death sentence.

3. While the ABA and the Project do not take a position on the death penalty itself, the Project is committed to ensuring that basic constitutional protections have been provided to all individuals who have been sentenced to death. To this end, the Project promotes policies and procedures that will guarantee that all those facing execution are represented at every stage of the proceedings – from trial through clemency – by qualified, adequately compensated counsel.

4. The American Bar Association Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases, first adopted in 1989, were revised and updated in 2003 so that they would accurately reflect current death penalty law and practice. The ABA House of Delegates, which includes government lawyers, defense attorneys, prosecutors, and judges, overwhelmingly approved the revised ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases in February 2003 without dissent.

5. The ABA Guidelines have been cited favorably in more than 250 state and federal capital appellate decisions, including the Florida Supreme Court, the U.S. Court of Appeals for the 11th Circuit, and the U.S. Supreme Court. See, e.g., Rompilla v. Beard, 545 U.S. 374, 387 (2005); Wiggins v. Smith, 539 U.S. 510, 524 (2003); Stephens v. Sec'y, 678 F.3d 1219, 1230 n.2 (11th Cir. 2012); Simmons v. Florida, 105 So.3d 475 (Fla. 2012); Middleton v. State, No. SC12-2469, 2015 WL 6387760, at *27 (Fla. Oct. 22, 2015) (Pariente, J., concurring) (discussing relevance of ABA Guidelines in Florida capital cases).

6. The Guidelines have been adopted in substantive part or officially acknowledged as an accurate description of the standard of care for defense representation in death penalty cases by organizations such as the Texas State Bar Association, the Department for Public Advocacy for the Commonwealth of Kentucky, the Georgia Public Defender Standards Council, the Maryland Commission on Capital Punishment, the National Association of Criminal Defense Lawyers, the

San Francisco and Alameda County Bar Associations, the California Commission on the Fair Administration of Justice, the Oregon's Office of Public Defense Services, and others. The ABA Guidelines have also been adopted in substantive part by state legislative action or court rule in Louisiana, Nevada, and Arizona.

7. The ABA Guidelines did not themselves create the national standard of care for capital representation; rather they simply codified long-standing norms of capital defense practice in the United States. See Hamblin v. Mitchell, 354 F.3d 482, 487 (6th Cir. 2003) ("the [ABA Guidelines] merely represent a codification of longstanding, common-sense principles of representation understood by diligent, competent counsel in death penalty cases.").

8. Importantly, "[t]hese Guidelines are not aspirational. Instead, they embody the current consensus about what is minimally required to provide effective defense representation in capital cases." See Guideline 1.1, Commentary. They are intended to provide guidance to judges and capital defense counsel regarding the skills and training death penalty counsel must possess when representing a person charged with or convicted of a capital crime. Critically, the ABA Guidelines also address many other issues that affect the quality and availability of legal representation for capital defendants, such as the need for the assistance of experts and other resources, and adequate funding for counsel and experts.

9. In my position as Director of the Project, I often train and consult with defense lawyers and judges about various aspects of defending a capital trial or prosecuting a capital appeal, including a discussion of the ABA Guidelines.

10. The Guidelines describe the need for a qualified and adequately resourced defense effort and zealous and effective representation of the client in every stage of the proceedings.

11. The Guidelines recognize that defense counsel, no matter how talented, are not able to represent capital defendants working alone. Instead, defense counsel work with and guide the activities of a defense team, which is comprised of at least four individuals in every death penalty case: two attorneys, an investigator, and a mitigation specialist, with at least one team member having the professional background to be able to "screen individuals for the presence of mental or psychological disorders or impairments." See Guideline 4.1(A)(1) and (2).

12. The Guidelines discuss certain broad categories of responsibilities that capital defense counsel must perform, including the need to: (a) develop a relationship of trust with the client; (b) conduct a complete, and independent investigation of all facts that are relevant to the guilt phase and the sentencing phase of the trial; (c) obtain the assistance of necessary experts, investigators, and mitigation specialists, and integrate their work into the trial strategy for the guilt and sentencing phases; (d) develop a defense theory that integrates the presentations that will be made at the guilt and sentencing phases of trial; (e) prepare case-

specific voir dire tailored to the legal precedents governing jury selection in a capital case and participate in the jury selection process; (f) present fact and expert witnesses at both phases of trial, and challenge the prosecution's evidence and experts through vigorous cross-examination; (g) raise all legal claims that may ultimately prove to be meritorious; (h) seize any opportunity to negotiate an agreed-upon resolution less than a death sentence; (i) oppose the government's attempt to impose the death penalty by vigorously challenging the government's case at the penalty phase and presenting an affirmative case for a sentence other than death; (j) take affirmative actions to facilitate the work of appellate and/or post-conviction counsel; and (k) limit the workload stemming from capital and other cases to a level that enables counsel to provide each client with high quality legal representation. See Guidelines 5.1, 10.3, 10.4, 10.5, 10.7, 10.8, 10.9.1, 10.10.1, 10.10.2, 10.11, and 10.13.

13. The Guidelines direct that lead counsel are responsible for the conduct of the case and have the duty to direct the work of the defense team in such a way that it provides high quality representation. Lead counsel has direct responsibility for making "any appropriate contractual agreements with non-attorney team members in a way that the team includes . . . (b) at least one member qualified by training and experience to screen individuals for the presence of mental or psychological disorders or impairments; and (c) *any other members needed to provide high quality legal representation.* Guideline 10.4 (emphasis added).

14. The Guidelines further instruct that lead counsel "should demand on behalf of the client all resources necessary to provide high quality legal representation." Guideline 10.4(D). The responsibility for determining what resources are necessary to provide high quality representation is placed within lead counsel's "sound professional judgment." Guideline 10.4, Commentary.

15. The Guidelines recognize that mental health experts are essential to defending capital cases. See, e.g., Guideline 4.1, Commentary ("Although mental health issues are so ubiquitous in capital defense representation that the provision of resources in that area should be routine, it bears emphasis that every situation will also have its own unique needs.").

16. The Commentary to Guidelines 4.1 and 10.4 recognize that in addition to the core defense team that includes an expert generally trained to screen for the presence of mental illness, "additional expert assistance specific to the case will almost always be necessary for an effective defense" and that each case is unique: "While mental health experts—psychiatrists, psychologists, neuropsychologists, and clinical social workers are the most common, many other types of experts, including non-traditional ones, might be needed by the defense to prepare and present the case in mitigation." See Guidelines 4.1(B), Commentary; Guideline 10.4, Commentary.

17. The Guidelines recognize that the Responsible Agency may have its own rules and guidelines for establishing contracts with experts (see Guideline 10.4(C) and

Commentary), but cautions that any such restrictions must be in accord with the remainder of the Guidelines.

18. The Guidelines detail the need for insuring that the fact of receiving public funding does not diminish the quality of the assistance that counsel is able to obtain from experts. In order to "[ensure] that the fact of public funding does not diminish the quality of assistance...from experts," defense counsel should be able to obtain such expert services independent of the government, rather than through "the state mental hospital or the state crime laboratory." See Guidelines 9.1 and 4.1(B)(1), Commentary.

19. Further, there should be parity between resources available to the state and to the defense team: "As a rough benchmark, jurisdictions should provide funding for defender services that maintains parity between the defense and the prosecution with respect to workload, salaries, and resources necessary to provide quality legal representation (including benefits, technology, facilities, legal research, support staff, paralegals, investigators, mitigation specialists, and access to forensic services and experts)." Guideline 9.1, Commentary.

20. The Guidelines provide that lawyers and non-attorney members of the defense team, including experts, should be fully compensated for the time they spend working on death penalty cases. See Guideline 9.1. "[E]ach jurisdiction is responsible for paying not just the direct compensation of members of the defense team, but also the costs involved in meeting the requirements of these Guidelines for high quality legal representation." Guideline 9.1, Commentary.

21. When I train capital defenders and judges, I emphasize the importance of the time and resources in the effective defense of a capital case. I do so because we often find that counsel who do not have the necessary time and resources inevitably make mistakes and errors that are entirely avoidable. See Guideline 10.7, Commentary, n.197 ("Numerous courts have found counsel to be ineffective when they have failed to conduct an adequate investigation for sentencing. See, e.g., Wiggins v. Smith, 123 S. Ct. 2543-44 (2003) (counsel ineffective because, although they obtained some mitigation evidence, they failed to investigate client's social history or explore the numerous areas of mitigation listed in first edition of these guidelines).").

22. The Guidelines are the most authoritative and up-to-date articulation of the responsibilities of death penalty jurisdictions and defense counsel. The American Bar Association believes that meeting these responsibilities is essential to ensuring justice in capital cases.

I hereby swear under penalty of perjury that the above and foregoing is a true and correct statement.

Dated this 14th day of December, 2015.

Emily M. Olson-Gault

Sworn and subscribed to me this 14th day of December, 2015.

Signature of Notary Public: Roberto Vazquez

My commission expires on: 8-31-2020

ROBERTO VASQUEZ NOTARY PUBLIC EXP. 8-31-20 DISTRICT OF COLUMBIA

FREDERICK S. BERLIN, M.D., Ph.D. - CURRICULUM VITAE

DEMOGRAPHIC INFORMATION:

CURRENT APPOINTMENTS:

Associate Professor, Department of Psychiatry and Behavioral Sciences, The Johns Hopkins University School of Medicine.

Attending Physician, Active Staff, The Johns Hopkins Hospital.

PERSONAL DATA:

Johns Hopkins Medical Institutions
Department of Psychiatry
and Behavioral Sciences
4-181 Meyer Building
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National Institute for the
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Treatment of Sexual Trauma
104 E. Biddle Street
Baltimore, Maryland 21202
Telephone: (410) 539-1661
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EDUCATION:

B.S.	1964	University of Pittsburgh	Psychology
M.A.	1966	Fordham University	Psychology
Ph.D.	1972	Dalhousie University, Canada	Psychology
M.D.	1974	Dalhousie University, Canada	

TRAINING:

Research Assistant, 1961 - 1964, University of Pittsburgh, Department of Psychology.

Research Assistant, 1965 - 1966, Fordham University, Department of Psychology.

Research Assistant, 1966 – 1967, Dalhousie University, Department of Psychology.

Teaching Assistant, 1967 – 1971, Dalhousie University, Department of Psychology.

Clinical Clerkship, 1973 – 1974, Victoria General Hospital, Halifax.

Medical Intern, 1974 – 1975, McGill University School of Medicine, Jewish General Hospital, Children's Hospital, Montreal, Canada.

Psychiatric Resident, 1975 – 1976, The Johns Hopkins Hospital, Baltimore, Maryland.

Exchange Resident, 1977, Maudsley Hospital, London, England.

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Chief Resident, 1977-1978, Department of Psychiatry and Behavioral Sciences, The Johns Hopkins Hospital.

PROFESSIONAL EXPERIENCES:

Assistant Professor, 1978 – 1986, Department of Psychiatry and Behavioral Sciences, The Johns Hopkins University School of Medicine.

Associate Professor, 1986 - Present, Department of Psychiatry and Behavioral Sciences, The Johns Hopkins University School of Medicine.

Attending Physician, 1978 – Present, The Johns Hopkins Hospital.

Founder and Director, 1980 – 1992, The Johns Hopkins Sexual Disorders Clinic.

Founder and Director, 1992 – Present, National Institute for the Study, Prevention and Treatment of Sexual Trauma.

RESEARCH ACTIVITIES:

PUBLICATIONS (PEER REVIEWED):

Berlin F: Pedophilia: Criminal Mindset or Mental Disorder? A Conceptual Review, American Journal of Forensic Psychiatry, Vol. 32, Issue 2, pp. 3 – 25, 2011.

Berlin F: Commentary on Pedophilia Diagnostic Criteria in DSM-5, The Journal of the American Academy of Psychiatry and the Law, Vol. 39, No.2, pp. 242 – 244, April 2011.

Berlin F: Commentary: Risk/Benefit Ratio of Androgen Deprivation Treatment for Sex Offenders, Journal of the American Academy of Psychiatry and the Law, Vol. 37, pp. 59 – 62, November 1, 2009.

Rao V, Handel S, Vaishnavi S, Keach S, Robbins B, Spiro J, Ward J, Berlin F: Psychiatric Sequelae of Traumatic Brain Injury: A Case Report, American Journal of Psychiatry, 164:5, pp. 728-735, May 2007.

Berlin FS: Commentary: The Impact of Surgical Castration on Sexual Recidivism Risk Among Civilly Committed Sexual Offenders, Journal of The American Academy of Psychiatry Law, Vol. 33, No. 1, pp. 37-41, March 2005.

Saleh F, Berlin FS: Sex Hormones, Neurotransmitters, and Psychopharmacological Treatments in Men with Paraphilic Disorders, Journal of Child Sexual Abuse, Vol. 12, No. 3/4, pp. 233-253, 2003. Also published simultaneously in Identifying and Treating Sex Offenders: Current Approaches, Research, and Techniques, (ed: Robert Geffner, et al.), The Haworth Maltreatment & Trauma Press, New York, 2003, pp. 233-253.

Saleh F, Berlin FS: Sexual Deviancy: Diagnostic, Neurobiological, and Psychopharmacological Considerations and Sex Hormones, Neurotransmitters and Psychopharmacological Treatments

in Men with Paraphilic Disorders, Journal of Child Sexual Abuse, Vol. 12, No. 3/4, pp. 53-74, 2003. Also published simultaneously in Identifying and Treating Sex Offenders: Current Approaches, Research, and Techniques, (ed: Robert Geffner, et al.), The Haworth Maltreatment & Trauma Press, New York, 2003, pp. 53-74.

Berlin FS. Sex Offender Treatment and Legislation, Journal of the American Academy of Psychiatry and the Law, Vol. 31, No. 4, pp.510-513, 2003

Berlin F. Galbreath N, Geary B, McGlone G. The Use of Actuarials at Civil Commitment Hearings to Predict the Likelihood of Future Sexual Violence, Sexual Abuse: A Journal of Research and Treatment, Tucson, Arizona, Vol. 15, No. 4, pp. 377-382, October 2003.

Fagan PJ, Wise TN, Schmidt CW, Berlin FS. Special Communication on Pedophilia, Journal of the American Medical Association, 288, 19, pp. 2458-2465, November 20, 2002.

Berlin FS. Pedophilia: When is a Difference a Disorder? Peer Commentaries on Green (200) and Schmidt (2002), Archives of Sexual Behavior. 31 (6): pp. 1-2, 2002

Berlin F, The Vanderbilt Symposium – In My Opinion, Sexual Addiction & Compulsivity, 8, pp. 187-189, 2001

Berlin FS, Malin HM, Lehne GK, Hunt, WP, Thomas, K, Fuhrmaneck, J. The Eroticized Violent Crime: A Psychiatric Perspective with Six Clinical Examples. Journal of Sexual Addiction and Compulsivity, 4, 1, 10-32, 1997.

Berlin FS. Jeffrey Dahmer: Was He Ill? Was He Impaired? Insanity Revisited. American Journal of Forensic Psychiatry, 15, 1, pp. 5-29, 1994.

Federoff JP, Hanson A, McGuire M, Malin HM, Berlin FS. Simulated Paraphilias: A Preliminary Study of Patients Who Imitate or Exaggerate Paraphilic Symptoms and Behaviors. Journal of Forensic Sciences, 37, 3, pp. 902-911, 1992.

Federoff JP, Wisner-Carlson R, Dean S, Berlin FS. Medroxyprogesterone Acetate in the Treatment of Paraphilic Sexual Disorders. Journal of Offender Rehabilitation, 18, pp. 109-123, 1992.

Berlin FS, Hunt WP, Malin HM, Dyer A, Lehne GK, Dean S. A Five-year Plus Follow-up Survey of Criminal Recidivism Within a Treated Cohort of 406 Pedophiles, 111 Exhibitionists and 109 Sexual Aggressives: Issues and Outcome. American Journal of Forensic Psychiatry, 12, 3, pp. 5-28, 1991.

Berlin FS, Malin HM. Media Distortion of the Public's Perception of Recidivism and Psychiatric Rehabilitation. American Journal of Psychiatry, 148, 15, pp. 1572-1576, 1991.

DiGiovanni C, Berlin FS, Casterella P, Redfield R, Hiken M, Falck A, Malin HM, Gagliano S, Schaerf F. Prevalence of HIV Antibody Among a Group of Paraphilic Sex Offenders. Journal of Acquired Immune Deficiency Syndromes, 4, pp. 633-637, 1991.

Berlin FS, Malin HM, Dean S. Effects of Statutes Requiring Psychiatrists to Report Suspected Sexual Abuse of Children. American Journal of Psychiatry, 148, 4, pp. 449-453, 1991.

Berlin FS. The Paraphilias and Depo-Provera: Some Medical, Ethical and Legal Considerations. The Bulletin of the American Academy of Psychiatry and the Law, 17, 3, pp. 233-239, 1989.

Berlin FS. Issues in the Exploration of Biological Factors Contributing to the Etiology of the Sex Offender plus Some Ethical Considerations. Annals of the New York Academy of Sciences. 528, 528, pp. 183-192, 1988.

Chen JJS, Berlin FS, Margolis S. Effect of Large Dose Progesterone on Plasma Levels of Lipids, Lipoproteins and Apolipoproteins in Males. Journal of Endocrinological Investigation, 9, 4, pp. 281-285, 1986.

Berlin FS. Men Who Rape: Interviews with Five Rapists. American Journal of Forensic Psychiatry, 7, 4, pp. 11-41, 1986.

Berlin FS, Krout E. Pedophilia: Diagnostic Concepts, Treatment and Ethical Considerations. American Journal of Forensic Psychiatry, 7, 1, pp. 13-30, 1986.

Chen JJS, Berlin FS, Margolis S. Short Term Effects of High Dose Progesterone on Plasma Lipids, Lipoproteins and Apoproteins in Men. Clinical Research, 32, 3, p 704, 1984.

Gaffney GR, Berlin FS. Is There a Hypothalmic-Pituitary-Gonadal Dysfunction in Pedophilia? British Journal of Psychiatry, 145, pp. 657-660, 1984.

Gaffney GR, Lurie SF, Berlin FS. Is There Familial Transmission of Pedophilia? Journal of Nervous and Mental Disease, 172, 9, pp. 546-548, 1984.

Berlin FS, Bergy GK, Money J. Periodic Psychosis of Puberty: A Case Report. American Journal of Psychiatry, 139, 1, pp. 119-120, 1982.

Berlin FS, Coyle GS. Sexual Deviation Syndromes. Psychiatric Clinics at The Johns Hopkins Hospital. (Tune LE, Ed.) The Johns Hopkins Medical Journal, 149, pp. 119-125, 1981.

Berlin FS, Meinecke CF. Treatment of Sex Offenders with Antiandrogenic Medication: Conceptualization, Review of Treatment Modalities and Preliminary Findings. American Journal of Psychiatry, 138, pp. 601-607, 1981.

Greist JH, Marks IM, Berlin FS, Gournay K, Noshirvani H. Avoidance Versus Confrontation of Fear. Behavior Therapy, 11, pp. 1-14, 1980.

Berlin FS, Bartlett R, Black J. Acupuncture and Placebo: Effects on Delaying the Terminating Response to a Painful Stimulus. Anesthesiology, 42 , 5, pp. 527-531, 1975.

PUBLICATIONS (NON-PEER REVIEWED) AND POSTER PRESENTATIONS:

Kim C, Saleh F, Dwyer G, & Berlin F, A Female Patient with Multiple Paraphilias: A Case Study, Poster Presentation, American Academy of Psychiatry and the Law 37th Annual Meeting, Chicago, Illinois, October 27, 2006

Berlin F, Compulsive Sexual Behaviors. Proceedings of the 17th Biannual Catholic Bishops Workshop, Addiction and Compulsive Behaviors, The National Catholic Bioethics Center, Boston, Massachusetts, pp. 71-83, 2000.

Murphy DL, Sims K, Eisenhofer G, Greenberg BD, George T, Berlin F, Zametkin A, Ernst M, Breakefield XO. Are MAO-A Deficiency States in the General Population and in Putative High-Risk Populations Highly Uncommon? Presented at The 6th Rappaport Symposium and 7th Amine Oxidase Workshop, Haifa, Israel, June 1996.

Berlin FS. Psychosexual Disorders: Implications for the Impaired Physician. Straight Forward, 5, pp. 5-6, 1994.

Berlin FS: "Use of Chemically Castrating Medications." River Cities' Reader. 8, 1994.

Federoff JP, Berlin FS, Wisner-Carlson R, Dean S. An Open Five Year Follow-up of Paraphilic Men Treated With Psychotherapy and Medroxyprogesterone Acetate. Poster presentation, International Academy of Sex Research, Barrie, Ontario, August 1991.

DiGiovanni C, Berlin FS. Control of Hypersexuality in HIV Carriers. Proceedings of the Third International Conference on AIDS, Washington, D.C., p. 43, June 5, 1987

Frost JJ, Mayberg HS, Berlin FS, et al. Alteration in Brain Opiate Receptor Binding in Man Following Arousal Using C-11 Carfentinil and Positron Emission Tomography, Proceedings of the 33rd Annual Meeting of the Society of Nuclear Medicine. Journal of Nuclear Medicine, 27, 6, p.1027, 1986.

Berlin FS. Pedophilia. Medical Aspects of Human Sexuality, 19, 2, pp. 8, 79, 82, 85, 88, 1985.

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Berlin FS. The Use of Waking and Hypnotic Suggestions to Change Behavior. Copyrighted Ph.D. Thesis, available through The National Library Scheme on Canadian Thesis, 1972.

EDITORIALS:

Berlin FS, Fagan PJ, Wise TN, Schmidt CW, Medical Research in Pedophilia, Journal of the American Medical Association, 289, 10, p. 1243, March 12, 2003 (letter).

Berlin FS, Treatments to Change Sexual Orientation, The American Journal of Psychiatry, 157, 5, p. 838, May 2000 (letter).

Berlin FS, Thomas K, Congress shouldn't judge value of scientific studies, The Baltimore Sun p. 9A, Letter to the Editor, 7/27/99.

Berlin, FS. Unpaid Expert Witness. New England Journal of Medicine, 338, 17, p 1233, 1998 (correspondence).

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Berlin FS. Laws on Mandatory Reporting of Suspected Child Sexual Abuse. American Journal of Psychiatry, 145, p.8, 1988 (letter).

Berlin FS, Money J, Lehne GK. Antiandrogens Plus Counseling in the Treatment of Paraphilias. Journal of Sex Research, 19, 2, pp. 201-202, 1983 (letter).

Berlin FS. "Smoking Decreased After Hypnosis. Factors Relevant to Outcome" Archives of General Psychiatry, 37, pp. 1200-1201, 1980 (letter to the editor).

BOOK CHAPTERS:

Houts F, Taller I, Tucker D, Berlin F: Androgen Deprivation Treatment of Sexual Behavior, in (Balon R. Editor) Sexual Dysfunction: Beyond the Brain-Body Connection. Adv Psychosom Med. Basel, Karger, 2011, vol. 31. pp 149-163.

Berlin FS, Saleh FM, Malin HM: Mental Illness and Sex Offending, In (Saleh FM, Grudzinkas AJ, Bradford JM, Brodsky D, Editors) Sex Offenders: Identification, Risk Assessment, Treatment and Legal Issues, Oxford University Press, New York, New York, In press.

Saleh FM, Berlin FS, Malin HM, Thomas KJ: Paraphilias and Paraphilia-Like Disorders, In (Gabbard GO, Editor) Treatments of Psychiatric Disorders, 4th Edition, American Psychiatric Publishing, Inc., Washington, DC, 671-682, 2007.

Saleh F, Berlin FS: Sexual Deviancy: Diagnostic and Neurobiological Considerations and Sex Hormones, Neurotransmitters and Psychopharmacological Treatments in Men with Paraphilic Disorders, In (Geffner R, Franey K, Geffner T, Falconer R, Eds.) Identifying and Treatment Sex Offenders, Haworth Maltreatment and Trauma Press. To be published in 2005.

Fagan P, Lehne G., Strand J., Berlin FS: Paraphilias in (Gabbard GO, Beck JS, Holmes J, Eds.) Oxford Textbook of Psychotherapy, Oxford University Press, Inc., New York, Chapter 17, pp. 213-225, 2005.

Berlin FS: Child Psychiatrist in (Spitzer RL, First MB, Gibbons M, Williams JBW, Eds.) Treatment Companion to the DSM-IV-TR Casebook, American Psychiatric Publishing, Inc., Arlington, Virginia, 2004, pp. 180-188.

Galbreath, NW, Berlin FS, Sawyer D, Paraphilias and the Internet. In (Cooper A., Ed) Sex and the Internet: A Guidebook for Clinicians, Brunner-Routledge, Philadelphia, Pennsylvania, pp. 187-205, 2002.

Berlin FS. Compulsive Sexual Behaviors. In (Fulton EJ, McLoud-Dort V, Eds) Addiction and Compulsive Behaviors, The National Catholic Bioethics Center, Boston, Massachusetts, pp. 79-91, 2000.

Berlin FS: The Etiology and Treatment of Sexual Offending. In (Fishbein DH., Ed.) The Science, Treatment and Prevention of Antisocial Behaviors: Applications to the Criminal Justice System, Civic Research Institute, Inc., Kingston, New Jersey, pp. 211-215, 2000.

Berlin FS. How Many People Need to be Eaten in Milwaukee? In (Whitman C., Zimmerman J., Miller T., Eds.), Frontiers of Justice, Volume 2: Coddling or Common Sense?, Biddle Publishing Co., Brunswick, Maine, pp. 302-307, 1998.

Berlin FS: Hal, Driven by an Invisible Force: A Case of Pedophilia. In (Haglin R., Krauss Whitbourne S., Eds.), A Casebook in Abnormal Psychology, From the Files of Experts, Oxford University Press, pp. 114-126, 1998.

Berlin FS, Malin HM, Thomas K: Treatment of the Nonpedophilic and Nontransvestic Paraphilias. In (Gabbard GEO, Ed.), Treatment of Psychiatric Disorders: The DSM-IV Edition. American Psychiatric Press, pp. 1941-1958, 1996.

Berlin, FS: New Theories of Physical Causes of Homosexuality and Moral Behavior. In (Smith RE, Ed.), Proceedings of the 1993 Bishops' Workshop entitled "Communicating the Catholic Vision of Life". The Pope John XXIII Medical-Moral Research and Education Center, pp. 58-70, 1993.

Berlin FS: "Perfect Relationship". In (Spitzer RL, Gibbon M, Skodol AE, Williams JBW, First MB, Eds.), DSM-III-R Case Book: A Learning Companion to the Diagnostic and Statistical Manual of Mental Disorders (3rd Edition, Revised). American Psychiatric Press, Washington, D.C., pp. 116-117, 1989.

Berlin FS: "Child Psychiatrist." In (Spitzer RL, Gibbon M.Skodol AE, Williams JBW, First MB, Eds.), DSM-III-R Case Book: A Learning Companion to the Diagnostic and Statistical Manual of Mental Disorders (3rd Edition, Revised). American Psychiatric Press, Washington, D.C., pp 135-137, 1989.

Berlin FS: Special Considerations in the Psychiatric Evaluation of Sexual Offenders. In (Rosner R, Schwartz HI, Eds.), Critical Issues in American Psychiatry and the Law. volume 4 (Juvenile Psychiatry and the Law: Victims and Victimizers), Plenum Press, New York, pp. 119-132, 1989.

Berlin FS, Shaerf FW: Laboratory Assessment of the Paraphilias and Their Treatment with Antiandrogenic Medication. In (Hall RCW, Bereseford TP, Eds.), A Handbook of Psychiatric Diagnostic Procedures. New York, Spectrum Publications, pp. 273-305, 1985.

Berlin FS: (1) Behavior Modification, (2) Biological Therapies. Two sections in (Meyer J, Schmidt CW, Wise TN, Eds.), Clinical Management of Sexual Disorders. Williams and Wilkins, Baltimore, Maryland, 1983.

Berlin FS: Sex Offenders: A Biomedical Perspective and a Status Report on Biomedical Treatment. In (Greer JB, Stuart IR, Eds.), The Sexual Aggressor: Current Perspectives on Treatment. Van Nostrand Reinhold Co., New York, pp. 83-123, 1983.

INVITED REVIEWS AND EDITORIALS:

Lehne G, Thomas K, Berlin FS. Treatment of sexual paraphilias: a review of the 1999-2000 literature, Current Opinion in Psychiatry, 13, 569-573, 2000 (invited review requested of Dr. Berlin).

Berlin FS, Pornography and politics: A case for sane civility. The Baltimore Sun, p. 13F, 2/7/99 (invited editorial).

Berlin FS, If the Starr Report Were a Psychiatric Case Study, What Kind of Footprint Would It Leave? The Baltimore Sun, Arts & Society, p. 11G, 9/27/98 (invited editorial).

Berlin FS, Criminal or Patient? Culturefront, 5, 2, pp. 71-75, Summer 1998 (invited article).

Berlin FS. The Case for Castration, Part 2. The Washington Monthly, 5, pp. 28-29, May 1994 (invited editorial).

Berlin FS, Malin HM, Dean S. Involuntary Intervention: Does the Benefit Exceed the Cost? American Journal of Psychiatry, 149, 3, 1992 (invited editorial response - letter).

Berlin FS, Malin HM. Laws on Reporting Sexual Abuse of Children, Dr. Berlin and associates reply. American Journal of Psychiatry. 148, 11, p. 1619, 1991. (invited editorial response - letter).

Berlin FS. Response to KJ Masters Commentary "Dahmer Case Trivialized by Forensic Psychiatrists". Clinical Psychiatry News, p. 4, February 1993 (invited editorial).

Berlin FS, Malin HM. Rape: A Presumption of Guilt? A Presumption of Severe Punishment if Guilty. A Journal for the Expert Witness, The Trial Attorney and the Trial Judge, 5, pp. 7-9, 1990 (invited article).

Berlin FS. Commentary on "Sexual Addiction and Compulsive Sexual Behaviors" by Eric Griffin-Shelley. Medical-Moral Newsletter, 26, pp. 8-9, 1989 (invited article).

Berlin FS. Ethical Use of Psychiatric Diagnoses. Psychiatric Annals, 13, pp. 321-331, 1983 (invited article).

Berlin FS. Ethical Use of Antiandrogenic Medications. American Journal of Psychiatry, 138, 11, p 1516, 1981 (invited editorial response – letter).

Berlin FS. In Defense of the Disease Model in Psychiatry. Psychiatric Annals, 11, p. 5 - 12, 1981 (invited article).

Berlin FS. Psychological Therapies for Anxiety. Psychiatric Annals, 9, pp. 41-55, 1974 (invited article).

BOOK REVIEWS:

Sexual Deviation, Third Edition (Rosen I, Ed.), The Journal of Nervous and Mental Disease, 186, No. 4, pp 255-256, 4/98.

Text Book of Homosexuality and Mental Health (Cabaj RP and Stein TS, Eds.), Journal of Nervous and Mental Disease, 185, No. 11, 11/97. .

Handbook of Sexual Assault: Issues, Theories and Treatment of the Offender. (Marshall WL, Laws DR, Barbaree HE, Eds.), Archives of Sexual Behavior, 21, p. 4, 1992.

Treating Perpetrators of Sexual Abuse. (Ingersol SL, Patton S). The Bulletin of the American Academy of Psychiatry and the Law, 18, 4, pp. 429-430, 1990.

OTHER PUBLISHED MATERIALS:

Berlin FS, "Pharmacological Interventions with Sex Offenders." To Be Included in the Interpol Handbook. 2010

Berlin FS. An Interview by the Editor. The Maryland Psychiatrist, 17, pp. 5-7, 1990.

Berlin FS, National Conference of Catholic Bishops Interview, National Conference of Catholic Bishops' Ad Hoc Committee on Sexual Abuse, Published online at usccb.org, Baltimore, Maryland, 09/08/97

Berlin FS Diagnosis and Treatment of Paraphilias. Audio Digest Psychiatry, 17, p. 17, September 5, 1988.

Berlin FS. Treating Sexual Disorders with Medroxprogesterone Acetate: An Interview with Fred S. Berlin. Currents in Affective Illness, 6, 7, pp. 5-15, 1987.

Berlin FS. Psychiatry Meets the Sex Offender. Audio-Digest Psychiatry, 16, p. 13, July 13, 1987.

Berlin FS, Meinecke CF. Treatment of Sex Offenders with Antiandrogenic Medications. Audio Digest Psychiatry, December 1981. (Audio Cassette).

EXTRAMURAL SPONSORSHIP:

GRANTS AND CONTRACTS:

The Harry Frank Guggenheim Foundation: The Assessment of Compulsive Rapists and Pedophiles for Hormonal, Chromosomal and Neurobiological Pathologies. Grant awarded on July 15, 1985.

Berlin FS, Conner E, Rider M: Annotated Bibliographic Review of Literature on Etiology and Treatment of Sex Offenses and Sex Offenders. Contracted and published by The National Institute of Mental Health, 1982.

EDUCATIONAL ACTIVITIES:

TEACHING:

Classroom Instruction – Yearly lecture, 2nd year medical students, The Johns Hopkins University School of Medicine.

Clinical Instruction – Bedside and didactic teaching, psychiatric residents and students, Meyer-5 ward (currently attending physician 3 months of the academic year), The Johns Hopkins Hospital.

(See also below – "Primary Service Responsibilities")

CME INSTRUCTION:

Invited Participant, When Sex Offenders are Adolescents, Ministry of the Sick, The Johns Hopkins University School of Medicine Continuing Medical Education Course, Baltimore, Maryland, 4/29/96.

Invited Participant, Positron Emission Tomography and the Chemistry of Mental Illness: Changes in Brain Chemistry During Sexual Arousal, Nuclear Medicine Seminar, The Johns Hopkins University School of Medicine Continuing Medical Education Course, Baltimore, Maryland, 3/13/97.

Course Director, Pedophilia and Rape, 143rd Annual Meeting, American Psychiatric Association, New York, New York, 5/12/90 - 5/17/90.

Course Director, Diagnosis and Treatment of Pedophiles and Rapists, 142nd Annual Meeting, American Psychiatric Association, San Francisco, California, 5/6/89 - 5/11/89.

Course Director, Assessment and Treatment of Adult and Adolescent Sex Offenders, 141st Annual Meeting, American Psychiatric Association, Montreal, Canada, 5/9/88.

Course Director, Diagnosing and Treating Rapists and Pedophiles, 140th Annual Meeting, American Psychiatric Association, Chicago, Illinois, 5/13/87.

Invited Participant, Positron Emission Tomography: Changes in Opiate Receptor Activity on PET Scanning During Sexual Arousal, The Johns Hopkins University School of Medicine Continuing Education Course, Baltimore, Maryland, 4/19/86.

(See also below – "Conferences Organized")

MENTORING:

Member, Board of Student Advisors, The Johns Hopkins University School of Medicine, 1980-1983.

Member, Ph.D. Thesis Committee, for Dr. Kate Thomas and Dr. Kathy Pilero.

Clinical Supervisor for a Variety of Psychiatric Residents.

Supervisor of Elective Training to a Variety of Pre- and Post-doctoral Students.

EDITORIAL BOARD APPOINMENTS:

Member, Editorial Board, Family Violence and Sexual Assault Institute, 2003 – present

Member, Editorial Board, Journal of Sexual Addiction and Compulsivity, 2001 - present

Associate Editor, International Journal of Offender Therapy and Comparative Criminology, January 1997 – December 2002

PEER REVIEW PERFORMED FOR THE FOLLOWING JOURNALS:

The American Journal of Bioethics - Neuroscience
The American Journal of Psychiatry
Behavioral Sciences and the Law
Journal of the American Medical Association (JAMA)
Journal of Child Sexual Abuse
The Journal of Nervous & Mental Disease
The Journal of Pediatrics
The Journal of the American Academy of Psychiatry and the Law
The American Journal of Clinical Hypnosis
The Archives of General Psychiatry
Archives of Sexual Behavior
Child Abuse and Neglect: The International Journal
The Journal of Consulting and Clinical Psychology
The Journal of Neuropsychiatry and Clinical Neurosciences
Psychosomatics
Social Psychiatry and Psychiatric Epidemiology
The Harvard Review of Psychiatry

CLINICAL ACTIVITIES:

LICENSURES:

Licensed Physician, State of Maryland, 1975 – Present, ID #D18703.

CERTIFICATIONS AND FELLOWSHIPS:

Diplomat, National Board of Medical Examiners, ID #141770, 1975.

Board Certified in Psychiatry, American Board of Psychiatry and Neurology, ID #21208, 1980.

Distinguished Life Fellow, American Psychiatric Association, 2010.

Diplomat, The American Board of Forensic Examiners, ID #660, 1994.

Diplomat, The American Board of Sexology, ID #1760, 1995.

(have also provided questions for board certification examinations)

Board Certified in Forensic Psychiatry, American Board of Psychiatry and Neurology, ID #504, 1998 to 2008.

PRIMARY SERVICE RESPONSIBILITIES:

Attending Physician, Psychiatry, Meyer-5 Inpatient Service, Currently 2 months per year (previously as much as 12 months per year) – includes periodic weekends on-call

Periodic on-call physician for the Hopkins Access Line (HAL).

Director, Sexual Behaviors Consultation Unit, involves teaching and supervision of Johns Hopkins staff, psychiatric residents and medical students during their outpatient training.

ORGANIZATIONAL ACTIVITIES:

THE JOHNS HOPKINS MEDICAL INSTITUTIONS:

Member, Medical School Counsel, The Johns Hopkins University, 1982 – 1984.

Member, Gender Identity Committee, The Johns Hopkins Hospital, 1980 – 1981.

Member, Utilization Review Committee, The Johns Hopkins Hospital, 1977 – 1978.

Member, Advisory Committee, House Staff Council, The Johns Hopkins Hospital, 1977 – 1978.

Member, House Staff Council, The Johns Hopkins Hospital, 1976 – 1978.

PROFESSIONAL SOCIETIES:

ELECTED POSITIONS:

President, Chesapeake Bay Chapter, American Academy of Psychiatry and the Law, 4/95 - 4/98.

Treasurer, Chesapeake Bay Chapter, American Academy of Psychiatry and the Law, 1993-1995.

Elected Member of Council, Maryland Psychiatric Society, 1993-1996.

APPOINTED POSITIONS:

Appointed Member, Technical Advisory Committee, The Spurwink Institute, 1996.

Appointed Member, Board of Directors, Maryland Foundation for Psychiatry, 1995.

Appointed Member, Task Force on Examinations, Section on Sexological Research, The American Board of Sexology, 8/31/92.

Appointed Member, Legislative Committee, Maryland Psychiatric Society, 1989 - Present.

Appointed Member, Legislative Network, Mental Health Association of Metropolitan Baltimore, 1985.

Appointed Member (by the Governor of Maryland), The Board of Patuxent Institution, 1984 – 1989.

MEMBERSHIPS:

American Academy of Psychiatry and the Law
American Association for the Advancement of Science
American Board of Forensic Examiners
American College of Forensic Psychiatry
American Medical Association
American Professional Society on the Abuse of Children
American Psychiatric Association
Association for the Treatment of Sexual Abusers
Eastern Psychological Association
Greater Baltimore Task Force on Sexual Offenders
Maryland Psychiatric Society
Mental Health Association of Maryland
National Adolescent Perpetrator Network
Society for Scientific Study of Sex
Society of Biological Psychiatry
Southern Medical Association

CONFERENCES ORGANIZED:

Course Director, The First Annual Symposium Child Sexual Abuse: A Public Health Perspective, The Johns Hopkins Bloomberg School of Public Health, Baltimore, Maryland, 04/27/12.

Course Director, The Cycle of Sexual Trauma: Treating the Victim and Treating the Offender, The Johns Hopkins University School of Medicine Continuing Medical Education Course, Baltimore, Maryland, 2/10/94 - 2/12/94.

Course Director, Sex Offenders: Focus on Treatment, The Johns Hopkins University School of Medicine Continuing Medical Education Course, Baltimore, Maryland, 1/19/88.

Course Director, Sex Offenders: Criminals or Patients? The Johns Hopkins University School of Medicine Continuing Medical Education Course, Baltimore, Maryland, 1/19/87 - 2/21/87.

Course Director, The Sex Offender: Medical and Legal Issues, The Johns Hopkins University School of Medicine Continuing Medical Education Course, Baltimore, Maryland, 2/20/86 - 2/22/86.

Course Director, Diagnosis and Treatment of Sex Offenders, The Johns Hopkins University School of Medicine Continuing Medical Education Course, Baltimore, Maryland 2/21/85 - 2/22/85.

Course Director, Medical Assessment and Treatment of Sex Offenders, The Johns Hopkins University School of Medicine Continuing Medical Education Course, Baltimore, Maryland, 2/20/84.

Course Director, Medical Assessment and Treatment of Sex Offenders, The Johns Hopkins University School of Medicine Continuing Medical Education Course, Baltimore, Maryland, 2/16/83.

PEER REVIEW GROUPS:

Member, National Institute of Mental Health Special Emphasis Panel, ZMH1 ERB – 1(01), Adult and Adolescent Interventions, 10/29/04.

National Institute of Mental Health Grant Review Panel, Bethesda, Maryland, 03/04/00.

Ad Hoc Member, National Institute of Mental Health Review Group, Violence and Traumatic Stress Research Review Committee, 1997.

External Peer Reviewer of the Psychiatry Program at Shodair Hospital, Helena, Montana, 1996.

Grant Reviews performed for the Mental Health Foundation, Ottawa, Canada, 1984-85, 1996.

CONSULTANTSHIPS:

Consultation provided to the Ministry of Justice, Republic of Korea, August 30, 2010.

Consultation provided to Gerry Sutcliffe, MP, Under Secretary of State for Criminal Justice and Offender Management, United Kingdom, July 21, 2006.

Consultant, Prison Service Division, Correction Bureau, Ministry of Justice, Japan, September 15, 2005.

First Draft Technical Advisory Research Person, Entertainment Industries Council, 2002

Member, Cardinal's Commission for the Protection of Children, Archdiocese of Boston, 2002

Standing Ethics Committee Member, Association for the Treatment of Sexual Abusers (ATSA), Beaverton, Oregon, 7/2001 – Present.

Standing Advisory Member, Advisory Board, Association for the Treatment of Sexual Abusers (ATSA), Beaverton, Oregon, 12/00 – 12/08.

Standing Advisory Member, Ad Hoc Committee on Sexual Abuse, National Conference of Catholic Bishops, Washington, D.C., 11/13/93 – Present.

Ad Hoc Commentator, The Forensic Psychiatry Echo, New York, NY, 1996 – Present.

Consultant, Wisconsin Department of Corrections regarding the use of antiandrogens. July 2001.

Psychiatric Consultant, State of Maryland Division of Corrections, 1980 – 1994.

Psychiatric Consultant, The Maryland Training School for Boys, 1980 – 1988.

Consultation provided to several state agencies regarding establishment of treatment programs for sex offenders (e.g., Pennsylvania, Tennessee, Virginia, Oregon) 1984 – 1994.

Consultation provided to European Parliament regarding rehabilitation of sex offenders, 1984.

Numerous court appearances as an expert witness on the diagnosis and treatment of paraphilic disorders (and on the insanity defense), 1980 – Present.

RECOGNITION:

AWARDS, HONORS:

Distinguished Fellow, The American Psychiatric Association	*May 2003*
National Institute for the Study, Prevention and Treatment of Sexual Trauma designated as a National "Resource Site" by the United States Department of Justice	*1997*
Listed in "The Best 2000 Doctors"	*1996 - Present*
Listed in "Who's Who in Medicine and Healthcare"	*1996 - Present*
Presidential Citation, City of Baltimore	*December 1996*

Citation of Meritorious Achievement, Dictionary of International Biography, Cambridge, England	May 1995
Listed in "The Best Doctors in America"	1994 - Present
Listed in "Who's Who in America"	1990 – Present

INVITED TALKS:

GRAND ROUNDS (VISITING SPEAKER):

Invited Speaker, Sex and the Internet. Psychiatry Grand Rounds, The Johns Hopkins University School of Medicine, Baltimore, Maryland, 01/24/11

Invited Speaker, Sex Offenders: Criminals or Patients, Psychiatry Grand Rounds, George Washington University, Washington, DC, 03/11/10.

Invited Speaker, Sex Offenders: Criminals or Patients, Psychiatry Grand Rounds, Georgetown University Hospital, Washington, DC, 03/27/08.

Invited Speaker, Men Who Rape. Psychiatry Grand Rounds, The Johns Hopkins University School of Medicine, Baltimore, Maryland, 12/12/05.

Invited Speaker, Sex Offenders: Criminals or Patients?, Psychiatry Grand Rounds, University of Massachusetts, School of Medicine, Worcester, Massachusetts, 12/16/04.

Invited Presenter, The Paraphilias: Moral or Medical Problem?, Psychiatry Grand Rounds, Quillen College of Medicine, Johnson City, Tennessee, 08/27/04.

Invited Presenter, Clergy Sexual Abuse: The Crisis in the Catholic Church, Grand Rounds, St. Luke Institute, Silver Spring, Maryland, 11/21/02.

Invited Presenter, Evidence-based Treatment of Sex Offenders, Park Ridge Hospital, Rochester, New York, 10/2/03.

Invited Presenter, Psychiatry and the Law, Charles E. Steinberg Grand Rounds Lecture, University of Rochester Medical Center, Rochester, New York, 10/01/03.

Invited Presenter, Sex Offenders: Criminals or Patients? Grand Rounds, Springfield Hospital Center, Sykesville, Maryland, 04/15/12, 8/22/03.

Invited Presenter, The Crisis in the Catholic Church, Mendelsohn Lecture Series, The New England Medical Center, Boston, Massachusetts, 09/30/02.

Invited Presenter, Diagnosis and Treatment of Paraphilias, Correctional Mental Health Grand Round Series, Baltimore, Maryland, 11/17/00.

Invited Speaker, The Paraphilias, Grand Rounds, Columbia University College of Physicians and Surgeons, The Psychiatric Institute, New York, New York, 10/27/00.

Invited Speaker, Ethical Issues in the Care and Treatment of Sexual Predators, Grand Rounds, Bronx Psychiatric Center, Albert Einstein College of Medicine, Bronx, New York, 5/7/98.

Invited Speaker, Diagnosis and Treatment of Sexual Offenders, Grand Rounds, St. Luke Institute, Silver Spring, Maryland, 4/9/98.

Fifth Annual Speaker, Diagnosing and Treating Paraphilias, Paul Mendelsohn Memorial Grand Rounds on Psychiatry and the Law, New England Medical Center, Tufts University School of Medicine, Boston, Massachusetts, 4/28/95.

Invited Speaker, Psychiatric and Other Issues in Paraphilias, Grand Rounds, Springfield Hospital Center, Sykesville, Maryland, 2/18/94, 7/24/92, 4/26/91, 3/30/90.

Invited Speaker, The Insanity Plea and the Paraphilias, Grand Rounds, Sheppard Pratt Hospital, Baltimore, Maryland, 5/1/93.

Invited Speaker, The Paraphilias, Adolescent Psychiatry Grand Rounds, University of Maryland, Baltimore, Maryland, 2/23/93.

Invited Speaker, Treating Sexual Disorders, Grand Rounds, Crownsville Hospital Center, Baltimore, Maryland, 1/22/93.

Invited Speaker, Differential Diagnosis and Treatment Strategies in Sexual Perversions, Psychiatric Grand Rounds, West Virginia University School of Medicine, Morgantown, West Virginia, 4/1/92.

Invited Speaker, Interventions for the Paraphilic Patient, Psychiatric Grand Rounds, University of Maryland, Baltimore, Maryland, 3/26/92, 3/19/85.

Invited Speaker, The Paraphilias, Psychiatric Grand Rounds, Bethesda Naval Hospital, Bethesda, Maryland, 1/27/88, 5/20/87.

Invited Speaker, Treating the Paraphilias, Psychiatric Grand Rounds, University of Texas School of Medicine, Dallas, Texas, 10/27/87, 1/17/86.

Invited Speaker, Treating Sex Offenders, Psychiatric Grand Rounds, University of Virginia School of Medicine, Charlottesville, Virginia, 9/12/85.

Invited Speaker, Management of the Paraphilias, Psychiatric Grand Rounds, St. Elizabeth's Hospital, Washington, D.C., 5/23/84.

INVITED TALKS AND MEMBERSHIP AT GOVERNMENT SPONSORED ACTIVITIES:

(FEDERAL GOVERNMENT):

Invited Participant, "Sexual Assault in the Military Part Three: Context and Causes," Subcommittee on National Security and Foreign Affairs, Committee on Oversight and Government Reform, Congress of the United States, House of Representatives, Washington, DC, 06/25/09.

Invited Participant, Judicial Hearing Regarding Sex Offender Legislation, Subcommittee on Crime, Terrorism, and Homeland Security, United States Congress, Washington, DC, 6/9/05.

Invited Speaker, Sexual Addiction and the Fantasy Defense, International Online Child Sexual Victimization Symposium, United States Department of Justice, Federal Bureau of Investigation, Leesburg, Virginia, 06/06/04 – 06/11/04.

Invited Participant, Online Sexual Victimization of Children Working Group, Federal Bureau of Investigation, Quantico, Virginia, 02/04/04 – 02/05/04.

Invited Speaker, Understanding Sex Offenders, Annual In-service Training, Crimes Against Children Unit, Headquarters Federal Bureau of Investigation, Washington, DC, 03/20/2002.

Invited Participant, Second National Summit, Center for Sex Offender Management (CSOM), Office of Justice Programs, U. S. Department of Justice, Washington, D.C., 12/17/00 – 12/19/00.

Member, Office of Justice Programs Planning Group Regarding Safe Management of Sex Offenders in the Community, Center for Effective Public Policy, Center for Sex Offender Management (CSOM), U. S. Department of Justice, Washington, D.C., 9/9/96 - Present.

Invited Participant, National Resource Group Meeting, Center for Sex Offender Management (CSOM), Office of Justice Programs, U. S. Department of Justice, Washington, DC, 10/2/00 – 10/3/00.

Invited Participant, Third Meeting of the Center for Sex Offender Management's National Resource Sites, Boston, Massachusetts, 7/26/99 – 7/31/99.

Invited Participant, Mental Health and the Criminal Justice System Forum, U.S. Department of Justice, Office of Justice Programs and the Center for Mental Health Services, Washington, DC, 7/22/99 – 7/23/99.

Invited Speaker, Safe Management of Sex Offenders in the Community. Center for Effective Public Policy, Office of Justice Programs Symposium, U. S. Department of Justice, Washington, D.C., 11/24/96 - 11/26/96.

Invited Speaker, Treatment of Sex Offenders, United States Parole Commission (Northeastern Region), Baltimore, Maryland, 6/27/89.

Invited Testimony, presented to members of The Meese Commission on Pornography, Baltimore, Maryland, 5/16/85.

Invited Participant, NIMH Sponsored Conference, Allocation of Grant Funding to Support Training on Research Related to Sex Offenses and Sexual Disorders, St. Louis, Missouri, 3/2/85 - 3/8/85.

Invited Speaker, Subcommittee on Juvenile Justice Hearings, United States Senate, Washington, D.C., 9/18/84.

Invited Participant, White House Conference on Child Sexual Abuse, Washington, D.C., 4/1/83.

INVITED PRESENTATIONS:

(STATE GOVERNMENT and STATE BAR ASSOCIATIONS):

Keynote Speaker, Sex Offenders: Criminals or Patients? Clinical Evaluation of Sex Offenders, Treatment of Sex Offenders, Legislative Issues, Civil Commitments and "Cyber-Sex," Massachusetts District Attorneys Association, Boston, Massachusetts, October 25, 2007.

Invited Speaker, Watching and Restricting Dangerous Offenders, Annual Meeting, National Conference of State Legislatures, Nashville, Tennessee, 08/16/06.

Invited Speaker, Treatment of Sexual Offenders, State House Judiciary Committee, Annapolis, Maryland, 10/18/04.

Invited Speaker, Treatment of Sexual Offenders, Specialized Treatment Committee, New Jersey Study Commission on Parole, Trenton, New Jersey, 4/22/96; 10/23/96.

Invited Speaker, Megan's Law: Community Notification. Justice Committee, New Jersey State Legislature, Trenton, New Jersey, 2/22/95.

Invited Participant, Assessing Dangerousness and Treatment Potential, Conference of the Superior Court of California, San Diego, California, 1/15/95 - 1/17/95.

Invited Speaker, Designing a Model Sex Offender Treatment Program for the State of Texas, 2nd Round House Conference, Child Abuse and Texas Families, Austin, Texas, 9/24/93.

Invited Speaker, Cause and Elements of Pedophilic Behavior, Child Abuse Seminar, The New Jersey Institute for Continuing Legal Education, The New Jersey State Bar Association, Fairfield, New Jersey, 4/25/92.

Invited Speaker, Sentencing Alternatives and the Developmentally Handicapped Sex Offender, Wisconsin State Public Defender Service, Milwaukee, Wisconsin, 11/14/91.

Invited Speaker, Treatment of Sex Offenders with Depo-Provera, Seminar for South Carolina Judges and Penal Officers, Columbia, South Carolina, 4/17/90.

Invited Speaker, Rapist and Sex Offender Rehabilitation, Subcommittee on Crime and Corrections, New York State Senate, Albany, New York, 6/15/89.

Invited Speaker, Men Who Rape: Profiles of Rapists, Criminal Law and Sentencing Institute Conference, Supreme Court of Wisconsin, Oshkosh, Wisconsin, 5/17/89.

Invited Speaker, The Sex Offender and the Criminal Justice System, Cook County Circuit Court Judges Seminar, Chicago, Illinois, 9/24/88.

Invited Speaker, Sentencing Alternatives, Judicial Education Conference, District Court of Maryland, Baltimore, Maryland, 10/5/88.

Invited Speaker, Sex Offender Treatment, Annual Meeting, Pennsylvania State College of Judges, Hershey, Pennsylvania, 7/25/87.

Invited Speaker, Treating the Incarcerated Sex Offender, Special Conference, State of Maryland Division of Correction, Baltimore, Maryland, 11/16/87

Invited Speaker, Paraphilic Disorders and the Criminal Justice System, Annual Conference, Kansas State College of Judges, 10/14/86 - 10/16/86.

Invited Speaker, Treatment of Sex Offenders, Annual Conference, State of Utah Department of Corrections, Salt Lake City, Utah, 9/28/86 - 9/30/86.

Invited Speaker, Sex Offenders: Treatment and Sentencing Alternatives, Annual Meeting, Vermont Judicial College, Burlington, Vermont, 6/4/86 - 6/6/86.

Invited Speaker, Medical Assessment and Treatment of Sex Offenders, Annual Meeting, Maryland States Attorneys Association, Ocean City, Maryland 6/4/85.

Invited Speaker, Community Setting Programs for the Treatment of Sex Offenders, South Carolina Department of Parole and Community Corrections, Columbia, South Carolina, 5/10/85.

Invited Speaker, Issues in the Rehabilitation of Sex Offenders, Maryland State Parole Board, Baltimore, Maryland, 3/9/84.

Invited Speaker, Rape and Sexual Assault, Governor of Maryland's Task Force on Rape and Sexual Violence, Baltimore, Maryland, 10/4/83.

Invited Speaker, Rehabilitation of Sex Offenders, Somers Treatment Program, State of Connecticut Department of Corrections, Somers, Connecticut, 7/8/83.

INVITED PRESENTATIONS:

(LOCAL GOVERNMENTS and LOCAL BAR ASSOCIATIONS)

Invited Speaker, Mandatory Reporting of Child Sexual Abuse, Forum on Child Abuse and Confidentiality: Privacy Protection and Accountability, Association of the Bar of the City of New York, Committees on Family Court and Family Law and Children and the Law, New York, New York, 10/13/92.

INVITED PRESENTATIONS TO NATIONAL CONFERENCES OF JUDGES:

Invited Speaker, Sexual Offenders and the Criminal Justice System, National Conference of Juvenile Court Judges, Burlington, Vermont, 8/20/85 - 8/21/85.

Invited Speaker (as a National Leader in Law and Health), National Symposium on the Child Victim of Sexual Abuse, National Counsel of Juvenile and Family Court Judges, Burlington, Vermont, 2/24/85 - 2/27/85.

INVITED PRESENTATIONS TO LAW ENFORCEMENT AGENCIES:

Invited Speaker, Evaluation and Treatment of Sex Offenders, Annual Child Sexual Exploitation Seminar, Baltimore County Police Academy, Baltimore County, Maryland, 10/14/98; 10/15/97; 8/30/96; 7/20/95; 7/16/93; 6/14/91; 8/23/90; 9/15/89; 7/15/88; 6/15/87, 10/6/99, 10/13/00, 10/10/01, 10/11/02, 10/15/04, 10/25/05, 10/27/06. 10/23/07.

Invited Speaker, Profiling the Rapist, Violent Crimes Task Force, Baltimore City Police Department, Baltimore, Maryland, 9/22/97

Invited Speaker, The Mind of the Sex Offender, Violent Crimes Task Force, Baltimore City Police Department, Baltimore, Maryland, 12/6/96.

Invited Speaker, Clinical Perspectives and Profiles of Sexual Offenders, Colorado Association of Sex Crimes Investigators, Lakewood, Colorado, 9/8/94 - 9/10/94.

Production of a Training Film, Psychosexual Disorders as They Relate to Law Enforcement, Maryland State Police, Baltimore, Maryland, 3/25/86.

Invited Speaker, Sex Offenders and the Law, Educational Seminar, Baltimore City Police Department, Baltimore, Maryland, 12/17/85.

PRESENTATIONS AT NATIONAL TREATMENT CONFERENCES:

Invited Lecturer, Diagnosis and Treatment of Paraphilias/Pedophilia, Society for Sex Therapy and Research (SSTAR) 2011: 36th Annual Meeting, Palm Beach, Florida, 04/02/11.

Invited Speaker, Pre-Conference Seminar, Differential Diagnosis of Rapists, Plus a Conceptual overview of the Paraphilias, Association for the Treatment of Sexual Abusers (ATSA) 29th Annual Research and Treatment Conference, Phoenix, Arizona, 10/20/10 – 10/23/10.

Invited Panelist, Confrontation, Compassion, and Forgiveness: A Triangle for Transformation, Association for the Treatment of Sexual Abusers (ATSA) 29th Annual Research and Treatment Conference, Phoenix, Arizona, 10/20/10 – 10/23/10.

Invited Participant, A Case of Auto-eroticism, 34th Annual Meeting, Society for Sex Therapy and Research (SSTAR), Arlington, Virginia, 04/04/09.

Keynote Speaker, 2008 National Conference of The Society for the Advancement of Sexual Health (SASH), Cambridge, Massachusetts, 09/19/08.

Invited Participant, Child Pornography Roundtable: Toward a Shared Understanding of the Problem & Prevention Strategies, National Center for Missing and Exploited Children. Alexandria, Virginia, 02/07/08.

Invited Speaker, The Assessment and Etiology of Paraphilias & The Rationale for Treatment, and Treating Paraphilias, ValueOptions Postgraduate Institute for Medicine, Behavioral Health Update 2006, Phoenix Arizona, 03/04/06.

Invited Speaker, Sex and the Nursing Home Resident: Pharmacological Enhancement of Sexual Control, American Association for Geriatric Psychiatry, 17th Annual Meeting, Baltimore, Maryland, 02/21/04 – 02/24/04.

Invited Speaker, Sex Offenders: Criminals or Patients? National Defense Investigators Association, Federal Public Defenders Office, National Training Conference, Ft. Lauderdale, Florida, 4/23/03 – 4/25/03.

Keynote Speaker, Sex Offenders: Criminals or Patients? Annual Meeting of the Minnesota Association for the Treatment of Sexual Abusers, Minneapolis, Minnesota, 3/21/03.

Invited Participant, Law and Disorder: SVP, Mock Trial, American Academy of Psychiatry and the Law Annual Meeting, Newport Beach, California, 10/24/02 – 10/27/02.

Keynote Speaker, Sex Offenders: Criminals or Patients? National Council on Sexual Addiction and Compulsivity (NCSAC) Conference, Nashville, Tennessee, 10/6/02 – 10/8/02.

Invited Speaker, The Diagnosis and Treatment of Sex Offenders, SAPEN Conference, Pittsburgh, Pennsylvania, 9/6/01.

Invited Keynote Speaker, Sex Offenders: Criminals or Patients (and also The Use of Actuarials at Civil Commitment Hearings), Association for the Treatment of Sexual Abusers (ATSA), San Diego, California, 11/1/00 – 11/4/00.

Invited Speaker, Diagnosis and Treatment of Sexual Disorders, Sexual Abuse Prevention and Education Network (S.A.P.E.N.) Annual Conference, Harrisburg, Pennsylvania, 10/10/00.

Invited Speaker, Diagnosis and Treatment of Sex Offenders, American Academy of Psychiatry and the Law (AAPL) Annual Meeting, Baltimore, Maryland, 10/15/99.

Invited Participant, Diagnosing and Treating Sexual Offenders From a Medical Perspective, Association for the Treatment of Sexual Abusers (ATSA) 18th Annual Research and Treatment Conference, Lake Buena Vista, Florida, 9/22/99 – 9/25/99.

Invited Speaker, Diagnosis and Treatment of Sex Offenders, Specialized Training Services – Assessing and Treating Sex Offenders, Chicago, Illinois, July 8, 1999.

Keynote Speaker, Sex Offenders: Criminal or Patient? The National Council on Sex Addiction and Compulsivity 1999 National Conference, St. Louis, Missouri, 4/9/99.

Invited Panelist, Toward a Whole Systems Approach to Sex Abuse, 22nd Annual Family Therapy Network Symposium, Washington, D.C., 3/20/99.

Invited Panelist, The Missing Face in Sex Abuse Prevention, The International Society for Traumatic Stress Studies and The Dartmouth-Hitchcock Medical Center XIV Annual Meeting, Washington, D.C., 11/22/98.

Invited Panelist, A Serial Murderer: From Competency to Sentencing, American Academy of Psychiatry and the Law, New Orleans, Louisiana, October 23, 1998.

Invited Speaker, Sex Offenders: Criminals or Patients? National Council on Sexual Addiction and Compulsivity, Louisville, Kentucky, 3/26/98 - 3/28/98.

Invited Panelist, Sex Offenders: Criminals or Patients? 150th Annual Meeting, American Psychiatric Association, San Diego, California, 5/20/97.

Invited Speaker, Forensic Evaluation of the Accused Sexual Offender: Can He Be Treated? 12th Annual Symposium, American College of Forensic Psychiatry, Montreal, Canada 5/8/94 - 5/15/94.

Invited Speaker, Jeffrey Dahmer: Was He Ill? Was He Impaired? 11th Annual Symposium, American College of Forensic Psychiatry, Santa Fe, New Mexico, 4/23/93.

Invited Panelist, Jeffrey Dahmer: A Case Study, Annual Meeting, American Academy of Psychiatry and the Law, San Antonio, Texas, 10/15/92 - 10/18/92.

Invited Panelist, Diagnosis and Treatment of Sex Offenders, Annual Meeting, American Academy of Psychiatry and the Law, Washington, D.C., 10/19/89 - 10/20/89.

Invited Speaker, Evaluating and Treating Sex Offenders, 3rd Annual Meeting, American College of Forensic Psychiatry, Newport Beach, California, 4/18/85 - 4/21/85.

Invited Speaker, Behavioral Medicine Seminar, Medical Evaluation and Treatment of the Paraphilias, 136th Annual Meeting, American Psychiatric Association, 5/18/83.

ADDITIONAL SIGNIFICANT LECTURES:

Invited Participant (via teleconference), "Chemical Castration" and its limits for crime recidivism prevention, International Conference on the Treatment of Sexual Offenders, International Academy of Forensic Sciences, Rome, Italy, October 1, 2009.

Invited Participant, Mentally Ill/Problematic Sexual Behavior Summit Conference, University of Massachusetts Medical School, Beechwood Hotel, Worcester, Massachusetts, November 17, 2006

Invited Speaker, Sexual Offense and Sexual Offenders: An Overview, Reading Specialists Offender Treatment Services, The Delaware County Association of Criminal Defense Lawyers, and The Criminal Legal Education Committee of the Delaware County Bar Association, Sexual Offenders & the Law: Issues and Process in Treatment, Defense & Prosecution of Sexual Offenders, Reading, Pennsylvania, October 4, 2006

Invited Speaker, Sexually Violent Predators: Medical Issues and Trends, National Association of State Mental Health Program Directors, Alexandria, Virginia, 08/07/06.

Invited Presenter, Understanding Paraphilias: The Place for Research Findings, Topics in Psychiatry, Sixth Annual Course, Johns Hopkins Continuing Medical Education, Department of Psychiatry and Behavioral Sciences, Baltimore, Maryland, November 18, 2005.

Invited Speaker, Sex Offender Treatment, Massachusetts Psychiatric Society, Third Annual Genetics Update and Fall Seminar, Newton, Massachusetts, October 29, 2005.

Invited Speaker, Sexually Dangerous Persons: Issues and Controversies, Forensic Health Services, Boston, Massachusetts, June 24, 2005.

Invited Speaker, Sex Offenders: Criminals or Patients?, Massachusetts Psychiatric Society, Worcester, Massachusetts, 12/16/04.

Panel Member, The Need for a New Sexual Disorders Diagnosis in DSM-V, Annual Conference, The Society for the Advancement of Sexual Health (NCSAC / SASH), Washington, DC, 10/07/04.

Invited Speaker, Sex: Victims and Victimizers, Tristate American Academy of Psychiatry and the Law, Annual Meeting, New York University School of Medicine, New York, New York, 01/24/04.

Invited Speaker, Rehabilitation of Sex Offenders, Maryland Mensa, Baltimore, Maryland, 10/17/03.

Invited Speaker, Evaluating and Treating Sexual Disorders, Judicial Process Commission, Rochester, New York, 02/17/03.

Invited Speaker, Sexual Disorders and The Catholic Church Crisis, Diocese of Rochester, Rochester, New York, 2/17/03.

Invited Speaker, Sex Offenders: Criminals or Patients, Criminal Justice Seminar, Rochester Institute of Technology, Rochester, New York, 2/17/03.

Invited Speaker (full day), Diagnosing and Treating Sexual Offenders, Colorado Association for the Treatment of Sexual Abusers, Denver, Colorado, 2/23/01.

Invited Presenter, Diagnosis and Treatment of Sex Offenders, Association of Paroling Authorities International, 15th Annual Training Conference, Biloxi, Mississippi, 4/19/99.

Invited Speaker, Diagnosis and Treatment of "Sexually Violent Predators", Atascadero State Hospital, Atascadero, California, 2/26/99.

Invited Speaker, Sex Offenders: Criminals or Patients?, Tristate AAPL Annual Conference, New York, NY, 1/23/99.

Invited Speaker, Treatment of Sex Offenders, Center for Sex Offender Management Conference, Washington, D.C., 12/8/98

Invited Speaker, The Diagnosis and Treatment of Sex Offenders, Arizona State Hospital, Arizona Community Protection and Treatment Center, Phoenix, Arizona, 11/17/98.

Invited Speaker, Understanding Deviant Sexual Behavior, Effective Sex Offender Management Conference, Sponsored by the Arizona Supreme Court and the Center for Sex Offender Management, Phoenix, Arizona, 11/16/98.

Invited Speaker, Assessing and Treating Sex Offenders, Specialized Training Services and The National Association for the Development of Work With Sex Offenders (NOTA), London, England, 7/3/98.

Invited Speaker, Sexual Aggression: Treatment or Punishment, 2nd Biennial Meeting, American Psychiatric Association - French Federation of Psychiatry, Carre' des Sciences, Paris, France, 6/10/98.

Invited Speaker, Diagnosis and Treatment of Sex Offenders, First Annual Conference on Violence and Aggression, Centre de Richerche Phillippe Pinel de Montreal, Montreal, Canada, 11/1/96.

Distinguished Lecturer, The Evaluation and Treatment of Sex Offenders, Distinguished Lecturer Series, Poplar Springs Hospital, Petersburg, Virginia, 9/27/96.

Distinguished Lecturer, Differential Diagnosis and Treatment of Sexual Offenders, The Spurwink Foundation Distinguished Lecture Series, Nashua, New Hampshire, Portland, Maine, 3/15/95; 3/17/95.

Invited Panelist, Understanding Paraphilias and Sexual Offenders, 29th American Society of Hospital Pharmacists Annual Mid-year Meeting, Miami, Florida, 10/5/94.

Invited Lecturer, Understanding and Treating Sexual Trauma in Children and Adolescents, Devereux Glenholme Professional Resource Center, Windsor Locks, Connecticut, 10/31/94 - 11/2/94.

Visiting Professor, A Forensic Perspective on the Jeffrey Dahmer Case and Overview of the Paraphilias, Visiting Professor Seminar, Pennsylvania Hospital, Philadelphia, Pennsylvania, 7/29/93.

Invited Speaker, Reassignment of Priest Pedophiles, Cardinal's Commission on Sex Abuse, Archdiocese of Chicago, Chicago, Illinois, 4/30/93.

Invited Speaker, Theories on the Physical Causality of Homosexuality, Annual Meeting, Bishops of North America, Central America and the Caribbean, Dallas, Texas, 2/5/93.

Invited Speaker, Sexual Addiction, Research Seminar, National Institute on Alcohol and Drug Abuse, Rockville, Maryland 1/12/93.

Invited Lecturer, Treatment of the Paraphilias, 4th Annual Forensic Psychiatry Symposium on Sexual Misconduct in the Military, Walter Reed Army Hospital, Washington, D.C., 11/23/92.

Distinguished Lecturer, Jeffrey Dahmer and Other Sexual Offenders: Diagnosis and Treatment, Distinguished Lecturer Series, Poplar Springs Hospital, Petersburg, Virginia, 7/15/92.

Invited Speaker, Rehabilitation and Reassignment for the Errant in the Clergy, Annual Meeting, National Conference of Catholic Bishops, University of Notre Dame, West Bend, Indiana, 6/20/92.

Invited Speaker, How to Deal With Priest Pedophiles, Cardinal Bernardin's Commission on Sexual Misconduct, Archdiocese of Chicago, Chicago, Illinois, 3/19/92.

Invited Lecturer, Diagnosis and Treatment of the Paraphilias, Tenth Annual Columbia Hospital Psychiatry Conference, Medical College of Wisconsin, Milwaukee, Wisconsin, 3/10/92.

Invited Speaker, Paraphilia, Personality and Sex Offending Behavior, Annual Meeting, Society for Sex Therapy and Research, Baltimore, Maryland, 3/17/90.

Invited Panelist, Sexual Abuse: Research and Solutions, Child Help U.S.A. Forum, Capital Hill, Washington, D.C., 11/9/89.

Invited Panelist, Human Sexual Aggression and Dominance: Biological Clues, Differential Diagnosis and Pharmacological Treatment of Sex Offenders, Annual Meeting, American Association for the Advancement of Science, San Francisco, California, 1/14/89 - 1/19/89.

Invited Speaker, Diagnosis and Treatment of the Paraphilias, Northeast Ohio Psychiatric Association, Columbus, Ohio, 1/11/89.

Invited Lecturer, Diagnosis and Treatment of Paraphilic Disorders, Continuing Medical Education Program, Eastern State Hospital, Williamsburg, Virginia, 11/14/88.

Invited Speaker, Diagnosis and Treatment of Sex Offenders, Midwest Conference on Child Sexual Abuse and Incest, Madison, Wisconsin, 9/26/88 - 9/27/88.

Invited Lecturer, Diagnosing and Treating Sex Offenders, Education Program in Psychiatry, The Institute of Living, University of Connecticut Health Center Consortium, Hartford, Connecticut, 11/12/87 - 11/13/87.

Invited Panelist, Etiology and Treatment of Sexual Disorders, Conference on the Management of Sex Offenders, University of Illinois College of Medicine, Peoria, Illinois, 10/30/87.

Keynote Speaker, The Paraphilias, Annual Meeting, Scientific Society for the Study of Sex. Philadelphia, Pennsylvania, 4/3/87 - 4/5/87.

Invited Panelist, Evaluation and Treatment of Paraphilic Disorders, Annual Conference, National Association of Forensic Social Workers, Charleston, South Carolina, 3/26/87.

Invited Panelist, Issues in the Exploration of Biological Factors Contributing to the Etiology of the Sex Offender, Plus Some Ethical Considerations, Human Sexual Aggression Conference, New York Academy of Sciences, 1/7/87 -1/9/87.

Invited Speaker, Coordinating Treatment for Sex Offenders With Parole and Probation, Annual Conference, National Association of Parole and Probation, Baltimore, Maryland, 8/5/86.

Invited Speaker, Paraphilic Coercive Disorder, Board of Trustees, American Psychiatric Association, Washington, D.C., 6/24/86.

Invited Speaker, The Paraphilias: Forensic Issues, The Ohio Forensic Society, 6/7/86.

Invited Speaker, Inclusion of Paraphilic Coercive Disorder as a DSM-III-R Diagnosis, Hearing on Rapism, American Psychiatric Association, Washington, D.C., 10/4/85.

Invited NIMH Panelist, Rehabilitating Sex Offenders, 37th Annual Meeting, American Society of Criminology, San Diego, California, 11/13/85 - 11/17/85.

Invited Speaker, Assessment and Treatment of Incarcerated Sex Offenders, Annual Meeting, National Association of Prison Administrators, Philadelphia, Pennsylvania, 11/14/85.

Invited Speaker, The Paraphilic Disorders, Annual Meeting, Kansas Mental Health Association, Kansas City, Kansas, 8/17/85.

Invited Speaker, Changes to be Made in DSM-III-R Related to the Paraphilic Disorders, Educational Seminar, New York Division, American Academy of Psychiatry and the Law, New York, New York, 1/19/85.

Invited Speaker, Sex Offenders: Differential Diagnoses and Treatment, Centrocare Symposium, Sex Offender Treatment in Canada, St. John, New Brunswick, 10/17/84 - 10/18/84.

Invited Speaker, Treating Sex Offenders in the Community, Annual Meeting, National Association of Parole and Probation, Boston, Massachusetts, 8/24/84 - 8/27/84.

Invited Speaker, Treating Rapists, District of Columbia Conference on Rape and Sexual Violence, Washington, D.C., 5/8/84.

Invited Speaker, Diagnosing and Treating Incest, Third National Conference, Sexual Victimization of Children, Arlington, Virginia, 4/26/84.

Invited NIMH Panelist, Biological Factors Related to Rape, 35th Annual Meeting, American Society of Criminology, Denver, Colorado, 11/9/83 - 11/13/83.

Invited Speaker, Medical-Legal Issues in the Treatment of Sex Offenders, Georgetown University Law School Symposium, Washington, D.C., 1/20/83.

Invited Speaker, Pharmacological Treatment of Sexual Deviation, Psychiatric Symposia Series, Taylor Manor Hospital, Ellicott City, Maryland, 3/25/92, 3/21/86, 5/19/82.

Invited Speaker, Antiandrogenic Medication in the Treatment of Sex Offenders, Third National Conference, Evaluation and Treatment of Sexual Aggressives, Avila Beach, California, 3/15/81 - 3/18/81.

Invited Speaker, Victims Turned Victimizers, First World Congress of Victimology, Washington, D.C., 8/20/80 - 8/24/80.

OTHER TALKS AND PRESENTATIONS:

Invited Speaker, Addressing Pedophilia and Other Sexual Disorders. Urology Nursing Society, Inc. Baltimore, Maryland, October 4, 2012.

Invited Speaker, Evaluating and Treating Sexually-Disordered Patients, St. Luke Institute, Washington, DC, July 26, 2012.

Invited Speaker, Sex Offenders: Evaluation and Treatment, Discover Hopkins class, National Institute for the Study, Prevention and Treatment of Sexual Trauma, Baltimore, Maryland, July 11, 2012.

Keynote Speaker, Understanding Pedophilia and Other Paraphilias from a Psychiatric Perspective, B4U-ACT Symposium, Pedophilia, Minor-Attracted Persons, and the DSM: Issues and Controversies, BWI Airport, Maryland, August 17, 2011.

Invited Speaker, Sex Offenders: Evaluation and Treatment. Abnormal Psychology and Forensic Cases, The Johns Hopkins University, Baltimore, Maryland, July 11, 2011.

Invited Speaker, Sex Offenders: Evaluation and Treatment, Forensic Fellowship Lecture, University of Maryland School of Medicine, Courthouse East, Baltimore, Maryland, June 3, 2011, June 1, 2012.

Keynote Speaker, Sex Offenders: Criminals or Patients? Undergraduate Research Symposium, The Johns Hopkins University, Baltimore, Maryland, April 5, 2010.

Invited Speaker, Sex Offenders: Criminals or Patients? Forensic Fellowship Lecture, University of Maryland School of Medicine, Courthouse East, Baltimore, Maryland, March 19, 2010.

Invited Speaker, A Critical Appraisal of Proposed DSM-V Paraphilic Diagnoses (panel), 40th Annual Meeting, American Academy of Psychiatry and the Law, Baltimore, Maryland, October 29, 2009.

Invited Speaker, Provided Full-Day Statewide Training Session on Chronic Mentally Ill Patients with Comorbid Problematic Sexual Behaviors, University of Massachusetts Medical School, Worcester, Massachusetts,06/20/08.

Invited Panelist, Contemporary Perspectives on Sexual Paraphilias, American Association of Sexuality Educators, Counselors and Therapists (AASECT), Baltimore, Maryland, 05/18/08.

Invited Speaker, Sex Offenders: Criminals or Patient? University of Maryland Baltimore, Department of Psychiatry, Series on Forensic Psychiatry, Baltimore, Maryland, 02/14/08, 02/29/09, 02/04/10, 01/13/11, 01/19/12, 01/03/13.

Invited Speaker, Sex Offenders: Criminals or Patients? University of Maryland Baltimore, Department of Psychiatry, Series on Forensic Psychiatry, Baltimore, Maryland, 04/19/07.

Invited Speaker, Sex Offenders: Criminals or Patients? Roland Park Place Men's Club, Baltimore, Maryland, 01/08/07.

Invited Speaker, Using Actuarial Tables, New Perspectives on Youth Sexual Behavior, Sponsored by the Maryland Association of Resources for Families and Youth, Linthicum Heights, Maryland, 05/05/06.

Invited Speaker, Evaluating and Treating Paraphilic Disorders, Baltimore/DC Cluster of the Fielding Graduate University, Baltimore, Maryland, 01/07/06.

Invited Speaker, Evaluating and Treating Paraphilic Disorders, Baltimore County Department of Social Services, Towson, Maryland, 06/07/05.

Invited Speaker, Diagnosis and Treatment of Sexual Disorders, Topics in Psychiatry, The Johns Hopkins University, Department of Psychiatry and Behavioral Sciences, Baltimore, Maryland 11/05/04 – 11/06/04.

Invited Speaker, Sexuality Facts vs. Religious Responses, United Religious Initiative, Episcopal Cathedral, Baltimore, Maryland, 02/17/04.

Invited Speaker, Sexual Relations Between Adults and Children, Social and Community Psychiatry Seminar, The Johns Hopkins Hospital, Baltimore, Maryland 09/24/03.

Invited Speaker, Evaluating and Treating Paraphilic Disorders, Baltimore County Department of Social Services, Baltimore, Maryland, 04/15/03.

Invited Speaker, Sex Offenders: Criminals or Patients, Third Annual Henry L. Hartman Forensic Psychiatry Conference, Medical College of Ohio, Toledo, Ohio, 11/8/02.

Invited Speaker, The Crisis in the Catholic Church, Adult Night at St. John the Evangelist Catholic Church, Phoenix, Maryland, June 2, 2002.

Invited Chair, Vanderbilt Symposium on "Sexual Addiction," American Foundation for Addiction Research, Vanderbilt University, Nashville, Tennessee, 3/22/01 – 3/23/01.

Invited Speaker, Treatment of Adolescent Sex Offenders, Reading Specialists, Reading, Pennsylvania, 05/05/00.

Invited Lecturer, Sexuality Issues/Disorders Training, Maryland Department of Health and Mental Hygiene – Sponsored by DDA Central Regional Office, The Community College of Baltimore County – Catonsville Campus, Catonsville, Maryland, 03/24/00.

Invited Participant, The Neurobiology of Compulsive Sexual Behavior and Sexual Addiction – A Planning Meeting, Sponsored by Vanderbilt Addiction Center and The American Foundation for Addiction Research, Vanderbilt University Medical Center, Nashville, Tennessee, 2/3/00 – 2/4/00

Invited Speaker, Diagnosis and Treatment of Sexual Disorders, Regional Training Seminar Worcester County Department of Social Services, Salisbury State College, Salisbury, Maryland, 1/28/00

Invited Lecturer, Sex Offenders and the Law, course on Law and Psychiatry, University of Baltimore School of Law, Baltimore, Maryland, 11/1/99, 10/23/00.

Guest Lecturer, Diagnosis and Treatment of Sexual Disorders, Villa Julie College, Baltimore, Maryland, 7/14/99.

Invited Speaker, Evaluations and Etiology of Sex Offenders, Charter Psychosexual Rehabilitation and Education Program, Understanding, Assessing and Treating Male Adolescent Sex Offenders, Pittsburgh, Pennsylvania, 7/9/99.

Invited Speaker, Sex Offenders: Criminals or Patients, Chesapeake Bay Chapter of AAPL, Bethesda, Maryland, 6/30/99.

Invited Speaker, Diagnosis and Treatment of Sex Offenders, Allegany County Health Department, Cumberland, Maryland, 6/1/99.

Invited Lecturer, Sex Offenders: Criminals or Patients, Course on Psychiatry and the Law, University of Baltimore School of Law, Baltimore, Maryland, 3/17/99.

Invited Participant, The Use of Triptorelin in Paraphilia Management, DebioPharm S.A. Developpements Biologiques et Pharmaceutiques, Lausanne, Switzerland, 2/8/99.

Invited Speaker, Sexual Compulsivity, The National Catholic Bioethics Center, Dallas, Texas, 2/4/99.

Invited Participant, Mixing of Sex Offenders in Custodial Drug Treatment Therapeutic Community Units: Problems and Potential Solutions, A Gathering of Leading Experts, University of California, San Diego, School of Medicine, San Diego, California, 1/19/99 - 1/20/99.

Invited Presenter, Sexual Misconduct by Clergy, Case Conference at St. Luke Institute, Silver Spring, Maryland, 11/5/98.

Invited Speaker, Rape and Child Sexual Abuse, University of Baltimore, Baltimore, Maryland, 9/17/98.

Invited Speaker, Sexual Offenders: Criminal or Patients?, Loudon County Mental Health Center, Loudon County, Virginia, 9/15/98.

Invited Speaker, Sexual Offenders - Registration Statutes and Treatment Alternatives, Maryland Criminal Defense Attorney's Association Annual Meeting, Baltimore, Maryland, 6/6/98.

Invited Speaker, Treating the Paraphilias with Depo-Lupron, Maryland Health Administration, State-wide Pharmacy and Therapeutics Committee, Spring Grove Hospital, Baltimore, Maryland 5/29/98.

Invited Speaker, Diagnosis and Treatment of Sex Offenders, Utah Correctional Association Conference, St. George, Utah, 3/30/98 - 4/2/98.

Invited Speaker, Paraphilias in the Developmentally Disabled, The Kennedy-Krieger School, Baltimore, Maryland 12/10/97.

Invited Speaker, The Paraphilias, Sexual Offender Assessment, Risk Management and Treatment, Continuing Education Seminar, Psychiatry Department, The University of California School of Medicine, San Diego, California, 8/20/97 - 8/22/97.

Invited Speaker, Diagnosis and Treatment of Sex Offenders, Conference, Sexual Abuse Prevention and Education Network, New Cumberland, Pennsylvania, 8/6/97 - 8/8/97.

Invited Speaker, Evaluation, Etiology and Treatment of the Sex Offender, Educational Seminar, Forensic Hospital, Trenton, New Jersey, 6/23/95.

Invited Speaker, Reporting Sexual Abuse of Adult Survivors, Educational Seminar, Central Maryland Sexual Abuse Treatment Task Force, Baltimore, Maryland, 11/18/94.

Invited Speaker, The Etiology of Sexual Disorders: The Damaged Child Grows Up, Clinical Seminar Series on Infancy, University of Maryland School of Medicine, Baltimore, Maryland, 11/16/94.

"Guest Professor", Rape and Pedophilia, Course on Psychology of Criminal Behavior, Georgetown University, 11/14/94, 10/25/93, 2/2/93, 11/12/90, 4/2/90, 4/24/89, 4/9/87, 3/24/87.

Invited Speaker, Child Sexual Abuse, Conference on Domestic Violence: Sexual Trauma, Elder Abuse, Child Abuse, Doyelstown, Pennsylvania, 10/14/94.

Invited Speaker, Rape and Pedophilia, Forensic Mental Health Associates, Salt Lake City, Utah, 8/24/94; St. Petersburg, Florida, 7/1/94; Denver, Colorado, 8/31/88 - 9/1/88; Chicago, Illinois, 5/11/88 - 5/12/88; Boston, Massachusetts, 10/1/87 - 10/2/87; Denver, Colorado, 8/31/87 - 9/1/87; Fargo, South Dakota, 7/16/87 - 7/17/97; Chicago, Illinois, 5/11/87 - 5/12/87; Orange County, California, 1/21/87 - 1/23/87; Phoenix, Arizona, 10/30/86 - 10/31/86; Detroit, Michigan, 9/11/86 - 9/12/86; Cleveland, Ohio, 7/31/86 - 8/1/86; Dallas, Texas, 3/27/86 - 3/28/86; Lake

Buena Vista, Florida, 8/29/85 - 8/30/85; San Francisco, California, 3/21/85 - 3/22/85; Dallas, Texas, 10/11/84 - 10/12/84.

Invited Speaker, Sentencing Sex Offenders, Annual Meeting, National Association of Sentencing Advocates, Baltimore, Maryland, 6/9/94 - 6/11/94.

Invited Lecturer, The Paraphilias, Criminal Justice Class, The American University, The Johns Hopkins Center, Baltimore, Maryland, 4/22/94.

Invited Speaker, Paraphilic Development and Treatment, Educational Seminar, National Center on Institutions and Alternatives, Alexandria, Virginia, 10/15/93.

Invited Speaker, Treatment of Sexual Disorders and Sexual Trauma, Annual Symposium, Virginia Correctional Counseling Association, Charlottesville, Virginia, 6/2/93.

Invited Speaker, Rehabilitation and Reassignment for the Errant in the Clergy, Catholic Bishops of Indiana, Fort Wayne, Indiana, 9/3/92.

Invited Speaker, Treatment of Sex Offenders, Maryland Association of Private Practice Psychiatrists, Baltimore, Maryland, 4/23/92.

Invited Speaker, Issues of Pedophilia in the Developmentally Handicapped, Rosewood Hospital Center, Baltimore, Maryland, 12/18/91, 05/09/97.

Invited Speaker, Pharmacological Treatment of Juvenile Sex Offenders, Mathom House Residential Facility for Adolescents, Philadelphia, Pennsylvania, 9/20/91.

Invited Speaker, Diagnosis and Treatment of Sex Offenders, Community Mental Health Conference, Howard County Health Department, Columbia, Maryland, 9/17/91.

Invited Speaker, Paraphilias: Evaluation and Treatment, Psychiatric Staff Meeting, St. Joseph's Hospital, Towson, Maryland, 5/21/91.

Invited Speaker, Sexual Psychopath Laws, Medical Service, Circuit Court for Baltimore City, Baltimore, Maryland, 12/19/90.

Invited Speaker, Aspects of the Diagnosis and Treatment of Sexual Disorders, Educational Seminar, University of Maryland, College Park, Maryland, 11/16/90.

Invited Speaker, Diagnosis and Treatment of Paraphilias, Educational Meeting, Suburban Maryland Psychiatric Society, Greenbelt, Maryland, 10/11/90.

Invited Speaker, Working with Paraphilic Individuals, Educational Seminar, Counseling Associates, Hollywood, Florida, 10/5/90.

Invited Speaker, Forensic Issues of the Sex Offender, University of Maryland Forensic Fellowship Program, Baltimore, Maryland, 12/13/89.

Invited Speaker, Adolescent Sex Offenders, Conference on the Treatment of Adolescent Sex Offenders, Regional Institute for Children and Adolescents (RICA), Rockville, Maryland, 12/6/89.

Invited Speaker, Managing the Sex Offender on Probation, Annual Conference, Middle Atlantic States Correctional Association, Atlantic City, New Jersey, 5/22/88 - 5/25/88.

Invited Speaker, Treatment of the Sex Offender, Child Sexual Abuse - Adult Substance Abuse Connection Conference, St. Elizabeth's Hospital, Washington, D.C., (Rape Crises Center and Drug Abuse Center), 2/17/88.

Invited Speaker, Treating the Adolescent Sex Offender, State-wide Clinicians Network of Services for Adolescent Sex Offenders, Ellicott City, Maryland, 1/29/88.

Invited Speaker, Mandated Reporting of Child Sexual Abuse, People Against Child Abuse (PACA) Conference, Anne Arundel Community College, Anne Arundel, Maryland, 11/7/87.

Invited Speaker, Treating Sex Offenders in the Community, Annual Meeting, Allegheny County Health Department, Hagerstown, Maryland, 10/2/86.

Invited Speaker, Treating Incarcerated and Paroled Sex Offenders, Special Symposium, South Carolina Association for the Treatment of Sexual Aggressives, Columbia, South Carolina, 4/24/86 - 4/25/86.

Invited Speaker, The Paraphilias, Maryland Association of Private Practice Psychiatrists, Baltimore, Maryland, 1/23/86.

Invited Speaker, Victims and Victimizers, Maryland Conference on Child Victimization, Baltimore, Maryland, 1/6/86.

Invited Speaker, Sexual Offenders: Treatment Issues for the Social Worker, University of Maryland School of Social Work, Baltimore, Maryland, 9/17/85, 9/10/85.

Invited Speaker, Paraphilic Disorders and the Clergy, St. Luke's Institute, Suitland, Maryland, 8/23/85.

Invited Speaker, Protecting Children from Sexual Abuse, Annual Meeting, Montessori Society of Central Maryland, Baltimore, Maryland, 5/13/85.

Invited Speaker, Forensic Issues in Evaluation Sex Offenders, Clifton T. Perkins Hospital, Baltimore, Maryland, 1/14/85.

Invited Speaker, Differential Diagnosis of Sex Offenders, Annual Conference, Psychiatric Associates, Virginia Beach, Virginia, 11/9/84.

Invited Speaker, Use of Antiandrogenic Medications, Patuxent Institution, Baltimore, Maryland, 10/25/84, 5/29/84, 1/20/83.

Invited Speaker, Treating the Abuser, Community Seminar on Child Sexual Abuse, Carroll County, Maryland, 10/23/84.

Invited Speaker, Treatment of Sex Offenders, Symposium, Howard County General Hospital, Howard County, Maryland, 5/15/84.

OTHER PROFESSIONAL ACCOMPLISHMENTS:

Appointed Member, Subcommittee on the Paraphilias, American Psychiatric Association Committee to Review the 3rd Edition of the Diagnostic and Statistical Manual of Mental Disorders (DSM-III-R), 1984-1989.

President, Board of Directors, National Institute for the Study, Prevention and Treatment of Sexual Trauma

Chairman, Board of Directors, Foundation for the Study, Prevention and Treatment of Sexual Trauma (a nonprofit foundation supporting clinical care, teaching and research)

MAJOR NATIONAL MEDIA INTERVIEWS (PARTIAL LIST):

Face the Nation
Sixty Minutes
Nightline
Larry King Show
Anderson Cooper Show
Dianne Rehm Show (National Public Radio)
Emmy Winning Group W Documentary (Child Molesters: Please Make Them Stop)
Good Morning America
Today Show
20/20
48 Hours
NBC Dateline
Forensic Psychiatric Commentator for Court TV (based upon a recommendation from the American Psychiatric Association)
Johnnie Cochran Show (Court TV)
Alan Dershowitz Show (Court TV)

Expert Witness/Other Professional Services Invoice/Voucher Cover

EXP-0612

Vendor Name: (as listed on Substitute Form W-9 and JAC Agreement)	Brooke Butler, Ph.D., P.A.	Invoice Number: (MAX 9 characters)	11
Vendor Tax ID Number: (MUST match ID on Substitute Form W-9 and JAC Agreement)	45-3597485	Case Number:	16-2013-CF-005781-AXXX-MA
Defendant's Attorney Name:	Julie Agent Schlax	Select County... Duval	County and Circuit 4th
Florida Bar Number:	93040	IFC ☐ Pro Se ☐	Defendant/Client Name: Donald James Smith
Provider Name: (If different from Vendor Name)	N/A	**Total Invoice Amount:** (automatically calculated as form is completed)	$2.295.00

VENDOR INFORMATION: ✓ Hourly Services ○ Flat Fee Services — Select Expert Type... Mitigation Specialist :Expert Type

Hourly Services:

Please see the Invoice/Voucher Cover **Instructions** as well as the JAC Policies and Procedures for hourly billing requirements.

MUST attach detailed hourly statement listing dates and times.

BILLING MUST BE IN HOURS AND TENTHS.

Rate Category should be based on the rate set forth in the JAC Rate Chart by Circuit or established in court order.

Select Rate Category...	Hours: (in tenths) 30.60	Hourly Rate $ $75.00	Subtotal: $2,295.00
Select Rate Category...	Hours: (in tenths)	Hourly Rate $	Subtotal:
Select Rate Category...	Hours: (in tenths)	Hourly Rate $	Subtotal:
Select Rate Category...	Hours: (in tenths)	Hourly Rate $	Subtotal:
Select Rate Category...	Hours: (in tenths)	Hourly Rate $	Subtotal:

Flat Fee/Testing/Per Unit Services:

This section should be used for flat fee or per unit services, such as in Mental Health Evaluations, when there is a set fee.

Select Type of Service... :Type of Services — Unit: — Rate $ — Subtotal:

TRAVEL EXPENSES / MILEAGE A properly completed **DFS Travel Voucher** MUST BE ATTACHED. Mileage may be billed only when the destination is in excess of 50 miles (one-way) from vendor's office. Any one-way trip that exceeds 50 miles must be supported by documentation. The **DOT Mileage Calculator** MUST BE USED when cities are listed therein. If not listed, other documentation may be used. — Subtotal:

OTHER REIMBURSEMENT EXPENSES As permitted under JAC Policies and Procedures or pursuant to court order. (Invoice/receipt, proof of payment, and court order if applicable, MUST BE ATTACHED) — Specify Other: — Subtotal:

Vendor Certification

Under penalty of perjury, I certify that I have read the foregoing (Expert Witness/Other Professional Services Invoice/Voucher Cover) and the facts stated in it are true; and the amounts reflected on the invoice are true and accurate; and that the work in connection herewith was actually performed.

01/31/16

Vendor Signature **(Blue Ink)** C1100350 - A1100175 — Date

Brooke Butler, Ph.D., P.A. — Vendor Printed Name

(941) 321-3190 — Phone Number

Certification of Receipt of Services

I certify that the costs and services reflected on this invoice were satisfactorily performed, were necessary for the performance of my duties in the above-referenced case, the amount due is accurate, transactions were in accordance with Florida Statutes and all applicable laws and rules of the State of Florida, and that under the terms of my Agreement with the Justice Administrative Commission payment is appropriate.

Attorney/Pro Se Defendant Signature **(Blue Ink)** — Date

Printed Name / Florida Bar Number

JAC Date Stamp

BILL WILL BE RETURNED IF NOT SIGNED.

IMPORTANT: Original Signatures required, JAC will not accept copies or facsimiles of this form.

JAC DOC STAMP	JAC APPROVAL

Form **W-9**
(Rev. December 2014)
Department of the Treasury
Internal Revenue Service

Request for Taxpayer Identification Number and Certification

Give Form to the requester. Do not send to the IRS.

Print or type
See Specific Instructions on page 2.

1 Name (as shown on your income tax return). Name is required on this line; do not leave this line blank.

2 Business name/disregarded entity name, if different from above

3 Check appropriate box for federal tax classification; check only **one** of the following seven boxes:

☐ Individual/sole proprietor or single-member LLC ☐ C Corporation ☐ S Corporation ☐ Partnership ☐ Trust/estate

☐ Limited liability company. Enter the tax classification (C=C corporation, S=S corporation, P=partnership) ▶ _____

Note. For a single-member LLC that is disregarded, do not check LLC; check the appropriate box in the line above for the tax classification of the single-member owner.

☐ Other (see instructions) ▶

4 Exemptions (codes apply only to certain entities, not individuals; see instructions on page 3):

Exempt payee code (if any) _____

Exemption from FATCA reporting code (if any) _____

(Applies to accounts maintained outside the U.S.)

5 Address (number, street, and apt. or suite no.)

Requester's name and address (optional)

6 City, state, and ZIP code

7 List account number(s) here (optional)

Part I Taxpayer Identification Number (TIN)

Enter your TIN in the appropriate box. The TIN provided must match the name given on line 1 to avoid backup withholding. For individuals, this is generally your social security number (SSN). However, for a resident alien, sole proprietor, or disregarded entity, see the Part I instructions on page 3. For other entities, it is your employer identification number (EIN). If you do not have a number, see *How to get a TIN* on page 3.

Note. If the account is in more than one name, see the instructions for line 1 and the chart on page 4 for guidelines on whose number to enter.

Social security number

			–			–				

or

Employer identification number

		–						

Part II Certification

Under penalties of perjury, I certify that:

1. The number shown on this form is my correct taxpayer identification number (or I am waiting for a number to be issued to me); and
2. I am not subject to backup withholding because: (a) I am exempt from backup withholding, or (b) I have not been notified by the Internal Revenue Service (IRS) that I am subject to backup withholding as a result of a failure to report all interest or dividends, or (c) the IRS has notified me that I am no longer subject to backup withholding; and
3. I am a U.S. citizen or other U.S. person (defined below); and
4. The FATCA code(s) entered on this form (if any) indicating that I am exempt from FATCA reporting is correct.

Certification instructions. You must cross out item 2 above if you have been notified by the IRS that you are currently subject to backup withholding because you have failed to report all interest and dividends on your tax return. For real estate transactions, item 2 does not apply. For mortgage interest paid, acquisition or abandonment of secured property, cancellation of debt, contributions to an individual retirement arrangement (IRA), and generally, payments other than interest and dividends, you are not required to sign the certification, but you must provide your correct TIN. See the instructions on page 3.

Sign Here **Signature of U.S. person** ▶ **Date** ▶

General Instructions

Section references are to the Internal Revenue Code unless otherwise noted.

Future developments. Information about developments affecting Form W-9 (such as legislation enacted after we release it) is at *www.irs.gov/fw9*.

Purpose of Form

An individual or entity (Form W-9 requester) who is required to file an information return with the IRS must obtain your correct taxpayer identification number (TIN) which may be your social security number (SSN), individual taxpayer identification number (ITIN), adoption taxpayer identification number (ATIN), or employer identification number (EIN), to report on an information return the amount paid to you, or other amount reportable on an information return. Examples of information returns include, but are not limited to, the following:

- Form 1099-INT (interest earned or paid)
- Form 1099-DIV (dividends, including those from stocks or mutual funds)
- Form 1099-MISC (various types of income, prizes, awards, or gross proceeds)
- Form 1099-B (stock or mutual fund sales and certain other transactions by brokers)
- Form 1099-S (proceeds from real estate transactions)
- Form 1099-K (merchant card and third party network transactions)
- Form 1098 (home mortgage interest), 1098-E (student loan interest), 1098-T (tuition)
- Form 1099-C (canceled debt)
- Form 1099-A (acquisition or abandonment of secured property)

Use Form W-9 only if you are a U.S. person (including a resident alien), to provide your correct TIN.

If you do not return Form W-9 to the requester with a TIN, you might be subject to backup withholding. See *What is backup withholding?* on page 2.

By signing the filled-out form, you:

1. Certify that the TIN you are giving is correct (or you are waiting for a number to be issued),
2. Certify that you are not subject to backup withholding, or
3. Claim exemption from backup withholding if you are a U.S. exempt payee. If applicable, you are also certifying that as a U.S. person, your allocable share of any partnership income from a U.S. trade or business is not subject to the withholding tax on foreign partners' share of effectively connected income, and
4. Certify that FATCA code(s) entered on this form (if any) indicating that you are exempt from the FATCA reporting, is correct. See *What is FATCA reporting?* on page 2 for further information.

Monday, Feb 01, 2016 02:39:41 p.m. CT

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#2464 Date: **06/04** Amount:**$295.42**

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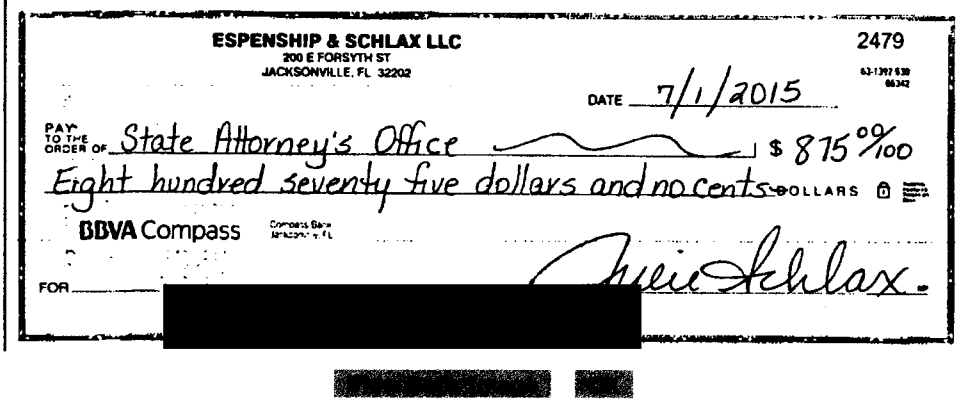

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SECURED

SECURED

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SECURED

IN THE CIRCUIT COURT, FOURTH JUDICIAL CIRCUIT, IN AND FOR DUVAL COUNTY, FLORIDA

CASE NO: 16-2013-CF-5781-AXXX-MA
DIVISION: CR-D

STATE OF FLORIDA

vs.

DONALD SMITH
_____/

DEFENDANT'S MOTION TO PROHIBIT DEATH QUALIFICATION OF THE JURY

COMES NOW the Defendant, Donald Smith, by and through his court-appointed attorney, and pursuant to Florida Laws of Criminal Procedure, moves this Honorable Court to prohibit any inquiry intended to "death qualify" the jury in this case. As grounds therefore the Defense argues:

1. Florida's death penalty scheme has been declared unconstitutional by the U.S. Supreme Court in *Hurst vs. Florida*, 136 S.Ct. 616 (2016). There is therefore no constitutionally permitted version of the death penalty in the State of Florida as of this date, and more specifically the date set for trial in this case, April 4, 2016.

WHEREFORE, the Defendant prays this Honorable Court grant this motion on the grounds set forth herein.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the Motion to Prohibit Death Qualification of the Jury has been provided to the State Attorney's Office via e-mail delivery this 23rd day of February, 2016.

Respectfully submitted,

/s/ Julie Agent Schlax

Julie Agent Schlax

200 East Forsyth Street
Jacksonville, Florida 32202
(904) 674-0717Telephone
(904) 674-0737 Facsimile
Attorney for Defendant

IN THE CIRCUIT COURT, FOURTH JUDICIAL CIRCUIT, IN AND FOR DUVAL COUNTY, FLORIDA

CASE NO: 16-13-CF-05781-XXXX
DIVISION: CR-D

STATE OF FLORIDA,

vs.

DONALD SMITH,
Defendant.

ORDER SETTING HEARING

INTERVENOR, MORRIS PUBLISHING GROUP, LLC'S MOTION TO INTERVENE AND MEMORANDUM IN OPPOSITION TO DEFENDANT'S NOTICE OF INTENT TO FILE MOTION FOR PROTECTIVE ORDER AND REQUEST FOR REASONABLE TIME; AND,

DEFENDANT'S MOTION TO DETERMINE CONFIDENTIALITY AND MOTION FOR PROTECTIVE ORDER REGARDING THE STATE'S SIXTH SUPPLEMENTAL DISCOVERY EXHIBIT AND REQUEST FOR IN CAMERA REVIEW

It is ORDERED that this matter is set for a Hearing on the aforementioned Motions before the Honorable Mallory D. Cooper, in **Courtroom 405**, Duval County Courthouse, 501 West Adams Street, Jacksonville, Florida, on **Tuesday, March 1, 2016 at 9:00 o'clock a.m.**

Please govern yourself accordingly.

DONE AND ORDERED in Chambers at Jacksonville, Duval County, Florida, this 24 February, 2016.

Mallory D. Cooper
Circuit Court Judge

FILED 02/24/16 4PM 0258 RUSSELL

Copies to:

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IN THE CIRCUIT COURT, FOURTH JUDICIAL CIRCUIT, IN AND FOR DUVAL COUNTY, FLORIDA

STATE OF FLORIDA,

Plaintiff,

vs.

DONALD JAMES SMITH,

Defendant.

_____/

CASE NO.: 16-2013-CF-5781

DIVISION: CR-D

MORRIS PUBLISHING GROUP, LLC, d/b/a *The Florida Times-Union,*

Intervenor.

_____/

MOTION TO INTERVENE FOR PURPOSES OF OPPOSING DEFENDANT'S MOTION TO DETERMINE CONFIDENTIALITY AND TO SET ASIDE ORDERS SEALING DOCUMENTS

Intervenor, Morris Publishing Group, LLC, d/b/a *The Florida Times-Union ("The Florida Times-Union")*, moves the Court for leave to intervene in this matter, to be heard, and submits this memorandum in opposition to Defendant's *ore tenus* Motion to Determine Confidentiality of Court Records of February 2, 2016, and Defendant's Motion to Make Court Records Confidential and Motion for Protective Order Sealing Specific Court Documents and Records of February 17, 2016, and moves to set aside the Court's Order Granting Motion to Determine Confidentiality of Court Records entered February 9, 2016, and the Court's Order Sealing Specific Court Documents and Records entered February 17, 2016, and in support hereof says:

1. On February 2, 2016, Defendant, Donald James Smith, through his counsel, filed a Notice of Intent indicating that a motion for protective order may be filed with respect to the State's Sixth Supplemental Discovery Exhibit which includes recorded conversations of Defendant. It is unclear what the substance of the recorded conversations may be.

2. On February 18, 2016, *The Florida Times-Union* filed its Motion to Intervene, and Memorandum in Opposition to Defendant's Notice of Intent to File Motion for Protective Order and Request for Reasonable Time. In the Motion, *The Florida Times-Union* noted that Defendant had not yet filed any motion to determine confidentially of the State-produced discovery in the State's Sixth Supplemental Discovery Exhibit.

3. After the filing of *The Florida Times-Union*'s February 18, 2016 Motion, Defendant filed his Motion to Determine Confidentiality and Motion for Protective Order Regarding the State's Sixth Supplemental Discovery Exhibit and Request for In Camera Review, on February 19, 2016.

4. The Court has set for hearing on March 1, 2016, Defendant's Motion to Determine Confidentiality and Motion for Protective Order Regarding the State's Sixth Supplemental Discovery Exhibit and Request for In Camera Review and the *The Florida Times-Union's* Motion to Intervene, and Memorandum in Opposition to Defendant's Notice of Intent to File Motion for Protective Order and Request for Reasonable Time.

5. However, certain documents which were not in the Court record or accessible on the Court's docket at the time of filing *The Florida Times-Union*'s February 18, 2016, Motion have now come to the attention of *The Florida Times-Union* based on its review of the on line docket entries.

6. It appears that separately from the issue involving the State's Sixth Supplemental Discovery Exhibit, on February 9, 2016, the Court entered an Order Granting Motion to Determine Confidentiality of Court Records, granting Defendant's *ore tenus* Motion to Determine Confidentiality of Court Records during a hearing held on February 2, 2016. The Order was rendered on February 11, 2016. The hearing on Defendant's *ore tenus* Motion to Determine Confidentiality of Court Records was not noticed to the public or the press, and obviously was an issue raised at the hearing orally, and not by a prior written motion.

7. By motion dated February 11, 2016, Defendant filed his Motion to Make Court Records Confidential and Motion for Protective Order Sealing Specific Court Documents and Records. The Clerk docketed the motion on February 17, 2016. Defendant's Motion sought the sealing of "all documents related to the hearing for Appointment of Dr. Fred Berlin in chambers on February 2, 2016."

8. On the same day, February 17, 2016, the Court entered an Order Sealing Specific Court Documents and Records. The Order was entered without notice to the press or public.

9. On February 17, 2016, the Court filed a Notice of Sealing Document, indicating that an Ex Parte Order Appointing Doctor Fred Berlin dated February 9, 2016, has been filed under seal. To the extent the sealing of these referenced records result from an Order separate from the Orders of February 9, 2016 and February 17, 2016, *The Florida Times-Union* moves the Court to set aside that Order too.

10. Defendant's February 11th Motion and the Court's February 17th Order indicated that they concern "psychiatric medical records of the Defendant to determine the legal issues in a case." The Court's February 17, 2016, Order also states that the records are sealed to avoid "substantial injury to a party by disclosure of matter protected by a common [law] or privacy

right not generally inherent in the specific type of proceeding sought to be closed." However, neither the Order nor the Motion identify the nature of the privacy right or the type of records being sealed.

11. In Florida, competency proceedings and evaluation reports are open to the public. Miami Herald Pub'g Co. v. Chappell, 403 So. 2d 1342 (Fla. 3d DCA 1981)(holding that competency proceedings should be open, and that a criminal defendant involved in a pretrial competency hearing is not a patient entitled to the confidentiality provisions of Chapter 394, Florida's Mental Health Act, also known as the "Baker Act."); Poole v. South Dade Nursing & Rehabilitation Center, 139 So. 3d 436, 441-442 (Fla. 3d DCA 2014) (holding that a competency evaluation report should be unsealed, and that such a report was not protected by a privacy right and was not confidential).

12. It is well established that the news media has standing to intervene and be heard, in order to oppose an effort to prevent access to judicial records. Morris Communications Company, LLC v. State of Florida and Stephen Lee Edmonds, 844 So.2d 671 (Fla. 1st DCA 2003); WESH Television, Inc. v. Freeman, 691 So.2d 532, 534-35 (Fla. 5th DCA 1997) (holding that the press has the right to be heard prior to the entry of an order closing public records); Times Publishing Co. v. Penick, 433 So.2d 1281, 1284 (Fla. 2nd DCA 1983); News-Press Publishing Co. v. State, 345 So.2d 865, 866 (Fla. 2d DCA 1977) (newspapers entitled to intervene in criminal case to seek access to sealed deposition transcripts); Miami Herald Publishing Co. v. Lewis, 426 So.2d 1, 8 (Fla. 1982); Florida Publishing Company v. Shorstein, 20 Med. L. Rptr. 2102 (Fla. 1st DCA 1992).

13. Likewise, it is beyond dispute that information gathered by the State during a criminal investigation immediately becomes a public record once it is given, or required to be

given, to the Defendant in discovery. See Florida Statute §119.011(3)(c)(5) (2005); City of Miami v. Post-Newsweek Stations Fla., Inc., 837 So.2d 1002, 1004 (Fla. 3rd DCA 2003); Florida Freedom Newspapers, Inc. v. McCrary, 520 So.2d 32, 34-35 (Fla. 1988).

14. Public records may only be sealed away from public view under an order that is based on clear and specific findings that:

> (a) Restricting public access to discovery materials is necessary to prevent a serious and imminent threat to the administration of justice;
>
> (b) No alternatives, other than a change in venue, would protect Defendant's right to a fair trial; and
>
> (c) Closure would be effective in protecting the rights of the accused, without being broader than necessary to accomplish this purpose.

Miami Herald Publishing Company v. Lewis, 426 So.2d 1, 6 (Fla. 1982); See also, Florida Rule of Judicial Administration 2.420 (directing that a court may seal court records only if "no less restrictive measures are available"). The Florida Supreme Court has held in no uncertain terms that "there must be a strict and inescapable necessity for closure." Lewis, 426 So.2d at 8. "A finding of cause to restrict or defer disclosure of [public judicial] records cannot rest in air." McCrary, 520 So.2d at 35.

15. In order to satisfy the burden of the *Lewis* test, the party seeking closure must do more than offer the argument of counsel; the proponent of closure must come forward with evidence on which the Court can make findings of fact supporting closure. See, Lewis, 426 So.2d at 7-8. As the Fifth District Court of Appeal has made clear:

> The three-pronged test contemplates an evidentiary hearing. At the hearing, the party seeking closure has the burden of proving by the greater weight of the evidence that closure is necessary to prevent a serious and imminent threat to the administration of justice.

* * *

> The court in McCrary also pointed out that [a closure order] "cannot rest in air," but rather, "must be a conclusion reached after considering relevant factors." Here, no evidentiary hearing was conducted and no *in camera* review of the tapes was made. Under Lewis and McCrary, this was error. (internal citation omitted).

See, WESH Television v. Freeman, 691 So.2d 532, 534-35 (Fla. 5th DCA 1997) (citing and quoting McCrary, 520 So.2d at 35; Lewis, 426 So.2d 1).

16. In State v. Dunn, 42 Med.L.Rptr. 1023 (Fla. 1st DCA 2013), the trial court entered a Restrictive Order Regarding Pretrial Discovery Materials. The trial court stated that it must "balance the need for open government and public access to the judicial process, and the paramount right of a defendant in a criminal proceeding to a fair trial before an impartial jury." The trial court found that the "future release of any materials such as jail letters, videos, audio records, photographs, and witness statements would gravely risk Defendant's right to a fair trial and could easily taint the jury pool." Accordingly, the trial court ordered that "[a]ny and all information or materials that either the State or Defendant, by and through counsel, intends for release to the public must be provided to the Court ***prior*** to its release in order for [the court] to conduct an in-camera inspection." The First District Court of Appeal vacated the order. The First District instructed that, upon motion to determine confidentiality, it was to immediately convene an evidentiary hearing, after providing appropriate notice to the media, for the purpose of determining whether closure — including deferral of public access to pretrial discovery materials — is warranted by the Lewis standard.

17. Similarly, the Court must hold an evidentiary hearing and make findings of fact to support closure of any criminal court proceedings, because the public and the press enjoy constitutional and common law protections for the right to attend criminal court proceedings,

both trial and pretrial. See Morris Publ'g Group, LLC v. State (State v. Dunn), 136 So. 3d 770, 42 Med. L. Rptr. 1657 (Fla. 1st DCA 2014).

18. There is no showing here of a serious and imminent threat to the administration of justice. No evidence has been presented to the Court that media publicity has or will affect the Defendant's trial in any way, let alone negatively. Only the gravest circumstances warrant closing off press access to public proceedings and records.

19. Moreover, there has been no showing that less restrictive means, such as individual voir dire, additional peremptory challenges, admonition of the jury and/or sequestration, would be insufficient to protect the rights of the Defendant to a fair trial.

20. As to the third prong of the Lewis analysis, there has been no demonstration that the closure sought by Defendant would be effective, and no broader than necessary.

21. Defendant's Motions fail to demonstrate a compelling privacy interest that outweighs the *The Florida Times Union*'s and the public's substantial common law and First Amendment rights of access.

22. No notice of any hearing regarding the subject of the Court's Order Granting Motion to Determine Confidentiality of Court Records entered February 9, 2016, and the Court's Order Sealing Specific Court Documents and Records entered February 17, 2016, was provided to the media, no evidentiary hearing has been held to the knowledge of undersigned counsel and none appears in the record, and the requisite support for findings under the three pronged analysis required by Lewis are absent. Accordingly, these Orders have been improvidently entered, and must be set aside.

WHEREFORE, *The Florida Times-Union* requests the Court: (1) for leave to intervene in this matter and to be heard; (2) to set aside its Order Granting Motion to Determine

Confidentiality of Court Records entered February 9, 2016; (3) to set aside its Order Sealing Specific Court Documents and Records entered February 17, 2016; (4) to deny Defendant's *ore tenus* Motion to Determine Confidentiality of Court Records of February 2, 2016; (5) to deny Defendant's Motion to Make Court Records Confidential and Motion for Protective Order Sealing Specific Court Documents and Records of February 17, 2016; and (6) any further relief the Courts deems just and proper.

MEMORANDUM OF LAW

I. *The Florida Times Union*'s Right to Intervene and be Heard.

It is well established that the news media has standing to intervene and be heard, in order to oppose an effort to prevent access to judicial records. Morris Communications Company, LLC v. State of Florida and Stephen Lee Edmonds, 844 So.2d 671 (Fla. 1st DCA 2003); WESH Television, Inc. v. Freeman, 691 So.2d 532, 534-35 (Fla. 5th DCA 1997) (holding that the press has the right to be heard prior to the entry of an order closing public records); Times Publishing Co. v. Penick, 433 So.2d 1281, 1284 (Fla. 2nd DCA 1983); News-Press Publishing Co. v. State, 345 So.2d 865, 866 (Fla. 2d DCA 1977) (newspapers entitled to intervene in criminal case to seek access to sealed deposition transcripts); Miami Herald Publishing Co. v. Lewis, 426 So.2d 1, 8 (Fla. 1982); Florida Publishing Company v. Shorstein, 20 Med. L. Rptr. 2102 (Fla. 1st DCA 1992).

Newsgathering is protected by the First Amendment. See United States v. Sherman, 581 F.2d 1358, 1361 (9th Cir. 1978) ("The Supreme Court has recognized that newsgathering is an activity protected by the First Amendment."); CBS Inc. v. Young, 522 F.2d 234, 237-38 (6th Cir. 1975) (newsgathering "qualifies for First Amendment protections"); CBS Inc. v. Smith, 681 F. Supp. 794, 803 (S.D. Fla. 1988) ("[s]imply put, newsgathering is a basic right protected by the First Amendment").

> The first amendment's broad shield for freedom of speech and of the press is not limited to the right to talk and print. The value of these rights would be circumscribed were those who wish to disseminate information denied access to it, for freedom to speak is of little value if there is nothing to say.

In re The Express-News Corp., 695 F.2d 807, 808 (5th Cir. 1982). Courts have recognized that the "protected right to publish the news would be of little value in the absence of sources from which to obtain it." CBS Inc. v. Young, 522 F.2d at 238. The United States Supreme Court has opined that "[w]ithout some protection for seeking out the news, freedom of the press could be eviscerated." Branzburg v. Hayes, 408 U.S. 665, 681 (1972).

Accordingly, intervention is proper because members of the news media are entitled to notice and an opportunity to be heard before a court may enter an order restricting access to judicial records. See United States v. Ellis, 90 F.3d 447, 449 (11th Cir. 1996); Newman v. Graddick, 696 F.2d 796, 800 (11th Cir. 1983); CBS, Inc. v. Young, 522 F.2d at 237-238.

II. Open Judicial Records Promote the Basic Fairness of, and Respect for, the Judicial System.

Open proceedings protect litigants' rights to fair and impartial adjudications of their claims. As described by the United States Supreme Court:

> Whatever differences may exist about interpretations of the First Amendment, there is practically universal agreement that a major purpose of that Amendment was to protect the free discussion of governmental affairs.
>
> * * *
>
> A responsible press has always been regarded as the handmaiden of effective judicial administration . . . . Its function in this regard is documented by an impressive record of service over several centuries. The press does not simply publish information about trials but guards against the miscarriage of justice by subjecting the police, prosecutors, and judicial processes to extensive public scrutiny and criticism.

Landmark Commc'ns, Inc. v. Virginia, 435 U.S. 829, 838-39 (1978).

Reporting by the media on trials and cases pending before the courts serves to inform the public on how the judicial system works, promotes public confidence in the judicial system, and engenders respect for the judicial system. Morris Publ'g Group, LLC v. State (State v. Dunn), 136 So. 3d 770, 42 Med. L. Rptr. 1657 (Fla. 1st DCA 2014), citing, Richmond Newspapers, Inc. v. Virginia, 448 U.s. 555, 563 (1983). Open court proceedings also enhance "the basic fairness" of the judicial process. See Press-Enterprise Co. v. Superior Court ("Press-Enterprise I"), 464 U.S. 501, 508 (1984); United States v. Guerrero, 693 F.3d 990, 1000 (9th Cir. 2012). The media's access to judicial records and reporting thereon informs the public with respect to judicial proceedings. Morris Publ'g Group, LLC v. State (State v. Dunn), 136 So. 3d 770, 42 Med. L. Rptr. 1657 (Fla. 1st DCA 2014), citing, Richmond Newspapers, Inc. v. Virginia, 448 U.s. 555, 563 (1983); Nebraska Press Ass'n v. Stuart, 427 U.S. 539, 559-60 (1976); Nixon v. Warner Communications, Inc., 435 U.S. 589, 609 (1978).

There is a "community therapeutic value" of openness of the courts. Press-Enterprise Co. v. Superior Court ("Press-Enterprise II"), 478 U.S. 1, 13 (1986). "Criminal acts, especially certain violent crimes, provoke public concern, outrage, and hostility. 'When the public is aware that the law is being enforced and the criminal justice system is functioning, an outlet is provided for these understandable reactions and emotions.'" Press-Enterprise II, 478 U.S. at 13, quoting, Press-Enterprise I, 464 U.S. at 509.

Therefore, open courts and records "contribute to the public understanding of the rule of law and to comprehension of the functioning of the entire [judicial] system." Nebraska Press, 427 U.S. at 587 (Powell, J., concurring). In this regard, the media acts as the surrogate for the public. "Instead of acquiring information about trials by firsthand observation or by word of

mouth from those who attended, people now acquire it chiefly through the print and electronic media." Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 572-73 (1980).

III. *The Florida Times Union* Has a Common Law and First Amendment Right of Access to Judicial Records and Proceedings.

The Florida Times Union has a qualified right of access to court proceedings and records, deeply rooted in the common law and the First Amendment. Morris Publ'g Group, LLC v. State (State v. Dunn), 136 So. 3d 770, 42 Med. L. Rptr. 1657 (Fla. 1st DCA 2014), citing, Richmond Newspapers, Inc. v. Virginia, 448 U.s. 555, 563 (1983).

The United States Supreme Court has emphasized that "what transpires in the courtroom is public property," Craig v. Harney, 331 U.S. 367, 374 (1947), and that the public has a strong interest in a full opportunity to know whatever happens in a courtroom. See Press-Enterprise I, 464 U.S. 501; Globe Newspaper Co. v. Superior Court, 457 U.S. 596 (1982); Richmond Newspapers, Inc. v. Commonwealth of Virginia, 448 U.S. 555 (1980).

The United States Supreme Court has held that the common law and the First Amendment provide a fundamental right to attend all portions of a criminal trial. See Press-Enterprise I, 464 U.S. 501 (1984) (holding that the guarantee of open criminal proceedings applies to jury selection); Richmond Newspapers, Inc. v. Virginia, 448 U.S. at 579 (holding that "the right to attend criminal trials is implicit in the guarantees of the First Amendment; without the freedom to attend such trials, which people have exercised for centuries, important aspects of freedom of speech and 'of the press could be eviscerated.'").

In Press-Enterprise Co. II, the United States Supreme Court held that the First Amendment also protects the public's and the press's access to pretrial criminal proceedings. See 478 U.S. at 12 (stating that public access to preliminary hearing was essential to the proper function of the criminal justice process). Because criminal proceedings are often resolved before

trial, preliminary hearings may provide "the sole occasion for public observation of the criminal justice system." See id. Accordingly, the Court held that a qualified First Amendment right of access applied to preliminary hearings prior to trial. Id. at 7, 14.

In Florida, competency proceedings are open. Miami Herald Publishing Company v. Chappell, 403 So. 2d 1342 (Fla. 3d DCA 1981)(holding that competency proceedings should be open, and that a criminal defendant involved in a pretrial competency hearing is not a patient entitled to the confidentiality provisions of Chapter 394, Florida's Mental Health Act, also known as the "Baker Act.").

Competency evaluation reports are also open. In Poole v. South Dade Nursing & Rehabilitation Center, 139 So. 3d 436 (Fla. 3d DCA 2014) the Court held that a competency evaluation report should be unsealed, and that such a report was not protected by a privacy right and was not confidential. 139 So. 3d at 441-442. Similar to the Defendant's argument here, the criminal defendant in Poole argued for privacy and confidentiality on the ground that the competency report was a medical record. "Poole finally contends the competency reports are medical records entitled to confidentiality under Article I, section 23 of the Florida Constitution, commonly referred to as Florida's Right to Privacy Law, and Chapter 456 of the Florida Statutes. We agree with the trial court that neither mandate confidentiality of the competency reports in this case." 139 So. 2d at 441.

As the Poole Court explained:

> In forensic examinations, the person being examined is not seeking care and treatment. In *Miami Herald Publishing Company v. Chappell*, 403 So.2d 1342, 1344–45 (Fla. 3d DCA 1981), this court ruled that a criminal defendant involved in a pretrial competency hearing is not a patient entitled to the confidentiality provisions of chapter 394, Florida's Mental Health Act, also known as the "Baker Act." Similarly, the Florida Rules of Civil Procedure provide for a party to submit to examination by a qualified expert, with a report of the examination made available to the other party notwithstanding any issue of confidentiality. Fla. R.

> Civ. P. 1.360. For the same reason, "communications made in the course of a court-ordered examination of the mental or emotional condition of the patient" are excluded from Florida's psychotherapist-patient privilege. § 90.503(4)(b), Fla. Stat. (2013).
>
> In the instant case, the physicians were consulted for purposes of examinations only, not for treatment. The purpose behind the examinations was to assist the court in determining whether the defendant was capable of participating in the criminal process. Any reports resulting from such an examination are intended to be communicated outside the patient-physician relationship. Thus, they are not the type of patient's medical record generally entitled to confidentiality protection.

139 So. 2d at 441-442.

Other state courts have also found both competency proceedings and reports to be open. See, e.g., State v. Chew, 309 P.3d 410 (Wash. 2013) (*en banc*)("we hold that competency evaluations are presumptively open once they become court records"); State v. Koch, 169 Vt. 109, 730 A.2d 577 (Vermont 1999)(non-hospitalization order); In re Times-World Corp., 488 S.E.2d 677 (Vir. App. 1997) (holding that documents which were admitted into evidence during a competency proceeding should have been open to the public); Soc. of Prof. Journalists, Utah Chapter v. Bullock, 743 P.2d 1166 (Utah 1997) (holding that, as with preliminary hearings, pretrial competency proceedings in criminal cases may be closed only upon a showing that access raises a realistic likelihood of prejudice to the defendant's right to a fair trial); Express-News Corp. v. MacRae, 787 S.W.2d 451 (Tx. App. 1990) (holding the examination and report were "criminal law matters" and thus it was error for trial court to deny media's motion for access to competency report).

As explained by the Court of Appeals of Virginia in In re Times-World Corp. regarding access to documents submitted into evidence at a competency proceeding:

> The same analysis employed to determine whether the media has a right of access to a criminal competency hearing is applicable to determine media access to documents that were submitted into evidence therein. *See In re Worrell*, 14 Va.App. at 676, 419 S.E.2d at 274; *see also In re Washington Post*, 807 F.2d at

> 390 ("[T]he First Amendment right of access applies to documents filed in connection with plea hearings and sentencing hearings in criminal cases, as well as to the hearings themselves."); *In re New York Times Co.*, 828 F.2d 110 (2d Cir.1987) (finding that the right of access extended to motions papers submitted by a defendant seeking to suppress evidence); *Associated Press, Inc. v. United States Dist. Court*, 705 F.2d 1143, 1145 (9th Cir.1983) (finding First Amendment right of access extends to "pretrial documents in general").
>
> ...
>
> We hold that our rationale allowing Times-World access to the videotape of the competency hearing is equally applicable to the documents admitted into evidence therein.
>
> Id., 488 S.E.2d at 683-684.

In federal court too, mental competency hearings have historically been open to the public in the absence of specific facts supporting closure. United States v. Guerrero, 693 F.3d 990, 1000-02 (9th Cir. 2012); United States v. Curran, 2006 WL 1159855 (D. Ariz. 2006)(unpublished); United States v. Moussaoui, 2002 WL 1311734 (E.D. Va. 2002)(unpublished). In United States v. Guerrero, 693 F.3d 990, 1000-02 (9th Cir. 2012), the Court held, in the context of a petition for a writ of mandamus, that the district court did not commit clear error by denying a criminal defendant's motion to close a competency hearing. The Court held that there is a clear qualified First Amendment right of access to mental competency hearings and "related filings."

Here, it is possible that an adjudication of incompetency would dispose of the entire case, with or without a plea bargain. Id. ("public confidence in the judicial system is especially significant where a defendant accused of a violent felony is not tried because he was found incompetent."). The rationale establishing the right of access to competency proceedings, coupled with the presumption that materials admitted into evidence are to be open, dictate that

any competency report and hearing regarding Defendant's competency to stand trial should be open and available for review, not under seal.

IV. Defendant Has Not Demonstrated Compelling Reasons for Closure of the Court Record that Outweigh the Public's Rights to Access.

On countless occasions, courts have been asked to entertain orders limiting information that may be released to the public concerning judicial matters. But before a court enters such an order, it must conduct an exacting inquiry into the circumstances. Courts must specifically identify the factors that threaten the administration of justice or constitutional privacy interests and weigh all reasonable alternatives to mitigate the perceived threats. Only then, after development of a full record on these issues (and allowing the media an opportunity to participate), may a court narrowly fashion a remedy that accommodates the public's interest alongside that of the judicial system. See Morris Publ'g Group LLC v. State of Florida, 136 So. 3d 770 (Fla. 1st DCA 2014).

Thus, a party seeking closure of the judicial record must demonstrate compelling reasons to justify the closure. Id.; see also United States v. Guerrero, 693 F.3d 990, 1002 (9th Cir. 2012). That is, that the "closure is essential to preserve higher values and is narrowly tailored to serve that interest." Press-Enterprise Co. v. Superior Court, 478 U.S. 1, 14 (1986).

Defendant has not even addressed the common law or First Amendment right to access, let alone demonstrated a compelling reason that outweighs those interests. The countervailing interests that Defendant has advanced for keeping the competency report confidential and under seal have been rejected by courts that have weighed those interests against the public's right of access. See, e.g., Guerrero, 693 F.3d at 1002-04 (holding that district court did not err in concluding that defendant failed to establish that an open competency hearing would violate his right to a fair trial, privacy interests, or attorney-client privilege and work product); Poole v.

South Dade Nursing & Rehabilitation Center, 139 So. 2d at 441-442 (rejecting numerous arguments advanced by defendant that disclosure of the competency evaluation report would violate a right to confidentiality and privacy).

V. Defendant's Request to Seal is not Narrowly Tailored.

Even if the Court were to consider that Defendant has an interest that somehow outweighs the common law and Constitutional rights of access and find in favor of sealing, the entire documents should not be sealed. Courts have recognized that because newsgathering is protected by the First Amendment, an order that impinges on the "journalistic right to gather news" must be "narrowly tailored to prevent a substantial threat to the administration of justice." In re Express-News Corp., 695 F.2d 807, 810 (5th Cir. 1982); CBS, Inc. v. Smith, 681 F. Supp. 794, 796 (S.D. Fla. 1988).

Sealing of the entirety of documents which contain some exempt information (such as a confession) is overbroad. Rather, only the exempt information must be redacted and the remainder of the document available to the public. See Guerrero, 693 F.3d at 1003 ("[E]ven if the privacy rights of Guerrero and others named in the competency documents constitute a compelling interest, there are alternatives to full closure of the competency proceedings that can protect these interests. Courts may issue protective orders, redact names from reports, and restrict the use of other people's names during the hearing. Therefore, there are alternatives to closure and it was not clear error to conclude that Guerrero's privacy interests do not override the First Amendment right of access.").

CONCLUSION

For the foregoing reasons, *The Florida Times Union* requests that this Court enter an order: (1) granting it leave to intervene in this matter and to be heard; (2) setting aside its Order Granting Motion to Determine Confidentiality of Court Records entered February 9, 2016; (3)

setting aside its Order Sealing Specific Court Documents and Records entered February 17, 2016; (4) denying Defendant's *ore tenus* Motion to Determine Confidentiality of Court Records of February 2, 2016; (5) denying Defendant's Motion to Make Court Records Confidential and Motion for Protective Order Sealing Specific Court Documents and Records of February 17, 2016; and (6) granting any further relief the Courts deems just and proper

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Attorneys for Morris Publishing Group LLC, d/b/a *The Florida Times-Union*,

CERTIFICATE OF SERVICE

I hereby certify that on the 26th day of February, 2016, I electronically filed the foregoing with the Clerk of the Court, which automatically will send email notification of such filing to the following attorney(s) of record:

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#39191687_v1

IN THE CIRCUIT COURT, FOURTH
JUDICIAL CIRCUIT, IN AND FOR
DUVAL COUNTY, FLORIDA

STATE OF FLORIDA

CASE NO.: 16-2012-CF-005781-AXXX-MA
DIVISION: CR-D

vs.

DONALD JAMES SMITH

GRAHAM MEDIA GROUP, FLORIDA, INC.,
d/b/a WJXT-TV4 & NEWS4JAX.COM,

Intervenor.
_____/

INTERVENOR GRAHAM MEDIA GROUP, FLORIDA, INC.'S MOTION TO INTERVENE AND OPPOSE DEFENDANT'S NOTICE OF INTENT AND MOTION REGARDING SIXTH SUPPLEMENTAL DISCOVERY EXHIBIT

Intervenor Graham Media Group, Florida, Inc. (f/k/a Post-Newsweek Stations Florida, Inc.), d/b/a WJXT-TV4 and NEWS4JAX.COM ("WJXT-TV4"), by counsel, seeks leave to intervene to oppose Defendant's Notice of Intent to File Motion for Protective Order and Request for Reasonable Time (docket line 420) filed February 2, 2016 and to oppose Defendant's Motion to Determine Confidentiality and Motion for Protective Order Regarding the State's Sixth Supplemental Discovery Exhibit and Request for In Camera Review (docket line 430) filed February 19, 2016.

I. Intervention:

The news media have standing to intervene as an affected non-party on matters of access to court proceedings and court records. "[B]oth the public and news media shall have standing to challenge any closure order. The burden of proof in these proceedings shall always be on the party seeking closure." Barron v. Florida Freedom Newspapers, Inc., 531 So. 2d 113, 118 (Fla. 1988).

In this case, for similar grounds, the Court previously granted WJXT-TV4 leave to intervene on Defendant's (first) Motion for Protective Order. Order, Sept. 6, 2013 (docket line 72).

II. Defendant's Notice and Motion Regarding Sixth Supplemental Discovery Exhibit:

WJXT-TV4 opposes all relief sought in Defendant's Notice (docket line 420) and Motion (docket line 430).

On January 22, 2016, the State filed its Sixth Supplemental Discovery Exhibit, thus making all of its contents subject to disclosure as a public record. § 119.011(3)(c)(5), Fla. Stat.

Nine days later, on February 1, 2016, WJXT-TV4 submitted its public records request to the Office of State Attorney seeking all materials provided by the State to Defendant as itemized in the State's Sixth Supplemental Discovery Exhibit (docket line 407). Attached as Exhibit A is WJXT-TV4's records request from Assignment Editor Frank Powers.

One day later, Defendant filed his Notice of Intent to File Motion for Protective Order and Request for Reasonable Time. Although titled only as a notice, the document nonetheless requested affirmative relief that the Court "grant a reasonable amount of time to review and file for appropriate relief."

On the twenty-seventh day, one day after co-Intervenor Morris Communications filed its motion to intervene, Defendant filed his Motion to Determine Confidentiality etc.

To date—nearly after a month after requesting records, WJXT-TV4 has received nothing.

None of the authorities that govern public access to Judicial Branch records provide a procedure contemplated by Defendant's combined Notice and subsequent Motion.

To the extent the Court construes Defendant's Notice of Intent as a request for relief, the request should be denied.

III. Defendant's Motion to Determine Confidentiality:

Defendant's Motion to Determine Confidentiality and Motion for Protective Order Regarding the State's Sixth Supplemental Discovery Exhibit and Request for In Camera Review also should be denied because they:

1. Are overbroad in the relief they request;
2. Offer only bald speculation to support his predicted harm to the administration of justice;
3. Lack evidence that alternatives to sealing would fail to preserve his to a fair trial;
4. Do not show that the closure he seeks would be narrowly tailored so that the public's right of access to courts is no more burdened than necessary; and
5. Cannot create a right of privacy for Defendant where none exists.

Defendant's motion seeks to seal the following materials:

1. A surreptitious recording of Defendant in his cell, comprising a total of 72 hours;
2. An investigator's summary of twenty minutes condensed from the 72 hours of recordings, presumably containing Defendant's statements to inmates and corrections personnel as referenced in his Motion; and
3. The condensed recording.

Def.'s Mot., ¶4(a, c, d).

Before a court may block public disclosure of discovery materials, the court **must** find that sealing is necessary to prevent a serious and imminent threat to the administration of justice; no alternatives are available, other than change of venue, to protect a defendant's right to a fair trial; and would protect the rights of the accused, without being broader than necessary to accomplish this purpose. Fla. R. Jud. Admin. 2.420(c)(9); Fla. Freedom Newspapers, Inc. v.

McCrary, 520 So. 2d 32, 34-35 (Fla. 1988); Miami Herald Publ'g Co. v. Lewis, 426 So. 2d 1, 6 (Fla. 1982); Post-Newsweek Stations, Fla., Inc. v. Doe, 612 So. 2d 549 (Fla. 1992).

Florida's "public policy favoring open records must be given the broadest expression." Tribune Co. v. Public Records, 493 So. 2d 480, 484 (Fla. 2d DCA 1986). "Exemptions from disclosure are to be construed narrowly and limited to their stated purposes." Id. at 483.

Consequently, the Florida Constitution, the Public Records Act, Florida Rules of Judicial Administration, and related case law all preclude the wholesale closure of unexamined materials as Defendant has requested in this case. Defendant asserts the recordings contain the "personal, private sounds of Defendant living within the confines of his cell, . . ." Def. Mot. ¶4(a). Defendant overlooks well-settled law that he has no right of privacy in a jail cell. See Palm Beach Newspapers, LLC v. State, Smith, and Cobia, ___ So. 3d ___, 2016 WL 239048, Case No. 4D15-4572 (Fla. 4th DCA Jan. 21, 2016) (quashing trial court's order sealing transcripts of inmate's jail-house telephone conversations).[1]

The fact that some of the recordings may be banal or boring or reflect potentially embarrassing bodily functions is irrelevant to the question at hand. The dispositive question is whether Defendant can assert any legally cognizable exemptions to public disclosure. If his statements contain the substance of a confession, only that portion that the Court determines to be a confession (referring to essential elements of the crimes charged) may be sealed or withheld. Section 119.071(2)(e) is an extremely narrow Public Records Act exemption. See Times Publ'g Co. v. State, 2002 WL 31250340, at *2 (Fla. 2d DCA Oct. 9, 2002) (holding trial court departed

[1] Defendant relies on Post-Newsweek Stations Florida, Inc. v. Doe, 612 So. 2d 549 (Fla. 1992) for the proposition that non-party witnesses had a right to privacy in criminal discovery materials and could obtain a protective over. Doe is unhelpful to Defendant. In Doe, several non-party witnesses sought to seal a prostitution customer list containing their names and addresses. The trial court declined their request. On review, the Florida Supreme Court held "the trial judge did not abuse his discretion in concluding that the Does lacked a privacy interest in their names and addresses. Although the trial judge did not make a finding as to whether release of the information would be defamatory to the victim or witness, our conclusion that the Does do not have a privacy interest in their names and addresses negates the need for such factual determination." 612 So. 2d at 553.

"from the essential requirements of law" by sealing entirety of defendant's interview with police). See also AGO 84-33. "[T]he term 'confession,' in its legal sense, is restricted to an acknowledgement of guilt, made by a person after an offense has been committed, and it does not apply to a statement or declaration of an independent fact from which such guilt may be inferred." Louette v. State, 12 So. 2d 168, 172 (Fla. 1943). Accordingly, unless a statement contains an acknowledgement of guilt of the offenses alleged, the statement is not exempt under Section 119.071(2)(e).

The fact some other non-confidential information contained in the recordings may be sensationalized "to create further negative publicity against Defendant" is not in itself a basis for sealing such otherwise public documents. Defendant's argument on this point ignores the Court's power to employ non-sealing alternatives such as individual voir dire, additional strikes, curative instructions or sequestration to ensure a right to a fair trial.

Pretrial publicity, standing alone, will not require a change in venue or justify sealing public records produced in discovery. The court must analyze the extent and nature of pretrial publicity, and the difficulty encountered in actually selecting a jury. Griffin v. State, 866 So. 2d 1 (Fla. 2003). Defendant has offered no evidence of publicity or notoriety of such a degree as to make impossible the empaneling of an unbiased jury. See State v. Bennett, 19 Med. L Rptr 1383 (Fla. 13th Jud. Cir. Sept. 26, 1991) (denying motion to seal Williams evidence). Moreover, if Casey Anthony, Danny Rollings, George Zimmerman, and Michael Dunn can receive fair trials, certainly Defendant Smith in this case can also receive a fair trial without casting a dragnet of secrecy over public records. *See Times Publ'g Co. v. State*, 903 So. 2d 322 (Fla. 2d DCA 2005) (quashing trial order in case of Joseph P. Smith who was convicted of abducting, sexually assaulting, and murdering an eleven-year-old girl).

IV. Conclusion

In additional to all of the foregoing arguments and authorities, WJXT-TV4 hereby adopts and joins in all arguments and authorities set forth in co-Intervenor Morris Publishing Group, LLC's Motions filed on February 18, 2016 and February 26, 2016.

WHEREFORE, Intervenor Graham Media Group, Florida, Inc., d/b/a as WJXT-TV4 and News4Jax.com, requests the Court enter an order (1) granting WJXT-TV4 leave to intervene, and (2) denying Defendant's Notice of Intent to File Motion for Protective Order and Request for Reasonable Time (docket line 420) filed February 2, 2016 and Defendant's Motion to Determine Confidentiality and Motion for Protective Order Regarding the State's Sixth Supplemental Discovery Exhibit and Request for In Camera Review (docket line 430) filed February 19, 2016.

In the alternative to denying Defendant's motion, WJXT-TV4 requests that the Court require Defendant to immediately submit materials for in camera review with specific grounds for redaction cited as to specific portions of the materials. WJXT-TV4 posits that only the investigator's summary and the condensed twenty-minute recording could possible contain any information subject to redaction.

Respectfully submitted this **28th day of February 2016.**

/s Edward L. Birk
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CERTIFICATE OF SERVICE

I CERTIFY that a copy of the foregoing has been furnished this **28th day of February 2016** to:

The Honorable Mallory D. Cooper, Circuit Judge;

Julie Agent Schlax, Esquire

Mark Caliel, Assistant State Attorney.

/s Edward L. Birk
Attorney

15477/1284998

Edward L. Birk

Subject: FW: Open Records request re Donald Smith

From: Powers, Frank
Sent: Monday, February 01, 2016 3:35 PM
To: jbarnard@coj.net; Maldonado, Katy (KatyM@coj.net)
Subject: Open Records request

Ladies--

We'd like to make an Open Records request for the state's 6th discovery material provided the defense team for Donald Smith, dated Jan 22.
Please advise when those materials might be available.

Regards,

Frank

Exhibit A

IN THE CIRCUIT COURT, FOURTH
JUDICIAL CIRCUIT, IN AND FOR
DUVAL COUNTY, FLORIDA

STATE OF FLORIDA

CASE NO.: 16-2012-CF-005781-AXXX-MA
DIVISION: CR-D

vs.

DONALD JAMES SMITH

GRAHAM MEDIA GROUP, FLORIDA, INC.,
d/b/a WJXT-TV4 & NEWS4JAX.COM,

Intervenor.
_____/

INTERVENOR GRAHAM MEDIA GROUP, FLORIDA, INC.'S MOTION TO INTERVENE, TO OPPOSE DEFENDANT'S MOTIONS, AND TO VACATE RESULTANT ORDERS SEALING VARIOUS DOCUMENTS

Intervenor Graham Media Group, Florida, Inc. (f/k/a Post-Newsweek Stations Florida, Inc.), d/b/a WJXT-TV4 and NEWS4JAX.COM ("WJXT-TV4"), by counsel, seeks leave to intervene to:

1. oppose Defendant's Ore Tenus Motion of February 2, 2016 (made in camera and ex parte), and Defendant's Motion to Make Court Records Confidential and Motion for Protective Order Sealing Specific Court Documents and Records (docket line 427) filed on February 17, 2016; and
2. request the Court vacate the Order Granting Motion to Determine Confidentiality of Court Records (docket line 423) of February 9, 2016, the Notice of Sealing Document (docket line 426) of February 17, 2016, and the Order Sealing Specific Court Documents and Records (docket line 428) of February 17, 2016.

The motions were made without required notice to affected non-parties, and moreover do not satisfy the stringent requirements for sealing presumptively public records. The orders have

not made sufficient findings regarding the grounds for sealing as required by Florida law and Rule of Judicial Administration 2.420 and were improvidently entered.

I. Intervention:

The news media have standing to intervene as an affected party on matters of access to court, court proceedings, and court records. "[B]oth the public and news media shall have standing to challenge any closure order. The burden of proof in these proceedings shall always be on the party seeking closure." Barron v. Florida Freedom Newspapers, Inc., 531 So. 2d 113, 118 (Fla. 1988).

In this case, for similar grounds, the Court previously granted WJXT-TV4 leave to intervene on Defendant's (first) Motion for Protective Order. Order, Sept. 6, 2013 (docket line 72).

II. Defendant's Motions and the Resultant Orders Do Not Satisfy Rule 2.420

Inasmuch as the Court previously granted WJXT-TV4's motion to intervene, and inasmuch as Florida Rule of Judicial Administration 2.420(d)(4) requires a party filing a Rule 2.420 motion to provide notice to affected non-parties, Defendant should have provided notice regarding his motions. He did not.

Rule 2.420 allows ore tenus motions, but requires a speedy reduction to writing of such motions within five days. Fla. R. Jud. Admin. 4.240(h)(1)(D). Assuming Defendant's motion dated February 11, 2016 (filed February 17, 2016) (docket line 427) was Defendant's effort to comply with Rule 2.420(h)(1)(D), his motion is untimely as it was served nine days (on the State only) and filed fifteen days after he made his ore tenus motion in camera. Further, when filing the written motion, Defendant missed his second opportunity to provide the required notice.

It is unclear why Defendant's motion seeking authority to appoint and compensate an expert required Court approval rather than simply administrative review by payor Florida Justice Administrative Commission. Nonetheless, once Defendant sought Court approval, his motion and related papers became part of the Court file and were subject to public access. The Court's Order of February 9, its Notice of February 17, and Defendant's Motion of February 17 do not provide adequate basis for the wholesale sealing of Defendant's ore tenus motion and all related documents, let alone any portion.

When the law permits sealing of public judicial branch records, the extent of sealing must be no broader than necessary to accomplish the expressly stated grounds. Without further explanation and specific findings, it is impossible to know what grounds would justify the sealing of Defendant's entire motion and all related papers seeking appointment of a medical expert in their entirety. Defendant's ore tenus motion apparently includes trial strategy and psychiatric summaries. If there is any expressly recognized basis for sealing such information, then only as much information as is indeed confidential may be redacted.

Moreover, Defendant cites to his privacy interests. Def. Mot. of Feb. 11 ¶ 5. Defendant, however, apparently is making his psychiatric state an issue in this case and therefore has no privacy interest in such information.

The Court's Notice of February 17 states that the Ex Parte Order Appointing Doctor Fred Berlin dated February 9, 2016 was sealed upon a finding that "**portions of this record are exempt** . . . pursuant to Section 39.0132, Florida Statutes." (emphasis added). By its own wording, the Notice shows that portions of the record are not exempt. Therefore, they should be made public. Moreover, section 39.0132 pertains, as all of Chapter 39 does, to the interest of children, not to an adult such as Defendant. Without further explanation, it is unclear how section

39.0132 could justify sealing records pertaining to psychiatric summaries or evaluations of an adult defendant and where no guardian ad litem has been appointed for a child.

III. Conclusion

In additional to all of the foregoing arguments and authorities, WJXT-TV4 hereby adopts and joins in all arguments and authorities set forth in co-Intervenor Morris Publishing Group, LLC's Motions filed on February 18, 2016 and February 26, 2016.

WHEREFORE, Intervenor Graham Media Group, Florida, Inc., d/b/a as WJXT-TV4 and News4Jax.com, requests the Court enter an order (1) denying Defendant's several motions seeking to seal records associated with appointment of Dr. Fred Berlin; and (2) vacating the Court's Notice and Orders granting the foregoing motions; and (3) unsealing such records except as the Court may find to be expressly confidential upon further examination and justification.

Respectfully submitted this **28th day of February 2016.**

/s Edward L. Birk
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CERTIFICATE OF SERVICE

I CERTIFY that a copy of the foregoing has been furnished this **28th day of February 2016** to:

The Honorable Mallory D. Cooper, Circuit Judge;

Julie Agent Schlax, Esquire

Mark Caliel, Assistant State Attorney.

/s Edward L. Birk
Attorney

15477/1284997

IN THE CIRCUIT COURT, FOURTH JUDICIAL CIRCUIT, IN AND FOR DUVAL COUNTY, FLORIDA

CASE NO: 16-13-CF-05781-XXXX
DIVISION: CR-D

STATE OF FLORIDA,

vs.

DONALD SMITH,
Defendant.

ORDER SETTING HEARING ON INTERVENOR, MORRIS PUBLISHING GROUP, LLC'S MOTION TO INTERVENE FOR PURPOSES OF OPPOSING DEFENDANT'S MOTION TO DETERMINE CONFIDENTIALITY AND TO SET ASIDE ORDERS SEALING DOCUMENTS,

INTERVENOR, GRAHAM MEDIA GROUP, FLORIDA, INC.'S MOTION TO INTERVENE AND OPPOSE DEFENDANT'S NOTICE OF INTENT AND MOTION REGARDING SIXTH SUPPLEMENTAL DISCOVERY EXHIBIT; AND MOTION TO INTERVENE TO OPPOSE DEFENDANT'S MOTIONS, AND TO VACATE RESULTANT ORDERS SEALING VARIOUS DOCUMENTS

It is ORDERED that this matter is set for a Hearing on the aforementioned Motions before the Honorable Mallory D. Cooper, in **Courtroom 405**, Duval County Courthouse, 501 West Adams Street, Jacksonville, Florida, on **Tuesday, March 1, 2016 at 9:00 o'clock a.m.**

Please govern yourself accordingly.

DONE AND ORDERED in Chambers at Jacksonville, Duval County, Florida, this 29 February, 2016.

Mallory D. Cooper
Circuit Court Judge

FILED
FEB 29 2016
RONALD W. DAMSELL
CLERK CIRCUIT COURT

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IN THE CIRCUIT COURT, FOURTH
JUDICIAL CIRCUIT, IN AND FOR
DUVAL COUNTY, FLORIDA

STATE OF FLORIDA

CASE NO.: 16-2013-CF-005781-AXXX-MA
DIVISION: CR-D

vs.

DONALD JAMES SMITH

GRAHAM MEDIA GROUP, FLORIDA, INC.,
d/b/a WJXT-TV4 & NEWS4JAX.COM,

Intervenor.
_____/

INTERVENOR GRAHAM MEDIA GROUP, FLORIDA, INC.'S NOTICE OF SUPPLEMENTAL AUTHORITY IN SUPPORT OF MOTIONS HEARD ON MARCH 1, 2016

Intervenor Graham Media Group, Florida, Inc. (f/k/a Post-Newsweek Stations Florida, Inc.), d/b/a WJXT-TV4 and NEWS4JAX.COM ("WJXT-TV4"), by counsel, in response to inquiries from the Court, hereby gives notice of the following supplemental authority in support of both Intervenors' motions heard by the Court on March 1, 2016.

1. Smith v. State, 28 So. 3d 838 (Fla. 2009) (affirming conviction and sentence on direct appeal); and Smith v. State, Case No. SC-13-4 (Fla. Sept. 11, 2014) (denying collateral appeal).

The undersigned stated during argument on March 1, 2016 that no court found defendant Joseph P. Smith to have been denied a fair trial by the public disclosure of surveillance video showing him abducting an 11-year-old victim. Before that defendant's arrest, law enforcement disseminated the video to the news media to help identify suspects and the video was widely viewed. In neither his direct nor his collateral appeal did defendant assert denial of fair trial due to pretrial publicity involving distribution of the surveillance video.

Accordingly, in this case, there is no known opinion supporting any assertion that public access to the Walmart and Dollar General video, which the State has disclosed, will create pretrial publicity rising to a level necessary to deny Defendant a fair trial.

Moreover, the State, during the March 1 hearing, stated that it had already distributed or approved for distribution in 2013 the raw video recordings in question. The State explained that the video identified in the Sixth Discovery Exhibit embodied the State's work-product because it included enhancements provided by the FBI to make the video an exhibit for trial. Therefore, the un-enhanced video cannot be sealed. And, the enhanced video, since it has been disclosed to the defense as an exhibit, is subject to copying or inspection. See § 119.011(3)(c)(5), Fla. Stat. The State asserts a work product exemption, §119.071(1)(d), Fla. Stat. The enhancements would have to reflect counsel's mental impressions to qualify for the work product exemption.

2. Tribune Co. v. Cannella, 458 So. 2d 1075, 1079 (Fla. 1984) ("The only delay permitted by the [Public Records] Act is the limited reasonable time allowed the custodian to retrieve the record and delete those portions of the record the custodian asserts are exempt.").

Intervenors argued at hearing that the time elapsed from the State filing its Sixth Supplement Discovery Exhibit on January 22, 2016 to the Intervenors' separate public records requests on February 1 (WJXT-TV4) and February 3 (Times-Union) to the Defendant's filing of his Notice of Intent on February 2 to filing his Motion to Determine Confidentiality on February 19 far exceeds the permissible period for a custodian to conduct its redaction review as expressed in Cannella. Moreover, Defendant did not follow the time frame set forth in the Court's Order of September 6, 2013.

Florida Rule of Judicial Administration 2.420(m) states that "Requests and responses to requests for records under this rule shall be made in a reasonable manner." WJXT-TV4 is

unaware of any court that has construed the meaning of "reasonable" in Rule 2.420(m). Relying, therefore, on Cannella's construction of "reasonable" and the Court's prior order, the reasonable time for seeking adjudication of a request to seal certain records in this case has long passed.

Respectfully submitted this **1st day of March 2016.**

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CERTIFICATE OF SERVICE

I CERTIFY that a copy of the foregoing has been furnished this **1st day of March 2016** to:

The Honorable Mallory D. Cooper, Circuit Judge;

Julie Agent Schlax, Esquire

Mark Caliel, Assistant State Attorney.

/s/Edward L. Birk
Attorney

15477/1285912

Original Image of 28 So.3d 838 (PDF)

KeyCite Yellow Flag - Negative Treatment
Distinguished by Kaseckarow v. Board of Examiners of Sex Offenders of State, N.Y.Sup., October 25, 2011

28 So.3d 838
Supreme Court of Florida.

Joseph SMITH, Appellant/Cross Appellee,
v.
STATE of Florida, Appellee/Cross Appellant.

No. SC06–747.
|
Dec. 17, 2009.
|
Rehearing Denied Feb. 18, 2010.

Synopsis
Background: Defendant was convicted in the Circuit Court, Broward County, Andrew Douglas Owens Jr., J., of first-degree murder, capital sexual battery, and kidnapping. He was sentenced to death for the murder. Defendant appealed, and the state filed a cross appeal.

Holdings: The Supreme Court held that:

[1] admission of evidence of the results of DNA tests did not violate defendant's right of confrontation even though the biologists who performed the tests did not testify;

[2] medical examiner's expert opinion testimony that ligature strangulation was highly associated with sexual battery was inadmissible;

[3] error in the admission of medical examiner's expert opinion testimony that ligature strangulation was highly associated with sexual battery was not fundamental error;

[4] record supported a determination that defendant's brother was not acting as a state agent when defendant made statements to him about the sexual battery and murder;

[5] trial court was required to excuse two prospective jurors for cause;

[6] error in trial court's refusal to excuse two prospective jurors for cause was harmless;

[7] a finding of both capital aggravators that victim's murder was committed during the course of a sexual battery upon a child under 12 years of age and that victim of the murder was under 12 years of age did not constitute an improper doubling of aggravators;

[8] as a matter of first impression, the capital aggravator that the victim of a murder was under 12 years of age is not unconstitutionally overinclusive;

[9] as a matter of first impression, the capital aggravator that the victim of a murder was under 12 years of age is not unconstitutional for lacking an express requirement that the victim be particularly vulnerable; and

[10] the death sentence was proportionate.

Affirmed.

Canady, J., concurred in result and filed opinion in which Polston, J., concurred.

West Headnotes (48)

[1] **Criminal Law**
Use of documentary evidence

Admission of evidence of the results of DNA tests on a known sample taken from defendant and an unknown semen sample taken from minor victim's shirt did not violate defendant's Sixth Amendment right of confrontation at a capital-murder trial even though the biologists who performed the tests did not testify; the supervisor of the DNA-analysis team was the person who evaluated the raw test results, compared the DNA sample found on victim's shirt to the sample taken from defendant, and concluded that defendant's DNA matched the DNA from the shirt, and the supervisor was present at trial and subject to cross examination about the results that she obtained. U.S.C.A. Const.Amend. 6.

7 Cases that cite this headnote

[2] **Criminal Law**
Bodily condition

Trial court could allow a medical examiner to present expert opinion testimony, at a trial for capital sexual battery, that certain aspects of the crime scene were consistent with sexual battery of minor victim, including that victim was discovered naked below the waist and that bruises on victim's body could have been caused by a struggle with her attacker, even though there were alternative explanations for the condition of victim's body; the testimony assisted the jurors in deciding what happened, not who was responsible for the acts perpetrated against victim. West's F.S.A. §§ 90.702.

1 Cases that cite this headnote

[3] **Criminal Law**
Medical testimony in general

Medical examiner's expert opinion testimony that ligature strangulation was highly associated with sexual battery was inadmissible at a trial for capital sexual battery of minor victim, whose body had a deep ligature mark on her neck; the medical examiner failed to provide any basis whatsoever to support a purported connection or correlation between ligature strangulation and sexual battery, no evidence of such a connection was found in the case, and the medical examiner had no research, data, or other material from which he drew this conclusion. West's F.S.A. §§ 90.702, 90.704.

1 Cases that cite this headnote

[4] **Criminal Law**
Opinion evidence

Error in trial court's admission of medical examiner's expert opinion testimony that ligature strangulation was highly associated with sexual battery, which lacked a sufficient basis, was not fundamental error at trial for capital sexual battery; there was a plethora of evidence, including semen that matched the DNA profile of defendant and defendant's confession to his brother that he engaged in rough sex with minor victim, to support a conviction for capital sexual battery. West's F.S.A. §§ 90.702, 90.704.

Cases that cite this headnote

[5] **Criminal Law**
Necessity of Objections in General

To warrant reversal on the basis of fundamental error, the error must reach down into the validity of the trial itself to the extent that a verdict of guilty could not have been obtained without the assistance of the alleged error.

Cases that cite this headnote

[6] **Criminal Law**
Private persons in general

Record supported a determination that defendant's brother was not acting as a state agent when defendant made statements to him about sexual battery and murder of victim, and thus the statements were not obtained in violation of defendant's Sixth Amendment right of counsel, even though law enforcement officers once asked the brother whether he ever thought about asking defendant if he did the alleged acts; it was the brother who volunteered that the only way to persuade defendant to talk would be to engage in trickery, the officers encouraged the brother to contact them further only if he had forgotten something, and, inter alia, certain actions of the brother, including misleading law enforcement about his meeting with defendant and their mother, refuted any contention that he was working as a state agent. U.S.C.A. Const.Amend. 6.

1 Cases that cite this headnote

[7] **Criminal Law**
Review De Novo

Criminal Law
Questions of Fact and Findings

Mixed questions of law and fact that ultimately determine constitutional rights should be reviewed by appellate courts using a two-step approach, deferring to the trial court on questions

of historical fact but conducting a de novo review of the constitutional issue.

Cases that cite this headnote

[8] **Jury**
Opinion Founded on Rumor or Newspaper Reports

Trial court was required to excuse for cause, in a prosecution for capital murder of minor victim, a prospective juror who had an employment duty to follow the murder case and update his coworkers, changed his behavior toward his minor daughter based on the events of the case, and expressed an opinion that defendant "probably did it," even though the juror eventually stated that he would follow the law as a matter of integrity.

3 Cases that cite this headnote

[9] **Jury**
Personal relations in general

Trial court was required to excuse for cause, in a prosecution for capital murder of minor victim, a prospective juror who explained that he had been a witness in a capital case where his daughter was murdered and that the experience was very painful, even though the juror sincerely felt that he could be fair and impartial if he were selected to serve in defendant's case; it could not be accepted that a parent who testified as a witness during the trial for the murder of his own daughter could not be influenced, albeit unintentionally, by such a painful and tragic experience.

2 Cases that cite this headnote

[10] **Criminal Law**
Overruling challenges to jurors

Error in trial court's refusal to strike for cause two prospective jurors was harmless in a prosecution for capital murder; trial court granted defendant three peremptory challenges in addition to the original ten challenges that he received.

2 Cases that cite this headnote

[11] **Criminal Law**
Overruling challenges to jurors

When a trial court erroneously denies a defendant's cause challenges of prospective jurors, the defendant cannot demonstrate prejudice if the trial court grants the same number of additional peremptories as the cause challenges that were erroneously denied.

1 Cases that cite this headnote

[12] **Criminal Law**
Documentary evidence

Standard of review for the admission of photographs is abuse of discretion.

1 Cases that cite this headnote

[13] **Criminal Law**
Photographs and Other Pictures

Admission of photographs will be upheld if they are corroborative of other evidence.

Cases that cite this headnote

[14] **Criminal Law**
Depiction of Injuries or Dead Bodies

Admission of photographs of a deceased victim must be probative of an issue that is in dispute.

Cases that cite this headnote

[15] **Criminal Law**
Purpose of admission

Two photographs of the lower half of victim's body as it was discovered in a field, one of which depicted victim's exposed genitalia and decomposition of and insect larvae on the body, were relevant, at a trial for capital murder and capital sexual battery, to a medical examiner's testimony that victim's genitalia had been affected by outside forces, which might have played a role with regard to the lack of evidence of a sexual battery.

Cases that cite this headnote

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[16] **Criminal Law**
Purpose of admission

Photograph of victim's right calf, which showed prominent abrasions and larval activity around victim's ankle, was relevant, at a trial for capital murder and capital sexual battery, to illustrate a medical examiner's testimony about the nature and extent of the injuries and to establish the manner of and circumstances surrounding the victim's death.

Cases that cite this headnote

[17] **Sentencing and Punishment**
Arguments and conduct of counsel

Prosecutor's contention, during closing statements at the penalty phase of a capital-murder trial, that the death penalty was warranted because defendant left minor victim's body exposed to animal predators was improper; such a comment was not relevant to establish the method of death but instead was intended to inflame the emotions of the jury.

Cases that cite this headnote

[18] **Sentencing and Punishment**
Harmless and reversible error

Error in prosecutor's contention, during closing statements at the penalty phase of a capital-murder trial, that the death penalty was warranted because defendant left minor victim's body exposed to animal predators was harmless; the reference to animal predation did not reach into the validity of the trial to the extent that a jury recommendation of death could not have been obtained without the comment.

Cases that cite this headnote

[19] **Criminal Law**
Appeals to Sympathy or Prejudice

Closing statements must not be used to inflame the minds and passions of the jurors so that their verdict reflects an emotional response to the crime or the defendant.

1 Cases that cite this headnote

[20] **Criminal Law**
Purpose of admission

Photograph of victim's inner thigh with two surgical incisions was relevant, at a trial for capital murder and capital sexual battery, to a medical examiner's conclusion that victim's body exhibited signs of blunt-force trauma, including a bruise on victim's inner thigh, as confirmed by pooling of blood under the skin.

Cases that cite this headnote

[21] **Sentencing and Punishment**
Presentation and reservation in lower court of grounds of review

Defendant did not preserve for appellate review his claim that trial court improperly doubled the capital aggravators that victim's murder was committed during the course of a sexual battery upon a child under 12 years of age and that victim of the murder was under 12 years of age; that specific claim was raised for the first time on appeal. West's F.S.A. § 921.141(5).

Cases that cite this headnote

[22] **Sentencing and Punishment**
Dual use of evidence or aggravating factor

Capital aggravators that victim's murder was committed during the course of a sexual battery upon a child under 12 years of age and that victim of the murder was under 12 years of age were separate and distinct, such that a finding of both aggravators did not constitute an improper doubling of aggravators; one aggravator was based exclusively upon the age of victim, and the other was based upon the commission of a totally separate, different, and additional felony at the time of the murder, i.e., sexual battery, regardless of whether it was a child who was the victim of that contemporaneous felony. West's F.S.A. § 921.141(5).

Cases that cite this headnote

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[23] **Sentencing and Punishment**
Dual use of evidence or aggravating factor

Focus in an examination of a claim of unconstitutional doubling of capital aggravators is on the particular aggravators themselves, as opposed to whether different and independent underlying facts support each separate aggravating factor.

Cases that cite this headnote

[24] **Criminal Law**
Review De Novo

Constitutionality of a statutory aggravator in a capital case is a pure question of law and is, therefore, subject to de novo review. West's F.S.A. § 921.141(5).

Cases that cite this headnote

[25] **Sentencing and Punishment**
Aggravating or mitigating circumstances

Capital aggravator that the victim of a murder was under 12 years of age is not unconstitutionally overinclusive; the aggravator narrows the class of individuals who are subject to the death penalty because only a percentage of murder victims are under 12 years of age. West's F.S.A. § 921.141(5)(*l*).

Cases that cite this headnote

[26] **Sentencing and Punishment**
Age

To find the existence of the capital aggravator that the victim of a murder was under 12 years of age, the state need not demonstrate that the defendant targeted the victim based upon her age. West's F.S.A. § 921.141(5)(*l*).

1 Cases that cite this headnote

[27] **Sentencing and Punishment**
Aggravating or mitigating circumstances

Capital aggravator that the victim of a murder was under 12 years of age is not unconstitutional for lacking an express requirement that the victim be particularly vulnerable; the legislature has discretion to deem vulnerable all children under 12 years of age. West's F.S.A. § 921.141(5)(*l*).

Cases that cite this headnote

[28] **Sentencing and Punishment**
Degree of proof

In a capital case, the state is required to establish the existence of all aggravating circumstances beyond a reasonable doubt. West's F.S.A. § 921.141(5).

Cases that cite this headnote

[29] **Sentencing and Punishment**
Sufficiency

Where the evidence of a capital aggravator is entirely circumstantial, the state can satisfy the burden of proof only if the evidence is inconsistent with any reasonable hypothesis that might negate the aggravating factor. West's F.S.A. § 921.141(5).

Cases that cite this headnote

[30] **Sentencing and Punishment**
Questions of fact

Standard of review applicable to a trial court's finding of a capital aggravator is whether competent, substantial evidence supports the finding. West's F.S.A. § 921.141(5).

Cases that cite this headnote

[31] **Sentencing and Punishment**
Harmless and reversible error

Any error in trial court's finding of the capital aggravator that defendant murdered victim for the purpose of avoiding lawful arrest was harmless, where trial court found other, valid capital aggravators and expressly stated that any one of the aggravators, except the aggravator that the murder was committed while defendant was on felony probation, was sufficient to outweigh the mitigating factors due to the totality of the aggravators. West's F.S.A. § 921.141(5).

2 Cases that cite this headnote

[32] **Sentencing and Punishment**
Planning, premeditation, and calculation
Sentencing and Punishment
Sufficiency

Facts supported a reasonable hypothesis that was inconsistent with the capital aggravator that minor victim's murder was cold, calculated, and premeditated (CCP), and thus the aggravator was not established upon circumstantial evidence; victim's abduction was a spontaneous decision, nothing indicated that defendant was planning to kill victim at the time of the abduction, an equally if not more plausible explanation for the murder was that defendant, after he sexually battered victim, panicked due to what he had done and therefore strangled her, and, moreover, it appeared that defendant did not procure the murder weapon in advance. West's F.S.A. § 921.141(5).

Cases that cite this headnote

[33] **Sentencing and Punishment**
Planning, premeditation, and calculation

Premeditation of a felony cannot be transferred to a murder that occurs in the course of that felony for purposes of the capital aggravator that the murder was cold, calculated, and premeditated (CCP); what is required is that the murderer fully contemplate effecting the victim's death. West's F.S.A. § 921.141(5).

1 Cases that cite this headnote

[34] **Sentencing and Punishment**
Planning, premeditation, and calculation

Capital aggravator that a murder was cold, calculated, and premeditated (CCP) may be established by such facts as advance procurement of a weapon, lack of resistance or provocation, and the appearance of a killing carried out as a matter of course. West's F.S.A. § 921.141(5).

Cases that cite this headnote

[35] **Sentencing and Punishment**
Harmless and reversible error

Erroneous finding of the capital aggravator that minor victim's murder was cold, calculated, and premeditated (CCP) was harmless, where trial court found other, valid capital aggravators and expressly stated in the sentencing order that any one of the aggravators found, except the aggravator that the murder was committed while defendant was on felony probation, was sufficient to outweigh the mitigating factors and due to the other applicable aggravators. West's F.S.A. § 921.141(5).

2 Cases that cite this headnote

[36] **Sentencing and Punishment**
Harmless and reversible error

When the Supreme Court strikes an aggravating factor on appeal in a death-penalty case, the harmless-error test is applied to determine whether there is a reasonable possibility that the error affected the sentence. West's F.S.A. § 921.141(5).

Cases that cite this headnote

[37] **Sentencing and Punishment**
Presentation and reservation in lower court of grounds of review

Defendant did not preserve for appellate review his claim that evidence of sexual conduct between him and his sister, which the state argued would be admissible at the penalty phase of a capital-murder trial if defendant's mother and sister testified as indicated by defendant's proffer, would be unfairly prejudicial; that specific claim was raised for the first time on appeal. West's F.S.A. § 90.403.

Cases that cite this headnote

[38] **Criminal Law**
Reception and Admissibility of Evidence

Trial court rulings on evidentiary issues are reviewed under the abuse-of-discretion standard.

Cases that cite this headnote

[39] **Sentencing and Punishment**
Defendant's character and conduct

Trial court acted within its discretion during the penalty phase of a capital-murder trial in ruling that the state, if defendant's mother or sister testified, could cross-examine them about defendant's sexual conduct with the sister when she was 13 years old; defendant presented mitigation evidence during the penalty phase to demonstrate that he was a loving family member and that he maintained positive relationships with them, and such evidence opened the door for the presentation of evidence that rebutted the portrayal of defendant as an ideal family member.

Cases that cite this headnote

[40] **Sentencing and Punishment**
Actual or potential punishment

Defendant was not entitled to provide an allocution statement to the jury during the penalty phase of a capital-murder trial without being subject to cross-examination.

Cases that cite this headnote

[41] **Criminal Law**
Adding to or changing grounds of objection

Defendant did not preserve for appellate review any claim that the statute abolishing the defense of voluntary intoxication under certain circumstances violated due process or equal protection on the ground that it allowed individuals who ingested certain illicit substances to use a defense of voluntary intoxication; defendant did not assert that specific legal challenge before trial court. U.S.C.A. Const.Amend. 14; West's F.S.A. § 775.051.

Cases that cite this headnote

[42] **Homicide**
Miscellaneous particular circumstances

Homicide
Confessions and declarations

Infants
Carnal knowledge; rape and sodomy

Kidnapping
Weight and sufficiency

Rape
Female Under Age of Consent

Evidence was sufficient to support convictions for capital murder, capital sexual battery, and kidnapping; minor victim's kidnapping was captured on a video recording, victim's stepfather testified that neither he nor her mother gave anyone permission to take custody of her, defendant confessed that he forced victim to engage in sexual conduct and that he strangled her after rough sex, defendant informed his brother where victim's body could be found, the brother led law enforcement agents to that location, and, inter alia, semen found on the back of the shirt that victim was wearing at the time of her abduction and murder contained DNA that matched defendant's DNA.

Cases that cite this headnote

[43] **Sentencing and Punishment**
Scope of review

On appeal in a death-penalty case, even if a defendant has not specifically presented a sufficiency challenge, the Supreme Court has an independent obligation to review the record to determine whether sufficient evidence exists to support a conviction. West's F.S.A. R.App.P.Rule 9.142(a)(6).

Cases that cite this headnote

[44] **Sentencing and Punishment**
Killing while committing other offense or in course of criminal conduct

Sentencing and Punishment
Vileness, heinousness, or atrocity

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Death sentence for murder of minor victim was proportionate, even though trial court found 13 nonstatutory mitigating circumstances; trial court found multiple aggravators, including that the murder was committed while defendant was engaged in the commission of a sexual battery or kidnapping and that the murder was especially heinous, atrocious, or cruel (HAC), trial court found in part, with regard to the HAC aggravator, that 11-year-old victim was forced to engage in various sex acts by a man nearly four times her age and that she knew that she was going to die, and the mitigation found by trial court was insignificant in comparison to the established aggravators. West's F.S.A. § 921.141(5).

3 Cases that cite this headnote

[45] **Sentencing and Punishment**
Proportionality

Even if a defendant does not challenge the proportionality of a death sentence, the Supreme Court has an independent obligation to review each case to ensure that death is the appropriate punishment. West's F.S.A. R.App.P.Rule 9.142(a)(6).

Cases that cite this headnote

[46] **Sentencing and Punishment**
Proportionality

When the Supreme Court conducts a proportionality analysis of a death sentence, the totality of the circumstances should be considered and the matter should be considered in relation to other capital cases; this comparison, however, is not to be made as to the number of aggravating and mitigating circumstances found.

2 Cases that cite this headnote

[47] **Sentencing and Punishment**
Aggravating circumstances in general
Sentencing and Punishment
Mitigating circumstances in general

Death penalty is reserved only for those cases where the most aggravating and least mitigating circumstances exist.

1 Cases that cite this headnote

[48] **Sentencing and Punishment**
Nature, degree, or seriousness of other offense

Statutory definition of "conviction," as a determination of guilt that is the result of a plea or a trial regardless of whether adjudication is withheld, does not apply to the prior-violent-felony aggravating circumstance in capital cases; the legislature limited the statute containing that definition to noncapital felonies. West's F.S.A. §§ 921.0021, 921.141(5).

1 Cases that cite this headnote

Attorneys and Law Firms

***844** James Marion Moorman, Public Defender, and Deborah K. Brueckheimer, Assistant Public Defender, Tenth Judicial Circuit, Bartow, FL, for Appellant.

Bill McCollum, Attorney General, Tallahassee, FL, and Carol M. Dittmar, Senior Assistant Attorney General, Tampa, FL, for Appellee.

Opinion

PER CURIAM.

Joseph Smith appeals his convictions for first-degree murder, kidnapping, and capital sexual battery and his sentence of death. We have jurisdiction. *See* art. V, § 3(b)(1), Fla. Const. For the reasons that follow, we affirm the convictions and the sentences imposed by the trial court.

I. FACTS AND PROCEDURAL HISTORY

On February 20, 2004, Joseph Peter **Smith** was charged with one count of sexual battery by a person over eighteen years of age upon a child less than twelve years of age and one count of kidnapping for the alleged abduction of and sexual battery upon Carlie Jane **Brucia**, an eleven-year-old female. That same day, **Smith** was also indicted on one count of first-degree murder for the killing of Ms. **Brucia**.

The trial court record reflects that on February 1, 2004, Carlie Brucia left the Sarasota home of a friend between 6:10 and 6:15 p.m. to walk home. The mother of the friend called Carlie's mother to verify that permission had been given for the young girl to walk home alone. The mother advised that she had not given permission and immediately sent Carlie's *845 stepfather to transport Carlie. When the stepfather arrived at the house of the friend, Carlie had already left. At approximately 7:30 p.m., after attempts to locate Carlie failed, a 911 call was made to report her missing. Law enforcement officers canvassed the area where Carlie would have walked from her friend's house to her home until 3 a.m. and continued the search throughout the morning of February 2, 2004. At approximately 12 p.m., a bloodhound tracked the scent of Carlie to the area behind a car wash located on Bee Ridge Road, where the dog suddenly lost her scent.

The proprietor of the car wash was advised that police officers and dogs were outside the business, and that the police were securing the area. The proprietor spoke with law enforcement and learned that a young girl was missing. He informed law enforcement that he had motion-sensitive cameras installed around the car wash and offered to review them to see if anything of use had been captured. A recording from one of the cameras, which was located at the rear of the car wash, revealed that at approximately 6:21 p.m. a girl (subsequently identified as Carlie) was led away from the car wash by a man dressed in what appeared to be a mechanic's uniform. On the evening of February 2, 2004, a video of the apparent abduction was released to the media and an Amber Alert was issued for Carlie.

On the morning of February 3, 2004, the wife of a former business associate of Smith saw the video on television, recognized the man in the video as Smith, and asked her husband to also view the video. The husband watched the video a number of times and recognized the man in the video as Smith:

> I worked with him at the shop, so I knew what he looked like. The sneakers, the back of his—the way his hair was cut, the way that he walked, his gait was just like Joe walking through the shop. I mean, he's got a different type of walk to him. And then when I watched him ... reach for the girl ... the way he reached for it was —I've seen him pick up tools like that, you know.... I knew it was him.

The husband called the police, spoke with Detective Vincent Riva, and provided Riva with Smith's current address.

Riva and his partner proceeded to the address in an unmarked vehicle and were met there by two other officers. After a neighbor advised that someone was in the residence, the detectives approached the front door and knocked, but when no one responded, a detective called his supervisor and was advised that Smith was on probation. He then called Smith's probation officer and asked her to respond to the address. After the officers had been at the residence for approximately forty-five minutes, Smith's sister arrived at the scene and advised that she would retrieve her brother.

When Smith exited the house, a detective interrogated Smith with regard to his activities on the day of the abduction without specifically asking whether he had been at the car wash. Smith provided a timeline of his actions on February 1, which did not place him at or near the car wash that day. When a detective requested permission to examine Smith's tattoos, Smith inquired as to the purpose of the visit by law enforcement. A detective advised that they were investigating an abduction, to which Smith replied that he had no knowledge of an abduction. When Smith was confronted with a still photo from the car wash video, Smith responded: "That looks like me, but it's not me." A detective requested permission from Smith to search both the room in the house that Smith rented and his car, which was *846 parked at that location. Smith consented and signed a written consent form.

The search of Smith's room did not reveal anything of evidentiary value (although the detective did see a number of mechanic's uniforms in the closet). However, when Smith's vehicle was searched, a spoon was discovered under the front seat which appeared to have been used to melt or burn narcotics. A search of the trunk of the car revealed a cardboard box, which contained another spoon similar to the first and a syringe. When the probation officers arrived, the officers advised them of the items found in the car, and Smith was arrested for violation of probation and possession of drug paraphernalia.

As the vehicle search was being conducted, an owner of the house where Smith was living arrived in a yellow station wagon. When asked about Smith's whereabouts on February 1, she recalled that at around 6:30 p.m., Smith had engaged in a telephone call with his estranged wife from that residence.

The detective explained that based on this information, the homeowner had basically established an alibi for Smith, he was "temporarily cleared" in the investigation, and the detectives left the residence to pursue other leads in the abduction case. However, later that day at approximately 6:30 p.m. (Tuesday, February 3), the husband of the woman with whom the detectives had interacted at the residence earlier that day appeared at the police station and informed the detective that his wife's recollection of the events from the evening of February 1 was *inaccurate*. The husband explained that Smith had borrowed his yellow station wagon at approximately 3 p.m. on February 1 and did not return it until approximately 7 a.m. on February 2.[1] The husband also identified Smith as the individual on the car wash video and relinquished the station wagon to the Sarasota County Sheriff's Office (SCSO). After receiving *Miranda*[2] warnings from the detective assigned to the abduction case, Smith invoked his right to counsel.

During the evening of February 4, 2004, John Smith, the brother of the defendant, arrived at the SCSO and was interviewed by FBI agents.[3] John informed them that although he was not on good terms with his brother, he had received a phone call from Smith at approximately 8 p.m. on Sunday, February 1, the night of the abduction. John refused to speak with his brother at that time. On Monday night, John and his girlfriend saw the abduction video on television. John recognized his brother in the video based upon the abductor's face and hair, and the fact that the abductor was wearing a mechanic's uniform. The girlfriend believed that the abductor was Smith because Smith had a distinctive walk due to prior back surgery. That same night, Smith appeared at John's house at approximately 11 p.m. Smith was apparently under the influence of drugs, and John sent his brother away.

When asked if he could identify that the abductor captured on video was his brother, John replied:

> *847 I don't have any concrete evidence[,] it's just, it looks like him, it walks like him, the more I look at that video, the more I look at him, the more I look at the video[,] it just well, total resemblance, if it's not him.

During the interview, the FBI agent asked, "Have you ever thought about going to see him and asking if he did this?" John replied that if Smith had abducted the child, he would not confess; instead, "he will die with that secret. If it's him. You won't get it out of him." John then suggested that the only way to obtain any information from Smith would be to engage in trickery. John advised that if someone informed Smith that he or she had engaged in improper conduct similar to that for which Smith was being investigated, Smith would most likely open up and provide details about his own actions.

Later that evening, after the interview concluded, John informed the FBI agent that he wanted to see his brother. SCSO personnel advised the FBI agent that Smith had retained counsel, and any meeting would need to go through Smith's attorney. The next morning, Thursday, February 5, 2004, the public defender arranged a meeting between Smith, John, and their mother. The mother exited the interview room after approximately forty-five minutes, and John remained with Smith for an additional thirty minutes. When he exited the interview room, John commented that Smith "came close, but he didn't say anything." After exiting the room, neither John nor his mother was debriefed by law enforcement, and no surveillance was placed upon them when they left the building.

On the evening of February 5, 2004, John called the FBI agent from his cell phone and stated: "I guess you heard, what do you want to do?" Although John's cellular phone had never been tapped by law enforcement, John apparently believed that it had, and the FBI agent then realized that Smith must have provided John with information about Carlie. Two FBI agents along with one local officer travelled to John's residence, and John then directed the law enforcement officials to a local church. When they arrived at the church, John provided the investigators with an area in the field behind the church where they should look for a body. While at the church, John received a call from Smith. John eventually confirmed that Carlie's body was located approximately fifty yards from a group of concrete blocks out in the field.

After other officers arrived at the church and based upon the directions provided by John, Carlie's body was found in a wooded area of the field. She was lying on her back, naked below the waist except for a sock on her right foot, with her right leg stretched out and her left leg bent back and curled under her left buttock. A deep ligature mark was visible on her neck.

The FBI agents returned to the SCSO with John to obtain a second statement. John confessed to the agents that he lied to them during the morning meeting when he stated that Smith had not made any statements about Carlie. John now related

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that Smith had initially said, "I'm sorry I did this to you." After Smith's mother left the room, Smith informed John that on the night in question he ingested what he believed was cocaine and that everything that occurred afterwards was a blur. According to John, "It felt like he was afraid to say 'you know she's dead' so I just said, 'okay, Joe she's dead, fine, where is she? Where is she? We gotta find her. Where is she?' " Smith then revealed that Carlie was in a field near a church on Proctor Road. John advised the agents that he had not provided them with this information ***848** after the earlier meeting because he did not believe his brother and because Smith never stated that he had murdered Carlie. John explained that after he left the jail with his mother, they proceeded to the church on Proctor Road, and John looked for the body without success.

That night, John spoke with Smith by telephone and advised him that he had been to the church but could not find the body. Smith then informed John that he had engaged in a sexual act with the girl in the car, and "it got carried away." When John asked if Smith had sexual intercourse with her, Smith responded in the affirmative. When John inquired if Carlie was dead, Smith responded, "I don't know, she could be." John decided to call the FBI agents after Smith admitted the sexual conduct and because, when John asked for specific details with regard to Carlie's location, Smith requested his attorney. John also revealed that during the phone call at the church, Smith admitted that he had "rough sex" with Carlie before he strangled her.

Subsequent to his arrest, Smith was transferred from the Sarasota County Jail to the Manatee County Jail. Before Smith's capital trial, discussions between Smith and family members were recorded at the jail and were later played in the presence of the jury during the trial:

February 9, 2004—

MOTHER: Oh, Joe, the best thing that ... you can do is try to explain it was an accident.

SMITH: But it was an accident, Mom.

MOTHER: I know that Joe.

SMITH: You don't think I would do that on purpose, Mom.

MOTHER: No. No, I don't. I don't think so at all Joe. Not at all. I know you better than that. But everyone ... is up in arms, the community, the press, the ... governor, the mayor. You just don't know, Joe.

....

SMITH: Yeah, Mom. You know what my charges are, right?

MOTHER: Yeah, I do. Yeah, I do. You want me to tell [your estranged wife] anything?

SMITH: Yeah, Mom. Tell her that—does she know what happened, the drugs and everything?

MOTHER: Yeah, she knows.

SMITH: That I didn't mean to do it. She knows I'm not an animal, right?

February 10, 2004—

JOHN: You had to have met the girl before, the young girl.

SMITH: No.

JOHN: Because she knew you.

SMITH: No, John.

JOHN: Not to mention the fact that she don't look nowhere [sic] 11

years old. I was thinking 16 or 17.

SMITH: That's what I thought, too.

February 19, 2004—

JOHN: How much time did you spend with her?

SMITH: It was—I was so far out there. You know, I ...

JOHN: [D]id it happen right there and then you drove there?

SMITH: It wasn't very long.

JOHN: An hour? Two hours? Did you go back afterwards to look again? What made you pick that place?

SMITH: Quiet.

....

JOHN: She started something in the car?

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SMITH: Yeah.

*849 JOHN: Where did you finish? There? And what made you finish it?

SMITH: [Inaudible] scared.

JOHN: Scared?

SMITH: I'm telling you. The adrenaline. I don't know. I just, I don't know.

....

JOHN: Oh, what's some more things that I—like you were just driving around and you copped, right?

SMITH: John, I was doing in the car and everything and —

JOHN: And then what? You saw her walking?

SMITH: Yeah. Actually running.

JOHN: And then you parked somewhere.

SMITH: Uh-huh. Yeah....

....

SMITH: I do love [my daughter]. I didn't do any of this to hurt anybody.

JOHN: What I originally ... wanted to do way back in the beginning, I never got to do it *because I couldn't find it,* remember I wanted to open (inaudible) shop?

SMITH: Yeah.

JOHN: Didn't happen. *I couldn't find the material.*

SMITH: That was bad. That was a bad idea anyway.

JOHN: You're probably right, but he [sic] could have sold it for big, big bucks. Your kids could have went to college.

SMITH: No. John, it was a bad, bad idea. Not only because of what it would have done to you, to be there and see that, but *they would have followed you and they would have implicated you.*

....

SMITH: Tell mom this, okay? Because [the priest] came, I talked to him for quite a while about, you know, how I was brought up.... And then I did an Act of Contrition, which means he wipes all my sins away. You know, we did confession. I confessed to everything. Murder, all types of stuff. You know what I mean? Anything that could be—you know, I just confessed to everything.

In addition to these conversations, on April 9, 2005, a letter from Smith to John, written in code, was intercepted by jail personnel. During trial, a cryptanalyst testified that the code had been broken and the message contained in the letter was the following:

> I WLSH L HAD SOMETHLN JULCY TO SAY OH OK THE BACKPACK [4] AND CLOTHES WENT IN FOUR DIFFERENT DUMPSTERS.... I LEFT IT OUT IN THE OPEN I DRAGED THE BODY TO WHERE ST WAS FOUND DESTROY THIS AFTER DECIFERING IT AND SHUT UP.

Sarasota County medical examiner Dr. Vincent Vega concluded that Carlie died as a result of strangulation because there was a ligature mark around her neck, and there were no other evident injuries to her head or torso. Dr. Vega testified that a shoelace was consistent with the type of ligature that would make the indentations on her neck. The marks on the neck were deeper in the front than in the back and appeared to criss-cross in the back. These findings led Dr. Vega to conclude that during the strangulation, the ligature was not tied, but was held in the perpetrator's hands while he was standing behind the *850 victim.[5] Dr. Vega explained that if sufficient pressure is continuously applied to cut off the blood supply to the brain, unconsciousness will ensue in approximately eight to ten seconds; however, application of this pressure must continue for two to four minutes for death to result. Although Dr. Vega did not locate any defensive injuries on the body, he noted that ligature marks were found on the victim's wrists, indicating that she had been bound. There were also bruises on the inside of her right thigh and in the shin area of her right leg indicative of blunt-force trauma. Dr. Vega testified that these bruises could have been caused by a struggle with the perpetrator.[6] Dr. Vega also testified that abrasions on the side of the body indicated that the victim had been dragged.

Oral, anal, and vaginal swabs obtained from the body tested negative for semen. However, Dr. Vega testified that the presence of insect larvae and decomposition of the body impeded his ability to obtain optimal results from such testing. Dr. Vega further testified that he observed damage to the hymen membrane of the child. According to Dr. Vega, this injury was consistent with a pre-mortem loss of tissue due to penetration (i.e., sexual activity). However, Dr. Vega also noted that the larvae present on the victim could have caused the hymenal defect, and it merely appeared that the victim had suffered a premortem injury. Dr. Vega expressed the opinion that, based upon all of the available evidence, the victim had been sexually battered. In support of this conclusion, Dr. Vega explained that case reports and studies have demonstrated that ligature strangulations are most common in female victims and are highly associated with sexual batteries. Dr. Vega also reached his conclusion based upon the state of the victim's clothing when she was found; i.e., she was naked from the waist down. Lastly, Dr. Vega reached his conclusion based upon Smith's statements and DNA testing results which revealed the presence of semen on the back of Carlie's shirt.

An FBI team supervisor testified that the semen sample found on Carlie's shirt matched Smith's DNA profile at all thirteen relevant locations on the DNA strand. The supervisor testified that the likelihood of randomly selecting a DNA profile of a Caucasian male that matched the DNA sample found on the shirt was 1 in 32 quintillion. An FBI hair-and-fiber analyst testified that two head hairs recovered from the yellow station wagon that had been relinquished to the SCSO were consistent with the hair of the victim. Further, seven fibers that were removed from the station wagon were consistent with the fibers contained in the red shirt that Carlie was wearing on the day of her abduction and murder.

Smith chose not to testify on his own behalf and waived his guilt-phase closing statement. The jury convicted Smith of first-degree murder, sexual battery upon a child less than twelve years of age, and kidnapping.

During the penalty phase, the State presented evidence that Smith was on drug ***851** offender probation during the time of these crimes. Dr. Vega testified that he believed Carlie was conscious when the ligature was applied to her throat because there was no evidence of an injury that would have produced unconsciousness. Moreover, the ligature marks on the wrists indicated that she was restrained. Finally, the State offered victim-impact statements written by Carlie's father, mother, stepfather, and a teacher.

Smith presented nineteen penalty-phase witnesses, who provided the following evidence: (1) Smith was extremely helpful to his friends, family, and neighbors; (2) Smith loved animals; (3) Smith's father had a drinking problem; (4) Smith appeared to have a good relationship with his children and loved them; (5) Smith began taking drugs at an early age, and addiction and relapse pervaded his adult life; (6) Smith suffered from chronic back pain and became addicted to prescription drugs; (7) Smith had expressed the desire to cease his drug use; (8) Smith's life began to unravel after he discovered the body of his best friend after a drug overdose; (9) Smith had been hospitalized or admitted to treatment programs for his drug addiction over a period of years and also for depression and suicidal thoughts;[7] (10) Smith had no disciplinary problems and had not engaged in violent acts while he was in jail; (11) Smith sought spiritual counseling; and (12) if Smith received a life sentence, he would be housed at the highest level of security, and it was highly unlikely that his security status would ever change. Smith declined to testify during the penalty phase; however, he requested an opportunity to make an allocution statement before the jury. The trial court declined to permit allocution before the jury unless Smith agreed to be subject to cross-examination by the State. Smith was allowed to provide such a statement during the later *Spencer*[8] hearing.

In rebuttal, the State presented a letter written by Smith to another inmate housed in the Manatee County Jail that had been intercepted. The letter expressed a desire for violence on his brother John and requested that a violent act be committed upon another inmate.

On December 1, 2005, the jury recommended a death sentence by a vote of ten to two. During the *Spencer* hearing, defense counsel explained that he would not call any experts to testify with regard to mental-health mitigation and would only introduce this mitigation through documentary evidence. The trial court inquired of both defense counsel and Smith with regard to this decision. Smith then offered the testimony of Dr. Vega, who testified that when he viewed the photos of Smith, he identified injection marks that were consistent with intravenous drug use. Smith offered an allocution statement to the court which provided, in part:

> After a little time went by, I had called my wife and I had asked to come home, but on February 1st, I found out

> that she didn't want me.... I lost my business, my family, and my self-control was really coming apart fast. I just wanted to die on that day. So I went out, copped a bunch of heroin, cocaine, and ***852** began injecting it hoping I would overdose.... I was so high, I've never experienced a high like that. It was different than any other time. I think it was mixed with something else.
>
> ... I want you to know that I take full responsibility for the crimes. I don't know how this all happened. I was very angry at myself and very high. I knew that getting high was wrong but I could not stop....
>
> I'm not trying to make excuses for what happened, but I really don't remember much about anything on that day after about 4:00 p.m.

On March 15, 2006, the trial judge sentenced Smith to death for the murder. The trial court determined that the State had proven beyond a reasonable doubt the existence of six statutory aggravators: (1) Smith committed the felony while he was on probation, *see* § 921.141(5)(a), Fla. Stat. (2003) (moderate weight); (2) the murder was committed while Smith was engaged in the commission of a sexual battery or kidnapping, *see* § 921.141(5)(d), Fla. Stat. (2003) (significant weight);[9] (3) the murder was committed for the purpose of avoiding lawful arrest, *see* § 921.141(5)(e), Fla. Stat. (2003) (great weight); (4) the murder was especially heinous, atrocious or cruel (HAC), *see* § 921.141(5)(h), Fla. Stat. (2003) (great weight); (5) the murder was cold, calculated, and premeditated (CCP), *see* § 921.141(5)(i), Fla. Stat. (2003) (great weight); and (6) the victim was under twelve years of age, *see* § 921.141(5)(*l*), Fla. Stat. (2003) (great weight).

The trial court concluded that Smith had failed to prove the existence of any statutory mitigating circumstances.[10] The trial court found a total of thirteen non-statutory mitigating circumstances: (1) a long and well-documented history of mental illness (moderate weight); (2) a long and well-documented history of drug abuse (moderate weight); (3) longstanding severe pain from back injuries that contributed to his addiction (little weight); (4) Smith repeatedly sought help for his problems (little weight);[11] (5) Smith was repeatedly denied treatment or received inadequate treatment (little weight); (6) positive qualities, including-(a) skills as a mechanic, plumber, and carpenter; (b) performance of kind deeds for others; (c) love and support with his family; (d) despite his incarceration, attempts to exert a positive influence on family members; (e) artistic skills; and (f) he cares about animals (moderate weight); (7) providing information that led to the resolution of this case (very little weight); (8) his family assisted law enforcement with Smith's knowledge and cooperation (slight weight); (9) demonstration of spiritual growth ***853** (moderate weight); (10) maintenance of gainful employment (slight weight); (11) he is a loving father to his three daughters (moderate weight); (12) remorse (little weight); and (13) he is amenable to rehabilitation and a productive life in prison (little weight).

In imposing a sentence of death, the trial court found that the aggravating circumstances in the case *far* outweighed the mitigating circumstances. The trial court also held that, with the exception of the probation aggravator, "[e]ach one of the aggravating factors in this case, standing alone, would be sufficient to outweigh the mitigation submitted in this case."

This direct appeal followed. The State has filed a cross-appeal, which presents a single claim.

II. DIRECT APPEAL

A. Confrontation—DNA testimony

[1] Smith first asserts that the State violated the Confrontation Clause of the Sixth Amendment to the United State Constitution when it failed to present the biologists who performed the DNA tests on the known sample taken from Smith and the unknown semen sample taken from the victim's shirt. According to Smith, this highly significant forensic evidence required cross-examination of the person(s) who conducted the actual tests. During trial, the State instead presented the testimony of the FBI team supervisor, a forensic DNA examiner who interpreted the data, formulated the conclusions, and prepared the official report.

In evaluating whether a Sixth Amendment violation occurred, it is essential to examine the role of the team supervisor in the evaluation of the semen sample found on the victim's shirt. During a proffer, the supervisor explained her role as the manager of a DNA-analysis team as follows:

> I determine what items of [sic] exams will be conducted on which items. And I have the biologists who actually do[ ] the bench work for me. I then draw the conclusions, interpret their results

> and write the report and then testify, if needed.

When further asked to explain her duties as a team supervisor, she explained:

> I manage the case, the case comes in, it gets assigned to me to be the DNA or serology manager. By that it means that I am in charge of talking with the contributors, determining what items will be worked. Then from there determining what stains will be worked. If the biologists have a question, they, you know, they can always come and talk to me about what exams to do and if further testing needs to be done.

When asked if she interprets the results of the tests conducted by the biologists on her team, the supervisor responded, "Yes, I do. *I draw all the interpretations and all the conclusions* based on their work—an example would be if they test for blood, they will write the results of the test, but then it is my interpretation that says blood is there on that item of evidence." (Emphasis supplied.) She also testified that this protocol is standard for the FBI serology/DNA lab.

The supervisor also explained that the biologists on her team make notes and keep records of every test that they complete on a sample, that the notes become part of the file in the case, and that she uses the notes to reach her conclusions and prepare the final report. The supervisor testified that she was the individual who compared the DNA sample taken from the victim's shirt to that of Smith and determined that these specimens matched at all thirteen relevant locations on the DNA strand. She was also the individual who calculated the probability of selecting ***854** an unrelated individual at random from the pertinent sample group who would have the same DNA profile as that found on the shirt.

In *Crawford v. Washington*, 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004), the United States Supreme Court held that testimonial out-of-court statements that are introduced against a defendant violate the Confrontation Clause unless the declarant is unavailable and the defendant had a prior meaningful opportunity to cross-examine that witness. *See id.* at 68–69, 124 S.Ct. 1354. Smith contends that this case presents the same issue as that confronted in *State v. Johnson*, 982 So.2d 672 (Fla.), *cert. dismissed*, ——U.S. ——, 129 S.Ct. 28, 171 L.Ed.2d 930 (2008), and that *Johnson* should control the outcome here. In *Johnson*, this Court held that a report prepared by a Florida Department of Law Enforcement analyst, which established the illegal nature of the substances that Johnson possessed, was admitted in violation of *Crawford* where the analyst who prepared the report did not testify during trial—instead, the report was introduced through her supervisor. *See* 982 So.2d at 673–74. We concluded that the report was testimonial in nature because the report there was clearly prepared in anticipation of trial and designed to establish an element of the crime. *See id.* at 680. An accusatory document such as the report there should only be admissible where the preparer is unavailable and the defendant had a prior opportunity to conduct cross-examination of the person who prepared the report. *See id.* at 680–81. Similarly, in *State v. Belvin*, 986 So.2d 516, 518 (Fla.2008), we held that admission of a breath-test affidavit violated the Confrontation Clause where the technician who performed the test did not testify during trial. Thus, in each of these cases, *the person who prepared the report of the relevant results did not testify. See also Johnson v. State*, 929 So.2d 4, 6 (Fla. 2d DCA 2005) (noting that the supervisor "did not conduct this particular test, but he was able to testify about the general procedures used by FDLE in preparing such reports").

We have carefully considered both Florida and federal cases, and we conclude that the instant case is distinguishable from both *Johnson* and *Belvin*. Here, it was the supervisor in her capacity as the head of an FBI DNA-analysis team who evaluated the raw test results obtained by the biologists on her team and compared the DNA sample found on the victim's shirt to the sample taken from Smith. She was the person who concluded that Smith's DNA matched the DNA from the shirt and calculated the probability of a random individual from the pertinent sample group submitting a DNA sample that matched the sample obtained from the shirt. Thus, although the FBI team supervisor did not perform each actual test on the material found on the shirt and the buccal swab taken from Smith, she was the person who interpreted the data obtained from the testing and formulated the conclusions that incriminated Smith in the sexual battery. Thus, while the results that the supervisor obtained in this case were indubitably testimonial in nature, she was present at trial and subject to cross-examination with regard to those results.

At least two federal courts have held that the Sixth Amendment Confrontation Clause does not require an expert to have performed the actual laboratory work to permissibly

testify with regard to conclusions that he or she has drawn from those results. In *United States v. Moon*, 512 F.3d 359, 362 (7th. Cir.), *cert. denied*, 555 U.S. 812, 129 S.Ct. 39, 172 L.Ed.2d 19, *and cert. denied*, 555 U.S. 812, 129 S.Ct. 40, 172 L.Ed.2d 19 (2008), the Seventh Circuit Court of Appeals concluded that ***855** "the Confrontation Clause does not forbid the use of raw data produced by scientific instruments, though *the interpretation of* those data may be testimonial." (Emphasis supplied.) Similarly, the Fourth Circuit Court of Appeals held that a Confrontation Clause violation did not occur where the chief toxicologist of a lab reviewed the data from tests conducted by technicians at the lab and issued a report based upon that data where the toxicologist testified at trial with regard to his conclusions. *See United States v. Washington*, 498 F.3d 225, 228 (4th Cir.2007) ("While Dr. Levine did not see the blood sample and did not conduct any of the tests himself, three lab technicians operating under his protocols and supervision conducted the tests and then presented the raw data from the tests to him.").

We find the rationale followed by the federal courts in *Moon* and *Washington* to be persuasive with regard to the challenge raised by Smith. Accordingly, even though the FBI team supervisor did not actually perform the testing to extract DNA samples from the shirt and from Smith, her testimony did not implicate the Confrontation Clause because she, as supervisor, formulated her own conclusions from the raw data produced by the biologists under her supervision and control on her team, and she was subject to cross-examination with regard to those conclusions.[12] Accordingly, relief on this claim is denied.

B. Sexual Battery Opinion Testimony

Smith next asserts that the trial court erred when it permitted Dr. Vega to present opinion testimony that the victim had been sexually assaulted. Smith asserts that to allow Vega to testify with regard to commonly understood facts invaded the province of the jury and created the possibility that the jury would forgo independent analysis of the evidence to determine whether a sexual battery occurred.

We have explained that "[t]he determination of a witness's qualifications to express an expert opinion is peculiarly within the discretion of the trial judge, whose decision will not be reversed absent a clear showing of error." *Ramirez v. State*, 542 So.2d 352, 355 (Fla.1989). Section 90.702, Florida Statutes (2005), provides:

> If scientific, technical, or other specialized knowledge will assist the trier of fact in understanding the evidence or in determining a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify about it in the form of an opinion; however, the opinion is admissible only if it can be applied to evidence at trial.

Section 90.704, Florida Statutes (2005), further provides guidelines for the data upon which an expert may rely to reach an opinion or conclusion: "If the facts or data are of a type reasonably relied upon by experts in the subject to support the opinion ***856** expressed, the facts or data need not be admissible in evidence."

This Court has previously allowed a qualified expert to testify that, based upon the circumstances surrounding the discovery of the victim's body, a sexual battery likely occurred. Specifically, in *Dailey v. State*, 594 So.2d 254, 258 (Fla.1991), this Court addressed and rejected a challenge similar to that raised by Smith here:

> During the penalty phase, the judge qualified Detective Halliday as an expert in homicide and sexual battery and allowed him to testify that because the victim's body was found nude and her clothing scattered, it was highly likely that a sexual battery or attempt had occurred. Dailey claims that this testimony was only common sense and it was error for the court to permit expert testimony on a matter that is within the common understanding of the jury. Halliday, however, had extensive training and experience in homicides and sexual batteries; his expert testimony was helpful in consolidating the various pieces of evidence found at the crime scene. This would not necessarily be within the common understanding of the jury. We find no error.

[2] We conclude that, with the exception of the testimony discussed below, the trial court did not abuse its discretion when it permitted Vega to present opinion testimony as to whether this victim had been sexually battered. During trial, Dr. Vega testified that various aspects of the crime scene were consistent with sexual battery: (1) the victim was discovered naked below the waist; (2) there was evidence of tearing to the victim's hymen, and one possible cause of that tearing could have been penetration during a sexual battery; (3) bruises on the body could have been caused by a struggle with her attacker; and (4) it is more likely that the victim's jeans and underwear were removed before she was dragged to the location where her body was found, rather than pulled off while she was dragged, based upon the uniformity of the abrasions found.

The fact that there were alternative explanations for the condition of the body does not render Dr. Vega's testimony inadmissible. Rather, it was for the jury to decide what weight to accord Dr. Vega's opinion based upon any alternative explanations. *See Delap v. State*, 440 So.2d 1242, 1253–54 (Fla.1983); *see also Dailey*, 594 So.2d at 258 (detective's testimony that it was highly likely a sexual battery occurred was admissible because it "was helpful in consolidating the various pieces of evidence found at the crime scene"). The testimony of Dr. Vega assisted the jurors in deciding *what* happened, not *who* was responsible for the acts perpetrated against the victim. *Cf. Martinez v. State*, 761 So.2d 1074, 1079 (Fla.2000) ("[A] witness's opinion as to the guilt or innocence of the accused is not admissible."). Accordingly, we conclude that Dr. Vega's opinion that the evidence pointed to a sexual battery here was properly admitted.

[3] We agree with Smith, however, that the trial court should have excluded one portion of Dr. Vega's testimony—that ligature strangulation is "highly associated" with sexual battery. Dr. Vega failed to provide any basis whatsoever to support a purported connection or correlation between these two elements, no evidence of such a connection was found here, and Dr. Vega had no research, data, or other material from which he drew this conclusion. Since it is impossible to determine from Dr. Vega's testimony whether the facts or data were of a type reasonably relied upon by experts to support the opinion expressed, it is impossible to evaluate whether Dr. Vega's conclusion is scientifically ***857** supported or even valid. Absent adequate explanation of data, research, or other material from which this conclusion was drawn, we conclude that Dr. Vega should not have been allowed to express the opinion of a purported abstract connection between ligature strangulation and sexual battery.

[4] [5] However, defense counsel did not object to this particular statement, nor did the defense ask Vega to provide more detail with regard to this statement during cross-examination. Accordingly, this challenge was unpreserved. We have held that "[t]he failure to contemporaneously object to a comment on the basis that it constitutes improper ... testimony renders the claim procedurally barred absent *fundamental error*." *Sexton v. State*, 775 So.2d 923, 932 (Fla.2000) (emphasis supplied). To warrant reversal on the basis of fundamental error, "the error must reach down into the validity of the trial itself to the extent that a verdict of guilty *could not have been obtained without the assistance of the alleged error*." *Walls v. State*, 926 So.2d 1156, 1176 (Fla.2006) (emphasis supplied) (quoting *Brown v. State*, 124 So.2d 481, 484 (Fla.1960)). We conclude that Dr. Vega's testimony with regard to the ligature strangulation/sexual battery connection did not rise to the level of fundamental error. As previously discussed, there was a plethora of evidence, including semen that matched the DNA profile of Smith and Smith's confession to his brother that he engaged in "rough sex" with the victim, to support a conviction on this charge. We have no doubt that even if Dr. Vega had not presented this testimony, the jury nonetheless would have convicted Smith of capital sexual battery. Accordingly, no harmful error occurred, and Smith is not entitled to relief on this basis.

C. Statements by John Smith

[6] Smith next asserts that the trial court erred when it refused to suppress statements by his brother, John, which related to comments made by Smith with regard to the sexual battery and murder of the victim. According to Smith, John obtained these statements while he was acting as an agent of the FBI and the SCSO. We disagree.

[7] This Court has stated that "[a] trial court's ruling on a motion to suppress comes to us clothed with a presumption of correctness and, as the reviewing court, we must interpret the evidence and reasonable inferences and deductions derived therefrom in a manner most favorable to sustaining the trial court's ruling." *Connor v. State*, 803 So.2d 598, 605 (Fla.2001) (quoting *Murray v. State*, 692 So.2d 157, 159 (Fla.1997)). Nevertheless, "mixed questions of law and fact that ultimately determine constitutional rights should be

reviewed by appellate courts using a two-step approach, deferring to the trial court on questions of historical fact but conducting a de novo review of the constitutional issue." *Id.* (citing *United States v. Bajakajian*, 524 U.S. 321, 336 n. 10, 118 S.Ct. 2028, 141 L.Ed.2d 314 (1998)).

We have previously addressed the state-agent concept and the constitutional issues presented by the use of state agents:

> In *Massiah* [*v. United States*, 377 U.S. 201, 84 S.Ct. 1199, 12 L.Ed.2d 246 (1964)], the United States Supreme Court announced for the first time that the Sixth Amendment prohibits law enforcement officers from interrogating a defendant after his or her indictment and in the absence of counsel. Consequently, statements "deliberately elicited" from a defendant after the right to counsel has attached and in the absence of a valid waiver are rendered inadmissible and cannot be used against ***858** the defendant at trial. 377 U.S. at 206[, 84 S.Ct. 1199]. Nevertheless, incriminatory statements by a defendant will not be excluded merely because the statements are made after judicial proceedings have been initiated and in the absence of a valid waiver. Rather, law enforcement officials must do something that infringes upon the defendant's Sixth Amendment right.
>
> While the "deliberately elicited" standard is clearly satisfied when the police directly interrogate or question a defendant in some fashion, it also may be satisfied by less direct types of questioning. *See State v. Wooley*, 482 So.2d 595, 596 (Fla. 4th DCA 1986). Usually, determining whether the "deliberately elicited" standard has been met becomes an issue in cases ... where incriminatory statements from a defendant were obtained through persons other than the police who allegedly acted as police informants or surrogates.

Rolling v. State, 695 So.2d 278, 290 (Fla.1997) (footnote omitted). We held in *Rolling* that "a violation of a defendant's right to counsel turns on whether the confession was obtained through *the active efforts of law enforcement* or whether it came to them passively." *Id.* at 291 (emphasis supplied). For example, in *Malone v. State*, 390 So.2d 338, 339 (Fla.1980), an inmate and a detective established a plan whereby the inmate would be transferred to another jail. The inmate would then visit the defendant in civilian clothes and tell the defendant that he had been released, and that the inmate would attempt to retain an attorney for the defendant. *See id.* We held that the trial court erred when it failed to suppress the defendant's statements to the inmate indicating that the defendant had killed the victim and providing directions as to where the body was located. *See id.* In so holding, we concluded that the statements were "*directly elicited* by the State's stratagem *deliberately designed* to elicit an incriminating statement from [the defendant]." *Id.* (emphasis supplied); *cf. Dufour v. State*, 495 So.2d 154, 159 (Fla.1986) (inmate was not a state agent where the inmate approached the authorities on his own initiative and, after speaking with authorities, the inmate was "neither encouraged nor discouraged from obtaining further information").

We conclude that the record supports the determination by the trial court that John Smith was not acting as an agent of the State. First, both statements that John provided to FBI agents are transcribed in the record. Not once in either of these statements do the agents ask John to speak to his brother to determine whether Carlie was alive. While the agents on one occasion asked John, "Have you ever thought about going to see him and asking if he did this," the agents did not further pursue this line of inquiry. It was John who *volunteered* that the only way to persuade Smith to talk would be to engage in trickery. However, in response to this statement by John, the agents *did not* request that he trick Smith in an effort to locate Carlie. The agents encouraged John to contact them further only if he had forgotten something. Further, after the morning meeting with Smith and his mother, when John informed the FBI agent that Smith "came close, but he didn't say anything," the agent did not question John further with regard to that statement.

Second, there is no indication that law enforcement arranged the morning meeting between John, Smith, and their mother. During the hearing on the motion to suppress, an FBI agent testified that after John provided his first statement, he subsequently called and demanded to see his brother. The agent followed the chain of command and eventually informed John that it was not possible to arrange a meeting ***859** with Smith that night because Smith had requested an attorney. SCSO personnel confirmed that the FBI agent was informed that a visit was not possible that night and could only be arranged through the public defender. It was the public defender who eventually requested the visitation between John, his mother, and Smith. Thus, the record reflects that law enforcement *did not* affirmatively arrange the meeting between John and his brother. Instead, law enforcement initially blocked John from seeing Smith and required that he arrange a meeting through the public defender.

Finally, John's actions refute any contention that he was working as a State agent. John misled law enforcement with

regard to the morning meeting with his mother and Smith. John then traveled with his mother to the church where Smith informed him that the victim's body was located, and searched for the body. It appears that John may have been seeking some personal benefit for himself or his family, but not as a state agent. On February 19, 2004, when Smith advised John that it was a "bad idea" for John to search for the body, John replied, "You're probably right, but he [sic] could have sold it for big, big bucks. Your kids could have went to college." Finally, when Smith provided John with a note written in code that explained what happened to the victim's belongings, John did not decipher the code for the State or relinquish the note voluntarily. The State was required to enlist the services of a cryptanalyst to decipher the message.

Based on these record facts, and the absence of any facts to support the agency theory, we conclude that the trial court properly denied suppression of John's statements.

D. Juror Challenges

Smith next challenges the trial court's refusal to strike nine jurors for cause. According to Smith, each of the jurors he sought to strike for cause provided sufficiently equivocal responses to generate a reasonable doubt as to their fitness to serve as jurors in this case.

We have described the duty of an appellate court to review denials of for-cause challenges as follows:

> The test for determining juror competency is whether the juror can lay aside any bias or prejudice and render a verdict solely on the evidence presented and the instructions on the law given by the court. *See* Lusk v. State, 446 So.2d 1038, 1041 (Fla.1984). "In evaluating a juror's qualifications, the trial judge should evaluate all of the questions and answers posed to or received from the juror." Parker v. State, 641 So.2d 369, 373 (Fla.1994). A juror must be excused for cause if any reasonable doubt exists as to whether the juror possesses an impartial state of mind. *See* Bryant v. State, 656 So.2d 426, 428 (Fla.1995). The trial court has broad discretion in determining whether to grant a challenge for cause, and the decision will not be overturned on appeal absent manifest error. Overton v. State, 801 So.2d 877, 890 (Fla.2001).

Kopsho v. State, 959 So.2d 168, 170 (Fla.2007).

[8] We have considered Smith's challenges with regard to each of the nine jurors and agree with Smith that the trial court erroneously denied two for-cause challenges. The first juror whom the trial court should have stricken was juror number 29. [13] Juror 29 indicated that he possessed ***860** knowledge about the case because one of his employment duties was to update the internal computer-information network for the business, and he "broke" news to his staff as this case unfolded. When the trial court asked juror 29 whether he had formed impressions about the case, he replied, "yeah," after which the following dialogue occurred:

> COURT: Okay. Can you tell me what those are?
>
> JUROR: I have a daughter who is the same age that Carlie was and, you know, up until that time, we had allowed her to ride her bike in our neighborhood. Now, with things being what they are, we decided that all of that is now supervised even though she's now 13.
>
> My impression being that, you know, having seen the videotape and everything that came out and that he made the confession, my thought is, okay, well, *he's accused, he probably did it.* Those are the thoughts that are in my mind.
>
> COURT: Do you feel that that impression or opinion that you have ... is so strong that it would always color your decision, would affect your decision in this case? Or do you feel that you can completely set that aside and any decision that you would make in this case as to the guilt or innocence of Mr. Smith as it relates to these charges would be based solely on the evidence that you received here in this courtroom and my instructions to you on the law? Or do you feel that those impressions that you have are going to bleed over and might fill the gaps for you here at the trial?
>
> JUROR: Well, having a great respect for the judicial system, I think I would do my very best to be impartial and understanding that it would have to be based on the evidence. I would have to look at it in a very black and white manner, which is what I would like to consider myself being, a person of integrity who would be able to say that, you know, if this is what the law says, then we have to go by what the law says. So, for me, it would be a matter of integrity.

(Emphasis supplied.) Although juror 29 eventually stated that he would follow the law as a "matter of integrity,"

> we conclude that this statement was totally insufficient to overcome (1) his expressed opinion that **Smith** "probably did it," (2) his employment duty to follow the **Brucia** case and provide updates to his coworkers, and (3) the fact that he changed his behavior towards his daughter based upon the events of the instant case.

[9] We also conclude that the trial court erred when it refused to strike juror 89 for cause. Juror 89 painfully explained that he had been a witness in a capital case where his daughter was murdered and that the experience was "[v]ery, very painful." When questioned further by the State, the prospective juror professed that "time is a great healer," and stated that that he could follow the instructions given by the trial court as well as be fair during the trial. It is apparent from voir dire that this juror sincerely felt that he could be fair and impartial if he were selected to serve on this case. Although we do not question this sincerity, we nonetheless conclude that the trial court should have stricken juror 89 for cause. Despite the earnest expression of beliefs and the good intentions of juror 89, we cannot accept that a parent who *testified as a witness during his own daughter's murder trial* could not be influenced, albeit unintentionally, by such a painful and tragic experience.

[10] [11] Although these two jurors should have been stricken for cause, Smith is *not* entitled to relief because the failures here constituted harmless error. We have explained that "where a trial court has ***861** awarded additional peremptory challenges to a defendant, each such additional challenge is treated as having replaced one that was expended on a juror who should have been but was not struck for cause." *Conde v. State*, 860 So.2d 930, 942 (Fla.2003). Accordingly, "[a] defendant cannot demonstrate prejudice if the trial court grants the same number of additional peremptories as cause challenges that were erroneously denied." *Busby v. State*, 894 So.2d 88, 97 (Fla.2004). The trial court here granted Smith three peremptory challenges in addition to the original ten challenges that he received. Thus, because the failure to strike jurors 29 and 89 constitutes harmless error, Smith is not entitled to relief.

E. Admission of Photographs

[12] [13] [14] In his next challenge, Smith contends that the trial court erroneously admitted photos of the victim's body. The standard of review for the admission of photographs is abuse of discretion. *See Davis v. State*, 859 So.2d 465, 477 (Fla.2003). This Court has explained:

> "The test for admissibility of photographic evidence is relevancy rather than necessity." Crime scene photographs are considered relevant when they establish the manner in which the murder was committed, show the position and location of the victim when he or she is found by police, or assist crime scene technicians in explaining the condition of the crime scene when police arrived. This Court has upheld the admission of autopsy photographs when they are necessary to explain a medical examiner's testimony, the manner of death, or the location of the wounds.
>
> However, even where photographs are relevant, the trial court must still determine whether the "gruesomeness of the portrayal is so inflammatory as to create an undue prejudice in the minds of the jur[ors] and [distract] them from a fair and unimpassioned consideration of the evidence." In making this determination, the trial court should "scrutinize such evidence carefully for prejudicial effect, particularly when less graphic photos are available to illustrate the same point."

Douglas v. State, 878 So.2d 1246, 1255 (Fla.2004) (alterations in original) (citations omitted) (quoting *Pope v. State*, 679 So.2d 710, 713 (Fla.1996); *Czubak v. State*, 570 So.2d 925, 928 (Fla.1990); *Marshall v. State*, 604 So.2d 799, 804 (Fla.1992)). The admission of photographs will also be upheld if they are "corroborative of other evidence." *Czubak v. State*, 570 So.2d 925, 928 (Fla.1990). At the same time, the admission of the photographs of a deceased victim also "must be probative of an issue *that is in dispute*." *Almeida v. State*, 748 So.2d 922, 929 (Fla.1999). Nonetheless, we have also explained that "[t]hose whose work products are murdered human beings should expect to be confronted by photographs of their accomplishments." *Chavez v. State*, 832 So.2d 730, 763 (Fla.2002) (quoting *Henderson v. State*, 463 So.2d 196, 200 (Fla.1985)). Finally, with regard to the impact of gruesome photos upon the jury, this Court has noted:

> It is not to be presumed that gruesome photographs will so inflame the jury that they will find the accused guilty in the absence of evidence of guilt. Rather, we presume that jurors are guided by logic and thus are aware that pictures of the murdered victims do not alone prove the guilt of the accused.

Henderson, 463 So.2d at 200.

The record reflects that the trial court carefully considered each of the photographic exhibits and even requested that the State speak to Dr. Vega with regard to ***862** the photos that he thought would best illustrate his testimony. *See generally* Philmore v. State, 820 So.2d 919, 932 (Fla.2002) (trial court's preliminary screening weighed in favor of admissibility). The trial court also excluded some photos that were proffered by the State. For example, the trial court admitted photo 53 to illustrate the testimony that the victim's wrists were bound, but excluded photos 54 and 55. We consider the challenged photos based upon the purpose for their admission.

[15] *Exhibits 34 and 35A*—These photos depict the body of the victim as she was discovered in the field behind the church. Exhibit 34 is a side view of the lower half of her body. Exhibit 35A, which is clearly the more graphic of the two, is a photo taken from the foot of the body and depicts the victim's spread legs and exposed genitalia. The image reflects decomposition of, and insect larvae on, the body.

One of the disputed issues during trial was whether the victim was sexually battered. Dr. Vega testified that vaginal and anal swabs taken from the body tested negative for sperm. However, Dr. Vega explained that optimal testing was compromised by the presence of larvae and decomposition. These two exhibits were relevant to Dr. Vega's testimony that the genitalia of Carlie had been affected by outside forces, which may have played a role with regard to the lack of evidence of a sexual battery. Therefore, we conclude that the trial court did not abuse its discretion when it admitted these photographs.

[16] [17] [18] [19] *Exhibit 42*—This exhibit depicts the right calf of the victim, which exhibits prominent abrasions. Although animal predation on her ankle is visible, around this injury is larval activity. Dr. Vega utilized this exhibit to support his conclusion that the body had been dragged across a concrete-like surface before it was deposited in the field behind the church. [14] On cross-examination, Dr. Vega agreed that the positioning of the victim's shirt (i.e., pushed up on the right side of her body with her right shirt sleeve pulled down off of her right shoulder) could have been caused by the dragging of the body, but that most likely her jeans and undergarments had been removed before she was dragged based on the uniformity of the abrasions on her legs. The uniformity and smoothness of these abrasions also led Vega to conclude that the dragging occurred while the victim was either unconscious or dead. Accordingly, exhibit 42 was admissible and relevant to illustrate Dr. Vega's testimony with regard to the nature and extent of the injuries, and also to establish the manner of, and circumstances surrounding, the victim's death. *See* Philmore, 820 So.2d at 931 (citing *Jackson v. State*, 545 So.2d 260, 265 (Fla.1989); *Wilson v. State*, 436 So.2d 908, 910 (Fla.1983)); *see also Engle v. State*, 438 So.2d 803, 809 (Fla.1983) (noting that admitted color photos were "especially useful in showing the drag marks on the victim's body"). [15]

***863** [20] *Exhibit 48*—This last contested exhibit depicts the inner thigh of the victim with two surgical incisions. Dr. Vega explained that when he first examined the body, he found what appeared to be a bruise on the inside of her thigh. He incised the skin in two places, and pooling of blood under the skin confirmed that at or around the time of death, she suffered a bruise to her inner thigh. Dr. Vega testified that such a bruise could have been caused by a struggle between the victim and her attacker. Although it is a graphic photo, we conclude that exhibit 48 was relevant to the conclusion of Dr. Vega that the body exhibited signs of blunt-force trauma. *See* Philmore, 820 So.2d at 931 (photographs admissible to illustrate injuries noted by the medical examiner).

Based on the foregoing considerations, we conclude that the trial court did not abuse its discretion with regard to the photographs.

F. Doubling of Aggravating Circumstances

[21] Smith contends that the trial court improperly doubled the aggravating factors that the murder was committed during the course of a sexual battery upon a child under the age of twelve and that the victim of the murder was under the age of twelve. However, the State correctly notes that during trial proceedings, defense counsel contended that improper doubling with the victim-age aggravating circumstances would occur if the trial court also found and applied the aggravating factor that the murder was committed during the course of aggravated child abuse. Thus, defense counsel *never asserted improper doubling based upon the sexual battery charge.* [16] Smith contends for the first time on appeal that the application of the "committed during the course of a sexual battery upon a person under the age of twelve" and the "under the age of twelve" aggravating factors would constitute improper doublers. Therefore, the instant challenge is unpreserved and procedurally barred from appellate consideration. *See* Perez v. State, 919 So.2d 347, 359 (Fla.2005) (holding that for an issue to be preserved for

appeal, the *specific legal argument* or ground to be argued on appeal must have been presented to the lower court), *cert. denied,* 547 U.S. 1182, 126 S.Ct. 2359, 165 L.Ed.2d 285 (2006).

[22] [23] However, even if defense counsel had asserted below that a determination and application of both of these aggravating circumstances would result in improper doubling, the position is without merit. We have previously explained:

> Improper doubling occurs when both aggravators rely on *the same essential feature or aspect of the crime. Provence v. State,* 337 So.2d 783, 786 (Fla.1976). However, there is no reason why the facts in a given case may not support multiple aggravating factors *so long as they are separate and distinct aggravators* and not merely restatements of ***864** each other, as in murder committed during a burglary or robbery and murder for pecuniary gain, or murder committed to avoid arrest and murder committed to hinder law enforcement.

Banks v. State, 700 So.2d 363, 367 (Fla.1997) (emphasis supplied). As a result, "the focus in an examination of a claim of unconstitutional doubling is on the particular aggravators themselves, as opposed to whether different and independent underlying facts support each separate aggravating factor." *Sireci v. Moore,* 825 So.2d 882, 885–86 (Fla.2002).

We conclude that these two aggravators are separate and distinct because one is based exclusively upon the age of the victim and the other is based upon the commission of a totally separate, different, and additional felony at the time of the murder (i.e., sexual battery), regardless of whether it is a child who is the victim of that contemporaneous felony. Indeed, to conclude that the "in the course of a sexual battery" aggravator cannot also be found and applied with the "under the age of twelve" aggravator would produce illogical results. The "committed in the course of a felony" aggravator lists numerous felonies to which it applies, including robbery, burglary, or arson. Under Smith's interpretation, if a child dies while the defendant commits arson or a robbery, *two* aggravators may be found and applied by the trial court, simply because the contemporaneous felony does not provide a specific reference to the age of a child. Conversely, a defendant who sexually batters and murders a child will only be subject to one statutory aggravator. Neither a jury nor a sentencing court should be precluded from considering as an aggravating circumstance that the murder occurred during the commission of a second violent felony simply because the defendant murdered a child and the additional felony includes an age component. Section 921.141(5)(d), Florida Statutes (2004), lists sexual battery—*not* sexual battery upon a child under the age of twelve—as a qualifying crime for application of this aggravating circumstance, and these two aggravators are not "merely restatements of each other" and do not rely upon the "same essential feature or aspect of the crime." *Banks,* 700 So.2d at 367. Accordingly, the trial court did not err when it found and applied both of these aggravators to the murder here. We deny relief on this claim.

G. Constitutionality of Section 921.141(5)(i), Florida Statutes (2004)

Smith next asserts that the statutory aggravating circumstance that the victim of the murder was under twelve years of age is unconstitutional. Smith contends that this circumstance is overinclusive and operates as an automatic aggravator because the statute requires neither that the defendant know the victim's age nor that the State demonstrate that an age-based vulnerability played a role in the homicide. We disagree.

[24] The instant challenge presents an issue of first impression because, although similar challenges have previously been asserted, this is the first case in which such an issue has been properly preserved. *See Stephens v. State,* 975 So.2d 405, 426 (Fla.2007) (appellate counsel not ineffective for failure to challenge the constitutionality of section 921.141(5)(*i*) where trial counsel did not object during trial); *Lukehart v. State,* 776 So.2d 906, 925 (Fla.2000) (constitutional challenge to section 921.141(5)(*i*) procedurally barred where defendant failed to object during trial to the jury instruction on constitutional grounds). The constitutionality of a statutory aggravator is a pure question of law and is, therefore, subject to de novo review. *See* ***865** *Troy v. State,* 948 So.2d 635, 643 (Fla.2006).

[25] We reject Smith's constitutional challenge with regard to this aggravating circumstance. As argued by the State, this aggravator narrows the class of individuals who are subject to the death penalty because only a percentage of murder victims are under twelve years of age. *See Francis v. State,* 808 So.2d

110, 138 (Fla.2001) ("[T]o be constitutional, an aggravating circumstance must 'not apply to every defendant convicted of murder; it must apply only to a subclass of defendants convicted of murder.' " (quoting *Tuilaepa v. California*, 512 U.S. 967, 972, 114 S.Ct. 2630, 129 L.Ed.2d 750 (1994))).

[26] With regard to the contention that section 921.141(5)(*l*) violates due process because it does not require the State to establish that Smith targeted the victim based upon her age, this assertion is also without merit. In *Woodel v. State*, 804 So.2d 316, 325 (Fla.2001), this Court considered the constitutionality of section 921.141(5)(m), which establishes an aggravating circumstance for consideration when the victim of the capital felony is particularly vulnerable due to advanced age or disability. We previously upheld the constitutionality of this statute in *Francis* and further noted in *Woodel* that the finding of this aggravator *is not dependent* on whether the defendant has targeted his or her victim based on the age or disability of the victim. *See* 804 So.2d at 325. We similarly conclude that to find the existence of the "under twelve" aggravating circumstance, the State need not demonstrate that the defendant targeted the victim based upon her age. *See also United States v. Minerd*, 176 F.Supp.2d 424, 447 (W.D.Pa.2001) (rejecting claim that aggravator did not apply because defendant did not select the victim based upon her age where in "the plain language of the statute the aggravator refers to the age or physical characteristics of the victim, and not to whether she was targeted because of those qualities").

[27] Finally, although the "under twelve" aggravator does not expressly require that the victim be "particularly vulnerable," the absence of these words in section 921.141(5)(*l*) does not render this subsection constitutionally deficient. The Legislature has the discretion to deem all children under the age of twelve "vulnerable" and, at times, has even equated young children with vulnerable adults. *See, e.g.*, §§ 39.908(3)(b), Fla. Stat. (2008) ("[r]eporting suspected abuse of a child or a vulnerable adult as required by law"); 393.0673(1), Fla. Stat. (2008) ("The agency may revoke or suspend a license or impose an administrative fine ... if: ... (b) The Department of Children and Family Services has verified that the licensee is responsible for the abuse, neglect, or abandonment of a child or the abuse, neglect, or exploitation of a vulnerable adult."); ch. 85–53, Laws of Fla. (preamble) ("WHEREAS, children are in need of special protection as victims or witnesses in the judicial system as a result of their age and vulnerability ...."); *see also Leon v. State*, 498 So.2d 680, 682 (Fla. 3d DCA 1986) ("All children under the age of twelve are, by definition, children of tender age who are particularly vulnerable to acts of child abuse."). We hold that section 921.141(5)(*l*) is constitutional.

H. Avoid Arrest Aggravating Circumstance

Smith asserts that the trial court erroneously found the existence of the avoid-arrest aggravating circumstance. According to Smith, the only evidence of Smith's motivation were his statements to his brother John, which reflect that at the time of the murder he was under the ***866** influence of drugs and scared and that the killing was an accident. Smith asserts that there may have been several motives for the murder, and that the State failed to establish that the *sole or dominant* motive was to avoid arrest.

[28] [29] [30] The State is required to establish the existence of all aggravating circumstances beyond a reasonable doubt. *See Geralds v. State*, 601 So.2d 1157, 1163 (Fla.1992). Where the evidence in the case is entirely circumstantial, the State can satisfy the burden of proof only if the evidence is "inconsistent with any reasonable hypothesis which might negate the aggravating factor." *Id.* "The standard of review applicable to this issue is whether competent, substantial evidence supports the trial court's finding." *Conde v. State*, 860 So.2d 930, 953 (Fla.2003).

This Court has described what must be demonstrated to satisfy the avoid arrest aggravator:

> The avoid arrest/witness elimination aggravating circumstance focuses on the motivation for the crimes. *See Jennings v. State*, 718 So.2d 144, 151 (Fla.1998). Where the victim is not a police officer, "the evidence [supporting the avoid arrest aggravator] must prove that the *sole or dominant motive* for the killing was to eliminate a witness," and "*[m]ere speculation* on the part of the state that witness elimination was the dominant motive behind a murder *cannot support the avoid arrest aggravator.*" *Consalvo v. State*, 697 So.2d 805, 819 (Fla.1996); *accord Gore v. State*, 706 So.2d 1328, 1334 (Fla.1997). However, *this factor may be proved by circumstantial evidence* from which the motive for the murder may be inferred, without direct evidence of the offender's thought processes. *See Preston [v. State]*, 607 So.2d [404, 409 (Fla.1992)].
>
> In other cases, this Court has found it significant that the victims knew and could identify their killer. While this fact alone is insufficient to prove the avoid arrest aggravator,

> *see* Consalvo, 697 So.2d at 819, we have looked at any further evidence presented, such as whether the defendant used gloves, wore a mask, or made any incriminating statements about witness elimination; whether the victims offered resistance; and whether the victims were confined or were in a position to pose a threat to the defendant. *See* Jennings, 718 So.2d at 151.

Farina v. State, 801 So.2d 44, 54 (Fla.2001) (emphasis supplied). We have also explained that "the avoid arrest aggravator is proper where the victim is transported to another location and then killed." *Zile v. State*, 748 So.2d 1012, 1027 (Fla.1999). Here, the trial court relied upon four factors to conclude that the State had established this aggravator: (1) Smith did not attempt to conceal his identity; (2) Smith removed the victim's belongings, disposed of them, and then dragged her body to a wooded location; (3) Smith initially lied to Detective Davis with regard to his whereabouts on February 1, 2004; and (4) Smith abducted the victim from one location and transported her to another to commit the sexual battery. The trial court ultimately found that

> [Smith's] decision was not based on reaction or instinct, but was motivated *solely* by his decision to eliminate [Carlie] as a witness. No doubt, [Smith] realized that if he were caught and convicted [of] kidnapping and capital sexual battery, he would spend the rest of his life in prison.

[31] We need not address the substance of this claim because we conclude that even if we were to find that competent, substantial evidence does not support ***867** this aggravator as asserted by Smith, any error is harmless. Even if we were to strike this aggravating factor on appeal, the harmless error test would be applied. The trial court expressly stated that any one of the aggravators found (except felony probation) was sufficient to outweigh the mitigating factors due to the totality of the aggravating factors that we uphold and affirm today. There is no possibility that any erroneous finding on this issue affected the sentence imposed. Smith is not entitled to a new penalty phase.

I. CCP Aggravating Circumstance

[32] [33] [34] Smith next contends that the trial court erred when it found that the murder here was cold, calculated, and premeditated. This Court has explained that:

> To support the CCP aggravator, a jury must find "that the killing was the product of cool and calm reflection and not an act prompted by emotional frenzy, panic, or a fit of rage (cold), *and* that the defendant had a careful plan or prearranged design to commit murder before the fatal incident (calculated), *and* that the defendant exhibited heightened premeditation (premeditated), *and* that the defendant had no pretense of moral or legal justification."

Buzia v. State, 926 So.2d 1203, 1214 (Fla.2006) (quoting *Jackson v. State*, 648 So.2d 85, 89 (Fla.1994)). We have previously recognized that "[s]imple premeditation of the type necessary to support a conviction for first-degree murder is not sufficient to sustain a finding that a killing was committed in a cold, calculated, and premeditated manner." *Holton v. State*, 573 So.2d 284, 292 (Fla.1990). Moreover, "[t]he premeditation of a felony cannot be transferred to a murder which occurs in the course of that felony for purposes of [CCP]. What is required is that the murderer fully contemplate effecting the victim's death." *Geralds*, 601 So.2d at 1163 (quoting *Hardwick v. State*, 461 So.2d 79, 81 (Fla.1984)). CCP may be established by such facts as "advance procurement of a weapon, lack of resistance or provocation, and the appearance of a killing carried out as a matter of course." *Swafford v. State*, 533 So.2d 270, 277 (Fla.1988).

Here, the trial court based its finding of this aggravator on two purely circumstantial factors: (1) the kidnapping and sexual battery were deliberate acts planned by Smith; and (2) Dr. Vega testified that death by strangulation can take minutes to effect, and during the time that Smith held the ligature around the victim's neck, Smith had adequate time to reflect. According to the trial court, "as each moment passed, he made a conscious choice to slowly and methodically deprive her body of the blood and air necessary to sustain life." Because the facts of this case support another reasonable hypothesis that is inconsistent with this aggravator, we conclude that the State failed to establish beyond a reasonable doubt that this murder was cold, calculated, and premeditated.

The facts reflect that the abduction of Carlie was a spontaneous decision. Smith confided to his brother, John, on multiple occasions that he had never met the victim before. Accordingly, Smith could not have known that Carlie would be walking home alone that day without permission.

Although Smith may have kidnapped her from the car wash with the intent to sexually batter her, there is no indication that at the time of the abduction he was planning to kill her. *Cf. Geralds*, 601 So.2d at 1163–64 (CCP aggravator rejected where defendant planned to burglarize the victim's home but evidence supported a reasonable hypothesis that defendant killed the victim in sudden anger). In the instant case, an equally if not more plausible explanation for the killing is that after ***868** Smith battered this child, he panicked due to what he had done and he therefore strangled her. The latter scenario fails to present the careful and calm reflection that is required for the killing to qualify as "cold." *See Holton*, 573 So.2d at 292 (rejecting CCP aggravator when "[t]he strangulation murder occurred during another crime, sexual battery, and could have been a spontaneous act in response to the victim's refusal to participate in consensual sex"); *Harmon v. State*, 527 So.2d 182, 188 (Fla.1988) (rejecting CCP aggravator when murder happened during the commission of a robbery and the defendant became frightened when the victim said his name).

Moreover, while the ligatures used to bind and strangle the victim were never found, the record reflects that at the time of the abduction, Smith was not driving his own vehicle. Thus, when he made what appears to be the spontaneous decision to kidnap Carlie, he obtained whatever was available within the vehicle to bind her and eventually kill her. Thus, unlike the cases that the State relies upon in support of the CCP aggravating circumstance, it appears that Smith did not procure the murder weapon in advance. *See Ibar v. State*, 938 So.2d 451, 458 (Fla.2006) (defendant went to his house and retrieved a firearm before travelling to the locations where the murders occurred); *Hertz v. State*, 803 So.2d 629, 635 (Fla.2001) (evidence reflected that at the time the defendant approached the victims' home, he and his codefendants were armed with guns); *cf. Geralds*, 601 So.2d at 1164 (no CCP where the defendant used a knife from the victim's kitchen rather than one brought to the scene).

Moreover, unlike the cases upon which the State relies, there is no clear indication from the record that Smith had a window of time in which he "coldly and calmly decide[d] to kill." *Ibar*, 938 So.2d at 473–74 (CCP proper where the victims were bound and one of the victims was beaten for more than twenty minutes before the murder); *Hertz*, 803 So.2d at 650 (victims were bound and gagged for two hours before the murders); *Wike v. State*, 698 So.2d 817, 822 (Fla.1997) (after sexually battering one of the victims, the defendant drove both victims to another location and forced them walk into the woods, where he slit their throats). In light of the foregoing, we hold that competent, substantial evidence does not support the finding of this aggravator.

[35] [36] When this Court strikes an aggravating factor on appeal, the harmless error test is applied to determine whether there is a reasonable possibility that the error affected the sentence. *See Jennings v. State*, 782 So.2d 853, 863 n. 9 (Fla.2001); *see also Douglas v. State*, 878 So.2d 1246, 1268 (Fla.2004) ("Striking [an] aggravator necessitates a harmless error analysis."). We conclude that the erroneous finding of the CCP aggravator here was harmless because the trial court expressly stated in the sentencing order that any one of the aggravators found (except the felony probation aggravator) was sufficient to outweigh the mitigating circumstances found in this case and due to the other applicable aggravating factors. There is no reasonable possibility that the erroneous finding of CCP affected the sentence that was imposed by the trial court. Accordingly, Smith is not entitled to a new penalty phase.

J. Testimony of Smith's Mother and Sister

Both Smith's sister and mother expressed a desire to testify during the penalty phase. Defense counsel proffered that Smith's mother could testify to numerous elements of mitigation, and Smith's sister sought to read a letter that she had written. The State countered that such ***869** testimony or statements would "open the door" to cross-examination about the fact that Smith allegedly had sexual contact with his sister when she was thirteen and he was seventeen, and that the mother sent Smith to live with his aunt when she learned from her daughter about the sexual contact. The trial court agreed that if these witnesses were called, they would be subject to cross-examination to "show the entire picture" with regard to Smith's prior actions. Smith ultimately chose not to present either witness. Smith now contends that the ruling of the trial court constituted an abuse of discretion because, had the sister and mother been cross-examined with regard to the alleged sexual conduct between Smith and his sister, the unfair prejudice of this testimony would have substantially outweighed its probative value. *See* § 90.403, Fla. Stat. (2004).

[37] [38] Trial court rulings on evidentiary issues are reviewed under the abuse of discretion standard. *See Salazar v. State*, 991 So.2d 364, 373 (Fla.2008), *cert. denied*, 555 U.S. 1187, 129 S.Ct. 1347, 173 L.Ed.2d 614 (2009). The

State correctly notes that during the trial proceeding, defense counsel contended that the evidence of sexual conduct between Smith and his sister should not be disclosed because it was irrelevant to the instant proceeding. For the first time on appeal, Smith now contends that while this evidence may be relevant, the relevance is far outweighed by its prejudicial value and therefore should be excluded pursuant to section 90.403, Florida Statutes. Accordingly, this challenge in unpreserved and, therefore, procedurally barred for appellate consideration. *See Perez*, 919 So.2d at 359.

[39] However, even if defense counsel had preserved this challenge below, we conclude that Smith would not be entitled to relief because the trial court did not abuse its discretion. This Court has explained that

> the State "shall be provided a full opportunity to rebut the existence of mitigating factors urged by [the defendant] ... and to introduce evidence tending to diminish their weight if they cannot be rebutted." We usually allow the State to rebut the mitigation offered by the defense, and we allow the defense to offer evidence to rebut aggravation proposed by the State.

Kormondy v. State, 845 So.2d 41, 51–52 (Fla.2003) (citation omitted) (quoting *Ellis v. State*, 622 So.2d 991, 1001 (Fla.1993)).

During the penalty phase, Smith presented the testimony of various witnesses who testified positively as to Smith's relationship with his family. Smith's aunt testified that Smith is her godchild; that he was more of a son to her than a nephew; that he played with her son every day as the two grew up; that he attended family functions; that he was the best man at her son's wedding; and that when her husband passed away, Smith helped her, and she could not have made it through that time without him. Smith's cousin testified that she and Smith were more like siblings than cousins because they did everything together. She testified that Smith was always around to help her mother after her father died. The cousin also identified photographs of Smith with his sister feeding a baby lamb and Smith with other family members at his sister's communion.

This evidence was presented to demonstrate that Smith was a loving family member and that he maintained positive relationships with them. We agree with the State that this evidence "opened the door" for the presentation of evidence that rebutted the portrayal of Smith as an ideal family member. Indeed, to prohibit cross-examination of Smith's mother and sister would operate to deceive the jury. The ***870** defense does not dispute that Smith engaged in sexual conduct with his then thirteen-year-old sister and was subsequently forced to leave his home and live with his aunt as a result of this conduct. If the court had permitted Smith to present witnesses to demonstrate that Smith was a good brother, nephew, and cousin, but then protected those witnesses from cross-examination with regard to the darker elements of Smith's childhood, the State would have been erroneously precluded from rebutting mitigation evidence. *See Kormondy*, 845 So.2d at 51–52. This also would have presented a skewed portrait of Smith to the jury. Therefore, although the trial court's decision not to allow Smith's mother or sister to testify without being subject to cross-examination may have strategically precluded some mitigation evidence from being presented during the penalty phase, we cannot conclude that the trial court's evidentiary ruling on this sensitive issue constituted an abuse of discretion.

K. Allocution Before the Jury

[40] During the penalty phase, the jury submitted the following question to the trial court: "Is it within the realm of possibility to consider a sentence based on allocution to the crime?" Smith prepared a written statement and asked to make a statement of allocution to the jury in response to its question without being subject to cross-examination by the State. The trial court denied this request, and Smith challenges this ruling.

Smith concedes that the Court rejected a similar claim in *Troy v. State*, 948 So.2d 635 (Fla.2007); however, he notes one factual difference—here, the jury was sophisticated enough be aware of allocution and may have expected Smith to make a statement of remorse. According to Smith, when the jurors did not receive allocution, they may have believed that Smith had no remorse for what he had done. Smith contends that the ruling of the trial court deprived him of a fair penalty phase and due process of the law.

In *Troy v. State*, we held that the trial court did not err when it denied a capital defendant the opportunity to provide an allocution statement before the jury without being subject to cross-examination. In our analysis, we explained:

> *Spencer* outlines the proper sentencing phase procedure to be followed in death cases; it also emphasizes the role of

the circuit judge over the trial jury in the decision to impose a sentence of death:

> First, the trial judge should hold a hearing to: a) give the defendant, his counsel, and the State, an opportunity to be heard; b) afford, if appropriate, both the State and the defendant an opportunity to present additional evidence; c) allow both sides to comment on or rebut information in any presentence or medical report; and d) *afford the defendant an opportunity to be heard in person.* Second, after hearing the evidence and argument, the trial judge should then recess the proceeding to consider the appropriate sentence. If the judge determines that the death sentence should be imposed, then, in accordance with section 921.141, Florida Statutes ... the judge must set forth in writing the reasons for imposing the death sentence. Third, the trial judge should set a hearing to impose the sentence and contemporaneously file the sentencing order. Such a process was clearly not followed during these proceedings.
>
> ....

615 So.2d at 690–91 (emphasis added)....

In *Johnson v. State*, 608 So.2d 4 (Fla.1992), this Court rejected the defendant's ***871** claim that a videotape he made expressing remorse should have been shown to the jury. *Id.* at 10. At trial, the trial judge denied this request, agreeing with the prosecution that it would enable the defendant to escape cross-examination by not testifying in person. *Id.* This Court agreed with the trial court's decision to exclude the videotape, concluding,

> "All witnesses are subject to cross-examination for the purpose of discrediting them by showing bias, prejudice or interest." *Jones v. State*, 385 So.2d 132, 133 (Fla. 4th DCA 1980). Johnson could have made this plea to the judge, the sentencer, and we find no error in refusing to let the jury hear his self-serving statement.

Johnson, 608 So.2d at 10. We reaffirm our holding in *Johnson* here.

Troy, 948 So.2d at 648–49.

In the instant case, consistent with *Troy*, Smith was allowed to make an allocution statement during the *Spencer* hearing. Accordingly, the trial court properly denied Smith's request, and relief on this claim is not warranted. [17]

L. Constitutionality of Section 775.051, Florida Statutes (2004)

Under this challenge, Smith contends that section 775.051, Florida Statutes (2004), which abolished the defense of voluntary intoxication under certain circumstances, violates due process. [18] Smith asserts that section 775.051 is fundamentally different from the voluntary-intoxication-defense abolishment statute upheld by the United States Supreme Court in *Montana v. Egelhoff*, 518 U.S. 37, 116 S.Ct. 2013, 135 L.Ed.2d 361 (1996), because the Montana statute removed voluntary intoxication across the board from the mens rea inquiry, thereby redefining the mental state for the committed offense. On the other hand, the Florida statute precludes the defense based upon the substance consumed. Thus, according to Smith, section 775.051 does not amount to a redefinition of the mental-state element of specific-intent criminal offenses as did the Montana statute. Rather, the statute unconstitutionally prohibits most, but not all, voluntarily intoxicated defendants from introducing evidence to negate the requisite mental state for commission of an offense.

In *Egelhoff*, the United States Supreme Court upheld a statute, *see* 518 U.S. at 56, 60, 116 S.Ct. 2013, which provided that voluntary intoxication "may not be taken into consideration in determining the existence of a mental state which is an element of [a criminal] offense." ***872** 518 U.S. at 39–40, 116 S.Ct. 2013 (plurality opinion). In reaching this determination, the plurality noted that under old English and early American law, defendants were precluded from arguing that, due to intoxication, they could not have possessed the mens rea required to commit the crime. *See id.* at 44, 116 S.Ct. 2013. The plurality noted that an exception to this common-law rule had been created in more recent years: "[B]y the end of the 19th century, in most American jurisdictions, intoxication could be considered in determining whether a defendant was capable of forming the specific intent necessary to commit the crime charged." *Id.* at 47, 116 S.Ct. 2013.

However, the plurality concluded that this exception had not become so deeply rooted in the tradition or conscience of our society as to qualify as a fundamental principle of justice, such that the decision of a state to abolish the exception would be "subject to proscription under the Due Process Clause." *Id.* at 43, 116 S.Ct. 2013 (quoting *Patterson v. New York*, 432 U.S. 197, 201–02, 97 S.Ct. 2319, 53 L.Ed.2d 281 (1977)).

Accordingly, the plurality held that "[t]he people of Montana have decided to resurrect the rule of an earlier era, disallowing consideration of voluntary intoxication when a defendant's state of mind is at issue. Nothing in the Due Process Clause prevents them from doing so." *Id.* at 56, 116 S.Ct. 2013.

As with the allocution issue, this Court in *Troy* considered and rejected a claim that section 775.051 violates due process. In *Troy*, we adopted the analyses of two Florida district courts that rejected constitutional challenges to section 775.051 and relied on *Egelhoff* in their analyses:

> In Florida, two appellate decisions have addressed and upheld the constitutionality of section 775.051. *See Barrett v. State*, 862 So.2d 44 (Fla. 2d DCA 2003); *Cuc v. State*, 834 So.2d 378 (Fla. 4th DCA 2003). In *Cuc*, the defendant alleged that she was denied her right to due process of law under section 775.051 because she was not allowed to raise a defense of voluntary intoxication. 834 So.2d at 378. In affirming her conviction, the Fourth District noted that the statute at issue in Florida was similar to the one upheld in *Egelhoff*. *Id.* ...
>
> In the case before the Second District, Barrett was convicted of first-degree murder; on appeal, he argued that section 775.051 "improperly excludes a class of relevant evidence and lessens the State's burden to prove his guilt beyond a reasonable doubt." *Barrett*, 862 So.2d at 45. Barrett conceded that the Florida statute was similar to the statute upheld in *Egelhoff*, but he argued that Florida's Constitution provides stronger due process protections than does the United States Constitution. *Id.* at 47, 518 U.S. 37, 116 S.Ct. 2013. The Second District disagreed, holding that "there is no basis to conclude that the Florida Constitution provides greater protections to Barrett than does the United States Constitution in relation to the elimination of voluntary intoxication as a defense to a criminal offense." *Id.* at 48, 518 U.S. 37, 116 S.Ct. 2013.
>
> The *Barrett* court also considered whether section 775.051 effects a "substantive change to the mens rea element of criminal conduct or is simply a rule of evidence." *Id.* at 48. The court found that, based on this Court's precedent in *State v. Garcia*, 229 So.2d 236, 238 (Fla.1969), and *Caple v. Tuttle's Design-Build, Inc.*, 753 So.2d 49, 53 (Fla.2000), the change is substantive, in line with *Egelhoff*:
>
> > Substantively, section 775.051 addresses the mens rea element of criminal offenses by stating that voluntary intoxication is not a defense to criminal ***873** conduct and cannot be used to show that the defendant lacked the specific intent to commit a crime. This is consistent with the State's interest in making persons who voluntarily become intoxicated responsible for their behavior. *See Egelhoff*, 518 U.S. at 49–50, 116 S.Ct. 2013. However, the statute also addresses procedural matters by excluding, at trial, evidence of voluntary intoxication.
> >
> > Although section 775.051 has both substantive and procedural elements, this does not render the statute constitutionally infirm when the procedural provisions "are intimately related to the definition of those substantive rights." *See Caple*, 753 So.2d at 54. As was the case with the Montana statute under Justice Ginsburg's analysis, section 775.051 effects a substantive change in the definition of mens rea, and it is not simply an evidentiary rule. *See Egelhoff*, 518 U.S. at 57–60, 116 S.Ct. 2013.
>
> *Barrett*, 862 So.2d at 48 (parallel citations omitted). We find the reasoning and conclusions in *Cuc* and *Barrett* to be sound and we adopt that reasoning as our own.

948 So.2d at 644–45. Thus, we have previously determined that section 775.051 does not violate due process.

[41] To the extent Smith contends that the statute violates due process (or possibly equal protection) because it allows individuals who ingest illicit substances that are not listed in chapter 893, Florida Statutes (2004), to utilize a defense of voluntary intoxication, this challenge is unpreserved and, therefore, procedurally barred. *See Perez*, 919 So.2d at 359. The record reflects that Smith did not assert this specific legal challenge before the trial court. The only disparate-treatment contention that Smith argued below was that the statute violates equal protection because it allows a voluntary intoxication defense to be utilized when the person ingests a controlled substance pursuant to a medical prescription, but does not allow the defense for individuals who ingest drugs without a valid prescription. An identical equal-protection claim was decided adversely to Smith in *Troy*. *See* 948 So.2d at 645. Accordingly, relief is not warranted on this claim.

M. Challenges pursuant to Ring v. Arizona

In *Ring v. Arizona*, 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002), the United States Supreme Court invalidated sentencing schemes where the trial court was responsible for (1) the finding of an aggravating circumstance which

rendered a defendant eligible for the death penalty, and (2) the ultimate decision to impose a death sentence. According to Smith, Florida constitutes a "judge-sentencing" state and, therefore, its sentencing scheme violates the Sixth Amendment.

Smith's claim is without merit. This Court has repeatedly held that Florida's capital sentencing scheme does not violate the United States Constitution under *Ring*. *See, e.g.*, *Gore v. State*, 964 So.2d 1257, 1276–77 (Fla.2007); *Hannon v. State*, 941 So.2d 1109, 1147 (Fla.2006); *Jones v. State*, 845 So.2d 55, 74 (Fla.2003). Further, in *Owen v. Crosby*, 854 So.2d 182, 193 (Fla.2003), this Court rejected a *Ring* challenge where the trial court found as an aggravating circumstance that the defendant committed the murder during the commission of a burglary or sexual battery. In reaching this determination, the Court noted that this particular aggravator "involve[s] circumstances that were submitted to a jury and found to exist beyond a reasonable doubt." *Id.*

*874 In the instant case, a jury convicted Smith of sexual battery upon a child less than twelve years of age and kidnapping. Since the jury determined beyond a reasonable doubt that Smith committed these crimes, Smith's *Ring* challenge is without merit on this additional basis. Accordingly, this claim is denied.

N. Sufficiency

[42] [43] Even if a defendant has not specifically presented a sufficiency challenge, this Court has an independent obligation to review the record to determine whether sufficient evidence exists to support a conviction. *See Overton v. State*, 801 So.2d 877, 905 (Fla.2001); Fla. R.App. P. 9.142(a)(6). Here, the record evidence is sufficient to affirm Smith's convictions on each of the charged crimes. Carlie's kidnapping was captured on a video recording and, during trial, her stepfather testified that neither he nor her mother gave anyone permission to take custody of her on February 1, 2004. Smith subsequently confessed that he forced the victim to engage in sexual conduct and that he strangled her after "rough sex." Smith informed his brother John where victim's body could be found, and John led law enforcement agents to that location. Hair and fibers consistent with that of the victim were found in the yellow station wagon which was in Smith's borrowed possession on the night of the crimes. The child was found naked from the waist down, and semen which was found on the back of the shirt she was wearing at the time of her abduction and murder contained DNA that matched Smith. Finally, the record reflects that Smith admitted to his brother that he dragged the body of Carlie into the field behind the church and disposed of her personal belongings in four different dumpsters.

O. Proportionality

[44] [45] [46] [47] As with sufficiency of the evidence, even if a defendant does not challenge the proportionality of the death sentence, this Court has an independent obligation to review each case to ensure that death is the appropriate punishment. *See Philmore v. State*, 820 So.2d 919, 939 (Fla.2002); Fla. R.App. P. 9.142(a)(6). When we conduct a proportionality analysis, the totality of the circumstances should be considered and the matter should be considered in relation to other capital cases. *See Nelson v. State*, 748 So.2d 237, 246 (Fla.1999). This comparison, however, is not to be made as to the number of aggravating and mitigating circumstances found. *See Porter v. State*, 564 So.2d 1060, 1064 (Fla.1990). Additionally, the death penalty is "reserved only for those cases where the most aggravating and least mitigating circumstances exist." *Terry v. State*, 668 So.2d 954, 965 (Fla.1996).

In the instant matter, the jury recommended the death penalty by a vote of ten to two. The trial court found this recommendation appropriate after weighing the statutory aggravating circumstances with the mitigating circumstances. In imposing the death sentence, the trial court found five statutory aggravators (not including the stricken CCP aggravator): (1) Smith committed the felony while he was on probation (moderate weight); (2) the murder was committed while Smith was engaged in the commission of a sexual battery or kidnapping (significant weight); (3) the murder was committed for the purpose of avoiding lawful arrest (great weight); (4) HAC (great weight); and (5) the victim was under twelve years of age (great weight). The trial court also found thirteen nonstatutory mitigating circumstances.

*875 After reviewing the totality of the circumstances and considering the striking of the CCP aggravating circumstance, we conclude that the instant matter is proportional based on other capital cases in which this Court has upheld the death penalty. We have repeatedly affirmed the death penalty where the defendant has kidnapped, sexually battered, and murdered a child victim. In *Davis v. State*, 698 So.2d 1182 (Fla.1997), this Court affirmed the imposition of

a death sentence where the defendant entered the home of his ex-girlfriend, removed the ex-girlfriend's eleven-year-old daughter, transported her to his trailer, digitally penetrated her, and then strangled her. *See id.* at 1186–87. In aggravation, the trial court found that Davis was under a sentence of imprisonment; the murder was committed in the course of a kidnapping and sexual battery; the murder was committed for the purpose of avoiding arrest; and HAC. *See id.* at 1187. The trial court found one statutory mitigating circumstance —that the murder was committed while Davis was under the influence of extreme mental or emotional disturbance—and accorded this factor great weight. *See id.* The trial court also found a number of nonstatutory mitigating circumstances:

> Davis was capable of accepting responsibility for his actions and had shown remorse for his conduct and offered to plead guilty; that he had exhibited good behavior while in jail and prison; that he had demonstrated positive courtroom behavior; that he was capable of forming positive relationships with family members and others; that he had no history of violence in any of his past criminal activity; that he did not plan to kill or sexually assault the victim when he began his criminal conduct; that he cooperated with police, confessed his involvement in the crime, did not resist arrest, and did not try to flee or escape; that he had always confessed to crimes for which he had been arrested in the past, accepted responsibility, and pled guilty; that he had suffered from the effects of being placed in institutional settings at an early age and spending a significant portion of his life in such settings; and that Davis obtained his GED while in prison and participated in other self-improvement programs.

Id.; *see also* *Chavez v. State*, 832 So.2d 730, 767 n. 44 (Fla.2002) (death sentence affirmed where defendant kidnapped, sexually battered, and strangled nine-year-old victim; in aggravation, trial court found HAC, the murder was committed while the defendant was engaged in a kidnapping, and the murder was committed to avoid lawful arrest; trial court found six mitigating circumstances but held that "the strength of the aggravating circumstances in this case are so overwhelming that they make the mitigating circumstances appear insignificant by comparison"); *Carroll v. State*, 636 So.2d 1316, 1319 (Fla.1994) (death sentence affirmed where defendant sexually battered and strangled ten-year-old victim; in aggravation, trial court found HAC, the murder was committed while the defendant was engaged in a sexual battery, and the defendant had previously been convicted of two prior violent felonies; trial court found no statutory mitigation but found that the defendant suffered from "some possible mental abnormalities and has an antisocial personality").

Here, the trial court found the same aggravators as in *Davis* plus the "victim under the age of twelve" aggravator.[19] ***876** Particularly compelling in this proportionality analysis is the trial court's finding with regard to HAC:

> Carlie endured unspeakable trauma, which began at the time of her kidnapping at Evie's. Because of the surveillance cameras, Carlie's abduction was literally caught on tape. The image of the Defendant taking her by the arm and leading her away will, no doubt, forever be etched in our minds. Because of the forensic evidence, we know the truth of what Carlie experienced thereafter.
>
> From Evie's, Carlie was transported to at least one location, possibly more, and subjected to demeaning and cruel acts including the binding of her hands, the removal of her clothes and being forced to engage in various sex acts by a man nearly four times her age and double her size. During those acts, Carlie was unable to fight back. At eleven years of age, there is no doubt she was aware of her dire predicament and that she had little, if any, hope of survival.
>
> Any hope of survival Carlie may have clung to faded once the Defendant placed the ligature around her neck. At this time, Carlie was conscious, but clearly in no position to fight back. Perhaps worst of all, Carlie knew she was going to die. Although this Court may never know exactly how long it took for Carlie to be rendered unconscious once the defendant placed the ligature around her neck, this child had already suffered unspeakable terror and physical suffering at the Defendant's hands.

The trial court here found no statutory mitigating circumstances. While the trial court did find thirteen nonstatutory mitigating circumstances, a number of them

were accorded little weight. As in *Chavez*, the mitigation found by the trial court in this case was insignificant in comparison to the established aggravation. Accordingly, we hold that the imposition of death for the murder of Carlie is proportionate, and we affirm the sentence.

III. CROSS–APPEAL

The State filed a pretrial motion seeking a determination that Smith's 1993 aggravated battery charge should be used to establish the "prior violent felony conviction" aggravating circumstance. The trial court relied upon this Court's decision in *Garron v. State*, 528 So.2d 353 (Fla.1988), and held that this aggravator did not apply because Smith pled no contest to the aggravated battery charge and adjudication was withheld. In *Garron*, we struck the "prior violent felony" aggravator under identical circumstances. Our analysis provided:

> In *McCrae v. State*, 395 So.2d 1145 (Fla.1980), *cert. denied*, 454 U.S. 1041, 102 S.Ct. 583, 70 L.Ed.2d 486 (1981), this Court upheld that aggravating factor because there was a guilty plea but no adjudication of guilt. In that case we recognized that a valid guilty plea should be considered a "conviction" for capital sentencing proceedings. The Court reasoned that the guilty plea is more than a confession; it is a conviction. In the present case, however, the prior "conviction" lacks a guilty plea. Under the *McCrae* analysis, *the plea of guilty is an absolute condition precedent before the lack of adjudication can be considered a conviction.* Here, appellant pled nolo contendere to the aggravated assault charge and received no adjudication of guilt. It does not follow from *McCrae* that a plea of nolo contendere amounts to either a confession of guilt or a "conviction" for purposes of capital sentencing proceedings. A nolo plea means "no contest," not "I confess." It simply means that the defendant, for whatever reason, chooses not to contest ***877** the charge. He does not plead either guilty or not guilty, and it does not function as such a plea. None of the factors which go toward evidencing a conviction are present in this case, therefore, the first aggravating factor must fail.

528 So.2d at 360 (emphasis supplied) (citation omitted).

The State contends on cross-appeal that the ruling of the trial court was erroneous because *Garron* was statutorily abrogated by the Legislature's 1993 adoption of a broader definition for the word "conviction" as that term is used in chapter 921, Florida Statutes (2008), which governs sentencing. In support of this contention, the State relies upon *Montgomery v. State*, 897 So.2d 1282, 1286 (Fla.2005), in which this Court held, in the context of sentencing guidelines, that the statutory definition of "conviction" in section 921.0021, Florida Statutes (2002), includes those felonies to which a defendant pled no contest, regardless of whether adjudication was withheld.

A review of the legislative history of the definition of "conviction" leads us to conclude that the Legislature did *not* intend for the definition in section 921.0021, Florida Statutes (2003), to apply to the "prior violent felony conviction" aggravator. *See generally* § 921.002(1), Fla. Stat. (2008) ("The provision of criminal penalties and of limitations upon the application of such penalties is a matter of predominantly substantive law and, as such, is a matter properly addressed by the Legislature."); *State v. J.M.*, 824 So.2d 105, 109 (Fla.2002) ("[L]egislative intent is the polestar that guides a court's statutory construction analysis.").

In 1993, the Florida Legislature adopted section 921.0011(2), Florida Statutes (2008), which defined "conviction" as "a determination of guilt that is the result of a plea or a trial, regardless of whether adjudication is withheld." *See* ch. 93–406, § 9, at 2924, Laws of Fla. The session law provided that the definitions under section 921.0011 applied to the *entire chapter*. *See id.* ("921.0011 Definitions—As used in this chapter...."). Chapter 921, entitled "Sentence," included section 921.141(5)(b), which provides as an aggravating circumstance that "[t]he defendant was previously convicted of another capital felony or of a felony involving the use or threat of violence to the person." Thus, under the plain language of section 921.0011, the 1993 definition of "conviction" applied to section 921.141(5)(b), and a plea, regardless of whether adjudication was withheld, constituted a conviction.

In 1997, section 921.0011 was repealed and renumbered as section 921.0021. *See* ch. 97–194, §§ 1, 4, at 3674–75, Laws of Fla. While renumbered, section 921.0021 still indicated in 1997 that it applied to the whole of chapter 921. *See* ch. 97–194, § 4, at 3675, Laws of Fla. ("As used in this chapter ... (2) "Conviction" means a determination of guilt that is the result of a plea or a trial, regardless of whether adjudication is withheld."). In 1998, however, the Legislature expressly limited this section *to noncapital felonies:*

> As used in this chapter, for any felony offense, *except any capital felony,* committed on or after October 1, 1998, the term ... (2) "Conviction" means a determination of guilt that is the result of a plea or a trial, regardless of whether adjudication is withheld.

Ch. 98–204, § 3, at 1937–38, Laws of Fla. (emphasis supplied). In *Montgomery v. State,* 897 So.2d 1282, 1285–86 (Fla.2005), we subsequently held that, under the statutory definition of "conviction" provided in section 921.0021, a no contest plea with adjudication withheld constituted a conviction *for purposes of the sentencing guidelines,* ***878** which do not apply to capital felonies.

[48] The specific decision of the Legislature in 1998 to limit section 921.0021 to *noncapital felonies* demonstrates that it did *not* intend for the broader definition of the word "conviction" to apply to the "prior violent felony" aggravating circumstance in capital cases. *See State v. Mark Marks, P.A.,* 698 So.2d 533, 541–42 (Fla.1997) ("When the legislature amends a statute, we presume it intended the statute to have a different meaning than that accorded it before the amendment."). Accordingly, the trial court properly denied the State's request to utilize Smith's 1993 aggravated battery charge to establish the "prior violent felony" aggravator.

IV. CONCLUSION

Based upon the foregoing analyses and considerations, we affirm Smith's convictions and sentences.

It is so ordered.

QUINCE, C.J., and PARIENTE and LEWIS, JJ., concur.

CANADY, J., concurs in result with an opinion, in which POLSTON, J., concurs.

LABARGA and PERRY, JJ., did not participate.

CANADY, J., concurring in result.

I agree with the conclusion that Smith's convictions and sentences should be affirmed, but I disagree with the per curiam opinion's reasoning on four points.

First, with respect to Smith's challenge to the expert opinion testimony of Dr. Vega that ligature strangulation is highly associated with sexual battery, I conclude that the merits of Smith's argument need not be addressed but that the argument should be rejected because it was unpreserved. On the merits, I disagree with the per curiam opinion's conclusion that the trial court erred in admitting Dr. Vega's testimony.

Pursuant to sections 90.704–.705, Florida Statutes (2005), Dr. Vega was permitted to testify on direct examination without disclosing the data upon which his opinion was based. *See Jackson v. State,* 648 So.2d 85, 91 (Fla.1994) ("[T]here is no requirement that the facts or data underlying an expert opinion be admitted into evidence in order to establish the basis of the opinion."). If Smith wished to challenge Dr. Vega's testimony and inquire as to the basis supporting his opinion, he could have done so through cross-examination, section 90.705(1), or voir dire examination, section 90.705(2). *See also Jackson,* 648 So.2d at 91. However, Smith failed to challenge Dr. Vega's testimony under either procedure. Since sections 90.704–.705 permit expert opinion without disclosure of the facts or data upon which the opinion is based, the trial court could not have abused its discretion in admitting Dr. Vega's testimony. Furthermore, it is unreasonable to fault the prosecutor for failing to adduce evidence of the basis for Dr. Vega's expert opinion. The rules of evidence do not place this burden on the prosecutor. *See City of Hialeah v. Weatherford,* 466 So.2d 1127, 1129 (Fla. 3d DCA 1985) ("Under current law, the burden of challenging the sufficiency of the basis for the opinion rests with the party against whom it is offered.").

Second, with respect to Smith's argument regarding juror challenges to jurors 29 and 89, I agree with the per curiam opinion's conclusion that any error with respect to those jurors was harmless because Smith was granted three additional peremptory challenges. Accordingly, there is no need to address the substantive merits of the challenges to jurors 29 and 89. On the merits, given the legal rules ***879** governing

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juror challenges and the broad discretion afforded trial judges considering juror challenges, I disagree with the per curiam opinion's conclusion that the trial court erred in determining that jurors 29 and 89 could serve as impartial jurors.

Juror 29 expressed the initial impression that based on news reports he believed that Smith "probably did it." However, the trial judge twice asked juror 29 whether he could set aside his initial impression of Smith and decide the case based solely on the evidence presented in the courtroom and the instructions on the law that he would receive. In both instances, juror 29 answered affirmatively. Juror 29 explained that his role as a juror in the judicial system was a matter of integrity for him and that "if this is what the law says, then we have to go by what the law says." Juror 29 never equivocated on his ability to follow the law.

Section 913.03(10), Florida Statutes (2005), provides that a juror may be challenged for cause on the ground that "[t]he juror has a state of mind regarding the defendant," but goes on to specifically provide that "the formation of an opinion or impression regarding the guilt or innocence of the defendant shall not be a sufficient ground for challenge to a juror if he or she declares and the court determines that he or she can render an impartial verdict according to the evidence." In this case, juror 29 declared, and the trial court determined, that the juror could render an impartial verdict according to the evidence. It is unwarranted for an appellate court to discredit such a prospective juror's statements—which the trial court credited—evidencing that the juror could be fair and impartial. The per curiam opinion's view on this point cannot be reconciled with section 913.03(10).

With regard to juror 89, I am particularly concerned that the per curiam opinion appears to rely on a categorical rule of exclusion for prospective jurors based on the juror's relationship with a murder victim in an unrelated case. Juror 89 explained that he had been a witness in a case involving the murder of his daughter but unequivocally stated his commitment to be impartial in Smith's case. The per curiam opinion concedes that this juror sincerely felt that he could be fair and impartial if he were selected to serve as a juror. Again, it is unwarranted for an appellate court to discredit such a prospective juror's statements—which the trial judge credited—evidencing that the juror could be fair and impartial. *See* *Brown v. State*, 755 So.2d 737 (Fla. 4th DCA 2000) (upholding trial court's denial of for-cause challenges to jurors whose relatives had been murder victims). This case is unlike cases where jurors were related to victims of violent crimes but did not assure the court of their ability to follow the law. *See, e.g.*, *Segura v. State*, 921 So.2d 765 (Fla. 3d DCA 2006); *Wilkins v. State*, 607 So.2d 500 (Fla. 3d DCA 1992); *Salazar v. State*, 564 So.2d 1245 (Fla. 3d DCA 1990).

Finally, with respect to this point, I note that section 913.03 sets forth a list of grounds on which a challenge for cause may be based and provides that such a challenge "may be made only on" one of the specifically enumerated grounds. The statute does not contain a specific ground for challenge based on the prospective juror's status as a victim (or relative of a victim) of another defendant in an unrelated criminal case. Such a victim (or victim's relative) may, as a result of the prior experience, have "a state of mind regarding the defendant, the case, [or] the person alleged to have been injured by the offense charged ... that will prevent the juror from acting with impartiality." § 913.03(10). There is, however, no basis for establishing an irrefutable presumption that such a state of mind exists and that a for-cause challenge must be granted when such a juror credibly avows an ability and ***880** intention to act with impartiality. Such a presumption is not consistent with section 913.03.

Third, I disagree with the per curiam opinion's conclusion that the State failed to establish beyond a reasonable doubt that the murder of Carlie Brucia was cold, calculated, and premeditated. In my view, Smith's use of a ligature in carrying out the murder is significant evidence of calculation and reflection, which supports the trial court's finding of the CCP aggravator.

Fourth, I would not reach the merits of the State's cross-appeal but would instead dismiss the cross-appeal as moot. *See, e.g.*, *Deparvine v. State*, 995 So.2d 351, 361 n. 4 (Fla.2008) ("The state raises two cross-appeal issues, which we will not address because Deparvine's convictions and sentences are affirmed."); *Hoskins v. State*, 965 So.2d 1, 7 (Fla.2007) ("Because we affirm, we do not address the State's cross-appeal."); *Buzia v. State*, 926 So.2d 1203, 1208 n. 2 (Fla.2006) ("State cross-appealed and raised two issues. However, because we affirm all of the trial court's findings, the State's cross-appeal is rendered moot.").

POLSTON, J., concurs.

All Citations

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Footnotes

1 The yellow station wagon became relevant to the investigation because when the proprietor subsequently reviewed the images captured on other cameras that were stationed at the car wash, he discovered that a camera which faced Bee Ridge Road recorded a yellow station wagon at 6:18 p.m. on February 1, 2004 (approximately three minutes before the abduction). A second camera captured that station wagon driving through the parking lot of the car wash. As previously noted, Carlie Brucia was abducted from the car wash at approximately 6:21 p.m. that day.

2 *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966).

3 The SCSO requested and received assistance from the FBI with regard to the abduction case.

4 When Carlie left her girlfriend's house on February 1, she was carrying a pink vinyl backpack, which had not been located.

5 Dr. Vega examined photos that were taken of Smith after he was arrested for violation of probation. Dr. Vega testified that an injury on one of Smith's fingers was consistent with the type of injury that would be caused by friction from the rubbing of a cord against the side of a finger during manual strangulation. However, Dr. Vega emphasized that he could not determine if that was in fact the cause of Smith's injury.

6 Dr. Vega testified that a large bruise on the inside of Smith's knee, which had been photographed after his arrest on the probation violation, could have been caused by a struggle with another person (i.e., a kick).

7 A doctor certified in addiction medicine who reviewed Smith's treatment history was of the opinion that certain entities that treated Smith failed to implement a coordinated plan to address all of Smith's health issues—i.e., pain, depression, and addiction. The doctor explained that she did *not* discuss the details of the crimes with Smith, including whether he was on drugs that night and, if so, what type. Accordingly, she had no opinion with regard to Smith's level of intoxication on the night of the murder.

8 *Spencer v. State*, 615 So.2d 688 (Fla.1993).

9 The trial court noted that even though the murder was committed during the commission of two separate crimes, the court considered this aggravating circumstance only once, and no doubling occurred.

10 Specifically, the trial court found that there was *no* evidence presented to support the mitigating circumstances that Smith was under extreme mental or emotional disturbance during the commission of these crimes or that Smith's capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired. *See* § 921.141(6)(b),(f), Fla. Stat. (2003). In support of this finding, the trial court noted that on the day of the crimes, at approximately 8:15 p.m. (i.e., after the murder), Smith visited the home of an acquaintance where they discussed repairs to a vehicle for approximately thirty-five to forty-five minutes.

11 The trial court concluded that the timing of certain admissions "supports [the] finding that [Smith] attempted to use his mental health and drug abuse problems to achieve the desired outcome of avoiding prison and rallying his family around him."

12 The recent decision of the United States Supreme Court in *Melendez–Diaz v. Massachusetts*, —— U.S. ——, 129 S.Ct. 2527, 174 L.Ed.2d 314 (2009), does not impact our holding today. In fact, the Supreme Court concluded that our decision in *Johnson* with regard to the Confrontation Clause was *consistent with* its holding in *Melendez–Diaz*. *See id.* at 2540 n. 11. In *Melendez–Diaz*, the analysts who conducted the tests that led to the conclusion that the defendant possessed cocaine *did not* testify during trial—instead, only affidavits which reported the results of the testing were introduced. We conclude that the present case is distinguishable from and not controlled by *Melendez–Diaz* because, as previously noted, the FBI team supervisor who interpreted the data, formulated the conclusions, and prepared the report that implicated Smith in the sexual battery *actually testified during trial*.

13 Because of the high-profile nature of this case, the jurors were referenced by number throughout the trial.

14 Vega explained to the jury that the injury to Carlie's ankle was most likely caused by animal predation and not by her attacker.

15 We agree with Smith, however, that it was improper for the prosecutor during closing penalty-phase statements to contend that Smith should receive the death penalty because he left the body "exposed to animals, predators in the woods." Such a comment was not relevant to establish the method of death, but instead was intended to inflame the emotions of the jury. Defense counsel did not object to this statement; therefore, absent fundamental error, Smith is not entitled to relief based upon improper commentary. *See Morton v. State*, 789 So.2d 324, 329 (Fla.2001). We conclude that the reference to animal predation does not reach into the validity of the trial to the extent that a jury recommendation of death could not have been obtained without this statement. *See id.* However, we again remind prosecutors that closing statements "must not be used to inflame the minds and passions of the jurors so that their verdict reflects an emotional response to the crime or the defendant." *Bertolotti v. State*, 476 So.2d 130, 134 (Fla.1985).

16 In fact, during the penalty phase, the trial court asked the parties if there would be a doubling concern with regard to the "victim under the age of twelve" and the "during the course of a sexual battery on a child under the age of twelve" aggravating circumstances, and the State responded, "No sir, I have not seen that as an issue on those two aggravators." Defense counsel did not make any comment in response to the position of the State.

17 When the jury in this case inquired about allocution, the trial court did *not* indicate (or even imply) that Smith did not wish to make such a statement. Instead, the court simply advised the jury that "a defendant does not have a right to allocute before a jury without being subject to cross-examination." This statement would have conveyed to the jury that although Smith may have greatly desired to make a statement to the jury, he felt unable to do so because he would be cross-examined.

18 Florida's voluntary-intoxication statute provides:

> **775.051. Voluntary intoxication; not a defense; evidence not admissible for certain purposes; exception.** Voluntary intoxication resulting from the consumption, injection, or other use of alcohol or other controlled substance as described in chapter 893 is not a defense to any offense proscribed by law. Evidence of a defendant's voluntary intoxication is not admissible to show that the defendant lacked the specific intent to commit an offense and is not admissible to show that the defendant was insane at the time of the offense, except when the consumption, injection, or use of a controlled substance under chapter 893 was pursuant to a lawful prescription issued to the defendant by a practitioner as defined in s.893.02.

§ 775.051, Fla. Stat. (2004).

19 Davis committed the murder in 1994, and this aggravator was not enacted until 1995. *See* ch. 95–159, § 1, Laws of Fla.

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Supreme Court of Florida

No. SC13-4

JOSEPH P. SMITH,
Appellant,

vs.

STATE OF FLORIDA,
Appellee.

[September 11, 2014]

PER CURIAM.

This case is before the Court on appeal from an order denying a motion to vacate a judgment of conviction of first-degree murder and a sentence of death. We have jurisdiction. Art. V, § 3(b)(1), Fla. Const.

FACTS

A jury convicted Joseph Peter Smith of the kidnapping, capital sexual battery, and first-degree murder of an eleven-year-old girl. Smith v. State, 28 So. 3d 838, 850 (Fla. 2009). In the decision on direct appeal, this Court described in detail the circumstances of the murder and the evidence presented during trial. See id. at 844-50. The jury recommended that Smith be sentenced to death for the

murder by a vote of ten to two. Id. at 851. The trial court followed the recommendation and sentenced Smith to death. Id. at 852. Six aggravating circumstances were found by the trial court:

> (1) Smith committed the felony while he was on probation, see § 921.141(5)(a), Fla. Stat. (2003) (moderate weight); (2) the murder was committed while Smith was engaged in the commission of a sexual battery or kidnapping, see § 921.141(5)(d), Fla. Stat. (2003) (significant weight); (3) the murder was committed for the purpose of avoiding lawful arrest, see § 921.141(5)(e), Fla. Stat. (2003) (great weight); (4) the murder was especially heinous, atrocious or cruel (HAC), see § 921.141(5)(h), Fla. Stat. (2003) (great weight); (5) the murder was cold, calculated, and premeditated (CCP), see § 921.141(5)(i), Fla. Stat. (2003) (great weight); and (6) the victim was under twelve years of age, see § 921.141(5)(*l*), Fla. Stat. (2003) (great weight).

Id. (footnote omitted). The trial court found no statutory mitigating circumstances, but concluded that thirteen nonstatutory factors had been established:

> (1) a long and well-documented history of mental illness (moderate weight); (2) a long and well-documented history of drug abuse (moderate weight); (3) longstanding severe pain from back injuries that contributed to his addiction (little weight); (4) Smith repeatedly sought help for his problems (little weight); (5) Smith was repeatedly denied treatment or received inadequate treatment (little weight); (6) positive qualities, including—(a) skills as a mechanic, plumber, and carpenter; (b) performance of kind deeds for others; (c) love and support with his family; (d) despite his incarceration, attempts to exert a positive influence on family members; (e) artistic skills; and (f) he cares about animals (moderate weight); (7) providing information that led to the resolution of this case (very little weight); (8) his family assisted law enforcement with Smith's knowledge and cooperation (slight weight); (9) demonstration of spiritual growth (moderate weight); (10) maintenance of gainful employment (slight weight); (11) he is a loving father to his three daughters (moderate weight); (12)

remorse (little weight); and (13) he is amenable to rehabilitation and a productive life in prison (little weight).

Id. at 852-53 (footnote omitted).

Smith presented thirteen challenges on direct appeal, and the State presented one challenge in a cross-appeal. The challenges by Smith were: (1) the State violated the Confrontation Clause of the Sixth Amendment when it failed to present the biologists who performed the DNA tests on the known sample taken from Smith and the unknown semen sample taken from the victim's shirt; (2) the trial court erred when it allowed the medical examiner to present opinion testimony that the victim had been sexually assaulted; (3) the trial court erred when it failed to suppress the statements of Smith's brother; (4) the trial court erred when it failed to strike nine jurors for cause; (5) the trial court erred when it admitted certain photos of the victim; (6) the trial court improperly doubled the aggravating factors that the murder was committed during the course of a sexual battery upon a child under the age of twelve, and the victim of the murder was under the age of twelve; (7) the statutory aggravating circumstance that the victim was under the age of twelve is unconstitutional; (8) the trial court erred when it found the avoid arrest aggravating circumstance; (9) the trial court erred when it found the CCP aggravating circumstance; (10) the trial court erred when it ruled that Smith's mother and sister would be subject to cross-examination by the State if they testified during the penalty phase; (11) the trial court erred when it refused to allow

Smith to make a statement of allocution before the jury; (12) section 775.051, Florida Statutes (2004), violates due process; and (13) Florida's death penalty sentencing scheme violates Ring v. Arizona, 536 U.S. 584 (2002). Smith, 28 So. 3d at 853-73. On cross-appeal, the State contended that the trial court erred when it held that the prior violent felony conviction aggravating circumstance was not applicable to the murder. Id. at 876-77.[1]

This Court held that the trial court erroneously denied two for-cause juror challenges, but determined that the error was harmless. Id. at 859-61. We also struck the CCP aggravating circumstance, but held that any error by the trial court with regard to the finding of this aggravating factor was harmless. Id. at 868. With respect to the avoid arrest aggravating factor, this Court stated:

> We need not address the substance of this claim because we conclude that even if we were to find that competent, substantial evidence does not support this aggravator as asserted by Smith, any error is harmless. . . . The trial court expressly stated that any one of the aggravators found (except felony probation) was sufficient to outweigh the mitigating factors due to the totality of the aggravating factors that we uphold and affirm today. There is no possibility that any erroneous finding on this issue affected the sentence imposed. Smith is not entitled to a new penalty phase.

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1. Smith previously pled no contest to a 1993 charge of aggravated battery. Id. at 876. The State contended that this no contest plea constituted a conviction for purposes of the capital sentencing statute and, therefore, qualified as a prior violent felony conviction under the statute. Id. at 877.

Id. at 866-67. We also determined that (1) the trial court should have excluded the testimony of the medical examiner that ligature strangulation is "highly associated" with sexual battery, and (2) the prosecutor made an improper comment that Smith should receive the death penalty because he left the body "exposed to animals, predators in the woods." Id. at 856-57, 862 n.15. However, because neither challenge was preserved, we considered only whether they amounted to fundamental error, and concluded that they did not. Id. at 857, 862 n.15.

We rejected all other claims presented by Smith and affirmed his convictions and sentences. Id. at 853-74, 878. We also rejected the issue presented by the State on cross-appeal. Id. at 878.

Smith subsequently filed a motion for postconviction relief pursuant to Florida Rule of Criminal Procedure 3.851 that presented the following claims: (1) Rule Regulating the Florida Bar 4-3.5(d)(4) and Florida Rule of Criminal Procedure 3.575 are unconstitutional and denied Smith the assistance of counsel in pursuing postconviction relief; (2) the trial court unconstitutionally instructed the jury that its role is merely "advisory"; (3) Florida's death penalty statute is unconstitutional as applied pursuant to Apprendi v. New Jersey, 530 U.S. 466 (2000), and Ring; (4) execution by lethal injection or electrocution violates the Eighth Amendment; (5) Florida's capital sentencing statute is unconstitutional because it fails to (a) provide a standard for determining that aggravating

circumstances "outweigh" mitigating circumstances, (b) define "sufficient aggravating circumstances," and (c) adequately define the aggravating circumstances; (6) Florida's capital sentencing procedure lacks the independent reweighing of aggravating and mitigating circumstances required by Proffitt v. Florida, 428 U.S. 242 (1976); (7) the aggravating circumstances have been applied in a vague and inconsistent manner; (8) Florida's capital sentencing scheme is unconstitutional because it presumes that death is an appropriate sentence upon the finding of a single aggravating factor, and also requires a defendant to establish that the mitigating circumstances outweigh the aggravating circumstances for a life sentence to be appropriate; (9) section 945.10, Florida Statutes, is unconstitutional because it precludes Smith from knowing the identity of execution team members; and (10) cumulative error. Smith further alleged that to the extent trial counsel and appellate counsel failed to present certain claims listed above, they were ineffective.[2]

---

2. Claims of ineffective assistance of appellate counsel are not cognizable in postconviction motions, but rather are to be raised in habeas corpus proceedings. Thompson v. State, 759 So. 2d 650, 660 (Fla. 2000). Smith has not filed a habeas corpus petition with this Court. Moreover, because all claims presented by Smith are without merit, even if Smith had presented his ineffective assistance of appellate counsel challenges in a habeas proceeding, he would not be entitled to relief. See Johnson v. Moore, 837 So. 2d 343, 347 (Fla. 2002) ("Appellate counsel cannot be deemed ineffective for failing to raise a claim that was not preserved below or that is without merit.").

Smith asserted in his motion for postconviction relief that none of the claims presented required an evidentiary hearing. The postconviction court heard oral argument on the motion and subsequently issued an order that summarily denied all claims.

This appeal followed.

ANALYSIS

Juror Interviews

Smith asserts that Florida Rule of Criminal Procedure 3.575 and Rule Regulating the Florida Bar 4-3.5(d)(4), which prohibit interviews of jurors by a party or counsel except under limited circumstances, are unconstitutional. This claim is procedurally barred because it could have been raised on direct appeal. See, e.g., Reese v. State, 14 So. 3d 913, 919 (Fla. 2009); Israel v. State, 985 So. 2d 510, 522 (Fla. 2008). Moreover, this Court has consistently rejected constitutional challenges to the rules in question. See, e.g., Reese, 14 So. 3d at 919; Barnhill v. State, 971 So. 2d 106, 116-17 (Fla. 2007). Further, in Troy v. State, 57 So. 3d 828, 842 (Fla. 2011), we rejected the challenge of a defendant that the postconviction court had "fail[ed] to explain why academics, journalists, and lawyers not connected to his case can conduct 'fishing expedition' interviews while trial and postconviction counsel are precluded from doing so." Thus, Smith's similar challenge is without merit.

We note that Smith has failed to present a single factual allegation that juror misconduct occurred during his capital trial. Instead, he asserts that criminal defense counsel should have unlimited authority to conduct interviews to probe jurors for possible misconduct. We decline to change the rules of procedure to permit criminal defense counsel to conduct fishing expeditions any time a conviction is obtained. Where a party or counsel has reason to believe that a verdict may be subject to legal challenge, the rules delineate procedures to be followed for seeking juror interviews. However, where no such belief is present, as in this case, we decline to allow defense counsel to have unfettered access to jurors.

We affirm the denial of this claim.

Caldwell v. Mississippi

Smith contends that the trial court improperly instructed the jury that its role is merely "advisory," in violation of Caldwell v. Mississippi, 472 U.S. 320 (1985).[3]

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3. Although the heading of this claim in Smith's brief alleges that trial counsel was ineffective in the failure to present this challenge, the argument provides no elaboration with regard to counsel's ineffectiveness and contains no analysis of this issue. This Court has previously held that "[v]ague and conclusory allegations on appeal are insufficient to warrant relief." Heath v. State, 3 So. 3d 1017, 1029 n.8 (Fla. 2009) ("Heath has waived his cumulative-error claim because his brief includes no argument whatsoever and instead consists of a one-sentence heading in his brief."); see also Doorbal v. State, 983 So. 2d 464, 482-83 (Fla. 2008) ("Doorbal neither states the substance of any of the claims that were summarily denied, nor provides an explanation why summary denial was inappropriate or what factual determination was required on each claim so as to

This challenge is procedurally barred. See Jones v. State, 928 So. 2d 1178, 1182 n.5 (Fla. 2006) (holding that a Caldwell claim is procedurally barred if not raised on direct appeal). Further, this Court has repeatedly rejected Caldwell challenges to the current standard jury instructions. See, e.g., Rigterink v. State, 66 So. 3d 866, 897 (Fla. 2011); Globe v. State, 877 So. 2d 663, 673-74 (Fla. 2004).[4] Accordingly, the postconviction court properly denied this claim.

Apprendi and Ring

Smith asserts that the postconviction court erred when it held that Florida's capital sentencing statute is not unconstitutional as applied pursuant to Apprendi and Ring. On direct appeal, Smith presented a Ring challenge, which was rejected:

> In Ring v. Arizona, 536 U.S. 584 (2002), the United States Supreme Court invalidated sentencing schemes where the trial court was responsible for (1) the finding of an aggravating circumstance which rendered a defendant eligible for the death penalty, and (2) the ultimate decision to impose a death sentence. According to Smith,

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necessitate an evidentiary hearing. We conclude that this general, conclusory argument is insufficient to preserve the issues raised in the 3.851 motion, and, therefore, this claim is waived."). Based upon our precedent, we hold that Smith's assertion of ineffective assistance under this claim—and any other claim where ineffectiveness is solely referenced in the heading—is waived.

Moreover, because all claims presented by Smith are without merit, even if he had not waived the ineffective assistance challenges, he would not be entitled to relief. See Lukehart v. State, 70 So. 3d 503, 513 (Fla. 2011) ("[C]ounsel cannot be deemed ineffective for failing to pursue a meritless claim.").

4. Although the instructions provided to the jury during the penalty phase of Smith's trial are not identical to the instructions contained in Florida Standard Jury Instruction (Criminal) 7.11, the instructions given do not differ materially from the standard jury instructions.

> Florida constitutes a "judge-sentencing" state and, therefore, its sentencing scheme violates the Sixth Amendment.
>
> Smith's claim is without merit. This Court has repeatedly held that Florida's capital sentencing scheme does not violate the United States Constitution under Ring. See, e.g., Gore v. State, 964 So. 2d 1257, 1276-77 (Fla. 2007); Hannon v. State, 941 So. 2d 1109, 1147 (Fla. 2006); Jones v. State, 845 So. 2d 55, 74 (Fla. 2003). Further, in Owen v. Crosby, 854 So. 2d 182, 193 (Fla. 2003), this Court rejected a Ring challenge where the trial court found as an aggravating circumstance that the defendant committed the murder during the commission of a burglary or sexual battery. In reaching this determination, the Court noted that this particular aggravator "involve[s] circumstances that were submitted to a jury and found to exist beyond a reasonable doubt."
>
> In the instant case, a jury convicted Smith of sexual battery upon a child less than twelve years of age and kidnapping. Since the jury determined beyond a reasonable doubt that Smith committed these crimes, Smith's Ring challenge is without merit on this additional basis. Accordingly, this claim is denied.

28 So. 3d at 873-74. As we noted on direct appeal, a Ring challenge by Smith is without merit because the trial court found as an aggravating circumstance that the murder was committed during the course of a sexual battery and a kidnapping, and a unanimous jury verdict was returned in connection with both charges. Id. at 873-74. Further, we have repeatedly rejected the contention that aggravating circumstances must be alleged in the indictment for a death sentence to be constitutional. See, e.g., Pham v. State, 70 So. 3d 485, 496 (Fla. 2011); Coday v. State, 946 So. 3d 988, 1006 (Fla. 2006).

This claim was properly denied.

Florida's Death Penalty Statute

According to Smith, Florida's death penalty statute is unconstitutional based on additional theories. We disagree. Nearly identical challenges to those presented by Smith were raised unsuccessfully in Miller v. State, 926 So. 2d 1243 (Fla. 2006). The defendant in Miller asserted:

> Florida's capital sentencing statute fails to provide a necessary standard for determining that aggravating circumstances "outweigh" mitigating factors, does not define "sufficient aggravating circumstances," and does not sufficiently define each of the aggravating circumstances; Florida's capital sentencing procedure does not have the independent reweighing of aggravating and mitigating circumstances required by Proffitt v. Florida, 428 U.S. 242 (1976); the aggravating circumstances have been applied in a vague and inconsistent manner . . . and Florida law violates the Eighth Amendment in creating a presumption of death if a single aggravating circumstance is found, which occurs in every case of felony murder and nearly every premeditated murder.

Id. at 1259-60. We held in Miller that these challenges were procedurally barred because they were not presented on direct appeal and further concluded that they were without merit. Id. at 1260. We reject Smith's challenges here for the same reasons.

The challenge to methods of execution is also procedurally barred and without merit. See, e.g., Kilgore v. State, 55 So. 3d 487, 511-12 (Fla. 2010); Wyatt v. State, 71 So. 3d 86, 112 (Fla. 2011) ("We deny relief because the Court has consistently rejected these claims, and Wyatt has not made any additional allegations that would call into question the State's current methods of execution.").

We affirm the denial of this claim.

Section 945.10

Smith contends that the postconviction court erred when it failed to conduct an evidentiary hearing on the constitutionality of Florida's lethal injection procedures and, more specifically, section 945.10, Florida Statutes. However, the postconviction motion expressly provided that an evidentiary hearing was not sought with regard to this claim. Accordingly, Smith's assertion of error is unpreserved. See Jimenez v. State, 997 So. 2d 1056, 1072 (Fla. 2008) (holding that a claim of factual innocence was not preserved for appeal where the defendant did not present this claim to the postconviction court during the successive rule 3.851 proceeding (quoting Steinhorst v. State, 412 So. 2d 332, 338 (Fla. 1982) ("[F]or an argument to be cognizable on appeal, it must be the specific contention asserted as legal ground for the objection, exception, or motion below."))).[5] Further, Smith presents new arguments on appeal that were never presented to the postconviction court. To the extent Smith presents claims not previously asserted, they are also unpreserved for review. See Jimenez, 997 So. 2d at 1072; Steinhorst, 412 So. 2d at 338.

5. Moreover, we have reviewed the postconviction motion and conclude that even if Smith had sought an evidentiary hearing on this claim, one would not have been warranted.

With regard to the claims that were presented below, and are therefore preserved, we have previously rejected constitutional challenges to section 945.10. See, e.g., Darling v. State, 45 So. 3d 444, 447-48 (Fla. 2010) ("Darling simply requests that we recede from prior precedent so that he may engage in an in-depth review of his executioners' qualifications and training. We refuse to do so."); Henyard v. State, 992 So. 2d 120, 130 (Fla. 2008) ("We previously found section 945.10 facially constitutional and decline to recede from our decision now.").

Accordingly, we conclude that this challenge is without merit.

Cumulative Error

Finally, where the individual claims asserted by a capital defendant are held to be procedurally barred or without merit, a claim of cumulative error fails. See Lukehart, 70 So. 3d at 524 (quoting Israel, 985 So. 2d at 520). Because we have rejected each of Smith's challenges on appeal, he is not entitled to relief based upon cumulative error.

CONCLUSION

In light of the foregoing, we affirm the order of the trial court denying postconviction relief.

It is so ordered.

LABARGA, C.J., and PARIENTE, LEWIS, QUINCE, CANADY, POLSTON, and PERRY, JJ., concur.

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

An Appeal from the Circuit Court in and for Sarasota County,
Andrew D. Owens, Jr., Judge - Case No. 582004CF002129XXXANC

James Vincent Viggiano, Jr., Capital Collateral Regional Counsel, Middle Region, Tampa, Florida, and Robert T. Strain, Assistant-Capital Collateral Regional Counsel, Middle Region, Tampa, Florida, and Ann Marie Mirialakis, Assistant-Capital Collateral Regional Counsel, Middle Region, Tampa, Florida,

for Appellant

Pamela Jo Bondi, Attorney General, Tallahassee, Florida, and Carol Marie Dittmar, Senior Assistant Attorney General, Tampa, Florida,

for Appellee

Original Image of 458 So.2d 1075 (PDF)

KeyCite Yellow Flag - Negative Treatment
Declined to Extend by A.J. v. Times Pub. Co., Fla.App. 2 Dist., September 11, 1992

458 So.2d 1075
Supreme Court of Florida.

The TRIBUNE COMPANY, Petitioner,
v.
Norman CANNELLA, Chief Assistant State Attorney, Cynthia Sontag, Director of Administration of the City of Tampa, Robert DePerte, Robert Jones, and Roy Pierce, Respondents.
Robert DePERTE, Robert Jones, and Roy Pierce, Petitioners,
v.
The TRIBUNE COMPANY, Respondent.

Nos. 64450, 64453.
|
Sept. 6, 1984.
|
Rehearing Denied Dec. 20, 1984.

Newspaper publisher petitioned for writ of certiorari to review orders of Circuit Court, Hillsborough County, Daniel E. Gallagher, J., denying petitions for writ of mandamus to compel chief assistant state attorney and director of city administration to release personnel files of certain police officers. The District Court of Appeal, Second District, 438 So.2d 516, granted certiorari, even though records had been released, and held that government employee personnel files could be automatically withheld from release for 48 hours, and applications were filed for review of questions certified to be of great public importance. The Supreme Court, Ehrlich, J., held that: (1) automatic delay in release of records to permit employee challenge was not permissible since no one other than custodian of records could challenge release of records, and then only if a statutory exemption was claimed, and (2) state legislation concerning public records preempted any local law relating to delay in producing records for inspection.

District Court decision quashed.

West Headnotes (7)

[1] **Municipal Corporations**
Conformity to Constitutional and Statutory Provisions in General

Generally, municipality may not act in an area preempted by legislature; however, Florida statutes and the Constitution include a restrictive application of preemption doctrine, precluding preemption and leaving "home rule" to municipalities unless legislature has expressly said otherwise. West's F.S.A. § 166.021; West's F.S.A. Const. Art. 8, § 2(b).

12 Cases that cite this headnote

[2] **Municipal Corporations**
Conformity to Constitutional and Statutory Provisions in General

Under the preemption doctrine, a subject is preempted by a senior legislative body from action by a junior body if senior body's scheme of regulation of the subject is pervasive and if further regulation by junior body would present danger of conflict with pervasive regulatory scheme.

12 Cases that cite this headnote

[3] **Municipal Corporations**
Conformity to Constitutional and Statutory Provisions in General

Legislature has preempted local regulation vis-a-vis delay in release of public records by enaction of Public Records Act. West's F.S.A. § 119.01 et seq.

8 Cases that cite this headnote

[4] **Records**
Matters Subject to Disclosure; Exemptions
Records
In General; Request and Compliance

No provision is made in Public Records Act for anyone other than custodian of records to

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withhold a record, and the only justification for withholding record, or portion thereof, is custodian's assertion of statutory exemption. West's F.S.A. § 119.07(1)(a), (2)(a).

3 Cases that cite this headnote

[5] **Records**

In General; Request and Compliance

Public Records Act does not provide that employee be present during inspection of his personnel records, or even that employee be given notice that an inspection has been requested or made. West's F.S.A. § 119.07(1)(a).

2 Cases that cite this headnote

[6] **Records**

In General; Request and Compliance

Public Records Act does not permit an automatic delay in release of personnel records to allow employee time to raise a constitutional challenge, since only person with power to raise such a challenge is custodian of records and employee has no right, at time request for release is made, to raise challenge. West's F.S.A. § 119.07.

5 Cases that cite this headnote

[7] **Records**

In General; Request and Compliance

The only delay permitted by Public Records Act in release of records is limited reasonable time allowed custodian to retrieve record and delete those portions of record custodian asserts are exempt from disclosure. West's F.S.A. §§ 119.07, 119.11(2).

8 Cases that cite this headnote

Attorneys and Law Firms

***1076** Julian Clarkson, Gregg D. Thomas, Steven L. Brannock and Mike Piscitelli of Holland & Knight, Tampa, for The Tribune Co., petitioner/cross-respondent.

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Opinion

EHRLICH, Justice.

This case is before us to answer questions certified to be of great public importance. *Tribune Co. v. Cannella*, 438 So.2d 516 (Fla. 2d DCA 1983). We have jurisdiction. Art. V, § 3(b)(4), Fla. Const.

The *Tampa Times*, a now-defunct afternoon newspaper published by the Tribune Co., sought release of the personnel files of three Tampa police officers, pursuant to the Public Records Act, chapter 119, Florida Statutes (1981). The officers had been involved in an incident where a suspect was shot and killed. Sontag, director of administration for the City of Tampa and custodian of the records requested, refused to release the files. Her refusal was based on a city policy of delaying release of personnel files seven days pending notice to the affected employee. The delay had been reduced to three days before the district court filed its opinion. The newspaper persisted in demanding the files, leading to actions in both state and federal court, by the newspaper and by the city and the officers. Following three weeks of intricate legal maneuvering, the city released the personnel files.

During the maneuvers, the newspaper had filed a petition for a writ of certiorari with the Second District Court of Appeal. Although the files had been released, the district court took jurisdiction because the problem was "capable of repetition yet evading review." *Sosna v. Iowa*, 419 U.S. 393, 95 S.Ct. 553, 42 L.Ed.2d 532 (1975). In an en banc decision, the Second District held, 5-4, that government employee personnel files could be automatically withheld for 48 hours, to allow employees an opportunity to raise any claims that the

information should be withheld permanently because *1077 of privacy interests.[1] The court also certified two questions to this Court:

> I. May disclosure of nonexempt public records automatically be delayed for a specific period of time for any reason?
> II. If the answer to the first question is yes, what is the maximum permissible delay period, and for what purpose or purposes may the delay period be invoked?

The Tribune challenges the holding that a 48-hour delay is permissible, while the officers have cross-petitioned, urging that they have a privacy interest which must be protected by an automatic delay to allow time to raise the issue. The Court allowed the briefing on the two cases to be consolidated. We hold that no automatic delay is permitted and answer the first question in the negative. The second question is mooted.

[1] [2] We base our decision on the fundamental principle that a municipality may not act in an area preempted by the legislature. We agree with Judge Lehan's cogent dissent to the opinion below on this point, 438 So.2d at 525-26.

> Under [the preemption] doctrine a subject is preempted by a senior legislative body from the action by a junior legislative body if the senior legislative body's scheme of regulation of the subject is pervasive and if further regulation of the subject by the junior legislative body would present a danger of conflict with that pervasive regulatory scheme.... Florida law, under section 166.021, Florida Statutes (1981), which cites article VIII, section 2(b) of the Florida Constitution, includes a more restrictive application of the preemption doctrine, precluding preemption and leaving "home rule" to municipalities unless the legislature has expressly said otherwise.

Id. at 525. *See Rinzler v. Carson*, 262 So.2d 661, 668 (Fla.1972) ("A municipality cannot forbid what the legislature has expressly licensed, authorized or required, nor may it authorize what the legislature has expressly forbidden."); *State ex rel. Johnson v. Johns*, 92 Fla. 187, 109 So. 228 (1926).

[3] The legislature has clearly preempted local regulation vis-a-vis delay in the release of public records. The Public Records Act, chapter 119, Florida Statutes (1981), provides that "It is the public policy of this state that all state, county and municipal records shall at all times be open for a personal inspection by any person." Section 119.01(1). This fundamental policy in essence places all government records on the table for open inspection by all. While there are certain statutory exemptions from this initial disclosure, section 119.07 and the statutes cross-referenced therein, the public disclosure of the content of all nonexempt records occurs at the moment they become records. *See, e.g., Shevin v. Byron, Harless, Schaffer, Reid and Associates*, 379 So.2d 633 (Fla.1980) (information becomes public record when it is "prepared in connection with official agency business which is intended to perpetuate, communicate, or formalize knowledge of some type." *Id.* at 640); *Wait v. Florida Power and Light Co.*, 372 So.2d 420 (Fla.1979) (exemptions limited solely to those provided by statute).

[4] To literally place the records on the public table would be unrealistic. The legislature thus provided a procedure for making the records available for inspection. Section 119.07(1)(a) mandates that "Every person who has custody of public records *1078 shall permit the records to be inspected and examined by any person desiring to do so, at reasonable times, under reasonable conditions, and under supervision by the custodian of records or his designee." Section 119.07(2)(a) provides that if the custodian believes certain items are statutorily exempt he "shall produce for inspection and examination" the record with the asserted exempt material deleted. Section 119.11 provides for an accelerated court hearing when, inter alia, the party seeking to inspect a record challenges the exemption asserted by the custodian under section 119.07(2)(a). The effect of these cited sections of the Act is to provide for timely inspection of the records, with the exception of statutory exemptions asserted *by the custodian*, which may be challenged by an accelerated court hearing. In essence, the custodian is mandated to place any nonexempt requested record "on the table" for inspection, at reasonable times and under reasonable conditions.

We have already held that reasonable items and conditions

> refers not to conditions which must be fulfilled before review is permitted but to reasonable regulations that would

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> permit the custodian of records to protect them from alteration, damage, or destruction and also to ensure that the person reviewing the records is not subjected to physical constraints designed to preclude review.

Wait, 372 So.2d at 425. No provision is made for anyone other than the custodian of records to withhold a record, and the only justification for withholding a record or a portion thereof is the custodian's assertion of a statutory exemption.

[5] The City of Tampa and the police officers urge that an automatic delay is necessary to allow the officers to be present during the inspection of their records,[2] and to allow them time to raise any constitutional claim that the records should not be opened for inspection. To agree with these positions would cause us to write into the statute something that is not there, and this we decline to do.

Delaying inspection to allow an employee to be present during the inspection of his personnel records is not within the legislative scheme. The Act provides for the custodian or his designee to supervise the inspection of records. Section 119.07(1)(a). The sole purpose of custodial supervision is to protect the records from "alteration, damage, or destruction." *Wait*. The Act does not provide that the employee be present during the inspection, nor even that the employee be given notice that an inspection has been requested or made. The employee's presence could serve no legally cognizable purpose, and any delay to allow such presence is therefore inconsistent with the Act, which contemplates only the reasonable custodial delay necessary to retrieve a record and review and excise exempt material.

[6] As to the argument that an automatic delay is necessary to allow an employee time within which to raise a constitutional challenge, we can only say that the time when the record is requested is not the time to raise such a challenge. The only challenge permitted by the Act at the ***1079** time a request for records is made is the assertion of a statutory exemption pursuant to section 119.07. The only person with the power to raise such a challenge is the custodian. The employee therefore has no statutory right at the time a request for inspection is made. When the records are on the table, the purpose of the Act would be frustrated if, every time a member of the public reaches for a record, he or she is subjected to the possibility that someone will attempt to take it off the table through a court challenge. Likewise, an automatic delay, no matter how short, impermissibly interferes with the public's right, restrained only by the physical problems involved in retrieving the records and protecting them, to examine the records. The legislature has placed the books on the table; only it has the power to alter that situation.

[7] We therefore hold that the legislative scheme of the Public Records Act has preempted the law relating to any delay in producing records for inspection. The only delay permitted by the Act is the limited reasonable time allowed the custodian to retrieve the record and delete those portions of the record the custodian asserts are exempt.[3]

Accordingly, the decision of the district court is quashed.

It is so ordered.

BOYD, C.J., and ADKINS, OVERTON, ALDERMAN, McDONALD and SHAW, JJ., concur.

All Citations

458 So.2d 1075

Footnotes

1 The district court also held that the officers had no privacy interest in their personnel records, and that personnel records could never be criminal investigative or intelligence information which are exempted from inspection by section 119.07(3)(d). Cannella had subpoenaed the records after the newspaper made its inspection request, and the city complied without retaining copies of the files, thereby rendering it temporarily unable to comply with the inspection request. Cannella then claimed the records were exempt as part of his investigation into the death of the suspect. The district court found this to be an improper "shell game" thwarting inspection and suggested a method to prevent such games in the future. 438 So.2d at 523. These issues were not raised in this Court.

2 The second district did not discuss in its opinion the right to be present during an inspection. However, the court relied heavily on its prior decision in *Roberts v. News-Press Publishing Co.*, 409 So.2d 1089 (Fla. 2d DCA), *review denied*,

418 So.2d 1280 (Fla.1982). In that case, the court found a 24-hour delay to be reasonable to allow an employee time to challenge the release of information as being statutorily exempt or protected by a constitutional right, and to allow the employee to be present during the inspection. In the instant case, the district court's references to *Roberts* avoid mention of the right to be present. However, Sontag's counsel urged at oral argument that the right to be present was one rationale for an automatic delay. Sontag urges in her brief that an automatic delay to permit the employee to be present may in fact further the goals of the Act, quoting from *Roberts:* "The right to be present may well result in the employee waiving any right of privilege or confidentiality, and, therefore, work to the advantage of prompt access to the records." 409 So.2d at 1095. Although the instant case apparently does not involve a regulation designed to allow the employee to be present, unlike the ordinance in *Roberts,* we find it necessary to address the issue because it has been raised.

3 We are aware of the 48-hour deadline of section 119.11(2) upon which the court below relied in determining what would constitute a reasonable period for an automatic delay. This section merely provides a two-day grace period for a custodian to appeal an inspection order and can have no effect on the *custodian's* obligation to timely produce records for which he asserts no *statutory* exemption.

End of Document

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IN THE CIRCUIT COURT, FOURTH JUDICIAL CIRCUIT, IN AND FOR DUVAL COUNTY, FLORIDA

CASE NO: 16-2013-CF-5781-AXXX-MA
DIVISION: CR-D

STATE OF FLORIDA

vs.

DONALD SMITH
_____/

MOTION FOR AUTHORITY TO INCUR COSTS ADDITIONAL COSTS OF MITIGATION COORDINATOR/ INVESTIGATOR AND MITIGATION EXPENSES

COMES NOW the Defendant, Donald Smith, by and through his court-appointed attorney, and pursuant to Florida Laws of Criminal Procedure, moves this Honorable Court for the entry of an Order authorizing the incurring of additional costs of a mitigation coordinator/investigator, and as grounds hereby states:

1. The Defendant was indicted for Murder in the First Degree, Kidnapping a Child Under the Age of 13 Years, and Sexual Battery on a Child Less than 12 Years; followed by the filing of the State's Notice of Intent to Seek the Death Penalty;

2. The Defendant has been previously adjudged insolvent by this Court;

3. The undersigned was appointed to represent the Defendant in this matter;

4. Due to of the unusual and extraordinary facts of this case and the fact that the State has filed their notice of intent to seek the death penalty;

5. A mitigation coordinator/investigator is necessary in the preparation of a defense in this cause;

6. The American Bar Association Guidelines (2003) regarding the performance of attorneys representing death eligible Defendants required at a minimum the services of two attorneys, investigators, appropriate staff, and a mitigation coordinator/investigator , as the bare minimum for a defense team;

7. The American Bar Association standards were held to be minimum requirements in *Rompilla v. Beard*, 125 S. Ct. 2456;

8. Counsel does not believe she can provide Defendant with proper representation to which he is entitled unless the Court authorizes additional fees for a mitigation expert who will report her findings directly to the undersigned counsel;

FILED 03-02-16 4PM 0305 FUSSELL

9. Brooke Butler, Ph.D., P.A., was previously appointed as a mitigation coordinator/investigator in this cause and counsel was authorized fees up to $20,000.00;

10. The appointed mitigation coordinator/investigator, Brooke Butler, Ph.D., P.A., has exhausted the previous $20,000.00 authorized thus counsel is requesting authority to incur an additional amount of $15,000.00, with the authority to submit a motion for additional fees if necessary;

11. Defendant is 59 years old. He has an extensive criminal and psychiatric history within the Department of Corrections including being evaluated and forced into the Jimmy Rice Involuntary Commitment Center.

12. Defense counsel has received over 10,000 pages of discovery in our public records request, which must be thoroughly reviewed.

13. Reasonable and necessary travel expenses will be incurred by Brooke Butler, Ph.D., P.A., and the reasonable associated fees for mitigation/investigative costs and reasonable travel expenses should be paid by the State of Florida, Justice Administrative Commission

WHEREFORE, the Defendant respectfully requests this Honorable Court for entry of an Order appointing a mitigation coordinator/investigator and authorizing the incurring of costs of a mitigation coordinator/investigator to assist with the preparation of a defense in this cause.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the Motion for Appointment and Authority to Incur Costs of Mitigation Coordinator/Investigator and Mitigation Expenses has been provided to the Justice Administrative Commission via e-mail delivery this 28th day of January, 2016.

Respectfully submitted,

/s/ Julie Agent Schlax

Julie Agent Schlax
200 East Forsyth Street
Jacksonville, Florida 32202
(904) 674-0717Telephone
(904) 674-0737 Facsimile
Attorney for Defendant

From: JAC Pleadings <pleadings@justiceadmin.org>

To: 'Julie@esalawgroup.com' <Julie@esalawgroup.com>
Cc:

Date: Thursday, January 28, 2016 02:54 pm
Subject: RE: Smith - mtn for add. costs of mitigation specialist
Attachments: Motion and Order for Appointment of Mitigation Specialist (Donald Smith)....pdf (65KB)

JAC has received and reviewed the Motion for Authority to Incur Costs/Additional Costs of Mitigation Coordinator/Investigator and Mitigation Expenses as to the above-referenced matter. JAC will not be filing a formal response and takes no position as to your motion. You may utilize this email in lieu of a formal response and should attach it to your motion when you provide it to the court.

Buddy Aspy
Senior Management Analyst
Justice Administrative Commission
227 Bronough St.
Tallahassee, Fl. 32301
866.355.7902 Ext 243

PLEASE NOTE: All e-mail is potentially available as a public record.

From: sherri@esalawgroup.com [mailto:sherri@esalawgroup.com]
Sent: Thursday, January 28, 2016 2:46 PM
To: JAC Pleadings <pleadings@justiceadmin.org>
Subject: Smith - mtn for add. costs of mitigation specialist

Please see the attached motion to incur additional costs of a mitigation specialist for Def. Donald Smith

FILED 03/02/16 09:05 AM FLSSC

IN THE CIRCUIT COURT, FOURTH JUDICIAL CIRCUIT, IN AND FOR DUVAL COUNTY, FLORIDA

CASE NO: 16-2013-CF-5781-AXXX-MA
DIVISION: CR-D

STATE OF FLORIDA

vs.

DONALD SMITH
_____/

EX-PARTE MOTION FOR APPOINTMENT OF DR. GEOFFREY COLINO

COMES NOW the Defendant, Donald Smith, by and through his court-appointed attorney, and pursuant to Florida Laws of Criminal Procedure, and Florida Statute 27.5305(4), moves this Honorable Court for the entry of an Order appointing Dr. Geoffrey Colino, neurologist, and as grounds hereby states:

1. The Defendant was indicted for Murder in the First Degree, Kidnapping a Child Under the Age of 13 Years, and Sexual Battery on a Child Less than 12 Years; followed by the filing of the State's Notice of Intent to Seek the Death Penalty;

2. The Defendant has been previously adjudged insolvent by this Court and the undersigned private attorney was appointed to represent the Defendant in this matter;

3. Based on neuropsychological testing completed by Dr. Joseph Sesta, Ph.D, and concerns raised by Dr. Joseph Sesta, further assessments are necessary for possible mitigation in this case. A licensed Medical Doctor is necessary with an expertise in neurology for the investigation and possible presentation of this mitigation.

4. Due to of the unusual and extraordinary facts of this case and the fact that the State has filed their notice of intent to seek the death penalty;

5. If the Court finds that a hearing on this matter is necessary, counsel believes that an *ex-parte in-camera* hearing is necessary in order to properly argue pursuant to Florida Statue 27.5305(4) the necessity of this expert for the preparation of a defense in this cause;

6. Counsel does not believe she can properly represent the defendant absent the specialty provided by Dr. Geoffrey Colino.

7. Dr. Geoffrey Colino of Neuroscience Practice Institute has a contract with the Justice Administrative Commission;

8. Dr. Colino's hourly rate is $400.00 and it is estimated that a minimum fee of $15,000.00 will be necessary thus counsel is requesting authority to submit a motion for additional fees if necessary;

9. Dr. Colino will have to incur travel related expenses including airfare, auto rental, mileage, baggage, change fees, lodging, meals and incidentals and would seek compensation of these expenses to be paid by the Justice Administration Commission.

WHEREFORE, the Defendant respectfully requests this Honorable Court enter an Order appointing Dr. Geoffrey Colino, on in the alternative for an *ex parte in camera* hearing to argue for entry of an Order appointing Dr. Geoffrey Colino and authorizing the incurring of costs of Dr. Colino to assist with the preparation of a defense in this cause.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the Motion for Appointment of a has been provided to the Justice Administrative Commission via e-mail delivery on the 24th day of February, 2016.

Respectfully submitted,

/s/ Julie Agent Schlax

Julie Agent Schlax
200 East Forsyth Street
Jacksonville, Florida 32202
(904) 674-0717Telephone
(904) 674-0737 Facsimile
Attorney for Defendant

From: Lake, Christian <christian.lake@justiceadmin.org>

To: 'Julie@esalawgroup.com' <Julie@esalawgroup.com>
Cc:
Date: Friday, February 26, 2016 03:32 pm
Subject: 13-5781; State v. Smith; JAC response
Attachments:

Ms. Schlax:

The Justice Administrative Commission (JAC) has received and reviewed the Motion for Appointment of Expert (Dr. Colino) as to the above-referenced matter. JAC will not be filing a formal response and takes no position as to your motion except JAC objects to any rate in excess of the established rates absent a showing to exceed those rates. JAC does not request to participate in any hearing set in this matter. You may utilize this email in lieu of a formal response and should attach it to your motion when you provide it to the court.

Christian Lake
Assistant General Counsel
(850) 488-2415

PLEASE NOTE: All e-mail is potentially available as a public record.

IN THE CIRCUIT COURT, FOURTH JUDICIAL CIRCUIT, IN AND FOR DUVAL COUNTY, FLORIDA

CASE NO: 16-2013-CF-5781-AXXX-MA
DIVISION: CR-D

STATE OF FLORIDA

vs.

DONALD SMITH
_____/

ORDER APPOINTING DR. GEOFFREY COLINO

THIS CAUSE, came on to be heard upon the Defendant's Ex-Parte Motion for Appointment of Dr. Geoffrey Colino, and the Court having been fully advised in the premises, and finding that a Neurologist is both necessary and essential to the defense in this cause, it is

ORDERED as follows:

1. That Dr. Geoffrey Colino, of Neuroscience Practice Institute, is hereby appointed as an expert in this matter.

2. The initial fee cap of $15,000.00 at an hourly rate of $400.00 is approved; along with all reasonable and necessary travel expenses.

3. That the Justice Administrative Commission shall be responsible for payment to Dr. Colino, of Neuroscience Practice Institute, upon submission of proper invoices.

4. That should the Defendant need to exceed said cap, the Defendant shall seek leave of the Court prior to incurring any additional fees.

DONE AND ORDERED in Duval County, Jacksonville, Florida on this 7 day of March, 2016.

_____
THE HONORABLE MALLORY D. COOPER
CIRCUIT JUDGE

Copies to: Julie Agent Schlax
Justice Administrative Commission
Dr. Geoffrey Colino, Neuroscience Practice Institute

FILED 03/07/16 PM 03:14 FUSSELL

IN THE CIRCUIT COURT, FOURTH JUDICIAL CIRCUIT, IN AND FOR DUVAL COUNTY, FLORIDA

CASE: 16-2013-CF-005781-AXXX-MA

DIVISION: CR-D (Circuit)

STATE OF FLORIDA

vs.

DONALD JAMES SMITH, DEFENDANT

ORDER

THIS CAUSE COMING ON BEFORE THE COURT UPON THE ☒DEFENDANT'S ☐STATE'S

MOTION TO CONTINUE TRIAL

FILED HEREIN ON THE 8th DAY OF MARCH , 2016 AND THE COURT HAVING HEARD ARGUMENTS OF THE STATE'S ATTORNEY AND OF COUNSEL FOR DEFENSE, AND BEING FULLY ADVISED IN THE PREMESIS, IT IS THEREUPON

ORDERED AND ADJUDGED THAT THE AFORESAID MOTION SHALL BE AND THE SAME IS HEREBY:

granted

DONE AND ORDERED IN OPEN COURT AT JACKSONVILLE, DUVAL COUNTY, FLORIDA, THIS 8 DAY OF March, 2016.

Circuit Judge

FILED

MAR 08 2016

CLERK CIRCUIT COURT

IN THE CIRCUIT COURT, FOURTH JUDICIAL CIRCUIT, IN AND FOR DUVAL COUNTY, FLORIDA

CASE NO.:16-2013-CF-5781
DIVISION: CR-D

STATE OF FLORIDA

vs.

DONALD SMITH
_____/

MOTION TO CONTINUE TRIAL

Defendant, Donald Smith, by and through the undersigned attorney, Julie Agent Schlax, pursuant to Rule 3.190(g), Florida Rules of Criminal Procedure, respectfully moves this Court to grant a continuance of the trial currently scheduled in this cause. As grounds Defendant states the following:

1. Defendant's case is set for trial for the week of April 4, 2016.

2. Defendant was indicted for Murder in the First Degree, Kidnapping a Child Under the Age of 13 Years, and Sexual Battery on a Child Less than 12 Years. The State has filed Notice of Intent to Seek the Death Penalty.

3. Due to the new bill restructuring the State's death penalty statute, and also that mitigation investigation is still be conducted, counsel believes that a continuance is necessary in this matter.

4. Counsel has discussed this Motion with the assigned Assistant State Attorney, Mark Caliel, and he has no objection to a continuance being granted.

5. Counsel submits that this request for continuance is in good faith and not for purposes of delay.

WHEREFORE, Defendant respectfully requests this Court grant this motion and order a continuance in the above styled cause.

FILED
MAR 08 2016
JOHN W. POWELL
CLERK CIRCUIT COURT

Respectfully submitted,

ESPENSHIP, SCHLAX & ALBEE, LLC

/s/ Julie Agent Schlax

Julie Agent Schlax, Esquire
Florida Bar No.: 093040
200 E. Forsyth Street
Jacksonville, Florida 32202
Tel: (904) 674-0717
Fax: (904) 674-0737
Attorney for Defendant

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the above and foregoing "Defendant's Motion for Continuance" has been furnished to the Office of the State Attorney, electronically, this 8th day of March, 2016.

/s/ Julie Agent Schlax

Julie Agent Schlax, Esquire

CERTIFICATE OF GOOD FAITH

I HEREBY CERTIFY that the foregoing Motion for Continuance is filed in good faith and is not interposed merely for the purpose of unnecessary delay.

/s/ Julie Agent Schlax

Julie Agent Schlax, Esquire

IN THE CIRCUIT COURT, FOURTH
JUDICIAL CIRCUIT, IN AND FOR
DUVAL COUNTY, FLORIDA

CASE NO.: 16-2013-CF-05781-AXXX-MA

DIVISION: CR-D

FILED
MAR 08 2016
CLERK CIRCUIT COURT

STATE OF FLORIDA

v.

DONALD JAMES SMITH,
Defendant.
_____/

ORDER DENYING MOTION TO STRIKE NOTICE OF INTENT TO SEEK THE DEATH PENALTY AND MOTION TO PROHIBIT DEATH QUALIFICATION OF THE JURY

This matter came before this Court on Defendant's Motion to Strike Notice of Intent to Seek the Death Penalty and Bar the State from Seeking the Death Penalty Based on U.S. Supreme Court's Decision in Hurst v. Florida filed January 12, 2016, and Defendant's Motion to Prohibit Death Qualification of the Jury filed February 23, 2016, both of which were filed through court-appointed counsel. On February 2, 2016, the State filed a Response to Defendant's Motion to Strike Notice of Intent to Seek the Death Penalty. On March 1, 2016, this Court held a hearing addressing the two instant Motions, during which the following parties were present: Assistant State Attorneys Mark Caliel, Esq., and Meredith Charbula, Esq.; Attorneys for Defendant Julie Schlax, Esq., and Charles Fletcher, Esq.; and Defendant.

In the instant Motions, Defendant seeks to preclude the State from seeking the death penalty against him. To support his Motions, Defendant cites Hurst v. Florida, 136 S. Ct. 616 (2016), and maintains death is no longer a possible penalty because the Hurst Court declared

Florida's death penalty unconstitutional. Therefore, since he is charged with capital first-degree murder, Defendant argues the only possible penalty, in light of Hurst, is a sentence of life in prison without the possibility of parole. Defendant notes his case is set for jury selection on April 4, 2016.

The recent United States Supreme Court decision in Hurst addressed a number of inherent issues with Florida's death penalty scheme, including the jury's role in making factual findings of aggravators and mitigators and the roles of both the judge and jury in imposing the death penalty. Hurst v. Florida, 136 S. Ct. 616, 616-24 (2016). The Court ultimately held that portions of section 921.141, Florida Statutes, providing the procedure for the imposition of the death penalty, are unconstitutional. Id. at 624. Notably, the Court did not hold that death, as a penalty, is unconstitutional. Id. On March 7, 2016, in light of Hurst, the Governor of Florida signed into law a revised version of section 921.141, Florida Statutes, effective immediately.

Based on the foregoing, it is:

ORDERED AND ADJUDGED that Defendant's Motion to Strike Notice of Intent to Seek the Death Penalty and Bar the State from Seeking the Death Penalty Based on U.S. Supreme Court's Decision in Hurst v. Florida filed January 12, 2016, and Defendant's Motion to Prohibit Death Qualification of the Jury filed February 23, 2016, are **DENIED as MOOT.**

DONE AND ORDERED in Chambers, at Jacksonville, Duval County, Florida, on this 8 day of March, 2016.

MALLORY D. COOPER
Circuit Court Judge

Copies to:

Mark Caliel, Esq.
Meredith Charbula, Esq.
Office of the State Attorney
311 W. Monroe St.
Jacksonville, FL 32202

Julie Schlax, Esq.
Attorney for Defendant
200 E. Forsyth St.
Jacksonville, FL 32202

Charles Fletcher, Esq.
Attorney for Defendant
8833 Perimeter Park Blvd., Ste. 104
Jacksonville, FL 32216

Case No.: 16-2013-CF-05781-AXXX-MA

IN THE CIRCUIT COURT, FOURTH JUDICIAL CIRCUIT, IN AND FOR DUVAL COUNTY, FLORIDA

CASE NO: 16-2013-CF-5781-AXXX-MA
DIVISION: CR-D

STATE OF FLORIDA

vs.

DONALD SMITH
_____/

MOTION TO DIRECT DEPARTMENT OF CORRECTIONS TO PERMIT TESTING

COMES NOW the Defendant, Donald Smith, by and through his court-appointed attorney, and pursuant to Florida Laws of Criminal Procedure, moves this Honorable Court for the entry of an Order directing the Department of Corrections to permit neurological testing, and as grounds hereby states:

1. Dr. Geoffrey Colino, of Neuroscience Practice Institute, has been appointed to conduct confidential neurological testing of the Defendant and to report his findings directly to the undersigned counsel.

2. Dr. Colino is scheduled to conduct testing on the Defendant on April 6, 2016, and should require approximately 4 hours to complete.

3. Dr. Colino is traveling from out of town to conduct the requested/required testing.

4. Dr. Colino needs to conduct the scheduled testing in a room that affords both privacy and sufficient space for a physical evaluation which includes assessment of gait, so sufficient room for the defendant to walk around and also a table strong enough for the defendant to sit on is required to complete the evaluation. As well, the defendant must be unshackled to be able to partake in the testing.

5. Dr. Colino will be in possession of the following medical equipment: 1. Stethoscope, 2. Otoscope and disposable tips, 3. Ophthalmoscope, 4. 2 tuning forks, 5. Reflex hammer, 6. Safety pin, 7. Two coins, 8. Blood pressure cuff, 9. Three scented oil bottles for olfactory testing, 10. Red plastic lens, 11. Measuring tape, 12. Latex gloves, 13. Hand sanitizer.

6. Counsel has been advised that the testing can only be properly completed with the specific requests herein which are reasonable and necessary.

WHEREFORE, the Defendant respectfully requests this Honorable Court for entry of an Order Directing the Department of Corrections to Permit Testing.

Respectfully submitted,

/s/ Julie Agent Schlax

Julie Agent Schlax
200 East Forsyth Street
Jacksonville, Florida 32202
(904) 674-0717Telephone
(904) 674-0737 Facsimile
Attorney for Defendant

IN THE CIRCUIT COURT, FOURTH
JUDICIAL CIRCUIT, IN AND FOR
DUVAL COUNTY, FLORIDA

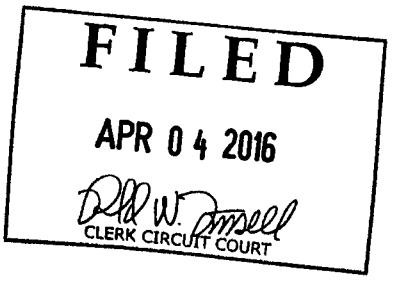
CASE NO.: 16-2013-CF-05781-AXXX-MA

DIVISION: CR-D

STATE OF FLORIDA

v.

DONALD JAMES SMITH,
Defendant.
_____/



ORDER DENYING MOTION TO DIRECT
DEPARTMENT OF CORRECTIONS TO PERMIT TESTING

This cause is before this Court on Defendant's "Motion to Direct Department of Corrections to Permit Testing," filed by court-appointed counsel on March 31, 2016.

In the instant Motion, Defendant requests this Court order the Pre-Trial Detention Facility where Defendant is currently housed to permit Dr. Geoffrey Colino (Dr. Colino) access to conduct confidential neurological testing on Defendant.[1] According to Defendant, Dr. Colino requires various medical devices and sufficient space to complete said examination.

For the safety and well-being of jail personnel and inmates, the Pre-Trial Detention Facility has institutional rules and regulations in place regarding facility access and visitation. When visiting Defendant, Dr. Colino is subject to these institutional rules and regulations, and shall adhere to them. As such, for purposes of his upcoming examination on Defendant, Dr. Colino may bring with him and use instruments that are permitted by the Pre-Trial Detention Facility rules and regulations.

[1] This Court infers Defendant is referring to the Pre-Trial Detention Facility when he mentions the Department of Corrections.

ORDERED AND ADJUDGED that Defendant's "Motion to Direct Department of Corrections to Permit Testing" is **DENIED.**

DONE AND ORDERED in Chambers, at Jacksonville, Duval County, Florida, on this 4 day of April, 2016.

MALLORY D. COOPER
Circuit Court Judge

Copies to:

Mark Caliel, Esq.
Meredith Charbula, Esq.
Office of the State Attorney
311 W. Monroe St.
Jacksonville, FL 32202

Julie Schlax, Esq.
Attorney for Defendant
200 E. Forsyth St.
Jacksonville, FL 32202

Charles Fletcher, Esq.
Attorney for Defendant
8833 Perimeter Park Blvd., Ste. 104
Jacksonville, FL 32216

Case No.: 16-2013-CF-05781-AXXX-MA

IN THE CIRCUIT COURT, FOURTH
JUDICIAL CIRCUIT, IN AND FOR
DUVAL COUNTY, FLORIDA

CASE NO.: 16-2013-CF-05781-AXXX-MA

DIVISION: CR-D

STATE OF FLORIDA

v.

DONALD JAMES SMITH,
Defendant.
_____/

FILED
APR 04 2016
RONNIE W. POWELL
CLERK CIRCUIT COURT

ORDER ON MOTIONS TO INTERVENE AND DEFENDANT'S MOTION TO DETERMINE CONFIDENTIALITY AND MOTION FOR PROTECTIVE ORDER AND REQUEST FOR IN-CAMERA REVIEW

This matter came before this Court on Defendant's "Notice of Intent to File Motion for Protective Order and Request for Reasonable Time," filed on February 2, 2016, related to the State's Sixth Supplemental Discovery Exhibit, filed on January 22, 2016. On February 19, 2016, Defendant filed a "Motion to Determine Confidentiality and Motion for Protective Order Regarding the State's Sixth Supplemental Discovery Exhibit and Request for In Camera Review," pursuant to Florida Rule of Judicial Administration 2.420; Florida Rule of Criminal Procedure 3.220(*l*); chapter 119, Florida Statutes; and applicable case law.

On February 18, 2016, Morris Publishing Group, LLC, d/b/a *The Florida Times-Union*, filed its "Motion of Morris Publishing Group, LLC to Intervene, and Memorandum in Opposition to Defendant's Notice of Intent to File Motion for Protective Order and Request for Reasonable Time."

On February 29, 2016, Graham Media Group, Florida, Inc., d/b/a WJXT-TV4 & NEWS4JAX.COM, filed a "Motion to Intervene and Oppose Defendant's Notice of Intent and

Motion Regarding Sixth Supplemental Discovery Exhibit."[1] This Court conducted a hearing to address the instant Motions on March 1, 2016. Having heard the arguments of counsel, reviewed the Motions, the discovery at issue, and pertinent law, this Court finds as follows:

Motions to Intervene

The news media has standing to intervene in judicial proceedings and be heard, particularly regarding judicial records. Barron v. Fla. Freedom Newspapers, Inc., 531 So. 2d 113, 118 (Fla. 1988) ("[A] strong presumption of openness exists for all court proceedings. A trial is a public event, and the filed records of court proceedings are public records available for public examination."). As a surrogate of the public, the media has "standing to challenge any closure order." Id.; WESH Tel., Inc. v. Freeman, 691 So. 2d 532, 533-35 (Fla. 5th DCA 1997); see Morris Commc'n Co. v. State, 844 So. 2d 671, 672-73 (Fla. 1st DCA 2003). As such, the two instant Motions to Intervene are granted to the extent that the Intervenors may now intervene in the instant case.

Defendant's Motion for Protective Order

In Defendant's Motion, he summarizes the contents of the evidence contained within the State's Sixth Supplemental Discovery Exhibit, filed on January 22, 2016: (1) a surreptitious seventy-four-and-one-half hours[2] recording of Defendant, beginning on June 23, 2015, within his individual isolation cell speaking with other inmates and correctional officers (labeled as paragraph C in the State's Sixth Supplemental Discovery Exhibit); (2) a twenty-minute excerpt of the recording; (3) an accompanying memorandum authored by State Attorney Investigator Robert Hinson summarizing the seventy-four-and-one-half hours recording and, in particular, the

[1] In this Order, this Court refers to the two Intervenors collectively as "the Intervenors."
[2] Defendant has stated this recording contains seventy-two hours of audio.

twenty-minute excerpt (labeled as paragraph K in the State's Sixth Supplemental Discovery Exhibit);[3] and (4) thirteen photographs of: (a) an isolation cell which is allegedly identical to Defendant's isolation cell during the time of the recording, and (b) a "chase" area through which Defendant spoke with other inmates (labeled as paragraph K in the State's Sixth Supplemental Discovery Exhibit).

Defendant requests an *in-camera* review of the recordings and accompanying memorandum to determine whether a protective order is appropriate as to these records.[4] Defendant alleges the recordings and memorandum contain inculpatory, irrelevant, and prejudicial statements and create further negative publicity against Defendant. Moreover, Defendant asserts the recordings and memorandum, if released, would ensure Defendant would not receive a fair trial. Defendant further argues he seeks a protective order to prevent a serious and imminent threat to the fair, impartial, and orderly administration of justice.

At the hearing on March 1, 2016, this Court granted Defendant's request for an *in-camera* inspection of the discovery material at issue. During the hearing, the Intervenors contended that, pursuant to this Court's previous Order entered on September 6, 2013, which required Defendant to file a motion to determine confidentiality within ten days of receipt of discovery material, Defendant had waived his right to request such a determination. The Intervenors also suggested that if this Court were to find Defendant had not waived his right to seal the records at issue, this Court should conduct an *in-camera* inspection of the material at

[3] During the hearing on March 1, 2016, the State addressed an edited surveillance video from Walmart and Dollar General, contained within paragraph K in the State's Sixth Supplemental Discovery Exhibit. Although the State discussed this discovery record, Defendant has not requested this Court protect it, seal it, or defer its release. Therefore, this Court does not address said surveillance video in this Order.

[4] Defendant does not object to the release of the photographs, and does not request a protective order over them. However, out of an abundance of caution, this Court reviews the photographs for confidentiality purposes.

issue. Further, the Intervenors averred that Defendant had not met the threshold of showing closure of the discovery was necessary to protect his rights, particularly because he has no right to privacy in the Duval County Jail ("the Jail"). In addition, the Intervenors argued this Court cannot seal the State's entire discovery exhibit.

Initially, this Court notes discovery material in possession of the State becomes public record when furnished to the Defense. See § 119.011(3)(c)(5), Fla. Stat. (2015); Fla. R. Crim. P. 3.220; Morris Publ'g Grp. v. State, 154 So. 3d 528, 532-33 (Fla. 1st DCA 2015); Fla. Freedom Newspapers, Inc. v. McCrary, 520 So. 2d 32, 34-35 (Fla. 1988). Notwithstanding the public disclosure laws, however, this Court has a duty to protect Defendant's right to a fair trial. See McCrary, 520 So. 2d at 34 ("[I]t is the responsibility of the judicial branch to ensure that parties receive a fair trial."); Miami Herald Publ'g Co. v. Lewis, 426 So. 2d 1, 3-4 (Fla. 1982).

Neither the public nor the press has a *constitutional* right to pretrial discovery material. McCrary, 520 So. 2d at 36; Palm Beach Newspapers, Inc. v. Burk, 504 So. 2d 378, 382 (Fla. 1987) (relying on Seattle Times Co. v. Rhinehart, 467 U.S. 20 (1984)). While chapter 119 ("The Public Records Act") creates a *statutory* right of access to public records, under the Public Records Act, "criminal investigative information" developed for the prosecution of criminal defendants is exempt from public disclosure until the information is given or required by law or agency rule to be given to the accused. § 119.071(2)(c); see § 119.011(3)(b), (c)(5). Chapter 119 also exempts any information that reveals the identity of a victim of any sexual offense. § 119.071(2)(h)1.b.; 119.0714(1)(h), Fla. Stat. (2015); see Fla. R. Jud. Admin. 2.420(c)(7); Fla. R. Jud. Admin. 2.420(d)(1)(B)(xiii).

Additionally, the public's statutory right to pretrial discovery is a qualified right, as it

"must be balanced against [a defendant's] constitutional rights of a fair trial and due process." McCrary, 520 So. 2d at 36; Burk, 504 So. 2d at 382 (discussing that "where a defendant's right to a fair trial conflicts with the public's right of access, it is the right of access which must yield"); Morris Commc'n Co., 844 So. 2d at 673 n.3 (citing WESH Tel., Inc. v. Freeman, 691 So. 2d 532, 534 (Fla. 5th DCA 1997) ("Although documents turned over to the defendant during discovery are generally public records subject to disclosure under Chapter 119, the courts have authority to manage pretrial publicity to protect the defendant's constitutional rights as described in Lewis, and as specifically provided by § 119.011(3)(c)5.")). Therefore, upon a showing of cause, this Court may restrict or defer release of specified disclosures during discovery and exempt them temporarily from public disclosure. See Fla. R. Crim. P. 3.220(*l*), (m).

In determining whether the public's access to judicial records should be restricted or deferred, the following factors are relevant to a finding of cause:

1. Closure is necessary to prevent a serious and imminent threat to the administration of justice;

2. No alternatives are available, other than a change of venue, which would protect a defendant's right to a fair trial; and

3. Closure would be effective in protecting the rights of the accused, without being broader than necessary to accomplish this purpose.

McCrary, 520 So. 2d at 35-36 (applying the Lewis factors to determine whether closure of pretrial discovery is warranted). During a hearing addressing closure, the party seeking closure should "first provide an adequate basis to support a finding that closure is necessary to prevent a serious and imminent threat to the administration of justice. . . . Second, those seeking closure should be required to show that no less restrictive alternative measures than closure are available for this purpose." Lewis, 426 So. 2d at 7-8. But see Nebraska Press Ass'n v. Stuart, 427 U.S.

539, 559 (1976) ("[P]rior restraints on speech and publication are the most serious and least tolerable infringement on First Amendment rights.").

As to this Court's previous Order entered on September 6, 2013, which required Defendant to file a motion to determine confidentiality within ten days of receipt of discovery material, this Court notes it did not intend its previous Order to function as a standing court order with which all motions to determine confidentiality must comply. Rather, this Court intended said Order to apply only to discovery and records pertaining to submission of initial discovery. Accordingly, this Court now reviews the discovery material at issue, referenced in the State's Sixth Supplemental Discovery Exhibit, and makes its required findings as to whether non-disclosure of the discovery is appropriate.

a. Audio Recording (seventy-four-and-one-half hours; twenty minute excerpt)

Defendant requests this Court defer release of the entire audiotape depicting conversations between Defendant and other inmates, particularly Randall Deviney, at the Jail. In Defendant's Motion, he argues the instant case has "received extensive pre-trial publicity" which has been "overwhelmingly negative towards the Defendant." He states in his Motion, and argued during the hearing on the instant Motion, that the audio recording contains alleged inculpatory, irrelevant, and prejudicial statements which could be sensationalized and taken out of context, to create further negative publicity against him. Defendant provides specific examples contained within the audio recording to include personal, private sounds such as sniffing, water running, sleeping, using the restroom, and other private matters. During the hearing on the instant Motion on March 1, 2016, counsel argued that if the audio recording is released, the Defense fears Defendant will not receive a fair trial.

Similarly, Defendant avers the negative publicity about his case has affected the potential jury pool in Duval County so much so that he filed a Motion for Change of Venue.[5] In said Motion, Defendant provided copies of numerous examples demonstrating the media attention and publicity the instant case has garnered, including "thousands of [written] articles on the case" written by the local media. Defendant further argues that other news outlets across the State have taken an interest in his case, as well as national media. Defendant argues the media reports as if he is guilty. Further, Defendant states the media has denigrated his character by telling its viewers about his past and referring to him as a sexual predator and a monster. Defendant further submits that Jacksonville is invested in justice for the victim, leading to bias on behalf of all residents of Jacksonville. Defendant additionally states the media have reported that "the criminal justice system failed the community by letting Mr. Smith out of jail." Based on the discovery the State has released, Defendant argues the media has been building its case against him. Finally, Defendant presented examples of the attention his case has received on numerous social media outlets. Defendant concludes that because of the negative, inflammatory, and prejudicial publicity his case has received, he cannot receive a fair trial by an impartial jury.

This Court has reviewed the entire seventy-four-and-one-half hours of audiotape, and finds Defendant has shown cause to justify partial closure of the audio recording. In light of Defendant's arguments pertaining to pre-trial publicity, such that he fears he will not receive a fair trial and an unbiased jury in Duval County, this Court finds it is necessary to restrict public access to certain portions of the audiotape to prevent a serious and imminent threat to the administration of justice. Release of the entire audio recording would interfere with Defendant's

[5] After hearing argument on this Motion, this Court determined the parties will first attempt to obtain a fair and impartial jury in Jacksonville. If such an attempt is unsuccessful, the Motion for Change of Venue will be granted.

right to a fair trial. As shown by Defendant in his Motion for Change of Venue, as well as the instant Motion and arguments made in support of it, because of the pre-trial publicity Defendant's case has already received, no alternatives are available, other than a change of venue, which would protect Defendant's right to a fair trial. This Court also notes it has observed the print and broadcast media in attendance at nearly every hearing conducted in Defendant's case. Finally, after having had the opportunity to review the content of the entire audiotape, this Court finds partial non-disclosure of this discovery material will be effective in protecting Defendant's rights, especially his right to a fair trial, without being broader than necessary to accomplish this purpose. Specifically, due to the subject matter of certain actions depicted, as well as certain content, this Court directs the State to release the audiotape **with the following redactions**:

- 13:35:58 to 13:37:15
- 29:20:29 to 29:26:24
- 29:27:25 to 29:29:30
- 29:36:00 to 29:38:00
- 30:53:02 to 30:54:10
- 30:55:45 to 30:56:10
- 31:19:12 to 31:20:15
- 31:21:22 to 31:22:05
- 31:22:46 to 31:24:10
- 31:25:18 to 31:26:20
- 31:30:15 to 31:31:06
- 31:32:00 to 31:32:30
- 31:34:15 to 31:37:35
- 31:41:10 to 31:43:02
- 33:36:03 to 33:36:40
- 34:40:00 to 34:42:45
- 35:43:30 to 35:43:50
- 35:49:20 to 35:50:30
- 35:53:50 to 35:54:45
- 36:15:00 to 36:16:35
- 36:19:21 to 36:19:40

- 49:53:00 to 49:53:20
- 53:53:33 to 53:54:00
- 54:59:20 to 55:00:00
- 55:44:20 to 55:44:25
- 56:23:10 to 56:26:00
- 56:55:07 to 56:56:25
- 57:21:16 to 57:21:42
- 57:58:20 to 57:58:50
- 59:15:50 to 59:15:58
- 59:25:00 to 59:25:50
- 59:41:16 to 59:43:30
- 59:56:34 to 59:58:21
- 60:04:58 to 60:05:38
- 60:34:25 to 60:34:50
- 60:36:11 to 60:36:35
- 60:44:04 to 60:44:18
- 60:44:46 to 60:44:50
- 60:53:30 to 60:54:10

After a jury has been empaneled in this case and the potential prejudice to Defendant is removed, this Court will enter an Amended Order directing the State to provide a redacted version of the audiotape which will contain additional audio than that currently being provided; this version of the audiotape will be accessible to the public and the media. See § 119.071(2). The State is directed that when it provides the audiotape, it must redact exempted information in compliance with Florida Rule of Judicial Administration 2.420 as provided in chapter 119.

b. Memorandum

In this memorandum, Detective Hinson, an Investigator for the State Attorney's Office, provided Assistant State Attorney Mark Caliel, Esq., a summary of the seventy-four-and-one-half hour audiotape and the excerpt of it discussed *supra*, as well as his impressions of it. The State opposes disclosure of memorandum because the State argues it is work product and exempt from chapter 119. The Intervenors argue that because the State listed the memorandum as

discovery in its Sixth Supplemental Discovery Exhibit, it is now public record and subject to disclosure.

This Court finds the entire memorandum is exempt from being released as a public record. Detective Hinson, as an Investigator for the State Attorney's Office, prepared the memorandum (which reflects his conclusions and mental impressions) at the express direction of an agency attorney, Assistant State Attorney Mark Caliel, Esq., exclusively for the instant criminal prosecution. As such, this memorandum is exempt from public disclosure pursuant to sections 119.071(1)(d)1. and 119.0714(1)(a). Therefore, it is sealed.

Defendant's Motion to Determine Confidentiality

In his Motion, Defendant requests this Court determine the confidentiality, by conducting an *in-camera* inspection, of the following evidence contained within the State's Sixth Supplemental Discovery Exhibit: (1) a surreptitious seventy-four-and-one-half hours recording of Defendant within his individual isolation cell speaking with other inmates (labeled as paragraph C in the State's Sixth Supplemental Discovery Exhibit); (2) a twenty-minute excerpt of the recording; (3) an accompanying memorandum authored by Investigator Robert Hinson summarizing the seventy-four-and-one-half hours recording (labeled as paragraph K in the State's Sixth Supplemental Discovery Exhibit); and (4) thirteen photographs of: (a) an isolation cell which is allegedly identical to Defendant's isolation cell during the time of the recording, and (b) a "chase" area through which Defendant spoke with other inmates (labeled as paragraph K in the State's Sixth Supplemental Discovery Exhibit). As noted, during the hearing addressing the instant Motion, this Court granted Defendant an *in-camera* inspection of this discovery material.

During the hearing on the instant Motion on March 1, 2016, the Intervenors argued that, pursuant to this Court's previous Order entered on September 6, 2013, which required Defendant to file a motion to determine confidentiality within ten days of receipt of discovery material, Defendant waived his right to request such a determination. As to this Court's previous Order entered September 6, 2013, this Court notes it did not intend its previous Order to function as a standing court order with which all motions to determine confidentiality must comply. Rather, this Court intended said Order to apply only to initial discovery and the production of records pertaining to that specific issue involved. Therefore, this Court reviews the instant Motion.

> A motion to determine the confidentiality of trial court records in a criminal case must:
>
> (A) identify the particular court records or a portion of a record that the movant seeks to have determined as confidential with as much specificity as possible without revealing the information subject to the confidentiality determination;
>
> (B) specify the bases for determining that such court records are confidential without revealing confidential information; and
>
> (C) set forth the specific legal authority and any applicable legal standards for determining such court records to be confidential without revealing the confidential information.

Fla. R. Jud. Admin. 2.420(e)(1); see also Fla. R. Jud. Admin. 2.420(f)(1) (stating, "[s]ubdivision[] (e) . . . shall apply to any motion by the state, a defendant, or an affected non-party to determine the confidentiality of trial court records in criminal cases under subdivision (c)"); see also Morris Publ'g Grp., LLC v. State, 13 So. 3d 120, 121 (Fla. 1st DCA 2009) ("Florida Rule of Judicial Administration 2.420 governs public access to the records of Florida's judicial branch.").

Here, this Court finds Defendant's Motion to Determine Confidentiality is legally sufficient, as required by the mandates of rule 2.420(e)(1). First, Defendant specifically

described the material sought to be determined as confidential, in particular, the three categories of discovery material referenced in the State's Sixth Supplemental Discovery Exhibit. As discussed, Defendant also provided the discovery material to this Court for review. Second, Defendant stated the specific bases for determining that such records are confidential, without revealing confidential information. Defendant argued that because the recordings contain alleged inculpatory, irrelevant and prejudicial statements, and the accompanying memorandum discusses such statements, such discovery should be determined confidential to prevent a serious and imminent threat to his right to a fair trial. Third, Defendant described the legal authority and case law to support confidentiality, without revealing confidential information.

During the hearing addressing the instant Motion on March 1, 2016, counsel for Defendant argued that because of the extensive pre-trial publicity the instant case has received, the discovery material at issue should be determined to be confidential and sealed to prevent further negative publicity to Defendant's case and his right to a fair trial. Counsel further argued that, regarding the memorandum, it contains the Detective's opinions, not facts. Counsel asserted the contents of the memorandum cannot be proven, and the Detective has no ability to determine what the audio depicts. In his Motion, Defendant argued the discovery material should be determined to be confidential and sealed to prevent a serious and imminent threat to the fair, impartial, and orderly administration of justice, to protect a compelling governmental interest, and to comply with established State and Federal constitutional law, statutes, and cases. Finally, as discussed in great detail *supra*, and as argued by counsel during the hearing on March 1, 2016, and in the instant Motion, counsel has filed a Motion for Change of Venue which details the extensive nature of the pre-trial publicity and media attention regarding this case.

Pursuant to Florida Rule of Judicial Administration 2.420(e)(3), this Court makes the following findings. This Court enters the instant Order in a capital criminal case. Under subdivisions (c)(7) and (c)(8) of rule 2.420, the memorandum and photographs are made confidential under the Florida and United States Constitutions, statutes, case law, and Florida and federal law. Under subdivision (c)(9) of rule 2.420, this Court finds: portions of the audio recording are determined to be confidential on grounds that confidentiality is required to prevent a serious and imminent threat to the fair, impartial, and orderly administration of justice; the degree, duration, and manner of confidentiality ordered by this Court are no broader than necessary to protect the interests set forth; and no less restrictive measures are available to protect the interests discussed. This Court details its findings as to confidentiality below.

This Court finds no party's name contained within the discovery material is determined to be confidential. Likewise, the Clerk's Online Docket, any progress dockets, or similar records generated to document activity in this case are not determined to be confidential.

The particular information determined to be confidential is:

1. Twenty-minute excerpt of audio recording and portions of entire seventy-four and one-half hours of audio recording. As discussed *supra* in this Court's findings on Defendant's Motion for Protective Order, these material are confidential pursuant to Florida Rule of Judicial Administration 2.420(c)(9) as follows: confidentiality is required to prevent a serious and imminent threat to the fair, impartial, and orderly administration of justice; the degree, duration, and manner of confidentiality ordered by this Court are no broader than necessary to protect the interests set forth; and no less restrictive measures are available to protect the interests discussed. This Court finds the temporary

partial sealing of this audio recording will achieve the purpose enunciated in rule 2.420(c)(9), as discussed; additional portions of this audio shall be released as directed by court order after a jury is empaneled in the instant case.

2. Memorandum prepared by State Attorney's Office Investigator, which summarized the contents of the audio recording. This memorandum is confidential as work product prepared at the express direction of an agency attorney, pursuant to sections 119.071(1)(d)1. and 119.0714(1)(a), through Florida Rule of Judicial Administration 2.420(c)(7) and (c)(8).

3. Photographs depicting isolation jail cell and "chase" area through which Defendant communicated with other inmates. The photographs are confidential as depicting a surveillance technique or procedure used by the State Attorney's Office at the Jail, pursuant to sections 119.071(2)(d) and 119.0714(1)(c), through Florida Rule of Judicial Administration 2.420(c)(7) and (c)(8). The photographs are also confidential because they depict a portion of a physical security system plan of property owned by or leased to the State, the Jail, pursuant to sections 119.071(3)(a)1.a., and 119.071(3)(a)2.a., through Florida Rule of Judicial Administration 2.420(c)(7) and (c)(8). See, e.g., § 945.10(3), Fla. Stat. (2015); Farmer v. Crews, 804 F.Supp. 1516, 1520 (M.D. Fla. 1992), aff'd, 995 F.2d 236 (11th Cir. 1993) (stating, "[s]ecurity concerns are foremost among the objectives of the prison system.").

The Clerk of Court is directed to allow only the following persons to view the information deemed confidential by this Order: this Court; judicial staff; Clerk's Office personnel as necessary to maintain the confidentiality of the records; and counsel for the State

and Defense and their support staff who are actively and directly assisting with this case. This Court finds the degree, duration, and manner of confidentiality ordered are no broader than necessary to protect the interests of rule 2.420(c), specifically paragraphs 7, 8, and 9 of rule 2.420(c), in that the records referenced *supra* are made confidential either: (1) under the Florida and United States Constitutions, Florida and federal law, and statutes; or (2) this Court has determined they require confidentiality to prevent a serious and imminent threat to the fair, impartial, and orderly administration of justice; the degree, duration, and manner of confidentiality ordered by this Court are no broader than necessary to protect the interests set forth; and no less restrictive measures to sealing or partially sealing the records are available to protect the interests discussed in paragraphs 7, 8, and 9 of rule 2.420(c). Finally, the Clerk of the Court is directed to publish the instant Order in accordance with subdivision (e)(4) of Florida Rule of Judicial Administration 2.420.

In view of the above, it is **ORDERED:**

1. Morris Publishing Group, LLC, d/b/a *The Florida Times-Union*'s "Motion of Morris Publishing Group, LLC to Intervene and Memorandum in Opposition to Defendant's Notice of Intent to File Motion for Protective Order and Request for Reasonable Time," filed on February 18, 2016, is **GRANTED IN PART AND DENIED IN PART to the extent provided herein.**

2. Graham Media Group, Florida, Inc., d/b/a WJXT-TV4 & NEWS4JAX.COM's "Motion to Intervene and Oppose Defendant's Notice of Intent and Motion Regarding Sixth Supplemental Discovery Exhibit," filed on February 29, 2016, is **GRANTED IN PART AND DENIED IN PART to the extent provided herein.**

3. Defendant's "Motion to Determine Confidentiality and Motion for Protective Order Regarding the State's Sixth Supplemental Discovery Exhibit and Request for In Camera Review," filed on February 19, 2016, is **GRANTED IN PART AND DENIED IN PART to the extent provided herein.**

4. Portions of the seventy-four-and-one-half hours of audiotape and the entire twenty-

minute excerpt contain **CONFIDENTIAL information, SHALL BE TEMPORARILY SEALED, and shall not be disseminated to the media or to the public until the confidential information can be redacted.** Upon redaction in accordance with this Order, the redacted audiotape shall be released to the public. Portions of the audiotape shall only be temporarily sealed until the jury is empanelled, to the extent provided herein.

5. The following discovery items, submitted within the State's Sixth Supplemental Discovery Exhibit, are hereby deemed **CONFIDENTIAL and SHALL BE SEALED, and shall not be disseminated to the media or to the public at any time**: (1) the memorandum summarizing the audio evidence; and (2) the thirteen photographs of the jail cell and the "chase" area.

6. The parties should be mindful that **any information identifying the victim in the above-captioned criminal case is confidential** pursuant to sections 119.071(2)(h)1.b. and 119.0714(1)(h), Florida Statutes (2015), through Florida Rule of Judicial Administration 2.420(d)(1)(B)(xiii).

7. The Clerk of Court is directed to allow only the following persons to view the information deemed confidential by this Order: this Court; judicial staff; Clerk's Office personnel as necessary to maintain the confidentiality of the records; and counsel for the State and Defense and their support staff who are actively and directly assisting with this case.

8. Extensions of this Order may be granted upon proper motion of a party pursuant to Florida Rule of Judicial Administration 2.420(f)(3)(C).

9. Should future discovery material contain information that would be subject to Florida Rule of Judicial Administration 2.420, the parties shall file an appropriate motion prior to filing any notice of supplemental discovery and the discovery material in accordance with this Order.

10. This Order **shall not** be construed as a prohibition of the publication of any information already in the possession of the press. Nor shall this Order be construed as a closure of the judicial proceedings to the press or the public.

11. The Clerk of the court is directed to publish the instant Order in accordance with subdivision (e)(4).

DONE AND ORDERED in Jacksonville, Duval County, Florida this 4 day of April, 2016.

MALLORY D. COOPER
Circuit Court Judge

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Case No.: 16-2013-CF-05781-AXXX-MA

IN THE CIRCUIT COURT, FOURTH
JUDICIAL CIRCUIT, IN AND FOR
DUVAL COUNTY, FLORIDA

CASE NO.: 16-2013-CF-05781-AXXX-MA

DIVISION: CR-D

STATE OF FLORIDA

v.

DONALD JAMES SMITH,
Defendant.
_____/

FILED
APR 04 2016
CLERK CIRCUIT COURT

ORDER GRANTING IN PART AND DENYING IN PART MOTIONS TO INTERVENE; ORDER VACATING PREVIOUSLY-ENTERED ORDER GRANTING MOTION TO DETERMINE CONFIDENTIALITY AND ORDERS SEALING RECORDS; ORDER ON PROTECTIVE ORDER AND SEALING CONFIDENTIAL RECORDS

This matter came before this Court on Defendant's *ore tenus* Motion to make records confidential and protective order, made on February 2, 2016,[1] and Motion to Make Court Records Confidential and Motion for Protective Order Sealing Specific Court Documents and Records, filed on February 17, 2016. On February 8, 2016, this Court entered an Order Granting Motion to Determine Confidentiality of Court Records. On February 16, 2016, this Court entered a Notice of Sealing Document. On February 17, 2016, this Court entered an Order Sealing Specific Court Documents and Records.

On February 26, 2016, Morris Publishing Group, LLC, d/b/a *The Florida Times-Union*, filed a Motion to Intervene for Purposes of Opposing Defendant's Motion to Determine Confidentiality and to Set Aside Orders Sealing Documents. On February 29, 2016, Graham

[1] On February 2, 2016, this Court conducted an *in-camera* hearing on Defendant's Ex-Parte Motion for Appointment of Out of State Expert and Request for In-Camera Hearing.

Media Group, Florida, Inc., d/b/a WJXT-TV4 & NEWS4JAX.COM, filed a Motion to Intervene, to Oppose Defendant's Motions, and to Vacate Resultant Orders Sealing Various Documents.[2] This Court held a hearing on the instant Motions on March 1, 2016. Having heard the arguments of counsel, reviewed the Motions, records at issue, and pertinent law, this Court finds as follows:

Motions to Intervene

The news media has standing to intervene in judicial proceedings and be heard, particularly regarding judicial records. Barron v. Fla. Freedom Newspapers, Inc., 531 So. 2d 113, 118 (Fla. 1988) ("[A] strong presumption of openness exists for all court proceedings. A trial is a public event, and the filed records of court proceedings are public records available for public examination"). As a surrogate of the public, the media has "standing to challenge any closure order." Id.; WESH Tel., Inc. v. Freeman, 691 So. 2d 532, 533-35 (Fla. 5th DCA 1997); see Morris Commc'n Co. v. State, 844 So. 2d 671, 672-73 (Fla. 1st DCA 2003). As such, the two instant Motions to Intervene are granted to the extent that the Intervenors may now intervene in the instant cause.

Defendant's Motion for Protective Order

In this Motion, Defendant requested that this Court seal the documents and records tendered related to the hearing on February 2, 2016, for the appointment of Dr. Fred Berlin, including all psychiatric summaries, the Motion to appoint Dr. Berlin, and the Order granting or denying such appointment. In support of this Motion, Defendant argued these documents and records contain confidential trial strategies and psychiatric summaries of Defendant. The Motion stated Defendant filed it in seeking to ensure a fair trial as well as to ensure his privacy rights. Subsequent to this Court granting Defendant's motion for appointment of Dr. Berlin, the

[2] In this Order, this Court refers to the two Intervenors collectively as "the Intervenors."

Intervenors now argue there are five improperly sealed documents on the Clerk's Online Docket ("CORE") related to this matter, and this Court's orders on these records should be set aside: (1) Ex-Parte Motion for Appointment of Out of State Expert and Request for In-Camera Hearing (line 431); (2) Affidavit of EMOG (line 432); (3) Doctor's Notes 1A, 1B, 2A, 2B, 3A, 3B, 4A, 4B (line 433); Documents Curriculum Vitae, Voucher, Images, Medical Printout (line 434); and Documents Abbreviated Chronology (line 435).

The Intervenors contend they should have been given notice and an opportunity to be heard prior to this Court sealing the records and documents at issue. The Intervenors argue the records should not be sealed. The Intervenors further argue that Dr. Berlin's Curriculum Vitae is readily available on the Internet, and Defendant has failed to establish how the release of said Curriculum Vitae and costs associated with the Doctor's appointment reveals trial strategy. The Intervenors also seem to assert that the documents and records at issue involve competency proceedings, reports, or discovery material, which are public records. Finally, the Intervenors request this Court vacate its previously entered Orders regarding records related to Dr. Berlin.

This Court notes discovery material becomes public record when furnished to the opposing party. See § 119.011(3)(c)(5), Fla. Stat. (2015); Fla. R. Crim. P. 3.220; Fla. Freedom Newspapers, Inc. v. McCrary, 520 So. 2d 32, 34-35 (Fla. 1988). But see Kight v. Dugger, 574 So. 2d 1066, 1068-69 (Fla. 1990) (holding, "files in the possession of [defense counsel] in furtherance of its representation of an indigent client are not subject to public disclosure under chapter 119").

Here, the evidence presented to this Court during its hearing on March 1, 2016, shows Defendant's counsel has not furnished to the State the motion, reports and documents at issue.

Specifically, counsel argued that because she is private registry counsel for Defendant, section 27.5305(4), Florida Statutes (2015), requires her to submit approval to the Justice Administration Commission ("JAC") to demonstrate necessity of receiving compensation for expert witnesses. Counsel asserted she filed the instant Ex-Parte Motion because JAC required she do so, not because it is discovery.

Based on the argument presented during the hearing on March 1, 2016, this Court finds the motion, records, and documents discussed herein are not discovery. Counsel clearly asserted the motion, records, and documents are to be used for mitigation purposes, potentially during trial, not records evaluating competency as argued by the Intervenors. See Kight, 574 So. 2d at 1068-69. Therefore, because the records and documents are not pre-trial discovery, a protective order is not appropriate. See Fla. R. Crim. P. 3.220(*l*), (m) (stating, upon showing of good cause, trial court may restrict or defer specified disclosures during discovery and exempt them temporarily from public disclosure). Defendant's Motion for Protective Order is denied.

Defendant's Motion to Determine Confidentiality

In this Motion, Defendant requests this Court determine the confidentiality of the materials tendered related to the appointment of Dr. Fred Berlin, including all psychiatric summaries, the Motion to appoint Dr. Berlin, and the Order granting or denying such appointment. As discussed *supra*, Defendant also requests that this Court enter a Protective Order regarding these records.

The Intervenors contend that, pursuant to this Court's previous Order entered on September 6, 2013, which required Defendant to file a motion to determine confidentiality within ten days of receipt of discovery materials, Defendant waived his right to request such a

determination. Further, the Intervenors contend they should have been given notice and an opportunity to be heard regarding the instant Motion but, instead, this Court entered an Order on the Motion first. The Intervenors concede that work product is not subject to disclosure, but it may be redacted. The Intervenors also argue Dr. Berlin's Curriculum Vitae is readily available on the Internet, so it has already been disseminated and is not confidential.

A motion to determine the confidentiality of trial court records in a criminal case must:

> (A) identify the particular court records or a portion of a record that the movant seeks to have determined as confidential with as much specificity as possible without revealing the information subject to the confidentiality determination;
>
> (B) specify the bases for determining that such court records are confidential without revealing confidential information; and
>
> (C) set forth the specific legal authority and any applicable legal standards for determining such court records to be confidential without revealing confidential information.

Fla. R. Jud. Admin. 2.420(e)(1); see Fla. R. Jud. Admin. 2.420(f)(1) (stating that "[s]ubdivision[] (e) . . . shall apply to any motion by the state, a defendant, or an affected non-party to determine the confidentiality of trial court records in criminal cases under subdivision (c)"); see also Morris Publ'g Grp., LLC v. State, 13 So. 3d 120, 121 (Fla. 1st DCA 2009) ("Florida Rule of Judicial Administration 2.420 governs public access to the records of Florida's judicial branch").

Here, as to this Court's previous Order entered on September 6, 2013, which required Defendant to file a motion to determine confidentiality within ten days of receipt of discovery materials, this Court notes the instant Motion to Determine Confidentiality does not pertain to discovery materials. This Court's previous Order does not affect the instant Motion. Therefore, this Court has examined the instant Motion and finds it is legally sufficient, as required by the mandates of rule 2.420(e)(1). First, Defendant specifically identified the particular court records

sought to be determined as confidential, without revealing the information subject to the confidentiality determination. During the hearing on the instant Motion on March 1, 2016, Defendant's counsel argued she filed the court records because the records reflect that services of experts are required to effectively present mitigation on Defendant's behalf. Specifically, counsel asserted the records contain psychological evaluations and related notes. Further, Defendant submitted the documents and records to this Court and this Court has reviewed them. Second, Defendant stated the specific bases for determining such records are confidential, without revealing confidential information, particularly that the records contain medical records and evaluations of Defendant. Third, Defendant set forth the legal authority for determining such court records to be confidential, without revealing the confidential information.

Initially, this Court finds the following records are not exempt as confidential under rule 2.420, and may be released: (1) the Affidavit of Emily M. Olson-Gault ("EMOG" as listed on CORE); and (2) *only* the thirty-four page Curriculum Vitae of Dr. Frederick Berlin.

Pursuant to Florida Rule of Judicial Administration 2.420, this Court makes the following findings:

This Court enters the instant Order in a capital criminal case. Under subdivision (c)(7) of rule 2.420, the records and information contained within them (discussed below) are determined to be confidential under the Florida and United States Constitutions and Florida and federal law. This Court details its findings as to confidentiality below. No party's name is determined to be confidential. The Clerk's Online Docket ("CORE"), any progress dockets, or similar records generated to document activity in this case are not determined to be confidential. The particular information determined to be confidential is:

1. Ex-Parte Motion for Appointment of Out of State Expert and Request for In-Camera Hearing, filed on December 10, 2015, which is confidential in its entirety pursuant to sections 456.057 and 456.059, Florida Statutes (2015), through Florida Rule of Judicial Administration 2.420(c)(7) and (8). The Intervenors argue that because counsel submitted this Ex-Parte Motion to JAC, a State agency, it is now public record. During the hearing on the instant matters, counsel argued that because she is private registry counsel, section 27.5305(4), Florida Statutes (2015), requires her to submit approval to JAC for compensation of expert witnesses. Counsel asserted she only filed the instant Ex-Parte Motion because JAC required she do so. Counsel argued it is inequitable that she is required to file such a Motion seeking funding because if she worked for the Office of the Public Defender, Office of Regional Conflict Counsel, or as a privately retained attorney, she would not be required to do so. This Court finds counsel's Ex-Parte Motion should be kept confidential pursuant to rule 2.420(c)(7) and (8).
2. Chart summarizing Defendant's medical history, diagnoses, and doctor visits starting in 1977, which is confidential in its entirety pursuant to sections 395.3025, 456.057, and 456.059, Florida Statutes (2015), through Florida Rule of Judicial Administration 2.420(c)(7) and (8).
3. Checking account number on the check attached to Dr. Berlin's Curriculum Vitae, confidential pursuant to sections 119.071(5)(b) and 119.0714(1)(j), (2)(e), Florida Statutes (2015), through Florida Rule of Judicial Administration 2.420(d)(1)(B)(iii).
4. Four-page document attached to Dr. Berlin's Curriculum Vitae, contains medical records and a prescription for a person other than Defendant, is confidential in its entirety

pursuant to sections 395.3025 and 456.057, through Florida Rule of Judicial Administration 2.420(c)(7) and (8).

5. Abbreviated chronology authored by Dr. Brooke Butler, which contains her mental impressions after evaluating Defendant, is confidential in its entirety pursuant to sections 456.057, 456.059, 119.071(1)(d)1., and 119.0714(1)(a),[3] through Florida Rule of Judicial Administration 2.420(c)(7) and (8).

The Clerk of Court is directed to allow only the following persons to view the information deemed confidential by this Order: this Court; judicial staff; Clerk's Office personnel as necessary to maintain the confidentiality of the records; and counsel for the State and Defense and their support staff who are actively and directly assisting with this case.

This Court finds the degree, duration, and manner of confidentiality ordered are no broader than necessary to protect the interests set forth in rule 2.420(c), in that all records referenced *supra* are confidential under the Florida and United States Constitutions, Florida and federal law, and Florida Statutes and case law. This Court also finds no less restrictive measures are available to protect the interests set forth in rule 2.420(c), in that the records at issue are confidential and exempt from public disclosure. Finally, the Clerk of the Court is directed to publish the instant Order in accordance with subdivision (e)(4) of Florida Rule of Judicial Administration 2.420. See Fla. R. Jud. Admin. 2.420(e)(3).

[3] This Court is aware that counsel is not an agency attorney for the State of Florida but, rather, a private registry attorney. However, this Court finds private registry attorneys, who represent indigent clients, are afforded the same confidentiality for work product as that afforded to agency attorneys. See Kight, 574 So. 2d at 1068-69.

In view of the above, it is **ORDERED:**

1. Morris Publishing Group, LLC, d/b/a *The Florida Times-Union*'s Motion to Intervene for Purposes of Opposing Defendant's Motion to Determine Confidentiality and to Set Aside Orders Sealing Documents, filed on February 26, 2016, is **GRANTED IN PART AND DENIED IN PART** to the extent provided herein.

2. Graham Media Group, Florida, Inc., d/b/a WJXT-TV4 & NEWS4JAX.COM's Motion to Intervene, to Oppose Defendant's Motions, and to Vacate Resultant Orders Sealing Various Documents, filed on February 29, 2016, is **GRANTED IN PART AND DENIED IN PART** to the extent provided herein.

3. This Court's previous Order Granting Motion to Determine Confidentiality of Court Records, entered on February 8, 2016, is **VACATED.**

4. This Court's previous Notice of Sealing Document, entered on February 16, 2016, is **VACATED.**

5. This Court's previous Order Sealing Specific Court Documents and Records, entered on February 17, 2016, is **VACATED.**

6. Defendant's Motion to Make Court Records Confidential and Motion for Protective Order Sealing Specific Court Documents and Records, filed on February 17, 2016, and *ore tenus* Motion made on February 2, 2016, is **GRANTED IN PART AND DENIED IN PART** to the extent provided herein.

7. The following records are **CONFIDENTIAL AND SHALL BE IMMEDIATELY SEALED** and shall not be disseminated to the media or to the public: (1) Ex-Parte Motion for Appointment of Out of State Expert and Request for In-Camera Hearing, filed on December 10, 2015; (2) Chart summarizing Defendant's medical history, diagnoses, and doctor visits starting in 1977; (3) Four-page document attached to Dr. Berlin's Curriculum Vitae which contains medical records and a prescription for a person other than Defendant; and (4) Abbreviated chronology authored by Dr. Brooke Butler.

8. The Clerk of Court shall **REDACT the checking account number on the check** attached to Dr. Berlin's Curriculum Vitae before it releases said check to the media or to the public.

9. The Affidavit of Emily M. Olson-Gault, as well as *only* the thirty-four page Curriculum Vitae of Dr. Frederick Berlin, are **not confidential**, and shall **BE RELEASED FOR PUBLIC DISCLOSURE.**

10. The Clerk of Court is directed to allow only the following persons to view the information deemed confidential by this Order: this Court; judicial staff; Clerk's Office

personnel as necessary to maintain the confidentiality of the records; and counsel of record for the State and Defense and their support staff who are actively and directly assisting with this case.

11. Extensions of this Order may be granted upon proper motion of a party in accordance with the procedures of Florida Rule of Judicial Administration 2.420(f)(3)(C).

12. This Order **shall not** be construed as a prohibition of the publication of any information already in the possession of the press. Nor shall this Order be construed as a closure of the judicial proceedings to the press or the public.

13. The Clerk of Court may publish this Order in its entirety.

DONE AND ORDERED in Jacksonville, Duval County, Florida this 4 day of April, 2016.

MALLORY D. COOPER
Circuit Court Judge

Copies to:

Mark Caliel, Esq.
Assistant State Attorney
Office of the State Attorney
311 W. Monroe St.
Jacksonville, FL 32202

Julie Schlax, Esq.
Attorney for Defendant
200 E. Forsyth St.
Jacksonville, FL 32202

Charles Fletcher, Esq.
Attorney for Defendant
8833 Perimeter Park Blvd., Ste. 104
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Timothy Conner, Esq.
Jennifer Mansfield, Esq.
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Edward Birk, Esq.
Marks Gray, P.A.
Attorney for Graham Media Group, Florida
P.O. Box 447
Jacksonville, FL 32201

Case No.: 16-2013-CF-05781-AXXX-MA

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IN THE CIRCUIT COURT OF THE FOURTH JUDICIAL CIRCUIT, IN AND FOR DUVAL COUNTY, FLORIDA.

CASE NO.:16-2013-CF-005781-AXXX-MA

DIVISION: CR-D

STATE OF FLORIDA

VS.

DONALD SMITH

MOTION FOR CONTINUANCE OF HEARING ON MOTION TO SUPPRESS

Defendant, Donald Smith, by and through the undersigned attorney, pursuant to the Florida Rules of Criminal Procedure, respectfully requests a continuance of the hearing on Defendant's Motion to Suppress, currently set for April 11, 2016 and as grounds therefore, states the following:

1. Undersigned counsel is filing a motion to have a prisoner brought back from Florida State Prison who has information relevant to the grounds presented in the Motion to Suppress.
2. Undersigned counsel needs additional time to prepare for the Motion to Suppress.
3. Counsel has discussed this motion Assistant State Attorney Mark Caliel and he has no objection to a continuance to the week of April 25, 2016.

Wherefore, Defense counsel in the above-entitled action respectfully requests a continuance of the motion to suppress to the week of April 25, 2016.

Respectfully submitted,

Law Offices of W. Charles Fletcher, P.A.

W. Charles Fletcher, Esquire
Florida Bar No.: 0125792
8833 Perimeter Park Blvd.
Suite 104
Jacksonville, Florida 32216
Tel: (904) 314-0233
Williamfletcher96@yahoo.com
Attorney for Defendant

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished to The Office of The State Attorney, by email and e-file this 7th day of April 2016.

W. Charles Fletcher, Esq.

IN THE CIRCUIT COURT, FOURTH
JUDICIAL CIRCUIT, IN AND FOR
DUVAL COUNTY, FLORIDA.

CASE NO.: **16-2013-CF-005781-AXXX-MA**
DIVISION: **CR-D**

STATE OF FLORIDA

vs.

DONALD JAMES SMITH

REQUEST FOR RE-APPOINTMENT OF COUNSELTO FORMER CLIENT RANDALL DEVINEY

The undersigned attorney hereby requests that lead counsel James A. Hernandez be Re-Appointed to Mr. Deviney for purposes of advising him on post-sentencing matters. This request is based on the below:

1. It has brought to the undersigned counsel's attention that Mr. Deviney may be transported back to Jacksonville, Florida to testify in a Motion to Suppress Hearing scheduled for May 4, 2016 in another death penalty case, State of Florida v. Donald Smith 16-2013-CF-005781.

2. Mr. Deviney is currently represented for appellate purposes by Nada M. Carey, Assistant Public Defender 301 South Monroe Street, Tallahassee, Florida 32301.

3. Federal Court allows for appointment of counsel for the purpose of advising a material witness. **The undersigned attorney will forward this request to the Justice Administrative Commission for their position on re-appointment of counsel for this issue.**

4. This re-appointment of counsel is sought for the below reasons:

a. The undersigned counsel or Mr. Deviney has not been provided with a copy of the Motion to Suppress Statements in case 16-2013-CF-005781. The undersigned counsel cannot retrieve said Motion to Suppress from the Core system since said docket entry "475" Motion to

Suppress Statements is currently listed as "unavailable/secured".

b. The undersigned counsel or Mr. Deviney has not been provided with

a copy of the 74 hours of statements of Mr. Deviney and Mr. Smith.

c. Mr. Deviney is just starting his appellate process. Mr. Deviney may

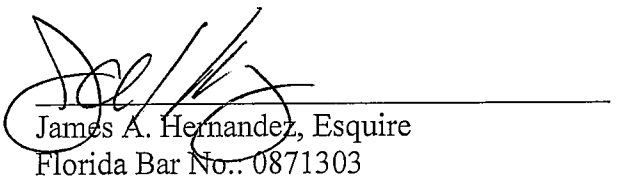
have to seek a Clemency Request if his appellate process and post-conviction review should fail. Anything Mr. Deviney may do, from now to a Clemency Review/Request (if needed), may affect said request.

d. The undersigned counsel has been informed by the State of Florida and the attorney for Mr. Smith, Mr. Charles Fletcher, that there are approximately 74 hours of recordings that exist between Mr. Smith and Mr. Deviney taken in the Duval County Pre-Trial Detention Facility before Mr. Deviney's trial in July 2015. Mr. Deviney defense team did not receive these recordings before Mr. Deviney's trial, penalty phase hearing, Spenser hearing and/or sentencing hearing.

5. The undersigned counsel, therefore, requests re-appointment as counsel for the purpose of advising Mr. Deviney as a material witness, a copy of said Motion to Suppress Statements in case 16-2013-CF-005781, and a copy of the 74 hours of recorded statements of Mr. Deviney and Mr. Smith.

WHEREFORE, the Defendant respectfully requests this Honorable Court to Grant this Request.

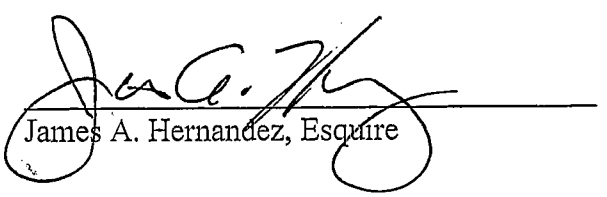
LAW OFFICE OF JAMES A. HERNANDEZ



James A. Hernandez, Esquire
Florida Bar No.: 0871303
118 West Adams St., Ste 500
Jacksonville, Florida 32202
(904) 354-4499
(904) 354-4403 (Facsimile)

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished to the Assistant State Attorney Mr. Bernardo de la Rionda , Esquire and Mark Caliel State Attorney's Office, Jacksonville, Florida, 32202; Julie Agent Schlax, Esquire and Charles Fletcher, Esquire and the Justice Administrative Commission by electronic CORE delivery, this 13th day of April 2016 and Nada M. Carey, Assistant Public Defender 301 South Monroe Street, Tallahassee, Florida 32301 by e-mail Bill.McLain@flpd2.com this 13th day of April 2016.



James A. Hernandez, Esquire

IN THE CIRCUIT COURT OF THE FOURTH CIRCUIT
IN AND FOR DUVAL COUNTY, FLORIDA

STATE OF FLORIDA

vs.

DONALD JAMES SMITH

CASE NO.: 16-2013-CF-005781-AXXX-MA
DIVISION: CR-D

NOTICE OF JUSTICE ADMINISTRATIVE COMMISSION RESPONSE TO REQUEST FOR RE-APPOINTMENT OF COUNSEL TO FORMER CLIENT RANDALL DEVINEY

The undersigned attorney hereby, gives Notice of Justice Administrative Commission Response to Request for Re-Appointment of Counsel to Former Client Randall Deviney.

On April 13, 2016 the undersigned counsel received a telephone phone call from Christian Lake, Esquire of the Justice Administrative Commission. Mr. Lake stated that Justice Administrative Commission (JAC) will not be filing a formal response to the Request for Re-Appointment of Counsel to Former Client Randall Deviney. Mr. Lake stated it was the discretion of the Judge to appoint counsel to represent a Material Witness. Mr. Lake further stated if counsel was appointed then counsel would be paid at an hourly basis.

Law Offices of James A. Hernandez

JAMES A. HERNANDEZ, ESQUIRE
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Tel. (904) 354-4499/Fax (904) 354-4403
E-mail: lawjimhernandez@aol.com

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished to the Assistant State Attorney Mr. Bernie de la Rionda, Esquire and Mark Caliel, Esquire at the State's Attorney, Jacksonville, Florida 32202, Julie Agent Schlax, Esquire and Charles Fletcher, Esquire and the Justice Administrative Commission by electronic CORE delivery this 25th day of April, 2016 and Nada M. Caret, Assistant Public Defender, 301 South Monroe Street, Tallahassee, Florida 32301 by e-mail Bill.McLain@flpd2.com this 25th day of April 2016.

JAMES A. HERNANDEZ, ESQUIRE

IN THE CIRCUIT COURT, FOURTH JUDICIAL CIRCUIT, IN AND FOR DUVAL COUNTY, FLORIDA

CASE NO: 16-2013-CF-5781-AXXX-MA
DIVISION: CR-D

STATE OF FLORIDA

vs.

DONALD SMITH
_____/

MOTION FOR THE APPOINTMENT OF A PRIVATE INVESTIGATOR

COMES NOW the Defendant, Donald Smith, by and through his court-appointed attorney, and pursuant to Florida Laws of Criminal Procedure, moves this Honorable Court for the entry of an Order appointing a private investigator and authorizing the incurring of costs of a private investigator, and as grounds hereby states:

1. The Defendant was indicted for Murder in the First Degree, Kidnapping a Child Under the Age of 13 Years, and Sexual Battery on a Child Less than 12 Years; followed by the filing of the State's Notice of Intent to Seek the Death Penalty;

2. The Defendant has been previously adjudged insolvent by this Court and the undersigned was appointed to represent the Defendant in this matter;

3. Undersigned counsel knows there are a number of detailed and technical issues which must be investigated and explored. Counsel does not possess the knowledge or expertise to address all the issues involved in this investigation which it is believed can only be done properly and effectively through the use of a private investigator.

4. Appointment of a Private Investigator is necessary to insure that Defendant receives his rights to effective assistance of counsel, cross-examination and confrontation of witnesses, and compulsory process, guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and Section 16 of the Florida Constitution; also his rights to due process and due course of law, guaranteed by the Fourteenth Amendment to the United States Constitution and Section 9 of the Florida Constitution; and, his right to the equal protection of the law, guaranteed by the Fourteenth Amendment to the United States Constitution and Section 2 of the Florida Constitution.

5. An indigent defendant is entitled to reimbursement for reasonable costs incurred Fla. R Crim. P3.220(o). Defendant is indigent for costs. This indigence prevents defendant from hiring a Private Investigator to assist in the defense.

6. This Court previously appointed Jonathan Ruda One Step Ahead Investigations, as the Private Investigator in this matter; however, he has recently accepted a full time position with Regional Conflict Counsel.

7. Counsel requests that this Court appoint an alternate investigator, specifically, Hannon Investigations.

8. Hannon Investigations would be utilized as an investigator for both guilt and mitigation purposes.

WHEREFORE, Defendant prays that this Court appoint Hannon Investigations to assist in the preparation of a defense and the Court order the Justice Administration Commission to pay the costs of the investigator's services.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been provided to the Justice Administrative Commission via e-mail delivery this 28th day of April, 2016.

Respectfully submitted,

/s/ Julie Agent Schlax

Julie Agent Schlax
200 East Forsyth Street
Jacksonville, Florida 32202
(904) 674-0717Telephone
(904) 674-0737 Facsimile
Attorney for Defendant

State Attorney No.:13CF039428

IN THE CIRCUIT COURT, FOURTH JUDICIAL CIRCUIT, IN AND FOR DUVAL COUNTY, FLORIDA

CASE NO.: 2013-CF-5781

DIVISION : CR-D

STATE OF FLORIDA
V.
DONALD JAMES SMITH
_____/

STATE'S RESPONSE TO DEFENDANT'S MOTION TO SUPPRESS

COMES NOW, the State of Florida, by and through the undersigned Assistant State Attorney, and responds, in opposition, to Smith's motion to suppress as follows: [1]

1. Smith moves to suppress statements made to Randall Deviney while Smith and Deviney were incarcerated in the Duval County Jail. The statements were gathered as a result of a wire placed, not in their cells, but in an area between the two isolation cells in which Deviney and Smith were housed; the "chase" area.
2. Smith claims that introduction of these statements would violate his rights under the Fourth, Fifth, and Sixth Amendments to the United States Constitution. Smith also avers, as a kind of umbrella catch all, that introduction of these statements would likewise violate his Fourteenth Amendment rights. [2]

[1] The State rejects Smith's statement of the "facts" set forth in his motion.

[2] A Due Process violation occurs when the State takes action in derogation of a Defendant's fundamental constitutional rights. Gideon v. Wainwright, 372 U.S. 335, 341 (1963). Conversely and logically, this means that when the government's

3. Smith purports to base his motion to suppress, in part, on the Fourth Amendment. Smith posits that no warrant was requested or obtained prior to placing the wire in the chase area. [3] Smith also asserts that the wire unreasonably invaded his privacy because, along with his conversations, the wire captured his private moments on the toilet and in the shower.

4. Smith cites to no case law that stands for the proposition that a warrant is required before law enforcement officials may place a recording device in any area of their own jail. Likewise, Smith offers no legal support for the idea that the State violates an inmate's right to privacy by placing a wire in an area outside his cell.

5. This is understandable because the Fourth Amendment is not implicated in places where a defendant does not have an expectation of privacy. State v. Smith, 641 So.2d 849, 851 (Fla.1994). *See also* Katz v. United States, 389 U.S. 347, 360, (1967) (Harlan, J., concurring)) (A citizen's right to privacy under the Fourth Amendment of the Constitution of the United States is determined by a two prong test: (1) whether the citizen had a subjective expectation of privacy; and 2) whether that expectation was one that society recognizes as reasonable .

6. It is well established that a jail inmate has no reasonable expectation of privacy in jail. Lanza v. New York, 370 U.S. 139 (1962); Allen v. State, 636 So.2d 494, 496–97 (Fla.1994)(Surreptitiously made recordings of voluntary jailhouse

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actions do not violate the defendant's fundamental constitutional rights, there is no Due Process violation stemming from the same actions.

[3] The need for a warrant stems from the Fourth's Amendments protection against unreasonable search and seizure. Ortiz v. State, 24 So.3d 596 (Fla. 5th DCA 2009).

conversations between inmates are admissible, "at least in the absence of any factor diminishing the trustworthiness of the conversation such as coercion or trick."). [4] This is true even when the defendant is on the toilet. Cleveland v. State, 557 So.2d 959, 960 (Fla. 4th DCA 1990)(resident of probation and restitution center did not have reasonable expectation of privacy even when he was sitting in locked toilet stall because the center was akin to a jail cell where there is no expectation of privacy). Moreover, the United States Supreme Court has specifically rejected claims that the Fourth Amendment applies to searches of an inmate's jail cell. *See also* Hudson v. Palmer, 468 U.S. 517, 528, 104 S.Ct. 3194, 82 L.Ed.2d 393 (1984) (finding that the Fourth Amendment proscription against unreasonable searches does not apply within the confines of a prison cell).

7. Smith had no expectation of privacy in his conversations with Deviney because he had no expectation of privacy while in his jail cell. Even so, the wire was not even placed in Smith's cell, making any expectation of privacy even more attenuated. Based on well-established case law, this Court should reject Smith's claim the wire violated his rights under the Fourth Amendment.

8. Smith also argues that introducing statements captured by the wire would violate his Fifth Amendment rights. Smith's Fifth Amendment claim turns on the notion that, after Smith invoked his right to counsel, his conversations with Randall Deviney were taped.

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[4] The only exception, not applicable here, is when law enforcement officials deliberately and affirmatively foster an expectation of privacy. Cox v. State, 26 So.3d 666 (Fla. 4th DCA 2010).

9. Smith is mistaken when he claims this violates his Fifth Amendment right to counsel. Indeed, the Fifth Amendment is not even implicated.

10. Fifth Amendment protections are intended to ensure that a person is not "compelled" to be a witness against himself. Both the United States and Florida Constitutions provide that persons shall not be "compelled" to be witnesses against themselves in any criminal matter. *U.S. Const. amend. V; art. I, § 9, Fla. Const. See also* Traylor v. State, 596 So.2d 957, 964 (Fla.1992) (stressing that under the basic contours of Florida's constitutional privilege against self-incrimination, "a main focus of Florida confession law has always been on guarding against one thing—coercion").

11. To provide a prophylactic safeguard for important Fifth Amendment rights, the United States Supreme Court determined that statements made by a person, while under custodial interrogation, may not be introduced into evidence against that person unless he has been informed of certain rights including the right to remain silent and the right to have counsel present during custodial interrogation. Miranda v. Arizona, 384 U.S. 436 (1966). These rights, commonly known as Miranda rights, are designed to protect an individual's Fifth Amendment right against compelled self-incrimination by offsetting the "inherently compelling pressures" of custodial interrogation. Id. at 467. *See also* Duckworth v. Eagan, 492 U.S. 195, 202 (1989)(the reason for requiring Miranda warnings at this stage is because interrogation in certain custodial circumstances is inherently coercive and statements made under those circumstances are inadmissible unless the

suspect is specifically warned of his Miranda rights and freely decides to forgo those rights).

12. Once a defendant has invoked his Fifth Amendment right to counsel, the police may not initiate custodial interrogation again without counsel being present. Edwards v. Arizona, 451 U.S. 477, 486-487 (1981). *See also* Minnick v. Mississippi, 498 U.S. 146 (1990). The Edwards rule is designed to "prevent police from badgering a defendant into waiving his previously asserted Miranda rights," Michigan v. Harvey, 494 U.S. 344, 350 (1990).

13. As is clear from both Miranda and Edwards, the linchpin of the Fifth Amendment right to both silence and counsel is the presence of two things; custody and police interrogation. Absent one or the other, the Fifth Amendment is not implicated. Sapp v. State, 690 So.2d 581, 585 (Fla.1997).

14. In this case, there was no police interrogation. Instead, the conversations captured on the wire were voluntary conversations between inmates housed in the Duval County Jail. Smith's Fifth Amendment claims are without merit and should be denied.

15. Finally, Smith claims that introduction of the taped conversations would violate his Sixth Amendment right to counsel. Smith's allegations stems from his suggestion that Randall Deviney was an agent, albeit an unwitting one, when the conversations took place. This Court should reject Smith's claim that a Sixth Amendment violation occurred. [5]

[5] The Sixth Amendment right to counsel is triggered "at or after the time that judicial proceedings have been initiated ... 'whether by way of formal charge, preliminary

16. Once a defendant actually invokes his Sixth Amendment right to counsel, law enforcement may not, thereafter, deliberately initiate interrogation of the defendant without counsel being present. [6] This is true if the police, themselves, initiate interrogation or if they affirmatively employ an agent, such as a paid informant or cooperating co-defendant, to conduct the interrogation. Massiah v. U.S., 377 U.S. 201 (1964) (typically referred to as a "Massiah violation").

17. In this context, a Massiah violation would arise if two facts were present; first that the defendant's conversation partner is a government agent and second, that the government agent deliberately elicits incriminating statements. United States v. Henry, 447 U.S. 264 (1980).

18. In Henry, the United States Supreme Court made clear that critical to a determination of whether someone is a government agent is whether the alleged agent is acting under the instructions of the government. Likewise critical, is that the statements at issue were deliberately elicited by governmental action. Henry at 270.

19. Boiling it down to its essence, a Massiah violation occurs only when the government takes some affirmative action to elicit an incriminating statement from a defendant for which the Sixth Amendment right to counsel has attached. Massiah does not prohibit the introduction of spontaneous statements that are not elicited by governmental action. Likewise, "the Sixth Amendment is not

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hearing, indictment, information, or arraignment.' " Brewer v. Williams, 430 U.S. 387, 398, (1977) (quoting Kirby v. Illinois, 406 U.S. 682, 689, (1972)).

[6] *See* Montejo v. Louisiana, 556 U.S. 778 (2009) (mere appointment of counsel without invocation, does not preclude police interrogation if the defendant freely and voluntarily waives right to silence and counsel after warning).

violated when a passive listening device collects, but does not induce, incriminating comments." United States v. Henry, 447 U.S. at 276 (J. Powell concurring).

20. In support of his motion, Smith relies heavily on his claim the State knew that Deviney might continue his effort to eliciting incriminating statements from Smith in hopes of helping himself, and did nothing to dissuade him from doing so. The State denies that is the case, given its repeated assertions in both Deviney and Smith's cases, that it had no interest in Deviney's testimony in Smith's case. Even if true, however, no Massiah violation occurred. Passive knowledge and failure to dissuade one inmate from talking to another does not rise to the level of the "deliberately elicited" standard. Rather, to show a Massiah violation, the defendant must demonstrate that the police and their informant took some action, beyond merely listening, that was designed deliberately to elicit incriminating remarks. Johnson v. State, 135 So.3d 1002, 1027 (Fla. 2014).

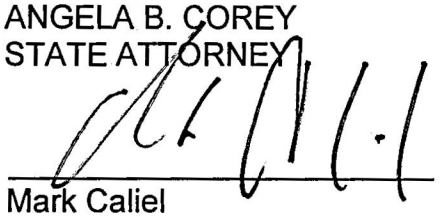
21. In this case, Smith cannot establish that the State violated his right to counsel. Deviney was not acting under the instructions of the State in any way. Likewise, the State did nothing to induce Smith's incriminating statements. Instead, the State merely placed a listening device outside of Smith's cell; a technique that the United States Supreme Court specifically noted did not constitute the deliberate eliciting of incriminating statements. U.S. v. Henry, 447 U.S. 264, 271 n.9 (1980) ("The situation where the 'listening post' is an inanimate electronic device differs; such a device has no capability of leading the conversation into any particular subject or prompting any particular replies.").

22. In this case, Smith and Deviney engaged in voluntary conversation, without government input, interference, or interrogation, in a place where they had no expectation of privacy. Accordingly, the introduction of a portion of Smith's statements into evidence would not violate Smith's constitutional rights.

BASED ON THE FOREGOING, the State respectfully asks this Court to deny Smith's motion to suppress.

Respectfully submitted,

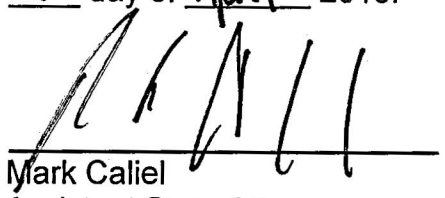
ANGELA B. COREY
STATE ATTORNEY



Mark Caliel
Assistant State Attorney
Fla. Bar Number: 105650
311 W. Monroe Street
Jacksonville, Florida 32202
(904) 255-2500 (Phone)
mcaliel@coj.net (Email)

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been served by electronic service to counsel for the defendant this 25th day of April 2016.



Mark Caliel
Assistant State Attorney

IN THE CIRCUIT COURT, FOURTH JUDICIAL CIRCUIT, IN AND FOR DUVAL COUNTY, FLORIDA

CASE NO: 16-2013-CF-5781-AXXX-MA
DIVISION: CR-D

STATE OF FLORIDA

vs.

DONALD SMITH
_____/

ORDER APPOINTING PRIVATE INVESTIGATOR

THIS CAUSE came to be heard upon the Defendant's Motion for Appointment of a Private Investigator to assist in the defense, the Court having been fully advised in the premise, and finding that a Private Investigator to assist in the defense is both necessary and essential due to the magnitude of discovery and complexity of the issues, it is:

ORDERED as follows:

Julie Schlax is hereby authorized to incur the reasonable expenses of obtaining Hannon Investigations, to assist in the preparation of a defense in this cause, not to exceed initial costs of $6,000.00.

IT IS FURTHER ORDERED that the Justice Administrative Commission shall pay the costs of Hannon Investigations upon submission of the Private Investigator's invoices which shall be shall be in accordance with the rates, terms and conditions approved by the 4th Judicial Circuit's ISC, Laws of Florida, applicable Florida Statutes and the JAC contract, policies and procedures. The rate for the Private Investigator shall be $40.00 per hour.

DONE AND ORDERED at the Duval County Courthouse, Jacksonville, Florida on this 2 day of ~~April~~, 2016.

THE HONORABLE MALLORY D. COOPER
CIRCUIT JUDGE

Copies to: Julie Agent Schlax
Justice Administration Commission
Hannon Investigations

FILED 05/02/16 PM 03:05 RUSSELL

IN THE CIRCUIT COURT OF THE FOURTH JUDICIAL CIRCUIT, IN AND FOR DUVAL COUNTY, FLORIDA.

CASE NO.:16-2013-CF-005781-AXXX-MA

DIVISION: CR-D

STATE OF FLORIDA

VS.

DONALD SMITH

MOTION TO MODIFY THIS COURT'S PROTECTIVE ORDER ENTERED ON APRIL 6, 2016

Defendant, Donald Smith, by and through the undersigned attorney, pursuant to the Florida Rules of Criminal Procedure, respectfully requests this Honorable Court to Modify its previously entered Protective Order and as grounds therefore, states the following:

1. Undersigned counsel has filed a Motion To Suppress related to recorded statements of the defendant and a prisoner named Randall Deviney, disclosed by the state in its previously filed State's Sixth Supplemental Discovery Exhibit.
2. This Court entered a Protective Order on April 6, 2016, restricting the release of the recordings to the parties listed in the Order.
3. Undersigned counsel needs to release the recordings to attorney James Hernandez so that he may discuss them with his client, Randall Deviney.

Wherefore, Defense counsel in the above-entitled action respectfully requests this Honorable Court to enter an order allowing defense counsel to provide attorney James Hernandez with a copy of the discovery materials disclosed in the State's Sixth Supplemental Discovery Exhibit.

Respectfully submitted,

Law Offices of W. Charles Fletcher, P.A.

W. Charles Fletcher, Esquire
Florida Bar No.: 0125792
8833 Perimeter Park Blvd.
Suite 104
Jacksonville, Florida 32216
Tel: (904) 314-0233
Williamfletcher96@yahoo.com
Attorney for Defendant

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished to The Office of The State Attorney, by email and e-file this 2nd day of May 2016.

W. Charles Fletcher, Esq.

IN THE CIRCUIT COURT OF THE FOURTH JUDICIAL CIRCUIT, IN AND FOR DUVAL COUNTY, FLORIDA.

CASE NO.:16-2013-CF-005781-AXXX-MA

DIVISION: CR-D

STATE OF FLORIDA

VS.

DONALD SMITH

DEFENDANT'S SECOND MOTION FOR CONTINUANCE OF HEARING ON MOTION TO SUPPRESS

Defendant, Donald Smith, by and through the undersigned attorney, pursuant to the Florida Rules of Criminal Procedure, respectfully requests a continuance of the hearing on Defendant's Motion to Suppress, currently set for May 4, 2016 and as grounds therefore, states the following:

1. Undersigned counsel is filing a motion to have a prisoner brought back from Florida State Prison who has information relevant to the grounds presented in the Motion to Suppress.
2. The above mentioned prisoner/witness was previously sentenced to death in an unrelated case, and this Court entered an Order re-appointing attorney James Hernandez to resume his representation on April 28, 2016.

3. Mr. Hernandez will need additional time to review portions of the State's Sixth Supplemental Discovery Exhibit with his client prior to the hearing on this defendant's Motion to Suppress.

Wherefore, Defense counsel in the above-entitled action respectfully requests a continuance of the hearing on the motion to suppress.

Respectfully submitted,

Law Offices of W. Charles Fletcher, P.A.

W. Charles Fletcher, Esquire
Florida Bar No.: 0125792
8833 Perimeter Park Blvd.
Suite 104
Jacksonville, Florida 32216
Tel: (904) 314-0233
Williamfletcher96@yahoo.com
Attorney for Defendant

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished to The Office of The State Attorney, by email and e-file this 2nd day of May 2016.

W. Charles Fletcher, Esq.

STATE ATTORNEY NO.: 13CF39428

IN THE CIRCUIT COURT OF THE FOURTH JUDICIAL CIRCUIT, IN AND FOR DUVAL COUNTY, FLORIDA

CASE NO.:162013CF5781AXXXMA

DIVISION: CR-D

STATE OF FLORIDA

vs.

DONALD JAMES SMITH

STATE'S NOTICE OF AGGRAVATING FACTORS
THE STATE INTENDS TO RELY ON AND
MOTION FOR NOTICE OF MITIGATING CIRCUMSTANCES

The State of Florida, having previously filed Notice of Intent to seek the Death Penalty on July 16th, 2013, pursuant to Sections 782.04, 775.082, and 921.141 Florida Statutes, gives notice to Defendant of the following Aggravating Factors the State will rely on.

Additionally, the State requests the Defendant to provide the State with a list of all Mitigating Circumstances under Section 921.141(7), Florida Statutes it intends to rely on, including specifying the non-statutory mitigating circumstances under 921.141(7)(h), pursuant to the Court's previous order.

AGGRAVATING FACTORS

The applicable statutory aggravating factors, as set forth in Florida Statute 921.141, are as follows:

(b) The Defendant was previously convicted of a felony involving the use or threat of violence to the person;

(d) The Defendant was engaged in a kidnapping and sexual battery during the capital felony;

(e) The capital felony was committed for the purpose of avoiding or preventing a lawful arrest;

(h) The capital felony was especially heinous, atrocious, or cruel;

(i) The capital felony was a homicide and was committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification.

(l) The victim of the capital felony was a person less than 12 years of age.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by email, to Julie Schlax, Esquire, 200 East Forsythe Street, Jacksonville, FL 32202, this 3rd day of May, 2016.

Angela B. Corey
State Attorney

By: _____
Mark Caliel
Florida Bar Number : 0105650
Assistant State Attorney

IN THE CIRCUIT COURT, FOURTH JUDICIAL CIRCUIT, IN AND FOR DUVAL COUNTY, FLORIDA

CASE: 16-2013-CF-005781-AXXX-MA

DIVISION: CR-D (Circuit)

STATE OF FLORIDA

vs.

DONALD JAMES SMITH, DEFENDANT

ORDER

THIS CAUSE COMING ON BEFORE THE COURT UPON THE ☒DEFENDANT'S ☐STATE'S

SECOND MOTION FOR CONTINUANCE OF HEARING ON MOTION TO SUPPRESS

FILED HEREIN ON THE 2ND DAY OF MAY , 2016 AND THE COURT HAVING HEARD ARGUMENTS OF THE STATE'S ATTORNEY AND OF COUNSEL FOR DEFENSE, AND BEING FULLY ADVISED IN THE PREMESIS, IT IS THEREUPON

ORDERED AND ADJUDGED THAT THE AFORESAID MOTION SHALL BE AND THE SAME IS HEREBY:

Granted

DONE AND ORDERED IN OPEN COURT AT JACKSONVILLE, DUVAL COUNTY, FLORIDA, THIS 4 DAY OF May ;20 16 .

MALLORY COOPER
Circuit Judge

FILED
MAY 04 2016
RONALD W. DAMSELL
CLERK CIRCUIT COURT

Filing # 40972414 E-Filed 05/02/2016 03:58:14 PM

IN THE CIRCUIT COURT OF THE FOURTH JUDICIAL CIRCUIT, IN AND FOR DUVAL COUNTY, FLORIDA.

CASE NO.:16-2013-CF-005781-AXXX-MA

DIVISION: CR-D

STATE OF FLORIDA

VS.

DONALD SMITH

DEFENDANT'S SECOND MOTION FOR CONTINUANCE OF HEARING ON MOTION TO SUPPRESS

Defendant, Donald Smith, by and through the undersigned attorney, pursuant to the Florida Rules of Criminal Procedure, respectfully requests a continuance of the hearing on Defendant's Motion to Suppress, currently set for May 4, 2016 and as grounds therefore, states the following:

1. Undersigned counsel is filing a motion to have a prisoner brought back from Florida State Prison who has information relevant to the grounds presented in the Motion to Suppress.
2. The above mentioned prisoner/witness was previously sentenced to death in an unrelated case, and this Court entered an Order re-appointing attorney James Hernandez to resume his representation on April 28, 2016.

FILED: DUVAL COUNTY, RONNIE FUSSELL, CLERK, 05/04/2016 08:45:48 AM

3. Mr. Hernandez will need additional time to review portions of the State's Sixth Supplemental Discovery Exhibit with his client prior to the hearing on this defendant's Motion to Suppress.

Wherefore, Defense counsel in the above-entitled action respectfully requests a continuance of the hearing on the motion to suppress.

Respectfully submitted,

Law Offices of W. Charles Fletcher, P.A.

W. Charles Fletcher, Esquire
Florida Bar No.: 0125792
8833 Perimeter Park Blvd.
Suite 104
Jacksonville, Florida 32216
Tel: (904) 314-0233
Williamfletcher96@yahoo.com
Attorney for Defendant

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished to The Office of The State Attorney, by email and e-file this 2nd day of May 2016.

W. Charles Fletcher, Esq.

IN THE CIRCUIT COURT, FOURTH JUDICIAL CIRCUIT, IN AND FOR DUVAL COUNTY, FLORIDA

CASE NO.: 16-2013-CF-05781-AXXX-MA

DIVISION: CR-D

STATE OF FLORIDA

v.

DONALD JAMES SMITH,
Defendant.
_____/

ORDER GRANTING MOTION TO MODIFY THIS COURT'S PROTECTIVE ORDER ENTERED ON APRIL 6, 2016

This matter came before this Court on Defendant's "Motion to Modify This Court's Protective Order Entered on April 6, 2016," filed through counsel on May 2, 2016. On May 4, 2016, this Court held a hearing addressing the instant Motion, during which the following parties were present: Assistant State Attorneys Mark Caliel, Esq., and Meredith Charbula, Esq.; Attorneys for Defendant Charles Fletcher, Esq., and Julie Schlax, Esq.; and Defendant.

In the instant Motion, Defendant seeks an order from this Court modifying its Protective Order entered on April 4, 2016.[1] Specifically, counsel seeks permission to provide the recordings disclosed as part of the State's Sixth Supplemental Discovery Exhibit to James Hernandez, Esq., so that he may discuss those with his client, Randall Deviney. This Court **GRANTS** defense counsel's request for modification, but strictly limits the modification to

[1] While counsel lists the filing date as April 6, 2016 in the Motion's title and body, the Protective Order was entered on April 4, 2016.

FILED 05/05/2016 05:15 PM DUVAL CLERK OF COURT RUSSELL

allow disclosure to James Hernandez, Esq., for the purposes of representing his client in this matter.

Based on the foregoing, it is:

ORDERED AND ADJUDGED that Defendant's "Motion to Modify This Court's Protective Order Entered on April 6, 2016," filed through counsel on May 2, 2016, is **GRANTED**.

DONE AND ORDERED in Chambers, at Jacksonville, Duval County, Florida, on this 4 day of May, 2016.

MALLORY D. COOPER
Circuit Court Judge

Copies to:

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Meredith Charbula, Esq.
Office of the State Attorney
311 W. Monroe St.
Jacksonville, FL 32202

Julie Schlax, Esq.
Attorney for Defendant
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Jacksonville, FL 32202

Charles Fletcher, Esq.
Attorney for Defendant
8833 Perimeter Park Blvd., Ste. 104
Jacksonville, FL 32216

Case No.: 16-2013-CF-05781-AXXX-MA

IN THE CIRCUIT COURT, FOURTH JUDICIAL CIRCUIT, IN AND FOR DUVAL COUNTY, FLORIDA.

STATE OF FLORIDA,

CASE NO.: 16-2013-CF-5781

DIVISION: CR-D

vs.

DONALD SMITH

_____/

MOTION TO PROHIBIT DEATH QUALIFICATION BECAUSE THE NEW LEGISLATION CREATING A NEW DEATH PENALTY SCHEME IS NOT RETROACTIVE

DONALD SMITH, by and through the undersigned attorney, Julie Agent Schlax, moves this Honorable Court to enter an order finding that the Defendant is not eligible for imposition of the Death penalty and in support thereof would show unto the Court as follows;

SUMMARY OF FACTS

1. Defendant was arrested on June 22, 2013 for Murder, Kidnapping, and Sexual Battery.
2. On July 2, 2013, the State indicted Defendant for First Degree Murder, Kidnapping, and Capital Sexual Battery.
3. On July 16, 2013, the State of Florida filed a Notice of Intent to Seek the Death Penalty pursuant to Florida Rule of Criminal Procedure 3.202.

4. On January 12, 2016, the United States Supreme Court ruled that the Florida death penalty was unconstitutional in Hurst v. Florida, ___ U.S. ___, 136 S. Ct. 616, 193 L. Ed. 2D 504 (2016).

5. Effective March 7, 2016, the State of Florida has enacted new legislation which amends pertinent statues and rules of procedure to create a new death penalty scheme.

ARGUMENT

The new legislation passed on March 7, 2016 creating a new death penalty scheme is not retroactive to the conduct of Defendants that preceded March 7, 2016. Since the United States Supreme Court ruled on January 12, 2016 that Florida's Death Penalty law was unconstitutional then all criminal conduct before March 7, 2016 the maximum penalty must be Life in Prison Without the Possibility of Parole.

MEMORANDUM OF LAW

Chapter 2016-13, Laws of Florida, cannot apply to pending prosecutions for offenses committed prior to its effective date for three reasons, two of which implicate controlling constitutional proscriptions. First, the statute does not authorize retrospective application and Florida statutes are presumed to operate prospectively, absent clear evidence of a contrary intent. Second, even had such intent been explicit, this Court would be called upon to consider whether retrospective application is

constitutionally permissible, and it is not under the Florida Constitution's article x, section 9. Third, both the federal and the state Constitutions' Ex Post Facto Clauses prohibit applying the new legislation to prior offenses.

It is basic that statutes are to be prospectively applied. *See Dade County v. Ferro*, 384 So. 2d 1283, 1285 (Fla. 1980); *Foley v. Morris*, 339 So. 2d 215, 216-17 (Fla. 1976). Where the Legislature intends otherwise, Florida law requires "clear evidence of legislative intent to apply the statute retrospectively." *Florida Ins. Guar. Ass'n, Inc. V. Devon Neighborhood Ass'n, Inc.*, 67 So. 3d 187, 194 (Fla. 2011) (citation omitted); *see Middlebrooks v. Department of State, Div. of Licensing*, 565 So. 2d 727, 728 (Fla. 1st DCA 1990) ("Absent a clear legislative expression requiring retroactive application, a law is presumed to operate prospectively, meaning that it will apply only to conduct occurring after the statute becomes effective.") (citation omitted)).

Prospective application is particularly mandated when criminal statutes are at issue. Thus, it has been repeatedly emphasized that criminal defendants are to be sentenced in accordance with the statutes in effect when the offenders committed their crimes. *E.g.*, *Larkins v. State,* 739 So. 2d 90, 96 n.5 (Fla. 1999); *Lamore v. State,* 86 So. 3d 546, 548 (Fla. 2d DCA 2012); *Roca v. State*, 58 So. 3d 384, 385 (Fla. 2d DCA 2011); *State v. Miranda*, 793 So. 2d 1042, 1044 (Fla. 3d DCA 2001). Indeed, "it is axiomatic that a criminal sentence is governed by the laws in effect at the time of the offense." *Vonador v. State*, 857 So. 2d 323, 324 (Fla. 2d DCA 2003)

(citation omitted).

Consistent with this fundamental precept, the Legislature chose to make its new death-penalty statute prospective. Not only does the statute not manifest retrospective intent, it reflects the precise contrary. Chapter 2016-13, Laws of Florida, specifies that the new statute "shall take effect upon becoming a law."[1]

And there are two good reasons why the legislature chose to enact a prospective statute. To attempt to do otherwise would contravene the Florida and the United States Constitutions.

Article x, section 9 of the Florida Constitution provides: "Repeal or amendment of a criminal statute shall not affect prosecution or punishment for any crime previously committed." This Court early on explained the purpose of the progenitor constitutional provision, then set forth in article 3, section 32 of our Constitution, as precluding the retroactive force of statutes such as Chapter 2016-3:

> The effect of this constitutional provision is to give all criminal legislation a prospective effectiveness; that is to say, the repeal or amendment by subsequent legislation, of a preexisting criminal statute does not become effective, either as repeal or as an amendment of

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[1] Of course, if there was any ambiguity, the rule of lenity codified in the Florida Statutes would require that the statute be construed in the light most favorable to petitioner. *See* § 775.021(1), Fla. Stat. ("The provisions of this code and offenses shall be strictly construed; when the language is susceptible of differing constructions, it shall be construed most favorably to the accused"); *see also Reino v. State*, 352 So. 2d 853, 860 (Fla. 1977).

> such preexisting statute, in so far as offenses are concerned that have been already committed prior to the taking effect of such repealing or amending law.

Raines v. State, 42 Fla. 141, 28 So. 57, 58 (1900).[2]

The predecessor constitutional provision in article 3, section 32 was almost identical to the current article x provision and provided that "the repeal or amendment of any criminal statute shall not affect the prosecution or punishment of any crime committed before such repeal or amendment," – and was broadly construed by this Court:

> [W[e may define a "criminal statute" as an act of the Legislature as an organized body, defining crime, treating of its nature, or providing for its punishment. It is sufficiently broad and comprehensive as to include within its scope and meaning all those acts of the Legislature as an organized body which deal in any way with crime or its punishment.

Washington v. Dowling, 92 Fla. 601, 610-11, 109 So. 588, 591 (Fla. 1926).

Equally so, "[w]ith regard to article x, section 9, the term "criminal statute" is defined in a broad context." *Smiley v. State*, 966 So. 2d 330, 337 (Fla. 2007). This Court has noted that a statute would qualify as a "criminal statute" if it has a direct impact on the prosecution of the criminal offense.

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[2] This Court has noted that "[c]ourts have interpreted this section the same as its successor provision in the 1968 revision." *State v. Watts*, 558 So. 2d 994, 1008 n.5 (Fla. 1990).

Id. And this constitutional provision applies so long as the amendments cannot be dismissed as merely procedural or remedial. *See State v. Pizarro*, 383 So. 2d 762, 763 (Fla. 4th DCA 1980).

Chapter 2016-13 amends multiple criminal statutes, two of which are key as establishing that the amendments qualify as substantive "criminal statutes" for purposes of article X, section 9. *See also Washington v. Dowling*, 92 Fla. at 615-16, 109 So. at 593 (Brown, C.J., concurring) (different statutory sections read in pari materia where each are part of one general subject). First, section 775.082(1)(a), the substantive provision which actually establishes the penalty of death, is amended by substituting "a determination" for "findings by the court." Second, section 921.141, which sets forth the death-penalty scheme, is substantially amended to provide for multiple substantive changes. The burden of proof has been inverted (aggravating factors must outweigh mitigating circumstances under the amended section 921.141(2)(b)1.b.); the jury must return findings identifying each aggravating factor found to exist, and a unanimous vote is now required under section 921.141(2)(b)2.; death eligibility is modified so that a defendant becomes "eligible for a sentence of death" once the jury unanimously finds "at least one aggravating factor" under section 921.141(2)(b)2.; the jury death verdict requires a vote of at least 10 jurors under section 921.141(2)(c); and a verdict of life is now binding under section 921.141(3)(a)1.

It is plain that these amendments are substantive "criminal statutes" within the ambit of article x, section 9.[3] While some of the overall statutory modifications have "procedural elements," all are closely related to the substantive components of the statute, and distinct substantive changes have undoubtedly been made. *See Horsley v. State*, 160 So. 3d 393, 401 (Fla. 2015) (amendments to juvenile-sentencing statutes characterized as "substantive provisions"); *Smiley*, 966 So. 2d at 336 (statutes that create or abrogate affirmative defenses are classified as substantive change in the law although possessing procedural elements); *Troy v. State*, 948 So. 2d 635, 644-45 (Fla. 2006) (although statute eliminating voluntary intoxication as a defense has procedural elements, it constitutes a substantive change in the law because those elements are closely related to the substantive elements); *see also Montgomery v. Louisiana*, 136 S. Ct. 718, 734-35 (2016) (some rules of law may have procedural and substantive ramifications, but be best categorized as substantive).

Accordingly, while Florida's death-penalty scheme has indeed been declared unconstitutional by the Supreme Court in *Hurst*, and it is essential that this Court provide some remedy, the new statutory scheme is no answer. Article x, section 9 precludes the amendment from applying retroactively to pending cases. *See also Smiley v. State*, 966 So. 2d at 335-37 (statute that created a new affirmative defense, but did not alter the definition or elements

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of the murder statute, qualified as substantive criminal statute and retrospective application was precluded by article x, section 9); *State v. Pizzaro*, 383 So. 2d 762, 763 (Fla. 4th DCA 1980) (because Youthful Offender Act alters prescribed punishments for defendants meeting its requirements, it cannot apply to offenses committed prior to its effective date); *cf. State v. Watts*, 558 So. 2d 994, 998-99 (Fla. 1990) (Article x, section 9 not applicable because the statutes defining the original offense and sentence were unchanged and not all of defendants' criminal conduct occurred prior to the amendment's effective date).

That this Court sanctioned the use of the new juvenile-sentencing statutes in *Horsley*, over the State's assertion that article x, section 9 precluded their retrospective application, does not authorize using the new death-penalty statutes here. As noted, the Court found such amendments of a substantive nature, but found article x, section 9, referred to as the "Savings Clause," not controlling based on the purpose of the Clause. That purpose, according to the Court, "is to require the statute in effect at the time of the crime to govern the sentence an offender receives for commission of that crime." *Horsley* , 160 So. 3d at 406. (citation omitted). The Court proceeded to explain that the statute in effect at the time of the crime was unconstitutional under the federal constitution so it could not be enforced, and, even if the Savings Clause could apply, the federal constitution "must trump" the state constitution. *Id.*

But the juvenile-sentencing case is no analog. For while the statute considered it was wholly unconstitutional as applied to juveniles, in that the Eighth Amendment precluded both the death penalty and mandatory life imprisonment, section 775.082(1)(a), as extant at the time of the offenses at issue, is not wholly unconstitutional. That statute contains a separate – and severable – provision that authorizes a sentence of life imprisonment without the possibility of parole. The statute provides in pertinent part:

> [A] person who has been convicted of a capital felony shall be punished by death if the proceeding held to determine sentence according to the procedure set forth in s. 921.141 results in findings by the court that such person shall be punished by death, otherwise such person shall be punished by life imprisonment and shall be ineligible for parole.

The "unconstitutional portion of a general law may be deleted and the remainder allowed to stand if the unconstitutional provision can be logically separated from the remaining provisions." *State ex rel. Boyd v. Green*, 355 So. 2d 789, 794 (Fla. 1978). Because the legislative purpose can be furthered independently of the void death-penalty provision, because the valid and invalid provisions can be neatly separated, because the Legislature would have passed one without the other, and because a complete act remains after the invalid portion is stricken, severance is proper. *Id.*; *accord Lawnwood Med. Ctr., Inc. v. Seeger*, 990 So. 2d 503, 518 (Fla. 2008) (citation omitted).

Indeed, this Court has so recognized once before in considering the

severability of this statute. In *Donaldson v. Sack*, 265 So. 2d 499, 502-03 (Fla. 1972), the Court -- after Florida's death-penalty process was, in effect, rendered unconstitutional by *Furman v. Georgia*, 408 U.S. 238 (1972) -- held that the automatic sentence upon conviction of a formerly "capital offense" was life imprisonment:

> We find no difficulty with a continuation of the sentencing for these former "capital offenses" under s 775.082(1) as automatically life imprisonment upon conviction, inasmuch as that is the only offense left in the statute. . . . The elimination of the death penalty from the statute does not of course destroy the entire statute. We have steadfastly ruled that the remaining consistent portions of statutes shall be held constitutional if there is any reasonable basis for doing so and of course this clearly exists in these circumstances.

Id. at 502-03 (footnote omitted). The Court concluded that this result was proper under the rule of severability. *Id.* at 503. And the result is equally proper in this case. The maximum potential sentence is life imprisonment without the possibility of parole.

This remedy upon severance is also compelled because applying Chapter 2016-13 to pending cases would violate the Ex post facto Clause of the state and the federal Constitutions. The Supreme Court of the United States has recognized that laws that seek retrospectively to "reduce the quantum of evidence" necessary for the state to meet its burden of proof will run afoul of the Ex Post Facto Clause. *Carmell v. Texas*, 529 U.S. 513, 531 (2000). Likewise, a statute that alters the "definition of crimes" to the defendant's disadvantage is the archetypical example of a new law that

cannot be retroactively applied. *Collins v. Youngblood*, 497 U.S. 37, 51 (1990).

As has been established, Chapter 2016-13 attempts to reduce the state's burden of establishing that a capital defendant is eligible for a death-sentence by virtue of the language in section 921.141(2)(b)2. that a defendant is eligible for a death sentence upon the jury finding "at least one aggravating factor." Such an alteration reduces the state's burden of proof and changes the definition of a capital crime to the defendant's detriment, and cannot, consistent with the Ex post facto Clauses, be applied to capital defendants whose offenses preceded the statute's effective date.[4]

Additionally, the Florida Constitution's Ex Post Facto Clause has been liberally construed so that even some procedural matters give rise to an ex post facto violation. As this Court explained in *Dugger v. Williams*, 593 So. 2d 180, 181 (Fla. 1991), "it is too simplistic to say that an ex post facto violation can occur only with regard to substantive law, not procedural law. Clearly, some procedural matters have a substantive effect." The new death-penalty scheme, like the sentencing scheme for juvenile homicide offenders,[5] effects substantial substantive changes, and cannot be

[4] While a statute must operate to a defendant's detriment to constitute an ex post facto law, *see Calder v. Bull*, 3 U.S. (3 Dall.) 386, 390 (1798), the same is not true with respect to article x, section 9 of the Florida Constitution. *See State v. Watts*, 558 So. 2d at 999.

retrospectively applied to capital defendants whose crimes occurred long before the statutes were enacted.

Dobbert v. Florida, 432 U.S. 282 (1977), is not to the contrary. There, the Supreme Court held that the statutory transformation that occurred when Florida adopted the 1972 death penalty scheme was procedural and ameliorative in nature, and consequently retrospective application did not give rise to an ex post facto violation. *Id.* at 292. But that holding is inapposite here, because the amendatory scheme is predominantly substantive and to the defendant's detriment to the extent that the state can establish eligibility for a death sentence upon proof of a single aggravating factor. This is particularly so because the statute fails to reduce that which can be considered in aggravation, and therefore denies a capital defendant the Eighth Amendment guarantee that the category of homicide offenders will be "genuinely narrowed" by specified aggravators before a death sentence may be considered. *See Zant v. Stephens*, 462 U.S. 862, 877 (1983).

WHEREFORE, the Defendant moves this Honorable Court to enter an order finding that the Defendant is not eligible for imposition of the Death penalty.

Respectfully submitted,

Julie Agent Schlax

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[5] *See Horsley v. State*, 160 So. 3d 393, 401 (Fla. 2015) (amendments to juvenile-sentencing statutes are "substantive provisions").

/s/ Julie Schlax

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been furnished to Mark Caliel, Esquire at the Office of the State Attorney, Jacksonville, Florida, 32202, by CORE electronic delivery on this _6th__ day of May, 2016.

/s/ Julie Schlax

ATTORNEY

IN THE CIRCUIT COURT OF THE
FOURTH JUDICIAL CIRCUIT
FOR FLORIDA, IN AND FOR
DUVAL COUNTY
CASE NO: 16-2013-CF-5781

THE STATE OF FLORIDA,

Vs.

DONALD SMITH,

_____/

MOTION TO DECLARE FLORIDA STATUTE 921.141 (2016) UNCONSTITUTIONAL

THE DEFENDANT, DONALD SMITH, through counsel, moves this Court, pursuant to the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution and Article 1§ 2,9, 16,17, 21, and 22 of the Florida Constitution and Florida Rule of Criminal Procedure 3.190 to enter an order declaring Fla. Stat. 921.141 unconstitutional. In support thereof the Defendant states:

1. The Defendant is charged by way of indictment with one count of First Degree Murder.
2. The prosecution has filed a Notice of its Intent to Seek the Death Penalty under Amended Florida Statute 782.04(1) and 921.141 (2016).

ARGUMENT

In an uninterrupted series of decisions spanning more than fifteen years, the United States Supreme Court has vigorously and consistently repeated a basic, bright-line rule mandated by the Sixth Amendment: "any fact that 'expose[s] the defendant to a greater punishment than that authorized by the jury's guilty verdict' is an 'element' that must be submitted to a jury." *Hurst v. Florida*, 136 S.Ct. 616, 621 (2016), quoting *Apprendi v. New Jersey*, 530 U.S. 466, 494 (2000). In *Hurst v. Florida*, the Court recently restated this foundational principle, emphasizing that it applies with equal force to death-penalty sentencing statutes: "The Sixth Amendment requires a jury, not a judge, to find each fact necessary to impose a sentence of death." *Id.* at 619 (emphasis added). A jury "finding" only meets constitutional standards if it is made unanimously, based on proof beyond a reasonable doubt. *See Apprendi*, 530 U.S. at 498 (Scalia, J. concurring) (charges against the accused, and the corresponding maximum exposure he faces, must be determined "*beyond a reasonable doubt by the unanimous vote of 12 of his fellow citizens*") (emphasis in original).

The Florida statute, which allows a non-unanimous jury finding, pursuant to an unstated burden of proof, to authorize a death sentence, violates this central constitutional tenet. In addition, because it is contrary to the national consensus rejecting non-unanimous sentencing in capital cases, it also violates the Eighth Amendment's prohibition on cruel and unusual punishment.

I. The Florida Capital Sentencing Statute, which Permits a Jury to Make Non-Unanimous Factual Findings Justifying a Death Sentence, Violates the Sixth Amendment

The Supreme Court's Sixth Amendment precedent, culminating in *Hurst,* clearly illustrates that the Florida capital sentencing statute, which permits a non-unanimous jury to make factual findings regarding the sufficiency of aggravating

factors and the relative weight of aggravating factors and mitigating circumstances, violates the United States Constitution.

A. Under the Sixth Amendment to the United States Constitution, All Facts Supporting an Enhanced or Increased Sentence, Including the Sufficiency of Aggravating Factors and the Relative Weight of Aggravating Factors and Mitigating Circumstances, are Elements of the Crime that Must be Proven to a Jury

It is now incontrovertible that, under the Sixth Amendment, "any fact that increases the penalty for a crime beyond the prescribed statutory maximum" qualifies as an element that "must be submitted to a jury, and proved beyond a reasonable doubt." *Apprendi*, 530 U.S. at 490. Where a factual finding is a necessary precursor to an enhanced or increased sentence, such as a death sentence, any distinction between "elements" of the crime and "sentencing factors" is dissolved. *Apprendi*, 530 U.S. at 494. *Apprendi's* unbending rule has, therefore, invalidated schemes involving sentencing enhancements, 530 U.S. at 490, mandatory sentencing guidelines, *United States v. Booker*, 543 U.S. 220, 226 (2005), and the death penalty, *Ring v. Arizona*, 536 U.S. 584, 589 (2002).

Apprendi applies to all findings of fact necessary to the imposition of an increased sentence under state or federal law. While its precise impact depends on the particular sentencing scheme analyzed, legislative labels are in no way dispositive of the Sixth Amendment issue. *Ring*, 536 U.S. at 610 (Scalia, J., concurring)("the fundamental meaning of the jury-trial guarantee of the Sixth Amendment is that all facts essential to imposition of the level of punishment that the defendant receives—whether the statute calls them elements of the offense, sentencing factors, or Mary Jane—must be found by the jury beyond a reasonable doubt."). Neither is there a constitutionally significant distinction between "facts

concerning the offense" and "facts concerning the offender." *Cunningham v. California*, 549 U.S. 270, 291 n. 14 (2007).

This fundamental right is no less protective in death penalty cases. *Ring*, 536 U.S. at 589 ("Capital defendants, no less than noncapital defendants, we conclude, are entitled to a jury determination of any fact on which the legislature conditions an increase in their maximum punishment."). In *Hurst*, the Court clearly stated, "The Sixth Amendment requires a jury, not a judge, to find *each fact necessary* to impose a sentence of death." *Hurst v. Florida*, 136 S.Ct. 616, 619 (2016) (emphasis added). Florida's former death penalty statute, which permitted judicial fact-finding to support a death sentence, violated *Apprendi and Ring*'s clear command:

> As with Timothy Ring, the maximum punishment Timothy Hurst could have received without any judge-made findings was life in prison without parole. As with *Ring*, a judge increased Hurst's authorized punishment based on her own fact-finding. In light of *Ring*, we hold that Hurst's sentence violates the Sixth Amendment.

Id. at 622.

The Court acknowledged that, under the previous Florida law, the factual findings necessary to authorize a death sentence were not limited to the presence of a single aggravating factor but rather extended to findings regarding mitigating circumstances, and the relative weight of each:

> [T]he Florida sentencing statute does not make a defendant eligible for death until "findings *by the court* that such person shall be punished by death." Fla. Stat. § 775.082(1) (emphasis added). The trial court *alone* must find "the facts ... [t]hat sufficient aggravating circumstances exist" and "[t]hat there are insufficient mitigating circumstances to outweigh the aggravating circumstances." § 921.141(3); *see* [*State v.*] *Steele*, 921 So.2d [538,] 546 [(Fla. 2005)].

Id. (emphasis in original); *see also Kansas v. Carr*, 136 S.Ct. 633, 643 (2016)(approving constitutionality of Kansas death penalty statute where "the existence of aggravating circumstances and the conclusion that they outweigh mitigating circumstances must be proved beyond a reasonable doubt; mitigating circumstances themselves, on the other hand, must merely be 'found to exist.'"). Therefore, determining the relative weight of aggravating factors and mitigating circumstances is also a factual finding encompassed within *Apprendi*'s rule.

The Sixth Amendment is not satisfied by a jury verdict which only determines a single aggravating factor. The holdings of *Ring* and *Hurst*, which specifically address the unconstitutional judicial finding of aggravating factors, do not suggest the opposite. The limited holdings of those cases simply reflect the specific question presented in each. In *Ring*, the Court noted, "Ring's claim is tightly delineated: He contends only that the Sixth Amendment required jury findings on the aggravating circumstances asserted against him." 536 U.S. at 597 n.4. Hurst raised an identical claim. Petitioner's Brief on the Merits, *Hurst v. Florida*, No. 14-7505, at 17-18 ("Florida's capital sentencing scheme violates [the Sixth Amendment] because it entrusts to the trial court instead of the jury the task of 'find[ing] an aggravating circumstance necessary for imposition of the death penalty.'")[1] Therefore, it is no surprise that the Court's holdings specifically addressed the only constitutional infirmity Ring and Hurst challenged: the judicial determination of an aggravating circumstance. *See Kasten v. Saint-Gobain Performance Plastics Corp.*, 563 U.S. 1, 17 (2011) ("We do not normally consider a separate legal question not raised in the certiorari briefs."). The Court's opinion in *Hurst* elucidates, however, that these holdings are narrow applications of a much broader principle: any fact-finding that is a necessary precursor to a death sentence,

[1]Available at http://sblog.s3.amazonaws.com/wp-content/uploads/2015/06/Hurst-merits-brief.pdf.

rather than one of life imprisonment, is an "element" of the crime for Sixth Amendment purposes. *Hurst*, 136 S.Ct. at 619, 622.

Justice Sotomayor, dissenting from the denial of certiorari in *Woodward v. Alabama*, 134 S.Ct. 405 (2013), made this precise observation. *Woodward* involved a challenge to Alabama's capital punishment scheme, which allows judges to independently weigh aggravating and mitigating circumstances and impose death sentences, even where a jury has recommended a sentence of life in prison. *Id.* at 406. Justice Sotomayor acknowledged,

> The very principles that animated our decisions in *Apprendi* and *Ring* call into doubt the validity of Alabama's capital sentencing scheme. Alabama permits a defendant to present mitigating circumstances that weigh against imposition of the death penalty. *See* Ala.Code §§ 13A–5–51, 13A–5–52. Indeed, we have long held that a defendant has a constitutional right to present mitigating evidence in capital cases. *See Eddings v. Oklahoma*, 455 U.S. 104, 110, 102 S.Ct. 869, 71 L.Ed.2d 1 (1982). And a defendant is eligible for the death penalty in Alabama only upon a specific factual finding that any aggravating factors outweigh the mitigating factors he has presented. *See* Ala.Code §§ 13A–5–46(e), 13A–5–47(e). The statutorily required finding that the aggravating factors of a defendant's crime outweigh the mitigating factors is therefore necessary to impose the death penalty. It is clear, then, that this factual finding exposes the defendant to a greater punishment than he would otherwise receive: death, as opposed to life without parole. Under *Apprendi* and *Ring*, a finding that has such an effect must be made by a jury.

Id. at 410-11.

The highest courts and legislatures of several states have likewise acknowledged that the Supreme Court's Sixth Amendment jurisprudence extends to determinations about aggravating and mitigating circumstances, and the relative weight of each. On remand from *Ring v. Arizona*, 536 U.S. 584 (2002), the Arizona Supreme Court rejected the State's argument that, as long as the jury

found one aggravating circumstance, the defendant was "death eligible" and there was no Sixth Amendment error. *State v. Ring*, 204 Ariz. 534, 561 (Ariz. 2003) (*Ring* III). Specifically, the State had claimed, "Nothing in *Ring [v. Arizona]* ... prevents a trial judge from finding the second and succeeding aggravating factors, as well as finding mitigating factors and balancing them against the aggravator." *Ring* III, 204 Ariz. at 561. The Arizona Supreme Court disagreed,

> In our view, however, *Ring* II [*Ring v. Arizona*] should not be read that narrowly. Although the Court there considered a death sentence based upon the existence of a single aggravating factor, we conclude that *Ring* II requires a jury to consider all aggravating factors urged by the state and not either exempt from *Ring* II, implicit in the jury's verdict, or otherwise established beyond a reasonable doubt.

Id. at 562.

The Court also refused to accede to the State's entreaty that it exempt findings of fact regarding mitigating circumstances and the relative weight of aggravators and mitigators from the jury's purview:

> Neither a judge, under the superseded statutes, nor the jury, under the new statutes, can impose the death penalty unless that entity concludes that the mitigating factors are not sufficiently substantial to call for leniency. A.R.S. §§ 13–703.E (Supp.2002) and 13–703.F (Supp.2001). The process involved in determining whether mitigating factors prohibit imposing the death penalty plays an important part in Arizona's capital sentencing scheme. We will not speculate about how the State's proposal would impact this essential process.

Id. As a result, in several subsequent cases, the Arizona Supreme Court reversed judge-imposed death sentences and remanded for jury sentencing where, although the judge's findings with respect to the aggravators was harmless error (because the aggravators were clearly established beyond a reasonable doubt), the jury may have reached a different conclusion than the court about the weight of the mitigating evidence presented. *See, e.g., State v. Nordstrom*, 206 Ariz. 242 (2003);

State v. Dann, 206 Ariz. 371 (2003); *State v. Armstrong*, 208 Ariz. 360 (2003); *State v. Jones*, 205 Ariz. 445 (2003).

In *State v. Whitfield*, 107 S.W.3d 253 (Mo. 2003)(en banc), the Missouri Supreme Court reached a similar conclusion, specifically holding that the Sixth Amendment's scope in death penalty cases was not limited to a jury determination of a single aggravating factor:

> [In *Ring v. Arizona*, t]he Supreme Court held that not just a statutory aggravator, but every fact that the legislature requires be found before death may be imposed must be found by the jury.... Because Mr. Ring did not argue that Arizona's sentencing scheme required the jury to make a factual finding as to mitigating factors, the Supreme Court declined to specifically address whether a jury was also required to determine whether mitigating factors were present that called for leniency. *See Ring*, 536 U.S. at 597, n. 4, 122 S.Ct. 2428. Instead, it set out the general principle that courts must use in applying *Ring* to determine whether a particular issue must be determined by the jury or can be determined by a judge, stating, "[c]apital defendants ... are entitled to a jury determination of any fact on which the legislature conditions an increase in their maximum punishment." *Id.* at 589, 122 S.Ct. 2428.

Whitfield, 107 S.W.3d at 257-58.

The Court determined that Missouri's death penalty statute, which permitted the trial judge to make findings of fact and determine whether a death sentence was warranted in cases where the jury was unable to reach a unanimous sentencing decision, violated the Sixth Amendment. *Id.* at 262. In so ruling, the Court specifically held that Missouri's death sentencing process involved three separate factual determinations. *Id.* at 261. Under the Missouri statute, the jury (or the court, if the jury could not agree) was tasked with determining (1) the presence of at least one aggravating factor, (2) whether all of the aggravating factors, taken

together, warrant imposition of the death penalty, and (3) whether the evidence in aggravation outweighs the evidence in mitigation. *Id.* at 258-59. Because a defendant was death-eligible only if these three inquiries were answered in the affirmative, the Court concluded each was a factual finding that the Sixth Amendment required a jury to make. *Id.* at 259; *see also Woldt v. People*, 64 P.3d 256, 266 (Colo. 2003) (en banc)(Sixth Amendment required jury to make all factual findings on which death sentence predicated, including that "(A) At least one aggravating factor has been proved; and (B) There are insufficient mitigating factors to outweigh the aggravating factor or factors that were proved"). [2]

Similarly, several state legislatures have enacted capital sentencing statutes consistent with the Sixth Amendment's requirement that all factual determinations on which a death sentence is predicated, including those regarding mitigating circumstances, must be proven to a jury beyond a reasonable doubt. *See* ARK. CODE § 5-4-603 ("jury shall impose sentence of death if [it] unanimously returns written findings that: (1) [a]n aggravating circumstance exists beyond a reasonable doubt; (2) [a]ggravating circumstances outweigh beyond a reasonable doubt all mitigating circumstances found to exist; and (3) [a]ggravating circumstances justify a sentence of death beyond a reasonable doubt"); KAN. STAT. ANN. § 21-6617(e) (death penalty imposed if "by unanimous vote, the jury finds beyond a reasonable doubt that one or more of the aggravating circumstances .... exist and, further, that the existence of such aggravating circumstances is not outweighed by any mitigating circumstances which are found to exist"); OHIO REV. CODE § 2929.03(D) (jury shall return a death sentence if it "unanimously finds, by proof

[2] Several state courts held, following *Ring v. Arizona*, but prior to the U.S. Supreme Court's decision in *Hurst v. Florida*, that the process of weighing aggravating and mitigating circumstances is not a factual finding or element subject to Sixth Amendment requirements. *See, e.g., Nunnery v. State*, 263 P.3d 235, 252 (Nev. 2011); *Commonwealth v. Roney*, 866 A.2d 351, 361 (Pa. 2005); *Ritchie v. State*, 809 N.E.2d 258, 266 (Ind. 2004); *Oken v. State*, 835 A.2d 1105, 1117 (Md. 2003); *Brice v. State*, 815 A.2d 314, 322 (Del. 2003); *Ex Parte Waldrop*, 859 So.2d 1181, 1189 (Ala. 2002). These decisions reflected the not unique, but now-discredited, opinion that "*Ring* does not extend to the weighing phase." *Brice*, 815 A.2d at 322.

beyond a reasonable doubt, that the aggravating circumstances the offender was found guilty of committing outweigh the mitigating factors"); TENN CODE ANN. § 39-13-204 (g)(1)(B) ("The sentence shall be death, if the jury unanimously determines that (A) At least one (1) statutory aggravating circumstance or several statutory aggravating circumstances have been proven by the state beyond a reasonable doubt; and (B) Such circumstance or circumstances have been proven by the state to outweigh any mitigating circumstances beyond a reasonable doubt"); UTAH CODE ANN. § 76-3-207 (5)(b) ("The death penalty shall only be imposed if... the jury is persuaded beyond a reasonable doubt that total aggravation outweighs total mitigation, and is further persuaded, beyond a reasonable doubt, that the imposition of the death penalty is justified and appropriate in the circumstances"); WASH. REV. CODE § 10.95.060 (4) (for death sentence to be imposed, jury must be "convinced beyond a reasonable doubt that there are not sufficient mitigating circumstances to merit leniency").

The Florida statute now provides, upon a conviction of first-degree murder, the jury must unanimously determine, beyond a reasonable doubt, the presence of an aggravating factor. § 921.141(2) (a)-(b), Fla. Stat. After it does so, however, the jury makes additional findings justifying a death sentence. *Id.* The statute requires the jury to return a sentencing recommendation based on the presence of specific facts:

> The recommendation shall be based on a weighing of all of the following:
> a. Whether sufficient aggravating factors exist.
> b. Whether aggravating factors exist which outweigh the mitigating circumstances found to exist.
> c. Based on the considerations in sub-subparagraphs a. and b., whether the defendant should be sentenced to life imprisonment without the possibility of parole or to death.

Id. If the jury's factual findings do not result in the conclusion that sufficient aggravating factors exist, or that the aggravating factors outweigh the mitigating circumstances, the Court must impose a sentence of life without the possibility of parole. § 921.141(3), Fla. Stat. The statute does not require a unanimous jury verdict regarding the relative weight of the aggravating and mitigating evidence, nor does it apply any particular burden of proof to this jury determination. § 921.141(2), Fla. Stat.

The analysis in *Hurst* reveals that these additional findings regarding the sufficiency of the aggravating factors and the relative weight of the aggravating factors and mitigating circumstances are necessary factual prerequisites to the imposition of a death sentence and, as a result, must be determined by a unanimous jury, beyond a reasonable doubt. The Florida statute clearly and unambiguously states that, even where the jury has determined an aggravating factor exists, life imprisonment must be imposed unless the jury makes an additional finding that the aggravating factors are sufficient to warrant a death sentence and that they outweigh the mitigating circumstances. § 921.141(2), Fla. Stat. The Florida legislature did not make a death sentence permissible simply upon the jury's determination that an aggravating factor exists. *Id.* Rather, it chose to make these additional findings statutorily necessary to the imposition of a death sentence. *Id.* Therefore, under *Apprendi* and its progeny, they are elements of the crime of capital murder. *See Hurst*, 126 S.Ct. at 622; *Apprendi*, 530 U.S. at 490.

The State may claim that determining the sufficiency of aggravating factors or the relative weight of aggravating factors and mitigating circumstances is not a factual finding but a judgment call that *Hurst* permits a court to make. The reasoning of *Hurst*, which extends *Ring* to determinations about the relative weight of aggravating and mitigating circumstances, refutes this claim. The United States Supreme Court specifically noted that, under the previous Florida statute, the judge

made an impermissible *factual determination*, within the scope of the Sixth Amendment's jury trial guarantee, that "there are insufficient mitigating circumstances to outweigh the aggravating circumstances," *Hurst*, 136 S.Ct. at 622. This determination, made by the trial court under the former Florida statute, is indistinguishable from that made by the jury in the current one. *Compare* § 921.141(3), Fla Stat. (2010) and § 921.141(2), Fla. Stat. (2016). Both are included within the Sixth Amendment's umbrella.

B. Elements of a Crime, Including the Determination that Sufficient Aggravating Factors Exist and that the Aggravating Factors Outweigh the Mitigating Circumstances Must be Found by a Unanimous Jury

Because all factual determinations justifying a death sentence fall within the Sixth Amendment's purview, it necessarily follows that these determinations must be proven to a unanimous jury. Both Florida and United States Supreme Court precedent mutually reinforce this inescapable conclusion.

1. In Florida, Jury Verdicts Must be Unanimous

Under the Florida Constitution, in all criminal cases, "the verdict of the jury must be unanimous." *Jones v. State*, 92 So.2d 261 (Fla. 1957). "Although neither the Sixth nor Fourteenth Amendments to the federal constitution require unanimous jury verdicts in noncapital state trials, the requirement was an integral part of all jury trials in the Territory of Florida in 1838." *Bottoson v. Moore*, 833 So.2d 693, 714 (Fla. 2002) (Shaw, J., concurring), *citing Motion to Call Circuit Judge to Bench*, 8 Fla. 459, 482 (1859) ("The common law wisely requires the verdict of a petit jury to be unanimous"). This requirement, with roots in the Florida Constitution, is incorporated into the Florida Rules of Criminal Procedure. *See* Fla. R. Crim. P. 3.440 ("No verdict may be rendered unless all of the trial

jurors concur in it"). Therefore, within this State, any jury verdict that is a constitutional prerequisite to a death sentence must be unanimous.

2. The Sixth Amendment Requires Unanimous Jury Verdicts in Capital Cases

The Sixth Amendment, applicable to the States through the Fourteenth Amendment, also requires a unanimous verdict in a capital case. It is indisputable that the Sixth Amendment requires that all convictions for non-petty offenses be supported by a unanimous jury verdict. *Andres v. United States*, 333 U.S. 740, 748 (1948) ("Unanimity in jury verdicts is required where the Sixth and Seventh Amendments apply. In criminal cases this requirement of unanimity extends to all issues—character or degree of the crime, guilt and punishment—which are left to the jury."); *McDonald v. City of Chicago, Ill.*, 561 U.S. 742, 766 n.14. (2010)("the Sixth Amendment right to trial by jury requires a unanimous jury verdict in federal criminal trials").

Under current precedent, however, the standard is somewhat different in state cases. This distinction results from the Court's splintered ruling in the companion cases of *Apodaca v. Oregon*, 406 U.S. 404 (1972), and *Johnson v. Louisiana*, 406 U.S. 356 (1972), involving constitutional challenges to state law provisions permitting non-unanimous jury verdicts in non-capital cases. Oregon law permitted convictions by a 10-2 jury vote, and Louisiana required a vote of 9-3 in favor of guilt. *Id.* In *Apodaca*, eight Justices agreed that the right to a jury trial "applied identically" in federal and state cases. *McDonald*, 561 U.S. at 766 n.14 (citing *Johnson v. Louisiana*, 406 U.S. 356, 395 (1972) (Brennan, J., dissenting in *Apodaca*)). But because those eight Justices were evenly divided on whether the Sixth Amendment required unanimity, Justice Powell's separate concurrence broke the tie, and he concluded that the Sixth Amendment requires unanimity in federal

cases, but that the states' supermajority rule satisfied the Fourteenth Amendment. *Id.*; *Johnson*, 406 U.S. at 369-380 (Powell, J., concurring in the judgment in *Apodaca*); *id.* at 381-382 (Douglas, J., dissenting); *Apodaca*, 406 U.S. at 406 (plurality); *id.* at 414-415 (Stewart, J., dissenting).

The Supreme Court has not revisited *Apodaca* in the past forty years. In the intervening period, however, the Supreme Court has rejected Justice Powell's notion of inequivalent incorporation. In *McDonald v. City of Chicago*, a plurality of the Court confirmed that "incorporated Bill of Rights protections 'are all to be enforced against the States under the Fourteenth Amendment according to the same standards that protect those personal rights against federal encroachment.'" 561 U.S. at 765. The Court recognized that it had "abandoned the notion that the Fourteenth Amendment applies to the States only a watered-down, subjective version of the individual guarantees of the Bill of Rights," noting that "it would be incongruous to apply different standards depending on whether the claim was asserted in a federal or state court." *Id.* at 765 (internal quotation marks and citation omitted). Writing separately, Justice Thomas agreed that the Fourteenth Amendment makes applicable against the States all the "individual rights enumerated in the Constitution." *Id.* at 823 (Thomas, J., concurring).

Therefore, the continued validity of *Apodaca* is at best questionable. The only way to reconcile the Court's repeated recognition that the Sixth Amendment requires a unanimous jury verdict and *McDonald*, which made clear that the incorporated provisions of the Bill of Rights apply in the same manner, and with equal force, in state cases, is to conclude that the Sixth Amendment does, in fact, require state criminal convictions to be supported by a unanimous verdict.

Even if the holding of *Apodaca* were not predicated on a splintered ruling encompassing since-discredited principles, the Court's approval of non-unanimous verdicts in *Apodaca* addressed only non-capital cases. In both states where non-

unanimous jury verdicts were permitted, Oregon and Louisiana, capital verdicts were and are required to be unanimous. La. Const. art. I, § 17(A); La. Code Crim. P. Ann. art. 782(A); Or. Const. art. I, § 11. "When a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, 'the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds…'" *Marks v. United States*, 430 U.S. 188, 193 (1977), quoting *Gregg v. Georgia*, 428 U.S. 153, 169 n. 15, (1976) (opinion of Stewart, Powell, and Stevens, JJ.). Therefore, *Apodaca*'s narrow holding cannot be extended to approve the constitutionality of a less-than-unanimous verdict in a capital case.

Neither has the Court ever explicitly countenanced such a practice. To the contrary, in the *Apprendi* line of cases, the Court clearly presumed that the required jury verdict would be unanimous. In *Blakely*, the Court noted that the *Apprendi* rule reflected the "longstanding tenet[] of common-law criminal jurisprudence…: that the 'truth of every accusation' against a defendant 'should afterwards be confirmed by the unanimous suffrage of twelve of his equals and neighbours,'" *Blakely*, 542 U.S. at 301, quoting 4 W. Blackstone, Commentaries on the Laws of England 343 (1769); *accord Booker*, 543 U.S. at 238-239 (also quoting Blackstone); *Apprendi*, 530 U.S. at 498 (Scalia, J. concurring) (charges against the accused, and the corresponding maximum exposure he faces, must be determined "*beyond a reasonable doubt by the unanimous vote of 12 of his fellow citizens*") (emphasis in original).

Further reinforcing this conclusion is the scarcity of state laws that permit any non-unanimous jury findings in capital cases. The Supreme Court has relied on a survey of the jury trial systems existing in the various States to set boundaries on the rights guaranteed by the Sixth Amendment. In *Burch v. Louisiana*, 441 U.S.

130, 138 (1979), the Court held that a non-unanimous, six-person jury violated the Sixth Amendment. In so doing, it noted,

> We are buttressed in this view by the current jury practices of the several States. It appears that of those States that utilize six-member juries in trials of non-petty offenses, only two, including Louisiana, also allow non-unanimous verdicts. We think that this near-uniform judgment of the Nation provides a useful guide in delimiting the line between those jury practices that are constitutionally permissible and those that are not.

Id. Other than Florida, only Alabama and Delaware permit a jury to recommend death by a less than unanimous vote. The statutes in both of these states, however, are under substantial constitutional attack.[3] The "near-uniform judgment" of every other death penalty jurisdiction therefore demonstrates that the Sixth Amendment requires unanimous verdicts in capital cases.

C. Elements of a Crime, Including the Determination that Sufficient Aggravating Factors Exist and that the Aggravating Factors Outweigh the Mitigating Circumstances, Must be Proven Beyond a Reasonable Doubt

Where the Sixth Amendment necessitates that facts supporting a death sentence be proven to a jury, those facts must be established beyond a reasonable

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[3] The Delaware Supreme Court has stayed all pending death prosecutions while it considers the constitutionality of the state's death penalty statute under *Hurst v. Florida*. Tom McParland, "All Del. Capital Cases Stayed Pending High Court Ruling," Delaware Law Weekly (Feb. 1, 2016), available at http://www.delawarelawweekly.com/id=1202748516955/All-Del-Capital-Cases-Stayed-Pending-High-Court-Ruling?slreturn=20160207124245. In Alabama, a trial court judge recently ruled that the state death penalty was unconstitutional in a pending murder case. Kent Faulk, "JeffCo judge: Alabama death penalty sentence scheme unconstitutional," Al.com (March 3, 2016), available at http://www.al.com/news/birmingham/index.ssf/2016/03/jeffco_judge_rules_alabama_dea.html. In addition, Justices Sotomayor, Ginsburg and Breyer have each noted the likely unconstitutionality of the Alabama death penalty statute. *See Woodward v. Alabama*, 134 S.Ct. 405 (2013) (Sotomayor, J., dissenting from denial of certiorari); *Brooks v. Alabama*, 136 S.Ct. 708 (2016) (Sotomayor, J. and Ginsburg, J. concurring in denial of certiorari) and (Breyer, J., dissenting from denial of certiorari). Additionally, on May 2, 2016 the United States Supreme Court granted rehearing for certiorari in *Johnson v. Alabama*, and remanded the case back to the Court of Criminal appeals of Alabama for further consideration in light of *Hurst*.15-7091, (2016).

doubt. The Fifth Amendment's due process guarantee requires that, in all criminal prosecutions, the government establish each element of the crime beyond a reasonable doubt. *In re Winship*, 397 U.S. 358, 364 (1970). This requirement attaches to any factual finding falling under the umbrella of the Sixth Amendment's guarantee. As the United States Supreme Court noted in *Sullivan v. Louisiana*, "[i]t is self-evident, we think, that the Fifth Amendment requirement of proof beyond a reasonable doubt and the Sixth Amendment requirement of a jury verdict are interrelated. It would not satisfy the Sixth Amendment to have a jury determine that the defendant is probably guilty, and then leave it up to the judge to determine (as *Winship* requires) whether he is guilty beyond a reasonable doubt. In other words, the jury verdict required by the Sixth Amendment is a jury verdict of guilty beyond a reasonable doubt." 508 U.S. 275, 278 (1993).

Because they are, in essence, elements of capital murder, this rule must apply with equal force to factual findings concerning the sufficiency of aggravating factors and the determination that aggravating factors outweigh the mitigating circumstances. Therefore, the Florida statute, which assigns no particular burden of proof to these determinations, violates the Fifth and Sixth Amendments to the U.S. Constitution. *See Apprendi*, 530 U.S. at 490.

Because the Florida statute requires the jury to make additional factual findings that sufficient aggravating factors exist and that the aggravating factors outweigh the mitigating circumstances before a death sentence may be imposed, those findings are elements of the crime of capital murder. As a result, these elements must be found by a unanimous jury, beyond a reasonable doubt. The Florida statute, which provides for a non-unanimous determination that is not subject to any burden of proof, violates the Florida Constitution and the Fifth and Sixth Amendments to the United States Constitution. *See Bottoson v. Moore*, 833 So.2d 693, 716 (Fla. 2002)(Shaw, J., concurring)("[U]nder longstanding Florida

law, every element of a charged offense must be found by a jury …, must be found beyond a reasonable doubt, and must be found unanimously.").

II. The Eighth Amendment to the United States Constitution Requires Death Sentencing Verdicts to be Unanimous

The Eighth Amendment prohibits "cruel and unusual punishments," U.S. Const. amend. VIII. The "standard of extreme cruelty" remains stable over time; yet, "its applicability must change as the basic mores of society change." *Kennedy v. Louisiana*, 554 U.S. 407, 419 (2008), quoting *Furman v. Georgia*, 408 U.S. 238, 382 (1972) (Burger, C. J., dissenting). To gauge whether a punishment practice has fallen outside these evolving standards, the Court looks to objective indicia of societal consensus. *See Atkins v. Virginia*, 536 U.S. 304, 312 (2002); *Furman*, 408 U.S. at 239.

In this analysis, the Court first examines objective indicators, such as state legislation, death sentences, and executions, to determine whether the punishment or practice is consistent with contemporary standards of decency. *See Atkins*, 536 U.S. at 312. In doing so, the Court gives particular weight to legislation, "'the clearest and most reliable objective evidence of contemporary values.'" *Id.*, 536 U.S. at 312 (quoting *Penry v. Lynaugh*, 492 U.S. 302 (1989)).

However, this review of societal consensus, though significant, does not "wholly determine" the constitutional permissibility of capital punishment. *Coker v. Georgia*, 433 U.S. 584, 597 (1977). Rather, "the Constitution contemplates that in the end [the Court's] own judgment will be brought to bear on the question of the acceptability of the death penalty under the Eighth Amendment." *Id.*

The Court has utilized this two-part analysis to evaluate the constitutionality of a category of sentences, *see, e.g.*, *Roper v. Simmons*, 543 U.S. 551

(2005)(prohibiting the execution of juveniles); *Atkins, supra* (barring execution of the intellectually disabled); *Coker*, *supra* (prohibiting the death penalty as a punishment for the rape of an adult woman), as well as the adequacy of the procedures used to implement the Eighth Amendment principles contained in its precedent, *see Hall v. Florida*, 134 S.Ct. 1986, 1996-2000 (2014).

In *Hall*, the Court examined Florida's procedure for determining whether a capital defendant is intellectually disabled. In Florida, a defendant was first required to show that he had an IQ score of 70 or below. *Id.* at 1992. Only if IQ testing produced such a score would he be entitled to present additional evidence of intellectual disability. *Id.* This IQ score cut-off was strict, and prohibited defendants whose IQ score was above 70, but still within the test's standard error of measurement, from pursuing a claim of intellectual disability. *Id.* Because Hall's lowest admissible IQ score was a 71, the Florida Supreme Court affirmed his death sentence, finding that the testing had conclusively established Hall was not intellectually disabled. *Id.*

The U.S. Supreme Court reversed, holding that Florida's bright-line IQ cutoff posed a procedural hurdle to establishing intellectual disability that violated the Eighth Amendment. *Id.* at 2001. As with its substantive Eighth Amendment jurisprudence, the Court looked to the national consensus by examining the means through which most states implemented the protections of *Atkins*. *Id.* at 1996. Because only two other states, in addition to Florida, had adopted a fixed score cutoff that failed to incorporate the standard error of measurement in IQ testing, the Court found that there was "strong evidence of consensus that our society does not regard this strict cutoff as proper or humane." *Id.* at 1998. The Court's independent judgment supported the same conclusion, finding that, "when a defendant's IQ test score falls within the test's acknowledged and inherent margin of error, the defendant must be able to present additional evidence of intellectual

disability, including testimony regarding adaptive deficits." *Id.* at 2001. The reasoning in *Hall* demonstrates that, where a state has adopted a procedure that fails to adequately protect a defendant's substantive Eighth Amendment rights, that "rule is invalid under the Constitution's Cruel and Unusual Punishments Clause." *Id.* at 2001.

Application of *Hall*'s analysis to a non-unanimous verdict in a capital case demonstrates that it could not withstand constitutional scrutiny. There is a strong national consensus against non-unanimous verdicts in death penalty cases. In addition, such a procedure fails to provide the heightened reliability in capital sentencing that the Eighth Amendment requires.

A. There is a Nationwide Consensus Against Non-Unanimous Jury Determinations in Capital Cases

There is a nationwide consensus against non-unanimous jury verdicts in capital cases. Only two states besides Florida, Alabama and Delaware, permit a jury's sentencing determination to be less than unanimous. *See* Ala. Code § 13A-5-46 (f) (requiring a minimum jury recommendation of 10-2 in favor of death); 11 Del. C. § 4209 (sentence recommendation must contain a vote of the jurors, with no minimum requirement for number). As discussed *supra*, there is increasing recognition that the statutes in Alabama and Delaware do not pass constitutional muster.[4]

Even assuming the validity of these statutes, that only three out of thirty-one states permit non-unanimous jury verdicts in capital cases weighs heavily against its constitutionality. As in *Hall*, which also addressed procedures adopted by only three death penalty states, the scarcity of state laws permitting non-unanimous capital sentencing is "strong evidence of consensus that our society does not regard

[4] *See* discussion of Delaware and Alabama constitutional questions raised, post-*Hurst v. Florida*, supra note 3.

this [procedure] as proper or humane." 134 S.Ct. at 1998; *see also Coker v. Georgia*, 433 U.S. 584, 596 (1977) (death penalty for rape of an adult woman held unconstitutional, in part, because Georgia was the only state in the country that authorized such a punishment and therefore the nation's collective judgment on the penalty "obviously weigh[ed] very heavily on the side of rejecting capital punishment as a suitable penalty for raping an adult woman.").

B. Non-Unanimous Jury Verdicts, Which Produce Less Reliable Results and Undermine the Discussion of Minority Viewpoints, Fail to Comport with Supreme Court Precedent and the Evolving Standards of Decency

In addition to evaluating consensus, the Court must also exercise its "'own judgment … on the question of the acceptability of the death penalty under the Eighth Amendment.'" *Hall*, 134 S.Ct. at 2000, *quoting Coker*, 433 U.S. at 597. A non-unanimous jury determination fails in this respect as well. Because of the severity and finality of the punishment, the Eighth Amendment demands "heightened reliability" in death penalty cases. *Sumner v. Shuman*, 483 U.S. 66 (1987). Non-unanimous jury decision-making undermines the jury's valuable function and is markedly less reliable than unanimous decision-making. Therefore, its use in capital cases cannot pass constitutional muster.

Empirical studies suggest that "where unanimity is required, jurors evaluate evidence more thoroughly, spend more time deliberating and take more ballots." American Bar Association, American Jury Project, *Principles for Juries and Jury Trials,* 24.[5] According to a 2001 study, "several consistent findings have emerged" in research conducted over the last four decades: Juries not subject to a unanimity requirement "tend to take less time to reach a verdict, take fewer polls, … hang

[5] Available at: http://www.abanet.org/jury/pdf/final%20commentary_july_1205.pdf

less often," and most importantly, "cease deliberating when [the minimum necessary vote] is reached." Devine et al., *Jury Decision Making: 45 Years of Empirical Research on Deliberating Groups*, 7 Psychol. Pub. Pol'y. & L. 622, 669 (2001) (citations omitted); *see also* Taylor-Thompson, *Empty Votes in Jury Deliberations*, 113 Harv. L. Rev. 1261, 1272-1273 (2000) (reporting similar findings). Such careful deliberations substantially reduce the chance of error in the verdict.

Allowing a non-unanimous vote also has a deleterious effect on the decision-making process itself. When the members of a jury know that unanimity is not required, they do not feel compelled to give serious consideration to disagreements among the jurors. A non-unanimous decision rule "allows juries to reach a quorum without seriously considering minority voices, thereby effectively silencing those voices and negating their participation." American Bar Association, American Jury Project, *Principles for Juries and Jury Trials,* 24. A non-unanimous jury may also suppress the voice of racial minorities in the process. When a jury contains no members of the defendant's race, there is an increased likelihood of conscious and unconscious biases influencing the vote. Riordan, *Ten Angry Men: Unanimous Jury Verdicts in Criminal Trials and Incorporation after McDonald*, 101 Northwestern J. Law and Crim. No. 4, 1431 (Fall 2011). Under a non-unanimous verdict system, members of racial and ethnic minority groups lose their power to bring to the attention of their fellow jurors information or evidence their fellow jurors may have missed, or to encourage their fellow jurors to consider a viewpoint that challenges stereotypes and assumptions. *Id.*

C. Because it is Contrary to the National Consensus and Fails to Guarantee the Necessary Heightened Reliability, a Non-Unanimous Jury Finding in a Capital Case Violates the Eighth Amendment.

Where a death penalty scheme is contrary to the national consensus, fails to adequately implement Supreme Court precedent, and undermines rather than promotes the reliability of capital sentencing proceedings, that practice is necessarily invalid under the Eighth Amendment. *See Hall*, 134 S.Ct. at 2001. Because non-unanimity is a widely-rejected practice which fails to ensure robust deliberations or reliable results, it cannot survive Eighth Amendment scrutiny.

D. Florida Law Requires Jury Unanimity As to Any Criminal Verdict

At no time in Florida history, prior to the enactment of the statute challenged here, has the common-law requirement of a unanimous verdict ever been supplanted by legislative or judicial enactment. "Unanimity of verdicts has always been part of Florida's common law." *Butler v. State*, 842 So.2d 817 (Fla. 2003) (Pariente, J., concurring in part and dissenting in part). Article 1 section 22 of the Florida Constitution gurantees the right to trial by jury. Florida Courts have always interpreted this constitutional guranteee as requiring the right to a unanimous verdict. *See, e.g. Bottoson v. Moore,* 833 So.2d 261 (Fla. 1956); *Grant v. State*, 14. So. 757 (Fla.1984).

The Statute amended in 2016, 921.141, calls for a jury to determine three things prior to recommending an enhanced sentence of death. (1) Whether the juries unanimously find the presence of at least one aggravating factor beyond a reasonable doubt; (2) whether mitigating circumstances exist, and (3) whether the aggravating circumstances as a whole outweigh the mitigating circumstances. To permit a majority of ten rather than a unanimous twelve jurors to reach that recommendation is contrary to both the common law, Florida Constitutional law, and Appellate decisions.

CONCLUSION

WHEREFORE, based on the above argument, the Defendant, DONALD SMITH, moves this Court to declare Florida Statute 921.141 unconstitutional as it violates the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and Article 1, Section 22 of the Florida Constitution and Florida common law.

Respectfully submitted,

Julie Agent Schlax
200 E. Forsyth Street
Jacksonville, Florida 32202

/s/JulieSchlax_
Attorney for Defendant
Florida Bar No.:0093040

IN THE CIRCUIT COURT OF THE FOURTH JUDICIAL CIRCUIT, IN AND FOR DUVAL COUNTY, FLORIDA.

CASE NO.: 16-2013-CF-5781 AXXX
DIVISION: CR-D

STATE OF FLORIDA

VS.

DONALD SMITH
_____/

MOTION TO BAR THE STATE FROM SEEKING THE DEATH PENALTY BASED ON FAILURE TO PROVIDE NOTICE PURSUANT TO FLORIDA STATUTE 782.04(1)(b) 2016

COMES NOW, Defendant DONALD SMITH, by and through the undersigned counsel, and moves for an order prohibiting the State from seeking the Death Penalty based on the failure to provide mandatory notice pursuant to Florida Statute 782.04(1)(b), 2016. Defendant would state the following:

1. Defendant was arrested on June 22, 2013 for Murder, Kidnapping, and Sexual Battery.

2. On July 2, 2013, the State indicted Defendant for First Degree Murder, Kidnapping, and Capital Sexual Battery.

3. On July 16, 2013, the State of Florida filed a Notice of Intent to Seek the Death Penalty pursuant to Florida Rule of Criminal Procedure 3.202. The State did not file a Notice of Aggravating Circumstances.

4. On January 12, 2016, the United States Supreme Court in Hurst v. Florida, Docket No. 14-7505, ____ S.Ct. ____ 2016, found the procedure as outlined in Florida Statutes permitting the imposition of the Death Penalty in the State of Florida to be unconstitutional as a violation of the Sixth Amendment to the Constitution.

5. On January 12, 2016, the Defendant filed a Motion to Strike the Notice of Intent to Seek the Death Penalty based on the ruling in Hurst v. Florida.

6. On February 23, 2016 the Defendant filed a Motion to Prohibit Death Qualification of the Jury.

7. On March 8, 2016, this Honorable Court denied both Motions.

8. The Defendant has filed a motion to prohibit the application of the death penalty in this case on the basis that the new death penalty scheme is not retroactive.

9. In the event that the Court rules that the new statutory scheme is retroactive and would be applicable to this matter, the Court should strike the Death Notice and Aggravator Notice due to the State's failure to timely comply with the newly enacted provisions of §782.04(1)(b) and prohibit them from seeking a Death sentence.

10. The new amendments concerning the death penalty include the following amendment to §782.04(1)(b): "In all cases under this section, the procedure set forth in §921.141 shall be followed in order to determine sentence of death or life imprisonment. If the prosecutor intends to seek the death penalty, ***the prosecutor must give notice to the defendant and file the notice with the court within 45 days after arraignment. The notice must contain a list of the aggravating factors the state intends to prove and has reason to believe it can prove beyond a reasonable doubt.*** The court may allow the prosecutor to amend the notice upon a showing of good cause". (***Emphasis added***)

11. Given the plain and ordinary meaning of the term "must", it is abundantly clear that the legislature intended these requirements to be mandatory prerequisites before the State is allowed to seek a Death sentence.

12. The failure to file a Notice of Intent to Seek Death, including the list of aggravating factors, within the mandatory period of 45 days from arraignment operates to prohibit the State from seeking the Death Penalty.

13. Although a Death Notice under FRCP 3.202 was timely filed in this case, the prior Notice did not include a list of aggravating factors that the State intends to prove as mandated by the newly amended §782.04(1)(b).

14. The amendment to §782.04(1)(b) became effective on March 7, 2016.

15. The State filed the subsequent Aggravator Notice on May 3, 2016, fifty-seven (57) days after the amended statute was enacted.

16. As stated previously, the State did not include a list of Aggravating Factors in the Death Notice filed on July 16, 2013. Furthermore, when the amended statute became effective on March 7, 2016, the State did not provide the Defendant with a list of aggravating factors within the forty-five (45) day period as mandated. Therefore, the State has failed to comply with the mandatory prerequisites required for them to seek a Death sentence.

17. Allowing the State to continue to seek death in this case would violate the rights of the Defendant as guaranteed by the constitutions of the United States and Florida, as amended.

WHEREFORE, the Defendant moves this Honorable Court to enter an order finding that the Defendant is not eligible for imposition of the Death penalty and to strike the Death Notice in this case and proceed to trial with the only lawful penalty applicable to a guilty verdict as charged to be Life Imprisonment without the possibility of parole.

I HEREBY CERTIFY that a copy of the foregoing has been furnished to the Office of the State Attorney, electronically, this 17th day of May, 2016.

Respectfully submitted,

/s/ Julie Schlax

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Attorneys for Defendant

IN THE CIRCUIT COURT OF THE FOURTH JUDICIAL CIRCUIT, IN AND FOR DUVAL COUNTY, FLORIDA.

CASE NO.: 16-2013-CF-005781-AXXX-MA

DIVISION: CR-D

STATE OF FLORIDA

VS.

DONALD SMITH

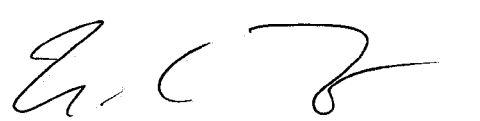
MOTION FOR CONTINUANCE OF HEARING ON MOTION TO SUPPRESS

Defendant, Donald Smith, by and through the undersigned attorney, W. Charles Fletcher, pursuant to the Florida Rules of Criminal Procedure, respectfully moves this Honorable Court to continue the hearing on Defendant's Motion to Suppress, currently set for May 26, 2016 and as grounds therefore, states the following:

1. Defendant has filed today a Motion to Unseal certain sealed documents in this case and in the case of State v. Deviney, 16-2008-12641, related to the Motion to Suppress filed in this case.

WHEREFORE, Defense counsel in the above entitled case respectfully requests a continuance of the hearing on the motion to suppress.

Law Offices of W. Charles Fletcher, P.A.



W. Charles Fletcher, Esquire
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Jacksonville, Florida 32216
Tel: (904) 314-0233
Attorney for Defendant
Williamfletcher96@yahoo.com

I HEREBY CERTIFY that a copy of the above and foregoing Motion For Continuance has been furnished to the Office of the State Attorney, by email, this 25th day of May 2016.

W. Charles Fletcher, Esq.

IN THE CIRCUIT COURT OF THE FOURTH JUDICIAL CIRCUIT, IN AND FOR DUVAL COUNTY, FLORIDA.

CASE NO.: 16-2013-CF-005781-AXXX-MA

DIVISION: CR-D

STATE OF FLORIDA

VS.

DONALD SMITH

MOTION TO UNSEAL DOCUMENTS

Defendant, Donald Smith, by and through the undersigned attorney, pursuant to Rule 3.190(h), Florida Rules of Criminal Procedure, respectfully moves this Honorable Court to unseal several previously sealed documents and as grounds counsel states that the evidence within the sealed documents is admissible, or will lead to admissible evidence and testimony related to the Defendant's pending Motion to Suppress filed on April 7, 2016 (docket entry 475).

1. The transcript of the In Camera hearing held on December 5, 2014 in State v. Deviney, Case Number 16-2008-CF-12641.
2. The transcript of the In Camera hearing held in this case on November 19, 2014.
3. A letter from Defendant Randall Deviney to the Court filed on January 5, 2015 and filed as docket entry 745 in State v. Deviney, Case Number 16-2008-CF-12641.

4. Three letters to the Court from Defendant Randall Deviney, filed on January 26, 2015, as docket entries 765, 766, and 767 in State v. Deviney, Case Number 16-2008-CF-12641.

WHEREFORE, Defendant respectfully requests this Court to grant this motion and unseal the above listed documents for inspection by counsel for the defendant herein.

I HEREBY CERTIFY that a copy of the above and foregoing Motion to Unseal Documents has been furnished to the Office of the State Attorney, email, this __25th__ day of May 2016.

RESPECTFULLY SUBMITTED this __25th___ day of May 2016.

Law Offices of W. Charles Fletcher, P.A.

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Florida Bar #0125792
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Williamfletcher96@yahoo.com
Attorney for Defendant

IN THE CIRCUIT COURT, FOURTH
JUDICIAL CIRCUIT, IN AND FOR
DUVAL COUNTY, FLORIDA

CASE NO.: 16-2013-CF-05781-AXXX-MA

DIVISION: CR-D

STATE OF FLORIDA

v.

DONALD JAMES SMITH,
Defendant.
_____/

ORDER UNSEALING RECORDS FOR IN CAMERA INSPECTION

This matter came before the Court upon Defendant's "Motion to Unseal Records," filed through court-appointed counsel, W. Charles Fletcher, Esq., on May 25, 2016.

In the Motion to Unseal, Defendant requests the Court unseal the following documents: (1) the transcript of the in camera hearing held on December 5, 2014, in State v. Randall Deviney, 16-2008-CF-12641-AXXX-MA; (2) the transcript of the in camera hearing held in the instant case on November 19, 2014; (3) the letter written to the Court by Randall Deviney, filed on January 5, 2015, as docket entry 745 in State v. Deviney, 16-2008-CF-12641-AXXX-MA; and (4) the three letters written to the Court from Randall Deviney, filed on January 26, 2015, as docket entries 765, 766, and 767 in State v. Deviney, 16-2008-CF-12641-AXXX-MA.

In order to determine Defendant's entitlement to these documents, the Court must conduct an in-camera inspection of the documents. The Court's in-camera inspection will be limited to the items stated in Defendant's Motion to Unseal.

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Based on the foregoing, it is:

ORDERED that the items listed above shall be **unsealed** for an in-camera inspection by the Court.

DONE AND ORDERED in Jacksonville, Duval County, Florida, this 26 day of May, 2016.

MALLORY COOPER
Circuit Judge

Copies furnished to:

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Meredith Charbula, Esq.
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Jacksonville, FL 32202

Charles Fletcher, Esq.
Attorney for Defendant
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Jacksonville, FL 32216

Duval County Clerk
Duval County Courthouse
501 West Adams Street
Jacksonville, Florida 32202

Case No.: 16-2013-CF-05781-AXXX-MA

IN THE CIRCUIT COURT, FOURTH JUDICIAL CIRCUIT, IN AND FOR DUVAL COUNTY, FLORIDA

CASE: 16-2013-CF-005781-AXXX-MA

DIVISION: CR-D (Circuit)

STATE OF FLORIDA

vs.

DONALD JAMES SMITH, DEFENDANT

ORDER

THIS CAUSE COMING ON BEFORE THE COURT UPON THE ☒DEFENDANT'S ☐STATE'S

MOTION FOR CONTINUANCE OF HEARING ON MOTION TO SUPPRESS

FILED HEREIN ON THE 25th DAY OF MAY , 2016 AND THE COURT HAVING HEARD ARGUMENTS OF THE STATE'S ATTORNEY AND OF COUNSEL FOR DEFENSE, AND BEING FULLY ADVISED IN THE PREMESIS, IT IS THEREUPON

ORDERED AND ADJUDGED THAT THE AFORESAID MOTION SHALL BE AND THE SAME IS HEREBY:

GRANTED

DONE AND ORDERED IN OPEN COURT AT JACKSONVILLE, DUVAL COUNTY, FLORIDA, THIS 26 DAY OF May, 20 16 .

Circuit Judge

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IN THE CIRCUIT COURT OF THE FOURTH JUDICIAL CIRCUIT, IN AND FOR DUVAL COUNTY, FLORIDA.

CASE NO.: 16-2013-CF-005781-AXXX-MA

DIVISION: CR-D

STATE OF FLORIDA

VS.

DONALD SMITH

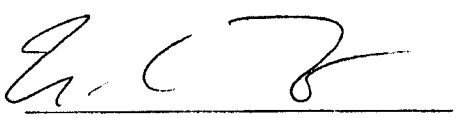
MOTION FOR CONTINUANCE OF HEARING ON MOTION TO SUPPRESS

Defendant, Donald Smith, by and through the undersigned attorney, W. Charles Fletcher, pursuant to the Florida Rules of Criminal Procedure, respectfully moves this Honorable Court to continue the hearing on Defendant's Motion to Suppress, currently set for May 26, 2016 and as grounds therefore, states the following:

1. Defendant has filed today a Motion to Unseal certain sealed documents in this case and in the case of State v. Deviney, 16-2008-12641, related to the Motion to Suppress filed in this case.

WHEREFORE, Defense counsel in the above entitled case respectfully requests a continuance of the hearing on the motion to suppress.

Law Offices of W. Charles Fletcher, P.A.



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Jacksonville, Florida 32216
Tel: (904) 314-0233
Attorney for Defendant
Williamfletcher96@yahoo.com

I HEREBY CERTIFY that a copy of the above and foregoing Motion For Continuance has been furnished to the Office of the State Attorney, by email, this 25th day of May 2016.

W. Charles Fletcher, Esq.

IN THE CIRCUIT COURT, FOURTH
JUDICIAL CIRCUIT, IN AND FOR
DUVAL COUNTY, FLORIDA

CASE NO.: 16-2013-CF-05781-AXXX-MA

DIVISION: CR-D

STATE OF FLORIDA

v.

DONALD JAMES SMITH,
Defendant.
_____/

ORDER ON DEFENDANT'S MOTION TO UNSEAL RECORDS

This matter came before the Court upon Defendant's "Motion to Unseal Records," filed through court-appointed counsel, W. Charles Fletcher, Esq., on May 25, 2016.

In the Motion to Unseal, Defendant requests the Court unseal the following documents: (1) the transcript of the in camera hearing held on December 5, 2014, in State v. Randall Deviney, 16-2008-CF-12641-AXXX-MA; (2) the transcript of the in camera hearing held in the instant case on November 19, 2014; (3) the letter written to the Court by Randall Deviney, filed on January 5, 2015, as CORE docket entry 745 in State v. Deviney, 16-2008-CF-12641-AXXX-MA; and (4) the three letters written to the Court from Randall Deviney, filed on January 26, 2015, as CORE docket entries 765, 766, and 767 in State v. Deviney, 16-2008-CF-12641-AXXX-MA.

As the Motion contains no indication that notice of the request was given to any intervenors, this Court finds it appropriate to schedule a hearing on this Motion as it relates to item 2. Because items 1, 3, and 4 requested to be unsealed are not contained in the court file of the instant case, this Court finds it appropriate to dismiss those portions of the Motion without

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prejudice. If anything further is filed on this issue prior to the hearing, those issues can also be addressed at that time, if requested.

Based on the foregoing, it is **ORDERED** that:

(1) Defendant's "Motion to Unseal Records" as to items 1, 3, and 4 is **DISMISSED WITHOUT PREJUDICE**.

(2) Defendant's "Motion to Unseal Records" as to item 2 is **SET FOR HEARING** on Friday, July 15, 2016, at 9:30 a.m. in Courtroom 405 of the Duval County Courthouse.

DONE AND ORDERED in Jacksonville, Duval County, Florida, this 16 day of June, 2016.

MALLORY COOPER
Circuit Judge

Copies furnished to:

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Jacksonville, FL 32202

James Hernandez, Esq.
Attorney for Randall Deviney
118 West Adams Street, Suite 500
Jacksonville, Florida 32202

Timothy Conner, Esq.
Attorney for Intervenor, Morris Publishing Group, LLC
50 North Laura Street, Suite 3900
Jacksonville, Florida 32202

Edward Birk, Esq.
Attorney for Intervenors
Post-Newsweek Stations, Florida, Inc. and Graham Media Group, Florida, Inc.
P.O. Box 447
Jacksonville, Florida 32201

Case No.: 16-2013-CF-05781-AXXX-MA

IN THE CIRCUIT COURT, FOURTH
JUDICIAL CIRCUIT, IN AND FOR
DUVAL COUNTY, FLORIDA

CASE NO.: 16-2013-CF-05781-AXXX-MA

DIVISION: CR-D

STATE OF FLORIDA

v.

DONALD JAMES SMITH,
Defendant.
_____/

ORDER ON DEFENDANT'S MOTION TO UNSEAL RECORDS

This matter came before the Court upon Defendant's "Motion to Unseal Records," filed through court-appointed counsel, W. Charles Fletcher, Esq., on May 25, 2016.

In the Motion to Unseal, Defendant requests the Court unseal the following documents: (1) the transcript of the in camera hearing held on December 5, 2014, in State v. Randall Deviney, 16-2008-CF-12641-AXXX-MA; (2) the transcript of the in camera hearing held in the instant case on November 19, 2014; (3) the letter written to the Court by Randall Deviney, filed on January 5, 2015, as CORE docket entry 745 in State v. Deviney, 16-2008-CF-12641-AXXX-MA; and (4) the three letters written to the Court from Randall Deviney, filed on January 26, 2015, as CORE docket entries 765, 766, and 767 in State v. Deviney, 16-2008-CF-12641-AXXX-MA.

On June 16, 2016, the Court dismissed Defendant's Motion as to Items 1, 3, and 4. On July 15, 2016, the Court held a hearing on Item 2, during which the following parties were present: Assistant State Attorney Mark Caliel, Esq., Attorney for Defendant W. Charles Fletcher, Esq.; and Defendant.

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While the transcript of the in camera hearing held in the instant case remains confidential, the Court finds that to ensure a fair and complete representation of Defendant, defense counsel is entitled to review the transcript. Therefore, the Court **GRANTS** Defendant's Motion to Unseal Records as to Item 2, to the extent the transcript will be released to defense counsel. The transcript, however, will otherwise remain under seal.

DONE AND ORDERED in Jacksonville, Duval County, Florida, this 15 day of July, 2016.

MALLORY COOPER
Circuit Judge

Copies furnished to:

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Attorney for Intervenors, Post-Newsweek Stations and Graham Media Group
P.O. Box 447
Jacksonville, Florida 32201

Case No.: 16-2013-CF-05781-AXXX-MA

IN THE CIRCUIT COURT, FOURTH
JUDICIAL CIRCUIT, IN AND FOR
DUVAL COUNTY, FLORIDA

CASE NO: 16-2013-CF-5781-AXXX
DIVISION: CR-D

STATE OF FLORIDA

VS.

DONALD SMITH
_____/

ORDER GRANTING MOTION TO INCUR COSTS OF SELECT DEPOSITION TRANSCRIPTS

THIS CAUSE having come before the court upon the Defendant's Motion, and the Court having been fully advised in the premises, and finding that the transcript is both necessary and essential to the defense in this cause, it is

ORDERED AND ADJUDGED as follows:

Julie Agent Schlax, Esquire is hereby authorized to incur the reasonable costs of obtaining the transcript of the deposition of the following witness:

Date of Proceeding	**Type of Proceeding**	**Name of Witness**
June 30, 2016	Deposition in Case No. 16-2016-CF1432	Rayne Perrywinkle

IT IS FURTHER ORDERED AND ADJUDGED that the Justice Administrative Commission shall pay these reasonable costs upon submission of the proper invoice(s) and that the rate shall be $4.00 per page transcribed for depositions, $5.00 per page transcribed for hearings, and $0.50 per page for copies of transcriptions.

DONE AND ORDERED at the Duval County Courthouse, Jacksonville, Florida on this 28 day of July, 2016.

The Honorable Mallory Cooper
Circuit Judge

Copies to:
Julie Agent Schlax, Esquire
Justice Administrative Commission

FILED 07/28/16 PM 03:32 RUSSELL

IN THE CIRCUIT COURT, FOURTH JUDICIAL CIRCUIT, IN AND FOR DUVAL COUNTY, FLORIDA

CASE NO: 16-2013-CF-5781-AXXX-MA
DIVISION: CR-D

STATE OF FLORIDA

vs.

DONALD SMITH
_____/

ORDER AUTHORIZING COSTS OF MEDICAL TESTING

THIS CAUSE, came on to be heard upon the Defendant's Ex-Parte Motion for Authorization to Incur Costs of Medical Testing, and the Court having been fully advised in the premises, and finding that a Pet scan with Cat scan is both necessary and essential to the defense in this cause, it is

ORDERED as follows:

1. That Attorney Julie Schlax is authorized to incur the costs of a PET scan with the follow-up Cat scan.

2. That Precision Imaging Centers shall be compensated a flat fee of $1,200.00 for said testing.

3. That the Justice Administrative Commission shall be responsible for payment directly to Precision Imaging, upon submission of a signed contract and proper invoices for costs.

4. That should the Defendant shall seek leave of the Court prior to incurring any additional fees.

DONE AND ORDERED in Duval County, Jacksonville, Florida on this 28 day of July, 2016.

THE HONORABLE MALLORY D. COOPER
CIRCUIT JUDGE

Copies to: Julie Agent Schlax
Justice Administrative Commission

FILED 08/02/16 PM 03:15 FUSSELL

IN THE CIRCUIT COURT, FOURTH JUDICIAL CIRCUIT, IN AND FOR DUVAL COUNTY, FLORIDA

CASE NO: 16-2013-CF-5781-AXXX-MA
DIVISION: CR-D

STATE OF FLORIDA

vs.

DONALD SMITH
_____/

ORDER APPOINTING A RADIOLOGIST

THIS CAUSE, came on to be heard upon the Defendant's Ex-Parte Motion for Appointment of a Radiologist, and the Court having been fully advised in the premises, and finding that a Neuropsychologist is both necessary and essential to the defense in this cause, it is

ORDERED as follows:

1. That Dr. Joseph Wu, a Radiologist with UC Regents, is hereby appointed as an expert in this matter.

2. The initial fee cap of $5,000.00 at an hourly rate of $275.00, and $125 for travel time, is approved along with all travel expenses.

3. That the Justice Administrative Commission shall be responsible for payment to Dr. Wu upon submission of proper invoices.

4. That should the Defendant need to exceed said cap, the Defendant shall seek leave of the Court prior to incurring any additional fees.

DONE AND ORDERED in Duval County, Jacksonville, Florida on this 28 day of June, 2016.

THE HONORABLE MALLORY D. COOPER
CIRCUIT JUDGE

Copies to: Julie Agent Schlax
Justice Administrative Commission
Dr. Wu, Radiologist

FILED 08/02/16 PM 03:15 FUSSELL

IN THE CIRCUIT COURT, FOURTH JUDICIAL CIRCUIT, IN AND FOR DUVAL COUNTY, FLORIDA

CASE NO: 16-2013-CF-5781-AXXX-MA
DIVISION: CR-D

STATE OF FLORIDA

vs.

DONALD SMITH
_____/

MOTION TO TRANSPORT DEFENDANT FOR MEDICAL TESTING

The Defendant, Donald Smith (Jail No. 2013-016727), by and through his undersigned attorney, Julie Agent Schlax, respectfully moves this Honorable Court to order that he transported from the Duval County Jail to Precision Imaging Centers of Jacksonville, for a PET Scan. In support of said Motion the Defendant states as follows:

1. Defendant is indicted for First Degree Murder and is facing the Death Penalty.
2. For purposes of investigating avenues of important mental health mitigation, the Defendant has sought the expertise of Dr. Geoffrey Colino, whom has indicated the necessity of a PET scan imaging.
3. Defendant has consulted with Precision Imaging Centers of Jacksonville, Florida for the PET scan imaging. This must take place at their physical location at 7860 Gate Parkway, Suite 123 Jacksonville, Florida 32256. In consultation with the Pre-Trial Detention Facility, Jacksonville Sheriff's Office, Defendant understands and agrees that the exact timing of the transport will be left at the discretion of the Jacksonville Sheriff's Office to ensure all safety protocols can be followed.
4. Defense counsel has consulted with Assistant State Attorney, Mr. Mark Caliel, regarding this Motion who states he has no objection to the transport so long as the

FILED 08/03/16 PM 03:13 FUSSELL

Jacksonville Sheriff's Office is able to facilitate all necessary safety protocols as determined by the Jacksonville Sheriff's Office.

Respectfully submitted, this 2nd day of August, 2016.

ESPENSHIP, SCHLAX & ALBEE, LLC

/s/ Julie Agent Schlax

Julie Agent Schlax, Esquire
Florida Bar No.: 093040
200 E. Forsyth Street
Jacksonville, Florida 32202
Tel: (904) 674-0717
Fax: (904) 674-0737
Attorney for Defendant

3CC

IN THE CIRCUIT COURT, FOURTH JUDICIAL CIRCUIT, IN AND FOR DUVAL COUNTY, FLORIDA

CASE NO: 16-2013-CF-5781-AXXX-MA
DIVISION: CR-D

STATE OF FLORIDA

vs.

DONALD SMITH
_____/

ORDER TO TRANSPORT

THIS CAUSE, having come before the Court on the Defendant's Motion to Transport, and the Court being advised in the premises, it is therefore, upon consideration,

ORDERED AND ADJUDGED that the Defendant's Motion to Transport is hereby **GRANTED** and Donald Smith (Jail No. 2013-016727) shall be transported from the Duval County Jail to Precision Imaging Center of Jacksonville, at 7860 Gate Parkway, Suite 123, Jacksonville, Florida 32256, for scheduled testing no later than the 31st day of August, 2016. Upon completion of said testing, the Defendant shall be returned to the Duval County Jail.

DONE AND ORDERED at Jacksonville, Florida this 30 day of August, 2016.

The Honorable Mallory Cooper
Circuit Court Judge

Cc: Julie Schlax, Esquire
Duval County Jail
Jacksonville Sheriff's Office, Transportation Division

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IN THE CIRCUIT COURT, FOURTH JUDICIAL CIRCUIT, IN AND FOR DUVAL COUNTY, FLORIDA

CASE NO: 16-2013-CF-5781-AXXX-MA
DIVISION: CR-D

STATE OF FLORIDA

vs.

DONALD SMITH
_____/

ORDER DIRECTING DEPARTMENT OF CHILDREN AND FAMILIES TO RELEASE UN-REDACTED CONFIDENTIAL RECORDS OF DONALD SMITH

THIS CAUSE, came on to be heard upon the Defendant's oral Motion to seek an Order requiring the release of un-redacted Confidential Records of Donald Smith, and the Court having been fully advised in the premises, it is

ORDERED as follows:

1. The Department of Children and Families, Sexually Violent Predator Program, shall provide un-redacted copies of all records and evaluations of former inmate Donald Smith, Department of Corrections Number 986205 to his attorney Julie Schlax.

DONE AND ORDERED in Duval County, Jacksonville, Florida on this 18 day of August, 2016.

THE HONORABLE MALLORY D. COOPER
CIRCUIT JUDGE

Copies to: Julie Agent Schlax
Justice Administrative Commission

FILED
AUG 18 2016
CLERK CIRCUIT COURT

IN THE CIRCUIT COURT, FOURTH JUDICIAL CIRCUIT, IN AND FOR DUVAL COUNTY, FLORIDA.

CLERK'S EXHIBIT MEMORANDUM

DIVISION: CR-D (Circuit)
CASE: 16-2013-CF-005781-AXXX-MA

STATE OF FLORIDA
vs.
DONALD JAMES SMITH

Ex. No	State	Ex. No	Defendant
A-1	PHOTO - BLUE WALL PANEL		
B-2	PHOTO - BLUE WALL PANEL OPENED		
C-3	PHOTO - PIPE BEHIND CELL		
D-4	PHOTO- METAL VENT BEHIND CELL		
E-5	PHOTO - INSIDE CELL (W/SHOWER)		
F-6	PHOTO - INSIDE CELL (W/SINK)		

FILED
AUG 18 2016
CLERK CIRCUIT COURT

Date turned in: 8-18-16
Date received: 8/19/2016

Trial Clerk:
Evidence Clerk:

SECURED

SECURED

SECURED

SECURED

SECURED

SECURED

IN THE CIRCUIT COURT OF THE FOURTH JUDICIAL CIRCUIT, IN AND FOR DUVAL COUNTY, FLORIDA.

CASE NO.: 16-2013-CF-005781-AXXX-MA

DIVISION: CR-D

STATE OF FLORIDA

VS.

DONALD SMITH

AMENDED MOTION TO SUPPRESS STATEMENTS

Defendant, Donald Smith, by and through the undersigned attorney, pursuant to Rule 3.190(h), Florida Rules of Criminal Procedure, respectfully moves this Honorable Court to suppress all statements obtained from the defendant during a warrant-less recording of his conversations in his jail cell between June 23, 2015 and June 26, 2015.

As grounds for this motion, the undersigned counsel states that the evidence mentioned above was illegally obtained in violation of the defendant's rights guaranteed by the Fourth, Fifth, and Sixth and Fourteenth Amendments to the United States Constitution.

Defendant further states that he has standing to contest the legality of said seizure.

THE FACTS

A general statement of the facts upon which this motion

is based are alleged as follows:

1. Donald Smith, the defendant herein, was arrested for Sexual Battery, Kidnapping and Murder in 2013.
2. The State of Florida is seeking the Death Penalty in Mr. Smith's case.
3. At some time after his arrest, Mr. Smith was placed in an isolation cell on the 6th floor of the Duval County Pre-Trial Detention Center.
4. In another isolation cell next to Mr. Smith was inmate Randall Deviney, also facing the Death Penalty for an unrelated murder.
5. For many years in Duval County it has been the policy of The State Attorney's Office to reward inmates who provide information in other inmates cases. This policy is well known amongst the inmates at the duval county pre-trial detention facility and the use of "jailhouse informants" has become the common practice in just about every homicide case.
6. In the later months of 2014 the attorneys representing Randall Deviney (the Public Defender's Office) approached the State Attorney's Office indicating that defendant Randall Deviney had spoken to Defendant Smith about the facts of Smith's case and informed the State Attorney's Office of Mr. Deviney's willingness to cooperate against Mr. Smith.
7. Soon thereafter the office of the Public Defender filed notifications of conflicts in both the Deviney case and the Smith case, and after several months of litigation, private attorney's were appointed to represent the two defendants.

8. Despite the State Attorney's Office assertions to the Court that the alleged conflict of interest was based on a scheme devised by defendants Smith and Deviney (the resulting removal of the Public Defender's Office has resulted in multiple delays in the trials of both defendants), the State Attorney's Office chose to leave defendants Smith and Deviney in the same, connected isolation cells even though there are at least 18 other isolation cells at the pre-trial detention facility.
9. Subsequent to the conversations between Deviney and Smith that led to the conflict issue, the attorney appointed to represent defendant Deviney approached assistant state attorney Bernie de la Rionda and proffered alleged statements made by Smith to Deviney.
10. The State chose not to list Deviney as a witness in the Smith case but entertained the factual proffer, and took no steps to inform defendant Deviney to have no more contact with Smith.
11. Knowing that defendant Deviney was still attempting to solicit statements from defendant Smith (Deviney's attorney sent an email to Deviney's prosecutor about Mr. deviney's continued desire to testify against Mr. Smith on June 15, 2015) in an effort to cooperate with the State, on or about June 23, 2015 an investigator working with the State Attorney's Office and an Officer with the Jacksonville Sheriff's Office placed a recording device in the "chase" area between the two isolation cells occupied by defendants Smith and Deviney.
12. Prior to installing the recording device neither

the State Attorney's Office or the Jacksonville Sheriff's Office requested or obtained a warrant to record the sounds that would come from Mr. Smith's isolation cell, nor was the device tested as to whether or not it was sensitive enough to pick up parts of conversations between defense lawyers and their clients in interview rooms that were just 20 to 25 feet away.

13. The recording device was left running for approximately 74 and a half hours.
14. The recording device captured the sounds from Mr. Smith's cell, including the times he took a shower and used the bathroom.
15. The recording device also captured what purports to be a conversation initiated by defendant Randall Deviney. The conversation, initiated by Randall Deviney, although hard to understand, purports to contain inculpatory statements which the State of Florida is seeking to use at the guilt and penalty phase of Mr. Smith's trial.

AS AN AGENT OF THE STATE, DEFENDANT RANDALL DEVINEY WAS REQUIRED TO ADVISE DEFENDANT SMITH OF HIS MIRANDA WARNINGS PRIOR TO INITIATING A CONVERSATION WITH HIM BETWEEN JUNE 23, 2015 AND JUNE 26, 2015. AS A RESULT, ANY STATEMENTS MADE BY DEFENDANT SMITH ARE DUE TO BE SUPPRESSED

Defendant Donald Smith signed an *Edwards* Notice the morning after his arrest. Any further questioning of him, by detectives or other agents of the state, was prohibited. In the present case, Defendant Randall Deviney was an agent

of the state. Defendant Deviney repeatedly proffered testimony against Mr. Smith through his attorney. The state, even after alleging that defendant Deviney and Smith were conspiring to "create a conflict" and defraud the Court, chose to leave the two defendants in adjacent cells, knowing that Deviney would continue to attempt to solicit incriminating information from defendant Smith. Finally, the State took no steps to prevent Mr. Deviney from continuing to attempt to solicit incriminating statements from defendant Smith. This continued questioning by defendant Randall Deviney was done in violation of the proscription set forth in *Edwards v. Arizona,* 451 U.S. 477, 484-485 (1981)(but if a suspect requests counsel at any time during the interview, he is not subject to further questioning until a lawyer has been made available or the suspect himself reinitiates conversation.).

As a result, the statements made by defendant Smith during this interrogation were obtained in violation of the Defendant's rights guaranteed by the Fifth, Sixth and Fourteenth Amendments to the United States Constitution. Therefore, any and all statements obtained by Randall Deviney and the recording device during the questioning of Mr. Smith after he requested and was appointed an attorney must be suppressed. *Miranda v. Arizona*, 384 U.S. 436 (1966); *Almeida v. State*, 737 So.2d 520,522 (Fla. 1999). *Edwards v.*

Arizona, 451 U.S. 477 (1981); *Wong Sun v. U.S.*, 371 U.S. 471 (1963).

THE 74 HOUR RECORDING OF DEFENDANT SMITH'S ACTIVITIES IN HIS ISOLATION CELL VIOLATED HIS RIGHT TO PRIVACY AND WAS AN UNREASONABLE SEARCH AND SEIZURE AND IS DUE TO BE SUPPRESSED.

While it is generally recognized that "prisoners do not have a reasonable expectation of privacy in their prison cells entitling them to the protection of the fourth amendment" Hudson v. Palmer, 468 U.S. 517 (1984), the actions of the Jacksonville Sheriff's Office violated Mr. Smith's fourth amendment rights. The holding in the *Hudson* case is limited to prison cell searches and "shakedowns" for weapons and other illegal contraband" having an impact on the prison's internal security and safety. In the present case, a recording device was positioned in the "chase" area of Mr. Smith's isolation cell and left to record for just over three days, capturing Mr. Smith's private moments in his shower and even during his use of the toilet. This level of intrusion into an inmates most private of moments is so intrusive that it must be characterized as an unreasonable search and seizure, prohibited by the fourth and Fourteenth Amendments to the United States Constitution. As such, the recording, in its entirety, is due to be suppressed.

PLACING A SENSITIVE RECORDING DEVICE IN THE JAIL 20 TO 25 FEET FROM THE INTERVIEW ROOMS USED BY DEFENSE LAWYERS AND THEIR CLIENTS, WITHOUT ANY JUDICIAL OVERSIGHT, VIOLATES THE FOURTH AND SIXTH AMENDMENTS TO THE UNITED STATES CONSTITUTION

The Fourth Amendment to the United States Constitution protects those charged with crimes from unreasonable searches and seizures of not only their property, but of their very words. In addition, the Sixth Amendment's right to counsel not only provides for the accused to have counsel, but also guarantees that their conversations will not be surreptitiously recorded by the state.

In the present case, two assistant state attorneys and their investigators, without judicial oversight, placed a sensitive recording device in the jail just 20 to 25 feet away from where incarcerated defendants meet with their attorneys to discuss their cases. At the hearing on the instant motion to suppress, one officer testified that the sensitive recording equipment was not tested, and that the officers didn't know if the equipment would be able to pick up conversations down the hall, or through the jail's air conditioning vent system. In addition, defense attorney James Hernandez testified that knowing that prosecutors had set up a recording device so close to where he routinely meets with his client's at the jail was worrisome to him, and created a chilling effect.

Irrespective of whether or not the recording device captured attorney client conversations, the state's actions here violated the Constitution's Fourth and Sixth Amendments and as such, the entire recording is due to be suppressed.

WHEREFORE, Defendant respectfully requests this Court to suppress the above mentioned evidence.

I HEREBY CERTIFY that a copy of the above and foregoing Amended Motion to Suppress Statements has been furnished to the Office of the State Attorney, by efile, this 24th day of August 2016.

RESPECTFULLY SUBMITTED this 24th day of August 2016.

Law Offices of W. Charles Fletcher, P.A.

W. Charles Fletcher
Florida Bar #0125792
8833 Perimeter Park Blvd., Suite 104
Jacksonville, Florida 32216
(904) 314-0233
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Attorney for Defendant

IN THE CIRCUIT COURT, FOURTH
JUDICIAL CIRCUIT, IN AND FOR
DUVAL COUNTY, FLORIDA

CASE NO.: 16-2013-CF-05781-AXXX-MA

DIVISION: CR-D

STATE OF FLORIDA

v.

DONALD JAMES SMITH,
Defendant.
_____/

ORDER DENYING DEFENDANT'S MOTION TO SUPPRESS STATEMENTS AND AMENDED MOTION TO SUPPRESS STATEMENTS

This cause came before this Court upon Defendant's "Motion to Suppress Statements" and "Amended Motion to Suppress Statements," filed through counsel on April 7, 2016, and August 24, 2016, respectively. Defense counsel filed each Motion pursuant to Florida Rule of Criminal Procedure 3.190(h). The State filed a Response to Defendant's initial Motion on April 29, 2016.

In the instant Motions, Defendant requests this Court suppress all statements obtained from Defendant through a recording of his conversations in his jail cell between June 23, 2015 and June 26, 2015. This Court held a hearing on the instant Motions on August 18, 2016.[1]

Factual Background

At the evidentiary hearing, the State presented the testimony of Robert Hinson ("Hinson"), an investigator with the State Attorney's Office, Officer Carter, an officer with the

[1] At the evidentiary hearing, defense counsel presented argument and testimony in support of the third ground contained in Defendant's Amended Motion. At the end of the hearing, counsel asked for the opportunity to file an amended motion memorializing that argument.

FILED 08/26/16 AM 10:33 RUSSELL

Jacksonville Sheriff's Office ("JSO") Department of Corrections' intelligence unit, and Detective Gonzalez with JSO. Hinson testified that on April 8, 2015, the State Attorney's Office received a letter from a [redacted]) who wanted to provide information to the State. In an interview with the [redacted], the [redacted] provided information that Defendant and Randall Deviney ("Deviney"), another inmate at the Duval County Jail, were communicating through vents and were trying to be disruptive to their court proceedings.

Hinson then spoke with Officer Carter to discuss the layout of isolation cells where Defendant and Deviney were being housed, and Officer Carter provided pictures of isolation cells on a different floor, which are the exact replica of Defendant and Deviney's cells. Hinson talked to Detective Gonzalez to see if there was certain equipment that could be placed in the vents to record the conversations between Defendant and Deviney. Detective Gonzalez researched equipment, which would be sensitive enough to capture conversations despite being placed on or near pipes and which would be able to record for an extended period of time without monitoring by JSO.

Detective Gonzalez purchased the necessary equipment, and on July 23, 2015, dressed up as maintenance personnel and installed the surveillance equipment in the pipe chase connected to Defendant and Deviney's cells. The equipment captured seventy-four hours of recording. Each state witness testified no one knew of this plan except themselves and other members of the State Attorney's Office. Hinson further testified there was no judicial oversight to their plan and the [redacted] was not utilized after being interviewed.

Defendant presented the testimony of James Hernandez, Esquire ("Hernandez"), who represented Deviney during his trial. Hernandez testified he was appointed to represent Deviney after a conflict arose because the Office of the Public Defender was representing Deviney and

Defendant, while Deviney wanted to provide information to the State regarding Defendant. Hernandez indicated he had discussed Deviney's desire to cooperate with the prosecutor in Deviney's case, Bernardo de la Rionda ("Mr. de la Rionda"). Hernandez indicated he emailed Mr. de la Rionda on June 15, 2015, regarding Deviney's desire to cooperate. Hernandez testified he talked to and met with Mr. de la Rionda multiple times regarding the matter and informed his client he had approached Mr. de la Rionda to facilitate cooperation between them. Hernandez testified, however, that Mr. de la Rionda always made it clear there would be no cooperation between the State and Deviney.

Analysis of Defendant's Arguments

In his Motions, Defendant makes three separate arguments for suppression, which this Court will address in turn below.

I.

First, Defendant argues Deviney was an agent of the State and was, therefore, required to advise Defendant of his Miranda[2] warnings prior to initiating a conversation with him. Defendant suggests Deviney became an agent of the State when the State allowed Defendant and Deviney to remain in adjacent cells and did not prevent Deviney from soliciting statements from Defendant, despite Deviney's repeated proffers of testimony against Defendant. As such, Defendant suggests the failure of Deviney to advise Defendant of his Miranda rights, after Defendant had requested counsel, requires suppression.

The Fifth Amendment to the United States Constitution states that no person "shall be compelled in any criminal case to be a witness against himself." U.S. Const. amend. X. In Miranda, the United States Supreme Court held statements made by a person while under custodial interrogation may not be presented as evidence against that person unless the person

[2] Miranda v. Arizona, 384 U.S. 436 (1966).

had been informed of certain rights, since referred to as Miranda rights, prior to making the statements. Miranda, 384 U.S. 436. Miranda rights are intended to protect a defendant's Fifth Amendment right against self-incrimination and include the right to remain silent and the right to counsel. Id. at 444. Once a defendant has invoked his right to counsel or right to remain silent under the Fifth Amendment, the police may not initiate a custodial interrogation without counsel being present. Edwards v. Arizona, 451 U.S. 477, 486 (1981). If there is no custodial interrogation, however, there can be no infringement on a defendant's Fifth Amendment right to counsel. Edwards, 451 U.S. at 486.

In the instant case, there was no custodial interrogation to lead to an infringement on Defendant's Fifth Amendment rights. Deviney's own attorney testified the State made it abundantly clear that it would not consider utilizing Deviney's cooperation against Defendant. Moreover, while the surveillance equipment was installed just over a week after Hernandez sent an email to Mr. de la Rionda, Hinson testified the plan to record Deviney and Defendant's conversations began in April when the Office of the State Attorney received a letter from [redacted] indicating the two were having conversations through the vents in their cells. Moreover, it is not enough, as Defendant suggests, that the State did not try to stop Defendant and Deviney's conversations to turn Deviney into a state agent. See Cuomo v. State, 98 So. 3d 1275, 1282 (Fla. 1st DCA 2012) (finding conversation between defendant and his mother was admissible even though police facilitated conversation because police did not foster expectation of privacy for the conversation). Indeed, it was clear Deviney was not even aware the recording was taking place. Therefore, the lack of Miranda warnings before Deviney and Defendant engaged in conversation resulted in no infringement on Defendant's Fifth Amendment rights.

II.

Defendant next suggests the recording violated his Fourth Amendment right to privacy and was an unreasonable search and seizure because the recordings captured Defendant's "private moments" in the shower and use of the toilet.

Fourth Amendment rights are not implicated where a defendant has no reasonable expectation of privacy. Katz v. United States, 389 U.S. 347, 360 (1967). It is well established that an inmate does not have a reasonable expectation of privacy in jail. Lanza v. New York, 370 U.S. 139 (1962). Indeed, "the Fourth Amendment proscription against unreasonable searches does not apply within the confines of the prison cell." Hudson v. Palmer, 468 U.S. 517, 525-26 (1984). Moreover, "[v]oluntary jailhouse conversations between inmates are not entitled to the same degree of privacy afforded some other communications." Allen v. State, 636 So. 2d 494, 496 (Fla. 1994) (citing Lanza, 370 U.S. 139). These types of recordings are admissible in the absence of evidence the police "deliberately fostered an expectation of privacy in the inmates' conversation" or evidence of "any factor diminishing trustworthiness of the conversation such as coercion or trick." Davis v. State, 121 So. 3d 462, 485 (Fla. 2013); Allen, 636 So. 2d at 496-97; see also Cuomo, 98 So. 3d at 1282. Further, a defendant does not have a reasonable expectation of privacy while on the toilet in confinement. Cleveland v. State, 557 So. 2d 959, 960 (Fla. 4th DCA 1990); cf. Ramirez v. State, 654 So.2d 1222, 1223-24 (Fla. 2d DCA 1995) (distinguishing the case from Cleveland as the defendant was in bathroom stall at farmer's market, rather than in confinement which "carries with it the circumscription of certain privacy rights").

Here, the recordings captured voluntary conversations between Defendant and Deviney while they were each in their respective prison cells. Additionally, there is no evidence of a fostered expectation of privacy, coercion, or trick. Indeed, it is clear neither inmate even knew the recording was taking place. Defendant, therefore, had no reasonable expectation of privacy in his jail cell, and the Fourth Amendment proscription against unreasonable searches does not apply to this situation.

III.

Lastly, Defendant suggests the recording must be suppressed as a violation of Defendant's Fourth and Sixth Amendment rights because JSO placed a sensitive recording device near an area of the jail where attorneys meet with their clients and did so without judicial oversight. Defendant suggests defendants and defense attorneys alike should not have to worry whether their confidential conversations will be recorded.

Initially, this Court notes Defendant has no support for his assertions that this recording violated the rights of any defendant and is based purely on possibility. Officer Carter and Hernandez testified they agreed with defense counsel's estimation that the total distance between the isolation cells to the area attorneys meet with their clients is approximately twenty to twenty-five feet, but no one testified regarding a precise measurement. Officer Carter testified, however, that if an attorney and client were talking loud enough to be heard by the recording device, they were also talking loud enough to be heard by other inmates, including those in the isolation cells. This fact alone could waive attorney-client privilege. See Mobley v. State, 409 So. 2d 1031, 1038 (Fla. 1982) ("Whether a communication is confidential depends on whether the person invoking the privilege knew or should have known that the privileged conversation was being overheard.") (citation omitted). Importantly, while the recording did capture sounds and voices

from outside Defendant and Deviney's isolation cells, the recording did not capture any attorney-client conversations. Therefore, Defendant is not entitled to suppression on this basis.

Accordingly, it is:

ORDERED that Defendant's "Motion to Suppress Statements" and "Amended Motion to Suppress Statements" are hereby **DENIED.**

DONE AND ORDERED in Jacksonville, Duval County, Florida, on August 26, 2016.

MALLORY COOPER
Circuit Judge

Copies to:

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Jacksonville, FL 32202

Charles Fletcher, Esq.
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8833 Perimeter Park Blvd., Ste. 104
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200 E. Forsyth St.
Jacksonville, FL 32202

Case No.: 16-2013-CF-05781-AXXX-MA
/bjj

IN THE CIRCUIT COURT, FOURTH
JUDICIAL CIRCUIT, IN AND FOR
DUVAL COUNTY, FLORIDA

CASE NO.: 16-2013-CF-05781-AXXX-MA

DIVISION: CR-D

STATE OF FLORIDA

v.

DONALD JAMES SMITH,
Defendant.
_____/

AMENDED ORDER DENYING DEFENDANT'S MOTION TO SUPPRESS STATEMENTS AND AMENDED MOTION TO SUPPRESS STATEMENTS

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In the instant Motions, Defendant requests this Court suppress all statements obtained from Defendant through a recording of his conversations in his jail cell between June 23, 2015 and June 26, 2015. This Court held a hearing on the instant Motions on August 18, 2016.[1]

Factual Background

At the evidentiary hearing, the State presented the testimony of Robert Hinson ("Hinson"), an investigator with the State Attorney's Office, Officer Carter, an officer with the

[1] At the evidentiary hearing, defense counsel presented argument and testimony in support of the third ground contained in Defendant's Amended Motion. At the end of the hearing, counsel asked for the opportunity to file an amended motion memorializing that argument.

FILED 09/13/16 AM 10:40 FUSSELL

Jacksonville Sheriff's Office ("JSO") Department of Corrections' intelligence unit, and Detective Gonzalez with JSO. Hinson testified that on April 8, 2015, the State Attorney's Office received a letter from a confidential informant ("CI") who wanted to provide information to the State. In an interview with the CI, the CI provided information that Defendant and Randall Deviney ("Deviney"), another inmate at the Duval County Jail, were communicating through vents and were trying to be disruptive to their court proceedings.

Hinson then spoke with Officer Carter to discuss the layout of isolation cells where Defendant and Deviney were being housed, and Officer Carter provided pictures of isolation cells on a different floor, which are the exact replica of Defendant and Deviney's cells. [redacted] Each state witness testified no one knew of this plan except themselves and other members of the State Attorney's Office. Hinson further testified there was no judicial oversight to their plan and the CI was not utilized after being interviewed.

Defendant presented the testimony of James Hernandez, Esquire ("Hernandez"), who represented Deviney during his trial. Hernandez testified he was appointed to represent Deviney after a conflict arose because the Office of the Public Defender was representing Deviney and

Defendant, while Deviney wanted to provide information to the State regarding Defendant. Hernandez indicated he had discussed Deviney's desire to cooperate with the prosecutor in Deviney's case, Bernardo de la Rionda ("Mr. de la Rionda"). Hernandez indicated he emailed Mr. de la Rionda on June 15, 2015, regarding Deviney's desire to cooperate. Hernandez testified he talked to and met with Mr. de la Rionda multiple times regarding the matter and informed his client he had approached Mr. de la Rionda to facilitate cooperation between them. Hernandez testified, however, that Mr. de la Rionda always made it clear there would be no cooperation between the State and Deviney.

Analysis of Defendant's Arguments

In his Motions, Defendant makes three separate arguments for suppression, which this Court will address in turn below.

I.

First, Defendant argues Deviney was an agent of the State and was, therefore, required to advise Defendant of his Miranda[2] warnings prior to initiating a conversation with him. Defendant suggests Deviney became an agent of the State when the State allowed Defendant and Deviney to remain in adjacent cells and did not prevent Deviney from soliciting statements from Defendant, despite Deviney's repeated proffers of testimony against Defendant. As such, Defendant suggests the failure of Deviney to advise Defendant of his Miranda rights, after Defendant had requested counsel, requires suppression.

The Fifth Amendment to the United States Constitution states that no person "shall be compelled in any criminal case to be a witness against himself." U.S. Const. amend. X. In Miranda, the United States Supreme Court held statements made by a person while under custodial interrogation may not be presented as evidence against that person unless the person

[2] Miranda v. Arizona, 384 U.S. 436 (1966).

had been informed of certain rights, since referred to as Miranda rights, prior to making the statements. Miranda, 384 U.S. 436. Miranda rights are intended to protect a defendant's Fifth Amendment right against self-incrimination and include the right to remain silent and the right to counsel. Id. at 444. Once a defendant has invoked his right to counsel or right to remain silent under the Fifth Amendment, the police may not initiate a custodial interrogation without counsel being present. Edwards v. Arizona, 451 U.S. 477, 486 (1981). If there is no custodial interrogation, however, there can be no infringement on a defendant's Fifth Amendment right to counsel. Edwards, 451 U.S. at 486.

In the instant case, there was no custodial interrogation to lead to an infringement on Defendant's Fifth Amendment rights. Deviney's own attorney testified the State made it abundantly clear that it would not consider utilizing Deviney's cooperation against Defendant. [redacted] Moreover, it is not enough, as Defendant suggests, that the State did not try to stop Defendant and Deviney's conversations to turn Deviney into a state agent. See Cuomo v. State, 98 So. 3d 1275, 1282 (Fla. 1st DCA 2012) (finding conversation between defendant and his mother was admissible even though police facilitated conversation because police did not foster expectation of privacy for the conversation). Indeed, it was clear Deviney was not even aware the recording was taking place. Therefore, the lack of Miranda warnings before Deviney and Defendant engaged in conversation resulted in no infringement on Defendant's Fifth Amendment rights.

II.

Defendant next suggests the recording violated his Fourth Amendment right to privacy and was an unreasonable search and seizure because the recordings captured Defendant's "private moments" in the shower and use of the toilet.

Fourth Amendment rights are not implicated where a defendant has no reasonable expectation of privacy. Katz v. United States, 389 U.S. 347, 360 (1967). It is well established that an inmate does not have a reasonable expectation of privacy in jail. Lanza v. New York, 370 U.S. 139 (1962). Indeed, "the Fourth Amendment proscription against unreasonable searches does not apply within the confines of the prison cell." Hudson v. Palmer, 468 U.S. 517, 525-26 (1984). Moreover, "[v]oluntary jailhouse conversations between inmates are not entitled to the same degree of privacy afforded some other communications." Allen v. State, 636 So. 2d 494, 496 (Fla. 1994) (citing Lanza, 370 U.S. 139). These types of recordings are admissible in the absence of evidence the police "deliberately fostered an expectation of privacy in the inmates' conversation" or evidence of "any factor diminishing trustworthiness of the conversation such as coercion or trick." Davis v. State, 121 So. 3d 462, 485 (Fla. 2013); Allen, 636 So. 2d at 496-97; see also Cuomo, 98 So. 3d at 1282. Further, a defendant does not have a reasonable expectation of privacy while on the toilet in confinement. Cleveland v. State, 557 So. 2d 959, 960 (Fla. 4th DCA 1990); cf. Ramirez v. State, 654 So.2d 1222, 1223-24 (Fla. 2d DCA 1995) (distinguishing the case from Cleveland as the defendant was in bathroom stall at farmer's market, rather than in confinement which "carries with it the circumscription of certain privacy rights").

Here, the recordings captured voluntary conversations between Defendant and Deviney while they were each in their respective prison cells. Additionally, there is no evidence of a fostered expectation of privacy, coercion, or trick. Indeed, it is clear neither inmate even knew the recording was taking place. Defendant, therefore, had no reasonable expectation of privacy in his jail cell, and the Fourth Amendment proscription against unreasonable searches does not apply to this situation.

III.

Lastly, Defendant suggests the recording must be suppressed as a violation of Defendant's Fourth and Sixth Amendment rights [redacted] did so without judicial oversight. Defendant suggests defendants and defense attorneys alike should not have to worry whether their confidential conversations will be recorded.

Initially, this Court notes Defendant has no support for his assertions that this recording violated the rights of any defendant and is based purely on possibility. Officer Carter and Hernandez testified they agreed with defense counsel's estimation that the total distance between the isolation cells to the area attorneys meet with their clients is approximately twenty to twenty-five feet, but no one testified regarding a precise measurement. Officer Carter testified, however, that if an attorney and client were talking loud enough to be heard by the recording device, they were also talking loud enough to be heard by other inmates, including those in the isolation cells. This fact alone could waive attorney-client privilege. See Mobley v. State, 409 So. 2d 1031, 1038 (Fla. 1982) ("Whether a communication is confidential depends on whether the person invoking the privilege knew or should have known that the privileged conversation was being overheard.") (citation omitted). Importantly, while the recording did capture sounds and voices

from outside Defendant and Deviney's isolation cells, the recording did not capture any attorney-client conversations. Therefore, Defendant is not entitled to suppression on this basis.

Accordingly, it is:

ORDERED that Defendant's "Motion to Suppress Statements" and "Amended Motion to Suppress Statements" are hereby **DENIED**.

DONE AND ORDERED in Jacksonville, Duval County, Florida, on September 12, 2016.

MALLORY COOPER
Circuit Judge

Copies to:

Mark Caliel, Esq.
Office of the State Attorney
311 W. Monroe St.
Jacksonville, FL 32202

Charles Fletcher, Esq.
Attorney for Defendant
8833 Perimeter Park Blvd., Ste. 104
Jacksonville, FL 32216

Julie Schlax, Esq.
Attorney for Defendant
200 E. Forsyth St.
Jacksonville, FL 32202

Case No.: 16-2013-CF-05781-AXXX-MA
/bjj

IN THE CIRCUIT COURT, FOURTH JUDICIAL CIRCUIT, IN AND FOR DUVAL COUNTY, FLORIDA.

CASE NOS.: 16-2013-CF-5781
DIVISION: CR-D

STATE OF FLORIDA

VS

DONALD JAMES SMITH

NOTICE OF HEARING ON MOTION FOR PAYMENT OF EXCESS ATTORNEY'S FEES

THIS CAUSE having been reviewed by the Court, finds that a hearing should be set, therefore, it is accordingly,

ORDERED that:

This cause is hereby set for hearing to be held on:

October 4, *2016, at 10:15 a.m.*

before Chief Judge Mark H. Mahon, Room 7139, Duval County Courthouse, 501 W. Adams Street, Jacksonville, FL 32202. Time allocated for said hearing is FIFTEEN (15) MINUTES.

PLEASE BE GOVERNED ACCORDINGLY.

DONE AND ORDERED in Chambers at Jacksonville, Duval County, Florida this 21 day of September, 2016.

MARK H. MAHON
CHIEF JUDGE

FILED 09/22/16 AM 10:47 FUSSELL

Case#16-2013-CF-5781

Copies to:
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Jacksonville, Fl. 32202

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8833 Perimeter Park Blvd., Suite 104
Jacksonville, Fl. 32216

Office of the State Attorney
220 East Bay St. CR-D
Jacksonville,Fl. 32202

Caroline Emery, Esquire
501 W. Adams St., Suite 7150
Jacksonville, Fl. 32202

Justice Administration Commission
P.O. Box 1654
Tallahassee, Fl. 32302

Duval County Courthouse
501 W. Adams St., Suite 7038
Judge Mark Borello
Jacksonville, Fl. 32202

IN THE CIRCUIT COURT OF THE FOURTH JUDICIAL CIRCUIT IN AND FOR DUVAL COUNTY, FLORIDA

STATE OF FLORIDA

v.

DONALD JAMES SMITH
Defendant
_____/

CASE NO: 2013-CF-005781-AXXX
DIVISION: CR-D

ORDER ON MOTION FOR PAYMENT OF INTERIM ATTORNEY'S FEES IN EXCESS OF THE STATUTORY CAP PURSUANT TO SECTION 27.5304(12) OF THE FLORIDA STATUTES

Before the Court, is the Motion for Payment of **Interim** Attorney's Fees in Excess of the Statutory Cap Pursuant to section 27.5304(12), Florida Statutes.

The Court, having fully considered the pleadings and record, having held an evidentiary hearing and heard arguments of counsel, and being fully advised pursuant to section 27.5304, Florida Statutes, and applicable laws in Florida, finds the following:

1. The Court held an evidentiary hearing on October 4, 2016.

2. Defense counsel, Chuck Fletcher, Esq., appeared in person and had served as Co-counsel.

3. Lead Counsel, Julie A. Schlax, Esq., also filed a motion requesting an interim payment and attended the evidentiary hearing in person as well.

4. The Justice Administrative Commission (JAC) submitted an informal response by e-mail, and requested to appear at the hearing. Brad Bischoff, Esq., appeared telephonically at the hearing on behalf of the JAC.

5. Both Lead counsel and Co-counsel signed a contract with the JAC, and on February 20, 2015, were appointed to represent the Defendant in this death case.

6. The case is set for trial to begin January 17, 2017.

7. Defense counsel is seeking $46,150.00 in attorney's fees at a rate of $100.00 per hour.

8. In its Letter of Objection dated August 9, 2016, the JAC objected to the bill because it exceeded the maximum $25,000.00 flat fee. At the evidentiary hearing, the parties conceded to a total billable amount of **$46,150.00** in attorney's fees to this date.

FILED 10/13/16 PM 03:11 RUSSELL

9. Pursuant to the JAC's Policies and Procedures II(D), defense counsel would only be entitled to 80% of the $46,150.00 amount billed (i.e., **$36,920.00**), with the remaining 20% (i.e., **$9,230.00**) to be carried forward to the disposition of the case.

10. Counsel is not presently making a claim for costs.

11. This is a Capital case in which the Defendant was charged with Murder in the First Degree and Capital Sexual Battery.

12. Under the General Appropriations Act, the flat fee for this type of case is $25,000.00.

13. Pursuant to § 27.5304(12)(d), Florida Statutes, the rate is:

a) ____ "*not to exceed*" seventy-five dollars ($75.00) per hour;

b) _X_ one-hundred dollars ($100.00) per hour in this First Degree Murder case.

14. Defense counsel thoroughly set forth the facts of the case in full detail both in the Motion and at the evidentiary hearing, to establish that this case required an extraordinary and unusual effort to represent the Defendant. This Court adopts and incorporates as its findings herein all of the allegations made in the pleadings submitted as well as all of the defense counsel's arguments made at the evidentiary hearing, none of which were refuted by the JAC.

15. Defense counsel represented that more than seventy-five (75) hours had been expended to perform legal services on this case to ensure effective and competent representation, which this Court finds justifies compensation in excess of the flat fee.

16. Based upon such unrefuted findings and based upon the number of hours expended, this Court specifically finds that defense counsel has proven by competent and substantial evidence that this case required "extraordinary and unusual efforts" of counsel, which warranted exceeding the flat fee; furthermore, in light of such findings, counsel has established that even an award of double the flat fee would be confiscatory. See § 27.5304(12), Fla. Stat.

17. The Court finds that the total hours expended and an interim payment in the stipulated amount of $46,150.00 is reasonable.

18. The Chief Judge was not the presiding trial judge in this case and, therefore, has no first-hand knowledge regarding whether or not the hours expended were "reasonable." Absent a gross abuse on counsel's invoices or short of cross-examining counsel, the Chief Judge has no way of confirming whether the hours expended were reasonable. Therefore, the Court relies upon the parties' stipulation and unrefuted evidence that the number of hours expended were reasonable.

19. The Court has determined that:

_X_ refusing to award an interim payment in this case would be confiscatory; and

____ Counsel will be awarded the flat fee;

____ Counsel will be awarded 200 % of the flat fee;

_X_ 200 % of the flat fee would be confiscatory, and the Court will use:

(a) _X_ an hourly rate of $100.00, since this is a Capital First Degree Murder case;

(b) ____ an hourly rate of $ 75.00 , so as to "not exceed" $75.00 per hour to ensure that the "total fees paid" are not confiscatory for the number of hours expended. § 27.5304(12)(d), Fla. Stat.

20. The total hours ultimately billed at this time are **461.5** hours. Therefore, the Court is approving a total award in the amount of **$46,150.00** as a reasonable, non-confiscatory amount for counsel's extraordinary and unusual efforts in this Capital case at this time.

21. Defense counsel is entitled to payment of 80% of the award (i.e., **$36,920.00**) as an **interim bill** at this time and the remaining 20% in the amount of $9,230.00 shall be carried forward until the final billing in the case. See Makemson v. Martin County, 491 So. 2d 1109 (Fla. 1986); White v. Board of County Comm'rs, 537 So. 2d 1376 (Fla. 1989). Accordingly, it is

ORDERED AND ADJUDGED that:

A. The Motion for Payment of Interim Attorney's Fees in Excess of the Statutory Cap Pursuant to section 27.5304(12), Florida Statutes is **GRANTED in part**.

B. The Justice Administrative Commission is directed to pay attorney's fees to Chuck Fletcher, Esq., as follows:

C. The Court approves a total amount of award for attorney's fees in this case in the amount of $46,150.00.

D. This is an award for payment of an **interim bill** of attorney's fees at this time. Counsel is entitled to 80% of $46,150.00 at this time, for payment in the amount of **$36,920.00**, plus costs of $0.

E. The remaining 20% in the amount of $9,230.00 shall be carried forward until the final billing in the case.

F. The Justice Administrative Commission shall process such billing for payment by the State of Florida upon receipt of a copy of this Order.

DONE AND ORDERED in Chambers at Jacksonville, Duval County, Florida, this 13 day of OCT., 2016.

MARK H. MAHON
CHIEF JUDGE

cc. The Honorable Mallory Cooper
Chuck Fletcher, Esq., Counsel for Defendant
SAO - Division CR-D
Caroline C. Emery, Court Counsel

Justice Administrative Commission
pleadings@justiceadmin.org
Cris Martinez, Esq.
P.O. Box 1654
Tallahassee, Florida 32302

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IN THE CIRCUIT COURT OF THE FOURTH JUDICIAL CIRCUIT IN AND FOR DUVAL COUNTY, FLORIDA

STATE OF FLORIDA

CASE NO: 2013-CF-005781-AXXX
DIVISION: CR-D

v.

DONALD JAMES SMITH
Defendant
_____/

ORDER ON MOTION FOR PAYMENT OF INTERIM ATTORNEY'S FEES IN EXCESS OF THE STATUTORY CAP PURSUANT TO SECTION 27.5304(12) OF THE FLORIDA STATUTES

Before the Court, is the Motion for Payment of **Interim** Attorney's Fees in Excess of the Statutory Cap Pursuant to section 27.5304(12), Florida Statutes.

The Court, having fully considered the pleadings and record, having held an evidentiary hearing and heard arguments of counsel, and being fully advised pursuant to section 27.5304, Florida Statutes, and applicable laws in Florida, finds the following:

1. The Court held an evidentiary hearing on October 4, 2016.

2. Defense counsel, Julie A. Schlax, Esq., appeared in person and served as Lead Counsel.

3. Co-Counsel, Chuck Fletcher, Esq., also filed a motion requesting an interim payment and attended the evidentiary hearing in person as well.

4. The Justice Administrative Commission (JAC) submitted an informal response by e-mail, and requested to appear at the hearing. Brad Bischoff, Esq., appeared telephonically at the hearing on behalf of the JAC.

5. Both Lead counsel and Co-counsel signed a contract with the JAC, and on February 20, 2015, were appointed to represent the Defendant in this death penalty case.

6. The case is set for trial to begin January 17, 2017.

7. In its Letter of Objection dated November 4, 2015, the JAC objected to the bill because it exceeded the maximum $25,000.00 flat fee. Also, the JAC reduced defense counsel's bill by $330.00 for various reasons. Defense counsel concedes to such reduced amount. The amount ultimately billed was, therefore, reduced to **$56,300.00** at a rate of $100.00 per hour.

FILED 10/13/16 3PM 0310 FUSSELL

8. Pursuant to the JAC's Policies and Procedures II(D), defense counsel would only be entitled to 80% of the $56,300.00 amount billed (i.e., **$45,040.00**), with the remaining 20% (i.e., **$11,260.00**) to be carried forward to the disposition of the case.

9. Counsel is not presently making a claim for costs.

10. This is a Capital case in which the Defendant was charged with Murder in the First Degree and Capital Sexual Battery.

11. Under the General Appropriations Act, the flat fee for this type of case is $25,000.00.

12. Pursuant to § 27.5304(12)(d), Florida Statutes, the rate is:

a) ____ "*not to exceed*" seventy-five dollars ($75.00) per hour;

b) _X_ one-hundred dollars ($100.00) per hour in this First Degree Murder case.

13. Defense counsel thoroughly set forth the facts of the case in full detail both in the Motion and at the evidentiary hearing, to establish that this case required an extraordinary and unusual effort to represent the Defendant. This Court adopts and incorporates as its findings herein all of the allegations made in the pleadings submitted as well as all of the defense counsel's arguments made at the evidentiary hearing, none of which were refuted by the JAC.

14. Defense counsel represented that more than seventy-five (75) hours had been expended to perform legal services on this case to ensure effective and competent representation, which this Court finds justifies compensation in excess of the flat fee.

15. Based upon such unrefuted findings and based upon the number of hours expended, this Court specifically finds that defense counsel has proven by competent and substantial evidence that this case required "extraordinary and unusual efforts" of counsel, which warranted exceeding the flat fee; furthermore, in light of such findings, counsel has established that even an award of double the flat fee would be confiscatory. See § 27.5304(12), Fla. Stat.

16. The Court finds that the total hours expended and an interim payment in the stipulated amount of $45,040.00 is reasonable.

17. The Chief Judge was not the presiding trial judge in this case and, therefore, has no first-hand knowledge regarding whether or not the hours expended were "reasonable." Absent a gross abuse on counsel's invoices or short of cross-examining counsel, the Chief Judge has no way of confirming whether the hours expended were reasonable. Therefore, the Court relies upon the parties' stipulation and unrefuted evidence that the number of hours expended were reasonable.

18. The Court has determined that:

_X_ refusing to award an interim payment in this case would be confiscatory; and

____ Counsel will be awarded the flat fee;

____ Counsel will be awarded 200 % of the flat fee;

_X_ 200 % of the flat fee would be confiscatory, and the Court will use:

(a) _X_ an hourly rate of $100.00, since this is a Capital First Degree Murder case;

(b) ____ an hourly rate of $ 75.00 , so as to "not exceed" $75.00 per hour to ensure that the "total fees paid" are not confiscatory for the number of hours expended. § 27.5304(12)(d), Fla. Stat.

19. The total hours ultimately billed at this time are **563.00** hours. Therefore, the Court is approving a total award in the amount of **$56,300.00** as a reasonable, non-confiscatory amount for counsel's extraordinary and unusual efforts in this Capital case at this time.

20. Defense counsel is entitled to payment of 80% of the $56,300.00 award (i.e., **$45,040.00**) as an **interim bill** at this time and the remaining 20% in the amount of $11,260.00 shall be carried forward until the final billing in the case. See Makemson v. Martin County, 491 So. 2d 1109 (Fla. 1986); White v. Board of County Comm'rs, 537 So. 2d 1376 (Fla. 1989). Accordingly, it is

ORDERED AND ADJUDGED that:

A. The Motion for Payment of Interim Attorney's Fees in Excess of the Statutory Cap Pursuant to section 27.5304(12), Florida Statutes is **GRANTED in part**.

B. The Justice Administrative Commission is directed to pay attorney's fees to Julie A. Schlax, Esq., as follows:

C. The Court approves an award for attorney's fees in this case for work performed up until this time, in the total amount of $56,300.00.

D. This is an award for payment of an **interim bill** of attorney's fees at this time. Counsel is entitled to 80% of $56,300.00 at this time, for payment in the amount of **$45,040.00**, plus costs of $0.

E. The remaining 20% in the amount of $11,260.00 shall be carried forward until the final billing in the case.

F. The Justice Administrative Commission shall process such billing for payment by the State of Florida upon receipt of a copy of this Order.

DONE AND ORDERED in Chambers at Jacksonville, Duval County, Florida, this 13 day of OCT, 2016.

MARK H. MAHON
CHIEF JUDGE

cc. The Honorable Mallory Cooper
Julie A. Schlax, Esq., Counsel for Defendant
SAO - Division CR-D
Caroline C. Emery, Court Counsel

Justice Administrative Commission
pleadings@justiceadmin.org
Cris Martinez, Esq.
P.O. Box 1654
Tallahassee, Florida 32302

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IN THE CIRCUIT COURT OF THE FOURTH JUDICIAL CIRCUIT, IN AND FOR DUVAL COUNTY, FLORIDA.

CASE NO.: 16-2013-CF-5781 AXXX
DIVISION: CR-D

STATE OF FLORIDA

VS.

DONALD SMITH
_____/

FILED
OCT 18 2016
CLERK CIRCUIT COURT

DEFENDANT'S MOTION FOR COURT INTERVENTION BASED ON THE PRE-TRIAL DETENTION FACILITY'S FAILURE TO PROVIDE NECESSARY MEDICAL ATTENTION IN VIOLATION OF THE PROHIBITION AGAINST CRUEL AND UNUSAL PUNISHMENT

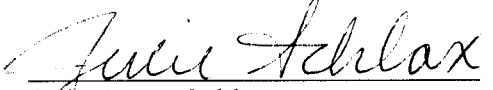
COMES NOW, Defendant, by and through the undersigned attorney, asserts the following:

1. Defendant is indicted for First Degree Murder, Kidnapping and Capital Sexual Battery. The State is seeking the Death Penalty. Defendant has been held at the Jacksonville Pre-Trial Detention Facility since June 22, 2013. Defendant is sixty years of age.
2. Defendant is suffering from a skin disorder which has increased in severity over the last five months. *See attached photographs*. Defendant has repeatedly requested medical intervention to stop the growth and severe symptoms he suffers. The only medical intervention he has received is a small tube of lotion. He has not seen a Dermatologist, and his last three requests to seek medical intervention have been ignored.
3. The lack of proper medical intervention is in violation of the prohibition against "cruel and unusual punishment" guaranteed to Mr. Smith by Article I, Section 17 of the Florida Constitution, and the Eighth and Fourteenth Amendments to the United States Constitution. *See Robinson v. California 370 U.S. 660 (1962).*

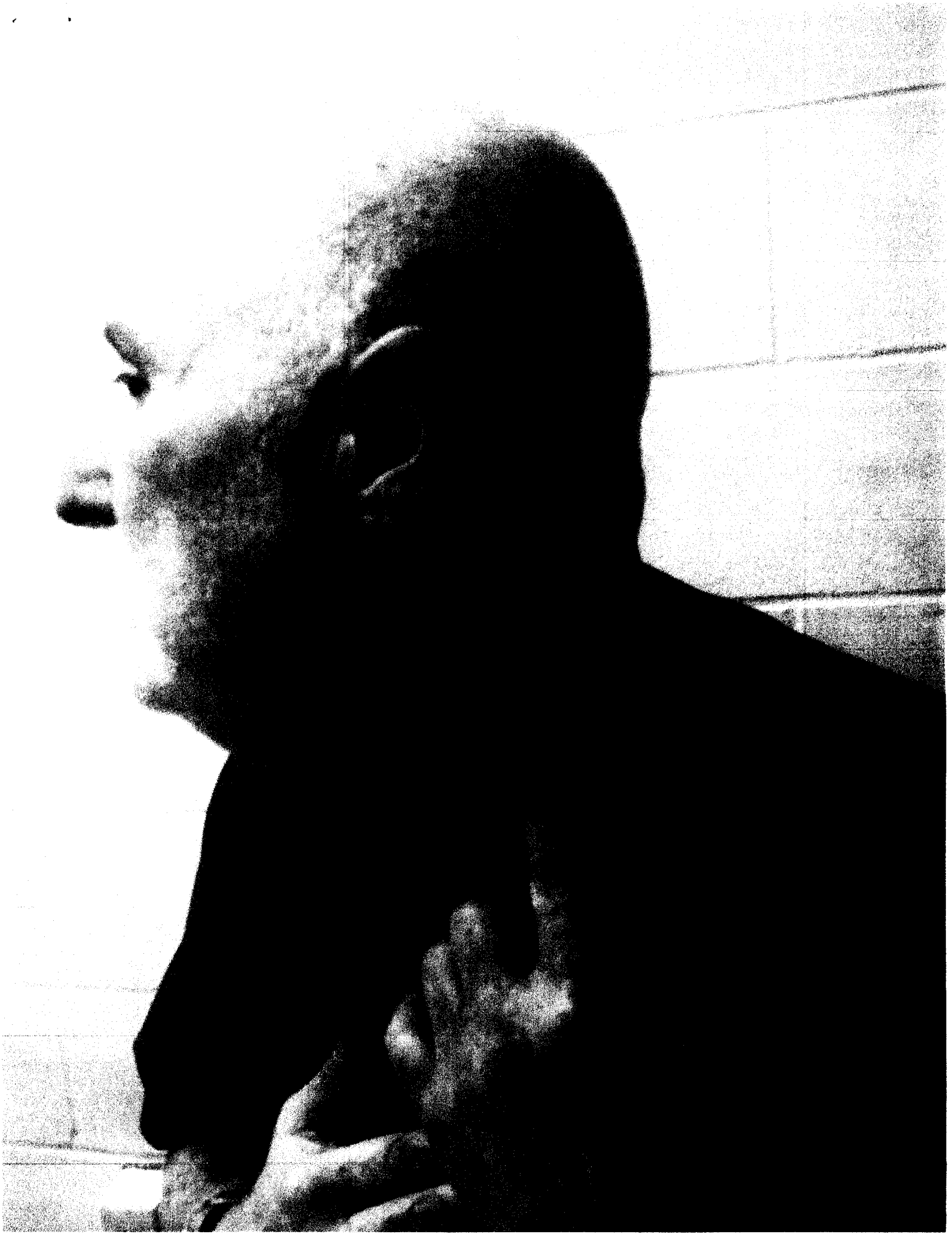
WHEREFORE, Defendant requests this Honorable Court intervene to ensure Mr. Smith receives appropriate medical intervention.

I HEREBY CERTIFY that a copy of the foregoing has been furnished to the Office of the State Attorney, electronically, this 5th day of October, 2016.

Respectfully submitted,



Julie Agent Schlax
200 E. Forsyth Street
Jacksonville, Florida 32202
(904) 674-0717
julie@esalawgroup.com
Attorney for Defendant



IN THE CIRCUIT COURT, FOURTH JUDICIAL CIRCUIT, IN AND FOR DUVAL COUNTY, FLORIDA

CASE: 16-2013-CF-005781-AXXX-MA

DIVISION: CR-D (Circuit)

STATE OF FLORIDA

vs.

DONALD JAMES SMITH, DEFENDANT

ORDER

THIS CAUSE COMING ON BEFORE THE COURT UPON THE ☒DEFENDANT'S ☐STATE'S MOTION FOR COURT INTERVENTION BASDED ON THE PRE-TRIAL DETENTION FACILITY'S FAILURE TO PROVIDE NECESSARY MEDICAL ATTENTION IN VIOLATION OF THE PROHIBITION AGAINST CRUEL AND UNUSUAL PUNISHMENT

FILED HEREIN ON THE 5TH DAY OF October , 2016 AND THE COURT HAVING HEARD ARGUMENTS OF THE STATE'S ATTORNEY AND OF COUNSEL FOR DEFENSE, AND BEING FULLY ADVISED IN THE PREMISES, IT IS THEREUPON

ORDERED AND ADJUDGED THAT THE AFORESAID MOTION SHALL BE AND THE SAME IS HEREBY:

GRANTED – PTO to see that Mr Smith had a medical professional at the jail today

DONE AND ORDERED IN OPEN COURT AT JACKSONVILLE, DUVAL COUNTY, FLORIDA, THIS 18 DAY OF Oct , 2016 .

Circuit Judge

FILED
OCT 18 2016
CLERK CIRCUIT COURT

IN THE CIRCUIT COURT, FOURTH JUDICIAL CIRCUIT, IN AND FOR DUVAL COUNTY, FLORIDA

CASE NO: 16-2013-CF-5781-AXXX-MA
DIVISION: CR-D

STATE OF FLORIDA

vs.

DONALD SMITH
_____/

ORDER AUTHORIZING ADDITIONAL COSTS OF A NEUROPSYCHOLOGIST

THIS CAUSE, came on to be heard upon the Defendant's Motion for Authority to Incur Additionals Costs of a Neuropsychologist, and the Court having been fully advised in the premises, and finding that a Neuropsychologist is both necessary and essential to the defense in this cause, it is

ORDERED as follows:

1. That Julie Agent Schlax, Esquire, is hereby authorized to incur additional reasonable expeses of Dr. Joseph Sesta, a Neuropsychologist with Suncoast Neuropsychology, LLC.

2. That an additional amount of $7,500.00 at an hourly rate of $300.00 is approved; travel rate is also approved at an hourly rate of $100.00.

3. That the Justice Administrative Commission shall be responsible for payment to Dr. Sesta upon submission of proper invoices.

4. That should the Defendant need to exceed the authorized amounts, the Defendant shall seek leave of the Court prior to incurring any additional fees.

DONE AND ORDERED in Duval County, Jacksonville, Florida on this 3 day of ~~October~~ November, 2016.

Mallory Cooper
_____
THE HONORABLE MALLORY D. COOPER
CIRCUIT JUDGE

Copies to: Julie Agent Schlax
Justice Administrative Commission
Joseph Sesta, Neuropsychologist

FILED 11/04/16 AM 10:55 RUSSELL

STATE ATTORNEY NO.: 13CF039428AD

IN THE CIRCUIT COURT OF THE FOURTH JUDICIAL CIRCUIT, IN AND FOR DUVAL COUNTY, FLORIDA

CASE NO.: 162013CF5781AXXXMA

DIVISION: CR-D

STATE OF FLORIDA

vs.

DONALD JAMES SMITH

STATE'S SEVENTH SUPPLEMENTAL DISCOVERY EXHIBIT

A.

Category A:

Lori Armstrong Case Coordinator, CPT 4539 Beach Blvd., Bldg 4100 , Jacksonville, FL 32207

K. Video of June 26th, 2013 CPT interviews and corresponding reports.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by eservice/mail, to Julie Schlax, Esquire, 200 East Forsyth Street, Jacksonville, FL 32202 this 17th day of November, 2016.

ANGELA B. COREY
STATE ATTORNEY

By: _____
Mark Caliel
Bar Number: 0105650
Assistant State Attorney

IN THE CIRCUIT COURT, FOURTH JUDICIAL CIRCUIT, IN AND FOR DUVAL COUNTY, FLORIDA

CASE NO: 16-2013-CF-5781-AXXX-MA
DIVISION: CR-D

STATE OF FLORIDA

vs.

DONALD SMITH
_____/

MOTION FOR APPROVAL OF ADDITIONAL FEES AND OTHER NECESSARY COSTS FOR LEGAL PSYCHOLOGIST DR. BROOKE BUTLER

COMES NOW the Defendant, Donald Smith, by and through undersigned Counsel, and respectfully moves that the Court approve additional mitigation fees and other necessary costs in the amount of $15,000.00 for Dr. Brooke Butler. In support of this Motion, the undersigned would show:

1. The Court previously appointed Dr. Brooke Butler to serve as a legal psychologist in this matter.

2. The Court previously approved $35,000.00 in fees for Dr. Butler plus necessary costs. Undersigned counsel has not requested fees for Dr. Butler since January 28, 2016.

3. Due to the nature of Mr. Smith's case, his age, and his background information, records location and analysis has been extraordinarily time-consuming.

4. Mr. Smith's father, as well as other family members, resides in McDonough, GA which will make interviews more labor-intensive. It will be necessary for Dr. Butler to travel to McDonough, GA to conduct extensive, in-person interviews of his family members, former neighbors, and teachers, and to gather pertinent information necessary for Mr. Smith's defense.

5. Undersigned counsel has reviewed Dr. Butler's previous invoices and found her work to be both necessary and reasonable.

WHEREFORE, the Defendant requests that this motion be granted and that the following costs and fees be approved:

1. Additional fees for Legal Psychologist Dr. Brooke Butler at a rate of $75.00 per hour (for both work and travel time) with a cap of $50,000.00 (additional amount of $15,000.00), with the authority to submit a motion for additional fees if necessary;

2. All necessary statutory costs, including travel expenses, required to represent Mr. Smith for Dr. Butler, at statutory rates established by Section 112.061, Fla. Stat.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been provided to the Justice Administrative Commission via e-mail delivery this 7th day of December, 2016.

Respectfully submitted,

/s/ Julie Agent Schlax

Julie Agent Schlax
200 East Forsyth Street
Jacksonville, Florida 32202
(904) 674-0717Telephone
(904) 674-0737 Facsimile
Attorney for Defendant

IN THE CIRCUIT COURT, FOURTH JUDICIAL CIRCUIT, IN AND FOR DUVAL COUNTY, FLORIDA

CASE NO: 16-2013-CF-5781-AXXX-MA
DIVISION: CR-D

STATE OF FLORIDA

vs.

DONALD SMITH
_____/

MOTION FOR APPROVAL OF ADDITIONAL FEES AND OTHER NECESSARY COSTS FOR INVESTIGATOR

COMES NOW the Defendant, Donald Smith, by and through undersigned Counsel, and respectfully moves that the Court approve additional investigation fees and other necessary costs in the amount of $6,000.00 for Hannon Investigations. In support of this Motion, the undersigned would show:

1. The Court previously appointed Hannon Investigations to serve as the private investigation firm in this matter.

2. The Court previously approved $6,000.00 in fees for Hannon Investigations. Undersigned counsel has not requested fees for Hannon Investigations since April 28, 2016.

3. Due to the nature of Mr. Smith's case, his age, and his background information, records location and analysis has been extraordinarily time-consuming.

4. Mr. Smith's father, as well as other family members, resides in McDonough, GA which will make interviews more labor-intensive. It will be necessary for Mimi Hannon, of Hannon Investigations to travel to McDonough, GA to conduct extensive, in-person interviews of his family members, former neighbors, and teachers, and to gather pertinent information necessary for Mr. Smith's defense. Additionally, Ms. Hannon will be traveling with the Court Appointed Mitigation specialist, Dr. Brooke Butler. It is anticipated that both Dr. Butler and Ms. Hannon will be necessary to adequately explain to the jury the background of Defendant. Due to safety concerns communicated to both Dr. Butler and Ms. Hannon thru prior investigation, it is considered necessary for both a licensed investigator as well as the mitigation specialist to travel to Georgia.

5. Reasonable and necessary travel expenses will be incurred by Hannon Investigations, and the reasonable associated fees for investigative costs and reasonable travel expenses should be paid by the State of Florida, Justice Administrative Commission

WHEREFORE, the Defendant requests that this motion be granted and that the following costs and fees be approved:

1. Additional fees for Hannon Investigations at a rate of $40.00 per hour (for both work and travel time) with a cap of $12,000.00 (additional amount of $6,000.00), with the authority to submit a motion for additional fees if necessary;

2 All necessary costs, including travel expenses, required to represent Mr. Smith for Hannon Investigations.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the Motion for Approval of Additional Fees and Other Necessary Costs for Investigator has been provided to the Justice Administrative Commission via e-mail delivery this 7th day of December, 2016.

Respectfully submitted,

/s/ Julie Agent Schlax

Julie Agent Schlax
200 East Forsyth Street
Jacksonville, Florida 32202
(904) 674-0717Telephone
(904) 674-0737 Facsimile
Attorney for Defendant

IN THE CIRCUIT COURT, FOURTH JUDICIAL CIRCUIT, IN AND FOR DUVAL COUNTY, FLORIDA

CASE NO: 16-2013-CF-5781-AXXX-MA
DIVISION: CR-D

STATE OF FLORIDA

vs.

DONALD SMITH
_____/

MOTION FOR APPROVAL OF ADDITIONAL FEES AND OTHER NECESSARY COSTS FOR INVESTIGATOR

COMES NOW the Defendant, Donald Smith, by and through undersigned Counsel, and respectfully moves that the Court approve additional investigation fees and other necessary costs in the amount of $6,000.00 for Hannon Investigations. In support of this Motion, the undersigned would show:

1. The Court previously appointed Hannon Investigations to serve as the private investigation firm in this matter.

2. The Court previously approved $6,000.00 in fees for Hannon Investigations. Undersigned counsel has not requested fees for Hannon Investigations since April 28, 2016.

3. Due to the nature of Mr. Smith's case, his age, and his background information, records location and analysis has been extraordinarily time-consuming.

4. Mr. Smith's father, as well as other family members, resides in McDonough, GA which will make interviews more labor-intensive. It will be necessary for Mimi Hannon, of Hannon Investigations to travel to McDonough, GA to conduct extensive, in-person interviews of his family members, former neighbors, and teachers, and to gather pertinent information necessary for Mr. Smith's defense. Additionally, Ms. Hannon will be traveling with the Court Appointed Mitigation specialist, Dr. Brooke Butler. It is anticipated that both Dr. Butler and Ms. Hannon will be necessary to adequately explain to the jury the background of Defendant. Due to safety concerns communicated to both Dr. Butler and Ms. Hannon thru prior investigation, it is considered necessary for both a licensed investigator as well as the mitigation specialist to travel to Georgia.

FILED
DEC 12 2016
RONNIE W. RUSSELL
CLERK CIRCUIT COURT

5. Reasonable and necessary travel expenses will be incurred by Hannon Investigations, and the reasonable associated fees for investigative costs and reasonable travel expenses should be paid by the State of Florida, Justice Administrative Commission

WHEREFORE, the Defendant requests that this motion be granted and that the following costs and fees be approved:

1. Additional fees for Hannon Investigations at a rate of $40.00 per hour (for both work and travel time) with a cap of $12,000.00 (additional amount of $6,000.00), with the authority to submit a motion for additional fees if necessary;

2 All necessary costs, including travel expenses, required to represent Mr. Smith for Hannon Investigations.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the Motion for Approval of Additional Fees and Other Necessary Costs for Investigator has been provided to the Justice Administrative Commission via e-mail delivery this 7th day of December, 2016.

Respectfully submitted,

/s/ Julie Agent Schlax

Julie Agent Schlax
200 East Forsyth Street
Jacksonville, Florida 32202
(904) 674-0717Telephone
(904) 674-0737 Facsimile
Attorney for Defendant

IN THE CIRCUIT COURT, FOURTH JUDICIAL CIRCUIT, IN AND FOR DUVAL COUNTY, FLORIDA

CASE NO: 16-2013-CF-5781-AXXX-MA
DIVISION: CR-D

STATE OF FLORIDA

vs.

DONALD SMITH
_____/

ORDER GRANTING MOTION FOR APPROVAL OF ADDITIONAL FEES AND OTHER NECESSARY COSTS FOR INVESTIGATOR

THIS CAUSE, came on to be heard upon the Defendant's Motion for Approval of Additional Fees and Other Necessary Costs for Investigator, and the Court having been fully advised in the premises, and finding that the additional fees and cost are both necessary and essential to the defense in this cause, it is

ORDERED as follows:

1. That this Court hereby approves additional fees for Hannon Investigations at a rate of $40.00 per hour (for both work and travel time) with a cap of $12,000.00 (additional amount of $6,000.00), with the authority to submit a motion for additional fees if necessary;

2. That all necessary statutory costs, including travel expenses, required to represent Mr. Smith for Hannon Investigations, are hereby approved, including Mimi Hannon's travel to Georgia to interview pertinent witness and family members of the Defendant;

3. It is further ordered that the Justice Administrative Commission shall pay the reasonable and necessary fees and travel expenses incurred by Hannon Investigations.

DONE AND ORDERED in Duval County, Jacksonville, Florida on this 12 day of December, 2016.

Mallory Cooper

THE HONORABLE MALLORY D. COOPER
CIRCUIT JUDGE

FILED
DEC 12 2016
RONNIE W. FUSELL

Copies to: Julie Agent Schlax
Justice Administrative Commission
Hannon Investigations

IN THE CIRCUIT COURT, FOURTH JUDICIAL CIRCUIT, IN AND FOR DUVAL COUNTY, FLORIDA

CASE NO: 16-2013-CF-5781-AXXX-MA
DIVISION: CR-D

STATE OF FLORIDA

vs.

DONALD SMITH
_____/

MOTION FOR APPROVAL OF ADDITIONAL FEES AND OTHER NECESSARY COSTS FOR LEGAL PSYCHOLOGIST DR. BROOKE BUTLER

COMES NOW the Defendant, Donald Smith, by and through undersigned Counsel, and respectfully moves that the Court approve additional mitigation fees and other necessary costs in the amount of $15,000.00 for Dr. Brooke Butler. In support of this Motion, the undersigned would show:

1. The Court previously appointed Dr. Brooke Butler to serve as a legal psychologist in this matter.

2. The Court previously approved $35,000.00 in fees for Dr. Butler plus necessary costs. Undersigned counsel has not requested fees for Dr. Butler since January 28, 2016.

3. Due to the nature of Mr. Smith's case, his age, and his background information, records location and analysis has been extraordinarily time-consuming.

4. Mr. Smith's father, as well as other family members, resides in McDonough, GA which will make interviews more labor-intensive. It will be necessary for Dr. Butler to travel to McDonough, GA to conduct extensive, in-person interviews of his family members, former neighbors, and teachers, and to gather pertinent information necessary for Mr. Smith's defense.

5. Undersigned counsel has reviewed Dr. Butler's previous invoices and found her work to be both necessary and reasonable.

WHEREFORE, the Defendant requests that this motion be granted and that the following costs and fees be approved:

1. Additional fees for Legal Psychologist Dr. Brooke Butler at a rate of $75.00 per hour (for both work and travel time) with a cap of $50,000.00 (additional amount of $15,000.00), with the authority to submit a motion for additional fees if necessary;

FILED
DEC 12 2016
RONALD W. DAMSELL
CLERK CIRCUIT COURT

IN THE CIRCUIT COURT, FOURTH JUDICIAL CIRCUIT, IN AND FOR DUVAL COUNTY, FLORIDA

CASE NO: 16-2013-CF-5781-AXXX-MA
DIVISION: CR-D

STATE OF FLORIDA

vs.

DONALD SMITH
_____/

ORDER GRANTING MOTION FOR APPROVAL OF ADDITIONAL FEES AND OTHER NECESSARY COSTS FOR LEGAL PSYCHOLOGIST DR. BROOKE BUTLER

THIS CAUSE, came on to be heard upon the Defendant's Motion for Approval of Additional Fees and Other Necessary Costs for Legal Psychologist Dr. Brooke Butler, and the Court having been fully advised in the premises, and finding that the additional fees and cost are both necessary and essential to the defense in this cause, it is

ORDERED as follows:

1. That this Court hereby approves additional fees for Legal Psychologist Dr. Brooke Butler at a rate of $75.00 per hour (for both work and travel time) with a cap of $50,000.00 (additional amount of $15,000.00), with the authority to submit a motion for additional fees if necessary;

2. That all necessary statutory costs, including travel expenses, required to represent Mr. Smith for Dr. Butler, at statutory rates established by Section 112.061, Fla. Stat. are hereby approved, including Dr. Butler's travel to Georgia to interview pertinent witness and family members of the Defendant;

3. It is further ordered that the Justice Administrative Commission shall pay the reasonable and necessary fees and travel expenses incurred by Dr. Brooke Butler.

DONE AND ORDERED in Duval County, Jacksonville, Florida on this 12 day of December, 2016.

THE HONORABLE MALLORY D. COOPER
CIRCUIT JUDGE

FILED
DEC 12 2016
CIRCUIT COURT

IN THE CIRCUIT COURT, FOURTH JUDICIAL CIRCUIT, IN AND FOR DUVAL COUNTY, FLORIDA

CASE NO: 16-2013-CF-5781-AXXX-MA
DIVISION: CR-D

STATE OF FLORIDA

vs.

DONALD SMITH
_____/

ORDER AUTHORIZING ADDITIONAL EXPERT FEES

THIS CAUSE, came on to be heard upon the Defendant's Ex-Parte Motion for Additional Expert Fees, and the Court having been fully advised in the premises, and finding that a Mitigation Coordinator/Investigator is both necessary and essential to the defense in this cause, it is

ORDERED as follows:

1. That Julie Agent Schlax, Esquire is hereby authorized to incur additional reasonable expenses of Dr. Fred Berlin;

3. That the Justice Administrative Commission, shall pay the costs of the invoices submitted by Dr. Fred Berlin, at an hourly rate of $475.00 and not to exceed an additional amount of $5,000.00 ($15,000 total) without further Order.

4. It is further ordered that the Justice Administrative Commission shall pay the reasonable and necessary travel expenses incurred by Dr. Fred Berlin.

DONE AND ORDERED in Duval County, Jacksonville, Florida on this 17 day of April 2017.

THE HONORABLE MALLORY D. COOPER
CIRCUIT JUDGE

Copies to: Julie Agent Schlax
Justice Administrative Commission

FILED 04/19/17 PM 03:14 RUSSELL

IN THE CIRCUIT COURT, FOURTH JUDICIAL CIRCUIT, IN AND FOR DUVAL COUNTY, FLORIDA

CASE NO: 16-2013-CF-5781-AXXX-MA
DIVISION: CR-D

STATE OF FLORIDA

vs.

DONALD SMITH
_____/

ORDER AUTHORIZING ADDITIONAL COSTS OF MITIGATION COORDINATOR/INVESTIGATOR AND MITIGATION EXPENSES

THIS CAUSE, came on to be heard upon the Defendant's Motion for Authority to Incur Additional Costs of Mitigation Coordinator/Investigator and Mitigation Expenses, and the Court having been fully advised in the premises, and finding that a Mitigation Coordinator/Investigator is both necessary and essential to the defense in this cause, it is

ORDERED as follows:

1. That Julie Agent Schlax, Esquire is hereby authorized to incur additional reasonable expenses of Brooke Butler, Ph.D., P.A.;

3. That the Justice Administrative Commission, shall pay the costs of the invoices submitted by Brooke Butler, Ph.D., P.A., at an hourly rate of $75.00 and not to exceed an additional amount of $20,000.00 without further Order.

4. It is further ordered that the Justice Administrative Commission shall pay the reasonable and necessary travel expenses incurred by Brooke Butler, Ph.D., P.A.

DONE AND ORDERED in Duval County, Jacksonville, Florida on this 17 day of April 2017.

THE HONORABLE MALLORY D. COOPER
CIRCUIT JUDGE

Copies to: Julie Agent Schlax
Justice Administrative Commission
Brooke Butler, Ph.D., P.A.

FILED 04/19/17 PM 03:14 RUSSELL

Filing # 63547263 E-Filed 10/31/2017 01:30:31 PM

IN THE CIRCUIT COURT, FOURTH JUDICIAL CIRCUIT, IN AND FOR DUVAL COUNTY, FLORIDA.

STATE OF FLORIDA,

CASE NO.: 16-2013-CF-5781

DIVISION: CR-D

vs.

DONALD SMITH

_____/

AMENDED MOTION TO PROHIBIT DEATH QUALIFICATION BECAUSE THE NEW LEGISLATION CREATING A NEW DEATH PENALTY SCHEME IS NOT RETROACTIVE

DONALD SMITH, by and through the undersigned attorney moves this Honorable Court to enter an order finding that the Defendant is not eligible for imposition of the Death penalty and in support thereof would show unto the Court as follows;

SUMMARY OF FACTS

1. Defendant was arrested on June 22, 2013 for Murder, Kidnapping, and Sexual Battery.
2. On July 2, 2013, the State indicted Defendant for First Degree Murder, Kidnapping, and Capital Sexual Battery.
3. On July 16, 2013, the State of Florida filed a Notice of Intent to Seek the Death Penalty pursuant to Florida Rule of Criminal Procedure 3.202.

ACCEPTED: DUVAL COUNTY, RONNIE FUSSELL, CLERK, 10/31/2017 04:23:36 PM

4. On January 12, 2016, the United States Supreme Court ruled that the Florida death penalty was unconstitutional in Hurst v. Florida, ___ U.S. ___, 136 S. Ct. 616, 193 L. Ed. 2D 504 (2016).
5. On March 7, 2016, the State of Florida enacted new legislation which amended pertinent statues and rules of procedure to create a new death penalty scheme.
6. In October, 2016, the Supreme Court of Florida struck down this new sentencing scheme.
7. On March 13, 2017, the State of Florida amended Florida Statute 921.141 (2017).

ARGUMENT

The new legislation passed on March 13, 2017, creating a new death penalty scheme is not retroactive to the conduct of Defendants that preceded that date. Since the United States Supreme Court ruled on January 12, 2016 that Florida's Death Penalty law was unconstitutional then all criminal conduct before March 13, 2017 the maximum penalty must be Life in Prison Without the Possibility of Parole.

MEMORANDUM OF LAW

Chapter 2016-13, Laws of Florida, cannot apply to pending prosecutions for offenses committed prior to its effective date for three reasons, two of which implicate controlling constitutional proscriptions. First, the statute does not authorize retrospective application and Florida statutes are presumed to operate prospectively, absent clear evidence of a

contrary intent. Second, even had such intent been explicit, this Court would be called upon to consider whether retrospective application is constitutionally permissible, and it is not under the Florida Constitution's article x, section 9. Third, both the federal and the state Constitutions' Ex Post Facto Clauses prohibit applying the new legislation to prior offenses.

It is basic that statutes are to be prospectively applied. *See Dade County v. Ferro*, 384 So. 2d 1283, 1285 (Fla. 1980); *Foley v. Morris*, 339 So. 2d 215, 216-17 (Fla. 1976). Where the Legislature intends otherwise. Florida law requires "clear evidence of legislative intent to apply the statute retrospectively." *Florida Ins. Guar. Ass'n, Inc. V. Devon Neighborhood Ass'n, Inc.*, 67 So. 3d 187, 194 (Fla. 2011) (citation omitted); *see Middlebrooks v. Department of State, Div. of Licensing*, 565 So. 2d 727, 728 (Fla. 1st DCA 1990) ("Absent a clear legislative expression requiring retroactive application, a law is presumed to operate prospectively, meaning that it will apply only to conduct occurring after the statute becomes effective.") (citation omitted)).

Prospective application is particularly mandated when criminal statutes are at issue. Thus, it has been repeatedly emphasized that criminal defendants are to be sentenced in accordance with the statutes in effect when the offenders committed their crimes. *E.g.*, *Larkins v. State,* 739 So. 2d 90, 96 n.5 (Fla. 1999); *Lamore v. State,* 86 So. 3d 546, 548 (Fla. 2d DCA 2012); *Roca v. State*, 58 So. 3d 384, 385 (Fla. 2d DCA 2011); *State v. Miranda*, 793 So. 2d 1042, 1044 (Fla. 3d DCA 2001). Indeed, "it is axiomatic that a

criminal sentence is governed by the laws in effect at the time of the offense." *Vonador v. State*, 857 So. 2d 323, 324 (Fla. 2d DCA 2003) (citation omitted).

Consistent with this fundamental precept, the Legislature chose to make its new death-penalty statute prospective. Not only does the statute not manifest retrospective intent, it reflects the precise contrary. Chapter 2016-13, Laws of Florida, specifies that the new statute "shall take effect upon becoming a law."[1]

And there are two good reasons why the legislature chose to enact a prospective statute. To attempt to do otherwise would contravene the Florida and the United States Constitutions.

Article x, section 9 of the Florida Constitution provides: "Repeal or amendment of a criminal statute shall not affect prosecution or punishment for any crime previously committed." This Court early on explained the purpose of the progenitor constitutional provision, then set forth in article 3, section 32 of our Constitution, as precluding the retroactive force of statutes such as Chapter 2016-3:

The effect of this constitutional provision is to give all criminal

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[1] Of course, if there was any ambiguity, the rule of lenity codified in the Florida Statutes would require that the statute be construed in the light most favorable to petitioner. *See* § 775.021(1), Fla. Stat. ("The provisions of this code and offenses shall be strictly construed; when the language is susceptible of differing constructions, it shall be construed most favorably to the accused"); *see also Reino v. State*, 352 So. 2d 853, 860 (Fla. 1977).

> legislation a prospective effectiveness; that is to say, the repeal or amendment by subsequent legislation, of a preexisting criminal statute does not become effective, either as repeal or as an amendment of such preexisting statute, in so far as offenses are concerned that have been already committed prior to the taking effect of such repealing or amending law.

Raines v. State, 42 Fla. 141, 28 So. 57, 58 (1900).[2]

The predecessor constitutional provision in article 3, section 32 was almost identical to the current article x provision and provided that "the repeal or amendment of any criminal statute shall not affect the prosecution or punishment of any crime committed before such repeal or amendment," – and was broadly construed by this Court:

> [W[e may define a "criminal statute" as an act of the Legislature as an organized body, defining crime, treating of its nature, or providing for its punishment. It is sufficiently broad and comprehensive as to include within its scope and meaning all those acts of the Legislature as an organized body which deal in any way with crime or its punishment.

Washington v. Dowling, 92 Fla. 601, 610-11, 109 So. 588, 591 (Fla. 1926).

Equally so, "[w]ith regard to article x, section 9, the term "criminal statute" is defined in a broad context." *Smiley v. State*, 966 So. 2d 330, 337

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[2] This Court has noted that "[c]ourts have interpreted this section the same as its successor provision in the 1968 revision." *State v. Watts*, 558 So. 2d 994, 1008 n.5 (Fla. 1990).

(Fla. 2007). This Court has noted that a statute would qualify as a "criminal statute" if it has a direct impact on the prosecution of the criminal offense. *Id.* And this constitutional provision applies so long as the amendments cannot be dismissed as merely procedural or remedial. *See State v. Pizarro*, 383 So. 2d 762, 763 (Fla. 4th DCA 1980).

Chapter 2016-13 amends multiple criminal statutes, two of which are key as establishing that the amendments qualify as substantive "criminal statutes" for purposes of article X, section 9. *See also Washington v. Dowling*, 92 Fla. at 615-16, 109 So. at 593 (Brown, C.J., concurring) (different statutory sections read in pari materia where each are part of one general subject). First, section 775.082(1)(a), the substantive provision which actually establishes the penalty of death, is amended by substituting "a determination" for "findings by the court." Second, section 921.141, which sets forth the death-penalty scheme, is substantially amended to provide for multiple substantive changes. The burden of proof has been inverted (aggravating factors must outweigh mitigating circumstances under the amended section 921.141(2)(b)1.b.); the jury must return findings identifying each aggravating factor found to exist, and a unanimous vote is now required under section 921.141(2)(b)2.; death eligibility is modified so that a defendant becomes "eligible for a sentence of death" once the jury unanimously finds "at least one aggravating factor" under section 921.141(2)(b)2.; the jury death verdict requires a vote of at least 10 jurors under section 921.141(2)(c); and a verdict of life is now binding under

section 921.141(3)(a)1.

It is plain that these amendments are substantive "criminal statutes" within the ambit of article x, section 9.[3] While some of the overall statutory modifications have "procedural elements," all are closely related to the substantive components of the statute, and distinct substantive changes have undoubtedly been made. *See Horsley v. State*, 160 So. 3d 393, 401 (Fla. 2015) (amendments to juvenile-sentencing statutes characterized as "substantive provisions"); *Smiley*, 966 So. 2d at 336 (statutes that create or abrogate affirmative defenses are classified as substantive change in the law although possessing procedural elements); *Troy v. State*, 948 So. 2d 635, 644-45 (Fla. 2006) (although statute eliminating voluntary intoxication as a defense has procedural elements, it constitutes a substantive change in the law because those elements are closely related to the substantive elements); *see also Montgomery v. Louisiana*, 136 S. Ct. 718, 734-35 (2016) (some rules of law may have procedural and substantive ramifications, but be best categorized as substantive).

Accordingly, while Florida's death-penalty scheme has indeed been declared unconstitutional by the Supreme Court in *Hurst*, and it is essential that this Court provide some remedy, the new statutory scheme is no answer. Article x, section 9 precludes the amendment from applying retroactively to pending cases. *See also Smiley v. State*, 966 So. 2d at 335-37 (statute that

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created a new affirmative defense, but did not alter the definition or elements of the murder statute, qualified as substantive criminal statute and retrospective application was precluded by article x, section 9); *State v. Pizzaro*, 383 So. 2d 762, 763 (Fla. 4th DCA 1980) (because Youthful Offender Act alters prescribed punishments for defendants meeting its requirements, it cannot apply to offenses committed prior to its effective date); *cf. State v. Watts*, 558 So. 2d 994, 998-99 (Fla. 1990) (Article x, section 9 not applicable because the statutes defining the original offense and sentence were unchanged and not all of defendants' criminal conduct occurred prior to the amendment's effective date).

That this Court sanctioned the use of the new juvenile-sentencing statutes in *Horsley*, over the State's assertion that article x, section 9 precluded their retrospective application, does not authorize using the new death-penalty statutes here. As noted, the Court found such amendments of a substantive nature, but found article x, section 9, referred to as the "Savings Clause," not controlling based on the purpose of the Clause. That purpose, according to the Court, "is to require the statute in effect at the time of the crime to govern the sentence an offender receives for commission of that crime." *Horsley* , 160 So. 3d at 406. (citation omitted). The Court proceeded to explain that the statute in effect at the time of the crime was unconstitutional under the federal constitution so it could not be enforced, and, even if the Savings Clause could apply, the federal constitution "must trump" the state constitution. *Id.*

But the juvenile-sentencing case is no analog. For while the statute considered there was wholly unconstitutional as applied to juveniles, in that the Eighth Amendment precluded both the death penalty and mandatory life imprisonment, section 775.082(1)(a), as extant at the time of the offenses at issue, is not wholly unconstitutional. That statute contains a separate – and severable – provision that authorizes a sentence of life imprisonment without the possibility of parole. The statute provides in pertinent part:

> [A] person who has been convicted of a capital felony shall be punished by death if the proceeding held to determine sentence according to the procedure set forth in s. 921.141 results in findings by the court that such person shall be punished by death, otherwise such person shall be punished by life imprisonment and shall be ineligible for parole.

The "unconstitutional portion of a general law may be deleted and the remainder allowed to stand if the unconstitutional provision can be logically separated from the remaining provisions." *State ex rel. Boyd v. Green*, 355 So. 2d 789, 794 (Fla. 1978). Because the legislative purpose can be furthered independently of the void death-penalty provision, because the valid and invalid provisions can be neatly separated, because the Legislature would have passed one without the other, and because a complete act remains after the invalid portion I s stricken, severance is proper. *Id.*; *accord Lawnwood Med. Ctr., Inc. v. Seeger*, 990 So. 2d 503, 518 (Fla. 2008) (citation omitted).

Indeed, this Court has so recognized once before in considering the

severability of this statute. In *Donaldson v. Sack*, 265 So. 2d 499, 502-03 (Fla. 1972), the Court -- after Florida's death-penalty process was, in effect, rendered unconstitutional by *Furman v. Georgia*, 408 U.S. 238 (1972) -- held that the automatic sentence upon conviction of a formerly "capital offense" was life imprisonment:

> We find no difficulty with a continuation of the sentencing for these former "capital offenses" under s 775.082(1) as automatically life imprisonment upon conviction, inasmuch as that is the only offense left in the statute. . . . The elimination of the death penalty from the statute does not of course destroy the entire statute. We have steadfastly ruled that the remaining consistent portions of statutes shall be held constitutional if there is any reasonable basis for doing so and of course this clearly exists in these circumstances.

Id. at 502-03 (footnote omitted). The Court concluded that this result was proper under the rule of severability. *Id.* at 503. And the result is equally proper in this case. The maximum potential sentence is life imprisonment without the possibility of parole.

This remedy upon severance is also compelled because applying Chapter 2016-13 to pending cases would violate the Ex post facto Clause of the state and the federal Constitutions. The Supreme Court of the United States has recognized that laws that seek retrospectively to "reduce the quantum of evidence" necessary for the state to meet its burden of proof will run afoul of the Ex Post Facto Clause. *Carmell v. Texas*, 529 U.S. 513, 531 (2000). Likewise, a statute that alters the "definition of crimes" to the defendant's disadvantage is the archetypical example of a new law that

cannot be retroactively applied. *Collins v. Youngblood*, 497 U.S. 37, 51 (1990).

As has been established, Chapter 2016-13 attempts to reduce the state's burden of establishing that a capital defendant is eligible for a death-sentence by virtue of the language in section 921.141(2)(b)2. that a defendant is eligible for a death sentence upon the jury finding "at least one aggravating factor." Such an alteration reduces the state's burden of proof and changes the definition of a capital crime to the defendant's detriment, and cannot, consistent with the Ex post facto Clauses, be applied to capital defendants

whose offenses preceded the statute's effective date.[4]

And the Florida Constitution's Ex Post Facto Clause has been liberally construed so that even some procedural matters give rise to an ex post facto violation. As this Court explained in *Dugger v. Williams*, 593 So. 2d 180, 181 (Fla. 1991), "it is too simplistic to say that an ex post facto violation can occur only with regard to substantive law, not procedural law.

[4] While a statute must operate to a defendant's detriment to constitute an ex post facto law, *see Calder v. Bull*, 3 U.S. (3 Dall.) 386, 390 (1798), the same is not true with respect to article x, section 9 of the Florida Constitution. *See State v. Watts*, 558 So. 2d at 999.

Clearly, some procedural matters have a substantive effect." The new death-penalty scheme, like the sentencing scheme for juvenile homicide offenders,[5] effects substantial substantive changes, and cannot be retrospectively applied to capital defendants whose crimes occurred long before the statutes were enacted.

Dobbert v. Florida, 432 U.S. 282 (1977), is not to the contrary. There, the Supreme Court held that the statutory transformation that occurred when Florida adopted the 1972 death penalty scheme was procedural and ameliorative in nature, and consequently retrospective application did not give rise to an ex post facto violation. *Id.* at 292. But that holding is inapposite here, because the amendatory scheme is predominantly substantive and to the defendant's detriment to the extent that the state can establish eligibility for a death sentence upon proof of a single aggravating factor. This is particularly so because the statute fails to reduce that which can be considered in aggravation, and therefore denies a capital defendant the Eighth Amendment guarantee that the category of homicide offenders will be "genuinely narrowed" by specified aggravators before a death sentence may be considered. *See Zant v. Stephens*, 462 U.S. 862, 877 (1983).

WHEREFORE, the Defendant moves this Honorable Court to enter an

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[5] *See Horsley v. State*, 160 So. 3d 393, 401 (Fla. 2015) (amendments to juvenile-sentencing statutes are "substantive provisions").

order finding that the Defendant is not eligible for imposition of the Death penalty.

Respectfully submitted,

Julie Schlax

/s/ Julie Schlax

Julie Schlax, Esquire
Florida Bar No.: 0093040
200 E. Forsyth Street
Jacksonville, Florida 32202
(904) 674-0717
julie@esalawgroup.com
Attorney for the Defendant

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been furnished to Mark Caliel, Esquire at the Office of the State Attorney, Jacksonville, Florida, 32202, by CORE electronic delivery on this 31st day of October, 2016.

/S/ Julie Schlax

ATTORNEY

IN THE CIRCUIT COURT, FOURTH JUDICIAL CIRCUIT, IN AND FOR DUVAL COUNTY, FLORIDA

CASE: 16-2013-CF-5781-AXXX-MA

DIVISION: CR-D (CIRCUIT)

STATE OF FLORIDA

vs.

DOANLD JAMES SMITH, DEFENDANT

ORDER

THIS CAUSE COMING ON BEFORE THE COURT UPON THE ☒DEFENDANT'S ☐STATE'S

AMENDED MOTION TO PROHIBIT DEATH QUALIFICATION BECAUSE THE NEW LEGISLATION CREATING A NEW DEATH PENALTY SCHEME IS NOT RETROACTIVE

FILED HEREIN ON THE 31ST day of OCTOBER, 2017 AND THE COURT HAVING HEARD ARGUMENTS OF THE STATE'S ATTORNEY AND OF COUNSEL FOR DEFENSE, AND BEING FULLY ADVISED IN THE PREMESIS THEREOF, IT IS THEREUPON

ORDERED AND ADJUDGED THAT THE AFORESAID MOTION SHALL BE AND THE SAME IS HEREBY: Denied

DONE AND ORDERED IN OPEN COURT AT JACKSONVILLE, DUVAL COUNTY, FLORIDA, THIS 2 day of NOV, 20 17.

MALLORY COOPER
Circuit Judge

FILED
NOV 02 2017
D.W. Daniel
CLERK CIRCUIT COURT

IN THE CIRCUIT COURT, FOURTH JUDICIAL CIRCUIT, IN AND FOR DUVAL COUNTY, FLORIDA

CASE: 16-2013-CF-5781-AXXX-MA

DIVISION: CR-D (CIRCUIT)

STATE OF FLORIDA

vs.

DOANLD JAMES SMITH, DEFENDANT

ORDER

THIS CAUSE COMING ON BEFORE THE COURT UPON THE ☒DEFENDANT'S ☐STATE'S

MOTION TO BAR THE STATE FROM SEEKING THE DEATH PENALTY BASED ON FAILURE TO PROVIDE NOTICE PURSUANT TO FLORIDA STATUTE 782.04(1)(b) 2016

FILED HEREIN ON THE 17TH day of MAY, 2016 AND THE COURT HAVING HEARD ARGUMENTS OF THE STATE'S ATTORNEY AND OF COUNSEL FOR DEFENSE, AND BEING FULLY ADVISED IN THE PREMESIS THEREOF, IT IS THEREUPON

ORDERED AND ADJUDGED THAT THE AFORESAID MOTION SHALL BE AND THE SAME IS HEREBY: Denied

DONE AND ORDERED IN OPEN COURT AT JACKSONVILLE, DUVAL COUNTY, FLORIDA, THIS 2ND day of NOVEMBER, 2017.

Mallory Cooper

MALLORY COOPER
Circuit Judge

FILED
NOV 02 2017
D.W. Jewell
CLERK CIRCUIT COURT

IN THE CIRCUIT COURT, FOURTH JUDICIAL CIRCUIT, IN AND FOR DUVAL COUNTY, FLORIDA

CASE: 16-2013-CF-5781-AXXX-MA

DIVISION: CR-D (CIRCUIT)

STATE OF FLORIDA

vs.

DOANLD JAMES SMITH, DEFENDANT

ORDER

THIS CAUSE COMING ON BEFORE THE COURT UPON THE ☒DEFENDANT'S ☐STATE'S

MOTION TO DECLARE FLORIDA STATUTE 921.141 (2016) UNCONSTITUTIONAL

FILED HEREIN ON THE 10TH day of MAY, 2016 AND THE COURT HAVING HEARD ARGUMENTS OF THE STATE'S ATTORNEY AND OF COUNSEL FOR DEFENSE, AND BEING FULLY ADVISED IN THE PREMESIS THEREOF, IT IS THEREUPON

ORDERED AND ADJUDGED THAT THE AFORESAID MOTION SHALL BE AND THE SAME IS HEREBY: Denied

DONE AND ORDERED IN OPEN COURT AT JACKSONVILLE, DUVAL COUNTY, FLORIDA, THIS 2ND day of NOVEMBER, 2017.

MALLORY COOPER
Circuit Judge

FILED
NOV 02 2017
D.W. Cornell
CLERK CIRCUIT COURT

IN THE CIRCUIT COURT, FOURTH JUDICIAL CIRCUIT, IN AND FOR DUVAL COUNTY, FLORIDA

CASE NO: 16-2013-CF-5781-AXXX-MA
DIVISION: CR-D

STATE OF FLORIDA

vs.

DONALD SMITH
_____/

ORDER AUTHORIZING ADDITIONAL COSTS FOR MENTAL HEALTH EXPERT DR. HEATHER HOLMES

THIS CAUSE, came on to be heard upon the Defendant's Motion for Authority to Incur Additional Cost of Mental Health Expert Dr. Heather Holmes, and the Court having been fully advised in the premises, and finding that a Mental Health Expert is both necessary and essential to the defense in this cause, it is

ORDERED as follows:

1. The Julie Agent Schlax, Esquire, is hereby authorized to incur additional expenses of Dr. Heather Holmes, Forensic Psychologist.

2. That an additional amount of $15,000.00 at an hourly rate of $200.00 is approved; travel rate is also approved at an hourly rate of $200.00. The expert is further authorized to incur travel related expenses to include mileage, air fare and hotel.

3. That the Justice Administrative Commission shall be responsible for payment to Dr. Holmes upon submission of proper invoices.

4. That should the Defendant need to exceed said cap, the Defendant shall seek leave of the Court prior to incurring any additional fees.

DONE AND ORDERED in Duval County, Jacksonville, Florida on this 19 day of December, 2017

THE HONORABLE MALLORY D. COOPER
CIRCUIT JUDGE

Copies to: Julie Agent Schlax
Justice Administrative Commission
Heather Holmes, Forensic Psychologist

FILED
DEC 19 2017
CLERK CIRCUIT COURT

IN THE CIRCUIT COURT, FOURTH JUDICIAL CIRCUIT, IN AND FOR DUVAL COUNTY, FLORIDA

CASE NO: 16-2013-CF-5781-AXXX-MA
DIVISION: CR-D

STATE OF FLORIDA

vs.

DONALD SMITH
_____/

MOTION FOR AUTHORITY TO INCUR ADDITIONAL COSTS OF MENTAL HEALTH EXPERT, DR. HEATHER HOLMES

COMES NOW the Defendant, Donald Smith, by and through his court-appointed attorney, and pursuant to Florida Laws of Criminal Procedure, moves this Honorable Court for the entry of an Order authorizing the incurring of additional costs of Dr. Heather Holmes, and as grounds hereby states:

1. The Defendant was indicted for Murder in the First Degree, Kidnapping a Child Under the Age of 13 Years, and Sexual Battery on a Child Less than 12 Years; followed by the filing of the State's Notice of Intent to Seek the Death Penalty.

2. The Defendant has been previously adjudged insolvent by this Court and the undersigned was appointed to represent the Defendant in this matter.

3. Due to of the unusual and extraordinary facts of this case and the fact that the State has filed their notice of intent to seek the death penalty;

4. Counsel believes that a mental health expert is necessary in the preparation of a defense in this cause.

5. Counsel does not believe she can provide Defendant with proper representation to which his is entitled unless the Court authorizes additional fees for the mental health expert.

6. Dr. Heather Holmes, a Forensic Psychologist, was previously appointed to conduct a confidential psychological evaluation and report her findings directly to the undersigned counsel.

7. Counsel is requesting authority to incur an additional amount of $15,000.00, with the authority to submit a motion for additional fees if necessary. Dr. Heather Holmes' hourly rate is $200.00.

8. Reasonable and necessary travel expenses will be incurred by Dr. Heather Holmes, and the reasonable associated fees incurred for travel including mileage,

air fare, and hotel should be paid by the State of Florida, Justice Administrative Commission in addition to expert witness fees.

WHEREFORE, the Defendant respectfully requests this Honorable Court for entry of an Order authorizing the incurring of additional costs of mental health expert Dr. Heather Holmes to assist with the preparation of a defense in this cause.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been provided to the Justice Administrative Commission via e-mail delivery this 14th day of December, 2017.

Respectfully submitted,

/s/ Julie Agent Schlax

Julie Agent Schlax
200 East Forsyth Street
Jacksonville, Florida 32202
(904) 674-0717Telephone
(904) 674-0737 Facsimile
Attorney for Defendant

JAC Pleadings <pleadings@justiceadmin.org> 12/15/2017 12:39 PM

RE: Smith - Motion for additional costs of Heather Holmes

To Sherri Boyd <sherri@esalawgroup.com>

JAC has received and reviewed the Motion for Authority to Incur Additional Costs of Mental Health Expert Dr. Heather Holmes as to the above-referenced matter. JAC will not be filing a formal response and takes no position as to your motion. You may utilize this email in lieu of a formal response and should attach it to your motion when you provide it to the court.

Buddy Aspy
Senior Management Analyst
Justice Administrative Commission
227 Bronough St.
Tallahassee, Fl. 32301
866.355.7902 Ext 243

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JAC Website: https://www.justiceadmin.org.

From: Sherri Boyd [mailto:sherri@esalawgroup.com]
Sent: Thursday, December 14, 2017 1:32 PM
To: JAC Pleadings <pleadings@justiceadmin.org>
Subject: Smith - Motion for additional costs of Heather Holmes

Attached for your review and response please find a motion for authority to incur additional costs of the mental health expert appointed in Donald Smith's case (Dr. Heather Holmes).

Sherri Boyd
Paralegal
ESPENSHIP, SCHLAX & ALBEE, LLC
200 E. Forsyth Street
Jacksonville, Florida 32202
P: (904) 674-0717
F: (904) 674-0737

- Motion for Additional Fees for Heather Holmes.pdf (169 KB)

IN THE CIRCUIT COURT, FOURTH JUDICIAL CIRCUIT, IN AND FOR DUVAL COUNTY, FLORIDA

CASE NO: 16-2013-CF-5781-AXXX-MA
DIVISION: CR-D

STATE OF FLORIDA

vs.

DONALD SMITH
_____/

ORDER AUTHORIZING ADDITIONAL COSTS OF A NEUROPSYCHOLOGIST

THIS CAUSE, came on to be heard upon the Defendant's Motion for Authority to Incur Additionals Costs of a Neuropsychologist, and the Court having been fully advised in the premises, and finding that a Neuropsychologist is both necessary and essential to the defense in this cause, it is

ORDERED as follows:

1. That Julie Agent Schlax, Esquire, is hereby authorized to incur additional reasonable expeses of Dr. Joseph Sesta, a Neuropsychologist with Suncoast Neuropsychology, LLC.

2. That an additional amount of $10,000.00 (not to exceed a total amount of $25,000.00) at an hourly rate of $300.00 is approved; travel rate is also approved at an hourly rate of $100.00.

3. That the Justice Administrative Commission shall be responsible for payment to Dr. Sesta upon submission of proper invoices.

4. That should the Defendant need to exceed the authorized amounts, the Defendant shall seek leave of the Court prior to incurring any additional fees.

DONE AND ORDERED in Duval County, Jacksonville, Florida on this 19 day of December, 2017.

THE HONORABLE MALLORY D. COOPER
CIRCUIT JUDGE

Copies to: Julie Agent Schlax
Justice Administrative Commission
Joseph Sesta, Neuropsychologist

FILED
DEC 19 2017
RONNIE W. FUSSELL
CLERK CIRCUIT COURT

IN THE CIRCUIT COURT, FOURTH JUDICIAL CIRCUIT, IN AND FOR DUVAL COUNTY, FLORIDA

CASE NO: 16-2013-CF-5781-AXXX-MA
DIVISION: CR-D

STATE OF FLORIDA

vs.

DONALD SMITH
_____/

MOTION FOR AUTHORITY TO INCUR ADDITIONAL COSTS OF NEUROPSYCHOLOGIST

COMES NOW the Defendant, Donald Smith, by and through his court-appointed attorney, and pursuant to Florida Laws of Criminal Procedure, moves this Honorable Court for the entry of an Order authorizing the incurring of additional costs of a neuropsychologist, and as grounds hereby states:

1. The Defendant was indicted for Murder in the First Degree, Kidnapping a Child Under the Age of 13 Years, and Sexual Battery on a Child Less than 12 Years; followed by the filing of the State's Notice of Intent to Seek the Death Penalty;

2. The Defendant has been previously adjudged insolvent by this Court and the undersigned was appointed to represent the Defendant in this matter;

3. Due to of the unusual and extraordinary facts of this case and the fact that the State has filed their notice of intent to seek the death penalty;

4. Counsel believes that a neuropsychologist is necessary in the preparation of a defense in this cause;

5. Counsel does not believe she can provide Defendant with proper representation to which his is entitled unless the Court authorizes additional fees for a neuropsychologist.

6. Dr. Joseph Sesta, of Suncoast Neuropsychology, LLC, was previously appointed to conduct a confidential forensic neuropsychological work up, inclusive of exam, record review, scoring, data analysis and a written report and report his findings directly to the undersigned counsel;

7. Counsel is requesting authority to incur an additional amount of $10,000.00, with the authority to submit a motion for additional fees if necessary;

8. Dr. Joseph Sesta's hourly rate is $300.00;

9. Dr. Joseph Sesta will not be seeking reimbursement for travel expenses such as accommodations or mileage; rather, his hourly rate for travel is $100.00. The reasonable associated fees for travel time should be paid by the State of Florida, Justice Administrative Commission in addition to expert witness fees.

WHEREFORE, the Defendant respectfully requests this Honorable Court for entry of an Order authorizing additional costs of a neuropsychologist to assist with the preparation of a defense in this cause.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the Motion for Authority to Incur Additionals Costs of a Neuropsychologist has been provided to the Justice Administrative Commission via e-mail delivery this 14th day of December, 2017.

Respectfully submitted,

/s/ Julie Agent Schlax

Julie Agent Schlax
200 East Forsyth Street
Jacksonville, Florida 32202
(904) 674-0717Telephone
(904) 674-0737 Facsimile
Attorney for Defendant

JAC Pleadings <pleadings@justiceadmin.org> 12/14/2017 9:40 AM

RE: Smith - Motion for additional costs (Sesta)

To Sherri Boyd <sherri@esalawgroup.com>

JAC has received and reviewed the Motion for Authority to Incur Additional Costs of Neuropsychologist as to the above-referenced matter. JAC will not be filing a formal response and takes no position as to your motion. You may utilize this email in lieu of a formal response and should attach it to your motion when you provide it to the court.

Thank you and have a great day,

Jeanette Ottley, CPM
Management Review Specialist
Justice Administrative Commission
227 N. Bronough Street, Suite 2100
Tallahassee, Florida 32301
Tel: 850.488.2415 ext 244
JAC Website: https://www.justiceadmin.org/

Follow JAC on social media.
Click to follow each link.

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From: Sherri Boyd [mailto:sherri@esalawgroup.com]
Sent: Thursday, December 14, 2017 9:28 AM
To: JAC Pleadings <pleadings@justiceadmin.org>
Subject: Smith - Motion for additional costs (Sesta)

Attached for your review and response please find a motion for authority to incur additional costs for the neuropsychologist (Dr. Sesta) that is appointed in Donald Smith's case.

Sherri Boyd
Paralegal
ESPENSHIP, SCHLAX & ALBEE, LLC
200 E. Forsyth Street
Jacksonville, Florida 32202

P: (904) 674-0717
F: (904) 674-0737

- Motion and Order for Appointment of Neuropsychologist Sesta - Third (Don....pdf (169 KB)
- image001.png (2 KB)
- image002.png (2 KB)

IN THE CIRCUIT COURT, FOURTH JUDICIAL CIRCUIT, IN AND FOR DUVAL COUNTY, FLORIDA

CASE NO: 16-2013-CF-5781-AXXX-MA
DIVISION: CR-D

STATE OF FLORIDA

vs.

DONALD SMITH
_____/

ORDER AUTHORIZING ADDITIONAL COSTS OF A RADIOLOGIST

THIS CAUSE, came on to be heard upon the Defendant's Motion for Authority to Incur Additional Costs of a Radiologist, and the Court having been fully advised in the premises, and finding that a Neuropsychologist is both necessary and essential to the defense in this cause, it is

ORDERED as follows:

1. That Julie Agent Schlax, Esquire, is hereby authorized to incur additional expenses of Dr. Joseph Wu, a Radiologist with UC Regents.

2. That an additional amount of $10,000.00 (not to exceed a total amount of $15,000.00) at an hourly rate of $275.00, and $125 for travel time, is approved along with all travel expenses.

3. That the Justice Administrative Commission shall be responsible for payment to Dr. Wu upon submission of proper invoices.

4. That should the Defendant need to exceed said cap, the Defendant shall seek leave of the Court prior to incurring any additional fees.

DONE AND ORDERED in Duval County, Jacksonville, Florida on this 19 day of December, 2017.

THE HONORABLE MALLORY D. COOPER
CIRCUIT JUDGE

Copies to: Julie Agent Schlax
Justice Administrative Commission
Dr. Wu, Radiologist

FILED
DEC 19 2017
CLERK CIRCUIT COURT

IN THE CIRCUIT COURT, FOURTH JUDICIAL CIRCUIT, IN AND FOR DUVAL COUNTY, FLORIDA

CASE NO: 16-2013-CF-5781-AXXX-MA
DIVISION: CR-D

STATE OF FLORIDA

vs.

DONALD SMITH
_____/

MOTION FOR AUTHORITY TO INCUR ADDITIONAL COSTS OF A RADIOLOGIST

COMES NOW the Defendant, Donald Smith, by and through his court-appointed attorney, and pursuant to Florida Laws of Criminal Procedure, moves this Honorable Court for the entry of an Order authorizing the incurring of additional costs of a radiologist and as grounds hereby states:

1. The Defendant was indicted for Murder in the First Degree, Kidnapping a Child Under the Age of 13 Years, and Sexual Battery on a Child Less than 12 Years; followed by the filing of the State's Notice of Intent to Seek the Death Penalty;

2. The Defendant has been previously adjudged insolvent by this Court and the undersigned was appointed to represent the Defendant in this matter;

3. Due to of the unusual and extraordinary facts of this case and the fact that the State has filed their notice of intent to seek the death penalty;

4. Counsel believes that a radiologist is necessary in the preparation of a defense in this cause;

5. Counsel does not believe she can properly represent the defendant absent a radiologist reviewing the defendant's medical records and providing defense his/her findings.

6. Dr. Joseph Wu, of UC Regents, was previously appointed to conduct a confidential review of the Defendant's records and report his findings directly to the undersigned counsel;

7. Counsel is requesting authority to incur an additional amount of $10,000.00, with authority to submit a motion for additional fees if necessary. Dr. Wu's hourly rate is $275.00 and his hourly rate for travel time is $125.00 per hour.

8. Dr. Wu will have to incur travel related expenses including airfare, auto rental, mileage, baggage, change fees, lodging, meals and incidentals and would seek

compensation of these expenses to be paid by the Justice Administration Commission.

WHEREFORE, the Defendant respectfully requests this Honorable Court for entry of an Order appointing a radiologist and authorizing the incurring of costs of a radiologist to assist with the preparation of a defense in this cause.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been provided to the Justice Administrative Commission via e-mail delivery this 14th day of December, 2017.

Respectfully submitted,

/s/ Julie Agent Schlax

Julie Agent Schlax
200 East Forsyth Street
Jacksonville, Florida 32202
(904) 674-0717Telephone
(904) 674-0737 Facsimile
Attorney for Defendant

JAC Pleadings <pleadings@justiceadmin.org> 12/14/2017 10:47 AM

RE: Smith - Motion for Additional costs - Radiologist - Dr. Wu; 13-5781

To **Sherri Boyd <sherri@esalawgroup.com>**

Ms. Schlax:

The Justice Administrative Commission (JAC) has received and reviewed the Motion for Authority to Incur Additional Costs of a Radiologist (Dr. Wu) as to the above-referenced matter. JAC will not be filing a formal response and takes no position as to your motion. You may utilize this email in lieu of a formal response and should attach it to your motion when you provide it to the court.

Christian Lake
Assistant General Counsel
Justice Administrative Commission
227 N. Bronough Street, Suite 2100
Tallahassee, FL 32301
Tel.: 850.488.2415
JAC Website: https://www.justiceadmin.org

PLEASE NOTE: All e-mail is potentially available as a public record. This email or any attachments provided may contain confidential information intended for the use of the designated recipients named above. If you are not the intended recipient and have received this email in error, please notify the sender immediately by returning the email and deleting the message and be aware that any review, dissemination, distribution or copying of this communication is strictly prohibited.

From: Sherri Boyd [mailto:sherri@esalawgroup.com]
Sent: Thursday, December 14, 2017 10:21 AM
To: JAC Pleadings <pleadings@justiceadmin.org>
Subject: Smith - Motion for Additonal costs - Radiologist - Dr. Wu

Attached for your review and response please find a motion for authority to incur additional costs of the radiologist (Dr. Wu) that is appointed in Donald Smith's case.

Sherri Boyd
Paralegal
ESPENSHIP, SCHLAX & ALBEE, LLC
200 E. Forsyth Street
Jacksonville, Florida 32202
P: (904) 674-0717
F: (904) 674-0737

IN THE CIRCUIT COURT, FOURTH JUDICIAL CIRCUIT, IN AND FOR DUVAL COUNTY, FLORIDA

CASE NO: 16-2013-CF-5781-AXXX-MA
DIVISION: CR-D

STATE OF FLORIDA

vs.

DONALD SMITH
_____/

ORDER AUTHORIZING ADDITIONAL COSTS FOR DR. GEOFFREY COLINO

THIS CAUSE, came on to be heard upon the Defendant's Motion for Authority to Incur Additional costs for Dr. Geoffrey Colino, and the Court having been fully advised in the premises, and finding that a Neurologist is both necessary and essential to the defense in this cause, it is

ORDERED as follows:

1. That Julie Agent Schlax, Esquire, is hereby authorized to incur additional expenses for Dr. Geoffrey Colino, of Neuroscience Practice Institute.

2. That an additional amount of $10,000.00 at an hourly rate of $400.00 is approved; along with all reasonable and necessary travel expenses.

3. That the Justice Administrative Commission shall be responsible for payment to Dr. Colino, of Neuroscience Practice Institute, upon submission of proper invoices.

4. That should the Defendant need to exceed said cap, the Defendant shall seek leave of the Court prior to incurring any additional fees.

DONE AND ORDERED in Duval County, Jacksonville, Florida on this 19 day of December, 2017.

THE HONORABLE MALLORY D. COOPER
CIRCUIT JUDGE

Copies to: Julie Agent Schlax
Justice Administrative Commission
Dr. Geoffrey Colino, Neuroscience Practice Institute

FILED
DEC 19 2017
RONNIE W. POWELL
CLERK CIRCUIT COURT

IN THE CIRCUIT COURT, FOURTH JUDICIAL CIRCUIT, IN AND FOR DUVAL COUNTY, FLORIDA

CASE NO: 16-2013-CF-5781-AXXX-MA
DIVISION: CR-D

STATE OF FLORIDA

vs.

DONALD SMITH
_____/

MOTION FOR AUTHORITY TO INCUR ADDITIONAL COSTS FOR DR. GEOFFREY COLINO

COMES NOW the Defendant, Donald Smith, by and through his court-appointed attorney, and pursuant to Florida Laws of Criminal Procedure, and Florida Statute 27.5305(4), moves this Honorable Court for the entry of an Order authorizing the incurring of additional costs of Dr. Geoffrey Colino, a neurologist, and as grounds hereby states:

1. The Defendant was indicted for Murder in the First Degree, Kidnapping a Child Under the Age of 13 Years, and Sexual Battery on a Child Less than 12 Years; followed by the filing of the State's Notice of Intent to Seek the Death Penalty;

2. The Defendant has been previously adjudged insolvent by this Court and the undersigned private attorney was appointed to represent the Defendant in this matter;

3. Due to of the unusual and extraordinary facts of this case and the fact that the State has filed their notice of intent to seek the death penalty;

4. Counsel believes that a neurologist is necessary in the preparation of a defense in this cause;

5. Counsel does not believe she can provide Defendant with proper representation to which his is entitled unless the Court authorizes additional fees for Dr. Colino;

6. Dr. Geoffrey Colino of Neuroscience Practice Institute, was previously appointed to evaluate the defendant and to review medical documents and to report his findings directly to the undersigned counsel;

6. Counsel is requesting authority to incur an additional amount of $10,000.00, with the authority to submit a motion for additional fees if necessary. Dr. Colino's hourly rate is $400.00;

8. Dr. Colino will have to incur travel related expenses including airfare, auto rental, mileage, baggage, change fees, lodging, meals and incidentals and would seek

compensation of these expenses to be paid by the Justice Administration Commission.

WHEREFORE, the Defendant respectfully requests this Honorable Court enter an Order authorizing the incurring of additional costs of Dr. Geoffrey Colino, a neurologist whom is assisting with the preparation of a defense in this cause.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been provided to the Justice Administrative Commission via e-mail delivery on the 14th day of December, 2017.

Respectfully submitted,

/s/ Julie Agent Schlax

Julie Agent Schlax
200 East Forsyth Street
Jacksonville, Florida 32202
(904) 674-0717Telephone
(904) 674-0737 Facsimile
Attorney for Defendant

JAC Pleadings <pleadings@justiceadmin.org> 12/15/2017 9:15 AM

RE: Smith - Motion for additional costs (Dr. Colino)

To Sherri Boyd <sherri@esalawgroup.com>

JAC has received and reviewed the Motion for Authority to Incur Additional Costs for Dr. Geoffrey Colino as to the above-referenced matter. JAC will not be filing a formal response and takes no position as to your motion. You may utilize this email in lieu of a formal response and should attach it to your motion when you provide it to the court.

Buddy Aspy
Senior Management Analyst
Justice Administrative Commission
227 Bronough St.
Tallahassee, Fl. 32301
866.355.7902 Ext 243

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JAC Website: https://www.justiceadmin.org.

From: Sherri Boyd [mailto:sherri@esalawgroup.com]
Sent: Thursday, December 14, 2017 11:49 AM
To: JAC Pleadings <pleadings@justiceadmin.org>
Subject: Smith - Motion for additional costs (Dr. Colino)

Attached for your review and response please find a motion for authority to incur additional costs of a neurologist (Dr. Colino) that has been appointed in Donald Smith's case.

Sherri Boyd
Paralegal
ESPENSHIP, SCHLAX & ALBEE, LLC
200 E. Forsyth Street
Jacksonville, Florida 32202
P: (904) 674-0717
F: (904) 674-0737

- Motion for additional costs of Dr. Geoffrey Colino.pdf (169 KB)

Filing # 65627107 E-Filed 12/20/2017 10:48:57 AM

IN THE CIRCUIT COURT OF THE FOURTH JUDICIAL CIRCUIT, IN AND FOR DUVAL COUNTY, FLORIDA.

CASE NO.: 16-2013-CF-005781-AXXX-MA

DIVISION: CRD

STATE OF FLORIDA

VS.

DONALD SMITH

DEFENDANT'S MOTION FOR REQUESTED JURY INSTRUCTION: MERCY

COMES NOW, Donald Smith, by and through the undersigned attorney, and pursuant to Rule 3.390(c) of the Florida Rules of Criminal Procedure, and moves this Honorable Court for a special jury instruction as follows:

THE DEATH PENALTY IS NOT REQUIRED

You are never required to impose a death sentence. You have complete control and discretion in determining whether the circumstances of this case justify a sentence of death.

You must consider whether the aggravating factor or factors you have found to be established in this case sufficiently outweigh the mitigating factor or factors you have found to have been established before you may consider imposing a sentence of death. However, regardless of your findings as to aggravating and mitigating circumstances, you are neither compelled nor required to recommend a sentence of death. You may always consider mercy in making this determination.

MEMORANDUM OF LAW

Under the Federal Death Penalty At, the jury exercises complete discretion in determining whether the aggravating factors outweigh the mitigating factors. In making this determination, "mercy is not precluded from entering into the balance of whether the aggravating circumstances outweigh the mitigating circumstances." *United States v.*

ACCEPTED: DUVAL COUNTY, RONNIE FUSSELL, CLERK, 12/20/2017 03:22:58 PM

Rodriguez, 581 F.3 775 , 813-814 (8th Cir. 2009). Defense counsel is also not prohibited from urging the jury to be merciful in its deliberations and it its consideration of mitigating factors. The proposed special instruction does not invite the jury to arbitrarily disregard a decision to recommend death. It does, however, advise them that regardless of their findings as to aggravation and mitigation, they may always consider mercy in making their determination as to whether the defendant should live or die.

WHEREFORE, the Defendant prays this Honorable Court should grant this Motion for Requested Special Jury Instruction, Mercy.

I HEREBY CERTIFY that a copy of the foregoing has been furnished to the Office of the State Attorney, electronically, this 20th day of December, 2017.

Respectfully submitted,

/s/ Julie Schlax

****

Julie Agent Schlax
200 E. Forsyth Street
Jacksonville, FL 32202
julie@esalawgroup.com
Attorney for Defendant

IN THE CIRCUIT COURT OF THE FOURTH JUDICIAL CIRCUIT, IN AND FOR DUVAL COUNTY, FLORIDA.

CASE NO.: 16-2013-CF-5781 AXXX
DIVISION: CR-D

STATE OF FLORIDA

VS.

DONALD SMITH

DEFENDANT'S SECOND MOTION IN LIMINE

Defendant, DONALD SMITH, through his undersigned attorney, JULIE AGENT SCHLAX, respectfully moves this Honorable Court to grant Defendant's Motion in Limine precluding the State from eliciting any testimony or playing the contents of a surreptitious jail wire obtained by the Jacksonville Sheriff's Office. As grounds therefore, the Defendant submits the following:

1. Defendant is charged by Indictment with First Degree Murder, Kidnapping, and Capital Sexual Battery on a child less than twelve years old.
2. The Defense anticipates the State of Florida will seek to admit, during the guilt phase, testimony and contents of a surreptitious jail wire which allegedly captures the voice of the Defendant speaking to another inmate while awaiting trial in this case. This surreptitious tape has previously been challenged on suppression grounds, and the Defense would re-new it's objections on all previously stated grounds for exclusion.
3. The contents of the surreptitious tape, which were allegedly made by Defendant contain statements which are irrelevant to the crimes charged and would only serve to negatively inflame the jury's perception of the Defendant. This tape was surreptitiously recorded after the crime was allegedly completed.

4. Even if such evidence is relevant to a potential issue at trial, its probative value would be outweighed by its tendency to be prejudicial, to confuse the issues, and to mislead the jury in light of the other evidence available to the State of Florida. Florida Statutes §90.403.

WHEREFORE, Defendant respectfully requests this Honorable Court to prohibit the State from making reference to, introducing, or otherwise making use of any of the above-mentioned evidence or testimony until the Court rules upon its admissibility.

Respectfully submitted, this **20th** day of December, 2017.

/s/ Julie Agent Schlax

Julie A. Schlax, Esquire
Florida Bar No.: 0093040
200 E. Forsyth Street
Jacksonville, Florida 32202
Tel: (904) 674-0717
Attorney for the Defendant

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing, "Defendant's Motion in Limine" has been furnished to the Office of the State Attorney, electronically, this 20th day of December, 2017.

/s/ Julie Agent Schlax

Julie Schlax, Esquire

IN THE CIRCUIT COURT OF THE FOURTH JUDICIAL CIRCUIT, IN AND FOR DUVAL COUNTY, FLORIDA.

CASE NO.: 16-2013-CF-5781 AXXX
DIVISION: CR-D

STATE OF FLORIDA

VS.

DONALD SMITH

DEFENDANT'S THIRD MOTION IN LIMINE

Defendant, DONALD SMITH, through his undersigned attorney, JULIE AGENT SCHLAX, respectfully moves this Honorable Court to grant Defendant's Motion in Limine precluding the State from introducing enhanced and/or digitally altered surveillance videos from WalMart and Dollar General. As grounds therefore, the Defendant submits the following:

1. Defendant is charged by Indictment with First Degree Murder, Kidnapping, and Capital Sexual Battery on a child less than twelve years old.

2. The Defense anticipates the State of Florida will seek to admit, during the guilt phase, testimony and contents of digitally enhanced and altered compilations of the surveillance videos obtained in this case. The Defense is in receipt of two compilation videotapes. The first is a compilation of the surveillance cameras located at the Dollar General store. The second is of the surveillance footage from Walmart. Each have been digitally enhanced to include color-coded arrows to determine the locations of each person designated by the State. Additionally, each video has been spliced to omit certain time frames.

3. These compilations which have been digitally altered are not proper evidence in this case and cannot be properly authenticated.

4. Even if such evidence is relevant to a potential issue at trial, its probative value would be outweighed by its tendency to be prejudicial, to confuse the issues, and to mislead the jury in light of the other evidence available to the State of Florida. Florida Statutes §90.403.

WHEREFORE, Defendant respectfully requests this Honorable Court to prohibit the State from making reference to, introducing, or otherwise making use of any of the above-mentioned evidence or testimony until the Court rules upon its admissibility.

Respectfully submitted, this **20th** day of December, 2017.

/s/ Julie Agent Schlax

Julie A. Schlax, Esquire
Florida Bar No.: 0093040
200 E. Forsyth Street
Jacksonville, Florida 32202
Tel: (904) 674-0717
Attorney for the Defendant

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing, "Defendant's Motion in Limine" has been furnished to the Office of the State Attorney, electronically, this 20th day of December, 2017.

/s/ Julie Agent Schlax

Julie Schlax, Esquire

Filing # 65627107 E-Filed 12/20/2017 10:48:57 AM

IN THE CIRCUIT COURT OF THE FOURTH JUDICIAL CIRCUIT, IN AND FOR DUVAL COUNTY, FLORIDA.

CASE NO.: 16-2013-CF-005781-AXXX-MA

DIVISION: CRD

STATE OF FLORIDA

VS.

DONALD SMITH

DEFENDANT'S STATEMENT OF PARTICULARS OF MENTAL MITIGATION

COMES NOW, Donald Smith, by and through the undersigned attorney, and gives notice of this Statement of Particulars of Mental Mitigation.

The mental health experts expected to testify to the issues of Mental Mitigation Statutory and Non-Statutory Mitigating Circumstances are:

Dr. Heather Holmes

Dr. Geoff Colino

Dr. Joseph Sesta

Dr. Buffington

Dr. Joseph Wu

Mr. James Aiken

The below statutory mental mitigating circumstances will be presented and/or established:

921.141(7)(b) The capital felony was committed while the defendant was under the influence of extreme mental or emotional disturbance.

921.141(7)(f) The capacity of the Defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired.

921.141(7)(g) The age of the defendant at the time of the crime

921.141(7)(h) The existence of any other factors in the defendant's background that would mitigate against the imposition of the death penalty.

ACCEPTED: DUVAL COUNTY, RONNIE FUSSELL, CLERK, 12/20/2017 03:22:58 PM

I HEREBY CERTIFY that a copy of the foregoing has been furnished to the Office of the State Attorney, electronically, this 20th day of December, 2017.

Respectfully submitted,

/s/ Julie Schlax

****

Julie Agent Schlax
200 E. Forsyth Street
Jacksonville, FL 32202
julie@esalawgroup.com
Attorney for Defendant

IN THE CIRCUIT COURT OF THE FOURTH JUDICIAL CIRCUIT, IN AND FOR DUVAL COUNTY, FLORIDA.

CASE NO.: 16-2013-CF-5781 AXXX
DIVISION: CR-D

STATE OF FLORIDA

VS.

DONALD SMITH
_____/

MOTION TO REQUEST THE DEFENSE BE PERMITTED TO SHOW PHOTOGRAPH OF THE VICTIM DURING JURY SELECTION

COMES NOW, Defendant DONALD SMITH, by and through the undersigned counsel, and hereby moves this Honorable Court to allow the Defense to show a photograph of the victim during the jury selection process. Defendant would state the following:

1. Defendant is indicted for First Degree Murder, Kidnapping, and Capital Sexual Battery on a child under the age of twelve.
2. The Defendant is facing the Death Penalty.
3. The Defense anticipates that inflammatory photographs of the child victim will be shown to the jury at both the guilt and penalty stages of the trial.
4. The State has alleged heinous, atrocious and cruel, as well as the age of the victim as two of the aggravating factors in this case.
5. The Defense must be allowed to ask case specific questions in order to effectively exercise the Defendant's constitutional right to a jury trial comprised of jurors whom can critically evaluate the evidence presented. *Morgan v. Illinois*, 504 US 719, 734-35 (recognizing a defendant's right to question a juror's ability to impose life as well as death on the basis of the facts of the case and the trial courts instructions, not merely on the basis of a conviction for a capital offense).

I HEREBY CERTIFY that a copy of the foregoing has been furnished to the Office of the State Attorney, electronically, this 2nd day of January, 2018.

Respectfully submitted,

/s/ Julie Schlax

Julie Agent Schlax
200 E. Forsyth Street
Jacksonville, Florida 32202
(904) 674-0717
julie@esalawgroup.com
W. Charles Fletcher
8833 Perimeter Park Blvd. Suite 104
Jacksonville, Florida 32216
Attorneys for Defendant

Filing # 66012901 E-Filed 01/03/2018 08:03:58 AM

IN THE CIRCUIT COURT OF THE FOURTH JUDICIAL CIRCUIT, IN AND FOR DUVAL COUNTY, FLORIDA.

CASE NO.: 16-2013-CF-5781 AXXX
DIVISION: CR-D

STATE OF FLORIDA

VS.

DONALD SMITH

DEFENDANT'S FIRST MOTION IN LIMINE TO INSTRUCT ON ALL MITIGATING CIRCUMSTANCES

Defendant, DONALD SMITH, through his undersigned attorney, JULIE AGENT SCHLAX, respectfully moves this Honorable Court to enter an order granting this motion and instruct on all mitigating circumstances, both statutory and non-statutory circumstances. In support thereof, the Defendant states:

1. Defendant is charged by Indictment with First Degree Murder, Kidnapping, and Sexual Battery on a child less than 12-years-old. The State is seeking the Death Penalty.
2. The Advisory Committee Proposed Jury Instructions filed in the Florida Supreme Court on 6/21/2017 provides for the jury to be instructed on all mitigators presented by the defense. Specifically, it states, "the Judge should also instruct on any additional mitigating circumstances as requested."
3. The Defense is requesting this Honorable Court to instruct the jury on each mitigating circumstance, whether statutory or non-statutory. Additionally, the Defense requests that each mitigating circumstance be specifically listed within the verdict form, whether statutory or non-statutory.

WHEREFORE, Defendant respectfully requests this Honorable Court to specifically instruct on all mitigating circumstances requested by the Defense.

ACCEPTED: DUVAL COUNTY, RONNIE FUSSELL, CLERK, 01/05/2018 01:41:32 PM

Respectfully submitted, this _3rd__ day of January, 2018.

/s/ Julie Agent Schlax

Julie A. Schlax, Esquire
Florida Bar No.: 0093040
200 E. Forsyth Street
Jacksonville, Florida 32202
Tel: (904) 674-0717
Attorney for the Defendant

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing, "Defendant's Motion in Limine" has been furnished to the Office of the State Attorney, electronically, this __3rd_ day of January, 2018.

/s/ Julie Agent Schlax

Julie Schlax, Esquire

IN THE CIRCUIT COURT OF THE FOURTH JUDICIAL CIRCUIT, IN AND FOR DUVAL COUNTY, FLORIDA.

CASE NO.: 16-2013-CF-5781 AXXX
DIVISION: CR-D

STATE OF FLORIDA

VS.

DONALD SMITH
_____/

MOTION TO ADOPT ALL PREVIOUSLY FILED MOTIONS BY PRIOR COUNSEL

COMES NOW, Defendant DONALD SMITH, by and through the undersigned counsel, and hereby moves this Honorable Court to permit the undersigned counsel to adopt all previously filed Motions filed on behalf of the Defendant. Defendant would state the following:

1. Defendant is indicted for First Degree Murder, Kidnapping, and Capital Sexual Battery on a child under the age of twelve.
2. The Defendant is facing the Death Penalty.
3. The undersigned counsel were appointed to represent Defendant on or about February 20, 2015 due to a conflict of interest filed by the Public Defender's Office.
4. Prior to their withdrawal, the Office of the Public Defender had filed numerous motions on behalf of Defendant.
5. The undersigned attorneys would seek to adopt all prior Motions filed on behalf of Defendant.

WHEREFORE, the Defense requests this Honorable Court permit the undersigned counsel to adopt all previously filed Motions.

I HEREBY CERTIFY that a copy of the foregoing has been furnished to the Office of the State Attorney, electronically, this 3rd day of January, 2018.

Respectfully submitted,

/s/ Julie Schlax

Julie Agent Schlax
200 E. Forsyth Street
Jacksonville, Florida 32202
(904) 674-0717
julie@esalawgroup.com
W. Charles Fletcher
8833 Perimeter Park Blvd. Suite 104
Jacksonville, Florida 32216
Attorneys for Defendant

Filing # 66139569 E-Filed 01/05/2018 09:32:18 AM

IN THE CIRCUIT COURT OF THE FOURTH JUDICIAL CIRCUIT, IN AND FOR DUVAL COUNTY, FLORIDA.

CASE NO.: 16-2013-CF-5781 AXXX
DIVISION: CR-D

STATE OF FLORIDA

VS.

DONALD SMITH

DEFENDANT'S FIRST MOTION IN LIMINE TO INSTRUCT ON ALL MITIGATING CIRCUMSTANCES

Defendant, DONALD SMITH, through his undersigned attorney, JULIE AGENT SCHLAX, respectfully moves this Honorable Court to enter an order granting this motion and instruct on all mitigating circumstances, both statutory and non-statutory circumstances. This Motion is filed based on the possibility a Penalty Phase may occur in this case. In support thereof, the Defendant states:

1. Defendant is charged by Indictment with First Degree Murder, Kidnapping, and Sexual Battery on a child less than 12-years-old. The State is seeking the Death Penalty.
2. The Advisory Committee Proposed Jury Instructions filed in the Florida Supreme Court on 6/21/2017 provides for the jury to be instructed on all mitigators presented by the defense. Specifically, it states, "the Judge should also instruct on any additional mitigating circumstances as requested."
3. The Defense is requesting this Honorable Court to instruct the jury on each mitigating circumstance, whether statutory or non-statutory. Additionally, the Defense requests that each mitigating circumstance be specifically listed within the verdict form, whether statutory or non-statutory.

ACCEPTED: DUVAL COUNTY, RONNIE FUSSELL, CLERK, 01/05/2018 01:48:39 PM

WHEREFORE, Defendant respectfully requests this Honorable Court to specifically instruct on all mitigating circumstances requested by the Defense.

Respectfully submitted, this _5th__ day of January, 2018.

/s/ Julie Agent Schlax

Julie A. Schlax, Esquire
Florida Bar No.: 0093040
200 E. Forsyth Street
Jacksonville, Florida 32202
Tel: (904) 674-0717
Attorney for the Defendant

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing, "Defendant's Motion in Limine" has been furnished to the Office of the State Attorney, electronically, this __5th_ day of January, 2018.

/s/ Julie Agent Schlax

Julie Schlax, Esquire

IN THE CIRCUIT COURT OF THE FOURTH JUDICIAL CIRCUIT, IN AND FOR DUVAL COUNTY, FLORIDA.

CASE NO.: 16-2013-CF-5781 AXXX
DIVISION: CR-D

STATE OF FLORIDA

VS.

DONALD SMITH
_____/

MOTION FOR MEANINGFUL INQUIRY IN JURY SELECTION AND MOTION FOR JURY QUESTIONNAIRE

COMES NOW, Defendant DONALD SMITH, by and through the undersigned counsel, and hereby moves this Honorable Court to permit the use of a jury questionnaire during the jury selection process. Defendant would state the following:

1. Defendant is indicted for First Degree Murder, Kidnapping, and Capital Sexual Battery on a child under the age of twelve.
2. The Defendant is facing the Death Penalty.
3. The Defense has previously sought a change of venue due to the overwhelming amount of pre-trial publicity. This Motion was denied until an attempt has been made to seat a fair and impartial jury in this jurisdiction.
4. The Defense must be allowed to ask case specific questions in order to effectively exercise the Defendant's constitutional right to a jury trial comprised of jurors whom can critically evaluate the evidence presented. *Morgan v. Illinois*, 504 US 719, 734-35 (recognizing a defendant's right to question a juror's ability to impose life as well as death on the basis of the facts of the case and the trial courts instructions, not merely on the basis of a conviction for a capital offense). This would include asking potential jurors about specific areas of mitigation that may be relevant in this case.
5. The Defense is seeking the use of a detailed questionnaire in order to shorten the length of time in potential jurors' exercise of routine questions to allow more thorough questioning of each juror as to their views on the death penalty, and

specifically as it relates to the alleged sexual battery, kidnapping, and murder of a child under 12 years of age. Without meaningful voir dire as to these issues, the Defendant's right to a fair and impartial jury would be constitutionally barred.

WHEREFORE, the Defense requests this Honorable Court permit the use of a detailed questionnaire during the process of jury selection and permit wide latitude in appropriately questioning prospective jurors as to their views on the death penalty.

I HEREBY CERTIFY that a copy of the foregoing has been furnished to the Office of the State Attorney, electronically, this 5th day of January, 2018.

Respectfully submitted,

/s/ Julie Schlax

Julie Agent Schlax
200 E. Forsyth Street
Jacksonville, Florida 32202
(904) 674-0717
julie@esalawgroup.com
W. Charles Fletcher
8833 Perimeter Park Blvd. Suite 104
Jacksonville, Florida 32216
Attorneys for Defendant

IN THE CIRCUIT COURT OF THE FOURTH JUDICIAL CIRCUIT, IN AND FOR DUVAL COUNTY, FLORIDA.

CASE NO.: 16-2013-CF-5781 AXXX
DIVISION: CR-D

STATE OF FLORIDA

VS.

DONALD SMITH
_____/

MOTION FOR SEQUESTRATION OF THE JURY

COMES NOW, Defendant DONALD SMITH, by and through the undersigned counsel, pursuant to Florida Rule of Criminal Procedure 3.370, and hereby moves this Honorable Court to enter an Order requiring sequestration of the jury throughout the entire proceedings in this case. Defendant would state the following:

1. Defendant is indicted for First Degree Murder, Kidnapping, and Capital Sexual Battery on a child under the age of twelve.
2. The Defendant is facing the Death Penalty.
3. The Defense has previously sought a change of venue due to the overwhelming amount of pre-trial publicity. This Motion was denied until an attempt has been made to seat a fair and impartial jury in this jurisdiction.
4. The publicity surrounding this case has continued and it is expected the trial will be broadcast live for streaming purposes.
5. If a jury is able to be sworn in Duval County, the Defendant's right to a fair and impartial jury would be hindered absent sequestration.

WHEREFORE, the Defense requests this Honorable Court enter an Order requiring sequestration of the jury through all proceedings.

I HEREBY CERTIFY that a copy of the foregoing has been furnished to the Office of the State Attorney, electronically, this 5th day of January, 2018.

Respectfully submitted,

/s/ Julie Schlax

Julie Agent Schlax
200 E. Forsyth Street
Jacksonville, Florida 32202
(904) 674-0717
julie@esalawgroup.com
W. Charles Fletcher
8833 Perimeter Park Blvd. Suite 104
Jacksonville, Florida 32216
Attorneys for Defendant

Filing # 66139569 E-Filed 01/05/2018 09:32:18 AM

IN THE CIRCUIT COURT OF THE FOURTH JUDICIAL CIRCUIT, IN AND FOR DUVAL COUNTY, FLORIDA.

CASE NO.: 16-2013-CF-5781 AXXX
DIVISION: CR-D

STATE OF FLORIDA

VS.

DONALD SMITH
_____/

REQUEST FOR JUDICIAL NOTICE

The defendant, DONALD SMITH, through the undersigned attorney, Julie Agent Schlax, pursuant to Florida Statutes 90.202(6) and 90.203, moves this Honorable Court to take judicial notice of the following judgments and sentences:

16-1982-CF-1436 AXXXMA

16-1992-CF-11193AXXXMA

16-1998-CF-3446 AXXXMA

16-1999-CA-1635 AXXXMA

16-2003-CF-7080AXXXMA

16-2008-CF-1694AXXXMA

16-2009-CF-12156AXXXMA

The defendant, DONALD SMITH, through the undersigned attorney, Julie Agent Schlax, pursuant to Florida Statutes 90.202(6) and 90.203, moves this Honorable Court to take judicial notice of the statutory maximum sentence for each felony offense contained within the above-cited judgements.

ACCEPTED: DUVAL COUNTY, RONNIE FUSSELL, CLERK, 01/05/2018 01:48:39 PM

WHEREFORE, the undersigned attorney respectfully requests this Honorable Court to grant this Motion and take judicial notice of the above judgments and sentences and so instruct the jury if necessary.

Respectfully submitted, this 5th day of January, 2018.

ESPENSHIP & SCHLAX, LLC

/s/ Julie Agent Schlax

Julie Agent Schlax, Esquire
Florida Bar No.: 093040
200 E. Forsyth Street
Jacksonville, Florida 32202
Tel: (904) 674-0717
Fax: (904) 674-0737
Attorney for Defendant

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the above and foregoing has been furnished to the Office of the State Attorney, by hand delivery, this 5th day of January, 2018.

/s/ Julie Agent Schlax

Julie Agent Schlax, Esquire

IN THE CIRCUIT COURT OF THE FOURTH JUDICIAL CIRCUIT, IN AND FOR DUVAL COUNTY, FLORIDA.

CASE NO.: 16-2013-CF-5781 AXXX
DIVISION: CR-D

STATE OF FLORIDA

VS.

DONALD SMITH
_____/

MOTION TO ADOPT ALL PREVIOUSLY FILED MOTIONS BY PRIOR COUNSEL

COMES NOW, Defendant DONALD SMITH, by and through the undersigned counsel, and hereby moves this Honorable Court to permit the undersigned counsel to adopt all previously filed Motions filed on behalf of the Defendant. Defendant would state the following:

1. Defendant is indicted for First Degree Murder, Kidnapping, and Capital Sexual Battery on a child under the age of twelve.
2. The Defendant is facing the Death Penalty.
3. The undersigned counsel were appointed to represent Defendant on or about February 20, 2015 due to a conflict of interest filed by the Public Defender's Office.
4. Prior to their withdrawal, the Office of the Public Defender had filed numerous motions on behalf of Defendant.
5. The undersigned attorneys would seek to adopt all prior Motions filed on behalf of Defendant.

WHEREFORE, the Defense requests this Honorable Court permit the undersigned counsel to adopt all previously filed Motions.

I HEREBY CERTIFY that a copy of the foregoing has been furnished to the Office of the State Attorney, electronically, this 5th day of January, 2018.

Respectfully submitted,

/s/ Julie Schlax

Julie Agent Schlax
200 E. Forsyth Street
Jacksonville, Florida 32202
(904) 674-0717
julie@esalawgroup.com
W. Charles Fletcher
8833 Perimeter Park Blvd. Suite 104
Jacksonville, Florida 32216
Attorneys for Defendant

Mize, Darlene S

From: Powell, Becci
Sent: Tuesday, January 09, 2018 10:03 AM
To: CircuitCriminalDivision
Cc: Stagg, Buffy L; Bowen, Mark E.; Weintraub, Steven R.; Caliel, Mark; Sherri Boyd; julie@esalawgroup.com
Subject: Donald Smith 13-CF-5781

Importance: High

Please place this case on the calendar for Thursday, January 11th at 1:00 p.m. in CR ~~405~~ 305 on a HOM. Defense Motion to Sequester Jury.
Courtroom Personnel is Requested.

Becci Powell, Judicial Assistant
Honorable Russell L. Healey
Felony Division CR-I
Administrative Judge - Felony Division
Duval County Courthouse
501 West Adams Street
Jacksonville, FL 32202
[redacted]

SECURED

SECURED

Filing # 66729199 E-Filed 01/18/2018 04:24:09 PM

IN THE CIRCUIT COURT, FOURTH JUDICIAL CIRCUIT, IN AND FOR DUVAL COUNTY, FLORIDA

CASE NO: 16-2013-CF-5781-AXXX
DIVISION: CR-D

STATE OF FLORIDA

VS.

DONALD SMITH
_____/

MOTION TO INCUR COSTS OF SELECT DEPOSITION TRANSCRIPTS

Defendant, Donald Smith, through his undersigned attorney, Julie Agent Schlax, pursuant to Sections 27.54, 914.11 and 939.07, Florida Statutes and Rule 3.220(o), Florida Rules of Criminal Procedure, respectfully moves this Honorable Court to enter an order authorizing Defendant's attorney to incur the costs for the transcripts of the deposition testimony of the following witness(es) to assist with the preparation of the defense.

Date of Deposition	**Name of Witness**
January 16, 2018	Heather Holmes
February 18, 2018	Joseph Sesta

Defendant further moves this Honorable Court to order the State of Florida, Judicial Administrative Commission (JAC), to pay the reasonable costs of said transcription at the rate of $4.00 per page or $0.50 per page for copies of transcriptions if the depositions have already been transcribed. As grounds, Defendant states:

1. The Defendant is charged with First Degree Murder, Kidnapping a Child Under the Age of 13 Years, and Sexual Battery – Defendant 18 or Older Victim Less Than 12.

2. The Defendant has been found indigent and counsel is court appointed.

3. The deposition transcript(s) of the above listed witness(es) is/are necessary for impeachment of that/those witness(es) at trial and/or to fully prepare for trial.

ACCEPTED: DUVAL COUNTY, RONNIE FUSSELL, CLERK, 01/25/2018 07:58:06 AM

WHEREFORE, Defendant respectfully requests this Honorable Court authorize the defense to incur the costs of the transcript(s) of the deposition testimony of the above listed witness(es), and order that the reasonable costs of transcript(s) be paid by the State of Florida, Judicial Administrative Commission (JAC).

Respectfully submitted, this 18th day of January, 2018.

ESPENSHIP, SCHLAX & ALBEE, LLC

/s/ Julie Agent Schlax

Julie Agent Schlax, Esquire
Florida Bar No.: 093040
200 E. Forsyth Street
Jacksonville, Florida 32202
Tel: (904) 674-0717
Fax: (904) 674-0737
Attorney for Defendant

CERTIFICATE OF SERVICE

I HEREBY CERTIFY, that a copy of the foregoing was furnished to the Justice Administrative Commission, by email, on this 18th day of January, 2018.

/s/ Julie Agent Schlax

Julie Agent Schlax, Esquire

Filing # 66757516 E-Filed 01/19/2018 11:27:01 AM

IN THE CIRCUIT COURT OF THE FOURTH JUDICIAL CIRCUIT, IN AND FOR DUVAL COUNTY, FLORIDA.

CASE NO.: 16-2013-CF-5781 AXXX
DIVISION: CR-D

STATE OF FLORIDA

VS.

DONALD SMITH
_____/

REQUEST FOR JUDICIAL NOTICE

The defendant, DONALD SMITH, through the undersigned attorney, Julie Agent Schlax, pursuant to Florida Statutes 90.202(6) and 90.203, moves this Honorable Court to take judicial notice of the following judgments and sentences:

16-1991-CF-11745 AXXXMA (Burglary to a Dwelling and Grand Theft)

16-1992-CF-11193AXXXMA (Attempted Kidnapping and Showing Obscene Materials to Minors)

16-1999-CA-1635 AXXXMA (Civil Commitment)

16-2003-CF-7080AXXXMA (Dealing in Stolen Property and False Verification of Ownership)

16-2009-CF-12156AXXXMA (Attempted Unlawful Impersonation of a Public Employee and Attempted Child Abuse)

The defendant, DONALD SMITH, through the undersigned attorney, Julie Agent Schlax, pursuant to Florida Statutes 90.202(6) and 90.203, moves this Honorable Court to take judicial notice of the statutory maximum sentence for each felony offense contained within the above-cited judgements.

ACCEPTED: DUVAL COUNTY, RONNIE FUSSELL, CLERK, 01/23/2018 02:13:17 PM

WHEREFORE, the undersigned attorney respectfully requests this Honorable Court to grant this Motion and take judicial notice of the above judgments and sentences and so instruct the jury if necessary.

Respectfully submitted, this 19th day of January, 2018.

ESPENSHIP & SCHLAX, LLC

/s/ Julie Agent Schlax

Julie Agent Schlax, Esquire
Florida Bar No.: 093040
200 E. Forsyth Street
Jacksonville, Florida 32202
Tel: (904) 674-0717
Fax: (904) 674-0737
Attorney for Defendant

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the above and foregoing has been furnished to the Office of the State Attorney, by hand delivery, this 19th day of January, 2018.

/s/ Julie Agent Schlax

Julie Agent Schlax, Esquire

IN THE CIRCUIT COURT OF THE FOURTH JUDICIAL CIRCUIT, IN AND FOR DUVAL COUNTY, FLORIDA.

CASE NO.: 16-2013-CF-5781 AXXX
DIVISION: CR-D

STATE OF FLORIDA

VS.

DONALD SMITH
_____/

SECOND AMENDED REQUEST FOR JUDICIAL NOTICE

The defendant, DONALD SMITH, through the undersigned attorney, Julie Agent Schlax, pursuant to Florida Statutes 90.202(6) and 90.203, moves this Honorable Court to take judicial notice of the following judgments and sentences:

16-1991-CF-11745 AXXXMA (Burglary to a Dwelling and Grand Theft)

16-1992-CF-11193AXXXMA (Attempted Kidnapping and Showing Obscene Materials to Minors)

16-1998-CF-3466 (Purchase of Cocaine)

16-1999-CA-1635 AXXXMA (Civil Commitment)

16-2003-CF-7080AXXXMA (Dealing in Stolen Property and False Verification of Ownership)

16-2009-CF-12156AXXXMA (Attempted Unlawful Impersonation of a Public Employee and Attempted Child Abuse)

The defendant, DONALD SMITH, through the undersigned attorney, Julie Agent Schlax, pursuant to Florida Statutes 90.202(6) and 90.203, moves this Honorable Court to take judicial notice of the statutory maximum sentence for each felony offense contained within the above-cited judgements.

WHEREFORE, the undersigned attorney respectfully requests this Honorable Court to grant this Motion and take judicial notice of the above judgments and sentences and so instruct the jury if necessary.

Respectfully submitted, this 19th day of January, 2018.

ESPENSHIP & SCHLAX, LLC

/s/ Julie Agent Schlax

Julie Agent Schlax, Esquire
Florida Bar No.: 093040
200 E. Forsyth Street
Jacksonville, Florida 32202
Tel: (904) 674-0717
Fax: (904) 674-0737
Attorney for Defendant

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the above and foregoing has been furnished to the Office of the State Attorney, by hand delivery, this 19th day of January, 2018.

/s/ Julie Agent Schlax

Julie Agent Schlax, Esquire

IN THE CIRCUIT COURT OF THE FOURTH JUDICIAL CIRCUIT, IN AND FOR DUVAL COUNTY, FLORIDA

CASE NO.: 16-2013-CF-5781-AXXX

DIVISION: CR-D

STATE OF FLORIDA

VS.

DONALD SMITH

DEFENDANT'S EIGHTH MOTION IN LIMINE

Defendant, Donald Smith, by and through his undersigned attorney, W. Charles Fletcher, respectfully moves this Honorable Court to grant Defendant's Eighth Motion in Limine precluding the State from introducing the autopsy photographs of the minor victim in this case and as grounds therefore, states:

1. The defendant is charged with First Degree Murder, Kidnapping a Child Under the Age of 13, and Sexual Battery.
2. Counsel for the Defendant believes that at trial the State will attempt to introduce the autopsy photographs of the minor victim.
3. The autopsy photographs depict a naked child with injuries to her vagina and anus. In addition, as part of the autopsy, the child's skin was removed from the front of her

FILED

JAN 24 2018

RONALD W. DAMSELL
CLERK CIRCUIT COURT

throat to show deep bruising around her trachea. Finally, to show the depth of a bruise to the top of the child's head, the medical examiner removed the skin from the child's skull and stretched it backwards.

Because the medical examiner will testify to the injuries discovered during the autopsy, there is no need to introduce the photographs of the same injuries (this is especially true if the medical examiner is not challenged on cross examination as to the injuries discovered). As a result, the photographs are cumulative. In addition, the autopsy photographs are extremely prejudicial, outweighing any probative value they provide once the medical examiner has testified to the same injuries. The great majority of potential jurors have never seen the types of photographs taken during an autopsy and to place such photos before the jury would do nothing but shock them and inflame their passions, to the detriment of the defendant.

WHEREFORE, Defendant respectfully requests this Honorable Court to prohibit the State from introducing the autopsy photographs in this case.

Respectfully submitted,

W. Charles Fletcher, Esquire
Florida Bar No.: 0125792
8833 Perimeter Park Boulevard
Suite 104
Jacksonville, Florida 32216
Tel: (904) 314-0233
Williamfletcher96@yahoo.com

Attorney for Defendant

I HEREBY CERTIFY that a copy of the above and foregoing "Defendant's Eighth Motion in Limine" has been furnished to the Office of the State Attorney, by hand delivery, this 11th day of January 2017.

W. Charles Fletcher, Esquire

IN THE CIRCUIT COURT OF THE FOURTH JUDICIAL CIRCUIT, IN AND FOR DUVAL COUNTY, FLORIDA

CASE NO.: 16-2013-CF-5781-AXXX

DIVISION: CR-D

STATE OF FLORIDA

VS.

DONALD SMITH

DEFENDANT'S NINTH MOTION IN LIMINE

Defendant, Donald Smith, by and through his undersigned attorney, W. Charles Fletcher, respectfully moves this Honorable Court to grant Defendant's Ninth Motion in Limine precluding the State from introducing a photograph of a bundle of rope purchased while in the presence of the victim and her family, later found in defendant's vehicle, and as grounds therefore, states:

1. The defendant is charged with First Degree Murder, Kidnapping a Child Under the Age of 13, and Sexual Battery.
2. Counsel for the Defendant believes that at trial the State will attempt to introduce a photograph and testimony regarding a bundle of rope he purchased while in the presence of the victim and her family.

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JAN 24 2018

RONALD W. AMSELL
CLERK CIRCUIT COURT

3. The bundle of rope was found in the defendant's van and was never removed from its packaging.
4. Given the nature of the charges in this case, the bundle of rope carries with it the inference that it was purchased with the intent that it be used during the kidnapping and sexual battery of the victim and its introduction into evidence, given the fact that it was never removed from its packaging, is extremely prejudicial, outweighing any slight probative value.

WHEREFORE, Defendant respectfully requests this Honorable Court to prohibit the State from introducing testimony and a photograph of the bundle of rope in this case.

Respectfully submitted,

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Williamfletcher96@yahoo.com

Attorney for Defendant

I HEREBY CERTIFY that a copy of the above and foregoing "Defendant's Ninth Motion in Limine" has been furnished to the Office of the State Attorney, by hand delivery, this 11th day of January 2018.

W. Charles Fletcher, Esquire

IN THE CIRCUIT COURT OF THE FOURTH JUDICIAL CIRCUIT, IN AND FOR DUVAL COUNTY, FLORIDA

CASE NO.: 16-2013-CF-5781-AXXX

DIVISION: CR-D

STATE OF FLORIDA

VS.

DONALD SMITH

DEFENDANT'S TENTH MOTION IN LIMINE

Defendant, Donald Smith, by and through his undersigned attorney, W. Charles Fletcher, respectfully moves this Honorable Court to grant Defendant's Tenth Motion in Limine precluding the State from introducing photographs of the defendant's penis in this case and as grounds therefore, states:

1. The defendant is charged with First Degree Murder, Kidnapping a Child Under the Age of 13, and Sexual Battery.
2. Counsel for the Defendant believes that at trial the State will attempt to introduce photographs of the defendant's penis.
3. The photographs of the defendant's penis depict a small bruise on his penis.

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JAN 24 2018

RONNIE W. POWELL
CLERK CIRCUIT COURT

Because the medical examiner will testify to the injuries on the defendant's penis, there is no need to introduce the photographs of the same injuries (this is especially true if the medical examiner is not challenged on cross examination as to the injuries discovered). As a result, the photographs are cumulative. In addition, the photographs are extremely prejudicial, and having them introduced at trial does nothing but humiliate the defendant. As such, their probative value is clearly outweighed by their prejudicial impact.

WHEREFORE, Defendant respectfully requests this Honorable Court to prohibit the State from introducing the photographs of the defendant's penis in this case.

Respectfully submitted,

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Attorney for Defendant

I HEREBY CERTIFY that a copy of the above and foregoing "Defendant's Tenth Motion in Limine" has been furnished to the Office of the State Attorney, by hand delivery, this 11th day of January 2018.

W. Charles Fletcher, Esquire

IN THE CIRCUIT COURT, FOURTH JUDICIAL CIRCUIT, IN AND FOR DUVAL COUNTY, FLORIDA

CASE NO: 16-2013-CF-5781-AXXX
DIVISION: CR-D

STATE OF FLORIDA

VS.

DONALD SMITH
_____/

ORDER GRANTING MOTION TO INCUR COSTS OF TRANSCRIPTS

THIS CAUSE having come before the court upon the Defendant's Motion, and the Court having been fully advised in the premises, and finding that the transcripts are both necessary and essential to the defense in this cause, it is

ORDERED AND ADJUDGED as follows:

Julie Agent Schlax, Esquire is hereby authorized to incur the reasonable costs of obtaining the transcripts of the following proceedings/witnesses:

Date of Proceeding	**Type of Proceeding**	**Name of Witness**
January 16, 2018	Deposition	Heather Holmes
January 18, 2018	Deposition	Joseph Sesta

IT IS FURTHER ORDERED AND ADJUDGED that the Justice Administrative Commission shall pay these reasonable costs upon submission of the proper invoice(s) and that the rate shall be $4.00 per page transcribed for depositions, and $0.50 per page for copies of transcriptions.

DONE AND ORDERED at the Duval County Courthouse, Jacksonville, Florida on this 24 day of January, 2018.

Circuit Judge

Copies to:
Julie Agent Schlax, Esquire
Justice Administrative Commission

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IN THE CIRCUIT COURT OF THE FOURTH JUDICIAL CIRCUIT, IN AND FOR DUVAL COUNTY, FLORIDA

CLERK NO.: 16-2013-CF-005781-AXXX-MA

DIVISION: CRD

STATE OF FLORIDA

vs.

DONALD JAMES SMITH

STATE'S RESPONSE TO DEFENDANT'S TENTH MOTION IN LIMINE

The State of Florida (the "State"), by and through the undersigned attorneys, requests this Honorable Court to deny Defendant's Tenth Motion in Limine filed on January 24, 2018 (hereinafter "Motion").

The State intends to tender, for consideration by the fact finder, three photographs of injuries on the Defendant's penis ("Photographs"). At the direction of the Medical Examiner, seven photographs were taken of the Defendant's penis, revealing injuries consistent with forced sucking and penetration. The State seeks to introduce three of those seven Photographs.

The Defendant requests preclusion of all the Photographs arguing that 1) the Photographs are cumulative because the Medical Examiner will testify to the injuries and 2) the Photographs are extremely prejudicial.[1]

STATE'S ARGUMENT

I. THE PHOTOGRAPHS ARE RELEVANT AND PROBATIVE OF THE DEFENDANT'S GUILT

Relevant evidence is evidence that tends "to prove or disprove a material fact." § 90.401, Fla. Stat. In *Jennings v. State*, the Supreme Court of Florida held that photographs showing abrasions on the defendant's penis were admissible in a case involving the first-degree murder, kidnapping, and sexual battery of a six-year-old girl. *Jennings v. State*, 512 So. 2d 169 (Fla. 1987). While the issue in that case involved whether the photographs were taken "as a result of an illegally obtained confession," the Court explained that the "relevancy of the photographs was

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[1] *See* "Defendant's Tenth Motion in Limine." [D.E. 712].

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that a pathologist had said that the person who raped the physically immature victim would have likely injured his penis." *Jennings v. State*, 512 So. 2d at 171.

In the instant case, the State seeks to introduce Photographs that will assist the Medical Examiner, Dr. Rao, in explaining how the injuries on the Defendant's penis connect him to the crimes with which he has been charged. Dr. Rao testified that, at her direction, photographs were taken of the Defendant on multiple occasions. Dr. Rao testified that photographs were taken on multiple occasions to show that the injuries on the Defendant's penis were not caused by an infectious disease.[2] The Photographs reveal multiple bruises and are probative of the Defendant's guilt.

II. THE PHOTOGRAPHS ARE NOT CUMULATIVE

The State intends to introduce only three of the seven Photographs that were taken. The "test for admissibility of photographic evidence is relevance, not necessity." *Hampton v. State*, 103 So. 3d 98, 115 (Fla. 2012).

In *Hampton v. State*, the Supreme Court of Florida held that photographs of a victim were not duplicative. *Hampton v. State*, 103 So. 3d 98 (Fla. 2012). The Court noted that none of the photographs was identical, the photographs revealed different angles of the victim's multiple injuries, and any duplication was "slight" and in no way independently prejudicial. *Hampton v. State*, 103 So. 3d 98 at 115-16 (Fla. 2012).

The same analysis can be applied to photographs of a defendant's injuries. In this case, the Photographs are not identical. Dr. Rao testified that the Photographs are not duplicative and explained how each Photograph depicts a different injury or a different angle.[3] Each Photograph will uniquely assist the Medical Examiner in explaining her findings to the fact finder. Moreover, the State has eliminated duplicative photographs. Thus, the remaining Photographs are not cumulative in nature.

III. THE PROBATIVE VALUE OF THE PHOTOGRAPHS IS NOT OUTWEIGHED BY ANY POTENTIAL PREJUDICE

The Supreme Court of Florida has "consistently upheld the admission of allegedly gruesome photographs where they were independently relevant or corroborative of other evidence." *Davis v. State*, 207 So. 3d 142, 169 (Fla. 2016). A relevant photograph must be "unfairly prejudicial" to warrant exclusion. *Hampton v. State*, 103 So. 3d 98, 115 (Fla. 2012).

The Supreme Court of Florida's analysis in *Jennings v. State* supports the State's position that, given the nature of the crimes with which the Defendant has been charged, the

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[2] On January 24, 2018, Dr. Rao testified in Court during the hearing on "Defendant's Tenth Motion in Limine." [D.E. 713].

[3] This testimony is in reference to the hearing on "Defendant's Tenth Motion in Limine." [D.E. 713].

Photographs are admissible despite the location of the injuries on the Defendant's body. *See Jennings v. State*, 512 So. 2d 169, 171 (Fla. 1987). The Photographs are independently relevant and corroborative of other evidence, and the probative value of the Photographs is not outweighed by the "danger of unfair prejudice, confusion of issues, misleading the jury, or needless presentation of cumulative evidence." § 90.403, Fla. Stat.

CONCLUSION

Based on the foregoing, the Photographs are relevant, the Photographs are not cumulative, and the Photographs are not unduly prejudicial.

WHEREFORE, the State of Florida respectfully requests that this Honorable Court deny the Defendant's Motion.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy hereof has been furnished to Julie A. Schlax, Attorney for the Defendant, 200 East Forsyth Street, Jacksonville, Florida, 32202; and W. Charles Fletcher, Attorney for the Defendant, 8833 Perimeter Park Boulevard, Suite 104, Jacksonville, Florida 32216 by e-delivery this 25th day of January, 2018.

/s/ Mark Caliel
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IN THE CIRCUIT COURT OF THE FOURTH JUDICIAL CIRCUIT, IN AND FOR DUVAL COUNTY, FLORIDA

CLERK NO.: 16-2013-CF-005781-AXXX-MA

DIVISION: CRD

STATE OF FLORIDA

vs.

DONALD JAMES SMITH

STATE'S RESPONSE TO DEFENDANT'S SECOND MOTION IN LIMINE

The State of Florida (the "State"), by and through the undersigned attorneys, requests this Honorable Court to deny Defendant's Second Motion in Limine filed on December 20, 2017 (hereinafter "Motion").

The State intends to tender, for consideration by the fact finder, a 2 minute and 44 second audio recording of the Defendant which contains relevant and inculpatory statements made by the Defendant. Specifically, the State seeks to introduce the four following statements made by the Defendant (the "Wire Statements")[1]:

a. Deviney: "These are young girls, you hear?
   Defendant: They're young.
   Deviney: Man. When you look at this girl's ass…
   Defendant: You know how old they are? About 12!"
b. Deviney: "You see that shit man?
   Defendant: Yeah…
   Deviney: You sure that she's 12?
   Defendant: Yeah…That's right up my alley right there.
   Deviney: Huh?
   Defendant: That's my target area right there. That's what I go after."

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[1] The Defendant has previously sought suppression of these Wire Statements, arguing that the Defendant's Fourth, Fifth, and Sixth Amendment rights were violated. *See* "Defendant's Amended Motion to Suppress Statements." [D.E. 566]. On August 26, 2016, the Honorable Judge Mallory Cooper denied the Defendant's "Motion to Suppress Statements" and "Amended Motion to Suppress Statements."[D.E. 567].

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c. Deviney: "See? Her mama should be ashamed…
Defendant: Yeah.
Deviney: [Discussion of a young female that passed by.]
Defendant: "Yeah, I'd like to run into her at Walmart."

d. Deviney: "Cherish has a butt on her?
Defendant: Yeah.
Deviney: …She ain't have one like that though.
Defendant: That's 'cause she ain't black. She had a lot for a white girl."

The Defendant requests preclusion of the introduction of the Wire Statements. The Defendant renews his previous objections and argues that the Defendant's Wire Statements are irrelevant and serve to negatively inflame the jury's perception of the Defendant. The Defendant further argues that even if the Defendant's Wire Statements are relevant, the probative value of them is outweighed by their tendency to be prejudicial, confuse the issues, and mislead the jury in light of the other evidence available to the State.

The State disagrees with the Defendant's assertions. The probative value of the Wire Statements is not outweighed by any prejudice to the Defendant. The Wire Statements are not only relevant but are also highly probative of the Defendant's motive and intent in murdering the victim, Cherish Perrywinkle ("Perrywinkle" or "Victim"). The Wire Statements further reveal the Defendant's knowledge and, consequently, the Defendant's guilt. Rather than confuse the issues, the Wire Statements help to explain and corroborate the evidence the State will introduce throughout the course of the trial.

STATE'S ARGUMENT

I. THE STATEMENTS ARE ADMISSIBLE AS STATEMENTS BY A PART-OPPONENT

The Wire Statements are statements by a party-opponent and are admissible as substantive evidence against the Defendant pursuant to Florida Statute § 90.803(18). Moreover, the Wire Statements are relevant, inculpatory, and probative of the Defendant's guilt. The Wire Statements are admissions that reveal not only the Defendant's detailed knowledge of Perrywinkle's anatomy but also his motive and intent.

II. THE WIRE STATEMENTS ARE RELEVANT TO PROVE THE DEFENDANT'S MOTIVE AND INTENT

Florida Statute § 90.402 states that "[a]ll relevant evidence is admissible, except as provided by law." § 90.402, Fla. Stat. The law provides, under Florida Statute § 90.403, that relevant evidence is "inadmissible if its probative value is substantially outweighed by the

danger of unfair prejudice, confusion of issues, misleading the jury, or needless presentation of cumulative evidence." § 90.403, Fla. Stat.

In the instant case, the Defendant's statements are admissible to establish his motive and intent. In *Gregory v. State*, the Supreme Court of Florida held that the defendant's statement made eight months prior to the crime was admissible to establish his motive and intent, and the probative value of his statement was not substantially outweighed by the danger of unfair prejudice. *Gregory v. State*, 118 So. 3d 770 (Fla. 2013). In *Gregory*, the defendant stated that if he ever caught his girlfriend cheating, he would "kill them both." *Gregory v. State*, 118 So. 3d at 780. Gregory argued that the statement "did not indicate intent to kill because the threat was not taken seriously." *Id.* at 781. The court, however, stated that his argument went "to the weight of the evidence, not its admissibility." *Id.* Gregory also argued that the statement was unduly prejudicial. The court responded by stating that the defendant's prior comments provided "evidence of his motive and intent in murdering his former girlfriend and her new boyfriend." *Id.*

The Wire Statements in the instant case, like Gregory's statements, did not occur at or around the time he committed the crime but, similarly, provide evidence of the Defendant's motive and intent. Here—like in *Gregory*—the Defendant's arguments go to the weight, rather than the admissibility, of the Wire Statements.

III. THE WIRE STATEMENTS ARE ALSO RELEVANT TO PROVE THE DEFENDANT'S KNOWLEDGE AND CONSEQUENTLY, HIS GUILT

In *State v. Blackwell*, the First District Court of Appeal held that the defendant's admission was relevant to prove knowledge of the crime with which he was charged. *State v. Blackwell*, 787 So. 2d 963 (Fla. 1st DCA 2001). The case involved knowledge of the presence of cocaine in a vehicle. The First District Court of Appeal reversed the trial court's exclusion of the statements because the defendant's statements were "relevant and their probative value [was] not outweighed by unfair prejudice." *Id.* Blackwell's statement occurred two months after the charged offense, but the court reasoned that the statements were made specifically about the cocaine that was found inside the car. In its Section 90.403 analysis, the appellate court reasoned that "the admission was not simply a comment about another, uncharged offense; it was an admission of the charged offense." *Id.* at 965. The court stated that the admission was "not evidence of another bad act two months before" but instead tended to prove the crime with which he had been charged. *Id.*

This underlying principle of *Blackwell* applies here: the Wire Statements are not evidence of prior bad acts; they tend to prove the crimes with which the Defendant has been charged. The third and fourth Wire Statements refer to the specific location of the abduction of Perrywinkle and reflect intimate knowledge of her anatomy

IV. THE PROBATIVE VALUE OF THE WIRE STATEMENTS IS NOT OUTWEIGHED BY ANY POTENTIAL PREJUDICE

The Defendant argues that the prejudicial impact of the Wire Statements outweigh the probative value of the Statements. The State disagrees.

The fact that a defendant's statements are prejudicial does not render them inadmissible. In *State v. Gad*, the defendant was charged with sexual battery and filed a motion in limine to exclude apologies he made over the phone to his wife. *State v. Gad*, 27 So. 3d 768 (Fla. 2d DCA 2010). The defendant argued that the prejudice outweighed the probative value of the statements. *Id.* at 769. Specifically, he argued that the "apologies were not necessarily admissions of his wrongdoing but could just as easily be understood to be apologies for getting into the argument and asking the women to leave." *Id.* The trial court agreed with the defendant and issued an order granting the defendant's motion to exclude the statements. *Id.* On appeal, the Second District Court of Appeal noted that the defendant could only be prejudiced by the statements "if they are actually found to be relevant to the events at issue. Such prejudice, however, is the type that is inherently associated with relevant probative evidence." *Id.* at 770. Reversing the trial court's order, the appellate court held that the probative value of the defendant's statements during the phone calls to his wife outweighed the danger of unfair prejudice to the defendant. *Id.* Here, the Wire Statements are relevant to the events at issue and probative of the Defendant's guilt.

Additionally, the Defendant argues that the fact that the jury will learn that the Defendant was incarcerated at the time he made the Wire Statements renders them too prejudicial to be admitted. But Florida courts have consistently upheld the admission of recorded jail conversations. In *Hayward v. State*, the Supreme Court of Florida upheld the admission of a recorded jail conversation in which the defendant, using code language, instructed an individual to get rid of the murder weapon. *Hayward v. State*, 24 So. 3d 17, 38 (Fla. 2009).

Likewise, the First District Court of Appeal has held that the recording of a jailhouse call between the defendant and his mother was admissible. *Bass v. State*, 147 So. 3d 1033 (Fla. 1st DCA 2014). Furthermore, the Fourth District Court of Appeal held jail call recordings to be admissible despite the defendant's argument that the recordings were unduly prejudicial, reasoning that the recordings were relevant and admissible to show consciousness of guilt. *Faust v. State*, 95 So. 3d 421, 426 (Fla. 4th DCA 2012).

In the instant case, the jury will become aware of the fact that the Defendant was arrested for the crimes with which he has been charged.[2] The recordings do not comment on whether the Defendant is *currently* incarcerated, making the recordings distinguishable from

[2] "No prejudice can result from seeing that which is already known." *Thompson v State*, 192 So. 3d 711, 712 (Fla. 1st DCA 2016) (quoting *U.S. ex rel. Stahl v. Henderson*, 472 F. 2d 556, 557 (5th Cir. 1973)).

compelling the accused to stand trial in jail clothes which "operates usually against only those who cannot post bail prior to trial." *Hayes v. State*, 140 So. 3d 1106, 1108 (Fla. 1st DCA 2014) (quoting *Estelle v. Williams*, 425 U.S. 501, 505 (1976)).

CONCLUSION

The Wire Statements are admissible as statements by a party-opponent under Florida Statute § 90.803(18). The Statements are further relevant to prove the Defendant's motive and intent. Finally, the Defendant's description of Cherish Perrywinkle's anatomy and his reference to the location of her abduction are probative of his knowledge and guilt. Based on the foregoing, the probative value of the Wire Statements is not substantially outweighed by any potential prejudice, and the Statements should not be excluded.

WHEREFORE, the State of Florida respectfully requests that this Honorable Court deny Defendant's Motion.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy hereof has been furnished to Julie A. Schlax, Attorney for the Defendant, 200 East Forsyth Street, Jacksonville, Florida, 32202; and W. Charles Fletcher, Attorney for the Defendant, 8833 Perimeter Park Boulevard, Suite 104, Jacksonville, Florida 32216 by e-delivery this 25th day of January, 2018.

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IN THE CIRCUIT COURT OF THE FOURTH JUDICIAL CIRCUIT, IN AND FOR DUVAL COUNTY, FLORIDA

CLERK NO.: 16-2013-CF-005781-AXXX-MA

DIVISION: CRD

STATE OF FLORIDA

vs.

DONALD JAMES SMITH

STATE'S RESPONSE TO DEFENDANT'S EIGHTH MOTION IN LIMINE

The State of Florida (the "State"), by and through the undersigned attorneys, requests this Honorable Court to deny Defendant's Eighth Motion in Limine filed on January 24, 2018 (hereinafter "Motion").

The State intends to tender, for consideration by the fact finder, photographs of the victim, Cherish Perrywinkle ("Perrywinkle" or "Victim"), taken during the Medical Examiner's autopsy of Perrywinkle ("Photographs"). These Photographs depict various injuries to Perrywinkle in addition to evidencing the cause of her death: strangulation by ligature.

The Defendant requests preclusion of the Photographs, arguing that 1) the Photographs are cumulative because the Medical Examiner will testify to the injuries discovered during the autopsy and 2) the Photographs are extremely prejudicial.[1]

The probative value of the Photographs outweighs any prejudice because the Photographs reveal the cause of death, the location of the Victim's wounds, and the Victim's identity. Indeed, the Photographs are as important as the testimony itself. The Medical Examiner will testify that each Photograph reveals something different from any other.

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[1] *See* "Defendant's Eighth Motion in Limine." [D.E. 710].

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STATE'S ARGUMENT

I. THE PHOTOGRAPHS ARE RELEVANT TO SHOW THE CAUSE AND MANNER OF DEATH, AND THE INJRIES SUSTAINED BY THE VICTIM

The State seeks to introduce the Photographs as they will assist the Medical Examiner, Dr. Rao, in explaining the nature and manner in which the wounds to Cherish Perrywinkle were inflicted. Additionally, the Photographs will assist Dr. Rao in describing the Victim's multiple injuries and explaining the cause and manner of death. The Photographs are relevant because they tend "to prove or disprove a material fact." § 90.401, Fla. Stat. The law is well settled that autopsy photographs are admissible when relevant to demonstrate a victim's injuries and manner of death.

In *Davis v. State*, the Supreme Court of Florida held that autopsy and hospital photographs of the victim were admissible and relevant to explain the victims' injuries and manner of death. *Davis v. State*, 207 So. 3d 142 (Fla. 2016). The defendant argued that the trial court erred in admitting 48 autopsy and hospital photographs of the three victims in the case. The Supreme Court of Florida disagreed, stating that photographs are admissible if they "assist the medical examiner in explaining to the jury the nature and manner in which the wounds were inflicted." *Id.* at 169 (quoting *Bush v. State*, 461 So. 2d 936, 939 (Fla. 1984)). The Court further stated that photographs are admissible to "show the manner of death, location of wounds, and the identity of the victim." *Id.* (quoting *Larkins v. State*, 655 So. 2d 95, 98 (Fla. 1995).

The Medical Examiner, Dr. Rao, has previously testified that the Photographs reveal "tremendous injury." The Photographs assist Dr. Rao in intricately describing the Victim's wounds, explaining how the injuries reveal the nature in which the wounds were inflicted, and articulating the difference between postmortem and antemortem injuries. Dr. Rao also testified that the Victim's injuries reveal the physical signs of her struggle. [2]

II. THE PHOTOGRAPHS ARE NOT CUMULATIVE OR DUPLICATIVE IN NATURE

Defendant also argues that the Photographs are cumulative. The State disagrees.

In 2012, the Supreme Court of Florida held that autopsy photographs of a murder victim were "neither unfairly prejudicial nor duplicative." *Hampton v. State*, 103 So. 3d 98 (Fla. 2012). As the Defendant does here, the defendant in *Hampton* argued that the autopsy photographs of the victim were duplicative. The Court responded that the "test for admissibility of photographic evidence is relevance, not necessity." *Id.* at 115. The Court noted that none of the

[2] On January 24, 2018, Dr. Rao testified in Court during the hearing on "Defendant's Eighth Motion in Limine." [D.E. 713].

photographs were identical, the photographs revealed different angles of the victim's multiple injuries, and any duplication was "slight" and in no way independently prejudicial. *Hampton v. State*, 103 So. 3d 98 at 115-16 (Fla. 2012).

In *Arbelaez v. State*, the Supreme Court of Florida held that the trial court did not abuse its discretion in admitting ten photographs of the child victim's body during the guilt phase. *Arbelaez v. State*, 898 So. 2d 25 (Fla. 2005). Four images showed the victim lying on a dock. Six photographs depicted the autopsy. The trial judge questioned whether one photograph at the crime scene was duplicative but then noted that the photograph "seems to depict something other than what [the similar] picture depicts." *Id.* at 44. The trial judge admitted the autopsy photographs after the medical examiner testified they would assist him in explaining his findings to the jury. *Id.* Likewise here, the State does not intend to introduce every photograph taken during the Medical Examiner's autopsy. Of the 74 photographs taken during the autopsy, the State intends to introduce 30 Photographs

The *Arbelaez* case also addresses the question of whether "the fact that the victim…was a young child" alters the analysis. *Id.* The Court found that the child's age does not alter the analysis. The Court referred to the case of *Chavez v. State* in which the Court previously affirmed "cumulative gruesome photographs" of a murdered child victim. *Id.* at 44 (citing *Chavez v. State*, 832 So. 2d 730, 763 (Fla. 2002)). In *Chavez*, the Court noted that the medical examiner testified that the photographs were not cumulative and also explained the difference between exhibits, "refuting the suggestion that these photographs were cumulative." *Chavez v. State*, 832 So. 2d at 763.

In this case the Photographs are not cumulative. The Medical Examiner, Dr. Rao, testified that the Photographs are crucial in assisting her during trial. She has stated, for the layperson, the Photographs are "as important as the testimony itself." She has also presented testimony as to how the Photographs are not duplicative and how they uniquely reveal the Victim's injuries, the physical signs of her struggle, and the cause and manner of her death.[3] Each Photograph reveals something different from any other, and each Photograph will uniquely assist Dr. Rao in explaining her findings to the fact finder.

III. THE PROBATIVE VALUE OF THE PHOTOGRAPHS IS NOT OUTWEIGHED BY ANY POTENTIAL PREJUDICE

The Court noted that it has "consistently upheld the admission of allegedly gruesome

[3] On January 24, 2018, Dr. Rao's testified in Court during the hearing on "Defendant's Eighth Motion in Limine." [D.E. 713].

photographs where they were independently relevant or corroborative of other evidence." *Davis v. State*, 207 So. 3d 142, 169 (Fla. 2016). The "admission of photographic evidence of a murder victim is within the sound discretion of the trial court and its ruling will not be disturbed on appeal absent abuse." *Hampton v. State*, 103 So. 3d 98, 115 (Fla. 2012). Furthermore, a relevant photograph must be "unfairly prejudicial" to warrant exclusion. *Hampton v. State*, 103 So. 3d 98, 115 (Fla. 2012).[4]

The Supreme Court of Florida, in *Patrick v. State*, held that the probative value of gruesome autopsy photographs was not outweighed by the danger of unfair prejudice. *Patrick v. State*, 104 So. 3d 1046 (Fla. 2012). The photographs in *Patrick* depicted "the skin of the victim's head pulled back to reveal his skull and the entire torso opened to reveal his upper chest." *Patrick v. State*, 104 So. 3d at 1062. The medical examiner testified that jurors might understand her testimony better with photographs, specifically explaining that while some people might be able to easily picture what she was saying, others "might need to actually see." *Id.* The photographs, though gruesome, demonstrated internal injuries that would not have otherwise been visible. *Id.*

Likewise, the Photographs in this case demonstrate internal and external wounds. Some of the Photographs demonstrate internal injuries that would not have otherwise been visible. The Photographs the State seeks to introduce are independently relevant and corroborative of the State's evidence. It is well settled law that gruesome autopsy photographs should be admitted when they are independently relevant or corroborative of other evidence. The probative value of the Photographs is not outweighed by prejudice; therefore, the Photographs should be deemed admissible.

CONCLUSION

Based on the foregoing, the Photographs are relevant, the Photographs are not cumulative, and the Photographs will assist the Medical Examiner in establishing the manner of death, the location of injuries, and the victim's identity.

WHEREFORE, the State of Florida respectfully requests that this Honorable Court deny Defendant's Motion.

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[4] The trial court eliminated a photograph of the victim's exposed brain and a close-up of the victim's severed jugular vein. The remaining photographs revealed "abrasions, injuries, and bruising suffered by the victim." *Hampton v. State*, 103 So. 3d 98 (Fla. 2012).

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IN THE CIRCUIT COURT OF THE FOURTH JUDICIAL CIRCUIT, IN AND FOR DUVAL COUNTY, FLORIDA

CLERK NO.: 16-2013-CF-005781-AXXX-MA

DIVISION: CRD

STATE OF FLORIDA

vs.

DONALD JAMES SMITH

STATE'S RESPONSE TO DEFENDANT'S THIRD MOTION IN LIMINE

The State of Florida (the "State"), by and through the undersigned attorneys, requests this Honorable Court to deny Defendant's Third Motion in Limine filed on December 20, 2017 (hereinafter "Motion").

The State intends to tender, for consideration by the fact finder, two video compilations that capture Cherish Perrywinkle, (the "Victim"); the Victim's mother, Rayne Perrywinkle; the Defendant; and the Defendant's white van. The two locations depicted in the videos are Dollar General and Walmart. The footage was captured on June 21, 2013, the date Cherish Perrywinkle was last seen alive. Specifically, the State seeks to introduce two video recordings that contain legends, four color-coded arrows, and a time lapse (the "Marked Videos"):

a. Dollar General Surveillance Video (28 minutes)
b. Walmart Surveillance Video (40 minutes and 5 seconds)

Defendant requests preclusion of the introduction of the Marked Videos. Defendant first argues that the digitally enhanced videos, which include color-coded arrows and a "time lapse," are not proper evidence and cannot be properly authenticated. The Defendant next argues that even if the evidence is relevant, the probative value would be outweighed by its tendency to be prejudicial, to confuse the issues, and to mislead the jury in light of the other evidence available to the State.[1]

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[1] *See* "Defendant's Third Motion in Limine." [D. E. 668].

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The State disagrees with the Defendant's assertions. The State's expert witness will testify that the Marked Videos are fair and accurate copies of the original videos. While differences between the Marked Videos and the original videos clearly exist, the differences do not constitute improper distortions of the original content. The Marked Videos are admissible and in trial, will be properly authenticated by the State's expert witness. The color-coded arrows clarify the locations and actions of the relevant individuals in this case; therefore, the probative value of the Marked Videos is not outweighed by any prejudice to the Defendant.

STATE'S ARGUMENT

I. THE MARKED VIDEOS ARE ADMISSIBLE AND THE STATE'S EXPERT IS PREPARED TO PROPERLY AUTHENTICATE THEM

The rule governing the admissibility of photographs applies "with equal force to the admission of motion pictures and video tapes." *Bryant v. State*, 810 So. 2d 532, 535 (Fla. 1st DCA 2002).

a. Florida Law

In *Bryant v. State*, the First District Court of Appeal held that the jury was entitled to compare an original videotape with the edited fully enhanced excerpt presented at trial. *Bryant v. State*, 810 So. 2d 532 (Fla. 1st DCA 2002). The court also noted that the state's expert testified about the nature of the enhancements to the original videotape. *Id.* The court found that the expert's testimony was "a necessary component of the state's effort to prove the foundation necessary for admission of the edited, fully enhanced excerpt." *Id.* While the court remanded the case due to the fact that the jury did not have an opportunity to compare the enhanced copy with the original, the *Bryant* case reveals that edited, fully enhanced excerpts are admissible.

In *Jefferson v. State*, the First District Court of Appeal held that a copy of a time lapse video was properly admitted despite the defendant's objection that the original video contained fewer frames per second than the duplicate. *Jefferson v. State*, 818 So. 2d 565 (Fla. 1st DCA 2002). The defendant in *Jefferson* argued that the change in speed created a "difference in how the action [was] displayed." *Id.* at 566. The court rejected this argument stating that "[n]o issue was raised concerning the copy's fidelity to the original." *Id.*[2] While the video in *Jefferson* was displayed differently to the jury as a result of the change in speed, the content remained the

[2] The court also noted that counsel for the defendant never alleged that anything was added to the video. *Jefferson v. State*, 818 So. 2d at 566. While the opinion does not address this further, "adding" markers to depict that which is seen in an original video is distinguishable from distorting the underlying content of a video.

same. Likewise, in the instant case, the arrows and time lapse do not affect the copy's fidelity to the original.

The question regarding the admissibility of enhanced videotapes has also been addressed outside the First District Court of Appeal. In *Dolan v. Florida*, the Fourth District Court of Appeal held that an enhanced video surveillance tape was properly admitted into evidence. *Dolan v. State*, 743 So. 2d 544 (Fla. 4th DCA 1999). In *Dolan*, the video quality was poor, but the tape and the testimony established that the suspect's characteristics were apparent. *Dolan v. State*, 743 So. 2d at 545. The local police department sent the video to a forensic video analyst who created a "computer-enhanced image which was 'bigger, brighter, and better.'" *Id.* The process involved using computer software "to add, enlarge, darken, or lighten pixels." *Id.* The court, however, did not find this process to be concerning, noting that the proper question to ask is whether the images reflect "distorted or altered images." *Id.* at 546.

Likewise, in the instant case, the added arrows and time lapse do not amount to distortions. The purpose of a video enhancement is to clarify, or improve, that which is already present. If adding pixels or changing the lighting in a video does not constitute a video distortion, the addition of four color-coded arrows cannot be tantamount to a distortion. In fact, changing the lighting in a video is arguably more prejudicial because it could potentially affect a juror's perception of the time frame in which a particular crime occurred.[3]

b. Federal and State Law

The admissibility of enhanced video tapes has also been addressed outside Florida. In *U.S. v. Begay*, the Ninth Circuit Court of Appeal addressed whether an enhanced videotape was admissible. *U.S. v. Begay*, 42 F. 3d 486 (9th Cir. 1994). In *Begay*, a law enforcement officer narrated the events depicted in Exhibit 105 which was an enhanced portion of Exhibit 1, the original videotape in question. In the enhanced portion, the tape speed was "slowed by 50 percent and color-coded circles and arrows were added to aid the jury in tracing the movements of each of the identified Appellants." *U.S. v. Begay*, 42 F. 3d 486, 502 (9th Cir. 1994).

The defendant argued that 1) the expert testimony was improper because the officer lacked personal knowledge of the events depicted in the video tape and 2) the testimony of the officer was "unfairly prejudicial because it was cumulative and invaded the province of the

---

[3] Still, courts have routinely allowed such videos into evidence when the videos "have been proven accurate and serve to present the substance of the original videotape in a more easily understood form." *See U.S. v. Beeler*, 62 F. Supp. 2d 136, 150 (D. Me. 1999); *See also U.S. v. Seifert*, 445 F. 3d 1043 (8th Cir. 2006) (finding no facts to show that the edited or enhanced videotape was inauthentic or untrustworthy where the state's expert brightened the suspect and his surrounding area).

jury." *U.S. v. Begay*, 42 F. 3d 486, 502 (9th Cir. 1994). The appellate court, however, rejected the defendant's arguments. First, the court found that the officer's perceptions did not need to be based on "live" events because he was not testifying as an eyewitness. The officer's perceptions needed to be based only on his perception of Exhibit 1, the original videotape. *Id.*[4] Second, the court found that the officer's testimony was "likely to have been helpful to the jury in evaluating Exhibit 1." *Id.* Moreover, the court found that the officer's testimony "concerning which persons were engaged in what conduct at any given moment could help the jury discern correctly and efficiently the events depicted in the videotape." *Id.*

Likewise, in the instant case, the State's expert witness is capable of authenticating the Marked Videos. The State's expert, like the officer in *Begay*, added color-coded arrows and a time lapse, depicting which persons were engaged in what conduct at any given moment. Rather than confuse the jury, the Marked Videos will make the content more understandable. Furthermore, any concern regarding the Marked Videos can be cured by admitting the original tape into evidence. The jurors will then be able to compare the original with the Marked Videos and make their own determination as to whether or not the Marked Videos are fair and accurate depictions of the original.

In 1980, the Supreme Court of North Dakota addressed the same issue. In *State v. Engel*, the court held that the admission of a marked photograph into evidence was not an abuse of discretion. *State v. Engel*, 289 N.W. 2d 204 (N.D. 1980). The court noted that a relevant and properly verified photograph, even when it contains markings or writings, is admissible if the marks are devoid of evidential value and a witness explains the markings and verifies the accuracy. *Id.* at 209. The court cited to a Supreme Court of Iowa case in which photographs of the scene of an automobile crash were not inadmissible despite the fact that the photographs contained "X's" marking the point of impact, arrows showing the direction, and broken lines to show the presence of skid marks. *Id.* (citing to *Hamdorf v. Corrie*, 101 N. W. 2d 836 (Iowa 1960)).

In the instant case, the State's expert did not augment the quality of the surveillance nor did he distort the underlying content. The State's expert added arrows and a time lapse for clarification and demonstrative value, and the "duplicate" Marked Videos should be admitted into evidence.

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[4] In *Bryant*, the First District Court of Appeal noted that in order to properly authenticate a photograph, the proponent must be prepared to establish that the photograph "fairly and accurately represents what it purports to depict." *Bryant v. State*, 810 So. 2d 532, 536 (Fla. 1st DCA 2002).

II. THE MARKED VIDEO IS RELEVANT

Florida Statute § 90.402 states that "[a]ll relevant evidence is admissible, except as provided by law." § 90.402, Fla. Stat. The law provides, under Florida Statute § 90.403, that relevant evidence is "inadmissible if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of issues, misleading the jury, or needless presentation of cumulative evidence." § 90.403, Fla. Stat.

A video or motion picture may be admissible "if relevant to any issue required to be proven in a case." *Bryant v. State*, 810 So. 2d 532, 535 (Fla. 1st DCA 2002) (quoting *State v. Wright*, 265 So. 2d 361, 362 (Fla. 1972)). Furthermore, it is well settled that the use of "demonstrative devices to aid the jury's comprehension is well within the court's discretion." *McCoy v. State*, 853 So. 2d 396, 405 (Fla. 2003). The First District Court of Appeal, in *Brown v. State*, held that the use of a demonstrative exhibit during the victim's testimony and closing argument was proper, noting that demonstrative evidence to aid the jury may be utilized when relevant and when the exhibits constitute "an accurate and reasonable reproduction of the object involved." *Brown v. State*, 550 So. 2d 527, 528 (Fla. 1st DCA 1989).

In the instant case, the Marked Videos are relevant to prove the Defendant's actions, his contact with the Victim, and his contact with the Victim's mother. The enhancements serve only to aid the jury's comprehension of the Defendant's actions leading up to the crimes he committed against the Victim.

III. THE PROBATIVE VALUE OF THE MARKED VIDEOS IS NOT OUTWEIGHED BY ANY POTENTIAL PREJUDICE

Defendant argues that the prejudicial impact of the Marked Videos outweighs the probative value. The State disagrees.

In *Smith v. Geico Casualty Company*, the Second District Court of Appeal held that time lapse videotapes were a fair and accurate representation of what occurred and that the court did not abuse its discretion in rejecting the appellant's argument that the probative value of the videotapes was outweighed by the danger of misleading the jury. *Smith v. Geico Cas. Co.*, 127 So. 3d 808 (Fla. 2d DCA 2013). The court could not "say that the trial court abused its discretion in rejecting [the appellant's] section 90.403 argument." *Id.* at 811. The court reasoned that the still shots were accurate representations of what occurred on the bus and that the appellant was "free to—and did—cross-examine the expert regarding the time-lapse nature...and the fact that real time would include another twenty-four to twenty-six frames per second." *Id.* at 811.

Similarly, in the instant case, this Court should reject the Defendant's section 90.403

argument. The Marked Videos are accurate representations of what occurred on June 21, 2013, and the Defendant is free to cross-examine the State's expert, if he so chooses, regarding the enhancements. Additionally, the Marked Videos, while capturing the events leading up to the Defendant's crimes, are probative of the Defendant's guilt and will serve to aid the jury in understanding the events leading up to the Victim's death.

CONCLUSION

The Marked Videos are admissible, relevant, and capable of being properly authenticated. Furthermore, the content of the Marked Videos is in no way prejudicial and could not reasonably serve to confuse the issues. In fact, the added arrows clarify that which is seen in the original surveillance videos. Based on the foregoing, the probative value of the Marked Videos is not substantially outweighed by any potential prejudice, and the Marked Videos should not be deemed inadmissible.

WHEREFORE, the State of Florida respectfully requests that this Honorable Court deny Defendant's Motion.

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IN THE CIRCUIT COURT OF THE FOURTH JUDICIAL CIRCUIT, IN AND FOR DUVAL COUNTY, FLORIDA

CLERK NO.: 16-2013-CF-005781-AXXX

DIVISION: CRD

STATE OF FLORIDA

vs.

DONALD JAMES SMITH

STATE'S RESPONSE TO DEFENDANT'S MOTION FOR REQUESTED JURY INSTRUCTION: MERCY

The State of Florida ("The State"), by and through the undersigned attorneys, requests this Honorable Court to deny Defendant's Motion for Requested Jury Instruction: Mercy filed on December 20, 2017 (hereinafter "Motion"). In the Motion, Defendant requests a special jury instruction that would advise the jury that they may choose to exercise mercy when determining whether the aggravating factors outweigh the mitigating factors.

The State opposes the Defendant's request for a mercy instruction because the standard jury instructions are adequate, the Defendant cannot meet his burden of showing that he is entitled to this instruction, and the jury instructions already address the concept of mercy.

STATE'S ARGUMENT

I. STANDARD JURY INSTRUCTIONS ARE PRESUMED TO BE CORRECT

The standard jury instructions in capital penalty proceedings are listed under Florida Standard Instructions in Criminal Cases, 7.11 Penalty Proceedings – Capital Cases. *See* Fla. Std. Jury Instr. (Crim), 7.11 (2017); § 921.141, Fla. Stat. It is well settled law that standard jury instructions are presumed to be correct. *Freeman v. State*, 761 So. 2d 1055, 1071 (Fla. 2000). Further, it is also well settled that standard jury instructions are preferred over special instructions. *Stephens v. State*, 787 So. 2d 747 (Fla. 2001); *State v. Bryan*, 290 So. 2d 482 (Fla. 1974).

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II. THE COURT HAS DISCRETION TO DETERMINE THE APPROPRIATE JURY INSTRUCTIONS

A trial judge has "wide discretion" as it relates to determining the appropriate jury instructions. *Johnson v. State*, 747 So. 2d 436, 438 (Fla. 4th DCA 1999). The standard for review of a denial of a requested jury instruction is abuse of discretion. *Id.* Furthermore, the failure to give a special jury instruction is not erroneous when the standard instructions "adequately address the applicable legal standards." *Stephens v. State*, 787 So. 2d 747, 755 (Fla. 2001); *Palmes v. State*, 397 So. 2d 648 (Fla. 1981).

III. THE DEFENDANT IS NOT ENTITLED TO A MERCY INSTRUCTION

A defendant has the burden of proving that the trial court abused its discretion in giving a standard jury instruction. *Stephens v. State*, 787 So. 2d 747 (Fla. 2001); *Williams v. State*, 437 So. 2d 133 (Fla. 1983). In order to be entitled to a special jury instruction, a defendant must prove the following: 1) the special instruction was supported by the evidence, 2) the standard instruction did not adequately cover the defense's theory; and 3) the special instruction correctly stated the law and was not misleading or confusing. *Hudson v. State*, 992 So. 2d 96 (Fla. 2008) (citing *Stephens v. State*, 787 So. 2d 747, 756 (Fla. 2001)).

The Supreme Court of Florida has stated that "there is no requirement that a jury be instructed on its pardon power" in reference to a trial court's denial of a defendant's request for a mercy instruction. *Mendyk v. State*, 545 So. 2d 846, 850 (Fla. 1989). Specifically, the defendant in *Mendyk* requested the following instruction:

> With regard to your decision to recommend life or death, the court hereby instructs that there is nothing which would suggest that the decision to afford an individual defendant mercy violates our constitution. You are empowered to decline to recommend the penalty of death even if you find one or more aggravating circumstances and no mitigating circumstance. *Mendyk v. State*, 545 So. 2d 846, 849, n 3 (Fla. 1989).

Like Mendyk, the Defendant in the instant case is not entitled to a mercy instruction. The Defendant has not demonstrated that an instruction regarding mercy is supported by the evidence, nor has he shown that the standard instructions do not adequately cover his theory of defense. Specifically, the jury instructions already advise the jurors that "weighing aggravating factors and mitigating circumstances is not a mechanical or mathematical process," that "different factors or circumstances may be given different weight or values by different jurors," and that "the law neither compels nor requires [the juror] to determine that the defendant should be sentenced to death" even if the juror finds that the "sufficient aggravators outweigh

the mitigators." Fla. Std. Jury Instr. (Crim), 7.11(a); § 921.141(7), Fla. Stat.

CONCLUSION

The standard jury instructions are presumed to be correct, this Court has wide discretion as it relates to jury instructions, and the Defendant has not shown that he is entitled to a special jury instruction on mercy. Moreover, the standard jury instructions already address the concept of mercy by informing the jurors that the law neither compels nor requires them to sentence a defendant to death even when the jurors find that the sufficient aggravators outweigh the mitigators.

WHEREFORE, the State of Florida respectfully requests that this Honorable Court deny the Defendant's Motion.

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IN THE CIRCUIT COURT, FOURTH
JUDICIAL CIRCUIT, IN AND FOR
DUVAL COUNTY, FLORIDA

CASE NO.: 16-2013-CF-05781-AXXX

DIVISION: CR-D

STATE OF FLORIDA

v.

DONALD J. SMITH,
Defendant.
_____/

ORDER GRANTING DEFENDANT'S MOTION TO SHOW PHOTOGRAPH OF THE UNDERAGE VICTIM DURING JURY SELECTION

This cause comes before this Court on Defendant's "Motion to Request the Defense be Permitted to Show Photograph of the Victim During Jury Selection," filed on January 2, 2018.

This Court heard argument on the above-captioned motion on January 22, 2018. At the hearing, defense counsel and the State represented that they had agreed to use a photograph of the underage victim while she was alive during jury selection. Defense counsel has previously advised this Court that they wish to show a picture of the underage victim to impress upon prospective jurors the emotional toll they will experience at trial. Given the parties' agreement and likely inability of certain prospective jurors to handle the emotional rigors of this particular trial, this Court finds it appropriate to allow Defendant to show prospective jurors the agreed upon photograph of the underage victim.

FILED
FEB 0 1 2018
RONNIE W. FUSSELL
CLERK CIRCUIT COURT

Accordingly, it is **ORDERED** that Defendant's "Motion to Request the Defense be Permitted to Show Photograph of the Victim During Jury Selection," filed on January 2, 2018, is **GRANTED** as to the single picture that was agreed upon by defense counsel and the State.

DONE AND ORDERED in Jacksonville, Duval County, Florida on January 1, 2018.

MALLORY D. COOPER
Circuit Judge

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I do certify that a copy hereof has been furnished to the above-listed parties by United States mail or electronic service on 2/1/2018, 2018.

Deputy Clerk

Case No.: 16-2013-CF-05781-AXXX
/tbc

IN THE CIRCUIT COURT, FOURTH
JUDICIAL CIRCUIT, IN AND FOR
DUVAL COUNTY, FLORIDA

CASE NO.: 16-2013-CF-05781-AXXX

DIVISION: CR-D

STATE OF FLORIDA

v.

DONALD J. SMITH,
Defendant.
_____/

ORDER GRANTING DEFENDANT'S MOTION TO ADOPT ALL PREVIOUSLY FILED MOTIONS BY PRIOR COUNSEL

This cause comes before this Court on Defendant's "Motion to Adopt All Previously Filed Motions by Prior Counsel," filed on January 3, 2018.

This Court heard argument on the above-captioned motion on January 22, 2018. At the hearing, the State represented that it did not object to Defendant's Motion.

Accordingly, it is **ORDERED** that Defendant's "Motion to Adopt All Previously Filed Motions by Prior Counsel," filed on January 3, 2018, is **GRANTED**.

DONE AND ORDERED in Jacksonville, Duval County, Florida on January 1, 2018.

MALLORY D. COOPER
Circuit Judge

FILED
FEB 0 1 2018
CLERK CIRCUIT COURT

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Case No.: 16-2013-CF-05781-AXXX
/tbc

FILED
FEB 06 2018
D. W. Jones
CLERK CIRCUIT COURT

IN THE CIRCUIT COURT, FOURTH JUDICIAL CIRCUIT, IN AND FOR DUVAL COUNTY, FLORIDA.

CASE NO.: 16-13-CF-005781-AXXX-MA
DIVISION: D

STATE OF FLORIDA,

v.

DONALD J. SMITH,
Defendant.
_____/

ORDER DIRECTING THAT JURORS' IDENTITIES BE KEPT CONFIDENTIAL

The State and Defendant requested, stipulated and agreed that in the above-styled cause any and all information that in anyway identifies any potential or ultimately seated juror, including any alternate juror, be protected from disclosure. This protection includes any photographs, video, drawing, sketch, or other image of any juror as well as any recording of their voices as they answer questions during voir dire. This Order shall protect a juror's name, address, date of birth, specific place of employment or any other aspect of their identity that may lead to the revealing of their identity. This Order also includes any attempt to capture images of jurors as they travel to and from the Courtroom to include protecting the jurors means of transportation and any description of their vehicles or tag numbers.

The State and Defendant further request, stipulate and agree that this Court protect any identifying information such as name, address, date of birth, specific place of employment, or any other aspect of their identity that may lead to the revealing of their identity.

The State and Defendant lastly request, stipulate and agree that the voir dire panel and the ultimately seated jurors and alternates should be protected from any attempt of

any person to follow, surveil, photograph, record, or in any way capture images as those jurors travel to and from the courtroom to include protecting the jurors' means of transportation and any description of their vehicles or tag numbers from disclosure.

The State and Defense in support of this request cite Sunbeam Television Corporation v. State, 723 So.2nd 275 (Fla. 3rd DCA 1998) and Florida Rule of Judicial Administration 2.450

The stated purpose of these requests, stipulations and agreements in this high publicity case is to protect the jurors from any prejudicial outside influences. Sheppard v. Maxwell, 284 U.S. 333 (1966). (Administrative Order No.: 2013-08 addresses this issue and said Order has been implemented in this case.)

As set forth herein, the State and Defendant's request, stipulation and agreement shall be granted. The jurors' identities and addresses will be known to the attorneys of record so that they may properly inquire during voir dire. However, the participants shall refer to those jurors by the juror number assigned to them by the Clerk of the Court and shall also not disclose the jurors' current residential addresses or places of employment. This is to be done in order to protect the prospective jurors from harassment and pressure from the public at large. Sunbeam Television Corp. V. State, 723 So.2d 275, 279 (Fla. 3rd DCA 1998). The jurors will be properly instructed that the anonymity is for their protection from media harassment and shall not impact the Defendant's presumption of innocence. See State v. Bowles, 531 N.W. 521, 531 (Minn. 1995). This order is not intended to prevent the media entities from reporting on or disclosing information disclosed during voir dire. Sunbeam Television Corp., 723 So.2d at 281.

Based upon the foregoing, it is

ORDERED AND ADJUDGED that:

1. The State and Defendant's request, stipulation and agreement to keep juror identity confidential is hereby **GRANTED**.

2. Such prohibition shall remain in full force and effect until 60 days after the conclusion of this case, said conclusion to be determined by the Court.

3. The Clerk of the Court shall not release to the public the names of the jurors called to be part of the venire in this case.

4. The parties shall not identify the jurors by their names during voir dire. The jurors shall only be identified by the parties by their given juror numbers.

6. Prospective jurors may not be photographed or identified during the course of jury selection. Such prohibition shall be lifted upon their release from jury service by the Court.

7. Sitting jurors shall not be identified or photographed during the course of the trial.

DONE AND ORDERED in Chambers at Jacksonville, Duval County, Florida on this 6 day of February, 2018. Nunc pro tunc January 5, 2018

MALLORY D. COOPER
Circuit Court Judge

Copies to:

Melissa Nelson, State Attorney
Mark Caliel, Assistant State Attorney
Office of the State Attorney

Julie Schlax, Esq.
Attorney for Defendant

Chuck Fletcher, Esq.
Attorney for Defendant

IN THE CIRCUIT COURT, FOURTH
JUDICIAL CIRCUIT, IN AND FOR
DUVAL COUNTY, FLORIDA

CASE NO: 16-2013-CF-5781-AXXX
DIVISION: CR-D

STATE OF FLORIDA

VS.

DONALD SMITH
_____/

ORDER GRANTING MOTION TO INCUR COSTS OF TRANSCRIPTS

THIS CAUSE having come before the court upon the Defendant's Motion, and the Court having been fully advised in the premises, and finding that the transcripts are both necessary and essential to the defense in this cause, it is

ORDERED AND ADJUDGED as follows:

Julie Agent Schlax, Esquire is hereby authorized to incur the reasonable costs of obtaining the transcripts of the following proceedings/witnesses:

Date of Proceeding	**Type of Proceeding**	**Name of Witness**
January 23, 2018	Deposition	Bradley Calhoun

IT IS FURTHER ORDERED AND ADJUDGED that the Justice Administrative Commission shall pay these reasonable costs upon submission of the proper invoice(s) and that the expedited rate shall be $5.50 per page transcribed for depositions, and $0.50 per page for copies of transcriptions.

DONE AND ORDERED at the Duval County Courthouse, Jacksonville, Florida on this 6 day of ~~January~~ February, 2018.

Circuit Judge

Copies to:
Julie Agent Schlax, Esquire
Justice Administrative Commission

FILED 02/06/18 10:30 AM OFFICIAL RECORDS RUSSELL

IN THE CIRCUIT COURT, FOURTH JUDICIAL CIRCUIT, IN AND FOR DUVAL COUNTY, FLORIDA

CASE: 16-2013-CF-005781-AXXX-MA

DIVISION: CR-D (Circuit)

STATE OF FLORIDA

vs.

DONALD JAMES SMITH, DEFENDANT

Amended
ORDER

THIS CAUSE COMING ON BEFORE THE COURT UPON THE ☒DEFENDANT'S ☐STATE'S

MOTION TO PROHIBIT ANY REFERENCE TO THE JURY'S ROLE AT THE PENALTY PHASE AS BEING "ADVISORY" OR TO THE JURY'S PENALTY VERDICT AS BEING A "RECOMMENDATION"

FILED HEREIN ON THE 10th DAY OF December, 2013 AND THE COURT HAVING HEARD ARGUMENTS OF THE STATE'S ATTORNEY AND OF COUNSEL FOR DEFENSE, AND BEING FULLY ADVISED IN THE PREMISES, IT IS THEREUPON

ORDERED AND ADJUDGED THAT THE AFORESAID MOTION SHALL BE AND THE SAME IS HEREBY:

GRANTED pursuant to change in Florida law.

DONE AND ORDERED IN OPEN COURT AT JACKSONVILLE, DUVAL COUNTY, FLORIDA, THIS 8th DAY OF FEBRUARY, 2018.

MALLORY D. COOPER
Circuit Judge

FILED
FEB 08 2018
RONALD W. DAMELL
CLERK CIRCUIT COURT

IN THE CIRCUIT COURT, FOURTH JUDICIAL CIRCUIT, IN AND FOR DUVAL COUNTY, FLORIDA.

CASE NO.: 16 2013 CF 005781 AXXX MA

DIVISION: CR-D

STATE OF FLORIDA

VS.

DONALD JAMES SMITH

MOTION TO PROHIBIT ANY REFERENCE TO THE JURY'S ROLE AT THE PENALTY PHASE AS BEING "ADVISORY" OR TO THE JURY'S PENALTY VERDICT AS BEING A "RECOMMENDATION"

Defendant, by and through the undersigned attorney, the Public Defender for the Fourth Judicial Circuit of Florida, hereby moves this Honorable Court to prohibit any reference to the jury's role as being "advisory" or to the jury's penalty verdict as being a "recommendation". As grounds, he would state:

1. The current version of the Standard Jury Instructions contain numerous references to the jury's role at penalty as being "advisory" or to the jury's penalty verdict as being a "recommendation". These references are incorrect and in violation of the Florida and United States Constitution. They diminish the jury's sense of responsibility for the sentence in violation of Article I, Sections 2, 9, 16, and 17, of the Florida Constitution and the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution. Caldwell v. Mississippi, 472 U.S. 320 (1985).

2. In Ring v. Arizona, 536 U.S.584 (2002), the Court extended the rule of Apprendi v. New Jersey, 530 U.S. 466 (2000), to capital cases. In Bottoson v. Moore, 833 So. 2d 693 (Fla. 2002), the Florida Supreme Court seemed to reject a challenge to the constitutionality of Florida's capital sentencing statute. However, four members of the Court (a majority), Justices Anstead, Shaw, Pariente, and Lewis, wrote concurring opinions in which they advocated prospective changes to Florida's Standard Jury Instructions. All four of the concurring opinions expressed concern about the issue of whether the jury's role was truly

advisory in light of Ring. 833 So.2d at 703-733. Additionally, Justice Quince expressed concern as to whether the jury override procedure is constitutional, but stated that this issue was not before the Court in Bottoson. 833 So.2d at 701-702. Justice Lewis most clearly expressed the need for prospective revisions of the jury instructions in light of Ring. He stated:

> I write separately to express my view that in light of the dictates of Ring v. Arizona, it necessarily follows that Florida's standard penalty phase jury instructions may no longer be valid and are certainly subject to further analysis under the United States Supreme Court's Caldwell v. Mississippi, 472 U.S. 320, 105 S.Ct. 2633, 86 L. Ed. 2d 231 (1985), holding. In Caldwell, the Supreme Court concluded "it is constitutionally impermissible to rest a death sentence on a determination made by a sentencer who has been led to believe that the responsibility for determining the appropriateness of the defendant's death rests elsewhere." *Id.* at 328-29, 105 S.Ct. 2633. There, the Court deemed prosecutorial statements to a jury unconstitutional because the State "sought to minimize the jury's sense of responsibility for determining the appropriateness of death." *Id.* at 341, 105 S.Ct. 2633. Following the decision in *Caldwell*, this Court evaluated the constitutionality of Florida's standard jury instructions. *See* Combs v. State, 525 So.2d 853 (Fla. 1988), (rejecting the petitioner's argument that the standard jury instruction was unconstitutional); *see also* Cook v. State, 792 So.2d 1197, 1201 (Fla. 2001). (same)
>
> I recognize that this Court has held that Florida's standard jury instructions are constitutional under Caldwell. *See* Combs, 525 So. 2d 853. However, in light of the decision in Ring v. Arizona, it is necessary to reevaluate both the validity and, if valid, the wording of these jury instructions. The United States Supreme Court has defined the reach of Caldwell by stating that "Caldwell is relevant only to certain types of comment--those that mislead the jury as to its role in the sentencing process in a way that allows the jury to feel less responsible than it should for the sentencing decision." Darden v. Wainwright, 477 U.S. 168, 183 n. 15, 106 S.Ct. 2464, 91 L. Ed. 2d 144 (1986). In Ring, the high Court made the jury's role in capital sentencing absolutely clear--the jury must find the aggravating factors. *See* Ring, 536 U.S. at 609, 122 S.Ct. at 2443. As the Court in Ring stated, "[T]he right to trial by jury...would be

> senselessly diminished if it encompassed the fact-finding necessary to increase a defendant's sentence by two years, but not the fact-finding necessary to put him to death." *Id.* Clearly, under Ring, the jury plays a vital role in the determination of a capital defendant's sentence through the determination of aggravating factors. However, under Florida's standard penalty phase jury instructions, the role of the jury is minimized, rather than emphasized, as is the necessary implication to be drawn from Ring. Under Florida's standard penalty phase jury instructions, the jury is told, even before evidence is presented in the penalty phase, that its sentence is only advisory and the judge is the final decision-maker. *See* Fla. Std. Jury Instr. (Crim.) 7.11. The words "advise" and "advisory" are used more than ten times in the instructions, while the members of the jury are only told once that they must find the aggravating factors beyond a reasonable doubt. *See id.* The jury is also instructed several times that its sentence is simply a recommendation. *See id.* By highlighting the jury's advisory role, and minimizing its duty under *Ring* to find the aggravating factors, Florida' standard penalty phase jury instructions must certainly be reevaluated under the Supreme Court's Caldwell v. Mississippi decision.
>
> Just as the high Court stated in Caldwell, Florida's standard jury instructions "minimize the jury's sense of responsibility for determining the appropriateness of death." Caldwell, 472 U.S. at 341, 105 S.Ct. 2633. *Ring* clearly requires that the jury play a vital role in determining the factors upon which the sentencing will depend, and Florida's jury instructions tend to diminish that role and could lead the jury members to believe they are less responsible for a death sentence than they actually are. *Ring* has now emphasized the jury's role in this process and may compel Florida's standard penalty phase jury instructions to do the same.

833 So. 2d at 731-733.

3. Justice Lewis is correct in his assertions that the continual references to the jury's penalty being "advisory" and a "recommendation" must be discontinued in light of *Ring.*

4. The denial of this motion would deny Defendant due process of law pursuant to Article I, Sections 2, 9, 16 and 17, of the Florida Constitution and the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution.

WHEREFORE, Defendant hereby moves this Honorable Court to issue its order prohibiting references to the jury's penalty verdict as "advisory" or a "recommendation."

I HEREBY CERTIFY that a true and correct copy of the foregoing motion has been furnished to the Office of the State Attorney, by hand and/or electronically, this 10 day of December, 2013.

Respectfully submitted,

MATT SHIRK
PUBLIC DEFENDER

BY: _____
Fred C. Gazaleh, #353787
Assistant Public Defender

/slc

(CAP059)

IN THE CIRCUIT COURT, FOURTH JUDICIAL CIRCUIT, IN AND FOR DUVAL COUNTY, FLORIDA

CASE: 16-2013-CF-005781-AXXX-MA

DIVISION: CR-D (Circuit)

STATE OF FLORIDA

vs.

DONALD JAMES SMITH, DEFENDANT

Amended
ORDER

THIS CAUSE COMING ON BEFORE THE COURT UPON THE ☒DEFENDANT'S ☐STATE'S

MOTION TO PROHIBIT MISLEADING REFERENCES TO THE ADVISORY ROLE OF THE JURY AT SENTENCING

FILED HEREIN ON THE 10TH DAY OF DECEMBER , 2013 AND THE COURT HAVING HEARD ARGUMENTS OF THE STATE'S ATTORNEY AND OF COUNSEL FOR DEFENSE, AND BEING FULLY ADVISED IN THE PREMISES, IT IS THEREUPON

ORDERED AND ADJUDGED THAT THE AFORESAID MOTION SHALL BE AND THE SAME IS HEREBY:

GRANTED pursuant to change in Florida law.

DONE AND ORDERED IN OPEN COURT AT JACKSONVILLE, DUVAL COUNTY, FLORIDA, THIS 8TH DAY OF FEBRUARY, 2018.

MALLORY D. COOPER
Circuit Judge

FILED
FEB 08 2018
RONALD W. DAMSELL
CLERK CIRCUIT COURT

IN THE CIRCUIT COURT, FOURTH JUDICIAL CIRCUIT, IN AND FOR DUVAL COUNTY, FLORIDA.

CASE NO.: 16 2013 CF 005781 AXXX MA

DIVISION: CR-D

STATE OF FLORIDA

VS.

DONALD JAMES SMITH

MOTION TO PROHIBIT MISLEADING REFERENCES TO THE ADVISORY ROLE OF THE JURY AT SENTENCING

Defendant respectfully requests this Honorable Court to prohibit misleading references by the State to the advisory role of the jury in sentencing. As grounds, Defendant would state:

1. The United States Supreme Court has stated:

> "It is constitutionally impermissible to rest a death sentence on a determination made by a sentencer who has been led to believe that the responsibility for determining the appropriateness of the defendant's death rests elsewhere."

Caldwell v. Mississippi, 472 U.S. 320, 105 S.Ct. 2633, 2639 (1985).

2. The Eleventh Circuit Court of Appeals held that the *Caldwell* rationale applies to Florida's sentencing scheme. Adams v. Wainwright, 804 F.2d 1526, 1529-1530 (11th Cir. 1986); *reh. den. sub. nom.* Adams v. Dugger, 816 F.2d 1493 (11th Cir. 1987). The Court in Adams granted a petition for writ of habeas corpus, despite the lack of objection. 804 F.2d at 1530-1531.

3. References to the advisory role of the jury would deny Defendant due process of law and a fair trial pursuant to Article I, Sections 9, 16, and 17, of the Florida Constitution and the Fifth, Eighth and Fourteenth Amendment to the United States Constitution, unless such references are accompanied by appropriate explanations of the seriousness of the jury's role and appropriate explanations of the great weight that the court must give their recommendation. If such explanations are not given, the jury is more likely to recommend death. Adams v. Wainwright at 1530.

4. Defendant therefore requests that the Court require that each reference by the prosecutor to the jury's advisory role be accompanied by a statement that the law requires the judge to give great weight to the jury's recommendation and that the judge may reject the recommendation only if the facts are so clear and convincing that virtually no reasonable person could differ. See Mann v. Dugger, 817 F.2d 1471, 1482 (11th Cir. 1987).

WHEREFORE, the defendant respectfully requests this Honorable Court to grant this motion.

I HEREBY CERTIFY that a copy of the above and foregoing Motion has been furnished to the Office of the State Attorney, by hand and/or electronically, this 10 day of December, 2013.

Respectfully submitted,

MATT SHIRK
PUBLIC DEFENDER

BY: _____
Fred O. Gazaleh, #353787
Assistant Public Defender

/slc

(CAP060)

IN THE CIRCUIT COURT, FOURTH JUDICIAL CIRCUIT, IN AND FOR DUVAL COUNTY, FLORIDA.

CLERK'S EXHIBIT MEMORANDUM

DIVISION: CR-D (Circuit)
CASE: 16-2013-CF-005781-AXXX-MA

STATE OF FLORIDA
vs.
DONALD JAMES SMITH

Ex. No	Courts	Ex. No	Defendant
1	Composite - Instructions to jurors for questionnaire and blank copy of questionnaire		(A) - Photo of victim (Entered as ID only)
2	Composite - Juror Questionnaires from jurors excused on 2/5/18		
3	DVD of jury qualification from 2/5/18 with Judge Whittington		
4	Composite - Juror Questionnaires (excluding those entered as exhibit 2)		

FILED
FEB 09 2018
CLERK CIRCUIT COURT

Date turned in: 2/9/18 Trial Clerk:

Date received: 2/9/18 Evidence Clerk:

IN THE CIRCUIT COURT OF THE FOURTH JUDICIAL CIRCUIT, IN AND FOR DUVAL COUNTY, FLORIDA.

CASE NO.: 16-2013-CF-5781 AXXX
DIVISION: CR-D

STATE OF FLORIDA

VS.

DONALD SMITH
_____/

THIRD AMENDED REQUEST FOR JUDICIAL NOTICE

The defendant, Donald Smith, through the undersigned attorney, Julie Agent Schlax, pursuant to Florida Statutes 90.202(6) and 90.203, moves this Honorable Court to take judicial notice of the following judgments and sentences:

16-1977-CF-3161-AXXXMA (Lewd Assault on a Child)

16-1991-CF-11745-AXXXMA (Burglary to a Dwelling and Grand Theft)

16-1992-CF-11193-AXXXMA (Attempted Kidnapping and Showing Obscene Materials to Minors)

16-1998-CF-3466-AXXXMA (Attempted Purchase of Cocaine)

16-1999-CA-1635-AXXXMA (Involuntary Civil Commitment)

16-2003-CF-7080-AXXXMA (Dealing in Stolen Property and False Verification of Ownership)

16-2009-CF-12156-AXXXMA (Attempted Unlawful Impersonation of a Public Employee and Attempted Child Abuse)

The defendant, Donald Smith, through the undersigned attorney, Julie Agent Schlax, pursuant to Florida Statutes 90.202(6) and 90.203, moves this Honorable Court to take judicial

notice of the statutory maximum sentence for each felony offense contained within the above-cited judgements.

WHEREFORE, the undersigned attorney respectfully requests this Honorable Court to grant this Motion and take judicial notice of the above judgments and sentences and so instruct the jury if necessary.

Respectfully submitted, this 9th day of February, 2018.

ESPENSHIP, SCHLAX & ALBEE, LLC

/s/ Julie Agent Schlax

Julie Agent Schlax, Esquire
Florida Bar No.: 093040
200 E. Forsyth Street
Jacksonville, Florida 32202
Tel: (904) 674-0717
Fax: (904) 674-0737
Attorney for Defendant

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the above and foregoing has been furnished to the Office of the State Attorney, by electronic mail, this 9th day of February, 2018.

/s/ Julie Agent Schlax

Julie Agent Schlax, Esquire

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IN THE CIRCUIT COURT OF THE FOURTH JUDICIAL CIRCUIT, IN AND FOR DUVAL COUNTY, FLORIDA

CASE NO.: 162013CF5781AXXXMA
DIVISION: CR-D

STATE OF FLORIDA

vs.

DONALD JAMES SMITH

STIPULATION

The State and the Defense hereby stipulate that the following facts are true, and you, the jury, should accept said facts proven beyond a reasonable doubt :

The deceased person examined by Dr. Valerie Rao in Medical Examiner Number 13-1034 was identified as Cherish Perrywinkle.

Defendant

Attorney for the State

Attorney for the Defense

2/12/18
Date

FILED
FEB 13 2018
CLERK CIRCUIT COURT

DonaldSmithVictimIDStip.wpd

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IN THE CIRCUIT COURT OF THE FOURTH JUDICIAL CIRCUIT, IN AND FOR DUVAL COUNTY, FLORIDA

CASE NO.: 162013CF005781AXXXMA

DIVISION: CRD

STATE OF FLORIDA

vs.

DONALD JAMES SMITH

VERDICT I

X We, the jury, find the Defendant guilty of First Degree Murder, as charged in the indictment.

If you find the Defendant guilty of Murder in the First Degree you must check one or both of the following findings:

X We further find the killing was premeditated.

X We further find the killing was done during the commission or attempted commission of a felony, to-wit: Kidnapping or Sexual Battery.

____ We, the jury, find the Defendant guilty of Second Degree Murder, a lesser-included offense.

____ We, the jury, find the Defendant guilty of Manslaughter, a lesser included offense.

____ We, the jury, find the Defendant, not guilty.

SO SAY WE ALL.
DONE at Jacksonville, Duval County, Florida.

[redacted]
FOREPERSON

FILED
FEB 14 2018
CLERK CIRCUIT COURT

2.14.18
DATE

IN THE CIRCUIT COURT OF THE FOURTH JUDICIAL CIRCUIT, IN AND FOR DUVAL COUNTY, FLORIDA

CASE NO.: 162013CF005781AXXXMA

DIVISION: CRD

STATE OF FLORIDA

vs.

DONALD JAMES SMITH

VERDICT II

X We, the jury, find the Defendant guilty of Kidnapping, as charged in the indictment.

A, If you find the Defendant guilty of this offense, you must choose one of the following findings:

X We find the victim was under 13 years of age at the time of the offense.

____ We find the victim was not under 13 years of age at the time of the offense.

B. If you find the Defendant guilty of this offense, you must choose one of the following findings:

X We find the Defendant committed a sexual battery on the victim during the commission of the offense.

____ We find the Defendant did not commit a sexual battery on the victim during the commission of the offense.

FILED

FEB 14 2018

CLERK CIRCUIT COURT

_____ We, the jury, find the Defendant guilty of False Imprisonment, a lesser-included offense.

A, If you find the Defendant guilty of this offense, you must choose one of the following findings:

_____ We find the victim was under 13 years of age at the time of the offense.

_____ We find the victim was not under 13 years of age at the time of the offense.

B. If you find the Defendant guilty of this offense, you must choose one of the following findings:

_____ We find the Defendant committed a sexual battery on the victim during the commission of the offense.

_____ We find the Defendant did not commit a sexual battery on the victim during the commission of the offense.

_____ We, the jury, find the Defendant, not guilty.

SO SAY WE ALL.

DONE at Jacksonville, Duval County, Florida.

[redacted]

FOREPERSON

2.14.18

DATE

IN THE CIRCUIT COURT OF THE FOURTH JUDICIAL CIRCUIT, IN AND FOR DUVAL COUNTY, FLORIDA

CASE NO.: 162013CF005781AXXXMA

DIVISION: CRD

STATE OF FLORIDA

vs.

DONALD JAMES SMITH

VERDICT III

X We, the jury, find the Defendant guilty of Sexual Battery upon a Person Less Than 12 Years of Age, as charged in the indictment.

____ We, the jury, find the Defendant guilty of Battery, a lesser-included offense.

____ We, the jury, find the Defendant, not guilty.

SO SAY WE ALL.
DONE at Jacksonville, Duval County, Florida.

[redacted]
FOREPERSON

2.14.18
DATE

FILED
FEB 14 2018
RONNIE W. FUSSELL
CLERK CIRCUIT COURT

IN THE CIRCUIT COURT OF THE FOURTH JUDICIAL CIRCUIT, IN AND FOR DUVAL COUNTY, FLORIDA

CASE NO.: 162013CF005781AXXXMA

DIVISION: CRD

STATE OF FLORIDA

vs.

DONALD JAMES SMITH

Instructions read to Jury by the Honorable Mallory Cooper, Circuit Judge.

DATED at Jacksonville, Florida on February 14, 2018.

CIRCUIT JUDGE

FILED

FEB 14 2018

CLERK CIRCUIT COURT

Members of the Jury, I thank you for your attention during this trial.

Please pay attention to the instructions I am about to give you.

STATEMENT OF CHARGE

DONALD JAMES SMITH, the Defendant in this case, has been accused of the crimes of Murder in the First Degree, Kidnapping a Child under the Age of 13 Years and Sexual Battery on a Child Less Than 12 Years Old.

INTRODUCTION TO HOMICIDE

In this case DONALD JAMES SMITH is accused of Murder in the First Degree.

Murder in the First Degree includes the lesser crimes of Murder in the Second Degree, and Manslaughter, all of which are unlawful.

A killing that is excusable or was committed by the use of justifiable deadly force is lawful.

If you find Cherish Perrywinkle was killed by DONALD JAMES SMITH, you will then consider the circumstances surrounding the killing in deciding if the killing was Murder in the First Degree or was Murder in the Second Degree or Manslaughter, or whether the killing was excusable or resulted from justifiable use of deadly force.

JUSTIFIABLE HOMICIDE

The killing of a human being is justifiable homicide and lawful if necessarily done while resisting an attempt to murder or commit a felony upon the defendant, or to commit a felony in any dwelling house in which the defendant was at the time of the killing.

EXCUSABLE HOMICIDE

The killing of a human being is excusable, and therefore lawful, under any one of the following three circumstances:

1. When the killing is committed by accident and misfortune in doing any lawful act by lawful means with usual ordinary caution and without any unlawful intent, or

2. When the killing occurs by accident and misfortune in the heat of passion, upon any sudden and sufficient provocation, or

3. When the killing is committed by accident and misfortune resulting from a sudden combat, if a dangerous weapon is not used and the killing is not done in a cruel or unusual manner.

"Dangerous weapon" is any weapon that, taking into account the manner in which it is used, is likely to produce death or great bodily harm.

I now instruct you on the circumstances that must be proved before DONALD JAMES SMITH may be found guilty of Murder in the First Degree or any lesser included crime.

MURDER — FIRST DEGREE

There are two ways in which a person may be convicted of First Degree Murder. One is known as Premeditated Murder and the other is known as Felony Murder.

As to count I, to prove the crime of First Degree Premeditated Murder, the State must prove the following three elements beyond a reasonable doubt:

1. Cherish Perrywinkle is dead.

2. The death was caused by the criminal act of DONALD JAMES SMITH.

3. There was a premeditated killing of Cherish Perrywinkle.

An "act" includes a series of related actions arising from and performed pursuant to a single design or purpose.

"Killing with premeditation" is killing after consciously deciding to do so. The decision must be present in the mind at the time of the killing. The law does not fix the exact period of time that must pass between the formation of the premeditated intent to kill and the killing. The period of time must be long enough to allow reflection by the defendant. The premeditated intent to kill must be formed before the killing.

The question of premeditation is a question of fact to be determined by you from the evidence. It will be sufficient proof of premeditation if the circumstances of the killing and the conduct of the accused convince you beyond a reasonable doubt of the existence of premeditation at the time of the killing.

FELONY MURDER — FIRST DEGREE

To prove the crime of First Degree Felony Murder, the State must prove the following three elements beyond a reasonable doubt:

1. Cherish Perrywinkle is dead

2. While engaged in the commission of a Kidnapping or Sexual Battery DONALD JAMES SMITH caused the death of Cherish Perrywinkle .

3. DONALD JAMES SMITH was the person who actually killed Cherish Perrywinkle.

In order to convict the Defendant of First Degree Felony Murder, it is not necessary for the State to prove that the Defendant had a premeditated design or intent to kill.

WHEN THERE ARE LESSER INCLUDED CRIMES OR ATTEMPTS

In considering the evidence, you should consider the possibility that although the evidence may not convince you that the defendant committed the main crime of which he is accused, there may be evidence that he committed other acts that would constitute a lesser included crime. Therefore, if you decide that the main accusation has not been proven beyond a reasonable doubt, you will next need to decide if the defendant is guilty of any lesser included crime. The lesser crimes indicated in the definition of Murder in the First Degree are:

Murder in the Second Degree

Manslaughter

MURDER — SECOND DEGREE

As to count I to prove the lesser included crime of Second Degree Murder, the State must prove the following three elements beyond a reasonable doubt:

1. Cherish Perrywinkle is dead.

2. The death was caused by the criminal act of DONALD JAMES SMITH.

3. There was an unlawful killing of Cherish Perrywinkle by an act imminently dangerous to another and demonstrating a depraved mind without regard for human life.

An "act" includes a series of related actions arising from and performed pursuant to a single design or purpose.

An act is "imminently dangerous to another and demonstrating a depraved mind" if it is an act or series of acts that:

1. a person of ordinary judgment would know is reasonably certain to kill or do serious bodily injury to another, and
2. is done from ill will, hatred, spite, or an evil intent, and

3. is of such a nature that the act itself indicates an indifference to human life.

In order to convict of Second Degree Murder, it is not necessary for the State to prove the Defendant had an intent to cause death.

MANSLAUGHTER

As to Count I to prove the lesser included crime of Manslaughter, the State must prove the following two elements beyond a reasonable doubt:

1. Cherish Perrywinkle is dead.

2. DONALD JAMES SMITH intentionally committed an act or acts that caused the death of Cherish Perrywinkle.

The Defendant cannot be guilty of Manslaughter by committing a merely negligent act or if the killing was either justifiable or excusable homicide, as I have previously instructed you.

Each of us has a duty to act reasonably toward others. If there is a violation of that duty, without any conscious intention to harm, that violation is negligence.

In order to convict of Manslaughter by Act, it is not necessary for the State to prove that the Defendant had an intent to cause death, only an intent to commit an act that was not merely negligent, justified, or excusable and which caused death.

KIDNAPPING

As to Count II, to prove the crime of Kidnapping, the State must prove the following three elements beyond a reasonable doubt:

1. DONALD JAMES SMITH forcibly, secretly, or by threat confined, abducted, or imprisoned Cherish Perrywinkle against her will.

2. DONALD JAMES SMITH had no lawful authority to do so.

3. DONALD JAMES SMITH acted with intent to: commit or facilitate the commission of a Sexual Battery.

In order to be Kidnapping, the confinement, abduction, or imprisonment

a. must not be slight, inconsequential, or merely incidental to the Sexual Battery;

b. must not be of the kind inherent in the nature of the Sexual Battery; and

c. must have some significance independent of the Sexual Battery in that it makes the Sexual Battery substantially easier of commission or substantially lessens the risk of detection.

"Secretly" means the Defendant intended to isolate or insulate Cherish Perrywinkle from meaningful contact or meaningful communication with the public.

Confinement of a child under the age of 13 is against the child's will if such confinement is without the consent of the child's parent or legal guardian.

If you find the Defendant guilty of Kidnapping, you must also determine whether the State has proved the following aggravating circumstances beyond a reasonable doubt:

1. At the time of the Kidnapping, Cherish Perrywinkle was under 13 years of age;

   and

2. In the course of committing the Kidnapping, DONALD JAMES SMITH committed a Sexual Battery against Cherish Perrywinkle

WHEN THERE ARE LESSER INCLUDED CRIMES OR ATTEMPTS

In considering the evidence, you should consider the possibility that although the evidence may not convince you that the defendant committed the main crime of which he is accused, there may be evidence that he committed other acts that would constitute a lesser included crime. Therefore, if you decide that the main accusation has not been proven beyond a reasonable doubt, you will next need to decide if the Defendant is guilty of any lesser included crime. The lesser crime indicated in the definition of Kidnapping a Child under the Age of 13 Years is:

False Imprisonment

FALSE IMPRISONMENT

As to Count II, to prove the lesser included crime of False Imprisonment, the State must prove the following two elements beyond a reasonable doubt:

1. DONALD JAMES SMITH forcibly, secretly or by threat confined, abducted, imprisoned, or restrained Cherish Perrywinkle against her will.

2. DONALD JAMES SMITH had no lawful authority to do so.

"Secretly" means the defendant intended to isolate or insulate Cherish Perrywinkle from meaningful contact or meaningful communication with the public.

Confinement of a child under the age of 13 is against the child's will if such confinement is without the consent of the child's parent or legal guardian.

If you find the defendant guilty of False Imprisonment, you must also determine whether the State has proved the following aggravating circumstances beyond a reasonable doubt:

1. At the time of the False Imprisonment, Cherish Perrywinkle was under 13 years of age;

   and

2. In the course of committing the False Imprisonment, DONALD JAMES SMITH committed a Sexual Battery against Cherish Perrywinkle.

SEXUAL BATTERY —
VICTIM LESS THAN 12 YEARS OF AGE

As to Count III, to prove the crime of Sexual Battery upon a Person Less Than 12 Years of Age, the State must prove the following three elements beyond a reasonable doubt:

1. DONALD JAMES SMITH injured the sexual organ of Cherish Perrywinkle in an attempt to commit an act upon Cherish Perrywinkle in which the sexual organ of DONALD JAMES SMITH would have penetrated or would have had union with the anus, vagina, or mouth of Cherish Perrywinkle.

2. Cherish Perrywinkle was less than 12 years of age.

3. DONALD JAMES SMITH was 18 years of age or older at the time of the battery

However, any act done for bona fide medical purposes is not a sexual battery.

"Union" means contact.

WHEN THERE ARE LESSER INCLUDED CRIMES OR ATTEMPTS

In considering the evidence, you should consider the possibility that although the evidence may not convince you that the defendant committed the main crime of which he is accused, there may be evidence that he committed other acts that would constitute a lesser included crime. Therefore, if you decide that the main accusation has not been proven beyond a reasonable doubt, you will next need to decide if the Defendant is guilty of any lesser included crime. The lesser crime indicated in the definition of Sexual Battery Victim Less than 12 Years of Age is :

Battery

BATTERY

As to Count III, to prove the lesser included crime of Battery, the State must prove the following element beyond a reasonable doubt:

DONALD JAMES SMITH intentionally touched or struck Cherish Perrywinkle against her will.

DATE OF CRIME

The State must prove that the crimes were committed on or between June 21, 2013 and June 22, 2013.

VENUE

It must be proved, only to a reasonable certainty, that the alleged crimes were committed in Duval County.

PLEA OF NOT GUILTY; REASONABLE DOUBT; AND BURDEN OF PROOF

The Defendant has entered a plea of not guilty. This means you must presume or believe the Defendant is innocent. The presumption stays with the Defendant as to each material allegation in the Indictment through each stage of the trial unless it has been overcome by the evidence to the exclusion of and beyond a reasonable doubt.

To overcome the Defendant's presumption of innocence the State has the burden of proving the crime with which the Defendant is charged was committed and the Defendant is the person who committed the crime.

The Defendant is not required to present evidence or prove anything.

Whenever the words "reasonable doubt" are used you must consider the following:

A reasonable doubt is not a mere possible doubt, a speculative, imaginary or forced doubt. Such a doubt must not influence you to return a verdict of not guilty if you have an abiding conviction of guilt. On the other hand, if, after carefully considering, comparing and weighing all the evidence, there is not an abiding conviction of guilt, or, if, having a conviction, it is one which is not stable but one which wavers and vacillates, then the charge is not proved beyond every reasonable doubt and you must find the Defendant not guilty because the doubt is reasonable.

It is to the evidence introduced in this trial, and to it alone, that you are to look for that proof.

A reasonable doubt as to the guilt of the defendant may arise from the evidence, conflict in the evidence or the lack of evidence.

If you have a reasonable doubt, you should find the Defendant not guilty. If you have no reasonable doubt, you should find the Defendant guilty.

WEIGHING THE EVIDENCE

It is up to you to decide what evidence is reliable. You should use your common sense in deciding which is the best evidence, and which evidence should not be relied upon in considering your verdict. You may find some of the evidence not reliable, or less reliable than other evidence.

You should consider how the witnesses acted, as well as what they said. Some things you should consider are:

1. Did the witness seem to have an opportunity to see and know the things about which the witness testified?

2. Did the witness seem to have an accurate memory?

3. Was the witness honest and straightforward in answering the attorneys' questions?

4. Did the witness have some interest in how the case should be decided?

5. Does the witness' testimony agree with the other testimony and other evidence in the case?

6. Had any pressure or threat been used against the witness that affected the truth of the witness' testimony?

Whether the State has met its burden of proof does not depend upon the number of witnesses it has called or upon the number of exhibits it has offered, but instead upon the nature and quality of the evidence presented.

The fact that a witness is employed in law enforcement does not mean that his or her testimony deserves more or less consideration than that of any other witness.

Expert witnesses are like other witnesses, with one exception—the law permits an expert witness to give his or her opinion. However, an expert's opinion is reliable only when given on a subject about which you believe him or her to be an expert. Like other witnesses, you may believe or disbelieve all or any part of an expert's testimony.

It is entirely proper for a lawyer to talk to a witness about what testimony the witness would give if called to the courtroom. The witness should not be discredited by talking to a lawyer about his or her testimony.

You may rely upon your own conclusion about the credibility of any witness. A juror may believe or disbelieve all or any part of the evidence or the testimony of any witness.

DEFENDANT NOT TESTIFYING

The Constitution requires the State to prove its accusations against the Defendant. It is not necessary for the defendant to disprove anything. Nor is the Defendant required to prove his innocence. It is up to the State to prove the Defendant's guilt by evidence.

The Defendant exercised a fundamental right by choosing not to be a witness in this case. You must not view this as an admission of guilt or be influenced in any way by his decision. No juror should ever be concerned that the Defendant did or did not take the witness stand to give testimony in the case.

DEFENDANT'S STATEMENTS

A statement claimed to have been made by the Defendant outside of court has been placed before you. Such a statement should always be considered with caution and be weighed with great care to make certain it was freely and voluntarily made.

Therefore, you must determine from the evidence that the Defendant's alleged statement was knowingly, voluntarily and freely made.

In making this determination, you should consider the total circumstances, including but not limited to:

1. Whether, when the Defendant made the statement, he had been threatened in order to get him to make it, and

2. Whether anyone had promised him anything in order to get him to make it.

If you conclude the Defendant's out of court statement was not freely and voluntarily made, you should disregard it.

EYEWITNESS IDENTIFICATION

You have heard testimony of eyewitness identification. In deciding how much weight to give to this testimony, you may consider the various factors mentioned in these instructions concerning credibility of witnesses.

In addition to those factors, in evaluating eyewitness identification testimony, you may also consider:

1. The capacity and opportunity of the eyewitness to observe the offender based upon the length of time for observation and the conditions at the time of observation, including lighting and distance.

2. Whether the identification was the product of the eyewitness's own recollection or was the result of influence or suggestiveness.

3. The circumstances under which the defendant was presented to the eyewitness for identification.

4. Any inconsistent identifications made by the eyewitness.

5. Any instance in which the eyewitness did not make an identification when given the opportunity to do so.

6. The witness's familiarity with the subject identified.

7. Lapses of time between the event and the identification[s].

8. Whether the eyewitness and the offender are of different races or ethnic groups, and whether this may have affected the accuracy of the identification.

9. The totality of circumstances surrounding the eyewitness's identification.

RULES FOR DELIBERATION

These are some general rules that apply to your discussion. You must follow these rules in order to return a lawful verdict:

1. You must follow the law as it is set out in these instructions. If you fail to follow the law, your verdict will be a miscarriage of justice. There is no reason for failing to follow the law in this case. All of us are depending upon you to make a wise and legal decision in this matter.

2. This case must be decided only upon the evidence that you have heard from the testimony of the witnesses and have seen in the form of the exhibits in evidence and these instructions.

3. This case must not be decided for or against anyone because you feel sorry for anyone, or are angry at anyone.

4. Remember, the lawyers are not on trial. Your feelings about them should not influence your decision in this case.

5. Your duty is to determine if the defendant has been proven guilty or not, in accord with the law.

6. Whatever verdict you render must be unanimous, that is, each juror must agree to the same verdict.

7. Your verdict should not be influenced by feelings of prejudice, bias or sympathy. Your verdict must be based on the evidence, and on the law contained in these instructions.

CAUTIONARY INSTRUCTION

Deciding a verdict is exclusively your job. I cannot participate in that decision in any way. Please disregard anything I may have said or done that made you think I preferred one verdict over another.

NOTES

During this trial, I have permitted you to take notes. You will be allowed to take those notes into the jury room during deliberations. You are instructed that your notes are a tool to aid your individual memory. You should not compare your notes with those of other jurors in determining the content of any testimony or in evaluating the importance of any evidence. Notes are for the note taker's personal use in refreshing his or her recollection of the evidence. They are not evidence. Above all, your memory should be your greatest asset in your recollection of the evidence.

VERDICT

You may find the Defendant guilty as charged in the indictment or guilty of such lesser included crimes as the evidence may justify or not guilty.

If you return a verdict of guilty, it should be for the highest offense which has been proven beyond a reasonable doubt. If you find that no offense has been proven beyond a reasonable doubt, then, of course, your verdict must be not guilty.

The verdict must be unanimous, that is, all of you must agree to the same verdict. Only one verdict may be returned as to each crime charged. The verdict must be in writing and for your convenience the necessary verdict forms have been prepared for you. They are as follows:

SINGLE DEFENDANT, MULTIPLE COUNTS

A separate crime is charged in each count of the indictment and although they have been tried together each crime and the evidence applicable to it must be considered separately and a separate verdict returned as to each. A finding of guilty or not guilty as to one crime must not affect your verdict as to the other crimes charged.

VERDICT AND SUBMITTING CASE TO JURY

In just a few moments you will be taken to the jury room by the bailiff. The first thing you should do is choose a foreperson who will preside over your deliberations. The foreperson should see to it that your discussions are carried on in an organized way and that everyone has a fair chance to be heard. It is also the foreperson's job to sign and date the verdict form when all of you have agreed on a verdict and to bring the verdict form back to the courtroom when you return.

During deliberations, jurors must communicate about the case only with one another and only when all jurors are present in the jury room. You are not to communicate with any person outside the jury about this case. Until you have reached a verdict, you must not talk about this case in person or through the telephone, writing, or electronic communication, such as a blog, twitter, e-mail, text message, or any other means. Do not contact anyone to assist you during deliberations. These communications rules apply until I discharge you at the end of the case. If you become aware of any violation of these instructions or any other instruction I have given in this case, you must tell me by giving a note to the bailiff.

Many of you may have cell phones, tablets, laptops, or other electronic devices here in the courtroom. The rules do not allow you to bring your phones or any of those types of electronic devices into the jury room. Kindly leave those devices on your seats where they will be guarded by the bailiff while you deliberate.

If you need to communicate with me, send a note through the bailiff, signed by the foreperson. If you have voted, do not disclose the actual vote in the note.

If you have questions, I will talk with the attorneys before I answer, so it may take some time. You may continue your deliberations while you wait for my answer. I will answer any questions, if I can, in writing or orally here in open court.

During the trial, items were received into evidence as exhibits. You may examine whatever exhibits you think will help you in your deliberations. These exhibits will be sent into the jury room with you when you begin to deliberate.

In closing, let me remind you that it is important that you follow the law spelled out in these instructions in deciding your verdict. There are no other laws that apply to this case. Even if you do not like the laws that must be applied, you must use them. For two centuries we have lived by the constitution and the law. No juror has the right to violate rules we all share.

IN THE CIRCUIT COURT, FOURTH JUDICIAL CIRCUIT, IN AND FOR DUVAL COUNTY, FLORIDA.

Circuit Court, Duval County, Florida
CLERK'S MEMORANDUM OF TRIAL

DIVISION: CR-D (Circuit)
CASE: 16-2013-CF-005781-AXXX-MA

STATE OF FLORIDA

Faye Gay
Court Reporter
RONNIE FUSSELL

Clerk
Leslie Smith / David Cherok
Deputy Clerk

vs.

DONALD JAMES SMITH
Defendant

MALLORY COOPER
Judge
Mark Caliel / Melissa Nelson / Vanessa Wheeler-Sanchez
Attorney for State
Julie Schlax / Charles Fletcher
Attorney for Defendant

WITNESSES	DATE OF TRIAL TIME
1 STATE'S WITNESSES	**COPY OF VERDICT**
2 Rayne Perriwinkle	02-09-18: Jury selected. 02-12-18 Jury empaneled and sworn. Preliminary instructions to
3 Brad Calhoun	Jury. Opening statements in full. Evidence to Jury by State in part. 02-13-18: Evidence to
4 Samantha Bray	Jury by State in part. Defense motion for mistrial -Denied. Evidence to Jury by State in full.
5 Christopher Iber - FBI	State rests. Defense oral motion for JOA - Denied. Defense rests. 02-14-18: Closing Arg-
6 Christopher Rozier	uments in full by State. Defense waives closing argument. Instructions and charge to Jury.
7 Ashley Chappell (Rozier)	Verdict > Guilty as charged as to each count 1, 2, & 3. Jury polled. Jury discharged from
8 Marquita Howard	guilt phase.
9 Christina Howard	
10 Brenda Fillingim	**JURORS**
11 Ofc. T. Henson - JSO	[redacted]
12 C. Wilkie - former JSO	
13 Det. K. Long - JSO	
14 ----------02-23-2018----------	27
15 Jerome Bruton	28
16 James Carter - former JSO	29
17 Dr. Valerie Rao - M.E.	30
18 Nicole Lee - FDLE	31
19 Robert Hinson -former law enforcement	32
20 Det. D. Gonzalez - JSO	33
21 Ofc. C. Carter - JSO	34 Jury Out ---- 11:16 am
22	35 Jury Buzzed – 11:28 am
23	36 Jury In ------- 11:39 am
24	37
25	38
26	39 **FILED**

RONNIE FUSSELL
CLERK OF THE CIRCUIT COURT

FEB 14 2018

RONNIE W. FUSSELL
CLERK CIRCUIT COURT

IN THE CIRCUIT COURT, FOURTH JUDICIAL CIRCUIT, IN AND FOR DUVAL COUNTY, FLORIDA.

CLERK'S EXHIBIT MEMORANDUM

DIVISION: CR-D (Circuit)
CASE: 16-2013-CF-005781-AXXX-MA

STATE OF FLORIDA
vs.
DONALD JAMES SMITH

Ex. No	State	Ex. No	Defendant
1	(A) Photo - Defendant		
2	(B) Photo - Dollar general parking lot		
3	(C) Photo - Rope		
4	(D) Photo - Clothing section at Walmat		
5	(E) CD - 911 call of Rayne Perrywinkle		
6	(F) Composite - DVD (3) Dollar General surveillance videos		
7	(G) Composite - DVD (16) Walmart surveillance videos		
8	(H) DVD - Dollar General surveillance video edited by FBI		
9	(I) DVD - Walmart surveillance video edited by FBI		
10	(J) CD - 911 call of Christina Howard		
11	(K) Photo - Rear of defendant's van		
12	(L) Photo - Driver's door of Van		
13	(M) Photo - Interior of Van		
14	(N) Photo - Bench seat in back of van		
15	(O) Aerial Photo - Church property with orange tire tracks		
16	(P) Photo - Tree line view from church		
17	(Q) Photo - Tree line view from river		
18	(R) Photo -Path through marsh grass to river		
19	(S) Photo - Asphalt		
20	(T) Photo - Cement		
21	(U) Photo - Fallen tree with victim's body		
22	(V) Photo - Fallen tree with victim's body (close-up)		
23	(W) Photo - Back of victim's body		

FILED
FEB 14 2018
CLERK CIRCUIT COURT

Date turned in: 2-23-18
Trial Clerk:
Date received: 2/23/2018
Evidence Clerk: Greg Dixon

IN THE CIRCUIT COURT, FOURTH JUDICIAL CIRCUIT, IN AND FOR DUVAL COUNTY, FLORIDA.

CLERK'S EXHIBIT MEMORANDUM

DIVISION: CR-D (Circuit)
CASE: 16-2013-CF-005781-AXXX-MA

STATE OF FLORIDA
vs.
DONALD JAMES SMITH

Ex. No	State	Ex. No	Defendant
24	(X) Diagram of Church property		
25	(Y) Aerial Photo - Broward Rd and Church		
26	(Z) Aerial Photo - Rutgers Rd and Church		
27	(AA) Aerial Photo - Location of victim's body		
28	(BB) Aerial Photo - Location of victim's body (close up)		
29	(CC) Photo - Orange tire tracks at asphalt		
30	(DD) Photo - Tire tracks leading to tree line		
31	(EE) Photo - Orange tires tracks leading to tree line with orange flags		
32	(FF) Photo - Orange tires tracks leading to tree line		
33	(GG) Photo - Tire tracks leading to opening in tree line		
34	(HH) Photo - Tree line with blue tent		
35	(II) Photo - Path through marsh grass at trees (close up)		
36	(JJ) Photo - Path through marsh grass at trees		
37	(KK) Photo - Fallen tree with yellow flag		
38	(LL) Photo - Victim's body under tree and tree limb		
39	(MM) Photo - Back of victim under tree		
40	(NN) Photo - Victim's foot with leg under asphalt		
41	(OO) Photo - Victim face down under tree		
42	(PP) Photo - Victim's body on sheet		
43	(QQ) Photo - Victim's body with insect activity		
44	(RR) Photo - Victim's face		
45	(SS) Composite - DNA swabs (9) from victim's neck		
46	(TT) Location map		

FILED
FEB 14 2018
RONNIE MUSSELL
CLERK OF CIRCUIT COURT

Date turned in: 2-23-18
Trial Clerk: [signature] CL
Date received: 2/23/2018
Evidence Clerk: Greg Dixon

IN THE CIRCUIT COURT, FOURTH JUDICIAL CIRCUIT, IN AND FOR DUVAL COUNTY, FLORIDA.

CLERK'S EXHIBIT MEMORANDUM

DIVISION: CR-D (Circuit)
CASE: 16-2013-CF-005781-AXXX-MA

STATE OF FLORIDA
vs.
DONALD JAMES SMITH

Ex. No	State	Ex. No	Defendant
47	(UU) Photo - White house #2339		
48	(VV) Photo - Stroller on side of house next to recycle and trash can		
49	(WW) Photo - Stroller (close up)		
50	(XX) Photo - Inside of recycle bin		
51	(YY) Photo - Umbrellas in box		
52	(ZZ) Photo - Purple flip flops in bottom of trash can		
53	(AAA) Photo - Items removed from recycle and trash		
54	(BBB) ME Photo - ID photo of victim		
55	(CCC) ME Photo - Post mortem insect activity on chest		
56	(DDD) ME Photo - Bruising on left side of chest		
57	(EEE) ME photo - Injuries on left leg		
58	(FFF) ME Photo - Abrasions on inside of left ankle		
59	(GGG) ME Photo - Bruising on back of left leg		
60	(HHH) ME Photo - Abrasions on right leg		
61	(III) ME Photo - Bruising on right thigh		
62	(JJJ) ME Photo - Antemortem injury on back of right arm		
63	(KKK) ME Photo - Neck injury - bruising		
64	(LLL) ME Photo - Abrasion and contustion to chin, lip, and nose		
65	(MMM) ME Photo - Injuries to right side offace and ligature mark to neck		
66	(NNN) ME Photo - Left side of face and ligature marks		
67	(OOO) ME Photo - Back of left side of neck with ligature mark		
68	(PPP) ME Photo - Back of right side of neck with ligature mark		
69	(QQQ) ME Photo - Injury to nostrils		

FILED
FEB 14 2018

Date turned in: 2-23-2018 Trial Clerk:

Date received: 2/23/2018 Evidence Clerk:

IN THE CIRCUIT COURT, FOURTH JUDICIAL CIRCUIT, IN AND FOR DUVAL COUNTY, FLORIDA.

CLERK'S EXHIBIT MEMORANDUM

DIVISION: CR-D (Circuit)
CASE: 16-2013-CF-005781-AXXX-MA

STATE OF FLORIDA
vs.
DONALD JAMES SMITH

Ex. No	State	Ex. No	Defendant
70	(RRR) ME Photo - Abrasions to left nostril		
71	(SSS) ME Photo - Hemorrhaging on gum line		
72	(TTT) ME Photo - Right lower inside eye lid with petechial hemorrhaging		
73	(UUU) ME Photo - Right eye with large coarse petechial hemorrhaging		
74	(VVV) ME Photo - Hemorrhage between left eye and lid		
75	(WWW) ME Photo - Hemorrhage at top of left eye		
76	(XXX) ME Photo - Entire left eye with petechiae		
77	(ZZZ) ME Photo - Tears to genital area		
78	(AAAA) ME Photo - Close up of bruising and tears to genital area		
79	(BBBB) ME Photo - Tears in vaginal and anal walls and bruising to urethra		
80	(CCCC) Vaginal swabs (2) from victim (10.2)		
81	(DDDD) Labia swabs from victim (10.3)		
82	(EEEE) Anal swabs (2) from victim (10.4)		
83	(FFFF) Oral swabs (2) from victim (10.1)		
84	(GGGG) ME Photo - Hemorrhaging on inside of scalp		
85	(HHHH) ME Photo - Disection of throat		
86	(IIII) ME Photo - Larynx		
87	(JJJJ) Composite - Penile swabs (5) of defendant		
88	(KKKK) Buccal swab of defendant		
89	(LLLL) Photo - Defendant		
90	(MMMM) Photo - Bruising on tip of penis		
91	(NNNN) Photo - Bruising on shaft of penis		
92	(OOOO) Photo - Bruising on underside of penis		

FILED
FEB 14 2018

Date turned in: 2-23-2018 Trial Clerk: David CC

Date received: 2/23/2018 Evidence Clerk: Greg Dixon

IN THE CIRCUIT COURT, FOURTH JUDICIAL CIRCUIT, IN AND FOR DUVAL COUNTY, FLORIDA.

CLERK'S EXHIBIT MEMORANDUM

DIVISION: CR-D (Circuit)
CASE: 16-2013-CF-005781-AXXX-MA

STATE OF FLORIDA
vs.
DONALD JAMES SMITH

Ex. No	State	Ex. No	Defendant
93	(PPPP) Photo - Defendant's pants		
94	(QQQQ) Photo - Defendant's pants (side view)		
95	(RRRR) Photo - Defendant's shoes		
96	(SSSS) Photo - Defendant's right shoe		
97	(TTTT) Photo - Defendant's left shoe		
98	(UUUU) Photo - Bottom of right shoe		
99	(VVVV) Photo - Bottom of left shoe		
100	(WWWW) Defendant's pants		
101	(XXXX) Defendant's shirt		
102	(YYYY) Victim's dress		
103	(ZZZZ) Smear slides from sex kit		
104	(AAAAA) Donald Smith DNA chart		
105	(BBBBB) Neck swab DNA chart		
106	(CCCCC) Anal swab DNA chart		
107	(DDDDD) Vaginal swab DNA chart		
108	(EEEEE) Photo - Jail pipe chase door		
109	(FFFFF) Photo - Jail pipe chase interior		
110	(GGGGG) Photo - Air vents in pipe chase		
111	(HHHHH) Photo - Interior of isolation cell		
112	(IIIII) Photo - Air vent in cell		
113	(JJJJJ) Photo - Air vent (close-up)		
114	(KKKKK) CD - Jail recording (redacted)		
	(YYY) Diagram of vagina ****ID ONLY***		

FILED
FEB 14 2018

Date turned in: 2-23-2018 Trial Clerk:

Date received: 2/23/2018 Evidence Clerk: Greg Dixon

IN THE CIRCUIT COURT, FOURTH JUDICIAL CIRCUIT, IN AND FOR DUVAL COUNTY, FLORIDA

CASE NO: 16-2013-CF-5781-AXXX-MA
DIVISION: CR-D

STATE OF FLORIDA

vs.

DONALD SMITH
_____/

NOTICE OF INENT TO RELY ON CERTIFICATION OF BUSINESS RECORD

The Defendant, by and through the undersigned attorney, pursuant to Florida Statute 90.803(6)(c), hereby serves notice of his intent to offer medical records from Precision Imaging, by means of a certified copy of the business record through the Custodian of Records or Designee, Megan Jarvis, which properly meets the requirements of Florida Statute 90.803(6).

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing, has been furnished by electronic mail to the Office of the State Attorney this 14th day of February, 2018.

ESPENSHIP, SCHLAX & ALBEE, LLC

/s/ Julie Agent Schlax

Julie Agent Schlax, Esquire
Florida Bar No.: 093040
200 East Forsyth Street
Jacksonville, Florida 32202
Tel: (904) 674-0717
Fax: (904) 674-0737
Attorney for Defendant

IN THE CIRCUIT COURT, FOURTH JUDICIAL CIRCUIT, IN AND FOR DUVAL COUNTY, FLORIDA

CASE NO: 16-2013-CF-5781-AXXX-MA
DIVISION: CR-D

STATE OF FLORIDA

vs.

DONALD SMITH
_____/

NOTICE OF INENT TO RELY ON CERTIFICATION OF BUSINESS RECORD

The Defendant, by and through the undersigned attorney, pursuant to Florida Statute 90.803(6)(c), hereby serves notice of his intent to offer medical records from Mental Health Resource Center, Inc., by means of a certified copy of the business record through the Custodian of Records or Designee, Debbie Luci, which properly meets the requirements of Florida Statute 90.803(6).

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing, has been furnished by electronic mail to the Office of the State Attorney this 14th day of February, 2018.

ESPENSHIP, SCHLAX & ALBEE, LLC

/s/ Julie Agent Schlax

Julie Agent Schlax, Esquire
Florida Bar No.: 093040
200 East Forsyth Street
Jacksonville, Florida 32202
Tel: (904) 674-0717
Fax: (904) 674-0737
Attorney for Defendant

IN THE CIRCUIT COURT OF THE FOURTH JUDICIAL CIRCUIT, IN AND FOR DUVAL COUNTY, FLORIDA.

CASE NO.: 16-2013-CF-5781 AXXX
DIVISION: CR-D

STATE OF FLORIDA

VS.

DONALD SMITH
_____/

DISCLOSURE TO PROSECUTION

The defendant, DONALD SMITH, through the undersigned attorney, Julie Agent Schlax, pursuant to Rule 3.220(d), Florida Rules of Criminal Procedure, discloses to the prosecutor the following information:

Defendant hereby gives notice of his intention to call the following witnesses at Trial:

1. Detective Don Alexander, retired, Jacksonville Sheriff's Office
2. Detective Lonnie Mills, retired, Jacksonville Sheriff's Office
3. Dr. Brooke Butler 8437 Tuttle Avenue #156 Sarasota, Fl 34243
4. Mr. Michael Bossen 1639 Emerson Street Jacksonville, FL 32207
5. Dr. Heather Holmes
6. Dr. Daniel Buffington
7. Dr. Joseph Sesta
8. Dr. Geoff Colino
9. Dr. Joseph Wu
10. Mr. James Aiken
11. Mr. Donald Smith, Jr.

Defendant hereby gives notice of the following exhibits which may be introduced at Trial:

1. Pet scan and MRI imaging completed at Precision Imaging Center on 8/30/2016 (previously provided)
2. Pet scan imaging documents completed by Dr. Geoff Colino and Dr. Joseph Wu (previously provided)
3. Records of Mental Health Resource Center of Donald Smith (previously provided)
4. Prior Judgments and Sentences of Donald Smith
5. Photographs of Donald Smith
6. Photograph of Cherish Perriwinkle
7. Data and graphs on neuropsychological assessment completed by Dr. Joseph Sesta (previously provided)

Respectfully submitted, this 15th day of February, 2018.

ESPENSHIP & SCHLAX, LLC

/s/ Julie Agent Schlax

Julie Agent Schlax, Esquire
Florida Bar No.: 093040
200 E. Forsyth Street
Jacksonville, Florida 32202
Tel: (904) 674-0717
Fax: (904) 674-0737
Attorney for Defendant

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the above and foregoing has been furnished to the Office of the State Attorney, by hand delivery, this 19th day of January, 2018.

/s/ Julie Agent Schlax

Julie Agent Schlax, Esquire

IN THE CIRCUIT COURT OF THE FOURTH JUDICIAL CIRCUIT, IN AND FOR DUVAL COUNTY, FLORIDA

CASE NO.: 162013CF5781AXXXMA
DIVISION: CR-D

STATE OF FLORIDA

vs.

DONALD JAMES SMITH

STIPULATION

The State and the Defense hereby stipulate that the following facts are true, and you, the jury, should accept said facts proven beyond a reasonable doubt :

The Defendant, Donald James Smith, was convicted of the crime of Attempted Kidnapping in the Circuit Court, in and for Duval County, Florida, in Case Number 1992-11193-CF-A on January 15th, 1993. The victim of the Attempted Kidnapping was Kerri-Anne Buck.

Defendant

Attorney for the State

Attorney for the Defense

2/20/18
Date

FILED
FEB 20 2018
CLERK CIRCUIT COURT

DonaldSmithPriorViolentCrimeStip.wpd

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IN THE CIRCUIT COURT, FOURTH JUDICIAL CIRCUIT, IN AND FOR DUVAL COUNTY, FLORIDA

CASE NO: 16-2013-CF-5781-AXXX-MA
DIVISION: CR-D

STATE OF FLORIDA

vs.

DONALD SMITH
_____/

MOTION FOR AUTHORITY TO INCUR ADDITIONAL COSTS FOR DR. DANIEL BUFFINGTON

COMES NOW the Defendant, Donald Smith, by and through his court-appointed attorney, and pursuant to Florida Laws of Criminal Procedure, and Florida Statute 27.5305(4), moves this Honorable Court for the entry of an Order authorizing the incurring of additional costs of Dr. Daniel Bugffington, a pharmacologist, and as grounds hereby states:

1. The Defendant was indicted for Murder in the First Degree, Kidnapping a Child Under the Age of 13 Years, and Sexual Battery on a Child Less than 12 Years; followed by the filing of the State's Notice of Intent to Seek the Death Penalty;

2. The Defendant has been previously adjudged insolvent by this Court and the undersigned private attorney was appointed to represent the Defendant in this matter;

3. Due to of the unusual and extraordinary facts of this case and the fact that the State has filed their notice of intent to seek the death penalty;

4. Counsel believes that a Pharmacologist is necessary in the preparation of a defense in this cause;

5. Counsel does not believe she can provide Defendant with proper representation to which his is entitled unless the Court authorizes additional fees for Dr. Daniel Buffington;

6. Dr. Daniel E. Buffington, of Clinical Pharmacology Services, Inc., was previously appointed to evaluate the defendant and to review medical documents and to report his findings directly to the undersigned counsel;

7. Counsel is requesting authority to incur an additional amount of $10,000.00, with the authority to submit a motion for additional fees if necessary. Dr. Buffington's hourly rate is $400.00;

FILED
FEB 21 2018
RONNIE W. FUSSELL
CLERK CIRCUIT COURT

8. Dr. Buffington will have to incur travel related expenses including airfare, auto rental, mileage, baggage, change fees, lodging, meals and incidentals and would seek compensation of these expenses to be paid by the Justice Administration Commission.

WHEREFORE, the Defendant respectfully requests this Honorable Court enter an Order authorizing the incurring of additional costs of Dr. Geoffrey Colino, a neurologist whom is assisting with the preparation of a defense in this cause.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been provided to the Justice Administrative Commission via e-mail delivery on the 14th day of February, 2018.

Respectfully submitted,

/s/ Julie Agent Schlax

Julie Agent Schlax
200 East Forsyth Street
Jacksonville, Florida 32202
(904) 674-0717Telephone
(904) 674-0737 Facsimile
Attorney for Defendant

JAC Pleadings <pleadings@justiceadmin.org> 2/19/2018 5:08 PM

13-5781; State v. Smith; JAC response

To Sherri Boyd <sherri@esalawgroup.com>

Ms. Schlax:

The Justice Administrative Commission (JAC) has received and reviewed the Motion for Authority to Incur Additional Costs (Dr. Buffington) as to the above-referenced matter. JAC will not be filing a formal response and takes no position as to your motion. You may utilize this email in lieu of a formal response and should attach it to your motion when you provide it to the court.

Christian Lake
Assistant General Counsel
Justice Administrative Commission
227 N. Bronough Street, Suite 2100
Tallahassee, FL 32301
Tel.: 850.488.2415
JAC Website: https://www.justiceadmin.org

PLEASE NOTE: All e-mail is potentially available as a public record. This email or any attachments provided may contain confidential information intended for the use of the designated recipients named above. If you are not the intended recipient and have received this email in error, please notify the sender immediately by returning the email and deleting the message and be aware that any review, dissemination, distribution or copying of this communication is strictly prohibited.

From: Sherri Boyd [mailto:sherri@esalawgroup.com]
Sent: Wednesday, February 14, 2018 1:38 PM
To: JAC Pleadings <pleadings@justiceadmin.org>
Subject: smith - motion for additional fees - buffington
Importance: High

Attached for your review and response please find a motion to incur additional fees for Dr. Buffington in Def. Donald Smith's case.

Respectfully,
Sherri Boyd
Paralegal
ESPENSHIP, SCHLAX & ALBEE, LLC
200 E. Forsyth Street
Jacksonville, Florida 32202
P: (904) 674-0717
F: (904) 674-0737

IN THE CIRCUIT COURT, FOURTH JUDICIAL CIRCUIT, IN AND FOR DUVAL COUNTY, FLORIDA

CASE NO: 16-2013-CF-5781-AXXX-MA
DIVISION: CR-D

STATE OF FLORIDA

vs.

DONALD SMITH
_____/

ORDER AUTHORIZING ADDITIONAL COSTS FOR DR. DANIEL BUFFINGTON

THIS CAUSE, came on to be heard upon the Defendant's Motion for Authority to Incur Additional costs for Dr. Daniel Buffington, and the Court having been fully advised in the premises, and finding that a Neurologist is both necessary and essential to the defense in this cause, it is

ORDERED as follows:

1. That Julie Agent Schlax, Esquire, is hereby authorized to incur additional expenses for Dr. Daniel Buffington, of Clinical Pharmacology Services, Inc.

2. That an additional amount of $10,000.00 at an hourly rate of $400.00 is approved; along with all reasonable and necessary travel expenses.

3. That the Justice Administrative Commission shall be responsible for payment to Dr. Daniel Buffington, of Clinical Pharmacology Services, Inc., upon submission of proper invoices.

4. That should the Defendant need to exceed said cap, the Defendant shall seek leave of the Court prior to incurring any additional fees.

DONE AND ORDERED in Duval County, Jacksonville, Florida on this 21 day of February, 2018.

THE HONORABLE MALLORY D. COOPER
CIRCUIT JUDGE

Copies to: Julie Agent Schlax
Justice Administrative Commission
Dr. Daniel Buffington, of Clinical Pharmacology Services, Inc.

FILED
FEB 21 2018
CLERK CIRCUIT COURT

IN THE CIRCUIT COURT, FOURTH JUDICIAL CIRCUIT, IN AND FOR DUVAL COUNTY, FLORIDA

STATE OF FLORIDA

VS.

DONALD JAMES SMITH

CASE NO.: 162013CF005781AXXXMA

DIVISION: CRD

VERDICT AS TO SENTENCE

We, the jury, find as follows as to the Defendant, DONALD JAMES SMITH, in this case:

A. Aggravating Factors:

We, the jury, unanimously find that the State has proven the following Aggravating Factors beyond a reasonable doubt as to the Defendant DONALD JAMES SMITH, in this case:

1. DONALD JAMES SMITH was previously convicted of a felony involving the use or threat of violence to another person.

YES X NO _____

2. The First Degree Murder was committed while DONALD JAMES SMITH was engaged in the commission of a Kidnapping and a sexual battery.

YES X NO _____

3. The First Degree Murder was committed for the purpose of avoiding or preventing a lawful arrest.

YES X NO _____

4. The First Degree Murder was especially heinous, atrocious or cruel

YES X NO _____

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5. The First Degree Murder was committed in a cold, calculated, and premeditated manner, without any pretense of moral or legal justification.

YES X NO _____

6. Cherish Perrywinkle was a person less than 12 years of age.

YES X NO _____

If you answer YES to at least one of the aggravating factors listed above, please proceed to Section B.

If you answered NO to every aggravating factor listed above, do not proceed to Section B; the Defendant, DONALD JAMES SMITH, is not eligible for the death penalty and will be sentenced to life in prison without the possibility of parole. Please sign and date the verdict form and return it to the courtroom.

B. Sufficiency of the Aggravating Factors:

Reviewing the aggravating factors that we unanimously found to be proven beyond a reasonable doubt in Section A above, we, the jury, also unanimously find that the aggravating factors are sufficient to warrant a possible sentence of death.

YES X NO _____

If you answer YES to Section B, please proceed to Section C.

If you answer NO to Section B, do not proceed to Section C; the Defendant, DONALD JAMES SMITH will be sentenced to life in prison without the possibility of parole. Please sign and date the verdict form and return it to the courtroom.

C. Statutory Mitigating Circumstances:

We, the jury, find that the following statutory mitigating circumstances have been established by a greater weight of the evidence as to the Defendant, DONALD JAMES SMITH, in this case:

1. The First Degree Murder was committed while DONALD JAMES SMITH was under the influence of extreme mental or emotional disturbance.

YES _____ NO __X__

If you answered YES above, please provide below the numerical jury vote as to the existence of this statutory mitigating circumstance:

Vote of: _____ YES to _____ NO

2. The capacity of DONALD JAMES SMITH to appreciate the criminality of his/~~her~~ conduct or to conform his conduct to the requirements of law was substantially impaired.

YES _____ NO __X__

If you answered YES above, please provide below the numerical jury vote as to the existence of this statutory mitigating circumstance:

Vote of: _____ YES to _____ NO

3. DONALD JAMES SMITH's age at the time of the crime.

YES __X__ NO _____

If you answered YES above, please provide below the numerical jury vote as to the existence of this statutory mitigating circumstance:

Vote of: 12 YES to _____ NO

4. The existence of any other factors in DONALD JAMES SMITH's character, background, or life or the circumstances of the offense that would mitigate against the imposition of the death penalty.

A. DONALD JAMES SMITH's biological father left before he was born. As a result, he never had a relationship with him.

YES _____ NO X

If you answered YES above, please provide below the numerical jury vote as to the existence of this statutory mitigating circumstance:

Vote of: _____ YES to _____ NO

B. DONALD JAMES SMITH's parents were forced to divorce by his maternal grandparents "who openly disapproved of his biological father."

YES _____ NO X

If you answered YES above, please provide below the numerical jury vote as to the existence of this statutory mitigating circumstance:

Vote of: _____ YES to _____ NO

C. DONALD JAMES SMITH's mother was 17 years old when she gave birth to him.

YES _____ NO X

If you answered YES above, please provide below the numerical jury vote as to the existence of this statutory mitigating circumstance:

Vote of: _____ YES to _____ NO

D. DONALD JAMES SMITH was born premature with low birth weight.

YES _____ NO X

If you answered YES above, please provide below the numerical jury vote as to the existence of this statutory mitigating circumstance:

Vote of: _____ YES to _____ NO

E. DONALD JAMES SMITH's mother wanted to give him up for adoption.

YES _____ NO X

If you answered YES above, please provide below the numerical jury vote as to the existence of this statutory mitigating circumstance:

Vote of: _____ YES to _____ NO

F. Mental illness runs in DONALD JAMES SMITH's mother's side of the family and in his biological father's family.

YES _____ NO X

If you answered YES above, please provide below the numerical jury vote as to the existence of this statutory mitigating circumstance:

Vote of: _____ YES to _____ NO

G. Addiction runs in DONALD JAMES SMITH's mother's side of the family and in his biological father's family.

YES _____ NO X

If you answered YES above, please provide below the numerical jury vote as to the existence of this statutory mitigating circumstance:

Vote of: _____ YES to _____ NO

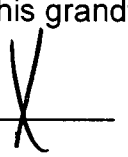
H. Emotional instability leading to physical violence is present on DONALD JAMES SMITH's father's side of the family.

YES _____ NO X

If you answered YES above, please provide below the numerical jury vote as to the existence of this statutory mitigating circumstance:

Vote of: _____ YES to _____ NO

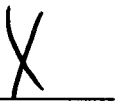
I. DONALD JAMES SMITH's paternal uncle shot his grandfather to death.

YES _____ NO 

If you answered YES above, please provide below the numerical jury vote as to the existence of this statutory mitigating circumstance:

Vote of: _____ YES to _____ NO

J. DONALD JAMES SMITH's mother spent very little time with him as a baby, instead focusing all of her attention on finding a man who could provide her with the lifestyle her parents felt she deserved.

YES _____ NO 

If you answered YES above, please provide below the numerical jury vote as to the existence of this statutory mitigating circumstance:

Vote of: _____ YES to _____ NO

K. DONALD JAMES SMITH moved out of his grandparents' home when his mother married Clifton (Cliff) Smith, the man who formally adopted him, which was extremely traumatic.

YES _____ NO

If you answered YES above, please provide below the numerical jury vote as to the existence of this statutory mitigating circumstance:

Vote of: _____ YES to _____ NO

L. Cliff was verbally and emotionally abusive to DONALD JAMES SMITH. He also locked DONALD JAMES SMITH outside as punishment.

YES _____ NO ___X___

If you answered YES above, please provide below the numerical jury vote as to the existence of this statutory mitigating circumstance:

Vote of: _____ YES to _____ NO

M. Cliff was physically abusive to DONALD JAMES SMITH.

YES _____ NO ___X___

If you answered YES above, please provide below the numerical jury vote as to the existence of this statutory mitigating circumstance:

Vote of: _____ YES to _____ NO

N. DONALD JAMES SMITH was traumatized by his stepfather's treatment. He became clingy, stopped eating, and wet the bed long past the age of typical potty training.

YES _____ NO ___X___

If you answered YES above, please provide below the numerical jury vote as to the existence of this statutory mitigating circumstance:

Vote of: _____ YES to _____ NO

O. Cliff was paranoid and obsessed with violence. DONALD JAMES SMITH was terrified of what he witnessed.

YES _____ NO ___X___

If you answered YES above, please provide below the numerical jury vote as to the existence of this statutory mitigating circumstance:

Vote of: _____ YES to _____ NO

P. Cliff's job in the insurance business forced them to move regularly. As a result, DONALD JAMES SMITH was repeatedly uprooted from his home, adding to the instability of his living environment.

YES _____ NO X

If you answered YES above, please provide below the numerical jury vote as to the existence of this statutory mitigating circumstance:

Vote of: _____ YES to _____ NO

Q. Because of the frequent moves, DONALD JAMES SMITH was frequently bullied. This caused him to feel alienated, detached, despondent, and angry. DONALD JAMES SMITH resorted to paying other kids to play with their toys.

YES _____ NO X

If you answered YES above, please provide below the numerical jury vote as to the existence of this statutory mitigating circumstance:

Vote of: _____ YES to _____ NO

R. DONALD JAMES SMITH was sexually molested at the age of eight by two neighborhood teenagers.

YES _____ NO X

If you answered YES above, please provide below the numerical jury vote as to the existence of this statutory mitigating circumstance:

Vote of: _____ YES to _____ NO

S. The teenagers coerced DONALD JAMES SMITH into watching them violently sexually molest several girls. He found the experience confusing and frightening.

YES _____ NO X

If you answered YES above, please provide below the numerical jury vote as to the existence of this statutory mitigating circumstance:

Vote of: _____ YES to _____ NO

T. DONALD JAMES SMITH did not reveal the sexual abuse to his mother.

YES _____ NO X

If you answered YES above, please provide below the numerical jury vote as to the existence of this statutory mitigating circumstance:

Vote of: _____ YES to _____ NO

U. DONALD JAMES SMITH's mother suspected that her sister's husband, Bob, molested her son; however she did not confront them.

YES _____ NO X

If you answered YES above, please provide below the numerical jury vote as to the existence of this statutory mitigating circumstance:

Vote of: _____ YES to _____ NO

V. DONALD JAMES SMITH never received treatment for the sexual abuse he endured.

YES _____ NO X

If you answered YES above, please provide below the numerical jury vote as to the existence of this statutory mitigating circumstance:

Vote of: _____ YES to _____ NO

W. Cliff was sexually inappropriate with DONALD JAMES SMITH. He touched DONALD JAMES SMITH on his buttocks. He called DONALD JAMES SMITH sexually explicit names.

YES _____ NO X

If you answered YES above, please provide below the numerical jury vote as to the existence of this statutory mitigating circumstance:

Vote of: _____ YES to _____ NO

X. When his mother divorced Cliff after seven years of marriage, this was yet another change that brought instability into DONALD JAMES SMITH's life.

YES _____ NO X

If you answered YES above, please provide below the numerical jury vote as to the existence of this statutory mitigating circumstance:

Vote of: _____ YES to _____ NO

Y. DONALD JAMES SMITH's second stepfather, Dr. Marlin Moore, was a cold, self-centered, and aloof man who insisted that his wife and stepson call him "Dr. Moore."

YES _____ NO X

If you answered YES above, please provide below the numerical jury vote as to the existence of this statutory mitigating circumstance:

Vote of: _____ YES to _____ NO

Z. Dr. Moore was verbally and physically abusive to DONALD JAMES SMITH. He made it known that he "didn't have time for children."

YES _____ NO X

If you answered YES above, please provide below the numerical jury vote as to the existence of this statutory mitigating circumstance:

Vote of: _____ YES to _____ NO

AA. As a teenager, DONALD JAMES SMITH began self-medicating with pills from Dr. Moore's home office. He was never confronted with the drug use.

YES _____ NO X

If you answered YES above, please provide below the numerical jury vote as to the existence of this statutory mitigating circumstance:

Vote of: _____ YES to _____ NO

BB. DONALD JAMES SMITH's drug abuse escalated to regularly using marijuana, LSD, PCP, MDA, Mescaline, Peyote, Quaaludes, and cocaine.

YES _____ NO X

If you answered YES above, please provide below the numerical jury vote as to the existence of this statutory mitigating circumstance:

Vote of: _____ YES to _____ NO

CC. DONALD JAMES SMITH dropped out of school in the 10th grade. Although DONALD JAMES SMITH was intelligent, he had lost all motivation based on drug use, depression, and anger.

YES _____ NO X

If you answered YES above, please provide below the numerical jury vote as to the existence of this statutory mitigating circumstance:

Vote of: _____ YES to _____ NO

DD. As a teenager, DONALD JAMES SMITH began to get arrested.

YES _____ NO X

If you answered YES above, please provide below the numerical jury vote as to the existence of this statutory mitigating circumstance:

Vote of: _____ YES to _____ NO

EE. At the age of 15, DONALD JAMES SMITH began engaging in voyeurism.

YES _____ NO X

If you answered YES above, please provide below the numerical jury vote as to the existence of this statutory mitigating circumstance:

Vote of: _____ YES to _____ NO

FF. DONALD JAMES SMITH was raped while incarcerated.

YES _____ NO X

If you answered YES above, please provide below the numerical jury vote as to the existence of this statutory mitigating circumstance:

Vote of: _____ YES to _____ NO

GG. When DONALD JAMES SMITH was released from jail, his drug abuse spiraled into full-blown crack addiction.

YES _____ NO X

If you answered YES above, please provide below the numerical jury vote as to the existence of this statutory mitigating circumstance:

Vote of: _____ YES to _____ NO

HH. On crack, DONALD JAMES SMITH's inability to control his impulses was intensified to the point that he felt like another person. On the streets, DONALD JAMES SMITH became notorious for his behavior while high. He was paranoid, manic, unstable, and impulsive.

YES _____ NO X

If you answered YES above, please provide below the numerical jury vote as to the existence of this statutory mitigating circumstance:

Vote of: _____ YES to _____ NO

II. DONALD JAMES SMITH's mother enabled his drug addiction. She drove him to pay off his drug debts and, if he was unable to make the trip, paid them off herself. She continued this for decades.

YES _____ NO /

If you answered YES above, please provide below the numerical jury vote as to the existence of this statutory mitigating circumstance:

Vote of: _____ YES to _____ NO

JJ. At the age of 20, DONALD JAMES SMITH attempted suicide for the first time by driving into an oak tree on Orange Picker Road. He flipped his car, but survived the accident. DONALD JAMES SMITH did not receive treatment for his injuries.

YES _____ NO X

If you answered YES above, please provide below the numerical jury vote as to the existence of this statutory mitigating circumstance:

Vote of: _____ YES to _____ NO

KK. DONALD JAMES SMITH experienced a dissociative episode due to drug use where he lost time.

YES _____ NO X

If you answered YES above, please provide below the numerical jury vote as to the existence of this statutory mitigating circumstance:

Vote of: _____ YES to _____ NO

LL. DONALD JAMES SMITH made his second suicide attempt in the Duval County Jail.

YES _____ NO X

If you answered YES above, please provide below the numerical jury vote as to the existence of this statutory mitigating circumstance:

Vote of: _____ YES to _____ NO

MM. In 1977, DONALD JAMES SMITH was designated as a Mentally Disordered Sex Offender and committed to the North Florida Evaluation and Treatment Center (NFETC).

YES _____ NO X

If you answered YES above, please provide below the numerical jury vote as to the existence of this statutory mitigating circumstance:

Vote of: _____ YES to _____ NO

NN. Throughout his adult life, DONALD JAMES SMITH spent hundreds of dollars per day on crack. During the year of 2002, he spent more than $90,000 in a four month period. He went on binges that lasted for weeks. During these episodes, DONALD JAMES SMITH did not eat or sleep.

YES _____ NO X

If you answered YES above, please provide below the numerical jury vote as to the existence of this statutory mitigating circumstance:

Vote of: _____ YES to _____ NO

OO. DONALD JAMES SMITH fathered a son, Donald James Smith, Jr., born June 2, 1992. He married his son's mother, Francine Brown, but the relationship was short-lived.

YES _____ NO X

If you answered YES above, please provide below the numerical jury vote as to the existence of this statutory mitigating circumstance:

Vote of: _____ YES to _____ NO

PP. DONALD JAMES SMITH was far from a perfect father. However, he has tried to parent his son to the best of his ability.

YES _____ NO X

If you answered YES above, please provide below the numerical jury vote as to the existence of this statutory mitigating circumstance:

Vote of: _____ YES to _____ NO

QQ. Donald James Smith, Jr. has developed a close relationship with his father since he has been incarcerated.

YES X NO _____

If you answered YES above, please provide below the numerical jury vote as to the existence of this statutory mitigating circumstance:

Vote of: 7 YES to 5 NO

RR. DONALD JAMES SMITH has been repeatedly diagnosed as having Antisocial Personality Disorder (ASPD), Polysubstance Dependence, Pedophilia, and Cocaine Dependence.

YES _____ NO X

If you answered YES above, please provide below the numerical jury vote as to the existence of this statutory mitigating circumstance:

Vote of: _____ YES to _____ NO

SS. In 1999, DONALD JAMES SMITH was designated as a Sexually Violent Predator and subsequently committed to the Martin Treatment Center (MTC) through the Jimmy Ryce Civil Commitment Act. While detained at MTC, DONALD JAMES SMITH did not complete the treatment plan developed for him.

YES _____ NO X

If you answered YES above, please provide below the numerical jury vote as to the existence of this statutory mitigating circumstance:

Vote of: _____ YES to _____ NO

TT. While at the Martin Treatment Center, DONALD JAMES SMITH engaged in a sexual relationship with another patient who was known for being HIV positive. This was regarded as DONALD JAMES SMITH's third suicide attempt.

YES _____ NO X

If you answered YES above, please provide below the numerical jury vote as to the existence of this statutory mitigating circumstance:

Vote of: _____ YES to _____ NO

UU. In spite of the fact that DONALD JAMES SMITH did not participate in counseling, he was released from the Martin Treatment Center based on a decision made by members of the State Attorney's Office in Duval County.

YES _____ NO X

If you answered YES above, please provide below the numerical jury vote as to the existence of this statutory mitigating circumstance:

Vote of: _____ YES to _____ NO

VV. Once released from the Martin Treatment Center, he was required to receive a psychosexual evaluation and treatment. Dr. James Vallely completed the evaluation and concluded that DONALD JAMES SMITH was highly likely to re-offend.

YES _____ NO X

If you answered YES above, please provide below the numerical jury vote as to the existence of this statutory mitigating circumstance:

Vote of: _____ YES to _____ NO

WW. DONALD JAMES SMITH was arrested for Dealing in Stolen Property and Burglary and was eligible to receive thirty years in prison as a Habitual Offender. However, members of the State Attorney's Office in Duval County permitted him to plea to a sentence of 4 years in prison. DONALD JAMES SMITH was not placed on any form of supervision upon his release from prison.

YES _____ NO X

If you answered YES above, please provide below the numerical jury vote as to the existence of this statutory mitigating circumstance:

Vote of: _____ YES to _____ NO

XX. In 2006, a state psychological assessment determined that DONALD JAMES SMITH did not meet the criteria for civil commitment in the Jimmy Ryce Civil Commitment Center, although he had never received any meaningful rehabilitation.

YES _____ NO X

If you answered YES above, please provide below the numerical jury vote as to the existence of this statutory mitigating circumstance:

Vote of: _____ YES to _____ NO

YY. In 2011, DONALD JAMES SMITH Baker Acted himself. He reported homicidal thoughts, auditory, and visual hallucinations. He also admitted a history of using cocaine and Lortab. He was diagnosed as having a potential for homicide, suicide, and violence. The center recommended one-on-one counseling and let him stay three or four days. They never followed up with therapy.

YES _____ NO X

If you answered YES above, please provide below the numerical jury vote as to the existence of this statutory mitigating circumstance:

Vote of: _____ YES to _____ NO

ZZ. In 2009, DONALD JAMES SMITH was arrested for attempting to lure a 9-year-old girl while posing as a Department of Children and Families (DCF) worker. If found guilty, he could have been sentenced to 10 years in the DOC, but members of the State Attorney's Office in Duval County agreed to a plea agreement allowing a county jail sentence, which bypassed further screening into the Jimmy Ryce Civil Commitment Center.

YES _____ NO X

If you answered YES above, please provide below the numerical jury vote as to the existence of this statutory mitigating circumstance:

Vote of: _____ YES to _____ NO

AAA. On June 1, 2013, DONALD JAMES SMITH was released from the Duval County Jail. He was not placed on any kind of supervision by the State of Florida.

YES _____ NO X

If you answered YES above, please provide below the numerical jury vote as to the existence of this statutory mitigating circumstance:

Vote of: _____ YES to _____ NO

BBB. Three weeks before the murder of Cherish Perrywinkle, DONALD JAMES SMITH went to Shands Hospital and then was Baker Acted. He stated that he was having violent thoughts and wanted to get into a residential program. The center gave him "a new brochure" and told him to "study and practice." They allowed him to stay approximately 24 hours.

YES _____ NO X

If you answered YES above, please provide below the numerical jury vote as to the existence of this statutory mitigating circumstance:

Vote of: _____ YES to _____ NO

CCC. Neuropsychological testing has indicated that DONALD JAMES SMITH's brain functioning is abnormal. He has deficits in executive functioning and poor impulse control.

YES _____ NO X

If you answered YES above, please provide below the numerical jury vote as to the existence of this statutory mitigating circumstance:

Vote of: _____ YES to _____ NO

DDD. DONALD JAMES SMITH's neuropsychological disorders are exacerbated by substance abuse and addiction.

YES _____ NO X

If you answered YES above, please provide below the numerical jury vote as to the existence of this statutory mitigating circumstance:

Vote of: _____ YES to _____ NO

EEE. Medical testing, specifically PET, MRI, and DTI scans, have revealed that DONALD JAMES SMITH's brain functioning is abnormal.

YES _____ NO X

If you answered YES above, please provide below the numerical jury vote as to the existence of this statutory mitigating circumstance:

Vote of: _____ YES to _____ NO

FFF. DONALD JAMES SMITH's brain abnormalities are consistent with someone who has suffered brain damage.

YES _____ NO X

If you answered YES above, please provide below the numerical jury vote as to the existence of this statutory mitigating circumstance:

Vote of: _____ YES to _____ NO

GGG. DONALD JAMES SMITH has suffered from significant mental illness for most of his life.

YES _____ NO X

If you answered YES above, please provide below the numerical jury vote as to the existence of this statutory mitigating circumstance:

Vote of: _____ YES to _____ NO

HHH. DONALD JAMES SMITH's mental illness is not something he has chosen.

YES _____ NO X

If you answered YES above, please provide below the numerical jury vote as to the existence of this statutory mitigating circumstance:

Vote of: _____ YES to _____ NO

III. DONALD JAMES SMITH did not choose his family.

YES _____ NO X

If you answered YES above, please provide below the numerical jury vote as to the existence of this statutory mitigating circumstance:

Vote of: _____ YES to _____ NO

JJJ. DONALD JAMES SMITH did not choose the way his family treated him.

YES _____ NO X

If you answered YES above, please provide below the numerical jury vote as to the existence of this statutory mitigating circumstance:

Vote of: _____ YES to _____ NO

KKK. DONALD JAMES SMITH did not choose to be sexually molested.

YES _____ NO X

If you answered YES above, please provide below the numerical jury vote as to the existence of this statutory mitigating circumstance:

Vote of: _____ YES to _____ NO

LLL. DONALD JAMES SMITH's childhood experiences shaped the person he became as an adult.

YES _____ NO X

If you answered YES above, please provide below the numerical jury vote as to the existence of this statutory mitigating circumstance:

Vote of: _____ YES to _____ NO

MMM. At the time of the offenses, DONALD JAMES SMITH was 56 years old. He is now 61 years old.

YES _____ NO X

If you answered YES above, please provide below the numerical jury vote as to the existence of this statutory mitigating circumstance:

Vote of: _____ YES to _____ NO

NNN. DONALD JAMES SMITH has been diagnosed with Chronic Obstructive Pulmonary Disease (COPD), heart disease, Hepatitis B, and Hepatitis C.

YES _____ NO X

If you answered YES above, please provide below the numerical jury vote as to the existence of this statutory mitigating circumstance:

Vote of: _____ YES to _____ NO

OOO. DONALD JAMES SMITH has been a strong support system for his mother, who is receiving treatment for breast cancer.

YES _____ NO X

If you answered YES above, please provide below the numerical jury vote as to the existence of this statutory mitigating circumstance:

Vote of: _____ YES to _____ NO

PPP. DONALD JAMES SMITH has not been a threat to correctional officers or other inmates in the Duval County Jail and the Department of Corrections.

YES _____ NO X

If you answered YES above, please provide below the numerical jury vote as to the existence of this statutory mitigating circumstance:

Vote of: _____ YES to _____ NO

Please proceed to Section D, regardless of your findings in Section C.

D. Eligibility for the Death Penalty

We, the jury, unanimously find that the aggravating factors that were proven beyond a reasonable doubt in Section A above outweigh the mitigating circumstances established in Section C above.

YES __X__ NO _____

If you answered YES to Section D, please proceed to Section E.

If you answered NO to Section D, do not proceed; the Defendant, DONALD JAMES SMITH will be sentenced to life in prison without the possibility of parole. Please sign and date the verdict form and return it to the courtroom.

E. Jury Verdict as to Death Penalty

Having unanimously found that at least one aggravating factor has been established beyond a reasonable doubt in Section A above; that the aggravating factors are sufficient to warrant a sentence of death in Section B above; and that the aggravating factors outweigh the mitigating circumstances in Section D above; we, the jury, unanimously find that the Defendant, DONALD JAMES SMITH, should be sentenced to death.

YES X NO _____

If NO, our numeric vote to impose a sentence of life imprisonment without the possibility of parole is as follows:

_____ Life _____ Death

If your vote to impose death is less than unanimous, the trial court shall impose a sentence of life without the possibility of parole.

So say we all, this 22nd day of February, 2018.

[redacted]
FOREPERSON

IN THE CIRCUIT COURT, FOURTH JUDICIAL CIRCUIT, IN AND FOR DUVAL COUNTY, FLORIDA.

Circuit Court, Duval County, Florida

CLERK'S MEMORANDUM OF TRIAL-PENALTY PHASE

DIVISION: CR-D (Circuit)
CASE: 16-2013-CF-005781-AXXX-MA

STATE OF FLORIDA

Faye Gay
Court Reporter
RONNIE FUSSELL

vs.

MALLORY COOPER
Judge
Mark Caliel / Melissa Nelson / Vanessa Wheeler-Sanchez
Attorney for State
Schlax, Julie / Charles Fletcher
Attorney for Defendant

Clerk
Leslie Smith / David Cherok
Deputy Clerk

DONALD JAMES SMITH
Defendant

WITNESSES	DATE OF TRIAL TIME
1 STATE WITNESSES	**COPY OF VERDICT**
2 Kerry-Ann Buck	02-20-18: Penalty Phase. Preliminary instructions to Jury. Opening statements in full. Evi-
3	dence to Jury by State in full. State rests. Evidence to Jury by Defense in part. 02-21-18:
4 DEFENSE WITNESSES	Evidence to Jury by Defense in full. Defense rests. 02-22-18: Closing arguments in full.
5 Dr. Heather Holmes	Instructions and charge to Jury. Verdict As To Sentence > Jury unanimously finds defend-
6 Dr. Daniel Buffington	dant should be sentenced to death. Jury polled. Jury and alternate jurors discharged.
7 Michael Bosson	
8 Dr. Geoff Colino	
9 ----------02-21-2018----------	
10 Dr. Joseph Wu	**JURORS** [redacted]
11 Dr. Joseph Sesta	
12 James Aiken	
13 Dr. Brooke Butler	
14 Donald Smith, Jr. - via Skype	27
15	28
16	29
17	30
18	31
19	32 Jury Out ---------- 12:58 pm
20	33 Jury buzzed (verdict) - 03:02 pm
21	34 Jury In ----------03:19 pm
22	35
23	36
24	37
25	38
26	39

FILED

RONNIE FUSSELL
CLERK OF THE CIRCUIT COURT

FEB 22 2018

RONNIE W. FUSSELL
CLERK CIRCUIT COURT

IN THE CIRCUIT COURT, FOURTH JUDICIAL CIRCUIT, IN AND FOR DUVAL COUNTY, FLORIDA.

CLERK'S EXHIBIT MEMORANDUM
(PENALTY PHASE)

DIVISION: CR-D (Circuit)
CASE: 16-2013-CF-005781-AXXX-MA

STATE OF FLORIDA
vs.
DONALD JAMES SMITH

Ex. No	State	Ex. No	Defendant
		1	(A) Business records of Mental Health Resource Center
		2	(B) Composite - Business records of Precision Imaging - 3 CDs (2 Brain MRI / 1 Brain CT)
		3	(G) Certified copy of judgment and sentence from 3/5/82 on case 16-1977-CF-3161-AXXX
		4	(H) Certified copy of judgment and sentence from 11/7/91 on case 16-1991-CF-11745-AXXX
		5	(I) Certified copy of judgment and sentence from 1/15/93 on case 16-1992-CF-11193-AXXX
		6	(J) Certified copy of judgment and sentence from 4/14/98 on case 16-1998-CF-3466-AXXX
		7	(K) Certified copy of Order of Release and Order of Dismissal from 4/15/02 on case 16-1999-CA-1635-AXXX
		8	(L) Certified copy of judgment and sentence from 4/5/04 on case 16-2003-CF-7080-AXXX
		9	(M) Certified copy of judgment and sentence from 3/20/12 on case 16-2009-CF-12156-AXXX
			(C) CD - Demonstrative composite exhibit Dr. Buffington ****ID ONLY****
			(D) CD - Demonstrative composite exhibit Dr. Colino ****ID ONLY****
			(E) CD - Demonstrative composite exhibit Dr. Wu ****ID ONLY****
			(O) CD - Demonstrative composite exhibit Dr. Butler ****
			FILED
			FEB 22 2018
			CLERK CIRCUIT COURT

Date turned in: 2-22-2018 Trial Clerk:

Date received: 2/23/2018 Evidence Clerk: Greg Dixon

IN THE CIRCUIT COURT OF THE FOURTH JUDICIAL CIRCUIT, IN AND FOR DUVAL COUNTY, FLORIDA

CASE NO.: 162013CF005781AXXXMA

DIVISION: CRD

STATE OF FLORIDA

vs.

DONALD JAMES SMITH

Instructions read to jury by the Honorable Mallory Cooper, Circuit Judge.

DATED at Jacksonville, Florida on February 22, 2018.

CIRCUIT JUDGE

FILED

FEB 22 2018

CLERK CIRCUIT COURT

IN THE CIRCUIT COURT OF THE FOURTH JUDICIAL CIRCUIT, IN AND FOR DUVAL COUNTY, FLORIDA

CASE NO.: 162013CF005781AXXXMA

DIVISION: CRD

STATE OF FLORIDA

vs.

DONALD JAMES SMITH

FINAL JURY INSTRUCTIONS FOR PENALTY PHASE PROCEEDINGS

Members of the jury, you have heard all the evidence and the argument of counsel. It is now your duty to make a decision as to the appropriate sentence that should be imposed upon the defendant for the crime of First Degree Murder. There are two possible punishments: (1) life imprisonment without the possibility of parole, or (2) death.

In making your decision, you must first unanimously determine whether the aggravating factors alleged by the State have been proven beyond a reasonable doubt. An aggravating factor is a circumstance that increases the gravity of a crime or the harm to a victim. No facts other than proven aggravating factors may be considered in support of a death sentence.

The aggravating factors alleged by the State are:

1. DONALD JAMES SMITH was previously convicted of a felony involving the use or threat of violence to another person.

2. The First Degree Murder was committed while DONALD JAMES SMITH was engaged in the commission of a Kidnapping and a Sexual Battery.

3. The First Degree Murder was committed for the purpose of avoiding or preventing a lawful arrest.

4. The First Degree Murder was especially heinous, atrocious or cruel.

"Heinous" means extremely wicked or shockingly evil.

"Atrocious" means outrageously wicked and vile.

"Cruel" means designed to inflict a high degree of pain with utter indifference to, or even enjoyment of, the suffering of others.

The kind of crime intended to be included as especially heinous, atrocious, or cruel is one accompanied by additional acts that show that the crime was conscienceless or pitiless and was unnecessarily torturous to Cherish Perrywinkle.

5. The First Degree Murder was committed in a cold, calculated, and premeditated manner, without any pretense of moral or legal justification.

"Cold" means the murder was the product of calm and cool reflection.

"Calculated" means having a careful plan or prearranged design to commit murder.

A killing is "premeditated" if it occurs after the defendant consciously decides to kill. The decision must be present in the mind at the time of the killing. The law does not fix the exact period of time that must pass between the formation of the premeditated intent to kill and the killing. The period of time must be long enough to allow reflection by the defendant. The premeditated intent to kill must be formed before the killing.

However, in order for this aggravating factor to apply, a heightened level of premeditation, demonstrated by a substantial period of reflection, is required.

A "pretense of moral or legal justification" is any claim of justification or excuse that, though insufficient to reduce the degree of murder, nevertheless rebuts the otherwise cold, calculated, or premeditated nature of the murder.

6. Cherish Perrywinkle was a person less than 12 years of age.

As explained before the presentation of evidence, the State has the burden to prove an aggravating factor beyond a reasonable doubt. A reasonable doubt is not a mere possible doubt, a speculative, imaginary, or forced doubt. Such a doubt must not influence you to disregard an aggravating factor if you have an abiding conviction that it exists. On the other hand, if, after carefully considering, comparing, and weighing all the evidence, you do not have an abiding conviction that the aggravating factor exists, or if, having a conviction, it is one which is not stable but one which wavers and vacillates, then the aggravating factor has not been proved beyond every reasonable doubt and you must not consider it in providing a verdict.

A reasonable doubt as to the existence of an aggravating factor may arise from the evidence, a conflict in the evidence, or the lack of evidence. If you have a reasonable doubt as to the existence of an aggravating factor, you must find that it does not exist. However, if you have no reasonable doubt, you should find the aggravating factor does exist.

A finding that an aggravating factor exists must be unanimous, that is, all of you must agree that each presented aggravating factor exists. You will be provided a form to make this finding as to each alleged aggravating factor and you should indicate whether or not you find each aggravating factor has been proven beyond a reasonable doubt.

If you do not unanimously find that at least one aggravating factor was proven by the State, then the defendant is not eligible for the death penalty, and your verdict must be for a sentence of life imprisonment without the possibility for parole. At such point, your deliberations are complete.

If, however, you unanimously find that one or more aggravating factors have been proven beyond a reasonable doubt, then the defendant is eligible for the death penalty, and you must make additional findings to determine whether the appropriate sentence to be imposed is life imprisonment without the possibility of parole or death.

If you do unanimously find the existence of at least one aggravating factor and that the aggravating factor or factors are sufficient to impose a sentence of death, the next step in the process is for you to determine whether any mitigating circumstance or circumstances exist. A mitigating circumstance can be anything in the life of the defendant which might indicate that the death penalty is not appropriate. It is not limited to the facts surrounding the crime. A mitigating circumstance may include any aspect of the defendant's character, background, or life or any circumstance of the offense that may reasonably indicate that the death penalty is not an appropriate sentence in this case.

Among the mitigating circumstances you may consider are:

1. The First Degree Murder was committed while DONALD JAMES SMITH was under the influence of extreme mental or emotional disturbance.

2. The capacity of DONALD JAMES SMITH to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired.

3. DONALD JAMES SMITH's age at the time of the crime.

4. The existence of any other factors in DONALD JAMES SMITH's character, background, or life or the circumstances of the offense that would mitigate against the imposition of the death penalty.

A. DONALD JAMES SMITH's biological father left before he was born. As a result, he never had a relationship with him.

B. DONALD JAMES SMITH's parents were forced to divorce by his maternal grandparents "who openly disapproved of his biological father."

C. DONALD JAMES SMITH's mother was 17 years old when she gave birth to him.

D. DONALD JAMES SMITH was born premature with low birth weight.

E. DONALD JAMES SMITH's mother wanted to give him up for adoption.

F. Mental illness runs in DONALD JAMES SMITH's mother's side of the family and in his biological father's family.

G. Addiction runs in DONALD JAMES SMITH's mother's side of the family and in his biological father's family.

H. Emotional instability leading to physical violence is present on DONALD JAMES SMITH's father's side of the family.

I. DONALD JAMES SMITH's paternal uncle shot his grandfather to death.

J. DONALD JAMES SMITH's mother spent very little time with him as a baby, instead focusing all of her attention on finding a man who could provide her with the lifestyle her parents felt she deserved.

K. DONALD JAMES SMITH moved out of his grandparents' home when his mother married Clifton (Cliff) Smith, the man who formally adopted him, which was extremely traumatic.

L. Cliff was verbally and emotionally abusive to DONALD JAMES SMITH. He also locked DONALD JAMES SMITH outside as punishment.

M. Cliff was physically abusive to DONALD JAMES SMITH.

N. DONALD JAMES SMITH was traumatized by his stepfather's treatment. He became clingy, stopped eating, and wet the bed long past the age of typical potty training.

O. Cliff was paranoid and obsessed with violence. DONALD JAMES SMITH was terrified of what he witnessed.

P. Cliff's job in the insurance business forced them to move regularly. As a result, DONALD JAMES SMITH was repeatedly uprooted from his home, adding to the instability of his living environment.

Q. Because of the frequent moves, DONALD JAMES SMITH was frequently bullied. This caused him to feel alienated, detached, despondent, and angry. DONALD JAMES SMITH resorted to paying other kids to play with their toys.

R. DONALD JAMES SMITH was sexually molested at the age of eight by two neighborhood teenagers.

S. The teenagers coerced DONALD JAMES SMITH into watching them violently sexually molest several girls. He found the experience confusing and frightening.

T. DONALD JAMES SMITH did not reveal the sexual abuse to his mother.

U. DONALD JAMES SMITH's mother suspected that her sister's husband, Bob, molested her son; however she did not confront them.

V. DONALD JAMES SMITH never received treatment for the sexual abuse he endured.

W. Cliff was sexually inappropriate with DONALD JAMES SMITH. He touched DONALD JAMES SMITH on his buttocks. He called DONALD JAMES SMITH sexually explicit names.

X. When his mother divorced Cliff after seven years of marriage, this was yet another change that brought instability into DONALD JAMES SMITH's life.

Y. DONALD JAMES SMITH's second stepfather, Dr. Marlin Moore, was a cold, self-centered, and aloof man who insisted that his wife and stepson call him "Dr. Moore."

Z. Dr. Moore was verbally and physically abusive to DONALD JAMES SMITH. He made it known that he "didn't have time for children."

AA. As a teenager, DONALD JAMES SMITH began self-medicating with pills from Dr. Moore's home office. He was never confronted with the drug use.

BB. DONALD JAMES SMITH's drug abuse escalated to regularly using marijuana, LSD, PCP, MDA, Mescaline, Peyote, Quaaludes, and cocaine.

CC. DONALD JAMES SMITH dropped out of school in the 10th grade. Although DONALD JAMES SMITH was intelligent, he had lost all motivation based on drug use, depression, and anger.

DD. As a teenager, DONALD JAMES SMITH began to get arrested.

EE. At the age of 15, DONALD JAMES SMITH began engaging in voyeurism.

FF. DONALD JAMES SMITH was raped while incarcerated.

GG. When DONALD JAMES SMITH was released from jail, his drug abuse spiraled into full-blown crack addiction.

HH. On crack, DONALD JAMES SMITH's inability to control his impulses was intensified to the point that he felt like another person. On the streets, DONALD JAMES SMITH became notorious for his behavior while high. He was paranoid, manic, unstable, and impulsive.

II. DONALD JAMES SMITH's mother enabled his drug addiction. She drove him to pay off his drug debts and, if he was unable to make the trip, paid them off herself. She continued this for decades.

JJ. At the age of 20, DONALD JAMES SMITH attempted suicide for the first time by driving into an oak tree on Orange Picker Road. He flipped his car, but survived the accident. DONALD JAMES SMITH did not receive treatment for his injuries.

KK. DONALD JAMES SMITH experienced a dissociative episode due to drug use where he lost time.

LL. DONALD JAMES SMITH made his second suicide attempt in the Duval County Jail.

MM. In 1977, DONALD JAMES SMITH was designated as a Mentally Disordered Sex Offender and committed to the North Florida Evaluation and Treatment Center (NFETC).

NN. Throughout his adult life, DONALD JAMES SMITH spent hundreds of dollars per day on crack. During the year of 2002, he spent more than $90,000 in a four month period. He went on binges that lasted for weeks. During these episodes, DONALD JAMES SMITH did not eat or sleep.

OO. DONALD JAMES SMITH fathered a son, Donald James Smith, Jr., born June 2, 1992. He married his son's mother, Francine Brown, but the relationship was short-lived.

PP. DONALD JAMES SMITH was far from a perfect father. However, he has tried to parent his son to the best of his ability.

QQ. Donald James Smith, Jr. has developed a close relationship with his father since he has been incarcerated.

RR. DONALD JAMES SMITH has been repeatedly diagnosed as having Antisocial Personality Disorder (ASPD), Polysubstance Dependence, Pedophilia, and Cocaine Dependence.

SS. In 1999, DONALD JAMES SMITH was designated as a Sexually Violent Predator and subsequently committed to the Martin Treatment Center (MTC) through the Jimmy Ryce Civil Commitment Act. While detained at MTC, DONALD JAMES SMITH did not complete the treatment plan developed for him.

TT. While at the Martin Treatment Center, DONALD JAMES SMITH engaged in a sexual relationship with another patient who was known for being HIV positive. This was regarded as DONALD JAMES SMITH's third suicide attempt.

UU. In spite of the fact that DONALD JAMES SMITH did not participate in counseling, he was released from the Martin Treatment Center based on a decision made by members of the State Attorney's Office in Duval County.

VV. Once released from the Martin Treatment Center, he was required to receive a psychosexual evaluation and treatment. Dr. James Vallely completed the evaluation and concluded that DONALD JAMES SMITH was highly likely to re-offend.

WW. DONALD JAMES SMITH was arrested for Dealing in Stolen Property and Burglary and was eligible to receive thirty years in prison as a Habitual Offender. However, members of the State Attorney's Office in Duval County permitted him to plea to a sentence of 4 years in prison. DONALD JAMES SMITH was not placed on any form of supervision upon his release from prison.

XX. In 2006, a state psychological assessment determined that DONALD JAMES SMITH did not meet the criteria for civil commitment in the Jimmy Ryce Civil Commitment Center, although he had never received any meaningful rehabilitation.

YY. In 2011, DONALD JAMES SMITH Baker Acted himself. He reported homicidal thoughts, auditory, and visual hallucinations. He also admitted a history of using cocaine and Lortab. He was diagnosed as having a potential for homicide, suicide, and violence. The center recommended one-on-one counseling and let him stay three or four days. They never followed up with therapy.

ZZ. In 2009, DONALD JAMES SMITH was arrested for attempting to lure a 9-year-old girl while posing as a Department of Children and Families (DCF) worker. If found guilty, he could have been sentenced to 10 years in the DOC, but members of the State Attorney's Office in Duval County agreed to a plea agreement allowing a county jail sentence, which bypassed further screening into the Jimmy Ryce Civil Commitment Center.

AAA. On June 1, 2013, DONALD JAMES SMITH was released from the Duval County Jail. He was not placed on any kind of supervision by the State of Florida.

BBB. Three weeks before the murder of Cherish Perrywinkle, DONALD JAMES SMITH went to Shands Hospital and then was Baker Acted. He stated that he was having violent thoughts and wanted to get into a residential program. The center gave him "a new brochure" and told him to "study and practice." They allowed him to stay approximately 24 hours.

CCC. Neuropsychological testing has indicated that DONALD JAMES SMITH's brain functioning is abnormal. He has deficits in executive functioning and poor impulse control.

DDD. DONALD JAMES SMITH's neuropsychological disorders are exacerbated by substance abuse and addiction.

EEE. Medical testing, specifically PET, MRI, and DTI scans, have revealed that DONALD JAMES SMITH's brain functioning is abnormal.

FFF. DONALD JAMES SMITH's brain abnormalities are consistent with someone who has suffered brain damage.

GGG. DONALD JAMES SMITH has suffered from significant mental illness for most of his life.

HHH. DONALD JAMES SMITH's mental illness is not something he has chosen.

III. DONALD JAMES SMITH did not choose his family.

JJJ. DONALD JAMES SMITH did not choose the way his family treated him.

KKK. DONALD JAMES SMITH did not choose to be sexually molested.

LLL. DONALD JAMES SMITH's childhood experiences shaped the person he became as an adult.

MMM. At the time of the offenses, DONALD JAMES SMITH was 56 years old. He is now 61 years old.

NNN. DONALD JAMES SMITH has been diagnosed with Chronic Obstructive Pulmonary Disease (COPD), heart disease, Hepatitis B, and Hepatitis C.

OOO. DONALD JAMES SMITH has been a strong support system for his mother, who is receiving treatment for breast cancer.

PPP. DONALD JAMES SMITH has not been a threat to correctional officers or other inmates in the Duval County Jail and the Department of Corrections.

It is the defendant's burden to prove that a mitigating circumstance or circumstances exist. As explained before these proceedings, the defendant need only establish a mitigating circumstance by the greater weight of the evidence, which means evidence that more likely than not tends to establish the existence of a mitigating circumstance. If you determine by the greater weight of the evidence that a mitigating circumstance exists, you must consider it established and give that evidence such weight as you determine it should receive in reaching your verdict about the appropriate sentence to be imposed. Any juror persuaded as to the existence of a mitigating circumstance must consider it in this case. Further, any juror may consider a mitigating circumstance found by another juror, even if he or she did not find that factor to be mitigating.

Your decision regarding the appropriate sentence should be based upon proven aggravating factor or factors and established mitigating circumstance or circumstances that have been presented to you during these proceedings. You will now engage in a weighing process.

You must weigh all of the following:

a. Whether the aggravating factor or factors found to exist are sufficient to justify the death penalty,

b. Whether the aggravating factor or factors outweigh any mitigating circumstance or circumstances found to exist, and

c. Based on all of the considerations pursuant to these instructions, whether the defendant should be sentenced to life imprisonment without the possibility of parole or death.

The process of weighing aggravating factors and mitigating circumstances is not a mechanical or mathematical process. In other words, you should not merely total the number of aggravating factors and compare that number to the total number of mitigating circumstances. The law contemplates that different factors or circumstances may be given different weight or values by different jurors. Therefore, in your decision-making process, each individual juror must decide what weight is to be given to a particular factor or circumstance. Regardless of the results of each juror's individual weighing process—even if you find that the sufficient aggravators outweigh the mitigators—the law neither compels nor requires you to determine that the defendant should be sentenced to death.

Once each juror has weighed the proven factors, he or she must determine the appropriate punishment for the defendant. The jury's decision regarding the appropriate sentence must be unanimous if death is to be imposed. To repeat what I have said, if your verdict is that the defendant should be sentenced to death, your finding that at least one aggravating factor exists must be unanimous, your finding that the aggravating factor or factors are sufficient to impose death must be unanimous, and your finding that the aggravating factor or factors found to exist outweigh the established mitigating circumstance or circumstances must be unanimous, and your decision if to impose a sentence of death must be unanimous.

You will be provided a form to reflect your findings and decision regarding the appropriate sentence. If your vote on the appropriate sentence is less than unanimous, the defendant will be sentenced to life in prison without the possibility of parole.

The fact that the jury can make its decision on a single ballot should not influence you to act hastily or without due regard to the gravity of these proceedings. Before you vote, you should carefully consider and weigh the evidence, realizing that a human life is at stake, and bring your best judgment to bear in reaching your verdict.

When considering aggravating factors and mitigating circumstances, it is up to you to decide which evidence is reliable. You should use your common sense in deciding which is the best evidence and which evidence should not be relied upon in making your decision as to what sentence should be imposed. You may find some of the evidence not reliable, or less reliable than other evidence.

You should consider how the witnesses acted, as well as what they said. Some things you should consider are:

1. Did the witness seem to have an opportunity to see and know the things about which the witness testified?

2. Did the witness seem to have an accurate memory?

3. Was the witness honest and straightforward in answering the attorneys' questions?

4. Did the witness have some interest in how the case should be decided?

5. Does the witness' testimony agree with the other testimony and other evidence in the case?

6. Has the witness been offered or received any money, preferred treatment, or other benefit in order to get the witness to testify?

7. Did the witness at some other time make a statement that is inconsistent with the testimony he gave in court?

The fact that a witness is employed in law enforcement does not mean that his or her testimony deserves more or less consideration that that of any other witness.

Expert witnesses are like other witnesses with one exception—the law permits an expert witness to give an opinion. However, an expert's opinion is only reliable when given on a

subject about which you believe that person to be an expert. Like other witnesses, you may believe or disbelieve all or any part of an expert's testimony.

It is entirely proper for a lawyer to talk to a witness about what testimony the witness would give if called to the courtroom. The witness should not be discredited by talking to a lawyer about his or her testimony.

You may rely upon your own conclusion about the credibility of any witness. A juror may believe or disbelieve all or any part of the evidence or the testimony of any witness.

The defendant exercised a fundamental right by choosing not to be a witness in this case. You must not be influenced in any way by his decision. No juror should ever be concerned that the defendant did or did not take the witness stand to give testimony in the case.

These are some general rules that apply to your discussions. You must follow these rules in order to make a lawful decision.

1. You must follow the law as it is set out in these instructions. If you fail to follow the law, your decisions will be a miscarriage of justice. There is no reason for failing to follow the law in this case. All of us are depending upon you to make wise and legal decisions in this matter.

2. Your decisions must be based only upon the evidence that you have heard from the testimony of the witnesses, have seen in the form of the exhibits in evidence, and these instructions.

3. Your decisions must not be based upon the fact that you feel sorry for anyone or are angry at anyone.

4. Remember, the lawyers are not on trial. Your feelings about them should not influence your decisions.

5. Your decisions should not be influenced by feelings of prejudice, racial or ethnic bias, or sympathy. Your decisions must be based on the evidence and the law contained in these instructions.

During this trial, I have permitted you to take notes. You will be allowed to take those notes into the jury room during deliberations. You are instructed that your notes are a tool to aid your individual memory. You should not compare your notes with those of other jurors in determining the content of any testimony or in evaluating the importance of any evidence. Notes are for the note taker's personal use in refreshing his or her recollection of the evidence. They are not evidence. Above all, your memory should be your greatest asset in your recollection of the evidence.

In just a few moments you will be taken to the jury room by the bailiff. When you have reached decisions in conformity with these instructions, the appropriate forms should be signed and dated by your foreperson. *(Verdict Forms)*

During deliberations, jurors must communicate about the case only with one another and only when all jurors are present in the jury room. You are not to communicate with any person outside the jury about this case, and you must not talk about this case in person or through the telephone, writing, or electronic communication, such as a blog, Twitter, e-mail, text message, or any other means.

Many of you may have cell phones, tablets, laptops, or other electronic devices here in the courtroom. The rules do not allow you to bring your phones or any of those types of electronic devices into the jury room. Kindly leave those devices on your seats where they will be guarded by the bailiff while you deliberate.

Do not contact anyone to assist you during deliberations. These communications rules apply until I discharge you at the end of the case. If you become aware of any violation of these instructions or any other instruction I have given in this case, you must tell me by giving a note to the bailiff.

During this trial, items were received into evidence as exhibits. You may examine whatever exhibits you think will help you in your deliberations. These exhibits will be sent into

the jury room with you when you begin to deliberate. If you desire to view any other exhibits, please let me know by submitting your request in writing.

I cannot participate in your deliberations in any way. Please disregard anything I may have said or done that made you think I preferred one decision over another. If you need to communicate with me, send a note through the bailiff, signed by the foreperson. If you have questions, I will talk with the attorneys before I answer, so it may take some time. You may continue your deliberations while you wait for my answer. I will answer any questions, if I can, in writing or orally here in open court.

In closing, let me remind you that it is important that you follow the law spelled out in these instructions. There are no other laws that apply to this case. Even if you do not like the laws that must be applied, you must use them. For more than two centuries we have lived by the constitution and the law. No juror has the right to violate rules we all share.

Filing # 68758266 E-Filed 03/05/2018 06:28:52 AM

IN THE CIRCUIT COURT OF THE FOURTH JUDICIAL CIRCUIT, IN AND FOR DUVAL COUNTY, FLORIDA.

CASE NO.:16-2013-CF-005781 AXXXMA

DIVISION: CR-D

STATE OF FLORIDA

VS.

DONALD SMITH

MOTION FOR NEW TRIAL

Defendant, Donald Smith, through his undersigned attorney, W. Charles Fletcher, pursuant to Rules 3.580, 3.590 and 3.600, Florida Rules of Criminal Procedure respectfully requests this Honorable Court to grant a new trial in the above-styled cause. Defendant states the following grounds for this motion:

1. This Court erred in not granting Defendant's Motion for Judgment of Acquittal made at the close of the State's case.
2. This Court erred in not granting Defendant's Motion for Judgment of Acquittal made at the close of all the evidence.
3. The verdict is contrary to the weight of the evidence.
4. The verdict is contrary to the law.

ACCEPTED: DUVAL COUNTY, RONNIE FUSSELL, CLERK, 03/05/2018 04:22:08 PM

5. The Court erred when it denied the Defendant's Motion in Limine wherein the defense sought to preclude testimony regarding a bundle of rope that was placed in the shopping cart at Walmart. The defense noted that the rope was never purchased and was in fact, left inside the Walmart. Allowing testimony regarding the rope would cause the jury t speculate about its intended purpose. At the hearing on the Motion in Limine the State indicated to the Court that the evidence regarding the rope was relevant because the child victim's mother said it was something that Mr. Smith had placed in the shopping cart. During the State's opening statement, the state referred to it as evidence of what Mr. Smith was intending to do.

6. The Court erred when it denied the Motion in Limine seeking to prevent the admission into evidence the photographs taken by the medical examiner and to only allow testimony by the medical examiner as to the child victim's injuries. The defense contended that the photographs were too gruesome and would cause the jury to decide the case based on emotion rather than the law. At trial, not only did several jurors cry during the introduction of the photographs, but the medical examiner who took the photographs broke down and sobbed, and asked the court for a break.

7. The Court erred when it denied the Motion to Suppress the jail wire containing a recorded conversation between the defendant and another inmate.
8. The Court erred when it denied the Motion in Limine regarding the contents of the jail wire.
9. The Court erred when it denied the Motion for Change of Venue.
10. During the state's opening statement, the prosecutor told the jury that "this was a mother's worst nightmare." The defense objected to the improper comment as argumentative and this Court overruled the objection. The statement by the state was clearly intended to invoke the anger of the members of the jury in an effort to have them decide the case on emotion rather than on an analysis of the facts and a subsequent application of the law. After the Court overruled the objection the state said it again, even louder.
11. During the testimony of the medical examiner, the medical examiner testified that she had over 35 years of experience and had conducted thousands of autopsies. While reviewing the photographs of the child victim before the jury she became emotional, started to cry, and asked for a break. The defense moved for a mistrial based on the outpouring of emotion by a professional state witness whose interests are clearly in line with the state. The Court denied the motion in error.

WHEREFORE, Defendant respectfully requests this Honorable Court to grant a new trial for the reasons cited herein.

I HEREBY CERTIFY that a copy of the above and foregoing Motion for New Trial has been furnished to the Office of the State Attorney, by electronic filing this 5th day of March 2018.

Respectfully submitted,
Law Offices of W. Charles Fletcher, P.A.

/s/ W. Charles Fletcher

W. Charles Fletcher, Esquire
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Attorney for Defendant
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05-16-2018

IN THE CIRCUIT COURT, FOURTH JUDICIAL CIRCUIT, IN AND FOR DUVAL COUNTY, FLORIDA

CASE: **16-2013-CF-005781-AXXX-MA**

DIVISION: **CR-D (Circuit)**

STATE OF FLORIDA

vs.

DONALD JAMES SMITH, DEFENDANT

ORDER

THIS CAUSE COMING ON BEFORE THE COURT UPON THE ☒DEFENDANT'S ☐STATE'S

Motion for New Trial

FILED HEREIN ON THE 5TH DAY OF **MARCH** , 2018 AND THE COURT HAVING HEARD ARGUMENTS OF THE STATE'S ATTORNEY AND OF COUNSEL FOR DEFENSE, AND BEING FULLY ADVISED IN THE PREMISES, IT IS THEREUPON

ORDERED AND ADJUDGED THAT THE AFORESAID MOTION SHALL BE AND THE SAME IS HEREBY: Moot - Amended Motion filed / Ruled on 3/28/18

DONE AND ORDERED IN OPEN COURT AT JACKSONVILLE, DUVAL COUNTY, FLORIDA, THIS 28 DAY OF March, 2018.

Circuit Judge

FILED

MAR 28 2018

CLERK CIRCUIT COURT

IN THE CIRCUIT COURT, FOURTH JUDICIAL CIRCUIT, IN AND FOR DUVAL COUNTY, FLORIDA

CASE: 16-2013-CF-005781-AXXX-MA

DIVISION: CR-D (Circuit)

STATE OF FLORIDA

vs.

DONALD JAMES SMITH, DEFENDANT

ORDER

THIS CAUSE COMING ON BEFORE THE COURT UPON THE ☒DEFENDANT'S ☐STATE'S

AMENDED MOTION FOR NEW TRIAL

FILED HEREIN ON THE 27TH DAY OF MARCH , 2018 AND THE COURT HAVING HEARD ARGUMENTS OF THE STATE'S ATTORNEY AND OF COUNSEL FOR DEFENSE, AND BEING FULLY ADVISED IN THE PREMISES, IT IS THEREUPON

ORDERED AND ADJUDGED THAT THE AFORESAID MOTION SHALL BE AND THE SAME IS HEREBY:

Denied

DONE AND ORDERED IN OPEN COURT AT JACKSONVILLE, DUVAL COUNTY, FLORIDA, THIS 28 DAY OF March , 2018 .

MALLORY D COOPER
Circuit Judge

FILED

MAR 28 2018

RONALD W. DAMSELL
CLERK CIRCUIT COURT

IN THE CIRCUIT COURT, FOURTH JUDICIAL CIRCUIT, IN AND FOR DUVAL COUNTY, FLORIDA.

CLERK'S EXHIBIT MEMORANDUM – SPENCER HEARING

DIVISION: CR-D (Circuit)
CASE: 16-2013-CF-005781-AXXX-MA

STATE OF FLORIDA
vs.
DONALD JAMES SMITH

Ex. No	State	Ex. No	Defendant
1	CD - Testimony of Dr. Rao from trial		

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IN THE CIRCUIT COURT OF THE FOURTH JUDICIAL CIRCUIT, IN AND FOR DUVAL COUNTY, FLORIDA

CLERK NO.: 16-2013-CF-005781-AXXX-MA

DIVISION: CRD

STATE OF FLORIDA

vs.

DONALD JAMES SMITH

STATE'S MEMORANDUM IN SUPPORT OF THE IMPOSITION OF THE DEATH PENALTY

The State of Florida (the "State"), by and through the undersigned attorneys, requests this Honorable Court to follow the jury's unanimous 12-0 verdict and impose the death penalty in the First Degree Murder conviction of the Defendant, Donald James Smith. In support of this memorandum, the State would present the following:

FACTS

On June 21, 2013, Cherish Perrywinkle was eight years old and weighed sixty-seven pounds. She was wearing an orange dress, purple flip flops, and a pink headband when she walked to Family Dollar with her mother, Rayne Perrywinkle ("Ms. Perrywinkle"), and her two younger sisters, Destiny and Neveah. After shopping at Family Dollar, she and her family walked across the street to the Dollar General on Edgewood Avenue. Ms. Perrywinkle had shopped there before, but the trip on that day involved a special occasion. Cherish was going to travel to California the next morning to spend the summer with her father, and Ms. Perrywinkle wanted Cherish to have new clothes. Ms. Perrywinkle had only $100.00 to spend, and she needed to save a portion of the money for Cherish's transportation to the airport the following morning.

Sometime after Ms. Perrywinkle and her children arrived, the Defendant also arrived at Dollar General where he approached the assistant store manager, Brad Calhoun, and asked for

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adult magazines. Mr. Calhoun informed the Defendant they did not have adult magazines, but the Defendant did not leave the store. Instead, he began to watch Ms. Perrywinkle and her children. He watched Ms. Perrywinkle as she asked Mr. Calhoun for the price of a small dress. He observed as Ms. Perrywinkle decided not to buy the dress. He even approached Mr. Calhoun and asked if it would be too forward of him to offer to pay for the dress.

When Ms. Perrywinkle and her children left the store, the Defendant was outside waiting for them. He commented on how Ms. Perrywinkle appeared to have her hands full and offered to buy the dress for her. He then began to gain her trust by lying to her. He told her his wife, who drove a gold car, was on her way with a $150.00 gift card. He led Ms. Perrywinkle to believe he would allow her to use the gift card, so she waited for the Defendant's wife to arrive. While she waited, Cherish and her sisters played in the rain. The Defendant's wife never arrived at Dollar General, but the Defendant continued to gain Ms. Perrywinkle's trust. He told her he worked for a non-profit organization, HabiJax, and talked about the church he attended.

The Defendant ultimately convinced her to ride with him to Walmart where he claimed his wife would meet them with the gift card. She was hesitant at first but believed the Defendant was genuinely willing to help. She and her three daughters entered the Defendant's white van and rode with him to Walmart. In the parking lot, the Defendant continued his cunning ruse. He told Ms. Perrywinkle to go ahead and said he would wait for his wife to bring the gift card. Ms. Perrywinkle and her children went inside the store, and the Defendant entered shortly thereafter, carefully looking up and down the aisles to find them. When he found them, he continued to watch Ms. Perrywinkle and her family while they shopped. While they were shopping, the Defendant selected a rope and placed it into Ms. Perrywinkle's shopping cart.

As time passed and it was getting late, the children became hungry. The Defendant, who had been lingering around Cherish and her family for hours, said he was going to McDonald's and asked what Cherish wanted to eat. Cherish asked her mother what she wanted to eat and they decided to have cheeseburgers. The Defendant walked away, and Cherish walked away with him. When Cherish realized McDonald's was closed, she followed the Defendant to his white van. She still believed they were going to get cheeseburgers. This was the last time anyone – other than the Defendant – saw Cherish Perrywinkle alive.

The Defendant was calm, methodical, and deceptive in the way he kidnapped Cherish. Anyone watching would have believed Cherish was walking away with a grandfather or an uncle. The Defendant drew no attention to himself because he had successfully, through deception and lies, earned the innocent trust of Cherish and her family. As the Defendant was

driving toward the parking lot exit, he pulled up to a gold car, rolled down his window, and said, "We're going to get cheeseburgers." Neither of the people inside the gold car understood why the Defendant, whom they had never met, spoke to them about getting cheeseburgers. Only those who were aware of the Defendant's claims of a wife and a gold car would have understood the significance of this seemingly random act. The only reasonable explanation is that Cherish became fearful and the Defendant was attempting to calm her fears.

The Defendant's story – about his wife, the gift card, and the gold car – was a lie. In those moments, the lie began to unravel, but it was too late. The Defendant continued to drive away with Cherish trapped inside. Within an hour, Ms. Perrywinkle realized Cherish was missing, borrowed a phone, and called the police. A "BOLO" was issued notifying all law enforcement officers to be on the lookout for the Defendant's white van. Officers of the Jacksonville Sheriff's Office ("JSO") were dispatched to Walmart where they reviewed video surveillance. In the early morning hours of June 22, 2013, an Amber Alert was issued.

The details of the anguish, pain, and terror Cherish endured in the hours after she was kidnapped are known only to the Defendant, who gagged, raped, and sodomized Cherish before he strangled her to death. After the Defendant murdered Cherish, he took her body to a wooded area near Rutgers and Broward Road, backed his van into the tree line, and hid Cherish's body under a log. He piled pavement and debris on top of Cherish in an attempt to wash away the evidence that would later speak more powerfully than the most eloquent witness. Sometime between 7:15 a.m. and 7:20 a.m., Marquita Howard and her daughter, Christina Howard, saw a suspicious van backed into the tree line. When they arrived home between 7:20 a.m. and 7:25 a.m., they heard about the Amber Alert and learned police were looking for a little girl in a white van. Ms. Howard and her daughter quickly returned to the area, but the van was gone. Christina called 911, leading police to the crime scene.

On June 22, 2013, JSO Officer Charles Wilkie, Sr. woke up at 4:15 a.m. and within the hour learned of an Amber Alert involving a missing child. While he knew he and his police service dog, Gator, would be looking for the missing child that day, he did not know what a critical role he would have in the capture of the Defendant and the discovery of Cherish's body. Officer Wilkie, whose shift began at 5:00 a.m., also received a BOLO that morning. Between 8:45 a.m. and 9:00 a.m., Officer Wilkie's dispatcher contacted him with information about the location of the suspect vehicle. He was in the area of 20th Street and Main Street when he learned another officer had a visual on the Defendant's white van. He initiated his emergency equipment and participated in the felony traffic stop just before I-95 South.

As Officer Wilkie followed directly behind the van with his emergency equipment

activated, the Defendant stopped the van, flamboyantly revealed his hands, and exited the van. The Defendant lifted up his shirt to expose his waistline pursuant to Officer Wilkie's command. As Officer Wilkie conducted a pat down of the Defendant, the Defendant's soaking pants left water on the officer's hands. Officer Wilkie instinctively shouted, "Oh my God. She's in the water." The Defendant turned, looked at the officer, and looked away. The look on the Defendant's face confirmed what the physical evidence had already revealed. Officer Wilkie cleared the van with Gator, but Cherish was not inside.

Officer Wilkie completed the traffic stop and drove to the church where Ms. Howard and her daughter had earlier observed the Defendant's white van. Behind the church, Officer Wilkie asked where the water was and instructed Gator to "track." As Gator tracked the wood line, he picked up the track and took off into the woods. On the edge of the shoreline, Gator began to circle. Officer Wilkie, realizing they were close, observed a distinct path of trampled reeds leading to a tree on its side. He walked to the water and underneath the tree was Cherish, in her orange dress, floating lifelessly under several inches of water. He could tell that Cherish was not alive, but he guarded her and the scene until other law enforcement officers arrived.

Kimberly Long, a JSO crime scene unit detective, arrived on scene at around 9:17 that morning. She was responsible for the documentation, collection, and preservation of evidence. When she arrived, Cherish was still under water. She processed the scene for evidence and obtained swabs from Cherish's body and the surrounding area where her body was found. Detective Long did not oversee the sexual battery kit because it would later be completed at the direction of the chief medical examiner, Dr. Valerie Rao. As a forensic pathologist, Dr. Rao was not required to attend every crime scene. This case, however, involved an abducted child and a deeply grieved community. Dr. Rao attended the crime scene on June 22, 2013 and directed photography of Cherish before having her transported. On the same day, she also directed the collection of the sexual battery kit.

On June 23, 2013, Dr. Rao conducted the autopsy of Cherish Perrywinkle and determined the cause and manner of her death: mechanical asphyxia. The Defendant had strangled Cherish to death by ligature. Dr. Rao determined that Cherish's injuries were antemortem injuries, caused prior to Cherish's death. Moreover, she determined that the injuries on Cherish's body revealed Cherish's struggle in the moments leading up to her death. The Defendant used such great force in smothering Cherish that her nose, gums, and eyeballs bled. The size of the hemorrhaging in her eyes revealed the intensity of the struggle she endured. The area between her vagina and anus was reduced to a thin line of tissue as a result of the force the Defendant used during the rape. The Defendant destroyed Cherish's anatomy.

Nicole Lee of the Florida Department of Law Enforcement received items of evidence including the buccal swab of the Defendant, the penile swab of the Defendant, a swab of Cherish's neck, a sexual assault kit collected from Cherish (oral swabs, vaginal swabs, mons pubis and labia swabs, anal swabs, right breast swabs, and left breast swabs), a vaginal smear slide, an anal smear slide, and an oral smear slide. Ms. Lee conducted analyses on the mons pubis and labia swabs, anal swabs, oral swabs from inside the sexual assault kit, vaginal swabs, and penile swab from the Defendant. The results were consistent with the evidence that had previously been gathered in the case.

Ms. Lee detected the presence of semen on the penile swabs from the Defendant. The swabs of Cherish's mouth, mons pubis and labia, vagina, and anus were all positive for the presence of semen. The anal swabs contained more semen than any other area Ms. Lee examined. Although moisture, dirt, and sunlight have the potential to wash away and degrade DNA, Ms. Lee obtained a full DNA profile on the neck swabs and on the anal swabs of Cherish Perrywinkle. The foreign DNA profile on Cherish's neck swabs and anal swabs was an exact match to the Defendant. The foreign profile on Cherish's vaginal swabs was also a match to the Defendant although a full profile was not obtained.

The collection of the overwhelming and incriminating evidence did not end there. In April of 2015, a confidential informant revealed that the Defendant was conversing with another inmate, Randall Deviney ("Deviney"), through a pipe chase between isolation cells. The JSO technical support unit assisted with the installment of a recording device within the chase. On June 23, 2015, the recording equipment was covertly placed within the chase at the Duval County Jail. The device was removed after approximately one week. The recording captured the Defendant saying a twelve year old girl who passed by the cell was right up his alley. He said this was his "target area" and that he would like to run into her at Walmart. When Deviney asked if Cherish had a "butt," the Defendant said, "Yeah." When Deviney said, "She ain't have one like that though," the Defendant responded, "That's 'cause she ain't black. She had a lot for a white girl."

PROCEDURAL HISTORY

On June 22, 2013, the Defendant was arrested for the kidnapping and murder of Cherish Perrywinkle. On July 2, 2013, the Grand Jury returned an Indictment for Murder in the First Degree, Kidnapping a Child Under the Age of 13 Years, and Sexual Battery on a Child Less than 12 Years Old.

On February 5, 2018, the Defendant proceeded to trial. The State called its first witness

on February 12, 2018. On February 14, 2018, the jury found him guilty, as charged in the indictment, of First Degree Murder, Kidnapping, and Sexual Battery Upon a Person Less than 12 Years of Age. As to the First Degree Murder, the jury unanimously made a further finding that the killing was premeditated and that the killing was done during the commission or attempted commission of a felony, to wit: Kidnapping or Sexual Battery. As to Kidnapping, the jury unanimously made a further finding that the victim was under 13 years of age at the time of the offense and that the Defendant committed a sexual battery on the victim during the commission of the offense.

The penalty phase began on February 20, 2018. On February 22, 2018, the jury unanimously found the following: the aggravating factors were all proven beyond a reasonable doubt, the aggravating factors were sufficient to impose death, and the aggravating factors outweighed the mitigating circumstances. The jury unanimously recommended a death sentence.

On March 28, 2018, the Court conducted a *Spencer* Hearing and passed the case for further proceedings, submission of sentencing memoranda, and imposition of sentence.

INTRODUCTION

This Honorable Court must consider the evidence presented during the guilt and penalty phases and the jury's unanimous verdict of death. The Court must also determine the appropriate sentence. The State urges this Court to impose the death penalty in conformity with the jury's unanimous verdict.

AGGRAVATING FACTORS

During the guilt and penalty phases, the State proved beyond a reasonable doubt the following six aggravating factors:

1. **DONALD JAMES SMITH was previously convicted of a felony involving the use or threat of violence to another person.**

The jury unanimously found that the State proved this factor beyond a reasonable doubt. The State presented the testimony of Kerri-Anne Buck, the victim of the attempted kidnapping. Kerri-Anne Buck revealed that on September 27, 1992, the Defendant approached her when she was 13 years old. She was walking to her friend's home after church when she encountered the Defendant in a gray van with tinted windows. The Defendant first asked her if she knew someone named Susie. She said she did not. He next asked her if she went to

Southside Middle School. She told him she did not. The Defendant finally asked Kerri-Anne if she wanted a ride. When she told him no, he demanded that she enter his van by telling her to "get the fuck in the van." She described him as mean and scary, and she ran away from him toward her friend's house.

As she was running away on foot, the Defendant chased after her in his van. The Defendant cut her off at a crossroad, but she kept on running. When she arrived at her friend's house, nobody was home. Kerri-Anne found shelter in a tube slide on a nearby playground. The Defendant did not give up. He continued to come after her. As Kerri-Anne was slipping down the slide, she heard the Defendant say, "I know you're in there you little bitch…I'm going to find you." Kerri-Anne stayed silent for moments that felt like forever until she finally heard the van drive off. She ran to the home of her sister's friend, contacted her family, and called the police.

In the weeks that followed, Kerri-Anne saw the Defendant in his van outside her house. She and her jumped into the car and followed him to obtain his license plate number. When she and the Defendant made eye contact, he looked at her like he was going to kill her. She and her mother contacted the Jacksonville Sheriff's Office ("JSO"). Within several days, she met with Detective Parker of the JSO, told him what happened, and identified the Defendant in a photo spread.

On February 20, 2018, the State and Defendant stipulated that the Defendant was convicted of Attempted Kidnapping on January 15, 1993. After Kerri-Anne finished testifying, the Honorable Mallory Cooper read the stipulation to the jury during trial. The Court should give this aggravating factor great weight.

2. **The First Degree Murder was committed while DONALD JAMES SMITH was engaged in the commission of a Kidnapping and a Sexual Battery.**

The jury unanimously found that the State proved this factor beyond a reasonable doubt. The jury's decision is consistent with the jury's verdicts from February 14, 2018 when the jury made a further finding as to the First-Degree Murder (Count 1) that the killing was done during the commission or attempted commission of a felony, to-wit: Kidnapping or Sexual Battery. The jury's unanimous decision is also consistent with the jury's verdicts as to the Kidnapping (Count 2) and Sexual Battery (Count 3).

The Defendant's feigned generosity masked his true intentions when he walked away with Cherish on the evening of June 21, 2013. The Defendant would later murder Cherish by strangling her to death, and he committed this murder while he was engaged in the commission

of a Kidnapping and a Sexual Battery. The Defendant smothered her, raped her, and sodomized her. During the vicious rape, the Defendant used such great force that he destroyed Cherish's anatomy. Cherish's small body was covered with injuries. The area between Cherish's vagina and anus was reduced to a thin line of tissue because of the destructive force this Defendant used against her.

The examination later revealed the presence of semen inside Cherish's mouth, vagina, and anus. The DNA evidence from Cherish's anal swabs and vaginal swabs matched the Defendant. The evidence overwhelmingly proved that the Defendant was engaged in a Kidnapping and Sexual Battery when he used a ligature to strangle Cherish to death. The jury found this to be an aggravating factor during the penalty phase. The factor, however, is also contained within the jury's guilt phase verdicts from February 14, 2018. The Court should give this aggravating factor great weight.

3. **The First Degree Murder was committed for the purpose of avoiding or preventing a lawful arrest.**

The jury unanimously found that the State proved this factor beyond a reasonable doubt. This factor focuses on the Defendant's "motivation for the crime." *Card v. State*, 803 So. 2d 613, 625 (Fla. 2001). The Supreme Court of Florida has upheld the finding of this factor where "the victim is transported to another location and then killed." *Card v. State*, 803 So. 2d 613 (Fla. 2001) (citing *Jones v. State*, 748 So. 2d 1012, 1027 (Fla. 1999)). When the Defendant killed Cherish Perrywinkle, he attempted to silence the only witness to his crimes. He killed her so that she would never be able to do what Kerri-Anne Buck did decades prior. The Defendant knew that he would never have been caught had Kerri-Anne Buck been unable to identify him in a photo spread.

A life in prison without the possibility of parole would have been the Defendant's punishment for sexually battering eight-year-old Cherish. The Defendant's legal expert witness, Michael Bossen, confirmed that the Defendant would have faced life in prison without the possibility of parole even if he had not killed Cherish. While the Defendant knew he was on video with Cherish, he also knew the manner in which he kidnapped her was unconventional. The Defendant intentionally took Cherish to another location to commit his heinous crimes and to avoid creating witnesses to those crimes. Because the Defendant took Cherish to a secluded area, she was the only witness. The only possibility of escaping punishment was not only to destroy Cherish by murdering her, but also to attempt to wash away any incriminating evidence he left behind.

The Defendant failed to foresee, however, that Ms. Howard and her daughter Christina would observe the Defendant's van, realize something was amiss, and quickly thereafter learn of the Amber Alert. He failed to foresee that they would immediately contact the police before Cherish's body and the DNA evidence within her could be washed away by the brackish water. The Court should give this factor great weight.

4. The First Degree Murder was especially heinous, atrocious or cruel.

The jury unanimously found that the State proved this factor beyond a reasonable doubt. This factor focuses on "the means and manner in which death is inflicted and the immediate circumstances surrounding the death." *Brown v. State*, 721 So. 2d 274 (Fla. 1998). The "fear and emotional strain suffered by the victim can also be considered in determining whether the murder was heinous, atrocious, or cruel." *Covington v. State*, 228 So. 3d 49, 63 (Fla. 2017) (citing *Lott v. State*, 695 So. 2d 1239, 1244 (Fla. 1997)). The heinous, atrocious, or cruel factor is supported by the torture and emotional trauma this Defendant inflicted upon Cherish. The focus should be on the Cherish's perception of the circumstances "which may be evaluated in accordance with common-sense inferences from the circumstances." *Id.* at 64.

The State proved through the testimony of Dr. Valerie Rao that the murder of Cherish Perrywinkle was heinous, atrocious, and cruel. Bruises and injuries covered Cherish's small body. Dr. Rao testified that the Defendant used "tremendous force" against Cherish. The area surrounding Cherish's nipple was bruised, consistent with someone sucking on her breast. Dr. Rao testified that this bruising was caused while Cherish was still alive. She described the difference between postmortem and antemortem injuries and testified that all Cherish's injuries were sustained prior to her death, providing further proof of the physical and emotional agony Cherish endured.

Dr. Rao concluded that mechanical asphyxia caused Cherish's death. She testified that Cherish sustained "tremendous force" on her neck such that she could not breathe. The force applied by the ligature caused Cherish's skin to be abraded. Cherish suffered swelling of her brain as a result of a lack of oxygen, which ultimately caused her death. Dr. Rao testified that three to five minutes without oxygen to the brain would result in death. The injuries, however, revealed more than the cause and manner of death. The injuries also revealed that Cherish struggled prior to her death. The signs of her struggle were revealed in the hemorrhaging of both eyes. The hemorrhaging was large, revealing the intensity of Cherish's struggle. Cherish's nostrils and gums bled as a result of the pressure that was applied to the front of her face.

When one focuses on Cherish's perception of what happened, the words heinous,

atrocious, and cruel do not adequately describe the horror of the Defendant's actions. The DNA evidence revealed semen in Cherish's mouth, anus, and vagina. The foreign DNA in Cherish's vagina and anus matched the Defendant. Dr. Rao observed "so much trauma" surrounding the victim's vaginal area and noted that Cherish's anatomy was "totally destroyed" by the injuries she sustained. Dr. Rao observed tearing in Cherish's vaginal area. She stated that while there is generally a distance between the area where one passes urine and the vagina, and a broad area of distance between the vagina and the anus, the area between the anus and vagina was reduced to a very thin area of tissue.

Dr. Rao further testified that the Defendant had abnormalities on his penis. The Defendant had a circular bruise on the head of his penis and many areas of bruising on the shaft of his penis. Dr. Rao testified that a sucking motion with significant force would have caused the injury on the head of the Defendant's penis. She testified that the injuries were fresh and consistent with the time frame of Cherish's death. Even the Defendant's injuries offer proof that the Defendant tortured Cherish in inconceivable ways. The Court should give this aggravating factor great weight.

5. **The First Degree Murder was committed in a cold, calculated, and premeditated manner, without any pretense of moral or legal justification.**

The jury unanimously found that the State proved this factor beyond a reasonable doubt. In order to establish this factor, the evidence must show that "the killing was the product of cool and calm reflection and not an act prompted by emotional frenzy, panic, or a fit of rage (cold), *and* that the defendant had a careful plan or prearranged design to commit murder before the fatal incident (calculated), *and* that the defendant exhibited heightened premeditation (premeditated), *and* that the defendant had no pretense of moral or legal justification. *Brown v. State*, 721 So. 2d 274, 279 (Fla. 1998).

The murder was the product of calm and cool reflection. The Defendant carefully planned the murder. The Defendant's careful planning started long before Cherish entered the Defendant's van. The Defendant saw Cherish Perrywinkle and targeted her and her mother from the moment he saw them in the Dollar General. He lingered and watched until he had an opportunity to converse with Ms. Perrywinkle and offer to buy her the dress she could not afford to buy on her own.

The Defendant had a careful plan which involved the use of deception and trickery to gain Ms. Perrywinkle's trust. The Defendant continued the ruse on the way to Walmart by telling Ms. Perrywinkle she was safe. Instead of leaving the Walmart after dropping them off,

the Defendant walked into Walmart searching every aisle until he found them. He lingered for over an hour and a half watching as they shopped. He even took Cherish to the dressing room where he could have taken advantage of her there. Instead, he waited for an opportunity. He exhibited heightened premeditation by waiting for hours before he took Cherish to a secluded area.

Once he convinced Cherish to leave with him, he continued the ruse by stopping by a gold vehicle and engaging in conversation with the occupants. After the Defendant gagged, raped, and sodomized Cherish, he strangled her for at least three minutes until he took every last breath from her. The heightened premeditation was also exhibited in the rope he placed in the cart earlier that evening. There was absolutely no moral or legal justification for the Defendant's vicious actions. The Court should give great weight to this aggravating factor.

6. **Cherish Perrywinkle was a person less than 12 years of age.**

The jury unanimously found that the State proved this factor beyond a reasonable doubt. Cherish's mother testified that Cherish was eight years old. The photographs of Cherish also reveal that she was less than 12 years of age. Moreover, the jury, in its verdict as to Sexual Battery (Count 3), had previously found that the State proved Cherish was less than 12 years of age. The pain, the anguish, and the suffering Cherish endured as a child is unthinkable. The Defendant, in kidnapping, raping, and murdering Cherish, stole her innocence. The Court should give this aggravating factor great weight.

MITIGATING CIRCUMSTANCES

The Defendant argued that the following mitigating circumstances were proven:

1. **The First Degree Murder was committed while DONALD JAMES SMITH was under the influence of extreme mental or emotional disturbance.**

The jury unanimously found that this mitigating circumstance was not established by a greater weight of the evidence. One of the Defendant's experts, Dr. Joseph John Sesta, testified that the Defendant was malingering and specifically stated that the Defendant was "faking" the psychiatric component. The Court should give this factor no weight.

2. **The capacity of DONALD JAMES SMITH to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired.**

The jury unanimously found that this mitigating circumstance was not established by a

greater weight of the evidence. Dr. Daniel Buffington opined that the combined effects of chronic substance abuse, the Defendant's psychological disorder, and his cocaine binge use resulted in an impaired and substantially diminished moral judgment. Dr. Buffington, however, admitted that the Defendant's history was self-reported. He testified that he drafted his opinion after a fifteen minute phone call with the Defendant, prior to ever having met the Defendant.

Dr. Geoffrey Colino testified about traumatic brain injuries and their ability to affect behavior. Dr. Colino contradicted himself during his testimony and subsequently blamed it on having been ill at the time of his deposition. He did not think it was important to question the Defendant about the crimes he committed. His conclusions, like Dr. Buffington's, were based in part on the Defendant's own self-reporting.

Another defense expert, Dr. Heather Holmes, testified as to the Defendant's competency. Her response as to whether or not the Defendant was competent was, "Yes. No question." When questioned about insanity, she said he was "absolutely not" insane. She testified that the Defendant blamed Cherish and his attorneys. She testified that having his condition did not preclude one from "exercising the ability to control impulses." She testified that the Defendant lacked motivation to change and was manipulative, selfish, callous, and uncaring. She also testified that the Defendant lacked empathy, remorse and conscience. In fact, the Defendant was one of the most dangerous sex offenders she had ever evaluated. She testified that there was nothing mitigating about the Defendant, nor was there anything mitigating about his actions.

Dr. Sesta testified that the Defendant was responsible, the Defendant knew what he was doing, and the Defendant knew what he was doing was wrong. The evidence presented by the Defendant's experts was inconsistent with his claim that his capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was substantially impaired.

The jury's unanimous finding was consistent with the lack of evidence supporting this claim. The Court should give this factor no weight.

3. DONALD JAMES SMITH's age at the time of the crime.

The jury unanimously agreed that this factor was established by a greater weight of the evidence. This was the only mitigating factor the jury unanimously determined was established by a greater weight of the evidence.

When a defendant is not a minor, "no per se rule exists which pinpoints a particular age as an automatic factor in mitigation." *Nelson v. State*, 850 So. 2d 514, 528 (citing *Shellito v. State*,

701 So. 2d 837 (Fla. 1997)). The existence of the age mitigator and the weight it should be given depends on the "evidence presented at trial and the sentencing hearing." *Id.* at 529.

In *Hurst v. State*, the Court found that "the defendant's age must be linked with some other characteristic of the defendant or the crime, such as significant emotional immaturity or mental problems" for a non-minor defendant's age to be given significant weight as a mitigating circumstance. *Hurst v. State*, 819 So. 2d 689, 698 (Fla. 2002). In *Mahn v. State*, the Court held that age was a mitigating circumstance where the defendant's history of substance abuse, mental instability, and emotional instability "provided the essential link between his youthful age and immaturity." *Mahn v. State*, 714 So. 2d 391, 400 (Fla. 1998). The Defendant in *Mahn* was 19 at the time of the crimes and the evidence was "unrebutted" and "unrefuted." *Id.* at 400.

The validity of the evidence involving a defendant's history is dependent upon a defendant's truthful and accurate report. In the case before this Court, however, the Defendant's evidence of substance abuse, mental instability, and emotional instability was self-reported and often lacked corroboration. As Dr. Buffington testified, patients are not always forthright, even in clinical settings. Dr. Holmes found the Defendant to be "mentally stable" and "intelligent." Dr. Sesta testified that the Defendant was malingering and "faking" the psychiatric component. The Defendant's history did not provide an essential link between his age and his actions. The jury, however, agreed that his age was mitigation.

While the jury unanimously agreed that this factor was established, the aggravating factors overwhelmingly outweigh any mitigation involving the Defendant's age at the time of the crime.

4. **The existence of any other factors DONALD JAMES SMITH's character, background, or life or the circumstances of the offense that would mitigate against the imposition of the death penalty.**

The Defendant listed 68 mitigating circumstances as other factors. The circumstances of the Defendant's birth, childhood, family background, and life experiences were almost unanimously rejected as mitigators by the jury. The jury unanimously rejected Defendant's argument in 67 of the circumstances. Seven out of the twelve jurors determined that only one factor was established by a greater weight of the evidence. That factor was the following: "Donald James Smith, Jr. has developed a close relationship with his father since he has been incarcerated.

The relationship Donald James Smith, Jr. has developed with his father since his father's arrest may speak to the forgiving character of Donald James Smith, Jr., but it tells us very little

about the character of this Defendant. When viewed in light of the aggravating factors, this factor does not outweigh the Defendant's actions in kidnapping, raping, and strangling Cherish Perrywinkle to death. Only seven out of twelve jurors agreed this was a mitigating factor. The Court should give little weight to this factor.

CONCLUSION

The aggravating factors were proven beyond a reasonable doubt and should be given great weight. The jury needed to find only one aggravating factor to consider the imposition of the death penalty. The jury, in this case, unanimously agreed that all six aggravating factors were established beyond a reasonable doubt. The jury unanimously agreed that the factors justified the imposition of the death penalty and that the death penalty is the appropriate punishment. The two mitigating circumstances of the Defendant's age and the relationship his son developed with him after incarceration do not outweigh the overwhelming aggravation in the First Degree Murder of Cherish Perrywinkle.

WHEREFORE, the State of Florida respectfully requests that this Honorable Court follow the jury's unanimous 12-0 verdict and impose the death penalty on the Defendant.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy hereof has been furnished to Julie A. Schlax, Attorney for the Defendant, 200 East Forsyth Street, Jacksonville, Florida, 32202; and W. Charles Fletcher, Attorney for the Defendant, 8833 Perimeter Park Boulevard, Suite 104, Jacksonville, Florida 32216 by e-delivery this ___ day of April, 2018.

MELISSA W. NELSON
STATE ATTORNEY

/s/ Mark Caliel
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Filing # 71427569 E-Filed 04/30/2018 03:13:02 PM

IN THE CIRCUIT COURT OF THE FOURTH JUDICIAL CIRCUIT, IN AND FOR DUVAL COUNTY, FLORIDA.

CASE NO.:16-2013-CF-005781 AXXXMA

DIVISION: CR-D

STATE OF FLORIDA

VS.

DONALD SMITH

AMENDED MOTION FOR NEW TRIAL

Defendant, Donald Smith, through his undersigned attorney, W. Charles Fletcher, pursuant to Rules 3.580, 3.590 and 3.600, Florida Rules of Criminal Procedure respectfully requests this Honorable Court to grant a new trial in the above-styled cause. Defendant states the following grounds for this motion:

1. This Court erred in not granting Defendant's Motion for Judgment of Acquittal made at the close of the State's case.
2. This Court erred in not granting Defendant's Motion for Judgment of Acquittal made at the close of all the evidence.
3. The verdict is contrary to the weight of the evidence.
4. The verdict is contrary to the law.

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5. The Court erred when it denied the Defendant's Motion in Limine wherein the defense sought to preclude testimony regarding a bundle of rope that was placed in the shoppin cart at Walmart. The defense noted that the rope was ever purchased and was in fact, left inside the Walmart. Allowing testimony regarding the rope would cause the jury to speculate about its intended purpose. At the hearing on the Motion in Limine the State indicated to the Court that the evidence regarding the rope was relevant because the child victim's mother said it was something that Mr. Smith had placed in the shopping cart. During the State's opening statement, the state referred to it as evidence of what Mr. Smith was intending to do.

6. The Court erred when it denied the Motion in Limine seeking to prevent the admission into evidence the photographs taken by the medical examiner and to only allow testimony by the medical examiner as to the child victim's injuries. The defense contended that the photographs were too gruesome and would cause the jury to decide the case based on emotion rather than the law. At trial, not only did several jurors cry during the introduction of the photographs, but the

medical examiner who took the photographs broke down and sobbed, and asked the court for a break.

7. The Court erred when it denied the Motion to Suppress the jail wire containing a recorded conversation between the defendant and another inmate.
8. The Court erred when it denied the Motion in Limine regarding the contents of the jail wire.
9. The Court erred when it denied the Motion for Change of Venue.
10. During the state's opening statement, the prosecutor told the jury that "this was a mother's worst nightmare." The defense objected to the improper comment as argumentative and this Court overruled the objection. The statement by the state was clearly intended to invoke the anger of the members of the jury in an effort to have them decide the case on emotion rather than on an analysis of the facts and a subsequent application of the law. After the Court overruled the objection the state said it again, even louder.
11. During the testimony of the medical examiner, the medical examiner testified that she had over 35 years of experience and had conducted thousands of autopsies. While reviewing the photographs of the child victim before the jury she became emotional, started to cry, and asked for a break. The defense

moved for a mistrial based on the outpouring of emotion by a professional state witness whose interests are clearly in line with the state. The Court denied the motion in error.

12. The state committed fundamental error during its closing argument when it stated:

> "Even in death, through the irrefutable physical evidence that was left behind…the injuries to her body, the biological evidence he left on her and inside of her, through that evidence she has a voice. And from the grave she is crying out to you … Donald Smith raped me (displaying the DNA swabs from the victim's vagina). Donald Smith sodomized me (displaying the DNA swabs from the victim's anus). Donald Smith strangled me until every last breath left my body (Displaying DNA swabs from the victim's neck)."

To argue before the jury that even in death , the victim has a voice, and that she is crying out from the grave, "to you" (referring to the jury) is improper argument. Under

Florida law, "wide latitude is permitted in presenting opening and closing statements to a jury, and comments by the prosecutor will merit a mistrial only when they deprive the defendant of a fair and impartial trial, materially contribute to the conviction, are so harmful or fundamentally tainted as to require a new trial, or are so inflammatory they might have influenced the jury to reach a more severe verdict than it would have otherwise rendered. *Miller v. State*, 161 So.3d 354, 382 (Fla. 2015). Suggesting that the 8 year old victim was "crying out from the grave" was clearly intended to appeal to the sympathy of the jury and invite an emotional response, and its prejudicial effect vitiated both the guilt and subsequent penalty phases of the trial. Closing arguments "must not be used to inflame the minds and passions of the jurors so that their verdict reflects an emotional response to the crime or the defendant." *Bertolotti v. State*, 476 So.2d 130, 134 (Fla. 1985).

WHEREFORE, Defendant respectfully requests this Honorable Court to grant a new trial for the reasons cited herein.

I HEREBY CERTIFY that a copy of the above and foregoing Amended Motion for New Trial has been furnished to the Office of the State

Attorney, by electronic filing this 30th day of April 2018.

Respectfully submitted,
Law Offices of W. Charles Fletcher, P.A.

/s/ W. Charles Fletcher

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IN THE CIRCUIT COURT OF THE FOURTH JUDICIAL CIRCUIT, IN AND FOR DUVAL COUNTY, FLORIDA

CASE NO.: 16-2013-CF-5781

DIVISION: CR-D

STATE OF FLORIDA

VS.

DONALD SMITH

MOTION FOR POST VERDICT, PRE-SENTENCING MISTRIAL AND REQUEST FOR NEW PENALTY PHASE

Defendant, Donald Smith, by and through his undersigned attorney, W. Charles Fletcher, respectfully moves this Honorable Court to grant Defendant's Motion for Post Verdict, Pre-Sentencing Mistrial and Request for New Penalty Phase in this case and as grounds therefore, states:

1. The defendant was found guilty as charged on February 14, 2018.
2. A penalty phase was conducted and the jury returned a 12-0 recommendation for death on February 22, 2018.
3. A Spencer hearing was set for March 28, 2018 and a sentencing date was set for May 2, 2018 at 9:00 am.

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4. On March 29, 2018 the prosecution team was interviewed by Janese Harris of "News 4 Jax," a local news station. During the interview both prosecutors indicated that they had "daughters" and that the case took an emotional toll on them. They further stated that "this case is among the worst of the worst, so it was important that we also send a message that the highest levels of the office were behind the prosecution of this matter."
5. Comments inviting a jury, or a member of the judiciary, to send a message with its verdict or sentence are improper under Florida law.
6. Here, the State has done outside of Court, through a televised interview, what it was clearly prohibited from doing before the Court.
7. As Mr. Smith has not been sentenced yet, such public statements violate his right to a fair trial and sentencing hearing.

.

WHEREFORE, Defendant respectfully requests this Honorable Court to grant this motion and hold a new penalty phase in this case.

Respectfully submitted,

/s/ William Charles Fletcher

W. Charles Fletcher, Esquire

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8833 Perimeter Park Boulevard
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Jacksonville, Florida 32216
Tel: (904) 314-0233
Williamfletcher96@yahoo.com
Attorney for Defendant

I HEREBY CERTIFY that a copy of the above and foregoing "Defendant's Motion for Post-Verdict, Pre-Sentencing Motion for Mistrial" has been furnished to the Office of the State Attorney, by e-delivery, this 1st day of May 2018.

/s/ William Charles Fletcher

W. Charles Fletcher, Esquire

Filing # 71502347 E-Filed 05/01/2018 01:31:00 PM

IN THE CIRCUIT COURT, FOURTH JUDICIAL CIRCUIT, IN AND FOR DUVAL COUNTY, FLORIDA.

CASE NO.: 16-2013-CF-5781

DIVISION: CR-D

STATE OF FLORIDA

vs.

DONALD JAMES SMITH
_____/

DEFENDANT'S SENTENCING MEMORANDUM IN SUPPORT OF A SENTENCE OF LIFE WIHOUT PAROLE

The undersigned court appointed counsel, Julie Agent Schlax and Charles Fletcher, request this Honorable Court to sentence Donald Smith to life in prison without the possibility of parole.

INTRODUCTION

Procedural History:

The Defendant, Donald Smith, was born August 13, 1989, He was charged by Indictment with the crime of Murder in the First

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Degree on July 2, 2013. Jury selection for the Defendant's trial began on February 5, 2018. Trial began on February 12, 2018. The Jury returned a verdict of guilty on February 15, 2018. The Jury returned on February 20, 2018 for the penalty phase, and on February 22, 2018, the Jury recommended to the Court that a sentence of Death be imposed upon the Defendant for the death of Cherish Perrywinkle.

AGGRAVATING CIRCUMSTANCES

State's Proposed Aggravating Circumstances

1. **DONALD JAMES SMITH was previously convicted of felony involving the use or threat of violence to another person.**

This circumstance was not alleged in the Indictment.

2. **The First Degree Murder for which Donald Smith is to be sentenced was committed while he was engaged in the commission of a Kidnapping and Sexual Battery.**

This proposed aggravating circumstance violated the Eighth Amendment to the United States Constitution. As explained by Judge Anstead, in a concurring opinion in Blanco v. State, 706 So.2d 7, 11-12 (Fla. 1997):

> The concept of narrowing requires that once it has been established that a defendant is guilty of first-degree murder the sentencer may properly consider only additional factors, termed aggravators, that genuinely narrow the class of convicted murderers who may be eligible for the death penalty. For example, if a person is guilty of premeditated murder and is shown to have been guilty of additional aggravating misconduct, then he becomes part of the narrower, less

> numerous class of persons eligible for the death penalty. But a person convicted of felony murder who then has the same felony used. against her as an aggravator does not become a member of a smaller group. Rather, the felony aggravator used there would make the entire larger group of felony murderers automatically eligible for the death penalty without proof of any additional aggravating misconduct. Hence, the felony aggravator serves no legitimate narrowing function in such a case.

Use of the felony murder aggravator also violates the prohibition against double jeopardy contained in the 5th Amendment to the United States Constitution. As explained by Justice Pariente in her concurring opinion in Douglas v. State, 878 So.2d 1246, 1261 (Fla. 2004):

> In light of Ring, first-degree murder must now be viewed as a wholly subsumed lesser included offense of capital murder (first-degree murder plus one or more aggravating circumstances). Thus, I conclude that it is constitutionally impermissible to rely on the same underlying felony to support both the first-degree murder conviction and the aggravating circumstance. The effect of Ring is similar to the prohibition against imposing an enhanced sentence for the use of a weapon or firearm where an essential element of the underlying felony is the use of a weapon or firearm. The trial court's use of the murder in the course of a felony aggravator in this case both prevents the aggravator from performing the narrowing function required by the Eighth Amendment and impermissibly relies on the same felony to support both Douglas' first-degree murder conviction and the greater offense of first-degree murder punishable by death in violation of the Fifth Amendment Double Jeopardy Clause.

For these reasons, even if the Court finds that the aggravating circumstance has been established, the circumstance should be given little weight. The State of Florida has already relied upon these felonies in order to secure a conviction for first-degree murder in Donald Smith's case. In fact, these felonies were crucial to the State's case. This Court should also be

careful to avoid improper doubling. The State is relying upon these felonies to argue the application of other aggravating circumstances. As noted in the Florida Standard Jury Instructions: "The State may not rely upon a single aspect of the offense to establish more than one aggravating circumstance." (Florida Standard Jury Instruction 7.11). Therefore, the Court should not accept the State's argument, for instance, that the homicide was especially heinous, atrocious, or cruel" because it was accompanied by a sexual battery.

The Jury unanimously found this aggravating circumstance to exist.

3. The capital felony was especially heinous, atrocious, or cruel.

This circumstance also was not alleged in the Indictment. Furthermore, the statutory factor of "heinous, atrocious or cruel" is too vague to restrain the arbitrary imposition of the death penalty. Florida has avoided vagueness challenges by attempting to judicially construe this aggravating factor. For instance, in State v. Dixon, 283 So.2d 1, the Court held that: "What is intended to be included are those capital crimes where the actual commission of the capital felony was accompanied by such additional acts as to set the crime apart from the norm of capital felonies- the conscienceless or pitiless crime which is unnecessarily torturous to the victim." Id. at 283 So.2d at 23. However, in practice, this standard has not been followed. Virtually every type of homicide in the State of Florida has been found to be "especially heinous, atrocious or crueL" Therefore, the circumstance does nothing to genuinely narrow the class of Defendants who are eligible for the death penalty. This circumstance therefore violates the Eighth Amendment of the United Sates Constitution and the Florida Constitution.

The Court should reject this aggravating circumstance in this case because no evidence was presented that supported the crime was conscienceless or pitiless. Additionally, State witness, Dr. Rao conceded that while it may have taken up to three minutes for the child to die, it could take as little as 15 seconds for the child to be rendered unconscious.

The Jury unanimously found this aggravating circumstance to exist.

4. The victim of the capital felony was under the age of 12.

Counsel acknowledges that the victim was under the age of 12.. No evidence has been presented that the Defendant was motivated to commit murder by the fact that the victim was under the age of twelve. This circumstance, though established, should be given only little weight by this Court.

The Jury unanimously found this aggravating circumstance to exist.

5. The First Degree Murder was committed in a cold, calculated, and premeditated manner, without any pretense or moral or legal justification. This circumstance was not alleged in the Indictment. The State did not produce any evidence other than that of Dr. Rao concerning the time-frame of the Murder. Importantly, they did not produce any evidence required for heightened premeditation to be justified. This Court should reject this aggravator based on the lack of evidence presented.

6. The First Degree Murder was committed for the purpose of avoiding or preventing a lawful arrest.

None of these acts were alleged in the Indictment. The State did not produce any evidence of this circumstance, only argument that he must have committed the

Murder to avoid arrest. This Court should reject this aggravator based on the lack of evidence presented.

MITIGATING CIRCUMSTANCES

Introduction:

As the Court instructed the jury in this case: " ... Mitigating circumstances may include any aspect of the defendant's character, background or life or any circumstance of the offense that may indicate the death penalty is not an appropriate sentence in this case." The Court also instructed the jury that: "A mitigating circumstance need not be proved beyond a reasonable doubt by the Defendant. If you are reasonably convinced that a mitigating circumstance exists, you may consider it as established and give that evidence such weight as you determine it should receive... " This Court should consider mitigating evidence wherever it might be found; during testimony from the trial or penalty phase, the exhibits introduced into evidence, and the Court's own observations of the Defendant.

The evidence introduced by the Defendant is the type of evidence normally introduced at a sentencing proceeding. "Florida has approved a philosophy granting a sentencing Court wide discretion in the kinds of information it uses to determine a sentence." Florida Criminal Practice and Procedure Section 14.S(b)(Evidence at Sentencing) Florida Rule of Criminal Procedure 3.720(b) notes: "The Court shall entertain submissions and evidence by the parties that are relevant to the sentence." Counsel· would

submit that this Court should give full weight to all of the exhibits introduced by the Defendant.

Defendant's Proposed Mitigating Circumstances:

1. The capital felony was committed while Donald Smith was under the influence of extreme mental or emotional disturbance.

Dr. Joseph Sesta testified that Donald Smith suffers from an extreme mental disturbance. This mitigator has been established and should be given great weight.

The Jury did not find this mitigator to exist.

2. The capacity of Donald Smith to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was substantially impaired.

Dr. Sesta, Dr. Colino and Dr. Wu all testified that they believed that Mr. Smith's capacity to conform his conduct to the requirements of the law was substantially impaired based on the effects of brain damage from which he continually suffers. This mitigator has been established and should be given great weight.

The Jury did not find this mitigating circumstance existed.

3. The age of Donald Smith at the time of the crime.

At the time of the crime Donald Smith was sixty one years of age. As such, the likelihood that the State of Florida would ever fulfill the requirements of due process prior to the death of Mr. Smith due to natural causes is highly unlikely. This Court has an obligation to consider the practical implications of a

death sentence upon the resources of the State to implement the sentence.

This mitigator has been established and should be given great weight.

The Jury did find this mitigating circumstance existed, by a vote of 12-0.

4. The existence of any other factors in Donald Smith's character, background, or life or the circumstances of the offense that would mitigate against the imposition of the death penalty.

A. DONALD JAMES SMITH's biological father left before he was born. As a result, he never had a relationship with him.

B. DONALD JAMES SMITH's parents were forced to divorce by his maternal grandparents "who openly disapproved of his biological father."

C. DONALD JAMES SMITH's mother was 17 years old when she gave birth to him.

D. DONALD JAMES SMITH was born premature with low birth weight.

E. DONALD JAMES SMITH's mother wanted to give him up for adoption.

F. Mental illness runs in DONALD JAMES SMITH's mother's side of the family and in his biological father's family.

G. Addiction runs in DONALD JAMES SMITH's mother's side of the family and in his biological father's family.

H. Emotional instability leading to physical violence is present on DONALD JAMES SMITH's father's side of the family.

I. DONALD JAMES SMITH's paternal uncle shot his grandfather to death.

J. DONALD JAMES SMITH's mother spent very little time with him as a baby, instead focusing all of her attention on finding a man who could provide her with the lifestyle her parents felt she deserved.

K. DONALD JAMES SMITH moved out of his grandparents' home when his mother married Clifton (Cliff) Smith, the man who formally adopted him, which was extremely traumatic.

L. Cliff was verbally and emotionally abusive to DONALD JAMES SMITH. He also locked DONALD JAMES SMITH outside as punishment.

M. Cliff was physically abusive to DONALD JAMES SMITH.

N. DONALD JAMES SMITH was traumatized by his stepfather's treatment. He became clingy, stopped eating, and wet the bed long past the age of typical potty training.

O. Cliff was paranoid and obsessed with violence. DONALD JAMES SMITH was terrified of what he witnessed.

P. Cliff's job in the insurance business forced them to move regularly. As a result, DONALD JAMES SMITH was repeatedly uprooted from his home, adding to the instability of his living environment.

Q. Because of the frequent moves, DONALD JAMES SMITH was frequently bullied. This caused him to feel alienated, detached, despondent, and angry. DONALD JAMES SMITH resorted to paying other kids to play with their toys.

R. DONALD JAMES SMITH was sexually molested at the age of eight by two neighborhood teenagers.

S. The teenagers coerced DONALD JAMES SMITH into watching them violently sexually molest several girls. He found the experience confusing and frightening.

T. DONALD JAMES SMITH did not reveal the sexual abuse to his mother.

U. DONALD JAMES SMITH's mother suspected that her sister's husband, Bob, molested her son; however she did not confront them.

V. DONALD JAMES SMITH never received treatment for the sexual abuse he endured.

W. Cliff was sexually inappropriate with DONALD JAMES SMITH. He touched DONALD JAMES SMITH on his buttocks. He called DONALD JAMES SMITH sexually explicit names.

X. When his mother divorced Cliff after seven years of marriage, this was yet another change that brought instability into DONALD JAMES SMITH's life.

Y. DONALD JAMES SMITH's second stepfather, Dr. Marlin Moore, was a cold, self-centered, and aloof man who insisted that his wife and stepson call him "Dr. Moore."

Z. Dr. Moore was verbally and physically abusive to DONALD JAMES SMITH. He made it known that he "didn't have time for children."

AA. As a teenager, DONALD JAMES SMITH began self-medicating with pills from Dr. Moore's home office. He was never confronted with the drug use.

BB. DONALD JAMES SMITH's drug abuse escalated to regularly using marijuana, LSD, PCP, MDA, Mescaline, Peyote, Quaaludes, and cocaine.

CC. DONALD JAMES SMITH dropped out of school in the 10th grade. Although DONALD JAMES SMITH was intelligent, he had lost all motivation based on drug use, depression, and anger.

DD. As a teenager, DONALD JAMES SMITH began to get arrested.

EE. At the age of 15, DONALD JAMES SMITH began engaging in voyeurism.

FF. DONALD JAMES SMITH was raped while incarcerated.

GG. When DONALD JAMES SMITH was released from jail, his drug abuse spiraled into full-blown crack addiction.

HH. On crack, DONALD JAMES SMITH's inability to control his impulses was intensified to the point that he felt like another person. On the streets, DONALD JAMES SMITH became notorious for his behavior while high. He was paranoid, manic, unstable, and impulsive.

II. DONALD JAMES SMITH's mother enabled his drug addiction. She drove him to pay off his drug debts and, if he was unable to make the trip, paid them off herself. She continued this for decades.

JJ. At the age of 20, DONALD JAMES SMITH attempted suicide for the first time by driving into an oak tree on Orange Picker Road. He flipped his car, but survived the accident. DONALD JAMES SMITH did not receive treatment for his injuries.

KK. DONALD JAMES SMITH experienced a dissociative episode due to drug use where he lost time.

LL. DONALD JAMES SMITH made his second suicide attempt in the Duval County Jail.

MM. In 1977, DONALD JAMES SMITH was designated as a Mentally Disordered Sex Offender and committed to the North Florida Evaluation and Treatment Center (NFETC).

NN. Throughout his adult life, DONALD JAMES SMITH spent hundreds of dollars per day on crack. During the year of 2002, he spent more than $90,000 in a four month period. He went on binges that lasted for weeks. During these episodes, DONALD JAMES SMITH did not eat or sleep.

OO. DONALD JAMES SMITH fathered a son, Donald James Smith, Jr., born June 2, 1992. He married his son's mother, Francine Brown, but the relationship was short-lived.

PP. DONALD JAMES SMITH was far from a perfect father. However, he has tried to parent his son to the best of his ability.

QQ. Donald James Smith, Jr. has developed a close relationship with his father since he has been incarcerated.

RR. DONALD JAMES SMITH has been repeatedly diagnosed as having Antisocial Personality Disorder (ASPD), Polysubstance Dependence, Pedophilia, and Cocaine Dependence.

SS. In 1999, DONALD JAMES SMITH was designated as a Sexually Violent Predator and subsequently committed to the Martin Treatment Center (MTC) through the Jimmy Ryce Civil Commitment Act. While detained at MTC, DONALD JAMES SMITH did not complete the treatment plan developed for him.

TT. While at the Martin Treatment Center, DONALD JAMES SMITH engaged in a sexual relationship with another patient who was known for being HIV

positive. This was regarded as DONALD JAMES SMITH's third suicide attempt.

UU. In spite of the fact that DONALD JAMES SMITH did not participate in counseling, he was released from the Martin Treatment Center based on a decision made by members of the State Attorney's Office in Duval County.

VV. Once released from the Martin Treatment Center, he was required to receive a psychosexual evaluation and treatment. Dr. James Vallely completed the evaluation and concluded that DONALD JAMES SMITH was highly likely to re-offend.

WW. DONALD JAMES SMITH was arrested for Dealing in Stolen Property and Burglary and was eligible to receive thirty years in prison as a Habitual Offender. However, members of the State Attorney's Office in Duval County permitted him to plea to a sentence of 4 years in prison. DONALD JAMES SMITH was not placed on any form of supervision upon his release from prison.

XX. In 2006, a state psychological assessment determined that DONALD JAMES SMITH did not meet the criteria for civil commitment in the Jimmy Ryce Civil Commitment Center, although he had never received any meaningful rehabilitation.

YY. In 2011, DONALD JAMES SMITH Baker Acted himself. He reported homicidal thoughts, auditory, and visual hallucinations. He also admitted a history of using cocaine and Lortab. He was diagnosed as having a potential for homicide, suicide, and violence. The center recommended one-on-one counseling and let him stay three or four days. They never followed up with therapy.

ZZ. In 2009, DONALD JAMES SMITH was arrested for attempting to lure a 9-year-old girl while posing as a Department of Children and Families (DCF) worker. If found guilty, he could have been sentenced to 10 years in the DOC, but members of the State Attorney's Office in Duval County agreed to a plea agreement allowing a county jail sentence, which bypassed further screening into the Jimmy Ryce Civil Commitment Center.

AAA. On June 1, 2013, DONALD JAMES SMITH was released from the Duval County Jail. He was not placed on any kind of supervision by the State of Florida.

BBB. Three weeks before the murder of Cherish Perrywinkle, DONALD JAMES SMITH went to Shands Hospital and then was Baker Acted. He stated that he was having violent thoughts and wanted to get into a residential program. The center gave him "a new brochure" and told him to "study and practice." They allowed him to stay approximately 24 hours.

CCC. Neuropsychological testing has indicated that DONALD JAMES SMITH's brain functioning is abnormal. He has deficits in executive functioning and poor impulse control.

DDD. DONALD JAMES SMITH's neuropsychological disorders are exacerbated by substance abuse and addiction.

EEE. Medical testing, specifically PET, MRI, and DTI scans, have revealed that DONALD JAMES SMITH's brain functioning is abnormal.

FFF. DONALD JAMES SMITH's brain abnormalities are consistent with someone who has suffered brain damage.

GGG. DONALD JAMES SMITH has suffered from significant mental illness for most of his life.

HHH. DONALD JAMES SMITH's mental illness is not something he has chosen.

III. DONALD JAMES SMITH did not choose his family.

JJJ. DONALD JAMES SMITH did not choose the way his family treated him.

KKK. DONALD JAMES SMITH did not choose to be sexually molested.

LLL. DONALD JAMES SMITH's childhood experiences shaped the person he became as an adult.

MMM. At the time of the offenses, DONALD JAMES SMITH was 56 years old. He is now 61 years old.

NNN. DONALD JAMES SMITH has been diagnosed with Chronic Obstructive Pulmonary Disease (COPD), heart disease, Hepatitis B, and Hepatitis C.

OOO. DONALD JAMES SMITH has been a strong support system for his mother, who is receiving treatment for breast cancer.

PPP. DONALD JAMES SMITH has not been a threat to correctional officers or other inmates in the Duval County Jail and the Department of Corrections.

The jury only found one mitigating circumstance, that Donald Smith Jr. had developed a close relationship with his father since he was incarcerated, by a vote of 7 to 5. However, the evidence at trial clearly established each of these mitigating circumstances. Dr. Brooke Butler testified in great detail about the circumstances of Donald Smith's life. Accordingly, this Court should find each mitigating circumstance to

have been proven, and provide appropriate weight to each.

WEIGHING THE AGGRAVATING AND MITIGATING CIRCUMSTANCES

"'(O)ur law reserves the death penalty only for the **most aggravated and least mitigated** murders.'" Cooper v. State, 739 So. 2d 82 (Fla. 1999), The Court's role is "to determine if the crime falls within the category of both (l}the most aggravated, and (2) the least mitigated of murders." Cooper, 739 So.2d at 85. In Cooper, the Florida Supreme Court gave numerous examples of cases where death was found to be an inappropriate sentence, despite the existence of aggravating circumstances. See, e.g., Urbin v. State, 714 So. 2d 411 (Fla. 1998) (vacating death sentence for robbery-murder where multiple aggravators--including prior violent felony--were weighed against substantial mitigation including impaired capacity, deprived childhood, and youth); Curtis v. State, 685 So. 2d 1234 (Fla. 1996) (vacating death sentence for shooting death of store clerk where multiple aggravators-- including attempted murder of second store clerk--were weighed against substantial mitigation including remorse and youth), cert. denied, 521 U.S. 1124, 117 S. Ct. 2521, 138 L. Ed. 2d 1022 (1997); Morgan v. State, 639 So. 2d 6{Fla.1994) (vacating death sentence for bludgeoning death of homeowner where multiple aggravators were weighed against copious mitigation including brain damage and youth); Livingston v. State, 565 So. 2d 1288 (Fla. 1988) (vacating death sentence for shooting death of store clerk where multiple aggravators were weighed against substantial mitigation including abusive childhood, diminished intellectual functioning, and youth). See also Knowles v. State, 632 So. 2d 62

(Fla. 1993) (vacating death sentence for shooting deaths of defendant's father and neighborhood child where one aggravator was weighed against substantial mitigation including brain damage and impaired capacity).

The case of Florida v. Donald Smith is clearly not one of the most aggravated cases to come before this Court, nor is it one of the least mitigated. The facts and circumstances surrounding this homicide are not extraordinary. One of the listed aggravating circumstances, felony murder, was already considered when securing the conviction. The mitigation presented was substantial, compelling and well documented. This Court should not believe that it is in any way compelled or required to sentence the Defendant to death. The Legislature, the Florida Supreme Court and the community contemplate that this Court will bring its experience to bear. Even if this Court believed that this case was one of the most aggravated and least· mitigated of capital cases, the Court is still under no obligation to impose a sentence of death.

> The statute contemplates that the trial jury, the trial judge and this Court will exercise reasoned judgment as to what factual situations require the imposition of death and which factual situations can be satisfied by life imprisonment in light of the totality of the circumstances present in the evidence. **Certain factual situations may warrant the infliction of capital punishment, but, nevertheless, would not prevent either the trial jury, the trial judge, or this Court from exercising reasoned judgment in reducing the sentence to life imprisonment.** Such an exercise of mercy on behalf of the defendant in one case does not prevent the imposition of death by capital punishment in the other case. Alvord v. State, 322 So. 2d 533, 540 (Fla. 1975).

CONCLUSION

There is no compelling reason to sentence Donald Smith to death. Mr.

Smith is not a terrorist, traitor, or serial killer. He has redeeming qualities which can be put to good use while serving a life sentence. Florida's death penalty is reserved for the most aggravated and least mitigated of homicides. State v. Dixon, 283 So.2d 1 (Fla. 1973). This is not such a case. On behalf of Mr. Smith, court appointed counsel, Julie Agent Schlax and Charles Fletcher, respectfully ask this Court to not follow the Jury's sentence of death, but instead sentence him to life without the possibility of parole for the offense of Murder in the First Degree.

I HEREBY CERTIFY that a copy of the foregoing has been furnished to the Office of the State Attorney, electronically, this 24th day of April 2018.

Respectfully submitted,

/s/ Julie Schlax

Julie Agent Schlax
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Recorded 05/03/2018 09:43 AM, RONNIE FUSSELL CLERK CIRCUIT COURT DUVAL COUNTY

IN THE CIRCUIT COURT,
FOURTH JUDICIAL CIRCUIT,
IN AND FOR DUVAL COUNTY,
FLORIDA

CASE NUMBER: 16-2013-CF-005781-AXXX-MA
DIVISION: CR-D (Circuit)

STATE OF FLORIDA
vs.
DONALD JAMES SMITH, DEFENDANT

☐ Probation Violator
☐ Community Control Violator
☐ Retrial
☐ Resentence

JUDGMENT

The defendant, **DONALD JAMES SMITH**, being personally before this Court, represented by Julie Schlax, Appt'd, the attorney of record, and the State being represented by Mark Caliel, and having:

☒ been tried and found guilty by jury/~~by court~~ of the following crime(s)
☐ entered a plea of guilty to the following crime(s)
☐ entered a plea of nolo contendere to the following crime(s)

Count	Crime	Offense Statute Number(s)	Degree Of Crime
1	MURDER IN THE FIRST DEGREE	782.04(1)(a)	FC
2	KIDNAPPING A CHILD UNDER THE AGE OF 13 YEARS	787.01(3)(a)	FL
3	SEXUAL BATTERY ON A CHILD LESS THAN 12 YEARS OLD	794.011(2)(a)	FC

☒ and no cause being shown why the defendant should not be adjudicated guilty; IT IS ORDERED that the defendant is hereby ADJUDICATED GUILTY of the above crime(s).

☐ being a qualified offender pursuant to F.S. 943.325, the defendant shall be required to submit a DNA sample as required by law.

☐ and good cause being shown; IT IS ORDERED THAT ADJUDICATION OF GUILT BE WITHHELD.

FILED
MAY 02 2018
RONALD W. FUSSELL
CLERK CIRCUIT COURT

STATE OF FLORIDA
vs.
DONALD JAMES SMITH, DEFENDANT

CASE NUMBER: 16-2013-CF-005781-AXXX-MA

FINGERPRINTS OF DEFENDANT				
1. Right Thumb	2. Right Index	3. Right Middle	4. Right Ring	5. Right Little
6. Left Thumb	7. Left Index	8. Left Middle	9. Left Ring	10. Left Little

Fingerprints taken by: Name: J C FARRAR 67870 Title: J. O.

I HEREBY CERTIFY that the above and foregoing are the fingerprints of the defendant, **DONALD JAMES SMITH**, and that they were placed thereon by the defendant in my presence in open court on this date.

DONE AND ORDERED in open court in Jacksonville, Duval County, Florida, this 2nd day of MAY, 20 18.

Judge

STATE OF FLORIDA

vs.
DONALD JAMES SMITH, DEFENDANT

IN THE CIRCUIT COURT, FOURTH JUDICIAL CIRCUIT, IN AND FOR DUVAL COUNTY FLORIDA
CASE NUMBER: 16-2013-CF-005781-AXXX-MA
DIVISION: CR-D (Circuit)

COURT ORDERED COSTS/FINES/FEES

The defendant is hereby ordered to pay the following sums if checked:

☒ A sum of $3.00 as a court cost pursuant to section 938.01, Florida Statutes, (Additional Court Cost Clearing Trust Fund).
☒ A sum of $50.00 pursuant to section 938.03, Florida Statutes, (Crimes Compensation Trust Fund).
☒ A sum of $225.00 pursuant to section 938.05, Florida Statutes, (Local Government Criminal Justice Trust Fund).
☒ A sum of $3.00 pursuant to section 938.19, Florida Statutes, and section 634.108, Ordinance Code, (Assessment of Additional Court Costs-Duval County Teen Court Trust Fund).
☒ A sum of $65.00 pursuant to section 939.185(1)(a), Florida Statutes, and section 634.102(c), Ordinance Code, (Assessment of Additional Court Costs to be used for innovations, legal aid, law library, teen court programs).
☐ A sum of $100.00 pursuant to section 938.055, Florida Statutes, (FDLE Operating Trust Fund).
☐ A sum of $100.00 pursuant to section 938.27(1), Florida Statutes, (Sheriff's Office Investigative Cost).
☒ A sum of $14946.74 pursuant to section 938.27(8), Florida Statutes, (Cost of Prosecution).
☒ A sum of $20.00 pursuant to section 938.06, Florida Statutes, (Assessment of Additional Court Costs for Crime Stoppers Trust Fund).
☒ A sum of $100.00 pursuant to section 938.29, Florida Statutes, (Court Appointed Counsel Fees).
☒ A sum of $50.00 pursuant to section 27.52, Florida Statutes, (Application for Court Appointed Counsel Fees).
☒ A sum of $302.00 pursuant to section 938.10, Florida Statutes, (Crimes Against Minors).
☒ A sum of $201.00 pursuant to section 938.08, Florida Statutes, (Funding Programs in Domestic Violence).
☒ A sum of $302.00 pursuant to section 938.085, Florida Statutes, (Rape Crisis Trust Fund).
☒ A sum of $50.00 pursuant to section 775.083(2), Florida Statutes, (Cost).
☐ A fine in the sum of $ _____ pursuant to section 775. 0835, Florida Statutes, (This provision refers to the optional fine for the Crimes Compensation Trust Fund and is not applicable unless checked and completed. Fines imposed as a part of a sentence to section 775.083, Florida Statutes, are to be recorded on the sentence page(s)).
☐ A sum of $_____ pursuant to section 938.04, Florida Statutes, (additional cost 5% of fine).
☒ A sum of $2.00 as a court cost pursuant to section 938.15, Florida Statutes, (Criminal Justice Education by Municipalities and Counties).
☐ A sum of $15.00 pursuant to section 938.13, Florida Statutes, (Misd. convictions involving drugs or alcohol).
☐ A sum of $135.00 pursuant to section 938.07, Florida Statutes, (EMS – DUI/BUI cases).
☐ A sum of $30.00 pursuant to section 318.18(13), Florida Statutes, and section 634.102, Ordinance Code, (CHT - State Court Facilities).
☐ A sum of $3.00 pursuant to section 318.18(17), Florida Statutes, (State Radio System (SRS)).
☐ A sum of $_____ for the cost of collecting the DNA sample required by section 943.325, Florida Statutes.
☒ Restitution in accordance with attached order.
☐ Other _____.

DONE AND ORDERED in open court in Jacksonville, Duval County, Florida, this 2nd day of May, 20 18.

Judge

DONALD JAMES SMITH, DEFENDANT

CASE NUMBER:16-2013-CF-005781-AXXX-MA
OBTS # _____

SENTENCE

(As to Count(s) 1)

The defendant, being personally before this court, accompanied by the defendant's attorney of record Julie Schlax, Appt'd, and the adjudication/withhold having been determined, and the court having given the defendant an opportunity to be heard and to offer matters in mitigation of sentence, and to show cause why the defendant should not be sentenced as provided by law, and no cause being shown:

☒ and the court having on 02/14/2018 deferred imposition of sentence until this date.

☐ and the court having previously entered a judgment in this case on _____ now resentences the defendant.

☐ and the court having placed the defendant on probation/community control, and having subsequently revoked the defendant's probation/community control;

It Is The Sentence Of The Court That (check all that are applicable; unmarked sections are inapplicable):

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

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

☐ The defendant is hereby committed to the custody of the Sheriff of Duval County, Florida.

☐ The defendant is sentenced as a Youthful Offender in accordance with section 958.04, Florida Statutes.

To be Imprisoned (check one; unmarked sections are inapplicable):

☐ For a term of natural life.

☒ For a term of Death.

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

☐ Youthful Offender Sentence:

Pursuant to the Florida Youthful Offender Act, the defendant is hereby sentenced to _____, of which _____shall be served by incarceration followed by _____ in a Community Control Program according to the terms and conditions set forth in a separate order.

☐ Split Sentence (complete the appropriate paragraph):

☐ Followed by a period of _____ on probation/community control under the supervision of the Department of Corrections according to the terms and conditions of supervision set forth in a separate order.

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

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

Imposition of Sentence Stayed and Withheld (check one; unmarked sections are inapplicable):

☐The court hereby stays and withholds the imposition of sentence and places the defendant on:

☐ Probation/community control for a period of _____under the supervision of the Department of Corrections with a special condition that the defendant serve _____in Duval County Jail, with credit for _____days.

☐ Unsupervised probation for a period of _____with the special condition that the defendant serve _____ days in Duval County Jail, with credit for _____ days. Unsupervised probation will terminate upon completion of special condition.

(All other general/special conditions of probation/community control shall be set forth in a separate order.)

DONALD JAMES SMITH, DEFENDANT

CASE NUMBER:16-2013-CF-005781-AXXX-MA
OBTS # _____

SENTENCE

(As to Count(s) 2-3)

The defendant, being personally before this court, accompanied by the defendant's attorney of record Julie Schlax, Appt'd, and the adjudication/withhold having been determined, and the court having given the defendant an opportunity to be heard and to offer matters in mitigation of sentence, and to show cause why the defendant should not be sentenced as provided by law, and no cause being shown:

☒ and the court having on 02/14/2018 deferred imposition of sentence until this date.

☐ and the court having previously entered a judgment in this case on _____ now resentences the defendant.

☐ and the court having placed the defendant on probation/community control, and having subsequently revoked the defendant's probation/community control;

It Is The Sentence Of The Court That (check all that are applicable; unmarked sections are inapplicable):

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

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

☐ The defendant is hereby committed to the custody of the Sheriff of Duval County, Florida.

☐ The defendant is sentenced as a Youthful Offender in accordance with section 958.04, Florida Statutes.

To be Imprisoned (check one; unmarked sections are inapplicable):

☐ For a term of natural life.

☒ For a term of Life.

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

☐ Youthful Offender Sentence:

Pursuant to the Florida Youthful Offender Act, the defendant is hereby sentenced to _____, of which _____shall be served by incarceration followed by _____ in a Community Control Program according to the terms and conditions set forth in a separate order.

☐ Split Sentence (complete the appropriate paragraph):

☐ Followed by a period of _____ on probation/community control under the supervision of the Department of Corrections according to the terms and conditions of supervision set forth in a separate order.

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

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

Imposition of Sentence Stayed and Withheld (check one; unmarked sections are inapplicable):

☐The court hereby stays and withholds the imposition of sentence and places the defendant on:

☐ Probation/community control for a period of _____under the supervision of the Department of Corrections with a special condition that the defendant serve _____in Duval County Jail, with credit for _____days.

☐ Unsupervised probation for a period of _____with the special condition that the defendant serve _____ days in Duval County Jail, with credit for _____ days. Unsupervised probation will terminate upon completion of special condition.

(All other general/special conditions of probation/community control shall be set forth in a separate order.)

DONALD JAMES SMITH, DEFENDANT

CASE NUMBER:16-2013-CF-005781-AXXX-MA
OBTS # _____

OTHER PROVISIONS

(As to Count(s) 1 & 2)

Current Jail Credit Time:

☒ It is further ordered that the defendant shall be allowed a total of 1775 days as credit for time incarcerated on this case / count before imposition of this sentence.

Credit for Time Served on Violation of Probation / Community Control:
(check one)

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

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

☐ It is further ordered that the defendant be allowed _____ days time served between date of arrest as a violator following release from prison to the date of resentencing. The Department of Corrections shall apply original jail time credit and shall compute and apply credit for time served on count(s) _____. (Offenses committed between October 1, 1989, and December 31, 1993.)

Prior Prison Credit:

☐ It is further ordered that the defendant shall be allowed _____ days time served between date of the original sentence being vacated to the date of resentencing. The Department of Corrections shall apply original jail time credit and shall compute and apply credit for time served on count(s) _____.

Forfeiture of Prior Gain/Good Time:
(check one)

☐The court deems the unforfeited gain time previously awarded on the above count(s) forfeited under section 948.06(7)

OR

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

Consecutive/ Concurrent As to Other Counts:
(if Applicable)

☒ It is further ordered that the sentence imposed for count(s) 2 shall run (check one)
☒ consecutive to ☐ concurrent with the sentence set forth in count 1 of this case.

Consecutive/ Concurrent As To Other Sentences:
(if Applicable)

It is further ordered that the composite term of all sentences imposed for the counts specified in this order shall run (check one) ☐ consecutive to ☐ concurrent with the following: (check one)

☐ any active sentence being served.
☐ specific sentences: _____

Retention of Jurisdiction:

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

DONALD JAMES SMITH, DEFENDANT

CASE NUMBER:16-2013-CF-005781-AXXX-MA
OBTS # _____

OTHER PROVISIONS

(As to Count(s) 3)

Current Jail Credit Time:

☒ It is further ordered that the defendant shall be allowed a total of 1775 days as credit for time incarcerated on this case / count before imposition of this sentence.

Credit for Time Served on Violation of Probation / Community Control:
(check one)

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

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

☐ It is further ordered that the defendant be allowed _____ days time served between date of arrest as a violator following release from prison to the date of resentencing. The Department of Corrections shall apply original jail time credit and shall compute and apply credit for time served on count(s) _____. (Offenses committed between October 1, 1989, and December 31, 1993.)

Prior Prison Credit:

☐ It is further ordered that the defendant shall be allowed _____ days time served between date of the original sentence being vacated to the date of resentencing. The Department of Corrections shall apply original jail time credit and shall compute and apply credit for time served on count(s) _____.

Forfeiture of Prior Gain/Good Time:
(check one)

☐The court deems the unforfeited gain time previously awarded on the above count(s) forfeited under section 948.06(7)

OR

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

Consecutive/ Concurrent As to Other Counts:
(if Applicable)

☒ It is further ordered that the sentence imposed for count(s) 3 shall run (check one)

☒ consecutive to ☐ concurrent with the sentence set forth in count 2 of this case.

Consecutive/ Concurrent As To Other Sentences:
(if Applicable)

It is further ordered that the composite term of all sentences imposed for the counts specified in this order shall run (check one) ☐ consecutive to ☐ concurrent with the following: (check one)

☐ any active sentence being served.
☐ specific sentences: _____

Retention of Jurisdiction:

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

DONALD JAMES SMITH, DEFENDANT CASE NUMBER:16-2013-CF-005781-AXXX-MA

SPECIAL PROVISIONS

(As to Count(s) 2 & 3)

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

☐ **Firearm:** It is further ordered that the _____mandatory minimum imprisonment provisions of section 775.087(2)(a), Florida Statutes, is hereby imposed for the sentence specified in this count.

☐ **Drug Trafficking:** It is further ordered that the _____ mandatory minimum imprisonment provision and a fine of $_____, as set forth in section 893.135(1), Florida Statutes, is hereby imposed for the sentence specified in this count.

☐ **Controlled Substance Within 1,000 Feet of School:** It is further ordered that the 3-year mandatory minimum imprisonment provision of section 893.13(1)(c)1, Florida Statutes, is hereby imposed for the sentence specified in this count.

☐ **Habitual Felony Offender:** The defendant is adjudicated a habitual felony offender and has been sentenced to an extended term in accordance with the provisions of section 775.084(4)(a), Florida Statutes. The requisite findings by the court are set forth in a separate order or stated on the record in open court.

☐ **Habitual Violent Felony Offender:** The defendant is adjudicated a habitual violent felony offender and has been sentenced to an extended term in accordance with the provisions of section 775.084(4)(b), Florida Statutes. A mandatory minimum term of_____ year(s) must be served prior to release. The requisite findings of the court are set forth in a separate order or stated on the record in open court.

☐ **Violent Career Criminal:** The defendant is adjudicated a violent career criminal and has been sentenced to an extended term in accordance with the provisions of section 775.084(4)(d), Florida Statutes. A mandatory minimum term of _____ year(s) must be served prior to release. The requisite findings of the court are set forth in a separate order or stated on the record in open court.

☐ **Prison Release Reoffender:** The defendant is adjudicated a prison release reoffender in accordance with the provisions of section 775.082(9), and is sentenced to serve 100 percent of the maximum sentence provided by law for the offense of which the defendant has been convicted. A mandatory minimum term of _____ year(s) imposed as PRR in accordance with the provisions of this section.

☐ **Law Enforcement Protection Act:** It is further ordered that the defendant shall serve a minimum of _____ year(s) before release in accordance with section 775.0823, Florida Statutes (offenses committed before January 1, 1994).

☐ **Capital Offense (Excluding First Degree Murder and s. 790.161):** It is further ordered that the defendant shall serve no less than 25 years in accordance with the provisions of section 775.082(1), Florida Statutes (offenses committed before October 1, 1995).

☐ **Short-Barreled Rifle, Shotgun, Machine Gun:** It is further ordered that the 5-year mandatory minimum provisions of section 790.221(2), Florida Statutes, are hereby imposed for the sentence specified in this count (offenses committed before January 1, 1994).

☐ **Continuing Criminal Enterprise:** It is further ordered that the 25-year mandatory minimum sentence provisions of section 893.20, Florida Statutes, are hereby imposed for the sentence specified in this count (offenses committed before January 1, 1994).

☐ **DUI Manslaughter:** It is further ordered that the 4 year mandatory minimum sentence provision pursuant to section 316.193(3)(c)3, Florida Statutes, is hereby imposed for the sentence specified in this count.

☐ **Dangerous Sexual Felony Offender:** The defendant is adjudicated a dangerous sexual felony offender and has been sentenced to an extended term in accordance with the provisions of section 794.0115, Florida Statutes. A mandatory minimum term of _____ year(s) must be served. The requisite findings of the court are set forth in a separate order or stated on the record in open court.

☐ **Criminal Gang Activity:** The felony conviction is for an offense that was found, pursuant to section 874.04, Florida Statutes, to have been committed for the purpose of benefiting, promoting or furthering the interests of a criminal gang.

☐ **Sexual Offender:** The defendant is adjudicated a Sexual Offender in accordance with the provisions of section 943.0435(1)(a) , Florida Statutes.

☒ **Sexual Predator:** The defendant is adjudicated a Sexual Predator in accordance with the provisions of section 775.21(4)(a), Florida Statutes.

☐ **Youthful Offender:** The defendant is adjudicated a Youthful Offender in accordance with the provisions of section 958.04(1)(a), Florida Statutes.

☐ **Taking a Law Enforcement Officer's Firearm:** It is further ordered that the 3- year mandatory minimum imprisonment provision of section 775.0875(1), Florida Statutes, is hereby imposed for the sentence specified in this count (offenses committed before January 1, 1994).

DONALD JAMES SMITH, DEFENDANT

CASE NUMBER:16-2013-CF-005781-AXXX-MA
OBTS # _____

In the event the defendant is sentenced to a period of incarceration in state prison, the Sheriff of Duval County, Florida, is hereby ordered and directed to deliver the defendant to the Florida Department of Corrections at the facility designated by the Department together with a copy of this judgment and sentence and any other documents specified by Florida Statute.

In open court, the defendant was advised of the right to appeal from this sentence by filing a notice of appeal with the clerk of this court within 30 days from this date and the right to the assistance of counsel in taking the appeal at the expense of the State on showing of indigency.

In imposing the above sentence, the court further recommends / adjudges:

DONE AND ORDERED in open court in Jacksonville, Duval County, Florida, this 2nd day of May, 2018.

Judge

IN THE CIRCUIT COURT OF THE FOURTH JUDICIAL CIRCUIT, IN AND FOR DUVAL COUNTY, FLORIDA

CLERK NO.: 162013CF005781A

DIVISION: CRD

STATE OF FLORIDA

vs.

DONALD JAMES SMITH SR.

ORDER ON STATE'S MOTION FOR AWARD OF COSTS OF PROSECUTION PURSUANT TO SECTION 938.27, FLORIDA STATUTES

This cause, coming on to be heard on the motion of the Assistant State Attorney for the Award of Costs of Prosecution in the amount of $14,846.74. The State having made a sufficient showing of the costs of prosecution incurred in this case, and the court being otherwise fully advised in the premises herein, it is:

ORDERED that the amount of $14,846.74 is imposed pursuant to Section 938.27, Florida Statutes, and the defendant shall be required to pay this amount as part of his probation or otherwise as part of a payment plan to be established with the Clerk of Court within 60 days of release from custody.

DONE AND ORDERED at Jacksonville, Duval County, Florida, this 2 day of ~~March~~ May, 2018.

JUDGE

cc: Julie A. Schlax, Defense Attorney, julie@esalawgroup.com
Mark Caliel, Assistant State Attorney, SAO4DuvalCriminal@coj.net

FILED
MAY 02 2018
CLERK CIRCUIT COURT

Fund name	Invoice no	Vendor	Invoice total	Invoice date	Batch no	JAC no	Case no	Internal case no
15-A541	41379	ACCURATE COURT REPORTING, INC.	$145.30	9/8/2014	15-0250	008683	162013CF005781A	13CF039428AD
16-A541	23198	ADVANTAGE VIDEO PRODUCTION INC [06/07/2011]	$266.00	7/7/2015	16-0181	006546	162013CF005781A	13CF039428AD
15-A541	081014 CALIEL	AMERICAN EXPRESS [REMIT]	$495.00	7/10/2014	15-0026	001879	162013CF005781A	13CF039428AD
15-A541	081014 CALIEL	AMERICAN EXPRESS [REMIT]	$180.70	9/10/2014	15-0237	007530	162013CF005781A	13CF039428AD
15-A541	081014 CALIEL	CALIEL, MARK A.	$376.00	8/14/2014	15-0128	004726	162013CF005781A	13CF039428AD
18-A541	4630	CLINICAL PHARMACOLOGY SERVICES INC.	$400.00	2/5/2018	18-1179		162013CF005781A	13CF039428AD
14-A541	13-08-004	FCCC - CORRECT CARE RECOVERY SOLUTIONS	$16.06	8/19/2013	14-0237	006339	162013CF005781A	13CF039428AD
18-A541	SMITH	HOLDER, LAWRENCE MD	$1,700.00	2/16/2018	18-1028	025700	162013CF005781A	13CF039428AD
14-A541	3399	LANGUAGE SERVICES INTERNATIONAL	$931.25	8/9/2013	14-0170	005193	162013CF005781A	13CF039428AD
18-A541	2293	MORE REPORTERS, INC.	$60.00	1/24/2018	18-0926	023557	162013CF005781A	13CF039428AD
16-A541	8108158	OFFICIAL REPORTERS, INC.	$120.00	7/14/2015	16-0024	001214	162013CF005781A	13CF039428AD
14-A541	8111095	OFFICIAL REPORTERS, INC.	$75.00	8/2/2013	14-0129	004291	162013CF005781A	13CF039428AD
13-A541	8111711	OFFICIAL REPORTERS, INC.	$243.00	7/8/2013	13-1607CF	001489	162013CF005781A	13CF039428AD
18-A541	8217404	OFFICIAL REPORTERS, INC.	$75.00	2/12/2018	18-1013	025426	162013CF005781A	13CF039428AD
13-A541	8221858	OFFICIAL REPORTERS, INC.	$75.00	7/2/2013	13-1601CF	001489	162013CF005781A	13CF039428AD
14-A541	8311610	OFFICIAL REPORTERS, INC.	$65.00	12/9/2013	14-0620	017670	162013CF005781A	13CF039428AD
14-A541	8312728	OFFICIAL REPORTERS, INC.	$50.00	1/29/2014	14-0804	022439	162013CF005781A	13CF039428AD
14-A541	8460281	OFFICIAL REPORTERS, INC.	$94.50	7/31/2013	14-0132	004291	162013CF005781A	13CF039428AD
14-A541	8462875	OFFICIAL REPORTERS, INC.	$75.00	7/25/2013	14-0095	003438	162013CF005781A	13CF039428AD
14-A541	8463121	OFFICIAL REPORTERS, INC.	$37.00	10/18/2013	14-0429	012622	162013CF005781A	13CF039428AD
14-A541	8464988	OFFICIAL REPORTERS, INC.	$31.00	12/6/2013	14-0618	016951	162013CF005781A	13CF039428AD
14-A541	8465581	OFFICIAL REPORTERS, INC.	$68.00	2/4/2014	14-0830	023277	162013CF005781A	13CF039428AD
14-A541	8470109	OFFICIAL REPORTERS, INC.	$130.00	6/23/2014	14-1407	038847	162013CF005781A	13CF039428AD
17-A541	8486198	OFFICIAL REPORTERS, INC.	$50.00	11/3/2016	17-0379	014319	162013CF005781A	13CF039428AD
17-A541	8488405	OFFICIAL REPORTERS, INC.	$49.00	10/25/2016	17-0348	013718	162013CF005781A	13CF039428AD
18-A541	8495983	OFFICIAL REPORTERS, INC.	$342.00	1/23/2018	18-0887	022981	162013CF005781A	13CF039428AD
18-A541	8496398	OFFICIAL REPORTERS, INC.	$396.00	1/22/2018	18-0876	022836	162013CF005781A	13CF039428AD
18-A541	8496399	OFFICIAL REPORTERS, INC.	$75.00	1/22/2018	18-0876	022836	162013CF005781A	13CF039428AD
18-A541	8499212	OFFICIAL REPORTERS, INC.	$354.00	1/23/2018	18-0887	022981	162013CF005781A	13CF039428AD
18-A541	8499329	OFFICIAL REPORTERS, INC.	$294.00	2/5/2018	18-0941	024090	162013CF005781A	13CF039428AD
18-A541	8499855	OFFICIAL REPORTERS, INC.	$100.00	1/22/2018	18-0876	022836	162013CF005781A	13CF039428AD
14-A541	8600965	OFFICIAL REPORTERS, INC.	$162.00	8/14/2013	14-0208	005532	162013CF005781A	13CF039428AD
18-A541	8690842	OFFICIAL REPORTERS, INC.	$75.00	1/31/2018	18-0933	023776	162013CF005781A	13CF039428AD
18-A541	8717327	OFFICIAL REPORTERS, INC.	$348.00	2/1/2018	18-0934	023776	162013CF005781A	13CF039428AD
18-A541	8717775	OFFICIAL REPORTERS, INC.	$550.00	2/15/2018	18-1020	025542	162013CF005781A	13CF039428AD
14-A541	8753491	OFFICIAL REPORTERS, INC.	$112.00	10/21/2013	14-0427	012795	162013CF005781A	13CF039428AD
14-A541	8753491	OFFICIAL REPORTERS, INC.	$55.00	10/21/2013	14-0427	012795	162013CF005781A	13CF039428AD
14-A541	8753491	OFFICIAL REPORTERS, INC.	$31.00	10/21/2013	14-0427	012795	162013CF005781A	13CF039428AD
16-A541	8783699	OFFICIAL REPORTERS, INC.	$28.00	1/21/2016	16-0710	022563	162013CF005781A	13CF039428AD
16-A541	8783701	OFFICIAL REPORTERS, INC.	$53.00	1/21/2016	16-0710	022563	162013CF005781A	13CF039428AD
18-A541	8816156	OFFICIAL REPORTERS, INC.	$75.00	1/26/2018	18-0903	023209	162013CF005781A	13CF039428AD
18-A541	REDDI ARTS-014735	P - CARD	$55.90	1/18/2018	18-0895	022024	162013CF005781A	13CF039428AD

18-A541	REDDI ARTS-142808-(	P - CARD	($4.06)	1/18/2018	18-0936	023162	162013CF005781A	13CF039428AD
18-A541	2077	SUNCOAST NEUROPSYCHOLOGY LLC.	$390.00	1/18/2018	18-1068	026783	162013CF005781A	13CF039428AD
18-A541	17-051-13-1034	TAX COLLECTOR - MEDICAL EXAMINER'S OFFICE	$500.00	12/20/2017	18-0772	019929	162013CF005781A	13CF039428AD
18-A541	17-062-13-1034	TAX COLLECTOR - MEDICAL EXAMINER'S OFFICE	$500.00	1/22/2018	18-0880	022981	162013CF005781A	13CF039428AD
18-A541	17-080-13-1034	TAX COLLECTOR - MEDICAL EXAMINER'S OFFICE	$1,000.00	2/13/2018	18-1009	025426	162013CF005781A	13CF039428AD
14-CO25	25800-20131015	NORTHERN FLORIDA TRANSPORT LLC.	$590.44	10/15/2013	14-0095-C	272857	162013CF005781AXX	13CF039428AD
18-CO25	021818 BUCK	BUCK, KERRIANNE	$300.00	2/21/2018	18-0109-C	623031	162013CF005781A	13CF039428AD
18-CO25	02132018	CARTER, JR., J. A.	$48.06	2/13/2018	18-0110-C	623030	162013CF005781A	13CF039428AD
18-CO25	021818 BUCK	AMERICAN EXPRESS [REMIT]	$692.64	3/12/2018	18-0120-C		162013CF005781A	13CF039428AD
18-CO25	021818 BURT, JENIKA	AMERICAN EXPRESS [REMIT]	$638.65	3/12/2018	18-0121-C		162013CF005781A	13CF039428AD
18-CO25	021818 BURT, JAIDEL	AMERICAN EXPRESS [REMIT]	$638.65	3/12/2018	18-0122-C		162013CF005781A	13CF039428AD
18-CO25	021818 BURT, JORDII	AMERICAN EXPRESS [REMIT]	$638.65	3/12/2018	18-0123-C		162013CF005781A	13CF039428AD
		TOTAL	**$14,846.74**					

IN THE CIRCUIT COURT OF THE FOURTH JUDICIAL CIRCUIT, IN AND FOR DUVAL COUNTY, FLORIDA.

CASE NO.: 16-2013-CF-5781 AXXX
DIVISION: CR-D

STATE OF FLORIDA

VS.

DONALD SMITH
_____/

REQUEST FOR RELEASE OF PROPERTY

COMES NOW, Donald Smith, through the undersigned attorney, and requests the release of the previously seized van in this case to the lawful owner, Patricia Moore. Defendant understands the release of this property will preclude any further forensic testing.

Donald Smith

Julie Agent Schlax
200 E. Forsyth Street
Jacksonville, Florida 32202
(904) 674-0717
julie@esalawgroup.com
Attorney for Defendant

FILED
MAY 02 2013

Doc # 2018104732, OR BK 18373 Page 1233, Number Pages: 2,
Recorded 05/03/2018 09:44 AM, RONNIE FUSSELL CLERK CIRCUIT COURT DUVAL COUNTY

S. A. CASE NO.: 13CF039428AD

IN THE CIRCUIT COURT OF THE FOURTH JUDICIAL CIRCUIT, IN AND FOR DUVAL COUNTY, FLORIDA

CLERK NO.: 162013CF005781AXXXMA

DIVISION: CRD

STATE OF FLORIDA

Plaintiff,

vs.

DONALD JAMES SMITH SR.,

Defendant,

FILED

MAY 02 2018

RONNIE W. FUSSELL
CLERK CIRCUIT COURT

RACE: White
SEX: Male
DOB: 09/04/1956

JUDGMENT AND RESTITUTION ORDER
[F.S. 775.089]

THIS CAUSE having come on to be heard upon the State's Motion for an Order requiring that the defendant, pursuant to Section 775.089, Florida Statutes, pay restitution costs for the benefit of the victim, herein namely:

B. Victim Compensation Trust Fund
Office of the Attorney General
The Capitol
Tallahassee, Florida 32399-1050

* If Victim Compensation has compensated the victim in part or in whole, then payments shall be made and distributed first to the victim, and when fully compensated, to Victim Compensation for reimbursement.

On the evidence presented it is adjudged,

1. That the State's Motion is hereby granted and the Defendant shall pay restitution for the benefit of the above-named victim in the total sum of **$2,500.00**; that shall bear interest at the legal rate, for which let execution issue. Said amount is to be offset by any monies paid to the victim by responsible co-defendants.

2. Payment shall be made to the victim through the Clerk of Court (Felony or Misdemeanor as applicable). If the Defendant is released from prison to supervision under the Department of Corrections, payments and disbursements shall be made through the Department for the length of such supervision. Upon completion of supervision, payments and disbursements on any outstanding balance shall be made directly through the Clerk of the Court. The Clerk of Court is authorized to collect a $3.50 fee per payment, pursuant to Section 28.24(26)(a), Florida Statutes.

3. Payment Schedule: [Check applicable instructions(s)]

[ ] Total sum shall be paid immediately.

[ ] Total sum shall be paid in installment payments of $_____, payable on a [ ] weekly [ ] monthly basis. Payments shall be applied first to interest and the balance, if any, to principal.

[ ] Other, specified schedule: _____

_____

4. (a) The Court may require that the defendant make restitution under this section within a specified period or in specified installments.

(b) The end of such period or the last such installment shall not be later than:

1. The end of the period of probation if probation is ordered;
2. Five years after the end of the term of imprisonment imposed if the Court does not order probation; or
3. Five years after the date of sentencing in any other case; or

(c) If not otherwise provided by the Court under this subsection, restitution must be made immediately.

5. If a defendant is placed on probation or paroled, complete satisfaction of any restitution ordered under this section shall be a condition of such probation or parole. The Court may revoke probation, and the Parole Commission may revoke parole, if the defendant fails to comply with such order.

6. That the Clerk of the Court shall provide to the victim named herein a copy hereof, in order for the victim to record the judgment as a lien, pursuant to Section 55.10, Florida Statutes.

DONE AND ORDERED in Jacksonville, Duval, Florida, on this 2 day of May, 2018.

Judge of the Circuit Court

Copies furnished by Clerk to:

Victim
Assistant State Attorney
Defendant and/or Defense Counsel

NOTE: The victim shall notify the Clerk of the Court, in writing, of any address changes.

PAM BONDI
ATTORNEY GENERAL
STATE OF FLORIDA

OFFICE OF THE ATTORNEY GENERAL
Division of Victim Services and Criminal Justice Programs
Bureau of Victim Compensation

The Capitol, PL-01 • Tallahassee, FL 32399-1050
Office: (800) 226-6667 • Fax: (850) 414-6197 or (850) 487-1595
Providers: (850) 414-3331 • TDD Florida Relay: (800) 955-8771
Website: myfloridalegal.com • Email: vcintake@myfloridalegal.com

February 28, 2018

Office of the State Attorney
Fourth Judicial Circuit of Florida
311 W Monroe St
Jacksonville, FL 32202
Attention: Mark Caliel, Assistant State Attorney

Re: STATE OF FLORIDA v. Donald James Smith (16-2013-CF-005781-AXXX)
Victim: Cherish Lily Perrywinkle

Dear Sir/Madam:

Please accept the attached self-authenticating public record in lieu of providing testimony in the restitution hearing for the above-referenced case. The attached public record should be admissible as evidence under section 90.803(8), and since the document is self-authenticating pursuant to section 90.902(2), **it is not necessary that a custodian be called to testify.**

If you should encounter any obstacles or have any questions, please call me at 850-414-3300.

Sincerely,

Monica Ivery-Clayton
Program Administrator

Attachments

FILED
MAY 02 2018
CLERK OF CIRCUIT COURT

PAM BONDI
ATTORNEY GENERAL
STATE OF FLORIDA

OFFICE OF THE ATTORNEY GENERAL
Division of Victim Services and Criminal Justice Programs
Bureau of Victim Compensation

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I, **Monica Ivery-Clayton** Program Administrator and Records Custodian for the Bureau of Victim Compensation, Division of Victim Services and Criminal Justice Programs, Office of the Attorney General, do hereby certify and attest that the attached record is a true copy of the original payment and crime information documents for claim number **2013-006926 VC** for crime victim **Cherish Lily Perrywinkle.** The payment and crime information documents are generated by the Victim Assistance Network (VANext) which is operated and maintained by the Division of Victim Services and Criminal Justice Programs, Office of the Attorney General, Tallahassee, Florida. The payment and crime information documents contain a compilation of data used by the Bureau of Victim Compensation, Division of Victim Services and Criminal Justice Programs for the purposes of analyzing qualifications for compensation, and payment of benefits to eligible crime victims and providers on behalf of victims. These documents constitute record of payment of all benefits to, or on behalf of, the victim and are being provided pursuant to section 960.17, Florida Statutes, for restitution purposes.

Monica Ivery-Clayton
Program Administrator
Division of Victim Services and
Criminal Justice Programs
PL-01, The Capitol
Tallahassee, FL 32399-1050

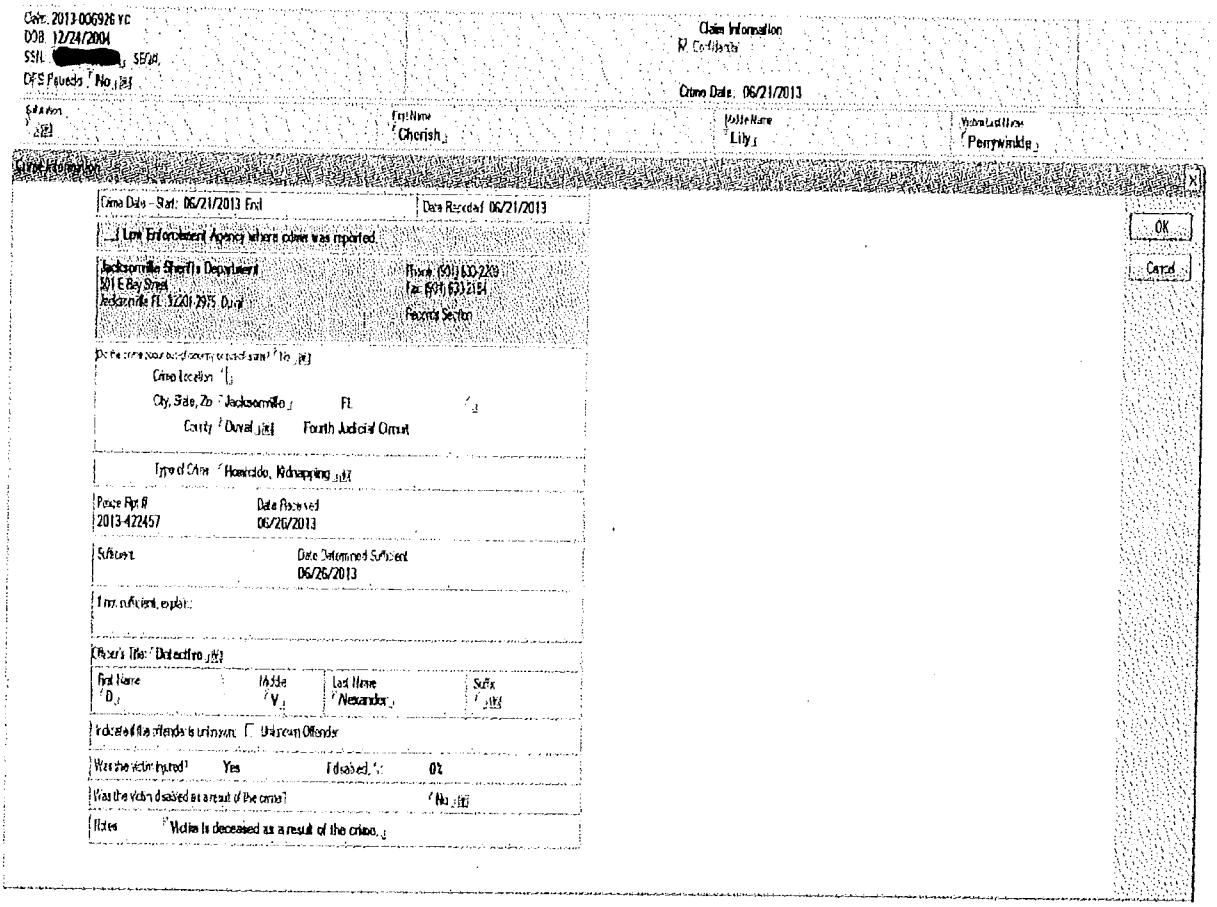
STATE OF FLORIDA)
)
COUNTY OF LEON)

Sworn to and subscribed before me
this 1st day of March 2018.

SHERI STEWART
Commission # FF 102289
Expires March 16, 2018
Bonded Thru Troy Fain Insurance 800-385-7019

✓ Personally known to me
____ Identification produced

NOTARY PUBLIC
State of Florida


Claim Information
Crime Date: 06/21/2013
First Name
Cherish
Middle Name
Lily
Victim Last Name
Pennywinkle
Crime Information
Crime Date - Start: 06/21/2013 End
Date Reported: 06/21/2013
Law Enforcement Agency where crime was reported
Jacksonville Sheriff's Department
501 E Bay Street
Jacksonville FL 32201-2975 Duval
Records Section
Crime Location
City, State, Zip: Jacksonville FL
County: Duval
Fourth Judicial Circuit
Type of Crime: Homicide, Kidnapping
Police Rpt #: 2013-422457
Date Received: 06/26/2013
Sufficient
Date Determined Sufficient: 06/26/2013
If not sufficient, explain:
Officer's Title: Detective
First Name: D
Middle: V
Last Name: Alexander
Suffix
Indicate if the offender is unknown
Unknown Offender
Was the victim injured? Yes
If disabled, %: 0%
Was the victim disabled as a result of the crime? No
Notes: Victim is deceased as a result of the crime.
OK
Cancel

Payment

Claim: 2013-006926 VC Victim: Cherish Lily Perrywinkle

Payee Name	Amount
Hardage-Giddens Town & Country	$2,500.00

Date Authorized	Payment Authorized By:	BPR Date	Date Paid
11/13/2013	Sheila Josil	11/14/2013	11/15/2013

Voucher Number	SAMAS Voucher	Check Number	ID Type	FEID or SSN	SPURS ID
VC001750028	D2014000263755	0485008	FEID	[redacted]	007

FEID or SSN:	[redacted]
Paying For:	Funeral/Burial
Accounts:	No account information; $2500
Service Dates:	6/22/2013 thru 6/22/2013
(print on payment receipt)	06/22/2013 thru 06/22/2013
Payee's Address:	7242 Normandy Blvd Jacksonville FL 32205

R/A/V Date	R/A/V Type
	( ) Refund ( ) Affidavit ( ) Void ( ) Deselect

Notes:

Victim: Cherish Lily Perrywinkle

Claim #: 2013-006926 VC

Check Date	Payee	Check #	Amount	Date Cleared per Comptroller
11/15/13	Hardage-Giddens Town & Country	0485008	$ 2,500.00	11/22/13
Total Paid			$ 2,500.00	

I certify that the information listed above was obtained from the records of the Department of Financial Services.

Jacqueline L Turner, Government Analyst
Bureau of Victim Compensation 02/27/2018

From:

PAM BONDI
ATTORNEY GENERAL
STATE OF FLORIDA

OFFICE OF THE ATTORNEY GENERAL
Victim Services

PL-01 The Capitol
Tallahassee, FL 32399-1050
Phone (800) 226-6667 Fax (850) 414-6197
http://www.myfloridalegal.com

Fax Cover Sheet

To: Carl Harms, Victim Advocate
Office of the State Attorney, 4th Judicial Circuit of Florida
Fax: (904) 255-2894

Phone: (904) 255-2500

From: Sonja Marie Scott, Claims Analyst

Fax: (850) 414-6197 Phone:(800) 226-6667

Message: Restitution Packet for Claim No. 2013-006926VC as requested; original to follow via USPS (mail).

SAO Case No. 18CF039428AD
Case No. 16201BCF005781AXXX
Defendant: Donald James Smith
ASA: Mark Caliel
Disposition Date: 03/28/2017

Number of pages (including cover sheet): 6

Please notify me at (800)226-6667 if all pages are not received or send an email to VCIntake@myfloridalegal.com

PAM BONDI
ATTORNEY GENERAL
STATE OF FLORIDA

OFFICE OF THE ATTORNEY GENERAL
Division of Victim Services and Criminal Justice Programs
Bureau of Victim Compensation

The Capitol, PL-01 • Tallahassee, FL 32399-1050
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Website: myfloridalegal.com • Email: vcintake@myfloridalegal.com

February 28, 2018

Office of the State Attorney
Fourth Judicial Circuit of Florida
311 W Monroe St
Jacksonville, FL 32202
Attention: Mark Caliel, Assistant State Attorney

Re: STATE OF FLORIDA v. Donald James Smith (16-2013-CF-005781-AXXX)
Victim: Cherish Lily Perrywinkle

Dear Sir/Madam:

Please accept the attached self-authenticating public record in lieu of providing testimony in the restitution hearing for the above-referenced case. The attached public record should be admissible as evidence under section 90.803(8), and since the document is self-authenticating pursuant to section 90.902(2), **it is not necessary that a custodian be called to testify.**

If you should encounter any obstacles or have any questions, please call me at 850-414-3300.

Sincerely,

Monica Ivery-Clayton
Program Administrator

Attachments

PAM BONDI
ATTORNEY GENERAL
STATE OF FLORIDA

OFFICE OF THE ATTORNEY GENERAL
Division of Victim Services and Criminal Justice Programs
Bureau of Victim Compensation

The Capitol, PL-01 • Tallahassee, FL 32399-1050
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I, **Monica Ivery-Clayton** Program Administrator and Records Custodian for the Bureau of Victim Compensation, Division of Victim Services and Criminal Justice Programs, Office of the Attorney General, do hereby certify and attest that the attached record is a true copy of the original payment and crime information documents for claim number **2013-006926 VC** for crime victim **Cherish Lily Perrywinkle.** The payment and crime information documents are generated by the Victim Assistance Network (VANext) which is operated and maintained by the Division of Victim Services and Criminal Justice Programs, Office of the Attorney General, Tallahassee, Florida. The payment and crime information documents contain a compilation of data used by the Bureau of Victim Compensation, Division of Victim Services and Criminal Justice Programs for the purposes of analyzing qualifications for compensation, and payment of benefits to eligible crime victims and providers on behalf of victims. These documents constitute record of payment of all benefits to, or on behalf of, the victim and are being provided pursuant to section 960.17, Florida Statutes, for restitution purposes.

Monica Ivery-Clayton
Program Administrator
Division of Victim Services and
Criminal Justice Programs
PL-01, The Capitol
Tallahassee, FL 32399-1050

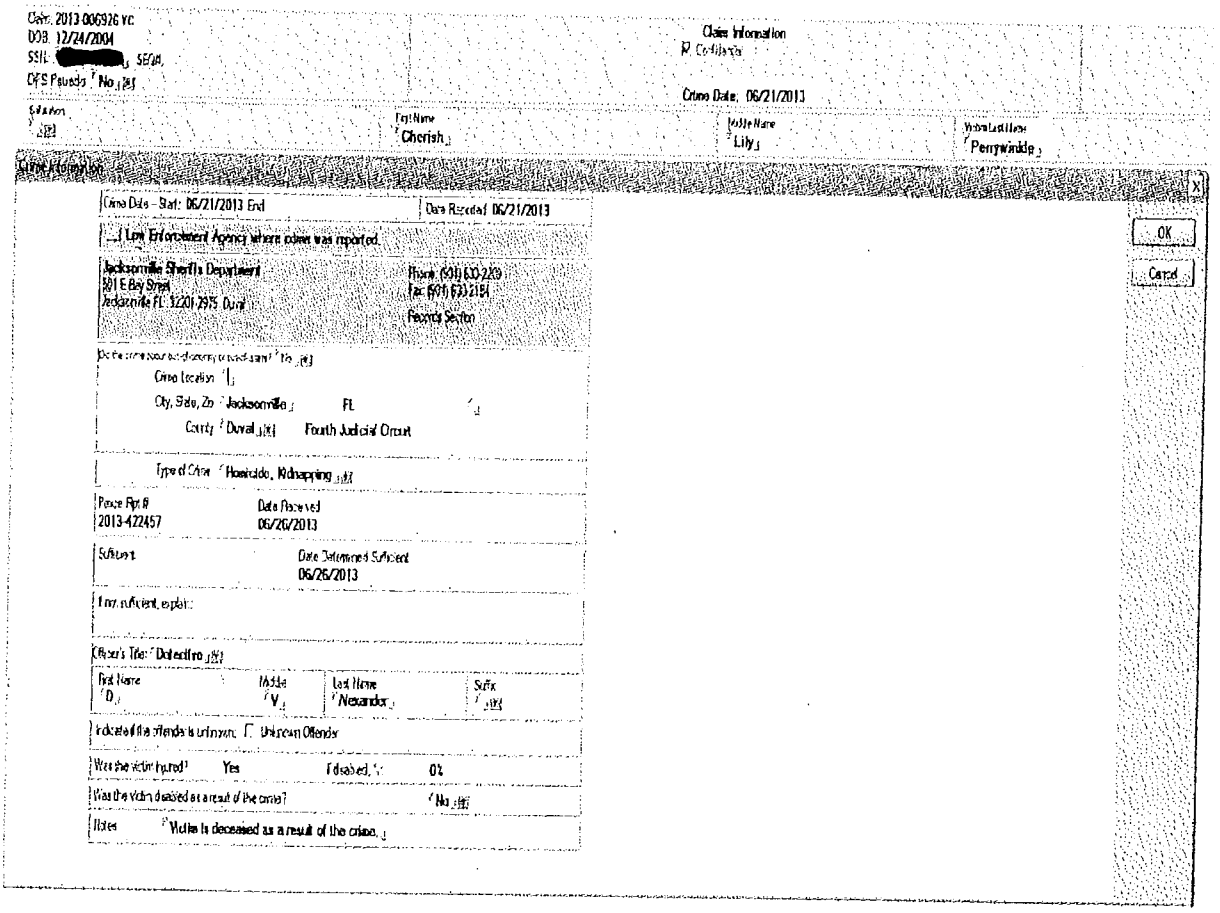
STATE OF FLORIDA)
)
COUNTY OF LEON)

Sworn to and subscribed before me
this 1st day of March 2018.

✓ Personally known to me
____ Identification produced

SHERI STEWART
Commission # FF 102289
Expires March 16, 2018
Bonded Thru Troy Fain Insurance 800-385-7019

NOTARY PUBLIC
State of Florida


Case: 2013-006926 VC
DOB: 12/24/2004
SSN: [redacted], SEQ#,
CPS Records: No
Salutation:
First Name: Cherish
Middle Name: Lily
Victim Last Name: Pennywinkle
Crime Information
Crime Date - Start: 06/21/2013 End
Date Reported: 06/21/2013
Law Enforcement Agency where crime was reported
Jacksonville Sheriff's Department
501 E Bay Street
Jacksonville FL 32201-2975 Duval
Phone: (904) 630-2439
Fax: (904) 630-2184
Records Section
Crime Location:
City, State, Zip: Jacksonville FL
County: Duval Fourth Judicial Circuit
Type of Crime: Homicide, Kidnapping
Police Rpt #: 2013-422457
Date Received: 06/26/2013
Sufficient
Date Determined Sufficient: 06/26/2013
If not sufficient, explain:
Officer's Title: Detective
First Name: D
Middle: V
Last Name: Alexander
Suffix:
Indicate if the offender is unknown: Unknown Offender
Was the victim injured? Yes
If disabled, %: 0%
Was the victim disabled as a result of the crime? No
Notes: Victim is deceased as a result of the crime.
OK
Cancel

Payment

Claim: 2013-006926 VC Victim: Cherish Lily Perrywinkle

Payee Name	Amount
Hardage-Giddens Town & Country	$2,500.00

Date Authorized	Payment Authorized By:	BPR Date	Date Paid
11/13/2013	Sheila Josli	11/14/2013	11/15/2013

Voucher Number	SAMAS Voucher	Check Number	ID Type	FEID or SSN	SPURS ID
VC001750028	D2014000263755	0485008	FEID	[redacted]	007

FEID or SSN:	[redacted]
Paying For:	Funeral/Burial
Accounts:	No account information: $2500
Service Dates:	6/22/2013 thru 6/22/2013
(print on payment receipt)	06/22/2013 thru 06/22/2013
Payee's Address:	7242 Normandy Blvd Jacksonville FL 32205

R/A/V Date	R/A/V Type
	◯ Refund ◯ Affidavit ◯ Void ◯ Deselect

Notes:

Victim: Cherish Lily Perrywinkle

Claim #: 2013-006926 VC

Check Date	Payee	Check #	Amount	Date Cleared per Comptroller
11/15/13	Hardage-Giddens Town & Country	0485008	$ 2,500.00	11/22/13
Total Paid			$ 2,500.00	

I certify that the information listed above was obtained from the records of the Department of Financial Services.

Jacqueline L Turner, Government Analyst
Bureau of Victim Compensation 02/27/2018

Doc # 2018104733, OR BK 18373 Page 1235, Number Pages: 2,
Recorded 05/03/2018 09:44 AM, RONNIE FUSSELL CLERK CIRCUIT COURT DUVAL COUNTY

STATE OF FLORIDA

vs.
DONALD JAMES SMITH, DEFENDANT

IN THE CIRCUIT COURT, FOURTH JUDICIAL CIRCUIT, IN AND FOR DUVAL COUNTY FLORIDA
CASE NUMBER: 16-2013-CF-005781-AXXX-MA
DIVISION: CR-D (Circuit)

COURT ORDERED COSTS/FINES/FEES

The defendant is hereby ordered to pay the following sums if checked:

☒ A sum of $3.00 as a court cost pursuant to section 938.01, Florida Statutes, (Additional Court Cost Clearing Trust Fund).
☒ A sum of $50.00 pursuant to section 938.03, Florida Statutes, (Crimes Compensation Trust Fund).
☒ A sum of $225.00 pursuant to section 938.05, Florida Statutes, (Local Government Criminal Justice Trust Fund).
☒ A sum of $3.00 pursuant to section 938.19, Florida Statutes, and section 634.108, Ordinance Code, (Assessment of Additional Court Costs-Duval County Teen Court Trust Fund).
☒ A sum of $65.00 pursuant to section 939.185(1)(a), Florida Statutes, and section 634.102(c), Ordinance Code, (Assessment of Additional Court Costs to be used for innovations, legal aid, law library, teen court programs).
☐ A sum of $100.00 pursuant to section 938.055, Florida Statutes, (FDLE Operating Trust Fund).
☐ A sum of $100.00 pursuant to section 938.27(1), Florida Statutes, (Sheriff's Office Investigative Cost).
☒ A sum of $14946.74 pursuant to section 938.27(8), Florida Statutes, (Cost of Prosecution).
☒ A sum of $20.00 pursuant to section 938.06, Florida Statutes, (Assessment of Additional Court Costs for Crime Stoppers Trust Fund).
☒ A sum of $100.00 pursuant to section 938.29, Florida Statutes, (Court Appointed Counsel Fees).
☒ A sum of $50.00 pursuant to section 27.52, Florida Statutes, (Application for Court Appointed Counsel Fees).
☒ A sum of $302.00 pursuant to section 938.10, Florida Statutes, (Crimes Against Minors).
☒ A sum of $201.00 pursuant to section 938.08, Florida Statutes, (Funding Programs in Domestic Violence).
☒ A sum of $302.00 pursuant to section 938.085, Florida Statutes, (Rape Crisis Trust Fund).
☒ A sum of $50.00 pursuant to section 775.083(2), Florida Statutes, (Cost).
☐ A fine in the sum of $ _____ pursuant to section 775. 0835, Florida Statutes, (This provision refers to the optional fine for the Crimes Compensation Trust Fund and is not applicable unless checked and completed. Fines imposed as a part of a sentence to section 775.083, Florida Statutes, are to be recorded on the sentence page(s)).
☐ A sum of $_____ pursuant to section 938.04, Florida Statutes, (additional cost 5% of fine).
☒ A sum of $2.00 as a court cost pursuant to section 938.15, Florida Statutes, (Criminal Justice Education by Municipalities and Counties).
☐ A sum of $15.00 pursuant to section 938.13, Florida Statutes, (Misd. convictions involving drugs or alcohol).
☐ A sum of $135.00 pursuant to section 938.07, Florida Statutes, (EMS – DUI/BUI cases).
☐ A sum of $30.00 pursuant to section 318.18(13), Florida Statutes, and section 634.102, Ordinance Code, (CHT - State Court Facilities).
☐ A sum of $3.00 pursuant to section 318.18(17), Florida Statutes, (State Radio System (SRS)).
☐ A sum of $_____ for the cost of collecting the DNA sample required by section 943.325, Florida Statutes.
☒ Restitution in accordance with attached order.
☐ Other _____.

DONE AND ORDERED in open court in Jacksonville, Duval County, Florida, this 2nd day of May, 2018.

Judge

STATE OF FLORIDA
DUVAL COUNTY

I, UNDERSIGNED Clerk of the Circuit & County Courts, Duval County, Florida, DO HEREBY CERTIFY the within and foregoing, consisting of 2 pages, is a true and corract copy of the original as it appears on record and file in the office of the Clerk of Circuit & County Courts of Duval County, Florida.

WITNESS my hand and [illegible] & County Courts at Jacksonville, Florida, this the MAY 02 2016 A.D.

RONNIE FUSSELL
Clerk, Circuit and County Courts
Duval County, Florida

By _____
Deputy Clerk

CLERK OF THE CIRCUIT COURT
SUUM CUIQUE
DUVAL COUNTY, FLORIDA

IN THE CIRCUIT COURT OF THE FOURTH JUDICIAL CIRCUIT, IN AND FOR DUVAL COUNTY, FLORIDA.

STATE OF FLORIDA
UNIFORM COMMITMENT TO CUSTODY
DEPARTMENT OF CORRECTIONS
FOURTH JUDICIAL CIRCUIT COURT
DUVAL COUNTY

Conviction for: **FALL Term. 2017**

Count	Active Statute Number and Description
1	S782.04(1)(A) MURDER - FIRST DEGREE
2	S787.01(3)(A) KIDNAPPING A CHILD UNDER THE AGE OF 13 YEARS
3	S794.011(2)(A) SEXUAL BATTERY: DEFENDANT 18 OR OLDER VICTIM LESS THAN 12

Date of conviction: **May 2, 2018**
Date of sentence imposed:**May 2, 2018**

Term of sentence:

Count	Disposition	Prison Time	Credit Time	Probation Time
1	ADJUDICATED GUILTY WITH FINGERPRINTS	DEATH	1775 DAYS	
2	ADJUDICATED GUILTY WITH FINGERPRINTS	LIFE	1775 DAYS	
3	ADJUDICATED GUILTY WITH FINGERPRINTS	LIFE	1775 DAYS	

Confinement Conditions: Defendant Deemed Sexual Predator Pursuant to 775.21(4)(a) Counts 2 & 3; Count 2 Consecutive Count 1; Count 3 Consecutive to Count 2.
Sentence Conditions:
Total Fees: 16,319.74
Probation Conditions:

STATE OF FLORIDA
vs.
DONALD JAMES SMITH, DEFENDANT

Plaintiff,
CASE: **16-2013-CF-005781-AXXX-MA**
OFFENDER NO. **2013-016727**

IN THE NAME AND BY THE AUTHORITY OF THE STATE OF FLORIDA, TO THE SHERIFF OF THE ABOVE REFERENCED COUNTY AND THE DEPARTMENT OF CORRECTIONS GREETINGS:

The above-named defendant has been duly charged, convicted, adjudicated guilty, and sentenced for the offense(s) set forth in the attached certified copies of the Indictment(s)/Informations, Original Judgment(s) Adjudicating Guilt, and Sentencing Order(s). In addition to the Original Judgment, if judicial supervision has been revoked subsequent to the entry of the judgment adjudicating guilt, a certified copy of the order revoking supervision (rather than a duplicative judgment adjudicating guilt) is also attached in support of this commitment.

Now therefore, this is to command you, the Sheriff, to take and keep and, within a reasonable time after receiving this commitment, deliver the defendant into the custody of the Department of Corrections; and this is to command you, the Secretary of the Department of Corrections, to keep and imprison the defendant for the term of the sentence. Herein fail not.

WITNESS the Honorable **MALLORY COOPER**
Judge of said Court, as also **RONNIE FUSSELL**
Clerk, and Seal thereof, this **2nd day of May, A.D. 2018**

BY: **Charlene Smith**
Deputy Clerk

IN THE CIRCUIT COURT, FOURTH JUDICIAL CIRCUIT, IN AND FOR DUVAL COUNTY, FLORIDA

STATE OF FLORIDA
vs.

CASE NUMBER: 16-2013-CF-005781-AXXX-MA

DONALD JAMES SMITH, DEFENDANT

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the Judgment and Sentence entered herein has been served on counsel for the defendant and counsel for the state in compliance with Florida Rule of Criminal Procedure 3.670 by hand, email, or U.S. mail delivery on this date: 2nd of May, 2018.

RONNIE FUSSELL
CLERK OF THE CIRCUIT AND COUNTY COURTS

BY: Charlene Smith
Deputy Clerk

IN THE CIRCUIT COURT, FOURTH
JUDICIAL CIRCUIT, IN AND FOR
DUVAL COUNTY, FLORIDA

CASE NO.: 16-2013-CF-05781-AXXX

DIVISION: CR-D

FILED
MAY 23 2018
CLERK CIRCUIT COURT

STATE OF FLORIDA

v.

DONALD J. SMITH,
Defendant.
_____/

CAPITAL SENTENCING ORDER

On February 14, 2018, a jury found Donald James Smith ("Defendant") guilty of Premeditated First Degree Murder During the Commission of a Felony (Count One), Kidnapping of a Victim Under Thirteen Years of Age While Committing a Sexual Battery (Count Two), and Sexual Battery on a Person Less Than Twelve Years of Age (Count Three).

GUILT PHASE

On and between February 12, 2018, and February 14, 2018, this Court conducted the guilt phase of Defendant's trial during which the State and Defendant presented evidence. The State presented the testimony of:

1. Rayne Perrywinkle (the Victim's Mother)
2. Brad Calhoun (Assistant Manager at Dollar General)
3. Samantha Bray (Asset Protection Associate at Walmart)
4. Christopher Iber (FBI Forensic Audio-Video and Image Analyst)
5. Christopher Rozier (Eyewitness in Walmart Parking Lot)
6. Ashley Chappell (Eyewitness in Walmart Parking Lot)

7. Marquita Howard (Reported Defendant's Van Behind Highlands Baptist Church)
8. Christina Howard (Reported Defendant's Van Behind Highlands Baptist Church)
9. Brenda Fillingim (Reported Defendant's Van Behind Highlands Baptist Church)
10. Tina Henson (Identified and Followed Defendant's Van on I-95)
11. Charles Wilkie, Sr. (Arresting Officer)
12. Kimberly Long (JSO Crime Scene Detective)
13. Jerome Bruton (Found Stroller on Property Near Highlands Baptist Church)
14. James Carter (Crime Scene Investigator)
15. Dr. Valerie Rao (Medical Examiner)
16. Nicole Lee (FDLE Crime Laboratory – Biology Section)
17. Robert Hinson (SAO Homicide Investigator)
18. David Gonzalez (JSO Detective – Technology Support Unit)
19. Charles Carter (JSO Corrections Officer – Intelligence Unit)

Defendant did not present any witnesses and waived closing argument.

On February 14, 2018, the jury found Defendant guilty on all counts.

PENALTY PHASE

On and between February 20, 2018, and February 22, 2018, this Court conducted the penalty phase of Defendant's trial during which the State and Defendant presented evidence. The State presented the testimony of:

1. Kerri-Ann Buck (Victim of Prior Violent Felony Conviction)

Defendant presented the testimony of:

1. Dr. Heather Holmes (Forensic Psychologist)
2. Dr. Daniel Buffington (Clinical Pharmacologist)

3. Michael Bossen (Duval County Criminal Law Expert)
4. Dr. Geoff Colino (Forensic Neurologist)
5. Dr. Joseph Chong Sang Wu (Neuropsychiatrist)
6. Dr. Joseph Sesta (Neuropsychologist)
7. James Aiken (Prison Security and Classification Expert)
8. Dr. Brooke Butler (Mitigation Specialist)
9. Donald J. Smith, Jr. (Defendant's Biological Son)

On February 22, 2018, the jury unanimously found the following six statutory aggravating factors were proven beyond a reasonable doubt: (1) Defendant was previously convicted of a felony involving the use or threat of violence to another person; (2) the First Degree Murder was committed while Defendant was engaged in the commission of a Kidnapping and Sexual Battery; (3) the First Degree Murder was committed for the purpose of avoiding or preventing a lawful arrest; (4) the First Degree Murder was especially heinous, atrocious, or cruel; (5) the First Degree Murder was committed in a cold, calculated, and premeditated manner, without any pretense of moral or legal justification; and (6) Cherish Perrywinkle (the "Victim") was a person less than twelve years of age. The jury also unanimously found these six aggravating factors were sufficient to warrant a possible sentence of death.

The jury unanimously found one statutory mitigating circumstance was proven by the greater weight of the evidence: Defendant's age at the time of the crime. The jury also found one non-statutory mitigating circumstances was proven by the greater weight of the evidence by a seven-to-five vote: that Defendant's son, Donald J. Smith, Jr., has developed a close relationship with his father since he has been incarcerated. As to the other statutory and non-

statutory mitigating circumstances, the jury either found they were not established by the greater weight of the evidence or that they were not mitigating in nature.

The jury then unanimously found the six statutory aggravating factors that were proven beyond a reasonable doubt outweighed the one statutory mitigating circumstance and the one non-statutory mitigating circumstance proven by the greater weight of the evidence.

Having unanimously found that at least one aggravating factor had been proven beyond a reasonable doubt, that the aggravating factors were sufficient to warrant a potential sentence of death, and that the aggravating factors outweighed the mitigating circumstances, the jury unanimously found Defendant should be sentenced to death.

On March 28, 2018, this Court held a Spencer[1] hearing. Defendant chose to waive his right to present any additional mitigation evidence. The State presented the victim impact statements from the Victim's father, Billy Jarreau, and mother, Rayne Perrywinkle.

As ordered by this Court, the State and Defendant filed memorandum in support of and in opposition to Defendant being sentenced to death.

In imposing this sentence, this Court has taken into account the jury verdict, all the evidence presented during trial, including the guilt and penalty phases, the Spencer hearing, and all sentencing memoranda submitted by the parties.[2] This Court now finds as follows:

[1] Spencer v. State, 615 So. 2d 688 (Fla. 1993).
[2] This Court did not order a Presentence Investigation Report. See Fla. R. Crim. P. 3.170(a) (stating the trial court has discretion, but is not required, to order report except when sentencing first time felony offenders or defendants under the age of eighteen); Rose v. State, 461 So. 2d 84, 87 (Fla. 1984) (holding "the ordering of a presentence investigation report is discretionary in capital cases").

AGGRAVATING FACTORS FOUND BY THE JURY

Aggravating Factor 1: Prior Violent Felony (6)(b)

The jury unanimously found beyond a reasonable doubt Defendant was previously convicted of a felony involving the use or threat of violence to a person. This jury finding is both supported by the evidence and consistent with the law.

This Court has the discretion to admit evidence relating to the details of Defendant's prior violent felony. Gonzalez v. State, 136 So. 3d 1125, 1150 (Fla. 2014). Moreover, the State is not limited to a defendant's admission of a prior violent felony conviction; it is allowed to present evidence relevant to the nature of the prior violent felony. See id. (quoting Miller v. State, 42 So. 3d 204, 225 (Fla. 2010)). This type of evidence allows the jury to evaluate the Defendant's character and circumstances surrounding the prior violent felony so it can make an informed decision as to the weight to give to the prior violent felony aggravator and, ultimately, the proper sentence. Gonzalez, 136 So. 3d at 1150 (citing Rhodes v. State, 547 So. 2d 1201, 1204 (Fla. 1989); Seibert v. State, 64 So. 3d 67, 79 (Fla. 2010)). Prior violent felonies are limited to "life-threatening crimes in which the perpetrator comes in direct contact with a human victim." Lewis v. State, 398 So. 2d 432, 438 (Fla. 1981) (citing Ford v. State, 374 So. 2d 496 (Fla. 1979).

At the penalty phase, the State called Kerri-Ann Buck ("Ms. Buck") to establish and explain Defendant's prior violent felony conviction for Attempted Kidnapping. Ms. Buck testified that on September 27, 1992, at the age of thirteen, Defendant attempted to lure her into his van on a Sunday afternoon. After Ms. Buck refused, she ran to a friend's house while Defendant pursued in his van, but no one answered the door. She proceeded to run towards a park behind a nearby elementary school. Defendant then began to pursue Ms. Buck on foot. Ms. Buck said she crawled into an enclosed slide and lodged herself in the middle of the slide by

extending her arms and legs. Ms. Buck testified while Defendant looked for her he yelled "I know you're in there, you little bitch. If you—I'm going to find you." Ultimately, Defendant gave up, returned to his van, and drove away. The parties stipulated Defendant was convicted of Attempted Kidnapping based on this incident.

Ms. Buck's testimony and the parties' stipulation establish beyond a reasonable doubt that Defendant was convicted of a prior felony involving the threat of violence. Although Defendant was ultimately unsuccessful in kidnapping Ms. Buck, he clearly threatened Ms. Buck with violence given his pursuit of Ms. Buck to the park and his violent statements to her. Accordingly, this Court finds the State has proven the existence of the prior violent felony aggravator beyond a reasonable doubt. This Court gives this aggravating factor great weight.

Aggravating Factor 2: Murder Committed During Kidnapping and Sexual Battery (6)(d)

The jury unanimously found beyond a reasonable doubt the first degree murder was committed while Defendant was engaged in kidnapping and sexual battery. This Court, too, finds Defendant murdered the Victim during the commission of a kidnapping and sexual battery. Accordingly, this Court finds the State has proven the existence of the during-the-commission-of-an-enumerated-felony aggravator beyond a reasonable doubt. This Court gives this aggravating factor great weight.

Aggravating Factor 3: Murder Committed to Avoid or Prevent Lawful Arrest (6)(e)

The jury unanimously found beyond a reasonable doubt the first degree murder was committed for the purpose of avoiding a lawful arrest. This finding is both supported by the evidence and consistent with the law.

"In order to establish the avoid arrest aggravator 'where the victim is not a law enforcement officer, the State must show beyond a reasonable doubt that the sole or dominant

motive for the murder was the elimination of a witness. In such cases, proof of the intent to avoid arrest or detection must be very strong." Phillips v. State, 39 So. 3d 296, 302 (Fla. 2010) (quoting Hernandez v. State, 4 So. 3d 642, 667 (Fla. 2009)). "Even without direct evidence of the offender's thought processes, the arrest avoidance factor can be supported by circumstantial evidence through inference from the facts shown." Swafford v. State, 533 So. 2d 270, 276 n.6 (Fla. 1988) (citing Harich v. State, 437 So. 2d 1082, 1086 (Fla. 1983)). Courts consider the following factors to determine whether the avoid arrest aggravator has been established: whether the victim knew and could identify the killer; whether the defendant used gloves, mask, or made incriminating statements about witness elimination; whether the victim offered any resistance; and whether the victim was confined or in a position to pose a threat to the defendant. Farina v. State, 801 So. 2d 44, 54 (Fla. 2001).

Based on the circumstances surrounding this crime, it is patently clear the Victim was murdered to avoid lawful arrest. First, the Victim would have been able to identify Defendant as the person who kidnapped and raped her if Defendant did not kill her. Second, the eight-year-old Victim posed absolutely no threat to Defendant. Third, Defendant's intent to avoid arrest is supported by the fact he hid the Victim's body under logs and other debris in a creek. Given these factors in conjunction with the other evidence presented at trial, it is clear Defendant murdered the Victim to avoid being arrested for kidnapping and sexual battery. Accordingly, this Court finds the State has proven the existence of the avoid arrest aggravator beyond a reasonable doubt. This Court gives this aggravating factor great weight.

Aggravating Factor 4: Heinous, Atrocious, or Cruel ("HAC") (6)(h)

The jury unanimously found beyond a reasonable doubt the first degree murder was especially heinous, atrocious, or cruel. This finding is both supported by the evidence and consistent with the law.

"For HAC to apply, the crime must be conscienceless or pitiless and unnecessarily torturous to the victim." Francis v. State, 808 So. 2d 110, 134 (Fla. 2001). "HAC focuses on the means and manner in which the death is inflicted and the immediate circumstances surrounding the death, rather than the intent and motivation of a defendant, where a victim experiences the torturous anxiety and fear of impending death. Thus, if a victim is killed in a torturous manner, a defendant need not have the intent or desire to inflict torture, because the very torturous manner of the victim's death is evidence of a defendant's indifference." Barnhill v. State, 834 So. 2d 836, 849-50 (Fla. 2002) (citations omitted). "Because strangulation of a conscious victim involves foreknowledge and the extreme anxiety of impending death, death by strangulation constitutes prima facie evidence of HAC." Id. at 850 (citing Mansfield v. State, 758 So. 2d 636, 645 (Fla. 2000)); Orme v. State, 677 So. 2d 258, 263 (Fla. 1996). "[T]he fear and emotional strain preceding the death of the victim may be considered as contributing to the heinous nature of a capital felony." Id. at 135 (citing Walker v. State, 707 So. 2d 300, 315 (Fla. 1997)). HAC is one of the weightiest aggravating factors. Carr v. State, 156 So. 3d 1052, 1071 (Fla. 2015).

Defendant brutally sexually assaulted the Victim prior to murdering her, causing extensive damage to her vagina and anus. At some point thereafter, Defendant used a ligature to asphyxiate the Victim. This fact alone constitutes prima facie evidence of HAC. Barnhill, 834 So. 2d at 849-50. There is also evidence suggesting Defendant smothered the Victim in an attempt to either silence her during the sexual battery or suffocate her afterwards. The medical

examiner, Dr. Valerie Rao, stated Defendant strangled the Victim for "[p]robably a couple of minutes" before she passed out and three-to-five minutes before she died. Dr. Rao also testified the mass hemorrhaging of the blood vessels in the Victim's eyes, mouth, and throat was indicative of the Victim struggling vigorously while being strangled. Taken together, these facts establish the Victim suffered horrendous physical and psychological pain while being murdered by Defendant. Moreover, the eight-year-old Victim would have been forced to experience, after having just been sexually assaulted, "the torturous anxiety and fear of impending death" for at least two minutes before losing unconsciousness. Barnhill, 834 So. 2d at 850. Accordingly, this Court finds the State has proven the existence of the HAC aggravator beyond a reasonable doubt. This Court gives this factor great weight.

Aggravating Factor 5: Cold, Calculated, and Premeditated ("CCP") (6)(i)

The jury unanimously found beyond a reasonable doubt the first degree murder was cold, calculated, and premeditated. This finding is both supported by the evidence and consistent with the law.

"The CCP aggravator pertains specifically to the state of mind, intent, and motivation of the defendant." Wright v. State, 19 So. 3d 277, 298 (Fla. 2009). "A defendant can be emotionally and mentally disturbed or suffer from a mental illness but still have the ability to experience cool and calm reflection, make a careful or prearranged design to commit murder, and exhibit heightened premeditation." Id. (citing Evans v. State, 800 So. 2d 182, 193 (Fla. 2001)). "The cold element is generally found in those murders that are not committed in a heat of passion." Id. at 299 (citing Looney v. State, 803 So. 2d 656, 678 (Fla. 2001)). "The calculated element applies in cases where the defendant arms himself in advance, kills execution-style, plans his actions, and has time to coldly and calmly decide to kill." Id. (citing Ibar v. State,

938 So. 2d 451, 473 (Fla. 2006)). "[T]o prove the element of heightened premeditation, the evidence must show that the defendant had a careful plan or prearranged design to kill, not to just simply commit another felony." Id. at 300 (citing Geralds v. State, 601 So. 2d 1157, 1163 (Fla. 1992)). "[T]his element exists where a defendant has the opportunity to leave the crime scene with the victim[] alive but, instead, commits the murders." Id. (citing Alston v. State, 723 So. 2d 148, 162 (Fla. 1998)). CCP is one of the weightiest aggravators. Carr, 156 So. 3d at 1071.

First, the murder was committed in a cold fashion. Nothing suggests Defendant murdered the Victim in the midst of some sort of frenzied rage. To the contrary, the evidence shows Defendant patiently waited for an opportunity to be alone with the Victim and lure her into his van outside the Walmart. Thereafter, Defendant brutally sexually assaulted the Victim. After Defendant completed the sexual battery, he used a ligature to suffocate the Victim and then took the time and effort to hide her lifeless body under logs and other debris in a creek to avoid being caught. Therefore, the cold element of CCP is satisfied.

Second, the murder was committed in a calculated fashion. After Defendant kidnapped and sexually assaulted the Victim, he was alone with her in his van. This time—however long it may have been—afforded Defendant the time to make the calculated decision to kill the Victim. He then used a ligature to strangle the Victim for up to five minutes before she finally died of asphyxiation. Therefore, the calculated element of CCP is satisfied.

Third, the murder was premeditated. At the Dollar General store, Defendant told the Victim's mother he would be willing to buy the Victim and her sisters some clothes with a Walmart gift certificate. This was a ruse. That Defendant lied about having a Walmart gift certificate immediately upon meeting the Victim and her family shows he was planning on kidnapping, sexually assaulting, and murdering the Victim or one her sisters at the outset. He

then convinced the Victim's mother to have them ride in his van to Walmart. At Walmart, Defendant waited until he was alone with the Victim to lure her away from her mother and into his van. This pattern of events as well as the other evidence presented at trial shows the first degree murder was part of a premeditated to plan to abduct, sexually assault, and eliminate the Victim. Furthermore, Defendant had the opportunity to leave the Victim alive after the kidnapping and sexual battery but, instead, chose to murder the Victim. Accordingly, this Court finds the State has proven the CCP aggravator beyond a reasonable doubt. This Court gives this aggravating factor very great weight.

Aggravating Factor 6: Victim Less than Twelve Years of Age (6)(1)

The jury unanimously found beyond a reasonable doubt the murder Victim was less than twelve years of age. This Court, too, finds the Victim was less than twelve years of age. Accordingly, this Court finds the State has proven the existence of the victim-less-than-twelve-years-of-age aggravator beyond a reasonable doubt. This Court gives this factor great weight.

Sufficiency of the Aggravating Factors Found by the Jury

This Court finds the six aggravating factors found to exist beyond a reasonable doubt by both the jury and this Court—all of which are entitled to great or very great weight—are sufficient to warrant a sentence of death. As such, Defendant is eligible for death, and this Court must now consider Defendant's proposed mitigating circumstances. See § 921.141(2)(b)2., Fla. Stat. (2018).

MITIGATING CIRCUMSTANCES

Defendant requested, and this Court instructed the jury on, three statutory mitigating circumstances and sixty-eight non-statutory mitigating circumstances. A mitigating circumstance is "any aspect of a defendant's character or record and any of the circumstances of

the offense that reasonably may serve as a basis for imposing a sentence less than death." Campbell v. State, 571 So. 2d 415, 419 n.4 (Fla. 1990) receded from on other grounds, Trease v. State, 768 So. 2d 1050 (Fla. 2000). "The trial court, during the penalty phase of a capital trial, is required to expressly find, consider and weigh" all of the statutory and non-statutory mitigation, "which appears anywhere in the record." Donaldson v. State, 722 So. 2d 177, 188 (Fla. 1998) (citations omitted).

> In considering allegedly mitigating evidence the court must decide if the facts alleged in mitigation are supported by the evidence, if those established facts are capable of mitigating the defendant's punishment, i.e., . . . may be considered as extenuating or reducing the degree of moral culpability for the crime committed, and if they are of sufficient weight to counterbalance the aggravating factors. The decision as to whether a mitigating circumstance has been established is within the trial court's discretion.

Hall v. State, 614 So. 2d 473, 478-79 (Fla. 1993) (quotations omitted).

Unlike the State's burden to prove aggravating factors beyond a reasonable doubt, the defendant need only establish mitigating circumstances by the greater weight of the evidence. Ford v. State, 802 So. 2d 1121, 1133 (Fla. 2001) (citations omitted). A court, therefore, will reject a mitigating circumstance if the defendant fails to establish that this circumstance exists by substantial competent evidence. Ault v. State, 53 So. 3d 175, 186-87 (Fla. 2010).

There are situations where a mitigating circumstance may be found to be supported by the record, but given no weight:

> [W]hile a proffered mitigating factor may technically be relevant and must be considered by the sentencer because it is generally recognized as a mitigating circumstance, the sentencer may determine in the particular case at hand that it is entitled to no weight for additional reasons or circumstances unique to that case.

Trease, 768 So. 2d at 1055; see also Coday v. State, 946 So. 2d 988, 1003 (Fla. 2006) (concluding once trial court determines evidence supports proposed mitigating circumstance, it

must then determine whether that mitigating factor is truly mitigating). The trial court's decision will be reviewed only for abuse of discretion. Ault, 53 So. 2d at 187.

Statutory Mitigating Circumstances

(1) Extreme Mental or Emotional Disturbance (F.S. 921.141(7)(b))

Defendant claims he murdered the Victim while under extreme mental or emotional disturbance. The jury, however, did not find this statutory mitigating circumstance.

In Cheshire v. State, 568 So. 2d 908, 912 (Fla. 1990), the Florida Supreme Court stated "*any* emotional disturbance relevant to the crime must be considered and weighed by the sentencer, no matter what the statutes say." Notably, "[a] defendant can be emotionally and mentally disturbed or suffer from a mental illness but still have the ability to experience cool and calm reflection, make a plan or prearranged design to commit murder, and exhibit heightened premeditation." Evans, 800 So. 2d at 193.

Dr. Holmes, a forensic pathologist, testified Defendant had a severe, long-term cocaine addiction. Leading up to the murder, Defendant was binging on crack cocaine and using quetiapine to ease "coming down" from his binges. During this time, Defendant would have been sleep deprived and suffering from impaired judgment and increased impulsivity. Dr. Buffington, a clinical pharmacologist, testified Defendant would have been "[i]mpaired to the degree that his normal judgment, skills and ability were profoundly diminished." Dr. Buffington also testified Defendant may have been experiencing crack cocaine-induced psychosis during this time. This pattern of behavior is consistent with Defendant's lifelong pattern of abusing drugs, especially crack cocaine. In fact, Defendant was known on the streets as "Weasy" based on his oftentimes violent and erratic behavior when high on crack cocaine.

This Court finds Defendant has established this statutory circumstance by the greater weight of the evidence and that the circumstance is mitigating in nature. Defendant's crack cocaine addiction, along with his binges in the weeks leading up to the murder, eroded his ability to control his prurient urges and constitute an "extreme mental disturbance." This Court believes this statutory mitigating circumstance should be given moderate weight.

(2) Substantial Impairment of Ability to Appreciate the Criminality of Conduct or Conform Conduct to Requirements of Law (F.S. 921.141(7)(f))

Defendant maintains he suffered from a substantial impairment of his ability to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law. The jury, however, did not find this mitigating circumstance.

This Court finds Defendant did not suffer from any impairment of his ability to appreciate the criminality of his conduct, but does find Defendant suffered from a substantial impairment of his ability to conform his conduct to the requirements of the law.

There is no evidence suggesting Defendant did not fully understand the criminal nature of his conduct. Although Dr. Buffington and Dr. Colino testified Defendant suffered from impaired judgment and impulse control, these conditions do not constitute an impairment in Defendant's ability to understand the criminality of his conduct and are undercut by the testimony of Dr. Sesta, who testified Defendant "knew what he was doing" and "knew what he was doing was wrong." Dr. Sesta's testimony is supported by Defendant's actions. After sexually assaulting the Victim, Defendant murdered her to disable her from testifying against him. After murdering the Victim, Defendant hid her body under debris in a creek to avoid her body being found. Both of these actions are clear evidence Defendant fully understood the criminality of his conduct.

There is, however, uncontroverted evidence suggesting Defendant suffered from an impairment of his ability to conform his conduct to the requirements of the law. Dr. Buffington

stated Defendant's substantial crack cocaine usage leading up to the murder would have left him sleep deprived and "[i]mpaired to the degree that his normal judgment, skills and ability were profoundly diminished." Dr. Colino testified Defendant suffered from "[p]rofoundly abnormal" shrinkage in certain parts of his brain that appeared to be "the consequences of traumatic brain injury or an asymmetric neurodegenerative disease." Dr. Colino stated this shrinkage would cause "considerable difficulty regulating his behaviors, his impulses, making decisions, learning from past experiences, [and] rationally assessing his own self-interest." Dr. Wu, a neuropsychiatrist, testified the MRI and PET scans performed on Defendant were suggestive of neurodevelopmental and neurodegenerative abnormalities. Dr. Wu concluded Defendant's significant brain abnormalities would produce a "catastrophic failure in impulse control." Dr. Sesta stated "[Defendant] has a lot of other things wrong with him. He's a pedophile, he's a psychopath, but then he also has this brain injury which will prevent him from controlling his behavior the way the rest of us do to live in society."

This Court finds Defendant has established a significant impairment in his ability to conform his conduct to the requirements of the law by the greater weight of the evidence and that this circumstance is mitigating in nature. This Court believes this statutory mitigating circumstance should be given significant weight.

(3) Age of Defendant at Time of Crime (F.S. 921.141(7)(g))

Defendant claims his age at the time of the crime mitigates the murder. The jury unanimously found this statutory mitigating circumstance.

"For a court to give a non-minor defendant's age significant weight as a mitigating circumstance, the defendant's age must be linked with some other characteristic of the defendant

or the crime, such as significant emotional immaturity or mental problems." Hurst v. State, 819 So. 2d 689, 698 (Fla. 2002); Mahn v. State, 714 So. 2d 391, 400 (Fla. 1998).

Dr. Colino and Dr. Wu testified Defendant's brain shrinkage is a result of some abnormal neurodegenerative process, caused by either an asymmetric neurodegenerative disease such as Alzheimer's disease or chronic traumatic encephalopathy ("CTE"). Regardless of the cause of Defendant's brain shrinkage, neurodegenerative processes worsen with time. This evidence links Defendant's advanced age with his neurodegenerative brain abnormalities, which lessens his ability to control his impulsive behaviors.

This Court finds Defendant has established the linkage between his advanced age and neurodegenerative brain abnormalities by the greater weight of the evidence and that this circumstance is mitigating in nature. Although this statutory mitigating circumstance overlaps to some extent with Defendant's impaired ability to conform his conduct to the requirements of the law, this Court finds it appropriate to give this mitigating circumstance moderate weight.

Non-Statutory Mitigating Circumstances

A. Defendant's biological father left before he was born. As a result, he never had a relationship with Defendant.

This Court finds this mitigating circumstance was established by the greater weight of the evidence, but should be accorded little weight.

B. Defendant's biological parents were forced to divorce by his maternal grandparents "who openly disapproved of his biological father."

This Court finds this mitigating circumstance was established by the greater weight of the evidence, but should be accorded little weight.

C. Defendant's mother was seventeen years old when she gave birth to him.

This Court finds this circumstance was established by the greater weight of the evidence, but is not, standing alone, mitigating in nature. Therefore, this Court accords it no weight.

D. Defendant was born premature with low birth weight.

This Court finds this circumstance was established by the greater weight of the evidence, but is not, standing alone, mitigating in nature. Therefore, this Court accords it no weight.

E. Defendant's mother wanted to give him up for adoption.

This Court finds this circumstance was established by the greater weight of the evidence, but is not, standing alone, mitigating in nature. Specifically, there is nothing in the record suggesting Defendant was aware of his mother's desire to have him adopted or that it impacted his life or development in any way. Therefore, this Court affords this circumstance no weight.

F. Mental Illness runs in Defendant's mother's and biological father's sides of the family.

This Court finds this mitigating circumstance was established by the greater weight of the evidence, but should be accorded no weight. There is no evidence suggesting Defendant was directly affected by his parents' families' history of mental illness other than his inherited genetic makeup. And, because this Court is considering Defendant's personal mental illnesses as mitigation in this case, there is no need to also consider his family history of mental illnesses where there is no evidence that Defendant was exposed to the behavioral manifestations of those illnesses. Therefore, this mitigating circumstance will be given no weight.

G. Addiction runs in Defendant's mother's and biological father's sides of the family.

This Court finds this mitigating circumstance was established by the greater weight of the evidence, but should be accorded no weight. There is no evidence suggesting Defendant was directly affected by his parents' families' history of addiction other than his inherited genetic makeup. And, because this Court is considering Defendant's various personal addictions as mitigation in this case, there is no need to also consider his family history of addiction where

there is no evidence that Defendant was exposed to the behavioral manifestations of those addictions. Therefore, this mitigating circumstance will be given no weight.

H. Emotional instability leading to physical violence is present on Defendant's biological father's side of the family.

This Court finds this mitigating circumstance was established by the greater weight of the evidence, but should be accorded no weight. Although it was proven that Defendant's paternal family was involved of instances of physical violence, there is no evidence this led to any emotional instability in Defendant's life given that his father's family was never part of his life. Therefore, this circumstance will be given no weight.

I. Defendant's paternal uncle shot his grandfather to death.

This Court finds this circumstance was established by the greater weight of the evidence, but is not, standing alone, mitigating in nature. Therefore, this Court accords it no weight.

J. Defendant's mother spent very little time with him as a baby, instead focusing all of her attention on finding a man who could provide her with the lifestyle her parents felt she deserved.

This Court finds this mitigating circumstance was established by the greater weight of the evidence, but should be accorded little weight.

K. Defendant moved out of his grandparents' home when his mother married Clifton Smith, the man who formally adopted Defendant, which was extremely traumatic.

This Court finds this mitigating circumstance was established by the greater weight of the evidence, but should be accorded little weight.

L. Clifton Smith was verbally and emotionally abusive to Defendant, and locked Defendant outside as punishment.

This Court finds this mitigating circumstance was established by the greater weight of the evidence, and should be accorded some weight.

M. Clifton Smith was physically abusive towards Defendant.

This Court finds this mitigating circumstance was established by the greater weight of the evidence, and should be accorded some weight.

N. Defendant was traumatized by Clifton Smith's treatment. Defendant became clingy, stopped eating, and wet the bed long past the age of typical potty training.

This Court finds this mitigating circumstance was not established by the greater weight of the evidence. Dr. Butler testified Clifton Smith treated Defendant and his mother poorly and that Defendant was clingy, not eating, and wetting the bed beyond an acceptable age. This Court finds, however, Dr. Butler was unable to provide competent testimony establishing the causal link between Clifton Smith's treatment of Defendant and his mother and Defendant's atypical behavioral development. Therefore, this circumstance will be given no weight.

O. Clifton Smith was paranoid and obsessed with violence. Defendant was terrified of what he witnessed.

This Court finds this mitigating circumstance was not established by the greater weight of the evidence. No testimony suggests Clifton Smith was paranoid. The only testimony suggesting Clifton Smith was "obsessed with violence" is based on the fact that he watched war movies and marched around the house like a soldier. This Court does not believe such behavior amounts to an obsession with violence. Therefore, this circumstance will be given no weight.

P. Clifton Smith's job in the insurance business forced them to move regularly. As a result, Defendant was repeatedly uprooted from his home, adding to the instability in his living environment.

This Court finds this mitigating circumstance was established by the greater weight of the evidence, but should be accorded little weight.

Q. Because of the frequent moves, Defendant was frequently bullied. This caused him to feel alienated, detached, despondent, and angry. Defendant resorted to paying other kids to play with their toys.

This Court finds this mitigating circumstance was established by the greater weight of the evidence, and should be accorded some weight.

R. Defendant was sexually molested at the age of eight by two neighborhood teenagers.

This Court finds this circumstance was not established by the greater weight of the evidence. The only testimony suggesting Defendant was molested by two neighborhood boys was Defendant's mitigation specialist, Dr. Butler, and the only person who could have given Dr. Butler that information is Defendant himself. This Court gives little to no credence to any self-serving statement made by Defendant. Given these findings, this circumstance was not proven by the greater weight of the evidence and will be given no weight.

S. The teenagers coerced Defendant into watching them violently sexually molest several girls. He found the experience confusing and frightening.

This Court finds this circumstance was not established by the greater weight of the evidence. The only testimony suggesting Defendant watched two neighborhood boys sexually molest other neighborhood girls was Defendant's mitigation specialist, Dr. Butler, and the only person who could have given Dr. Butler that information is Defendant himself. This Court gives little to no credence to any self-serving statement made by Defendant. Given these findings, this circumstance was not established by the greater weight of the evidence and will be given no weight.

T. Defendant did not reveal the sexual abuse to his mother.

This Court has not found the above instances of sexual abuse to have been established by the greater weight of the evidence, and additionally finds this circumstance has not been

established by the greater weight of the evidence. Therefore, this circumstance will be given no weight.

U. Defendant's mother suspected that her sister's brother, Bob, molested her son; however, she did not confront them.

This Court finds this circumstance was not established by the greater weight of the evidence. There is no evidence suggesting Defendant was sexually molested by a family member named Bob. In fact, the only testimony suggesting Defendant may have been molested by a family member came from Dr. Butler, who stated "[Defendant's mother] did suspect that he was molested by a family member, but she never confirmed that, she never confronted it and she never did anything about it." This circumstance was not established by the greater weight of the evidence; therefore, it will be given no weight.

V. Defendant never received treatment for the sexual abuse he endured.

This Court has not found the above instances of sexual abuse to have been established by the greater weight of the evidence, and additionally finds this circumstance has not been established by the greater weight of the evidence. Therefore, this circumstance will be given no weight.

W. Clifton Smith was sexually inappropriate with Defendant. He touched Defendant on his buttocks. He called Defendant sexually explicit names.

This Court finds this mitigating circumstance was established by the greater weight of the evidence, but should be accorded little weight.

X. When Defendant's mother divorced Clifton Smith after seven years of marriage, this was yet another change that brought instability into Defendant's life.

This Court finds this mitigating circumstance was established by the greater weight of the evidence, but should be accorded little weight.

Y. *Defendant's second stepfather, Dr. Marlin Moore, was a cold, self-centered, and aloof man who instead that his wife and stepson call him "Dr. Moore."*

This Court finds this mitigating circumstance was established by the greater weight of the evidence, but should be accorded very little weight.

Z. *Dr. Moore was verbally and physically abusive to Defendant. He made it known that he "didn't have time for children."*

This Court finds this mitigating circumstance was established by the greater weight of the evidence, but should be accorded little weight.

AA. *As a teenager, Defendant began self-medicating with pills from Dr. Moore's home office. He was never confronted with the drug use.*

This Court finds this mitigating circumstance was established by the greater weight of the evidence, but should be accorded little weight.

BB. *Defendant's drug abuse escalated to regularly using marijuana, LSD, PCP, MDA, Mescaline, Peyote, Quaaludes, and cocaine.*

This Court finds this mitigating circumstance was established by the greater weight of the evidence, but should be accorded little weight.

CC. *Defendant dropped out of school in the Tenth Grade. Although Defendant was intelligent, he had lost all motivation based on drug use, depression, and anger.*

This Court finds this mitigating circumstance was established by the greater weight of the evidence, but should be accorded little weight.

DD. *As a teenager, Defendant began to get arrested.*

This Court finds this circumstance was established by the greater weight of the evidence, but is not, standing alone, mitigating in nature. Therefore, this Court accords it no weight.

EE. *At the age of fifteen, Defendant began engaging in voyeurism.*

This Court finds this circumstance was established by the greater weight of the evidence, but is not, standing alone, mitigating in nature. Therefore, this Court accords it no weight.

FF. Defendant was raped while incarcerated.

This Court finds this mitigating circumstance was established by the greater weight of the evidence, and should be accorded some weight.

GG. When Defendant was released from jail, his drug abuse spiraled into a full-blown crack addiction.

This Court finds this mitigating circumstance was established by the greater weight of the evidence, but should be accorded little weight.

HH. On crack, Defendant's inability to control his impulses was intensified to the point that he felt like another person. On the streets, Defendant became notorious for his behavior while high. He was paranoid, manic, unstable, and impulsive.

This Court finds this mitigating circumstance was established by the greater weight of the evidence, but should be accorded little weight.

II. Defendant's mother enabled his drug addiction. She drove him to pay off his drug debts and, if he was unable to make the trip, paid them off herself. She continued this for decades.

This Court finds this mitigating circumstance was established by the greater weight of the evidence, but should be accorded little weight.

JJ. At the age of twenty, Defendant attempted suicide for the first time by driving into an oak tree on Orange Picker Road. He flipped his car, but survived the accident. Defendant did not receive treatment for his injuries.

This Court finds this circumstance was not established by the greater weight of the evidence. The only testimony suggesting Defendant attempted to commit suicide was Defendant's mitigation specialist, Dr. Butler, and the only person who could have given her that information is Defendant. This Court gives little to no credence to any self-serving statement made by Defendant. Given these findings, this circumstance was not established by the greater weight of the evidence and will be given no weight.

KK. Defendant experienced a dissociative episode due to drug use where he lost time.

This Court finds this circumstance was established by the greater weight of the evidence, but is not, standing alone, mitigating in nature. Therefore, this Court accords it no weight.

LL. Defendant made his second suicide attempt in the Duval County Jail.

This Court finds this circumstance was not established by the greater weight of the evidence. The only testimony regarding Defendant's "second" attempted suicide was Dr. Butler, and she never testified as to the manner in which Defendant attempted to commit suicide while housed in the Duval County Jail or how she obtained this information. Given the complete lack of specificity regarding Defendant's "second" suicide attempt, this Court finds this circumstance was not established by the greater weight of the evidence and will be given no weight.

MM. In 1977, Defendant was designated as a Mentally Disordered Sex Offender and committed to the North Florida Evaluation and Treatment Center.

This Court finds this circumstance was established by the greater weight of the evidence, but is not, standing alone, mitigating in nature. Therefore, this Court accords it no weight.

NN. Throughout his adult life, Defendant spent hundreds of dollars per day on crack. During the year of 2002, he spent more than $90,000 in a four-month period. He went on binges that lasted for weeks. During these episodes, Defendant did not eat or sleep.

This Court finds this mitigating circumstance was established by the greater weight of the evidence, but should be accorded very little weight.

OO. Defendant fathered a son, Donald James Smith, Jr., born June 2, 1992. He married his son's mother, Francine Brown, but the relationship was short-lived.

This Court finds this circumstance was established by the greater weight of the evidence, but is not, standing alone, mitigating in nature. Therefore, this Court accords it no weight.

PP. Defendant was far from a perfect father. However, he has tried to parent his son to the best of his ability.

This Court finds this circumstance was not established by the greater weight of the evidence. Although Dr. Butler testified "[Defendant] has a son and has been the best parent that he could be given [Defendant's] life experiences being incarcerated for as long as he has," this Court finds such generic and boilerplate testimony does not constitute competent evidence of this mitigating circumstance. Therefore, this circumstance was not established by the greater weight of the evidence and will be given no weight.

QQ. Donald James Smith, Jr. has developed a close relationship with his father since he has been incarcerated.

This Court finds this mitigating circumstance was established by the greater weight of the evidence, but should be accorded little weight.

RR. Defendant has been repeatedly diagnosed as having Antisocial Personality Disorder ("ASPD"), Polysubstance Dependence, Pedophilia, and Cocaine Dependence

This Court finds this circumstance was proven by the greater weight of the evidence. Pedophilia, however, is not mitigating in nature. Although Defendant's pedophilia may have possibly been mitigating in nature with respect to the sexual battery charge to the extent it helps explain Defendant's compulsion to commit such a crime, that reasoning does not apply to murder, the only crime for which Defendant is subject to the death penalty. See Ault v. State, 53 So. 3d 175, 193-94 (Fla. 2010) (pedophilia).

As to Defendant's antisocial personality disorder (*i.e.*, psychopathy or sociopathy) and various substance addictions, this Court finds those circumstances are mitigating in nature. See Morton v. State, 789 So. 2d 324, 329-31 (Fla. 2001) (ASPD); Mahn v. State, 714 So. 2d 391, 401 (Fla. 1998) (addiction). Therefore, this Court gives these circumstances moderate weight to the extent they are not duplicative of the statutory mitigating factors found above.

SS. *In 1999, Defendant was designated a Sexually Violent Predator and subsequently committed to the Martin Treatment Center ("MTC") through the Jimmy Ryce Civil Commitment Act. While detained at MTC, Defendant did not complete the treatment plan developed for him.*

This Court finds this mitigating circumstance was proven by the greater weight of the evidence, but should be accorded little to no weight.

TT. *While at the MTC, Defendant engaged in a sexual relationship with another patient who was known for being HIV positive. This was regarded as Defendant's third suicide attempt.*

This Court finds Defendant's sexual relationship with an HIV-positive male patient at the Arcadia Civil Commitment Center was established by the greater weight of the evidence, but this sexual relationship, standing alone, does not constitute attempted suicide. Therefore, this circumstance was not established by the greater weight of the evidence and is given no weight.

UU. *In spite of the fact that Defendant did not participate in counseling, he was released from the MTC based on a decision made by members of the State Attorney's Office in Duval County.*

This Court finds this circumstance was established by the greater weight of the evidence, but is not, standing alone, mitigating in nature. Therefore, this Court accords it no weight.

VV. *Once released from MTC, Defendant was required to receive a psychosexual evaluation and treatment. Dr. James Vallely completed the evaluation and concluded that Defendant was highly likely to re-offend.*

This Court finds this circumstance was established by the greater weight of the evidence, but is not, standing alone, mitigating in nature. Therefore, this Court accords it no weight.

WW. *Defendant was arrested for Dealing in Stolen Property and Burglary and was eligible to receive thirty years in prison as a habitual felony offender. However, members of the State Attorney's Office in Duval County permitted him to plea to a sentence of four years in prison. Defendant was not placed on any form of supervision upon his release from prison.*

This Court finds this circumstance was established by the greater weight of the evidence, but is not, standing alone, mitigating in nature. Therefore, this Court accords it no weight.

XX. In 2006, a state psychological assessment determined Defendant did not meet the criteria for civil commitment in the Jimmy Ryce Civil Commitment Center, although he had never received any meaningful rehabilitation.

This Court finds this circumstance was established by the greater weight of the evidence, but is not, standing alone, mitigating in nature. In hindsight, it is clear Defendant should have been subject to involuntary civil commitment under the Jimmy Ryce Act in 2006. However, the Department of Children and Family determined Defendant did not meet the criteria for civil commitment in spite of his prior violent, sexually-motivated crimes and extensive criminal background. Therefore, this circumstance is accorded no weight.

YY. In 2011, Defendant "Baker Acted" himself. He reported homicidal thoughts as well as auditory and visual hallucinations. He also admitted a history of using cocaine and Lortab. He was diagnosed as having a potential for homicide, suicide, and violence. The center recommended one-on-one counseling and let him stay three or four days. They never followed up with therapy.

This Court finds this circumstance was established by the greater weight of the evidence and is mitigating in nature. This action by Defendant shows he was aware of his prurient and homicidal proclivities as well as his inability to regulate those behaviors. This Court finds this mitigating circumstance should be given some weight.

ZZ. In 2009, Defendant was arrested for attempting to lure a nine-year-old girl while posing as a Department of Children and Families worker. If found guilty, he could have been sentenced to ten years in the DOC, but members of the State Attorneys' Office in Duval County agreed to a plea agreement allowing a county jail sentence, which bypassed further screening into the Jimmy Ryce Civil Commitment Center.

This Court finds this circumstance was established by the greater weight of the evidence, but is not, standing alone, mitigating in nature. Therefore, this Court accords it no weight.

AAA. On June 1, 2013, Defendant was released from the Duval County Jail. He was not placed in any kind of supervision by the State.

This Court finds this circumstance was established by the greater weight of the evidence, but is not, standing alone, mitigating in nature. Therefore, this Court accords it no weight.

BBB. Three weeks before the murder of Cherish Perrywinkle, Defendant went to Shands Hospital and then was "Baker Acted." He stated that he was having violent thoughts and wanted to get into a residential program. The center gave him a brochure and told him to "study and practice." They allowed him to stay for approximately twenty-four hours.

This Court finds this circumstance was established by the greater weight of the evidence and is mitigating in nature. This action by Defendant shows he was aware of his prurient and homicidal proclivities as well as his inability to regulate those behaviors. This Court finds this mitigating circumstance should be given moderate weight.

CCC. Neuropsychological testing has indicated the Defendant's brain functioning is abnormal. He has deficits in executive functioning and poor impulse control.

This Court finds this circumstance was proven by the greater weight of the evidence and is mitigating in nature. See Ault v. State, 53 So. 3d 175, 190 (Fla. 2010) ("[B]rain damage has been recognized as a mitigating circumstance."). Therefore, this Court gives this circumstance moderate weight to the extent it is not duplicative of the statutory mitigating factors found above.

DDD. Defendant's neuropsychological disorders are exacerbated by substance abuse and addiction.

This Court finds this circumstance was proven by the greater weight of the evidence and is mitigating in nature. Therefore, this Court gives this circumstance some weight to the extent it is not duplicative of the statutory mitigating factors found above.

EEE. Medical testing, specifically PET, MRI, and DTI scans, have revealed that Defendant's brain functioning is abnormal.

This Court finds this circumstance was proven by the greater weight of the evidence and is mitigating in nature. See Ault, 53 So. 3d at 190 ("[B]rain damage has been recognized as a mitigating circumstance."). Therefore, this Court gives this circumstance moderate weight to the extent it is not duplicative of the statutory mitigating factors found above.

FFF. Defendant's brain abnormalities are consistent with someone who has suffered brain damage.

This Court finds this circumstance to be irrelevant. The greater weight of the evidence establishes abnormal neurodegenerative shrinkage in Defendant's brain—this fact alone is mitigating in nature regardless of whether this shrinkage is being caused by some asymmetric neurodegenerative disease such as Alzheimer's disease or CTE. Therefore, this circumstance is not mitigating in nature and will be given no weight by this Court.

GGG. Defendant has suffered from significant mental illness for most of his life.

This Court finds this circumstance was established by the greater weight of the evidence and is mitigating in nature. This Court gives this circumstance some weight to the extent it is not duplicative of the statutory mitigating factors found above.

HHH. Defendant's mental illnesses are not something he has chosen.

This Court finds this circumstance was established by the greater weight of the evidence, but is not, standing alone, mitigating in nature. Therefore, this Court accords it no weight.

III. Defendant did not choose his family.

This Court finds this circumstance was established by the greater weight of the evidence, but is not, standing alone, mitigating in nature. Therefore, this Court accords it no weight.

JJJ. Defendant did not choose the way his family treated him.

This Court finds this circumstance was established by the greater weight of the evidence, but is not, standing alone, mitigating in nature. Therefore, this Court accords it no weight.

KKK. Defendant did not choose to be sexually molested.

This Court did not find Defendant was sexually molested; it only found he was reprimanded by his stepfather, Clifton Smith, in a sexually inappropriate manner. Therefore, to the extent this mitigating circumstance refers to the sexually inappropriate behavior from Clifton

Smith, this Court accords this mitigating circumstance little weight. Otherwise, this Court accords this circumstance no weight.

LLL. Defendant's childhood experiences shaped the person he became as an adult.

This Court finds this mitigating circumstance too vague and speculative to be capable of being established by the greater weight of the evidence.

MMM. At the time of the offenses, Defendant was fifty-six years old. He is now sixty-one years old.

This Court finds this circumstance was established by the greater weight of the evidence, but is not, standing alone, mitigating in nature. Furthermore, it is duplicative of the third statutory mitigating circumstance found above. Therefore, this Court accords it no weight.

NNN. Defendant has been diagnosed with Chronic Obstructive Pulmonary Disease, heart disease, Hepatitis B, and Hepatitis C.

This Court finds this circumstance was established by the greater weight of the evidence, but is not, standing alone, mitigating in nature. Therefore, this Court accords it no weight.

OOO. Defendant has been a strong support system for his mother, who is receiving treatment for breast cancer.

This Court finds this mitigating circumstance was established by the greater weight of the evidence, but should be accorded little weight.

PPP. Defendant has not been a threat to correctional officers or other inmates in Duval County Jail and the DOC.

This Court finds this circumstance was established by the greater weight of the evidence and is mitigating in nature. See Ault v. State, 53 So. 3d 175, 190-91 (Fla. 2010) ("[E]vidence of good conduct in prison does not reduce culpability for a defendant's crime, [but] it could be mitigating in the sense that it might serve as a basis for a sentence less than death." (citing Skipper v. South Carolina, 476 U.S. 1, 7 (1986))). This Court, however, accords this mitigating circumstance very little weight.

CONCLUSION

This Court must give great weight to the jury's recommendation of death. Tedder v. State, 322 So. 2d 908, 910 (Fla. 1975). This Court has the independent responsibility of weighing the aggravating factors against the mitigating circumstances. Bevel v. State, 983 So. 2d 505, 523 (Fla. 2008). This Court must carefully and conscientiously consider the aggravating factors and mitigating circumstances. Gunsby v. State, 574 So. 2d 1085, 1090 (Fla. 1991).

This Court has complied with the above-listed dictates and wholly agrees with the jury's recommendation of death based on a qualitative review of the aggravating factors and mitigating circumstances presented and their respective weights. This Court finds the aggravating factors heavily outweigh the mitigating circumstances and that death is the only proper penalty for the murder of Cherish Perrywinkle as charged in Count One of the Indictment.

Donald J. Smith, you have not only forfeited your right to live among us, but under the laws of the State of Florida, you have forfeited your right to live at all.

Accordingly, it is therefore **ORDERED AND ADJUDGED** that:

1. As to Count One, for the First Degree Murder of Cherish Perrywinkle, Donald James Smith shall be delivered into the custody of the Florida Department of Corrections at the Florida State Prison, where you shall be confined until a date certain selected by the Governor of the State of Florida and on that date you shall be executed in a method provided by Florida state law. You shall receive jail credit for 1775 days.
2. As to Count Two, for the Kidnapping of a Person under Thirteen Years of Age of Cherish Perrywinkle, Donald James Smith shall be sentenced to life imprisonment without the possibility of parole. You shall receive jail credit for 1775 days.

3. As to Count Three, for the Sexual Battery on a Person Less than Twelve Years of Age of Cherish Perrywinkle, Donald James Smith shall be sentenced to life imprisonment without the possibility of parole. You shall receive jail credit for 1775 days.
4. Counts One, Two, and Three shall run consecutively.

You are hereby notified this sentence is subject to automatic review by the Supreme Court of Florida. Counsel will be appointed by separate Order to represent you for that purpose. Further, pursuant to section 922.105, Florida Statutes (2018), you have thirty (30) days from the issuance of a mandate from the Supreme Court of Florida affirming the sentence of death to elect death by electrocution by the procedures required by that law.

Donald James Smith, may God have mercy on your soul.

DONE AND ORDERED in Jacksonville, Duval County, Florida on May 23, 2018.

MALLORY D. COOPER
Circuit Judge

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CERTIFICATE OF SERVICE

I do certify that a copy hereof has been furnished to the above-listed parties by United States mail or electronic service on May 23, 2018.

Deputy Clerk

Case No.: 16-2013-CF-05781-AXXX
/tbc

Doc # 2018124024, OR BK 18399 Page 497, Number Pages: 1,
Recorded 05/24/2018 10:17 AM, RONNIE FUSSELL CLERK CIRCUIT COURT DUVAL COUNTY

Filing # 72587986 E-Filed 05/23/2018 04:52:41 PM

IN THE CIRCUIT COURT OF THE FOURTH JUDICIAL CIRCUIT, IN AND FOR DUVAL COUNTY, FLORIDA

CASE NO.: 16-2013-CF-5781-AXXX
DIVISION: CR-D

STATE OF FLORIDA

vs.

DONALD JAMES SMITH.
_____/

NOTICE OF APPEAL

The Defendant takes and enters an appeal to the Supreme Court of Florida to review the final Order of Judgment and Sentence including a Sentence of Death imposed on the 2nd day of May, 2018, by The Honorable Mallory Cooper, Circuit Judge, and all parties to said cause are called upon to take notice of the entry of this appeal.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been delivered electronically to the Office of the State Attorney, representing the State of Florida and, by mail, to the Office of the Attorney General, representing the State of Florida, this 23rd day of May, 2018.

/s/ Julie Schlax

Julie Agent Schlax, Esquire
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200 E. Forsyth Street
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Fax: (904) 674-0737
Attorney for Defendant

ACCEPTED: DUVAL COUNTY, RONNIE FUSSELL, CLERK, 05/24/2018 09:45:37 AM

IN THE CIRCUIT COURT OF THE FOURTH JUDICIAL CIRCUIT, IN AND FOR DUVAL COUNTY, FLORIDA

CASE NO.: 16-2013-CF-5781-AXXX
DIVISION: CR-D

STATE OF FLORIDA

vs.

DONALD JAMES SMITH.
_____/

DIRECTIONS TO THE CLERK

The Defendant hereby requests and directs that the Clerk include the following documents in the Record on Appeal and transmit the same to the Clerk, Supreme Court of Florida:

1. All exhibits entered in the above-styled cause;
2. All exhibits under seal and Court exhibits;
3. The complete record;
4. These Directions to Clerk in the above-styled cause.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been delivered, to the Office of the State Attorney, and to the Office of the Attorney General, by electronic or U.S. mail this 23rd day of May, 2018.

ESPENSHIP, SCHLAX & ALBEE, LLC

/s/ Julie Agent Schlax

Julie Agent Schlax, Esquire
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IN THE CIRCUIT COURT OF THE FOURTH JUDICIAL CIRCUIT, IN AND FOR DUVAL COUNTY, FLORIDA

CASE NO.: 16-2013-CF-5781-AXXX
DIVISION: CR-D

STATE OF FLORIDA

vs.

DONALD JAMES SMITH.
_____/

STATEMENT OF JUDICIAL ACTS TO BE REVIEWED

The Defendant, by and through the undersigned attorney, pursuant to Rule 9.140(d), Florida Rules of Appellate Procedure, submits the following judicial acts to be reviewed upon the appeal in this cause:

1. The Court erred in denying Defendant's Motion for New Trial in the above-styled cause and erred in all previously made objections to the evidence, prior suppression Motions and Motions in Limine.

2. The Court erred in sentencing Defendant to Death in the above-styled cause.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been delivered electronically to the Office of the State Attorney and to the Office of the Attorney General, this 23rd day of May, 2018.

/s/ Julie Agent Schlax

Julie Agent Schlax, Esquire
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Attorney for Defendant

ACCEPTED: DUVAL COUNTY, RONNIE FUSSELL, CLERK, 05/24/2018 09:45:37 AM

IN THE CIRCUIT COURT OF THE FOURTH JUDICIAL CIRCUIT, IN AND FOR DUVAL COUNTY, FLORIDA

CASE NO.: 16-2013-CF-5781-AXXX
DIVISION: CR-D

STATE OF FLORIDA

vs.

DONALD JAMES SMITH
_____/

DESIGNATION TO COURT REPORTER FOR STENOGRAPHIC NOTES

Appellant files this Designation to the Court Reporter and directs Official Court Reporters, Inc., to transcribe all proceedings in this case as listed below to be used in this appeal the following proceedings and file an **original and two** certified copies of jury selection, trial proceedings and penalty phase **(consecutively numbered)** and an **original only** of all other court proceedings with the Clerk of this Court within thirty (30) days of this designation to be used in the appeal to the Supreme Court of Florida. In addition to the preparation of paper transcripts, the court reporter shall submit all transcripts to the Florida Supreme Court via e-mail pursuant to the Administrative Order of the Court of June 10, 2005.

The entire proceedings on the following dates: *(Including Jury Selection & **3CD-ROMs** for all dates)*

7/16/2013 (Arraignment)	4/11/16 (Pretrial)
8/19/13 (Pretrial)	5/4/16 (Motion Hearing)
8/22/13 (Motion Hearing)	5/26/16 (Motion Hearing)
9/4/13 (Pretrial)	7/15/16 (Pretrial)
10/15/13 (Pretrial)	7/21/16 (Motion Hearing)
12/3/13 (Pretrial)	8/18/16 (Motion Hearing)
1/6/14 (Pretrial)	10/18/16 (Pretrial)
1/9/14 (Motion Hearing)	12/12/16 (Pretrial)
2/12/14 (Pretrial)	1/18/17 (Pretrial)
3/19/14 (Pretrial)	5/11/17 (Pretrial)
5/7/14 (Pretrial)	8/8/17 (Pretrial)
7/16/14 (Pretrial)	9/14/17 (Pretrial)
9/3/14 (Pretrial)	10/3/17 (Pretrial)
11/4/14 (Pretrial)	11/2/17 (Pretrial)
11/19/14 (Motion Hearing)	12/19/17 (Pretrial)
11/24/14 (Pretrial)	1/11/18 (Motion Hearing)

12/4/14 (Pretrial)	1/22/18 (Motion Hearing)
12/11/14 (Motion Hearing)	1/24/18 (Motion Hearing)
12/19/14 (Motion Hearing)	2/1/18 (Final Pretrial)
1/15/15 (Pretrial)	2/5/18 (Jury Selection)
2/4/15 (Pretrial)	2/6/18 (Jury Selection)
2/20/15 (Pretrial)	2/7/18 (Jury Selection)
3/24/15 (Pretrial)	2/8/18 (Jury Selection)
5/12/15 (Pretrial)	2/9/18 (Jury Selection)
7/2/15 (Pretrial)	2/12/18 (Trial)
8/13/15 (Pretrial)	2/13/18 (Trial)
9/15/15 (Pretrial)	2/14/18 (Trial)
11/2/15 (Pretrial)	2/20/18 (Penalty Phase)
11/5/15 (Motion Hearing)	2/21/18 (Penalty Phase)
11/17/15 (Pretrial)	2/22/18 (Penalty Phase)
12/15/15 (Pretrial)	3/28/18 (Spencer Hearing)
2/2/16 (Pretrial)	5/2/18 (Sentencing)
3/1/16 (Pretrial)	
3/8/16 (Pretrial)	

The court reporter is hereby directed to serve a copy of the Reporter's Acknowledgement and any future motions for extension(s) of time requested to transcribe notes to Office of the Public Defender, Office of the State Attorney and Clerk of this Court, and to the Office of the Attorney General, upon filing.

The undersigned certifies a copy of this designation has been delivered to the Office of the State Attorney representing the State of Florida, to Official Court Reporters, the Office of the Attorney General, representing the State of Florida and Clerk, Supreme Court of Florida, this 23rd day of May, 2018.

ESPENSHIP, SCHLAX & ALBEE, LLC

/s/ Julie Agent Schlax

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Attorney for Defendant

REPORTER'S ACKNOWLEDGMENT

1. The foregoing was served on the _____day of _____, 2018 and received on the _____ day of _____, 2018.

2. Satisfactory arrangements have ( ) have not ( ) been made for payment of the transcript cost. These financial arrangements were completed on the _____ day of _____, 2018.

3. Number of trial or hearing days is _____.

4. Estimated number of transcript pages is _____.

5. Transcript will be completed on the _____ day of _____, 2018 or an extension of time is needed until the _____day of _____, 2018.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of this acknowledgment (with Counsel's Designation attached) has been furnished this _____day of _____, 2018 to Julie Agent Schlax, Court Appointed Attorney for Defendant, 200 East Forsyth Street, Jacksonville, Florida 32202; Office of the State Attorney, 311 W. Monroe, Jacksonville, FL 32202; the Office of the Attorney General, The Capital, PL-01, Tallahassee, FL 32399, and Clerk, Supreme Court of Florida, 500 South Duval Street, Tallahassee, Florida 32399-1927, this _____day of _____, 2018.

_____
OFFICIAL COURT REPORTER

Supreme Court of Florida

Office of the Clerk
500 South Duval Street
Tallahassee, Florida 32399-1927

JOHN A. TOMASINO
CLERK
MARK CLAYTON
CHIEF DEPUTY CLERK
JULIA BREEDING
STAFF ATTORNEY

PHONE NUMBER: (850) 488-0125
www.floridasupremecourt.org

ACKNOWLEDGMENT OF NEW CASE

May 29, 2018

RE: DONALD JAMES SMITH vs. STATE OF FLORIDA

CASE NUMBER: SC18-822
Lower Tribunal Case Number(s): 162013CF005781AXXXMA CR-D
Lower Tribunal Filing Date: 5/23/2018

The Florida Supreme Court has received the following documents reflecting a filing date of 5/25/2018.

Notice of Appeal

The Florida Supreme Court's case number must be utilized on all pleadings and correspondence filed in this cause.

cd
cc:
CAROLYN M. SNURKOWSKI
JULIE AGENT SCHLAX
HON. ANDY THOMAS, PUBLIC DEFENDER
HON. RONNIE FUSSELL, CLERK
MARK CALIEL

FILED
MAY 29 2018
RONNIE W. FUSSELL
CLERK CIRCUIT COURT

Filing # 72731269 E-Filed 05/29/2018 09:46:22 AM

Supreme Court of Florida

TUESDAY, MAY 29, 2018

CASE NO.: SC18-822
Lower Tribunal No(s).:
162013CF005781AXXXMA

DONALD JAMES SMITH vs. STATE OF FLORIDA

CB-D

Appellant(s) Appellee(s)

We have received a notice of appeal (Initial) in the above-captioned case, which is an appeal from a first-degree murder conviction with a sentence of death.

Pursuant to Florida Rule of Appellate Procedure 9.142(a)(1), the Honorable Mark H. Mahon, Chief Judge of the Fourth Judicial Circuit Court of Florida, is hereby appointed to monitor the preparation of the complete record in the circuit court for timely filing in this Court.

The transcripts should be filed with the trial court clerk within eighty days from the filing of the notice of appeal in this Court. As the time for filing the transcript has already been extended, the Court does not anticipate that any further extensions of time will be necessary.

The trial court clerk shall have twenty days after the filing of the transcript(s) in which to file the record on appeal with this Court. The complete record in a death penalty appeal shall include all items required by rule 9.200 and by any order issued by the supreme court. In any appeal following the initial direct appeal, the record transmitted shall begin with the most recent mandate issued by the supreme court, or the most recent filing not already transmitted in a prior record in the event the preceding appeal was disposed of without a mandate, and shall exclude any materials already transmitted to the supreme court as the record in any prior appeal. The supreme court shall take judicial notice of the appellate records in all prior appeals and writ proceedings involving a challenge to the same judgment of conviction and sentence of death. Appellate records subject to judicial notice under this subdivision shall not be duplicated in the record transmitted for the appeal under review.

FILED

MAY 29 2018

CLERK CIRCUIT COURT

The trial court clerk is further directed to provide copies of all exhibits which can be copied, including photographs, video tapes, CDs and DVDs (if any) to counsel, along with the transmission of the record on appeal. The original exhibits (if any) shall be kept at the trial court unless this Court orders otherwise. The copies provided to counsel for the parties and to this Court shall be properly bound, indexed and paginated pursuant to Florida Rule of Appellate Procedure 9.200(d). **A master index of the all exhibits should be included in the record on appeal.**

Pursuant to Florida Rule of Judicial Administration 2.215(i), the circuit judge assigned to the case shall take such action as may be necessary to ensure that a complete record on appeal is properly prepared and filed. Judge Mallory Cooper is directed to hold a status conference **within sixty days from the date of this order** which shall be attended by the Clerk of Court (or the clerk's designee), all appropriate court reporters, counsel, and such other persons Judge Cooper may deem necessary. Judge Cooper may enter such orders as necessary for the timely completion and filing of the record on appeal with this Court. The time and place of the status conference shall be set by Judge Cooper for the purpose of ensuring that the record on appeal is complete. Judge Cooper shall file with this Court, **within twenty days from the date of the status conference**, a report detailing the current status of the record preparation. The record on appeal shall be timely filed with this Court unless there are substantial reasons requiring delay. The trial court is reminded that only this Court can extend the deadline for filing the record on appeal.

Pursuant to Florida Rule of Appellate Procedure 9.200(e), the burden to ensure that the record on appeal is prepared and transmitted in accordance with the Florida Rules of Appellate Procedure shall be on the appellant. Counsel for the appellant is hereby directed to file Status Reports with this Court **every thirty days** regarding the progress of the completion of the record on appeal.

The failure to timely file a record on appeal substantially affects this Court's ability to timely process its death cases and will not be tolerated.

A True Copy
Test:

John A. Tomasino
Clerk, Supreme Court

cd
Served:

CAROLYN M. SNURKOWSKI
JULIE AGENT SCHLAX
HON. ANDY THOMAS, PUBLIC DEFENDER
HON. RONNIE FUSSELL, CLERK
HON. MARK H. MAHON, CHIEF JUDGE
HON. MALLORY DURDEN COOPER, JUDGE
OFFICIAL COURT REPORTERS
MARK CALIEL

IN THE CIRCUIT COURT OF THE FOURTH JUDICIAL CIRCUIT, IN AND FOR DUVAL COUNTY, FLORIDA

CASE NO.: 16-2013-CF-5781-AXXX
DIVISION: CR-D

STATE OF FLORIDA

vs.

DONALD JAMES SMITH.
_____/

ORDER FINDING THE DEFENDANT INDIGENT FOR PURPOSE OF APPEAL AND APPOINTING PUBLIC DEFENDER AS APPELLATE COUNSEL

In the trial proceedings of the above styled case number, the defendant was found indigent and this Court appointed the undersigned counsel to represent him. This Court finds that the defendant is indigent for purposes of appeal. Trial counsel has not been retained for the appeal, and the Court finds that the Public Defender should be appointed to represent the defendant in the appellate proceedings. Upon consideration, it is

ORDERED AND ADJUDGED as follows:

1. The defendant is indigent for purpose of appeal.

2. The Public Defender is hereby appointed as appellate counsel to represent the Defendant in his appeal in the above styled proceedings.

DONE AND ORDERED in Chambers at the Duval County Courthouse, Jacksonville, Florida on this 21 day of May, 2018

Circuit Judge Mallory Cooper

_____/

Copies to:

Julie Schlax, Esquire
200 East Forsyth Street
Jacksonville, Florida 32202

Public Defender, Attn: Richard Gordon, Esq.
407 N. Laura Street
Jacksonville, Florida 32202

Office of the Attorney General
Criminal Appeals Division
The Capitol
Tallahassee, Florida 32399

Clerk, First District Court of Appeal
301 Martin Luther King, Jr., Blvd.
Tallahassee, Florida 32399

Official Court Reporters
Fax: (904) 358-0062

Filing # 72823129 E-Filed 05/30/2018 01:14:24 PM

IN THE CIRCUIT COURT OF THE FOURTH JUDICIAL CIRCUIT, IN AND FOR DUVAL COUNTY, FLORIDA

CASE NO.: 16-2013-CF-5781
DIVISION: CR-D

STATE OF FLORIDA

VS.

DONALD SMITH
_____/

MOTION TO DISCHARGE ATTORNEY

The undersigned attorney, Julie Agent Schlax, moves this Honorable Court to discharge her from further representation in this cause, and as grounds therefore would show the following:

1. On or about February 18, 2018, the Honorable Mallory Cooper, Circuit Judge, appointed the undersigned attorney to represent the defendant herein.

2. On May 2, 2018, the defendant was sentenced in this cause.

3. On May 23, 2018, counsel filed necessary initial appeal paperwork in this case.

4. On May 29, 2018, the Office of the Public Defender was appointed as appellate counsel and the undersigned counsel completed her representation of the defendant herein.

WHEREFORE, the undersigned attorney respectfully requests this Honorable Court to discharge her from further representation of the Defendant in the above-styled cause.

Respectfully submitted, this 30th day of May, 2018.

/s/ Julie Agent Schlax

Julie Agent Schlax, Esquire
Florida Bar No.: 0093040
200 East Forsyth Street
Jacksonville, Florida 32202
Tel: (904) 674-0717
Fax: (904) 674-0737
Attorney for Defendant

ACCEPTED: DUVAL COUNTY, RONNIE FUSSELL, CLERK, 05/31/2018 08:19:29 AM

_____/

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing "Motion to Discharge Attorney" has been furnished to the Office of the State Attorney, by hand delivery, this 30th day of May, 2018.

/s/ Julie Agent Schlax

_____

Julie Agent Schlax, Esquire

IN THE CIRCUIT COURT OF THE FOURTH JUDICIAL CIRCUIT IN AND FOR DUVAL COUNTY, FLORIDA

II REPORTER'S ACKNOWLEDGEMENT

CASE NO: 2013CF5781

State of Florida

Vs.

Donald Smith

The foregoing designation was served (e-filed) 5-23-18 and was received on 5-30-18.

Satisfactory arrangements have (✓) have not ( ) been made for payment of the transcript costs. These financial arrangements were completed on 5-30-18.

The number of trial or hearing days is 66. The estimated number of transcript pages is 4000.

The transcript(s) will be completed on 8-13-18 or an extension of time is needed until _____.

Completion and filing of this acknowledgement by the court reporter constitutes submission to the jurisdiction of the court for all purposes in connection with these appellate proceedings.

The undersigned court reporter certifies that the foregoing is true and correct and that a copy has been furnished by e-filing through the E-portal this 31st day of May, 2018, to each of the parties or their counsel.

DATE: 5-31-18

Official Reporters, Inc.
421 West Church Street, Ste. 701
Jacksonville, Florida 32202
904-358-2090

Filing # 72889469 E-Filed 05/31/2018 12:42:29 PM

SUPREME COURT OF FLORIDA

APPEAL NO.: SC18-0822
L.T. CASE NO.: 16-2013-CF-005781

DONALD JAMES SMITH,
Appellant,

vs.

STATE OF FLORIDA,
Appellee.

NOTICE OF APPEARANCE

In the best interest of Appellant's right to a timely appeal, and despite the fact that this office has a conflict in this case and that this office still maintains a Special Public Defender should have been appointed due to conflict to superintend the record on appeal, the Public Defender for the Fourth Judicial Circuit, in and for Duval County, Florida, hereby enters his appearance as counsel of record for Appellant in order to expedite his right to a timely appeal.

CHARLIE COFER
PUBLIC DEFENDER

ELIZABETH HOGAN WEBB
ASSISTANT PUBLIC DEFENDER
407 North Laura Street
Jacksonville, FL 32202
(904) 255-4727
FLORIDA BAR NO.: 0853089
Primary Email:
PD4DuvalAppeal@Coj.Net
Secondary email: ehw@pd4.coj.net

I HEREBY CERTIFY that a copy of the above and foregoing has been furnished by e-mail to the Office of the Attorney General, representing the State of Florida, by e-service to the Office of the State Attorney, representing the State of Florida, this 31st day of May, 2018.

ELIZABETH HOGAN WEBB

ACCEPTED: DUVAL COUNTY, RONNIE FUSSELL, CLERK, 06/04/2018 07:40:22 AM

IN THE CIRCUIT COURT OF THE FOURTH JUDICIAL CIRCUIT, IN AND FOR DUVAL COUNTY, FLORIDA

CASE NO.: 16-2013-CF-5781
DIVISION: CR-D

STATE OF FLORIDA

vs.

DONALD SMITH
_____/

ORDER DISCHARGING ATTORNEY

THIS CAUSE, having come before the Court on the Defendant's Counsel's Motion to Discharge Attorney, the Court being advised in the premises, it is therefore, upon consideration,

ORDERED AND ADJUDGED that the Defendant's Counsel's Motion to Discharge Attorney is hereby **GRANTED** and Julie Agent Schlax is discharged from further representation of the Defendant in the above-styled cause.

DONE AND ORDERED at Jacksonville, Florida this 31 day of May, 2018.

for Mallory Cooper
CIRCUIT COURT JUDGE

Copies to:

Office of the State Attorney
Julie Agent Schlax

FILED 06/01/18 AM 11:11 RUSSELL

IN THE CIRCUIT COURT OF THE FOURTH JUDICIAL CIRCUIT, IN AND FOR DUVAL COUNTY, FLORIDA.

CASE NO.: 16-2013-CF-5781 AXXX
DIVISION: CR-D

STATE OF FLORIDA

VS.

DONALD SMITH
_____/

REQUEST FOR RELEASE OF PROPERTY

COMES NOW, Donald Smith, through the undersigned attorney, and requests the release of the previously seized computer, to wit: a Macintosh OSX desktop computer, in this case to the lawful owner, Patricia Moore. Defendant understands the release of this property will preclude any further forensic testing.

Donald Smith

Julie Agent Schlax
200 E. Forsyth Street
Jacksonville, Florida 32202
(904) 674-0717
julie@esalawgroup.com
Attorney for Defendant

Filing # 74215596 E-Filed 06/28/2018 08:00:04 AM

SUPREME COURT OF FLORIDA
CASE NO. SC18-0822
L.T. NO: 16-2013-CF-005781

DONALD JAMES SMITH,

vs.

STATE OF FLORIDA.

FIRST STATUS REPORT

Counsel for Appellant, pursuant to this Honorable Court's May 29, 2018 order, hereby reports the status of the preparation of the record on appeal herein.

1. On May 23, 2018 the designation to the court reporter was filed by trial counsel.
2. Transcripts are due to be delivered to the Clerk of the Circuit Court, Duval County, Florida by August, 13, 2018 (eighty days from date Notice on Appeal was filed).
3. The record on appeal is due from the Clerk of the Circuit Court, Duval County, Florida by September 3, 2018 (twenty days from receipt of transcripts).
4. As of June 27, 2018, 45 of 66 transcripts have been received by the Clerk of the Circuit Court, Duval County, Florida from the various court reporters as noted below.

07/16/2013	Arraignment-***received***
08/19/2013	Pretrial
08/22/2013	Motion Hearing-***received***
09/04/2013	Pretrial-***received***
10/15/2013	Pretrial
12/03/2013	Pretrial
01/06/2014	Pretrial
01/09/2014	Motion Hearing
02/12/2014	Pretrial-***received***
03/19/2014	Pretrial
05/07/2014	Pretrial-***received***

ACCEPTED: DUVAL COUNTY, RONNIE FUSSELL, CLERK, 06/29/2018 04:02:57 PM

07/16/2014	Pretrial-***received***
09/03/2014	Pretrial
11/04/2014	Pretrial
11/19/2014	Motion Hearing-***received***
11/24/2014	Pretrial-***received***
12/04/2014	Pretrial-***received***
12/11/2014	Motion Hearing-***received***
12/19/2014	Motion Hearing
01/15/2015	Pretrial
02/04/2015	Pretrial
02/20/2015	Pretrial-***received***
03/24/2015	Pretrial-***received***
05/12/2015	Pretrial
07/02/2015	Pretrial-***received***
08/13/2015	Pretrial-***received***
09/15/2015	Pretrial-***received***
11/02/2015	Pretrial-***received***
11/05/2015	Motion Hearing-***received***
11/17/2015	Pretrial
12/15/2015	Pretrial-***received***
02/02/2016	Pretrial-***received***
03/01/2016	Pretrial-***received***
03/08/2016	Pretrial-***received***
04/11/2016	Pretrial-***received***
05/04/2016	Motion Hearing-***received***
05/26/2016	Motion Hearing-***received***
07/15/2016	Pretrial-***received***
07/21/2016	Motion Hearing
08/18/2016	Motion Hearing-***received***
10/18/2016	Pretrial-***received***
12/12/2016	Pretrial-***received***
01/18/2017	Pretrial-***received***
05/11/2017	Pretrial-***received***
08/08/2017	Pretrial-***received***
09/14/2017	Pretrial
10/03/2017	Pretrial-***received***
11/02/2017	Pretrial-***received***
12/19/2017	Pretrial-***received***
01/11/2018	Motion Hearing
01/22/2018	Motion Hearing
01/24/2018	Motion Hearing
02/01/2018	Final Pretrial
02/05/2018	Jury Selection-***received***
02/06/2018	Jury Selection-***received***

02/07/2018	Jury Selection-***received***
02/08/2018	Jury Selection-***received***
02/09/2018	Jury Selection-***received***
02/12/2018	Trial-***received***
02/13/2018	Trial-***received***
02/14/2018	Trial-***received***
02/20/2018	Penalty Phase-***received***
02/21/2018	Penalty Phase-***received***
02/22/2018	Penalty Phase-***received***
03/28/2018	Spencer Hearing
05/02/2018	Sentencing

Respectfully submitted,

CHARLIE COFER
PUBLIC DEFENDER

ELIZABETH HOGAN WEBB
ASSISTANT PUBLIC DEFENDER
407 North Laura Street
Jacksonville, FL 32202
(904) 255-4727
FLORIDA BAR NO.: 0107050
Primary Email:
PD4DuvalAppeal@pd4.coj.net
Secondary Email: ehw@pd4.coj.net

I HEREBY CERTIFY that a true and correct copy of the foregoing has been delivered, by e-mail, to the Office of the Attorney General, representing the State of Florida, by e-service to the Office of the State Attorney, representing the State of Florida, and e-filed with the Clerk of the Circuit Court, Duval County, Florida, this 26th day of June, 2018.

ELIZABETH HOGAN WEBB
ASSISTANT PUBLIC DEFENDER

Filing # 75666185 E-Filed 07/30/2018 10:22:38 AM

SUPREME COURT OF FLORIDA
CASE NO. SC18-0822
L.T. NO: 16-2013-CF-005781

DONALD JAMES SMITH,

vs.

STATE OF FLORIDA.

SECOND STATUS REPORT

Counsel for Appellant, pursuant to this Honorable Court's May 29, 2018 order, hereby reports the status of the preparation of the record on appeal herein.

1. On May 23, 2018 the designation to the court reporter was filed by trial counsel.
2. Transcripts are due to be delivered to the Clerk of the Circuit Court, Duval County, Florida by August, 13, 2018 (eighty days from date Notice on Appeal was filed).
3. The record on appeal is due from the Clerk of the Circuit Court, Duval County, Florida by September 3, 2018 (twenty days from receipt of transcripts).
4. As of July 30, 2018, 48 of 66 transcripts have been received by the Clerk of the Circuit Court, Duval County, Florida from the various court reporters as noted below.

07/16/2013	Arraignment-***received***
08/19/2013	Pretrial
08/22/2013	Motion Hearing-***received***
09/04/2013	Pretrial-***received***
10/15/2013	Pretrial
12/03/2013	Pretrial
01/06/2014	Pretrial
01/09/2014	Motion Hearing
02/12/2014	Pretrial-***received***
03/19/2014	Pretrial-***received***
05/07/2014	Pretrial-***received***

ACCEPTED: DUVAL COUNTY, RONNIE FUSSELL, CLERK, 07/30/2018 11:03:10 AM

07/16/2014	Pretrial-***received***
09/03/2014	Pretrial
11/04/2014	Pretrial
11/19/2014	Motion Hearing-***received***
11/24/2014	Pretrial-***received***
12/04/2014	Pretrial-***received***
12/11/2014	Motion Hearing-***received***
12/19/2014	Motion Hearing
01/15/2015	Pretrial
02/04/2015	Pretrial
02/20/2015	Pretrial-***received***
03/24/2015	Pretrial-***received***
05/12/2015	Pretrial-***received***
07/02/2015	Pretrial-***received***
08/13/2015	Pretrial-***received***
09/15/2015	Pretrial-***received***
11/02/2015	Pretrial-***received***
11/05/2015	Motion Hearing-***received***
11/17/2015	Pretrial
12/15/2015	Pretrial-***received***
02/02/2016	Pretrial-***received***
03/01/2016	Pretrial-***received***
03/08/2016	Pretrial-***received***
04/11/2016	Pretrial-***received***
05/04/2016	Motion Hearing-***received***
05/26/2016	Motion Hearing-***received***
07/15/2016	Pretrial-***received***
07/21/2016	Motion Hearing-***received***
08/18/2016	Motion Hearing-***received***
10/18/2016	Pretrial-***received***
12/12/2016	Pretrial-***received***
01/18/2017	Pretrial-***received***
05/11/2017	Pretrial-***received***
08/08/2017	Pretrial-***received***
09/14/2017	Pretrial
10/03/2017	Pretrial-***received***
11/02/2017	Pretrial-***received***
12/19/2017	Pretrial-***received***
01/11/2018	Motion Hearing
01/22/2018	Motion Hearing
01/24/2018	Motion Hearing
02/01/2018	Final Pretrial
02/05/2018	Jury Selection-***received***
02/06/2018	Jury Selection-***received***

02/07/2018	Jury Selection-***received***
02/08/2018	Jury Selection-***received***
02/09/2018	Jury Selection-***received***
02/12/2018	Trial-***received***
02/13/2018	Trial-***received***
02/14/2018	Trial-***received***
02/20/2018	Penalty Phase-***received***
02/21/2018	Penalty Phase-***received***
02/22/2018	Penalty Phase-***received***
03/28/2018	Spencer Hearing
05/02/2018	Sentencing

Respectfully submitted,

CHARLIE COFER
PUBLIC DEFENDER

ELIZABETH HOGAN WEBB
ASSISTANT PUBLIC DEFENDER
407 North Laura Street
Jacksonville, FL 32202
(904) 255-4727
FLORIDA BAR NO.: 0107050
Primary Email:
PD4DuvalAppeal@pd4.coj.net
Secondary Email: ehw@pd4.coj.net

I HEREBY CERTIFY that a true and correct copy of the foregoing has been delivered, by e-mail, to the Office of the Attorney General, representing the State of Florida, by e-service to the Office of the State Attorney, representing the State of Florida, and e-filed with the Clerk of the Circuit Court, Duval County, Florida, this 30 day of July, 2018.

ELIZABETH HOGAN WEBB
ASSISTANT PUBLIC DEFENDER

Filing # 76355259 E-Filed 08/13/2018 02:42:23 PM

IN THE DISTRICT COURT OF APPEAL OF FLORIDA, FIRST DISTRICT

CASE NO: 16-2013-CF-5781-AXXX-MA
SC NO.: SC 18-822

STATE OF FLORIDA

vs.

DONALD JAMES SMITH

NOTICE OF INABILITY TO PROVIDE TRANSCRIPT

This notice is to notify the District Court of Appeals that the Courthouse was closed due to a hurricane on September 14, 2017, and the case was not heard. Therefore, a transcript of that date is not able to be provided.

Respectfully Submitted,
/s/ Karen Waugerman

KAREN WAUGERMAN

Official Reporters, Inc.
421 West Church Street
Jacksonville, FL 32202
(904) 358-2090

I hereby certify that a copy of the foregoing has been furnished to the Office of the State Attorney; Office of the Public Defender; Office of Criminal Conflict Counsel; First District Court of Appeal, 301 Martin Luther King Boulevard, Tallahassee, FL 32399; and, Office of the Attorney General, The Capitol Building, 400 South Monroe Street, Tallahassee, FL 32399, by mail, on the date of August 13, 2018.

ACCEPTED: DUVAL COUNTY, RONNIE FUSSELL, CLERK, 08/13/2018 03:52:24 PM

Filing # 76346812 E-Filed 08/13/2018 01:32:43 PM

IN THE CIRCUIT COURT OF THE FOURTH JUDICIAL CIRCUIT, IN AND FOR DUVAL COUNTY, FLORIDA

CASE NO.: 16-2013-CF-5781-AXXX

STATE OF FLORIDA

VS.

DONALD JAMES SMITH
_____/

MOTION FOR PAYMENT OF ATTORNEY'S FEES IN EXCESS OF THE STATUTORY CAP PURSUANT TO SECTION 27.5304(12) OF THE FLORIDA STATUTES

The undersigned attorney, Julie Agent Schlax, moves this Honorable Court to award her a reasonable attorney's fee in the above styled causes, and as grounds therefore would show the following:

1. On or about February 20, 2015, Circuit Court Judge Mallory Cooper, appointed the undersigned attorney to represent the defendant herein. Mr. Smith was indicted for First Degree Murder, Kidnapping, and Capital Sexual Battery. The State sought the Death Penalty. Counsel was previously awarded $56,300.00 after prior hearing for Interim fees. Pursuant to JAC's Policies and Procedures, the amount of $11,260.00 was carried forward until final disposition. Counsel has performed 989.2 hours of additional legal services at the rate of one hundred dollars per hour, totaling $98,020.00 dollars.

2. The Undersigned Counsel is making a claim for costs in this case in the amount of $329.90 dollars.

3. The undersigned counsel has provided the State of Florida Justice Administrative Commission (JAC) with a copy of his "Statement of Intended Billing" (Copy Attached). The JAC responded stating that it objects to the billing, and requests participation in the Hearing for Interim

ACCEPTED: DUVAL COUNTY, RONNIE FUSSELL, CLERK, 08/14/2018 08:05:36 AM

billing. A copy of the JAC Objection Letter is attached. The undersigned counsel will be prepared to provide testimony regarding the specific objections JAC has made at this hearing.

6. The above styled cause involved extraordinary circumstances and unusual representation that merits a fee departure award in excess of the statute's fee guidelines, necessary to ensure effective representation and in support thereof counsel would state the following grounds:

1. Mr. Donald Smith was tried and convicted of First Degree Murder, Kidnapping, and Capital Sexual Battery. The jury recommended the Death Penalty. Ultimately, the Court imposed a Sentence of Death. The undersigned attorney filed all appellate paperwork and was discharged.

2. Counsel began her representation with a thorough analysis of the guilt portion of the trial, including reviewing all police reports and depositions and evidence. Mr. Smith's case has more than 40 Category A listed witnesses. Counsel has also met extensively with the client in order to develop a relationship so that he could adequately investigate all mitigation and evidence.

3. On January 12, 2016, the United State Supreme Court ruled in the *Hurst* decision that Florida's Death Penalty Scheme was unconstitutional based on the Trial Court being the fact finder regarding the eligibility of a Defendant to receive the Death Penalty. As a result, numerous Motions have been filed and researched regarding the effect of this decision, along with legal attacks based on the new Death penalty statute which was signed into law on March 7, 2016. The legal analysis required to properly preserve Mr. Smith's rights under the Florida and United States Constitution has been extraordinary.

4. The case was a high publicity case. Besides previously dealing with a change of

venue and Motions for Protective Orders to limit pre-trial exposure, counsel and the Court had to meet repeatedly to determine appropriate procedures due to the trial being live-streamed. As a result, jury selection took five full days to seat a jury.

5. Based on the nature of the case and argued aggravating factors, numerous experts were consulted and retained for mitigation purposes. Thru intense investigation, counsel discovered prior records concerning Mr. Smith's prior offenses, as well as numerous prior psychological records to thoroughly present all possible mental mitigation. Additionally, counsel and the mitigation team interviewed over 30 possible mitigation witnesses at the request of Mr. Smith in an effort to bolster the mitigation presentation.

6. The trial lasted three full weeks and counsel ultimately spent an additional 980.2 hours on this case.

7. As a result, the above styled cause involves extraordinary circumstances and unusual representation that merits a fee departure award in excess of the statute's fee guidelines, necessary to ensure effective representation. White v. Board of County Commissioners, 537 So.2d 1376 (Fla. 1989).

8. The time expended in the above styled cause has limited the undersigned attorney's availability to serve other clients. White v. Board of County Commissioners, 537 So.2d at 1380. Specifically, counsel has devoted a large proportion of his time to the Defense of Mr. Presley. He is therefore depriving himself of the opportunity to retain new business.

9. Based upon the grounds listed above and pursuant to §27.5304(12), this motion for attorney's fees is being filed with the Chief Judge. **The Chief Judge must hold an evidentiary hearing on the issue of whether to exceed the flat fee.** The Justice Administrative Commission

requests to appear telephonically at the hearing.

WHEREFORE, the undersigned attorney respectfully requests this Honorable Court to award the undersigned attorney a reasonable fee for his representation of the defendant.

Respectfully submitted, this 10th day of August, 2018.

/s/ Julie Agent Schlax

Julie Agent Schlax
200 E. Forsyth Street
Jacksonville, FL 32202
julie@esalawgroup.com
(904) 674-0717

Copies to:
Justice Administrative Commission
P. O. Box 1654
Tallahassee, Florida 32302

Filing # 76424941 E-Filed 08/14/2018 02:40:20 PM

IN THE SUPREME COURT OF FLORIDA, FIRST DISTRICT

CASE NO: 16-2013-CF-5781-AXXX-MA
SC NO.: SC 18-822

STATE OF FLORIDA

vs.

DONALD JAMES SMITH

NOTICE OF INABILITY TO PROVIDE TRANSCRIPT

This notice is to notify the District Court of Appeals that the Courthouse was closed due to a hurricane on September 14, 2017, and the case was not heard. Therefore, a transcript of that date is not able to be provided.

Respectfully Submitted,
/s/ Karen Waugerman

KAREN WAUGERMAN

Official Reporters, Inc.
421 West Church Street
Jacksonville, FL 32202
(904) 358-2090

I hereby certify that a copy of the foregoing has been furnished to the Office of the State Attorney; Office of the Public Defender; Office of Criminal Conflict Counsel; First District Court of Appeal, 301 Martin Luther King Boulevard, Tallahassee, FL 32399; and, Office of the Attorney General, The Capitol Building, 400 South Monroe Street, Tallahassee, FL 32399, by mail, on the date of August 13, 2018.

ACCEPTED: DUVAL COUNTY, RONNIE FUSSELL, CLERK, 08/16/2018 08:29:18 AM

IN THE CIRCUIT COURT, FOURTH
JUDICIAL CIRCUIT, IN AND FOR
DUVAL COUNTY, FLORIDA

CASE NO.: 16-2013-CF-05781-AXXX

DIVISION: CR-D

STATE OF FLORIDA

v.

DONALD J. SMITH,
Defendant.
_____/

STATUS REPORT

This cause comes before this Court pursuant to the Florida Supreme Court's Notice issued on May 29, 2018, directing this Court to hold a hearing on the status of the preparation of Defendant's record on appeal in Florida Supreme Court Case No. SC18-822, Lower Case No. 16-2013-CF-05781-AXXX. This Court held a status hearing on July 26, 2018. At the hearing, the court reporter represented that the complete transcript will be filed with the trial court clerk by the August 13, 2018, deadline, and this Court scheduled a follow-up status hearing for August 29, 2018, to ensure the complete transcript will be filed with the Florida Supreme Court by the September 3, 2018 deadline.

DONE AND ORDERED in Jacksonville, Duval County, Florida on August 14, 2018.

MALLORY D. COOPER
Circuit Judge

Copies to:

The Honorable Mark H. Mahon
Chief Judge, Fourth Judicial Circuit

John A. Tomasino
Clerk, Florida Supreme Court
500 South Duval Street
Tallahassee, FL 32399-1927

Office of the Attorney General
PL-01, The Capitol
Tallahassee, FL 32399-1050

Office of the State Attorney
Division CR-D

Julie A. Schlax (Julie@esalawgroup.com)
200 E. Forsyth Street
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W. Charles Fletcher (Williamfletcher96@yahoo.com)
8833 Perimeter Park Blvd., Ste. 104
Jacksonville, FL 32216
Trial Counsel for Defendant

Elizabeth Hogan Webb (PD4DuvalAppeal@pd4.coj.net)
Assistant Public Defender
407 North Laura Street
Jacksonville, FL 32202
Appellate Counsel for Defendant

The Honorable Ronnie Fussell
Clerk of the Circuit Court

Donald J. Smith – DC# 986055
Jail No.: 2013016727
JOS ID: 253150
Jacksonville Pre-Trial Detention Facility
500 East Adams Street
Jacksonville, FL 32202

Florida State Prison
7819 NW 228th St.
Raiford, FL 32026-1000

CERTIFICATE OF SERVICE

I do certify that a copy hereof has been furnished to the above-listed parties by United States mail or electronic service on August 15, 2018.

Deputy Clerk

Case No.: 16-2013-CF-05781-AXXX
/tbc

IN THE CIRCUIT COURT, FOURTH JUDICIAL CIRCUIT, IN AND FOR DUVAL COUNTY, FLORIDA.

CASE NO.: 16-2013-CF-005781-AXXX
DIVISION: CR-D

STATE OF FLORIDA

v.

DONALD JAMES SMITH,
Defendant

ORDER SETTING HEARING ON MOTION FOR PAYMENT OF ATTORNEY'S FEES IN EXCESS OF THE STATUTORY CAP PURSUANT TO SECTION 27.5304(12) OF THE FLORIDA STATUTES

THIS CAUSE has come before the Court upon Defense Attorney Julie A. Schlax' Motion for Payment of Attorney's Fees in Excess of the Statutory Cap Pursuant to Section 27.5304(12) of the Florida Statutes. The Court finds that a hearing should be set, therefore it is hereby

ORDERED:

That this cause is set for a hearing to be held on **August 30, 2018, at 10:00 a.m.**, before Chief Judge Mark H. Mahon, Room 7139, Duval County Courthouse, 501 W. Adams Street, Jacksonville, Florida 32202. The time allocated for this hearing is FIFTEEN (15) MINUTES.

PLEASE BE GOVERNED ACCORDINGLY.

DONE AND ORDERED in Chambers, at Jacksonville, Duval County, Florida, this 22nd day of August, 2018.

MARK H. MAHON
CHIEF JUDGE

Copies to:
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Via e-mail at: julie@esalawgroup.com; sherri@esalawgroup.com

W. Charles Fletcher, Esq.
233 East Bay Street, Suite 1020
Jacksonville, Florida 32202
Via e-mail at: williamfletcher96@yahoo.com

Office of the State Attorney, Duval County
Div. CR-D
Via e-mail at: sao4duvalcriminal@coj.net

Justice Administrative Commission
P.O. Box 1654
Tallahassee, Florida 32302
Via e-mail at: pleadings@justiceadmin.org

Julie K. Taylor, Esq., Court Counsel
Via e-mail

Filing # 77170648 E-Filed 08/29/2018 11:40:46 AM

SUPREME COURT OF FLORIDA
CASE NO. SC18-0822
L.T. NO: 16-2013-CF-005781

DONALD JAMES SMITH,

vs.

STATE OF FLORIDA.

THIRD STATUS REPORT

Counsel for Appellant, pursuant to this Honorable Court's May 29, 2018 order, hereby reports the status of the preparation of the record on appeal herein.

1. As of August 29, 2018, **all** transcripts have been received by the Clerk of the Circuit Court, Duval County, Florida from the various court reporters.

2. The record on appeal is due from the Clerk of the Circuit Court, Duval County, Florida by September 3, 2018.

Respectfully submitted,

CHARLIE COFER
PUBLIC DEFENDER

ELIZABETH HOGAN WEBB
ASSISTANT PUBLIC DEFENDER
407 North Laura Street
Jacksonville, FL 32202
(904) 255-4727
FLORIDA BAR NO.: 0107050
Primary Email:
PD4DuvalAppeal@pd4.coj.net
Secondary Email: ehw@pd4.coj.net

ACCEPTED: DUVAL COUNTY, RONNIE FUSSELL, CLERK, 08/29/2018 03:05:24 PM

I HEREBY CERTIFY that a true and correct copy of the foregoing has been delivered, by e-mail, to the Office of the Attorney General, representing the State of Florida, by e-service to the Office of the State Attorney, representing the State of Florida, and e-filed with the Clerk of the Circuit Court, Duval County, Florida, this 29 day of August, 2018.

ELIZABETH HOGAN WEBB
ASSISTANT PUBLIC DEFENDER

Filing # 73343690 E-Filed 06/11/2018 09:58:01 AM

IN THE CIRCUIT COURT OF THE FOURTH JUDICIAL CIRCUIT, IN AND FOR DUVAL COUNTY, FLORIDA.

Case No: 2013-CF-5781-AXXX-MA

Division CR-D

STATE OF FLORIDA

-vs-

DONALD SMITH,

Defendant,

PROCEEDINGS taken before the Honorable Mallory D. Cooper, Judge of the Circuit Court, on July 16, 2013, and as reported by Faye M. Gay, Certified Realtime Reporter, Registered Merit Reporter, and Certified Legal Video Specialist.

OFFICIAL REPORTERS, INC.
421 W. Church St., Suite 701
Jacksonville Florida 32202
904-358-2090

ACCEPTED: DUVAL COUNTY, RONNIE FUSSELL, CLERK, 06/12/2018 09:46:57 AM

APPEARANCES:

MARK CALIEL, Esquire,

Assistant State Attorney,
Appearing on behalf of the State of Florida

FRED GAZALEH, Esquire,

Appearing on behalf of the Defendant.

P R O C E E D I N G S

PROCEEDING PAGE

Arraignment.....4

MR. GAZALEH: Good morning, Your Honor.

THE COURT: Good morning.

I need Donald Smith, please. Thank you.

(Defendant present.)

THE COURT: Page 10 of the calendar, Donald Smith.

MR. CALIEL: Good morning, Your Honor.

We're here for arraignment this morning on an Indictment for first degree murder, kidnapping a child under the age of 13 years of age and sexual battery on a child less than 12 years of age.

MR. GAZALEH: Your Honor, I'd acknowledge receipt of the Indictment. At this time I'd waive the formal reading, enter pleas of not guilty, reserving the right to file the appropriate motions attacking the legal sufficiency at a later date.

Your Honor, I had discussed a possible six-week -- six-week pass date for first pretrial. For security reasons I don't want necessarily to have my client brought back and forth from the jail on too regular of a basis. So we had discussed possibly the first week of September, maybe Wednesday of that week.

THE COURT: The 4th? September 4th?

MR. GAZALEH: That would be fine if that's good with Your Honor.

MR. CALIEL: That would be perfect with the State, Your Honor.

THE COURT: What's his speedy trial date? Do you know?

MR. CALIEL: Your Honor, I can provide that to the Court at this point in time. Speedy trial runs on December 14th of 2013.

THE COURT: All right. September 4th at 9:00 for a pretrial.

And you're requesting to waive your client's appearance at that court date?

MR. GAZALEH: Not at this time. We may discuss that.

THE COURT: I guess I misunderstood you.

MR. GAZALEH: I just didn't want to --

THE COURT: Come back frequently.

MR. GAZALEH: Correct.

MR. CALIEL: Your Honor, pursuant to Rule 3.202 of Florida Rules of Criminal Procedure the State has filed a notice and served on defendant and defense counsel at this time of our intent to seek the death penalty and our request for a statement of particulars as to mental mitigation

in this case. Pursuant to that rule we're asking for a statement of particulars listing statutory and nonstatutory mitigating circumstances that the defense intends to establish through expert testimony and the names and addresses of those witnesses they intend to use as evidence at a penalty phase. But we are filing our death notices at this time.

THE COURT: You're aware of that?

MR. GAZALEH: As well as I got a copy of that this morning and the State did provide me with some discovery.

THE COURT: Thank you.

September 12th for pretrial.

MR. GAZALEH: Thank you, Your Honor.

THE COURT: Thank you.

And we'll be in recess until 9:15 to start our regular calendar. Thank you.

(Thus the proceedings ended.)

C E R T I F I C A T E

I, Faye M. Gay, hereby certify that the foregoing transcript is a true and accurate transcription of my Stenograph notes taken at the time and date stated herein.

Dated this 8th day of June, 2018.

/S/ Faye M. Gay

_____

Faye M. Gay, CRR, RMR, FCR, RPR, CLVS

Filing # 76071746 E-Filed 08/07/2018 11:11:02 AM

IN THE CIRCUIT COURT, FOURTH JUDICIAL CIRCUIT, IN AND FOR DUVAL COUNTY, FLORIDA.

CASE NO.: 16-2013-CF-5781-AXXX-MA
DIVISION: CR-D

STATE OF FLORIDA

vs.

DONALD JAMES SMITH,

Defendant.
_____/

PROCEEDINGS before the Honorable MALLORY COOPER, Circuit Judge, Courtroom No. 605, at the Duval County Courthouse, Jacksonville, Duval County, Florida, on Monday, August 19th, 2013, commencing at 9:35 a.m., reported by Sharron A. McLendon, Florida Professional Reporter.

- - -

ACCEPTED: DUVAL COUNTY, RONNIE FUSSELL, CLERK, 08/07/2018 11:45:38 AM
PAGE # 3190

A P P E A R A N C E S

MARK CALIEL, Esquire
and
PETER OVERSTREET

Office of the State Attorney

311 West Monroe Street
Jacksonville, Florida 32202

Attorneys for the State of Florida.

FRED GAZALEH, Esquire

Office of the Public Defender

407 North Laura Street
Jacksonville, Florida 32202

Attorney for the Defendant.

ALSO PRESENT: Mr. Burke, attorney for Channel 4.

- - -

P R O C E E D I N G S

September 19th, 2013 9:35 a.m.

- - -

MR. CALIEL: Good morning, Your Honor.

Your Honor, Mark Caliel on behalf of the State of Florida in the case of Donald Smith. Mr. Smith's case is located on the bottom of Page 8 of the morning calendar.

THE COURT: Page 8 at the bottom, Donald Smith.

(Defendant not present.)

MR. GAZALEH: Good morning, Your Honor.

Fred Gazaleh for Donald Smith. I called last week and asked to waive his appearance for the purpose of just setting this case for a hearing.

MR. CALIEL: And, Your Honor, I believe Mr. Burke is present on behalf of some of the motions that Mr. Gazaleh has filed. The State really only has a position as to the protective order in reference to the mental health records. Mr. Gazaleh and I had some brief conversation in reference to that this morning, but we don't take the position when it comes to the motion for protective order on the public records request that

has been filed, so I would defer to Mr. Gazaleh and Mr. Burke as to the scheduling of that matter. Obviously, I'll be present if the Court needs information from the State, but at this point in time we're prepared to respond appropriate under the public records law, and I understand Mr. Gazaleh's position and that certain media outlets have a position as well when it comes to that.

THE COURT: All right. Well, who has the trial?

MR. OVERSTREET: Ms. Jones and I.

THE COURT: Is it still going?

MR. OVERSTREET: Your Honor, I'm still trying to figure that out. Ms. Jones has some issues with some out of state witnesses that are coming to testify, but I'm trying to figure out that with Ms. Jones.

THE COURT: But if it does go it would be Tuesday, Wednesday?

MR. OVERSTREET: Yes, Your Honor.

THE COURT: Okay. So obviously this can be either Thursday afternoon or Friday morning.

MR. GAZALEH: At your leisure, Your Honor, I'm free all week.

THE COURT: All right.

MR. BURKE: I'm sorry, Your Honor, Thursday afternoon or Friday morning, Thursday afternoon would actually be better.

MR. CALIEL: That's fine with the State, Judge, we're available whenever the Court needs us.

THE COURT: August 22nd at 1:30 for hearing on the motions.

MR. GAZALEH: 1:30, Your Honor?

THE COURT: Uh-huh.

MR. GAZALEH: Thank you.

MR. CALIEL: And, Your Honor, I'll make sure Ms. Defransea, our department of records lawyer, has sent notices to all the agency or media outlets who have done public records requests. I'll have her send notice of the hearing to all those outlets who had done public records request and, therefore, they'll have notice to be there if they wish to be heard in reference to those motions for protective order filed by Mr. Gazaleh.

THE COURT: That's the only motion, the motion for protective order?

MR. GAZALEH: That's correct. Well...

MR. CALIEL: Your Honor, there is another matter. The State has issued a subpoena duces

tecum in reference to psychological records. I think part of the confusion, and we'll try to resolve them the best that we can prior to Thursday's hearing, Mr. Smith had been seen by Community Behavioral Services predating his arrest through Jimmy Ryce proceedings and things of that nature. The State has subpoenaed those information or those records as part of potentially Williams Rule evidence to prove motive and intent, things of that nature. Since his arrest, Dr. Krop, who is also employed by that partnership, I guess, for lack of a better term, has seen him in this case.

The State at this point in time has no intent -- now, obviously, if mental health becomes an issue and there is a notice filed we may seek those records later on, but we have no intent of obtaining records since his arrest in this particular case. Our subpoena was directed towards his previous treatment and counseling.

MR. GAZALEH: So I have filed an objection to their notice of intent to issue a subpoena, but we may be able to work that out if it's something we can agree on by Thursday.

THE COURT: Okay. So just those two matters for Thursday?

MR. GAZALEH: Yes, Your Honor.

MR. CALIEL: Yes, Your Honor.

THE COURT: All right. 10:30 Thursday.

Thank you.

MR. GAZALEH: Thank you, Your Honor.

(Whereupon, the proceedings were concluded.)

- - -

C E R T I F I C A T E

STATE OF FLORIDA)

COUNTY OF DUVAL)

I, Sharron Ann McLendon, certify that I was authorized to and did stenographically report the foregoing proceedings and that the transcript is a true and complete record of my stenographic notes.

DATED this 7th day of August, 2018.

/s/Sharron A. McLendon
Sharron A. McLendon, FPR

Filing # 73343690 E-Filed 06/11/2018 09:58:01 AM

IN THE CIRCUIT COURT OF THE FOURTH JUDICIAL CIRCUIT, IN AND FOR DUVAL COUNTY, FLORIDA.

Case No: 2013-CF-5781-AXXX-MA

Division CR-D

STATE OF FLORIDA

-vs-

DONALD SMITH,

Defendant,

PROCEEDINGS taken before the Honorable Mallory D. Cooper, Judge of the Circuit Court, on August 22, 2013, and as reported by Faye M. Gay, Certified Realtime Reporter, Registered Merit Reporter, and Certified Legal Video Specialist.

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421 W. Church St., Suite 701
Jacksonville Florida 32202
904-358-2090

ACCEPTED: DUVAL COUNTY, RONNIE FUSSELL, CLERK, 06/12/2018 09:47:03 AM

APPEARANCES:

MARK CALIEL, Esquire,

Assistant State Attorney,
Appearing on behalf of the State of Florida

FRED GAZALEH, Esquire,

Appearing on behalf of the Defendant.

TIMOTHY J. CONNER, Esquire,

Appearing on behalf of the Morris Publishing, Florida Times-Union.

EDWARD L. BIRK, Esquir,

Appearing on behalf of Post Newsweek Florida, Inc., Channel 4 News.

P R O C E E D I N G S

PROCEEDING PAGE

Motion to Intervene.....4

(Defendant present.)

THE COURT: Good afternoon.

MR. GAZALEH: Good afternoon, Your Honor.

MR. CALIEL: Good afternoon.

THE COURT: We're here on Donald Smith, 2013-CF-5781, on the defense motion for protective order, and I also have intervenor, Post Newsweek Station Florida, Inc.'s, motion to intervene and be heard on matters of public record, and motion of Morris Publishing Group, LLC, to intervene, and memorandum in opposition to the defendant's motion for protective order. So --

MR. GAZALEH: Your Honor, there is one other thing. I did file an objection to the State's notice of intent to issue subpoena and the State and I have come to an agreement on matters that we don't have an objection to.

THE COURT: Okay.

MR. CALIEL: Your Honor, just so the record is clear pertaining to that objection, Mr. Smith had been evaluated previously for a number of different matters and actually seen and counselled in reference to sex offender status and things of that nature. We have subpoenaed for purposes of Williams Rule evidence and possibly penalty phase

evidence the records pertaining to those treatments.

One of the treatment providers also employs Dr. Harry Krop who has been retained for the purposes of this proceeding in this case and we have an agreement that the State at this point, until further notices are filed on behalf of defendant, is not asking for, nor are we entitled to, any work product that's created post-June 22nd of 2013, which would have been subsequent to his arrest in this particular case. The records that we're asking for don't have anything to do with his confidential, at this point in time, evaluation that's being conducted by the defense. So we're in agreement that we're not entitled to anything after June 22nd of 2013. Our subpoena will only be for materials that were generated before that date.

MR. GAZALEH: Based on that we would withdraw our objection.

THE COURT: Okay. Thank you.

Okay. If you want to go ahead and proceed on the motion for protective order first.

MR. GAZALEH: Yes, Your Honor. And, for the record, I'm not going to object to the motions to

intervene by the -- by the media.

THE COURT: Okay.

MR. GAZALEH: I would object to -- to the rest of what they --

THE COURT: Their position?

MR. GAZALEH: Yes.

Your Honor, I'm not going to read my motion for protective order into the record. What I'm going to do is just make my argument for the Court.

I would submit to the Court that Chapter 119 provides that a criminal court may order that certain information typically required to be released -- required to be released be maintained in a confidential manner and be exempted from disclosure until released at trial under certain circumstances.

119 provides that under certain circumstances most -- most of what the State would require to be held confidential, in order that they may investigate certain prosecutions and protect certain witnesses, that they can ask that certain things be maintained to be confidential.

I would submit to the Court that if the State can do that the defense should be allowed to do that to ensure fairness and that the defendant also be

allowed to have a fair trial. If the Court can protect the State's interest, it can certainly protect the interest of a defendant who is facing the death penalty.

Your Honor, I would submit that the seminal case that would -- that would -- that would defend my position in this case would be Florida Freedom Newspapers versus McCrary, which is 520 So. 2d 32. It's a Florida Supreme Court case, 1988.

I've included that with a package of cases that I have provided to the Court and to the State and I've got a package to give to the media, but I'm sure that they're familiar with the case. It's a case that I think they may have even cited in their motions.

It's a case that provides that -- well, in that case the Court held, the Supreme Court, held that a defendant has a right to use Chapter 119 to ensure that he has a fair trial. It says that the judicial branch is responsible to ensure that a defendant receives a fair trial and that the right includes the right to an impartial jury in the county where the crime is alleged to have occurred.

It's a case that -- where they talk about the separation of powers where the Court can use Chapter

119. It says the legislature can't -- can't deny a defendant his right to a fair trial legislatively where the Court is empowered to use 119 to protect the defendant's rights.

Both the Florida Supreme Court and the U.S. Supreme Court have found that death is different. The cases that are cited by the media in their motions to intervene, not one of those cases are a death penalty case.

I would submit to the Court that death penalty cases are certainly different. Their interests in providing information to the public is -- is not more -- is not overcome by the defendant's right to have a fair trial, especially when he's facing the death penalty. What's fair in a case where a defendant is facing a term of years is not necessarily fair when a defendant is facing the death penalty.

In this case the State has, in fact, filed a death notice. Mr. Smith's trial is potentially going to involve two phases. The jurors will have -- will have to be death qualified in this case. At some point during this case the Court will have to have a hearing to determine which statutory aggravators will be submitted to the jury for their

consideration. The State will also have an opportunity to petition the Court to allow evidence of other bad acts and conduct that may be presented during the trial of this case and until Your Honor has had a chance to rule on these matters, I would submit that it would be inappropriate to release these materials containing certain matters that may or may not be admissible during the trial to the public, especially when they're liable to be posted on media websites. And we could certainly expect that feature articles would be run as the trial date approaches.

Your Honor, I will tell the Court a case that I recently tried -- well, it's been about a year. I tried where there was a case of public interest where as the trial date approached, the weekend before the trial the media ran all weekend long, they ran an article about my client's case and they -- they played all weekend on their website, they played 911 tapes of my client's tape -- of my client's case. And so when we were doing the jury selection, over half of the jurors had listened to the 911 tapes on the internet that weekend. It made it almost impossible to pick a six-person jury. That wasn't a death penalty case. Made it almost

impossible to pick a six-person jury in that case because of the media exposure for things that they had posted on the internet the weekend before the trial.

Your Honor, in closing I would submit that basically the things that I am asking that the Court maintain to be confidential are things that the public does not need to know prior to the trial. They're things that in no way are -- I would submit that they're potential aggravators that may or may not be admissible during the trial and that in the alternative, if the Court is not going to -- is not going to keep them from the media, I would at least ask the Court to have an in camera inspection and determine at that point whether or not certain items should be maintained as confidential.

Thank you, Your Honor

THE COURT: Thank you.

Before you stand up, did you have anything?

MR. CALIEL: Your Honor, the only thing I can state, the State of Florida is prepared to comply with public records requests that we have received from the media and we understand Mr. Gazaleh's objection in the sense that the State's records in this particular case, and in regards to other

closed matters that pertain to Mr. Smith, contain a wide array of evidence, some of which may be admissible at trial, some of which may not be admissible during the guilt phase but in the penalty phase, but, most importantly, the Court needs to make a determination as to the admissibility of these items prior to any juror listening or considering these items in the guilt phase or the penalty phase. And so there is a potential, and I would concur there are a wide range of materials within our discovery packet and within the State's records at this point in time, and that wide range includes things that are arguably admissible, things that are clearly inadmissible in the guilt phase because it would be prejudicial to Mr. Smith, such as things regarding his sex offender status.

Frankly, I think if a juror at this point in time knows or if a juror's aware of the fact that he's a sex offender, that juror likely is to be subject to be struck for cause because it could prejudice the defendant's right to a fair trial. Obviously that's been widely publicized at this point in time and we will have -- we will have a task ahead of us to try to find a fair and

impartial juror at this stage.

But I concur with the defense's argument in the sense there is a large amount of materials and at this point in time we don't know what the Court's ruling will be as to the admissibility of a large number of those items, and that the publication broadcasting of these materials could detrimentally effect both sides' ability to obtain a fair and impartial jury because of the fact that those items that may be inadmissible at trial could then eliminate a juror from being selected because they have knowledge of that information before the beginning of proceedings, and they should only be learning about the evidence in the courtroom subject to the rules of evidence. Otherwise there is a chance that both sides could be prejudiced in the proceeding.

THE COURT: Thank you, Mr. Caliel.

Mr. Birk.

MR. BIRK: May it please the Court, Your Honor.

THE COURT: And would you --

MR. BIRK: Ed Birk.

THE COURT: I'm sorry. State your name and who you represent for the court reporter.

MR. BIRK: Yes, Your Honor. Ed Birk and I represent intervenor Post Newsweek Stations Florida, Inc., doing business as WJXT TV.

Your Honor, I was a little surprised to hear the State take a position in this case. I was informed before the hearing that the State would not be participating substantively.

Be that as it may, I'll try to incorporate my --

MR. CALIEL: I apologize, Your Honor. I may not have been clear on the record. We're prepared to comply with the public records request. I just wanted to make sure that the Court was aware of the content of the records that are being disclosed. We do not take a position as to whether or not they should be sealed or not, but I think it's appropriate for the Court to understand what the actual content is. We're prepared to comply with the requests that have been submitted and we're waiting on the Court for guidance in that matter.

THE COURT: All right. Thank you.

MR. BIRK: Your Honor, this motion is a bit troubling and it's troubling because the same motion, virtually identical with just a few

changes, was filed in the Henson case and it seems as though it's becoming a matter of routine to ask the Court to close discovery materials that are presumptively open and shouldn't be closed except in extraordinary circumstances where there's no other alternative to protect the Sixth Amendment right of the defendant to a fair trial.

This motion lacks specificity. There's no specific information as to what is in the eight categories of discovery materials that defendant would like to close. There's no showing, not even any facts cited to show why the three Lewis elements are -- are satisfied. There's no facts to support the first element that an imminent threat to the administration of justice would be created by the disclosure of this information.

So, you know, if the decision -- our position, Your Honor, is that if the decision was right now, the decision would have to be denied, perhaps denied without prejudice, but nonetheless denied.

There are a couple of -- I don't like to criticize the Public Defender because they do honorable work, but there are a couple of errors in the motion that I want to call to the Court's attention.

Specifically with regard to Sections 406.135 and 406.136, the Dale Earnhardt statute. It's about autopsy photos and photos or recordings depicting the death of a human being. Those are not automatic excluders of those materials.

The statutes themselves specifically exempt themselves from application in this setting, in a court setting, but it does give the Court power to seal those kinds of records, but there are several factors. It's first not automatic. It's within the Court's discretion. And so the motion gives the impression that it is automatic and there's no consideration to be given whatsoever.

There's an issue about privacy. The motion asserts that the witnesses to this case have a privacy interest and there is case law that does grant witnesses the ability to come in and object to their information being disclosed, but I'm not sure that the defense has the standing to raise that argument on behalf of the witnesses.

More importantly, though, there's no -- much of the witness information is already in the public domain. It's been disclosed in the State's initial discovery disclosures to the defense. It's on file in the Court's electronic file. I don't believe the

phone numbers are in there, but names and addresses, both police officers and civilian witnesses, are in there. So anything that's already in the public record shouldn't be sealed. We have cited case law in our motion.

THE COURT: Can I stop you a second? Are you saying it's already in the public record and already able to be retrieved?

MR. BIRK: Yes, ma'am.

THE COURT: By the press? That's already -- in other words, it's not under a waiting period, waiting for the Court to rule? It's already out there for you or your client -- your client --

MR. BIRK: Yes, ma'am.

THE COURT: -- your client or some other person's client to go ahead and get and disseminate if they wish?

MR. BIRK: Yes, it was filed and posted by the clerk before the motion for protective order was filed and so it hasn't been restricted in any way since then, the last time I checked, which was a couple of days ago.

Moreover, on that point there's no showing, not even an allegation, that any witness has been reluctant to participate. There's no allegation

that either the State or the defense has been unable to prepare its case because a witness, presumably a civilian witness, has not come forward or has been avoiding participation because of their name may become a matter or is already a matter of public record.

So there needs to be some showing beyond just that bald allegation. And the case law we cite in our motion all requires that there be more than just a bald allegation of imminent threat to the administration of justice.

Your Honor, I -- I will be -- we are prepared to go through each of the eight categories. We think that's premature. But we are prepared to argue it today.

You know, so initially I'd just like to say that there are many, many high profile cases, including death cases, capital cases, where motions for protective order have been denied and convictions thereafter affirmed.

The Danny Rolling case is one, and I can provide copies to the Court if you so wish. The Provenzano case. In the George Zimmerman case, that was not a death case, but certainly as high profile a case as most of us have ever seen. There were

orders denying motions to seal, motion for protective order. Casey Anthony case similarly. And perhaps the case that is factually similar to this one, Joseph P. Smith, was prosecuted and convicted for the abduction and murder of Carla Brucia. The Supreme Court of Florida in 2009 in a case reported at 28 Southern 3d 838 affirmed his conviction, discussed that there had been pretrial publicity, discussed that there -- some of the jurors knew about the case and discussed that that was not the standard, that we can't expect jurors, you know, to live in a vacuum without knowing some facts of these cases.

THE COURT: What was that cite, please?

MR. BIRK: Yes, ma'am. I have copies for Your Honor if you'd like.

THE COURT: Yes, that's fine. Thank you.

MR. BIRK: It's 28 U.S. -- I'm sorry. 28 So. 2d -- Southern 3d -- forgive me -- 838. 28 Southern 3d, 838.

THE COURT: Thank you.

MR. BIRK: May I hand this up to Your Honor?

THE COURT: Thank you.

MR. BIRK: Many other factors have to come into the Court's analysis. Once the defense does

put forth the minimum factual allegations to put this matter properly in front of the Court by identifying specifics of the evidence or discovery materials that should be considered and should be done and considered in camera.

There are many other factors. Is there no other alternative to sealing the documents to ensure the Sixth Amendment Right of Mr. Smith to a fair trial? You know, there are a number of jury instructions.

The Supreme Court just recently addressed a related issue by issuing instructions to jurors on E-devices, electronic devices. Courts can now confiscate or remove or notify jurors up front that their I-Phones and whatnot will be subject to being taken away during the trial. And that's a -- to protect, you know, against some of the things we read about jurors blogging and otherwise doing their own research.

Jurors can be prescreened about their knowledge of the case. Individual juror examination can take place. And those kinds of things can, all short of change of venue, those kind of things can reassure the Court and prove that the Sixth Amendment Right is being preserved.

So there's been no showing that any of those alternatives available to the Court would not succeed in protecting Mr. Smith's right to a fair trial.

I do want to call to the Court's attention two cases. One is State versus Bennett and that is -- actually three cases. State versus Bennett. That's reported at 19 Media Law Reporter page 1383. And I'd be happy to provide copies of that case to the Court.

THE COURT: That would be very nice. Thank you.

MR. BIRK: This is not a standard reporter that most of us have access to.

And in that case, which was from Hillsborough County, the Court denied a motion to seal Williams Rule evidence, and I believe there was probably -- there has been discussion of Williams Rule evidence in this case and although my client would not like to believe this, here's what the judge said, and I think it's probably true. A significant number of the public does not retain what is disseminated by the media or simply does not read newspapers or watch television. As a result, the feared impact on the trial rights of

criminal defendants often does not occur, even in matters that have received extensive media coverage. And in that case the judge denied the request to seal.

THE COURT: When was that?

MR. BIRK: I'm sorry.

THE COURT: What year was the case?

MR. BIRK: Oh, it was 1991, Your Honor.

THE COURT: You would agree that things are not the same, correct?

MR. BIRK: I'd be happy to address that. Are you referring to the internet?

THE COURT: I'm referring to everything is different as far as how information gets disseminated these days as compared to 1991.

MR. BIRK: There have been major changes. I can't argue on that.

Then the case of State versus McTear, M-c-t-e-a-r, 2009, 37 Media Law Reporter, page 2209, again from Hillsborough County. That was a highly publicized case with highly emotional facts. The defendant was charged with first degree murder, kidnapping, and I believe the facts included an allegation that he threw a child from a car. There was extensive coverage in the media and the court,

again, declined to seal the discovery materials.

And, again, I'll be happy to provide a copy of that case, Your Honor

THE COURT: Thank you.

MR. BIRK: Lastly, I want to cite to the Court the case of Hooks versus the State which is cited at 82 So. 2d 905. And that was from the Fourth District Court of Appeal in 2011.

The importance of that case to this matter, Your Honor, is that there's a good discussion of what constitutes pretrial publicity and how far pretrial publicity has to go before there's a real threat to the defendant's right to a fair trial. The Court there, the Fourth District Court of Appeal, this was a murder -- prosecution of a young man who along with a couple of friends set out one night to beat up some homeless people and they ended up attacking three homeless people, one of whom I believe died. One of the attacks was recorded on surveillance video from a nearby -- I don't know if it was a store or what the enterprise was, but that video was released to the press by the police and was played over and over again, was available on the internet, was familiar to many of the jurors, and yet the court still said that the fair trial rights

of the defendant had not been denied and the conviction of this one defendant was upheld.

So, I do have copies of that case, Your Honor. I can hand that up to you.

There were -- there was a discussion in that case, Your Honor, blogs, certainly a new -- new thing for most of us since 1991. But the -- the vehement opinions expressed over those blogs, as we've all seen, and what the court took to heart was that it was a discussion both of the nature of the crime, but also the rights of the defendant to have a fair trial.

And so in determining whether something should be closed the Court, I submit, has to consider both the nature and the extent of any pretrial publicity. Things like the size of the county where we are. The Smith case that I talked about earlier was from the -- from Broward County. And the court noted that the size of the county made it likely that, you know, not everybody in the jury pool is infected with the knowledge of that videotape. Here in Duval, not quite as big as Broward, but we are in the circuit, Fourth Circuit, more than a million people and, again, we don't know when this trial will take place. Information released today or

discussed today may not be remembered in six, 12, or 18 months, whenever the trial takes place in this matter.

And ultimately, just to repeat myself, the test is not whether we can find a juror who has no knowledge of the case, but is able to set aside any knowledge and rely solely on the facts and law presented in the courtroom.

As I say, Your Honor, I'm willing to discuss each of the specific categories of information that the defense has asked to be sealed. I think that's premature at this point, but I'd be happy to do so.

THE COURT: All right. What is the reason -- I think you might be right, but what is the reason you feel it might be premature at this point?

MR. BIRK: Well, the defense has not identified specifically enough, I believe, the information --

THE COURT: Okay.

MR. BIRK: Nor has there been any factual allegations as to why the alternatives to sealing would not protect the Sixth Amendment Rights of the defendant.

THE COURT: All right. Thank you.

MR. BIRK: Thank you, Your Honor.

THE COURT: Good afternoon.

MR. CONNER: Good afternoon, Your Honor.

THE COURT: How are you?

If you would identify yourself also and who you represent.

MR. CONNER: Your Honor, my name is Tim Conner. I'm here for Morris Publishing which publishes the Florida Times-Union.

We filed yesterday a motion to intervene to oppose the motion that's been filed by the defendant in this case for protective order.

As I understand, the portion of this motion to intervene is not objected to.

THE COURT: Correct.

MR. CONNER: And I know you're familiar with that law and so I won't go over it.

With respect to the substance of whether a protective order should be granted or not, I believe, based on the case law, Your Honor, that you have to apply in this case and the principle case is Miami Harald Post v. Lewis, that the defendant's motion comes nowhere near meeting the burden that is required of -- whether it's the defense or the State, moving to close discovery evidence in a criminal case.

As you know, the standard -- and it's not how do we feel about it or what is our perception or whether it might be perceived by someone to be fair or not fair, but it's the law that the Florida Supreme Court has said is applicable and has to be followed.

And the standard is that there has to be a showing by the movant and there has to be evidence, of which in this instance there is absolutely none, that -- and then there has to be findings by the Court that restricting public access to discovery materials is necessary to prevent a serious and imminent threat to the administration of justice. That's the first prong.

The second prong is that there are no alternatives other than a change of venue that would protect the defendant's right to a fair trial. So, in other words, an increased jury pool, increased peremptory challenges, sequestration, any of those things are simply not going to be effective. And during the defendant's argument there was a reference to a case from a year or so ago. I don't know which case it was, but that at least half of the folks in the jury pool had listened to a 911 recording of a call, which I assume means that the

other half had not listened to it. And so I'm assuming that a jury was able to be seated in that case.

That's not evidence. That's argument of counsel. The case law is very clear that argument of counsel doesn't suffice to satisfy the standard here.

The third prong is that closure would be effective in protecting the rights of the accused without being broader than necessary to accomplish the purpose. And what that gets to is that you can't simply just carte blanche seal things because the defendant suggests that it would be better for the defendant if that were to happen. You actually have to look at what they're asked to be sealed, go through the three steps, and if you get to that third step determine is there a way to release information, is there a way to redact information. It's -- unfortunately, it's somewhat of a tedious task that the Court is charged with by the law, but that is what the law is. And that's the law that we have to follow.

In the McCrary case, Your Honor, the Supreme Court specifically said a finding of cause to restrict or defer disclosure of public judicial

records cannot rest in air. And when they said that, what they meant was it can't be based on the argument of counsel, it can't be based on a motion which, as Mr. Birk said, is a motion we've seen many times before in these cases, for the most part word-for-word.

And I believe that given the clear law that applies to these cases and to these situations, there is not an intent that these types of motions be filed in every case. There is also not an intent that these types of motions be filed without supporting evidence and without some level of specificity being made to the arguments that address the three prongs that are required to be addressed.

I think it's inappropriate for a motion to be filed like the motion in this case which is very generic. It's clearly cut and pasted from other similar motions that have been filed in other cases that I know you're familiar with. The Henson case was mentioned. There's been a number of others. Without producing a shred of evidence that there is even a possibility of prejudice or a possibility of an imminent threat to the administration of justice, as well as the other prongs.

In this particular instance, not only has there

been no showing with respect to any of the three categories that are required to be applied here, but we attached to our motion an article that the Florida Times-Union published back on June 30th, specifically about Mr. Smith and about his criminal history, and appended to that is a timeline of criminal arrests, and it's lengthy. It goes to the timeline, goes back to 1974, and it sort of tracks his criminal history up-to-date. That timeline and that article were all based on information that is already out there in the public domain.

Mr. Shotler (phonetically), who was the reporter who wrote it, gathered information from JSO files, from court records for each of those prosecutions, from other public records and from interviewing witnesses and put that article together. The case law is very clear that when information like that is already out in the public domain that there's no legal basis to seal discovery in a criminal case that duplicates that information.

There are a number of photographs that are already out there. They were published by the Times-Union. They are available to be accessed on Jacksonville.com as we speak. Eight of them are mugshots of Mr. Smith from JSO. One of them is from

his first appearance here in this court. If you Googled pictures of Donald James Smith, there are a number of pictures out there that are available on the internet already.

So to suggest that somehow photographs of Mr. Smith or other photographs that, you know, might be part of the discovery in this case should simply be sealed without any kind of analysis, without any kind of determination that they're not already out there or they meet the three prongs of Lewis is just not legally sufficient.

I've cited a couple of other cases in our papers, Your Honor. I don't know if you had the opportunity to --

THE COURT: I've read them.

MR. CONNER: Okay. The Edmonds case, Your Honor, was approximately ten years ago. In that case Mr. Edmonds was accused of some fairly awful sexually graphic things. There was discovery in that case that was the subject of the motion for protective order. Judge McCaulie felt like the information was -- was, in his words, graphic, shocking, damning and distressing. He entered an order sealing the discovery and made the following finding: The information in those items is

consistent with the general allegations that have already been published in the news articles, yet is so specific that if published before trial there is a substantial likelihood that an unbiassed jury would be difficult if not impossible to obtain. This is especially true of the instant messages and the recorded telephone conversation. I can envision the instant messages and transcript of the recorded telephone conversation on the front page or as a lead television news report just before jury selection begins. It would be an enticing story with a strong and lasting impact. And that was his finding with respect to an imminent threat to the administration of justice.

And the First District Court of Appeal reversed that finding and said we disagree that that is a sufficient basis for closure under that prong.

We've cited another case which goes back a little bit further. The Adrian Crump case which you may recall. And in that case Judge Dearing entered an order closing the discovery and he specifically found the saturation of the northeast Florida market with stories about the case, the newspaper's very distressing and judicial disruptive practice of

publishing major summary articles about a case on the day before or the day of jury selection and the disclosure of admissions and confessions, the admissibility of which was still a pending issue, were bases that in his opinion satisfied the Lewis test. And the First District Court of Appeal reversed that order and said that is not sufficient in that case to close the discovery.

There were some statements made by both the defense and the State here today about there has yet to be a determination of admissibility and that perhaps that should be a factor in whether materials should be leased -- released. Are they going to be admissible at trial or not admissible at trial.

And the suggestion, I took it, was if it's not going to be admissible at trial then perhaps it should be placed under seal because there could be prejudice to a potential jury by having seen evidence that is not admissible. That is not the standard. The case law does not support that position whatsoever. That is not a relevant factor in analyzing these issues.

And I want to provide Your Honor a case.

Pass that up, please.

State v. Cosnat (phonetically), which discusses

a couple of these concepts. It also gets into discussing the last point that I would like to make, Your Honor, and that is -- and Mr. Birk made this point as well. In a population center like Duval County, with a substantial population, the likelihood of pretrial publicity constituting prejudice that would prevent a fair trial from being held is very slim and it is not like other places where there is a small population. And that issue comes out in the case law.

This is one of the cases. Now it's -- yes, it's an older case, but the refrain has carried over from a number of more recent cases. If you look at the second page, Your Honor, starting with -- it has a paragraph numbered 7 there. This case was about whether statements, recorded statements of the defendant, could be released and whether they qualified as confessions. The Court found that they were not a confession, and we don't even know if we're dealing with that in this case, since we don't know what statements the defense's motion is talking about.

But if you -- if you look there at paragraph 7, the court says the burden is on the defendant to present sufficient evidence to satisfy each element

of this strict three-part Lewis test. Defendant Cosnat has failed to do so. He relies on the extensive publicity and print television media about this case and introduced into evidence numerous articles about the case. However, even massive pretrial publicity about a case is not enough to show a serious and imminent threat to the administration of justice or to the denial of fair trial rights.

And there's a couple of cases cited there, one of which is the Ted Bundy case.

The fact that the statement has been determined to be inadmissible does not alter that conclusion. Even where pretrial publicity includes publication of inadmissible evidence or confessions, a defendant can still receive a fair trial, citing the Holdsworth v. State and Newman v. Virginia cases.

The few instances in which extensive pretrial publicity has been found to pose a serious and imminent threat to fair trial rights have been in much smaller communities than Broward County, where this case was, such as Jackson County, population 41,375, according to the 1990 census, which was inundated with prejudicial pretrial publicity, in Florida Freedom Newspapers v. McCrary, and that's

the case that defense relies on.

The large size and nature of the jury pool in Broward County essentially precludes the type of showing required by the strict three-part Lewis test.

And then it goes on to cite the Bennett case, which Mr. Birk already cited to and so I won't read that portion.

But that's the standard. It's not admissible, inadmissible. You have to look at where it is the case is being tried and you have to look at other factors.

The burden is on the defense here and it has done nothing to satisfy the burden that's been imposed on it by the law and so the motion, frankly, should just be denied.

Thank you.

THE COURT: Okay. Thank you.

Any response?

MR. GAZALEH: Your Honor, just briefly. I would state that the motion -- I was forced to file the motion early and some of the -- some of the documents that I'm even asking to be sealed I don't even know what they are. I mean the media has asked for a 2009 State Attorney file for a

case that my office didn't handle. It was handled by a private attorney. I have no idea what is even in that file, what evidence may be in that file. I have no way of knowing what's in that file. But I have to file something to protect my client's interests. So I have no way of knowing what's in that file. I can't itemize or specify what evidence that might be. But in order to protect my client's interest, I have to file this motion.

I would submit, again, that because there's a penalty phase in this case and there are certain statutory aggravators I'm obligated to make sure that a potential juror does not hear something that is not a statutory aggravator that is not admissible in the trial of this case and so that's why I -- I feel like Chapter 119 and the McCrary case does allow this Court to seal certain documents and perhaps if the motion is overbroad certain things should be released to the media, but not everything. And maybe itemized line-by-line in camera viewing of these documents might be necessary.

Thank you, Your Honor.

THE COURT: Thank you.

MR. BIRK: Your Honor, may I just briefly

address?

THE COURT: Yes, sir.

MR. BIRK: Thank you, Judge Cooper.

Mr. Gazaleh made a telling admission there. He doesn't know what's in the 2009 State Attorney's file so how can -- how can he possibly assert that any of it should be sealed under the standards that apply?

Your Honor asked if the initial disclosures from the State with the witness names and number -- names and addresses was available to the public. I want to tell you why I say that. I was able to retrieve them before intervening in this case and I don't know how the clerk's electronic website works for non-attorneys. So I was able to retrieve it so I assumed anybody will, not being a party to the case. If for some --

THE COURT: Maybe public was the wrong word. It's the press that's objecting, not the public, and the press, you're telling me, is able to retrieve it, whether through their attorneys or themselves.

MR. BIRK: Yes, ma'am.

THE COURT: Okay.

MR. BIRK: And, lastly, Your Honor raised a

very good point about how we live in a different world today than we did in 1991 with regard to information. I would ask the Court, as I did in the memo, to recognize that there is a difference between television, radio, newspapers and the internet. The internet requires some affirmative steps to go seek out information. It's still, you know, if you go to website information, can't just come up with something that you didn't specifically search for, but a reader, a prospective juror, still has to go and take steps to find information.

So the -- the call that the internet has changed everything, you know, has a much broader affect on infecting potential jurors with information, I think needs to be looked at very critically.

Thank you.

THE COURT: Well, I think -- I think the world that we deal with with criminal cases and privacy and protecting interests, et cetera, has really changed a lot even in six months. Certainly in a year, certainly in two -- the last two years, and I don't even think there's any case law out there yet to speak of, and I think it's

going to change again in the next six months, in the next year and, unfortunately or fortunately, however you may look at it, Florida seems to be an area that's, at least from what we can tell, been in the public arena more than locally, whether nationally or internationally. Sometimes internationally. More so than some other areas of the country, although we can all remain who's next to be looked at because of whatever case is pending in that area. But I think the rules will change, but they haven't changed, and the reason I think it'll change is the fall-back for all of us is worst case scenario you can always change venue. That's going to change because the change of venue isn't going to accomplish anything because everybody in the new place will know what everybody in the old place knew, to a certain extent, if the coverage continues as it is.

That's not a -- that's not a criticism, it's not anything more than an observation of the way things are now. So because these older cases did have that fall-back, whether it was because it was a small county and there just wasn't large enough jurors so they moved to get a bigger panel or bigger pool or whatever, I think a lot of that is

going to change, and I'm not sure how, and it hasn't changed the law yet, I understand that, and we're dealing with the laws that exist today, but I'm not sure that the laws that exist today actually address some of the issues that we're facing today with some of our cases.

Be that as it may, I'll have to tailor an order based on the case law that applies today, I understand that and don't have any problem with that. Maybe I'm just pontificating, but I think you're going to be standing here as you've stood before me before in other cases in another year or another two years and the world is going to be even more different, the world we have to make our rules and case law revolve around.

MR. BIRK: Certainly, Your Honor. That's --

THE COURT: I don't know how we're all going to deal with that. I think it's something we're all going to have to look at and I think, just for an example, I understand why you bring up that Mr. Gazaleh on behalf of his client doesn't even know what's in something. Well, he wouldn't even know that was an issue except that it was brought out in the press. So now he knows it's an issue that they're looking, whoever it is, is asking for

that. So what can you do? You can't see it. So there's an example of how the rules are going to have to change. It's brought to his attention through the back door, if you will, and so he's doing what he can, a preemptive strike, I guess you would call it, to make sure that his client's interests are protected. So I think there's a lot of issues like that that we're going to have to talk about and work through and reach reasonable conclusions that address everyone's interests and concerns.

So I guess the bottom line is it's going to take me a little bit of time to go over all of this and put it in the perspective of today and formulate what would be an appropriate order. And I understand both of your arguments is it should just be denied, I understand that. Perhaps that will be the bottom line. I don't know.

I'm going to read everything and I'll get something out as quickly as I can, but I wouldn't expect it to be real quick.

MR. BIRK: I understand, Your Honor.

THE COURT: And if I have to look at everything in camera, I'm certainly willing to do that. I've done it before, as you know, and I'll

do it again if I have to. So that's fine, too.

MR. BIRK: Thank you, Your Honor. I appreciate all of that. It's our feeling that the defense has put too much of a burden on the Court by not specifying what evidence should be looked at closely and why that particular evidence or discovery materials would not -- would leave no alternative but to seal. So in the law the legal framework for this issue does put a burden on the Court to do these things. We don't think it should be an undue burden, which it is at this moment.

THE COURT: All right. Anything further? Thank you.

MR. BIRK: Thank you.

THE COURT: Anything further from anyone else?

MR. GAZALEH: No, Your Honor.

THE COURT: I believe that our next court date is September 4th.

MR. GAZALEH: That's correct.

THE COURT: So I'll pass the case to September 4th for pretrial and I'm not sure we'll have an order by then, but as quickly as I can I'll get an enter ordered on all the motions.

Thank you.

MR. CALIEL: And, Your Honor, just so we all are on track when it comes to the September 4th date, I believe in discussing with counsel it's not going to be necessary or we don't need to worry about this issue, except absent any waiver of speedy trial, 175 days will be running in December of this year. I anticipate that that's not going to be an issue, but we have to have that on our forefront for our next court date because otherwise we will be needing to get things ramped up prior to December so...

THE COURT: I have the speedy trial date as December 14th.

MR. CALIEL: Yes.

THE COURT: Okay.

MR. GAZALEH: All right.

THE COURT: I'll make a note for us to discuss that at the next court date.

MR. GAZALEH: And it's been discussed.

THE COURT: All right. Thank you.

MR. GAZALEH: Thank you, Your Honor.

THE COURT: All right. We'll be in recess. Thank you, everyone.

(Thus the proceedings ended.)

C E R T I F I C A T E

I, Faye M. Gay, hereby certify that the foregoing transcript is a true and accurate transcription of my Stenograph notes taken at the time and date stated herein.

Dated this 8th day of June, 2018.

/S/ Faye M. Gay

_____

Faye M. Gay, CRR, RMR, FCR, RPR, CLVS

Filing # 73343690 E-Filed 06/11/2018 09:58:01 AM

IN THE CIRCUIT COURT OF THE
FOURTH JUDICIAL CIRCUIT, IN
AND FOR DUVAL COUNTY, FLORIDA.

Case No: 2013-CF-5781-AXXX-MA

Division CR-D

STATE OF FLORIDA

-vs-

DONALD SMITH,

Defendant,

PROCEEDINGS taken before the Honorable Mallory D. Cooper, Judge of the Circuit Court, on September 4, 2013, and as reported by Faye M. Gay, Certified Realtime Reporter, Registered Merit Reporter, and Certified Legal Video Specialist.

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APPEARANCES:

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Assistant State Attorney,
Appearing on behalf of the State of Florida

FRED GAZALEH, Esquire,

Appearing on behalf of the Defendant.

P R O C E E D I N G S

PROCEEDING PAGE

Waiver of Speedy Trial.....4

MR. CALIEL: Good morning, Your Honor.

THE COURT: Good morning.

MR. CALIEL: Your Honor, if we could address the case of Donald Smith on the bottom of page 19 of the calendar in case No. 2013-5781.

THE COURT: Page 19, Smith.

(Defendant present.)

MR. GAZALEH: Good morning, Your Honor.

THE COURT: Good morning.

MR. GAZALEH: For the record, Fred Gazaleh for Donald Smith.

This morning my client has executed an unlimited waiver of speedy trial.

I'd like to advise the Court that we have got depositions scheduled with the State on October 10th. Mr. Caliel and I had discussed a possible pretrial date of October 14th or 15th, if Your Honor has either of those dates available.

THE COURT: Either one is fine. The 15th is probably a little better if that's okay.

MR. GAZALEH: That would be fine.

MR. CALIEL: October 15th would be great, Your Honor.

THE COURT: Would you place Mr. Smith under oath?

(Defendant sworn.)

THE DEFENDANT: I do.

THE COURT: Mr. Smith, this form that you have signed is entitled Waiver of Speedy Trial. It advises you that you are entitled to speedy trial under the Constitutions of the United States and the State of Florida as well as Florida Rules and Statutes and your signature indicates you're freely and voluntarily waiving that right because you consider it to be in your best interest. Is that correct?

THE DEFENDANT: That's correct, ma'am.

THE COURT: All right. Thank you.

I do find that Mr. Smith has freely and voluntarily waived his right to speedy trial and his case is passed to October 15th for pretrial.

And I know you all are waiting on an order and that should be out in the next day or two.

MR. GAZALEH: Thank you, Your Honor.

MR. CALIEL: Thank you, Your Honor.

THE COURT: Thank you.

(Thus the proceedings ended.)

C E R T I F I C A T E

I, Faye M. Gay, hereby certify that the foregoing transcript is a true and accurate transcription of my Stenograph notes taken at the time and date stated herein.

Dated this 8th day of June, 2018.

/S/ Faye M. Gay

_____

Faye M. Gay, CRR, RMR, FCR, RPR, CLVS

Filing # 76233259 E-Filed 08/09/2018 03:40:20 PM

IN THE CIRCUIT COURT OF THE
FOURTH JUDICIAL CIRCUIT, IN
AND FOR DUVAL COUNTY, FLORIDA.

CASE NO.: 16-2013-CF-5781-AXXX

DIVISION: CR-D

STATE OF FLORIDA

-vs-

DONALD JAMES SMITH
_____/

STATE OF FLORIDA)
)
COUNTY OF DUVAL)

Proceedings before the HONORABLE MALLORY D. COOPER, Circuit Judge, in Courtroom 605, at the Duval County Courthouse, 501 West Adams Street, Jacksonville, Florida, on Tuesday, October 15, 2013, commencing at 9:40 a.m., as recorded by M. Kim Simms, Registered Professional Reporter and Notary Public in and for the State of Florida at Large.

- - -

ACCEPTED: DUVAL COUNTY, RONNIE FUSSELL, CLERK, 08/10/2018 04:47:14 PM

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P R O C E E D I N G S

October 15, 2013 9:40 a.m.

- - -

MR. CALIEL: Good morning, Your Honor.

THE COURT: Good morning.

MR. CALIEL: Your Honor, if we could address the case of Donald Smith.

THE COURT: Donald Smith.

(Defendant present in open court.)

MR. CALIEL: Mr. Smith's case is located on the top of Page 13 of the calendar this morning.

THE COURT: Page 13.

MR. GAZALEH: Good morning, Your Honor.

THE COURT: Good morning.

MR. GAZALEH: Fred Gazaleh for Donald Smith. We have depositions scheduled -- another set of depositions scheduled through the week of December -- I'm sorry, November 19th, that's the last full week before the Thanksgiving week, and we were talking about possible early December pretrial.

THE COURT: Pretrial date the 3rd, December 3rd?

MR. GAZALEH: That will be fine.

MR. CALIEL: That will be fine with the State.

And Counsel and I have discussed, if possible, Your Honor, that at that point in time we have a better idea perhaps, and be requesting a trial date from the Court in December at that point.

THE COURT: Okay. That would be great. December 3rd for pretrial and to set a jury trial.

MR. GAZALEH: Thank you, Your Honor.

MR. CALIEL: Thank you.

(Thereupon, the proceedings in the above-entitled cause were concluded at 9:41 a.m.)

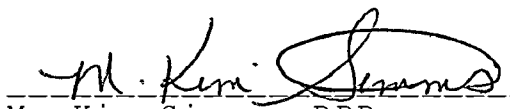
* * *

C E R T I F I C A T E

STATE OF FLORIDA)
COUNTY OF DUVAL)

I, M. Kim Simms, Registered Professional Reporter, hereby certify that I was authorized to and did stenographically report the foregoing proceedings and that the transcript is a true and complete record of my stenographic notes.

Dated this 9th day of August, 2018.


/s/
M. Kim Simms, RPR

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IN THE CIRCUIT COURT OF THE
FOURTH JUDICIAL CIRCUIT, IN
AND FOR DUVAL COUNTY, FLORIDA

CASE NO: 16-2013-CF-005781-AXXX-MA

DIVISION: CR-D

STATE OF FLORIDA

-vs-

DONALD SMITH,

Defendant.

STATE OF FLORIDA)

COUNTY OF DUVAL)

Proceedings before the Mallory Cooper, Judge of the Circuit Court, Division CR-D, as cause in this matter came to be heard on the 3rd of December, 2013, before Catherine M. Morrow, Florida Professional Reporter and a Notary Public in and for the State of Florida at Large.

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JACKSONVILLE, FL 32202
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APPEARANCES:

MARK CALIEL, Esquire,
Assistant State Attorney,
311 West Monroe Street
Jacksonville, Florida 32202
Appearing on behalf of the State of Florida.

FRED GAZALEH, Esquire,
Assistant Public Defender,
407 N. Laura Street
Jacksonville, Florida 32202
Appearing on behalf of the Defendant.

P R O C E E D I N G S

December 3, 2013 9:34 a.m.

(Heard in open Court.)

(The defendant, defense counsel and the State present.)

(Parties sworn.)

* * * * *

MR. CALIEL: Good morning, your Honor.

THE COURT: Good morning. Just a moment.

MR. CALIEL: Good morning, your Honor. If we could address the case of Donald Smith Case which is your first case, 16-2013-5781.

THE COURT: Page 14, Smith.

MR. CALIEL: Mr. Smith is before the court. Counsel and I have discussed prior to court a prospective trial date for Mr. Smith's case. We were hoping the court may have the availability of the jury selection the week of May 12th.

Both sides anticipate that we will be prepared for trial at this point. I know that defense counsel has relayed that they are still conducting mitigation research.

If anything pops up they'll let us know, but we think we can be prepared by May 12th.

THE COURT: I think that is fine. I don't

think we have anything in the way of major trials that week. I believe we can use that week. That will be May 12th for jury trial and Thursday, May 8th for final pre-trial.

MR. CALIEL: And your Honor, for scheduling sake, especially given the potential need for experts for this, is it possible to reserve the following week for the penalty phase, if at all possible?

I am fairly confident that we can conclude the guilt phase of the trial in the first week of May 12th and hopefully follow with the penalty phase.

THE COURT: Reserve the entire the week, is that what you're asking?

MR. CALIEL: Mr. Gazaleh?

MR. GAZALEH to be safe, your Honor.

THE COURT: That is fine. We can do that.

MR. CALIEL: That way, your Honor, the one issue that could take more time than anything else is jury selection, given the publicity of the case. And that way we could reserve the entire week and then we could bleed over to the guilt phase the following week.

THE COURT: I think that is good idea.

May 19th, if necessary, to conclude the trial and/or, if necessary, the penalty phase.

MR. GAZALEH: And the one last thing, your Honor, is we will -- I told Mr. Caliel we will have our death penalty motions filed by the first part of next week. We need a date say in January or February, probably two hours, to hear that.

THE COURT: Okay. Do you have a date in mind you would like to use?

MR. CALIEL: The only date that I am reserved at this point in time, your Honor, the week of the 27th I do have a first degree murder case set in front of the bench in CR-H at this time. I don't know the court.

And then Friday, January 24th, the criminal rules committee meeting is in Orlando. I am unavailable on that date. Other than that January looks good.

THE COURT: January 21st is a short week. Do you want to try that week?

MR. GAZALEH: That's fine. Is it okay with Mr. Caliel?

MR. CALIEL: Yes, your Honor. If we could do it any day but that Friday. I have to be in Orlando.

THE COURT: We better not use that week. It is four-day week. How is the week of the 13th?

MR. CALIEL: It is wide open for the state.

MR. GAZALEH: That is fine.

THE COURT: January 13th hearing on motions to-be-set.

THE CLERK: Your Honor, you have a trial that week.

THE COURT: She's right. I'm sorry. I have a two-defendant death penalty case that week. I am trying to keep up. Is there a possibility we could do it the week of the 6th?

We have no trials set that week.

MR. GAZALEH: It is doable, your Honor.

MR. CALIEL: I am available. Other than a two or three-hour block Friday afternoon, I am available the entire afternoon.

THE COURT: Let's try that. January 6thfor hearing on motion to-be-set. And if you are not ready we can move it.

MR. GAZALEH: We have argued them before. There is not going to be anything new, I don't think.

THE COURT: That can be the next pre-trial, as well?

MR. CALIEL: Yes, your Honor.

MR. GAZALEH: Yes, your Honor.

THE COURT: Thank you.

MR. CALIEL: Thank you, your Honor. May I be excused?

THE COURT: Yes.

MR. GAZALEH: Thank you.

* * * * *

(Whereupon the proceedings were concluded AT 9:39 a.m.)

C E R T I F I C A T E

STATE OF FLORIDA)

COUNTY OF DUVAL)

I, Catherine M. Morrow, Florida Professional Reporter, certify that I was authorized to and did stenographically report the foregoing proceedings and that the transcript is a true and complete record of my stenographic notes.

DATED this 13 day of August, 2018.

/s/Catherine M. Morrow
CATHERINE M. MORROW
Florida Professional Reporter

Filing # 76320717 E-Filed 08/13/2018 09:22:01 AM

IN THE CIRCUIT COURT OF THE
FOURTH JUDICIAL CIRCUIT, IN
AND FOR DUVAL COUNTY, FLORIDA.

CASE NO: 16-2013-CF-5781-AXXX

DIVISION: CR-D

STATE OF FLORIDA

-vs-

DONALD JAMES SMITH,

Defendant.

STATE OF FLORIDA)
COUNTY OF DUVAL)

PROCEEDINGS before the Honorable MALLORY COOPER, Judge of the Circuit Court, Division CR-D, as cause in this matter came to be heard on the 6th and 9th of January, 2014, before Karen Waugerman, a Notary Public in and for the State of Florida at Large and Registered Professional Reporter.

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PAGE # 3261

APPEARANCES:

MARK CALIEL, Esquire,
Assistant State Attorney, appearing on behalf of the State of Florida.

FRED GAZALEH, DARCY GALNOR and TRISH RADO, Esquires, Assistant Public Defenders, appearing on behalf of the Defendant.

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January 6, 2014

MR. CALIEL: Your Honor, call the case of Donald Smith on page 11 of the morning calendar.

THE COURT: Page 11, Donald Smith.

MR. GAZALEH: Good morning, Your Honor. I talked to Mr. Smith this morning, he asked me if I would waive his appearance for the purpose of setting this hearing.

THE COURT: Okay.

MR. GAZALEH: Your Honor, this morning we're here for pre-trial and to potentially set the death penalty motions for hearing this week. I don't know if Your Honor has time this week to do that and I wanted to ask you if we do do that do you want a binder and a hard copy of the motions or would you prefer a disk with motions?

THE COURT: I would prefer the binder.

MR. GAZALEH: I'll have it delivered this week.

THE COURT: Okay.

MR. GAZALEH: Today, not this week but today.

THE COURT: So I could do it Thursday

end of calendar or in the afternoon at 1:30.

MR. GAZALEH: Whatever your pleasure?

MR. CALIEL: Afternoon at 1:30 would be great on Thursday, that's the 9th.

THE COURT: January 9th at 1:30 for hearing on motion time and date certain.

MR. CALIEL: And, Your Honor, my cursory review of the motions that have been filed I don't see any of them in particular that the Court or counsel has not handled before, this wasn't anything new and novel --

MR. GAZALEH: I don't think there is anything.

MR. CALIEL: -- in regards to those motions so I would expect probably an hour and a half, two hours at most.

MR. GAZALEH: That sounds about right.

THE COURT: Okay.

MR. GAZALEH: And I will have those delivered to your chambers this afternoon. I called last week but got the answering machine.

THE COURT: Okay. Thank you very much.

MR. GAZALEH: Thank you, Your Honor.

(Hearing concluded.)

January 9, 2014

(Defendant present.)

THE COURT: Mr. Smith is present and his attorneys and the State is present and we're here for hearing on motions.

MR. GAZALEH: Good afternoon, Your Honor.

THE COURT: Good afternoon.

(Defendant present).

MR. GAZALEH: Your Honor, I figured I would just -- I assume you got the binder delivered to you.

THE COURT: I have it, yes.

MR. GAZALEH: I'm just going to go through the binder if that's all right with Your Honor.

THE COURT: Uh-huh.

MR. GAZALEH: Number one in the binder is the certificate that both myself and James Armstrong are death certified signed by Mr. Shirk.

THE COURT: Okay.

MR. GAZALEH: And two is the motion in limine to prohibit the State from commenting to the jury that the Grand Jury has indicted

Mr. Smith on pending charges. And, that is, again the Court's heard most of these motions before and I don't know that I'm going to argue each and everyone of they before the Court. If there's anything that the Court wants me to argue just let me know.

THE COURT: Okay. Thank you. Any response on that?

MR. CALIEL: Your Honor, on that motion, obviously the State does not intend to argue because the Grand Jury indicted Mr. Smith that the jury might be able to make some reference about that. Obviously it's most Court's practice to read the indictment to the jury or perspective jurors before jury selection, and then also some times the copy of the indictment goes back during the course of deliberations. I'm not sure Your Honor's practice as to that but outside of the jury knowing that the Grand Jury had indicted Mr. Smith, the State intends on make no argument in reference to that.

THE COURT: Okay. All right. Thank you.

MR. GAZALEH: Thank you, Your Honor.

Number three is just a notice just stating on the record any time we make an argument and cite the United States Constitution that we would also be by reference also arguing the respective Florida Constitution sections that apply.

THE COURT: Okay.

MR. GAZALEH: Number four, Your Honor, is motion for production of favorable evidence. I don't know that the Court has to rule on that, the State typically will follow their obligations in regard to that, but we would be asking for any material that the State has in their possession that would be -- would tend to provide favorable evidence both in the innocence and guilt phase and in the penalty phase.

MR. CALIEL: As to the defense's motion five and six, Your Honor, the State is well aware of our Brady/Giglio obligation and will abide by the law as pertains to them.

THE COURT: Okay. Five, I mean, six is I didn't call but for penalty phase, correct?

MR. CALIEL: Yes, Your Honor. I believe so.

THE COURT: Thank you. Just a second. Four is -- I think we're on four and five, not five and six.

MR. GAZALEH: Yes, six is different.

MR. CALIEL: Yes, I apologize.

THE COURT: Four and five, okay.

MR. GAZALEH: Now six is a little different, this is one that I came up with based on something that happened in one of my trials before but this is for a statement of particulars post indictment. In the event that the State intends to argue felony murder for offenses that are not charged in the indictment I would ask for a statement of particulars for any and all offenses that they intend to argue felony murder for. So I would like the dates and times and places for any offenses other than those that are charged in the indictment that the State intends to argue felony murder for during the course of the trial, so that's what this motion for statement of particulars is asking for.

MR. CALIEL: Your Honor, obviously indictment details felony murder occurring on

the dates and it's on or between date because carryover from 20th to 21st based upon this being during the night hours of the Friday night into that Saturday morning.

And beyond enumerating the dates as to that, there is no legal requirement. There are additional counts of the indictment with sex battery and kidnapping charges that have been charged, but there is no legal requirement for the State to be precluded from arguing any other felony murder theory, even if it's not charged offenses at this point in time. So we would object to the motion.

There is no -- there will be no argument of a felony murder theory that does not incorporate the time frame in the alleged information.

MR. GAZALEH: And Mr. Caliel is right, there is nothing that bars them from arguing any other offenses. And for that reason that's why I'm asking for a statement of particulars for any other offenses that they intend to argue. There is nothing that keeps me from asking what other offenses they

intend to allege during the course of the trial. I don't want to be surprised during the course of the trial and have the State argue any other offenses that are uncharged for purpose of felony murder.

MR. CALIEL: And, Your Honor, I don't -- I do not anticipate because of the facts and circumstances that that is going to be the case. If you look at the enumerated felonies, two of the enumerated violent felonies are subject to felony murder are alleged in the indictment. I do not anticipate making arguments of any of the others such as airplane piracy or things of that nature.

THE COURT: Okay. Thank you.

MR. GAZALEH: Thank you, Your Honor. Number seven, I'm asking the Court to when the Court rules on objections, to make specific findings of facts so we have a clean record in the event we do find ourself in a position where we have to file an appeal.

THE COURT: I'll do my best.

MR. GAZALEH: Thank you, Your Honor. Number eight, Your Honor, I would ask that

the Court grant our motion to exclude confusing and misleading evidence that would be -- having the State not bring witnesses come in and testify why they did not do certain things. Some times the State will bring evidence technicians or experts to come in and say we didn't do this cause we didn't expect we would be able to find anything or do anything. So I would submit to the Court that would be misleading and confusing to the jury. So we're asking the Court to not allow witnesses to come in and testify to that kind of evidence.

MR. CALIEL: Your Honor, the State's only response to this motion is at this point in time is a little vague and nonspecific. Obviously there are times when negative evidence is appropriate to be produced to the jury depending on facts and circumstances that come out during the course of the trial, and so at this point in time I would just ask the Court to rely on any contemporaneous objection if that becomes an issue during the course of the trial.

THE COURT: All right. Thank you.

MR. GAZALEH: Number nine is probably going to be in the same mode. I'm asking that the State not be allowed to call any rebuttal witnesses or any witnesses as rebuttal witnesses that they should have called as witnesses in their case in chief. And again, that probably would be better be ruled upon as it comes up during the course of the trial.

MR. CALIEL: I would concur, Your Honor.

THE COURT: Okay. Thank you.

MR. GAZALEH: Number ten, Your Honor, we're making a request that the State at some point prior to the trial provide us with a statement of the aggravating circumstances that they intend to rely upon in the event that we do have a second phase of the trial. We have -- typically in the past we have had an agreement with the State where we would have the statement provided to us maybe two weeks prior to the guilt phase, the guilt/innocence phase of the trial. I don't know whether Mr. Caliel and I can come to an agreement on that, certain time limit prior to the trial and we would be obligated to

provide them with our mitigators at the same time.

THE COURT: Correct.

MR. CALIEL: Your Honor, is my common practice and as with Mr. Gazaleh I handle capital litigation beforehand upon agreement if they are amenable to providing the mitigators and if the Court wants to set a deadline, and I understand both mitigators and aggravators, if evidence changes in the meantime obviously we'll give advance notice and we would ask the same from defense counsel. But I can agree to a time frame and will provide those to the defense, and if they provide us the mitigation as well.

At this point in time we have filed our notice of intent to set the death penalty and request for the mental mitigation experts and things of that nature. I understand based upon conversation with counsel that that may be ongoing, however, we're well beyond the 30 day timeframe that is required under the statute and he would just ask as soon as possible that information because that could delay possible penalty phase litigation.

THE COURT: Okay. Is there a date y'all can agree on at this time? He's set for final pre-trial May 8th.

MR. GAZALEH: Your Honor, we have -- I think two weeks -- as we continue through our discovery, I think it becomes apparent what the aggravators may be, so I think two weeks before the guilt/innocence phase should be plenty of time. Obviously as we develop our mental health we will provide that to the State as we get it. I'm not going to wait two weeks before the trial to get that to the State. If I have an expert that I intend to call as a witness I will do that well before the two weeks before the trial, but, that is ongoing, Mr. Caliel is correct.

MR. CALIEL: Your Honor, if possible and if this is amenable to counsel perhaps we schedule April 1st deadline for both sides to submit to each other aggravation and mitigation, any additional witnesses that have not previously been listed that pertain to the penalty phase. I know that Mr. Gazaleh and I perhaps will be in another trial in April, another capital case, so

giving us a little bit of advance notice so our co-counsels can be researching or handling those issues while we're doing other matters might be useful.

THE COURT: Okay. I'll give you a deadline April 1st with the understanding that if something arises that that deadline becomes not attainable, that y'all can let me know and we can move it a little bit.

MR. GAZALEH: Thank you, Your Honor.

Number 11, Your Honor, I filed a motion to prohibit argument and/or instruction concerning First Degree Felony Murder. The State has charged in their information premeditated First Degree Murder and our motion is they not be allowed to argue felony murder, that is not the state -- that is not the current state of the law in Florida but we're moving to prohibit felony murder from being argued in any event.

THE COURT: Okay.

MR. CALIEL: And Mr. Gazaleh is correct, it's not the current state of the law. The State has charged First Degree Murder and we're availed the opportunity to argue either

premeditated murder or felony murder before the jury.

THE COURT: All right.

MR. GAZALEH: Number 12, Your Honor, in the event the Court does allow the jury to be -- to be instructed on First Degree Felony Murder, I would ask that there be a special verdict form where they would choose between premeditated murder and felony murder. Again that does conflict with the current state of the law in Florida but we would ask that the verdict form provide the jury with the option of premeditated or felony murder.

MR. CALIEL: Actually, Your Honor, it is my practice in the felony -- when felony murder is a possibility, because it is one of the aggravating circumstances that the State will intend to argue at penalty phase if we get to that point, what my request is typically the Court and counsel is there be interrogatory under First Degree Murder and that the jury be allowed to check premeditated felony murder or both, the jury has the availability to mark both if they believe both, it was premeditated and then

also during the course of the enumerated violent felony. I think that is useful and I would make that request because then there is a finding beyond a reasonable doubt as to one of the aggravating circumstances that we're going to be alleging at the penalty phase.

THE COURT: That's not what you're asking, correct?

MR. GAZALEH: Actually --

THE COURT: You're asking either or?

MR. GAZALEH: Either or, yes.

THE COURT: Not what we've been -- I just had one where they were given the option to mark either one or both of those choices, so okay.

MR. GAZALEH: 13, Your Honor, is motion for cut off for any future motions in limine. I would be asking for approximately two weeks prior to the guilt/innocence phase of the trial so we don't have any last minute motions in limine, other than newly discovered information, anything that would be known or known to either side prior to the trial I think we ought to be required to provide any motions in limine to the Court

and to each other two weeks prior.

MR. CALIEL: Your Honor, I don't have a problem with that cut off date with the stipulation if for whatever reason perhaps a late listed witness couldn't be deposed until -- and in that interim and something comes up during the discovery process we believe is important to preclude or get a pre-trial ruling on that, we at least be availed the opportunity to argue that if that comes to light in those two weeks prior to trial.

THE WITNESS: The same with the defense of course.

MR. GAZALEH: Absolutely.

THE COURT: Okay. So two weeks before would be two weeks before the trial date would be April 21st.

MR. GAZALEH: Yes, Your Honor.

MR. CALIEL: Yes, Your Honor. Well, our trial date is.

THE COURT: Did I do that wrong?

MR. CALIEL: Trial date is May 12th, so it would be April 28th.

THE COURT: April 28th. I apologize.

MR. GAZALEH: Number 14, Your Honor, is demand for notice of intent to rely on hearsay, this is specifically regarding the second phase of the trial. Since during the sentencing hearing the State does have the opportunity to provide certain hearsay information during the sentencing hearing, I would just be asking for notice of any hearsay that the State would be relying upon during that hearing so that I would have an opportunity to review it and possibly rebut it if there is any possible rebuttal, so if there are any documents or statements the State intends to use I would like them to be provided to me prior to the hearing so I would have an opportunity to know and see what that is.

MR. CALIEL: And I'm a little confused, the hearing, are we talking about penalty phase Spencer Hearing?

MR. GAZALEH: Both, penalty phase, Spencer Hearing, anything that the State would intend to use judgment and sentences, documents, arrest and booking reports.

THE COURT: You're not talking about

guilt phase. Penalty phase and anything after that.

MR. GAZALEH: Yes, penalty phase, Spencer Hearing, anything like that.

MR. CALIEL: Obviously we'll provide upon request of counsel any judgment and sentences we intend to introduce, I don't believe they are hearsay because they are exceptions to the hearsay rule based upon their status itself, I'm familiar with a lot of the case law when it deals with Crawford and confrontation issues when it comes to prior to Crawford there would often times be hearsay evidence from detectives about circumstances of prior violent offenses, things of that nature. I think there is a legal pitfall that could perhaps come up in light of Crawford if we introduce what has traditionally been introduced in the past during penalty phase. So we'll deal with that and I'll provide counsel. If I do intend to introduce any hearsay it will be hearsay that is either excluded from the hearsay rule or there's some sort of exception to it because I do not want to have

that become an issue for appellate purposes. So particularly usually comes up with prior violent offenses and I will let counsel know that the detectives have already been contacted, Detective Parker is one of the prior offenses and we're making efforts to get the most recent locations and availability of prior victims that they will be able and available to testify themselves as to what happened versus having hearsay come in through detectives as to the facts and circumstances. So we're working on that. Those cases are back from the early 90s and we will get that information to counsel as soon as possible.

THE COURT: Okay. So they're agreeing to that.

MR. GAZALEH: And number 15, this is probably going to be another one that probably have to rule on as it comes up, but objection and motion to preclude improper closing arguments, I think we'll just have to wait and see how that -- how the trial progresses.

THE COURT: All right.

MR. GAZALEH: Your Honor, 16 is probably one that's premature. I filed a motion to compel DNA evidence. I really need to file the request for the State to provide me with certain documents before I move to compel them, so there is no need for you to rule on this one just jet.

THE COURT: Okay.

MR. CALIEL: For the record I've spoken with Mr. Gazaleh about this. If he gives me a listing of items that is necessary for discovery process, traditionally what we will do is obtain a disk from the FDLE analyst that contains some of that information, some of it is so voluminous they can schedule an appointment, either counsel or independent experts, if it's necessary, to meet with FDLE at their facility to review the documents if necessary. So once we get that listing I'll get that to Mr. Gazaleh as soon as possible.

THE COURT: All right.

MR. GAZALEH: Your Honor, number 17 is a motion for trial court to refrain from commenting on ID evidence. I'm just going to withdraw because I'm trying to think of an

alternative way for the Court to make a clean record and I can't think of one, so I'll just withdraw that motion all together.

THE COURT: Okay. So you may refile some amended motion of some sort?

MR. GAZALEH: No, Your Honor, I've tried a case and tried to argue that motion and for the life of me I cannot figure out a way that the record can be clear about who the witness is talking about if you don't do what you've been doing in the past. So I'll just withdraw that one.

THE COURT: Number 17 is withdrawn.

MR. GAZALEH: Thank you. Number 18 is a motion for the Court to direct the clerk of court to limit perspective jurors' access and exposure to pre-trial local media coverage prior to jury selection.

This has come up in the past and obviously going to come up in this case where the jurors some times bring newspapers folded underneath their arms reading them in the jury room just before they come into the -- just before they come into the courtroom for jury selection. And I have no doubt the

weekend before this trial there is going to be plenty of news between the newspaper and television. I'm going to ask the Court to -- there is a suggestion in this motion, I'm going to ask the Court to order the clerk to at least follow most of these suggestions about trying to get the jurors to not educate themselves about this case prior to coming to the courthouse on Monday before jury selection. I know we're not going to have much luck, but I'm going to do the best I can to have some jurors that don't educate themselves before they come in court for jury selection on Monday.

THE COURT: Okay. I know that they do take newspapers from them if they bring them, if there is anything not the newspaper in its entirety but the section that would contain an article and take those from them until they are needed again and it won't affect anything.

As far as a recorded message, I don't know, I'll have to talk with the clerk. I'm not sure what's on their message. Do you know what's on their message?

MR. GAZALEH: Well, I've had jury duty before so there is -- there is a message, I don't know if it's something they could change from week to week, but I mean, it may be something they could change the week of this jury selection and say, maybe not real case specific, but real generic, it would be a good idea not to watch TV news or read the newspaper this weekend to educate yourself on any criminal cases or --

THE COURT: Okay. I'll look into that.

MR. GAZALEH: I think we could work with the clerk and maybe develop something that they could put on their recording if it's something they could change from week to week.

THE COURT: Okay. I would think there may be some work being done on that now for some cases that are scheduled prior to this but I don't know.

MR. GAZALEH: Sure. I think we at least ought to give it a try because it's going to be difficult to pick a jury in this case anyway but we have to give it a shot, Your Honor.

THE COURT: Okay.

MR. GAZALEH: Number 19. Number 19, Your Honor, I know we've argued this before, is a motion to produce the State's written protocol for seeking the death penalty. Basically Florida is a death penalty capital of the United States and it seems like the Fourth Circuit is the death penalty capital of Florida. And I don't know that the Fourth Circuit has a death penalty written protocol but if there is one I'd ask that it be produced so that we can review it and see how the death penalty is applied in the Fourth Circuit. It doesn't seem to be done on a basis that is consistent or uniform.

MR. CALIEL: Judge, I'm not sure how to respond to the last comment by counsel. What I can say is the State's written protocol in reference to when we do not seek the death penalty is Florida Statutes 921.141 so there -- in addition to Florida Law there is no additional written protocol within the Fourth Judicial Circuit as to who, when and how the State will seek the death penalty. We are obliged and we've taken a sworn oath

to only seek the death penalty when appropriate under Florida Law. So I'd refer counsel to the Florida Statutes for that purpose.

THE COURT: All right. So there is nothing in writing to provide to them?

MR. CALIEL: That is correct, Your Honor.

THE COURT: Okay.

MR. GAZALEH: Number 20, Your Honor, is motion to exclude gruesome and inflammatory photographs. There are other ways that we can for certain things like identification, or for the Medical Examiner to describe injuries and that sort of thing. I don't think it would be a necessity for any photographs or any gruesome or inflammatory photographs to be exposed to the jury for anything other than inflaming the jury or causing sympathy or outrage.

So I'm putting the State on notice at this point that we're moving to exclude any inflammatory photographs from the trial. So if it comes up, obviously we will object as they come up, but again we would be

stipulating to the ID of the victim. For whatever other purpose the State might want to introduce photographs of the victim in this case, I think there are alternative ways to prove whatever issues that they may have or whatever elements that they may need to prove without introducing photographs. So I would submit to the Court there's no reason that any inflammatory photographs need to be provided. So that's what I have for number 20.

MR. CALIEL: Your Honor, I would respectfully disagree with counsel and object to the defense's motion. I would probably suggest to the Court and counsel that at a date closer to our trial date that a pre-trial hearing would be conducted in reference to the autopsy photographs and scene photographs which we intend to introduce so that the Court can make an independent determination as to each photograph's individual relevance. Because obviously it is not the State's intention to introduce any photograph other than for the evidentiary purpose to prove specific

injuries or specific acts that the State would establish. In particular in this case we do anticipate that heinous, atrocious and cruel aggravating circumstance would be one that we would be seeking when it comes to the death penalty. And that the nature, the number of the severity of the injuries are extremely relevant when it comes to proving HAC.

In addition to that and trust me the State of Florida does not enjoy looking at these pictures any more than anybody else would, but there are going to be specific injuries to the victim's genital area which are extremely relevant in proving the sexual battery count. They are horrific to say the least, but they are extremely relevant. And regardless of the prejudicial or, as the defense would put it, inflammatory nature of those photographs they are extremely relevant, and the State is entitled to prove our case using this evidence.

And so I would suggest perhaps maybe the week before trial a separate evidentiary hearing be conducted once we have narrowed

the scope of what autopsy photographs or scene photographs we intend to introduce so we can go through each photograph one by one so that counsel can make their arguments as to why they believe they're inappropriate. We will make our arguments as to why they are relevant and then the Court can lay an adequate record as to the admissibility and relevance of each of those photographs.

THE COURT: I think that's a good way to proceed. As a general rule there will be some which you will agree to.

MR. GAZALEH: Sure.

THE COURT: And that you would not classify as gruesome or inflammatory and that we wouldn't have to spend much time on.

And the State is aware they can't produce multiple photographs showing the same exact thing over and over again, so we should be able to narrow it to appropriate and relevant photographs, and we can do that the week before trial when you feel like you're totally ready to make those decisions. So we'll make time for that a little bit later on in our scheduling some time the week of

May 5th, we'll perhaps even the final pre-trial day we'll figure that out.

MR. GAZALEH: Thank you, Your Honor.

THE COURT: Okay.

MR. CALIEL: Thank you, Your Honor.

MR. GAZALEH: Number 21, Your Honor, I prepared a proposed pre voir dire instruction for the jury. I don't think there is a standard pre voir dire instruction, so I got one for the Court's consideration.

Number 22 is --

THE COURT: Wait a second.

MR. CALIEL: Your Honor, pre voir dire instruction to the jury members, and I'm trying to think back, I do not believe I have litigated a capital case in front of Your Honor beforehand, and I don't know if Your Honor has a specific instruction that you have used in the past that I just think that perhaps maybe prior to voir dire the parties and the Court can see if there is anything necessary, especially because one of the things that I know we try to do as well as maybe get a brief summary of the facts as well that we would incorporate to if possible

sort of jog any perspective jurors' memory as to whether or not they have any pre-trial publicity as to this particular offense. So perhaps we can discuss all those things at the same time because, like I said, I'm not aware if Your Honor had a specific standard set that you had used in the past or not.

THE COURT: I do, I have a standard one. The standard in the sense that a great deal of it is the same but it's of course case specific as to the facts, as to the courtroom personnel I introduce them to the courtroom personnel as well as to the defendant and the attorneys for the State and defense. And then there is some information in there regarding the death penalty. So if you would like to contact Miss Lotos, sorry, she can get you a copy of the last one we used. Like I said, it is somewhat case specific but the majority is -- y'all can review it, I'm willing to make any changes that you suggest. And certainly, the facts scenario we will agree upon before I read that to the panel if those are the appropriate things to be telling the jury. So you can look at it --

MR. GAZALEH: Sure.

THE COURT: -- see if it meets your needs. If it doesn't I'm happy to listen to argument to change it.

MR. GAZALEH: All right. That will be fine, Your Honor. Now number 22.

THE COURT: Okay.

MR. GAZALEH: Number 22 requests voir dire after any potential guilty verdict to determine whether or not the jury's attitude has changed in whether or not they could continue to be fair and impartial with regard to any potential second phase of the trial. That is what it is.

MR. CALIEL: Your Honor, we would object. We believe it's inappropriate at that juncture to communicate with the jury about that, that we should outline any of our concerns and ask our questions prior to the jury being sworn.

THE COURT: All right. Thank you.

MR. GAZALEH: 23 is motion in limine regarding other crimes evidence. I imagine the State if they intend to have any Williams Rule they will -- I'm sorry, I'm ahead of

myself.

THE COURT: No, that's it.

MR. CALIEL: It's the Williams Rule.

MR. GAZALEH: Oh, yeah, okay. I'm sorry, I flipped too many pages.

THE COURT: Motion in limine concerning other crimes evidence.

MR. GAZALEH: Yeah, I'm sorry, I went one page too many.

Yes, so I assume that the State will be providing Williams Rule notice if they intend to introduce any Williams Rule evidence. So that's basically what my motion asks for, that they provide us with any notice if they intend to use any Williams Rule evidence.

MR. CALIEL: Your Honor, Mr. Moody and I are evaluating, there are two forms of potential other crimes, wrongs or bad acts evidence that we're evaluating at this point in time as to whether or not we're going to seek to introduce them. One is obviously the defendant's prior record and convictions for acts that may tend to establish elements of the offense. Another, and we've recently tendered discovery to counsel in reference to

this, is some information and evidence that was obtained off a computer seized during the course of the investigation. And the relevance of those things which I guess may be qualified as either prior crimes or bad acts, in establishing those relevance. We're evaluating that. As soon as we've made our decision as to whether or not that evidence is relevant and tends to prove material elements of our case, we'll file the appropriate notice to counsel.

THE COURT: All right. Thank you.

MR. GAZALEH: Your Honor, number 24 is motion for individual and sequestered voir dire.

Your Honor, we always file this but in this case, in particular, Your Honor is well aware of the amount of pre-trial publicity that's gone on in this case. I think this week alone there has been articles in the newspaper and on TV. I've been avoiding it but my friends and family keep telling me every day they've seen something somewhere written or broadcasted about this case. And I suspect as we get closer to the trial it

will be intensified even more.

I think in this case in particular the potential for having jurors hear things during the course of open voir dire from other jurors that may taint the entire jury pool is -- it's a very high risk. And I think if we don't do individual voir dire in this case that you -- that we run the risk of very early on or even worse, very late in the day wasting an entire jury pool because one person gets tired and says something that could ruin the whole jury pool.

And besides that, Your Honor, I've seen too many times where some smart-aleck during the course of jury selection just says something to get out of jury duty, and is liable to say just about anything. And we're going to have too many jurors and this case is going to take too long to pick a jury and just to have that risk with this case with this much pre-trial publicity to have an open jury selection, I think we run the risk of maybe having to pick this jury multiple times or at least trying to pick this jury multiple times if we don't do a sequestered jury

selection in this case.

MR. CALIEL: Your Honor, I don't necessarily have an objection to individual sequestered voir dire when it comes to pre-trial publicity issues. In particular, one concern that the State of Florida has, a lot of the media coverage or pre-trial publicity related to this case, the headlines or lead into the story sex offender who kidnapped a little girl from Wal-Mart. As the Court is aware, Mr. Smith's sex offender status is not an element of the offense, it's not something that's even an aggravating circumstance under Florida Law in seeking the death penalty. And I believe it is valid argument by the defense that if any juror is aware of the fact he's a sex offender would be similar to a juror in an armed robbery case knowing that the defendant is a convicted felon before they even get to hear the facts and circumstances of the case.

So when it comes to the pre-trial publicity I would concur with Mr. Gazaleh, I wouldn't want an individual juror saying well, what did you hear about the case in

front of the entire panel? Well, I heard Mr. Smith is a sex offender and he was let out of jail two weeks before or three weeks before this alleged crime occurred because there is the risk of them poisoning the other members of the panel. However, I do believe there is an inherent benefit in bifurcating the proceeding and dealing with the pre-trial publicity and narrowing the scope down to those jurors whom we know can sit as jurors but then going into open voir dire with the remainder of the panel because often times, as the Court and counsel are aware, when we're discussing issues such as the death penalty or proof beyond a reasonable doubt, things of that nature, that often times when other juror members hear another juror's response in regards to the law or circumstances somehow jogs and brings up information they may not yet have come forward with.

And so while I agree that we have to thread very lightly when it comes to dealing with pre-trial publicity, I'm not sure if I'd agree to have each and every juror

sequestered throughout the entire process because I think that limits our ability to gain valuable information from perspective jurors.

THE COURT: What I typically do and I think it may even be in opening remarks, I'm not sure, but at some point I do ask the jury panel if anyone, first of all, knows anything about the case because there could be people on the panel that actually know some of the witnesses or those kind of things. So we find that out but also the media coverage.

And I have -- I tell them not to say anything, to only raise their hand if they think they know anything and to raise their hands. And we mark down the number and names. Then we bring them one by one to the jury room and question them individually on those specific issues.

If that's all you're asking for, that seems to work very well. If you're asking for more than that I haven't seen that done but --

MR. GAZALEH: Well it could be more than that. I mean, it depends, I mean, that still

could take quite a bit of time.

And I'll tell you, Your Honor, I tried a case a couple years ago where the case where the woman was forced off the Buckman Bridge and we had 75 percent of the jurors that heard about that case. So we ended up with -- and we didn't have anywhere near the size panel because that was a six-person jury, we didn't have nearly the number of jurors that we had -- that we're going to end up having in this case.

And so I suspect we're going to have a lot of folks that we're going to have to talk to individually for some period of time.

THE COURT: We may. And certainly you can each ask whatever questions you feel need to be asked. And they can be advised that they're not to speak about anything with the other jurors until after their case is over. But I think it works pretty well.

It may be that we have to individually talk to a lot of people. I don't know. We always think it's going to be a lot, it's usually not as many as we think it is. In this case it may be, I don't know. So --

MR. CALIEL: And the only thing I might suggest, and I think the Court has a good policy or plan or scheme in place, I was perhaps going to suggest to the Court and counsel that whatever our pool is that we start with, 50, hundred, whatever the number we believe need to be, that before we bring them all into the courtroom as a group for the Court's general instructions and things of that nature that we've discussed briefly here that perhaps maybe we do individually one by one talk to them about publicity before we even get them into the room because of the fact that if something comes up, and it maybe inadvertent, I'm sure a perspective juror may not say something in violation the Court's instructions, but I have seen before comments being made inadvertently in reference to either to their knowledge or to something they saw on TV or something of that nature. And because I think there are a lot of inflammatory and prejudicial things that have to do with the defendant, the facts and circumstances of this case, in addition to that, there's been quite a bit of media

coverage in reference to dependency proceedings for the victim's family since this that may be prejudicial to both sides, one or both sides as well, and I can put a little bit more thought to it if I think of anything that we can bring up, but I'm just envisioning perhaps we might want to do something individually first before we then bring them all in together.

THE COURT: However we can all agree somehow on what the appropriate way to do it is.

MR. GAZALEH: Sure, we can put our heads together.

THE COURT: It's also going to be apparently some publicity regarding some of the laws that are being introduced in the legislature and it seems to tend to some times mention cases, reason that they are asking that those laws be passed. So there's a lot going on, however y'all think we should do it we can come up with a plan that will work, I believe, so whether it be we will do everything individually, I don't think we'll need to do that but we may need to do a great

portion individually.

MR. GAZALEH: All right. Thank you.

MR. CALIEL: Thank you, Your Honor.

MR. GAZALEH: The next motion, Your Honor, is number 25, motion to prohibit the State from using peremptory challenges to systematically exclude death scruple jurors who are not excludable for cause.

And this motion, Your Honor, we're arguing that the jurors who can follow the evidence and who are not challengeable for cause but who have some concern regarding the death penalty should not be systematically excluded with peremptory challenges.

Mr. Smith has a right to have a jury that is a cross section of the community and that would include people who are not crazy about the death penalty. But I will tell the Court this is contrary to the current authority in the State of Florida.

MR. CALIEL: That is correct, Your Honor. Death scruple jurors are not a protected class and therefore, the State does not need to give any death scruple neutral reason as to striking a juror. So we would

object.

THE COURT: All right. Number 26.

MR. GAZALEH: 26, Your Honor, motion for additional peremptory challenges. I think we can wait until I run out of peremptory challenges before you have to rule on that.

THE COURT: I think so.

MR. CALIEL: We'll agree.

MR. GAZALEH: Number 27, motion to prohibit use of juror criminal records or in the alternative for the State to disclose criminal records to the defense. And in the past the State has been willing to do that, to provide us with criminal records of jurors before we begin jury selection. So if they're willing to do that in this case that would be acceptable.

MR. CALIEL: Yes, Your Honor, it is my policy, we get the perspective jurors' JSO criminal records obtained and it is my policy in addition to those records I have our support staff then also pull up photographs and detailed record of the -- of whatever is in that background so that both sides are aware of what the facts and circumstances may

be as well as photographs to verify the identity of that particular individual. We'll get those packets prepared. Some times it takes us a little into the jury selection to get the entire packet but we'll have a copy for defense counsel so we can share all the same information.

THE COURT: Okay. And by the way, I didn't think about this until a minute ago but we may be trying this case in a different courtroom, in 407.

MR. GAZALEH: I figured we might need a bigger courtroom.

THE COURT: We'll see but keep that in mind. And that allows us to bring in a bigger panel of jurors as well for the part we do with the jury panel all together.

MR. GAZALEH: Right. Thank you, Your Honor.

Number 28, Your Honor, in that one we're asking for a bifurcated jury selection so that we wouldn't death qualify guilt/innocence of a jury. We're asking for separate juries for guilt/innocence and for the penalty phase.

MR. CALIEL: Your Honor, contrary to the State of Florida current status of the law and we would object.

THE COURT: All right. 29.

MR. GAZALEH: Number 29, motion to declare Florida capital sentencing procedure unconstitutional under the Ring versus Arizona decision and that is the decision that says basically that a jury has to determine facts necessary to impose the death penalty. In Florida the Courts make the ultimate decision or ultimate finding of facts on aggravating factors, not a jury. And that is contrary to Ring.

MR. CALIEL: Your Honor, that has been litigated to the Florida Supreme Court and is currently not the status of the law, so we would object.

THE COURT: All right. Number 30.

MR. GAZALEH: Number 30, Your Honor, we would submit that the Court should prohibit any reference to the jury's role as being advisory or a recommendation to the Court. It would or at least if those comments are used that the Court always follow that up by

saying that the jury's recommendation has got to be given great weight. There should be nothing that would -- that should give the jurors the impression that their decision is anything but significant. So that's what that -- that's what that motion asks for, that either they not be told it's an advisory opinion or that they be told every time it's mentioned that the Court has to give it great weight.

MR. CALIEL: Your Honor, we would just rely on the status of the jury instructions when it comes to this as defining the jurors' role. I think the Florida Supreme Court has done a very adequate job in defining what the jury's role is, and then what the Court will do with said recommendation.

So I think as long as everybody agrees to adhere to the standard jury instructions in making argument I think we should be fine.

THE COURT: All right.

MR. GAZALEH: I think part of my argument for 30 I just argued 31, is alternative argument.

THE COURT: Okay.

MR. GAZALEH: So that's part of the same argument. Go onto 32 at this point.

Number 32 asks that the mitigating factors that are some times referred to as nonstatutory, catch all mitigating factors, that they not be referred to as nonstatutory during the course of the trial, that they be referred to as the I guess the nonenumerated, nonenumerated mitigating factors. I don't want the jury to get the impression that they are any less significant because they, the jurors, could decide they are as significant as anything. So what I'm asking for in that motion is they be referred to as none enumerated mitigating factors, not nonstatutory mitigating factors as we refer to them, but as you will see in the next motion I refer to them as the nonstatutory mitigating factors myself. It's a hard habit to break but they are nonenumerated mitigating factors, not nonstatutory. So I'm asking as best as we can to refer to them as nonenumerated, not nonstatutory.

MR. CALIEL: Your Honor, I believe in the true sense of the word calling them

nonstatutory is appropriate because the statute discusses how anything can be used as mitigating factors and what we commonly refer to catch all mitigation. So I don't have an objection. I don't think I've ever used the terminology nonstatutory or nonenumerated, either one referring to this, it's just they are mitigators, there are aggravators. And I typically leave it at that. So I don't have an objection to try to make sure as long as Mr. Gazaleh doesn't try to violate his own motion.

THE COURT: I don't think there is any language like that in the instructions, is there?

MR. GAZALEH: I think you're right, they're not, because it is any other -- any other thing that you consider to be mitigation, so...

THE COURT: Okay. Well, Mr. Caliel, on behalf of the State has agreed not to use that term.

MR. GAZALEH: He is probably more artistic than I am when he is talking.

As I said, in number 33 I violated my

own request, but it's a motion for jury instruction delineating all mitigating factors.

What I have done some times is, and I'm asking to do it in this case, is as we identify the mitigators when we do do the jury instructions in this case I will ask the Court to delineate each and everyone of the mitigators that we present evidence of during the second phase of the trial and have them all as part of the jury instructions. So if I present evidence of ten mitigators, I'll ask the Court to have in the jury instructions each and everyone of those as part of the instruction.

MR. CALIEL: And, Your Honor, I believe this is inappropriate. And my argument in reference to that is there is going to be the mitigating circumstance, any other factor that the jury may believe mitigates the imposition of the death penalty.

I believe what Mr. Gazaleh is requesting, and correct me if I'm wrong, when it comes to this motion, motion 33, is that he wants each bit of evidence that would fall

under that mitigating circumstance to be specifically enumerated out and I believe that's improper. Would be the same as me asking for aggravating circumstances every bit of evidence that falls under heinous, atrocious and cruel or every bit of evidence that establishes this is felony murder or he had multiple prior violent acts or whatever it may be.

He can argue those facts of evidence when he presents his argument to the jury, but the mitigating factors is the one which considers all those pieces of evidence as mitigation. And that would be our argument.

MR. GAZALEH: Maybe I can make myself more clear. I think if I present evidence that he was a good son to his mother, which has been determined in the past to be a valid mitigating factor, what I would be asking is that to be enumerated as mitigator and for the jury to consider whether to be -- to be charged that that is a mitigating factor that they can consider. Because what that does if that is a valid mitigator, which case law says that it is, if you just say any

other mitigating factor, what you do is you devalue that to the jury, you just lump it in with everything else and it devalues it to the jury. But if it's a valid mitigator it ought to stand on its own and that's what we're asking for, that anything that's a valid mitigator it ought to be -- it ought to be listed in the jury instructions.

And we have actually had cases, I think I tried a case with Judge Arnold where we did literally list and I'll see if I can find the jury instructions for that case, but I think we literally listed each and everyone of the ones -- each of the -- each of the ones that we provided to the State as a mitigator pre-trial, that we presented evidence of, we were able to put on the jury instructions.

MR. CALIEL: Your Honor, I respectfully disagree. I think the converse is true. I think that by enumerating out that he was a good son or that he cared for animals when he was a child or whatever it is, it overemphasizes and gives more value than should these factors.

There is a mitigating factor that has

been enumerated in the statutes. And that what Mr. Gazaleh is asking to do is to specifically list out evidence that falls under that mitigating factor which the legislature has established and we believe that is inappropriate.

THE COURT: Okay. Thank you.

MR. GAZALEH: Thank you, Your Honor. Number 34 is a motion to dismiss and declare the death penalty is not a possible penalty and declare section 782.04 and 921.141 invalid or unconstitutional for a variety of reasons. And I will not go through all of them but I will just highlight the reasons that I think the Court should consider strongly. And those are that one of the reasons is that the aggravators are not listed in the indictment. Two, that the death penalty statutes are so ambiguous that they provide for arbitrary infliction of punishment in violation of the 14th amendment of the United States Constitution. That the burden of proving mitigating circumstances violates the Fifth Amendment and 14th Amendment of the United States Constitution.

That life without parole violates the 8th and 14th Amendment of the Constitution, requiring individualized sentencing based upon the defendant's acts and background. That there is improper proportionality in the imposition of the death penalty. That there's potential for jury override. That nonunanimous verdicts for the death penalty are unconstitutional. That there are no jury findings on the aggravators. That there is arbitrary application of the statute. That there is a proliferation of aggravating factors, there was originally after Profit there were eight statutory aggravating factors, now there are 14 or 15 aggravating factors. So what was once the death penalty was once suppose to be for the worst of the worst, the worst of the worst is now twice as many factors.

So for that reason I would submit that the statutes that provide for the death penalty in Florida are no longer constitutional and should be not applicable in this case.

MR. CALIEL: Your Honor, the Florida

Supreme Court has addressed and rejected all the arguments made by counsel on that motion.

THE COURT: Okay. 35.

MR. GAZALEH: 35, Your Honor, that's a motion declare sections 921.141, 922.10, and 922.105 of the Florida Statutes unconstitutional because the electrocution and/or lethal injection are cruel and unusual punishments. That motion will speak for itself.

THE COURT: Okay.

MR. GAZALEH: I don't think I need to argue that any further.

MR. CALIEL: And, Your Honor, again those arguments have been rejected by the Florida Supreme Court.

MR. GAZALEH: Number 36, Your Honor, I will argue that the death penalty is unconstitutional because unreliability that is for a couple of reasons. One is there have been numerous exonerations and, two, the Supreme Court seems to be vacillating on what is a death penalty case and what is not a death penalty case, especially based on proportionality. Some times armed robbery

case is a death penalty case, some times it's not. Some times a sexual battery case is a death penalty case, some times it's not. Based on those reasons it's unreliable, nobody knows from case to case what the death penalty case is suppose to be. For that reason I'll submit to the Court that it's unconstitutional when it's applied in Florida.

THE COURT: Okay.

MR. CALIEL: Your Honor, again those arguments have been rejected by the Florida Supreme Court.

MR. GAZALEH: Number 37, long memorandum explaining to the Court why we would submit death penalty is unconstitutional as it is now applied in Florida. And I would rely upon that memorandum instead of argument at this point.

MR. CALIEL: And again, Your Honor, I'm aware of all the arguments that are made in the memorandum and they have also been rejected by the Florida Supreme Court.

THE COURT: Okay.

MR. GAZALEH: Number 38, Your Honor,

Florida Statutes 782.04 and 921.141 are unconstitutional because of the treatment of mitigating circumstances. And again that is because of the undue emphasis on certain mitigating circumstances to the detriment of other circumstances. That was kind of what I was arguing before how some are enumerated, then there is the catch all which kind of dumps everything else into kind of a waste basket which gives them very little weight as far as the jury is concerned. And for that reason I would submit that the statute is unconstitutional.

MR. CALIEL: And, Your Honor, the Florida Supreme Court has rejected this argument as well.

THE COURT: 39.

MR. GAZALEH: 39, Your Honor, I would argue that the Florida Statutes 921.141 is unconstitutional as applied because of the arbitrariness and jury override and sentencing. I don't think I need to argue that any further.

MR. CALIEL: That's contrary to the law of the State of Florida.

THE COURT: Okay. Number 40.

MR. GAZALEH: Number 40, Your Honor, I would argue Florida Statutes 782.04 and 921.141 are unconstitutional because they are no longer endorsed by the American Law Institute which was the -- which promulgated the model penal code which basically set forth the standard which Profit used to set up the way that the death penalty was approved after the death penalty was abolished or when the death penalty was found to be illegal in the United States and there was no death penalty. And then it was determined that you could do the death penalty under certain circumstances, then there was the model penal code which set up the formula you could use to do it appropriately, and now it's no longer endorsed by the people that said this is how you should do it.

I would submit to the Court that if they are no longer endorsing it it's not done appropriately. For that reason it should be held to be unconstitutional.

THE COURT: Okay.

MR. CALIEL: Your Honor, it has been endorsed by the people of the State of Florida, Florida Legislature and the Florida Supreme Court. So we would argue that motion should be denied.

THE COURT: 41.

MR. GAZALEH: 41, I would move to declare 921.141 unconstitutional because only a bare majority of the jurors are sufficient to recommend death rather than unanimous verdict.

MR. CALIEL: Your Honor, that issue has been addressed by the Florida Supreme Court and the United States Supreme Court and has been upheld.

THE COURT: Number 42.

MR. GAZALEH: Number 42, Your Honor, I would argue that the death penalty is unconstitutional based upon Evans versus McNeil which was the US District Court of the South District of Florida case decided in 2011 holding that Florida should follow Ring. That was not -- that was not binding on the Fourth Circuit at the time. Still not binding on the Fourth Circuit but based on

the Evans versus McNeil case I would submit that ruling should be followed and that Ring should apply to cases in the Fourth Circuit.

THE COURT: Okay.

MR. CALIEL: And, Your Honor, Mr. Gazaleh has outlined it's not binding upon this Court and has not been endorsed by the Florida Supreme Court as being proper.

MR. GAZALEH: Number 43, Your Honor, it's a motion to declare 921.141(7) unconstitutional, that is the victim impact evidence. We would ask that, A, that the victim impact evidence completely be found to be unconstitutional, that it not be allowed during the trial or that in the alternative that it -- that we have a pre-trial hearing to determine whether or not the specific pre-trial, I'm sorry, specific victim impact evidence in this case that the Court decide on the admissibility of any evidence before it's submitted in the second phase of this trial.

MR. CALIEL: Your Honor, I think the easiest way to address because I believe 43, 44, 45 and 46 all relate to victim impact.

MR. GAZALEH: That's correct.

MR. CALIEL: While it is constitutional we would argue for all of those enumerated motions that it is constitutional allowed by the State. It has been my policy to always prior to presenting the victim impact to produce it in writing, proffer that in a hearing to Court and counsel. And to appropriately present the victim impact as to avoid any prejudicial impact that it may have on the jury's determination, so we would argue that the motions to exclude victim impact are contrary to the law in the State of Florida, but agree to the procedure in which that impact can be provided to the jury and then also to the Court in an appropriate fashion.

MR. GAZALEH: Move on to the aggravators starting with number 47.

THE COURT: Okay.

MR. GAZALEH: Your Honor, number 47 I would move to declare section 921.141(5)(B) as unconstitutional based on it being vague and overbroad, that is the prior violent felony aggravator.

MR. CALIEL: And, Judge, this is contrary to the law of the State of Florida. And in particular actually the Florida Supreme Court has held actually this is one of the most weighty aggravating circumstances and it alone can be sufficient to support the imposition of the death penalty.

THE COURT: 48.

MR. GAZALEH: 48, Your Honor, 921.141(5)(D), I would move to be declared unconstitutional based on the felony murder aggravator which makes the least culpable form of homicide basis for the death penalty.

MR. CALIEL: And we would argue it's contrary to the law in the State of Florida and that felony murder theory has been upheld repeatedly by the Florida Supreme Court.

THE COURT: 49.

MR. GAZALEH: 49, Your Honor, I would submit to the Court that the 921.141(5)(E), the witness elimination which is commonly called witness eliminate aggravator be found to be unconstitutional as applied in the State of Florida.

MR. CALIEL: Your Honor, it has been

upheld in the State of Florida and we do anticipate arguing this as one of our multiple aggravating circumstances in this case.

THE COURT: Okay.

MR. GAZALEH: Number 50, Your Honor, is the especially heinous, atrocious and cruel aggravator, that's 291.141(5)(H), I would allege or I would argue that that is overbroad and vague and doesn't narrow the class of the person eligible for the death penalty as required by the case law in the statutes and for that reason it is unconstitutional.

MR. CALIEL: Again this has been repeatedly upheld and been found to be one of the most weighty aggravators by the Florida Supreme Court and the State will be seeking to utilize this aggravating circumstance as well in this case.

THE COURT: And 51.

MR. GAZALEH: 51, the same argument for cold, calculated and premeditated which is 921.141(5), I believe that's (I), it would be vague, overbroad and doesn't narrow the class

of the person eligible for the death penalty.

MR. CALIEL: Again that aggravating circumstance has been repeatedly upheld by the Florida Supreme Court and is again one of the multiple aggravating circumstances that will be -- the State will be intending to utilize in this case.

MR. GAZALEH: Then the last motion, Your Honor, is number 52, motion to declare 921.141(L) Florida Statutes unconstitutional, victim under the age of 12 as an aggravator because it's overly inconclusive, arbitrary and applies automatically to a huge percentage of the population regardless of the circumstances of the offense. And for that reason it should be declared unconstitutional.

MR. CALIEL: Obviously, Judge, this has been upheld by the Florida Supreme Court, as it should, at any time a child is a victim of a First Degree Murder that it should be one of the weightiest aggravators that the jury should be able to consider in determining whether or not death penalty is appropriate. And we would argue that motion should be

denied.

THE COURT: Okay.

MR. GAZALEH: That's all I have.

THE COURT: That's all of them? And was that the only thing we needed to do today?

MR. GAZALEH: Yes, Your Honor.

MR. CALIEL: Yes, Your Honor, it is.

THE COURT: Okay.

MR. CALIEL: Your Honor, currently we are still conducting discovery in this matter. I believe our last scheduled set of depositions are scheduled out through the afternoon of January 21st, so if perhaps we have an intervening pre-trial date some time following that day, if any issues come up we can address it with the Court. I don't know if you need any more time, Fred, or less time.

MR. GAZALEH: I will need some -- I will need some more deposition dates but we can set them up.

THE COURT: So far they're set through January 21st or February?

MR. CALIEL: Through January 21st. So if we do need some additional dates I do not

have an objection, Your Honor, I know I'm in trial, just rescheduled a trial the short week of February 17th. And so if we wanted to push this off for pre-trial conference either the week beforehand or the week that follows, whatever the Court and counsel's preference is. That may give us enough time to at least handle those depositions then schedule additional discovery.

MR. GAZALEH: Right. There are very few witnesses left to depose and after that I just didn't want to --

THE COURT: So do you want me to use the week of February 10th or February 24th?

MR. GAZALEH: 10th would be fine.

MR. CALIEL: So would be great with the State.

THE COURT: Is there a day that week that y'all prefer?

MR. GAZALEH: Any day is fine with me, Your Honor, so whatever Mr. Caliel likes.

MR. CALIEL: If I may have a moment to check, Your Honor. Any day that week would be fine.

THE COURT: February 12th for pre-trial.

Just to make sure I have this correct, it's May 8th for final pre-trial, May 12th for jury trial, and also May 19th to conclude the trial and if necessary the second phase of the trial. And I did write down that other date.

MR. GAZALEH: April 28th.

THE COURT: April 28th, that's the cut off date for the motions in limine for both the State and the defense unless there is something that arises after that date and the Court will consider that.

MR. GAZALEH: Thank you, Your Honor.

THE COURT: Okay. We are in recess.

(Hearing concluded.)

C E R T I F I C A T E

STATE OF FLORIDA)

COUNTY OF DUVAL)

I, Karen Waugerman, Registered Professional Reporter, certify that I was authorized to and did stenographically report the foregoing proceedings and that the transcript is a true and complete record of my stenographic notes.

DATED this 13th day of August, 2018.

/s/ Karen Waugerman

KAREN WAUGERMAN, RPR

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Filing # 73343490 E-Filed 06/11/2018 09:55:52 AM

IN THE CIRCUIT COURT OF THE FOURTH JUDICIAL CIRCUIT, IN AND FOR DUVAL COUNTY, FLORIDA.

Case No: 2013-CF-5781-AXXX-MA

Division CR-D

STATE OF FLORIDA

-vs-

DONALD SMITH,

Defendant,

PROCEEDINGS taken before the Honorable Mallory D. Cooper, Judge of the Circuit Court, on February 12, 2014, and as reported by Faye M. Gay, Certified Realtime Reporter, Registered Merit Reporter, and Certified Legal Video Specialist.

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ACCEPTED: DUVAL COUNTY, RONNIE FUSSELL, CLERK, 06/12/2018 09:09:40 AM

APPEARANCES:

MARK CALIEL, Esquire,
Assistant State Attorney,
Appearing on behalf of the State of Florida

FRED GAZALEH, Esquire,
Appearing on behalf of the Defendant.

P R O C E E D I N G S

PROCEEDING PAGE

Pretrial.....4

MR. CALIEL: Your Honor, if we could address the case of Donald Smith on page 18 of the morning calendar, case No. 2013-5781.

THE COURT: Page 18, Smith.

MR. CALIEL: Your Honor, may counsel and I approach briefly?

THE COURT: You may.

(Counsel for the State and defense approached the bench for a side-bar conference out of the hearing of the court reporter.)

MR. GAZALEH: Your Honor, for the record, I met with my client yesterday and got his permission to waive his presence for today's hearing and I would ask for a pretrial approximately one month off.

THE COURT: Okay. Would March 19th be okay?

MR. GAZALEH: That's fine, Your Honor.

MR. CALIEL: That would be fine with the State, Your Honor.

THE COURT: March 19th for pretrial.

Now originally there was an April 28th deadline for motions in limine. We can extend that to the next court date, if appropriate.

MR. GAZALEH: Thank you, Your Honor.

THE COURT: All right. Thank you.

(Thus the proceedings ended.)

C E R T I F I C A T E

I, Faye M. Gay, hereby certify that the foregoing transcript is a true and accurate transcription of my Stenograph notes taken at the time and date stated herein.

Dated this 8th day of June _____, 2018.

/S/ Faye M. Gay

_____

Faye M. Gay, CRR, RMR, FCR, RPR, CLVS

Filing # 74016221 E-Filed 06/25/2018 09:09:35 AM

IN THE CIRCUIT COURT OF THE
FOURTH JUDICIAL CIRCUIT, IN
AND FOR DUVAL COUNTY, FLORIDA

CASE NO.:
16-2013-CF-5781-AXXX
DIVISION: CR-D

STATE OF FLORIDA

vs.

DONALD JAMES SMITH,

Defendant.

Proceedings held before the Honorable Mallory D. Cooper on Wednesday, May 7th, 2014, at 9:17 a.m., at the Duval County Courthouse, 501 West Adams Street, Courtroom Number 605, Jacksonville, Florida, before Stephanie T. Lachowicz, Florida Professional Reporter and Notary Public in and for the State of Florida at Large.

ACCEPTED: DUVAL COUNTY, RONNIE FUSSELL, CLERK, 06/26/2018 08:45:48 AM

A P P E A R A N C E S

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Appearing on behalf of the Defendant.

ALSO PRESENT:

Donald Smith

I N D E X

PROCEEDINGS..... 4

N O E X H I B I T S

P R O C E E D I N G S

May 7th, 2014 9:17 a.m.

MR. CALIEL: Good morning, Your Honor.

THE COURT: Just a moment.

MR. CALIEL: Yes, ma'am.

THE COURT: I'm ready.

MR. CALIEL: Yes, Your Honor. The State's prepared to call the case of Donald Smith. It's located on the top of page 10 of the calendar. Case Number 16-2013-5781.

THE COURT: Smith on the top of page 13. I'm sorry. It's on the bottom of page 11.

MR. CALIEL: Oh. On the bottom of page -- top of page 10 is what I have, but I'm sorry. That's the pre-calendar that I get. I apologize.

THE COURT: All right. Thank you.

MR. GAZELAH: Good morning, Your Honor. Fred Gazelah for Donald Smith who's in the courtroom at this time. We talked about having a pretrial sometime in the middle of July. We have a trial date set, and it looks like that trial date's going to be fine. I don't think -- I don't anticipate any problems at this point.

THE COURT: Okay.

MR. CALIEL: Your Honor, the State would

agree. If there's sometime other than Monday the week of July 14th that the Court's available, I think we can anticipate at this point in time completing the majority, if not all, of the discovery by that point in time. There are a couple of out-of-state witnesses that we still need to coordinate travel to go take their depositions, and we'll try to get that accomplished between now and July.

THE COURT: Okay. I mean, if I understood you correctly, it can be any other day that week?

MR. CALIEL: Yes, Your Honor. I will be out of the state until July 14th, but any other day that week will be fine.

MR. GAZELAH: That week is fine. Yes. Yes, Your Honor.

THE COURT: All right. July 16th for pretrial. He's already scheduled October 6th and October 13th for jury trial with the possibility of a day or two the following week and October 2nd for final pretrial.

MR. GAZELAH: Thank you, Your Honor.

THE COURT: All right. Thank you.

MR. CALIEL: Thank you, Your Honor. May I be excused?

THE COURT: Yes. Thank you.

MR. CALIEL: Thank you.

(Proceedings concluded at 9:19 a.m.)

- - -

REPORTER'S CERTIFICATE

STATE OF FLORIDA)

COUNTY OF DUVAL)

I, Stephanie T. Lachowicz, Registered Professional Reporter, Florida Professional Reporter, and Notary Public in and for the State of Florida at Large, hereby certify that I was authorized to and did stenographically report the proceedings and that the transcript, pages 1 through 6, is a true record of my stenographic notes.

I further certify that I am not a relative, employee, attorney, or counsel of any of the parties, nor am I a relative or employee of any of the parties' attorneys or counsel connected with the action, nor am I financially interested in the action.

DATED this 24th day of June 2018.

/s/ Stephanie T. Lachowicz
Stephanie T. Lachowicz
Florida Professional Reporter

Filing # 73343690 E-Filed 06/11/2018 09:58:01 AM

IN THE CIRCUIT COURT OF THE FOURTH JUDICIAL CIRCUIT, IN AND FOR DUVAL COUNTY, FLORIDA.

Case No: 2013-CF-5781-AXXX-MA

Division CR-D

STATE OF FLORIDA

-vs-

DONALD SMITH,

Defendant,

PROCEEDINGS taken before the Honorable Mallory D. Cooper, Judge of the Circuit Court, on July 16, 2014, and as reported by Faye M. Gay, Certified Realtime Reporter, Registered Merit Reporter, and Certified Legal Video Specialist.

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APPEARANCES:

MARK CALIEL, Esquire,

Assistant State Attorney,
Appearing on behalf of the State of Florida

Fred GAZALEH, Esquire,

Appearing on behalf of the Defendant.

P R O C E E D I N G S

PROCEEDING PAGE

Pretrial.....4

THE COURT: Good morning.

MR. GAZALEH: Good morning, Your Honor.

MR. CALIEL: Good morning, Your Honor.

Your Honor, if we could address the case of Donald Smith located on page 11 of the calendar at the top of that page, case No. 16-2013-5781.

THE COURT: Page 11, Donald Smith.

(Defendant present.)

MR. GAZALEH: And for the record Fred Gazaleh for Donald Smith and Mr. Smith is before the Court at this time.

Your Honor, we're here for a pretrial this morning and Mr. Caliel and I have some depositions out of town that we're going to be taking and we talked about possibly getting one more pretrial at the very first part of September.

THE COURT: Okay. We can leave the trial date?

MR. GAZALEH: For right now.

THE COURT: All right. His case is scheduled October 6th and October 13th for trial with the week of October 20th, if necessary. He also has a final pretrial October 2nd.

And when would you like a pass date? Early September?

MR. GAZALEH: Yes, Your Honor.

THE COURT: The first week or the second week?

MR. CALIEL: Preferably the first week, Your Honor. I think that gives us a month out of our anticipated trial date. We have some of the penalty phase witnesses that are being deposed. That's the witness out of state in New York.

THE COURT: Okay.

MR. CALIEL: And we should complete that deposition August 11th, but then the transcripts will be ready towards the end of that month.

THE COURT: So either that 2nd, 3rd or 4th of September. That's a Tuesday, Wednesday, Thursday.

MR. GAZALEH: Any date, Your Honor.

MR. CALIEL: At the Court's pleasure.

THE COURT: All right. September 3rd for pretrial.

MR. GAZALEH: Okay. If anything changes we'll certainly contact your assistant.

THE COURT: Thank you.

MR. CALIEL: Your Honor, may I be excused?

THE COURT: You may.

MR. GAZALEH: Thank you.

(Thus the proceedings ended.)

C E R T I F I C A T E

I, Faye M. Gay, hereby certify that the foregoing transcript is a true and accurate transcription of my Stenograph notes taken at the time and date stated herein.

Dated this 8th day of June, 2018.

/S/ Faye M. Gay

_____

Faye M. Gay, CRR, RMR, FCR, RPR, CLVS

Filing # 75323087 E-Filed 07/23/2018 08:48:53 AM

IN THE CIRCUIT COURT OF THE
FOURTH JUDICIAL CIRCUIT, IN
AND FOR CLAY COUNTY, FLORIDA.

CASE NO.: 16-2013-CF-5781

DIVISION: CR-D

STATE OF FLORIDA

-vs-

DONALD JAMES SMITH,

Defendant.

STATE OF FLORIDA)

COUNTY OF DUVAL)

Proceedings before the Honorable Mallory Cooper, Judge of the Circuit Court, Division CR-D, as cause in this matter came to be heard on Wednesday, March 19, 2014, before Angela M. Mathis, Registered Professional Reporter, Florida Professional Reporter, and Notary Public in and for the State of Florida at Large.

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(904) 358-2090

ACCEPTED: DUVAL COUNTY, RONNIE FUSSELL, CLERK, 07/23/2018 08:50:26 AM

APPEARANCES

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Assistant State Attorney
Appearing on behalf of the State of Florida

FRED GAZALEH, Esquire, Attorney at Law
Assistant Public Defender
Appearing on behalf of the Defendant.

- - -

P R O C E E D I N G S

9:30 a.m. March 19, 2014

THE COURT: Page 16, Donald Smith.

MR. GAZALEH: Good morning, Your Honor. Fred Gazaleh for Donald Smith.

This morning I filed a written motion to continue the trial that's currently scheduled for May 12, 2014. I have previously discussed the fact that I was going to file this motion with the State. I don't believe they've got an objection. And I have discussed it with my client previously and my client consents to me filing the motion.

THE COURT: All right.

MR. CALIEL: Your Honor, Mr. Gazaleh had discussed it with me. While the State will be prepared for trial on May 12th, I understand that there is still work to be done on the penalty phase issues that are at hand in the case for the defense, and we have no objection. We would rather them be fully prepared and deal with all those issues before trial.

THE COURT: All right. I'll grant the motion for continuance. There's no objection by the State.

And had y'all discussed a time to pass the case to for trial?

MR. CALIEL: Your Honor, what I had discussed with Mr. Gazaleh just briefly in the interim since our last court date, I have scheduled another capital murder trial the week of September 15th. So respectfully I would request from the Court either a trial date of August 18th or some time in October to allow me time for that trial to conclude and the penalty phase, perhaps or October 4 through the 13th, either one of those dates is fine with the State.

THE COURT: October 6th.

MR. CALIEL: The 6th or the 13th, whichever is amenable to the Court. With the September 15th trial date, I expect that case with penalty phase would last two weeks, so probably take us into the week of September 29th. I would prefer if the Court is available the 13th just because it would be transitioning from one capital case to the next.

THE COURT: How long is the trial?

MR. CALIEL: This trial or the --

THE COURT: This trial.

MR. CALIEL: I think penalty -- or guilt phase, Your Honor, I'm pretty confident we'll probably conclude it in a week. The only variable in that is of course going to be jury selection and that may take a little bit longer based upon the publicity of

the case to get through the jury selection process.

THE COURT: My only time off this year starts October 23rd or 24th. And I'm not sure that -- if we start on the 13th --

MR. CALIEL: Judge, I could be prepared and I'll be ready on October 8th.

THE COURT: 6th.

MR. CALIEL: October 6th.

THE COURT: And what was your other option, the 18th of August?

MR. CALIEL: 18th of August.

THE COURT: And you already have a capital case set the following week, so that won't work.

Is October 6th all right with you?

MR. GAZALEH: That will be just fine, Your Honor.

THE COURT: All right. I'll strike the case from the May 8th final pretrial and the May 12th and May 19th jury trial dates, and reschedule this the weeks of October 6th and October 13th for trial, and Thursday, October 2nd for final pretrial.

And when would you like an intervening date?

MR. GAZALEH: Your Honor, I think maybe the first part of May.

THE COURT: May 6th, 7th, or 8th, whichever you

prefer.

MR. GAZALEH: Any of those dates would be fine.

THE COURT: That's a Tuesday, Wednesday, or Thursday. Do you have a preference?

MR. CALIEL: Any of those days is fine, Your Honor.

THE COURT: All right. May 7th for pretrial.

MR. GAZALEH: That would be fine, Judge.

THE COURT: Okay. And do we have anything else?

MR. CALIEL: No, Your Honor. I think that's it for today.

THE COURT: All right. Thank you very much.

MR. GAZALEH: Thank you, Your Honor.

(Thereupon, the proceedings as to this defendant were concluded.)

* * *

C E R T I F I C A T E

STATE OF FLORIDA)
COUNTY OF DUVAL)

I, Angela M. Mathis, Registered Professional Reporter and Florida Professional Reporter, hereby certify that I was authorized to and did stenographically report the foregoing proceedings and that the transcript is a true and complete record of my stenographic notes.

Dated this 19th day of July, 2018.

/s/ Angela M. Mathis
Angela M. Mathis, RPR, FPR
Registered Professional Reporter
Florida Professional Reporter

Filing # 76071746 E-Filed 08/07/2018 11:11:02 AM

IN THE CIRCUIT COURT, FOURTH JUDICIAL CIRCUIT, IN AND FOR DUVAL COUNTY, FLORIDA.

CASE NO.: 16-2013-CF-5781-AXXX-MA
DIVISION: CR-D

STATE OF FLORIDA

vs.

DONALD JAMES SMITH,

Defendant.
_____/

PROCEEDINGS before the Honorable MALLORY COOPER, Circuit Judge, Courtroom No. 605, at the Duval County Courthouse, Jacksonville, Duval County, Florida, on Wednesday, September 3rd, 2014, commencing at 9:40 a.m., reported by Sharron A. McLendon, Florida Professional Reporter.

- - -

ACCEPTED: DUVAL COUNTY, RONNIE FUSSELL, CLERK, 08/07/2018 11:45:38 AM
PAGE # 3356

A P P E A R A N C E S

MARK CALIEL, Esquire

Office of the State Attorney

311 West Monroe Street
Jacksonville, Florida 32202

Attorney for the State of Florida.

FRED GAZALEH, Esquire

Office of the Public Defender

407 North Laura Street
Jacksonville, Florida 32202

Attorney for the Defendant.

- - -

P R O C E E D I N G S

September 3rd, 2014 9:20 a.m.

- - -

MR. CALIEL: Good morning, Your Honor.

THE COURT: Good morning.

MR. CALIEL: Your Honor, if we could address the case of Donald Smith. Mr. Smith's case is located on the top of Page 18 of the calendar, case number 16-2013-5781.

THE COURT: Donald Smith.

MR. CALIEL: Your Honor, as Mr. Smith is being brought before the Court, may counsel and I approach on a scheduling matter?

THE COURT: You may.

(Defendant present.)

(Whereupon, a sidebar conference was had out of the presence of the court reporter, after which the proceedings were resumed as follows:)

MR. GAZALEH: Good morning, Your Honor.

Fred Gazaleh for Donald Smith. At this time I would advise the Court that I filed a written motion to continue the trial scheduled for October 16th. My client has consented to my filing that motion.

THE COURT: Okay. I have it right here. Let me just take a look at it.

Is there any objection by the State?

MR. CALIEL: Your Honor, Mr. Gazaleh and I have had conversations about the reasons for the continuance, and the State did not object to this continuance given we have a prospective trial date in mind.

THE COURT: All right. The motion for continuance, there is no objection by the State, and I'll strike the October 2nd final pretrial and the October 6th and October 13th jury trial weeks and the week of Monday, October 20th, which we had set aside, I'll strike that as well.

And I want to make sure I've got this correct. Let me get my -- I believe we've agreed to the week of January 19th --

MR. GAZALEH: Yes, Your Honor.

THE COURT: -- for jury selection.

MR. CALIEL: Yes, Your Honor.

I actually believe the 19th is the Martin Luther King holiday, so it would be that Tuesday the 20th for jury selection.

THE COURT: Correct. January 20th for jury selection, for however many days that takes, the

trial itself with start on January 26th, if there is need for an additional phase, that will be February 12th and February 13th, and the final pretrial date would be January 15th.

Does that all sound correct?

MR. GAZALEH: It does.

MR. CALIEL: It does, Your Honor.

THE COURT: And then when would you like the next intervening pretrial date?

MR. GAZALEH: I don't know that we need one before the 1st of November.

THE COURT: So the 4th, 5th and 6th, any of those?

MR. GAZALEH: Any of those days would work for me.

MR. CALIEL: Yes, Your Honor.

And, Your Honor, just to advise the Court, there is one issue that I've had conversation with counsel, when it deals with the content on the computer, that we may need a pretrial hearing to determine the admissibility relevance of certain items. I think we can schedule the pretrial for November and then select a hearing date sometime either late in November or December to address the issue.

MR. GAZALEH: That's fine.

THE COURT: Okay. So October 4, or excuse me, November 4th for pretrial and to select a hearing date if necessary.

MR. GAZALEH: Thank you, Your Honor.

THE COURT: Thank you.

MR. CALIEL: Thank you, Your Honor.

May I be excused?

THE COURT: You may.

(Whereupon, the proceedings were concluded.)

- - -

C E R T I F I C A T E

STATE OF FLORIDA)

COUNTY OF DUVAL)

I, Sharron Ann McLendon, certify that I was authorized to and did stenographically report the foregoing proceedings and that the transcript is a true and complete record of my stenographic notes.

DATED this 7th day of August, 2018.

/s/Sharron A. McLendon
Sharron A. McLendon, FPR

Filing # 76350947 E-Filed 08/13/2018 02:10:56 PM

IN THE CIRCUIT COURT OF THE
FOURTH JUDICIAL CIRCUIT, IN
AND FOR DUVAL COUNTY, FLORIDA

CASE NO: 16-2013-CF-005781-AXXX-MA

DIVISION: CR-D

STATE OF FLORIDA

-vs-

DONALD SMITH,

Defendant.

STATE OF FLORIDA)

COUNTY OF DUVAL)

Proceedings before the Mallory Cooper, Judge of the Circuit Court, Division CR-D, as cause in this matter came to be heard on the 4th of November, 2014, before Catherine M. Morrow, Florida Professional Reporter and a Notary Public in and for the State of Florida at Large.

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JACKSONVILLE, FL 32202
(904) 358-2090

ACCEPTED: DUVAL COUNTY, RONNIE FUSSELL, CLERK, 08/13/2018 04:12:02 PM

APPEARANCES:

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311 West Monroe Street
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Appearing on behalf of the State of Florida.

FRED GAZALEH, Esquire,
Assistant Public Defender,
407 N. Laura Street
Jacksonville, Florida 32202
Appearing on behalf of the Defendant.

P R O C E E D I N G S

November 4, 2014 10:11 a.m.

(Heard in open Court.)

(The defendant, defense counsel and the State present.)

(Parties sworn.)

* * * * *

MR. CALIEL: May counsel and I approach on a scheduling matter?

THE COURT: You may.

(Off the record sidebar conference.)

(Donald Smith entering the room.)

MR. GAZALEH: We are prepared to go forward, your Honor. For the record Fred Gonzaleh here for Donald Smith. This morning my client and I executed a waiver of sequestration of the jury between the first and second phase of the trial in this case.

I met with Mr. Smith earlier in the week and went over it with him and actually showed him this document this morning and read it with him.

So if I can approach the clerk, we will be filing this waiver?

THE COURT: All right. Thank you.

(Party Sworn)

THE DEFENDANT: I do.

THE COURT: Okay. Thank you, Mr. Smith. Just in regard to this document that has just been filed with the court, your attorney has indicated he discussed it with you fully; is that correct?

THE DEFENDANT: Yes, ma'am.

THE COURT: And do you degree with what is stated in this document?

THE DEFENDANT: Yes, ma'am.

THE COURT: And you understand what that means, that the jury will be sequestered and not be questioned? Do you understand that?

THE DEFENDANT: Yes.

THE COURT: And you agree with that?

THE DEFENDANT: Yes.

THE COURT: Okay. I find that Mr. Smith has knowingly and intelligently entered this waiver because it is in his best interest; is that correct?

THE DEFENDANT: Yes, ma'am.

THE COURT: All right. Then I will sign it.

MR. CALIEL: Your Honor, in anticipation of pre-trial motions we discussed at sidebar with the court's scheduling matters, it is amenable to the state as well as to the court to pass the case

until December 11th for any pre-trial motions that need to be heard at that time.

THE COURT: All right. That will be December 11th at 1:30 for pre-trial and hearing on motions, time and date certain.

MR. GAZALEH: Thank you, your Honor. So you will not need us in the morning?

THE COURT: No. Unless something occurs and you can't proceed, come in the morning and let me know. Otherwise, have witnesses prepared to come at 1:30.

MR. GAZALEH: All right, your Honor. Thank you, your Honor.

MR. CALIEL: Thank you, your Honor.

THE COURT: For the record, also, this case is already scheduled for January 20th for jury selection and January 26th for trial for however long that takes and the possibility -- I think, February -- we changed the dates. February.

MR. CALIEL: Nine and 10.

THE COURT: Nine and 10 for potential penalty phase. Thank you.

MR. CALIEL: Thank you, your Honor.

(Whereupon the proceedings were concluded at 10:25 a.m.)

* * * * *

C E R T I F I C A T E

STATE OF FLORIDA)

COUNTY OF DUVAL)

I, Catherine M. Morrow, Florida Professional Reporter, certify that I was authorized to and did stenographically report the foregoing proceedings and that the transcript is a true and complete record of my stenographic notes.

DATED this 13 day of August, 2018.

/s/Catherine M. Morrow
CATHERINE M. MORROW
Florida Professional Reporter

Filing # 73009238 E-Filed 06/04/2018 10:49:28 AM

IN THE CIRCUIT COURT OF THE FOURTH JUDICIAL CIRCUIT, IN AND FOR DUVAL COUNTY, FLORIDA

CASE NO.: 2013-CF-005781
DIVISION: CR-D

STATE OF FLORIDA

VS.

DONALD SMITH,

Defendant.

_____/

STATE OF FLORIDA)

COUNTY OF DUVAL)

Transcript of Hearing on Motions

Proceedings before the HONORABLE JUDGE MALLORY COOPER, Circuit Court Judge, in open court, at the Duval County Courthouse, Jacksonville, Florida, on the 19th day of November, 2014, commencing at 11:9 a.m., as reported by Gretchen Lee Chatley, Florida Professional Reporter Notary Public in and for the State of Florida at Large.

OFFICIAL REPORTERS
421 WEST CHURCH STREET, SUITE 430
JACKSONVILLE, FLORIDA 32202

ACCEPTED: DUVAL COUNTY, RONNIE FUSSELL, CLERK, 06/06/2018 08:33:38 AM

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MARK CALIEL, Esquire
&
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I N D E X

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CERTIFICATE OF REPORTER 38

(N O E X H I B I T S)

P R O C E E D I N G S

November 19, 2014 11:46 a.m.

MR. CALIEL: Your Honor, the State would call the case of Donald Smith.

THE COURT: Donald Smith, top of Page 14.

(The defendant is present in open court with counsel.)

MR. GAZALEH: Good morning, Your Honor. For the record, Fred Gazaleh for Donald Smith. We're here today to hear a motion or have hearing on motion that I filed, a certificate of conflict and motion to withdraw.

I have set forth what facts that I could set forth in my motion. I cited the rules of professional responsibility that I feel make it necessary for me to file this motion. I would advise the Court that before filing the motion, my office talked to the Florida Bar Ethics Department and it was their advice that we should file a motion to withdraw.

THE COURT: I don't know how long this is going to take, but if you wish, Mr. Smith can sit instead of stand.

MR. CALIEL: Your Honor, I think procedurally, first -- and whether or not it needs to be made

part of the record in open court or whether or not the Court needs to meet in camera with Mr. Gazaleh and the defendant, I think a specific factual basis outlined in the conflict needs to be part of the record for any appellate review.

And I'm not sure if the -- and perhaps the Court can get some feedback on this as to whether or not the boilerplate nature of the motion is sufficient in outlining this specific conflict. But I think that once all the factual circumstances are outlined with the defendant and defense counsel and the Court being present and then whatever information can be relayed to the Court, the next step, which is always a possibility, Mr. Smith has the right to waive that conflict.

And then an inquiry, once he has been fully apprised of the facts and circumstances surrounding the conflict, then the Court can, on the record, inquire of the defendant as to whether or not he intends or has a desire to waive that conflict, because he's has a Constitutional right to counsel of his choice.

And if he believes, after he has been fully apprised of the facts and circumstances to what degree Mr. Gazaleh can outline them, if he's

willing to waive that conflict, then I think the issue is moot at that point.

THE COURT: I don't think the certificate of conflict of motion to withdraw is sufficient for the Court to rule on, so I do think we do have to go to the next step under the rule or under the Statute 27.5303(1)(a), midway through the paragraph, "Once the motion's been filed, the Court shall review and may inquire" -- obviously, I can't just inquire, because you've indicated to the Court it's matters that should not be disclosed on the record at least at this point through your motion or the inquiry.

"So may inquire or conduct a hearing into the adequacy of the Public Defender's representations regarding the conflict of interest without requiring disclosure of any confidential communication."

Then it goes on to say what the Court should do next, but the in camera hearing, I'm not sure, I think it does have to be an in camera hearing based on what you alleged in your conflict and motion to withdraw, but I'm not sure who is required to be present. I know it would be me and I know it would be you.

MR. GAZALEH: Right.

THE COURT: I don't know if it's even your client. I think it is. And the court reporter, I think it has to be recorded --

MR. GAZALEH: I agree with that.

THE COURT: -- for appellate purposes. And I'm not sure -- I know it's not the State, not now anyway.

MR. GAZALEH: I think they agree.

MR. CALIEL: And I do agree with that, Your Honor, at this point in time, but I think that's the next procedural step that we have to hurdle first before we go to any argument or any seeking of a waiver of any potential conflict from the defendant.

THE COURT: So are you prepared to do that today?

MR. GAZALEH: Yes, Your Honor. And it shouldn't take very long.

THE COURT: And so can I excuse the State --

MR. CALIEL: We can step out.

THE COURT: -- but we can do it here with the bailiffs and the clerk with everybody present or --

MR. GAZALEH: Yeah, as long as -- yes, as long as everybody here is either with my office -- well,

anybody that works for the State --

THE COURT: Everybody that work for the State needs to be excused and wait in the hall. I agree with that. I'm not sure --

MR. GAZALEH: She works with us.

THE COURT: She's with you?

MR. GAZALEH: She's a new attorney.

THE COURT: Okay.

(REPORTER'S NOTE: The following proceedings were held in camera and are transcribed herein.)

THE COURT: So for the record, all we have in here now is the security staff from the sheriff's office including Mr. Lawson, who is not a uniformed bailiff; Mr. Smith; Mr. Gazaleh and Ms. Rado representing Mr. Smith; and I do have a staff attorney here.

Do you have any objection to that?

MR. GAZALEH: No, not at all, Your Honor.

THE COURT: And Madam Clerk and the court reporter.

MR. GAZALEH: Right. And Loren Hevesi is the attorney that's with our office.

THE COURT: Thank you. I can't see, but I think that's everyone that's in here.

MR. GAZALEH: I think so.

THE COURT: Okay. So I shall inquire into the nature of the conflict.

MR. GAZALEH: Yes, Your Honor, and I'll tell you what I feel like I can tell you.

THE COURT: And I understand that. That's fine.

MR. GAZALEH: Last Friday it was brought to my attention by one of the attorneys in my office that they had been approached by a Public Defender client that claimed to have some information about Mr. Smith. I don't know what that information is, but I have been led to believe that it's not just necessarily about the facts of this case, that it may involve something else besides that.

Based on the information that the other attorney received, she contacted the Florida Bar and gave them just the general scenario with more detail than I'm able to give you right now, but she gave them a little bit more details, and they repeated several times you need to file a motion to withdraw, you need to file a motion to withdraw.

So based on that, the other attorney contacted Mr. Eler, who is the director of the Homicide Unit, and Mr. Eler advised me that I needed to file a motion to withdraw in this case.

Based on that, I took the time to do some legal research over the weekend that's why I didn't -- I'm sorry. I said it was Friday, but it was actually Thursday afternoon that I found this out, late Thursday afternoon last week.

I brought that to the State's attention Friday morning and I brought that the Court's attention on Friday morning, but Mr. Eler told me it was his opinion, based on what he knew about the scenario, was that we would have a conflict. Whether we have a conflict with both clients, I don't know yet, but at least in my case, there was -- there was a -- a significant appearance of conflict, if there is not one.

I'm trying to think of what else I can tell you besides that. I have done quite a bit of legal research. I don't know if you want any legal argument or not, but those facts -- I don't think I can disclosed anymore without violating confidences.

Now, the biggest problem that I think we have is the State has already told me that they don't care who it is, what it is, they have no intention of using it, but I have an obligation to Mr. Smith to tell him what I know and I have an obligation to

the other person not to disclose what they provided in confidence, so that's why I feel like I'm in the smallest box that I could possibly fit in and that's why we're here today.

THE COURT: Okay. Just looking at a little bit of the case law real quick.

MR. GAZALEH: I don't know if the *Valle* case, the V-a-l-l-e, case is one of the ones you have got there, but that scenario is as close to this case as I have been able to find in Florida.

THE COURT: No, I don't have that. What's the name?

MR. GAZALEH: It's *Valle vs.* -- and I assume it's pronounced Valle, V-a-l-l-e, *Valle v. State*. It's at 763 So. 2d 1175. It was a vehicular homicide case where the -- and it was a Public Defender who filed a motion to withdraw based on a conflict.

In that case, it was taken up on a writ of certiorari, so that they didn't have to try the case and find out later it was a mistake. But what, basically, that case ruled is that, which everybody knows, that the Public Defender's Office is the functional equivalent of a law firm and in that case the appeals court found that the Court

should have granted the motion to withdraw and then sent it back for them to do that.

The facts are a little bit different in that those people were victims in the case as opposed to the scenario that we have at this point, but that's still about the closest case that I could find based on our fact situation.

THE COURT: In that case, the *Valle* case, the Public Defender represented both the defendant and the victims?

MR. GAZALEH: He represented the defendant and had formerly represented the victims on completely unrelated matters. I can give the Court a copy of the case.

(Document tendered.)

THE COURT: I don't see how that's like this case at all, but maybe I'm missing something.

MR. GAZALEH: Well, in the facts, it doesn't help us determine whether this is, in fact, a conflict, but the points are that anything that any other attorney in my office knows, I know, I mean for all intents and purposes. So I think that's why it is relevant. And this was a case where the Court, the Appellate Court, said the trial court did everything they were supposed to do except for

they came up with the wrong conclusion and that's my concern.

THE COURT: Okay. I guess, we'll only here on one motion on one of your client's today?

MR. GAZALEH: That's correct.

THE COURT: If the State's position is that whatever that information is and I don't know what it is and I'm not sure you know what it is either --

MR. GAZALEH: I can't -- I don't.

THE COURT: At this point whatever it is they said they don't care about it, they're not going to use it, that person will not be called as a witness, they don't want to investigate anything else that he's saying might have happened about some other incident not this incident, they just will not have anything to do with it at all, I don't see how and I'm not -- I'm not sure how it effects the other individual, but I don't see how in the world it effects this client, if, in fact, the State's not going to use it, delve into it, investigate it, or anything.

MR. GAZALEH: Well, the way it effects this client is because of the way that I got the information. Whatever information I have, I can't

share that with him.

THE COURT: Why do you need to if the State's not going to use it?

MR. GAZALEH: Because he's got a right to be fully informed of everything that's going on in his case and that is, whether the State's intends to use it or not, that is something that is going on with his case.

THE COURT: Okay. So you have to disclose it to him, correct?

MR. GAZALEH: But I can't because I have a duty to the other client not to disclose confidential information.

THE COURT: How does that effect your representation of this client?

MR. GAZALEH: Only that I can't -- I can't serve Mr. Smith and I can't serve the other client without violating one of their rights to have conflict-free counsel.

THE COURT: Well, how would -- why would you not be conflict-free counsel for Mr. Smith, if -- again, the other gentlemen is a different day a different motion if, in fact, it's filed.

MR. GAZALEH: Right.

THE COURT: Perhaps that is a conflict, but I

don't understand why it's a conflict to Mr. Smith.

MR. GAZALEH: Because even if we withdraw from the other client, I still can't tell him what we learned in confidence, I can't tell Mr. Smith that, so I'm not 100 percent all in on his case.

If I was in, you know, a perfect world or not in the Public Defender's Office I could tell them exactly what I know and I can investigate further to find out what more there is, but I can't do that in this case, because what I would be doing is violating another one of my client's confidences.

There are cases that say in the scenario it's not unusual for both defendants to have a conflict where you would have to get out of both of them. And I can understand where the Court is coming from when you say that, well, the State says they're not interested in using it, so why is that a conflict?

And the conflict is the way I see it is I just can't tell my client about what I know about his case and I really should be talking to him about what he should do about what I know about the case and I really can't, because in order to do that I would be violating someone else's confidence.

THE COURT: You really should be talking to this client about what he should do in response to

the information?

MR. GAZALEH: That's correct, because --

THE COURT: Even -- I'm not trying to get you to tell me what it is. Again, I don't know if you know what it all is, but I'm just thinking out loud.

MR. GAZALEH: Well, I know the State is not interested in this case, because they think they -- or they suspect they know who the other person is. But what happens if the same thing happens and its not that person and that might be somebody they would be willing to use? I've got to tell my client what he should be doing and I can't really tell him what to do without telling him what I know and who it is.

And I'll stand here and tell you, Your Honor, other than the bar telling me that I need to file a motion to withdraw, I don't know what is the right thing to do in this case.

THE COURT: And I didn't hear that when the bar said that that they knew that the State wasn't going to use the information. I don't think they knew that.

MR. GAZALEH: I think that was posed to them by the other attorney.

THE COURT: That may not change their advice, I don't know, but --

MR. GAZALEH: And it didn't. That's when I said they repeated several times that we needed to withdraw that was with a little bit more facts and a little bit more facts and every single time, it was it doesn't matter you need to withdraw or at least file a motion to withdraw. I can't withdraw without the Court's permission.

THE COURT: I wanted to read the *Valle* case, if that's correct case, 763 So. 2d 1175, and I think the only thing really it's not factually similar at all, but I believe your argument is in the last sentence, which is the Public Defender's Office is the functional equivalent of a law firm different attorneys in the same Public Defender's Office cannot represent defendants with conflicting interest.

MR. GAZALEH: That's what we're relying on, yes, Your Honor.

THE COURT: What I don't know also is how we proceed with the State. I'm not going to disclose to the State the substance of this hearing. I'm not going to ask you to disclose any confidential communications. I'm not allowed to nor would I.

MR. GAZALEH: Right.

THE COURT: So I'm not sure how we would proceed with the State being able to argue that there is no conflict.

MR. GAZALEH: I think what they intend to do is discuss a hypothetical with you and argue that if that hypothetical is what the facts are in this case that would be their position. I think that is their intention is.

THE COURT: Well, this is somewhat hypothetical, because I didn't hear much.

MR. GAZALEH: Well, you actually know -- well, that's true you don't know much more than they do.

THE COURT: No, I don't.

Is there anything else that you believe that we should be putting on the record or that I should have for consideration before we proceed to the next step, which is to determine and I can do that.

MR. GAZALEH: Just I don't know if the Court's recently looked at the rules of professional responsibility, but I would cite to the Court Rule 4-1.6, which isn't real specific about our case. Rule 4-1.7, which is pretty specific about the case and that rule says that except for the provisions in Subdivision B, a lawyer must not represent a

client and the ones that apply is the representation of one client would be directly adverse to the other client or if that the representation of one or more clients would be materially be limited by the lawyer's responsibility to another client.

THE COURT: Okay. I'm sorry. Can you say that, again? There were a couple of words I would like to write down.

MR. GAZALEH: Sure.

THE COURT: 4-1.7.

MR. GAZALEH: And it's Subparagraph A and then Subparagraph 1 is the lawyer must not represent a client if the representation of one client will be directly adverse to another client.

THE COURT: Okay.

MR. GAZALEH: And then two, if there is an substantial risk that the representation of one or more clients would be materially limited by the lawyer's responsibilities to another client.

THE COURT: Substantial risk, is that what you said?

MR. GAZALEH: If there is substantial risk, Yes, Your Honor.

THE COURT: It would materially limit the

lawyer's responsibility. Okay.

MR. GAZALEH: And that's 4-1.7(a) 1 and 2.

THE COURT: Okay.

MR. GAZALEH: And then I would cite to the Court Rule 4-1.16, declining or terminating representation. It says that when a lawyer must decline or terminate representation and it's accepted and stated in Subdivision C, which doesn't apply to the fact of this case, a lawyer shall not represent a client -- shall not represent a client nor when representation has commenced shall withdraw from representation of client if their reputation will result in the violation of rules of professional conduct and law.

So that rule is telling me that if I believe that we're violating 4-1.7, then I have to file a motion to withdraw, whether it is before -- I can't take the case if I know before and I have to withdraw if I know after.

THE COURT: Okay.

MR. GAZALEH: And I think that's it.

THE COURT: So without the Court -- because I don't intend on making the determination today on whether or not there is a conflict, without the Court making that determination today, is the next

step for the State to argue or is the next step for Mr. Smith to have a dialogue regarding waiving a conflict if, in fact, a conflict does exist or does that have to be done after the Court says there is, in fact, a conflict?

MR. GAZALEH: I think that waits until after you rule whether or not it is a conflict.

THE COURT: Okay. So do you agree we can go ahead and have the State's argument on a hypothetical just for the Court to consider --

MR. GAZALEH: Certainly.

THE COURT: -- at this point?

MR. GAZALEH: Yes, Your Honor.

THE COURT: And then we would be doing anything else, I wouldn't speak with Mr. Smith today; is that correct?

MR. GAZALEH: Correct, Your Honor.

THE COURT: -- until I have made the ruling?

MR. GAZALEH: Right.

THE COURT: Does everybody agree that's the way to proceed, although you're the only one that has to agree?

MR. GAZALEH: I'll ask Ms. Rado. Do you agree?

MS. RADO: Yes, Judge. I would agree.

MR. GAZALEH: I certainly don't have -- I don't think that would be appropriate. I don't believe that in any way is detrimental to my client if the State comes in and argues a hypothetical.

THE COURT: All right.

So this, Madam Court Reporter, is an in camera hearing that we conducted once the representatives from the State Attorney's Office left. So it's a recording for purposes of appeal, depending on the Court's ruling.

And now we're going to be back to regular recording of this hearing and allow the State to make their argument as to a hypothetical situation.

So the State can come back and I will tell them that I do not intend to ask Mr. Smith anything today.

MR. GAZALAH: Thank you, Your Honor.

(REPORTER'S NOTE: This marks the end of the in camera proceeding.)

(The State is now present in open court.)

THE COURT: Okay. So we have finished our in camera hearing and Mr. Gazaleh has made his argument to the Court as to why a conflict exists with his representation of Mr. Smith.

After that, we agreed that the State could

present their argument, hypothetically, if, in fact, such and such, then there is or there is not a conflict. And I don't intend to rule today. Since I don't intend to rule today, I informed Mr. Gazaleh I wouldn't question Mr. Smith today, because I would have to find there is a conflict before he could waive a conflict. So we've agreed that I would not question him today about the potential of waiving a conflict, if, in fact, a conflict exists.

That's where we are at. Madam Court Reporter has the in camera portion separated out, not literally, but she's -- we know where it is in case it's needed for any purpose and you can go ahead and proceed with the State's argument.

MR. CALIEL: And, Your Honor, and correct me if I'm wrong, Mr. Mr. Gazaleh, I think, hypothetically, the issue that posed the conflict is that there is another client of the Public Defender's Office, who is currently incarcerated awaiting trial, who wishes to provide information against Mr. Smith in some sort of criminal capacity and to what capacity, we do not know.

What I can place on the record at this point in time is the State of Florida has absolutely no

interest in utilizing an inmate witness regardless of their identity or regardless of the charges against Mr. Smith at his trial on January 20th.

We have reviewed all of our evidence and the forensic evidence and the testimony evidence that we have and there is no strategic value or inherent value whatsoever placing a person charged with an offense on the witness stand to testify against Mr. Smith.

And based upon that, we are firmly stating on the record that we have no interest speaking with this client, whomever they may be, and we intend on proceeding to trial January 20th as planned. By doing so, I'm not aware, obviously, of what the Court's prior conversation with counsel is, but when it comes to having conflict in our proceedings, if there is no Public Defender witness who takes the witness stand there would be no conflict, because there would be no limitations on cross-examining that witness.

So we have no interest whatsoever in speaking to that individual and we're basically declining any offers to do so. I'm not sure that any actual conflict actually arises.

THE COURT: Let me just ask, Mr. Gazaleh, I've

got a few cases myself, which I'll review and I'll put on the record later when we conclude or before we conclude, but Mr. Gazaleh did provide the Court with the case of *Valle,* V-a-l-l-e, *vs. State*, 763 So. 2d 1175. It's factually different. It's a case where the Public Defender's Office represented a defendant as well as had previously represented some of the witnesses in the case, but he has grounded his argument on the last sentence on the last page.

In quotes, "The Public Defender's Office is the functional equivalent of a law firm. Different attorneys in the same Public Defender's Office cannot represent defendants with conflicting interests."

And I'll let him respond by telling you their position on what that conflicting interest is, even with the knowledge that the State did not intend to speak to whoever this person is, use him, have him testify, or in any way have contact with him regarding Mr. Smith's case.

So I'll let you respond.

MR. GAZALEH: Thank you, Your Honor. Where that creates a problem, as I see it, is that I have a duty to Mr. Smith to disclose to him what I know

and I cannot perform that duty without violating the confidence of another Public Defender client, which is, according to *Valle*, my client.

And for that reason, I cannot -- let me see how it's -- I cannot be a completely effective advocate without telling him what I know and give him advice on what he should not be doing in the future.

And there is one other case, which I didn't bring a copy of, but it's *U.S. vs. Culp.* It's a Middle District case from 1996, which is 934 F. Supp. 394. And what that says is that the lawyer as an obligation to make sure that the client's Sixth Amendment right to an effective advocate is not violated. And if I can't tell him what I know, I don't know how I can be an effective advocate in this case. And that's the only other thing that I've got to provide.

But there is one other thing. I would like to respond to something Mr. Caliel said earlier. A client doesn't have a Constitutional right to a particular attorney. I think Mr. Caliel said he has the right to have the attorney that he wants to represent him, but there is plenty of cases where the State has moved to disqualify the defense

attorney and the cases are all clear that if there is a conflict that he doesn't have the right to have who he wants. He has the right to have an effective and competent attorney, but he doesn't have the right to pick and choose whichever one he wants.

THE COURT: And what was the second case that you said you didn't have a copy of, if I could just get a cite?

MR. GAZALEH: Sure, Judge. It's *United States vs. Culp*, C-u-l-p. It's at 934 F. Supp. 394 and it's from the Middle District of Florida in 1996.

THE COURT: Okay. Thank you.

MR. CALIEL: Your Honor, my only response to the last argument made by Mr. Gazaleh in regards to his inability to appropriately counsel and confer Mr. Smith based upon his firm's knowledge of this other person, Mr. Smith comes into contact with multiple individuals. He's come into contact with individuals here today. He will probably be shipped back to the jail with other individuals. He will probably be brought back to his holding cell and come into contact with other individuals, both law enforcement and currently incarcerated inmates, all of whom may have an interest in

sharing any conversation that Mr. Smith has with them.

And it's very common and I'm sure Mr. Gazaleh has already had this conversation don't discuss your case with anybody, any visitors who come to see you in jail, anybody over the telephone, the bailiffs when they walk you into the courtroom, and I think a simple admonition to Mr. Smith, shut up, stop talking, and don't talk to anybody about your case or anything else, cures that issue with creating, you know, how this issue came about.

And so without even divulging who it was that came forward with this information and divulging that person's confidence, a common attorney admonition to their client, which is do not discuss your case or anything with anybody, because everybody you come into contact with may have an interest in sharing the substance of those conversations, I think adequately represents the interest of Mr. Smith without divulging the confidence of the other Public Defender client, regardless who that person may be.

I'm not sure why the specific nature of the conversation that has been divulged to another Public Defender, specifically, is important to

share with that individual, other than be quiet, don't talk to anybody. And so I'm not sure as to what more or what details about the substance that has been divulged allegedly, what more information needs to be with Mr. Smith about that other than an admonition to stop talking, because people you talk to have an interest coming forward and sharing that information with the State of Florida.

And he knows, the defendant himself knows, who he's had conversations with. He's a party to those and he knows who to talk to and who not to talk to.

MR. GAZALEH: I don't have anything further, Your Honor.

THE COURT: Okay. Well, I guess, we need to schedule this again.

MR. GAZALEH: I think we're on your calendar next week, but I'm not sure.

THE COURT: On the 24th?

MR. CALIEL: Are we? I thought our next date was the scheduled --

THE CLERK: The 11th.

MR. CALIEL: -- the December 11th hearing date for the motion that I will be filing.

MR. GAZALEH: That's right.

MR. CALIEL: And, obviously, I think we need

to resolve this before we handle any motions of that nature.

THE COURT: What was that motion hearing that was scheduled?

MR. CALIEL: December 11 at 1 o'clock.

THE COURT: I don't remember what the motion was.

MR. CALIEL: Your Honor, what we had discussed -- I'd think I can openly discuss today, during the course of the deposition from the victim --

THE COURT: I recall regarding the victim's mother, okay, about what is and what's not admissible. That's going to be an interesting week, because I've got so much. We'll do it when we said we would do it, but this issue, first of all, there has not been any other motions filed that I'm aware of.

MR. GAZALEH: And there was a reason for that. Mr. De La Rionda and I spoke on Friday and he asked me to wait on the second one until after you had ruled on the first one. I agreed with him and I thought that was the appropriate thing to do, so the other attorney will be filing a motion, regardless of what your ruling is in this case, she'll be filing a motion.

THE COURT: Okay. So I'm thinking we need to have this resolved for Monday the 24th. Now, that's the Monday of Thanksgiving week, I don't know if --

MR. CALIEL: Your Honor, I have a similar conflict in the morning. I have some depositions scheduled in a capital 3.850 starting at 9 o'clock going to 11:00, but I can get somebody to cover those for me. They're not material depositions that I necessarily need to be present for, so I can plug somebody in and handle those.

THE COURT: I don't think we'll be in here but a minute.

MR. GAZALEH: I don't think it would be long.

THE COURT: Where are the depositions to be held?

MR. CALIEL: The depositions are, ironically, will be held in the courthouse. They are one of the clerk's staff and one additional witness.

THE COURT: Here in the courthouse?

MR. CALIEL: Yes, Your Honor.

THE COURT: Well, can't we just start court a quarter to 9:00 and run up and do this or run to those or do you have preparations to make for the depos?

MR. CALIEL: The depos, no, and I'm less worried about the depos. I have a physical therapy appointment at 8:15 on Monday morning that lasts until about 9:30 that's why I requested the 10:30 time today.

THE COURT: Okay.

MR. CALIEL: Would 10:30 work as well or 10 o'clock on Monday?

THE COURT: Oh, yeah. We're going to be in court. We have a huge calendar.

MR. CALIEL: If we could have the 10:30 timeframe and I'll just step out of the depos. Ms. Carbula is also assisting me with those in a post-conviction matter. She can stand in on those while I'm handling this.

THE COURT: Okay. So we'll keep the days that are already scheduled for Mr. Smith, December 11th at 1:30 for pretrial and hearing on motion, time and date certain; January 20th for jury selection; January 26th for trial; if necessary, February 9th and, if necessary, February 10th for the penalty phase; and now November 24th at 10:30 for pretrial and ruling on motion.

And while I have y'all here, understanding things could change based on your motion, but

assuming for a moment just for purposes of my question. If we pick the jury on January to the week of January 20th, which is a Tuesday with a Monday holiday, and I believe we had anticipated not starting the trial to the following Monday the 26 --

MR. CALIEL: Yes, ma'am.

THE COURT: -- what do we do with the jury from the time they are selected and the time we start the trial?

Because if you're requesting that they be sequestered, I don't think -- I mean, we could get a jury by Wednesday or Thursday or even if it was Friday, I'm not sure about sequestering a jury at that point and not starting a trial for them.

I don't think that's something that anyone would understand really, until two or three or four days later.

MR. CALIEL: Right.

THE COURT: So you don't have to tell me today. You can tell me Monday. And I'm not trying to get a change of whether or not the jury is sequestered for the guilt phase, I'm just trying to figure out logistically how we accomplish that without having them give up time that we're not

accomplishing anything, but that's my only question, so y'all can discuss it.

MR. GAZALEH: I'll talk to my client about it, Your Honor.

THE COURT: We may need to start right away. I don't know. That's certainly one solution to select the jury and send them home and get them settled and start the trial the very next day. Without knowing what day that will be that's hard to see, but I think we do need to consider how we're going to have them come back and go to wherever they're going to go and stay there for two, three, or four days to start testimony. So you may need to kind of regroup. I'll let y'all talk about that part.

Are you allowed to do that while this is pending?

MR. GAZALEH: Sure.

THE COURT: Procedural issues?

MR. GAZALEH: Yes, Your Honor.

THE COURT: Not substantive issues?

MR. GAZALEH: I feel like I can do that.

MR. CALIEL: And, Judge, what we can do after Mr. Gazaleh discusses it with his client, I've already outlined my order of proof. The majority

of the witnesses are local. Not all of them are local. A good bulk of them are law enforcement. And given the nature of some of the testimony, the first day those individuals we could have on standby and combining opening statements and the first few witnesses that we know we would call and get through in the first day, we probably could have them available sort of in limbo if need be. Obviously, it would be easier to have date and time set, because of the uncertainty of --

THE COURT: That's kind of what we had planned, but then it was brought to my attention that I never had a sequestered jury, but I didn't think about the fact that typically they're sequestered once they're selected and that would procedurally talked about not starting to the following week. We just need to discuss it and come up with whatever plan is appropriate under the circumstances.

MR. GAZALEH: And I hate to throw another monkey wrench into the machine, but I haven't ruled out the possibility that if you rule that there is no conflict that I might have to take a writ, which would maybe change everything as far as the dates are concerned.

THE COURT: Do you do you have any rule on that other writ you wrote them?

MR. GAZALEH: I do not, but the last writ that we filed was on a stand your ground motion, which was probably more fact complicated, I mean, obviously, more fact complicated than this and that took five to six months I'd say to get something back from the DCA. But it was different, it was a writ of prohibition not a writ of certiorari.

THE COURT: I don't know what the standard -- not the standard, but what the typical turnaround time is for that. I have no idea.

MR. GAZALEH: And I'm not saying I'm definitely going to do it, but it's just I haven't ruled that out yet.

THE COURT: Of course not, I would not expect you to. Anything else we needed to consider today?

MR. CALIEL: Only just to put it on everyone's radar and perhaps after we have this motion hearing on December 11th and all this is resolved, is I know the Court discussed perhaps maybe having some sort of questionnaire the parties could agree upon on the publicity issues that play in the case for the individual voir dire. We might need to start working towards that. I'm sure we'll have a couple

of drafts that we'll exchange between the parties and then the Court as to what would be appropriate, but obviously, we have to get past this issues.

THE COURT: Yes, I think so for that.

MR. GAZALEH: And we discussed talking about a questionnaire that we would be comfortable with, but we haven't delved into it too deeply.

MR. CALIEL: Yes.

MR. GAZALEH: Thank you.

THE COURT: All right. Thank y'all very much. See you Monday at 10:30.

MR. GAZALEH: Thank you.

(The proceedings were adjourned at 12:33.)

C E R T I F I C A T E O F R E P O R T E R

STATE OF FLORIDA)
COUNTY OF DUVAL)

I, Gretchen Lee Chatley, Florida Professional Reporter, certify that I was authorized to and did stenographically report the proceeding; and that the foregoing pages are a true and complete record of my stenographic notes taken during said proceeding.

I further certify that I am not a relative, employee, attorney, or counsel of any of the parties, nor am I a relative or employee of any of the parties' attorneys or counsel connected with the action, nor am I financially interested in the action.

Dated this 19th day of November, 2014.

/s/ Gretchen Lee Chatley
GRETCHEN LEE CHATLEY, FPR

* * *

Filing # 73343875 E-Filed 06/11/2018 09:59:49 AM

IN THE CIRCUIT COURT OF THE
FOURTH JUDICIAL CIRCUIT, IN
AND FOR DUVAL COUNTY, FLORIDA.

Case No: 2013-CF-005781-AXXX-MA

Division CR-D

STATE OF FLORIDA

-vs-

DONALD SMITH,

Defendant,

PROCEEDINGS taken before the Honorable Mallory D. Cooper, Judge of the Circuit Court, on November 24, 2014, and as reported by Faye M. Gay, Certified Realtime Reporter, Registered Merit Reporter, and Certified Legal Video Specialist.

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Jacksonville Florida 32202
904-358-2090

ACCEPTED: DUVAL COUNTY, RONNIE FUSSELL, CLERK, 06/12/2018 09:19:41 AM

APPEARANCES:

MARK CALIEL, Esquire,
Assistant State Attorney,
Appearing on behalf of the State of Florida.

FRED GAZALEH, Esquire,
Assistant Public Defender,
Appearing on behalf of the Defendant.

PROCEEDINGS

PROCEEDING PAGE

Ruling on Defense Motion to Withdraw.....4

MR. CALIEL: Your Honor, we would call the case of Donald Smith located on the bottom of page 17 on the morning calendar.

(Defendant present.)

THE COURT: Okay. Mr. Smith is present.

We passed the case from last week on a filing by the Office of the Public Defender of a Certificate of Conflict and Motion to Withdraw.

I do not have the written order finished, but I am denying the Public Defender's Office motion to withdraw. The basis of the ruling is that I find there's no substantial risk of any material limitation to the Public Defender's responsibility to Mr. Smith or to whomever the other client is, as well as there can be no prejudice for Mr. Smith not to be informed of the words that Mr. Smith spoke to whoever this other individual was. He already knows those words. He doesn't have to be informed of them.

The State has indicated they absolutely, and they were clear on this, have no intention to use whoever this other person is no matter what the information is. They won't even know what the information is. So Mr. Smith, knowing the information, there's no prejudice, therefore

there's no substantial risk to materially limit the responsibility to either one of the clients, actually.

So that's the basis of my ruling. I will have an written order for purposes of whatever you want to do, however you want to proceed. And it should be out either today or Monday.

He's already set December 11th for pretrial and hearing on motions at 1:30, is that correct?

MR. GAZALEH: That's correct.

MR. CALIEL: That's correct.

THE COURT: January 26th to start jury selection. We had anticipated starting the trial on the 26th and carrying over to the following week, if necessary, the first week of February, with a potential penalty phase February 9th and February 10th, if that becomes necessary.

However, we're still -- still need to resolve what we will do as far as sequestration if we pick the jury starting on the 20th, but don't start the trial until the 26th, unless it takes that long to get the jury. But assuming as we have that we may be able to select a jury during the week of the 26th and have one by that Friday afternoon, we would need to know, or earlier, what it is we're

going to do. So you all can talk about that.

MR. CALIEL: We will, Your Honor. And one thing I might suggest, Your Honor, is an intervening pretrial date perhaps next Thursday, December 4th. Mr. Gazaleh informed me of his intent to seek appellate remedies and my research of that issue is that a stay of the proceedings, even if the Court determines they're going to hear the issue, is not mandatory, but if the Court does grant a stay that would affect the December 11th hearing date, and although I don't believe any of it's evidentiary in nature, but perhaps if we were just to come back to court next Thursday, the 4th, we may have some more insight as to the defense's position and the Court's position on that before we proceed to the evidentiary hearings that would affect the trial.

THE COURT: Okay. December 4th will be added to those dates for a pretrial.

MR. GAZALEH: Thank you, Your Honor.

THE COURT: Thank you.

(Thus the proceedings ended.)

C E R T I F I C A T E

I, Faye M. Gay, hereby certify that the foregoing transcript is a true and accurate transcription of my Stenograph notes taken at the time and date stated herein.

Dated this 8th day of June, 2018.

/S/ Faye M. Gay

_____

Faye M. Gay, CRR, RMR, FCR, RPR, CLVS

Filing # 73343875 E-Filed 06/11/2018 09:59:49 AM

IN THE CIRCUIT COURT OF THE FOURTH JUDICIAL CIRCUIT, IN AND FOR DUVAL COUNTY, FLORIDA.

Case No: 2013-CF-5781-AXXX-MA

Division CR-D

STATE OF FLORIDA

-vs-

DONALD SMITH,

Defendant,

TESTIMONY AND PROCEEDINGS taken before the Honorable Mallory D. Cooper, Judge of the Circuit Court, on December 11, 2014, and as reported by Faye M. Gay, Certified Realtime Reporter, Registered Merit Reporter, and Certified Legal Video Specialist.

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FRED GAZALEH, Esquire,
Appearing on behalf of the Defendant.

P R O C E E D I N G S

PROCEEDING PAGE

Motion in Limine.....4

THE COURT: Good afternoon.

MR. CALIEL: Good afternoon, Your Honor.

THE COURT: Are you ready for Mr. Smith?

MR. GAZALEH: Yes, Your Honor.

(Defendant present.)

MR. GAZALEH: Would it be all right if my client sat?

THE COURT: Absolutely.

Madam Clerk, do you have a copy of the State's motion?

THE CLERK: Ma'am?

THE COURT: Do you have a copy of the State's motion in limine?

MR. CALIEL: Your Honor, I think there were two filed, although I think defense counsel may have an announcement as to State's second motion in limine.

MR. GAZALEH: And we do, Your Honor, whenever you're ready.

(Clerk tendering documents to Court.)

THE COURT: Do you show the second one also?

THE CLERK: That was both.

THE COURT: Oh, that's both. Okay. All right. On the second motion in limine.

MR. GAZALEH: We don't object to the Court

granting that motion. I talked to my client. He has no objection and it was not my plan to talk about the Internal Affairs Investigation.

THE COURT: All right. I'll grant the State's second motion in limine. There's no objection by the defense.

MR. CALIEL: And, Your Honor, would that also include, although -- at this point in time I don't anticipate a witness testifying that would make this relevant, but would it also include testimony and argument, cross-examination pertaining to discipline as to certain individual officers as a result of that investigation?

THE COURT: I would think it would.

MR. GAZALEH: I think it would.

MR. CALIEL: I just want to be clear for them.

THE COURT: All right. That's granted.

All right. We're just dealing with the State's first motion in limine which there's an objection, I assume, we'll be hearing.

MR. CALIEL: Your Honor, in anticipation of today's hearing I sent to defense counsel an enumeration, as filed, and we would concede the State's first motion in limine is fairly broad

when it talks about personal history and character of Rayne Perrywinkle. We're going to narrow the focus. I had provided to defense counsel a listing of what I believe to be objectionable material that was discussed during the course of Ms. Perrywinkle's deposition. It related to mainly, as I indicated to counsel, pages 1 through 73, which is more of the background portion of that -- of that deposition. And then I specifically then outlined and then provided to defense counsel page and line number of the subject matter which we believed was irrelevant and prejudicial and had no probative value to this proceeding.

I think perhaps if we started with that list with defense counsel if they were going to concede as to a point that they would do so and then we could line-by-line item go through and they would explain their objections if they do object.

THE COURT: Okay. I've gone through and marked them myself, based on the listing the State provided.

So I guess if we went through the page and line number as they're listed in order you could tell me if there is an objection or if there's not

an objection and if there's not we could go all the way through and clear those out of the way and then have argument on the ones to which you object.

MR. GAZALEH: That's perfect. Thank you, Your Honor.

THE COURT: Page 6, line 3.

MR. GAZALEH: I would have an objection to that one.

THE COURT: Okay. Page 7, line 6.

MR. GAZALEH: Only to the extent that I would -- I would want to get into information with regard to her relationship with the victim, Cherish's father, Ms. Perrywinkle's relationship with the father.

THE COURT: Okay. So you're not able, at this point anyway, to agree to that?

MR. GAZALEH: Correct.

THE COURT: So I'll mark that as an objection for now.

Page 10 through 17.

MR. GAZALEH: No objection, Your Honor.

THE COURT: Page 18, line 10 through 17.

MR. GAZALEH: No objection.

THE COURT: Page 19, line 6.

MR. GAZALEH: No objection.

THE COURT: Page 19, line 14.

MR. GAZALEH: No objection.

THE COURT: Page 21, line 5 and 22 line 1.

MR. GAZALEH: Your Honor, I would object to that one.

THE COURT: Okay. Page 22, line 14.

MR. GAZALEH: No objection.

THE COURT: Page 29, line 24.

MR. GAZALEH: No objection.

THE COURT: Page 30, line 8.

MR. GAZALEH: In general no objection. I think we talk about it again at another point so I would say no objection to that one.

THE COURT: Okay. Page 31, line 14.

MR. GAZALEH: No objection.

THE COURT: Page 33, lines 10 through 16.

MR. GAZALEH: No objection.

THE COURT: Page 20, lines 8 through 14 and page 33, line 16.

MR. GAZALEH: No objection.

THE COURT: Page 34, line 7.

MR. GAZALEH: I would object at this time.

THE COURT: Okay. Page 34, lines 19 through 22.

MR. GAZALEH: No objection.

THE COURT: Page 35, line 3.

MR. GAZALEH: No objection.

THE COURT: Pages 36 through 39.

MR. GAZALEH: We would object, Your Honor.

THE COURT: Okay. Page 38, line 23.

MR. GAZALEH: We would object to that one.

THE COURT: Page 39, line 16 through page 40 line 4.

MR. GAZALEH: We would object to that.

THE COURT: Okay. Page 40, line 13.

MR. GAZALEH: We would object to that.

THE COURT: Page 41, lines 15 through 25.

MR. GAZALEH: No objection.

THE COURT: Page 42, line 7.

MR. GAZALEH: No objection.

THE COURT: Pages 46 through 48.

MR. GAZALEH: We would object to that one.

THE COURT: Page 48, line 23.

MR. GAZALEH: Objection.

THE COURT: Page 51, line 16.

MR. GAZALEH: We would object to that.

THE COURT: Page 51, line 16 through 18.

MR. GAZALEH: No objection.

THE COURT: Page 53, lines 8 through 16.

MR. GAZALEH: We would object.

THE COURT: Page 53, line 24.

MR. GAZALEH: We would object.

THE COURT: Pages 60 through 61.

MR. GAZALEH: No objection.

THE COURT: Page 61, line 19.

MR. GAZALEH: No objection.

THE COURT: Page 61, line 7.

MR. GAZALEH: No objection.

THE COURT: Page 65, line 3.

MR. GAZALEH: No objection.

THE COURT: Page 68, line 5.

MR. GAZALEH: No objection.

THE COURT: Page 68, line 18.

MR. GAZALEH: No objection.

THE COURT: And page 70, line 22.

MR. GAZALEH: No objection.

THE COURT: Okay. So I've marked the ones that you have no objection on the right side of my page and I've marked the ones to which you --

MR. GAZALEH: There may be one more.

MR. CALIEL: There's one more, Your Honor, that carried over to the second page.

THE COURT: I'm sorry. There sure is. I'm sorry. I didn't mark that one. Page 72, line 2.

MR. GAZALEH: We have no objection to that one.

THE COURT: No objection?

MR. GAZALEH: None.

THE COURT: Okay. So I've marked all of those on the right side of this list and I've marked the objectionable ones to which you want to argue on the left side of the list. So, again, if you'll just go in chronological order as they're listed.

MR. GAZALEH: Yes, Your Honor. Some of them are going to have the exact same argument.

THE COURT: All right. We'll start with page 6, line 3.

MR. GAZALEH: Your Honor, on that -- with regard to that information, I think that the identity of a witness is very important and any names and former names that she would have -- would have had I don't think is in anyway abusive or irrelevant. I mean she is who she is and she is who she was and, therefore, I think the fact that she has had a legal name change, a voluntary name change, is relevant and that we should be able to cross-examine her on that.

MR. CALIEL: Your Honor, the State's position

is during a discovery deposition I believe defense counsel is entitled to find out all prior names or identities that a particular witness went under, but when somebody goes under a legal name change, whether if I change my name to John Smith, the facts are only relevant if it pertains to the testimony for which she's testifying to, whether the legal name change related to that.

I believe the name change is detailed that Ms. Perrywinkle began holding herself out as Rayne Perrywinkle back in the 1990s, but then once here in Jacksonville in the early 2000s went through the legal procedures to legally change her name. I believe it was in 2002, according to her testimony, that she legally changed her name from her previous name of Kimberly Hoy to Rayne Perrywinkle. I see no relevance as to the fact that she went through the legal process of changing her name.

For that information to be brought up in front of the jury, while in a discovery deposition so that counsel can adequately investigate her background and possible criminal history that could be used to impeach her, which there was no impeachables brought out during the course of the

background investigation, I think it's relevant for the discovery process, but I don't see how it has any relevance for this jury's determination or determining whether or not she's a credible witness or not because she went about the mechanism to change her name from X to Y 12 years or 11 years before this incident ever took place. And so I fail to see the relevance as to that testimony.

MR. GAZALEH: Your Honor, if I could, just one last thing in with regard to that one.

THE COURT: You may.

MR. GAZALEH: If she holds herself out to be someone who she's not, I think that does go to her credibility and that's why we believe it is relevant. She lived a long time using a false name.

THE COURT: Are you saying the time that she's been using the name Perrywinkle prior to doing the legal change?

MR. GAZALEH: Yes, Your Honor.

THE COURT: That that part is relevant?

MR. GAZALEH: I would.

THE COURT: And why would that be relevant some ten, 11 years later, whatever it is?

MR. GAZALEH: Well, it's because she lived a long time basically lying at that point. She was not Rayne Perrywinkle when she started using that name and she held herself out to be Rayne Perrywinkle so it goes to her credibility.

THE COURT: Okay.

MR. CALIEL: Your Honor, it seems to me that would be impeachment on a collateral matter that is not relevant to this and would be the same as goes to somebody's credibility because they committed an act or told a little white lie to their spouse at some time prior to them testifying. I don't think it's relevant.

THE COURT: Okay. All right.

MR. GAZALEH: That's all I have on that one.

THE COURT: Okay. Page 7, line 6.

MR. GAZALEH: Your Honor, with regard to that one, I believe that it would be relevant to the case, and it's actually a very major fact in this case that Ms. Perrywinkle and the father of Cherish did not get along and it was to the extent that she did not want her daughter to go visit the father the next day. And it may go --

THE COURT: Let me stop you just a minute. My page 7, line 6 doesn't relate to that. So

maybe I have the wrong page numbers.

MR. GAZALEH: 7, 6 says background regarding the fathers of the children.

THE COURT: That's what the list says, but page 7, line 6 is asking how many children does she have.

MR. CALIEL: Yes. Yes, Your Honor, it goes on from that point in time to then go through the enumeration of the fathers of all of those children.

THE COURT: Okay. So it starts on line 6.

MR. CALIEL: It starts at line 6 and then there's a continuation as to a listing of her biological children and then who the biological fathers were of those four respective children.

MR. GAZALEH: All right. I don't have any intention of talking about how many different baby daddies she's had in the past, but I think her relationship with Mr. Jerrell (phonetically) is relevant and it comes up again later. So if you're just talking about not to talk about the number of different fathers she's fathered children with or she's bore children with, I don't have any problem with that.

MR. CALIEL: And, Your Honor, we don't

believe it's improper and I believe the testimony will show at trial that the day following that this incident took place that Cherish was scheduled to get on a flight to travel to her biological father's for the summer, for summer visitation. We believe that testimony is relevant. I think it's even arguably relevant, and I don't have an objection to this, that Ms. Perrywinkle was not happy about the fact that she was going to have to have her child in California across the country for the entire summer. I think that somewhat, although not really relevant to this defendant's guilt or innocence, may be relevant as to perceptions or things of that nature as to why she was out at 10:00 o'clock at night shopping for her child before she got on a plane or things of that nature.

What I don't believe is relevant is when it comes to the fathers of the children, how Cherish was conceived, the fact that there was a paternity test conducted and that there were child support proceedings ongoing and that during the course of that child support proceedings and a fight over custody for the child there were certain

allegations that were made by one side or the other in relation to what was taking place between the parties. I don't find that relevant, that doesn't go to prove any material fact in regards that we're here for as to whether or not Mr. Smith kidnapped, raped and murdered Cherish Perrywinkle.

So I think it is relevant that Billy Jerrell was the father, it is relevant that Cherish was going to be flying to California the next morning to spend the summer with him pursuant to a court ordered visitation. Beyond that, when it comes to the in-fighting between the parents, which oftentimes happens in any custody dispute, I don't see the relevance in that to prove any material issue.

THE COURT: Just to make sure the record is clear, I've reviewed line 7 -- I mean page 7. The only thing on there regarding Cherish's father is his name and how you spell it and the State doesn't object to that, correct?

MR. CALIEL: Correct.

THE COURT: So --

MR. GAZALEH: In that case, Your Honor, we have no problem --

THE COURT: And we'll go on to the other

matters as we get to them.

MR. GAZALEH: Yes, ma'am.

THE COURT: But I think we're just on the wrong page for that.

MR. CALIEL: Yes, Your Honor.

THE COURT: So on that one, although the listing says background, page 7, line 6 only gives name and spelling and there's no objection to that and we'll get to background on a different page. Is that all correct?

MR. CALIEL: Yes, Your Honor.

MR. GAZALEH: Yes, Your Honor.

THE COURT: The next one is page 21, line 5 and page 22, line 1.

MR. GAZALEH: Your Honor, I would argue that in light of the words and actions of Ms. Perrywinkle the night of the incident that her mental health, including past and present mental health, would be relevant. It goes to her ability to see, perceive and understand what it is that was going on and what she was seeing at the time.

MR. CALIEL: And, Your Honor, I think what we're talking about here are prior Baker Act proceedings. There was one discussed on page 21 in relation to 2009. Then a second was after this

incident took place after her child was murdered in August of 2013. I'm not quite sure how one four years before the date in question where she was observing things and then something that took place after the crime occurred would be relevant. I think what her testimony was during the course of the deposition --

Counsel, correct me if I'm wrong.

But that in June of 2013 that she was not under the care or treatment of any mental health practitioner, she was not under the influence of or prescribed any psychotropic or mental health medications. And that is the time that's relevant to her ability to see, perceive and relate what happened on June 20th, 21st, 2013.

So I'm not sure the relevance of her being Baker Acted in 2009 and her being Baker Acted subsequent to the murder of her child after she was suffering mental anguish as a result of what occurred, why that's relevant to her ability to perceive and testify to what happened on the evening in question.

THE COURT: Well, I'm just asking why would that be any different than, for example, the use of some substances at the time of an event as

opposed to the use of a substance four years before an event. I think typically what -- what's going on at the time that addresses one's ability to perceive and remember and testify about what happened is certainly relevant, but how is it relevant what happened four years earlier or what she might have suffered as a result of this?

MR. GAZALEH: Well, I mean I'm not going to concede that the only reason she got Baker Acted in 2013 was because of this, and I can't concede that just because she wasn't getting treatment in June of 2013 that she didn't need treatment in June of 2013.

I mean she's testified that she had been non-compliant with her -- with the recommendations of her counselors in the past and so, you know, unless we get a chance to delve into that, there may be some relevance to it.

THE COURT: Okay. Anything further on that?

MR. GAZALEH: No, Your Honor.

MR. CALIEL: Not from the State, Your Honor.

THE COURT: Page 34, line 7.

MR. GAZALEH: I think we skipped one, page 30, line 8. Although I did say that it comes up later so we could -- you're right.

THE COURT: Okay.

MR. GAZALEH: Your Honor, I believe that that one is relevant to show that her conduct before the incident happened, what she described happening from the time they got to the Dollar Store until the time that the incident happened, that her conduct was unreasonable and unusual, to say the least. I would submit that if somebody was the victim of a sexual battery it would be relevant to find out why -- why she would have gotten into a van with a stranger in June of 2013.

MR. CALIEL: Your Honor, I don't see the relevance that [redacted] as to why that's relevant, her conduct, as to why she got into the van. Whether she's overly trusting or not is not relevant to determine whether or not this defendant was the person who kidnapped, raped and murdered Cherish Perrywinkle.

She could be the most naive, most trusting or most foolish person on the face of the earth and it in no way mitigates this person's conduct or proves he's not guilty of the crimes he's accused

of. So I fail to see how the fact that [redacted] prior is in anyway relevant to what this jury's job would be to determine.

THE COURT: Okay. Anything further?

MR. GAZALEH: Only that her -- well, I said no, but, yes, only to the extent that her version of what happened is going to be vital to at least maybe the degree of the offenses that Mr. Smith may be subjected to. So, again, I just stand by my prior argument that somebody who's been the [redacted] wouldn't typically -- you wouldn't expect would typically get into a van with a stranger. So it shines a poor light on her version of the facts.

MR. CALIEL: Well, Your Honor, the only issue when it comes to it, there was an issue as to whether or not Ms. Perrywinkle got into a van with a stranger. That might be an issue if those facts were how she got from point A to point B or what happened to lead them to this particular location. This defendant is on videotape allowing them into the van at the Dollar Store. He's on videotape arriving at the Wal-Mart and dropping them off at the front of the store and then rejoining them

inside the store. He's on videotape leaving the store with Cherish Perrywinkle in the van. So there's no contest, it's not a contested issue as to whether it was prudent or not. It's not an issue as to whether or not Ms. Perrywinkle did, in fact, get into a van with a stranger because it's uncontested.

THE COURT: Okay. Anything else?

MR. GAZALEH: No, Your Honor.

THE COURT: Pages 36 through 39. I think this gets back to your other argument.

MR. GAZALEH: It does, Your Honor, and I think during -- I think it's during this portion that we discuss her compliance and non-compliance with what she has been -- what has been suggested to her would be the healthy thing for her to do. So, again, the fact that she wasn't getting mental health treatment on the day or the week in question doesn't mean that she didn't need it, and so I think her prior history is significant to shed some light on that.

MR. CALIEL: And, Your Honor, the State's position is that during those three pages there's discussion, and also includes and sort of carries through to the next two items in regards to

hospitalizations or medications, that this whole subject matter of previous diagnoses, previous prescriptions, previous care or treatment at the hands of mental health practitioners and some of these predate 1999. These are distance incidents that we're talking about here that predate her even arriving in Jacksonville, Florida. She had been in Jacksonville, I think pursuant to her testimony, since 1999. How it would be relevant, any prior treatment, medications, course of treatment she may have received in California, Nevada, Utah, other locations where she had been, how that could possibly be relevant to her state of mind in June of 2013 where she said at the time I was not under a doctor's care and I was not prescribed any medications that I was required to take.

And so I think that what this is doing is delving into the background and character of more or less the mental health background of a witness during a time frame when it is not relevant to the proceedings at bar.

MR. GAZALEH: Your Honor, I would call your attention to page 39, line 24, where I asked her how about the ones, we're talking about

prescriptions, what medications have you been told that you should be taking and now that you've decided that you're not going to take. And then she lists three medicines, three medications that she's been prescribed she was supposed to be taking and was not taking at the time of the incident.

THE COURT: That goes on to page 40, correct?

MR. GAZALEH: Yes, Your Honor.

MR. CALIEL: The vagueness of that testimony, Your Honor, is there's an enumeration of one, two, three, four, five, six, seven, age, nine, ten, ten prior medications that at some point in time she had been prescribed to take but she has no longer taken. The only thing that makes anything relevant, and I guess -- and I'm -- I'm not an expert in this field, nor do I believe Mr. Gazaleh is, but he asked the follow-up question have you been cured of any of those disorders that you were diagnosed with and her answer was no. But there was no indication that she was suffering from any of these disorders at the time of the incident that would affect her ability to see or relate information that she observed on June 20th and 21st of 2013.

THE COURT: Mr. Gazaleh.

MR. GAZALEH: Your Honor, again, she said she wasn't cured, she said she was prescribed three medicines which she was not taking. I think that goes to her mental state at the time and her ability to see and perceive the things that she's testifying to.

THE COURT: Doesn't -- although she answers the question in the way that you have stated she did answer it, there's no time frame on it.

MR. GAZALEH: I think there was. I think I said on page 39 what medications have you been told you should be taking now. That is the time frame, now.

THE COURT: Okay. I see it now.

MR. CALIEL: But -- but, Your Honor, now -- and that's where the confusion is.

THE COURT: Now is --

MR. CALIEL: That's not in June of 2013. She's been under the care and counseling and she was directed by the dependency court to see a mental health counselor and there was actually some discussion in regards to the dependency proceedings. Now was at the time of the deposition where Mr. Gazaleh's questioning her.

And, I apologize, I'll go back to the first

page so I can give an appropriate date. On June 11th of 2014, at that time now was June of 2014, pursuant to her counseling that was ordered by the dependency proceedings, a mental health practitioner said you should be taking X, Y and Z. That doesn't relate to June of 2013, at the date and time of these incidents.

MR. GAZALEH: I don't have anything further on that through -- well, through page 39 and 40.

THE COURT: So that covers pages 36 through 39.

And then page 38, line 23 is a specific --

MR. GAZALEH: I withdraw my objection to that one.

THE COURT: Okay. And then page 39, line 16 through page 40, line 2, that's what we just talked about, is the medications that have been prescribed.

MR. GAZALEH: Right. And it would only be relevant as to the point in time when the incident happened. I would agree to that. So I don't know what her answer to that question would be. I mean I think it is relevant if she wasn't supposed to. So if she says, no, she wasn't supposed to be taking any medicine in June of 2013, that's the

end of it.

THE COURT: Okay.

MR. CALIEL: Well, I think, Your Honor, if we were to get to that point where we believe it's relevant, I would request a proffer outside the presence of the jury because I think asking the question brings up the subject matter of her mental state and things of that nature.

THE COURT: I think we would have to proffer that.

MR. GAZALEH: Sure.

THE COURT: It's an awful lot of issues. Since it wasn't specifically asked here, then we could go through that procedure in a proffer and determine what, in fact, should be let to the jury. So I think that's a good way to handle that.

MR. GAZALEH: Yes, Your Honor.

THE COURT: Pages 46 through 48.

MR. GAZALEH: I think we -- we missed one.

THE COURT: I did? I'm sorry. Page 40, line 13.

MR. GAZALEH: Yes, Your Honor.

THE COURT: You're correct.

MR. GAZALEH: I think the fact that she has

admitted under oath that she has lied under oath is admissible as impeachment. She's -- she's exhibited the willingness and no shame in testifying falsely under oath, and I don't intend to get into what kind of hearing it was or what judge it was in front of, but if somebody's willing to lie under oath I think that's very relevant -- relevant to the credibility of that witness.

MR. CALIEL: Your Honor, the State's contention is it's improper impeachment. Her -- proper impeachment would be if she was convicted of a crime of dishonesty or she was convicted of perjury. At that point in time counsel could cross-examine her as to whether or not she's been convicted of a crime of dishonesty or making false statement. This was a vague admission. We don't know what proceeding she's talking about. Could have been any child support proceeding in which she fabricated something before a child support judge. Could have been a family court proceeding. Could have been a dependency proceeding. It could have been one of her own criminal proceedings in which she told the judge at J-1 she didn't do X, Y or Z. We don't know what the subject matter of it

was, but a specific false statement, whether it's outside of court or in court, absent any conviction that's unrelated to her testimony in this case. She's not saying that I lied about this case. She's not saying she lied under oath in this proceeding. If she's admitted that she lied under oath in this proceeding, then there may be some relevance if she lied in the proceeding before the Court, that may be relevant as to her testimony later on in the same proceeding, but this was a very vague admission, have you ever lied under oath, she said yes, but without any specificity as to what type of proceeding it may have been or its relevance to any of these proceedings.

If counsel wants to somehow proffer that or further explore that to establish outside the presence of the jury why -- what type of proceeding it was and why it may, in fact, have any relevance in this particular case, again, a proffer is the best thing, but it seems like improper impeachment because there is no subsequent conviction of that. It's just as if you lied to your husband and now you're testifying on the witness stand because you lied to the

person you swore you would love and cherish and now you're lying here today. That's improper impeachment and character assassination.

MR. GAZALEH: I hope Mr. Caliel prosecutes me for perjury one day because, Your Honor, it's not my job to prosecute her for perjury or to set her up to be prosecuted for perjury so I was not going to get involved in getting her to admit to committing a specific crime on a specific day. I think when she stands up and says I swear to tell the truth, the whole truth and nothing but the truth so help me God, except when I don't really want to, I think that's significant and I think it's relevant.

THE COURT: Okay. Now we're on pages 46 to 48.

MR. GAZALEH: Yes. Your Honor, if you read the transcript you see that -- I don't -- maybe she is clairvoyant, but if she's not then she lives in some kind of fantasy world and I think it's important. Again, it goes to her ability to see and perceive things. If she's got this -- this thing in her head that she believes she's clairvoyant, there's all kinds of questions I want to ask her about why she did or did not foresee

certain things happening. I should be able to ask her that.

THE COURT: You want to be able to ask her --

MR. GAZALEH: Since you're clairvoyant, why didn't you see what was going to happen next, basically. I mean because that's what she testified she could do. Not at will, or not at any given moment, but she says that she can see the future and she can foretell the future, and some of these other things that are listed in this list are real specific about what kind of things she claims to have seen in the future.

MR. CALIEL: Your Honor, I think the subject matter as brought up by counsel during the deposition is Ms. Perrywinkle believes, since the age of three, that she has -- she and both counsel refer to it as has a gift, that she believes she can sense or feel things are going to happen or she gets feelings about things that are going to happen in the future. She claimed under oath that it comes and goes and it's not something that she can bring up at will. She discusses how some of those things is she's had bad feelings about Cherish since she's been born, that something bad was going to happen to her, things of that nature.

I'm not sure how, again, it's relevant as whether or not even for the sake of argument that Ms. Perrywinkle is clairvoyant, she has ability to see things that may occur in the future, that her inability to see what this defendant was going to do to her child in anyway is relevant or anyway exculpates or mitigates what this defendant did to Cherish Perrywinkle. I don't understand the relevance beyond that. She could be the worst clairvoyant or the worst psychic on the face of the earth, it doesn't mitigate or bring up any doubt as to what this defendant's actions were. So I don't understand the relevance that she believes she's clairvoyant and has a gift, she's worked as a psychic in the past and she had some bad feelings or premonitions about something bad happening to her daughter at some point in time.

MR. GAZALEH: I don't have anything further.

THE COURT: Can you restate to me what it is you want to be able to question her about?

MR. GAZALEH: Well, I want to be able to question her about whether or not she's clairvoyant and for that purpose -- and then to go from there, I want to ask her if she had a premonition that her child -- or if she said that

she had a premonition that her child would be dead before the age of seven.

With as many bizarre things that came out during the deposition, this may have become a self-fulfilling prophecy at some point and I want to be able to get into that, that she's -- that she foresaw this happening and for her to be a true clairvoyant something did have to happen to her daughter.

THE COURT: But if her testimony was, number one, she can't make it happen at will, number two, it comes and goes, basically, I'm not sure those are the exact words, but that's basically what she said, then I'm not sure how you can even question her in that regard.

MR. GAZALEH: Well, I should be able to question her about did she predict that her daughter would be dead by the time she turned seven or eight, which she was eight years old when this incident happened, and whether or not she somehow made that clairvoyant image come true.

THE COURT: Okay.

MR. CALIEL: Your Honor, I'm a little confused. That somehow she subconsciously or consciously sought out this defendant so he could

kill her child?

THE COURT: I'm not sure either.

MR. GAZALEH: I don't know that I have to tell anybody what our defense is at this point, but --

THE COURT: I don't want to pry into what your defense is. I'm just not sure I understand your argument, but I want to write down what you said. Did she predict that Cherish would be dead by the age of eight?

MR. GAZALEH: Right. And --

THE COURT: And did she --

MR. GAZALEH: I want to be able to address whether or not she made that prophecy come true.

THE COURT: Okay. Anything further on that?

MR. GAZALEH: No, Your Honor.

THE COURT: And does that also -- well, I guess it doesn't.

Page 48, line 23.

MR. GAZALEH: Your Honor, I'll withdraw my objection to that.

THE COURT: Okay.

MR. GAZALEH: And I'll withdraw my objection to the next one as well.

THE COURT: Okay.

MR. GAZALEH: 51, line 16.

THE COURT: And the first one you withdrew was page 48, line 23.

MR. GAZALEH: That's correct.

THE COURT: Okay. So now we go to page 53, lines 8 through 16, is that correct?

MR. GAZALEH: Yes, Your Honor.

MR. CALIEL: Yes, Your Honor.

MR. GAZALEH: And that's -- we've already argued that, basically. That's why I wanted to ask if she was clairvoyant so that I could get into her premonitions, and one in particular, which would be the next one.

THE COURT: So that relates -- that relates --

MR. GAZALEH: To the clairvoyance.

THE COURT: Back to your previous argument from pages 46 through 48?

MR. GAZALEH: That's correct.

THE COURT: And also to the next one it seems, too.

MR. GAZALEH: Yes, Your Honor.

THE COURT: Page 53, line 24.

MR. GAZALEH: That's correct. I've already argued that.

THE COURT: Okay. Any other response by the State?

MR. CALIEL: Nothing further than what we've already argued in reference to the clairvoyance.

MR. GAZALEH: And that's the last one I had any objection to, I believe.

THE COURT: That's how I had it marked.

MR. CALIEL: I show that the same as well.

THE COURT: Okay. I'll try to get an order out on this right away.

MR. CALIEL: And, Your Honor, may counsel and I approach briefly on a procedural matter?

THE COURT: You may.

MR. CALIEL: Thank you.

(Counsel for the State and defense approached the bench for a side-bar conference out of the hearing of the court reporter.)

THE COURT: All right.

MR. GAZALEH: Your Honor, can I have just a second and talk to my client about that waiver of hearing?

THE COURT: You may.

(Defense counsel conferring with defendant.)

MR. GAZALEH: Your Honor, I have been authorized to waive my client's appearance at the

next pretrial.

THE COURT: All right. I believe it's been determined that we need to add a pretrial date to his list of coming dates. So I'll set his case January 5th for pretrial.

Would you place him under oath, please?

(Defendant sworn.)

THE DEFENDANT: I do.

THE COURT: Thank you, Mr. Smith.

I just want to ask you one question. We're scheduling the case, at least for now, January 5th for a pretrial. It's a procedural matter that needs to be finalized by that date that we need to make sure is done. Your attorney has spoken to you about that and has indicated you have no objection to not appearing on that one date, is that correct?

THE DEFENDANT: Yes, ma'am, that's correct.

THE COURT: You're okay with having your appearance waived on January 5th?

THE DEFENDANT: I am.

THE COURT: Thank you, Mr. Smith.

So January 5th for pretrial and the defendant's appearance is waived for that date only. He's also scheduled January 20th to start jury selection with the possibility or probability

that the trial will start January 26th, may continue through the following week, and for now, although this could change, if there is a second phase it's scheduled February 9th and February 10th. I understand that could be delayed. If it's delayed that's fine. We'll just see where we are on January 5th or January 25th or 26th. If we need to delay it, we can delay it if it's necessary. That takes care of that.

I'll try to get an order out immediately on the second motion -- or the first motion in limine.

MR. GAZALEH: Thank you, Your Honor.

THE COURT: And I'll check on those other motions.

MR. GAZALEH: Thank you, Your Honor.

THE COURT: Thank you.

MR. CALIEL: And, Your Honor, if we hear from the Court prior to January 5th, I think we can keep the 5th date if we're proceeding as is, but if we hear back from the court adversely, should we seek the Court to get it scheduled with Your Honor for procedural matters at that point in time or should we just wait until January 5th?

THE COURT: If we get something from the

higher court prior to the 5th, we'd still convene on the 5th for announcing these other dates would be stricken and no further action until we got further...

MR. GAZALEH: I don't think that would violate the Court's orders.

MR. CALIEL: I think that would be fine.

THE COURT: So we'll leave the 5th on either way so we can finalize where we're at one way or the other.

MR. GAZALEH: Yes, Your Honor. Thank you.

MR. CALIEL: Thank you.

(Thus the proceedings ended.)

I, Faye Gay, was authorized to and did transcribe the foregoing proceedings and the transcript is a true and complete record of the recording, subject to the quality of the recording, to the best of my ability.

DATED this 8th day of June, 2018.

/S/ Faye M. Gay

_____

FAYE M. GAY, Transcriber

Filing # 73343875 E-Filed 06/11/2018 09:59:49 AM

IN THE CIRCUIT COURT OF THE FOURTH JUDICIAL CIRCUIT, IN AND FOR DUVAL COUNTY, FLORIDA.

Case No: 2013-CF-5781-AXXX-MA

Division CR-D

STATE OF FLORIDA

-vs-

DONALD SMITH,

Defendant,

PROCEEDINGS taken before the Honorable Mallory D. Cooper, Judge of the Circuit Court, on December 4, 2014, and as reported by Faye M. Gay, Certified Realtime Reporter, Registered Merit Reporter, and Certified Legal Video Specialist.

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ACCEPTED: DUVAL COUNTY, RONNIE FUSSELL, CLERK, 06/12/2018 09:19:41 AM

APPEARANCES:

MARK CALIEL, Esquire,
Assistant State Attorney,
Appearing on behalf of the State of Florida

TRICIA RADO, Esquire,
Appearing on behalf of the Defendant.

P R O C E E D I N G S

PROCEEDING PAGE

Pretrial.....4

MR. CALIEL: Your Honor, if we could address the case of Donald Smith.

And while they're bringing him out, may counsel and I approach on a procedural matter?

THE COURT: You may.

(Counsel for the State and defense approached the bench for a side-bar conference out of the hearing of the court reporter.)

(Defendant present.)

MS. RADO: Your Honor, this is Mr. Smith approaching to my left. Tricia Rado standing in for Mr. Gazaleh this morning on Mr. Smith's case.

THE COURT: Okay.

MR. CALIEL: Your Honor, we're in receipt of the court's order and in speaking with Mr. Gazaleh the Public Defender's Office did intend to file an appeal of the court's order. They anticipate that will be done by either the end of next week or the first part of the next. So once that's accomplished, we'll try to be in contact with the Attorney General's Office in Tallahassee to see what the timetable is on the Court hearing that issue, and in particular any motions to stay that may be filed pending the Court's review.

THE COURT: Okay. So for now we're scheduled

already next week and I'll leave it on the calendar for that. That's December 11th at 1:30 for hearing on motions. And we'll proceed with that unless we get directions otherwise from the appellate court.

And Mr. Smith also already has January 20th for jury selection, January 26th and the following week for trial, if necessary, and February 9th and February 10th for an additional date for that, if necessary. So we'll keep those dates for now and come back on the 11th unless we're told otherwise. Okay.

MR. CALIEL: Thank you, Your Honor.

MS. RADO: Thank you, Your Honor.

THE COURT: Thank you.

(Thus the proceedings ended.)

C E R T I F I C A T E

I, Faye M. Gay, hereby certify that the foregoing transcript is a true and accurate transcription of my Stenograph notes taken at the time and date stated herein.

Dated this 8th day of June, 2018.

/S/ Faye M. Gay

_____

Faye M. Gay, CRR, RMR, FCR, RPR, CLVS

Filing # 76260248 E-Filed 08/10/2018 10:05:38 AM

IN THE CIRCUIT COURT,
FOURTH JUDICIAL CIRCUIT, IN
AND FOR DUVAL COUNTY, FLORIDA

CASE NO.: 16-2013-CF-5781-AXXX-MA

DIVISION: CR-D

STATE OF FLORIDA

-VS-

DONALD JAMES SMITH,

Defendant.

TESTIMONY AND PROCEEDINGS before **The Honorable Mallory Cooper,** Judge of the Circuit Court, Division CR-D, as cause in this matter came to be heard on **December 19, 2014,** before Jayne Foreman, Florida Professional Reporter and Notary Public in and for the State of Florida at Large.

- - -

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ACCEPTED: DUVAL COUNTY, RONNIE FUSSELL, CLERK, 08/13/2018 10:41:03 AM

APPEARANCES:

MARK CALIEL, Esquire,

Assistant State Attorney,

Appearing on behalf of the State of Florida.

JEFFREY MOODY, Esquire,

Assistant State Attorney,

Appearing on behalf of the State of Florida.

FRED CANANN GAZALEH, Esquire,

Assistant Public Defender,

Appearing on behalf of the Defendant.

TRICIA RADO, Esquire,

Assistant Public Defender,

Appearing on behalf of the Defendant.

P R O C E E D I N G S

December 19, 2014 10:44 a.m.

(Side bar, Court and counsel.)

(Defendant present.)

MR. GAZALEH: Your Honor, if I could, I'm filing a motion to continue the trial scheduled on January 20th, and that was actually set on the calendar for this morning, but we are also here to hear our motion to stay proceedings while the appeal is pending on the issue of whether or not there's a conflict.

THE COURT: And that was calendared, and I have the motion. Do you want to go ahead with that first, the motion to stay?

MR. GAZALEH: Yes, Your Honor, and I couldn't add anything more than what is already written in the written motion, just basically that we would respect that there would be an expeditious order from the DCA. We're hoping for that, and all of the attorneys spoke with the attorney general's office, and our office has been trying to be very proactive about getting things filed well before the deadlines, and we're just asking that the matter be stayed until we get a ruling from the DCA.

THE COURT: Any response from the state?

MR. CALIEL: Your Honor, in regards to the emergency motion for stay, I don't believe the motion should be granted. I don't see the necessity, and when discussing the status of the pleadings with the attorney general's office in Tallahassee, I know that the state's response and the defense's reply are already received in the Smith case, and given the other matters that we've previously discussed, I don't think a stay is necessary given that I do expect that we will hear something before further substantive matters will take place in this particular case.

THE COURT: All right, I'll deny the motion to stay. I think the two factors that the Court reviews for that are the likelihood of success on the merits of the petition and the potential for harm to the defense by denying the motion to stay, and there has been no argument or evidence presented to the Court on either of those issues that -- I'm comfortable with my ruling, so I don't feel that I can find that there is a likelihood of success on the merits, even though I fully understand that that could occur.

MR. GAZALEH: Sure.

THE COURT: But I don't think I can find that

at this point. And, secondly, I don't find any harm to the defense by denying the motion to stay, so I will deny that, and I will give you a written order on that.

And then on your motion to continue or motion for a continuance it's titled, I've reviewed that, and I think based on the grounds listed in the motion, the defense would be entitled to a continuance.

Does the state have any objection?

MR. CALIEL: Your Honor, we would not have an objection. While we discussed with counsel as we're prepared to proceed forward with the trial, given the aggravating circumstances of this particular homicide and that we are seeking the death penalty, the fact that the grounds are a continued need for further work on mitigation, which we -- the state's position is will be vitally important because we anticipate that that will be a major issue, so whether or not the death penalty is important when it comes to the sentence, I think it would be prudent to allow the continuance because if we were to force the defense to go forward when they are not prepared and they need further work, that creates postconviction matters that we would be litigating

years from now. And so in the abundance of caution, we have no objection, although we are prepared to go to trial.

THE COURT: I will grant the motion for continuance, and I think based on that, we don't need to have a January 5th pretrial date.

MR. GAZALEH: I agree.

THE COURT: I do think we need to have a pretrial date in early January to give the state and the defense some time to look at the potential next trial date, and I would ask you to look in the month of May and the month of June, except I'm not available -- I'll be at a conference the week of June 8th, so for June we would need to start after that. But May is open and July is open, so I would ask you to look at those few months.

MR. GAZALEH: We will, Your Honor.

THE COURT: If we had a court date on January 13th for pretrial, would that work?

MR. GAZALEH: That is fine, Your Honor, with us.

THE COURT: All right, then what I'm going to do, I'm going to strike Mr. Smith's case from the January 5th pretrial, January 20th jury selection date, January 26th and the following week,

February 2nd, for trial and the potential second phase should it become necessary. Strike also February 9th and February 10th. And then I'm going to reset the case January 13th for pretrial and select a new jury trial date. And, hopefully, we'll have an answer by then.

MR. GAZALEH: I hope so.

THE COURT: We will know how we are proceeding.

MR. GAZALEH: Thank you for your time, Your Honor.

THE COURT: Thank you.

MR. CALIEL: Thank you, Your Honor.

Your Honor, if I don't see you next week, have a great holiday.

THE COURT: Thank you.

(The proceedings were concluded at 10:49 a.m.)

- - -

COURT CERTIFICATE

STATE OF FLORIDA)
)
COUNTY OF DUVAL)

I, Jayne Foreman, Professional Court Reporter, certify that I was authorized to and did stenographically report the foregoing proceedings and that the transcript is a true and complete record of my stenographic notes.

I further certify the original transcript herein will be delivered to Elizabeth Webb, Esq., attorney for the defendant, Appeal Department, Duval County Courthouse.

DATED this 10th day of August 2018.

/S/ Jayne Foreman
Jayne Foreman
Notary Public, State of Florida
My Comm. expires June 16, 2022
Commission No. GG 220009

Filing # 76260248 E-Filed 08/10/2018 10:05:38 AM

IN THE CIRCUIT COURT,
FOURTH JUDICIAL CIRCUIT, IN
AND FOR DUVAL COUNTY, FLORIDA

CASE NO.: 16-2013-CF-5781-AXXX-MA

DIVISION: CR-D

STATE OF FLORIDA

-VS-

DONALD JAMES SMITH,

Defendant.

TESTIMONY AND PROCEEDINGS before **The Honorable Mallory Cooper,** Judge of the Circuit Court, Division CR-D, as cause in this matter came to be heard on **January 15, 2015,** before Jayne Foreman, Florida Professional Reporter and Notary Public in and for the State of Florida at Large.

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APPEARANCES:

MARK CALIEL, Esquire,

Assistant State Attorney,

Appearing on behalf of the State of Florida.

FRED CANANN GAZALEH, Esquire,

Assistant Public Defender,

Appearing on behalf of the Defendant.

P R O C E E D I N G S

January 15, 2015 9:13 a.m.

(The defendant is not present.)

MR. CALIEL: Good morning, Your Honor.

THE COURT: Good morning.

MR. CALIEL: Your Honor, if we could address the case of Donald Smith. Mr. Smith's case is located on the calendar here on page 15 of the calendar, the bottom of that page. Mark Caliel on behalf of the State of Florida.

MR. GAZALEH: And Fred Gazaleh for Donald Smith. Your Honor, with the Court's permission I'd waive Mr. Smith's appearance for this hearing. I talked to him this morning and told him where we were, and he said that is fine, so I will waive his appearance.

THE COURT: And he was okay with that?

MR. GAZALEH: Yes, Your Honor.

THE COURT: All right. Then we can waive his appearance as long as he okay with it.

MR. CALIEL: Your Honor, at this juncture because the state has done a request with the First District Court of Appeals, there was a request for supplemental briefings that was filed by the Court earlier this week in relation to an issue that came

up in reference to Mr. Deviney's statements. I'm not sure at this point in time of the timing of when the First District may have an answer to us, and I might suggest to possibly a two-week pass date just as a status just to keep on track in the event -- or we could pass it until right before that week in February, and then if we do have an answer, we could have it placed back on the calendar sooner if need be.

THE COURT: I think they requested their briefs by the 23rd.

MR. GAZALEH: That's correct, Your Honor.

THE COURT: So there is no point in placing it on the calendar. I think yesterday we set Mr. Deviney the following week, I think, either on the 28th or 29th.

Do you remember, Madam Clerk?

THE CLERK: Yes, ma'am, it was the 29th.

THE COURT: 29th, so I want to go to the following week, the first week of February.

MR. CALIEL: Yes, Your Honor.

MR. GAZALEH: Yes, Your Honor. That is fine. I'm available any day that week.

MR. CALIEL: Your Honor, any day other than Friday the 6th I'm available at the Court's

pleasure.

THE COURT: February 5th for pretrial and reset the jury trial date. I'm assuming we'll have an answer by then.

MR. GAZALEH: From what I understood from the clerk at the DCA, I think we may.

THE COURT: I think we should. And, of course, if that necessitates adding it on earlier, we can add it on earlier.

MR. GAZALEH: Thank you, Your Honor.

MR. CALIEL: Yes, Your Honor.

THE COURT: All right, thank you.

MR. CALIEL: Thank you, Your Honor.

(The proceedings were concluded at 9:17 a.m.)

- - -

COURT CERTIFICATE

STATE OF FLORIDA)
)
COUNTY OF DUVAL)

I, Jayne Foreman, Professional Court Reporter, certify that I was authorized to and did stenographically report the foregoing proceedings and that the transcript is a true and complete record of my stenographic notes.

I further certify the original transcript herein will be delivered to Elizabeth Webb, Esq., attorney for the defendant, Appeal Department, Duval County Courthouse.

DATED this 10th day of August 2018.

/S/ Jayne Foreman
Jayne Foreman
Notary Public, State of Florida
My Comm. expires June 16, 2022
Commission No. GG 220009

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IN THE CIRCUIT COURT OF THE
FOURTH JUDICIAL CIRCUIT, IN
AND FOR DUVAL COUNTY, FLORIDA.

CASE NO: 16-2013-CF-5781-AXXX

DIVISION: CR-D

STATE OF FLORIDA

-vs-

DONALD JAMES SMITH,

Defendant.

STATE OF FLORIDA)
COUNTY OF DUVAL)

PROCEEDINGS before the Honorable MALLORY COOPER, Judge of the Circuit Court, Division CR-D, as cause in this matter came to be heard on the 4th of February, 2015, before Karen Waugerman, a Notary Public in and for the State of Florida at Large and Registered Professional Reporter.

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ACCEPTED: DUVAL COUNTY, RONNIE FUSSELL, CLERK, 08/13/2018 11:55:35 AM
PAGE # 3476

APPEARANCES:

MARK CALIEL, Esquire,
Assistant State Attorney, appearing on behalf of the State of Florida.

FRED GAZALEH, Esquire, Assistant Public Defender, appearing on behalf of the Defendant.

February 4, 2015

THE COURT: Good morning.

MR. CALIEL: Good morning, Your Honor.

MR. GAZALEH: Fred Gazaleh for Donald Smith.

Your Honor, at this time I would ask the Court if I could waive my client's appearance, I've spoken to him this morning and he gave me authority to do that. I told him we have not gotten anything back from the District Court of Appeals yet and he understands there will be another status hearing scheduled.

THE COURT: Okay. You want to wait to set anything else until we get that ruling?

MR. CALIEL: Yes, Your Honor, given the status of the stay and pending appeal, I was going to suggest to the Court if the Court was amenable passing the case some time the week of March 2nd, that gives us approximately just shy of 30 days for the District Court. Then if we do hear anything that necessitates moving it up we can always get with Your Honor's JA and try to get the case calendared if need be.

THE COURT: Is there a day that week you'd prefer?

MR. GAZALEH: Any day should be fine that week, Your Honor.

MR. CALIEL: Preferably not Monday or Tuesday, Your Honor, because the status of what's going on with the new building.

THE COURT: Oh, that's right. That's your first week.

MR. CALIEL: The 2nd will be the first day in the new building, if we could have Wednesday or Thursday.

THE COURT: March 5th, that's Thursday for pre-trial and reset the jury trial, if we need to add it on earlier just let us know and we will.

MR. GAZALEH: Thank you, Your Honor.

THE COURT: Thank you.

MR. CALIEL: Thank you. Your Honor, may Mr. Gazaleh and I approach about a procedural matter in reference to the transition of the move?

THE COURT: Yes, you may.

(Side-bar Conference.)

C E R T I F I C A T E

STATE OF FLORIDA)

COUNTY OF DUVAL)

I, Karen Waugerman, Registered Professional Reporter, certify that I was authorized to and did stenographically report the foregoing proceedings and that the transcript is a true and complete record of my stenographic notes.

DATED this 13th day of August, 2018.

/s/ Karen Waugerman

KAREN WAUGERMAN, RPR

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Filing # 74015515 E-Filed 06/25/2018 08:56:31 AM

IN THE CIRCUIT COURT, FOURTH JUDICIAL CIRCUIT, IN AND FOR DUVAL COUNTY, FLORIDA

CASE NO.: 16-2013-CF-5781-AXXX
DIVISION: CR-D

STATE OF FLORIDA

- vs -

DONALD JAMES SMITH,

Defendant.

_____/

Proceedings taken on Friday, February 20, 2015, before the Honorable Mallory Cooper, Judge of the Circuit Court, Division CR-D, in the Duval County Courthouse, 501 West Adams Street, Jacksonville, Florida, and as reported by Holli V. Callahan, Florida Professional Reporter and a Notary Public in and for the State of Florida at Large.

ACCEPTED: DUVAL COUNTY, RONNIE FUSSELL, CLERK, 06/26/2018 10:35:04 AM

APPEARANCES:

JEFFREY MOODY, ESQUIRE,

Appearing on behalf of the State.

FRED GAZALEH, ESQUIRE,

Appearing on behalf of the Defendant.

JULIE SCHLAX, ESQUIRE,

Appearing on behalf of the Defendant.

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P R O C E E D I N G S

February 20, 2015 9:04 a.m.

MR. MOODY: Good morning, Your Honor. Jeff Moody on behalf of the State of Florida.

Judge, if we can call the case of Donald Smith. I believe it was on page 2 on Your Honor's calendar.

MS. SCHLAX: And good morning, Your Honor.

THE COURT: Good morning.

MS. SCHLAX: And, Your Honor, Mr. Fletcher is parking his car.

THE COURT: Okay.

MS. SCHLAX: And, Your Honor, good morning. Julie Schlax appearing on behalf of Mr. Smith who stands to my left.

Your Honor, this morning we have prepared an authorization for release of information concerning all the prior discovery that's been accomplished as well as the mitigation discovery. I'm going to meet with my client to have him execute that.

At this point we would be requesting probably a month pass date in order to get the appropriate files and figure out where we will be proceeding.

THE COURT: All right. I first will grant the certificate of conflict and motion to withdraw.

MR. GAZALEH: Thank you, Your Honor.

THE COURT: For the record, that is based on the ruling by the District Court and appoint Ms. Schlax and Mr. Fletcher to represent Mr. Smith.

MS. SCHLAX: Yes, Your Honor. And we have -- I have filed -- based on the Court appointing myself, I have filed the appropriate motion with JAC. I have not received their response yet, which I anticipate and then I will forward that order to the Court.

THE COURT: Okay. Good. Yeah, I don't have anything yet. I don't have an order yet.

Does Donna send one or do we have to wait for the JAC response?

THE CLERK: She sent an order appointing Ms. Schlax down through the inner office. It just hasn't hit Core yet.

THE COURT: Okay.

THE CLERK: So it should be there by this afternoon.

THE COURT: I think I signed it yesterday.

MS. SCHLAX: I have received it, Your Honor.

THE COURT: Okay. And you would like a month pass date?

MS. SCHLAX: Yes, Your Honor.

THE COURT: That would be -- I guess the week of the 23rd of March.

MS. SCHLAX: Yes, Your Honor. Any day that week is fine.

THE COURT: March 24th for pretrial and hopefully to set a trial date.

MS. SCHLAX: I just honestly am -- I'm not -- I'm not in a position to know whether we --

THE COURT: Oh, I know. We may not be able to do that at that point, but that is what we did in the other case, go ahead and set it. If not, another pretrial.

MS. SCHLAX: Yes, Your Honor.

THE COURT: All right. Thank you.

MR. MOODY: Thank you, Your Honor.

THE COURT: Strike the March 5th date. We don't need it.

(The proceedings were concluded.)

- - -

C O U R T C E R T I F I C A T E

STATE OF FLORIDA)

COUNTY OF DUVAL)

I, Holli V. Callahan, Florida Professional Reporter and Notary Public, do hereby certify that I was authorized to and did stenographically report the foregoing proceedings and that the transcript is a true and complete record of my stenographic notes.

DATED this 23rd day of June 2018.

/s/ Holli V. Callahan

_____

Holli V. Callahan,
Florida Professional Reporter

Filing # 73343490 E-Filed 06/11/2018 09:55:52 AM

IN THE CIRCUIT COURT OF THE
FOURTH JUDICIAL CIRCUIT, IN
AND FOR DUVAL COUNTY, FLORIDA.

Case No: 2013-CF-5781-AXXX-MA

Division CR-D

STATE OF FLORIDA

-vs-

DONALD SMITH,

Defendant,

TESTIMONY AND PROCEEDINGS taken before the Honorable Mallory D. Cooper, Judge of the Circuit Court, on July 2, 2015, and as reported by Faye M. Gay, Certified Realtime Reporter, Registered Merit Reporter, and Certified Legal Video Specialist.

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ACCEPTED: DUVAL COUNTY, RONNIE FUSSELL, CLERK, 06/12/2018 09:09:48 AM

APPEARANCES:

MARK CALIEL, Esquire,
Assistant State Attorney,
Appearing on behalf of the State of Florida.

JULIE SCHLAX, Esquire,
Appearing on behalf of the Defendant.

WITNESS

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(Defendant present.)

THE COURT: Good afternoon. I thought I left my paperwork down here. I must have taken it upstairs. And Donna's not in. She's in the break room.

BAILIFF: Do you want me to go get it?

THE COURT: Yes, please.

Just a minute. I'm sorry. I had some paperwork, my notes and everything on this case and I guess I took it back upstairs.

(Brief pause.)

THE COURT: Thank you. I apologize for the delay.

We're here on a motion which I granted to take the deposition of one of the witnesses in the case of Donald Smith, case No. 13-5781, is that correct?

MR. CALIEL: That is correct, Your Honor.

THE COURT: And my understanding is of the law that the -- this is not a public event and that the press has no right to be present in deposition.

I see Mr. Connor here so I don't know if you're here to make any argument or any statements or anything before we proceed.

MR. CONNOR: I am.

THE COURT: And who are you representing as well?

MR. CONNOR: Good afternoon, Your Honor.

THE COURT: Good afternoon.

MR. CONNOR: Tim Connor here for the Florida Times-Union.

Judge, under Palm Beach Newspapers versus Burk, the Florida Supreme Court case which addresses discovery depositions in a criminal proceeding, you are correct, there is no generally public access to those depositions. However, what I would say is that that's in the context of a pure discovery deposition, which is obviously ordinarily not taken in a courtroom with the Judge present. My understanding is that this is more than a pure discovery deposition. This is a deposition to preserve testimony for trial due to some unfortunate circumstances, that Your Honor will be presiding over that deposition, it will be taped for purposes of presentation, et cetera, and so this is more like a court proceeding for purposes of taking the testimony, akin to suppression hearing, preliminary hearings, and other types of court proceedings where the U.S. Supreme Court and the Florida Supreme Court have recognized the right of access.

So, admittedly, this is a unique situation. I think that under the circumstances the taking of this deposition today is more similar to those situations where access is to be granted versus a pure discovery deposition.

THE COURT: I don't know if either one of you have any argument.

MRS. SCHLAX: Just to make sure the record is clear, Your Honor, I'm Julie Schlax appearing on behalf.

The deposition of this particular witness has not been taken in this matter, as well as the defense has objected to the perpetuation. We have every belief that when this case does proceed to trial that this witness will testify live. We will not be asking this witness any questions and it would solely be a State discovery deposition.

THE COURT: Okay. Thank you, Ms. Schlax.

MR. CALIEL: Your Honor, just to put on the record, because I think there was a statement in reference to the condition of the witness. At this juncture we are unaware of any infirmity or situation that will prevent Ms. Moore from testifying, as we argued during our motion to have this proceeding recorded. Unfortunately, we have

an uncertain trial date based upon the voluminous discovery in this matter and Ms. Schlax taking over the defense for Mr. Smith. And this was, in essence, being recorded, a precautionary measure. We do sincerely hope Ms. Moore is in good health and will be able to testify live at a trial when a trial takes place.

THE COURT: Anything further?

MR. CONNOR: Well, I guess I'm sort of wondering whether there's an objection to the presence of the -- of the press from either side.

THE COURT: I'll see. Thank you.

MR. CALIEL: Your Honor, as with the other discovery depositions, it's the State's belief that the media should not be present during those discovery depositions.

MRS. SCHLAX: The defense agrees, Your Honor.

THE COURT: All right. Anything else?

MR. CONNOR: Nothing more than what I've already said, Your Honor.

THE COURT: Okay. Thank you, Mr. Connor. I just happened to have that same case in front of me, Palm Beach Newspapers, Inc., versus Burk, B-u-r-k, in case No. 504 -- or it's cited at 504 So. 2d 378. And they found that they were

satisfied that there is no affirmative constitutional right on the part of the press to attend deposition proceedings or to have access to depositions prior to their being filed with the Court.

And they went on to say, and I think it's important for this particular date, that the purpose of the depositions is to develop evidence by discovering what potential witnesses may know about the subject of the trial and it is not possible to know beforehand with any degree of certainty what information will be discovered. Often irrelevant and inadmissible evidence is discovered during a deposition that has a substantial potential of hazarding the right to a fair trial, the privacy rights of both parties and non-parties and the right to a trial in the venue of the alleged crime. All of those things are unknown to us at this point. It is truly a discovery deposition.

Mr. Caliel did inform the Court at the time that he filed his motion that Ms. Schlax did object to it at the time, that there's every hope that this deposition will not have to be used as trial testimony, but will only be a deposition. And

certainly if it's ever made a part of discovery the press will be entitle to it. It is going to be video recorded, it is going to be court reported, there will be a record of everything that's done here today.

So I think in an abundance of caution I'm going to follow this case, reading it differently than the way that you do, and find that the press does not have the right to be public -- to be present at any non-public proceeding, which a discovery deposition is.

And I appreciate everyone's time and interest, but I think that's the right ruling for this particular occasion.

MR. CONNOR: Your Honor, is there more to today than just the deposition?

THE COURT: I don't think so. I don't think there's any other motions, other than the fact that at the end -- and my job really is just to sit here, just in case there's an objection that would be made at trial. That's it. I'm not involved in it at all. And the only thing I would do when we're through is pass the case to the next pretrial date, and I don't know what that will be because we haven't determined it yet, but that

would be it. I can assure you we will not handle anything other than the deposition.

MR. CALIEL: And, Your Honor, if need be, and I don't think the defense has any objection, we want to handle that portion and do discussion of scheduling at that point in time, conclude the pretrial hearing and then proceed with the deposition, then that way everybody can be present for that portion of the proceedings.

THE COURT: We can do that. And we don't have a trial date yet so we're just going to the next pretrial date. We're hoping to set a trial date late this year or early next year. That has not been determined yet. I believe the attorneys would agree that's the time frame that we're looking at.

MR. CALIEL: Yes, Your Honor. I had discussions with the defense prior to the Court taking the bench and the discovery process that we discussed at the previous hearing, particularly in regards to mitigation and mitigation experts, is still ongoing and we're unable to pinpoint a realistic trial date for the Court at this time. Perhaps after the next 30 days or so we'll have a better idea for the Court as to when that will

occur.

MRS. SCHLAX: I agree with Mr. Caliel's assessment. I'll still waiting on voluminous public records and so I'm just not in a position to advise the Court when we might be ready.

THE COURT: That's fine. You all can let me know. This is probably a little too early to be doing that.

So what we will do is set our next pretrial date and I'll do that based on your feelings about how long you feel it would be before you would have the next group of materials that you're seeking so you'd have a better idea of where we need to go.

MRS. SCHLAX: Yes, Your Honor. I would suggest August 4th.

THE COURT: I'm in conference that week. Any other week but not that week.

MRS. SCHLAX: If we wanted to do the 11th then, Your Honor.

THE COURT: Are you here or at your conference?

MR. CALIEL: We will be at the prosecutor's conference, but I will be back Thursday the 13th or Friday the 14th. Either of those dates is good

for the State.

MRS. SCHLAX: Either date is fine, Your Honor.

THE COURT: All right. Then the next pretrial date will be August 13th at 9:00 for pretrial.

Thank you all for your time. I appreciate it.

MR. CONNOR: Thank you, Your Honor.

THE COURT: May I please have a five-minute recess before we proceed?

MR. CALIEL: Yes, Your Honor.

THE COURT: Five-minute recess and then we'll get ready.

MR. CALIEL: Your Honor, do you mind if we have Ms. Moore take the witness stand because we'll be asking her to be sworn on camera for the purposes of the deposition.

THE COURT: Sure.

MR. CALIEL: That way she can settle herself and get the microphone on.

THE COURT: Of course.

(Recess.)

(Defendant present.)

MR. CALIEL: Your Honor, for the record, the record's sake, we are in court on case No.

16-2013-CF-5781, the case of the State of Florida versus Donald Smith.

Your Honor, at this point in time I would ask that the witness be sworn.

THE COURT: Would you raise your right hand, please. Madam Clerk is going to swear you in.

(Witness sworn.)

THE WITNESS: I do.

THE CLERK: Thank you.

PATRICIA MOORE,

was called as a witness on behalf of the State, and after being duly sworn, then testified as follows:

DIRECT EXAMINATION

BY MR. CALIEL:

Q Good afternoon, ma'am.

A Good afternoon.

Q Ma'am, if you could, if you could try to keep your voice up. The courtroom acoustics are not very good so if you could try to lean forward and speak into the microphone so we can hear your responses.

A Okay.

Q Ma'am, could you please state your name for the record?

A Patricia Moore.

Q And where do you live, ma'am?

A I reside at 2495 Segovia, S-e-g-o-v-i-a, Avenue, Jacksonville, Florida, 32217.

Q How long have you been living at that address?

A Since 1976.

Q And directing your attention to June of 2013, were you living at the Segovia address at that time?

A Yes.

Q In June of 2013 was anybody else living with you at Segovia Avenue?

A Yes.

Q Who was living with you at that time?

A Charlie Shejin.

Q And can you spell Mr. Shejin's name?

A C-h-a-r-l-i-e S-h-e-j-i-n. I'm not sure.

Q Okay. And was anybody else living with you at that time?

A No.

Q In June of 2013.

A Oh, Donald Smith.

Q And who is Donald Smith to you?

A He is my son.

Q Do you see Mr. Smith sitting here in the courtroom today?

A Yes.

Q Could you please point to where Mr. Smith is seated and describe where he is and what he's wearing here today?

MRS. SCHLAX: Your Honor, we'd stipulate to the identification.

THE COURT: All right.

MR. CALIEL: Your Honor, may the reflect then that the witness is able to identify the defendant?

THE COURT: The record will so reflect.

BY MR. CALIEL:

Q And had your son been living with you at the Segovia address since May of 2013?

A Yes.

Q How many bedrooms does that home have?

A Approximately five.

Q And did each of you, meaning yourself, Mr. Shejin and your son, each have individual bedrooms to stay in inside the home?

A Mr. Shejin had his own bedroom. I had mine, but I -- there was not really furniture in some of the other bedrooms and so Don was sleeping in my bedroom.

Q Okay. On the floor or in a -- in a cot or something?

A Yes. On the floor, yes.

Q Back in June of 2013, was there also a personal computer inside the home?

A Yes.

Q And did you and your son and Mr. Shejin all have access to that personal computer?

A Yes.

Q Where was that personal computer kept inside the home?

A In a room that we labelled the office.

Q And so all of you would have had the ability to utilize that computer?

A Yes.

Q In June of 2013, did your son have access to a motor vehicle?

A Yes.

Q What type of vehicle did he have access to?

A It was a white van.

Q A panel van? Passenger van?

A Yes.

Q And was that your son's primary vehicle and was he the primary user in June of 2013?

A Yes.

Q In the days prior to your son's arrest on June 22nd of 2013, were any alterations or changes made to the seating of that particular van?

A Could you repeat that, please?

Q Yes, ma'am. Prior to your son's arrest on June 22nd, 2013, were there any changes made to the interior of the van, the seating arrangements inside the van?

A Yes.

Q Describe for us what those changes were.

A The van -- the bench seat that was in the back of the van was removed in order to accommodate equipment for his work purposes.

Q At the time prior to his arrest, was he employed? Your son.

A No, he did -- no.

Q Okay. But the seating in the middle portion of the van was removed for, for lack of a better term, moving or hauling possible construction equipment or things of that nature?

A Yes.

Q And was your son the primary user of that van at that time?

A Yes.

Q Ma'am, I'd like to direct your attention specifically to Friday, June 21st of 2013. During that afternoon were you with your son?

A Yes.

Q And during the course of the afternoon did you and your son run errands throughout the course of the afternoon?

A Yes.

Q At some point in time after you ran some errands in the afternoon, did you go furniture shopping with your son?

A Yes.

Q Where was that?

A Phillips Highway.

Q And what portion of Phillips Highway did you go furniture shopping?

A Somewhere around the Avenues Mall, Baymeadows Road.

Q Okay. On the south side of town?

A Correct.

Q Phillips and Southside, that sort of general area where the Avenues Mall is located?

A Yes.

Q And was this furniture shopping for the home where you were living? You said that it was sparsely furnished.

A Yes.

Q And was it just you and your son who were doing the shopping that afternoon?

A Yes.

Q Approximately what time did you return home after furniture shopping with your son?

A Approximately 6:30.

Q Did you stay at home for the remainder of the evening?

A Yes.

Q What about your son? Did your son stay at home?

A No.

Q About what time did your son leave the home at Segovia Avenue?

A Between 6:30 and 6:45.

Q How did he leave the home? Did he drive the van when he left?

A Yes.

Q And that's the white van that he had access to?

A Yes.

Q Did your son tell you where he was going when he left the house that night?

A To an NA meeting.

Q And where was he headed? What area of town was he headed to?

A San Marco area.

Q And after your son left your home at Segovia Avenue sometime between 6:30 and 7:00, was that the last time you saw or spoke to your son before his arrest on June 22nd?

A Yes.

Q If you could describe for the record what side of town is your home located. Is it referred to as the southside of town, sort of deep Mandarin area?

A My home is located on the southside of town in the Lakewood area.

Q Lakewood area of town. Are there Wal-Mart stores in close proximity to where your house is located?

A Yes.

Q Okay. In particular, you previously stated that you were shopping for furniture at the Phillips Highway and Southside area of town. Is there a Wal-Mart in that general area?

A Yes.

Q Also is there a Wal-Mart off of Phillips Highway in close proximity to where your home is located in Lakewood?

A Yes.

Q And would those be the Wal-Marts that you and your son would utilize in shopping if you had some

shopping to do at Wal-Mart?

A Mostly.

Q In June of 2013, was your son married?

A I'm sorry.

Q In June of 2013, what was your son's marital status? Was he married at that time?

A Divorced.

Q He was divorced. How long had he been divorced prior to June 21st of 2013?

A A lengthy period of time.

Q Where was his ex-wife living at the time in June of 2013?

A I'm not certain of a location where she was.

Q Was she located here in Jacksonville, Duval County, Florida?

A No, not to my knowledge.

Q And, to your knowledge, when your son left your home on the evening of June 21st, 2013, did he have in his possession any Wal-Mart gift cards that you were aware of?

MRS. SCHLAX: Objection, Your Honor. Calls for speculation.

THE COURT: I think you could rephrase it if she saw any.

BY MR. CALIEL:

Q Were you made aware, from your son, that he was in possession of any Wal-Mart gift cards prior to his departure on June 21st of 2013?

A I was not aware of any.

Q Did your son ever return home after leaving sometime shortly after 6:30 that evening?

A Not to my knowledge.

Q At some point in the early morning hours of June 22nd, 2013, did police officers come to your home at Segovia Avenue?

A Yes.

Q And did they speak to you at that early morning hour?

A Yes.

Q Were those police officers looking for your son?

A Yes.

Q Prior to the police arriving at your home, had you seen or heard from your son, either via telephone call or anything of that nature, prior to the police getting there since he had left the evening before?

A No.

Q And did you make any attempts to try to reach your son or contact your son after the police had made

contact with you?

A No.

Q Your son was arrested on June 22nd of 2013, is that correct?

A Yes.

Q Immediately following your son's arrest on June 22nd, 2013, were you able to speak to him in the three weeks that followed via telephone from his location in the Duval County Jail?

A Yes.

Q And also in the three weeks following his arrest, were you also allowed to see him on scheduled visitation days at the Duval County Jail?

A Yes.

Q Okay. Explain how that visitation works. Did you have a specific day did you go to see him?

A Yes. Fridays are his visitation days.

Q Okay. And in the three Fridays immediately following his arrest, were you able to go and visit with him at the Duval County Jail?

A Yes.

Q On those first three visits that you went to see him, were all those visits at the same location?

A They were all at Duval County Jail, yes.

Q Were some of the visits at different

locations within the jail facility itself?

A Yes.

Q Okay. During the course of those visitations, could you describe for the record how it is that the visitation is set up and how you communicated with your son during the course of those visitations?

A We were behind -- I was -- it was between glass. I think the first visit was up on the sixth floor and maybe the next visit was downstairs.

Q Okay. And when the visitations, regardless of which floor it was on, was it always where there was a glass partition between the two of you and then phones are available so that you can talk via the telephones?

A Yes.

Q During the course of your visits with your son in the first three weeks after his arrest, were there portions of time where you would communicate over the telephone itself, where you would hold the phone to your ear and he would hold the phone to his and you would speak much like you would be having a phone conversation?

A Yes.

Q Were there times during those three

visitations when you and your son would communicate without the phones and either speak close to the glass that separated the two of you all or try to communicate in another manner?

A Yes.

Q Okay. How would you try to communicate when it wasn't with the telephones that were there for you to talk to?

A Just by speaking normally or gesturing.

Q Do you know sign language?

A Yes, sir.

Q Okay. And just rudimentarily, does your son also know some sign language with spellings and signs and things of that nature?

A Only some finger spelling.

Q During the course of these first three visitations, on occasion did you choose to communicate via sign language at times?

A I think only because of emotional stress that we just spoke without using a phone.

Q Okay. And, again, regardless of the reasons behind it, where there occasions when you spoke to your son during the visitation without utilizing the telephones, but utilizing sign language?

A Without using the phones, yes.

Q And was it your son's decision to not use the phones and to speak in a manner avoiding the use of the telephones that were provided by the facility?

MRS. SCHLAX: Objection, Your Honor. Argumentative.

THE COURT: Can you rephrase your question?

BY MR. CALIEL:

Q Whose decision was it to use other methods of communication other than the phones that were provided by the facility?

A It was really no one's decision. We just did.

Q And, ma'am --

MR. CALIEL: For Court and counsel, I'm referring to page 14 line 24.

BY MR. CALIEL:

Q Ma'am, directing your attention to a sworn statement that was taken from you on August 2nd of 2013. Do you recall coming down and meeting with me on that day?

A On what date?

Q August 2nd of 2013.

A Yeah.

Q Okay.

MRS. SCHLAX: Your Honor, I'm going to object at this point. It's improper impeachment.

THE COURT: What page and line did you refer to?

MR. CALIEL: Page 14, line 24, Your Honor. Starting on line 24 and proceeding onto line 25 at the top of page 15.

THE COURT: I'm not sure I understand your objection.

MRS. SCHLAX: Your Honor, I think this is -- I think this is improper impeachment. He continually asks her the question of who made this decision. She's explained, well, no one, which is it, and now he's trying to again have her speculate as to what her son was thinking or doing when they both did something, and it's improper impeachment.

THE COURT: Well, it's certainly different than the answer she gave today and I assume that's the purpose of --

MRS. SCHLAX: Well, I think -- let me I guess further then object. I think the difficulty is, number one, this is a sworn statement without the presence of defense counsel and the question was, I didn't have any objection to using the phone. Okay. Then the leading question of, it was your son's choice then to avoid using the telephone.

Yes. Meaning, obviously, he did not use the telephone, nor did she. I didn't have a problem doing it, but it wasn't some choice they made. Again, he's going to try to infer that this was a choice made to in some way avoid detection. There's no evidence of that. But he's trying to infer it and then now when she's being asked the question and she's fully explaining, was it really a choice or a decision, and she certainly wouldn't have the ability to know what was going through his mind. We just didn't use it. And so I think it's improper impeachment of her now fully explaining what the situation was.

THE COURT: Mr. Caliel.

MR. CALIEL: Your Honor, I respectfully disagree. As clearly indicated in the sworn testimony, which was under oath, Ms. Moore indicated that she did not have any objections to using the phone. And when specifically asked, okay, it was your son's choice then to avoid using the phone, her answer was yes. And that is a different answer that what she just provided.

THE COURT: Okay. I'll going to overrule the objection for the purposes of continuing with the deposition. That doesn't mean it can't be

re-raised and reargued at a later date should it become necessary.

BY MR. CALIEL:

Q And, ma'am, directing your attention then to line 24, page 14 of the sworn statement that you provided. To be clear on that day of August 2nd of 2013, you were present and you actually had counsel present with you, correct?

A Yes.

Q Okay. Ms. Finnell?

A Yes.

Q Okay. And on that day you were sworn to tell the truth, the very same oath that you took here today?

A Yes.

Q Okay. And on that day do you remember stating, quote, I did not have any objections to using the phone. Do you remember that?

A I don't remember. It's here on paper.

Q Okay. And then specifically when asked, okay, it was your son's choice to avoid using the telephone, your response on August 2nd of 2013 was yes.

A Can I look at that?

Q Yes. It's the bottom of page 14 leading then to the very top of page 15, lines 1 and 2.

A It's not that my son said, mom, let's don't

use the phone, let's just, you know, talk through the glass. He did not say that. We just didn't use the phone.

Q Okay. To be clear, it's easier to communicate during the course of these visitations and you can hear better when you actually talk through the telephone so you can hear the person on the other side; isn't that true?

A Not necessarily.

Q But you didn't have any problems using the telephone. There wasn't any logistical problems, crackling or anything like that. When you used the telephone during these conversations --

A Not that I remember.

Q -- they operated?

A Not that I remember.

Q During these visits in the first three weeks following your son's arrest, did your son ever ask you to get him any books?

A Yes.

Q And specifically did he ever ask you to send him a psychology book which he referenced as the DSM-IV, a reference book for psychologists?

A Yes.

Q Did you purchase this book for him?

A Yes.

Q Okay. How did you go about purchasing this book and having it sent to him?

A I went online and ordered it from -- I believe it was Amazon or one of the sites that you can order books from.

Q And it was ordered by you from Amazon and sent directly to him at -- at the facility?

A Yes.

Q And during these visitations when he made this request for this book, was this one of those specific times when he was communicating with you by holding up writings versus simply talking over the telephone?

A Yes.

Q In those first three weeks following his arrest, did you speak with your son and was he able to provide you any details about his interaction with Cherish Perrywinkle and her family on that evening?

A Some.

Q Did he ever tell you where he came into contact with the family and the little girl on June 21st of 2013?

A Made contact with the family on the northside at a store.

Q Did he give you an idea of what type of store it was?

A I don't recall the name of the store.

Q Did your son ever tell you specifically why he was at that store on the northside on the evening of June 21st of 2014?

A It was my understanding that he stopped there to buy himself a drink.

Q And you said "it was my understanding". Was that what your son told you during the conversations about what took place?

A I don't know if those were the exact words or not or I just stopped there to buy a drink.

Q And was it while he was at the store to buy this drink that he came into contact with the family?

A I believe so.

Q Did your son ever tell you that he actually spoke to or communicated with the family at that particular store?

A I don't know how the conversation began.

Q Regardless of how it began, did your son tell you that he actually communicated or talked to the family?

A I don't recall.

Q Did your son ever tell you about offering a

ride to the family to take them to Wal-Mart?

A I know that he did offer them a ride, but I don't recall that he actually said that he offered them a ride.

Q How would you learn that information other than through your son?

A Through media, television.

Q Did your son ever relate to you what it was -- the weather was like when he was out at the northside on that day?

A I know that the weather was -- it was rainy.

Q And did he ever communicate to you that he actually did provide a ride to the family from where they were at the store to the Wal-Mart?

A Here again, I don't remember if he specifically said I took them there, but I know from the media or the news that that supposedly is what happened.

Q During your conversations with your son, did you specifically ask him or confront him and ask if he raped the little girl?

A Yes.

Q What was your son's response to that?

A He responded that he had not.

Q What did he tell you he did do to the little

girl when you asked him whether or not he raped the little girl?

A As far as I remember, there wasn't a verbal response, but only a gesture.

Q What did he show you that he did to the little girl?

A It was just a gesture of like touching (indicating).

Q And for the record, you just held your hands up and moved your fingers in that fashion. Is that the same sort of motion or indication that your son did when you asked him if he raped her and he said no?

A Yeah.

Q And he indicated that he just did that, indicated that with the hand gesture (indicating) that you were just describing?

A Yeah.

Q During the course of the conversations that you had with your son about that evening with the little girl, did he ever indicate to you that he prayed with the little girl?

A Yes.

Q What did he specifically tell you, the best of your recollection about that, how he prayed with the little girl?

A Just the comment that they prayed together.

Q During these conversations in the weeks that followed your son's arrest at visitation, did your son ever tell you what he said specifically to Cherish Perrywinkle after she got into his van in the Wal-Mart parking lot?

A Only after looking at the tapes was I able to recall what he said, and he emphatically repeated very loudly, twice on the tape that I saw, to the little girl, "You have to go".

Q So he indicated on the recording that you had observed -- this recording that you're referring to, that was a recording of one of these visitations, the last visitation that you had with your son, correct?

A I'm not sure if it was the last one. They weren't marked, dated.

Q And it was during that interaction and that conversation that your son told you that after the girl got into the van he said, "You got to go"?

MRS. SCHLAX: Objection, Your Honor, leading. It's also been asked and answered.

THE COURT: Can you state the beginning of that question again? I got the end.

BY MR. CALIEL:

Q And so was it during the course of that

conversation you had with your son during visitation, that when he said to the little girl, after he got into the van, "You've got to go"?

THE COURT: Is that -- are you asking her to clarify which time it was of the visit, because she indicated she doesn't know that?

MR. CALIEL: Not what time in the visit, but at what point in time during the interaction between the two of them that he made that statement.

THE COURT: During one of the visits?

MR. CALIEL: Yes.

THE COURT: Whichever one it was?

MR. CALIEL: Yes.

THE COURT: Okay. I'll allow the question. I'll overrule the objection.

THE WITNESS: Could you repeat the question?

BY MR. CALIEL:

Q Certainly. And so what I'm trying to focus on here is the statement, "You've got to go", your son during one of these visitations indicated to you that he made that statement to the little girl after she got into his van, into the front seat of his van.

A I don't know if the little girl was actually in the van or if she was in the parking lot.

Q Now, ma'am, we've already previously discussed the sworn statement of August 2nd of 2013. You remember that day?

A Yes.

Q And you do remember coming down and speaking to me on that day with your lawyer, correct?

A Yes.

MR. CALIEL: And for Court and counsel I'm referring to page 22 line 12.

MRS. SCHLAX: Improper impeachment, Your Honor.

MR. CALIEL: I haven't actually even got to that point yet, but I believe I've laid the foundation, Your Honor.

THE COURT: Page 22, line 12? Is that correct?

MR. CALIEL: Yes, Your Honor. That's where the question begins and the answers that follow.

THE COURT: Maybe I didn't hear everything, but I -- I don't recall you asking the question today as asked in the question on line 12, 13, and 14 on page 2 -- 22. Did I miss it?

MRS. SCHLAX: No, Your Honor, you did not. He never asked her. And the question should be what did your son tell you, not leading her.

MR. CALIEL: Okay.

THE COURT: I'm going to sustain the objection.

MR. CALIEL: I'll lay the foundation.

THE COURT: You can try to rectify it, but...

BY MR. CALIEL:

Q During the course of the conversations, ma'am, that you had with your son in the three weeks following his arrest during visitation, did your son ever make mention of making any comments to the little girl after she got into his van?

A The comment was, "You have to go".

Q Do you ever remember saying anything differently prior to today?

A From what's on the paper, yes.

Q Okay. And then proceeding to that, ma'am, we've already talked about on how August 2nd, 2013, you came down to my office and you were sworn in to tell the truth, much like you were sworn in to tell the truth today, correct?

A Correct.

Q Okay. And a copy of that transcript, you've had the opportunity to review that transcript before today, correct?

A Yes.

Q And you and I prior to today have discussed that transcript, correct?

A Yes.

Q Okay. And on that day, starting on line 12, in that transcript on page 22, did you ever make any mention that the -- that because the girl was in the van at that point in time that he would have to kill her? And on August 2nd, 2013, when you were under oath in my office your response was, "I think he said to me on one of the visits, that he said to the little girl, 'You know you'll have to die'". Isn't that true?

A That is what's on this paper, yes.

Q Okay. And you remember saying that to me?

A From what's on this paper, yes.

Q But you don't have the same memory now of what he said to her?

A Since being able to review the tapes, I made the statement to you that I wanted to revoke what I said here because I thought that the question that you asked me was leading and it was like a subliminal thought that was put into my mind because you had already said to me that you had already seen the videotape of our conversation and that, you know, anything that I said that was not truthful, then that would be harmful to me, could get me in trouble. And

so after making the statement it was like where did that come from, that's not what was said to me. And so I said that I wanted to revoke that statement.

Q But to be clear, on August 2nd of 2013, you were the one -- set aside what was in the transcript, when you and I met part of our conversation was the need for you to be truthful, correct?

A Yes, and I was trying to be truthful.

Q Okay. And you had your lawyer present, Ms. Finnell, correct?

A Ms. Finnell was there, yes.

Q But when specifically asked these questions under oath, you were the one who provided that information that he said, he told the little girl, "You'll have to die", correct?

A I was under oath. I was also under much stress.

Q And I understand that, that the situation is a stressful situation. I understand that. But you're not denying the fact that you did --

MRS. SCHLAX: Objection, Your Honor --

BY MR. CALIEL:

Q -- state those things.

MRS. SCHLAX: -- asked and answered.

THE COURT: I think -- well, I'm going to let

him ask it this one last time. I know she's explained why she gave the answer, but she hasn't said that she gave the answer, other than how she explained that she gave the answer. I think he can ask that and then we'll move on.

MR. CALIEL: Yes.

BY MR. CALIEL:

Q Simply concluding this topic, ma'am, you're not denying that you made the statement, you're just saying that under the stress you may have made it in error, I guess, for lack of a better term?

A I made the statement and I made it in error, yes.

Q Aside from the indication or denial that he raped the girl and the statement that he prayed with the girl, do you recall any other specific statements that your son made to you about his interaction with Cherish Perrywinkle prior to her death?

A Could you repeat that?

Q Yes. You previously talked about how you asked him about the rape and he denied it when he indicated with his hand gesture as to what he did.

MRS. SCHLAX: Objection, Your Honor. Mr. Caliel is just testifying. If he could just get to the question.

THE COURT: I think -- I think he did and she didn't understand it. I'm assuming he's trying to explain it better.

MR. CALIEL: I am, Your Honor.

THE COURT: I'll overrule the objection.

MR. CALIEL: Okay.

BY MR. CALIEL:

Q And, again, you confronted him about whether or not he had raped the little girl and your response in regards to that line of questioning was that he indicated he had not, but that he gave you a hand gesture of moving his hand in a fondling fashion, is that correct?

A That's what I said, yes.

Q Okay. And you also indicated at some point in time after she had got into the van he indicated to you that she has to go.

A Correct.

Q Okay. Other than those two statements, and the statement that he provided to you that he prayed with the little girl at some point in time, do you recall any other statements during these visitations that your son told you about the interaction he had with Cherish Perrywinkle on that night?

A No.

Q Thank you, ma'am.

MR. CALIEL: I don't have any further questions.

MRS. SCHLAX: May it please the Court.

THE COURT: Yes, ma'am.

CROSS-EXAMINATION

BY MRS. SCHLAX:

Q Good afternoon, ma'am.

A Good afternoon.

Q Let's -- let's begin with the -- with the van. That was a van that you'd had for a number of years?

A Several years. Two years.

Q Okay. And Donald ended up using that van for work purposes?

A Yes.

Q Your son is very handy, is he not?

A Very handy.

Q And at the -- at the time, I guess the time frame in question, you were actually in the process of putting a new roof on your house, were you not?

A Yes. Yes.

Q And Donald was one of the key workers on that project, correct?

A I had hired a company that came to give me an

estimate on putting a new roof on my house and Don was present for the meeting there and the -- Carlson, I think it was the name of the company, was made aware of Don's skills as a painter and repair person for structural damage. And so the gentleman that was there had said to Don that because of his skills that there was possibly work that he could turn over to Don when people who had damages, water damages from their house. So he was going to utilize Don, refer customers to him.

Q Okay. And that was the purpose of removing the middle seat, bucket seat within the van, so that it would transport materials --

A Yes.

Q -- much better?

A Yes.

Q Okay. And I think you also mentioned in your direct testimony that your son had specifically requested a DSM-IV, which is a kind of psychiatrist handbook, is it not?

A Yes.

Q Okay. Were you -- were you personally familiar with that book?

A I was not.

Q Okay. Your late husband was a psychiatrist, correct?

A Correct.

Q Okay. And Don had been actively trying to kind of pursue some help in the -- in the weeks preceding his arrest, had he not?

A Yes.

Q Okay. And what he was telling you when he's asking for the DSM-IV is he wants to try to gain the knowledge to help him understand what might be afflicting him.

MR. CALIEL: Objection, Your Honor. Calls for speculation.

MRS. SCHLAX: He actually says it.

THE COURT: Well, I think she can answer it if he said it.

BY MRS. SCHLAX:

Q Do you remember your son specifically telling you, I need this DSM-IV, mom, because I need to understand what's going on in my head?

A Yes.

Q Okay. And that was -- that was not a -- a new expression to you, was it?

A No, it was not.

Q Okay. And the weeks leading up to his arrest, there had been several comments that Mr. -- Mr. Smith had made in regards to his mental health.

A Yes.

Q Mr. Caliel ended up speaking to you quite a few times over the late June, July, even into August, correct?

A That's correct.

Q How many different times were you actually subpoenaed to come down to the State Attorney's Office?

A Three.

Q Okay. Did you also, besides those three occasions, did you also voluntarily come down?

A No.

Q Okay. How many times did law enforcement come to your home?

A In regards to?

Q In regards to this case, ma'am.

A I don't recall.

Q Okay. Was it -- it was more than at least two separate times?

A Yes. Yes.

Q And each time they were asking you questions about your son, correct?

A Correct.

Q And each time you tried to be as cooperative as possible, correct?

A Yes.

Q Okay. Obviously very uncomfortable for you, though, correct?

A Yes.

Q Okay. In fact, one of the sworn statements you actually asked to come back because you did want to hire Ms. Finnell, a private attorney, correct?

A Correct.

Q Okay. And was that because you felt a little intimidated?

A Yes.

Q Okay. At the time you walk in, were you presented with any kind of videotapes or recordings of your interactions with your son that had occurred approximately a month before?

A I did receive some videotapes.

Q But at the time you were giving a sworn statement, that we've spoken extensively about, on August 2nd, 2013, had you had the ability to review any kind of tapes?

A No. No, I had not.

Q So, you were trying to answer the questions as best you could based on a memory of an emotional visit that had occurred over a month before?

A Yes.

Q Thank you very much, ma'am.

THE COURT: Mr. Caliel, anything further?

MR. CALIEL: Yes, ma'am.

REDIRECT EXAMINATION

BY MR. CALIEL:

Q For clarification, Ms. Moore, you were subpoenaed three separate occasions, correct, to come to the State Attorney's Office following your son's arrest?

A I am not sure of the number. I received several.

Q And one time you came down with Mr. Shejin?

A Yes.

Q Okay. And when we met on that particular occasion, understanding that the subject matter, given the circumstances may not have been pleasant, was anybody mean to you or intimidating to you?

A I don't know that I would say they were intimidating. I was just very stressed, stressed out.

Q And understandably so, given the circumstances. But that one occasion you actually came down with Mr. Shejin because Mr. Shejin was also subpoenaed to come down and speak at that time as well, correct?

A He was there with me, yes.

Q On the second occasion following these three

visitations when you were subpoenaed to come down and speak, that's when you were made aware of the fact that these interactions or visitations that had been ongoing had been recorded specifically, correct?

A I'm sorry.

Q That's when you were made aware of the fact that the visitations had been recorded, correct? The second time you came down when you asked to come back at a later time once you had a lawyer present.

A I did know that our visits had been recorded, yes.

Q Okay. And speaking in reference to that second visitation, you were subpoenaed to come down and speak with me, correct?

A Correct.

Q And I didn't do anything on that occasion specifically to intimidate you, did I?

A I think I was just intimidated anyway at being asked to come.

Q Because of the circumstances and what was taking place and the gravity of the situation, correct?

A I was just intimidated.

Q Okay. But when you asked if you could postpone our meeting and our conversation so that you could have the opportunity to seek counsel, that

request was granted by me, wasn't it?

A It was -- it was granted, yes. You at first said I could only have like two days on the weekend and I'm like, I can't find anybody on the weekend. But eventually we came to some agreement as to when we could set another date.

Q Because originally we wanted to speak to you the Monday, the following day, and you needed a little bit more time to seek counsel from Ms. Finnell, correct?

A I did.

Q Okay. And we agreed to that, right, that you could have more time and that's what ultimately culminated in the August 2nd, 2013 meeting that we've previously discussed today, correct?

A Correct.

Q Okay. And on that meeting, it was a morning meeting, you were able to come in with Ms. Finnell?

MRS. SCHLAX: Objection, Your Honor. All leading.

THE COURT: Do you want to rephrase the question, please?

BY MR. CALIEL:

Q On the final meeting on that August 2nd date, were you able to come in with Ms. Finnell?

A Yes.

Q And Ms. Finnell, who was your lawyer at the time, was she able to sit in during the entire conversation that we had on August 2nd of 2013?

A Yes, she was able to sit with me.

Q And if you had any questions, would you have been able to speak with Ms. Finnell?

A I would have been able to, yes. I just -- it was so new to me I didn't know what kind of questions I should stop and ask her.

Q But she was there if you needed her?

A I suppose.

Q Thank you, ma'am.

MR. CALIEL: I don't have any further questions.

THE COURT: Ms. Schlax.

MRS. SCHLAX: No further questions, Your Honor.

THE COURT: So is Ms. Moore free -- free to leave?

MR. CALIEL: Yes, she's free to leave at this point in time, Your Honor.

THE COURT: Somebody is escorting her?

MR. CALIEL: Yes, Mr. Hinson is outside and waiting to take her.

THE COURT: Is she going that way?

MR. CALIEL: She can if she wants or I can ask Detective Hinson to come in and we can have her escorted down the back just to avoid that. Let me get Robbie and we'll do that.

THE COURT: Ms. Schlax, do you have any objection to that?

MRS. SCHLAX: No. Detective Hinson has been wonderful.

THE COURT: Would you like her to go out this way?

MRS. SCHLAX: I prefer it.

THE COURT: Thank you.

MRS. SCHLAX: Thank you, Your Honor.

(Thus the proceeding ended.)

C E R T I F I C A T E

I, Faye M. Gay, hereby certify that the foregoing transcript is a true and accurate transcription of my Stenograph notes taken at the time and date stated herein.

Dated this 8th day of June, 2018.

/s/ FAYE M. GAY

FAYE M. GAY

Filing # 73343690 E-Filed 06/11/2018 09:58:01 AM

IN THE CIRCUIT COURT OF THE FOURTH JUDICIAL CIRCUIT, IN AND FOR DUVAL COUNTY, FLORIDA.

Case No: 2013-CF-5781-AXXX-MA

Division CR-D

STATE OF FLORIDA

-vs-

DONALD SMITH,

Defendant,

TESTIMONY taken before the Honorable Mallory D. Cooper, Judge of the Circuit Court, on August 13, 2015, and as reported by Faye M. Gay, Certified Realtime Reporter, Registered Merit Reporter, and Certified Legal Video Specialist.

OFFICIAL REPORTERS, INC.
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ACCEPTED: DUVAL COUNTY, RONNIE FUSSELL, CLERK, 06/12/2018 09:46:57 AM

APPEARANCES:

MARK CALIEL, Esquire,
Assistant State Attorney,
Appearing on behalf of the State of Florida

JULIE SCHLAX, Esquire,
Appearing on behalf of the Defendant.

P R O C E E D I N G S

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Pretrial.....4

MR. CALIEL: Good morning, Your Honor.

THE COURT: Good morning.

MR. CALIEL: Your Honor, if we could call the case of Donald Smith. The case is located on the top of page 20 of the morning calendar.

THE COURT: Smith.

(Defendant present.)

MS. SCHLAX: Good morning, Your Honor. Julie Schlax appearing on behalf of Mr. Smith who stands to my left.

Your Honor, this was an additional pretrial in which I can advise the Court that I did receive last week the public records request from the State Attorney's Office. It is approximately a little over four thousand pages of material.

I as well as the mitigation specialist have begun to go through that and we are now in a position over the next week, once I hear back from the Justice Administration Commission, to go ahead and formally file the appropriate motion to have a psychologist picked out.

Mr. Caliel and I were anticipating perhaps a September 14th pretrial and I'm optimistic that at that time I will be able to set a trial date.

THE COURT: Okay. September 14th for

pretrial.

Can you all approach side-bar for a minute, please?

MR. CALIEL: Yes, Your Honor.

(Counsel for the State and Defense approached the bench for a side-bar conference out of the hearing of the court reporter.)

THE COURT: All right. Our next court date will be September 14th.

MS. SCHLAX: Thank you, Your Honor.

MR. CALIEL: Thank you, Your Honor.

May I be excused?

THE COURT: Yes.

MR. CALIEL: Thank you.

(Thus the proceedings ended.)

C E R T I F I C A T E

I, Faye M. Gay, hereby certify that the foregoing transcript is a true and accurate transcription of my Stenograph notes taken at the time and date stated herein.

Dated this 8th day of June, 2018.

/S/ Faye M. Gay

_____

Faye M. Gay, CRR, RMR, FCR, RPR, CLVS

Filing # 74015515 E-Filed 06/25/2018 08:56:31 AM

IN THE CIRCUIT COURT, FOURTH JUDICIAL CIRCUIT, IN AND FOR DUVAL COUNTY, FLORIDA

CASE NO.: 16-2013-CF-5781-AXXX
DIVISION: CR-D

STATE OF FLORIDA

- vs -

DONALD JAMES SMITH,

Defendant.

_____/

Proceedings taken on Tuesday, March 24, 2015, before the Honorable Mallory Cooper, Judge of the Circuit Court, Division CR-D, in the Duval County Courthouse, 501 West Adams Street, Jacksonville, Florida, and as reported by Holli V. Callahan, Florida Professional Reporter and a Notary Public in and for the State of Florida at Large.

ACCEPTED: DUVAL COUNTY, RONNIE FUSSELL, CLERK, 06/26/2018 10:35:04 AM

APPEARANCES:

MARK CALIEL, ESQUIRE,

Appearing on behalf of the State.

JULIE SCHLAX, ESQUIRE, and MR. FLETCHER, ESQUIRE,

Appearing on behalf of the Defendant.

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P R O C E E D I N G S

March 24, 2015 9:57 a.m.

MR. CALIEL: Good morning, Your Honor.

THE COURT: Good morning.

MS. SCHLAX: Good morning, Your Honor.

MR. CALIEL: Your Honor, if we can address the case of Donald Smith located on the top of page 5 of Your Honor's calendar.

THE COURT: Page 5, Donald Smith.

(Defendant present.)

MS. SCHLAX: Good morning, Your Honor.

THE COURT: Good morning.

MS. SCHLAX: Julie Schlax and Mr. Charles Fletcher appearing on behalf of Mr. Smith standing to my left.

Your Honor, this is our first pretrial since the entry of the order appointing us. Unfortunately, we still do not have the file. We did inquire of the Public Defender's Office yesterday. Because they have to scan everything in, they can no longer give us hard copies of anything.

Evidently, that's taking an enormous amount of time. They are working actively on the file.

The only other thing we are requesting of the Court is Ms. Brooke Butler has previously been in

contact with the Public Defender's Office as a mitigation specialist. We have coordinated with her. She has executed a JAC contract. She wishes to remain on the case. We would ask the Court to appoint her.

THE COURT: Do you know what amount she is seeking?

MS. SCHLAX: I would be seeking --

THE COURT: She has already done some of the work, correct?

MS. SCHLAX: She has done some of the work.

There is a tremendous amount of records that I can tell the Court at this point still need to be sought. And so I would ask for a preliminary amount of $5,000.

THE COURT: Okay. I signed the order of appointment and granting to incur costs.

MR. CALIEL: Your Honor, at this time there is nothing more from the State. I understand that Mr. Fletcher and Ms. Schlax need to review the file. There is one primary deposition that still needs to be completed. That is the deposition of a DNA expert and FDLE. So we'll get that scheduled once they are able to get up to speed and review the contents of the Public Defender's file. I can supplement

anything that they believe may be missing or just lost in translation at that point in time. So I would suggest perhaps another pretrial date to allow them to get up to speed with the file and we can schedule those depositions by the next court date.

THE COURT: Okay. How long do you think it should be passed for?

MS. SCHLAX: Your Honor, maybe we are looking at the week of May 11th.

THE COURT: Is there a day that week that you'd prefer?

MS. SCHLAX: Any day is fine, Your Honor.

THE COURT: May 12th.

MR. CALIEL: The 12th would be fine with the State.

THE COURT: May 12th for pretrial.

That's I guess, about a month and a half from now?

MS. SCHLAX: Yes, Your Honor.

THE COURT: Okay. So maybe at that point -- hopefully you will the file before then. Did they give you any idea?

MS. SCHLAX: They thought they would get it to me in the next two weeks.

THE COURT: Okay. That will be great.

MS. SCHLAX: We found that once we start calling, it speeds up.

THE COURT: Anything further?

MR. CALIEL: Your Honor, may counsel and I approach just on a procedural matter?

THE COURT: You may.

(Off-the-record sidebar discussion.)

THE COURT: Okay. I'll pass Mr. Smith's case to May 12th for pretrial. Thank you.

MR. CALIEL: Thank you, Your Honor.

MR. FLETCHER: Thank you, Judge.

(The proceedings were concluded.)

- - -

C O U R T C E R T I F I C A T E

STATE OF FLORIDA)

COUNTY OF DUVAL)

I, Holli V. Callahan, Florida Professional Reporter and Notary Public, do hereby certify that I was authorized to and did stenographically report the foregoing proceedings and that the transcript is a true and complete record of my stenographic notes.

DATED this 23rd day of June 2018.

/s/ Holli V. Callahan

_____

Holli V. Callahan,
Florida Professional Reporter

Filing # 74899131 E-Filed 07/13/2018 11:50:55 AM

IN THE CIRCUIT COURT OF THE
FOURTH JUDICIAL CIRCUIT, IN
AND FOR DUVAL COUNTY, FLORIDA

CASE NO.: 16-2013-CF-5781-AXXX

DIVISION: CR-D

STATE OF FLORIDA

-vs-

DONALD JAMES SMITH,

Defendant.

STATE OF FLORIDA)

COUNTY OF DUVAL)

TESTIMONY AND PROCEEDINGS taken before the Honorable MALLORY D. COOPER, Judge of the Circuit Court, Division CR-D, in the Duval County Courthouse, Jacksonville, Florida, on Tuesday, May 12, 2015, at 9:50 a.m., and as reported by Colleen S. David, Florida Professional Reporter, and a Notary Public in and for the State of Florida at Large and Court Reporter.

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ACCEPTED: DUVAL COUNTY, RONNIE FUSSELL, CLERK, 07/17/2018 09:28:16 AM

APPEARANCES:

MARK CALIEL, Esquire,
Assistant State Attorney, appearing on behalf of the State of Florida.

JULIE A. SCHLAX, Esquire,
and
CHARLES FLETCHER, Esquire,
appearing on behalf of the Defendant.

P R O C E E D I N G S

May 12, 2015 9:50 a.m.

MR. CALIEL: And Your Honor, as the Court personnel is gathering Donald Smith, may counsel and I approach on this case.

THE COURT: You may.

(A discussion was held off the record.)

MS. SCHLAX: Good morning, Your Honor. Julie Schlax and Mr. Charles Fletcher appearing on behalf of Mr. Smith, who stands to our left.

MR. CALIEL: Your Honor, this morning the only matter filed by the State was a motion to perpetuate the testimony of Patricia Moore. I provided copies to both Court and counsel and filed that electronically. The essence of the motion is, I guess in the abundance of caution Ms. Moore is currently 76 years of age, and we have some uncertainty as to when we actually will be trying this particular case, and as articulated in our motion we would like to perpetuate Ms. Moore's testimony via deposition and we will make arrangements to have that videotaped. And we've even offered that if the defense wishes to have any portions of the testimony perpetuated for the possibility of the penalty phase as well, they can

do that. This is only a precautionary measure. If Ms. Moore is available to testify when the case is tried, then we will put on her live testimony. This is just in an abundance of caution, given her advanced age, we don't want to lose the opportunity to present her testimony one way or the other.

MS. SCHLAX: And Your Honor, for the record we would object to this motion. As is articulated in the Florida Rules of Criminal Procedure 3.190(I), after the filing of an indictment or information on which a defendant is to be tried, the defendant nor the State may apply for an order to perpetuate testimony. However, it requires that the application shall be verified or supported by the affidavit of a credible person that a perspective witness resides either beyond the territory of jurisdiction or may be unable to attend or be prevented from attending a trial. I appreciate that Mr. Caliel has been candid in his motion that cites, and he actually swore to it, that Ms. Moore has no obvious health issues. Just because of her age, I would suggest to the Court, that is not a valid reason to perpetuate testimony. The witness that they seek to perpetuate is my client's mother, it would obviously be emotional testimony, and

without any kind of good cause shown I would suggest is unnecessary.

THE COURT: I think the fact that the State agrees that if she is, of course, available at the time of trial that this deposition testimony would not be used, and it's merely a precautionary motion in case, since we don't yet know a trial date. We've discussed when we might be able to set it in the future, but so far there's no agreement as to when both the State and defense would be ready, so, we're not there yet. And I would find that it would be appropriate to do that in the courtroom with the Judge present as if it were trial testimony in case it does need to be used. The surroundings would be the same as if it were live testimony. With all of that, understanding that the State will not use it if she's available, and it can be done with the Court present in this courtroom, then I'll grant the motion. And in looking at my calendar the only day during June that I have free is Friday, June 26th. The rest of them are scheduled.

MR. CALIEL: Your Honor, unfortunately that is the day the Florida criminal rules committee meets in south Florida, and I am required to attend that.

THE COURT: I can do it on the 19th, we have a 3850 that day.

MS. SCHLAX: And I apologize, Your Honor, I'm out of town.

THE COURT: Okay. I'm out of town the week of the 8th for a conference, and we have a trial the week of the 1st, but I don't know how long it's supposed to last. How long do you think the deposition would be?

MR. CALIEL: Your Honor, I can't imagine the direct testimony lasting much more than an hour to two hours at most. There is just very specific information that we need to get from Ms. Moore that she's previously testified to in sworn statements, so I expect it wouldn't be extremely lengthy testimony.

THE COURT: We may be able to do it on the 5th, well, no, I can't do it that day. We can do it Thursday, July 2nd, it's not a Friday. We can do it on the 10th of July, I have a 3.850, we'd have to work around that.

MS. SCHLAX: Your Honor, the 2nd is fine with the defense.

MR. CALIEL: The 2nd would be fine with the State as well.

THE COURT: Let's try for that. So, July 2nd, I'm going to say at 9:00, it should be fine. We have a calendar, let's make it 1:30, is that all right, July 2nd at 1:30?

MR. CALIEL: Yes, Your Honor.

MS. SCHLAX: Yes, Your Honor.

THE COURT: July 2nd at 1:30, to perpetuate testimony. And then do you want a pretrial before that date, do you want to use that date as a pretrial?

MS. SCHLAX: We can use that date as the pretrial.

THE COURT: Is that all right with the State?

MR. CALIEL: Yes, Your Honor. With the understanding that we discussed at sidebar that at that time we'd discuss a trial date.

THE COURT: All right. Thank you.

MS. SCHLAX: Thank you very much.

MR. CALIEL: Thank you, Your Honor.

(Proceedings concluded at 10:10 a.m.)

- - -

C E R T I F I C A T E

STATE OF FLORIDA)
COUNTY OF DUVAL)

I, Colleen S. David, Florida Professional Reporter, certify that I was authorized to and did stenographically report the foregoing proceedings and that the transcript is a true and complete record of my stenographic notes.

DATED this 13th day of July, 2018.

/s/ Colleen S. David
COLLEEN S. DAVID, FPR

Filing # 73343690 E-Filed 06/11/2018 09:58:01 AM

IN THE CIRCUIT COURT OF THE FOURTH JUDICIAL CIRCUIT, IN AND FOR DUVAL COUNTY, FLORIDA.

Case No: 2013-CF-5781-AXXX-MA

Division CR-D

STATE OF FLORIDA

-vs-

DONALD SMITH,

Defendant,

PROCEEDINGS taken before the Honorable Mallory D. Cooper, Judge of the Circuit Court, on September 15, 2015, and as reported by Faye M. Gay, Certified Realtime Reporter, Registered Merit Reporter, and Certified Legal Video Specialist.

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ACCEPTED: DUVAL COUNTY, RONNIE FUSSELL, CLERK, 06/12/2018 09:47:03 AM

APPEARANCES:

MARK CALIEL, Esquire,
Assistant State Attorney,
Appearing on behalf of the State of Florida

JULIE SCHLAX, Esquire,
Appearing on behalf of the Defendant.

P R O C E E D I N G S

PROCEEDING PAGE

Pretrial.....4

MR. CALIEL: Good morning, Your Honor.

THE COURT: Good morning.

MR. CALIEL: Your Honor, if we could address the case of Donald Smith. Mr. Smith's case is located on the bottom of page 16 of the morning calendar.

THE COURT: Page 16, Smith.

(Defendant present.)

MS. SCHLAX: Good morning, Your Honor. Julie Schlax appearing on behalf of Mr. Smith who stands to my left.

Your Honor, I am tendering to the Court courtesy copies of a motion for appointment of mental health expert as well as a second motion for authority to incur additional costs for the mitigation coordinator.

Your Honor, I do not have the JAC response and so I -- I'm -- although I somewhat expect a perfunctory e-mail response, I do not have that and I will notify Your Honor as soon as I have received that and can tender that.

THE COURT: Okay. Any objection?

MR. CALIEL: No, Your Honor.

THE COURT: Okay. I'll just hold onto this until you let me know you've gotten the response.

MS. SCHLAX: Yes, Your Honor.

And, Your Honor, counsel and I had discussed setting this case for trial Monday, April 4th.

THE COURT: I think that's fine, but --

MR. CALIEL: And, Your Honor, we checked the calendar and Easter Sunday falls in March this year, so it's beyond the Easter holiday because that may be a concern with the sequestration issue.

THE COURT: Okay. Good.

MR. CALIEL: So Easter Friday -- Good Friday is March 25th in 2016 and Easter Sunday is the 27th so this will be a full calendar week after that holiday.

THE COURT: April 4th, right?

MS. SCHLAX: Yes, Your Honor.

THE COURT: April 4th for jury trial. That would be March 31st for final pretrial.

And when would you like an intervening date?

MS. SCHLAX: I'm sorry, Your Honor. Did you ask for an intervening -- what intervening date?

THE COURT: Um-hum.

MS. SCHLAX: I would suggest to the Court that we probably need to come back -- if we could come back October 19th.

THE COURT: I'm out that week. That's my vacation week. Another week.

MS. SCHLAX: Can we do the 26th then, Your Honor?

THE COURT: That's fine. October 26th for pretrial.

MR. CALIEL: That would be fine, Your Honor.

THE COURT: All right.

MR. CALIEL: And, Your Honor, in reference -- I know we've had some brief discussions in reference to possible motions for change of venue, things of that nature. I think we need to set some date to have those matters addressed and perhaps start discussing that. The Court had suggested maybe a questionnaire for the venire, maybe getting that set up ahead of time and getting counsel together to organize that. So we might want to start thinking about those motions or issues.

THE COURT: Okay.

MS. SCHLAX: I will be prepared to argue that on the 26th and to have it filed no later than the 16th.

THE COURT: If that's the case, can we make the 26th a to-be-set date because I think I've got

a lot of jury selections that day.

MS. SCHLAX: And my only concern is I will be in the second week of a potential death penalty case. I think the guilt phase can be accomplished that prior week. I may -- if we bleed over into it, that would be my only conflict.

MR. CALIEL: Do we want to push it over to maybe November 2nd if the Court is a little more free? I do have a post-conviction matter that's going to be scheduled that week as well. I anticipate that will be a one-day post-conviction hearing, but I need to move that with the other measures as well.

THE COURT: Can I pass it to the week of November 2nd? That will probably still need to be a to-be-set.

MS. SCHLAX: Yes, Your Honor.

THE COURT: Is that all right?

MS. SCHLAX: Yes, Your Honor.

THE COURT: So we'll strike October 26th. And November 2nd for pretrial with motions to-be-set.

MR. CALIEL: Your Honor, could we have a deadline so we could perhaps respond in writing to anything prior to that hearing week?

THE COURT: I think Ms. Schlax indicated she intended to have it filed by October 16th.

MS. SCHLAX: Yes, Your Honor.

MR. CALIEL: By the 16th that should be fine, give us a couple of weeks to respond in writing.

THE COURT: Okay. Anything else?

MR. CALIEL: Nothing else from the State at this time, Your Honor.

MS. SCHLAX: Nothing else, Your Honor. Thank you.

THE COURT: If you'll just let me know when you get your response and I'll go ahead and do the orders. I agree with you they're probably going to agree, but we probably need to wait for that response.

MS. SCHLAX: Thank you, Your Honor.

MR. CALIEL: Thank you, Your Honor.

May I be excused?

THE COURT: You may.

MR. CALIEL: Thank you.

(Thus the proceedings ended.)

C E R T I F I C A T E

I, Faye M. Gay, hereby certify that the foregoing transcript is a true and accurate transcription of my Stenograph notes taken at the time and date stated herein.

Dated this 8th day of June, 2018.

/S/ Faye M. Gay

_____

Faye M. Gay, CRR, RMR, FCR, RPR, CLVS

Filing # 72932200 E-Filed 06/01/2018 08:51:55 AM

IN THE CIRCUIT COURT OF THE FOURTH JUDICIAL CIRCUIT, IN AND FOR DUVAL COUNTY, FLORIDA

CASE NO.: 2013-CF-005781
DIVISION: CR-D

STATE OF FLORIDA

VS.

DONALD JAMES SMITH,

Defendant.

_____/

STATE OF FLORIDA)

COUNTY OF DUVAL)

Transcript of Proceedings before the HONORABLE MALLORY D. COOPER, Circuit Court Judge, in open court, at the Duval County Courthouse, Jacksonville, Florida, on the 2nd day of November, 2015, commencing at 10:22 a.m., as reported by Gretchen Lee Chatley, Florida Professional Reporter Notary Public in and for the State of Florida at Large.

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ACCEPTED: DUVAL COUNTY, RONNIE FUSSELL, CLERK, 06/04/2018 09:46:43 AM

A P P E A R A N C E S

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200 East Forsyth Street
Jacksonville, Florida 32202

Attorney for the Defendant.

- - -

I N D E X

WITNESS PAGE NO.

CERTIFICATE OF REPORTER 06

(N O E X H I B I T S)

P R O C E E D I N G S

November 2, 2015 10:22 a.m.

THE COURT: Okay.

MR. SCHLAX: Good morning, Your Honor.

THE COURT: Good morning.

MS. SCHLAX: Julie Schlax appearing on behalf of Mr. Donald Smith. We'll bring him out in just a moment. May we briefly approach, Your Honor.

THE COURT: You may.

(A sidebar conference was had by the court and counsel out of the hearing of the court reporter.)

(End of sidebar discussion.)

THE COURT: All right. After checking the calendar do we need to bring him out now?

MS. SCHLAX: Thank you, Your Honor.

(The defendant is present in open court.)

MS. SCHLAX: Good morning, Your Honor. Julie Schlax appearing on behalf of Mr. Donald Smith, who stands to my left. Your Honor, we're here this morning to set argument in regards to the defense motion to change venue. I believe in talking sidebar Thursday is acceptable to the Court as it is for the Defense.

THE COURT: All right. I think that works with everyone's calendar and that would be the 5th?

MR. CALIEL: Yes, Your Honor.

THE COURT: November 5th for hearing on motion, time and date certain. That day is also a pretrial and then we also have scheduled already March 31st for final pretrial and April 4 for jury trial, so be back Thursday morning. Thank you.

MS. SCHLAX: Yes. Thank you very much, Your Honor.

MR. CALIEL: Thank you, Your Honor.

MS. SCHLAX: May I be excused?

THE COURT: Yes.

(The proceedings were concluded at 10:31 a.m.)

- - -

C E R T I F I C A T E O F R E P O R T E R

STATE OF FLORIDA)
COUNTY OF DUVAL)

I, Gretchen Lee Chatley, Florida Professional Reporter, certify that I was authorized to and did stenographically report the proceeding; and that the foregoing pages are a true and complete record of my stenographic notes taken during said proceeding.

I further certify that I am not a relative, employee, attorney, or counsel of any of the parties, nor am I a relative or employee of any of the parties' attorneys or counsel connected with the action, nor am I financially interested in the action.

Dated this 2nd day of November, 2015.

/s/ Gretchen Lee Chatley
GRETCHEN LEE CHATLEY, FPR

* * *

Filing # 76320717 E-Filed 08/13/2018 09:22:01 AM

IN THE CIRCUIT COURT OF THE
FOURTH JUDICIAL CIRCUIT, IN
AND FOR DUVAL COUNTY, FLORIDA.

CASE NO: 16-2013-CF-5781-AXXX

DIVISION: CR-D

STATE OF FLORIDA

-vs-

DONALD JAMES SMITH,

Defendant.

STATE OF FLORIDA)
COUNTY OF DUVAL)

PROCEEDINGS before the Honorable MALLORY COOPER, Judge of the Circuit Court, Division CR-D, as cause in this matter came to be heard on the 17th of November, 2015, before Karen Waugerman, a Notary Public in and for the State of Florida at Large and Registered Professional Reporter.

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ACCEPTED: DUVAL COUNTY, RONNIE FUSSELL, CLERK, 08/13/2018 11:55:35 AM
PAGE # 3579

APPEARANCES:

MARK CALIEL, Esquire, Assistant State Attorney, appearing on behalf of the State of Florida.

JULIE SCHLAX, Esquire, appearing on behalf of the Defendant.

November 17, 2015

MR. CALIEL: Donald Smith, bottom of page 17 of the morning calendar.

THE COURT: Page 17, Smith.

MS. SCHLAX: And good morning, Your Honor, may we approach?

THE COURT: You may.

(Side-bar Conference.)

(Defendant present).

MS. SCHLAX: Good morning, Your Honor, Julie Schlax appearing on behalf of Mr. Donald Smith who stands to my left.

Your Honor, I have provided the Court with a courtesy copy of our motion to appoint an expert pharmacologist.

I've also this morning e-mailed to the Court the 56 page curriculum vitae of Dr. Buffington, our requested pharmacologist.

Once the Court has had an opportunity to review that, if the Court would like to hear argument or specifically from Dr. Buffington we will be happy to do that.

I believe other than that, Your Honor -- and I guess I would also note for the record I've attached along with a courtesy copy of

the motion, the response from the Justice Administration Commission.

I guess other than that we just need a pre-trial in December, Your Honor.

THE COURT: Okay.

MR. CALIEL: Nothing from the State, Your Honor. We would defer to the Court when it comes to the cost for the appointment of the expert. Miss Schlax has explained the need for the expert for mitigation purposes and we'll leave it to the discretion of the Court as to the appointment of that expert.

THE COURT: All right. Would you like a status date December 7th or December 14th, 15th or 16th?

MS. SCHLAX: I defer to the Court, either week is fine.

MR. CALIEL: Your Honor, I'm available either week so whatever is more convenient with the Court.

THE COURT: December 15th.

MS. SCHLAX: Yes, Your Honor.

THE COURT: For status and he is currently scheduled March 31st for final pre-trial and April 4th for jury trial. And

I'll take your motion under advisement.

MS. SCHLAX: Thank you, Your Honor.

THE COURT: Thank you.

MR. CALIEL: Thank you, Your Honor.

(Hearing concluded.)

C E R T I F I C A T E

STATE OF FLORIDA)

COUNTY OF DUVAL)

I, Karen Waugerman, Registered Professional Reporter, certify that I was authorized to and did stenographically report the foregoing proceedings and that the transcript is a true and complete record of my stenographic notes.

DATED this 13th day of August, 2018.

/s/ Karen Waugerman

KAREN WAUGERMAN, RPR

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IN THE CIRCUIT COURT OF THE
FOURTH JUDICIAL CIRCUIT, IN
AND FOR DUVAL COUNTY, FLORIDA.

Case No: 2013-CF-5781-AXXX-MA

Division CR-D

STATE OF FLORIDA

-vs-

DONALD SMITH,

Defendant,

PROCEEDINGS taken before the Honorable Mallory D. Cooper, Judge of the Circuit Court, on November 5, 2015, and as reported by Faye M. Gay, Certified Realtime Reporter, Registered Merit Reporter, and Certified Legal Video Specialist.

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ACCEPTED: DUVAL COUNTY, RONNIE FUSSELL, CLERK, 06/12/2018 09:58:59 AM

APPEARANCES:

MARK CALIEL, Esquire,

Assistant State Attorney,
Appearing on behalf of the State of Florida

JULIE SCHLAX, Esquire,

Appearing on behalf of the Defendant.

P R O C E E D I N G S

PROCEEDING PAGE

Motion for Change of Venue.....4

MS. SCHLAX: Good morning, Your Honor.

THE COURT: Good morning.

MR. CALIEL: Good morning, Your Honor.

Your Honor, if we could address the case of Donald Smith. Mr. Smith's case is located on the bottom of page 11 of the morning calendar.

THE COURT: Page 11, Smith.

(Defendant present.)

(Defense counsel conferring with defendant.)

MS. SCHLAX: Good morning, Your Honor.

THE COURT: Good morning.

MS. SCHLAX: Julie Schlax appearing on behalf of Mr. Smith who is sitting behind me as this might be somewhat of a lengthy hearing and, Your Honor, I believe we are here today on the defense's amended motion for change of venue.

There were no substantive changes to the motion and memorandum that were previously filed. However, the amendment just comports with Florida Rule of Criminal Procedure 3.240 requiring the affidavit of two citizens as well as my client.

And, Your Honor, obviously I know the Court has had an opportunity to thoroughly review the memorandum of law that the defense has previously filed as well as the vast amount of materials that

were provided. And I won't -- understanding that I will not go through in detail the themes expressed in our motion, however, I would just articulate to the Court as I did in the motion and memorandum that any question in regards to determining the appropriateness of whether or not a venue change should be granted must liberally resolve in favor of the defendant. Any doubt as to the ability of the State to furnish a defendant a trial by a fair, impartial jury should be in favor of the defendant.

And I know this Court has great concern in ensuring that the process of a criminal trial is, in fact, fair to both the State and to the defense. It is not a question of whether or not there has been pretrial publicity. Unquestionably there has. It is whether or not the pretrial publicity and all of the surrounding circumstances have so pervasively invaded the minds of the prospective jurors that we would not be able to actually seat 12 impartial jurors who would not only look at the actual facts of the case and determine their first requirement, which is whether or not the State of Florida has met their burden of proof, but additionally in this case, because the State of Florida has filed their intent to seek the death penalty, what would be an

appropriate penalty based upon those facts and, unfortunately, the overwhelming theme that has been enunciated through the vast amount of pretrial publicity has been not only articulated in specific facts that have been alleged, but also the commentary from citizens, neighbors, prominent attorneys within the community, prominent former prosecutors within the community, with words such as monster, with words such as we have to protect our public from these kind of people, that kind of thing.

And that is the great -- that is the great concern of the defense, is that not just that there's been a vast amount of pretrial publicity, but that the overwhelming themes have labelled the evidence as overwhelming, that based on the -- what would be inadmissible evidence of Mr. Smith's prior criminal record and labelling him as a sexual predator, although he has never been identified as such under Florida law, that the only appropriate penalty would be execution.

I know the State is going to provide to the Court the Rolling v. State decision which is found at 695 Southern 278, it was a 1997 decision from the Florida Supreme Court in which they addressed the

trial posture of Mr. Rolling and ultimately affirming his death sentences.

I would just point out to the Court at the outset that the defense in that case never filed for a motion for change of venue until well into the jury selection process and, in fact, the Supreme Court specifically notes that in affirming the trial Court's decision in the middle of jury selection not to change the venue, that the defense itself had somewhat conceded the argument by never having addressed it with the Court. Obviously Rule 3.240 requires the motion to be filed at least ten days before trial. They waited until the midway point of the venire.

They point to several factors that the Court can consider in regards to the pretrial publicity and one is the length of time that has passed from the crime to the trial and when within this time the publicity occurred.

As viewed by the articles and all the materials provided to the Court, the pretrial publicity in this case, and specifically the themes expressed of monster, his prior -- his prior record, calling him a sexual offender, a sexual predator, someone who should not have ever been released and the death

penalty is the only appropriate penalty, those themes, I would suggest to this Court, are ongoing. They are most noticeably seen in the Facebook pages that are in support of Ms. Cherish Perrywinkle. I think it is only fair to assume that as we get closer to this trial, especially since I've been involved in this case, the media has been at every single court date to report on what has happened, that we can anticipate that these themes and this publicity will only increase, and so although we are two years hence from the actual incident that occurred, unfortunately, I think we can only assume that that publicity will increase again as we get closer to the trial date.

The second consideration is whether publicity consisted of straight factual news stories or inflammatory stories. Again, the news media has covered this in a -- in a wide array of kind of venues. There have been former prosecutors that were interviewed, there have been defense attorneys that have been interviewed, there have been comments from legislators in our community in support of some of the Florida Statutes that have changed after this case.

All of them have not just simply expressed that

Donald Smith is accused of the death of Cherish Perrywinkle, but the overwhelming theme is Donald Smith is guilty of killing Cherish Perrywinkle and is a sexual predator that should have never been released in the first place.

And, again, the use of the word monster, I began to count how many times the word monster was referred to in several articles and, Your Honor, I stopped in August of 2013 and I was at 44, and I think the materials that I provided to the Court clearly show that is an ongoing theme. That is not a factual assertion. That is an opinionated kind of indoctrination of this community on how they should specifically view my client.

Another consideration is the size of the community in question and in the Rolling case they also articulated whether the defendant exhausted all of his peremptory challenges. What we're asking is obviously for the venue to be changed prior to attempting to do so in Duval County, Florida.

And, again, I think, you know, the State would concede that it is completely within the discretion of the Court and that the Court can find, as a matter of law, and I think the defense has clearly carried its burden in this regard, that it can be

presumed, that we can presume that the overwhelming indoctrination of this community has to be to prejudice my client and prejudge my client prior to any facts actually being proven by the State of Florida and, additionally, that the only appropriate penalty is the death penalty.

I think both of those factors, taken together, would clearly show that Duval County, Florida, because of the amount and the continuing pervasive theme, would not allow us to pick 12 peers of Mr. Smith that can fairly and accurately weigh the evidence presented, the law that they would be bound to follow, and reach a just and fair verdict in both the guilt phase as well as any kind of recommendation sentence that they provide to the Court.

We would ask this Court to -- and have great comfort that the Court has already given this a great deal of thought. And I will end with just kind of articulating to the Court the overwhelming theme of -- that has kind of been indoctrinated to this community, we do not feel it would have gone as far as, say, Miami/Dade or the Tampa area, other large areas, because of the amount and the overwhelming themes. Yes, it was reported in other

jurisdictions, but it wasn't the continuing coverage of interviewing neighbors, of interviewing other prominent figures within Jacksonville where they just blatantly give their opinion of the actions and, you know, again, there's -- I have yet to see an article that questions whether or not the State can meet their burden of proof and the requirement for the State to meet their burden of proof. Every article just assumes when the trial happens he will be convicted and, again, that the only appropriate penalty is the death penalty.

And so we would ask the Court to change this venue so that we can ensure that the process that Mr. Smith is constitutionally entitled to be administered fairly and impartially.

THE COURT: Thank you.

MR. CALIEL: May it please the Court.

THE COURT: Yes.

MR. CALIEL: Your Honor, as I approach now and present to the Court the Rolling case which I'm sure the Court already has available, but I provided a courtesy copy for this morning's purpose. And the Rolling case is one of the preeminent cases when we deal with change of venue.

And to fully understand the concepts of the change of venue arguments that are being made, you even have to look to the Rolling facts. We're talking about one of the most horrific incidents that occurred in the Gainesville community where five college students were murdered on campus within a short period of time and that story did not just, I guess, envelope the entire community of Gainesville, but it was the entire State of Florida at the time when Rolling occurred. I was even going to college on the west coast and it was very much a mindset across country as to the nature of the crimes and the severity of the offenses.

And so that goes to show you that even in the most horrific and most notarized cases that it is possible through diligent jury selection to obtain a fair and impartial jury in the jurisdiction for which the community -- or where the crime occurred and the community in which the crime occurred.

In particular, Your Honor, the size, as Ms. Schlax has already noted, the size of the community is one of the facts which is outlined in the Rolling case and in comparison the population and span of the Gainesville community is quite

small in comparison to the Duval County population and demographic. And so there is much more of a chance, despite the publicity, that this case has garnered and will continue to garner, that there are individuals who will not be tainted inappropriately by publicity.

And it's not simply that they know about the case. While the defense has outlined factors which, if known to a prospective juror, would be reason for cause, such as the defendant's status as a sexual offender or any prior convictions which the defendant had which were similar in nature to the offense charged, outside of those two areas, simply hearing about the case or reading about the case in and of itself, so long as the juror had not formed an opinion that is fixed does not disqualify a prospective juror to sit in this particular case.

Through jury selection we can establish, and the jurors can be questioned despite the fact that they may have heard or read something about this case, that they still could come into the trial with an open mind, to only determine the evidence based upon what evidence they are presented in court. And if they affirm in court that they are able to do so and they do not have a fixed opinion before the

trial commences, that there is a presumption that that juror is being truthful on those accounts and they could sit and be a fair and impartial juror.

So part of what the Rolling case sort of establishes is we may be premature at this juncture in even ruling on this motion before we even try to select a jury in Duval County. However, the State will concede that there has been a good amount of publicity in this case, although in the articles which are being cited by the defense the majority of those articles were in 2013.

In particular the majority of the inflammatory articles were in the days, weeks and months that immediately followed this crime in June of 2013, and there has been, based upon the duration of pretrial discovery and issues that have come up in this case, a span of time, a distance from that, and the likelihood that those inflammatory articles and statements are going to still be fresh in the memory of jurors is something to consider because of that lapse of time.

And to look at whether or not the jury can be selected, we also have to look at the options and some of the hardships that we're dealing with because, as we have sort of thought or discussed in

this particular case, based upon the media attention, that there is a strong likelihood that the Court may grant sequestration in this case and so then again we're talking about hardships if we do go to a change of venue for the purpose of jury selection, the hardship and the difficulty in selecting a jury from an area outside of this community, which would be so distant that they aren't a part of the media markets that are saturating the public with this type of publicity, that the hardship will, again, just being in Jacksonville away from one's home and family for a long period of time, probably the better part of two to three weeks, creates another separate issue in selecting a fair and impartial jury because it would be extremely difficult to find members of any community who would be willing and able to up their lives and to leave their hometown and to travel a distance to sit in a jury for a period of up to two to three weeks where they are not going to have any contact with their family members, but for visitation.

And that then, of course, takes us to another issue which is when a jury is sequestered here locally to prevent any adverse influence by media

attention, the accommodations to meet with those jurors' families can be made here locally where they can be met in supervised conditions where they can have interaction with their family members. If you're going to Miami and selecting a jury, or Tampa, or St. Pete, or Ft. Myers, you're talking travelling distances of three to four hours and hardships that are going to be placed on those jurors and those jurors' family members for two to three weeks are extreme.

So those are all factors that are going to play in a part as to whether we're going to be able to select a jury that can be fair and impartial and capable of doing the tasks that we're going to ask them to do, which is listen to the evidence over a period of weeks and make that type of determination.

So the State will concede that it is within the discretion of the Court and from a judicial economy standpoint and in the interest of justice, when it comes to this case the State does have a concern that even though the issue may not be ripe, come April if we attempt to select a jury and are unable to, based upon the media attention in this case, we are creating a built-in delay. Because it's not as if we can then turn around and change venue in an

instant and be able to still try this case when we are coordinating expert witnesses from across the country and trying to coordinate the administration of the trial itself.

So we're sort of in a catch-22. There is realistically no good solution, no perfect solution, I guess is the best way to put it, in this particular case, but there is an underlying interest in this community to be able to try this case within this community, and that's based on the constitutional principle of venue in and of itself, that members of the community should be responsible for judging other members of the community based upon them being charged with a crime and establishing whether or not that crime occurred and what the appropriate punishment should be when it deals with a capital punishment case.

So as properly outlined by the defense, there are five factors outlined in the Rolling case and the last being whether or not the jury has proven to be impossible to select and that peremptory challenges have been exhausted, and so it would be well within the discretion of the Court to make an attempt here in Jacksonville and to deny this motion without prejudice until that attempt has been made,

but the State will concede that it could cause significant delay in what we all hope is achieving the right decision in this case and getting this case resolved in a timely fashion.

This June will be three years since the commission of this crime and both the defendant and the State of Florida are entitled to a trial in a speedy fashion to see that justice is served.

Thank you.

THE COURT: All right. Thank you.

Anything further?

MS. SCHLAX: No, Your Honor.

MR. CALIEL: Oh, and one last thing, Your Honor, and I do apologize. And I will provide to the Court as well, and obviously the Court has available -- availability to the statute, but Florida Statute 910 subsection 03, which deals with change of venue, the one objection that we do have and we would lodge to the -- to the defense's motion is specifically when they are asking for the venue of choice of Miami-Dade to either try the case or select the jury from, and in that statute it specifically outlines that if it is determined that change of venue is necessary in order to protect the due process rights of the

defendant, that the Court shall attempt to select a jury in a community and a county which closely resembles the demographic composition of the original venue of the case, and we would argue that Miami-Dade does not fit that description and it is not the same demographic composition as Duval County and that we would ask the Court to consider other venues, both because of the demographic composition, but also the proximity. Because if we are going to be selecting a jury from some other venue, if the Court deems that necessary, simply accommodating the jury selection process for the parties involved and then the jurors who will be sequestered during that process from a distance of five and a half hours away, it would be a significant hardship for those jurors and the parties involved and so we would ask that if the Court does consider the defense's motion that it be a jurisdiction more akin to what Duval County is like and in a closer proximity that will allow and facilitate the process in a more efficient fashion.

THE COURT: All right. Thank you.

I'll reserve ruling on the motion. I'll read everything that's been given to the Court and I'll

enter an order.

I do think we need one more final -- not final, but pretrial date this year. He is scheduled March 31st for final pretrial and that will be in Courtroom 406, and then scheduled April 4th for jury trial. So anytime in December that's convenient for both the attorneys we can schedule a pretrial date.

MS. SCHLAX: Your Honor, actually administratively I do have two motions for the appointment of appropriate -- one is an investigator, one is a prison expert. I have also attached the JAC response saying they have no opposition to it.

THE COURT: Okay.

MS. SCHLAX: I would ask for the first week in December. I anticipate there are three other motions I have pending with the JAC. I have not received their response. My guess is that they will actually be requesting a hearing so I wanted to do that to be able to resolve that prior to the trial dates.

THE COURT: When do you think they might be giving their response?

MS. SCHLAX: I filed them two days ago. I believe they have five days in which to respond to

me that they would request a hearing.

THE COURT: Maybe we should set a pretrial date in maybe three weeks, maybe two weeks to find time to set a hearing date rather than -- we're getting into December before we know.

MS. SCHLAX: Yes, Your Honor. That would be my preference.

THE COURT: We can set it the week of November 16th if there's a day that week that you're available and we could also use November 23rd. That is the Monday of Thanksgiving week. Some people are not available at that time.

MS. SCHLAX: If we could even have the 17th, Your Honor, if that's acceptable to the State.

MR. CALIEL: November 17th.

MS. SCHLAX: And then possibly maybe that following Monday have the hearing with JAC, if necessary.

THE COURT: Okay. November 17th for pretrial, March 31st for final pretrial, April 4th for jury trial. We'll be in this courtroom until the end of the year. After that we'll probably be in 406 or 405, but we'll know ahead of time so you'll know where to go.

And I'll sign the order. Two orders so you

can go ahead and get started on that. One is for the appointment of a private investigator and one is for the appointment of a prison expert.

Okay. Thank you.

MR. CALIEL: Thank you, Your Honor.

MS. SCHLAX: Your Honor, may I be excused?

THE COURT: You may.

(Thus the proceedings ended.)

C E R T I F I C A T E

I, Faye M. Gay, hereby certify that the foregoing transcript is a true and accurate transcription of my Stenograph notes taken at the time and date stated herein.

Dated this 8th day of June, 2018.

/S/ Faye M. Gay

_____

Faye M. Gay, CRR, RMR, FCR, RPR, CLVS

Filing # 73343875 E-Filed 06/11/2018 09:59:49 AM

IN THE CIRCUIT COURT OF THE
FOURTH JUDICIAL CIRCUIT, IN
AND FOR DUVAL COUNTY, FLORIDA.

Case No: 2013-CF-5781-AXXX-MA

Division CR-D

STATE OF FLORIDA

-vs-

DONALD SMITH,

Defendant,

PROCEEDINGS taken before the Honorable Mallory D. Cooper, Judge of the Circuit Court, on December 15, 2015, and as reported by Faye M. Gay, Certified Realtime Reporter, Registered Merit Reporter, and Certified Legal Video Specialist.

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ACCEPTED: DUVAL COUNTY, RONNIE FUSSELL, CLERK, 06/12/2018 09:19:41 AM

APPEARANCES:

MARK CALIEL, Esquire,
Assistant State Attorney,
Appearing on behalf of the State of Florida

JULIE SCHLAX, Esquire,
Appearing on behalf of the Defendant.

P R O C E E D I N G S

PROCEEDING PAGE

Pretrial.....4

MS. SCHLAX: Good morning, Your Honor. Could we address the case of Donald Smith?

THE COURT: Page 27 at the bottom, Smith.

MS. SCHLAX: Your Honor, may we briefly approach?

THE COURT: You may.

(Counsel for the State and Defense approached the bench for a side-bar conference out of the hearing of the court reporter.)

(Defendant present.)

MS. SCHLAX: Good morning, Your Honor.

Julie Schlax appearing on behalf of Mr. Donald Smith who stands to my left.

Your Honor, I have filed an administrative type motion just directing the Department of Corrections to assure that some testing that needs to be done in regards to the defense take place unimpeded and I have submitted a proposed order to the Court and I believe the Court has executed that.

THE COURT: I've entered the order directing the Department of Corrections to permit the testing.

MS. SCHLAX: And additionally, Your Honor, it's my understanding that with the Court's

impending retirement that your next pretrial shall be for January 25th.

THE COURT: January 25th at 9:00 in Courtroom 405 for pretrial. He's also scheduled March 31st for final pretrial and April 4th for jury trial.

And I'm going to reserve ruling on the motion for change of venue until we make an attempt to select a jury locally.

MR. CALIEL: Yes, Your Honor.

MS. SCHLAX: Thank you, Your Honor.

THE COURT: Is there anything else we can do today?

MS. SCHLAX: No, Your Honor.

MR. CALIEL: Nothing else from the State.

THE COURT: All right. January 25th at 9:00 o'clock Courtroom 405.

MR. CALIEL: Thank you, Your Honor.

(Thus the proceedings ended.)

C E R T I F I C A T E

I, Faye M. Gay, hereby certify that the foregoing transcript is a true and accurate transcription of my Stenograph notes taken at the time and date stated herein.

Dated this 8th day of June, 2018.

/S/ Faye M. Gay

_____

Faye M. Gay, CRR, RMR, FCR, RPR, CLVS

Filing # 73343490 E-Filed 06/11/2018 09:55:52 AM

IN THE CIRCUIT COURT OF THE
FOURTH JUDICIAL CIRCUIT, IN
AND FOR DUVAL COUNTY, FLORIDA.

Case No: 2013-CF-5781-AXXX-MA

Division CR-D

STATE OF FLORIDA

-vs-

DONALD SMITH,

Defendant,

SEALED IN CAMERA PROCEEDINGS taken before the Honorable Mallory D. Cooper, Judge of the Circuit Court, on February 2, 2016, and as reported by Faye M. Gay, Certified Realtime Reporter, Registered Merit Reporter, and Certified Legal Video Specialist.

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APPEARANCES:

JULIE SCHLAX and CHARLES FLETCHER, Esquires,
Appearing on behalf of the Defendant.

P R O C E E D I N G S

PROCEEDING PAGE

In camera proceedings.....4

(The following proceedings were had in camera in Room 719.)

(Defendant is not present.)

(Phone dialling and ringing.)

FEMALE ON PHONE: Good morning. Justice Administration. How may I direct your call?

JUDICIAL ASSISTANT: Hi. Sharon, please. It's Judge Cooper's office calling.

FEMALE ON PHONE: Are you ready for the hearing?

JUDICIAL ASSISTANT: Yes.

FEMALE ON PHONE: Okay. Hold on one moment.

MS. RAY: Good morning. This is Sharon Ray with the Justice Administration Commission.

THE COURT: Good morning, Ms. Ray. This is Judge Cooper and present for this hearing are Ms. Julie Schlax and Mr. Chuck Fletcher and --

MS. SCHLAX: I'm sorry. This is Dr. Brooke Butler.

THE COURT: Okay. And we're here on the motion for appointment of an out-of-state expert.

MS. RAY: Yes, Your Honor.

THE COURT: Okay.

MS. SCHLAX: And, Your Honor, I would seek to call Ms. -- Dr. Brooke Butler.

THE COURT: Okay. If you'd raise your right hand.

(Witness sworn.)

THE WITNESS: I do.

BROOKE BUTLER,

was called as a witness on behalf of the Defense, and after being duly sworn, then testified as follows:

DIRECT EXAMINATION

BY MS. SCHLAX:

Q Okay. And Dr. Butler, can you please introduce yourself to the Court?

A My name is Dr. Brooke Butler.

Q And can you give us an idea of your professional capacity?

A I work as a mitigation specialist and a litigation consultant in Sarasota, Florida. I have a Ph.D. in legal psychology obtained from Florida International University in 2000.

Q And, Dr. Butler, were you actually originally retained by the Public Defender's Office in the case of State of Florida versus Donald Smith?

A Yes, I was.

Q And how long did you work with them in regards to Mr. Smith's defense team?

A I worked with them approximately six months.

It was until they had to conflict off of the case.

Q Okay. During that time frame did you develop a rapport with the client such that continuity of that representation should continue?

A Yes, I did.

Q And then at my request and through the Court's appointment, you were approved under the Justice Administration Commission rules to be the mitigation specialist in this case?

A That is correct.

Q As of -- as of today how many hours have you devoted professionally? And I realize this is an estimate.

A Um-hum. To this case or just meeting with Mr. Smith?

Q To this case.

A I would say well over 100. Several hundred at this point.

Q I think actually it would be over several hundred. You are required to keep contemporaneous time records?

A Yes.

Q And you have exceeded over 17 thousand dollars in terms of being paid at $75 per hour.

A That is correct.

Q And you have provided to both myself as well as to the Justice Administration Commission the hourly billing of that time period.

A Correct. In very detailed invoices.

Q Okay. Why is Mr. Smith's case so complicated?

A Mr. Smith's case is the most complicated capital case I have ever worked on in my 16 years of practice in doing this line of work, and the reason is first he suffers from a variety of paraphilias. And they are largely misunderstood, probably the most -- the most least understood, the most stigmatized, probably the most resistant to treatment in terms of mental illness that we have in the DSM-V.

Q And if I could interrupt you for one moment.

I have previously provided to Ms. Ray yesterday and I will provide to the Court, these are two confidential summaries of some of the work that you have accomplished in terms of trying to organize the different diagnoses and evaluations that Mr. Smith has had.

A Correct.

Q And we're tendering those to the Court right now.

If you can explain how -- how did you compile

the timeline in regards to evaluations?

A I compiled the timeline through Mr. Smith's self-report as well as through the records request that we submitted to a wide variety of facilities, organizations, hospitals and psychologists and psychiatrists and private practice. They extend back to 1977, although that was not the first time he was treated for any type of mental illness. It was simply the first record that we were able to obtain.

Q And through this research and analysis did you -- have you made yourself intimately familiar with the proceedings that Mr. Smith was involved in in regards to the Jimmy Ryce?

A Yes.

Q And ultimately I guess for the Court's knowledge, Mr. Smith was released from the Jimmy Ryce without any kind of professional recommendation that that be done. That was done solely by the State Attorney's Office and only thereafter was he evaluated while being placed on what they call a civil contract to seek treatment. Have you also personally interviewed those that have conducted these evaluations?

A Yes, I have. Those that I've been able to contact and those who were still living. Some have

passed away due to the length of time.

Q And in your conversations, specifically with Dr. Vallely who was the treatment provider that was assigned Mr. Smith's, I guess, voluntary treatment under the civil contract, did he have an opinion in regards to whether or not Mr. Smith should be out in the general public?

A Yes, he did.

Q And what was that opinion?

A That he should not have been released.

Q Okay. Were you made further aware of the complications that excessive illegal narcotic use had had on his mental state?

A Yes, I was.

Q Okay. And, Dr. Butler, you being familiar with the Court system and the requirements under Daubert, are you, although you had a Ph.D., and obviously can help enunciate to myself as a lawyer the issues involved in this case, are you qualified to testify before the Courts in terms of bringing all of this information together in a context that could be understood by a jury?

A No. I am not.

Q Okay. You are -- you are aware, being familiar with the Justice Administration Commission,

you are aware of the contracted due process of -- due process vendor search that allows attorneys or mitigation specialists to try to identify experts within the State who are somewhat self-proclaimed experts in different fields, correct?

A Yes.

Q There's no requirement under the Justice Administration Commission for minimum standards for one to place themselves on this vendor search?

A Correct. As far as being a clinician or a mental health provider, no, not at all.

Q In the sensitive conversations that we have had in terms of trying to kind of correlate an overwhelming theme of mitigation in regards to Mr. Smith's extensive criminal as well as psychiatric history, has it been kind of our, I guess proclaimed theme, that we need to attack the procedures of how the Jimmy Ryce Law was utilized and specifically in regards to Mr. Smith's individual case and the failure to actually follow the law as enacted for the protection of the public?

A Yes.

Q Can anyone in Florida actually have the ability to correlate all of the medical, psychiatric, psychological issues and explain it to the jury in the

context that it's necessary?

A No. Not -- not the people on the JAC list in the context of the Jimmy Ryce Act and all of the issues that Mr. Smith in our research we have discovered that he suffers from, no.

Q Are you familiar with Dr. Frederick Berlin?

A Yes, I am.

Q Okay.

MS. SCHLAX: Your Honor, I provided this yesterday to Ms. Ray, but I'll tender to the Court his CV which is very extensive.

BY MS. SCHLAX:

Q Dr. Berlin has had kind of unprecedented success in the treatment of offenders, has he not?

A That is correct.

Q And why is it you as part of the defense team in doing everything we can to investigate and provide mitigation on behalf of Mr. Smith, why do you feel Dr. Berlin is critical?

A Well, first, Dr. Berlin exclusively treats and studies sex offenders from a medical as well as a psychological perspective. It is my understanding that he has a medical degree as well as a Ph.D. And that is not something that anyone -- anyone on the JAC list or anyone that we -- that I know of as someone who has a

Ph.D. in legal psychology knows of in the State of Florida. So he's unique in that sense that he's devoted his expertise and his practice to the treatment and the study of sex offenders.

As such, he is on the cutting edge of the evolving knowledge that we have about sex offenders. And it is evolving. From the operational definitions or how we diagnose certain people with or certain types of the paraphilias or sexual disorders to the way that we treat certain sexual disorders. That has changed significantly.

And Dr. Berlin has kind of revolutionized the way that we look at sex offenders, we treat sex offenders and in many ways humanize sex offenders in terms of them suffering from a mental illness, just as schizophrenia is a mental illness, just as bipolar disorder is a mental illness, the paraphilias are a mental illness as well.

And, in addition he has -- he's kind of the go-to expert for discussing sex offenses, sex offenders, the wide variety of paraphilias, and as such he's testified -- testified across the country as an expert and I think, most importantly, not kind of -- not just because of his knowledge base and experience, he is very -- very much able in a way that I've not

ever seen before, able to explain to lay persons why -- how someone becomes a sex offender and to correlate both medical as well as -- or biological as well as the social or environmental correlates of the paraphilias, as well as the things that can intersect or interact with paraphilias, that can exacerbate the presentation of them, as well as what treatment approaches are effective versus not, how society can assist in treating people with the paraphilic disorders versus how society can -- can, you know, contribute to the problem, so to speak.

So he is not only unique to the State of Florida, but he is unique across the country. So that's -- that's how Dr. Berlin is very different.

Q In addition, you're aware through your countless hours of research that Mr. Smith at one point was involved in chemical castration.

A Yes, he was.

Q And ultimately what happened with that?

A It was terminated. I believe Dr. Larry Neidigh terminated the chemical castration. And to be clear, that was the older version of the chemical castration that was known to be demonizing and where men who were on the chemical castration were -- could exhibit feminine traits such as growing breasts, hot

flashes, almost as if a woman in menopause might, and as a result of some of the uncomfortable side-effects the compliance rate was quite low. And the studies had shown -- of course, this is not the research that I've done, but the research that others have done, that because the compliance rate was low it was typically not very effective.

But what Dr. Berlin has found is that there are newer treatments that have lower side-effects and as a result the compliance rate is much higher. And that combined with a newer approach to talk therapy, which is a cognitive behavioral therapy, is a much more effective approach to treating sex offenders.

The general perspective in the psychiatric and psychological community is that someone who is a section offender cannot be changed, they can only learn to control their impulses. That is very different from the way that people looked at sex offenders ten years ago and 20 years ago.

And so but Dr. Berlin has had a much higher success rate than others psychiatrists and psychologists across the country in having his clients do that, just control their impulses through the combination of therapy and medical intervention.

Q And I know we provided this to the Court, but

literally Mr. Smith has been evaluated also 23 separate times by various professionals within the State of Florida in regards to -- I'll just simply say sexual disorders, but for ongoing mental health treatment, as they classified him in 1977, as qualifying as a mentally disordered sex offender. However, there was very little intervention in terms of actual treatment.

A That is correct. And I suspect -- I know he was diagnosed or evaluated by more than the number that we have. We just weren't able to obtain the records because they were shredded or people just didn't keep them or we just weren't able to locate the facilities. But, yes, that's correct.

Q Okay.

MS. SCHLAX: I don't have any further questions, Your Honor.

THE COURT: Okay. Ms. Ray.

MS. RAY: I have no questions of Dr. Brooke.

THE COURT: Okay.

MS. SCHLAX: Your Honor, additionally, I'd like to provide to the Court an affidavit, which was previously provided to Ms. Ray, and it's the affidavit of Emily M. Olson dash Gault, spelled G-a-u-l-t. She is an attorney licensed to practice law in the State of New York in the U.S.

Supreme Court. I tender this to the Court because she is currently the director and chief counsel of the American Bar Association Death Penalty Representation Project. And, Your Honor, she provides this affidavit in order to just highlight the -- the guidelines that the American Bar Association promulgates to attorneys practicing capital litigation in regards to the necessity of having a true team of professionals dedicated towards the defense of capital litigation, including at a minimum two qualified attorneys as well a mitigation specialist that has the capability, experience, and credibility such as Dr. Butler, an investigator, as well as the need for experts when the specifics of the case and the facts require.

I have no further witnesses and would be happy to go into argument to the Court unless Ms. Ray wanted to interject anything about Ms. Gault.

MS. RAY: No, I did not.

THE COURT: Okay. Thank you.

MS. SCHLAX: Thank you.

In regards to argument and, Your Honor, I appreciate and recognize and have somewhat been daunted by the cost of the experts requested in this

specific case. However, this case is, as I think Dr. Butler so eloquently said, is extremely unusual, unusual in the sense of the allegations themselves are horrendous, however we have someone who is approximately 60 years of age and has been in this criminal justice system since, at a minimum, of 1977, and actually I think it's even before 1977. 1977 being his first evaluation after his first sexually-motivated offense.

He had complex psychiatric issues that fortunately we've been armed with Dr. Butler to help us reach out to the experts to help us identify those and the difficultly that we have is even with the experts that have previously been appointed on this case, we need someone such as Dr. Berlin to be able to put in these other subspecies of the neuropsychology, of the pharmacologists that we have had appointed, to put it all into context so that it can be appreciated by jurors who are ultimately making the decision as to whether or not these are mitigating circumstances that could outweigh the aggravating circumstances that the State will be able likely to prove.

We struggle in that, a case of this magnitude, had this case remained with the Public Defender's

Office or even with Regional Conflict Counsel, and just candidly, I've had multiple conversations with members of both of those operations in regards to the hiring of experts and getting recommendations and such. They do not have to go through this process.

I understand and agree with the law as cited by the Justice Administration Commission that there is a burden upon the defense in regards to actually providing, and that's why we requested this in camera proceeding, and actually are revealing to the Court trial strategy that normally we would not want the State to know at this juncture.

I would cite to the Court San Martin v. State, spelled M-a-r-t-i-n, which is found at 705 So. 2d 1337. It is a Florida Supreme Court decision from 1997, and would just cite specifically this was a death penalty case and in the particular expert requested in this case, and ultimately the Court found that the denial of the expert did not prejudice the defendant such as to provide him relief, but they were requesting a jury consultant expert. But they cite that the use of expert witnesses -- and I'm sorry -- in regards to the standard was whether the defendant made a

particularized showing of need and whether the defendant was prejudiced by the court's denial of the motion requesting the expert assistance.

Ultimately the Florida Supreme Court -- and I'll tender that to the Court. Ultimately the Supreme Court essentially found that because of the experience of the actual litigators involved in the case being death penalty qualified, having numerous trials, that a jury consultant was not out of their realm of expertise. In this situation it's far different.

Your Honor, I'm not a psychologist, I do not have a psychology background, I do not have a psychiatry background. I do not have any kind of medical background of any kind. Although we've been greatly aided by Dr. Butler, we need this specific expert that we cannot find within the confines of Florida so that we can put in context the entirety of Mr. Smith's very, very complicated psychiatric and criminal behavior so as to provide true mitigation. And we would respectfully request that this Court grant Dr. Berlin.

I did not in my initial motion put an hourly rate because Dr. Berlin, in my initial communication, and he is a very busy doctor, has

professional rates that break it down in terms of consults at facilities and such. I have been in specific contact with him now and explained to him the requirements of the Justice Administration Commission to work solely on an hourly basis for actual work performed and he is requesting, which is a reduced rate from his normal fees, of 475 per hour, and that's what we're requesting.

THE COURT: And before Ms. Ray answers with her argument, is there any ability to determine ahead of time approximately how many hours might be needed?

MS. SCHLAX: One of the things Dr. Butler had -- has done that has greatly aided our other experts is I think we've mentioned to the Court that the public records request that I got from the State Attorney's Office was over ten thousand pages. We have made these detailed summaries to -- so to be concise. I don't know, and Dr. Berlin did not know till he started reviewing these, whether or not he would need to go back and look at specific reports. And so in terms of how much time he will need to review items, that's the largest question mark.

THE COURT: Okay. Ms. Ray.

MS. RAY: And, yes, Your Honor, the only thing that we would offer is that it was her burden to establish that there was no competent expert in the State of Florida. I think she's done that. We would continue to object to the hourly rate which is greater -- excuse me -- than the established rate by the Indigent Services Advisory Board, but that would be our only continuing objection, Your Honor.

THE COURT: All right. Is there anything further?

MS. SCHLAX: No, Your Honor.

MS. RAY: No, Your Honor.

THE COURT: Thank you, Ms. Ray. We appreciate your appearing today.

MS. RAY: Thank you so much, Your Honor, for allowing me to be here.

THE COURT: That's fine. And I will get an order out quickly.

MS. RAY: Okay. Thank you, Your Honor.

THE COURT: Okay. Thank you.

MS. SCHLAX: Your Honor, I -- I had prepared a potential proposed -- and I had honestly done this before our last hearing and reviewing again from my argument, if the Court would like me to

prepare one, I would be happy to. I think it needs to be more detailed than the one I had previously -- was going to submit.

THE COURT: I think that would be helpful. Can you forward a copy to Ms. Ray?

MS. SCHLAX: I will.

THE COURT: We'll go from there. Now, I do have a question. The materials that you gave me today I'm going to have Madam Clerk -- I mean Madam Court Reporter, I'm sorry, when this transcript -- if and when it's typed, or transcribed, I'm sorry. It'll be under seal. The materials that you gave me along with your argument, should those be in the record under seal? I think they have to be.

MS. SCHLAX: I would ask for them to be.

THE COURT: Okay. So I -- I need to go over them first, but when I give them to you it will be under seal.

THE CLERK: That's fine.

THE COURT: Okay. That'll be the affidavit of Emily M. Olson dash Gault, the CV or curriculum vitae of Dr. Frederick S. Berlin, all normal spelling.

I'm not sure what to call this. It doesn't

have anything on it, but that you prepared that shows all of the different times that he's been, he being Mr. Smith, has been examined, a summary of his doctor and psychology exposures, and then an abbreviated bio-psycho social chronology of Donald James Smith. The case law I don't think has to go in for the record.

MS. SCHLAX: That's correct.

THE COURT: Okay. That's it.

MS. SCHLAX: Thank you, Your Honor.

THE COURT: Thank you.

(Thus the proceedings ended.)

C E R T I F I C A T E

I, Faye M. Gay, hereby certify that the foregoing transcript is a true and accurate transcription of my Stenograph notes taken at the time and date stated herein.

Dated this 8th day of June, 2018.

/S/ Faye M. Gay

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Faye M. Gay, CRR, RMR, FCR, RPR, CLVS

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IN THE CIRCUIT COURT OF THE FOURTH JUDICIAL CIRCUIT, IN AND FOR DUVAL COUNTY, FLORIDA.

Case No: 2013-CF-5781-AXXX-MA

Division CR-D

STATE OF FLORIDA

-vs-

DONALD SMITH,

Defendant,

TESTIMONY taken before the Honorable Mallory D. Cooper, Judge of the Circuit Court, on March 1, 2016, and as reported by Faye M. Gay, Certified Realtime Reporter, Registered Merit Reporter, and Certified Legal Video Specialist.

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APPEARANCES:

MARK CALIEL and MEREDITH CHARBULA, Esquires,
Assistant State Attorneys,
Appearing on behalf of the State of Florida

JULIE SCHLAX and CHARLES FLETCHER, Esquires,
Appearing on behalf of the Defendant.

JENNIFER MANSFIELD, Esquire,
Appearing on behalf of the Morris Publishing, Florida Times-Union.

EDWARD BIRK, Esquire,
Appearing on behalf of Post Newsweek Florida, Channel 4.

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(Defendant present.)

THE COURT: All right. Mr. Smith is present with his attorney, Ms. Schlax, and the State is present.

Additionally we have attorneys present for the various media regarding some motions that they have filed.

This hearing was previously scheduled to hear the defense motion -- actually two motions now regarding the death penalty. Since those were scheduled the media filed some motions and those are also added on for hearing today.

Before we get started, two things. I've reviewed all the motions by both the defense and by the State's responses -- or response and by the media and I do want to start by granting in part the Morris Publishing motion to intervene as far as granting their right to intervene. I'm not getting to the merits of the other matters requested in the motion, but I did want to do that first so that they could participate fully in today's hearing.

Secondly, because the death penalty motions were previously scheduled, I wanted to check with the State and the defense.

Do you want to hear those first before I

proceed on the media motion?

MR. CALIEL: At the pleasure of the Court, Your Honor. I'm flexible.

MS. SCHLAX: The same with defense, Your Honor.

THE COURT: Does anybody else have any input on that? Mr. Birk or --

MR. BIRK: Thank you, Your Honor. It's up to Your Honor's preference.

MS. SCHLAX: It might be more efficient with time to get the media motions done and over with, but we'll do whatever Your Honor...

THE COURT: I assumed from that statement, and I assumed it previously anyway, that once the media motions were heard you would not be staying here for the other motions that were filed so if that makes it easier for the two of you, Ms. Mansfield and Mr. Birk, we could go ahead and hear those first.

I think one of them covers both issues, but we have -- we'll set aside the packet, I'm going to set aside the motions regarding the death penalty until after we hear these other motions.

And one of the issues is -- and let me just go through both issues and each of you can argue those

together.

The defense had filed a notice of intent to file a motion for protective order and request for reasonable time regarding the State's sixth supplemental discovery exhibit and then filed after that the defendant's motion to determine confidentiality and motion for protective order regarding State's sixth supplemental discovery exhibit and request for in camera review.

Subsequent to that, Morris Publishing Group filed a motion, Morris Publishing Group, LLC, to intervene, which I've granted, and memorandum in opposition to defendant's notice of intent to file motion for protective order and request for reasonable time, and then immediately filed intervening Graham Media Group, Florida, Inc.'s motion to intervene and oppose defendant's notice of intent and motion regarding sixth supplemental discovery exhibit.

That's one issue that the media had indicated through their motions an interest in arguing today.

The second subject matter, the defense had filed a motion to make court records confidential and motion for protective order sealing specific court documents and records. The Court had entered

an order granting the motion to determine the confidentiality of the court's records, a notice of sealing documents, an order sealing specific court documents and records.

Subsequent to that -- well, I'm sorry. Not subsequent. The defendant had also filed a motion to determine confidentiality and motion for protective order regarding the State's sixth supplemental discovery exhibit.

I think I read these out of order. That belongs with the other packet.

Then Ms. Mansfield has sent a courtesy copy to the Court of Morris Publishing Group's motion to intervene, opposing defendant's motion to determine confidentiality and to set aside order sealing documents, and intervening Graham Media Group of Florida, Inc.'s motion was filed to intervene to oppose defendant's motions and to vacate resultant order sealing various documents.

Before we do those, we can do them individually regarding State's sixth supplemental discovery exhibit and one regarding the records that were sealed pursuant to -- or following the in camera hearing.

I do want to state on the record after reading

all the information that I realize that when the defense, and even the State, had any argument regarding either of these, they cannot necessarily be very specific as to what they're asking the Court to do because that would then disclose the material prior to the Court making the ruling on the confidentiality. So I understand your arguments would be vague in that regard and that's allowed for purposes of this particular hearing.

So I don't know how you want to begin.

Mr. Birk and Ms. Mansfield, are you going to each argue your motions separately or have you agreed to argue them one -- one argue one and one argue the other or how you want to proceed?

MS. SCHLAX: Your Honor, if I -- if I may suggest, and I'm happy to defer to counsel, I would like to separate the two motions because the analysis is completely different.

THE COURT: Okay.

MS. SCHLAX: And I'm happy, whichever one they'd like to begin with.

MS. MANSFIELD: We agree with the Court's summarization of the two different issues and they probably should be taken up separately.

THE COURT: Okay. Which of you or both

wishes to argue and which would you like to argue first? The sixth supplemental discovery exhibit issue or the sealed in camera review documents?

MS. MANSFIELD: The sixth supplemental discovery issue first, Your Honor.

THE COURT: Okay. Let's start with that and --

MS. MANSFIELD: I think as attorneys we both want to have our say for our client.

THE COURT: That's fine. I just -- I didn't know. Sometimes one person covers an issue.

Okay. We can go ahead with that.

If you would use the podium, it makes it easier for me and for the court reporter. And use the microphone so that everyone can hear. Thank you.

And this is Ms. Mansfield on behalf of --

MS. MANSFIELD: Morris Publishing, Florida Times-Union.

THE COURT: Okay.

MS. MANSFIELD: Your Honor, thank you for hearing us this morning.

Under the Court's prior order, the defendant had ten days to move to seal discovery documents, which did not happen. We believe that the Court's prior order, which was entered prior to the First

DCA's decisions in the Dunn case, but in Dunn the Court struck a default period of time that would allow documents to remain sealed once they've been produced to the defendant in light of the clear case law from the Florida Supreme Court and the law that once documents are released to the defendant they become public records. And because there can't be any judicially created exceptions, and that a Lewis hearing is required in order to make findings of fact and conclusions of law that are clearly stated as to why there should be an exception to the public record access.

So although it's the media trying to gain access, the case law is very clear, including the First DCA's decision in Dunn, that it's because the media acts as surrogates for the general public who can't be here all the time and rely on the media in order to learn about how the judicial system operates. Especially when you have a high-profile case like that, the media coverage actually helps alleviate concerns that the public has about the operation of the judicial system and fairness of the court system and so it's actually more important in a high-profile case for the media to be able to report on how cases proceed,

how the defendant's rights are protected and how the State is protecting the public in their prosecution as well.

And so when the media acts as a surrogate for the public to gain information on how the judicial system works it is actually fair to everyone and open access to courts assures fairness to the defendant because closed courtrooms have been held to be unconstitutional for the defendant's rights as well.

So in light of the Dunn decisions that were entered after the initial closure order, after discovery it's the defendant's obligation then if the defendant wants to seek to seal anything to move right away, and that did not happen in this case. In fact, the notice of intent hung out there, way more than ten days had passed, and actually the defendant's motion to seal documents did not happen until after we filed our motion to object to the notice of intent, because even when we filed our motion nothing had been filed, nothing had been sought to be sealed. And we believe that that was an abuse of the Court's prior order because then the record was closed for over 27 days with nothing happening after the disclosure had been made.

So under Miami Herald versus Lewis closure can only happen if three prongs are established, that it's necessary to prevent a serious and imminent threat to the administration of justice, that no alternatives are available other than a change of venue, and in order to protect the defendant's fair trial rights and closure would be effective.

Now, in order to make those findings of law, findings of fact need to be established and so it does contemplate an evidentiary hearing and merely reciting those elements in an order is insufficient. They actually have to be stated in the Court's conclusions in order to foster appellate review and, frankly, so that the general public can understand why the Court took the actions that the Court takes.

So the -- and I'll take up the other issue later.

So in this case the defendant, in our view, waived. The Court's prior order was that a motion would have to be made within ten days, it wasn't made, and now even if the Court were to entertain the motion, it doesn't set forth the elements under Lewis that would justify closure in this case.

THE COURT: All right. Thank you.

Mr. Birk.

MR. BIRK: May it please the Court. Good morning, Judge Cooper.

THE COURT: Good morning.

MR. BIRK: Good to be back in your courtroom.

THE COURT: Thank you.

MR. BIRK: I'll do my best not to repeat the arguments well presented by co-counsel.

Our view is that, yes, in accord with the Dunn case. There's also another case, Cannella, and I can provide the citation to the Court, that talks about the only reasonable time allowed for production of public records is the time necessary to review and redact, if any exemptions would apply. That time has passed and we believe the defendant's right to seal these documents has been waived.

Nonetheless, if we look at what is contained in the sixth supplemental discovery disclosure, clearly there can be no sealing -- wholesale sealing of all the materials. There's 72 hours of tape. By the defendant's own motion much of that is extraneous, irrelevant material. The State has apparently condensed those 72 hours down into 20 minutes of recordings and there's a written summary by the investigator as to what is contained in those 20

minutes.

The only possible exemption that I can think of that might apply would be the substance of confession which is contained in 119 and therefore picked up by Rule 2.420.

Now, the substance of a confession is an exception that must be drawn narrowly. There's not a lot of cases on it. But in 1984 Attorney General Jim Smith did issue an opinion on that.

If I might provide that to the Court.

THE COURT: You may.

MR. BIRK: And that opinion draws on one case from the Supreme Court and it concludes that basically an admission is not necessarily a confession. The statement by a defendant that requires an inference to -- an inference of guilt is not the same as a confession that would qualify under this particular exemption. There has to be almost an acknowledgement of the essential elements of a particular crime.

So if something is to be redacted or sealed until trial, as the substance of a confession, we'd argue it that is to be drawn very narrowly.

If the Court is not likely to rule that Mr. Smith has waived his right to seal these

documents, we would request that they be submitted to Your Honor immediately today for in camera review and then analysis for any sort of sealing.

I have conferred with defense counsel and she tells me that the materials are ready for submission to the Court.

There are no privacy interests at stake here. As the case we cited from the Fourth DCA recently, Palm Beach Newspapers versus State, held that the inmate, the defendant, had no right of privacy to jail conversations, telephone conversations, and so privacy interests cannot be part of the Court's analysis here, we believe.

Also pretrial publicity, as we said in our motion, you know, if these other high-profile cases in Florida, if the defendants have been able to receive a fair trial under those circumstances we don't think there's anything that stands out about this case and the press coverage of this case that would make this any different from those.

There is one particular item on the sixth discovery disclosure that I would like to discuss in particular and that is the videotape from, I believe it was Wal-Mart and another location. There was a case in 2004 involving a gentleman by the name of

Joseph Smith and he was charged and tried and convicted of abducting an 11 year old girl. And the police in the course of investigating and trying to identify a suspect released a video from a car wash surveillance camera and through that process the defendant was identified.

That gentleman was provided a fair trial and the release of that video did not -- no court found that the release of that video impaired his right to a fair trial.

So similarly in these circumstances we would argue that the videotape in this case should be released as well

THE COURT: Two things. Do you have the cite for the Joseph Smith case? I know which case you're speaking of, but do you have the cite for that? If not, I can get it.

MR. BIRK: I can get that for you, Your Honor.

THE COURT: And you mentioned another case earlier on in your argument that you said you would provide the cite for.

MR. BIRK: Yes, the Cannella case, C-a-n-n-e-l-l-a, and it's in my public records handbook on my desk and I'll have to get that for

you, Judge.

THE COURT: Okay. If you could just provide those two cites that would be great.

MR. CALIEL: And, Your Honor, I had offered to the defense to at least provide a timeline for the Court before Ms. Schlax made argument on behalf of the defendant and also for some clarification on our sixth supplemental discovery exhibit that was filed on January 21st of 2016. First pertaining to subsection C of that supplemental discovery response, our initial discovery response that was provided to the defense was 24 minutes, approximately 24 minutes worth of recordings, that were captured at the Duval County Jail. Those were the only portions of recordings that we felt we were requesting to seek to introduce at trial or penalty phase and so I provided those. And detailed in the memorandum from our investigators, the entire recording that was captured in June of 2015 was approximately 72 hours. I think much of that the State deemed was not relevant to this particular investigation and so we only tendered the first 24 minutes, which were the portions which we sought to introduce.

At the request of Ms. Schlax, we then

subsequently, and this was sometime later, provided a -- and Ms. Schlax can give you the exact date because she was involved in a murder trial and so we made arrangements to get to her the full 72 hours of recordings that are available.

And so when deeming an appropriate discovery or release of public records of something of this nature, the 24 minutes would be obviously much easier to redact when you're talking about 72 hours worth of recordings. The redaction time is far more extensive when it comes to that because you're talking it is a minute-for-minute, you know, public records division of the State Attorney's Office that has to listen to each one of those minutes individually for potential redaction.

The other issue when it pertains to that, of course, and I know the Court has heard similar argument of this nature in the past, the public records request that came in from multiple media outlets pertaining to this particular discovery response are placed in a queue at the State Attorney's Office and it wasn't until actually about a week ago last Friday that they went to the top of the queue for redaction purposes. And so right now they're at the top of the queue in the public

records division to be prepared, however, in the interim the motion for sealing of those documents for protective order was already filed and so we stopped our process until this Court had an opportunity to rule and hear from both of the parties.

So that's in particular when it comes to subsection C, that originally the 24 minutes in the memorandum were provided to Ms. Schlax and the defense on the 21st. However, a subsequent request for the entire 72 hours was made. At some point in time later on the defense may give you a better timetable as to when that was provided and when they had that.

In particular when it comes to subsection K, which is the Wal-Mart video and the Dollar General video, my only response or to educate the Court as to what that exhibit is, all of the previous videotapes, to my recollection, I'll confirm with my public records division, and I can also confirm with media outlets, the raw footage of all the surveillance videos I believe have already been provided in previous public records requests.

I may be wrong in reference to that, but the State believes that Mr. Birk is correct when it

comes to the releasing of those surveillance footages because they don't show the death itself. It's just contact between the parties on the respective date, that those are subject to release. I believe they already have been released and I'll have to double-check with the media outlets pertaining to the entirety of the raw footage obtained from those two locations.

What is specified in subsection K is work product. What I have done through the assistance of the FBI and their forensic team up in Quantico is we have taken that raw footage, compressed it down to what we believe, the State believes, after our evaluation of all the raw footage, is the most relevant time frames and vantage points, and compressed that videotape down into a constant flowing shorter term and it's a constant flow from angle-to-angle, adding, of course, enhancements where there are flags that indicate where the relative parties are on the videotape. There's like a little arrow in different colors, one that relates to each specific party that the State believed was important to emphasize in the presentation of the evidence.

And so when it comes to State's Exhibit K, the

compressed videotapes that have been -- at this point in time we've obtained the Wal-Mart videotape from the FBI. I've spoken to the FBI in Quantico this week, we anticipate that the Dollar General video will hopefully be to us within the next week or so. They were finishing their work on that because they had other cases that they were working. But that is, in essence, my work product as to what I believe is most important for me to present in my presentation of the evidence. It is not the raw footage from those locations. This is my compressing it down to what we believe is relevant in our presentation of the evidence. And because of that I do not believe that's subject to a public records request, that is attorney's work product as to my impressions as to what specifically is important, especially because -- and like I said, I'll have to confirm with media outlets, but I believe all the raw footage was previously disclosed in previous public records requests. So they have the material. They just don't have my analysis of that material. And that's what State's Exhibit K contains, is my analysis and presentation for trial.

THE COURT: All right. Ms. Schlax.

MS. SCHLAX: And good morning, Your Honor.

THE COURT: Good morning.

MS. SCHLAX: Julie Schlax appearing on behalf of Mr. Donald Smith in regards to at this time addressing the motions that have been filed in regards to State's sixth supplemental discovery exhibit.

Let me explain to the Court, as the Court is likely familiar, when Mr. Caliel electronically transmits a new discovery exhibit I receive the e-mail almost instantaneously from when he sends that. And that did occur on the 21st. I also had the benefit when Mr. Caliel actually called me and kind of gave me an idea of what these actual materials contained. However, I did not physically receive in my office, because it was mailed to me, the investigative memorandum from Mr. Hinson as well as the initial CD of the 24-minute tape as well as the photographs of the actual jail cell until that Monday, the 25th.

On the 2nd when I met with the Court, I specifically requested I would need more time in which to review thoroughly all of the materials in regards to the sixth supplemental discovery exhibit. And that's why I filed my notice of intent and request for an extension of time rather

than the ten days that had been previously imposed by the Court in regards to any other request.

Obviously I was not the attorney of record at that time, but I am familiar with what has been filed within the CORE clerk System, that the Court had previously stated in denying kind of the overbroad motion previously filed that any specific motions would need to be filed within ten days of receipt.

Your Honor, I did not receive the 72 hour -- the full 72 hours. And I apologize, I did not make specific note of it when requested by -- by myself Mr. Caliel sought to get that to me. I was in the middle of another murder trial. When I got out of that trial and realized I still did not have it for my review, Mr. Caliel got it to me that day, but I believe I did not receive it until maybe the 8th.

THE COURT: Of February?

MS. SCHLAX: Yes. Yes, Your Honor.

It is a full 72 hours. I did think it was important for me to have reviewed the entire 72 hours. I have the fortune of having a court-appointed second chair, but both of us are private attorney practitioners. Just being involved with other cases it took a very long time

to listen to 72 hours, but to do that in addition to our other court obligations through privately retained clients as well as court-appointed counsel.

Your Honor, as we have laid out in our motion, we would seek for the Court to listen to this and the Court can begin with reviewing the investigative summary by Mr. Hinson, followed by the 24 minutes, and then I would suggest that I could even suggest to the Court specific areas that I have made note of that highlight the intensive and intrusive -- just intrusive access of my client's private jail cell.

I will ultimately be arguing to this Court in a motion to suppress that this is unlike situations in the past where the courts have found that the recording of jail cell -- or jail phone calls that a defendant makes or surreptitious recording in the back of a police car or within an actual jail interview room are proper. This is within his private cell. This is -- you can -- there are long periods where you hear nothing, but there are multiple periods where you hear him actually just living within this cell, and to not be too graphic, you hear him use the restroom, you can see by the photographs of the cell that were disclosed by the

State, they do not photograph the actual cell Mr. Smith resides in, but evidently photographed an identical cell on a different floor. You can clearly see that within this cell is not only a toilet but as well as a shower. This is where he lived continuously. There was no security interest that they did this. They just simply set up a recording that would capture every sound emanating from the cell for a full 72 hours.

Additionally, you had hear voices, none of which have been truly identified. Within the investigative memo by Mr. Hinson he purports to claim that he can identify Mr. Smith's voice versus Randall Deviney's voice. I would submit to the Court when you listen to it you will hear three separate voices, but there's been no articulation of exactly who that is.

I think when the Court takes the time for the in camera inspection, the Court will deem that there are parts of these purported statements that could be sensationalized, that could suggest inculpatory type statements, and that ultimately are likely irrelevant, they're likely suppressible in regards to the invasion.

And the true concern by the defense is that on

October 16th of this past year the defense filed on behalf of Mr. Smith a change of venue motion articulating, in summary format for the Court, and I'm sure the Court remembers the extensive pretrial publicity provided to the Court highlighting and somewhat demonizing Mr. Smith within the media.

This exhibit contained in the State's supplemental sixth supplement -- supplemental discovery exhibit would do nothing except to try and attempt to further demonize Mr. Smith before he has his day in court.

And so we would ask, under Florida Rule of Judicial Administration 2.420, that the Court deem the entire 72 hours as well as investigative summary -- and let me also mention that the investigative summary is, quite frankly, just the opinion of Mr. Hinson in regards to what he thinks they are talking about and what perhaps is going on, that they are specifically talking about with any -- without any kind of basis in fact. And I think it will be more evident when the Court reviews Mr. Hinson's investigative summary where the Court will be able to see that what's alleged to have been taking place can -- can never be proven because they basically put a recording in, captured these

statements and then listened to it far later. They have no ability to go back to June of 2015 and determine what exactly was occurring within the jail cell, within the jail floor at that time where these supposed comments were allegedly made.

We would ask that the Court do this in camera and ultimately make the determination that this is irrelevant material that would serve no purpose but then to thwart Mr. Smith's ability to receive a fair trial within the State of Florida, and specifically within Duval County, Florida, as the Court has previously determined that we shall attempt.

And so we would ask the Court to make that in camera inspection, and we are happy to tender those materials to the Court for the Court's inspection and offer any help for the Court if the Court deems it appropriate to listen to not only the 24 minutes but as well to the full 72 hours.

THE COURT: Okay.

MR. CALIEL: Your Honor, may I respond to one point for clarification purposes, because I think it's -- it's important, and obviously there'll be another day when -- when the intrusiveness and the manner in which this recording is fully vented by the Court, when and if a motion to suppress said

statements is ultimately filed, but as detailed in the investigative memorandum the State Attorney's Office came into possession of intelligence by a confidential inmate who came forward sometime the early part of 2015, who provided information that Randall Deviney and Donald Smith were communicating through their isolation cells inappropriately and that they were, for lack of a better term, trying to commit fraud upon the Court. Because as the Court is aware, Mr. Deviney and Mr. Smith had the issue at hand as to concurrent representation by two counsel and because of that, obviously Ms. Schlax is here today because of a conflict being determined by the appellate courts, that a conflict of interest arose, and all of that sort of stemmed out of the fact that Mr. Deviney was offering to provide information against Mr. Smith.

Based upon the information from this confidential inmate who said that this was fraud, this was false, there is not something that was taking place, and that individual provided to our investigators the manner in which these two inmates were inappropriately communicating between the two cells. This investigative technique was utilized.

Mr. Smith's cell was not bugged. [redacted] Mr. Deviney and Mr. Smith were in isolation, which means they're not supposed to have contact or communicate with anybody, [redacted] And so without going into Mr. Smith's cell or without going into Mr. Deviney's cell, [redacted] this inmate told us that this defendant and Mr. Deviney were communicating, and sort of as a bump on a log, just listening to see what we heard at that point in time.

And so the only objection that I have to the claims made to the Court is the intrusive nature of the recording system itself. We did not go into his cell, we did not go into Mr. Deviney's cell. Based upon intelligence that we received that they were improperly communicating, [redacted]

[redacted]. And that's the only point of clarification I would make.

THE COURT: While you're up here, may I ask you one other thing?

MR. CALIEL: Yes, sir.

THE COURT: One of the photographs is a photograph of the identical cell, is that correct?

MR. CALIEL: Yes. Well, photographs of the cell and then also [redacted] locations as to how they gained access to those locations.

THE COURT: Okay. Is there any objection to the release of the photographs of the cell?

MR. CALIEL: My understanding, in speaking to my public records division, and while they haven't considered in whole this entire media request, because there are multiple requests for the exhibits, that the photographs from within the Duval County Jail, in particular the cells and the locations, falls under the security exception to the public records law.

THE COURT: All right.

MR. CALIEL: That they're not allowed to release those informations because of security interests in the Duval County Jail.

THE COURT: Okay.

MR. CALIEL: And so, like I said, I have -- they have not formalized their full opinion and done their response, which will outline the exceptions, because they haven't got to that point in the queue, but in preliminary discussions that I had with my public records division they believed that those would be things that they could not produce because of that security interest reason.

THE COURT: Okay. Ms. Mansfield.

MS. MANSFIELD: Thank you, Your Honor.

To clarify for the record, I'll try not to repeat each other, but we incorporate the arguments made on behalf of Channel 4 by Mr. Birk.

THE COURT: Thank you.

MS. MANSFIELD: And to address some of the other statements that have been made, the Dollar General, Wal-Mart video, to the extent the State Attorney is saying that he disclosed work product to the defendant, once -- once an attorney discloses work product, you waive it and if you're going to produce it to the defendant the public records law says that it becomes a public record then and so it should be produced.

THE COURT: Okay. We're talking now about

the --

MS. MANSFIELD: Apparently a summary video to present as evidence.

THE COURT: Okay.

MS. MANSFIELD: By the State is the way I understood.

The photograph of the identical jail cell, this is the first time we've heard this, but if you're going to admit a photograph in an open court proceeding, how could you also claim an exemption for that? That just doesn't make any sense.

It also doesn't make any sense that it shows any kind of security. Everyone knows that a jail has security. It doesn't -- but to take that type of position that a photograph of a jail cell reveals security plans I think is just way broad and just boils down to ridiculous.

Asking for the entire 72 hours of video to be exempted, defense counsel said that the video would be --

THE COURT: That the audio?

MS. MANSFIELD: Excuse me. The audio. It would be prejudicial. Well, one can assume that all of the evidence that the State intends to submit in this case will be prejudicial to the

defendant. That's their job. That's the entire reason for these proceedings. And so that doesn't lay a standard down. In fact, it's non-standard because in every case everything that the State pretends -- or intends to produce will be detrimental to the defendant. Rather the exemption is only for an actual confession.

And as Mr. Birk pointed out in the case law and the interpretations by the Attorney General, things that are not an actual confession are not covered under that exemption and, therefore, the audio should be analyzed under the standard public records exemptions that apply to confessions and not an overbroad analysis of just that it's either unpleasant or the defendant doesn't like it or finds any of it embarrassing. Those are not public records exemptions under the law.

All of the -- all of the records that have been produced to the defendant, including any proposed exhibits, once they're produced, are public records under the public records law and nothing that we've heard here today shows that an exemption would be appropriate.

Thank you.

THE COURT: Thank you.

Mr. Birk.

MR. BIRK: Yes, Judge. Thank you, Your Honor.

The -- may it please the Court. The prospect of asking Your Honor to review 72 hours of audiotape is unpalatable at best. The Court doesn't have the resources to do that nor should the Court have to do that. It's incumbent upon the parties seeking closures to identify, as precisely as possible, portions of records that they seek closure of and to provide specific grounds for those. So to ask the Court to do that in wholesale fashion is not required.

On the privacy issue, based on Mr. Caliel's description of the events, we emphasize that Mr. Smith has no privacy interest in these recordings or what is said or done or not said or done on these recordings. He was engaged in communications through the, you know, the courthouse -- or sorry -- the jailhouse Bat Channel way of communicating that we've read about and seeing it reported recently when there was a pipe break, I think at the jail, that interrupted all kinds of operations over at J-1 at the jail.

They were engaged in illicit activity. I don't

know that it's illegal, but it was certainly not activity that was permitted for the inmates at the jail.

The defense has cited the case of Post Newsweek versus Doe for the proposition, and that case is cited at 612 So. 2d 549, the Supreme Court of Florida, 1992. Cited that case for the proposition that a witness non -- in fact, it was a non-party witness in that case, had a right to privacy in information that was going to be offered as an exhibit. The information in that case that was offered -- was to be offered as an exhibit was a list of clients of a prostitute. The non-party witnesses moved to seal that information. They didn't want their names out in public. The Court found and the Supreme Court agreed that these non-party witnesses did not have a privacy interest in this information because they had engaged partly -- partly because they had been engaged in criminal conduct.

That's four-square with the circumstances here. Mr. Smith was engaged in improper, illicit conduct at the jail. He has no privacy interest in anything that was recorded, outside the confines of the cell, even accepting the idea that there is some privacy

-- somewhat of a privacy in a jail cell, which we contend there is not, but even accepting that, the recordings were made outside of that area. He engaged in conversations that had no reasonable expectation of privacy and there should be no consideration by the Court of any privacy interest in this analysis.

Thank you, Your Honor.

THE COURT: Thank you.

Anything further on this?

MS. SCHLAX: No, Your Honor. I would just tender to the Court the materials.

THE COURT: Okay. I understand that the two media outlets have a two-prong objection. The first being this defendant waived any protection based on failure to file specific motions within a certain period of time. Beyond that, then they addressed the confidentially of any portion or all of the 72 hours.

I'm going to go ahead and grant a motion for in camera review. I haven't made a decision on the waiver, but to speed up the time, rather than waiting for that decision, the defense has provided the documents to the Court and they will be considered in in camera review.

I don't want to get into too much detail because I haven't reviewed anything yet, but I believe it would be the Court's responsibility, regardless of what the parties might tell the Court, as to where to look, which will be helpful, I think it's still the Court's responsibility to review the whole 72 hours for the Court to determine, not the State or defense, if there's materials that need to be protected. So I'm going to have to disagree with Mr. Birk, not that I look forward to reviewing 72 hours, but I think under the circumstances that's my responsibility.

So I'll take whatever assistance I can get by someone from the State or the defense or both pointing out the areas of concern, and certainly I have the summary, 24 minutes, and the investigative summary to assist, but I still think it's my responsibility and duty to review the whole matter for purposes of formulating a correct ruling. So that's going to take some time, obviously, to do that.

But in the meantime I also recognize that there's that separate argument regarding a waiver and that will be addressed as well. I'm not going to review or rule on anything today, but I will rule

on that at some point.

So I think with that we can move on to the other issue, which is the sealing of some records. I think Mr. Birk on behalf of Channel 4 has a little bit different argument than Morris Publishing, only because of the fact they were granted intervenor status earlier in the proceeding than the other media outlet. So that's a separate issue, just review, but then the rest of it's all pretty much the same.

MR. BIRK: May it please the Court. Thank you, Your Honor.

I think Your Honor is referring to the argument that we were not provided notice --

THE COURT: Correct.

MR. BIRK: -- with regard to the various motions and proceedings subject to the second motion. In my mind that would apply, even if we had not been granted intervenor status because the rule requires notice to effective non-parties. The rule doesn't really define what an effective non-party is, but we are within that definition.

The material that defense has sought to seal, both at the February 2 ex parte in camera hearing and at the subsequent filings, we suggest should not

be sealed, at least not in its entirety. The material pertains to retention and payment for the services of an out-of-state expert, Dr. Fred Berlin. He's a doctor and professor and clinician at Johns Hopkins University in Maryland. The Justice Administration Commission filed an opposition to what was apparently an impending request by the defense to authorize expenditures for Dr. Berlin.

The JAC argued that there were plenty of well-qualified experts in that field of study within Florida, there was no reason to go out of state which would incur additional expenses.

Apparently the defense felt strongly about that and wanted to present to Your Honor, in an ex parte fashion, materials that would justify this taxpayer expense and to do so would require revealing trial strategy or work product or some other privileged materials that they wouldn't want the State to have. And as a result Your Honor sealed the motion and all the materials that were submitted with that -- that request by the defense.

We submit, Your Honor, that the motion -- well, first the order and the notice, pursuant to that hearing, do not provide enough specificity to foster appellate review. The order does mention the

factors within 2.420C9, which really are the embodiment of the Lewis case, those three factors.

But simply mentioning those factors we believe is not sufficient under the law. There has to be specificity or some description of how the materials at issue meet those criteria. And we did not see that in the notice or order. The notice itself, as we said in our motion, says that portions of the materials are subject to being sealed, yet the entire package of materials were sealed.

I don't understand exactly how anything could be revealed about the defense trial strategy that hasn't already been revealed on this point by the selection of this particular expert. I was able to find on the internet very quickly his background, what his field of study is, his field of treatment, clinical treatment is. There's some controversy associated with his work, but it's very apparent that his work has to do with treating sexual offenders and sexual misconduct.

So in my humble opinion all of this goes to mitigation. If there's not going to be a psychiatric evaluation performed by Dr. Berlin, which itself the evaluation and the evaluation report would be exempt under 916.1065, if there's

not going to be an evaluation like that, then this probably goes to mitigation. So I don't see how releasing the motion or Dr. Berlin's curriculum vitae or the costs that he's going to, you know, submit for repayment, how any of that would reveal trial strategy or work product of the defendant.

The CORE documents sealed on the docket, line item 431 in the motion, line item 432, an affidavit of EMOG, and I'm not clear what EMOG is. 433 is doctor's notes, 434 is the CV, a voucher, images and a medical printout. Without more information we can't really say what those things are, but certainly a CV and a motion should not be subject to sealing.

So as we argue in our motion, Your Honor, we ask that those materials be unsealed and the -- you know, this is a procedural issue, the fact that, you know, the rule does provide for an ora tenus motion to seal, but it does require within five days reducing that motion to writing. In this case that deadline was not met and for that reason we would argue that the right to seal these materials has been waived.

And with that I'd be happy to answer any questions, Your Honor.

THE COURT: I don't have any questions right now, but thank you, Mr. Birk.

MR. BIRK: Thank you.

THE COURT: Ms. Mansfield.

MS. MANSFIELD: Thank you, Your Honor.

The Florida Times-Union did intervene in the case in 2013, filed a motion

THE COURT: Okay.

MS. MANSFIELD: And in an abundance of caution, we included a motion to intervene in case the Court deemed it issue specific rather than the entire case, but we also agree with Mr. Birk that even in the absence of formal intervention the media is always entitled to notice before closure of a court record or court proceeding.

I believe that the record of this illustrates the hazard that arises from deviating from the standards of Rule 2.420 and the Lewis standards and the articulation of the reasons that McCreary and Lewis require because if it is work product we agree that work product is not disclosed, but we also agree with Mr. Birk when he says that the motions, the procedures used, that by a defendant, the fact that the State can pay for experts, again, it's part of the public's view of how the court system works

and understanding of how the court system works to protect the defendant and taxpayers and the constitutional rights of defense and therefore the motions and the supporting materials that are not work product should be open. And again it helps the public understanding of how the court system works and without notice or an opportunity to be heard, they shouldn't have been closed at all, and then to articulate and differentiate between protected work product and the other materials that should be open.

THE COURT: Did you have any input on this issue?

MR. CALIEL: Your Honor, I do not. It was an ex parte proceeding and so I'm in a similar position as the media at this point in time.

THE COURT: Okay. I just wanted to stay in the same order.

MR. CALIEL: Yes, Your Honor.

MS. SCHLAX: Thank you, Your Honor.

Your Honor, the first thing I would cite to the Court is Florida Statute 27.5305 which encompasses what a private attorney -- a private court-appointed attorney must do in order to obtain an expert witness. And I think it's important to understand the distinction that is

made between the Public Defender's Office, the Regional Conflict Counsel and court-appointed private attorneys.

Currently the procedure is if someone is found indigent and is represented by the Public Defender's Office or Regional Conflict Counsel and those attorneys working on their behalf determine that an expert witness is necessary, they simply engage in a contract with that expert witness and proceed accordingly. There is no judicial oversight, if you will. They have their own general appropriations budget and they use their resources accordingly. Because I'm a court-appointed private attorney, I must go through the Justice Administration Commission and Florida Statute 27.5305 outlines procedure. And what I would highlight for the Court is subsection 4 which is entitled expert witnesses, mitigation specialist. A private court-appointed attorney must obtain authorization from the Court to employ an out-of-state expert or mitigation specialist upon a showing that an expert or mitigation specialist who has appropriate skills or expertise is not available from within the county in which the case is filed or from elsewhere in the state. An order authorizing the employment must be

in writing and contain specific findings regarding the unavailability of a qualified in-state expert or mitigation specialist. The attorney shall submit a copy of the order to the Justice Administration -- Administrative Commission.

And, Your Honor, that's what I would suggest, that my only obligation is to submit the motion and the order to the Justice Administration Commission. It would be my position that that is not something that needs to be filed in the specific court case. I -- in fact, I did not file the motion in regards to Mr. Berlin, but just tendered it personally to the Court and then tendered it personally to the Justice Administrative Commission.

My only reason in filing the subsequent motion to make court records confidential and motion for protective order sealing specific court documents in regards to that motion and materials submitted in argument for the granting of that motion was because the Justice Administrative Commission, in my discussions with them, of course, I had to tender the same materials to them, they then did let me know we are a public agency.

And so absent an order sealing it, if it was requested from us, we would have to tender these

materials, which is why I ultimately did file the specific motion to make those court records confidential.

I have -- I had told the Court repeatedly in regards to scheduling this hearing that I did think -- I do think it was exempt from public disclosure. I wanted the hearing in camera as well as ex parte away from the State Attorney's Office because this is in regards to our investigation. This is not discovery that I have tendered to the State. I may never tender the name of this potential expert witness to the State. I may never present expert testimony in regards to that.

As the Court is well aware, to justify having this particular expert appointed in regards to following the requirements of Florida Statute 27.5305, I did reveal confidential work product in regards to a direction, an investigative direction, that the defense may very well pursue in regards to mitigation. It does not go to the guilt phase. It goes to the private investigation that we are conducting on behalf of Mr. Smith.

It is incumbent upon us to fully investigate every option and every alternative, but we cannot do that with having to reveal that information to the

general public or to the State Attorney's Office. To effectively present ultimately, if necessary, a full mitigation on behalf of Mr. Smith, we have to have the resources and the ability.

I will articulate for the record that the affidavit, and I think it's referred to in the clerk's database system as the affidavit of EONC, which was the affidavit of Emily Olson Gault who is a member of the ADA Capital Litigation Committee, and it just outlined for the Court the requirements and the necessities for minimum standards in regards to capital defense litigation.

I would concede that's -- that affidavit in and of itself is not -- is not work product of myself, it's not specific to Mr. Smith's situation. However, everything else tendered to the Court, as the Court remembers, were summaries of confidential psychological prior evaluations and we would suggest to the Court that we have no obligation to provide those to the State Attorney's Office and that they should absolutely be exempt under any kind of public records.

And, again, just based on Florida Statute 27.5305, the unique proceedings in regards to obtaining experts, my client, just because he's

represented by a private attorney, should not face higher scrutiny or -- or have things divulged that someone who the Public Defender's Office or Regional Conflict Counsel would not be in the same position. And so to force those kinds of proceedings to be even considered public when they, quite frankly, are not, would be to put a different standard on Mr. Smith's case or any -- any individual who's indigent but is being represented by a court-appointed attorney

THE COURT: Wouldn't it be true that even if a defendant, any defendant, had the ability to hire an attorney, that that hired attorney could also do, without any hearings or requests or anything, could also hire whatever experts or assistants they felt they might need in order to present their client's case?

MS. SCHLAX: Yes, Your Honor.

THE COURT: That would be true for a non-indigent client who had been able to hire their own attorney, is that correct?

MS. SCHLAX: Yes, Your Honor.

THE COURT: So the only defendant that's in the position you're arguing today would be an indigent defendant who cannot, for whatever

reason, be represented by the Public Defender's Office or Regional Conflict Counsel?

MS. SCHLAX: Yes, Your Honor.

THE COURT: Is that correct? Okay. Thank you.

Anything further on this?

MS. SCHLAX: No, Your Honor.

MR. BIRK: Briefly, Your Honor. Thank you.

If those materials were submitted to the Justice Administrative Commission then by counsel's own argument they are public and we just don't see how, without further explanation or analysis, how the motion itself, how this doctor's curriculum vitae, when it's available on the internet, since it's been submitted to the Court, if there are psychiatric evaluations from other cases, prior incidents we don't know the basis for, how those would be exempt from disclosure.

Clearly under 916.1065 Florida Statutes if a defendant is seeking a finding of incompetency to stand trial then that report submitted in furtherance of such a motion would be exempt, but we're not aware of any basis, and there may be one, but I'm not aware of one that would exempt psychological evaluations from prior incidents not

submitted for purposes of competency determination by the Court.

And with that, we would ask that the Court review the materials and either provide further explanation for why they are exempt or reassess whether, in fact, they are exempt.

THE COURT: All right. Thank you.

MR. BIRK: Thank you, Judge.

THE COURT: Ms. Mansfield.

MS. MANSFIELD: I just wanted to reiterate the importance of redaction and that a motion to be -- to have someone appointed pursuant to the law allowing for indigent defendants should be open. It's a statute that's available to the public. It's a process available to the public. The trial is available to the public. What gets redacted is the work product, but that doesn't mean that the public is robbed of the opportunity to know that this procedure has been used and why it's been used. And it's -- it's easy enough to put in a motion because it's work product and then have redactions for which she deems necessary to tell the Court about that and if the Court needs to make findings that articulate the work product, then that would be redacted, but the fact that the

Court were to analyze under this statute or request for an expert to be paid should be open to the public.

THE COURT: Okay. Thank you.

Anything further?

MS. SCHLAX: No, Your Honor.

THE COURT: All right. I think that completes the two issues regarding the motions filed on behalf of the media outlets, I believe.

So we'll move on to the reason we were first going to be here to begin with, which is some motions regarding the death penalty and the fact that a case has come down from the United States Supreme Court which interferes with our ability to proceed with that at this point.

MS. MANSFIELD: Thank you, Your Honor.

THE COURT: Thank you.

MR. BIRK: Thank you, Judge.

THE COURT: Let me get to the motions. I think there was first filed the defense motion to strike notice of intent to seek the death penalty and bar the State from seeking the death penalty based on the United States Supreme Court's decision in Hurst v. Florida. And then the State filed the State's response to defendant's motion to strike

notice of intent to seek the death penalty and bar the State from seeking the death penalty based on THE U.S. Supreme Court's decision in Hurst v. Florida. And then the defense filed the defendant's motion to prohibit death qualification of the jury. We'll concentrate on those two motions and response.

MS. SCHLAX: I apologize, Your Honor.

THE COURT: We can concentrate on those two motions and the State's response to the first motion.

MS. SCHLAX: And two things I will provide to the Court that certainly I'm not suggesting are binding upon this Court, but they are two orders from other circuits within the State of Florida. One is from the 18th Circuit in Brevard County. The other is in the 13th Judicial Circuit for Hillsborough County in which those two -- in those two cases two judges in particular granted motions similar to ones that I have filed on behalf of Mr. Smith.

Let me begin with the first motion that I filed which was actually filed on January 16th, the day of the Hurst decision, which was the motion to strike notice of intent to seek the death penalty and bar

the State from seeking the death penalty based on the U.S. Supreme Court's decision in Hurst v. Florida.

And, Your Honor, while I do agree in regards to the State's response that the Court is not specifically at liberty to strike the notice as -- as I suggested in that initial motion, what I was trying to accomplish was that the -- was a vehicle in which the Court could announce that based on the Hurst opinion that currently there's only the option of mandatory life imprisonment with no possibility of parole if Mr. Smith was specifically convicted of first degree murder.

And I do base that on Hurst -- on the Hurst decision, which although Hurst certainly does not strike down the concept of the death penalty as a penalty option in the State of Florida, currently with the statutory scheme as currently enunciated the Court could not proceed on the statute as written right now.

I understand that the legislature may very well at some point in the future pass another sentencing scheme statute that provides framework where the Court could theoretically impose the death penalty, but as we stand here today on March 1st, just a mere

essentially four weeks from the trial in this cause, we would urge the Court to grant the motion to strike, and specifically under the vehicle that we filed in our second motion on February 23rd, which was the motion to prohibit death qualification of the jury.

And in regards to the State's initial response, we would argue that this Court does not have the ability to essentially amend the current -- the current jury instructions that are in place and go outside the purview of 921.141. Under the current statutory scheme the jury would be told that they are merely an advisory type recommendation and it does not specifically -- does not specifically have them making the ultimate determination that, number one, aggravating circumstances have been proven beyond a reasonable doubt, but even more importantly, that those aggravators, if proven beyond a reasonable doubt, sufficiently outweigh mitigating factors to make someone actually death eligible.

Absent a framework in which the legislature acts to correct that, this statute obviously in Hurst was stricken down and any -- any other statute that might come has to address those concerns, those

constitutional concerns.

I would -- I would argue in regards to how the Courts handled the juvenile situation and amended 775.082, that ultimately was permitted, but ultimately that -- that inured to the benefit of the defendant. The, I guess tinkering, if you will, of the actual sentencing scheme for juveniles in creating judicial procedures to handle that situation before the legislature acted inured to the benefit of the defendants.

Here we're talking about the ultimate penalty and we have a statute that clearly under -- under Hurst, the United States Supreme Court has spoken, is inadequate. It is inadequate to be constitutional. This Court nor any court, I would suggest, in the State of Florida at this time, does not have the ability to tinker with the current statute and try to fix its difficulty. There's no ability to sit and adequately advise any potential jury of what their actual role is because we don't have a framework by which we could do so.

So we would ask this Court as we proceed toward our April 4th trial date to declare that the only possible penalty that Mr. Smith lawfully could be convicted of and imposed upon him is mandatory life

imprisonment.

MR. CALIEL: Good morning, Your Honor.

THE COURT: Good morning.

MR. CALIEL: Obviously what I'll do, and I don't want to repeat arguments that have already been articulated in the State's response, but in particular when it comes to the defense's argument that the Hurst decision has declared the Florida death penalty unconstitutional is inaccurate and it's inaccurate based upon the simple reality that they did not remand for a penalty phase, they remanded to the Florida Supreme Court for determination as to whether or not the error that they found in the sentencing scheme was harmless error in and of itself. And the Supreme Court of Florida has not yet ruled on that issue of harmless error based upon the Hurst decision.

And so when dealing with the realities of where we sit right now, first and foremost, the State anticipates, and hopes, and believes that before April 4th the legislature and the Governor will act and a new sentencing scheme will be in effect. There has been much movement in Tallahassee in the redrafting of the sentencing scheme to address the concerns that were raised in Hurst, to address the

constitutional concerns as to the jury's finding of an aggravating circumstance beyond and to the exclusion of a reasonable doubt.

And we expect that those changes will be effectuated on or before April 4th, first and foremost, which may, of course, bring other litigation pertaining to that, and I anticipate that there probably will be motions filed once the legislature does that.

However, assuming for one moment that the legislature does not act, based upon the fact that the Supreme Court remanded to the Florida Supreme Court for harmless error analysis, I believe there are mechanisms available to this Court that will allow us to craft jury instructions that will sufficiently meet the requirements of Hurst.

In particular the State is of the position that if we create an interrogatory verdict form at penalty phase where the jury will be instructed that they are to find and they will check a box, much like we've had with the aggravating circumstances or enhancements of 10/20/life, that, we, the jury, find beyond and to the exclusion of a reasonable doubt that this aggravating circumstance exists and that this aggravating circumstance exists, that that jury

finding of fact beyond and to the exclusion of a reasonable doubt at a unanimous standard in the interrogatory verdict would cure any ills that have been brought up in Hurst, that now are being considered in a harmless error analysis in the Hurst case itself by the Florida Supreme Court.

And so our suggestion, of course, would be that the death penalty is not dead in the State of Florida, that there are requirements under Hurst that must be followed, much like in 10/20/life cases. There is no statutory outline in the 10/20/life statute that requires Ring, Apprendi findings on 10/20/life verdict forms. What it requires and what the case law reaction was in those particular cases was that the jury finds that the defendant actually possessed a firearm and/or actually discharged a firearm causing great bodily harm, which is a sentencing enhancement, and that there is no statutory enactment in the 775 language that requires that jury finding. It is simply an interpretation of the case law that comports with Apprendi and Ring. And so the similar type of actions and the interrogatory verdict form at penalty phase by a death qualified jury can cure the ills that are outlined in Hurst, can cure the fact

that there was no articulation of an aggravating circumstance being found beyond and to the exclusion of a reasonable doubt.

Once that has been determined, once the jury has made their factual finding that this aggravating circumstance exists, much like in a 10/20/life case, there is discretion to the Court as to whether the death penalty is appropriate or not.

I don't think the defense or any defense counsel in the State of Florida is arguing that if the jury finds a death recommendation and if they find beyond a reasonable doubt that aggravating circumstances exist that somehow Your Honor or any other court could not, as a matter of law, then overrule the jury's recommendation and automatically impose the death penalty. I think what they're saying is at that point in time a legal sentencing analysis will take place, once the enhancements have been found beyond and to the exclusion of a reasonable doubt, that the Court will then impose a sentence which the Court deems legal and appropriate.

So I think so long as the jury has the opportunity during deliberations and speaks to their verdict in a penalty phase as to what aggravating

circumstances have been proven beyond and to the exclusion of a reasonable doubt that that will satisfy the requirements of the Hurst opinion and that we could proceed on April 4th in four weeks and death qualify a jury and tailor jury instructions that will meet the Hurst requirement so that that jury could make the findings necessary as outlined in Hurst and if they find the aggravating circumstances exist beyond and to the exclusion of a reasonable doubt.

What the Court had issue with in Hurst was that the ultimate finding of the aggravating circumstances was in the Court's determination later on down the road, and that that was an inappropriate finding, that the Court cannot find the enhancement facts, I think, in its sentencing order.

So I think there are opportunities that are available to this Court to still proceed to trial on April 4th and still death qualify this jury and avail the State of their right to seek the death penalty in appropriate cases.

THE COURT: Okay. If we could discuss that a minute. I understand the legislature's looking at curing the Hurst decision in our death penalty statute. They're also looking at, whether it was

required by Hurst or not, they're also looking at a requirement of the number of jurors voting for the death penalty, different than what we have now, if the death penalty were to be imposed.

There's no way a Court could fashion that because, at least as we stand here today, which is what we're arguing, I have absolutely no idea what they're going to end up with. I know what they're talking about, like we all do, but we don't have any finality on that issue, and that's an important part of the issue, whether we could -- and I'm not agreeing or disagreeing that the Court, this Court, could come up with appropriate jury instructions. I'm not agreeing or disagreeing on that, but assuming that could be done then how do you go to the next step and how do you qualify the jury, not knowing what's that's going to be and not knowing when it's going to become effective? And I know your argument is -- that's the whole argument. We don't have it right now. I realize that.

But in addition to that, and it's not on the same subject, but in speaking of the trial date, the schedule that you both have, I don't know how long it's going to take to review 72 hours worth of tapes and enter an order. I know I have 30 days by

law to do it so I know it will be done in 30 days. I don't know that it will be done much before that. I anticipate, from what I heard, even today, that there may be some suppression motion filed that needs to be heard and ruled on.

So, you know, I'm just saying these things out loud to indicate that I don't think whether or not this Court could or could not come up with an appropriate way to address this -- this singular issue in Hurst is everything that needs to be considered. So I don't know when the legislature is going to make their final decision and what they're going to vote on. I particularly don't know when the Governor might sign it into law and then beyond that the day that it would become effective. I assume it would be pretty quick, maybe immediately. I don't know that. But I would assume under the circumstances that it would be something that would be done and fairly quickly, but there's an awful lot of unknowns as we stand here today.

MR. CALIEL: I couldn't concur with the Court more and, in fact, I believe the prudent course of action would not be to proceed to trial before the legislature acts. However, that's not what we're

here arguing today.

THE COURT: No, I know.

MR. CALIEL: What defense counsel is arguing today is that if this Court strikes the death penalty we go to trial on April 4th, which we believe is inappropriate and, quite frankly, even if the Court were to deem that to be appropriate ruling in this particular case, there would be appellate remedies that the State would obviously avail itself to that may come into play when it comes to the effectiveness of our ability to even proceed on April 4th, based upon taking an appeal of this Court's action.

I think the most prudent course of action, of course, would be to wait and see what the legislature does. Hypothetically if the defendant demands, which he's entitled to, if he were to make a demand for speedy trial at this point in time, I believe the proper course of action would be to have a ruling on whether or not the death penalty is still an available punishment. If the Court agrees with us, with the State's position that it still is an available punishment and then we have to proceed, then we'd go forward and try to I guess tread new ground, legal ground that has

not been treaded before, at the peril of having to do the penalty phase a second time. Or if the Court deems that the defense's argument is appropriate, obviously we'll ultimately appeal that ruling.

But I could not agree more that I think in the current legal status, because of the Hurst decision and the legislature tinkering with the death penalty statute as we speak, the prudent course of action would be to not proceed to trial on April 4th. I think that would be the most appropriate measure to avoid any possible error that we may not foresee based upon future court rulings by either the United States Supreme Court or the Florida Supreme Court.

But if the State is placed in the position where that is not an opportunity, that we are forced to proceed to trial on April 4th, as currently scheduled, I believe there are adequate remedies with the instructions.

I agree with the Court we can't alter jury instructions to deal with the jury's vote as to whether or not it's 10-2, which is something being tossed around in Tallahassee, or 7-5 as it currently exists, or unanimous, as it existed, the Florida

Supreme Court, but I've read every inch and every word of the Hurst opinion and unanimity was not ever addressed in that opinion.

THE COURT: No, I know that. But I know they're addressing it so it's another issue that's undecided. I'm not sure when the legislature ends. Is it the end of this week?

MR. CALIEL: I believe it ends the end of next week, the 11th. The 11th is the end of the session.

THE COURT: The 11th.

MR. CALIEL: And so we'll know with a couple, hopefully within a week or so whether or not the legislature and Governor take action on this particular issue and how we can adjust.

And obviously I think the prudent course of action would be, if they do change, we'll follow the law and go 10-2 or unanimous or whatever they ultimately compromise on because I know there's been a bantering back and forth as to what the vote count should be when it comes to the recommendation, but because that specific issue was never addressed in Hurst I don't think we -- I agree with the Court it's something that we can be mindful of down the road when we get into trial,

but at this juncture right now the current status of the law of the 7-5 has not been overruled by the United States Supreme Court, only the mechanism in which the jury needs to find beyond a reasonable doubt that aggravating circumstances exist.

THE COURT: I understand that. I think we all agree that they're also looking at other things, though.

MR. CALIEL: Oh, absolutely. Absolutely.

THE COURT: Did you have anything further?

MS. SCHLAX: No, Your Honor.

THE COURT: All right. All of these motions will be taken under advisement, except the one I granted earlier to allow the one press outlet to intervene, and then I had forgotten that they had intervened before.

So all this will be taken under advisement and I think we need to have another court date.

MR. CALIEL: Your Honor, may we approach on scheduling matters?

THE COURT: You may.

(Counsel for the State and defense approached the bench for a side-bar conference out of the hearing of the court reporter.)

THE COURT: All right. After speaking to the attorneys at side-bar and looking at their calendars and the Court's calendar I'm going to set another pretrial date next Tuesday, March 8th, and I believe I'm in this courtroom. I'm in a trial, but I think it's in this courtroom. In Courtroom 405.

And right now Mr. Smith's case is also currently scheduled March 31st for final pretrial and April 4th for jury trial.

Thank you all very much.

MR. CALIEL: Thank you, Your Honor.

THE COURT: We'll be in recess.

(Thus the proceedings ended.)

C E R T I F I C A T E

I, Faye M. Gay, hereby certify that the foregoing transcript is a true and accurate transcription of my Stenograph notes taken at the time and date stated herein.

Dated this 8th day of June, 2018.

/S/ Faye M. Gay

_____

Faye M. Gay, CRR, RMR, FCR, RPR, CLVS

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IN THE CIRCUIT COURT OF THE FOURTH JUDICIAL CIRCUIT, IN AND FOR DUVAL COUNTY, FLORIDA.

Case No: 2013-CF-5781-AXXX-MA

Division CR-D

STATE OF FLORIDA

-vs-

DONALD SMITH,

Defendant,

PROCEEDINGS taken before the Honorable Mallory D. Cooper, Judge of the Circuit Court, on March 8, 2016, and as reported by Faye M. Gay, Certified Realtime Reporter, Registered Merit Reporter, and Certified Legal Video Specialist.

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APPEARANCES:

MARK CALIEL, Esquire,
Assistant State Attorney,
Appearing on behalf of the State of Florida

JULIE SCHLAX and CHARLES FLETCHER, Esquires,
Appearing on behalf of the Defendant.

P R O C E E D I N G S

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Motion for Continuance Granted.....4

MR. CALIEL: Good morning, Your Honor.

THE COURT: Good morning.

MR. FLETCHER: Good morning.

MS. SCHLAX: Julie Schlax and Charles Fletcher on behalf of Mr. Smith.

Your Honor, I have touched base with my client. He is horribly ill and so he did not wish to come out into the courtroom.

We are this morning filing two motions, Your Honor. The first by Mr. Fletcher is a motion to suppress statements which -- which Madam Clerk has a courtesy copy.

I also am filing this morning a formal motion to continue the trial set for April 4th based on the new statute that was passed last week. Obviously we will need time in which to analyze that, file appropriate motions, as well as the investigation of mitigation is ongoing.

THE COURT: Okay. And I've got an order denying the motion to strike the notice of intent to seek the death penalty and motion to prohibit death qualification of the jury, also based on the legislation signed, I think yesterday, by the Governor, with copies for you and Mr. Fletcher and Mr. Caliel.

Madam Clerk has the original.

Let me just look at the motion to continue.

All right. I will find that the motion to continue is filed in good faith and also indicate there's no objection by the State, is that correct?

MR. CALIEL: There is not, Your Honor. Given the most recent change in the law it would be inappropriate to press this matter to trial on April 4th.

THE COURT: Okay. So I'll grant the motion to continue the trial and I'll strike the case from the -- I think it was March 29th final pretrial and April 4th jury trial date.

MS. SCHLAX: Yes.

THE COURT: However, with the filing of the motion to suppress, do you want to keep one of those dates for that purpose or is that too soon?

MS. SCHLAX: Your Honor, I think we anticipate needing Mr. Deviney back from Florida State Prison and I'm not sure exactly how long that would take. April 4th to be set might be appropriate.

THE COURT: Okay.

MR. CALIEL: To be set that week or to pick a date?

THE COURT: I thought you meant to be set that week.

MS. SCHLAX: To be set that week, Your Honor.

THE COURT: We can have him back by then for sure. If you will get with Becky Howell, she can do the transport order.

Do you need him back earlier than that week?

MS. SCHLAX: If we could have him back probably about a week before that.

THE COURT: Okay. If you'll go ahead and do that by motion, she'll be able to get that in plenty of time.

Okay. So even know I've stricken the April 4th jury trial date, it will be on April 4th for hearing on motion to be set that week. And that will be in Courtroom 406. We've already got that reserved. We'll just keep it.

And is there any thought at this time on when the trial can be rescheduled or do you want to do that at the next -- the April 4th week?

MS. SCHLAX: Your Honor, I have checked with all of the anticipated expert witnesses that I'm aware of right now. There is a potential for the defense to seek one additional expert and I do not know their schedule. So if the Court wanted to

wait until the April 4th date. I know that we had discussed preliminarily September and I'm making sure my calendar keeps clear for September, but as to the exact week in September, I should be able to advise the Court of absolute availability of all potential expert witnesses.

MR. CALIEL: Your Honor, we're just waiting as to the defense's arguments as to mitigation. Obviously we can handle the legal motions pertaining to the death penalty pretty expeditiously. That's the main issue.

If Ms. Schlax believes they can in good faith shoot for September, I think it's probably best at this juncture just to leave no dates at this point in time to get more updates from the defense. I will keep the entire month of September available for trial --

THE COURT: And I will, too.

MR. CALIEL: -- in the event that we do need to schedule it at that point in time and then once Ms. Schlax and Mr. Fletcher have a little bit more knowledge as to their experts' schedules we'll be able to pick a more certain date.

THE COURT: That's fine. I think we can set it in April. That's certainly enough time and you

can find out when everybody will be available.

And you can do the same thing with your witnesses.

MR. CALIEL: Yes, Your Honor.

MS. SCHLAX: Yes, Your Honor.

THE COURT: And there's pending motions that I know will be ruled on within 30 days. You'll have that ruling prior to the motion to suppress by a couple of days. Not on. I think the date is March 29th actually it has to be done. So you'll have it by then.

MS. SCHLAX: Yes, Your Honor.

THE COURT: Anything else we need to do today?

MR. CALIEL: Nothing that I can think of, you Your Honor.

MS. SCHLAX: Your Honor, if we could just approach briefly on an administrative matter.

THE COURT: Sure.

(Counsel for the State and defense approached the bench for a side-bar conference out of the hearing of the court reporter.)

THE COURT: I think that's everything and we'll just be back on the calendar April 4th in courtroom 406 for hearing on motion to be set.

MS. SCHLAX: Thank you very much, Your Honor.

THE COURT: And to set a trial date.

MS. SCHLAX: May we be excused?

THE COURT: Yes. Thank you.

MR. CALIEL: Thank you, Your Honor.

MR. FLETCHER: Thank you, Judge.

(Thus the proceedings ended.)

C E R T I F I C A T E

I, Faye M. Gay, hereby certify that the foregoing transcript is a true and accurate transcription of my Stenograph notes taken at the time and date stated herein.

Dated this 8th day of June, 2018.

/S/ Faye M. Gay

_____

Faye M. Gay, CRR, RMR, FCR, RPR, CLVS

Filing # 73343490 E-Filed 06/11/2018 09:55:52 AM

IN THE CIRCUIT COURT OF THE FOURTH JUDICIAL CIRCUIT, IN AND FOR DUVAL COUNTY, FLORIDA.

Case No: 2013-CF-5781-AXXX-MA

Division CR-D

STATE OF FLORIDA

-vs-

DONALD SMITH,

Defendant,

PROCEEDINGS taken before the Honorable Mallory D. Cooper, Judge of the Circuit Court, on April 11, 2016, and as reported by Faye M. Gay, Certified Realtime Reporter, Registered Merit Reporter, and Certified Legal Video Specialist.

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Jacksonville Florida 32202
904-358-2090

ACCEPTED: DUVAL COUNTY, RONNIE FUSSELL, CLERK, 06/12/2018 09:09:40 AM

APPEARANCES:

MARK CALIEL, Esquire,
Assistant State Attorney,
Appearing on behalf of the State of Florida

JULIE SCHLAX and CHARLES FLETCHER, Esquires,
Appearing on behalf of the Defendant.

P R O C E E D I N G S

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MR. CALIEL: Good morning, Your Honor.

THE COURT: Good morning.

MR. CALIEL: Your Honor, if we could address the case of Donald Smith.

MS. SCHLAX: And, Your Honor, I'm going to waive his appearance. He's having difficulty with some blood pressure medication and he's feeling very dizzy.

THE COURT: Okay.

MR. CALIEL: And, Your Honor, we were here this morning to schedule a motion to suppress that was filed by the defense. However, I've been in communication with Mr. Fletcher and Ms. Schlax with regards to some witness issues and I believe we just need to select a date a little bit further out than this week to accommodate their witness issues.

MR. FLETCHER: That's correct, Your Honor. And I filed a motion to continue this particular hearing.

THE COURT: I did get a copy of that. A courtesy copy. So I was aware of it.

I believe in the motion you had asked for the week of April 25th and I can't do it that week. I don't mind doing it after that week.

MR. FLETCHER: That's fine, Judge.

THE COURT: I just can't do it that week.

MR. CALIEL: And, Your Honor, given the witness issues and also the State witness issues, would it be possible maybe to pick a time certain maybe the week that follows that would be good for everybody and then that way rather than come back for the Monday to be set we could notify our witnesses as to a specific date.

THE COURT: That's fine. That Thursday is a problem because we have -- well, it's a problem if we can't be through by 12:00 or 12:30. Otherwise that day is fine. Any day that week is fine. I can work around anything.

MR. CALIEL: Wednesday, May 4th, would that work with counsel?

MR. FLETCHER: That's fine.

MS. SCHLAX: That's fine, Your Honor.

THE COURT: Wednesday, May 4th. Let me check real quick. Make sure we can get the courtroom. I'll have to do it by phone.

(Court speaking on phone.)

THE COURT: That's fine.

MR. CALIEL: And, Your Honor, for scheduling purposes I don't expect the State's testimony to

be much more than about an hour, then whatever the defense intends to put on. I can't see the -- the actual evidentiary portion being that lengthy.

THE COURT: You have no objection to the continuance?

MR. CALIEL: We do not, Your Honor.

THE COURT: All right. I'll grant the motion for a continuance and strike the case from a hearing this week and reschedule it time and date certain Wednesday May 4th at 9:00 in Courtroom 405. Is that all right?

MR. FLETCHER: That's fine.

MR. CALIEL: Your Honor, perhaps on the day of May 4th -- we've already had discussions about perspective trial dates in the fall. I think we're clear with what we previously discussed but perhaps maybe on that date scheduling the new trial date so we'll have that set.

THE COURT: That will be fine. I think that's enough time.

All right. We'll do both of those things on Wednesday, May 4th.

MR. CALIEL: Thank you, Your Honor.

MS. SCHLAX: Thank you very much.

(Thus the proceedings ended.)

C E R T I F I C A T E

I, Faye M. Gay, hereby certify that the foregoing transcript is a true and accurate transcription of my Stenograph notes taken at the time and date stated herein.

Dated this 8th day of June, 2018.

/S/ Faye M. Gay

_____

Faye M. Gay, CRR, RMR, FCR, RPR, CLVS

Filing # 73343490 E-Filed 06/11/2018 09:55:52 AM

IN THE CIRCUIT COURT OF THE
FOURTH JUDICIAL CIRCUIT, IN
AND FOR DUVAL COUNTY, FLORIDA.

Case No: 2013-CF-5781-AXXX-MA

Division CR-D

STATE OF FLORIDA

-vs-

DONALD SMITH,

Defendant,

PROCEEDINGS taken before the Honorable Mallory D. Cooper, Judge of the Circuit Court, on May 4, 2016, and as reported by Faye M. Gay, Certified Realtime Reporter, Registered Merit Reporter, and Certified Legal Video Specialist.

OFFICIAL REPORTERS, INC.
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APPEARANCES:

MARK CALIEL and MEREDITH CHARBULA, Esquires,
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Appearing on behalf of the State of Florida

JULIE SCHLAX and CHARLES FLETCHER, Esquires,
Appearing on behalf of the Defendant.

P R O C E E D I N G S

PROCEEDING PAGE

Pretrial.....4

MR. CALIEL: Good morning, Your Honor.

THE COURT: Good morning.

MR. FLETCHER: Good morning, Your Honor.

MS. SCHLAX: Good morning.

THE COURT: You want Mr. Smith present?

MS. SCHLAX: Yes, Your Honor, he should be.

THE COURT: Okay.

(Defendant present.)

THE COURT: Okay. Mr. Smith is present along with his attorneys and the State.

We're here for a hearing on motion and pretrial.

MR. FLETCHER: That's correct, Judge.

Judge, I've filed two motions. The first is a motion to modify the protective order. Mr. Hernandez was appointed to represent -- reappointed to represent Randall Deviney who is the subject -- one of the people that speaks on the conversations captured at the jail. He was appointed on the 27th. I can't speak with Mr. Deviney, because he has lawyers, until I meet with Mr. Hernandez. He has now been appointed.

I had filed a motion to authorize me to provide Mr. Hernandez with a copy of the jail surveillance, we'll call it that, and a motion to continue this

hearing today for that reason.

THE COURT: Let's do them one at a time. On the motion to modify, requesting that Mr. Hernandez be given access to [redacted] transcript [redacted] [redacted] any objection?

MR. CALIEL: Well, Your Honor, only an observation. The only reason the motion was filed, Mr. Hernandez, once he was appointed by the Court, made a request to our office to be provided a copy of the recordings. Based upon the protective order I felt uncomfortable in providing that information to him. I understand the need that has been expressed by the defense to speak to Mr. Deviney and in reference to these recordings my only concern is this, is that -- and obviously the testimony is not going to be taken today, but Mr. Deviney was unaware of this recording, didn't know when it was taking place, how it was taking place, didn't have any idea any of this was taking place so I don't necessarily see the relevance of allowing Mr. Deviney, for the purposes of what is expressed in the motion, which is the agency issue as well as some other Fourth Amendment issues that we dealt with in our written response, I don't see the relevance, given the fact Mr. Deviney had no

idea that was taking place, as to why he needs to listen to the recordings to testify in regards to what the issues are. And my only concern is that it is potentially, and obviously we raised issues when we affirmatively rejected Mr. Deviney's offer to cooperate, that Mr. Deviney has significant credibility issues, and I do have concerns that somehow after listening to the tape that Mr. Deviney may tailor his testimony in a fashion or another to meet whatever means he believes is in his best interest. And so that is the State's concern.

I don't see the evidentiary need to have Mr. Deviney, who is not being called by the State as a witness, and we have no intention of ever calling Mr. Deviney as a witness in this case, to have him listen to the tape when it is not material to the issues at bar.

Now, obviously if counsel has other reasons why they want to do that in pretrialing their witnesses and discussing that with them, and I'll leave that to them, but I don't see the relevance of [redacted] recording for a witness who the State does not intend to call and was unaware that any of this was ever taking place. I don't see anything to benefit

either side, other than the potential -- and we have significant concerns about Mr. Deviney's credibility, that he may tailor his testimony after he listens to those recordings in a fashion that he feels is in his best interest.

MR. FLETCHER: I Judge, I have to, in order to speak to Mr. Deviney about this particular conversation, to request the jail -- I have to find a way to refresh his recollection and I think I'm entitled to play that for him. I can't do it because I don't represent him. Mr. Hernandez will do it or we'll both do it at some future date. Mr. Caliel's a very capable attorney. If he suspects that I put on a witness who then tailors his testimony, I expect Mr. Caliel will cross-examine him about it, but it's relevant to me in what I'm doing in my case.

THE COURT: Okay. I'll enter an order on your motion to modify the Court's protective order sometime today, hopefully, on that.

And then you also filed a motion to continue this hearing --

MR. FLETCHER: Yes, Your Honor.

THE COURT: -- that was scheduled for today, based basically on the same thing, give you time

to have Mr. Hernandez do what he's going to do and give you the opportunity to speak to the witness, et cetera. And I'll hear from the State in a moment, but do you have any idea how much time you're looking at?

MR. FLETCHER: I would guess three to four weeks, Judge.

THE COURT: Mr. Caliel.

MR. CALIEL: Your Honor, I'm just checking because there were a couple of dates that two of the material witnesses were unavailable.

That time frame will work. One of the witnesses is unavailable May 30th through July. So we would have to try to schedule it July 5th. They're out of work, the corrections officer is not going to be available. If we could do it sometime in May, avoiding the 6th. The 21st or the 27th, I think we could find a date in there. Those were three dates that I was given that there are a couple of witnesses had unavailability due to medical procedures or things of that nature.

THE COURT: The 6th, the 21st and the 27th?

MR. CALIEL: Yes, Your Honor.

THE COURT: I can do it on the 26th. I don't know if that's the -- that's three weeks.

MS. SCHLAX: That's fine.

MR. FLETCHER: That's fine, Judge.

MR. CALIEL: I'm available if everybody else is.

MR. FLETCHER: May I speak with Mr. Hernandez?

THE COURT: Yes.

(Mr. Fletcher conferring with Mr. Hernandez.)

MR. FLETCHER: Judge, I think the 26th works for everybody.

MR. CALIEL: That would be great.

THE COURT: Do you want to do that then?

May 26th at 9:00. I'll grant the motion for continuance.

Let me make one phone call and make sure we can get this courtroom that day so we know.

Okay. That's fine. So May 26th at 9:00, Courtroom 405, hearing on motion to suppress. Okay.

MS. SCHLAX: And, Your Honor, there are administrative matters I'd like to discuss with the Court at side-bar.

THE COURT: Okay. You may approach.

(Counsel for the State and defense approached the bench for a side-bar conference out of the hearing of the court reporter.)

THE COURT: All right. After a lengthy discussion at side-bar regarding setting a trial date, it's been determined by everyone that we're not quite ready to do that yet and we'll hopefully be able to do that at the next hearing date on May 26th. Everybody has a few chores to attend to, make sure that we can pick an appropriate date and we'll know at that time.

Is there anything else we need to do?

MS. SCHLAX: No, Your Honor.

MR. CALIEL: Nothing from the State, Your Honor.

THE COURT: All right. Then we'll be in recess. Thank you.

MS. SCHLAX: Thank you.

MR. FLETCHER: Thank you, Judge.

MR. CALIEL: Thank you.

(Thus the proceedings ended.)

C E R T I F I C A T E

I, Faye M. Gay, hereby certify that the foregoing transcript is a true and accurate transcription of my Stenograph notes taken at the time and date stated herein.

Dated this 8th day of June, 2018.

/S/ Faye M. Gay

_____

Faye M. Gay, CRR, RMR, FCR, RPR, CLVS

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IN THE CIRCUIT COURT OF THE
FOURTH JUDICIAL CIRCUIT, IN
AND FOR DUVAL COUNTY, FLORIDA.

Case No: 2013-CF-5781-AXXX-MA

Division CR-D

STATE OF FLORIDA

-vs-

DONALD SMITH,

Defendant,

PROCEEDINGS taken before the Honorable Mallory D. Cooper, Judge of the Circuit Court, on May 26, 2016, and as reported by Faye M. Gay, Certified Realtime Reporter, Registered Merit Reporter, and Certified Legal Video Specialist.

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ACCEPTED: DUVAL COUNTY, RONNIE FUSSELL, CLERK, 06/14/2018 09:49:46 AM

APPEARANCES:

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Assistant State Attorney,
Appearing on behalf of the State of Florida

JULIE SCHLAX and CHARLES FLETCHER, Esquires,
Appearing on behalf of the Defendant.

P R O C E E D I N G S

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(Defendant present.)

MR. FLETCHER: Good morning, Your Honor.

THE COURT: Good morning.

Mr. Smith is present with his attorneys.

THE DEFENDANT: Good morning.

THE COURT: Good morning.

And the State is present.

MR. CALIEL: Good morning, Your Honor.

THE COURT: So we can proceed.

MR. FLETCHER: Good morning, Your Honor, Charles Fletcher, for the record, for Mr. Smith.

Judge, I filed two motions. I'm not sure if they've made it to CORE yet. I didn't see them this morning.

THE COURT: They have.

MR. FLETCHER: They have?

THE COURT: Yes.

MR. FLETCHER: One is a motion to continue this hearing and another one is a motion to unseal certain documents which is the reason for the continuance. The motions speak for themselves.

THE COURT: I've reviewed both of them. We should, I believe, start with the motion to unseal the documents, if those documents are the grounds for your motion for continuance.

MR. FLETCHER: Yes, Your Honor. Judge, I believe the items I am seeking are currently sealed. Some of them -- one of them is a transcript in the Randall Deviney case. I've indicated to the Court what docket entry that is.

THE COURT: Okay.

MR. FLETCHER: Some of them I think are four letters that he sent to the Court right about at the same time as the Public Defender was moving to withdraw from his case for various reasons. The other item is a transcript of the in camera hearing in our case, the case of Donald James -- I'm sorry -- Donald Smith. I need all of those transcripts. They are relevant to the allegations I've set forth in the motion to suppress.

THE COURT: All right. Does the State have any response?

MR. CALIEL: Your Honor, my only response is that I don't see the relevance of the materials for what the issues are regarding the jail recordings that are the subject matter to the motion to suppress. As articulated in our response, other than four members of law enforcement, which include myself, nobody was aware of those recordings taking place.

Mr. Deviney was not aware of these recordings taking place. And so I'm not quite sure how Mr. Deviney can allege that he's acting as an agent of the State for an action which he had no knowledge of. I know that the proceedings that Mr. Fletcher is seeking are the transcripts and the documents in regards to Mr. Deviney's desire to become a witness against Mr. Smith, which the State at that time and still continues at this point in time to refuse to utilize Mr. Deviney. We don't believe he has any credibility whatsoever in the statements that he provided and we still maintain the fact that we do not seek to use Mr. Deviney in any capacity. He's not a necessary witness for the predicates of this jail recording and we don't believe that the materials being sought are relevant to the issues that we are litigating for the motion to suppress.

That being said, our only request would be if the Court does allow the defense to obtain these materials, that obviously they have indicated their intention of calling Mr. Deviney as a witness during the motion to suppress and these would, therefore, then be statements of a witness who's testifying and we believe that that would

then make those materials that up until this point in time have been sealed and kept from the State of Florida, that those materials would then be discoverable to the State and we would be entitled to review those documents as well, particularly if Mr. Deviney is going to take the witness stand for the defense in this particular case.

And so while we believe the materials are relevant for the legal discussion, arguments that are going to be made, if those materials are made available to the defense we should be entitled to reciprocal discovery of those matters.

THE COURT: Any response to that?

MR. FLETCHER: Judge, I believe the materials are relevant to what I'm seeking to do in my motion to suppress. I'd ask the Court to take a look at those before disclosing them to me and I can look at them. If I feel for some reason they should not be discoverable by the State, I'll file an appropriate motion.

THE COURT: All right. I just want to make sure I'm understanding what you're saying. If I grant your motion then I would review the materials in camera and determine whether or not your motion should be granted as to any or all of

the materials you're requesting. Then you're asking, I believe, for you to have the opportunity for anything that I do unseal for you, for you to review it before it's discoverable to the State.

MR. FLETCHER: Yes, Your Honor.

THE COURT: Is that correct?

MR. FLETCHER: Yes, Your Honor.

MR. CALIEL: Your Honor, I'm -- I would probably ask the Court in its original in camera review if the defense is made available these statements of a witness that pertains to issues that he's going to be testifying to, that would be the only reason why these materials are relevant, is if it pertains to the issues that he's going to testify to, that regardless of what the defense's position is on that that if the witness is testifying and has made prior statements in regards to that, that is discoverable in reciprocal discovery and we should be entitled to those documents and transcripts.

THE COURT: What if the defense -- what if I agree with their motion and allowed them to have unsealed -- or for me to unseal for them all or parts of the materials they're requesting, they review the materials and determine that they are,

in fact, irrelevant and I not going to use them, do you still feel that they're discoverable to the State?

MR. CALIEL: I'm sorry, Your Honor. If Mr. Deviney testifies. If they decide after reviewing these materials that they elect not to call Mr. Deviney as a potential witness in the hearing, then I think those materials would not be discoverable to the State of Florida. But because these issues that are alleged in the defense's motion, which all surround Mr. Deviney's desire to become a witness against Mr. Smith, and we know for a fact, based upon the conflict nature and that that was the subject matter of these discussions in these letters, that if Mr. Deviney takes the witness stand those are materials or statements -- statements of a witness who's testifying. If they choose not to put Mr. Deviney on the witness stand then that's a whole different matter, I don't believe they're discoverable and I don't think they would be relevant. But if they choose to call him as a witness, these are statements about the subject matter for which he's testifying, regardless of whether or not the defense believes they're relevant I believe

they're relevant for impeachment purposes and we would be entitled to review those materials.

THE COURT: Okay. So for my purposes again, I would be looking at the materials, in camera, myself, to make a determination on the motion. If I agreed with some or all of the motion and disclose -- or unseal them for the defense, then I think you are agreeing that they would have a period of time, not long, to review them and determine whether or not they are going to continue to seek to use, if they even are now, I don't know, to use Mr. Deviney as a witness. And if they make the determination that they're not going to use him as a witness, they just would inform the Court and the State he would not be used as a witness and then the materials would just be kept under seal to everyone other than Mr. Fletcher.

There's another issue, too. I know Mr. Hernandez is here who currently represents Mr. Deviney and I don't know if he has any -- I know he's not a party to your motion, but I guess if he wanted to have any access he could file something on Mr. Deviney's behalf.

MR. FLETCHER: That's fine with me, Judge.

THE COURT: Okay. All right. I'm going to take this under advisement because it will take some work by the Court before I can make a determination and I'll let you know as quickly as I can.

MR. FLETCHER: Thank you.

MR. CALIEL: Your Honor, the only request that I would have, particularly if we're going to be scheduling other hearing dates and things of that nature, if there can be some sort of deadline as to a decision as to whether or not Mr. Deviney -- I don't believe, correct me if I'm wrong, counsel, I don't believe Randall Deviney has been listed as a witness by the defense as of yet.

MR. FLETCHER: That's correct.

MR. CALIEL: Okay. A deadline for reciprocal discovery if they intend to call Mr. Deviney because there is a possibility and, of course, I'd have to coordinate with Mr. Hernandez and defense counsel, that if they do intend to call him as a witness for the purpose of this hearing that we would seek the opportunity to depose Mr. Deviney prior to his testimony in that hearing. And so if we could have some sort of deadline to accommodate all that being accomplished prior to any

prospective hearing date that would be the request of the State.

MR. FLETCHER: That's fine with me, Your Honor.

THE COURT: Okay. Well, let's get to the second motion then. Then based on that we'll try to put together a timeline as you've requested and that's agreed.

So on the motion to continue, and that is a motion to continue the motion to suppress hearing, correct?

MR. FLETCHER: Yes, Your Honor.

THE COURT: Okay. And what is your argument on that?

MR. FLETCHER: Judge, just because I need these materials, I'm not prepared for hearing yet. So I'd ask the Court for a continuance.

THE COURT: And do you feel that once these materials, if disclosed, are disclosed to you, what is the timeline you think -- not interim timeline, but the timeline for the purpose of scheduling a hearing again?

MR. FLETCHER: I would ask for about mid-July.

MR. CALIEL: Your Honor, if the Court is

going to grant access after reviewing the materials, obviously we want the defense to have the opportunity to review these to make a decision and then we would actually want to have access to these materials and to be able to depose any potential witnesses prior to the hearing, so we have no objection to the continuance.

THE COURT: Okay. Does anybody know where Mr. Deviney is? Is he here or is he --

MR. FLETCHER: I assume he's in Starke.

THE COURT: In Starke?

MR. FLETCHER: Yes.

THE COURT: Okay. But we can get him brought over if it arrives to the point where the State needs to depose him prior to the hearing.

MR. CALIEL: I thought an order to transport was already tendered.

THE COURT: Do you know, Mr. Hernandez?

MR. HERNANDEZ: Yes, sir.

THE COURT: Is he here?

MR. HERNANDEZ: No, ma'am, he's not here in Duval County Jail.

THE COURT: Okay. So we would need a new transport order?

MR. HERNANDEZ: Yes, ma'am.

THE COURT: Okay. So I'll leave it to the State to --

MR. CALIEL: Well, Your Honor, my preference would be -- there's no sense, especially given the fact that he's a death row inmate, I don't want to have him transported for obvious security issues, and it's an extreme burden on DOC and the Jacksonville Sheriff's Office, until Mr. Fletcher has had an opportunity to --

THE COURT: No, I know.

MR. CALIEL: -- make that decision and I would depose him at Florida State Prison if need be.

THE COURT: Oh, okay.

MR. CALIEL: I can do the deposition there. It's a short drive for us. We can make those arrangements and then --

THE COURT: Okay.

MR. CALIEL: -- if Mr. Fletcher does need his presence at a particular hearing, then we can have him transported back. I just don't want to place any undue burden on the Jacksonville Sheriff's Office and DOC in transporting him unless it's absolutely necessary because there's special requirements for death row inmates.

THE COURT: Okay. There are. I've checked the schedule and we can set the hearing anytime the week of July 11th or we can set the hearing anytime the week of July 18th, except July 19th.

MR. CALIEL: Your Honor, I would make the request, if possible, I spoke to my necessary witnesses for the hearing yesterday afternoon, and one of the needed witnesses is going to be in Seattle, Washington, in training the entire week of the 11th. If we could have a date and time certain the week of the 18th, if even possible maybe perhaps July 18th or any other date that week, frankly, I'm available, if need be. I'm not sure what counsel's schedule is.

MS. SCHLAX: Your Honor, if we could have it later in the week. I'm anticipating being in a jury trial that week and so that Monday I would be picking a jury. But it's a short trial. So I don't foresee any difficulty if it was scheduled for Thursday or Friday of that week.

THE COURT: So July 21st is Thursday.

MR. CALIEL: That's fine with the State, Your Honor.

THE COURT: I'll grant the motion for continuance. I'll find there is good cause for

the continuance of the hearing on the motion to suppress, schedule the motion to suppress July 21st at 9:00 o'clock in Courtroom 405.

There are also other pending motions. Could we hear those that day as well?

MS. SCHLAX: Your Honor, I have -- I -- absolutely. I do anticipate filing one additional motion and it may actually be more than one once the jury instructions are actually affirmed, which I'm expecting -- it's any day I'm expecting that.

THE COURT: Do you think we need to set aside two days or just one day?

MS. SCHLAX: No, Your Honor.

MR. CALIEL: Once we receive the motion we'll do everything within our power to be prepared to have --

THE COURT: I'll reserve the courtroom for Thursday and Friday just in case.

MS. SCHLAX: Okay, Your Honor. And we can certainly take up the three that have already previously been filed. I just anticipate once the jury instructions are finalized filing additional motions as well as requests for special jury instructions.

THE COURT: Okay. I'm not sure we have to

get to requests for special instructions this early, but maybe we will. We'll see.

So July 21 at 9:00 in Courtroom 405. I'll reserve it for the 22nd as well just in case to hear the motion to suppress and other motions that we can hear that day we will hear. And then we had also --

Well, let me see the attorneys at side-bar, if you would, please, for scheduling.

(Counsel for the State and defense approached the bench for a side-bar conference out of the hearing of the court reporter.)

MS. SCHLAX: Your Honor, I think in terms of setting this case for trial, obviously there are still some matters that the defense is investigating. However, in consultation with the appropriate witnesses that we anticipate calling, we believe that January 17th, and after coordinating with the State's schedule, January 17th of 2017, would be an appropriate trial date.

THE COURT: And my memory is that's a Monday -- I mean a Tuesday. That Monday is a holiday, is that correct?

MS. SCHLAX: Yes, Your Honor. Anticipating that the Court will impose a schedule that we will continue on Saturdays if need be to finish the

trial in the most efficient manner possible. That Tuesday, the 17th, to begin with the jury selection process would be appropriate.

MR. CALIEL: Your Honor, while I understand, and there have been communications with counsel about the availability of their witnesses, obviously we are concerned with the delay until July. The State of Florida has been ready to try this case since 2014. Understanding that a number of matters have come up and Ms. Schlax has indicated to me there are potential mitigation witnesses and their availability to me because there were experts from out of state. I have very little information to argue to the Court because at this point in time those witnesses are not listed, and they don't need to list them at this point in time because they've not determined if they're going to call them, but based upon representations of counsel that they intend to at least investigate this mitigation prior to making any decision, and given the timetables, I believe there were examinations and the availability of out-of-State witnesses I understand. We do not want to force the defense to go to trial before they're prepared, we want to do this thing right

the first time, but the State of Florida, in particular the victim's family, has an interest in trying to get this case litigated and brought to closure as quickly as possible.

So I have no legal objection to the continuance for fear that it may cause issues post-conviction if defense is not adequately prepared, however, there has been an extremely long investigative period for this particular case. We would like to have the case tried sooner, but I understand the witness issues that Ms. Schlax has indicated to the Court and counsel.

THE COURT: Okay. Then -- of course, everyone involved in the system is opposed to delay, but delay happens and it happens for good reasons and there is still work to be done, as the Court has been informed, and I don't want to set the case and then have to reset it again. I want to set it and we're going to go. So in order to give you all the time that you seem to think that you will need to get with the experts and their availability, I believe you've informed the Court they are available --

MS. SCHLAX: Yes, Your Honor.

THE COURT: -- in January. Then I will set

the case January 17th for jury selection. That's a Tuesday. And that will be in Courtroom 406 and 407. We'll be doing actual selection in 406, but 407 will be available.

And, Mr. Fletcher, on your request for documents to be unsealed, I'd like to give you a deadline of June 13th to inform the Court and the State if you're going to proceed with Mr. Deviney or any of the materials, if they are, in fact, unsealed and given to you. And that gives the State a month to set up their deposition if he is going to be a witness.

MR. FLETCHER: That's fine, Judge.

THE COURT: And based on that I will certainly give to you as quickly as possible a decision on your motion so that you have some time to consider it before you let us know on January 13th -- I mean June 13th.

MR. FLETCHER: Yes, Your Honor.

THE COURT: So is there anything else?

MS. SCHLAX: No, Your Honor.

MR. CALIEL: No, Your Honor. Nothing from the State.

THE COURT: Okay. We'll be in recess. Thank you.

MS. SCHLAX: Thank you.

MR. CALIEL: Thank you, Your Honor.

MR. FLETCHER: Thank you, Your Honor.

(Thus the proceedings ended.)

C E R T I F I C A T E

I, Faye M. Gay, hereby certify that the foregoing transcript is a true and accurate transcription of my Stenograph notes taken at the time and date stated herein.

Dated this 11th day of June, 2018.

/S/ Faye M. Gay

_____

Faye M. Gay, CRR, RMR, FCR, RPR, CLVS

Filing # 73473902 E-Filed 06/13/2018 08:42:26 AM

IN THE CIRCUIT COURT OF THE
FOURTH JUDICIAL CIRCUIT, IN
AND FOR DUVAL COUNTY, FLORIDA.

Case No: 2013-CF-5781-AXXX-MA

Division CR-D

STATE OF FLORIDA

-vs-

DONALD SMITH,

Defendant,

PROCEEDINGS taken before the Honorable Mallory D. Cooper, Judge of the Circuit Court, on July 15, 2016, and as reported by Faye M. Gay, Certified Realtime Reporter, Registered Merit Reporter, and Certified Legal Video Specialist.

OFFICIAL REPORTERS, INC.
421 W. Church St., Suite 701
Jacksonville Florida 32202
904-358-2090

ACCEPTED: DUVAL COUNTY, RONNIE FUSSELL, CLERK, 06/14/2018 09:49:46 AM

APPEARANCES:

MARK CALIEL, Esquire,
Assistant State Attorney,
Appearing on behalf of the State of Florida

CHARLES FLETCHER, Esquire,
Appearing on behalf of the Defendant.

P R O C E E D I N G S

PROCEEDING PAGE

Pretrial.....4

(Defendant present.)

THE COURT: Good morning. Mr. Smith is present.

MR. CALIEL: Good morning.

THE COURT: Mr. Fletcher, one of his attorneys.

MR. FLETCHER: Good morning, Your Honor.

THE COURT: And Mr. Caliel for the State.

And what happened was we've already had a hearing on these issues. You've already presented your argument, the State has presented theirs. But it occurred to me, after reviewing everything, that perhaps the interveners had not been noticed on the issues so we rescheduled it to notice them. And I did notice the media, who had intervened, and I don't think any of the attorneys for the media are here. We noticed Timothy Conner and Ed Birk who represent Morris Publishing Group and also Post Newsweek Stations and Graham Media Group in case they have any input into the motions, but since they're not here I guess they don't.

I had determined that there was one issue even without the interveners' input that needed to be addressed and that was that the items that were requested in numerals I, III, and IV are actually

contained in a different court file than Mr. Smith's court file.

MR. FLETCHER: Yes, ma'am.

THE COURT: And I was not sure, although they're both my cases, that there was a way for me to address those without that file being noticed in the request. So I dismissed without prejudice those three paragraphs.

Just to make sure that the record's clear, what's being requested out of what file --

MR. FLETCHER: Okay.

THE COURT: -- I don't know that I can go into other people's files without -- I know Mr. Hernandez was here, he represents Mr. Deviney who is the subject of the other three requests. So I gave you the opportunity, if you wish, to refile something so that I can address those three. And I'm happy to do that.

MR. FLETCHER: I will need to do that. And, Your Honor, is that an order that was filed today or -- because I -- for whatever reason --

THE COURT: You didn't get this order?

MR. FLETCHER: If I don't go to CORE and look at it I don't get noticed on anything. I have to go and look. And I wasn't anticipating that was

going to happen. Ms. Schlax probably gets noticed, but for whatever reason the second attorney doesn't get it.

THE COURT: It looks like it went to you, but maybe it didn't. You're both listed together. It might have gone to her, but it was just an order. I've got a copy. Would you like to look at it? It's very short.

MR. FLETCHER: Sure.

THE COURT: Madam Clerk, would you give this to him. Thank you.

(Mr. Fletcher reviewing documents.)

THE COURT: It basically just says what I just said. I was giving the media an opportunity to have any input on the request regarding Mr. Smith's case and in camera hearing that you wish to have access to and dismissing without prejudice the three that relate to Mr. Deviney. And that's basically all the order says.

MR. FLETCHER: Yes, ma'am.

THE COURT: So if you'll let me know if you're going to file something else.

MR. FLETCHER: I will.

THE COURT: Without any further input from anyone else, I think you're entitled to everything

in Mr. Smith's file. You and Ms. Schlax are attorneys for Mr. Smith now, you should have access to anything in his file. So for that purpose I'm going to unseal it to you.

MR. FLETCHER: Okay.

THE COURT: To you and Ms. Schlax. Not to anyone else. It's still something that should be sealed except for the attorneys who are representing Mr. Smith. So I will give you access to that.

As far as the others, you can file what you like and I'll be happy to address it.

This is set for a motion to suppress Thursday.

MR. FLETCHER: Judge, I have discussed that with Mr. Caliel and I have done some of the other things that we had previously discussed that I was going to do that had caused continuances of that motion. Myself and Mr. Hernandez went down to Florida State Prison and interviewed Mr. Deviney and Mr. Hernandez informed me this morning that he will be advising Mr. Deviney to take the Fifth.

I need to look at the transcripts that are being unsealed now and I need to file this motion. So I would ask for about a week or two to get all that together.

THE COURT: Well, could we get the motion filed and hear that next Thursday?

MR. FLETCHER: Yes, Your Honor.

THE COURT: And then with the understanding that the suppression would have to be moved a week or two?

MR. FLETCHER: Yes, Your Honor.

THE COURT: Is that what you're saying?

MR. FLETCHER: Yes, Your Honor.

THE COURT: If you could do that so we could go ahead and kind of keep on schedule. We already have the courtroom and everything for next Thursday, July 21st, so rather than that being a hearing on the motion to suppress it'll be a hearing on your motion to be filed.

We also have another case that day, Cecil King. It's a status. It will be very brief. And then if we're going to have that hearing on the 21st, when do you think we could have the suppression hearing? I am here on the 28th.

MR. CALIEL: Your Honor, I am not. I'm unavailable the 27th and 28th. Counsel and I have discussed perhaps either maybe the week of August 1st or the week of August 15th, depending on the Court's availability.

THE COURT: I can do it the week of the 1st if we could do it Monday or Tuesday, I think. I'm not sure about the rest of the week.

MR. CALIEL: I'm wide open on either one of those dates, Your Honor.

MR. FLETCHER: Tuesday is my best date, Judge.

THE COURT: The 2nd?

MR. FLETCHER: Yes, ma'am.

MR. CALIEL: I don't think this is going to be an issue, but there are three witnesses the State is going to be presenting in regards to the motion to suppress and I will verify before next Thursday's hearing their availability for August 2nd. I believe that's not going to be an issue. But those are three necessary witnesses for the issues related to the admissibility of the jail recording.

THE COURT: Okay. Let me see if the courtroom's available.

(Court speaking on phone.)

THE COURT: That's fine. So we'll be here next Thursday for hearing on the motion you're going to file regarding the other three items that were requested and also on August 2nd for the

suppression hearing. And Mr. Caliel will inform us on the 21st if for some reason that won't work. Hopefully we can at least get part of it done then.

MR. CALIEL: I can't imagine that all three of the witnesses would be unavailable. I believe everybody will be available, but I just want to double-check because I had their schedule for next week cleared and I don't know if they -- especially because that's right before the end of the year summer break for school, whether they had any plans to be out of town.

THE COURT: Okay. Well, we can pick a different date on the 21st if the 2nd doesn't work.

MR. CALIEL: Yes, ma'am.

THE COURT: I already have Courtroom 405 on August 11th. You might just put that in your wheel, just in case there's a reason that the 2nd doesn't work and you can let me know on the 21st.

MR. CALIEL: Yes, ma'am.

THE COURT: Is there anything else we need to do today?

MR. FLETCHER: No, Your Honor.

MR. CALIEL: No, Your Honor, nothing from the

State.

THE COURT: Okay. We'll be in recess. Thank you.

MR. FLETCHER: Thank you, Judge.

(Thus the proceedings ended.)

C E R T I F I C A T E

I, Faye M. Gay, hereby certify that the foregoing transcript is a true and accurate transcription of my Stenograph notes taken at the time and date stated herein.

Dated this 12th day of June, 2018.

/S/ Faye M. Gay

_____

Faye M. Gay, CRR, RMR, FCR, RPR, CLVS

Filing # 74878803 E-Filed 07/13/2018 08:17:08 AM

IN THE CIRCUIT COURT OF
THE FOURTH JUDICIAL CIRCUIT, IN
AND FOR DUVAL COUNTY, FLORIDA

CASE NO.: 16-2013-CF-005781

DIVISION: CR-D

STATE OF FLORIDA

-vs-

DONALD JAMES SMITH,

Defendant.

STATE OF FLORIDA)

COUNTY OF DUVAL)

Proceedings before the Honorable Mallory Cooper, Judge of the Circuit Court, Division CR-D, as cause in this matter came to be heard on the 21st of July, 2016, at 9:25 a.m., Duval County Courthouse, 501 West Adams Street, Jacksonville, Florida 32202, before Angela Sass, Court Reporter and Notary Public in and for the State of Florida at Large.

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Appearing on behalf of the Defendant

P R O C E E D I N G S

07/21/2016 9:25 a.m.

(The defendant is not present.)

THE COURT: Good morning.

MR. FLETCHER: Good morning, Your Honor.

Charles Fletcher for Donald Smith.

THE COURT: Did you file anything?

MR. FLETCHER: I did, Judge. I filed it in Deviney's case. I looked at CORE this morning. It's on there.

THE COURT: Is that a copy that you have?

MR. FLETCHER: Yes, ma'am.

And I gave -- I provided Mr. Caliel a copy.

THE COURT: Give me just a minute to look at it.

MR. FLETCHER: Yes, Your Honor.

THE COURT: We originally were going to have a longer hearing today. That's been passed originally to August 2nd, but now to August 18th at 9:30 in this courtroom, because the witnesses were not available on the 2nd.

So we used today instead for a secondary motion on -- request to unseal some documents that are actually in Mr. Deviney's case; is that correct?

MR. FLETCHER: Yes, Your Honor.

THE COURT: Okay. Let me just read this real

quick.

(Pause.)

THE COURT: So what you're requesting is that those documents, which are a transcript of an in-camera hearing and three or four -- four letters total. You're requesting that they be allowed for inspection by Mr. Deviney's current and former attorney, Mr. Hernandez?

MR. FLETCHER: Yes, Your Honor.

THE COURT: And then he will advise if there's any objection. And if there's no objection to the attorneys for Mr. Smith and Mr. Smith having access to those, he'll let us know that.

MR. FLETCHER: Yes, Your Honor. I thought that was probably the best way to do that, to let Mr. Hernandez see them first.

THE COURT: Okay.

MR. CALIEL: Your Honor, the State's position in reference to this is that obviously we have some concern if the documents are tendered to Mr. Fletcher, Mr. Smith's attorney, the State would also have reciprocal discovery of those documents; and I'm not sure how Mr. Hernandez, who now represents Mr. Deviney, will view that. Because I don't think if the documents are released to one party in this particular case that

they can be withheld from the other party, because Mr. Deviney is not a defendant in this particular case.

The other issue that I have is the relevance of these materials given Mr. Hernandez's assertion on the record at the last hearing that Mr. Deviney is going to be exercising his Fifth Amendment right.

If Mr. Deviney were testifying, any prior statements of that particular witness may or may not be relevant for impeachment or, you know, prior consistent statements, things of that nature.

Because Mr. Hernandez exercised Mr. Deviney's Fifth Amendment rights, I'm not sure the relevance of hearsay documents or statements that were made by Mr. Deviney in the subject matter of these letters, how they would be relevant or admissible given the fact that Mr. Deviney has chosen to exercise his right to remain silent.

And, similarly, although I do not know what was contained in the obviously sealed transcripts where there was a colloquy between the Court and prior counsel for Mr. Deviney, I'm not sure how anything in that proceeding, again because of Mr. Deviney's exercising of his right to remain silent, would be relevant in these proceedings.

It is the State's contention that -- and I don't

think there is any evidence to refute it at this point in time -- that there have been repeated denials of Mr. Deviney's request to become a witness for the State and that Mr. Deviney never was being utilized by the State of Florida and any agreements to that had never been reached.

And, in fact, the evidence will establish in our upcoming hearing that Mr. Deviney, his lawyers, and pretty much almost everybody was unaware of the investigation that was taking place that resulted in the recordings from the jail. So I'm not sure how any of these matters will be relevant.

But if the Court releases it to one of the parties, I think, as a measure of reciprocal discovery, the State would be entitled to those documents and those transcripts as well.

MR. FLETCHER: Judge, I think that's probably correct. But I don't think it's for me to object to the State receiving those documents. I think that would be for Mr. Hernandez to do.

THE COURT: Well, one thing I'd like for both of you to address is, the in-camera hearing that you requested in a prior motion regarding Mr. Smith's case which I've -- I think have been provided to you now -- and I agreed that as his attorney you should have access

to anything in his file so you can properly represent him -- that wasn't an issue. His case is still pending. It has not gone to trial yet. And the State, with that understanding, had no objection to not receiving that particular item.

The Deviney case is a little bit different. It's over. It's in the appellate stage. I understand there is a lot of appellate proceedings to follow. But the case itself is over. He's been found guilty. He's been sentenced. And I'm not sure there's anything in the rules and law that allow me to continue to keep the documents in his case sealed. They were sealed for the purposes of making sure that Mr. Deviney received a fair trial.

I don't know what the appellate courts will do, of course, with this case. I have no idea. But there are always issues in any case that can be appealed. And I'm sure that they will be and that Mr. Hernandez is probably working on that. But I don't know that I have any authority at this point in Mr. Deviney's case to continue to keep those from being released completely.

And I think that Mr. Hernandez certainly would, as Mr. Deviney's attorney -- the same as you for Mr. Smith -- he should have access. He should have access to anything in Mr. Deviney's file that might be

helpful to Mr. Deviney in the appellate proceedings. I don't know whether it would be or not, but that's up to him to decide. So he should have the access, just like you have with Mr. Smith.

But whether or not I can continue, based on what I've reviewed with the laws and rules that are in effect regarding sealings, I don't know that I can continue to keep his documents sealed.

Do either of you have any --

MR. FLETCHER: The only thing that I can think, Judge, is that unsealing them to myself or to the State is one thing; but unsealing them to the press and the statements about the two cases getting out to the public, I think, are two separate issues. If you unseal them only to us, we are not going to release them to the press. That's the only thing I can think of, Judge. I think it's two separate things.

THE COURT: It's two separate things; I agree. But I don't know that I have any -- I suppose what you're saying without saying it is that the authority to keep the materials in Mr. Deviney's case sealed from public record requests and from the public would be if it would affect Mr. Smith's right to a fair trial?

MR. FLETCHER: At this point, yes.

MR. CALIEL: And, Your Honor, I believe the only

issue that I take with Mr. Fletcher's analysis is, absent a protective order from the Court, if the parties receive these documents as part of discovery, there is no exception to the public records law under 119 that these would not be subject. And so if they are released from being sealed in Mr. Deviney's case and both of the parties receive these as a part of discovery, that, absent a protective order from Your Honor, if a media outlet or anybody filed a 119 request regarding that information, we would be compelled to release that information because it's not subject to any exception under 119.

So I think, obviously, Mr. Hernandez should have access to this information for his work in Mr. Deviney's case, as should appellate counsel. There may be things in that that become -- that are attorney/client that we're not entitled to or that Mr. Fletcher would not be entitled to but may become relevant in a post-conviction matter after claims are made later on down the road, where attorney/client was waived for that purpose. But I do not believe that once -- if we do receive this information, that it can be withheld under a 119 request absent a protective order.

THE COURT: I think what we need to do is establish a timeline.

First of all, the materials that are requested by Mr. Smith that are in Mr. Deviney's file are clearly -- should be made available to Mr. Hernandez, and we will do that right away.

And then what I'm going to do, I'm going to give Mr. Hernandez until next Thursday, July 28th, to disclose to you, Mr. Fletcher, whether or not he and Mr. Deviney have any objection to you, as Mr. Smith's attorney, with having access to those documents.

If he has no objection to you, Mr. Fletcher, on behalf of Mr. Smith, having access to those documents on July 28th, then I'll give you till August 4th -- these are each a week -- to August 4th to notify the Court and the State either, one, you're seeking a protective order and what your reasons are for that, or, two, that you are not going to use the materials and therefore not going to disclose them to the State, or, three, you will disclose them to the State and you're not seeking a protective order, which means they would be fully disclosed.

And then if you -- I'm not available the 4th and 5th, but I'm going to give you the date of the 4th and then I'll get something back out to you at the beginning of the following week so that -- I still want to have the suppression hearing on August 18th. I don't want

that to change. That should give everybody enough time.

MR. CALIEL: And, Your Honor, to inform the Court, I do not anticipate, given my general knowledge of the information that's contained, that it is in any way, shape, or form going to affect the State's presentation of evidence during the course of the suppression hearing. Because our position is that Mr. Deviney and his lawyers were totally unaware of this.

Much of what is being sought predates the investigation that resulted in this recording by about six months, so I don't believe it's going to be relevant. We're all talking about a hearing in January of 2015. The recordings were -- I think it was 2015.

THE COURT: It was December of 2014.

MR. CALIEL: Yes.

And then some letters, as well, from January of 2015.

The recordings were not recorded until June, after Mr. Deviney had been appointed new counsel. So I do not anticipate in any way, shape, or form that it's going to affect the presentation of evidence in the case -- or the recording issue.

THE COURT: And I don't think Mr. Fletcher knows whether or not any of it will be something he would be using at that hearing or not. Which is why I'm trying

to give a deadline for each thing, so that he can -- if he does need to do anything -- still be prepared for the 18th.

Let me just look at the motion for a minute.

(Pause.)

THE COURT: So just to make sure I'm clear. I believe both sides agree that barring a protective order, if the items are provided to anybody other than Mr. Hernandez as Mr. Deviney's attorney or the appellate attorneys, then they are public record?

MR. CALIEL: Yes, Your Honor.

MR.FLETCHER: (Nodding head.)

THE COURT: If a motion is filed, a protective order, I probably -- I have court August 11th already, so if -- I think. So if anything needs to be argued, then it can be done that day.

MR. CALIEL: Yes, Your Honor. The State of Florida is available.

THE COURT: At that point that won't be delaying you looking at whether or not you can use the materials.

MR. FLETCHER: Right.

THE COURT: It will be -- assuming that Mr. Hernandez agrees you have access to them. If not, then that's a whole different thing.

If he gets them and says you can't have access to

them, then I guess we need to come back on the 28th. I'm in court on the 28th already anyway.

MR. CALIEL: The 28th of August?

THE COURT: July.

MR. CALIEL: Your Honor, I will not be in town on the 28th of July.

THE COURT: I'm just trying to use dates that I already have --

MR. CALIEL: Yes, ma'am. I understand.

You were going to be here on the 2nd.

Well, the 28th of July and the 2nd, I'm going to be out of town on both of those dates.

THE COURT: Say that again. I'm sorry.

MR. CALIEL: The 28th and the 2nd, I will be out of town on both of those dates. I'm out of town on the 27th and 28th. And then August 2nd is another date that -- I'll be in Tallahassee on that day.

THE COURT: Okay. What about the 29th?

MR. CALIEL: I will be available on the 29th, Your Honor. That's a Friday, I believe?

THE COURT: Uh-huh.

MR. CALIEL: Yes, Your Honor, I'm available on the 29th.

THE COURT: I'm not going to ask you to schedule anything there. If you'll let me know that we need to

have something, I'll --

MR. FLETCHER: I will let the Court know on the 28th.

THE COURT: Just make sure to keep the date open at 9:00 in case we need it.

MR. CALIEL: Yes, Your Honor. I'll be available if necessary on the 29th.

Thank you.

THE COURT: All right. And, as I said earlier, the August 2nd suppression hearing date has been moved to August 18th for the witnesses to be available to appear.

We've all agreed on that date. That's in here at 9:30.

Okay. I think that's it.

We'll get the materials disclosed to Mr. Hernandez hopefully today so he can begin his review.

And he may be able to let you know something a lot sooner than next week.

MR. FLETCHER: I'll let him know.

Thank you, Judge.

THE COURT: Thank you.

MR. CALIEL: Thank you, Your Honor.

(The proceedings concluded at 9:43 a.m.)

- - -

C E R T I F I C A T E

STATE OF FLORIDA)

COUNTY OF DUVAL)

I, Angela Sass, Court Reporter, certify that I was authorized to and did stenographically report the foregoing proceedings and that the transcript is a true and complete record of my stenographic notes.

DATED this 13th day of July, 2018.

/s/ Angela Sass
ANGELA SASS, COURT REPORTER

Filing # 73473963 E-Filed 06/13/2018 08:43:38 AM

IN THE CIRCUIT COURT OF THE FOURTH JUDICIAL CIRCUIT, IN AND FOR DUVAL COUNTY, FLORIDA.

Case No: 2013-CF-5781-AXXX-MA

Division CR-D

STATE OF FLORIDA

-vs-

DONALD SMITH,

Defendant,

TESTIMONY AND PROCEEDINGS taken before the Honorable Mallory D. Cooper, Judge of the Circuit Court, on August 18, 2016, and as reported by Faye M. Gay, Certified Realtime Reporter, Registered Merit Reporter, and Certified Legal Video Specialist.

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APPEARANCES:

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Appearing on behalf of the State of Florida

CHARLES FLETCHER and JULIE SCHLAX, Esquires,
Appearing on behalf of the Defendant.

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THE COURT: Are you ready?

MR. FLETCHER: Yes, Your Honor. I think we need to bring Mr. Smith out.

THE COURT: Next case on the calendar is Donald Smith, 2013-CF-005781.

MR. CALIEL: Your Honor, while they're bringing Mr. Smith out, I believe Ms. Schlax wanted to address some procedural issues and there's one issue to bring up to the Court.

THE COURT: Okay.

(Defendant present.)

(Counsel for the State and defense approached the bench for a side-bar conference out of the hearing of the court reporter.)

MS. SCHLAX: Good morning, Your Honor.

Julie Schlax appearing on behalf of Mr. Smith along with Mr. Charles Fletcher.

Your Honor, I would orally move for an order compelling the Department of Children and Families to provide unredacted confidential records of my client previously held by them. I have provided the Court with an order.

MR. CALIEL: And the State has no objection, Your Honor.

THE COURT: Okay. Madam Clerk.

We're here on the defense motion to suppress statements.

MR. FLETCHER: That's correct, Your Honor.

THE COURT: I believe it was filed April 8th of this year and we're ready to proceed on the motion.

So you may call your first witness.

MR. FLETCHER: Thank you, Your Honor.

Your Honor, my first witness is James Hernandez.

THE COURT: Mr. Hernandez.

MR. CALIEL: And I apologize, Your Honor, but I think typically under the Fourth Amendment standard, I think the State has to establish the manner in which the items were taken first and then if you want to put that on. I mean --

MR. FLETCHER: That's fine.

MR. CALIEL: -- we can take them in reverse order, it doesn't make any difference to me, but I expected our burden was first.

THE COURT: That's fine.

MR. CALIEL: Your Honor, based upon that, the State would call Detective Robert Hinson to the witness stand.

THE COURT: Detective Hinson.

(Witness present.)

THE COURT: Good morning, Detective. Madam Clerk will swear you in.

(Witness sworn.)

THE WITNESS: I do.

THE COURT: Thank you. If you'll have a seat here.

MR. CALIEL: May I proceed, Your Honor?

THE COURT: You may.

ROBERT HINSON,

was called as a witness on behalf of the State, and after being duly sworn, then testified as follows:

DIRECT EXAMINATION

BY MR. CALIEL:

Q Sir, can you please state your name for the record?

A Robert A. Hinson.

Q What's your occupation, sir?

A I'm an investigator at the State Attorney's Office.

Q And how long have you been employed with the State Attorney's Office?

A December of 2012.

Q Prior to that did you have any previous law enforcement experience?

A Almost 27 years with the Jacksonville Sheriff's Office.

Q And what was your assignment within the State Attorney's Office back in April of 2015?

A I was the investigator for CR-I, Division CR-I, and I was your investigator, Mr. Caliel.

Q Directing your attention specifically to April 8th of 2015, did you receive any information pursuant to a confidential informant who was an inmate in the Duval County Jail?

A Yes, sir, I did.

Q And what was the substance of that information?

A I received information from you and Mr. De la Rionda that there was an individual who wished to give information from out at the jail and it was in and around April 8th, it was received through a letter, and I arranged to have that inmate transported over to the State Attorney's Office to be interviewed.

Q And during the course of the interview did that inmate provide any information in regards to Donald Smith and another inmate by the name of Randall Deviney?

A Yes, sir, he did.

Q And what was that information?

A That they were communicating while in an isolation cell through the vents and they were communicating in regards to being disruptive to the courtroom process in regards to trying to change attorneys and things of that nature, that they were communicating through these vents in between the two isolation cells.

Q Based upon the information that was provided by this confidential informant, did you start exploring investigative methods that could confirm whether or not this communication between Randall Deviney and Donald Smith was occurring?

A Yes, sir, I did.

Q What did you do?

A I spoke with Officer Carter who is in the jail intell area. I asked him about the layout or the set-up of the isolation cells and where the vents were. He photographed a pair of isolation cells on a different floor.

I then went and spoke with [redacted] in the technical support unit of the Sheriff's Office [redacted]

Q And let me go back just for a moment. After receiving this information on April 8th from this confidential informant who was an inmate, was that inmate any further utilized during the course of this investigation?

A No, sir, he was not.

Q And was that inmate even made aware of any further investigation that would have been going on in reference to the information he provided?

A No, sir, he was not.

Q Once you had had conversations with both Officer Carter from the jail intelligence unit and then [redacted] the technical support unit, was [redacted] if it was occurring within the Duval County Jail?

A Officer Carter had taken some pictures of the layout of the jail and I provided those pictures to [redacted] had to do some research [redacted] And so he had to do some research on that and that took him a period of time and when he was finally able to do that

we gave him the okay to go ahead [redacted]

[redacted]

Q And at what point in time [redacted]

[redacted] and I want to say it was on June 23rd i[redacted]

[redacted]

Q Okay. [redacted]

[redacted]

A [redacted]

Q Okay. And at the conclusion [redacted]

[redacted]

[redacted] Officer Carter?

A Yes.

Q Okay. And was that the subject matter of the recordings that were provided to the Court previously?

A Yes.

Q During the period of time [redacted]

[redacted] who was aware that this operation was even taking place?

A Myself, Officer Carter, [redacted] you, and Mr. De la Rionda.

Q Outside of that group of individuals, were even the corrections officers on the floor where this -- where this defendant was held even notified that this was taking place?

A Not to my knowledge, no, sir.

Q Thank you, sir.

MR. CALIEL: I don't have any further questions.

THE COURT: Any cross?

CROSS-EXAMINATION

BY MR. FLETCHER:

Q Officer Hinson, these two cells, the way the jail is constructed, there's two cells on one side and there's two cells on a different side, right?

A I believe so. Are you talking about the isolation cells?

Q Yes, sir.

A I believe so. I think there's two. There might be three. I'm not sure, but I think there's only two.

Q There's two and they're side-by-side?

A Yes, sir.

Q And on the other side of the jail, 40 or 50 feet away there's two more. Do you recall that just from being over there?

A Yes, sir. Well, I never went in -- from -- I never went into the jail on this. I didn't go in. That was left up to Officer Carter [redacted]

Q Okay.

A But from prior history that's the way I remember the layout.

Q And the two isolation cells, they only hold one inmate in each isolation cell, is that right?

A That's correct.

Q And what sits out in front of them is the officers' pods where they control the whole jail, right?

A It's not directly in front. I believe there's a pod area or control room area and then there's a walkway and then there's I think a set of elevators on the other side and then, as I recall, it's on the other side is the other isolation cells.

Q Okay. But right out in front of those cells, they don't keep inmates right out in front of those cells, right? They don't house them?

A Not house them, no, sir. They pass back and forth but --

Q Okay. And the CI that you talked to, if these two guys, Deviney and Smith, the two defendants

that were communicating through this vent, how did the CI know that? Did he -- he wasn't in either cell, right?

A That's correct. Yes, sir.

Q So how did he provide that information to you? You must have --

A On the inside -- the area that you've just described, that's where the elevators and the pod area is, on the other side where the access door is if -- I believe Mr. Caliel will show you some pictures. There's kind of a -- a flap that comes out and it is not very big at all, but it actually -- you can communicate through, and I'm sure you've listened to the tapes, you've heard people talking, and what I've been told by the CI, as well as Officer Carter, and he can answer this better, is they'll come up and they'll lay down right there and they will talk in through that and that's the way I understood that this informant was able to communicate.

Q Okay. So he asked them, hey, are you guys communicating through this -- this place up here? Is that how it's --

A I don't recall him saying those words. He just knew that that was a common way. Now, how he knew for sure --

Q Okay.

A -- you know, I don't know, but there was a conversation in that manner between --

Q Okay. [redacted]?

A That would be a question better posed to [redacted] I know he had to research [redacted] -- I mean if it was -- the way I understood it [redacted] which he could testify to, [redacted]

Q Okay.

A So I mean it was fairly sensitive and we wanted it that way [redacted].

Q All right. Fairly sensitive. And you yourself just said even though [redacted] you could hear people on the outside doors of the jail, right?

A You could hear various sounds from a variety of different places. Exactly where they were at, I knew they weren't in between -- in that cell, but you could hear other noises and other conversations.

Q Right. And you're aware, sir, that those

rooms, those isolation cells, are really about 20 feet or so from where attorneys meet with their clients, right, or do you know?

A No, sir, I don't know that. I thought they met in other places. I didn't think that the attorneys were allowed to meet there with -- no, sir, I don't know that for sure.

Q Okay. Which officer of the next two is more familiar with the layout of the jail?

A I would imagine Officer Carter would be. He's the intelligence officer for the jail.

Q Okay. And the people that you said that -- you said there was a very limited number of people that knew about this, right?

A That's correct, yes, sir.

Q Did anybody in that group ever seek any sort of judicial oversight of this recording?

A Can you define what you mean by judicial oversight? I mean did they ask if it was okay?

Q Yes.

A I did.

Q You asked a judge?

A No, I made sure I spoke with my supervisors and I was under -- I was always led to believe that there was no expectation of privacy between two

individuals talking between their isolation cells.

Q Okay. And when you say your supervisors, who are we talking about?

A Mr. Caliel.

Q Okay.

MR. FLETCHER: That's all I have. Thank you.

THE COURT: Anything further?

MR. CALIEL: No follow-up, Your Honor.

THE COURT: May Detective Hinson be excused?

MR. CALIEL: He may be.

THE COURT: Thank you, sir. We appreciate your time.

THE WITNESS: Yes, ma'am.

MR. CALIEL: Your Honor, the State would call Officer Charles Carter to the witness stand.

THE COURT: Officer Charles Carter.

(Witness present.)

(Witness sworn.)

THE WITNESS: I do.

THE COURT: Thank you. If you'll have a seat over here, please.

CHARLES CARTER,

was called as a witness on behalf of the State, and after being duly sworn, then testified as follows:

DIRECT EXAMINATION

BY MR. CALIEL:

Q Good morning, sir.

A Good morning.

Q Can you please state your name for the record?

A Yes, sir. Officer Charles Carter.

Q Who do you work for, sir?

A I work for JSO, Department of Corrections.

Q And what's your current assignment, sir?

A I'm currently assigned to the intelligence unit.

Q And is that within the Duval County Jail?

A Yes, sir.

Q Sir, I'd like to direct your attention to the April inmate time frame of 2015. At some point in time were you contacted by Investigator Robbie Hinson from the State Attorney's Office?

A Yes, sir.

Q Okay. And in regards to that contact, were you asked about the layout and the locations of the isolation cells [redacted] that may be associated with those isolation cells?

A Yes, sir.

Q Okay. And specifically if you could please describe for the Court, the best that you can, how the

two isolation cells are located on the isolation floors and what [redacted] in between those cells?

A Yes, sir. The two cells are connected to each other. They have doors in the front. Only the inmates are in there by themselves. [redacted] and things like that. And there are vents at the bottom and at the top of the cell for air flow in and out of the cell.

Q And the purpose of isolation cells is to keep these particular inmates separated from other inmates and other individuals?

A Yes, sir.

Q Okay. And it is inappropriate, I guess, for lack of a better word, for the inmates to make attempts to communicate or exchange information back and forth, correct?

A Yes, sir.

Q And despite those efforts, are there still methods that the inmates, based upon your experience working in the jail, utilize to communicate back and forth within the isolation cells themselves within the jail?

A Yes, sir.

Q Just describe briefly how that occurs.

A In the back of the pipe chase where the vents are, they can talk through the vents. The vents at the top, they're located over the sink and toilet. They can speak through those and the vent that's at the bottom, they can also speak through that as well.

Q And based upon your conversations with Investigator Hinson, did you make arrangements to photograph not only the isolation cell where the defendant Donald Smith was located, but a similar footprint, identical footprint, so that Investigator Hinson and other detectives could use those photographs [redacted] that's taking place?

A Yes, sir.

MR. CALIEL: Your Honor, may I approach the witness?

THE COURT: You may.

MR. CALIEL: Your Honor, for the record, State's Exhibits 1 through 6 have been previously agreed to by the parties and marked and moved into evidence and I'll review them with the witness and then submit them directly to the Court.

BY MR. CALIEL:

Q Sir, I'm now showing you what's been previously marked and moved into evidence as State's Exhibit 1. Could you describe what's depicted in that photograph?

A That is the door inside the dorm that leads to the chase, the pipe chase.

Q And so this blue door which is depicted in State's Exhibit 1 is actually the entryway to get into the pipe chase which is in between the two isolation cells?

A Yes, sir.

Q Okay. Now, all these photographs, State's 1 through 6, these were not actually photographs of the floor where Mr. Smith was being housed, correct?

A No, sir.

Q Why was that?

A They're all identical. All the way up the building, they're all laid out exactly the same way.

Q Okay. Were measures taken when you collected this information to provide to Investigator Hinson to prevent any of the inmates or even personnel within the jail to know what you all were doing?

A Yes, sir. We went to a different area to take those pictures for that reason.

MR. CALIEL: Your Honor, I now submit to the

Court State's Exhibit 1.

BY MR. CALIEL:

Q Now, showing you what has been previously marked and moved into evidence as State's Exhibit 2. Could you please briefly describe what's depicted in that photograph?

A Yes, sir, that's the inside of that pipe chase in between the cells.

Q And so this is mainly a utility area that's located between the two isolation cells where electrical and other utilities are running through the course of the jail?

A Yes, sir.

Q Okay. And so this is not an area where it's open to inmates or even corrections officers. This is a maintenance access?

A Yes, sir.

MR. CALIEL: And, Your Honor, now submitting what's been previously entered with as State's 2 to the Court.

BY MR. CALIEL:

Q Now showing you what's been marked and previously moved into evidence as State's Exhibit 3. Can you please describe what's depicted in that photograph?

A Yes, sir. Those are the vents at the top of each cell that are located above the sink and toilet area.

Q Okay. And there's one vent located to the left and one vent located to the right. Do those lead to two separate isolation cells within the isolation units?

A Yes, sir.

Q And, again, despite the fact this is not the actual wing that was utilized to house Mr. Smith, these are identical footprints and identical to the floor where he was being housed?

A Yes, sir.

MR. CALIEL: Submitting to the Court now, Your Honor, what's been marked as State's Exhibit 3.

BY MR. CALIEL:

Q Now showing you what's been previously marked and moved into evidence as State's Exhibit 4. Is that a photograph depicting one of the vents?

A Yes, sir.

Q Okay. And can you see through the holes in the vent the actual lighting within the isolation cell?

A Yes, sir.

Q Correct?

MR. CALIEL: And, again, Your Honor, submitting State's Exhibit 4 to the Court.

BY MR. CALIEL:

Q Officer Carter, I'm now showing you what's been previously marked and moved into evidence as State's Exhibit 5. Could you please briefly describe what's depicted in that photograph?

A Yes, sir. That's the inside of the cell and all the vents and things that are located inside of it and where they are.

Q Okay. And is this layout identical for all the isolation cells within the Duval County Jail?

A Yes, sir.

Q And above the sink and commode area, is that the vent at the top right corner which we just looked at from the other angle coming from inside the maintenance chase?

A Yes, sir.

MR. CALIEL: Now submitting State's Exhibit 5 to the Court.

BY MR. CALIEL:

Q And, again now showing you what's been previously marked and moved into evidence as State's Exhibit No. 6. Briefly describe what's in that photograph.

A Yes, sir. That's the wall where the vent is located above the sink as well.

Q Okay. And these are the vents, again, directly above what is, I guess, the stainless steel mirror and sink that goes to the pipe chase or access which is adjacent and then leads to the next cell through the other vent that was previously depicted in the photograph?

A Yes, sir.

Q Okay.

MR. CALIEL: Now submitting to the Court State's Exhibit No. 6.

BY MR. CALIEL:

Q Once these photographs were taken, did you also assist [redacted] from the technical support unit implementing a plan to actually place recording equipment in the isolation area where the defendant Donald Smith was housed?

A Yes, sir.

Q And how did you all formulate a plan to accomplish that?

A [redacted], he gathered the equipment for what was going to be used and I was to escort him to the cell where we would place it.

Q And without divulging the methodology that

you utilized to place this in there, was it done in a covert fashion?

A Yes, sir.

Q And what was the purpose of that?

A To gather the intell that the State -- State was asking us to see if we could record a conversation between them.

Q Okay. Were even the corrections officers who worked in that area aware that this recording equipment was being placed in there and activated?

A No, sir.

Q Okay. Who was aware that this operation was even taking place?

A Just the State Attorney's Office and our units that were involved.

Q Okay. Were you actually there and present when the equipment was placed into the -- into the cell?

A Yes, sir.

Q Okay. Based upon your work within the Duval County Jail, are you familiar with an inmate by the name of Donald Smith?

A Yes, sir.

Q Okay. Do you see that individual seated here in the courtroom today?

A Yes, sir, I do.

Q Could you please point him out and describe where he's seated and what he's wearing?

A Yes, sir, he's to the right there wearing an orange jumpsuit in the middle.

MR. CALIEL: Your Honor, may the record reflect that the witness has identified the defendant?

THE COURT: The record will so reflect.

BY MR. CALIEL:

Q Through your work with Officer Carter, [redacted] the defendant in this case, Donald Smith, was being housed?

A Yes, sir.

Q Okay. And after [redacted] was Mr. Deviney at some point in time shortly thereafter also located in one of the adjacent isolation cells that's adjoined by this pipe chase?

A Yes, sir.

Q And at that point in time were either Mr. Smith, Mr. Deviney, or anybody on that isolation cell aware that any of this operation was taking place?

A No, sir.

Q After [redacted] did you also assist [redacted]?

A Yes, sir.

Q Okay. And once that was done, did that conclude your involvement to that point in time in this particular case?

A Yes, sir.

Q Thank you, sir.

MR. CALIEL: I don't have any further questions at this time.

THE COURT: Any cross-examination?

MR. FLETCHER: Just a couple of questions, Your Honor.

CROSS-EXAMINATION

BY MR. FLETCHER:

Q Officer Carter, you're very familiar with the inside of the jail, is that right?

A Yes, sir.

Q Let me see if I can just map this out for the Court. If over here we've got isolation cell 1 and 2 and back here is where the officers sit in the pod, control pod, you have a door here, right?

A Yes, sir. Yes, sir.

Q And inmates go from the basketball courts,

they go right through here and then back to wherever the dorms are, right?

A Yes, sir.

Q All right. There's a door there and then there's another door here on the other side of this hallway, right?

A Yes, sir.

Q And right here is the first interview room where attorneys speak with their clients, right?

A Yes, sir.

Q And are you familiar with the vents that are right above inside of those attorney rooms?

A Yes, sir.

Q And do you know whether or not they go that way?

A I do not.

Q No idea?

A No, sir, I do not.

Q [redacted]

A No, sir, I did not.

MR. FLETCHER: That's all I have. Thank you.

THE COURT: Anything further, Mr. Caliel?

Okay.

REDIRECT EXAMINATION

BY MR. CALIEL:

Q Officer Carter, the area where attorneys meet with their clients, that is some distance away from [redacted] correct?

A Yes, sir, it's -- there's a hallway between and then they're down at the other end -- they're down that side hallway as well.

Q And then [redacted] in particular in no way has any vents that are accessed or go to that particular area?

A I'm not a hundred percent sure. I don't think so.

MR. CALIEL: No further questions.

MR. FLETCHER: Couple more.

RECROSS-EXAMINATION

BY MR. FLETCHER:

Q Sir, I just want to be clear about how far away we're talking. Okay?

A Yes, sir.

Q And if I'm misleading anybody tell me. I'm over there all the time.

Got two rooms, right?

A Yes, sir.

Q And then there's a door and here's the officers' pod, right?

A Yes, sir.

Q And inmates walk through this door and they make a right and they go towards their dorms, right, or if you're on the other side of the jail it's that way, right?

A Yes, sir.

Q And there's a wall here, right?

A Yes, sir.

Q The other side of that hallway?

A Yes, sir.

Q And the distance from that wall to about here is about the same distance that we're talking about, right?

A Yes, sir, to the inmate area, yes, sir.

Q Okay. And right on the other side, right up on this side there's a door and one step in there's a window and that's the first place. There's several rooms where attorneys meet with their clients, right?

A Yes, sir. Some -- I don't know exactly the layout of the floor, but some of those first rooms are set up for like a TTY machine, but, yes, sir, there are rooms for that, yes, sir.

Q Okay. And the total distance between the isolation pods -- cells and where the first room is and where the second room is is about from me to that wall?

A Yes, sir.

Q About 20, 25 feet?

A Yes, sir.

Q Officer Carter, corrections officers are commonly in that open area up there, correct?

A Yes, sir.

Q Okay. Inmates walk to and from rack or to medical or wherever it might be by going through that area as well?

A Yes, sir.

Q So if somebody is in the interview room and talking loud enough to be heard in the pipe chase, they're also talking loud enough that they would be heard by any inmates or corrections officers who are directly adjacent to that area?

A Yes, sir, if they were loud enough they could be heard, yes, sir.

Q Thank you.

MR. FLETCHER: I don't have any further questions.

THE COURT: Anything further?

MR. FLETCHER: No, Your Honor.

THE COURT: May Officer Carter be excused?

MR. CALIEL: He may be, Your Honor, at this time.

THE COURT: Thank you, sir. We appreciate your time this morning.

MR. CALIEL: The State would call as the next witness [redacted] but at this point in time based upon his current position within the Sheriff's Office we would make the request with the Court that while media can be present but no photography or video be taken of him based upon the role that he plays within the Sheriff's Office.

MR. FLETCHER: I have no objection to that, Judge.

THE COURT: All right. I'll instruct the media the next witness, based on his current job duties, is not to be photographed or filmed. You certainly can remain in the room and you can listen to his testimony, but I would ask you not to film in the courtroom.

[redacted]

(Witness present.)

THE COURT: Good morning, Detective.

THE WITNESS: Good morning.

THE COURT: Madam Clerk will swear you in.

(Witness sworn.)

THE WITNESS: I do.

THE COURT: Thank you. If you'll have a seat over here, please.

[redacted] was called as a witness on behalf of the State, and after being duly sworn, then testified as follows:

DIRECT EXAMINATION

BY MR. CALIEL:

Q Good morning, sir.

A Good morning.

Q Can you please state your name for the record?

A It's [redacted]

Q What's your occupation, sir?

A I'm a detective with the Jacksonville Sheriff's Office.

Q And what's your current assignment?

A I work for the technical support unit.

Q Okay. Now, how long have you held that position?

A Three and a half years.

Q How long have you been working with the Jacksonville Sheriff's Office?

A 21 and a half years.

Q Okay. And if you could briefly describe your duties and role in the technical support unit with the

Jacksonville Sheriff's Office.

A I assist the Sheriff's Office personnel with equipment, [redacted] that kind of stuff.

Q Okay. [redacted] equipment, video equipment, things of that nature?

A That is correct.

Q I'd like to direct your attention to April of 2015. Were you contacted by Investigator Robbie Hinson from the Jacksonville -- or from the State Attorney's Office?

A I was.

Q And when he came into contact with you, did he inquire of you of [redacted] the case of the State of Florida versus Donald Smith?

A That's correct.

Q Okay. Based upon conversations with Detective Hinson, [redacted] did you research [redacted]?

A He and I met in my office and he showed me some photographs [redacted] I looked at it and after researching I made a -- a choice of [redacted]

Q Okay. [redacted]

A That is correct.

Q Okay. And so what would have to happen with [redacted] what, if anything, had been said?

A That is correct.

Q Did you also meet with an Officer Carter from the jail intelligence unit and discuss [redacted] in question without alerting any of the inmates or even jail personnel who may be working in that location in the Duval County Jail?

A That's correct. We met and he -- he gave me a quick synopsis of what -- [redacted] -- I do undercover stuff and [redacted]

Q Okay. And so based upon the methodology that was utilized, you [redacted] Donald Smith was located?

A That's correct.

Q And you were able to do so without detection, as far as you knew?

A As far as we knew, yes.

Q And at the time [redacted] did anyone outside of Officer Carter, Detective Hinson or the State Attorney's Office have any idea that this was taking place?

A Not that I know of.

Q If you could explain to the Court how and where --

MR. CALIEL: And, Your Honor, if I may have the photographs, it may be easier for him to explain to you.

BY MR. CALIEL:

Q Now, showing you what has been previously marked and moved into evidence as State's Exhibit 3. Do you recognize the layout, understanding this is not the same area [redacted] but the layout of [redacted] that was utilized in this particular case.

A This is the -- it's a similar -- I think this is a lower level. We were higher. [redacted]

from the bottom of the jail cell all the way to the roof or to the sixth floor, from my understanding, so it was very similar to what [redacted].

Q Now showing you what's been marked as State's Exhibit 1, which is the photograph of the blue door and then also State's Exhibit 2 which is the blue door then opened exposing the pipe chase, [redacted] on the floor where Mr. Smith was being housed?

A Yes, sir, it is.

Q Okay. [redacted] if you could, using State's Exhibit 3 to demonstrate to the Court and explain how was it that [redacted] conversations that may have been illicitly taking place between Mr. Smith and anybody in the adjacent cell?

A [redacted]

Q [redacted]

A That's correct.

Q Detective, [redacted] on June 23rd of 2015. Was it after [redacted]?

A That's correct.

Q Okay. And did you download [redacted] and provide those to Investigator Hinson from the State Attorney's Office?

A I did.

Q And, again, at any point in time, to what you are aware of, were you ever detected or noticed by any of the inmates [redacted]?

A I have no knowledge of being detected.

Q Thank you, sir.

MR. CALIEL: I don't have any further questions at this time.

THE COURT: Thank you. Any

cross-examination?

MR. FLETCHER: Just a couple of questions, Your Honor.

CROSS-EXAMINATION

BY MR. FLETCHER:

Q [redacted], you're familiar with the insides of those two isolation cells, right?

A Not technically, no.

Q I mean you were there[redacted]

[redacted]?

A [redacted]

Q [redacted]how far from the actual -- how many feet from the toilet, for instance? Is it right below it?

A I wasn't on the inside of the jail, sir. [redacted]

[redacted]

THE COURT: Here you go.

MR. FLETCHER: Your Honor, can I see the exhibits?

BY MR. FLETCHER:

Q I show you what's been filed as State's Exhibit 6. Where is the vent in that picture?

A Above the -- that sink.

Q That sink. Okay. And I'm going to show you

State's Exhibit 5. Do you see the sink in that picture?

A Yes.

Q And do you see the -- basically the lid area to the toilet right next to the sink?

A Yes.

Q So it's just a few feet from the toilet area in the cell, is that right?

A That's correct.

Q So if somebody is using the bathroom [redacted]?

A I suppose.

Q Okay. Thank you, sir.

MR. FLETCHER: That's all I have, Your Honor.

MR. CALIEL: Nothing further from this witness, Your Honor.

THE COURT: May he be excused?

MR. CALIEL: He may.

THE COURT: Thank you for your time. We appreciate it.

Mr. Caliel, anymore witnesses?

MR. CALIEL: I apologize, Your Honor. That's the extent of the evidence the State intends to introduce.

THE COURT: Thank you.

Mr. Fletcher.

MR. FLETCHER: Your Honor, I have one witness, Mr. James Hernandez.

THE COURT: Mr. Hernandez. Good morning. She'll swear you in.

(Witness sworn.)

THE WITNESS: I do.

THE COURT: Thank you, if you'll have a seat.

(State and defense counsel conferring.)

JAMES HERNANDEZ,

was called as a witness on behalf of the Defense, and after being duly sworn, then testified as follows:

DIRECT EXAMINATION

BY MR. FLETCHER:

Q Good morning, Mr. Hernandez.

A Good morning.

Q Sir, could you state your full name for the record, please?

A James Antonio Hernandez.

Q Mr. Hernandez, where do you live? Not your address, but what city.

A St. Johns.

Q St. Johns County?

A Yes.

Q And do you work here in Jacksonville?

A I do.
Q And what is your occupation?
A I am a private attorney in a solo practice.
Q Do you handle criminal cases?
A I do. I handle criminal --
Q And how long have you been doing that?
A I've handled criminal cases in military courts, federal court and state court. Military courts I've been doing for 30 years. State courts I've been doing -- doing that for about 25 years, and federal courts for about 22.
Q Okay. And do you handle death penalty cases?
A I do.
Q And in the year of -- in 2015 did you represent Randall Deviney?
A I believe I was appointed in February of 2015.
Q And you were appointed to represent him because there was a conflict with the PD's, Public Defender's Office.
A I believe that's what led to the appointment, yes.
Q Okay. And are you somewhat aware of the circumstances of that conflict?
A Yes.
Q Would it be safe to say that the conflict

arose because Mr. Deviney wanted to provide information to the State Attorney's Office about Mr. Donald Smith?

A Yes.

Q Okay. And are you aware that that -- that offer to make -- that offer to provide information resulted in a conflict with the Public Defender's Office?

A I think it resulted in a conflict for both -- both of the defendants.

Q Okay. So both Donald Smith and Randall Deviney had after that got appointed lawyers, right?

A I believe the Court appointed myself and Ms. Bynum for Mr. Deviney and you and Ms. Schlax for Mr. Smith.

Q Okay. Just let me back up a little bit. In your practice here in Jacksonville is it standard practice if an inmate, a client of yours, provides information to you about another inmate's case, is it standard practice for you to contact the prosecutor and see if they are interested in using any information that inmate might have?

A That's -- that's the usual practice, yes.

Q Okay.

A In state and federal court.

Q Okay. And you're aware that that had

happened with Mr. Deviney and his lawyers before you were appointed to represent Mr. Deviney?

A I -- yes.

Q Okay. And if a person does provide information against another inmate, and perhaps testifies in that inmate's case, does he get rewarded for providing that information?

A In federal court there's usually a motion for substantial assistance that is filed and then the -- the defendant in federal court will be given certain levels off for providing substantial assistance. Be at the discretion of the United States Attorney's Office. In state court it's not quite as streamlined.

Q You mean as far as the process goes?

A The process.

Q Okay. But, for instance, if you're handling a homicide case and somebody from the -- an inmate from the jail is going to testify against your client, typically that -- that person's case, that person's sentencing hearing, gets postponed for months?

A Oh, absolutely. They're not sentenced until after the case that they're testifying on, usually, or at least every one I've experienced, till after your case has gone through trial and they've testified.

Q Okay. And then his cooperation is made known

to whoever is sentencing him, whichever judge is sentencing him, right?

A It's usually made known by the State Attorney's Office and that's usually ripe for cross-examination of that person when they testify at trial.

Q Okay. But the hope is when that person goes to be sentenced that he's going to get some benefit for having cooperated with the State, right?

A Correct.

Q Just like in federal court, it's just the process is a little different, right?

A The process seems to be a little bit more streamlined in federal court.

Q All right. In your representation of Mr. Deviney, did he want to cooperate against Mr. Smith?

A Yes.

Q And without going into what he told you, did you relay that information to the prosecutor in Mr. Deviney's case?

A Yes.

Q And who was the prosecutor in Mr. Deviney's case?

A Mr. De la Rionda.

Q Okay. Now, we heard earlier Detective Hinson testify that there was a confidential informant that informed the State Attorney's Office that there was communication going on between Mr. Deviney and Mr. Smith. You heard that earlier, right?

A Yes.

Q And I believe the date was on April 8th. Do you recall that?

A Yes, I heard that in the courtroom. Since I'm representing Mr. Deviney, I stayed in the courtroom to hear the witnesses, yes.

Q Okay. Did you send an e-mail to Bernie De la Rionda about your client's wish to cooperate against Mr. Smith?

A Yes.

Q And do you remember when you sent that e-mail?

A I believe it was June 15th, 2015.

Q June 15th, 2015. And do you recall -- you've received a copy of the recording that was made in this case, right?

A I did.

Q And you know that recording was made on June 23rd through June 26th of 2015?

A Yes.

Q Between eight and ten days after you sent the e-mail to Bernie De la Rionda, right?

A That's what the math equates out to.

Q Okay. After you sent that e-mail, did you meet with Bernie De la Rionda about your client's desire to cooperate against Mr. Smith?

A I'm going to answer your question exactly how you --

Q Okay.

A -- you stated it. I met with Mr. De la Rionda after I sent that e-mail, yes. It wasn't the first time I met with him, but, yes.

Q Okay. Do you remember how many times you met with Mr. De la Rionda about your client wanting to cooperate in Donald Smith?

A I know it was previous times, but it was -- Mr. De la Rionda's stance on it was that there would be no cooperation.

Q Okay.

A I went again early June to try to persuade Mr. De la Rionda to let my client cooperate. I believe it was out of professional courtesy since we've been practicing against each other for about 20 -- 26 years now that he allowed me to give him information or -- and but he made it quite clear that there would be no

cooperation.

Q Okay. So he made it clear that he was not going to award your client for anything your client did? Mr. Deviney.

A He made it clear that he didn't want -- basically there would be no cooperation. He made that clear from day one throughout the months that I represented Mr. Deviney. I believe the only reason why -- well, again, that's my speculation.

Q Okay.

A Just professional courtesy.

Q But, Mr. Hernandez, you sending -- you meeting with Bernie De la Rionda and talking to him about it, your client knew that you were trying, right?

A Yes.

Q In fact, you were trying eight days before they started making this recording, right?

A I sent the e-mail, yes.

Q Okay. So just trying gives Bernie De la Rionda information that these two are talking, that Mr. Deviney and Mr. Smith are talking, right?

A Pardon me.

Q In your efforts to get Mr. De la Rionda to allow your client to cooperate, you're telling him that these two defendants, Deviney and Smith, are talking

over at the jail, right?

A That would make sense, yes. I mean yeah.

Q Was that a yes?

A Yes.

Q Okay. So in a way you're providing information on behalf of your client.

A I'm trying to do a proffer to convince Mr. De la Rionda to utilize information where he would remove the intent to seek death against Mr. Deviney and have my client not be subject to the death penalty.

Q Okay. So at least as far as documented, we know you sent an e-mail to Bernie De la Rionda on the 15th and we know just a few days later, eight days later, they started recording there, right?

A That's what I heard.

Q Okay.

A Yes.

Q And you were here when I described the layout of the jail, right?

A Correct.

Q Was my description of where the two rooms are, the isolation rooms are and where the attorney meeting rooms are, was that an accurate description?

A It's an approximate. I've never taken a tape measure from the isolation cells to the conference

rooms where we meet. We meet in that first conference room, even though there's a Teleprompter in there. We just make sure the Teleprompter is off when we meet with our clients.

Q And you're aware in all those rooms there's a big ceiling vent, right?

A That's the only thing that provides air.

Q And you don't know where it goes, right?

A No idea.

Q When you found out this recording had been made, were you at all worried about how close it is to the attorneys' rooms --

MR. CALIEL: Objection as to relevance, Your Honor.

THE COURT: What is the relevance?

MR. FLETCHER: Well, Judge, my motion to suppress is attacking [redacted] inside the jail and as the testimony is being developed [redacted] feet from where attorneys meet with their clients and that's why I'm asking that, because he's worried about that.

MR. CALIEL: I don't think whether Mr. Hernandez is worried about it is relevant to this proceeding and as the Court has reviewed 74 hours no attorney-client privileges were ever

captured [redacted] so I think that's inappropriate.

MR. FLETCHER: Well, can I proffer his answer?

THE COURT: Yeah, you can proffer it.

EXAMINATION ON PROFFER

BY MR. FLETCHER:

Q Are you worried about that?

A Yeah, it concerns me a great deal.

Q Okay. You're worried that -- and you're aware -- because your defendant is recorded, you received all of this discovery, you're aware that there was no warrant, there was no judicial oversight of what the State Attorney's Office decided to do [redacted] right?

A I realize that now, yes.

Q Okay.

MR. FLETCHER: That's all I have, Your Honor.

THE COURT: Mr. Caliel.

MR. CALIEL: Yes, Your Honor.

CROSS-EXAMINATION

BY MR. CALIEL:

Q Good morning, sir.

A Good morning.

Q As a part of representing Randall Deviney,

obviously you acquainted yourself with his entire case file and court file, correct?

A Yes. There was extensive discovery from the Public Defender's Office. The Court was gracious enough to let me transcribe the prior trial, which was about 13 or 1400 pages, and so with that and the other discovery it was quite extensive.

Q But in particular, the whole reason why you were actually appointed by the Court to represent Mr. Deviney is because at some point in time towards the end of 2014 Mr. Deviney expressed an interest through his Public Defender to provide information against the defendant in this case, Donald Smith?

A I believe that was why we were appointed. But we were appointed to defend him in a death penalty case.

Q Yes?

A I mean that's what generated the appointment. And as an attorney we represent him.

Q And I understand that, but what I'm saying is the whole purpose as to why a new lawyer had to be appointed was because your client, at some point in time in 2014, expressed an interest through his Public Defender, who also at the time was representing Mr. Smith, that he wanted to cooperate against

Mr. Smith?

A Yes.

Q Okay. And it's clear through both the court proceedings and the communications that you had that Mr. De la Rionda at no point in time was ever interested in letting Randall Deviney cooperate with the State of Florida?

A He made that pretty clear.

Q Abundantly clear, correct?

A Bernie and I have gone at it for 26 years and each time he's pretty affirmative about what he has to say.

Q And let's talk about that because you talked about the practice. And just generically, theoretically, a person charged with murder could try to go to the State Attorney's Office and cooperate against somebody who's charged with a misdemeanor petit theft. Isn't that a possibility?

A I've never seen it, but I -- you're asking a question like a defense lawyer now.

Q Absolutely. Sometimes we can play that role?

A It's a possibility.

Q Okay. But part of the reason probably why you've never seen it is because of the evaluation that the State goes through is you have to weigh how much

you want to work with an individual or if you don't want to provide that individual with any possible cooperation benefit because they might be a worse individual than the person they're trying to provide information against?

A As a former prosecutor that was the evaluation I did.

Q Okay. And so what was abundantly clear was that Mr. De la Rionda had no interest in utilizing your client in any capacity, correct?

A He made that clear just about every time I saw him.

Q And, more importantly, in June of 2015, part of the reason why you made this last ditch effort on June 15th was because you had an upcoming trial date where your client would be facing the death penalty, correct?

A July 27th. The way I look at it, I'm preparing for trial, Ms. Bynum is preparing for trial, and you keep on trying to save the client's life any way you can.

Q Correct. But at that time you were preparing for trial and Mr. De la Rionda made it clear that he was going to actually seek the death penalty against your client and not utilize him in any way as a

witness?

A He made that clear. He allowed me to proffer it and, like I told you before, I thought that was out of professional courtesy.

Q And Mr. Deviney's case did ultimately go to trial, correct?

A It did.

Q And Mr. De la Rionda did seek the death penalty from the Court?

A He did.

Q And, in fact, a death sentence was imposed by the Court.

A It was.

Q Okay. During your representation of Mr. Deviney, were you ever made aware that any of these recordings were taking place?

A I don't think so.

Q Your client was never made aware, to your knowledge, that any of these recordings were ever taking place?

A No. No.

Q Based upon your review, because since you have reviewed the recordings it's crystal clear, based upon what your client was saying, he had no idea [redacted]?

A Well, that calls for speculation on my part what my client thinks, but the recordings are 74 hours and I don't believe he was aware. I certainly wasn't aware until after I was appointed that these recordings were there.

Q Okay. After you met with Mr. De la Rionda and he told you you -- he wasn't interested in utilizing Mr. Deviney as a witness after June 15th, you communicated that to Mr. Deviney, correct?

A I don't think -- going through my notes, Bernie didn't actually get together with me after the June 15 e-mail until our pretrial on July 2nd and then he told me that he didn't want to utilize the information and then he put it on the record. It's in the court transcripts, probably.

Q Okay. But that was the last meeting that you had? You had previously stated that you had multiple meetings with Mr. De la Rionda and multiple requests trying to get Mr. Deviney's cooperation?

A I had several meetings with Mr. De la Rionda before June. Either before I approached him, he'd tell me the same thing, even before I even got it out of my mouth.

Q Being polite, he told you not interested, don't even bother?

A That's sum and substance.

Q Thank you, sir.

MR. CALIEL: I don't have any further questions.

THE COURT: Anything further?

MR. FLETCHER: No, Your Honor.

THE COURT: May Mr. Hernandez be excused?

MR. FLETCHER: Yes, Your Honor.

THE COURT: Thank you, Mr. Hernandez.

MR. FLETCHER: Judge, I have no other witnesses.

THE COURT: Okay. Argument?

MR. CALIEL: And, Your Honor, directing the Court to the previously filed response that the State had, I'm not going to belabor the State's argument on the record because we have filed our response to the motion to suppress which outlines the case law and the arguments, but just in summary of the facts that we presented here before the Court today.

Information was obtained in April of 2015, that potentially this defendant, Mr. Smith, and Randall Deviney were trying to somehow subvert or manipulate the justice system. This information was provided to the State of Florida through a

confidential inmate who was housed at the Duval County Jail and who passed on information that these two individuals, these two inmates, had been communicating within the Duval County Jail utilizing an area in between their isolation cells which is inappropriate and illicit; that based upon this information that was obtained at the beginning of April Investigator Hinson then researched with [redacted] and Officer Carter how this might be able to be investigated further and whether or not [redacted] in a way that is undetected by any of the individuals on the pod or within the dorm.

Through the research and the work of the detectives who operated in this particular investigation it was determined [redacted] unbeknowing to the defendant, Mr. Deviney and anybody else on the floor.

There were measures taken to avoid even corrections officers from knowing [redacted] within the Duval

County Jail; [redacted]

And then the Court, of course, has heard and reviewed the entirety of that recording at this point in time.

As our response clearly indicates, there is no expectation of privacy in the Duval County Jail, in particular when two individuals who are placed in isolation are illicitly communicating through alternative measures.

We've heard how people communicate through the toilets and how they ran the water and how kites, or inappropriate letters, are sent between inmates that are oftentimes intercepted. This is just another mechanism in which inmates who have nothing but time on their hands utilize to try to communicate inappropriately between the cells that they've been housed in.

That at the time [redacted] Mr. Smith nor Mr. Deviney had any expectation of privacy in their conversations that could be overheard. And as the Court heard [redacted] you can even hear conversations audibly from cells down the hallway and other individuals who are singing and making

comments and things of that nature.

What occurred here is Mr. Smith and Mr. Deviney, [redacted] they were having conversation and that that conversation specifically involved information, and without getting into the details because of the, you know, sensitive nature of that material, those conversations were relevant to this particular proceeding.

The argument, the only argument based upon the case law, because there is no -- the case law is clear there is no expectation of privacy in that setting, is that somehow Mr. Deviney was acting as an agent of the State. And the Court is probably more aware of this than anybody else as to how emphatic Mr. De la Rionda was that we were not going to be utilizing Mr. Deviney and, in fact, even on the record in this case I announced that we have received this request from Mr. Deviney's counsel at the time he was represented by the Public Defender, and it was made abundantly clear in multiple court hearings and on multiple occasions that the State of Florida had no interest in utilizing Randall Deviney as a witness.

We believed and we were led to believe that

this was true that Mr. Deviney and Mr. Smith were utilizing this as some sort of delay tactic in both of their cases and we did not feel that either one were credible witnesses in any event whatsoever and that both were deserving of the maximum punishment that's allowable under the law.

Even the testimony here today confirmed the fact that after Mr. Hernandez was appointed, after a conflict was found by the appellate courts, that Mr. De la Rionda reiterated I have no interest in utilizing Randall Deviney as a witness or cooperating as a witness, and that this method or investigation was done, number one, to intercept any illicit conversations that were taking place between the two of them and uncovering the fraud upon the court that they were trying to manipulate by causing this delay, and there was never, in fact, any conversation about any separate homicide or anything of that nature.

And it should be noted for the record, while we don't get into the details [redacted] there were no conversations in relation to any additional uncharged homicides, as Mr. Deviney alleged in his letters and in his requests to cooperate with the State of Florida.

It's clear [redacted] however, that these two inmates are friends and that they're buddies within the Duval County Jail and they yuk it up and they communicate with each other in a very inappropriate fashion, but Mr. Deviney was not acting as an agent of the State. All the investigators made it clear today here in court that outside the State Attorney's Office and the three of them nobody was aware that [redacted] was taking place, not Mr. Deviney, not his attorney, nobody was aware, not even this Court was aware of the fact, and that's emphasized by Mr. Fletcher's argument there was no judicial oversight or supervision of this. Not even this Court was aware that we were rewarding [redacted].

Mr. Deviney in no way, shape or form was acting as an agent of the State. He was not enticed or placed into a position to try to illicit incriminating responses and, quite frankly, as indicated on cross-examination of Mr. Hernandez, it's clear that he knew the State of Florida wasn't listening based upon the information that he was putting forward [redacted].

This is an individual who was getting ready to go to trial and was facing the death penalty himself

and, quite frankly, some of the comments that he made on that tape were aggravating circumstances that could be used to attack his character and potentially rebut any mitigation that may have been presented during the course of his case when we were seeking the death penalty against him.

Based upon all those facts and circumstances it is, quite frankly, unbelievable to believe that Mr. Deviney was acting as an agent of the State, he was unaware this was taking place, and based upon that and the fact that there was no expectation of privacy based on these conversations, where they took place and how they were taking place, these statements should be admissible under the Fourth Amendment attack that is being presented by the defense.

Obviously there are some concerns, and we can address them after the Court rules, as to the nature or probative versus prejudicial effect of certain contents or certain statements which may have to be redacted, and that's something we have to address once the Court rules, and we would concede that certain statements may have to be redacted based upon the prejudicial nature, but there are certain statements that are relevant and admissible in the

manner they were received.

THE COURT: Thank you.

Mr. Fletcher

MR. FLETCHER: Judge, at the outset I will ask for leave to amend my motion just to add a ground that I had discussed with Mr. Hernandez and something I had just thought of.

And basically, Judge, I have two Assistant State Attorneys and a couple of investigators deciding to go [redacted] feet from where attorneys meet with their clients in the Duval County Jail.

And Mr. Caliel said it himself just a second ago, you hear things, [redacted] you hear things all through the jail. You hear people singing, you hear all kinds of things, and I just think that defense attorneys, when they meet with their clients at the Duval County Jail, we are entitled to not have to worry [redacted].

Mr. Hernandez said through the proffer that he worried about that and it creates a chilling effect on us attorneys. It's bad enough that when they call our offices they're recorded. When they meet

with their families they're recorded, the visitations. And now us defense attorneys have to worry about [redacted] who knows where in the jail now. [redacted] feet from where attorneys meet their clients I think is unacceptable and this was done without any judicial oversight. So under the Fourth Amendment we think that you should suppress it just for that reason alone.

As to the two grounds in the motion, I understand the general proposition set forth in all of the case law that there is no expectation of privacy in a county jail or a prison, but in our case I don't know that the person -- the judges that drafted those opinions ever contemplated [redacted] the sounds of Mr. Smith urinating. We think it just goes too far. It's passed the line that they have drawn. So we're asking that this Court suppress it on that ground, even though case law is completely against us, I understand.

And, second, as I pointed out in the last ground, Deviney had always wanted to cooperate against Mr. Smith and that's borne out right down to

that -- to the conversation [redacted] where he starts asking Mr. Smith questions. Without getting into it, the Court is aware of the content. But it starts with Deviney asking questions. And just eight days prior to that Mr. Hernandez, through an e-mail to Bernie De la Rionda, reiterated his request to allow his client to cooperate. If nothing else, it gives the State Attorney, Mr. De la Rionda, the information that the two are still talking. They're talking. He takes that information and eight days later [redacted] at the jail.

So he might not have been a direct agent of the State, but through the circumstances in this case he has become sort of an inadvertent agent of the State and it's our position that under the Constitution he was required to Mirandize, basically, to Mirandize Mr. Smith because he is an agent of the State.

That's all I have, Your Honor

THE COURT: All right. Anything further?

MR. CALIEL: Your Honor, just responding as to two specific points. First on the last, and this alleged -- oh, the e-mail from June 15th. Well, it's clear from the timeline here this investigation had been commenced well before June

15th in this last e-mail or this last possible plea by Mr. Hernandez to avoid the death penalty for his client. The State met with a confidential informant separate and apart from Mr. Deviney who divulged this communication was taking place in April and that much research and investigation had to be continued between April and actually [redacted] between April and when [redacted] on June 23rd of 2015. June 15th had no play or part in that conversation in this investigation and, quite frankly, until I was provided with this e-mail this morning the State in Mr. Smith's case was even unaware any such meeting had ever taken place. Quite frankly, Mr. De la Rionda probably didn't choose to share it with me because he didn't have any interest in utilizing Mr. Deviney in any capacity whatsoever against Mr. Smith.

But what is clear is this investigation was being conducted separate and apart from Mr. Deviney months before that July 15th meeting ever took place.

As to the last point which is the amendment, and that's why I didn't respond to it initially, is this allegation that somehow this is a

violation of due process or the defendant's right to privacy [redacted] in regards to attorney-client. What is clear from the recording that the Court has listened to, there is no attorney-client conversations that are being recorded here, [redacted] they would have been doing -- what we can hear is screaming within the pod or singing in a loud voice for those statements within that interview room to have been heard. And if Mr. Fletcher chose to sing with his client in an isolation room, he has waived any expectation of privacy based upon the volume he's utilizing and what evidence we've heard today that that area directly outside that interview room is constantly utilized by other inmates and jail personnel. They're far closer to that interview room [redacted] particular cells where these two inmates were being housed.

So to somehow argue that we're violating an

attorney-client relationship [redacted] is a ludicrous argument in the sense that if they're loud enough or audible [redacted] they're going to be audible to corrections officers who occupy that pod [redacted] and, therefore, by having a communication audible to law enforcement who's standing right there would waive any privilege because you can't have a conversation with another party and have privileged communication. And so I think that argument is without merit.

THE COURT: Anything further?

MR. FLETCHER: Obviously I disagree, Judge, and Mr. Hernandez, who is a defense attorney, kind of expressed to the Court it's kind of a chilling effect. He's a little bit worried now. That's all I have to say about that.

Of course, Mr. Caliel thinks it's ludicrous, but myself and Mr. Hernandez are practicing criminal defense attorneys and we've got to worry about whether or not we're being recorded.

That's all I have at this point.

THE COURT: All right. I'll take this under advisement. I do have all the materials, the motion, response and the case law. I've reviewed

it. I'll review it again.

May I see the attorneys at side-bar regarding scheduling?

(Counsel for the State and defense approached the bench for a side-bar conference out of the hearing of the court reporter.)

THE COURT: Okay. After looking at everyone's schedules and availability, and I do already have a court date in this courtroom on October 6th, it appears to fit with everyone's schedule so we'll schedule Mr. Smith's case for a status hearing. You'll have an order way before that on this hearing, but we'll have a status hearing on Mr. Smith on October 6th in Courtroom 405 at 9:00. And if there's anything before that, contact Becky Howell and we can add something on earlier if need be.

Thank you all very much. We'll be in recess.

MR. CALIEL: Thank you, Your Honor.

MR. FLETCHER: Thank you, Your Honor.

(Thus the proceedings ended.)

C E R T I F I C A T E

I, Faye M. Gay, hereby certify that the foregoing transcript is a true and accurate transcription of my Stenograph notes taken at the time and date stated herein.

Dated this 11th day of June, 2018.

/S/ Faye M. Gay

_____

Faye M. Gay, CRR, RMR, FCR, RPR, CLVS

Filing # 74034425 E-Filed 06/25/2018 12:16:25 PM

IN THE CIRCUIT COURT OF THE
FOURTH JUDICIAL CIRCUIT, IN
AND FOR DUVAL COUNTY, FLORIDA

CASE NO.: 16-2013-CF-005781
DIVISION: CR-D

STATE OF FLORIDA

-vs-

DONALD JAMES SMITH,

Defendant.

STATE OF FLORIDA)
COUNTY OF DUVAL)

COURT PROCEEDINGS held before the Honorable Mallory D. Cooper, Circuit Court Judge in the above-entitled action, held on October 18, 2016, at 9:00 a.m., at the Duval County Courthouse, 501 West Adams Street, Courtroom Number 605, and taken down stenographically by Ashley Whitehair, FPR, Certified Court Reporter, and Notary Public, in and for the State of Florida at Large.

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ALSO PRESENT:

Donald James Smith, the Defendant.

I N D E X

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E X H I B I T S

Page No.

Court

(None Entered/Admitted.)

State

(None Entered/Admitted.)

Defense

(None Entered/Admitted.)

October 18, 2016 9:16 a.m.

P R O C E E D I N G S

* * * * *

MS. SCHLAX: Good morning, Your Honor.

THE COURT: Good morning.

MR. CALIEL: Your Honor, we are prepared to call the case of Donald Smith.

(Defendant enters the courtroom.)

MS. SCHLAX: And good morning, Your Honor. Julie Schlax appearing on behalf of Donald Smith, who stands to my left.

Your Honor, I know we're here for a status hearing, in order to discuss the January trial date, but I've also filed this morning, and previously provided courtesy copies to both the State and to the Court, regarding my motion for court intervention regarding my client's lack of medical care at the Pre-Trial Detention Facility.

As the pictures that are attached to the motion indicate, and Your Honor can physically see my client as he stands next to me, he has developed a rash that is encompassing his entire body.

He has not received, even though

requested repeatedly to see medical professionals on this issue, he has not seen them. Those requests have been ignored.

It has now reached, just in my numerous conversations with him, it's affecting his ability to not only function on such a basic scale in the Duval County Jail, but even to effectively communicate with myself as we go over obviously very complex issues regarding charges that he faces and the status of the death penalty in the State of Florida.

And so we're asking -- we realize this Court's ability is somewhat limited, but we're asking for some type of court intervention, so that Mr. Smith can get the care that he absolutely needs.

THE COURT: Okay.

MR. CALIEL: Your Honor, I don't believe we have a stance on this issue. We're not really a party to Mr. Smith's incarceration.

I think the Court can enter an order, as is oftentimes done, whenever it comes to either accessing the library or access to medical care, things of that nature. And if -- if that order is ignored, then somebody --

the sheriff's office or general counsel can come and answer as to why it's not being complied with.

But the State Attorney's Office really doesn't play a part in the manner in which Mr. Smith is held pretrial.

THE COURT: What exactly are you asking the Court to do?

MS. SCHLAX: Your Honor, right now, he is seeing a doctor, and if I can just for the very limited purpose of establishing the last time he saw a physical doctor: Mr. Smith, when is the last time you saw a physical doctor?

THE COURT: Well, if we're going to do that, let's place him under oath. I know it's for a limited purpose, but he still needs to be placed under oath.

THE CLERK: Please raise your right hand.

THE DEFENDANT: (Complies.)

THE CLERK: Do you solemnly swear or affirm that the testimony you give, will be the truth, the whole truth, and nothing but the truth, so help you God?

THE DEFENDANT: I do.

THE CLERK: Thank you.

(Defendant was duly sworn in by the clerk.)

MS. SCHLAX: Mr. Smith, when was the last time that you saw an actual medical doctor?

THE DEFENDANT: That would probably be around six or seven months ago.

When I kept insisting on treatment, I was passed off from the doctor to the DOs with -- I mean, they have seen me, but they are treating me with dandruff shampoo and A&D ointment, which is in no way affecting this whatsoever.

I've been suffering this for almost 11 months now, and its taken over completely.

THE COURT: Okay.

MS. SCHLAX: The last three -- explain to the Court the process of how you seek medical intervention? What do you physically have to do?

THE DEFENDANT: I have to put in a medical request slip, and I had to put in about seven medical request slips before I was

seen.

I have an ongoing problem with the feelings that a couple of the medical staff have with me and...

THE COURT: Okay. Well, now, we probably ought not get into that.

I think -- I mean, maybe you disagree. I don't know if you do, that's fine.

THE DEFENDANT: They say they're not receiving it.

MS. SCHLAX: And that's the difficulty, because the mechanism by which Mr. Smith has explained to me that he physically fills out a request form seeking medical intervention, we have no way to document where those physical requests are going. We just know that he's not being seen. He's not getting any type of aid that is necessary for him.

As the pictures clearly illustrate, and I took those photographs on September 23rd, he was inflamed even more than he physically was standing next to me now, but every time I see him, and as recently as yesterday when I saw him in the Duval County Jail, he's just not receiving any kind of treatment, in order to

help him.

And the side effects of it are that he is constantly scratching and not able to focus on much more than his physical discomfort.

THE COURT: I think on this issue the thing to do is pass him to -- we may not be through with everything else, I don't know, but on this issue, pass it temporarily. I'll get a phone call made. We'll find out what can be done. I'm not sure what can be done.

I'm still not sure what you're asking, but I'm going to assume that you're asking for a medical person, a doctor or a physician's assistant, or somebody like that to see him in the jail.

You're not asking that he be transported to some doctor's office?

MS. SCHLAX: Not having a medical degree myself, it's difficult to suggest an actual course of treatment.

I know without him being physically seen by an accredited doctor to understand what is going on, which may require further testing, I mean, you know, candidly, you see commercials all the time of people suffering, and there

are medications out there that, you know, greatly affect their quality of life. Mr. Smith is being denied that opportunity.

THE COURT: I think we'll start with seeing if we can have someone see him in the jail and go from there. I think that's the way to start.

Again, I'm not sure we're through with everything else, but on that issue I'll pass it temporarily after we finish everything else that we're going to do today, and have Mr. Smith kept in the back temporarily until we can get an answer, and see what can be done in the jail, and we'll start with that.

And then I know we're here also just as a status date or pretrial date. He's set for trial in January. I think it's the 17th.

And, of course, we all are aware that the Florida Supreme Court has issued a new opinion that might effect the trial date.

So, I'm not sure where we are on that from your perspectives.

MR. CALIEL: Counsel and I have briefly discussed that, Your Honor.

Obviously, across the state, I think

lawyers and prosecutors are evaluating and assessing the meaning of the Hurst and Perry decisions.

However, what appears to be pretty evident, and there may be some clarification coming down, I think there may be additional hearings that are going to be requested to clarify some of the issues in the opinions, the anticipation is though that given the timing and the date that we currently have for jury selection, that there will not be sufficient remedy by the legislature by January 17th, I do not anticipate.

I may be wrong, I'm not sure if a special session will be called, but I think given the fact that it is an election year and the timing particularly when it comes to trial date and how much time is in between when the elections take place, would change leadership of committees and things of that nature.

I think it would be highly unlikely that we would have any direction from the legislature prior to January 17th, which I think absent any specific demands, I think it would be less than prudent to proceed to trial

prior to any enactment coming down with instructions as to how we should proceed, given the Hurst and Perry decisions.

THE COURT: Well, then, even after that, we won't have jury selection -- jury instructions, excuse me, for some period of time, whatever that period of time is.

MR. CALIEL: Correct.

THE COURT: So if the legislature acting won't be the last step, I don't think, in the process of being able to proceed.

MR. CALIEL: We have had some conversations, and obviously I don't think the defense needs to fully disclose everything at this point in time, but there was some conversations even before these opinions came down as to whether or not all of the mitigation would be completed in that timeframe already.

And, so, I would defer to counsel as to their position in reference to that, but I think when it comes to just legally being able to proceed at this point in time, still seeking the death penalty, while I believe and I think there is some legal footing to go

forward that we could have a guilt phase of the trial and select a separate penalty phase, if need be, but then you're getting into issues of death qualification and things of that nature that need to be discussed during jury selection, that will be very unclear absent any action by the legislature, and the jury instructions being completed.

MS. SCHLAX: I would agree that the Perry decision seems to undermine the issue that I had previously filed a motion to strike when the original Hurst decision on January 12th came down that this Court then denied, and Perry confirmed that that was the correct result, that the concept of the death penalty within the State of Florida is not unconstitutional, but just the mechanism. And we currently, as we stand here right now, do not have a constitutional mechanism in place.

I would foresee that there would be great difficulty, and even assuming it's the easy fix of just changing the language to mirror a unanimous decision instead of 10-2, that the jury instructions themselves will have to be completely reworked as well.

And so I think we are somewhat in a holding pattern based on those decisions.

THE COURT: What would you like for me to do today, just maybe pass it a month or so to have a little firmer footing of where we're at, or do you want to do something more than that today? How do you want to proceed?

MS. SCHLAX: I would almost suggest to the Court that perhaps a pass date into January.

We are still diligently working on both guilt phase discovery, as well as mitigation and penalty phase discovery. We will continue to work on that in this time period.

If at any point we get a more clear direction, in terms of whether a special session is going to be called, we can certainly place it on the calendar, so that we can kind of get in the queue of this Court's time, as well as counsel's and my time, in regards to these cases being backed up.

MR. CALIEL: And I think from a logistics standpoint, Your Honor, because I know the Court and staff have to make a great deal of arrangements, and set aside time and

planning for the jury selection and the trial process, this is based upon sequestration and other issues that we're dealing with, number of jurors, I think it would be prudent at this point in time to strike the January 17th trial date, to have a control date and a status date.

I think both sides can still continue to be working towards getting that trial completed. I think both sides are still working, particularly the defense in the mitigation phase, and the continuing discovery that may be ongoing when it comes to that.

The only concern that I would have, and maybe this could be discussed a little bit now, in the sense that originally we had discussed a timeline as to when certain experts were going to be disclosed, and it all related to a jury selection date, but I really hesitate in -- if the mitigation, and mental mitigation in particular has been completed, and I know there are potential experts that are outside the State of Florida, that if we can perhaps still maintain those timeframes, if they're realistic, so that we can complete

our discovery, and whenever the legislature and the Courts act with the jury instructions and everything else, that both sides will be ready to proceed as quickly as possible to litigate the case.

I just hate to put everything in a holding pattern, particularly when it comes to the discovery of potential mental mitigation experts, because there, of course, may be the potential examination by State experts as well, and we can get those things accomplished while we're in this sort of holding pattern, in reference to the death penalty itself.

THE COURT: Well, I agree, everybody needs to keep working towards having everything ready for trial.

And you've already told me today that it was already possible that it wouldn't be ready for trial, absent the Supreme Court's decision, but for purposes of preparation by the January date, so I would ask you both to continue to prepare.

And what is your position regarding striking the January 17th?

MS. SCHLAX: Your Honor, I would ask you

to strike it at this point. I was not the counsel of record when the Court made the decision of the timeline of 60 days prior to trial. I would have argued against that, but I understand that that is this Court's ruling, and am certainly willing to abide by it as an absolute deadline.

And in good faith, when I'm in a position to disclose certain things that I believe will be relevant, and we will seek to admit during either of the penalty phase or guilt phase of this trial, I will disclose those.

I'll do that in good faith before any specific deadlines, where I can, and understand that there is an absolute deadline in place; and if I cannot meet it, when we do get a new trial date, I will certainly let the Court know, and show good cause why I can't.

THE COURT: Okay. Well, hopefully, when we discuss setting a new trial date, we can set it with that 60 day time period in mind, and set it in the way that that can be accomplished without delaying the trial again.

I think I've said this before, and this

is not anyone's fault at all, but I don't want to set it again and have to move it again.

So I would rather everybody tell me, whenever we get to that point, we need this many weeks, days, months, whatever it is, to meet all the deadlines and to be ready, and then set it accordingly, so that it doesn't have to be moved again.

It does require a lot of effort, as Mr. Caliel mentioned, and I know you've acknowledged in the past to prepare to try a case like this, not only for the attorneys, obviously, of course, but for the staff, the security, the Court, everybody else.

So we all need some time, and we'll try to set it accordingly, so you have the time you need to be able to follow those guidelines and still be prepared to proceed.

I would take this as an oral joint motion to strike the January 17th trial date; is that correct?

MR. CALIEL: That would be correct, Your Honor.

MS. SCHLAX: From the defense, yes, Your Honor.

THE COURT: All right. I'll grant that joint motion.

I'm a little bit concerned about passing it that far for a status hearing: Number one, you have an issue you've asked the Court to address, and I don't know that we want to wait until January 17th to find out if it's been addressed, however we're going to do it, I'll find out in a little bit, and I just feel like having a hearing some time before the end of the year, just a status date, just to make sure everything is moving along, the disclosures are being made as they can be, and things like that.

January 17th --

MR. CALIEL: I would agree, Your Honor --

THE COURT: -- is three months. I would rather do something in December.

MR. CALIEL: And that's what I was going to request.

Based upon a conference call that the State Attorney's Office participated in yesterday, there may be some more information known, I guess, based upon motions for

rehearing, and then following the November election, there may be a leadership organization session, and we will have a little bit more guidance as to a timeline, or at least whether or not a special session will be called into order or not. I don't anticipate that's the case, but it's not an impossibility.

So maybe sometime in the first part of December we may have a little bit more guidance in reference to that, and if at that point in time we know that it's not going to be until the regular session, I think we'll know it at that juncture, so...

THE COURT: All right. Can you both look at your calendars and give me a date, and then I'll check and see if the courtroom's available. I know it wouldn't be on the 8th. We can't do the 8th.

MS. SCHLAX: The 5th, 6th, or 7th are open for myself.

THE COURT: What days of the week are they? I've forgotten my calendar.

MS. SCHLAX: The 5th is a Monday, Your Honor. The 8th is a Thursday.

MR. CALIEL: The only request I would have, Your Honor, and there is a possibility based upon these new decisions that this evidentiary hearing may be continued, but currently, right now, I have a week long evidentiary hearing in front of Judge Senterfitt on another capital case that's scheduled to begin at 9:00 on the 5th.

If we do proceed to that evidentiary hearing, it will be the entire -- likely, the entirety of that week, on the post conviction matter.

If there is anyway possibly the week of the 12th, which is wide open at this juncture?

MS. SCHLAX: That's fine, Your Honor.

THE COURT: And the 12th is a Monday?

MR. CALIEL: The 12th is a Monday, and I'm available any day that week.

THE COURT: Do you have a preference that week?

MS. SCHLAX: That Monday is fine, Your Honor.

(Pause.)

THE COURT: All right. December 12th is fine in Courtroom 405 for a status hearing.

And we can add it on earlier, if we need to. Hopefully, we won't need to, but I think that will give us a better clue of where we're headed, rather than waiting another month after that.

Is there any other issues we need to address today?

MR. CALIEL: Nothing from the State, Your Honor.

MS. SCHLAX: No, Your Honor.

THE COURT: Okay. I'm going to pass Mr. Smith temporarily, and we'll see what we can find out.

So if he can be held in the back?

THE BAILIFF: Yes, Your Honor.

THE COURT: He may not need to come back out, but he'll need you to tell him what we find out.

MS. SCHLAX: Thank you, Your Honor.

(Case was passed temporarily.)

THE COURT: If we can recall Donald Smith.

Do you want him to come back out, Ms. Schlax?

Do you need him to come back out?

MS. SCHLAX: That's all right, Your Honor.

THE COURT: It's up to you. It's fine, if he does.

MS. SCHLAX: No, it's fine.

(Defendant not present in the courtroom.)

MS. SCHLAX: It's my understanding Mr. Smith will be seen by medical professionals today.

THE COURT: With some assistance, a call was made to the Pre-Trial Detention Facility. They are aware of the situation, and they are going to make arrangements for him to see a medical -- I'm not sure if it's a doctor or a physician's assistant, but a medical member of the community today to address the concerns that were addressed in your motion and on the record today.

If there's any further issue or problem, you can let me know, and we'll address it.

Our next actual scheduled court date for other matters is November 3rd.

So if there's any reason that you need to add it on, that would be the day next up

for that.

MS. SCHLAX: Yes, Your Honor.

THE COURT: So I'm granting your motion to intervene. The intervention is that the jail has agreed to have a medical professional address Mr. Smith's skin condition today.

MS. SCHLAX: Yes, Your Honor.

Thank you very much.

THE COURT: Thank you.

MS. SCHLAX: And just to clarify: November 3rd, if we needed to, the Court would be in session, we would contact your office to place it on the formal calendar?

THE COURT: I am in session on November 3rd.

Now, we've got a -- Mr. Andux was here. We have a case not on the calendar today, but it's set that day for two days of hearings on a 3.851 on a death penalty case.

We don't know at this point if that's going to proceed, but we kept the court date of the 3rd, and we've already passed another case to that date. So, yeah, that's the next day I have.

MS. SCHLAX: Okay. I will make note of

that. I doubt that it will be necessary, but I'll make note of that.

Thank you very much, Your Honor.

THE COURT: Thank you.

MS. SCHLAX: May I be excused?

THE COURT: Uh-huh (affirmative).

* * * * *

(Whereupon, the proceedings for this defendant were adjourned at 10:01 a.m.)

- - -

C E R T I F I C A T E O F R E P O R T E R

STATE OF FLORIDA)
COUNTY OF DUVAL)

I, Ashley Whitehair, FPR, Certified Court Reporter, certify that I was authorized to and did personally stenographically report the foregoing proceedings on October 18, 2016, and that the transcript is a true and complete record of my stenographic notes.

/s/ Ashley Whitehair
Ashley Whitehair
Certified Court Reporter

Filing # 73473963 E-Filed 06/13/2018 08:43:38 AM

IN THE CIRCUIT COURT OF THE FOURTH JUDICIAL CIRCUIT, IN AND FOR DUVAL COUNTY, FLORIDA.

Case No: 2013-CF-5781-AXXX-MA

Division CR-D

STATE OF FLORIDA

-vs-

DONALD SMITH,

Defendant,

PROCEEDINGS taken before the Honorable Mallory D. Cooper, Judge of the Circuit Court, on December 12, 2016, and as reported by Faye M. Gay, Certified Realtime Reporter, Registered Merit Reporter, and Certified Legal Video Specialist.

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PAGE # 3883

APPEARANCES:

MARK CALIEL, Esquire,
Assistant State Attorney,
Appearing on behalf of the State of Florida

JULIE SCHLAX and CHARLES FLETCHER, Esquires,
Appearing on behalf of the Defendant.

P R O C E E D I N G S

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MR. CALIEL: Your Honor, if you're prepared we can call the case of Donald Smith.

(Defendant present.)

THE COURT: He's on the top of page 3.

MS. SCHLAX: Good morning, Your Honor.

Julie Schlax and Mr. Charles Fletcher appearing on behalf of Mr. Donald Smith who stands to our left.

Your Honor, we're here for pretrial. I've handed Madam Clerk some -- just motions in regards to investigation with attached responses from the Justice Administration Commission. We would ask the Court to sign the proposed orders.

THE COURT: It's just one motion?

MS. SCHLAX: No, there's actually two separate motions and two proposed orders. One is for the Brooke Butler, mitigation specialist, and one is our investigator.

THE COURT: I see. Okay. And are there two copies of the order?

MS. SCHLAX: Yes, there's two copies of each of the orders.

THE COURT: Here's the first one.

Okay. Both of those motions are granted and the orders are signed for both.

MS. SCHLAX: Thank you very much, Your Honor.

And, Your Honor, in consultation with Mr. Caliel we were suggesting January 23rd for another status date.

MR. CALIEL: Or sometime during that week, depending on the Court's schedule.

THE COURT: Is there a day that you would prefer? I would prefer that it not be -- I'm not sure what our schedule is going to be. We're going to be covering juvenile, several of us, covering one of the divisions. Hopefully the day I cover will be Tuesday, but I don't know that for sure. So either Wednesday or Thursday for now I think is better, if that's okay with the two of you.

MR. CALIEL: Either date is fine with the State.

MS. SCHLAX: Either for the defense is fine.

THE COURT: Wednesday, January 25th. Let me go ahead and check and make sure we can be in here.

I can't find out right now. Let's just schedule it for 405 and if something changes I'll let you know.

MR. CALIEL: Yes, Your Honor.

MS. SCHLAX: Yes, Your Honor.

THE COURT: It should be fine.

Is there anything else that we need to take up? That's just for a status hearing, correct?

MS. SCHLAX: That's correct, Your Honor.

MR. CALIEL: That's correct.

Nothing else from the State, Your Honor.

MS. SCHLAX: Nothing from defense.

THE COURT: Thank you.

MS. SCHLAX: Thank you very much.

MR. CALIEL: Thank you, Your Honor.

(Thus the proceedings ended.)

C E R T I F I C A T E

I, Faye M. Gay, hereby certify that the foregoing transcript is a true and accurate transcription of my Stenograph notes taken at the time and date stated herein.

Dated this 11th day of June, 2018.

/S/ Faye M. Gay

_____

Faye M. Gay, CRR, RMR, FCR, RPR, CLVS

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IN THE CIRCUIT COURT OF THE FOURTH JUDICIAL CIRCUIT, IN AND FOR DUVAL COUNTY, FLORIDA.

Case No: 2013-CF-5781-AXXX-MA

Division CR-D

STATE OF FLORIDA

-vs-

DONALD SMITH,

Defendant,

PROCEEDINGS taken before the Honorable Mallory D. Cooper, Judge of the Circuit Court, on January 18, 2017, and as reported by Faye M. Gay, Certified Realtime Reporter, Registered Merit Reporter, and Certified Legal Video Specialist.

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APPEARANCES:

MARK CALIEL, Esquire,
Assistant State Attorney,
Appearing on behalf of the State of Florida

JULIE SCHLAX and CHARLES FLETCHER, Esquires,
Appearing on behalf of the Defendant.

P R O C E E D I N G S

PROCEEDING PAGE

Pretrial.....4

MR. CALIEL: Your Honor, we can address the case of Donald Smith.

Mr. Smith's case is located on the top of page 3 of the morning calendar this morning.

THE COURT: Page 3.

MS. SCHLAX: Good morning, Your Honor.

Julie Schlax appearing on behalf of Mr. Smith.

May counsel approach?

THE COURT: You may.

(Counsel for the State and defense approached the bench for a side-bar conference out of the hearing of the court reporter.)

MS. SCHLAX: Good morning again, Your Honor.

(Defendant present.)

MS. SCHLAX: Julie Schlax appearing on behalf of Mr. Donald Smith who stands to my left.

Your Honor, in terms of scheduling, if I could suggest perhaps the first week in May.

THE COURT: I didn't bring my calendar down.

MS. SCHLAX: May 1st is a Monday.

THE COURT: Do you want to do Wednesday, May 3rd?

MS. SCHLAX: Yes, Your Honor.

MR. CALIEL: That's fine with the State, Your

Honor.

THE COURT: May 3rd at 9:00, Courtroom 405 for pretrial. And I'll make sure -- in fact, I know the last time I did this we couldn't reach Becky. Let me see if I can reach her.

(Court making phone call.)

THE COURT: Okay. That day is fine.

MS. SCHLAX: Thank you, Your Honor.

Administratively we also have I believe on the Court's calendar a court date for next Wednesday, the 25th. Should we just formally strike that?

THE COURT: Yes, we can strike that. We had to move that because this courtroom is being used for something else that week.

Thank you. May 3rd at 9:00 for pretrial.

MS. SCHLAX: Thank you, Your Honor. May I be excused?

THE COURT: You may.

MR. CALIEL: Thank you, Your Honor.

(Thus the proceedings ended.)

C E R T I F I C A T E

I, Faye M. Gay, hereby certify that the foregoing transcript is a true and accurate transcription of my Stenograph notes taken at the time and date stated herein.

Dated this 11th day of June, 2018.

/S/ Faye M. Gay

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Faye M. Gay, CRR, RMR, FCR, RPR, CLVS

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IN THE CIRCUIT COURT OF THE FOURTH JUDICIAL CIRCUIT, IN AND FOR DUVAL COUNTY, FLORIDA.

Case No: 2013-CF-5781-AXXX-MA

Division CR-D

STATE OF FLORIDA

-vs-

DONALD SMITH,

Defendant,

PROCEEDINGS taken before the Honorable Mallory D. Cooper, Judge of the Circuit Court, on August 8, 2017, and as reported by Faye M. Gay, Certified Realtime Reporter, Registered Merit Reporter, and Certified Legal Video Specialist.

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APPEARANCES:

MARK CALIEL, Esquire,
Assistant State Attorney,
Appearing on behalf of the State of Florida

JULIE SCHLAX, Esquire,
Appearing on behalf of the Defendant.

P R O C E E D I N G S

PROCEEDING PAGE

Pretrial.....4

MS. SCHLAX: And good morning, Your Honor.

THE COURT: Good morning.

MS. SCHLAX: Julie Schlax appearing on behalf of Mr. Donald Smith.

I have had an opportunity to discuss the pretrial situation this morning with him in the back and I will waive his formal appearance for court.

I think at this juncture that we're proceeding along to be ready for our February trial date.

I am drafting, Your Honor, a formal agreement in regards to the sequestration that I'll have my client sign in private so that we can have every opportunity to go over all the details and then present that to the Court at our next court date.

THE COURT: Okay. We're scheduled -- we're scheduled February 5th to begin jury selection and February 1st for final pretrial. Is that correct?

MS. SCHLAX: Yes, Your Honor.

MR. CALIEL: Yes, Your Honor.

THE COURT: And I think we're going to need some intervening dates for sure.

MS. SCHLAX: Yes, Your Honor.

THE COURT: And I was just going to suggest

anytime September 11th or after. Do you have a preference?

MR. CALIEL: Your Honor, I'm available the entire week of September 11th, depending on the Court's calendar.

THE COURT: I'm good except for that Friday. So any day that's best for you is fine with me.

MS. SCHLAX: Did we want to do the 12th, which is a Tuesday?

THE COURT: That's fine.

MR. CALIEL: That's fine with the State, Your Honor.

THE COURT: September 12th at 9:00 for pretrial. February 1st at 9:00 for -- and the September 12th date is in here and I'll check on that, make sure if there's a problem with it being here I'll let you know, but the February 1st and February 5th dates are in Courtroom 406.

Anything else we need to address?

MR. CALIEL: Nothing else from the State, Your Honor.

MS. SCHLAX: Nothing else, Your Honor.

MR. CALIEL: Thank you.

May we be excused?

THE COURT: You may.

MS. SCHLAX: Thank you.

(Thus the proceedings ended.)

C E R T I F I C A T E

I, Faye M. Gay, hereby certify that the foregoing transcript is a true and accurate transcription of my Stenograph notes taken at the time and date stated herein.

Dated this 11th day of June, 2018.

/S/ Faye M. Gay

_____

Faye M. Gay, CRR, RMR, FCR, RPR, CLVS

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IN THE CIRCUIT COURT OF THE
FOURTH JUDICIAL CIRCUIT, IN
AND FOR DUVAL COUNTY, FLORIDA.

Case No: 2013-CF-5781-AXXX-MA

Division CR-D

STATE OF FLORIDA

-vs-

DONALD SMITH,

Defendant,

PROCEEDINGS taken before the Honorable Mallory D. Cooper, Judge of the Circuit Court, on October 3, 2017, and as reported by Faye M. Gay, Certified Realtime Reporter, Registered Merit Reporter, and Certified Legal Video Specialist.

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P R O C E E D I N G S

PROCEEDING PAGE

Pretrial.....4

MS. SCHLAX: Good morning, Your Honor.

THE COURT: Good morning.

MS. SCHLAX: Julie Schlax appearing on behalf of Mr. Donald Smith. He is in agreement to waive his appearance this morning.

May we approach briefly?

THE COURT: Sure.

MS. SCHLAX: Just to speak on administrative matters.

THE COURT: Sure.

(Counsel for the State and defense approached the bench for a side-bar conference out of the hearing of the court reporter.)

THE COURT: All right. After discussion with the attorneys at side-bar regarding scheduling it does appear that at least right now we're on track for a February 1st final pretrial and a February 5th jury selection date. Both of those would be in Courtroom 406.

We do have some motions that need to be heard as well as some other preliminary matters to resolve so we do need a next court date for that.

MS. SCHLAX: And I think you said the end of October or beginning of November?

MR. CALIEL: Yes, Your Honor.

MS. SCHLAX: Yes, Your Honor.

THE COURT: November 1st, 2nd or 3rd. That's a Wednesday, Thursday or Friday.

MR. CALIEL: I'm available any of those three days, Your Honor.

MS. SCHLAX: Your Honor, if I could have either the 2nd or 3rd.

THE COURT: Do you have a preference?

MR. CALIEL: At the Court's pleasure, Your Honor.

THE COURT: Let's do November 2nd at 9:00 in Courtroom 405 and let me check and make sure we can have it.

Okay. November 2nd is fine. And it will be in this courtroom, 405, for a pretrial and, as I stated, we still have February 1st at 9:00 in Courtroom 406 for final pretrial and February 5th at 9:00, Courtroom 406, for jury selection.

MR. CALIEL: Thank you, Your Honor.

MS. SCHLAX: Your Honor, would you like us to be prepared to argue the motions that are pending before the Court on that date?

THE COURT: I think so. I'm free the whole day so I think it's a good day for us to go ahead and handle that. Gives us some time for arguments

and things after.

MS. SCHLAX: Yes, Your Honor.

THE COURT: Yes.

MR. CALIEL: Perfect. Thank you, Your Honor.

MS. SCHLAX: Thank you, Your Honor.

THE COURT: Thank you.

(Thus the proceedings ended.)

C E R T I F I C A T E

I, Faye M. Gay, hereby certify that the foregoing transcript is a true and accurate transcription of my Stenograph notes taken at the time and date stated herein.

Dated this 11th day of June, 2018.

/S/ Faye M. Gay

_____

Faye M. Gay, CRR, RMR, FCR, RPR, CLVS

Filing # 73473963 E-Filed 06/13/2018 08:43:38 AM

IN THE CIRCUIT COURT OF THE FOURTH JUDICIAL CIRCUIT, IN AND FOR DUVAL COUNTY, FLORIDA.

Case No: 2013-CF-5781-AXXX-MA

Division CR-D

STATE OF FLORIDA

-vs-

DONALD SMITH,

Defendant,

PROCEEDINGS taken before the Honorable Mallory D. Cooper, Judge of the Circuit Court, on November 2, 2017, and as reported by Faye M. Gay, Certified Realtime Reporter, Registered Merit Reporter, and Certified Legal Video Specialist.

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421 W. Church St., Suite 701
Jacksonville Florida 32202
904-358-2090

ACCEPTED: DUVAL COUNTY, RONNIE FUSSELL, CLERK, 06/15/2018 08:50:34 AM

APPEARANCES:

MARK CALIEL, Esquire,
Assistant State Attorney,
Appearing on behalf of the State of Florida

JULIE SCHLAX and CHARLES FLETCHER, Esquires,
Appearing on behalf of the Defendant.

P R O C E E D I N G S

PROCEEDING PAGE

Pretrial.....4

MR. CALIEL: We're ready on Mr. Smith. He's in the chute.

MS. SCHLAX: And, good morning, Your Honor.

THE COURT: Good morning.

MS. SCHLAX: Julie Schlax appearing on behalf of Mr. Donald Smith who approaches and remains behind me.

(Defendant present.)

MS. SCHLAX: Your Honor, I believe we're on the calendar this morning for actual argument on the three previously filed motions.

THE COURT: Okay. I do have all three.

MS. SCHLAX: If we can begin with the motion to prohibit death qualification due to the new legislation creating a new death penalty scheme is not retroactive.

This was originally filed on May 9th, 2016, by myself. I did amend it yesterday solely to incorporate the fact that since the filing of this motion the 2016 version of 921.141 was specifically ruled unconstitutional. 921.141 again was reenacted in 2017. And so I just elicited those facts in the motion. There's no other substantive change.

I will concede at the outset that the

decision by the Florida Supreme Court Supreme Court in the Perry decision essentially is binding precedent upon this Court, that they have found that the newly enacted 921.141 statute as of 2016 was able to be applied to even pending prosecutions. However, I would seek a ruling on this motion because of details in the memorandum attached to the motion in that it's the defense's position that the changes in the law were actually substantive and, therefore, it should not be retroactive to any prosecutions pending before the actual enactment.

The new statute, as the 2016 version, both articulate that it is effective upon the date of the signing. Therefore, it was not in effect at the time of the -- at the time that this offense was allegedly committed and we would, therefore, ask for a ruling on it.

MR. CALIEL: And, Your Honor, we would just rely on the Perry case, State of Florida versus Perry, 192 So. 3d 70, and then also later cited in Evans v. the State of Florida at Florida Law Weekly 42S200. Both discuss how retroactivity does apply to this particular statute and the finding that the changes were procedural in nature

and not substantive.

THE COURT: Anything further?

MS. SCHLAX: No, Your Honor.

THE COURT: Okay. That motion as amended will be denied.

MS. SCHLAX: Your Honor, the next motion that was filed on May 10th of 2016 is titled motion to declare Florida Statute 921.141 (2016) unconstitutional. Although obviously we concede that a new statute was enacted by the Florida Legislature in 2017, we would seek ruling on this motion.

MR. CALIEL: No argument from the State. The statute has been subsequently amended and the new statute is in place.

THE COURT: Okay. I'll deny the motion to declare Florida Statute 921.141 paren 2016 paren, unconstitutional as moot.

MS. SCHLAX: The third motion that was filed on May 17th, 2016, Your Honor, was the motion to bar the State from seeking death penalty based on its failure to provide timely notice pursuant to Florida Statute 782.04 subsection 1, subsection B 2016.

This statute, Your Honor, has not been amended

since 2016. However in 2016 it was specifically amended to include a specific notice provision. That notice provides that in all cases under this section in 872.04 Florida Statutes, does cover the murder statute. In all cases under this section the procedures set forth in 921.141 shall be followed in order to determine sentence of death or life imprisonment. If the prosecutor intends to seek the death penalty, the prosecutor must give notice to the defendant and file the notice with the Court within 45 days after arraignment. The notice must contain a list of aggravating factors the State intends to prove and has reason to believe it can prove beyond a reasonable doubt.

It is the defense's position that -- and we've laid out the pertinent dates within the motion itself, that the State did file, within 45 days, a notice of intent to seek the death penalty pursuant to Florida Rule of Criminal Procedure 3.202.

Upon the enactment of the new statute in 2016, which would have been March 7th, they failed to then follow the newly enacted 782.04 and give the list of the aggravating factors within 45 days. Upon the filing of that motion it actually was 57 days after -- and I apologize. The State filed it on May 3rd,

2016, which was 57 days after the amended statute was enacted, thus failing the 45-day requirement that was mandated by 782.041B.

We would argue this prohibits the State from seeking the death penalty in this case.

MR. CALIEL: Your Honor, the amended statute speaks nothing about the enactment date of the statute itself. The new law speaks that a notice of intent to seek the death penalty must be filed within 45 days of arraignment on the Indictment. Obviously given the fact that this case has been pending for years prior to the enactment of the new statute it is a physical impossibility to have filed a notice of intent to seek the death penalty enumerating the aggravating factors within 45 days of arraignment because Mr. Smith was arraigned in 2013.

Had the legislature intended this to be a procedural bar and wanted it to be from the date of enactment of the statute they would have specifically cited that in the language of the statute as it was amended. They did not and based upon statutory construction it should not be interpreted that they intended that any case that predated this particular enactment would, in fact,

be procedurally barred if that a notice of aggravating factors was not filed within 45 days.

That being said, Your Honor, this is a notice requirement, much like a Williams Rule notice, where there is a timeline to give the defense proper notice.

And the whole issue at hand here is whether or not the defendant would be prejudiced based upon any delinquent filing of the notice. The notice was filed, in fact, in May of 2016, years before our perspective or a year and nine months before our perspective trial date.

Also to be noted, this Court had heard capital motions previously before a lot of the litigation regarding the death penalty was enacted. The Court outlined a timeline for us to file a notice of aggravating factors and a reciprocal response from the defense, and we filed it well within the timelines as dictated by this Court pursuant to those holdings or the law of this particular case and the Court's findings.

There is no prejudice. The State has filed the aggravating factors well in advance of trial so that defense counsel can adequately prepare for what we anticipate will be the penalty phase in this

particular case. Therefore, this motion should be denied.

THE COURT: Anything further?

MS. SCHLAX: Nothing further, Your Honor.

THE COURT: All right. I'll deny the motion to bar the State from seeking the death penalty based on failure to provide notice pursuant to Florida Statute 782.04 paren 1 paren B 2016.

MR. CALIEL: And, Your Honor, at this time both sides are still proceeding and will be prepared for our scheduled jury selection date on February 5th. We would ask for one intervening pretrial date in December on the Court's calendar and then a motion hearing date in January, if possible, so we can handle any pretrial motions that we can handle before jury selection.

THE COURT: All right. I'm going to schedule the case as follows: December 19th at 9:00 in Courtroom 405. I've already cleared that. Courtroom 405 for pretrial.

And as you might have noticed, there's a couple of other cases on the calendar that day that we'll take first because they'll be short and then we'll proceed with the pretrial in Mr. Smith. And then January 22nd at 9:00 in Courtroom 405 for

hearing on motions to be set that week. And we can tailor that a little more carefully once we have a notice of the ability of whoever needs to appear to appear. It won't be for the whole week, but it will be sometime during that week.

MR. CALIEL: And, Your Honor, can I make a request, and the State will do what we can to accommodate for the defense, but there be a motion in limine filing date for any pretrial motions that deal with the evidence so that we can handle it that week in advance. I think we're working towards both sides will have all our pretrial motions filed by that point in time. But if we could will have a date maybe in the first part of January so we can adequately prepare and have the necessary witnesses available for that time frame that would be great. I would suggest maybe the Friday, I believe it's the --

MS. SCHLAX: 12th.

MR. CALIEL: How about the week beforehand? The 5th. So that give us a week to prepare and get witnesses available.

MS. SCHLAX: That's fine.

THE COURT: The 5th of January?

MR. CALIEL: Yes, as a deadline for both

sides to file any pretrial motions in limine.

THE COURT: Any motions are to be filed by Friday at 5:00 o'clock p.m., January 5th, and we'll be able to hear those, if need be, the week of January 22nd.

And then Mr. Smith has already previously been scheduled February 1st at 9:00 in Courtroom 406 for pretrial, final pretrial, and February 5th at 9:00 in Courtroom 406 for jury selection and trial.

MR. CALIEL: Perfect.

THE COURT: Anything further?

MS. SCHLAX: No, Your Honor.

MR. CALIEL: Nothing from the State, Your Honor.

THE COURT: Thank you.

MR. CALIEL: Thank you, Your Honor.

THE COURT: We'll be in recess.

(Thus the proceedings ended.)

C E R T I F I C A T E

I, Faye M. Gay, hereby certify that the foregoing transcript is a true and accurate transcription of my Stenograph notes taken at the time and date stated herein.

Dated this 11th day of June, 2018.

/S/ Faye M. Gay

_____

Faye M. Gay, CRR, RMR, FCR, RPR, CLVS

Filing # 73473963 E-Filed 06/13/2018 08:43:38 AM

IN THE CIRCUIT COURT OF THE
FOURTH JUDICIAL CIRCUIT, IN
AND FOR DUVAL COUNTY, FLORIDA.

Case No: 2013-CF-5781-AXXX-MA

Division CR-D

STATE OF FLORIDA

-vs-

DONALD SMITH,

Defendant,

PROCEEDINGS taken before the Honorable Mallory D. Cooper, Judge of the Circuit Court, on December 19, 2017, and as reported by Faye M. Gay, Certified Realtime Reporter, Registered Merit Reporter, and Certified Legal Video Specialist.

OFFICIAL REPORTERS, INC.
421 W. Church St., Suite 701
Jacksonville Florida 32202
904-358-2090

ACCEPTED: DUVAL COUNTY, RONNIE FUSSELL, CLERK, 06/15/2018 08:50:42 AM

APPEARANCES:

MARK CALIEL, Esquire,
Assistant State Attorney,
Appearing on behalf of the State of Florida

JULIE SCHLAX and CHARLES FLETCHER, Esquires,
Appearing on behalf of the Defendant.

P R O C E E D I N G S

PROCEEDING PAGE

Pretrial.....4

MS. SCHLAX: Good morning, Your Honor.

THE COURT: Good morning.

MS. SCHLAX: I believe we're ready for the case of Donald Smith.

THE COURT: Yes.

(Defendant present.)

MS. SCHLAX: Your Honor, good morning again.

Julie Schlax and Charles Fletcher appearing on behalf of Mr. Smith who joins me to my left.

At this juncture, Your Honor, we do have our hearing date set for January 22nd. I believe we're on track for those hearings.

I am this morning filing with the Court, the motions have previously been filed, but I'm providing to the Court proposed orders as well as the appropriate Justice Administrative Commission's responses in regards to additional fees for four experts in anticipation of trial.

THE COURT: Okay.

MS. SCHLAX: And they provided their standard response then. None requested hearing.

THE COURT: Okay. Okay. I signed the order.

MS. SCHLAX: Thank you, Your Honor.

Other than that, I think we're ready to proceed on January 22nd with hearing on motions.

MR. CALIEL: I would agree, Your Honor. We're coordinating the logistics on discovery depositions with experts. We'll try to get that accomplished in the month of January so it doesn't cause any unneeded delay, and we should be able to get those scheduled and accommodated, hopefully if not before the 22nd date, but I don't think any motions will be pertaining to those witnesses during that week.

THE COURT: I'm not sure if I remember correctly. Are we going to actually have the hearings on the 22nd? I know that's a Monday. Or did we put that date in case somebody needed a different day that week?

MR. CALIEL: I think we're going to use that as a control date, Your Honor. I think some of -- I reviewed one of the motions that was filed by Ms. Schlax pertaining to the jail wire. All those witnesses are local. That shouldn't be an issue. Also local are the ETs and the Medical Examiner pertaining to the photographs that we'll be laying predicates for that particular week in evaluation as to the prejudice versus probative nature of those photographs.

The video experts are coordinated in

regards -- we haven't been able to reach a stipulation as to the surveillance video. So the security experts from Wal-Mart, Dollar General security and also the FBI who did editing or compressing of the video to the relevant time frames that we're concerned with, and that witness will at a minimum would be coming from Quantico to testify. And so I'm trying to coordinate his travel arrangements and any other trials that he may have testimony in during that time frame.

So I hope to have the schedule where at a minimum we could handle some of the hearings initially in that week and if we needed a date later that week due to the analyst's availability we can arrange that. I should hopefully know more in the upcoming weeks in regard to his availability requirements for testimony.

THE COURT: Okay. I'll check. I can't remember if I reserved Courtroom 406 for the whole week. I don't think it's an issue even if I didn't, but I'll check as soon as I leave here on that to make sure we can use it at anytime during the week. Again, I don't think it's an issue and I think I actually did reserve it for the week, but I'll check on that right away.

MS. SCHLAX: And I'm available the entire week, Your Honor.

THE COURT: Yeah, I am, too. I think that's that. So we'll have court January 22nd at 9:00 for hearing on motions to be set and perhaps some of them time and date certain if they can be handled that day. He also has a court date --

MS. SCHLAX: February 1st, Your Honor.

THE COURT: February 1st at 9:00 in Courtroom 406 for final pretrial and February 5th at 9:00 in 406 for jury trial, to begin jury selection.

And may I see the attorneys at side-bar, please?

MR. CALIEL: Yes, Your Honor.

MS. SCHLAX: Yes, Your Honor.

(Counsel for the State and defense approached the bench for a side-bar conference out of the hearing of the court reporter.)

THE COURT: Okay. I think that's everything so we'll be back in court January 22nd.

MS. SCHLAX: Thank you, Your Honor.

THE COURT: Thank you.

(Thus the proceedings ended.)

C E R T I F I C A T E

I, Faye M. Gay, hereby certify that the foregoing transcript is a true and accurate transcription of my Stenograph notes taken at the time and date stated herein.

Dated this 11th day of June, 2018.

/S/ Faye M. Gay

_____

Faye M. Gay, CRR, RMR, FCR, RPR, CLVS

Filing # 73473902 E-Filed 06/13/2018 08:42:26 AM

IN THE CIRCUIT COURT OF THE
FOURTH JUDICIAL CIRCUIT, IN
AND FOR DUVAL COUNTY, FLORIDA.

Case No: 2013-CF-5781-AXXX-MA

Division CR-D

STATE OF FLORIDA

-vs-

DONALD SMITH,

Defendant,

PROCEEDINGS taken before the Honorable Mallory D. Cooper, Judge of the Circuit Court, on May 11, 2017, and as reported by Faye M. Gay, Certified Realtime Reporter, Registered Merit Reporter, and Certified Legal Video Specialist.

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Jacksonville Florida 32202
904-358-2090

ACCEPTED: DUVAL COUNTY, RONNIE FUSSELL, CLERK, 06/14/2018 09:49:46 AM

APPEARANCES:

MARK CALIEL, Esquire,
Assistant State Attorney,
Appearing on behalf of the State of Florida

JULIE SCHLAX, Esquire,
Appearing on behalf of the Defendant.

P R O C E E D I N G S

PROCEEDING PAGE

Pretrial.....4

MR. CALIEL: Your Honor, if we could address the case of Donald Smith. Mr. Smith is on page 2 of your morning calendar this morning.

THE COURT: Donald Smith on the bottom of page 2.

MS. SCHLAX: Your Honor, may we briefly approach?

THE COURT: You may.

(Counsel for the State and defense approached the bench for a side-bar conference out of the hearing of the court reporter.)

(Defendant present.)

MS. SCHLAX: Good morning, Your Honor.

My client, Donald Smith, is approaching to my left. Julie Schlax appearing on his behalf.

We spoke at side-bar in regards to just scheduling matters and it's my understanding that we would be passing the case until August -- I apologize. What day was it?

THE COURT: 8th.

MS. SCHLAX: August 8th.

MR. CALIEL: Yes, Your Honor. The State has no objection to that pass date and if the Court is comfortable on either setting the trial date today or setting the trial date at that point in time,

either is agreeable with the State. We've been in conversations with maintaining our witness contact to make sure everybody will be available pursuant to a trial date, but we're still awaiting the new instructions from the Supreme Court that were published and I anticipate we'll hopefully have them in the first part of the fall.

THE COURT: I think we can go ahead and schedule a date today. We discussed scheduling at side-bar and I think everybody is clear for that time frame. So the trial will be scheduled February 5th at 9:00 in Courtroom 407.

MS. SCHLAX: 7 is the ceremonial.

MR. CALIEL: 6 and 7. 406.

THE COURT: 406.

MR. CALIEL: Yes, ma'am.

THE COURT: February 5th in courtroom 406 for jury trial to begin the jury selection process and February 1st at 9:00 in Courtroom 406 for final pretrial. And August 8th at 9:00 in this courtroom for a pretrial. And we'll schedule any other dates between the 8th and the beginning of February to conclude any other pretrial matters.

MS. SCHLAX: Thank you, Your Honor.

MR. CALIEL: Great. Thank you, Your Honor.

MS. SCHLAX: May I be excused?

THE COURT: Yes. Thank you.

(Thus the proceedings ended.)

C E R T I F I C A T E

I, Faye M. Gay, hereby certify that the foregoing transcript is a true and accurate transcription of my Stenograph notes taken at the time and date stated herein.

Dated this 11th day of June, 2018.

/S/ Faye M. Gay

_____

Faye M. Gay, CRR, RMR, FCR, RPR, CLVS

Filing # 76355754 E-Filed 08/13/2018 02:45:46 PM

IN THE CIRCUIT COURT OF THE
FOURTH JUDICIAL CIRCUIT, IN
AND FOR DUVAL COUNTY, FLORIDA.

CASE NO: 16-2013-CF-5781-AXXX

DIVISION: CR-D

STATE OF FLORIDA

-vs-

DONALD JAMES SMITH,

Defendant.

STATE OF FLORIDA)
COUNTY OF DUVAL)

PROCEEDINGS before the Honorable MALLORY COOPER, Judge of the Circuit Court, Division CR-D, as cause in this matter came to be heard on the 11th of January, 2018, before Karen Waugerman, a Notary Public in and for the State of Florida at Large and Registered Professional Reporter.

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JACKSONVILLE, FL 32202
(904) 358-2090

ACCEPTED: DUVAL COUNTY, RONNIE FUSSELL, CLERK, 08/13/2018 04:19:35 PM
PAGE # 3938

APPEARANCES:

MELISSA NELSON, Esquire, State Attorney, and MARK CALIEL, Esquire, Assistant State Attorney, appearing on behalf of the State of Florida.

JULIE SCHLAX and CHARLES FLETCHER, Esquires, appearing on behalf of the Defendant.

January 11, 2018

THE COURT: We have a lot of pending motions in the Donald Smith case, case number 16-2013-CF-5781-AXXX. And they are mostly all scheduled the week of January 22nd. But the defense has filed one motion that appeared to the Court we needed to go ahead and hear before the week of the 22nd so that a decision could be made with the person.

MS. SCHLAX: Yes, Your Honor and can we bring my client out?

THE COURT: Oh, I'm sorry.

MS. SCHLAX: That's all right.

THE COURT: Yes.

(Defendant present).

MS. SCHLAX: Good afternoon, Julie Schlax and Mr. Charles Fletcher appearing on behalf of Mr. Donald Smith who is behind me and seated in the courtroom.

And, Your Honor, it's my understanding that the motion for sequestration that was filed by myself on January 5th is being called up for hearing at this time.

And after extensive conversation with my client, and we will discuss further on

January 22nd, we will continue to argue for the change of venue because it is our position that based on the amount of pre-trial publicity this case has received and continues to receive that unfortunately it is our belief we will not be able to empaneled a jury that can truly afford Mr. Smith his constitutional right to a trial by jury, and receive a jury that is in fact fair and impartial.

However, at this time after extensive consultation which has included not only the past week but also several months, my client has asked me to withdraw the motion for sequestration of the jury. It is his position that this trial will be a burden on all those involved and there's been enough of a burden. And we would withdraw it at this time.

MR. CALIEL: Your Honor, obviously we have -- we were objecting to the motion for sequestration so the State really has no issue with the defense withdrawing that motion.

I have supplied to counsel and the Court

a series of cases this afternoon. And without going into the full argument which I planned to go through with the Court as to why sequestration is only not necessary in this case, but it is fully within the discretion of this Court to deny sequestration other than during the deliberation process of the jury, I think it's important to note in the case law that I provided outline safeguards prophylactic measures the Court can do when the jury is recessed for the day and separates from -- the court separates from each other. And a process to go through to make sure that the jury is sufficiently admonished not to take any outside information, not media, Twitter blogs, anything of that nature.

And then also, and I specifically cited to the Court at this time and provided a copy of the case US v Porcarro (phonetically) which is 648 Fed.2d 753. That if there ever comes a time during the course of the trial that we suspect that there might be an issue with information going to the jury, that the Judge can go through and the Court can go

through a process to inquire of the jurors as to whether or not they've been exposed to the material that may be prejudicial. And then also whether or not that exposure has affected their ability to be fair and impartial in this particular case.

Obviously -- and cited multiple times during -- in the cases that I provided to the Court that sequestration is an extreme measure, it's the most burdensome measure we would place on any possible juror. And that it should be an issue of last resort because, in fact, sequestration is such a major intrusion on the jurors and the families themselves because they are isolated from their families and ability to conduct their normal lives.

And I believe that we are taking steps through discussions as to Court and counsel as to how we're going to conduct the jury selection process where we'll identify any jurors who had some sort of outside influence. And then at that point in time the Court can individually warn the jurors not to take in any additional information

that may affect their ability to be fair and impartial.

I think -- and I think the Court in essence denied previously but without prejudice the motion for change of venue. And I think we will see during the course of the jury selection process and individual voir dire that we are able to obtain a jury of fair composition who can be fair and impartial to Mr. Smith during the course of this trial. So I will still supply the cases to the Court in the event which of course Mr. Smith may change his mind as he has in the past. We believe the case law is clear that it is within this Court's discretion and there's ample measures available to this Court and counsel to prevent any improper influence upon the jury panel even if they are allowed to recess in the evening and go home. And we can just inquire and inform them before and afterward as to what their responsibilities are. I think jurors take their responsibilities extremely seriously and will abide by this Court's instructions at each and every phase of the trial.

THE COURT: Anything further?

MS. SCHLAX: No, Your Honor.

THE COURT: Okay. I think all other motions are already schedule for the week of January 22nd, whenever we can do them during that week. The week is free, I know there may be some can't be here on a certain day or only be here on a certain day, we will work around those schedules. So with that in mind this was the only motion I felt needed to be heard most haste, so we will be in recess till January 22nd in courtroom 406.

MR. CALIEL: May counsel and I approach briefly on a procedural matter?

THE COURT: Yes.

(Side-bar Conference.)

THE COURT: I did forget to do one thing. Mr. Smith, I need to ask you about withdrawal of this motion. If you would stand, please, and let me place you under oath. We will only be talking about the withdrawal of this one motion. If you'll raise your right hand.

(Defendant sworn).

THE COURT: Your attorney has indicated

on the record as you've heard that you have decided to move to withdraw your motion for sequestration of the jury that was filed on January 5th, is that correct?

THE DEFENDANT: Yes, ma'am.

THE COURT: And did you have ample time to discuss this decision with your attorneys?

THE DEFENDANT: Yes, ma'am.

THE COURT: Did you -- were you able to ask them any questions you had about it and receive appropriate answers?

THE DEFENDANT: Yes, ma'am.

THE COURT: Do you have any other questions that you would like to ask me about that decision?

THE DEFENDANT: None whatsoever.

THE COURT: Do you understand by withdrawing the motion that the jury at least initially would not be sequestered?

THE DEFENDANT: That's what I understand.

THE COURT: And is that what you wish to occur?

THE DEFENDANT: Yes, ma'am.

THE COURT: And I know we know this but

just for the record what is your age?

THE DEFENDANT: 61.

THE COURT: 61. And your highest level of education?

THE DEFENDANT: Formal education, 12.

THE COURT: Through high school?

THE DEFENDANT: Yeah.

THE COURT: Okay. And you've worked in your life, is that correct?

THE DEFENDANT: Yes.

THE COURT: At various jobs?

THE DEFENDANT: Yes.

THE COURT: Okay. You have any other questions before I grant your motion to withdraw this motion to sequester the jury?

THE DEFENDANT: No, ma'am.

THE COURT: All right. I do find that Mr. Smith has freely and voluntarily determined that he wishes to withdraw the motion for sequestration of the jury. And I'll grant his motion to withdraw the motion for sequestration and we will be in recess.

(Hearing concluded.)

C E R T I F I C A T E

STATE OF FLORIDA)

COUNTY OF DUVAL)

I, Karen Waugerman, Registered Professional Reporter, certify that I was authorized to and did stenographically report the foregoing proceedings and that the transcript is a true and complete record of my stenographic notes.

DATED this 13th day of August, 2018.

/s/ Karen Waugerman

KAREN WAUGERMAN, RPR

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Filing # 75662020 E-Filed 07/30/2018 09:38:51 AM

IN THE CIRCUIT COURT OF THE
FOURTH JUDICIAL CIRCUIT, IN
AND FOR DUVAL COUNTY, FLORIDA.

Case No: 2013-CF-5781-AXXX-MA

Division CR-D

STATE OF FLORIDA

-vs-

DONALD SMITH,

Defendant,

PROCEEDINGS taken before the Honorable Mallory D. Cooper, Judge of the Circuit Court, on January 22, 2018, and as reported by Faye M. Gay, Certified Realtime Reporter, Registered Merit Reporter, and Certified Legal Video Specialist.

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421 W. Church St., Suite 701
Jacksonville Florida 32202
904-358-2090

ACCEPTED: DUVAL COUNTY, RONNIE FUSSELL, CLERK, 07/31/2018 11:00:51 AM

APPEARANCES:

MELISSA NELSON, Esquire,

State Attorney,
Appearing on behalf of the State of Florida.

MARK CALIEL, Esquire,

Assistant State Attorney,
Appearing on behalf of the State of Florida

JULIE SCHLAX, Esquire,

Appearing on behalf of the Defendant.

P R O C E E D I N G S

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MR. CALIEL: Good morning.

THE COURT: Good morning.

I thought somebody had a conflict right at 10:30.

MS. SCHLAX: I do, Your Honor. I have a hearing this morning.

THE COURT: Is that correct?

MR. CALIEL: Your Honor, what counsel and I both discussed, the scheduling issues with the 10:30 conflict and out-of-state witnesses, we suggest that perhaps before we begin that we have a conference regarding procedure and scheduling so that we can outline to the Court which motions we're going to handle and when, how those are going on the record.

Some of the evidentiary portions we'll go be requesting Wednesday to handle those motions. They deal with live witnesses and telephonic witnesses from Virginia. I think the majority of the outstanding motions today are legal motions, some of which I think we're going to have agreements and some of which I think we're going to defer until potentially after a verdict in the guilt phase.

MS. SCHLAX: It's really just a matter of,

Your Honor, how you'd like to proceed in terms of this morning, understanding that at 10:30 I do have a conflict.

(Defendant present.)

THE COURT: So -- okay. Mr. Smith is in the courtroom now.

And just so he'll know, we're just discussing how we can procedurally put together how we're going to handle the things that need to be accomplished this week. And because of the conflict at 10:30 there's not a lot we can do prior to that time. Therefore, we may just recess and come back after --

Do you know how long that will be?

MS. SCHLAX: I can't imagine it being more than 20 minutes, Your Honor.

THE COURT: We could come back at 11:00?

MS. SCHLAX: Yes, Your Honor.

THE COURT: We could recess until 11:00 and then try to formulate how we're going to schedule things throughout the week, which we don't have to do that on the record. Just do a conference and try to figure out how to schedule.

MS. SCHLAX: Yes, ma'am.

THE COURT: Do you need time to explain that

to him, why he wouldn't necessarily need to be present for that just for procedural scheduling?

THE DEFENDANT: I believe I understand that already, Your Honor.

THE COURT: Okay.

THE DEFENDANT: Okay.

THE COURT: Thank you. Let me get you to raise your right hand.

(Defendant sworn.)

THE DEFENDANT: Yes, ma'am.

THE COURT: Okay. Because you're stating something on the record, it's better if it's under oath. So you do understand we're not going to actually get started until 11:00 o'clock. We'll recess and between the attorneys and I we'll map out how we're going to handle everything this week. It's been told that a lot of the hearings or one of the hearings, at least with live witnesses, will have to be on Wednesday of this wake. There are other matters that are more legal arguments that we can handle today after 11:00 o'clock when we resume.

We do have to recess at 4:00 o'clock today based on some other conflicts that we have, and then I'm not sure when else during the week,

Tuesday, Thursday, Friday, we may need to have additional time to complete everything that needs to be done to prepare for trial. But we'll get together, I've talked with the attorneys, we'll map it out exactly what we're going to do when and your attorneys will let you know before we resume at 11:00 o'clock. Okay?

THE DEFENDANT: Okay.

THE COURT: Thank you. We'll be in recess until 11:00.

(Recess.)

(Defendant present.)

MS. SCHLAX: Good morning, Your Honor. Julie Schlax appearing on behalf of Mr. Donald Smith.

Your Honor, if my client may be afforded the opportunity to sit down at counsel table.

THE COURT: Sure, he may.

MS. SCHLAX: And, Your Honor, we're here to address a number of pending motions, the first of which is our motion to adopt all previously filed motions by prior counsel and, as the Court likely remembers, this Court heard extensive arguments by Mr. Smith's prior counsel, Mr. Gazaleh, along with the State Attorney, Mr. Caliel, in regards to the capital case motions that were previously filed.

In the order on those motions the Court specifically delineated that there were several motions that the Court felt would be raised at jury selection and onward and so we are requesting that without having to file new identical motions that we be permitted to adopt those prior motions.

MR. CALIEL: No objection from the State.

THE COURT: All right. I'll grant your motion to adopt all previously filed motions by prior counsel.

MS. SCHLAX: Your Honor, the second motion the defense would like to request to be addressed is the motion to request that a photograph of Cherish Perrywinkle be used during the jury selection process.

MR. CALIEL: Your Honor, after discussions with the defense counsel the State is willing to stipulate or agree to this motion for the purpose of showing a single living photograph to prospective jurors during the individual questions. Counsel and I will meet outside of court and determine the photograph used and I think there's an agreement that perhaps we'll just have one hard like 8 by 10 copy of whatever photo is selected for that purpose.

MS. SCHLAX: Yes, Your Honor. And that's what we're seeking.

THE COURT: All right. Then I'll grant the motion allowing the defense to be permitted to show a single photograph of the victim during jury selection.

MS. SCHLAX: The third motion, Your Honor, is a motion for meaningful inquiry of jury selection and motion specifically for jury questionnaire.

There are two cases that I'd like to specifically cite that have been previously provided to the State yesterday and I've given a courtesy copy to the Court this morning.

And the first is Chandler v. State found at 442 So. 2d 171. It is a 1983 Florida Supreme Court decision.

Additionally, I'm citing a United States Supreme Court decision, Morgan v. Illinois found at 504 U.S. 719. It is a 1992 decision.

And both of them standing for the proposition that in a death penalty case, while obviously we must death qualify the jury, I felt -- I thought both were helpful and illustrative of the kind of process that we need to go through in order for both sides to properly exercise not only cause

challenges but peremptory challenges.

And with that comes the responsibility by defense counsel, and although jury selection is always viewed as within the trial court's discretion, we would ask to be given wide latitude to go into specifically not only jurors' general thoughts in regards to the death penalty, but also whether or not they could consider the specific mitigating circumstances that may be brought forth in regards to Mr. Smith's life.

While this is somewhat premature in terms of whether or not there will be a penalty proceeding, what is difficult for defense counsel, since the motion for bifurcated proceedings was denied, is to adequately address, and we almost need to ask these jurors to assume that there will, in fact, be a conviction to properly answer the death qualifying questions.

And so I provide those cases to the Court in hopes that the defense will be given wide latitude and also just assessing the correct standard when it comes to cause challenges for death scrupled jurors.

MR. CALIEL: Your Honor, I don't believe there's any objection to a meaningful inquiry of the jury panel. I think both sides have proposed

or have suggested the type of questionnaires that could be utilized. The State's in agreement that because of the publicity and attention, the nature of the crimes charged in this case, that a questionnaire filled out by prospective jurors could help us review any prior knowledge or information that a possible juror had regarding the case.

I think to the extent as to how long that questionnaire should be and the subject matter, I think it needs to be a workable version. At this point in time I have no objection to meaningful questioning of defense counsel. Obviously we won't know what the questions are until they're posed to the individual jurors or the jury as a whole, as a panel, and if we believe that anything went beyond what the law allows we'll make a contemporaneous objection at that point in time.

However, I think we would agree that a questionnaire could be useful in the jury selection process. I think the State's suggestions are a far more workable series of maybe six to eight questions in four pages that could highlight the issues that I think are hot-bed issues in this particular case and we can explore those jurors'

knowledge in regards to those.

So we have no objection to the use of the questionnaire. The length and the content of the questionnaire, though, I think should be limited to the point where it's a workable questionnaire that can be reviewed by the parties and then, of course, there can be meaningful inquiry on general jury selection questions as well as death qualification questions later on in the process once we have a panel of jurors, prospective jurors, who are not tainted by outside influence and who can be fair and impartial jurors in this particular case.

THE COURT: Anything further?

MS. SCHLAX: No, Your Honor.

THE COURT: Well, of course, I'm inclined to grant the motion because the State doesn't object. I would like to read the two cases first. I have not read them yet. But my inclination, of course, is to grant it.

Now, what will go in the questionnaire and what will be reserved for individual or further questioning is a different issue and we'll have to work those all out, but at this point, just because I feel obligated to read the two cases, I'm going to reserve ruling on this motion for

meaningful inquiry in jury selection, motion for jury questionnaire, with the understanding that I'm going to grant it. I just -- I want to read the cases first to see if there's anything additional that needs to be said in the order granting the motion. So I'll reserve ruling on that for now.

MS. SCHLAX: And, Your Honor, in contemplation of perhaps addressing this after there's some more informal discussion, at this time I'd like to go ahead and formally file the questionnaire proposed by the defense as well as the one proposed by the State.

MR. CALIEL: That's fine with the State, Your Honor.

THE COURT: Okay.

MS. SCHLAX: I guess as exhibits for this -- this pending motion.

Your Honor, the next motion I would suggest to call up for hearing is entitled the defendant's second motion in limine which concerns the surreptitious jail wire that this Court has previously heard testimony regarding and the motion to suppress.

And what we'd articulate to the Court and ask

the Court to consider in regards to -- and we accept the Court's position on our motion to suppress, we would just for record purposes renew that objection in terms of it being suppressed.

But in regard to a motion in limine and the analysis that we'd ask the Court to undertake is not only looking at whether or not it's probative versus prejudicial, but doing that with the caveat of understanding what the other evidence available to the State is.

I would suggest to the Court that it is -- the prejudicial value is so overwhelming in light of the other evidence that the State has to, I guess, if they -- if they try to argue that this [redacted] is relevant in some way, offering it in the guilt phase to identify Mr. Smith as the actual killer of Cherish Perrywinkle, I would suggest it -- it does not do so. I would just submit to the Court that we have what appears to be two men talking. We do not know in what circumstances they were talking, what they were possibly viewing when this kind of language was used.

There's a reference specifically to Wal-Mart, but not in any kind of context, and I would suggest is not even admission of any type of crime without

even understanding what it might have been that they were viewing. We don't know in anyway what -- we don't know in any regard whether or not both of these people that are speaking were actually looking out the windows of their isolation cells to even know that they're looking at the same thing.

You know, in this -- in this case, and I imagine the Court is well aware, we anticipate the State will produce evidence showing contact between Mr. Smith and Cherisher Perrywinkle, that he was the last person to be seen with her, that her body was found approximately six hours later, that there is DNA evidence that, according to the statistical analysis by those DNA experts, virtually excludes the possibility that anyone else could have perpetrated the sexual battery.

And so looking at that other available evidence to the State, which we anticipate they will put on, the prejudicial nature of this specific [redacted] really has no relevance and it's what I would suggest would be used solely to attempt to inflame the jurors. It doesn't have any probative value, in light of all the other evidence that will be presented, that Mr. Smith should actually be convicted of any of the crimes he's currently

indicted for.

MR. CALIEL: Your Honor, the amount of evidence against the defendant is not of relevance to this Court's determination when it comes to hearing this motion. And what I mean by that is no person, no judge, no litigant can anticipate what evidence will be more impactful than others when it comes to evidence of guilt in a particular case.

While some jurors may place a great emphasis on the DNA evidence, which is extremely inculpatory of Mr. Smith in this particular case, you don't know what else will be used to bolster that. And it would be akin to saying, well, we have DNA evidence, but a videotaped confession shouldn't be admitted because it's just cumulative at that point in time, it doesn't have any probative value because the DNA evidence is overwhelming.

The statements involved in this [redacted] are probative and there is context. And what we have done -- as the Court's aware, over [redacted] were obtained in this particular case. Of that initially the subject matter of our previous motion to suppress was 24

minutes, which was the defendant and a fellow inmate engaged in conversation over a 24-minute period of time. There are some statements that are made during those 24 minutes that even the State concedes at this juncture are prejudicial and the probative value is outweighed and so we have now redacted those 24 minutes down to less than four minutes worth of direct statements.

And I can place them in four clips and four categories. The first is to give context exactly what Ms. Schlax had just argued is we don't know what they're talking about, actually the first clip establishes that, that these are two inmates who are looking out their cell and they are commenting on young juvenile girls, and we know that because of their statements during that first clip when they referred to the age of the young females being somewhere between 12 and 13 years old.

The second clip, which we believe is probative, goes to motive, intent and premeditation when it comes not only to the first degree murder in this particular case, but also the defendant is charged with a sexual battery on a child under the age of 12 and the specific

comments that are made by this defendant in regards to that is my target area, that's what I go after, shows the sexual intent in the crime that he committed in this particular case.

So, again, the first clip talks about what they're looking at, and it's even bolstered or clarified when the defendant makes the comment that that is his target area when he's talking with the second inmate.

The third clip specifically references the word Wal-Mart and, more importantly, that Mr. Smith is talking with this other inmate while they're engaged in the conversation about these two young girls that they're looking at and says, quote, I'd like to run into her at Wal-Mart. That specifically relates back to the crime charged here because that is the same location in which this defendant came across -- or transported Ms. Perrywinkle and her family to the Wal-Mart and then he took Cherish Perrywinkle from that Wal-Mart. And so that's an admission relating back to the instant case in this particular case.

And then the fourth clip describes or is a conversation in regards to the anatomy of the child victim in this particular case. A question

is posed by the other inmate asking whether or not the victim in this case had a -- a butt or a posterior region that looked like that, and the defendant's admissions following that that, no, she didn't because she was a white girl, but she had a lot of butt for a white girl, is a direct admission to the crimes charged in this particular case. It's charged as a sexual battery and it identifies him as the perpetrator.

All of those statements are then later corroborated by the physical evidence and the circumstantial evidence in this case, which is him being seen leaving the Wal-Mart on videotape with the victim, the forensic evidence of DNA identifying him as the attacker and the person who committed the sexual battery.

We have tried the best that we could to eliminate any cumulative or not relevant content of those 24 minutes so that the only issue before the jury is the defendant's intent in identifying him as the person who committed these crimes against Cherish Perrywinkle.

And we believe that we have gone from 72 hours to 24 minutes to these four clips and that these four clips that involve statements of the

defendant are admissions by this defendant that he is the person that committed the crime and they are admissions that show his intent when he interacted with Cherish Perrywinkle on that evening and then later assaulted and killed her.

And so based upon that, Your Honor, while all evidence of guilt is prejudicial, that's the reason why it's being introduced. It's -- it's being introduced to show that the defendant has committed the crime. We believe we have only submitted to the Court, and would ask to submit to the jury for its review, very small relevant portions that have a direct purpose in this case which are corroborated by their evidence.

Statements such as, oh, that's a butt I would kill for, things of that nature, other statements by the other individual who's talking during the course of this we have taken out. We show that those are far more prejudicial and give no additional weight to the jury's consideration. However, these four specific clips are directly relevant, they are probative to the defendant's guilt when it comes to his intent and his premeditation in this case to commit these acts. And based upon that we believe they should be

admitted before the jury.

THE COURT: Anything further?

MS. SCHLAX: If I may, Your Honor.

Your Honor, one of the difficulties, especially with understanding how the State plans on eliciting and authenticating this particular tape, my understanding is they would do it through the detective who is involved, Detective Lonnie Mills, that it's not their intention to call Mr. Deviney.

MR. CALIEL: No, ma'am, actually it's not Detective Mills. There are three witnesses that we called during the course of the motion to suppress hearing, Detective Hinson, formerly with the State Attorney's Office who laid the foundation for why [redacted] were being obtained and what the efforts were entailing. Then two witnesses, one from the Jacksonville Sheriff's Office intelligence unit who, along with a security officer or a supervisor from the jail, would say as to how [redacted], as the Court heard, identify who the relative two individuals were in the two cells, and then Detective Carter in particular, or Officer Carter, rather, can identify the

individuals making the statements based upon his interaction with those individuals and knowing those are the two people who were in those cells at the time [redacted].

Officer Carter had lengthy interactions both with this defendant and Randall Deviney, who was the other individual who was [redacted].

And so based upon that evidence we can authenticate it, this is when [redacted] took place, this is during the time frame of when it took place, and Officer Carter can identify voice one as the inmate in the cell next to him, which I also believe is not really relevant. Who he is or what charges he had isn't relevant. We can refer to him as the other inmate. But he also can identify Donald Smith as the other declarant during the course of these conversations based upon his continual interaction with him since 2013, and he can also say that those were the two individuals who were in the cell where [redacted] was established.

So it's very clear we can establish who the declarant is and then the rest of it is just a silent witness listening to these two individuals talking during the course of these four clips.

And I think it's important the first clip gives context of what they're talking about and the remainder then grow in the probative nature based upon the comments that are being made and how it relates back to the charges against Mr. Smith in this case.

MS. SCHLAX: And my difficulty, and what I would point out to the Court that the Court has to consider, is obviously then it will be put forth in the guilt phase that my client has been in custody this entire time since 2013, that we will go to great effort, as we do in all criminal jury trials, where the accused is kept in custody pending trial to not tell the jury that, in fact, they've been in custody. We make sure that they aren't paraded out in the halls in their jail uniform, that every time they are professionally and appropriately introduced to the jury that they are in civilian clothes. This testimony will then put before this jury that my client has been incarcerated and, therefore, because he's incarcerated he must be guilty. And that inference, I would suggest, is problematic and should be taken into consideration in the analysis of whether it's probative or prejudicial.

MR. CALIEL: Your Honor, in a case where the defendant is charged with capital murder, with the rape and murder of a young child, it is almost assumed by any person with common sense that he's going to be incarcerated pending these cases. We're not going to highlight the fact that he was incarcerated the entire time frame. All we're going to highlight is through this testimony at this time and this place he was in custody and [redacted].

We don't need to talk about how long he'd been in custody. Any longer than that, unless they make it relevant by questioning how can you make an identification of this individual, because then it may be relevant. Well, I've been interacting with him for the last two years before [redacted] took place and I've been interacting with him for two years since [redacted] took place.

So I don't think it's overly prejudicial and it is not exclusionary, that, oh, the jury cannot know at all, especially when conversations and evidence arise during the course of their incarceration that this defendant has been incarcerated for any period of time post-arrest

and so that -- that prejudicial value is outweighed in this case.

THE COURT: Okay. Well, I've listened to the four clips and I'll take your arguments into account. I'll get an order out post haste before trial, obviously, but I'll reserve ruling on it for now.

MS. SCHLAX: And, Your Honor, I believe the only other motion we're seeking to argue this morning is the defendant's amended request for judicial notice. I do not believe there has been any kind of objection filed by the State and so we will be seeking to, during the course of the penalty phase, if we actually have a penalty phase, for the Court to take judicial notice of those prior judgments and sentences.

THE COURT: The second amended request for judicial notice?

MS. SCHLAX: Yes, Your Honor.

THE COURT: Any objection?

MR. CALIEL: Judge, we do not object for the Court to take judicial notice of certain judgments and sentences in the prior case. I think, though, that we have to probably explore this after conviction a little bit further and there needs to

be sort of colloquy in regards to any of these type of documents or arguments about these documents being placed in front of the jury for their consideration. So I think it's a little premature at this juncture as to how that's going to take place because obviously traditionally the State has filed a notice of aggravators and part of that is one of the convictions that was detailed in this particular case, but a lot of the other convictions or case files, including the civil commitment proceedings that are -- that are the subject matter with the notice, traditionally that information would not be before a jury absent the defense wanting that information to get before the jury.

So I think we have to deal with that post-conviction when we get to the penalty phase because I think there needs to be some sort of specific colloquy with this defendant about the admission or the discussion or the intent to introduce that evidence, because absent the defense wanting to do that the State would concede that these materials would not be admissible for our purposes at the penalty phase. So I think we have to address that at some point, Your Honor.

THE COURT: Okay. Anything further?

MS. SCHLAX: No, Your Honor.

THE COURT: Well, then I think I'll reserve ruling on the second amended request for judicial notice. There may need to be, as the State indicated, some colloquy on this. Doesn't mean I can't take judicial notice --

MS. SCHLAX: Right.

THE COURT: -- of course, but I think we need to go over this in a little bit more detail at a later time if it becomes appropriate to do so. So I'll reserve ruling on that second amended request for judicial notice until the appropriate time.

We did meet as far as scheduling and I believe we agreed that Wednesday is when we would hear the majority of the lengthier motions. It will take some time. So we'll be in Courtroom 406 this Wednesday, January 24th, at 9:00 o'clock.

I did pass one case from this morning. Not Mr. Smith, but Mr. Hubbard, to that same date in the anticipation that it will be disposed of. It's basically a modification of sentence. They did indicate they may not be ready, they think they'll be ready, so I asked them to be here right at 9:00 o'clock so we can handle that matter and then we'll

start on our hearings on Mr. Smith's case.

MR. CALIEL: And, counsel, did we want to argue the requested jury instruction today or --

MS. SCHLAX: Wednesday.

MR. CALIEL: We're going to argue that on Wednesday as well?

MS. SCHLAX: Yes.

THE COURT: Okay. I'm sorry. I didn't notice that. You're correct. We indicated maybe today, but we'll wait for Wednesday on that. So we'll have a lengthier day Wednesday with hearings on motions that are scheduled.

And I have the disk to give back to you that I've listened to of the four snippets.

I think that might be it. And then Wednesday we can talk about when we need to meet and then February 5th for jury selection.

MS. SCHLAX: Yes, Your Honor. May counsel and I briefly approach in regards to that?

THE COURT: Sure.

(Counsel for the State and defense approached the bench for a side-bar conference out of the hearing of the court reporter.)

MR. CALIEL: Your Honor, for the record, too, and I forgot, I apologize for not stating this

earlier, we have prepared a response to the [redacted] motion along with a proposed order and we'll submit that to the Court and counsel. Just details a couple of cases about the relevancy issues and probative versus prejudicial affect.

THE COURT: Okay. That would be helpful. Thank you.

All right. Anything else?

MS. SCHLAX: No, Your Honor.

THE COURT: Then we'll be in recess until Wednesday morning at 9:00 o'clock in here.

Thank you.

(Thus the proceedings ended.)

C E R T I F I C A T E

I, Faye M. Gay, hereby certify that the foregoing transcript is a true and accurate transcription of my Stenograph notes taken at the time and date stated herein.

Dated this 12th day of June, 2018.

/S/ Faye M. Gay

_____

Faye M. Gay, CRR, RMR, FCR, RPR, CLVS

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IN THE CIRCUIT COURT OF THE
FOURTH JUDICIAL CIRCUIT, IN
AND FOR DUVAL COUNTY, FLORIDA.

Case No: 2013-CF-5781-AXXX-MA

Division CR-D

STATE OF FLORIDA

-vs-

DONALD SMITH,

Defendant,

TESTIMONY AND PROCEEDINGS taken before the Honorable Mallory D. Cooper, Judge of the Circuit Court, on January 24, 2018, and as reported by Faye M. Gay, Certified Realtime Reporter, Registered Merit Reporter, and Certified Legal Video Specialist.

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Appearing on behalf of the State of Florida

JULIE SCHLAX and CHARLES FLETCHER, Esquires,

Appearing on behalf of the Defendant.

STATE WITNESSES

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THE COURT: Are you all ready on Mr. Smith? We're just waiting on Mr. Smith.

Are you all ready?

MS. SCHLAX: Yes, Your Honor.

MR. CALIEL: Yes, Your Honor.

(Defendant present.)

MS. SCHLAX: And, Your Honor, obviously there are a number of pending motions still pending. I believe it's the State's intent to argue the defendant's motions in limine regarding the arrest.

MS. NELSON: I apologize, Your Honor. I couldn't see you with the monitor. I thought you had somebody still at the bench.

Your Honor, for the record, Melissa Nelson on behalf of the State of Florida. We would like to proceed this morning in addressing defendant's motions in limine, first and third, which have been refiled today as the eighth and tenth.

THE COURT: Okay.

MS. NELSON: And we will call Dr. Rao to the stand.

THE COURT: Okay. Dr. Rao.

We'll start with No. 8 and No. 10.

MS. NELSON: That's correct.

Your Honor, when I am showing photographs there are going to be times where my back is going to be to the Court.

THE COURT: You're fine.

MS. NELSON: Thank you.

THE COURT: Thank you.

(Witness present.)

(Witness sworn.)

THE WITNESS: I do.

THE COURT: Good morning, Dr. Rao.

Yes, over here, please. Thank you.

MS. NELSON: Doctor, are you ready?

THE WITNESS: Yes.

DR. VALERIE RAO,

was called as a witness on behalf of the State, and after being duly sworn, then testified as follows:

DIRECT EXAMINATION

BY MS. NELSON:

Q Good morning.

A Good morning.

Q Will you please state your name for the record?

A Yes, my name is Dr. Valerie Rao. My last name is spelled R-a-o.

Q Will you advise how are you currently

employed?

A I am the chief Medical Examiner for District 4 which is part of District 3 which is Hamilton and Columbia Counties.

MS. NELSON: Your Honor, the defense has agreed to stipulate to Dr. Rao's qualifications as an expert so at this time I would tender her as an expert in the field of forensic pathology.

MR. FLETCHER: That's correct, Judge.

THE COURT: All right. Thank you.

BY MS. NELSON:

Q Dr. Rao, this morning we are here in the matter of the State of Florida versus Donald Smith. Are you familiar with this case?

A Yes.

Q And, in fact, did you attend the scene where the body of Cherish Periwinkle was recovered in 2013?

A Yes.

Q And why is that?

A Just to get a better understanding of the environment she was placed in and also to give to the police some idea of what happened to this child.

Q At the scene where the body of Cherish Periwinkle was recovered, did you direct photography be conducted from your office of the body --

A Yes.

Q -- at the scene?

A Yes.

Q And when Cherish Periwinkle's body was transported to your office, the Medical Examiner's Office, did you personally conduct the autopsy of Cherish Periwinkle?

A Yes, I did.

Q During any autopsy do you direct photography to be taken of the body and the autopsy as you conduct it?

A Yes.

Q For what purpose?

A For -- to check the documentation of the injuries that one sustains.

Q Consistent with your practice of taking photographs during an autopsy, did you do that in this case as well of your autopsy of Cherish Periwinkle?

A Yes.

Q Have you reviewed those photographs in preparation for your testimony today?

A Many times over.

Q And have you also spent some time to reduce the total number of autopsy photographs to those which will facilitate your testimony in this trial?

A Yes.

MS. NELSON: Your Honor, I'm going to tender at this time, for the record, which we will premark as State's 2.

May I approach?

THE COURT: Yes.

BY MS. NELSON:

Q Dr. Rao, do you recognize this DVD?

A Yes.

Q And how do you recognize it?

A So these are the photographs that were taken from the Medical Examiner's Office by our photographer.

Q And how do you recognize that this includes all of the autopsy photographs?

A The dates and signature.

Q The date is 1 -- is January 22nd, this week. Did you come to my office and actually again review all of the autopsy photos in their entirety?

A I did.

Q Dr. Rao, do you believe in describing the injuries sustained by Cherish Periwinkle as well as rendering your opinion as to cause and manner of death, the photographs, the autopsy photographs, will facilitate your testimony?

A They are very essential to the testimony.

Q Okay. Let me go ahead and direct your attention to your monitor. Is your monitor up?

MS. NELSON: Julie, do you want to come up here?

BY MS. NELSON:

Q Let me direct your attention to what's been premarked for identification purposes as State's Exhibit Triple G, GGG.

Dr. Rao, for the record, will you please describe what this photograph is of?

A Yes, this is the photograph of the child that I examined and autopsied in case No. 13 dash 1034. The decedent's name is Cherish Periwinkle.

Q In fact, the autopsy number is a unique identifier, unique to Cherish Periwinkle?

A It is in the year 2013. She was the 1034th body that came to the Medical Examiner's Office.

Q The next series of photographs, Dr. Rao, are as to surface injuries to Cherish Periwinkle's body.

Let me direct your attention to what's been premarked for identification as State's Exhibit Triple H, HHH. Dr. Rao, can you describe what is depicted in State's Triple H?

A Yes. Two injuries here. One is antemortem that you can see right there (indicating) and the other

are the postmortem injuries that she sustained in the location that she was discovered and they are postmortem insect activity.

Q Okay. So let me take a step back. Will you explain what antemortem is?

A Antemortem is prior to death. Postmortem is after death.

Q And how are you able to distinguish these injuries, one being sustained before death and the other after death?

A Okay. So the antemortem injury like right here, you see the body responding to injury by the pink discoloration. It is a bruise. Where the postmortem injury is yellow. If one was to touch this it would be very dry and parchment like to the touch. So this one is postmortem and the bruise is antemortem.

Q And for the record you have circled -- put a circle around the right breast of Cherish Periwinkle, is that correct?

A Correct.

Q Let me direct your attention to what's been premarked for identification as State's Exhibit Triple I and will you explain what is depicted in Triple I?

A Yes, this is the close-up of the injury sustained and the anatomic location. If you look at

this, this is her right nipple and aureola is there and the bruise is right there (indicating).

Q Dr. Rao, do you, in fact, have an opinion about how that injury was sustained?

A Yes.

Q And what is that opinion?

A It is as a result of most -- most probably a hickey-like area, traumatic.

Q Let me direct your attention to what's been premarked for identification purposes as State's Triple J. Will you describe what this photograph depicts?

A So she has multiple injuries on her left leg. Right there she had a bruise, right there she has a bruise (indicating). Right here she has injury (indicating). She has a scratch mark right there (indicating).

Q And for the record you've used your finger to circle four separate injuries as depicted on State's Triple J.

A Correct.

Q Let me direct your attention to State's Triple K and will you describe what this photograph is of?

A So this is an abrasion on the inside of her left leg (indicating).

Q Let me direct your attention to State's Triple L. And, Dr. Rao, will you please describe what this depicts?

A Yes. So she has a very long linear abrasion on her right leg and then one on the outside of her right knee (indicating).

Q Will you describe the area where the body of Cherish Periwinkle was recovered?

A Yes. So it was a mashy area. There were short palm trees and there were long blades of grass. So this child, she was taken through that environment. The linear scratches could have very well have been due to that.

Q The abrasions you see on the body are consistent with the physical environment from where her body was located?

A Yes.

Q Let me show you State's Triple M, that's MMM, and can you identify what this photograph depicts?

A I can't find the location because it's a close-up so I would need the anatomic location for it and then I could tell you where. There's a bruise right there (indicating).

Q Let me direct your attention to State's Triple N, NNN, and will you describe what this

photograph depicts?

A So you're looking at the back of her leg. This is the left leg. You have a bruise right there (indicating) and a bruise right there (indicating).

Q I should have asked earlier. The bruises and the abrasions that you have testified to, are they antemortem or postmortem?

A Antemortem.

Q I'm sorry.

A Antemortem.

Q Let me direct your attention to State's Triple O. Will you describe what this photograph depicts?

A Yes. So one can very well see the contrast between antemortem and postmortem injury in this photograph. You have an antemortem injury right here (indicating).

Q And, for the record, Dr. Rao, you have circled the injury reflected on the upper back of the right arm?

A Correct. And then you can see the same postmortem injury which is yellow and dry so you can tell antemortem versus postmortem.

Q And for the record you have just circled the area of injury to the right upper torso of --

A Correct.

Q Thank you.

I'm now going to take you through a series of photographs that depict injury to Cherish Periwinkle's neck.

Let me direct your attention to State's Triple P, PPP. First will you orient the Court to what we are looking at?

A Yes. So we are looking at the front of her neck and to orient you, this is her left ear, her right ear, and this is the area of her chin right there (indicating). So you can see that she has tremendous injury on the front of her neck. The blue discoloration or bruising, the linear pattern that she has on her neck, and because of the sustained pressure on her neck she has these very fine petechial areas on the skin of her neck extending up to her chin.

Q Dr. Rao, will you please explain what petechia is?

A Petechia are the result of small blood vessels that rupture because they are overfilled and the reason they are overfilled is because they're not allowed to empty. So it's like a balloon that's overfilled and it bursts and that result gives you the small pinpoint areas of hemorrhage.

Q Dr. Rao, for the record, I have just marked the front injury to the neck of Cherish Perrywinkle (indicating). What do you see -- do you have an opinion as to the markings on the neck?

A Yes. It's a -- it's some sort of ligature that gives you that linear pattern.

Q Let me direct your attention to State's Triple Q, QQQ. And this photograph reflects what, Dr. Rao?

A Okay. So this is the right side of her neck and you can continue to see that linear pattern of the ligature that was applied to her neck and see smaller areas of injury on her face on the right side (indicating).

Q Let me direct your attention to State's Triple R. And what does this photograph reflect?

A So here you can see on the left side of her neck that linear pattern of the ligature continuing on to each side of her neck.

Q And each of these photographs reflect a different perspective or angle of the neck, is that correct?

A Correct.

Q And why, Dr. Rao, are these photographs necessary for you to describe these injuries to a jury?

A I think that jurors need to get the visual understanding. You know, I could sit here and talk about petechia and talk about bruises and abrasions, but the lay person does not really understand what basic issues are in terms of injury. So this really brings it home.

Q Before we go to that, let me go back to Triple R. Dr. Rao, what is your opinion as to cause and manner of death?

A Strangulation.

Q Let me direct your attention to State's Triple S. Will you describe what is depicted in this photograph?

A Yes. So this, again, is the front of the neck but to continue onto her face and the reason this picture demonstrates her injury and how it was sustained is if you look at her chin she has an abrasion and a contusion (indicating). She has this abrasion right here (indicating). She has --

Q For the record, you've circled an injury to what part of her face?

A To her upper lip.

Q Thank you.

A And then the area of the nose (indicating) out where the septum is and on the side and those injuries

are consistent with this child being somehow suffocated to prevent her screaming. And so it was such a force that you actually have abrasions and some of the teeth show hemorrhage into the gumline as a result of the sustained pressure.

Q Let me direct your attention to State's Triple T. This is a photograph of what?

A This is the back of her neck showing you, again, that linear pattern of the ligature going on the back of her neck (indicating).

Q And perspective is what side of the back of the neck?

A That's the left side according to the midline of the back.

Q Let me direct your attention to State's Triple U. And this photograph, does this depict the right back of the neck?

A Yes. So this is the right side and, again, you can see that linear pattern (indicating).

Q Consistent, again, with a ligature?

A Correct.

Q Okay. You mentioned bleeding inside of the gums. Let me direct your attention to State's Triple V as in Victor. What is reflected in this photograph?

A So you can see that there's hemorrhage along

the gumline on her front teeth. These (indicating).

Q What would cause bleeding along the gumline?

A Again, in this particular case, because of the combination of the injuries to her face, it's consistent with the pressure that's exerted on her nose, her mouth, her chin.

Q Dr. Rao, is this reflective of injury (indicating)?

A That, again, is just the -- the inside of her lip showing the same contused area.

Q And for the record I have directed your attention to the upper interior right of the front lip.

A Upper right, correct.

Q Let me direct your attention to State's Triple W. What does this photograph reflect that the previous photographs do not?

A Okay. So here you can see the -- all the injuries are aligned, the gumline hemorrhage, to include the upper lip and it's all midline, to include the circumference of her nostril (indicating) and the tip of the nose of the underside. So it's all in one linear pattern.

Q And, in fact, does this photograph reflect -- is it a close-up of her nostrils?

A Yes.

Q Let me direct your attention to State's Triple X. What does this photograph reflect?

A That's a close-up showing the margin of her left nostril.

Q And what is reflected in this photograph?

A The abrasions.

Q Okay. Now let me direct your attention to a series of photographs related to Cherish Periwinkle's eyes.

Will you please describe what is depicted in State's Triple Y?

A So this is the lower lid on the inside and what you can see are petechia, both very fine and larger, indicative of an asphyxial type death, which in this particular case is strangulation.

Q State's ZZZ. What does this photograph depict, Dr. Rao?

A So after the fluid in the eye is removed the petechia become more easy to photograph and the extent of the petechia. You can see it's really large, course petechia indicating a struggle between the assailant and the victim.

Q Dr. Rao, you mentioned that you have been a forensic pathologist for 37 years. Do you know how many autopsies you have conducted?

A Thousands.

Q You're familiar, obviously, with the evidence of petechia?

A Yes.

Q Do you have an opinion as to the amount of petechia and what it means as it relates to the amount of force or struggle used?

A Unfortunately, we can't really quantitate something like force, but this child struggled to the extent that she got these big course large petechia. There is actually hemorrhage into the -- into the sukus. Between the eye and the lid, there's like a groove in there and she had hemorrhage as you can see all down in here (indicating).

Q Now, let me direct your attention to photograph Quadruple A, AAAA. What does this photograph reflect?

A And so this is trying to demonstrate the sukus, which is that -- that gutter. We can call it a gutter between the eye and the lid and you can see that area of hemorrhage right there (indicating), very pronounced.

Q And the previous photographs were of Cherish's right eye. Is this her left eye?

A Yes.

Q State's Quadruple B as in boy. Is this also a photograph of the left eye?

A Yes. And --

Q What does it reflect that the others --

A So you can see the hemorrhage into the sukus again and the petechia.

Q At the top of the eye, is that correct?

A Correct.

Q Different from the previous photograph?

A Yes.

Q State's Quadruple C.

A Again, the --

Q What does this reflect that the other two do not?

A This is on the inside of the eye to show you the extent of the -- the petechia and the hemorrhage that she has. Every part of the white of her eyes are involved in this particular multiple feature.

Q This is also of Cherish Periwinkle's left eye?

A Yes.

Q Dr. Rao, did you also document, observe and document, injuries to Cherish Periwinkle's genital area?

A Yes.

Q I'm going to show you a series of photographs of her genital area. I'd ask you to look at what's been premarked as State's Quadruple D as in dog and identify what this photograph depicts.

A So this is without us opening the area. So this is an as-is and this is not normal on an eight year old child.

Q Well, first of all -- first of all, will you describe actually what the photograph is of?

A Of her genitals.

Q Okay. You said it's not normal?

A No.

Q What do you mean by that?

A There are different abnormalities in this -- in this picture. We start from the top and you see the urethra where it passes the urine, just to clarify, and not is it only swollen, it's bruised. And that gives you the red color (indicating) surrounding the actual opening.

Then you have the vaginal opening which is torn, it's completely torn. So you can actually see into the vagina. And there's a very thin bar of tissue between her vagina and her rectum because of the injuries sustained not only to the -- to the anal area which is torn, her vaginal area is also torn such that

there is a very thin piece of tissue between her anus and her vagina.

Q Let me direct your attention to State's Quadruple E for identification. What is this photograph? What angle does this -- is this photograph from?

A This is a close-up of the injury that she sustained. You can see the thin piece of tissue right here (indicating). This is her anus which is torn (indicating). This is her vagina that is torn (indicating).

Q And let me direct your attention to the skin around the rectum (indicating). What do you see in that skin?

A It's dark purple and blue because it's bruised so surrounding the tearing. There is the bruising on the soft tissue.

Q Is that consistent with injury being sustained to that area?

A Tremendous injury.

Q I'm sorry.

A Tremendous injury.

Q Okay. Let me direct your attention to State's Quadruple F, also a photograph, a close-up photograph, of the genitalia. What in State's

Quadruple F is depicted that is not depicted in the previous two photographs?

A So here you can see the vaginal wall that is torn right there (indicating). Here you can see the anal wall that's torn (indicating), and you can actually see into the vagina because of the trauma of the surrounding wall. You can see the bruising of her urethra (indicating).

Q You've indicated, using your finger, injuries to the vaginal wall. These injuries depicted in this photograph are -- were not seen in the prior two photographs; is that fair?

A Yes, because now it's actually opened to demonstrate the wall tearing of the vagina and the anus.

Q Dr. Rao, when you conduct an autopsy in a case -- well, in this specific case, determining that the cause and manner of death was strangulation, will you describe what steps you took to further investigate the throat and larynx of Cherish Periwinkle?

A Yes. So what is done in cases of strangulation or suspected strangulation, a neck dissection is performed, an interior neck dissection, and it's layer by layer of the muscles that go all the way to the voice box or the larynx and also the back of

the neck is inspected.

Q And for what purpose do you conduct a dissection such as this?

A Because it's supportive of the diagnosis of cause of death, in this case strangulation, because there can being hemorrhage into the skeletal muscle and the soft tissue.

Q So now let me direct your attention to what's been premarked as State's Quadruple H. So HHHH. And will you for the Court orient the Court to what -- to the body in this photograph?

A Yes. So this is the chin right there (indicating) and the -- the rest of the body is right down here (indicating). So her shoulders are in this location (indicating). And so after all the organs are removed from the chest and abdomen and also the brain is removed, this way anything that's found in the neck has to do with an antemortem condition.

And if you look at the -- there is what is strap muscles in the neck. She has hemorrhage into the strap muscles which look like a blush into the skeletal muscle right there and there (indicating). Smaller areas of hemorrhage right there (indicating). So this supports the cause of death as strangulation.

Q Let me direct your attention to State's

Quadruple I and will you describe what is depicted in State's Quadruple I?

A So this is the voice box, that one is looking at, but it's open to demonstrate the petechial hemorrhages on the inner surface of the voice box and this is again supported evidence of the cause of death as strangulation. You can see all the petechial hemorrhage right there (indicating), all on the epiglottis.

Epiglottis is the small covering that covers the airways when one swallows food so it's very pliable. But this is something that we see in cases of strangulation.

Q Do you also, as a matter of course, dissect the scalp during an autopsy?

A Yes.

Q For what -- and did you do that in this case?

A Yes.

Q And for what purpose?

A So the scalp is reflected so that one can get into the cranium or the -- the box that holds our brain. So in order to reach that level one has to reflect the scalp.

Q Let me direct your attention to State's Quadruple G. And will you orient the Court to what is

depicted in State's Quadruple G?

A Yes. So this is -- to orient, the ear is right here, this is the front of the head and this is the back of the head (indicating) and in this area she has hemorrhage into her scalp. This is the left parietal occipital area (indicating).

Q And what does this hemorrhaging mean to you?

A Blunt injury. Blunt impact.

Q Now I'm going to direct your attention to photographs of the defendant.

Did you also, in addition to conducting the autopsy, take photographs of Mr. Smith?

A I did.

Q Do you see Mr. Smith in court today?

A I do.

Q Is he seated at counsel table in an orange suit?

A Yes, he is.

Q And for what purpose did you photograph Mr. Smith? Well, first, let me back up. I'm sorry. On what date did you photograph Mr. Smith and where?

A Actually I photographed him on multiple occasions in sequence to establish the fact that his injuries that he had on his penis was not an infectious disease but it was injury and as a result of which if

one looks at these injuries in progression one sees that they actually fade with time. And this is not infection but trauma.

Q So let me direct your attention to what's been marked as State's Exhibit Double W. It's WW, for the record. Is this a photograph of Mr. Smith?

A Yes, it is.

Q Let me direct your attention to what's been premarked as State's Quadruple J and is this a photograph of the defendant's penis?

A Yes, it is.

Q There's gloved hands in this photograph. Are those your gloved hands?

A Yes.

Q Did you, in fact -- so did you take the photograph?

A No, I directed them by our forensic photographer.

Q Dr. Rao, will you please describe what is depicted in State's Quadruple J?

A Yes. So he has multiple bruises on his penis. The one at the tip right here (indicating) is a circular injury or bruising. The ones on the shaft of his penis are multiple bruises right there (indicating).

Q And what do these injuries indicate to you, Dr. Rao?

A Consistent with somebody being forcefully asked to do oral sex.

Q Let me direct your attention to State's Quadruple K and will you describe what is depicted in State's Quadruple K?

A Yes. So this is -- in order to better visualize the injuries it is stretched a bit.

Q What is stretched?

A The penis. So that the skin is then -- you can see the injuries much better (indicating) and they are, in fact, multiple contusions.

Q And, in fact, Dr. Rao, is this photograph taken from a different angle than that taken in State's Quadruple J?

A Yes.

Q And, lastly, let me direct your attention to State's Quadruple L. And will you please describe what is depicted in State's Quadruple L?

A So this is the undersurface of his penis and, again, you can see on the shaft of his penis multiple bruises.

Q Dr. Rao, in preparing for your testimony today did you take care in identifying the photographs

that would facilitate your testimony to insure that you were not duplicating photographs?

A Yes. Correct.

Q Is it your opinion that each of the photographs that we've gone through today depict something unique that another does not?

A Yes.

MS. NELSON: Your Honor, may I have just a moment?

THE COURT: You may.

(State counsel conferring.)

MS. NELSON: Your Honor, let me tender at this time State's Exhibit 2 identified by Dr. Rao as a disk containing all of the autopsy photos taken in this case, 74 photos, and let me now tender State's Composite Exhibit 1, which is a CD which contains all of the photos which we intend to tender into evidence during the trial and seek to admit today.

I have no further questions.

THE COURT: Any cross-examination?

MR. FLETCHER: Yes, Your Honor. Thank you. I have a few questions.

CROSS-EXAMINATION

BY MR. FLETCHER:

Q Dr. Rao, you've conducted thousands of autopsies in your career, right?

A That's correct.

Q And in each one you use a map of a human body, right?

A Yes.

Q And you describe where injuries are on that map, right?

A Body diagrams, that's correct.

Q A diagram. Okay. And with respect to sexual organs, do you have separate maps that you use or separate diagrams so you can point out where different injuries are?

A Well, we don't have that descriptive area. You don't have that.

Q Okay. But as you're doing the autopsy, every time you see an injury you document it, right?

A That's correct.

Q In a report?

A Yes.

Q So to testify in front of a jury about the injuries to this child, you don't have to have photographs, right?

A Okay. So let me explain. As a gentleman, I'm sure you are unaware, most people are unaware, the lay

person, of what a woman's genital area looks like and position of where the injuries are located, and as a result of which these photographs are crucial to the testimony. I could be talking about, you know, and they would have absolutely no idea. So I think it is as important as the testimony to present the photographs and demonstrate where exactly these injuries are located.

Q Okay. So like you said on direct examination, it facilitates your testimony, right?

A It's crucial.

Q Okay. And I think you used the words it brings it home, right?

A Well, it makes a person understand exactly where the injuries are.

Q Okay. And would you admit, as long as we're talking about gentlemanliness, these photographs are kind of shocking, right?

A Extremely.

Q Extremely shocking?

A Because the injuries that this child sustained are shocking so...

Q And not only that, but we're looking at pictures of a naked child, right?

A Well, that's part of an autopsy. I mean --

Q That's part of what makes it shocking, right?

A Well, it's part of the autopsy protocol. That is taken as standard procedure and I have used photographs my entire professional career to demonstrate to jurors as to the extent and the nature of the injuries.

Q I understand, Dr. Rao, and I've been looking at them as well as these State Attorneys and probably some of this court staff, but for jurors who have never been exposed to any of these types of photographs, they're shocking, right?

A Well, they're part of justice, don't you think?

Q I'm not trying to get into a debate with you.

Do you think they're shocking to average people who have never seen those types of photographs before?

A It is shocking, but it's the fact. We have to present fact.

Q Okay. But you can testify as to injuries, right?

A I could lecture to medical students and forensic pathologists, but talking to a lay panel of people unexposed to areas of anatomy that are for the most part protected, it's extremely -- it's not all the

facts. Let's put it that way.

Q Okay. And with respect to the pictures of Mr. Smith's penis --

A Yes.

Q -- most of us know what that looks like, right?

A I hope, yes.

Q Okay. And so a map with a description of the injuries to his penis would suffice.

A Well, I don't think so because when you look at -- you know, what I'm doing is interpreting on the pictures. So I could be interpreting when they see the actual circular pattern of injuries, then you compute in your mind that this is as a result of sucking this area of one's anatomy that you could then think, okay, how this happened. So jurors would get that -- the rationale why I'm saying what I'm saying. I could say it, you know, but this actually is the scientific proof this is probably how it was sustained.

Q Thank you, Dr. Rao.

MR. FLETCHER: That's all I have, Judge.

THE COURT: Anything further?

MS. NELSON: Nothing further.

THE COURT: May this witness be excused?

MS. NELSON: Yes, Your Honor.

THE COURT: Thank you, Dr. Rao. We appreciate your time this morning.

MS. NELSON: Thank you.

Your Honor, I might suggest that we go ahead and argue this motion. We have another witness that we're going to call as to a separate motion telephonically and since it's the defendant's motion.

MR. FLETCHER: Judge, the motions I filed are No. 8 and No. 10. I think I gave a copy to the Court this morning.

THE COURT: I have it.

MR. FLETCHER: And, Judge, this is not a complicated argument. As I said during Dr. Rao's testimony, we've all seen this stuff before. Your Honor has seen this before, myself having done this for 20 years, Ms. Nelson, Mr. Caliel. We've all seen this stuff before. But to a jury I just think, particularly when it involves the sexual organs, the anus, and some of the other pictures where they peel back the skin to show injuries, I think it's sufficient for a jury to hear the testimony about those injuries from a qualified and, frankly, unchallenged State expert. I think that's sufficient. Anything else I think is

extremely inflammatory. I think it's shocking to the jury. I think she admitted the photographs are shocking and I think the probative value is clearly outweighed by the prejudicial nature of those photographs. And so I'd ask that every single one of them be stricken.

THE COURT: Thank you.

MS. NELSON: Your Honor, this afternoon we'll be filing a response on the merits in response to defendant's motion in limine and will provide you a courtesy copy of all the cited authorities so I won't belabor the law, but will simply explain that the law is very well-established that autopsy photos are admissible.

The fact that these are shocking certainly would not prevent their admission. This evidence, by nature of what it demonstrates, is indeed damaging to the defendant. It's damaging to the defendant and extremely prejudicial to the defendant because it is evidence of his actions.

These photographs, we've introduced the full autopsy as well as those photographs that we intend to use in front of the jury. There are 74 photos in total that were taken during this autopsy. We seek to introduce only 30. The State has, with the help

of Dr. Rao, carefully gone through these photographs in order to choose those that will facilitate and aid her testimony in describing to the jury both the injuries sustained by Cherish Periwinkle and the cause and manner of death.

An example, in talking to her today, is petechia. To the lay person a chart cannot do what a photograph can explain.

And so the balancing test, I suspect what the defense is asking you to balance is whether or not these photographs are -- their prejudice outweighs their probative value and the State submits, in fact, they do not.

There were seven photographs taken of the defendant's penis, three of which we seek to introduce. Three are taken from different angles and depict a different perspective of the injury and there is no authority that the defendant -- defense counsel has cited to which would bar the admission of this evidence.

Obviously if this evidence was applied for improper motive, if the State was intending simply to inflame jurors or appeal improperly to a juror's emotion or if, in fact, we sought to introduce all 74, there would be an argument as to duplicity or

cumulative nature, but the fact that we are only seeking to introduce those photographs which, in fact, facilitate the jury and the fact finder's understanding of the Medical Examiner's expert opinions, these should be admitted.

THE COURT: Okay. With the understanding that you're going to file a response and also submit case law, I'll reserve ruling on the issue of these photographs, all of them, until I can have the opportunity to review that. But I'll get it out as quickly as I can so we have it.

MS. NELSON: We also, Your Honor, will be submitting to you a proposed order and we'll submit that to you so that you can review it and revise it as the Court deems fit.

THE COURT: Okay. Thank you.

MR. FLETCHER: Thank you, Judge.

THE COURT: Um-hum.

MS. NELSON: Okay. At this time do we want to -- I suggest we take up the defendant's third motion in limine which goes to the surveillance videos. We will be calling Chris Iber of the FBI telephonically on this motion and we'll probably need a couple of minutes to let him know that we'll be calling.

THE COURT: Do we need a short recess or --

MS. NELSON: Will you give us five minutes?

THE COURT: Let's do a ten-minute recess. We'll be in recess for ten minutes.

MS. NELSON: Okay.

(Recess.)

THE COURT: Are you all ready for Mr. Smith?

MS. SCHLAX: Yes, Your Honor.

THE COURT: Yes, we're ready.

(Defendant present.)

MS. NELSON: So, Your Honor, at this time we're taking up defendant's third motion in limine. Pursuant to that motion we seek to telephonically inquire of Christopher Iber of the FBI, and I have a phone number to call him.

Before we do that, for the record, I know the parties agreed, stipulated, and the Court has reviewed the subject matter of the motion, both the enhanced surveillance video of the Dollar General and Wal-Mart.

THE COURT: Right.

MS. NELSON: Both have been enhanced with legends, arrows to indicate the relevant parties in the matter and have been time-lapsed so to condense the surveillance videos for convenience

for the fact finder.

So with that I can give you the phone number.

And let me -- the Court has reviewed those.

THE COURT: I have reviewed both -- both of them twice and have the legend in my mind, et cetera et cetera.

So I'm prepared to proceed and we're on defendant's third motion in limine --

MS. NELSON: Yes, ma'am.

THE COURT: -- to prohibit the State from producing that enhanced or digitally altered surveillance video. I did notice also when it was time-lapsed that shows on the screen how many seconds or minutes were removed before it moved on to the next segment.

MS. NELSON: It does.

(Phone dialling.)

(Phone ringing.)

THE WITNESS: Chris Iber, image analysis.

MS. NELSON: Hi, Chris. Melissa Nelson. How are you?

THE WITNESS: I'm fine.

MS. NELSON: Chris, you're on a polycom in Court and we'll go ahead -- well, you can't be -- we're not taking this as sworn testimony so --

THE COURT: We're not?

MS. NELSON: No.

Chris, are you prepared to proceed with inquiry regarding the videos you enhanced for the matter of State of Florida versus Donald Smith?

THE WITNESS: Yes, I am.

THE COURT: Do you know how to spell his name, please?

MS. NELSON: Yes.

CHRISTOPHER W. IBER,

was called as a witness on behalf of the State, and testified as follows:

DIRECT EXAMINATION

BY MS. NELSON:

Q Will you state your name, Mr. Iber, and spell it for the record?

A Yes, my name is Christopher, middle initial W, last name Iber, I-b as in boy e-r.

Q Where do you work?

A I am currently employed with the Federal Bureau of Investigations forensic audio, video and image analysis unit in Quantico, Virginia.

Q Thank you.

Will you describe your responsibilities in the FAVIO unit of the FBI?

A I am a forensic examiner of questioned photographic evidence. My official title is photographic technologist. I conduct four types of exams on photographic evidence. One type of exam is comparison analysis. This includes comparing anything that could be depicted in an image. Those images can come from video, still cameras, printed media. I compare that to other objects or persons that are depicted in a different image or video or to the object itself, such as a piece of clothing or a firearm.

The second type of exam I do is photo imagery, which is the science of taking photographs, images. The type of exam I would do for this would be to do height analysis or to determine the velocity of a vehicle that's depicted in a video.

The third type of exam I do is authenticity. That's where I determine if an image has been manipulated or computer generated. I've also used this type of exam to try to identify a specific image that came from a specific camera.

And then the last type of exam I do is enhancement or information extraction. This is where I take information that is already present to make the image clearer or by making pertinent information more apparent by circling it or adding indicators to point

out features.

I also have collateral duties where I teach, I teach digital video retrieval to federal and state and local law enforcement. I also teach reverse projection photography and image comparison workshops at different law enforcement conferences.

Q In this matter, that is State of Florida versus Donald Smith, were you provided surveillance video from the State of Florida?

A Yes, I was.

Q And were you provided that video -- those videos for the purpose of the fourth thing that you do, and that is enhancement?

A That is correct.

Q And what were you asked to do with both of the surveillance videos that you were provided?

A I was asked to add arrows to point out individuals within the video.

Q Mr. Iber, how did you obtain information regarding who those pertinent individuals were.

A I received an exemplar video from Robert Hinson which showed me which camera views and who the pertinent people were of interest.

Q And who -- what pertinent people did you identify in both the surveillance videos from Dollar

General and the surveillance videos from Wal-Mart?

A The three people of interest I was told about were of a man, a woman and the oldest daughter. The woman apparently had three daughters with her in the videos.

Q Now, Mr. Iber, the Court, the Judge, yesterday took the time to review your enhanced videos and is familiar with the legends that you used to enhance both videos, but for the record will you go ahead and describe what you did to each of those videos in order to indicate the relevant parties?

A So I used a non-linear digital video editing software, Adobe Premiere, which is just an off-the-shelf software. I imported the different video segments and using filters within the software I added different colored arrows which then just -- the process of going through the videos, having arrows follow different -- the three different individuals that I mentioned earlier.

I did a blue-colored arrow for the man and then, I cannot remember, the woman was either orange or yellow, I believe, and then for her daughter was the other colored arrow.

I also placed a white arrow on the van that entered the parking lot of both the Dollar General and

the Wal-Mart as well. And I simply just added those to a timeline and -- and then once the video was -- the different sequences, the different cameras used, were edited together, I then just returned that as my result copy.

Q Now, the legend in specific colored arrows that you used to identify the car in question as well as the parties, did you on each of these videos include that legend at the beginning of the video?

A Yes, I did.

Q Did you digitally alter these videos in any way?

A Well, technically, yes. Those arrows didn't exist before so I mean the arrows would be an alteration to the video. So the answer would be, yes, I altered those videos.

Q Did you change -- let me reframe the question, though.

Are the videos as they exist with the enhancements and the legends, do they remain accurate copies of the videos that you received, with the exception of time-lapse which we'll discuss in a minute?

A Yes.

Q Okay. Will you explain, when you talk about

editing, will you explain time-lapse and how you reflected the time-lapse in the copies you produced?

A Yes. You want me to talk -- talk about that now?

Q Yes.

A So in the process of putting arrows in the videos I noticed there were sections of time where the pertinent people were not observed in both camera angles, and the video we're talking quite a few different camera angles. And so it was a lot of video. So a way to make the video shorter so that it would be easier to watch, to observe, I -- when I was editing if the pertinent people were not in the camera view at the time I just edited that section out and I put in the amount of elapsed time that I removed.

Q When you say you put in the amount of elapsed time, how did you indicate time-lapse on the copy that you produced?

A I actually put in text that would say, you know, approximately five minutes time has lapsed between -- between the two -- the two views.

Q So either the inclusion of the time indicator or the legend, did you alter any of the images reflected in the video surveillance?

A No.

Q Okay.

MS. NELSON: I have nothing further of Mr. Iber.

THE COURT: Cross-examination?

MS. SCHLAX: Thank you, Your Honor.

CROSS-EXAMINATION

BY MS. SCHLAX:

Q Good morning, Mr. Iber.

Can you hear me okay?

A Yes.

Q Sir, what is the purpose of the software? You mentioned Adobe Premiere. What does that software do for you?

A It is simply a non-linear editor. It's just a digital editing software so that you can bring in digital video and you can enhance, you can -- you can create timelines, you can add title screens, you can add texts, in this case arrows as well. It's just -- it's one of the tools that we use.

Q And I guess to try to understand your testimony, did you personally go through all of these video segments and search for who you believed to be the relevant parties or does that software do that for you?

A No, the software does not -- does not do that.

I had an exemplar video that was produced by Mr. Hinson that was given to me to use to find the pertinent areas.

Q I'm sorry. For whatever reason I didn't quite catch that with the microphone. Can you state that answer again?

A Sure. The software does not do any kind of automated function. I was provided an exemplar video of the pertinent areas of the video and that is what I used to determine what was pertinent in the videos.

Q All right. Are you saying exemplar?

A Yes, I was given a video from Mr. Hinson, a copy of the videos that were provided by Wal-Mart and Dollar General.

Q Okay. And so you then, after you had looked this into your software that allows you to add the arrows, you personally went that and made your own determination as to whether or not you saw the relevant parties?

A Basically, yes.

Q Okay. And then based on your interpretation of watching the video and deciding, oh, I think that's the same relevant party throughout all these different videos, you then added the arrows?

A I added the arrows based on the video that

indicated the pertinent people that was provided to me by Mr. Hinson.

Q And that was -- that was based on your own, I guess layman's interpretation of watching it and deciding, oh, there's that person again?

A It -- it -- following the videos and following the motion of the people, yes.

Q Okay.

MS. SCHLAX: I don't have anything further, Your Honor.

THE COURT: Anything further?

MS. NELSON: No, ma'am.

THE COURT: Is that all we need from this witness?

MS. NELSON: Yes, ma'am.

THE COURT: Okay. Thank you for appearing by phone. We appreciate it, Mr. Iber.

THE WITNESS: Thank you.

THE COURT: And we're through with his testimony for today so you can just hang up.

I'm not sure he can hear me.

MS. SCHLAX: May I proceed?

THE COURT: You may.

MS. SCHLAX: Your Honor, there are three cases that I cited to the Court in regard to our

motion in limine and I provided those previously to give the Court kind of a backdrop in terms of how we assess and our argument is this.

Under Wagner v. State, which is a First District Court of Appeal decision from 1998, the Court kind of set out and refers back to -- excuse me -- Hannewacker, which is spelled H-a-n-n-e-w-a-c-k-e-r, the City of Jacksonville Beach. And that is a Supreme Court of Florida decision from 1982 found at 419 So. 2d 308.

If I neglected to give the cite to Wagner, Wagner is found at 707 So. 2d 827, First District Court of Appeal, 1998, as to the proper procedure for authentication. And it lays out that, in fact, something can be authenticated, especially surveillance type video, under almost kind of a silent witness theory.

I also cite Dolan v. State which is a Fourth District Court of Appeal decision from 1999, found at 743 So. 2d 544, which again talks about proper authentication.

And in all three of these cases the appellate courts ultimately found the trial court was correct in allowing the proffered videos and/or pictures into evidence. But all of them, and I'll

point back to the Dolan opinion on page 2, talk about the images were not altered or edited. What we have here is we have not only a splicing of multiple tapes, but we also have the interpretation of a witness who was not there, who has gone through and determined and put arrows to suggest, and is essentially testifying, to what should be within the province of the jury. It is for the province of the jury to determine if and when they see what we're calling relevant parties.

They talk about it all these cases, that essentially photographs and videos speak for themselves and it's up to the determination of the jury to determine who the relevant parties are.

And so we would argue that this enhanced video is an alteration, it's actually having an expert from FBI say, well, in my opinion I watched these videos and in my lay opinion I watched these people go through and seems to me this is where they were within the store. That's something the jury can do all on their own and I would suggest it is far too prejudicial than probative and improper to actually authenticate these enhanced videos.

MS. NELSON: Your Honor, the two videos in

question are that of Dollar General and Wal-Mart. They each have been enhanced with legends for the purpose of aiding the fact-finder, that is the jury, in tracing the movements of the relevant parties and the relevant vehicle. And that is of the vehicle, Donald Smith, of Rayne Periwinkle, the mother of the victim, and Cherish Periwinkle, the victim.

And, secondly, these two surveillance videos have been lapsed to reduce the amount of essentially viewing time for the jury so that the jury is not wasting minutes upon minutes looking at camera frames or perspectives that are not relevant to the case at hand.

Surveillance tapes are admissible upon the same bases as photographs and videotapes. The law is well settled on that. There is no authority that defendant points to which would bar the admissibility of this evidence, assuming that we successfully can authenticate it at trial, which we intend to do.

We obviously did not put on the custodial witnesses today for the purpose of this hearing, but will do so in front of the jury.

There is no specificity before the Court as to

dissimilarities between the original surveillance videos, which have been provided in discovery, and those enhanced copies which we seek to introduce in front of the jury.

In the motion the defendant alleges that the marked videos omit certain time frames and they are certainly at liberty in trial to offer the originals.

Their motion does not speak with any specificity or object or state a problem that we have, in fact, enhanced an image that is not of the defendant. And certainly if that argument, if defense has an issue with that in front of the fact finder that would go to the weight and certainly not to the admissibility of these surveillance videos.

Also in defendant's motion they argue that these enhanced videos, which through the testimony of Mr. Iber none of the images are altered at all and they are accurate copies of the originals, but defendant argues that these videos could mislead the jury. And to the contrary the State submits that, in fact, these will only serve to clarify for the jury the people that they need to follow.

We will, as we're doing with the autopsy motion and motion related to photographs of the defendant,

will be submitting to the Court a response. We'll be filing a response and submitting all of the cited authorities later today as well as with the proposed order.

And one last point, Rayne Periwinkle, during trial will actually on direct examination, she'll view still-shots from both the Dollar General videos as well as the Wal-Mart video and she will, in fact, identify herself, her daughter, Cherish Periwinkle, and the defendant Donald Smith, and lay that basis for the jury.

THE COURT: Anything further?

MS. SCHLAX: No, Your Honor.

THE COURT: Okay. I'll reserve ruling on the defendant's third motion in limine.

MS. SCHLAX: And, Your Honor, I believe the last motion on schedule to be heard this morning is the defendant's motion for requested jury instruction regarding mercy.

THE COURT: Do we have the one regarding the rope?

MS. SCHLAX: I apologize.

THE COURT: The rope.

MR. FLETCHER: One more.

MS. SCHLAX: Oh, yes, I apologize. Mr.

Fletcher has that.

Your Honor, since filing this motion, I have received the proposed jury instructions for penalty phase proceedings that the State is proposing. And where I would suggest this would be most applicable -- and I don't know if the Court has had an opportunity to look at these.

THE COURT: No, I have not.

MS. SCHLAX: And I'll be happy to provide this to the Court. It would be -- they're not numbered. It's on the -- excuse me -- the sixth page and it's in regards to the weighing process that will be asked of a potential penalty phase jury and it is regardless of each juror's individual weighing process, even if find that the sufficient -- I think that's a typographical error, but even if you find that sufficient aggravators outweigh the mitigators, the law neither compels nor requires you to determine that the defendant should be sentenced to death.

And, Your Honor, that has been a longstanding law within the State of Florida. What we would specifically request is the jury instruction proffered to the Court, and that is to remind jurors that it is their absolute ability to

consider mercy in that process and that's why we are asking you are never required to impose the death sentence, you have complete control and discretion in determining whether the circumstances of this case justify a sentence of death. You must consider whether the aggravating factor or factors you have found to be established in this case sufficiently outweigh the mitigating factor or factors you have found to have been established before you may consider imposing a sentence of death. However, regardless of your findings as to aggravating and mitigating circumstances, you are neither compelled nor required to recommend a sentence of death. You may always consider mercy in making this determination.

And, Your Honor, I cited United States v. Rodriguez, 581 Federal 3d 775, which also relates back to the Allen decision of that same circuit. And just in recognizing our jurisprudence regarding the death penalty from state court decisions all the way up to the United States Supreme Court that our death penalty is based on a system that allows 12 people to individually make a decision and even if they determine, and we specifically tell them even

if they determine that the aggravating factors outweigh the mitigating factors, they still, on their own, for their own reasons, may vote for life imprisonment. And one of those reasons can be mercy.

I would suggest to this Court that it is incumbent upon the Court to so instruct the jurors that they have that ability. That has always been the longstanding, the law in regards to this issue, and that's why we're requesting this specific language.

MR. CALIEL: Your Honor, in response, and, again we'll be filing a memorandum in support of our position in this case and the cited case law, but just to summarize it briefly to the Court.

When special instructions are requested by the defendant, the defendant must establish four things. First that the special instruction was supported by the evidence; two, that the standard instruction did not adequately cover this defense theory; that the special instruction is correctly stated in the law and was not misleading. Or three things, rather. This is cited in Hudson v. State at 992 So. 2d 96. There's a Florida Supreme Court case from 2008.

And specifically, as the defense has already

pointed out, the jurors' role and their ability to impose a life sentence, regardless of the weighing of the aggravators and mitigators, is outlined in the standard jury instructions and the Supreme Court held in Mendyk, M-e-n-d-y-k, v. State at 545 So. 2d 846, so a Florida Supreme Court case from 1989, that there is no requirement that a jury be instructed on its pardon power.

And in that case they were specifically dealing with the requested instruction on mercy. And based upon the law and the fact that the standard instructions adequately and carefully instruct the jury as to how they can conduct their business in the penalty phase, this special instruction gives no guidance to them and it is not explaining further area of the law or evidence that are requiring of a special instruction.

THE COURT: Anything further?

MS. SCHLAX: No, Your Honor.

THE COURT: Okay. Again, I'll reserve ruling until I get the State's response and read the applicable case law. But then I don't have a copy of the new -- or amended motion regarding -- motion in limine regarding -- I think you said you were going to provide them. I'm sorry. I do have

-- well, I have one. I don't know if it's your current one. Did you amend one?

MR. FLETCHER: Yes, Your Honor, defendant's ninth motion.

THE COURT: I have the ninth motion.

MS. SCHLAX: Your Honor, I know the State will supply, at the same time they're supplying to the Court their response. If there's anything that we feel we need to address, we'll contact the Court with that.

THE COURT: Okay. Of course.

So the ninth motion in limine.

MR. FLETCHER: May I proceed?

THE COURT: Sure.

MR. FLETCHER: Judge, in our ninth motion in limine, while Mr. Smith was allegedly at the Wal-Mart, a bundle of what appears to be mountain-climbing rope was purchased and placed in a buggy and pushed around the store and it was later recovered in Mr. Smith's van. And I'm asking the Court to prohibit the State from introducing any testimony or the photographs -- or photographs of that rope.

I think it's speculative, the rope was not used, it was never taken out of its packaging. I

think it provokes in the minds of the jury that Mr. Smith was evil and was planning to do something with the rope to the child, but he never -- never did that. It's not alleged that he did and any inferences drawn from the presence of that rope are just speculation. So I'd ask that the Court prohibit the State from introducing the rope or pictures of the rope.

MR. CALIEL: Your Honor, for clarification sake, and I'll be submitting for the Court for review State's Exhibit B marked purposes and I'll present that to the Court.

And to correct the record, I think Mr. Fletcher is just mistaken. The rope in question, which is depicted in State's Exhibit B for identification, is photographed at the check-out counter at Wal-Mart. The testimony at trial would be that Mr. Smith, along with Rayne Periwinkle and her children, were shopping and walking around the Wal-Mart in various sections of the store and that the family members, Rayne Periwinkle and her children, were putting certain items into the cart for purchase. While the shopping was going on, and they were mainly children's clothes, children's shoes, things of

that nature, Rayne Periwinkle will testify that the only item that was placed in that cart by this defendant was the rope which is depicted there. She identified that and pointed that out to police who then photographed it after they pulled it from the shopping cart and placed it on -- in what the photograph depicts there is the turnstile for grocery bags that is at the end of the -- end of the aisle in which the cashier checks out an individual.

Ms. Periwinkle will testify at trial that this was the only item that Mr. Smith placed into the shopping cart. She identified that and pointed out to the police that that could be photographed and collected as possible evidence.

Where it is relevant, Your Honor, and the Court heard testimony here today, is the manner and cause of death was strangulation by ligature. And while this defendant did not utilize the rope that was placed in the shopping cart, because he left the store before any purchases were made with Cherish Periwinkle, it goes to show relevancy when it goes to the intent, and planning and premeditation that this defendant had in his actions on that particular night.

Obviously if the victim was shot, the victim was stabbed, things of that nature, there might be a less relevant portion of this testimony, but specifically because the manner of death was strangulation by ligature, and this was the only thing that the defendant placed in the shopping cart before he left the store with Cherish Periwinkle, I think it goes to show his intent and what's in his mind at the time when he's engaged with these individuals at the store. And for that purpose we believe that photograph is relevant.

THE COURT: Anything further?

MR. FLETCHER: No, Judge. I just disagree with the relevance of it. I believe it -- it's just prejudicial. It was never taken from the store so...

THE COURT: I'll reserve ruling.

I think that's all the motions we have scheduled for today.

MR. CALIEL: Yes, Your Honor, I believe that does cover everything.

MS. SCHLAX: Yes, Your Honor.

THE COURT: Is there anything else we need to do before we recess?

MR. CALIEL: No, Your Honor.

MS. SCHLAX: No, Your Honor.

THE COURT: All right. We'll be in recess. Thank you.

MR. CALIEL: Your Honor, I'm sorry. We're next in court for final pretrial.

THE COURT: Yes, I'm sorry. February 1st in here for final pretrial.

(Thus the proceedings ended.)

C E R T I F I C A T E

I, Faye M. Gay, hereby certify that the foregoing transcript is a true and accurate transcription of my Stenograph notes taken at the time and date stated herein.

Dated this 30th day of July, 2018.

/S/ Faye M. Gay

_____

Faye M. Gay, CRR, RMR, FCR, RPR, CLVS

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IN THE CIRCUIT COURT OF THE FOURTH JUDICIAL CIRCUIT, IN AND FOR DUVAL COUNTY, FLORIDA.

Case No: 2013-CF-5781-AXXX-MA

Division CR-D

STATE OF FLORIDA

-vs-

DONALD JAMES SMITH,

Defendant,

PROCEEDINGS taken before the Honorable Mallory D. Cooper, Judge of the Circuit Court, on February 1, 2018, and as reported by Faye M. Gay, Certified Realtime Reporter, Registered Merit Reporter, and Certified Legal Video Specialist.

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APPEARANCES:

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Appearing on behalf of the State of Florida.

MARK CALIEL and VANESSA WHEELER-SANCHEZ, Esquires,
Assistant State Attorneys,
Appearing on behalf of the State of Florida.

JULIE SCHLAX and CHARLES FLETCHER, Esquires,
Appearing on behalf of the Defendant.

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(Defendant present.)

THE COURT: Okay.

MR. CALIEL: Good morning, Your Honor.

THE COURT: Good morning.

MR. CALIEL: Your Honor, I believe both the State and defense are prepared to call the case of Donald Smith.

MS. SCHLAX: Yes. Excuse me, Your Honor. Julie Schlax and Mr. Charles Fletcher appearing on behalf of Mr. Smith who is to my right.

MR. CALIEL: And Mark Caliel and Vanessa Wheeler-Sanchez on behalf of the State of Florida.

THE COURT: We're here, the trial is scheduled to begin -- the trial is scheduled to begin with jury selection Monday, February 5th, in this courtroom.

MS. SCHLAX: Yes, Your Honor.

MR. CALIEL: The State is ready to proceed to jury, Your Honor.

MS. SCHLAX: As is the defense.

THE COURT: There are some pending motions. Let me go over those. Some of them I'll follow up with a written order.

The first one is that is a Motion to Adopt All Previously Filed Motions By Prior Counsel.

And I'll go ahead and sign the order on that one today granting that motion.

The second is a Motion to Request the Defendant to Be Permitted to Show Photograph of Victim During Jury Selection. I remember that the State had no objection and I'll grant that and I'll sign that order today.

MR. CALIEL: And, Ms. Schlax, will the exhibit be prepared prior to Monday?

MS. SCHLAX: I have it with me.

MR. CALIEL: Okay. Great. We'll just review that, Judge. I don't think there's any issue regarding that.

THE COURT: The third one is the Motion for Meaningful Inquiry in Jury Selection and Motion for Jury Questionnaire, and I'm only reserving ruling on that until we finalize the questionnaire. I'm going to grant it, but until we have the final questionnaire I'll just -- I'll wait to rule on that.

MS. SCHLAX: And, Your Honor, for the record, I have previously filed as exhibits in regards to that motion the requested questionnaire request by the defense as well as the proposed questionnaire by the State. We would be requesting the full

questionnaire presented by the defense.

THE COURT: Maybe we'll get back to that one while we're still on the record.

MS. SCHLAX: Yes, Your Honor.

THE COURT: But for now I'm going to put that one aside. Maybe we can finalize that this morning.

The next one is entitled Defendant's Second Motion in Limine Regarding the Surreptitious Jail Monitor, and I'm going to deny that motion and I'll follow that up with a written order.

Just for the record, we had argument on all this at the prior court date.

The next one is the Defendant's Third Motion in Limine Regarding Digitally Enhanced and Altered Surveillance Videos, and I'm going to deny that motion and I'll follow that up with a written order.

The next one we already agreed, Defendant's First Motion in Limine to Instruct on All Mitigating Circumstances, that that's not ripe yet, so that will be held in reserve until the time it becomes appropriate to deal with that.

The next one is Defendant's Motion for Requested Jury Instruction -- Or Motion for Mercy Jury Instruction. And I'll deny that motion and

I'll follow that up with a written order.

The next one, the Defendant's Motion in Limine Regarding Autopsy Photographs of the Underage Victim, and I'll deny that motion and I will follow that up with a written order.

No. 9 is the defendant's motion in limine regarding the Defendant's Motion in Limine Regarding Final Verdict, I'm going to reserve ruling on that one until Monday.

No. 10, or the next one in line on the index of motions, is the Motion in Limine Regarding Photographs of the Defendant, and I'll deny that motion and I'll enter a written order following the hearing.

The last one on the index of pending motions is the Defendant's Amended Request for Judicial Notice, and I believe we all agreed that judicial notice can be taken. There was some argument that most of what's being -- or all of what's being asking to be judicially noticed isn't relevant until later in the trial, if I remember correctly.

MR. CALIEL: I believe almost exclusively for penalty phase, Your Honor.

MS. SCHLAX: Yes, and the request for judicial notice was if we should find ourselves in

a penalty proceeding that is when we would actually request for judicial notice.

THE COURT: Okay. So I'll reserve on that until it becomes ripe.

MS. SCHLAX: And, Your Honor, my understanding of reading the rules is that unless a formal objection is filed by the State of Florida that the Court's compelled to take judicial notice.

THE COURT: Right. We'll deal with it at the appropriate time.

I think that's all the pending motions. You want to go back to the -- this third on the index of pending motions and motion for meaningful inquiry in jury selection and motion -- or in use of the written questionnaire. We've all agreed to use the written questionnaire. The defense and State both provided proposed written questionnaires.

The defense proposal was significantly more lengthy and they had a valid reason for asking for that lengthier questionnaire. The State's was a more general questionnaire, if you will, that didn't go into as many details as we normally go into as we're actually verbally questioning the jury.

And our goal is we're going to be dealing with

a lot of jurors, we'll talk about that later, but we'll be bringing them in in groups of 100. They'll be filling out a questionnaire. At the end of the day, hopefully at the end of the day on Monday, we're going to have 300 questionnaires to review, both the defense and the State and the Court, and the majority of the additional questions, if not all of the additional questions, requested by the defense in the proposed written questionnaire that they submitted to the Court are questions, as I said, that we normally ask the jurors or the panel of potential jurors as we're questioning them in the actual jury selection. The actual jury selection won't occur until we've been able to go through the 300 questionnaires, individual questionnaires, or question some jurors, until we reach a panel of an appropriate size that we can then begin the actual jury selection.

And so I'm going to go ahead and grant this, but I'm going to use as a basis the State's proposal for the written questionnaire. We've added a few things, but even though the defense objects to using that questionnaire, they did request certain questions be added to the State's proposal, which I've done, and we'll go over that at some point

before we start jury selection, and that's the one we'll use.

There may still be modifications that need to be made, but since there still could be specific questions or objections to the proposal, other than objecting to the use of the amended State's proposal, I realize that objection will remain on the record, but other than that there still could be some changes made. So I'll reserve ruling on that until we have finalized the questionnaire that we're actually going to use.

MS. SCHLAX: Yes, Your Honor.

MR. CALIEL: And, Your Honor, just so it's clear for the record, I understand that defense is objecting. It is the State's position we are not objecting to defense counsel having meaningful questioning of the jury panel themselves, just not in the written questionnaire format. We believe that's more appropriate for the jury selection process once a panel of a certain number is obtained.

THE COURT: Correct. Okay.

All right. That's all the pending motions, I believe.

MS. SCHLAX: Yes, Your Honor.

THE COURT: And I will say that when we're through on the record we do need to remain. We've changed the seating in the courtroom slightly which will change the seating chart slightly. So we need to be able to look at that together and so that you can -- each side and the Court can remedy their seating can chart and have it correct before we start on Monday.

The Clerk's Office, I will say on the record, has gone to great lengths to prepare, not for this trial particularly, although that's included, but for the increased number of jurors that will be in the building on Monday, not all of which are because of this trial and the need that we indicated we have for the number of jurors they'll be bringing to us initially, which is 300. There are other trials that are needing a lot of jurors as well.

So they come up with a plan, which seems to me to be very well thought out and very appropriate, to try to still get us all this trial and any other trial that's going on Monday for jury selection, our jurors as soon as they can.

And I just want ed to put that on the record. They really have worked hard. And they're also

going to have extra clerk employees involved in dealing with the movement of all these people.

And I guess I should put on the record, too, the changed seating chart in this courtroom does allow, I believe the media -- I don't want to misstate anything, but my understanding is that they thought that they would need seating for six media members, but in an abundance of caution they will have both rows in the back, the very back rows in this courtroom for jury selection. We're not talking about the trial now. Just jury selection. And if they want to put six on one side and six on the other or three and three or however they want to divvy up those two back rows, one on each side, then they're allowed to do that. And they're aware.

MS. SCHLAX: And, Your Honor, with that may I interrupt the Court and just for record-keeping purposes we would renew our motion for change of venue. Just in the Court's efforts to accommodate the vast amount of media, as we look out into the courtroom right now, for a final pretrial, the number of media outlets, our concern of the media coverage and the ability for Mr. Smith to receive a fair trial we feel is going to literally be

impossible. But just for the record, we would continue that objection and continue to ask the Court to change the venue.

THE COURT: Okay. I realize that will be a continuing objection. Of course, we don't know if we're going to be able to be successful or not, but the Court has ruled that I think we can and so we're going to try. And if we're not successful we'll have another hearing another day on that issue.

MS. SCHLAX: Yes, ma'am.

THE COURT: But it will be a continuing objection on the record.

MR. CALIEL: Yes, Your Honor.

THE COURT: Is there anything else?

MR. CALIEL: Nothing else from the State, Your Honor.

MS. SCHLAX: No, Your Honor.

THE COURT: Just for everybody's information, the Clerk's Office is going to attempt to get us jurors by 10:30 Monday. That might be a little bit optimistic, they said. I would think a reasonable time would be sometime between 10:30 and 11:00 and I just tell you that so that you can prepare accordingly everyone.

However, I think we should meet earlier than that, of course, to make sure we have everything in order and are ready to go when the jurors are, in fact, delivered. So I think we should still have maybe a 9:30 time.

MS. SCHLAX: That's fine, Your Honor.

MR. CALIEL: That's fine, Your Honor.

THE COURT: And if you need time to discuss with your client before that, let security know so they can make sure to have him here in time for that.

MS. SCHLAX: Yes, Your Honor.

THE COURT: Anything else?

MS. SCHLAX: No, Your Honor.

MR. CALIEL: Nothing else, Your Honor.

THE COURT: I would ask you to wait, we're going to be off the record, and we'll have a look around the courtroom to make sure we all know the seating arrangements.

MR. CALIEL: Yes, Your Honor.

MS. SCHLAX: Yes, Your Honor.

THE COURT: Okay?

MS. SCHLAX: Yes, Your Honor.

THE COURT: Okay. Thank you. Monday at 9:30 for jury selection in this courtroom.

(Thus the proceedings ended.)

C E R T I F I C A T E

I, Faye M. Gay, hereby certify that the foregoing transcript is a true and accurate transcription of my Stenograph notes taken at the time and date stated herein.

Dated this 6th day of August, 2018.

/S/ Faye M. Gay

Faye M. Gay, CRR, RMR, FCR, RPR, CLVS