FIRST DISTRICT COURT OF APPEAL
STATE OF FLORIDA

No. 1D19-3597

NICHOLAS N. KERR,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

On appeal from the Circuit Court for Calhoun County.
Shonna Young Gay, Judge.

December 15, 2020

PER CURIAM.

AFFIRMED.

B.L. THOMAS, WINOKUR, and TANENBAUM, JJ., concur.

Not final until disposition of any timely and authorized motion under Fla. R. App. P. 9.330 or 9.331.

Mark V. Murray, Tallahassee, for Appellant.

Ashley Moody, Attorney General, and Julian E. Markham, Assistant Attorney General, Tallahassee, for Appellee.

Florida First District Court of Appeal Docket

Case Docket

Case Number: 1D19-3597

Final Criminal 3.850 Notice from Calhoun County

Nicholas N. Kerr vs. State of Florida

Lower Tribunal Case(s):2010-CF-187, 2010-CF-187

3/16/2022 11:02:02 AM

Date Docketed	Description	Filed By	Notes
10/04/2019	Notice of Appeal Filed	Mark V. Murray 0182168	
10/04/2019	Notice of Appeal Transmittal Form	Carla Hand	
10/04/2019	Order Appealed		
10/04/2019	Received Records	Carla Hand	164 pages
10/07/2019	Notice of Appeal / Acknowledgement letter		
10/21/2019	Initial Brief on Merits	Mark V. Murray 0182168	
10/28/2019	Docketing Statement		
11/18/2019	Notice of Filing No Answer Brief	Julian E. Markham 0884731	
04/07/2020	Answer Brief to be Filed (9.141/Toler)		Pursuant to Florida Rule of Appellate Procedure 9.141(b)(2)(C), Appellee is directed to file an answer brief within 30 days of the date of this order. See Collins v. Virginia, 138 S. Ct. 1663 (2018) (holding that the vehicle exception to a warrantless seizure set forth in Carrol v. United States, 267 U.S. 132 (1925) does not apply to private residential property and curtilage). Appellant may file a reply within 30 days thereafter.
05/07/2020	Motion for Extension of Time to File Response	Julian E. Markham 0884731	
05/12/2020	Grant EOT Response to Court Order		Appellee's motion for extension of time, filed May 7, 2020, is granted. Time for filing a response in compliance with this Court's order dated April 7, 2020, is extended up to and including July 6, 2020. No further extensions will be granted absent a showing of bona fide emergency.
07/06/2020	RESPONSE	Julian E. Markham 0884731	Response to Order SC
08/05/2020	Appellant's Reply Brief	Mark V. Murray 0182168	

12/15/2020	Affirmed - Per Curiam Affirmed		
12/30/2020	Motion For Rehearing		and written opinion FILED BY::: Nicholas Norris Kerr
12/31/2020	AA/PT Serve Copy/File Supp Cert of Svc 10 days		This Court does not provide service for litigants. Appellant is directed to serve a copy of the motion for rehearing docketed December 30, 2020, on the Attorney General, and to file a supplemental certificate of service within 10 days of this order which demonstrates that service. The failure of Appellant to timely comply with this order will result in striking of the motion for rehearing, as authorized by Florida Rule of Appellate Procedure 9.410(a).
02/01/2021	AA/PT Serve Copy/File Supp Cert of Svc 10 days		This Court does not provide service for litigants. Appellant is directed to serve a copy of the motion for rehearing docketed December 30, 2020, on the Attorney General, and to file a supplemental certificate of service within 10 days of this order which demonstrates that service. The failure of Appellant to timely comply with this order will result in striking of the motion for rehearing, as authorized by Florida Rule of Appellate Procedure 9.410(a).
03/15/2021	Deny Appellant's Motion for Rehearing		Appellant's motion docketed December 30, 2020, for rehearing and request for written opinion is denied.
04/05/2021	Mandate		
04/05/2021	West Publishing		
04/14/2021	Article I, section 16(b)(10)b-Postconviction Filedw/in 2 Yrs		

IN THE CIRCUIT COURT
OF THE FOURTEENTH JUDICIAL CIRCUIT
IN AND FOR CALHOUN COUNTY, FLORIDA
CRIMINAL DIVISION

CASE NO.: 10-187 CF

STATE OF FLORIDA,
Plaintiff,

v.

NICHOLAS N. KERR,
Defendant.

FINAL ORDER DENYING DEFENDANT'S AMENDED SECOND (SUCCESSIVE) MOTION FOR POST CONVICTION RELIEF

THIS MATTER is before the Court on the Defendant's Amended Second (Successive) Motion for Post Conviction Relief pursuant to Fla. R. Crim. P. 3.850 filed February 17, 2019. Having considered said Motion,[1] court file and records, Defendant's Motion for Post Conviction Relief filed August 27, 2018, the Court's Order Striking Motion for Post Conviction Relief filed December 21, 2018, the Court's Order Denying In Part Amended Second (Successive) Motion for Post Conviction Relief and Order Directing State to Respond filed April 18, 2019, the State's Response to Amended Second (Successive) Motion for Post Conviction Relief filed June 17, 2019, and being otherwise fully advised, this Court finds that:

The Defendant was charged by Information with Count I: Felon in Possession of a Firearm, Count III: Discharging a Firearm in Public, and Count IV: Possession of Less Than 20 Grams of Marijuana.[2] In Count I, the Information specifically alleged that the Defendant did "unlawfully own or have care, custody, actual possession, or control of a firearm, ammunition, or electric weapon or device, to wit: a .308 semi automatic assault rifle and a .38 caliber Colt revolver..." (*See* Information). Defense counsel filed two separate motions to suppress, and a hearing was held on each. (*See* Motion to Suppress and Amended Motion to Suppress, and transcripts of hearings held on May 6 and June 3, 2011, respectively). Both were denied. (*See* orders). After a trial, a jury found the Defendant guilty of Count I, with a special finding that the Defendant "actually possessed said

[1] Defendant swore to his allegations under oath. See Rule 3.850(n), which subjects him to sanctions.

[2] On the verdict form, the charges were referred to as Count I: Felon in Possession of Firearm or Ammunition, Count II: Discharging a Firearm in Public, and Count III: Possession of Less Than 20 Grams of Marijuana.

firearm on his person," found the Defendant not guilty of Count II, and found the Defendant guilty as charged of Count III. *(See* verdict form). On July 6, 2011, the Defendant was sentenced to 15 years of imprisonment on Count I with a 3-year mandatory minimum, and time-served on Count III. His convictions and sentences were per curiam affirmed on direct appeal. See *Kerr v. State,* 95 So.3d 218 (Fla. 1st DCA 2012).

On August 16, 2013, Defendant filed his first Motion for Post Conviction Relief, which the Court struck pursuant to *Spera v. State*, 971 So. 2d 754 (Fla. 2007). Thereafter, Defendant filed his Amended Rule 3.850 Motion on October 24, 2013 raising three (3) claims of ineffective assistance of counsel. After a State response, the Court issued an Order Denying Amended Motion for Post Conviction Relief filed June 9, 2014.[3] Following an appeal of the trial court's ruling, the First DCA per curiam affirmed the decision in Case No. 1D14-3097. See *Kerr v. State*, 152 So. 3d 569 (Fla. 1st DCA 2014)

On August 27, 2018, the Defendant filed a Second or Successive Rule 3.850 motion raising two (2) ground for relief, which the Court struck with leave to amend pursuant to *Spera v. State*, 971 So.2d 754 (Fla. 2007). See *also Nelson v. State,* 977 So. 2d 710, 711 (Fla. 1st DCA 2008)("Furthermore, *Spera* does not impose on trial courts or court personnel the nearly impossible burden to provide legal guidance or "suggestions" to help the defendant file sufficient "good faith" claims or explain why the claims are insufficient or how to cure the insufficiency."). Thereafter, Defendant filed his instant Amended Second (Successive) Motion for Post Conviction Relief on February 17, 2019, raising only one (1) ground for relief.

First, the Court would note that the Defendant's initial Ground One raised in his Rule 3.850 Motion filed August 27, 2018 alleged newly discovered evidence which was effectively abandoned by the Defendant in his subsequent amended motion. By prior Order filed April 18, 2019, the Court denied with prejudice this ground. See Order Denying In Part Amended Second (Successive) Motion for Post Conviction Relief and Order Directing State to Respond filed April 18, 2019.

Next, the Court addresses the Defendant's instant amended second (Successive) Motion for Post Conviction Relief filed February 17, 2019, wherein the Defendant raises only one (1) ground for relief. In **Ground One**, Defendant raises the following:

> The Supreme Court of the United States has recently confirmed that the vehicle exception to a warrantless seizure and search of an automobile under the Carroll Doctrine does not apply on private residential property demonstrating that the issue Mr. Kerr has been litigating for years has always had merit, and that under the doctrines of fundamental fairness and manifest injustice his convictions and sentences should be vacated.

[3] In Ground 3 of his prior post conviction motion filed October 24, 2013, the Defendant argued that trial counsel was ineffective for failing to challenge the warrantless seizure of his vehicle from a private driveway. See Order Denying Amended Motion for Post Conviction Relief filed June 9, 2014.

Out of abundance of caution, the Court directed a response from the State before a final determination. See Order Denying In Part Amended Second (Successive) Motion for Post Conviction Relief and Order Directing State to Respond filed April 18, 2019. Additionally, the Court requested the State to address the timeliness of this ground. See Fla. R. Crim. P. 3.850(b)(2) (the fundamental constitutional right asserted was not established within the period provided for herein and has been held to apply retroactively, and the claim is made within 2 years of the date of the mandate of the decision announcing the retroactivity). Defendant submits in his motion that because the Supreme Court has just recently confirmed that Mr. Kerr's interpretation of the existing case law was correct all along, he is requesting relief now pursuant to the Fundamental Fairness and Manifest Injustice doctrines. Thus, Defendant maintains and articulates that this is a facially sufficient claim, which procedural bars are not applicable, including successiveness, untimeliness, collateral estoppel, lack of retroactivity, etc. See Defendant's Amended Rule 3.850 Motion filed February 17, 2019 at pg. 2.

On June 17, 2019, the State filed their response to the Court's Order. In considering said response, the Court finds that the Defendant is not entitled to relief. First, there is no manifest injustice exception to Rule 3.850's time limitations or bar against filing successive post conviction motions. See e.g., *Cuffy v. State*, 190 So.3d 86, 87 (Fla. 4th DCA 2015); *Sierra v. State*, 252 So.3d 426 (Fla. 1st DCA 2018)(concurring opinion). Moreover, the specific requirements of the time bar exception set forth in 3.850(b)(2) have not been alleged or met. See e.g., *Flowers v. State*, 54 So.3d 1049 (Fla. 4th DCA 2011); *Lebron v. State*, 135 So.3d 1040, 1052 n.9 (Fla. 2014).

Additionally, the Court would also note that it was the Defendant's position, even in the previous motion filed August 27, 2018 that was ultimately struck by order of this Court on December 21, 2018, that he was not the one driving or in possession of the green Honda when the shots were fired from the vehicle. Defendant claims that it was his brother that was driving the vehicle when the shots were fired. Defendant claimed that he did not normally drive the green Honda. Defendant also denied knowing the firearms or drugs were in the car and denied that they were his. (TT Testimony Nicholas Kerr beg. Pg. 97; TT Defense Closing beg. Pg. 143). Regardless, Defendant's motion is due to be denied.

Additionally, the Defendant's ground[4] would be time barred. See *Gust v. State*, 535 So. 2d 642 (Fla. 1st DCA 1988); See also Fla. R. Crim. P. 3.850(b); *Earls v. State*, 958 So. 2d 1153 (Fla. 1st DCA 2007); *Cabrera v. State*, 721 So. 2d 1190 (Fla. 2nd DCA 1998).

Finally, sanctions are authorized when a petitioner's repetitious or frivolous pleadings require the use of limited judicial resources which are properly used for the consideration of legitimate claims filed by others. See *Sweitzer v. State*, 46 So.3d 1132 (Fla. 1st DCA 2010); *Schmidt v. State*, 41 So. 3d 427 (Fla. 1st DCA 2010); *Tate v. State*, 32 So.3d 657, 658 (Fla. 1st DCA 2010); *Pettway v. McNeil*, 987 So.2d 20 (Fla. 2008). **The Defendant is hereby cautioned that any citizen, including**

[4] Defendant's allegation are time barred. See *Hughes v. State*, 22 So. 3d 132 (Fla. 4th DCA 2009) (holding that allegation of "fundamental error" could not be used as mechanism for seeking review of untimely motion for postconviction relief.)

a citizen attacking his or her conviction, abuses the right to pro se access by filing repetitious and frivolous pleadings, thereby diminishing the ability of the courts to devote their finite resources to the consideration of legitimate claims. See *State v. Spencer*, 751 So.2d 47 (Fla. 1999). The Defendant is hereby warned that an inmate who has filed successive post-conviction motions or petitions for relief may be barred from filing further pro se pleadings relating to his case, and may be subject to having his gain-time forfeited for filing frivolous claims. See *Minor v. State*, 963 So.2d 797 (Fla. 3rd DCA 2007). Florida courts "are authorized to sanction an abusive litigant, regardless of his prior judicial history," and the abusive litigant's claims need not be repetitive or an abuse of post-conviction process to warrant sanctions. See *Hall v. State*, 94 So. 3d 655, 656 (Fla. 1st DCA 2012) (citing *Johnson v. State*, 44 So. 3d 198, 200 (Fla. 4th DCA 2010)). See also Section 944.279, Florida Statutes, *Walker v. Ellis*, 28 So.3d 91 (Fla. 1st DCA 2009) and *Sweitzer v. State*, 46 So.3d 1132 (Fla. 1st DCA 2010). Consequently, this Court informs the Defendant that if he continues to file frivolous motions or motions raising issues previously addressed by this Court or the First DCA, he may be prohibited from submitting any future pro se pleadings in this case.

Therefore, it is

ORDERED AND ADJUDGED that the Defendant's Amended Second (Successive) Motion for Post Conviction Relief is hereby DENIED WITH PREJUDICE. The Defendant has thirty (30) days from the date of this Order to appeal this decision.

DONE AND ORDERED in chambers, Calhoun County, Florida, this 23 day of April, 2019.

HONORABLE SHONNA YOUNG GAY,
CIRCUIT JUDGE

Attachments:

Order Denying In Part Amended Second (Successive) Motion for Post Conviction Relief and Order Directing State to Respond filed April 18, 2019
Charging document, Information
Motion to Suppress Physical Evidence and Statements
Amended Motion to Suppress
Order(s) Denying Defendant's Motion to Suppress
Jury's Verdict Form
Judgment and Sentence
Defendant's Amended Motion for Post Conviction Relief filed October 24, 2013
Order Denying Amended Motion for Post Conviction Relief filed June 9, 2014
Notice of Appeal field July 9, 2014
First DCA Acknowledgement letter dated July 11, 2014, Case No. 1D14-3097
First DCA Opinion and Mandate issued in Case No. 1D14-3097
Excerpts of Trial Transcript held June 13, 2011, pp. 1-3, 96-117, 143-149, 169

I HEREBY CERTIFY that a true and exact copy of the foregoing has been provided by U.S. Mail, hand delivery and/or E-portal to **Mark V. Murray, Esq.**, (Attorney for Defendant) 317 East Park Avenue, Tallahassee, Florida 32301; and **State Attorney's Office**, P.O. Box 503, Blountstown, Florida 32424, this 21st day of August 2019.

Wendy Strickland, Judicial Assistant

IN THE CIRCUIT COURT
OF THE FOURTEENTH JUDICIAL CIRCUIT
IN AND FOR CALHOUN COUNTY, FLORIDA
CRIMINAL DIVISION

CASE NO.: 10-187 CF

STATE OF FLORIDA

Plaintiff,

v.

NICHOLAS N. KERR,

Defendant.

ORDER DENYING IN PART AMENDED SECOND (SUCCESSIVE) MOTION FOR POST CONVICTION RELIEF AND ORDER DIRECTING STATE TO RESPOND

THIS MATTER is before the Court on the Defendant's Amended Second or Successive Motion for Post Conviction Relief pursuant to Fla. R. Crim. P. 3.850 filed February 17, 2019. Having considered said Motion,[1] court file and records, the Defendant's Motion for Post Conviction Relief filed August 27, 2018, the Court's Order Striking Motion for Post Conviction Relief filed December 21, 2018, and being otherwise fully advised, this Court finds that:

The Defendant was charged by Information with Count I: Felon in Possession of a Firearm, Count III: Discharging a Firearm in Public, and Count IV: Possession of Less Than 20 Grams of Marijuana.[2] In Count I, the Information specifically alleged that the Defendant did "unlawfully own or have care, custody, actual possession, or control of a firearm, ammunition, or electric weapon or device, to wit: a 308 semi automatic assault rifle and a .38 caliber Colt revolver..." *(See* Information). Defense counsel filed two separate motions to suppress, and a hearing was held on each. *(See* Motion to Suppress and Amended Motion to Suppress, and transcripts of hearings held on May 6 and June 3, 2011, respectively). Both were denied. *(See* orders). After a trial, a jury found the Defendant guilty of Count I, with a special finding that the Defendant "actually possessed said firearm on his person," found the Defendant not guilty of Count II, and found the Defendant guilty as charged of Count III. *(See* verdict form). On July 6, 2011, the Defendant was sentenced to 15 years of

[1] Defendant swore to his allegations under oath. *See* Rule 3.850(n), which subjects him to sanctions.

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imprisonment on Count I with a 3-year mandatory minimum, and time-served on Count III. His convictions and sentences were per curiam affirmed on direct appeal. See *Kerr v. State*, 95 So.3d 218 (Fla. 1st DCA 2012).

On August 16, 2013, Defendant filed his first Motion for Post Conviction Relief, which the Court struck pursuant to *Spera v. State*, 971 So. 2d 754 (Fla. 2007). Thereafter, Defendant filed his Amended Rule 3.850 Motion on October 24, 2013 raising three (3) claims of ineffective assistance of counsel. After a State response, the Court issued an Order Denying Amended Motion for Post Conviction Relief filed June 9, 2014.[3] Following an appeal of the trial court's ruling, the First DCA per curiam affirmed the decision in Case No. 1D14-3097. See *Kerr v. State*, 152 So. 3d 569 (Fla. 1st DCA 2014)

On August 27, 2018, Defendant filed his Second or Successive Motion for Post Conviction Relief raising two (2) grounds for relief, which the Court struck with leave to amend pursuant to *Spera v. State*, 971 So. 2d 754 (Fla. 2007). Thereafter, the Defendant now files his Amended Motion for Post Conviction Relief on February 17, 2019 raising only one (1) ground for relief.

First, the Court would note that the Defendant effectively abandoned his prior claim raised in Ground One alleging newly discovered evidence which exonerates Defendant from being in possession of firearms or the marijuana as he did not re-alleged this claim in his amend motion, and therefore is deemed denied with prejudice. See *Watson v. State*, 247 So. 3d 685 (Fla. 1st DCA 2018) (holding that defendant's claims raised in first post conviction motion that were not raised in the subsequent post conviction motion were properly denied for failure to amend the petition to make it facially sufficient).

Defendant's initial Ground One raised in his Rule 3.850 Motion filed August 27, 2018 alleged newly discovered evidence. Under Fla. R. Crim. P. 3.850, a motion for post conviction relief must be filed within two years after the conviction and sentence become final. Fla. R. Crim. P. 3.850(b). One exception, known as "newly discovered evidence", is that a motion may be filed outside of the limitation period if it alleges that "the facts on which the claim is predicated were unknown to the movant or the movant's attorney and could not have been ascertained by the exercise of due diligence, and the claim is made within 2 years of the time the new facts were or could have been discovered with the exercise of due diligence." *Id.*

To obtain a new trial based on newly discovered evidence, a defendant must meet two requirements: (1) the evidence must not have been known by the trial court, the party, or counsel at the time of trial, and it must appear that the defendant or defense counsel could not have known of it by the use of diligence; and (2) the newly discovered evidence must "be of such a nature that it would probably produce an acquittal on retrial." *Marek v State*, 14 So.3d 985, 990 (Fla. 2009).

[3] In Ground 3 of his prior post conviction motion filed October 24, 2013, the Defendant argued that trial counsel was ineffective for failing to challenge the warrantless seizure of his vehicle from a private driveway. See Order Denying Amended Motion for Post Conviction Relief filed June 9, 2014.

Newly discovered evidence satisfies the second part of the test if it "weakens the case against the defendant so as to give rise to a reasonable doubt as to his culpability." *Id.* (quoting *Jones v. State*, 709 So.2d 512, 521 (Fla. 1998)). In determining whether the new evidence requires a new trial, the Court must consider all newly discovered evidence which would be admissible in trial, and must evaluate the weight of both the newly discovered evidence and the evidence which was introduced at the trial." *Id.* This determination includes whether the evidence goes to the merits of the case or is impeachment evidence and whether it is cumulative to other evidence in the case, and the Court should consider the materiality and relevance of the evidence and any inconsistencies in the newly discovered evidence. *Id.* (quoting *Jones*, quotations omitted).

In the instant case, the Defendant has failed to meet the above standard. Defendant failed to allege when or how he learned of the newly discovered evidence, so as to demonstrate compliance with the requirement that the claim be filed within two years from the date the evidence could have been discovered with the exercise of due diligence. See *Blake v. State*, 152 So. 3d 66 (Fla. 2nd DCA 2014); see also *Berry v. State*, 175 So. 3d 896 (Fla. 3rd DCA 2015) (in the context of a guilty or no contest plea on the basis of newly discovered evidence how the defendant failed to establish that the evidence from a friend was unknown to him and could not have been discovered by the use of due diligence within the two year window for filing a post conviction relief petition). Further, the motion did not explain how or why the newly discovered evidence was not known to defendant or his counsel through due diligence. Finally, Defendant gave no indication when or how he discovered evidence or why it could not have been discovered sooner. Although a trial court in its discretion may grant more than one opportunity to amend an insufficient claim, *Spera* does not mandate repeated opportunities. See *Nelson v. State*, 977 So. 2d 710 (Fla. 1st DCA 2008). Since the Defendant was either unable or unwilling to cure the deficiency, his insufficient claim is denied with prejudice. See *Id.*

Finally, the Court addresses the Defendant's instant amended Rule 3.850 Motion filed February 17, 2019, wherein the Defendant raises only one (1) ground for relief. In **Ground One**, Defendant raises the following:

> The Supreme Court of the United States has recently confirmed that the vehicle exception to a warrantless seizure and search of an automobile under the Carroll Doctrine does not apply on private residential property demonstrating that the issue Mr. Kerr has been litigating for years has always had merit, and that under the doctrines of fundamental fairness and manifest injustice his convictions and sentences should be vacated.

Out of abundance of caution, the Court shall direct a response from the State before a final determination. Additionally, the Court requests the State to address the timeliness of this ground. See Fla. R. Crim. P. 3.850(b)(2) (the fundamental constitutional right asserted was not established within the period provided for herein and has been held to apply retroactively, and the claim is made within 2 years of the date of the mandate of the decision announcing the retroactivity). Defendant submits in his motion that because the Supreme Court has just recently confirmed that Mr. Kerr's

interpretation of the existing case law was correct all along, he is requesting relief now pursuant to the Fundamental Fairness and Manifest Injustice doctrines. Thus, Defendant maintains and articulates that this is a facially sufficient claim, which procedural bars are not applicable, including successiveness, untimeliness, collateral estoppel, lack of retroactivity, etc. *See* Defendant's Amended Rule 3.850 Motion filed February 17, 2019 at pg. 2.

Therefore, it is

ORDERED AND ADJUDGED as follows:

1. The Defendant's Amended Motion for Post Conviction Relief is hereby DENIED IN PART WITH PREJUDICE as to Ground One initially raised in his Rule 3.850 Motion filed August 27, 2018 which alleged newly discovered evidence which was thereafter abandoned by the Defendant in his subsequent amended motion; ("this order is a nonfinal, nonappealable order"); and

2. The State Attorney's Office shall RESPOND to the allegations raised in Defendant's amended motion filed February 17, 2019 within sixty (60) days from the date of this Order.

DONE AND ORDERED in chambers, Calhoun County, Florida, this 18th day of April, 2019.

HONORABLE SHONNA YOUNG GAY,
CIRCUIT JUDGE

I HEREBY CERTIFY that a true and exact copy of the foregoing has been provided by U.S. Mail, hand delivery, and/or e-portal to **Mark V. Murray, Esq.**, (Attorney for Defendant), 317 East Park Avenue, Tallahassee, Florida 32301; and **State Attorney's Office**, P.O. Box 503, Blountstown, Florida 32424; and **State Attorney's Office**, Attn: Research Attorneys, P.O. Box 1040, Panama City, Florida 32402; this 18th day of April, 2019.

Wendy Strickland
Wendy Strickland, Judicial Assistant