

No. 18-_____

IN THE

Supreme Court of the United States

RANDOLPH LAWRENCE
Petitioner,

v.

STATE OF FLORIDA,
Respondent.

**On Petition for Writ of Certiorari to the
District Court of Appeal, Second District, Florida
and to the Sixth Judicial Circuit, Florida**

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

The question presented is:

Whether, at a suppression hearing held pursuant to Chapter 934, Florida Statutes, application of the Florida Supreme Court's decision in *State v. Inciarrano*, 473 So.2d 1272 (Fla. 1985), which adopts a "society is prepared to recognize" test to determine the admissibility at a criminal trial of a non-consensual, surreptitiously recorded conversation, impermissibly flips the burden of proof and persuasion from the State to the defendant contrary to the presumption of innocence mandated by the Fifth and Fourteenth Amendments.

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PETITION FOR WRIT OF CERTIORARI

Petitioner, RANDOLPH LAWRENCE, petitions this Court for a writ of certiorari to review the judgment and decision of the trial court for the Sixth Judicial Circuit and Second District Court of Appeal, State of Florida. Petitioner's conviction for capital sexual battery upon a minor and automatic minimum mandatory sentence of life in prison without the possibility of parole should be vacated and a new trial ordered because they potentially resulted from a state evidentiary procedure that subverted the presumption of innocence to which Lawrence was entitled under the Fifth Amendment to the United States Constitution.

PARTIES TO THE PROCEEDINGS

The caption of the case in this Court contains the names of all parties (Petitioner, Randolph Lawrence and the State of Florida).¹

OPINIONS BELOW

The opinion and order denying rehearing of the District Court of Appeal for the Second District of Florida were both issued without opinion and are set forth in the Appendix attached hereto at A1 and A2 respectively.

JURISDICTION

On December 20, 2017, the district court of appeal entered its order denying Lawrence's timely filed motion for rehearing of the district court of appeals *per curiam* affirmance without opinion of the trial court's denial of Lawrence's post conviction relief motion. This Petition for Writ of Certiorari is due on or before March 19, 2018 and is being electronically filed on that date. Petitioner invokes this Court's jurisdiction under 29 U.S.C. 1254(1).

¹ Pursuant to Rule 29.6, no parent or publicly held company owning 10% or more of a party corporation is involved in this case.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution states in material part:

No person shall be...deprived of life, liberty, or property, without due process of law;

Section 1 of the Fourteenth Amendment to the United States Constitution provides in material part:

[N]or shall any State deprive any person of life, liberty or property, without due process of law

The relevant portions of Florida's Security of Communications Act, sections 934.02(2), 934.03(1), 934.03(2) and 934.06, Florida Statutes (2010), are set forth in the Appendix at A3-A10.

STATEMENT OF THE CASE

In 2011, Lawrence was convicted of capital sexual battery on a minor and automatically sentenced to a minimum mandatory of life in prison without the possibility of parole. The alleged victim's mother testified at trial that Lawrence came to her workplace and asked to speak to her outside. She concealed a tape recorder on her person and surreptitiously recorded the conversation that took place in the parking lot without Lawrence's knowledge or consent. The incriminating tape recording was admitted in evidence at trial over Lawrence's objection that such admission was prohibited under Florida's Security of Communications Act, chapter 934, Florida Statutes.

Section 934.03(1), Florida Statutes (2010), contains a general prohibition on the interception of any wire, oral, or electronic communications. Section 934.02(2), Florida Statutes (2010), defines the term "oral communication" for purposes of chapter 934 as:

any oral communication uttered by a person exhibiting an expectation that such communication is not subject to interception under circumstances justifying such expectation and does not mean any public oral communication uttered at a public meeting or any electronic communication.

Section 934.06, Florida Statutes (2010), provides that the contents of any improperly intercepted communication may not be used as evidence in a criminal trial:

Whenever any wire or oral communication has been intercepted, no part of the contents of such communication and no evidence derived therefrom may be received in evidence in any trial, hearing, or other proceeding in or before any court, grand jury, department, officer, agency, regulatory body, legislative committee, or other authority of the state, or a political subdivision thereof, if the disclosure of that information would be in violation of this chapter. The prohibition of use as evidence provided in this section does not apply in cases of prosecution for criminal interception in violation of the provisions of this chapter.

Section 934.03(2), Florida Statutes (2010), contains a list of specific exceptions to the general prohibition in section 934.03(1). One of these exceptions is for situations in which all parties to the conversation have consented. § 934.03(2)(d), Fla. Stat. (2010). Significantly, the statute created no exception for the surreptitious interception of oral communications by private citizens conducting their own personal investigations of criminal activity.

Lawrence moved pre-trial to suppress the recording pursuant to section 934.06, Florida Statutes (2010). At the suppression hearing, the burden of proof and persuasion was effectually placed on Lawrence to prove that his expectation of privacy in the parking lot was justified. (A57-A68). He testified under oath that he drove his own vehicle to a Walgreens drug store where the mother worked as a cashier and spoke to her briefly explaining “that he wanted to have a private conversation with her...” He further testified that they agreed to speak outside, that he did not intend for their conversation to be overheard by anyone and that no one else listened to the conversation. (A54-A67) This testimony was unrebutted and the State presented no evidence of

its own that Lawrence's expectation of privacy in the parking lot was not justified under the circumstances.

Relying upon the Florida Supreme Court's decision in *State v. Inciarrano*, 473 So.2d 1272 (Fla. 1985), the trial court denied Lawrence's motion. He concluded that Lawrence did not have a reasonable expectation of privacy because the incriminating statements were made by Lawrence in an open public parking lot at a time when other parties and bystanders had access to the parking lot. (A71-A72) In *Inciarrano*, the Florida Supreme Court held for purposes of section 934.02(2) that:

[t]his expectation of privacy does not contemplate merely a subjective expectation on the part of the person making the uttered oral communication but rather contemplates a reasonable expectation of privacy. A reasonable expectation of privacy under a given set of circumstances depends upon one's actual subjective expectation of privacy ***as well as whether society is prepared to recognize this expectation as reasonable.***

473 So. 2d at 1275 (emphasis supplied). *Inciarranno* effectively shifted the exclusionary admissibility analysis under the statute from the strong privacy protecting language in section 934.03(1) and the plain exclusionary language of section 934.06 to the definition of "oral communication" in section 934.02(2).

At trial, the court then admitted over Lawrence's objection a CD containing an "enhanced" version of the surreptitiously recorded tape recording and it was played to the jury. The surreptitiously recorded conversation was the only admission of Lawrence introduced at trial and the only corroboration of the alleged victim's testimony. The State made Lawrence's recorded statements the centerpiece of its case arguing in closing that the statements reflected an admission of his guilt:

Ms. Gissinger:...I'm sorry. I'll do whatever you want. I'll do whatever it takes. I'll leave America. I don't know why I did that. It wasn't me. Those are Defendant's own words. That is what the Defendant had to say when he was confronted by [A.B.'s] mother. Those are his words. You'll have the opportunity to take that audiotape back. Listen to it. Those are his words...

On appeal of his conviction, Lawrence argued that the surreptitiously recorded conversation should have been suppressed. The district court of appeal affirmed Lawrence's conviction *per curiam* without opinion on October 26, 2012. *Lawrence vs. State*, 100 So. 3d 694 (Fla. 2d DCA 2012), and his conviction became final on March 25, 2013. *Lawrence v. Florida*, 133 S. Ct. 1643 (2013).

Less than three months after Lawrence's conviction became final, the same district court of appeal issued its decision in *McDade v. State*, 114 So. 3d 465 (Fla. 2d DCA 2013) ("*McDade I*"), which also involved a defendant's conviction for capital sexual battery after the trial court admitted into evidence under *Inciarrano* a surreptitiously recorded conversation. In *McDade I*, the district court of appeal affirmed with written opinion and certified a question of great public importance to the Florida Supreme Court as to whether recording of solicitation and confirmation of child sexual abuse made by a minor child fell within the proscription of chapter 934, Florida Statutes. The Florida Supreme Court answered the question in the affirmative, and reversed McDade's conviction. *McDade v. State*, 154 So. 3d 292 (Fla. 2014) ("*McDade II*"). He was retried without admission into evidence of the recording and was acquitted.

In *McDade I*, Judge Altenbernd, specially concurring, expressed significant constitutional concerns with *Inciarrano*'s "society is prepared to recognize" test. He concluded that *Inciarrano* flipped the burden of proof and persuasion at the preliminary hearing on admissibility from the State to the defendant in violation of the Fifth Amendment's presumption of innocence. *Id.* at

472.

Lawrence timely filed a post conviction relief motion, which he later amended, arguing that the circuit court should reverse his conviction and sentence and grant him a new trial based on retroactive application of *McDade II*, in part, based on Judge Altenbernd's specially concurring opinion. (App. A13, A17, A19.) The trial court denied Lawrence's motion without addressing the substantive merits of his argument. (A31-A32). On appeal to the district court of appeal, Lawrence argued that the trial court should have addressed the retroactivity argument, including Judge Altenbernd's concurring opinion. (App. A38-A40, A44). The district court of appeal affirmed the trial court *per curiam* without opinion on June 23, 2017. (App. A1). Lawrence timely filed a motion for rehearing and requested the district court of appeal to certify the following question to the Florida Supreme Court:

Whether, at a suppression hearing held pursuant to section 934, Florida Statutes, application of the *Inciarrano* "society is prepared to recognize" test impermissibly flips the burden of proof and persuasion from the State to the defendant contrary to the presumption of innocence mandated by the Fifth Amendment, while leaving our rights in flux.

(App. A47-A56, A55).

The district court of appeal denied the motion without opinion on December 20, 2017. (App. A2).

REASONS FOR GRANTING THE WRIT

In his concurring opinion in *McDade I*, Judge Altenbernd stated:

My first concern involves the burden of proof and persuasion on this issue. Whether this recording violates chapter 934 is not an issue that is resolved at a typical hearing on a motion to suppress under Fourth Amendment standards. In the trial court, the hearing was conducted like a hearing on a motion to suppress, but it was actually a preliminary hearing that should have been conducted under

section 90.105, Florida Statutes (2011)², to determine whether these recordings are statutorily inadmissible under section 934.06. We have assumed that the burden of proof and persuasion at this hearing rested with Mr. McDade. But at the time of the preliminary hearing, he was presumed innocent; he had all of his Fifth Amendment rights. By expanding the holding of *Inciarrano* to include these circumstances, we may have effectively placed the burden on him to prove by a preponderance of the evidence that he is innocent in order to prevent the recordings from being admitted into evidence. I am troubled by this procedure.

114 So. 3d at 472.

Lawrence's case highlights the Fifth Amendment concerns expressed by Judge Altenbernd. Lawrence's surreptitiously recorded statements were "uttered by a person exhibiting an expectation that [his] communication [was] not subject to interception" and that he made these statements "under circumstances justifying" his expectation that his statements would not be recorded. It is undisputed that Lawrence adjourned to the parking lot by agreement specifically to ensure the privacy of his conversation, that he did not consent to his conversation being recorded, and that none of the other exceptions to exclusion listed in section 934.03(2) applied. Moreover, notably, the citizens of the State of Florida had adopted by constitutional amendment a broad right of privacy protection that exceeds those under federal law.³

² Section 90.105, Florida Statutes, requires the trial court to "determine preliminary questions concerning . . . the admissibility of evidence."

³ In *Winfield v. Division of Pari-Mutuel Wagering*, 477 So.2d 544 (Fla.1985), the Florida Supreme Court stated the following regarding Florida's right of privacy:

The citizens of Florida opted for more protection from governmental intrusion when they approved article I, section 23, of the Florida Constitution. This amendment is an independent, freestanding constitutional provision which declares the fundamental right to privacy. Article I, section 23, was intentionally phrased in strong terms. The drafters of the amendment rejected the use of the words "unreasonable" or "unwarranted" before the phrase "governmental intrusion" in order to make the privacy right as strong as possible. Since the people of this state exercised their prerogative and enacted an amendment to the Florida Constitution which expressly and succinctly provides for a strong right of

At the time of the suppression hearing, Lawrence was presumed innocent. The presumption of innocence required that the burden of proof and persuasion be placed on the State to demonstrate an exception to the otherwise plain import of chapter 934's exclusionary rule by demonstrating that Lawrence's expectation of privacy was not one society was prepared to recognize. The State below presented no such evidence. Yet the recording was admitted in evidence and could easily have been a key if not the key piece of evidence that resulted in Lawrence's conviction and automatic mandatory sentence of life in prison without the possibility of parole.

The early history of the presumption of innocence is detailed in *Coffin v. United States*, 156 U.S. 432, 453 (1895), where this Court said:

The principle that there is a presumption of innocence in favor of the accused is the undoubted law, axiomatic and elementary, and its enforcement lies at the foundation of the administration of our criminal law.

In *Deutch v. United States*, 367 U.S. 456, 471 (1961), this Court reiterated:

In fulfillment of their obligation under this statute, the courts must accord to the defendants every right which is guaranteed to defendants in all other criminal cases.' *Watkins v. United States*, 354 U.S. 178, 208, 77 S.Ct. 1173, 1 L.Ed.2d 1273 (1957). 'One of the rightful boasts of Western civilization is that the (prosecution) has the burden of establishing guilt solely on the basis of evidence produced in court and under circumstances assuring an accused all the safeguards of a fair procedure.' *Irvin v. Dowd*, 366 U.S. 717, 729, (81 S.Ct. 1639, 1646, 6 L.Ed.2d 751) (concurring opinion). Among these is the presumption of the defendant's innocence. *Sinclair v. United States*, 279 U.S. 263, at 296-297, 49 S.Ct. 268, 73 L.Ed. 692); *Flaxer v. United States*, 358 U.S. 147 at 151, 79 S.Ct. 191, 3 L.Ed.2d 183.

Thus, in *Cummings v. State of Missouri*, 4 Wall. 277, 328 (1866), this Court said:

privacy not found in the United States Constitution, it can only be concluded that the right is much broader in scope than that of the Federal Constitution.

Id. at 548.

The clauses in question subvert the presumptions of innocence, and alter the rules of evidence, which heretofore, under the universally recognized principles of the common law, have been supposed to be fundamental and unchangeable. They assume that the parties are guilty; they call upon the parties to establish their innocence; and they declare that such innocence can be shown only in one way—by an inquisition, in the form of an expurgatory oath, into the consciences of the parties

In *Speiser v. Randall* 357 U.S. 513, 525-526 (1958), this Court said:

There is always in litigation a margin of error, representing error in fact finding, which both parties must take into account. Where one party has at stake an interest of transcending value—as a criminal defendant his liberty—this margin of error is reduced as to him by the process of placing on the other party the burden of producing a sufficiency of proof in the first instance, and of persuading the fact finder at the conclusion of the trial of his guilt beyond a reasonable doubt. Due process commands that no man shall lose his liberty unless the Government has borne the burden of producing the evidence and convincing the fact finder of his guilt.

In sum, there is no constitutional protection more important than the presumption of innocence. *McPhaul v. U.S.*, 364 U.S. 372, 384 (1960) Douglas, J. dissent. (“The presumption of innocence, deep in our criminal law, has been one of our most important safeguards against oppression.”).

For this reason, this Court has made clear that rules of evidence cannot be employed in such a manner as to subvert the presumption of innocence. *Carmell v. Texas*, 529 U.S. 513, 540 (2000) citing *Cummings v. Missouri*, 4 Wall 277, 328 (1867). Yet, that is precisely what happened below in Lawrence’s case. By placing the burden of proof and persuasion upon Lawrence under *Inciarrano*, the presumption of innocence to which he was constitutionally entitled under the Fifth and Fourteenth Amendments was subverted potentially resulting in his automatic condemnation to life in prison without the possibility of parole.

CONCLUSION

Lawrence's case highlights Judge Altenbernd's concerns with the "troubling" "results oriented" nature of *Inciarrano*'s "society is prepared to accept" test that "leaves our rights in flux" while effectively flipping the burden of proof at a suppression hearing from the State to the defendant contrary to the presumption of innocence. For these reasons, Lawrence respectfully requests that this Court accept jurisdiction, grant his petition, vacate his sentence and conviction and order that Lawrence be granted a new trial.

Respectfully submitted this 19th day of March, 2018.

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No. 18-____

IN THE

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RANDOLPH LAWRENCE,
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v.

STATE OF FLORIDA,
Respondent.

**On Petition for Writ of Certiorari To the
District Court of Appeal, Second District, Florida
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IN THE DISTRICT COURT OF APPEAL
OF FLORIDA
SECOND DISTRICT

Appellee.

Case No. 2D16-1234

SILBERMAN, LaROSE, and BLACK, JJ., Concur.

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

December 20, 2017

CASE NO.: 2D16-1234
L.T. No.: 0720654CFANO

RANDOLPH ROLANDO LAWRENCE v. STATE OF FLORIDA

Appellant / Petitioner(s), Appellee / Respondent(s).

BY ORDER OF THE COURT:

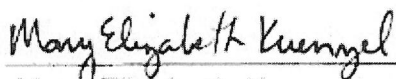
Appellant's motion for clarification, certification, rehearing, rehearing en banc,
and for written opinion is denied.

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

Served:

David Smolker, Esq. Randolph Rolando Lawrence Ken Burke, Clerk

ag



Mary Elizabeth Kuenzel
Clerk



The 2010 Florida Statutes(including Special Session A)

[Title XLVII](#)

[Chapter 934](#)

[View Entire Chapter](#)

CRIMINAL PROCEDURE AND CORRECTIONS SECURITY OF COMMUNICATIONS

CHAPTER 934

SECURITY OF COMMUNICATIONS

- 934.01 Legislative findings.
- 934.02 Definitions.
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- 934.32 Application for an order for a pen register or a trap and trace device.
- 934.33 Issuance of an order for a pen register or a trap and trace device.
- 934.34 Assistance in installation and use of a pen register or a trap and trace device.
- 934.41 Alternative penalty.
- 934.42 Mobile tracking device authorization.
- 934.43 Criminal disclosure of subpoena, order, or authorization.

934.01 Legislative findings.—On the basis of its own investigations and of published studies, the Legislature makes the following findings:

(1) Wire communications are normally conducted through the use of facilities which form part of an intrastate network. The same facilities are used for interstate and intrastate communications.

(2) In order to protect effectively the privacy of wire and oral communications, to protect the integrity of court and administrative proceedings, and to prevent the obstruction of intrastate commerce, it is necessary for the Legislature to define the circumstances and conditions under which the interception of wire and oral

communications may be authorized and to prohibit any unauthorized interception of such communications and the use of the contents thereof in evidence in courts and administrative proceedings.

(3) Organized criminals make extensive use of wire and oral communications in their criminal activities. The interception of such communications to obtain evidence of the commission of crimes or to prevent their commission is an indispensable aid to law enforcement and the administration of justice.

(4) To safeguard the privacy of innocent persons, the interception of wire or oral communications when none of the parties to the communication has consented to the interception should be allowed only when authorized by a court of competent jurisdiction and should remain under the control and supervision of the authorizing court. Interception of wire and oral communications should further be limited to certain major types of offenses and specific categories of crime with assurance that the interception is justified and that the information obtained thereby will not be misused.

History.—s. 1, ch. 69-17.

934.02 Definitions.—As used in this chapter:

(1) “Wire communication” means any aural transfer made in whole or in part through the use of facilities for the transmission of communications by the aid of wire, cable, or other like connection between the point of origin and the point of reception including the use of such connection in a switching station furnished or operated by any person engaged in providing or operating such facilities for the transmission of intrastate, interstate, or foreign communications or communications affecting intrastate, interstate, or foreign commerce.

(2) “Oral communication” means any oral communication uttered by a person exhibiting an expectation that such communication is not subject to interception under circumstances justifying such expectation and does not mean any public oral communication uttered at a public meeting or any electronic communication.

(3) “Intercept” means the aural or other acquisition of the contents of any wire, electronic, or oral communication through the use of any electronic, mechanical, or other device.

(4) “Electronic, mechanical, or other device” means any device or apparatus which can be used to intercept a wire, electronic, or oral communication other than:

(a) Any telephone or telegraph instrument, equipment, or facility, or any component thereof:

1. Furnished to the subscriber or user by a provider of wire or electronic communication service in the ordinary course of its business and being used by the subscriber or user in the ordinary course of its business or furnished by such subscriber or user for connection to the facilities of such service and used in the ordinary course of its business; or

2. Being used by a provider of wire or electronic communications service in the ordinary course of its business or by an investigative or law enforcement officer in the ordinary course of her or his duties.

(b) A hearing aid or similar device being used to correct subnormal hearing to not better than normal.

(5) “Person” means any employee or agent of the State of Florida or political subdivision thereof, of the United States, or of any other state or political subdivision thereof, and any individual, partnership, association, joint stock company, trust, or corporation.

(6) “Investigative or law enforcement officer” means any officer of the State of Florida or political subdivision thereof, of the United States, or of any other state or political subdivision thereof, who is empowered by law to conduct on behalf of the Government investigations of, or to make arrests for, offenses enumerated in this chapter or similar federal offenses, any attorney authorized by law to prosecute or participate in the prosecution of such offenses, or any other attorney representing the State of Florida or political subdivision thereof in any civil, regulatory, disciplinary, or forfeiture action relating to, based upon, or derived from such offenses.

(7) “Contents,” when used with respect to any wire, oral, or electronic communication, includes any information concerning the substance, purport, or meaning of that communication.

(8) “Judge of competent jurisdiction” means justice of the Supreme Court, judge of a district court of appeal, circuit judge, or judge of any court of record having felony jurisdiction of the State of Florida, irrespective of the geographic location or jurisdiction where the judge presides.

(9) “Aggrieved person” means a person who was a party to any intercepted wire, oral, or electronic communication or a person against whom the interception was directed.

(10) “Law enforcement agency” means an agency of the State of Florida or a political subdivision thereof or of the United States if the primary responsibility of the agency is the prevention and detection of crime or the enforcement of the penal, traffic, or highway laws of this state and if its agents and officers are empowered by law to conduct criminal investigations and to make arrests.

(11) “Communication common carrier” shall have the same meaning which is given the term “common carrier” in 47 U.S.C. s. 153(10).

(12) “Electronic communication” means any transfer of signs, signals, writing, images, sounds, data, or intelligence of any nature transmitted in whole or in part by a wire, radio, electromagnetic, photoelectronic, or photooptical system that affects intrastate, interstate, or foreign commerce, but does not include:

- (a) Any wire or oral communication;
- (b) Any communication made through a tone-only paging device;
- (c) Any communication from an electronic or mechanical device which permits the tracking of the movement of a person or an object; or
- (d) Electronic funds transfer information stored by a financial institution in a communications system used for the electronic storage and transfer of funds.

(13) “User” means any person or entity who:

- (a) Uses an electronic communication service, and
- (b) Is duly authorized by the provider of such service to engage in such use.

(14) “Electronic communications system” means any wire, radio, electromagnetic, photooptical, or photoelectronic facilities for the transmission of wire or electronic communications, and any computer facilities or related electronic equipment for the electronic storage of such communications.

(15) “Electronic communication service” means any service which provides to users thereof the ability to send or receive wire or electronic communications.

(16) “Readily accessible to the general public” means, with respect to a radio communication, that such communication is not:

- (a) Scrambled or encrypted;
- (b) Transmitted using modulation techniques whose essential parameters have been withheld from the public with the intention of preserving the privacy of such communication;
- (c) Carried on a subcarrier or other signal subsidiary to a radio transmission;
- (d) Transmitted over a communications system provided by a common carrier, unless the communication is a tone-only paging system communication; or
- (e) Transmitted on frequencies allocated under part 25; subpart D, subpart E, or subpart F of part 74; or part 94 of the Rules of the Federal Communications Commission, unless, in the case of a communication transmitted on a frequency allocated under part 74 that is not exclusively allocated to broadcast auxiliary services, the communication is a two-way voice communication by radio.

(17) “Electronic storage” means:

- (a) Any temporary intermediate storage of a wire or electronic communication incidental to the electronic transmission thereof.
- (b) Any storage of a wire or electronic communication by an electronic communication service for purposes of backup protection of such communication.

(18) “Aural transfer” means a transfer containing the human voice at any point between and including the point of origin and the point of reception.

(19) “Remote computing service” means the provision to the public of computer storage or processing services by means of an electronic communications system.

(20) “Pen register” means a device or process that records or decodes dialing, routing, addressing, or signaling information transmitted by an instrument or facility from which a wire or electronic communication is transmitted, but such information does not include the contents of any communication. The term does not include any device or

process used by a provider or customer of a wire or electronic communication service for billing or recording as an incident to billing or for communication services provided by such provider, and does not include any device or process used by a provider or customer of a wire communication service for cost accounting or other like purposes in the ordinary course of its business.

(21) “Trap and trace device” means a device or process that captures the incoming electronic or other impulses that identify the originating number or other dialing, routing, addressing, or signaling information reasonably likely to identify the source of a wire or electronic communication, but such information does not include the contents of any communication.

(22) “State” means any state of the United States, the District of Columbia, the Commonwealth of Puerto Rico, or any other possession or territory of the United States.

(23) “Subpoena” means any administrative subpoena authorized by federal or Florida law, federal or Florida grand jury subpoena, or any criminal investigative subpoena as authorized by Florida statute which may be utilized on behalf of the government by an investigative or law enforcement officer.

(24) “Foreign intelligence information” means information, whether or not concerning a United States person, as that term is defined in 50 U.S.C. s. 1801, which relates to:

(a) The ability of the United States to protect against actual or potential attack or other grave hostile acts of a foreign power or an agent of a foreign power;

(b) Sabotage or international terrorism by a foreign power or an agent of a foreign power;

(c) Clandestine intelligence activities by an intelligence service, a network of a foreign power, or an agent of a foreign power; or

(d) With respect to a foreign power or foreign territory, the national defense or security of the United States or the conduct of the foreign affairs of the United States.

(25) “Protected computer” means:

(a) A computer for the exclusive use of a financial institution or governmental entity;

(b) A computer that is not for the exclusive use of a financial institution or governmental entity, but that is used by or for a financial institution or governmental entity and with respect to which unlawful conduct can affect the use by or for the financial institution or governmental entity; or

(c) A computer that is used in interstate or foreign commerce or communication, including a computer located outside the United States.

(26) “Computer trespasser” means a person who accesses a protected computer without authorization and thus does not have a reasonable expectation of privacy with respect to any communication transmitted to, through, or from the protected computer. The term does not include a person known by the owner or operator of the protected computer to have an existing contractual relationship with the owner or operator of the protected computer for access to all or part of the protected computer.

History.—s. 2, ch. 69-17; s. 1, ch. 72-294; s. 1, ch. 74-249; s. 1, ch. 80-27; s. 1, ch. 88-184; s. 1, ch. 89-269; s. 1581, ch. 97-102; s. 8, ch. 2000-369; s. 1, ch. 2002-72; s. 125, ch. 2010-5.

934.03 Interception and disclosure of wire, oral, or electronic communications prohibited.—

(1) Except as otherwise specifically provided in this chapter, any person who:

(a) Intentionally intercepts, endeavors to intercept, or procures any other person to intercept or endeavor to intercept any wire, oral, or electronic communication;

(b) Intentionally uses, endeavors to use, or procures any other person to use or endeavor to use any electronic, mechanical, or other device to intercept any oral communication when:

1. Such device is affixed to, or otherwise transmits a signal through, a wire, cable, or other like connection used in wire communication; or

2. Such device transmits communications by radio or interferes with the transmission of such communication;

(c) Intentionally discloses, or endeavors to disclose, to any other person the contents of any wire, oral, or electronic communication, knowing or having reason to know that the information was obtained through the interception of a wire, oral, or electronic communication in violation of this subsection;

(d) Intentionally uses, or endeavors to use, the contents of any wire, oral, or electronic communication, knowing or having reason to know that the information was obtained through the interception of a wire, oral, or electronic communication in violation of this subsection; or

(e) Intentionally discloses, or endeavors to disclose, to any other person the contents of any wire, oral, or electronic communication intercepted by means authorized by subparagraph (2)(a)2., paragraph (2)(b), paragraph (2)(c), s. 934.07, or s. 934.09 when that person knows or has reason to know that the information was obtained through the interception of such a communication in connection with a criminal investigation, has obtained or received the information in connection with a criminal investigation, and intends to improperly obstruct, impede, or interfere with a duly authorized criminal investigation;

shall be punished as provided in subsection (4).

(2)(a)1. It is lawful under ss. 934.03-934.09 for an operator of a switchboard, or an officer, employee, or agent of a provider of wire or electronic communication service whose facilities are used in the transmission of a wire or electronic communication, to intercept, disclose, or use that communication in the normal course of his or her employment while engaged in any activity which is a necessary incident to the rendition of his or her service or to the protection of the rights or property of the provider of that service, except that a provider of wire communication service to the public shall not utilize service observing or random monitoring except for mechanical or service quality control checks.

2. Notwithstanding any other law, a provider of wire, oral, or electronic communication service, or an officer, employee, or agent thereof, or landlord, custodian, or other person, may provide information, facilities, or technical assistance to a person authorized by law to intercept wire, oral, or electronic communications if such provider, or an officer, employee, or agent thereof, or landlord, custodian, or other person, has been provided with:

- a. A court order directing such assistance signed by the authorizing judge; or
- b. A certification in writing by a person specified in s. 934.09(7) that no warrant or court order is required by law, that all statutory requirements have been met, and that the specified assistance is required, setting forth the period of time during which the provision of the information, facilities, or technical assistance is authorized and specifying the information, facilities, or technical assistance required.

3. A provider of wire, oral, or electronic communication service, or an officer, employee, or agent thereof, or landlord, custodian, or other person may not disclose the existence of any interception or the device used to accomplish the interception with respect to which the person has been furnished an order under ss. 934.03-934.09, except as may otherwise be required by legal process and then only after prior notice to the Governor, the Attorney General, the statewide prosecutor, or a state attorney, as may be appropriate. Any such disclosure renders such person liable for the civil damages provided under s. 934.10, and such person may be prosecuted under s. 934.43. An action may not be brought against any provider of wire, oral, or electronic communication service, or an officer, employee, or agent thereof, or landlord, custodian, or other person for providing information, facilities, or assistance in accordance with the terms of a court order under ss. 934.03-934.09.

(b) It is lawful under ss. 934.03-934.09 for an officer, employee, or agent of the Federal Communications Commission, in the normal course of his or her employment and in discharge of the monitoring responsibilities exercised by the commission in the enforcement of 47 U.S.C. ch. 5, to intercept a wire, oral, or electronic communication transmitted by radio or to disclose or use the information thereby obtained.

(c) It is lawful under ss. 934.03-934.09 for an investigative or law enforcement officer or a person acting under the direction of an investigative or law enforcement officer to intercept a wire, oral, or electronic communication when such person is a party to the communication or one of the parties to the communication has given prior consent to such interception and the purpose of such interception is to obtain evidence of a criminal act.

(d) It is lawful under ss. 934.03-934.09 for a person to intercept a wire, oral, or electronic communication when all of the parties to the communication have given prior consent to such interception.

(e) It is unlawful to intercept any wire, oral, or electronic communication for the purpose of committing any criminal act.

(f) It is lawful under ss. 934.03-934.09 for an employee of a telephone company to intercept a wire communication for the sole purpose of tracing the origin of such communication when the interception is requested by the recipient of the communication and the recipient alleges that the communication is obscene, harassing, or threatening in nature. The individual conducting the interception shall notify local police authorities within 48 hours after the time of the interception.

(g) It is lawful under ss. 934.03-934.09 for an employee of:

1. An ambulance service licensed pursuant to s. 401.25, a fire station employing firefighters as defined by s. 633.30, a public utility, a law enforcement agency as defined by s. 934.02(10), or any other entity with published emergency telephone numbers;
2. An agency operating an emergency telephone number "911" system established pursuant to s. 365.171; or
3. The central abuse hotline operated pursuant to s. 39.201

to intercept and record incoming wire communications; however, such employee may intercept and record incoming wire communications on designated "911" telephone numbers and published nonemergency telephone numbers staffed by trained dispatchers at public safety answering points only. It is also lawful for such employee to intercept and record outgoing wire communications to the numbers from which such incoming wire communications were placed when necessary to obtain information required to provide the emergency services being requested. For the purpose of this paragraph, the term "public utility" has the same meaning as provided in s. 366.02 and includes a person, partnership, association, or corporation now or hereafter owning or operating equipment or facilities in the state for conveying or transmitting messages or communications by telephone or telegraph to the public for compensation.

(h) It shall not be unlawful under ss. 934.03-934.09 for any person:

1. To intercept or access an electronic communication made through an electronic communication system that is configured so that such electronic communication is readily accessible to the general public.

2. To intercept any radio communication which is transmitted:

- a. By any station for the use of the general public, or that relates to ships, aircraft, vehicles, or persons in distress;
- b. By any governmental, law enforcement, civil defense, private land mobile, or public safety communications system, including any police or fire communications system, readily accessible to the general public;
- c. By a station operating on an authorized frequency within the bands allocated to the amateur, citizens band, or general mobile radio services; or
- d. By any marine or aeronautical communications system.

3. To engage in any conduct which:

- a. Is prohibited by s. 633 of the Communications Act of 1934; or
- b. Is excepted from the application of s. 705(a) of the Communications Act of 1934 by s. 705(b) of that act.

4. To intercept any wire or electronic communication the transmission of which is causing harmful interference to any lawfully operating station of consumer electronic equipment to the extent necessary to identify the source of such interference.

5. To intercept, if such person is another user of the same frequency, any radio communication that is not scrambled or encrypted made through a system that utilizes frequencies monitored by individuals engaged in the provision or the use of such system.

6. To intercept a satellite transmission that is not scrambled or encrypted and that is transmitted:

- a. To a broadcasting station for purposes of retransmission to the general public; or
- b. As an audio subcarrier intended for redistribution to facilities open to the public, but not including data transmissions or telephone calls, when such interception is not for the purposes of direct or indirect commercial advantage or private financial gain.

7. To intercept and privately view a private satellite video communication that is not scrambled or encrypted or to intercept a radio communication that is transmitted on frequencies allocated under subpart D of part 74 of the rules of the Federal Communications Commission that is not scrambled or encrypted, if such interception is not

for a tortious or illegal purpose or for purposes of direct or indirect commercial advantage or private commercial gain.

(i) It shall not be unlawful under ss. 934.03-934.09:

1. To use a pen register or a trap and trace device as authorized under ss. 934.31-934.34 or under federal law; or

2. For a provider of electronic communication service to record the fact that a wire or electronic communication was initiated or completed in order to protect such provider, another provider furnishing service toward the completion of the wire or electronic communication, or a user of that service, from fraudulent, unlawful, or abusive use of such service.

(j) It is not unlawful under ss. 934.03-934.09 for a person acting under color of law to intercept the wire or electronic communications of a computer trespasser which are transmitted to, through, or from a protected computer if:

1. The owner or operator of the protected computer authorizes the interception of the communications of the computer trespasser;

2. The person acting under color of law is lawfully engaged in an investigation;

3. The person acting under color of law has reasonable grounds to believe that the contents of the communications of the computer trespasser will be relevant to the investigation; and

4. The interception does not acquire communications other than those transmitted to, through, or from the computer trespasser.

(3)(a) Except as provided in paragraph (b), a person or entity providing an electronic communication service to the public shall not intentionally divulge the contents of any communication while in transmission on that service to any person or entity other than an addressee or intended recipient of such communication or an agent of such addressee or intended recipient.

(b) A person or entity providing electronic communication service to the public may divulge the contents of any such communication:

1. As otherwise authorized in paragraph (2)(a) or s. 934.08;

2. With the lawful consent of the originator or any addressee or intended recipient of such communication;

3. To a person employed or authorized, or whose facilities are used, to forward such communication to its destination; or

4. Which were inadvertently obtained by the service provider and which appear to pertain to the commission of a crime, if such divulgence is made to a law enforcement agency.

(4)(a) Except as provided in paragraph (b), whoever violates subsection (1) is guilty of a felony of the third degree, punishable as provided in s. 775.082, s. 775.083, s. 775.084, or s. 934.41.

(b) If the offense is a first offense under paragraph (a) and is not for any tortious or illegal purpose or for purposes of direct or indirect commercial advantage or private commercial gain, and the wire or electronic communication with respect to which the offense under paragraph (a) was committed is a radio communication that is not scrambled, encrypted, or transmitted using modulation techniques the essential parameters of which have been withheld from the public with the intention of preserving the privacy of such communication, then:

1. If the communication is not the radio portion of a cellular telephone communication, a cordless telephone communication that is transmitted between the cordless telephone handset and the base unit, a public land mobile radio service communication, or a paging service communication, and the conduct is not that described in subparagraph (2)(h)7., the person committing the offense is guilty of a misdemeanor of the first degree, punishable as provided in s. 775.082 or s. 775.083.

2. If the communication is the radio portion of a cellular telephone communication, a cordless telephone communication that is transmitted between the cordless telephone handset and the base unit, a public land mobile radio service communication, or a paging service communication, the person committing the offense is guilty of a misdemeanor of the second degree, punishable as provided in s. 775.082 or s. 775.083.

History.—s. 3, ch. 69-17; s. 1163, ch. 71-136; ss. 2, 3, ch. 74-249; s. 249, ch. 77-104; s. 1, ch. 78-376; s. 187, ch. 79-164; s. 2, ch. 80-27; s. 1, ch. 87-301; s. 2, ch. 88-184; s. 2, ch. 89-269; s. 1582, ch. 97-102; s. 18, ch. 99-168; ss. 7, 9, ch. 2000-369; s. 2, ch. 2002-72; s.

934.04 Manufacture, distribution, or possession of wire, oral, or electronic communication intercepting devices prohibited.—

(1) Except as otherwise specifically provided in this chapter, any person who intentionally:

(a) Sends through the mail or otherwise sends or carries any electronic, mechanical, or other device, knowing or having reason to know that the design of such device renders it primarily useful for the purpose of the illegal interception of wire, oral, or electronic communications as specifically defined by this chapter; or

(b) Manufactures, assembles, possesses, or sells any electronic, mechanical, or other device, knowing or having reason to know that the design of such device renders it primarily useful for the purpose of the illegal interception of wire, oral, or electronic communications as specifically defined by this chapter;

shall be guilty of a felony of the third degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.

(2) It is not unlawful under this section for:

(a) A provider of wire or electronic communication service or an officer, agent, or employee of, or a person under contract with, such a provider, in the normal course of the business of providing that wire or electronic communication service; or

(b) An officer, agent, or employee of, or a person under contract with, bidding upon contracts with, or in the course of doing business with, the United States, a state, or a political subdivision thereof, in the normal course of the activities of the United States, a state, or a political subdivision thereof,

to send through the mail; send or carry in intrastate, interstate, or foreign commerce; or manufacture, assemble, possess, or sell any electronic, mechanical, or other device, knowing or having reason to know that the design of such device renders it primarily useful for the purpose of the surreptitious interception of wire, oral, or electronic communications.

*History.—*s. 4, ch. 69-17; s. 1164, ch. 71-136; s. 3, ch. 88-184; s. 3, ch. 89-269.

934.05 Confiscation of wire, oral, or electronic communication intercepting devices.—Any electronic, mechanical, or other device used, sent, carried, manufactured, assembled, possessed, or sold in violation of this chapter may be seized and forfeited to the state.

*History.—*s. 5, ch. 69-17; s. 4, ch. 88-184.

934.06 Prohibition of use as evidence of intercepted wire or oral communications; exception.—

Whenever any wire or oral communication has been intercepted, no part of the contents of such communication and no evidence derived therefrom may be received in evidence in any trial, hearing, or other proceeding in or before any court, grand jury, department, officer, agency, regulatory body, legislative committee, or other authority of the state, or a political subdivision thereof, if the disclosure of that information would be in violation of this chapter. The prohibition of use as evidence provided in this section does not apply in cases of prosecution for criminal interception in violation of the provisions of this chapter.

*History.—*s. 6, ch. 69-17; s. 4, ch. 89-269.

934.07 Authorization for interception of wire, oral, or electronic communications.—

(1) The Governor, the Attorney General, the statewide prosecutor, or any state attorney may authorize an application to a judge of competent jurisdiction for, and such judge may grant in conformity with ss. 934.03-934.09 an order authorizing or approving the interception of, wire, oral, or electronic communications by:

(a) The Department of Law Enforcement or any law enforcement agency as defined in s. 934.02 having responsibility for the investigation of the offense as to which the application is made when such interception may provide or has provided evidence of the commission of the offense of murder, kidnapping, aircraft piracy, arson, gambling, robbery, burglary, theft, dealing in stolen property, criminal usury, bribery, or extortion; any felony violation of ss. 790.161-790.166, inclusive; any violation of chapter 893; any violation of the provisions of the Florida Anti-Fencing Act; any violation of chapter 895; any violation of chapter 896; any violation of chapter 815;

IN THE CIRCUIT COURT OF THE SIXTH JUDICIAL CIRCUIT
IN AND FOR PINELLAS COUNTY, FLORIDA CRIMINAL
DIVISION

RANDOLPH ROLANDO LAWRENCE,
Defendant

v.

CASE NO: CRC-07-20654-CFANO

STATE OF FLORIDA
Plaintiff

_____/

AMENDMENT TO PREVIOUSLY FILED MOTION
FOR POSTCONVICTION RELIEF

Defendant, RANDOLF ROLANDO LAWRENCE, by and through undersigned counsel, and pursuant to Rule 3.850, Florida Rules of Criminal Procedure and this Honorable Court's order of even date, hereby amends his previously filed *pro se* Motion To Vacate Judgment And Sentence Pursuant To Fla. R. Crim. P. 3.850 With Incorporated Memorandum Of Law as follows:

PROCEDURAL HISTORY OF CASE

1. The judgment and sentence under review was rendered in the Sixth Judicial Court Of Pinellas County, Florida by the Honorable Judge Keith Meyer on May 5, 2011.
2. The nature of the offense for which the judgment was imposed is one count of capital sexual battery.
3. The sentence imposed under such conviction is life imprisonment without the possibility of parole.
4. The judgment under attack resulted from a jury's finding of guilt which was rendered on May 5th, 2011; trial from May 3rd, 2011 through May 5, 2011.
5. Defendant testified during pretrial hearings. However, he did not testify at trial nor at his sentencing.

6. During pretrial proceedings, Defendant was represented by private counsel(s) Attorney Glen R. Lansky and Attorney Patrick B. Courtney, of Lansky and Courtney, located at 137 South Parsons Ave., Brandon, Florida 33511.

7. Defendant was represented during the latter stages of pretrial proceedings and trial by private counsel Attorney N. Adam Tebrugge, located at 520 1th Street West #203, Bradenton, Florida 34205, along with co-counsel Attorney Terra Carrol, whose address is 11161 East State Road #70, Unit #110-136, Lakewood Ranch, Florida 34202-9407.

8. Defendant appealed the judgment in this case to the Second District Court of Appeal. Oral argument was held before the Second District Court of Appeal on October 17, 2012. Said appeal was *per curiam* affirmed without opinion on October 27, 2012. See, *Lawrence v. State*, 100 So.3d 694 (Fla. 2d DCA 2012). The Mandate was issued November 16, 2012. Defendant was represented on direct appeal by private counsel Attorney N. Adam Tebrugge.

9. Following the Second District Court of Appeal's Mandate, Defendant filed a Petition for Writ of Certiorari in the Supreme Court of the United States. However, the United States Supreme Court denied the petition. See *Lawrence v. Florida*, 133 S. Ct. 1643 (2013). Counsel again was N. Adam Tebrugge, assisted by the undersigned.

10. On February 2, 2015, Defendant filed a Petition for Writ of Habeas Corpus to the Second District Court of Appeal asserting correction of a manifest injustice see, *Lawrence v. State*, 2nd DCA, Case No. 2D15-502. The Petition was denied without opinion on February 24, 2015.

11. On March 10, 2015, Defendant filed, *pro se*, "Defendant's Motion To Vacate Judgment And Sentence Pursuant To Fla. R. Crim. P. 3.850 With Incorporated Memorandum Of Law." On June 26, 2015 this Honorable Court denied said *pro se* motion without an evidentiary hearing.

12. On July 15, 2015, undersigned counsel filed a notice of appearance in order to represent the Defendant on a *pro bono* basis in his efforts to secure post conviction relief. In connection therewith, the undersigned timely filed a motion for extension of time to file a motion for rehearing in order to evaluate the record, determine whether to file a motion for rehearing on this Court's order, obtain previously reported but not transcribed jury voir dire portions of the trial, and to otherwise evaluate the case to determine whether Defendant has additional grounds for relief. This Court granted said motion on July 16, 2015 and has granted additional extensions of time up to and including November 30, 2015.

13. On November 30, 2015, Defendant filed his Motion to For Further Extension Of Time To File Motion For Rehearing And/Or Amendment Of Previously Filed Post Conviction Relief

14. On December 10, 2015 this Court granted said motion giving Defendant until December 18, 2015 to file its motion.

15. Other than the aforementioned, Defendant has filed no other motions, pleadings, or petitions in this Court or any other court attacking the judgment and sentence in this cause.

16. Defendant hereby amends its previously filed Motion To Vacate Judgment And Sentence Pursuant To Fla. R. Crim. P. 3.850 With Incorporated Memorandum Of Law to add the following arguments.

ADDITIONAL GROUND ONE

THIS COURT SHOULD REVERSE DEFENDANT'S CONVICTION AND SENTENCE AND GRANT DEFENDANT A NEW TRIAL IN LIGHT OF THE FLORIDA SUPREME COURT'S DECISION IN *MCDADE v. STATE*, 154 SO. 3d 292 (FLA. 2014) WHICH SHOULD BE RETROACTIVELY APPLIED AND WOULD HAVE REQUIRED SUPPRESSION OF THE INCRIMINATING SURREPTITIOUSLY RECORDED CONVERSATIONS ADMITTED IN EVIDENCE AT THE TRIAL OF THIS CASE

SUPPORTING FACTS AND ARGUMENT

Aubrey Daniel, the mother of A.B., testified at trial that Defendant came to her workplace and asked to speak to her outside. She concealed a tape recorder on her person and recorded the conversation that took place in the parking lot. Defendant moved pretrial to exclude or suppress the recording of the conversation pursuant to section 934.06 (2006), Florida Statutes, which provides: "Whenever any oral communication has been intercepted, no part of the contents of such communication and no evidence derived therefrom may be received in evidence in any trial...if the disclosure of that information would be in violation of this chapter." Section 934.02(2) (2006), Florida Statutes defines "[o]ral communication" as "any oral communication uttered by a person exhibiting an expectation that such communication is not subject to interception under circumstances justifying such expectation..."

A hearing was held on the motion at which the prosecutor announced that she would not be presenting any evidence and that the issue of whether the recording was illegally intercepted was a legal question. The Defendant testified under oath at the hearing that he drove his own vehicle to the Walgreens where Aubrey Daniel worked as a cashier and spoke to her briefly explaining to her "that he wanted to have a private conversation with her..." He further testified that they agreed to speak outside and that he did not intend for their conversation to be overheard by anyone. This testimony was unrebutted.

The trial court denied Defendant's motion ruling that: "According to the facts presented to the Court at the hearing, the Defendant made admissions of sexual contact with the listed minor victim directly to that child's mother. This admission was made by the Defendant in an open public parking lot at a time when other parties and bystanders had access to the parking lot."

No testimony whatsoever had been presented to the trial court to justify these findings.

Apparently relying upon the Florida Supreme Court's decision in *State v. Inciarrano*, 473 So.2d 1272 (Fla. 1985), the trial court concluded that Defendant "did not have a reasonable expectation of privacy as is required for exclusion of the recording." In *Inciarrano*, the Florida Supreme Court held for purposes of Section 934.02(02):

This expectation of privacy does not contemplate merely a subjective expectation on the part of the person making the uttered oral communication but rather contemplates a reasonable expectation of privacy. A reasonable expectation of privacy under a given set of circumstances depends upon one's actual subjective expectation of privacy *as well as whether society is prepared to recognize this expectation as reasonable.*

473 So. 2d at 1275 (emphasis supplied). Inciarrano had entered the business of another with the intention of murdering him. The recording captured the conversation between him and the victim, as well as the sounds of the murder. The Court adopted the reasoning of the lower court, that Inciarrano's status changed from invitee to trespasser upon his formation of intent to commit the murder. Therefore, he had no reasonable expectation of privacy. *Id.* Two years later, in *LaPorte v. State*, 512 So. 2d 984 (Fla. 2d DCA 1987), the Second District Court of Appeal was confronted with a claim that a recording made at a place of business necessarily indicated that the participants had no expectation of privacy. The Court rejected this argument, holding:

(W)e conclude that the legislature intended that if the person whose conversation or voice is being recorded expects that their conversation or voice will not be recorded and the circumstances justify that expectation and society is prepared to accept that expectation as reasonable, a violation of section 934.03 has occurred regardless of whether the recorded words are of a private nature or privileged content.

512 So. 2d at 986.

As a result of the trial court's ruling in this case, the recording of the conversation was played to the jury and was a prominent feature at trial. Defendant was convicted of capital sexual battery and sentenced to life in prison without the possibility of parole. Defendant appealed his

conviction to the Second District, arguing, among things, that the trial court abused his discretion in admitting the recording in evidence. Specifically, Defendant argued not only that he had a subjective expectation of privacy, but that he deliberately took steps to actualize this expectation by asking Aubrey Daniel to go into the parking lot for privacy instead of having a public conversation with Ms. Daniels within the place of business. Defendant contended that it was the fact that she was wearing a concealed tape recorder that destroyed this privacy. The Second District affirmed Defendant's conviction *per curiam* without opinion on October 27, 2012. *See, Lawrence v. State*, 100 So.3d 694 (Fla. 2d DCA 2012). Defendant sought review by the United States Supreme Court which was denied on March 25, 2013.

Defendant's conviction and sentence became final approximately three months before the Second District issued its opinion in *McDade v. State*, 114 So. 3d 465 (Fla. 2d DCA 2013) ("*McDade I*"). In *McDade I*, the defendant was charged with capital sexual battery. The trial court admitted in evidence before the jury two incriminating surreptitious recordings made by McDade's step-daughter of conversations she had with McDade while located in McDade's bedroom. 114 So. 3d at 467-68. McDade moved to suppress the recordings. The trial court denied the motion and the recordings were introduced into evidence at trial and were a prominent feature of the trial. McDade was convicted and appealed contending that the recordings should have been suppressed. Relying upon *Inciarrano*, the Second District affirmed, concluding that given society's special interest in child protection, "any expectation of privacy McDade may have had is not one society is prepared to accept as reasonable." *Id.* at 470. The Court then certified as a question of great public importance the question of whether a recording of solicitation and confirmation of child sexual abuse made by the minor child fall within the proscription of chapter 934, *Florida Statutes*. *Id.* at 471.

In a specially concurring opinion, Judge Altenbernd expressed concern with *Inciarrano's* "society is prepared to recognize" test, while acknowledging that the other factors present strongly supported McDade's subjective expectation that his statements were not being intercepted, and, therefore, reversal of his conviction and sentences may have been required. *Id.* at 471-72. Specifically, he expressed concern that *Inciarrano* flipped the burden of proof and persuasion at the preliminary hearing on admissibility from the State—who clearly has the burden of establishing an exception to the otherwise absolute exclusion language of section 934.06, *Florida Statutes*—to the Defendant—who is presumed innocent until proven guilty under the Fifth Amendment—to demonstrate that the intercepted communication meets the definition of oral communication under section 934.02(2) based on *Inciarrano's* "society is prepared to recognize" test.

Judge Altenbernd further characterized this test as a "troubling" "results-oriented" test that "leaves our rights in flux." *Id.* at 473, 474. On review, the Florida Supreme Court slightly rephrased the certified question, answering it in the affirmative and quashing the Second District's decision based, in part, on its conclusion that the recordings should have been suppressed under section 934.06, *Florida Statutes*. *McDade v. State*, 154 So. 3d 292 (Fla. 2014) ("*McDade II*") It remanded the case to the Second District with directions to reverse McDade's convictions and sentence, and held that he was entitled to a new trial. *Id.* at 300.

The Florida Supreme Court based its decision on two key points. First, it reaffirmed its holding in *State v. Walls*, 356 So. 2d 294 (Fla. 1978), finding that McDade's conversations were inadmissible under the plain language of the section 934.06(10) because they were oral communications uttered by a person exhibiting an expectation that his communications were not subject to interception under circumstances justifying that his expectation that his statements would not be recorded. *Id.* at 298. The Court further rejected the importation of *Inciarrano's* "society is

prepared to recognize" test as a general rule for testing the admissibility of intercepted oral communications under section 934.06. In the words of the Court:

It may well be that a compelling case can be made for an exception from chapter 934's statutory exclusion rule for recordings that provide evidence of criminal activity--or at least certain type of criminal activities. But the adoption of such an exception is a matter for the Legislature. It is not the province of the courts to create such an exception by ignoring the plain import of the statutory text.

Id. at 299.

For the reasons set forth hereafter, the Florida Supreme Court's decision in *McDade II* constituted a change in law that should be retroactively applied so as to set aside Defendant's conviction and sentence in this case and grant him a new trial.

A. McDade Represents a Change in Florida Law

Prior to *McDade II*, the rule since 1985 with respect to determining the reasonableness of any expectation of privacy for purposes of the exclusion of surreptitiously recorded oral communications under section 934.06, as explained by the Florida Supreme Court and applied by the district courts of appeal, had been set forth in *Inciarrano* as follows:

A reasonable expectation of privacy under a given set of circumstances depends upon one's actual subjective expectation of privacy *as well as whether society is prepared to recognize this expectation as reasonable.*

473 So. 2d at 1275 (emphasis supplied).

McDade II rejects application of *Inciarrano*'s "society is prepared to recognize" test as a general rule for testing the admissibility of intercepted oral communications under section 934.06, and requires strict adherence to the plain language of section 934.06. *McDade II*, 154 So. 3d at 298-99.

B. The Three-Prong Test For Retroactive Application of Decisional Law Under Witt v. State Is Met

In the post conviction setting, a change in decisional law requires retroactive application

where the change: (1) emanates from the United States Supreme Court or the Florida Supreme Court; (2) is constitutional in nature; and (3) has fundamental significance. *Witt v. State*, 387 So. 2d 922 (Fla. 1980); *Johnston v. Moore*, 789 So. 2d 262 (Fla. 2001). When deciding whether to apply a decision retroactively, the fundamental consideration is the balancing of need for decisional finality against the concern for fairness and uniformity in individual cases. Other considerations include: (1) the purpose to be served by the new rule; (2) the extent of reliance upon the old rule; and (3) the effect on the administration of justice. *Witt*, 387 So. 2d at 926.

1. The Decisional Change Emanates From the Florida Supreme Court

McDade II is a decision of the Florida Supreme Court and therefore clearly meets the first prong of *Witt*.

2. McDade II is Constitutional in Nature

McDade is of constitutional dimension and therefore meets the second prong of *Witt* in several important respects. First, as Judge Altenbernd observed in *McDade I*, *Inciarrano* effectively flipped the burden of proof and persuasion at the preliminary hearing on the admissibility of intercepted oral communications from the State—who clearly has the burden of establishing an exception to the otherwise absolute evidentiary exclusion under section 934.06, *Florida Statutes* -- to the Defendant—who is presumed innocent until proven guilty under the Fifth Amendment to demonstrate that the intercepted communication meets the definition of oral communication under section 934.02(2) based on *Inciarrano's* "society is prepared to recognize" test. Judge Altenbernd characterized this test as requiring the defendant to prove his innocence in violation of the Fifth Amendment. *Id.* at 473, 474.

Second, *McDade II* implicates the Florida Constitution's right to privacy set forth in Article I, section 23. It provides the right to be let alone and free from governmental intrusion into a

person's private life. Notably, the right of privacy under the Florida Constitution is fundamental and much broader in scope, embracing more privacy interests, and extending more protection to those interests than its federal counterpart. *Von Eiff v. Azicri*, 720 So.2d 510 (1998); *Tallahassee Memorial Regional Medical Center, Inc. v. Petersen*, 920 So.2d 75 (Fla. 1st DCA 2006). The right encompasses at least two different categories of interest; the first is the individual interest in avoiding disclosure of personal matters, while the second is the interest in independence in making certain kinds of important decisions. *G.P. v. State*, 842 So.2d 1059 (Fla. 4th DCA 2003). The right of disclosural privacy protects citizens from government's uninvited observation in those areas that fall within ambit of zone of privacy afforded under the provision. Florida courts recognize that private conversations between two persons in a public place may be constitutionally protected see, e.g., *Brandin v. State*, 669 So. 2d 280, 281-82 (Fla. 1st DCA 1996); *Migut v. Flynn*, 131 Fed. Appx 262, 265 (11th Cir. 2005). And Chapter 934 vindicates those interests.

Prior to enactment of Article 1, section 23, the Florida Supreme Court refused to recognize a general right of disclosural privacy, However, since its enactment, while Florida courts hold that no *per se* disclosural right of privacy exists under federal constitution or Article 1, section 23, they recognize that a qualified disclosural right of privacy exists under Article 1, section 23 and under the federal constitution for certain private communications where a reasonable expectation of privacy exists. See, *Forsberg v. Housing Authority of City of Miami Beach*, 455 So. 2d 373, 374-80 (Fla. 1984) (J. Overton, *spec. concurr*); *Roberts v. News Press Publishing Co., Inc.*, 409 So. 2d 1089, 1093-94 (Fla. 2d DCA 1982); *Nixon v. Administrator of General Services*, 433 U.S. 425 (1977). Thus, secretly recording defendants' private conversation in the backseat of a police car—one of the last places one would expect privacy—violated defendants' reasonable expectation of privacy under article 1, section 23, where defendants were not under arrest and officers deliberately

led them to believe that their conversation would be private. *Springle v. State*, 613 So.2d 65 (Fla. 4th DCA 1993).

These privacy protections are inextricably intertwined with chapter 934, Florida Statutes. Thus, Florida courts hold that the Fourth Amendment, article 1, sections 12 and 23 of the Florida Constitution and sections 934.03 and 943.06, Florida Statutes, all prohibit the unlawful interception and use as evidence of communications where there is a reasonable expectation of privacy. And, in many instances, the violation of one provision is also a violation of the other. *See, State v. Calhoun*, 479 So. 2d 241, 243-45 (Fla. 4th DCA 1985); *Horning—Keating v. State*, 777 So. 2d 438, 447-48 (Fla. 5th DCA 2001).

Here, the State did not claim that any of the specific exceptions to the general prohibition to interception of communications contained in section 943.03(2) applied. Nor did it put on any testimony or evidence in support of admission of the recordings. The unrefuted evidence was that A.B's mother and Defendant specifically walked out A.B's mothers place of business to the parking lot so that they could have a private conversation, that a recording devise was secreted on A.B's mother's person, that Defendant was unaware his conversation was being recorded and that he had not consented to such recording. Thus, Defendant's recorded statements were oral communications uttered by a person exhibiting an expectation that such communications were not subject to interception under circumstances justifying such expectation. Thus, while Defendant clearly had a legitimate expectation of privacy, which meant that Article I, section 23 placed the burden on the State to justify intrusion of Defendant's rights of non-disclosure under the compelling state interest standard, *Inciarrano* enabled the trial court to admit evidence that would have otherwise been excluded under *McDade II* in violation of Defendant's privacy rights. As applied to Defendant, *McDade II* would have mandated exclusion of the recorded conversations as a matter of law.

Instead, Defendant bore the burden of proof and persuasion at the preliminary hearing, met that burden with unrefuted testimony and nevertheless was denied the protection of section 934.06 afforded by the plain language based on *Inciarrano*'s "society is prepared to recognize" standard.

3. **McDade II is of Fundamental Significance**

McDade II is of fundamental significance for several reasons. First, it directly implicates the right of privacy and the right against self-incrimination which are fundamental rights under both the federal and Florida constitutions and which are inextricably intertwined with chapter 934, *Florida Statutes*. Second, the Second District clearly thought that the issue of importation of *Inciarrano*'s questionable "society is prepared to recognize" test to determinations of admissibility under section 934.06, *Florida Statutes*, important enough in the context of capital sexual battery cases, where the defendant faces the possibility of life in prison without the possibility of parole, to certify the question as one "of great public importance." Third, *McDade II* effectively rejects continued use of *Inciarrano*'s "society is prepared to recognize" test in deciding whether unconsented to surreptitiously recorded oral communications will be admissible under section 394.06, *Florida Statutes*, thereby both vindicating the Legislature's long-standing, strong policy of requiring consent of "all parties" to an intercepted communication, while avoiding continued use of what is fairly best described as a far from objective, results oriented rule that actually had the effect of weakening the strong legislative policy of privacy that underlies and is expressed by chapter 934. *See, McDade II*, 114 So. 3d 471-75 (J. Altenbernd, J., *concur. spec. w/opinion*).

4. **McDade II is Not the Sort of Ruling as to Admissibility of Evidence Amounting to an Evolutionary Refinement in the Criminal Law That Would Otherwise Not Compel Abridgment of Finality**

While *McDade II* involves standards admissibility of evidence, it is inextricably intertwined with constitutionally protected rights of privacy and against self-incrimination, and, therefore, is not

the sort of evolutionary refinement in the criminal law that does not compel abridgment of finality.

Defendant acknowledges *Williams v. State*, 421 So. 2d 512 (Fla. 1982), wherein the Florida Supreme Court refused to give retroactive application to *State v. Sarmiento*, 397 So. 2d 643 (Fla. 1981) (holding that warrantless, electronic interception by state agents of a conversation between defendant and an undercover police officer in defendant's home was an unreasonable interception of defendant's private communications in violation of article I, section 12, Florida Constitution.). Defendant submits that *Williams* is materially distinguishable in several important respects. First, *Williams* was decided based on article I, section 12, Florida's constitutional protection against unreasonable search and seizure; not the specific fundamental right of privacy under Article 1, section 23, or section 934.06, Florida Statutes. Unlike the exclusionary requirements addressed in *Williams* that implicitly arise under Article I, section 12, here there is an explicit statutory prohibition against the surreptitious recordings and associated exclusionary rule. Thus, in *Williams*, the exclusionary right was not an essential ingredient of the constitutional protection against unreasonable searches and seizures; whereas here, the right is not only statutorily mandated, but it is an essential ingredient of the right to privacy guaranteed by Article 1, section 23 of the Florida Constitution. Nor was the court in *Williams* faced with the fact that defendants are languishing in jail potentially convicted on the basis of the poisonous fruit of the criminal acts of others. *See*, § 943.0(4)(a), Fla. Stat. (violation of section 934.03(1), Florida Statutes, is a third degree felony).

5. **Considerations of Uniformity and Fairness Outweigh Those of Finality In This Case**

The surreptitiously recorded conversation was the *only admission* of the Defendant introduced at trial and the *only corroboration* of A.B.'s testimony. The State made Defendant's recorded statements the centerpiece of its case arguing in closing that the statements were a tacit admission of Defendant's guilt:

Ms. Gissinger:...I'm sorry. I'll do whatever you want. I'll do whatever it takes. I'll leave America. I don't know why I did that. It wasn't me. Those are Defendant's own words. That is what the Defendant had to say when he was confronted ..by [A.B.'s] mother. Those are his words. You'll have the opportunity to take that audiotape back. Listen to it. Those are his words...Was he sorry? Yes, he was sorry. He was sorry he got caught...He was sorry that this 11-year old child that he had taken places, done things with, become this father figure to, would actually disobey him, and do the one thing he told her not to do. She told her mom.

Defendant's recorded statements could easily have been a key if not the key piece of evidence that resulted in Defendant's conviction.

Fairness strongly militates in favor retroactive application of *McDade II*. Under *McDade II* the incriminating recorded conversation would not have been admitted in evidence in this case, the State would not have been able to make the recording the centerpiece of its case, Defendant's trial strategy likely would have been different and Defendant might well have been found not guilty, in which case he would not be serving life in prison without the possibility of parole—the most extreme sentence that can be imposed short of the death penalty. Other defendants convicted in cases where surreptitiously recorded conversations were admitted at trial based on *Incicarrano*, are also languishing in jail, some for lengthy sentences, who, but for the timing of the finality of their convictions, might be set free under *McDade II*. Defendant should not have to spend the rest of his life in jail without the possibility of parole because his conviction became final 21 months before *McDade II* was decided. The arbitrariness of such result is underscored by the fact that McDade's alleged offense occurred in 2006 *before* Defendant's, which occurred in 2007. The timing of the administration of justice should not serve as the basis for discriminating between McDade and Defendant under such circumstances.

It is *per se* unreasonable for private persons who are not law enforcement officials or agents, to surreptitiously record conversations they are a party to without the consent of the other party. To

permit them to do so, and to then provide such recordings to the State for use in criminal prosecutions would be a dangerous step down the path of totalitarianism and a direct violation of the strong Legislative policy underlying chapter 934.

Nothing in *McDade II* suggests that its purpose is to punish those who violate section 934.03, Florida Statutes. Rather it clearly seeks to safeguard a defendant's privacy consistent with chapter 934. Thus, the need for uniformity does not outweigh the unfairness to defendants who may be convicted and are serving sentences based on admission in evidence of conversations surreptitiously recorded without their consent in violation of chapter 934, Florida Statutes. Many of these convictions may well rest on criminal acts. Considerations of uniformity should not continue to visit upon defendants the consequences of criminal violations of chapter 934 by others. The public policy reflected by chapter 934 militates in favor of retroactive application.

This is not a case where the State has resisted an exclusionary rule such that its prisons may be full of persons convicted on the basis of illegally intercepted conversations. Chapter 934's exclusionary rule has been in place since 1969. Presumably its plain language has generally been faithfully followed by the State and the general public such that there should be relatively few defendants currently incarcerated as a result of its violation who could seek post-conviction relief. Cases involving the admissibility of surreptitiously recorded communication under chapter 334, Florida Statutes, appear to be relatively rare given this strong legislative policy prohibiting such recording and the limited exceptions thereto. Indeed, shepardization of *Inciarrano* reveals the reporting of 14 state court cases involving exclusion of recorded conversations under section 934.06, including *McDade*, in the 30 years since the Florida Supreme Court issued its opinion. Thus, retroactive application of *McDade II* should not unduly tax the administration of justice. It will only open up to collateral review the relatively few cases of persons who are in prison by

reason of *Inciarrano* and denial of their constitutional rights of privacy.

ADDITIONAL GROUND TWO

TRIAL COUNSEL RENDERED INEPT AND UNPROFESSIONAL REPRESENTATION WHEN HE FAILED TO CHALLENGE FOR CAUSE OR PREEMPTORILY JUROR LISA MATTOX BASED ON HER UNEQUIVOCAL AFFIRMATION THAT SHE COULD NOT BE IMPARTIAL, AND HER LATER EQUIVOCAL OR CONDITIONAL ANSWERS WHICH ESTABLISHED HER BIAS AND RAISED A REASONABLE DOUBT THAT SHE DID NOT POSSESS THE REQUISITE STATE OF MIND NECESSARY TO RENDER AN IMPARTIAL DECISION, FOR FAILING TO PRESERVE FOR DIRECT APPEAL AND FOR FAILING TO RAISE THE ISSUE ON DIRECT APPEAL

In order to establish a claim of ineffective assistance of counsel, Defendant must satisfy the two-prong test of *Strickland v. Washington*, 466 U.S. 668 (1984). First, Defendant must show that counsel's performance was deficient in that counsel's acts or omissions were outside the range of professionally competent counsel. Second, Defendant must show that the deficient performance prejudiced the defense. To demonstrate prejudice, Defendant must show a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. In order to satisfy the prejudice prong, it is sufficient to show that the jury that found him guilty was composed in part of jurors who were biased.

For the reasons set forth hereafter, Defendant was denied effective assistance of counsel within the meaning of *Strickland v. Washington*.

SUPPORTING FACTS AND ARGUMENT

Defendant was charged with capital sexual battery based on an alleged incident that took place sometime in early 2007. At trial, the venire consisted of forty individuals - eight of whom were sworn (six regular jurors plus two alternate jurors) to serve for the duration of the trial. During voir dire, potential jurors were asked a series of questions, first by the trial court, then the prosecutor and finally by defense counsel.

vacated and set aside. E.g. see *Thomas v. State*, 828 So.2d 456 (Fla. 4th DCA 2002) (finding that this deficiency fell below the standard of effective assistance of counsel as guaranteed by the Sixth Amendment to the United States Constitution and meets the prongs enunciated in *Strickland v. Washington*, 466 U.S. 668 (1984)). Furthermore, counsel's deficient performance had the direct result of delaying the finding of said issues and as such Grounds Two and Three in this motion should be considered on their individual merits notwithstanding the delay in presenting them to the Court. In sum, defense counsel's performance was ineffective under *Strickland*.

RELIEF SOUGHT

WHEREFORE, based on the foregoing, the Defendant respectfully prays and asks that this Honorable Court issue and enter its order directing the State to respond in a reasonable time, and further respectfully prays and asks that this Honorable Court enter and issue its order that an evidentiary hearing be held, and thereafter vacate and set aside the judgment of conviction and sentence now under attack, and grant such other relief as is appropriate and just under the circumstances..

Respectfully Submitted,

/s/ David Smolker

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Counsel for Defendant

CERTIFICATE OF SERVICE

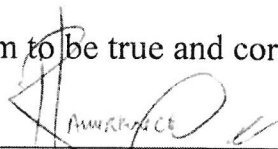
I HEREBY CERTIFY that on the 18th day of December, 2015, the original of this document was e-filed with the Court, and a true and correct copy of the foregoing was served via regular U.S. Mail to: the Office of State Attorney, P.O. Box 5028, Clearwater, Florida 33758.

/s/ David Smolker
DAVID SMOLKER

OATH

Pursuant to 92.525 Florida Statute and Fla.R.Crim.P. 3.850(c)

UNDER PENALTY OF PERJURY, I Randolph Rolando Lawrence,
hereby declare that (1) I speak and understand English; and (2) I have read the
foregoing facts and arguments, and affirm them to be true and correct.

A handwritten signature in dark ink, appearing to read "Randolph Rolando Lawrence", is written over a horizontal line.

Randolph Rolando Lawrence
DC# C05818 – I1206 Low
Hamilton C.I. / Main Unit
10650 S.W. 46th Street
Jasper, Florida 32052-1360

IN THE CIRCUIT COURT OF THE SIXTH JUDICIAL CIRCUIT OF THE STATE OF
FLORIDA IN AND FOR PINELLAS COUNTY CRIMINAL DIVISION

STATE OF FLORIDA,

v.

RANDOLPH LAWRENCE,
Person ID: 2863761, Defendant

CASE NO.: CRC07-20654CFANO
UCN: 522007CF020654XXXXNO
DIVISION: D

**ORDER GRANTING DEFENDANT'S MOTION FOR LEAVE TO AMEND
PREVIOUSLY FILED MOTION FOR POSTCONVICTION RELIEF;
ORDER DENYING IN PART AND DISMISSING IN PART DEFENDANT'S
AMENDMENT TO PREVIOUSLY FILED MOTION FOR POSTCONVICTION
RELIEF**

THIS CAUSE came before the Court upon two motions filed by Defendant. First, this cause comes upon Defendant's "Motion for Leave to Amend Previously Filed Motion for Postconviction Relief," filed on December 18, 2015. Second, the matter arises on Defendant's "Amendment to Previously Filed Motion for Postconviction Relief," also filed on December 18, 2015, pursuant to Florida Rule of Criminal Procedure 3.850. Having reviewed the motions, the record and applicable law, the Court finds as follows:

PROCEDURAL HISTORY

On May 5, 2011, a jury found Defendant guilty of one count of sexual battery. This Court subsequently sentenced Defendant to life without the possibility of parole. (See Exhibit A: Judgment and Sentence). Thereafter, Defendant filed an appeal with the Second District Court of Appeal and the appellate court *per curiam* affirmed the matter Lawrence v. State, 100 So. 3d 694 (Fla. 2d DCA 2012). The mandate issued November 16, 2012. Following the Second District Court of Appeal's mandate, Defendant filed a petition for writ of certiorari in the Supreme Court of the United States. The Supreme Court, however, denied his petition. Lawrence v. Florida, 133 S. Ct. 1643 (2013).

Defendant filed his initial 3.850 motion, *pro se*, on March 10, 2015. On June 30, 2015, the Court entered an order denying Defendant's motion. (See Exhibit B: Order Denying Defendant's Motion to Vacate Judgment and Sentence). Thereafter, attorney David Smolker entered an appearance and filed a motion for extension time to file a motion for rehearing. The Court granted Defendant's motion in an order entered on July 16, 2015. (See Exhibit C: Order

Granting Motion for Extension of Time). On July 30, 2015, Defendant filed a second motion for extension of time to file a motion for rehearing. The Court granted Defendant's second motion for extension of time on July 31, 2015. (See Exhibit D: Order Granting Motion for Second Extension of Time). On October 1, 2015, Defendant filed a "motion for further extension of time to file motion for rehearing." The Court granted this motion on October 7, 2015. (See Exhibit E: Order Granting Motion for Further Extension of Time). On November 10, 2015, Defendant filed a "second motion for further extension of time to file motion for rehearing." The Court granted that motion the same day. (See Exhibit F: Order Granting Second Motion for Further Extension of Time). On November 30, 2015, Defendant filed a motion "for further extension of time to file motion for rehearing and/or amendment of previously filed post conviction [sic] motion." The Court granted Defendant's motion on December 11, 2015. (See Exhibit G: Order Granting Motion for Further Extension of Time to File Motion for Rehearing or for Amendment to Previously Filed Pro Se Post Conviction Motion). On December 18, 2015, rather than filing a motion for rehearing, Defendant filed an amended motion for postconviction relief and a motion for leave to amend his previous motion.

ANALYSIS

I. DEFENDANT'S MOTION FOR LEAVE TO AMEND PREVIOUSLY FILED MOTION FOR POSTCONVICTION RELIEF

In his motion for leave, Defendant asserts that he should be allowed to file an amended motion for postconviction relief. In view of the arguments presented in Defendant's motion, the Court grants Defendant's motion for leave.

II. DEFENDANT'S AMENDMENT TO PREVIOUSLY FILED MOTION FOR POSTCONVICTION RELIEF

In his amended motion, Defendant raises four additional grounds for relief. The first ground alleges that McDade v. State, 154 So. 3d 292 (Fla. 2014) should be applied retroactively to Defendant's case. The remaining three grounds each allege ineffective assistance of counsel. For the reasons discussed below, each of Defendant's arguments is dismissed or denied.

A. Defendant's "Additional Ground One"

In his first ground, Defendant argues that the Florida Supreme Court's holding in McDade v. State should be applied retroactively to Defendant's case. 154 So. 3d at 292.

Defendant avers that McDade invalidates his conviction because, in view of the Supreme Court's holding, some of the evidence used to convict Defendant should have been excluded. Despite his argument, McDade has not been held to apply retroactively. Accordingly, this Court cannot apply it as such. Thus, Defendant's first ground is dismissed.

B. Defendant's "Additional Grounds" Two Through Four

In his second, third, and fourth grounds, Defendant claims entitlement to relief based upon allegations that trial counsel rendered ineffective assistance. A legally sufficient claim of ineffective assistance of counsel must allege both that counsel's performance was deficient, and that the defendant suffered prejudice as a result. Strickland v. Washington, 466 U.S. 668, 687 (1984). Such allegations must be supported by specific instances and the burden of identifying particular acts or omissions falls upon the movant. Hoskins v. State, 75 So. 3d 250, 253-254 (Fla. 2011). Thus, to prevail on a claim of ineffective assistance of counsel, movants must meet their burden of arguing both deficiency and prejudice. If the movant fails to satisfy either prong of this analysis, the inquiry ends. Maxwell v. Wainwright, 490 So. 2d 927, 932 (Fla. 1986).

To satisfy the deficiency prong, movants must identify counsel's specific acts or omissions that fell below a standard of reasonableness under prevailing professional norms. Jones v. State, 998 So. 2d 573, 582 (Fla. 2008). The legal standard for such an evaluation is "reasonably effective counsel, not perfect or error-free counsel." Teffeteller v. Dugger, 734 So. 2d 1009, 1022 n. 14 (Fla. 1999). In analyzing a trial attorney's performance, courts consider all of the circumstances from the attorney's perspective at that time, with the strong presumption that counsel acted reasonably. Downs v. State, 453 So. 2d 1102, 1107-08 (Fla. 1984).

Upon satisfying the first prong, the movant must still establish prejudice. To do so, he "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. A "reasonable probability" is a probability that is "sufficient to undermine confidence in the outcome." Haliburton v. Singletary, 691 So. 2d 466, 470 (Fla. 1997) (quoting Cruse v. State, 588 So. 2d 983, 987 (Fla. 1991)). Once the movant has alleged facts sufficient to satisfy both prongs, his motion is facially sufficient. At that point, an evidentiary hearing is required unless the record conclusively shows that the movant is not entitled to relief. Harrel v. State, 79 So. 3d 231, 233 (Fla. 2d DCA 2012).

1. “Additional Ground” II

In his second ground, Defendant argues that counsel was ineffective for failure to raise a preemptory challenge to a juror, or to challenge that juror for cause. Specifically, Defendant alleges that Counsel was deficient in failing to strike Juror Mattox from the panel after she unequivocally stated that she could not be fair and impartial. Additionally, Defendant claims that counsel was deficient in failing to strike Juror Mattox after she indicated that she would not be able to remain impartial if Defendant did not testify. Defendant asserts that counsel’s deficiency prejudiced him because Juror Mattox would have been struck if counsel had acted appropriately. As a result, Defendant concludes that he was denied a fair and impartial jury.

Defendant’s second ground is denied because it is based upon flagrant mischaracterizations of the record and is, therefore, factually incorrect. The record refutes Defendant’s assertion that, on page 160, Juror Mattox states that she cannot be fair and impartial. It is clear from context that Juror Mattox’s “unequivocal no” was voiced in response to the question of whether she had ever been fingerprinted. Beginning on page 157 of the transcript, Ms. Grissinger asks each potential juror if they have ever been fingerprinted. (See Exhibit H: Transcript). To each potential juror who answers yes, Ms. Grissinger directs follow-up questions. (Exhibit H at 157–164). The question regarding fairness and impartiality to which Defendant refers is a follow-up question, directed solely to Prospective Juror Galler. (Exhibit H at 160). Thus Juror Mattox’s subsequent “no” does not refer to her ability to remain impartial.

Further, the record contradicts Defendant’s contention that Juror Mattox’s statements call to question her ability to remain impartial where the accused does not testify. The exchange upon which Defendant bases this assertion does not indicate that Juror Mattox cannot remain impartial. (Exhibit H at 194–196). Moreover, Juror Mattox—along with the other prospective jurors—affirmatively indicated that she understood the accused’s right to remain silent. (Exhibit H at 33).

In view of the above, Defendant’s “additional ground two” is denied.

2. “Additional Ground” III

In his third ground, Defendant argues that the trial court committed error in failing to excuse Juror Mattox. This argument must be dismissed because it should have been raised on direct appeal. See Bruno v. State, 807 So. 2d 55, 63 (Fla. 2001) (“A claim of trial court error generally can be raised on direct appeal but not in a rule 3.850 motion”); Henry v. State,

933 So. 2d 28, 29 (Fla. 2d DCA 2006) (holding that allegations of trial court error should have been raised on direct appeal) (citations omitted). Moreover, Defendant's third ground is based upon the same mischaracterization of Juror Mattox's statements discussed above with regard to ground two. Regardless of the basis for Defendant's argument, his "additional ground three is dismissed"

3. "Additional Ground" IV

In his fourth ground, Defendant asserts that counsel was ineffective for failing to have the voir dire segment of the trial transcribed. This claim is dismissed because it should have been raised in a motion alleging ineffective assistance of appellate counsel. C.f. Flowers v. State, 965 So. 2d 1233 (Fla. 1st DCA 2007) (addressing the claim that appellate counsel was ineffective in failing to order a transcript); Lavin v. State, 861 So. 2d 488 (Fla. 4th DCA 2003) (addressing the argument that appellate counsel was ineffective for failure to order transcripts).

Furthermore, the Court notes that Defendant's argument is not supported by law. Though Defendant cites Thomas v. State in support of his assertion that failure to include the voir dire portions of the trial transcript constitutes ineffective assistance of counsel, the Thomas panel made no such finding. 828 So. 2d 456 (Fla. 4th DCA 2002). Thus, as he did with the transcripts, Defendant has misrepresented the cited authority in his fourth ground.

It is therefore

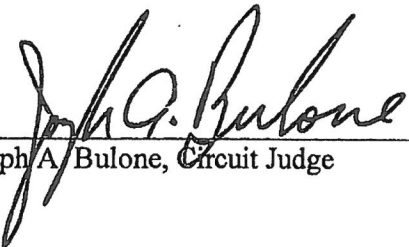
ORDERED AND ADJUDGED that Defendant's Motion for Leave to Amend Previously Filed Motion for Postconviction Relief is hereby **GRANTED**.

AND IT IS FURTHER ORDERED AND ADJUDGED that "Additional Ground One," "Additional Ground Three," and "Additional Ground Four" of Defendant's "Amendment to Previously Filed Motion for Postconviction Relief" are hereby **DISMISSED**.

AND IT IS FURTHER ORDERED AND ADJUDGED that "Additional Ground Two" of Defendant's "Amendment to Previously Filed Motion for Postconviction Relief" is hereby **DENIED**.

DEFENDANT IS HEREBY NOTIFIED that this is a final order and he has thirty days from the rendition date of this order to appeal, should he choose to do so.

DONE AND ORDERED in Chambers at Clearwater, Pinellas County, Florida, this 17 day of February 2016. A true and correct copy of the foregoing has been furnished to the parties listed below.



Joseph A. Bulone, Circuit Judge

cc: State Attorney

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Jasper, Florida 32052-1360

**IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
SECOND DISTRICT**

RANDOLPH ROLANDO LAWRENCE

Appellant,

vs.

**DCA CASE NO.: 2D16-1234
LT Case No.: 07-20654CFANO**

STATE OF FLORIDA,

Appellee.

_____ /

**ON APPEAL FROM THE SIXTH JUDICIAL CIRCUIT OF THE
STATE OF FLORIDA, IN AND FOR PINELLAS COUNTY, FLORIDA**

APPELLANT'S INITIAL BRIEF

SMOLKER BARTLETT LOEB HINDS
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prove, and concluded that "[t]he State produced competent, testimonial evidence that Defendant committed sexual battery upon the victim." (3rd Supp. R. 873).

The State's evidence did not conclusively refute the claim of innocence. The sections of the record cited by the court are refuted as follows: (1) (Tr. 31:22-40:17, 41:23-43:10) by the alleged victim's testimony and her original story that she had sex with her boyfriend Robert which changed to with Lawrence when she feared punishment from her mother; (2) (Tr. 81:9-84:15) by Ms. Daniel's testimony in which she stated that Lawrence told her he did not rape A.B. and claimed he touched A.B. in inappropriate ways which is not evidence of sexual battery; (3) (99:5-105:19) by the illegally recorded conversation between Ms. Daniel and Lawrence which is in large part unintelligible and is so riddled with unintelligible questions and answers that its weight as evidence is negligible; and (4) (141:21-147:13), by the nurse's testimony in which she said that the facts were inconclusive and that her conclusions were based on the alleged victim's unsubstantiated verbal report rather than any physical findings.

As such, the case was "circumstantial" and prejudice to Lawrence must be found where no actual physical evidence existed and trial counsel was deficient in presenting an adequate motion for judgment of acquittal. The lower court erred in denying Initial Ground III.

E. The Trial Court Erred in Dismissing Additional Ground I Alleging That The Florida Supreme Court's Decision In *McDade v. State*, 154

So. 3d 292 (Fla. 2014) Should Be Applied Retroactively To Require a New Trial

During the same time frame it was reviewing Lawrence's conviction on direct appeal, this Court was also reviewing on direct appeal the conviction of Richard McDade. See, *McDade v. State*, 114 So. 3d 465 (Fla. 2d DCA 2013) ("*McDade I*"). As in Lawrence's case, McDade was charged with capital sexual battery. As in Lawrence's case, the trial court admitted in evidence before the jury two incriminating surreptitious recordings made by McDade's step-daughter of conversations she had with McDade. *Id.* at 467-68. As in Lawrence's case, McDade moved to suppress the recordings. As in Lawrence's case, the trial court denied the motion and the recordings were introduced into evidence at trial and were a prominent feature of the trial. As in Lawrence's case there was surprisingly limited evidence at trial to support the victim's claims. *Id.* at 468. As in Lawrence's case, McDade was convicted and appealed contending that the recordings should have been suppressed. *Id.* And, as in Lawrence's case, relying upon *Inciarrano v. State*, 473 So. 2d 1272 (Fla. 1985), this Court affirmed. *Id.* at 471. However, unlike Lawrence's case, which was affirmed per curiam without opinion, this Court issued a written opinion concluding that, given society's special interest in child protection, "any expectation of privacy McDade may have had is

not one society is prepared to accept as reasonable."² *Id.* at 470. And, unlike in Lawrence's case, this Court then certified as a question of great public importance the question of whether a recording of solicitation and confirmation of child sexual abuse made by the minor child fell within the proscription of chapter 934, Florida Statutes. *Id.* at 471.

In a specially concurring opinion, Judge Altenbernd expressed concern with *Inciarrano's* "society is prepared to recognize" test, while noting that the other factors present strongly supported McDade's subjective expectation that his statements were not being intercepted, and, therefore, reversal of his conviction and sentences may have been required. *Id.* at 471-72. Specifically, he expressed concern that *Inciarrano* flipped the burden of proof and persuasion at the preliminary hearing on admissibility from the State—who clearly has the burden of establishing an exception to the otherwise absolute exclusion language of section 934.06, Florida Statutes—to the Defendant—who is presumed innocent under the Fifth Amendment—to demonstrate that the intercepted communication meets the definition of oral communication under section 934.02(2). The result, according to

² Chapter 934's exclusionary provision applies where the person uttering the communication has a reasonable expectation of privacy. See, 934.02(2), Fla. Stat. Borrowing from 4th Amendment cases, the Florida Supreme Court has explained that such expectations are reasonable "depends upon ones subjective expectations of privacy as well as whether society is prepared to recognize this expectation as reasonable." *Inciarrano*, 473 So. 2d 1272, 1275 (Fla. 1985).

Judge Altenbernd, is a "troubling," "results-oriented" "society is prepared to recognize" test that "leaves our rights in flux." *Id.* at 473, 474.

These concerns are highly relevant to Lawrence's case since, the State presented no evidence to meet its burden to establish an exception to the otherwise absolute exclusion language of Section 934.06, Florida Statutes. Moreover, Florida cases recognize a reasonable expectation of privacy in a parking lot. See, *Brandin v. State*, 669 So. 2d 280, 281 (Fla. 1st DCA 1996); *Migut v. Flynn*, 131 Fed. Appx. 262265 (11th Cir. 2005). Nevertheless, Lawrence was forced, contrary to the presumption of innocence, to demonstrate that the communication met the definition of oral communication under section 934.02(2) based on the *Inciarrano* test. Here, the factors weighed heavily in favor of Lawrence's subjective expectation of privacy.

On review of *McDade I*, the Florida Supreme Court quashed the Second District's decision based, in part, on its conclusion that the recordings should have been suppressed under section 934.06, Florida Statutes. *McDade v. State*, 154 So. 3d 292 (Fla. 2014) ("*McDade II*"). It remanded the case to this Court with directions to reverse McDade's convictions and sentence, and held that he was entitled to a new trial. *Id.* at 300.

The Florida Supreme Court held that McDade's conversations were inadmissible under the plain language of the section 934.06(10) because they were

oral communications uttered by a person exhibiting an expectation that his communications were not subject to interception under circumstances justifying his expectation that his statements would not be recorded. *Id.* at 298.

Here, had the trial court or this Court in Lawrence's case had the benefit of *McDade, II*, Lawrence would have been tried without the surreptitiously recorded conversation having been heard by the jury. Lawrence argues in Additional Ground I that the Florida Supreme Court's decision in *McDade II* should be applied retroactively because it: (1) represents a change in Florida law that rejected application of *Inciarrano's* "society is prepared to recognize" test; and (2) satisfied the three-prong test of *Witt v. State*, 387 So. 2d 922 (Fla. 1980) (requiring that the decision: (a) emanate from the United States Supreme Court or the Florida Supreme Court; (b) be constitutional in nature; and (c) have fundamental significance.) (R. 10-18)

Lawrence further argued that because *McDade II* was inextricably intertwined with constitutionally protected rights of privacy and against self-incrimination, it was not the sort of evolutionary refinement in the criminal law that ordinarily does not compel abridgment of finality. (R. 14-15)

Finally, Lawrence argued that the need for uniformity does not outweigh the unfairness to defendants who may be convicted and are serving sentences based

on admission in evidence of conversations surreptitiously recorded without their consent in violation of chapter 934, Florida Statutes. (R. 15-16)

The trial court dismissed Additional Ground I concluding that it could not apply *McDade* retroactively since it has not been held to apply retroactively. (R. 37-38). However, a claim that a judicial decision should be applied retroactively is the proper subject of a Rule 3.850 motion. *Dixon vs. State*, 730 So. 2d 265 (Fla. 1999), *Callaway vs. State*, 642 So. 2d 636, 639 (Fla. 2d DCA 1994), Fla. R. Crim. P. 3.850 (a)(6), (b)(2). This Court's review of the trial court's dismissal is *de novo*. Therefore, this Court should address the issue rather than remanding it to the trial court.

Should the Court elect to address Additional Ground I on the merits, Lawrence further adopts its arguments set forth in his Amendment to Previously Filed Motion for Post Conviction Relief filed below. See, (R-6-18).

The undersigned acknowledges this Court's recent ruling in *State v. Caraballo*, 2016 WL 886538 *1 (Fla. 2d DCA March 9, 2016), rejecting the argument that *McDade II* vitiated *Inciarrano's* "society is prepared to recognize" test. While this weighs against Lawrence's argument that *McDade II* represented a change in decisional law, a careful analysis of *McDade II* reveals it to still be such a change. This is because the Court makes clear that only the Legislature can create exceptions to the otherwise absolute exclusion of surreptitiously recorded oral

communication uttered by a person exhibiting an expectation that such communication is not subject to interception under circumstances justifying such expectation. Here it is undisputed that Lawrence had a subjective expectation of privacy. The issue was whether his expectation was justified under the circumstances. True, the surreptitiously recorded conversation in *McDade* took place in McDade's bedroom, whereas here, the surreptitiously recorded conversation took place in a parking lot. See, *Ruiz v. State*, 416 So. 2d 32 (Fla. 5th DCA 1982); *Cinci v. State*, 642 So. 2d 572 (Fla. 4th DCA 1994). However, here, Lawrence's undisputed testimony was that he took specific actions to ensure the privacy of his conversation by leaving the interior of the mother's workplace and adjourning to the parking lot so that the conversation would not be overheard or intercepted by third parties. (2nd Supp R. 61-66); See, *La Porte v. State*, 512 So. 2d 984 (Fla. 2d DCA 1987). Here, the State put on no evidence to refute the reasonableness of Lawrence's actions or his expectation of privacy resulting therefrom. Instead it argued that, as a matter of law, a person has no reasonable expectation of the privacy if their conversations occur in a parking lot. (2nd Supp. R. 61-66). Florida law does not hold that society is never prepared to recognize an legitimate expectation of privacy in an unenclosed area such as a parking lot accessible to the public where it is unrefuted that the defendant specifically took steps to ensure the privacy of his conversation and there was no evidence that such expectation

was unreasonable under the circumstances. See, *Brandin v. State*, 669 So. 2d 280, 281 (Fla. 1st DCA 1996); *Migut v. Flynn*, 131 Fed Appx. 262265 (11th Cir. 2005). As in *McDade II*, the recording was made surreptitiously, Lawrence did not consent to the conversation being recorded and none of the other exceptions listed in section 934.03(2), Florida Statutes, were applicable. Lawrence took action to ensure the privacy of the conversation. His actions were reasonable under the circumstances. And nothing in the record of this case refutes the reasonableness of his expectation other than the mere fact that it took place in a parking lot. That fact alone was an insufficient basis for concluding that Lawrence had no justifiable expectation of privacy.

Here, the State made Lawrence's recorded statements the centerpiece of its case arguing in closing that the statements were a tacit admission of Lawrence's guilt. (R. 625-626). These statements could easily have been a key, if not the key, piece of evidence that resulted in Lawrence's conviction.

Both McDade's and Lawrence's appeals were before this Court at the same time.³ Both were convicted based on surprisingly little evidence other than the victim's statement based in part on surreptitiously recorded conversations admitted

³ Lawrence's judgment and sentence was affirmed per curium on October 27, 2012 and became final on March 25, 2013. McDade's judgment and sentence was affirmed and the issue certified to the Florida Supreme Court by this Court less than three months later on June 7, 2013. McDade's judgment and sentence was reversed in *McDade II* on December 14, 2014. The Supreme Court's mandate was issued on January 2, 2015.

pursuant to *Inciarrano* “society is prepared to recognize” test. In some cases, a person has a legitimate expectation of privacy in a parking lot while in others, he or she does not, even when the person adjourns to the parking lot specifically to ensure such privacy. Lawrence's case highlights Judge Altenbernd's concerns with the “troubling” “results oriented” nature of this test that “leaves our rights in flux” while effectively flipping the burden of proof at a suppression hearing from the State to the defendant contrary to the presumption of innocence. McDade was retried and acquitted by a jury that did not hear the illegally tape recorded conversation. Thus, McDade is now free, while Lawrence remains in prison sentenced to life without the possibility of parole.

VI. CONCLUSION

The record reflects that a potentially biased juror served on the jury that convicted Lawrence. Defense counsel should have questioned or challenged this juror based on her unequivocal “no” to the question of whether she could be fair and impartial. Defense counsel failed to investigate, interview and present Robert as a witness. His testimony might have undermined the State case and cast doubt on Lawrence's guilt. Defense counsel further failed to present potentially exculpatory evidence DNA evidence from the condom the analysis of which measurably included the alleged victim but not Lawrence. Defense counsel's motion for judgment of acquittal was insufficient because it did not specifically

raise the insufficiencies in the direct circumstantial evidence. These grounds for relief were not conclusively refuted by the record below.

The Supreme Court's decision in *McDade* should be applied retrospectively to grant Lawrence a new trial. Finally, this Court should consider that, despite having taken specific steps to ensure the privacy of his conversation, Lawrence was forced, contrary to the presumption of innocence, to demonstrate that a conversation surreptitiously recorded without his consent met the definition of oral communication under section 934.02(2). The State made Lawrence's recorded statements the centerpiece of its case arguing in closing that the statements were a tacit admission of Lawrence's guilt. These statements could easily have been a key, if not the key, piece of evidence that resulted in Lawrence's conviction.

Justice demands that a man should not spend the rest of his life in prison without the possibility of parole when his conviction might well have been based on what Judge Altenbernd characterizes as the "troubling", results-oriented *Inciarrano* "society is prepared to recognize" test.

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

RANDOLPH ROLANDO LAWRENCE,

Appellant,

2DCA#: 2D16-1234

v.

STATE OF FLORIDA,

Appellee.

**MOTION FOR CLARIFICATION, REHEARING AND REHEARING EN BANC, FOR
WRITTEN OPINION AND FOR CERTIFICATION TO THE FLORIDA SUPREME
COURT OF A QUESTION OF GREAT PUBLIC IMPORTANCE**

Appellant, RANDOLPH ROLANDO LAWRENCE ("Lawrence"), by and through undersigned counsel, hereby moves this Honorable Court: (1) for clarification, rehearing and rehearing en banc; (2) to write a written opinion as to whether the Florida Supreme Court's decision in *McDade v. State*, 154 So. 3d 292 (Fla. 2014), should be applied retroactively to grant Lawrence a new trial; and/or (3) to certify to the Florida Supreme Court a question of great public importance.

**I.
INTRODUCTION**

In 2011, Lawrence was convicted of capital sexual battery and sentenced to life in prison without the possibility of parole. At trial, the court admitted over Lawrence's objection a CD containing an incriminating conversation between Lawrence and the alleged victim's mother that took place in the parking lot of the mother's workplace and which the mother surreptitiously recorded. Lawrence sought to suppress the recording pre-trial pursuant to section 934.06, Florida Statutes (2010). Based on *State v. Inciarrano*, 473 So. 2d 1272 (Fla. 1985), the trial

court refused to suppress the recording. It was played to the jury. And it may well have been a key, if not the key piece of evidence that led to his conviction. Lawrence appealed his conviction contending that the surreptitiously recorded conversation should have been suppressed. This Court affirmed *per curium* without opinion in October 2012. Lawrence's conviction became final in March 2013,

Three months later, this Court issued its decision in *McDade v. State*, 114 So. 3d 465 (Fla. 2d DCA 2013) ("*McDade I*"), which also involved a defendant's conviction of capital sexual battery after the trial court admitted into evidence under *Inciarrano* a surreptitiously recorded conversation. The two appeals were simultaneously pending before this Court. In *McDade I*, this Court affirmed with written opinion and certified a question of great public importance to the Florida Supreme Court as to whether recording of solicitation and confirmation of child sexual abuse made by a minor child fell within the proscription of chapter 934, Florida Statutes. The Florida Supreme Court answered the question in the affirmative, and reversed McDade's conviction. *McDade v. State*, 154 So. 3d 292 (Fla. 2014) ("*McDade II*").

In *McDade I*, Judge Altenbernd, specially concurring, expressed significant constitutional concerns with *Inciarrano's* "society is prepared to recognize" test. He concluded that *Inciarrano* flipped the burden of proof and persuasion at the preliminary hearing on admissibility from the State to the Defendant in violation of the Fifth Amendment and that the test itself was a "troubling" "results-oriented" test that "leaves our rights in flux." *Id.* at 472, 473, 474.

Lawrence's case highlights Judge Altenbernd's constitutional concerns; concerns this Court has yet to address further. Here, it was undisputed that Lawrence and the mother agreed to adjourn to the parking lot to have a private conversation and that no one else listened in. Yet under *Inciarrano*, some courts may conclude that society is prepared to recognize an expectation of privacy in a parking lot while others may not, even where, as here, the parties agree to adjourn

to the parking lot to have a private conversation and no other person listened.

Lawrence's post conviction relief motion argued that the circuit court should reverse Lawrence's conviction and sentence and grant Lawrence a new trial based on retroactive application of *McDade II*. (R. 5-17). Neither the trial court nor this Court has addressed the merits of his argument, which relies in part on Judge Altenbernd's specially concurring opinion.

McDade was retried without admission of the surreptitiously recorded conversation and acquitted. Thus, despite the remarkable similarity of Lawrence's and McDade's cases and their simultaneous pendency before this Court, McDade is a free man while Lawrence remains in prison serving life without the possibility of parole at the end of the line of his ability to obtain post-conviction relief.

II. STATEMENT OF FACTS

The alleged victim's mother testified at trial that Lawrence came to her workplace and asked to speak to her outside. (R. 455). She concealed a tape recorder on her person and recorded the conversation that took place in the parking lot. (R. 455). Lawrence moved pre-trial to exclude the recording pursuant to section 934.06, Florida Statutes (prohibiting admission of surreptitiously recorded oral communications¹ where the person uttering the communication has a reasonable expectation of privacy).

At the suppression hearing, Lawrence testified under oath that he drove his own vehicle to a Walgreens drug store where the mother worked as a cashier and spoke to her briefly explaining "that he wanted to have a private conversation with her..." (2nd Supp. R. 61-64). He further testified that they agreed to speak outside, that he did not intend for their conversation to

¹ "Oral communication" is defined as "any oral communication uttered by a person exhibiting an expectation that such communication is not subject to interception under circumstances justifying such expectation and does not mean any public oral communication uttered at a public meeting or any electronic communication." § 934.02(2), Fla. Stat. (2010)

be overheard by anyone and that no one else listened to the conversation. (2nd Supp. R. 61-64). This testimony was un rebutted and the State presented no evidence that Lawrence's expectation of privacy in the parking lot was unreasonable under the circumstances. (2nd Supp. R. 64).

The trial court denied Lawrence's motion ruling that the incriminating statements were made by Lawrence in an open public parking lot at a time when other parties and bystanders had access to the parking lot. (2nd Supp. R. 75). At trial, the court admitted over Lawrence's objection a CD containing an "enhanced" version of the surreptitiously recorded tape recording and it was played to the jury.

The surreptitiously recorded conversation was the only admission of Lawrence introduced at trial and the only corroboration of the alleged victim's testimony. The State made Lawrence's recorded statements the centerpiece of its case arguing in closing that the statements reflected a tacit admission of Lawrence's guilt:

Ms. Gissinger:...I'm sorry. I'll do whatever you want. I'll do whatever it takes. I'll leave America. I don't know why I did that. It wasn't me. Those are Defendant's own words. That is what the Defendant had to say when he was confronted .by [A.B.'s] mother. Those are his words. You'll have the opportunity to take that audiotape back. Listen to it. Those are his words...

Defendant's recorded statements could easily have been a key if not the key piece of evidence that resulted in Defendant's conviction.

On appeal of his conviction, Lawrence argued that the surreptitiously recorded conversation should have been suppressed. This Court affirmed Lawrence's conviction *per curiam* without opinion on October 26, 2012. *Lawrence vs. State*, 100 So. 3d 694 (Fla. 2d DCA 2012). Defendant's conviction and sentence became final on March 25, 2013², approximately three months before this Court issued its opinion in *McDade I*. In *McDade I*, McDade was

² Lawrence timely filed a Petition for Writ of Certiorari in the Supreme Court of the United States which denied review on March 25, 2013. *Lawrence v. Florida*, 133 S. Ct. 1643 (2013).

charged with capital sexual battery. The trial court admitted in evidence before the jury two incriminating surreptitious recordings made by McDade's step-daughter of conversations she had with McDade while located in McDade's bedroom. McDade moved to suppress the recordings. The trial court denied the motion and the recordings were introduced into evidence at trial and were a prominent feature of the trial. McDade was convicted and appealed contending that the recordings should have been suppressed. 114 So. 3d at 467-68.

Relying upon *Inciarrano*, this Court affirmed, concluding that, given society's special interest in child protection, “any expectation of privacy McDade may have had is not one society is prepared to accept as reasonable.” *Id.* at 470. This Court then certified as a question of great public importance whether a recording of solicitation and confirmation of child sexual abuse made by the minor child fell within the proscription of chapter 934, Florida Statutes. *Id.* at 471.

In *McDade I*, Judge Altenbernd, specially concurring, expressed significant constitutional concerns with *Inciarrano's* “society is prepared to recognize” test, while acknowledging that the other factors present strongly supported McDade's subjective expectation that his statements were not being intercepted, and, therefore, reversal of his conviction and sentences may have been required. *Id.* at 471-72. His first concern was that *Inciarrano* flipped the burden of proof and persuasion at the preliminary hearing on admissibility from the State—who clearly has the burden of establishing an exception to the otherwise absolute exclusion language of section 934.06, *Florida Statutes*—to the Defendant—who is presumed innocent until proven guilty under the Fifth Amendment—to demonstrate that the intercepted communication meets the definition of oral communication under section 934.02(2) *Florida Statutes*. *Id.* at 472. His second concern was with the test itself, which he characterized as a “troubling” “results-oriented” test that “leaves our rights in flux.” *Id.* at 472, 473, 474.

On review of *McDade I*, the Florida Supreme Court reversed granting McDade a new

trial, and concluding that: (1) the recordings should have been suppressed under the plain language of section 934.06, *Florida Statutes*; and (2) creation of any exception to the plain language in the case of recordings providing evidence of criminal activity was the province of the Legislature not the courts. *McDade II*, 154 So. 3d 292. McDade was subsequently retried and acquitted by a jury that did not hear the illegally tape recorded conversation.

On February 2, 2015, shortly after issuance of *McDade II*, Lawrence sought a writ of habeas corpus from this Court requesting that this Court overturn its prior *per curiam* affirmance based on *McDade II*. This Court summarily denied the petition on February 24, 2015. In Additional Ground I of his Amendment To Previously Filed Motion For Post Conviction Relief, Lawrence argued that the circuit court should reverse Lawrence's conviction and sentence and grant Lawrence a new trial based on retroactive application of *McDade II*. (R. 5-17). In support of his argument, he cited Judge Altembernd's characterization of *Inciarrano's* "society's prepared to recognize" test as requiring defendant's to prove their innocence in violation of the Fifth Amendment.

The trial court dismissed without addressing the merits of Additional Ground I concluding that *McDade II* has not been held to apply retroactively. (R. 37-38). This Court affirmed the trial court's dismissal *per curiam* without opinion.

III.

Rehearing and Certification Is Warranted Because This Court's Per Curiam Affirmance Overlooks Fact That Trial Court Dismissed Without Ever Deciding the Merits of Additional Ground I Thereby Leaving A Properly Raised Potential Basis For a New Trial Unaddressed by a Court of Law

In *Belle v. State*, 177 So. 3d 285 (Fla. 2d DCA 2015), this Court recognized that *McDade II* represented a "change in law." Yet, neither the trial court nor this Court addressed the merits of Additional Ground I. Lawrence respectfully suggests he is entitled to have a court adjudicate Additional Ground I on the merits. *Clingenpeel v. State*, 610 So. 2d 75 (Fla. 2d DCA 1992); *Judd*

v State, 666 So. 2d 237 (Fla. 2d DCA 1996); *Lee v. Hudson*, 346 Fed. Appx. 381 (11th Cir. 2009). This Court's *per curiam* affirmance of the trial court's summary dismissal of Additional Ground I overlooks the significant due process concerns³ which arise when *both* the trial court and the district court of appeal fail to address a criminal defendant's Rule 3.850 claim on the merits especially, where, as here, the law on the issues presented is neither well-settled nor so generic as to warrant no reference to citation. See, Comm. On Per Curiam Affirmed Dec., Final Report and Recommendation, 29 (May 2000).⁴

Both McDade's and Lawrence's appeals were pending before this Court at the same time. Both McDade and Lawrence were convicted based on surprisingly little evidence, other than the victim's statement, based on surreptitiously recorded conversations admitted under *Inciarrano's* "society is prepared to recognize" test. However, despite the striking similarity between these cases, and the near contemporaneous consideration of their respective appeals by this Court, McDade is now free, while Lawrence remains in prison sentenced to life without the possibility of parole.

WHEREFORE, Lawrence respectfully requests that this Court: (1) grant rehearing and rehearing *en banc* to address Additional Ground I; and (2) issue a written opinion with respect thereto.

IV.

Rehearing and Certification Is Warranted to Address Whether *Inciarrano's* "Society is Prepared to Recognize" Test "Impermissibly Flips The Burden of Proof and Persuasion on the Admissibility of Surreptitiously Recorded Conversations Under Section 934.06, Florida Statutes, in Violation of The Fifth Amendment's Presumption of Innocence

Lawrence acknowledges that in *McDade II*, the illegally recorded conversation occurred

³ *Clisby v. Jones*, 960 F.2d 925, 936 (11th Cir.1992) (en banc); *Strader v. Secretary, Florida Dept. of Corrections*, 634 Fed. Appx. 270 (11th Cir. 2015); *Brewster v. Dept. of Corrections*, 323 Fed. Appx. 738 (11th Cir. 2009); *Leone v. Florida Power Corporation*, 567 So. 2d 992 (Fla. 1st DCA 1990).

⁴ Available at <https://www.flcourts.org/core/fileparse.php/260/urlt/pca-report.pdf>.

in McDade's bedroom, while in Lawrence's case, it occurred in a parking lot. Thus, it can be argued that retroactive application of *McDade II* might not change the outcome of Lawrence's case. However, in Lawrence's case, it is undisputed that he adjourned to the parking lot by agreement specifically to ensure the privacy of his conversation and that the State presented no evidence that his expectation of privacy was not reasonable under the circumstances. Thus Lawrence's case highlights the concerns with *Inciarrano*'s "society is prepared to recognize" test expressed by Judge Altenbernd in *McDade I*.

There is no constitutional protection more important than the presumption of innocence. *McPhaul v. U.S.*, 364 U.S. 372, 384 (1960) Douglas, J. dissent. ("The presumption of innocence, deep in our criminal law, has been one of our most important safeguards against oppression."). For this reason, the United States Supreme Court has made clear that rules of evidence cannot be employed in such a manner as to subvert the presumption of innocence. *Carmell v. Texas*, 529 U.S. 513, 540 (2000) citing *Cummings v. Missouri*, 4 Wall 277, 328 (1867). Yet that is precisely what the *Inciarrano* test does.

Moreover, *Inciarrano* leaves our right of privacy in parking lots in flux. In some cases, a person has a legitimate expectation of privacy in a parking lot. See, e.g., *Brandin v. State*, 669 So. 2d 280, 281 (Fla. 1st DCA 1996); *Migut v. Flynn*, 131 Fed. Appx. 262265 (11th Cir. 2005) In others, he or she does not, *even where, as here, the person adjourns to the parking lot by agreement specifically to ensure such privacy.*

As Judge Altenbernd observed: "[i]t seems ill advised to depend upon individual trial judges and the societal approval test to sort out the good recordings from the bad after the fact." *McDade I*, 114 So. 3d at 475.

Criminal defendants, such as Lawrence, should not be permanently deprived of liberty based on the "troubling", "results oriented" *Inciarrano* test that "leaves our rights in flux" and

arguably “subvert[s] the presumption of innocence and alter[s] the rules of evidence which heretofore under universally recognized principles of common law have been supposed to be fundamental and unchangeable.” 4 Wall at 328.

WHEREFORE, Lawrence respectfully requests that this Court certify to the Florida Supreme Court the following question of great public importance:

Whether, at a suppression hearing held pursuant to section 934, Florida Statutes, application of the *Inciarrano* “society is prepared to recognize” test impermissibly flips the burden of proof and persuasion from the State to the defendant contrary to the presumption of innocence mandated by the Fifth Amendment, while leaving our rights in flux.

Respectfully submitted

Smolker Bartlett Loeb Hinds and Shepard, P.A.

By: /s/ David Smolker

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RULE 9.331(d)(2) CERTIFICATION

I express a belief, based on reasoned and studied professional judgment that the issue presented above is of exceptional importance because it implicates due process of law and the presumption of innocence, which are fundamental safeguards against oppression.

By: /s/ David Smolker

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RULE 9.330(a) CERTIFICATION

I express a belief, based upon reasoned and studied professional judgment, that a written opinion in this case will provide a legitimate basis for supreme court review pursuant to Article V, section 3(b) of the Florida Constitution because such opinion would construe the Florida and Federal constitutional protections of the presumption of innocence and due process of law all in a context that has been generally overlooked, and which would be of first impression and likely arise in future cases.⁵

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished on this 17th day of November, 2017, to Susan Shanahan, Esq. of the Office of Attorney General, State of Florida, The Capitol PL-01, Tallahassee, FL 32399-1050 via the Florida E-Filing Portal.

By: /s/ David Smolker

⁵ See, Comm. On Per Curiam Affirmed Dec., Final Report and Recommendation, Appendix E (May 2000) available at <https://www.flcourts.org/core/fileparse.php/260/urlt/pca-report.pdf>

1 more, you know, then I could rule on these motions, and
2 I would rule probably granting, you know, the motions to
3 exclude, you know, but I have to hear it from, you know,
4 from the witness.

5 MS. CONNOLLY: I understand.

6 THE COURT: Okay. So that's where we are with
7 that.

8 **MOTION TO EXCLUDE OR SUPPRESS CONVERSATIONS AND EVIDENCE**

9 **DERIVED**

10 THE COURT: All right. Number -- is this the last
11 one on our list, to exclude or suppress conversations
12 and evidence derived? And that would be the recorded
13 statement, I believe.

14 Mr. Tebrugge. Whoops.

15 MR. TEBRUGGE: I'm usually stumbling all over the
16 place anyway, so.

17 Your Honor, again, I set out a number of facts in
18 the motion, and I'll just briefly review them with you
19 here.

20 The date in issue is August the 24th of 2007, and
21 the person in question is a woman by the name of Audrey,
22 A-u-d-r-e-y, Daniel, D-a-n-i-e-l. And, Your Honor, Ms.
23 Daniel is the mother of the child who has brought forth
24 the allegations in this case.

25 Ms. Daniel is employed, or was employed at that

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1 time, by Walgreens, which was a store in Pinellas
2 County. The defendant is alleged to have arrived at the
3 Walgreens and had some contact with Ms. Daniel inside
4 the store, and the two of them left the store and went
5 outside in order to have a private conversation.

6 Now, I haven't met Ms. Daniel, and if she was
7 deposed, I have not yet had access to her deposition.
8 But I do have access to a handwritten statement that she
9 made, and I also have access to a report from Detective
10 Gore of the Largo Police Department recounting his
11 conversations with Ms. Daniel.

12 And so that's where I drew these additional facts
13 from, that Ms. Daniel tells Mr. Gore that she's
14 surreptitiously recorded her conversation with Mr.
15 Lawrence, and Detective Gore put in his report
16 specifically that that was not done at his direction.

17 And that's very important because if a recording is
18 done at the direction of law enforcement, then it is
19 possibly exempt from the requirements of Chapter 934.
20 But otherwise, Florida Statute 934 is pretty clear, at
21 least to me, that surreptitiously recording a
22 conversation is a felony, and the conversation is not
23 admissible in evidence, and that evidence derived as a
24 result of the illegal recording is not admissible. And
25 that's where we really get into potentially a can of

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1 worms in this particular case.

2 Despite the fact that Detective Gore wrote that in
3 his report, that she did not do this at his direction,
4 when we look -- when I look at the probable cause
5 affidavit for Mr. Lawrence's arrest, that seems to be
6 one of the key facts in the PCA, is the alleged
7 substance of this conversation.

8 And then secondly, a predecessor Assistant State
9 Attorney had conversations with Detective Gore where
10 they mutually decided to subpoena the defendant's
11 telephone records. And when I look at that subpoena,
12 and I've got that for the Court's review, it also is
13 relying heavily upon this illegally recorded
14 conversation, and thus that's why I ask for the Court to
15 exclude those telephone records as well.

16 I really think this is a pretty straightforward
17 issue. The only issue that I could really see was
18 whether a private conversation fell within the ambit of
19 934, and so I have for the Court the interesting case of
20 *Guilder, G-u-i-l-d-e-r, versus State* from the Fourth
21 District in 2005.

22 And without going into all of the facts of *Guilder*,
23 it's a pretty long opinion, a private citizen was
24 concerned about jury tampering for a -- or was concerned
25 about jury misconduct in a jury that had convicted one

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1 of his offspring, and so he privately recorded
2 conversations with one of the jurors.

3 And then his defense was, "I didn't break the law.
4 I didn't break 934 because these were private
5 person-to-person conversations. This wasn't a wiretap
6 or a phone recording." And the Court rejected that
7 argument and said, "No, a face-to-face conversation
8 surreptitiously recorded does fall within the ambit of
9 934." So --

10 THE COURT: So this is the spotted cow on the issue
11 you're talking about?

12 MR. TEBRUGGE: I'm sorry, I didn't --

13 THE COURT: Was it the spotted cow case as to the
14 issue you're talking about, whether or not 934 covers
15 private conversations?

16 MR. TEBRUGGE: Yes, sir. I had not heard that
17 expression before, "spotted cow."

18 THE COURT: Sorry. That's an old, old expression.

19 MR. TEBRUGGE: Well, good.

20 THE COURT: I belie my age with my youthful
21 appearance, so.

22 MR. TEBRUGGE: Well, me too, and I'm always happy
23 to learn a new expression, so thank you.

24 THE COURT: Thank you, sir.

25 Ms. Connolly?

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1 MS. CONNOLLY: Your Honor, I would agree that 934
2 does apply to face-to-face conversations. Where I would
3 disagree is that -- what we really get down to is the
4 definition of an oral communication. And there's a line
5 of cases that defines what kind of oral communication is
6 covered under 934, and what it comes down to is whether
7 a person has a reasonable expectation of privacy in that
8 conversation.

9 If I may approach with some case law?

10 THE COURT: Uh-huh.

11 MS. CONNOLLY: I'm providing copies to the defense
12 as well.

13 THE COURT: Thank you.

14 MS. CONNOLLY: And, Your Honor, I would point first
15 to *State versus Inciarrano*, 473 So.2d 1272, which is a
16 Florida Supreme Court case from 1985, which states that
17 the Legislature did not intend every oral communication
18 to be free from interception. And I've highlighted the
19 relevant portions for the Court and defense.

20 The statute only protects communications that are
21 made with the expectation of privacy under circumstances
22 reasonably justifying that expectation, so it's not a
23 mere subjective expectation. It's not the defendant's
24 subjective belief; it's whether it's a reasonable
25 expectation.

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1 In the state (*sic*) of *Inciarrano*, what we have,
2 Your Honor, is a defendant went into a victim's private
3 office with the intent to do that victim harm, and the
4 Court found that the motion to suppress was properly
5 denied because a person does not have an expectation of
6 privacy in another person's office.

7 More on the point, I would point to *Ruiz v. State*,
8 which is a Fifth District Court of Appeals opinion from
9 1982, which specifically addresses a conversation held
10 in a parking lot, and finds that a parking lot does not
11 provide a person with a reasonable expectation of
12 privacy.

13 That case, as well as *Cinci v. State*, C-i-n-c-i,
14 642 So.2d 572, which is a Fourth District case from
15 1994, this was a conversation held in an apartment
16 building courtyard. And there again, the Court found
17 that there was no reasonable expectation of privacy in
18 the apartment building courtyard. An enclosed area or a
19 secluded area is more likely to be protected.

20 I would also point out that in *Ruiz v. State*, the
21 Court goes on, under the highlighted portion, to point
22 out that the -- a person has the highest expectation of
23 privacy in their home, and conversations in basically
24 public places, a restaurant, outdoors, or in a
25 defendant's truck, did not invoke the same expectations

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1 of privacy.

2 And here, Your Honor, just as in the Ruiz case, we
3 have a conversation held in a parking lot, outdoors, and
4 I would argue that there is no expectation of privacy,
5 and therefore the oral communication was not an oral
6 communication as intended in Statute 934, and is
7 therefore not an illegal interception and not
8 inadmissible under 934.

9 THE COURT: Rebuttal?

10 MR. TEBRUGGE: Judge, what I would like to do is
11 present testimony on one point.

12 THE COURT: Uh-huh. Okay. Is that person here?

13 MR. TEBRUGGE: Yes, sir.

14 THE COURT: Okay. If they'll come forward and be
15 sworn. I'll swear him.

16 Sir, can you raise your right hand for me, please?

17 **RANDOLPH ROLANDO LAWRENCE,**

18 having been duly sworn by the Court, was examined and
19 testified as follows:

20 THE COURT: Okay. Thank you. You may have a seat
21 in the witness chair.

22 And, Counsel, you can approach the podium to
23 inquire. And the record will reflect that you've called
24 your client, the defendant in this case, Randolph
25 Lawrence, to the stand, and he has been sworn. And you

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1 may proceed.

2 DIRECT EXAMINATION

3 BY MR. TEBRUGGE:

4 Q Sir, are you, in fact, Randolph Lawrence?

5 A Yes, I am.

6 Q Mr. Lawrence, I would like to direct your attention
7 to August the 24th, 2007. Did you go to a Walgreens Drug
8 Store in Pinellas County, Florida, on that day?

9 A Yes, I did.

10 Q For what purpose?

11 A To meet Audrey.

12 Q Is that Audrey Daniel?

13 A Audrey Daniel, sir.

14 Q Would you testify as to -- first off, where did --
15 how did you get to the Walgreens?

16 A I drove my private car there, and then I parked in
17 the parking lot. And then I went inside and I saw Audrey, at
18 the time she was a cashier, and I told her that I needed to
19 talk to her. And she said, "You got to wait a little bit,
20 and then I'll meet you outside."

21 Q Okay. When you came to the Walgreens, did you park
22 in any particular spot?

23 A Yes. I parked directly to the side of Audrey's
24 car.

25 Q When you went inside and had the conversation that

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1 you just mentioned to the Court, was there any reason that
2 you did not continue the conversation inside the Walgreens
3 store?

4 A I explained to her that I wanted to have a private
5 conversation with her, and she was a cashier. She was taking
6 money and giving money, so we couldn't talk where she was.

7 Q Did you, in fact, have a subsequent conversation
8 with her?

9 A Yes, I did, sir.

10 Q And where did that take place?

11 A On the telephone, sir.

12 Q No, on this morning. Did you -- let's back up.
13 You had gone to the Walgreens store, correct?

14 A Yes, sir.

15 Q You encountered Ms. Daniel inside the store,
16 correct?

17 A Yes, sir.

18 Q What happened then?

19 A After I started talking to her, I said, "Audrey,
20 I'm here," and she said, "Oh, I've got to talk to you." I
21 said, "Okay, let's -- where do you want to talk? Because we
22 can't talk here because you're a cashier." And she said,
23 "No, we'll go outside." And she said, "Yeah, but I have to
24 wait until I get a break or something, so just wait out --
25 wait by my car." I said, "I'm parked beside your car." And

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1 I waited, and I went outside.

2 Q Okay. And did you have a conversation with her
3 outside?

4 A Yes, I did, sir.

5 Q At any point in time, did she make you aware that
6 she was recording this conversation?

7 A No, she did not, sir.

8 Q Did you intend for this conversation to be
9 overheard by anyone?

10 A No, sir.

11 MR. TEBRUGGE: That's all of the questions I have,
12 Judge.

13 THE COURT: Thank you.

14 Cross-examination?

15 MS. CONNOLLY: Yes, Your Honor.

16 CROSS-EXAMINATION

17 BY MS. CONNOLLY:

18 Q Sir, this conversation took place in the Walgreens
19 parking lot?

20 A Yes, ma'am.

21 Q Outside of her car?

22 A Yes, ma'am.

23 Q Standing in the parking lot?

24 A Yes, ma'am.

25 MS. CONNOLLY: Nothing further.

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1 THE COURT: Thank you.

2 Sir, you don't have any redirect on that, do you?

3 REDIRECT EXAMINATION

4 BY MR. TEBRUGGE:

5 Q To your knowledge, was anyone listening in to this.
6 conversation that you were having with Ms. Daniel?

7 A No, sir.

8 MR. TEBRUGGE: I think that was it.

9 THE COURT: Thank you.

10 You may step down --

11 THE DEFENDANT: Yes, sir.

12 THE COURT: -- and return to your seat by your
13 counsel.

14 Okay. Any additional argument you want to present,
15 Mr. Tebrugge?

16 And then I have some questions for both of you.

17 MR. TEBRUGGE: One thing I note in the cases
18 presented by the Assistant State Attorney is that the
19 persons in question there all seem to have been involved
20 in illegal activities. The one person who's going into
21 another's office for the purpose of killing him, and I
22 think the Court probably correctly ruled that he did not
23 have an expectation of privacy by doing that.

24 In another instance in the case cited by the
25 Assistant State Attorney, it seems like it's a drug deal

1 that's going on. And it seemed also like several people
2 might have been involved in that drug deal, and law
3 enforcement was using their expert ears to listen in,
4 and that seemed to be germane to the Court's opinion.

5 What we have here is a situation where the
6 defendant, Mr. Lawrence, goes to this store for the
7 purpose of having a private conversation, and they can't
8 hold that conversation in the store where Ms. Daniel is
9 employed as a cashier, so they mutually agree to go out
10 to the parking lot.

11 But the reason they're in the parking lot is for
12 purposes of having a private conversation, and that's
13 the only reason I called Mr. Lawrence to the witness
14 stand, so he could clear that point up if there was any
15 question about it. But he certainly had the expectation
16 that this would be a private conversation, and he had no
17 knowledge that she would be recording it, so that's my
18 rebuttal, Your Honor.

19 **RULING ON MOTION TO EXCLUDE OR SUPPRESS CONVERSATIONS AND**
20 **EVIDENCE DERIVED**

21 THE COURT: Thank you.

22 Let me see here. The motion asked for the
23 following to be suppressed or excluded: A recording of
24 a conversation between the defendant and Audrey Daniel,
25 so that's the actual conversation that we're talking

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1 about, in the parking lot, right?

2 MR. TEBRUGGE: Yes, sir.

3 THE COURT: Any testimony by Audrey as to the
4 substance of that conversation; any testimony regarding
5 the interrogation of the defendant on September 18,
6 2007, by Al Danna of the Florida Department of Law
7 Enforcement and Scott Gore of the Largo Police
8 Department; any phone records that were obtained based
9 upon affidavits relying upon the "recoding" of the
10 conversation, "recording" I think you meant to say, of
11 the conversation between the defendant and Audrey
12 Daniel; and then any other evidence not yet known to
13 counsel that was obtained in reliance upon the
14 conversation.

15 And if I get your argument, what I think you're
16 saying is, A, you know, the actual recording itself
17 shouldn't come in pursuant to 934, okay, and then you're
18 sort of making a fruit of the poisonous tree argument
19 and an argument that 934.06 specifically precludes any
20 evidence derived from a 934 violation to come in.

21 So I think it's kind of a combo argument, but fruit
22 of the poisonous tree, you know, you kind of get shut
23 down there because I don't see anything that would say
24 that she was acting at the behest of law enforcement,
25 you know.

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1 So it's sort of like that situation where you break
2 into somebody's house, steal a bunch of really
3 incriminating evidence against the person and turn it
4 over to law enforcement, and the State didn't ask you to
5 do that; yes, that evidence was obviously illegally
6 obtained, but the State could use it, and use it to get
7 other evidence.

8 But 934.06 says specifically by statute, whenever
9 any wire or oral communication has been intercepted, no
10 part of the contents of such communication and no
11 evidence derived there from may be received in evidence
12 in any trial, hearing, or other proceeding in or before
13 any court, grand jury, et cetera, et cetera, thereof, if
14 the disclosure of that information would be in violation
15 of this chapter.

16 So I think that portion of that statute is critical
17 to the decision that I have to make, as well as the
18 argument that the State is making, as to whether or not
19 934 applies in this setting.

20 So, if you all want me to know anything else right
21 now, I'll hear it. My intention is to rule on this
22 motion within the week, and I will be filing a written
23 ruling on this motion -- a written order as to the scope
24 of my ruling.

25 If you all want to supplement the record in any

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IN THE CIRCUIT COURT FOR THE SIXTH JUDICIAL CIRCUIT
IN AND FOR PINELLAS COUNTY, FLORIDA
CRIMINAL DIVISION
CASE NO: CRC-0720654CFANO-D

STATE OF FLORIDA,

Vs.

RANDOLPH LAWRENCE

02863761 Defendant /

KEN BURKE
CLERK OF CIRCUIT COURT

2011 APR 25 PM 4:15

FILED
CRIMINAL JUSTICE CENTER

**ORDER DENYING DEFENDANT'S MOTION TO EXCLUDE OR SUPPRESS
ILLEGALLY RECORDED CONVERSATION AND THE EVIDENCE DERIVED
THEREFROM**

THIS CAUSE was before the Court upon the Defendant's Motion to Exclude or Suppress Illegally Recorded Conversation and the Evidence Derived Therefrom, filed on January 13, 2011. The Court received testimony and heard argument from the parties and after review of the file and pleadings therein and being otherwise fully advised in the premises finds as follows:

The issue before the Court is whether the audio recording of statements made by the Defendant to a third party witness as well as all evidence derived therefrom should be excluded from introduction at trial in this matter pursuant to Chapter 934, Florida Statutes (2010).

Pursuant to the undisputed facts presented to the Court, a third party witness (the mother of the listed victim) recorded a face to face conversation she had with the Defendant in a drugstore parking lot during normal business hours. The witness did not advise the Defendant that the conversation was being recorded and the Defendant was not aware of the recording. The tape of the recorded conversation was subsequently given to law enforcement by the witness and used as a basis to obtain additional evidence in the case. The tape allegedly contains admissions by the Defendant which the State intends to present to the jury during its case in chief.

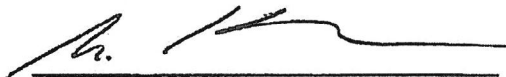
While the authority presented to the Court makes it clear that the surreptitious recording in this case is to be considered an "interception" for purposes of application of Chapter 934, the circumstances of the interception in the case at bar do not trigger the statutory exclusionary rule set forth in Fla. Stat. Ch. 934.06. According to the facts presented to the Court at the hearing, the Defendant made admissions of sexual contact with the listed minor victim directly

to that child's mother. This admission was made by the Defendant in an open public parking lot at a time when other parties and bystanders had access to the parking lot. Under the circumstances of the case at bar, the Court finds that when these statements were made, the Defendant did not have a **reasonable expectation of privacy** as is required for exclusion of the recording under Ch. 934. See, State v. Inclarrano, 473 So2d 1272 (Fla. 1985), Cinci v. State, 642 So.2d 572 (Fla. App 4th Dist. 1994), Guilder v. State, 899 So2d 412 (Fla. App. 4th Dist. 2005) and Fla. Stat. §§ 934.02, 934.03 and 934.06 (2010).

Because introduction of the recording of Defendant's statements is not prohibited by Ch. 934, the introduction of any testimony by the third party witness as to those statements and any other evidence procured using the recorded statements is likewise not barred by Ch. 934.

ORDERED AND ADJUDGED that the Defendant's Motion to Exclude or Suppress Illegally Recorded Conversation and the Evidence Derived Therefrom is hereby **DENIED**.

DONE AND ORDERED in Chambers, Clearwater, Pinellas County, Florida, this 25 day of April 2011.



Keith Meyer, Circuit Court Judge

Cc:
Office of the State Attorney
Counsel for the Defendant