JUDICIAL NOMINATING COMMISSION

SEVENTH JUDICIAL CIRCUIT OF FLORIDA

FLAGLER COUNTY JUDGE APPLICATION

OF

K. MARK JOHNSON

JUDICIAL NOMINATING COMMISSION
SEVENTH JUDICIAL CIRCUIT OF FLORIDA

FLAGLER COUNTY COURT APPLICATION

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TAB 1

TAB 2

APPLICATION FOR NOMINATION TO THE FLAGLER COUNTY COURT

(Please attach additional pages as needed to respond fully to questions.)

DATE: August 5, 2019 Florida Bar No.: 0378320

GENERAL: Social Security No.: [redacted]

1. Name: Kenneth Mark Johnson E-mail: [redacted]

   Date Admitted to Practice in Florida: October 2, 2000

   Date Admitted to Practice in other States: N/A

2. State current employer and title, including professional position and any public or judicial office.

   Assistant State Attorney, Homicide Investigations Unit,
   Office of the State Attorney, Seventh Judicial Circuit

3. Business address: 2446 Dobbs Rd.

   City: St. Augustine County: St. Johns State: FL ZIP: 32086

   Telephone: (904) 209-1300 FAX: (904) 209-1313

4. Residential address: [redacted]

   City: [redacted] County: [redacted] State: [redacted] ZIP: [redacted]

   Since: November 2009 Telephone: [redacted]

5. Place of birth: Murfreesboro, TN

   Date of birth: March 30, 1974 Age: 45

6a. Length of residence in State of Florida: 41 years

6b. Are you a registered voter? Yes ☒ No ☐

   If so, in what county are you registered? St. Johns County

7. Marital status: Married

   If married: Spouse's name: Ralenda Thornton Johnson

   Date of marriage: December 29, 2001

   Spouse's occupation: Currently, stay-at-home mom

If ever divorced, give for each marriage name(s) of spouse(s), current address for each former spouse, date and place of divorce, court and case number for each divorce.

I have never been previously married or divorced.

8. Children:

Name(s)	*Age(s)*	*Occupation(s)*	*Residential address(es)*
Lillian Grace Johnson	13	Student	Same as applicant
Benjamin Mark Johnson	12	Student	Same as applicant
Maxwell Alexander Johnson	6	Student	Same as applicant

9. Military Service (including Reserves):

Service	*Branch*	*Highest Rank*	*Dates*
N/A	N/A	N/A	N/A

Rank at time of discharge _____ Type of discharge _____

Awards or citations _____

HEALTH:

10. Are you currently addicted to or dependent upon the use of narcotics, drugs, or intoxicating beverages? If yes, state the details, including the date(s).

No

11a. During the last ten years have you been hospitalized or have you consulted a professional or have you received treatment or a diagnosis from a professional for any of the following: Kleptomania, Pathological or Compulsive Gambling, Pedophilia, Exhibitionism or Voyeurism?

Yes ☐ No ☒

If your answer is yes, please direct such professional, hospital and other facility to furnish the Chairperson of the Commission any information the Commission may request with respect to any such hospitalization, consultation, treatment or diagnosis. ["Professional" includes a Physician, Psychiatrist, Psychologist, Psychotherapist or Mental Health Counselor.]

Please describe such treatment or diagnosis.

N/A

11b. In the past ten years have any of the following occurred to you which would interfere with your ability to work in a competent and professional manner?

- Experiencing periods of no sleep for 2 or 3 nights
- Experiencing periods of hyperactivity

- Spending money profusely with extremely poor judgment
- Suffered from extreme loss of appetite
- Issuing checks without sufficient funds
- Defaulting on a loan
- Experiencing frequent mood swings
- Uncontrollable tiredness
- Falling asleep without warning in the middle of an activity

Yes ☐ No ☒

If yes, please explain.

N/A

12a. Do you currently have a physical or mental impairment which in any way limits your ability or fitness to properly exercise your duties as a member of the Judiciary in a competent and professional manner?

Yes ☐ No ☒

12b. If your answer to the question above is Yes, are the limitations or impairments caused by your physical or mental impairment reduced or ameliorated because you receive ongoing treatment (with or without medication) or participate in a monitoring or counseling program?

Yes ☐ No ☐ N/A

Describe such problem and any treatment or program of monitoring or counseling.

N/A

13. During the last ten years, have you ever been declared legally incompetent or have you or your property been placed under any guardianship, conservatorship or committee? If yes, give full details as to court, date and circumstances.

No

14. During the last ten years, have you unlawfully used controlled substances, narcotic drugs or dangerous drugs as defined by Federal or State laws? If your answer is "Yes," explain in detail. (Unlawful use includes the use of one or more drugs and/or the unlawful possession or distribution of drugs. It does not include the use of drugs taken under supervision of a licensed health care professional or other uses authorized by Federal law provisions.)

No

15. In the past ten years, have you ever been reprimanded, demoted, disciplined, placed on probation, suspended, cautioned or terminated by an employer as result of your alleged consumption of alcohol, prescription drugs or illegal use of drugs? If so, please state the circumstances under which such action was taken, the name(s) of any persons who took such action, and the background and resolution of such action.

No

16. Have you ever refused to submit to a test to determine whether you had consumed and/or were under the influence of alcohol or drugs? If so, please state the date you were requested to submit to such a test the type of test required, the name and entity requesting that you submit to the test, the outcome of your refusal and the reason why you refused to submit to such a test.

No

17. In the past ten years, have you suffered memory loss or impaired judgment for any reason? If so, please explain in full.

No

EDUCATION:

18a. Secondary schools, colleges and law schools attended.

Schools	***Class Standing***	***Dates of Attendance***	***Degree***
Faith Christian School, Milton, Florida	Valedictorian	8/1988 – 5/1992	H.S. Diploma
Pensacola Junior College, Pensacola, Florida	Unknown (3.43 GPA)	8/1992 – 12/1994	Associate of Arts, Criminal Justice
Florida State University, Tallahassee, Florida	Unknown (3.20 GPA)	1/1995 – 12/1996	Bachelor of Science, Criminology
Stetson University College of Law, Gulfport, Florida	Top 53%	8/1997 – 5/2000	Juris Doctor

18b. List and describe academic scholarships earned, honor societies or other awards.

- William F. Blews Pro Bono Service Award, Stetson University College of Law, Spring 2000
- Honor Roll, Stetson University College of Law, Fall 1999

- Associate Justice, Moot Court Board, Stetson University College of Law, 1999-2000
- Best Brief Award recipient, 1998 Nance, Cacciatore, Sisserson, Duryea & Hamilton Moot Court Competition
- Third Place Brief Category recipient, Fall 1998 Intramural Writing Competition
- Second Place recipient, Fall 1998 Phi Alpha Delta Closing Argument Competition
- *Pi Gamma Mu* Social Science Honor Society, Florida State University, 1996
- Southern Scholarship Foundation recipient, Florida State University, Spring 1995 – Fall 1996
- Academic Honors, Pensacola Junior College, Spring 1993
- Academic Honors, Pensacola Junior College, Fall 1993
- American Legion Award, 1992
- Administrator's Award, Faith Christian School, 1992

NON-LEGAL EMPLOYMENT:

19. List all previous full-time non-legal jobs or positions held since 21 in chronological order and briefly describe them.

Date	***Position***	***Employer***	***Address***
6/1995 – 8/1995	Lifeguard	Georgia FFA-FCCLA Center	720 FFA-FHA Rd., Covington, Georgia 30014
6/1996 – 7/1996	Lifeguard	Georgia FFA-FCCLA Center	720 FFA-FHA Rd., Covington, Georgia 30014
1/1997 – 5/1997	Delivery driver	Pizza Hut	5149 Dogwood Dr., Milton, Florida 32570
1/1997 – 5/1997	Sales Associate	K-Mart	6050 Hwy. 90, Milton, Florida 32570 (closed)
6/1997 – 7/1997	Lifeguard	Georgia FFA-FCCLA Center	720 FFA-FHA Rd., Covington, Georgia 30014
2/2000 – 5/2000	Student Clerk	Stetson University College of Law Library	1401 61st St. South, Gulfport, FL 33707

PROFESSIONAL ADMISSIONS:

20. List all courts (including state bar admissions) and administrative bodies having special admission requirements to which you have ever been admitted to practice, giving the dates of admission, and if applicable, state whether you have been suspended or resigned.

Court or Administrative Body	*Date of Admission*
The Florida Bar	October 2, 2000
United States Court of Appeals for the Eleventh Circuit	December 6, 2001
United States District Court, Middle District of Florida	December 14, 2001

LAW PRACTICE: (If you are a sitting judge, answer questions 21 through 26 with reference to the years before you became a judge.)

21. State the names, dates and addresses for all firms with which you have been associated in practice, governmental agencies or private business organizations by which you have been employed, periods you have practiced as a sole practitioner, law clerkships and other prior employment:

Position	***Name of Firm / Agency***	***Address***	***Dates***
Law Clerk	Gibbs Law Firm, P.A.	5666 Seminole Blvd., Seminole, Florida 33772	6/1998 – 8/1998 6/1999 – 8/1999
Certified Legal Intern	Office of the State Attorney, Sixth Judicial Circuit	14250 49th St. N., Clearwater, Florida 33762	1/2000 – 5/2000
Associate Attorney	Gibbs Law Firm, P.A.	5666 Seminole Blvd., Seminole, Florida 33772	9/2000 – 11/2003
Assistant State Attorney	Office of the State Attorney, Second Judicial Circuit	301 S. Monroe St., Ste. 475, Tallahassee, Florida 32301	1/2004 – 1/2009
Assistant State Attorney	Office of the State Attorney, Seventh Judicial Circuit	251 N. Ridgewood Ave,, Daytona Beach, Florida 32114	1/2009 – Present

22. Describe the general nature of your current practice including any certifications which you possess; additionally, if your practice is substantially different from your prior practice or if you are not now practicing law, give details of prior practice. Describe your typical clients or former clients and the problems for which they sought your services.

For 10 years, I have had the privilege to serve as a prosecutor in the Homicide Investigations Unit (HIU) of the State Attorney's Office of the Seventh Judicial Circuit. Within HIU, I am a part of a team of attorneys, investigators, and support staff who assist local law enforcement during their investigation of any homicide or suspicious death that occurs in Flagler, St. Johns, and Putnam counties. My duties involve advising law enforcement concerning the numerous constitutional and statutory issues that may arise during their investigation, including the drafting and execution of search warrants and the sufficiency of evidence in the prosecution of a case. When a decision to file a criminal charge has been made, I am responsible for all aspects of the prosecution, including presenting the case to a grand jury for an indictment, responding to discovery demands, conducting depositions, and, finally, trying the case before a jury. I also work closely with the family members of homicide victims. It is my responsibility, with assistance by the victim advocates in our office, to guide them through the difficult legal process, keep them informed of upcoming court proceedings, and answer any questions they may have about the case.

I also had the opportunity to serve for three and a half years as the managing attorney of our office in Putnam County, which employs approximately 20 staff, including attorneys, secretaries, victim advocates and investigators. In that role, I had the responsibility of overseeing all office operations, training new attorneys, and working closely with local judges, clerks, and law enforcement in working to ensure that our criminal justice system operated efficiently and fairly.

Prior to working for the State Attorney's Offices in St. Augustine and Tallahassee, I practiced for three years with a law firm that specialized in assisting churches, schools, non-profit organizations, and individuals with legal advice on issues such as tax, zoning, contract, employment, and constitutional law. Our firm also frequently represented individual clients in personal injury and wrongful death claims as well as estate planning. During my time with the firm, I generally handled cases involving real property and constitutional claims.

23. What percentage of your appearance in courts in the last five years or last five years of practice (include the dates) was in:

Court			Area of Practice		
Federal Appellate	_____	%	Civil	_____	%
Federal Trial	_____	%	Criminal	100	%
Federal Other	_____	%	Family	_____	%
State Appellate	_____	%	Probate	_____	%
State Trial	100	%	Other	_____	%
State Administrative	_____	%			
State Other	_____	%			
	_____	%		_____	
TOTAL	100	%		100	%

24. In your lifetime, how many (number) of the cases you have tried to verdict or judgment were:

Jury?	80+	Non-jury?	20+
Arbitration?	0	Administrative Bodies?	0

25. Within the last ten years, have you ever been formally reprimanded, sanctioned, demoted, disciplined, placed on probation, suspended or terminated by an employer or tribunal before which you have appeared? If so, please state the circumstances under which such action was taken, the date(s) such action was taken, the name(s) of any persons who took such action, and the background and resolution of such action.

No

26. In the last ten years, have you failed to meet any deadline imposed by court order or received notice that you have not complied with substantive requirements of any business or contractual arrangement? If so, please explain in full.

No

(Questions 27 through 30 are optional for sitting judges who have served 5 years or more.)

27a. For your last 6 cases, which were tried to verdict before a jury or arbitration panel or tried to judgment before a judge, list the names and telephone numbers of trial counsel on all sides and court case numbers (include appellate cases).

1. *State of Florida v. William Sanders*, Putnam Co. Case #2015-1320-CF

Charges: First Degree Murder
Possession of a Firearm by a Convicted Felon

Defense counsel: William Fletcher, (904) 314-0233

State counsel: Mark Johnson

2. *State of Florida v. James T. Colley, Jr.*, St. Johns Co. Case #2015-1248-CF

Charges: First Degree Murder – 2 counts **(death penalty case)**
Burglary of Dwelling – 2 counts
Aggravated Stalking after Injunction

Defense counsel: Terry Shoemaker, (904) 814-7540 & Garry Wood, (386) 937-7836

State counsel: Jennifer Dunton (1st Chair), (904) 343-3838 & Mark Johnson

- *See Tab 3 for News4Jax article on the James Colley trial.*

3. ***State of Florida v. Kevin Daniels*, Putnam Co. Case #2014-0973-CF**

Charges: First Degree Murder
Attempted First Degree Murder
Burglary of a Dwelling While Armed with a Firearm

Defense counsel: Garry Wood (number provided above)

State counsel: Mark Johnson (1st Chair) & James Nealis, (904) 434-8799

4. ***State of Florida v. Luis Toledo*, Volusia Co. Case #2013-102888-CFDL**

Charges: First Degree Murder – 2 counts **(death penalty case)**
Second Degree Murder
Tampering with Physical Evidence

Defense counsel: Jeffrey Deen, (407) 592-7634; Michael Nielsen, (407) 327-5865; and Michael Nappi, (407) 389-5140

State counsel: Mark Johnson (1st Chair) & Ryan Will, (352) 281-0281

- *See Tab 4 for News Chief article on the Luis Toledo trial.*

5. ***State of Florida v. Sean Bush*, St. Johns Co. Case #2011-1604-CF**

Charges: First Degree Murder **(death penalty case)**
Burglary of a Dwelling While Armed with a Firearm

Defense counsel: Ray Warren, (386) 212-3963 & Rosemarie Peoples, (904) 827-5699

State counsel: Mark Johnson (1st Chair) & Jennifer Dunton

- *See Tab 5 for St. Augustine Record article on the Sean Bush trial*

6. ***State of Florida v. Porfirio Torres*, Putnam Co. Case #2013-1168-CF**

Charge: First Degree Murder
False Imprisonment

Defense counsel: Clyde M. Taylor, Sr., (850) 591-3254

State counsel: Mark Johnson

27b. For your last 6 cases, which were settled in mediation or settled without mediation or trial, list the names and telephone numbers of trial counsel on all sides and court case numbers (include appellate cases).

1. ***State of Florida v. Dalton Faulkner*, St. Johns Co. Case #2018-0100-CF**

   Original charges: Second Degree Felony Murder
   Robbery with a Weapon
   Tampering with Physical Evidence

   Defense counsel: Terry Shoemaker, (904) 814-7540

   State counsel: Mark Johnson

2. ***State of Florida v. Sarah Itani*, St. Johns Co. Case #2018-0132-CF**

   Original charges: Second Degree Felony Murder
   Robbery

   Defense counsel: Victoria Mussallem, (904) 365-5200

   State counsel: Mark Johnson

3. ***State of Florida v. Gerald Evans*, St. Johns Co. Case #2018-0119-CF**

   Original charges: Second Degree Felony Murder
   Robbery

   Defense counsel: Tyler Gates, (904) 354-2444

   State counsel: Mark Johnson

4. ***State of Florida v. Carl Devore*, Flagler Co. Case #2016-0621-CF**

   Original charge: Second Degree Felony Murder

   Defense counsel: Sharon Feliciano, (386) 848-6112

   State counsel: Mark Johnson

5. ***State of Florida v. Andre Robinson*, St. Johns Co. Case #2015-1250-CF**

   Original charge: First Degree Felony Murder
   Robbery with a Firearm

   Defense counsel: Ann Finnell, (904) 791-1101

   State counsel: Mark Johnson

6. ***State of Florida v. Peter Hughes*, St. Johns Co. Case #2010-0765**

Original charges: First Degree Murder (death penalty case)
Kidnapping to Facilitate a Felony

Defense counsel: Sung Lee, (904) 616-8244 & Richard Kuritz, (904) 355-1999

State counsel: Mark Johnson

27c. During the last five years, how frequently have you appeared at administrative hearings?

_0_ average times per month

27d. During the last five years, how frequently have you appeared in Court?

_10-15_ average times per month

27e. During the last five years, if your practice was substantially personal injury, what percentage of your work was in representation of plaintiffs? ___0___% Defendants? _0_%

28. If during any prior period you have appeared in court with greater frequency than during the last five years, indicate the period during which this was so and give for such prior periods a succinct statement of the part you played in the litigation, numbers of cases and whether jury or non-jury.

During my tenure with the State Attorney's Office in Tallahassee, I was a line prosecutor. Throughout that time, I was assigned and handled a caseload that consistently averaged several hundreds of cases at any given time. I was lead counsel on all these cases and was, thus, solely responsible for all aspects of the litigation. This included reviewing police reports, witness statements, and physical evidence; making charging decisions; conducting depositions; and eventually trying the cases before a jury or judge. As a result, I was in court on a near-daily basis. My caseload was large enough that during the 2006-07 time period I tried 36 jury trials, 20 of which I tried in a single year.

29. For the cases you have tried to award in arbitration, during each of the past five years, indicate whether you were sole, associate or chief counsel. Give citations of any reported cases.

None

30. List and describe the six most significant cases which you personally litigated giving case style, number and citation to reported decisions, if any. Identify your client and describe the nature of your participation in the case and the reason you believe it to be significant. Give the name of the court and judge, the date tried and names of other attorneys involved.

1. State of Florida vs. Luis Toledo	
Case No.	2013-102888-CFDL (Volusia Co.)
Judge:	Raul Zambrano
State Counsel:	Mark Johnson (1st Chair) & Ryan Will (2nd Chair)
Defense Counsel:	Jeffrey Deen, Michael Nielsen, & Michael Nappi
Trial dates:	October 2 – November 3, 3017
Appellate decision:	Pending, *Toledo v. State*, 5D18-467 (Fla. 5th DCA filed Feb. 13, 2018)

In this case, Luis Toledo, a former leader of the Latin Kings gang, was charged with murder following the disapperance of his wife, Yessenia Suarez, and her two young children, Michael and Thalia Otto. On October 22, 2013 – the day they were last seen alive – Toledo discovered that his wife was having an affair with a co-worker and confronted them at their job site. Later that evening, Mrs. Suarez made the decision to leave her mother's home and return to her house with her children. Sometime after midnight, Toledo killed them and disposed of their bodies in an unknown location. The next day, law enforcement recovered evidence that Toledo thrown in a dumpster, including boots, a trunk mat, stuffed animals, and cleaning supplies. Blood spatter, which matched the DNA of Thalia Otto, was found in Toledo's bathroom, on one of the boots, and trunk mat that Toledo had discarded.

The Toledo case involved the rare and extraordinary murder prosecution where the victims' bodies were never recovered. As a result, the case presented unique and challenging legal issues, such as establishing *corpus delicti* as well as cause and manner of death. Second, the case generated heavy media coverage in the Orlando and Daytona Beach area, which forced a change of venue to St. Johns County. Lastly, the U.S. Supreme Court's opinion in *Hurst v. Florida*, ruling that Florida's death penalty scheme was unconstitutional, was released days before the trial was scheduled to commence. This decision set off a flury of additional lawsuits, which further delayed the trial because it was unclear what rules would apply to pending death penalty litigation. Eventually, the law was settled and the case proceeded forward. Following a month-long trial, Toledo was convicted of the murders of his wife and her two children. During the penalty phase of the trial, the jury returned a 10-2 verdict, which, under the new law, required the imposition of a life sentence without the possibility of parole.

2. State of Florida vs. Quentin Truehill, Kentrell Johnson & Peter Hughes	
Case Nos.	2010-0763-CF; 2010-0764-CF & 2010-0765-CF (St. Johns Co.)
Judge:	Raul Zambrano
State Counsel:	Applicant (1st Chair) & Jason Lewis (2nd Chair)
Defense Counsel::	Jim Valerino & Ray Warren (Truehill) Junior Barrett & Randall Richardson (Johnson) Sung Lee & Richard Kuritz (Hughes)
Trial dates:	February 3 – March 7, 2014 (Truehill) June 9-24, 2014 (Johnson)

Appellate decisions:	*Truehill v. State*, 211 So.3d 930 (Fla. 2017). *Johnson v. State*, 238 So.3d 726 (Fla. 2018).

On the night of April 1, 2010, Quentin Truehill, Kentrell Johnson & Peter Hughes kidnapped Vincent Binder, a graduate student at Florida State University, robbed him of his debit card, and then transported him alive all the way to St. Augustine where they brutally hacked him to death. Binder's body was left in a vacant field. The defendants then used the victim's debit card to withdraw hundreds of dollars in cash to finance the rest of their trip to Miami. A few days prior to the kidnapping, they had escaped from a jail in Louisiana, stole a truck, and then began robbing people to finance their flight out of Louisiana and into Florida. As they were passing through Pensacola, they robbed a cleaning lady at an apartment complex during which they attempted to kill her by repeatedly striking her in the head with a large knife. The attack resulted in several of her fingers being amputated. The defendants then made their way to Tallahassee, where again they attempted to rob several people before making contact with Binder and kidnapping him. One of the murder weapons used to murder Binder was the same knife used in the attempted killing of the cleaning lady in Pensacola. The victim was missing for almost a full month as law enforcement in Tallahassee and FDLE attempted to locate him. The defendants were subsequently arrested in Miami and charged with kidnapping. Vincent Binder's body was eventually located in St. Johns Co. where a grand jury indictment was obtained against the defendants for first degree murder and other crimes.

The case was significant to me on several fronts. First, I personnally connected with the case because I had worked for the State Attorney's Office in Tallahassee for five years and attended Florida State University. Second, the case was, by far, the most extensive and complicated murder case I have ever tried. The trials were severed, so each defendant had to be tried separately. The case involved approximately 10 different crime scenes from Louisiana to Miami, Florida; numerous law enforcement agencies from both state and federal jurisdictions; and hundreds of pieces of evidence. At trial, we called 50-60 witnesses, who lived in jurisdictions as far away as Montana, Louisiana, Alabama, and several counties within the State of Florida. Following their trials, Truehill and Johnson were convicted of 1st degree murder, and the juries in each case handed down unanimous verdicts for the death penalty before the *Hurst* decision required it. Peter Hughes eventually entered a guilty plea in exchange for a life sentence. Johnson's death sentence was later overturned by the Florida Supreme Court on the grounds that he was entitled to receive a life sentence due to some negotiations he had engaged in with the State Attorney's Office in Tallahassee prior to Binder's body being discovered in St. Augustine. Truehill's death sentence was upheld by the Florida Supreme Court.

- *See Tab 6 for a News4Jax article on the Quentin Truehill trial.*

3. State of Florida vs. Sean Bush	
Case No.	2011-1604-CF (St. Johns Co.)
Judge:	Howard Maltz
State Counsel:	Mark Johnson (1st Chair) & Jennifer Dunton (2nd Chair)
Defense Counsel::	Ray Warren & Rosemarie Peoples
Trial dates:	July 17, 2017 – August 4, 2017
Appellate decisions:	Pending, *Bush v. State*, SC18-227 (Fla. filed Feb. 9, 2018)

On May 31, 2011, Nicole Bush was found in her home barely alive and covered in blood. Previously she had separated from her husband, Sean Bush, and purchased her own home which she moved into with her two sons. In the days leading up to her murder, she informed the defendant that

she intended to file for divorce and had begun filling out the paperwork to do so. Mr. Bush had already begun planning to murder Nicole, asking for help to find a gun and conducting research on how to build a silencer for a .22 pistol he eventually obtained. He decided to carry it out on Memorial Day weekend when he had custody of their two sons. In the early morning hours of May 31, he left his home, drove to Nicole's house, turned off her alarm system, then put a pillow over her head as she slept and shot her multiple times in the head. When the shooting did not kill her, Mr. Bush stabbed her several times, then used an aluminum baseball bat to beat her repeatedly. He then attempted to hide the bloody baseball bat in the living room couch before leaving. The victim eventually managed to call a friend, who then contacted law enforcement. Nicole Bush later died at the hopital, leaving behind her two young boys.

The first reason this case was significant is because it was one of the first cases to be tried in the State of Florida following the decision in *Hurst* to require a unamimous verdict for the death penalty. Second, the case hinged on a very complicated DNA test of the handle of the aluminum bat, which an expert was able to conclude had been handled by Mr. Bush, despite his repeated claims not to have known about the bat. The investigation also revealed that Mr. Bush was in dire financial straights and stood to gain over $800,000.00 from a life insurance policy, which he attempted to collect on following the murder. The jury found Mr. Bush guilty of first degree murder and then returned a unanimous verdict for the death penalty after learning during the penalty phased that the defendant had attempted to kill a previous ex-wife in New Jersey.

4. State of Florida v. James Colley, Jr.	
Case No.	2015-1248-CF (St. Johns Co.)
Judge:	Howard Maltz
State Counsel:	Jennifer Dunton (1st Chair) & Mark Johnson (2nd Chair)
Defense Counsel::	Terry Shoemaker & Garry Wood
Trial dates:	July 9-25, 2018
Appellate decisions:	Pending, *Colley v. State*, SC18-2014 (Fla. filed Dec. 4, 2018)

On August 27, 2015, James Colley obtained two handguns, drove to his estranged wife's home, fired several shots into the back of the house, then entered the home and killed his wife and her best friend. He had just left court in St. Johns County where he had entered a plea agreement to violating an injunction that his wife had filed against him. The murders were captured in their entirety by the recorded 911 calls made by each of the victims. After the shooting, Colley fled to Virginia where he was arrested and taken into custody.

This case was significant for two reasons. First, it highlighted the growing problem of domestic violence-related homicides that seem to be on the rise in our circuit. The Colley case was the fourth consecutive case I tried between 2016-17 that involved a husband killing his wife. Second, it involved the rare defense of involuntary intoxication. The defense notified the State prior to trial of its intent to present evidence that, on the morning of the shooting, the defendant had taken a presecribed dose of Ambien, which resulted in him being unable to form a premeditated intent to kill the victims. Between the defense and the State, six doctors had been retained to address this unique claim at trial. However, the defense abandoned the defense mid-trial, opting instead to present the evidence as mitigation during the potential penalty phase. The jury convicted Mr. Colley of the first degree murders of his wife and friend and then returned a unamimous verdict for the death penalty after considering the defendant's claim of impairment at the time of the murders.

5. State of Florida v. Timothy Fletcher	
Case No.	2009-0648-CF (Putnam Co.)
Judge:	Wendy Berger
State Counsel:	Mark Johnson (1st Chair) & Jason Lewis (2nd Chair)
Defense Counsel::	Garry Wood
Trial dates:	May 21 – June 12, 2012
Appellate decisions:	*Fletcher v. State*, 168 So.3d 186 (Fla. 2015)

On April 15, 2009, Timothy Fletcher and Doni Ray Brown escaped from the Putnam Co. Jail using a hydraulic jack that Fletcher had obtained from a jail transport van, hid in a walking cast, and smuggled into his cell. After stealing a nearby truck, they drove the home of Helen Googe, Fletcher's step-grandmother. They broke into the house and forced Googe to open a safe in which Fletcher believed she kept a large sum of cash. When Fletcher discovered that there was no money in the safe, he manually strangled Googe to death, stole her credit cards and car, and then fled to Kentucky. At trial, the jury found Fletcher guilty of first degree murder and recommended a death sentence by an 8-to-4 vote and the trial court subsequently sentenced him to death. On direct appeal in 2015, the Florida Supreme Court upheld the death sentence. However, that sentence was later overturned as a result the *Hurst* decision. Fletcher is currently awaiting retrial on the sentencing portion of his case.

This case was significant in that involved attracted national media attention following the "Escape from Alcatraz"-like breakout. The case was featured on "America's Most Wanted" with John Walsh and was later the subject of an episode on the Discovery Channel's "I (Almost) Got Away With It." The fact that Fletcher manually strangled his step-grandmother to death over the fact that she did not have money to finance his escape from custody made the crime particularly appalling.

- *See Tab 7 for a St. Augustine Record article on the Timothy Fletcher trial.*

6. State of Florida v. Richard Madieros	
Case No.	2009-0648-CF (Putnam Co.)
Judge:	Wendy Berger
State Counsel:	Mark Johnson (1st Chair) & Robert Mathis (2nd Chair)
Defense Counsel::	Valli Quetti & Jim Valerino
Trial dates:	August 22-26, 2011
Appellate decisions:	*Medeiros v. State*, 108 So.3d 1109 (Fla. 5th DCA 2013).

On February 6, 2009, the body of Alyce Bowles, a 92-year old widow and resident of the Sawgrass community of Ponte Vedra, was found within her home. She had been bound around the legs with tape, beaten in the head and stabbed in the back multiple times. There was no obvious suspect or motive. The only evidence obtained from the crime scene was a small amount of DNA from the back of the tape. Some of Mrs. Bowles' blood was found on a light switch, but DNA from the blood was found to contain a mixture that included a male DNA profile. The investigation had no solid leads, and it seemed destined to become a cold case. Several months later, detectives with the St. Johns Co. Sheriff's Office received a tip about a man by the name of Richard Medeiros, who had been arrested in Jacksonville Beach after

he randomly attacked another older woman with a hammer. The detectives were able to obtain a DNA sample from Medeiros, which was found to match DNA from the tape and the light switch in Alyce Bowles' home.

This case was noteworthy for several reasons. First, was how SJSO detectives obtained the tip about Mederios. The woman who he attacked in Jacksonville Beach was a real estate agent. Following her assault, she researched Medeiros and discovered that he had once lived across the street from Alyce Bowles and her husband. That tip was the turning point in solving the case. The other striking aspect of the case was that the complete randomness of the murder, coupled with Medeioros' unprovoked attack on the real estate agent, seemed to bear the hallmarks of a serial killing. To this day, it is unknown why Medeiros brutally killed Alyce Bowles or attempted to kill the female real estate agent. No connection could ever be made between Medeiros and unsolved crimes in the various state jurisdictions in which he had lived during his adult life. Following a trial, a jury found Medeiros guilty of 1st degree murder, and he was subsequently sentenced to life in prison without the possibility of parole. The 5th District Court of Appeals later upheld his conviction. Three years after he was found guilty, Medeiros died in prison of natural causes.

31. Attach at least one example of legal writing which you personally wrote. If you have not personally written any legal documents recently, you may attach writing for which you had substantial responsibility. Please describe your degree of involvement in preparing the writing you attached.

I have included with this application the following three writing samples of which I was the sole author:

- State's Sentencing Memorandum, *State v. Quentin M. Truehill*, St. Johns Co. Case #2010-0763-CF (May 1, 2014). *See Writing Sample #1 provided at Tab 8.*
- State's Response to Defendant's Motion for Post-Conviction Relief, *State v. Randy Seal*, Putnam Co. Case #2004-1683-CF (Nov. 16, 2010). *See Writing Sample #2 provided at Tab 9.*
- State's Memorandum of Law in Support of Its Argument That the Defendant is Not Eligible to Receive a Sentencing Review for the Offense to Which He Has Pleaded Guilty and Been Convicted, *State v. Andrew Jerome Robinson*, St. Johns Co. Case #2015-1250-CF (May 16, 2017). *See Writing Sample #3 provided at Tab 10.*

PRIOR JUDICIAL EXPERIENCE OR PUBLIC OFFICE:

32a. Have you ever held office or been a candidate for judicial office? If so, state the court(s) involved and the dates of service or dates of candidacy.

No

32b. List any prior quasi-judicial service:

Dates	*Names of Agency*	*Position Held*

None.

Type of issues heard:

32c. Have you ever held or been a candidate for any other public office? If so, state the office, location and dates of service or candidacy.

No

32d. If you have had prior judicial or quasi-judicial experience,

(i) List the names, phone numbers and addresses of six attorneys who appeared before you on matters of substance.

N/A

(ii) Describe the approximate number and nature of the cases you have handled during your judicial or quasi-judicial tenure.

N/A

(iii) List citations of any opinions which have been published.

N/A

(iv) List citations or styles and describe the five most significant cases you have tried or heard. Identify the parties, describe the cases and tell why you believe them to be significant. Give dates tried and names of attorneys involved.

N/A

(v) Has a complaint about you ever been made to the Judicial Qualifications Commission? If so, give date, describe complaint, whether or not there was a finding of probable cause, whether or not you have appeared before the Commission, and its resolution.

N/A

(vi) Have you ever held an attorney in contempt? If so, for each instance state name of attorney, approximate date and circumstances.

N/A

(vii) If you are a quasi-judicial officer (ALJ, Magistrate, General Master), have you ever been disciplined or reprimanded by a sitting judge? If so, describe.

N/A

BUSINESS INVOLVEMENT:

33a. If you are now an officer, director or otherwise engaged in the management of any business enterprise, state the name of such enterprise, the nature of the business, the nature of your duties, and whether you intend to resign such position immediately upon your appointment or election to judicial office.

N/A

33b. Since being admitted to the Bar, have you ever been engaged in any occupation, business or profession other than the practice of law? If so, give details, including dates.

No

33c. State whether during the past five years you have received any fees or compensation of any kind, other than for legal services rendered, from any business enterprise, institution, organization, or association of any kind. If so, identify the source of such compensation, the nature of the business enterprise, institution, organization or association involved and the dates such compensation was paid and the amounts.

None

POSSIBLE BIAS OR PREJUDICE:

34. The Commission is interested in knowing if there are certain types of cases, groups of entities, or extended relationships or associations which would limit the cases for which you could sit as the presiding judge. Please list all types or classifications of cases or litigants for which you as a general proposition believe it would be difficult for you to sit as the presiding judge. Indicate the reason for each situation as to why you believe you might be in conflict. If you have prior judicial experience, describe the types of cases from which you have recused yourself.

None

MISCELLANEOUS:

35a. Have you ever been convicted of a felony or a first degree misdemeanor?

Yes _____ No ___X___ If "Yes" what charges? _____

Where convicted? _____ Date of Conviction: _____

35b. Have you pled nolo contendere or pled guilty to a crime which is a felony or a first degree misdemeanor?

Yes _____ No ___X___ If "Yes" what charges? _____

Where convicted? _____ Date of Conviction: _____

35c. Have you ever had the adjudication of guilt withheld for a crime which is a felony or a first degree misdemeanor?

Yes _____ No ___X___ If "Yes" what charges? _____

Where convicted? _____ Date of Conviction: _____

36a. Have you ever been sued by a client? If so, give particulars including name of client, date suit filed, court, case number and disposition.

No

36b. Has any lawsuit to your knowledge been filed alleging malpractice as a result of action or inaction on your part?

No

36c. Have you or your professional liability insurance carrier ever settled a claim against you for professional malpractice? If so, give particulars, including the amounts involved.

No

37a. Have you ever filed a personal petition in bankruptcy or has a petition in bankruptcy been filed against you?

No

37b. Have you ever owned more than 25% of the issued and outstanding shares or acted as an officer or director of any corporation by which or against which a petition in bankruptcy has been filed? If so, give name of corporation, your relationship to it and date and caption of petition.

No

38. Have you ever been a party to a lawsuit either as a plaintiff or as a defendant? If so, please supply the jurisdiction/county in which the lawsuit was filed, style, case number, nature of the lawsuit, whether you were Plaintiff or Defendant and its disposition.

No

39. Has there ever been a finding of probable cause or other citation issued against you or are you presently under investigation for a breach of ethics or unprofessional conduct by any court, administrative agency, bar association, or other professional group. If so, give the particulars.

No

40. To your knowledge within the last ten years, have any of your current or former co-workers, subordinates, supervisors, customers or clients ever filed a formal complaint or formal accusation of misconduct against you with any regulatory or investigatory agency, or with your employer? If so, please state the date(s) of such formal complaint or formal accusation(s), the specific formal complaint or formal accusation(s) made, and the background and resolution of such action(s). (Any complaint filed with JQC, refer to 32d(v).

No

41. Are you currently the subject of any investigation which could result in civil, administrative or criminal action against you? If yes, please state the nature of the investigation, the agency conducting the investigation and the expected completion date of the investigation.

No

42. In the past ten years, have you been subject to or threatened with eviction proceedings? If yes, please explain.

No

43a. Have you filed all past tax returns as required by federal, state, local and other government authorities?

Yes ☒ No ☐ If no, please explain.

_____

43b. Have you ever paid a tax penalty?

Yes ☐ No ☒ If yes, please explain what and why. _____

43c. Has a tax lien ever been filed against you? If so, by whom, when, where and why?

No

HONORS AND PUBLICATIONS:

44. If you have published any books or articles, list them, giving citations and dates.

None

45. List any honors, prizes or awards you have received. Give dates.

Patriotic Employer, presented by the Office of the Secretary of Defense, Employer Support of the Guard and Reserve (during tenure as managing attorney of the Putnam Co. SAO)

46. List and describe any speeches or lectures you have given.

Johnson, M. & Ferebee, C. (2018). *Search Warrant Issues.* Lecture presented at detectives training hosted by the St. Johns Co. Sheriff's Office for law enforcement agencies in St. Johns, Putnam and Flagler counties.

- *See Tab 11 for PowerPoint presentation on Search Warrant Issues.*

Lewis, J., Johnson, M., & Dunton, J. (2018). *Homicide Investigative Strategies for Overdose-Related Deaths.* Lecture presented at symposium hosted by State Attorney's Office and the St. Johns Co. Sheriff's Office for homicide and narcotics detectives with law enforcement agencies in St. Johns, Putnam and Flagler counties.

Johnson, M. (2017). *4th Amendment Issues.* Lecture presented to detectives training hosted by the St. Johns Co. Sheriff's Office for law enforcement agencies in St. Johns, Putnam and Flagler counties.

Johnson, M. & Lewis, J. (2015). *Traffic Homicide Legal Issues.* Lecture presented at a training hosted by the State Attorney's Office for traffic homicide investigators with the Florida Highway Patrol.

Johnson, M. & Dunton, J. (2015). *Legal Issues: Body Cameras, Social Media & Technology*. Lecture presented at the New Detectives College hosted by the Daytona State Advance Technology College.

Johnson, M. & Dunton, J. (2014). *Legal Issues: Body Cameras, Social Media & Technology*. Lecture presented at the New Detectives College hosted by the Daytona State Advance Technology College.

Johnson, M. (2014). *Closing Arguments: Legal & Ethical Considerations*. Lecture to new prosecutors hosted by the State Attorney's Office.

Johnson, M. (2013). *Closing Arguments: Legal & Ethical Considerations*. Lecture to new prosecutors hosted by the State Attorney's Office.

Johnson, M. (2013). *Case Handling*; *Miranda Issues*; *Report Writing & Testimony Preparation; Search & Seizure Issues*; *Joint & Constructive Drug Possession Issues*. Organized a series of lectures on these topics to be presented to deputies with the Putnam Co. Sheriff's Office.

47. Do you have a Martindale-Hubbell rating? Yes ☐ If so, what is it? ____ No ☒

PROFESSIONAL AND OTHER ACTIVITIES:

48a. List all bar associations and professional societies of which you are a member and give the titles and dates of any office which you may have held in such groups and committees to which you belonged.

The Florida Bar, member

Putnam County Bar Association, member

St. Johns County Bar Association, member

48b. List, in a fully identifiable fashion, all organizations, other than those identified in response to questions No. 48(a), of which you have been a member since graduating from law school, including the titles and dates of any offices which you have held in each such organization.

Rotary Club of Palatka, member (2013 – Present)

Stewart-Marchman Act Foundation, Board of Directors (2015 – Present)

Federalist Society, member (2000-03; 2018-Present)

48c. List your hobbies or other vocational interests.

I enjoy spending time with family; traveling; and watching my kids play sports, participate in band concerts, and drama performances. I also personally enjoy running, hiking, camping, and studying American history.

48d. Do you now or have you ever belonged to any club or organization that in practice or policy restricts (or restricted during the time of your membership) its membership on the basis of race, religion, national origin or sex? If so, detail the name and nature of the club(s) or organization(s), relevant policies and practices and whether you intend to continue as a member if you are selected to serve on the bench.

No.

48e. Describe any pro bono legal work you have done. Give dates.

During my tenure as an Associate Attorney with the Gibbs Law Firm (2000-03), our practice frequently represented and performed legal services for churches, schools, non-profit organizations, and individuals on a pro bono basis. I did receive a modest salary from the firm for my work on these projects, but our office did not typically receive payment from many of the clients for the work performed on their behalf.

Since that time, however, my employment with the State of Florida has precluded me from performing any legal pro bono work. However, I have donated to Jacksonville Area Legal Aid for the many pro bono services they provide to the public.

SUPPLEMENTAL INFORMATION:

49a. Have you attended any continuing legal education programs during the past five years? If so, in what substantive areas?

In the past five years, I have attended CLE programs on death penalty issues, ethical obligations under Brady & Giglio, Florida law updates, trial procedure, and technology, among other subject areas.

49b. Have you taught any courses on law or lectured at bar association conferences, law school forums, or continuing legal education forums? If so, in what substantive areas?

No

50. Describe any additional educational or other experience you have which could assist you in holding judicial office.

Throughout my career as a prosecutor, I have personally tried over 100 cases. As a result of this extensive litigation experience, I have developed a strong working knowledge of the Florida Evidence Code, criminal procedure, and case law that would well serve the parties and counsel that appear before me. Also, my tenure as a Division Chief, overseeing all office operations and managing a staff of approximately 20 lawyers, secretaries, and investigators, has given me many of the leadership and organizational skills that are necessary for a judge to manage a docket and move cases efficiently and fairly toward resolution.

51. Explain the particular potential contribution you believe your selection would bring to this position.

I have extensive experience litigating in a subject area that involves some of the most consequential and complex issues in criminal law. These cases have been challenged by some of the best, brightest, and most talented trial lawyers in our area. Most of the cases I have handled in recent years have literally involved life and death decisions. While some of these decisions have involved seeking the death penalty on behalf of the State, I have also had to disappoint the family members of victims and other interested parties where it was my judgment that pursuing a capital sentence was not supported by the law or evidence. I am also frequently called upon to review cases in which I have to decide whether there is sufficient evidence to bring a criminal charge against an individual in the first place. Sometimes, these judgments are not easy where an enormous amount of investigative effort and resources have been spent. This is particularly difficult when an investigation has exhausted all leads and the case, at that moment, is as strong as it likely ever will be. There have been many occasions where I have had to make the difficult decision that the evidence was not sufficient to move forward with a criminal charge. In other cases, I have had to concede that evidence would be inadmissible on constitutional or statutory grounds before a crime was ever charged or a motion to suppress filed. Furthermore, I have had cases where an individual was victimized by another family member and I knew that proceeding forward with a charge would irrevocably and negatively alter the relationships within that family. Having to face these hard decisions have taught me that my duty, first and foremost, is to the rule of law, regardless of which side the law favors. In this way, I have already been in the position to make the types of legally complicated and emotionally challenging decisions that judges are called upon to make every day. As a result, I believe I am well-prepared to serve as a county judge.

52. If you have previously submitted a questionnaire or application to this or any other judicial nominating commission, please give the name of the commission and the approximate date of submission.

This is my third application for a judicial appointment. The previous applications were submitted to this Judicial Nominating Commission in August of 2018 for the Circuit Court seat previously held by Judge Scott Dupont and in November of the same year for the Circuit Court seat vacated by Judge Clyde Wolfe upon his death. I was honored by the Commission to be among the six nominees forwarded to the Governor for potential appointment to the seat held by former Judge Dupont.

53. Give any other information you feel would be helpful to the Commission in evaluating your application.

Thank you for allowing me the opportunity to apply for this position. I look forward to meeting you during the upcoming interviews. If there are any additional materials or information you would like prior to the interviews, please do not hesitate to contact me.

REFERENCES:

54. List the names, addresses and telephone numbers of ten persons who are in a position to comment on your qualifications for judicial position and of whom inquiry may be made by the Commission.

Name	Address	Telephone number
Hon. R.J. Larizza State Attorney, 7th Judicial Circuit	251 North Ridgewood Ave. Daytona Beach, FL 32114	[redacted]
Jason Lewis, Chief of Operations State Attorneys' Office, 7th Jud. Cir.	1769 East Moody Blvd. Bunnell, FL 32110	
Hon. Edward E. Hedstrom Circuit Judge (retired)	601 St. Johns Ave., Palatka, FL 32177	
Hon. Howard M. Maltz Circuit Judge	4010 Lewis Speedway, Rm. 344 St. Augustine, FL 32084	
Hon. Matthew M. Foxman Circuit Judge	251 North Ridgewood Ave. Daytona Beach, FL 32114	
Hon. Chris France Circuit Judge, 7th Judicial Circuit	1769 E. Moody Blvd., Bldg. 1 Bunnell, FL 32110	
Hon. Chris Miller Volusia County Judge	101 N. Alabama Ave., Deland, FL 32724	
Hon. Frank Allman Circuit Judge, 2nd Judicial Circuit	301 S. Monroe St., Suite 301-B Tallahassee, FL 32301	
Hon. Hunter Conrad St. Johns Co. Clerk of Court	4010 Lewis Speedway, St. Augustine, FL 32084	
Chief Robert Hardwick St. Augustine Beach Police Dept.	2300 A1A South, St. Augustine, FL 32080	

CERTIFICATE

I have read the foregoing questions carefully and have answered them truthfully, fully and completely. I hereby waive notice by and authorize The Florida Bar or any of its committees, educational and other institutions, the Judicial Qualifications Commission, the Florida Board of Bar Examiners or any judicial or professional disciplinary or supervisory body or commission, any references furnished by me, employers, business and professional associates, all governmental agencies and instrumentalities and all consumer and credit reporting agencies to release to the respective Judicial Nominating Commission and Office of the Governor any information, files, records or credit reports requested by the commission in connection with any consideration of me as possible nominee for appointment to judicial office. Information relating to any Florida Bar disciplinary proceedings is to be made available in accordance with Rule 3-7.1(l), Rules Regulating The Florida Bar. I recognize and agree that, pursuant to the Florida Constitution and the Uniform Rules of this commission, the contents of this questionnaire and other information received from or concerning me, and all interviews and proceedings of the commission, except for deliberations by the commission, shall be open to the public.

Further, I stipulate I have read, and understand the requirements of the Florida Code of Judicial Conduct.

Date this 5th day of August, 2019.

Kenneth Mark Johnson
Printed Name

Signature

(Pursuant to Section 119.071(4)(d)(1), F.S.), . . . *The home addresses and telephone numbers of justices of the Supreme Court, district court of appeal judges, circuit court judges, and county court judges; the home addresses, telephone numbers, and places of employment of the spouses and children of justices and judges; and the names and locations of schools and day care facilities attended by the children of justices and judges are exempt from the provisions of subsection (1), dealing with public records.*

INSTRUCTIONS FOR COMPLETING FORM 6:

PUBLIC RECORD: The disclosure form and everything attached to it is a public record. **Your Social Security Number is not required and you should redact it from any documents you file.** If you are an active or former officer or employee listed in Section 119.071(4)(d), F.S., whose home address is exempt from disclosure, the Commission is required to maintain the confidentiality of your home address ***if you submit a written request for confidentiality.***

PART A – NET WORTH

Report your net worth as of December 31 or a more current date, and list that date. This should be the same date used to value your assets and liabilities. In order to determine your net worth, you will need to total the value of all your assets and subtract the amount of all of your liabilities. Simply subtracting the liabilities reported in Part C from the assets reported in Part B will not result in an accurate net worth figure in most cases.

To total the value of your assets, add:

(1) The aggregate value of household goods and personal effects, as reported in Part B of this form;
(2) The value of all assets worth over $1,000, as reported in Part B; and
(3) The total value of any assets worth less than $1,000 that were not reported or included in the category of "household goods and personal effects."

To total the amount of your liabilities, add:

(1) The total amount of each liability you reported in Part C of this form, except for any amounts listed in the "joint and several liabilities not reported above" portion; and,
(2) The total amount of unreported liabilities (including those under $1,000, credit card and retail installment accounts, and taxes owed).

PART B – ASSETS WORTH MORE THAN $1,000

HOUSEHOLD GOODS AND PERSONAL EFFECTS:

The value of your household goods and personal effects may be aggregated and reported as a lump sum, if their aggregate value exceeds $1,000. The types of assets that can be reported in this manner are described on the form.

ASSETS INDIVIDUALLY VALUED AT MORE THAN $1,000:

Provide a description of each asset you had on the reporting date chosen for your net worth (Part A), that was worth more than $1,000 and that is not included as household goods and personal effects, and list its value. Assets include: interests in real property; tangible and intangible personal property, such as cash, stocks, bonds, certificates of deposit, interests in partnerships, beneficial interest in a trust, promissory notes owed to you, accounts received by you, bank accounts, assets held in IRAs, Deferred Retirement Option Accounts, and Florida Prepaid College Plan accounts. You are not required to disclose assets owned solely by your spouse.

How to Identify or Describe the Asset:

— Real property: Identify by providing the street address of the property. If the property has no street address, identify by describing the property's location in a manner sufficient to enable a member of the public to ascertain its location without resorting to any other source of information.

— Intangible property: Identify the type of property and the business entity or person to which or to whom it relates. **Do not list simply "stocks and bonds" or "bank accounts."** For example, list "Stock (Williams Construction Co.)," "Bonds (Southern Water and Gas)," "Bank accounts (First

National Bank)," "Smith family trust," Promissory note and mortgage (owed by John and Jane Doe)."

How to Value Assets:

— Value each asset by its fair market value on the date used in Part A for your net worth.

— Jointly held assets: If you hold real or personal property jointly with another person, your interest equals your legal percentage of ownership in the property. However, assets that are held as tenants by the entirety or jointly with right of survivorship must be reported at 100% of their value.

— Partnerships: You are deemed to own an interest in a partnership which corresponds to your interest in the equity of that partnership.

— Trusts: You are deemed to own an interest in a trust which corresponds to your percentage interest in the trust corpus.

— Real property may be valued at its market value for tax purposes, unless a more accurate appraisal of its fair market value is available.

— Marketable securities which are widely traded and whose prices are generally available should be valued based upon the closing price on the valuation date.

— Accounts, notes, and loans receivable: Value at fair market value, which generally is the amount you reasonably expect to collect.

— Closely-held businesses: Use any method of valuation which in your judgment most closely approximates fair market value, such as book value, reproduction value, liquidation value, capitalized earnings value, capitalized cash flow value, or value established by "buy-out" agreements. It is suggested that the method of valuation chosen be indicated in a footnote on the form.

— Life insurance: Use cash surrender value less loans against the policy, plus accumulated dividends.

PART C—LIABILITIES

LIABILITIES IN EXCESS OF $1,000:

List the name and address of each creditor to whom you were indebted on the reporting date chosen for your net worth (Part A) in an amount that exceeded $1,000 and list the amount of the liability. Liabilities include: accounts payable; notes payable; interest payable; debts or obligations to governmental entities other than taxes (except when the taxes have been reduced to a judgment); and judgments against you. You are not required to disclose liabilities owned *solely* by your spouse.

You do not have to list on the form any of the following: credit card and retail installment accounts, taxes owed unless the taxes have been reduced to a judgment), indebtedness on a life insurance policy owned to the company of issuance, or contingent liabilities. A "contingent liability" is one that will become an actual liability only when one or more future events occur or fail to occur, such as where you are liable only as a partner (without personal liability) for partnership debts, or where you are liable only as a guarantor, surety, or endorser on a promissory note. If you are a "co-maker" on a note and have signed as being jointly liable or jointly and severally liable, then this is not a contingent liability.

How to Determine the Amount of a Liability:

— Generally, the amount of the liability is the face amount of the debt.

— If you are the only person obligated to satisfy a liability, 100% of the liability should be listed.

— If you are jointly and severally liable with another person or entity, which often is the case where more than one person is liable on a promissory note, you should report here only the portion of the liability that corresponds to your percentage of liability. *However*, if you are jointly and severally liable for a debt relating to property you own with one or more others as tenants by the entirely or jointly, with right of survivorship, report 100% of the total amount owed.

— If you are only jointly (not jointly and severally) liable with another person or entity, your share of the liability should be determined in the same way as you determined your share of jointly held assets.

Examples:

— You owe $10,000 to a bank for student loans, $5,000 for credit card debts, and $60,000 with your spouse to a saving and loan for the mortgage on the home you own with your spouse. You must report the name and address of the bank ($10,000 being the amount of that liability) and the name and address of the savings and loan ($60,000 being the amount of this liability). The credit cards debts need not be reported.

— You and your 50% business partner have a $100,000 business loan from a bank and you both are jointly and severally liable. Report the name and address of the bank and $50,000 as the amount of the liability. If your liability for the loan is only as a partner, without personal liability, then the loan would be a contingent liability.

JOINT AND SEVERAL LIABILITIES NOT REPORTED ABOVE:

List in this part of the form the amount of each debt, for which you were jointly and severally liable, that is not reported in the "Liabilities in Excess of $1,000" part of the form. Example: You and your 50% business partner have a $100,000 business loan from a bank and you both are jointly and severally liable. Report the name and address of the bank and $50,000 as the amount of the liability, as you reported the other 50% of the debt earlier.

PART D – INCOME

As noted on the form, you have the option of either filing a copy of your latest federal income tax return, <u>including all schedules, W2's and attachments,</u> with Form 6, or completing Part D of the form. If you do not attach your tax return, you must complete Part D.

PRIMARY SOURCES OF INCOME:

List the name of each source of income that provided you with more than $1,000 of income during the year, the address of that scurce, and the amount of income received from that source. The income of your spouse need not be disclosed; however, if there is a joint income to you and your spouse from property you own jointly (such as interest or dividends from a bank account or stocks), you should include all of that income.

"Income" means the same as "gross income" for federal income tax purposes, even if the income is not actually taxable, such as interest on tax-free bonds. Examples of income include: compensation for services, gross income from business, gains from property dealings, interest, rents, dividends, pensions, IRA distributions, distributive share of partnership gross income, and alimony, but not child support. Where income is derived from a business activity you should report that income to <u>you</u>, as calculated for income tax purposes, rather than the income to the business.

Examples:

— If you owned stock in and were employed by a corporation and received more than $1,000 of income (salary, commissions, dividends, etc.) from the company, you should list the name of the company, its address, and the total amount of income received from it.

— If you were a partner in a law firm and your distributive share of partnership gross income exceeded $1,000, you should list the name of the firm, its address, and the amount of your distributive share.

— If you received dividend or interest income from investments in stocks and bonds, list only each individual company from which you received more than $1,000. Do not aggregate income from all of these investments.

— If more than $1,000 of income was gained from the sale of property, then you should list as a source of income the name of the purchaser, the purchaser's address, and the amount of gain from the sale. If the purchaser's identity is unknown, such as where securities listed on an exchange are sold through a brokerage firm, the source of income should be listed simply as "sale of (name of company) stock," for example.

— If more than $1,000 of your income was in the form of interest from one particular financial institution (aggregating interest from all CD's, accounts, etc., at that institution), list the name of the institution, its address, and the amount of income from that institution.

SECONDARY SOURCE OF INCOME:

This part is intended to require the disclosure of major customers, clients, and other sources of income to businesses in which you own an interest. It is not for reporting income from second jobs. That kind of income should be reported as a "Primary Source of Income." You will ***not*** have anything to report ***unless***:

(1) You owned (either directly or indirectly in the form of an equitable or beneficial interest) during the disclosure period, more than 5% of the total assets or capital stock of a business entity (a corporation, partnership, limited partnership, LLC, proprietorship, joint venture, trust, firm, etc., doing business in Florida); and

(2) You received more than $1,000 in gross income from that business entity during the period.

If your ownership and gross income exceeded the two thresholds listed above, then for that business entity you must list every source of income to the business entity which exceeded 10% of the business entity's gross income (computed on the basis of the business entity's more recently completed fiscal year), the source's address, the source's principal business activity, and the name of the business entity in which you owned an interest. You do not have to list the amount of income the business derived from that major source of income.

Examples:

— You are the sole proprietor of a dry cleaning business, from which you received more than $1,000 in gross income last year. If only one customer, a uniform rental company, provided more than 10% of your dry cleaning business, you must list the name of your business, the name of the uniform rental company, its address, and its principal business activity (uniform rentals).

— You are a 20% partner in a partnership that owns a shopping mall and your gross partnership income exceeded $1,000. You should list the name of the partnership, the name of each tenant of the mall that provided more than 10% of the partnership's gross income, the tenant's address and principal business activity.

PART E – INTERESTS IN SPECIFIED BUSINESS

The types of businesses covered in this section include: state and federally chartered banks; state and federal savings and loan associations; cemetery companies; insurance companies; mortgage companies, credit unions; small loan companies; alcoholic beverage licensees; pari-mutuel wagering companies; utility companies; and entities controlled by the Public Service Commission; and entities granted a franchise to operate by either a city or a county government.

You are required to make this disclosure if you own or owned (either directly or indirectly in the form of an equitable or beneficial interest) at any time during the disclosure period, more than 5% of the total assets or capital stock of one of the types of business entities listed above. You also must complete this part of the form for each of these types of business for which you are, or were at any time during the year an officer, director, partner, proprietor, or agent (other than a resident agent solely for service of process).

If you have or held such a position or ownership interest in one of these types of businesses, list: the name of the business, its address and principal business activity, and the position held with the business (if any). Also, if you own(ed) more than a 5% interest in the business, as described above, you must indicate that fact and describe the nature of your interest.

JUDICIAL APPLICATION DATA RECORD

The judicial application shall include a separate page asking applicants to identify their race, ethnicity and gender. Completion of this page shall be optional, and the page shall include an explanation that the information is requested for data collection purposes in order to assess and promote diversity in the judiciary. The chair of the Commission shall forward all such completed pages, along with the names of the nominees to the JNC Coordinator in the Governor's Office (pursuant to JNC Uniform Rule of Procedure).

(Please Type or Print)

Date: 8/5/2019

JNC Submitting To: Seventh Judicial Circuit Court

Name (please print): Kenneth Mark Johnson

Current Occupation: Assistant State Attorney

Telephone Number: (904) 615-7337 Attorney No.: 0378320

Gender (check one): ☒ Male ☐ Female

☒

Male

☐ Female

Ethnic Origin (check one):

☒ White, non Hispanic

☐ Hispanic

☐ Black

☐ American Indian/Alaskan Native

☐ Asian/Pacific Islander

County of Residence: St. Johns

FLORIDA DEPARTMENT OF LAW ENFORCEMENT

DISCLOSURE PURSUANT TO THE FAIR CREDIT REPORTING ACT (FCRA)

The Florida Department of Law Enforcement (FDLE) may obtain one or more consumer reports, including but not limited to credit reports, about you, for employment purposes as defined by the Fair Credit Reporting Act, including for determinations related to initial employment, reassignment, promotion, or other employment-related actions.

CONSUMER'S AUTHORIZATION FOR FDLE TO OBTAIN CONSUMER REPORT(S)

I have read and understand the above Disclosure. I authorize the Florida Department of Law Enforcement (FDLE) to obtain one or more consumer reports on me, for employment purposes, as described in the above Disclosure.

Printed Name of Applicant: Kenneth Mark Johnson

Signature of Applicant:

Date: 8/5/2019

TAB 3

https://www.news4jax.com/news/florida/st-johns-county/jury-recommends-death-penalty-for-james-colley-jr

St Johns County

Jury recommends death penalty for James Colley Jr.

St. Johns County man gunned down wife, her best friend in 2015 rampage
By Francine Frazier - Senior web producer, Elizabeth Campbell - Reporter
Posted: 12:28 PM, July 25, 2018Updated: 11:41 PM, July 25, 2018

ST. AUGUSTINE, Fla. - James Colley Jr. should be executed by the state for the 2015 shooting deaths of his estranged wife and her best friend. The jury that convicted Colley last week of the murders of Amanda Colley, 36, and Lindy Dobbins, 39, took less than three hours to return the unanimous recommendation of the death penalty in both murders.

Assistant State Attorney Jennifer Dunton called the jury's recommendation "bittersweet." "It's not an easy process the jury has go through, but we're very happy they considered case the same way we did and it brings some measure of justice and closure for Amanda and Lindy."

Circuit Judge Howard Maltz will consider the jury's recommendation, along with arguments presented by the prosecution and defense, and will hand down his sentence for Colley, 38, at a later date.

Colley will have a Spencer hearing on Oct. 2, which gives him another chance to present evidence that could convince Maltz to set aside the jury's recommendation and sentence him to life. Maltz can still choose to do so, but that would be an unusual decision, considering the unanimous recommendation that is now required for any death penalty sentence in Florida.

Death or life?

Assistant State Attorney Kenneth Johnson argued Wednesday that Colley had plenty of chances on Aug. 27, 2015, to decide not to murder his estranged wife, but instead he continued with the shooting

rampage because "he was on a mission." That rampage also claimed the life of Amanda Colley's best friend, Lindy Dobbins.

Johnson said Colley planned the shooting because he was losing control of Amanda, who was in a relationship with someone new, and Colley couldn't let her go.

"Remember that real people were involved. They were human beings, and now they're dead. They're dead because of one man -- the selfish choices he made," Johnson said, pointing at Colley in court.

The jury decided the state successfully proved the murders were "cold, calculated and premeditated," and also "heinous, atrocious and cruel" -- two of the aggravating factors that could warrant the death penalty.

To prove his point about the heinous nature of the crimes, Johnson recounted the brutal details of the murders, including the nine gunshot wounds Amanda suffered, and again played the 911 calls that recorded the women's deaths and their pleas for Colley to stop.

Johnson said Colley had "no conscience, no pity" as he repeatedly pulled the trigger.

"Whatever he thought about Amanda Colley, he was not the judge, jury and executioner of her character. What she did, did not deserve a death sentence," Johnson said.

But what Colley did does, he argued.

The jury unanimously agreed, despite the defense's plea that they show mercy and recommend Colley spend the rest of his life in prison.

The three other aggravating factors the state argued were already proven when the jury convicted Colley last week of two counts of first-degree murder, two counts of attempted first-degree murder, two burglary counts and a count of aggravated stalking, Johnson said:

1. Colley was previously (or simultaneously) convicted of a capital felony or felony involving use of violence.
2. The murders were committed while Colley was in the commission of a burglary.
3. The victim had an injunction against the killer at the time of the murder (applies only to Amanda Colley).

The jury said the state proved all of the aggravating factors beyond a reasonable doubt and that although some mitigating circumstances existed, they did not outweigh the aggravating factors.

TAB 4

NEWS CHIEF

Jury deliberates whether Luis Toledo should live or die

By Frank Fernandez

Posted Nov 3, 2017 at 8:38 PM
Updated Nov 3, 2017 at 8:39 PM

ST. AUGUSTINE — Jurors have begun deciding whether to recommend that Luis Toledo be sentenced to death for killing two children or spend the rest of his life in prison.

Luis Toledo, 35, was convicted of second-degree murder a week ago for killing his wife, Yessenia Suarez, 28. He faces up to life on that charge. Toledo also was convicted of first-degree murder in the deaths of her children Thalia Otto, 9, and Michael Elijah Otto, 8.

The same panel of nine women and three men that convicted Toledo began deliberating at 2:53 p.m. on whether he should receive the death penalty.

Assistant State Attorney Mark Johnson told jurors during his closing arguments that Toledo killed the children to eliminate them as witnesses in hopes of avoiding arrest for killing their mother.

"There can be nothing more cold-hearted than the murder of an innocent child," Johnson said.

Defense attorney Michael Nielsen asked jurors to think of Toledo as a bird in their palm.

"Luis is in your hand and you have a choice to make," Nielsen said. "You can either vote that he should be killed and tossed away or you can take that little Luis bird and put him in a tiny little cage. Let him go for the rest of his life in misery in a little cage. You have that choice."

The killings took place four years ago as Toledo's marriage with Suarez came apart. Suarez worked in human resources at American K9 in Lake Mary and was on track to graduate from Rollins College in the spring of 2014. She was unhappy with the marriage to Toledo and the recurring conflicts.

Suarez had an affair with a co-worker named Kevin Dredden at American K9, consummating it during a business trip to Alabama in early October 2013. She also told Toledo she wanted a divorce. Toledo suspected she was having an affair and installed spyware on her phone.

Toledo confirmed his suspicions of an affair on Oct. 22, 2013. Prosecutors said the next morning, between 1:03 a.m. and 5 or 5:30 a.m., Toledo killed his wife and then killed the children to eliminate them as witnesses.

Toledo then disposed of the bodies which have not been found.

Jurors are now working on their final task in the trial which began with jury selection on Oct. 2 at the Richard O. Watson Judicial Center. Jurors must first unanimously agree that there is at least one aggravating factor that supports imposing death on Toledo. If they agree on that, then they must weigh aggravating factors versus mitigating circumstances.

Under a new state law, jurors must unanimously recommend death for the judge to have the option of imposing death. If the jury vote is not unanimous, then Toledo must be sentenced to life in prison without parole.

Johnson, who is working the case along with Ryan Will, gave the jurors several aggravating factors during his closing arguments:

- Toledo killed the two children to eliminate them as witnesses and avoid arrest.

- The murders were cold, calculated and premeditated.

- The children were younger than 12.

- The children were particularly vulnerable because Toledo was in a position of familial or custodial authority over them.

- Toledo had a prior violent felony in 1999 when he and two other men armed themselves with a gun and burst into a man's home in Davie, robbing him of some jewels and other items. The murder of Suarez also counts for this aggravator as does the murder of either one of the children.

Johnson, in his closing, said there was no excuse for the killing of the innocent children. Johnson said kids when they get scared in the middle of the night run to their parent's room.

"On this particular night when they went to their mother's and defendant's bedroom they were running to a death trap," Johnson said.

Blood spots found in the home showed that Toledo first attacked Thalia just outside the master bathroom. The spots show she fell to the floor and was hit again. She tried to escape into the master bathroom. That's where Toledo finished off the girl, Johnson said.

Nielsen, who defended Toledo along with Jeff Deen and Michael Nappi, argued in his closing that defense psychological experts said Toledo had a damaged frontal lobe from traumatic brain injuries and concussions he had suffered throughout his life. That brain damage kept him from being able to control his impulses. Nielsen also said that Toledo was admitted to a mental health hospital for seven months when he was 9-years-old. He said records showed Toledo suffered from bipolar disorder.

Johnson argued that his own expert had said that the defense expert could not say that Toledo had brain damage simply based on a PET scan. He also said there was no medical record that Toledo had ever suffered a traumatic brain injury and the only time he was diagnosed with bipolar disorder was while in prison. He had not been diagnosed with that since his release in 2007.

TAB 5

THE ST. AUGUSTINE RECORD
staugustine.com
COVERING THE ANCIENT CITY AND ST. JOHNS COUNTY SINCE 1894

Sentencing in Bush case scheduled for December

By Jared Keever
Posted Nov 4, 2017 at 12:01 AM

The St. Johns County courthouse saw two death penalty murder cases inch toward conclusion Friday morning as jurors were set to decide the fate of a Volusia County defendant who was convicted of three counts of murder last month, and Circuit Judge Howard Maltz heard witness testimony and attorneys' final arguments before deciding whether to affirm or override a jury's decision to impose the death sentence in the state's case against Sean Alonzo Bush.

It was a busy day for Assistant State Attorney Mark Johnson who, in a brief set of arguments Friday morning at the conclusion of what is called a Spencer hearing, told Maltz that he believed the five aggravating factors that the he and Assistant State Attorney Jennifer Dunton proved to a jury in August were sufficient for imposition of the death penalty for Bush, who was convicted earlier that same month of killing his estranged wife, Nicole Bush.

Less than an hour after appearing before Maltz in the third-floor courtroom, Johnson was scheduled to be on the second floor of the courthouse appearing before a jury and Circuit Judge Raul Zambrano to make closing arguments in the penalty phase of the case against Luis Toledo, who was convicted last of killing his wife and her two children in 2013. The state is seeking the death penalty.

(For more on that Volusia County case, see the story on page 3.)

Jurors convicted Bush in early August of first-degree murder for killing Nicole Bush, who was found shot, beaten with an aluminum baseball bat and stabbed in her Julington Creek home in May 2011. She died later that same day in a Jacksonville hospital.

Jurors voted unanimously for a death sentence on Aug. 17 after finding that, among other things, the murder was done for financial gain, was "heinous, atrocious and cruel," and was "cold, calculated and premeditated."

Johnson told Maltz Friday that it was those last two factors that were the most important in the case. Not only had Bush planned the killing, Johnson argued, by searching the Internet for ways to build to silencer for a gun and disconnecting the security system in Nicole Bush's home, but when shooting her six times did not kill her, he "transitioned" to the "heinous, atrocious and cruel" act of trying to beat her to death with the bat.

"This is a proportionate sentence," Johnson said.

Most of the morning's hearing though was given over to Bush's defense attorney Rosemarie Peoples, with the Public Defender's Office, who, just as she had in the penalty phase, argued that Bush's difficult childhood in Newark, New Jersey, where he was raised, virtually homeless, by a schizophrenic mother and was witness to, and victim of, various forms of abuse was a sufficient mitigating factor to spare her client's life.

She also called a former prison warden who testified that Bush appears to have adjusted to a life of incarceration and would be a benefit to the general population in a state prison where he could mentor younger inmates instead of living out his last days in near-solitary confinement on death row.

In her closing argument, Peoples argued that Bush was not among the "worst of the worst" defendants for whom the death penalty should be reserved and pointed to infamous Florida defendants, Ted Bundy and Danny Rolling, for contrast.

She also drew on trial testimony from the first responding Sheriff's deputy at the scene, who testified that Nicole Bush said, before she died, that she did not know who attacked her.

In one of the only times he as spoken at length during courtroom proceedings, Bush told Maltz that he feels "horrible for the family," but said he did not kill his wife.

"While I appreciate the magnitude of the situation, I am innocent and I maintain that," he said.

Maltz scheduled sentencing in the case for Dec. 18.

TAB 6

https://www.news4jax.com/news/local/jury-votes-12-0-for-death-penalty-in-fsu-students-killing

News4JAX

Jury votes 12-0 for death penalty in FSU student's killing

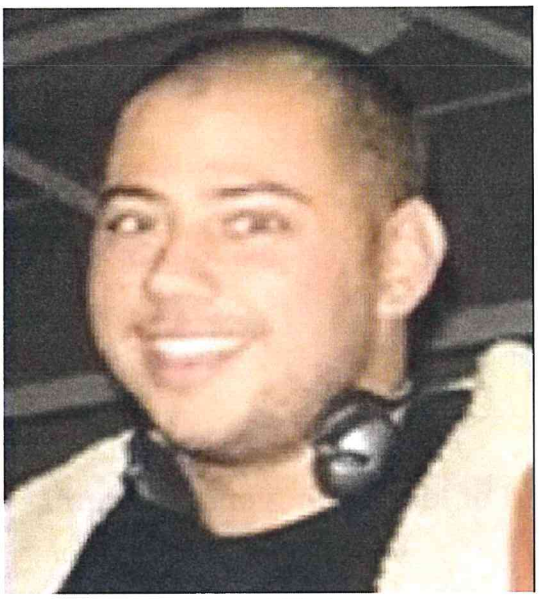
Prison escapee convicted of kidnapping man, dumping body in St. Augustine

Posted: 10:40 PM, February 18, 2014; Updated: 10:40 PM, February 18, 2014

ST. JOHNS COUNTY, Fla. - A 12-member jury has unanimously recommended the death penalty for a man it convicted last month of kidnapping and murdering a Florida State University student.

Quentin Truehill, 26, was the first of three suspects to stand trial in the killing of Vincent Binder (pictured below) in 2010. The jury that convicted Truehill of first-degree murder spent hours Friday deliberating whether to recommend the death penalty or let him face life in prison without parole.

The sentencing phase of the trial lasted all week, with testimony from both sides. The judge will make the ultimate decision on sentencing sometime in the next few weeks.



Vincent Binder

"The jury sent a very strong message with a unanimous 12-vote verdict. So we are pleased that finally at least one measure of justice has been done," Assistant State Attorney Mark Johnson said.

A large group of Binder's family was in the courtroom to hear the killer's suggested sentence.

"It's a bittersweet moment for them," Johnson said. "A trial like this reminds them of what they have lost. He was a very unique individual. He had a bright future ahead of him."

Truehill, Peter Hughes, 26, and Kentrell Johnson, 43, (pictured below) were jail escapees from Louisiana.

Binder was abducted in Tallahassee and his body was dumped along State Road 16 in St. Augustine. It become known in court that Binder died of multiple stab wounds.

After friends reported Binder missing on April 8, 2010, the Tallahassee Police Department said it began reviewing Binder's phone and financial information. The review led investigators to Miami.

St. Johns County Sheriff's Office booking photos of Peter Hughes and Kentrell Johnson

Tallahassee police said they were notified by the South Florida U.S. Marshals Violent Fugitive Task Force that it had located a stolen pickup truck believed to be used by three prison escapees from Louisiana. Investigators linked the three fugitives to Tallahassee and possibly to the disappearance of Binder.

U.S. marshals apprehended the fugitives on April 12, 2010.

Investigators said they later received information from one of the fugitives that further linked them to Binder's disappearance.

Florida Department of Law Enforcement agents searching for evidence in conjunction with the case found Binder's body in a field near the intersection of Interstate 95 and State Road 16.

Hughes and Johnson are awaiting trials. The state will also seek the death penalty in their cases if they're convicted.

TAB 7

THE ST. AUGUSTINE RECORD
staugustine.com
COVERING THE ANCIENT CITY AND ST. JOHNS COUNTY SINCE 1894

Murder trial 'like movie script' with man facing possibility of execution if found guilty

By Douglas Jordan
Posted May 24, 2012 at 12:01 AM

Timothy Fletcher, who had been listening intently and taking notes, lowered his head and stared at his yellow legal pad as Putnam County Sheriff's Detective Lynn Nicely described finding the body of 66-year-old Helen Key Googe - Fletcher's step-grandmother - face down in her living room on April 15, 2009.

Fletcher, 28, is charged with the first-degree murder of Googe, along with escape from the Putnam County jail, home invasion robbery, grand theft of a motor vehicle and burglary of a motor vehicle.

He has pleaded not guilty.

A jury of seven men and five women will decide Fletcher's fate in the capital murder case. If he is convicted, Fletcher faces death by lethal injection or life in prison.

His escape along with his cell mate, Doni Ray Brown, reads like a movie script and resulted in a nationwide manhunt that made headlines all over the country. The pair made it all the way to Kentucky before they returned to Putnam County, where they were caught three days later.

Fletcher's trial, which began Wednesday after two days of jury selection, was moved to St. Augustine because of publicity surrounding the escape and crime spree in Putnam County.

Looking gaunt and chewing gum, he stood before Circuit Court Judge Wendy Berger dressed in a light gray shirt, dark slacks and a blue tie. Occasionally whispering to his attorney, he remained stone-faced through the proceedings.

Assistant state attorneys Mark Johnson and Jason Lewis called 14 witness during preliminary testimony in the trial, which is expected to continue through the week.

Much of Wednesday's early testimony was related to the escape, which afterward pointed to serious security issues at the Putnam County jail, resulting in multiple disciplinary actions, the resignation of the jail director and the firing of one corrections officer.

The state alleges that the two men broke out of the jail, located in Palatka, around 2 a.m. on April 15, 2009.

According to a sheriff's investigation report, Fletcher had smuggled a car jack back into the jail that he had stolen from a jail transport van after a court appearance. He had been wearing a cast on his left leg, which helped him conceal it from corrections officers.

It was also disclosed during an investigation that Fletcher had not been patted down before re-entering the jail and being placed into a holding cell.

Johnson showed the jury video footage of Fletcher, who appeared to be laboring to hide something, in the holding cell with other prisoners.

Once back inside, Fletcher stuffed the jack in an overhead fixture in his cell, where it stayed for 12 days before the pair made their escape.

The men reportedly used the jack to remove a sink and toilet in the cell, then sneaked through a utility hallway to an outside door. Outside, they made their way under one fence, then climbed through another that was rusty and in a state of disrepair.

According to authorities, the escapees then ran across a field and tried unsuccessfully to steal at least two vehicles before grabbing a red and white pickup truck from Louis Tire Store on Highway 17 North. Next, they drove it to Googe's home in Bardin, where Fletcher once lived.

Authorities say the two men killed Googe, who had worked for the Putnam County Tax Collector's office for more than 30 years prior to her retirement, and stole her Lincoln Town Car, heading across several states. Her car was later found in Kentucky, prompting police to go to her home, where they found her body.

Fletcher had originally been in jail after being arrested on March 3, 2009, on three counts of failure to appear on an aggravated assault charge, and Brown had been arrested Aug. 17, 2008, and charged with robbery with a firearm.

State testimony continues through this week, after which the defense will present its case.

TAB 8

IN THE CIRCUIT COURT, SEVENTH
JUDICIAL CIRCUIT, IN AND FOR
ST. JOHNS COUNTY, FLORIDA

STATE OF FLORIDA

v. CASE NO. 2010-763-CF

QUENTIN M. TRUEHILL,

Defendant.
_____/

STATE'S SENTENCING MEMORANDUM

COMES NOW, the State of Florida, by and through the undersigned Assistant State Attorney, and files this sentencing memorandum to present the State's legal authority, facts and argument supporting the imposition of the death penalty in this cause as follows:

CASE HISTORY

On May 10, 2010, a St. Johns County Grand Jury returned a True Bill and Indictment against the Defendant, Quentin Marcus Truehill, for Kidnapping to Facilitate a Felony and First Degree Murder. Upon presentment of the charging documents to the Circuit Court, an arrest warrant was issued. On May 14, 2010, the Defendant was arrested in Leon County, Florida, and transported to St. Johns County to stand trial for the these charges.

Jury selection began on Monday, February 3, 2014. On Tuesday, February 18, 2014, the jury chosen returned verdicts of guilty as charged on both counts. The penalty phase commenced on Monday, March 3, 2014, and during that phase the State requested and the Court allowed the jury to be presented with evidence and to receive argument as to the following six (6) aggravating circumstances:

1. The capital felony was committed by a person previously convicted of a felony and under sentence of imprisonment.

2. The Defendant was previously convicted of a felony involving the use or threat of violence to the person.

3. The capital felony was committed while the Defendant was engaged, or an accomplice, in the commission of . . . a kidnapping and/or robbery.

4. The capital felony was committed for the purpose of avoiding or preventing a lawful arrest.

5. The capital felony was especially heinous, atrocious or cruel.

6. The capital felony was a homicide and was committed in a cold, calculated and premeditated manner without the pretense of moral or legal justification.

In an effort to establish mitigating circumstances, the defense presented a number of witnesses and items of evidence during the penalty phase of the trial and a Spencer hearing. The evidence submitted by the defense primarily involved allegations and opinions regarding the Defendant's age, childhood, mental condition, and life experiences. The primary piece of evidence presented in mitigation was the testimony of Dr. Frederick Sautter, a psychologist from New Orleans, Louisiana, who opined that, as a

result of a number of traumatic events, the Defendant suffered from posttraumatic stress disorder that he alleged had a substantial influence on him during the commission of the crimes in question.

At the conclusion of the presentation of evidence and closing arguments, the jury retired and returned with an advisory verdict that recommended the death penalty by a unanimous vote of 12-0. This Court must now consider the evidence and argument presented at the guilt and penalty phases of the trial and at the Spencer hearing in accordance with the law to determine whether the appropriate sentence in this case is a sentence of life in prison without the possibility of parole or the death penalty.

AGGRAVATING CIRCUMSTANCES

1. **Florida Statutes § 921.141(5)(a): The capital felony was committed by a person previously convicted of a felony and under sentence of imprisonment.**

2. **Florida Statutes § 921.141(5)(b): The Defendant was previously convicted of a felony involving the use or threat of violence to the person.**

The existence of these aggravating circumstances is proven by the admission of certified copies of the Defendant's convictions and sentences for the crimes of Armed Robbery and Manslaughter. At the time of his escape from the Avoyelles Parish Jail in Marksville, Louisiana and the murder of Vincent Binder, the Defendant was serving a sentence of 40 years hard labor out of Rapides Parish, Louisiana, for crime of Armed Robbery and 30 years hard labor out of Lafayette Parish, Louisiana, after being convicted

of Manslaughter. In the Armed Robbery conviction, the Defendant was sentenced on June 23, 2007. He was sentenced on the Manslaughter conviction on July 21, 2007.

In addition to the certified convictions, the State presented the testimony of Kristine Keegan, a qualified fingerprint examiner with the St. Johns County Sheriff's Office. Ms. Keegan compared the Defendant's known fingerprints to those attached to the certified copy of the Armed Robbery conviction and testified during the penalty phase that they matched.

Former Assistant District Attorney Keith Stutes from Lafayette Parish, Louisiana also identified the Defendant in court as the person who pleaded guilty to and was convicted of Manslaughter. Mr. Stutes also testified that, during the plea colloquy in that case, the Defendant admitted to shooting the victim in the face, then, after the victim fell to the ground, standing over the victim and shooting him three more times in the chest. This evidence demonstrated beyond a reasonable doubt that, while the Defendant may have pleaded to the charge of Manslaughter, the crime involved a greater violent offense. *See Miller v. State*, 42 So.3d 204, 225-26 (Fla. 2010).

With this evidence, the State has proven these aggravating circumstances beyond any reasonable doubt. The Florida Supreme Court has observed that the "prior violent felony" aggravator is one of the "most weighty in Florida's sentencing calculus." *Sireci v. Moore*, 825 So.2d 882, 887 (Fla. 2002). For this reason and those outlined above, the State submits that the Court should give this aggravating circumstance great weight.

3. **Florida Statutes § 921.141(5)(d): The capital felony was committed while the Defendant was engaged, or an accomplice, in the commission of . . . a kidnapping and/or robbery.**

The State has also proven this aggravating factor beyond a reasonable doubt. Evidence was submitted to the jury that the murder of Vincent Binder occurred during the commission of both a kidnapping and a robbery.

During the guilt phase of the trial, Beth Frady and Rebecca Edwards testified that at approximately midnight on April 1-2, 2010, Vincent Binder left their apartment in Tallahassee to walk home. Video from a surveillance camera was also introduced showing the Defendant at an ATM inside the Half Time Keg convenience less than 30 minutes later. Also admitted into evidence were credit card records that revealed that the Defendant had used the ATM at that time and location to withdraw $160.00 from Binder's credit card account. Importantly, Vincent Binder never appeared on the store surveillance video using his credit card.

Binder's wallet was later found in a pair of jeans located in a Miami hotel where the Defendant was staying. The victim's credit card and driver's license were seized at a Miami Wachovia bank where the Defendant personally attempted to withdraw $1,300.00 from the victim's bank account.

On April 28, 2010, Vincent Binder's deceased body was found lying in a vacant field on Commercial Drive in St. Augustine, approximately 200 miles away from Tallahassee. Dr. Frederick Hobin, who performed an autopsy on Binder's body, testified that Binder has suffered approximately 5-10 chopping-type injuries to the head that were

consistent with a Rambo-style knife that was found covered in the victim's blood in Miami. Dr. Hobin also found that they victim had suffered multiple defensive injuries to his left arm, hands, and fingers.

Dr. Hobin also testified that the injuries inflicted on Vincent Binder would have caused a substantial amount of bleeding. Philipp Balunan, a crime scene technologist with the Florida Department of Law Enforcement, processed the black Chevy truck that the Defendant and his cohorts used to travel from Louisiana, through Tallahassee and St. Augustine, to Miami. At trial, Mr. Balunan testified that he processed or visually inspected both the interior and exterior of the truck, including the truck bed, for the presence of blood and found none. This evidence proves beyond a reasonable doubt that the Defendant and his cohorts kidnapped Vincent Binder from Tallahassee, robbed him of his credit card, used his credit card at multiple locations between Tallahassee and Miami, and transported Binder alive to St. Augustine, where they murdered him during the commission of the ongoing kidnapping and robbery.

Notwithstanding the above, the proof of this aggravating circumstance is most clearly reflected by the jury's unanimous verdict finding the Defendant guilty of Kidnapping beyond a reasonable doubt. As summarized, this verdict was supported by an overwhelming array of evidence presented during the guilt phase of the trial. Accordingly, this Court should give this aggravator great weight.

4. **Florida Statutes § 921.141(5)(e): The capital felony was committed for the purpose of avoiding or preventing a lawful arrest.**

The State asserts that this aggravating factor applies because the dominant motive for the murder of Vincent Binder was to eliminate him as a witness to the Defendant's crimes. This aggravating circumstance has been repeatedly upheld in cases where the victim was abducted from the scene of one crime and then taken to a remote area and killed for no other apparent motive. *See Jones, v. State*, 748 So.2d 1012, 1027 (Fla. 199); *Preston v. State*, 607 So.2d 404, 409 (Fla. 1993); *Hall v. State*, 614 So.2d 473, 477 (Fla. 1993); *Routly v. State*, 440 So.2d 1257 (Fla. 1983). *See also*, *Cole v. State*, 36 So.3d 597, 607-08 (Fla. 2010); *Card v. State*, 803 So.2d 613, 625-26 (Fla. 2001).

In *Jones v. State*, 748 So.2d at 1027, the Florida Supreme Court ruled that the "avoid arrest" aggravator was supported by competent, substantial evidence based on the following findings by the trial court in that case:

> "[T]he facts are clear that the Defendant selected [the victim] . . . in order to rob her and obtain money to purchase to crack cocaine . . . . However, there was [no] reason for the Defendant to kill the victim after he had obtained her money to buy crack cocaine. The Defendant had abducted the victim from the parking lot in Duval County and had used the victim's ATM card approximately two hours later in Nassau County, where he extracted $300 from the ATM machine. He could not have used this card any other way than obtaining the PIN number from the victim. Once the money had been obtained from the machine the Defendant had no reason to kill the victim, yet he transported her to Baker County where her body was left in a wooded area . . . . By transporting [the victim] to the remote location in Baker County where he killed her, the only reasonable inference that the Court can glean from the evidence was that he intended to eliminate her as a witness to [the] crime."

These facts are virtually identical to those the State has proven in the instant case. Video evidence presented at trial shows beyond a reasonable doubt that the Defendant kidnapped Vincent Binder and, less than 30 minutes later, used his credit card at an ATM machine inside the Half Time Keg convenience store in Tallahassee. The purpose for obtaining this money was to finance the Defendant's continuous escape from custody. Credit card records show that the Defendant was able to withdraw $160.00 from the ATM machine. The records also show that Binder's credit card was used to obtain more money from a number of ATM machines in the Miami / Opa Locka, Florida area. The Defendant could not have withdrawn this money from these ATM machines without obtaining the PIN number from Vincent Binder.

Once the Defendant was able to obtain the PIN number to Vincent Binder's credit card and was able to use it successfully to withdraw money from the ATM in Tallahassee, there was absolutely no reason to kill him. However, the Defendant continued to confine Binder in the back of the black Chevy truck, which was used to transport him to St. Augustine. Once there, the Defendant and his collaborators drove him to a dark, isolated field and murdered him.

Accordingly, there can be no reasonable doubt that the Defendant's dominate motive for killing Vincent Binder was to eliminate him as a witness. The State submits that this aggravating circumstance should be given <u>great weight.</u>

5. Florida Statutes § 921.141(5)(h): The capital felony was especially heinous, atrocious, or cruel.

In *Rogers v. State*, the Florida Supreme Court held:

> In order for the HAC aggravating factor to apply, the murder must be conscienceless or pitiless and unnecessarily torturous to the victim. A finding of HAC is appropriate only when a murder evinces extreme and outrageous depravity as exemplified either by the desire to inflict a high degree of pain or utter indifference to or enjoyment of the suffering of another.

783 So.2d 980, 994 (Fla. 2003) (citations omitted). The evidence presented during the guilt phase of this trial leaves this Court with no reasonable doubt that the murder of Vincent Binder was characterized by all the elements of this definition. Accordingly, a finding of HAC in this case is appropriate.

The evidence introduced at trial clearly shows that shortly after midnight on April 2, 2010, the Defendant, along with Kentrell Johnson and Peter Hughes, kidnapped Vincent Binder as he was walking home from his friends' apartment in Tallahassee. After successfully using Binder's credit card at an ATM machine minutes later, the Defendant and his partners in crime continued to confine Binder to the back of the black Chevy pickup truck they had stolen in Louisiana, rather than releasing him unharmed.

They then transported Binder from Tallahassee to St. Augustine, a journey of over 200 miles that took between five (5) and six (6) hours. Binder was alive for the entirety of this trip, throughout which he had an extraordinarily long time to contemplate not only the probability that he was going to die, but also how death would be inflicted on him.

Twice before arriving in St. Augustine, the Defendant and his cohorts stopped to use Binder's credit card to buy gas and ask for directions, each time raising, and then extinguishing Binder's hope that he would be released alive.

Sometime before dawn, the Defendant and his accomplices decided that the time had come to dispose of Vincent Binder. They pulled off of I-95 at State Road 16 in St. Augustine and snaked their way to Commercial Drive, where they found a vacant field. They then pulled over and removed Binder from the truck. Based on the distance between the roadway and the location where Binder's mutilated body would later be found, the evidence shows that the Defendant and his accomplices then either led or chased Binder over 450 feet across the field where they executed him with at least two (2) knives.

Vincent Binder did not die a quick and easy death. To the contrary, the evidence shows that he suffered great physical and emotional pain as he fought for his life against impossible odds.

During the trial, Dr. Frederick Hobin, a forensic pathologist who performed an autopsy on the body of Vincent Binder, testified that the victim suffered between five (5) and ten (10) blows to the head with a heavy, sharp instrument; four stab wounds to the left lower back with a second knife; a broken left arm; and between two and four incised and hacking wounds to his hands and fingers. Dr. Hobin also testified that the injuries to Binder's left arm, hands, and fingers were consistent with the victim, in a struggle against his attackers, raising his arm and hands over his head in a defensive posture to protect

himself from the blows of one of the murder weapons. Dr. Hobin opined that these defensive injuries showed that Vincent Binder was conscious and alive for at least the initial portion of the attack.

Dr. Michael Warren, a forensic anthropologist, also testified that Binder had suffered a minimum of six (6) blows to the head with a heavy, sharp instrument and had sustained at least three (3) "nightstick" type injuries to the ulna bone of his left forearm. Two (2) of the blows inflicted on Binder's left arm literally chopped into the bone, leaving hack marks, while one (1) or more additional blows actually broke the ulna bone in two. Dr. Warren concurred with Dr. Hobin's opinion that these injuries to Binder's left arm were classic defensive wounds. Photographs of the injuries to Binder's body were offered into evidence supporting the testimony of Dr. Hobin and Dr. Warren.

a. Consciousness / Awareness of Impending Death:

The Florida Supreme Court has consistently upheld findings that a murder was heinous, atrocious or cruel in beating and stabbing deaths if the evidence also showed that the victim was conscious and aware of impending death. *See King v. State*, 130 So.3d 676, 684 (Fla. 2013) (citing *Douglas v. State*, 878 So.2d 1246, 1261 (Fla. 2006) and *Bogle v. State*, 655 So.2d 1103, 1109 (Fla. 1995)) (beating deaths); *Guardado v. State*, 965 So.2d 108, 115-16 (Fla. 2007) (beating and stabbing death); *Buzia v. State*, 926 So.2d 1203, 1212-14 (Fla. 2006) and cases cited therein (beating deaths); *Dennis v. State*, 817 So.2d 741, 766 (Fla. 2002); *Aguirre-Jarquin v. State*, 9 So.3d 593, 608-09 (Fla. 2009) (stabbing death); *Schoenwetter v. State*, 931 So.2d 857, 874 (Fla. 2006) (stabbing

death); *Perez v. State*, 919 So.2d 347, 378-79 (Fla. 2006) and cases cited therein (stabbing deaths); *Cox v. State*, 819 So.2d 705, 720 (Fla. 2002) (stabbing death); *Francis v. State*, 808 So.2d 110, 134-35 (Fla. 2002) (stabbing death); *Pittman v. State*, 646 So.2d 167, 172-73 (Fla. 1994) and cases cited therein (stabbing deaths).

It has also repeatedly found the existence of defensive wounds extremely relevant to the determination of a victim's consciousness and awareness. *See King*, 130 So.3d at 684 (citing *Guardado v. State*, 965 So.2d 108, 116 (Fla. 2007); *Boyd v. State*, 910 So.2d 167, 191 (Fla. 2005); *Dennis v. State*, 817 So.2d 741, 766 (Fla. 2002); *Roberts v. State*, 510 So.2d 885, 894 (Fla. 1987); *Heiney v. State*, 447 So.2d 210, 216 (Fla. 1984). Nevertheless, the Florida Supreme Court has also emphasized that it has never required a minimum number of defensive wounds in order to sustain a finding of HAC. *King*, 130 So.3d at 685. *See also Heiney*, 447 So.2d at 211, 215-16 (Fla.1984) (holding that the record amply supported a finding of HAC where the victim suffered defensive wounds only to the back side of the victim's hands and wrists).

In this case, Vincent Binder was obviously aware of his impending death. The physical evidence and the presence of defensive injuries prove that he was conscious and fighting for his life. Dr. Hobin and Dr. Warren were clear in their testimony that the medical and anthropological evidence showed that Vincent Binder engaged in a violent struggle to defend himself from his attackers. The evidence shows that, as he was being attacked, Binder used his left arm and hands to shield his head and body from the deadly blows of the eventual murder weapon. From this response, it is reasonable to conclude

that Vincent Binder feared for his life and was doing what little was within his power to save it. There can be no question that as the almost half dozen blows chopped into his left arm and hands, breaking his left arm and severing the fingers on his right hand, Vincent Binder experienced great physical pain and suffering at the hands of the Defendant and his cohorts before he eventually succumbed to their vicious attack.

b. Fear, Emotional Strain & Terror of the Victim:

The Florida Supreme Court has also explained that the actual length of the victim's consciousness is not the only factor relevant to the determination of the HAC aggravating circumstance. *Davis v. State*, 121 So.3d 462, 498 (Fla. 2013). It has consistently held that the "fear, emotional strain, and terror of the victim during the events leading up to the murder may make an otherwise quick death especially heinous, atrocious, or cruel." *Lynch v. State*, 841 So.2d 362, 369 (Fla. 2003) (citing *James v. State*, 695 So.2d 1229, 1235 (Fla. 1997), *Francis v. State*, 808 So.2d 110, 125 (Fla. 2001); and *Farina v. State*, 801 So.2d 44, 53 (Fla. 2001). Moreover, in determining whether the HAC factor is present, the focus should be on the victim's perceptions of the circumstances as opposed to those of the perpetrator. *Id.* (citing *Farina*, 801 So.2d at 53, and *Hitchcock v. State*, 578 So.2d 685, 692 (Fla. 1990).

Looking through these lenses, the Florida Supreme Court has, in numerous cases, affirmed a finding of HAC when the evidence has shown that the victim was abducted, transported to a remote location, and executed. *See Baker v. State*, 71 So.3d 802, 821 (Fla. 2011); *Parker v. State*, 873 So.2d 270, 287 (Fla. 2004); *Cave v. State*, 727 So.2d

227, 229 (Fla. 1999); *Alston v. State*, 723 So.2d 148, 160-61 (Fla. 1998); *Preston v. State*, 607 So.2d 404 (Fla. 1992); *Routly v. State*, 440 So.2d 1257, 1264-65 (Fla. 1983); *Smith v. State*, 424 So.2d 726, 728, 733 (Fla. 1983); *Griffin v. State*, 414 So.2d 1025, 1029 (Fla. 1982); *Steinhorst v. State*, 412 So.2d 332, 339-40 (Fla. 1982); *Knight v. State*, 338 So.2d 201, 202, 205 (Fla. 1976). The common element in these cases is that, before death occurred, the victims were subjected to agony over the prospect that death was soon to occur. *Routly*, 440 So.2d at 1265.

There can be no reasonable doubt that Vincent Binder suffered fear, emotional strain, and terror during the events leading up to the actual killing. He was abducted in the middle of the night from the streets of Tallahassee, robbed of his wallet and credit card, and then taken on a terrifying ride that extended over 200 miles and approximately five (5) to six (6) hours.

Again, the evidence shows that Binder was alive throughout this entire journey, giving him an excruciatingly lengthy time to deliberate on when and how he would be murdered. The Defendant and his cohorts stopped at least twice during the trip, which no doubt raised the victim's hope of survival, only to be crushed when they continued on.

Sometime before sunrise, the Defendant and his accomplices decided that the time had come to get rid of Vincent Binder. They pulled off of I-95 at State Road 16 in St. Augustine and found a dark, vacant field on Commercial Drive. They then pulled over and removed Binder from the truck. Any remaining hope of survival to which Vincent Binder might have clung up until that point no doubt vanished upon his arrival at this

dark and isolated location. Because there was no other reason for them to have stopped in this area, he could have come to no other conclusion than that they selected this spot for the specific purpose to kill him.

Given that his body was found over 450 feet from the roadway it is reasonable to conclude either that Vincent Binder was frog-marched to his execution site in the field or was chased down after managing to break free and attempting to escape. Either way, the fear and terror that must have been going on in Vincent Binder's mind as he contemplated the end of his life cannot be fathomed.

The evidence in this case, as outlined above, clearly proves that the Defendant's murder was especially heinous, atrocious, or cruel. Like the "prior violent felony" aggravator, HAC is among "the most weighty in Florida's sentencing calculus," *Sireci*, 825 So.2d at 887, and has been considered sufficient by itself to sustain a death sentence, *see Butler v. State*, 842 So.2d 817 (Fla. 2003). Accordingly, the State submits that this aggravating circumstance should be given great weight.

6. Florida Statutes § 921.141(5)(i): The capital felony was a homicide and was committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification.

To establish the CCP aggravating factor, Florida law requires the State to prove that: (1) the killing must have been the product of cool and calm reflection and not an act prompted by emotional frenzy, panic, or a fit of rage ("cold"); (2) the defendant must have had a careful plan or prearranged design to commit murder before the killing

("calculated"); (3) the defendant must have exhibited heightened premeditation ("premeditation"); and (4) the defendant had no pretense of legal or moral justification. *Lynch v. State*, 841 So.2d 362, 371 (Fla. 2003) (citing *Evans v. State*, 800 So.2d 182, 192 (Fla. 2001). "The CCP aggravator pertains specifically to the state of mind, intent, and motivation of the defendant." *Wright v. State*, 19 So.3d 277, 298 (Fla. 2009).

a. "Cold":

As stated above, the first element that the State must prove is that the murder was "cold," in the sense that that the killing was "the product of cool and calm reflection and not an act prompted by emotional frenzy, panic, or a fit of rage." *Lynch*, 841 So.2d at 371. "[E]xecution-style killing is by its very nature a 'cold' crime." *Id.* at 372.

The evidence in this case leads to no other reasonable conclusion than that the murder of Vincent Binder was an execution. Long before the Defendant and his cohorts arrived in St. Augustine with the victim as their captive, he had everything he could want or obtain from Binder. He had already obtained Binder's credit card, along with the PIN, and had successfully used it once to withdraw money from an ATM and three times to purchase gas. When they exited I-95 in St. Augustine just before dawn on April 2, 2010, they made their way to a vacant field along Commercial Drive, which at that hour was a dark, isolated area where they could easily dispatch Vincent Binder without being discovered. There was no other reason for the Defendant and his accomplices to have been at that location except to execute Vincent Binder.

b. "Calculated":

Second, to prove that a murder was "calculated," "the defendant must have had a careful plan or prearranged design to commit murder before the fatal incident." *Id.* at 371. "The calculated element applies in cases where the defendant arms himself in advance, kills execution-style, plans his actions, and has time to coldly and calmly decide to kill." *Wright v. State*, 19 So.3d 277, 299 (Fla. 2009).

As explained previously, the only explanation for the fact that the Defendant and his accomplices continued their kidnapping of Vincent Binder even after they had obtained his credit card and PIN number and used it successfully was that they planned from the beginning to eventually murder him and prevent him from ever being a witness against them. The careful and calculated nature of Binder's murder is proven even more so by the evidence that the Defendant armed himself with the murder weapon prior to the killing. The Rambo-style knife that DNA evidence proved was the weapon that was used to hack Binder to death was not one of mere happenstance. James Mose, the operator of the black Chevy truck the Defendant and his accomplices stole, testified that the knife was not his and that it was not in the truck at the time it was stolen. Therefore, the knife wasn't simply a weapon that the Defendant happened upon at the time of the killing. Long before Binder's murder, the Defendant sought out and obtained the knife to be used to commit murder when the opportunity presented itself.

c. "Premeditated":

Third, the State must show that the circumstances of the crime must indicate that the defendant killed the victim with heightened premeditation. *See Lynch*, 841 So.2d at 371. "Heightened premeditation necessary for CCP is established where . . . the defendant had ample opportunity to release the victim but instead, after substantial reflection, 'acted out the plan [he] had conceived during the extended period in which [the] events occurred.'" *Turner v. State*, 37 So.3d 212, 225-26 (Fla. 2010) (quoting *Alston v. State*, 723 So.2d 148, 162 (Fla. 1998)), *cert. denied*, 131 S.Ct. 426, 178 L.Ed. 2d 332 (2010). "[T]his element exists where a defendant has the opportunity to leave the crime scene with the victims alive but, instead, commits the murders." *Wright*, 19 So.3d at 300.

The existence of heightened premeditation cannot be reasonably doubted in this case. The Defendant had between five (5) and six (6) hours to contemplate and reflect on what he and his accomplices would do with Vincent Binder. He had ample opportunities to release Binder unharmed, including the multiple occasions when they stopped between Tallahassee and St. Augustine to purchase gas or ask for directions. Instead, the Defendant chose to continue on with his prearranged plan to murder Vincent Binder.

d. "No Pretense of Moral or Legal Justification":

Finally, the State must demonstrate that the murder was committed without any pretense of moral or legal justification. *See Lynch*, 841 So.2d at 371. "[A] pretense of moral or legal justification is any colorable claim based at least partly on uncontroverted

and believable factual evidence or testimony that, but for its incompleteness, would constitute an excuse, justification, or defense to the homicide." *Walls v. State*, 641 So.2d 381, 388 (Fla. 1994).

It hardly needs to be said that there is not one scintilla of evidence that even remotely suggests that the Defendant in this case had any pretense of moral or legal justification in killing Vincent Binder. The proof is overwhelmingly to the contrary.

The evidence in this case proves beyond a reasonable doubt that the Defendant's murder of Vincent Binder was cold, calculated, and premeditated. The Florida Supreme Court has also classified CCP as one of the most serious aggravating circumstances set out in the statutory sentencing scheme. *Suggs v. State*, 923 So.2d 419, 436 (Fla. 2005) (citing *Larkins v. State*, 739 So.2d 90, 95 (Fla. 1999)). Therefore, the Court should give this aggravating factor great weight.

MITIGATING CIRCUMSTANCES

At the Defendant's request, the jury received instructions pertaining to the following statutory mitigating circumstances, pursuant to Florida Statutes § 921.141(6)(b), (d), (e), (f), and (g):

1. The capital felony was committed while the Defendant was under the influence of extreme mental or emotional disturbance.

2. The Defendant was an accomplice in the capital felony committed by another person and his or her participation was relatively minor.

3. The Defendant acted under extreme duress or under the substantial domination of another person.

4. The capacity of the Defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired.

5. The age of the Defendant at the time of the crime.

During closing argument, the defense argued that the following non-statutory circumstances should be considered as "other factors in the Defendant's background that [should] mitigate against imposition of the death penalty" under Florida Statutes § Section 921.141(6)(h):

6. The Defendant was affected by his father's extra-marital relationship.

7. The Defendant was affected by his parents' divorce.

8. The Defendant was affected by his father's remarriage.

9. The Defendant played basketball in high school.

10. The Defendant graduated from high school.

11. The Defendant was affected by his father not attending his high school graduation.

12. The Defendant enrolled in an automobile collision repair course.

13. The Defendant helped his girlfriend's family evacuate New Orleans after Hurricane Katrina.

14. The Defendant was affected by the fact that he was unable to obtain assistance from FEMA following Hurricane Katrina.

15. The Defendant lost two homes.

16. The Defendant participated in community service.

17. The Defendant went fishing with his brother.

18. The Defendant worked at Baskin Robbins.

19. The Defendant has family that supports and loves him.

20. Lack of future dangerousness.

21. The Defendant has exhibited good behavior while incarcerated in jail.

22. The Defendant will adjust well to prison.

23. The Defendant was a follower, not a leader.

24. The Defendant witnessed his father abuse his mother.

25. The Defendant witnessed his father abuse his siblings.

26. The Defendant was abused by his father.

27. The Defendant grew up in a dysfunctional family.

28. The Defendant had a girlfriend whose child died of SIDS.

29. The Defendant had a girlfriend who was shot and killed.

30. The Defendant was present when a school shooting took place.

31. The Defendant had no support from his siblings.

32. The Defendant suffered trauma as a result of Hurricane Katrina.

33. The Defendant was never treated for mental health or emotional problems.

34. The Defendant suffers from post-traumatic stress disorder (PTSD).

The State asserts that the mitigating circumstances offered by the defense in this case should not be given great weight. To the extent that this Court finds that mitigation does exist and assigns it some level of weight, the State further argues that such mitigation does not outweigh the aggravating circumstances that have been proven beyond a reasonable doubt in the murder of Vincent Binder. Because some of the

mitigating circumstances offered by the defense are supported by the same evidence, the State will, in some cases, combine its response to these claims.

1. Florida Statutes § 921.141(b): The capital felony was committed while the Defendant was under the influence of extreme mental or emotional disturbance.

To establish that the murder of Vincent Binder was committed while the Defendant was under the influence of extreme mental or emotional disturbance, the defense relied upon the testimony of Dr. Gregory Sautter, a psychologist from New Orleans, Louisiana. During the penalty phase, Dr. Sautter opined that the Defendant suffers from Post-Traumatic Stress Disorder ("PTSD"). His diagnosis was based on number of traumatic events the Defendant was alleged to have experienced, including verbal and physical abuse by his father, a school shooting he witnessed, the shooting death of a former girlfriend, and surviving Hurricane Katrina.

An essential element in the proof of this mitigator is the requirement that the defense show that a defendant was *under the influence* from an extreme mental or emotional disturbance *at the time of the murder*. Evidence that the circumstances of a homicide involved a coherent and well-thought-out plan can demonstrate that the defendant's commission of the crime was not influenced by the disturbance at the time. *See Hoskins v. State*, 965 So.2d 1, 17 (Fla. 2007); *Philmore v. State*, 820 So.2d 919, 935-37 (Fla. 2002) (emphasis added). Moreover, with regard to the issue of expert psychological evaluations of a defendant's mental health, the Florida Supreme Court has explained that "expert testimony alone does not require a finding of extreme mental or

emotional disturbance." Even uncontroverted opinion testimony can be rejected, especially when it is hard to reconcile with the other evidence presented in the case. *Hoskins*, 965 So.2d at 16; *Philmore*, 820 So.2d at 936 (quoting *Knight v. State*, 746 So.2d 423, 436 (Fla. 1998).

In *Hoskins v. State*, the defense presented unrebutted expert testimony that the defendant suffered from a brain abnormality that could result in reduced ability to control impulsive behavior. Nevertheless, the Florida Supreme Court held that the trial court's rejection of this mitigator was appropriate where the evidence also showed that the defendant placed the victim in the truck of his car and drove her around for six (6) hours before obtaining a shovel, transporting her to a remote location, and strangling her to death. 965 So.2d at 17. In *Philmore v. State*, the defense offered expert opinion that the defendant suffered from a psychotic disturbance that contributed to his criminal behavior and perhaps brain damage and PTSD. As in *Hoskins*, the Supreme Court in *Philmore* held the trial court's refusal to recognize this evidence as mitigation was supported by substantial, competent evidence where the expert's testimony was strongly rebutted by the State's expert witness and where the defendant – in the process of carrying out a plan to steal a car – abducted the victim, robbed her, then drove her to a remote location and shot her. *Philmore*, 820 So.2d at 936-37.

In this case, Dr. Sautter testified that he was of the opinion that that the Defendant's behavior was "strongly affected" by PTSD during the murder. He did agree, though, that PTSD did not "cause" the Defendant to commit the murder.

However, Dr. Sautter admitted that he neither knew anything about the circumstances of the kidnapping and murder of Vincent Binder nor what the Defendant was thinking or feeling at the time he committed these crimes. He conceded that he never asked the Defendant any of these questions or even reviewed a single report relating to the crimes. In fact, he erroneously believed that Vincent Binder had been shot to death.

On the other hand, Dr. Gregory Prichard, a forensic psychologist called by the State, testified that, in addition to conducting his own face-to-face evaluation of the Defendant, he spent approximately 17 hours reviewing records in the case. These records included police reports concerning the kidnapping and murder of Vincent Binder as well as the previous crimes committed by the Defendant. Dr. Prichard emphasized that it was critically important to review these records in order to determine whether PTSD, if legitimately present, had any influence over the Defendant at the time of Vincent Binder's murder.

Dr. Prichard testified that, while he agreed that the Defendant had experienced some traumatic events in his life, he did not agree that they rose to the level of causing PTSD. He further emphasized that what limited criteria the Defendant did meet for a diagnosis of PTSD had absolutely no influence on the Defendant's participation in the kidnapping and murder of Vincent Binder.

Even if this Court were to agree with Dr. Sautter's opinion that the Defendant has PTSD, it should disregard his testimony that it the Defendant was "strongly affected" by

the disorder at the time of the murder. Dr. Sautter did not ask the Defendant a single question about the circumstances of the murder or even review a single police report documenting the same. It is virtually impossible for him to have reached this conclusion without any knowledge of the facts of the case or what was going through the Defendant's mind at the time.

This stands in stark contrast with the testimony of Dr. Prichard, who after spending 17 hours reviewing reports in the case and conducting his own evaluation, rejected Dr. Sautter's diagnosis and opinion that the Defendant was under the influence of PTSD at the time he murdered Vincent Binder.

Even apart from Dr. Prichard's testimony, Dr. Sautter's opinion cannot be reconciled with the evidence establishing that the murder of Vincent Binder followed a coherent and well-thought-out plan. Similar to the facts in *Hoskins and Philmore*, the Defendant kidnapped Binder for the specific purpose of robbing him, continued to confined him to the back of a truck for five (5) to six (6) hours, drove him to a remote location approximately 200 miles from his home, and then executed him. These circumstances clearly show that the Defendant was not under the influence of an extreme mental or emotional disturbance at the time of the murder.

Accordingly, the State asserts that this mitigating circumstance was not proven at trial. Thus, it should not be given any weight.

2. **Florida Statutes § 921.141(d): The Defendant was an accomplice in the capital felony committed by another person and his participation was relatively minor.**

3. **Florida Statutes § 921.141(e): The Defendant acted under extreme duress or under the substantial domination of another person.**

In closing argument, the defense argued that the evidence showed that Co-Defendant Kentrell Johnson was the one who actually killed Vincent Binder and that the Defendant's role was relatively minor. It also argued that the Defendant acted under extreme duress or the substantial domination of Kentrell Johnson. In support of this argument, the defense pointed to the relative age and size differences between the Defendant and Johnson as well the testimony of Shirley Marcus, who agreed with the defense that, during their stay with her in Miami, it seemed that Johnson was the leader in that he would frequently tell the Defendant and Co-Defendant Peter Hughes what to do.

However, the evidence is overwhelmingly clear that the Defendant was no shrinking violet and that he played a leading, if not a starring role in the kidnapping and murder of Vincent Binder and the crimes leading up to those events. The video from the Avoyelles Parish Jail in Marksville, Louisiana, clearly show the Defendant attacking a corrections officer with a homemade shank while his unarmed co-defendants forced another officer to open a door leading to the outside. The video from the Half-Time convenience store in Tallahassee shows the Defendant using the victim's credit card to withdraw money from an ATM. Additionally, Shirley Marcus testified that when she drove the Defendant and his cohorts to the Wachovia Bank in Miami to withdraw money

from Vincent Binder's bank account, it was the Defendant who filled out the withdrawal slip and handed it, along with the victim's driver's license and credit card, to her to give to the teller. Furthermore, the victims of three other robberies – Brenda Jo Brown, Mario Rios, and Chris Pavlish – all identified the Defendant as the one who brandished a weapon during the attacks. The weapon that Brown and Rios identified with the Defendant was the knife that DNA evidence confirmed was used to kill Vincent Binder.

The evidence in this case could not more strongly refute the claim that the Defendant was a minor participant in Vincent Binder's murder or that his involvement was forced upon him by Kentrell Johnson. Accordingly, the Court should reject these mitigating circumstances.

4. Florida Statutes § 921.141(f): The capacity of the Defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired.

To establish this mitigating factor, the defense relied *solely* on the expert testimony of Dr. Gregory Sautter. However, following a lengthy discussion concerning Dr. Sautter's opinion that the Defendant suffered from PTSD, defense counsel explicitly asked him his opinion as it related to this mitigating factor. Dr. Sautter's candid answer quickly sums up the evidence in this case:

Mr. Warren: In your opinion, does PTSD affect or impair an individual, and in this case, Quentin Truehill's capacity to appreciate the criminality of his conduct?

Dr. Sautter: I don't know.

Little more needs to be said to establish that the defense did not prove this mitigating circumstance. Therefore, the Court should assign it no weight.

5. Florida Statutes § 921.141(g): The age of the Defendant at the time of the crime.

It has been established that the Defendant was 22 years of age at the time Vincent Binder was murdered. The State does not dispute this fact.

However, there is no *per se* rule that pinpoints a particular age as an automatic factor in mitigation. *Peek v. State*, 395 So.2d 492, 498 (Fla. 1980). The Florida Supreme Court has frequently held that "a sentencing court may decline to find age as a mitigating factor even in cases where the defendants were twenty to twenty-five years old at the time their offenses were committed." *Caballero v. State*, 851 So.2d 655, 661 (Fla. 2003) (upheld rejection of age as a mitigating factor where defendant was 20 years old). *See also*, *Mungin v. State*, 689 So.2d 1026, 1031 (Fla. 1995) (upheld rejection of age as a mitigating factor where defendant was 24-years-old, had no neurological impairment, and did not graduate from high school); *Garcia v. State*, 492 So.2d 360, 367 (Fla. 1986) (20-year-old defendant); *Mills v. State*, 476 So.2d 172, 179 (Fla. 1985) (22-year-old defendant).

Furthermore, the Florida Supreme Court has observed that "age is simply a fact, every murderer has one." *State v. Ballard*, 956 So.2d 470, 475 (Fla. 2007); *Ramirez v. State*, 739 So.2d 569, 582 (Fla. 1999); *Mungin* , 689 So.2d at 1031; *Garcia*, 492 So.2d at 367; *Echols v. State*, 484 So.2d 568, 575 (Fla. 1985) *cert. denied*, 479 U.S. 871, 107 S.Ct.

241, 93 L.Ed. 166 (1986). "Chronological age standing alone is of little import." *Campbell v. State*, 679 So.2d 720, 726 (Fla. 1996). If it is to be accorded any significant weight, it must be linked with some other characteristic of the defendant or the crime such as immaturity or senility. *Echols*, 484 So.2d at 575.

While the defense called Dr. Frederick Sautter to testify that the Defendant suffered from PTSD, it offered no evidence from him or any other mental health expert that the Defendant suffered from an intellectual disability or was otherwise psychologically immature. To the contrary, evidence of the Defendant's trade skills, his past actions in leading people out of danger, and his criminal conduct in this case, show a person with a high level of intelligence and maturity.

During the penalty phase, the defense introduced evidence that, during high school, the Defendant was employed at an automobile collision repair shop. While working there, he repaired his grandfather's car that had been involved in a crash. According to his mother, the Defendant did an "excellent job." The Defendant eventually graduated from high school, and then began courses in collision repair at Louisiana Technical College in New Orleans.

The defense also presented evidence about the Defendant's "heroic" actions in directing his girlfriend and her family out of New Orleans in aftermath of Hurricane Katrina. Eleanor Smith, the mother of the Defendant's girlfriend, testified about his efforts to obtain a boat and car and lead her and her family safely out of the city after the

massive flooding that occurred. These are not the actions of an unsophisticated, timid adolescent.

The planning and leadership role the Defendant took in committing the crimes in this case also show a person with a high level of maturity and intelligence. His use of a homemade shank during his escape from the Avoyelles Parish Jail shows that the Defendant was part of a well-thought-out plan to escape. His action in assaulting the corrections officer with the shank and attacking Brenda Jo Brown, Mario Rios, and Chris Pavlish with a weapon demonstrates, not a passive role in these crimes, but a violently assertive one. Furthermore, his use of Vincent Binder's credit card to withdraw money from ATMs and his attempt to use the victim's credit card, driver's license, and a deposit slip to extract money directly from a bank reveals a bold and cunning intellect.

In sum, there is no evidence that the Defendant's age was coupled with immaturity, whether as a result of an intellectual disability or psychological weakness. To the contrary, the evidence shows that the Defendant clearly operated as an intelligent and assertive leader who was mature beyond his years. It is not enough that the Defendant simply happened to be 22 years old at the time of the murder. Therefore, the Court should find that this mitigating circumstance has not been established and assign it no weight.

6. **The Defendant was affected by his father's extra-marital relationship.**
7. **The Defendant was affected by his parents' divorce.**
8. **The Defendant was affected by his father's remarriage.**

As a mitigating factor, the defense claims that the Defendant was affected by his father having an extra-marital relationship with Miranda Farr, his parents' subsequent divorce, and his father's remarriage. The State agrees that the Defendant's parents, Marshall and Valli Truehill, divorced in July of 1999 and that his father married Miranda Farr in December of that same year. And, it is difficult to contest the claim that the Defendant's father had an extra-marital relationship with Miranda Farr while he was still married to the Defendant's mother. The State is even willing to concede that these events were upsetting to the Defendant. What the State does dispute, however, is the extent to which these events affected the Defendant and his claim that they had a substantial impact on his decision to participate in the kidnapping and gruesome murder of Vincent Binder.

Again, the latest of these events – the father's marriage to Miranda Farr – took place in December of 1999. The murder of Vincent Binder, which occurred in April of 2010, occurred over 10 years later. Given the remote nature of these events from the crimes at issue, it is unreasonable to conclude that they have any significance as a mitigating factor. Accordingly, the Court should assign this mitigating circumstance little, if any weight.

9. The Defendant played basketball in high school.

The State does not dispute the fact that the Defendant played basketball in high school. However, it is unfathomable to conceive how the Defendant's participation in a recreational activity several years ago could mitigate even slightly his participation in the gruesome murder of Vincent Binder. Involvement in a team sport often has the positive benefit of teaching teamwork, discipline, hard work, sacrifice, playing fair and by the rules, setting and achieving goals, and overcoming adversity. Unfortunately, the Defendant's actions in this case demonstrate that he perhaps only learned the value of teamwork. The Court should reject this as a mitigating factor.

10. The Defendant graduated from high school.

The defense submitted evidence in the form of testimony and a diploma that established that the Defendant graduated in 2005 from John McDonogh High School in New Orleans. The State accepts this evidence as true.

Nevertheless, the Defendant's achievement of a high school diploma only highlights the fact that he was provided the tools to be a productive and law-abiding member of society. However, the Defendant chose to throw all of that away and, within two years of graduating from high school, began committing violent felonies. This mitigating circumstance, if found, should be given minimal weight.

11. The Defendant was affected by his father not attending his high school graduation.

The State does not dispute the claim that the Defendant's father did not attend his high school graduation. However, this circumstance, too, should only be given minimal weight.

12. The Defendant enrolled in an automobile collision repair course.

Testimony was presented that the Defendant began taking college-level courses in automobile collision repair at Louisiana Technical College in New Orleans. While evidence was also offered that this instruction was abruptly halted as a result of Hurricane Katrina, it was also established that the Defendant decided not to continue that education when the opportunity later presented itself. The Defendant's mother testified that, following their resettlement in Lafayette, Louisiana, he attempted to enroll in another collision repair course there, but he was required to go through a screening process since the school there did not accept a transfer of his enrollment in the school in New Orleans. She further testified that he missed the screening because he had a flat tire on his way to the school and never went back. It was shortly after this time that the Defendant turned to a life of crime.

His decision to not continue his education is tragic not only because society may have benefitted from his training and labor, but also because Vincent Binder would probably be alive today if the Defendant had only followed a different path. The Court should give this mitigating factor minimal weight.

13. The Defendant helped his girlfriend's family evacuate New Orleans after Hurricane Katrina.

The State does not contest the basic claim that the Defendant helped his girlfriend's family evacuate New Orleans following Hurricane Katrina. This evidence was offered by the defense through the testimony of Eleanor Smith, the mother of the Defendant's girlfriend. As has already been argued, the Defendant's actions in this regard demonstrated his maturity and ability to overcome adversity. Nevertheless, the State argues that the Court should assign this mitigator little weight.

14. The Defendant was affected by the fact that he was unable to obtain assistance from FEMA following Hurricane Katrina.

During her penalty phase testimony, the Defendant's mother stated that, following Hurricane Katrina, she and her father relocated to Lafayette, Louisiana. The Defendant, who evacuated New Orleans separately with his girlfriend, Sharell Smith, found lodging at a shelter in Broussard, Louisiana, which is about 20 miles from Lafayette. Eventually, the Defendant's mother was able to buy a house in Lafayette, which she moved into with her father. The decision was made at some point thereafter to allow her fiancée to move into the house as well.

Valli Truehill also testified that, during this same timeframe, the Defendant was still living in the shelter. Previously, he had decided to live separately from his mother because he needed to find a place that would allow him to keep his dog. When his mother purchased the house, he asked if he could move in. However, the house, which was occupied by that time by his mother, her father and her fiancée, was full.

During this time, the Defendant applied for housing assistance from FEMA, but was turned down because he was on his mother's registration. In other words, the housing assistance his mother was receiving from FEMA already accounted for him. According to Valli Truehill, the Defendant became extremely frustrated that FEMA had denied him assistance and that he was not able to live with her. He was angry that she was receiving money for him to have a place to live, but was denying him a place in her house in favor of her fiancée.

At a certain point in time, the Defendant's anger over these circumstances reached a breaking point. According to his mother, he came over to her house one day and was allowed in by her fiancée. The Defendant then walked directly into the garage and slashed three (3) tires on her car.

The defense argues that the Defendant's frustration and anger as a result of being denied assistance from FEMA should be considered as a mitigating factor in the murder of Vincent Binder. However, the account provided by his own mother reveals an individual with an entitlement mentality and who was willing to lash out violently when he didn't get what he thought was rightfully his. The Court should reject this claim.

15. The Defendant lost two homes.

During the penalty phase, the defense presented evidence that the Defendant was required to leave two homes, one as a result of foreclosure and the other as a result of Hurricane Katrina. The State does not dispute these events, but asserts that they should only be given slight weight as mitigating factors.

16. The Defendant participated in community service.

The Defendant's brother, Marshall Truehill, III, testified during the penalty phase that the Defendant participated in community service through their father's church while he was growing up. This evidence dovetailed with the testimony of Valli Truehill, that the Defendant's father tried to instill in his children a love of their community by having them perform neighborhood service projects. The State does not dispute this evidence.

It should be noted, however, that no evidence was presented that the Defendant voluntarily performed community service as an adult when he was out from under his father's authoritative upbringing. Such evidence would have been a more significant example of the Defendant's character as it relates to this mitigation claim. Accordingly, the Court should only give it slight weight.

17. The Defendant went fishing with his brother when they were children.
18. The Defendant worked at Baskin Robbins.

During the penalty phase, the Defendant's brother shared a few anecdotes about occasions when he and the Defendant went fishing as children. The Defendant's mother also testified that for a period of three or four months during high school, the Defendant worked at a Baskin Robbins ice cream shop. During the penalty phase, she recounted a story about how she and the rest of the family would go to the shop while the Defendant was working, order ice cream, and sit and watch as he worked. The State does not dispute the truth of these sentimental accounts; rather it argues that they should be given no weight.

19. The Defendant has family that supports and loves him.

Regarding this proposed mitigation, the State does not argue that these statements are untrue. However, this evidence again only highlights the fact that the Defendant had the resources to be a productive and law-abiding member of society. He chose to throw that away by committing violent crimes and, in turn, disappointing his family. This mitigating circumstance should be given little weight.

20. Lack of future dangerousness.
21. The Defendant has exhibited good behavior while incarcerated in jail.
22. The Defendant will adjust well to prison.

The defense claims three (3) mitigating factors that it presented through the testimony of prison expert James Aiken. The primary thrust of Mr. Aiken's testimony was his opinion that the Defendant did not represent a future danger if incarcerated for life. He also concluded that the Defendant would adjust well to prison. These opinions, Mr. Aiken stated, were based on his review of jail records that he said showed that the Defendant was compliant and had displayed good behavior throughout the four years he has been incarcerated in the St. Johns County Jail awaiting trial.

In *Bevel v. State*, 983 So.2d 505, 520 (Fla. 2008), the Florida Supreme Court affirmed the trial court's rejection as mitigation the claim that the defendant was a good inmate and did well in the structured environment of a jail. This claim had been rebutted by evidence that the defendant in that case had exhibited aggressiveness, had been involved in physical fights or assaults, and had received two (2) disciplinary reports for being in an unauthorized area and disregarding an order to stop running laps in an indoor

area. The trial court had also based its decision to reject this mitigation on the fact that the defendant had previously been incarcerated after a prior conviction for attempted robbery and then had committed the murders at issue less than a year after his release.

Despite Mr. Aiken's testimony that the Defendant in this case was well-behaved in the St. Johns County Jail, he admitted on cross-examination that the Defendant had received four (4) disciplinary reports during his incarceration there. Mr. Aiken acknowledged that one of these reports documented an incident in which the Defendant threatened to bash in a correction officer's head.

Additionally, the Defendant in this case, like the defendant in *Bevel*, was incarcerated in jail shortly before he participated in the victim's murder. However, the Defendant's behavior here in relation to his prior incarceration is even more egregious and was in closer proximity. The defendant in *Bevel* murdered the victim less than a year *following his release* from prison. In this case, the Defendant *escaped* from jail before he and his cohorts went on a crime spree that culminated in the kidnapping and murder of Vincent Binder three (3) days later.

The Defendant's past violent criminal conduct also repudiates the defense's claim that he represents a lack of future dangerousness. It has been said that the best predictor of the future conduct is past behavior. The defense stated during closing arguments that the circumstances of Vincent Binder's murder will not reoccur if the Defendant receives a life sentence. However, this is not a fact; it is a prediction – and one that gambles on an individual who has already killed, not once, but *twice* before. The evidence does not

support the claim that the Defendant does not represent a future danger. In fact, the proof is overwhelmingly to the contrary.

23. The Defendant was a follower, not a leader.

The defense attempted to establish this mitigating factor through the testimony of Walter Goodwin, one of the Defendant's high school principals, and Miranda Farr Truehill, the Defendant's step-mother. Both described the Defendant as a "follower." It also pointed again to the testimony of Shirley Marcus to support their argument that the Defendant followed orders from Kentrell Johnson, "who was always bossing him around." The State asserts the several reasons why this testimony should be disregarded.

First, testimony of Walter Goodwin and Miranda Farr Truehill offered hardly any specific explanations or details about *why* they considered the Defendant to be follower. The closest either got to providing a specific example was Mr. Goodwin's relatively vague statement that the Defendant preferred to be "one of the guys" instead of "being out in front" while in high school. This language could be used to describe just about every teenage male in high school.

Second, much time had passed between the time when Walter Goodwin testified and when he last had contact with the Defendant. Mr. Goodwin stated that the last time he saw the Defendant was when he left John McDonogh High School in 2004. This would have been six (6) years prior to the kidnapping and murder of Vincent Binder. During that time, the Defendant graduated from high school, endured Hurricane Katrina, and been found guilty of organizing the robbery of a man at gunpoint and shooting and

killing another. Even if he had been a follower in high school, he, like many other young adults in life, grew up and learned how to take charge.

Third, their testimony was strongly rebutted by Dr. Prichard, a psychologist who testified that that the Defendant appeared to him in his evaluation to be very smart, independent, assertive and opinionated. These observations by Dr. Prichard were corroborated by a transcript of the sentencing hearing that followed the Defendant's conviction for Armed Robbery in [location], Louisiana in [date/year]. That transcript revealed that the judge in that case made the following finding of fact, which Dr. Prichard read into the record:

> The offender was a leader or his violation was in concert with one or more persons with whom the offender occupied a position of organizer, a supervisory position or . . . other position of management.

Accordingly, Dr. Prichard testified that the Defendant was, in his opinion, more of a leader than a follower.

As for the testimony of Shirley Marcus, the evidence of the Defendant's participation in the crimes involved in this case unequivocally refutes the notion that the Defendant was a vassal of Kentrell Johnson. As explained previously, his actions in attacking the jail guard with a shank during his escape, using the victim's credit card, filling out a withdrawal slip to extract money from the victim's bank account, and attacking other victims with the same knife used to kill the victim all show conclusively that the Defendant took a leading role in the kidnapping and murder of Vincent Binder.

Based on the above, the State asserts that this mitigating circumstance has not been proven. Therefore the Court should not give it any weight.

24. The Defendant witnessed his father abuse his mother.
25. The Defendant witnessed his father abuse his siblings.
26. The Defendant was abused by his father.
27. The Defendant grew up in a dysfunctional family.

The State accepts that the Defendant's home during the time that his parents were married was one that experienced moments of turmoil and dysfunction, particularly during the time leading up to his parents' divorce. During the penalty phase, the defense offered testimony from members of the Defendant's family that described his father, Marshall Truehill, Jr., as abusive and controlling during this time.

Some of this evidence, however, was conflicting. For example, while the Defendant's mother and sister testified that his father physically abused him and the other siblings, the Defendant's brother said there was no abuse outside of normal corporal punishment. The Defendant's step-mother, Miranda Farr Truehill, testified similarly. Nevertheless, the State will accept that the Defendant likely witnessed or experienced behavior in the home during his childhood that some people may characterize as harsh or abusive.

However, as the Defendant's mother admitted on cross-examination, the testimony concerning the family's bad times did not tell the whole story. Valli Truehill stated that there were many happy times as well. She acknowledged that Marshall Truehill, Jr. was a loving father who provided for his family. And, while he was a strict disciplinarian, he

sought to instill in his children strong moral values and a love for their community. Accordingly, he involved them in church activities and community service projects.

The Defendant's father also provided financial assistance to his children even after high school, helping the Defendant's sister Brianna pay for college and medical school. And, although the Defendant's mother testified that Marshall Truehill was guilty of slightly favoring his daughters over his sons, his generosity did not end with his daughters. Following the Defendant's graduation from high school, his father bought him a Mustang sports car to help the Defendant get around.

Furthermore, the alleged incidents of abuse, which everyone in the household either witnessed or suffered from, apparently did not negatively affect the Defendant's four siblings. The Defendant's oldest sister Brianna graduated from LSU medical school and currently works as an OB/GYN in Arizona. His second oldest sister, Tracy, is also employed in Arizona as an administrative officer of a franchise and has also worked as an actress and model. His brother Marshall owns his own marketing and television production business in Houston, Texas. His youngest sister, Jessica, is a professional ballet dancer and costume designer for movies and television shows in Los Angeles, California. All of them appear to be very well-adjusted and highly successful in their respective careers.

Finally, there was no evidence presented that any abuse occurred after the Defendant's parents' divorce in July of 1999. In fact, the Defendant's mother and step-mother both testified that they could not recall a single incident. Valli Truehill also

testified that, following the divorce, the Defendant primarily lived with her and that during that time the only form of discipline she imposed on the Defendant was talking to him and restricting his activities, such as watching TV and playing video games. Therefore, at the time he murdered Vincent Binder, at least a decade had passed since the Defendant had witnessed or experienced any abuse at the hands of his father or anyone else.

The State will concede that this mitigating circumstance has been established. However, in light of the above, the Court should only assign it little weight.

28. The Defendant had a girlfriend whose child died of SIDS.
29. The Defendant had a girlfriend who was shot and killed.

During closing argument, the defense argued that two (2) mitigating circumstances the jury should consider was testimony that the Defendant had a girlfriend by the name of Amber Brown who had a child who died of SIDS and that she was later shot and killed. This testimony was somewhat confusing, incomplete, and perhaps conflicting for a number of reasons. First, there was testimony from Eleanor Smith that her daughter, Sharell Smith, was the Defendant's girlfriend at the time he helped them evacuate from New Orleans following Hurricane Katrina in 2005. Second, Dr. Prichard testified that during his review of the information pertaining to the shooting of Amber Brown, he learned that she was shot by an individual by the name of Curtis Brown, who was described as her boyfriend.

No evidence was presented that established when these incidents occurred, when the Defendant had a relationship with Miss Brown, or if he was in this relationship at the time the child passed away. From the small amount of information that is in the record, it is possible that the Defendant's relationship with her, if there ever was one, was so remote in time that these events were negligible in its impact. It seems that if they had as profound an effect on the Defendant as is being claimed, the circumstances of these events would have been developed more than in a few passing references. To the extent that the Court finds that this mitigating circumstance was established, the State argues that it should be given minimal, if any, weight.

30. The Defendant was present when a school shooting took place.

The State does not dispute that the Defendant was present when a shooting took place at John McDonogh High School in New Orleans. While there was no evidence presented during the trial concerning the exact date of the shooting, the State will stipulate, based on documented news accounts, that it took place on April 14, 2003 – almost exactly 7 years prior to the murder of Vincent Binder.

The State will also concur that this mitigating factor has been established. However, because of the remoteness in time between this event and the victim's murder, the State contends that it should only be given little weight.

31. The Defendant had no support from his siblings.

During the penalty phase, the defense presented testimony from Dr. Sautter that the Defendant felt abandoned when all of his siblings moved away from home to pursue

their college education and careers. The State does not contest this claim, but submits that it only warrants minimal weight.

32. The Defendant suffered trauma as a result of Hurricane Katrina.

The defense presented evidence that the Defendant was present when Hurricane Katrina struck New Orleans and then evacuated the city once the flooding began in its aftermath. The State does not question these accounts or the proposition that this experience was traumatic. However, Hurricane Katrina occurred five years prior to the murder of Vincent Binder. And, according to Dr. Prichard, whatever trauma the Defendant experienced as a result had no influence on his involvement in the murder of Vincent Binder. Therefore, the Court should only give this mitigating factor little weight.

33. The Defendant was never treated for mental health problems.
34. The Defendant suffers from post-traumatic stress disorder (PTSD).

These mitigating circumstances are premised on the finding that the Defendant has suffered from mental health problems. The only evidence presented at trial concerning such a diagnosis was Dr. Sautter's testimony that the Defendant suffered from PTSD. However, in light of the testimony of Dr. Prichard, who rejected Dr. Sautter's analysis, the State disputes the foundation on which these mitigating factors rest. Accordingly, it asserts the Court should give it no weight.

CONCLUSION

In conclusion, the mitigating circumstances that were presented in this case are insubstantial when weighed against any of the six (6) aggravating circumstances proved beyond a reasonable doubt. In a capital case, the death penalty is appropriate even if one aggravator is found and outweighs (or is not outweighed by) the mitigation found to have been established. *Foster v. State*, 369 So.2d 928 (Fla. 1979). The aggravating circumstances in this case should be given great weight. The mitigation in this case is so weak that even if the State only proved one of the aggravating circumstances presented, that factor (any one you chose) would outweigh the mitigation presented. The "prior violent felony," HAC, and CCP aggravators are three (3) of the most serious set out in the death penalty statute. The State has proven all three (3) of these aggravating factors beyond a reasonable doubt, and each of them alone justifies a death sentence in this case.

The jury in this case returned a death recommendation by a vote of 12-0. A unanimous vote is a rare occurrence, which in itself should send a strong message that a death sentence is appropriate. Furthermore, as this Court is aware, the law requires it to give the jury's recommendation great weight in its determination of a proper, legal penalty for the violent and vicious murder of Vincent Binder.

Respectfully, the State submits to the Court that the death penalty is an appropriate, lawful and justified sentence for the Defendant and requests this Court to sentence Quentin Marcus Truehill to death.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Sentencing Memorandum has been furnished by electronic mail, hand delivery, and/or U.S. Mail to James R. Valerino and Raymond Warren, counsel for Quentin M. Truehill, Office of the Public Defender, 4010 Lewis Speedway, Suite #1101, St. Augustine, FL 32084, this 1st day of May, 2014.

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TAB 9

IN THE CIRCUIT COURT OF THE
SEVENTH JUDICIAL CIRCUIT, IN AND
FOR PUTNAM COUNTY, FLORIDA

STATE OF FLORIDA,

vs. CASE NO. 2004-1683-CF-52

RANDY SEAL,

Defendant.
_____/

STATE'S RESPONSE TO DEFENDANT'S MOTION FOR POST-CONVICTION RELIEF

COMES NOW, the State of Florida, by and through the undersigned Assistant State Attorney, and files this Response to the Defendant's Motion for Post-Conviction Relief pursuant to Rule 3.850, Florida Rules of Criminal Procedure. The State moves that Claim 3 (on the limited issue of whether Mike Clifford should have been called to provide alibi testimony) and Claim 18 (as numbered herein) be set for an evidentiary hearing and that the remaining claims be summarily denied or dismissed with leave to amend, within 30 days, those claims that have been found to be legally insufficient. As support for its response, the State argues the following:

INTRODUCTION

On October 18, 2004, a Putnam County grand jury returned an indictment and true bill against the Defendant, Randy Wayne Seal, for the charges of First Degree Murder and First Degree Arson of an Occupied Structure. On November 9, 2005, the

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State of Florida filed a Notice of Intent to Seek Death Penalty, pursuant to Section 921.141, Florida Statutes, and Rule 3.202, Florida Rules of Criminal Procedure.

The Defendant was tried on these charges before a Putnam County petit jury from May 14 to May 24, 2007. At the conclusion of the trial, the jury found the Defendant guilty as charged and recommended a sentence of life imprisonment. On June 4, 2007, the trial court, as required by law, followed the jury's recommendation and sentenced the Defendant to life in the Florida Department of Corrections. Throughout the discovery, trial and sentencing phases, the Defendant was represented by the Office of the Public Defender.

On December 21, 2007, the Defendant filed a direct appeal with the Fifth District Court of Appeals. His appeal was limited to challenging the trial court's admission of Williams Rule evidence and denial of his motion to exclude test results and opinion testimony related to evidence not available to the defense for independent testing. Initial Br. of Appellant (Dec. 21, 2007). On February 3, 2009, the 5th DCA affirmed the judgment of the trial court in a *per curiam* opinion. *Seal v. State*, 1 So.3d 381 (Fla. 5th DCA 2009). A Mandate was issued by the appeals court on February 25, 2009.

In June 2010, the Defendant filed a *pro se* Motion for Post-Conviction Relief, supplemented with a memorandum of law and an exhibits appendix. The Motion,

memorandum and appendix are timely filed and adequately verified with an unnotarized oath as required by Rule 3.850, Florida Rules of Criminal Procedure.

In his Motion, the Defendant labels 18 claims for post-conviction relief. However, several of the claims are sequentially misnumbered. A close examination of the Motion show that he sets forth in total essentially 20 grounds for relief, and this response renumbers the claims accordingly. Eighteen of these complaints involve allegations of ineffective assistance of counsel, one claims the existence of newly discovered evidence, and one asserts a cumulative error charge.

EVIDENTIARY STANDARD

I. *Ineffective Assistance of Counsel Claims:*

Claims of ineffective assistance of trial counsel are evaluated using the two-part test announced in *Strickland v. Washington*, 466 U.S. 668 (1984). For such a claim to be meritorious, a claimant must (1) identify particular acts or omissions of the trial lawyer that fall below the wide range of reasonably competent performance under prevailing professional standards and (2) show that there is a reasonable probability that, but for the (alleged) clear and substantial deficiency in counsel's performance, the result of the proceeding would have been different.

Under *Strickland*, the defendant as the moving party bears the burden of overcoming a strong presumption of counsel's reasonable and effective performance. *State v. Patterson*, 966 So.2d 471, 477 (Fla. 2d DCA 2007) (citing *Cabrera v. State*,

766 So.2d 1131, 1133 (Fla. 2d DCA 2000)). In addition to this presumption, an examination of trial counsel's performance must be considered from trial counsel's perspective under the circumstances at the time of trial, *Patterson*, 966 So.2d at 471, and strategic or tactical decisions by counsel made after a thorough investigation are virtually unchallengeable, *Cabrera*, 766 So.2d at 1133.

A defendant asserting a claim of ineffective assistance of counsel is not entitled to a hearing if (1) the motion, files and record in the case conclusively show that that the defendant is not entitled to any relief, and (2) the motion or a particular claim is legally insufficient. *Williamson v. State*, 994 So.2d 1000, 1006 (Fla. 2008) (quoting *Freeman v. State*, 761 So.2d 1055, 1061 (Fla. 2000). A defendant's post-conviction motion is legally insufficient if the allegations contained therein are conclusory. His motion must allege specific facts that, when considered in the totality of the circumstances, demonstrate a deficiency on the part of counsel that is detrimental to the defendant. *State v. Coney*, 845 So.2d 120, 135 (Fla. 2003). Even when the allegations are sufficiently specific, a court may summarily deny a claim for relief when it is clear that the prejudice component is not satisfied. *Kennedy v. State*, 547 So.2d 912, 914 (Fla. 1989) (citing *Maxwell v. Wainwright*, 490 So.2d 927, 932 (Fla. 1986)).

II. *Newly Discovered Evidence / Recantation Claims:*

A defendant must meet two requirements to obtain relief based on newly discovered evidence. First, the evidence must have been unknown to the trial court, the party, or counsel by the time of trial, and it must appear that the defendant or his counsel could not have known of such evidence by the use of diligence. Second, the newly discovered evidence must be of a nature that it would probably produce an acquittal on retrial or a less severe sentence. *Davis v. State*, 26 So.3d 519, 526 (Fla. 2009) (citing *Jones v. State*, 709 So.2d 512, 521 (Fla. 1998).

Specifically, newly discovered evidence in the form of recanted testimony is treated by Florida law with suspicion and, thus, will mandate relief only under two conditions. First, the court must be satisfied that the recantation is true. Second, it must be clear that the witness's testimony will change to such an extent as to render probable a different verdict. *Armstrong v. State*, 642 So.2d 730, 735 (Fla. 1994).

ARGUMENT

Claim 1: Ineffective Assistance of Counsel Defense Counsel Failed to Move to Suppress Defendant's Statements

The Defendant's primary allegation in Claim 1 is that he was prejudiced by his attorneys' failure to file a motion to suppress statements he made to law enforcement immediately following his arrest. This claim also contains the Defendant's charge that counsel failed to object and move to strike the statements after they were introduced at trial. But, since those claims are merely subsidiary complaints

involving the same legal issues, the State will only directly address the Defendant's principal allegation.

On September 29, 2004, the Defendant was arrested for the murder of Tscharna Hampton by officers with the Putnam County Sheriff's Office and the State Attorney's Office. At trial, Det. Christopher Middleton of the Putnam County Sheriff's Office testified that just after the arrest the Defendant made the statement, "You guys got me. I know what I did. I'm going away for a long time." Tr. Transcr. vol. X, 1471:12-13 (May 21, 2007). Investigator Christopher Stallings of the State Attorney's Office similarly testified that he heard the Defendant say, "I'm not going anywhere. For what I did, I'm going away for a long time." Tr. Transcr. vol. X, 1487:22-24.

The Defendant complains that these statements were taken in violation of *Miranda v. Arizona*, 384 U.S. 436 (1966). His claim is based on two assertions. First, he alleges that he had not been read his *Miranda* rights prior to the statements being given. Second, he (inconsistently) admits that *Miranda* warnings were given, but claims that they were defective because he was not told that he had the right to counsel during questioning. The record clearly refutes both of these allegations.

Investigator Kevin Perry testified at trial that he read the Defendant his *Miranda* rights immediately after placing him under arrest and prior to his contact with Det. Chris Middleton. Tr. Transcr. vol. X, 1454:3-1456:13 (May 21, 2007). He

also testified that he advised the Defendant of all four of the *Miranda* warnings. Tr. Transcr. vol. X, 1454:3-1455:15. This matter had previously been addressed by defense counsel at a deposition, and Inv. Perry's testimony at that time was no different. Depo. Inv. Kevin Perry 30:8-10 (Dec. 20, 2006). There is no evidence in the record contrary to these facts, and the Defendant does not identify any in his motion.

Even if *Miranda* warnings were not adequately given, the record clearly establishes that the Defendant's post-arrest statements were not in response to interrogation or its functional equivalent. Detective Middleton testified at trial that after the Defendant's roadside arrest, he was guarding the Defendant while the officers were awaiting a vehicle that would transport the Defendant to jail. During this time, the Defendant complained that the way his hands were handcuffed was causing him discomfort. When Det. Middleton responded by repositioning the handcuffs, the Defendant began exhibiting signs of aggression. Upon observing this, Det. Middleton simply told the Defendant to calm down. It was then that the Defendant made the statements at issue. Tr. Transcr. vol. X, 1468:22-1471:13. This account was corroborated by the testimony of Inv. Chris Stallings, Tr. Transcr. vol. X, 1486:3-1487:24, and there is no contrary evidence in the record.

"*Miranda* safeguards come into play whenever a person in custody is subjected to either express questioning or its functional equivalent." *Rhode Island v. Innis*, 446

U.S. 300-01 (1980). For *Miranda* purposes, the functional equivalent of interrogation can be defined as "any words or actions designed to elicit an incriminating response." *Francis v. State*, 808 So.2d 110, 128 (Fla. 2001). A practice that the police should know is reasonably likely to evoke an incriminating response from a suspect thus amounts to interrogation. *Everett v. State*, 893 So.2d 1278, 1284 (Fla. 2004). "[E]xpressly exempted from the definition of 'interrogation' [is] routine police contact 'normally attendant to arrest and custody.'" *Id.* at 1285 (quoting *Innis*, 446 U.S. at 301). Voluntary incriminating statements, however, not made in response to an officer's questioning are freely admissible. *Christopher v. State*, 583 So.2d 642, 645 (Fla. 1991) (quoting *U.S. v. Suggs*, 775 F.2d 1538, 1541 (11th Cir. 1985).

The record evidence shows that the Defendant's statements were not in response to any direct questioning by officers designed to elicit an incriminating response. Nor was Det. Middleton's conduct of a nature that he would have known that it was likely to evoke an incriminating response from the Defendant. To the contrary, Det. Middleton's actions clearly fall within the description of "routine police contact normally attendant to arrest and custody." The statements volunteered by the Defendant were not the result of custodial interrogation.

Accordingly, the Defendant's trial counsel was not deficient in failing to move to suppress the statements. The record clearly shows that if defense counsel had filed

a motion to suppress the Defendant's statements, it likely would have been denied. Therefore, Claim 1 of the Defendant's motion should be summarily denied.

Claim 2: Ineffective Assistance of Counsel
Defense Counsel Failed to Timely Conduct Independent Testing on Evidence

In his second allegation for relief, the Defendant asserts that he is entitled to post-conviction relief due to his trial attorneys' failure to timely request access to several pieces of crime scene evidence for the purpose of independent testing. The record conclusively establishes that the Defendant is not entitled to relief on this claim. Therefore, denial is appropriate.

Prior to the trial in this cause, it was discovered that a piece of wood flooring believed to have been taken into evidence from the crime scene was missing and that aluminum evidence cans that held the victim's clothing had become rusted. The State held that these items contained evidence of an accelerant, namely gasoline, that had been used to start the fire in question. Upon disclosure of the status of the evidence, the defense immediately moved to exclude the items (and expert opinion testimony related to them) from being admitted at trial on the grounds that the loss of the wood and the rusting of the cans made independent testing impossible. *See* Mot. Exclude Test Results and/or Op. Test. Due to Destruction Evid. (Dec. 13, 2006).

Following a hearing, the trial court denied the motion to exclude on several grounds. First, it found that the Defendant was unable to show any bad faith connected with the loss or destruction of the evidence. Further, it reasoned that the

evidence did not have any exculpatory value that was apparent prior to being lost or destroyed. Finally, it held that the Defendant could not demonstrate that independent testing could have shown different results on the items that were tested by the State. *See* Or. Denying Mot. Exclude Test Results and Or. Denying, In Part, Op. Test. Due to Destruction of Evid. 5-6 (May 2, 2007). As noted previously, the Defendant appealed this ruling to the 5th DCA, and the appellate court found no error in that decision. Initial Br. of Appellant (Dec. 21, 2007); *Seal v. State*, 1 So.3d 381 (Fla. 5th DCA 2009).

In *Kelley v. State*, 486 So.2d 578 (Fla. 1986), the defendant filed a direct appeal of his murder conviction on the ground that the destruction of certain evidence violated his due process rights. The Florida Supreme Court recognized that in such a case, the appropriate analysis was to determine whether the destruction was a result of bad faith on the part of the State and whether the defendant suffered prejudice as a result. *Id.* at 581. The Court found that neither condition existed and affirmed the conviction. *Id.* at 581-82, 586.

Kelley later filed a motion for post-conviction relief and appealed its summary denial. *Kelley v. State*, 3 So.3d 970 (Fla. 2009). One of the grounds of the motion and appeal was the destruction of evidence disposition forms, which the defendant claimed would have led to the discovery of exculpatory evidence. The Florida Supreme Court rejected Kelley's post-conviction appeal, finding that the record

conclusively showed that the forms were not exculpatory and, therefore, he suffered no prejudice as a result of their destruction. *See id.* at 972-73.

The Court then observed that Kelley was improperly attempting to use the destruction of the forms to relitigate his unsuccessful direct appeal regarding the destroyed evidence. Noting its repeated findings that he could not show prejudice by the destruction of the evidence, the Court held that Kelley was procedurally barred from raising the matter through a motion for post-conviction relief. *Id.* at 973.

The Defendant's effort here in repackaging this claim in a motion for post-conviction relief is no different than Kelley's. The instant trial court found that the Defendant had not been prejudiced by the accidental loss or destruction of the evidence in this case, and the 5th DCA affirmed that ruling. *Seal v. State*, 1 So.3d 381 (Fla. 5th DCA 2009). Therefore, like Kelley, the Defendant here is estopped from relitigating this issue through the post-conviction mechanism.

Even if he was not, the record conclusively shows that the Defendant would not be entitled to relief under either part of the *Strickland* test. For that reason, too, summary denial would be appropriate.

Addressing the performance prong, the Defendant cannot establish that defense counsel failed to perform a related legal duty. A common thread in the case law governing the issue of lost or contaminated evidence is the principle that the responsibility for maintaining evidence lies with the State, not defense counsel.

When the State fails in that obligation, the remedy is the exclusion of the evidence if the defendant is prejudiced. *See Arizona v. Youngblood*, 488 U.S. 51 (1989). In this case, defense counsel was able to discover the destruction of the evidence before trial and then made a reasonable and competent effort to exclude the test results and opinion testimony associated with that evidence. *Compare Guzman v. State*, 868 So.2d 498, 510 (Fla. 2004) (holding that defense counsel was not deficient for failing to discover the destruction of evidence before trial),

Also, the Defendant does not, neither can he, provide evidence that had the defense requested the evidence more promptly, it would have been available at that time for independent testing. In order to do so, he would have to establish when the evidence was lost or contaminated. The evidence may have been lost or contaminated within days or weeks after being collected. With regard to the piece of wood flooring, it is entirely possible that it may have never been collected.

Even if he was able to present such evidence, he cannot establish prejudice without a showing that the evidence had exculpatory value that was apparent before it was lost or destroyed. *Guzman*, 868 So.2d at 509. *See also*, *State v. Muro*, 909 So.2d 448, 453 (Fla. 4th DCA 2005) (citing *California v. Trombetta*, 467 U.S. 479, 489 (1984)). The record demonstrates that not only is the Defendant unable to show that the evidence had any exculpatory value, but rather that the opposite is true. The State presented evidence, which the trial jury chose to believe, that the victim's clothing

had tested positive for gasoline and that photographs of burn patterns indicated that an accelerant had been used to cause the victim's death. Tr. Transcr. vol. VIII, 1224:22-1227:14; VII, 961:25-980:5 (May 17, 2007).

The record shows that this matter was litigated extensively prior to trial. When it was discovered that some of the items had been lost or contaminated, trial counsel did what a competent attorney would do under the circumstances: move to exclude all test results and opinion testimony related to the evidence. Nevertheless, the trial court denied that motion on the grounds that the Defendant could not show prejudice, and the 5th DCA has affirmed that ruling.

Finally, the Defendant sets forth no new, specific facts that require the court to reevaluate his claim of prejudice. He does not identify any apparent exculpatory qualities the evidence possessed or explain how any independent testing would have produced results different from the State's. For all these reasons, the Defendant's claim should be denied.

Claim 3: Ineffective Assistance of Counsel
Defense Counsel Failed to Interview, Depose or Call Witnesses

In the Defendant's third claim, he faults his attorneys for not interviewing, deposing or otherwise investigating witnesses that may have provided helpful testimony if called on his behalf at trial. The majority of this claim is legally insufficient and should be summarily denied. As explained below, one portion of the claim is sufficiently pleaded and, therefore, is entitled to a hearing.

In order to characterize the failure to conduct a deposition as a specific omission, a defendant must identify what evidence would have been discovered had counsel taken the deposition. *Davis v. State*, 928 So.2d 1089, 1117 (Fla. 2005) (citing *Magill v. State*, 457 So.2d 1367 (Fla. 1984)). The Defendant's claim as it relates to Lt. John Loftus, Ricardo Lopez, Lt. Phil Roman, Maj. Spradley, Maj. Ron McCradle, Ofc. Dorton, Charity Lions, Patricia Copeland, Det. Azula, Keith Pardon, and Sheriff Taylor Douglas fails to meet this requirement. Nowhere in the paragraphs he dedicates to criticizing his attorneys for not deposing these witnesses does the Defendant ever identify what specific evidence would have been discovered as a result of the depositions. He merely speculates about testimony that might have been helpful to his case. Therefore, the Defendant's claim as it relates to these witnesses should be denied.

With regard to his claim as it relates to alleged alibi witness Mike Clifford, the Defendant appears to have sufficiently alleged a claim that requires a hearing. The failure to investigate and summon alibi witnesses can constitute ineffective assistance. *Comfort v. State*, 597 So.2d 944, 945 (Fla. 2d DCA 1992) (citing *Young v. State*, 511 So.2d 735 (Fla. 2d DCA 1987). While counsel may have had legitimate tactical reasons for not calling such a witness, such a conclusion is rarely appropriate for summary denial of post-conviction relief. *Id.* (citing *Dauer v. State*, 570 So.2d 314 (Fla. 2d DCA 1990).

A study of trial counsels' presentation of evidence during their opening statement and case-in-chief demonstrates that their defense strategy was to present evidence that the fire was accidental, rather than intentionally set. It is certainly reasonable to conclude that the omission of Mike Clifford's alibi testimony was a strategic decision by defense counsel. Calling an admitted drug dealer to testify that the Defendant was purchasing crack cocaine at the time that the fire occurred certainly could have distracted the jury from a more credible theory of defense. However, because the reason this witness was not called is unclear from the record, a hearing is required to clarify it.

Claim 4: Ineffective Assistance of Counsel
Defense Counsel Failed to File a Motion for Change of Venue

Defendant's fourth claim alleges that his attorneys rendered defective representation when they failed to file a motion for change of venue. When a defendant is claiming post-conviction relief for his attorney's failure to move for a change of venue, he must, at a minimum, "bring forth evidence that there is a reasonable probability that the trial court would have, or at least should have, granted a motion for change of venue if defense counsel had presented such a motion to the court." *State v. Knight*, 866 So.2d 1195, 1209 (Fla. 2003) (quoting *Meeks v. Monroe*, 216 F.3d 951, 961 (11th Cir. 2000). This claim for relief falls woefully short of this standard.

To determine if a change of venue is necessary to protect a defendant's rights, the Florida Supreme Court has set forth the following test:

> The test for determining a change of venue is whether the general state of mind of the inhabitants of a community is so infected by knowledge of the incident and accompanying prejudice, bias, and preconceived opinions that jurors could not possibly put these matters out of their minds and try the case solely on the evidence presented in the courtroom.

Knight, 866 So.2d at 1209 (quoting *Rolling v. State*, 695 So.2d 278, 284 (Fla. 1997) and *McCaskill v. State*, 344 So.2d 1276, 1278 (Fla. 1977)). When a motion for change of venue is filed, a trial court should evaluate (1) the extent and nature of any pretrial publicity and (2) the difficulty encountered in actually selecting a jury. *Id.*

Furthermore, the existence of pretrial publicity in a case does not necessarily lead to an inference of partiality or require a change of venue. Rather, pretrial publicity must be examined with attention to a number of circumstances, including (1) when the publicity occurred in relation to the time of the crime and the trial; (2) whether the publicity was made up of factual or inflammatory stories; (3) whether the publicity favored the prosecution's side of the story; (4) the size of the community exposed to the publicity; and (5) whether the defendant exhausted all of his peremptory challenges in seating the jury. *Id.*

To begin, there is no record evidence that there was extensive and inflammatory pretrial publicity in this case. In his exhibits appendix, the Defendant provided only six newspaper articles that were printed prior to the trial (the other

articles were printed during or after the trial). Four of the six pretrial articles were published soon after the incident occurred, which was approximately three (3) years prior to the trial. These same articles did not mention the Defendant as a suspect. In fact, two of the articles reported that the fire was not considered suspicious at the time of publication.

In *Provenzano v. State*, 561 So.2d 541 (Fla. 1990), the defendant appealed a summary denial of his motion that his trial attorney was ineffective in failing to move for a change of venue because of pretrial publicity. The Supreme Court of Florida found that the denial was proper for two reasons.

First, it found that the trial court did not have great difficulty in impaneling a fair and impartial jury. Of the 87 veniremen summoned for jury duty in the case, only 27 of them expressed fixed opinions as to the defendant's guilt due to information received prior to trial. *See id.* at 544. The trial court dismissed for cause every potential juror with a hint of prejudice.

Second, the Florida Supreme Court found that the record in *Provenzano* clearly reflected that the defendant had approved of the jury that was chosen to decide his guilt. It found that his satisfaction was plainly demonstrated by his acquiescence in the jury's composition after consultation with his trial attorney and by his decision not to use all of his peremptory challenges. *See id.* at 545.

In the instant case, 53 individuals were called for jury selection, which took place over a two-day period. Of the 53, only seven (7) individuals had heard or read about the case in the news. Tr. Transcr. vol. III, 321:20-340:3 (May 15, 2007). Only two (2) individuals, Judy Johns and Monica Hendrieth, clearly indicated that they had fixed opinions of the defendant's guilt as a result of the news coverage. Both were immediately excused for cause. Tr. Transcr. vol. III, 323:13-325:7; 327:4-329:20. One other potential juror, Catherine Gresham, sparked some debate concerning whether news reports she had read would adversely affect her ability to be fair and impartial. However, she was not seated as a juror when the selections were finalized. Tr. Transcr. vol. III, 332:5-336:4, vol. IV, 571:20-573:6, 580:15-582:18.

Of the seven (7) who read news reports of the case, only two (2), Wendy Hancock and Lalita Thomas, were eventually selected by the State and the defense to serve on the jury. Tr. Transcr. vol. IV, 580:15-582:18 (May 15, 2007). Ms. Thomas was an alternate who did not participate in deciding the eventual verdict. Tr. Transcr. vol. IV, 581:19-25. As for Ms. Hancock, she indicated that she had read newspaper reports about the incident mostly just after it occurred, which was three (3) years prior to the commencement of the trial. Tr. Transcr. vol. III, 326:11-17. In any event, both Hancock and Thomas clearly stated that they held no fixed opinions concerning the Defendant's guilt and could set aside anything they had read about the case. Tr. Transcr. vol. III, 326:22-327:1, 330:15-332:4.

More importantly, however, the Defendant specifically advised the trial court that he was satisfied with the jury that he and the State selected. Tr. Transcr. vol. V, 602:24-603:3, 621:20-622:3 (May 16, 2007). The Defendant also implicitly expressed his satisfaction by choosing not to use all of his peremptory challenges. The record reflects that he exercised only seven (7) peremptory challenges out of the 10 he was entitled to by law. Tr. Transcr. vol. IV, 583:3-7 (May 15, 2007).

Using the standards set forth by the Florida Supreme Court in *Knight* and comparing the record in the instant case with *Provenzano*, the Defendant's motion clearly fails to establish a reasonable probability that the trial court should have granted a motion for change of venue if his attorneys would have filed one. Accordingly, this claim should be summarily denied.

Claim 5: Ineffective Assistance of Counsel
Defense Counsel Failed to Move for a Bench Trial

In Claim 5, the Defendant complains that his attorneys should have moved for a bench trial due to the complex, scientific nature of the evidence that was offered at trial. This claim is without merit.

The Defendant sets forth two reasons why a bench trial should have been requested. First, he asserts that the trial judge was more equipped to understand the "overwhelming complexity of scientific evidence" that was introduced at trial. Second, he points to several pieces of evidence that were ruled inadmissible to the

trial jury and argues that the judge would have been able to consider those items during a bench trial.

As to the first reason, the Defendant fails to identify any evidence whatsoever that the jury did not actually understand the scientific evidence admitted at trial. He merely assumes that they did not or that a trial judge would have understood it better. He also assumes that the verdict would have been different if the trial judge had been asked to weigh the facts presented at trial. However, assumptions are not facts, and a defendant must set forth facts to establish that his attorney was ineffective and that such ineffectiveness was prejudicial. The Defendant's motion falls short on both counts.

The second reason the Defendant sets forth as support for this claim stands on no firmer ground. A judge can no more consider inadmissible evidence at a bench trial than a jury can. In fact, a judge at a bench trial is presumed to have disregarded any evidence that would be inadmissible at a jury trial. *Guzman v. State*, 868 So.2d 498, 510-11 (Fla. 2003). Thus, the allegation set forth in this claim should be dismissed.

Claim 6: Ineffective Assistance of Counsel
Defense Counsel Failed to Move for the Impaneling of a New Jury

In his sixth claim, the Defendant charges his attorney with failing to request that the Court impanel a new jury. The Defendant appears to claim that since the jury selection process resulted in a greater number of women than men on the jury, he was

the victim of gender bias once evidence of his prior abuse of the victim was offered into evidence. His claim is based on the assumption that women are more predisposed than men to convict when evidence of prior domestic abuse is presented. This claim is rich in irony, but empty on evidence.

Again, the Defendant's allegation assumes prejudice merely from the gender composition of the jury. He sets forth no proof of the bias he imagines existed. In fact, his allegation appears to be guilty of the same gender bias of which he accuses the trial jury. This claim is baseless and should accordingly be rejected.

Claim 7: Ineffective Assistance of Counsel
Defense Counsel Failed to Move for Sequestration of the Jury

Defense counsel's failure to request that the jury be sequestered for the duration of the trial is the issue in the Defendant's seventh post-conviction claim. Transcripts of the trial proceedings confirm that the jury was not sequestered for the nine days between the first presentation of evidence and the verdict. They likewise contain no reference to a motion or request by the defense for that to be done. Nevertheless, this claim is legally insufficient.

A showing that there is a reasonable probability that trial counsel's failure to ensure that the jury be sequestered actually compromised the defendant's right to a fair trial is required to support a claim of ineffective assistance of counsel. *Pope v. State*, 569 So.2d 1241, 1245 (Fla. 1990). Again, conclusory allegations are insufficient. It is not enough to claim that an attorney should have performed a

particular duty, but did not. A defendant must allege that the failure to perform prejudiced him in a particular way. If a defendant does not articulate specifically how the outcome of a trial was affected by counsel's failure to request sequestration of the jury, then summary denial is proper. *See id.*

The factual support the Defendant asserts in favor of relief on this claim mentions only that one juror discussed his case over lunch with her husband and one or more friends. However, the trial transcript does not indicate that the Defendant or any other individual brought this to the Court's attention during the course of the trial. So, there is no corroboration that this discussion ever occurred.

Even assuming the truth of his allegation, the Defendant does not specify the substance of the juror's discussion, what influence it may have had on the juror, or how it contributed to the guilty verdict against him. As such, this claim is without factual support and should be summarily denied.

Claim 8: Ineffective Assistance of Counsel
Defense Counsel Failed to Argue Effectively Against Williams' Rule Evidence

The Defendant alleges that his attorneys did not argue "effectively" against Williams Rule evidence that was offered against him by the State. This claim is refuted by the record.

The trial transcripts clearly show that defense counsel consistently and repeatedly objected to the admission of Williams Rule evidence offered by the State. *See* Objection to State's Use of Alleged Collateral Crimes Evid. (Feb. 15, 2007); Tr.

Transcr. vol. X, 1359:17-1361:21, 1370:8-13, 1392:8-13, 1412:12-17 (May 21, 2007). These objections preserved the issue for direct appeal, which the Defendant filed. Initial Br. of Appellant (Dec. 21, 2007). Following a full briefing on the issue and a review of the record, the 5th DCA affirmed the trial court's ruling that allowed the evidence. *Seal v. State*, 1 So.3d 381 (Fla. 5th DCA 2009).

In this post-conviction motion, the Defendant repackages his direct appeal and criticizes as "woefully and harmfully inadequate" defense counsel's efforts to provide the trial court with legal precedent to support its objection to the State's Williams Rule evidence. The record shows that the Defendant's claim is false.

On May 10, 2007, defense counsel filed a response to the trial court's order allowing the State to introduce Williams Rule or similar fact evidence at trial. Def.'s Response Ct. Or. Dated 8 May 2007 (May 10, 2007). In that memorandum, counsel cited no less than eight appellate court opinions supporting their opposition to the introduction of the State's evidence. In his claim that counsel failed to provide the trial with sufficient precedent to persuade the court that introduction of the evidence would be in error, the Defendant fails to cite any precedent overlooked by counsel that would have resulted in a different ruling by the trial court. Accordingly, this claim is woefully inadequate and compels a denial on the merits.

Claim 9: Ineffective Assistance of Counsel
Defense Counsel Failed to Argue Against Admission of "Pour Pattern" Evidence

In his ninth claim for relief, the Defendant faults his attorneys for failing to argue against admission of photographs and testimony concerning incriminating "pour patterns." The record evidence contradicts this allegation.

Prior to and throughout trial, defense counsel consistently and repeatedly objected to the admission of evidence, including photographs, relating to a "pour pattern" on the grounds that evidence related to the pour pattern had been lost. *See* Def.'s Mot. Exclude Test Results and/or Op. Test. Due Destruction of Evid. (Dec. 13, 2006); Tr. Transcr. vol. V, 635:18-637:16 (May 16, 2007); vol. VI, 876:15-25, 934:8-938:4, 939:20-949:8, 952:8-14, 952, 967:7-968:2 (May 16, 2007). There is no allegation in the Defendant's post-conviction motion that is more refuted by the record than this one, which was highly contested even before the trial began. Therefore, this false claim should be summarily denied.

Claim 10: Ineffective Assistance of Counsel
Defense Counsel Failed to Object to Tainted Identification Testimony

The Defendant, in his tenth claim, complains that his attorneys failed to object at trial to allegedly tainted identification testimony. This charge is without merit.

James Spahn, the witness at issue, testified that two years prior to the murder of the victim, he had witnessed a white male repeatedly beating and kicking a white female at a residence near a family member's home he was visiting. Tr. Transcr. vol.

X, 1370:20-1392:1 (May 21, 2007). He also testified that the police immediately responded to the scene and was able to take the Defendant into custody there following a brief foot pursuit. Tr. Transcr. vol. X, 1386:3-1388:13. During that testimony, Spahn identified the Defendant as the perpetrator of the beating and the individual taken into custody. Tr. Transcr. vol. X, 1376:10-24; 1387:15-1388:13. Another witness later identified the victim of the beating as Tscharna Hampton. Tr. Transcr. vol. X, 1395:18-1401:7.

On cross-examination, defense counsel attempted to impeach Spahn's in-court identification by bringing to light three facts. First, they had Spahn admit that the date of the beating incident was the one and only time he had seen the white male. Second, they brought out that Spahn had testified in a deposition approximately a year before the trial that he doubted that he would be able to recognize the Defendant if he saw him again. Lastly, the defense had him acknowledge that investigators had shown him a series of photographs that included the Defendant about two weeks prior to the trial. Tr. Transcr. vol. X, 1389:20-1391:6.

In *Armstrong v. State*, 862 So.2d 705 (Fla. 2003) (*Armstrong II*), the defendant appealed a summary denial of his claim that his trial attorney was ineffective in failing to object to an allegedly unreliable in-court identification. The Florida Supreme Court took into account three facts in addressing the defendant's post-conviction motion. First, testimony from other witnesses corroborated the

allegedly tainted identification testimony. Second, although the witness was initially unsure whether he could identify the defendant, he was able to do so shortly after the murder in question. Third, the jury was made aware of the witness's initial uncertainty. Finding that the outcome of the case would not have been different had the defendant's attorney objected to the in-court identification, the Supreme Court found that the claim was without merit and that summary denial was appropriate. *See id.* at 711-12.

The circumstances of the Defendant's instant claim are similar to those in *Armstrong* in all the important aspects. The Defendant was arrested on scene after he attempted to flee from responding officers, sufficiently corroborating Spahn's later in-court identification. Tr. Transcr. vol. X, 1386:3-1388:13. *See also* Arrest Rpt. Dep. Davis Platt (Jun. 1, 2003). This is significant because in *Armstrong*, like most cases in which this issue arises, the defendant fled the scene and was not identified until a photo lineup was presented for a while after the fact. *See Armstrong v. State*, 642 So.2d 730, 733 (Fla. 1994) (*Armstrong I*); *Armstrong II*, 862 So.2d at 712. Here, the record evidence establishes that the Defendant was in Spahn's continuance presence from the moment Spahn first witnessed the incident until the Defendant was arrested. Although Spahn indicated in a deposition three years after the incident that he "doubted" at that time whether he would recognize the Defendant if he saw him again, he did identify the Defendant immediately after the incident. Depo. James N.

Spahn 42:14-16 (Mar. 13, 2006); Arrest Rpt. Dep. Davis Platt; Victim / Witness State. James N. Spahn, Jr. (Jun. 1, 2003). Finally, defense counsel, by emphasizing Spahn's uncertainty and investigators' efforts to refresh his memory, competently attempted to convince the jury on cross-examination that his in-court identification was the result of improper influence and thus unreliable.

The record demonstrates that Defendant's trial counsel was not deficient in failing to object to Spahn's identification testimony. Furthermore, it shows that he suffered no prejudice, particularly in light of counsel's vigorous efforts to impeach the identification on cross-examination. Accordingly, this claim should be summarily denied.

Claim 11: Ineffective Assistance of Counsel
Defense Counsel Failed to Object to Autopsy Photographs

The eleventh claim the Defendant sets forth in his Motion for Post-Conviction Relief is defense counsel's failure to object to the admission and publication of autopsy photographs at trial. He complains that defense counsel allowed the jury to be exposed to enlarged photographs for a prolonged period of time and failed to object to their relevance and gruesomeness. This allegation appears to be contradicted by the record.

The Defendant's claim that defense counsel did not pose any objection to the admission of the autopsy photographs is incorrect. The trial transcript establishes that only five (5) autopsy photographs were offered by the State and entered into evidence

at trial. Tr. Transcr. vol. IX, 1289:15-16; 1291:17; 1292:12-22 (May 18, 2007). The defense objected to three (3) of the photographs, arguing that they were "irrelevant, immaterial, . . . graphic and gruesome." Tr. Transcr. vol. IX, 1290:6-18; 1292:14-15. The trial court overruled the objection and permitted the State to publish the photographs. Tr. Transcr. vol. IX, 1392:16-1293:3.

As for the Defendant's claim that trial counsel was ineffective is permitting prolonged publication of the enlarged autopsy photographs, his claim lacks factual support. Nowhere in his motion does the Defendant specify the length of time the photographs, individually or collectively, were displayed to the jury. His claim is based on conjecture. In fact, an examination of the record, to the extent it may shed light on this allegation, uncovers evidence contrary to the Defendant's speculative conclusion. The portion of the trial transcript that extends from the moment the first photograph was published to the jury to the conclusion of the medical examiner's direct examination takes up only about 10 pages or approximately 250 lines of dialogue. Tr. Transcr. vol. IX, 1293:8-1303:5. Assuming the few objectionable autopsy photographs were displayed throughout this period of testimony, the record indicates that this was the case for only a short period of time. Therefore, this claim should be denied.

Claim 12: Ineffective Assistance of Counsel
Defense Counsel Failed to Object to Court's Denial of Juror's Request for Clarification of Walter Godfrey's Testimony

The Defendant's twelfth claim faults trial counsel for failing to object to the trial court's denial of a juror's request for clarification of the testimony of defense witness Walter Godfrey. In reality, the Defendant's complaint is that defense counsel did not prevail on the court to change its ruling. The claim is not related to the performance of trial counsel, but rather a disagreement with the trial court. This is not cognizable in a motion for post-conviction relief. If there is legal support to conclude that the trial court's ruling was wrong, then that is a matter for direct appeal. Thus, this claim should be dismissed.

Claim 13: Ineffective Assistance of Counsel
Defense Counsel Failed to Object to the Expert Qualifications of Robert Johnson

The Defendant next claims that his attorneys were ineffective because they did not object to the qualifications of State witness Robert Johnson as a fire investigation, cause and origin expert. This claim, both in terms of performance and prejudice, is refuted by the record.

Defense counsel, prior to and during the trial, consistently and strongly objected to Robert Johnson's qualifications to testify as a fire cause and origin expert. *See* Mot. in Limine Exclude Test. Robert Johnson Regarding Cause and Origin of Fire in Cause (Dec. 13, 2006); Tr. Transcr. vol. V, 636:2-18; VI, 863:15-23 (May 16, 2007); vol. VII, 978:16-25 (May 17, 2007). When the trial overruled counsel's

objection, the defense vigorously and extensively impeached Johnson's training, education and experience on voir dire and cross-examination. Tr. Transcr. vol. VI, 838:16-862:17 (May 16, 2007); VIII, 1072:2-1188:12 (May 18, 2007). The objections themselves conclusively show that counsel performed competently on behalf of the Defendant. Even if counsel had not objected to Johnson's qualifications, their impeachment of him demonstrates that the Defendant would not have been prejudiced by the omission anyway. Therefore, this claim should be denied.

Claim 14: Newly Discovered Evidence
State Witness Recanted Her Trial Testimony

In his fourteenth argument for relief, the Defendant asserts a claim of newly discovered evidence. Specifically, he alleges that State witness Linda Rogers has recanted her trial testimony. This claim, like those alleging ineffective assistance of counsel, is without merit.

At trial, Linda Rogers essentially testified that she saw the Defendant and the victim at a bar on the day of the murder. Shortly before the victim met her death, she witnessed the Defendant become angry, assault the victim and force her to leave the bar after the victim put on lipstick against the Defendant's well-known wishes. Tr. Transcr. vol. V, 640:14-656:13 (May 16, 2007).

In support of his recantation claim, the Defendant attaches an unsworn, unnotarized letter purportedly from Linda Rogers. The only relevant statement in

that letter reads, "I was made to testify trying for them to prove you & her were fighting that day (sic)."

Florida law treats recantations with suspicion and, thus, requires a new trial only if the court is satisfied that the recantation is true and that the witness's testimony will change to such an extent as to render probable a different verdict. *Armstrong v. State*, 642 So.2d 730, 735 (Fla. 1994). While an evidentiary hearing is "usually required to make such a determination," summary denial is authorized where "the purported recantation testimony is neither sworn nor particularized." *See Brooks v. State*, 972 So.2d 958 (Fla. 5th DCA 2007); *Moss v. State*, 943 So.2d 946, 948 (Fla. 4th DCA 2006)); *Davidson v. State*, 638 So.2d 626 (Fla. 3rd DCA 1994). *But see Butler v. State*, 946 So.2d 30, 31 (Fla. 2d DCA 2006); *Keen v. State*, 855 So.2d 117, 118 (Fla. 2d DCA 2003); *Smith v. State*, 837 So.2d 1185, 1186 (Fla. 4th DCA 2003).

Because the letter offered as evidence by the Defendant is not sworn, the Court may, under precedent from the 5th DCA, deny the Defendant's claim without an evidentiary hearing. Notwithstanding this deficiency, however, the claim can be rejected on the substance of the letter as well.

In short, the statement referred to by the Defendant as support for his claim cannot be read as a recantation of her trial testimony. In the letter, Linda Rogers does not state that the substance of her trial testimony was false. She only states that she was "made to testify" about a fight between the Defendant and the victim on the day

of the murder. Compelling a witness to testify at trial is not uncommon or improper. State law permits both parties to serve subpoenas on witnesses to mandate their presence for trial. Fla. Stat. § 48.031 (2010). In fact, the Florida and United States Constitutions guarantee defendants the right to compulsory process for witnesses. Art. 1, §16(a), Fla. Const.; U.S. Cont. amend VI. Frequently, witnesses are reluctant to testify, even when the substance of the testimony they would provide is truthful. The statement offered by the Defendant is not inconsistent with the frequent need to compel a witness to testify truthfully concerning a relevant issue at trial. For that reason, this claim can and should be denied on the merits.

Claim 15: Ineffective Assistance of Counsel
Defense Counsel Failed to Argue for a Mistrial, Directed Verdict, Suppression of Evidence, Judgment of Acquittal & New Trial

In his fifteenth claim for post-conviction relief, the Defendant sets forth general allegations that his attorneys did not argue for a mistrial, a directed verdict, suppression of certain evidence, a judgment of acquittal, and a new trial. Most of the Defendant's specific complaints in this claim are rehashed arguments that his attorneys failed to timely request independent testing and were generally unprepared for trial. He also repeats his grievance that they failed to file a motion to suppress. These charges have been addressed in preceding responses, which will not be repeated here. As for the other allegations, the record clearly refutes them.

The trial transcript shows that defense counsel argued for a mistrial no less than nine (9) times during the trial. Tr. Transcr. vol. V, 636:2-18; 638:2-4; 638:12-13 (May 16, 2007); vol. VI, 796:10-19 (May 16, 2007); vol. XIII, 1843:21-1848:25 (May 22, 2007); vol. XIV, 2101:21-2102:5 (May 23, 2007); vol. XV, 2157:7-21; 2249:1-3 (May 23, 2007); vol. XVII, 2435:6-8 (May 24, 2007). One of these motions addressed the same claim of prosecutorial misconduct that the Defendant alleges counsel failed to object to. The Defendant does not specifically identify in this claim any other circumstances where defense counsel should have moved for a mistrial, but did not.

Likewise, the record conclusively demonstrates that trial counsel moved for a directed verdict or judgment of acquittal. Tr. Transcr. vol. XI, 1563:14-1566:12 (May 21, 2007); Tr. Transcr. vol. XVI, 2382:18-2384:1 (May 23, 2007). The Defendant's allegations that counsel's arguments were inadequate are conclusory and fail to make a *prima facie* case that, but for counsel's omission, a judgment of acquittal would have been granted.

Lastly, the record is clear that defense counsel filed a motion and argued extensively for a new trial. *See* Mot. New Trial (May 31, 2007); Tr. Transcr. vol. XVIII, 2596:14-2605:5 (Jun. 4, 2007). Thus, these allegations are without merit and do not warrant a hearing.

Claim 16: Ineffective Assistance of Counsel
Defense Counsel Failed to Impeach State Witnesses

In his sixteenth claim for relief, the Defendant alleges that his attorneys were ineffective by failing to impeach the State's witnesses. The Defendant dedicates almost 40 pages of his motion to this claim and therein criticizes defense counsel's cross-examination of every single State witness. This is exactly the sort of hindsight claim by a defendant who has received an adverse verdict that *Strickland* and its progeny caution trial courts to be wary of. *Strickland*, 466 U.S. at 689.

Again, summary denial of a post-conviction claim is appropriate when the prejudice element of *Strickland* is clearly unsupported. *Kennedy v. State*, 547 So.2d 912, 914 (Fla. 1989) (citing *Maxwell v. Wainwright*, 490 So.2d 927, 932 (Fla. 1986)). To demonstrate prejudice in a claim such as this, a defendant must demonstrate that the impeaching evidence would have "provided 'a reasonable probability' . . . that the outcome of the proceeding would have been different." *Marquand v. State*, 850 So.2d 417, 427 (Fla. 2002).

The Defendant motion fails miserably on this score. Despite the voluminous allegations made, nowhere in his motion does the Defendant attempt to reasonably specify how he was prejudiced by the failure of his attorneys to impeach all of the State's witnesses to his satisfaction. Accordingly, this claim is legally insufficient and warrants summary denial.

Claim 17: Ineffective Assistance of Counsel
Defense Counsel Gave Affirmative Misadvice to Not Testify at Trial

The Defendant's seventeenth claim charges that his trial counsel affirmatively misadvised him of the risk he faced if he chose to testify on his own behalf. This claim is legally insufficient.

The record shows that at the conclusion of the defense's case-in-chief, defense counsel informed the trial court that the Defendant, with the advice of counsel, had decided not to testify on his own behalf. The court then conducted a colloquy in which it informed the Defendant that the final decision to testify or not was, notwithstanding his attorneys' advice, his decision alone. The Defendant responded that it was his decision not to testify. Tr. Transcr. vol. XV, 2286:18-2288:22 (May 23, 2007).

Defendant now alleges that his decision was influenced by trial counsel's warning that the State, on cross-examination, would "force" him to reveal past criminal charges against him. He asserts that this advice was incorrect because the State's examination on this issue was legally limited and that they could not admit any past criminal charges against the Defendant unless he "opened the door."

Even assuming his allegation of deficient performance to be true, his claim does not sufficiently identify how he was prejudiced as a result. In order for the Defendant to adequately claim that the verdict would have been different if he had testified, he must at the very least specify what his testimony would have been. *See*

Bell v. State, 965 So.2d 48, 59 (Fla. 2007). Because he does not do so, his claim is legally insufficient and requires dismissal.

Claim 18: Ineffective Assistance of Counsel
Defense Counsel Failed to Pursue Four Alternative Theories of Innocence

The Defendant next claims that his trial attorneys were ineffective in failing to investigate and present evidence indicating that any one of four alternative suspects had a motive to kill the victim and may have murdered the victim. These individuals include the victim's son, a jealous lover, the victim's father, and a vengeful drug dealer.

First, the Defendant first faults trial counsel for failing to present evidence that the victim's son may have started the fire that caused the victim's death. He asserts that depositions taken from the victim's ex-husband, Jess Horstman, and her daughter, Melinda "Mindy" Hampton, support his claim that this was a viable defense that the defense should have been pursued. During his deposition, Horstman did testify that the victim's teenage son, Derrick, had been investigated in 2000 for being involved in a house fire in Clay County. Dep. Jess Horstman 26:21-27:14 (Dec. 4, 2006). Mindy Hampton also testified in her deposition of her and her siblings' knowledge of the Defendant's abuse of her mother, the victim in this case. Depo. Melinda Hampton 7:10-25; 8:22-12:8; 15:1-5; 21:4-27:13 (Mar. 13, 2006).

Second, the Defendant charges his attorneys should have submitted to the jury evidence that Tamara Denton committed the crime. He claims that both he and the

victim were involved in an open sexual relationship with Tamara Denton, who eventually became jealous of the victim's attention to the Defendant.

Third, the Defendant points to the victim's father as a viable alternative suspect not pursued by trial counsel. The Defendant claims that the victim had written a book entitled "My Life Story" in which she alleged that her father had sexually abused her for many years.

Finally, the Defendant claims that the victim's work as a confidential drug informant offered the viable possibility of a fourth suspect. He alleges that, on one occasion, someone slashed the tires and broke the windows of the victim's car, and it was suspected that the damage caused was in direct retaliation for the victim's work as an informant for the Bradford County Sheriff's Office.

When evaluating a post-conviction claim that defense counsel did not pursue an alternative theory of innocence, a defendant is entitled to an evidentiary hearing if he presents sufficient facts in support of that claim that cannot be conclusively refuted by the record. *Victory v. State*, 981 So.2d 1240, 1242 (Fla. 5th DCA 2008). Any dispute concerning the credibility of the alleged facts or a claim that the omission of such evidence was a strategic decision can only be resolved by the trial court after considering additional evidence. *See id.* Therefore, an evidentiary hearing is necessary to determine the merits of the Defendant's allegations in this claim.

Claim 19: Ineffective Assistance of Counsel
Defense Counsel Failed to Object to Prosecutorial Misconduct

In his last individual claim for post-conviction relief, the Defendant maintains that his attorneys failed to object to multiple instances of alleged prosecutorial misconduct. This claim again consists of several rehashed arguments previously addressed as well as hypercritical grievances concerning the prosecutors' conduct at trial that range from amplifying the evidence to exhibiting disparaging facial expressions.

The arguments that have already been addressed include the objections to Robert Johnson's expert testimony and James Spahn's identification of the Defendant. As argued previously, these claims should be summarily denied.

The Defendant's allegations concerning the prosecution's cross examination of John Lentini are also without merit. At trial, Lentini testified for the defense that the State experts' findings of gasoline in the crime scene were based on flawed science and even went so far as to characterize their experts as "practicing witchcraft." Tr. Transcr. vol. XV, 2160:13-25 (May 23, 2007). On cross-examination, the prosecutor asked Lentini whether he would be willing to smell the gas the Defendant poured on the victim. The Defendant asserts that such a question amounted to prosecutorial misconduct and that defense counsel was negligent in failing to object.

In order to validly make this claim, the Defendant must first show that the question was improper to begin with. While slightly argumentative, it was not inappropriate to challenge an expert with evidence that the State in good faith believes contradicts his findings. Evidence of the genuineness of the State's belief is found in the transcript of its closing argument. There, the State issued the same challenge to the jurors that it gave to Lentini. It suggested that they open the same can and determine for themselves if they could smell gasoline. Tr. Transcr. vol. XVII, 2433:22-2434:17 (May 24, 2007). The jury was the ultimate judge of the facts. If the State had overreached and issued that challenge without a good faith basis, then it would likely have lost credibility with the jury. The defense was not ineffective for failing to object to this perfectly legitimate question.

The Defendant's complaint concerning the statements related to Lentini that were made during cross-examination and closing argument are likewise without merit. The Defendant maintains that he was prejudiced when the prosecutor, in response to the defense expert testifying how much he expected the defense to pay him for his services, stated, "Not bad for two months." He also complains of the State's characterization of Lentini as "arrogant or "flippant" during her closing argument. However, the record conclusively establishes, and the Defendant plainly admits, that the defense objected to these comments. Tr. Transcr. vol. XV, 2247:18-2249:4 (May 23, 2007); vol. XVII, 2433:25-2434:14 (May 24, 2007).

The trial transcript likewise shows that the defense objected to the off-hand characterization of the crime scene as "the home where the arson occurred" within a question to Det. Ross Heaton. Tr. Transcr. vol. VI, 812:10-15 (May 16, 2007). The remainder of the Defendant's claims that defense counsel failed to object to instances of alleged prosecutorial misconduct are simply frivolous. Thus, all the allegations in this claim should be summarily dismissed.

Claim 20: Ineffective Assistance of Counsel
Cumulative Errors

In his twentieth allegation for post-conviction relief, the Defendant asserts a cumulative error claim. However, "where individual claims of error alleged are either procedurally barred or are without merit, the claim of cumulative error must fail." *State v. Duncan*, 894 So.2d 817, 832 (Fla. 2004) (citing *Griffin v. State*, 866 So.2d 1, 22 (Fla. 2003); *Downs v. State*, 740 So.2d 506, 509 n.5 (Fla. 1999).

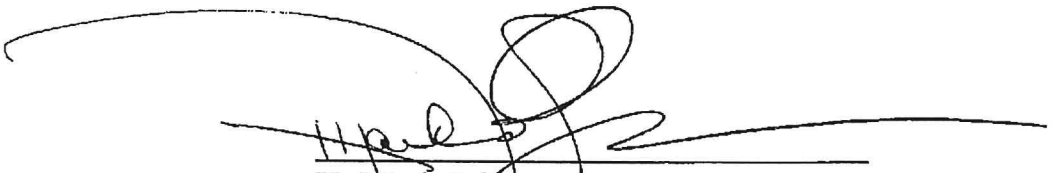
The State submits that this claim should be held in abeyance until an evidentiary hearing is held on Claims 3 (limited to whether Mike Clifford should have been called to provide alibi testimony) and 18. If relief is denied at that time, then the State would then submit that summary denial would be appropriate as to this cumulative error claim as well.

Respectfully submitted,

K. Mark Johnson
Assistant State Attorney

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the Response has been furnished by U.S. Mail to the Honorable Terrence J. LaRue, Circuit Court Judge, 410 St. Johns Ave., Suite 300, Palatka, Florida 32177; and to Defendant Randy Seal, DC# 285154, Graceville Correctional Facility, 5168 Ezell Rd., Graceville, FL 32440, this 16th day of November, 2010.



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TAB 10

IN THE CIRCUIT COURT, SEVENTH JUDICIAL CIRCUIT, IN AND FOR ST. JOHNS COUNTY, FLORIDA

CASE NO: CF1501250

STATE OF FLORIDA

VS.

ANDRE JEROME ROBINSON,
DEFENDANT.
_____/

STATE'S MEMORANDUM OF LAW IN SUPPORT OF ITS ARGUMENT THAT THE DEFENDANT IS NOT ELIBIBLE TO RECEIVE A SENTENCING REVIEW FOR THE OFFENSES TO WHICH HE HAS PLEADED GUILTY AND BEEN CONVICTED

COMES NOW, the State of Florida, by and through the undersigned Assistant State Attorney, and hereby filed this Memorandum of Law in support of its argument that the defendant is not eligible to receive a sentencing review for the offenses to which he has pleaded guilty and of which he has been convicted. In support thereof, the State sets for the following:

1. On September 4, 2015, the defendant was formally charged by Indictment with one count of First Degree Murder and one count of Robbery with a Firearm.

2. In support of those charges, the State intended to present evidence at trial that, on May 19, 2015, the defendant, with full knowledge that a robbery was to take place, drove his co-defendant, Sergio Morgan-Wideman, to the Tobacco and Beverage Express located at 70 Masters Drive in St. Augustine and waited outside in the vehicle while Morgan-Wideman walked into the store with a handgun and then robbed and shot the clerk in the head, killing him. After the robbery and murder, the defendant then fled the scene with Morgan-Wideman. The two were later apprehended following a two-county, high-speed chase during which the defendant was driving the get-away vehicle.

3. The State has conceded that the defendant did not kill or attempt to kill the victim and that it did not have sufficient evidence to prove that he intended for the victim to be killed.

4. At the time of the offense, the defendant was 17 years of age, but was charged as an adult.

5. On May 3, 2017, the defendant entered a negotiated plea of guilty to the lesser included offenses of Manslaughter with a Firearm and Robbery with a Weapon, both first-degree felonies punishable by up to 30 years in the Department of Corrections. The terms of the agreement called for the defendant to be sentenced, consistent with the Sentencing Guidelines, to a prison term between 15 and 25 years.

6. At the time of the plea, the State advised the Court of its opinion that, under the charges to which he was pleading, the defendant would not be entitled to a sentencing review if the Court sentenced him to a term greater than 15 or 20 years. Counsel for the defendant responded that she did not concur with that interpretation, but that the defendant would go forward with the plea and allow the Court to determine whose legal interpretation was correct at the time of sentencing. To that end, the Court has allowed each side an opportunity to provide it with a legal memorandum in support of its respective reading of the law relevant to this issue.

7. The applicable statutes regarding review-eligible juveniles are found in Florida Statutes §§ 775.082 and 921.1402. The general qualifications for a sentencing review are largely found in Section 775.082. If a defendant qualifies for a review, Section 775.082 then refers the reader to Section 921.1402, which provides the period of time when a defendant would become entitled to a review and the procedures that apply once an eligible defendant submits an application for a review. In the following paragraphs, the State will break down each of these

statutes and explain the limited number of circumstances in which they provide a sentencing review for juvenile defendants.

8. The conditions under which a defendant would be entitled to a sentencing review are specifically found in Sections 775.082(1)(b), 775.082(3)(a)5, 775.082(3)(b)2, and 775.082(3)(c).

9. Section 775.082(1)(b) applies solely to capital offenses, such as First-Degree Murder.[1] These provisions mandate that a defendant who killed, intended to kill, or attempted to kill the victim be sentenced to a mandatory minimum of 40 years in prison up to a life sentence. Before a court can sentence a juvenile to life in prison, however, it must conduct a hearing and consider a non-exclusive list of certain factors relevant to the offense and the defendant's youth and attendant circumstances.[2] A defendant would thereafter be entitled to a sentencing review after 25 years. If the defendant did not kill, intend to kill, or attempt to kill the victim, then the statute provides that he or she may still be sentenced up to life following an appropriately conducted hearing, but would be eligible for a sentencing review after 15 years. *See also* Florida Statutes § 921.1402(2)(a) and (c).

---

[1] Other offenses defined as "capital felonies" are "capital sexual battery," F.S. § 794.011(2) and "capital drug trafficking," F.S. § 893.135(1)(b)2.a or b; (1)(c)4.a or b; (1)(d)2; (1)(e)2; (1)(f)2; (1)(g)2.a or b; (1)(h)2; (1)(i)2; (1)(j)2 (1)(k)3; and (1)(l)2. However a juvenile could never be legally charged with capital sexual battery because one of the necessary elements of the crime is the perpetrator's status as an adult. As for capital drug trafficking, it appears theoretically possible for a juvenile to be charged as an adult with that offense, although the undersigned is not aware of any cases in Florida where that has occurred.

[2] *See* F.S. § 921.1401(2).

10. Section 775.082(3)(a)5 applies solely to murder offenses[3] that are punishable by life in prison, and Section 775.082(3)(b)2 applies solely to murder offenses that are classified as first degree felonies punishable by a term of years not exceeding life in prison. In both of these circumstances, a defendant is again entitled to a sentencing review after 25 years if found to have killed, intended to kill, or attempted to kill the victim or after 15 years if he or she did not. *See also* Florida Statutes § 921.1402(2)(b) and (c).

11. Finally, Section 775.082(3)(c) applies solely to any other felony that is potentially punishable by up to a life sentence. In that situation, a defendant is entitled to a sentencing review after 20 years.[4] *See also* Florida Statutes § 921.1402(2)(d).

12. In summary, a defendant is entitled to a sentencing review only if he has been convicted of one of the following offenses:

a. a capital felony,

b. a murder offense punishable by life or a term of years not exceeding life, or

c. any other felony punishable by life or a term of years not exceeding life.

---

[3] F.S. § 775.082(3)(a)5 applies to "a person who is convicted under s. 782.04 of an offense that was reclassified as a life felony . . . ." The only offenses defined in F.S. § 782.04 are (1) first degree premediated murder, (2) first degree felony murder, (3) second degree murder, (4) second degree felony murder, and (5) third degree felony murder.

[4] The defense may, in response, attempt to highlight the last sentence of F.S. § 775.082(3)(c), which does read, "A person who is sentenced to a term of imprisonment of more than 20 years is entitled to a review of his or her sentence in accordance with s. 921.1402(2)(d) (granting review after 20 years) and argue that it may be applied to any felony sentence in excess of that timeframe. However, that provision cannot be separated from the entire paragraph, which read in its proper context shows that conviction of an offense carrying a life or potential life sentence is a condition precedent to the entitlement of a 20-year sentencing review.

13. In this case, the defendant has pleaded guilty to the crimes of Manslaughter with a Firearm[5] and Robbery with a Weapon. Both of these crimes are first degree felonies, punishable by up to 30 years in prison. Clearly, neither is a capital offense, nor does either falls under the murder statute in Section 782.04.[6] Most importantly, neither of them is a felony that is punishable by a life sentence or a term of years not exceeding life in prison. Accordingly, these offenses are not eligible for any type of future sentencing review.

14. In light of the above, the State therefore requests this Honorable Court to make a written finding at the time of sentencing that the defendant, who has voluntarily entered a guilty plea to the aforementioned offenses, is ineligible for a review of his sentence under Sections 775.082 and 921.1402.

I HEREBY CERTIFY that a true and correct copy hereof has been furnished by electronic mail and e-service delivery to ANN E. FINNELL, 2114 OAK STREET, JACKSONVILLE, FL 32204, on May 12, 2017.

Respectfully submitted,

R.J. LARIZZA
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[5] Manslaughter is not an enumerated felony under the 10-20-Life statute, F.S. § 775.087(2). While robbery is, the defendant pleaded guilty to Robbery with a Weapon and not Robbery with a Firearm. The plea to the respective enhancements in this case has the effect only of increasing each offense from second degree felonies to first degree felonies under F.S. § 775.087(1).

[6] Manslaughter falls under its own separate statute, F.S. § 782.07.

TAB 11

Search Warrant Issues

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United States Constitution

4th Amendment

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated; and no Warrants shall issue but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

Florida Constitution & Statutes

Article 1, Section 12: Searches and seizures.—The right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures, and against the unreasonable interception of private communications by any means, shall not be violated. No warrant shall be issued except upon probable cause, supported by affidavit, particularly describing the place or places to be searched, the person or persons, thing or things to be seized, the communication to be intercepted, and the nature of evidence to be obtained. This right shall be construed in conformity with the 4th Amendment to the United States Constitution, as interpreted by the United States Supreme Court. **Articles or information obtained in violation of this right shall not be admissible in evidence if such articles or information would be inadmissible under decisions of the United States Supreme Court construing the 4th Amendment to the United States Constitution.**

Florida Statutes § 933.04: Affidavits.—The right of the people to be secure in their persons, houses, papers and effects against unreasonable seizures and searches shall not be violated and no search warrant shall be issued except upon probable cause, supported by oath or affirmation particularly describing the place to be searched and the person and thing to be seized.

Fundamental concepts

- No unreasonable searches are allowed
- Generally have to have a search warrant
- Search warrant must supported by probable cause
- Search warrant must identify with particularity the place to be searched, thing to be seized, communication to be intercepted, and nature of evidence to be obtained.
- Exclusionary rule
  Weeks v. United States, 232 U.S. 383 (1914);
  Mapp v. Ohio, 367 U.S. 643 (1961)

What constitutes a search?

1. Any intrusion into an area in which a person has a reasonable expectation of privacy
   - Katz v. United States, 389 U.S. 347 (1967)
2. Any physical encroachment onto a person's property
   - United States v. Jones, 132 S.Ct. 945 (2012)

Katz Doctrine: Expectation of Privacy

Katz Doctrine two-part test:

1. Person exhibited an actual (or subjective) expectation of privacy AND
2. The expectation exhibited is one society is prepared to accept as reasonable (objective)

"What a person knowingly exposes to the public . . . is not a subject of Fourth Amendment protection."

Subjective expectation of privacy

- Inspection of garbage left for disposal outside of the curtilage of a home in opaque garbage bags – No subjective or objective expectation of privacy. California v. Greenwood, 486 U.S. 35 (1988).
- Removal and search of garbage can from residence right-of-way – No expectation of privacy. State v. Fisher, 591 So.2d 1049 (Fla. 5th DCA 1991).
- Installation of a telephone pen register – no subjective or objective expectation of privacy in numbers conveyed to a 3rd party, such as a phone company. Smith v. Maryland, 442 U.S. 735 (1979)

Objective expectation of privacy

- Aerial observation from a navigable altitude generally used by the public of fenced-in backyard within curtilage of home – No objective expectation of privacy because anyone flying over could have made the same observations. California v. Ciraolo, 476 U.S. 207 (1986); Florida v. Riley, 488 U.S. 445 (1989)
- Use of non-publicly available sense enhancing technology, such as a thermal-imaging device, to detect activity within a home – objective expectation of privacy because the information could not have otherwise been obtained without a physical intrusion into a constitutionally protected area. Kyllo v. U.S., 533 U.S. 27 (2001).

Drones

Florida Statutes § 934.50 – Searches and seizure using a drone.

(3) PROHIBITED USE OF DRONES.—

(a) A law enforcement agency may not use a drone to gather evidence or other information.

(b) A person, a state agency, or a political subdivision as defined in s. 11.45 may not use a drone equipped with an imaging device to record an image of privately owned real property or of the owner, tenant, occupant, invitee, or licensee of such property with the intent to conduct surveillance on the individual or property captured in the image in violation of such person's reasonable expectation of privacy without his or her written consent. For purposes of this section, a person is presumed to have a reasonable expectation of privacy on his or her privately owned real property if he or she is not observable by persons located at ground level in a place where they have a legal right to be, regardless of whether he or she is observable from the air with the use of a drone.

Drones

Florida Statutes § 934.50:

(4) EXCEPTIONS.*—This section does not prohibit the use of a drone:

(a) To counter a high risk of a terrorist attack by a specific individual or organization if the United States Secretary of Homeland Security determines that credible intelligence indicates that there is such a risk.

(b) If the law enforcement agency first obtains a search warrant signed by a judge authorizing the use of a drone.

(c) If the law enforcement agency possesses reasonable suspicion that, under particular circumstances, swift action is needed to prevent imminent danger to life or serious damage to property, to forestall the imminent escape of a suspect or the destruction of evidence, or to achieve purposes including, but not limited to, facilitating the search for a missing person.

. . .

*There are several other exceptions that will not generally apply to law enforcement functions.

Drones

Florida Statutes § 934.50:

(5) REMEDIES FOR VIOLATION.—

- Basically, your agency could get sued and have to pay punitive damages and up to twice the amount of the other side's court costs and attorney's fees if they win their lawsuit.

(6) PROHIBITION ON USE OF EVIDENCE.—Evidence obtained or collected in violation of this act is not admissible as evidence in a criminal prosecution in any court of law in this state.

Objective expectation of privacy

Open Fields Doctrine:

- Open fields (areas outside of a home's curtilage) – No objective expectation of privacy (even if fence has been erected and "No Trespassing" signs displayed). Oliver v. U.S., 466 U.S. 170 (1984)
- Barn located 50 yards outside fence surrounding house – No objective expectation of privacy. U.S. v. Dunn, 480 U.S. 294 (1987)
- Open Fields Doctrine determined by four factors:
  - (1) the proximity of the area to the home;
  - (2) whether the area is within an enclosure surrounding the home;
  - (3) the nature and uses to which the area is put; and
  - (4) the steps taken by to protect area from observation by passersby.

Objective expectation of privacy

- Overnight guest in another person's home – Has an objective expectation of privacy within the home. Minnesota v. Olson, 495 U.S. 91 (1990).
- Non-overnight guest – No objective expectation of privacy within another's home. Minnesota v. Carter, 525 U.S. 83 (1998).
- Passengers with no property or possessory interest in a vehicle – No objective expectation of privacy within the vehicle. Rakas v. Illinois, 439 U.S. 128 (1978).
- Inspection of a vehicle parked in a public place – No objective expectation of privacy. Cardwell v. Lewis, 417 U.S. 583 (1974).

Objective expectation of privacy

- Random "shakedowns" or cell searches for security purposes – No objective expectation of privacy by prisoners. Hudson v. Palmer, 468 U.S. 517 (1984)
- Search of pretrial detainee's cell at instruction of prosecutor without any colorable concern for institutional security – Detainee does have reasonable expectation of privacy. McCoy v. State, 639 So.2d 163 (Fla. 1st DCA 1994)
- Squeezing or feeling soft luggage located on public bus – Passenger had an objective expectation of privacy and did not, by exposing bag to the public, lose a reasonable expectation that it would not be manipulated in an exploratory manner. Bond v. U.S., 529 U.S. 334 (2000)

Objective expectation of privacy

- Use of radio transmitter to listen in on conversation between an informant and a suspect in his home – No objective expectation of privacy. U.S. v. White, 401 U.S. 745 (1971).
- Use of radio transmitter placed inside container to track its location & movement along public roads – No objective expectation of privacy. U.S. v. Knotts, 460 U.S. 276 (1983).
- Use of radio transmitter placed inside container that tracked its location to within a person's home – Objective expectation of privacy. U.S. v. Karo, 468 U.S. 705 (1984).

Trespass doctrine

- Olmstead v. U.S., 277 U.S. 438 (1928): Held that wiretapping person's private telephone line was not a search because it had been done without a physical trespass.
- Katz v. United States, 389 U.S. 347 (1967): Overruled Olmstead and established the reasonable expectation of privacy doctrine.
- Officer's attachment of GPS tracking device to person's vehicle – trespassory intrusion on an "effect." U.S. v. Jones, 132 S.Ct. 945 (2012).
  - F.S. § 934.42 authorizes court order for tracking devices, but SW are likely now required under Jones.

Trespass doctrine

GPS Trackers

Florida Statute § 934.425:

. . .

(2) Except as provided in subsection (4), a person may not knowingly install a tracking device or tracking application on another person's property without the other person's consent.

. . .

(4) This section does not apply to:(a) A law enforcement officer as defined in s. 943.10, or any local, state, federal, or military law enforcement agency, that lawfully installs a tracking device or tracking application on another person's property as part of a criminal investigation.

Trespass doctrine

GPS Trackers

Florida Statute § 934.42:

- Allows for issuance of court orders to install GPS trackers, but, under U.S. v. Jones, 132 S.Ct. 945 (2012), you must now obtain a search warrant to do so.
- Search warrant must include:
  1. A statement of the identity of the applicant and the identity of the law enforcement agency conducting the investigation.
  2. A certification by the applicant that the information likely to be obtained is relevant to an ongoing criminal investigation being conducted by the investigating agency.
  3. A statement of the offense to which the information likely to be obtained relates.
  4. A statement whether it may be necessary to use and monitor the mobile tracking device outside the jurisdiction of the court from which authorization is being sought.
- **Search warrant may authorize the use of the device inside and outside the jurisdiction of the court, but within the State of Florida, if the device is installed within the jurisdiction.**

Trespass doctrine

- Use of drug-sniffing dog on front porch of home was trespassory invasion of the curtilage of the home (no Katz / "expectation of privacy" analysis). Florida v. Jardines, 133 S.Ct. 1409 (2013).
- Seizure of bag containing suspect's clothing from his hospital room / emergency bay violated suspect's possessory rights to clothing even though they were located in a public place. Jones v. State, 648 So.2d 669 (Fla. 1994). Purifoy v. State, 225 So.3d 867 (Fla. 1st DCA 2017).

Before searching you must have:

Probable Cause + Search Warrant

OR

Warrant Exception

Search Warrants

- Key to a "reasonable" search
- Warrantless searches are presumptively **UNREASONABLE**. Payton v. New York, 445 U.S. 573 (1980).

Search Warrants

What they look like:

- Affidavit
- Warrant
- Inventory
- Return

Search Warrants

- The requirements for a search warrant and affidavit are all contained within Chapter 933 of the Florida Statutes.
- Additionally, they contain provisions which deal with the execution of a warrant and subsequent return.
- Historically, the courts have strictly construed the statutes governing the issuance and execution of search warrants.

Search Warrants: Affidavit

- There are two sections in the chapter that deal with the statutory reasons for the issuance of a search warrant.

1. F.S. § 933.02 of the Florida Statutes deal with the specific law violations will allow the issuance of a search warrant in general.

2. F.S. § 933.18 of the Florida Statutes deal with the specific violations that will allow us to enter a dwelling.

Search Warrants: Affidavit

Florida Statutes § 933.02:

Grounds for issuance of search warrant.—Upon proper affidavits being made, a search warrant may be issued under the provisions of this chapter upon any of the following grounds:

(3) When any property constitutes evidence relevant to proving that a felony has been committed;

Florida Statutes § 933.18:

When warrant may be issued for search of private dwelling.—No search warrant shall issue under this chapter or under any other law of this state to search any private dwelling occupied as such unless:

(6) A weapon, instrumentality, or means by which a felony has been committed, or evidence relevant to proving said felony has been committed, is contained therein;

Search Warrants: Affidavit

- Write in plain English
- Pick an organizational style: Chronological or topical
- Use subheadings for longer affidavits (over 1 page)
- Put in the kitchen sink (and the mold)
- Must be sworn to and subscribed – Florida Statutes § 933.06
- Can be by any person – doesn't necessarily have to be by LEO

Search Warrants: Affidavit

Probable cause to believe

1. Evidence relevant to a crime (completed or ongoing)
2. Is located within the place to be search

- Nothing that happens during or after the search can be taken into account to determine probable cause.
- Snapshot in time immediately before the search
- PC cannot be based on observations of the location to be searched unless made from a lawful vantage point (security sweeps vs. secured scene)

Search Warrants: Affidavit

Probable cause:

- Definition: "[T]here is a fair probability that contraband or evidence of a crime will be found in a particular place." Illinois v. Gates, 462 U.S. 213, 239 (1983).
- Standard: "Totality of the circumstances"
- Circumstantial evidence – As a rule, put in any facts that support a probable cause finding. Many times it is the abundance of little facts that are important.

Search Warrants: Affidavit

Probable cause:

- Most affidavits will be based on hearsay information.
- "Fellow officer rule": You are allowed to rely on reliable information from other officers.
- Some affidavits may be based on info from informants.
- A judge has to consider "the veracity and basis of knowledge of persons supplying hearsay information." Gates, 462 U.S. at 239.

Search Warrants: Affidavit

Informants – 3 Types:

1. **"Citizen informant":** A known individual who does not have any expectation of benefit in exchange for providing information. Courts will consider them with the highest level of reliability. Corroboration of information is not generally required.

2. **"Confidential informant/source":** A known individual who does have an expectation of benefit in exchange for providing information. Usually someone who is working for money or who has looming charges or a criminal past. Considered less reliable than "citizen informants." Generally need a track record of verifiable past performance to be considered reliable. You should always include any corroborative information.
   - Multiple successful prosecutions based on info provided
   - Controlled transactions / calls

3. **"Anonymous tipster":** An unknown individual whose identity is not readily discoverable and provides limited or easily observable information. Substantial corroboration of information is always required.

Search Warrants: Affidavit

"Four Corners" Doctrine

- Applies at Motion to Suppress Hearings
- Court can only consider what is contained within the "four corners" of the search warrant affidavit.
- Cannot cure errors or omissions with additional testimony or exhibits.
- If it's not in the affidavit, it didn't happen & doesn't count.

Search Warrants: Affidavit

Nexus:

- Information that ties the crime to the place to be searched
- Remember standard is PC; it's got to be more than a hunch
- Drug case: paraphernalia in the trash
- Gun case: witness recently saw gun in house
- Social media: evidence suspect used it in connection w/ crime

Search Warrants: Affidavit

Nexus: Automobiles on Property

The appellate courts are divided on this issue and have two different views:

The 1st DCA held in Miller decision that not only must the warrant authorize the search of persons and vehicles located on the premises or curtilage, it is also required that a reasonable connection be established between the illegal activity in the residence to the vehicle or person to be searched. Miller v. State, 516 So.2d 1118 (1st DCA 1987).

Other DCAs allow the automatic search if authorized in the warrant. State v. Booream, 560 So.2d 1303 (2nd DCA 1990).

5th DCA seems to side with Booream, but has not issued a decision specifically holding as such. Wheeler v. State, 62 So.3d 1218 (Fla 5th DCA 2011) (concurring opinion). Probably best to establish nexus to automobiles on property.

Search Warrants: Affidavit

Particularity

4th Amendment: *"...particularly describing the place to be searched, and the persons or things to be seized."*

Article 1, Section 12: *"...particularly describing the place or places to be searched, the person or persons, thing or things to be seized, the communication to be intercepted, and the nature of evidence to be obtained.*

Florida Statutes § 933.04: *"...particularly describing the place to be searched and the person and thing to be seized."*

Two-fold focus: (1) Place to be searched & (2) Property to be seized

Search Warrants: Affidavit

Particularity

1. Place to be searched:

- The description of the place to be searched must either:

  (1) be made with such specificity "that the executing officer, relying on the description alone can go unerringly to the designated premises" or

  (2) the description must be such as is generally known in the locality and upon which inquiry by the officer will enable the people of the locality to direct him to the premises designated.

  Seymour v. State, 110 So.2d 460 (Fla. 2d DCA 1959)

- The description should also include directions to the place to be searched
- Multi-unit buildings: identify which unit unless suspect controls more of the property

Search Warrants: Affidavit

Particularity

2. Property to be seized (no overbroad / general warrants):

- Inherently illegal property: Particularity requirement is met if the description is reasonably "consistent with the type or character of the property sought. Carlton v. State, 418 So.2d 449 (Fla. 5th DCA 1982).
- Inherently innocuous items: Description of item must be specific enough that it leaves no discretion to the executing officer, who can distinguish the item to be seized over another similar item. Marron v. U.S., 275 U.S. 192 (1927).
  - Seizure of stolen VCR while executing search warrant for guns and drugs was improper even though the warrant also included "stolen property" within its search language. Perez v. State, 521 So.2d 262 (Fla. 2d DCA 1988).

Search Warrants: Affidavit

Staleness

- If too much time has passed between the event supporting PC and issuance of the affidavit, then info will considered stale.
- Remember PC definition: There must be a "fair probability that contraband or evidence of a crime will be found in a particular place."
- How much time is too much?
- General rule of thumb: 30 days. Smith v. State, 438 So.2d 896, 898 (Fla. 2d DCA 1983).

Search Warrants: Affidavit

Staleness

- Factors to determine whether more than 30 days is justified:

Montgomery v. State, 584 So.2d 65, 67 (Fla. 1st DCA 1991):

(1) Pattern of ongoing criminal activity.

(2) The nature of the object being sought (consumable items such as drugs or liquor will easily become stale, unlike items such as guns, manufacturing equipment, or videotapes).

(3) The nature of the criminal activity involved (for example, in cultivation of marijuana, the plants will grow over an extended period).

(4) Whether there is a continuing flow of information from the informant or an ongoing investigation.

(5) Whether the quantity of drugs or contraband involved is so large that it could not be disposed of or consumed in a short period of time.

Search Warrants: Affidavit

False Statements

Franks v. Delaware, 523 So.2d 744 (1978):

"If, after a hearing, a defendant establishes by a preponderance of the evidence that the false statement was included in the affidavit by the affiant knowingly and intentionally, or with reckless disregard for the truth, and the false statement was necessary to the finding of probable cause, then the search warrant must be voided and the fruits of the search excluded from the trial to the same extent as if probable cause was lacking on the face of the affidavit."

Search Warrants: Affidavit

False Statements

Franks v. Delaware, 523 So.2d 744 (1978):

Defendant must show:

1. Search warrant affidavit contained false statement
2. Statement was made knowingly and intentionally or with a reckless disregard for the truth.
3. Statement was necessary to the finding of probable cause.

Search Warrants: Affidavit

False Statements

State v. Beney, 523 So.2d 744 (Fla. 5th DCA 1988):

- Officer drafted a search warrant
- Stated that C.I. relayed to him that a quantity of drugs was en route to FL from NJ
- Stated that C.I. had provided reliable information in the past about drug deals
- Later admitted that the info had come from NJ officers based on wiretap there
- Reason given was that he wanted to maintain the secrecy of the wiretap

Evidence found as a result of the search was inadmissible.

Search Warrants: Affidavit

False Statements

State v. Robinson, 460 So.2d 440 (Fla. 5th DCA 1984):

- Officer drafted a search warrant
- Stated that C.I. lived w/ D on a certain date and personally saw D buy & sell drugs
- Stated that C.I. also said that he had seen large quantities of drugs at other times
- C.I. later said he had been at D's house during timeframe, but wasn't living with D
- C.I. confirmed that he saw drug deal, but the date was a day off from the affidavit

Evidence found as a result of the search was admissible.

Search Warrants: Affidavit

False Statements

State v. Chapin, 486 So.2d 566 (Fla. 1986)

- Case involved shooting outside D's home
- D claimed he shot victim in self-defense
- Victim had gunshot wounds to back, cut on hand, & other injuries inconsistent w/ D's story
- Signs of struggle inside home including gouge marks & piece of metal stuck in wall
- Metal in wall was not removed from wall, crime scene techs just cut out piece of wall
- D refused consent to search 2 locked bedrooms in house, so officers wrote SW
- SW referred to piece of metal in wall as a broken knife tip & wound to hand and possible knife wound
- Large quantities of drugs found in locked bedrooms
- Later, officers discovered that the piece of metal in wall was not a broken knife tip

Evidence found as a result of the search was admissible.

Search Warrants: Affidavit

False Statements

State v. Chapin, 486 So.2d 566 (Fla. 1986)

"It is not the truth of the information in the affidavit which is critical but rather the affiant's belief that it is true. The fact that the police acted negligently, made an innocent mistake, or might have conducted an investigation in a different manner, does not prove, or even establish a presumption of, bad faith or reckless disregard of the truth."

Search Warrants: Warrant

- Essentially a proposed court order
- Make sure the variables in the affidavit match
- Make sure that all law enforcement agencies that may participate in the execution of the warrant in included

Florida Statutes § 933.08 Search warrants to be served by officers mentioned therein.—The search warrant shall in all cases be served by any of the officers mentioned in its direction, but by no other person except in aid of the officer requiring it, said officer being present and acting in its execution.

Search Warrants: Warrant

- Make sure that the warrant expressly authorizes you to execute it either during the daytime or nighttime or on Sunday.

Florida Statutes § 933.10 Execution of search warrant during day or night.—A search warrant issued under this chapter may, if expressly authorized in such warrant by the judge, be executed by being served either in the daytime or in the nighttime, as the exigencies of the occasion may demand or require.

Florida Statutes § 933.101 Service on Sunday.—A search warrant may be executed by being served on Sunday, if expressly authorized in such warrant by the judge.

Search Warrants: Execution

Expiration of Warrant:

Warrant must be executed within 10 days or it will be considered expired.

- Florida Statutes § 933.05
- Spera v. State, 467 So.2d 329 (Fla. 2d DCA 1985).
- This will be strictly construed.

Search Warrants: Execution

Knock & Announce Rule:

Florida Statutes § 933.09:

The officer may break open any outer door, inner door or window of a house, or any part of a house or anything therein, to execute the warrant, if after due notice of the officer's authority and purpose he or she is refused admittance to said house or access to anything therein.

Florida Statutes § 901.19:

Officer cannot forcibly enter a building to effect a lawful arrest or serve search warrant until he or she has first announced his or her authority and purpose for entering.

- State v. Cable, 51 So.3d 434 (Fla. 2010) (holding exclusionary rule applies based on state statute notwithstanding contrary holding based on 4th Amendment in Hudson v. Michigan, 547 U.S. 586 (2006)).

Search Warrants: Execution

Knock & Announce Rule:

- Reasonable time delay required – How much time?
- 15-20 seconds generally sufficient. U.S. v. Banks, 540 U.S. 31 (2003)

Exceptions – You need to document these up front in detail:

1. Occupant already knows of the officer's authority & purpose
2. Persons inside are in peril of bodily harm
3. Increase in peril to officers
4. Danger of escape/destruction of evidence

- Benefield v. State, 160 So.2d 706 (Fla. 1964)

Search Warrants: Execution

Detention of persons during the search

- Persons already on or arriving at the premises during the course of the search may be detained until the search is completed. Michigan v. Summer, 101 S.Ct. 2587 (1981).

Securing the location of the search:

- Officers may enter to secure residence if a search warrant has been issued but is en route and not physically in hand. State v. Riley, 462 So.2d 800 (Fla. 1984).
- Officers may enter to secure residence prior to the issuance of a search warrant if they have a good faith belief a warrant is being obtained. Conner v. State, 701 So.2d 441 (Fla. 4th DCA 1997).

Search Warrants: Securing locations

- Timing is important:
  - Warrant on the way – good to go
  - Warrant in the works – good to go
  - No warrant in sight – stay out
- No searching before the warrant gets there!

Search Warrants: Execution

Other limitations:

1. The search may not continue once the items specified in the warrant are found. Purcell v. State, 325 So.2d 83 (1st DCA 1976). Search warrant for a stolen camera and the after the camera was found, police continued to search. Items recovered after were suppressed.

2. The only areas which may be searched are those in which the items are likely to be found. So if you are looking for a rifle, it is not permissible to search the medicine cabinet.

Search Warrants: Execution

Seizure of items not covered in the search warrant:

Officers may seize items in plain view without a warrant if the seizing officers are lawfully in a location where the item is observed and have probable cause to believe that the item is evidence of a crime. Rimmer v. State, 825 So.2d 304 (Fla. 2002) (citing Alford v. State, 307 So.2d 433 (Fla. 1975).

Remember Requirements for "Plain View" Exception:

1. You see the evidence from a lawful vantage point.
2. The incriminating character of the item is "immediately apparent."
3. You have a lawful right of access to the object.

- Horton v. California, 496 U.S. 128 (1990).

Search Warrants: To Seal or Not to Seal?

- Can be vital to an investigation to keep the fact that a search warrant has been issued & the facts / evidence supporting it out of the public domain.

- Reasons:
  - Protect the integrity of your investigation
  - Prevent the removal or destruction of evidence
  - Test the honesty of suspects or witnesses during an interview
  - Protect victims or witnesses

- Clerk's Offices will consider SWs to be disclosable public records if they have not received an order to seal them

Search Warrants: To Seal or Not to Seal?

Rule 2.420(c)(6), Florida Rules of Judicial Administration:

(c) Confidential and Exempt Records. The following records of the judicial branch shall be confidential:

. . .

(6) Copies of arrest and search warrants and supporting affidavits retained by judges, clerks, or other court personnel until execution of said warrants or until a determination is made by law enforcement authorities that execution cannot be made;

Search Warrants: To Seal or Not to Seal?

Rule 2.420(c)(9)(A), Florida Rules of Judicial Administration:

(c) Confidential and Exempt Records. The following records of the judicial branch shall be confidential:

. . .

(9) Any court record determined to be confidential in case decision or court rule on the grounds that:

(A) confidentiality is required to:

(i) **prevent serious & imminent threat to fair, impartial, and orderly administration of justice;**

(ii) protect trade secrets;

(iii) **protect a compelling governmental interest;**

(iv) **obtain evidence to determine legal issues in a case;**

(v) **avoid substantial injury to innocent third parties;**

(vi) avoid substantial injury to a party by disclosure of matters protected by a common law or privacy right not generally inherent in the specific type of proceeding sought to be closed;

(vii) **comply with established public policy set forth in the Florida or United States Constitution or statutes or Florida rules or case law;**

Search Warrants: To Seal or Not to Seal?

Rule 2.420(f)(3), Florida Rules of Judicial Administration:

(f) Request to Determine Confidentiality of Court Records in Criminal Cases.

. . .

(3) Any motion to determine whether a court record that pertains to a plea agreement, substantial assistance agreement, or other court record that reveals the identity of a confidential informant or active criminal investigative information is confidential under subdivision (c)(9)(A)(i), (c)(9)(A)(iii), (c)(9)(A)(v), or (c)(9)(A)(vii) of this rule may be made in the form of a written motion captioned "Motion to Determine Confidentiality of Court Records." . . .

Search Warrants: To Seal or Not to Seal?

What to do:

- Have a prosecutor review your search warrant prior to taking it to a judge
- Discuss your concerns about the search warrant being a public record
- Suggest that motion/order to determine SW's confidentiality be prepared
- Take motion/order for judge to review/sign along with your SW
- Rule 2.420(f)(1)(A) allows for *in camera* hrg. to protect interests in (c)(9)(A)

Search Warrants: Inventory & Return

- List of all the property taken from the location
- Deliver a copy of the warrant and sworn inventory to the person named in the warrant, to a person living at the place searched, or leave a copy on the premises.
- File a copy with the Clerk of Court

  Florida Statutes § 933.11

  Florida Statutes § 933.12

Search Warrants: Return of Property

A judge may order a return of property if:

1. It appears that the property taken are not the same as described in the warrant,
2. That there is no PC for believing the existence of the grounds upon which the warrant was issued, or
3. It appears that the property was secured by an "unreasonable" search.

Florida Statutes § 933.14

Exceptions to warrant requirement

Exceptions are generally based on conclusion that the searches involved are "reasonable" under the Constitution.

- Plain view
- Consent
- Exigent circumstances
- Search incident to valid arrest
- Automobile exception
- Inventory searches
- Regulatory / administrative searches
- Protective sweeps

If you are relying on an exception to the warrant requirement, be sure you document the circumstances that justify your search.

Exceptions to warrant requirement

Plain View:

Horton v. California, 496 U.S. 128 (1990):

Requirements:

1. You are at a lawful vantage point; you have a right to be in the place where you see the evidence.
2. The incriminating character of the object is "immediately apparent."
3. You have a lawful right of access to the object.

Exceptions to warrant requirement

Plain View:

- Officers were not in a lawful vantage point when they stepped off suspect's front porch to look inside window. Friedson v. State, 207 So.3d 961 (Fla. 5th DCA 2016).
- Can't manipulate or move items around that you suspect are contraband in order to determine if they are or not. Arizona v. Hicks, 480 U.S. 321 (1987).
- Officers did not have right of access to unsealed bag containing suspects clothing located in suspect's hospital room, nor was mud found on the clothing that was later determined to be consistent with crime scene by expert "immediately apparent." Jones v. State, 648 So.2d 669 (Fla. 1994).
- Officers did have probable cause to associate a suspect's clothing with criminal activity when they observed blood and bullet holes in the clothing. Purifoy v. State, 225 So.3d 867 (Fla. 1st DCA 2017).

Exceptions to warrant requirement

Consent:

- Must be freely and voluntary given
- Person must have authority to give consent
- Stay within the scope of the consent
- Can be withdrawn (must have ability to do so)
- You can ask for consent at any time – you don't have to have reasonable suspicion or probable cause to merely ask for consent

Exceptions to warrant requirement

Consent:

Factors relevant to voluntariness:

- Time and place of encounter
- Number of officers present
- Officers' words and actions
- Miranda warnings
- Coercive conduct
- Custody status
- Language difficulties
- Drug or alcohol impairment of defendant

"Totality of circumstances"

Exceptions to warrant requirement

Consent:

Coercive conduct:

- Telling citizen they are target of criminal investigation
- High number of officers present
- Lengthy detention of defendant
- Telling citizen he is free to leave if he gives consent
- Threatening to get search warrant if citizen doesn't consent (esp. where you don't have PC)
- Telling citizen you don't need a warrant if citizen asks if you have one
- Implying promises of immunity
- Repeated requests for consent

Exceptions to warrant requirement

Consent:

Authority to give consent:

- Who is the person consenting?
- What is his relationship to the suspect?
- What is his relationship to the place to be searched?

Exceptions to warrant requirement

Consent:

Authority to give consent:

- Actual vs. apparent authority
- There cannot be any ambiguity about authority to consent.
- It's your responsibility to inquire further to determine if you can rely on their representations.

Former co-tenant did not have authority to give consent to search premises. Illinois v. Rodriguez, 497 U.S. 177 (1990).

Consent by one co-tenant is not valid if other co-tenant expressly refuses consent. Georgia v. Randolph, 547 U.S. 103 (2006).

Exceptions to warrant requirement

Consent:

Knock & Talks:

- Legitimate investigative tool
- Key is the absence of coercive police conduct, including any express or implied assertion of authority to enter or authority to search

Luna-Martinez v. State, 984 So.2d 592 (Fla. 2d DCA 2008)

Exceptions to warrant requirement

Consent:

Knock & Talks / Example:

- 10:00 p.m.
- 3 uniformed officers approach mobile home (14'x70') and ask to come inside
- Once inside, inform resident target of drug investigation
- Resident becomes emotional
- Officers repeatedly request consent to search

Exceptions to warrant requirement

Consent:

Knock & Talks / Example:

- Court held officers' show of force rendered the consent to search unlawful. A reasonable person in the place of the defendant would not have believed she was free to refuse consent.
- An officer's approach to a person in their home is more intimidating than an approach on the street. The fact that the person has no opportunity to walk away makes the event less likely to elicit a voluntary consent.
- Kutzorik v. State, 891 So2d 645 (Fla. 2d DCA 2005)

Exceptions to warrant requirement

Consent:

Knock & Talks / Example:

- 3:00 a.m.
- Officers use ruse to get resident outside
- Once outside, tell resident target of drug investigation
- Ask for consent to search while outside
- Resident polite & cooperative
- Resident informed of right to refuse

Exceptions to warrant requirement

Consent:

Knock & Talks / Example:

- Court held consent was voluntary because police did not act in a coercive manner, and
- Nothing was said or done by police that a reasonable person would understand as an assertion of authority to search.
- Luna-Martinez v. State, 984 So.2d 592 (Fla. 2d DCA 2008)

Exceptions to warrant requirement

Consent:

Containers within area searching:

Can open them if:

1. consent can reasonably be inferred to extend to the container (don't pry open a locked briefcase) AND
2. items sought could reasonably be located within that container (don't look for a shotgun in a purse)

Florida v. Jimeno, 500 U.S. 248 (1991).

Exceptions to warrant requirement

Exigent Circumstances:

- Emergency aid exception: Brigham City v. Stuart, 547 U.S. 398 (2006).
- Fire-fighting exception: Michigan v. Tyler, 436 U.S. 499 (1978).
- Hot pursuit of "fleeing felon" exception: U.S. v. Santana, 427 U.S. 38 (1976).
- Imminent destruction of evidence: Schmerber v. California, 384 U.S. 757 (1966).
- Protective sweeps, Maryland v. Buie, 494 U.S. 325 (1990).

- Rationale: No time for warrant
- Stay within scope of why you're there
- Emergency is not your fault

Exceptions to warrant requirement

Automobile exception:

- Carroll v. U.S., 267 U.S. 132 (1925) (search on side of highway)
- Chambers v. Maroney, 399 U.S. 42 (1970) (search at police station after seizure)

- Must have:
  1. PC that relevant evidence is within the vehicle. Dyke v. Taylor Implement Mfg. Co., 391 U.S. 216 (1968).
  2. Vehicle is readily mobile. California v. Carney, 471 U.S. 386 (1985) (can include RV or mobile home).

- There is no separate exigency requirement. Maryland v. Dyson, 527 U.S. 465 (1999); Pennsylvania v. Labron, 518 U.S. 938 (1996). But see Coolidge v. New Hampshire, 403 U.S. 443 (1971).

- Scope is limited and defined by the object for which you have PC to search. U.S. v. Ross, 456 U.S. 798 (1982).

Exceptions to warrant requirement

Automobile exception:

Can you search a container in the trunk?

You may conduct a warrantless search of a container within an automobile if the item for which you have probable cause to search may reasonable be contained within the container.

U.S. v. Ross, 456 U.S. 798 (1982).

Exceptions to warrant requirement

Inventory exception:

- Inventory search pursuant to established department policy and procedures: South Dakota v. Opperman, 428 U.S. 364 (1976); Illinois v. Lafayette, 462 U.S. 640 (1983); Colorado v. Bertine, 479 U.S. 367 (1987).
- Just because the suspect you've just arrested has a car nearby, doesn't mean you can do an inventory search of the car.
- Validity depends upon purpose
- Is the car legally parked?
- Does it pose a traffic hazard?
- Have you inquired if somebody can come get the car for the defendant?
- Are you going on a fishing expedition?

Exceptions to warrant requirement

Search incident to arrest exception:

- Weeks v. U.S, 232 U.S. 383 (1918).
- Chimel v. California, 395 U.S. 752 (1969): Officer may conduct warrantless search of the person arrest as well as the area within reach.
  - Rationale: (1) Officer Safety and (2) Preservation of Evidence
- U.S. v. Robinson, 414 U.S. 218 (1973): Search incident to arrest permissible even if it is unlikely that arrestee has a weapon or evidence related to a crime on his person (not going to second-guess officers).
- Arizona v. Gant, 556 U.S. 332 (2009): Cannot search a suspect's vehicle if he or she has been secured and separated from it.

Exceptions to warrant requirement

Search incident to arrest exception:

What about cell phones?

What if cell phone had been search immediately after the defendant was arrested?

- Defendant was separated from his phone & secured in police car
- Officer then searched data on phone & found incriminating photos
- Lower court held that search was legal under Robinson

Holding: Search was unconstitutional. Facts more analogous to Gant.

Exceptions to warrant requirement

Search incident to arrest exception:

What about cell phones?

Riley v. California & U.S. v. Wurie, 134 S.Ct. 2473 (2014):

Facts:

- Riley was arrested for DWLSR & carrying concealed weapon
- "Smart phone" was seized & searched incident to arrest
- Incriminating text messages, videos & photos were found
- Wurie was arrested for drug sale
- "Flip phone" was seized & searched incident to arrest
- Phone number on call log led to apartment where drugs were discovered.

Exceptions to warrant requirement

Search incident to arrest exception:

What about cell phones?

Riley v. California & U.S. v. Wurie, 134 S.Ct. 2473 (2014):

Holding:

- Search incident to arrest exception does NOT allow search of cell phone found on arrestee
- Cell phone are "minicomputers that hold a vast amount of personal information and are materially distinguishable from a static, inert package or container such as a cigarette pack
- Back to the future: Remember Chimel? A cell phone search is more exhaustive than searching a house.

Exceptions to warrant requirement

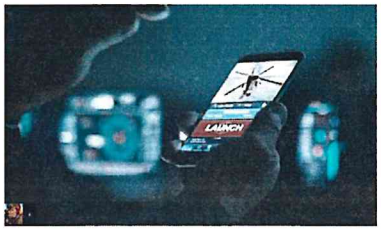
Search incident to arrest exception:

What about cell phones?

Riley v. California & U.S. v. Wurie, 134 S.Ct. 2473 (2014):

Chimel conerns:

1. Officer safety: Digital data can't be used as a weapon
   - What if suspect called someone to help him? Not enough evidence of that.
   - Can examine phone's physical aspects to ensure it won't be used as weapon.
2. Evidence destruction: Can be prevented
   - Remote Wiping
   - Data Encryption

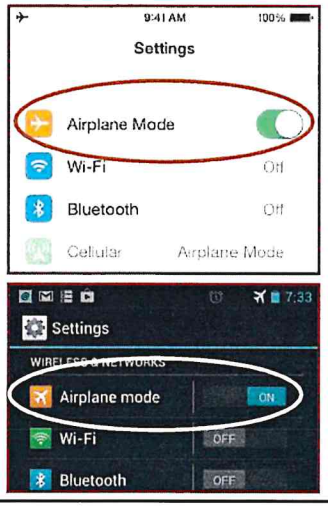


Exigent circumstances can still apply

Exceptions to warrant requirement

Search incident to arrest exception:

What about cell phones?



Riley v. California & U.S. v. Wurie, 134 S.Ct. 2473 (2014):

What about encryption or remote destruction of evidence?

Riley offers 2 solutions:

1. Turn phone off or remove battery
2. Place it in a "Faraday bag"

U.S. v. Doney, 2015 WL 327835 (D. Mont. 2015): Indicated you could access phone's settings for the limited purpose of activating the "airplane mode" feature.

Exceptions to warrant requirement

Search incident to arrest exception:

What about cell phones?

What if the phone is password protected?

State v. Stahl, 206 So.3d 124 (Fla 2d DCA 2016):

State can compel defendant to provide the password to his cell phone if the State can show the following:

1. It knows with reasonable particularity that the passcode exists.
2. The passcode is within the accused's possession or control.
3. The passcode is authentic (self-authenticating).

You must have already obtained a warrant to search the phone

Exceptions to warrant requirement

Protective Sweeps

Maryland v. Buie, 494 U.S. 325 (1990):

"The Fourth Amendment permits a properly limited protective sweep in conjunction with an in-home arrest when the searching officer possesses a reasonable belief based on specific and articulable facts that the area to be swept harbors an individual posing a danger to those on the arrest scene."

Can you perform a protective sweep of an suspect's residence if he or she is arrested outside of the residence?

Exceptions to warrant requirement

Protective Sweeps

Fact Pattern #1:

Police obtain an arrest warrant for John Doe for aggravated battery with a deadly weapon. They learn that he lives alone in a house at 123 Main St. A DAVID search shows that he is the owner of a single pickup truck. They arrive at his residence at 6:00 a.m. to serve the arrest warrant and observe a truck, matching the description and plate number from DAVID, in the driveway. Just as they are approaching the house, John Doe exits the front door and shuts the door behind him. He then spots the officers approaching and takes off running down the street. Officers catch and arrest him about 50 feet outside his front yard. As they are taking him into custody, they don't see any lights on in the house or hear any noise coming from within.

May they conduct a protective sweep of the house?

Exceptions to warrant requirement

Protective Sweeps

Fact Pattern #2:

Police obtain an arrest warrant for Jane Smith for armed robbery with a firearm and possession of a cocaine. They learn that she lives in a trailer at 321 Broad Ave. The address is a location known for the sale of illegal narcotics. A DAVID search shows that Jane Smith is the owner of a small car. They arrive at her residence at 6:00 a.m. to serve the arrest warrant and see the car, which matches the description and plate number from DAVID, parked in the street in front of the house. They also see a bicycle leaned up against the side of the trailer near the front steps. As soon as they exit their patrol cars, Jane Smith exits the front door of the trailer, shuts the door behind her, and walks toward her car. Officers arrest her within feet of her front door. As they are taking her into custody, she tells the officers that her boyfriend in inside the trailer and they hear a TV playing.

May they conduct a protective sweep of the house?

Exceptions to warrant requirement

Protective Sweeps

Fact Pattern #1: NO

Klosieski v. State, 482 So.2d 448, 449 (Fla. 5th DCA 1986):

"Generally, unless a search warrant is issued, police officers may not enter a home and search absent exigent circumstances. Exigent circumstances would include a situation where, after an arrest, the officers have a reasonable basis to suspect that there may be other individuals on the premises who would be dangerous to the police officers or destroy evidence. Absent extraordinary circumstances, government agents have no right to search a dwelling when an arrest is effectuated outside it." (citations omitted)

Exceptions to warrant requirement

Protective Sweeps

Fact Pattern #2: YES

Diaz v. State, 34 So.3d 797, 802 (Fla. 4th DCA 2010):

"Regardless of whether the initial arrest is made inside or outside the home, 'police officers have a right to conduct a quick and cursory check of a residence when they have reasonable grounds to believe that there are other persons present inside the residence who might present a security risk.' The officers must have a reasonable, articulable suspicion that the protective sweep is necessary due to a safety threat or the destruction of evidence. Further, 'a protective sweep of the inside of a residence incident to an arrest made outside the residence is not *per se* unlawful, and is proper if the arresting officer has (1) a reasonable belief that third persons are inside, and (2) a reasonable belief that the third persons were aware of the arrest outside the premises so that they might destroy evidence, escape or jeopardize the safety of the officers or the public.'"

Exceptions to warrant requirement

There is no "murder scene" exception.

Mincey v. Arizona, 437 U.S. 385 (1978).

QUESTIONS?

For copies of the presentation, send request via email:

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TAB 12