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DEFENDER
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Motion for Change of Venue

34TH ANNUAL MEETING

JULY 15-17, 2021

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FLORIDA ASSOCIATION OF CRIMINAL DEFENSE LAWYERS

34TH ANNUAL MEETING

JULY 15-17, 2021

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NO MAN IS AN ISLAND
Unless, of course, he wets the bed

by Mitch Stone

No man is an island, entire of itself; every man is a piece of the continent, a part of the main...
–JOHN DONNE

This prose essentially means that we cannot and should not do everything by ourselves. We need help and rely on others to get us through most things in life, personally and professionally. This most definitely pertains to the practice of law.

Before I became a lawyer, I clerked at Steel, Hector and Davis, a large Miami-based law firm with hundreds of attorneys in offices in several major cities in Florida, the United States and the world. I was exposed to how big law operates. One of the things that struck me was the level of support the lawyers had. From senior partners, to managing partners to junior partners, associates, law clerks, paralegals, secretaries, runners and even mail room workers, they all played a part in the process.

Of course, clients had to pay for all that overhead. As we all know, most individual clients accused of crimes do not have that buying power so large criminal defense firms are not the norm.

When I graduated law school, I worked at the State Attorney's Office and a similar level of support was available to the attorneys—although taxpayers, not clients, provided the budget.

United States' Attorneys, Public Defenders and Federal Defender offices also have a considerable amount of support. Importantly, most of those government offices have several attorneys who can help and cover for each other. That is the point of this column. When you work in such an environment you have people you can rely on—you are not alone on an island.

Alternatively, most private criminal defense lawyers and some of the smaller public defender offices are not so fortunate. Many of us are solo or small firm practitioners who have a staff of one or two assistants, no partners and no associates. In fact, we are our own runners. Some criminal defense lawyers in big firms may be sole attorney in the criminal defense section—meaning none of their colleagues in the firm can offer much help.

That is why criminal defense lawyers need FACDL. As a voluntary bar organization, we are over 1,200 strong. We represent the criminal defense bar throughout the entire state of Florida in ways criminal defense lawyers individually cannot. Whether it is covering a case for a colleague in

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ERNIE'S EARNEST OPINIONS

by Ernest Chang

I know we're all tired of COVID and COVID-related articles. Hopefully by the time this goes to print we are starting to get back to normal with the court system and jury trials are opening up. If you are like me, you took advantage of all the various seminars offered, some free, some were paid for, some maybe we would not normally have had time for. Hopefully, you used that opportunity to brush up on your skills via online CLE.

So, I thought it would be time to get back to basics. Dust that rust off and let's get to work!

One of the missions of FACDL is to foster, maintain and encourage the integrity, independence and expertise of defense lawyers in criminal cases. In other words, to improve the knowledge and skill of our members. This issue will be dedicated to that mission. We have gathered a collection of tips, tricks, and practice pointers to help you become a better lawyer.

When I was a young lawyer, I wanted to emulate the old lawyers. They had practiced their craft for decades and honed their techniques after years of practice. One of my mentors told me that we each had to develop our own styles. Some of us are perhaps more animated and flamboyant, while others are more sedate and factual. Be honest, be sincere, be yourself. Do not pretend to be someone you are not. The jury will see through that quite easily and you will lose credibility.

When I was a young assistant public defender and had free time, I walked over to the courthouse and watched great lawyers practice their craft. Even today, if I have the free time, I love to sit in a courtroom and watch good lawyers ply their trade. Believe it or not, even on vacation, I will oftentimes wander into a courtroom just to watch lawyers in other jurisdictions. (Yes, I went to Night Court in New York City once.)

WE are lawyers practicing Criminal Defense. We don't do it for the money. There are other areas of law that are far more lucrative. Most of us do this work because we love it. We believe in what we do. We fight for the wrongfully accused, the oppressed, the forgotten. We take on unpopular cases and sometimes face adverse consequences and criticism… until those folks need US.

This is not a 9-5 job for us. We live and breathe criminal defense. It is in our DNA. We should want to get better at our profession. When we get together, it's not surprising that we always end up talking shop. It's a wonder that our spouses and significant others put up with us. But that is how we learn from our colleagues and become better, more experienced lawyers. At one of our recent annuals, I happened to be speaking with one of my more seasoned colleagues, (Older than me!) as we discussed the topic of communicating offers with our clients. I described how I spent two days imploring a client to accept a reasonable plea to no avail. My esteemed colleague shared how he did the same by actually going to the jail at 2:00 a.m. and explaining to his client that he could not sleep and just how important it was for the client to re-consider a particular offer. He was more persuasive with his method than I was. These are the stories that we tell and this is the profession that we choose. Read, study, share, learn! Become a better lawyer!

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EXECUTIVE DIRECTOR'S REPORT

Becky's Bulletin

HOME SWEET HOME

by
Becky
Barlow

I have written (and recycled articles) about using the FACDL website and its benefits to members. This time (for the first time) the focus will be on the FACDL website Home page. This is the page that opens when you login as a member.

The Carousel is the large picture box, that if you are on the Home page a few seconds, changes pictures. The picture works as a shortcut to the related page. Currently, the carousel provides a shortcut to the FACDL Gear page (FACDL masks, ballcaps…), the COVID-19 Resource page, and past issues of *The Florida Defender* magazine.

To the right of the carousel are other shortcut boxes: your Profile (see past transactions, access community memberships, upload picture…); the latest issue of *The Florida Defender* magazine (available for download); the Find a Lawyer search page (search current members based upon location and or areas of practice for referrals); all the discussion forums (list-serves available for posting and subscription); and, Renew Membership page. Speaking of renewing memberships, if you haven't already, this is a great box to click!

Scroll down a bit and you will see a list of the latest tweets by FACDL, your Interests, New Threads in your favorites, Recent Stories, and Upcoming Events. Upcoming Events is updated more often now due to COVID-19 and our growing number of virtual events. If you click on a listed event, you will find the applicable time frame (if not already in the title) and a registration link (takes you to the corresponding event page).

The public has access to a slightly different Home page. The public (those needing an attorney, vendors, non-member attorneys or even members) can still use the Home page shortcuts to purchase FACDL Gear (like masks); Find a Lawyer (search for an attorney out of our membership rolls); Donate to FACDL; learn more about our Upcoming Events; learn more about advertising in the Florida Defender magazine; or even Join FACDL. I especially like the Join FACDL shortcut!

Now you know a little bit more about FACDL's Home page. Use it as your "Home Sweet Home." As always, contact me if you need more detail about the FACDL website.

FACDL CALENDAR

NOV	WEDNESDAY, NOVEMBER 18, 2020 **LUNCH & LEARN WEBINAR: "Injunction Defense"** **www.facdl.org**
DEC	FRIDAY, DECEMBER 11, 2020 **BLOOD BREATH & TEARS 2020 "DRE" (VIRTUAL EDITION SESSION 4)** **www.facdl.org**
DEC	DECEMBER 17, 2020 **LUNCH & LEARN WEBINAR: "From Defendant to Defender"** **www.facdl.org**
JAN	SATURDAY, JANUARY 16, 2021 **EXECUTIVE COMMITTEE AND BOARD MEETING** Nashville
JAN	TUESDAY, JANUARY 26, 2021 **LUNCH & LEARN WEBINAR: "Brady: A Defense Lawyer's Best Friend"** **www.facdl.org**
FEB	THURSDAY, FEBRUARY 25 - FRIDAY, FEBRUARY 26, 2021 **DEATH IS DIFFERENT** Orlando • **www.facdl.org**
APR	THURSDAY, APRIL 8 - FRIDAY, APRIL 9, 2021 **CERTIFICATION REVIEW SEMINAR** Orlando • **www.facdl.org**
APR	SATURDAY, APRIL 10, 2021 **EXECUTIVE COMMITTEE AND BOARD MEETING** Orlando
JUL	THURSDAY, JULY 15 - SUNDAY, JULY 18, 2021 **34TH ANNUAL MEETING** Marco Island • **www.facdl.org**
JUL	SUNDAY, JULY 18, 2021 **EXECUTIVE COMMITTEE AND BOARD MEETING** Marco Island
OCT	THURSDAY, OCTOBER 14 - FRIDAY, OCTOBER 15, 2021 **BLOOD, BREATH & TEARS SEMINAR** Tampa • **www.facdl.org**
JUL	SATURDAY, OCTOBER 16, 2021 **EXECUTIVE COMMITTEE AND BOARD MEETING** Tampa
JUL	THURSDAY, JULY 14 - SUNDAY, JULY 17, 2022 **35TH ANNUAL MEETING** Fort Lauderdale • **www.facdl.org**
JUL	SUNDAY, JULY 17, 2022 **EXECUTIVE COMMITTEE AND BOARD MEETING** Fort Lauderdale

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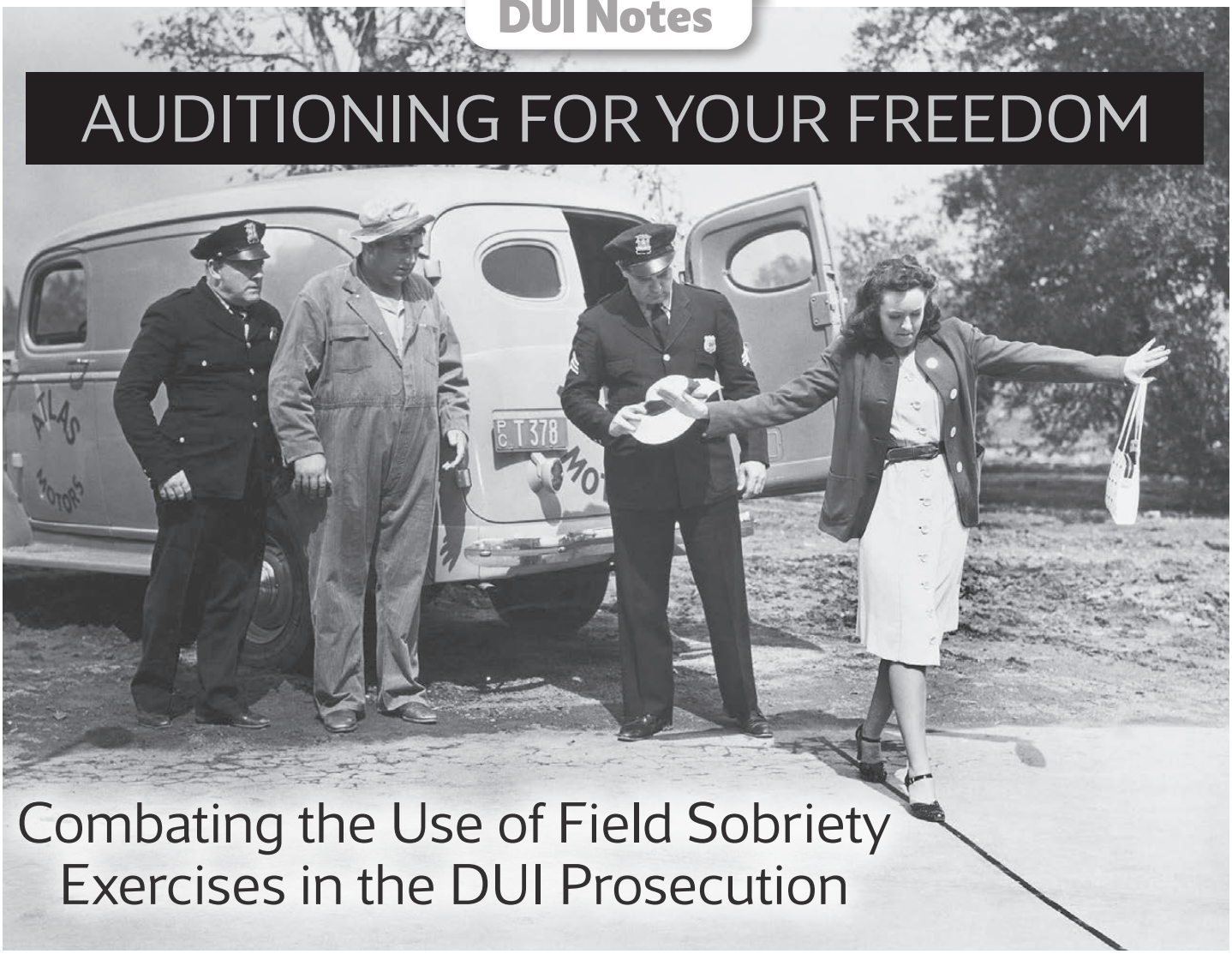
AUDITIONING FOR YOUR FREEDOM



Combating the Use of Field Sobriety Exercises in the DUI Prosecution

by Robert S. Reiff

A LOOK AT THE ORIGINS OF THE PHYSICAL SOBRIETY EXERCISES

Physical sobriety exercises have their origin in psychological and neurological testing, often administered to determine if a patient has suffered head trauma. *See* 1981 *An Assessment of Behavioral Tests to Detect Impaired Drivers* [DOT HS-806-211], citing to Thorndike, "Driver Skill and Safety" (1949) and *Duane's Clinical Ophthalmology*. Now, while consuming alcoholic beverages will not cause your client head trauma (unless they banged their head against the bars' walls), it may affect his or her ability to behave normally under the law. What is so unique about these sobriety exercises is that the police use them to gauge whether a DUI suspect is possessed of his or her normal faculties based upon their performance of what are truly abnormal tasks.

Why do I use the term abnormal? Well, if we saw someone walking down the street in a heel-to-toe manner, more likely than not, we would think he or she was, well, strange. If we saw that same individual balancing on one leg, the other leg six inches of the ground, we would similarly look twice at them. Still, these (highly?) unusual manners of walking and standing are the standard by which the police adjudge whether your client is DUI in order to arrest them (i.e., whether she has her mental and physical faculties intact).

You may even ask the officer how well your client performed on the walk and turn exercise when she applied for her driver's license. The officer will undoubtedly look at you with a blank stare because the answer is that you do not have to be able to perform such exercises to obtain a driver's license in this or any state!

Beginning in late 1975, research studies were sponsored by the National Highway Traffic Safety Administration [hereafter referred to as NHTSA] through a contract with the Southern California Research Institute [hereafter referred to as SCRI] to determine whether and, if so, which roadside field sobriety exercises were the most accurate. SCRI traveled to law enforcement agencies throughout the United States (but not to neurologist's offices) to select the most commonly used exercises. So they started their investigative process

by reviewing the many various exercises administered by different police officers and culling them down to "15-20 exercises that we thought might work."[1] Take a moment to think about that. They observed the literally hundreds of tests that police officers had come up with, they culled through them, and they picked the three best tests that police officers had come up with!

While scientists and doctors routinely scoff at the testing methods they used,[2] SCRI's research indicated that three of these tests, when administered in a standardized manner, were an accurate and reliable battery of exercises for distinguishing blood alcohol content above the legal limit.[3]

After setting forth extensive criteria for administering and evaluating the exercises,[4] NHTSA concluded, importantly, that the reliability, and hence, the admissibility, of sobriety exercise evidence, depended upon the manner in which they were administered:

> **IT IS NECESSARY TO EMPHASIZE THIS VALIDATION APPLIES ONLY WHEN:**
> - **THE TESTS ARE ADMINISTERED IN THE PRESCRIBED, STANDARDIZED MANNER**
> - **THE STANDARDIZED CLUES ARE USED TO ASSESS THE SUSPECT'S PERFORMANCE**
> - **THE STANDARDIZED CRITERIA ARE EMPLOYED TO INTERPRET THAT PERFORMANCE.**
>
> **IF ANY ONE OF THE STANDARDIZED FIELD SOBRIETY TEST ELEMENTS IS CHANGED, THE VALIDITY IS COMPROMISED.**[5]

One of these studies was co-authored by Dr. Marcelline Burns, Ph.D.,[6] and sanctioned by the State of Florida Department of Transportation and the Institute of Police Technology and Management. In her study, Dr. Burns noted that during the early years of the use of sobriety exercises to determine impairment, legal challenges were relatively infrequent, but now, as then, objections Atypically focus on test validity and reliability.[7]

Dr. Burns did not question that sobriety exercises, when properly administered, "not only aid police officers in meeting their responsibility to remove alcohol-impaired drivers from the roadway, they also protect the rights of the unimpaired driver."[8] Dr. Burns noted that "if it can be shown that officers' reliance on the tests is misplaced, causing them frequently to err, then… the officers, the courts, and the driving public need to be aware that the tests are not valid and that DUI laws are not being properly enforced."[9] Dr. Burns reiterated her position in a sworn statement taken shortly thereafter:

> If you don't give the instructions properly, you don't tell them to leave their arms at their side, count their steps out loud, take nine steps, et. cetera, those are critical because the nature of the task requires them to assume the stance on the line, to stand in that position while they're given instructions, and the ability to understand and follow the instructions is part of the test. So, if they don't do that, that's important. And then whether or not the results have as much meaning as you would like them to becomes problematic.[10]

The problem is that, to my knowledge, no courts other than those in Ohio have held that in order for the results of a field sobriety exercise to serve as evidence of probable cause to arrest, or to be admitted at trial, the police must have administered the exercise in strict compliance with the very standardized testing procedures that NHTSA created to ensure the accuracy of the testing procedures.[11] So SCRI says "these are the tests you can use but only if they are administered in a standardized manner," and then that standardization does not matter (or as judges like to say, "it goes to the weight of the evidence, not the admissibility.").

It is also important to examine the difference in the terminology used by NHTSA over the years. In 1983, NHTSA noted in their training manuals that "[s]ome people have difficulty with balance even when sober. The test criteria for Walk-and-Turn is not necessarily valid for suspects 60 years of age or older, person's with injuries to their legs, or persons with inner ear disorders."[12]

In 1995, NHTSA's revised manual again noted that A[s]ome people have difficulty with balance even when sober. However, without any explanation, the manual suddenly changed the age at which the test criteria for when the Walk-and-Turn exercise is not necessarily valid to Asuspects 65 years of age or older.@[13] Why the change in age? No explanation was given.

In 2000, the language apparently provided an explanation for this change, now stating that "[t]he original research indicated that individuals over 65 years of age, back, leg or middle ear problems had difficulty performing this [exercise]."[14] Except there is nothing in the studies conducted that justifies such a reclassification!

Similarly, NHTSA noted in its 1983 manual that "[s]ome people have difficulty with the One-Leg Stand even when sober. The test criteria for the One-Leg Stand is not necessarily valid for suspects 60 years of age or older, or 50 pounds or more overweight. Person's with injuries to their legs, or [with] inner ear disorders, may have difficulty with the [exercise]."[15]

In 1995, the manual was reworded to state that "[s]ome people have difficulty with the One-Leg Stand even when sober. The test criteria for the One-Leg Stand is not necessarily valid for suspects 65 years of age or older, or 50 pounds or more overweight. Person's with injuries to their legs, or [with] inner ear disorders, may have difficulty with the [exercise]."[16]

In 2002, the wording was even more radically altered, now noting that "[t]he original research indicated that certain individuals over 65 years of age, back, leg or middle ear problems, or people who are overweight by 50 or more pounds had difficulty performing this [exercise]."[17] Yet, for no reason other

than to forestall defense challenges, the language that "some people have difficulty performing this exercise even when sober" was removed.

AUDITIONING FOR THEIR FREEDOM

It is curious that in making their arrest determination, police officers believe that a citizen should be able to perform physical sobriety exercises under the extremely stressful and non-controlled settings in which they are usually performed in an audition for their freedom. It is also interesting that these suspects are often being asked to perform these exercises for the very first time.

Many years ago, my now-wife convinced me that we should take a few dance lessons at the local Arthur Murray studio in preparation for our wedding dance. "Yes, dear," I responded in a line repeated many times over 36 years of marriage. The thing is, I never could seem to ever get those dance steps right. Whether it was my large (6'4") stature or some other unknown reason, I probably looked like a giraffe trying to dance on the Serengeti (stop and try visualizing that for a moment). Aren't the field sobriety exercises on the side of that uneven roadway nothing more than a dance lesson on the roadway? And, as those of us who have been subjected to episodes of Dancing with the Stars can tell you, even with practice, some people never seem to get it right!

THE FIRST TIME IS THE WORST TIME

In fact, one of my favorite cross-examination techniques with regard to field sobriety exercises involves something I like to call the "baseball analogy."

Q: Officer, have you ever played baseball?
A: Yes, of course.
Q: The very first time you swung that bat, did you hit a home run?
A: Probably not.
Q: Chances are, you missed the ball entirely the first time you swung at that ball because it was your first attempt at that physical task.
A: That is probably correct.
Q: The exercises you offered to John Q. Public are physical tasks, are they not?
A: That is true.
Q: To your knowledge, this was the first time he was ever asked to perform these types of physical tasks.
A: To my knowledge, yes.
Q: Therefore, you cannot exclude the possibility that he would have performed these tasks much better if he had the opportunity to practice; in order for him to familiarize himself with these tasks?
A: No, I cannot.

One of the problems with these exercises is that even though the officers are warned that "certain individuals over 65 years of age, [or people with] back, leg or middle ear problems, or people who are overweight by 50 or more pounds [have trouble performing these exercises],"[18] the exercises are a "one size fits all" approach to the problem. Very simply put, you cannot judge a 20-year-old gymnast the same as a 50-year-old "weekend warrior!" They do not respond the same way to physical challenges, to pressure, to nervousness, to the ability to perform physical tasks.

When professional athletes begin their careers, they are tested, re-tested and monitored. For those involved in violent sports where head injuries may ensue, "baseline" tests are conducted to determine their physical, mental and medical starting point. No such baseline tests are administered to the general public, and the police certainly do not know if the suspect can perform these exercises at any time, under any circumstances.

And do you exercise in dress shoes or a suit? When I exercise, I bring the proper exercise equipment for the particular sport. If the exercise involves ice hockey, I bring my ice hockey bag with my ice skates. If I am going to weight train, I bring special weight training support sneakers. If I am playing softball, I bring a pair of softball cleats. But no matter the type of exercise, I am not performing them in my dress shoes! Yet, when performing these exercises in the street, or on the sidewalk, your client is almost always performing them in dress shoes! Wouldn't we quite reasonably expect that the "performance" of exercises under such circumstances might be compromised by the type of footwear being worn?

Occasionally, I will have an older police officer who has handled his share of DUI cases from the early days when the standardized field sobriety testing was not routinely followed by his department. In reminiscing about the old days, I will mention some of the long since discarded field sobriety exercises that he may have administered early in his career, such as throwing coins on the ground. After I have gotten the officer to admit that such exercises were determined to be an inaccurate gauge of an individual's sobriety, I ask how many letters of apology the officer later wrote? When they look at me quizzically, I asked how many letters of apology were sent to those who were erroneously arrested based upon these now-discarded exercises. The answer is none, of course. Which opens up the follow-up question: can you guarantee that the exercises administered today will not be discarded as inaccurate 10 years from now?

INJURIES, ILLNESSES AND MEDICAL CONDITIONS THAT MAY IMPAIR AN INDIVIDUAL'S ABILITY TO PERFORM SUCH EXERCISES

Most officers do not even ask the suspect if they have ever suffered any type of injury that might impair their ability to perform the exercises. The few that do often ask the wrong question, asking the subject if Athere is anything that would prevent you from performing these exercises? The problem with that question is that the officer should not be attempting to determine if your client is unable to perform the exercises, he should be attempting to determine if their performance will be affected by factors unrelated to whether they are under the influence of alcohol or controlled substances.

Timing is another important aspect

of the investigation. Asking the subject if "there is anything that would prevent you from performing these exercises" before telling them what the instructions are, or what they are going to be asked to do, will often not illicit a proper response. For some reason, police officers don't seem to understand that to the average citizen, speaking up about their medical problems, while on the side of the roadway, to a uniformed and armed officer is an unlikely thing. This is the reason that we all don't win a million dollars on game shows such as *Jeopardy*; when under pressure, most people will forget to provide important details or will freeze up, even if it concerns important matters.

How many times have you had a stressful situation arise, let's say in a motion or trial, and you then wished, afterwards, that you said or did something different? How can it be reasonably expected that I know that the leg I broke way back when I was in high school would impair my ability to perform a One-Leg Stand exercise? Certainly a recent injury may come to your mind. But recent injuries are not the only ones that would impair your performance of the exercises. A test which relies on a suspect's self-diagnosis of what may affect her performance is often not an accurate one.

We don't have to look at sporting event (although it never hurts to remind the judge and jury of this fact) to know that nervousness will affect someone=s performance of such exercises. The fact that a person suspected by the police of committing a criminal offense is nervous, a given under such circumstances, has to affect their performance of these exercises. Yet, this is often not factored into the officer's evaluation of them. In a society where it has been said that death is less feared than public speaking, how can we not consider this fear factor?

DON'T OVERLOOK THE MENTAL CASE

A police officer's opinion that your client did not properly perform one or a series of physical sobriety exercises is critical to the prosecution's sustaining its burden of proof, especially in an impairment case. However, the most overlooked area of the roadside exercises involves the mental aspect of it. The ability to follow instructions is seen as a very important indicator of whether someone is under the influence of alcohol.[19] Yet most officers and attorneys do not pay attention to the suspect's mental faculties.

It is in this aspect of the case that it is important to understand the dichotomy between the physical and mental faculties of an individual and use it to your advantage. Particularly where there is not a specific note in any police report as to your client's inability to follow the instructions for the exercises, have the officer repeat the litany of directions he or she ordered your client to perform. Make note of each direction given, systematically going over each instruction, and elicit how your client performed each instructive (mental) task as instructed. Thereafter, have the officer agree that although the suspect may have been unable to perform certain physical portions of the exercises, she was able to follow each and every instruction in an attempt to do so nonetheless.

Most officers will concede that field sobriety exercises are also known as divided attention tasks, and that the mental aspects are weighed as heavily as the physical. You may even be able to get the officer to admit that the defendant had her normal mental faculties, even though her physical performance of the exercises may have been lacking!

READ THE MANUALS, LEARN THE MANUALS, LIVE THE MANUALS

Remember, a sway is not always a sway, so to speak. Know when your client's actions do not equal the improper performance of the exercise by obtaining local and national guidelines for these exercises.[20]

You may learn, as I did, that a sway of up to two inches is acceptable for the Romberg balance exercise or that moving your arms up to 6 inches from your body is acceptable for the balance, walk and turn or one-leg stand exercises.[21]

You should know that "[t]he Walk-and-Turn [Exercise] requires a designated straight line…"[22] Knowing what is permitted, and what the officer should instruct your client to do (in case they do it wrong), is very important!

SHOULD POLICE OFFICERS BE ALLOWED TO CALL THESE EXERCISES TESTS, OR TO GIVE THEIR OPINION CONCERNING WHETHER THE DEFENDANT WAS DUI?

I am of the opinion that you should always petition the court to enter an order in limine to preclude the prosecution's witnesses from calling the field sobriety exercises tests, or from allowing the witnesses, especially police officers, from giving their opinion concerning a defendant's alleged impairment.

"Impairment of the driver's normal faculties' is [a] critical determination in a DUI prosecution."[23] This is particularly true where the officer's probable cause determination to arrest (which is a much lower standard than "beyond a reasonable doubt" to convict) a DUI defendant is based predominantly upon his or her performance of the physical sobriety exercises.

In *State v. Meador*, the defendant challenged the admissibility of his performance of the physical sobriety exercises administered because they lacked scientific reliability and probative value of impairment and, alternatively, were otherwise highly prejudicial.

After reviewing myriad scientific data and precedent from across the country, and hearing from experts in the field, the court determined that "[i]t is entirely appropriate for the jury to consider the simply physical tasks which comprise the field-sobriety tests."[24] This is because "[j]urors do not require any special expertise to interpret performance of these tasks."[25]

Therefore, the court found that "evidence of the police officer's observations of the results of the defendant's

performing the walk-and-turn test, the one-legged stand test, the balance test and the finger-to-nose test should be treated no differently than testimony of lay witnesses (officers, in this case) concerning their observations about the driver's conduct and appearance…. The police officer's observations of the field sobriety exercises, other than the HGN test, should be placed in the same category as other commonly understood signs of impairment, such as glassy or bloodshot eyes, slurred speech, staggering, flushed face, labile emotions, odor of alcohol or driving patterns."[26] The defendant's argument that the utterly unusual exercises did not test his Anormal faculties was deemed to go to "the weight of the evidence and not its admissibility."[27]

However, because of the significance a jury may attach to police officers' testimony, in particular an officer's lay observation as to signs of impairment in a DUI case, the court limited such testimony in two important respects.[28] First, the court precluded any reference to the sobriety exercises by using terms such as "test, pass, fail, or points, because they create] a potential for enhancing the significance of the observations in relationship to the ultimate determination of impairment, as such terms give these layperson observations an aura of scientific validity. Therefore, such terms should be avoided to minimize the danger that the jury will attach greater significance to the results of the field sobriety exercises than to other lay observations of impairment."[29] Second, the court limited the officers' testimony in another significant respect as well.

> While the psychomotor tests are admissible, we agree with defendants that any attempt to attach significance to defendants' performance of these exercises beyond that attributable to any of the other observations of a defendant's arrest could be misleading to the jury and thus tip the scales so that the danger of unfair prejudice would outweigh its probative value.[30]
>
> Therefore, [t]he likelihood of unfair prejudice does not outweigh the probative value as long as the witnesses simply describe their observations…. As long as the testimony by the officers is restricted to lay observations…the probative value of the psychomotor testing is not outweighed by the danger of unfair prejudice.[31]

In sum, the court held that officers are to be prevented from testifying as to their ultimate opinion that a DUI defendant is impaired based upon any of the investigation conducted, for such lay testimony invades the jury's province with misleading, scientific-appearing, but unscientific information.[32] Testimony concerning the results of field sobriety exercises are thus to be treated as lay observations of intoxication and not as "scientific evidence of impairment."[33]

By the same token, no officer should be permitted to testify as to his or her opinion that a defendant was impaired or "under the influence to the extent that his normal faculties are impaired. Such lay testimony beyond mere observations will impart precisely the same danger of unfair evidence upon and present the same aura of scientific reliability to the jury as that precluded in *Meador* as the ultimate determination of impairment is the jury's alone.[34]

The proper use of words and phrases can be crucial to the defense of your client. Begin using the proper verbiage before you ever meet the jury panel, and try to indoctrinate the judge to get him or her to use these words and phrases as well. The following are some of the terms that you should (and should not) be using:

- *Exercises*, not tests
- *Performance of the exercises*, not took the tests.
- Permitted to administer exercises and/or the breath tests, not that the officer is certified to administer field sobriety exercises. In most cases, the only formal training the officer received in handling DUI cases took place at the police academy during his initial training, a 40-hour course during a several month training period. Some officers also receive a permit to administer breath tests, but they are not certified to do so.
- The officer made the determination that *probable cause* existed to make an arrest, not that they determined that the defendant was impaired (or guilty or intoxicated).
- That the officer *assumed* certain things (such as the ability to balance on one leg for 30 seconds under any circumstances) to be true.
- That the officer *ignored* certain things (such as the fact that your client had a bad knee).
- That the officer *failed* (to ensure accurate examination; to ask about medical limitations that the person may have).
- That the officer *attempted* to administer these exercises on a roadway graded for drainage at night.

And make sure that you do not allow the officer to claim that he is certified to administer field sobriety exercises;[35] usually, the only training the officer received in handling DUI cases took place at the police academy during his initial training.

HAS ANYONE EVER PASSED THE OFFICER'S TESTS?

Did you know that, at last count, there are 93 possible clues for the walk-and-turn exercise? Or that there are 151 possible clues for the one-leg-stand exercise? So if the officer claims that your client failed the exercises because he exhibited five clues for the Walk & Turn, or six clues for the One Leg Stand, isn't the officer mis grading them (especially under the Areasonable doubt grading system)? Does the officer give the suspect credit for the portions of the exercise they performed correctly? And how can their grading system be fair if they don't tell them what passing is? Pretrial, determine if the officer has ever stopped a person suspected of being intoxicated, admin-

istrated to them sobriety exercises and then determined that she was *not* DUI.[36] This will work to your advantage either way. Not only will it establish that people drive erratically and then are determined not to be DUI after performing these subjective exercises, but if the officer says that it has *never* happened to him, it shows that he is not fairly evaluating whether your client is impaired but instead merely gathering evidence.

ONE FINAL POINT: THE HORIZONTAL GAZE NYSTAGMUS TEST AS ADMINISTERED BY POLICE OFFICERS

Scientists and medical experts scoff at the use of these field sobriety tests, exercises or whatever you call them. When I told my neurologist when he was evaluating me at his office that he was asking me to perform the same tests that police officers used to supposedly detect impaired drivers, he could only mutter under his breath something about police science being an oxymoron (or he called the police morons; I'm not sure).

Ophthalmologists will tell you that the book *Duane's Clinical Ophthalmology* is their training bible. So what does the bible of ophthalmology think about police officers attempting to use the horizontal gaze nystagmus test to determine alcohol impairment? Well, let's see:

> Unfortunately, that alcohol can produce horizontal gaze-evoked nystagmus has led to a 'roadside sobriety' test conducted by law-enforcement officers. Nystagmus as an indicator of alcohol intoxication is fraught with extraordinary pitfalls; many normal individuals have physiologic end-point nystagmus; small doses of tranquilizers that wouldn't interfere with driving ability can produce nystagmus, nystagmus may be congenital or consequent to structural neurologic disease; and often a neuro-ophthalmologist or sophisticated oculographer is required to determine whether nystagmus is pathologic.
>
> *Duane's Clinical Ophthalmology* (Updated July 01, 2013), chapter 11 at p. 2 (emphasis added). 🏛

[1] From the April 17, 1998, testimony of Marcelline Burns, Ph.D., in an examination under oath she gave in Los Angeles, California to noted DUI defense attorney Bruce Kapsack, at pp. 10-14 (hereafter referred to as "Burns Deposition").

[2] See, eg. "Crying Wolf: What Never Before Published Data Proves About Standardized Field Sobriety Tests," *Trial Talk* (August/September 2018).

[3] See "Concepts and Principles of the Standardized Field Sobriety Tests," from NHTSA's *DWI Detection and Standardized Field Sobriety Testing Participant Manual* (Participant Manual) (2000).

[4] *Id*. at VIII-1-3.

[5] *Id*. at VIII-3 (emphasis and capitalization as originally supplied). Interestingly, while the SCRI placed such emphasis on the need to administer these exercises in a standardized manner (or their validity would be compromised), beginning with the release of their 2004, this language was curiously removed from all NHTSA training manuals. See *DWI (Driving While Intoxicated) Detection & Standardized Field Sobriety Testing Manual*. This of course leads me to wonder why something that was so important for them to post in bold and all capital letters would be eliminated from consideration entirely.

[6] See *A Florida Validation Study of the Standardized Field Sobriety Test (S.F.S.T.) Battery* [hereafter referred to as "Validation Study"], co-authored with Pinellas County Sheriff's Office Sergeant Teresa Dioquino. Dr. Burns is a clinical psychologist and founder and a director of the SCRI, to whom NHTSA turned for its primary research. Indeed, Dr. Burns was one of the supervisors of the 1977 and 1981 NHTSA studies. *State v. Meador*, 674 So.2d at 829. In addition to the Florida validation study, Dr. Burns co-authored the Colorado validation study and has testified in numerous states on the subject of field sobriety tests.

[7] Validation Study at p. 3.

[8] *Id*. at p. 6.

[9] *Id*. at p. 5.

[10] Burns Deposition at pp. 32-33.

[11] See *State v. Homan*, 732 N.E.2d 952 (Ohio), reconsideration denied, 736 N.E.2d 27 (Ohio 2000). And cf. *State v. Meador*, 674 So.2d 826, 830 (Fla. 4th DCA 1996).

[12] 1983 Field Sobriety Testing Manual at p. VIII-21 (emphasis added).

[13] 1995 Manual at p. VIII-21 (emphasis added).

[14] 2000 Manual at p. VIII-12 (emphasis added). The 2002 manual stated the same.

[15] 1983 Field Sobriety Testing Manual at p. VIII-25 (emphasis added).

[16] 1995 Manual at p. VIII-25 (emphasis added).

[17] 15 2000 Manual at p. VIII-14 (emphasis added). The 2002 manual stated the same.

[18] See U.S. Department of Transportation, National Highway Traffic Safety Administration, Standardized Field Sobriety Testing Student Manual (2002), at p. VIII-11 & 14.

[19] See U.S. Department of Transportation, National Highway Traffic Safety Administration, Improved Sobriety Testing, at p. 2. See also Florida Highway Patrol Improved Sobriety Testing; and State of Florida, Department of Highway Safety and Motor Vehicles, Standardized Field Sobriety Testing – Screening Procedures.

[20] See www.nhtsa.gov/standardized-field-sobriety-test-training-downloads.

[21] See Florida Standardized Field Sobriety Testing Screening Procedures Manual at pp. 25, 26 and 28.

[22] See NHTSA Standardized Field Sobriety Testing Student Manual (2002) at p. VIII-11 (emphasis added).

[23] *State v. Meador*, 674 So.2d 826, 830 (Fla. 4th DCA 1996).

[24] *Id*. at 831, quoting *People v. Sides*, 556 N.E.2d 778, 779-80 (Ill. App. 3d 1990). See also *State v. Ferrer*, 2000 WL 310294 (Haw. App.) (officer may not state their conclusion that a subject "failed" the field sobriety exercises); *State v. Ybanez*, 1 FLW Supp. 547 (Fla. St. Johns County Ct. 1993) (sobriety exercises are not scientific tests); *State v. Thompson*, 1 FLW Supp. 463 (Fla. Polk County Ct. 1993) ("[the] ordinary experiences of jurors will allow them to examine th[e] evidence and make a proper determination as to whether or not the defendant is impaired").

[25] *Meador* at 831.

[26] *Id*. at 831-32 (emphasis added). The court declined to extend its analysis to the horizontal gaze nystagmus exercise, finding that it should not be admitted as a lay observation of intoxication "because HGN constitutes scientific evidence." *Id*. at 836.

[27] *Id*. at 832.

[28] The court also felt it necessary to limit the officers' testimony in light of the fact that the studies it reviewed "revealed that there is no reliable numerical correlation between performance on the field sobriety tests and breath alcohol concentration, let alone impairment." *Id*. at 832. While sobriety exercises may tend to increase the accuracy of the decision-making process, "[w]hat the studies do not show… is that the tasks have any enhanced scientific reliability not readily observable by the average lay person. Further, the tests' flaws prevent the State from accurately quantifying the relevancy of the tasks." *Id*.

[29] *Id*. at 833 (citations omitted).

[30] *Id*. at 832.

[31] *Id*. (emphasis added). The court also noted that "[c]ertainly in an individual case, depending on the totality of the facts and the nature of the testimony, a trial court might very well be within its discretion to exclude such evidence pursuant to section 90.403." *Id*. at 832.

[32] In so ruling, the court implicitly overruled *City of Orlando v. Newell*, 232 So.2d 413 (Fla. 4th DCA 1970), which had permitted officers to testify not only as to their "observations of a defendant's acts, conduct, appearance and statements, but also to give opinion testimony of impaired based on their observations." *Meador* at 831. And see *Jones v. State*, 95 So.3d 426 (Fla. 4th DCA 2012) (officer's subjective interpretations of defendant's statements, while not an ultimate opinion regarding guilt, still improperly bolstered the prosecution's case); *McKeon v. State*, 16 So.3d 247 (Fla. 4th DCA

2009) (improper for arresting officer to state that he only arrests half of the DUI suspects that he investigates; conviction reversed).

[33] *Id.* at 831 (emphasis added).

[34] In fact, any opinion rendered by the officer would necessarily be based mostly, if not solely, upon his or her observations of the defendant during the administration of the field sobriety exercises. See *Martinez v. State*, 761 So.2d 1074, 1078-1081 (Fla. 2000) (a witness' opinion as to the guilt or innocence of the accused is not admissible); *Sosa-Valdez v. State*, 785 So.2d 633 (Fla. 3d DCA 2001) (by testifying that the victim was not involved in some sort of setup, the officer was in effect saying that the defendants were guilty); *Rivera v. State*, 807 So.2d 721 (Fla. 3d DCA 2002) (conviction reversed because of police officer's testimony that he was one hundred percent sure that he got the right guy).

[35] See *Sheppard v. State*, 2014 Fla. LEXIS 2717.

[36] And see *McKeon v. State*, 16 So.3d 247 (Fla. 4th DCA 2009) (improper for arresting officer to state that he only arrests half of the DUI suspects that he investigates; conviction reversed).

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PRESIDENT • from page 6

one county because he or she is in court in another county or it is asking for a memo of law, caselaw or advise concerning a legal issue, FACDL members help each other like lawyers in a big firm.

There is no question that many times in multi-defendant cases we flip our clients on each other's clients. There are times we point the finger at each other's clients in trial as the true culprit or at least the main culprit. There are times that we consult with the same potential client in an effort to get that business for ourselves. We represent our client's interests over others, we compete for business, and we compete for results. However, that does not mean we cannot help each other out when needed. But, covering cases for each other and providing sample motions, memos of law or caselaw are only a small part of how FACDL helps the criminal defense bar. What you may not realize is that FACDL is doing a lot more for you and your practice than you may know.

LEGISLATION

We have a Legislative Committee chaired this year by **Russell Smith** and **Aaron Wayt** and we have a lobbyist—**Jorge Chamizo**, with Floridian Partners. FACDL tracks what laws are being proposed to determine what effect the law will have on the criminal justice system. If something needs to be challenged, amended or addressed we are there on the front lines. Additionally, we support legislation that can have a positive impact on the criminal justice system. We also craft and propose legislation. This year we are working on a bill that could make recording interrogations a law enforcement requirement. When the goal is transparency in the criminal justice system relying on note taking is antiquated. If this is successful, no jury will have to question if our clients confessed or not. That is just one example of how FACDL represents the interests of the criminal defense bar in Tallahassee and Washington.

APPEALS

FACDL has an Amicus Committee, chaired by **Diana Johnson**. FACDL has submitted briefs on various subjects and issues. We filed a brief successfully challenging the unlawful sneak and peak search warrants in a mass surveillance case. We submitted amicus briefs concerning Felon's Voting Rights, Juvenile Minimum Mandatory Sentencing, Juvenile Life without Parole, the Confrontation Clause and supported motions in the trial court concerning Virtual Probation Violation Hearings. When a request is made to support or oppose an issue important to our practice, FACDL responds. That type of support can and sometimes does make a difference.

EDUCATION

We have a Continuing legal Education Committee chaired by **Sabrina Puglisi**. In years past, FACDL regularly produced a seminar at The Annual Meeting, Blood Breath and Tears, Board Certification and Death is Different. This year COVID threw us a curveball. Board Certification and the Annual Meeting seminars were lined up and ready to go when everything shut down. We missed those because we could not go live, but the CLE committee was tasked with coming up with alternatives to provide education to our membership. They met the challenge and FACDL has so far produced a variety of interesting and informative virtual web based live seminars. BBT has successfully been transitioned to Zoom-based and a lunch and learn virtual series will take us into 2021.

PUBLICITY

We have a Communications Committee chaired by **Teri Sopp**. This committee has worked overtime identifying current events and issues relevant to criminal justice that FACDL has weighed in with press releases and public statements. As a result, FACDL has been quoted and featured in local, state and national media concerning our positions on a variety of subjects. We publicly supported the removal of a mural from the Baker County Courthouse containing an image of the Ku Klux Klan as a romanticized symbol of law and order. We have

publicly come out against a law requiring convicted felons to pay off fines and fees, even if they have no financial ability to do so, in order to vote. We have publicly stated our concern about campaign literature vilifying a candidate because he practices criminal defense. We most recently publicly opposed the Governor's proposed unconstitutional laws concerning protests. In a few short months FACDL's voice is being heard thanks to the work of this newly designed committee.

CRIMINAL JUSTICE RULES

We have a Rules Committee chaired by **Gene Mitchell** that identifies, analyzes and responds to proposed rules changes that affect the practice of criminal law. Recently, this committee joined with other organizations to respond to a proposed change that would have gutted the speedy trial rights of the accused. In the end, the proposed changes were not made. FACDL was also made aware of an attack on discovery depositions in felony cases. We were prepared to respond had it been necessary thanks to the work of this committee. Fortunately, that did not happen, but we expect these and other proposed changes that affect the criminal justice system and our practices will arise again. When they do FACDL will be ready to respond.

EMERGENCIES

No one thought a pandemic would reach our shores and shut down our practices, but it happened and when it did FACDL responded. We have a COVID Committee chaired by **Jude Faccidomo**. This committee initially provided education on Payroll Protection, courthouse closures and other issues pertaining to our practices in the early days of the pandemic. More recently, this committee drafted a public policy statement that expressed FACDL's position against any effort to roll the wheels of justice over the rights of the accused. That policy statement was attached to several individual member's motions in an effort to prevent criminal jury trials from being conducted before courthouses could be safely reopened. The committee is currently representing our interests against a decision to try to conduct Zoom-based probation violation hearings for incarcerated clients.

These are just some of the examples of what FACDL does for the criminal defense bar. Of course, any lawyer may be able to successfully fight a battle on their own. However, without an organization to support them, chances are they will not be able to wage an effective prolonged campaign. There is no question that organizational support increases the chances of success.

While representing the interests of all criminal defense lawyers is important, FACDL also responds when our members need help individually. We have a Strike Force committee chaired by **Donnie Murell**. This committee is there for members who are being unfairly targeted based on their practice of law. Most recently, when the JAC was unreasonably challenging **Tania Alavi**'s billing for her work on court appointed death penalty cases, we set up a conference call to help. FACDL assisted with strategy and suggestions for her response. In the end, the effort established the bills were legitimate and they actually owed her money.

I bring all of this up to show how FACDL is vital to your practice. However, we need you as much as you need FACDL. The more members we have, the more effective we can be.

That is why we have a Long Range Planning Committee chaired by **Jeff Harris** and **Barry Wax** and a Chapter and Membership Development and Diversity Committee chaired by **Samantha Vacciana** and **Anne Marie Rizzo**. They are conducting meetings with local chapters to encourage members to join the statewide organization to increase membership which will in turn make FACDL more effective in promoting and protecting the interests of criminal defense lawyers and their practices.

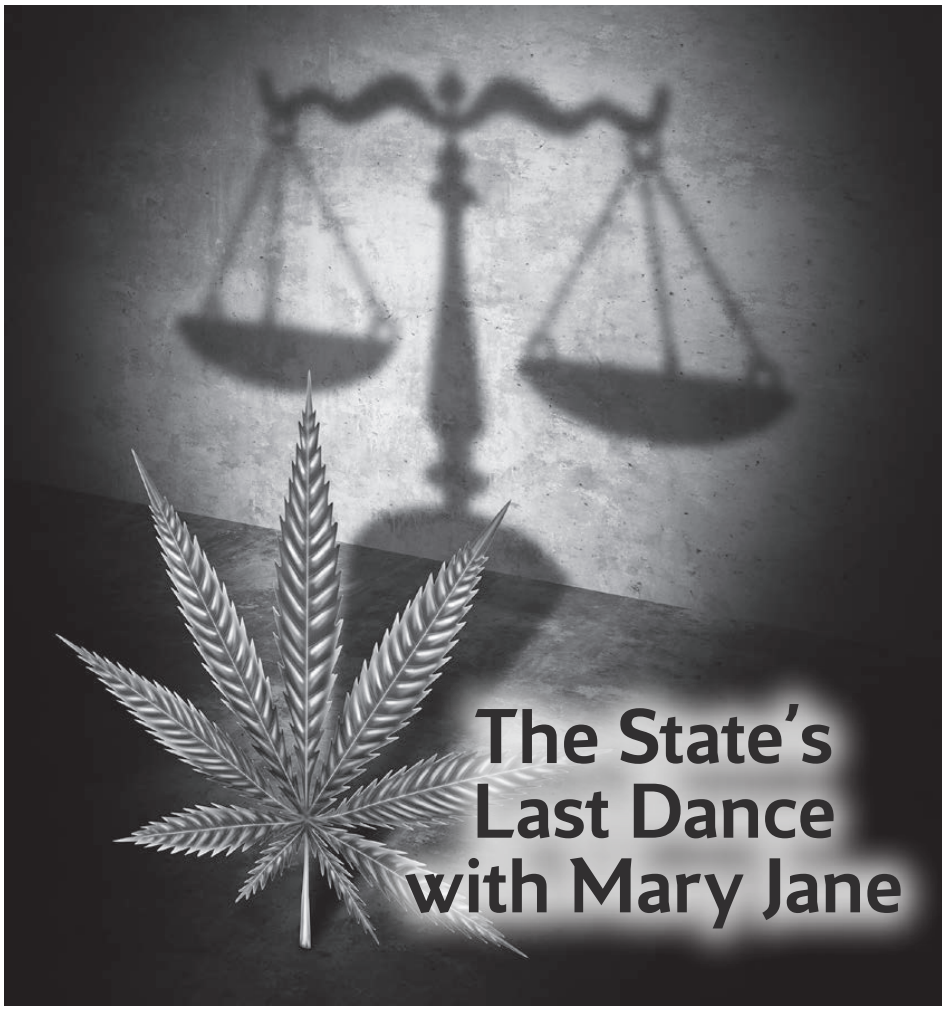
We encourage you to join. In addition to the above, the benefits are numerous. Our website, which is run by our Executive Director **Becky Barlow**, is extremely helpful for members. If you need someone from another county to help you with a case, you can go to FACDL.org to find a lawyer from that area of the state to assist you. If you are in trial and need some help with an issue you can send out an email and someone will respond. There are FACDL.org on-line communities relating to DUI, Federal practice, Death Penalty work and others that can provide information to you at the click of a mouse. Also, The *Florida Defender* magazine that you are reading thanks to Editor **Ernie Chang**, provides articles that contain a wealth of information.

Not only that, but we do have social events where you can enjoy congregating with people who understand what you do and why you do it. Come to the Annual Meeting next year. Most big firms have retreats for their lawyers. They get together at resorts and play golf, tennis, volleyball and other activities. They hang out at the pool together with their families. They have drinks and dinner and attend banquets. Some even close the hotel bars before riding the elevator to their rooms. Well, so do we.

Just because you are a solo practitioner does not mean you cannot enjoy that type of camaraderie. Our Annual Meeting is a convention of Florida criminal defense lawyers that takes place over a long weekend. It is a fun social event and the relationships it fosters will help build your practice with the referrals that will come. Attending also has a way of recharging your batteries so that when you return to your practice you are more effective as a lawyer.

Let's face it, practicing criminal defense can be stressful and difficult. There is no need to go it alone. FACDL is your big firm, so get off the island and join us on the continent. We want you in our ranks. Together we will have a louder voice and you will most certainly enjoy the benefits FACDL provides. 🏛

MITCH STONE is President of FACDL. He is board certified in criminal trial law since 1999. His firm, Mitchell A. Stone, P.A., is located at 1830 Atlantic Blvd., Jacksonville, FL 32207. Reach him at (904) 396-3335 ornmitch@jacksonvilledefense.com.



The State's Last Dance with Mary Jane

by Fan Li

Bipartisan commercial interest in the cannabis industry has led to seismic changes in the legal landscape, particularly in the criminal context. Yet, prosecutors and judges continue to rely on outdated case law, so it is up to us to enforce the new statutes and change deeply ingrained police practice.

Given Florida's 2016 constitutional amendment to legalize medical marijuana and the July 2019 legislation to legalize hemp, the law effectively disarmed patrol officers of their favorite tool for justifying an illegal search: the mere claim of marijuana odor. While Florida courts have yet to address the issue head-on, especially since the legalization of hemp, the more astute State Attorneys and Police Departments have issued memoranda conceding that the odor of marijuana alone no longer provides probable cause, because the legal and illegal substances are indistinguishable by odor.

But that's all old news (and if not, feel free to email me for a more detailed analysis). The intent behind this piece is to advance our position even further. The run-of-the-mill prosecution of a marijuana case — be it simple possession or drug trafficking — may now be subject to a Judgement of Acquittal motion based on the new definition of "cannabis."

THE NEW LAW

Under Fla. Stat. 893.02, the definition of what is illegal now expressly excludes three different substances, each derived from a separate cannabis legislation:

- Medical marijuana as defined by Fla. Stat. 381.986(1)(f).
- Hemp as defined in Fla. Stat. 581.217 or industrial hemp as defined in Fla. Stat. 1004.4473.
- Drugs derived from cannabis that adheres to the requirements of Fla. Stat. 893.03(5)(d).

To survive our motion for judgment of acquittal, the State would have to disprove each of these.

THE THROWBACK

While the prosecution may be tempted to view these as affirmative defenses, case law disagrees. Back in 1978, when possession of over five grams of marijuana was a third-degree felony, the Florida Supreme Court addressed this very issue of what makes an element vs. an affirmative defense in this very statute. In *Purifoy v. State*, 359 So.2d 446 (1978), the appellant argued that, since the definition of "cannabis" expressly excluded the mature stalks of the plant, the State needed but failed to prove that the contraband weighed over five grams once the stalks were parsed out. The Court agreed. Rejecting the State's argument that the exclusion of stalks was an affirmative defense, the Court contrasted the exclusionary clause in the definition section of 893.02 with the "Exceptions" section of 893.08, and provided the following gem:

> "Implicit in our decision was a construction of the statute which would limit exemptions from the law to those enumerated expressly, *in contrast to definitional matters which establish the essential elements of a crime*…. The parts of the cannabis plant listed in the second sentence of Section 893.02(2), which include "the mature stalks of the plant," are *by definition not prohibited substances*. In order to obtain a felony conviction, then, the state has the burden of proving that the quantity found in the defendant's possession exceeds five grams after all excluded matter has been removed. [Emphasis added]

Id. at 448-49.

This rationale squarely applies to the newest iteration of 893.02. Therefore, the trial court must treat today's exclusionary clauses in the definition section as elements, not affirmative defenses. Unless the State has admitted sufficient evidence to prove that your client's substance does not fall into the three protected categories in 893.02(3), the trial court must grant the motion for Judgement of Acquittal.

THE HOBBLE

My octogenarian grandparents on iPads constantly remind me that the saying about old horses and new tricks isn't true. I do not doubt that prosecutors will evolve as we do, just like I anticipate the police to invent new "indicia of criminality" to justify their searches (perhaps taken verbatim from the enumerated list on one of the State Attorneys' memoranda). But the new legal scheme around cannabis comes with an inherent hobble for the State.

First, the State must have the equipment to distinguish hemp from marijuana, which requires tools that can reliably test the THC content in the evidence. Gone are the days when a drug detective can simply testify to the nature of a plant matter based on his training and experience.

But, even if those tools were procured, the State must still call a live witness from each of the relevant governing agencies in order to prove that a defendant was unlicensed for marijuana possession or cultivation. Else it runs afoul of the Confrontation Clause. In 2009 the 4th DCA relied on a U.S. Supreme Court case from the same year, *Melendez-Diaz v. Massachusetts*, 557 U.S. 305 (2009), to rule that a certificate of non-licensure was testimonial hearsay, and therefore inadmissible in an unlicensed contracting prosecution unless the defense was given the opportunity to cross-examine the certificate's originator. *Washington v. State*, 18 So. 3d 1221 (Fla. 4th DCA 2009). Although the Court found the erroneous admission to be harmless, that was only in light of the case-specific evidence presented by the State. *Id.* at 1225.

A year later, the 4th DCA struck again. This time it found error in a trial court's admission of a letter from the Department of Agriculture and Consumer Services, which stated that the defendant was not licensed to carry concealed firearms. *Watt v. State*, 31 So. 3d 238 (Fla. 4th DCA 2010). The Court held that the letter was inadmissible and did not fall into the public records exception to hearsay. While the error was again found to be harmless, it is important to note that the justification for the harmless error analysis preceded the statutory change in the concealed carry law. The defendant used to bear the burden to show that she had a license for concealed carry, but now non-licensure is an element for the State to prove — not an affirmative defense. *Jackson v. State*, 289 So. 3d 967, 968 (Fla. 4th DCA 2020). In other words, if *Watt* happened after the concealed carry statutory amendment in 2015, the error may well have warranted a reversal.

Given the strict demand of the Confrontation Clause, the State cannot simply enter a certificate or letter to prove that a defendant is unlicensed in possessing or cultivating marijuana. The new legal landscape is rife with landmines and potholes for the prosecution.

Cannabis has had a long and harrowing history in the criminal justice system. From uncontestable searches and seizures to lives lost behind bars, the laws around this plant have caused a lot of pain for many of our clients. Now that commercial interests are pouring into the "green gold" and shaking up decades-old legislations, I hope we can harness this momentum together to even the battlefield and right some old wrongs. 🏛

FAN LI has been an Assistant Public Defender in Miami for five years. He attended Harvard Law School but everything he knows about trial practice comes from the heroes in the Richard E. Gerstein Building.

Tech is So Convenient– Why Don't We Love It?

by Phyllis Cook

Technology is here. When did it happen? Was I asleep at the wheel? Did I miss the boat? These are my first questions whenever I'm faced with a new dump of discovery that includes terabytes of data: all those social media uploads, Cellebrite reports, texts messages. Now you want me to understand Geofence Warrants? What about "Iot" (Internet of things)? "Iot," for the uninitiated, are devices that connect to the web to exchange information–such as smart home devices, body cameras, surveillance drones, CCTV, and security management software. What about obtaining that subpoena to obtain that "exonerating information" that our client swears exists on Facebook, Twitter or some other new app like Telegram? What ever happened to the good old days, when all I had to understand was alleles, loci and base pairs for a DNA match? Or maybe the range of a cell tower?

So in the past, we've been able to hire the expert in computer forensics. He or she could walk us through the mountain of evidence that was piled upon us at the most inconvenient time. And that was that. Situation averted. But then came COVID-19. With COVID-19, came Zoom and Microsoft Teams and a whole new arena of technology for us to master. This technology is problematic not because of the scientific intricacy of it, but because of its ability to remove our clients from the courtroom where their fates are being decided.

These platforms appear to magically solve the problems of conducting magistrate hearings, status conferences and bond hearings in a remote environment. Judges are becoming more comfortable with technology in their courtrooms. As backlogs in criminal cases are happening due to the pandemic, they are starting to see how technology can help them move those precious docket numbers down. Pushing the envelope even further, judges might even be ready to conduct evidentiary hearings and minimal risk trials virtually. What is a criminal defense attorney to do? Do we jump on board with technology or do we resist? Does the new technology benefit our client? Or is it a slippery slope to dehumanizing our clients even more? Answers don't come easy and often depend on the individual situation.

The using of remote means to conduct evidentiary hearings or testimony at trial does not provide a client the fundamental right to counsel, afford the opportunity for meaningful cross examination, or meet the criteria for the confrontation clause at trial.

CHOOSE CLIENT OVER CONVENIENCE EVERY TIME

Earlier this year, I was monitoring one of our Zoom felony hearing dockets. The defendant was placed in handcuffs, in jail attire, alone in front of the camera. He appeared young, scared and lost. The judge and assistant state attorney were visible on my computer screen. Unfortunately, the client's attorney was appearing by "telephone," so not visible on the screen. As the hearing progressed, a heart wrenching drama unfolded. The defendant watched on a computer monitor as only his attorney's voice asked for a reinstatement to probation. The judge never looked at the defendant and was clearly distracted by something else going on in her physical space. The assistant state attorney asked for a maximum Florida state prison sentence for this first time offender, with a minor violation of probation. The judge granted that request without having to look at the defendant in the eye or even acknowledge his existence as a real person. The accused was not given the opportunity to provide any input, was unable to participate and the defense attorney had no concept of his deficiencies. The defendant was sentenced to four years of Florida State Prison. Without belaboring the point: When it comes to technology in the courtroom a criminal defense attorney must always be on equal or superior footing to your judge and to the assistant state attorney. We must choose the client over convenience of technology EVERY TIME.

As a practical matter, defense counsel has to always have the ability to have instantaneous and confidential communications with the client during the hearing. In the current climate of Zoom hearings, evidentiary or otherwise, the right to counsel has to be vigorously protected. A defendant's right to counsel is denied when a client is prohibited by technology from instantaneously and confidentially speaking with his attorney

during the hearing. Remembering that it's his or her right to communicate with you — not yours to give away for convenience. This should keep defense counsel on track. Don't allow physical separation to interfere with the defendant's ability to have instantaneous communication with counsel. The need to have instantaneous access to counsel, to share information and strategy, during the examination of any witness is paramount.[1]

> We can imagine no more fettered and ineffective consultation and communication between an accused and his lawyer than to do so by television in front of a crowded courtroom with the prosecutor and judge able to hear the exchange. Quite apart from that obvious inhibition is the added circumstance that the accused is deprived of the opportunity to look directly into the eyes of his counsel, to see facial movements, to perceive subtle changes in tone and inflections,- in short, to use all of the intangible methods by which human beings discern meaning and intent in oral communication.
>
> Not every technological advance fits within constitutional constraints or the realities of criminal proceedings. We are most unwilling, even if the Fifth and Sixth Amendments permitted us to do so, to burden this stage of pre-trial proceedings with such an impediment to effective communication and understanding between the accused and counsel.[2]

Additionally, the Fourth District Court of Appeals has found that a speakerphone was insufficient as the defendant has no means by which to confer privately with counsel.[3]

TECHNOLOGY DOES NOT REPLACE THE CONFRONTATION CLAUSE AND EXISTING CASE LAW AT TRIAL

Whether the Confrontation Clause strictly forbids virtual testimony during trial is found in a mix of federal and states cases. While no authority exists to outright forbid the practice in all cases, one federal case appears to explicitly prohibit virtual testimony as a regular course of operation.

Defense counsel must be prepared to litigate any future attempts by the assistant state attorney to conduct virtual testimony in its case in chief. The assistant state attorney may attempt to use the court's pandemic responses to normalize remote testimony and circumvent existing case law.

We start with the Sixth Amendment's Confrontation Clause which declares that the accused has a fundamental right "to be confronted with the witnesses against him."[4] The Supreme Court solidified this right in *Coy v. Iowa* stating that "[w]e have never doubted, therefore, that the Confrontation Clause guarantees the defendant a face-to-face meeting with witnesses appearing before the trier of fact."[5]

The Supreme Court has declared that face-to-face confrontation is one of "the core of the values furthered by the Confrontation Clause."[6] Initially this right served several purposes. Of course, facing one's accusers deters false accusations, as it is far more difficult to lie when looking directly upon the accused.[7] Additionally, it enables jurors to more properly assess credibility. A physical in person confrontation enables jurors to fully examine not only the demeanor of the witness' testimony, but also the accused's reactions to this live testimony.

However, *Coy* did not grant an absolute right to face-to-face confrontation in all circumstances. In fact, four of the *Coy* Justices wrote or joined in separate concurring or dissenting opinions to emphasize that any right conferred by the Confrontation Clause requiring the witness to physically face the defendant was not absolute.[8]

The Supreme Court was given the opportunity to further clarify face to face confrontation in *Maryland v. Craig*[9] This case involved a sexual abuse allega-

tion which required several preschool victims to testify. The Maryland state law allowed children to testify by one-way closed circuit television in sex abuse cases upon a finding that they would suffer serious emotional distress such that they could not reasonably communicate if they testified in the courtroom.[10] Based on expert testimony, the trial court allowed the one-way closed circuit television testimony after finding that testifying in the courtroom would cause the children such distress that they could not reasonable communicate.[11]

The *Craig* Court found that the Confrontation Clause did not strictly prohibit a state from using one way closed circuit television to capture testimony of a child witness in a child abuse case. Instead the Court held that while the Confrontation Clause "reflects a *preference* for a face-to-face confrontation at trial," which "must occasionally give way to considerations of public policy[12] and the necessities of the case."

Craig created a two-part test for determining whether an exception to the Confrontation Clause's face-to-face requirement is warranted. "[A] defendant's right to confront accusatory witnesses may be satisfied absent a physical, face to face confrontation at trial *only* where [1] denial of such confrontation is necessary to further an important public policy and [2] the reliability of the testimony is otherwise assured."[13]

Florida courts applied the *Craig* test in *Harrell v. State*.[14] The *Harrell* case involved two-way remote testimony of witnesses in another country and out of the state's subpoena power. In finding a proper use of remote testimony, the Third District Court observed: "a screen and camera allowed the defendant in Miami and the witnesses in Argentine to observe each other.[15]

Additionally, the face-to-face confrontation issue has been recently raised again in *Avsenew v State*.[16] During this capital case, the state was allowed to perpetuate testimony under 3.190 (i) which allows use of deposition testimony "an essential witness" as substantive evidence if the defendant is in the same room as the deponent. During the course of this perpetuated testimony, the judge, lawyers and defendant were in the courtroom while the state witness testified via video conferencing in a separate county. The state witness could see the judge's bench and a podium, but not the entire courtroom, certainly not the defendant. Defense counsel established through cross examination that the witness could not see the defendant.

At trial the judge incorrectly declared that during the prerecorded testimony the witness could see into the courtroom. Although the witness could see the judge at times and whomever was at the podium, the witness could not see everyone in the courtroom, including the defendant. Additionally the jury was not granted a full ability to assess the demeanor of the witness in confrontation as originally envisioned by the Sixth Amendment.[17]

Clerk at podium administering oath. The courtroom, counsel tables, the judge are not visible in the frame. The witness is off camera for the swearing of the oath. Counsel has no way to determine if the witness is alone in the room or being coached. The jury will not be able to fully determine credibility of this witness. (The witness is moved into camera shot for the rest of the testimony.)

SOME FINAL PRACTICAL CONSIDERATIONS

If your court insists on going forward with the remote witness testimony consider some of the following tips:

- The remote witness has to be positively identified and correctly sworn in; and
- Determine what materials the remote witness may have with them, physically or on their electronic devices; and
- Determine whether the remove witness is being coached, cajoled, or otherwise influenced by persons or events occurring out of the camera view; and
- Considering having the witness should show the attendees that they are in a room by themselves; and
- Determine if language translation, accents, speech impediments, and the like, are being amplified when testimony is being presented remotely; and
- Consider the inability to assess body language and other intangible aspects of presentation used to determine witness credibility; and
- Consider the inability to provide or receive exhibits from the witness in real-time; and
- Consider the inability to have the witness perform an effective physical demonstration; and
- If the client and defense counsel are physically separated or socially distanced, defense counsel and the client are prevented from engaging in personal, private, and contemporaneous communication with each other; and
- Technology is imperfect, permitting drops in audio, delays in audio, drops in video, frozen video, dropped calls, and other technological difficulties.

Finally, in the cases of evidentiary hearings, defense counsel needs to

Prosecutor at the podium. Throughout the rest of the testimony, only the podium and the individual questioning attorney can be seen, with one or two court personnel in the background.

Defense counsel points out that defendant is not visible to witness on in-court camera. Additionally, the jury is limited in determining the demeanor of the state witness testimony.

attempt to limit the testimony to that hearing. Consider asking the court for a limiting order in the hearing testimony. The purposes of the hearing is different than at trial. The content of the testimony is different than at trial. The motive for cross examination is different. The order should limit the testimony to not be used in trial later as a perpetuating testimony of the witness. The current remote technology being used during hearings limits the ability of defense counsel to conduct an effective cross examination.

As we are faced with the new frontier of technology in the courtroom, defense counsel has to be ever mindful of the lasting implications. Being prepared is essential as we transition back to our new normal in evidentiary hearings and criminal jury trials. We don't want the pandemic to become a justification for across the board limitations on an accused's rights to Due Process, Confrontation, Effective Assistance of Counsel, Equal Protection and other essential trial rights. 🏛

[1] *Seymour v. State*, 582 So.2d 127 (Fla. 4th DCA 1991).

[2] *Id*. At 128-129.

[3] *Haynes v. State*, 695 So2d 371 (Fla. 4th DCA 1997. *See also*: *Coney v. State*, 643 So.2d (Fla. 3d DCA 1994) (trial court employed a relay system allowing a victim to testify by closed-circuit television was found inadequate and a violation of the Defendant's constitutional right to assistance of counsel.) *Myles v. State*, 602 So.2d 1278, 1280 (Fla. 1992) (communication system whereby bailiff relayed messages from defendant to counsel was inadequate) *Schiffer v. State*, 617 So.2d 357 (Fla. 4th DCA 1993) (Probation revocation hearing in which Defendant participated via video/audio arrangement violated defendant's right to counsel where Defendant had no means by which he could confer privately with counsel.) *disapp'd on other grounds.*

[4] U.S. Constitution, Amendment VI.

[5] *Coy v Iowa* 487, U.S. 1012, 1016 (1988).

[6] *Id.* at 1017.

[7] *Id.* at 1019-20.

[8] *Id.* at 1024.

[9] *Maryland v. Craig*, 497 U.S. 836 (1990).

[10] *Id.* at 840-841.

[11] *Id.* at 842-843.

[12] *Id.* at 848-849 (internal citations omitted).

[13] *Id.* at 850.

[14] *Harrell v. State*, 689 So.2d 400 (Fla. 3d DCA 1997).

[15] *Id.* at 402.

[16] *Avsenew v. State,* Case Number SC18-1629, Lower Tribunal Case: 062011CF005061A8810, Opinion pending.

[17] Pending appeal on issues of a matter of law in allowing the video testimony of this key state witness under rule 3.190, the Confrontation Clauses of the state and federal constitutions, and the heightened standards of due process in capital cases. Art. I. §§9, 16, 17 Florida Constitution, Amendments V, VI, VII and XIV U.S. Constitution.

PHYLLIS COOK has been an Assistant Public Defender with the 17th Judicial Circuit since 2005. She is currently assigned to Major Crimes Unit, specializing in Death Penalty Litigation. She was the lead mitigation attorney in the case referenced in the article: *Peter Avsenew v. State of Florida.* Additionally, she teaches Pre-Law Enrichment Classes and is the Mock Trial Club monitor/coach at a local high school.

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9:00 - 11:00 a.m.	**Picking a Capital Jury Pre-, During and Post-COVID** ALLISON MILLER
11:00 - 11:15 a.m.	**Break**
11:15 a.m. - 12:30 p.m.	**A Resentencing Is Not Deja Vu All Over Again** MARC BOOKMAN
12:30 - 1:30 p.m.	**Lunch**
1:30 - 2:45 p.m.	**Situational Ethics: An Interactive Approach** DENIS DEVLAMING
2:45 - 4:00 p.m.	**Pseudo Experts: Bloodstain Pattern Interpretation & Crime Scene Reconstruction** BARIE GOETZ
4:00 - 4:15 p.m.	**Break**
4:15 - 5:15 p.m.	**Keynote** CLEMENTE AGUIRRE-JARQUIN
5:30 p.m.	**Happy Hour**

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9:00 - 10:15 a.m.	**Mitigation Investigation and COVID-19** FELICIA SULLIVAN
10:15 - 10:30 a.m.	**Break**
10:30 - 11:45 a.m.	**The Brain: A Complex, Vulnerable Substrate – Unhinged by Drugs & Alcohol** SUSAN SKOLLY-DANZIGER
11:45 a.m. - 12:45 p.m.	**Lunch**
12:45 - 2:00 p.m.	**Protecting Your Client: Preserving the Record and Post-Representation Responsibilities** MARIE DELIBERATOR, MARIE-LOUISE PARMER & RICK SITCHA
2:00 - 2:15 p.m.	**Break**
2:15 - 3:30 p.m.	**Emerging Technology Issues in Death Penalty Litigation** PHYLLIS COOK & CALEB KENYON
3:30 - 4:45 p.m.	**Shazaam! Case Law Update!** PETE MILLS
4:45 p.m.	**Closing Remarks**

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Applying Florida Law to the Issuance of the Breonna Taylor Search Warrant

QUESTIONS

1. ***Had the Search Warrant in the Breonna Taylor case been issued in Florida, would the officers have had to knock and announce their presence before entering her residence?***
2. ***Under Florida Law, was there probable cause for a Judge to sign the Search Warrant in the Breonna Taylor case?***

by Geoffrey Golub

ANSWER TO QUESTION # 1

Had the Search Warrant in the Breonna Taylor case been issued in Florida would the officers have had to knock and announce their presence before entering her residence?

To answer the question one must first examine Florida's knock and announce law, and then examine the search warrant affidavit in the Taylor case.[1]

> Florida Statute, 933.09 states:
> 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.

The statute does not authorize a no-knock warrant. It states that the police must give notice of their authority and purpose before entering a residence. The police may only break into a house if after giving such notice, they are denied entry.

Similarly, Florida Statute, 901.19(1) which relates to entering a house to make an arrest, states:

> If a peace officer fails to gain admittance after she or he has announced her or his authority and purpose in order to make an arrest either by a warrant or when authorized to make an arrest for a felony without a warrant, the officer may use all necessary and reasonable force to enter any building or property where the person to be arrested is or is reasonably believed to be.

If the police violate Florida Statute, 933.09 or 901.19(1), any evidence gathered by them should be suppressed.[2] Failure by the police to state their purpose prior to entering the residence, should result in suppression of any evidence the police might gather.[3]

In *Soto v. State*, 75 So.3d 296 (Fla. 3rd DCA 2010), the police knocked and announced their presence, but neglected to state the purpose for which they were there, which was to execute an arrest warrant. The failure of the police to state their purpose resulted in the heroin found inside the house being suppressed and Mr. Soto being discharged from his conviction for trafficking in heroin. The "useless gesture doctrine," was an argument made by the State in *Soto*, to excuse the police from not announcing the purpose of their call. The doctrine states, that it would be useless for the police to announce the purpose of their visit if no one was home at the time of the execution of the warrant, or if anyone who was home wouldn't have been able to have heard the police even if they had announced their purpose for being there. But this doctrine can only be used if the police knew of the uselessness of their announcement of authority prior to breaking into the house, which the court in *Soto*, did not find.

After knocking, announcing and stating their purpose, the police before storming the castle have to give the occupants some time to answer the door. Florida Statutes, 933.09 and 901.19(1) do not give any indication of how much time should be given. The caselaw holds that the occupants of a residence must be given a reasonable opportunity to answer the door.[4] How long a period that reasonable opportunity should be depends upon the facts of the particular case. Some of the factors that the courts tend to look at when establishing the amount of time the police should wait before huffing and puffing and breaking the door down are:

> …the nature of the underlying offense, the time of day the warrant is executed, the size of the home, whether any activity or movement is observed within the home at the time of execution, and whether any exigencies exist.[5]

Julian Leshay / Shutterstock.com

The above-mentioned factors account for the fluctuations in time that Courts have either deemed a reasonable amount of time to wait or an unreasonable amount of time to wait. A ten-second delay has been held unreasonable.[6] A twelve-second delay has been held reasonable.[7] A five-second delay has been held reasonable.[8] A five-second delay has also been held unreasonable.[9] Though caselaw has not established a bright-line rule for how long a period of time the police should give the occupants to answer the door, the cases have tended to find that five seconds or less is not a reasonable amount of time to wait and fifteen seconds or more is usually held to be a reasonable amount of time to wait.[10]

Certain exigent circumstances can significantly lower the amount of wait time that is deemed a reasonable amount of time to wait to as little as no time at all. These exigent circumstances have been codified by the Florida Supreme Court in *Benefield v. State*, 160 So. 2d 706 (Fla. 1964) and in *State v. Cable*, 51 So.3d 434(Fla. 2010). The exceptions are as follows:

> 1) the occupant already knows of the officers' authority and purpose, 2) there is a reasonable belief that persons within are in peril of bodily harm, 3) the officers' peril would increase, and 4) the occupants might attempt to escape or to destroy the evidence. *Id*. at 438.

In *Holloway v. State*, 718 So.2d 1281(Fla. 2nd DCA 1998), "Only a couple of seconds passed between the police announcing, 'police with a search warrant' and ramming the door." *Id*. at 1282 The State argued that the "officer peril" exigency justified the short time period because a confidential informant had told the police that a firearm was present in the house. But the court held that what the confidential informant had told the police did not support the "officer peril" exigency and that a couple of seconds was not a reasonable amount of time to wait.

An immediate entrance after knocking and announcing was deemed unreasonable in *State v. Stepp*, 661 So.2d 375(Fla. 2nd DCA 1995). The police testified that a confidential informant who had conducted a controlled buy at the residence to be searched, had observed a handgun under a seat cushion and the presence of a rifle or shotgun. The State claimed that based on that knowledge, the "officer peril" exigency allowed the police to immediately enter the premises. The court held otherwise.

Though Florida does not have a statute authorizing no-knock warrants, this does not mean that under certain exigent or exceptional circumstances the police cannot forcibly enter a residence without first knocking and announcing their presence and purpose for wanting to enter the premises. The Florida Supreme Court in *Power v. State*, 605 So.2d 856 (Fla. 1992) held that the "officer peril" exigency justified a no-knock search when the police knew that the person inside the house "had used a gun or knife to rape several females, had committed armed robbery of a deputy, was a black belt in karate, and had a gun." *Id*. at 862.

The same four exigent circumstances listed in *Benefield* and *Cable* regarding a reasonable wait time, can also be used to justify forcibly entering a residence without the police even knocking,

let alone announcing who they are and why they are there.[10] In *Bamber v. State*, 630 So.2d 1048(Fla. 1994), though the Supreme Court of Florida held that Florida does not authorize or allow the issuance of no-knock search warrants it also held that:

> Police may engage in a no-knock search of a residence where officers have "reasonable grounds to believe the [contraband] within the house would be immediately destroyed if they announced their presence. *Id.* at 1054-1055.

The Court refused to enter a blanket or bright-line rule urged by the State to hold that a forcible entry without knocking is always reasonable in narcotics cases, "any time a small quantity of drugs is believed to be present in a residence with standard plumbing — regardless of immediacy of destruction." *Id.* at 1053 The State argued the bright-line rule was necessary in those circumstances, because "narcotics violators normally are on the alert to destroy the easily disposable evidence quickly at the first sign of an officer's presence." *Id.* at 1053 The Court rejected the State's argument choosing instead to rely on a case by case, totality of the circumstances, fact-specific determination.

> Accordingly, we hold that an officer's belief in the immediate destruction of evidence must be based on particular circumstances existing at the time of entry and must be grounded on something more than his or her generalized knowledge as a police officer and the presence of a small quantity of disposable contraband in a home with standard plumbing. In short, forcible entry is lawful only under exceptional circumstances, where no reasonable alternative is available. *Id.* at 1055.

The burden of proof to establish that the Police violated Florida's knock and announce statutes is on the Defendant. The First DCA in *Carter v. State*, 173 So.3d 1048(Fla. 1st DCA 2015) held:

> We determine that the burden initially falls on the defendant to prove a prima facie case of officer noncompliance with the knock-and-announce requirements. After the defendant makes that prima facie case, the burden then shifts to the State to prove compliance. *Id.* at 1049.

The affidavit of search warrant in the Breonna Taylor case for Ms. Taylor's residence located at 3003 Springfield Drive #4, stated the following:

> Affiant has been an officer in the aforementioned agency for a period of 15 years and ____ months. The information and observations contained herein were received and made in his/her capacity as an officer thereof. On March 12th, 2020 at approximately 10:00 a.m. p.m., Affiant received information from/observed:
>
> Affiant received information from multiple LMPD crime tips (most recent being 01/18/2020 LMPD Tip # 277851) that there has been drug activity going on at 2424 Elliott Avenue.
>
> A narcotics search warrant was executed by LMPD 1st Division on 12/30/2019 where narcotics and firearms were recovered. Less than a week after the search warrant, Affiant received information that the drug activity had resumed on 2424 Elliot Avenue.
>
> Affiant conducted physical surveillance and witnessed vehicular traffic going to and from the listed location for short periods of time which is indicative of trafficking in narcotics.
>
> Acting on the information received, Affiant conducted the following independent investigation:
>
> - On 01/02/2020, Affiant had LMPD tech unit place a "pole camera" at the intersection of S. 24th Street and Elliott Avenue. Within an hour of surveillance, Affiant witnessed approximately 15-20 vehicles go to and from 2424 Elliott Avenue within a short period of time which is indicative of trafficking in narcotics.
> - On 01/2/2020, Detectives observed Adrian O. Walker, DOB:06/02/1992, in operation of the above listed red 2017 Dodge Charger go to and from 2424 Elliott Avenue for a short period of time. Mr. Walker drove W/B on Elliott Avenue at a high rate of speed to which a traffic stop was conducted shortly after. Detectives could smell a strong odor of marijuana coming from the listed vehicle. A small amount of marijuana was located inside the vehicle along with a large undetermined amount of US currency located in the center console of the listed vehicle.
> - Adrian Walker has a pending court case for COMP Convicted Felon in Possession of a Firearm, Drug Paraphernalia- Buy/Possess, ENH Trafficking in Marijuana (less than 8oz) 1st Offense, COMP Trafficking in a Controlled Substance 1st Degree, 1st Offense (>=4GMS Cocaine) (19-F-013851).
> - On 01/08/2020, at approximately 1336 hours, Detectives observed Jamarcus Glover operating the above listed red 2017 Dodge Charger with Adrian Walker as a passenger. Detectives observed on the pole camera Jamarcus Glover exit the vehicle, walk over to the property line of 2425 and 2427 Elliott Avenue (near there is a chain-link fence that ends with an amount of large rocks appearing to be disturbed). Jamarcus Glover is seen on a zoomed camera dropping a large, blue cylinder-shaped object near

the rocks and then appears to be covering it up to avoid detection.

- Jamarcus Glover has the following pending court cases: Convicted Felon in Possession of a Firearm, Convicted Felon in Possession of a Handgun, Receiving Stolen Property (Firearm), Drug Paraphernalia - Buy/Possess, Trafficking in a Controlled Substance 1st Degree, 1st Offense (<4GMS Cocaine) (20-F-000098), COMP Possession of a Controlled Substance 1st Degree, 1st Offense (Heroin), COMP Possession of a Controlled Substance 1st Degree, 1st Offense (Cocaine), Tampering With Physical Evidence, COMP Trafficking in Marijuana (less than 8oz) 1st Offense (19-CR-001583-003), COMP Trafficking in a Controlled Substance 1st Degree, 1st Offense (<4GMS Cocaine), COMP Tampering With Physical Evidence (19-CR-002323).
- Affiant has conducted surveillance multiple times on site near the physical location of 2424 Elliott Avenue and through the pole camera. Affiant has witnessed on occasion subjects running from 2424 Elliott Avenue to the rock pile near the property line of 2425 and 2427 Elliott Avenue where Jamarcus Glover dropped the suspected narcotics and then the subjects then run back into 2424 Elliott Avenue. Affiant believes through my 10 years of narcotics related detective work and experience that Jamarcus Glover and Adrian Walker are the sources of narcotics for the "trap house" (where drugs are sold) at 2424 Elliott Avenue. When the narcotics being dealt from 2424 Elliott Avenue are low (pedestrian and vehicular traffic is minimal), Mr. Walker and/or Mr. J. Glover show up operating the red 2017 Dodge Charger and appear to "re-up" the drug house at 2424 Elliott Avenue. Mr. Walker and/or Mr. J. Glover are seen either entering/exiting 2424 Elliott Ave. or going to drop suspected narcotics at the rock pile near the property line of 2425 and 2427 Elliott Avenue. Once they leave the area, normal pedestrian and vehicular traffic resumes.
- Affiant has observed the listed red 2017 Dodge Charger make frequent trips from 2424 Elliott Avenue to 3003 Springfield Drive. Both Mr. Glover and Mr. Walker have been known to operate the listed vehicle.
- On 01/16/2020, during the afternoon hours, Affiant witnessed Jamarcus Glover operating the listed red 2017 Dodge Charger. Mr. J. Glover pulled up and parked in front of 3003 Springfield Drive. Affiant then observed Mr. J. Glover walk directly into apartment #4. After a short period of time, Mr. J. Glover was seen exiting the apartment with a suspected USPS package in his right hand. Mr. Glover then got into the red 2017 Dodge Charger and drove straight to 2605 W. Muhammed Ali Blvd. which is a known drug house.
- Affiant verified through a US Postal Inspector that Jamarcus Glover has been receiving packages at 3003 Springfield Drive #4. Affiant knows through training and experience that it is not uncommon for drug traffickers to receive mail packages at different locations to avoid detection from law enforcement. Affiant believes through training and experience, that Mr. J. Glover may be keeping narcotics and/or proceeds from the sale of narcotics at 3003 Springfield Drive #4 for safe keeping.
- Affiant has observed the above listed white 2016 Chevrolet Impala park in front of 2424 Elliott Avenue on different occasions. This vehicle is registered to Breonna Taylor.
- Affiant has verified through multiple computer databases that Breonna Taylor lives at 3003 Springfield Drive.
- Affiant verified through multiple computer databases that as of 02/20/2020, Jamarcus Glover uses 3003 Springfield Drive #4 as his current home address.
- Mr. J. Glover and Mr. Walker are acquaintances and have been seen going to and from 2424 Elliott Avenue. Additionally, the red 2017 Dodge Charger has been driven by these individuals mentioned within this affidavit. Affiant has witnessed during physical surveillance the suspected drug traffickers sharing the red 2017 Dodge Charger numerous times to transport and store their suspected narcotics.
- Affiant is requesting a No-Knock entry to the premises due to the nature

> of how these drug traffickers operate. These drug traffickers have a history of attempting to destroy evidence, have cameras on the location that compromise Detectives once an approach to the dwelling is made, and a have history of fleeing from law enforcement.

Florida law does not allow no-knock Search Warrants, but as previously stated Florida does allow in exceptional circumstances a no-knock search. The only reason the police in Ms. Taylor's case asked for a no-knock warrant was based on a generalized belief that drug traffickers destroy evidence, have cameras that can detect when the police are present and drug traffickers tend to flee from the police. This generalized belief would not have been enough in Florida to allow a no-knock search.

The search in Ms. Taylor's case took place at around 12:40 a.m.[11] Mr. Glover listed Ms. Taylor's address as his own and received packages at her address. Mr. Glover had a history of firearm and drug charges. This information in and of itself would not have been enough in Florida to establish the "officer peril" exception to the knock and announce rule.

Though circumstances could certainly change once at the scene to turn an otherwise knock and announce search into a no-knock search, there was no information in the search warrant that would have authorized a no-knock search had Ms. Taylor's case been in Florida. Florida police would have been expected to knock and announce and wait at least fifteen seconds for someone to answer the door.

ANSWER TO QUESTION #2
Under Florida Law, was there probable cause for a Judge to sign the search warrant?

Probable cause exists when the affidavit for a search warrant establishes a fair probability that contraband or evidence of a crime will be found in a particular place.[12] When determining whether or not the affidavit for a search warrant establishes that there is a fair probability that contraband or evidence of a crime will be found in a particular place, one has to look at the four corners of the affidavit to determine if based on the totality of circumstances and a common sense assessment, probable cause is shown.[13]

One major factor in determining whether or not there is a fair probability that contraband or evidence of a crime will be found is the freshness of the information in the Affidavit. The "passage of time must be considered in the context of the specific facts, including the nature of the unlawful activity alleged and the length of the activity."[14]

> …as the length of time between the observation of the events establishing probable cause and the date of issuance of the warrant increases, there is less likelihood that the items sought to be seized will be found on the premises.[15]

"The Courts in Florida have generally refused to invalidate warrants because of 'staleness' in the absence of extraordinary circumstances, if the issuance of the warrant occurs within 30 days of the observation of the evidence establishing probable cause."[16] However, information has been held not to be stale when it was more than 30 days old,[17] and stale when it has been less than 30 days old.[18]

Information in a search warrant was considered stale when the affidavit did not establish evidence of a drug sale within a reasonable time prior to the issuance of the search warrant.[19] The search warrant was mainly based on the prior criminal history of the occupants of the residence, and an anonymous tip that did not indicate the date any sales had taken place at the residence. No trash pulls were conducted. Surveillance was conducted eleven days prior to the issuance of the search warrant. But the surveillance did not yield any evidence of a sale. The Court also held that good faith did not save the unlawful search, since an objectively reasonable officer would have known that the affidavit was insufficient to establish probable cause for the search.

In *Gonzales v. State*, 38 So.3d 226(Fla. 2nd DCA 2010), at the time the search warrant was issued, the information in the search warrant was more than three-months old and the Court held that the information was too stale to establish a fair probability that contraband or evidence of a crime would be found in the place to be searched. But it was more than just time that made the search warrant invalid. There was an anonymous tip in the case that claimed the occupants of the residence were growing marijuana and selling cocaine. But no trash pulls were conducted at the residence. No control buys were conducted at the residence. There was no evidence of people coming and going from the residence, no one observed contraband in the residence and the use of electricity was within normal range.

Information was not found stale in a case where the search warrant was issued 21 days after the last controlled buy.[20] Another control buy had taken place within the 48-hour period that the last one had been conducted. There was also information given by a reliable confidential informant prior to the controlled buys about sales taking place at the residence.

In *State v. Paige*, 934 So.2d 595(Fla. 5th DCA 2006), the Court noted:

> When an affidavit establishes the existence of a widespread, firmly entrenched, and ongoing narcotics operation, which is observed to be continuing, a staleness argument loses much of its force. *Id.* at 601

The *Paige* case had a tip from a concerned citizen, a trash pull, surveillance that observed individuals leaving the premises with plastic bags and other people who left the house and travelled to known drug areas. In addition, many of the occupants of the residence and visitors to the residence had extensive histories

of drug related arrests. In sum, the affidavit showed a tip in July of possible drug sales from the residence from a concerned citizen who reported short stays and persons removing trash bags from the residence, a trash pull in August which produced evidence of cannabis and cocaine and packaging for a kilogram of cocaine which was indicative of sale or distribution, and surveillance in September which showed various persons, some with plastic bags, coming and going from the residence and to known drug areas. In addition, the persons occupying or visiting the residence had extensive drug offense histories and appear to be in the business of drug dealing. *Id*. at 600.

Based on the aforementioned cases, does the affidavit in the Taylor case establish probable cause to issue a search warrant in Florida? From just a staleness point of view, Florida law would find that the search warrant lacked probable cause. All of the information in the affidavit was from January 2020 with the latest bit of information being from January 18, 2020 (an anonymous tip regarding a different residence than Ms. Taylor's) and the Search Warrant was signed on March 12, 2020, which was 52 days after the anonymous tip. Aside from the staleness issue, there were no controlled buys conducted at the Taylor residence, no trash pulls, no information from confidential informants, no evidence of drugs being found in the residence and no surveillance of traffic going in and out of the residence.

However, the police in the Taylor case would argue as in *Florida v. Paige*, that their surveillance showed a widespread, firmly entrenched, and ongoing narcotics operation, which they observed to be continuing. Their argument would be that the Taylor residence was the hub or ground zero for the distribution of drugs to the other residences named in the search warrant. The officer's theory was that packages were being delivered to the Taylor residence that were addressed to a known drug dealer and then the packages would be brought by car by the same known drug dealer and another person with a history of drug arrests, to the other addresses in the search warrant, including a known drug house. However, when breaking down the information in the affidavit regarding the Taylor residence, the evidence isn't fresh enough or specific enough to suggest any continuing operation that would involve Ms. Taylor's residence at the time the search warrant was issued. None of the evidence provided in the affidavit is specific or fresh enough to establish probable cause. For instance, paragraph 7 of the affidavit states:

> Affiant has observed the listed red 2017 Dodge Charger make frequent trips from 2424 Elliott

SEARCH WARRANT

Ky. Const. Sect. 10; RCr 13.10

SEARCH WARRANT

Case No. RECEIPT NO 20-1371
Court: District
County: Jefferson
Division:

TO ALL PEACE OFFICERS IN THE COMMONWEALTH OF KENTUCKY:
Proof by affidavit having this day been made before me by: Detective Joshua C. Jaynes (7627)

a peace officer of Louisville Metro Police Department, that there is probable and reasonable cause for the issuance of this Search Warrant as set out in the affidavit attached hereto and made a part hereof as if fully set forth herein; **you are commanded to search** the premises known and numbered as:

St. Anthony Gardens
3003 Springfield Drive #4
Louisville, KY 40214
Jefferson County Kentucky
and All Surrounding Curtilage

and more particularly described as follows:
A multi-family, two-story apartment complex that consists of beige vinyl siding, multi colored brick, and brown shingles. The numbers "3003" are in black lettering arranged vertically on a single column of the apartment building. The specific apartment has a sliding glass door that opens to a small patio on the first floor of the complex. The specific apartment has a green door with a gold-plated number "4" in the top center of the front door. The apartment complex is located within St. Anthony Gardens.

FILED IN CLERKS OFF
JEFFERSON CIRCUIT CT
2020 APR -2 AM 9:13
JEFFERSON CO
BY _____ D.C.

and/or in a vehicle or vehicles described as:

2017 Dodge Charger SRT-8, red in color, Mississippi Registration – MTA7305, VIN: 2C3CDXHG2HH612076

2016 Chevrolet Impala, white in color, Kentucky Registration – 140ZAT, VIN:1G11Z5SA6GU159016

and/or on the person or persons of:
B/M Jamarcus Cordell Glover, DOB:0[redacted]
B/M Adrian Orlandes Walker, DOB:0[redacted]
B/F Breonna Taylor, DOB:06/05/1993, S[redacted]

and seize the following described personal property:
Marijuana, cocaine, heroin, meth and all illegal narcotics or paraphernalia as described in violation of KRS 218A. Any monies that are proceeds from drug trafficking. Any safes that are used to store illegal narcotics or money. Any weapons that may be used to protect illegal narcotics or money. Any paperwork that may be a record of narcotics sales or that may indicate the transport, concealment or sales of narcotics. Any paper that may be evidence of individuals living in the residence. Any documents, to include mail matter, which may indicate financial activities stemming from illegal activity. Any electronic recording media, computers, software, cameras or other such devices that may be used to hold or document illegal narcotics activities in violation of KRS 218A. Any items that may be evidence of other violations of the Kentucky Revised Statutes.

If you find the above-described property, or any part thereof, **you will seize the property and deliver it forthwith** to me or any other court in which the offense in respect to which the property or things taken is triable, **or retain it in your custody subject to order of said court.**

Date: 3/12, 2020. Judge

Jefferson Circuit Court

AFFIDAVIT FOR SEARCH WARRANT

Ky. Const. Section 10; RCr 2.02
RCr 13.10

AFFIDAVIT FOR SEARCH WARRANT

Case No.:
Court: District
County: Jefferson
Division:

Affiant, Detective Joshua C. Jaynes (7627), a peace officer of Louisville Metro Police Department, being first duly sworn, states he/she has, and there is reasonable and probable grounds to believe, and **Affiant** does believe, there is now on the premises known and numbered as:

St. Anthony Gardens
3003 Springfield Drive #4
Louisville, KY 40214
Jefferson County Kentucky
and All Surrounding Curtilage

and more particularly described as follows:

A multi-family, two-story apartment complex that consists of beige vinyl siding, multi colored brick, and brown shingles. The numbers "3003" are in black lettering arranged vertically on a single column of the apartment building. The specific apartment has a sliding glass door that opens to a small patio on the first floor of the complex. The specific apartment has a green door with a gold-plated number "4" in the top center of the front door. The apartment complex is located within St. Anthony Gardens.

and/or in a vehicle or vehicles described as:

2017 Dodge Charger SRT-8, red in color, Mississippi Registration – MTA7305, VIN: 2C3CDXHG2HH612076

2016 Chevrolet Impala, white in color, Kentucky Registration – 140ZAT, VIN:1G11Z5SA6GU159016

and/or on the person or persons of:
B/M Jamarcus Cordell Glover, [redacted]
B/M Adrian Orlandes Walker, [redacted]
B/F Breonna Taylor, DOB:06/[redacted]

the following described personal property, to wit:
Marijuana, cocaine, heroin, meth and all illegal narcotics or paraphernalia as described in violation of KRS 218A. Any monies that are proceeds from drug trafficking. Any safes that are used to store illegal narcotics or money. Any weapons that may be used to protect illegal narcotics or money. Any paperwork that may be a record of narcotics sales or that may indicate the transport, concealment or sales of narcotics. Any paper that may be evidence of individuals living in the residence. Any documents, to include mail matter, which may indicate financial activities stemming from illegal activity. Any electronic recording media, computers, software, cameras or other such devices that may be used to hold or document illegal narcotics activities in violation of KRS 218A. Any items that may be evidence of other violations of the Kentucky Revised Statutes.

Affiant believes and states there is probable and reasonable cause to believe said property constitutes:
(check appropriate box or boxes):

- ☐ stolen or embezzled property;
- ☒ property or things used as means of committing a crime;
- ☒ property or things in possession of a person who intends to use it as a means of committing a crime;
- ☒ property or things in possession of a person to whom it was delivered for the purpose of concealing it or preventing its discovery and which is intended to be used as a means of committing a crime;
- ☒ property or things consisting of evidence which tends to show a crime has been committed or a particular person has committed a crime;
- ☐ Other _____

Affiant has been an officer in the aforementioned agency for a period of 15 years and _____ months. The information and observations contained herein were received and made in his/her capacity as an officer thereof. On March 12th, 2020, at approximately 1000 ☒ a.m. p.m., **Affiant** received information from/observed:

*Affiant received information from multiple LMPD crime tips (most recent being 01/18/2020 LMPD Tip # 277851) that there has been drug activity going on at 2424 Elliott Avenue.

* A narcotics search warrant was executed by LMPD 1st Division on 12/30/2019 where narcotics and firearms were recovered.

* Less than a week after the search warrant, Affiant received information that the drug activity had resumed on 2424 Elliot Avenue. Affiant conducted physical surveillance and witnessed vehicular traffic going to and from the listed location for short periods of time which is indicative of trafficking in narcotics.

Acting on the information received, Affiant conducted the following independent investigation:

1.) On 01/02/2020, Affiant had LMPD tech unit place a "pole camera" at the intersection of S. 24th Street and Elliott Avenue. Within an hour of surveillance, Affiant witnessed approximately 15-20 vehicles go to and from 2424 Elliott Avenue within a short period of time which is indicative of trafficking in narcotics.
2.) On 01/2/2020, Detectives observed Adrian O. Walker, DOB:06/02/1992, in operation of the above listed red 2017 Dodge Charger go to and from 2424 Elliott Avenue for a short period of time. Mr. Walker drove W/B on Elliott Avenue at a high rate of speed to which a traffic stop was conducted shortly after. Detectives could smell a strong odor of marijuana coming from the listed vehicle. A small amount of marijuana was located inside the vehicle along with a large undetermined amount of US currency located in the center console of the listed vehicle.
3.) *Adrian Walker* has a pending court case for COMP Convicted Felon in Possession of a Firearm, Drug Paraphernalia – Buy/Possess, ENH Trafficking in Marijuana (less than 8oz) 1st Offense, COMP Trafficking in a Controlled Substance 1st Degree, 1st Offense (>=4GMS Cocaine) (19-F-013851).
4.) On 01/08/2020, at approximately 1336 hours, Detectives observed Jamarcus Glover operating the above listed red 2017 Dodge Charger with Adrian Walker as a passenger. Detectives observed on the pole camera Jamarcus Glover exit the vehicle, walk over to the property line of 2425 and 2427 Elliott Avenue (near there is a chain- link fence that ends with an amount of large rocks appearing to be disturbed). Jamarcus Glover is seen on a zoomed camera dropping a large, blue cylinder-shaped object near the rocks and then appears to be covering it up to avoid detection.
5.) *Jamarcus Glover* has the following pending court cases: Convicted Felon in Possession of a Firearm, Convicted Felon in Possession of a Handgun, Receiving Stolen Property (Firearm), Drug Paraphernalia – Buy/Possess, Trafficking in a Controlled Substance 1st Degree, 1st Offense (<4GMS Cocaine) (20-F-000098), COMP Possession of a Controlled Substance 1st Degree, 1st Offense (Heroin), COMP Possession of a Controlled Substance 1st Degree, 1st Offense (Cocaine), Tampering With Physical Evidence, COMP Trafficking in Marijuana (less than 8oz) 1st Offense (19-CR-001583-003), COMP Trafficking in a Controlled Substance 1st Degree, 1st Offense (<4GMS Cocaine), COMP Tampering With Physical Evidence (19-CR-002323).
6.) Affiant has conducted surveillance multiple times on site near the physical location of 2424 Elliott Avenue and through the pole camera. Affiant has witnessed on occasion subjects running from 2424 Elliott Avenue to the rock pile near the property line of 2425 and 2427 Elliott Avenue where Jamarcus Glover dropped the suspected narcotics and then the subjects then run back into 2424 Elliott Avenue. Affiant believes through my 10 years of narcotics related detective work and experience that Jamarcus Glover and Adrian Walker are the sources of narcotics for the "trap house" (where drugs are sold) at 2424 Elliott Avenue. When the narcotics being dealt from 2424 Elliott Avenue are low (pedestrian and vehicular traffic is minimal), Mr. Walker and/or Mr. J. Glover show up operating the red 2017 Dodge Charger and appear to "re-up" the drug house at 2424 Elliott Avenue. Mr. Walker and/or Mr. J. Glover are seen either entering/exiting 2424 Elliott Ave. or going to drop suspected narcotics at the rock pile near the property line of 2425 and 2427 Elliott Avenue. Once they leave the area, normal pedestrian and vehicular traffic resumes.
7.) Affiant has observed the listed red 2017 Dodge Charger make frequent trips from 2424 Elliott Avenue to 3003 Springfield Drive. Both Mr. Glover and Mr. Walker have been known to operate the listed vehicle.
8.) On 01/16/2020, during the afternoon hours, Affiant witnessed Jamarcus Glover operating the listed red 2017 Dodge Charger. Mr. J. Glover pulled up and parked in front of 3003 Springfield Drive. Affiant then observed Mr. J. Glover walk directly into apartment #4. After a short period of time, Mr. J. Glover was seen exiting the apartment with a suspected USPS package in his right hand. Mr. Glover then got into the red 2017 Dodge Charger and drove straight to 2605 W. Muhammed Ali Blvd. which is a known drug house.
9.) Affiant verified through a US Postal Inspector that Jamarcus Glover has been receiving packages at 3003 Springfield Drive #4. Affiant knows through training and experience that it is not uncommon for drug traffickers to receive mail packages at different locations to avoid detection from law enforcement. Affiant believes through training and experience, that Mr. J. Glover may be keeping narcotics and/or proceeds from the sale of narcotics at 3003 Springfield Drive #4 for safe keeping.
10.) Affiant has observed the above listed white 2016 Chevrolet Impala park in front of 2424 Elliott Avenue on different occasions. This vehicle is registered to Breonna Taylor.
12.) Affiant has verified through multiple computer databases that Breonna Taylor lives at [redacted]
13.) Affiant verified through multiple computer databases that as of 02/20/2020, Jamarcus [redacted] Drive #4 as his current home address.
14.) Mr. J. Glover and Mr. Walker are acquaintances and have been seen going to and from 2424 Elliott Avenue. Additionally, the red 2017 Dodge Charger has been driven by these individuals mentioned within this affidavit. Affiant has witnessed during physical surveillance the suspected drug traffickers sharing the red 2017 Dodge Charger numerous times to transport and store their suspected narcotics.
15.) Affiant is requesting a No-Knock entry to the premises due to the nature of how these drug traffickers operate. These drug traffickers have a history of attempting to destroy evidence, have cameras on the location that compromise Detectives once an approach to the dwelling is made, and a have history of fleeing from law enforcement.

Affiant has reasonable and probable cause to believe, and believes, grounds exist for issuance of a Search Warrant based on the aforementioned facts, information and circumstances and **prays a Search Warrant be issued**, that the property (or any part thereof) be seized and brought before any Court and/or retained subject to order of said Court.

Officer

Subscribed and sworn to before me ☒ in my presence ☐ via oral communication on this the 12th day of March, 2020, at 12:37 ☐ a.m. ☒ p.m.

Judge

Executed this 13th day of March, 2020, by Officer _____
of the LMPD, Badge No. _____, by
searching said premises/vehicle/person(s) described herein and by seizing the following:

Avenue to 3003 Springfield Drive. Both Mr. Glover and Mr. Walker have been known to operate the listed vehicle.

The problem with this paragraph is no dates are given for when these frequent trips took place or what occurred on each of the alleged trips.

Paragraph 8 states:

On 01/16/2020, during the afternoon hours, Affiant witnessed Jamarcus Glover operating the listed red 2017 Dodge Charger. Mr. J. Glover pulled up and parked in front of 3003 Springfield Drive. Affiant then observed Mr. J. Glover walk directly into apartment #4. After a short period of time, Mr. J. Glover was seen exiting the apartment with a suspected USPS package in his right hand. Mr. Glover then got into the red 2017 Dodge Charger and drove straight to 2605 W. Muhammed Ali Blvd. which is a known drug house.

This paragraph doesn't provide any proof that there were drugs in the package nor does it state that Mr. Glover brought the package into the known drug house.

Paragraph 9 states:

Affiant verified through a US Postal Inspector that Jamarcus Glover has been receiving packages at 3003 Springfield Drive #4. Affiant knows through training and experience that it is not uncommon for drug traffickers to receive mail packages at different locations to avoid detection from law enforcement. Affiant believes through training and experience, that Mr. J. Glover may be keeping narcotics and/or proceeds from the sale of narcotics at 3003 Springfield Drive #4 for safe keeping.

This paragraph does not list the dates that these packages were received, nor does it state how many packages were received or that drugs were discovered in the packages. The rest of the paragraphs in the affidavit merely show that Ms. Taylor's vehicle had been seen outside one of the alleged drug houses, and that Mr. Glover lists Ms. Taylor's address as his residence.

Under Florida law, the information was stale. It was not established in the affidavit that there was a fair probability that contraband or evidence of a crime would be found in Ms. Taylor's residence at the time the warrant was signed. At best, the affidavit established a slight possibility that drugs would be found in the residence almost two months after an anonymous tip, that was given about drug activity in a house other than Ms. Taylor's.[21] In Florida, Probable cause did not exist to issue a Search Warrant for Breonna Taylor's residence and good faith would not have saved the bad search.

[1] The search warrant and affidavit are in the appendix.

[2] *Benefield v. State*, 160 So. 2d 706 (Fla. 1964); *State v. Cable*, 51 So.3d 434 (Fla. 2010).

[3] *Soto v. State*, 75 So.3d 296 (Fla. 3rd DCA 2011).

[4] *Falcon v. State*, 230 So.3d 168 (Fla. 2nd DCA 2017).

[5] *Mendez-Jorge v. State*, 135 So.3d 464, 467 (Fla. 5th DCA 2014).

[6] *Randall v. State*, 793 So.2d 59 (Fla. 2nd DCA 2001); *Richardson v. State*, 787 So.2d 906 (Fla. 2nd DCA 2001).

[7] *State v. Pruitt*, 967 So.2d 1021 (Fla. 2nd DCA 2007).

[8] *Braham v. State*, 724 So. 2d 592 (Fla. 2nd DCA 1998).

[9] *Kellom v. State*, 849 So. 2d 391 (Fla. 1st DCA 2003).

[10] *Spradley v. State*, 933 So.2d 51 (Fla. 2nd DCA 2006).

[11] www.courier-journal.com/story/news/local/breonna-taylor/2020/09/23/minute-by-minute-timeline-breonna-taylor-shooting/3467112001/.

[12] *State v. Paige*, 934 So.2d 595 (Fla. 5th DCA 2006).

[13] *Id.*

[14] *State v. Ward*, 935 So.2d 1287 (Fla. 5th DCA 2006).

[15] *Gonzales v. State*, 38 So.3d 226, 229 (Fla. 2nd DCA 2010); *Smith v. State*, 438 So.2d 896 (Fla. 2nd DCA 1983).

16 *State v. Jones*, 110 So.3d 19, 24 (Fla. 2nd DCA 2013).

[17] *State v. Paige*, 934 So.2d 595 (Fla. 5th DCA 2006) (In finding no probable cause, the trial court concluded the information from the July anonymous tip and the August trash pull was stale because it was more than 30 days old. However, the federal courts have held there is no "bright line" rule for staleness.)

[18] *Sanchez v. State*, 141 So.3d 1281 (Fla. 2nd DCA 2014) (See *Pilieci*, 991 So.2d at 891, explaining that thirty days is a "rule of thumb" to determine staleness but that each case must be determined on its own circumstances).

[19] *Id.*

[20] *Jones v. State*, 110 So.3d 19 (Fla. 2nd DCA 2013).

[21] *Sanchez v. State*, 141 So.3d 1281 (Fla. 2nd DCA 2014) (See Barrentine, 107 So.3d at 484; see also *Pilieci*, 991 So.2d at 894 ("At best, the affidavit establishes a slight possibility and not a 'fair probability' of finding drugs almost a month after a single sale transaction.")

GEOFFREY P. GOLUB is a sole practitioner in Melbourne, Florida. He was admitted to practice in November 1993 after earning his A.B. at Washington University in St. Louis and a J.D. from University of Miami School of Law. He spent two and a half years as an Assistant Public Defender with the 18th Judicial Circuit in Brevard County. He is a Florida Board certified criminal trial lawyer.

GEOFENCE WARRANTS

AN UPDATE

by
Caleb
Kenyon

If you read my last article, you're one step ahead of where law enforcement wants: you know what a geofence warrant is. Since the last *Defender* was released, the Northern District of Illinois issued the first ruling on the constitutionality of geofence warrants. A federal magistrate judge denied the Government's application and wrote a comprehensive opinion to help you litigate possible suppression issues in your cases. Like my geofence case, this Chicago case finds itself in a peculiar procedural position. Magistrate Judge Gabriel Fuentes's opinion is an unsealed order denying the AUSA's second application for a geofence warrant. It should be telling that the Government lost a fight two times without an opponent. Magistrate Fuentes attacked the constitutionality on multiple fronts, some obvious and others not as much.

THE PARTICULARITY REQUIREMENT

As previously written about, geofence warrants follow a formula. They dictate a process by which Google is to limit unnecessary disclosure of private information. While this sounds good in principle, the manner dictated in each warrant gave immense latitude to law enforcement. Magistrate Fuentes bluntly quoted his colleague—who denied the first application for the warrant—that geofence warrants were "'completely devoid of any meaningful limitation' and concluded that the three-stage process proposed in the Initial Application did not satisfy the Fourth Amendment's particularity requirement because it gave law enforcement agents unbridled discretion to obtain identifying information about each device detected in the geofences."[1]

This was the ruling even though the Government eliminated the request for any identifying information (the third step) and sought only anonymous information. This means fundamental problems in geofence warrants with the particularity requirement. The AUSA confirmed that all that was needed was the anonymous information to work in concert with the ability to lawfully subpoena "the identifying subscriber information."[2] The court, however, saw "no practical difference between a warrant that harnesses the technology of the geofence, easily and cheaply, to generate a list of device IDs that the government may easily use to learn the subscriber identities, and a warrant granting the government unbridled discretion to compel Google to disclose some or all of those identities."[3,4] "This amount of discretion is too great to comply with the particularity requirement…."[5]

PROBABLE CAUSE

Because of the sweeping nature of geofences, a geofence warrant invariably ensnares completely unrelated individuals.[6] A geofence warrant therefore, must have probable cause to support capturing all individuals' device IDs. Put simply, "A person's mere propinquity to others independently suspected of criminal activity does not, without more, give rise to probable cause to search that person."[7] Magistrate Fuentes noted precedent "allowed 'all persons' warrants only when the affidavit establishes that there is probable cause to believe *every* person who entered the location engaged in the criminal activity."[8]

The opinion goes on to suggest some situations where a very specific and tailored geofence warrant could pass constitutional muster, but certainly not the generic version that follows the template language. If in your case law enforcement doesn't even attempt constitutionality, your two best friends will be Magistrate Fuentes's opinion and copy and paste. 🏛

[1] *In the Matter of Search of Info. Stored at Premises Controlled by Google*, 20 M 392, 2020 WL 4931052, at *10 (N.D. Ill. Aug. 24, 2020).

[2] *Id.* at 11.

[3] *Id.* at 13.

[4] As a complete aside, this reasoning highlights an issue in DUI manslaughter cases I've thought about where a search warrant is required to draw legal blood, but law enforcement can just wait and subpoena the medical records of a blood draw after the fact.

[5] *Id.* at 17.

[6] My case discussed in the previous *Defender* magazine provides a perfect example of this. Also, in the pending *Chatrie* case, 19 different people had their information disclosed pursuant to the warrant.

[7] *Id.* at 15 (internal edits omitted and quoting *Ybarra v. Illinois*, 444 U.S. 85, 91 (1979)).

[8] *Id.* at 14 (emphasis retained).

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SHOTGUNS AND STATUTES
or Remington 870s and F.S. 870

by David Tom

and Alan Diamond

They tell us that the pen is mightier than the sword.

However, if one is to consider the number of folks who have taken over six city blocks in Seattle in early June 2020 and have created a self declared autonomous zone demanding social and legal changes—it is not entirely clear that they're familiar or even agree with that particular phrase.

What is clear is that although there are many ways to protest and demand progressive change, there are some unique and obscure legal nuances that have come to the forefront as a direct result of the actions of mass protesters taking to the streets in Seattle, Minneapolis and even in Florida.

Many Florida residents and attorneys are familiar with the annual coming of hurricane season. A couple things that are pretty self explanatory when a hurricane arrives is that the Governor or the local authorities having jurisdiction have broad authority to declare a state of emergency before, during and after the storm.

Their powers are outlined in F.S. 252.36, Emergency management powers of the Governor, which states in part that the governor may: (5)(h): Suspend or limit the sale, dispensing, or transportation of alcoholic beverages, firearms, explosives, and combustibles. However, nothing contained in ss. 252.31-252.90 shall be construed to authorize the seizure, taking, or confiscation of firearms that are lawfully possessed, unless a person is engaged in the commission of a criminal act.

In short, F.S. 252 expressly suspends or limits the sale or dispensing of firearms.

Unfortunately, that does not take into account F.S. 870.043, which covers declaration of emergency after acts of general public disorder and lawlessness occur. The impacts of such a declaration are outlined in FS 870.044.

These emergency measures are on a local level—and are declared by the sheriff, county or city official and NOT the governor.

Automatic Emergency Measures (1): 870.044 Whenever the public official declares that a state of emergency exists, pursuant to s. 870.043, the following acts shall be prohibited during the period of said emergency throughout the jurisdiction: (1) The sale of, or offer to sell, with or without consideration, any ammunition or gun or other firearm of any size or description. (2) The intentional display, after the emergency is declared, by or in any store or shop of any ammunition or gun or other firearm of any size or description. (3) The intentional possession in a public place of a firearm by any person, except a duly authorized law enforcement official or person in military service acting in the official performance of her or his duty.

Some notable quotes from local authorities on the issue of general public disorder, circa June 1, 2020:

"If we can't handle you, I'll exercise the power and authority as the sheriff, and I'll make special deputies of every lawful gun owner in this county and I'll deputize them for this one purpose: to stand in the gap between lawlessness and civility,"

CLAY COUNTY SHERIFF DARRYL DANIELS

"I would tell them, if you value your life, they probably shouldn't do that in Polk County. Because the people of Polk County like guns, they have guns, I encourage them to own guns, and they're going to

be in their homes tonight with their guns loaded, and if you try to break into their homes to steal, to set fires, I'm highly recommending they blow you back out of the house with their guns. So, leave the community alone,"
POLK COUNTY SHERIFF GRADY JUDD

Since 870.43 is only to be invoked during "an act of violence or a flagrant and substantial defiance of, or resistance to, a lawful exercise of public authority" - mass protesting and rioting could meet that criteria.

The City of West Palm Beach made such a declaration to take effect immediately on May 31, 2020 lasting 72 hours after protesting turned into vandalism and other criminal activity.

Although the provisions of F.S. 870 are well intentioned and geared to provide a mechanism for prosecution, there are a number of problems with the nature of the language.

870.44 (1) prohibits the offer of firearms/ammunition for sale, with or without consideration — it would be easy for West Palm Beach firearm retailers such as Walmart, Bass Pro Shops, Cabelas, or the local firearm store, etc., to simply hang a sign on their door that informs all that firearm sales are prohibited for 72 hours.

870.44 (2) prohibits the display of any ammunition or gun or other firearm of any size or description — it would be easy for firearm retailers to take down their display models and move them out of view to comply with the order.

However due to the obscure nature of the legislation, it may not be immediately apparent that their operations are impacted by the declaration or if their locale is impacted, due to ambiguity between cities and adjacent unincorporated areas.

As of this writing, protesters are taking to the streets of Louisville, Kentucky. They are demanding justice for Breonna Taylor, who was killed by police executing a search warrant looking for narcotics that were never found.

Thousands of people have taken to the streets, two police officers have been shot and the civil disorder does not appear to be slowing down anytime soon.

Keep these laws in mind, as obscure as they may be. In the event of a state of emergency due to protests or natural disasters occurring near you, it might come in handy. 🏛

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ALAN DIAMOND is a Board Certified Criminal Trial attorney licensed to practice law in Florida since 1992. He is a former Assistant State Attorney and Felony Division Chief and has litigated issues before FDLE and the Florida Department of Agriculture regarding concealed weapons permitting. He teaches classes to law enforcement agencies, attorneys and private citizens regarding the use of force and the criminal/legal implications thereof. He is a co-founder of Legally Accurate, lecturing on firearm related criminal defense issues. He may be reached at 321-360-4446.

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A Judge's Journey

by Hugh Starnes

In 1979 at the Royal Palm Motel, Fort Myers, Florida — meek Juanita Maxwell (a housekeeper) has an altercation with an elderly motel resident over a pen. The elderly lady said she hadn't taken the pen and slammed the door on Juanita several times. Juanita leaves and comes back shortly as Wanda Weston who takes over — she hits the lady over the head with a lamp and kills her.

At a preliminary hearing in chambers, Juanita, handcuffed, slides with her back on the wall down to the floor sobbing and wailing uncontrollably. She is soon sent to the Florida State Hospital for competency evaluation and treatment. Eventually, she is cleared as competent to stand trial, but with a diagnosis of multiple personality disorder.

At trial before me, without a jury by agreement of the parties, Juanita's treating psychologist testifies and places her under hypnosis in the courtroom. Juanita is a meek, shy, black woman with little education. She was subjected to severe sexual abuse by her alcoholic mother, who was a prostitute, and who made her available at a very young age to men who came through the house. As a protective device, Juanita created Wanda Weston, aggressive and mean, who could protect her. After a minute or two of bringing Juanita into a hypnotic state while seated at Defense counsel's table in a big courtroom, she straightens from her slumped-over, seated position, cackles loudly with gales of laughter and asks for marijuana. Asked for her name, she says: "Wanda Weston!" If this was acting, Meryl Streep could not have done a better job. The State's expert witness testified that Juanita suffered from "explosive personality disorder," which would not qualify for an insanity defense. At the end of the trial, I retired for a while with the Courtroom filled with spectators and the pool video team from a national TV network. This was one of the earliest trials where media recording was allowed in the courtroom in Florida.

When I returned, I found her not guilty by reason of insanity. This case had such intense public attention that I felt I needed to rule right away in the courtroom to avoid any contamination of the decision-making process.

I never knew this at the time, but have been told later, that this was the first time in Florida that a Judge had found a defendant in a murder trial not guilty by reason of insanity. She was then committed for treatment, which was ultimately successful after a long period of treatment and discovery of even more personalities. She had at least one relapse, while on furlough, into Wanda's domain, which was a robbery charge. She was in the Tampa-St. Petersburg area and the charges were handled there. One of the professionals there called me and indicated that it appeared she threatened that she had a gun but didn't actually have one. I think the charge was resolved by putting her back in treatment, but I was not involved in that part of Juanita's court history. She ultimately got enough education and training to become a nurse.

Looking back, Juanita's life was a chapter in the 400-year book of slavery of millions of Africans and their descendants who were violently kidnapped and brought 4,000 miles to a land where they did not speak the language spoken, were kept in bondage for over 200 years under terrible conditions where children and parents were often split up and sold as chattels. A few years after "emancipation" and some progress under "reconstruction" they were still dominated, hated and obstructed from voting, accumulating wealth, and advancing in education, employment, and social acceptance. The progress that has been made by them from the ashes of this conflagration is, in many ways, remarkable, but these sterile words I have crafted here belie the remaining undercurrents in our society of a form of racism which is often subtle and quiet, but also is sometimes open, hostile, violent, and relentless.

Certainly, only those who have experienced the negative effects of the history of slavery know the fullness of the pain, grief, and frustration over the negative effects remaining from this terrible history. I feel guilty over the need to recount this history. If I could, I would wave it away as gone without need for recounting anymore. But I can't. None of us can — and tears are flowing just typing out these words.

Remaining are at least two separate views from society: one characterized by the terms "white privilege" and "white power;" the other by "black lives matter" and "black power." In the middle are a variety of views where concepts of racism are not malignant.

> "You are the last bastion of protection for those who may be oppressed. You are a group of lawyers who are essential to our democracy.

You, the readers of this *Defender* magazine, share a common task: protecting the rights of the accused, often also the under-privileged, against the State which represents the power of society. You are the last bastion of protection for those who may be oppressed. You are a group of lawyers who are essential to our democracy.

There is another person you should defend: her name is Lady Justice and she resides in New York harbor, holding a flaming torch, which may be flickering out. You must find your own ways to defend her. It's your job! Do it!

My epiphany is my resignation letter:

September 1, 2020
Fort Myers, Florida
To: Chief Justice Charles Canady:

Today is the 42nd anniversary of my appointment as a Circuit Judge in 1978. While I treasure my career as a Circuit Judge in Florida for 30 years, followed by 12 years as a Senior Judge, recent national events cause me to reconsider my position. The coronavirus has temporarily interrupted my work while my wife and I primarily sheltered at home. I hoped to resume my work, consisting primarily of large dockets in court. That respite allowed me considerable time for thought and introspection. The tipping point for me came as I recently witnessed an emotional sequence of professional athletes, men and women, from a variety of sports, followed by a basketball commentator for the Milwaukee Bucks, announce the canceling of a series of playoff games and other events. Their message was that advocating for social justice and equality in the light of disturbing instances of the shooting of black Americans was more important than participating in their sports events at this time. They demonstrated great courage and conviction, as well as sincere emotion over the loss of life in what seemed like senseless use of violence by law enforcement officers. Their message was: "Enough! There must be change!"

I was moved, and I realized I stand with them.

There are deep, serious flaws in our society, and there is a desperate need to effectively address them. Even after considerable public concern and even resulting murder charges, these encounters continue. This evidences a very deep underlying malignancy which is not getting corrected.

My value system will not allow me to sit silently by while our society struggles to deal with these flaws that tear at the very fabric of our society and democracy, and worse, while the upper echelon of our federal government appears to be aggravating these flaws rather than attempting to solve them. This presents an irreconcilable conflict with my position as a judge, bound by judicial ethics that require me to say nothing. I can only resolve this dilemma by resigning my appointment as a Senior Judge, which I respectfully do now. Virtually all the standards I believe I should stand for as a Judge, and a moral person, are being viciously torn apart by the current administration: tolerance, fair and equal justice, honest problem-solving, adherence to the Rule of Law, and the sanctity of reason and truth.

I don't know what the future will hold for me, but I feel great relief in expressing myself on the most important issues of this time and my life.

—Hugh E. Starnes

Damn, the tears have turned to sobs— I have to go— 🏛

HUGH STARNES was a judge in Florida's 20th Circuit until his resignation on September 1, 2020.

The Virtual Effect

by Sabrina Puglisi

It's fair to say that the pandemic has impacted all of our lives in one way or another. One is FACDL's ability to hold live seminars. Many of us looked forward to going to seminars throughout the year because it was a wonderful opportunity to see and make friends, while attending great programming. We were saddened to have to cancel our Annual, however FACDL is adapting to the change and moving forward with our commitment to provide continuing educational programs for all of our members.

This year we are offering **Blood Breath & Tears** as a virtual four-part series over four months. **Lee Lockett**, co-chair of the Blood, Breath & Tears Planning Committee says, "One of our major challenges in preparing for BB&T 2020 was to make sure we didn't miss a beat in structuring the new virtual format and to try and build on the momentum of the past two years that the mock jury trial gave us. Even though the jury trial wasn't feasible this year, the committee felt like moving to a four part series made the most sense and so far, it seems to have paid off."

Florida is slowly getting back to normal, but with many courts still proceeding virtually, attorneys are continuing to spend more time at home or at the office. The goal for these webinars is to make sure that our members are receiving the required CLEs that they need, while getting knowledge in all areas of criminal law. FACDL Life Member and Assistant Public Defender **Teri Sopp**, after attending "Child Witnesses: What Could Possibly Go Wrong?" presented by Drs. Lori Butts and Michael Brannon, stated, "It was perfect for me because I had been searching for an expert. I hope that I will be able to retain one of the presenters."

FACDL continues to be thankful to all of our members. To express our thanks and commitment to those members, we have instituted a complimentary monthly "Lunch & Learn" series. President-Elect **Jude Faccidomo** remarked, "Understanding sealings and expungements is the type of thing that can often be taken for granted but will have a permanent effect on our clients. Sabrina and Diana did an excellent job of honing in on the key points of law while also offering useful practice tips. This was the first of the lunch and learn series and it seems clear that this program will prove invaluable to our membership." To finish off 2020, in December, we are honored to have exoneree **Jarrett Adams** speak to our members in our final "Lunch and Learn" for the year. Mr. Adams spent seven years of a 28-year sentence incarcerated for rape before being exonerated by the Innocence Project. After his release, he attended law school and now works as an attorney for the Innocence Project where he continues to help other wrongfully convicted individuals. Mr. Adams life story is one of hope and perseverance and will not want to be missed.

We are all hopeful that our lives will return to normal soon. At FACDL, we are planning for live seminars in 2021 and look forward to seeing all of you in person. But, like many of us who have learned that working virtually is a possibility, FACDL makes the commitment to continue to provide virtual CLE's in the years to come. For the most up to date CLE information, go to www.facdl.org and look under "Upcoming Events" or the CLE tab.

SABRINA PUGLISI is a Florida Board Certified Criminal Trial attorney practicing State and Federal criminal defense. Prior to starting Puglisi Law in 2011, she was an Assistant Public Defender and Assistant Federal Defender. She chairs the CLE committee for FACDL and is a board of director.

Restriction (not Enlargement) of Police Authority Under the Florida Mutual Aid Act

by Jason S. Downs

The days of Boss Hogg and his ilk making backwater handshake deals regarding jurisdictional limitations are a thing of the past, though the movies still portray rival police agencies brawling over who "gets" the case. In Florida, these issues are governed by the Florida Mutual Aid Act.[1] The Act's purpose is to allow neighboring agencies a pre-approved method of dealing with emergency situations that may cross the imaginary lines created by the various jurisdictions. Local governments also enact their own agreements in accordance with the Act.[2] This aids in removing (or sometimes adding) red tape and setting "rules" the various agencies are to abide by when crossing jurisdictional borders.

As criminal defense attorneys, we see the Act come into play in various situations, though the issue is seldom challenged. Sometimes there is a police pursuit that begins in one jurisdiction and crosses into another. Sometimes an incident occurs in one jurisdiction and police from that jurisdiction enter into another jurisdiction to undertake a seizure or to continue their investigation. The question then becomes whether such an agreement bestows authority upon a police officer outside of their own jurisdiction to undertake investigatory procedures and make arrests under the color of office.

In many cases, the answer is "no."

Because it would be futile to cite every local mutual aid agreement,[3] we will use the Brevard County Mutual Aid Agreement (herein after, "Agreement") as an example. That Agreement lays out which jurisdictions are participants and it sets forth the "rules" by which the various agencies and officers must abide. There are subsections that discuss investigations outside jurisdiction,[4] pursuits,[5] emergencies,[6] arrests outside jurisdiction,[7] off-duty activities,[8] requested assistance,[9] temporary personnel assignment,[10] and school safety officers.[11]

The most relevant subsections for defense attorneys are those dealing with pursuit and arrest. The pursuit subsection is self-explanatory. If there is a hot or fresh pursuit that originates in one jurisdiction, the officer need not stop at an imaginary border, but may continue to pursue the subject into a neighboring jurisdiction. The Agreement is silent as to the level of offense and only qualifies such a pursuit as stating the officer "may pursue ***any*** individual or individuals into the jurisdiction of another agency ***to the extent allowable by law***."[12] Dependent upon the facts of any given case, "to the extent allowable by law" may become relevant. However, so long as the officer has a legal justification to initiate the pursuit, the pursuit itself will almost always be held to have been "allowable by law." It should also be noted that the Agreement only requires a pursuing officer to notify the jurisdictional agency "when practical."[13]

The real focus for a criminal defense attorney then becomes the arrest subsection. That provision states that an "on-duty" officer, "in whose presence is committed," one of the listed criminal acts,[14] "may affect the arrest of such offender and detain such offender until an officer of that other agency arrives, in which case the arrestee and all evidence shall be provided to the other officer of such other agency in whose jurisdictional area the arrest occurred…."[15] In essence, if the officer is on-duty and witnesses any of the listed offenses (which covers just about any criminal act, yet sounds so unusually specific), they can make an arrest. (Please note the "Fellow Officer Rule" should be heavily scrutinized under these circumstances because an officer must turn over the arrestee and all evidence to a local officer).

Although the Agreement(s) "intends to provide broad extra jurisdictional authority to the officers who are employed by the parties"[16] thereto, that intent runs afoul of the legislative intent found in the Act. The Second District discussed the "announced policy" of the Act and determined the legislative intent was to "provide a means to deal with disasters, emergencies, and other major law enforcement problems."[17] In fact, that Court went on to hold such an agreement "***cannot extend police powers*** beyond the specific additional authority granted by the legislature. Here, the ***legislative intent was to assure the continued functioning of law enforcement in times of emergencies*** or in areas where major law enforcement efforts were being thwarted by jurisdictional barriers."[18] In that case, the Second District was clear to point out this glaring issue when the State's position was that such agreements confer upon police officers those powers usually

only vested in county deputy sheriffs.[19] That Court concluded "[a]n expansion of police power jurisdiction to that degree is not authorized by the legislature's conferring upon the municipalities the miscellaneous executive power to enter such agreements. In the absence of a clear legislative intent to universally expand both municipal and county law enforcement jurisdiction, we do not believe it is the role of the judiciary to do so."[20]

That Court threw a wrench into the cog that was to become the larger-than-intended law enforcement machine. It told law enforcement agencies they can no longer get too big for their respective britches and they cannot unilaterally (or by agreement with other agencies) enlarge their powers without an act of the legislature.

The Court also held the Act does not bestow any rights to investigate, detain, or arrest upon any out-of-jurisdiction officer the powers not bestowed upon a private citizen.[21] Plainly stated, an out-of-jurisdiction officer, who did not initiate pursuit in their own jurisdiction, is really acting under the authority of a citizen's arrest. This makes sense when taken in light of the provision requiring an officer to turn over the arrestee and evidence to an officer of the subject jurisdiction. This is important to note in a lot of instances. Using a DUI as an example, the power to administer Standardized Field Sobriety Exercises is not bestowed upon a citizen. Therefore, an out-of-jurisdiction officer cannot do so, but must turn the detainee over to an officer of the subject jurisdiction and *that* officer must then either establish their own reasonable suspicion (or, remember the mention of the Fellow Officer Rule above) to seize a subject and request they perform the exercises. "Since the officers were 'acting outside their territorial jurisdiction, the investigation was proper, if at all, ***only if it could have been conducted by a private citizen***.'"[22]

Defense attorneys should also be mindful in scenarios where an agency lends assistance to an agency in another jurisdiction. The *Allen* Court held the Act bestows upon the assisting agency "all powers, privileges and immunities" of the requesting agency, but ***only if*** the assisting agency is "being requested and coordinated by the affected local law enforcement executive in charge."[23] The operative words found within the Statute are "only if," because "only if" demonstrates that "all powers, privileges, and immunities" are bestowed upon an out-of-jurisdiction officer ***only if*** their assistance has been ***requested***. If the assistance was not requested and coordinated by an executive in charge of the agency within whose jurisdiction the seizure occurs, the out-of-jurisdiction officer has no legal authority to act under the color of law. Rather, they may only act as a private citizen may act under the circumstances. And because a citizen's arrest is governed by common law and not statute, each case will require its own analysis to determine whether a citizen — and therefore an out-of-jurisdiction officer — has legal authority to initiate the seizure.

Based on the case law and the Statute (and the legislative intent thereof), these out-of-jurisdiction scenarios can become sticky situations for law enforcement agencies. There are a lot of moving parts and any multi-jurisdictional agreement has to be scrutinized against the superseding statute, the Fellow Officer Rule, and the case law governing citizen's arrests. In many instances, the officer is nothing more than a citizen without any additional legal authority, but because they are often in uniform and in marked patrol vehicles, they undoubtedly act "under the color of law," which in and of itself raises other constitutional issues. Defense attorneys must carefully review the facts, the imaginary jurisdictional lines, the Florida Mutual Aid Act, the local agreement(s), and all the governing authorities discussed herein, then analyze the case-specific facts to determine whether a jurisdictional violation occurred. If there is such a violation, a motion to suppress evidence would be advisable.

[1] Chapter 23, §23.12, Fla. Stat.
[2] Chapter 23, §23.1225(1)(a)-(c).
[3] There are a lot of them in Florida and most of them are similar enough to use one as an example.
[4] Brevard County Mutual Aid Agreement ("Agreement"), 2019, (2)(a).
[5] Agreement, (2)(b).
[6] Agreement, (2)(c).
[7] Agreement, (2)(d).
[8] Agreement, (2)(e).
[9] Agreement, (2)(f).
[10] Agreement, (2)(g).
[11] Agreement, (2)(h).
[12] Agreement, (2)(b) [Emphasis added].
[13] *Id.*
[14] "DUI; breach of the peace; aggravated abuse of an elderly person or disabled adult; aggravated child abuse; aggravated stalking; aircraft piracy; arson; assault; battery; burglary; carjacking; criminal mischief; escape; false imprisonment; resisting a law enforcement officer with violence to his or her person; retail theft; robbery; sexual battery; homicide; theft; unlawful throwing, placing or discharging a destructive device or bomb; willful and wanton reckless driving; felony violations of Chapter 893, Florida Statutes; or, any felony not hereinbefore listed…." Agreement, (2)(d).
[15] Agreement, (2)(d).
[16] *Id.*
[17] *State v. Allen*, 790 So.2d 1122 (Fla. 2d DCA 2001).
[18] *Allen*, 790 So.2d 1126 [Emphasis added].
[19] *Id.*
[20] *Id.*
[21] *Allen*, 790 So.2d 1125.
[22] *Allen*, 790 So.2d 1125, citing *Wilson v. State*, 403 So.2d 982 (Fla. 1st DCA 1980). *See also State v. Chapman*, 376 So.2d 262 (Fla. 3d DCA 1979); *Parker v. State*, 362 So.2d 1033 (Fla. 1st DCA 1978); *Schachter v. State*, 338 So.2d 269 (Fla. 3d DCA 1976) (where an officer outside his jurisdiction is a private citizen and had no authority to seize a person for a traffic infraction).
[23] Chapter 23, §23.1225(a), Fla. Stat. [Emphasis added].

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Random Thoughts Before Going Back to Normal*

by
Michael Mario Pirolo

We were going full speed ahead in our professional lives with hearings, trials, demanding speedy and full speed ahead in our personal lives with working out in gyms, taking kids to school, coaching our kids' sports teams, and vacations. And all of a sudden, we had to slam on the brakes. For many people like me working remotely was more stressful than being in the office and the courthouse, we missed the daily grind. We do this work because we are dedicated, motivated, and thirsty for more.

With things looking like we may be slowly getting back to normal (fingers crossed), it is time to get back to doing what we do best. I have been wanting, needing in fact, to get back to the courtroom, to hearings, to trials, to conferences, anything that makes my work life seem normal again. In the 18th Circuit (Brevard and Seminole Counties) we are beginning jury trials again (October 5 in Seminole County and October 19 in Brevard County).

I doubt any of my capital cases will be going to trial in 2020 but hopefully 2021 will be a year of much awaited court time with my clients. The down time has been productive (brainstorming, draft motion writing) but some things could not be done. Those of us who have clients awaiting *Hurst* resentencing (again, fingers crossed) we were unable to meet with our clients on death row for a period of time. All the phone conferences and letter writing fail in comparison to meeting with our clients face to face. Even our mitigation specialists were unable to do their job adequately- meeting with people face to face. Especially those clients in Union C.I. where our visits give them hope and just old-fashioned human connection. I have a client that after our "case discussion" we talk about sports. We are not fans of the same teams but at times it is like being with a friend. Remember these are the same human beings as you and me that the government tries to label as animals, not fit to live among us.

Assuming Fall 2020 and 2021 will be back to somewhat normalcy in the courthouses, where do we begin? In those parts of the state where face to face contact is achievable (with mask wearing and/or six feet of distance) we need to get our mitigation specialists back to interviewing and spending time with our witnesses. We need to do the same. Spending time with a client's family in their home can gain you so much for your case from the serious conversations to small anecdotes spoken by your client's grandmother or neighbor, or friend of the family who no one seemed to bring up to you earlier. We need to get back to meeting with our clients and our experts. We need to be filing our "death motions" and arguing them in court. Our motions serve as education pieces for the judges and at the very least we are preserving our issues. The pandemic sparks a whole host of new motions (client being masked, witnesses being masked, prospective jurors masked during voir dire, etc.). In the 18th Circuit the judges have agreed for witnesses and clients to wear face shields during the trials. They have also agreed for the prospective jurors to wear face shields during voir dire. Attorneys will be allowed to wear face shields at

the podium, during voir dire, opening statements, examinations, and closing arguments (some judges have agreed for attorneys to remove masks and shields while at the podium).

We also need to think about other COVID-19 related motions regardless if we are trying a capital case or a second-degree misdemeanor. We should be asking for additional alternate jurors. What happens during a trial if a juror were to get sick? These days many people get paranoid as soon as they hear someone they had close contact with becomes sick, and rightfully so, regardless if that person has COVID or not. Another issue to consider: which prospective jurors were released before ever making it to the courthouse or released upon arrival because of certain responses they gave to the "COVID questions?" We will need to inquire who was released, why, and obtain as much information about that prospective juror as possible in order to make a record for a fair cross section objection. Judges need to be mindful that trials will take longer during COVID times. The large jury panels many of us were used to seeing will be limited in number. This may be a great opportunity in capital cases for individual voir dire. We are fortunate in Brevard County where we are granted individual voir dire in capital cases. I know many jurisdictions are not afforded that luxury. COVID-19 may be a reason for a judge to give it a try and who knows, if it goes smoothly, that judge will be more likely to implement it post COVID. Judges and prosecutors have agreed that individual voir dire went a lot smoother than they thought it would go each time we have implemented it in Brevard. Feel free to contact me to learn how we have conducted individual voir dire in Brevard.

Which prosecution witnesses may be appearing via Skype, Teams, or Zoom? Objections? For sure, but will you need to call some witnesses remotely because he or she may be immunocompromised? These are issues you and the rest of the defense team need to hash out. Putting possible technological issues aside, what if something is on a spilt screen or second screen of the witness' computer while he

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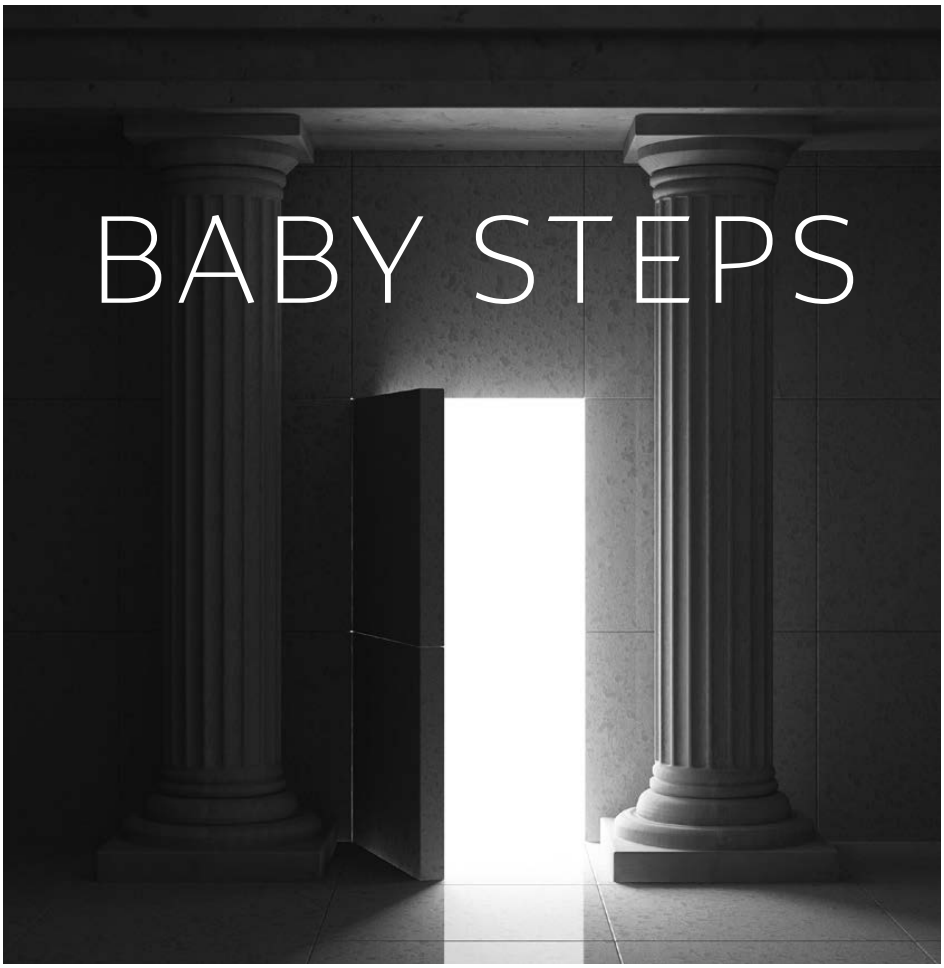
FLORIDA ASSOCIATION OF CRIMINAL DEFENSE LAWYERS

FACDL's COVID-19 Response and Resource Page is live on the FACDL website. There members will find:

- ***A motion bank with sample motions and orders issued from various courts related to COVID-19.***
- ***Current and past Administrative Orders from the respective circuits around the State as well as the Florida Supreme Court to keep you advised of current policies and procedures.***
- ***Links and materials related to Small Business Loans and Payroll Protection Loans.***
- ***Links for FREE CLEs from FACDL.***

It is our hope to provide service and assistance to our members throughout this difficult time. This webpage is just one part of the Board of FACDL's continuing response to the current crisis. This is a work in progress, and will be updated and changed as necessary, but please rest assured that we are here to assist in any way possible. Individual members should feel free to reach out to directly to me, Executive Director Becky Barlow, or Chair of the COVID-19 Ad Hoc committee, Jude M. Faccidomo with any questions or concerns.

–Hal Schuhmacher, FACDL Immediate Past President



Reopening the Courts and Resumption of Trials

by
Leonard A. Sands

On Wednesday, September 16, 2020, I attended a longish ZOOM conference — along with 465 other attorneys — to listen to F. Dennis Saylor, Chief Judge of the United States District for the District of Massachusetts, discuss his district's tentative plans to soon resume civil and criminal trials. I found Judge Saylor to be remarkably "down to earth," and, his remarks to be informative, constructive, and, insightful. Clearly, a "peek" into what to expect here in Florida once we too move forward with resuming criminal jury trials in the age of COVID-19.

For what it is worth, I have been asked to share the main takeaways from Judge Saylor's remarks. Before I do, however, you might ask:

Why were you listening to what is going on in a district 1,200 or more miles away from where we in Florida live and practice criminal law?

The short answer is: years ago I had a major trial in Boston, and, once admitted pro hac vice I continue to receive notices concerning the "goings-on" in the District of Massachusetts. Interestingly, I saw two other South Florida lawyers also online and several Boston criminal law practitioners whose names I recognized.

Because of social distancing restrictions, no more than four trials can be conducted at the same time in their very large, modern, main John Joseph Moakley Federal Courthouse in Boston. They are exploring perhaps using the old John W. McCormack Federal Courthouse for trials as well.

In Massachusetts, they are now out of COVID Phase 1 and will have their first criminal trial beginning Tuesday, September 29. The trial involves a single in-custody defendant, who asks to go to trial. Realistically, Judge Saylor concedes regular trials are not likely until the end of January or beginning of February 2021, at the earliest. All of that, of course, depends upon the number of reported new COVID cases and if there is a vaccine then ready and available.

Even though their new main courthouse in Boston has very large courtrooms, they have determined, no more than 24 people can be in the courtroom at any one time. Also, jury deliberation rooms are too small to maintain social distancing. Therefore, they have decided deliberations will take place in a courtroom; most likely a courtroom other than where the trial itself will take place.

Also, for safety sake, no more than four people will be allowed to get on an elevator at one time.

Interestingly, Judge Saylor told us medical experts tell them plastic face shields provide inadequate protection; and, only face masks should be used. Moreover, the court is mindful of something known as "face mask fatigue;" which may affect the ability to go full days. Significantly, everyone will be required to wear a face mask — except, the witness so their face can be observed by the jury. Lawyers conducting questioning will, however, still have to wear a mask; no exceptions!

Judge Saylor stated they have one of the broadest, fairest jury pools, using the state of Massachusetts census rolls. Nonetheless, the court is mindful there will be jurors who do not want to serve, have children or elderly family members

at home, and/or are at risk themselves because of so-called "co-morbidities." In addition, the court sees it is going to be a challenge drawing jurors and conducting trials in multi-defendant/multi-lawyer cases. The court recognizes the challenges to be finding space for everyone in the courtroom. One solution may be to allow two lawyers who are related, or, who work together, or, are otherwise satisfied their colleagues and clients are COVID free, to sit with each other.

In addition, Judge Saylor addressed another issue we as lawyers do not generally think about. Namely, the court itself is a large institutional employer with many moving parts. The court staff is already spread thin and many of the court's own personnel have concerns about their individual health and possible exposure to potentially infected individuals and/or spreaders of the virus.

An additional challenge the court anticipates is where a juror during the course of a trial takes ill and has to be excused. This raises the question of what psychological effect that will have on remaining jurors, and, their ability to put that aside and stay focused.

In response to the question:

Can we watch the trial?

The Judge did not give a simple "Yes" or "No" answer. Instead, he said:

> We are not allowed to broadcast. But, you will be allowed to observe.

Frankly, it was clear much thought has been given to all the many potential variations, permutations and combinations of the many and various scenarios that may arise.

The big takeaway, for me, is that something will arise that has not been anticipated. It will be up to the court administration and individual judges to decide how to deal with the inevitable unexpected. For now, as far as scheduling of trials is concerned, individual judges are not going to decide themselves which cases get tried and when to start; but, rather through the court administrator, in conjunction with the chief judge, the few cases to be tried will be selected.

Clearly this is all an experiment. It remains to be seen what the future holds.

Frankly, my impression was that all the court's stakeholders involved are making a good-faith effort to try to restore some semblance of "normal" to the court system. But, this is not normal and nothing like what we have known. It is going to be quite a while before things get back to the way they were before the start of the pandemic, sheltering in place, face masks, social distancing, and the like.

These are indeed only baby steps, one large metropolitan federal district court is undertaking in the age of the pandemic. Time will tell.

We will see. We will see.

LEONARD A. SANDS is FACDL Chapter Representative for Miami-Dade and winner of the 2020 Daniel S. Pearson-Harry W. Prebish Founders Award.

BACK TO NORMAL • from page 43

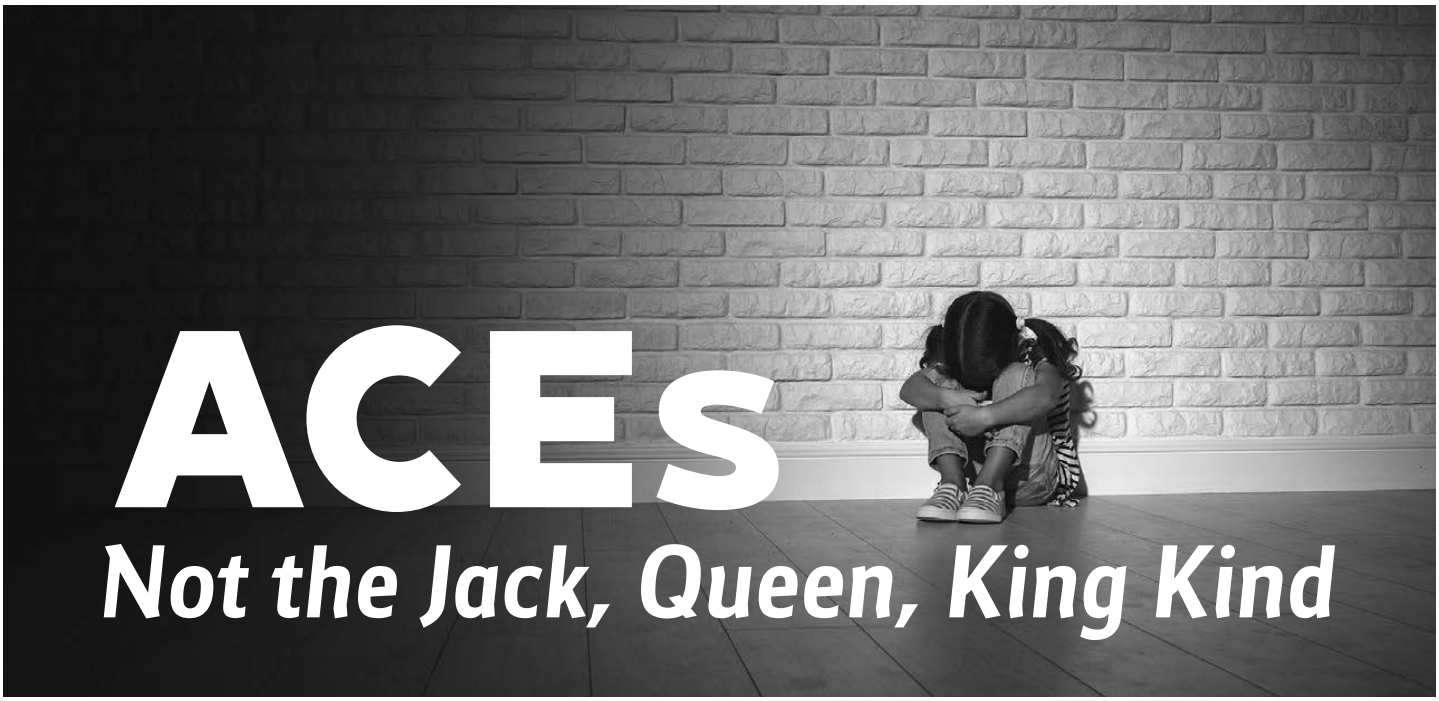
or she is testifying remotely? Does a law enforcement officer have his or her report on the screen? An assisting detective's report? These are concerns we will need to have and address with our judges. We will need to object, move to strike the witness, even move for a mistrial if we find out during testimony they are "cheating" during their direct and/or cross examinations.

Since conferences were cancelled we have to find ways on how we can brush up on the Morgan Method in capital voir dire (if you don't know what I'm talking about then you should not be trying a capital case).[1] You can have a secretary from the office, friend or family member, even local college students sit in as a mock juror. It is a method that needs to be constantly repeated. It is not something where the night before voir dire you find your Morgan Method notes, brush off the dust, and think you are ready to implement it competently first thing in the morning.

I'm sure I'm not the only one who is desperately wanting back in trial. We will bring with us some more baggage, more concerns than usual. But our job, our duty, our oath remains the same. After I told a law school professor of mine that I wanted to do indigent criminal defense work after graduation he told me that it is the most noble thing one can do with their law degree and license. He added that more importantly "Mike, you can save a life doing that work, and I know you will." He was 100% correct figuratively and literally. Thank you Judge Lawton for your support! So, go out and be the warriors we have to be in our profession, our calling and remember you can and will save lives! Vai avanti con forza (go forward with strength)!

[1] *Witherspoon v, Illinois*, 391 U.S. 510 (1968); *Wainwright v. Witt*, 469 U.S. 412 (1985); *Lockhart v. McCree*, 476 U.S. 162 (1986); *Morgan v. Illinois*, 112 S.Ct. 2222 (1992).

MICHAEL MARIO PIROLO graduated from New England School of Law in 2004. He has been the Chief Assistant Public Defender for Brevard County since 2014. He is a member of the Florida Public Defender Association Death Penalty Steering Committee and has been a Morgan Method instructor.



ACEs
Not the Jack, Queen, King Kind

by
Denis
deVlaming

Adverse Childhood Experiences, or ACEs, as they are referred to are often responsible for and the cause of criminal behavior later in life. When a child has been exposed to violence, sexual assault, systemic anger, divorce, emotional and physical abuse, domestic violence, substance abuse, parent incarceration, and generally adverse living conditions they fester over time and sometimes, not always, result in criminality. They can also lead to addictions, disease, joblessness, and mental health issues.

So what are ACEs? Simply put, they are adverse factors that occur in a child's life that may cause negative behavior. To understand these factors research has shown that there are 10 types of childhood trauma measured in the ACE study. Five are personal. They include physical abuse, verbal abuse, sexual abuse, physical neglect, and emotional neglect. To understand these factors, it would be helpful to see the actual ACEs quiz. There are 10 questions.

Did a parent or other adult in the household often or very often:

- **Swear at you, insult you, put you down, or humiliate you? Or**
- **Act in a way that made you feel that you might be physically hurt?**

☐ Yes ☐ No

Did a parent or other adult in the household often or very often:

- **Push, grab, slap, or throw something at you? Or**
- **Ever hit you so hard that you had marks or were injured?**

☐ Yes ☐ No

Did an adult or person at least five years older than you ever:

- **Touch or fondle you or have you touched their body in a sexual way? Or**
- **Attempt or actually have oral, anal, or vaginal intercourse with you?**

☐ Yes ☐ No

Did you often or very often feel that:

- **No one in your family loved you or thought you were important or special? Or**
- **Your family didn't look out for each other, feel close to each other, or support each other?**

☐ Yes ☐ No

Did you often or very often feel that:

- **You didn't have enough to eat, had to wear dirty clothes, and had no one to protect you? Or**
- **Your parents were too drunk or high to take care of you or take you to the doctor if you needed it?**

☐ Yes ☐ No

Were your parents ever separated or divorced?

☐ Yes ☐ No

Was your mother or stepmother:

- **Often or very often pushed, grabbed, slapped or had something thrown at her? Or**
- **Sometimes, often, or very often kicked, bitten, hit with a fist, or hit with something hard? Or**
- **Ever repeatedly hit over at least a few minutes or threatened with a gun or knife?**

☐ Yes ☐ No

Did you live with anyone who was a problem drinker or alcoholic, or who used street drugs?

☐ Yes ☐ No

Was a household member depressed or mentally ill, or did a household member attempt suicide?

☐ Yes ☐ No

Did a household member go to prison?
☐ Yes ☐ No

Studies have shown that the higher the ACE score, the greater the risk of a person becoming involved in the criminal justice system both as a juvenile and adult. A 2018 study of 215,000 respondents from 23 states showed that 62% of those studied report at least one ACE. 25% reported three or more ACEs. In Florida, a study of 64,329 juveniles who found themselves in the criminal justice system, 97% had at least one ACE, 50% had four or more and 25% had six or more ACEs. In another study, involving 100 subjects, those with no ACEs had one in 96 attempts of suicide, one in 69 were alcoholics and one in 480 used IV drugs. Of those people that had from one to three ACEs, one in ten attempted suicide, one in nine were alcoholics and one in 43 used IV drugs. And for those that had from four to eight ACEs, one in five attempted suicide, one in six were alcoholics and one in 30 used IV drugs.

Data has proven that ACEs impact criminal behavior. Childhood maltreatment is a significant predictor of delinquency, recidivism, violence, incarceration, and early-onset of behavioral problems. Sexual abuse is the strongest predictor of delinquency and family violence is the ACE most strongly related to subsequent criminal behavior, followed by an incarcerated household member. Youth with high ACE scores are more likely to be violent, serious offenders than those with low ACE scores. Nearly 70% of violent recidivism adjudications are committed by youth with high ACE scores. These findings support previous studies indicating that youth with high ACE scores are more likely to be serious, violent offenders. Adolescents exposed to six or more risk factors by age 10 are more likely to be violent in adulthood than a teen exposed to only one risk factor. Aggression in young children has been one of the best predictors of violent offending behavior. Poor parenting skills, antisocial parents, family size, home dysfunction, child abuse and neglect are all associated with delinquency. And so are antisocial peers. Residing in an adverse environment and inadequate schools, low academic performance, high absenteeism and instances of suspension, expulsion, or dropout all increase the risk of criminality.

Forensic studies of the brain have also shown a direct correlation to a high number of ACEs. The amygdala, or the survival part of the brain, alerts to danger producing adrenaline and cortisol. They continue to be released causing the heart to race, blood pressure to rise which over stresses the heart. When under threat, the fast-tracked amygdala (survival brain) is activated before the slower prefrontal cortex (thinking brain) has a chance to evaluate the situation. The prefrontal cortex regulates judgment, impulse control and emotions. When under constant release, it now continues to disrupt clear thinking, sleep and appetite causing insomnia and obesity. People with histories of trauma, default to survival brain as a result of decreased frontal lobe capacity and increased sensitivity of the amygdala. Actual brain scans have dramatically proven the physical damage caused by ACEs.

So what can the criminal defense lawyer do to help his or her client who is found to have multiple ACEs? First, they must be exposed. There is a low risk for the first time adult offender who steals $1,000 from his employer in order to pay for a medical procedure for their child. Contrast that with a young man or woman sitting in your waiting room who has been in and out of the criminal justice system for years. A long criminal record at age 19. You might want to consider printing out the ACEs quiz in this article. Give it to them to fill out along with the initial office form that you provide. Then take a look at the number of ACEs. If it appears, as predictable, that they are present, then you need to discuss the nature of their "yes" responses. A considerable prior record will often mean that they score mandatory prison. A downward departure may be the only hope of keeping them from going to prison (Note: please see the article "Sentencing Departures: Getting around the math" in the Fall 2013 edition of *The Florida Defender* magazine by this author).

Sometimes it's a hard sell to get the court (or prosecutor) to go along with rehabilitation over punishment. Florida Statute §921.0026 (Mitigating circumstances) provides for a dozen statutory reasons that give the court the authority to sentence an offender to less than a guideline sentence. Paragraph (1) (a) *"the departure results from a legitimate, uncoerced plea bargain"* may be a hard sell with the State. Depending on the ACEs present in the client's life, (1)(c) may be applicable. It reads *"the capacity of the defendant to appreciate the criminal nature of the conduct or to conform that conduct to the requirements of law was substantially impaired."* Or (1)(d) may apply. It reads *"the defendant requires specialized treatment for a mental disorder that is unrelated to substance abuse or addiction or for a physical disability, and the defendant is amenable to treatment."* It may require a healthcare professional to evaluate the client and confirm the existence of the ACEs. A formal plan to address a therapeutic approach to rehabilitation can then be formulated. This will often involve the family. After all, conditions within the family have probably contributed to the ACEs in the first place. It is important if not critical to have at least one constant, caring adult in the life of a juvenile to help overcome the trauma caused by the ACEs. It is not embarrassing or shameful for a juvenile or even an adult to have a mentor that provides a stabilizing guidance to their life.

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DENIS M. DE VLAMING, a Board Certified criminal defense attorney in Clearwater, has practiced criminal law exclusively since 1972. He has been on FACDL's Board of Directors since its inception in 1988 and is a Charter Member of the organization. He is a past president of FACDL.

DEATH IS DIFFERENT...

UPDATES ON CASES, LAW, RULES & SO FORTH

by Peter N. Mills

This case and law update is intended to serve as a research aid in highlighting issues primarily related to the death penalty that occurred during direct appeal and some other matters. Due to space limitations extensive summation has been used and full citation limited. Many of the more recent opinions have not been released for publication in the permanent law reports, and until released, are subject to revision or withdrawal. I encourage you to fully read the cases, statutes, and rules to gain a better understanding of them. If you have an opinion or suggestion about the column, let me know. Reach me at PMILLS@PD10.ORG.

IN PASSING

Jeff Walsh, a long time capital investigator and an ardent Cleveland Indians fan, passed away on August 8, 2020. He was 59 years old. He served four years in the United States Navy and then graduated from the University of Wyoming.

His obituary notes that "Jeff had an innate passion for social justice. He dedicated his life to giving a voice to those who had none; giving hope to those in despair and providing comfort for those most in need.... His tireless work ethic in pursuit of justice produced many tangible results and the effects were pronounced. In essence, Jeff's life was one of service to others."

I met Jeff when I started at CCR in the early 90s. I remember him being dedicated, smart (book and street), driven, hardworking, and filled with empathy for clients. I had the honor of working with him on my first capital post-conviction case representing James Floyd. Jeff was involved in the investigation in that case and others that revealed the extensive use of snitching in the Pinellas County Jail. Jeff was tough but tempered. He was willing to stand up and speak truth to power, which was noted in *Rogers v. State*, 630 So.2d 513, 514 and 518-520 (Fla. 1994). There he testified about a witness claiming that a judge made up his mind about a ruling before any evidence was submitted. I believe Jeff would have reasonably felt threatened with unsubstantiated perjury charges given what the judge said during the postconviction evidentiary hearing. In another case, Jeff discovered and gathered the evidence, including a recantation by the State's star witness, proving death row inmate Frank Lee Smith's innocence. For Rodney Lowe, Jeff ferreted out information that dispelled the State's trial theory that Rodney acted alone in the robbery-killing of a store clerk. That information led to a circuit court decision granting a new penalty phase, which was upheld by the Florida Supreme Court in *Lowe v. State*, 2 So.3d 21, 39-41 (Fla. 2008). Jeff, along with others, investigated on behalf of Leo Jones and found witnesses who testified that another man confessed repeatedly to the charges for which Leo was convicted and eye witnesses who corroborated that testimony.

Jeff worked in the public sector, private sector, in Florida, Pennsylvania, and around the country. With Jeff's passing our community lost a dedicated colleague.

PP IAC SO BAD AN ORAL ARGUMENT WASN'T NEEDED

Andrus v. Texas,
140 S.Ct. 1875 (2020).

The record before the Court made clear that the trial lawyer's performance was deficient. The trial lawyer didn't meet with Mr. Andrus for eight months. Over a period of four years, he saw Mr. Andrus a total of six times outside of court. The trial lawyer conducted virtually no investigation despite there being "vast" mitigation available. The jury never heard that Mr. Andrus' mother was a drug abusing prostitute, that he was raised by his siblings, that he suffered from untreated mental illnesses, and that he experienced abuse. The trial lawyer "nominally" put on a case to save Mr. Andrus' life. Some of what the trial lawyer presented hurt the defense. Mr. Andrus' mother testified that he had a "tranquil" home life and that he got into

drugs on his own. She failed to mention the life insurance policy she took out on him that she hoped to collect on in the event of his execution. In a *per curiam* opinion, the U.S. Supreme Court sent Mr. Andrus' case back to a Texas state court for a prejudice evaluation.

DISGUSTING REGARDLESS OF HOW YOU CONSIDER IT

Information from the UCLA COVID-19 Behind Bars Data Project and the Death Penalty Information Center confirms that more prison inmates have died from the virus than were executed from 2001-2020.

F'ING FINALLY

Curtis Flowers, who was tried six times for murder and faced the death penalty five times in Mississippi, had all charges dropped against him on September 4. He had two mistrials. He was convicted four times and each was overturned on appeal. His last victory was in the U.S. Supreme Court wherein Justice Kavanaugh wrote for the majority that the State's racist use of peremptory challenges violated *Batson*. *See Flowers v. Mississippi*, 139 S.Ct. 2228 (2019).

BOSTON MARATHON BOMBER

Tsarnaev,
2020 WL 4381578
(1st Cir. July 31, 2020).

This opinion is very long (my copy reached 88 pages in a single-spaced 12-point font) and is written in an easygoing format — despite dealing with the multiple murders of a terroristic act and the government's attempt to kill another human. It provides a detailed history of the events surrounding the Boston Marathon Bombing and the prosecution that followed. I believe the opinion was written with the idea the reader is sitting in an overstuffed chair. I suggest you do that.

Facts: "Together with his older brother Tamerlan, Dzhokhar Tsarnaev detonated two homemade bombs at the 2013 Boston Marathon, thus committing one of the worst domestic terrorist attacks since the 9/11 atrocities. Radical jihadists bent on killing Americans, the duo caused battlefield-like carnage. Three people died. And hundreds more suffered horrific, life-altering injuries. Desperately trying to flee the state, the brothers also gunned down a local campus police officer in cold blood. Reports and images of their brutality flashed across the TV, computer, and smartphone screens of a terrified public — around the clock, often in real time. One could not turn on the radio either without hearing something about these stunningly sad events." Mr. Tsarnaev was eventually caught, though his brother died after a violent confrontation with the police. Indicted on various charges arising from these ghastly events, Mr. Tsarnaev "… stood trial about two years later in a courthouse just miles from where the bombs went off. Through his lawyers, he conceded that he did everything the government alleged. But he insisted that Tamerlan was the radicalizing catalyst, essentially intimidating him into acting as he had…Apparently unconvinced, a jury convicted him of all charges and recommended a death sentence on several of the death-eligible counts — a sentence that the district judge imposed (among other sentences)."

Trial Venue and Jury Selection: The publicity in this case was by all accounts huge. It was covered extensively in the traditional press and on different social-media platforms. Multiple elected officials called for the death penalty. The defense repeatedly filed motions for venue-change. Telegraphing their decision to grant Mr. Tsarnaev's appeal on the venue issue early in the opinion the court announced their reasoning. "A core promise of our criminal-justice system is that even the very worst among us deserves to be fairly tried and lawfully punished…. To help make that promise a reality, decisions long on our books say that a judge handling a case involving prejudicial pretrial publicity must elicit "the kind and degree" of each prospective juror's "exposure to the case or the parties," if asked by counsel, … only then can the judge reliably assess whether a potential juror can ignore that publicity, as the law requires." The court explicitly endorsed the American Bar Association's Standards Relating to Fair Trial and Free Press, which provides that in cases involving prejudicial pretrial publicity, voir-dire "questioning shall be conducted for the purpose of determining what the prospective juror has read and heard about the case." *See Am. Bar Ass'n, Standards Relating to Fair Trial and Free Press* §3.4(a).

Voir Dire: Relief denied regarding *Morgan* issues.

Mitigation Evidence Presentation and Brady: Relief granted. The defense wanted to gather and present evidence that his brother, a dead confederate, was the prime driver of the planning and execution of the murders, and that his brother was involved in other serious, violent crimes. The defense goal was to argue that Mr. Tsarnaev was a follower and easily influenced by his older brother, akin to our §921.141(7)(e), Fla. Stat., which provides for mitigation when the Defendant acts "under the substantial domination of another person." The government successfully argued at the trial level to keep most of the evidence out by claiming that it was irrelevant, would confuse the jury, and that it was privileged due to an ongoing investigation. After the defense argued the existence of the mitigation to the jury, the government argued it was baseless because there was no evidence to support it. The 2nd Circuit called shenanigans on the government. The appellate court ruled that the evidence about the brother's other crimes was mistakenly withheld under *Brady* and *Kyles*, was clearly relevant since it showed the brother's ability to convince someone to participate in murder who gave no prior indication of such inclination, and "…inspired fear and influenced another to commit unspeakable crimes and thus strongly supported the defense's arguments about relative culpability…."

Penalty-Phase Jury Instructions Regarding Weighing Aggravating and Mitigating Factors and BARD: In Florida, our capital juries are instructed that they must "…determine whether the aggravating factor[s] that you have unanimously found to exist outweigh[s] the mitigating circumstance[s] that you have individually found to exist," under Fla. Std. Jury Instr. (Crim.) 7.11. They are not instructed that they must find the aggravators outweigh the mitigators beyond a reasonable doubt. You should propose and argue for such an instruction. Be prepared for the point of view below.

The U.S. Supreme Court tells us that only a jury, and not a judge, may find beyond a reasonable doubt facts that increase a maximum penalty, except for the simple fact of a prior conviction, in *Mathis* and *Apprendi*. Mr. Tsarnaev argued that the weighing determination is a fact that ups a defendant's maximum possible punishment from life to death. Therefore, he argued, the judge erred by not telling the jurors that they had to find the aggravators outweighed the mitigators under the reasonable-doubt standard due to *Hurst v. Florida*. But this argument ignores the fact that about a week after *Hurst* came out, the U.S. Supreme Court issued *Kansas v. Carr*. *Carr* held that the Constitution does not require capital-sentencing courts to affirmatively inform the jury that mitigating circumstances need not be proven beyond a reasonable doubt. So, if the U.S. Supreme Court in *Hurst* intended to impose the reasonable-doubt standard on the weighing process, the U.S. Supreme Court in *Carr* would not have said days later that telling the jury to use that standard "would mean nothing." Further, consider *McKinney v. Arizona*, a U.S. Supreme Court opinion that held while cases like *Hurst* require a jury to "find the aggravating circumstance that makes the defendant death eligible," they "did not require jury weighing of aggravating and mitigating circumstances." The bottom line of this discussion is that the reasonable-doubt standard does not apply to the weighing process.

Mitigation Evidence Regarding Defendant's Mental Condition: In Florida, we have Fla. R. Crim. P. 3.202(b), which provides that, after appropriate notice of intent to seek the death penalty by the State, when the Defense intends to present penalty phase evidence from a mental health expert, who has tested, evaluated, or examined the defendant, in order to establish statutory or non-statutory mental mitigating circumstances, the Defendant shall give written notice of that intent. That defense filing triggers Fla. R. Crim. P. 3.202(d), which directs the trial court to order an examination of the Defendant by a mental health expert chosen by the State within 48 hours of the defendant's capital murder conviction. Attorneys for the State and Defendant may be present at the examination. The examination is limited to those mitigating circumstances listed by the defense in their notice.

In federal court there is a similar but different rule. One of those differences is that Judges in federal court often appoint assistant U.S. attorneys from other districts as "fire-walled" attorneys to handle this process. Another difference is that the results and reports from a rebuttal exam must be sealed and not given to the prosecution or the defense unless the Defendant is found guilty and confirms his intent to rely on mental-condition evidence during the penalty phase. If the defense does intend to use that evidence during the penalty phase, they must then give the government any results and reports of his mental condition about which he intends to introduce expert evidence. Further, prosecutors cannot use any statement the Defendant made during an exam conducted under this regime unless he first introduces evidence of his mental condition. This rule is designed to protect a Defendant's Fifth Amendment right against compulsory self-incrimination. Finally, the defense is not allowed to have any member of the defense team present during the examinations.

In Mr. Tsarnaev's case, the defense asked the trial judge to limit the exams of the government experts to the same type of testing conducted by the defense experts—i.e., objective tests, like the computer based tests, pen and paper tests, physical tests, and neuroimaging tests that the defense experts used. None of those tests, the defense argued, would elicit or rely on statements by Mr. Tsarnaev expressing his views about his own symptoms or history. According to the defense, the judge had to bar the government experts from asking questions beyond those specified in the test instruments themselves, or otherwise engaging the Defendant in any communication intended to elicit testimonial evidence, including opinions, views, beliefs, historical information or anything else because asking such questions would compel him to testify

against himself. The trial judge ordered the appointment of the "fire-walled" assistant U.S. attorneys, set up a sealed docket for the purpose of addressing these issues, and overruled the rest of the defense objections. The defense withdrew their notice of intent to use mental health experts.

On appeal, Mr. Tsarnaev argued that the trial judge infracted his constitutional right against compelled self-incrimination and the criminal rules of procedure by conditioning the admission of his non-testimonial neuropsychological evidence on his being interrogated, without limits, by government experts. The appellate court ruled that Mr. Tsarnaev's reliance on the Fifth Amendment failed. To get anywhere, Mr. Tsarnaev had to show that he had reasonable cause to apprehend danger from submitting to interviews with the government experts. The U.S. Supreme Court has long held that the Fifth Amendment protects against real dangers, not remote and speculative possibilities. The appellate court reasoned that no appreciable danger of a Fifth Amendment violation would have arisen unless 1) Mr. Tsarnaev incriminated himself during the government experts' exams, 2) Mr. Tsarnaev still chose to present mental-health evidence, 3) the trial judge let a government expert testify based on Mr. Tsarnaev's self-incriminating comments, and 4) the government's expert's testimony was not proper rebuttal. Ultimately, the appellate court found that it was rank conjecture on Mr. Tsarnaev's behalf and asking too much of the appellate court.

Expert Testimony Regarding ISIS: Ultimately Mr. Tsarnaev did not prevail on this issue due to harmless error. However, I believe reviewing this claim and considering arguments regarding relevance and prejudice are worthwhile, especially if you have a client facing charges that involve gang allegations or the gang aggravator under §921.141(6)(n) or §874.03, Fla. Stat.

Death Penalty for Offenders Under Age 21: Dismissed as procedurally barred and denied under *Roper*.

In early October, the government announced plans to appeal to the U.S. Supreme Court.

HURST AND HALL RETROACTIVITY

Freeman,
2020 WL 4691639
(Fla. Aug. 13, 2020).

Retroactive *Hurst* relief denied. "*Hurst* relief is not available to defendants, like Freeman, whose death sentences were final prior to the Supreme Court's decision in *Ring v. Arizona*…" And an "untimely" ID claim was denied. Under *Walls*, *Hall* was retroactive. However, the new FSC took that away in *Phillips*. Therefore, under Fla. R. Crim. P. 3.203, Mr. Freeman had no more than 60 days from October 1, 2004, to raise the claim. Expect the issue to be re-raised federally and certainly as a *Ford* issue, if Mr. Freeman gets an execution date.

HURST, HALL AND CALDWELL RETROACTIVITY

Pooler,
2020 WL 3580001
(Fla. July 2, 2020).

First, Mr. Pooler's ID claim under *Hall* was rejected because *Hall* doesn't apply retroactively under *Phillips*. Second, Mr. Pooler's *Hurst* claim was rejected under Poole because of his contemporaneous convictions for burglary and attempted first-degree murder. Finally, Mr. Pooler's *Hurst*-induced *Caldwell* claim was rejected because under *Reynolds* it did not violate *Caldwell* to refer to the jury's role as advisory prior to the *Hurst* decisions.

RETROACTIVE APPLICATION OF POOLE

Brown,
2020 WL 5048548
(Fla. August 27, 2020).

Ms. Brown argued that the trial court erred in summarily denying her *Hurst* claim based on the U.S. Supreme Court and Florida Supreme Court decisions. That denial occurred before the FSC issued *Poole*. "Although the required jury finding does not exist in Brown's case, we agree with the circuit court that the error is harmless beyond a reasonable doubt…. Any jury that found, based on the State's presentation, that Brown was guilty of first-degree murder could not have logically concluded that Brown was

"Is the defendant ready for sentencing?"

not also guilty of kidnapping, whether as the primary aggressor or an accomplice. Accordingly, we hold that, under the circumstances of this case, there is no reasonable doubt that a "rational jury," properly instructed, would have found beyond a reasonable doubt the existence of the statutory aggravating circumstance that the capital murder was committed while Brown was engaged in the commission of a kidnapping… Because the existence of a single statutory aggravating circumstance would render Brown eligible for imposition of the death penalty, see *Poole*, 297 So.3d at 501-03, it is unnecessary to address any of the other statutory aggravators found by the trial court to conclude that the sentencing error in Brown's case is harmless."

Justice Canady concurred in the *Hurst* result but didn't agree with the reasoning. "Although I agree that the *Hurst* error here is harmless, I also adhere to the view that "[t]he new rule articulated in *Hurst v. Florida*—which simply requires that the jury find an aggravator—is an evolutionary refinement in the law that does not cast doubt on the veracity or integrity of penalty phase proceedings resulting in death sentences that are now final" and that the new rule therefore should not be given retroactive effect."

VOIR DIRE: JURORS MISTAKENLY STRUCK FROM PANEL FOR THEIR VIEWS ON THE DEATH PENALTY

Peterson,
2020 WL 4930269
(Cal. Aug. 24, 2020).

This case deals with Scott Peterson in California. Yes, that Scott Peterson, the fertilizer salesman who was convicted of killing his wife and unborn child. Ms. Peterson's decomposing body was found on the eastern shore of the San Francisco Bay. A day earlier, the less decomposed body of a late-term male fetus, her son, was found about a mile away. The doctor, who performed the autopsies, opined that the fetus had been expelled from Ms. Peterson's decaying body. The doctor could not offer an opinion about whether the fetus was alive or dead at the time of the expulsion. That Scott Peterson.

Before the trial even started, the trial court made a series of clear and significant errors in jury selection that undermined Mr. Peterson's right to an impartial jury at the penalty phase. "Here, the trial court erroneously dismissed many prospective jurors because of written questionnaire responses expressing opposition to the death penalty, even though the jurors gave no indication that their views would prevent them from following the law—and, indeed, specifically attested in their questionnaire responses that they would have no such difficulty." While a trial court may dismiss prospective jurors as unqualified to sit on a capital case if the juror's views on capital punishment would substantially impair his or her ability to follow the law, a juror may not be dismissed for cause merely because he or she has expressed opposition to the death penalty as a general matter. *See Gray v. Mississippi*, 481 U.S. 648 (1987); *Wainwright v. Witt* 469 U.S. 412 (1985); *Witherspoon v. Illinois*, 391 U.S. 510 (1968).

PRACTICE TIP #1: CHECK ON YOUR CIRCUITS JURY POOL GATHERING

Given the recent changes due to the pandemic, clerks and courts have been excusing jurors in new ways. Some of them do not seem to be permitted by law. You should investigate and consider a challenge to your grand jury's composition before entering a plea of not guilty to an indictment. Further, you should consider a challenge to the venire before picking a jury. From my informal investigations and surveys in these areas, I believe various concentrations of jurors may not be serving. There are statutory and rule challenges that have been filed in the 1st and 10th Circuits on venire issues.

PRACTICE TIP #2: CHECK ON WHETHER YOUR ALLEGED VICTIM IS REALLY DEAD

Police and paramedics arrived at the home of Timesha Beauchamp in Southfield, Michigan, based on a call from family members about her being unconscious. After first responders observed her and/or attempted life saving measures for thirty minutes, Ms. Beauchamp was declared dead. A family member or members told first responders that Ms. Beauchamp was still breathing and had a heartbeat. First responders reassessed Ms. Beauchamp, determined that she was definitely dead, informed the family that the body's chest would continue to move as if breathing, and left. The Oakland County Medical Examiner's Office was notified. As Ms. Beauchamp's body was being prepared for embalming at a funeral home, staff there heard Ms. Beauchamp gasp for air. She was alive and taken to a hospital, where hopefully medical staff could tell the difference between people who are alive and dead. See clickondetroit.com/news/local/2020/09/25/police-records-paramedics-performed-cpr-for-30-minutes-on-southfield-woman-wrongly-declared-dead/ and detroit.cbslocal.com/2020/08/26/southfield-fire-chief-provides-update-on-woman-found-alive-at-detroit-funeral-home/.

HEADS UP FOR POSSIBLE U.S. SUPREME COURT OPINIONS… INCLUDING PENDING PETITIONS AND ACCEPTED CASES

Do you have a client with a ***prior violent felony aggravator*** or who was ***under a sentence of imprisonment/ community control/ probation*** from an incident that occurred on a reservation or in "Indian country"? Then those might be challengeable and unusable as aggravators under §921.141(a) or (b), Fla. Stat. See *McGirt v. Oklahoma*, 140 S.Ct. 2452 (2020). There the U.S. Supreme Court held that the State did not have jurisdiction to prosecute a defendant for three serious sex offenses because of treaties the U.S. Government entered with Native American tribes and federal law.

Is the ***unanimity requirement*** from *Ramos v. Louisiana* retroactive? Pssst. I doubt they'll find that it is. But we'll

all find out in *Edwards v. Vannoy*, 19-5807. The oral argument is set for November 30.

Would the execution of a person sentenced to death by ***judicial override violate the Eighth Amendment***? The answer seems like "yes" but the Court hasn't even set this one for conference yet, as of October 1. I mean — even Florida and Alabama have outlawed life to death overrides. The U.S. Supreme Court upheld a judicial override case in 2013. At that time, four states permitted life to death overrides. But since then, all four have abandoned it. Check out *McMillan v. Alabama*, 20-193.

Is there a ***right to discover potentially exculpatory mental health records*** under the Sixth and Fourteenth Amendments held by a private party, despite confidentiality laws? Hopefully we'll find out from *Perez v. Colorado*, 19-1357. The Court set the case conference to be held on October 16.

Is ***evidence of alternative execution methods*** employed by other corrections departments relevant to showing another method is feasible and available under *Glossip*? Stay tuned to *Jordan v. Georgia DOC*, 19-1361. The Court held its conference on this case on September 29.

Does a criminal offense that can be committed with a *mens rea* of recklessness qualify as a "***violent felony***" under the Armed Career Criminal Act? I raise this case for the possible impact on consideration of prior violent felonies under §921.141(6)(b), Fla. Stat. The petition had been accepted and extensive briefing occurred in *Walker v. U.S.*, No. 19-373. However the case was dismissed when Mr. Walker died. New candidates for the U.S. Supreme Court's consideration that raise the same or related issues include: *Gomez Gomez* v. *U.S.*, 19-5325, *Borden v. U.S.*, 19-5410, *Bettcher v. U.S.*, 19-5652, *Smith v. U.S.*, 19-5727, *Perez v. U.S.*, 19-5749, *Lara-Garcia v. U.S.*, 19-5763, *Combs v. U.S.*, 19-5908, *Burris v. U.S.*, 19-6186, and *Ash v. U.S.*, 19-9639.

Is there a ***First Amendment violation*** with a state's blanket policy of denying all prisoners the aid of a religious adviser at the time of the execution, which was adopted for the acknowledged purpose of avoiding the obligation to allow such a minister to a Buddhist prisoner? Whether the issue will be decided is pending for a yet to be rescheduled conference by the Court in *Gutierrez v. Collier*, 19-8695.

WHEN IS THE RIGHT TIME AND WHO GETS TO RAISE IAC?

Rosario,
2020 WL 5505862
(Fla. 5th DCA September 11, 2020).

Facts Pertinent to this Appeal: Mr. Rosario was "…indicted for first-degree murder and arson of an occupied structure, and the State filed its notice of intent to seek the death penalty. In April 2017, Rosario was tried and found guilty on both counts and a penalty phase trial occurred the following month. After hearing all the evidence of aggravation and mitigation, the jury unanimously determined that Rosario should be sentenced to death. Soon after the jury's recommendation, Rosario's counsel withdrew from representation and a new attorney was appointed. Several months later, Rosario's new counsel filed a motion requesting a new penalty phase trial. In that motion, Rosario attacked, in great detail, the performance of his penalty phase counsel, arguing that it was so deficient as to render the jury's findings unreliable. Prior to any hearing, that motion was withdrawn, only to be replaced a week later by a motion for new trial. The sole basis alleged by Rosario in his motion for new trial was that his trial counsel was not legally qualified to be lead counsel in a death penalty case. See Fla. R. Crim. P. 3.112. There were no allegations of deficient performance."

"The trial court denied the relief requested by Rosario, i.e., a new guilt phase trial, and instead granted him a new penalty phase hearing, basing its ruling on several findings of deficient performance by Rosario's lawyers. The trial court granted Rosario's motion for new penalty phase, even though that motion had been expressly withdrawn, and denied the only motion actually pending — Rosario's motion for new guilt phase trial…. Here, Rosario filed, and the [trial] court granted, the motion for new trial prior to a final judgment of conviction and sentence being filed. To date, Rosario has not been sentenced in this case."

"In addition to its concerns about the timing of the filing of the motion for new trial and the trial court's ruling on that motion, the State also argue[d] that the court erred by granting a new penalty phase based on *sua sponte* allegations of ineffective assistance of counsel without giving the State any opportunity to refute the court's findings. The State further argue[d] that the [trial] court improperly found Rosario's counsel to be deficient based on pure speculation and that it failed to conduct a proper prejudice analysis under *Strickland*. We agree with the State in each of those arguments and would reverse the order granting in part

Rosario: With ten judges, six written opinions, and two recusals, this is how things shook out:

Main Opinion	Concurrences and Special Concurrences	Dissents	Recusals
Orfinger	Cohen	Sasso	Lambert
Wallis	Sasso	Eisnaugle	Traver
Edwards	Eisnaugle	Grosshans	
	Grosshans	Evander	
	Evander		

Rosario's motion for new penalty phase trial on those grounds irrespective of the applicability of rule 3.590(b)." "The State [also] argue[d] that it was error for the trial court to find ineffective assistance of counsel in the absence of an evidentiary hearing. The State argues that the allegations of ineffective assistance of counsel contained in the motion for new penalty phase were entirely speculative and that the court could not have made findings supporting these allegations without an evidentiary hearing." The State also argued that the procedure employed by the trial court in finding prejudice under *Strickland* constituted reversible error…." because there was no proper showing that the deficient performance prejudiced the Defendant.

Because the defense motion was inappropriately considered under Fla. R. Crim. P. 3.590(b), because the State was not properly noticed and given an opportunity to respond, and because the *Strickland* issue was inappropriately considered, the trial court's decision to grant a new penalty phase before a sentence of death was even imposed was overturned with instructions to sentence Mr. Rosario in the case.

OTHER FSC CASES
McCOY WITH A TWIST?
Atwater,
2020 WL 4691632
(Fla. August 13, 2020).

Mr. Atwater argued that trial counsel provided IAC in failing to discuss with the client a potential trial strategy of conceding guilt. Mr. Atwater's issue is not covered by the relatively recently release *McCoy* case but instead by *Nixon*, which was released by the U.S. Supreme Court in 2004. There the Court held that a trial attorney "…undoubtedly has a duty to consult with the client regarding 'important decisions,' including questions of overarching defense strategy." Mr. Atwater's attempt to get relief under *McCoy* failed because he didn't allege that trial counsel conceded guilt over Mr. Atwater's objection so it was facially insufficient to warrant relief under *McCoy*.

FLORIDA ASSOCIATION OF CRIMINAL DEFENSE LAWYERS

F·L·O·R·I·D·A DEFENDER

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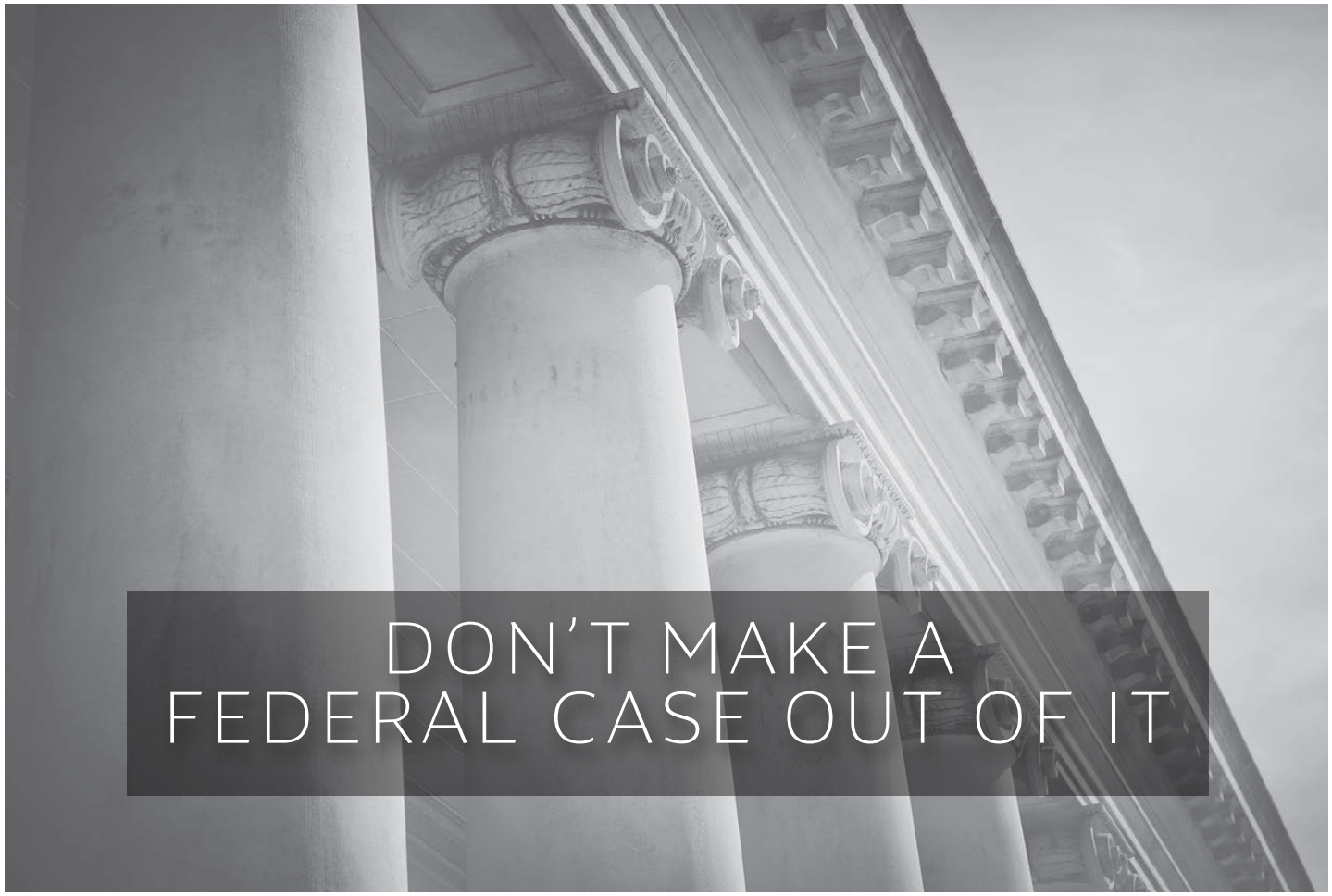
McCOY CLAIM REJECTED BUT NO NEW BAD LAW ANNOUNCED
Merck,
298 So.3d 1120 (Fla. 2020).

BRADY/GIGLIO CLAIMS REJECTED
Davis,
2020 WL 5048551
(Fla. Aug. 27, 2020). 🏛

PETE MILLS is an Assistant Public Defender in the 10th Judicial Circuit, Bartow, in the trial unit. He is qualified to handle capital trials. In addition to his work as an APD, Pete has worked at the Office of the Capital Collateral Representative (CCR) and has handled personal injury cases. He is a 1993 graduate from the Valparaiso University School of Law. He may be reached at 863/534-4327.



DON'T MAKE A FEDERAL CASE OUT OF IT

by Lisa Call

QUESTION CERTIFIED TO FLORIDA SUPREME COURT

United States v. Conage,
2020 WL 5814501
(11th Cir. September 30, 2020)

The defendant, at sentencing, had argued that his prior conviction for trafficking in a controlled substance did not meet the ACCA's definition of a 'serious drug offense.' The sentencing court held that the conviction did qualify. The Eleventh Circuit found that the Florida statute numerates six methods of trafficking cocaine: selling, purchasing, manufacturing, delivering, bringing into the state, or knowingly possessing cocaine in an amount that Florida law specifies as constituting a trafficking quantity: 28 grams or more of cocaine. Under federal law interpreting the ACCA, a §893.135(1) conviction can qualify as a serious drug offense under the ACCA only if each one of these six alternatives satisfies the ACCA definition of a serious drug offense. Conage argued that a conviction based on one of these methods of violating the statute ("purchasing" a trafficking quantity of cocaine) would not qualify under federal law as a serious drug offense. If he is right, the district court improperly sentenced him under the ACCA because if even one of the methods for violating Florida Statutes §893.135(1) fails to constitute a serious drug offense, then the entire statute falls to be counted as a predicate conviction for ACCA. After reviewing state precedent to determine the elements of the Florida trafficking statute, the court certified to the Florida Supreme Court these questions: How does Florida law define the term "purchase" for Florida Statutes §893.135(1)? More specifically, does a completed purchase for purposes of conviction under §893.135(1) require some form of possession—either actual or constructive—of the drug being purchased?

REHEARING EN BANC GRANTED

United States v. Brown,
947 F.3d 655
(11th Cir. 2019)

In *United States v. Brown*, the panel decision held that the district court did not err in removing a juror who, during the deliberations, said that a higher being told him that the defendant was not guilty. The district court removed this juror from the panel. The majority of the panel upheld the district court's finding that the juror was relying on external forces. The dissent (Judge William Pryor) argued that "for a juror to receive and rely on divine guidance is not misconduct. When a conscientious juror asks God in prayer to assist her and believes that she has received his assistance, she has not taken instructions from an outside source." The defendant, a former United States representative, moved for rehearing *en banc*.

DUPLICITY / MULTIPLICITY

United States v. Deason,
965 F.3d 1252
(11th Cir. 2020)

A count is duplicitous if it charges two or more separate and distinct offenses. In criminal pleading, duplicity creates the risk that: 1) a jury may convict a defendant without unanimously agreeing on the same offense; 2) a defendant may be prejudiced in a subsequent double jeopardy defense; and 3) a court may have difficulty determining the admissibility of evidence. To determine if a count is duplicitous, the court considers what conduct constitutes a single offense, and to do that the court looks to the text of the underlying statute.

COMPETENCY

United States v. Cometa,
966 F.3d 1285
(11th Cir. 2020)

The court of appeals reviews for abuse of discretion a district court's decision not to hold a competency hearing.

SEARCH & SEIZURE

United States v. Knights,
967 F.3d 1266
(11th Cir. 2020)

"It was a dark and stormy night…" Question to the appellate court: whether officers violated Knights's right to be free from unreasonable seizures, under the Fourth Amendment, by conducting an investigatory stop without reasonable suspicion, at around 1:00 a.m. in a car that was parked in the front yard of a home. Suspecting that the men might be trying to steal the car, the officers parked near it and approached Knights, who was in the driver's seat. When Knights opened the door, an officer immediately smelled marijuana and located ammunition in a subsequent search. The court held that this was a consensual encounter, because a reasonable person would have felt free to leave.

BRADY VIOLATION

United States v. Melgen,
967 F.3d 1250
(11th Cir. 2020)

To succeed on a *Brady* argument, a defendant must show that 1) the government possessed evidence favorable to him; 2) he did not possess the evidence and could not obtain the evidence with any reasonable diligence; 3) the prosecution suppressed the favorable evidence; and 4) had the evidence been disclosed to him, there is a reasonable probability that the outcome would have been different.

HEALTH CARE FRAUD

United States v. Chalker,
966 F.3d 1177
(11th Cir. 2020)

Evidence would support convictions for health care fraud by defendant, who was pharmacist-in-charge at pharmacy, under *Pinkerton* theory of liability that a knowing member of a conspiracy was liable for reasonably foreseeable crimes of coconspirators; evidence was presented that patients received or were billed for prescriptions from pharmacy for compounded medication they did not want or need, and which were prescribed by out-of-state doctors to whom they had not spoken, that defendant remained a knowing, willing, and vital member of the conspiracy with pharmacy owners to fill unnecessary prescriptions, and that pharmacy would submit fraudulent claims for payment as a consequence and to further the conspiracy.

United States v. Ruan,
966 F.3d 1101
(11th Cir. 2020)

Evidence was sufficient to convict defendant medical doctor of distributing controlled substances outside usual course of professional practice and without legitimate medical purpose, where expert testified that if patient was able to work it would be only because of amphetamines defendant prescribed her and prescribing those was "simply way below the rational standard of care for dealing with people who are in a near overdose state" and he further explained that subsequent studies had shown that particular controlled substance did not always work as intended when given by family member instead of medical professional and would not help a patient who also was taking other drugs with sedative effects, including benzodiazepines.

POSSESSION OF A SILENCER

United States v. Bolatete,
2020 WL 5784153
(11th Cir. September 29, 2020)

The defendant argued that the National Firearms Act in general, and 26 U.S.C. §5861(d) in particular (prohibiting silencers or unregistered firearms) are unconstitutional both facially and as applied because they exceed Congress' power to tax. "In our federal system, the National Government possesses only limited powers; the States and the people retain the remainder." *Bond v. United States*, 134 S.Ct. 2077 (2014). Congress does not have a general police power that would allow it to punish felonies generally. Instead, every criminal penalty that Congress enacts must be grounded in one of its enumerated powers, such as the power to regulate interstate commerce or the power to lay and collect taxes. The court upheld the conviction, finding that the National Firearms Act, and the criminal penalty for violating it, are grounded in Congress' power to tax.

SUFFICIENCY OF EVIDENCE

United States v. Estrada,
969 F.3d 1245
(11th Cir. 2020)

There was sufficient evidence that defendant who was baseball trainer aided and abetted in bringing Cuban baseball players to the United States, as supported conviction for alien smuggling. A conviction for smuggling aliens into the United States can be sustained on an aiding-and-abetting theory. To prove a substantive alien smuggling offense under the theory of aiding and abetting, the evidence must establish that 1) the substantive offense was committed by someone, 2) the defendant committed an act which contributed to and furthered the offense, and 3) the defendant intended to aid in its commission.

There was sufficient evidence that defendant aided and abetted in bringing Cuban baseball players to the United States, as supported conviction for

alien smuggling, where the government presented evidence that a baseball trainer, made every effort to ensure that one player made it to the United States-Mexico border by working with smuggler to secure player's passage, paying smuggler's immigration contract, paying for player's plane ticket and accompanying him on flight from Panama to Mexico, and crossing border shortly after player and waiting for him on Texas side of border, and defendant contributed to and furthered two additional players' moves from Cuba to Haiti and, eventually, the United States.

RICO AS "CRIME OF VIOLENCE" 924(C) PREDICATE

United States v. Green,
2020 WL 4592245
(11th Cir. August 11, 2020)

In recent precedent, the Court held that a conviction for conspiracy to commit a Hobbs Act robbery did not qualify as a 924(c) predicate. Holding that the RICO conspiracy is virtually indistinguishable from a conspiracy to commit Hobbs Act robbery, the Court held that RICO conspiracy does not qualify as a crime of violence under §924(c).

ACCA / ON SEPARATE OCCASIONS

United States v. Carter,
969 F3.d 1239 (11th Cir. 2020)

The Court of Appeals reviews de novo the district court's legal determination that prior convictions meet the Armed Career Criminal Act's (ACCA) different-occasions requirement, and may affirm on any ground supported by the record. To satisfy the Armed Career Criminal Act's (ACCA) different-occasions requirement, the government must prove by reliable and specific evidence that the defendant's prior convictions more likely than not arose out of distinct crimes. To satisfy the Armed Career Criminal Act's different-occasions requirement, the crimes must have been committed successively rather than simultaneously, and differences in time and place are usually sufficient to separate criminal episodes from one another even when the gaps are small.

USSG 2K2.1/"IN CONNECTION WITH" ENHANCEMENT

United States v Martinez,
964 F.3d 1329 (11th Cir. 2020)

Plan of defendant convicted of being a felon in possession of a firearm to sell stolen shotgun found in his possession for dope was "another felony offense" of drug trafficking, supporting four-level sentencing increase under sentencing guideline for possessing a gun in connection with another felony offense. The shotgun was found in defendant's car, defendant admitted to arresting officers that he planned to sell the shotgun for a pound of dope because he needed money to pay his bills and buy drugs for personal use, a pound of any type of drug was more than personal users would typically buy, and other items found in defendant's possession, including small plastic bags and digital scale, supported finding that defendant intended to sell the drugs.

USSG 5G1.3/GUIDELINES ADJUSTMENT FOR TIME SERVED

United States v. Henry,
968 F.3d 1276 (11th Cir 2020)

The court was asked to decide whether the district court erred by refusing to adjust the defendant's federal sentence for time served on a related state sentence. See United States Sentencing Guidelines Manual §5G1.3(b)(1) (Nov. 2016). The Sentencing Guidelines provide that a district court "shall adjust" a defendant's sentence for time served on a related sentence if certain requirements are satisfied. The parties have never disputed that the relevant requirements are satisfied, but the district court nonetheless refused to adjust Henry's sentence. The government argues that because the Guidelines are advisory, the district court did not have to adjust Henry's sentence. The court rejected this argument and held that an adjustment under section 5G1.3(b)(1) of the Guidelines is mandatory when its requirements are satisfied, and our precedent is consistent with *Booker*.

DEPARTURE v. VARIANCE/ NOTICE REQUIRED?

United States v. Hall,
965 F.3d 1281
(11th Cir. 2020)

"Although they may lead to the same result (a sentence outside the advisory guidelines range) a variance and a departure reach that result in different ways. A variance is a sentence imposed outside the guidelines range when the court determines that a guidelines sentence will not adequately further the purposes reflected in 18 U.S.C. §3553(a)." "A departure, by contrast, is 'a term of art under the Guidelines and refers only to non-Guidelines sentences imposed under the framework set out in the Guidelines,' including the departure provisions." A court must give the parties advance notice if it is considering departing from the guidelines range calculated in the PSR, but it need not give advance notice if it is considering varying from that range.

SENTENCING/SUBSTANTIVE REASONABLENESS

United States v. Harris,
964 F.3d 986
(11th Cir. 2020)

To find a district court's sentence substantively unreasonable, the appellate court must be "left with the definite and firm conviction that the district court committed a clear error of judgment in weighing the §3553(a) factors by arriving at a sentence that lies outside the range of reasonable sentences dictated by the facts of the case. The defendant bears the burden of demonstrating that his total sentence is unreasonable.

The contents of this message are personal and do not reflect any position of the judiciary or the FLMD Federal Public Defender Office.

LISA CALL attended the University of Florida, receiving a Bachelor of Science in Business Administration with High Honors and a Juris Doctor with Honors. After being in private practice in Jacksonville from 1992 through 2000, she joined the Federal Public Defender's Office in July 2000. She served as president of FACDL 2016-2017.

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Date: September 11, 2020 from 10 a.m. to 12 p.m.
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Issues addressed during this virtual hearing:

- Objection to virtual MTS
- Stop
- Detention
- Arrest

Participants: Michael Kessler (Defense Attorney), Mike Catalano (Prosecutor), Aaron Delgado (Officer), and Robert Harrison (Judge)

Includes a 10 minute Q&A session and sponsor break courtesy of LAWPAY.

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Session 2 • BB&T 2020

Case Law, COVID & Motions

Date: October 16, 2020 from 10 a.m. to 2 p.m.
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CLE: Approved by Florida Bar for 3 hours General/Criminal Appellate/Criminal Trial/Juvenile Law

Agenda/Speakers:

- Case Law Update by Eilam Isaak
- COVID-19 DUI Arguments by AnneMarie Rizzo
- Gladiator Award Presentation
- Motions to Suppress and Motions in Limine by Aaron Wayt

Registration only open for purchasing recorded event.

ars Virtual Schedule

Session 3 • BB&T 2020

Jury Selection and DMV

Date: November 13, 2020 from 10 a.m. to 12 p.m.

CLE: Approved by Florida Bar for 2 hours of General/Criminal Appellate/Criminal Trial/Juvenile Law

Agenda/Speakers:

- Jury Selection by Denis DeVlaming
- DMV Hearings by Susan Cohen and David M. Robbins

Includes a 10 minute Q&A session and sponsor break courtesy of LAWPAY after every 50 minute presentation.

Registration closes on November 12 at 10 a.m.

Session 4 • BB&T 2020

Jury Selection and DMV

Date: December 11, 2020 from 10 a.m. to 12 p.m.

CLE: Approved by Florida Bar for 2 hours of General/Criminal Appellate/Criminal Trial/Juvenile Law

Agenda/Speakers:

- DRE Strategies by Wayne Richter
- DRE Cross Examination by Dan Sabol

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ACEs • from page 47

It is important for the criminal defense lawyer to educate both the court and the prosecutor about ACEs and their effect on the offender's life. They do not provide an excuse but rather a reason. In many courts around Florida we have what can be termed "specialty courts." They include drug court, mental health court, veterans court, domestic violence court, girls court and even early childhood court. There are both an understanding and a need for these specialty courts. In the criminal justice system, "one size does not fit all." If we are committed to breaking the recidivism of criminality starting from juvenile offenders into adult life, the core problem or problems in the offender's life must be recognized, addressed and treated.

The following story may best describe the approach advocated in this article. There were two aboriginal tribes that lived deep in the forest of a very poor, third world country. One day, several people in both towns became violently ill. They traced the problem to individual contaminated wells in each town. In one town there was a notice displayed at the well that stated "anyone who drinks from this well will be beaten." Needing water, some did and were summarily punished. In the other town they took a different approach. They realized the problem and filled in the well so that no one else could drink from it and get sick. Eventually, everyone got better. They then located an alternate water source that was not contaminated. Often times, addressing and curing a problem is superior to just telling someone not to do it and then punishing them if they do. Kind of novel, don't you think? 🏛

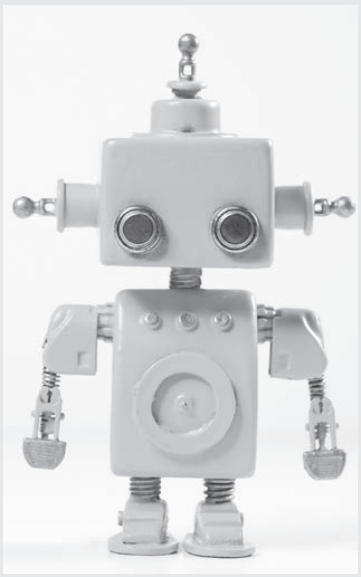
SPECIAL NOTE: I would like to thank **Dr. Mimi Graham**, **Judge Jack Hellinger** and Public Defender **Bob Dillinger** for their invaluable help in providing information for this article. They are committed to getting the word out to the entire legal community about understanding and dealing with ACEs.

From the Pits

Robo Calls

by Denis deVlaming

Robo calls. I hate Robo calls. If a "Robo" ever came to my house, I would kill 'em. Death by Robo. I'd call him every five minutes until he was dead. Relying on the "defense of necessity" I would be acquitted by a jury of my peers. I feel so strongly about this that I am thinking of running for president of the United States. If elected, I would pass one law and then resign. I would outlaw Robo calls. First offense would be punishable by life imprisonment. Second offense, death. That ought to stop those god-awful calls.



For the life of me, I do not understand why our elected officials have not made a concerted effort to stop these annoying calls or at least block them from ringing on our phones. I will vote for anyone whose platform is to stop Robo calls. Let me explain.

When I was in law school two students were running for class president. One of them pledged to increase the dialogue and relationship between students, faculty and the administration. The other student promised only one thing. That he would have "Tom's snack vending machines" installed in the downstairs 24-hour study hall. He won by a landslide.

So to all you future candidates for public office, take this to heart. Advise your constituency that the only thing you stand for, will fight for, and will accomplish is to do away, once and for all, with Robo calls. If that is your soul platform, call me for a donation. I'm in. 🏛

DENIS M. DE VLAMING, a Board Certified criminal defense attorney in Clearwater, has practiced criminal law exclusively since 1972. He has been on FACDL's Board of Directors since its inception in 1988 and is a Charter Member of the organization. He is a past president of FACDL.

RECIPES FOR SUCCESS

by
Jason B.
Blank

Fall is upon us, which in much of Florida means that the temperatures might dip below 80 on occasion…might. But we can pretend that we are in the leaf-changing, brisk weather loving, coat wearing part of the Country that is enjoying the transition into my favorite season of the year. And on top of that, courtrooms are opening around the State and we are going to have to be fueled up, sometimes on-the-go for hearings and trials! One way to do that is to make this wonderfully easy soup using warm seasonal flavors. Hope you enjoy!

APPLE SQUASH SOUP

4-5 lbs mixed autumn or winter squash
3 medium tart apples like Gala or Pink Lady, peeled, cored and cubed
1 medium yellow or white onion, chopped
3 Tbs olive oil divided
1 tsp rubbed sage
½ tsp ground ginger
2 cups vegetable stock
1 cup water (or more as needed)
¾ cup non-fat milk

Preheat oven to 425 degrees. Cut squash in half and scoop out all seeds. Drizzle 1 tablespoon of oil on insides of squash and rub all over meat to coat. Place squash cut-side down on a sheet pan. Roast for 40 minutes to 1 hour until the squash is super soft. While roasting, prepare the apples. Peel, core, and cube the apples. In a large soup or stock pot, add remaining 2 tablespoons of olive oil and sauté the onions and sage over medium-high heat until they are translucent, approximately 3-4 minutes. Add the apples and coat with the onions and sage by stirring for approximately 1 minute. When the squash is roasted and soft, remove from oven, scoop out meat of the squash and add it to the pot with the apples along with the ginger, stirring to coat.

Add the vegetable stock and water to the mixture and bring to a boil. Cover and reduce to low, simmering for 20-30 minutes until apples and squash are super soft. Remove from heat and let cool to near room temperature. Use either a stick blender or blend in a standard blender in batches until entire mixture is smooth. Stir in milk. If the mixture is still too thick, add water a couple tablespoons at a time until it reaches the desired consistency.

To serve, warm the soup gently and garnish with a dollop of crème fresh and toasted pine nuts.

This soup can be the perfect appetizer or served on its own for a hearty lunch with a nice crusty piece of bread. I hope you enjoy and get a little taste of fall even if you are sitting in your pool while you do!

JASON B. BLANK is a partner at Haber Blank, LLP in Fort Lauderdale and is the current Secretary of FACDL.

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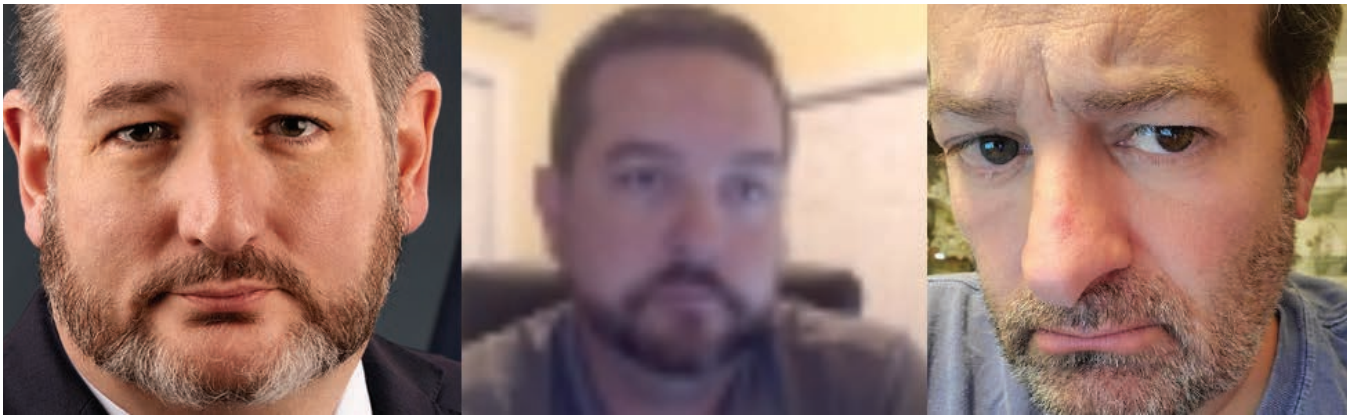
GUESS WHO?

Who are these masked cruasaders for justice???

FACDL masks now available online at www.facdl.org.

Which photo is which person???



Brian Tannebaum? Luke Newman? Ted Cruz?

Members of Pinellas Chapter of FACDL volunteering at the St. Pete Free Clinic Food Bank distributing food.

WWW.FACDL.ORG

FACDL Lunch and Learn Webinar Series

FACDL CLE Chair, Sabrina Puglisi, introduces our new complimentary "Lunch and Learn" webinar series FREE for FACDL members. This series is expected to occur monthly from noon to 1pm and cover a variety of topics helpful to FACDL members. If you have an idea for a topic, contact Sabrina at sabrina@puglisilaw.com

CURRENT SCHEDULE

(see FACDL.ORG homepage calendar for updates):

November 18, 2020: Injunction Defense

Speaker: Matthew I. Lufrano

December 17, 2020: From Defendant to Defender: Overcoming a Wrongful Conviction

Speaker: Jarrett Adams

January 26, 2021: A Defense Lawyer's Best Friend

Speaker: Denis deVlaming

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