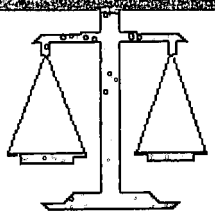
State Of Florida

VS

Curtis Reeves

1400216CFAES

00683538



ESCOBAR &
ASSOCIATES P.A.
ATTORNEYS AT LAW
2917 WEST KENNEDY BOULEVARD
SUITE 100
TAMPA, FL 33609

State of Florida v. Curtis J. Reeves

Case No.: CRC-1400216CFAES
Division: 1

Response in Opposition to Motion for Protective Order
Regarding Deposition of Colonel Jeff Harrington

APPENDIX

Response in Opposition to Motion for Protective Order Regarding Deposition of Colonel Jeff Harrington

EXHIBITS:

LEGAL AUTHORITY:

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

STATE OF FLORIDA,
Plaintiff,

vs.

CURTIS J. REEVES,
Defendant.
_____/

Case No: CRC-1400216CFAES

Division: 1

RESPONSE IN OPPOSITION TO MOTION FOR PROTECTIVE ORDER REGARDING DEPOSITION OF COLONEL JEFF HARRINGTON

Defendant, CURTIS J. REEVES, by and through the undersigned attorney, files this Response in Opposition to Motion for Protective Order Regarding Deposition of Colonel Jeff Harrington, requesting that the Court deny Colonel Harrington's motion, for good cause shown, as follows:

1. In his motion, Colonel Harrington alleges that the Office of the State Attorney has not listed Colonel Harrington as a witness in this case and that the State does not intend to call Colonel Harrington at the trial in this matter. However, on February 3, 2014, the undersigned received the State's Witness List, which included then Major Jeff Harrington as a Category "A" Witness. (*See* Copy of State's Witness List, attached). The undersigned was not previously apprised of a change in the State's intent to call Colonel Harrington as a witness until after he had been served with a subpoena.

2. In his motion, Colonel Harrington also alleges that he has no first hand knowledge of the facts forming the basis of any of the criminal charges in this case. However, it is undisputed that Colonel Harrington was on the scene of the alleged crime on January 13, 2014. Indeed, Colonel

Harrington was originally listed as a Category "A" Witness under the purview of Fla. R. Crim. P. 3.220(b)(1)(A)(i), which requires the State to disclose all "investigating officers." The Fla. R. Crim. P. 3.220 committee notes define an "investigating officer" as "an officer who has directed the collection of evidence, interviewed material witnesses, or who was assigned as the case investigator." Colonel Harrington's presence at the scene of the alleged crime and original listing as an "investigating officer" creates a conflict with Colonel Harrington's present claim that he has no firsthand knowledge of the facts of this case. Unclear or conflicting evidence as to what information a witness may have about a crime or a defendant's presence and participation in a crime is insufficient to sustain a protective order barring the defense from access to the witness, particularly where, as in the present matter, the "existence and identity of the witness originated with the state's disclosure of [the] name to the [defendant] as a witness who was present at the scene of the crime." *Fuller v. State*, 485 So.2d 35, 35 (Fla. 4th DCA 1986).

3. Colonel Harrington's reliance on *In re United States of America*, 985 F.2d 510 (11th Cir. 1993), *Horne v. School Board of Miami-Dade*, 901 So.2d 238 (Fla. 1st DCA 2005), and *State, HRS v. Brooke*, 573 So.2d 363 (Fla. 1st DCA 1991) is misplaced. These cases rely on an assumption that there is no relevancy to calling the "head of an agency." *See, e.g., Dept. of Agriculture v. Broward*, 810 So.2d 1056, 1058 (Fla. 1st DCA 2002) ("To hold otherwise would...subject agency heads to being deposed in virtually every...proceeding."). Here, the relevance of Colonel Harrington's testimony is *prima facie* established by virtue of his presence at the scene of the alleged crime. *See, generally, Fuller*, 485 So.2d at 35. Further, the cases relied on by Colonel Harrington caution against seeking relevant testimony from an agency head where that testimony would arise from their status as the head of an agency alone. The testimony sought from Colonel Harrington

concerns his eye-witness observations and actions taken at the scene of the alleged crime, and is not based on his status as Colonel for the Pasco Sheriff's Office. *Id.* The *Fuller* Court found that an "alleged claim of danger to the witness [which] was totally unconnected to the case against the defendant...[was] insufficient to excuse the presence of the witness." *Id.* The argument offered by Colonel Harrington that he should be exempt from deposition because of his status as a "head of agency" is analogously "unconnected to the case against defendant" in this matter. *Id.* In sum, the transition of a witness into a head of agency cannot be used as a cloak under which one may conceal relevant testimony.

4. Fla. R. Crim. P. 3.220(h) does not prohibit a defendant from taking a deposition of a witness that was initially listed by the prosecution. To interpret Rule 3.220(h) otherwise would be to violate the spirit and purpose of discovery, which should be broadly and liberally permitted to guarantee a defendant the right to a fair trial. *See State v. Brock*, 106 So.2d 607, 610 (Fla. 1st DCA 1958) ("Discovery processes are available to persons charged with crime by which they may obtain such details dehors the information or indictment as are proper and necessary to [their] defense."). Rule 3.220(h) must be interpreted to support the policy behind discovery. *See, generally, Carnivale v. State*, 271 So.2d 793, 795 (Fla. 3d DCA 1973). Further, under the principle of lenity, ambiguity or doubts in the meaning of a criminal rule should be resolved in favor of the defendant. *See, generally, Key v. State*, 837 So.2d 535 (Fla. 2d DCA 2003). Accordingly, any doubt as to whether a deposition of Colonel Harrington is authorized under Fla. R. Crim. P. 3.220(h) should be resolved in favor of Mr. Reeves. Finally, *Fuller* suggests a strong disapproval of the State alerting the defendant to the existence of a Category "A" Witness, only for the State to later prevent that witness's deposition. *Fuller*, 485 So.2d at 35. Rule 3.220(h)'s silence on a defendant's ability to

depose a witness originally listed as a Category "A" Witness by the State cannot be interpreted to prohibit a defendant from deposing such a witness where public policy, the principle of lenity, and case law clearly favors broad and liberal discovery.

5. In the event the State or Sheriff's Office argues that Colonel Harrington is a Category "B" Witness, Mr. Reeves would still be entitled to take his deposition. Under Fla. R. Crim. P. 3.220(b)(1)(A)(ii), a Category "B" Witness is any witness not otherwise listed as Category "A" or "C." Under Fla. R. Crim. P. 3.220(h)(1)(B), a party may take the deposition of a Category "B" Witness upon leave of court with good cause shown. In determining if good cause has been shown, a court must consider: (1) the consequences to the defendant; (2) the complexities of the issues involved; (3) the complexity of the testimony of the witness; and (4) other opportunities available to the defendant to discovery the information sought by deposition. For the reasons already stated above, and in conjunction with those discussed below, Mr. Reeves has shown good cause for taking the deposition of Colonel Harrington:

A. Consequences to the Defendant

Mr. Reeves will be deeply prejudiced if he is prohibited from taking the deposition of Colonel Harrington. As described above, it is undisputed that Colonel Harrington responded to the scene of the alleged crime. It is clear that the State identified Colonel Harrington as an "investigating officer," which comes with duties to direct the collection of evidence, interview witness, or otherwise investigate a crime. Considering Colonel Harrington's rank at the time, he and other ranking officers would have been responsible for directing an immediate investigation and deciding whether an arrest was appropriate. Indeed, in explaining to Mr. Reeves the decision to arrest him, Investigator Allen Proctor stated, "I'm gonna have to arrest you on a second degree... I've

talked it over with the state, and uh, my **command staff and everybody's in agreement..."** (*See*, Police Report, p. 83) (emphasis added). Further, it is axiomatic that in determining whether to arrest Mr. Reeves, Colonel Harrington and other commanding officers would have considered whether Mr. Reeves acted in self-defense. In fact, statements made by Sheriff Nocco to the press reflect this very procedure: "I remember very clearly that we stood outside the movie theater, got all the detectives over and said, 'what do we think we've got here? Is this a Stand Your Ground case?' Everyone said, no way, this is not Stand Your Ground." What Colonel Harrington observed and considered with regards to Mr. Reeves' self-defense, including participation in the discussions described by Sheriff Nocco, is not only relevant, but may prove critical. If Mr. Reeves is deprived of the opportunity to depose Colonel Harrington on his role in the investigation and the ultimate decision to effect an arrest, Mr. Reeves will face the very serious consequence of being unable to fully develop his theory of defense.

B. Complexities of the Issues Involved

This is a highly complex case that may require application of justifiable use of force under Florida Statutes 782.02 and 776.012. Parsing out proper application of these statutes will require presentation of all relevant evidence, including the observations and decisions of Colonel Harrington.

C. The Complexity of the Testimony of the Witness

The complexity of Colonel Harrington's testimony has yet to be determined. If he swears, under oath, that he has no first-hand knowledge of this case, then his testimony may not prove very complex. If, on the hand, Colonel Harrington can offer his observations, the role he took in the investigation, and insight into any decisions he made, his testimony may prove fairly complex.

D. Other Opportunities Available to Discover the Information Sought by Deposition

Only Colonel Harrington can testify as to his own observations and any decisions he made based on them. There is no other opportunity available to discover this information.

6. Finally, the State and the Sheriff's Department should be foreclosed from arguing that Colonel Harrington is a Category "C" Witness. A Category "C" Witness is any "witness who performed only ministerial functions or whom the prosecutor does not intend to call at trial **and** whose involvement with and knowledge of the case is fully set out in a police report or other statement furnished to the defense." Fla. R. Crim. P. 3.220(b)(1)(A)(iii) (emphasis added). It is clear that Colonel Harrington is not a witness that "performed only ministerial acts." Further, even if the State does not intend to call Colonel Harrington, it must still be true that Colonel Harrington's involvement with and knowledge of the case be fully set out in a police report or other statement for Colonel Harrington to be a Category "C" Witness. However, the Police Report merely lists "J. Harrington" as an "assisting officer," and does not at all explain Colonel Harrington's involvement in the investigation. No other statement has been provided to the defense that otherwise explains Colonel Harrington's involvement with, and knowledge of, this case.

WHEREFORE, Mr. Reeves respectfully requests that this Honorable Court find that Colonel Harrington has not established a proper predicate or good cause for a protective order and that Mr. Reeves is entitled to take Colonel Harrington's deposition as scheduled, or, in the alternative, find that Mr. Reeves has shown good cause for deposing Colonel Harrington as a Category "B" Witness, together with such further relief as justice demands.

/s/ Dino M. Michaels
Dino M. Michaels, Esquire
Escobar & Associates, P.A.
2917 W. Kennedy Boulevard, Suite 100
Tampa, Florida 33609
Tel: (813) 875-5100
Fax: (813) 877-6590
Florida Bar No. 0526290
Email: dmichaels@escobarlaw.com
Attorney for Defendant

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by Hand Delivery to the Office of the State Attorney, Dade City, Florida, to Pasco County Sheriff's Office, this 13th day of August, 2014.

/s/ Dino M. Michaels
Dino M. Michaels, Esquire
Escobar & Associates, P.A.
2917 W. Kennedy Boulevard, Suite 100
Tampa, Florida 33609
Tel: (813) 875-5100
Fax: (813) 877-6590
Florida Bar No. 0526290
Email: dmichaels@escobarlaw.com
Attorney for Defendant

"Exhibit A"

IN THE CIRCUIT COURT FOR PASCO COUNTY, FLORIDA

STATE OF FLORIDA CASE NO. CRC1400216CFAES SAX: MARSEE,LISA

VS LIST OF WITNESSES : ANSWER TO DEMAND FOR DISCOVERY

REEVES,CURTIS JUDSON
SPN 00683538

NAME	RESIDENCE	BUSINESS PAGE 1
ABREU,NERIDA 00600117 WIP	3640 BALLASTONE DR LAND OLAKES FL 34638	NO BUSINESS ADDRESS
AGUILAR,ERIC 00684767 WIP	7638 QUAIL HOLLOW BLVD WESLEY CHAPEL FL 33544	NO BUSINESS ADDRESS
AJAMAIN,ELAINE 00684792 WIP	22912 KILLINGTON BLVD LAND O LAKES FL 34369	NO BUSINESS ADDRESS
ALEXANDER,ANDREW 00684786 WIP	NO RESIDENCE ADDRESS	3001 W DR MLK BLVD TAMPA FL 336
ALLEE,SAMANTHA DEP [redacted]331806 INO	NO RESIDENCE ADDRESS	PASCO COUNTY S.O. 8700 CITIZENS DRIVE NEW PORT RICHEY FL 346
ANDREW,ERIC 00684812 WIP	COBB CINEBISTRO 1004 TOWN BLVD ATLANTA GA 30319	NO BUSINESS ADDRESS
CARDONA,JOHN DEP 00584612 INO	NO RESIDENCE ADDRESS	PCSO 36409 SR 52 DADE CITY FL 335
CHAMBERS,DELIA 00684821 WIP	COBB THEATERS 26423 WHIRLAWAY TER WESLEY CHAPEL FL 33544	NO BUSINESS ADDRESS
COLELLO,ANTHONY 00684778 WIP	34352 PERFECT DRIVE DADE CITY FL 33525	NO BUSINESS ADDRESS
COTTRAL,KRISTIE DR 00684761 WIE	NO RESIDENCE ADDRESS	FLORIDA HOSPITAL 2600 BRUCE B DOWNS BLV WESLEY CHAPEL FL 335

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BERNIE MCCABE, STATE ATTORNEY
SIXTH JUDICIAL CIRCUIT OF FLORI

BY [redacted]
ASSISTANT STATE ATTORNEY

ALL WITNESSES ARE
CATEGORY "A" WITNESSES
(UNLESS OTHERWISE NOTED)

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REEVES,CURTIS JUDSON
SPN 00683538

NAME	RESIDENCE	BUSINESS PAGE 2
CUMMINGS,ALEXANDER 00684785 WIP	4604 BRAESGATE CT LAND O LAKES FL 34639	NO BUSINESS ADDRESS
CUMMINGS,CHARLES JAMES 00684784 WIP	4604 BRAESGATE CT LAND O LAKES FL 34639	NO BUSINESS ADDRESS
DEJESUS,MANUEL 00611580 INO	NO RESIDENCE ADDRESS	PCSO 36409 SR 52 DADE CITY FL 335
DEMAS,DEP CHRISTINA 00319076 INO	NO RESIDENCE ADDRESS	PASCO COUNTY S.O. 8700 CITIZENS DRIVE NEW PORT RICHEY FL 346
DIXON,JAMIRA [redacted]84805 WIP	6435 SUSHI CT WESLEY CHAPEL FL 33545	NO BUSINESS ADDRESS
DIXON,MICHAEL CARLOS 00684811 WIP	6435 SUSHI CT WESLEY CHAPEL FL 33545	NO BUSINESS ADDRESS
DUFF,DAVID DEP 00495106 INO	NO RESIDENCE ADDRESS	PCSO 36409 STATE ROAD 52 DADE CITY FL 335
DUVALL,ANDREW 00684814 WIP	5011 CULPEPPER PLACE WESLEY CHAPEL FL 33545	NO BUSINESS ADDRESS
EASTMOND,STEVEN DEP 00120284 INO	NO RESIDENCE ADDRESS	PCSO 644 36409 STATE ROAD 52 DADE CITY FL 335
ELAM,ERIN M 00684813 WIP	COBB THEATER 6809 BOULDER RUN LP ZEPHYRHILLS FL 33545	NO BUSINESS ADDRESS

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SPN 00683538

NAME	RESIDENCE	BUSINESS PAGE 3
ELDERS,ELISSA DEP 00556638 INO	36409 STATE ROAD 52 DADE CITY FL 33525	PCSO 20101 CENTRAL BLVD LAND O LAKES FL 336
FEDERICO,PETE DET 00287678 INO	NO RESIDENCE ADDRESS	PCSO 8700 CITIZENS DR NEW PORT RICHEY FL 346
FIELDS,LUBY SGT 00338052 INO	NO RESIDENCE ADDRESS	PCSO 8700 CITIZENS DRIVE NEW PORT RICHEY FL 346
FOLSOM,GENNIS DEP 00347533 INO	PCSO 8700 CITIZENS DRIVE NEW PORT RICHEY FL 34654	PCSO 8700 CITIZENS DRIVE NEW PORT RICHEY FL 346
FRIEDHOFF,DEREK [redacted]84781 WIP	32141 BROOKSTONE DR WESLEY CHAPEL FL 33545	NO BUSINESS ADDRESS
GARD,GARY 00684772 WIP	7649 TALLOWTREE DRIVE WESLEY CHAPEL FL 33544	NO BUSINESS ADDRESS
GARIEPY,JAMES DET 00185495 INO	NO RESIDENCE ADDRESS	PCSO 8700 CITIZENS DRIVE NEW PORT RICHEY FL 346
GARLOCK,JASON 00567269 INO	2571 RANCHSIDE TER NEW PORT RICHEY FL 34655	NO BUSINESS ADDRESS
GARRISON,JENNY TECH 00359791 WIR	PCSO 8700 CITIZENS DRIVE NEW PORT RICHEY FL 34654	PCSO 8700 CITIZENS DRIVE NEW PORT RICHEY FL 346
GILLOTTE,JESSICA 00354113 INO	NO RESIDENCE ADDRESS	36409 STATE ROAD 52 DADE CITY FL 355

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NAME	RESIDENCE	BUSINESS PAGE 4
GONDEK,DEP TRAVIS 00331255 INO	NO RESIDENCE ADDRESS	PASCO COUNTY S.O. 8700 CITIZENS DRIVE NEW PORT RICHEY FL 346
GONZALEZ,SANJUANITA 00550020 WIR	NO RESIDENCE ADDRESS	PCSO FORENSICS 36409 SR 52 DADE CITY FL 335
GREINER,STEVE SGT 00120568 INO	NO RESIDENCE ADDRESS	PASCO COUNTY SO 8700 CITIZEN DRIVE NEW PORT RICHEY FL 346
GRINNELL,LYNN 00684802 WIP	27808 SANTA ANITA BLVD WESLEY CHAPEL FL 33265	NO BUSINESS ADDRESS
GRINNELL,RICHARD [redacted]84797 WIP	27808 SANTA ANITA BLVD WESLEY CHAPEL FL 33544	NO BUSINESS ADDRESS
HAMILTON,ALAN DET 00595666 WIP	NO RESIDENCE ADDRESS	SUMTER COUNTY S O 1010 NORTH MAIN ST BUSHNELL FL 335
HAMILTON,ANGELA 00684807 WIP	NO RESIDENCE ADDRESS	1010 NORTH MAIN ST BUSHNELL FL 335
HARRINGTON,JEFF MAJOR 00187035 INO	NO RESIDENCE ADDRESS	PSO 8700 CITIZENS DR NEW PORT RICHEY FL 346
HARTMAN,LEONARD 00538432 INO	19153 CAUSEWAY BLVD LAND O LAKES FL 34638	NO BUSINESS ADDRESS
HOUSTON,GARRY HERBERT 00684816 WIP	9608 ROLLING CIR SAN ANTONIO FL 33576	NO BUSINESS ADDRESS

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REEVES,CURTIS JUDSON
SPN 00683538

NAME	RESIDENCE	BUSINESS PAGE 5
HOUSTON,MARY 00684817 WIP	9608 ROLLING CIR SAN ANTONIO FL 33576	NO BUSINESS ADDRESS
JONES,ERIC DEP 00684762 INO	NO RESIDENCE ADDRESS	PASCO SHERIFFS OFC 8700 CITIZEN DRIVE NEW PORT RICHEY FL 346
KERR,ROBERT MILLER 00684806 WIP	27936 MILLER ROAD DADE CITY FL 33525	NO BUSINESS ADDRESS
KERR,SYLVIA 00684804 WIP	27936 MILLER ROAD DADE CITY FL 33525	NO BUSINESS ADDRESS
KING,MYRA [redacted]84789 WIP	NO RESIDENCE ADDRESS	ST JOSEPHS HOSPITAL 3001 W DR MLK BLVD TAMPA FL 336
KITCHEN,THOMAS G 00684771 WIP	7601 TALLOWTREE DRIVE WESLEY CHAPEL FL 33544	NO BUSINESS ADDRESS
LAURIA,NICOLE ELIZABETH 00451761 WIP	37475 ACORN LOOP DADE CITY FL 33523	NO BUSINESS ADDRESS
MAGGIO,KENNETH 00684790 WIP	28505 TWINBROOK LANE WESLEY CHAPEL FL 33544	NO BUSINESS ADDRESS
MANERA,JENNIE 00684782 WIP	32141 BROOKSTONE DR WESLEY CHAPEL FL 33545	NO BUSINESS ADDRESS
MARCH,MICHELLE SGT 00446090 INO	8700 CITIZENS DR NEW PORT RICHEY FL 34654	NO BUSINESS ADDRESS

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REEVES,CURTIS JUDSON
SPN 00683538

NAME	RESIDENCE	BUSINESS PAGE 6
MATWIEJOW,VITORIA 00684747 WIP	7717 SEAFIELD LN WESLEY CHAPEL FL 33545	NO BUSINESS ADDRESS
MCCULLEN,MAJOR BRYANT JR 00684794 WIP	28600 BENNINGTON DR WESLEY CHAPEL FL 33544	NO BUSINESS ADDRESS
MCDONALD,KELLEY 00684791 WIP	3422 CHAPEL CREEK CIR WESLEY CHAPEL FL 33544	NO BUSINESS ADDRESS
MCFADDEN,EDWARD M 00684770 WIP	12410 PALM ST SAN ANTONIO FL 33576	NO BUSINESS ADDRESS
MCINNES,STEPHEN DEP 126039 INO	NO RESIDENCE ADDRESS	PASCO SHERIFFS OFF 8700 CITIZENS DRIVE NEW PORT RICHEY FL 346
MEYERS,FRED 00684810 WIR	COBB CINEBISTRO 1004 TOWN BLVD ATLANTA GA 30319	NO BUSINESS ADDRESS
MICKLEY,JACE P 00684774 WIP	2667 MOSSER ST ALLENTOWN PA 18104	NO BUSINESS ADDRESS
MILLER,SUSAN TECH 00355608 WIR	NO RESIDENCE ADDRESS	PSO FORENSICS 20101 CENTRAL BLVD LAND O LAKES FL 346
MORRISON,MARK DET 00209909 INO	PCSO DADE CITY FL 33525	PCSO 36409 STATE RD 52 DADE CITY FL 335
MOYERS,RICHARDO 00684775 WIP	30534 LATOURETTE DRIVE WESLEY CHAPEL FL 33543	NO BUSINESS ADDRESS

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SPN 00683538

NAME	RESIDENCE	BUSINESS PAGE 7
MURPHY,ANNE 00684796 WIP	23831 CORAL RIDGE LANE LAND O LAKES FL 34639	NO BUSINESS ADDRESS
MURRAY,MARK DEP 00532081 INO	NO RESIDENCE ADDRESS	PASCO COUNTY SO 8700 CITIZENS DR NEW PORT RICHEY FL 346
MYERS,MATTHEW DEP 00365114 INO	NO RESIDENCE ADDRESS	PCSO 8700 CITIZENS DRIVE NEW PORT RICHEY FL 346
OULSON,NICOLE 00683650 WIV	8043 SEQUESTER LOOP LAND O LAKES FL 34637	NO BUSINESS ADDRESS
PARISH,AMY TECH [redacted]466843 WIR	NO RESIDENCE ADDRESS	PASCO COUNTY S.O. 8700 CITIZENS DRIVE NEW PORT RICHEY FL 346
PECK,THOMAS 00684815 WIP	NO RESIDENCE ADDRESS	COBB THEATER 6333 WESLEY GROVE BLV WESLEY CHAPEL FL 335
PEREZ,GLADYS 00684809 WIP	10702 CORY LAKE DRIVE TAMPA FL 33647	NO BUSINESS ADDRESS
PEREZ,LUIS 00684808 WIP	10702 CORY LAKE DR TAMPA FL 33647	NO BUSINESS ADDRESS
PROCTOR,ALLEN DET 00072076 ARO	NO RESIDENCE ADDRESS	PASCO SHERIFFS OFF 8700 CITIZENS DRIVE NEW PORT RICHEY FL 346
QUINLAN,SGT DEAN 00138061 INO	NO RESIDENCE ADDRESS	PCSO #704 8700 CITIZEN DRIVE NEW PORT RICHEY FL 346

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STATE OF FLORIDA CASE NO. CRC1400216CFAES SAX: MARSEE,LISA

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REEVES,CURTIS JUDSON
SPN 00683538

NAME	RESIDENCE	BUSINESS PAGE 8
RAULERSON,GARY 00378944 INO	NO RESIDENCE ADDRESS	PCSO 36409 STATE ROAD 52 DADE CITY FL 335
REDFORD,JAMES VINCENT 00610535 WIP	28442 OLD MILL DR WESLEY CHAPEL FL 33544	NO BUSINESS ADDRESS
ROBARTS,DAVID DEP 00624216 INO	NO RESIDENCE ADDRESS	PASCO SHERIFFS OFF 8700 CITIZENS DRIVE NEW PORT RICHEY FL 346
ROY,JANE 00684780 WIP	24243 SATINWOOD CT LUTZ FL 33559	NO BUSINESS ADDRESS
ROY,MARK [redacted]84777 WIP	24243 SATINWOOD CT LUTZ FL 33543	NO BUSINESS ADDRESS
SCHNECK,DAVID 00684803 WIP	34124 ESTATES LANE ZEPHYRHILLS FL 33543	NO BUSINESS ADDRESS
SCHULER,MONTE DET 00539429 INO	NO RESIDENCE ADDRESS	PASCO SHERIFFS OFF 8700 CITIZENS DRIVE NEW PORT RICHEY FL 346
SCILEX,RICHARD DET 00341067 INO	NO RESIDENCE ADDRESS	PASCO SHERIFFS OFF 36409 STATE ROAD 52 DADE CITY FL 335
SELTMAN,BRADFORD DEP 00234261 INO	NO RESIDENCE ADDRESS	PASCO COUNTY S.O. 8700 CITIZENS DRIVE NEW PORT RICHEY FL 346
SELTZER,ERIC SGT 00247686 INO	NO RESIDENCE ADDRESS	PCSO 8700 CITIZENS DRIVE NEW PORT RICHEY FL 346

I DO CERTIFY THAT COPY (COPIES) HEREOF HAVE BEEN FURNISHED TO ATTORNEY FOR DEFENDANT, Dino Michaels, ESQ Richard Escobar, ESQ BY US Mail , THIS 3rd DAY OF Feb , 2014

BERNIE MCCABE, STATE ATTORNEY
SIXTH JUDICIAL CIRCUIT OF FLORI

BY [redacted]
ASSISTANT STATE ATTORNEY

ALL WITNESSES ARE CATEGORIZED AS ENDORSED (UNLESS OTHERWISE NOTED)

IN THE CIRCUIT COURT FOR PASCO COUNTY, FLORIDA

STATE OF FLORIDA CASE NO. CRC1400216CFAES SAX: MARSEE,LISA

VS LIST OF WITNESSES : ANSWER TO DEMAND FOR DISCOVERY

REEVES,CURTIS JUDSON
SPN 00683538

NAME	RESIDENCE	BUSINESS PAGE 9
SELWA,DANIEL 00684799 WIP	5100 LOCKHART ROAD BROOKSVILLE FL 34602	NO BUSINESS ADDRESS
SELWA,DENISE 00684800 WIP	5100 LOCKHART ROAD BROOKSVILLE FL 34602	NO BUSINESS ADDRESS
SESSA,JAMES SGT 00104547 INO	PCSO DADE CITY FL 33525	PCSO 8700 CITIZEN DRIVE NEW PORT RICHEY FL 346
SHORT,JOSHUA DEP 00579913 INO	NO RESIDENCE ADDRESS	PASCO SHERIFFS OFF 8700 CITIZENS DR NEW PORT RICHEY FL 346
SIKES,BRYAN DEP [redacted]566995 INO	NO RESIDENCE ADDRESS	PCSO 8700 CITIZENS DR NEW PORT RICHEY FL 346
SMITH,AARON DEP 00607850 INO	NO RESIDENCE ADDRESS	PCSO 36409 SR 52 DADE CITY FL 335
SMITH,GENE DEP 00578772 INO	NO RESIDENCE ADDRESS	PASCO SHERIFFS OFF 8700 CITIZENS DRIVE NEW PORT RICHEY FL 346
SOTO,SERGIO DET 00503424 INO	NO RESIDENCE ADDRESS	PCSO 36409 SR 52 DADE CITY FL 335
SOUTO,GARY DET 00082903 INO	PCSO NEW PORT RICHEY FL 34654	PCSO 36409 STATE ROAD 52 DADE CITY FL 335
STOLMEIER,PETER 00684793 WIP	7907 TALLOWTREE DRIVE WESLEY CHAPEL FL 33544	NO BUSINESS ADDRESS

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Richard Escobar ESQ

BERNIE MCCABE, STATE ATTORNEY
SIXTH JUDICIAL CIRCUIT OF FLORI

BY [redacted]
ASSISTANT STATE ATTORNEY

ALL WITNESSES ARE
CATEGORY "A" WITNESSES
(UNLESS OTHERWISE NOTED)

IN THE CIRCUIT COURT FOR PASCO COUNTY, FLORIDA

STATE OF FLORIDA CASE NO. CRC1400216CFAES SAX: MARSEE,LISA

VS LIST OF WITNESSES : ANSWER TO DEMAND FOR DISCOVERY

REEVES,CURTIS JUDSON
SPN 00683538

NAME	RESIDENCE	BUSINESS PAGE 10
SUMMERS,JAMES 00684764 WIP	1099 FOX CHAPEL DRIVE LUTZ FL 33549	NO BUSINESS ADDRESS
THAI,THUY 00684769 WIP	8313 PALMA VISTA LANE TAMPA FL 33614	NO BUSINESS ADDRESS
THOGMARTIN,JON DR 00370250 WIE	NO RESIDENCE ADDRESS	M E OFFICE 10900 ULMERTON ROAD LARGO FL 337
TITUS,STEPHEN DEP 00501367 INO	NO RESIDENCE ADDRESS	PASCO SHERIFFS OFF 8700 CITIZENS DRIVE NEW PORT RICHEY FL 346
TONER,DANIEL DET [redacted]426576 INO	NO RESIDENCE ADDRESS	PASCO COUNTY SO 8700 CITIZENS DRIVE NEW PORT RICHEY FL 346
TROY,CHARLES DET 00430786 INO	NO RESIDENCE ADDRESS	PASCO COUNTY SO 8700 CITIZENS DRIVE NEW PORT RICHEY FL 346
TURNER,JOANNA 00684820 WIP	27440 MIST FLOWER DR WESLEY CHAPEL FL 33544	NO BUSINESS ADDRESS
TURNER,MARK 00684819 WIP	27440 MIST FLOWER DR WESLEY CHAPEL FL 33544	NO BUSINESS ADDRESS
WEIGAND,DENICE TECH 00262779 WIR	PSO FORENSICS 20101 CENTRAL BV LAND O LAKES FL 34637	PSO FORENSICS 20101 CENTRAL BLVD LAND O LAKES FL 346
WOLFE,ALLEN 00673748 WIP	34237 PARK SQUARE PLC RIDGE MANOR FL 33523	NO BUSINESS ADDRESS

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BERNIE MCCABE, STATE ATTORNEY
SIXTH JUDICIAL CIRCUIT OF FLORI

BY [redacted]
ASSISTANT STATE ATTORNEY

ALL WITNESSES ARE
CATEGORY 'A' WITNESSES
(UNLESS OTHERWISE NOTED)

"Exhibit B"

PROCTOR: Because, Curtis, I'm sorry because I don't have a choice.

REEVES: Sure... (inaudible)

PROCTOR: Because, understand what's going on here, I've got somebody that I would resp, I, I respect a great deal.... you put your rear-end on the line a lot of days...

REEVES: That, that, that doesn't have anything to do with it man...

PROCTOR: Yeah it does..., it does, I've been a cop 30 years myself sir, so, I, I hate to do what I have to do sometimes, but I don't have a choice right now.

REEVES: I don't know what to say I.... I'm sitting back here, I'm thinking to myself..... my life is ruined, his life is ruined, my family's life is ruined, his family's life is ruined.....

PROCTOR: Um... I'm gonna have to arrest you on a second degree... I've talked it over with the state, and uh, my command staff and everybody's in agreement..... You'll have a bond.... You know all the procedures. I'll make sure that they're aware you're law enforcement, they will treat you with respect just like if you, you know how, It's just like anybody else, they're gonna treat.... They will take care of you sir.

REEVES: Okay now.... my, my wife was sitting next to me, your saying she never saw that guy get that close to me and saw me push him back?

PROCTOR: No sir. She never saw a punch.

REEVES: Well I.. Okay.

PROCTOR: She said that he leans over...

REEVES: Okay.

PROCTOR: But you know, and I ask her point blank, did you ever see a punch? No, I never saw a punch.

REEVES: I never saw it either.

PROCTOR: Did it happen?

REEVES: I've been sitting back here second guessing myself. I got hit in the left side of my face and my temple, got my glasses knocked off. There was nobody else there man. There was nobody else there.

PROCTOR: Did you see, did your wife see your glasses knocked off?

REEVES: Now that you're gonna have to ask her.

PROCTOR: because she says no.

West's Florida Statutes Annotated
Florida Rules of Criminal Procedure (Refs & Annos)
VI. Discovery

Fla. R. Crim. P. Rule 3.220

Rule 3.220. Discovery

Currentness

(a) Notice of Discovery. After the filing of the charging document, a defendant may elect to participate in the discovery process provided by these rules, including the taking of discovery depositions, by filing with the court and serving on the prosecuting attorney a "Notice of Discovery" which shall bind both the prosecution and defendant to all discovery procedures contained in these rules. Participation by a defendant in the discovery process, including the taking of any deposition by a defendant or the filing of a public records request under chapter 119, Florida Statutes, for law enforcement records relating to the defendant's pending prosecution, which are nonexempt as a result of a codefendant's participation in discovery, shall be an election to participate in discovery and triggers a reciprocal discovery obligation for the defendant. If any defendant knowingly or purposely shares in discovery obtained by a codefendant, the defendant shall be deemed to have elected to participate in discovery.

(b) Prosecutor's Discovery Obligation.

(1) Within 15 days after service of the Notice of Discovery, the prosecutor shall serve a written Discovery Exhibit which shall disclose to the defendant and permit the defendant to inspect, copy, test, and photograph the following information and material within the state's possession or control, except that any property or material that portrays sexual performance by a child or constitutes child pornography may not be copied, photographed, duplicated, or otherwise reproduced so long as the state attorney makes the property or material reasonably available to the defendant or the defendant's attorney:

(A) a list of the names and addresses of all persons known to the prosecutor to have information that may be relevant to any offense charged or any defense thereto, or to any similar fact evidence to be presented at trial under section 90.404(2), Florida Statutes. The names and addresses of persons listed shall be clearly designated in the following categories:

(i) Category A. These witnesses shall include (1) eye witnesses, (2) alibi witnesses and rebuttal to alibi witnesses, (3) witnesses who were present when a recorded or unrecorded statement was taken from or made by a defendant or codefendant, which shall be separately identified within this category, (4) investigating officers, (5) witnesses known by the prosecutor to have any material information that tends to negate the guilt of the defendant as to any offense charged, (6) child hearsay witnesses, (7) expert witnesses who have not provided a written report and a curriculum vitae or who are going to testify, and (8) informant witnesses, whether in custody, who offer testimony concerning the statements of a defendant about the issues for which the defendant is being tried.

(ii) Category B. All witnesses not listed in either Category A or Category C.

(iii) Category C. All witnesses who performed only ministerial functions or whom the prosecutor does not intend to call at trial and whose involvement with and knowledge of the case is fully set out in a police report or other statement furnished to the defense;

(B) the statement of any person whose name is furnished in compliance with the preceding subdivision. The term "statement" as used herein includes a written statement made by the person and signed or otherwise adopted or approved by the person and also includes any statement of any kind or manner made by the person and written or recorded or summarized in any writing or recording. The term "statement" is specifically intended to include all police and investigative reports of any kind prepared for or in connection with the case, but shall not include the notes from which those reports are compiled;

(C) any written or recorded statements and the substance of any oral statements made by the defendant, including a copy of any statements contained in police reports or report summaries, together with the name and address of each witness to the statements;

(D) any written or recorded statements and the substance of any oral statements made by a codefendant;

(E) those portions of recorded grand jury minutes that contain testimony of the defendant;

(F) any tangible papers or objects that were obtained from or belonged to the defendant;

(G) whether the state has any material or information that has been provided by a confidential informant;

(H) whether there has been any electronic surveillance, including wiretapping, of the premises of the defendant or of conversations to which the defendant was a party and any documents relating thereto;

(I) whether there has been any search or seizure and any documents relating thereto;

(J) reports or statements of experts made in connection with the particular case, including results of physical or mental examinations and of scientific tests, experiments, or comparisons; and

(K) any tangible papers or objects that the prosecuting attorney intends to use in the hearing or trial and that were not obtained from or that did not belong to the defendant.

(L) any tangible paper, objects or substances in the possession of law enforcement that could be tested for DNA.

(M) whether the state has any material or information that has been provided by an informant witness, including:

(i) the substance of any statement allegedly made by the defendant about which the informant witness may testify;

(ii) a summary of the criminal history record of the informant witness;

(iii) the time and place under which the defendant's alleged statement was made;

(iv) whether the informant witness has received, or expects to receive, anything in exchange for his or her testimony;

(v) the informant witness' prior history of cooperation, in return for any benefit, as known to the prosecutor.

(2) If the court determines, in camera, that any police or investigative report contains irrelevant, sensitive information or information interrelated with other crimes or criminal activities and the disclosure of the contents of the police report may seriously impair law enforcement or jeopardize the investigation of those other crimes or activities, the court may prohibit or partially restrict the disclosure.

(3) The court may prohibit the state from introducing into evidence any of the foregoing material not disclosed, so as to secure and maintain fairness in the just determination of the cause.

(4) As soon as practicable after the filing of the charging document the prosecutor shall disclose to the defendant any material information within the state's possession or control that tends to negate the guilt of the defendant as to any offense charged, regardless of whether the defendant has incurred reciprocal discovery obligations.

(c) Disclosure to Prosecution.

(1) After the filing of the charging document and subject to constitutional limitations, the court may require a defendant to:

(A) appear in a lineup;

(B) speak for identification by witnesses to an offense;

(C) be fingerprinted;

(D) pose for photographs not involving re-enactment of a scene;

(E) try on articles of clothing;

(F) permit the taking of specimens of material under the defendant's fingernails;

(G) permit the taking of samples of the defendant's blood, hair, and other materials of the defendant's body that involves no unreasonable intrusion thereof;

(H) provide specimens of the defendant's handwriting; and

(I) submit to a reasonable physical or medical inspection of the defendant's body.

(2) If the personal appearance of a defendant is required for the foregoing purposes, reasonable notice of the time and location of the appearance shall be given by the prosecuting attorney to the defendant and his or her counsel. Provisions may be made for appearances for such purposes in an order admitting a defendant to bail or providing for pretrial release.

(d) Defendant's Obligation.

(1) If a defendant elects to participate in discovery, either through filing the appropriate notice or by participating in any discovery process, including the taking of a discovery deposition, the following disclosures shall be made:

(A) Within 15 days after receipt by the defendant of the Discovery Exhibit furnished by the prosecutor pursuant to subdivision (b)(1)(A) of this rule, the defendant shall furnish to the prosecutor a written list of the names and addresses of all witnesses whom the defendant expects to call as witnesses at the trial or hearing. When the prosecutor subpoenas a witness whose name has been furnished by the defendant, except for trial subpoenas, the rules applicable to the taking of depositions shall apply.

(B) Within 15 days after receipt of the prosecutor's Discovery Exhibit the defendant shall serve a written Discovery Exhibit which shall disclose to and permit the prosecutor to inspect, copy, test, and photograph the following information and material that is in the defendant's possession or control:

(i) the statement of any person listed in subdivision (d)(1)(A), other than that of the defendant;

(ii) reports or statements of experts made in connection with the particular case, including results of physical or mental examinations and of scientific tests, experiments, or comparisons; and

(iii) any tangible papers or objects that the defendant intends to use in the hearing or trial.

(2) The prosecutor and the defendant shall perform their obligations under this rule in a manner mutually agreeable or as ordered by the court.

(3) The filing of a motion for protective order by the prosecutor will automatically stay the times provided for in this subdivision. If a protective order is granted, the defendant may, within 2 days thereafter, or at any time before the prosecutor furnishes the information or material that is the subject of the motion for protective order, withdraw the defendant's notice of discovery and not be required to furnish reciprocal discovery.

(e) Restricting Disclosure. The court on its own initiative or on motion of counsel shall deny or partially restrict disclosures authorized by this rule if it finds there is a substantial risk to any person of physical harm, intimidation, bribery, economic reprisals, or unnecessary annoyance or embarrassment resulting from the disclosure, that outweighs any usefulness of the disclosure to either party.

(f) Additional Discovery. On a showing of materiality, the court may require such other discovery to the parties as justice may require.

(g) Matters Not Subject to Disclosure.

(1) *Work Product.* Disclosure shall not be required of legal research or of records, correspondence, reports, or memoranda to the extent that they contain the opinions, theories, or conclusions of the prosecuting or defense attorney or members of their legal staffs.

(2) *Informants.* Disclosure of a confidential informant shall not be required unless the confidential informant is to be produced at a hearing or trial or a failure to disclose the informant's identity will infringe the constitutional rights of the defendant.

(h) Discovery Depositions.

(1) *Generally.* At any time after the filing of the charging document any party may take the deposition upon oral examination of any person authorized by this rule. A party taking a deposition shall give reasonable written notice to each other party and shall make a good faith effort to coordinate the date, time, and location of the deposition to accommodate the schedules of other parties and the witness to be deposed. The notice shall state the time and the location where the deposition is to be taken, the name of each person to be examined, and a certificate of counsel that a good faith effort was made to coordinate the deposition schedule. After notice to the parties the court may, for good cause shown, extend or shorten the time and may change the location of the deposition. Except as provided herein, the procedure for taking the deposition, including the scope of the examination, and the issuance of a subpoena (except a subpoena duces tecum) for deposition by an attorney of record in the action, shall be the same as that provided in the Florida Rules of Civil Procedure. Any deposition taken pursuant to this rule may be used by any party for the purpose of contradicting or impeaching the testimony of the deponent as a witness. The trial court or the clerk of the court may, upon application by a pro se litigant or the attorney for any party, issue subpoenas for the persons whose depositions are to be taken. In any case, including multiple defendants or consolidated cases, no person shall be deposed more than once except by consent of the parties or by order of the court issued on good cause shown. A witness who refuses to obey a duly served subpoena may be adjudged in contempt of the court from which the subpoena issued.

(A) The defendant may, without leave of court, take the deposition of any witness listed by the prosecutor as a Category A witness or listed by a co-defendant as a witness to be called at a joint trial or hearing. After receipt by the defendant of the Discovery Exhibit, the defendant may, without leave of court, take the deposition of any unlisted witness who may have information relevant to the offense charged. The prosecutor may, without leave of court, take the deposition of any witness listed by the defendant to be called at a trial or hearing.

(B) No party may take the deposition of a witness listed by the prosecutor as a Category B witness except upon leave of court with good cause shown. In determining whether to allow a deposition, the court should consider the consequences to the defendant, the complexities of the issues involved, the complexity of the testimony of the witness (e.g., experts), and the other opportunities available to the defendant to discover the information sought by deposition.

(C) A witness listed by the prosecutor as a Category C witness shall not be subject to deposition unless the court determines that the witness should be listed in another category.

(D) No deposition shall be taken in a case in which the defendant is charged only with a misdemeanor or a criminal traffic offense when all other discovery provided by this rule has been complied with unless good cause can be shown to the trial court. In determining whether to allow a deposition, the court should consider the consequences to the defendant, the complexity of the issues involved, the complexity of the witness' testimony (e.g., experts), and the other opportunities available to the defendant to discover the information sought by deposition. However, this prohibition against the taking of depositions shall not be applicable if following the furnishing of discovery by the defendant the state then takes the statement of a listed defense witness pursuant to section 27.04, Florida Statutes.

(2) *Transcripts.* No transcript of a deposition for which the state may be obligated to expend funds shall be ordered by a party unless it is in compliance with general law.

(3) *Location of Deposition.* Depositions of witnesses residing in the county in which the trial is to take place shall be taken in the building in which the trial shall be held, such other location as is agreed on by the parties, or a location designated by the court. Depositions of witnesses residing outside the county in which the trial is to take place shall be taken in a court reporter's office in the county or state in which the witness resides, such other location as is agreed on by the parties, or a location designated by the court.

(4) *Depositions of Sensitive Witnesses.* Depositions of children under the age of 16 shall be videotaped unless otherwise ordered by the court. The court may order the videotaping of a deposition or the taking of a deposition of a witness with fragile emotional strength to be in the presence of the trial judge or a special magistrate.

(5) *Depositions of Law Enforcement Officers.* Subject to the general provisions of subdivision (h)(1), law enforcement officers shall appear for deposition, without subpoena, upon written notice of taking deposition delivered at the address of the law enforcement agency or department, or an address designated by the law enforcement agency or department, five days prior to the date of the deposition. Law enforcement officers who fail to appear for deposition after being served notice as required by the rule may be adjudged in contempt of court.

(6) *Witness Coordinating Office/Notice of Taking Deposition.* If a witness coordinating office has been established in the jurisdiction pursuant to applicable Florida Statutes, the deposition of any witness should be coordinated through that office. The witness coordinating office should attempt to schedule the depositions of a witness at a time and location convenient for the witness and acceptable to the parties.

(7) *Defendant's Physical Presence.* A defendant shall not be physically present at a deposition except on stipulation of the parties or as provided by this rule. The court may order the physical presence of the defendant on a showing of good cause. The court may consider (A) the need for the physical presence of the defendant to obtain effective discovery, (B) the intimidating effect of the defendant's presence on the witness, if any, (C) any cost or inconvenience which may result, and (D) any alternative electronic or audio/visual means available.

(8) *Telephonic Statements.* On stipulation of the parties and the consent of the witness, the statement of any witness may be taken by telephone in lieu of the deposition of the witness. In such case, the witness need not be under oath. The statement, however, shall be recorded and may be used for impeachment at trial as a prior inconsistent statement pursuant to the Florida Evidence Code.

(i) Investigations Not to Be Impeded. Except as is otherwise provided as to matters not subject to disclosure or restricted by protective orders, neither the counsel for the parties nor other prosecution or defense personnel shall advise persons having relevant material or information (except the defendant) to refrain from discussing the case with opposing counsel or showing opposing counsel any relevant material, nor shall they otherwise impede opposing counsel's investigation of the case.

(j) Continuing Duty to Disclose. If, subsequent to compliance with the rules, a party discovers additional witnesses or material that the party would have been under a duty to disclose or produce at the time of the previous compliance, the party shall promptly disclose or produce the witnesses or material in the same manner as required under these rules for initial discovery.

(k) Court May Alter Times. The court may alter the times for compliance with any discovery under these rules on good cause shown.

(*l*) Protective Orders.

(1) *Motion to Restrict Disclosure of Matters.* On a showing of good cause, the court shall at any time order that specified disclosures be restricted, deferred, or exempted from discovery, that certain matters not be inquired into, that the scope of the deposition be limited to certain matters, that a deposition be sealed and after being sealed be opened only by order of the court, or make such other order as is appropriate to protect a witness from harassment, unnecessary inconvenience, or invasion of privacy, including prohibiting the taking of a deposition. All material and information to which a party is entitled, however, must be disclosed in time to permit the party to make beneficial use of it.

(2) *Motion to Terminate or Limit Examination.* At any time during the taking of a deposition, on motion of a party or of the deponent, and upon a showing that the examination is being conducted in bad faith or in such manner as to unreasonably annoy, embarrass, or oppress the deponent or party, the court in which the action is pending or the circuit court where the deposition is being taken may (1) terminate the deposition, (2) limit the scope and manner of the taking of the deposition, (3) limit the time of the deposition, (4) continue the deposition to a later time, (5) order the deposition to be taken in open court, and, in addition, may (6) impose any sanction authorized by this rule. If the order terminates the deposition, it shall be resumed thereafter only upon the order of the court in which the action is pending. Upon demand of any party or deponent, the taking of the deposition shall be suspended for the time necessary to make a motion for an order.

(m) In Camera and Ex Parte Proceedings.

(1) Any person may move for an order denying or regulating disclosure of sensitive matters. The court may consider the matters contained in the motion in camera.

(2) Upon request, the court shall allow the defendant to make an ex parte showing of good cause for taking the deposition of a Category B witness.

(3) A record shall be made of proceedings authorized under this subdivision. If the court enters an order granting relief after an in camera inspection or ex parte showing, the entire record of the proceeding shall be sealed and preserved and be made available to the appellate court in the event of an appeal.

(n) Sanctions.

(1) If, at any time during the course of the proceedings, it is brought to the attention of the court that a party has failed to comply with an applicable discovery rule or with an order issued pursuant to an applicable discovery rule, the court may order the party to comply with the discovery or inspection of materials not previously disclosed or produced, grant a continuance, grant a mistrial, prohibit the party from calling a witness not disclosed or introducing in evidence the material not disclosed, or enter such other order as it deems just under the circumstances.

(2) Willful violation by counsel or a party not represented by counsel of an applicable discovery rule, or an order issued pursuant thereto, shall subject counsel or the unrepresented party to appropriate sanctions by the court. The sanctions may include, but are not limited to, contempt proceedings against the attorney or unrepresented party, as well as the assessment of costs incurred by the opposing party, when appropriate.

(3) Every request for discovery or response or objection, including a notice of deposition made by a party represented by an attorney, shall be signed by at least 1 attorney of record in the attorney's individual name, whose address shall be stated. A party who is not represented by an attorney shall sign the request, response, or objection and list his or her address. The signature of the attorney or party constitutes a certification that the signer has read the request, response, or objection and that to the best of the signer's knowledge, information, or belief formed after a reasonable inquiry it is:

(A) consistent with these rules and warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law;

(B) not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation; and

(C) not unreasonable or unduly burdensome or expensive, given the needs of the case and the importance of the issues at stake in the litigation.

If a request, response, or objection is not signed, it shall be stricken unless it is signed promptly after the omission is called to the attention of the party making the request, response, or objection, and a party shall not be obligated to take any action with respect to it until it is signed.

If a certification is made in violation of this rule, the court, on motion or on its own initiative, shall impose on the person who made the certification, the firm or agency with which the person is affiliated, the party on whose behalf the request, response, or objection is made, or any or all of the above an appropriate sanction, which may include an order to pay the amount of the reasonable expenses incurred because of the violation, including a reasonable attorney's fee.

(*o*) Pretrial Conference.

(1) The trial court may hold 1 or more pretrial conferences, with trial counsel present, to consider such matters as will promote a fair and expeditious trial. The defendant shall be present unless the defendant waives this in writing.

(2) The court may set, and upon the request of any party shall set, a discovery schedule, including a discovery cut-off date, at the pretrial conference.

Credits

Amended Sept. 24, 1992, effective Jan. 1, 1993 (606 So.2d 227); Sept. 12, 1996, effective Oct. 1, 1996 (681 So.2d 666); April 2, 1998 (710 So.2d 961); Dec. 3, 1998 (721 So.2d 1162); Feb. 18, 1999 (745 So.2d 319); Feb. 10, 2000 (763 So.2d 274); Sept. 30, 2004, effective Oct. 1, 2004 (887 So.2d 1090); April 7, 2005 (900 So.2d 528); Nov. 19, 2009, effective Jan. 1, 2010 (26 So.3d 534); Dec. 20, 2012 (105 So.3d 1275); Nov. 8, 2012, effective Jan. 1, 2013 (104 So.3d 304); May 23, 2013 (115 So.3d 207); May 29, 2014, effective July 1, 2014 (2014 WL 2579634).

Editors' Notes

COMMITTEE NOTES

1968 Adoption.

(a)(1) This is substantially the same as section 925.05, Florida Statutes.

(a)(2) This is new and allows a defendant rights which he did not have, but must be considered in light of subdivision (c).

(a)(3) This is a slight enlargement upon the present practice; however, from a practical standpoint, it is not an enlargement, but merely a codification of section 925.05, Florida Statutes, with respect to the defendant's testimony before a grand jury.

(b) This is a restatement of section 925.04, Florida Statutes, except for the change of the word "may" to "shall."

(c) This is new and affords discovery to the state within the trial judge's discretion by allowing the trial judge to make discovery under (a)(2) and (b) conditioned upon the defendant giving the state some information if the defendant has it. This affords the state some area of discovery which it did not previously have with respect to (b). A question was raised concerning the effect of (a)(2) on FBI reports and other reports which are submitted to a prosecutor as "confidential" but it was agreed that the interests of justice would be better served by allowing this rule and that, after the appropriate governmental authorities are made aware of the fact that their reports may be subject to compulsory disclosure, no harm to the state will be done.

(d) and (e) This gives the defendant optional procedures. (d) is simply a codification of section 906.29, Florida Statutes, except for the addition of "addresses." The defendant is allowed this procedure in any event. (e) affords the defendant the additional practice of obtaining all of the state's witnesses, as distinguished from merely those on whose evidence the information, or indictment, is based, but only if the defendant is willing to give the state a list of all defense witnesses, which must be done to take advantage of this rule. The confidential informant who is to be used as a witness must be disclosed; but it was expressly viewed that this should not otherwise overrule present case law on the subject of disclosure of confidential informants, either where disclosure is required or not required.

(f) This is new and is a compromise between the philosophy that the defendant should be allowed unlimited discovery depositions and the philosophy that the defendant should not be allowed any discovery depositions at all. The purpose of the rule is to afford the defendant relief from situations when witnesses refuse to "cooperate" by making pretrial disclosures to the defense. It was determined to be necessary that the written signed statement be a criterion because this is the only way witnesses can be impeached by prior contradictory statements. The word "cooperate" was

intentionally left in the rule, although the word is a loose one, so that it can be given a liberal interpretation, i.e., a witness may claim to be available and yet never actually submit to an interview. Some express the view that the defendant is not being afforded adequate protection because the cooperating witness will not have been under oath, but the subcommittee felt that the only alternative would be to make unlimited discovery depositions available to the defendant which was a view not approved by a majority of the subcommittee. Each minority is expressed by the following alternative proposals:

Alternative Proposal (1): When a person is charged with an offense, at any time after the filing of the indictment, information, or affidavit upon which the defendant is to be tried, such person may take the deposition of any person by deposition upon oral examination for the purpose of discovery. The attendance of witnesses may be compelled by the use of subpoenas as provided by law. The deposition of a person confined in prison may be taken only by leave of court on such terms as the court prescribes. The scope of examination and the manner and method of taking such deposition shall be as provided in the Florida Rules of Civil Procedure and the deposition may be used for the purpose of contradicting or impeaching the testimony of a deponent as a witness.

Alternative Proposal (2): If a defendant signs and files a written waiver of his or her privilege against self-incrimination and submits to interrogation under oath by the prosecuting attorney, then the defendant shall be entitled to compulsory process for any or all witnesses to enable the defendant to interrogate them under oath, before trial, for discovery purposes.

A view was expressed that some limitation should be placed on the state's rights under sections 27.04 and 32.20, Florida Statutes, which allow the prosecutor to take all depositions unilaterally at any time. It was agreed by all members of the subcommittee that this right should not be curtailed until some specific time after the filing of an indictment, information, or affidavit, because circumstances sometimes require the filing of the charge and a studied marshalling of evidence thereafter. Criticism of the present practice lies in the fact that any time up to and during the course of the trial the prosecutor can subpoena any person to the privacy of the prosecutor's office without notice to the defense and there take a statement of such person under oath. The subcommittee was divided, however, on the method of altering this situation and the end result was that this subcommittee itself should not undertake to change the existing practice, but should make the Supreme Court aware of this apparent imbalance.

(g) This is new and is required in order to make effective the preceding rules.

(h) This is new and, although it encompasses relief for both the state and the defense, its primary purpose is to afford relief in situations when witnesses may be intimidated and a prosecuting attorney's heavy docket might not allow compliance with discovery within the time limitations set forth in the rules. The words, "sufficient showing" were intentionally included in order to permit the trial judge to have discretion in granting the protective relief. It would be impossible to specify all possible grounds which can be the basis of a protective order. This verbiage also permits a possible abuse by a prosecution-minded trial judge, but the subcommittee felt that the appellate court would remedy any such abuse in the course of making appellate decisions.

(i) This is new and, although it will entail additional expense to counties, it was determined that it was necessary in order to comply with the recent trend of federal decisions which hold that due process is violated when a person who has the money with which to resist criminal prosecution gains an advantage over the person who is not so endowed. Actually, there is serious doubt that the intent of this subdivision can be accomplished by a rule of procedure; a statute is needed. It is recognized that such a statute may be unpopular with the legislature and not enacted. But, if this subdivision has not given effect there is a likelihood that a constitutional infirmity (equal protection of the law) will be found and either the entire rule with all subdivisions will be held void or confusion in application will result.

(j) This provision is necessary since the prosecutor is required to assume many responsibilities under the various subdivisions under the rule. There are no prosecuting attorneys, either elected or regularly assigned, in justice of the peace courts. County judge's courts, as distinguished from county courts, do not have elected prosecutors. Prosecuting attorneys in such courts are employed by county commissions and may be handicapped in meeting the requirements of the rule due to the irregularity and uncertainty of such employment. This subdivision is inserted as a method of achieving as much uniformity as possible in all of the courts of Florida having jurisdictions to try criminal cases.

1972 Amendment. The committee studied the ABA Standards for Criminal Justice relating to discovery and procedure before trial. Some of the standards are incorporated in the committee's proposal, others are not. Generally, the standards are divided into 5 parts:

Part I deals with policy and philosophy and, while the committee approves the substance of Part I, it was determined that specific rules setting out this policy and philosophy should not be proposed.

Part II provides for automatic disclosures (avoiding judicial labor) by the prosecutor to the defense of almost everything within the prosecutor's knowledge, except for work product and the identity of confidential informants. The committee adopted much of Part II, but felt that the disclosure should not be automatic in every case; the disclosure should be made only after request or demand and within certain time limitations. The ABA Standards do not recommend reciprocity of discovery, but the committee deemed that a large degree of reciprocity is in order and made appropriate recommendations.

Part III of the ABA Standards recommends some disclosure by the defense (not reciprocal) to which the state was not previously entitled. The committee adopted Part III and enlarged upon it.

Part IV of the Standards sets forth methods of regulation of discovery by the court. Under the Standards the discovery mentioned in Parts II and III would have been automatic and without the necessity of court orders or court intervention. Part III provides for procedures of protection of the parties and was generally incorporated in the recommendations of the committee.

Part V of the ABA Standards deals with omnibus hearings and pretrial conferences. The committee rejected part of the Standards dealing with omnibus hearings because it felt that it was superfluous under Florida procedure. The Florida committee determined that a trial court may, at its discretion, schedule a hearing for the purposes enumerated in the ABA Omnibus Hearing and that a rule authorizing it is not necessary. Some of the provisions of the ABA Omnibus Hearing were rejected by the Florida committee, i.e., stipulations as to issues, waivers by defendant, etc. A modified form of pretrial conference was provided in the proposals by the Florida committee.

(a)(1)(i) Same as ABA Standard 2.1(a)(i) and substance of Standard 2.1(e). Formerly Florida Rule of Criminal Procedure 3.220(e) authorized exchange of witness lists. When considered with proposal 3.220(a)(3), it is seen that the proposal represents no significant change.

(ii) This rule is a modification of Standard 2.1(a)(ii) and is new in Florida, although some such statements might have been discoverable under rule 3.220(f). Definition of "statement" is derived from 18 U.S.C. § 3500.

Requiring law enforcement officers to include irrelevant or sensitive material in their disclosures to the defense would not serve justice. Many investigations overlap and information developed as a byproduct of one investigation may form the basis and starting point for a new and entirely separate one. Also, the disclosure of any information obtained from computerized records of the Florida Crime Information Center and the National Crime Information Center should be subject to the regulations prescribing the confidentiality of such information so as to safeguard the right of the innocent to privacy.

(iii) Same as Standard 2.1(a)(ii) relating to statements of accused; words "known to the prosecutor, together with the name and address of each witness to the statement" added and is new in Florida.

(iv) From Standard 2.1(a)(ii). New in Florida.

(v) From Standard 2.1(a)(iii) except for addition of words, "that have been recorded" which were inserted to avoid any inference that the proposed rule makes recording of grand jury testimony mandatory. This discovery was formerly available under rule 3.220(a)(3).

(vi) From Standard 2.1(a)(v). Words, "books, papers, documents, photographs" were condensed to "papers or objects" without intending to change their meaning. This was previously available under rule 3.220(b).

(vii) From Standard 2.1(b)(i) except word "confidential" was added to clarify meaning. This is new in this form.

(viii) From Standard 2.1(b)(iii) and is new in Florida in this form. Previously this was disclosed upon motion and order.

(ix) From Standard 2.3(a), but also requiring production of "documents relating thereto" such as search warrants and affidavits. Previously this was disclosed upon motion and order.

(x) From Standard 2.1(a)(iv). Previously available under rule 3.220(a)(2). Defendant must reciprocate under proposed rule 3.220(b)(4).

(xi) Same committee note as (b) under this subdivision.

(2) From Standard 2.1(c) except omission of words "or would tend to reduce his punishment therefore" which should be included in sentencing.

(3) Based upon Standard 2.2(a) and (b) except Standards required prosecutor to furnish voluntarily and without demand while this proposal requires defendant to make demand and permits prosecutor 15 days in which to respond.

(4) From Standards 2.5(b) and 4.4. Substance of this proposal previously available under rule 3.220(h).

(5) From Standard 2.5. New in Florida.

(b)(1) From Standard 3.1(a). New in Florida.

(2) From Standard 3.1(b). New in Florida.

(3) Standards did not recommend that defendant furnish prosecution with reciprocal witness list; however, formerly, rule 3.220(e) did make such provision. The committee recommended continuation of reciprocity.

(4) Standards did not recommend reciprocity of discovery. Previously, Florida rules required some reciprocity. The committee recommended continuation of former reciprocity and addition of exchanging witness' statement other than defendants'.

(c) From Standard 2.6. New in Florida, but generally recognized in decisions.

(d) Not recommended by Standards. Previously permitted under rule 3.220(f) except for change limiting the place of taking the deposition and eliminating requirement that witness refuse to give voluntary signed statement.

(e) From Standard 4.1. New in Florida.

(f) Same as rule 3.220(g).

(g) From Standard 4.4 and rule 3.220(h).

(h) From Standard 4.4 and rule 3.220(h).

(i) From Standard 4.6. Not previously covered by rule in Florida, but permitted by decisions.

(j)(1) From Standard 4.7(a). New in Florida except court discretion permitted by rule 3.220(g).

(2) From Standard 4.7(b). New in Florida.

(k) Same as prior rule.

(*l*) Modified Standard 5.4. New in Florida.

1977 Amendment. The proposed change only removes the comma which currently appears after (a)(1).

1980 Amendment. The intent of the rule change is to guarantee that the accused will receive those portions of police reports or report summaries which contain any written, recorded, or oral statements made by the accused.

1986 Amendment. The showing of good cause under (d)(2) of this rule may be presented ex parte or in camera to the court.

1989 Amendment. 3.220(a). The purpose of this change is to ensure reciprocity of discovery. Under the previous rule, the defendant could tailor discovery, demanding only certain items of discovery with no requirement to reciprocate items other than those demanded. A defendant could avoid reciprocal discovery by taking depositions, thereby learning of witnesses through the deposition process, and then deposing those witnesses without filing a demand for discovery. With this change, once a defendant opts to use any discovery device, the defendant is required to produce all items designated under the discovery rule, whether or not the defendant has specifically requested production of those items.

Former subdivision (c) is relettered (b). Under (b)(1) the prosecutor's obligation to furnish a witness list is conditioned upon the defendant filing a "Notice of Discovery."

Former subdivision (a)(1)(i) is renumbered (b)(1)(i) and, as amended, limits the ability of the defense to take depositions of those persons designated by the prosecutor as witnesses who should not be deposed because of their tangential relationship to the case. This does not preclude the defense attorney or a defense investigator from interviewing any witness, including a police witness, about the witness's knowledge of the case.

This change is intended to meet a primary complaint of law enforcement agencies that depositions are frequently taken of persons who have no knowledge of the events leading to the charge, but whose names are disclosed on the witness list. Examples of these persons are transport officers, evidence technicians, etc.

In order to permit the defense to evaluate the potential testimony of those individuals designated by the prosecutor, their testimony must be fully set forth in some document, generally a police report.

(a)(1)(ii) is renumbered (b)(1)(ii). This subdivision is amended to require full production of all police incident and investigative reports, of any kind, that are discoverable, provided there is no independent reason for restricting their disclosure. The term "statement" is intended to include summaries of statements of witnesses made by investigating officers as well as statements adopted by the witnesses themselves.

The protection against disclosure of sensitive information, or information that otherwise should not be disclosed, formerly set forth in (a)(1)(i), is retained, but transferred to subdivision (b)(1)(xii).

The prohibition sanction is not eliminated, but is transferred to subdivision (b)(1)(xiii). "Shall" has been changed to "may" in order to reflect the procedure for imposition of sanctions specified in *Richardson v. State,* 246 So. 2d 771 (Fla. 1971).

The last phrase of renumbered subdivision (b)(2) is added to emphasize that constitutionally required Brady material must be produced regardless of the defendant's election to participate in the discovery process.

Former subdivision (b) is relettered (c).

Former subdivisions (b)(3) and (4) are now included in new subdivision (d). An introductory phrase has been added to subdivision (d). Subdivision (d) reflects the change in nomenclature from a "Demand for Discovery" to the filing of a "Notice of Discovery."

As used in subdivision (d), the word "defendant" is intended to refer to the party rather than to the person. Any obligations incurred by the "defendant" are incurred by the defendant's attorney if the defendant is represented by counsel and by the defendant personally if the defendant is not represented.

The right of the defendant to be present and to examine witnesses, set forth in renumbered subdivision (d)(1), refers to the right of the defense, as party to the action. The term refers to the attorney for the defendant if the defendant is represented by counsel. The right of the defendant to be physically present at the deposition is controlled by new subdivision (h)(6).

Renumbered subdivision (d)(2), as amended, reflects the new notice of discovery procedure. If the defendant elects to participate in discovery, the defendant is obligated to furnish full reciprocal disclosure.

Subdivision (e) was previously numbered (a)(4). This subdivision has been modified to permit the remedy to be sought by either prosecution or defense.

Subdivision (f) was previously numbered (a)(5) and has been modified to permit the prosecutor, as well as the defense attorney, to seek additional discovery.

Former subdivision (c) is relettered (g).

Former subdivision (d) is relettered (h). Renumbered subdivision (h)(1) has been amended to reflect the restrictions on deposing a witness designated by the prosecution under (b)(1)(i) (designation of a witness performing ministerial duties only or one who will not be called at trial).

(h)(1)(i) is added to provide that a deposition of a witness designated by the prosecutor under (b)(1)(i) may be taken only upon good cause shown by the defendant to the court.

(h)(1)(ii) is added to provide that abuses by attorneys of the provisions of (b)(1)(i) are subject to stringent sanctions.

New subdivision (h)(1)(iii) abolishes depositions in misdemeanor cases except when good cause is shown.

A portion of former subdivision (d)(1) is renumbered (h)(3). This subdivision now permits the administrative judge or chief judge, in addition to the trial judge, to designate the place for taking the deposition.

New subdivision (h)(4) recognizes that children and some adults are especially vulnerable to intimidation tactics. Although it has been shown that such tactics are infrequent, they should not be tolerated because of the traumatic effect on the witness. The videotaping of the deposition will enable the trial judge to control such tactics. Provision is also made to protect witnesses of fragile emotional strength because of their vulnerability to intimidation tactics.

New subdivision (h)(5) emphasizes the necessity for the establishment, in each jurisdiction, of an effective witness coordinating office. The Florida Legislature has authorized the establishment of such office through section 43.35, Florida Statutes. This subdivision is intended to make depositions of witnesses and law enforcement officers as convenient as possible for the witnesses and with minimal disruption of law enforcement officers' official duties.

New subdivision (h)(6) recognizes that one of the most frequent complaints from child protection workers and from rape victim counselors is that the presence of the defendant intimidates the witnesses. The trauma to the victim surpasses the benefit to the defense of having the defendant present at the deposition. Since there is no right, other than that given by the rules of procedure, for a defendant to attend a deposition, the Florida Supreme Court Commission on Criminal Discovery believes that no such right should exist in those cases. The "defense," of course, as a party to the action, has a right to be present through counsel at the deposition. In this subdivision, the word "defendant" is meant to refer to the person of the defendant, not to the defense as a party. *See* comments to rules 3.220(d) and 3.220(d)(1).

Although defendants have no right to be present at depositions and generally there is no legitimate reason for their presence, their presence is appropriate in certain cases. An example is a complex white collar fraud prosecution in which the defendant must explain the meaning of technical documents or terms. Cases requiring the defendant's presence are the exception rather than the rule. Accordingly, (h)(6)(i)-(ii) preclude the presence of defendants at depositions unless agreed to by the parties or ordered by the court. These subdivisions set forth factors that a court should take into account in considering motions to allow a defendant's presence.

New subdivision (h)(7) permits the defense to obtain needed factual information from law enforcement officers by informal telephone deposition. Recognizing that the formal deposition of a law enforcement officer is often unnecessary, this procedure will permit such discovery at a significant reduction of costs.

Former subdivisions (e), (f), and (g) are relettered (i), (j), and (k), respectively.

Former subdivision (h) is relettered (*l*) and is modified to emphasize the use of protective orders to protect witnesses from harassment or intimidation and to provide for limiting the scope of the deposition as to certain matters.

Former subdivision (i) is relettered (m).

Former subdivision (j) is relettered (n).

Renumbered (n)(2) is amended to provide that sanctions are mandatory if the court finds willful abuse of discovery. Although the amount of sanction is discretionary, some sanction must be imposed.

(n)(3) is new and tracks the certification provisions of federal procedure. The very fact of signing such a certification will make counsel cognizant of the effect of that action.

Subdivision (k) is relettered (*o*).

Subdivision (*l*) is relettered (p).

1992 Amendment. The proposed amendments change the references to "indictment or information" in subdivisions (b)(1), (b)(2), (c)(1), and (h)(1) to "charging document." This amendment is proposed in conjunction with amendments to rule 3.125 to provide that all individuals charged with a criminal violation would be entitled to the same discovery regardless of the nature of the charging document (i.e., indictment, information, or notice to appear).

1996 Amendment. This is a substantial rewording of the rule as it pertains to depositions and pretrial case management. The amendment was in response to allegations of discovery abuse and a call for a more cost conscious approach to discovery by the Florida Supreme Court. In felony cases, the rule requires prosecutors to list witnesses in categories A, B, and C. Category A witnesses are subject to deposition as under the former rule. Category B witnesses are subject to deposition only upon leave of court. Category B witnesses include, but are not limited to, witnesses whose only connection to the case is the fact that they are the owners of property; transporting officers; booking officers; records and evidence custodians; and experts who have filed a report and curriculum vitae and who will not offer opinions subject to the *Frye* test. Category C witnesses may not be deposed. The trial courts are given more responsibility to regulate discovery by pretrial conference and by determining which category B witnesses should be deposed in a given case.

The rule was not amended for the purpose of prohibiting discovery. Instead, the rule recognized that many circuits now have "early resolution" or "rocket dockets" in which "open file discovery" is used to resolve a substantial percentage of cases at or before arraignment. The committee encourages that procedure. If a case cannot be resolved early, the committee believes that resolution of typical cases will occur after the depositions of the most essential witnesses (category A) are taken. Cases which do not resolve after the depositions of category A, may resolve if one or more category B witnesses are deposed. If the case is still unresolved, it is probably going to be a case that needs to be tried. In that event, judges may determine which additional depositions, if any, are necessary for pretrial preparation. A method for making that determination is provided in the rule.

Additionally, trial judges may regulate the taking of depositions in a number of ways to both facilitate resolution of a case and protect a witness from unnecessary inconvenience or harassment. There is a provision for setting a discovery schedule, including a discovery cut-off date as is common in civil practice. Also, a specific method is provided for application for protective orders.

One feature of the new rule relates to the deposition of law enforcement officers. Subpoenas are no longer required.

The rule has standardized the time for serving papers relating to discovery at fifteen days.

Discovery in misdemeanor cases has not been changed.

(b)(1)(A)(i) An investigating officer is an officer who has directed the collection of evidence, interviewed material witnesses, or who was assigned as the case investigator.

(h)(1) The prosecutor and defense counsel are encouraged to be present for the depositions of essential witnesses, and judges are encouraged to provide calendar time for the taking of depositions so that counsel for all parties can attend. This will 1) diminish the potential for the abuse of witnesses, 2) place the parties in a position to timely and effectively avail themselves of the remedies and sanctions established in this rule, 3) promote an expeditious and timely resolution of the cause, and 4) diminish the need to order transcripts of the deposition, thereby reducing costs.

1998 Amendment. This rule governs only the location of depositions. The procedure for procuring out-of-state witnesses for depositions is governed by statute.

COURT COMMENTARY

1996 Amendment. The designation of a witness who will present similar fact evidence will be dependent upon the witness's relationship to the similar crime, wrong, or act about which testimony will be given rather than the witness's relationship to the crime with which the defendant is currently charged.

1999/2000 Amendment. This rule does not affect requests for nonexempt law enforcement records as provided in chapter 119, Florida Statutes, other than those that are nonexempt as a result of a codefendant's participation in discovery. *See Henderson v. State*, 745 So. 2d 319 (Fla. Feb. 18, 1999).

2014 Amendment. The amendment to subdivision (b)(1)(A)(i)(8) is not intended to limit in any manner whatsoever the discovery obligations under the other provisions of the rule. With respect to subdivision (b)(1)(M)(iv), the Florida Innocence Commission recognized the impossibility of listing in the body of the rule every possible permutation expressing a benefit by the state to the informant witness. Although the term "anything" is not defined in the rule, the following are examples of benefits that may be considered by the trial court in determining whether the state has complied with its discovery obligations. The term "anything" includes, but is not limited to, any deal, promise, inducement, pay, leniency, immunity, personal advantage, vindication, or other benefit that the prosecution, or any person acting on behalf of the prosecution, has knowingly made or may make in the future.

Notes of Decisions (1428)

West's F.S.A. RCrP Rule 3.220, FL ST RCRP Rule 3.220
Current with Amendments received through 7/1/14

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485 So.2d 35
District Court of Appeal of Florida,
Fourth District.

Eddie FULLER, Appellant,
v.
STATE of Florida, Appellee.

No. 84–1065. | March 19, 1986.

Defendant was convicted and sentenced in the Circuit Court for Broward County, J. Leonard Fleet, J., and defendant appealed. The District Court of Appeal held that: (1) evidence was insufficient to sustain trial court's order barring defense from access to witness, and (2) alleged claim of danger to witness which was totally unconnected with case against defendant was insufficient to excuse presence of witness at in camera hearing in which state obtained protective order barring defense from access to witness.

Reversed and remanded for new trial.

West Headnotes (2)

[1] **Criminal Law**
Consultation Between Accused or Counsel and Witnesses

Unclear and conflicting evidence as to what information witness may have had about crime or defendant's presence and participation in crime was insufficient to sustain protective order barring defense from access to witness.

Cases that cite this headnote

[2] **Criminal Law**
Consultation Between Accused or Counsel and Witnesses

Alleged claim of danger to witness which was totally unconnected with case against defendant was insufficient to excuse presence of witness at in camera hearing in which state sought and obtained protective order barring defense from access to witness.

Cases that cite this headnote

Attorneys and Law Firms

*35 Richard L. Jorandby, Public Defender, and Margaret Good, Asst. Public Defender, West Palm Beach, for appellant.

Jim Smith, Atty. Gen., Tallahassee, and Sarah B. Mayer, Asst. Atty. Gen., West Palm Beach, for appellee.

Opinion

PER CURIAM.

We reverse appellant's conviction and sentence and remand for a new trial because we believe the trial court erred in failing to require the presence of a witness during an in camera hearing in which the state sought and obtained a protective order barring the defense from access to the witness. In addition, upon review of the evidence submitted by the state to justify the protective order, we conclude that the state did not establish a proper predicate for the trial court's action. *Cf. State v. Hassberger,* 350 So.2d 1 (Fla.1977).

[1] [2] The record reflects that the existence and identity of the witness originated with the state's disclosure of her name to the defendant-appellant as a witness who was present at the scene of the crime. The evidence was unclear and conflicting as to what information the witness may have had about the crime or defendant's presence and participation. The record also reflects that an alleged claim of danger to the witness was totally unconnected to the case against the defendant and insufficient to excuse the presence of the witness at the in camera hearing.

The other issues raised on appeal are mooted by our decision. However, on remand, and in order to avoid future problems, the defendant's entitlement to appointed counsel should be fully explored, and no waiver accepted except in accord with prevailing standards.

ANSTEAD and GLICKSTEIN, JJ., and GODERICH, MARIO P., Associate Judge, concur.

Parallel Citations

11 Fla. L. Weekly 677

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985 F.2d 510
United States Court of Appeals,
Eleventh Circuit.

In re UNITED STATES of AMERICA, Petitioner.

No. 93-4147. | Feb. 23, 1993.

Government sought writ of mandamus to review order of the United States District Court for the Southern District of Florida, No. 91-6221-CR, which denied motion to quash subpoena for Commissioner of Food and Drug Administration. The Court of Appeals held that: (1) mandamus was available to review the order, and (2) defendants were not entitled to subpoena Commissioner of the FDA to testify with respect to their defense of selective prosecution.

Writ granted.

West Headnotes (4)

[1] **Mandamus**
Nature and Scope of Remedy in General

Mandamus
Existence and Adequacy of Other Remedy in General

Mandamus is an extraordinary remedy and will not lie if other remedies are available.

5 Cases that cite this headnote

[2] **Mandamus**
Evidence, Witnesses, and Depositions

Appellate court will generally not order district court to quash subpoena for witness to testify, as witness can appeal contempt citation if he or she fails to respond to the subpoena, but an exception is recognized if the witness is a high government official.

41 Cases that cite this headnote

[3] **Mandamus**
Evidence, Witnesses, and Depositions

Mandamus was available to review district court's refusal to quash subpoena for witness who was the Commissioner of the Food and Drug Administration (FDA).

12 Cases that cite this headnote

[4] **Witnesses**
Persons Who May Be Required to Appear and Testify

Defendants who claimed selective prosecution by Food and Drug Administration were not entitled to subpoena Commissioner of the Food and Drug Administration; Commissioner's time is very valuable and, if Commissioner were asked to testify in every case in which the FDA prosecuted, his time would be monopolized by preparing and testifying in those cases, and testimony was available from alternate witnesses.

7 Cases that cite this headnote

Attorneys and Law Firms

***510** Mark B. Stern, Civ. Div., Dept. of Justice, Washington, D.C., for U.S.

Michael S. Pasano, Zuckerman, Spaeder, Taylor & Evans, Miami, FL, for Kent.

Richard Essen, Essen & Essen, N. Miami Beach, FL, for Faloon.

On Petition for Writ of Mandamus to the United States District Court for the Southern District of Florida.

Before KRAVITCH, ANDERSON and DUBINA, Circuit Judges.

Opinion

PER CURIAM:

Before us is the government's emergency petition for a writ of mandamus requesting that we quash a subpoena for a witness in the case of ***511** *United States of America v. Faloon,* No. 91-0221 (S.D.Fla. filed Nov. 2, 1991). Defendants William Faloon and Saul Kent were indicted

for introducing unapproved drugs, misbranded drug products and misbranded prescription drugs into interstate commerce in violation of 21 U.S.C. §§ 333(a)(2), 353(b)(1), 331(a), 333(b) and 18 U.S.C. § 542. Pending before the district court is the defendants' motion to dismiss the indictment on the ground of selective prosecution. The defendants claim that the Food and Drug Administration (FDA) has failed to prosecute others similarly situated, specifically groups which have imported and distributed drugs not yet approved by the FDA. To substantiate this claim, defendants subpoenaed Dr. David Kessler, Commissioner of the FDA.

The magistrate denied the government's motion to quash the subpoena, ruling that Dr. Kessler may testify by telephone and is required to be available for thirty minutes. The district court denied the government's appeal of the magistrate's order. The government then filed a motion asking this court to issue a mandamus order compelling the district court to quash the subpoena. Pursuant to a request from this court, defendants filed a response to the government's motion.

[1] [2] We recognize that mandamus is an extraordinary remedy and will not lie if other remedies are available. *See In re Fink,* 876 F.2d 84 (11th Cir.1989); *U.S. v. Denson,* 603 F.2d 1143 (5th Cir.1979); *Huckeby v. Frozen Food Exp.,* 555 F.2d 542 (5th Cir.1977).[1] Generally, an appellate court will not order a district court to quash a subpoena for a witness to testify as the witness can appeal a contempt citation if he or she fails to respond to the subpoena. As a rule, this occurs in the context of grand jury testimony. *See United States v. Ryan,* 402 U.S. 530, 533, 91 S.Ct. 1580, 1581-82, 29 L.Ed.2d 85 (1971); *In re Fine,* 641 F.2d 199, 201 (5th Cir. Unit A 1981).

An exception, however, has been recognized if the witness is a high government official. In *United States v. Nixon,* 418 U.S. 683, 94 S.Ct. 3090, 41 L.Ed.2d 1039 (1974), the Supreme Court found an exception when the President has been subpoenaed. The Court reasoned that to force the President to incur a contempt order would be unseemly and would cause an unnecessary confrontation between two coequal branches of the government. In addition, the issue of whether the President can be cited for contempt would have to be litigated, incurring further delay in reaching the underlying claims. *Id.* at 691-92, 94 S.Ct. at 3099. Due to these considerations, the Court held that the issue was properly before the Court of Appeals without a contempt order.

At least two circuits have acknowledged that some of the *Nixon* factors can be relevant in cases of high officials who do not have the President's status. In a case involving a contempt citation against the Attorney General, the Second Circuit held that although the *Nixon* rule did not apply to an official without the executive responsibilities of the President, the court had jurisdiction to issue the writ of mandamus because a contempt sanction "raised separation of powers overtones, and warranted more sensitive judicial scrutiny than such a sanction imposed on an ordinary litigant." *In Re Attorney General,* 596 F.2d 58, 64 (2d Cir.1979). In *United States v. Winner,* 641 F.2d 825 (10th Cir.1981), the Tenth Circuit noted that the positions of the subpoenaed witnesses, the Deputy Attorney General and Assistant Attorney General, did not bring them within the rule stated in *Nixon;* however, they were "high level public officials of a coequal branch of government exercising power entrusted to them by both the legislative and executive departments." *Id.* at 830. This factor, as well as the important interests and issues presented, merited invocation of the *Winner* court's jurisdiction to issue a mandamus order. *Id.*

[3] Similarly, this case involves a high level official who does not come within the *Nixon* exemption per se, but who is the head of an important executive agency ***512** charged with ensuring the health and safety of the public. Requiring the FDA Commissioner to fight the subpoena by placing himself in contempt implicates separation of powers concerns and would harm the public perception of the FDA. The Commissioner would have to take valuable time away from other tasks in deciding whether to incur the sanction of the court. In addition, requiring the Commissioner to disobey an order of the court would prolong the litigation of this tangential issue and delay the trial of the underlying criminal offense. Because of the importance of the issue presented and the serious implications of forcing the FDA Commissioner to incur a contempt sanction before granting review, we hold that a writ of mandamus, if warranted, is the appropriate remedy.

As to the merits of this mandamus claim, the Supreme Court has indicated that the practice of calling high officials as witnesses should be discouraged. *See United States v. Morgan,* 313 U.S. 409, 61 S.Ct. 999, 85 L.Ed. 1429 (1941). In *Morgan,* the Court stated that in an effort to preserve the integrity of the administrative process, the Secretary of Labor should not have been asked to testify. *Id.* at 422, 61 S.Ct. at 1003-04.

The D.C. Circuit relied on *Morgan* for its holding that "top executive department officials should not, absent

extraordinary circumstances, be called to testify regarding their reasons for taking official actions." *Simplex Time Recorder Co. v. Secretary of Labor,* 766 F.2d 575, 586 (D.C.Cir.1985). The Fifth Circuit recently agreed with the holding in *Simplex* and cautioned a district court to "remain mindful of the fact that exceptional circumstances must exist before the involuntary depositions of high agency officials are permitted." *In Re Office of Inspector General,* 933 F.2d 276, 278 (5th Cir.1991). *See also Sweeney v. Bond,* 669 F.2d 542, 546 (8th Cir.), *cert. denied,* 459 U.S. 878, 103 S.Ct. 174, 74 L.Ed.2d 143 (1982) (governor not required to testify absent compelling need); *United States v. Merhige,* 487 F.2d 25, 29 (4th Cir.), *cert. denied,* 417 U.S. 918, 94 S.Ct. 2625, 41 L.Ed.2d 224 (1974) (members of Parole Board should be subject to deposition only under "exceptional circumstances"); *Peoples v. United States Dep't of Agriculture,* 427 F.2d 561, 567 (D.C.Cir.1970) (compelling testimony from a cabinet officer "is not normally countenanced").

[4] The reason for requiring exigency before allowing the testimony of high officials is obvious. High ranking government officials have greater duties and time constraints than other witnesses. In this case, the government notes that Commissioner Kessler is responsible for the regulation of all drugs, foods, cosmetics and medical devices as well as overseeing the enforcement of statutes and regulations governing the distribution and sales of these items. Thus, his time is very valuable. This concern about a high official's time constraints is particularly relevant to selective prosecution claims. If the Commissioner was asked to testify in every case which the FDA prosecuted, his time would be monopolized by preparing and testifying in such cases. [2] In order to protect officials from the constant distraction of testifying in lawsuits, courts have required that defendants show a special need or situation compelling such testimony. *See Sweeney,* 669 F.2d at 546.

This case does not present extraordinary circumstances or a special need for the Commissioner's testimony; on the contrary, the facts weigh against allowing the subpoena. The record discloses that testimony was available from alternate witnesses, including Daniel L. Michels, the former Director of the FDA's Office of Compliance, and Dr. Randolph Wykoff, Director of the FDA's Office of AIDS Coordination. Both of these officials testified at the hearing on the motion to dismiss the prosecution. Furthermore, Dr. Kessler was not the Commissioner at the time the defendants' case was investigated by the FDA ***513** and referred to the Justice Department for prosecution. Dr. Kessler did not assume office until four years after the initial investigation and over two years after the case was sent to the Justice Department for further action; accordingly, he could not have been responsible for selectively prosecuting the defendants.

Requiring Dr. Kessler to incur a contempt sanction would have serious repercussions for the relationship between two coequal branches of government and the public confidence in the FDA. Therefore, we have granted review in this mandamus action. Because of the time constraints and multiple responsibilities of high officials, courts discourage parties from calling them as witnesses and require exigent circumstances to justify a request for their testimony. Defendants have failed to show that such circumstances exist in this case. Accordingly, the writ of mandamus is GRANTED and the district court is ordered to quash the subpoena of Dr. David Kessler.

Footnotes

1 The Eleventh Circuit, in an en banc decision, *Bonner v. City of Pritchard,* 661 F.2d 1206, 1209 (11th Cir.1981), adopted as precedent decisions of the former Fifth Circuit rendered prior to October 1, 1981.

2 Although the magistrate's order allowed the Commissioner's testimony to be taken over the telephone and limited it to a thirty minute period, the cumulative effect of such decisions in all of the cases that the FDA prosecuted would be considerable. Also, the Commissioner would have to spend a significant amount of time preparing for the testimony.

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901 So.2d 238
District Court of Appeal of Florida,
First District.

Jim HORNE, FL Dep't of Education, et al., Petitioners,
v.
SCHOOL BOARD OF MIAMI-DADE COUNTY, Florida, Respondent.

No. 1D04-5259. | April 18, 2005.

Synopsis

Background: Former commissioner of education, state Department of Education, and State Board of Education filed petition for writ of certiorari, seeking to quash trial court's order that denied their motion to quash subpoena to depose former commissioner in county school board's action against petitioners regarding distribution of educational funding.

[Holding:] The District Court of Appeal, Lewis, J., held that, as a matter of first impression, former commissioner could not be compelled to give deposition testimony unless school board was able to establish that testimony to be elicited was necessary, relevant, and unavailable from other sources.

Petition granted, trial court's order quashed, and case remanded.

West Headnotes (2)

[1] **Pretrial Procedure**
Public Bodies and Their Officers and Employees

Former state commissioner of education could not be compelled to give deposition testimony unless county school board was able to establish that testimony to be elicited was necessary, relevant, and unavailable from other sources in school board's action that concerned distribution of educational funding and that was brought against former commissioner, state Department of Education, and State Board of Education; subjecting former commissioner to deposition without satisfying necessary requirements could be unduly burdensome and could serve as significant deterrent to qualified candidates seeking public-service positions.

4 Cases that cite this headnote

[2] **Pretrial Procedure**
Public Bodies and Their Officers and Employees

Former heads of state agencies and former high-ranking state officials cannot be compelled to give deposition testimony unless it has been established that testimony to be elicited is necessary, relevant, and unavailable from other sources.

4 Cases that cite this headnote

Attorneys and Law Firms

*239 Charlie Crist, Attorney General; Jason Vail, Assistant Attorney General, Tallahassee, for Petitioners.

Martha W. Barnett, Esq. and Jack L. McLean, Jr. of Holland & Knight, LLP, Tallahassee, for Respondents.

Opinion

LEWIS, J.

Petitioners, Jim Horne, the Florida Department of Education, and the State Board of Education, seek a writ of certiorari and ask this Court to quash the trial court's order denying their motion to quash subpoena and for protective order which sought to prevent respondent, the School Board of Miami-Dade County, from deposing Mr. Horne, the former commissioner of education, regarding school funding decisions that occurred during his tenure as commissioner. Petitioners contend that the trial court departed from the essential requirements of law in concluding that authority holding that depositions of agency heads may not be taken over objection unless it has been established that the testimony to be elicited is necessary, relevant, and unavailable from another source did not apply in this situation given Horne's status as former commissioner. We agree and, therefore, grant the petition.

After filing suit against petitioners regarding the distribution of educational funding, respondent noticed and subpoenaed Mr. Horne for a deposition. Horne filed an emergency motion to quash the subpoena and for a protective order in which he argued that as former commissioner he should be immune from deposition absent the required showing and that respondent had only deposed three employees of the Department of Education at that stage of the proceedings. In his attached affidavit, Horne asserted that he had no personal knowledge of the facts giving rising to respondent's claims and that any information known by him was also known by his former staff members.

Following a hearing, the trial court entered an order denying petitioners' motion to the extent that it sought to prevent Horne's deposition. The trial court reasoned, "Mr. Horne is the former commissioner of education. Consequently, authority holding that depositions of agency heads may not be taken except as a last resort when there are no other sources of relevant information available do[es] not apply in his situation." This proceeding followed.

***240** It is well established that in order to demonstrate an entitlement to certiorari relief, a petitioner must show that the order under review departs from the essential requirements of law and that the order will cause irreparable harm that cannot be remedied on plenary appeal. *City of Jacksonville v. Rodriguez,* 851 So.2d 280, 281 (Fla. 1st DCA 2003). Orders granting discovery requests have traditionally been reviewed by certiorari because once discovery is wrongfully granted, the complaining party is beyond relief. *Martin-Johnson, Inc. v. Savage,* 509 So.2d 1097, 1099 (Fla.1987).

[1] **[2]** In *State, Department of Health and Rehabilitative Services v. Brooke,* 573 So.2d 363, 371 (Fla. 1st DCA 1991), we agreed with the United States District Court for the Eastern District of Pennsylvania that " '[d]epartment heads and similarly high-ranking officials should not ordinarily be compelled to testify unless it has been established that the testimony to be elicited is necessary and relevant and unavailable from a lesser ranking officer.' " (quoting *Halderman v. Pennhurst State Sch. & Hosp.,* 559 F.Supp. 153, 157 (E.D.Pa.1982)). We subsequently held in *Department of Agriculture and Consumer Services v. Broward County,* 810 So.2d 1056, 1058 (Fla. 1st DCA 2002), that the petitioner was entitled to a protective order to prevent its commissioner from being deposed. In doing so, we explained:

> In circumstances such as these, the agency head should not be subject to deposition, over objection, unless and until the opposing parties have exhausted other discovery and can demonstrate that the agency head is uniquely able to provide relevant information which cannot be obtained from other sources. To hold otherwise would, as argued by the department, subject agency heads to being deposed in virtually every rule challenge proceeding, to the detriment of the efficient operation of the agency in particular and state government as a whole.

Id. However, the issue before us in this case, whether the rules stated above apply to former agency heads and high-ranking officials, is one of first impression in Florida. Therefore, a review of the case law addressing this issue in foreign jurisdictions is helpful.

In *Arnold Agency v. West Virginia Lottery Commission,* 206 W.Va. 583, 526 S.E.2d 814, 830 (1999), the Supreme Court of Appeals of West Virginia, while discerning a marked difference between current and former government officials in terms of likely frequency and onerousness of discovery requests, saw no reason not to apply the rule as stated in *Paige v. Canady,* 197 W.Va. 154, 475 S.E.2d 154, 162 (1996), that "highly placed public officials are not subject to a deposition absent a showing that the testimony of the official is necessary to prevent injustice to the party requesting it" to former high-ranking governmental officials. The court reasoned that the officials, whose past official conduct could potentially implicate them in a significant number of legal actions, have a legitimate interest in avoiding "unnecessary entanglements in civil litigation," which continues upon leaving office. *Id.*

Similarly, in *United States v. Wal-Mart Stores, Inc.,* No. CIV.A. PJM-01-CV-1521, 2002 WL 562301, at *2 (D.Md. Mar.29, 2002), the district court, when faced with the question of whether a former high-ranking official could be deposed, noted that the United States Supreme Court in *United States v. Morgan,* 313 U.S. 409, 61 S.Ct. 999, 85 L.Ed. 1429 (1941), had created an exception to the rule that a court may order discovery of any matter relevant to the subject matter as it applies to high-ranking officials. According ***241** to the court, one of the driving principles behind the *Morgan*

decision was that "the indiscriminate depositions of high-ranking government officials would be unduly burdensome upon said officials and likely discourage them from accepting positions as public servants." *Wal-Mart Stores, Inc.*, 2002 WL 562301, at *3. The court agreed with the plaintiff that this principle should apply with equal force in situations where depositions of former high-ranking governmental officials are sought, reasoning that "[s]ubjecting former officials decision-making processes to judicial scrutiny and the possibility of continued participation in lawsuits years after leaving public office would serve as a significant deterrent to qualified candidates for public service." *Id.* The court further reasoned that if it were to permit officials to be subject to depositions when their terms of office ended, public servants should expect a mailbag of deposition subpoenas on the day they leave office. *Id.* The court determined that if the "*Morgan* immunity" is to have any meaning, the protection the immunity affords must continue when the official departs from public service. *Id.* Thus, a party seeking to depose a former high-ranking governmental official must demonstrate the personal involvement of the official in a material way or the existence of extraordinary circumstances. *Id.; see also Energy Capital Corp. v. United States,* 60 Fed.Cl. 315, 318 (Fed.Cl.2004) (concluding that it is clear that in the context of deposing former high-ranking government officials, depositions are allowed if the party has personal knowledge of the facts in issue); *compare Sanstrom v. Rosa,* No. 93 Civ. 7146, 1996 WL 469589, at *5 (S.D.N.Y. Aug.16, 1996) (concluding that the former governor could not claim the "privilege" that would require the opposing side to show both the need for his deposition and that it would hinder governmental functions).

We agree with the courts in *Arnold Agency* and *Wal-Mart Stores, Inc.* that the rule prescribing that agency heads and other high-ranking officials should not be compelled to testify unless it has been established that the testimony to be elicited is necessary, relevant, and unavailable from other sources is equally applicable to former agency heads and high-ranking officials in circumstances such as these involving past official conduct. Not only would subjecting the former officials to depositions without satisfying the necessary requirements be unduly burdensome for the officials, it could very well, as the court in *Wal-Mart Stores, Inc.* explained, serve as a significant deterrent to qualified candidates seeking public service positions.

Accordingly, we GRANT the petition, QUASH the trial court's order, and REMAND for the trial court to determine whether the testimony to be elicited from Mr. Horne is necessary, relevant, and unavailable from another source.

ERVIN and BROWNING, JJ., concur.

Parallel Citations

198 Ed. Law Rep. 765, 30 Fla. L. Weekly D1002

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573 So.2d 363
District Court of Appeal of Florida,
First District.

STATE Of Florida, DEPARTMENT OF HEALTH AND REHABILITATIVE SERVICES, and Gregory Coler, as Secretary of the Department of Health and Rehabilitative Services, Petitioners,

v.

The Honorable Alban BROOKE of the Circuit Court of the Fourth Judicial Circuit In and For Duval County, Florida, and the Honorable Dorothy Pate of the Circuit Court of the Fourth Judicial Circuit, In and For Duval County, Florida, Respondents,

In the Interest of W.C.J. a/k/a W.C.J., a Child, J.S.B., a Child, P.H., a Child, A.G., a Child, R.H., a Child, J.R., a Child, O.W., a Child, J.R., a Child, and O.W., a Child.

Nos. 90–2475, 90–2511, 90–2530, 90–2739, 90–2804 to 90–2807, 90–2531 and 90–2532. | Jan. 2, 1991.

In hearings to reveal the status of dependent children committed to the custody of the Department of Health and Rehabilitative Services, the Circuit Court, Duval County, Brooke and Pate, JJ., ordered the appearance of the Department's secretary to explain why the Department did not have sufficient funding to place the children in psychiatric/therapeutic residential facilities, as recommended by the case review committee. On Department's and secretary's consolidated appeals and second amended emergency petition for writ of prohibition and common-law certiorari, the District Court of Appeal, Wigginton, J., held that: (1) petitions for writ of prohibition and certiorari would be dismissed on ground that petitioners had adequate legal remedy by appeal; (2) orders directing that Department place child "in available placement as recommended" by case review committee did not facially interfere with Department's executive discretion concerning placement of children in derogation of doctrine of separation of powers; (3) same orders did not require Department to make placements in excess of appropriated funds, as would have rendered orders in excess of trial judges' jurisdiction; but (4) it was abuse of trial court's discretion to demand that secretary appear under pain of contempt to provide information largely within realm of secretary's discretionary authority concerning transfer of funds among Department's programs and to make budgetary decisions.

Petition for writs of prohibition and common-law certiorari dismissed; orders under review reversed.

West Headnotes (11)

[1] **Prohibition**
🔑 Motion to quash or dismiss rule or alternative writ

Petition for writ of prohibition challenging orders of trial court would be dismissed on ground that petitioners had another appropriate and adequate legal remedy, as shown by fact that they had already appealed contested orders and had received stay pursuant to such appeal.

1 Cases that cite this headnote

[2] **Certiorari**
🔑 Quashing or dismissal

Petition for common-law certiorari challenging trial court's orders would be dismissed on basis that petitioners had already appealed from orders, thus showing that they had adequate legal remedy by appeal.

1 Cases that cite this headnote

[3] **Infants**
🔑 Placement or disposition of child

Department of Health and Rehabilitative Services is not required in all cases to follow case review committee's recommendation in placing dependent children committed to its custody. West's F.S.A. § 394.4781(3)(c).

Cases that cite this headnote

[4] **Infants**
🔑 Placement or disposition of child

Infants
🔑 Foster care and institutional placement

It is within discretion of Department of Health and Rehabilitative Services to decide where to keep child who is in its custody, and trial court has not been granted authority to direct precisely where child is cared for, but only to place child in Department's custody, though fact that trial court cannot order child to be placed in specific institution does not necessarily preclude court from placing other conditions on exercise of Department's discretion to place child. West's F.S.A. §§ 39.41(5), 394.4781.

1 Cases that cite this headnote

[5] **Constitutional Law**
Particular Issues and Applications

Infants
Placement or Custody

Infants
Rights of subject parent or party in general

Trial court orders directing that Department of Health and Rehabilitative Services place child "in available placement as recommended" by case review committee did not facially interfere with Department's executive discretion concerning placement of dependent children in derogation of doctrine of separation of powers; no order for placement in specific institution was made. West's F.S.A. §§ 39.41(5), 394.4781(3)(c).

8 Cases that cite this headnote

[6] **Constitutional Law**
Taxation and public finance

Had trial court orders required Department of Health and Rehabilitative Services to make placements of children in its custody that would exceed amounts set forth in Annual Appropriations Act by legislature, or had they encroached upon legislature's power of appropriation, they would have been rendered in excess of trial judges' jurisdiction. West's F.S.A. §§ 216.311, 394.4781(2), (3)(b, c), 409.165(1).

1 Cases that cite this headnote

[7] **Infants**
Commitment or treatment of children

Trial court orders directing that Department of Health and Rehabilitative Services place child "in available placement as recommended" by case review committee did not require Department to make placements in excess of appropriated funds, as would have rendered orders in excess of trial judges' jurisdiction but, rather, orders observed that Department was lacking appropriate funding and requested that secretary appear to determine why Department had not placed children in appropriate treatment facilities. West's F.S.A. §§ 216.311, 394.4781(2), (3)(b, c), 409.165(1).

7 Cases that cite this headnote

[8] **Constitutional Law**
Health

Infants
Reception of evidence; witnesses

It was an abuse of trial court's discretion to demand that Secretary of Department of Health and Rehabilitative Services appear under pain of contempt to provide information largely within realm of secretary's discretionary authority concerning transfer of funds among Department's programs and to make budgetary decisions; any inquiry involving discretion of secretary would not have been relevant to issue of whether funds were available to place dependent children in therapeutic residential facilities. West's F.S.A. §§ 20.19(2)(a), (9), (9)(a, b), 39.001 et seq., 216.023, 216.031, 216.292(2).

4 Cases that cite this headnote

[9] **Constitutional Law**
Encroachment on Executive

Separation of powers doctrine would not preclude trial court from calling before it member of executive branch for narrowly defined informational purposes, but information court is entitled to obtain must necessarily be limited to information relevant to issues before it.

3 Cases that cite this headnote

[10] **Constitutional Law**
Particular Issues and Applications
Infants
Reception of evidence; witnesses
Infants
Foster care and institutional placement

Nothing within statutory scheme would prohibit trial court from requiring minimal explanation as to why dependent children could not be placed in recommended facility in order to implement court's power and authority to assure that dependent children of State receive adequate care. West's F.S.A. §§ 20.19(2)(a), (9), (9)(a, b), 39.001(2)(b), 216.023, 216.031, 216.292(2).

Cases that cite this headnote

[11] **Witnesses**
Privileges and exemptions

Department heads and similarly high-ranking officials should not ordinarily be compelled to testify unless it has been established that testimony to be elicited is necessary and relevant and unavailable from lesser ranking officer.

2 Cases that cite this headnote

Attorneys and Law Firms

*365 Linda Harris, Acting General Counsel, HRS, Tallahassee, and Howard M. Talenfeld, Colodny, Fass & Talenfeld, P.A., North Miami, for petitioners.

William J. Sheppard, Sheppard and White, P.A., Jacksonville, for respondents.

Teresa H. Ellis, Guardian Ad Litem Program for Fourth Judicial Circuit, Jacksonville, for respondents W.C.J. and R.D.H.

Karen S. Jennemann, Jacksonville, for respondent A.G.

Raymond I. Booth, III, Brown, Terrell, Hogan, Ellis, McClamma & Yegelwel, P.A., Jacksonville, for respondent O.W.

Opinion

WIGGINTON, Judge.

We have for review in these consolidated appeals and the second amended emergency petition for writ of prohibition and common law certiorari the orders of Duval County Juvenile Court Judges Brooke and Pate ordering the appearance of Department of Health and Rehabilitative Services Secretary Gregory Coler on August 27, 1990, to explain why the Department did not have sufficient funding to place the appellees/children in psychiatric/therapeutic residential placement as recommended by the Case Review Committee. Also pending are motions to dismiss the petition for writ of prohibition and common law certiorari. For the following reasons, we grant the motions to dismiss the petition filed in Case No. 90–2475 and reverse the orders entered in the remaining cases.

As a preliminary matter, we note that by order, this court earlier granted in Case No. 90–2475 the petitioners' motion to treat its second amended emergency petition for writ of prohibition and common law certiorari and its reply to respondents' response to the petition as the initial and reply briefs in the separate consolidated appeals. [1] Consequently, the facts and issues as set forth in the emergency petition in *366 Case No. 90–2475 are identical to those involved in the consolidated appeals.

From July 16, 1990, to July 19, 1990, Duval County Juvenile Court Judge Alban Brooke held hearings to reveal the status of four dependent, emotionally disturbed children who had been committed to the custody of the Department of Health and Rehabilitative Services. Prior to each review, the Department District 4 Case Review Committee (hereinafter the "CRC"), had recommended various residential therapeutic placements for the children. However, the Department explained to Judge Brooke at each respective hearing that due to limitations in the amount of the legislature's appropriations for such placements, the Department was prohibited by section 216.311, Florida Statutes (1989), and other law, from agreeing to and making the recommended placements. [2] Judge Brooke, obviously highly agitated and frustrated by this announcement, and recognizing that the Department had received two million additional dollars in appropriated money in 1990, as well as the fact that "we are now in the third week of the fiscal year" and the Department was announcing it was out of money, stated on the record that in the event the placements were

not accomplished by August 27, 1990, he would require HRS Secretary Gregory Coler to appear on that date in order for the court to inquire into the Department's available alternatives such as the transfer of monies from other programs in order to effectuate the recommended placements, and to consider contempt sanctions.

Accordingly, on July 24, 1990, Judge Brooke signed identical orders pertaining to each of the four children, W.J., O.W., J.B., and J.R., requiring HRS to place the children in available placements as recommended by the individual predisposition studies and the CRC recommendations. The order also recognized that no money is presently available for such purpose and will not be available the entire fiscal year (1990–1991). Finally, the order concluded that if the children were not placed, there would be a hearing held on August 27, 1990, to determine why the Department had not placed the children in the appropriate and recommended therapeutic treatment and to determine whether an order to show cause should be issued to the Department. Additionally, Secretary Coler was ordered to appear at the hearing and if he failed to respond to said order, a subpoena for his attendance would be issued.

The judge ordered Secretary Coler to appear despite a letter submitted to him from Lee Johnson, acting district administrator for the Department, informing him that the budget allocated for the fiscal year 1990–1991 was lower than that which was actually needed, and pointing out that the Department was prohibited by section 216.311 from expending or committing funds in excess of the approved budget allocation. Mr. Johnson also enclosed a copy of the spending plan for the purchase of residential treatment services for children for the fiscal year, indicating the budget expenditures with each provider agency in which the children were currently placed for psychiatric residential treatment. It also revealed that by the date of the letter, the Department had incurred a $159,642 deficit for psychiatric residential treatment of children and adolescents. Mr. Johnson went on to explain that since the Department is constrained to "live within the budget," it was deferring long-term residential mental health placement of CRC-referred children until additional resources become available. He assured Judge Brooke that the Department would individually review those cases where it is believed that a failure to provide residential treatment would result in a clear and present danger to the child or adolescent. The judge was advised that further steps to be taken to control and reduce the deficit would include case management, stepping children down to less expensive placements, and focusing upon nonresidential, community-based services *367 through the family services planning and intervention team process.[3] Mr. Johnson closed by stating that he was available to discuss any questions or concerns the judge at any time may have.

On August 7, 1990, August 17, 1990, and August 20, 1990, Judge Pate reviewed the status of A.G., R.H., and P.H. who had been committed to the temporary custody of the Department. Again, therapeutic residential treatment had been recommended by the CRC, but, as with the other four children before Judge Brooke, the Department announced it could not agree to make the recommended placement of the children due to a lack of appropriated funds. At the August 7 hearing, Judge Pate indicated that either the legislature was wrong in failing to appropriate sufficient funds or the Department was wrong in failing to request sufficient appropriations. For these alternative reasons, Judge Pate signed an order requiring the appearance of Secretary Coler at the August 27, 1990 hearing, previously scheduled by Judge Brooke, to inquire into the Department's efforts to obtain appropriations with respect to the funding of residential therapeutic placements. A similar order was signed by Judge Pate on August 17 in the case of P.H., and on August 20 in the case of R.H.

The issues presently before us as raised in the petition and in the consolidated appeals are (I) whether Judge Brooke's orders interfere with HRS' executive discretion concerning the placement of dependent children in derogation of the doctrine of separation of powers; (II) whether Judge Brooke's orders requiring HRS to unlawfully make placements in excess of appropriated funds and whether both Judge Brooke's and Judge Pate's orders requiring the appearance of Secretary Coler encroach upon a legislative prerogative in derogation of the doctrine of separation of powers; and (III) whether the judges' orders requiring the appearance of Secretary Coler interfere with the secretary's executive discretion in derogation of the doctrine of separation of powers. In response to these issues, we first address respondents' motion to dismiss the second amended emergency petition for writ of prohibition and common law certiorari.

[1] [2] Specifically, respondents move to dismiss the petition for writ of prohibition on the basis that petitioners have another appropriate and adequate legal remedy as shown by the fact that they have already appealed the contested orders and have received a stay pursuant to such appeal. *English v. McCrary,* 348 So.2d 293, 297 (Fla.1977).

Similarly, respondents move to dismiss the second amended emergency petition for common law certiorari on the basis that petitioners have already appealed from the orders, thus showing that they have an adequate legal remedy by appeal. *Department of Health and Rehabilitative Services v. C.G.*, 556 So.2d 1243 (Fla. 5th DCA 1990). In both instances, respondents urge that this court should treat the consolidated petitions as notices of appeal and order compliance with the appropriate provisions of the Rules of Appellate Procedure pursuant to *Skinner v. Skinner,* 561 So.2d 260 (Fla.1990).

***368** We agree with respondents' position on this issue and therefore grant their motion to dismiss the second amended emergency petition for writ of prohibition and for common law certiorari, and hereby dismiss the petition. *Compare In the Interest of K.A.B.*, 483 So.2d 898 (Fla. 5th DCA 1986) (As legal custodian in that case, HRS was held entitled to appeal the order directing placement of the child pursuant to section 39.14(1), Fla.Stat.). As earlier noted, this court has already treated the petition, the responses thereto and the replies to the responses as the briefs appropriately filed in the consolidated appeals. Additionally, for purposes of the appeals, we treat the appendices to the petition and reply as the appellate record.

Turning now to the issues raised on appeal, appellants' Point I urges that Judge Brooke's orders interfere with the Department's executive discretion concerning the placement of dependent children in derogation of the doctrine of separation of powers. Relying on the decision in *In the Interest of K.A.B.*, 483 So.2d 898 (Fla. 5th DCA 1986), appellants argue that as part of its executive function, as primarily set forth in Chapter 409 of the Florida Statutes, the Department of Health and Rehabilitative Services has discretion concerning the placement of dependent children when committed to its custody, and its discretion is not subject to judicial scrutiny regarding its identification of a specific placement.[4] We do not disagree with this proposition.

Section 409.145(1), Florida Statutes (1989),[5] requires the Department to "conduct, supervise, and administer a program for dependent children and their families." Additionally, "[w]ithin funds appropriated," section 409.165(1) requires the Department to supervise a program of foster homes, group homes, agency-operated group treatment homes, non-psychiatric residential group care facilities, psychiatric residential treatment facilities, and other appropriate facilities to provide shelter and care for dependent children who must be placed away from their families. Additionally, in the event that HRS is granted custody of the child or children under section 39.41, Florida Statutes, section 39.41(5) provides that the Department will have "the right to determine where and with whom the child shall live...." *See In the Interest of K.A.B.*

In the present case, HRS' discretion in placing the dependent children was nonetheless constrained by the limits of legislative appropriations. Specifically, section 394.4781, Florida Statutes, requires the Department to administer a program to purchase mental health services for children diagnosed to be psychotic or emotionally disturbed. However, section 394.4781(3)(b) mandates that all therapeutic residential placements made by the Department be conditioned upon a monthly review of all applications therefore "in accordance with available funds." Additionally, as set forth above, section 409.165(1) clearly limits the Department's supervision to "funds appropriated."

[3] [4] To implement the Department's review power under section 394.4781, and as authorized by section 394.4781(3)(c), the Department promulgated Rule 10E–10.020, Florida Administrative Code, to provide for the creation of a Case Review Committee in each district to review and approve referrals to programs for mental health treatment of psychotic or emotionally disturbed children. CRC recommendations are purely advisory. Rule 10E–10.018 clearly establishes that a child who has been determined by a CRC to be appropriate for a mental health program is merely eligible, not entitled, to such a placement. The function of the CRC, rather, is to provide uniform case review and to advise the Department as to the most beneficial treatment ***369** available. Section 394.4781 then allows for placement of these children in accordance with available appropriations. Thus, as appellants argue, the Department is not required in all cases to follow the CRC recommendation in placing these children. Indeed, as the decision in *K.A.B.* points out, "it is within the discretion of the agency to decide where to keep a child who is in its custody," and the trial court has not been granted the authority to direct "precisely" where the child is cared for, but only to place the child in the Department's custody. 483 So.2d at 899.

Nevertheless, simply because the trial court cannot order a child to be placed in a specific institution does not necessarily preclude the court from placing other conditions on the exercise of the Department's discretion to place the child. For instance, earlier in *F.B. v. State,* 319 So.2d 77 (Fla. 1st DCA 1975), this court addressed the intent behind section 39.01(9), Florida Statutes (Supp.1974), which contains language identical to present section 39.41(5). In doing so,

the court recognized that although the legislature delegated to the Department the power to make the determination as to where and with whom the child should live, i.e., the particular institution or foster care facility in which the child should be placed, "[t]his facility selection power is all the authority that this statute confers." *Id.* at 79. Thus, it was held that the trial court did not infringe on the Department's power as it did not order the Department to place the subject children in any *particular* foster care facility. In restating its reasoning in *Division of Family Services v. State,* 319 So.2d 72 (Fla. 1st DCA 1975), this court emphasized that the broad grant of discretion given the Department in placing the child or children committed to its custody is neither "unfettered" nor is the Department permitted to "flaunt [or] ignore specific provisions contained in the custodial order." 319 So.2d at 79. Likewise, in *Division of Family Services,* it was repeatedly emphasized that the legislative intent embodied in Chapter 39 was "that the court and not the agency have primary responsibility in custody matters." 319 So.2d at 75.

[5] Applying the foregoing authorities to the orders under review in the instant case as challenged in Point I, it is clear that Judge Brooke only directed that the Department place the child "in *available* placement as recommended" by the CRC. No order for placement in a specific institution was made as was done in *K.A.B.* and the language arguably is consistent with the discretionary authority granted to the Department pursuant to section 394.4781, insofar as the order may be interpreted so that the Department need not place the children as recommended by the CRC if there are neither funds nor facilities available. Thus, this particular portion of the identical orders under review by Judge Brooke do not necessarily contravene the statutory scheme. Reading the orders as narrowly as possible, they do not facially interfere with the Department's executive discretion concerning the placement of dependent children in derogation of the doctrine of separation of powers by ordering the children to be placed in specific institutions.

A similarly narrow analysis may be applied to Point II in resolving the issue thereunder—whether Judge Brooke's orders require the Department to "unlawfully" make placements in excess of appropriated funds, and whether both of the judges' orders require the appearance of Secretary Coler—thereby encroaching upon a legislative prerogative in derogation of the doctrine of separation of powers. Again, we have no reservations in agreeing with appellants' general proposition made under Point II that the Department's administration of mental health programs for psychotic and emotionally disturbed children is expressly conditioned upon the availability of appropriated funds. *See* sections 409.165(1), 394.4781(2), and 394.4781(3)(b), Fla.Stat. Moreover, section 216.311 makes it unlawful for any agency within the state government to contract to spend money in excess of appropriations therefore. That latter section would affirmatively proscribe any placements required by a trial court order where appropriations were insufficient.

*370 [6] [7] We also have no argument with the proposition espoused by appellants that a trial court may not enter a placement order, as a constitutional matter, in derogation of the legislature's prerogative to make appropriations. Very recently, in *In re Order on Prosecution of Criminal Appeals by the Tenth Judicial Circuit Public Defender,* 561 So.2d 1130 (Fla.1990), the Florida Supreme Court observed that although the funding of the public defender's offices was woefully inadequate, the legislature's appropriations power was nonetheless off limits to the courts. Thus, had the orders of Judges Brooke and Pate required the Department to make placements that would exceed the amounts set forth in the annual appropriations act by the legislature, or had they in any way encroached upon the legislature's power of appropriation, they would have been rendered in excess of the judges' jurisdiction. However, as noted under Point I, the orders were not so specific. Indeed, the orders under review observe that the Department is lacking the appropriate funding to place the children in the recommended therapeutic treatment facilities. Rather than ordering that the children be placed nonetheless, the court simply requested that the secretary appear at a hearing to determine why the Department has not placed the children in appropriate treatment facilities.

The Second District Court of Appeal faced a similar dilemma in *In the Interest of J.C.,* 548 So.2d 1161 (Fla. 2d DCA 1989). Therein, the court recognized that a trial court cannot require the Department to place a child regardless of its funding situation at that time. Nevertheless, it also observed that neither it nor the trial court was convinced that the Department "pursued every possible avenue to obtain the funds necessary for the placement." *Id.* at 1163. The Second District went on to hold that "[u]ntil it is established that the funds are not obtainable and, therefore, unavailable, ... we cannot agree with HRS that the trial court exceeded its authority by ordering J.C. to be placed under conditions offering rehabilitative treatment." *Id.* Similarly, the question whether or not it was established before Judges Brooke and

Pate that funds were not obtainable and were unavailable leads us into a discussion of the third and final point raised as to whether the trial courts had authority and jurisdiction to order the *secretary* of the Department of HRS to appear to testify before it and whether the secretary enjoys any executive immunity in that regard.

[8] It is abundantly clear from the transcripts of the hearing that the judges were dismayed by the Department's budgetary decision-making and concerned with its ability to transfer funds to accomplish the appropriate placements. Judge Brooke made it clear on the record that his justification for requiring the appearance of Secretary Coler is for the secretary to explain the possibility of the transfer of money among the Department's programs. Judge Pate alternatively explained that she is requiring Secretary Coler's appearance to inquire as to the Department's budgetary request from the legislature. Nonetheless, as pointed out by appellants, transfers of appropriated monies among agency programs are strictly within the secretary's executive discretion and only permitted if deemed necessary by changed conditions. *See* sections 216.292(2) and 20.19(9)(b), Fla.Stat. In turn, budgetary decision-making is strictly within the secretary's executive discretion. *See* section 20.19(9)(a) and (b). Section 20.19(9) is a corollary to sections 216.023 and 216.031 which place responsibility for making budget requests for submission to the legislature and the Governor in the head of each state agency.

Appellants urge that the orders requiring Secretary Coler's appearance at the consolidated hearing for the reasons stated are an unlawful violation of the secretary's executive privilege in derogation of the doctrine of separation of powers. They maintain that as a high official in the executive branch of the government who serves at the pleasure of the Governor, *see* section 20.19(2)(a), Secretary Coler is entitled to an immunity from any such requirement. In this case, appellants submit that the secretary's appearance or non-appearance could not lead to the disclosure of any facts upon which the judges would have jurisdiction to act or against which to issue an order to show cause. The judges were therefore ***371** clearly without jurisdiction to require the secretary's appearance regarding his transfer of monies or his making of budgetary decisions. *Cf. Kirk v. Baker,* 229 So.2d 250 (Fla.1969).

Appellants' argument that the courts cannot demand Secretary Coler to transfer funds or to force his hand in making discretionary budgetary decisions is well taken. As was earlier observed by our supreme court in *Kirk v. Baker,*

> the respective branches of government in our country have throughout our history assiduously avoided any encroachment on one another's authority. In those few instances where difficult cases have arisen, each branch has had enough foresight and respect for the orderly functioning of the governmental processes to avoid a confrontation.

229 So.2d at 253.

The present case is indeed a difficult one, and, as in any other case involving the discretionary integrity of the respective branches of government, we will not only zealously protect the independence of the judicial branch but will, with equal vigor, guard the constitutional prerogatives of the other branches under the doctrine of separation of powers. In that light, it is apparent that the issues involved in these appeals valiantly attempt to reconcile the power of the Department, as an arm of the executive branch, to exercise its delegated authority in child custody matters, with the broad authority of the circuit courts under Chapter 39 of the Florida Statutes to direct and review the exercise of that power.

[9] **[10]** **[11]** Appellants conceded at oral argument in this matter that Secretary Coler does not enjoy unlimited executive immunity. Certainly, the separation of powers doctrine would not preclude a circuit court from calling before it a member of the executive branch for narrowly defined informational purposes. *Kirk v. Baker; Girardeau v. State,* 403 So.2d 513 (Fla. 1st DCA 1981). For instance, nothing within the above-referenced statutory scheme would prohibit a circuit court from requiring a minimal explanation as to why children cannot be placed in a recommended facility in order to implement its power and authority under Chapter 39 to assure that dependent children of the state receive adequate care. Children in the custody of HRS have a clear right to receive necessary medical and mental health services and the Department has no discretion to withhold such services. *See* section 39.001(2)(b). However, the information that the court is entitled to obtain must necessarily be limited to information *relevant* to the issues before it. We agree with the observation of the United States District Court for the Eastern District of Pennsylvania that "[d]epartment heads and similarly high-ranking officials should not ordinarily be compelled to testify unless it has been established that the testimony to be elicited is necessary and relevant and unavailable from a lesser

ranking officer." *Halderman v. Pennhurst State School and Hospital,* 559 F.Supp. 153 (E.D.Pa.1982).

In the present case, the relevant issue was whether funds were available in order to place the dependent children in therapeutic residential treatment facilities. That question was competently answered in the letter submitted by Lee Johnson. However, as discussed earlier, any inquiry involving the discretion of the secretary would *not* be a relevant inquiry and the judges would have been precluded from inquiring into those matters had this court condoned the hearing ordered by Judge Brooke. For that reason, because we hold that the record has already established the relevant information, it was an abuse of the trial court's discretion to demand that Secretary Coler appear before it under pain of contempt to provide information that is largely within the realm of the secretary's discretionary authority.

In summary, the petition for writs of prohibition and common law certiorari are hereby dismissed in Case No. 90–2475. The orders under review in the remaining consolidated appeals are hereby REVERSED.

ERVIN and MINER, JJ., concur.

Parallel Citations

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Footnotes

1 The proceedings below were also stayed pending resolution of the issues raised herein.

2 Section 216.311(1) provides:

> No agency of the state government shall contract to spend, or enter into any agreement to spend, any moneys in excess of the amount appropriated to such agency unless specifically authorized by law, and any contract or agreement in violation of this chapter shall be null and void.

3 Indeed, exemplifying this dynamic review process is the fact that by the date of oral argument in this case, November 30, 1990, O.W., J.B., and J.R. had been placed in therapeutic residential settings. W.J. was presently placed at the Youth Crisis Center, a shelter facility where he receives follow-up from Case Management, the Children's Mobile Emergency Intervention Team, and staff located at Baptist Children's Home from the Child Guidance Center. W.J. also continues in therapy and receives close management follow-up care. During oral argument, counsel for appellants explained that the three placements for O.W., J.B., and J.R. suddenly and fortuitously appeared due to the unexpected release of two other children and the "running away" of the third. However, because W.J., and the three children under Judge Pate's orders have not been appropriately placed as per the CRC recommendations, counsel urged that this court not consider the issue of the appropriateness of the judges' orders moot. (Nonetheless, appellee Karen Ibach, as Guardian Ad Litem of O.W. filed a suggestion of mootness in Case Nos. 90–2432 and 90–2807. Since O.W. has been appropriately placed, the issue pertaining to Judge Brooke's order calling for O.W.'s placement is obviously moot. Accordingly, we note the suggestion of mootness in that case, but the outstanding issue of the judges' authority to call Secretary Coler before the court must still be resolved in the remaining cases.)

4 In K.A.B., the Fifth District affirmed a trial court's order of placement, but in doing so, deleted the words "at County Acres," holding that under section 39.41(3), Florida Statutes (Supp.1984) [identical to the present section 39.41(5) discussed *infra*], "it is crystal clear that it is within the discretion of the [Department] to decide where to keep a child who is in its custody." 483 So.2d at 899.

5 Unless otherwise indicated, all statutory references will be to the 1989 version of the Florida Statutes.

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810 So.2d 1056
District Court of Appeal of Florida,
First District.

DEPARTMENT OF AGRICULTURE AND CONSUMER SERVICES, Petitioner,

v.

BROWARD COUNTY, City of Pompano Beach, City of Plantation, Miami-Date County, City of Coral Springs, Town of Davie, City of Delray Beach, City of Fort Lauderdale, City of Boca Raton, John M. and Patricia Haire, Laz and Ellen Schneider, Chester M. Himel, Alexander Christopher and Marcel Castin, Respondents.

Nos. 1D02-0145, 1D02-0204. | March 15, 2002.

After various local governments and individuals challenged proposed rule of Department of Agriculture and Consumer Services relating to eradication of citrus canker as invalid exercise of delegated legislative authority, Department sought judicial review of two orders of Administrative Law Judge (ALJ), namely grant of challengers' motion for continuance of hearing and denial of Department's motion for protective order, and sought writ of prohibition to review denial of motion for disqualification of ALJ. The District Court of Appeal held that: (1) Department was entitled to protective order after challengers of proposed rule noticed Department Commissioner for deposition; (2) receipt of ex parte letter disqualified ALJ from hearing matter.

Writ granted; remanded.

West Headnotes (9)

[1] **Pretrial Procedure**
Public Bodies and Their Officers and Employees

Pretrial Procedure
Protective Orders Before Examination

Department of Agriculture and Consumer Services was entitled to protective order after challengers of proposed rule noticed Department Commissioner for deposition, where Department offered Deputy Commissioner, to whom authority for program, of which rule was part, had been delegated, as reasonable substitute for Commissioner, and given that agency head should not be subject to deposition, over objection, unless and until opposing parties had exhausted other discovery and could demonstrate that agency head was uniquely able to provide relevant information which could not be obtained from other sources.

5 Cases that cite this headnote

[2] **Administrative Law and Procedure**
Bias, Prejudice or Other Disqualification to Exercise Powers

Agriculture
Destructive Insects, Birds, and Other Animals, and Diseases of Plants

Receipt of letter by Administrative Law Judge (ALJ) disqualified ALJ from determining validity of rule proposed by Department of Agriculture and Consumer Services relating to eradication of citrus canker, even though ALJ correctly disregarded letter writer's affidavit that indicated writer had not met or spoke with ALJ in ruling on disqualification motion, where letter, which was written by pro se individual, described individual's difficulties with Department employees who were enforcing eradication policies, Deputy Commissioner filed affidavit indicating that Department interpreted letter to state that in course of ex parte communication between ALJ and writer ALJ expressed willingness to "do something" about eradication program, and as result, Department feared it would not receive fair hearing before ALJ.

2 Cases that cite this headnote

[3] **Administrative Law and Procedure**
Trial De Novo

Appellate review of a decision of an administrative law judge (ALJ) on a motion for disqualification is de novo.

Cases that cite this headnote

[4] **Administrative Law and Procedure**
Bias, Prejudice or Other Disqualification to Exercise Powers

Test for determining the legal sufficiency of a motion for disqualification of an administrative law judge (ALJ) is whether the facts alleged, which must be taken as true, would prompt a reasonably prudent person to fear that he or she could not get a fair and impartial trial.

3 Cases that cite this headnote

[5] **Judges**
Bias and Prejudice

On a motion to disqualify a judge, it is not a question of how the judge actually feels but rather what feeling resides in the affiant's mind and the basis for such feeling.

1 Cases that cite this headnote

[6] **Judges**
Determination of Objections

In reviewing a motion to disqualify a judge, the judge cannot pass upon the truth of the allegations of fact. West's F.S.A. R.Jud.Admin.Rule 2.160(f).

1 Cases that cite this headnote

[7] **Judges**
Sufficiency of Objection or Affidavit

On a motion to disqualify a judge, it is sufficient that the allegations are neither frivolous nor fanciful.

Cases that cite this headnote

[8] **Judges**
Determination of Objections

On a motion to disqualify a judge, countervailing evidence is not admissible.

Cases that cite this headnote

[9] **Judges**
Bias and Prejudice

Judge's adverse rulings may not serve as a ground for disqualification.

1 Cases that cite this headnote

Attorneys and Law Firms

*1057 David C. Ashburn of Greenberg Traurig, Tallahassee; Jerold I. Budney of Greenberg Traurig, Ft. Lauderdale; Arthur J. England, Jr., Elliot H. Scherker and Elliot B. Kula of Greenberg Traurig, Miami, for petitioner.

Edward A. Dion, Broward County Attorney, Andrew J. Meyers, Chief Appellate Counsel, and Tamara M. Scrudders, Assistant County Attorney, Ft. Lauderdale; Robert A. Duvall, Assistant County Attorney, Miami; Susan Ruby, Delray Beach City Attorney, and R. Brian Shutt, Assistant City Attorney, Delray Beach; Gordon B. Linn, Pompano Beach City Attorney, and William J. Bosch, Senior Assistant City Attorney, Pompano Beach; Donald J. Lunny, Jr., Plantation City Attorney, and Brendan B. O'Brien of Brinkley, McNerney, Morgan, Solomon & Tatum, Ft. Lauderdale; Monroe D. Kiar, Davie Town Attorney, Davie; Samuel S. Goren, Coral Springs City Attorney, and Michael D. Cirullo of Goren, Cheroff, Doody & Ezrol, Ft. Lauderdale; Dennis E. Lyles, Ft. Lauderdale City Attorney, and Michael J. Pawelczyk, Assistant City Attorney, Ft. Lauderdale; Barry Silver, Boca Raton; John M. Haire and Patricia A. Haire, pro se, Ft. Lauderdale; Diana Freiser Grug, Boca Raton City Attorney, and John O. McKirchy, Assistant City Attorney, Boca Raton; Laz Schneider and Ellen Schneider, pro se, Ft. Lauderdale; and Dr. Chester M. Himel, pro se, Sun City Center, for respondents.

Opinion

PER CURIAM.

Various local governments and individuals are engaged in a rule challenge proceeding before the Division of Administrative Hearings, contending that a proposed rule of the Department of Agriculture and Consumer Services relating to eradication of citrus canker is an invalid exercise of delegated legislative authority. In case number 1D02-0145, the department timely petitions this court for review of two orders of the Administrative Law Judge (ALJ). In the first order, the challengers' motion for a continuance of the

hearing was granted. In the second, the department's motion for a protective order was denied. For the reasons set forth below, the petition is denied in part and granted in part. In case number 1D02-0204, the department seeks a writ of prohibition to review denial of a motion for disqualification of the ALJ. We consolidate these cases for our opinion and grant the petition for writ of prohibition.

We find it unnecessary to recite in detail the discovery disputes which have characterized the proceedings below. Given the ***1058** ALJ's superior vantage point, we are unable to say that his discretion was abused when the continuance was granted. While there are significant reasons to proceed with the hearing as quickly as possible, they are outweighed by the parties' rights to due process, including full and fair discovery prior to the hearing. Accordingly, we deny, without further comment, the petition insofar as it relates to the granting of the continuance.

[1] The challengers noticed the agency head, Commissioner Charles Bronson, for deposition. The department moved for a protective order, relying on this court's decision in *State, Department of Health and Rehabilitative Services v. Brooke,* 573 So.2d 363 (Fla. 1st DCA 1991). The department also offered a deputy commissioner, to whom authority for the program had been delegated, for deposition as a reasonable substitute for Commissioner Bronson. We agree with the department that the ALJ abused his discretion in denying the motion for protective order. In circumstances such as these, the agency head should not be subject to deposition, over objection, unless and until the opposing parties have exhausted other discovery and can demonstrate that the agency head is uniquely able to provide relevant information which cannot be obtained from other sources. To hold otherwise would, as argued by the department, subject agency heads to being deposed in virtually every rule challenge proceeding, to the detriment of the efficient operation of the agency in particular and state government as a whole.

[2] We also find merit to the department's argument regarding its motion to disqualify the ALJ. A pro se individual who sought to appear as an intervenor wrote a letter to the ALJ dated January 1, 2002, and which began with the following paragraph:

> Thank you for your time this morning. I am glad that you are interested in doing something about this Citrus Eradication program.

The letter went on to describe, in some detail, the writer's difficulties with employees of the department who were enforcing the department's policies in her geographic area. The department's motion for disqualification was supported by the affidavit of a deputy commissioner who stated that the agency interpreted the letter to say that the ALJ and the litigant had engaged in an ex parte communication and that in the course thereof the ALJ expressed a willingness to "do something" about the citrus canker eradication program. As a result, the department feared it would not receive a fair hearing before the ALJ. The challengers responded in opposition and offered the affidavit of the letter's author, who explained her use of the above-quoted language and stated that she had never met or spoken with the ALJ. The ALJ entered an order wherein it was stated that the facts of the motion for disqualification were taken as true but the motion was found to be legally insufficient and denied as such.

[3] **[4]** **[5]** **[6]** **[7]** **[8]** Our review of the ALJ's decision on the motion for disqualification is de novo. *Sume v. State,* 773 So.2d 600, 602 (Fla. 1st DCA 2000). The test for determining the legal sufficiency of a motion for disqualification is whether the facts alleged (which must be taken as true) would prompt a reasonably prudent person to fear that he or she could not get a fair and impartial trial. *Brofman v. Florida Hearing Care Center,* 703 So.2d 1191 (Fla. 4th DCA 1997). It is not a question of how the judge actually feels but rather what feeling resides in the affiant's mind and the basis for such feeling. *Wargo v. Wargo,* 669 So.2d 1123 (Fla. 4th DCA 1996). In reviewing a motion to disqualify the ***1059** judge cannot pass upon the truth of the allegations of fact. *Hayslip v. Douglas,* 400 So.2d 553 (Fla. 4th DCA 1981); Fla. R. Jud. Admin. 2.160(f). It is sufficient that the allegations are neither frivolous nor fanciful. *Barnett v. Barnett,* 727 So.2d 311 (Fla. 2d DCA 1999); *Scholz v. Hauser,* 657 So.2d 950 (Fla. 5th DCA 1995). Countervailing evidence is not admissible. *Cave v. State,* 660 So.2d 705(Fla.1995).

[9] The parties rely on the related cases of *Brake v. Murphy,* 693 So.2d 663 (Fla. 3d DCA 1997) and *Brake v. Swan,* 767 So.2d 500 (Fla. 3d DCA 2000). While we find they are analogous in some respects to the instant matter, we are not in total agreement with the analyses of the Third District. In *Brake v. Murphy,* a party sought disqualification of a trial judge based on an attorney's time sheet record which indicated counsel had twice conferred with the court shortly before a ruling was issued in that party's favor. The court cited *Rose v. State,* 601 So.2d 1181 (Fla.1992) for the proposition that ex

parte communications between a judge and counsel or a party are to be avoided and may serve as a basis for disqualification of a judge. The motion for disqualification, according to the district court, was legally sufficient and should have been granted. The facts of *Brake v. Murphy* are analogous to those in this case and we agree with the holding. However, the court went on to say that "[t]he certitude of our decision that the motion for disqualification should have been granted is reinforced by several highly questionable orders rendered after the surcharge order." 693 So.2d at 665. Petitioner in the instant case relies on this language and argues that the orders which are subject to its petition to review nonfinal administrative action also suggest the ALJ's bias. We reject this argument, however, in light of the well-settled principle that a judge's adverse rulings may not serve as a ground for disqualification. *Gieseke v. Grossman,* 418 So.2d 1055, 1057 (Fla. 4th DCA 1982). In *Brake v. Swan,* the court revisited the issue when the record in a later appeal revealed that counsel's time sheets actually reflected telephone conversations with the judge's judicial assistant, who had called to give directions to counsel regarding the drafting of certain orders. In dicta, the district court stated that the proper procedure would have been for the party opposing the motion for disqualification to have filed an affidavit clarifying the meaning of the time sheet entries. 767 So.2d at 503-04. We find that proposed procedure runs afoul of Florida Rule of Judicial Administration 2.160 and *Cave v. State,* 660 So.2d 705 (Fla.1995). We reject the suggestion that a meaningful distinction can be made and consistently applied between clarification and refutation of the facts underlying a motion for disqualification.

The ALJ correctly determined that he should disregard the affidavit of the letter writer in ruling on the motion for disqualification. He erred, however, in determining that the motion was legally insufficient. We grant the petition for writ of prohibition and remand with directions for the ALJ to grant the motion for disqualification.

PETITION FOR REVIEW OF NON-FINAL ADMINISTRATIVE ACTION DENIED IN PART AND GRANTED IN PART.

PETITION FOR WRIT OF PROHIBITION GRANTED.

MINER, WOLF and VAN NORTWICK, JJ., concur.

Parallel Citations

27 Fla. L. Weekly D625

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106 So.2d 607
District Court of Appeal of Florida, First District.

STATE of Florida, Appellant,
v.
Frank BROCK, Appellee.

No. A-255. | Nov. 18, 1958.

The Criminal Court of Record, Duval County, William T. Harvey, J., entered an order quashing an information in a criminal prosecution, and the State appealed. The District Court of Appeal, Sturgis, C. J., held that the information was sufficient to charge crime of bribery under F.S.A. s 838.011.

Order vacated and cause remanded for further proceedings consistent with opinion.

West Headnotes (6)

[1] **Criminal Law**
Grand jury and indictment

The bona fides of assignments of error on appeal by state from order quashing information in a criminal prosecution should be determined by reviewing court alone from the record on appeal and presentation of the parties, and not on the basis of opinion of trial judge.

1 Cases that cite this headnote

[2] **Criminal Law**
Nature of Decision Appealed from as Affecting Scope of Review

On appeal from order quashing information in a criminal prosecution, the only question before reviewing court was whether information charged a crime under state law, and statement filed by trial judge, explaining circumstances leading up to entry of order, though it might explain why error was committed, could not erase error or have any weight in determining issues of law presented by appeal.

Cases that cite this headnote

[3] **Bribery**
Requisites and Sufficiency

Information, charging that accused corruptly offered named person, acting in official capacity as road patrolman under authority of sheriff, as known to accused, $500 for purpose of causing patrolman to unlawfully release accused from arrest for a felony, was sufficient to charge statutory crime of bribery and fairly apprised accused of the nature of crime with which he was charged, without detailing the facts constituting crime for which he had been arrested. F.S.A. § 838.011.

2 Cases that cite this headnote

[4] **Bribery**
Requisites and Sufficiency

Where information sufficiently charged a crime under bribery statute, whether framers of information intended to charge an offense under common law, which as to bribery had been abrogated by statute, was immaterial. F.S.A. §§ 775.01, 838.01, 838.011.

Cases that cite this headnote

[5] **Indictment and Information**
Malfeasance or nonfeasance in office; bribery

As used in information charging offer of a bribe to obtain release from arrest for a "felony," quoted word had such a well-recognized meaning that there could be no question as to its adequacy to fairly apprise accused of the nature of crime with which he was charged under bribery statute. F.S.A. § 838.011.

2 Cases that cite this headnote

[6] **Criminal Law**
In general; examination of victim or witness

Discovery processes are available to persons charged with crime by which they may obtain such details dehors the information or indictment as are proper and necessary to their defense.

Cases that cite this headnote

Attorneys and Law Firms

*607 Richard W. Ervin, Atty. Gen., and Edward S. Jaffry, Asst. Atty. Gen., for appellant.

Damon G. Yerkes, Jacksonville, for appellee.

Opinion

STURGIS, Chief Judge.

The state appeals from an order of the Criminal Court of Record of Duval County, entered in case No. 20161 according to the serial numbering system employed by that court, quashing an information in a criminal prosecution, the material parts of *608 which charged that the appellee, Frank Brock, defendant below,

> '* * * of the County of Duval and State of Florida, on the seventh day of December in the year of our Lord, one thousand nine hundred and fifty-six in the County and State aforesaid, did corruptly offer R. N. Miller, then acting in his official capacity as Road Patrolman under the authority of the Sheriff of Duval County, as known to the defendant Frank Brock, a sum of money, to-wit: Five Hundred Dollars ($500.00), for the purpose of causing the said R. N. Miller, to unlawfully release the said Frank Brock from arrest as was the public duty of said R. N. Miller, to then and there arrest the said Frank Brock for the commission of a felony under the Laws of the State of Florida.'

Defendant moved to quash the information on the following grounds, in substance, (1) that it fails to set forth a charge under any statute, (2) that it fails to allege that a crime had been committed by the defendant prior to the alleged attempt to bribe, (3) that the alleged offer to bribe relates to an offense not yet committed, but presumably in contemplation, so that there was no matter, question, cause, or proceeding then pending concerning which the act, vote, opinion, decision, or judgment of the officer could be influenced, and (4) that the information fails to show the offense, if any, for which the said officers were about to or did arrest the defendant. The motion was granted and we are called on to determine whether that action was correct.

When the State's assignments of error came to the attention of the trial judge, he voluntarily filed under his hand a paper entitled 'Statement for the Record' explaining the circumstances leading up to the entry of the order in question. He recites therein that at the hearing on the motion to quash he requested the attorneys for the prosecution to identify the statute upon which the information was based, and in response was advised that none had been found; that the prosecution, without citing case law or other authority in support of its position, simply advised that it was relying on the sufficiency of the information under the common law; that the court, before acting on the motion to quash, invited the attention of the prosecution to F.S. s 775.01, F.S.A.[1] and to the case of State ex rel. Williams v. Coleman, 131 Fla. 892, 180 So. 357.[2] The trial judge goes on to recite that under these circumstances he was not called on to decide whether the information stated a cause of action under the Florida Statutes; that he only held that F.S. s 838.01, F.S.A.[3] - with which we are not concerned on this appeal-abrogated the common law in respect to bribery and attempted bribery; and that he made no mention, finding, or ruling on the matter set forth in certain of appellant's assignments of error. He concluded the statement by expressing an opinion that all of the assignments of error except those numbered one and two are frivolous.

*609 [1] [2] The appellant does not contest the trial judge's statement in any particular and, except as to his expression of an opinion regarding the bona fides of certain assignments of error-a matter which this court alone should determine from the record on appeal and presentation of the parties-, it is accepted as correct in every respect. In all candor we must observe, however, that while a statement of the nature filed herein may explain why an error is committed, it cannot erase error or have any weight in determining the issues of law presented by the appeal, our sole inquiry being: Did the information state a crime under the laws of Florida?

F.S. s 838.011, F.S.A., which was in force on the date the information was filed and which obviously was not brought to the attention of or considered by the trial judge, provides:

> 'Any person who shall corruptly give, offer or promise to any public officer, agent, servant or employee, after the election or appointment or employment

> of such public officer, agent, servant or employee and either before or after he shall have been qualified or shall take his seat, any commission, gift, gratuity, money, property or other valuable thing, or to do any act beneficial to such public officer, agent, servant or employee or another, with the intent or purpose to influence the act, vote, opinion, decision, judgment or behavior of such public officer, agent, servant or employee on any matter, question, cause or proceeding which may be pending or may by law be brought before him in his public capacity, or with the intent or purpose to influence any act or omission relating to any public duty of such public officer, agent, servant or employee, or with the intent or purpose to cause or induce such public officer, agent, servant or employee to use or exert or to procure the use or exertion of any influence upon or with any other public officer, agent, servant or employee in relation to any matter, question, cause or proceeding that may be pending or may by law be brought before such other public officer, agent, employee or servant, shall be guilty of the crime of bribery.'

Appellant maintains that the information tracks the statute by clearly alleging: (1) the date of the alleged acts; (2) the official capacity of the intended recipients; (3) that the accused had knowledge of their official capacity; (4) the value of the thing offered as a bribe; and (5) the general nature of the subject of the attempted bribery. Appellee insists that the information was fatally defective in that it did not detail the facts constituting the crime for which the accused was arrested, but merely stated that the accused was under arrest for the 'commission of a felony under the Laws of the State of Florida.' No authority is cited for this proposition and our research fails to disclose any.

[3] **[4]** It is of no consequence what was in the mind of the person who drafted the information if it was sufficient to make out a crime. State ex rel. Spitzer v. Mayo, 129 Fla. 426, 176 So. 434. The existence of a valid statute clearly sustains the sufficiency of the information, notwithstanding the intent of the framers of the informations or the impressions of the trial judge. Williams v. United States, 168 U.S. 382, 389, 18 S.Ct. 92, 42 L.Ed. 509.

In Streeter v. State, 89 Fla. 400, 104 So. 858, defendant was charged with attempting to bribe a police officer on condition that he not arrest a party for violation of the liquor law. It was there held that while the information might have been so drawn as to contain greater detail as to the elements constituting the offense charged and more particularly described the offense for which immunity from arrest was sought, a broad and liberal construction should be given to the words used and that under construction the information was adequate.

***610** **[5]** **[6]** The word 'felony' as used in the information forming the subject of this appeal has such a well-accepted meaning that there can be no question of its adequacy to fairly apprise the defendant of the nature of the crime with which he was charged under the provisions of F.S. s 838.011, F.S.A. Discovery processes are available to persons charged with crime by which they may obtain such details dehors the information or indictment as are proper and necessary to thir defense.

The order quashing the information is vacated and the cause remanded for further proceedings consistent herewith.

CARROLL, DONALD, and WIGGINTON, JJ., concur.

Footnotes

1 F.S. s 775.01, F.S.A. provides:
'The common law of England in relation to crimes, except so far as the same relates to the modes and degrees of punishment, shall be of full force in this state where there is no existing provision by statute on the subject.'

2 State ex rel. Williams v. Coleman simply held that the crime of bribery has been changed by statute and that the information must comply therewith.

3 F.S. s 838.01, F.S.A. provides:
'Whoever corruptly gives, offers or promises to any executive, legislative or judicial officer, state, county, or municipal officer, official or employee of the same, after his election or appointment, either before or after he is qualified, or has taken his seat, any gift

or gratuity whatever, with intent to influence his act, vote, opinion, decision or judgment on any matter, question, cause or proceeding which may be then pending, or which may by law come or be brought before him in his official capacity, shall be punished by imprisonment in the state prison not exceeding five years, or in the county jail not exceeding one year, or by fine not exceeding three thousand dollars.'

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271 So.2d 793
District Court of Appeal of Florida, Third District.

Clarence Joseph CARNIVALE, Appellant,
v.
The STATE of Florida, Appellee.

No. 72—443. | Jan. 10, 1973.
| Rehearing Denied Feb. 5, 1973.

Defendant was convicted before the Criminal Court of Record for Dade County, Murray Goodman, J., of unlawfully and feloniously breaking and entering with intent to commit grand larceny and of unlawfully and feloniously stealing personal property from dwelling with value in excess of $100, and he appealed. The District Court of Appeal held that where defendant had deposed all witnesses listed in statement of particulars and discovery but defense counsel had no opportunity to depose codefendant because counsel was not informed that codefendant had turned state's evidence, refusal by trial court, which failed to make proper inquiry as to whether state's failure to list codefendant as witness prejudiced defendant, to exclude codefendant's testimony for state or, in alternative, to suggest either recess or continuance to permit defense counsel to depose or converse with codefendant was reversible error.

Reversed and remanded, with directions.

West Headnotes (5)

[1] **Criminal Law**
⇐ Matters known to opponent; accomplices or codefendants

Criminal Law
⇐ Endorsing or listing witnesses

Where defendant had deposed all witnesses listed in statement of particulars and discovery but defense counsel had no opportunity to depose codefendant because counsel was not informed that codefendant had turned state's evidence, refusal by trial court, which failed to make proper inquiry as to whether state's failure to list codefendant as witness prejudiced defendant, to exclude codefendant's testimony for state or, in alternative, to suggest either recess or continuance to permit defense counsel to depose or converse with codefendant was reversible error. 33 F.S.A. Rules of Criminal Procedure, rule 3.220.

6 Cases that cite this headnote

[2] **Criminal Law**
⇐ In general; examination of victim or witness

Purpose of rule providing for discovery in criminal cases is to enable a defendant to eliminate likelihood of surprise at trial and to further enable him to plan his defense, since it would afford him necessary time to interview prospective witnesses. 33 F.S.A. Rules of Criminal Procedure, rule 3.220.

1 Cases that cite this headnote

[3] **Criminal Law**
⇐ Exchange of lists

If accused chooses to use exchange of witness provision within rule providing for discovery in criminal cases, prosecuting attorney must comply with rule. 33 F.S.A. Rules of Criminal Procedure, rule 3.220.

Cases that cite this headnote

[4] **Criminal Law**
⇐ Discovery and disclosure; transcripts of prior proceedings

If no harm or prejudice to defendant results from state's noncompliance with rule providing for discovery in criminal cases, such noncompliance does not constitute reversible error. 33 F.S.A. Rules of Criminal Procedure, rule 3.220.

1 Cases that cite this headnote

[5] **Criminal Law**
⇐ Objections and proceedings

It is not function of appellate court to determine whether prejudice has resulted to accused due to state's failure to list person as witness, but rather it is incumbent on trial judge to determine

if any prejudice has resulted from such failure. 33 F.S.A. Rules of Criminal Procedure, rule 3.220.

1 Cases that cite this headnote

Attorneys and Law Firms

*794 Phillip A. Hubbart, Public Defender, Walter S. Holland, Sp. Asst. Public Defender, for appellant.

Robert L. Shevin, Atty. Gen., and Joel D. Rosenblatt, Asst. Atty. Gen., for appellee.

Before BARKDULL, C.J., and CHARLES CARROLL and HAVERFIELD, JJ.

Opinion

PER CURIAM.

The appellant seeks review of his conviction and sentence. The record reveals the following: An information was filed against the defendant (Carnivale) and a co-defendant (Leonard L. DeLong). They were charged with unlawfully and feloniously breaking and entering with intent to commit grand larceny, in violation of s 810.01, Fla.Stat., F.S.A., and with unlawfully and feloniously stealing personal property from a dwelling with a value in excess of $100.00, in violation of s 811.021, Fla.Stat., F.S.A. The case came on for trial before the Honorable Murray Goodman.

[1] DeLong had apparently turned State's evidence the morning of the trial, but trial counsel for the appellant was not informed. The first witness called by the State was Leonard L. DeLong, formerly a co-defendant in this cause. Defense counsel objected to the testimony of Mr. DeLong upon the basis that he had not been listed as a witness in the Statement of Particulars and Discovery, and the defense had no prior opportunity to depose him. Defense counsel was unaware that DeLong had turned State's evidence and was going to testify as a witness for the State. The court overruled the defendant's objections upon the ground that Mr. DeLong was listed on all of the pleadings as a co-defendant and that the defendant (Carnivale) was not unaware that Mr. DeLong might testify. However, the court's ruling completely overlooked the fact that the defendant (Carnivale) was not entitled to depose him until after DeLong had turned State's evidence and entered a plea of guilty. DeLong's constitutional protection against self-incrimination would have been violated had defendant's attorneys been allowed to depose DeLong prior to his turning State's evidence.

The State Attorney's office was under a duty to inform Carnivale's counsel of the fact that DeLong had turned State's evidence. DeLong had entered a plea of guilty the morning of the trial. At no time after that and up to the time that Carnivale's trial began at 2:00 in the afternoon was the public defender informed of DeLong's new status as a potential witness. The court's refusal to exclude DeLong's testimony or, in the alternative, its failure to suggest either a recess or a continuance to allow Carnivale's counsel to depose or converse with DeLong regarding his testimony, constitutes reversible error.

*795 [2] [3] Florida Rule of Criminal Procedure 3.220, 33 F.S.A., provides for discovery in criminal cases. The defendant invoked Rule 3.220 in this cause and the State complied with said section by filing a Statement of Particulars and Discovery. The purpose behind this particular section of the Rules of Criminal Procedure is to enable a defendant to eliminate the likelihood of surprise at trial and to further enable him to plan his defense, since it would afford him necessary time to interview prospective witnesses. Ramirez v. State, Fla.App.1970, 241 So.2d 744. Once a defendant chooses to use this exchange of witness provision it becomes mandatory that the prosecuting attorney comply with the rule. Cacciatore v. State, Fla.App.1969, 226 So.2d 137.

[4] In a recent decision, Richardson v. State, Fla.1971, 246 So.2d 771, the Florida Supreme Court was faced with circumstances very similar to the facts of the case at bar. In this latter decision, the court noted that it is incumbent upon the trial judge to determine whether the State's non-compliance with Rule 3.220 has resulted in harm or prejudice to the defendant. If no such harm or prejudice results, then there is no reversible error. Howard v. State, Fla.App.1970, 239 So.2d 83; Buttler v. State, Fla.App.1970, 238 So.2d 313; Wilson v. State, Fla.App.1969, 220 So.2d 426. However, the court stated in Richardson v. State, supra, that the trial judge must adequately inquire into all the surrounding circumstances in order to determine if prejudice or harm would result to the defendant by the non-compliance by the State with Rule 3.220. The court approved the following language from Ramirez v. State, supra:

'The point is that if, during the course of the proceedings, it is brought to the attention of the trial court that the state has failed to comply with Rule 1.220(e)CrPR, the court's discretion can be properly exercised Only after the court has made an adequate inquiry into all of the surrounding

circumstances. Without intending to limit the nature or scope of such inquiry, we think it would undoubtedly cover at least such questions as whether the state's violation was inadvertent or wilful, whether the violation was trivial or substantial, and most importantly, what effect, if any, did it have upon the ability of defendant to properly prepare for trial. (court's emphasis)

'Once the court has considered all of the circumstances, it has authority to enter such order as it deems just. Rule 1.220(g)CrPR. However, in those cases where the court determines that the state's noncompliance with the rule has not prejudiced the ability of the defendant to properly prepare for trial, We deem it essential that the circumstances establishing nonprejudice to the defendant affirmatively appear in the record.' (emphasis added)

The record herein is totally devoid of any such a determination by the trial judge. Indeed, the only reason given by the trial judge for his allowance of the testimony of DeLong is given at page 42 of the record:

> 'A co-defendant need not be listed on the list of witnesses.'

The court made no inquiry of the State as to whether its omission was inadvertent or wilful. There is nothing in the record to reflect whether the court thought the violation was trivial or substantial or what effect it might have upon the ability of the defendant to properly prepare for trial. The Supreme Court of Florida, in Richardson v. State, supra, deemed it essential that the circumstances establishing non-prejudice to the defendant affirmatively appear in the record. No such circumstances appear in this record.

*796 In the case sub judice, the State gave no explanation as to why they failed to inform the defendant (Carnivale) that DeLong had pleaded guilty and had turned State's evidence and would testify as a State witness. In fact, the information was kept secret from defense counsel until Mr. DeLong was called as a witness in the afternoon session. Had the State informed the defense counsel during the morning session, a statement or a deposition could have been taken of DeLong. After the afternoon session had begun, the court itself might have avoided reversible error by recessing the trial and allowing defense counsel to depose DeLong or take a statement from him.

[5] One of the defendant's complaints to DeLong's testimony was that defense counsel had not had an opportunity to depose DeLong. The fact that the defendant herein had deposed all other witnesses lends credence to defendant's argument that DeLong would have been deposed had the defendant known he was available as a witness. Under the rationale contained in Richardson v. State, supra, it is not a function of the appellate court to determine whether prejudice had resulted to defendant in this cause by the State's failure to list DeLong as a witness. It was incumbent upon the trial judge to determine if any prejudice had resulted by such failure. The trial judge having failed to make proper inquiry, this cause must be reversed. Garcia v. State, Fla.App.1972, 268 So.2d 575.

The other points raised by the appellant have been examined and found to be without merit, although it is noted that upon a retrial of this matter, the State should probably offer a better quantum of proof as to the value of the goods taken.

Therefore, for the reasons stated, the judgment of conviction and the sentence be and they are hereby reversed and vacated, and the appellant be and he is remanded to the trial court for a new trial.

Reversed and remanded, with directions.

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837 So.2d 535
District Court of Appeal of Florida,
Second District.

Joseph KEY, Appellant,
v.
STATE of Florida, Appellee.

No. 2D01–4772. | Feb. 12, 2003.

Defendant was convicted in a jury trial in the Circuit Court, Hillsborough County, J. Rogers Padgett, J., of battery and child abuse. Defendant appealed. The District Court of Appeal, 779 So.2d 525, remanded for resentencing. Following resentencing, defendant appealed. The District Court of Appeal, Stringer, J., held that State presented sufficient evidence to support finding of "moderate victim injury" rather than "severe victim injury."

Reversed and remanded.

West Headnotes (4)

[1] **Criminal Law**
Application of guidelines
The trial court's assessment of victim injury points is reviewed for an abuse of discretion.
1 Cases that cite this headnote

[2] **Sentencing and Punishment**
Bodily injury and degree thereof
For purposes of assessing victim injury points in connection with sentencing, the State presented sufficient evidence to support a finding of "moderate victim injury," and trial court abused its discretion in finding "severe victim injury"; jury's acquittal of aggravated child abuse and conviction for child abuse, coupled with jury's acquittal of aggravated battery and conviction for misdemeanor battery, necessarily precluded a finding of great bodily harm and rejection of great bodily harm precluded a finding of "severe victim injury." West's F.S.A. §§ 784.03, 784.045, 827.03(1, 2).
1 Cases that cite this headnote

[3] **Assault and Battery**
Aggravated assault
"Great bodily harm," in the context of aggravated battery, defines itself and means great as distinguished from slight, trivial, minor, or moderate harm, and as such does not include mere bruises as are likely to be inflicted in a simple assault and battery. West's F.S.A. §784.045.
Cases that cite this headnote

[4] **Criminal Law**
Liberal or strict construction; rule of lenity
Under principles of lenity, doubts regarding meanings of terms in criminal statutes must be resolved in the defendant's favor.
1 Cases that cite this headnote

Attorneys and Law Firms

*536 James Marion Moorman, Public Defender, and Julius J. Aulisio, Assistant Public Defender, Bartow, for Appellant.

Charlie Crist, Attorney General, Tallahassee, and Dale E. Tarpley, Assistant Attorney General, Tampa, for Appellee.

Opinion

STRINGER, Judge.

Joseph Key seeks review of his sentence of 62.1 months' incarceration, which the trial court entered on remand from his direct appeal. Because the trial court abused its discretion in assessing forty points for severe victim injury, we reverse.

In September 1998 the State charged Key with the first-degree murder and aggravated child abuse of his girlfriend's three-year-old daughter. The evidence showed that the cause of death was blunt trauma to the back. The child's injuries included damage to the pancreas and intestines, a liver and spleen that were torn in half, a broken rib, and contusions to the head. At trial the State alleged that Key delivered these injuries to the child during a severe beating. Key admitted

to hitting the child on her back, but asserted that the child's injuries resulted from a fall down the stairs.

The jury acquitted Key of murder and aggravated child abuse and convicted him of the lesser-included crimes of misdemeanor battery and child abuse. The trial court sentenced Key to time served for battery and 97.27 months' incarceration for child abuse. This sentence was a guidelines sentence, and the trial court assessed 120 victim injury points for the child's death on his guidelines scoresheet.

Key appealed the trial court's assessment of victim injury points for death, and this court reversed with directions that the court could assess "other appropriate victim injury points." *Key v. State,* 779 So.2d 525, 526 (Fla. 2d DCA 2000), *review denied,* 794 So.2d 605 (Fla.2001). On remand, the trial court assessed forty points for severe victim injury. Key then filed the present appeal, arguing that the trial court abused its discretion in finding Key responsible for severe victim injury. [1]

[1] [2] The trial court's assessment of victim injury points is reviewed for an abuse of discretion. *Ely v. State,* 719 So.2d 11, 13 (Fla. 2d DCA 1998); *Gregory v. State,* 666 So.2d 222, 223 (Fla. 2d DCA 1995). Severe victim injury merits forty points, moderate victim injury merits eighteen points, and slight victim injury merits four points. Fla. R.Crim. P. 3.991(a) (1997). Victim injury points may not be assessed for a crime of which the defendant is acquitted. Fla. R.Crim. P. 3.702(d)(5). In this case, Key was acquitted of not only first-degree murder and aggravated child abuse, which were the crimes charged on the information, but also second-degree murder, manslaughter, and aggravated battery, which are lesser-included crimes that were charged in the jury instructions.

The difference between the statutory definitions of misdemeanor battery and aggravated battery is that aggravated battery requires great bodily harm or use of a deadly weapon. §§ 784.03, 784.045, Fla. Stat. (1997). There were no weapons involved in this case, so the jury must have *537 rejected the State's assertion that Key caused great bodily harm. Similarly, the jury's acquittal of aggravated child abuse and conviction for child abuse necessarily precludes a finding of great bodily harm. § 827.03(1), (2), Fla. Stat. (1997). [2]

[3] [4] Because the jury necessarily concluded that Key did not cause great bodily harm, he cannot be assessed victim injury points for great bodily harm. The question becomes whether great bodily harm is something greater than severe victim injury for which the trial court assessed forty victim injury points. " 'Great bodily harm defines itself and means great as distinguished from slight, trivial, minor, or moderate harm, and as such does not include mere bruises as are likely to be inflicted in a simple assault and battery.' " *Coronado v. State,* 654 So.2d 1267, 1270 (Fla. 2d DCA 1995) (quoting *Owens v. State,* 289 So.2d 472, 474 (Fla. 2d DCA 1974)). The term is not statutorily defined. Under principles of lenity, we must resolve doubts about the meanings of the terms in the appellant's favor. *Poole v. State,* 753 So.2d 698, 698 (Fla. 4th DCA 2000). Thus, we conclude that a rejection of great bodily harm precludes a finding of severe victim injury.

The trial court therefore abused its discretion in assessing forty points for severe victim injury, and we reverse Key's sentence and remand for resentencing. Although Key may not be assessed severe victim injury points as a matter of law, we conclude that the State presented sufficient evidence to support a finding of moderate victim injury. Thus, on remand the court shall assess eighteen points for moderate victim injury.

Reversed and remanded.

SALCINES and SILBERMAN, JJ., Concur.

Parallel Citations

28 Fla. L. Weekly D466

Footnotes

1 We reject Key's argument that the assessment of victim injury points is contra to *Apprendi v. New Jersey,* 530 U.S. 466, 490, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000), because the issue has not been preserved for review. *See Marshall v. State,* 789 So.2d 969, 970 (Fla.2001); *Sheffield v. State,* 789 So.2d 340 (Fla.2001).

2 It should be noted that the jury was erroneously given an instruction on child abuse that included the element of "great bodily harm." On direct appeal, this court recognized that the instruction was given in error, but concluded that the error was harmless. *Key v. State,*

779 So.2d 525, 526 (Fla. 2d DCA 2000), *review denied,* 794 So.2d 605 (Fla.2001). In accordance with this finding, we conclude that Key may not be assessed victim injury points for a finding of great bodily harm based on the erroneous jury instruction.

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West's Florida Statutes Annotated
Title XLVI. Crimes (Chapters 775-899)
Chapter 782. Homicide (Refs & Annos)

West's F.S.A. § 782.02

782.02. Justifiable use of deadly force

Currentness

The use of deadly force is justifiable when a person is resisting any attempt to murder such person or to commit any felony upon him or her or upon or in any dwelling house in which such person shall be.

Credits

Laws 1868, c. 1637, subc. 3, §§ 4, 5; Rev.St.1892, § 2378; Laws 1901, c. 4967; Laws 1901, c. 4964, § 1; Gen.St.1906, § 3203; Rev.Gen.St.1920, § 5033; Comp.Gen.Laws 1927, § 7135; Laws 1974, c. 74-383, § 66; Laws 1975, c. 75-24, § 1; Laws 1975, c. 75-298, § 45. Amended by Laws 1997, c. 97-102, § 1197, eff. July 1, 1997.

Notes of Decisions (263)

West's F. S. A. § 782.02, FL ST § 782.02
Current through Ch. 254 (End) of the 2014 2nd Reg. Sess. of the Twenty-Third Legislature

End of Document

West's Florida Statutes Annotated
Title XLVI. Crimes (Chapters 775-899)
Chapter 776. Justifiable Use of Force (Refs & Annos)

West's F.S.A. § 776.012

776.012. Use or threatened use of force in defense of person

Effective: June 20, 2014
Currentness

(1) A person is justified in using or threatening to use force, except deadly force, against another when and to the extent that the person reasonably believes that such conduct is necessary to defend himself or herself or another against the other's imminent use of unlawful force. A person who uses or threatens to use force in accordance with this subsection does not have a duty to retreat before using or threatening to use such force.

(2) A person is justified in using or threatening to use deadly force if he or she reasonably believes that using or threatening to use such force is necessary to prevent imminent death or great bodily harm to himself or herself or another or to prevent the imminent commission of a forcible felony. A person who uses or threatens to use deadly force in accordance with this subsection does not have a duty to retreat and has the right to stand his or her ground if the person using or threatening to use the deadly force is not engaged in a criminal activity and is in a place where he or she has a right to be.

Credits

Laws 1974, c. 74-383, § 13. Amended by Laws 1997, c. 97-102, § 1188, eff. July 1, 1997; Laws 2005, c. 2005-27, § 2, eff. Oct. 1, 2005; Laws 2014, c. 2014-195, § 3, eff. June 20, 2014.

Notes of Decisions (143)

West's F. S. A. § 776.012, FL ST § 776.012
Current through Ch. 254 (End) of the 2014 2nd Reg. Sess. of the Twenty-Third Legislature

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