Volume 31, Number 10, February 29, 2024

FLORIDA LAW WEEKLY FLW SUPPLEMENT

A PUBLICATION OF JUDICIAL AND ADMINISTRATIVE RESEARCH ASSOCIATES, INC.

Pages 457-511

Reports of Decisions of:

THE CIRCUIT COURTS OF FLORIDA
THE COUNTY COURTS OF FLORIDA
and
Miscellaneous Proceedings of Other Public Agencies

Readers are invited to submit for publication any decisions of these courts and any reports from other public bodies which are not generally reported and which would, because of the issues involved, be of interest to the legal community.

SUMMARIES

Summaries of selected opinions or orders published in this issue.

- **ARBITRATION—ARBITRABLE ISSUES—TORTS—INJURIES TO RIDE-SHARE DRIVERS AND PASSENGERS. In separate actions, judges from the Fourth and Seventeenth Judicial Circuits determined that passengers and a driver who downloaded and used the passenger and driver versions of a ride-share company's app expressly agreed to resolve through binding arbitration any disputes related to the use of the app. Accordingly, the plaintiffs in each action were ordered to arbitrate negligence claims arising out of accidents occurring during the ride-shares. Because the arbitration clause at issue contained a delegation clause, any attack on the arbitrability of the claims raised by the plaintiffs was required to be raised before an arbitrator.** *THOMAS-JACKSON v. GILLIAMS. Fourth Judicial Circuit in and for Clay County. Filed August 16, 2023. Full Text at Circuit Courts-Original Section, page 465b. ALI v. RAISIER, LLC. Seventeenth Judicial Circuit in and for Broward County. Filed November 14, 2023. Full Text at Circuit Courts-Original Section, page 476a.*

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FLW SUPPLEMENT

CASES REPORTED.

FLW Supplement includes reports of decisions of Florida circuit and county courts, and miscellaneous reports of the proceedings of other public agencies. Sections are divided as follows:

CIRCUIT COURT - APPELLATE	Opinions in those cases in which circuit courts were reviewing decisions of county courts or administrative agencies.
CIRCUIT COURT - ORIGINAL	Opinions in those cases in which circuit courts were acting as trial courts.
COUNTY COURTS	County court opinions.
MISCELLANEOUS	Other proceedings.

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CO	County Court
M	Miscellaneous Reports

Bold denotes decision by circuit court in its appellate capacity.

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Cite as 31 Fla. L. Weekly Supp. ___

CIRCUIT COURTS—APPELLATE

Licensing—Driver's license—Suspension—Refusal to submit to breath, blood or urine test—Lawfulness of stop—Investigatory stop—Officer who was called to a restaurant because licensee was creating a disturbance and who observed visible signs of impairment during encounter with licensee had well-founded suspicion sufficient to justify investigatory stop of licensee's vehicle when, after briefly dealing with another customer disturbance, he saw vehicle being driven away from restaurant parking lot

JENNIFER L. OUZTS, Petitioner, v. STATE OF FLORIDA, DEPARTMENT OF HIGHWAY SAFETY AND MOTOR VEHICLES, Respondent. Circuit Court, 2nd Judicial Circuit (Appellate) in and for Leon County. Case No. 2023 AP 11. November 17, 2023. Counsel: Aaron M. Wayt, for Petitioner. Kathy Jimenez-Morales, Chief Counsel, DHSMV, for Respondent.

ORDER DENYING PETITION FOR WRIT OF CERTIORARI

(ANGELA C. DEMPSEY, J.) **THIS CAUSE** is before the Court on Petitioner's Petition for Writ of Certiorari, filed on August 28, 2023. Petitioner seeks certiorari review of Respondent's final order suspending his driving privileges for refusal to submit to a breath, blood, or urine test under Section 322.2615, Florida Statutes. This Court has jurisdiction pursuant to Article V, section 5(b), Florida Constitution, Florida Rule of Appellate Procedure 9.030(c), and Sections 322.2615(13) and 322.31, Florida Statutes. This Court reviewed the Petition, Appendix, the Response to Petition for Writ of Certiorari and Petitioner's Reply. Based upon a review of these filings, this Court finds as follows:

Factual Background:

On April 24, 2023, Petitioner was arrested by the Tallahassee Police Department for DUI and her license was subsequently suspended. Petitioner requested a formal administrative hearing, which took place on July 12, 2023. The hearing officer sustained the suspension, finding there was probable cause that Petitioner was driving or in actual physical control of a motor vehicle in this state while under the influence of alcoholic beverages or chemical or controlled substances; Petitioner refused to submit to any such test after being requested to do so by a law enforcement officer or correctional officer, subsequent to a lawful arrest; and that Petitioner was told that if she refused to submit to such test her privilege to operate a motor vehicle would be suspended for a period of 1 year or in the case of a second or subsequent refusal for a period of 18 months. The hearing officer found that all elements necessary to sustain the suspension for refusal to submit to a breath, blood, or urine test under Section 322.2615, Florida Statutes were supported by a preponderance of the evidence.

Standard of Review:

A circuit court's review of an administrative agency decision is limited to the following standard of review: (1) whether procedural due process was accorded, (2) whether the essential requirements of law were observed; and (3) whether the administrative findings and judgment are supported by competent substantial evidence. *City of Deerfield Beach v. Vaillant,* 419 So.2d 624, 626 (Fla. 1982). Further, it is axiomatic that where substantial competent evidence supports the findings and conclusions of the administrative agency and the record discloses neither an abuse of discretion nor a violation of law by the agency, [a] court should not overturn the agency's determination. *Cohen v. School Board of Dade County, Florida,* 450 So. 2d 1238, 1241 (Fla. 3d DCA 1984); *Campbell v. Vetter,* 392 So. 2d 6 (Fla. 4th DCA 1980), *pet. for review denied,* 399 So. 2d 1140 (Fla. 1981).

Analysis:

Petitioner argues that the hearing officer's decision to uphold the suspension is not based on competent substantial evidence since the officer did not have reasonable suspicion to stop Petitioner's vehicle, resulting in a departure from the essential requirements of the law.

Courts have held that stopping a motor vehicle is permissible where there is reasonable suspicion that either the vehicle or the occupant is subject to seizure for a violation of the law. *See Jacobson v. State,* 227 So. 3d 712 (Fla. 1st DCA 2017) [42 Fla. L. Weekly D2033a]. Further, the totality of the circumstances must be considered in evaluating whether an officer has reasonable or well-founded suspicion to justify an investigatory stop. *Baden v. State,* 174 So. 3d 494 (Fla. 4th DCA 2015) [40 Fla. L. Weekly D1913b]. In this case, evidence in the record shows that Officer Harrison had a well-founded suspicion to justify stopping Petitioner's vehicle as it drove away from the parking lot of Chili's. The officer's sworn report provides that he was called to Chili's as backup because Petitioner was causing a disturbance at the restaurant. Officer Harrison spoke with the Petitioner about the incident and observed significant indicators of impairment, including slurred speech, drastic mood swings, a strong odor of an alcoholic beverage on her breath and that Petitioner swayed as she walked away from the officer. The officer noted in his report that the Petitioner's vehicle was parked in the Chili's parking lot and that she had arrived in her vehicle described as a black 2014 Chevy Camaro bearing tag FL [Editor's note: redacted]. Officer Harrison informed the Petitioner multiple times she needed to call someone to pick her up from the restaurant because she would not be able to drive. The officers also offered to give Petitioner a ride home. Petitioner instead walked away from the officers. The officers stayed in the restaurant's parking lot for a few minutes because there was another customer disturbance. Officer Harrison noticed the Petitioner's vehicle leaving the parking lot. Officer Harrison's report stated that based on his observations of Petitioner's impairment, he left the parking lot to conduct a stop of the vehicle because he believed her to be impaired.

Reasonable suspicion of criminal activity to justify an investigatory stop must be assessed based on the totality of the circumstances, meaning the whole picture and from the standpoint of an objectively reasonable officer. *State v. Teamer,* 151 So. 3d 421 (Fla. 2014) [39 Fla. L. Weekly S478a]. In this case, the officer spoke with the Petitioner, observed significant indicators of impairment, and advised her not to drive. The officer noted that her car was in the parking lot of the restaurant, and even described the color, make, model, year, and tag number of the vehicle. The officer states in his report that once the Petitioner walked away, he and another officer stayed for a few minutes in the parking lot to deal with another patron. Within that time, the officer observed the Petitioner's vehicle drive away from the parking lot. Based on those facts it was reasonable for the officer to believe that the Petitioner drove her car and based on his prior encounter with the Petitioner, had reasonable suspicion to stop Petitioner's vehicle a short distance away.

Based on the foregoing this Court concludes that the Department's decision to uphold the Petitioner's driver license suspension is supported by competent substantial evidence, that the Petitioner was accorded procedural due process, and that there was no departure from the essential requirements of the law. Further Petitioner's request for attorney's fees and costs is denied.

ACCORDINGLY, it is hereby **ORDERED** and **ADJUDGED** that Petitioner's Petition for Writ of Certiorari is **DENIED**.

* * *

Licensing—Driver's license—Suspension—Refusal to submit to breath test—Telephonic hearing—Administrative rule requiring that formal review hearings be held at Bureau of Administrative Reviews office nearest to arresting county applies only to in-person hearings and does not prevent hearing officer from conducting hearing by telephone from Tallahassee—Lawfulness of arrest—Competent, substantial evidence supported finding that officer who responded to scene of head-on collision had probable cause to believe that licensee was driving or in actual physical control of vehicle while under influence—Record reflects that officer found licensee to be suffering from injuries consistent with being in driver's seat of wrong-way vehicle and observed multiple indicia of impairment and that witness at scene identified licensee as driver of wrong-way vehicle

LAURA TYLER, Petitioner, v. STATE OF FLORIDA, DEPARTMENT OF HIGHWAY SAFETY & MOTOR VEHICLES, Respondent. Circuit Court, 6th Judicial Circuit (Appellate) in and for Pasco County. Case No. 2021-CA-000068. October 16, 2023. Petition for Writ of Certiorari. Counsel: Keeley R. Karatinos, for Petitioner. Mark L. Mason, Assistant General Counsel, and Kathy Jimenez-Morales, Chief Counsel, DHSMV, for Respondent.

[Prior report at 30 Fla. L. Weekly Supp. 137a]

ORDER DENYING PETITION FOR WRIT OF CERTIORARI

(SUSAN BARTHLE, LAURALEE WESTINE, and DANIEL DISKEY, JJ.) **THIS CAUSE** came before the Court on remand from the Mandate, entered April 21, 2023, from the Second District Court of Appeal, Case No. 2D22-1686. As set forth in its Order and Opinion, entered April 5, 2023, the above-styled Petition for Writ of Certiorari is not moot as the "capable-of-repetition-but-evading-review exception to mootness applies." The Second District Court of Appeal clarified its earlier holding, set forth in *McLaughlin v. Dep't of Highway Safety & Motor Vehicles*, 128 So.3d 815 (Fla. 2d DCA 2012) [37 Fla. L. Weekly D596a], which concluded that because the suspension had expired, the issue of the validity of the suspension of the petitioner's driver license was moot.[1] Hence, upon review of the briefs, record, and being otherwise fully advised, the Court finds that the Petition for Writ Certiorari must be denied.

STANDARD OF REVIEW

The circuit court, sitting in its appellate capacity, must determine whether: (1) the tribunal afforded the parties due process of law; (2) the order meets the essential requirements of law; and, (3) the order is supported by competent and substantial evidence. *Haines City v. Heggs,* 658 So.2d 523, 530 (Fla. 1995) [20 Fla. L. Weekly S318a] (*citations omitted*). This Court, sitting in its appellate capacity, is not entitled to reweigh the evidence; it may only review the evidence to determine whether it supports the hearing officer's findings and decision. *Dept. of Highway Safety & Motor Vehicles v. Stenmark*, 941 So.2d 1247, 1249 (Fla. 2d DCA 2006) [31 Fla. L. Weekly D2899a] (*citations omitted*). "As long as the record contains competent substantial evidence to support the agency's decision, the decision is presumed lawful and the court's job is ended." *Dusseau v. Metro. Dade Cty. Bd. of Cty. Commrs.*, 794 So.2d 1270, 1276 (Fla. 2001) [26 Fla. L. Weekly S329a].

BACKGROUND FACTS

Petitioner, Laura Tyler ("Tyler"), appeals the Findings of Fact, Conclusions of Law and Decision ("DMV Order"), entered December 11, 2020, by Samantha Simpkins, Field Hearing Officer ("Hearing Officer"), affirming the license suspension imposed by the Respondent, State of Florida, Department of Highway Safety and Motor Vehicles ("DMV"). The Hearing Officer upheld Tyler's driver's license suspension, effective October 25, 2020, for driving under the influence after Tyler refused to submit to a breath test as requested by the Florida Highway Patrol ("FHP"). Tyler was informed that if she refused to submit to a breath test her driving privilege would be suspended for a period of one year or, in the case of a second or subsequent refusal, for a period of 18 months.[2]

The underlying traffic investigation began on the early morning hours of October 25, 2020, around 4:45 a.m., after Tyler left her southbound lane of traffic and crashed head-on into a vehicle traveling in the northbound lane of traffic. The driver of the northbound vehicle was transported to the hospital with life-threatening injuries. After an investigation, Tyler was arrested for felony DUI with serious bodily injury to another and DUI property damage.[3]

Tyler timely requested an administrative hearing before the DMV's Bureau of Administrative Reviews ("BAR") to challenge the lawfulness of her license suspension. A telephonic hearing was held on December 2, 2020, with the Hearing Officer placing the call from Tallahassee.[4] The Hearing Officer admitted ten documents recieved from the FHP into evidence, without objection. As set forth in the transcript of the administrative hearing, the following exhibits were admitted:

DDL-1—Florida DUI UTC A76YO7E and Notice of Suspension;
DDL-2—Photocopy of Florida Driver License;
DDL-3—Arrest Report;
DDL-4—FHP Incident Report;
DDL-5—Affidavit of Refusal to Submit to Breath and/or Urine Test;
DDL-6—Alcohol and Drug Influence Report;
DDL-7—Florida Traffic Crash Report;
DDL-8—Breath Alcohol Test Affidavit;
DDL-9—Florida Uniform Traffic Citations;[5] and,
DDL-l 0—Vehicle Tow Receipt.

The transcript shows that the Hearing Officer listened to Tyler's objections and case law argument. The Hearing Officer also heard Tyler's oral motion to invalidate the license suspension arguing that there was insufficient evidence in the record to show that Tyler was driving, or in actual physical control of, the vehicle at the time of the crash. The Hearing Officer stated she would reserve ruling on Tyler's oral motion until she had a chance to review all the documentation submitted by Tyler. After the hearing, the Hearing Officer took the matter under advisement before entering the DMV Order on December 11, 2020, affirming Tyler's license suspension.

ISSUES RAISED

Before this Court, Tyler raises the following issues which are consolidated as follows:

(1) Tyler was denied due process of law when the telephonic hearing originated in Tallahassee instead of Tampa;

(2) the DMV Order departs from the essential requirements of law, and is not supported by competent substantial evidence, as there is not record evidence that Tyler was driving or in actual physical control of the vehicle involved in the head-on collision.

The DMV counters these arguments with citations to the record and case law.

LAW AND ANALYSIS

In addressing the first issue, the Court finds that Tyler was not denied due process because the telephonic hearing originated from Tallahassee instead of Tampa. Florida Administrative Code Rule 15A-6.009, location of hearings, requires that hearings be held at the nearest BAR office to the arresting county. The Court finds this section applies only to in-person hearings.[6] The hearing also occurred during a pandemic wherein the Florida Supreme Court issued several

orders permitting the use of telephonic hearings. Lastly, section 322.2615(6)(b), Fla. Stat., specifically provides that "[t]he hearings officer may conduct hearings using communications technology."

In addressing the second issue, the Court finds that the DMV Order adheres to essential requirements of law and is supported by competent substantial evidence. Under section 322.2615(7)(b)1.-3., Fla. Stat., the Hearing Officer was required to determine, by a preponderance of the evidence, the following to sustain a license for the refusal to submit to a breath test:

1. Whether the law enforcement officer had probable cause to believe that the person whose license was suspended was driving or in actual physical control of a motor vehicle in this state while under the influence of alcoholic beverages or chemical or controlled substances.
2. Whether the person whose license was suspended refused to submit to any such test after being requested to do so by a law enforcement officer or correctional officer.
3. Whether the person whose license was suspended was told that if he or she refused to submit to such test his or her privilege to operate a motor vehicle would be suspended for a period of 1 year or, in the case of a second or subsequent refusal, for a period of 18 months.

Tyler's argument focuses on the first prong arguing that Trooper Galloway, of the FHP, did not have sufficient probable cause to establish that Laura Tyler was driving or in actual physical control of the vehicle involved in the head-on collision. However, the Court finds that the record, to include FHP Arrest Report and Florida Traffic Crash Report,[7] provide competent substantial evidence to support the DMV Order.

As set forth in the FHP Arrest Report, Trooper Galloway was dispatched to the scene of a motor vehicle collision at U.S. 41 and Malabar Ave. in Spring Hill. When Trooper Galloway arrived on the scene, at approximately 4:45 a.m., he observed two vehicles, a blue Hyundai Sonata and red Nissan Altima, with damage consistent with a head-on collision. Trooper Galloway was informed that the driver of the Altima had been transported to Bayonet Medical facility with life threatening injuries.

As Trooper Galloway approached, he observed the driver of the Sonata, identified as Tyler by her Driver's License, standing on the east shoulder of U.S. 41. Trooper Galloway asked Tyler if she had any injuries to which she responded that her left side was sore and her left arm had an abrasion. Trooper Galloway found these injuries consistent with Tyler sitting in the driver's seat. Trooper Galloway observed several signs of Tyler's impairment to include bloodshot/watery eyes, fumbling with her Driver's License, mumbled/slurred speech, an orbital sway, and a strong odor of alcohol emitting from her breath. At approximately 6:08 a.m., Trooper Galloway informed Tyler that he was finished with the crash investigation and was now switching to the criminal investigation for DUI. Tyler was read Miranda warnings and refused to speak any further to Trooper Galloway. Tyler was then placed under arrest for DUI, and subsequently refused to provide two breath samples.

The FHP Incident Report mirrors the FHP Arrest Report, and contains additional information about the injuries sustained by the driver of the Altima.[8] The Florida Traffic Crash Report, also completed by Trooper Galloway, states: "Upon Trooper's arrival, Trooper spoke with a witness-1.[9] Witness-1 stated that Vehicle 1 [Sonata] began to travel in the northbound lanes of US-41. Witness-1 statement was consistent with the damage to the vehicles. Driver 2 was transported to Bayonet Regional Medical facility with serious bodily injuries." Attached to the Florida Traffic Crash Report is a diagram of the crash details.

The Hearing Officer was charged with reviewing the record and determine, by a preponderance of the evidence, whether sufficient cause existed to sustain, amend, or invalidate the license suspension. *See* § 322.2615(7), Fla. Stat. The record shows that there was one witness to the accident and this witness observed that Tyler was the driver of the Sonata at the time of the collision. So, notwithstanding the Hearing Officer's finding that there was "no one on the scene besides the Petitioner [Tyler] when Trooper Galloway arrived," there is still competent substantial evidence in the record to support the DMV Order. *See Stenmark,* 941 So.2d at 1249 (Fla. 2d DCA 2006) [31 Fla. L. Weekly D2899a] (*citations omitted*).

Further, it is inconsequential as to when FHP determined that Tyler was the registered owner of the vehicle, since the inquiry before the Hearing Officer was whether Trooper Galloway had probable cause to believe that Tyler was driving, or in actual physical control of, the Sonata while under the influence at the time of the accident. *See* § 322.2615(7)(b)(1), Fla. Stat. A probable cause determination can be made from reasonable inferences drawn from the surrounding facts and circumstances, as analyzed from the officer's knowledge and practical experience. *Dept. of Highway Safety and Motor Vehicles v. Silva*, 806 So.2d 551, 554 (Fla. 2d DCA 2002) [27 Fla. L. Weekly D139a] (*citations omitted)*. This Court is prohibited from reweighing the evidence and substituting its judgement for that of the Hearing Officer. *Id.* at 553. Accordingly, the Court finds that the DMV Order is supported by competent substantial evidence and adheres to the essential requirements of law, and that there no basis to grant certiorari relief under the facts of this case.

WHEREFORE, it is hereby, **ORDERED AND ADJUDGED** that the Petition for Writ of Certiorari s hereby DENIED.

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[1]The Florida Supreme Court, on December 9, 2021, declined to accept jurisdiction to resolve the inter-district conflict between *McLaughlin* and other cases on this matter. *See Cordaro v. Dep't. of Highway Safety & Motor Vehicles*, 2021 WL 5853778 (Fla. Dec. 9, 2021) [46 Fla. L. Weekly D1916a].

[2]This was Tyler's second DUI.

[3]These criminal charges remain pending, Pasco County Case No. 2020-CF-004892.

[4]Laura Tyler did not appear for this hearing, but was represented by counsel. While Tyler had the right to request the presence of a witness, no witnesses were subpoenaed for this hearing. *See* § 322.2615(6)(b), Fla. Stat.

[5]The transcript shows that these two citations, ACF7J8E and ACF7J9E, were for DUI property damage personal injury and driving on wrong side of roadway.

[6]At least one other circuit court, sitting in its appellate capacity, has also concluded that Rule 15A-6.009 applies only to in-person hearings. *See Celaj v. Dept. of Highway Safety and Motor Vehicles,* Case No. 2021-CA-000240 (Fla. 7th Cir. Ct. Oct. 4, 2021) [29 Fla. L. Weekly Supp. 566a].

[7]These documents were properly admitted into the record and are deemed self-authenticating. *See* 322.2615(2)(b), Fla. Stat.; Rule 15A-6.013(2), Fla. Admin. Code

[8]The driver of the Altima was later interviewed at the hospital and only recalled a vehicle coming into her northbound lane just before the collision.

[9]There was only one witness listed in the report, a one Leroy Vickers of Floral City.

* * *

Licensing—Driver's license—Revocation—Appeals—Certiorari challenge to order revoking driver's license is denied—Case became moot when Department of Highway Safety and Motor Vehicles' medical advisory board recommended approval of licensee's driving privileges contingent on licensee passing vision, written, and road tests and licensee passed those tests

JOSE ANTONIO GUZMAN MEDINA, Petitioner, v. STATE OF FLORIDA, DEPARTMENT OF HIGHWAY SAFETY AND MOTOR VEHICLES, Respondent. Circuit Court, 7th Judicial Circuit (Appellate) in and for Volusia County. Case No. 2023 11651 CIDL. Division 01. October 31, 2023. Counsel: Linsey Sims-Bohnenstiehl, Assistant General Counsel, DHSMV, for Respondent.

ORDER DENYING PETITION FOR WRIT OF CERTIORARI

(MICHAEL S. ORFINGER, J.) THIS CAUSE came before the Court upon the Petition for Writ of Certiorari filed by Petitioner, JOSE ANTONIO GUZMAN MEDINA. Petitioner asks the Court to quash an Order of License Revocation, Suspension, or Cancellation issued

by Respondent, STATE OF FLORIDA, DEPARTMENT OF HIGHWAY SAFETY AND MOTOR VEHICLES ("Department"), dated April 6, 2023, with an effective date of April 26, 2023 [PA. 1].[1] Because the Petition is now moot, the Court denies issuance of the writ.

The Petition is virtually devoid of any factual background, leaving the Court to rely on the Department's Response for those facts. Petitioner was involved in a motor vehicle crash on November 20, 2022 [RA. 4-6]. It appears that the crash may have been caused, at least in part, by Petitioner taking a Percocet for which he had no prescription because of back pain [RA. 5, 7].

On January 12, 2023, the Department wrote to Petitioner, stating that the Department had received information expressing concern over Petitioner's ability to drive safely. It requested that he complete and submit a Commercial Driver License Form, and that he submit a Medical Report Form and Medical Examiner's Certificate completed by a Certified Medical Examiner [RA. 8]. These were to be returned to the Department within 45 days.

After Petitioner complied with this request, the Department wrote to him again on March 6, 2023 [RA. 11]. This letter informed Petitioner that the Department's Medical Advisory Board required additional information. The Department requested that he provide a copy of all his medical records for the preceding one-year period, after which he would be informed of the Medical Advisory Board's decision.

Petitioner correctly states that the Department sent him an order revoking his driving privileges on April 6, 2023 [PA. 1-2]. The order states that its effective date was April 26, 2023 [PA. 1]. However, Petitioner failed to inform this Court that on April 20, 2023, the Department wrote to Petitioner again, stating that the Medical Advisory Board had recommended approval of his driving privileges, provided he passed the vision, written, and extended road tests [RA. 12]. It appears that Petitioner satisfied those requirements by May 24, 2023 [RA. 24]. In addition, the Department included in its Appendix a copy of Petitioner's Driver Record [RA. 23-26] dated July 10, 2023, the same day as it filed its Response to the Petition. That record shows Petitioner's driver privilege to be valid as of that date as well [RA. 23].

"An issue is moot when the controversy has been so fully resolved that a judicial determination can have no actual effect." *Kincaid v. State,* 910 So. 2d 301, 302 (Fla. 5th DCA 2005) [30 Fla. L. Weekly D1954a] (quoting *Godwin v. State,* 593 So. 2d 211, 212 (Fla. 1992)). "A case is 'moot' when it presents no actual controversy or when the issues have ceased to exist." *Godwin,* 593 So. 2d at 212 (citing *Black's Law Dictionary* 1008 (6th ed. 1990)). As a general matter, a moot case will be dismissed. *Godwin,* 593 So. 2d at 212.

Petitioner specifically states that the remedy he seeks is for this Court to quash the Department's Order of License Revocation, Suspension or Cancellation dated April 6, 2023. *See* Petition at p. 1. However, there is no longer any order to quash. There exists no need for the Court to determine whether the Petition raises any valid grounds for relief, because regardless of its conclusion, its ruling would have no actual effect. *E.g. Kincaid,* 910 So. 2d at 302. It appears to the Court that this case has been moot since May 24, 2023 [RA. 24], even before the Court issued its Order to Show Cause. Accordingly, the Petition for Certiorari shall be, and the same is hereby DENIED.

[1]References to the Appendix to the Petition are designated as "[PA.__]," followed by the appropriate exhibit number. References to the Respondent's Appendix are designated by "[RA.__]," followed by the appropriate page number thereof.

* * *

Licensing—Driver's license—Suspension—Refusal to submit to breath test—Lawfulness of arrest—Finding that licensee refused breath test incident to lawful arrest was supported by competent substantial evidence, which established that licensee was under lawful arrest for fleeing and eluding and that, prior to request for breath test, officer had reasonable suspicion that licensee was driving under influence based on licensee's conduct and odor of alcohol

RYAN JAMES STRONG, Petitioner, v. STATE OF FLORIDA, DEPARTMENT OF HIGHWAY SAFETY AND MOTOR VEHICLES, Respondent. Circuit Court, 20th Judicial Circuit (Appellate) in and for Collier County. Case No. 23AP1. October 30, 2023. Counsel: Kathy Jimenez-Morales, Chief Counsel, DHSMV, for Respondent.

ORDER DENYING PETITION FOR WRIT OF CERTIORARI

(JOSEPH G. FOSTER, J.) THIS CAUSE comes before the Court on Petitioner's "Petition for Writ of Certiorari," filed April 7, 2023, pursuant to Fla. Stat. §322.2615(13) and §322.31. Having reviewed the petition, response, reply, the case file and the applicable case law, and upon due consideration, the Court finds as follows:

1. Petitioner is challenging Respondent's decision to uphold Petitioner's driving suspension on the basis that the record lacks competent and substantial evidence to support the Hearing Officer's determination that Petitioner refused a breath test incident to arrest.

2. The applicable standard of review by a circuit court of an administrative agency decision is limited to: (1) whether procedural due process was accorded; (2) whether the essential requirements of law have been observed; and (3) whether the administrative findings and judgment are supported by competent substantial evidence. The Court is not entitled to reweigh the evidence, to reevaluate the credibility of the evidence, or to substitute its judgment for that of the agency. *Haines City Community Development v. Heggs,* 658 So. 2d 523 (Fla. 1995) [20 Fla. L. Weekly S318a].

3. In his petition, Petitioner asserts that the Hearing Officer's finding upholding the suspension is not supported by competent substantial evidence. Specifically, Petitioner argues that no testimony was provided at the formal review hearing or contained in the "Findings of Fact, Conclusions of Law and Decision" that Petitioner had been read implied consent prior to a lawful arrest for DUI.

4. Petitioner was driving a Side-by-Side or Utility Vehicle (UTV), which is a larger, more powerful version of an All Terrain Vehicle (ATV), on a sidewalk parallel to Logan Boulevard before turning off of that road and onto a side road to Logan and approaching a stop sign. Traffic on Logan was heavy. Lt. Kenneth Newell of the Collier County Sheriff's Office was driving on Logan and had noticed that Petitioner had been driving at a high rate of speed and appeared to be highly agitated and yelling. Lt. Newell tried to pull Petitioner over because he was operating the UTV on a sidewalk. However, as he approached Petitioner in his vehicle, Petitioner looked at him, accelerated and took off across Logan through traffic, causing other vehicles to suddenly hit their brakes. Lt. Newell activated his lights and sirens and followed Petitioner across Logan in order to conduct a traffic stop. Petitioner ignored the lights and sirens and continued driving until he stopped in a driveway and exited the UTV. When Petitioner stopped, Lt. Newell exited his vehicle and placed Petitioner under arrest for fleeing and eluding an officer. Petitioner was subsequently placed in the rear of another officer's patrol vehicle. At his first face-to-face interaction with Petitioner next to the UTV, Lt. Newell noted a strong odor of alcohol emitting from Petitioner's facial area and observed an open beer can, still cool to the touch. He asked Petitioner how much he had had to drink. Petitioner refused to answer his questions. He also refused to submit to any field sobriety exercise. Lt. Newell testified at the hearing that he had believed Petitioner might be under the influence of alcohol based on his driving pattern and Petitioner's personal interaction with him: Petitioner was

operating a licensed motor vehicle on a sidewalk at a high rate of speed, was belligerent and agitated, and had a strong odor of alcohol coming from his facial area. T. 19, 20. Lt. Newell "gave him the opportunity to dispel that belief." T. 19. He asked Petitioner "twice to do field sobriety [exercises] at the scene. . . .[and] in the parking garage at the jail (sic)," and had "explained implied consent all three times. . . . [and] had read it to him and he signed a form inside the jail." T. 18. Lt. Newell testified that Defendant was arrested for DUI at the jail, because Defendant had asked to have time to think about whether he would consent to a breath test.

5. As mentioned above, Petitioner claims that there is no competent substantial evidence to support the Hearing officer's determination that Petitioner refused a breath test incident to arrest. Respondent argues that the petition should be denied because "it is clear from the objective facts that Petitioner was under arrest for DUI before he was transported to the jail." Response, p. 9. It maintains that a "reasonable person who was asked to perform field sobriety exercises . . . and who exhibited indicators of impairment . . . would understand that an arrest for DUI . . . occurred when handcuffed, placed in the back of a patrol vehicle and transported to jail." Response, p. 10. Respondent also argues that it is immaterial when Petitioner was arrested for DUI, as he had been lawfully arrested for fleeing and eluding and Lt. Newell had probable cause to arrest Petitioner for DUI before he asked him to submit to a breath test. As support for this position, it cites to *Elwell v. Dep't of Highway Safety & Motor Vehicles,* 13 Fla. L. Weekly, Supp. 755a (Fla. 4th Cir. Ct. Nov. 23, 2005) ("Assuming *arguendo* that his detention in Officer Porter's patrol vehicle for 10 minutes was a *de facto* arrest, it was nonetheless not without probable cause.") and *Swanson v. Dep't of Highway Safety & Motor Vehicles,* 13 Fla. L. Weekly Supp. 653a (Fla. 4th Cir. Ct. Mar. 2, 2006) ("While the Court acknowledges that Petitioner may well have been under a *de facto* arrest, there is competent substantial evidence to support a finding that such arrest was *with* probable cause, and that his detention to conduct field sobriety tests was lawful."). The State alternatively argues that even if there had been "no de facto arrest for DUI prior to the request for a breath test, there was still a lawful arrest for fleeing and eluding . . ." Response, p. 10. As support for this position, it cites to *Dep't of Highway Safety and Motor Vehicles v. Whitley,* 846 So. 2d 1163, 1167 (Fla. 5th DCA 2003) [28 Fla. L. Weekly D1090a] ("However, the statute does not specifically say that the arrest must be for DUI; rather it only provides that the person be lawfully arrested for any offense allegedly committed while the person was driving while under the influence of alcoholic beverages.") and *Nill v. Dep't of Highway Safety and Motor Vehicles,* 28 Fla. L. Weekly Supp. 647a (Fla. 7th Cir. Ct. Sept. 14, 2020) ("Further, and perhaps more importantly, nothing in Florida's 'implied consent' law requires that someone in Petitioner's position be arrested for DUI as a prerequisite to submitting to a breath test."). In Reply, Petitioner argues that there was only competent substantial evidence to support the arrest for fleeing and eluding; there was no competent substantial evidence for a reasonable suspicion for DUI. Petitioner also distinguishes the instant case from *Whitley.*

6. Section 316.1932(1)(a) 1, Florida Statutes, provides in pertinent part that any "person who accepts the privilege . . . of operating a motor vehicle within this state . . . is deemed to have given his . . . consent to submit to a . . . [breath test] if the person is lawfully arrested for any offense . . . committed while the person was driving . . . under the influence . . ." Fla. Stat. §316.1932(1)(a)1 (West 2023). "However, the statute does not specifically say that the arrest must be for DUI . . ." *Whitley,* 846 So. 2d 1163 at1167. "[F]leeing and eluding meets the statutory requirement." *Id.*

7. Petitioner does not contest the legality of the stop or the legality of the arrest for fleeing and eluding. Rather, he asserts that the instant petition should be granted because there was no reasonable suspicion to support the DUI arrest. "To request that a driver submit to field sobriety tests, a police officer must have reasonable suspicion that the individual is driving under the influence." *State v. Ameqrane,* 39 So. 3d 339, 341 (Fla. 2d DCA 2010) [35 Fla. L. Weekly D1148b]. *See also Origi v. State,* 912 So.2d 69, 70-72 (Fla. 4th DCA 2005) [30 Fla. L. Weekly D2302a] (relying specifically on the defendant's speeding, odor of alcohol, and his bloodshot eyes as the basis for finding reasonable suspicion for the DUI investigation). "Probable cause is a reasonable ground of suspicion supported by circumstances strong enough in themselves to warrant a cautious person in belief that the named suspect is guilty of the offense charged." *State of Fla. Dep't of Highway Safety and Motor Vehicles v. Possati,* 866 So. 2d 737, 740 (Fla. 3d DCA 2004) [29 Fla. L. Weekly D375a] (internal marks and cites omitted). "Probable cause for a DUI arrest must arise from facts and circumstances that show a probability that a driver is impaired by alcohol or has an unlawful amount of alcohol in his system." *Id.* at 741 (internal marks and cites omitted). "In administrative hearings held to determine whether an individual's license should be suspended for DUI, the courts have generally held that the circumstances surrounding the incident and the officer's general observations are sufficient to establish probable cause." *Whitley,* 846 So. 2d 1163 at 1166. "Hence, it is not necessary to administer the breath test to establish probable cause to arrest an individual for DUI." *Id.* Additionally, "the officer does not have to specifically tell the detained person that he or she is under arrest, all that is required is that the officer's conduct inform the person that he or she is under arrest. Thus, when a defendant was informed of his *Miranda* rights, handcuffed, and placed inside the patrol car, he was arrested." *Id.* at fn. 2 (internal marks and cites omitted). *See also State v. Rivas-Marmol,* 679 So. 2d 808, 809 (Fla. 3d DCA 1996) [21 Fla. L. Weekly D1719c] ("[N]otwithstanding the testimony of Officer Mendez from his subjective view that he 'detained' Rivas-Marmol before the test and arrested him after the test, we conclude from an objective view that the arrest took place prior to the test."); *Elwell,* 13 Fla. L. Weekly, Supp. at 755a (finding that the fact that "Petitioner was not 'formally' placed under arrest until a later time . . . is immaterial.").

8. In light of the above, this Court finds that the record reflects that Petitioner was under lawful arrest for fleeing and eluding, Lt. Newell observed Petitioner's agitation as he drove at a high rate of speed on a sidewalk before crossing through heavy traffic and causing other vehicles to jam on their brakes, and Lt. Newell noted the strong odor of alcohol emitting from Petitioner's facial area and his belligerence once Petitioner was stopped. The Court also notes that fleeing and eluding is an offense covered by the Implied Consent statutes. Consequently, Lt. Newell had reasonable suspicion to arrest Petitioner on DUI before he ever asked Petitioner to submit to a breath test, and the Hearing Officer's decision was based on competent substantial evidence. Petitioner has failed to demonstrate any entitlement to relief. It is therefore,

ORDERED AND ADJUDGED that Petitioner's petition for writ of certiorari is DENIED.

* * *

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CIRCUIT COURTS—ORIGINAL

Dependent children—Reunification—Motion for reunification granted—Circumstances that caused out-of-home placement of children and subsequently identified issues have been remedied to extent that return of children to home with in-home safety plan will not be detrimental to children's safety, well-being, and physical, mental and emotional health

IN THE INTEREST OF: D.H., L.H., D.H., D.H., L.I-H., MINOR CHILDREN. Circuit Court, 2nd Judicial Circuit in and for Liberty County. Case No. 23-DP-1. October 9, 2023. David Frank, Judge. Counsel: Nicholas Dolce, for Department of Children and Families.

ORDER GRANTING REUNIFICATION WITH THE PARENTS

This cause came before the Court on September 27, 2023, for a hearing on the Mother's Amended Motion for Reunification of the Parents. All persons entitled to notice of this hearing were duly notified. The Court has reviewed the applicable filings, evidence, and argument and finds as follows:

Procedural History and Facts

The Court has subject matter jurisdiction over this cause and personal jurisdiction over the children.

The persons attending the hearing included: Attorney for the Department Nicholas Dolce, Dependency Case Manager Domonique Grant, Dependency Case Manager Program Director Jhaismen Collins, Mother L.I-H., Attorney for L.I-H. Ron Newlin, Father D.H., Attorney for D.H. Jim Harrison (who joined and deferred to Mr. Newlin), Attorney for Guardian ad Litem Nadine Karl for Pauline Evans, Guardian ad Litem Child Advocate Manager Toi Herring, Guardian ad Litem Volunteer PK Coats, Caregiver of D.H. Elsie Meade, Tia Stephens and Janiya Davis (FIT Team Counselors). The hearing was conducted without the presence of the children as it was determined to be in the best interest of the children.

This case opened on April 5, 2023 with a shelter petition that alleged in pertinent part:

> The Department received a hotline intake report on the family on April 4, 2023. The report indicated that the child L. was born exposed to marijuana and cocaine. . . . L. was born exposed to cocaine and marijuana with the mother testing positive for both substances at the hospital at the time of the child's birth. Likewise, the child D. tested positive for cocaine when he was born as well. . . . When the investigator came to the home she found that the area in which the mother, father and five children were living to be in a state of extraordinary disrepair which constituted a hazard to the children. In fact a substantial portion of the roof of the home had caved in and was being covered in black plastic. The step-grandfather would occasionally go more than a day without seeing any of the children or parents despite them living in the same household. It was not clear that the children were being bathed with any regularity and the school aged children had been missing weeks of school, particularly concerning as the eldest child, D., speaks with such a pronounced impediment that he could not be interviewed intelligibly by the Department. The Department was unable to even assess his ability to tell truth from lies. L., the second oldest child, was the only child able to provide information during an interview. The child explained that she knew what drugs were and routinely saw her parents using a green substance. She indicated that she did not notice a behavioral change in her parents when they used. She also indicated that when she lived with her family in Georgia, she witnessed the parents physically fight, with the father once breaking the mother's teeth. The investigator noted that the mother's teeth were chipped.

The Minor children were adjudicated dependent with the consent of the parents.

On June 13, 2023, the Department of Children and Families ("Department") filed a Reunification Case Plan.

On July 17, 2023, the Department filed a motion to accept the Reunification Case Plan.

All parties were contacted regarding this motion to accept the plan. There were no objections.

The terms of the Reunification Case Plan were consistent with the requirements of the law and previous orders of this Court. The Reunification Case Plan was meaningful and designed to address the facts and circumstances upon which the Court based the finding of dependency or to effectuate the current goal.

In its motion to accept the Reunification Case Plan, the Department stated, "The goal of Reunification is a reasonable permanency goal."

On July 19, 2023, the Court accepted the Reunification Case Plan as filed by the Department.

On September 7, 2023 the department filed a request to "stop the reunification process" from a dependency case manager based on an incident where, "The parents were involved in verbal altercation in the presence of the children and while driving."

On September 25, 2023, the Mother filed the present motion for reunification.

At the hearing, the Court requested counsel to file memoranda of law regarding the criteria for reunification given the status of the case, with emphasis on whether inconsistent attendance / participation in the FIT program alone could defeat reunification, and what specific course the Court should take if it grants or denies the motion. All counsel submitted their briefs.

In its brief, the Guardian Ad Litem Office referenced Florida Statute 39.522(4). Regarding specifically what the Court should do if it grants or denies the motion, the Guardian Ad Litem program recommended:

> The Guardian ad Litem Office recommends that the children remain in their current placement until their reunification with their parents.
>
> The Guardian ad Litem Office recommends sibling visitation to continue on a weekly basis.
>
> The Guardian ad Litem Office recommends continuing weekly unsupervised group visitations presently occurring between the parents and the children.
>
> The Guardian ad Litem Office recommends that the children continue in receiving the recommended services.
>
> The Guardian ad Litem Office recommends all recommended educational services for the children to be identified as soon as possible.
>
> The Guardian ad Litem Office recommends that the children continue in their age appropriate normalcy activities.
>
> The Guardian ad Litem Office supports the permanency goal of reunification and that the Court retain jurisdiction over the case post reunification for at least 6 months. The Guardian ad Litem Office recommends that the parents and children continue participating in the services after reunification.
>
> The Guardian ad Litem Office recommends that the parents provide possible safety monitors to the Department, and that the Department review the safety monitors for the implementation of a safety plan.
>
> The Guardian ad Litem Office recommends that the parents have established a safe home environment for the children.
>
> The Guardian ad Litem Office supports the permanency goal of reunification and that the parents and children continue in their required services after reunification.

The Department's brief referenced Florida Statute 39.522(4) and CFOP (Children and Families Operating Procedure) 170-7, Chapter 9-2, and proposed the following:

> The Department respectfully requests that the motion for reunification be denied by the Court. Immediate reunification of the children and parents would place the children at a substantial risk of ham'. Should the Court seek an alternative wherein reunification is granted, the Department and Guardian ad Litem Program believe that this should only occur after a transition plan wherein the mother completes a psychological evaluation, the results from that evaluation are given and any significant issues identified in that evaluation are addressed. Additionally, the parents should regularly and routinely engage in their drug screens; and safety service providers need to be identified in Calhoun county where the parents reside and where the children would be reunified.

In her brief, the Mother referenced Florida Statute 39.522(4) and CFOP (Children and Families Operating Procedure) 170-7, Chapter 9-2, stated that, "The parents have stated a willingness to complete services in-home, and have agreed to the addition of services not currently listed in the case plan. . .," and simply requests, ". . .that the court grant the motion for reunification, and return the children to the parents' care."

Testimony at the Hearing

The Mother's brief contains the most accurate description of the testimony presented at the hearing and the Court adopts it, with the following specific references and comments.

Witnesses for the department were ambivalent at best regarding opposition to reunification. Most conveyed a "well it's not perfect" picture without going the step further and saying "no" to reunification. Indeed, none were able to state that there was a confirmed safety issue in the home. For example, FIT program representative Ms. Davis testified that the Father's FIT performance was "not the best" but then added that it was constrained by his work schedule.

The focus of the department's opposition was twofold. The first was the concern over the mother's random UA testing showing positive for marihuana and a less than stellar FIT program record. The department argued a connection from that to the home not being "calm and consistent." The evidence indicated that the concern regarding cocaine has been resolved at this point. Second was the concern regarding an alleged incident involving an angry dispute between the parents on which there was no competent evidence offered.

Perhaps the best context regarding the mother's condition was expressed by the service provider, LCSW Lang, in a report dated September 26, 2023, that was inexplicably not shown to the Court at the hearing. She discussed the impediments to services. They include the department's failure to pay for and reauthorize services, confusion because of time zones, the "adjustment period related to the removal episode," the clinician being out of the office, and a holiday. In her words:

> In terms of engagement, initially, due to the adjustment period related to the removal episode, and service provision, Mrs. H. experienced a delay in engagement. Since readjusting the reoccurring schedule, Mrs. H. has been active and engaged in sessions, she provides feedback and she appears forthcoming regarding any individual as well as family barriers, challenges, and adjustments (including related to the recent allegations of parental discord during unsupervised/overnight visitations). Mrs. H. was eager to process the Adverse Childhood Experience Study and she continues to process her own ACE score as well as the ACE score of the minor children and the impact of the aforementioned scores on emotional, social, and developmental/physical functioning.

The Guardian Ad Litem Child Advocacy Manager Toi Herring indicated support for reunification but would like to see a transition plan and a psychological evaluation for the mother.

The testimony confirmed that the mother and father have a home which is secured through the Section 8 voucher program and the father works two jobs to provide income for the family and intend to seek public assistance upon reunification with the children. Even the department agrees that, "There is no argument that the parents have a home wherein the children could be reunified."

The department also agrees, "That the parents are willing for an in-home safety plan to be developed and that they have demonstrated that they will cooperate with all identified safety service providers."

Legal Analysis and Conclusions

The department has approached this issue with the wrong posture. The Reunification Case Plan reads:

> 09/15/2023 Tentative Reunification:
>
> So long as there are no safety concerns, by the GAL or other Agency concerns, the children shall be reunified (in the physical custody) of the parents on this date. Additional terms of the reunification shall be as follows: The parents will continue to complete services that have been put in place to modify their behaviors, increase theft protective capacities, and strengthen their relationship with their children.

This Court approved the plan. That means there is a court order putting the scenario in place. It was not some inspirational department goal. It was a plan.

Then, approximately one week before reunification and well into the transition, the department decided the parents were not quite ready for reunification and unilaterally suspended unsupervised visitation and in essence changed the plan.

There is a problem with that and the problem is Florida Statute 39.6013. The statute makes it clear that the department had no authority to unilaterally makes these changes. A court order is required. The proper course would have been to file a motion to change the plan and, if possible, have it heard before the projected reunification date. That includes where the plan has waffle language like "so long as there are no safety concerns."

Nonetheless, the mother has brought the matter to the Court on a motion to reunify prior to the judicial review set for this Thursday where, in the normal course, the reunification would be addressed.

The parties and the Court all agree on the standard. The standard for reunification is Florida Statute 39.522(4) and CFOP (Children and Families Operating Procedure) 170-7, Chapter 9-2. *Statewide Guardian Ad Litem Office v. J.B.,* 361 So.3d 419, 424 (Fla. 1st DCA 2023) [48 Fla. L. Weekly D1043a] (Section 39.522(4) applies "where the issue before the court is whether a child should be reunited with a parent.").

The court has reviewed the conditions for return and now determines that the circumstances that caused the out-of-home placement and issues subsequently identified have been remedied to the extent that the return of the child to the home with an in-home safety plan prepared or approved by the department will not be detrimental to the child's safety, well-being, and physical, mental, and emotional health. See discussion above.

And let's not forget, "time is of the essence for establishing permanency for a child in the dependency system." *Id.* at 422.

Accordingly, it is ORDERED and ADJUDGED that the motion is GRANTED. The children will be promptly reunified with their parents *pursuant to conditions and requirements* to be discussed and specified at the judicial review set for this Thursday.

* * *

Insurance—Failure to appear at motion hearing—Sanctions—Parties ordered to show cause why sanctions should not be entered after parties failed to appear at hearing on motion to dismiss without advising court that basis for motion had been fixed by filing of amended complaint—Parties conduct has caused a waste of judicial resources and unnecessarily stalled case

ESTATE OF DANNY BAKER, Plaintiff, v. AMERICAN BANKERS INSURANCE COMPANY OF FLORIDA, Defendant. Circuit Court, 2nd Judicial Circuit in and for Gadsden County. Case No. 20-2023-CA-000664-AXXX-XX. November 20, 2023. David Frank, Judge. Counsel: Leo Manzanilla, Coral Gables, for Plaintiff. Toni P. Turocy, Orlando, for Defendant.

ORDER TO SHOW CAUSE

This cause came before the Court for hearing on November 20, 2023 on defendant's motion to dismiss, and the Court having reviewed the court file, and being otherwise fully advised in the premises, finds and ORDERS that

The complaint in this case was filed on August 24, 2023. Defendant's motion to dismiss was filed on September 18, 2023. The hearing on the motion was set for November 20, 2023.

Defendant's motion was quite simple. It requested dismissal because the plaintiff named the wrong entity as the plaintiff. Importantly, defendant assisted the plaintiff by identifying in the motion the correct person to be named plaintiff, which was Mattie Baker, the insured.

Instead of promptly moving to correct the deficiency, the plaintiff waited until the Friday before the Monday hearing, November 17, 2023, to file an amended complaint to make the simple fix. Even worse, neither party attempted to notify the Court of this last minute development. Instead, the parties simply did not appear for the hearing.

The conduct of the parties, especially the plaintff, has caused a waste of extremely limited judicial resources. In addition, the case has been unnecessarily stalled for three months as the parties sauntered to the November hearing.

Accordingly, the parties will appear in person and show cause why appropriate sanctions should not be entered at 9:00 a.m., November 30, 2023, in Courtroom 3, Guy A. Race Judicial Complex, 13 N. Monroe Street, Quincy Florida.

IT IS FURTHER ORDERED that defendant will respond to the amended complaint within ten (10) days from the date it was filed, which was November 17, 2023. If another motion to dismiss is filed, it will be heard at the same hearing, 9:00 a.m., November 30, 2023. If an answer is filed, the parties will file a notice for trial twenty (20) days after the filing of the answer, or twenty (20) days after the filing of a reply, if there is one.

* * *

Arbitration—Arbitrable issues—Torts—Motion to compel arbitration and stay litigation arising out of injuries sustained by ride-share passengers is granted—Plaintiffs expressly agreed to resolve through binding arbitration any disputes with defendant related to use of ride-share service's rider app, negligence claims based on vehicle accident clearly arose from and related to plaintiffs' use of rider app, and defendant did not actively participate in suit or waive right to arbitrate—Further, any attacks on arbitrability must be left to arbitrator under delegation clauses in arbitration agreements

TIFFANY THOMAS-JACKSON and CHRISHELLE JACKSON, Plaintiffs, v. DIAMOND DASHON GILLIAMS, UBER TECHNOLOGIES, INC., A FOREIGN PROFIT CORPORATION, Defendants. Circuit Court, 4th Judicial Circuit in and for Clay County. Case No. 2022CA001183. August 16, 2023. Don H. Lester, Judge. Counsel: Nicholas Bright, Law Offices of Ronald E. Sholes, P.A., Orange Park, for Plaintiffs. Natalie Fina Wheeler, Cole, Scott & Kissane, P.A., Jacksonville, for Defendant Diamond Dashon Gilliams. Veresa Jones Adams and Angelo Mancini, ROIG Lawyers, Deerfield Beach, for Defendant Uber Technologies, Inc.

ORDER GRANTING DEFENDANT, UBER TECHNOLOGIES, INC.'S MOTION TO COMPEL ARBITRATION AND TO STAY ACTION

THIS CAUSE having come before the Court on Defendant Uber Technologies, Inc.'s ("Uber") hearing on its January 23, 2023 Motion to Compel Arbitration and Stay Plaintiff Tiffany Thomas-Jackson and Chrishelle Jackson's Action, and after hearing arguments, reviewing the parties' submission, and being otherwise fully advised in the premises, the Court finds and concludes as follows:

Factual and Procedural Background

Uber is a technology company that uses its proprietary technology to develop and maintain digital multi-sided marketplace platforms. On one side of the marketplace, businesses and individuals utilize Uber's platforms in order to connect with customers and obtain payment processing services. One of Uber's multi-sided platforms is the Rides platform. Riders, like Tiffany Thomas-Jackson ("Thomas-Jackson") and Chrishelle Jackson ("Jackson") (collectively "Plaintiffs"), download the rider version of the Uber App ("Rider App"), and drivers, like Diamond Dashon Gilliams ("Gilliams"), download the driver version of the Uber App ("Driver App"); together, the Apps allow users to access the platform that facilitates the connection of individuals in need of a ride with individuals willing to provide transportation services, and after completing all the necessary steps required to gain access to the Rider App, the Rider App enables Riders and Drivers to connect.

Plaintiffs initiated this action in Clay County Florida state court alleging injuries arising from a September 14, 2022 accident when they were riders in Ms. Gilliams' vehicle. Plaintiffs claim that they were injured as a result of the accident and that Ms. Gilliams was at fault for causing the accident.

Prior to the accident, and according to Uber's business records, Plaintiff Thomas-Jackson signed up to utilize the rider version of the Uber App on or about August 9, 2021. (See Affidavits of Alexandra Vasquez, attached to Uber's Motion to Compel Arbitration.) Plaintiff Thomas-Jackson expressly agreed to Defendant's July 2021 Terms of Use ("July 2021 Terms"), which included an arbitration provision. and Plaintiff Jackson expressly agreed to Defendant's December 2021 Terms of Use ("December 2021 Terms"). Similarly, on April 1, 2022, Plaintiff Jackson was presented with an in-app blocking pop-up screen. Plaintiff Jackson expressly agreed to Defendant's December 2021 Terms of Use ("December 2021 Terms"), which included an arbitration provision. As such, Plaintiffs Thomas-Jackson and Jackson both agreed to Uber's terms, which required Plaintiffs to resolve any claims that they may have against Defendant in arbitration and included a delegation clause, which gave the arbitrator *exclusive authority* to determine threshold questions of arbitrability. Although account holder Plaintiff Jackson used her app to initiate the September 14, 2022 ride with Ms. Gilliams, guest rider Plaintiff Thomas-Jackson was also bound to the terms because she separately agreed to the July 2021 Terms during the August 2021 signup process.

Legal Standard

Where a party to an agreement to arbitrate refuses to submit to arbitration, Florida law permits the aggrieved party to move for an order compelling arbitration. *See* Fla. Stat. § 682.03(1). Pending determination of such a motion, the Court should stay any related judicial proceedings. *See* Fla. Stat. § 682.03(6); *Open MRI of Okeechobee, LLC v. Aldana,* 969 So. 2d 589, 590 (Fla. 4th DCA 2007) [32 Fla. L. Weekly D2920b] ("It is clear that the statute [§ 682.03] mandates a stay while a motion for arbitration is pending"); *Miller & Solomon General Contractors, Inc. v. Brennan's Glass Co., Inc.,* 824 So. 2d 288, 290 (Fla. 4th DCA 2002) [27 Fla. L. Weekly D1902a]. "In ruling on a motion to compel arbitration, Florida courts

should resolve all doubts in favor of arbitration rather than against it." *Medanic v. Citicorp Inv. Servs.,* 954 So. 2d 1210, 1211 (Fla. 3d DCA 2007) [32 Fla. L. Weekly D1007a]. Florida courts routinely find that "arbitration clauses are to be given the broadest possible interpretation in order to accomplish the purpose of resolving controversies outside of the courts." *See e.g., Royal Caribbean Cruises, Ltd. v. Universal Employment Agency,* 664 So. 2d 1107, 1108 (Fla. 3d DCA 1995) [20 Fla. L. Weekly D2711a].

Legal Conclusions

A "trial court's jurisdiction is limited to three issues: (1) whether a valid written agreement to arbitrate exists; (2) whether arbitrable issues exist; and (3) whether the right to arbitrate has been waived." *Seifert v. U.S. Home Corp.,* 750 So. 2d 638 (Fla. 1999) [24 Fla. L. Weekly S540a]. Here, the Court finds that Defendant Uber satisfied the three-part test and Plaintiffs' claims are subject to Uber's arbitration clause.

A valid written agreement to arbitrate exists between Plaintiffs and Uber. Both Plaintiffs expressly agreed to Uber's terms: Plaintiff Thomas-Jackson expressly agreed to Defendant's July 2021 Terms and Plaintiff Jackson expressly agreed to Defendant's December 2021 Terms. Both terms provide that Plaintiffs were "required to resolve any claim that [they] may have against Uber on an individual basis in arbitration as set forth in this Arbitration Agreement." (See Affidavits attached to Uber's Motion to Compel Arbitration at Ex. C and F.)

Likewise, prong two is satisfied as Plaintiffs' claims clearly arise from and relate to Plaintiffs' use of the services available through the Rider App, and as a result, fall squarely within the scope of the Arbitration Agreements. The Agreements encompass ". . .**any dispute, claim or controversy in any way arising out of or relating to. . . (iii) incidents or accidents resulting in personal injury that you allege occurred in connection with your use of the Services. . .**" which include the September 14, 2022 accident from where this case emanates. In so doing, Plaintiffs waived their right to a jury trial.

The Court further finds that, contrary to Plaintiffs' assertion, Defendant did not actively participate in this lawsuit or waive its right to arbitrate. Defendant filed its Motion to Compel Arbitration as its responsive pleading. Even if Plaintiffs believed that Uber would file an answer—which Uber did not—filing an answer does not *ipso facto* result in a waiver of the right to arbitrability. *See generally Bonati v. Clark,* 975 So. 2d 440 (Fla. 2d DCA 2007) [32 Fla. L. Weekly D789a] (where a defendant files an answer and raises an arbitration agreement as an affirmative defense, defendant does not waive his right to arbitration). Additionally, any claims that Plaintiffs did not properly receive notice of arbitration were allayed when Uber filed its Motion to Compel Arbitration as well as its precursory letter advising Plaintiffs of its intent to arbitrate their claims. Further, Defendant Uber's July 2021 Terms and December 2021 terms contain delegation clauses that evince the parties' intent to delegate issues, including threshold issues, to the arbitrator. *See Suarez v. Uber Technologies, Inc.,* 2016 WL 2348706 at *4 (M.D. Fla. May 4, 2016) ("Defendants' motion [to compel arbitration] should be granted on this basis alone and adjudication of Plaintiff's attacks on Arbitration Provision should be left to the arbitrator because it is clear and unmistakable that the parties agreed to arbitrate arbitrability").

Based on the foregoing, it is thereby **ORDERED and ADJUDGED** as follows:

Defendant Uber Technologies, Inc.'s Motion to Compel Arbitration and to Stay Litigation is **GRANTED.**

It is further **ORDERED** that this action is **STAYED** pending completion of arbitration pursuant to the terms of the Arbitration Agreements in this case. The Arbitrator shall determine what the arbitral issues are between Plaintiffs and Uber. The parties shall notify the Court upon completion of arbitration, and either party shall have the right to resolve any remaining issues of contention in this case.

* * *

Criminal law—DUI manslaughter—Evidence—Statements of defendant—Observations by fire and rescue personnel—Section 401.304(4), which protects records of emergency calls containing patient examination or treatment information, protects only written records and does not require suppression of statements made by defendant to fire and rescue personnel and observations of those personnel at scene of fatal accident—Suppression is not warranted under section 395.3025(4)(d) or section 456.057(7)(c), which apply to licensed medical facilities and health care practitioners and not to fire and rescue personnel or ambulances—Disclosure of defendant's statements does not violate right to privacy under Article I, section 23, of Florida Constitution or Fourth and Fourteenth Amendments of U.S. Constitution because defendant had no reasonable expectation of privacy at scene of accident—Health Insurance Portability and Accountability Act—No merit to claim that suppression is required by HIPAA—Even if HIPAA applies to observations of fire and rescue personnel and defendant's statements, it does not bar transmission of that information to law enforcement—Suppression of body camera video shot in ambulance en route to hospital is not required by constitution because defendant had no reasonable expectation of privacy in ambulance—Statements made by hospital personnel to law enforcement regarding defendant's treatment are suppressed—Observations made by law enforcement at hospital, including body camera video, are not suppressed, as defendant had no reasonable expectation of privacy in emergency room examination area

STATE OF FLORIDA, Plaintiff, v. DENNIS PAGAN, Defendant. Circuit Court, 9th Judicial Circuit in and for Orange County. Case No. 2021-CF-009426-A-O, Division 12. January 3, 2024. Diego M. Madrigal, Judge.

ORDER ON AMENDED MOTION TO SUPPRESS AND/OR MOTION IN LIMINE WITH REGARD TO PARAMEDIC, FIRE DEPARTMENT AND HOSPITAL TREATMENT MEDICAL INFORMATION OF THE DEFENDANT filed on November 16, 2023

THIS CAUSE, having come on to be heard before me upon the Amended Motion To Suppress and/or Motion in Limine With Regard To Paramedic, Fire Department and Hospital Treatment Medical Information of the Defendant" filed on November 16, 2023 and the Court having reviewed the Pleading, the Court File, heard testimony of witnesses, heard argument of counsel and being otherwise duly advised in the premises, hereby finds:

Defendant, in his "Amended Motion To Suppress and/or Motion in Limine With Regard To Paramedic, Fire Department and Hospital Treatment Medical Information of the Defendant" filed on November 16, 2023 ("the Motion"), seeks to have this Court bar the State of Florida from making mention of, referring to, or interrogate concerning "any medical information allegedly obtained from the treatment of the Defendant by paramedics and fire department personnel of the Winter Park Fire Department and hospital personnel of Advent Health." The Defendant relies on *Fla. Stat.* §§ 401.30, 395.3025(4)(d), 456.057(7)(c) (2021), Article I Section 23 of the Florida Constitution, Federal HIPAA laws, and the Fourth and Fourteenth Amendments to the United States Constitution in support of his arguments. The Court would find as follows:

I. FACTS

The facts of this case are as straightforward as they are tragic. On May 1, 2021, a two-car auto accident occurred at or near the intersection of Osceola Avenue and Ollie Avenue in Winter Park, Florida which resulted in the death of Wanda Dudzinski. The other driver, the Defendant in this case, Dennis Pagan, survived the crash. At the scene,

Pagan was pinned behind the steering wheel of his vehicle. Those involved in his rescue noted that he showed visible signs of impairment. Further, he made statements to people on scene, including members of the Winter Park Fire Department. Among the statements made were that he was inebriated, had been drinking at a local bar, and had been "wilding out in Cocoa." These observations and statements were conveyed to law enforcement. As part of the investigation of the accident, law enforcement rode with Pagan in an ambulance to the Advent South Hospital and stayed in his emergency room with him while he was being treated. During these times, law enforcement activated their body worn camera. Mr. Pagan was eventually arrested and charged with DUI manslaughter pursuant to an arrest warrant.

II. STATEMENTS MADE AT THE SCENE

A. Fla. Stat. §401.304

It is undisputed that law enforcement, specifically Officer Talton, received information from Winter Park Fire Personnel related to Mr. Pagan's condition and statements at the scene. Mr. Pagan claims these statements are protected and should be suppressed. He is wrong. The authority on which he relies do not require suppression. Namely, Fla. Stat. §401.304(4) (2021) protects records of emergency calls "which contain patient examination or treatment information." The observations made by fire personnel are not records as contemplated by this statute. A reasonable reading of the Statue in toto, giving the plain and ordinary meaning to the words contained therein, leads to only one conclusion: the records contemplated by the statute are written documents. Here, there are no records, thus Defendant's argument is without merit. Furthermore, §401.30 has been cited in four reported cases in the history of Florida jurisprudence, and in each of those cases, the records sought were written records.

B. Fla. Stat. §395.3025

Likewise, the statements and observations should not be suppressed pursuant to Fla. Stat. 395.3025(4)(d) (2021). This statute is inapplicable to any action by fire personnel. The Statute only applies to records of "licensed facilities." That term is defined in Fla. Stat. §395.002(17) as being hospitals and ambulatory surgical centers. An ambulance is not licensed under that chapter; thus, it does not apply, and suppression cannot be granted.

C. Fla. Stat. §456.057

Furthermore, suppression is not warranted under Fla. Stat. §456.057(7)(c) Chapter 456 applies to "Health Care Practitioners." Under this chapter that term means "any person licensed under chapter 457; chapter 458; chapter 459; chapter 460; chapter 461; chapter 462; chapter 463; chapter 464; chapter 465; chapter 466; chapter 467; part I, part II, part III, part V, part X, part XIII, or part XIV of chapter 468; chapter 478; chapter 480; part I, part II, or part III of chapter 483; chapter 484; chapter 486; chapter 490; or chapter 491." Fla. Stat. § 456.001, (2021). Those chapters govern the following:

a. Chapter 457: Acupuncturists
b. Chapter 458: Medical Doctors
c. Chapter 459: Osteopathic Doctors
d. Chapter 460: Chiropractic Doctors
e. Chapter 461: Podiatrists
f. Chapter 462: Naturopaths
g. Chapter 463: Optometrists
h. Chapter 464: Nurses
i. Chapter 465: Pharmacists
j. Chapter 466: Dentists
k. Chapter 467: Midwives
1. Chapter 468 Part I: Language Pathologists and Audiologists
m. Chapter 468 Part II: Nursing Home Administration
n. Chapter 468 Part III: Occupational Therapists
o. Chapter 468: Part V: Respiratory Therapists
p. Chapter 468 Part X: Dieticts and Nutritionists
q. Chapter 468 Part XIII: Athletic Trainers
r. Chapter 468 Part XIV: Prosthetists, et. al
s. Chapter 478: Electrolysists
t. Chapter 480: Massage Therapists
u. Chapter 483 Part I: Clinical Lab Personnel
v. Chapter 483 Part II: Medical Physicists
w. Chapter 483: Part III: Genetic Counselors
x. Chapter 484: Dispensing of Medical Devices
y. Chapter 486: Physical Therapists
z. Chapter 490: Psychologists
aa. Chapter 491: Clinical Counselors

An emergency medical technician is not covered under any of these chapters; thus, suppression would be improper under §456.057(7)(c).

D. Article I, Section 23 of the Florida Constitution

The Defendant also claims that the disclosure of those statements is a violation of his privacy rights under Article I, Section 23 of the Florida Constitution. This Court would find that there was no violation of Mr. Pagan's right of privacy by any Winter Park Fire Department personnel.

Article I, Section 23 of the Florida Constitution codifies an individual's right to privacy from government intrusion. "Florida's right to privacy is a fundamental right that requires evaluation under a compelling state interest standard. However, before the right to privacy attaches and the standard is applied, a reasonable expectation of privacy must exist." *Bd. of County Comm'rs of Palm Beach County v. D.B.,* 784 So.2d 585, 588 (Fla. 4th DCA 2001) [26 Fla. L. Weekly D1256a]. That reasonable expectation of privacy is one based on society's view of what is reasonable, not solely on a person's subjective standard. In other words, although a person's expectation of privacy is one consideration," the final determination of an expectation's legitimacy takes a more global view, placing the individual in the context of a society and the values that the society seeks to foster. The right to privacy has not made each person a solipsistic island of self-determination." *Id.* at 590.

This Court does not find that a person has a reasonable expectation of privacy for statements made at the scene of a car accident. In short, a person does not have an expectation of privacy when being treated by emergency medical personnel while on a public road at the scene of an accident that person was involved in. Society would not recognize such an expansive expectation of privacy. Therefore, suppression would be improper because it is not supported by the law.

E. Fourth and Fourteenth Amendments to United States Constitution

The Defendant also avers that suppression should be made pursuant to the Fourth and Fourteenth Amendments to the United States Constitution. This argument also fails. The US Supreme Court has held that "the Fourth Amendment protects people, not places." *Katz v. U.S.* 389 U.S. at 351, 88 S.Ct. 507. An individual's Fourth Amendment protections crystallize when he or she "can claim a 'justifiable,' a 'reasonable,' or a 'legitimate expectation of privacy' that has been invaded by government action." *Smith v. Maryland,* 442 U.S. at 740, 99 S.Ct. 2577. As discussed above, the Defendant had no reasonable expectation of privacy at the scene.

F. HIPAA laws

Finally, the Defendant alleges that suppression of statements made at the scene is proper under federal HIPAA laws. It is not. The Health Insurance Portability and Accountability Act ("HIPAA") is a federal law that contains a privacy rule. The Privacy Rule protects all *"individually identifiable health information"* held or transmitted by a covered entity or its business associate, in any form or media,

whether electronic, paper, or oral. The Privacy Rule calls this information "protected health information (PHI). 45 C.F.R. § 160.103. "Individually identifiable health information" is information, that could relate to the individual's past, present or future physical or mental health or condition; the provision of health care to the individual; or the past, present, or future payment for the provision of health care to the individual. *Id*.

However, the privacy afforded by HIPAA is not limitless. In fact, there are six instances in the Statute which allow protected health information to be disclosed to law enforcement. Those instances are:

1) As required by law (including court orders, court-ordered warrants, subpoenas) and administrative requests;

2) To identify or locate a suspect, fugitive, material witness, or missing person;

3) In response to a law enforcement official's request for information about a victim or suspected victim of a crime;

4) To alert law enforcement of a person's death, if the covered entity suspects that criminal activity caused the death;

5) When a covered entity believes that protected health information is evidence of a crime that occurred on its premises; and

6) By a covered health care provider in a medical emergency not occurring on its premises, when necessary to inform law enforcement about the commission and nature of a crime, the location of the crime or crime victims, and the perpetrator of the crime.

45 C.F.R. § 164.512(f)

In the instant case, HIPAA was not violated, as any communication or disclosure would have been allowed pursuant to exceptions 2, 5, and 6. In short, the Court has reviewed HIPAA and finds that even if HIPAA applies to observations by fire rescue and statements made by the Defendant, it does not bar transmission of that information to law enforcement. Thus, suppression would be improper.

III. Observations Made in the Ambulance

For the same reasons above, the body camera footage is not suppressible under any of the authority cited by the Defendant. The Court will comment specifically on the Constitutional challenges raised by the Defendant. This Court must determine if society is prepared to recognize that someone who is suspected of drunken driving causing injury or death would have a reasonable expectation to no government intrusion of their transport to the hospital. This Court would find society is not ready to recognize that expectation as reasonable. Thus, the Defendant had no reasonable expectation of privacy and suppression is not called for under the Florida Constitution nor under the United States Constitution.

IV. Observations at the Hospital

Defendant's argument for suppression of observations and statements at the hospital is without merit for the reasons stated above with one exception. The Defendant's argument that nurses and doctors at the Hospital could not discuss his treatment with law enforcement does have merit. Fla. Stat. §456.057(7) (2021) states, ". . .the medical condition of a patient may not be discussed with, any person other than the patient, the patient's legal representative, or other health care practitioners and providers involved in the patient's care or treatment, except upon written authorization from the patient." That statute includes doctors, nurses, and other hospital workers as covered under its provisions. The exception to that statute requires a court order or warrant; neither was present in this case. Thus, any discussions of treatment of the Defendant by nurses and doctors with law enforcement is improper and should be suppressed. In other words, if a nurse or doctor made a comment to the officers present in the hospital regarding Defendant, those will not be admissible during trial.

The Court also specifically turns its attention to the constitutional claims raised by defendant regarding any statements made by Defendant and observations of law enforcement (including body cam footage) in the hospital. The same reasonable expectation of privacy above analysis should be applied to the Hospital room. Although a hospital is a type of space in which, under some circumstances, individuals have held reasonable expectations of privacy," but that alone does not mean appellee's expectation was reasonable in this case." *State v. Butler,* 1 So.3d 242, 248 (Fla. 1st DCA 2008) [34 Fla. L. Weekly D40b] citing to *Katz,* 389 U.S. at 351, 88 S.Ct. 507; *accord Brown,* 151 Cal.Rptr. at 754 (observing that "the question of privacy in a hospital . . . to some degree depends on the person whose conduct is questioned"). In Butler, the Court found that society was not prepared to recognize that there was a reasonable expectation of privacy that communications with a "monitored and very sick child in a hospital bed would remain private." *Id*. at 248. Courts have also recognized that an emergency room would have less privacy than a private hospital room. See *Buchanan v. State,* 432 So.2d 147, 148 (Fla. 1st DCA 1983) (finding no expectation of privacy in an emergency room examination area enclosed by curtains, "where medical personnel were constantly walking in and out of and where the patient could have expected to remain only a few hours at most.").

The more private the treatment space, the more reasonable the patient's expectation of privacy with respect to official activity. Compare *Jones v. State*, 648 So. 2d 669 (Fla. 1994) *with Buchanan v. State,* 432 So.2d 147, 148 (Fla. 1st DCA1983) (finding no expectation of privacy in emergency room examination area enclosed by curtains, "where medical personnel were constantly walking in and out and where [patient] could have expected to remain only a few hours at most"). Here, where the Defendant was in an open room, not admitted to a private room, had been accompanied by law enforcement during his entire treatment, and engaged in friendly, open conversation with law enforcement. The Court would find Defendant had no reasonable expectation of privacy.

V. CONCLUSION

Although accompanied together in the Defendant's Motion, the Defendant seeks to suppress several categories of items. The first are observations of the Defendant conveyed to law enforcement; these are not suppressible. The second are observations (including body cam) of the Defendant by law enforcement; these are not suppressible. The third are statements made by medical providers at the hospital; these are suppressed.

THEREFORE, THE COURT **ORDERS AND ADJUDGES** AS FOLLOWS:

1. The Motion is hereby Granted in part and Denied in part:

a. The Court will suppress statements made to law enforcement by doctors, nurses, and other medical personnel AT the hospital.

b. All other statements, observations, and other evidence is not suppressed and may be used at trial, subject to other applicable rules of evidence and procedure.

* * *

Criminal law—Possession of firearm by violent career criminal—Constitutionality of statute—Section 790.235 is not facially unconstitutional given U.S. Supreme Court's decision in *New York State Rifle & Pistol Ass'n, Inc. v. Bruen*—No merit to argument that, even if felon-in-possession restrictions are facially constitutional, they should not be applied to defendant, a violent career criminal and registered sex offender—It would be contrary to *Bruen* to engage in case-by-case analysis of which felonies should result in permanent disarmament where prohibition on felons possessing firearms adheres to historical tradition of firearm regulation—Motion to dismiss information is denied

STATE OF FLORIDA, v. MARCO NUNEZ, Defendant. Circuit Court, 11th Judicial Circuit in and for Miami-Dade County. Case No. F19-12548. Criminal Division. August 25, 2023. Ramiro C. Areces, Judge. Counsel: Kioceaia Stenson, Miami-Dade State Attorney's Office, for State. Joshua Brody, Miami-Dade County Public

Defender's Office, for Defendant.

ORDER DENYING DEFENDANT'S MOTION TO DISMISS INFORMATION UNDER SECOND AMENDMENT

THIS MATTER having come before the Court on Defendant's Motion to Dismiss Information Under Second Amendment (the "Motion") and this Court having read the Motion, examined the case file, heard the argument of counsel, reviewed the Parties' respective briefs, and being otherwise fully advised in the premises, it is hereby,

ORDERED AND ADJUDGED:

Defendant's Motion is DENIED.

Defendant contends this Court should declare section 790.235, Fla. Stat.[1] unconstitutional on its face. In the alternative, Defendant contends this Court should find the law is unconstitutional as applied to him because, although he is a convicted felon many times over, he has not previously been convicted of battery, robbery, assault, or a firearm-related offense. Instead, Defendant's prior convictions include, but are not limited to, felony convictions for Burglary of an Unoccupied Dwelling, Lewd and Lascivious Exhibition of a Child Less than 16 years of age, Burglary of an Unoccupied Conveyance, Uttering a Forged Check, Violation of Sex Offender Registration, and Grand Theft.[2] Defendant is a registered Sex Offender and qualifies as a Violent Career Criminal as defined by the Florida legislature in section 775.084(1)(d), Fla. Stat. As far as test cases go, this is not a good one.

Nearly 60 years ago, the Florida Supreme Court upheld the constitutionality of section 790.23(1)(a), Fla. Stat. *See Nelson v. State,* 195 So. 2d 853, 856 (Fla. 1967) ("We uphold the validity of s. 790.23. . . ."). Section 790.23(1)(a), like section 790.235, makes it unlawful for convicted felons to possess firearms. The only material difference between the two statutory provisions is that section 790.235 increases the severity of the penalty for those convicted felons who also qualify as "violent career criminals." *See Frear v. State,* 700 So. 2d 465, 466 (Fla. 1st DCA 1997) [22 Fla. L. Weekly D2494e] ("Section 790.23. . .like section 790.235, makes it a crime for a convicted felon to. . .have in his. . .possession. . .any firearm. . . . Section 790.235 merely provides for a more severe penalty if the convicted felon also meets the violent career criminal criteria. . . .").

Additionally, although the Second Amendment would not be incorporated into the Fourteenth Amendment until 2010,[3] the *Nelson* court nevertheless considered whether a felon disarmament law violated a defendant's rights under the Fourteenth Amendment. *Id.* at 854 ("Defendant has appealed contending that under. . .the Fourteenth Amendment. . .the Legislature may not single out persons who have been convicted of crime and create of them a special class who shall be deprived of constitutionally protected rights unrelated to their punishment.").

Nelson is still good law.

Defendant, however, contends the United States Supreme Court's decision in *Bruen*[4] compels this Court to reassess the facial constitutionality of any Florida law that permanently bars convicted felons from possessing firearms. *See* 142 S. Ct. 2111 (2022) [29 Fla. L. Weekly Fed. S440a]. This Court disagrees.

First, Defendant misreads *Bruen. Bruen* did not change the law as set forth in *Heller*[5] and *McDonald. Bruen* merely disapproved of the "two step" analysis around which the lower courts had coalesced in the wake of *Heller* and *McDonald. See Bruen,* 142 S. Ct. at 2127 ("Despite the popularity of this two-step approach. . .*Heller* and *McDonald* do not support applying means-end scrutiny in the Second Amendment context."). *Bruen* did not *create* new law, so much as it *clarified* old law. *Id.* at 2129 ("*Heller* and *McDonald* expressly rejected the application of any judge-empowering interest-balancing inquiry."). As a result, nothing in *Bruen* can be said to cast doubt upon the Court's prior assurances—dicta or otherwise—that "felon in possession" laws are "presumptively constitutional."[6] The United States Supreme Court has expressly stated,

> Although we do not undertake an exhaustive historical analysis today of the full scope of the Second Amendment, **nothing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons** and the mentally ill, or laws forbidding the carrying of a firearms in sensitive places such as school and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms.

Heller, 554 U.S. at 627 (emphasis added); *see also McDonald,* 561 U.S. at 786 ("We made it clear in *Heller* that our holding did not cast doubt on such longstanding regulatory measures as prohibitions on the possession of firearms by felons and the mentally ill. . . .We repeat those assurances here."); *see also U.S. v. Myers,* No. 22-10012, 2023 WL 3318492, at *4 (S.D. Fla. May 9, 2023); *U.S. v. Rice,* No. 3:22-CR-36, 2023 WL 2560836, at *5 ("While *Bruen* certainly built upon *Heller* and provided further direction to the circuit courts on how to analyze Second Amendment challenges, the conclusion that *Bruen* superseded *Heller* is a step too far."). Without more, this Court cannot find that the United States Supreme Court's rejection of a means-end analysis, which it had never previously adopted, casts doubt on the constitutionality of a Florida firearm restriction that has been found to be constitutional by the Florida Supreme Court, and which appears to be supported by the United States Supreme Court's dicta in *Heller* and *McDonald. See Gimeno v. NCHMD, Inc.,* 38 F.4th 910, 915 (11th Cir. 2022) [29 Fla. L. Weekly Fed. C1320a] ("the thoroughly reasoned dicta of the Supreme Court is of considerable persuasive value and is not something to be lightly cast aside.") (quotation marks omitted).

Second, to the extent that the Florida Supreme Court should, or even must, reassess the constitutionality of Florida's felon-in-possession laws, *this* Court's role is not to predict what the Florida Supreme Court might do if it re-evaluates said laws in the wake of *Bruen.* It is well-settled that lower courts are bound to follow the decisions of higher courts which directly control the issues before them. This rule remains true even when the higher court's binding decision rests on reasons that have since been rejected. *See, e.g., Rodriguez de Quijas v. Shearson/American Express, Inc.,* 490 U.S. 477 (1989).[7] The decision to revisit the constitutionality of Florida's felon-in-possession laws belongs solely to the Florida Supreme Court. Until and unless the Florida Supreme Court chooses to revisit *Nelson,* this Court is bound to the Florida Supreme Court's prior pronouncements concerning the validity of firearm restrictions that bar convicted felons from possessing firearms.

Third, even if (1) the Florida Supreme Court had never passed on the constitutionality of felon disarmament laws *vis-a-vis* the Fourteenth Amendment, (2) *Bruen* had done more than merely reiterate the law set forth in *Heller,* and (3) the United States Supreme Court had not repeated its assurances concerning the presumptive constitutionality of felon in possession laws, this Court would still be constrained to find section 790.235 facially constitutional.

It is well-settled that "in the absence of inter-district conflict, district court decisions bind all Florida trial courts." *Pardo v. State,* 596 So. 2d 665, 666 (Fla. 1992). In Florida, the First District Court of Appeal (hereinafter, the "First DCA") recently considered the facial constitutionality of Florida's felon disarmament laws in light of *Bruen* and found the restrictions historically justified and facially constitutional. *Edenfield v. State,* Case No. 1D22-290, 2023 WL 3734459 (Fla. 1st DCA May 31, 2023) [48 Fla. L. Weekly D1113a]. Specifically, the First DCA held,

> Whether based on the language from *McDonald, Heller,* and *Bruen*

excluding felons from having protected Second Amendment rights, or whether based on the historical tradition of the Second Amendment as given by *Bruen,* we conclude that Florida law prohibiting convicted felons from possessing firearms survives Second Amendment scrutiny. Accordingly, we reject Appellant's constitutional challenge to section 790.23(1)(a).

Id. at *4; *see also Heller,* 554 U.S. at 635 (implying there is a historical justification and that "there will be time enough to expound upon the historical justifications for the exceptions we have mentioned").

A majority of the Fifth District Court of Appeal (the "Fifth DCA") has also found that Florida's felon disarmament laws are historically justified and facially constitutional. *See Simpson v. State,* No. 5D23-0128, 2023 WL 4981373, at *13 (Fla. 5th DCA August 4, 2023) [48 Fla. L. Weekly D1541a] (Pratt, J., concurring) (finding "Florida's felon in possession ban has some applications that precisely track early American disarmament policies.").[8] There is, at present, therefore, no inter-district conflict. This Court is bound to follow District Court precedent.

For the aforementioned reasons, this Court finds section 790.235 is facially constitutional.

Our inquiry, however, is incomplete. Defendant contends that even if section 790.235 is facially constitutional, section 790.235 and/or section 790.23 are, nevertheless, unconstitutional as applied to him.[9] The question of the laws' "as applied" constitutionality is interesting, but not complicated.

It does not appear that *Edenfield, Simpson,* or even *Nelson,* reached the issue of whether the felon-in-possession restrictions were constitutional as applied to the defendants before them. As a result, Defendant contends this Court is free to determine whether the felon-in-possession restrictions, already found to be facially constitutional, should not be applied to him—a violent career criminal and registered sex offender.

There is, in fairness, quite a bit of debate among the various state and federal courts concerning the extent to which disarmament laws should, or could, be applied to *all* felons.[10] For example, Defendant's Motion heavily relies on an opinion by the Third Circuit, wherein that court found a federal law, which barred certain persons from possessing firearms, unconstitutional as applied to an individual who had never been convicted of a felony, or even a violent misdemeanor. *See Range v. Attorney General of the United States of America,* 69 F.4th 96 (3d Cir. 2023).

In *Range,* the Third Circuit, relying on language in *Bruen,* found there was no "historical analogue" for barring a person, like Mr. Range, whose sole conviction had been for making false statements in furtherance of obtaining food stamps from possessing firearms. *Id.* at 106. The instant case, however, is not like *Range* and *Range* is, in any event, not binding on this Court.

This Court finds the *Range* analysis—as it pertains to "as applied" challenges—is inapplicable here. As stated above, the firearm restriction at issue—namely, the permanent disarmament of Florida felons—has expressly been found constitutional by the highest court in this State. To the extent there was any doubt about its constitutionality following *Bruen,* the First DCA and Fifth DCA put those concerns to rest. To apply *Range* in Florida now would result in the substitution of one "judge-empowering interest-balancing inquiry" for another. *Bruen,* 142 S. Ct. at 2129.

The United States Supreme Court could not have been clearer that it is opposed to any test that would allow judges to determine, on a case-by-case basis, whether the Second Amendment provides some protection. *Id.* ("*Heller* and *McDonald* expressly rejected the application of any judge-empowering interest-balancing inquiry that asks whether the statute burdens a protected interest in a way or to an extent that is out of proportion to the statute's salutary effects upon other important governmental interests.") (cleaned up). As far as the United States Supreme Court is concerned, there is either a historical analogue for the sort of restriction at issue, or not. *See Jackson,* 69 F.4th at 501 ("Given these assurances by the Supreme Court, and the history that supports them, we conclude that there is no need for felony-by-felony litigation regarding the constitutionality of the federal felon in possession law); *see also Heller,* 554 U.S. at 643 ("A constitutional guarantee subject to future judges' assessments of its usefulness is no constitutional guarantee at all."); *Meyer,* 2023 WL 3318492 at *4 n.5 ("Since neither *Heller* nor *McDonald* distinguished between dangerous and non-dangerous felons, our reasoning here disposes of [defendant's] facial and as-applied challenges together.").

In this case, where the First DCA and Fifth DCA have, consistent with United States Supreme Court dicta, determined there is a historical analogue for Florida's felon-in-possession law, it would appear *contrary* to the United States Supreme Court's decisions in *Bruen* and *Heller* for this Court to engage in a case-by-case analysis of which specific felonies should, or should not, result in permanent disarmament. Frankly, this Court would not know where to begin.[11]

The undersigned is not a historian.[12] There is a difference between (1) looking to history to determine how a word or phrase might have been understood at the time a law, or constitutional amendment, was enacted or ratified; and (2) drawing quasi-academic conclusions from any number of historical sources, by authors unknown to this Court, to arrive at some unqualified expert opinion about whether a historically justified restriction may nevertheless lack some historical analogue when applied to any one or more particular felonies.[13]

There is no guide for where this Court would begin to draw the line. For example, this Court would be left to choose, among other options, whether to draw the line between (1) violent felons and non-violent felons;[14] (2) the virtuous citizen and the non-virtuous citizen;[15] and, (3) those that pose a present danger and those who do not pose a present danger.[16] The very act of drawing the line would amount to judicial lawmaking. This Court will not play policy maker.

Finally, even if "as applied" challenges on a felony-by-felony basis were appropriate, Defendant would still find no relief here. For *Edenfield* and the concurrence in *Simpson* to have found sec. 790.23(1)(a) facially constitutional, they must have necessarily determined that the law is constitutional *at least* as applied to some group of persons. *See Bullock,* 2023 WL 4232309, at *5 ("in a facial challenge, the court asks whether a law could never be applied in a valid manner.") (cleaned up). However large that group of persons may turn out to be—violent, non-violent, virtuous, unvirtuous—there can be no doubt that Defendant, whom the legislature has deemed a "violent career criminal" and "registered sex offender," falls within said group.

Section 790.23(1)(a), Fla. Stat., which unambiguously applies to *all* felons, has been found constitutional, to have a historical analogue, and to, therefore, be a permissible restriction on the Second Amendment right to keep and bear arms. *Heller,* 554 U.S. at 626 ("Like most rights, the right secured by the Second Amendment is not unlimited."). Section 790.235 merely increases the penalty for a subset of Florida felons who also qualify as violent career criminals. Barring a contention that some other right is being infringed upon, there is no room for "as applied," felony-by-felony challenges to section 790.23(1)(a) or 790.235. In this case, Defendant has made no such contention. Defendant, therefore, is merely a violent career criminal who broke into one or more homes and committed a sex crime against a Minor. And in Florida, felons, including this one in particular, cannot own firearms.

Accordingly, Defendant's Motion is DENIED.

[1]Section 790.235(1)(a) bars violent career criminals from possessing firearms.

[2]A list of his prior criminal history is attached to this Order.

[3]*See McDonald v. City of Chicago,* 561 U.S. 742 (2010) [22 Fla. L. Weekly Fed. S619a].

[4]*New York State Rifle & Pistol Association, Inc. v. Bruen,* 142 S. Ct. 2111 (2022) [29 Fla. L. Weekly Fed. S440a].

[5]*District of Columbia v. Heller,* 554 U.S. 570 (2008) [21 Fla. L. Weekly Fed. S497a].

[6]"Some have taken the phrase 'presumptively lawful' to mean that the Court was suggesting a presumption of constitutionality that could be rebutted on a case-by-case basis. That is an unlikely reading, for it would serve to cast doubt on the constitutionality of these regulations in a range of cases despite the Court's simultaneous statement that "nothing in our opinion should be taken to cast doubt" on the regulations. We think it more likely that the Court presumed that the regulations are constitutional because they are constitutional, but termed the conclusion presumptive because the specific regulations were not at issue in *Heller*." *U.S. v. Jackson,* 69 F.4th 495, 505 n.3 (8th Cir. 2023) (internal citations omitted).

[7]In this case, for example, one might argue that *Nelson* rested, at least in part, on a means-end analysis. 195 So. 2d at 855-56 ("The statutory prohibition of possession of a pistol by one convicted of a felony, civil rights not restored, is a reasonable public safeguard.").

[8]Although it was not the Opinion of the Court, a majority of the judges on the panel found Florida's felon disarmament restrictions on the Second Amendment to be historically justified and facially constitutional.

[9]In his Motion, Defendant alternates between sec. 790.23 and sec. 790.235. This is not surprising. If sec. 790.23 is a constitutional restriction on a class's Second Amendment rights (namely, *all* convicted felons), it follows that a restriction as to a subset of that class (convicted felons who also qualify, as violent career criminals) would also be constitutional.

[10]In at least one case, a Federal District Court, applying *Bruen,* found that a similar law to the one at issue here was unconstitutional as applied to a felon previously convicted of aggravated assault and manslaughter. *United States v. Bullock,* No. 3:18-CR-165, 2023 WL 4232309 (S.D. Miss. June 28, 2023).

[11]Literally. There appears to be a dispute over whether the historical analogue must come from those restrictions in place at the time the Second Amendment was ratified, or from the time the Fourteenth Amendment was ratified. *See Bruen,* 142 S. Ct. at 2138 ("We also acknowledge that there is an ongoing scholarly debate on whether courts should primarily rely on the prevailing understanding of an individual right when the Fourteenth Amendment was ratified in 1868 when defining its scope. . . .").

[12]*Bullock,* 2023 WL 4232309, at *4 ("Judges are not historians.").

[13]*See U.S. v. Yancey,* 621 F.3d 681, 684-85 (7th Cir. 2010) (a pre-*Bruen* case that cites to a series of scholarly articles on the historical justification for disarming felons).

[14]"Indeterminacy about how to measure the risk posed by a crime and indeterminacy about how much risk it takes for the crime to qualify as a violent felony. . .produce more unpredictability and arbitrariness than the Due Process Clause tolerates." *Folajtar v. Attorney General of the United States,* 980 F.3d 897 (3d Cir. 2020) (quoting *Johnson v. U.S.,* 576 U.S. 591, 598 (2015) [25 Fla. L. Weekly Fed. S459a]).

[15]*Compare U.S. v. Coombes,* 629 F. Supp. 3d. 1149, 1158 (N.D. Okla. 2022) ("Although not 'historical twins' to §922(g)(1), the attainder statutes are sufficient 'historical analogues' as they reflect regulations designed to protect the virtuous citizenry—the 'why'—through disarmament of the less virtuous—the 'how.' "), *with Kanter v. Barr,* 919 F.3d 437, 464 (7th Cir. 2019) (Barrett, J., dissenting) ("although the right protected by the Second Amendment is not unlimited, its limits are not defined by a general felon ban tied to a lack of virtue or good character.") (internal citations omitted).

[16]*Kanter,* 919 F.3d at 469 (Barrett, J., dissenting) ("Absent evidence that [defendant] would pose a risk to the public safety if he possessed a gun, the governments cannot permanently deprive him of his right to keep and bear arms.").

* * *

Criminal law—Post conviction relief—Timeliness of motion—Defendant's claim for relief is barred as grossly untimely, whether it is seen as claim that his original plea entered 22 years ago was involuntary or that his lawyer in probation revocation proceedings 14 years ago was ineffective—Even if resentencing that occurred four years ago restarted time period for filing motion, motion is untimely—No merit to claim that plea was involuntary because defendant was not advised that he would be sentenced to extended prison sentence if he violated his probation—Claim that counsel at defendant's probation revocation proceedings was ineffective for failing to move to withdraw plea fails—Defendant was not prejudiced by attorney's failure to make motion that could not have been granted, was not timely, and would not have assisted defendant—Motion to withdraw plea and identical successive motion are denied—Defendant who has filed many frivolous pleadings is ordered to show cause why he should not be barred from filing further pro se pleadings

STATE OF FLORIDA, Plaintiff, v. DERRICK GRANTLEY, Defendant. Circuit Court, 11th Judicial Circuit in and for Miami-Dade County, Criminal Division. Case Nos. F98-3144B and F98-5013. November 28, 2023. Milton Hirsch, Judge.

ORDER ON PENDING POST-CONVICTION MOTIONS

I. Introduction

In 1999—nearly a quarter-century ago—Derrick Grantley entered knowing, voluntary, and fully-informed pleas of guilty in the above-captioned cases, and was sentenced for his crimes. Since that time, he has been relentless in demanding the attention of this court and of not one but two courts of appeal.

It appears that he filed his first *pro se* post-conviction claim in 2001. The denial of that claim was affirmed by the appellate court. *See Grantley v. State*, 826 So. 2d 1032 (Fla. 3d DCA 2001) [27 Fla. L. Weekly D75e]. In 2005 the court of appeal again affirmed, *per curiam*, another of Grantley's *pro se* appeals. *See Grantley v. State,* 895 So. 2d 1230 (Fla. 3d DCA 2005). Another *per curiam* affirmance of a *pro se* appeal appears in 2014, although apparently the matter didn't even merit reporting in the Southern Reports. *See Grantley v. State*, Case No. 3D13-3156 (Fla. 3d DCA Feb. 19, 2014).

The year 2017 was a busy one for Mr. Grantley. He had violated his probation and was sentenced accordingly. The appeal from that sentence was not *pro se*, but was taken by the Office of the Public Defender. The appellate court affirmed the probation revocation, *Grantley v. State*, 211 So. 3d 301, 302 (Fla. 3d DCA 2017) [42 Fla. L. Weekly D349g], but remanded for resentencing due to an intervening Florida Supreme Court "decision unavailable to the trial court at the time it ruled" in imposing sentence. *Grantley*, 211 So. 3d at 303. Later that same year, Mr. Grantley managed to garner a denial in a decision without published opinion from an entirely different appellate court. *Grantley v. State*, 234 So. 3d 694 (Fla. 2d DCA 2017).

Mr. Grantley earned a dismissal without published opinion from the Second District the following year. *Grantley v. State*, 242 So. 3d 1076 (Fla. 2d DCA 2018). And he notched up another denial without published opinion the year after that. *Grantley v. State*, 270 So. 3d 340 (Fla. 2d DCA 2019). Perhaps dissatisfied with the service he was receiving from the Second District, Grantley returned to the Third District and promptly was awarded another dismissal without published opinion. *Grantley v. State*, 298 So. 3d 38 (Fla. 3d DCA 2019).

But it was 2020 that was Mr. Grantley's banner year. In an effort to protect itself and the appellate courts of this State from the torrent of Mr. Grantley's meritless but endless motion practice, this court barred Grantley from further *pro se* pleadings, requiring that any further pleadings be signed by a member in good standing of the Florida Bar. The Third District, however, reversed; holding that Grantley had engaged in an insufficiently "egregious abuse of the post-conviction process" to "warrant[ ] the barring of further *pro se* pleadings." *Grantley v. State*, 299 So. 3d 455, 456 (Fla. 3d DCA 2020) [45 Fla. L. Weekly D194a]. Not unreasonably, Mr. Grantley understood this to be an invitation to abuse the post-conviction process yet more egregiously. It was an invitation he was happy to accept.

His sense of liberation thus kindled, Grantley provided Florida's appellate courts with the opportunity to enter no fewer than three more decisions in 2020. The first was an affirmance without published opinion from the Second District. *Grantley v. State*, 302 So. 3d 329 (Fla. 2d DCA 2020). Then came yet another Third District denial without published opinion. *Grantley v. State*, 307 So. 3d 675 (Fla. 3d DCA 2020). And another denial without published opinion. *Grantley v. State*, 307 So. 3d 684 (Fla. 3d DCA 2020).

Now pending before this post-conviction court are not one but two more motions brought by Grantley *pro se*: his *Motion to Withdraw Guilty Plea* filed in March of 2021,[1] and his *Successive Motion for Post-Conviction Relief* filed in April of the same year.[2] These motions offer nothing more than a reprise of the meritless, fatuous claims that Mr. Grantley has so many times litigated. But because my betters on the appellate court have determined that Grantley's seemingly endless recapitulation of specious claims in specious motions does not constitute an abuse of the post-conviction process, I must consider them on the merits.

II. The two pending motions

A. The *Motion to Withdraw Guilty Plea*

Appended to this motion is what appears to be the transcript of Grantley's change-of-plea colloquy. At the court's invitation, the prosecutor stated the terms of the plea agreement very explicitly.

> [The prosecutor]: In exchange for a plea of guilty, the State will be offering the defendant thirty-five years state prison followed by fifteen years probation. He will be pleading guilty to all counts in the indictment, 98-3144B. He will also be pleading guilty to 98-5013. . .
>
> The Court: Thirty-five years state prison followed by fifteen years probation?
>
> [The prosecutor]: That's correct.

Grantley expressly acknowledged this understanding of the plea agreement. The court imposed sentence in accordance with the agreed terms.

But that is not the sentence that Mr. Grantley presently undergoes. As he concedes in his motion, only eight years later he violated his probation. As discussed *supra* at 2, the trial court's determination of violation was affirmed by the Third District.[3] The sentence Grantley presently undergoes is not the consequence of his taking a plea in 1999, but is a consequence of his engaging in new and additional misconduct only a few years thereafter.

It is less than entirely clear what Mr. Grantley complains of in the motion at bar. At one point, he couches his claim as one of ineffective assistance of counsel—not the counsel who represented him at his change-of-plea colloquy, but the counsel who represented him at his probation violation hearing. In his view, that counsel was ineffective for failing to move, at the probation violation hearing, to withdraw Grantley's plea entered more than eight years earlier. Viewed in another light, however, perhaps Mr. Grantley is complaining that his original plea was involuntary. "The defendant contends that had he known that he could be sentenced to an extended prison sentence for a violation of probation, that [*sic*] he would have never accepted the plea and would have insisted on going to trial." *Motion to Withdraw Plea* at 7.

In summary then: Grantley committed, by his own sworn admission, armed robbery, kidnapping, more than one brutal rape, and burglary with assault. In exchange for his plea of guilty, he received a sentence, advantageous in the circumstances, of 35 years in prison followed by probation. And in consideration of this plea, the prosecution abandoned a separate case of battery on a police officer. When, a few years later, he again engaged in misconduct, he was astonished to learn that he would receive, not an all-expenses-paid trip to DisneyWorld, but additional punishment. This, in his view, entitles him to withdraw the original plea. Given the age of this case and the extreme unlikelihood that the State could reprosecute him at this late date, he is, in effect, asking to be rewarded for his wrongdoing with a get-out-of-jail-free card.

Before even considering the merits, I note that Grantley's claim is barred as grossly untimely. Rule 3.850(b), Fla. R. Crim. P., provides that, as a general rule, a post-conviction motion must be brought within two years after the judgment and sentence under attack become final. Mr. Grantley entered his plea in 1999. If his present claim is that his plea was involuntary when entered because no one told him that if he persisted in wrongful conduct he would receive additional punishment, he was obliged to be sufficiently diligent to learn of that within two years, and to bring his claim within that period. He is late—by about two decades.

Alternatively, if his present claim is that when, some eight years later, he was being sentenced for his additional misconduct, his lawyer was constitutionally ineffective for failing to seek to withdraw his 1999 plea, his claim is still untimely.[4] Grantley argues that because as a result of subsequent changes in law he was obliged to be resentenced later, the two-year clock of Rule 3.850(b) didn't start to run in 2007. But by Grantley's own admission in his own pleading, the last imposition of sentence took place on February 12, 2018. The present motion was signed and dated by Mr. Grantley on March 18 of 2021—well outside the two-year window. No matter how viewed, the motion at bar is untimely and subject to denial on that basis alone.

For the benefit of any reviewing court, however, I consider the merits—such as they are—of Grantley's claim. As noted, it may be that he is arguing that his initial plea was involuntary because neither the trial court nor his lawyer told him that if he continued to engage in misconduct, he would continue to be punished. If this is his argument, he gets high marks for *chutzpah,*[5] but not for anything else.

State v. Fox, 659 So. 2d 1324 (Fla. 3d DCA 1995) [20 Fla. L. Weekly D2049a] (Cope, J.), although not "on all fours," is very instructive. Fox entered into a plea agreement in state court, served a short sentence pursuant to that agreement, and was released. He then committed more crimes, for which he was prosecuted in federal court. Because of his prior criminal record, he received a much higher sentence than would otherwise have been the case. *Fox*, 659 So. 2d at 1325-26. Fox then moved to set aside his earlier conviction in state court, claiming, in effect, that his plea was involuntary in the same sense that Grantley claims his plea is involuntary: no one told Mr. Fox, as part of the change-of-plea colloquy or otherwise, that if he continued to commit crimes his punishments would probably get worse. *Id.* at 1326. "The defendant's primary complaint is that the plea colloquy did not inform him that as a result of the plea he would become an adjudicated felon, and that as an adjudicated felon he would be exposed to greater penalties if in the future he were to commit new crimes." *Id.* at 1327.

Thus the pith of Fox's complaint is akin to the pith of Grantley's: My plea was involuntary because nobody told me that if I committed more bad acts, I would receive more punishment. Perhaps the best rejoinder is offered in *Capalbo v. State*, 73 So. 3d 838, 840 (Fla. 4th DCA 2011) [36 Fla. L. Weekly D2389a]: "A post-conviction movant cannot disown knowledge of the obvious. A post-conviction court is not required to hold hearings on absurd claims or accept as true allegations that defy logic and which are inherently incredible." *Fox* quotes from *United States v. Woods*, 870 F. 2d 285, 288 (5th Cir. 1989) for the proposition that, "The sentencing court is not required 'to anticipate a defendant's recidivism.' " *Fox*, 659 So. 2d at 1327. There is a very good reason that the change-of-plea colloquy appearing at Rule 3.172, Fla. R. Crim. P., does not include the question, "Do you understand that if you continue to commit crimes, or otherwise violate your probation, you will likely receive another sentence?" The reason, in the words of *Capalbo,* is that a defendant "cannot disown knowledge of the obvious," and an allegation that the failure of the trial judge to ask such a question would render a plea involuntary "def[ies] logic and . . . [is] inherently incredible." Mr. Fox was not entitled to relief because the trial court failed to ask such a question. Neither is Mr. Grantley.[6] *See also Major v. State*, 814 So. 2d 424, 431 (Fla. 2002) [27 Fla. L. Weekly S269a] ("we hold that neither the trial court nor counsel has a duty to advise a defendant that the defendant's

plea in a pending case may have sentencing enhancing consequences on a sentence imposed for a crime committed in the future"). *See gen'ly State v. Dickey*, 928 So. 2d 1193 (Fla. 2006) [31 Fla. L. Weekly S234a].

It is only a very slight divagation, and a very worthwhile one, to consider in this context the dissenting opinion of Justice John Paul Stevens, written when he was a judge of the 7th Circuit, in *United States v. Smith*, 440 F. 2d 521, 527 *et. seq.* (7th Cir. 1971). Smith brought a post-conviction motion claiming that at the time he took his plea, he was unaware that he would be ineligible for early parole; and that this unawareness rendered his plea involuntary. Then-Judge Stevens drew a distinction—a distinction of constitutional significance—between the voluntariness of a plea, and the wisdom (or unwisdom) of a plea bargain.

> The "consequences" of the plea of guilty which relate to voluntariness, and therefore have constitutional significance, are consequences of the plea rather than consequences of the conviction. The same punishment may be imposed in consequence of conviction regardless of whether the accused pleaded guilty or not guilty. But the waiver of constitutional protections, which would be available if the defendant elected to stand trial, is a consequence of the plea itself.

Smith, 440 F. 2d at 530 (Steven, J., dissenting) (fn. omitted).

In this respect, the "requirement that an admission of guilt be voluntary has the same constitutional foundation whether the admission is made in open court or in a police interrogation room." *Id.* at 529. But the *consequences* of conviction—not the voluntariness of the plea, but the consequences of the conviction—have "a different significance." *Id.* at 530. Those consequences "relate to the *wisdom* of a decision to plead guilty rather than to the *voluntariness* of the decision. A variety of factors enter into the exercise of the judgment which produces that decision. . . An erroneous appraisal of any of those factors affects the *wisdom* of the plea, but does not make it *involuntary*." *Id.* at 530 (emphasis added). In Justice Stevens's view, Smith's decision to accept a plea agreement which—all unknown to him—precluded the prospect of early parole went to the wisdom or unwisdom of the plea bargain, but not to the voluntariness of the plea.

The good sense of the distinction drawn by Justice Stevens is made abundantly clear by the motion at bar. Grantley made a voluntary waiver of his fair-trial rights as part of his plea of guilty. He now claims that he made a bad bargain, because as a consequence of that bargain, additional misconduct on his part results in additional punishment. That claim itself is laughably absurd; but more to the point, it goes, in terms of Justice Stevens's analysis, to the wisdom of the acceptance of the plea agreement, not to the voluntariness of the plea. The plea was voluntary. That should be the end of the analysis.

I recognize that Justice Stevens's position has never been squarely adopted by the courts of Florida. *But see Hurt v. State*, 82 So. 3d 1090, 1093 n. 2 (Fla. 4th DCA 2012) [37 Fla. L. Weekly D227a]; *Gusow v. State*, 6 So. 3d 699, 702 (Fla. 4th DCA 2009) [34 Fla. L. Weekly D676b] (Gross, C. J.) ("If we . . . were writing on a blank slate, we would adopt the analysis of Justice John Paul Stevens's dissent in *United States v. Smith*, 440 F. 2d 521, 528-29 (7th Cir. 1971)). That said, I join the Fourth District in respectfully but urgently suggesting that the Florida Supreme Court recede from the line of cases beginning with *State v. Leroux*, 689 So. 2d 235 (Fla. 1996) [21 Fla. L. Weekly S557a], and consider adopting Justice Stevens's analysis. *See McGee v. State*, 935 So. 2d 62. 64 (Fla. 1st DCA 2006) [31 Fla. L. Weekly D2015a] (citing *Hoffman v. Jones*, 280 So. 2d 431, 434 (Fla. 1973) (lower courts "may state their reasons for advocating change" as long as they follow controlling appellate case law)).

As discussed *supra*, however, it may be that Grantley is alleging, not the involuntariness of his original plea, but the ineffectiveness of his counsel in failing to move on his behalf to withdraw that plea years after the fact when Grantley was being sentenced for new misconduct. *See Motion to Withdraw Guilty Plea* at 7 ("Counsel was aware that the defendant had never been advised at the initial plea and sentencing of the maximum penalty, but still . . counsel failed to file a motion to withdraw" the plea); 10 ("counsel should have filed a motion to withdraw guilty plea, being that she was aware the defendant had never been advised of the maximum penalty his charges carried, and what he could face of [*sic*] a violation of probation, until the probation revocation hearings had started"). If this is indeed Grantley's argument, it fares even worse than his claim of the involuntariness of his initial plea.

To support a claim of ineffective assistance of counsel, a post-conviction defendant bears the burden of establishing that his counsel's performance was deficient, and that the deficiency prejudiced the defendant. *Jones v. State*, 998 So. 2d 573, 582 (Fla. 2008) [34 Fla. L. Weekly S8a] (citing *Strickland v. Washington*, 466 U.S. 668, 687 (1984)). Deficient performance requires the defendant to show that "counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed . . . by the Sixth Amendment," *Strickland*, 466 U.S. at 687, or that counsel's performance was "unreasonable under prevailing professional norms." *Valle v. State*, 778 So. 2d 960, 965 (Fla. 2001) [26 Fla. L. Weekly S46a]. In order to establish prejudice, the defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *Jones*, 998 So. 2d at 582.

In what respect was Grantley's attorney's performance deficient when he was found in violation of his probation? On his version of affairs, his attorney rendered constitutionally deficient performance by failing to move to withdraw a plea Grantley had entered some eight years earlier. Upon what grounds would the attorney have made such a motion? Upon the grounds that, at the time he entered the plea, Grantley was told what sentence he was actually getting, but wasn't told the maximum sentence that he wasn't getting?

Pity the poor lawyer, had she actually made such a motion. No doubt the then-presiding judge would have told her that *Fox*, *see supra* at n. 6, and cases following it, hold time and again that so long as a defendant is informed of the actual consequences to which he *is* being sentenced, it matters not at all if he isn't informed of possible consequences to which he *isn't* being sentenced. "[C]ounsel cannot be held to have been ineffective for not making meritless motions." *Dickerson v. State*, 285 So. 2d 353, 358 (Fla. 1st DCA 2019) [44 Fla. L. Weekly D2823a] (citing *Whitted v. State*, 992 So. 2d 352 (Fla. 4th DCA 2008) [33 Fla. L. Weekly D2337a]). And there can be no suggestion that Grantley was prejudiced by his lawyer's failure to make a motion that couldn't have been granted, that wasn't timely, *see* n. 1 *supra*, and that wouldn't have helped. Grantley has not asserted even a colorable claim of deficient performance on his lawyer's part.

B. The *Successive Motion for Post-Conviction Relief*

On March 29, 2021—about ten days after he filed his *Motion to Withdraw Guilty Plea*—Grantley filed his *Successive Motion for Post-Conviction Relief*. It is identical—word for word, letter for letter, jot for jot, tittle for tittle—to his *Motion to Withdraw Guilty Plea.*

III. Sanctions

Derrick Grantley is no doubt precisely the litigant that Chief Justice Warren Burger had in mind when he referred to someone who "considers the judicial system a laboratory where small boys can play." *Clark v. Florida*, 475 U.S. 1134, 1137 (1986). Contrary to what appears to be Grantley's impression, the "post-conviction process does not exist simply to give [defendants] something to do in order to pass the time as they serve their sentences." *Carroll v. State*, 192 So. 3d 525, 526 (Fla. 1st DCA 2016) [41 Fla. L. Weekly D1066a]. There

comes a point when "enough is enough." *Carroll*, 192 So. 3d at 526.

There is more at issue here than the minor annoyance and inconvenience involved in disposing of Grantley's frivolous pleadings. "It must prejudice the occasional meritorious [post-conviction] application to be buried in a flood of worthless ones. [The post-conviction judge] who must search a haystack for a needle is likely to end up with the attitude that the needle is not worth the search." *Brown v. Allen*, 344 U.S. 443, 537 (1953) (Jackson, J., concurring). In the same vein, the Florida Supreme Court has observed that one justification for sanctioning an abusive post-conviction litigant, "lies in the protection of the rights of others to have the Court conduct timely reviews of their legitimate filings." *Pettway v. McNeil*, 987 So. 2d 20, 22 (Fla. 2008) [33 Fla. L. Weekly S355a]. This court's resources are finite, and every minute spent on entertaining meritless post-conviction motions is time that cannot be spent on potentially meritorious cases. Turning again to Justice Stevens's dissent in *Smith, supra,* "Every inroad on the concept of finality undermines confidence in the integrity of our procedures; and, by increasing the volume of judicial work, inevitably delays and impairs the orderly administration of justice." *Smith*, 440 F. 2d at 528 (Stevens, J., dissenting). Any "concern that unfair procedures may have resulted in the conviction of an innocent defendant is only rarely raised by a petition to set aside a guilty plea," *id.* at 530, and is not raised at all here. Plainly, Mr. Grantley has abused the judicial system by filing the motion at bar.

Derrick Grantley is hereby directed to show cause within 30 days of the entry of this order why he should not be barred from filing further pleadings or papers pertaining or relating to, or arising out of, the present case. In light of the not one but two pleadings addressed herein, coming on the heels of the course of frivolous pleadings documented *supra* at 1-3, I sincerely and fervently hope that it is no longer the position of my betters on the Third District that Grantley has yet to reach the threshold of "egregious abuse of the post-conviction process" sufficient to "warrant[ ] the barring of further *pro se* pleadings," *Grantley,* 299 So. 3d at 456 (Fla. 3d DCA 2020) [45 Fla. L. Weekly D194a].

V. Conclusion

Derrick Grantley's *Motion to Withdraw Guilty Plea* and *Successive Motion for Post-Conviction Relief* are hereby denied. This is a final order. The movant has 30 days in which to appeal. Fla. R. Crim. P. 3.850(k). In the event of an appeal, the Clerk of Court is directed to append to this order for transmission to the appellate court the pending motions and all prior pleadings referenced in this order. *See* Fla. R. Crim. P. 3.850(f)(5).

No motion for rehearing will be entertained. *See* Fla. R. Crim. P. 3.850(j).

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[1]Although captioned a motion to withdraw a guilty plea, the substance of the motion is one for post-conviction relief. That being the case, I "must treat the claim as if it had been filed in a properly styled motion." *Gill v. State*, 829 So. 3d 299, 300 (Fla. 2d DCA 2002) [27 Fla. L. Weekly D2315a]. *See, e.g., Kemp v. State*, 245 So. 3d 987, 987 (Fla. 3d DCA 2018) [43 Fla. L. Weekly D992a] (claimant filed "petition for writ of error *coram nobis.* The trial court properly treated the petition as a motion for post-conviction relief under Florida Rule of Criminal Procedure 3.850"). Of course if Grantley's motion were to be treated as styled, *i.e.*, as a motion to withdraw plea, it would be untimely by nearly a quarter-century. Fla. R. Crim. P. 3.170(1) provides that, subject to certain exceptions inapplicable here, such a motion must be brought within 30 days of rendition of sentence. This time limit is generally viewed as jurisdictional. *See, e.g.*, *Gafford v. State*, 783 So. 2d 1191, 1192 (Fla. 1st DCA 2001) [26 Fla. L. Weekly D1095a].

[2]These motions were filed at a time when another judge was assigned to this division. They did not linger for nearly three years on my watch.

[3]According to Grantley, his first probation violation occurred in approximately 2007. According to the court record, the probation violation resulting in the sentence Grantley presently undergoes occurred years later, *see Grantley v. State*, 211 So. 3d 301, 302 (Fla. 3d DCA 2017) [42 Fla. L. Weekly D349g]. For analytical purposes, the difference in date matters little. Accordingly, I use Grantley's dates of choice.

[4]It is also specious. To maintain a claim of ineffective assistance of counsel, Grantley would have to show deficient performance, *i.e.*, that a competent lawyer would have moved in 2007 to withdraw his 1999 plea; and prejudice, *i.e.*, that a motion would likely be granted and then have resulted in a more favorable outcome for Grantley. *See* discussion *infra* at 10-11.

[5]https://en.wikipedia.org/wiki/Chutzpah.

[6]There is another respect in which Grantley's case and Fox's are identical. Like Grantley, Fox

> assert[ed] that the failure of the trial judge to inform him of the maximum possible penalty provided by law for the offense with which he was charged necessarily means that his plea cannot be considered knowing and intelligent. However, the defendant entered his plea on the understanding that he would be sentenced to a year and a day of incarceration, and that is the sentence which was imposed. The sentence was less than the maximum sentence allowable. There was no prejudice by the omission to advise the defendant of the maximum penalty.

Fox, 659 So. 2d at 1227 (citing *Baker v. State*, 344 So. 2d 597, 598 (Fla. 1 st DCA 1977)).

* * *

Criminal law—Sentencing—Death penalty—Jury instructions—Court will not advise jurors in capital case that their penalty-phase verdict would only be a recommendation—Advice is not required by statutory law, precedent, or rules of criminal procedure—There is no relevant reason to advise jurors that verdict is mere recommendation, and such advice may diminish jurors' sense of responsibility for verdict

STATE OF FLORIDA, Plaintiff, v. JOSE ROJAS, Defendant. Circuit Court, 11th Judicial Circuit in and for Miami-Dade County. Case No. F12-10603. Section 60. December 2, 2023. Miguel M. de la O, Judge. Counsel: Abbe Rifkin and Justin Funck, for Plaintiff. G.P. Della Fera and Richard Houlihan, for Defendant.

ORDER REGARDING ADVISING THE JURY THAT THEIR SENTENCING DECISION IS A RECOMMENDATION

THIS CAUSE is before the Court for trial on, *inter alia*, two counts of first-degree murder. The State is seeking imposition of the death penalty if the jury finds Defendant, Jose Rojas ("Rojas"), guilty of first-degree murder. During a status conference months ago, Rojas' counsel inquired whether the Court would advise the jury that their sentencing decision, if this case proceeded to a penalty phase, was a mere[1] recommendation. The Court advised the parties it would not so advise the jurors.

On November 27, 2023, the jury selection process began. During questioning by the State as to the jurors' willingness and ability to vote for imposition of the death penalty, the State referred to the jury's decision as a recommendation. The first time this happened, Rojas objected, the Court sustained the objection and the State proceeded without further argument. The second time it occurred, the Court brought the lawyers sidebar and asked why the State again used the word "recommendation." It became obvious the State had not comprehended the Court's prior rulings and instructions. The Court ordered the State to advise the jurors that the Court would impose the sentence that they handed down.

After that panel of jurors was excused, the State strenuously objected to not being able to advise the jurors in voir dire that their sentencing verdict is a recommendation and that the Court will make the final decision. The State asked how the Court would change Standard Jury Instruction 7.11, which explains to the jurors that their sentencing verdict is a recommendation to the Court. The Court advised the State that it has not yet drafted the phase two jury instructions and therefore was not prepared to answer the question posed. However, the Court advised that it would not tell the jurors that their penalty phase verdict would only be a recommendation.[2]

The Court recognizes that Rojas does not have a constitutional claim if this Court were to advise the jurors that their verdict is a recommendation. *See Reynolds v. State*, 251 So. 3d 811 (Fla. 2018) [43 Fla. L. Weekly S163a]. Likewise, the Court acknowledges that it is not a *Caldwell v. Mississippi*, 472 U.S. 320 (1985), violation to advise the jury that its sentencing decision is a recommendation

because it would not mislead the jury. However, the fact that jurors are not being misled about their role in Florida's capital sentencing scheme does not mean that their role should be minimized—even slightly. The fact that instructing the jury that its verdict is a recommendation would not be unconstitutional is not a good enough reason to do so.

Simply put, it is irrelevant to the jury's ultimate determination in the penalty phase that their decision is a recommendation. We should no more advise the jurors that their vote is a recommendation than we advise them about *Spencer* hearings, habeas petitions, the federal Antiterrorism and Effective Death Penalty Act (AEDPA), the Governor's pardon and commutation power, or any of the myriad of other procedural barriers to a death sentence being ultimately carried out.

The State objects to the Court's ruling for several reasons. It primarily argues that the Court is increasing the burden on the State. The Court disagrees. First, as of December 1, 2023, the Court has death-qualified 65 jurors. The State has been able to thoroughly question each of these potential jurors. All 65 have indicated they are willing to weigh the aggravating factors and the mitigating circumstances and consider whether to return a verdict for death or life imprisonment without the possibility of parole. All indicated a willingness to vote for death even if they were the 12th juror voting and the other 11 jurors were split 7 to 4 for death. In short, despite not minimizing in any way the jury's role in Florida's death penalty scheme, the Court has had no difficulty finding jurors who are willing to undertake the serious task of deciding whether another human being lives or dies.

Second, not allowing the State to minimize, even if only slightly, the jurors' role in capital sentencing is not the same as increasing the State's burden. There is no support in law or logic for concluding that the State is at a disadvantage unless the jurors know their verdict is a recommendation.[3] The State would have a better argument if it had a right to inform the jury their verdict of death is not final but merely a recommendation. Yet, no provision of Chapter 921, or the Florida Rules of Criminal Procedure, gives the State this right or compels this Court to so advise the jury.

Third, and this is the crux of the issue, advising the jurors that their sentence is only a recommendation implicates the very fears discussed in *Caldwell*.

> [W]e conclude that it is constitutionally impermissible to rest a death sentence on a determination made by a sentencer who has been led to believe that the responsibility for determining the appropriateness of the defendant's death rests elsewhere. This Court has repeatedly said that under the Eighth Amendment "the qualitative difference of death from all other punishments requires a correspondingly greater degree of scrutiny of the capital sentencing determination." *California v. Ramos*, 463 U.S. 992, 998-999 (1983). Accordingly, many of the limits that this Court has placed on the imposition of capital punishment are rooted in a concern that the sentencing process should facilitate the responsible and reliable exercise of sentencing discretion.

Caldwell, at 328-29. Although the State does not ask the Court to mislead the jury, the Court worries the jurors will not feel the "awesome responsibility" the Supreme Court requires as consistent with, and "indispensable" to, satisfying the Eighth Amendment.

> In evaluating the various procedures developed by States to determine the appropriateness of death, this Court's Eighth Amendment jurisprudence has taken as a given that capital sentencers would view their task as the serious one of determining whether a specific human being should die at the hands of the State. Thus, as long ago as the pre-*Furman* case of *McGautha v. California*, 402 U.S. 183 (1971), Justice Harlan, writing for the Court, upheld a capital sentencing scheme in spite of its reliance on jury discretion. The sentencing scheme's premise, he assumed, was "that jurors confronted with the truly awesome responsibility of decreeing death for a fellow human will act with due regard for the consequences of their decision. . . ." *Id*. Belief in the truth of the assumption that sentencers treat their power to determine the appropriateness of death as an "awesome responsibility" has allowed this Court to view sentencer discretion as consistent with—and indeed as indispensable to—the Eighth Amendment's "need for reliability in the determination that death is the appropriate punishment in a specific case." *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976) (plurality opinion).

Caldwell, at 329-330.

The State also complains that this Court is forcing it to lie to the jurors. First, the Court has done no such thing (except for the one instance when the State violated the Court's ruling). The State does not have to refer—one way or the other—to whether this Court is bound by the jury's sentencing verdict. The Court has only ruled that the State should not advise the jurors that their verdict is a recommendation. Second, information is routinely withheld from jurors for the purpose of ensuring due process. Indeed, sometimes we even affirmatively mislead jurors. For example, we tell jurors not to concern themselves with sentencing because the judge determines the sentence if the defendant is convicted. Yet, this is blatantly untrue in cases where a defendant is charged with first degree murder or who has been enhanced as a prison releasee reoffender. In those cases, the Court has no discretion as to sentencing at all, yet we tell the jurors it does. In short, it is acceptable to withhold factual and procedural information from jurors that is not relevant to their decision and which could prejudice one of the parties.

This is equally true with regards to the jury's role in death penalty sentencing. There is no relevant reason to advise the jury that its sentencing verdict is a recommendation. On the other hand, if this Court's concern—and the concern expressed by the United States Supreme Court in *Caldwell*—is legitimate, then there is a detriment to the Defendant in advising the jury that their verdict is a recommendation. Conversely, there is no harm to the State in not telling the jury this irrelevant fact.

Based on the Capital Jury Project's[4] interviews of jurors who served in capital cases, law professor Joseph L. Hoffman concluded:

> In this Article, I will suggest that the Court's continuing difficulty with the *Caldwell* rule can be traced to the way in which the Court originally articulated the rule. In light of the evidence supporting juror misperception of responsibility that is now emerging from the Capital Jury Project, I will propose that we consider framing the *Caldwell* rule in terms of a positive duty, not a negative prohibition. Instead of focusing on the extent to which jurors might have been misled by a prosecutor's argument or a judge's instructions, the rule should recognize that jurors are predisposed to use almost any available information to downplay their responsibility for the death sentencing decision-including information that accurately describes the sentencing process. I will therefore suggest that if society really cares about death penalty jurors' sense of personal moral responsibility, it should give the jurors—in every death penalty case—strong, unequivocal, affirmative instructions stating that the personal moral responsibility for the death sentencing decision rests with each and every one of them.

Joseph L. Hoffman, "Where's the Buck?—Juror Misperception of Sentencing Responsibility in Death Penalty Case," 70 Ind. L. J. 1137, 1138-39 (1995). *See* William J. Bowers, "The Capital Jury Project: Rationale, Design, and Preview of Early Findings," 70 Ind. L.J. 1043, 1076 (1995) ("Concerning both the California and Oregon studies, the investigators observed that 'there was a tendency among jurors from both samples to shift or abdicate responsibility for the ultimate decision-to 'the law,' to the judge, or to the legal instructions-rather

than to grapple personally with the life and death consequences of the verdicts they were called upon to render.' ").

The State's final argument is that the Florida Supreme Court has promulgated Standard Jury Instruction 7.11, which contains the recommendation language. First, the Florida Supreme Court did not issue the instruction at issue, a committee of the Court did. *See In re Amendments to Florida Rules of Judicial Admin., Florida Rules of Civil Procedure, & Florida Rules of Criminal Procedure-Standard Jury Instructions*, SC20-145, 2020 WL 1593030, *2 (Fla. Mar. 5, 2020) [45 Fla. L. Weekly S88a].

Second, the Florida Supreme Court has made it abundantly clear that the standard jury instructions are not binding on it and that trial judges are responsible for correctly instructing juries. *See id*. ("In authorizing the publication and use of these instructions, we express no opinion on [the instructions'] correctness and remind all interested parties that this authorization forecloses neither requesting additional or alternative instructions nor contesting the legal correctness of the instructions.").

This Court has been scrupulous about explaining the process the jury must undertake.[5] It has advised, and will advise, them of all relevant factors they must consider in determining the appropriate sentence. Since neither Florida statutory law, precedent, nor the rules of criminal procedure require that the jury be advised that its verdict is a recommendation, the burden is on State to justify why this Court should so instruct the jury. However, the State has not given this Court any basis for concluding that the jury's verdict constituting a recommendation is a relevant fact about which the jury should be informed. Therefore, the Court declines to do so because it would violate the spirit of *Caldwell* for no good or relevant reason.

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[1]In fairness to the State, it has never indicated it will use the words "mere recommendation," and it has painstakingly explained the process to the potential jurors accurately and fairly. The Court's concern is not with the lawyers, but rather that the term recommendation inherently diminishes the significance of the jury's sentencing verdict. Neither the Court nor the lawyers need to utter the words "mere recommendation" for the jurors to understand that a recommendation is not binding, and thus their decision is not determinative.

[2]Having now had an opportunity to reflect on the questioned posed by the State and to study the issue, the Court intends to modify Standard Jury Instruction 7.11 in this manner:

> Regardless of the results of each juror's individual weighing process—even if you conclude that the sufficient aggravators outweigh the mitigators—the law neither compels nor requires you to ~~recommend~~ vote that the defendant should be sentenced to death.
>
> If 8 or more jurors vote for the death penalty, your recommendation verdict must be for the death penalty. ~~This recommendation is not binding on the Court. However, I am required to assign and give great weight and deference to your recommendation.~~

[3]The only real disadvantage is that it increases the judicial labor because doubtless the Court has had to excuse some jurors who, believing their decision was the final one, were unwilling or unable to vote for death.

[4]The Capital Jury Project was "a research initiative that attempted to analyze jurors' understanding of their role and the exercise of their discretion in capital sentencing cases through post-sentencing juror interviews." *Wade v. State*, 41 So. 3d 857, 872 (Fla. 2010) [35 Fla. L. Weekly S239a]. It was founded in 1991 and was supported by the National Science Foundation.

[5]In fact, when Rojas' counsel told prospective jurors that they could consider anything they thought was a mitigating circumstance, even factors which were not raised during the penalty phase, the Court sustained the State's objection and instructed the jurors they could only consider mitigating factors which the greater weight of the evidence supported.

* * *

Arbitration—Arbitrable issue—Torts—Motion to compel arbitration and stay litigation arising out of injuries sustained by ride-share driver is granted—Plaintiff expressly agreed to resolve through binding arbitration any disputes with defendant related to use of ride-share service's driver app, negligence claim based on vehicle accident clearly arose from and related to plaintiff's use of driver app, and defendant did not actively participate in suit or waive right to arbitrate—Further, even if arbitrability were not clear, arbitration clause delegates to arbitrator the exclusive authority to resolve all questions of arbitrability

AWAIS ALI, Plaintiff, v. RASIER, LLC, Defendant. Circuit Court, 17th Judicial Circuit in and for Broward County. Case No. CACE23004665, Division 25. November 14, 2023. Shari Africk Olefson, Judge. Counsel: Eric S. Rudenberg, Rubenberg & Glasser, P.A., Ft. Lauderdale, for Plaintiff. Veresa Jones Adams, ROIG Lawyers, Deerfield Beach, for Defendant.

ORDER GRANTING DEFENDANT RASIER-DC, LLC'S MOTION TO COMPEL ARBITRATION AND TO STAY ACTION

THIS CAUSE having come before the Court on Defendant Rasier-DC, LLC's ("Rasier") hearing on its November 9, 2023 Motion to Compel Arbitration and Stay Plaintiff Awais Ali's ("Ali" or "Plaintiff") Action, and after hearing arguments, reviewing the parties' submission, and being otherwise fully advised in the premises, the Court finds and concludes as follows:

Factual and Procedural Background

Uber is a technology company that uses its proprietary technology to develop and maintain digital multi-sided marketplace platforms. On one side of the marketplace, businesses and individuals utilize Uber's platforms in order to connect with customers and obtain payment processing services. One of Uber's multi-sided platforms is the Rides platform. Drivers, like Plaintiff Ali and Defendant Ernesto Gonzalez Portocarrer ("Gonzalez"), download the driver version of the Uber App ("Driver App"), and riders download the rider version of the Uber App ("Rider App"); together, the Apps allow users to access the platform that facilitates the connection of individuals in need of a ride with individuals willing to provide transportation services, and after completing all the necessary steps required to gain access to the Driver App, the Driver App enables Riders and Drivers to connect. *See* Declaration of Alexandra O'Connor ("Decl.") at ¶4.

Plaintiff initiated this action in Broward County Florida state court alleging injuries arising from an April 15, 2023 accident involving Mr. Gonzalez. See Plaintiff's Complaint at ¶ 12. Plaintiff claims that he was injured as a result of the accident and that Mr. Gonzalez was at fault for causing the accident. *Id*.

Prior to the accident, and according to Uber's business records, Plaintiff Ali signed up to utilize the driver version of the Uber App on or about January 16, 2022. (See Affidavit of Alejandra O'Connor, attached to Uber's Motion to Compel Arbitration.) Plaintiff Ali expressly agreed to Defendant's January 2022 Terms of Use of the Platform Access Agreement ("January 2022 Terms"), which included an arbitration provision to resolve any claims he may have against Rasier related to his use of the Uber platform on an individual basis through binding arbitration. As such, Plaintiff Ali agreed to Uber's terms, which required Plaintiff to resolve any claims that he may have against Defendant in arbitration. The terms also included a delegation clause, which gave the arbitrator *exclusive authority* to determine threshold questions of arbitrability.

Legal Standard

Where a party to an agreement to arbitrate refuses to submit to arbitration, Florida law permits the aggrieved party to move for an order compelling arbitration. *See* Fla. Stat. § 682.03(1). Pending determination of such a motion, the Court should stay any related judicial proceedings. *See* Fla. Stat. § 682.03(6); *Open MRI of Okeechobee, LLC v. Aldana*, 969 So. 2d 589, 590 (Fla. 4th DCA 2007) [32 Fla. L. Weekly D2920b] ("It is clear that the statute [§ 682.03] mandates a stay while a motion for arbitration is pending"); *Miller & Solomon General Contractors, Inc. v. Brennan's Glass Co., Inc.*, 824 So. 2d 288, 290 (Fla. 4th DCA 2002) [27 Fla. L. Weekly

D1902a]. "In ruling on a motion to compel arbitration, Florida courts should resolve all doubts in favor of arbitration rather than against it." *Medanic v. Citicorp Inv. Servs.*, 954 So. 2d 1210, 1211 (Fla. 3d DCA 2007) [32 Fla. L. Weekly D1007a]. Florida courts routinely find that "arbitration clauses are to be given the broadest possible interpretation in order to accomplish the purpose of resolving controversies outside of the courts." *See e.g.*, *Royal Caribbean Cruises, Ltd. v. Universal Employment Agency*, 664 So. 2d 1107, 1108 (Fla. 3d DCA 1995) [20 Fla. L. Weekly D2711a].

Legal Conclusions

A "trial court's jurisdiction is limited to three issues: (1) whether a valid written agreement to arbitrate exists; (2) whether arbitrable issues exist; and (3) whether the right to arbitrate has been waived." *Seifert v. U.S. Home Corp.*, 750 So. 2d 638 (Fla. 1999) [24 Fla. L. Weekly S540a]. Here, the Court finds that Defendant Rasier satisfied the three-part test and Plaintiff's claims are subject to Rasier's arbitration clause.

A valid written agreement to arbitrate exists between Plaintiff and Rasier. Here Plaintiff Ali expressly agreed to Rasier's terms that "required to resolve any claim that [they] may have against Uber on an individual basis in arbitration as set forth in this Arbitration Agreement." (See Affidavit attached to Rasier's Motion to Compel Arbitration at Ex. C and F.) The PAA is the operative agreement here, and it included an agreement to resolve disputes with Rasier through binding arbitration, which Plaintiff agreed to on or about January 16, 2022 by placing a check in the checkbox for both prompts stating "YES, I AGREE." *Id.* at ¶ 12. Plaintiff and Rasier thus entered into what is commonly known as a "clickwrap" agreement, which is enforceable under Florida law.

Likewise, prong two is satisfied as Plaintiff's claims clearly arise from and relate to Plaintiff's use of the services available through the Driver App, and as a result, fall squarely within the scope of the Arbitration Agreements. When Plaintiff agreed to the PAA's terms, he agreed to a clear and broad arbitration provision requiring that "any legal dispute" arising from his relationship with Rasier be resolved through binding arbitration. *Id.* at ¶ 15, and Ex. C thereto, at § 13.1(a). The Agreement encompasses ". . .*without limitation*, [ ] disputes between you and us" involving "federal, state, or local statutory, common law and legal claims (**including without limitation, torts**) arising out of or relating to your relationship with" Rasier and "to all incidents or accidents resulting in personal injury to you or anyone else that . . . **occurred in connection with your use of Uber's platform. . .**" which include the April 15, 2022 accident from where this case emanates. In doing so, Plaintiff waived their right to a jury trial. (Emphasis added.)

There is nothing unclear about the broad terms of the arbitration agreement and how they apply to this case. Plaintiff's claim against Rasier sounds in negligence, which is a tort under Florida law. And Plaintiff's claim not only "relates to" his relationship with Rasier and use of Uber's Rides Platform, but there is also a "significant relationship" between the contract and claims, as he is alleging personal injury that arose from an accident while using the Driver App. The test for determining arbitrability of a particular claim under a broad arbitration provision is whether a "significant relationship" exists between the claim and the agreement containing the arbitration clause, regardless of the legal label attached to the dispute (i.e., tort or breach of contract). *Seifert*, 750 So. 2d at 637-8, *see also Bachus & Stratton, Inc. v. Mann*, 639 So. 2d 35, 36 (Fla. 4th DCA 1994).

Regardless of the test for determining arbitrability, the PAA delegates exclusive authority to resolve all threshold arbitrability issues. Exhibit C, at § 13.3(a) and (j). Accordingly, the Court further finds that, contrary to Plaintiff's assertion, Defendant's January 2022 terms contain a delegation clause that evince the parties' intent to delegate issues, including gateway issues involving scope, formation, to the arbitrator. The FAA governs the Arbitration Provision (*see* Decl., Ex. C, § 13.1(a)) and prohibits courts from deciding any arbitrability questions if delegated to an arbitrator. *See Henry Schein, Inc. v. Archer & White Sales*, 139 S. Ct. 524, 530 (2019) [27 Fla. L. Weekly Fed. S610a] (the US Supreme Court has recognized that parties may agree to arbitrate "gateway questions of arbitrability. . . such as whether [the parties'] agreement covers a particular controversy). *See also Suarez v. Uber Technologies, Inc.*, 2016 WL 2348706 at *4 (M.D. Fla. May 4, 2016) ("Defendants' motion [to compel arbitration] should be granted on this basis alone and adjudication of Plaintiff's attacks on Arbitration Provision should be left to the arbitrator because it is clear and unmistakable that the parties agreed to arbitrate arbitrability"). *See Newman v. Ernst & Young LLP*, 231 So. 3d 464, 467 (Fla. 4th DCA 2017) [42 Fla. L. Weekly D2162c] (when a delegation provision is included in an arbitration agreement—like the delegation clause included in Rasier's PAA—a court only retains jurisdiction to review a challenge to that particular provision. **Absent a direct challenge, a court must treat the delegation provision as valid and allow the arbitrator to determine the issue of arbitrability**).

In contrast, the cases cited by Plaintiff are unavailing for the propositions presented by Plaintiff. In *Lennar Homes, LLC v. Wilkinsky*, the Fourth DCA **reversed** the lower court's decision denying the right to arbitrate held that the "plain language of the agreement controls." 353 So. 3d 654 (Fla. 4th DCA 2023) [48 Fla. L. Weekly D94a]. The Fourth DCA further held that the arbitration provisions expressly and unambiguously extended to personal injuries suffered by plaintiff within the residential community. The court also warns of the trial court's "mistaken belief" that the scope of an arbitration agreement is *always limited* to claims with a contractual nexus to the agreement when the terms do not expressly apply to the terms. *Id.* (Emphasis added.) In relying on *Seifert v. U.S. Home Corp.*,750 So. 2d 633 (Fla. 1999) [24 Fla. L. Weekly S540a] and *Jackson v. Shakespeare Found, Inc.*, 108 So. 3d 587 (Fla. 2013) [38 Fla. L. Weekly S67a]—cases cited by Plaintiff in his opposition to compel arbitration—the court remanded with directions to the lower court to grant the Defendant's motion to dismiss and to compel arbitration.

Similarly, in *Jackson*, *supra*, which involved a fraud claim related to a land purchase contract, **the court found the claim was within the scope of the arbitration provision**. Notably, in *Jackson*, the arbitrator was limited in her review of the scope as a result of the terms of the agreement. The agreement at issue did not include a delegation clause, and specifically limited the arbitrator's role. The agreement provided that:

> **(b) All other disputes:** Buyer and Seller will have 30 days from the date a dispute arises between them to attempt to resolve the matter through mediation, failing which the parties *will resolve the dispute through neutral binding arbitration* in the county where the Property is located. ***The arbitrator may not alter the Contract terms or award any remedy not provided for in this Contract***. . . . This clause will survive closing.

Id. at 591. (Emphasis added.)[1]

In *Calvary Chapel Church, Inc. v. Happ*, while applying the significant relationship and contractual nexus test, **the Fourth overturned the circuit court's denial of the school's motion to dismiss plaintiff's wrongful death complaint and found that school's claims were subject to arbitration**. 353 So. 3d 649 (Fla. 4th DCA 2023) [48 Fla. L. Weekly D73f]. *Happ* involved the suicide of a 13-year-old student after being disciplined. The school moved to

compel arbitration pursuant to the enrollment contract signed by the parents when the child was admitted to school. The Estate argued that plaintiff's claim did not arise from the child's enrollment. *Id*. at 651. The court found "although the plaintiff's action sounds entirely in tort and does not specifically include a breach of contract claim, the claims have a direct relationship to the enrollment contract and handbook's terms and provisions" warranting the court reversing the lower court's order denying the school's motion to dismiss and compel arbitration. *Id*. at 652.

Finally, Rasier did not actively participate in this lawsuit or waive its right to arbitrate. Defendant filed its Motion to Compel Arbitration as its responsive pleading.

Based on the foregoing, it is thereby **ORDERED and ADJUDGED** as follows:

Defendant Rasier-DC, LLC's Motion to Compel Arbitration and to Stay Litigation is **GRANTED.**

It is further **ORDERED** that this action is **STAYED** pending completion of arbitration pursuant to the terms of the Arbitration Agreements in this case. The Arbitrator shall determine what the arbitral issues are between Plaintiff and Rasier. The parties shall notify the Court upon completion of arbitration.

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[1]The cases cited by Plaintiff make no mention of the arbitration agreements containing a delegation clause like the agreement between Rasier and Mr. Ali.

* * *

Criminal law—DUI manslaughter—Search and seizure—Medical blood and records—Warrant—Affidavit for warrants for medical blood sample and documents did not contain statements that were intentionally false or made with reckless disregard for truth, or omit material facts with intent to deceive or with reckless disregard for whether information should be revealed to magistrate—Motion to suppress denied—Fact that officer initially requested, but did not obtain, blood vials through notice to preserve does not warrant exclusion of vials subsequently obtained through valid warrants

STATE OF FLORIDA, Plaintiff, v. ALLAN JOSEPH REYNA, Defendant. Circuit Court, 18th Judicial Circuit in and for Brevard County. Case No. 05-2017-CF-054901-AXXX-XX. July 23, 2023. Steve Henderson, Judge.

ORDER DENYING MOTION TO SUPPRESS EVIDENCE SEIZED PURSUANT TO INVALID SEARCH WARRANTS

THIS CAUSE came before the Court for hearing on April 26, 2022, December 7, 2022, and January 6, 2023 upon the Defendant's Motion to Suppress Evidence Seized Pursuant to Invalid Search Warrants filed on May 7, 2021, pursuant to Fla. R. Crim. P. 3.190. The Defendant appeared at the hearing with his counsels, R. Scott Robinson, Esq., and Gregory W. Eisenmenger, Esq., and the State was represented by Assistant State Attorney Michael W. Doyle, Esq. The Court reserved its ruling on the motion and took the matter under advisement. The Court heard and considered the arguments from counsel, carefully reviewed the motion, together with the testimony and evidence, and the authorities presented, along with the State's Closing Argument filed on January 24, 2023, Defendant's Closing Argument filed on February 1, 2023, and State's Rebuttal Response to Defendant's Closing Argument filed on February 14, 2023. Based upon that review, and being otherwise fully advised, the Court makes the following findings of fact and conclusions of law:

A. On December 15, 2017, the State charged the Defendant with one count of DUI manslaughter for driving, or was in actual physical control, of a vehicle while under the influence of alcoholic beverages to the extent that a person's normal faculties were impaired or while a blood-alcohol level of .08 or more grams of alcohol per 100 milliliters of blood by operating such vehicle which caused the death of M.L. on July 15, 2017.

B. The evidence the Defendant seeks to suppress is (1) his medical blood, other bodily fluids, the medical records, and any evidence derived from the Defendant's blood; (2) the results of examinations or tests run on the Defendant's blood; and, (3) any other evidence derived from the Defendant's blood or medical records following the seizure by the Melbourne Police Department. The Court has reviewed the Motion and finds it facially sufficient. *See State v. Gay,* 823 So. 2d 153, 154-55 (Fla. 5th DCA 2002) [27 Fla. L. Weekly D1390c]. The State bears the burden of proving, by a preponderance, the legality of the search and seizure of evidence which it intends to introduce at trial. *See Nix v. Williams,* 467 U.S. 431, 444 (1984); *United States v. Mendenhall,* 446 U.S. 544 (1980).

C. The Defendant argues that his motion to suppress should be granted because the affidavit and search warrant are invalid. According to the Defendant, there is no probable cause for the seizure; the affidavit contains material omissions regarding impairment; the affidavit misstates injuries, specifically the witness statement of Giselle Kelly Campuzano and if the omitted facts are added to the affidavit, they would defeat probable cause; and, the affidavit contains misstatements regarding the issuance of the notice to preserve evidence on the hospital. These alleged omissions and misstatements are the result of intentional or reckless police conduct that amounts to deception.

D. The issuance of a search warrant must be supported by probable cause. To establish the requisite probable cause for the search warrant, the affidavit must set forth facts establishing two elements: (1) the commission element—that a particular person has committed a crime; and (2) the nexus element—that evidence relevant to the probable criminality is likely to be located in the place searched. *See State v. Hart,* 308 So. 3d 232, 235 (Fla. 5th DCA 2020) [45 Fla. L. Weekly D2607d]. "The standard of probable cause for the issuance of a search warrant does not require a prima facie showing of criminal activity, just 'probable' criminality." (citations omitted). *Id.* Here, Judge Silverman examined solely the content of the four corners of the affidavit "simply to make a practical, common sense decision whether, given all the circumstances before him, there is a fair probability that evidence of a crime will be found in a particular place." *Id.* at 236; *see also Illinois v. Gates,* 462 U.S. 213 (1983). Consistent with *Hart,* the undersigned gives "great deference" to the county judge's finding of probable cause. 308 So. 3d at 236. However, this does not end the Court's analysis.

E. The affidavit must also be examined for omissions made with intent to deceive or with reckless disregard of whether such information should have been revealed to the magistrate. *See Pagan v. State,* 830 So. 2d 792, 807 (Fla. 2002) [27 Fla. L. Weekly S299a] (*citing Johnson v. State,* 660 So. 2d 648 (Fla. 1995) [20 Fla. L. Weekly S347a]). In *Pardo v. State,* 941 So. 2d 1057, 1066-67 (Fla. 2006) [31 Fla. L. Weekly S690a], "[i]f the affidavit creates a substantial basis for a finding of probable cause on its face, a defendant seeking to suppress the fruits of the warrant must establish that the affidavit contains statements that were intentionally false or made with reckless disregard for the truth. *See Franks v. Delaware,* 438 U.S. 154 (1978); *Thorp v. State*, 777 So. 2d 385, 391 (Fla. 2000) [25 Fla. L. Weekly S1056d]." "In the alternative, the defendant must demonstrate that the affidavit omits facts with intent to deceive or with reckless disregard for whether the information should have been revealed to the magistrate. [Citations omitted]." "If probable cause does not exist after excising such falsehoods or adding the material omitted, evidence acquired thereby must be suppressed. Thus, falsehoods and omissions from an affidavit used to obtain a search warrant can invalidate the initial probable cause determination, but they are not impeachment material in the sense of facts bearing on the credibility

of a testifying witness." *Id.*

F. Here, the affidavit in support of the search warrant was executed by Officer Mark Whitright with the Melbourne Police Department on August 1, 2017. *Defendant's Exhibits 38 & 39.* The affidavit states that Officer Whitright is a certified law enforcement officer with certification after attending over 700 hours of training and passing the State Exam; he lists his work experience, in particular Officer Whitright has been assigned to the Selective Traffic Enforcement Until since 2011 and investigated numerous traffic fatalities, including traffic homicide investigations, search/arrest warrants.

G. The search warrant sought any vials of blood held by Holmes Regional Hospital as part of medical treatment in order to perform testing for alcohol, chemical substances, or controlled substances therein. The affidavit seeks a warrant for property that constitutes evidence relevant to the listed offenses: Driving Under the Influence Manslaughter, Vehicular Homicide, and Driving Under the Influence Injury. Officer Whitright swears probable cause exists, among other things, Giselle Kelly Campuzano's written statements prepared on July 15, 2017 and August 1, 2017. Ms. Campuzano testified at the suppression hearing on December 7, 2022.

H. During the evidentiary hearing on the defense motion to suppress, Ms. Campuzano testified that on July 15, 2017, at approximately 7:15 p.m., she was driving on US-1 in Melbourne when she observed in her rearview mirror a motorcycle behind her, on several occasions, weaving in and out of traffic lanes without signaling and playing loud music. She testified the motorcycle was going fast while passing vehicles on the roadway and she made a point to distance herself from the motorcyclist. However, the motorcyclist caught up to Ms. Campuzano's vehicle and was driving to the left of her vehicle in the furthest left lane. She testified that she observed a passenger reaching behind her and holding onto the backseat of the motorcycle when typically people hold onto the front. She testified that the passenger was holding on to her life. She observed the motorcycle lose control, speed across three lanes of traffic from the farthest left lane and made contact with a guardrail. The motorcyclist hit the railing, but the motorcycle continued down the lanes without a driver. The driver and the passenger landed on the ground. Ms. Campuzano testified she stopped her vehicle approximately a car distance behind the motorcycle. She stopped behind the motorcycle by the railing, called 911, and exited her vehicle to see if anyone needed help. She made contact with the driver and passenger who were close to each other. Other motorists stopped as well. She observed the passenger lying on her chest in the roadway and was not moving. She made contact with the male driver who was approximately in his early forties but did not speak to him. She was more than 20 feet from the motorcyclist. Ms. Campuzano testified the motorcyclist was incredibly angry, using profanity, and was unable to stand on his own, supporting himself by the railing. He directed his profanity to the bystanders who also stopped. She remained at the scene when the police and paramedic arrived. She also observed the motorcyclist using excessive profanity and yelling at the paramedic to turn the passenger over. She testified that someone with that amount of anger would be under the influence of something. However, she did not get close enough to the motorcyclist to smell the odor of alcohol and did not know how a person with a head injury would react.

I. While at the scene, an officer asked how the accident occurred and she provided a written statement, but did not have a lot of time to write it. *State's Exhibit 4.* Ms. Campuzano made a second statement on August 1, 2017, after the officer called her to elaborate on her first statement. *State's Exhibit 3.* Ms. Campuzano's second statement is more detailed and she testified that no officer pressured her to make the second statement. She testified that the motorcyclist's anger was why she suspected he was under the influence.

J. Ms. Campuzano testified that she made an audio statement to the police five days after the accident. The recording of Ms. Campuzano's statement was published to the Court. *Defense's Exhibit 51.* She testified that in the audio she told the police that she was traveling approximately 45 mph and when he passed her vehicle and that he was going no less than 50 mph. She testified that the motorcyclist was supporting himself on the railing when the paramedics tended to the passenger lying on the ground in front of him. She does not recall exactly how close he came to the police and the paramedics.

K. In the affidavit, Ms. Campuzano's July 15, 2017 handwritten statement states as follows:

> The motorcycle was on furthest left lane, I on furthest right lane, crossed over in front of me no light signal lost control, hit curb and railing. Going very fast. Lady holding the back of chair. On Harbor City Blvd. heading North, 2 people on bike. I, right behind them. He was driving. Music very loud.

Thereafter, Ms. Campuzano prepared on August 1, 2017 a more detailed handwritten statement as follows:

> After calling 911, was near crowd around couple. Driver was yelling at bystanders to turn the passenger over on back. Yelling/cursing increased as no one followed through. Not able to turn over passenger since he was fully supporting himself on the railing, erratic behavior/ shaken yelling her name over and over. Acting as if he was under the influence as he tried to turn around to face the passenger he stumbled, was not stable or [had] full balance was not able to observe if leg or foot was injured. Very rude to officers.

In the sworn probable cause affidavit executed by Officer Mark Whitright on August 1, 2017, he referenced Ms. Campuzano's statement to support probable cause as follows:

> Your affiant was advised by Officer Musante that eyewitnesses Giselle Kelly Campuzano told Officer Musante that she saw the motorcycle pass her vehicle northbound, occupied by a male operator and female passenger. Campuzano observed the crash occur and stopped to render aid. Upon arrival of officers, the motorcycle's license plate number yielded identification for the registered owner, identified as Allan Joseph Reyna. . .[c]ontact was then made with the witnesses of the crash on scene who provided their account of the crash. The witnesses indicated that they saw the motorcycle traveling at a high rate of speed. When asked, a witness relayed they knew the motorcyclist was speeding as they were doing the posted limit, and the motorcyclist passed them prior to the crash. Witnesses also stated when the motorcycle entered into the curve, the motorcycle failed to negotiate the curve. The motorcyclist also failed to stay within a single lane prior to the crash the motorcycle was "traveling at a high rate of speed" and "weaved in and out of lanes." Witness Campuzano stated in her written statement the motorcycle, "crossed over in front of me, no light signal" and "going very fast."
>
> Allan Joseph Reyna was observed by witness Campuzano at the crash scene exhibiting erratic behavior, displaying unsteady gate, poor balance, placing his full weight on the guardrail, stumbling when turning around from the railing, exhibiting no energy to turn, yelling, cursing, and acting "as if he was under the influence."

L. Officer Whitright also referenced in the affidavit the witness statement of Benjamin James Taylor taken on July 15, 2017. Mr. Taylor stated that at approximately 7:15 p.m., he was traveling northbound on Harbor City Blvd. when a motorcycle with a driver and one passenger passed him on his left. The motorcyclist was "traveling at a high rate of speed" and "weaved in and out of lanes." A few hundred feet ahead of Mr. Taylor the motorcyclist lost control and "went up over the curb and hit the guard rail." At this point, the driver and passenger were ejected from the motorcycle and fellow motorists stopped and dialed 911.

M. The Court finds Ms. Campuzano's testimony at the hearing,

coupled with her witness statements, credible that the Defendant was "[a]cting as if he was under the influence." However, the affidavit did not include that she "was unable to observe if [the Defendant's] leg or foot was injured. . ." which could have contributed to his instability or imbalance. This omission, if added to the affidavit, would not have defeated probable cause and the omission was not the result of intentional or reckless police conduct that amounts to deception. *See Pagan v. State,* 830 So. 2d 792, 807 (Fla. 2002) [27 Fla. L. Weekly S945a] ("The inclusion of statements by innocent mistake is insufficient to defeat the authenticity of an affidavit"). *Assuming arguendo* Officer Whitright acted deceptively by including in the affidavit that Ms. Campuzano observed that the Defendant was acting as if he was under the influence, the Court determines the remaining allegations in the affidavit are sufficient to establish probable cause and the alleged misleading statement will not invalidate the resulting search warrant. "Some omissions may be 'intentional' but also reasonable in the sense that they exclude material police in good faith believed to be marginal, extraneous, or cumulative. Such an exclusion is a valid and necessary part of the warrant process." *Johnson v. State,* 660 So. 2d 648, 656 (Fla. 1995) [20 Fla. L. Weekly S347a].

N. The Defendant also claims the affidavit upon which the search warrant was based contains misleading or omitted information, which when excised does not leave an affidavit that supplies probable cause to search. Specifically, the Defendant claims that Officer Whitright's affidavit does not inform the Court that Officer Linehan determined that the Defendant was not impaired or there was any suspicion of alcohol use. Further, Officer Whitright failed to include in his affidavit for a search warrant the Traffic Homicide Detective's report completed on November 27, 2017, wherein he stated, "Reyna was reportedly in good health and mental state and had no physical conditions that would have been a factor in the occurrence of this crash." Nevertheless, Officer Musante's report concluded that the Defendant operated his vehicle in a careless manner while under the influence.

O. During the evidentiary hearing on the defense's motion to suppress, Officer Linehan testified that on July 15, 2017, it was his first day in the traffic unit. He responded to the scene, but upon arrival the parties involved in the crash had already been transported to the hospital. He responded as part of the traffic unit on a secondary basis and was tasked to complete the long form of the crash report. *State's Exhibit 5*. He spoke to Officer Musante regarding the dynamics of the crash, he walked through the scene, but did no other crash investigation. He returned to his vehicle to complete the long form. Officer Linehan testified that in his report, there are pre-printed forms with (canned) responses that an officer checks off. Officer Linehan testified that he had no contact with the Defendant or the injured female and did not speak to any of the witnesses. Officer Linehan testified he did not refer to resources when he checked the boxes regarding no suspected alcohol or suspected drug use. He testified that he did not think he was qualified to do the role of a traffic homicide investigator at the time of the crash. Officer Linehan testified that he went to the ambulance bay, but did not have interaction with the Defendant. He went to the hospital to deliver a copy of the driver exchange to Officer Musante.

P. Officer Mark Daniel Whitright testified at the suppression hearing that he has been with the Melbourne Police Department for approximately 25 years. In June 2017, he was assigned to the selective traffic unit, which included proactive traffic enforcement and traffic accidents involving serious injury or death. He was involved in the investigation of the traffic homicide that occurred on July 17, 2017. After the collision, he assisted Officer Musante with the measurements of the post-collision inspection of the motorcycle involved; he met with the traffic unit; and, later mapped the scene to create a scaled diagram. Officer Whitright testified he did not have personal contact with the Defendant on July 15, 2017. He drafted the affidavits in support of the search warrant. On August 1, 2017, a search warrant was undertaken. The policy at that time was a drug recognition officer ("DRE") had to author the affidavits in search of blood. Officer Whitright testified that his position as a DRE did not have an impact on the investigation of this case. The officer was handed Defendant's Exhibit 38 (search warrant affidavit and warrant in support of obtaining blood samples) and Exhibit 39 (affidavit and search warrant affidavit in support of obtaining medical records) and reviewed the same. He testified that the resources he utilized in preparing the affidavit included the witness statements of Ms. Campuzano and another witness, the crash report, and the National Highway Traffic Safety Administration "NHTSA" guide predicting impaired motorcycle operation. Once the affidavits were drafted, he submitted them to Assistant State Attorney Michael Hunt with the felony intake who reviewed and approved them. Officer Whitright then took the affidavits to the Honorable Judge Silverman and he reviewed them, placed Officer Whitright under oath, and notarized the affidavits. He took the search warrant to the records department at Holmes Regional Hospital and obtained the medical records late in the afternoon. The following morning, he served the search warrant for the blood specimen at the hospital. The blood was tendered to the officer and he brought it back to the police station, packaged it, and submitted the blood specimen for analysis. Officer Whitright testified that on August 1, 2017, Officer Desormier requested his assistance on the investigation. The crash report was prepared by Officer Linehan. In the affidavit, the actual speed was undetermined. Officer Whitright testified he did not speak to any officers that were present at the scene. He reviewed Officer Linehan's report to refresh his memory. *State's Exhibit 5*. According to the report, Officer Linehan did not have suspicions of alcohol or drug use. He testified that at the time he assisted Officer Musante, the investigative packet had not been entered and the traffic homicide investigation was not yet completed. Officer Whitright testified as to which officer's report he reviewed in drafting the search affidavit. He testified that Officer Hibbs was the first officer to arrive on scene and that he assessed the Defendant who had a severe head injury and was yelling at the fire department personnel to assist his fiancé. Another firefighter was able to get the Defendant to calm down. Officer Whitright testified that according to Officer D'Errico's report, he arrived at the same time as Officer Hibbs. He reviewed Officer Koubek's report. Officer Whitright testified that only alcohol was found in the Defendant's blood. He spoke to Officer Musante before he drafted the affidavit. He testified that he had reviewed the statements from the witnesses—which are the two written statements from Ms. Campuzano dated July 15, 2017 and August 1, 2017. He agrees Ms. Campuzano's first statement did not include alcohol impairment, but discusses the Defendant's driving pattern. Officer Whitright was unaware of Ms. Campuzano's audio statement. Based on his investigation, he did not know how close she was to the Defendant and did not follow-up because it was not his investigation. In the third statement, it was a continuation of Ms. Campuzano's first statement. Officer Whitright referred to the Defendant's exhibits 38 and 39. He did not include in his affidavits the entire statement of Ms. Campuzano or police reports that did not indicate alcohol use. He testified NHSTA is a guide regarding impairment, such as, weaving, drifting, serving, speeding, running off the roadway, and is used as a reference material that lists driving queues of impairment. He used the information he had to determine enough probable cause at hand. He reviewed a statement from EMS personnel - Jason Frost, but did not include Mr. Frost's statement in the affidavit. Officer Whitright testified that typically what he provides in the affidavit is what is observed and not what is not observed in drafting an affidavit. He gives trained officers the weight

regarding the officer's observations. He was aware that Officer Musante met with the Defendant at the end of July at his attorney's office. He testified he cannot recall that the Defendant denied being under the influence. The officer testified he did not include the officer's or the paramedic's report of no impairment because they did not mention in their reports any indicators of impairment.

Q. After considering all of the testimony and evidence presented at the suppression hearings, the Court finds the search warrant for the medical blood sample and documents do not contain intentionally and knowingly or reckless false statements or omissions. Even if the medical blood evidence was initially pulled and saved pursuant to the Notice to Preserve, there are other facts in the search warrant affidavit that justify the issuance of the search warrant for the medical blood. Pursuant to the accident report, coupled with the fact that the passenger died as a result of the motorcycle crash, made the medical blood relevant pursuant to the ongoing crash investigation and pending criminal investigation. The fact that the officer initially requested through a notice to preserve, but did not obtain from the medical staff, the blood vials drawn in the course of the Defendant's treatment, this alone does not warrant the exclusion of the blood vials subsequently obtained through valid search warrants. The notice to preserve does not constitute the type of governmental misconduct that would warrant exclusion of the medical vials subsequently obtained through the search warrant. The police acted in good faith because they did not mislead the issuing judge, nor omitted material facts in the warrant application. To exclude the evidence in this case serves no deterrent purpose. *See Herring v. United States,* 555 U.S. 135 (2009) [21 Fla. L. Weekly Fed. S582a] ("To trigger the exclusionary rule, police conduct must be sufficiently deliberate that exclusion can meaningfully deter it. . .[E]xclusionary rule serves to deter deliberate, reckless, or grossly negligent conduct, or in some circumstances recurring or systemic negligence."). Accordingly, it is

ORDERED AND ADJUDGED:

The Defendant's Motion to Suppress Evidence Seized Pursuant to Invalid Search Warrant is **DENIED**.

* * *

Criminal law—DUI manslaughter—Search and seizure—Blood draw—Medical blood—Drawing of defendant's blood by hospital for medical diagnosis and treatment purposes, without any state involvement in blood draw or testing, does not violate Fourth Amendment or right to privacy under Florida Constitution—Hospital's actions in complying with notice to preserve medical blood did not amount to warrantless seizure of blood or meaningful interference with defendant's constitutionally protected possessory rights—Defendant had no possessory right to blood specimen at time of notice—Fact that officer initially requested, but did not obtain, blood vials through notice to preserve does not warrant exclusion of vials subsequently obtained through valid search warrants—Amended motion to suppress is denied

STATE OF FLORIDA, Plaintiff, v. ALLAN JOSEPH REYNA, Defendant. Circuit Court, 18th Judicial Circuit in and for Brevard County. Case No. 05-2017-CF-054901-AXXX-XX. July 23, 2023. Steve Henderson, Judge.

ORDER DENYING AMENDED MOTION TO SUPPRESS (ILLEGAL SEIZURE OF DEFENDANT'S BLOOD)

THIS CAUSE came before the Court for hearing on April 26, 2022, December 7, 2022, and January 6, 2023 upon the Defendant's Amended Motion to Suppress (Illegal Seizure of Defendant's Blood) filed on April 30, 2021, pursuant to Fla. R. Crim. P. 3.190. The Defendant appeared at the hearing with his counsels, R. Scott Robinson, Esq., and Gregory W. Eisenmenger, Esq., and the State was represented by Assistant State Attorney Michael W. Doyle, Esq. The Court reserved its ruling on the motion and took the matter under advisement. The Court heard and considered the arguments from counsel, carefully reviewed the motion, together with the testimony and evidence, and the authorities presented, along with the State's Closing Argument filed on January 24, 2023, Defendant's Closing Argument filed on February 1, 2023, and State's Rebuttal Response to Defendant's Closing Argument filed on February 14, 2023. Based upon that review, and being otherwise fully advised, the Court makes the following findings of fact and conclusions of law:

A. On December 15, 2017, the State charged the Defendant with one count of DUI manslaughter for driving, or was in actual physical control, of a vehicle while under the influence of alcoholic beverages to the extent that a person's normal faculties were impaired or while a blood-alcohol level of .08 or more grams of alcohol per 100 milliliters of blood by operating such vehicle which caused the death of M.L. on July 15, 2017.

B. The evidence the Defendant seeks to suppress is (1) the vials of medical blood seized by the police, (2) the results of examinations or tests run on the Defendant's blood; (3) and, any other evidence derived from the Defendant's blood following the seizure. The Court has reviewed the Motion and finds it facially sufficient. *See State v. Gay,* 823 So. 2d 153, 154-55 (Fla. 5th DCA 2002) [27 Fla. L. Weekly D1390c]. The State bears the burden of proving, by a preponderance, the legality of the search and seizure of evidence which it intends to introduce at trial. *See Nix v. Williams,* 467 U.S. 431, 444 (1984); *United States v. Mendenhall,* 446 U.S. 544 (1980).

C. The Defendant argues that his motion to suppress should be granted because his medical blood was illegally seized in violation of his federal and state constitutional rights to privacy and against unreasonable search and seizure. According to the Defendant, law enforcement coerced the hospital into acting as its agent to seize and hold the Defendant's blood two weeks before obtaining search warrants.

D. Article I, section 23 of the Florida Constitution provides that: "Every natural person has the right to be let alone and free from governmental intrusion into his private life *except as otherwise provided herein*." (Emphasis added). In *State v. Geiss,* 70 So. 3d 642, 645 (Fla. 5th DCA 2011) [36 Fla. L. Weekly D1575b], the Court opined that "this provision cannot be interpreted without reference to other provisions in the Florida Constitution addressing governmental intrusion into one's private life." The Court further explained the interpretation of the right to privacy relating to the other sections of the Florida Constitution as follows:

> Significantly, article 1, section 12 of the Florida Constitution requires that the state constitutional right against unreasonable searches and seizures "shall be construed in conformity with the 4th Amendment to the United States Constitution, as interpreted by the United States Supreme Court." Because article 1, section 12 expressly authorizes governmental searches and seizures to the extent found to be reasonable under the Fourth Amendment by the United States Supreme Court, the "except as otherwise provided herein" language of article 1, section 23 must be read as authorizing governmental intrusion into one's private life to the same measure. *See L.S. v. State,* 805 So. 2d 1004, 1008 (Fla. 1st DCA 2001) [26 Fla. L. Weekly D2970a] ("Article I, section 23, does not modify the applicability of Article I, section 12, so as to provide more protection than that provided under the Fourth Amendment . . . .") (citing *State v. Hume,* 512 So.2d 185, 188 (Fla. 1987)). Thus, if the search warrant was valid under the Fourth Amendment, it cannot be barred by article I, section 23.

Id. at 645-46.

E. It is well settled that the government's withdrawal of blood from a person's body without a warrant or consent is a search and seizure under the Florida Constitution. However, the Defendant was not subjected to a forcible extraction or a warrantless blood draw of his

blood when there is reason to think it would yield evidence of a crime. (Footnote[1]). Therefore, it does not afoul of the Fourth Amendment, or the Defendant's right to privacy under the provision of the state or federal constitution. In the present case, the blood was drawn by the hospital for medical diagnosis and treatment purposes only. As there was no state involvement in its withdrawal or testing, the drawing of the Defendant's blood did not implicate Article I, section 23 of the Florida Constitution. *See e.g., Lawlor v. State,* 538 So. 2d 86, 87 (Fla. 1st DCA 1989) ("We find the blood was properly drawn for dual medical and law enforcement purposes and that the results derived from the blood samples were properly admitted at trial.").

F. The question remains, however, whether the State's request to preserve the medical blood evidence prior to obtaining the search warrants violated Article I, section 23 of the Florida Constitution. This maybe a matter of first impression; nevertheless, several courts in other jurisdictions have addressed this issue or similar issue. A Court of Appeals of Indiana held that "to the extent the defendant does have an expectation of privacy in his medical records generally, we conclude that in Indiana at least, society does not recognize a reasonable expectation of privacy in blood alcohol test results obtained and recorded by a hospital as part of its consensual treatment of a patient, where those results are requested by law enforcement for law enforcement purposes only in the investigation of an automobile accident." *See Hannoy v. State,* 789 N.E.2d 977, 991 (Ind.Ct.App.2003); *see also Tims v. State,* 711 So.2d 1118, 1122-24 (Ala.Crim.App.1997); *People v. Perlos,* 436 Mich. 305, 462 N.W.2d 310, 319-21 (1990); *State v. Guido,* 698 A.2d 729, 733-34 (R.I.1997); *State v. Hardy,* 963 S.W.2d 516, 523-27 (Tex.Crim.App.1997); *State v. Jenkins,* 80 Wis.2d 426, 259 N.W.2d 109, 113 (1977). Other jurisdictions have held that the government's acquisition of medical records violates the defendant's rights under state constitutional provisions that guarantee a right to privacy, *see, e.g., King v. State,* 272 Ga. 788, 535 S.E.2d 492, 494-97 (2000); *State v. Nelson,* 283 Mont. 231, 941 P.2d 441, 446-50 (1997). While the decisions in other jurisdictions are not binding upon this Court, the reasoning of those cases that focus on the unique circumstances presented here. That is, law enforcement requests the hospital to preserve the medical blood and tests administered for the purpose of diagnosis and treatment of injuries sustained in an automobile accident and then obtains the same through search warrants. The Defendant also alleges that no one asked for or acquired his informed consent. However, the hospital provided a consent form stating as follows: "I further authorize my physician or the hospital to retain, preserve, use for the scientific, educational research purposes, or dispose of as they see fit, any specimens or tissues taken from my body during hospital or clinical visits." *State's Exhibit 9.*

G. In *Ferguson v. Charleston,* 532 U.S. 67 (2001) [14 Fla. L. Weekly Fed. S152a], at issue was a policy implemented by the police, a state hospital, and local officials to obtain evidence that could be used to prosecute pregnant women who tested positive for drugs. *Id.* at 69-71. Under the policy, the state hospital tested urine samples of maternity patients suspected of drug use. *Id.* at 70-73. The Supreme Court held that without the patient's informed consent, a state hospital's performance of diagnostic tests to obtain evidence of a patient's criminal conduct for law enforcement purposes was an unreasonable search under the Fourth Amendment. *Id.* at 84-86. In this context, the Supreme Court stated that "[t]he reasonable expectation of privacy enjoyed by the typical patient undergoing diagnostic tests in a hospital is that the results of those tests will not be shared with nonmedical personnel without her consent." *Id.* at 78. However, the Supreme Court also noted that the existence of a statutory mandatory reporting requirement "might lead to a patient to expect that members of the hospital staff might turn evidence acquired in the course of treatment to which the patient had consented," *id.* at 78 n. 13, and declined to address a case in which doctors independently complied with reporting requirements, *id.* at 85 n. 24. The Supreme Court also stated that "[w]hile state hospital employees, like other citizens, may have a duty to provide the police with evidence of criminal conduct that they inadvertently acquire in the course of routine treatment, when they undertake to obtain such evidence from their patients *for the specific purpose of incriminating those patients,* they have a special obligation to make sure that the patients are fully informed about their constitutional rights. . . ." [*Emphasis added*]. Based upon the foregoing, the Supreme Court found a violation of the Fourth Amendment because the testing was done for, and in conjunction with, law enforcement. However, in this case, as there was no law enforcement involvement in the taking or testing of the Defendant's blood, *Ferguson* does not apply. *See also Thomas v. Nationwide Children's Hosp.,* 882 F. 3d 608 (6th Cir. 2018) (emergency room physicians did not violate infant patient's Fourth Amendment rights when physicians ordered diagnostic x-rays, CT scans, and blood tests after they were brought into hospital's emergency room for serious injuries, even though tests eventually led to state investigation of parents for child abuse); *State v. Eads,* 154 N.E. 3d 538, 541 (May 6, 2020) (officer's warrantless acquisition of defendant's medical records was in violation of his Fourth Amendment rights; however, the exclusionary rule does not require the suppression of those unlawfully obtained test results).

H. The Defendant argues the blood is a person's property and when the Melbourne Police Department served the notice to preserve his medical blood 4 days after the accident without his knowledge or consent, this constituted a warrantless seizure because the hospital would have disposed of the blood in 5 days. The State counters that the staff at the hospital treated the notice to preserve as a routine request and responded accordingly and no seizure took place.

I. During the evidentiary hearing on the defense motion to suppress, Officer Joseph Musante testified that served eighteen years with the Melbourne Police Department before he retired on October 4, 2021. He attended traffic homicide school. On July 15, 2017, Officer Musante was working in the traffic unit as a traffic homicide investigator and Officer Linehan served as the accident investigator. According to Officer Linehan's Florida Highway Traffic Accident Report, he did not suspect alcohol use. He testified that Officer Linehan did not have direct contact with the Defendant. He testified that Officer Linehan concluded in his report that the investigation was not related to alcohol use independent of what he told Officer Linehan and he was not informed of this either. On July 15, 2017, the dispatcher contacted the on-call officer and he responded to the fatal crash on US Highway 1. At the time of the notification, Officer Musante was off-duty and received the call. He testified that he went directly to the scene in his patrol car and arrived at approximately 7:51 p.m. Upon arrival, he spoke with the sergeant. He did not observe the Defendant or the injured or deceased female at the scene. Officer Musante testified that he learned the crash involved a single motorcycle crash with two individuals on the vehicle. The Defendant and victim were transported to the Holmes Regional Medical Center accompanied by a sergeant and an officer. He testified that he interviewed two witnesses, Mr. Benjamin Taylor and Ms. Giselle Campuzano, who remained at the crash scene. Officer Musante testified at least three law enforcement officers and fire department personnel were still responding to the scene when he arrived. He also spoke to two other officers. He testified that he spoke with Officer Hibbs and his statement was entered in evidence at the hearing. Officer Hibbs told Officer Musante that personnel tended to the female lying on the ground and the Defendant became irate with them. By stipulation, Officer D'errico's statement to Officer Musante was

entered in evidence. Officer Musante testified that after the scene was mapped out, he arrived at the hospital at 9:33 p.m., where he learned the female passenger passed away. Upon arrival, he attempted to interview the Defendant, but hospital personnel were tending to him and he appeared seriously injured. He then contacted the medical examiner's office due to the death of the passenger. He left the hospital and went back to the police department. On July 16, 2017, he prepared his reports, and on July 18, 2017, the vehicle was towed, the vehicle's damage was investigated, and he also contacted the witnesses again. Officer Musante testified that on July 19, 2017, he returned to the hospital and served a notice to preserve blood evidence, which he used for the first time and was directed by the traffic sergeant to serve the notice. The notice form was held at the Melbourne Police Department and already existed when he served it. Officer Musante testified he spoke to the laboratory supervisor and served the notice and no questions were asked. Officer Musante testified he served the notice, because law enforcement was unable to interview the Defendant at the scene or the hospital. Generally, the police would have been able to make immediate contact with the individual to request a blood specimen. Officer Musante testified that he believed the Defendant's blood alcohol level was relevant in the investigation because of the observations of the Defendant's behavior by Officer Hibbs and D'Errico at the scene. Officer Musante testified that before using the notice to preserve evidence dated July 19, 2017, at the direction of his supervisor, he had never used the form before. Up to the point of using the notice, he testified he had no evidence of alcohol involved in the crash. He testified that he did not know of the hospital's policy of disposing blood within five days and it was his first experience with using the notice to preserve. He testified that he understood the notice was note a search warrant or a subpoena. Officer Musante testified that the normal procedure with any crash, law enforcement tries to obtain a voluntary blood draw of the party involved, but in this case, the officer could not obtain one on the day of the crash. Officer Musante did not inform the Defendant that he was going to obtain the blood from the hospital or ask if he would allow law enforcement to obtain the blood. As of July 27, 2017, Officer Musante advised the Defendant and counsel there was an active accident investigation but not a criminal investigation.

J. During the evidentiary hearing on the defense motion to suppress, Ms. Price testified that she is a supervisor of a team of forty-nine people at Holmes Regional Medical Center, including phlebotomists and processors. She ensures they are following state and federal regulations. Ms. Price testified that she has held the same position since July 19, 2017. Ms. Price was given State's Exhibit 8—Notice to Preserve Evidence and testified that she was not the individual that handled the blood specimen notated on the notice, but her associate. Upon receipt of the notice to preserve, it is given to the processors to preserve the blood specimen. She testified that before July 2017, she was aware of similar requests while employed at the hospital and these request are sent from the medical examiner's office or the sheriff's office. Ms. Price testified the requests arise from a medical examiner, the sheriff's department, or a member of law enforcement to preserve evidence arising from an accident. She testified that the blood specimen was taken from the Defendant for medical treatment. The hospital's normal course of action is to keep the blood specimen for four days because the stability of the specimen would not be viable for the testing that was performed. Ms. Price testified that the hospital does not have the capability of prolonging the viability of the blood specimen. After receipt of the notice, she testified there is an automation for testing and then the blood sample is stored and refrigerated. The automation process consists of documenting it into the computer and binder, the blood is placed on the instrument for testing, and once the testing is completed, it goes into a storage base and remains there for four days. After four days, the blood is disposed of automatically. Pursuant to the notice, someone from the hospital physically removed the blood from the storage base. After the request to preserve is made, the blood would be held for ninety days and after ninety days, the blood would be discarded. Ms. Price testified that the hospital does not notify the patient that the hospital was preserving the blood. She testified that a patient would need to be contacted, if a court order was not issued for the medical records, but not for the blood specimen. Ms. Price was handed Defense's Exhibit 37, and she testified there is a standard release form to release to the medical examiner, but no standard form for preserving evidence. Ms. Price testified as to the difference between "holding" an item versus "releasing" an item. She testified "holding" an item would be a motion to preserve the specimen and the order to release the specimen is the release of the specimen pursuant to a court order. The hospital will hold and preserve the specimen without a court order, but will only release the specimen with a court order. Ms. Price testified that the purpose of testing the patient's blood is that the physician may need it for a better diagnosis and treatment of the patient. In a routine case, the requesting physician would not ask that the blood sample be tested for blood alcohol content. Ms. Price testified that she did not look up the history of the case prior to her knowledge of the blood sample in this case. She also testified that she does not have access to the patient files. Ms. Price's involvement occurred after she received the notice via email or in person and she gave it to her processor. The processor records the specimen and preserves it for evidence by completing the paperwork and to have it ready for pickup. She testified that the pickup would occur once they receive a subpoena to release the specimen. Ms. Price testified that once the blood is drawn, the blood becomes the hospital's property, not the patient. Ms. Price testified that the blood itself does not belong to Health First. In order for Health First to exercise control over the blood, the hospital would need a court order. Ms. Price testified she believed the notice to be a court order.

K. Ms. Pacheco testified (via Teams) that she was employed at Holmes Regional Medical Center in July 2017 as a processing technician. She checked in laboratory samples and sent them to laboratories for testing. On July 19, 2017, she received a Notice to Preserve by the police to aside some blood work for a case. She testified that she did not previously have a similar request. She testified that she had some senior people assist her in processing the blood specimen, including Eva Price. She testified that after receiving the notice, she verified the identity of the officer in his official capacity and referred to his identification. She then followed through on the notice, pulled the blood samples, and set them aside. She testified there are no bar codes indicated on the blood samples when they were removed from the automated system. She searched for the laboratory blood sample in the refrigeration unit in the different departments depending on their tube type and placed them in a biohazard bag and placed the blood vials in a separate bin. She testified that the blood sample was taken from the patient upon the initial admittance into the hospital and before the physician's or nurse's treatment or medication. From this initial blood sample, it would determine how the physicians will treat the patient. She testified that if there was no notice to preserve, in due course, the blood would have been kept for thirty days and then placed in a biohazard waste container. She testified she was present when the police officer returned with a search warrant signed by the Court on August 2, 2017. She collected the paperwork from the officer and retained a copy for the hospital's record and tendered the samples as requested in the search warrant with the assistance of Ms. Price. On cross-examination, she previously testified in her deposition the blood is kept for five to seven days. On July 19, 2017, she received a

document from the police dressed in uniform, which she believed was an order and that she had to comply. Ms. Pacheco testified they did not attempt to get the Defendant's permission. The blood specimen taken from a patient is pursuant to a doctor's order.

L. The Fourth Amendment to the United States Constitution and article I, section 12 of the Florida Constitution, protect the people of this state from "unreasonable searches and seizures" of "their persons, houses, papers and effects." The protection afforded by the Florida constitution is expressly limited to that afforded under the Fourth Amendment as interpreted by the United States Supreme Court. *See Bernie v. State,* 524 So. 2d 988 (Fla. 1988); art. I, § 12, Fla. Const. (Article I, section 12 "right shall be construed in conformity with the 4th Amendment to the United States Constitution, as interpreted by the United States Supreme Court."). The United States Supreme Court has explained that the Fourth Amendment protects two types of expectations. One involving "searches," the other "seizures." In the present case, it involves an alleged "seizure" of property which occurs when there is some meaningful interference with an individual's possessory interest in that property. *See United States v. Jacobsen,* 466 U.S. 109, 112 (1984). To challenge a seizure, the Defendant needs to establish that the seizure interfered with his constitutionally protected possessory interest. "The infringement of privacy rights (as in the case of a search) while often a precursor to a seizure of property, is not necessary to such challenge." *See Jones v. State,* 648 So. 2d 669, 675 (Fla. 1994). The Court finds that the hospital complying with the notice to preserve did not amount to a warrantless seizure of his medical blood and the actions of the hospital in complying with the notice did not amount to a meaningful interference with the Defendant's constitutionally protected possessory rights in violation of the state and federal constitution because he did not have the possessory rights of the medical blood specimen at the time. In *Lawlor v. State,* 538 So. 2d 86 (Fla. 1st DCA 1989), the Court held the four vials of blood withdrawn by medical technologist, two for medical purposes and two anticipation of law enforcement requests, were properly withdrawn, and blood-alcohol test results derived from samples were accordingly admissible in prosecution for manslaughter by intoxication resulting from fatal vehicular collision, under § 316.1933, Fla. Stat. (1985), *see, e.g., Lindo v. State,* 983 So. 2d 672, 675 (Fla. 4th DCA 2008) [33 Fla. L. Weekly D1446a] (the temporary detention of defendant's packages at mailing facility was not a "seizure" within the meaning of the Fourth Amendment).

M. After considering all of the testimony and evidence presented at the suppression hearings, the medical blood evidence was initially pulled and saved pursuant to the Notice to Preserve which did not interfere with the Defendant's possessory rights. The medical blood was relevant pursuant to the ongoing crash investigation and pending criminal investigation. The fact that the officer initially requested through a notice to preserve, but did not obtain from the medical staff, the blood vials drawn in the course of the Defendant's treatment, this alone does not warrant the exclusion of the blood vials subsequently obtained through a valid search warrant. The notice to preserve does not constitute the type of governmental misconduct that would warrant exclusion of the medical vials subsequently obtained through the search warrant. The police acted in good faith because they did not mislead the issuing judge, nor omitted material facts in the warrant application. To exclude the evidence in this case serves no deterrent purpose. *See Herring v. United States,* 555 U.S. 135 (2009) [21 Fla. L. Weekly Fed. S582a] ("To trigger the exclusionary rule, police conduct must be sufficiently deliberate that exclusion can meaningfully deter it. . .[E]xclusionary rule serves to deter deliberate, reckless, or grossly negligent conduct, or in some circumstances recurring or systemic negligence."). Accordingly, it is

ORDERED AND ADJUDGED:

The Defendant's Motion to Suppress Evidence Seized Pursuant to Invalid Search Warrant is **DENIED**.

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[1]The situation in this case does not fall under section 316.1933(1), Fla. Stat. (1997), which authorizes a blood test where an officer has probable cause to believe a driver under the influence of alcoholic beverages has caused death or serious injury to a human being, including himself.

The other circumstance in which a police officer may obtain an involuntary blood sample is described in section 316.1932(1)(c), which also does not apply here. The requirements for this section are: (1) reasonable cause to believe the person was driving under the influence of alcoholic beverages or chemical or controlled substances; (2) the person appears for treatment at a hospital, clinic or medical facility, and (3) the administration of a breath or urine test is impractical or impossible or the person is incapable of refusal due to unconsciousness or other mental or physical condition.

* * *

Municipal corporations—Comprehensive plan—Amendment—Action for declaratory and injunctive relief from city council decision not to adopt proposed amendment to comprehensive plan that would create new imperial district future land use category and amend future land use map designation for plaintiff's property from density reduction groundwater resource category allowing maximum of 32 dwelling units on property to imperial district category allowing 700 dwelling units—Plaintiff's claim that it was denied substantive due process by decision not to adopt amendment fails—Decision to maintain status quo is fairly debatable based on impacts that proposed imperial district would have on traffic and transportation, problems with directing 700 dwelling units away from downtown to rural area, various improper references and misrepresentations in proposal, and residents' opposition to proposal—Requested relief, which include orders directing city council to adopt proposed amendment and to adopt formal procedures for land use hearings, would violate separation of powers—Claim that city violated plaintiff's procedural due process rights has no merit because procedural due process does not apply to legislative decision—Even if procedural due process did apply at city council hearing, plaintiff's allegations would not establish violation—City council was not required to identify reasons for decision, and motives of council members are irrelevant—Final summary judgment is entered in favor of city

3HWA LAND HOLDINGS, LLC, a Florida limited liability company, Plaintiff, v. CITY OF BONITA SPRINGS, a Florida Municipal Corporation, Defendant. Circuit Court, 20th Judicial Circuit in and for Lee County, Civil Division. Case No. 21-CA-004285. October 20, 2023. Alane Laboda, Judge. Counsel: James D. Fox, Roetzel & Andress, LPA, Naples, for Plaintiff. David A. Theriaque, S. Brent Spain, Benjamin R. Kelley, Theriaque & Spain, Tallahassee; and Derek P. Rooney, Gray Robinson, Fort Myers, for Defendant.

ORDER GRANTING DEFENDANT'S MOTION FOR FINAL SUMMARY JUDGMENT AND DENYING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT AND MEMORANDUM OF LAW

THIS CAUSE came before the Court for hearing on October 4, 2023, on competing Motions for Final Summary Judgment filed by Defendant City of Bonita Springs ("Defendant") on July 27, 2023, and by the Plaintiff 3HWA Land Holdings, LLC ("Plaintiff"), on July 31, 2023. Having reviewed the filings, heard argument from counsel, the matter stipulated by the parties to be appropriate as a question of law and ripe for summary judgment and being otherwise fully advised in the premises, the Court finds as follows:

1. This case arises from a decision by the City of Bonita Springs City Council ("City Council") to not adopt an amendment to the City of Bonita Springs Comprehensive Plan ("City's Comprehensive Plan") that was proposed by the Plaintiff ("Proposed Imperial District Amendment").

2. On April 18, 2022, the Plaintiff filed its four (4) count Amended Complaint against the Defendant for Declaratory Judgment (counts I & II) and Injunctive Relief (counts III & IV).

3. The property at issue consists of 328.13 acres of land ("Property") located in the City's Density Reduction Groundwater Resource Future Land Use Category ("DRGR").

4. The City's Comprehensive Plan provides that the DRGR is "[i]ntended to recognize geographic areas that provide significant recharge to aquifer systems associated with existing potable water wellfields or future wellfield development." (Policy 1.1.21, City's Comprehensive Plan). "Land uses in these areas must be compatible with maintaining surface and groundwater levels at their historic levels." (*Id.*).

5. The maximum density permitted in the DRGR is one (1) unit per ten (10) gross acres of land. (*Id.*). Thus, pursuant to its DRGR designation, the maximum number of dwelling units for the Property is approximately thirty-two (32) units.

6. In 2020, the Plaintiff submitted its Proposed Imperial District Amendment. The Plaintiff proposed to amend the City's Comprehensive Plan as follows:

> A. Create the new Imperial District Future Land Use Category; and
>
> B. Amend the City's Future Land Use Map designation for the Property from DRGR to the newly created Imperial District Future Land Use Category.

As a result of this proposed amendment, the maximum density for the Property would increase from approximately thirty-two (32) dwelling units to 700 dwelling units.

7. Pursuant to the City's Land Development Code procedures the City's Land Planning Agency ("City's LPA") conducts a public hearing and makes a recommendation to the City Council about proposed amendments to the City's Comprehensive Plan. (*See* § 4-88, City's Land Development Code). Thereafter, the City Council conducts a public hearing on the proposed amendment and renders a legislative decision. (*See id.* at § 4-53).

8. In the case at hand, the City Staff submitted a Staff Report to the City's LPA regarding the Proposed Imperial District Amendment. (A true and correct copy of the transcript of the Staff Report has been filed in this case by both parties.). The Staff Report did not contain a recommendation of approval or denial. (*See* Affidavit of Michael Fiigon, II, at ¶ 6). In light of Plaintiff's request—including the increase to the maximum density for the Property from approximately thirty-two (32) units to 700 units—the City Staff explained that this proposed amendment involved a legislative policy decision properly made by the City Council. (*See id.*).

9. The Staff Report did not contain a recommendation, however, it did state that the City Staff disagreed with and had concerns about certain aspects of the Proposed Imperial District Amendment. For example, the Staff Report expressed disagreement with the Plaintiff's analysis of the proposed density for the Property. (*See id.* at ¶ 7). Policy 1.1.2 of the Future Land Use Element of the City's Comprehensive Plan and Section 4-1282 of the City's Land Development Code require density to be calculated based upon the number of units per gross acre; the Plaintiff's analysis utilized a different formula which understated the proposed density for the Property. (*See id.*).[1]

10. On March 25, 2021, the City's LPA conducted a public hearing on the Proposed Imperial District Amendment ("LPA Hearing"). Although the City's LPA voted to recommend approval, three (3) of the five (5) members of the City's LPA expressed significant reservations about the proposal, including the negative impact that the amendment would have on water retention in the DRGR and traffic/transportation. (*See* LPA Hearing Transcript at 101:1-7, 101:9-10, 102:24-103:6). A fourth member indicated that the Plaintiff would "figure out traffic mitigation and the environment." (*See id.* at 102:16-20).

11. The City of Bonita Springs Community Development Senior Planner, Michael Fiigon, II, believed that the Plaintiff misrepresented aspects of its Proposed Imperial District Amendment during the public hearing before the City's LPA as to the following: "certain reports/studies that have been prepared regarding properties designated as the DRGR Future Land Use Category"; "the traffic impacts which would be caused by the additional traffic generated by the proposed development that would be allowed under the proposed new Imperial District Future Land Use District"; and "the public benefit of the proposed drainage conveyance that was going to be provided to the City." (*See id.*). As a result of these misrepresentations, Mr. Fiigon and the City's Community Development Director, John Dulmer, decided to expressly oppose approval of the Proposed Imperial District Amendment by the City Council. (*See id.*).

12. On April 21, 2021, the City Council conducted a public hearing on the Proposed Imperial District Amendment ("City Council Hearing"). (A true and correct copy of the transcript of the City Council Hearing has been filed and is referred to herein as the "Hearing Transcript.").

13. At the City Council Hearing, the Plaintiff's presentation lasted more than ninety (90) minutes. (*See* Plaintiff's Responses to Defendant's First Request for Admissions at Response No. 6). During that time, the Plaintiff presented testimony from a number of witnesses about a variety of different policy matters. (*See* Hearing Transcript at 6:11-66:14). This presentation also attempted to address the Staff Report which raised concerns about density, flooding, traffic and transportation, and other matters. (*See, e.g., id.* at 63:5-13) The Plaintiff's presentation was not interrupted and its time was not restricted. (*See id.* at 6:11-66:14).

14. After the Plaintiff concluded its presentation, the City Staff presented problems and policy considerations relating to the Proposed Imperial District Amendment; such as, density, traffic and transportation, infrastructure, flooding, storm-water, and various environmental concerns. (*See id.* at 67:1-75:13). Also, addressed was the Plaintiff's use of a step-down density approach, it was explained that such an approach is commonly used in urban areas, but that it is not common practice to utilize this approach in a rural or suburban area. (*See id.* at 72:7-22). The City's Traffic Engineer, Tom Ross, provided comprehensive testimony about the traffic and transportation problems with the Proposed Imperial District Amendment. (*See id.* at 75:14-92:6).[2]

15. Thereafter, thirteen (13) members of the public—including a former urban planner—provided comments to the City Council. (*See* Hearing Transcript at 98:21-128:3). All thirteen (13) people spoke against the proposal voicing various negative impact concerns. (*See id.*).

16. One member of the public who voiced opposition to the Proposed Imperial District Amendment was the Member of the City's LPA who had voted against a recommendation of approval. (*See id.* at 108:12-110:13). She asserted that the proposal is inconsistent with the City's Comprehensive Plan and that the infrastructure improvements that would have to be made to Terry Street east of I-75 could cost approximately $80 million dollars. (*See id.* at 108:12-110:13). She further added that the DRGR was designed to retain water and that more development would mean less surface area where water could be absorbed into the ground. (*See id.* at 109:19-110:4).

17. After public comment closed, the City Council voted to provide the Plaintiff with five (5) minutes for rebuttal—even though it was neither required nor customary for the City Council to do so. (*See id.* at 98:24-99:4, 134:9-25). The Plaintiff did not at any point voice any objection to this approach and did not request additional time for rebuttal. (*See id.* at 98:24-99:4, 131:14-140:3). In presenting rebuttal, the Plaintiff did not run out of time and explicitly noted that it had "covered most everything." (*See id.* at 135:6-139:2).

18. The City Council then debated whether to adopt the Proposed Imperial District Amendment. (*See id.* at 140:14-148:25). Two (2)

Council Members voiced opposition to the proposal on the basis of several different policy considerations. (*See id.* at 140:17-18, 142:15-146:8, 146:10-147:24).

19. Council Member Jesse Purdon expressed concerns about the increase in density and the negative impact such an increase would have on flooding, water quality, and transportation. (*See id.* at 142:15-146:8; *see also id.* at 144:8-9 (adding that water quality is the City's "number one strategic priority")). He stated that "for a multitude of reasons, from the economic side, from the environmental side, from the transportation side," he was not in favor of adopting the Proposed Imperial District Amendment. (*See id.* at 146:4-8).

20. Council Member Amy Quaremba explained her reasons for opposing the Proposed Imperial District Amendment as follows:

> "I think I look at this a little bit differently. I mean, I agree with what you said, Jesse, but this is—I see this as a significant departure from existing DRGR policies, which have been reiterated recently in our evaluation and appraisal report, which we just did just about a year ago. We had a lot of public input on that process. That's part of our planning process. That's part of a thing—a process by which we could review our comprehensive plan, and there was no impetus for us to change our current policy or the wording that we had within the DRGR.
>
> In fact, the people that came out said, Keep doing what you're doing. And I believe that—I have an issue with having these small portions of development requests for changes in the comprehensive plan, because I believe with the planner that came up and spoke and said we have to work to preserve the integrity of our comprehensive plan. If we change our comprehensive plan in spot areas, we don't have the total picture in our planning, so I'm against that.
>
> I am persuaded by some of the commentary that came out of the staff reports in regards to transportation, density, flooding, but that's somewhat irrelevant to the issue. This is a legislative issue on policy that the Council time and time again has supported. Density reduction, that's what it means, one unit per 10 acres."

(*See id.* at 146:10-147:13). Council Member Quaremba closed by emphasizing that the City's Strategic Priorities of "Downtown Development" and "DRGR Protection" supported denial of the Proposed Imperial District Amendment:

> "And just one more thing. . . . We have strategic priorities that we have articulated. We do it every year. Our current strategic objective is to focus on downtown development. And the second strategic—another strategic objective was to protect the DRGR. So that's what we told the people when we started. We should at least carry it forward for another year. So that's why I'm voting no on this."

(*See id.* at 147:17-24).

21. The City Council voted to not adopt the Proposed Imperial District Amendment by a vote of six (6) to one (1). (*See id.* at 149:1-13).

22. On April 18, 2022, the Plaintiff filed its four (4) Count Amended Complaint against the City. In Count I, the Plaintiff contends that the City Council violated its substantive due process rights by not forwarding its Proposed Imperial District Amendment to the Florida Department of Economic Opportunity ("FDEO") for review. (*See* Amended Complaint at 12-13). The Plaintiff alleges that the City Council's decision lacks a rational basis and is not fairly debatable. (*See id.*). Based on its substantive due process claim in Count I, the Plaintiff requests injunctive relief in Count III directing the City Council to approve the Proposed Imperial District Amendment and forward it to FDEO for review. (*See id.* at 15-16).

23. In Count II, the Plaintiff contends that the City Council was required to provide procedural due process to the Plaintiff at the City Council Hearing. (*See id.* at 13-15). The Plaintiff further contends that the City Council violated the Plaintiff's procedural due process rights by "limiting" the Plaintiff's testimony and evidence at this legislative hearing. (*See id.*). Based on its procedural due process claim in Count II, the Plaintiff requests injunctive relief in Count IV directing the City Council to adopt "formal procedures for land use hearings." (*See id.* at 16-17).

24. The Defendant filed its Answer and Affirmative Defenses to the Amended Complaint on May 11, 2022. Among other Affirmative Defenses, the Defendant contends that the relief sought by the Plaintiff in this case—an order compelling the City Council to adopt the Proposed Imperial District Amendment and to adopt formal rules for legislative land use hearings—violates the separation of powers doctrine.

25. On July 27, 2023, the Defendant filed its Summary Judgment Motion. As to the "substantive due process" claims in Counts I and III of the Amended Complaint. The Defendant argues that the City Council's decision to not adopt the Proposed Imperial District Amendment is a "fairly debatable" legislative policy decision. In support of this claim, the Defendant sets forth a number of different reasons that could conceivably support this legislative policy decision. As such, the Defendant contends that it is entitled to final summary judgment as a matter of law on Counts I and III. With respect to the "procedural due process" claims in Counts II and IV, the Defendant cites case law standing for the proposition that "procedural due process" does not apply in the context of a legislative decision. As such, the Defendant asserts that it is entitled to summary judgment as a matter of law on Counts II and IV under any set of facts.

26. The Plaintiff and Defendant both filed Affidavits and Exhibits in support of their Summary Judgment Motions.

27. On July 31, 2023, the Plaintiff filed its Summary Judgment Motion. As to the "substantive due process" claims in Counts I and III, the Plaintiff argues that the City Council's decision to not adopt the Proposed Imperial District Amendment is not "fairly debatable" for several reasons: the Proposed Imperial District Amendment would improve the existing conditions "on the ground" in the DRGR; the Proposed Imperial District Amendment "met or exceeded" the recommendations in certain studies of the DRGR; the City Council was precluded from considering traffic and transportation with respect to a comprehensive plan amendment; the City Council's decision to deny the Proposed Imperial District Amendment constitutes "reverse spot planning," and the City Council must adopt the Proposed Imperial District Amendment because it would be "consistent with abutting properties." On the basis of these arguments, the Plaintiff contends that it is entitled to summary judgment as to Counts I and III. As to the "procedural due process" claims in Counts II and IV, the Plaintiff raises a series of allegations about allegedly unfair actions by the City Council at the City Council Hearing.

28. As a threshold matter, it is well established that a municipality's decision to adopt or not adopt a proposed comprehensive plan amendment is purely a discretionary legislative decision. *See Coastal Dev. of N. Fla., Inc. v. City of Jacksonville Beach,* 788 So. 2d 204, 205 (Fla. 2001) [26 Fla. L. Weekly S224d] (reiterating that all amendments to a local comprehensive plan concern legislative "policy decisions"); *Martin Cty. v. Yusem,* 690 So. 2d 1288, 1293 (Fla. 1997) [22 Fla. L. Weekly S156a] ("[W]e expressly conclude that amendments to comprehensive land use plans are legislative decisions."). Thus, it is indisputable that the City Council's decision to not adopt the Plaintiff's Proposed Imperial District Amendment is a legislative decision.

30. The Plaintiff and the Defendant both assert that a substantive due process claim presents an issue of law. The Court agrees. *See Martin Cty. v. Section 28 P'ship, Ltd.,* 772 So. 2d at 616, 619 (Fla. 4th DCA 2000) [25 Fla. L. Weekly D2844a] ("*Partnership III*").

31. A substantive due process challenge to a legislative land use decision requires the reviewing court to apply the extremely deferential "rational basis" review standard. *See Partnership III,* 772 So. 2d at 619. This deferential standard requires the reviewing court to uphold a legislative decision to adopt or not adopt a comprehensive plan amendment if such decision is "fairly debatable." *Id.*

32. The rational basis test is well established. *See generally Membreno v. City of Hialeah,* 188 So. 3d 13, 25-29 (Fla. 3d DCA 2016) [41 Fla. L. Weekly D618a] (providing a detailed overview of the "highly deferential" rational basis review standard). This lenient standard of review provides that "a legislative act will not be considered arbitrary and capricious if it has 'a rational relationship with a legitimate general welfare concern.' " *Partnership III,* 772 So. 2d at 620 (citation omitted); *see also Membreno,* 199 So. 3d at 26 (explaining that "most legislation easily passes this test"). Pursuant to this standard of review, "[i]f the government's legislative decision is 'at least debatable' there is no denial of substantive due process." *Pinellas Cty. v. Richman Grp. of Fla., Inc.,* 253 So. 3d 662, 669 (Fla. 2d DCA 2017) [42 Fla. L. Weekly D2526a]. Such a deferential standard is necessary because "[a] more rigorous inquiry would amount to a determination of the wisdom of the legislation, and would usurp the legislative prerogative to establish policy." *Membreno,* 188 So. 3d at 25 (citation omitted). Accordingly, it is the burden of a plaintiff attacking legislative action on substantive due process grounds "to negate every conceivable basis which might support it." *Haire v. Fla. Dep't of Agric. & Consumer Servs.,* 870 So. 2d 774, 782 (Fla. 2004) [29 Fla. L. Weekly S67a] (citation omitted). Indeed, "[t]he proper inquiry is concerned with the existence of a conceivably rational basis, not whether that basis is actually considered by the legislative body." *WCI Cmtys., Inc. v. City of Coral Springs,* 885 So. 2d 912, 914 (Fla. 4th DCA 2004) [29 Fla. L. Weekly D2196b].

33. It is further well established that discretionary legislative decisions relating to comprehensive plan amendments are subject to the "fairly debatable" standard of review. *See Yusem,* 690 So. 2d at 1295 (holding that all comprehensive plan amendments are legislative policy decisions subject to "fairly debatable" review). "The fairly debatable standard of review is 'highly deferential' and requires approval of a planning action if reasonable persons could differ as to its propriety." *See id.* "In other words, '[a]n ordinance may be said to be fairly debatable when for any reason it is open to dispute or controversy on grounds that make sense or point to a logical deduction that in no way involves its constitutional validity.' " *Id.* (citation omitted); *Partnership III,* 772 So. 2d at 620 (explaining that a plaintiff alleging a substantive due process violation has the burden to demonstrate that the legislative decision was "so unreasonable and arbitrary as to not be even 'fairly debatable' "). As noted above, "fairly debatable" review presents a question of law. *See Partnership III,* 772 So. 2d at 619.

34. For a substantive due process claim regarding a legislative decision to ***not*** adopt a proposed comprehensive plan amendment, the question is ultimately whether the decision to "maintain the status quo" is fairly debatable. *See id.* at 621 (finding decision denying proposed plan amendment was fairly debatable). Such a decision—*i.e.,* choosing to maintain the existing comprehensive plan rather than adopt a proposed amendment—must be upheld if it is fairly debatable for any reason. *See id.* (reversing trial court because reasonable minds could differ as to the propriety of the county's legislative decision to maintain the status quo); *Pinellas Cty.,* 253 So. 3d at 670 ("Because reasonable persons could differ as to the propriety of the CPA's decision, we conclude that the trial court erred in ruling that the CPA's decision to maintain the status quo was not fairly debatable."); *City Env't Servs. Landfill, Inc. of Fla. v. Holmes Cty.,* 677 So. 2d 1327, 1333 (Fla. 1st DCA 1996) [21 Fla. L. Weekly D1791d] (upholding county's legislative decision to deny proposed comprehensive plan amendment). In other words, in a case of this sort, a plaintiff must demonstrate that adoption of the proposed amendment is the only conceivable decision the local government could possibly make.

35. Turning to the instant case, the Court finds that the City Council's legislative decision is "fairly debatable." There are many conceivable reasons why the City Council could decline to adopt the specific policy vision proposed by the Plaintiff. Moreover, while the actual reasons for a legislative decision are irrelevant for purposes of "fairly debatable" review, the Court finds that the concerns identified herein were explicitly addressed and recognized at the City Council Hearing.

36. The Proposed Imperial District Amendment represents a specific and detailed policy vision for 328.13 acres of land located in the DRGR. The DRGR is an environmentally sensitive area of immense importance to the City's water supply and quality, drainage and flooding, and other environmental concerns. The City's Comprehensive Plan explicitly states that the DRGR provides "significant recharge to aquifer systems associated with existing potable water wellfields or future wellfield development," and that "[l]and uses in these areas must be compatible with maintaining surface and groundwater levels at their historic levels." (Policy 1.1.21, City's Comprehensive Plan). As such, density is restricted in the DRGR to one (1) dwelling unit per ten (10) gross acres. (*See id.*). The Proposed Imperial District Amendment, however, would increase the permitted density on the Property from approximately thirty-two (32) dwelling units to 700 dwelling units. Such a density change in an environmentally sensitive area is, in and of itself, a legitimate policy basis on which the Proposed Imperial District Amendment could be denied. *See Partnership III,* 772 So. 2d at 619-21 (holding county's decision "was based on upon its legitimate interest in maintaining low densities in an environmentally sensitive area and accomplishing growth management goals for the [plaintiff's] property and the County as a whole"); *City Env't Servs. Landfill,* 677 So. 2d at 1333 (explaining that county's legislative decision "was premised on several legitimate considerations, including environmental risks, traffic, and cost of road repair); *see also Pinellas Cty.,* 253 So. 3d at 671 ("[T]he CPA's decision to deny amendment and keep the land available for target employers was fairly debatable.").

37. Indeed, while the Court need only address whether there is any conceivable basis for the City Council's decision that the Proposed Imperial District Amendment would impact traffic, transportation, and related infrastructure in the City. The Court notes that the Defendant filed Affidavits demonstrating the support for the City Council's decision as to traffic and transportation. (*See* Affidavit of Arleen Hunter, AICP, at ¶¶ 4-6; Affidavit of Tom Ross at ¶¶ 9-10).

38. The evidence demonstrated that The Proposed Imperial District Amendment could impact traffic and transportation, require the City to spend public funds on roadway and bridge expansion, and abandon its pedestrian-friendly plans for Terry Street. These considerations constitute legitimate policy reasons to not adopt the Proposed Imperial District Amendment. *See Pinellas Cty.,* 253 So. 3d at 669-72 (holding that county's policy decision to "preserve IL land for target employers who bring high-paying jobs to the County [was] related to a legitimate fiscal concern" and denial of proposed comprehensive plan amendment was fairly debatable); *City Env't Servs. Landfill,* 677 So. 2d at 1333 (explaining that county's legislative decision "was premised on several legitimate considerations, including environmental risks, traffic, and cost of road repair).

39.The Court rejects the Plaintiff's contention that a local government is somehow precluded from ever considering traffic and transportation with respect to a comprehensive plan amendment.

Traffic and transportation are perfectly legitimate considerations for a local government with respect to comprehensive planning. *See Coastal Dev. of N. Fla.,* 788 So. 2d at 209 (recognizing that a comprehensive plan amendment will require the local government to "consider the likely impact that the proposed amendment would have on traffic, utilities, other services, future capital expenditures, among other things") (quoting *City of Jacksonville Beach v. Coastal Dev. of N. Fla., Inc.,* 730 So. 2d 792, 794 (Fla. 1st DCA 1999) [24 Fla. L. Weekly D837a] (emphasis supplied); *see also City Env't. Servs. Landfill,* 677 So. 2d at 1333 (holding that county's legislative decision to not amend its comprehensive plan to create a new future land use designation "was premised on several legitimate considerations, including environmental risks, traffic, and cost of road repair") (emphasis supplied).

40. The Plaintiff appears to be arguing that the City Council's decision must be reversed—and, indeed, supplanted—because of the mere discussion of traffic and transportation at the City Council, which was only one amongst many. The actual reasons for a legislative decision are immaterial and a legislative decision is not reviewed on a "record" like a quasi-judicial decision would be. Unlike a quasi-judicial decision, a legislative decision must be upheld if it is supported for any conceivable reason. *See Yusem,* 690 So. 2d at 1293 (explaining that a comprehensive plan decision must be upheld if it is fairly debatable for "any reason"); *WCI Cmtys.,* 885 So. 2d at 914 (explaining that rational basis review is concerned with the existence of a "conceivable" basis and does not concern the actual reasons for a decision); *Membreno,* 185 So. 3d at 26-27 (explaining that rational basis review is not a review of the record or evidence presented at a legislative hearing).

41. Based upon the above, traffic and transportation considerations present an additional "fairly debatable" basis for the City Council's decision to not adopt the Proposed Imperial District Amendment.

42. Further, according to the evidence presented, the Proposed Imperial District Amendment would direct 700 dwelling units away from the downtown area and into a rural area, which Defendant states is inconsistent with the City's Strategic Priorities of "DRGR Protection" and "Downtown Revitalization." (*See* Affidavit of Michael Fiigon, II, at ¶ 20). Council Member Quaremba identified this issue at the City Council Hearing. (*See* Hearing Transcript at 146:10-147:24). This likewise presents a conceivable basis for the City Council's decision to not adopt the Proposed Imperial District Amendment that is "fairly debatable."

43. The Defendants evidence indicates there are a number of problems with the Proposed Imperial District Amendment. The Plaintiff has consistently calculated density differently and inconsistent with the City's Comprehensive Plan and the City's Land Development Code. (*See* Affidavit of Michael Fiigon, II, at ¶ 7 (explaining that Policy 1.1.2 of the Future Land Use Element of the City's Comprehensive Plan and Section 4-1282 of the City's Land Development Code require density to be calculated based upon the number of units per gross acre, but that the Plaintiff's analysis utilized a different formula which understated the proposed density for the Property)). The Plaintiff has put forward a method of calculation for density it believes is a better method. This Court will not disregard the requirements of the City's Comprehensive Plan and the City's Land Development Code and rejects the Plaintiff's alternative density calculation methods.

44. Additionally, the Defendant put forward evidence of other perceived problems with the Proposed Imperial District Amendment put forward by Plaintiff including the following:

- The Plaintiff has utilized a step-down density approach, which, in the view of the City Staff, is not commonly used in a rural area like the DRGR. (*See* Affidavit of Michael Fiigon, II, ¶ 13).
- The Plaintiff has improperly attempted to cast its request as similar to the total number of units "on property located immediately to the east of" the Property. (*See id.* at ¶ 8). The density on that neighboring property, however, is 0.52 units per acre—well below the 2.13 units per acre for the Proposed Imperial District Amendment. (*See id.* at ¶ 12).
- The Plaintiff has improperly referenced certain developments as not conforming to DRGR standards, even though such developments "were in existence prior to the establishment of the DRGR Future Land Use Category in 1989 and the City does not have the authority to retroactively remove development rights of built projects, especially those that existed prior to the City's incorporation." (*See id.* at ¶ 14).
- The City Staff disagrees with the "public benefits" touted by the Plaintiff regarding its proposed drainage conveyance. (*See id.* at ¶ 16).
- The City Staff is of the opinion that the Plaintiff made certain misrepresentations to the City's LPA. (*See id.* at ¶¶ 18-19).

45. The Defendant's evidence of various issues with the Plaintiff's proposal constitute conceivable reasons why the City Council could have declined to adopt this specific policy vision.

46. As explained above, thirteen (13) members of the public voiced concerns about the Proposed Imperial District Amendment at the City Council Hearing. (*See* Hearing Transcript at 99:6-128:3). This testimony related to a host of legitimate concerns, including, but not limited to, the following:

- Negative impacts to water quality and drainage/flooding, and the importance of the DRGR to these matters. (*See id.* at 99:6-25, 100:14-18, 101:12-14, 106:3-107:12, 108:4-7, 109:29-110:4, 112:21-113:3, 113:15-114:4, 119:8-11, 124:23-125:8).
- Potential harm to the local economy, which is directly impacted by the health of the local environment. (*See id.* at 100:16-18).
- Problems associated with the aforementioned increase in density. (*See id.* at 100:18-24; 112:21-25).
- Negative impacts to traffic/transportation problems and the exorbitant infrastructure costs that would fall on the taxpayers. (*See id.* at 101:19-21; 109:12-18; 113:3-6; 118:6-17).
- Pollution that would result from increased development. (*See id.* at 102:4-15; 124:12-16).
- The fact that the Property was already in the DRGR when purchased by the Plaintiff (who "knew what they were buying"). (*See id.* at 114:16-19).
- Harmful impacts to wildlife and plant life in the DRGR. (*See id.* at 126:3-15).

47. Resident opposition can provide a rational basis for a legislative decision regarding a proposed comprehensive plan amendment. *See Pinellas Cty.,* 253 So. 2d at 673 (holding that the trial court erred by basing its decision on the fact that the county's denial had been "motivated by significant political pressure" and explaining that resident opposition can provide a rational basis for a land use decision). Indeed, public influence on legislative policy matters is the very idea of representative democracy. *See, e.g.,* Art. I, § 5, Fla. Cost. (protecting the right of the people to instruct their representatives and petition for redress of grievances); *Izaak Walton League of Am. v. Monroe Cty.,* 448 So. 2d 1170, 1171-72 (Fla. 3d DCA 1984) (explaining that the remedy for dissatisfaction with a legislative decision is "at the polls, not in the courts"). Thus, the considerations raised by the public at the City Council Hearing constitute legitimate conceivable bases for the legislative land use decision at issue.

48. The Court finds that there exist conceivable bases upon which the City Council's decision must be upheld. Like in *Partnership III,* there is considerable evidence that the City Council's decision to maintain the status quo is "fairly debatable." *See Partnership III,* 772 So. 2d at 619-21; *see also Pinellas Cty.,* 253 So. 3d at 671; *City Env't Servs. Landfill,* 677 So. 2d at 1333. Indeed, all of the conceivable

bases identified above represent "grounds that make sense or point to a logical deduction." *See Partnership,* 772 So. 2d at 620.

49. The Plaintiff's "substantive due process" claim is, an argument about policy. Plaintiff contends that the City Council should have exercised its legislative discretion differently. (*See generally* Amended Complaint at 7-10, 12-13; Plaintiff's Summary Judgment Motion at 7-43)). Plaintiff asserts that the Proposed Imperial District Amendment amounts to "good planning"; would improve the "conditions on the ground"; would have benefits relating to "ground water recharge, flooding, and pollution," among other policy matters. (*See, e.g., id.* at ¶¶ 18, 28, 29, 38, 41; *see also* Amended Complaint at 9 (alleging that "the benefits of the Imperial District were overwhelming. These matters are irrelevant. It is well established that policy considerations cannot provide a legitimate basis for a substantive due process claim. *See, e.g., Membreno,* 188 So. 3d at 29 (explaining that substantive due process does not prohibit a legislative body from passing "unwise laws"); *see also Gallagher v. Motors Ins. Corp.,* 605 So. 2d 62, 70 (Fla. 1992) (explaining that legislative action must be upheld if the legislative body "rationally could have believed" that its decision would promote a legitimate objective, regardless of whether it actually *would* do so). It is the City Council's job—and not this Court to make legislative policy determinations like the one at issue. *See, e.g., Membreno,* 188 So. 3d at 26 (explaining that "[t]he rational basis test does not license a judge to insert courts into a disagreement over policy or politics").

51. The Plaintiff also contends that this Court must override the City Council's decision on the basis of the decisions in *Island, Inc. v. City of Bradenton Beach,* 884 So. 2d 107 (Fla. 2d DCA 2004) [29 Fla. L. Weekly D1488b], and *Debes v. City of Key West,* 690 So. 2d 700 (Fla. 3d DCA 1997) [22 Fla. L. Weekly D827a]. The Court finds these decisions, however, are inapposite to the instant matter and do not provide any basis for this Court to assert itself into the legislative matter at issue.

52. Among other material differences with this case, in both *Island* and *Debes,* the Court found the existing future land use designation for the property at issue to be improper pursuant to the terms of the existing comprehensive plan. *See Island,* 884 So. 2d at 108 (holding that denial of plan amendment was improper because the undisputed evidence showed that the existing land use classification for the property was incorrect pursuant to the terms of the plan itself); *Debes v. City of Key West,* 690 So. 2d 700, 701 (Fla. 3d DCA 1997) [22 Fla. L. Weekly D827a] (finding that the property required a commercial designation pursuant to the terms of the existing comprehensive plan because the property was located in the designated "primary commercial area"); *Pinellas Cty.,* 253 So. 3d at 672 ("*Island* is limited to situations in which unrefuted evidence establishes that an existing land use designation is improper under the terms of the land use plan itself."). Moreover, the Plaintiffs in *Island* and *Debes* sought a change to an existing future land use designation. *See Island,* 884 So. 2d at 108; *Debes* 690 So. 2d at 701. Unlike in *Island* and *Debes,* the Future Land Use designation for the Property is not incorrect pursuant to the terms of the City's Comprehensive Plan, nor is the Plaintiff requesting a change to an existing Future Land Use designation. Rather, the Plaintiff is asking this Court to mandate the legislative creation of an entirely new Future Land Use District for its Property. Stated simply, nothing in *Island* or *Debes* authorizes this Court to dictate a detailed policy decision of this sort.

53. With respect to the Plaintiff's argument about "reverse spot planning," the Court finds *Debes* to be materially distinguishable in several respects. Most significantly, the property in *Debes* was located in the designated commercial area and was also "surrounded on all sides" by properties being afforded a commercial designation. *See Debes,* 690 So. 2d at 701. In other words, the petitioner's property was the only property in the designated "primary commercial area" being denied a commercial designation. *See id.* Nothing comparable exists in this case, where the Property is located in the DRGR, is correctly designated DRGR, and the surrounding properties include a number of different designations—including DRGR.

54. The Plaintiff further relies on a number of decisions that pertain to review of quasi-judicial zoning decisions. *See, e.g., City Comm'n of the City of Miami v. Woodlawn Park Cemetery Co.,* 553 So. 2d 1227, 1233-36 (Fla. 3d DCA 1989) (conducting certiorari review of a rezoning decision); *City of Clearwater v. Coll. Props., Inc.,* 239 So. 2d 515, 516-18 (Fla. 2d DCA 1970) (same); *Dade Cty. v. Moore,* 266 So. 2d 389, 389-91 (Fla. 3d DCA 1972) (same). This is not a zoning case. This case concerns "fairly debatable" review of a legislative policy decision. As the Florida Supreme Court has explained, zoning changes concern the application of policy, require a quasi-judicial hearing, and are reviewed by certiorari. *See Coastal Dev. of N. Fla.,* 788 So. 2d at 209. Comprehensive plan amendments, on the other hand, concern the legislative creation of policy, do not require a quasi-judicial hearing, and are subject to review only by original action in Circuit Court. *See id.*; *see also Citrus Cty. v. Halls River Dev., Inc.,* 8 So. 3d 413, 420-21 (Fla. 5th DCA 2009) [34 Fla. L. Weekly D613a] (explaining that "[t]he comprehensive plan is similar to a constitution for all future development within the governmental boundary," whereas zoning "is the means by which the Plan is implemented"). As such, the cases cited by the Plaintiff pertaining to certiorari review of quasi-judicial zoning decisions have no applicability with respect to this original action concerning "fairly debatable" review of a legislative policy decision.

55. The Plaintiff also argues that the existing status quo in the DRGR Future Land Use District is not "fairly debatable" because of two (2) provisions in the City's Comprehensive Plan—Future Land Use Element Policy 1.7.2 ("FLU Policy 1.7.2") and Conservation/ Coastal Management Element Policy 16.4.2 ("CCME Policy 16.4.2")—and that the Court must compel adoption of the Proposed Imperial District Amendment on the basis of certain studies of the DRGR. (*See* Plaintiff's Summary Judgment Motion at 26-35). Both of these arguments are without merit.[3]

56. FLU Policy 1.7.1 provides as follows:

> In order to best protect ground water resources, by year-end 2004, the City shall have completed a study to identify the types and intensity of uses that should be allowed within the DRGR area, and to determine the most effective and appropriate techniques to ensure the maintenance of adequate quantity and quality of surface and groundwater resources.

This provision further identifies certain factors that must be evaluated in the DRGR. (*See* FLU Policy 1.7.1(a)-(b).[4] CCME Policy 16.4.1 sets forth the same basic language as FLU Policy 1.7.1.

57. FLU Policy 1.7.2 provides as follows:

> Upon completion of the study referred to in Policy 1.7.1, the City shall amend its Comprehensive Plan to identify the uses considered most appropriate in the DRGR and the resource protection measures and practices necessary to ensure its continued viability.

CCME Policy 16.4.2 sets forth substantially similar language to FLU Policy 1.7.2.

58. The City Council has repeatedly made the legislative determination to maintain the existing DRGR regulations. In evidence, Council Member Quaremba stated at the City Council Hearing:

> "I am persuaded by some of the commentary that came out of the staff reports in regards to transportation, density, flooding, but that's somewhat irrelevant to the issue. This is a legislative issue on policy that the Council time and time again has supported. Density reduction, that's what it means, one unit per 10 acres."

(*See* Hearing Transcript at 147:10-13 (emphasis supplied)). As explained below, the policy decision to make no changes to the DRGR is consistent with options explicitly set forth in all of the DRGR studies cited in the Plaintiff's Summary Judgment Motion.

59. Whether the City has complied with FLU Policy 1.7.2 and CCME Policy 16.4.2 is ultimately irrelevant to the issues in the case before this Court. This is not an action seeking a declaration as to whether the City has complied with FLU Policy 1.7.2 or CCME Policy 16.4.2, nor is it an action to compel the City Council to "identify the uses considered most appropriate in the DRGR and the resource protection measures and practices necessary to ensure" the DRGR's "continued viability." (*See* FLU Policy 1.7.2). Perhaps that could be a case—but it is not this case. *Cf. City Env't Servs. Landfill, Inc. of Fla.,* 677 So. 2d at 1333.

60. FLU Policy 1.7.2 and CCME Policy 16.4.2 pertain to the DRGR as a whole. The Plaintiff, however, is not seeking an order that would compel the City Council to adopt regulations applicable to the entire DRGR. Rather, the Plaintiff is seeking an order that would compel the City Council to actually remove 328.13 acres of land from the DRGR and create an entirely new Future Land Use District. In other words, the Plaintiff is attempting to rely on provisions pertaining to the DRGR as a basis to force legislation that would remove land from the DRGR.

61. Plaintiff's argument is legally flawed. It is premised on the contention that its Proposed Imperial District Amendment "met or exceeded" the recommendations in certain studies of the DRGR. (*See, e.g.,* Plaintiff's Summary Judgment Motion at 2, 25, 35). The Plaintiff asserts that there have been at least seven (7) (*see id.* at 28) or seventeen (17) (*see id.* at 31 n.13) studies of the DRGR. The Plaintiff then selects four (4) studies to argue that its Proposed Imperial District Amendment must be adopted because it "met or exceeded" the "recommendations" in these selected studies. (*See id.* at 12, 32). This argument is factually and legally without merit and ignores the remaining studies. The Plaintiff's reliance on these studies as examples that its' proposed amendment "met or exceeded" these studies is both inaccurate and misleading, as they make no changes to the respective comprehensive plan and identified making no changes to the DRGR.

62. Further, each of these four (4) studies pertained to the DRGR as a whole. As such, the various policy options and recommendations contained therein pertained to the DRGR as a whole. These studies did not set forth recommendations applicable to each individual propert y in the DRGR. Indeed, the various recommendations in these studies contemplated certain areas with higher densities and certain areas with lower densities. The recommendations did not apply uniformly to every single parcel in the DRGR.[5] Thus, even if the Plaintiff's argument did not suffer from the variety of separate deficiencies outlined above, the Court finds it is still inherently flawed to the extent the Plaintiff is attempting to use recommendations in these studies to justify an amendment applying to only a small portion of the DRGR.[6]

63. Notably, the City Council has not accepted any of the four (4) studies of the DRGR relied upon by the Plaintiff. (*See* Affidavit of John Dulmer at ¶¶ 3-6). Indeed, neither FLU Policy 1.7.2 nor CCME Policy 16.4.2 require the City Council to do so, nor do they delegate the City Council's legislative policy making authority. (*See* FLU Policy 1.7.2).

64. For all of these reasons, the Court finds the Plaintiff's arguments based on FLU Policy 1.7.2 and CCME Policy 16.4.2 unpersuasive. The Plaintiff cannot use Policies regulating the DRGR as a basis to force the removal of land from the DRGR by creation of an entirely new Future Land Use District. The City Council has repeatedly decided to not make any changes to the DRGR.

65. The Court further finds that the specific relief sought in Count III of the Amended Complaint—an order directing the City Council to adopt the Proposed Imperial District Amendment—would violate the separation of powers doctrine. *See City of Miami Beach v. Weiss,* 217 So. 2d 836, 837 (Fla. 1969) ("[T]he ultimate classification of lands under zoning ordinances involves the exercise of the legislative power, preventing the courts under the doctrine of separation of powers from the invasion of this field."); *see also McGeary,* 291 So. 2d at 29 ("It has been held uniformly and repeatedly that the ultimate classification of lands under zoning ordinances involves the exercise of legislative power, a field the invasion of which by the courts is interdicted by the doctrine of separation of powers."); *Lee Cty. v. Morales,* 557 So. 2d 652, 656 (Fla. 2d DCA 1990) ("The final judgment also erroneously ordered the County to rezone appellees' property and, therefore, violates the separation of powers doctrine."); *Town of Longboat Key v. Kirstein,* 352 So. 2d 924, 925 (Fla. 2d DCA 1977) (holding final judgment ordering town to change zoning of property "violates the separation of powers"); *Butler Estates,* 303 So. 2d at 67 (holding order directing county to "rezone such property 'in accordance with the (appellees') application' does, indeed, constitute an encroachment upon the exercise of the legislative power of the appellant").

66. In Count II of the Amended Complaint, the Plaintiff asserts that the City Council was required to provide it with "procedural due process" at the City Council Hearing on the Proposed Imperial District Amendment. (*See* Amended Complaint at 13-15). The Plaintiff further contends that the City Council violated the Plaintiff's procedural due process rights by "limiting" the Plaintiff's testimony and evidence at this legislative hearing. (*See id.*). Based on its procedural due process claim in Count II, the Plaintiff requests injunctive relief in Count IV directing the City to adopt "formal procedures for land use hearings." (*See id.* at 16-17).

67. It is well established that procedural due process does not apply with respect to legislative decisions. *See, e.g., 75 Acres, LLC v. Miami-Dade Cty.,* 338 F.3d 1288, 1294 (11th Cir. 2003) [16 Fla. L. Weekly Fed. C898a] ("[I]f government action is viewed as legislative in nature, property owners generally are not entitled to procedural due process."); *Support Working Animals, Inc. v. DeSantis,* 457 F.Supp.3d 1193, 1224 n.16 (N.D. Fla. 2020) ("The Eleventh Circuit has repeatedly made clear that the legislative process itself provides all the process constitutionally due to a property owner.") (citations omitted); *L C & S, Inc. v. Warren Cty. Area Plan Comm'n,* 244 F.3d 601, 602 (7th Cir. 2001) (" 'Legislative due process' seems almost an oxymoron."); *City Env't Servs. Landfill,* 677 So. 2d at 1333 ("Legislative proceedings do not require the type of procedural due process that petitioner claims was denied it at the county level."). If a governmental action is legislative, then the only potential due process challenge is a substantive due process challenge. *See, e.g., Watson Constr. Co.*, 433 F.Supp.2d at 1279 (recognizing that property rights are subject only to procedural due process protection "unless those rights have been infringed by legislative act," in which case "a plaintiff loses his right to procedural due process and is entitled instead to substantive due process").

68. The Court has found, the decision at issue is a legislative decision. Thus, there can be no claim against the Defendant for a "procedural due process" violation as a matter of law, and, for this reason alone, the Defendant is entitled to the entry of summary judgment on Counts II and IV. *See id.* at 1279 ("Because passage of the moratorium is a legislative act that does not implicate the procedural due process protections of the Fourteenth Amendment, *Watson* can prove no set of facts in support of its procedural due process claim that would entitle it to relief. Summary judgment must be granted on Count III."); *City Env't Servs. Landfill,* 677 So. 2d at 1333 (rejecting

plaintiff's procedural due process claim because it was not entitled to the procedural due process it claimed was denied at the legislative hearing).

69. Moreover, even if "procedural due process" did apply at the City Council Hearing—which it did not—the Plaintiff's allegations would not establish any such violation, for the following reasons gleamed from the evidence:

- The Plaintiff presented to the City Council for over ninety (90) minutes. (*See* Plaintiff's Responses to Defendant's First Request for Admissions at Response No. 6). The Plaintiff's time was not in any way restricted or capped by the City Council. (*See* Hearing Transcript at 6:11-66:14).
- The City Council afforded the Plaintiff the opportunity to present rebuttal evidence—even though the City Council does not customarily do so and is not required to do so. (*See id.* at 98:24-99:4, 134:9-25). In presenting rebuttal, the Plaintiff did not use all of its time and explicitly noted that it had "covered most everything." (*See id.* at 135:6-139:2).
- Unlike the Plaintiff, whose presentation time was not capped or restricted in any way, members of the public—all of which spoke in opposition to the proposal—were each given only four (4) minutes to address the City Council. (*See id.* at 98:21-23). To the extent the Plaintiff complains that two (2) members of the public were allowed to briefly speak beyond four (4) minutes, this is not a "procedural due process" violation. (*See id.* at 103:19-105:25, 127:5-128:3).
- The Plaintiff did not object to or raise any concerns about any of the procedures employed at the City Council Hearing. (*See id.* at 98:24-99:4, 131:14-140:3).

70. The Plaintiff complains about the "motives" behind the City Council's decision. (*See* Amended Complaint at 17). This is legally irrelevant. Members of a local government's legislative body are permitted to form opinions about legislative policy matters. *See City of Opa Locka,* 257 So. 2d at 104 (explaining that a court's inquiry in reviewing a legislative decision "is limited to the question of power, and does not extend to . . . the motives of the legislators, or the reasons which were spread before them to induce" the decision). Indeed, this is what they are elected to do. *See, e.g., Izaak Walton League of Am.,* 448 So. 2d at 1171-72 (holding trial court could not preclude political officeholder from voting on legislative matter on the basis of bias and prejudice and that relief for legislative decisions "is at the polls, not in the courts").

71. The City Council was not required to identify the reasons for its decision, nor was it required to explicitly identify such reasons "in the motion" on which it voted, as the Plaintiff claims. *See, e.g., City of Opa Locka,* 257 So. 2d at 104; *WCI Cmtys.,* 885 So. 2d at 914; *Membreno,* 185 So. 3d at 26-27.

72. To the extent the Plaintiff requests an order from this Court compelling the legislative adoption of "formal procedures for land use hearings," the Defendant already has such rules—*see* Section 4-227 of the City's Land Development Code—and an order of this sort would violate the separation of powers. Indeed, the control of its own procedure is the fundamental prerogative of a legislative body such as a city council. *Cf. Battaglia Fruit Co. v. City of Maitland,* 530 So. 2d 940, 942 (Fla. 5th DCA 1988) (noting that, in the absence of a "formal rule" for handling tie votes, the county was not required to follow generally accepted rules of parliamentary procedure and that "[t]he failure of the county commissioners to observe a general rule of parliamentary procedure did not violate any party's procedural due process rights").

73. Based upon the above, the Court finds that there are no genuine issues of material fact that exist such that when taking the evidence in a light most favorable to the non-moving party a reasonable trier of fact could return a verdict in their favor. Accordingly, Defendant is entitled to the entry of final summary judgment as to Plaintiff's Amended Complaint.

ACCORDINGLY, IT IS HEREUPON ORDERED AND ADJUDGED:

A. Defendant's Motion for Final Summary Judgment is **GRANTED.**

B. Plaintiff's Motion for Summary Judgment and Memorandum of Law is **DENIED.**

C. The Court enters this Final Judgment in favor of the Defendant and declares that:

1. The City Council's decision to not adopt the Proposed Imperial District Amendment is a legislative decision pursuant to binding precedent from the Florida Supreme Court;

2. The City Council's legislative decision to not adopt the Proposed Imperial District Amendment is "fairly debatable" as a matter of law and the Defendant is, therefore, entitled to a Final Judgment in its favor on Counts I and III of the Amended Complaint;

3. The relief sought by the Plaintiff in Count III of the Amended Complaint would violate the separation of powers doctrine and, on this separate basis, the Defendant is, therefore, entitled to a Final Judgment in its favor on Count III of the Amended Complaint;

4. The City Council's decision to not adopt the Proposed Imperial District Amendment cannot be subject to a "procedural due process" claim because "procedural due process" does not apply with respect to a legislative decision; the Defendant is, therefore, entitled to a Final Judgment in its favor on Counts II and IV of the Amended Complaint; and

5. Even if "procedural due process" did apply at the City Council Hearing—which it did not—the Plaintiff's allegations fail to establish any such violation; the Defendant is, therefore, entitled to a Final Judgment in its favor on Counts II and IV of the Amended Complaint.

For which let execution issue

The Plaintiff shall take nothing and go hence without day. The Court reserves jurisdiction as to the right to grant any other relief that this Court deems just and proper including but not limited to attorneys' fees and costs.

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[1]As explained at the LPA Hearing, the City Staff also expressed concerns about flooding in the DRGR, that the Plaintiff's proposed density would be higher than other existing developments in the DRGR, and that the proposal was inconsistent with the City's Strategic Priority of Downtown Development, among other problems. (*See* LPA Transcript at 65:24-85:4).

[2]Additionally, the City's Special Land Use Counsel refuted some of the inaccurate contentions the Plaintiff made during its presentation about a settlement agreement between the City and a nearby landowner, and about studies regarding the DRGR. (*See* Hearing Transcript at 92:7-98:18).

[3]In its Summary Judgment Motion, the Plaintiff asserts, with neither explanation nor supporting record evidence, that the existing DRGR provisions are somehow "inconsistent" with the "situation on the ground." (*See, e.g.,* Plaintiff's Summary Judgment Motion at 11 (stating that "DR/GR uses and densities are inconsistent with existing conditions on the ground "); *id.* at 18 (asserting that its proposal "would address the untenable situation on the ground "); *id.* at 28 (alleging that "the painfully obvious conditions on the ground" are "crying out")).

[4]The factors that must be evaluated include, but are not limited to, the following: subsurface and surface water resources; existing uses and those having received approval prior to the adoption of the City's Comprehensive Plan; soils, wetlands, habitats and species and their quantity and quality; the Imperial River and its historical and present floodways and flow ways; drainage and stormwater patterns and flooding; the long term water and wastew ater supply and disposal needs and plans of Bonita Springs Utilities; resource protection measures applicable and contained in the City's Comprehensive Plan and land development regulations; allowable uses and their density and intensity; existing and planned infrastructure in and affecting the area; SFWMD and County ownership in and projects affecting the area; potential positive or negative effects of possible new land uses on the resource base(s) and new or amended best environmental management practices needed by the City to further its control. (*See* FLU Policy 1.7.1(a)-(b)).

[5]As explained by the City's Community Development Director, John Dulmer, these studies "fail to address the planning analysis that must be performed when determining the appropriate Future Land Use Map designation to be assigned to the [Property]."

(*See* Affidavit of John Dulmer at ¶ 7). These studies "generally evaluated alternative land uses and scenarios on lands designated as DRGR, including the Property, rather than how such lands should be developed from a planning perspective. " (*See id* .). "While non -land use scenarios were sporadically addressed in two (2) of the studies, it was not the intent or focus of either. " (*See id.*). Moreover, while the Rawl Report and the Barraco Report "did provide some environmental and preservation analysis . . . both were generally framed in either a financial scheme or an attempt to balance additional land uses." (*See id.*). "A planning analysis would require the suitability of the Property for a particular Future Land Use Map designation to be based upon such factors as the character of the surrounding and nearby uses, environmental resources on and near the Property, and the availability of public facilities, such as sewer and water, to serve development of the Property. " (*See id.*).

[6]According to the DeLisi Study, the DRGR consists of approximately 4,739 acres, which is approximately 16.2% of the City's total land mass. (*See* Delisi Study at 18). The Property is 328.13 acres, which is only 6.9% of the DRGR.

* * *

Insurance—Mediation—Arbitration—Parties are ordered to attend mandatory mediation—If unable to reach settlement at mediation, arbitration is required pursuant to policy's mandatory mediation-arbitration endorsement—Three elements of *Shakespeare Foundation* for establishing when arbitration is appropriate have been met

HUGH HUDSON and KAREN HUDSON, Plaintiffs, v. AMERICAN INTEGRITY INSURANCE COMPANY OF FLORIDA, Defendant. Circuit Court, 20th Judicial Circuit in and for Charlotte County. Case No. 23002779CA. November 27, 2023. Geoffrey H. Gentile, Judge. Counsel: John S. Riordan, Kelley Kronenberg, West Palm Beach, for Defendant.

AMENDED ORDER ON DEFENDANT'S MOTION TO DISMISS AND TO COMPEL MANDATORY MEDIATION-ARBITRATION AND MOTION TO STRIKE PLAINTIFFS' CLAIM FOR ATTORNEY'S FEES AND COSTS AND INSTRUCTIONS TO CLERK TO CLOSE FILE

This cause came before the Court on an agreed-upon basis by the parties on Defendant's *Motion To Dismiss And To Compel Mandatory Mediation-Arbitration And Motion To Strike Plaintiff's Claim For Attorney's Fees And Costs* filed on October 17, 2023 (hereinafter referred to as Defendant's "*Motion*"), and the Court having been advised of the agreement reached by both parties' counsel and otherwise being fully advised in the premises, it is hereby:

ORDERED AND ADJUDGED that Defendant's *Motion* is **GRANTED**.

1. This case is hereby dismissed without prejudice, and the clerk is instructed to close this file.

2. The three (3) elements cited in *Jackson v. Shakespeare Found., Inc.,* 108 So.3d 587, 593 (Fla. 2013) [38 Fla. L. Weekly S67a] have been met establishing when arbitration is appropriate.

3. Any policy reduction contemplated in exchange for the Insured(s) agreeing to the Mandatory Mediation-Arbitration Endorsement of the Policy does not need to be reflected on the Policy's Declarations Page.

4. The parties shall attend mandatory mediation pursuant to the insurance policy's "Mandatory Mediation-Arbitration Endorsement."

5. In the event the parties impasse and are unable to reach a settlement at mediation, then the parties shall attend confidential binding arbitration pursuant to the insurance policy's "Mandatory Mediation-Arbitration Endorsement," which shall be the exclusive process for resolving this dispute between the parties and any arbitration decision rendered shall be binding and final on the parties.

6. The Court reserves jurisdiction related to the claim for Attorney Fees and Costs referenced in the Plaintiffs' Complaint and for purposes of enforcing this Order, if necessary.

* * *

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CIRCUIT COURTS—ORIGINAL

Dependent children—Reunification—Motion for reunification granted—Circumstances that caused out-of-home placement of children and subsequently identified issues have been remedied to extent that return of children to home with in-home safety plan will not be detrimental to children's safety, well-being, and physical, mental and emotional health

IN THE INTEREST OF: D.H., L.H., D.H., D.H., L.I-H., MINOR CHILDREN. Circuit Court, 2nd Judicial Circuit in and for Liberty County. Case No. 23-DP-1. October 9, 2023. David Frank, Judge. Counsel: Nicholas Dolce, for Department of Children and Families.

ORDER GRANTING REUNIFICATION WITH THE PARENTS

This cause came before the Court on September 27, 2023, for a hearing on the Mother's Amended Motion for Reunification of the Parents. All persons entitled to notice of this hearing were duly notified. The Court has reviewed the applicable filings, evidence, and argument and finds as follows:

Procedural History and Facts

The Court has subject matter jurisdiction over this cause and personal jurisdiction over the children.

The persons attending the hearing included: Attorney for the Department Nicholas Dolce, Dependency Case Manager Domonique Grant, Dependency Case Manager Program Director Jhaismen Collins, Mother L.I-H., Attorney for L.I-H. Ron Newlin, Father D.H., Attorney for D.H. Jim Harrison (who joined and deferred to Mr. Newlin), Attorney for Guardian ad Litem Nadine Karl for Pauline Evans, Guardian ad Litem Child Advocate Manager Toi Herring, Guardian ad Litem Volunteer PK Coats, Caregiver of D.H. Elsie Meade, Tia Stephens and Janiya Davis (FIT Team Counselors). The hearing was conducted without the presence of the children as it was determined to be in the best interest of the children.

This case opened on April 5, 2023 with a shelter petition that alleged in pertinent part:

> The Department received a hotline intake report on the family on April 4, 2023. The report indicated that the child L. was born exposed to marijuana and cocaine. . . . L. was born exposed to cocaine and marijuana with the mother testing positive for both substances at the hospital at the time of the child's birth. Likewise, the child D. tested positive for cocaine when he was born as well. . . . When the investigator came to the home she found that the area in which the mother, father and five children were living to be in a state of extraordinary disrepair which constituted a hazard to the children. In fact a substantial portion of the roof of the home had caved in and was being covered in black plastic. The step-grandfather would occasionally go more than a day without seeing any of the children or parents despite them living in the same household. It was not clear that the children were being bathed with any regularity and the school aged children had been missing weeks of school, particularly concerning as the eldest child, D., speaks with such a pronounced impediment that he could not be interviewed intelligibly by the Department. The Department was unable to even assess his ability to tell truth from lies. L., the second oldest child, was the only child able to provide information during an interview. The child explained that she knew what drugs were and routinely saw her parents using a green substance. She indicated that she did not notice a behavioral change in her parents when they used. She also indicated that when she lived with her family in Georgia, she witnessed the parents physically fight, with the father once breaking the mother's teeth. The investigator noted that the mother's teeth were chipped.

The Minor children were adjudicated dependent with the consent of the parents.

On June 13, 2023, the Department of Children and Families ("Department") filed a Reunification Case Plan.

On July 17, 2023, the Department filed a motion to accept the Reunification Case Plan.

All parties were contacted regarding this motion to accept the plan. There were no objections.

The terms of the Reunification Case Plan were consistent with the requirements of the law and previous orders of this Court. The Reunification Case Plan was meaningful and designed to address the facts and circumstances upon which the Court based the finding of dependency or to effectuate the current goal.

In its motion to accept the Reunification Case Plan, the Department stated, "The goal of Reunification is a reasonable permanency goal."

On July 19, 2023, the Court accepted the Reunification Case Plan as filed by the Department.

On September 7, 2023 the department filed a request to "stop the reunification process" from a dependency case manager based on an incident where, "The parents were involved in verbal altercation in the presence of the children and while driving."

On September 25, 2023, the Mother filed the present motion for reunification.

At the hearing, the Court requested counsel to file memoranda of law regarding the criteria for reunification given the status of the case, with emphasis on whether inconsistent attendance / participation in the FIT program alone could defeat reunification, and what specific course the Court should take if it grants or denies the motion. All counsel submitted their briefs.

In its brief, the Guardian Ad Litem Office referenced Florida Statute 39.522(4). Regarding specifically what the Court should do if it grants or denies the motion, the Guardian Ad Litem program recommended:

> The Guardian ad Litem Office recommends that the children remain in their current placement until their reunification with their parents.
>
> The Guardian ad Litem Office recommends sibling visitation to continue on a weekly basis.
>
> The Guardian ad Litem Office recommends continuing weekly unsupervised group visitations presently occurring between the parents and the children.
>
> The Guardian ad Litem Office recommends that the children continue in receiving the recommended services.
>
> The Guardian ad Litem Office recommends all recommended educational services for the children to be identified as soon as possible.
>
> The Guardian ad Litem Office recommends that the children continue in their age appropriate normalcy activities.
>
> The Guardian ad Litem Office supports the permanency goal of reunification and that the Court retain jurisdiction over the case post reunification for at least 6 months. The Guardian ad Litem Office recommends that the parents and children continue participating in the services after reunification.
>
> The Guardian ad Litem Office recommends that the parents provide possible safety monitors to the Department, and that the Department review the safety monitors for the implementation of a safety plan.
>
> The Guardian ad Litem Office recommends that the parents have established a safe home environment for the children.
>
> The Guardian ad Litem Office supports the permanency goal of reunification and that the parents and children continue in their required services after reunification.

The Department's brief referenced Florida Statute 39.522(4) and CFOP (Children and Families Operating Procedure) 170-7, Chapter 9-2, and proposed the following:

> The Department respectfully requests that the motion for reunification be denied by the Court. Immediate reunification of the children and parents would place the children at a substantial risk of ham'. Should the Court seek an alternative wherein reunification is granted, the Department and Guardian ad Litem Program believe that this should only occur after a transition plan wherein the mother completes a psychological evaluation, the results from that evaluation are given and any significant issues identified in that evaluation are addressed. Additionally, the parents should regularly and routinely engage in their drug screens; and safety service providers need to be identified in Calhoun county where the parents reside and where the children would be reunified.

In her brief, the Mother referenced Florida Statute 39.522(4) and CFOP (Children and Families Operating Procedure) 170-7, Chapter 9-2, stated that, "The parents have stated a willingness to complete services in-home, and have agreed to the addition of services not currently listed in the case plan. . .," and simply requests, ". . .that the court grant the motion for reunification, and return the children to the parents' care."

Testimony at the Hearing

The Mother's brief contains the most accurate description of the testimony presented at the hearing and the Court adopts it, with the following specific references and comments.

Witnesses for the department were ambivalent at best regarding opposition to reunification. Most conveyed a "well it's not perfect" picture without going the step further and saying "no" to reunification. Indeed, none were able to state that there was a confirmed safety issue in the home. For example, FIT program representative Ms. Davis testified that the Father's FIT performance was "not the best" but then added that it was constrained by his work schedule.

The focus of the department's opposition was twofold. The first was the concern over the mother's random UA testing showing positive for marihuana and a less than stellar FIT program record. The department argued a connection from that to the home not being "calm and consistent." The evidence indicated that the concern regarding cocaine has been resolved at this point. Second was the concern regarding an alleged incident involving an angry dispute between the parents on which there was no competent evidence offered.

Perhaps the best context regarding the mother's condition was expressed by the service provider, LCSW Lang, in a report dated September 26, 2023, that was inexplicably not shown to the Court at the hearing. She discussed the impediments to services. They include the department's failure to pay for and reauthorize services, confusion because of time zones, the "adjustment period related to the removal episode," the clinician being out of the office, and a holiday. In her words:

> In terms of engagement, initially, due to the adjustment period related to the removal episode, and service provision, Mrs. H. experienced a delay in engagement. Since readjusting the reoccurring schedule, Mrs. H. has been active and engaged in sessions, she provides feedback and she appears forthcoming regarding any individual as well as family barriers, challenges, and adjustments (including related to the recent allegations of parental discord during unsupervised/overnight visitations). Mrs. H. was eager to process the Adverse Childhood Experience Study and she continues to process her own ACE score as well as the ACE score of the minor children and the impact of the aforementioned scores on emotional, social, and developmental/physical functioning.

The Guardian Ad Litem Child Advocacy Manager Toi Herring indicated support for reunification but would like to see a transition plan and a psychological evaluation for the mother.

The testimony confirmed that the mother and father have a home which is secured through the Section 8 voucher program and the father works two jobs to provide income for the family and intend to seek public assistance upon reunification with the children. Even the department agrees that, "There is no argument that the parents have a home wherein the children could be reunified."

The department also agrees, "That the parents are willing for an in-home safety plan to be developed and that they have demonstrated that they will cooperate with all identified safety service providers."

Legal Analysis and Conclusions

The department has approached this issue with the wrong posture. The Reunification Case Plan reads:

> 09/15/2023 Tentative Reunification:
>
> So long as there are no safety concerns, by the GAL or other Agency concerns, the children shall be reunified (in the physical custody) of the parents on this date. Additional terms of the reunification shall be as follows: The parents will continue to complete services that have been put in place to modify their behaviors, increase theft protective capacities, and strengthen their relationship with their children.

This Court approved the plan. That means there is a court order putting the scenario in place. It was not some inspirational department goal. It was a plan.

Then, approximately one week before reunification and well into the transition, the department decided the parents were not quite ready for reunification and unilaterally suspended unsupervised visitation and in essence changed the plan.

There is a problem with that and the problem is Florida Statute 39.6013. The statute makes it clear that the department had no authority to unilaterally makes these changes. A court order is required. The proper course would have been to file a motion to change the plan and, if possible, have it heard before the projected reunification date. That includes where the plan has waffle language like "so long as there are no safety concerns."

Nonetheless, the mother has brought the matter to the Court on a motion to reunify prior to the judicial review set for this Thursday where, in the normal course, the reunification would be addressed.

The parties and the Court all agree on the standard. The standard for reunification is Florida Statute 39.522(4) and CFOP (Children and Families Operating Procedure) 170-7, Chapter 9-2. *Statewide Guardian Ad Litem Office v. J.B.,* 361 So.3d 419, 424 (Fla. 1st DCA 2023) [48 Fla. L. Weekly D1043a] (Section 39.522(4) applies "where the issue before the court is whether a child should be reunited with a parent.").

The court has reviewed the conditions for return and now determines that the circumstances that caused the out-of-home placement and issues subsequently identified have been remedied to the extent that the return of the child to the home with an in-home safety plan prepared or approved by the department will not be detrimental to the child's safety, well-being, and physical, mental, and emotional health. See discussion above.

And let's not forget, "time is of the essence for establishing permanency for a child in the dependency system." *Id.* at 422.

Accordingly, it is ORDERED and ADJUDGED that the motion is GRANTED. The children will be promptly reunified with their parents *pursuant to conditions and requirements* to be discussed and specified at the judicial review set for this Thursday.

* * *

Insurance—Failure to appear at motion hearing—Sanctions—Parties ordered to show cause why sanctions should not be entered after parties failed to appear at hearing on motion to dismiss without advising court that basis for motion had been fixed by filing of amended complaint—Parties conduct has caused a waste of judicial resources and unnecessarily stalled case

ESTATE OF DANNY BAKER, Plaintiff, v. AMERICAN BANKERS INSURANCE COMPANY OF FLORIDA, Defendant. Circuit Court, 2nd Judicial Circuit in and for Gadsden County. Case No. 20-2023-CA-000664-AXXX-XX. November 20, 2023. David Frank, Judge. Counsel: Leo Manzanilla, Coral Gables, for Plaintiff. Toni P. Turocy, Orlando, for Defendant.

ORDER TO SHOW CAUSE

This cause came before the Court for hearing on November 20, 2023 on defendant's motion to dismiss, and the Court having reviewed the court file, and being otherwise fully advised in the premises, finds and ORDERS that

The complaint in this case was filed on August 24, 2023. Defendant's motion to dismiss was filed on September 18, 2023. The hearing on the motion was set for November 20, 2023.

Defendant's motion was quite simple. It requested dismissal because the plaintiff named the wrong entity as the plaintiff. Importantly, defendant assisted the plaintiff by identifying in the motion the correct person to be named plaintiff, which was Mattie Baker, the insured.

Instead of promptly moving to correct the deficiency, the plaintiff waited until the Friday before the Monday hearing, November 17, 2023, to file an amended complaint to make the simple fix. Even worse, neither party attempted to notify the Court of this last minute development. Instead, the parties simply did not appear for the hearing.

The conduct of the parties, especially the plaintff, has caused a waste of extremely limited judicial resources. In addition, the case has been unnecessarily stalled for three months as the parties sauntered to the November hearing.

Accordingly, the parties will appear in person and show cause why appropriate sanctions should not be entered at 9:00 a.m., November 30, 2023, in Courtroom 3, Guy A. Race Judicial Complex, 13 N. Monroe Street, Quincy Florida.

IT IS FURTHER ORDERED that defendant will respond to the amended complaint within ten (10) days from the date it was filed, which was November 17, 2023. If another motion to dismiss is filed, it will be heard at the same hearing, 9:00 a.m., November 30, 2023. If an answer is filed, the parties will file a notice for trial twenty (20) days after the filing of the answer, or twenty (20) days after the filing of a reply, if there is one.

* * *

Arbitration—Arbitrable issues—Torts—Motion to compel arbitration and stay litigation arising out of injuries sustained by ride-share passengers is granted—Plaintiffs expressly agreed to resolve through binding arbitration any disputes with defendant related to use of ride-share service's rider app, negligence claims based on vehicle accident clearly arose from and related to plaintiffs' use of rider app, and defendant did not actively participate in suit or waive right to arbitrate—Further, any attacks on arbitrability must be left to arbitrator under delegation clauses in arbitration agreements

TIFFANY THOMAS-JACKSON and CHRISHELLE JACKSON, Plaintiffs, v. DIAMOND DASHON GILLIAMS, UBER TECHNOLOGIES, INC., A FOREIGN PROFIT CORPORATION, Defendants. Circuit Court, 4th Judicial Circuit in and for Clay County. Case No. 2022CA001183. August 16, 2023. Don H. Lester, Judge. Counsel: Nicholas Bright, Law Offices of Ronald E. Sholes, P.A., Orange Park, for Plaintiffs. Natalie Fina Wheeler, Cole, Scott & Kissane, P.A., Jacksonville, for Defendant Diamond Dashon Gilliams. Veresa Jones Adams and Angelo Mancini, ROIG Lawyers, Deerfield Beach, for Defendant Uber Technologies, Inc.

ORDER GRANTING DEFENDANT, UBER TECHNOLOGIES, INC.'S MOTION TO COMPEL ARBITRATION AND TO STAY ACTION

THIS CAUSE having come before the Court on Defendant Uber Technologies, Inc.'s ("Uber") hearing on its January 23, 2023 Motion to Compel Arbitration and Stay Plaintiff Tiffany Thomas-Jackson and Chrishelle Jackson's Action, and after hearing arguments, reviewing the parties' submission, and being otherwise fully advised in the premises, the Court finds and concludes as follows:

Factual and Procedural Background

Uber is a technology company that uses its proprietary technology to develop and maintain digital multi-sided marketplace platforms. On one side of the marketplace, businesses and individuals utilize Uber's platforms in order to connect with customers and obtain payment processing services. One of Uber's multi-sided platforms is the Rides platform. Riders, like Tiffany Thomas-Jackson ("Thomas-Jackson") and Chrishelle Jackson ("Jackson") (collectively "Plaintiffs"), download the rider version of the Uber App ("Rider App"), and drivers, like Diamond Dashon Gilliams ("Gilliams"), download the driver version of the Uber App ("Driver App"); together, the Apps allow users to access the platform that facilitates the connection of individuals in need of a ride with individuals willing to provide transportation services, and after completing all the necessary steps required to gain access to the Rider App, the Rider App enables Riders and Drivers to connect.

Plaintiffs initiated this action in Clay County Florida state court alleging injuries arising from a September 14, 2022 accident when they were riders in Ms. Gilliams' vehicle. Plaintiffs claim that they were injured as a result of the accident and that Ms. Gilliams was at fault for causing the accident.

Prior to the accident, and according to Uber's business records, Plaintiff Thomas-Jackson signed up to utilize the rider version of the Uber App on or about August 9, 2021. (See Affidavits of Alexandra Vasquez, attached to Uber's Motion to Compel Arbitration.) Plaintiff Thomas-Jackson expressly agreed to Defendant's July 2021 Terms of Use ("July 2021 Terms"), which included an arbitration provision. and Plaintiff Jackson expressly agreed to Defendant's December 2021 Terms of Use ("December 2021 Terms"). Similarly, on April 1, 2022, Plaintiff Jackson was presented with an in-app blocking pop-up screen. Plaintiff Jackson expressly agreed to Defendant's December 2021 Terms of Use ("December 2021 Terms"), which included an arbitration provision. As such, Plaintiffs Thomas-Jackson and Jackson both agreed to Uber's terms, which required Plaintiffs to resolve any claims that they may have against Defendant in arbitration and included a delegation clause, which gave the arbitrator *exclusive authority* to determine threshold questions of arbitrability. Although account holder Plaintiff Jackson used her app to initiate the September 14, 2022 ride with Ms. Gilliams, guest rider Plaintiff Thomas-Jackson was also bound to the terms because she separately agreed to the July 2021 Terms during the August 2021 signup process.

Legal Standard

Where a party to an agreement to arbitrate refuses to submit to arbitration, Florida law permits the aggrieved party to move for an order compelling arbitration. *See* Fla. Stat. § 682.03(1). Pending determination of such a motion, the Court should stay any related judicial proceedings. *See* Fla. Stat. § 682.03(6); *Open MRI of Okeechobee, LLC v. Aldana,* 969 So. 2d 589, 590 (Fla. 4th DCA 2007) [32 Fla. L. Weekly D2920b] ("It is clear that the statute [§ 682.03] mandates a stay while a motion for arbitration is pending"); *Miller & Solomon General Contractors, Inc. v. Brennan's Glass Co., Inc.,* 824 So. 2d 288, 290 (Fla. 4th DCA 2002) [27 Fla. L. Weekly D1902a]. "In ruling on a motion to compel arbitration, Florida courts

should resolve all doubts in favor of arbitration rather than against it." *Medanic v. Citicorp Inv. Servs.,* 954 So. 2d 1210, 1211 (Fla. 3d DCA 2007) [32 Fla. L. Weekly D1007a]. Florida courts routinely find that "arbitration clauses are to be given the broadest possible interpretation in order to accomplish the purpose of resolving controversies outside of the courts." *See e.g., Royal Caribbean Cruises, Ltd. v. Universal Employment Agency,* 664 So. 2d 1107, 1108 (Fla. 3d DCA 1995) [20 Fla. L. Weekly D2711a].

Legal Conclusions

A "trial court's jurisdiction is limited to three issues: (1) whether a valid written agreement to arbitrate exists; (2) whether arbitrable issues exist; and (3) whether the right to arbitrate has been waived." *Seifert v. U.S. Home Corp.,* 750 So. 2d 638 (Fla. 1999) [24 Fla. L. Weekly S540a]. Here, the Court finds that Defendant Uber satisfied the three-part test and Plaintiffs' claims are subject to Uber's arbitration clause.

A valid written agreement to arbitrate exists between Plaintiffs and Uber. Both Plaintiffs expressly agreed to Uber's terms: Plaintiff Thomas-Jackson expressly agreed to Defendant's July 2021 Terms and Plaintiff Jackson expressly agreed to Defendant's December 2021 Terms. Both terms provide that Plaintiffs were "required to resolve any claim that [they] may have against Uber on an individual basis in arbitration as set forth in this Arbitration Agreement." (See Affidavits attached to Uber's Motion to Compel Arbitration at Ex. C and F.)

Likewise, prong two is satisfied as Plaintiffs' claims clearly arise from and relate to Plaintiffs' use of the services available through the Rider App, and as a result, fall squarely within the scope of the Arbitration Agreements. The Agreements encompass ". . .**any dispute, claim or controversy in any way arising out of or relating to. . . (iii) incidents or accidents resulting in personal injury that you allege occurred in connection with your use of the Services. . .**" which include the September 14, 2022 accident from where this case emanates. In so doing, Plaintiffs waived their right to a jury trial.

The Court further finds that, contrary to Plaintiffs' assertion, Defendant did not actively participate in this lawsuit or waive its right to arbitrate. Defendant filed its Motion to Compel Arbitration as its responsive pleading. Even if Plaintiffs believed that Uber would file an answer—which Uber did not—filing an answer does not *ipso facto* result in a waiver of the right to arbitrability. *See generally Bonati v. Clark,* 975 So. 2d 440 (Fla. 2d DCA 2007) [32 Fla. L. Weekly D789a] (where a defendant files an answer and raises an arbitration agreement as an affirmative defense, defendant does not waive his right to arbitration). Additionally, any claims that Plaintiffs did not properly receive notice of arbitration were allayed when Uber filed its Motion to Compel Arbitration as well as its precursory letter advising Plaintiffs of its intent to arbitrate their claims. Further, Defendant Uber's July 2021 Terms and December 2021 terms contain delegation clauses that evince the parties' intent to delegate issues, including threshold issues, to the arbitrator. *See Suarez v. Uber Technologies, Inc.,* 2016 WL 2348706 at *4 (M.D. Fla. May 4, 2016) ("Defendants' motion [to compel arbitration] should be granted on this basis alone and adjudication of Plaintiff's attacks on Arbitration Provision should be left to the arbitrator because it is clear and unmistakable that the parties agreed to arbitrate arbitrability").

Based on the foregoing, it is thereby **ORDERED and ADJUDGED** as follows:

Defendant Uber Technologies, Inc.'s Motion to Compel Arbitration and to Stay Litigation is **GRANTED.**

It is further **ORDERED** that this action is **STAYED** pending completion of arbitration pursuant to the terms of the Arbitration Agreements in this case. The Arbitrator shall determine what the arbitral issues are between Plaintiffs and Uber. The parties shall notify the Court upon completion of arbitration, and either party shall have the right to resolve any remaining issues of contention in this case.

* * *

Criminal law—DUI manslaughter—Evidence—Statements of defendant—Observations by fire and rescue personnel—Section 401.304(4), which protects records of emergency calls containing patient examination or treatment information, protects only written records and does not require suppression of statements made by defendant to fire and rescue personnel and observations of those personnel at scene of fatal accident—Suppression is not warranted under section 395.3025(4)(d) or section 456.057(7)(c), which apply to licensed medical facilities and health care practitioners and not to fire and rescue personnel or ambulances—Disclosure of defendant's statements does not violate right to privacy under Article I, section 23, of Florida Constitution or Fourth and Fourteenth Amendments of U.S. Constitution because defendant had no reasonable expectation of privacy at scene of accident—Health Insurance Portability and Accountability Act—No merit to claim that suppression is required by HIPAA—Even if HIPAA applies to observations of fire and rescue personnel and defendant's statements, it does not bar transmission of that information to law enforcement—Suppression of body camera video shot in ambulance en route to hospital is not required by constitution because defendant had no reasonable expectation of privacy in ambulance—Statements made by hospital personnel to law enforcement regarding defendant's treatment are suppressed—Observations made by law enforcement at hospital, including body camera video, are not suppressed, as defendant had no reasonable expectation of privacy in emergency room examination area

STATE OF FLORIDA, Plaintiff, v. DENNIS PAGAN, Defendant. Circuit Court, 9th Judicial Circuit in and for Orange County. Case No. 2021-CF-009426-A-O, Division 12. January 3, 2024. Diego M. Madrigal, Judge.

ORDER ON AMENDED MOTION TO SUPPRESS AND/OR MOTION IN LIMINE WITH REGARD TO PARAMEDIC, FIRE DEPARTMENT AND HOSPITAL TREATMENT MEDICAL INFORMATION OF THE DEFENDANT filed on November 16, 2023

THIS CAUSE, having come on to be heard before me upon the Amended Motion To Suppress and/or Motion in Limine With Regard To Paramedic, Fire Department and Hospital Treatment Medical Information of the Defendant" filed on November 16, 2023 and the Court having reviewed the Pleading, the Court File, heard testimony of witnesses, heard argument of counsel and being otherwise duly advised in the premises, hereby finds:

Defendant, in his "Amended Motion To Suppress and/or Motion in Limine With Regard To Paramedic, Fire Department and Hospital Treatment Medical Information of the Defendant" filed on November 16, 2023 ("the Motion"), seeks to have this Court bar the State of Florida from making mention of, referring to, or interrogate concerning "any medical information allegedly obtained from the treatment of the Defendant by paramedics and fire department personnel of the Winter Park Fire Department and hospital personnel of Advent Health." The Defendant relies on *Fla. Stat.* §§ 401.30, 395.3025(4)(d), 456.057(7)(c) (2021), Article I Section 23 of the Florida Constitution, Federal HIPAA laws, and the Fourth and Fourteenth Amendments to the United States Constitution in support of his arguments. The Court would find as follows:

I. FACTS

The facts of this case are as straightforward as they are tragic. On May 1, 2021, a two-car auto accident occurred at or near the intersection of Osceola Avenue and Ollie Avenue in Winter Park, Florida which resulted in the death of Wanda Dudzinski. The other driver, the Defendant in this case, Dennis Pagan, survived the crash. At the scene,

Pagan was pinned behind the steering wheel of his vehicle. Those involved in his rescue noted that he showed visible signs of impairment. Further, he made statements to people on scene, including members of the Winter Park Fire Department. Among the statements made were that he was inebriated, had been drinking at a local bar, and had been "wilding out in Cocoa." These observations and statements were conveyed to law enforcement. As part of the investigation of the accident, law enforcement rode with Pagan in an ambulance to the Advent South Hospital and stayed in his emergency room with him while he was being treated. During these times, law enforcement activated their body worn camera. Mr. Pagan was eventually arrested and charged with DUI manslaughter pursuant to an arrest warrant.

II. STATEMENTS MADE AT THE SCENE

A. Fla. Stat. §401.304

It is undisputed that law enforcement, specifically Officer Talton, received information from Winter Park Fire Personnel related to Mr. Pagan's condition and statements at the scene. Mr. Pagan claims these statements are protected and should be suppressed. He is wrong. The authority on which he relies do not require suppression. Namely, Fla. Stat. §401.304(4) (2021) protects records of emergency calls "which contain patient examination or treatment information." The observations made by fire personnel are not records as contemplated by this statute. A reasonable reading of the Statue in toto, giving the plain and ordinary meaning to the words contained therein, leads to only one conclusion: the records contemplated by the statute are written documents. Here, there are no records, thus Defendant's argument is without merit. Furthermore, §401.30 has been cited in four reported cases in the history of Florida jurisprudence, and in each of those cases, the records sought were written records.

B. Fla. Stat. §395.3025

Likewise, the statements and observations should not be suppressed pursuant to Fla. Stat. 395.3025(4)(d) (2021). This statute is inapplicable to any action by fire personnel. The Statute only applies to records of "licensed facilities." That term is defined in Fla. Stat. §395.002(17) as being hospitals and ambulatory surgical centers. An ambulance is not licensed under that chapter; thus, it does not apply, and suppression cannot be granted.

C. Fla. Stat. §456.057

Furthermore, suppression is not warranted under Fla. Stat. §456.057(7)(c) Chapter 456 applies to "Health Care Practitioners." Under this chapter that term means "any person licensed under chapter 457; chapter 458; chapter 459; chapter 460; chapter 461; chapter 462; chapter 463; chapter 464; chapter 465; chapter 466; chapter 467; part I, part II, part III, part V, part X, part XIII, or part XIV of chapter 468; chapter 478; chapter 480; part I, part II, or part III of chapter 483; chapter 484; chapter 486; chapter 490; or chapter 491." Fla. Stat. § 456.001, (2021). Those chapters govern the following:

a. Chapter 457: Acupuncturists
b. Chapter 458: Medical Doctors
c. Chapter 459: Osteopathic Doctors
d. Chapter 460: Chiropractic Doctors
e. Chapter 461: Podiatrists
f. Chapter 462: Naturopaths
g. Chapter 463: Optometrists
h. Chapter 464: Nurses
i. Chapter 465: Pharmacists
j. Chapter 466: Dentists
k. Chapter 467: Midwives
1. Chapter 468 Part I: Language Pathologists and Audiologists
m. Chapter 468 Part II: Nursing Home Administration
n. Chapter 468 Part III: Occupational Therapists
o. Chapter 468: Part V: Respiratory Therapists
p. Chapter 468 Part X: Dieticts and Nutritionists
q. Chapter 468 Part XIII: Athletic Trainers
r. Chapter 468 Part XIV: Prosthetists, et. al
s. Chapter 478: Electrolysists
t. Chapter 480: Massage Therapists
u. Chapter 483 Part I: Clinical Lab Personnel
v. Chapter 483 Part II: Medical Physicists
w. Chapter 483: Part III: Genetic Counselors
x. Chapter 484: Dispensing of Medical Devices
y. Chapter 486: Physical Therapists
z. Chapter 490: Psychologists
aa. Chapter 491: Clinical Counselors

An emergency medical technician is not covered under any of these chapters; thus, suppression would be improper under §456.057(7)(c).

D. Article I, Section 23 of the Florida Constitution

The Defendant also claims that the disclosure of those statements is a violation of his privacy rights under Article I, Section 23 of the Florida Constitution. This Court would find that there was no violation of Mr. Pagan's right of privacy by any Winter Park Fire Department personnel.

Article I, Section 23 of the Florida Constitution codifies an individual's right to privacy from government intrusion. "Florida's right to privacy is a fundamental right that requires evaluation under a compelling state interest standard. However, before the right to privacy attaches and the standard is applied, a reasonable expectation of privacy must exist." *Bd. of County Comm'rs of Palm Beach County v. D.B.,* 784 So.2d 585, 588 (Fla. 4th DCA 2001) [26 Fla. L. Weekly D1256a]. That reasonable expectation of privacy is one based on society's view of what is reasonable, not solely on a person's subjective standard. In other words, although a person's expectation of privacy is one consideration," the final determination of an expectation's legitimacy takes a more global view, placing the individual in the context of a society and the values that the society seeks to foster. The right to privacy has not made each person a solipsistic island of self-determination." *Id.* at 590.

This Court does not find that a person has a reasonable expectation of privacy for statements made at the scene of a car accident. In short, a person does not have an expectation of privacy when being treated by emergency medical personnel while on a public road at the scene of an accident that person was involved in. Society would not recognize such an expansive expectation of privacy. Therefore, suppression would be improper because it is not supported by the law.

E. Fourth and Fourteenth Amendments to United States Constitution

The Defendant also avers that suppression should be made pursuant to the Fourth and Fourteenth Amendments to the United States Constitution. This argument also fails. The US Supreme Court has held that "the Fourth Amendment protects people, not places." *Katz v. U.S.* 389 U.S. at 351, 88 S.Ct. 507. An individual's Fourth Amendment protections crystallize when he or she "can claim a 'justifiable,' a 'reasonable,' or a 'legitimate expectation of privacy' that has been invaded by government action." *Smith v. Maryland,* 442 U.S. at 740, 99 S.Ct. 2577. As discussed above, the Defendant had no reasonable expectation of privacy at the scene.

F. HIPAA laws

Finally, the Defendant alleges that suppression of statements made at the scene is proper under federal HIPAA laws. It is not. The Health Insurance Portability and Accountability Act ("HIPAA") is a federal law that contains a privacy rule. The Privacy Rule protects all *"individually identifiable health information"* held or transmitted by a covered entity or its business associate, in any form or media,

whether electronic, paper, or oral. The Privacy Rule calls this information "protected health information (PHI). 45 C.F.R. § 160.103. "Individually identifiable health information" is information, that could relate to the individual's past, present or future physical or mental health or condition; the provision of health care to the individual; or the past, present, or future payment for the provision of health care to the individual. *Id*.

However, the privacy afforded by HIPAA is not limitless. In fact, there are six instances in the Statute which allow protected health information to be disclosed to law enforcement. Those instances are:

1) As required by law (including court orders, court-ordered warrants, subpoenas) and administrative requests;

2) To identify or locate a suspect, fugitive, material witness, or missing person;

3) In response to a law enforcement official's request for information about a victim or suspected victim of a crime;

4) To alert law enforcement of a person's death, if the covered entity suspects that criminal activity caused the death;

5) When a covered entity believes that protected health information is evidence of a crime that occurred on its premises; and

6) By a covered health care provider in a medical emergency not occurring on its premises, when necessary to inform law enforcement about the commission and nature of a crime, the location of the crime or crime victims, and the perpetrator of the crime.

45 C.F.R. § 164.512(f)

In the instant case, HIPAA was not violated, as any communication or disclosure would have been allowed pursuant to exceptions 2, 5, and 6. In short, the Court has reviewed HIPAA and finds that even if HIPAA applies to observations by fire rescue and statements made by the Defendant, it does not bar transmission of that information to law enforcement. Thus, suppression would be improper.

III. Observations Made in the Ambulance

For the same reasons above, the body camera footage is not suppressible under any of the authority cited by the Defendant. The Court will comment specifically on the Constitutional challenges raised by the Defendant. This Court must determine if society is prepared to recognize that someone who is suspected of drunken driving causing injury or death would have a reasonable expectation to no government intrusion of their transport to the hospital. This Court would find society is not ready to recognize that expectation as reasonable. Thus, the Defendant had no reasonable expectation of privacy and suppression is not called for under the Florida Constitution nor under the United States Constitution.

IV. Observations at the Hospital

Defendant's argument for suppression of observations and statements at the hospital is without merit for the reasons stated above with one exception. The Defendant's argument that nurses and doctors at the Hospital could not discuss his treatment with law enforcement does have merit. Fla. Stat. §456.057(7) (2021) states, ". . .the medical condition of a patient may not be discussed with, any person other than the patient, the patient's legal representative, or other health care practitioners and providers involved in the patient's care or treatment, except upon written authorization from the patient." That statute includes doctors, nurses, and other hospital workers as covered under its provisions. The exception to that statute requires a court order or warrant; neither was present in this case. Thus, any discussions of treatment of the Defendant by nurses and doctors with law enforcement is improper and should be suppressed. In other words, if a nurse or doctor made a comment to the officers present in the hospital regarding Defendant, those will not be admissible during trial.

The Court also specifically turns its attention to the constitutional claims raised by defendant regarding any statements made by Defendant and observations of law enforcement (including body cam footage) in the hospital. The same reasonable expectation of privacy above analysis should be applied to the Hospital room. Although a hospital is a type of space in which, under some circumstances, individuals have held reasonable expectations of privacy," but that alone does not mean appellee's expectation was reasonable in this case." *State v. Butler,* 1 So.3d 242, 248 (Fla. 1st DCA 2008) [34 Fla. L. Weekly D40b] citing to *Katz,* 389 U.S. at 351, 88 S.Ct. 507; *accord Brown,* 151 Cal.Rptr. at 754 (observing that "the question of privacy in a hospital . . . to some degree depends on the person whose conduct is questioned"). In Butler, the Court found that society was not prepared to recognize that there was a reasonable expectation of privacy that communications with a "monitored and very sick child in a hospital bed would remain private." *Id*. at 248. Courts have also recognized that an emergency room would have less privacy than a private hospital room. See *Buchanan v. State,* 432 So.2d 147, 148 (Fla. 1st DCA 1983) (finding no expectation of privacy in an emergency room examination area enclosed by curtains, "where medical personnel were constantly walking in and out of and where the patient could have expected to remain only a few hours at most.").

The more private the treatment space, the more reasonable the patient's expectation of privacy with respect to official activity. Compare *Jones v. State*, 648 So. 2d 669 (Fla. 1994) *with Buchanan v. State,* 432 So.2d 147, 148 (Fla. 1st DCA1983) (finding no expectation of privacy in emergency room examination area enclosed by curtains, "where medical personnel were constantly walking in and out and where [patient] could have expected to remain only a few hours at most"). Here, where the Defendant was in an open room, not admitted to a private room, had been accompanied by law enforcement during his entire treatment, and engaged in friendly, open conversation with law enforcement. The Court would find Defendant had no reasonable expectation of privacy.

V. CONCLUSION

Although accompanied together in the Defendant's Motion, the Defendant seeks to suppress several categories of items. The first are observations of the Defendant conveyed to law enforcement; these are not suppressible. The second are observations (including body cam) of the Defendant by law enforcement; these are not suppressible. The third are statements made by medical providers at the hospital; these are suppressed.

THEREFORE, THE COURT **ORDERS AND ADJUDGES** AS FOLLOWS:

1. The Motion is hereby Granted in part and Denied in part:

a. The Court will suppress statements made to law enforcement by doctors, nurses, and other medical personnel AT the hospital.

b. All other statements, observations, and other evidence is not suppressed and may be used at trial, subject to other applicable rules of evidence and procedure.

* * *

Criminal law—Possession of firearm by violent career criminal—Constitutionality of statute—Section 790.235 is not facially unconstitutional given U.S. Supreme Court's decision in *New York State Rifle & Pistol Ass'n, Inc. v. Bruen*—No merit to argument that, even if felon-in-possession restrictions are facially constitutional, they should not be applied to defendant, a violent career criminal and registered sex offender—It would be contrary to *Bruen* to engage in case-by-case analysis of which felonies should result in permanent disarmament where prohibition on felons possessing firearms adheres to historical tradition of firearm regulation—Motion to dismiss information is denied

STATE OF FLORIDA, v. MARCO NUNEZ, Defendant. Circuit Court, 11th Judicial Circuit in and for Miami-Dade County. Case No. F19-12548. Criminal Division. August 25, 2023. Ramiro C. Areces, Judge. Counsel: Kioceaia Stenson, Miami-Dade State Attorney's Office, for State. Joshua Brody, Miami-Dade County Public

Defender's Office, for Defendant.

ORDER DENYING DEFENDANT'S MOTION TO DISMISS INFORMATION UNDER SECOND AMENDMENT

THIS MATTER having come before the Court on Defendant's Motion to Dismiss Information Under Second Amendment (the "Motion") and this Court having read the Motion, examined the case file, heard the argument of counsel, reviewed the Parties' respective briefs, and being otherwise fully advised in the premises, it is hereby,

ORDERED AND ADJUDGED:

Defendant's Motion is DENIED.

Defendant contends this Court should declare section 790.235, Fla. Stat.[1] unconstitutional on its face. In the alternative, Defendant contends this Court should find the law is unconstitutional as applied to him because, although he is a convicted felon many times over, he has not previously been convicted of battery, robbery, assault, or a firearm-related offense. Instead, Defendant's prior convictions include, but are not limited to, felony convictions for Burglary of an Unoccupied Dwelling, Lewd and Lascivious Exhibition of a Child Less than 16 years of age, Burglary of an Unoccupied Conveyance, Uttering a Forged Check, Violation of Sex Offender Registration, and Grand Theft.[2] Defendant is a registered Sex Offender and qualifies as a Violent Career Criminal as defined by the Florida legislature in section 775.084(1)(d), Fla. Stat. As far as test cases go, this is not a good one.

Nearly 60 years ago, the Florida Supreme Court upheld the constitutionality of section 790.23(1)(a), Fla. Stat. *See Nelson v. State,* 195 So. 2d 853, 856 (Fla. 1967) ("We uphold the validity of s. 790.23. . . ."). Section 790.23(1)(a), like section 790.235, makes it unlawful for convicted felons to possess firearms. The only material difference between the two statutory provisions is that section 790.235 increases the severity of the penalty for those convicted felons who also qualify as "violent career criminals." *See Frear v. State,* 700 So. 2d 465, 466 (Fla. 1st DCA 1997) [22 Fla. L. Weekly D2494e] ("Section 790.23. . .like section 790.235, makes it a crime for a convicted felon to. . .have in his. . .possession. . .any firearm. . . . Section 790.235 merely provides for a more severe penalty if the convicted felon also meets the violent career criminal criteria. . . .").

Additionally, although the Second Amendment would not be incorporated into the Fourteenth Amendment until 2010,[3] the *Nelson* court nevertheless considered whether a felon disarmament law violated a defendant's rights under the Fourteenth Amendment. *Id.* at 854 ("Defendant has appealed contending that under. . .the Fourteenth Amendment. . .the Legislature may not single out persons who have been convicted of crime and create of them a special class who shall be deprived of constitutionally protected rights unrelated to their punishment.").

Nelson is still good law.

Defendant, however, contends the United States Supreme Court's decision in *Bruen*[4] compels this Court to reassess the facial constitutionality of any Florida law that permanently bars convicted felons from possessing firearms. *See* 142 S. Ct. 2111 (2022) [29 Fla. L. Weekly Fed. S440a]. This Court disagrees.

First, Defendant misreads *Bruen. Bruen* did not change the law as set forth in *Heller*[5] and *McDonald. Bruen* merely disapproved of the "two step" analysis around which the lower courts had coalesced in the wake of *Heller* and *McDonald. See Bruen,* 142 S. Ct. at 2127 ("Despite the popularity of this two-step approach. . .*Heller* and *McDonald* do not support applying means-end scrutiny in the Second Amendment context."). *Bruen* did not *create* new law, so much as it *clarified* old law. *Id.* at 2129 ("*Heller* and *McDonald* expressly rejected the application of any judge-empowering interest-balancing inquiry."). As a result, nothing in *Bruen* can be said to cast doubt upon the Court's prior assurances—dicta or otherwise—that "felon in possession" laws are "presumptively constitutional."[6] The United States Supreme Court has expressly stated,

> Although we do not undertake an exhaustive historical analysis today of the full scope of the Second Amendment, **nothing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons** and the mentally ill, or laws forbidding the carrying of a firearms in sensitive places such as school and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms.

Heller, 554 U.S. at 627 (emphasis added); *see also McDonald,* 561 U.S. at 786 ("We made it clear in *Heller* that our holding did not cast doubt on such longstanding regulatory measures as prohibitions on the possession of firearms by felons and the mentally ill. . . .We repeat those assurances here."); *see also U.S. v. Myers,* No. 22-10012, 2023 WL 3318492, at *4 (S.D. Fla. May 9, 2023); *U.S. v. Rice,* No. 3:22-CR-36, 2023 WL 2560836, at *5 ("While *Bruen* certainly built upon *Heller* and provided further direction to the circuit courts on how to analyze Second Amendment challenges, the conclusion that *Bruen* superseded *Heller* is a step too far."). Without more, this Court cannot find that the United States Supreme Court's rejection of a means-end analysis, which it had never previously adopted, casts doubt on the constitutionality of a Florida firearm restriction that has been found to be constitutional by the Florida Supreme Court, and which appears to be supported by the United States Supreme Court's dicta in *Heller* and *McDonald. See Gimeno v. NCHMD, Inc.,* 38 F.4th 910, 915 (11th Cir. 2022) [29 Fla. L. Weekly Fed. C1320a] ("the thoroughly reasoned dicta of the Supreme Court is of considerable persuasive value and is not something to be lightly cast aside.") (quotation marks omitted).

Second, to the extent that the Florida Supreme Court should, or even must, reassess the constitutionality of Florida's felon-in-possession laws, *this* Court's role is not to predict what the Florida Supreme Court might do if it re-evaluates said laws in the wake of *Bruen.* It is well-settled that lower courts are bound to follow the decisions of higher courts which directly control the issues before them. This rule remains true even when the higher court's binding decision rests on reasons that have since been rejected. *See, e.g., Rodriguez de Quijas v. Shearson/American Express, Inc.,* 490 U.S. 477 (1989).[7] The decision to revisit the constitutionality of Florida's felon-in-possession laws belongs solely to the Florida Supreme Court. Until and unless the Florida Supreme Court chooses to revisit *Nelson,* this Court is bound to the Florida Supreme Court's prior pronouncements concerning the validity of firearm restrictions that bar convicted felons from possessing firearms.

Third, even if (1) the Florida Supreme Court had never passed on the constitutionality of felon disarmament laws *vis-a-vis* the Fourteenth Amendment, (2) *Bruen* had done more than merely reiterate the law set forth in *Heller,* and (3) the United States Supreme Court had not repeated its assurances concerning the presumptive constitutionality of felon in possession laws, this Court would still be constrained to find section 790.235 facially constitutional.

It is well-settled that "in the absence of inter-district conflict, district court decisions bind all Florida trial courts." *Pardo v. State,* 596 So. 2d 665, 666 (Fla. 1992). In Florida, the First District Court of Appeal (hereinafter, the "First DCA") recently considered the facial constitutionality of Florida's felon disarmament laws in light of *Bruen* and found the restrictions historically justified and facially constitutional. *Edenfield v. State,* Case No. 1D22-290, 2023 WL 3734459 (Fla. 1st DCA May 31, 2023) [48 Fla. L. Weekly D1113a]. Specifically, the First DCA held,

> Whether based on the language from *McDonald, Heller,* and *Bruen*

excluding felons from having protected Second Amendment rights, or whether based on the historical tradition of the Second Amendment as given by *Bruen,* we conclude that Florida law prohibiting convicted felons from possessing firearms survives Second Amendment scrutiny. Accordingly, we reject Appellant's constitutional challenge to section 790.23(1)(a).

Id. at *4; *see also Heller,* 554 U.S. at 635 (implying there is a historical justification and that "there will be time enough to expound upon the historical justifications for the exceptions we have mentioned").

A majority of the Fifth District Court of Appeal (the "Fifth DCA") has also found that Florida's felon disarmament laws are historically justified and facially constitutional. *See Simpson v. State,* No. 5D23-0128, 2023 WL 4981373, at *13 (Fla. 5th DCA August 4, 2023) [48 Fla. L. Weekly D1541a] (Pratt, J., concurring) (finding "Florida's felon in possession ban has some applications that precisely track early American disarmament policies.").[8] There is, at present, therefore, no inter-district conflict. This Court is bound to follow District Court precedent.

For the aforementioned reasons, this Court finds section 790.235 is facially constitutional.

Our inquiry, however, is incomplete. Defendant contends that even if section 790.235 is facially constitutional, section 790.235 and/or section 790.23 are, nevertheless, unconstitutional as applied to him.[9] The question of the laws' "as applied" constitutionality is interesting, but not complicated.

It does not appear that *Edenfield, Simpson,* or even *Nelson,* reached the issue of whether the felon-in-possession restrictions were constitutional as applied to the defendants before them. As a result, Defendant contends this Court is free to determine whether the felon-in-possession restrictions, already found to be facially constitutional, should not be applied to him—a violent career criminal and registered sex offender.

There is, in fairness, quite a bit of debate among the various state and federal courts concerning the extent to which disarmament laws should, or could, be applied to *all* felons.[10] For example, Defendant's Motion heavily relies on an opinion by the Third Circuit, wherein that court found a federal law, which barred certain persons from possessing firearms, unconstitutional as applied to an individual who had never been convicted of a felony, or even a violent misdemeanor. *See Range v. Attorney General of the United States of America,* 69 F.4th 96 (3d Cir. 2023).

In *Range,* the Third Circuit, relying on language in *Bruen,* found there was no "historical analogue" for barring a person, like Mr. Range, whose sole conviction had been for making false statements in furtherance of obtaining food stamps from possessing firearms. *Id.* at 106. The instant case, however, is not like *Range* and *Range* is, in any event, not binding on this Court.

This Court finds the *Range* analysis—as it pertains to "as applied" challenges—is inapplicable here. As stated above, the firearm restriction at issue—namely, the permanent disarmament of Florida felons—has expressly been found constitutional by the highest court in this State. To the extent there was any doubt about its constitutionality following *Bruen,* the First DCA and Fifth DCA put those concerns to rest. To apply *Range* in Florida now would result in the substitution of one "judge-empowering interest-balancing inquiry" for another. *Bruen,* 142 S. Ct. at 2129.

The United States Supreme Court could not have been clearer that it is opposed to any test that would allow judges to determine, on a case-by-case basis, whether the Second Amendment provides some protection. *Id.* ("*Heller* and *McDonald* expressly rejected the application of any judge-empowering interest-balancing inquiry that asks whether the statute burdens a protected interest in a way or to an extent that is out of proportion to the statute's salutary effects upon other important governmental interests.") (cleaned up). As far as the United States Supreme Court is concerned, there is either a historical analogue for the sort of restriction at issue, or not. *See Jackson,* 69 F.4th at 501 ("Given these assurances by the Supreme Court, and the history that supports them, we conclude that there is no need for felony-by-felony litigation regarding the constitutionality of the federal felon in possession law); *see also Heller,* 554 U.S. at 643 ("A constitutional guarantee subject to future judges' assessments of its usefulness is no constitutional guarantee at all."); *Meyer,* 2023 WL 3318492 at *4 n.5 ("Since neither *Heller* nor *McDonald* distinguished between dangerous and non-dangerous felons, our reasoning here disposes of [defendant's] facial and as-applied challenges together.").

In this case, where the First DCA and Fifth DCA have, consistent with United States Supreme Court dicta, determined there is a historical analogue for Florida's felon-in-possession law, it would appear *contrary* to the United States Supreme Court's decisions in *Bruen* and *Heller* for this Court to engage in a case-by-case analysis of which specific felonies should, or should not, result in permanent disarmament. Frankly, this Court would not know where to begin.[11]

The undersigned is not a historian.[12] There is a difference between (1) looking to history to determine how a word or phrase might have been understood at the time a law, or constitutional amendment, was enacted or ratified; and (2) drawing quasi-academic conclusions from any number of historical sources, by authors unknown to this Court, to arrive at some unqualified expert opinion about whether a historically justified restriction may nevertheless lack some historical analogue when applied to any one or more particular felonies.[13]

There is no guide for where this Court would begin to draw the line. For example, this Court would be left to choose, among other options, whether to draw the line between (1) violent felons and non-violent felons;[14] (2) the virtuous citizen and the non-virtuous citizen;[15] and, (3) those that pose a present danger and those who do not pose a present danger.[16] The very act of drawing the line would amount to judicial lawmaking. This Court will not play policy maker.

Finally, even if "as applied" challenges on a felony-by-felony basis were appropriate, Defendant would still find no relief here. For *Edenfield* and the concurrence in *Simpson* to have found sec. 790.23(1)(a) facially constitutional, they must have necessarily determined that the law is constitutional *at least* as applied to some group of persons. *See Bullock,* 2023 WL 4232309, at *5 ("in a facial challenge, the court asks whether a law could never be applied in a valid manner.") (cleaned up). However large that group of persons may turn out to be—violent, non-violent, virtuous, unvirtuous—there can be no doubt that Defendant, whom the legislature has deemed a "violent career criminal" and "registered sex offender," falls within said group.

Section 790.23(1)(a), Fla. Stat., which unambiguously applies to *all* felons, has been found constitutional, to have a historical analogue, and to, therefore, be a permissible restriction on the Second Amendment right to keep and bear arms. *Heller,* 554 U.S. at 626 ("Like most rights, the right secured by the Second Amendment is not unlimited."). Section 790.235 merely increases the penalty for a subset of Florida felons who also qualify as violent career criminals. Barring a contention that some other right is being infringed upon, there is no room for "as applied," felony-by-felony challenges to section 790.23(1)(a) or 790.235. In this case, Defendant has made no such contention. Defendant, therefore, is merely a violent career criminal who broke into one or more homes and committed a sex crime against a Minor. And in Florida, felons, including this one in particular, cannot own firearms.

Accordingly, Defendant's Motion is DENIED.

[1]Section 790.235(1)(a) bars violent career criminals from possessing firearms.

[2]A list of his prior criminal history is attached to this Order.

[3]*See McDonald v. City of Chicago,* 561 U.S. 742 (2010) [22 Fla. L. Weekly Fed. S619a].

[4]*New York State Rifle & Pistol Association, Inc. v. Bruen,* 142 S. Ct. 2111 (2022) [29 Fla. L. Weekly Fed. S440a].

[5]*District of Columbia v. Heller,* 554 U.S. 570 (2008) [21 Fla. L. Weekly Fed. S497a].

[6]"Some have taken the phrase 'presumptively lawful' to mean that the Court was suggesting a presumption of constitutionality that could be rebutted on a case-by-case basis. That is an unlikely reading, for it would serve to cast doubt on the constitutionality of these regulations in a range of cases despite the Court's simultaneous statement that "nothing in our opinion should be taken to cast doubt" on the regulations. We think it more likely that the Court presumed that the regulations are constitutional because they are constitutional, but termed the conclusion presumptive because the specific regulations were not at issue in *Heller*." *U.S. v. Jackson,* 69 F.4th 495, 505 n.3 (8th Cir. 2023) (internal citations omitted).

[7]In this case, for example, one might argue that *Nelson* rested, at least in part, on a means-end analysis. 195 So. 2d at 855-56 ("The statutory prohibition of possession of a pistol by one convicted of a felony, civil rights not restored, is a reasonable public safeguard.").

[8]Although it was not the Opinion of the Court, a majority of the judges on the panel found Florida's felon disarmament restrictions on the Second Amendment to be historically justified and facially constitutional.

[9]In his Motion, Defendant alternates between sec. 790.23 and sec. 790.235. This is not surprising. If sec. 790.23 is a constitutional restriction on a class's Second Amendment rights (namely, *all* convicted felons), it follows that a restriction as to a subset of that class (convicted felons who also qualify, as violent career criminals) would also be constitutional.

[10]In at least one case, a Federal District Court, applying *Bruen,* found that a similar law to the one at issue here was unconstitutional as applied to a felon previously convicted of aggravated assault and manslaughter. *United States v. Bullock,* No. 3:18-CR-165, 2023 WL 4232309 (S.D. Miss. June 28, 2023).

[11]Literally. There appears to be a dispute over whether the historical analogue must come from those restrictions in place at the time the Second Amendment was ratified, or from the time the Fourteenth Amendment was ratified. *See Bruen,* 142 S. Ct. at 2138 ("We also acknowledge that there is an ongoing scholarly debate on whether courts should primarily rely on the prevailing understanding of an individual right when the Fourteenth Amendment was ratified in 1868 when defining its scope. . . .").

[12]*Bullock,* 2023 WL 4232309, at *4 ("Judges are not historians.").

[13]*See U.S. v. Yancey,* 621 F.3d 681, 684-85 (7th Cir. 2010) (a pre-*Bruen* case that cites to a series of scholarly articles on the historical justification for disarming felons).

[14]"Indeterminacy about how to measure the risk posed by a crime and indeterminacy about how much risk it takes for the crime to qualify as a violent felony. . .produce more unpredictability and arbitrariness than the Due Process Clause tolerates." *Folajtar v. Attorney General of the United States,* 980 F.3d 897 (3d Cir. 2020) (quoting *Johnson v. U.S.,* 576 U.S. 591, 598 (2015) [25 Fla. L. Weekly Fed. S459a]).

[15]*Compare U.S. v. Coombes,* 629 F. Supp. 3d. 1149, 1158 (N.D. Okla. 2022) ("Although not 'historical twins' to §922(g)(1), the attainder statutes are sufficient 'historical analogues' as they reflect regulations designed to protect the virtuous citizenry—the 'why'—through disarmament of the less virtuous—the 'how.' "), *with Kanter v. Barr,* 919 F.3d 437, 464 (7th Cir. 2019) (Barrett, J., dissenting) ("although the right protected by the Second Amendment is not unlimited, its limits are not defined by a general felon ban tied to a lack of virtue or good character.") (internal citations omitted).

[16]*Kanter,* 919 F.3d at 469 (Barrett, J., dissenting) ("Absent evidence that [defendant] would pose a risk to the public safety if he possessed a gun, the governments cannot permanently deprive him of his right to keep and bear arms.").

* * *

Criminal law—Post conviction relief—Timeliness of motion—Defendant's claim for relief is barred as grossly untimely, whether it is seen as claim that his original plea entered 22 years ago was involuntary or that his lawyer in probation revocation proceedings 14 years ago was ineffective—Even if resentencing that occurred four years ago restarted time period for filing motion, motion is untimely—No merit to claim that plea was involuntary because defendant was not advised that he would be sentenced to extended prison sentence if he violated his probation—Claim that counsel at defendant's probation revocation proceedings was ineffective for failing to move to withdraw plea fails—Defendant was not prejudiced by attorney's failure to make motion that could not have been granted, was not timely, and would not have assisted defendant—Motion to withdraw plea and identical successive motion are denied—Defendant who has filed many frivolous pleadings is ordered to show cause why he should not be barred from filing further pro se pleadings

STATE OF FLORIDA, Plaintiff, v. DERRICK GRANTLEY, Defendant. Circuit Court, 11th Judicial Circuit in and for Miami-Dade County, Criminal Division. Case Nos. F98-3144B and F98-5013. November 28, 2023. Milton Hirsch, Judge.

ORDER ON PENDING POST-CONVICTION MOTIONS

I. Introduction

In 1999—nearly a quarter-century ago—Derrick Grantley entered knowing, voluntary, and fully-informed pleas of guilty in the above-captioned cases, and was sentenced for his crimes. Since that time, he has been relentless in demanding the attention of this court and of not one but two courts of appeal.

It appears that he filed his first *pro se* post-conviction claim in 2001. The denial of that claim was affirmed by the appellate court. *See Grantley v. State*, 826 So. 2d 1032 (Fla. 3d DCA 2001) [27 Fla. L. Weekly D75e]. In 2005 the court of appeal again affirmed, *per curiam*, another of Grantley's *pro se* appeals. *See Grantley v. State,* 895 So. 2d 1230 (Fla. 3d DCA 2005). Another *per curiam* affirmance of a *pro se* appeal appears in 2014, although apparently the matter didn't even merit reporting in the Southern Reports. *See Grantley v. State*, Case No. 3D13-3156 (Fla. 3d DCA Feb. 19, 2014).

The year 2017 was a busy one for Mr. Grantley. He had violated his probation and was sentenced accordingly. The appeal from that sentence was not *pro se*, but was taken by the Office of the Public Defender. The appellate court affirmed the probation revocation, *Grantley v. State*, 211 So. 3d 301, 302 (Fla. 3d DCA 2017) [42 Fla. L. Weekly D349g], but remanded for resentencing due to an intervening Florida Supreme Court "decision unavailable to the trial court at the time it ruled" in imposing sentence. *Grantley*, 211 So. 3d at 303. Later that same year, Mr. Grantley managed to garner a denial in a decision without published opinion from an entirely different appellate court. *Grantley v. State*, 234 So. 3d 694 (Fla. 2d DCA 2017).

Mr. Grantley earned a dismissal without published opinion from the Second District the following year. *Grantley v. State*, 242 So. 3d 1076 (Fla. 2d DCA 2018). And he notched up another denial without published opinion the year after that. *Grantley v. State*, 270 So. 3d 340 (Fla. 2d DCA 2019). Perhaps dissatisfied with the service he was receiving from the Second District, Grantley returned to the Third District and promptly was awarded another dismissal without published opinion. *Grantley v. State*, 298 So. 3d 38 (Fla. 3d DCA 2019).

But it was 2020 that was Mr. Grantley's banner year. In an effort to protect itself and the appellate courts of this State from the torrent of Mr. Grantley's meritless but endless motion practice, this court barred Grantley from further *pro se* pleadings, requiring that any further pleadings be signed by a member in good standing of the Florida Bar. The Third District, however, reversed; holding that Grantley had engaged in an insufficiently "egregious abuse of the post-conviction process" to "warrant[ ] the barring of further *pro se* pleadings." *Grantley v. State*, 299 So. 3d 455, 456 (Fla. 3d DCA 2020) [45 Fla. L. Weekly D194a]. Not unreasonably, Mr. Grantley understood this to be an invitation to abuse the post-conviction process yet more egregiously. It was an invitation he was happy to accept.

His sense of liberation thus kindled, Grantley provided Florida's appellate courts with the opportunity to enter no fewer than three more decisions in 2020. The first was an affirmance without published opinion from the Second District. *Grantley v. State*, 302 So. 3d 329 (Fla. 2d DCA 2020). Then came yet another Third District denial without published opinion. *Grantley v. State*, 307 So. 3d 675 (Fla. 3d DCA 2020). And another denial without published opinion. *Grantley v. State*, 307 So. 3d 684 (Fla. 3d DCA 2020).

Now pending before this post-conviction court are not one but two more motions brought by Grantley *pro se*: his *Motion to Withdraw Guilty Plea* filed in March of 2021,[1] and his *Successive Motion for Post-Conviction Relief* filed in April of the same year.[2] These motions offer nothing more than a reprise of the meritless, fatuous claims that Mr. Grantley has so many times litigated. But because my betters on the appellate court have determined that Grantley's seemingly endless recapitulation of specious claims in specious motions does not constitute an abuse of the post-conviction process, I must consider them on the merits.

II. The two pending motions

A. The *Motion to Withdraw Guilty Plea*

Appended to this motion is what appears to be the transcript of Grantley's change-of-plea colloquy. At the court's invitation, the prosecutor stated the terms of the plea agreement very explicitly.

> [The prosecutor]: In exchange for a plea of guilty, the State will be offering the defendant thirty-five years state prison followed by fifteen years probation. He will be pleading guilty to all counts in the indictment, 98-3144B. He will also be pleading guilty to 98-5013. . .
>
> The Court: Thirty-five years state prison followed by fifteen years probation?
>
> [The prosecutor]: That's correct.

Grantley expressly acknowledged this understanding of the plea agreement. The court imposed sentence in accordance with the agreed terms.

But that is not the sentence that Mr. Grantley presently undergoes. As he concedes in his motion, only eight years later he violated his probation. As discussed *supra* at 2, the trial court's determination of violation was affirmed by the Third District.[3] The sentence Grantley presently undergoes is not the consequence of his taking a plea in 1999, but is a consequence of his engaging in new and additional misconduct only a few years thereafter.

It is less than entirely clear what Mr. Grantley complains of in the motion at bar. At one point, he couches his claim as one of ineffective assistance of counsel—not the counsel who represented him at his change-of-plea colloquy, but the counsel who represented him at his probation violation hearing. In his view, that counsel was ineffective for failing to move, at the probation violation hearing, to withdraw Grantley's plea entered more than eight years earlier. Viewed in another light, however, perhaps Mr. Grantley is complaining that his original plea was involuntary. "The defendant contends that had he known that he could be sentenced to an extended prison sentence for a violation of probation, that [*sic*] he would have never accepted the plea and would have insisted on going to trial." *Motion to Withdraw Plea* at 7.

In summary then: Grantley committed, by his own sworn admission, armed robbery, kidnapping, more than one brutal rape, and burglary with assault. In exchange for his plea of guilty, he received a sentence, advantageous in the circumstances, of 35 years in prison followed by probation. And in consideration of this plea, the prosecution abandoned a separate case of battery on a police officer. When, a few years later, he again engaged in misconduct, he was astonished to learn that he would receive, not an all-expenses-paid trip to DisneyWorld, but additional punishment. This, in his view, entitles him to withdraw the original plea. Given the age of this case and the extreme unlikelihood that the State could reprosecute him at this late date, he is, in effect, asking to be rewarded for his wrongdoing with a get-out-of-jail-free card.

Before even considering the merits, I note that Grantley's claim is barred as grossly untimely. Rule 3.850(b), Fla. R. Crim. P., provides that, as a general rule, a post-conviction motion must be brought within two years after the judgment and sentence under attack become final. Mr. Grantley entered his plea in 1999. If his present claim is that his plea was involuntary when entered because no one told him that if he persisted in wrongful conduct he would receive additional punishment, he was obliged to be sufficiently diligent to learn of that within two years, and to bring his claim within that period. He is late—by about two decades.

Alternatively, if his present claim is that when, some eight years later, he was being sentenced for his additional misconduct, his lawyer was constitutionally ineffective for failing to seek to withdraw his 1999 plea, his claim is still untimely.[4] Grantley argues that because as a result of subsequent changes in law he was obliged to be resentenced later, the two-year clock of Rule 3.850(b) didn't start to run in 2007. But by Grantley's own admission in his own pleading, the last imposition of sentence took place on February 12, 2018. The present motion was signed and dated by Mr. Grantley on March 18 of 2021—well outside the two-year window. No matter how viewed, the motion at bar is untimely and subject to denial on that basis alone.

For the benefit of any reviewing court, however, I consider the merits—such as they are—of Grantley's claim. As noted, it may be that he is arguing that his initial plea was involuntary because neither the trial court nor his lawyer told him that if he continued to engage in misconduct, he would continue to be punished. If this is his argument, he gets high marks for *chutzpah,*[5] but not for anything else.

State v. Fox, 659 So. 2d 1324 (Fla. 3d DCA 1995) [20 Fla. L. Weekly D2049a] (Cope, J.), although not "on all fours," is very instructive. Fox entered into a plea agreement in state court, served a short sentence pursuant to that agreement, and was released. He then committed more crimes, for which he was prosecuted in federal court. Because of his prior criminal record, he received a much higher sentence than would otherwise have been the case. *Fox*, 659 So. 2d at 1325-26. Fox then moved to set aside his earlier conviction in state court, claiming, in effect, that his plea was involuntary in the same sense that Grantley claims his plea is involuntary: no one told Mr. Fox, as part of the change-of-plea colloquy or otherwise, that if he continued to commit crimes his punishments would probably get worse. *Id.* at 1326. "The defendant's primary complaint is that the plea colloquy did not inform him that as a result of the plea he would become an adjudicated felon, and that as an adjudicated felon he would be exposed to greater penalties if in the future he were to commit new crimes." *Id.* at 1327.

Thus the pith of Fox's complaint is akin to the pith of Grantley's: My plea was involuntary because nobody told me that if I committed more bad acts, I would receive more punishment. Perhaps the best rejoinder is offered in *Capalbo v. State*, 73 So. 3d 838, 840 (Fla. 4th DCA 2011) [36 Fla. L. Weekly D2389a]: "A post-conviction movant cannot disown knowledge of the obvious. A post-conviction court is not required to hold hearings on absurd claims or accept as true allegations that defy logic and which are inherently incredible." *Fox* quotes from *United States v. Woods*, 870 F. 2d 285, 288 (5th Cir. 1989) for the proposition that, "The sentencing court is not required 'to anticipate a defendant's recidivism.' " *Fox*, 659 So. 2d at 1327. There is a very good reason that the change-of-plea colloquy appearing at Rule 3.172, Fla. R. Crim. P., does not include the question, "Do you understand that if you continue to commit crimes, or otherwise violate your probation, you will likely receive another sentence?" The reason, in the words of *Capalbo,* is that a defendant "cannot disown knowledge of the obvious," and an allegation that the failure of the trial judge to ask such a question would render a plea involuntary "def[ies] logic and . . . [is] inherently incredible." Mr. Fox was not entitled to relief because the trial court failed to ask such a question. Neither is Mr. Grantley.[6] *See also Major v. State*, 814 So. 2d 424, 431 (Fla. 2002) [27 Fla. L. Weekly S269a] ("we hold that neither the trial court nor counsel has a duty to advise a defendant that the defendant's

plea in a pending case may have sentencing enhancing consequences on a sentence imposed for a crime committed in the future"). *See gen'ly State v. Dickey*, 928 So. 2d 1193 (Fla. 2006) [31 Fla. L. Weekly S234a].

It is only a very slight divagation, and a very worthwhile one, to consider in this context the dissenting opinion of Justice John Paul Stevens, written when he was a judge of the 7th Circuit, in *United States v. Smith*, 440 F. 2d 521, 527 *et. seq.* (7th Cir. 1971). Smith brought a post-conviction motion claiming that at the time he took his plea, he was unaware that he would be ineligible for early parole; and that this unawareness rendered his plea involuntary. Then-Judge Stevens drew a distinction—a distinction of constitutional significance—between the voluntariness of a plea, and the wisdom (or unwisdom) of a plea bargain.

> The "consequences" of the plea of guilty which relate to voluntariness, and therefore have constitutional significance, are consequences of the plea rather than consequences of the conviction. The same punishment may be imposed in consequence of conviction regardless of whether the accused pleaded guilty or not guilty. But the waiver of constitutional protections, which would be available if the defendant elected to stand trial, is a consequence of the plea itself.

Smith, 440 F. 2d at 530 (Steven, J., dissenting) (fn. omitted).

In this respect, the "requirement that an admission of guilt be voluntary has the same constitutional foundation whether the admission is made in open court or in a police interrogation room." *Id.* at 529. But the *consequences* of conviction—not the voluntariness of the plea, but the consequences of the conviction—have "a different significance." *Id.* at 530. Those consequences "relate to the *wisdom* of a decision to plead guilty rather than to the *voluntariness* of the decision. A variety of factors enter into the exercise of the judgment which produces that decision. . . An erroneous appraisal of any of those factors affects the *wisdom* of the plea, but does not make it *involuntary*." *Id.* at 530 (emphasis added). In Justice Stevens's view, Smith's decision to accept a plea agreement which—all unknown to him—precluded the prospect of early parole went to the wisdom or unwisdom of the plea bargain, but not to the voluntariness of the plea.

The good sense of the distinction drawn by Justice Stevens is made abundantly clear by the motion at bar. Grantley made a voluntary waiver of his fair-trial rights as part of his plea of guilty. He now claims that he made a bad bargain, because as a consequence of that bargain, additional misconduct on his part results in additional punishment. That claim itself is laughably absurd; but more to the point, it goes, in terms of Justice Stevens's analysis, to the wisdom of the acceptance of the plea agreement, not to the voluntariness of the plea. The plea was voluntary. That should be the end of the analysis.

I recognize that Justice Stevens's position has never been squarely adopted by the courts of Florida. *But see Hurt v. State*, 82 So. 3d 1090, 1093 n. 2 (Fla. 4th DCA 2012) [37 Fla. L. Weekly D227a]; *Gusow v. State*, 6 So. 3d 699, 702 (Fla. 4th DCA 2009) [34 Fla. L. Weekly D676b] (Gross, C. J.) ("If we . . . were writing on a blank slate, we would adopt the analysis of Justice John Paul Stevens's dissent in *United States v. Smith*, 440 F. 2d 521, 528-29 (7th Cir. 1971)). That said, I join the Fourth District in respectfully but urgently suggesting that the Florida Supreme Court recede from the line of cases beginning with *State v. Leroux*, 689 So. 2d 235 (Fla. 1996) [21 Fla. L. Weekly S557a], and consider adopting Justice Stevens's analysis. *See McGee v. State*, 935 So. 2d 62. 64 (Fla. 1st DCA 2006) [31 Fla. L. Weekly D2015a] (citing *Hoffman v. Jones*, 280 So. 2d 431, 434 (Fla. 1973) (lower courts "may state their reasons for advocating change" as long as they follow controlling appellate case law)).

As discussed *supra*, however, it may be that Grantley is alleging, not the involuntariness of his original plea, but the ineffectiveness of his counsel in failing to move on his behalf to withdraw that plea years after the fact when Grantley was being sentenced for new misconduct. *See Motion to Withdraw Guilty Plea* at 7 ("Counsel was aware that the defendant had never been advised at the initial plea and sentencing of the maximum penalty, but still . . counsel failed to file a motion to withdraw" the plea); 10 ("counsel should have filed a motion to withdraw guilty plea, being that she was aware the defendant had never been advised of the maximum penalty his charges carried, and what he could face of [*sic*] a violation of probation, until the probation revocation hearings had started"). If this is indeed Grantley's argument, it fares even worse than his claim of the involuntariness of his initial plea.

To support a claim of ineffective assistance of counsel, a post-conviction defendant bears the burden of establishing that his counsel's performance was deficient, and that the deficiency prejudiced the defendant. *Jones v. State*, 998 So. 2d 573, 582 (Fla. 2008) [34 Fla. L. Weekly S8a] (citing *Strickland v. Washington*, 466 U.S. 668, 687 (1984)). Deficient performance requires the defendant to show that "counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed . . . by the Sixth Amendment," *Strickland*, 466 U.S. at 687, or that counsel's performance was "unreasonable under prevailing professional norms." *Valle v. State*, 778 So. 2d 960, 965 (Fla. 2001) [26 Fla. L. Weekly S46a]. In order to establish prejudice, the defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *Jones*, 998 So. 2d at 582.

In what respect was Grantley's attorney's performance deficient when he was found in violation of his probation? On his version of affairs, his attorney rendered constitutionally deficient performance by failing to move to withdraw a plea Grantley had entered some eight years earlier. Upon what grounds would the attorney have made such a motion? Upon the grounds that, at the time he entered the plea, Grantley was told what sentence he was actually getting, but wasn't told the maximum sentence that he wasn't getting?

Pity the poor lawyer, had she actually made such a motion. No doubt the then-presiding judge would have told her that *Fox*, *see supra* at n. 6, and cases following it, hold time and again that so long as a defendant is informed of the actual consequences to which he *is* being sentenced, it matters not at all if he isn't informed of possible consequences to which he *isn't* being sentenced. "[C]ounsel cannot be held to have been ineffective for not making meritless motions." *Dickerson v. State*, 285 So. 2d 353, 358 (Fla. 1st DCA 2019) [44 Fla. L. Weekly D2823a] (citing *Whitted v. State*, 992 So. 2d 352 (Fla. 4th DCA 2008) [33 Fla. L. Weekly D2337a]). And there can be no suggestion that Grantley was prejudiced by his lawyer's failure to make a motion that couldn't have been granted, that wasn't timely, *see* n. 1 *supra*, and that wouldn't have helped. Grantley has not asserted even a colorable claim of deficient performance on his lawyer's part.

B. The *Successive Motion for Post-Conviction Relief*

On March 29, 2021—about ten days after he filed his *Motion to Withdraw Guilty Plea*—Grantley filed his *Successive Motion for Post-Conviction Relief*. It is identical—word for word, letter for letter, jot for jot, tittle for tittle—to his *Motion to Withdraw Guilty Plea.*

III. Sanctions

Derrick Grantley is no doubt precisely the litigant that Chief Justice Warren Burger had in mind when he referred to someone who "considers the judicial system a laboratory where small boys can play." *Clark v. Florida*, 475 U.S. 1134, 1137 (1986). Contrary to what appears to be Grantley's impression, the "post-conviction process does not exist simply to give [defendants] something to do in order to pass the time as they serve their sentences." *Carroll v. State*, 192 So. 3d 525, 526 (Fla. 1st DCA 2016) [41 Fla. L. Weekly D1066a]. There

comes a point when "enough is enough." *Carroll*, 192 So. 3d at 526.

There is more at issue here than the minor annoyance and inconvenience involved in disposing of Grantley's frivolous pleadings. "It must prejudice the occasional meritorious [post-conviction] application to be buried in a flood of worthless ones. [The post-conviction judge] who must search a haystack for a needle is likely to end up with the attitude that the needle is not worth the search." *Brown v. Allen*, 344 U.S. 443, 537 (1953) (Jackson, J., concurring). In the same vein, the Florida Supreme Court has observed that one justification for sanctioning an abusive post-conviction litigant, "lies in the protection of the rights of others to have the Court conduct timely reviews of their legitimate filings." *Pettway v. McNeil*, 987 So. 2d 20, 22 (Fla. 2008) [33 Fla. L. Weekly S355a]. This court's resources are finite, and every minute spent on entertaining meritless post-conviction motions is time that cannot be spent on potentially meritorious cases. Turning again to Justice Stevens's dissent in *Smith, supra,* "Every inroad on the concept of finality undermines confidence in the integrity of our procedures; and, by increasing the volume of judicial work, inevitably delays and impairs the orderly administration of justice." *Smith*, 440 F. 2d at 528 (Stevens, J., dissenting). Any "concern that unfair procedures may have resulted in the conviction of an innocent defendant is only rarely raised by a petition to set aside a guilty plea," *id.* at 530, and is not raised at all here. Plainly, Mr. Grantley has abused the judicial system by filing the motion at bar.

Derrick Grantley is hereby directed to show cause within 30 days of the entry of this order why he should not be barred from filing further pleadings or papers pertaining or relating to, or arising out of, the present case. In light of the not one but two pleadings addressed herein, coming on the heels of the course of frivolous pleadings documented *supra* at 1-3, I sincerely and fervently hope that it is no longer the position of my betters on the Third District that Grantley has yet to reach the threshold of "egregious abuse of the post-conviction process" sufficient to "warrant[ ] the barring of further *pro se* pleadings," *Grantley,* 299 So. 3d at 456 (Fla. 3d DCA 2020) [45 Fla. L. Weekly D194a].

V. Conclusion

Derrick Grantley's *Motion to Withdraw Guilty Plea* and *Successive Motion for Post-Conviction Relief* are hereby denied. This is a final order. The movant has 30 days in which to appeal. Fla. R. Crim. P. 3.850(k). In the event of an appeal, the Clerk of Court is directed to append to this order for transmission to the appellate court the pending motions and all prior pleadings referenced in this order. *See* Fla. R. Crim. P. 3.850(f)(5).

No motion for rehearing will be entertained. *See* Fla. R. Crim. P. 3.850(j).

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[1]Although captioned a motion to withdraw a guilty plea, the substance of the motion is one for post-conviction relief. That being the case, I "must treat the claim as if it had been filed in a properly styled motion." *Gill v. State*, 829 So. 3d 299, 300 (Fla. 2d DCA 2002) [27 Fla. L. Weekly D2315a]. *See, e.g., Kemp v. State*, 245 So. 3d 987, 987 (Fla. 3d DCA 2018) [43 Fla. L. Weekly D992a] (claimant filed "petition for writ of error *coram nobis.* The trial court properly treated the petition as a motion for post-conviction relief under Florida Rule of Criminal Procedure 3.850"). Of course if Grantley's motion were to be treated as styled, *i.e.*, as a motion to withdraw plea, it would be untimely by nearly a quarter-century. Fla. R. Crim. P. 3.170(1) provides that, subject to certain exceptions inapplicable here, such a motion must be brought within 30 days of rendition of sentence. This time limit is generally viewed as jurisdictional. *See, e.g.*, *Gafford v. State*, 783 So. 2d 1191, 1192 (Fla. 1st DCA 2001) [26 Fla. L. Weekly D1095a].

[2]These motions were filed at a time when another judge was assigned to this division. They did not linger for nearly three years on my watch.

[3]According to Grantley, his first probation violation occurred in approximately 2007. According to the court record, the probation violation resulting in the sentence Grantley presently undergoes occurred years later, *see Grantley v. State*, 211 So. 3d 301, 302 (Fla. 3d DCA 2017) [42 Fla. L. Weekly D349g]. For analytical purposes, the difference in date matters little. Accordingly, I use Grantley's dates of choice.

[4]It is also specious. To maintain a claim of ineffective assistance of counsel, Grantley would have to show deficient performance, *i.e.*, that a competent lawyer would have moved in 2007 to withdraw his 1999 plea; and prejudice, *i.e.*, that a motion would likely be granted and then have resulted in a more favorable outcome for Grantley. *See* discussion *infra* at 10-11.

[5]https://en.wikipedia.org/wiki/Chutzpah.

[6]There is another respect in which Grantley's case and Fox's are identical. Like Grantley, Fox

> assert[ed] that the failure of the trial judge to inform him of the maximum possible penalty provided by law for the offense with which he was charged necessarily means that his plea cannot be considered knowing and intelligent. However, the defendant entered his plea on the understanding that he would be sentenced to a year and a day of incarceration, and that is the sentence which was imposed. The sentence was less than the maximum sentence allowable. There was no prejudice by the omission to advise the defendant of the maximum penalty.

Fox, 659 So. 2d at 1227 (citing *Baker v. State*, 344 So. 2d 597, 598 (Fla. 1 st DCA 1977)).

* * *

Criminal law—Sentencing—Death penalty—Jury instructions—Court will not advise jurors in capital case that their penalty-phase verdict would only be a recommendation—Advice is not required by statutory law, precedent, or rules of criminal procedure—There is no relevant reason to advise jurors that verdict is mere recommendation, and such advice may diminish jurors' sense of responsibility for verdict

STATE OF FLORIDA, Plaintiff, v. JOSE ROJAS, Defendant. Circuit Court, 11th Judicial Circuit in and for Miami-Dade County. Case No. F12-10603. Section 60. December 2, 2023. Miguel M. de la O, Judge. Counsel: Abbe Rifkin and Justin Funck, for Plaintiff. G.P. Della Fera and Richard Houlihan, for Defendant.

ORDER REGARDING ADVISING THE JURY THAT THEIR SENTENCING DECISION IS A RECOMMENDATION

THIS CAUSE is before the Court for trial on, *inter alia*, two counts of first-degree murder. The State is seeking imposition of the death penalty if the jury finds Defendant, Jose Rojas ("Rojas"), guilty of first-degree murder. During a status conference months ago, Rojas' counsel inquired whether the Court would advise the jury that their sentencing decision, if this case proceeded to a penalty phase, was a mere[1] recommendation. The Court advised the parties it would not so advise the jurors.

On November 27, 2023, the jury selection process began. During questioning by the State as to the jurors' willingness and ability to vote for imposition of the death penalty, the State referred to the jury's decision as a recommendation. The first time this happened, Rojas objected, the Court sustained the objection and the State proceeded without further argument. The second time it occurred, the Court brought the lawyers sidebar and asked why the State again used the word "recommendation." It became obvious the State had not comprehended the Court's prior rulings and instructions. The Court ordered the State to advise the jurors that the Court would impose the sentence that they handed down.

After that panel of jurors was excused, the State strenuously objected to not being able to advise the jurors in voir dire that their sentencing verdict is a recommendation and that the Court will make the final decision. The State asked how the Court would change Standard Jury Instruction 7.11, which explains to the jurors that their sentencing verdict is a recommendation to the Court. The Court advised the State that it has not yet drafted the phase two jury instructions and therefore was not prepared to answer the question posed. However, the Court advised that it would not tell the jurors that their penalty phase verdict would only be a recommendation.[2]

The Court recognizes that Rojas does not have a constitutional claim if this Court were to advise the jurors that their verdict is a recommendation. *See Reynolds v. State*, 251 So. 3d 811 (Fla. 2018) [43 Fla. L. Weekly S163a]. Likewise, the Court acknowledges that it is not a *Caldwell v. Mississippi*, 472 U.S. 320 (1985), violation to advise the jury that its sentencing decision is a recommendation

because it would not mislead the jury. However, the fact that jurors are not being misled about their role in Florida's capital sentencing scheme does not mean that their role should be minimized—even slightly. The fact that instructing the jury that its verdict is a recommendation would not be unconstitutional is not a good enough reason to do so.

Simply put, it is irrelevant to the jury's ultimate determination in the penalty phase that their decision is a recommendation. We should no more advise the jurors that their vote is a recommendation than we advise them about *Spencer* hearings, habeas petitions, the federal Antiterrorism and Effective Death Penalty Act (AEDPA), the Governor's pardon and commutation power, or any of the myriad of other procedural barriers to a death sentence being ultimately carried out.

The State objects to the Court's ruling for several reasons. It primarily argues that the Court is increasing the burden on the State. The Court disagrees. First, as of December 1, 2023, the Court has death-qualified 65 jurors. The State has been able to thoroughly question each of these potential jurors. All 65 have indicated they are willing to weigh the aggravating factors and the mitigating circumstances and consider whether to return a verdict for death or life imprisonment without the possibility of parole. All indicated a willingness to vote for death even if they were the 12th juror voting and the other 11 jurors were split 7 to 4 for death. In short, despite not minimizing in any way the jury's role in Florida's death penalty scheme, the Court has had no difficulty finding jurors who are willing to undertake the serious task of deciding whether another human being lives or dies.

Second, not allowing the State to minimize, even if only slightly, the jurors' role in capital sentencing is not the same as increasing the State's burden. There is no support in law or logic for concluding that the State is at a disadvantage unless the jurors know their verdict is a recommendation.[3] The State would have a better argument if it had a right to inform the jury their verdict of death is not final but merely a recommendation. Yet, no provision of Chapter 921, or the Florida Rules of Criminal Procedure, gives the State this right or compels this Court to so advise the jury.

Third, and this is the crux of the issue, advising the jurors that their sentence is only a recommendation implicates the very fears discussed in *Caldwell*.

> [W]e conclude that it is constitutionally impermissible to rest a death sentence on a determination made by a sentencer who has been led to believe that the responsibility for determining the appropriateness of the defendant's death rests elsewhere. This Court has repeatedly said that under the Eighth Amendment "the qualitative difference of death from all other punishments requires a correspondingly greater degree of scrutiny of the capital sentencing determination." *California v. Ramos*, 463 U.S. 992, 998-999 (1983). Accordingly, many of the limits that this Court has placed on the imposition of capital punishment are rooted in a concern that the sentencing process should facilitate the responsible and reliable exercise of sentencing discretion.

Caldwell, at 328-29. Although the State does not ask the Court to mislead the jury, the Court worries the jurors will not feel the "awesome responsibility" the Supreme Court requires as consistent with, and "indispensable" to, satisfying the Eighth Amendment.

> In evaluating the various procedures developed by States to determine the appropriateness of death, this Court's Eighth Amendment jurisprudence has taken as a given that capital sentencers would view their task as the serious one of determining whether a specific human being should die at the hands of the State. Thus, as long ago as the pre-*Furman* case of *McGautha v. California*, 402 U.S. 183 (1971), Justice Harlan, writing for the Court, upheld a capital sentencing scheme in spite of its reliance on jury discretion. The sentencing scheme's premise, he assumed, was "that jurors confronted with the truly awesome responsibility of decreeing death for a fellow human will act with due regard for the consequences of their decision. . . ." *Id*. Belief in the truth of the assumption that sentencers treat their power to determine the appropriateness of death as an "awesome responsibility" has allowed this Court to view sentencer discretion as consistent with—and indeed as indispensable to—the Eighth Amendment's "need for reliability in the determination that death is the appropriate punishment in a specific case." *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976) (plurality opinion).

Caldwell, at 329-330.

The State also complains that this Court is forcing it to lie to the jurors. First, the Court has done no such thing (except for the one instance when the State violated the Court's ruling). The State does not have to refer—one way or the other—to whether this Court is bound by the jury's sentencing verdict. The Court has only ruled that the State should not advise the jurors that their verdict is a recommendation. Second, information is routinely withheld from jurors for the purpose of ensuring due process. Indeed, sometimes we even affirmatively mislead jurors. For example, we tell jurors not to concern themselves with sentencing because the judge determines the sentence if the defendant is convicted. Yet, this is blatantly untrue in cases where a defendant is charged with first degree murder or who has been enhanced as a prison releasee reoffender. In those cases, the Court has no discretion as to sentencing at all, yet we tell the jurors it does. In short, it is acceptable to withhold factual and procedural information from jurors that is not relevant to their decision and which could prejudice one of the parties.

This is equally true with regards to the jury's role in death penalty sentencing. There is no relevant reason to advise the jury that its sentencing verdict is a recommendation. On the other hand, if this Court's concern—and the concern expressed by the United States Supreme Court in *Caldwell*—is legitimate, then there is a detriment to the Defendant in advising the jury that their verdict is a recommendation. Conversely, there is no harm to the State in not telling the jury this irrelevant fact.

Based on the Capital Jury Project's[4] interviews of jurors who served in capital cases, law professor Joseph L. Hoffman concluded:

> In this Article, I will suggest that the Court's continuing difficulty with the *Caldwell* rule can be traced to the way in which the Court originally articulated the rule. In light of the evidence supporting juror misperception of responsibility that is now emerging from the Capital Jury Project, I will propose that we consider framing the *Caldwell* rule in terms of a positive duty, not a negative prohibition. Instead of focusing on the extent to which jurors might have been misled by a prosecutor's argument or a judge's instructions, the rule should recognize that jurors are predisposed to use almost any available information to downplay their responsibility for the death sentencing decision-including information that accurately describes the sentencing process. I will therefore suggest that if society really cares about death penalty jurors' sense of personal moral responsibility, it should give the jurors—in every death penalty case—strong, unequivocal, affirmative instructions stating that the personal moral responsibility for the death sentencing decision rests with each and every one of them.

Joseph L. Hoffman, "Where's the Buck?—Juror Misperception of Sentencing Responsibility in Death Penalty Case," 70 Ind. L. J. 1137, 1138-39 (1995). *See* William J. Bowers, "The Capital Jury Project: Rationale, Design, and Preview of Early Findings," 70 Ind. L.J. 1043, 1076 (1995) ("Concerning both the California and Oregon studies, the investigators observed that 'there was a tendency among jurors from both samples to shift or abdicate responsibility for the ultimate decision-to 'the law,' to the judge, or to the legal instructions-rather

than to grapple personally with the life and death consequences of the verdicts they were called upon to render.' ").

The State's final argument is that the Florida Supreme Court has promulgated Standard Jury Instruction 7.11, which contains the recommendation language. First, the Florida Supreme Court did not issue the instruction at issue, a committee of the Court did. *See In re Amendments to Florida Rules of Judicial Admin., Florida Rules of Civil Procedure, & Florida Rules of Criminal Procedure-Standard Jury Instructions*, SC20-145, 2020 WL 1593030, *2 (Fla. Mar. 5, 2020) [45 Fla. L. Weekly S88a].

Second, the Florida Supreme Court has made it abundantly clear that the standard jury instructions are not binding on it and that trial judges are responsible for correctly instructing juries. *See id*. ("In authorizing the publication and use of these instructions, we express no opinion on [the instructions'] correctness and remind all interested parties that this authorization forecloses neither requesting additional or alternative instructions nor contesting the legal correctness of the instructions.").

This Court has been scrupulous about explaining the process the jury must undertake.[5] It has advised, and will advise, them of all relevant factors they must consider in determining the appropriate sentence. Since neither Florida statutory law, precedent, nor the rules of criminal procedure require that the jury be advised that its verdict is a recommendation, the burden is on State to justify why this Court should so instruct the jury. However, the State has not given this Court any basis for concluding that the jury's verdict constituting a recommendation is a relevant fact about which the jury should be informed. Therefore, the Court declines to do so because it would violate the spirit of *Caldwell* for no good or relevant reason.

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[1]In fairness to the State, it has never indicated it will use the words "mere recommendation," and it has painstakingly explained the process to the potential jurors accurately and fairly. The Court's concern is not with the lawyers, but rather that the term recommendation inherently diminishes the significance of the jury's sentencing verdict. Neither the Court nor the lawyers need to utter the words "mere recommendation" for the jurors to understand that a recommendation is not binding, and thus their decision is not determinative.

[2]Having now had an opportunity to reflect on the questioned posed by the State and to study the issue, the Court intends to modify Standard Jury Instruction 7.11 in this manner:

> Regardless of the results of each juror's individual weighing process—even if you conclude that the sufficient aggravators outweigh the mitigators—the law neither compels nor requires you to ~~recommend~~ vote that the defendant should be sentenced to death.
>
> If 8 or more jurors vote for the death penalty, your recommendation verdict must be for the death penalty. ~~This recommendation is not binding on the Court. However, I am required to assign and give great weight and deference to your recommendation.~~

[3]The only real disadvantage is that it increases the judicial labor because doubtless the Court has had to excuse some jurors who, believing their decision was the final one, were unwilling or unable to vote for death.

[4]The Capital Jury Project was "a research initiative that attempted to analyze jurors' understanding of their role and the exercise of their discretion in capital sentencing cases through post-sentencing juror interviews." *Wade v. State*, 41 So. 3d 857, 872 (Fla. 2010) [35 Fla. L. Weekly S239a]. It was founded in 1991 and was supported by the National Science Foundation.

[5]In fact, when Rojas' counsel told prospective jurors that they could consider anything they thought was a mitigating circumstance, even factors which were not raised during the penalty phase, the Court sustained the State's objection and instructed the jurors they could only consider mitigating factors which the greater weight of the evidence supported.

* * *

Arbitration—Arbitrable issue—Torts—Motion to compel arbitration and stay litigation arising out of injuries sustained by ride-share driver is granted—Plaintiff expressly agreed to resolve through binding arbitration any disputes with defendant related to use of ride-share service's driver app, negligence claim based on vehicle accident clearly arose from and related to plaintiff's use of driver app, and defendant did not actively participate in suit or waive right to arbitrate—Further, even if arbitrability were not clear, arbitration clause delegates to arbitrator the exclusive authority to resolve all questions of arbitrability

AWAIS ALI, Plaintiff, v. RASIER, LLC, Defendant. Circuit Court, 17th Judicial Circuit in and for Broward County. Case No. CACE23004665, Division 25. November 14, 2023. Shari Africk Olefson, Judge. Counsel: Eric S. Rudenberg, Rubenberg & Glasser, P.A., Ft. Lauderdale, for Plaintiff. Veresa Jones Adams, ROIG Lawyers, Deerfield Beach, for Defendant.

ORDER GRANTING DEFENDANT RASIER-DC, LLC'S MOTION TO COMPEL ARBITRATION AND TO STAY ACTION

THIS CAUSE having come before the Court on Defendant Rasier-DC, LLC's ("Rasier") hearing on its November 9, 2023 Motion to Compel Arbitration and Stay Plaintiff Awais Ali's ("Ali" or "Plaintiff") Action, and after hearing arguments, reviewing the parties' submission, and being otherwise fully advised in the premises, the Court finds and concludes as follows:

Factual and Procedural Background

Uber is a technology company that uses its proprietary technology to develop and maintain digital multi-sided marketplace platforms. On one side of the marketplace, businesses and individuals utilize Uber's platforms in order to connect with customers and obtain payment processing services. One of Uber's multi-sided platforms is the Rides platform. Drivers, like Plaintiff Ali and Defendant Ernesto Gonzalez Portocarrer ("Gonzalez"), download the driver version of the Uber App ("Driver App"), and riders download the rider version of the Uber App ("Rider App"); together, the Apps allow users to access the platform that facilitates the connection of individuals in need of a ride with individuals willing to provide transportation services, and after completing all the necessary steps required to gain access to the Driver App, the Driver App enables Riders and Drivers to connect. *See* Declaration of Alexandra O'Connor ("Decl.") at ¶4.

Plaintiff initiated this action in Broward County Florida state court alleging injuries arising from an April 15, 2023 accident involving Mr. Gonzalez. See Plaintiff's Complaint at ¶ 12. Plaintiff claims that he was injured as a result of the accident and that Mr. Gonzalez was at fault for causing the accident. *Id*.

Prior to the accident, and according to Uber's business records, Plaintiff Ali signed up to utilize the driver version of the Uber App on or about January 16, 2022. (See Affidavit of Alejandra O'Connor, attached to Uber's Motion to Compel Arbitration.) Plaintiff Ali expressly agreed to Defendant's January 2022 Terms of Use of the Platform Access Agreement ("January 2022 Terms"), which included an arbitration provision to resolve any claims he may have against Rasier related to his use of the Uber platform on an individual basis through binding arbitration. As such, Plaintiff Ali agreed to Uber's terms, which required Plaintiff to resolve any claims that he may have against Defendant in arbitration. The terms also included a delegation clause, which gave the arbitrator *exclusive authority* to determine threshold questions of arbitrability.

Legal Standard

Where a party to an agreement to arbitrate refuses to submit to arbitration, Florida law permits the aggrieved party to move for an order compelling arbitration. *See* Fla. Stat. § 682.03(1). Pending determination of such a motion, the Court should stay any related judicial proceedings. *See* Fla. Stat. § 682.03(6); *Open MRI of Okeechobee, LLC v. Aldana*, 969 So. 2d 589, 590 (Fla. 4th DCA 2007) [32 Fla. L. Weekly D2920b] ("It is clear that the statute [§ 682.03] mandates a stay while a motion for arbitration is pending"); *Miller & Solomon General Contractors, Inc. v. Brennan's Glass Co., Inc.*, 824 So. 2d 288, 290 (Fla. 4th DCA 2002) [27 Fla. L. Weekly

D1902a]. "In ruling on a motion to compel arbitration, Florida courts should resolve all doubts in favor of arbitration rather than against it." *Medanic v. Citicorp Inv. Servs.*, 954 So. 2d 1210, 1211 (Fla. 3d DCA 2007) [32 Fla. L. Weekly D1007a]. Florida courts routinely find that "arbitration clauses are to be given the broadest possible interpretation in order to accomplish the purpose of resolving controversies outside of the courts." *See e.g.*, *Royal Caribbean Cruises, Ltd. v. Universal Employment Agency*, 664 So. 2d 1107, 1108 (Fla. 3d DCA 1995) [20 Fla. L. Weekly D2711a].

Legal Conclusions

A "trial court's jurisdiction is limited to three issues: (1) whether a valid written agreement to arbitrate exists; (2) whether arbitrable issues exist; and (3) whether the right to arbitrate has been waived." *Seifert v. U.S. Home Corp.*, 750 So. 2d 638 (Fla. 1999) [24 Fla. L. Weekly S540a]. Here, the Court finds that Defendant Rasier satisfied the three-part test and Plaintiff's claims are subject to Rasier's arbitration clause.

A valid written agreement to arbitrate exists between Plaintiff and Rasier. Here Plaintiff Ali expressly agreed to Rasier's terms that "required to resolve any claim that [they] may have against Uber on an individual basis in arbitration as set forth in this Arbitration Agreement." (See Affidavit attached to Rasier's Motion to Compel Arbitration at Ex. C and F.) The PAA is the operative agreement here, and it included an agreement to resolve disputes with Rasier through binding arbitration, which Plaintiff agreed to on or about January 16, 2022 by placing a check in the checkbox for both prompts stating "YES, I AGREE." *Id.* at ¶ 12. Plaintiff and Rasier thus entered into what is commonly known as a "clickwrap" agreement, which is enforceable under Florida law.

Likewise, prong two is satisfied as Plaintiff's claims clearly arise from and relate to Plaintiff's use of the services available through the Driver App, and as a result, fall squarely within the scope of the Arbitration Agreements. When Plaintiff agreed to the PAA's terms, he agreed to a clear and broad arbitration provision requiring that "any legal dispute" arising from his relationship with Rasier be resolved through binding arbitration. *Id.* at ¶ 15, and Ex. C thereto, at § 13.1(a). The Agreement encompasses ". . .*without limitation*, [ ] disputes between you and us" involving "federal, state, or local statutory, common law and legal claims (**including without limitation, torts**) arising out of or relating to your relationship with" Rasier and "to all incidents or accidents resulting in personal injury to you or anyone else that . . . **occurred in connection with your use of Uber's platform. . .**" which include the April 15, 2022 accident from where this case emanates. In doing so, Plaintiff waived their right to a jury trial. (Emphasis added.)

There is nothing unclear about the broad terms of the arbitration agreement and how they apply to this case. Plaintiff's claim against Rasier sounds in negligence, which is a tort under Florida law. And Plaintiff's claim not only "relates to" his relationship with Rasier and use of Uber's Rides Platform, but there is also a "significant relationship" between the contract and claims, as he is alleging personal injury that arose from an accident while using the Driver App. The test for determining arbitrability of a particular claim under a broad arbitration provision is whether a "significant relationship" exists between the claim and the agreement containing the arbitration clause, regardless of the legal label attached to the dispute (i.e., tort or breach of contract). *Seifert*, 750 So. 2d at 637-8, *see also Bachus & Stratton, Inc. v. Mann*, 639 So. 2d 35, 36 (Fla. 4th DCA 1994).

Regardless of the test for determining arbitrability, the PAA delegates exclusive authority to resolve all threshold arbitrability issues. Exhibit C, at § 13.3(a) and (j). Accordingly, the Court further finds that, contrary to Plaintiff's assertion, Defendant's January 2022 terms contain a delegation clause that evince the parties' intent to delegate issues, including gateway issues involving scope, formation, to the arbitrator. The FAA governs the Arbitration Provision (*see* Decl., Ex. C, § 13.1(a)) and prohibits courts from deciding any arbitrability questions if delegated to an arbitrator. *See Henry Schein, Inc. v. Archer & White Sales*, 139 S. Ct. 524, 530 (2019) [27 Fla. L. Weekly Fed. S610a] (the US Supreme Court has recognized that parties may agree to arbitrate "gateway questions of arbitrability. . . such as whether [the parties'] agreement covers a particular controversy). *See also Suarez v. Uber Technologies, Inc.*, 2016 WL 2348706 at *4 (M.D. Fla. May 4, 2016) ("Defendants' motion [to compel arbitration] should be granted on this basis alone and adjudication of Plaintiff's attacks on Arbitration Provision should be left to the arbitrator because it is clear and unmistakable that the parties agreed to arbitrate arbitrability"). *See Newman v. Ernst & Young LLP*, 231 So. 3d 464, 467 (Fla. 4th DCA 2017) [42 Fla. L. Weekly D2162c] (when a delegation provision is included in an arbitration agreement—like the delegation clause included in Rasier's PAA—a court only retains jurisdiction to review a challenge to that particular provision. **Absent a direct challenge, a court must treat the delegation provision as valid and allow the arbitrator to determine the issue of arbitrability**).

In contrast, the cases cited by Plaintiff are unavailing for the propositions presented by Plaintiff. In *Lennar Homes, LLC v. Wilkinsky*, the Fourth DCA **reversed** the lower court's decision denying the right to arbitrate held that the "plain language of the agreement controls." 353 So. 3d 654 (Fla. 4th DCA 2023) [48 Fla. L. Weekly D94a]. The Fourth DCA further held that the arbitration provisions expressly and unambiguously extended to personal injuries suffered by plaintiff within the residential community. The court also warns of the trial court's "mistaken belief" that the scope of an arbitration agreement is *always limited* to claims with a contractual nexus to the agreement when the terms do not expressly apply to the terms. *Id.* (Emphasis added.) In relying on *Seifert v. U.S. Home Corp.*,750 So. 2d 633 (Fla. 1999) [24 Fla. L. Weekly S540a] and *Jackson v. Shakespeare Found, Inc.*, 108 So. 3d 587 (Fla. 2013) [38 Fla. L. Weekly S67a]—cases cited by Plaintiff in his opposition to compel arbitration—the court remanded with directions to the lower court to grant the Defendant's motion to dismiss and to compel arbitration.

Similarly, in *Jackson*, *supra*, which involved a fraud claim related to a land purchase contract, **the court found the claim was within the scope of the arbitration provision**. Notably, in *Jackson*, the arbitrator was limited in her review of the scope as a result of the terms of the agreement. The agreement at issue did not include a delegation clause, and specifically limited the arbitrator's role. The agreement provided that:

> **(b) All other disputes:** Buyer and Seller will have 30 days from the date a dispute arises between them to attempt to resolve the matter through mediation, failing which the parties *will resolve the dispute through neutral binding arbitration* in the county where the Property is located. ***The arbitrator may not alter the Contract terms or award any remedy not provided for in this Contract***. . . . This clause will survive closing.

Id. at 591. (Emphasis added.)[1]

In *Calvary Chapel Church, Inc. v. Happ*, while applying the significant relationship and contractual nexus test, **the Fourth overturned the circuit court's denial of the school's motion to dismiss plaintiff's wrongful death complaint and found that school's claims were subject to arbitration**. 353 So. 3d 649 (Fla. 4th DCA 2023) [48 Fla. L. Weekly D73f]. *Happ* involved the suicide of a 13-year-old student after being disciplined. The school moved to

compel arbitration pursuant to the enrollment contract signed by the parents when the child was admitted to school. The Estate argued that plaintiff's claim did not arise from the child's enrollment. *Id*. at 651. The court found "although the plaintiff's action sounds entirely in tort and does not specifically include a breach of contract claim, the claims have a direct relationship to the enrollment contract and handbook's terms and provisions" warranting the court reversing the lower court's order denying the school's motion to dismiss and compel arbitration. *Id*. at 652.

Finally, Rasier did not actively participate in this lawsuit or waive its right to arbitrate. Defendant filed its Motion to Compel Arbitration as its responsive pleading.

Based on the foregoing, it is thereby **ORDERED and ADJUDGED** as follows:

Defendant Rasier-DC, LLC's Motion to Compel Arbitration and to Stay Litigation is **GRANTED.**

It is further **ORDERED** that this action is **STAYED** pending completion of arbitration pursuant to the terms of the Arbitration Agreements in this case. The Arbitrator shall determine what the arbitral issues are between Plaintiff and Rasier. The parties shall notify the Court upon completion of arbitration.

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[1]The cases cited by Plaintiff make no mention of the arbitration agreements containing a delegation clause like the agreement between Rasier and Mr. Ali.

* * *

Criminal law—DUI manslaughter—Search and seizure—Medical blood and records—Warrant—Affidavit for warrants for medical blood sample and documents did not contain statements that were intentionally false or made with reckless disregard for truth, or omit material facts with intent to deceive or with reckless disregard for whether information should be revealed to magistrate—Motion to suppress denied—Fact that officer initially requested, but did not obtain, blood vials through notice to preserve does not warrant exclusion of vials subsequently obtained through valid warrants

STATE OF FLORIDA, Plaintiff, v. ALLAN JOSEPH REYNA, Defendant. Circuit Court, 18th Judicial Circuit in and for Brevard County. Case No. 05-2017-CF-054901-AXXX-XX. July 23, 2023. Steve Henderson, Judge.

ORDER DENYING MOTION TO SUPPRESS EVIDENCE SEIZED PURSUANT TO INVALID SEARCH WARRANTS

THIS CAUSE came before the Court for hearing on April 26, 2022, December 7, 2022, and January 6, 2023 upon the Defendant's Motion to Suppress Evidence Seized Pursuant to Invalid Search Warrants filed on May 7, 2021, pursuant to Fla. R. Crim. P. 3.190. The Defendant appeared at the hearing with his counsels, R. Scott Robinson, Esq., and Gregory W. Eisenmenger, Esq., and the State was represented by Assistant State Attorney Michael W. Doyle, Esq. The Court reserved its ruling on the motion and took the matter under advisement. The Court heard and considered the arguments from counsel, carefully reviewed the motion, together with the testimony and evidence, and the authorities presented, along with the State's Closing Argument filed on January 24, 2023, Defendant's Closing Argument filed on February 1, 2023, and State's Rebuttal Response to Defendant's Closing Argument filed on February 14, 2023. Based upon that review, and being otherwise fully advised, the Court makes the following findings of fact and conclusions of law:

A. On December 15, 2017, the State charged the Defendant with one count of DUI manslaughter for driving, or was in actual physical control, of a vehicle while under the influence of alcoholic beverages to the extent that a person's normal faculties were impaired or while a blood-alcohol level of .08 or more grams of alcohol per 100 milliliters of blood by operating such vehicle which caused the death of M.L. on July 15, 2017.

B. The evidence the Defendant seeks to suppress is (1) his medical blood, other bodily fluids, the medical records, and any evidence derived from the Defendant's blood; (2) the results of examinations or tests run on the Defendant's blood; and, (3) any other evidence derived from the Defendant's blood or medical records following the seizure by the Melbourne Police Department. The Court has reviewed the Motion and finds it facially sufficient. *See State v. Gay,* 823 So. 2d 153, 154-55 (Fla. 5th DCA 2002) [27 Fla. L. Weekly D1390c]. The State bears the burden of proving, by a preponderance, the legality of the search and seizure of evidence which it intends to introduce at trial. *See Nix v. Williams,* 467 U.S. 431, 444 (1984); *United States v. Mendenhall,* 446 U.S. 544 (1980).

C. The Defendant argues that his motion to suppress should be granted because the affidavit and search warrant are invalid. According to the Defendant, there is no probable cause for the seizure; the affidavit contains material omissions regarding impairment; the affidavit misstates injuries, specifically the witness statement of Giselle Kelly Campuzano and if the omitted facts are added to the affidavit, they would defeat probable cause; and, the affidavit contains misstatements regarding the issuance of the notice to preserve evidence on the hospital. These alleged omissions and misstatements are the result of intentional or reckless police conduct that amounts to deception.

D. The issuance of a search warrant must be supported by probable cause. To establish the requisite probable cause for the search warrant, the affidavit must set forth facts establishing two elements: (1) the commission element—that a particular person has committed a crime; and (2) the nexus element—that evidence relevant to the probable criminality is likely to be located in the place searched. *See State v. Hart,* 308 So. 3d 232, 235 (Fla. 5th DCA 2020) [45 Fla. L. Weekly D2607d]. "The standard of probable cause for the issuance of a search warrant does not require a prima facie showing of criminal activity, just 'probable' criminality." (citations omitted). *Id.* Here, Judge Silverman examined solely the content of the four corners of the affidavit "simply to make a practical, common sense decision whether, given all the circumstances before him, there is a fair probability that evidence of a crime will be found in a particular place." *Id.* at 236; *see also Illinois v. Gates,* 462 U.S. 213 (1983). Consistent with *Hart,* the undersigned gives "great deference" to the county judge's finding of probable cause. 308 So. 3d at 236. However, this does not end the Court's analysis.

E. The affidavit must also be examined for omissions made with intent to deceive or with reckless disregard of whether such information should have been revealed to the magistrate. *See Pagan v. State,* 830 So. 2d 792, 807 (Fla. 2002) [27 Fla. L. Weekly S299a] (*citing Johnson v. State,* 660 So. 2d 648 (Fla. 1995) [20 Fla. L. Weekly S347a]). In *Pardo v. State,* 941 So. 2d 1057, 1066-67 (Fla. 2006) [31 Fla. L. Weekly S690a], "[i]f the affidavit creates a substantial basis for a finding of probable cause on its face, a defendant seeking to suppress the fruits of the warrant must establish that the affidavit contains statements that were intentionally false or made with reckless disregard for the truth. *See Franks v. Delaware,* 438 U.S. 154 (1978); *Thorp v. State*, 777 So. 2d 385, 391 (Fla. 2000) [25 Fla. L. Weekly S1056d]." "In the alternative, the defendant must demonstrate that the affidavit omits facts with intent to deceive or with reckless disregard for whether the information should have been revealed to the magistrate. [Citations omitted]." "If probable cause does not exist after excising such falsehoods or adding the material omitted, evidence acquired thereby must be suppressed. Thus, falsehoods and omissions from an affidavit used to obtain a search warrant can invalidate the initial probable cause determination, but they are not impeachment material in the sense of facts bearing on the credibility

of a testifying witness." *Id.*

F. Here, the affidavit in support of the search warrant was executed by Officer Mark Whitright with the Melbourne Police Department on August 1, 2017. *Defendant's Exhibits 38 & 39.* The affidavit states that Officer Whitright is a certified law enforcement officer with certification after attending over 700 hours of training and passing the State Exam; he lists his work experience, in particular Officer Whitright has been assigned to the Selective Traffic Enforcement Until since 2011 and investigated numerous traffic fatalities, including traffic homicide investigations, search/arrest warrants.

G. The search warrant sought any vials of blood held by Holmes Regional Hospital as part of medical treatment in order to perform testing for alcohol, chemical substances, or controlled substances therein. The affidavit seeks a warrant for property that constitutes evidence relevant to the listed offenses: Driving Under the Influence Manslaughter, Vehicular Homicide, and Driving Under the Influence Injury. Officer Whitright swears probable cause exists, among other things, Giselle Kelly Campuzano's written statements prepared on July 15, 2017 and August 1, 2017. Ms. Campuzano testified at the suppression hearing on December 7, 2022.

H. During the evidentiary hearing on the defense motion to suppress, Ms. Campuzano testified that on July 15, 2017, at approximately 7:15 p.m., she was driving on US-1 in Melbourne when she observed in her rearview mirror a motorcycle behind her, on several occasions, weaving in and out of traffic lanes without signaling and playing loud music. She testified the motorcycle was going fast while passing vehicles on the roadway and she made a point to distance herself from the motorcyclist. However, the motorcyclist caught up to Ms. Campuzano's vehicle and was driving to the left of her vehicle in the furthest left lane. She testified that she observed a passenger reaching behind her and holding onto the backseat of the motorcycle when typically people hold onto the front. She testified that the passenger was holding on to her life. She observed the motorcycle lose control, speed across three lanes of traffic from the farthest left lane and made contact with a guardrail. The motorcyclist hit the railing, but the motorcycle continued down the lanes without a driver. The driver and the passenger landed on the ground. Ms. Campuzano testified she stopped her vehicle approximately a car distance behind the motorcycle. She stopped behind the motorcycle by the railing, called 911, and exited her vehicle to see if anyone needed help. She made contact with the driver and passenger who were close to each other. Other motorists stopped as well. She observed the passenger lying on her chest in the roadway and was not moving. She made contact with the male driver who was approximately in his early forties but did not speak to him. She was more than 20 feet from the motorcyclist. Ms. Campuzano testified the motorcyclist was incredibly angry, using profanity, and was unable to stand on his own, supporting himself by the railing. He directed his profanity to the bystanders who also stopped. She remained at the scene when the police and paramedic arrived. She also observed the motorcyclist using excessive profanity and yelling at the paramedic to turn the passenger over. She testified that someone with that amount of anger would be under the influence of something. However, she did not get close enough to the motorcyclist to smell the odor of alcohol and did not know how a person with a head injury would react.

I. While at the scene, an officer asked how the accident occurred and she provided a written statement, but did not have a lot of time to write it. *State's Exhibit 4.* Ms. Campuzano made a second statement on August 1, 2017, after the officer called her to elaborate on her first statement. *State's Exhibit 3.* Ms. Campuzano's second statement is more detailed and she testified that no officer pressured her to make the second statement. She testified that the motorcyclist's anger was why she suspected he was under the influence.

J. Ms. Campuzano testified that she made an audio statement to the police five days after the accident. The recording of Ms. Campuzano's statement was published to the Court. *Defense's Exhibit 51.* She testified that in the audio she told the police that she was traveling approximately 45 mph and when he passed her vehicle and that he was going no less than 50 mph. She testified that the motorcyclist was supporting himself on the railing when the paramedics tended to the passenger lying on the ground in front of him. She does not recall exactly how close he came to the police and the paramedics.

K. In the affidavit, Ms. Campuzano's July 15, 2017 handwritten statement states as follows:

> The motorcycle was on furthest left lane, I on furthest right lane, crossed over in front of me no light signal lost control, hit curb and railing. Going very fast. Lady holding the back of chair. On Harbor City Blvd. heading North, 2 people on bike. I, right behind them. He was driving. Music very loud.

Thereafter, Ms. Campuzano prepared on August 1, 2017 a more detailed handwritten statement as follows:

> After calling 911, was near crowd around couple. Driver was yelling at bystanders to turn the passenger over on back. Yelling/cursing increased as no one followed through. Not able to turn over passenger since he was fully supporting himself on the railing, erratic behavior/ shaken yelling her name over and over. Acting as if he was under the influence as he tried to turn around to face the passenger he stumbled, was not stable or [had] full balance was not able to observe if leg or foot was injured. Very rude to officers.

In the sworn probable cause affidavit executed by Officer Mark Whitright on August 1, 2017, he referenced Ms. Campuzano's statement to support probable cause as follows:

> Your affiant was advised by Officer Musante that eyewitnesses Giselle Kelly Campuzano told Officer Musante that she saw the motorcycle pass her vehicle northbound, occupied by a male operator and female passenger. Campuzano observed the crash occur and stopped to render aid. Upon arrival of officers, the motorcycle's license plate number yielded identification for the registered owner, identified as Allan Joseph Reyna. . .[c]ontact was then made with the witnesses of the crash on scene who provided their account of the crash. The witnesses indicated that they saw the motorcycle traveling at a high rate of speed. When asked, a witness relayed they knew the motorcyclist was speeding as they were doing the posted limit, and the motorcyclist passed them prior to the crash. Witnesses also stated when the motorcycle entered into the curve, the motorcycle failed to negotiate the curve. The motorcyclist also failed to stay within a single lane prior to the crash the motorcycle was "traveling at a high rate of speed" and "weaved in and out of lanes." Witness Campuzano stated in her written statement the motorcycle, "crossed over in front of me, no light signal" and "going very fast."
>
> Allan Joseph Reyna was observed by witness Campuzano at the crash scene exhibiting erratic behavior, displaying unsteady gate, poor balance, placing his full weight on the guardrail, stumbling when turning around from the railing, exhibiting no energy to turn, yelling, cursing, and acting "as if he was under the influence."

L. Officer Whitright also referenced in the affidavit the witness statement of Benjamin James Taylor taken on July 15, 2017. Mr. Taylor stated that at approximately 7:15 p.m., he was traveling northbound on Harbor City Blvd. when a motorcycle with a driver and one passenger passed him on his left. The motorcyclist was "traveling at a high rate of speed" and "weaved in and out of lanes." A few hundred feet ahead of Mr. Taylor the motorcyclist lost control and "went up over the curb and hit the guard rail." At this point, the driver and passenger were ejected from the motorcycle and fellow motorists stopped and dialed 911.

M. The Court finds Ms. Campuzano's testimony at the hearing,

coupled with her witness statements, credible that the Defendant was "[a]cting as if he was under the influence." However, the affidavit did not include that she "was unable to observe if [the Defendant's] leg or foot was injured. . ." which could have contributed to his instability or imbalance. This omission, if added to the affidavit, would not have defeated probable cause and the omission was not the result of intentional or reckless police conduct that amounts to deception. *See Pagan v. State,* 830 So. 2d 792, 807 (Fla. 2002) [27 Fla. L. Weekly S945a] ("The inclusion of statements by innocent mistake is insufficient to defeat the authenticity of an affidavit"). *Assuming arguendo* Officer Whitright acted deceptively by including in the affidavit that Ms. Campuzano observed that the Defendant was acting as if he was under the influence, the Court determines the remaining allegations in the affidavit are sufficient to establish probable cause and the alleged misleading statement will not invalidate the resulting search warrant. "Some omissions may be 'intentional' but also reasonable in the sense that they exclude material police in good faith believed to be marginal, extraneous, or cumulative. Such an exclusion is a valid and necessary part of the warrant process." *Johnson v. State,* 660 So. 2d 648, 656 (Fla. 1995) [20 Fla. L. Weekly S347a].

N. The Defendant also claims the affidavit upon which the search warrant was based contains misleading or omitted information, which when excised does not leave an affidavit that supplies probable cause to search. Specifically, the Defendant claims that Officer Whitright's affidavit does not inform the Court that Officer Linehan determined that the Defendant was not impaired or there was any suspicion of alcohol use. Further, Officer Whitright failed to include in his affidavit for a search warrant the Traffic Homicide Detective's report completed on November 27, 2017, wherein he stated, "Reyna was reportedly in good health and mental state and had no physical conditions that would have been a factor in the occurrence of this crash." Nevertheless, Officer Musante's report concluded that the Defendant operated his vehicle in a careless manner while under the influence.

O. During the evidentiary hearing on the defense's motion to suppress, Officer Linehan testified that on July 15, 2017, it was his first day in the traffic unit. He responded to the scene, but upon arrival the parties involved in the crash had already been transported to the hospital. He responded as part of the traffic unit on a secondary basis and was tasked to complete the long form of the crash report. *State's Exhibit 5*. He spoke to Officer Musante regarding the dynamics of the crash, he walked through the scene, but did no other crash investigation. He returned to his vehicle to complete the long form. Officer Linehan testified that in his report, there are pre-printed forms with (canned) responses that an officer checks off. Officer Linehan testified that he had no contact with the Defendant or the injured female and did not speak to any of the witnesses. Officer Linehan testified he did not refer to resources when he checked the boxes regarding no suspected alcohol or suspected drug use. He testified that he did not think he was qualified to do the role of a traffic homicide investigator at the time of the crash. Officer Linehan testified that he went to the ambulance bay, but did not have interaction with the Defendant. He went to the hospital to deliver a copy of the driver exchange to Officer Musante.

P. Officer Mark Daniel Whitright testified at the suppression hearing that he has been with the Melbourne Police Department for approximately 25 years. In June 2017, he was assigned to the selective traffic unit, which included proactive traffic enforcement and traffic accidents involving serious injury or death. He was involved in the investigation of the traffic homicide that occurred on July 17, 2017. After the collision, he assisted Officer Musante with the measurements of the post-collision inspection of the motorcycle involved; he met with the traffic unit; and, later mapped the scene to create a scaled diagram. Officer Whitright testified he did not have personal contact with the Defendant on July 15, 2017. He drafted the affidavits in support of the search warrant. On August 1, 2017, a search warrant was undertaken. The policy at that time was a drug recognition officer ("DRE") had to author the affidavits in search of blood. Officer Whitright testified that his position as a DRE did not have an impact on the investigation of this case. The officer was handed Defendant's Exhibit 38 (search warrant affidavit and warrant in support of obtaining blood samples) and Exhibit 39 (affidavit and search warrant affidavit in support of obtaining medical records) and reviewed the same. He testified that the resources he utilized in preparing the affidavit included the witness statements of Ms. Campuzano and another witness, the crash report, and the National Highway Traffic Safety Administration "NHTSA" guide predicting impaired motorcycle operation. Once the affidavits were drafted, he submitted them to Assistant State Attorney Michael Hunt with the felony intake who reviewed and approved them. Officer Whitright then took the affidavits to the Honorable Judge Silverman and he reviewed them, placed Officer Whitright under oath, and notarized the affidavits. He took the search warrant to the records department at Holmes Regional Hospital and obtained the medical records late in the afternoon. The following morning, he served the search warrant for the blood specimen at the hospital. The blood was tendered to the officer and he brought it back to the police station, packaged it, and submitted the blood specimen for analysis. Officer Whitright testified that on August 1, 2017, Officer Desormier requested his assistance on the investigation. The crash report was prepared by Officer Linehan. In the affidavit, the actual speed was undetermined. Officer Whitright testified he did not speak to any officers that were present at the scene. He reviewed Officer Linehan's report to refresh his memory. *State's Exhibit 5*. According to the report, Officer Linehan did not have suspicions of alcohol or drug use. He testified that at the time he assisted Officer Musante, the investigative packet had not been entered and the traffic homicide investigation was not yet completed. Officer Whitright testified as to which officer's report he reviewed in drafting the search affidavit. He testified that Officer Hibbs was the first officer to arrive on scene and that he assessed the Defendant who had a severe head injury and was yelling at the fire department personnel to assist his fiancé. Another firefighter was able to get the Defendant to calm down. Officer Whitright testified that according to Officer D'Errico's report, he arrived at the same time as Officer Hibbs. He reviewed Officer Koubek's report. Officer Whitright testified that only alcohol was found in the Defendant's blood. He spoke to Officer Musante before he drafted the affidavit. He testified that he had reviewed the statements from the witnesses—which are the two written statements from Ms. Campuzano dated July 15, 2017 and August 1, 2017. He agrees Ms. Campuzano's first statement did not include alcohol impairment, but discusses the Defendant's driving pattern. Officer Whitright was unaware of Ms. Campuzano's audio statement. Based on his investigation, he did not know how close she was to the Defendant and did not follow-up because it was not his investigation. In the third statement, it was a continuation of Ms. Campuzano's first statement. Officer Whitright referred to the Defendant's exhibits 38 and 39. He did not include in his affidavits the entire statement of Ms. Campuzano or police reports that did not indicate alcohol use. He testified NHSTA is a guide regarding impairment, such as, weaving, drifting, serving, speeding, running off the roadway, and is used as a reference material that lists driving queues of impairment. He used the information he had to determine enough probable cause at hand. He reviewed a statement from EMS personnel - Jason Frost, but did not include Mr. Frost's statement in the affidavit. Officer Whitright testified that typically what he provides in the affidavit is what is observed and not what is not observed in drafting an affidavit. He gives trained officers the weight

regarding the officer's observations. He was aware that Officer Musante met with the Defendant at the end of July at his attorney's office. He testified he cannot recall that the Defendant denied being under the influence. The officer testified he did not include the officer's or the paramedic's report of no impairment because they did not mention in their reports any indicators of impairment.

Q. After considering all of the testimony and evidence presented at the suppression hearings, the Court finds the search warrant for the medical blood sample and documents do not contain intentionally and knowingly or reckless false statements or omissions. Even if the medical blood evidence was initially pulled and saved pursuant to the Notice to Preserve, there are other facts in the search warrant affidavit that justify the issuance of the search warrant for the medical blood. Pursuant to the accident report, coupled with the fact that the passenger died as a result of the motorcycle crash, made the medical blood relevant pursuant to the ongoing crash investigation and pending criminal investigation. The fact that the officer initially requested through a notice to preserve, but did not obtain from the medical staff, the blood vials drawn in the course of the Defendant's treatment, this alone does not warrant the exclusion of the blood vials subsequently obtained through valid search warrants. The notice to preserve does not constitute the type of governmental misconduct that would warrant exclusion of the medical vials subsequently obtained through the search warrant. The police acted in good faith because they did not mislead the issuing judge, nor omitted material facts in the warrant application. To exclude the evidence in this case serves no deterrent purpose. *See Herring v. United States,* 555 U.S. 135 (2009) [21 Fla. L. Weekly Fed. S582a] ("To trigger the exclusionary rule, police conduct must be sufficiently deliberate that exclusion can meaningfully deter it. . .[E]xclusionary rule serves to deter deliberate, reckless, or grossly negligent conduct, or in some circumstances recurring or systemic negligence."). Accordingly, it is

ORDERED AND ADJUDGED:

The Defendant's Motion to Suppress Evidence Seized Pursuant to Invalid Search Warrant is **DENIED**.

* * *

Criminal law—DUI manslaughter—Search and seizure—Blood draw—Medical blood—Drawing of defendant's blood by hospital for medical diagnosis and treatment purposes, without any state involvement in blood draw or testing, does not violate Fourth Amendment or right to privacy under Florida Constitution—Hospital's actions in complying with notice to preserve medical blood did not amount to warrantless seizure of blood or meaningful interference with defendant's constitutionally protected possessory rights—Defendant had no possessory right to blood specimen at time of notice—Fact that officer initially requested, but did not obtain, blood vials through notice to preserve does not warrant exclusion of vials subsequently obtained through valid search warrants—Amended motion to suppress is denied

STATE OF FLORIDA, Plaintiff, v. ALLAN JOSEPH REYNA, Defendant. Circuit Court, 18th Judicial Circuit in and for Brevard County. Case No. 05-2017-CF-054901-AXXX-XX. July 23, 2023. Steve Henderson, Judge.

ORDER DENYING AMENDED MOTION TO SUPPRESS (ILLEGAL SEIZURE OF DEFENDANT'S BLOOD)

THIS CAUSE came before the Court for hearing on April 26, 2022, December 7, 2022, and January 6, 2023 upon the Defendant's Amended Motion to Suppress (Illegal Seizure of Defendant's Blood) filed on April 30, 2021, pursuant to Fla. R. Crim. P. 3.190. The Defendant appeared at the hearing with his counsels, R. Scott Robinson, Esq., and Gregory W. Eisenmenger, Esq., and the State was represented by Assistant State Attorney Michael W. Doyle, Esq. The Court reserved its ruling on the motion and took the matter under advisement. The Court heard and considered the arguments from counsel, carefully reviewed the motion, together with the testimony and evidence, and the authorities presented, along with the State's Closing Argument filed on January 24, 2023, Defendant's Closing Argument filed on February 1, 2023, and State's Rebuttal Response to Defendant's Closing Argument filed on February 14, 2023. Based upon that review, and being otherwise fully advised, the Court makes the following findings of fact and conclusions of law:

A. On December 15, 2017, the State charged the Defendant with one count of DUI manslaughter for driving, or was in actual physical control, of a vehicle while under the influence of alcoholic beverages to the extent that a person's normal faculties were impaired or while a blood-alcohol level of .08 or more grams of alcohol per 100 milliliters of blood by operating such vehicle which caused the death of M.L. on July 15, 2017.

B. The evidence the Defendant seeks to suppress is (1) the vials of medical blood seized by the police, (2) the results of examinations or tests run on the Defendant's blood; (3) and, any other evidence derived from the Defendant's blood following the seizure. The Court has reviewed the Motion and finds it facially sufficient. *See State v. Gay,* 823 So. 2d 153, 154-55 (Fla. 5th DCA 2002) [27 Fla. L. Weekly D1390c]. The State bears the burden of proving, by a preponderance, the legality of the search and seizure of evidence which it intends to introduce at trial. *See Nix v. Williams,* 467 U.S. 431, 444 (1984); *United States v. Mendenhall,* 446 U.S. 544 (1980).

C. The Defendant argues that his motion to suppress should be granted because his medical blood was illegally seized in violation of his federal and state constitutional rights to privacy and against unreasonable search and seizure. According to the Defendant, law enforcement coerced the hospital into acting as its agent to seize and hold the Defendant's blood two weeks before obtaining search warrants.

D. Article I, section 23 of the Florida Constitution provides that: "Every natural person has the right to be let alone and free from governmental intrusion into his private life *except as otherwise provided herein*." (Emphasis added). In *State v. Geiss,* 70 So. 3d 642, 645 (Fla. 5th DCA 2011) [36 Fla. L. Weekly D1575b], the Court opined that "this provision cannot be interpreted without reference to other provisions in the Florida Constitution addressing governmental intrusion into one's private life." The Court further explained the interpretation of the right to privacy relating to the other sections of the Florida Constitution as follows:

> Significantly, article 1, section 12 of the Florida Constitution requires that the state constitutional right against unreasonable searches and seizures "shall be construed in conformity with the 4th Amendment to the United States Constitution, as interpreted by the United States Supreme Court." Because article 1, section 12 expressly authorizes governmental searches and seizures to the extent found to be reasonable under the Fourth Amendment by the United States Supreme Court, the "except as otherwise provided herein" language of article 1, section 23 must be read as authorizing governmental intrusion into one's private life to the same measure. *See L.S. v. State,* 805 So. 2d 1004, 1008 (Fla. 1st DCA 2001) [26 Fla. L. Weekly D2970a] ("Article I, section 23, does not modify the applicability of Article I, section 12, so as to provide more protection than that provided under the Fourth Amendment . . . .") (citing *State v. Hume,* 512 So.2d 185, 188 (Fla. 1987)). Thus, if the search warrant was valid under the Fourth Amendment, it cannot be barred by article I, section 23.

Id. at 645-46.

E. It is well settled that the government's withdrawal of blood from a person's body without a warrant or consent is a search and seizure under the Florida Constitution. However, the Defendant was not subjected to a forcible extraction or a warrantless blood draw of his

blood when there is reason to think it would yield evidence of a crime. (Footnote[1]). Therefore, it does not afoul of the Fourth Amendment, or the Defendant's right to privacy under the provision of the state or federal constitution. In the present case, the blood was drawn by the hospital for medical diagnosis and treatment purposes only. As there was no state involvement in its withdrawal or testing, the drawing of the Defendant's blood did not implicate Article I, section 23 of the Florida Constitution. *See e.g., Lawlor v. State,* 538 So. 2d 86, 87 (Fla. 1st DCA 1989) ("We find the blood was properly drawn for dual medical and law enforcement purposes and that the results derived from the blood samples were properly admitted at trial.").

F. The question remains, however, whether the State's request to preserve the medical blood evidence prior to obtaining the search warrants violated Article I, section 23 of the Florida Constitution. This maybe a matter of first impression; nevertheless, several courts in other jurisdictions have addressed this issue or similar issue. A Court of Appeals of Indiana held that "to the extent the defendant does have an expectation of privacy in his medical records generally, we conclude that in Indiana at least, society does not recognize a reasonable expectation of privacy in blood alcohol test results obtained and recorded by a hospital as part of its consensual treatment of a patient, where those results are requested by law enforcement for law enforcement purposes only in the investigation of an automobile accident." *See Hannoy v. State,* 789 N.E.2d 977, 991 (Ind.Ct.App.2003); *see also Tims v. State,* 711 So.2d 1118, 1122-24 (Ala.Crim.App.1997); *People v. Perlos,* 436 Mich. 305, 462 N.W.2d 310, 319-21 (1990); *State v. Guido,* 698 A.2d 729, 733-34 (R.I.1997); *State v. Hardy,* 963 S.W.2d 516, 523-27 (Tex.Crim.App.1997); *State v. Jenkins,* 80 Wis.2d 426, 259 N.W.2d 109, 113 (1977). Other jurisdictions have held that the government's acquisition of medical records violates the defendant's rights under state constitutional provisions that guarantee a right to privacy, *see, e.g., King v. State,* 272 Ga. 788, 535 S.E.2d 492, 494-97 (2000); *State v. Nelson,* 283 Mont. 231, 941 P.2d 441, 446-50 (1997). While the decisions in other jurisdictions are not binding upon this Court, the reasoning of those cases that focus on the unique circumstances presented here. That is, law enforcement requests the hospital to preserve the medical blood and tests administered for the purpose of diagnosis and treatment of injuries sustained in an automobile accident and then obtains the same through search warrants. The Defendant also alleges that no one asked for or acquired his informed consent. However, the hospital provided a consent form stating as follows: "I further authorize my physician or the hospital to retain, preserve, use for the scientific, educational research purposes, or dispose of as they see fit, any specimens or tissues taken from my body during hospital or clinical visits." *State's Exhibit 9.*

G. In *Ferguson v. Charleston,* 532 U.S. 67 (2001) [14 Fla. L. Weekly Fed. S152a], at issue was a policy implemented by the police, a state hospital, and local officials to obtain evidence that could be used to prosecute pregnant women who tested positive for drugs. *Id.* at 69-71. Under the policy, the state hospital tested urine samples of maternity patients suspected of drug use. *Id.* at 70-73. The Supreme Court held that without the patient's informed consent, a state hospital's performance of diagnostic tests to obtain evidence of a patient's criminal conduct for law enforcement purposes was an unreasonable search under the Fourth Amendment. *Id.* at 84-86. In this context, the Supreme Court stated that "[t]he reasonable expectation of privacy enjoyed by the typical patient undergoing diagnostic tests in a hospital is that the results of those tests will not be shared with nonmedical personnel without her consent." *Id.* at 78. However, the Supreme Court also noted that the existence of a statutory mandatory reporting requirement "might lead to a patient to expect that members of the hospital staff might turn evidence acquired in the course of treatment to which the patient had consented," *id.* at 78 n. 13, and declined to address a case in which doctors independently complied with reporting requirements, *id.* at 85 n. 24. The Supreme Court also stated that "[w]hile state hospital employees, like other citizens, may have a duty to provide the police with evidence of criminal conduct that they inadvertently acquire in the course of routine treatment, when they undertake to obtain such evidence from their patients *for the specific purpose of incriminating those patients,* they have a special obligation to make sure that the patients are fully informed about their constitutional rights. . . ." [*Emphasis added*]. Based upon the foregoing, the Supreme Court found a violation of the Fourth Amendment because the testing was done for, and in conjunction with, law enforcement. However, in this case, as there was no law enforcement involvement in the taking or testing of the Defendant's blood, *Ferguson* does not apply. *See also Thomas v. Nationwide Children's Hosp.,* 882 F. 3d 608 (6th Cir. 2018) (emergency room physicians did not violate infant patient's Fourth Amendment rights when physicians ordered diagnostic x-rays, CT scans, and blood tests after they were brought into hospital's emergency room for serious injuries, even though tests eventually led to state investigation of parents for child abuse); *State v. Eads,* 154 N.E. 3d 538, 541 (May 6, 2020) (officer's warrantless acquisition of defendant's medical records was in violation of his Fourth Amendment rights; however, the exclusionary rule does not require the suppression of those unlawfully obtained test results).

H. The Defendant argues the blood is a person's property and when the Melbourne Police Department served the notice to preserve his medical blood 4 days after the accident without his knowledge or consent, this constituted a warrantless seizure because the hospital would have disposed of the blood in 5 days. The State counters that the staff at the hospital treated the notice to preserve as a routine request and responded accordingly and no seizure took place.

I. During the evidentiary hearing on the defense motion to suppress, Officer Joseph Musante testified that served eighteen years with the Melbourne Police Department before he retired on October 4, 2021. He attended traffic homicide school. On July 15, 2017, Officer Musante was working in the traffic unit as a traffic homicide investigator and Officer Linehan served as the accident investigator. According to Officer Linehan's Florida Highway Traffic Accident Report, he did not suspect alcohol use. He testified that Officer Linehan did not have direct contact with the Defendant. He testified that Officer Linehan concluded in his report that the investigation was not related to alcohol use independent of what he told Officer Linehan and he was not informed of this either. On July 15, 2017, the dispatcher contacted the on-call officer and he responded to the fatal crash on US Highway 1. At the time of the notification, Officer Musante was off-duty and received the call. He testified that he went directly to the scene in his patrol car and arrived at approximately 7:51 p.m. Upon arrival, he spoke with the sergeant. He did not observe the Defendant or the injured or deceased female at the scene. Officer Musante testified that he learned the crash involved a single motorcycle crash with two individuals on the vehicle. The Defendant and victim were transported to the Holmes Regional Medical Center accompanied by a sergeant and an officer. He testified that he interviewed two witnesses, Mr. Benjamin Taylor and Ms. Giselle Campuzano, who remained at the crash scene. Officer Musante testified at least three law enforcement officers and fire department personnel were still responding to the scene when he arrived. He also spoke to two other officers. He testified that he spoke with Officer Hibbs and his statement was entered in evidence at the hearing. Officer Hibbs told Officer Musante that personnel tended to the female lying on the ground and the Defendant became irate with them. By stipulation, Officer D'errico's statement to Officer Musante was

entered in evidence. Officer Musante testified that after the scene was mapped out, he arrived at the hospital at 9:33 p.m., where he learned the female passenger passed away. Upon arrival, he attempted to interview the Defendant, but hospital personnel were tending to him and he appeared seriously injured. He then contacted the medical examiner's office due to the death of the passenger. He left the hospital and went back to the police department. On July 16, 2017, he prepared his reports, and on July 18, 2017, the vehicle was towed, the vehicle's damage was investigated, and he also contacted the witnesses again. Officer Musante testified that on July 19, 2017, he returned to the hospital and served a notice to preserve blood evidence, which he used for the first time and was directed by the traffic sergeant to serve the notice. The notice form was held at the Melbourne Police Department and already existed when he served it. Officer Musante testified he spoke to the laboratory supervisor and served the notice and no questions were asked. Officer Musante testified he served the notice, because law enforcement was unable to interview the Defendant at the scene or the hospital. Generally, the police would have been able to make immediate contact with the individual to request a blood specimen. Officer Musante testified that he believed the Defendant's blood alcohol level was relevant in the investigation because of the observations of the Defendant's behavior by Officer Hibbs and D'Errico at the scene. Officer Musante testified that before using the notice to preserve evidence dated July 19, 2017, at the direction of his supervisor, he had never used the form before. Up to the point of using the notice, he testified he had no evidence of alcohol involved in the crash. He testified that he did not know of the hospital's policy of disposing blood within five days and it was his first experience with using the notice to preserve. He testified that he understood the notice was note a search warrant or a subpoena. Officer Musante testified that the normal procedure with any crash, law enforcement tries to obtain a voluntary blood draw of the party involved, but in this case, the officer could not obtain one on the day of the crash. Officer Musante did not inform the Defendant that he was going to obtain the blood from the hospital or ask if he would allow law enforcement to obtain the blood. As of July 27, 2017, Officer Musante advised the Defendant and counsel there was an active accident investigation but not a criminal investigation.

J. During the evidentiary hearing on the defense motion to suppress, Ms. Price testified that she is a supervisor of a team of forty-nine people at Holmes Regional Medical Center, including phlebotomists and processors. She ensures they are following state and federal regulations. Ms. Price testified that she has held the same position since July 19, 2017. Ms. Price was given State's Exhibit 8—Notice to Preserve Evidence and testified that she was not the individual that handled the blood specimen notated on the notice, but her associate. Upon receipt of the notice to preserve, it is given to the processors to preserve the blood specimen. She testified that before July 2017, she was aware of similar requests while employed at the hospital and these request are sent from the medical examiner's office or the sheriff's office. Ms. Price testified the requests arise from a medical examiner, the sheriff's department, or a member of law enforcement to preserve evidence arising from an accident. She testified that the blood specimen was taken from the Defendant for medical treatment. The hospital's normal course of action is to keep the blood specimen for four days because the stability of the specimen would not be viable for the testing that was performed. Ms. Price testified that the hospital does not have the capability of prolonging the viability of the blood specimen. After receipt of the notice, she testified there is an automation for testing and then the blood sample is stored and refrigerated. The automation process consists of documenting it into the computer and binder, the blood is placed on the instrument for testing, and once the testing is completed, it goes into a storage base and remains there for four days. After four days, the blood is disposed of automatically. Pursuant to the notice, someone from the hospital physically removed the blood from the storage base. After the request to preserve is made, the blood would be held for ninety days and after ninety days, the blood would be discarded. Ms. Price testified that the hospital does not notify the patient that the hospital was preserving the blood. She testified that a patient would need to be contacted, if a court order was not issued for the medical records, but not for the blood specimen. Ms. Price was handed Defense's Exhibit 37, and she testified there is a standard release form to release to the medical examiner, but no standard form for preserving evidence. Ms. Price testified as to the difference between "holding" an item versus "releasing" an item. She testified "holding" an item would be a motion to preserve the specimen and the order to release the specimen is the release of the specimen pursuant to a court order. The hospital will hold and preserve the specimen without a court order, but will only release the specimen with a court order. Ms. Price testified that the purpose of testing the patient's blood is that the physician may need it for a better diagnosis and treatment of the patient. In a routine case, the requesting physician would not ask that the blood sample be tested for blood alcohol content. Ms. Price testified that she did not look up the history of the case prior to her knowledge of the blood sample in this case. She also testified that she does not have access to the patient files. Ms. Price's involvement occurred after she received the notice via email or in person and she gave it to her processor. The processor records the specimen and preserves it for evidence by completing the paperwork and to have it ready for pickup. She testified that the pickup would occur once they receive a subpoena to release the specimen. Ms. Price testified that once the blood is drawn, the blood becomes the hospital's property, not the patient. Ms. Price testified that the blood itself does not belong to Health First. In order for Health First to exercise control over the blood, the hospital would need a court order. Ms. Price testified she believed the notice to be a court order.

K. Ms. Pacheco testified (via Teams) that she was employed at Holmes Regional Medical Center in July 2017 as a processing technician. She checked in laboratory samples and sent them to laboratories for testing. On July 19, 2017, she received a Notice to Preserve by the police to aside some blood work for a case. She testified that she did not previously have a similar request. She testified that she had some senior people assist her in processing the blood specimen, including Eva Price. She testified that after receiving the notice, she verified the identity of the officer in his official capacity and referred to his identification. She then followed through on the notice, pulled the blood samples, and set them aside. She testified there are no bar codes indicated on the blood samples when they were removed from the automated system. She searched for the laboratory blood sample in the refrigeration unit in the different departments depending on their tube type and placed them in a biohazard bag and placed the blood vials in a separate bin. She testified that the blood sample was taken from the patient upon the initial admittance into the hospital and before the physician's or nurse's treatment or medication. From this initial blood sample, it would determine how the physicians will treat the patient. She testified that if there was no notice to preserve, in due course, the blood would have been kept for thirty days and then placed in a biohazard waste container. She testified she was present when the police officer returned with a search warrant signed by the Court on August 2, 2017. She collected the paperwork from the officer and retained a copy for the hospital's record and tendered the samples as requested in the search warrant with the assistance of Ms. Price. On cross-examination, she previously testified in her deposition the blood is kept for five to seven days. On July 19, 2017, she received a

document from the police dressed in uniform, which she believed was an order and that she had to comply. Ms. Pacheco testified they did not attempt to get the Defendant's permission. The blood specimen taken from a patient is pursuant to a doctor's order.

L. The Fourth Amendment to the United States Constitution and article I, section 12 of the Florida Constitution, protect the people of this state from "unreasonable searches and seizures" of "their persons, houses, papers and effects." The protection afforded by the Florida constitution is expressly limited to that afforded under the Fourth Amendment as interpreted by the United States Supreme Court. *See Bernie v. State,* 524 So. 2d 988 (Fla. 1988); art. I, § 12, Fla. Const. (Article I, section 12 "right shall be construed in conformity with the 4th Amendment to the United States Constitution, as interpreted by the United States Supreme Court."). The United States Supreme Court has explained that the Fourth Amendment protects two types of expectations. One involving "searches," the other "seizures." In the present case, it involves an alleged "seizure" of property which occurs when there is some meaningful interference with an individual's possessory interest in that property. *See United States v. Jacobsen,* 466 U.S. 109, 112 (1984). To challenge a seizure, the Defendant needs to establish that the seizure interfered with his constitutionally protected possessory interest. "The infringement of privacy rights (as in the case of a search) while often a precursor to a seizure of property, is not necessary to such challenge." *See Jones v. State,* 648 So. 2d 669, 675 (Fla. 1994). The Court finds that the hospital complying with the notice to preserve did not amount to a warrantless seizure of his medical blood and the actions of the hospital in complying with the notice did not amount to a meaningful interference with the Defendant's constitutionally protected possessory rights in violation of the state and federal constitution because he did not have the possessory rights of the medical blood specimen at the time. In *Lawlor v. State,* 538 So. 2d 86 (Fla. 1st DCA 1989), the Court held the four vials of blood withdrawn by medical technologist, two for medical purposes and two anticipation of law enforcement requests, were properly withdrawn, and blood-alcohol test results derived from samples were accordingly admissible in prosecution for manslaughter by intoxication resulting from fatal vehicular collision, under § 316.1933, Fla. Stat. (1985), *see, e.g., Lindo v. State,* 983 So. 2d 672, 675 (Fla. 4th DCA 2008) [33 Fla. L. Weekly D1446a] (the temporary detention of defendant's packages at mailing facility was not a "seizure" within the meaning of the Fourth Amendment).

M. After considering all of the testimony and evidence presented at the suppression hearings, the medical blood evidence was initially pulled and saved pursuant to the Notice to Preserve which did not interfere with the Defendant's possessory rights. The medical blood was relevant pursuant to the ongoing crash investigation and pending criminal investigation. The fact that the officer initially requested through a notice to preserve, but did not obtain from the medical staff, the blood vials drawn in the course of the Defendant's treatment, this alone does not warrant the exclusion of the blood vials subsequently obtained through a valid search warrant. The notice to preserve does not constitute the type of governmental misconduct that would warrant exclusion of the medical vials subsequently obtained through the search warrant. The police acted in good faith because they did not mislead the issuing judge, nor omitted material facts in the warrant application. To exclude the evidence in this case serves no deterrent purpose. *See Herring v. United States,* 555 U.S. 135 (2009) [21 Fla. L. Weekly Fed. S582a] ("To trigger the exclusionary rule, police conduct must be sufficiently deliberate that exclusion can meaningfully deter it. . .[E]xclusionary rule serves to deter deliberate, reckless, or grossly negligent conduct, or in some circumstances recurring or systemic negligence."). Accordingly, it is

ORDERED AND ADJUDGED:

The Defendant's Motion to Suppress Evidence Seized Pursuant to Invalid Search Warrant is **DENIED**.

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[1]The situation in this case does not fall under section 316.1933(1), Fla. Stat. (1997), which authorizes a blood test where an officer has probable cause to believe a driver under the influence of alcoholic beverages has caused death or serious injury to a human being, including himself.

The other circumstance in which a police officer may obtain an involuntary blood sample is described in section 316.1932(1)(c), which also does not apply here. The requirements for this section are: (1) reasonable cause to believe the person was driving under the influence of alcoholic beverages or chemical or controlled substances; (2) the person appears for treatment at a hospital, clinic or medical facility, and (3) the administration of a breath or urine test is impractical or impossible or the person is incapable of refusal due to unconsciousness or other mental or physical condition.

* * *

Municipal corporations—Comprehensive plan—Amendment—Action for declaratory and injunctive relief from city council decision not to adopt proposed amendment to comprehensive plan that would create new imperial district future land use category and amend future land use map designation for plaintiff's property from density reduction groundwater resource category allowing maximum of 32 dwelling units on property to imperial district category allowing 700 dwelling units—Plaintiff's claim that it was denied substantive due process by decision not to adopt amendment fails—Decision to maintain status quo is fairly debatable based on impacts that proposed imperial district would have on traffic and transportation, problems with directing 700 dwelling units away from downtown to rural area, various improper references and misrepresentations in proposal, and residents' opposition to proposal—Requested relief, which include orders directing city council to adopt proposed amendment and to adopt formal procedures for land use hearings, would violate separation of powers—Claim that city violated plaintiff's procedural due process rights has no merit because procedural due process does not apply to legislative decision—Even if procedural due process did apply at city council hearing, plaintiff's allegations would not establish violation—City council was not required to identify reasons for decision, and motives of council members are irrelevant—Final summary judgment is entered in favor of city

3HWA LAND HOLDINGS, LLC, a Florida limited liability company, Plaintiff, v. CITY OF BONITA SPRINGS, a Florida Municipal Corporation, Defendant. Circuit Court, 20th Judicial Circuit in and for Lee County, Civil Division. Case No. 21-CA-004285. October 20, 2023. Alane Laboda, Judge. Counsel: James D. Fox, Roetzel & Andress, LPA, Naples, for Plaintiff. David A. Theriaque, S. Brent Spain, Benjamin R. Kelley, Theriaque & Spain, Tallahassee; and Derek P. Rooney, Gray Robinson, Fort Myers, for Defendant.

ORDER GRANTING DEFENDANT'S MOTION FOR FINAL SUMMARY JUDGMENT AND DENYING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT AND MEMORANDUM OF LAW

THIS CAUSE came before the Court for hearing on October 4, 2023, on competing Motions for Final Summary Judgment filed by Defendant City of Bonita Springs ("Defendant") on July 27, 2023, and by the Plaintiff 3HWA Land Holdings, LLC ("Plaintiff"), on July 31, 2023. Having reviewed the filings, heard argument from counsel, the matter stipulated by the parties to be appropriate as a question of law and ripe for summary judgment and being otherwise fully advised in the premises, the Court finds as follows:

1. This case arises from a decision by the City of Bonita Springs City Council ("City Council") to not adopt an amendment to the City of Bonita Springs Comprehensive Plan ("City's Comprehensive Plan") that was proposed by the Plaintiff ("Proposed Imperial District Amendment").

2. On April 18, 2022, the Plaintiff filed its four (4) count Amended Complaint against the Defendant for Declaratory Judgment (counts I & II) and Injunctive Relief (counts III & IV).

3. The property at issue consists of 328.13 acres of land ("Property") located in the City's Density Reduction Groundwater Resource Future Land Use Category ("DRGR").

4. The City's Comprehensive Plan provides that the DRGR is "[i]ntended to recognize geographic areas that provide significant recharge to aquifer systems associated with existing potable water wellfields or future wellfield development." (Policy 1.1.21, City's Comprehensive Plan). "Land uses in these areas must be compatible with maintaining surface and groundwater levels at their historic levels." (*Id.*).

5. The maximum density permitted in the DRGR is one (1) unit per ten (10) gross acres of land. (*Id.*). Thus, pursuant to its DRGR designation, the maximum number of dwelling units for the Property is approximately thirty-two (32) units.

6. In 2020, the Plaintiff submitted its Proposed Imperial District Amendment. The Plaintiff proposed to amend the City's Comprehensive Plan as follows:

> A. Create the new Imperial District Future Land Use Category; and
>
> B. Amend the City's Future Land Use Map designation for the Property from DRGR to the newly created Imperial District Future Land Use Category.

As a result of this proposed amendment, the maximum density for the Property would increase from approximately thirty-two (32) dwelling units to 700 dwelling units.

7. Pursuant to the City's Land Development Code procedures the City's Land Planning Agency ("City's LPA") conducts a public hearing and makes a recommendation to the City Council about proposed amendments to the City's Comprehensive Plan. (*See* § 4-88, City's Land Development Code). Thereafter, the City Council conducts a public hearing on the proposed amendment and renders a legislative decision. (*See id.* at § 4-53).

8. In the case at hand, the City Staff submitted a Staff Report to the City's LPA regarding the Proposed Imperial District Amendment. (A true and correct copy of the transcript of the Staff Report has been filed in this case by both parties.). The Staff Report did not contain a recommendation of approval or denial. (*See* Affidavit of Michael Fiigon, II, at ¶ 6). In light of Plaintiff's request—including the increase to the maximum density for the Property from approximately thirty-two (32) units to 700 units—the City Staff explained that this proposed amendment involved a legislative policy decision properly made by the City Council. (*See id.*).

9. The Staff Report did not contain a recommendation, however, it did state that the City Staff disagreed with and had concerns about certain aspects of the Proposed Imperial District Amendment. For example, the Staff Report expressed disagreement with the Plaintiff's analysis of the proposed density for the Property. (*See id.* at ¶ 7). Policy 1.1.2 of the Future Land Use Element of the City's Comprehensive Plan and Section 4-1282 of the City's Land Development Code require density to be calculated based upon the number of units per gross acre; the Plaintiff's analysis utilized a different formula which understated the proposed density for the Property. (*See id.*).[1]

10. On March 25, 2021, the City's LPA conducted a public hearing on the Proposed Imperial District Amendment ("LPA Hearing"). Although the City's LPA voted to recommend approval, three (3) of the five (5) members of the City's LPA expressed significant reservations about the proposal, including the negative impact that the amendment would have on water retention in the DRGR and traffic/transportation. (*See* LPA Hearing Transcript at 101:1-7, 101:9-10, 102:24-103:6). A fourth member indicated that the Plaintiff would "figure out traffic mitigation and the environment." (*See id.* at 102:16-20).

11. The City of Bonita Springs Community Development Senior Planner, Michael Fiigon, II, believed that the Plaintiff misrepresented aspects of its Proposed Imperial District Amendment during the public hearing before the City's LPA as to the following: "certain reports/studies that have been prepared regarding properties designated as the DRGR Future Land Use Category"; "the traffic impacts which would be caused by the additional traffic generated by the proposed development that would be allowed under the proposed new Imperial District Future Land Use District"; and "the public benefit of the proposed drainage conveyance that was going to be provided to the City." (*See id.*). As a result of these misrepresentations, Mr. Fiigon and the City's Community Development Director, John Dulmer, decided to expressly oppose approval of the Proposed Imperial District Amendment by the City Council. (*See id.*).

12. On April 21, 2021, the City Council conducted a public hearing on the Proposed Imperial District Amendment ("City Council Hearing"). (A true and correct copy of the transcript of the City Council Hearing has been filed and is referred to herein as the "Hearing Transcript.").

13. At the City Council Hearing, the Plaintiff's presentation lasted more than ninety (90) minutes. (*See* Plaintiff's Responses to Defendant's First Request for Admissions at Response No. 6). During that time, the Plaintiff presented testimony from a number of witnesses about a variety of different policy matters. (*See* Hearing Transcript at 6:11-66:14). This presentation also attempted to address the Staff Report which raised concerns about density, flooding, traffic and transportation, and other matters. (*See, e.g., id.* at 63:5-13) The Plaintiff's presentation was not interrupted and its time was not restricted. (*See id.* at 6:11-66:14).

14. After the Plaintiff concluded its presentation, the City Staff presented problems and policy considerations relating to the Proposed Imperial District Amendment; such as, density, traffic and transportation, infrastructure, flooding, storm-water, and various environmental concerns. (*See id.* at 67:1-75:13). Also, addressed was the Plaintiff's use of a step-down density approach, it was explained that such an approach is commonly used in urban areas, but that it is not common practice to utilize this approach in a rural or suburban area. (*See id.* at 72:7-22). The City's Traffic Engineer, Tom Ross, provided comprehensive testimony about the traffic and transportation problems with the Proposed Imperial District Amendment. (*See id.* at 75:14-92:6).[2]

15. Thereafter, thirteen (13) members of the public—including a former urban planner—provided comments to the City Council. (*See* Hearing Transcript at 98:21-128:3). All thirteen (13) people spoke against the proposal voicing various negative impact concerns. (*See id.*).

16. One member of the public who voiced opposition to the Proposed Imperial District Amendment was the Member of the City's LPA who had voted against a recommendation of approval. (*See id.* at 108:12-110:13). She asserted that the proposal is inconsistent with the City's Comprehensive Plan and that the infrastructure improvements that would have to be made to Terry Street east of I-75 could cost approximately $80 million dollars. (*See id.* at 108:12-110:13). She further added that the DRGR was designed to retain water and that more development would mean less surface area where water could be absorbed into the ground. (*See id.* at 109:19-110:4).

17. After public comment closed, the City Council voted to provide the Plaintiff with five (5) minutes for rebuttal—even though it was neither required nor customary for the City Council to do so. (*See id.* at 98:24-99:4, 134:9-25). The Plaintiff did not at any point voice any objection to this approach and did not request additional time for rebuttal. (*See id.* at 98:24-99:4, 131:14-140:3). In presenting rebuttal, the Plaintiff did not run out of time and explicitly noted that it had "covered most everything." (*See id.* at 135:6-139:2).

18. The City Council then debated whether to adopt the Proposed Imperial District Amendment. (*See id.* at 140:14-148:25). Two (2)

Council Members voiced opposition to the proposal on the basis of several different policy considerations. (*See id.* at 140:17-18, 142:15-146:8, 146:10-147:24).

19. Council Member Jesse Purdon expressed concerns about the increase in density and the negative impact such an increase would have on flooding, water quality, and transportation. (*See id.* at 142:15-146:8; *see also id.* at 144:8-9 (adding that water quality is the City's "number one strategic priority")). He stated that "for a multitude of reasons, from the economic side, from the environmental side, from the transportation side," he was not in favor of adopting the Proposed Imperial District Amendment. (*See id.* at 146:4-8).

20. Council Member Amy Quaremba explained her reasons for opposing the Proposed Imperial District Amendment as follows:

> "I think I look at this a little bit differently. I mean, I agree with what you said, Jesse, but this is—I see this as a significant departure from existing DRGR policies, which have been reiterated recently in our evaluation and appraisal report, which we just did just about a year ago. We had a lot of public input on that process. That's part of our planning process. That's part of a thing—a process by which we could review our comprehensive plan, and there was no impetus for us to change our current policy or the wording that we had within the DRGR.
>
> In fact, the people that came out said, Keep doing what you're doing. And I believe that—I have an issue with having these small portions of development requests for changes in the comprehensive plan, because I believe with the planner that came up and spoke and said we have to work to preserve the integrity of our comprehensive plan. If we change our comprehensive plan in spot areas, we don't have the total picture in our planning, so I'm against that.
>
> I am persuaded by some of the commentary that came out of the staff reports in regards to transportation, density, flooding, but that's somewhat irrelevant to the issue. This is a legislative issue on policy that the Council time and time again has supported. Density reduction, that's what it means, one unit per 10 acres."

(*See id.* at 146:10-147:13). Council Member Quaremba closed by emphasizing that the City's Strategic Priorities of "Downtown Development" and "DRGR Protection" supported denial of the Proposed Imperial District Amendment:

> "And just one more thing. . . . We have strategic priorities that we have articulated. We do it every year. Our current strategic objective is to focus on downtown development. And the second strategic—another strategic objective was to protect the DRGR. So that's what we told the people when we started. We should at least carry it forward for another year. So that's why I'm voting no on this."

(*See id.* at 147:17-24).

21. The City Council voted to not adopt the Proposed Imperial District Amendment by a vote of six (6) to one (1). (*See id.* at 149:1-13).

22. On April 18, 2022, the Plaintiff filed its four (4) Count Amended Complaint against the City. In Count I, the Plaintiff contends that the City Council violated its substantive due process rights by not forwarding its Proposed Imperial District Amendment to the Florida Department of Economic Opportunity ("FDEO") for review. (*See* Amended Complaint at 12-13). The Plaintiff alleges that the City Council's decision lacks a rational basis and is not fairly debatable. (*See id.*). Based on its substantive due process claim in Count I, the Plaintiff requests injunctive relief in Count III directing the City Council to approve the Proposed Imperial District Amendment and forward it to FDEO for review. (*See id.* at 15-16).

23. In Count II, the Plaintiff contends that the City Council was required to provide procedural due process to the Plaintiff at the City Council Hearing. (*See id.* at 13-15). The Plaintiff further contends that the City Council violated the Plaintiff's procedural due process rights by "limiting" the Plaintiff's testimony and evidence at this legislative hearing. (*See id.*). Based on its procedural due process claim in Count II, the Plaintiff requests injunctive relief in Count IV directing the City Council to adopt "formal procedures for land use hearings." (*See id.* at 16-17).

24. The Defendant filed its Answer and Affirmative Defenses to the Amended Complaint on May 11, 2022. Among other Affirmative Defenses, the Defendant contends that the relief sought by the Plaintiff in this case—an order compelling the City Council to adopt the Proposed Imperial District Amendment and to adopt formal rules for legislative land use hearings—violates the separation of powers doctrine.

25. On July 27, 2023, the Defendant filed its Summary Judgment Motion. As to the "substantive due process" claims in Counts I and III of the Amended Complaint. The Defendant argues that the City Council's decision to not adopt the Proposed Imperial District Amendment is a "fairly debatable" legislative policy decision. In support of this claim, the Defendant sets forth a number of different reasons that could conceivably support this legislative policy decision. As such, the Defendant contends that it is entitled to final summary judgment as a matter of law on Counts I and III. With respect to the "procedural due process" claims in Counts II and IV, the Defendant cites case law standing for the proposition that "procedural due process" does not apply in the context of a legislative decision. As such, the Defendant asserts that it is entitled to summary judgment as a matter of law on Counts II and IV under any set of facts.

26. The Plaintiff and Defendant both filed Affidavits and Exhibits in support of their Summary Judgment Motions.

27. On July 31, 2023, the Plaintiff filed its Summary Judgment Motion. As to the "substantive due process" claims in Counts I and III, the Plaintiff argues that the City Council's decision to not adopt the Proposed Imperial District Amendment is not "fairly debatable" for several reasons: the Proposed Imperial District Amendment would improve the existing conditions "on the ground" in the DRGR; the Proposed Imperial District Amendment "met or exceeded" the recommendations in certain studies of the DRGR; the City Council was precluded from considering traffic and transportation with respect to a comprehensive plan amendment; the City Council's decision to deny the Proposed Imperial District Amendment constitutes "reverse spot planning," and the City Council must adopt the Proposed Imperial District Amendment because it would be "consistent with abutting properties." On the basis of these arguments, the Plaintiff contends that it is entitled to summary judgment as to Counts I and III. As to the "procedural due process" claims in Counts II and IV, the Plaintiff raises a series of allegations about allegedly unfair actions by the City Council at the City Council Hearing.

28. As a threshold matter, it is well established that a municipality's decision to adopt or not adopt a proposed comprehensive plan amendment is purely a discretionary legislative decision. *See Coastal Dev. of N. Fla., Inc. v. City of Jacksonville Beach,* 788 So. 2d 204, 205 (Fla. 2001) [26 Fla. L. Weekly S224d] (reiterating that all amendments to a local comprehensive plan concern legislative "policy decisions"); *Martin Cty. v. Yusem,* 690 So. 2d 1288, 1293 (Fla. 1997) [22 Fla. L. Weekly S156a] ("[W]e expressly conclude that amendments to comprehensive land use plans are legislative decisions."). Thus, it is indisputable that the City Council's decision to not adopt the Plaintiff's Proposed Imperial District Amendment is a legislative decision.

30. The Plaintiff and the Defendant both assert that a substantive due process claim presents an issue of law. The Court agrees. *See Martin Cty. v. Section 28 P'ship, Ltd.,* 772 So. 2d at 616, 619 (Fla. 4th DCA 2000) [25 Fla. L. Weekly D2844a] ("*Partnership III*").

31. A substantive due process challenge to a legislative land use decision requires the reviewing court to apply the extremely deferential "rational basis" review standard. *See Partnership III,* 772 So. 2d at 619. This deferential standard requires the reviewing court to uphold a legislative decision to adopt or not adopt a comprehensive plan amendment if such decision is "fairly debatable." *Id.*

32. The rational basis test is well established. *See generally Membreno v. City of Hialeah,* 188 So. 3d 13, 25-29 (Fla. 3d DCA 2016) [41 Fla. L. Weekly D618a] (providing a detailed overview of the "highly deferential" rational basis review standard). This lenient standard of review provides that "a legislative act will not be considered arbitrary and capricious if it has 'a rational relationship with a legitimate general welfare concern.' " *Partnership III,* 772 So. 2d at 620 (citation omitted); *see also Membreno,* 199 So. 3d at 26 (explaining that "most legislation easily passes this test"). Pursuant to this standard of review, "[i]f the government's legislative decision is 'at least debatable' there is no denial of substantive due process." *Pinellas Cty. v. Richman Grp. of Fla., Inc.,* 253 So. 3d 662, 669 (Fla. 2d DCA 2017) [42 Fla. L. Weekly D2526a]. Such a deferential standard is necessary because "[a] more rigorous inquiry would amount to a determination of the wisdom of the legislation, and would usurp the legislative prerogative to establish policy." *Membreno,* 188 So. 3d at 25 (citation omitted). Accordingly, it is the burden of a plaintiff attacking legislative action on substantive due process grounds "to negate every conceivable basis which might support it." *Haire v. Fla. Dep't of Agric. & Consumer Servs.,* 870 So. 2d 774, 782 (Fla. 2004) [29 Fla. L. Weekly S67a] (citation omitted). Indeed, "[t]he proper inquiry is concerned with the existence of a conceivably rational basis, not whether that basis is actually considered by the legislative body." *WCI Cmtys., Inc. v. City of Coral Springs,* 885 So. 2d 912, 914 (Fla. 4th DCA 2004) [29 Fla. L. Weekly D2196b].

33. It is further well established that discretionary legislative decisions relating to comprehensive plan amendments are subject to the "fairly debatable" standard of review. *See Yusem,* 690 So. 2d at 1295 (holding that all comprehensive plan amendments are legislative policy decisions subject to "fairly debatable" review). "The fairly debatable standard of review is 'highly deferential' and requires approval of a planning action if reasonable persons could differ as to its propriety." *See id.* "In other words, '[a]n ordinance may be said to be fairly debatable when for any reason it is open to dispute or controversy on grounds that make sense or point to a logical deduction that in no way involves its constitutional validity.' " *Id.* (citation omitted); *Partnership III,* 772 So. 2d at 620 (explaining that a plaintiff alleging a substantive due process violation has the burden to demonstrate that the legislative decision was "so unreasonable and arbitrary as to not be even 'fairly debatable' "). As noted above, "fairly debatable" review presents a question of law. *See Partnership III,* 772 So. 2d at 619.

34. For a substantive due process claim regarding a legislative decision to ***not*** adopt a proposed comprehensive plan amendment, the question is ultimately whether the decision to "maintain the status quo" is fairly debatable. *See id.* at 621 (finding decision denying proposed plan amendment was fairly debatable). Such a decision—*i.e.,* choosing to maintain the existing comprehensive plan rather than adopt a proposed amendment—must be upheld if it is fairly debatable for any reason. *See id.* (reversing trial court because reasonable minds could differ as to the propriety of the county's legislative decision to maintain the status quo); *Pinellas Cty.,* 253 So. 3d at 670 ("Because reasonable persons could differ as to the propriety of the CPA's decision, we conclude that the trial court erred in ruling that the CPA's decision to maintain the status quo was not fairly debatable."); *City Env't Servs. Landfill, Inc. of Fla. v. Holmes Cty.,* 677 So. 2d 1327, 1333 (Fla. 1st DCA 1996) [21 Fla. L. Weekly D1791d] (upholding county's legislative decision to deny proposed comprehensive plan amendment). In other words, in a case of this sort, a plaintiff must demonstrate that adoption of the proposed amendment is the only conceivable decision the local government could possibly make.

35. Turning to the instant case, the Court finds that the City Council's legislative decision is "fairly debatable." There are many conceivable reasons why the City Council could decline to adopt the specific policy vision proposed by the Plaintiff. Moreover, while the actual reasons for a legislative decision are irrelevant for purposes of "fairly debatable" review, the Court finds that the concerns identified herein were explicitly addressed and recognized at the City Council Hearing.

36. The Proposed Imperial District Amendment represents a specific and detailed policy vision for 328.13 acres of land located in the DRGR. The DRGR is an environmentally sensitive area of immense importance to the City's water supply and quality, drainage and flooding, and other environmental concerns. The City's Comprehensive Plan explicitly states that the DRGR provides "significant recharge to aquifer systems associated with existing potable water wellfields or future wellfield development," and that "[l]and uses in these areas must be compatible with maintaining surface and groundwater levels at their historic levels." (Policy 1.1.21, City's Comprehensive Plan). As such, density is restricted in the DRGR to one (1) dwelling unit per ten (10) gross acres. (*See id.*). The Proposed Imperial District Amendment, however, would increase the permitted density on the Property from approximately thirty-two (32) dwelling units to 700 dwelling units. Such a density change in an environmentally sensitive area is, in and of itself, a legitimate policy basis on which the Proposed Imperial District Amendment could be denied. *See Partnership III,* 772 So. 2d at 619-21 (holding county's decision "was based on upon its legitimate interest in maintaining low densities in an environmentally sensitive area and accomplishing growth management goals for the [plaintiff's] property and the County as a whole"); *City Env't Servs. Landfill,* 677 So. 2d at 1333 (explaining that county's legislative decision "was premised on several legitimate considerations, including environmental risks, traffic, and cost of road repair); *see also Pinellas Cty.,* 253 So. 3d at 671 ("[T]he CPA's decision to deny amendment and keep the land available for target employers was fairly debatable.").

37. Indeed, while the Court need only address whether there is any conceivable basis for the City Council's decision that the Proposed Imperial District Amendment would impact traffic, transportation, and related infrastructure in the City. The Court notes that the Defendant filed Affidavits demonstrating the support for the City Council's decision as to traffic and transportation. (*See* Affidavit of Arleen Hunter, AICP, at ¶¶ 4-6; Affidavit of Tom Ross at ¶¶ 9-10).

38. The evidence demonstrated that The Proposed Imperial District Amendment could impact traffic and transportation, require the City to spend public funds on roadway and bridge expansion, and abandon its pedestrian-friendly plans for Terry Street. These considerations constitute legitimate policy reasons to not adopt the Proposed Imperial District Amendment. *See Pinellas Cty.,* 253 So. 3d at 669-72 (holding that county's policy decision to "preserve IL land for target employers who bring high-paying jobs to the County [was] related to a legitimate fiscal concern" and denial of proposed comprehensive plan amendment was fairly debatable); *City Env't Servs. Landfill,* 677 So. 2d at 1333 (explaining that county's legislative decision "was premised on several legitimate considerations, including environmental risks, traffic, and cost of road repair).

39.The Court rejects the Plaintiff's contention that a local government is somehow precluded from ever considering traffic and transportation with respect to a comprehensive plan amendment.

Traffic and transportation are perfectly legitimate considerations for a local government with respect to comprehensive planning. *See Coastal Dev. of N. Fla.,* 788 So. 2d at 209 (recognizing that a comprehensive plan amendment will require the local government to "consider the likely impact that the proposed amendment would have on traffic, utilities, other services, future capital expenditures, among other things") (quoting *City of Jacksonville Beach v. Coastal Dev. of N. Fla., Inc.,* 730 So. 2d 792, 794 (Fla. 1st DCA 1999) [24 Fla. L. Weekly D837a] (emphasis supplied); *see also City Env't. Servs. Landfill,* 677 So. 2d at 1333 (holding that county's legislative decision to not amend its comprehensive plan to create a new future land use designation "was premised on several legitimate considerations, including environmental risks, traffic, and cost of road repair") (emphasis supplied).

40. The Plaintiff appears to be arguing that the City Council's decision must be reversed—and, indeed, supplanted—because of the mere discussion of traffic and transportation at the City Council, which was only one amongst many. The actual reasons for a legislative decision are immaterial and a legislative decision is not reviewed on a "record" like a quasi-judicial decision would be. Unlike a quasi-judicial decision, a legislative decision must be upheld if it is supported for any conceivable reason. *See Yusem,* 690 So. 2d at 1293 (explaining that a comprehensive plan decision must be upheld if it is fairly debatable for "any reason"); *WCI Cmtys.,* 885 So. 2d at 914 (explaining that rational basis review is concerned with the existence of a "conceivable" basis and does not concern the actual reasons for a decision); *Membreno,* 185 So. 3d at 26-27 (explaining that rational basis review is not a review of the record or evidence presented at a legislative hearing).

41. Based upon the above, traffic and transportation considerations present an additional "fairly debatable" basis for the City Council's decision to not adopt the Proposed Imperial District Amendment.

42. Further, according to the evidence presented, the Proposed Imperial District Amendment would direct 700 dwelling units away from the downtown area and into a rural area, which Defendant states is inconsistent with the City's Strategic Priorities of "DRGR Protection" and "Downtown Revitalization." (*See* Affidavit of Michael Fiigon, II, at ¶ 20). Council Member Quaremba identified this issue at the City Council Hearing. (*See* Hearing Transcript at 146:10-147:24). This likewise presents a conceivable basis for the City Council's decision to not adopt the Proposed Imperial District Amendment that is "fairly debatable."

43. The Defendants evidence indicates there are a number of problems with the Proposed Imperial District Amendment. The Plaintiff has consistently calculated density differently and inconsistent with the City's Comprehensive Plan and the City's Land Development Code. (*See* Affidavit of Michael Fiigon, II, at ¶ 7 (explaining that Policy 1.1.2 of the Future Land Use Element of the City's Comprehensive Plan and Section 4-1282 of the City's Land Development Code require density to be calculated based upon the number of units per gross acre, but that the Plaintiff's analysis utilized a different formula which understated the proposed density for the Property)). The Plaintiff has put forward a method of calculation for density it believes is a better method. This Court will not disregard the requirements of the City's Comprehensive Plan and the City's Land Development Code and rejects the Plaintiff's alternative density calculation methods.

44. Additionally, the Defendant put forward evidence of other perceived problems with the Proposed Imperial District Amendment put forward by Plaintiff including the following:

- The Plaintiff has utilized a step-down density approach, which, in the view of the City Staff, is not commonly used in a rural area like the DRGR. (*See* Affidavit of Michael Fiigon, II, ¶ 13).
- The Plaintiff has improperly attempted to cast its request as similar to the total number of units "on property located immediately to the east of" the Property. (*See id.* at ¶ 8). The density on that neighboring property, however, is 0.52 units per acre—well below the 2.13 units per acre for the Proposed Imperial District Amendment. (*See id.* at ¶ 12).
- The Plaintiff has improperly referenced certain developments as not conforming to DRGR standards, even though such developments "were in existence prior to the establishment of the DRGR Future Land Use Category in 1989 and the City does not have the authority to retroactively remove development rights of built projects, especially those that existed prior to the City's incorporation." (*See id.* at ¶ 14).
- The City Staff disagrees with the "public benefits" touted by the Plaintiff regarding its proposed drainage conveyance. (*See id.* at ¶ 16).
- The City Staff is of the opinion that the Plaintiff made certain misrepresentations to the City's LPA. (*See id.* at ¶¶ 18-19).

45. The Defendant's evidence of various issues with the Plaintiff's proposal constitute conceivable reasons why the City Council could have declined to adopt this specific policy vision.

46. As explained above, thirteen (13) members of the public voiced concerns about the Proposed Imperial District Amendment at the City Council Hearing. (*See* Hearing Transcript at 99:6-128:3). This testimony related to a host of legitimate concerns, including, but not limited to, the following:

- Negative impacts to water quality and drainage/flooding, and the importance of the DRGR to these matters. (*See id.* at 99:6-25, 100:14-18, 101:12-14, 106:3-107:12, 108:4-7, 109:29-110:4, 112:21-113:3, 113:15-114:4, 119:8-11, 124:23-125:8).
- Potential harm to the local economy, which is directly impacted by the health of the local environment. (*See id.* at 100:16-18).
- Problems associated with the aforementioned increase in density. (*See id.* at 100:18-24; 112:21-25).
- Negative impacts to traffic/transportation problems and the exorbitant infrastructure costs that would fall on the taxpayers. (*See id.* at 101:19-21; 109:12-18; 113:3-6; 118:6-17).
- Pollution that would result from increased development. (*See id.* at 102:4-15; 124:12-16).
- The fact that the Property was already in the DRGR when purchased by the Plaintiff (who "knew what they were buying"). (*See id.* at 114:16-19).
- Harmful impacts to wildlife and plant life in the DRGR. (*See id.* at 126:3-15).

47. Resident opposition can provide a rational basis for a legislative decision regarding a proposed comprehensive plan amendment. *See Pinellas Cty.,* 253 So. 2d at 673 (holding that the trial court erred by basing its decision on the fact that the county's denial had been "motivated by significant political pressure" and explaining that resident opposition can provide a rational basis for a land use decision). Indeed, public influence on legislative policy matters is the very idea of representative democracy. *See, e.g.,* Art. I, § 5, Fla. Cost. (protecting the right of the people to instruct their representatives and petition for redress of grievances); *Izaak Walton League of Am. v. Monroe Cty.,* 448 So. 2d 1170, 1171-72 (Fla. 3d DCA 1984) (explaining that the remedy for dissatisfaction with a legislative decision is "at the polls, not in the courts"). Thus, the considerations raised by the public at the City Council Hearing constitute legitimate conceivable bases for the legislative land use decision at issue.

48. The Court finds that there exist conceivable bases upon which the City Council's decision must be upheld. Like in *Partnership III,* there is considerable evidence that the City Council's decision to maintain the status quo is "fairly debatable." *See Partnership III,* 772 So. 2d at 619-21; *see also Pinellas Cty.,* 253 So. 3d at 671; *City Env't Servs. Landfill,* 677 So. 2d at 1333. Indeed, all of the conceivable

bases identified above represent "grounds that make sense or point to a logical deduction." *See Partnership,* 772 So. 2d at 620.

49. The Plaintiff's "substantive due process" claim is, an argument about policy. Plaintiff contends that the City Council should have exercised its legislative discretion differently. (*See generally* Amended Complaint at 7-10, 12-13; Plaintiff's Summary Judgment Motion at 7-43)). Plaintiff asserts that the Proposed Imperial District Amendment amounts to "good planning"; would improve the "conditions on the ground"; would have benefits relating to "ground water recharge, flooding, and pollution," among other policy matters. (*See, e.g., id.* at ¶¶ 18, 28, 29, 38, 41; *see also* Amended Complaint at 9 (alleging that "the benefits of the Imperial District were overwhelming. These matters are irrelevant. It is well established that policy considerations cannot provide a legitimate basis for a substantive due process claim. *See, e.g., Membreno,* 188 So. 3d at 29 (explaining that substantive due process does not prohibit a legislative body from passing "unwise laws"); *see also Gallagher v. Motors Ins. Corp.,* 605 So. 2d 62, 70 (Fla. 1992) (explaining that legislative action must be upheld if the legislative body "rationally could have believed" that its decision would promote a legitimate objective, regardless of whether it actually *would* do so). It is the City Council's job—and not this Court to make legislative policy determinations like the one at issue. *See, e.g., Membreno,* 188 So. 3d at 26 (explaining that "[t]he rational basis test does not license a judge to insert courts into a disagreement over policy or politics").

51. The Plaintiff also contends that this Court must override the City Council's decision on the basis of the decisions in *Island, Inc. v. City of Bradenton Beach,* 884 So. 2d 107 (Fla. 2d DCA 2004) [29 Fla. L. Weekly D1488b], and *Debes v. City of Key West,* 690 So. 2d 700 (Fla. 3d DCA 1997) [22 Fla. L. Weekly D827a]. The Court finds these decisions, however, are inapposite to the instant matter and do not provide any basis for this Court to assert itself into the legislative matter at issue.

52. Among other material differences with this case, in both *Island* and *Debes,* the Court found the existing future land use designation for the property at issue to be improper pursuant to the terms of the existing comprehensive plan. *See Island,* 884 So. 2d at 108 (holding that denial of plan amendment was improper because the undisputed evidence showed that the existing land use classification for the property was incorrect pursuant to the terms of the plan itself); *Debes v. City of Key West,* 690 So. 2d 700, 701 (Fla. 3d DCA 1997) [22 Fla. L. Weekly D827a] (finding that the property required a commercial designation pursuant to the terms of the existing comprehensive plan because the property was located in the designated "primary commercial area"); *Pinellas Cty.,* 253 So. 3d at 672 ("*Island* is limited to situations in which unrefuted evidence establishes that an existing land use designation is improper under the terms of the land use plan itself."). Moreover, the Plaintiffs in *Island* and *Debes* sought a change to an existing future land use designation. *See Island,* 884 So. 2d at 108; *Debes* 690 So. 2d at 701. Unlike in *Island* and *Debes,* the Future Land Use designation for the Property is not incorrect pursuant to the terms of the City's Comprehensive Plan, nor is the Plaintiff requesting a change to an existing Future Land Use designation. Rather, the Plaintiff is asking this Court to mandate the legislative creation of an entirely new Future Land Use District for its Property. Stated simply, nothing in *Island* or *Debes* authorizes this Court to dictate a detailed policy decision of this sort.

53. With respect to the Plaintiff's argument about "reverse spot planning," the Court finds *Debes* to be materially distinguishable in several respects. Most significantly, the property in *Debes* was located in the designated commercial area and was also "surrounded on all sides" by properties being afforded a commercial designation. *See Debes,* 690 So. 2d at 701. In other words, the petitioner's property was the only property in the designated "primary commercial area" being denied a commercial designation. *See id.* Nothing comparable exists in this case, where the Property is located in the DRGR, is correctly designated DRGR, and the surrounding properties include a number of different designations—including DRGR.

54. The Plaintiff further relies on a number of decisions that pertain to review of quasi-judicial zoning decisions. *See, e.g., City Comm'n of the City of Miami v. Woodlawn Park Cemetery Co.,* 553 So. 2d 1227, 1233-36 (Fla. 3d DCA 1989) (conducting certiorari review of a rezoning decision); *City of Clearwater v. Coll. Props., Inc.,* 239 So. 2d 515, 516-18 (Fla. 2d DCA 1970) (same); *Dade Cty. v. Moore,* 266 So. 2d 389, 389-91 (Fla. 3d DCA 1972) (same). This is not a zoning case. This case concerns "fairly debatable" review of a legislative policy decision. As the Florida Supreme Court has explained, zoning changes concern the application of policy, require a quasi-judicial hearing, and are reviewed by certiorari. *See Coastal Dev. of N. Fla.,* 788 So. 2d at 209. Comprehensive plan amendments, on the other hand, concern the legislative creation of policy, do not require a quasi-judicial hearing, and are subject to review only by original action in Circuit Court. *See id.*; *see also Citrus Cty. v. Halls River Dev., Inc.,* 8 So. 3d 413, 420-21 (Fla. 5th DCA 2009) [34 Fla. L. Weekly D613a] (explaining that "[t]he comprehensive plan is similar to a constitution for all future development within the governmental boundary," whereas zoning "is the means by which the Plan is implemented"). As such, the cases cited by the Plaintiff pertaining to certiorari review of quasi-judicial zoning decisions have no applicability with respect to this original action concerning "fairly debatable" review of a legislative policy decision.

55. The Plaintiff also argues that the existing status quo in the DRGR Future Land Use District is not "fairly debatable" because of two (2) provisions in the City's Comprehensive Plan—Future Land Use Element Policy 1.7.2 ("FLU Policy 1.7.2") and Conservation/ Coastal Management Element Policy 16.4.2 ("CCME Policy 16.4.2")—and that the Court must compel adoption of the Proposed Imperial District Amendment on the basis of certain studies of the DRGR. (*See* Plaintiff's Summary Judgment Motion at 26-35). Both of these arguments are without merit.[3]

56. FLU Policy 1.7.1 provides as follows:

> In order to best protect ground water resources, by year-end 2004, the City shall have completed a study to identify the types and intensity of uses that should be allowed within the DRGR area, and to determine the most effective and appropriate techniques to ensure the maintenance of adequate quantity and quality of surface and groundwater resources.

This provision further identifies certain factors that must be evaluated in the DRGR. (*See* FLU Policy 1.7.1(a)-(b).[4] CCME Policy 16.4.1 sets forth the same basic language as FLU Policy 1.7.1.

57. FLU Policy 1.7.2 provides as follows:

> Upon completion of the study referred to in Policy 1.7.1, the City shall amend its Comprehensive Plan to identify the uses considered most appropriate in the DRGR and the resource protection measures and practices necessary to ensure its continued viability.

CCME Policy 16.4.2 sets forth substantially similar language to FLU Policy 1.7.2.

58. The City Council has repeatedly made the legislative determination to maintain the existing DRGR regulations. In evidence, Council Member Quaremba stated at the City Council Hearing:

> "I am persuaded by some of the commentary that came out of the staff reports in regards to transportation, density, flooding, but that's somewhat irrelevant to the issue. This is a legislative issue on policy that the Council time and time again has supported. Density reduction, that's what it means, one unit per 10 acres."

(*See* Hearing Transcript at 147:10-13 (emphasis supplied)). As explained below, the policy decision to make no changes to the DRGR is consistent with options explicitly set forth in all of the DRGR studies cited in the Plaintiff's Summary Judgment Motion.

59. Whether the City has complied with FLU Policy 1.7.2 and CCME Policy 16.4.2 is ultimately irrelevant to the issues in the case before this Court. This is not an action seeking a declaration as to whether the City has complied with FLU Policy 1.7.2 or CCME Policy 16.4.2, nor is it an action to compel the City Council to "identify the uses considered most appropriate in the DRGR and the resource protection measures and practices necessary to ensure" the DRGR's "continued viability." (*See* FLU Policy 1.7.2). Perhaps that could be a case—but it is not this case. *Cf. City Env't Servs. Landfill, Inc. of Fla.,* 677 So. 2d at 1333.

60. FLU Policy 1.7.2 and CCME Policy 16.4.2 pertain to the DRGR as a whole. The Plaintiff, however, is not seeking an order that would compel the City Council to adopt regulations applicable to the entire DRGR. Rather, the Plaintiff is seeking an order that would compel the City Council to actually remove 328.13 acres of land from the DRGR and create an entirely new Future Land Use District. In other words, the Plaintiff is attempting to rely on provisions pertaining to the DRGR as a basis to force legislation that would remove land from the DRGR.

61. Plaintiff's argument is legally flawed. It is premised on the contention that its Proposed Imperial District Amendment "met or exceeded" the recommendations in certain studies of the DRGR. (*See, e.g.,* Plaintiff's Summary Judgment Motion at 2, 25, 35). The Plaintiff asserts that there have been at least seven (7) (*see id.* at 28) or seventeen (17) (*see id.* at 31 n.13) studies of the DRGR. The Plaintiff then selects four (4) studies to argue that its Proposed Imperial District Amendment must be adopted because it "met or exceeded" the "recommendations" in these selected studies. (*See id.* at 12, 32). This argument is factually and legally without merit and ignores the remaining studies. The Plaintiff's reliance on these studies as examples that its' proposed amendment "met or exceeded" these studies is both inaccurate and misleading, as they make no changes to the respective comprehensive plan and identified making no changes to the DRGR.

62. Further, each of these four (4) studies pertained to the DRGR as a whole. As such, the various policy options and recommendations contained therein pertained to the DRGR as a whole. These studies did not set forth recommendations applicable to each individual propert y in the DRGR. Indeed, the various recommendations in these studies contemplated certain areas with higher densities and certain areas with lower densities. The recommendations did not apply uniformly to every single parcel in the DRGR.[5] Thus, even if the Plaintiff's argument did not suffer from the variety of separate deficiencies outlined above, the Court finds it is still inherently flawed to the extent the Plaintiff is attempting to use recommendations in these studies to justify an amendment applying to only a small portion of the DRGR.[6]

63. Notably, the City Council has not accepted any of the four (4) studies of the DRGR relied upon by the Plaintiff. (*See* Affidavit of John Dulmer at ¶¶ 3-6). Indeed, neither FLU Policy 1.7.2 nor CCME Policy 16.4.2 require the City Council to do so, nor do they delegate the City Council's legislative policy making authority. (*See* FLU Policy 1.7.2).

64. For all of these reasons, the Court finds the Plaintiff's arguments based on FLU Policy 1.7.2 and CCME Policy 16.4.2 unpersuasive. The Plaintiff cannot use Policies regulating the DRGR as a basis to force the removal of land from the DRGR by creation of an entirely new Future Land Use District. The City Council has repeatedly decided to not make any changes to the DRGR.

65. The Court further finds that the specific relief sought in Count III of the Amended Complaint—an order directing the City Council to adopt the Proposed Imperial District Amendment—would violate the separation of powers doctrine. *See City of Miami Beach v. Weiss,* 217 So. 2d 836, 837 (Fla. 1969) ("[T]he ultimate classification of lands under zoning ordinances involves the exercise of the legislative power, preventing the courts under the doctrine of separation of powers from the invasion of this field."); *see also McGeary,* 291 So. 2d at 29 ("It has been held uniformly and repeatedly that the ultimate classification of lands under zoning ordinances involves the exercise of legislative power, a field the invasion of which by the courts is interdicted by the doctrine of separation of powers."); *Lee Cty. v. Morales,* 557 So. 2d 652, 656 (Fla. 2d DCA 1990) ("The final judgment also erroneously ordered the County to rezone appellees' property and, therefore, violates the separation of powers doctrine."); *Town of Longboat Key v. Kirstein,* 352 So. 2d 924, 925 (Fla. 2d DCA 1977) (holding final judgment ordering town to change zoning of property "violates the separation of powers"); *Butler Estates,* 303 So. 2d at 67 (holding order directing county to "rezone such property 'in accordance with the (appellees') application' does, indeed, constitute an encroachment upon the exercise of the legislative power of the appellant").

66. In Count II of the Amended Complaint, the Plaintiff asserts that the City Council was required to provide it with "procedural due process" at the City Council Hearing on the Proposed Imperial District Amendment. (*See* Amended Complaint at 13-15). The Plaintiff further contends that the City Council violated the Plaintiff's procedural due process rights by "limiting" the Plaintiff's testimony and evidence at this legislative hearing. (*See id.*). Based on its procedural due process claim in Count II, the Plaintiff requests injunctive relief in Count IV directing the City to adopt "formal procedures for land use hearings." (*See id.* at 16-17).

67. It is well established that procedural due process does not apply with respect to legislative decisions. *See, e.g., 75 Acres, LLC v. Miami-Dade Cty.,* 338 F.3d 1288, 1294 (11th Cir. 2003) [16 Fla. L. Weekly Fed. C898a] ("[I]f government action is viewed as legislative in nature, property owners generally are not entitled to procedural due process."); *Support Working Animals, Inc. v. DeSantis,* 457 F.Supp.3d 1193, 1224 n.16 (N.D. Fla. 2020) ("The Eleventh Circuit has repeatedly made clear that the legislative process itself provides all the process constitutionally due to a property owner.") (citations omitted); *L C & S, Inc. v. Warren Cty. Area Plan Comm'n,* 244 F.3d 601, 602 (7th Cir. 2001) (" 'Legislative due process' seems almost an oxymoron."); *City Env't Servs. Landfill,* 677 So. 2d at 1333 ("Legislative proceedings do not require the type of procedural due process that petitioner claims was denied it at the county level."). If a governmental action is legislative, then the only potential due process challenge is a substantive due process challenge. *See, e.g., Watson Constr. Co.*, 433 F.Supp.2d at 1279 (recognizing that property rights are subject only to procedural due process protection "unless those rights have been infringed by legislative act," in which case "a plaintiff loses his right to procedural due process and is entitled instead to substantive due process").

68. The Court has found, the decision at issue is a legislative decision. Thus, there can be no claim against the Defendant for a "procedural due process" violation as a matter of law, and, for this reason alone, the Defendant is entitled to the entry of summary judgment on Counts II and IV. *See id.* at 1279 ("Because passage of the moratorium is a legislative act that does not implicate the procedural due process protections of the Fourteenth Amendment, *Watson* can prove no set of facts in support of its procedural due process claim that would entitle it to relief. Summary judgment must be granted on Count III."); *City Env't Servs. Landfill,* 677 So. 2d at 1333 (rejecting

plaintiff's procedural due process claim because it was not entitled to the procedural due process it claimed was denied at the legislative hearing).

69. Moreover, even if "procedural due process" did apply at the City Council Hearing—which it did not—the Plaintiff's allegations would not establish any such violation, for the following reasons gleamed from the evidence:

- The Plaintiff presented to the City Council for over ninety (90) minutes. (*See* Plaintiff's Responses to Defendant's First Request for Admissions at Response No. 6). The Plaintiff's time was not in any way restricted or capped by the City Council. (*See* Hearing Transcript at 6:11-66:14).
- The City Council afforded the Plaintiff the opportunity to present rebuttal evidence—even though the City Council does not customarily do so and is not required to do so. (*See id.* at 98:24-99:4, 134:9-25). In presenting rebuttal, the Plaintiff did not use all of its time and explicitly noted that it had "covered most everything." (*See id.* at 135:6-139:2).
- Unlike the Plaintiff, whose presentation time was not capped or restricted in any way, members of the public—all of which spoke in opposition to the proposal—were each given only four (4) minutes to address the City Council. (*See id.* at 98:21-23). To the extent the Plaintiff complains that two (2) members of the public were allowed to briefly speak beyond four (4) minutes, this is not a "procedural due process" violation. (*See id.* at 103:19-105:25, 127:5-128:3).
- The Plaintiff did not object to or raise any concerns about any of the procedures employed at the City Council Hearing. (*See id.* at 98:24-99:4, 131:14-140:3).

70. The Plaintiff complains about the "motives" behind the City Council's decision. (*See* Amended Complaint at 17). This is legally irrelevant. Members of a local government's legislative body are permitted to form opinions about legislative policy matters. *See City of Opa Locka,* 257 So. 2d at 104 (explaining that a court's inquiry in reviewing a legislative decision "is limited to the question of power, and does not extend to . . . the motives of the legislators, or the reasons which were spread before them to induce" the decision). Indeed, this is what they are elected to do. *See, e.g., Izaak Walton League of Am.,* 448 So. 2d at 1171-72 (holding trial court could not preclude political officeholder from voting on legislative matter on the basis of bias and prejudice and that relief for legislative decisions "is at the polls, not in the courts").

71. The City Council was not required to identify the reasons for its decision, nor was it required to explicitly identify such reasons "in the motion" on which it voted, as the Plaintiff claims. *See, e.g., City of Opa Locka,* 257 So. 2d at 104; *WCI Cmtys.,* 885 So. 2d at 914; *Membreno,* 185 So. 3d at 26-27.

72. To the extent the Plaintiff requests an order from this Court compelling the legislative adoption of "formal procedures for land use hearings," the Defendant already has such rules—*see* Section 4-227 of the City's Land Development Code—and an order of this sort would violate the separation of powers. Indeed, the control of its own procedure is the fundamental prerogative of a legislative body such as a city council. *Cf. Battaglia Fruit Co. v. City of Maitland,* 530 So. 2d 940, 942 (Fla. 5th DCA 1988) (noting that, in the absence of a "formal rule" for handling tie votes, the county was not required to follow generally accepted rules of parliamentary procedure and that "[t]he failure of the county commissioners to observe a general rule of parliamentary procedure did not violate any party's procedural due process rights").

73. Based upon the above, the Court finds that there are no genuine issues of material fact that exist such that when taking the evidence in a light most favorable to the non-moving party a reasonable trier of fact could return a verdict in their favor. Accordingly, Defendant is entitled to the entry of final summary judgment as to Plaintiff's Amended Complaint.

ACCORDINGLY, IT IS HEREUPON ORDERED AND ADJUDGED:

A. Defendant's Motion for Final Summary Judgment is **GRANTED.**

B. Plaintiff's Motion for Summary Judgment and Memorandum of Law is **DENIED.**

C. The Court enters this Final Judgment in favor of the Defendant and declares that:

1. The City Council's decision to not adopt the Proposed Imperial District Amendment is a legislative decision pursuant to binding precedent from the Florida Supreme Court;

2. The City Council's legislative decision to not adopt the Proposed Imperial District Amendment is "fairly debatable" as a matter of law and the Defendant is, therefore, entitled to a Final Judgment in its favor on Counts I and III of the Amended Complaint;

3. The relief sought by the Plaintiff in Count III of the Amended Complaint would violate the separation of powers doctrine and, on this separate basis, the Defendant is, therefore, entitled to a Final Judgment in its favor on Count III of the Amended Complaint;

4. The City Council's decision to not adopt the Proposed Imperial District Amendment cannot be subject to a "procedural due process" claim because "procedural due process" does not apply with respect to a legislative decision; the Defendant is, therefore, entitled to a Final Judgment in its favor on Counts II and IV of the Amended Complaint; and

5. Even if "procedural due process" did apply at the City Council Hearing—which it did not—the Plaintiff's allegations fail to establish any such violation; the Defendant is, therefore, entitled to a Final Judgment in its favor on Counts II and IV of the Amended Complaint.

For which let execution issue

The Plaintiff shall take nothing and go hence without day. The Court reserves jurisdiction as to the right to grant any other relief that this Court deems just and proper including but not limited to attorneys' fees and costs.

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[1]As explained at the LPA Hearing, the City Staff also expressed concerns about flooding in the DRGR, that the Plaintiff's proposed density would be higher than other existing developments in the DRGR, and that the proposal was inconsistent with the City's Strategic Priority of Downtown Development, among other problems. (*See* LPA Transcript at 65:24-85:4).

[2]Additionally, the City's Special Land Use Counsel refuted some of the inaccurate contentions the Plaintiff made during its presentation about a settlement agreement between the City and a nearby landowner, and about studies regarding the DRGR. (*See* Hearing Transcript at 92:7-98:18).

[3]In its Summary Judgment Motion, the Plaintiff asserts, with neither explanation nor supporting record evidence, that the existing DRGR provisions are somehow "inconsistent" with the "situation on the ground." (*See, e.g.,* Plaintiff's Summary Judgment Motion at 11 (stating that "DR/GR uses and densities are inconsistent with existing conditions on the ground "); *id.* at 18 (asserting that its proposal "would address the untenable situation on the ground "); *id.* at 28 (alleging that "the painfully obvious conditions on the ground" are "crying out")).

[4]The factors that must be evaluated include, but are not limited to, the following: subsurface and surface water resources; existing uses and those having received approval prior to the adoption of the City's Comprehensive Plan; soils, wetlands, habitats and species and their quantity and quality; the Imperial River and its historical and present floodways and flow ways; drainage and stormwater patterns and flooding; the long term water and wastew ater supply and disposal needs and plans of Bonita Springs Utilities; resource protection measures applicable and contained in the City's Comprehensive Plan and land development regulations; allowable uses and their density and intensity; existing and planned infrastructure in and affecting the area; SFWMD and County ownership in and projects affecting the area; potential positive or negative effects of possible new land uses on the resource base(s) and new or amended best environmental management practices needed by the City to further its control. (*See* FLU Policy 1.7.1(a)-(b)).

[5]As explained by the City's Community Development Director, John Dulmer, these studies "fail to address the planning analysis that must be performed when determining the appropriate Future Land Use Map designation to be assigned to the [Property]."

(*See* Affidavit of John Dulmer at ¶ 7). These studies "generally evaluated alternative land uses and scenarios on lands designated as DRGR, including the Property, rather than how such lands should be developed from a planning perspective. " (*See id* .). "While non -land use scenarios were sporadically addressed in two (2) of the studies, it was not the intent or focus of either. " (*See id.*). Moreover, while the Rawl Report and the Barraco Report "did provide some environmental and preservation analysis . . . both were generally framed in either a financial scheme or an attempt to balance additional land uses." (*See id.*). "A planning analysis would require the suitability of the Property for a particular Future Land Use Map designation to be based upon such factors as the character of the surrounding and nearby uses, environmental resources on and near the Property, and the availability of public facilities, such as sewer and water, to serve development of the Property. " (*See id.*).

[6]According to the DeLisi Study, the DRGR consists of approximately 4,739 acres, which is approximately 16.2% of the City's total land mass. (*See* Delisi Study at 18). The Property is 328.13 acres, which is only 6.9% of the DRGR.

* * *

Insurance—Mediation—Arbitration—Parties are ordered to attend mandatory mediation—If unable to reach settlement at mediation, arbitration is required pursuant to policy's mandatory mediation-arbitration endorsement—Three elements of *Shakespeare Foundation* for establishing when arbitration is appropriate have been met

HUGH HUDSON and KAREN HUDSON, Plaintiffs, v. AMERICAN INTEGRITY INSURANCE COMPANY OF FLORIDA, Defendant. Circuit Court, 20th Judicial Circuit in and for Charlotte County. Case No. 23002779CA. November 27, 2023. Geoffrey H. Gentile, Judge. Counsel: John S. Riordan, Kelley Kronenberg, West Palm Beach, for Defendant.

AMENDED ORDER ON DEFENDANT'S MOTION TO DISMISS AND TO COMPEL MANDATORY MEDIATION-ARBITRATION AND MOTION TO STRIKE PLAINTIFFS' CLAIM FOR ATTORNEY'S FEES AND COSTS AND INSTRUCTIONS TO CLERK TO CLOSE FILE

This cause came before the Court on an agreed-upon basis by the parties on Defendant's *Motion To Dismiss And To Compel Mandatory Mediation-Arbitration And Motion To Strike Plaintiff's Claim For Attorney's Fees And Costs* filed on October 17, 2023 (hereinafter referred to as Defendant's "*Motion*"), and the Court having been advised of the agreement reached by both parties' counsel and otherwise being fully advised in the premises, it is hereby:

ORDERED AND ADJUDGED that Defendant's *Motion* is **GRANTED**.

1. This case is hereby dismissed without prejudice, and the clerk is instructed to close this file.

2. The three (3) elements cited in *Jackson v. Shakespeare Found., Inc.,* 108 So.3d 587, 593 (Fla. 2013) [38 Fla. L. Weekly S67a] have been met establishing when arbitration is appropriate.

3. Any policy reduction contemplated in exchange for the Insured(s) agreeing to the Mandatory Mediation-Arbitration Endorsement of the Policy does not need to be reflected on the Policy's Declarations Page.

4. The parties shall attend mandatory mediation pursuant to the insurance policy's "Mandatory Mediation-Arbitration Endorsement."

5. In the event the parties impasse and are unable to reach a settlement at mediation, then the parties shall attend confidential binding arbitration pursuant to the insurance policy's "Mandatory Mediation-Arbitration Endorsement," which shall be the exclusive process for resolving this dispute between the parties and any arbitration decision rendered shall be binding and final on the parties.

6. The Court reserves jurisdiction related to the claim for Attorney Fees and Costs referenced in the Plaintiffs' Complaint and for purposes of enforcing this Order, if necessary.

* * *

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MISCELLANEOUS REPORTS

Judges—Judicial Ethics Advisory Committee—Elections—Campaign literature—Solicitation of funds—A judicial candidate may wear apparel that shows the uniform resource locator to the website maintained by the candidate's committee which contains options to donate and endorse the campaign, so long as candidate does not personally solicit attorneys and others by directing them to the website for the purposes of making donations and showing support

FLORIDA SUPREME COURT JUDICIAL ETHICS ADVISORY COMMITTEE. Opinion Number: 2023-12 (Election). Date of Issue: November 30, 2023.

ISSUE

Whether a judicial candidate may wear a shirt, hat, or other apparel that shows the uniform resource locator (URL) to the website maintained by the candidate's committee which contains options to donate and to endorse the campaign.

ANSWER: Yes.

FACTS

An attorney, who is a candidate for judicial office, has inquired whether a judicial candidate may wear a shirt, hat, or other apparel that shows the uniform resource locator (URL) to the website maintained by the candidate's committee which contains options to donate and to endorse the campaign.

DISCUSSION

Although it is the stated policy of the Judicial Ethics Advisory Committee not to vet campaign literature, *see* Fla. JEAC Op. 94-35 [2 Fla. L. Weekly Supp. 501a], we conclude that this Judge's question is capable of recurring and that the answer to the question will be of interest to other candidates now and in future contests. Accordingly, we offer the following guidance.

Canon 7C(1) of the Florida Code of Judicial Conduct forbids judicial candidates from personally soliciting funds or support. Instead, such tasks can only be performed by whatever "committees of responsible persons" the candidate appoints for that purpose. Therefore, in Fla. JEAC Op. 2008-11 [15 Fla. L. Weekly Supp. 757a], the Committee opined that a judge could not use the judge's personal website to facilitate the giving of financial or other support to the judge's re-election effort. We opined that such a website must be maintained by the committee of responsible persons.

In Fla. JEAC Op. 2004-07 [11 Fla. L. Weekly Supp. 374a], the Committee opined that a circuit judge who was a candidate for office could not personally distribute to attorneys campaign material, which solicited financial or in-kind contributions, and especially not if the materials contain an envelope for mailing a financial contribution to the campaign.

The Florida Supreme Court recently disciplined a lawyer who stipulated that while campaigning for judicial office, she solicited donations by handing out postcards and giving speeches that directed voters to her website that contained a "Donate Now" button, in addition to posting invitations on her personal social media pages to her campaign fundraisers and asking voters to support her by donating to her campaign. *See* Stipulation as to Probable Cause, *The Florida Bar v. Kaysia Monica Earley*, 368 So.3d 409 (Fla. 2023).

The common thread running through our prior opinions, and the stipulation accepted in *Florida Bar v. Early*, is *personal* solicitation by a judicial candidate. The question presented by the instant inquiry is, therefore, whether merely displaying the campaign's website amounts to personal solicitation by a judicial candidate.

A bare majority of the Committee concludes that the sort of passive advertisement described by the inquiring judicial candidate does not run afoul of Canon 7C(1). These members do not read Canon 7 as prohibiting a judicial candidate from making any reference whatsoever to the campaign's website merely because it contains a link for donation. Context is the key to finding the line between passive advertisement and personal solicitation. As our prior opinions have explained, a candidate must not personally solicit attorneys and others by directing them to the campaign website for the purpose of making donations and showing support.

A significant minority of the Committee disagrees. They conclude that a judicial candidate wearing apparel displaying the URL of a campaign website, which contains an option to donate or endorse the campaign, amounts to personally soliciting campaign funds or personally soliciting attorneys for publicly stated support contrary to Canon 7C(1).

REFERENCES

Fla. Code of Jud. Conduct, Canon 7C(1)
The Florida Bar v. Kaysia Monica Earley, 368 So. 3d 409 (Fla. 2023).
Fla. JEAC Ops. 2008-11 and 2004-07

* * *