

IN THE CIRCUIT COURT OF THE FIFTH
JUDICIAL CIRCUIT, IN AND FOR HERNANDO
COUNTY, FLORIDA

CASE NO. CF-2018-362

STATE OF FLORIDA,

Plaintiff,

vs.

GEORGE DOWNEY,

Defendant.

**ORDER GRANTING DEFENDANT'S MOTION FOR REHEARING
AND VACATING DEFENDANT'S CONVICTION AND SENTENCE**

This matter came before the Court upon the Defendant's Motion for Rehearing of Order Denying Grounds One, Two, and Four of Defendant's Motion for Postconviction Relief Following after Evidentiary Hearing. Based upon the evidence, testimony, and arguments presented by the parties, the relevant records in the court file, and the relevant caselaw, it is hereby **ORDERED AND ADJUDGED** that the Defendant's Motion for Rehearing is **GRANTED**. In support, the Court finds as follows:

This Court conducted an evidentiary hearing in this case on August 16, 2024. On February 24, 2025, this Court entered an Order on Defendant's Motion for Postconviction Relief. The Court denied all the claims in the Defendant's Motion.

The Defendant filed a Motion for Rehearing on Grounds One, Two, and Four of his Motion for Postconviction Relief. On May 16, 2025, the Court conducted a hearing at which it heard arguments of the parties and received caselaw. The Court reserved ruling.

In order to establish a valid claim of ineffective assistance of trial counsel, a defendant must establish that (1) trial counsel's performance was deficient; and (2) the deficient performance prejudiced the defendant. *Strickland v. Washington*, 466 U.S. 668 (1984). "The U.S. Supreme Court has held that prejudice exists if counsel's performance was deficient enough to undermine confidence in the outcome, even if it cannot be shown by a preponderance of the evidence to have determined the outcome." *Romero v. State*, 276 So. 3d 514, 518 (Fla. 5th DCA 2019) (citing *Strickland*).

Upon further consideration, the Court now grants Grounds One, Two, and Four of the Defendant's Motion for Postconviction Relief. The Court addresses each of these grounds separately in its discussion below.

Ground One

In Ground One, the Defendant asserts that trial counsel provided him with ineffective assistance of counsel by failing to object to the instructions provided to the jury on justifiable use of deadly force. More specifically, the Defendant argues that the instructions negated his sole defense because they incorrectly advised the jury that the Defendant had a duty to retreat if he was engaged in criminal activity.

The Defendant's argument regarding the impropriety of the instructions is supported by the decision of the district court in *Novak v. State*, 974 So.2d 520 (Fla. 4th DCA 2008). In *Novak*, the district court concluded that a nearly identical jury instruction concerning a defendant's duty to retreat was confusing and improperly negated the defendant's sole defense. The district court reasoned that, where the defendant was not engaged in any unlawful activity other than **11778**the crimes for which the defendant had

self-defense, the instruction had the same effect as when a court improperly instructs the jury on the forcible-felony exception. The jury might confuse the charged crimes with “unlawful activity” that precludes the justification of self-defense. 974 So. 2d at 522.

Trial counsel performed deficiently by failing to object to the improper duty to retreat instruction because counsel should have been aware of *Novak* and the wealth of analogous cases addressing the improper use of the forcible-felony instruction. See e.g. *Martinez v. State*, 981 So. 2d 449 (Fla. 2008); *McCullogh v. State*, 327 So. 3d 955 (Fla. 5th DCA 2021); *Sipple v. State* 927 So. 2d 912 (Fla. 5th DCA 2007); See also *State v. Apperson*, Case No. 2015-CF-1381-A (Fla. 18th Cir. Ct., 2021), *affirmed*, 347 So. 3d 1270 (Fla. 5th DCA 2022) (circuit court order granting Rule 3.850 motion based on trial counsel’s failure to object to the same duty to retreat instruction provided to the jury in the Defendant’s case) (Exhibit A). “A reasonably effective criminal defense attorney must keep himself or herself informed of significant developments in the criminal law.” *Johnson v. State*, 796 So. 2d 1227, 1228 (Fla. 4th DCA 2001).

Importantly, the Defendant’s sole defense at trial was that he was acting in self-defense and defense of Franklin Melo. Thus, trial counsel’s failure to object to the Court providing the jury with the instruction on the Defendant’s duty to retreat prejudiced the Defendant because it negated his sole defense. Under these circumstances, even if the jury believed the testimony and evidence presented by the Defendant, the instruction precluded the jury from concluding that he acted in lawful self-defense.

The Court notes that it does not find that the instructions provided in this case constituted fundamental error. Based upon the evidence presented by the State, the

Court is not convinced that a guilty verdict could not have been reached by the jury without the improper instruction.

However, fundamental error is the standard an appellate court applies to unpreserved errors raised on direct appeal. A claim of ineffective assistance of counsel raised in a rule 3.850 motion is controlled by the *Strickland* standard for prejudice. The Florida Supreme Court has held as follows:

[I]neffective assistance of trial counsel claims under *Strickland* afford criminal defendants an easier path to relief than claims of fundamental error. To succeed on a claim of ineffective assistance of counsel, a claimant need only show that trial counsel was deficient and that the deficiency prejudiced the claimant. contrast to the showing of prejudice required by *Strickland*—i.e., a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different, -establishing fundamental error is more difficult because, to be fundamental, an error must reach down into the validity of the trial itself to the extent that a *931 verdict of guilty could not have been obtained without the assistance of the alleged error.

Steiger v. State, 328 So. 3d 926, 930–31 (Fla. 2021) (internal quotations and citations omitted).

This distinction is important. In *Sloss v. State*, the Fifth DCA concluded that the improper forcible felony instruction provided to the jury in the defendant's case did not constitute fundamental error. 16 So. 3d 873 (Fla. 5th DCA 2009). After a postconviction evidentiary hearing, however, the Fifth DCA subsequently concluded that trial counsel's failure to object to the same instruction constituted ineffective assistance of counsel that

required reversal of the defendant's conviction. *Sloss v. State*, 45 So. 3d 66 (Fla. 5th DCA 2010).

Here, the Court concludes that the State presented sufficient evidence to support the jury's verdict. However, the Fifth DCA has held that a defendant can be prejudiced even where there is ample evidence of the Defendant's guilt. See *Romero*, 276 So. 3d at 519 (prejudice established because defendant and wife presented testimony, that if believed, could support a different verdict).

Here, the Defendant's account of what occurred on the date in question was also plausible. However, even if the jury believed the testimony and evidence presented by the Defendant, the improper instruction precluded the jury from concluding that the Defendant acted in lawful self-defense. Under these circumstances, the Court concludes that, pursuant to *Strickland*, there was a breakdown in the adversarial process of the trial that our system counts on to produce just results. See *Strickland*, 466 U.S. at 696.

Therefore, there is a reasonable probability that the outcome of the Defendant's trial would have been different had trial counsel raised the appropriate objection to the improper jury instructions. Accordingly, this Court concludes that the Defendant was provided ineffective assistance of counsel with regards to Ground One of the Defendant's Motion for Postconviction Relief.

Ground Two

In Ground Two, the Defendant asserts that trial counsel provided him with ineffective assistance of counsel by calling Frankling Melo as a witness with full knowledge that Melo would invoke his Fifth Amendment right against self-incrimination in

response to any questions about the incident in question. After further consideration, the Court also grants Ground Two of the Defendant's Motion for Postconviction Relief.

Florida caselaw clearly establishes that a defendant is prejudiced when a witness who is closely identified with the defendant is called to testify and invokes his Fifth Amendment privilege in front of the jury. See e.g. *Ashley v. State*, 314 So. 3d 454, 457 (Fla. 3d DCA 2020). At the evidentiary hearing, trial counsel testified that he knew that Melo would invoke his Fifth Amendment privilege. That fact is confirmed by the transcripts of the trial. (TT at 1015-1037).

Nonetheless, trial counsel chose to call Melo as a witness. Mello testified that he and the Defendant had known each other for four months, worked together at the same car dealership, worked out together, and spent some time together socially. (TT at 1043-1044). After obtaining that testimony, trial counsel elicited testimony from Melo in which he admitted to being present with the Defendant at the time of the incident in question. Melo testified that he voluntarily spoke to the police about the incident on two separate occasions. He testified that he was subsequently arrested for charges relating to the events in this case. (TT at 1044-1045).

Trial counsel then elicited testimony from Melo that he was invoking his Fifth Amendment privilege in order to avoid answering questions about the incident. Melo testified that he would be willing to answer questions if he was not charged with a criminal offense. (TT at 1046-1047).

Trial counsel performed deficiently by choosing to present Melo as a witness. Through the testimony of Jennifer Lamonte and the Defendant, trial counsel established

that the Defendant and Melo had been friends and co-workers for 4 months, and that the Defendant has established a mentor-mentee relationship with Melo. That testimony was unrefuted. As a result, Melo's testimony on those issues added no additional information in support of the defense.

However, without Melo's testimony, the testimony of Jennifer Lamonte and the Defendant described Melo as an innocent individual dragged into a physical altercation that started when Downey was punched without provocation by Jose Alonzo. (TT at 488, 1079-1081). After Melo testified, he was presented in a much different light. The jury was now advised that he was involved in the incident, that he was arrested after talking to the police about his involvement, and that he was not willing to testify about it during trial in order to avoid incriminating himself in his pending case.

Therefore, as a result of trial counsel's decision to have Melo testify, Melo was transformed from an innocent victim who the Defendant was trying to protect into an individual charged as a co-defendant for his involvement in the same incident for which the Defendant was on trial. It was now obvious to the jury that the police and the prosecution believed that Melo was not a victim, but a criminal. Given his strong connection to the Defendant, Melo's testimony and invocation of his right to remain silent substantially prejudiced the Defendant.

This Court concludes that trial counsel's decision to call Melo as witness was a patently unreasonable strategy decision that served to undermine the defense in this case. As a result, the Court concludes that this decision constituted ineffective assistance

of counsel that requires the Court to vacate the Defendant's convictions. See *Bowers v. State*, 929 So. 2d 1199, 1200 (Fla. 2d DCA 2006).

Ground Four

Finally, the Court also concludes that the cumulative effect of the deficient performance of trial counsel described in Grounds One and Two prejudiced the Defendant. See *Johnson v. State*, 381 So. 3d 1279 (Fla. 1st DCA 2024).

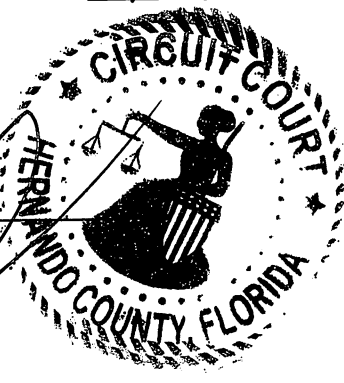
Therefore, it is hereby,

ORDERED AND ADJUDGED that:

Grounds One, Two, and Four of the Defendant's Motion for Postconviction Relief is GRANTED. The Defendant's convictions and sentences are hereby vacated. The State has 30 days to appeal.

DONE AND ORDERED in Chambers, Hernando County, Florida, on this 19th day of June, 2025


STEPHEN E. TONER
CIRCUIT JUDGE



CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to the following individuals by e-service on this 19 day of June, 2025:

William Ponall, Esq.
Ponall Law
253 North Orlando Ave. Sute 200
Maitland, Florida 32751
bponall@PonallLaw.com

Office of the State Attorney
Fifth Judicial Circuit
20 N. Main Street
Brooksville, FL 32601
eservicehernando@sao5.org

347 So.3d 1270 (Table)
Unpublished Disposition
(This unpublished disposition is
referenced in the Southern Reporter.)
District Court of Appeal of Florida, Fifth District.

STATE of Florida, Appellant,
v.
Matthew APPERSON, Appellee.

Case No. 5D21-2851
|
Decision filed September 20, 2022

Appeal from the Circuit Court for Seminole County, Melanie
Chase, Judge. LT Case No. 2015-CF-001381-AX

Attorneys and Law Firms

Ashley Moody, Attorney General, Tallahassee, and Pamela
J. Koller, Assistant Attorney General, Daytona Beach, for
Appellant.

William R. Ponall, of Ponall Law, Maitland, for Appellee.

Opinion

PER CURIAM.

***1** AFFIRMED.

COHEN, WALLIS and NARDELLA, JJ., concur.

All Citations

347 So.3d 1270 (Table), 2022 WL 4351084

IN THE CIRCUIT COURT FOR THE EIGHTEENTH JUDICIAL CIRCUIT
IN AND FOR SEMINOLE COUNTY, FLORIDA

STATE OF FLORIDA,

CASE NO. 2015-CF-1381-A

v.

MATTHEW APPERSON,

Defendant.

**ORDER VACATING DEFENDANT'S JUDGMENT AND SENTENCE
AND GRANTING DEFENDANT A NEW TRIAL**

THIS CAUSE comes before the Court on Defendant's "Motion for Rehearing on Order Denying Grounds 1(A), (3A), and 3(B) of Defendant's Amended Motion for Postconviction Relief after Evidentiary Hearing," filed on August 17, 2021, and "Amended Motion for Post-Conviction Relief," filed pursuant to Fla. R. Crim. P. 3.850 on November 17, 2020.¹ Having conducted multiple hearings and upon due consideration, the Court finds the following:

PROCEDURAL BACKGROUND

The record reflects that Defendant was convicted after a jury trial of Attempted Second Degree Murder with a Firearm (Count 1), Shooting Into an Occupied Vehicle (Count 2), and Aggravated Assault with a Firearm, Reclassified (Count 3). On October 17, 2016, Defendant was sentenced to twenty (20) years imprisonment with a twenty (20) year minimum mandatory for discharging a firearm on Count 1, fifteen (15) years on Count 2, and fifteen (15) years with a three (3) year minimum mandatory for use of a firearm on Count 3. All counts were imposed to

¹ Defendant originally filed his motion on September 24, 2020. By order rendered October 8, 2020, this Court dismissed Ground 2 as facially insufficient with leave to amend. Defendant subsequently filed his amended motion.

run concurrently. Defendant appealed and the Fifth District Court of Appeal per curiam affirmed. Apperson v. State, 252 So. 3d 387 (Fla. 5th DCA 2018).

The history of Defendant's post-conviction relief efforts is admittedly circuitous. Just as the prosecutor and trial counsel are talented and experienced attorneys, post-conviction counsel is skillful. The legal arguments have been persuasive from both sides and this analysis involves well-reasoned, but opposing, positions. By order rendered April 8, 2021, this Court denied Grounds 1-4 of Defendant's motion and set a status hearing for an evidentiary resentencing hearing on Grounds 5 and 6. On April 20, 2021, Defendant filed a motion for rehearing. By order rendered May 20, 2021, this Court granted rehearing and ordered an evidentiary hearing as to Grounds 1(A), 3(A) and 3(B). An evidentiary hearing was held on July 20, 2021, at which Defendant was present and represented by counsel. At the hearing, trial counsel, Attorney Michael LaFay, testified. By order rendered August 2, 2021, this Court denied Grounds 1(A), 3(A) and 3(B) and set a status hearing on Grounds 5 and 6. On August 17, 2021, Defendant filed a second motion for rehearing. By order rendered September 22, 2021, this Court granted rehearing as to Grounds 1(A) and 3(A).

ANALYSIS

In order to prevail on a claim of ineffective assistance of counsel, Defendant has the burden of demonstrating that (1) counsel's performance was deficient, and (2) there is a substantial likelihood that the outcome of the proceedings would have been different. Strickland v. Washington, 466 U.S. 668 (1984); Williamson v. Dugger, 651 So. 2d 84 (Fla. 1994); Knight v. State, 394 So. 2d 997 (Fla. 1981). "The Strickland prejudice prong requires the defendant to show that 'there is a reasonable probability that, but for counsel's professional errors, the result of the proceeding would have been different,' where '[a] reasonable probability is a probability

sufficient to undermine confidence in the outcome.” Allen v. State, 261 So. 3d 1255, 1269 (Fla. 2019) (quoting Strickland, 466 U.S. at 694); see also, Dennis v. State, 109 So. 3d 680, 690 (Fla. 2012).

GROUND 1(A) – FAILURE TO OBJECT TO JURY INSTRUCTION

In Ground 1(A), Defendant asserts that trial counsel was ineffective for failing to object to the inclusion in the jury instructions of the language “not otherwise engaged in criminal activity,” because it was confusing and misleading. Defendant asserts that this language was confusing because other than the shooting that formed the basis of the charges in this case, there was no evidence that Defendant was engaged in any other criminal activity. In support of this claim, Defendant relied upon Novak v. State, 974 So. 2d 520 (Fla. 4th DCA 2008), to assert that the instruction was improper.

At the hearing, Attorney LaFay testified that he had read Novak at the time of Defendant’s trial; however, because there was no issue of Defendant being otherwise engaged in criminal activity, he did not think to object to the inclusion of the language. Attorney LaFay further testified that had he thought of it, he would have requested that the language be removed from the jury instruction and, importantly, that the Court would have been required to strike it.

In Novak, the Fourth District Court of Appeal held that “a jury charged with the ‘unlawful activity’ instruction might confuse the charged crimes with ‘unlawful activity’ that precludes the justification of self-defense unless the defendant has retreated.” Id. at 522. Post-conviction counsel argued that had trial counsel objected to the inclusion of the “not otherwise engaged in criminal activity” language, the trial court would have removed it from the jury instructions based upon Novak. The jury instruction addressed in Novak provided:

No duty to retreat (location other than dwelling, residence, or occupied vehicle). Give if applicable.

If the defendant was not engaged in an unlawful activity and was attacked in any place where [he] [she] had a right to be, [he] [she] had no duty to retreat and had the right to stand [his] [her] ground and meet force with force, including deadly force, if [he] [she] reasonably believed that it was necessary to do so to prevent death or great bodily harm to [himself] [herself] [another] or to prevent the commission of a forcible felony.

In re Standard Jury Instructions in Criminal Cases (2006-3), 947 So. 2d 1159, 1161 (Fla. 2007)

(italics in original). The standard jury instructions were amended in 2016. As part of the 2016 change to Instruction 3.6(f), the Court revised the instruction regarding the duty to retreat, deleting the previous language, and adding the provision, “However, the defendant had no duty to retreat if [he] [she] was not otherwise engaged in criminal activity and was in a place where [he] [she] had a right to be.” *Id.* at 415. This is the language given to the jury in Defendant’s case, and while it constitutes an accurate statement of the law, it was inapplicable and therefore potentially confusing to the jury.

As the Supreme Court has recently stated in In re Amendments to the Florida Rules of Judicial Administration, et al., 45 Fla. L. Weekly S121 (Fla., April 2, 2020), “. . . because of this Court’s authorizing of the standard instructions, trial judges are sometimes reluctant to modify standard jury instructions or to give other instructions requested by a party that may be more appropriate.” In this case, trial counsel did more than fail to object to a standard jury instruction; counsel prepared and sponsored the instruction. By doing so, trial counsel opened the door to the prosecutor making an argument that Defendant had a duty to retreat. It was the inclusion of that language that brought the confusion into play.

Furthermore, even though the standard jury instructions were amended after Novak, this Court finds that the amendment did not alter the language in a manner that corrected the issue addressed in Novak. In Novak, the defendant asserted that “the jury instruction imposing a ‘duty to retreat’ on a defendant who employs self-defense while ‘engaged in unlawful activity’ was

confusing under the circumstances because the defendant was not engaged in any unlawful activity other than the crimes for which he asserted the justification.” Novak, 974 So. 2d at 522. The Court found that “a jury charged with the ‘unlawful activity’ instruction might confuse the charged crimes with ‘unlawful activity’ that precludes the justification of self-defense unless the defendant has retreated.” Id. There is no significant difference between the jury instruction used in Novak and the jury instruction given in this case. Based upon the reasoning in Novak, this Court finds that the jury instruction given in this case was confusing and that trial counsel was ineffective for proposing the use of the instruction that negated his client’s sole defense. See McCullough v. State, 46 Fla. L. Weekly D2163 (Fla. 5th DCA Oct. 1, 2021) (“ . . . we find that trial counsel was deficient for consenting to a jury instruction that legally negated his client’s sole defense.”).

GROUND 3(A) – FAILURE TO OBTAIN DEFINITIVE RULING

In Ground 3(A), Defendant asserts that trial counsel was ineffective for failing to make proper objections and obtain definitive rulings on the improper closing argument by the State regarding the duty to retreat. (T. 814).² Specifically, the prosecutor made the following argument to the jury during closing arguments:

“Duty to retreat. Mr. LaFay made that argument, well, he is wrong. Because there are exceptions to the stand your ground law. There are two exceptions to the stand your ground law, *where you have a duty to retreat*. But Mr. LaFay is going to make that argument that you have a duty to retreat. The first exception is, if you are the aggressor, you have the duty to retreat. The second exception is *if you your yourself are committing a crime, and then you claim self-defense, you have a duty to retreat.*”

(TT814) (emphasis added).

² Relevant portions of the trial transcript were attached to this Court’s April 8, 2021 order.

The State relies heavily on the notion that the jury instructions were amended to include the word “otherwise,” to clarify to jurors that a defendant should not be considered to be “engaged in criminal activity” based on the crime(s) charged. The State believes that the addition of this word makes the concept clear and unambiguous. However, even the very experienced prosecutor in this case omits the portion of that exception that is clarified by the addition of the word “otherwise”. Here, the State informed the jury that a defendant has a duty to retreat “. . . if you yourself are committing a crime . . .” If the word “otherwise” is the word that makes it perfectly clear for a jury, then its absence from the prosecutor’s statement of the law is significant.

While trial counsel did object to the argument, the trial court responded by informing the jury, “[l]adies and gentlemen, I will be reading the instructions to you, the copy of the instructions I will read will be going back to the jury room with you. What I read in those instructions you see -- you will see, are the law.” (T. 814). Attorney LaFay testified that he objected to the State’s argument because he believed it argued facts not in evidence and that it was an incorrect statement of the law, specifically, in the context of this case. He further stated that he did not believe the trial court made a definitive ruling but that he did not wish to press the matter. He testified that it appeared that the prosecutor had abandoned the argument and he was uncertain as to what the trial court would have done. If the trial court had overruled his objection, he thought the prosecutor would have been “off to the races” on the issue.

Given this Court’s finding that the “otherwise engaged in criminal activity” jury instruction was confusing, this curative instruction by the trial court did little to correct the issue of the State implying that Defendant had a duty to retreat if he was himself committing a crime. Therefore, while the strategy employed by trial counsel in letting the matter rest without obtaining a definitive ruling was well-reasoned and tactically sound, it contributed to the

probability that the jury was confused as to the applicable law.

The Court further notes the jury question: "Can the agresser (sic) stand his ground?" This question is significant because it likely would not have been asked if there were not at least one juror open to Defendant's claim of self-defense. The phrase "stand his ground" is only found once in the subject jury instructions, and that is in the very sentence that this Court has found to be improper: "If Matthew Apperson was not otherwise engaged in criminal activity and was in a place he had a right to be, then he had no duty to retreat and had the right to stand his ground." The jury's question indicates there was actual express confusion as to whether the charged crimes, which can only be characterized as aggressive behavior, constituted criminal activity that precluded Defendant's right to stand his ground. There is a reasonable probability that had that instruction been clarified, at least one juror would have reached a different result. Likewise, there is a reasonable probability that had the instruction been properly omitted, the juror or jurors who were open to Defendant's claim of self-defense would not have been confused as to whether the charged crimes constituted criminal activity and would have therefore reached a different result.

Based upon the forgoing, this Court finds that Defendant has established that trial counsel, though exceptional at his craft, was deficient in this instance, and further that Defendant has established a probability sufficient to undermine this Court's confidence in the outcome. Therefore, this Court finds that the Defendant is entitled to a new trial.

Regarding Grounds 5 and 6, this Court's ruling that Defendant is entitled to a new trial renders those issues moot.

Accordingly, it is

ORDERED AND ADJUDGED:

1. Defendant's Amended Motion for Post-Conviction Relief is hereby GRANTED.

The Judgments entered on October 17, 2016, are vacated. The sentences imposed on October 17, 2016, are set aside.

2. Defendant shall remain in the custody of the Seminole County Sheriff until a bond hearing can be held. Counsel is directed to schedule such hearing without delay.

3. The matter shall be set for docket sounding on the 8th day of December, 2021 at 9:00 a.m. in Courtroom 5D.

4. The parties have the right to appeal this order as provided by law.

DONE AND ORDERED in chambers at Sanford, Seminole County, Florida, this 8 day of November, 2021.


HONORABLE MELANIE CHASE
Circuit Judge

I hereby certify that copies of the foregoing have been furnished by mail this _____ day of November, 2021 to:

Office of the State Attorney
101 Eslinger Way
Sanford, FL 32773
SemFelony@sa18.org

William R. Ponall, Esq.
253 N. Orlando Ave., Suite 201
Maitland, FL 32751
bponall@PonallLaw.com

Florida Department of Corrections
501 South Calhoun St.
Tallahassee, FL 32399

GRANT MALOY, Clerk of Courts

By: _____
DEPUTY CLERK