IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner,

vs.

TONY GARCIA

Respondent.

Case No. SC19-1870

L.T. Nos. 4D17-3751

ON DISCRETIONARY REVIEW FROM
THE FOURTH DISTRICT COURT OF APPEAL

INITIAL BRIEF OF PETITIONER

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PRELIMINARY STATEMENT

In the Fourth District Court of Appeal, the State was the Appellee and Respondent was the Appellant. Emboldened emphasis is added unless otherwise noted. Citations to the jail recordings will be followed by a time stamp (_:__:__) indicating the specific chronological location of the event in that recording. The following symbols will be used, followed, as applicable, by citation to the electronic record by "PDF":

R1 = Original Record on Appeal filed in the 4th DCA on January 29, 2018;

R2 = Record of Appeal sent to this Court on June 5, 2020;

T1 = August, 2017 Trial Transcripts filed in the 4th DCA on January 29, 2018;

T2 = September, 2016 Trial Transcripts filed in the 4th DCA on October 26, 2018;

C1 = Jail Call Recording of April 15, 2017 with file name: 'Call01 04-15-17 13.24.12.wav';

C2 = Jail Call Recording of June 12, 2017 with file name: 'Call05 06-12-17 19.56.42.wav';

C3 = Jail Call Recording of August 31, 2017 with file name: 'Call06 08-31-17 19.25.26.wav';

_ DCA = District courts will be referred to by their respective abbreviations.

INTRODUCTION

This case presents two questions of statewide importance. First, whether a defendant can establish fundamental sentencing error where the State submitted evidence supporting an allegedly improper factor, the defendant declined to object, and the sentencing court did not purport to rely on the factor. Second, and in the alternative, whether the Due Process Clause completely prohibits a sentencing court from considering post-arrest misconduct that is supported by a preponderance of the evidence. The answer to both questions is no.

STATEMENT OF THE CASE AND FACTS

On August 31, 2017, Respondent was convicted of first degree arson of a dwelling by a jury. (T1 805-06); (R1 464). Respondent was sentenced to 7 years' imprisonment, far below the statutory maximum of 30 years' imprisonment. Respondent previously had a jury trial in September, 2016, ending with a mistrial. See (R1 61-65, 67-72, 74-77, 79-81, 83).

Offense of Conviction

To spite his bank, which was foreclosing on his house, Respondent set his house aflame using various flammable substances and a candle, which he rigged to ignite the substances after a time delay, allowing him to flee the house before the fire.

Summarily, the State proved the elements of first-degree arson with evidence that: (1) around 5-10 aerosol cans and one-pound propane tanks were left in the kitchen, some of which were near the stove, inside a rotisserie oven, and inside a toaster oven, (T1 61, 97-98, 143-44); (2) witnesses testified to smelling alcohol, fuel, or lighter fluid, (T1 239-40, 377-78, 425-26); (3) a candle was intentionally used as a time delay device to ignite the lighter fluid, (T1 401-02, 425); (4) witnesses testified it was not "normal to see pressurized cylinders of that quantity" in the kitchen area, (T1 161, 400-01); (5) a twenty pound propane tank was left inside the home with the "bleeder screw" loosened such that its contents were expelling from the tank, (T1 83, 143); (6) a "bleeder screw" is different from the consumer based valve on the propane tank in that it requires a screwdriver to open and is separate from the safety release system of the tank, see (T1 143, 267-75); (7) when an officer went to inform Respondent about the fire, Respondent identified himself from 20 feet away--without any prompting--to the officer after the officer spoke in a low voice to the bartender in a bar with music playing; (T1 440-41); (8) Respondent's home was in foreclosure and the mortgage holder obtained a final judgment on the foreclosure, (T1 311-15); (9) Respondent was personally served the final foreclosure documentation on May 9, 2014, less than two months before the fire, (R1 792; T1 731); and, (10) the sale of the house was set for July 7, 2014, 9 days after the fire, (R1 724-25; T1 313).

Revocation of Bond Hearing

Between the two trials, on February 16, 2017, the State moved to revoke Respondent's bond alleging he made various threats to people and had previously violated his bond conditions by leaving the scene of a crash causing damage and driving with a suspended license. (R1 368-69). A revocation of bond hearing was held on February 17, 2017. (R1 535, et seq.).

Several witnesses testified at the hearing. Mr. Darrell Day (Darrell) testified that on February 3, 2017, he went to Respondent's home to retrieve tools and Respondent threatened him with a gun:

> I said -- I told him I'd like to get his tools out of your truck he goes, well, come in. And I come in, had a beer with him and he goes, "You know, I don't really like you." I thought he was just the kidding. And then he goes, you cut my couch or my recliner, and then he reaches down in his recliner and pulled a gun out and pointed it at me and said, "My son got me this recliner."

(R1 561-62); see also (R1 563, 567) (identification of the date as February 3, 2017). Darrell acknowledged the gun looked like a gray semiautomatic handgun. (R1 564). Darrell detailed that Respondent stated the gun was loaded and that Respondent "started crying." (R1 564). Darrell then stated:

> A. . . . [H]e kept holding it and he was kind of shaking and he wasn't smiling or laughing. So I took it seriously after about ten seconds of acknowledging that that's a real gun loaded on me, so . . .
>
> Q. Where was it pointed?

A. In my face.

(R1 565). Darrell did not contact the police about the incident. (R1 565).

Officer Paul McCleary (Off. McCleary) testified that on February 5, 2017, he was dispatched to a domestic dispute at Respondent's ex-wife's house, Jamie Garcia, where Respondent was attempting to obtain guns she had secured in a safe. (R1 543-45). Respondent appeared to Off. McCleary as being "drunk," with "[r]ed eyes, slurred speech," and "a little insane," but Off. McCleary was informed that Respondent was on medication for cancer so he could not be sure of Respondent's intoxication. (R1 545). Respondent was acting angry towards Off. McCleary, "call[ing] [him] the 'N' word. I won't use it in here. 'Boy,' stuff like that." (R1 546). Off. McCleary contemplated Baker Acting Respondent, but instead offered him a ride home. (R1 546-47).

Off. McCleary drove Respondent home, and "[u]pon letting him out of the vehicle, he got into an argument with one of the neighbors." (R1 547). Off. McCleary testified:

> [T]hey were upset, saying, "You threaten me with a gun again, I'm going to hurt you." He came back and said, "Oh, you know what? I'm going to go inside, I'm going to get a gun, I'm going to shoot you and I'm going to shoot this officer and I'm going to make him shoot me."

(R1 547).

Mr. Billy Martin (Billy)--who was Respondent's neighbor and testified at his

first trial, see (T2 415-40)--testified at the bond revocation hearing that during this exchange he told Respondent that he was not allowed at his house anymore--based in part on Respondent's prior threat to Darrell. See (R1 555-56, 558). Respondent "went nuts" during this encounter and threatened to shoot Billy. (R1 553-54). Both Billy and Darrell also testified they saw Respondent drinking and intoxicated during the month prior to the hearing. (R1 554-55, 560-62).

After the encounter with Billy, Off. McCleary decided to Baker Act Respondent and transported him to John F. Kennedy Medical Center (JFK). (R1 548-49).

Officer Daniel Salguero (Off. Salguero) testified that his department received a phone call informing them Respondent had left JFK 30 minutes after being dropped off and was at a local bar. (R1 569). Upon arriving, Off. Salguero found Respondent "standing at the bar, drinking a beer and eating chicken wings." (R1 569-70). Off. Salguero took Respondent back to JFK to continue his Baker Act. (R1 570).

Sentencing Proceedings

After the second trial and guilty verdict, Respondent moved for a downward departure sentence under § 921.0026(2)(d), Fla. Stat. based on his cancer diagnosis. (R1 472-75). The State filed with the clerk an omnibus sentencing recommendation and objection to the downward departure, entitled "State's

Sentencing Recommendation" (State's Response). (R1 476-86). The State began its Response by detailing the facts of Respondent's arson. (R1 476-78). In a separately delineated section entitled "Defendant's Relevant Conduct Since His Arrest in This Case," (R1 478-80), the State summarized Respondent's bond conditions and the evidence obtained at the revocation of bond hearing. (R1 478-79).

The State also included information occurring subsequent to the bond revocation hearing concerning additional threats made by Respondent:

> Throughout the course of this case, [Respondent] has repeatedly made threats to do violence to the listed witnesses. While in Palm Beach County custody, [Respondent] continued to make threats to harm State Witnesses. On April 15, 2017, [Respondent] made a call from the jail to his son and told him, approximately eight minutes into the call, that if "they keep me in here I am definitely stopping at Billy's on the way back .... When the other thing is all over and done with then I get a clean slate and they can't mess me with anymore."
>
> On June 12, 2017, [Respondent] made a jail call to Jamie Garcia. Approximately eight minutes into the phone call, [Respondent] stated, "I hope I never see her [Brittany Garcia] again. If I do, I am going to break her neck. I will. I don't care if I have to do time for it but I am going to take her out if I ever see her. I've got no use for her."
>
> On August 31, 2017, [Respondent] calls Jaime Garcia and states, "The bitch [Brittany Garcia] had a lot to do it with it. It will be real hard not to send MS-13[1]

[1] "MS-13 refers to Mara Salvatrucha, a notorious and transnational criminal

> down there because I know they will take out Wyatt [his three year old grandson] too and I don't want that happening."

(R1 479-80). The jail call recordings were attached as Exhibit C to the State's Response. See (C1 08:33-09:00); (C2 08:53-09:18); (C3 02:49-3:00). The State also briefly detailed Respondent's prior convictions for battery--which was reduced in a plea from aggravated battery on a person 65 years of age or older--and adjudication withheld for leaving the scene of an accident. (R1 480).

In opposing the motion for downward departure, the State argued that Respondent failed to prove that he was in need of or was amenable to treatment, and, even if he were, the Florida Department of Corrections was capable of treating cancer. (R1 483-84). The State concluded with its final sentencing recommendation:

> [Respondent's] actions warrant severe punishment by this Court. [Respondent] intentionally and maliciously endangered the lives of the first responders and the people in his neighborhood because he would rather see the house at 345 Osborne Drive burn down than relinquish it to the bank. Wells Fargo was also financially affected by his criminal actions. The house was condemned and torn down.
>
> [Respondent's] actions were methodical and planned. He took multiple steps to secure property and pets that mattered to him, while leaving what he didn't care about behind as fuel for the fire. He planned out how

---

organization or gang, with factions located in at least 40 U.S. states, according to news release from the U.S. Department of Treasury on April 16, 2015." (R1 480).

> to set the fire by using flammable substances and ripping up his countertops to the expose the bare wood beneath in order to insure the fire took. [Respondent's] criminal actions were planned, sophisticated, and malicious.
>
> The only appropriate sentence in this case is a term of imprisonment. The State is asking the Court to sentence [Respondent] to a term of 84 months in the Department of Corrections for First Degree Arson. The State is also seeking restitution for Wells Fargo.

(R1 485).

At the sentencing hearing on November 20, 2017, defense counsel asked for probation pursuant to the motion for downward departure. (R1 615-18). The State argued substantively that Respondent failed to meet his burden regarding the motion for downward departure and about the facts of the underlying offense. (R1 619-22). The State also argued:

> The state would also like to take an opportunity at this time to address some of [Respondent's] conduct since his arrest, specifically toward witnesses in this case. On page three of the state's memorandum the state begins to outline some of this behavior, specifically that this defendant made threats to Billy Martin who was a state witness in the first trial. Brittney Garcia who reported to the police officers that this was an intentional act of arson and who testified in the second trial.
>
> For Billy Martin he threatened that he would shoot and kill Mr. Martin and his family members. And Mr. Martin was so scared that he went to police officers and reported the offense.

(R1 622-23).

Furthermore, [Respondent], also around that time, went to the house of Jamie Garcia and tried to obtain firearms. When [Respondent] started going over his discovery on April 15th, 2017, and found out what Billy Martin had said, he stated, "If they keep m[e] in here, I'm definitely stopping at Billy's on the way back. When the other thing is all over and done with, I can get a clean slate and they can't mess with me anymore."

THE COURT: Hold on. Just so the record is clear, we had that hearing without [Respondent] because there was some life threatening situations that had occurred, correct, that people's lives had been threatened?

[STATE]: Yes, your Honor, multiple lives were threatened with a firearm.

THE COURT: Okay. Just making sure. Go ahead.

[STATE]: Your Honor, on this call, April 15, 2017, which [Respondent] makes from the Palm Beach County Jail to his son has also been provided as part of the state's sentencing memorandum. A copy has also been provided to the defense. On June 12, 2017, [Respondent] makes a phone call to Jamie Garcia, his ex-wife. During that phone conversation he states, "I hope never to see her," referring to Brittney Garcia "again, and if I do, I'm going to break her neck. I will, I don't care if I have to do time for it, but I'm going to take her out if I ever see her again. I've got no use for her."

And again, the state would like to remind the Court that Brittney Garcia is the person who called law enforcement officers and advised them that [Respondent] had stated his intent to burn down the house before the bank would get it.

On August 31st, 2017, [Respondent] calls Jamie Garcia again from the Palm Beach County Jail and states, "The bitch, Brittney Garcia had a lot to do with it," referring to his conviction. It will not -- "it will be real

> hard not to send MS-13 down there, because I know they will take out Wyatt," and he is referring to his three-year old grandson in that phone call, "and I don't want that happening."
>
> And again, all those phone calls were submitted to the Court and to the defense and the state is ready to play them for the Court if the Court wants to listen to them again.

(R1 623-25). Respondent's only objection to this evidence regarded specifically the evidence elicited at his revocation of bond hearing; he objected to the evidence because he was not present at that hearing. (R1 623).

Respondent called Jamie Garcia as witness. (R1 627-34). Respondent was permitted to allocute. (R1 636-45). Both the State and defense counsel offered no further argument. (R1 645-46). The sentencing court found:

> So [Respondent] is charged with first degree arson. The bottom of the guidelines are 34.8. The maximum is 30 years. I've taken into consideration all the evidence, the PSI, the state's argument, the defense's argument. Obviously as everyone knows under Banks,[2] the downward departure is a two-step process, whether the Court can depart, from whether it should depart.
>
> Number one, I'm not even sure if the defense has proven that they can depart for a -- with the basis regarding the illness under 921.0026(2)(d). However, even if they did prove that, there is a basis for departure under Chubb[u]ck[3] and Banks by a preponderance of the evidence, this Court does not find that it should depart.

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[2] Banks v. State, 732 So. 2d 1065 (Fla. 1999).
[3] State v. Chubbuck, 141 So. 3d 1163 (Fla. 2014).

> Now, based on all the evidence, the severity of the crime, the issues that were testified to, this is [a] very, very sad situation all around, it really is. But even if I could depart, I do not believe I should depart and therefore, I'm sentencing [Respondent] to the 84 months that the state is requesting with restitution paid to Wells Fargo, state court costs and an adjudication.

(R1 646-47); see also (R1 511-14) (judgment and sentence orders).

Direct Appeal in the 4th DCA

Respondent raised two issues on direct appeal: (1) the trial court erred in admitting a recording of Tony Garcia, Jr.'s conversation with police under the past recollection recorded hearsay exception; and (2) the sentencing court imposed a vindictive sentence. (R2 96-101). The heading for Point II stated: "The sentencing court imposed a vindictive sentence influenced by impermissible sentencing factors." (R2 99).

Under the Point II argument, Respondent quoted Wilson v. State, 845 So. 2d 142 (Fla. 2003), regarding the factors for determining whether a sentence was vindictive. See (R2 99-100). Respondent further argued that the case was factually similar to the 4th DCA's White where, following a mistrial and judicially initiated plea discussions, the sentencing court increased White's sentence. (R2 100); see also White v. State, 199 So. 3d 497, 498-99 (Fla. 4th DCA 2016). Respondent then argued:

> [Respondent] acknowledge[s] *Walker v. State*, where this court found an exception to vindictive

> sentencing where the significant increase was from a departure sentence to a criminal punishment code sentence. *Walker v. State*, 199 So. 3d 990 (Fla. 4th DCA 2016). Even before *Walker*, the law refused to accept departure decisions that violate due process. *Barnhill v. State*, 140 So. 3d 1055, 1060-61 (Fla. 2d DCA 2014). *See also Norvil v. State*, 191 So. 3d 406, 410 (Fla. 2016) (subsequent arrests improper for sentencing considerations); *Cromartie v. State*, 70 So. 3d 559, 563 (Fla. 2011) and *Pressley v. State*, 73 So. 3d 834, 836 (Fla. 1st DCA 2011).
>
> No new facts presented themselves between [Respondent's] mistrial and his subsequent guilty verdict. Although the prosecution heavily weighed his behavior pending trial to support its final recommendation, similar disruptive behavior had been brought before the court prior to its involvement in the plea. Indeed, the proceeding where it made its offer stemmed from a revocation of bond for threatening witnesses. [Respondent] should be resentenced before a different judge.

(R2 100-01).

From this, the 4th DCA's opinion stated "[a]lthough we disagree with [Respondent's] argument that the trial court imposed a vindictive sentence after participating in plea discussions, we conclude that [Respondent's] due process rights were violated because his sentence may have been based, at least in part, on an impermissible sentencing factor." Garcia v. State, 279 So. 3d 148, 149 (Fla. 4th DCA 2019). The court further summarized the above information from the revocation of bond and sentencing proceedings. Id. at 149-50.

The 4th DCA outlined Norvil, to state "the only permissible sentencing

factors are those enumerated in the CPC," and "a trial court may not consider subsequent, uncharged misconduct when sentencing a defendant for the primary offense." Id. at 150 (citing Love v. State, 235 So. 3d 1037 (Fla. 2d DCA 2018) and Schwartzberg v. State, 215 So. 3d 611 (Fla. 4th DCA 2017)). The court then held:

> Here, [Respondent's] due process rights were violated because the State urged the trial court to consider an impermissible sentencing factor--namely, incidents of misconduct occurring after the charged offense--and his sentence may have been based, at least in part, on that impermissible factor. While the trial court made no comment indicating that it had considered [Respondent's] subsequent misconduct in imposing sentence, the prosecutor's recommendation at the sentencing hearing relied heavily upon the evidence of [Respondent's] post-arrest misconduct.
>
> . . .
>
> The State has not met that burden in this case. The trial court simply stated that its sentence was based upon "all the evidence, the severity of the crime, [and] the issues that were testified to . . . ." The trial court specifically stated that the sentence was based on "all the evidence," and nothing in the court's statement indicated that the court did not consider the evidence of [Respondent's] post-arrest misconduct. Furthermore, the trial court imposed the exact sentence requested by the prosecutor. Thus, the record may reasonably be read to suggest that the sentence was based, at least in part, on an impermissible factor argued by the State.
>
> In sum, although the trial court did not impose a vindictive sentence, the State has failed to meet its burden to show that the trial court did not impermissibly rely upon [Respondent's] post-arrest misconduct in sentencing him. We affirm [Respondent's] conviction but

> reverse his sentence and remand for resentencing before a different judge.

Id. at 150-51 (relying on Strong v. State, 254 So. 3d 428 (Fla. 4th DCA 2018), to explain the State's burden).

Thus, while the 4th DCA acknowledged that its review was for "fundamental error," it placed the burden on "[t]he State" to disprove that the "sentence was based, at least in part, on an impermissible factor." Id.

SUMMARY OF THE ARGUMENT

The 4th DCA erred because it failed to give the sentencing court **any** deference by presuming it had considered the allegedly improper sentencing factor of subsequent misconduct when sentencing Respondent.

Even if the sentencing court considered subsequent misconduct by Respondent, it did not err because Norvil[4] does not preclude consideration of post-offense misconduct. This Court should recede from Norvil.

If this Court decides not to recede from Norvil, and finds it applicable to the facts of this case, this Court should still quash the 4th DCA opinion because: (1) the 4th DCA improperly ruled upon an issue never raised in briefing; and (2) the sentencing court had discretion to consider Respondent's misconduct in denying a downward departure.

[4] Norvil v. State, 191 So. 3d 406 (Fla. 2016).

STANDARD OF REVIEW

"The issue[s] in this case [are] pure question[s] of law and therefore the standard of review is de novo." Cromartie v. State, 70 So. 3d 559, 563 (Fla. 2011).

ARGUMENT

I. Respondent failed to establish fundamental error.

Respondent objected neither to the State's reliance on his post-arrest misconduct nor to the sentencing court's pronouncement of sentence. Therefore, to have prevailed in the 4th DCA, Respondent had to establish fundamental error. But even assuming the Due Process Clause forbids consideration of post-arrest misconduct--a point disputed below--Respondent has failed to show either that: (a) the sentencing court relied on his misconduct; or (b) such reliance was fundamental error--error that so affected his sentence that interests of justice demands the error be corrected.

A. The 4th DCA erred in presuming the sentencing court considered Respondent's subsequent misconduct.

This Court has consistently applied a presumption that sentencing courts ignore improper sentencing factors made known to them. In Alford, this Court agreed with the State's argument "that, assuming the judge was 'made aware' of certain facts, that doesn't mean that he 'considered' those facts in imposing the sentence." Alford v. State, 355 So. 2d 108, 109 (Fla. 1977). This Court in Harvard again turned to Alford in rejecting the argument that a new trial judge should have

been assigned to Harvard's resentencing "because the original trial judge considered confidential material in imposing the first death sentence, he could have been influenced at resentencing by this improper information and by his prior ruling." Harvard v. State, 414 So. 2d 1032, 1034 (Fla. 1982).

This Court found "trial judges are routinely made aware of information which may not be properly considered in determining a cause. Our judicial system is dependent upon the ability of trial judges to disregard improper information and to adhere to the requirements of the law in deciding a case or in imposing a sentence." Id. (citing Alford). The Harvard opinion made clear that trial judges are presumed to "disregard improper information." See id.

This presumption has endured through the decades and is only overcome by a sentencing court's statements indicating it in fact considered such improper information. See Magill v. State, 457 So. 2d 1367, 1371 (Fla. 1984) ("Just as trial judges are aware of matters they do not consider in sentencing, [Alford], so appellate judges are cognizant of information that they disregard in the performance of their judicial tasks."); Petion v. State, 48 So. 3d 726, 732 (Fla. 2010) (a sentencing court is presumed to disregard improper evidence unless it expressly ruled the evidence admissible in light of an objection that it was inadmissible) (citing Alford); Yisrael v. State, 65 So. 3d 1177, 1178 (Fla. 1st DCA 2011), approved sub nom. Norvil, 191 So. 3d at 410 (reversing after noting that

sentencing judge's **comments** "strongly indicate that the dismissed and pending charges were a factor in the court's determination to impose the maximum allowable sentence"); Williams v. State, 193 So. 3d 1017, 1019 (Fla. 1st DCA 2016) (reversing only after noting "it is clear from the trial judge's **comments** at the sentencing hearing that he accepted as true, and based his sentencing decision on, the prosecutor's assertions [of unsubstantiated conduct]"); Charles v. State, 204 So. 3d 63, 66 (Fla. 4th DCA 2016) (again, citing Harvard, the 4th DCA found "[t]here is no evidence in the record that the trial court was, in any manner, influenced by the State's "send a message" entreaty."); Strong, 254 So. 3d at 435 (Levine, J., dissenting) ("Where there is no evidence in the record that the sentencing court relied upon an allegedly improper argument by the state, this court will not speculate and infer impropriety."); Barlow v. State, 238 So. 3d 416, 417 (Fla. 1st DCA 2018) (finding that "there is no indication that the trial court based its sentence on this uncharged conduct, so the exception provides no basis to reverse.") (citing Harvard).

Assuming, *arguendo*, the subsequent misconduct in this case is an impermissible sentencing consideration, nothing in the record overcomes the presumption that the sentencing court disregarded the misconduct.

First, the 4th DCA specifically stated "the trial court made **no comment indicating that it had considered [Respondent's] subsequent misconduct** in

imposing sentence." Garcia, 279 So. 3d at 150. The 4th DCA only found that "the trial court **may** have considered an impermissible factor in sentencing him." Id. This finding was based on the sentencing court's statement that it had considered "all the evidence" in imposing sentence, but that "nothing . . . indicated that the court did not consider the evidence of [Respondent's] post-arrest misconduct." Id. at 151.

Second, the sentencing court did not admit the evidence of the misconduct over an objection. See Petion, 48 So. 3d at 732. The record shows Respondent failed to lodge **any** objection that his misconduct is a legally impermissible sentencing factor. See (R1 623-25). Respondent's **only** objection regarded the evidence specifically elicited at his revocation of bond hearing because he was not present at that hearing; not because it was legally impermissible to consider such facts during sentencing under Norvil. See (R1 539-40, 623).

It is therefore clear the 4th DCA did **not** afford the sentencing court any deference and, in fact, presumed that it **did** consider the subsequent misconduct in imposing Respondent's sentence. See Garcia, 279 So. 3d at 150. The 4th DCA's holding is therefore contrary this Court's holdings in Alford, Harvard, and their progeny. See, e.g., Harvard, 414 So. 2d at 1034.

Mindful of Chief Justice Canady's concurring opinion in Petion,[5] the State

[5] See Petion, 48 So. 3d at 738 (Canady, C.J., concurring) ("I would reject the

alternatively argues, if this Court is inclined to revisit the presumption of disregard set out in Alford and Harvard, that this Court may adopt the standard used by the federal courts, which simply places on the defendant the "burden of establishing" the sentencing court relied on an improper factor. See United States v. Van Linda, 707 Fed. Appx. 622, 626 (11th Cir. 2017) (citing Gall v. United States, 552 U.S. 38, 41 (2007), United States v. Irey, 612 F.3d 1160, 1191 (11th Cir. 2010) (en banc), and United States v. Tome, 611 F.3d 1371, 1378 (11th Cir. 2010)). For the reasons above, Respondent cannot satisfy that burden.

B. Regardless, Respondent has failed to establish fundamental error.

Merely establishing that the sentencing court considered an improper sentencing factor is insufficient. Because Respondent did not object, he **must** establish fundamental error, meaning an error "that affects the determination of the length of the sentence such that the interests of justice will not be served if the error remains uncorrected." Maddox v. State, 760 So. 2d 89, 99-100 (Fla. 2000). This burden is a heavy one. A minor impact on the sentence does **not** constitute fundamental error. Cromartie, 70 So. 3d at 565 (Canady, C.J., dissenting, joined by Polston, J.) ("The minor impact of the sentencing judge's 'rounding-up' methodology on Cromartie's sentence does not rise to the level of error 'that

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broadly framed presumption that a trial court does not consider inadmissible evidence because it is a presumption fraught with the potential to mislead.").

affects the determination of the length of the sentence such that the interests of justice will not be served if the error remains uncorrected.'") (quoting Maddox).

Respondent cannot meet his burden. The maximum allowable sentence for first-degree arson is 30 years. See § 806.01(1), Fla. Stat.; § 775.082(3)(b)1., Fla. Stat. The minimum allowable sentence in this case was 34.80 months (2.9 years). Respondent committed an egregious crime, one that put the lives of first responders and his fellow citizens in danger. He also went to great extents ensuring his house was heavily damaged by the numerous propane tanks and flammable fluids. See (T1 61, 83, 97-98, 143-44, 161, 239-40, 377-78, 400-02, 425-26). The photographic evidence exemplifies such destruction. (R1 663-72, 684-703, 718-20, 764-74).

These considerations alone more than warranted imposition of a 7-year prison term and defeat any claim that consideration of the allegedly improper factors so affected the determination of the length of the sentence in this case "that the interests of justice will not be served if the error remains uncorrected." See Maddox, 760 So. 2d at 99-100.

Accordingly, this Court should quash the 4th DCA opinion in this case.

II. The 4th DCA erred in labeling subsequent misconduct an impermissible sentencing factor.

Presuming the sentencing court considered the subsequent misconduct in sentencing Respondent, such consideration was proper, because the misconduct is

supported by a preponderance of the evidence. See Norvil, 191 So. 3d at 411 (Canady, C.J., dissenting, joined by Polston, J.). As explained below, this Court should recede from Norvil or otherwise hold it is distinguishable.

A. Sentencing courts can consider substantiated misconduct.

The often cited 3d DCA case Epprecht serves to show the impropriety of speculative sentencing considerations where, in that case, "the [sentencing] court's equally candid speculation that the defendant probably committed other crimes that we do not know about, it is clear that this too is an impermissible sentencing consideration." Epprecht v. State, 488 So. 2d 129, 131 (Fla. 3d DCA 1986) (citing United States v. Cavazos, 530 F.2d 4 (5th Cir. 1976), and United States v. Tobias, 662 F.2d 381, 388 (5th Cir. 1981), cert. denied, 457 U.S. 1108 (1982)). That concern is undeniably valid, and the State condemns baseless speculation in deciding an appropriate sentence.

The Epprecht principle evolved into a standard that unsubstantiated allegations of misconduct considered at sentencing violate fundamental due process. See, e.g., Reese v. State, 639 So. 2d 1067, 1068 (Fla. 4th DCA 1994); Nusspickel v. State, 966 So. 2d 441, 445 (Fla. 2d DCA 2007); Martinez v. State, 123 So. 3d 701, 703 (Fla. 1st DCA 2013) ("Taking 'unsubstantiated allegations of wrongdoing' as established fact violates due process."); McGill v. State, 148 So. 3d 531, 532 (Fla. 5th DCA 2014) (Lawson, J.) (concluding that "affiliat[ion] with a

gang" would have been a **"proper sentencing consideration**" if it were substantiated) (citing Crouse v. State, 101 So. 3d 901, 903 (Fla. 4th DCA 2012), and Jackson v. State, 588 So. 2d 1085, 1086 (Fla. 5th DCA 1991)).

Inversely, if allegations of misconduct are substantiated, a sentencing court can consider such facts in sentencing a defendant. See Norvil, 191 So. 3d at 411 (Canady, C.J., dissenting). As an example, in the 3d DCA's Reaves, the court held:

> [A]lthough the evidence was legally insufficient to go to the jury on the charge of armed trafficking, **the evidence supported the inference that the firearm found in close proximity to [Reaves'] drug supply was [Reaves'] firearm**. For that and other reasons, the trial judge decided to sentence [Reaves] at the upper end of the permitted range. Contrary to [Reaves'] argument, the trial court's reasoning on this point was **entirely permissible**. Defendant was not penalized for acquitted conduct.

Reaves v. State, 655 So. 2d 1189, 1190-91 (Fla. 3d DCA 1995).

In the 4th DCA's Peters, the court found that allegations of misconduct were substantiated by record evidence of disciplinary reports and correction consultations of events that were sexual in nature. Peters v. State, 128 So. 3d 832, 846 (Fla. 4th DCA 2013).

In the 5th DCA's MacIntosh, the court ruled that the sentencing court's comments indicated it had relied on "uncharged acts of violence against another individual" in sentencing MacIntosh. MacIntosh v. State, 182 So. 3d 888, 889 (Fla. 5th DCA 2016). The court ruled that "[a]lthough **this may be a proper sentencing**

consideration, here, the allegations of violence were unsubstantiated hearsay from the assistant state attorney, to which MacIntosh objected." Id.

Discussed below, Respondent's misconduct was substantiated by jail calls and witness testimony.

B. This Court should recede from Norvil II.

In March, 2014, the 4th DCA addressed the argument that "the trial court improperly considered subsequent charges pending against him at sentencing." Norvil v. State, 162 So. 3d 3, 5 (Fla. 4th DCA 2014) (hereinafter Norvil I), decision quashed, 191 So. 3d 406 (Fla. 2016). The 4th DCA adhered to its prior precedent that a sentencing court "can consider pending charges if they are relevant for sentencing purposes." Id. at 8. Regarding substantiation, the court found "the information about the burglary before the court went beyond 'unsubstantiated allegations of misconduct.' The state presented reports of two separate fingerprints found on CD cases in the victim's burglarized car that matched the defendant's fingerprints and the victim's statement that the defendant did not have permission to enter his car." Id. at 10.

On review of that decision, this Court considered "whether the trial court violated the defendant's due process rights by considering a subsequent arrest without conviction during sentencing for the primary offense . . . ." Norvil v. State, 191 So. 3d 406, 407 (Fla. 2016) (hereinafter Norvil II). Despite the express

limitation to that of due process, this Court analyzed the Criminal Punishment Code (CPC) and found that because "the CPC is unambiguous concerning the factors a trial court may consider in sentencing a defendant," see § 921.231, Fla. Stat. (presentence investigation reports), and the CPC does **not** include "subsequent arrests and their related charges," such evidence is an impermissible sentencing factor. See Norvil, 191 So. 3d at 409.

The majority concluded:

> [T]he State failed to show that the trial court did not rely on the pending charge resulting from the subsequent arrest for burglary of a dwelling. Furthermore, chapter 921 is unambiguous and specifically states that prior arrests and convictions, not subsequent arrests and their related charges, are appropriate sentencing considerations. In conclusion, we adopt the following bright line rule for sentencing purposes: **a trial court may not consider a subsequent arrest without conviction during sentencing for the primary offense**. This rule is consistent with the Criminal Punishment Code, and it preserves a defendant's due process rights during sentencing.

Id. at 409-10.

Chief Justice--then Justice--Canady dissented. See id. at 410-11 (Canady, C.J., dissenting). He correctly found that neither the requirements of due process nor the CPC supported the majority's finding because: (1) "[n]othing in the CPC either expressly or implicitly limits a sentencing judge to considering facts presented in a PSI;" and (2) "[n]either the absence of a conviction for the

subsequent crime nor the temporal relationship of that crime with the offense for which sentence was imposed provide any basis for concluding that due process was violated." Id. at 410.

Candidly, this Court's majority opinion in Norvil II is confusing. The opinion did **not** expressly overrule the substantiation of misconduct standard, and even found the State failed to substantiate the underlying arrest in that case. Consequently, the opinion has caused an immense rift between the districts as to whether it prohibits a sentencing court from considering post-offense misconduct even when the misconduct is substantiated. See, e.g., Fox v. State, 281 So. 3d 498 (Fla. 4th DCA 2019) (affirming consideration of an offense committed prior to the underlying offense but not convicted until after the underlying offense); Paul v. State, 277 So. 3d 232 (Fla. 1st DCA 2019) (the court found the allegations of wrongdoing were substantiated because "the trial court heard the jail calls and was able to determine if what it heard supported the State's contention that Appellant attempted to influence his mother and girlfriend" to provide him an alibi for the underlying offenses); Walker v. State, 253 So. 3d 1, 2 (Fla. 4th DCA 2018) ("the court stated at sentencing that the 'court is also taking into consideration the constant misbehavior in the jail with regards to his improper actions towards the guards and the issues that are going on in the jail with respect to that as well.'"); Love v. State, 235 So. 3d 1037, 1040 (Fla. 2d DCA 2018) ("When the trial court

imposed sentence here, the trial court did not specifically mention the [subsequent] incidents of misconduct that occurred after the charged offense. However, the trial court did not announce any factors that it had considered. In looking at the record as a whole, we cannot conclude that the trial court did not consider the incidents of misconduct when imposing sentence.").

Beyond creating confusion, Norvil II's statement that sentencing courts may consider only factors listed in the CPC is incongruous with the common sense purpose of sentencing. For example:

> [I]t is indeed a remarkable proposition that a defendant who has committed an additional crime while out on bond should not have that subsequent crime held against him when being sentenced for the earlier offense. **Due process does not require the adoption of such a nakedly unreasonable proposition.** The view is unassailable that such a crime committed by a defendant while out on bond reflects unfavorably on the defendant's character just as much as--if not more than--crimes that were committed previously. The character of the defendant and a concomitant assessment of the likelihood that the defendant will reoffend are unquestionably proper matters for a sentencing judge to consider when imposing sentence within the statutory maximum.

Norvil II, 191 So. 3d at 411 (Canady, C.J., dissenting); see also, e.g., Williams v. People of State of N.Y., 337 U.S. 241, 247 (1949) ("Highly relevant--if not essential--to [a sentencing judge's] selection of an appropriate sentence is the **possession of the fullest information possible concerning the defendant's life**

and characteristics."); Witte v. United States, 515 U.S. 389, 397-98 (1995) ("a sentencing judge 'may appropriately conduct an inquiry broad in scope, **largely unlimited** either as to the kind of information he may consider, or the source from which it may come.'") (citing Williams and Nichols v. United States, 511 U.S. 738 (1994)).

The State therefore asks this Court to recede from Norvil II and bring Florida's sentencing procedures back in line with long-standing principles of due process which allow consideration and inquiry "largely unlimited either as to the kind of information he may consider, or the source from which it may come." See Witte, 515 U.S. at 397-98; Williams, 337 U.S. at 247; Norvil II, 191 So. 3d at 411 (Canady, C. J., dissenting).

Stare decisis does not support adhering to Norvil II. While stare decisis "provides stability to the law," "[p]erpetuating an error in legal thinking under the guise of stare decisis serves no one well and only undermines the integrity and credibility of the court." State v. Poole, 292 So. 3d 694 (Fla. 2020), reh'g denied, clarification granted, 292 So. 3d 659 (Mem) (Fla. Apr. 2, 2020). Moreover, Norvil II has generated no reliance interests, which "are lowest in cases--like this one--involving procedural and evidentiary rules." Id. (quoting Payne v. Tennessee, 501 U.S. 808, 829 (1991)).

C. This Case was Substantiated and Norvil II is Factually Inapplicable.

Should this Court decline to overturn Norvil II, it should nonetheless limit it to cases involving unsubstantiated post-offense arrests.

In Norvil II, the arrest was not supported by competent evidence:

> The record demonstrates that the trial court relied on the subsequent arrest and charge, which Norvil denied and also had not been tried for, in imposing sentence in the present case. Immediately before pronouncing sentence, the trial court stated that it saw two Sydney Norvils, one, in particular, who was "arrested now for burglary of a retired deputy sheriff's car, with fingerprint identification" and "running around with his friends breaking into people's cars." Even though the record shows that **the prosecutor did not go into detail about the evidence in the burglary of a vehicle charge--two fingerprints found on a CD case**--based on the trial court's comments, the trial court emphasized and relied upon the subsequent arrest and its related charge of burglary of a vehicle in sentencing Norvil on the primary offense.

Norvil II, 191 So. 3d at 409. The emphasized language is critical. This Court found the subsequent arrest and charge against Norvil was **not** substantiated by the fingerprint reports regarding a CD case. See id.

This case is completely different. Norvil II should not control. Much like the 1st DCA's Paul, the State here presented evidence in the form of jail calls and testimony at Respondent's bond revocation hearing regarding explicit threats State witnesses, neighbors, and a police officer which fully substantiated the subsequent

misconduct. Compare Paul, 277 So. 3d at 239-40 ("the trial court heard the jail calls and was able to determine if what it heard supported the State's contention that Appellant attempted to influence his mother and girlfriend. Indeed, the trial court stated, 'I will be very careful to assign them the weight that I think they deserve. I am very aware of the testimony at trial, which I think is the primary information before the Court, because we're here for sentencing on the guilty verdicts . . . .' Given such, **Appellant has failed to show any fundamental error as to this issue**.") with (R1 479-80, 561-70); (C1 08:33-09:00); (C2 08:53-09:18); (C3 02:49-3:00).

Thus, should this court decide not to recede from Norvil II, it should still find its facts inapplicable to the facts presented in this case and quash the 4th DCA's opinion.

D. The 2d DCA's sentencing case law does not help Respondent.

Since Norvil II, the 2d DCA has consistently proclaimed that, even prior to Norvil II, it has held that a sentencing court cannot properly consider misconduct occurring subsequent to the underlying offense. See, e.g., Love, 235 So. 3d at 1039 ("Indeed, prior to *Norvil*, this court held that incidents of misconduct occurring after the charged offense, some of which did not result in charges or arrests, were impermissible sentencing factors."). The State anticipates Respondent will emphasize this proclamation to contest the State's arguments here. However, the

2d DCA's line of cases illustrate that such proclamation is based on wholly inaccurate interpretations of prior cases.

Specifically, in Gray, the 2d DCA based its entire finding that the sentencing court in that case improperly considered new charges on the 4th DCA's opinion in Seays. See Gray v. State, 964 So. 2d 884, 885 (Fla. 2d DCA 2007), approved sub nom. Norvil II (citing Seays v. State, 789 So. 2d 1209 (Fla. 4th DCA 2001)).

In the short Seays opinion, the 4th DCA reviewed a claim of improper sentencing factors where at the sentencing hearing "[i]n arguing for the top of the guidelines, the state reminded the trial court of the pending attempted murder charge, and the court responded 'I understand serious charges are pending now on Mr. Seays.'" Seays, 789 So. 2d at 1209. The court reversed for resentencing by distinguishing its precedent in Jansson where the sentencing court considered a prior arrest, not a subsequent arrest. Id. at 1210.

Upon close inspection of Jansson, the 4th DCA's distinction in Seays is limited to consideration of "mere arrests." See Jansson v. State, 399 So. 2d 1061 (Fla. 4th DCA 1981). In that case, Jansson challenged the sentencing court's consideration of prior arrests where "[t]he trial judge stated he had not read these factual materials but had considered the PSI which merely listed the prior arrests and indicated that convictions had not resulted from most of these arrests." Id. at 1062. No further information was subsequently put forth to prove or to contest

those charges, and the sentencing court stated: "he was not disregarding the prior arrests, but that these played a very minimal part in his consideration of the appropriate sentence. It is clear that the court recognized that an arrest was not to be equated to a finding of guilt of the crime charged." Id. at 1062-63.

The 4th DCA detailed that there was no United States Supreme Court precedent regarding "the exclusion of arrests not leading to convictions in state sentencing procedures." Id. at 1063. The court further examined differing views of the several states regarding consideration of "mere prior arrests." See id. at 1063-64. Specifically, the court found the proper rule to be the analysis from Hawaii,[6] and that it was:

> [F]urther persuaded to this view by Section 921.231, Florida Statutes (1979), which prescribes the contents of a presentence investigation report in Florida. This report is, by definition, of a hearsay nature, and is to include a complete description of the circumstances surrounding the criminal activity in question. It is also to include a description of the offender's educational background, his employment background, his military record, his employment history, along with his social history, including the broadest consideration possible. In our opinion, if a court can consider a hearsay report of a defendant's social, educational, medical, psychiatric, and psychological history, it should also be able to consider the individual's arrest record so long as it is accurate and the opportunity to explain or otherwise rebut it is given.

Id. at 1064 .

[6] State v. Murphy, 575 P.2d 448 (1978) (consideration of arrest reports was proper where defendant was given an opportunity to contest the information).

Plainly, the 2d DCA's reading of Seays was completely wrong. See Gray, 964 So. 2d at 885. The 4th DCA did **not** prohibit consideration of all subsequent arrests or misconduct from consideration at sentencing but found that the **mere existence** of subsequent arrests were not specifically permitted to be considered in the same way prior arrests are under § 921.231, Fla. Stat. Compare Seays, 789 So. 2d at 1209 with Jansson, 399 So. 2d at 1063-64.

Such a finding in Jansson is rational and supported by common sense application of precedent. Arrests or charges, standing alone, are not properly substantiated because **only probable cause** is required to make an arrest or to file a criminal charge. See State v. Page, 73 So. 3d 351, 353 (Fla. 4th DCA 2011) (third level of police-citizen encounters is "arrests based upon probable cause"); State ex rel. Hardy v. Blount, 261 So. 2d 172, 174 (Fla. 1972) ("When a prosecuting attorney files an information against a defendant, he conclusively determines that the evidence is adequate to establish probable cause to put the defendant on trial.").

Probable cause that a criminal offense has been committed does **not** require that **"belief be correct** or more likely true than false. A 'practical, nontechnical' probability that incriminating evidence is involved is all that is required." Texas v. Brown, 460 U.S. 730, 742 (1983) (citing Brinegar v. United States, 338 U.S. 160, 176 (1949)).

Thus, the **mere existence** of arrests and charges do not meet the traditional

threshold of proof, preponderance of the evidence, for proper consideration at sentencing. Cf. State v. Krueger, 664 So. 2d 26, 27 (Fla. 3d DCA 1995) ("We find the court's reasons for the downward departure are not substantiated by a preponderance of evidence in the record"); Gilson v. State, 795 So. 2d 105, 110 (Fla. 4th DCA 2001) ("any fact which, if proved, provides for a higher sentence **within the prescribed bounds** need not be proved to a jury to a constitutional certainty. Instead, these sentencing factors may be determined by the judge by a preponderance of the evidence.") (emphasis in original).

The 2d DCA's analysis on this issue is no help to Respondent.

III. Alternatively, Respondent waived any impermissible-factor argument and his departure motion invited consideration of such factor.

A. Respondent waived his impermissible-factor argument.

"'Basic principles of due process'--to say nothing of professionalism and a long appellate tradition--'suggest that courts should not consider issues raised for the first time at oral argument' and 'ought not consider arguments outside the scope of the briefing process.'" Bainter v. League of Women Voters of Florida, 150 So. 3d 1115, 1126 (Fla. 2014) (quoting Powell v. State, 120 So. 3d 577, 591 (Fla. 1st DCA 2013)).

The State must emphasize that the claim underlying the 4th DCA's reversal in this case was **never** properly raised. While it is true that Respondent cited to

Norvil and included the words "impermissible sentencing factors," the substantive argument made below in no way alleged that the sentencing court considered impermissible factors in sentencing him. In fact, Respondent specifically argued the opposite:

> **No new facts presented themselves** between [Respondent's] mistrial and his subsequent guilty verdict. **Although the prosecution heavily weighed his behavior pending trial to support its final recommendation, similar disruptive behavior had been brought before the court prior to its involvement in the plea**. Indeed, the proceeding where it made its offer stemmed from a revocation of bond for threatening witnesses.

(R2 101). Stated another way, Respondent claimed he was vindictively sentenced by the sentencing court when no new or dissimilar bad acts occurred to justify a longer sentence. See (R2 101). The 4th DCA's opinion was plainly contradictory to the briefing process and should at the very least be quashed for this reason. See Bainter, 150 So. 3d at 1126.

B. Respondent's misconduct was properly considered in determining his downward departure motion.

Under Banks, review of an order denying a downward departure sentence is a two-step process. Banks v. State, 732 So. 2d 1065, 1067-68 (Fla. 1999). First, the court must determine whether it *can* depart, i.e., whether there is a valid legal ground and adequate factual support for that ground . . . ." Id. at 1067 (emphasis in original). "Second, where the step 1 requirements are met, the trial court further

must determine whether it should depart, i.e., whether departure is indeed the best sentencing option for the defendant in the pending case." Id. at 1068. "In making this determination (step 2), the court must weigh the totality of the circumstances in the case, including aggravating and mitigating factors." Id.

Here, Respondent specifically argued the sentencing court should enter a downward departure of probation:

> **[Respondent] has abided by the rules of in house arrest throughout this case**. For the reasons stated above especially his severe illness, **probation not a prison sentence**, is the appropriate sentence for [Respondent]. In order for [Respondent] to see his family and receive the medical treatment he needs in his final years he respectfully requests the Court grant him a downward departure and sentence him to probation.

(R1 474); see also (R1 615-18).

Evidence of Respondent's post-arrest misconduct was offered to refute his assertions that he "abided by the rules of his house arrest," because he in fact continuously threatened harm to others throughout the case. See (R1 479-80, 561-70); (C1 08:33-09:00); (C2 08:53-09:18); (C3 02:49-3:00). Such evidence showed that Respondent was a very poor candidate for his requested downward departure of probation.

At most, the sentencing court's comments when pronouncing Respondent's sentence, (R1 646) ("based on all the evidence, the severity of the crime, the issues that were testified to, . . . I do not believe I should depart"), suggest that, to the

extent the court relied on Respondent's misconduct at all, it did so only in denying the downward departure motion under step two of the Banks analysis.

This was proper because courts have broad discretion in weighing the totality of the circumstances at step two. See, e.g., Green v. State, 84 So. 3d 1169, 1171 n.3 (Fla. 3d DCA 2012) ("Of course, a sentencing court is free to conclude that a defendant seeking a . . . downward departure of a sentence, based upon a claim of remorse or acceptance of responsibility, has failed to make such a showing."); Shelton v. State, 59 So. 3d 248, 250 (Fla. 4th DCA 2011) ("We perceive the court's comments regarding the defendant's lack of remorse as the court's recognition that it lacked any grounds to mitigate his sentence.").

Indeed, under similar circumstances, the 1st DCA in Barlow found consideration of rebuttal evidence proper:

> [T]he evidence directly related to Barlow's request for a downward departure--a request he based in part on a report indicating he was at low risk to reoffend. That report, in turn, reported that Barlow denied having ever had sexual interest in children. The trial court found no basis for a downward departure, and to the extent it considered evidence directly refuting the report (or Barlow's denial within it), it committed no error.

Barlow, 238 So. 3d at 417.

This Court should similarly rule such consideration was proper here and quash the 4th DCA's opinion because the sentencing court properly considered the

subsequent misconduct in this case by exercising its lawful discretion to deny the motion for downward departure.

Accordingly, this Court should quash the 4th DCA opinion in this case.

CONCLUSION

Based on the foregoing arguments and authorities, the 4th DCA opinion below should be QUASHED.

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CERTIFICATE OF SERVICE

I CERTIFY that on June 22, 2020, I electronically filed the foregoing document with the Clerk of the Court using the Florida Courts e-filing Portal and it is being served on all counsel of record or *pro se* parties identified in the attached Service List either via the Florida Courts e-filing Portal or in another authorized manner for counsel or parties not authorized to receive Notices of Electronic Filing.

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