

IN THE SUPREME COURT OF FLORIDA

**CASE NO. SC 22-700
LOWER COURT CASE NO. 081992CF0004510001XX**

**JACK R. SLINEY
Appellant,
v.
STATE OF FLORIDA
Appellee.**

APPENDIX OF INITIAL BRIEF OF APPELLANT

RECEIVED, 08/16/2022 01:47:23 PM, Clerk, Supreme Court

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APPENDIX A— Ostrander Disciplinary Records

APPENDIX B—Inmate Disciplinary Record

APPENDIX C— Commonwealth Cases

SECTION 1. Commonwealth v. Watt (and nine companion cases, including Mattis), 484 Mass. 742, 146 N.E.3d 414 (2020).

SECTION 2. Commonwealth v. Watt (and nine companion cases, including Mattis), Massachusetts Supreme Judicial, SJC-11693, Court Docket entry, #128, 12/24/2021.

SECTION 3. Commonwealth v. Mattis, Suffolk (Mass.) Superior Ct., Case No. 1184CR11291, July 20, 2022.

IN THE SUPREME COURT OF FLORIDA
CASE NO. SC 22-700
LOWER COURT CASE NO. 081992CF0004510001XX

JACK R. SLINEY

Appellant,

v.

STATE OF FLORIDA

Appellee.

APPENDIX A

Ostrander Disciplinary Records



The Florida Bar

651 East Jefferson Street
Tallahassee, FL 32399-2300

Joshua E. Doyle
Executive Director

850/561/5600
www.FLORIDABAR.org

August 11, 2022

Ms. Heather Forgét
Capital Collateral Regional Counsel - Middle Region
12973 Telecom Parkway North
Temple Terrace, FL 33637

Dear Ms. Forgét:

Enclosed is the affidavit requested for Thomas Harold Ostrander. Please advise if you need further assistance.

Very truly yours,

Jessica Malloy, Manager
Membership Records Dept.
The Florida Bar

JM/WRJ:ksw2:R76

cc: Membership Records

Enclosure

AFFIDAVIT

STATE OF FLORIDA

COUNTY OF LEON

Before me, the undersigned authority, personally appeared Jessica Malloy, who first being duly sworn says:

I am the custodian of the membership records of The Florida Bar.

I have reviewed the membership records of The Florida Bar and such records indicate Thomas Harold Ostrander is a member thereof, was admitted to The Florida Bar on October 18, 1985, and has been assigned 508349 as his Florida Bar membership number.

The records of The Florida Bar reflect that Thomas Harold Ostrander became delinquent for non-payment of membership fees on October 1, 2015. After which, he was not eligible to practice Florida law.

The records further reflect that Thomas Harold Ostrander was suspended on September 19, 2016. He subsequently became delinquent for nonpayment of Lawyer Regulation costs on October 4, 2016. He was automatically reinstated from suspension on November 18, 2016.

The records further reflect that Thomas Harold Ostrander became delinquent for noncompliance with Continuing Legal Education requirements on June 30, 2017. And then, he became delinquent for failure to provide proof of restitution on November 21, 2017.

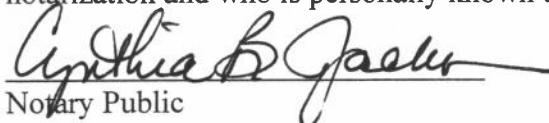
The records further reflect that Thomas Harold Ostrander passed away on August 2, 2019. All of the prior delinquencies remained unresolved until his passing, therefore he was unable to practice law from the date of his fee delinquency until his passing.

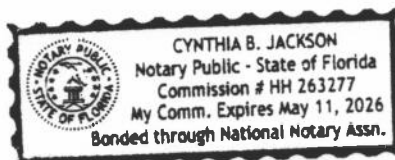

Jessica Malloy, Manager
Membership Records Dept.
The Florida Bar
651 East Jefferson Street
Tallahassee, Florida 32399-2300
(850) 561-5600

STATE OF FLORIDA

COUNTY OF LEON

The foregoing instrument was acknowledged before me, by means of ☒ physical presence or ☐ online notarizations, this 12th day of August, 2022 by Jessica Malloy, who personally appeared before me at the time of notarization and who is personally known to me.


Notary Public





Supreme Court of Florida

THURSDAY, FEBRUARY 17, 2000

THE FLORIDA BAR,

Complainant,

vs.

THOMAS HAROLD OSTRANDER,

Respondent.

*
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*
*
*
*

CASE NO. SC96103

The Court approves the uncontested referee's report and reprimands respondent.

Judgment is entered for The Florida Bar, 650 Apalachee Parkway, Tallahassee, Florida 32399, for recovery of costs from Thomas Harold Ostrander in the amount of \$750.00, for which sum let execution issue.

Not final until time expires to file motion for rehearing and, if filed, determined.

A True Copy

TEST:

Debbie Causseaux

Debbie Causseaux
Acting Clerk, Supreme Court

KBB

cc: Hon. Daniel R. Monaco, Referee

Michael M. Hamrick

Anthony J. Abate

Billy Jack Hendrix

Debbie Joyce Davis

Thomas H. Ostrander

PUBLIC RECORD

M.D.G.

1/17/2000



Tony Kuthi ✓

IN THE SUPREME COURT OF FLORIDA
(Before a Referee)

THE FLORIDA BAR,

Complainant,

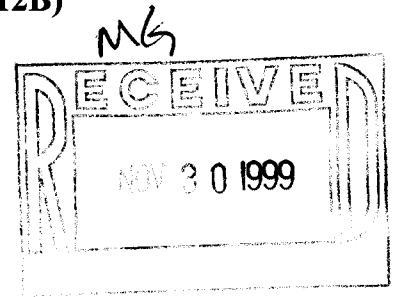
Case No. 96,103

TFB No. 1999-11,226(12B)

v.

THOMAS HAROLD OSTRANDER,

Respondent.



REPORT OF REFEREE

I. Summary of Proceedings: Pursuant to the undersigned being duly appointed as referee to conduct disciplinary proceedings herein according to the Rules Regulating The Florida Bar, the Consent Judgment and any pleadings, notices, motions, orders, transcripts, and exhibits are forwarded to The Supreme Court of Florida with this report and constitute the record in this case.

The following attorneys appeared as counsel for the parties:

For The Florida Bar: Debra Joyce Davis
Assistant Staff Counsel

For The Respondent: Pro se

II. Findings of Fact as to Each Item of Misconduct With Which the Respondent Is Charged: After considering all the pleadings and evidence before me, I find those facts set forth in the Bar's Complaint and admitted in Respondent's Answer constitute the findings of fact in this proceeding. In two separate appeals in the United States Court of Appeals for the Eleventh Circuit, Respondent failed to file his clients' briefs within the time permitted by the Court rules and orders of the Court extending the time to file the briefs. Respondent failed to demonstrate proper regard for the Court's rules and did not adequately represent his clients.

III. Recommendations as to Whether or Not the Respondent should Be Found Guilty: I find the Respondent guilty of violating the following Rules Regulating The

7203 12/6/99
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CLK
12/6/99 M.D.G.

Florida Bar: Rule 4-1.1 (Competence); Rule 4-1.3 (Diligence); and Rule 4-8.4(d) (Conduct Prejudicial to the administration of justice).

IV. Recommendation as to Disciplinary Measures to Be Applied: I recommend that the Respondent receive a Public Reprimand in Florida, as was imposed for the misconduct in disciplinary proceedings in the United States Court of Appeals for the Eleventh Circuit.

V. Personal History and Past Disciplinary Record: After the finding of guilty and prior to recommending discipline to be recommended pursuant to Rule 3-7.6(k)(1), I considered the following personal history and prior disciplinary record of the respondent, to wit:

Year of Birth: 1948

Date Admitted to Bar: October 10, 1985

Prior Disciplinary convictions and Disciplinary Measures Imposed Therein: None

The Referee notes that the Respondent is not certified in any area of practice.

Aggravating Factors: None

Mitigating Factors: Absence of prior disciplinary record (in Florida); and cooperative attitude toward The Florida Bar proceedings

VI. Statement of Costs and Manner in Which Costs Should Be Taxed: I find the following costs were reasonably incurred by The Florida Bar:

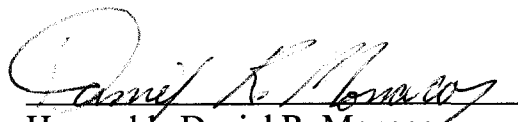
A. Administrative Costs

(Rule 3-7.6(o)(1)(I)).....\$ 750.00

TOTAL COSTS: \$750.00

It is apparent that other costs have or may be incurred. It is recommended that all such costs and expenses, together with the foregoing itemized costs, be charged to the Respondent and that interest at the statutory rate shall accrue and be payable beginning 30 days after the judgment in this case becomes final unless a waiver is granted by the Board of Governors of The Florida Bar.

Dated this 10th day of November, 1999.


Honorable Daniel R. Monaco
Referee

Copies:

Debra Joyce Davis, Assistant Staff Counsel, The Florida Bar, Tampa Airport
Marriott Hotel, Suite C-49, Tampa, Florida 33607

Thomas Harold Ostrander, Respondent, 456 12th Street West, Bradenton, Florida
34205-7821

John Anthony Boggs, Esquire, Staff Counsel, The Florida Bar, 650 Apalachee
Parkway, Tallahassee, Florida 32399-2300



IN THE SUPREME COURT OF FLORIDA
(Before a Referee)

THE FLORIDA BAR,

Case No. 96,103

TFB No. 1999-11,226(12B)

Complainant,

v.

THOMAS HAROLD OSTRANDER,

Respondent.

_____ /

**CONDITIONAL GUILTY PLEA FOR
CONSENT JUDGMENT**

COMES NOW, THOMAS HAROLD OSTRANDER, Respondent, pursuant to Rule 3-7.9, Rules Regulating The Florida Bar, and states his present intention to tender a conditional plea to the below-listed violations as charged in the Complaint filed by THE FLORIDA BAR in this cause, provided and conditioned upon the below-stated discipline being finally approved by the Supreme Court of Florida. The following is the stipulated factual basis:

1. Respondent is, and at all times mentioned herein was, a member of The Florida Bar, subject to the jurisdiction of the Supreme Court of Florida.
2. Respondent is aware that Rule 3-7.6(o), Rules Regulating The Florida Bar, provides for the taxing of costs incurred by THE FLORIDA BAR in a disciplinary proceeding.
3. Respondent is not certified in any area of practice.

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12/10/99
M.D.G.

4. Respondent admits the allegations of misconduct concerning his failure to timely file briefs in two separate appeals in the United States Court of Appeals for the Eleventh Circuit as set forth in the Bar's Complaint, which is incorporated herein by reference.

5. Respondent acknowledges that pursuant to Rules 3-4.6 and 3-7.2(j)(2), Rules Regulating The Florida Bar, the adjudication of the Respondent by the United States Court of Appeals for the Eleventh Circuit for the misconduct set forth in the Bar's Complaint is conclusive proof of such misconduct in a disciplinary proceeding in this jurisdiction.

DISCIPLINARY RULES: Rules Regulating The Florida Bar: Rule 4-1.1 (Competence); Rule 4-1.3 (Diligence); and Rule 4-8.4(d) (Conduct prejudicial to the administration of justice).

DISCIPLINE: Respondent will receive a Public Reprimand as was imposed in the foreign disciplinary proceedings.

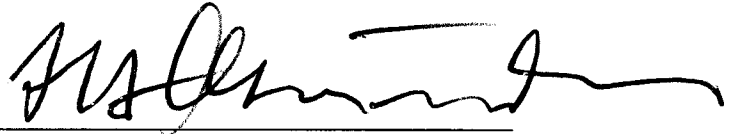
COSTS: Administrative Fee..... **\$750.00**

Total..... **\$750.00**

The Respondent acknowledges that there may be additional costs incurred if:

further proceedings are held. Respondent would be responsible for any future costs.

Dated: 11/12/99



THOMAS HAROLD OSTRANDER

Respondent

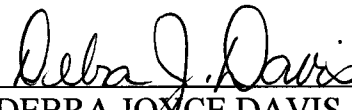
456 12th Street West

Bradenton, Florida 34205-7821

(941) 746-7220

Florida Bar No. 508349

Dated: 11/5/99



DEBRA JOYCE DAVIS

Assistant Staff Counsel

The Florida Bar, Suite C-49

Tampa Airport Marriott

Tampa, Florida 33607-1442

(813) 875-9821

Florida Bar No. 93556

Approved By: Anthony J. Abate, Designated Reviewer
John Anthony Boggs, Staff Counsel

IN THE SUPREME COURT OF FLORIDA
(Before a Referee)

THE FLORIDA BAR,

CASE NO.

Complainant,

TFB NO. 1999-11,226(12B)

v.

THOMAS HAROLD OSTRANDER,

Respondent.

_____ /

COMPLAINT

THE FLORIDA BAR, Complainant, files this Complaint against
THOMAS HAROLD OSTRANDER, Respondent, pursuant to Rule 3-3.2(b),
Rules Regulating The Florida Bar, and alleges:

1. Respondent is, and at all times mentioned herein was, a member of The Florida Bar, subject to the jurisdiction of the Supreme Court of Florida.
2. Respondent is, and at all times mentioned herein was, admitted to practice law before The United States Court of Appeals for the Eleventh Circuit (hereinafter "Eleventh Circuit").
3. On or about July 7, 1994, the Eleventh Circuit appointed the Respondent to represent Julio Carona, an indigent litigant in Case No. 92-2585, Carona v. Singletary, et al.

4. Respondent failed to file Mr. Carona's Anders brief, and the subsequently requested merits brief, within the time permitted by court rules and by orders extending the filing deadlines.

5. On November 22, 1995, the Eleventh Circuit granted the Appellant's motion for late filing of Mr. Carona's brief, and added that Respondent's conduct should be reviewed by the Chief Judge to determine whether referral to a disciplinary committee was appropriate. (A copy of the court's order is attached as Exhibit "A").

6. On or about August 8, 1995, the Eleventh Circuit appointed the Respondent to represent John J. Pearson, an indigent litigant in Case No. 94-3502, U.S. v. Richards, a/k/a Pearson.

7. Respondent failed to file Mr. Pearson's brief by the November 27, 1995 due date. Instead, Respondent filed two motions to withdraw, two motions to stay briefing, and a motion to extend time, all of which were denied.

8. On May 13, 1996, the Eleventh Circuit ordered the Respondent to file Mr. Pearson's brief and record excerpts by June 3, 1996, and warned him that he could be referred for discipline if he did not do so. Respondent failed to comply and instead, filed an emergency motion for extension of time in which to file the brief.

9. The Eleventh Circuit denied Respondent's emergency motion and on its own motion, discharged the Respondent as Mr. Pearson's counsel. (A copy of the court's order is attached and incorporated herein as Exhibit "B").

10. Respondent's conduct in Singletary and Richards was referred to the Eleventh Circuit Committee on Lawyer Qualification and Conduct (hereinafter "the Committee"). The Committee considered Respondent's conduct regarding these two cases and filed a report and recommendation with the court.

11. The Committee found that Respondent's conduct did not meet the standard of conduct expected of an attorney practicing before the Eleventh Circuit, that Respondent did not demonstrate proper regard for the court's rules, and as a result, did not adequately represent his clients before the court.

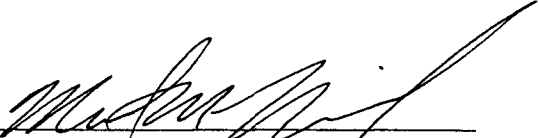
12. The Committee recommended that the court determine that Respondent violated the court's rules and impose a public reprimand.

13. The court accepted the Committee's recommendation and issued an order publicly reprimanding the Respondent. (A copy of this order is attached and incorporated herein as Exhibit "C").

14. By virtue of Rules 3-4.6 and 3-7.2(j)(2), Rules Regulating The Florida Bar, the above adjudication of Respondent by The United States Court of Appeals for the Eleventh Circuit, is conclusive proof of such misconduct in a disciplinary

proceeding in this jurisdiction and sufficient basis for filing of a complaint by The Florida Bar and assignment for hearing before the referee.

15. By virtue of the foregoing, Respondent has violated the following Rules Regulating The Florida Bar: Rule 4-1.1 (competence); Rule 4-1.3 (diligence); and Rule 4-8.4(d) (conduct prejudicial to the administration of justice).



MICHAEL MCRAE HAMRICK
Chair of Grievance Committee "12B"
Post Office Box 551
Bradenton, Florida 34206
(941) 747-171
Florida Bar No. 290556



DEBRA JOYCE DAVIS
Assistant Staff Counsel
The Florida Bar, Suite C-49
Tampa Airport Marriott
Tampa, Florida 33607
(813) 875-9821
Florida Bar No. 93556

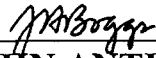
JOHN F. HARKNESS
Executive Director
The Florida Bar
650 Apalachee Parkway
Tallahassee, FL 32399-2300
(850) 561-5600
Florida Bar No. 123390



JOHN ANTHONY BOGGS
Staff Counsel
The Florida Bar
650 Apalachee Parkway
Tallahassee, FL 32399-2300
(850) 561-5600
Florida Bar No. 253847

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the original of the foregoing COMPLAINT was furnished by U. S. regular mail to Debbie Casseaux, Acting Clerk, Supreme Court of Florida, Supreme Court Building, 500 South Duval Street, Tallahassee, Florida, 32399; a copy furnished by U. S. regular mail and by certified mail No. Z-452-950-571, return receipt requested to Thomas Harold Ostrander, Respondent, 456 12th Street West, Bradenton, Florida 34205-7821; a copy furnished by U. S. regular mail to Anthony J. Abate, Designated Reviewer, at Post Office Box 49948, Sarasota, Florida 34230-6948; and a copy furnished by U. S. regular mail to Debra Joyce Davis, Assistant Staff Counsel, The Florida Bar, Tampa Airport Marriott, Suite C-49, Tampa, Florida 33607, this 22 day of July, 1999.



JOHN ANTHONY BOGGS
Staff Counsel

NOTICE OF TRIAL COUNSEL

PLEASE TAKE NOTICE that the trial counsel in this matter is Debra Joyce Davis, whose address is The Florida Bar, Suite C-49, Tampa Airport, Marriott, Tampa, Florida 33607. Respondent need not address pleadings, correspondence, etc. in this matter to anyone other than trial counsel and to Billy Jack Hendrix, Director of Lawyer Regulation, The Florida Bar, 650 Apalachee Parkway, Tallahassee, FL 32399-2300.

FILED
U.S. COURT OF APPEALS
ELEVENTH CIRCUIT

NOV 22 1995

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

MIGUEL J. CORTEZ

No. 92-2585

JULIO CARONA,

Plaintiff-Appellant,

versus

HARRY K. SINGLETARY,
ROBERT A. BUTTERWORTH,

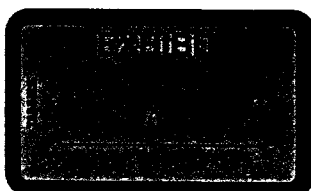
Defendants-Appellees.

On Appeal from the United States District Court for the
Middle District of Florida

O R D E R:

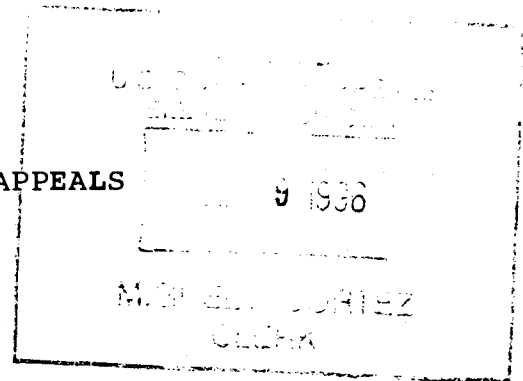
Appellant's motion for late filing of brief is GRANTED;
this attorney's conduct should be reviewed by the Chief Judge to
determine whether referral to disciplinary panel/committee is
appropriate.

/s/ STANLEY F. BIRCH
UNITED STATES CIRCUIT JUDGE



IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 94-3502



UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

PATRICIA RICHARDS, a/k/a
P.D. Richards, a/k/a Pat Pearson,
JOHN J. PEARSON, a/k/a Jack J. Pearson,
a/k/a J.J.,

Defendants-Appellants.

On Appeal from the United States District Court for the
Middle District of Florida

O R D E R:

This matter is before this court on the "emergency motion for extension of time in which to file brief" filed by John J. Pearson's CJA counsel, Thomas H. Ostrander. Mr. Ostrander was required to file his client's brief and record excerpts by 11/27/95, but did not do so. Instead, he filed two motions to withdraw, two motions to stay briefing, and a motion for an extension of time, all of which were denied. On 5/13/96, this court ordered Mr. Ostrander to file his client's brief and record excerpts by 6/3/96, and warned him that if he did not do so, he could be referred for discipline.



Rather than comply, Mr. Ostrander filed the present motion, which rehashes the same excuses that this court has at least twice rejected. Additionally, Mr. Ostrander argues that he should be given a further extension because he was scheduled to attend a seminar (from May 16, 1996 to May 18, 1996) and go on a vacation (from May 21, 1996 through May 26, 1996). He does not explain why he could not prepare the brief and record excerpts during the week of May 27, 1996 through June 3, 1996.

Mr. Ostrander's motion is DENIED. This court, on its own motion, DISCHARGES Mr. Ostrander as counsel for Appellant John J. Pearson. Replacement counsel will be appointed by separate order. A copy of this order shall be sent to this Court's Committee on Lawyer Qualification and Conduct as further evidence of Mr. Ostrander's contumacious conduct.

/s/ Gerald B. Tjoflat
CHIEF JUDGE

THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 96-1002

FILED
U.S. COURT OF APPEALS
ELEVENTH CIRCUIT

MAR 09 1999

THOMAS K. KAHN
CLERK

IN THE MATTER OF:

THOMAS H. OSTRANDER

Disciplinary Proceeding Pursuant to the Rules
Governing Attorney Discipline in the United States
Court of Appeals for the Eleventh Circuit

BEFORE: HATCHETT, Chief Judge, ANDERSON and CARNES, Circuit Judges.

BY THE COURT:

The Committee on Lawyer Qualifications and Conduct ("the Committee") has filed its report and recommendations in this matter. The Committee finds that in two appeals, 92-2585, Carona v. Singietary, et al., and 94-3502, U.S. v. Richards, et al., Mr. Ostrander failed to file his client's brief within the time permitted by the Court's rules and by orders of the Court extending the time to file the brief. The Committee finds that Mr. Ostrander's conduct did not meet the standard of conduct expected of an attorney practicing before the Court, and that Mr. Ostrander did not demonstrate the proper regard for the Court's

EXHIBIT

rules. As a result, the Committee finds that Mr. Ostrander did not adequately represent his clients before the Court.

The Committee therefore recommends that the Court determine that Mr. Ostrander violated this Court's rules and impose discipline.

Thus, the Committee recommends, as Rule 1(B) of Addendum Eight permits, that the Court publicly reprimand Mr. Ostrander.

IT IS THEREFORE ORDERED that the Committee's recommendations are accepted and implemented by this order. Accordingly, Mr. Ostrander is hereby Publicly Reprimanded.

IN THE SUPREME COURT OF FLORIDA
(Before a Referee)

THE FLORIDA BAR,
Complainant,

TFB NO. 1999-11,226(12B)

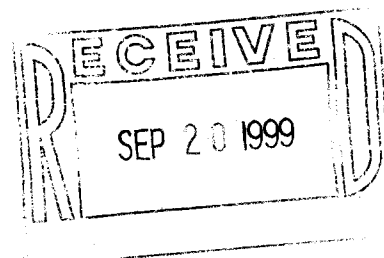
v.

THOMAS HAROLD OSTRANDER,
Respondent.

ANSWER TO COMPLAINT

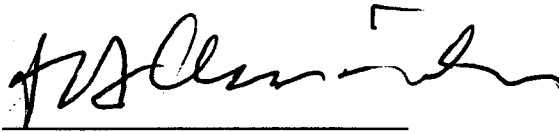
Respondent THOMAS HAROLD OSTRANDER files his Answer as follows:

1. Admitted.
2. Admitted.
3. Admitted.
4. Admitted.
5. Admitted.
6. Admitted.
7. Admitted.
8. Admitted.
9. Admitted.
10. Admitted.
11. Admitted.
12. Admitted.
13. Admitted.



14. Admitted.

15. Admitted.



Thomas H. Ostrander, Esq.
Florida Bar #508349
1101 6th Avenue West, Ste. #103
Bradenton, FL 34205
Phone: 1 (941) 746-7220
Fax: 1 (941) 747-1526

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy, and the original, of the foregoing has been furnished by U.S. Mail to: Debra Joyce Davis, Assistant Staff Counsel, The Florida Bar, Suite C-49, Tampa Airport Marriott, Tampa, FL 33607; and a true and correct copy was also furnished to: John Anthony Boggs, Staff Counsel, The Florida Bar, 650 Apalachee Parkway, Tallahassee, FL 32399-2300, this 16th day of September, 1999.



Thomas H. Ostrander, Esq.

IN THE TWENTIETH JUDICIAL CIRCUIT
IN AND FOR COLLIER COUNTY, FLORIDA

THE FLORIDA BAR,

Supreme Court Case No: 96,103

Complainant,

vs.

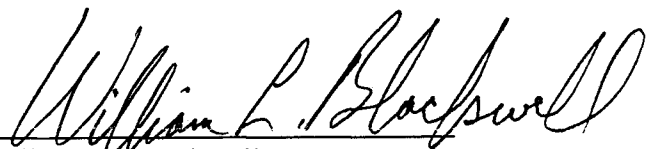
THOMAS HAROLD OSTRANDER,

Respondent.

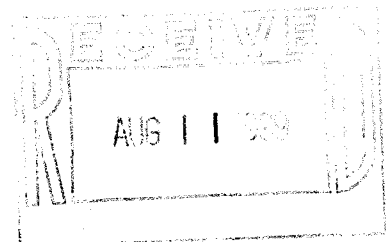
ORDER

THIS MATTER has been referred to the undersigned Chief Judge of the Twentieth Judicial Circuit by the Chief Justice of the Supreme Court of Florida for the purpose of appointing a referee for the Court in the above matter. Therefore, The Honorable Daniel R. Monaco, Judge of the Circuit Court of the Twentieth Judicial Circuit, is appointed as referee for the Court.

DONE AND ORDERED in Chambers at Naples, Collier County, Florida this 6th
day of August, 1999.



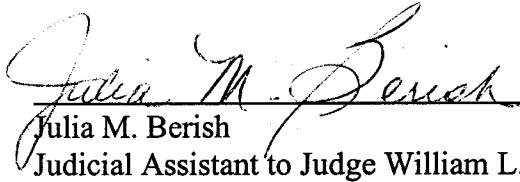
William L. Blackwell
Chief Judge



h2803

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the original of the foregoing Order has been forwarded by regular United States mail, to: Debbie Causseaux, Acting Clerk, The Supreme Court of Florida, 500 South Duval Street, Tallahassee, Florida 32399-1925; copy hand delivered to: The Honorable Daniel R. Monaco, Circuit Judge, Collier County Courthouse, 3301 E. Tamiami Trail, Bldg. L., Naples, FL 34112; and by regular U.S. Mail and by certified mail No. Z 316-547-675, return receipt requested to Thomas Harold Ostrander, Respondent, 456 12th Street West, Bradenton, FL 34205-7821; Thomas Anthony J. Abate, Esquire, Designated Reviewer, P.O. Box 49948, Sarasota, Florida 34230-6958; Debra Joyce Davis, Assistant Staff Counsel, The Florida Bar, Tampa Airport Marriott, Ste. C-49, Tampa, FL 33607; and Billy Jack Hendrix, Director of Lawyer Regulation, The Florida Bar, 650 Apalachee Parkway, Tallahassee, Florida 32399-2300, this 6th day of August, 1999.



Julia M. Berish
Judicial Assistant to Judge William L. Blackwell



THE FLORIDA BAR

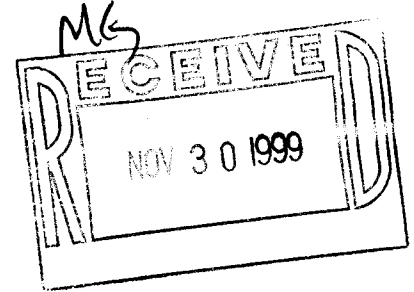
TAMPA AIRPORT MARRIOTT HOTEL, SUITE C-49
TAMPA, FL 33607

JOHN F. HARKNESS, JR.
EXECUTIVE DIRECTOR

813/875-9821

November 5, 1999

The Honorable Daniel R. Monaco, Referee
Collier County Courthouse
3301 East Tamiami Trail
Building L
Naples, Florida 34112



Re: The Florida Bar v. Thomas Harold Ostrander
Case No. 96,103; TFB No. 1999-11,226(12B)

Dear Judge Monaco:

Enclosed please find an executed Conditional Guilty Plea for Consent Judgment and proposed Report of Referee in the above referenced matter. Mr. Ostrander previously received a copy of the proposed Report of Referee and voiced no objections.

If the enclosed report meets with your approval, please sign the same and forward the original to the Supreme Court of Florida, along with the record in this case, and mail copies to the individuals indicated in the stamped, addressed envelopes provided.

Thank you for your time and consideration in this matter.

Sincerely,

Debra Joyce Davis
Assistant Staff Counsel

DJD/dd

Enclosure: Original Conditional Guilty Plea for Consent Judgment
Proposed Report of Referee

cc: Thomas Harold Ostrander (with copies of enclosures)

KLH
12/6/99
PUBLIC RECORD
M.D.G.

DEBBIE CAUSSEAU, ACTING CLERK
Supreme Court of Florida
500 SOUTH DUVAL STREET
TALLAHASSEE 32399-1927
(850) 488-0125

Y

Ms. Debra Joyce Davis
Assistant Bar Counsel
The Florida Bar
Suite C-49
Tampa Airport Marriott Hotel
Tampa, Florida 33607-1442

7/28/99

filed 7/23/99

RE: THE FLORIDA BAR
VS.
THOMAS HAROLD
OSTRANDER

CASE NO. 96,103

TFB NO. 1999-11,226(12B)

I have this date received the below-listed pleadings or documents:

COMPLAINT - (ORIG. & 1 COPY)

Please make reference to the case number in all correspondence and pleadings.

Most cordially,

Debbie Causseau

Acting Clerk
Supreme Court

**ALL PLEADINGS SIGNED BY
AN ATTORNEY MUST INCLUDE
THE ATTORNEY'S FLORIDA
BAR NUMBER.**

DC/kbb

cc: Mr. John Anthony Boggs
Mr. Billy Jack Hendrix ✓
Mr. Michael M. Hamrick
Mr. Anthony J. Abate
Mr. Thomas Harold Ostrander

RECEIVED
JUL 30 1999

PUBLIC RECORD
M.D.G.



THE FLORIDA BAR

650 APALACHEE PARKWAY
TALLAHASSEE, FL 32399-2300

JOHN F. HARKNESS, JR.
EXECUTIVE DIRECTOR

850/561-5600

July 22, 1999

Ms. Debbie Causseaux
Acting Clerk, Supreme Court of Florida
Supreme Court Building
500 South Duval Street
Tallahassee, FL 32399-1927

Re: The Florida Bar v. Thomas Harold Ostrander
TFB File No. 99-11,226 (12B)

Dear Ms. Causseaux:

Pursuant to Rule 3-3.2(a), Rules of Discipline, I have enclosed the above complaint for filing and request that the court assign a referee to try this cause.

Sincerely yours,

Charmaine D. Daniels
Secretary, Lawyer Regulation

Enclosures

cc: Thomas H. Ostrander, Respondent
Certified Mail RRR # Z 452 950 571
Debra J. Davis, Bar Counsel - Tampa Branch
Anthony J. Abate, Designated Reviewer

PUBLIC RECORD
CDC

POSSIBLE VENUE FORM

The Florida Bar v. Thomas Harold Ostrander

File No: 1999-11,226(12B)

1. Residence: Manatee County
2. Offense: Manatee County
3. Office: Manatee County

OTHER PENDING CASES

(IF NONE, PLEASE INDICATE BY WRITING NONE) (Only complete if a case is pending in the Supreme Court)

CASE NUMBER

FILE NUMBER

REFEREE

None

ESTIMATED TRIAL TIME: ONE DAY

PUBLIC RECORD
CDC _____

IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Complainant,

v.

THOMAS HAROLD OSTRANDER,

Respondent.

Supreme Court Case
No. SC-

The Florida Bar File
No. 2012-10,233 (12B)

COMPLAINT

The Florida Bar, Complainant, files this Complaint against Thomas Harold Ostrander, Respondent, pursuant to the Rules Regulating The Florida Bar and alleges:

1. Respondent is, and at all times mentioned in the complaint was, a member of The Florida Bar, admitted on October 18, 1985, and is subject to the jurisdiction of the Supreme Court of Florida.
2. Respondent resided and practiced law in Manatee County, Florida, at all times material.
3. In April 2006, Respondent was appointed to represent Richard W. Peterson in a criminal case before the U.S. District Court for the Middle District of Florida (hereinafter “District Court”), case no. 8:06-cr-00026-RAL-TBM-9.
4. In May 2010, a jury found Mr. Peterson guilty of two felonies.

5. On November 22, 2010, the court sentenced Mr. Peterson to thirty (30) months imprisonment at a federal correctional institution in California.

6. Respondent filed a Notice of Appeal on behalf of Mr. Peterson on November 30, 2010.

7. Respondent failed to respond to Mr. Peterson's telephone calls and emails for approximately five (5) months.

8. Respondent failed to reasonably consult with Mr. Peterson about the means by which the client's objectives were to be accomplished, and failed to keep his client reasonably informed about the status of the matter in violation of Rule 4-1.4, Rules Regulating The Florida Bar.

9. By letter dated June 23, 2011, Respondent informed Mr. Peterson that the initial brief was due by July 11, 2011, and that Respondent would complete it within the next ten (10) days.

10. On July 19, 2011, Respondent filed a motion for extension of time to file Mr. Peterson's initial brief with the Eleventh Circuit.

11. On July 19, 2011, the Clerk of Court of the Eleventh Circuit sent a letter to Respondent notifying him that the initial brief and/or record excerpts were overdue, and that a motion for leave to file them out of time was due within fourteen (14) days from the date of the letter.

12. A copy of the July 19, 2011 letter was sent to Mr. Peterson.

13. By failing to file the initial brief before the deadline, Respondent failed to act with reasonable diligence and promptness in representing Mr. Peterson in violation of Rule 4-1.3, Rules Regulating The Florida Bar.

14. On August 3, 2011, Respondent filed a motion for leave to file the initial brief and record excerpts after the deadline with the Eleventh Circuit.

15. By order dated August 18, 2011, Respondent's motion was granted.

16. On August 18, 2011, Respondent filed the initial brief and record excerpts on behalf of Mr. Peterson.

17. Respondent did not inform Mr. Peterson that the court had allowed him to file the initial brief after the due date, and he did not keep Mr. Peterson informed about the status of the appeal in violation of Rule 4-1.4, Rules Regulating The Florida Bar.

18. Mr. Peterson filed his Inquiry/Complaint against Respondent with the Bar on August 11, 2011.

19. On or about August 30, 2011, Bar Counsel sent Respondent a letter by regular U.S. mail to his official Bar address advising him of Mr. Peterson's Inquiry/Complaint, and that a written response was required no later than September 13, 2011, pursuant to Rule 4-8.4(g), Rules Regulating The Florida Bar.

20. The Bar's August 30, 2011 letter, which was sent by regular U.S. mail was not returned.

21. Respondent failed or refused to respond to Bar Counsel's letter dated August 30, 2011 in violation of Rule 4-8.4(g), Rules Regulating The Florida Bar.

22. On or about October 27, 2011, Bar Counsel sent Respondent a letter by regular U.S. mail to his official Bar address again advising him of Mr. Peterson's Inquiry/Complaint, and that a written response was required no later than November 7, 2011, pursuant to Rule 4-8.4(g), Rules Regulating The Florida Bar.

23. The Bar's October 27, 2011 letter, which was sent by regular U.S. mail, was not returned.

24. Respondent failed or refused to timely respond to Bar Counsel's letter dated October 27, 2011 in violation of Rule 4-8.4(g), Rules Regulating The Florida Bar.

25. By letter dated July 8, 2012, Respondent submitted his first response to Mr. Peterson's Inquiry/Complaint.

26. On August 27, 2012, the Twelfth Judicial Circuit Grievance Committee "B" found probable cause to file this complaint pursuant to Rule 3-7.4, of the Rules Regulating The Florida Bar, and this complaint has been approved by the presiding member of that committee.

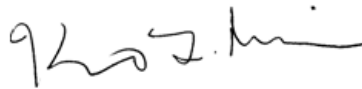
27. By reason of the foregoing, Respondent has violated the following Rules Regulating The Florida Bar: Rule 4-1.3 (Diligence); Rule 4-1.4

(Communication); and Rule 4-8.4(g) (Misconduct: A lawyer shall not fail to respond, in writing, to any official inquiry by bar counsel or a disciplinary agency).

WHEREFORE, The Florida Bar prays Respondent will be appropriately disciplined in accordance with the provisions of the Rules Regulating The Florida Bar as amended.



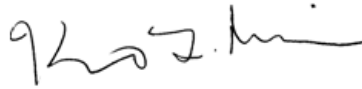
Leonard E. Clark
Bar Counsel
The Florida Bar, Tampa Branch
4200 George J. Bean Parkway
Suite 2580
Tampa, Florida 33607-1496
(813) 875-9821
Florida Bar No. 657808
lclark@flabar.org – Primary email
tampaoffice@flabar.org – Secondary email
csullivan@flabar.org – Secondary email



KENNETH LAWRENCE MARVIN
Staff Counsel
The Florida Bar
651 East Jefferson Street
Tallahassee, Florida 32399-2300
(850) 561-5600
Florida Bar No. 200999
kmarvin@flabar.org

CERTIFICATE OF SERVICE

I certify that this document has been E-filed with The Honorable Thomas D. Hall, Clerk of the Supreme Court of Florida, using the E-Filing Portal and that a copy has been furnished by United States Mail via certified mail No. 7010 0780 0001 6735 8056, return receipt requested to Respondent, Thomas Harold Ostrander, whose record bar address is 2701 Manatee Avenue West, Suite A, Bradenton, Florida 34205-4952 and via electronic mail to skydogesq@aol.com; with a copy by electronic mail to Leonard Evans Clark, Bar Counsel, to his primary designated e-mail address of lclark@flabar.org and to his secondary email addresses of tampaoffice@flabar.org and csullivan@flabar.org; and a copy by electronic mail to L. Norman Vaughan-Birch, Designated Reviewer, at his record Bar email address of normanvb@kirkpinkerton.com, on this 19th day of April, 2013.

A handwritten signature in black ink, appearing to read "K. L. Marvin", is positioned above the printed name.

KENNETH LAWRENCE MARVIN
Staff Counsel

**NOTICE OF TRIAL COUNSEL AND DESIGNATION OF PRIMARY AND
SECONDARY EMAIL ADDRESSES**

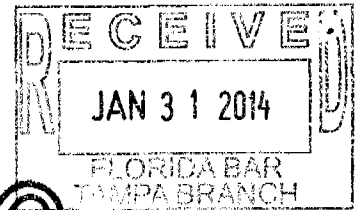
PLEASE TAKE NOTICE that the trial counsel in this matter is Leonard Evans Clark, Bar Counsel, whose address, telephone number and primary email address are The Florida Bar, Tampa Branch Office, 4200 George J. Bean Parkway, Suite 2580, Tampa, Florida 33607-1496, (813) 875-9821 and lclark@flabar.org. His secondary email addresses are tampaooffice@flabar.org and csullivan@flabar.org.

Respondent need not address pleadings, correspondence, etc. in this matter to anyone other than trial counsel and to Kenneth Lawrence Marvin, Staff Counsel, The Florida Bar, 651 East Jefferson Street, Tallahassee, Florida 32399-2300, kmarvin@flabar.org.

MANDATORY ANSWER NOTICE

RULE 3-7.6(h)(2), RULES OF DISCIPLINE, EFFECTIVE MAY 20, 2004,
PROVIDES THAT A RESPONDENT SHALL ANSWER A COMPLAINT.

IN THE SUPREME COURT OF FLORIDA
(Before a Referee)



COPY

THE FLORIDA BAR,

Complainant,

v.

THOMAS HAROLD OSTRANDER,

Respondent.

Supreme Court Case
No. SC13-730

The Florida Bar File
No. 2012-10,233 (12B)

REPORT OF REFEREE

I. SUMMARY OF PROCEEDINGS

Pursuant to the undersigned being duly appointed as referee to conduct disciplinary proceedings herein according to Rule 3-7.6, Rules of Discipline, the following proceedings occurred:

The Florida Bar filed a one-count complaint with The Supreme Court of Florida on April 19, 2013. Respondent stipulated to the facts and rule violations alleged in the Florida Bar Complaint. Thus, Respondent is not contesting violating the following Rules Regulating the Florida Bar: Rule 4-1.3 (Diligence); Rule 4-1.4 (Communication); and Rule 4-8.4(g) (Misconduct: A lawyer shall not fail to respond, in writing, to any official inquiry by bar counsel or a disciplinary agency). The undersigned conducted a Sanctions Hearing on November 5, 2013, and January 7, 2014, to determine the appropriate discipline for the aforementioned

rule violations.

II. FINDINGS OF FACT

Jurisdictional Statement. Respondent is, and at all times mentioned during this investigation was, a member of The Florida Bar, subject to the jurisdiction and Disciplinary Rules of the Supreme Court of Florida.

Narrative Summary Of Case. The undersigned referee accepts the following facts:

The Bar filed a Complaint against Respondent alleging several violations of the Rules Regulating the Florida Bar. Specifically, the Bar alleged that the Respondent violated Rules 4-1.3 (Diligence); 4-1.4 (Communication); and 4-8.4(g) (Misconduct: A lawyer shall not fail to respond, in writing, to any official inquiry by bar counsel or a disciplinary agency).

In April 2006, Respondent was appointed to represent Richard W. Peterson in a criminal case before the U.S. District Court for the Middle District of Florida. In May 2010, a jury found Mr. Peterson guilty of two (2) felonies. On November 22, 2010, the court sentenced Mr. Peterson to thirty (30) months imprisonment at a federal correctional institution in California. Respondent filed a Notice of Appeal on behalf of Mr. Peterson on November 30, 2010. Respondent failed to respond to Mr. Peterson's telephone calls and emails for approximately five (5) months.

By letter dated June 23, 2011, Respondent informed Mr. Peterson that the initial brief was due by July 11, 2011, and that Respondent would complete it within the next ten (10) days. On July 19, 2011, Respondent filed a motion for extension of time to file Mr. Peterson's initial brief with the United States Court of Appeals for the Eleventh Circuit. On July 19, 2011, the Clerk of Court for the Eleventh Circuit sent a letter to Respondent notifying him that the initial brief and/or record excerpts were overdue, and that a motion for leave to file them out of time was due within fourteen (14) days from the date of the letter. On August 3, 2011, Respondent filed a motion for leave to file the initial brief and record excerpts after the deadline with the Eleventh Circuit. By order dated August 18, 2011, Respondent's motion was granted. On August 18, 2011, Respondent filed the initial brief and record excerpts on behalf of Mr. Peterson. However, Respondent did not inform Mr. Peterson that the court had allowed him to file the initial brief after the due date, and he did not keep Mr. Peterson informed about the status of the appeal.

Mr. Peterson filed his Inquiry/Complaint against Respondent with the Bar on August 11, 2011. On or about August 30, 2011, The Bar sent Respondent a letter by regular U.S. mail to his official Bar address advising him of Mr. Peterson's Inquiry/Complaint, and that a written response was required no later than September 13, 2011. Respondent failed to timely respond to the inquiry. By letter

dated July 8, 2012, Respondent submitted his first response to Mr. Peterson's Inquiry/Complaint.

In his response, Respondent stated that he had recently moved out of his home and was estranged from his wife of 27 years. Additionally, Respondent stated he was suffering from depression caused by the Bar complaint, his failing marriage, and financial problems. Finally, Respondent stated that due to his financial problems he downsized his law office and lost track of the Peterson complaint.

III. RECOMMENDATIONS AS TO GUILT.

I recommend that Respondent be found guilty of violating the following Rules Regulating The Florida Bar: Rules 4-1.3; 4-1.4; and 4-8.4(g).

IV. STANDARDS FOR IMPOSING LAWYER SANCTIONS

I considered the following Standards prior to recommending discipline:

Standard 3.0 GENERALLY

In imposing a sanction after a finding of lawyer misconduct, a court should consider the following factors:

- (a) the duty violated;
- (b) the lawyer's mental state;
- (c) the potential or actual injury caused by the lawyer's misconduct; and
- (d) the existence of aggravating or mitigating factors.

4.4 LACK OF DILIGENCE

Standard 4.43 Public reprimand is appropriate when a lawyer is negligent and does not act with reasonable diligence in representing a client, and causes injury or potential injury to a client.

7.0 VIOLATIONS OF OTHER DUTIES OWED AS A PROFESSIONAL

Standard 7.3 Public reprimand is appropriate when a lawyer negligently engages in conduct that is a violation of a duty owed as a professional and causes injury or potential injury to a client, the public, or the legal system.

8.0 PRIOR DISCIPLINE ORDERS

Standard 8.3(b) Public reprimand is appropriate when a lawyer has received an admonishment for the same or similar misconduct and engages in further similar acts of misconduct.

9.2 AGGRAVATION

Standard 9.22 lists aggravating factors that may justify an increase in the degree of discipline to be imposed. The applicable aggravating factors include:

9.22 (a) Prior disciplinary offenses. Respondent was publicly reprimanded in 2000. Respondent's prior discipline demonstrates a pattern of cumulative misconduct.

9.22(i) Substantial experience in the practice of law. Respondent has been a member of The Florida Bar for 28 years. Respondent was admitted October 18, 1985.

9.3 MITIGATION

Standard 9.32 lists mitigating factors that may justify a reduction in the degree of discipline to be imposed. The applicable mitigating factors are:

9.32(c) Personal or emotional problems. Respondent was suffering from depression soon after the initiation of the current Bar case.

9.32(l) Remorse. Respondent has shown remorse for his conduct which caused the underlying Bar case to be filed.

9.32(m) Remoteness of prior offense. Respondent's previous discipline was a public reprimand, which was ordered by the Supreme Court in 2000.

V. CASE LAW

I considered the following case law prior to recommending discipline:

The Florida Supreme Court has disciplined attorneys who have engaged in similar misconduct. In *Florida Bar v. Whitaker*, 596 So. 2d 672 (Fla. 1992), The Florida Bar filed a complaint against Whitaker alleging that he violated several provisions of the Rules Regulating the Florida Bar. Specifically, Rule 4-1.3 (Diligence) and Rule 4-1.4 (Communication). The aforementioned conduct occurred when Respondent had the client sign a retainer agreement with his firm for representation in a potential civil lawsuit against a daycare provider for molestation of the client's child. Whitaker had agreed to investigate the case, but had not initially agreed to file a lawsuit. Eventually, Whitaker filed claims with the

daycare's insurance company because the daycare center had become insolvent. However, Whitaker failed to file suit within the one year statute of limitations because he mistakenly believed the statute of limitations was four years.

The referee found in part that Whitaker should be admonished as provided in Rule 3-5.1(a) and be placed on probation for 24 months. The Bar appealed the report of referee and on appeal the Supreme Court upheld the factual findings of the referee, but disagreed with the discipline. The court held in part that prior case law demonstrates that a public reprimand is more appropriate in cases such as this which involve neglect of client matters.

Similar to *Whitaker*, Respondent failed to diligently work on his client's case and Respondent failed to adequately communicate with his client. Although Respondent's negligent conduct did not cause actual harm to the client, pursuant to *Whitaker*, a public reprimand is the appropriate discipline for Respondent violating Rule 4-1.3 and Rule 4-1.4.

In *Florida Bar v. Greenspan*, 708 So. 2d 926 (Fla. 1998), the Court found in part that, a public reprimand was an appropriate sanction for an attorney who failed to cooperate with the disciplinary process. The Bar alleged in a three-count complaint that Greenspan failed to comply with certain advertising rules and that he failed to respond to the Bar inquiry in violation of Rule 4-8.4(g). The Bar filed a formal complaint, to which Greenspan failed to respond as required by Rule 3-

7.6(g)(2), which resulted in the entry of a default judgment. Based on the default, the referee recommended that Greenspan be found guilty of the ethical violations charged by the Bar and that he be suspended from the practice of law for twenty (20) days, to be followed by a one-year term of probation.

On review the Court approved the guilty finding but not the sanction. The Court found in part that, "A public reprimand is called for here in light of Greenspan's eighteen-year unblemished record as well as the fact that Greenspan's original transgression was rather minor."

Similar to *Greenspan*, Respondent failed to respond to the Bar in violation of Rule 4-8.4(g). However, unlike *Greenspan*, Respondent did eventually respond to the complaint. Respondent informed the Bar that the failure to timely respond was due in part to the difficult time the Respondent had recently gone through. Taking into consideration the reasoning in *Greenspan*, and considering the mitigating factors, a public reprimand would be an appropriate resolution to this case.

VI. RECOMMENDATION AS TO DISCIPLINARY MEASURES TO BE APPLIED

I recommend that Respondent be found guilty of misconduct justifying disciplinary measures, and that he be disciplined by:

- A. A public reprimand.
- B. Payment of The Florida Bar's costs in these proceedings.

In reaching this decision, the undersigned did consider in part the additional mitigation evidence presented by Respondent at the continued Sanctions Hearing which occurred on January 7, 2014. Respondent called Dr. Vischal Sharma to testify about Respondent's depression and other medical issues he experienced during the period he failed to respond to the Bar. However, although I found Dr. Sharma's testimony credible, the doctor was unable to offer an opinion on whether Respondent was so incapacitated, due to his depression, that he was unable to respond to the Bar.

Additionally, I considered that during the period Respondent failed to respond to the Bar, he was able to respond to an order to show cause in a federal case. Accordingly, based on all the information that has been presented to the undersigned, a public reprimand is an appropriate resolution to this case.

VII. PERSONAL HISTORY, PAST DISCIPLINARY RECORD

Prior to recommending discipline pursuant to Rule 3-7.6(k)(1), I considered the following:

Personal History of Respondent:

Age: 65

Date admitted to the Bar: October 18, 1985

Prior Discipline: The Respondent has one previous sanction as a result of violating the Rules Regulating the Florida Bar. On February 17, 2000, the Supreme

Court of Florida issued an order which publicly reprimanded Respondent in case number SC96,103, TFB No. 1999-11,226(12B). The public reprimand was a result of the Respondent's failure to timely file two separate briefs in the United States Court of Appeals for the Eleventh Circuit, despite being granted an extension of time to file the briefs.

VIII. STATEMENT OF COSTS AND MANNER IN WHICH COSTS SHOULD BE TAXED

I find the following costs were reasonably incurred by The Florida Bar:

Administrative costs pursuant to Rule 3-7.6(q)(1)(I)	\$1,250.00
Lexis Nexis	\$4.10
Bar Counsel Costs	\$294.75
Court Reporters' Fees	<u>\$365.00</u>
TOTAL	\$1,913.85

It is recommended that such costs be charged to respondent and that interest at the statutory rate shall accrue and be deemed delinquent 30 days after the judgment in this case becomes final unless paid in full or otherwise deferred by the Board of Governors of The Florida Bar.

Dated this _____ day of January, 2014.

**The Original of this
document was signed**

JAN 29 2014

**By Frank Mann, Jr.
County Court Judge**

Frank Mann, Jr., Referee

Original To:

Clerk of the Supreme Court of Florida; Supreme Court Building; 500 South Duval Street, Tallahassee, Florida, 32399-1927

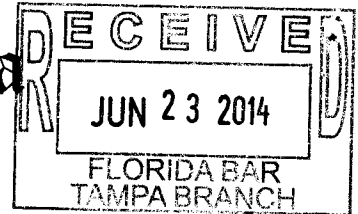
Conformed Copies to:

Thomas Harold Ostrander, Respondent, at his record Bar address of 2701 Manatee Avenue West, Suite A, Bradenton, Florida 34205-4952 and his last known address of 514 27th Street West, Bradenton, Florida 34205, and via electronic mail to skydogesq@aol.com

Leonard Evans Clark, Tampa Branch Office, 4200 George J. Bean Parkway, Suite 2580 Tampa, Florida 33607-1496, and via electronic mail to lclark@flabar.org

Adria E. Quintela, Staff Counsel, The Florida Bar, at her designated email address of aquintel@flabar.org

Supreme Court of Florida



THURSDAY, JUNE 19, 2014

CASE NO.: SCI3-730

Lower Tribunal No(s): 2012-10,233 (12B)

THE FLORIDA BAR

vs. THOMAS HAROLD OSTRANDER

Complainant(s)

Respondent(s)

The Court approves the uncontested referee's report and reprimands respondent.

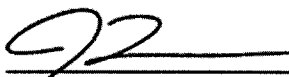
Judgment is entered for The Florida Bar, 651 East Jefferson Street, Tallahassee, Florida 32399-2300, for recovery of costs from Thomas Harold Ostrander in the amount of \$1,913.85, for which sum let execution issue.

Not final until time expires to file motion for rehearing, and if filed, determined.

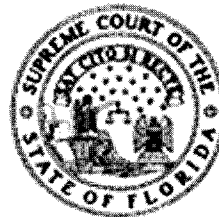
POLSTON, C.J., and PARIENTE, LEWIS, QUINCE, CANADY, LABARGA, and PERRY, JJ., concur.

A True Copy

Test:



John A. Tomasino
Clerk, Supreme Court



kb

Served:

✓LEONARD EVANS CLARK
THOMAS HAROLD OSTRANDER
L. NORMAN VAUGHAN-BIRCH
ADRIA E. QUINTELA
HON. FRANKLIN BALCH MANN, JR., JUDGE

**IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT**

No. 15-1009

**FILED
U.S. COURT OF APPEALS
ELEVENTH CIRCUIT**

AUG 24 2015

**JOHN LEY
CLERK**

IN THE MATTER OF:

THOMAS H. OSTRANDER

**Disciplinary Proceeding Pursuant to the
Rules Governing Attorney Discipline in the
United States Court of Appeals for the Eleventh Circuit**

ORDER OF INDEFINITE SUSPENSION

On June 15, 2015, this Court issued an Order to Show Cause requiring attorney Thomas H. Ostrander to show cause why he should not be disciplined on account of his conduct in the appeal United States v. Harrell, et al., No. 13-12289. The Order to Show Cause explained that Ostrander, who is not a member of this Court's Bar, impermissibly entered a notice of appearance and attempted to proceed as retained counsel for appellant Michael Harrell. Ostrander persisted in continuing his appellate representation despite an ongoing illness that affected his ability to adequately represent the appellant. Furthermore, Ostrander displayed dilatory conduct by failing to file the appellant's brief and appendix. It also appears that he may have inappropriately accepted appellate attorney's fees from the appellant's family.

The Order to Show Cause stated that Ostrander would be indefinitely suspended from practice before this Court if he failed to file a verified response with the Clerk within fourteen

days of the date of the Order. The Clerk's records show that on June 15, 2015, the Order to Show Cause was sent to Ostrander by certified mail, return-receipt requested, as provided by Rule 12 of Addendum Eight of the Rules of the U.S. Court of Appeals for the Eleventh Circuit. The Order was mailed to his address of record with this Court and with the Florida State Bar. The response was due by June 29, 2015. It was not received.

Because the Clerk's Office did not receive the return-receipt card, on July 6, 2015, the Attorney Discipline Clerk unsuccessfully attempted to telephone Ostrander in order to verify his receipt of the Order to Show Cause. That same day, she sent Ostrander an email directing him to respond immediately to the Order. On July 7, 2015, Ostrander telephoned the Clerk's Office and stated that he had not received the Order. In response, the Attorney Discipline Clerk emailed a copy of it to him and directed him to file his response within fourteen days, setting a deadline of July 21, 2015.

On July 13, 2015, the Clerk's Office received as "unclaimed" the Order to Show Cause that had been mailed to Ostrander on June 15, 2015. That same day, Ostrander telephoned the Clerk's Office, stated that he could not open the Order attached to the Attorney Discipline Clerk's July 7, 2015, email, and requested that a copy of it be faxed to him. Also on that same day, the Attorney Discipline Clerk faxed a copy of the Order to Ostrander and sent an email to him confirming that it had been faxed as he had requested. No response to the Order was received.

Pursuant to Addendum Eight of the Rules of the U.S. Court of Appeals for the Eleventh Circuit, IT IS THEREFORE ORDERED that Thomas H. Ostrander is indefinitely SUSPENDED from practice before this Court.

A handwritten signature in black ink, appearing to read "E. Hamer". The signature is fluid and cursive, with a large initial "E" and a stylized "Hamer".

Chief Judge

IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Complainant,

v.

THOMAS HAROLD OSTRANDER,

Respondent.

Supreme Court Case
No. SC-

The Florida Bar File
No. 2016-10,172 (12B)

**PETITION FOR APPROVAL OF CONDITIONAL GUILTY PLEA FOR
CONSENT JUDGMENT**

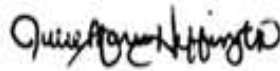
COMES NOW, The Florida Bar, by and through undersigned counsel, and respectfully requests this Court approve the Conditional Guilty Plea for Consent Judgment filed and attached as Exhibit A and says:

1. Respondent is, and at all times mentioned in the above-referenced disciplinary matter was, a member of The Florida Bar, subject to the jurisdiction and disciplinary rules of the Supreme Court of Florida.
2. Respondent tendered a Conditional Guilty Plea for Consent Judgment in this case prior to the filing of a formal complaint with the Supreme Court of Florida.
3. Pursuant to Rule 3-7.9 of the Rules of Discipline of The Florida Bar, Respondent's Consent Judgment has been approved by The Florida Bar.

4. Respondent's Consent Judgment contains within it the proposed discipline as to his violations of the Rules of Professional Conduct of The Florida Bar. Respondent shall receive a 60-day suspension, one year of probation upon reinstatement, restitution of \$5,000.00, and payment of disciplinary costs.

WHEREFORE, The Florida Bar respectfully requests that Respondent's Conditional Guilty Plea for Consent Judgment be accepted and that the proposed discipline be imposed.

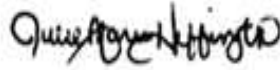
Respectfully submitted,



Julie Marie Heffington, Bar Counsel
The Florida Bar, Tampa Branch Office
4200 George J. Bean Parkway, Suite 2580
Tampa, Florida 33607-1496
(813) 875-9821
Florida Bar No. 667439
jheffington@flabar.org-primary
yserralta@flabar.org-secondary
tampaoffice@flabar.org-tertiary

CERTIFICATE OF SERVICE

I certify that this Petition for Approval of Conditional Guilty Plea for Consent Judgment has been furnished to The Honorable John A. Tomasino, Clerk of The Supreme Court of Florida; with a copy provided to Respondent's Counsel, Adron Walker, at awalker@barneswalker.com; and to Adria E. Quintela, Staff Counsel, The Florida Bar at aquintel@flabar.org, on this 1st day of August, 2016.

A handwritten signature in black ink, appearing to read "Julie Marie Heffington".

Julie Marie Heffington, Bar Counsel

IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Complainant,

v.

THOMAS HAROLD OSTRANDER,

Respondent.

Supreme Court Case
No. SC-

The Florida Bar File
No. 2016-10,172 (12B)

CONDITIONAL GUILTY PLEA FOR CONSENT JUDGMENT

COMES NOW, the undersigned respondent, Thomas Harold Ostrander, and files this Conditional Guilty Plea pursuant to Rule 3-7.9 of the Rules Regulating The Florida Bar.

1. Respondent is, and at all times mentioned herein was, a member of The Florida Bar, subject to the jurisdiction of the Supreme Court of Florida.
2. Respondent is currently the subject of a Florida Bar disciplinary matter which has been assigned The Florida Bar File No. 2016-10,172 (12B).
3. As to The Florida Bar File No. 2016-10,172 (12B), there has been a finding of probable cause by the grievance committee.
4. Respondent is acting freely and voluntarily in this matter, and tenders this Plea without fear or threat of coercion. Respondent is represented by Adron Hays Walker in this matter.

5. The disciplinary measures to be imposed upon respondent are as follows:

A. Respondent shall be suspended from the practice of law for sixty (60) days.

B. Respondent shall be placed on probation for a period of one (1) year upon reinstatement. As a condition of the probation, respondent shall pay restitution to Michael James Harrell in the amount of \$5,000.00 within the one-year period of probation. Respondent must submit proof of payment of restitution to the Bar's headquarters office in Tallahassee within the time frame for payment of the court's order. Respondent shall provide verifiable proof of payment and receipt which shall consist of a copy (front and back) of the negotiated check or a copy of the check and certified return. In the event the client cannot be located after a diligent search, respondent shall execute an affidavit of diligent search and provide same to The Florida Bar and shall pay the full amount of the restitution to the Clients' Security Fund of The Florida Bar. Failure to timely submit proof of payment of the restitution will result in respondent being deemed a delinquent member pursuant to Rule 1-3.6.

C. Respondent shall pay the bar's costs in this disciplinary proceeding.

6. Respondent acknowledges that, unless waived or modified by the Court on motion of respondent, the court order will contain a provision that prohibits respondent from accepting new business from the date of the order or opinion and shall provide that the suspension is effective 30 days from the date of the order or opinion so that respondent may close out the practice of law and protect the interest of existing clients.

7. The following allegations and rules provide the basis for respondent's guilty plea and for the discipline to be imposed in this matter:

A. The Florida Bar received an Order of Indefinite Suspension from The United States Attorney's Office related to respondent's attempt to represent Michael Harrell in his direct criminal appeal before The United States Court Of Appeals for the Eleventh Circuit. The district court had previously appointed Mark Ciaravella as appellate counsel to represent Mr. Harrell on his appeal. Respondent submitted to the appellate court a "Notice of Appearance" indicating that he would be co-counsel for Mr. Harrell in his appeal. Respondent was neither a member of the Eleventh Circuit's Bar nor was he court-appointed appellate counsel. Mr. Ciaravella informed the court that Mr. Harrell's family had paid respondent the sum of \$5,000.00 to "only 'oversee' and otherwise contribute to the appeal." Mr. Ciaravella submitted a "Motion to Withdraw as Counsel for Appellant", which the court granted.

Appellant's brief and appendix were due by October 20, 2014, and October 27, 2014, respectively. On December 17, 2014, and December 18, 2014, the deputy clerk sent dismissal notices to respondent regarding the overdue brief and appendix. Respondent's secretary informed the deputy clerk that respondent was in the hospital in a diabetic coma. No brief or appendix was ever submitted to the court. The Florida Bar sent respondent a letter by regular U.S. Mail to respondent's official bar address and by electronic mail to respondent's official bar email address requesting that he submit a response to the Eleventh Circuit's Order indefinitely suspending him. Respondent failed to respond to The Florida Bar as required in the letter and failed to contact the grievance committee investigating member.

8. In mitigation, respondent is 67 years old and suffers from serious medical issues related to his problems with diabetes that will require ongoing monitoring and follow-up [Florida Standards for Imposing Lawyer Sanctions 9.32 (h)].

9. By reason of the foregoing, respondent has violated the following Rules Regulating The Florida Bar: Rule 4-1.16 (Declining or Terminating Representation) (a) a lawyer shall not represent a client or, where representation has commenced, shall withdraw from the representation of a client if: (2) the lawyer's physical or mental condition materially impairs the lawyer's ability to

represent the client; Rule 4-5.5 (Unlicensed Practice of Law) (a) a lawyer may not practice law in a jurisdiction other than the lawyer's home state, in violation of the regulation of the legal profession in that jurisdiction, or in violation of the regulation of the legal profession in the lawyer's home state or assist another in doing so; and Rule 4-8.4 (g) (Misconduct) a lawyer shall not fail to respond, in writing, to any official inquiry by bar counsel or a disciplinary agency when bar counsel or the agency is conducting an investigation into the lawyer's conduct.

10. The Florida Bar has approved this proposed plea in the manner required by Rule 3-7.9.

11. If this plea is not finally approved by the Board of Governors of The Florida Bar and the Supreme Court of Florida, then it shall be of no effect and may not be used by the parties in any way.

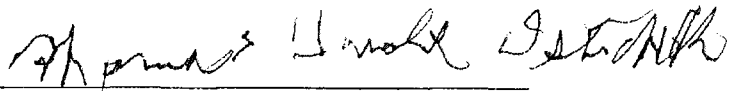
12. If this plea is approved, then respondent agrees to pay all reasonable costs associated with this case pursuant to Rule 3-7.6(q) in the amount of \$1,250.00. These costs are due within 30 days of the court order. Respondent agrees that if the costs are not paid within 30 days of this court's order becoming final, respondent shall pay interest on any unpaid costs at the statutory rate. Respondent further agrees not to attempt to discharge the obligation for payment of the bar's costs in any future proceedings, including but not limited to, a petition for bankruptcy. Respondent shall be deemed delinquent and ineligible to practice law

pursuant to Rule 1-3.6 if the cost judgment is not satisfied within 30 days of the final court order, unless deferred by the Board of Governors of The Florida Bar.

13. Respondent acknowledges the obligation to pay the costs of this proceeding and that payment is evidence of strict compliance with the conditions of any disciplinary order or agreement, and is also evidence of good faith and fiscal responsibility. Respondent understands that failure to pay the costs of this proceeding will reflect adversely on any other bar disciplinary matter in which respondent is involved.

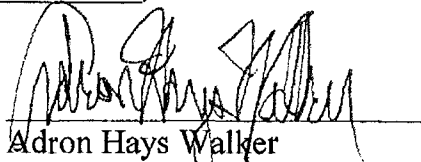
14. This Conditional Guilty Plea for Consent Judgment fully complies with all requirements of the Rules Regulating The Florida Bar.

Dated this 3 day of June, 2016.



Thomas Harold Ostrander, Respondent
514 27th Street West
Bradenton, FL 34205-4143
(941) 526-9551
Florida Bar ID No.: 508349
skydogesq@aol.com

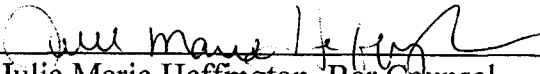
Dated this 3rd day of June, 2016.



Adron Hays Walker
Barnes Walker
3119 Manatee Avenue W.
Bradenton, FL 34205-3350

(941) 741-8224
Florida Bar ID No.: 302287
awalker@barneswalker.com

Dated this 7 day of June, 2016.


Julie Marie Heffington, Bar Counsel
The Florida Bar, Tampa Branch Office
4200 George J. Bean Parkway, Suite 2580
Tampa, Florida 33607-1496
(813) 875-9821
Florida Bar ID No. 667439
jheffington@floridabar.org

Supreme Court of Florida

THURSDAY, AUGUST 18, 2016

CASE NO.: SC16-1379

Lower Tribunal No(s).:

2016-10,172 (12B)

THE FLORIDA BAR

vs.

THOMAS HAROLD OSTRANDER

Complainant(s)

Respondent(s)

The conditional guilty plea and consent judgment for discipline are approved and respondent is suspended from the practice of law for sixty days, effective thirty days from the date of this order so that respondent can close out his practice and protect the interests of existing clients. If respondent notifies this Court in writing that he is no longer practicing and does not need the thirty days to protect existing clients, this Court will enter an order making the suspension effective immediately. Respondent shall fully comply with Rule Regulating the Florida Bar 3-5.1(h). In addition, respondent shall accept no new business from the date this order is filed until he is reinstated. Respondent is further directed to comply with all other terms and conditions of the consent judgment.

Upon reinstatement, respondent is further placed on probation for one year under the terms and conditions set forth in the consent judgment.

CASE NO.: SC16-1379

Page Two

Judgment is entered for The Florida Bar, 651 East Jefferson Street,
Tallahassee, Florida 32399-2300, for recovery of costs from Thomas Harold
Ostrander in the amount of \$1,250.00, for which sum let execution issue.

Not final until time expires to file motion for rehearing, and if filed,
determined. The filing of a motion for rehearing shall not alter the effective date
of this suspension.

LABARGA, C.J., and PARIENTE, LEWIS, QUINCE, CANADY, POLSTON,
and PERRY, JJ., concur.

A True Copy

Test:



John A. Tomasino
Clerk, Supreme Court



ld

Served:

JULIE MARIE HEFFINGTON
ADRON HAYS WALKER
ADRIA E. QUINTELA

IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Complainant,

v.

THOMAS HAROLD OSTRANDER,

Respondent.

Supreme Court Case
No. SC-

The Florida Bar File
No. 2016-10,172 (12B)

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2. Respondent is currently the subject of a Florida Bar disciplinary matter which has been assigned The Florida Bar File No. 2016-10,172 (12B).
3. As to The Florida Bar File No. 2016-10,172 (12B), there has been a finding of probable cause by the grievance committee.
4. Respondent is acting freely and voluntarily in this matter, and tenders this Plea without fear or threat of coercion. Respondent is represented by Adron Hays Walker in this matter.

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C. Respondent shall pay the bar's costs in this disciplinary proceeding.

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Appellant's brief and appendix were due by October 20, 2014, and October 27, 2014, respectively. On December 17, 2014, and December 18, 2014, the deputy clerk sent dismissal notices to respondent regarding the overdue brief and appendix. Respondent's secretary informed the deputy clerk that respondent was in the hospital in a diabetic coma. No brief or appendix was ever submitted to the court. The Florida Bar sent respondent a letter by regular U.S. Mail to respondent's official bar address and by electronic mail to respondent's official bar email address requesting that he submit a response to the Eleventh Circuit's Order indefinitely suspending him. Respondent failed to respond to The Florida Bar as required in the letter and failed to contact the grievance committee investigating member.

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9. By reason of the foregoing, respondent has violated the following Rules Regulating The Florida Bar: Rule 4-1.16 (Declining or Terminating Representation) (a) a lawyer shall not represent a client or, where representation has commenced, shall withdraw from the representation of a client if: (2) the lawyer's physical or mental condition materially impairs the lawyer's ability to

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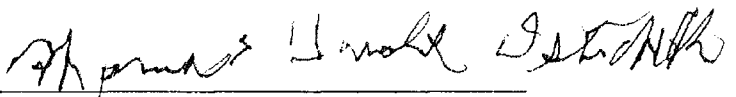
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14. This Conditional Guilty Plea for Consent Judgment fully complies with all requirements of the Rules Regulating The Florida Bar.

Dated this 3 day of June, 2016.

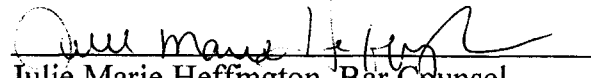

Thomas Harold Ostrander, Respondent
514 27th Street West
Bradenton, FL 34205-4143
(941) 526-9551
Florida Bar ID No.: 508349
skydogesq@aol.com

Dated this 3rd day of June, 2016.


Adron Hays Walker
Barnes Walker
3119 Manatee Avenue W.
Bradenton, FL 34205-3350

(941) 741-8224
Florida Bar ID No.: 302287
awalker@barneswalker.com

Dated this 7 day of June, 2016.


Julie Marie Heffington, Bar Counsel
The Florida Bar, Tampa Branch Office
4200 George J. Bean Parkway, Suite 2580
Tampa, Florida 33607-1496
(813) 875-9821
Florida Bar ID No. 667439
jheffington@floridabar.org

**IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT**

No. 15-1009

**FILED
U.S. COURT OF APPEALS
ELEVENTH CIRCUIT**

AUG 24 2015

**JOHN LEY
CLERK**

IN THE MATTER OF:

THOMAS H. OSTRANDER

**Disciplinary Proceeding Pursuant to the
Rules Governing Attorney Discipline in the
United States Court of Appeals for the Eleventh Circuit**

ORDER OF INDEFINITE SUSPENSION

On June 15, 2015, this Court issued an Order to Show Cause requiring attorney Thomas H. Ostrander to show cause why he should not be disciplined on account of his conduct in the appeal United States v. Harrell, et al., No. 13-12289. The Order to Show Cause explained that Ostrander, who is not a member of this Court's Bar, impermissibly entered a notice of appearance and attempted to proceed as retained counsel for appellant Michael Harrell. Ostrander persisted in continuing his appellate representation despite an ongoing illness that affected his ability to adequately represent the appellant. Furthermore, Ostrander displayed dilatory conduct by failing to file the appellant's brief and appendix. It also appears that he may have inappropriately accepted appellate attorney's fees from the appellant's family.

The Order to Show Cause stated that Ostrander would be indefinitely suspended from practice before this Court if he failed to file a verified response with the Clerk within fourteen

days of the date of the Order. The Clerk's records show that on June 15, 2015, the Order to Show Cause was sent to Ostrander by certified mail, return-receipt requested, as provided by Rule 12 of Addendum Eight of the Rules of the U.S. Court of Appeals for the Eleventh Circuit. The Order was mailed to his address of record with this Court and with the Florida State Bar. The response was due by June 29, 2015. It was not received.

Because the Clerk's Office did not receive the return-receipt card, on July 6, 2015, the Attorney Discipline Clerk unsuccessfully attempted to telephone Ostrander in order to verify his receipt of the Order to Show Cause. That same day, she sent Ostrander an email directing him to respond immediately to the Order. On July 7, 2015, Ostrander telephoned the Clerk's Office and stated that he had not received the Order. In response, the Attorney Discipline Clerk emailed a copy of it to him and directed him to file his response within fourteen days, setting a deadline of July 21, 2015.

On July 13, 2015, the Clerk's Office received as "unclaimed" the Order to Show Cause that had been mailed to Ostrander on June 15, 2015. That same day, Ostrander telephoned the Clerk's Office, stated that he could not open the Order attached to the Attorney Discipline Clerk's July 7, 2015, email, and requested that a copy of it be faxed to him. Also on that same day, the Attorney Discipline Clerk faxed a copy of the Order to Ostrander and sent an email to him confirming that it had been faxed as he had requested. No response to the Order was received.

Pursuant to Addendum Eight of the Rules of the U.S. Court of Appeals for the Eleventh Circuit, IT IS THEREFORE ORDERED that Thomas H. Ostrander is indefinitely SUSPENDED from practice before this Court.

A handwritten signature in black ink, appearing to read "E. Hamer". The signature is fluid and cursive, with a large initial "E" and a stylized "H".

Chief Judge

IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Complainant,

v.

THOMAS HAROLD OSTRANDER,

Respondent.

Supreme Court Case
No. SC-

The Florida Bar File
No. 2012-10,233 (12B)

COMPLAINT

The Florida Bar, Complainant, files this Complaint against Thomas Harold Ostrander, Respondent, pursuant to the Rules Regulating The Florida Bar and alleges:

1. Respondent is, and at all times mentioned in the complaint was, a member of The Florida Bar, admitted on October 18, 1985, and is subject to the jurisdiction of the Supreme Court of Florida.
2. Respondent resided and practiced law in Manatee County, Florida, at all times material.
3. In April 2006, Respondent was appointed to represent Richard W. Peterson in a criminal case before the U.S. District Court for the Middle District of Florida (hereinafter “District Court”), case no. 8:06-cr-00026-RAL-TBM-9.
4. In May 2010, a jury found Mr. Peterson guilty of two felonies.

5. On November 22, 2010, the court sentenced Mr. Peterson to thirty (30) months imprisonment at a federal correctional institution in California.

6. Respondent filed a Notice of Appeal on behalf of Mr. Peterson on November 30, 2010.

7. Respondent failed to respond to Mr. Peterson's telephone calls and emails for approximately five (5) months.

8. Respondent failed to reasonably consult with Mr. Peterson about the means by which the client's objectives were to be accomplished, and failed to keep his client reasonably informed about the status of the matter in violation of Rule 4-1.4, Rules Regulating The Florida Bar.

9. By letter dated June 23, 2011, Respondent informed Mr. Peterson that the initial brief was due by July 11, 2011, and that Respondent would complete it within the next ten (10) days.

10. On July 19, 2011, Respondent filed a motion for extension of time to file Mr. Peterson's initial brief with the Eleventh Circuit.

11. On July 19, 2011, the Clerk of Court of the Eleventh Circuit sent a letter to Respondent notifying him that the initial brief and/or record excerpts were overdue, and that a motion for leave to file them out of time was due within fourteen (14) days from the date of the letter.

12. A copy of the July 19, 2011 letter was sent to Mr. Peterson.

13. By failing to file the initial brief before the deadline, Respondent failed to act with reasonable diligence and promptness in representing Mr. Peterson in violation of Rule 4-1.3, Rules Regulating The Florida Bar.

14. On August 3, 2011, Respondent filed a motion for leave to file the initial brief and record excerpts after the deadline with the Eleventh Circuit.

15. By order dated August 18, 2011, Respondent's motion was granted.

16. On August 18, 2011, Respondent filed the initial brief and record excerpts on behalf of Mr. Peterson.

17. Respondent did not inform Mr. Peterson that the court had allowed him to file the initial brief after the due date, and he did not keep Mr. Peterson informed about the status of the appeal in violation of Rule 4-1.4, Rules Regulating The Florida Bar.

18. Mr. Peterson filed his Inquiry/Complaint against Respondent with the Bar on August 11, 2011.

19. On or about August 30, 2011, Bar Counsel sent Respondent a letter by regular U.S. mail to his official Bar address advising him of Mr. Peterson's Inquiry/Complaint, and that a written response was required no later than September 13, 2011, pursuant to Rule 4-8.4(g), Rules Regulating The Florida Bar.

20. The Bar's August 30, 2011 letter, which was sent by regular U.S. mail was not returned.

21. Respondent failed or refused to respond to Bar Counsel's letter dated August 30, 2011 in violation of Rule 4-8.4(g), Rules Regulating The Florida Bar.

22. On or about October 27, 2011, Bar Counsel sent Respondent a letter by regular U.S. mail to his official Bar address again advising him of Mr. Peterson's Inquiry/Complaint, and that a written response was required no later than November 7, 2011, pursuant to Rule 4-8.4(g), Rules Regulating The Florida Bar.

23. The Bar's October 27, 2011 letter, which was sent by regular U.S. mail, was not returned.

24. Respondent failed or refused to timely respond to Bar Counsel's letter dated October 27, 2011 in violation of Rule 4-8.4(g), Rules Regulating The Florida Bar.

25. By letter dated July 8, 2012, Respondent submitted his first response to Mr. Peterson's Inquiry/Complaint.

26. On August 27, 2012, the Twelfth Judicial Circuit Grievance Committee "B" found probable cause to file this complaint pursuant to Rule 3-7.4, of the Rules Regulating The Florida Bar, and this complaint has been approved by the presiding member of that committee.

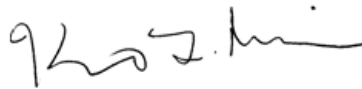
27. By reason of the foregoing, Respondent has violated the following Rules Regulating The Florida Bar: Rule 4-1.3 (Diligence); Rule 4-1.4

(Communication); and Rule 4-8.4(g) (Misconduct: A lawyer shall not fail to respond, in writing, to any official inquiry by bar counsel or a disciplinary agency).

WHEREFORE, The Florida Bar prays Respondent will be appropriately disciplined in accordance with the provisions of the Rules Regulating The Florida Bar as amended.



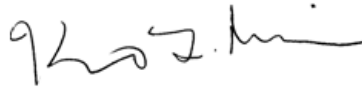
Leonard E. Clark
Bar Counsel
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Florida Bar No. 657808
lclark@flabar.org – Primary email
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csullivan@flabar.org – Secondary email



KENNETH LAWRENCE MARVIN
Staff Counsel
The Florida Bar
651 East Jefferson Street
Tallahassee, Florida 32399-2300
(850) 561-5600
Florida Bar No. 200999
kmarvin@flabar.org

CERTIFICATE OF SERVICE

I certify that this document has been E-filed with The Honorable Thomas D. Hall, Clerk of the Supreme Court of Florida, using the E-Filing Portal and that a copy has been furnished by United States Mail via certified mail No. 7010 0780 0001 6735 8056, return receipt requested to Respondent, Thomas Harold Ostrander, whose record bar address is 2701 Manatee Avenue West, Suite A, Bradenton, Florida 34205-4952 and via electronic mail to skydogesq@aol.com; with a copy by electronic mail to Leonard Evans Clark, Bar Counsel, to his primary designated e-mail address of lclark@flabar.org and to his secondary email addresses of tampaoffice@flabar.org and csullivan@flabar.org; and a copy by electronic mail to L. Norman Vaughan-Birch, Designated Reviewer, at his record Bar email address of normanvb@kirkpinkerton.com, on this 19th day of April, 2013.



KENNETH LAWRENCE MARVIN
Staff Counsel

**NOTICE OF TRIAL COUNSEL AND DESIGNATION OF PRIMARY AND
SECONDARY EMAIL ADDRESSES**

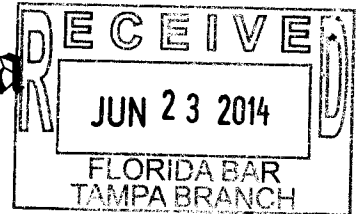
PLEASE TAKE NOTICE that the trial counsel in this matter is Leonard Evans Clark, Bar Counsel, whose address, telephone number and primary email address are The Florida Bar, Tampa Branch Office, 4200 George J. Bean Parkway, Suite 2580, Tampa, Florida 33607-1496, (813) 875-9821 and lclark@flabar.org. His secondary email addresses are tampaooffice@flabar.org and csullivan@flabar.org.

Respondent need not address pleadings, correspondence, etc. in this matter to anyone other than trial counsel and to Kenneth Lawrence Marvin, Staff Counsel, The Florida Bar, 651 East Jefferson Street, Tallahassee, Florida 32399-2300, kmarvin@flabar.org.

MANDATORY ANSWER NOTICE

RULE 3-7.6(h)(2), RULES OF DISCIPLINE, EFFECTIVE MAY 20, 2004,
PROVIDES THAT A RESPONDENT SHALL ANSWER A COMPLAINT.

Supreme Court of Florida



THURSDAY, JUNE 19, 2014

CASE NO.: SCI3-730

Lower Tribunal No(s): 2012-10,233 (12B)

THE FLORIDA BAR

vs. THOMAS HAROLD OSTRANDER

Complainant(s)

Respondent(s)

The Court approves the uncontested referee's report and reprimands respondent.

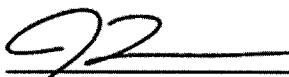
Judgment is entered for The Florida Bar, 651 East Jefferson Street, Tallahassee, Florida 32399-2300, for recovery of costs from Thomas Harold Ostrander in the amount of \$1,913.85, for which sum let execution issue.

Not final until time expires to file motion for rehearing, and if filed, determined.

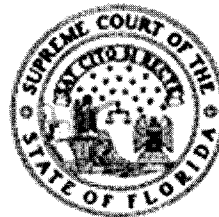
POLSTON, C.J., and PARIENTE, LEWIS, QUINCE, CANADY, LABARGA, and PERRY, JJ., concur.

A True Copy

Test:



John A. Tomasino
Clerk, Supreme Court

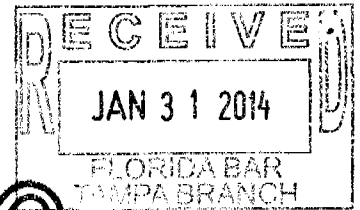


kb

Served:

✓LEONARD EVANS CLARK
THOMAS HAROLD OSTRANDER
L. NORMAN VAUGHAN-BIRCH
ADRIA E. QUINTELA
HON. FRANKLIN BALCH MANN, JR., JUDGE

IN THE SUPREME COURT OF FLORIDA
(Before a Referee)



COPY

THE FLORIDA BAR,

Complainant,

v.

THOMAS HAROLD OSTRANDER,

Respondent.

Supreme Court Case
No. SC13-730

The Florida Bar File
No. 2012-10,233 (12B)

REPORT OF REFEREE

I. SUMMARY OF PROCEEDINGS

Pursuant to the undersigned being duly appointed as referee to conduct disciplinary proceedings herein according to Rule 3-7.6, Rules of Discipline, the following proceedings occurred:

The Florida Bar filed a one-count complaint with The Supreme Court of Florida on April 19, 2013. Respondent stipulated to the facts and rule violations alleged in the Florida Bar Complaint. Thus, Respondent is not contesting violating the following Rules Regulating the Florida Bar: Rule 4-1.3 (Diligence); Rule 4-1.4 (Communication); and Rule 4-8.4(g) (Misconduct: A lawyer shall not fail to respond, in writing, to any official inquiry by bar counsel or a disciplinary agency). The undersigned conducted a Sanctions Hearing on November 5, 2013, and January 7, 2014, to determine the appropriate discipline for the aforementioned

rule violations.

II. FINDINGS OF FACT

Jurisdictional Statement. Respondent is, and at all times mentioned during this investigation was, a member of The Florida Bar, subject to the jurisdiction and Disciplinary Rules of the Supreme Court of Florida.

Narrative Summary Of Case. The undersigned referee accepts the following facts:

The Bar filed a Complaint against Respondent alleging several violations of the Rules Regulating the Florida Bar. Specifically, the Bar alleged that the Respondent violated Rules 4-1.3 (Diligence); 4-1.4 (Communication); and 4-8.4(g) (Misconduct: A lawyer shall not fail to respond, in writing, to any official inquiry by bar counsel or a disciplinary agency).

In April 2006, Respondent was appointed to represent Richard W. Peterson in a criminal case before the U.S. District Court for the Middle District of Florida. In May 2010, a jury found Mr. Peterson guilty of two (2) felonies. On November 22, 2010, the court sentenced Mr. Peterson to thirty (30) months imprisonment at a federal correctional institution in California. Respondent filed a Notice of Appeal on behalf of Mr. Peterson on November 30, 2010. Respondent failed to respond to Mr. Peterson's telephone calls and emails for approximately five (5) months.

By letter dated June 23, 2011, Respondent informed Mr. Peterson that the initial brief was due by July 11, 2011, and that Respondent would complete it within the next ten (10) days. On July 19, 2011, Respondent filed a motion for extension of time to file Mr. Peterson's initial brief with the United States Court of Appeals for the Eleventh Circuit. On July 19, 2011, the Clerk of Court for the Eleventh Circuit sent a letter to Respondent notifying him that the initial brief and/or record excerpts were overdue, and that a motion for leave to file them out of time was due within fourteen (14) days from the date of the letter. On August 3, 2011, Respondent filed a motion for leave to file the initial brief and record excerpts after the deadline with the Eleventh Circuit. By order dated August 18, 2011, Respondent's motion was granted. On August 18, 2011, Respondent filed the initial brief and record excerpts on behalf of Mr. Peterson. However, Respondent did not inform Mr. Peterson that the court had allowed him to file the initial brief after the due date, and he did not keep Mr. Peterson informed about the status of the appeal.

Mr. Peterson filed his Inquiry/Complaint against Respondent with the Bar on August 11, 2011. On or about August 30, 2011, The Bar sent Respondent a letter by regular U.S. mail to his official Bar address advising him of Mr. Peterson's Inquiry/Complaint, and that a written response was required no later than September 13, 2011. Respondent failed to timely respond to the inquiry. By letter

dated July 8, 2012, Respondent submitted his first response to Mr. Peterson's Inquiry/Complaint.

In his response, Respondent stated that he had recently moved out of his home and was estranged from his wife of 27 years. Additionally, Respondent stated he was suffering from depression caused by the Bar complaint, his failing marriage, and financial problems. Finally, Respondent stated that due to his financial problems he downsized his law office and lost track of the Peterson complaint.

III. RECOMMENDATIONS AS TO GUILT.

I recommend that Respondent be found guilty of violating the following Rules Regulating The Florida Bar: Rules 4-1.3; 4-1.4; and 4-8.4(g).

IV. STANDARDS FOR IMPOSING LAWYER SANCTIONS

I considered the following Standards prior to recommending discipline:

Standard 3.0 GENERALLY

In imposing a sanction after a finding of lawyer misconduct, a court should consider the following factors:

- (a) the duty violated;
- (b) the lawyer's mental state;
- (c) the potential or actual injury caused by the lawyer's misconduct; and
- (d) the existence of aggravating or mitigating factors.

4.4 LACK OF DILIGENCE

Standard 4.43 Public reprimand is appropriate when a lawyer is negligent and does not act with reasonable diligence in representing a client, and causes injury or potential injury to a client.

7.0 VIOLATIONS OF OTHER DUTIES OWED AS A PROFESSIONAL

Standard 7.3 Public reprimand is appropriate when a lawyer negligently engages in conduct that is a violation of a duty owed as a professional and causes injury or potential injury to a client, the public, or the legal system.

8.0 PRIOR DISCIPLINE ORDERS

Standard 8.3(b) Public reprimand is appropriate when a lawyer has received an admonishment for the same or similar misconduct and engages in further similar acts of misconduct.

9.2 AGGRAVATION

Standard 9.22 lists aggravating factors that may justify an increase in the degree of discipline to be imposed. The applicable aggravating factors include:

9.22 (a) Prior disciplinary offenses. Respondent was publicly reprimanded in 2000. Respondent's prior discipline demonstrates a pattern of cumulative misconduct.

9.22(i) Substantial experience in the practice of law. Respondent has been a member of The Florida Bar for 28 years. Respondent was admitted October 18, 1985.

9.3 MITIGATION

Standard 9.32 lists mitigating factors that may justify a reduction in the degree of discipline to be imposed. The applicable mitigating factors are:

9.32(c) Personal or emotional problems. Respondent was suffering from depression soon after the initiation of the current Bar case.

9.32(l) Remorse. Respondent has shown remorse for his conduct which caused the underlying Bar case to be filed.

9.32(m) Remoteness of prior offense. Respondent's previous discipline was a public reprimand, which was ordered by the Supreme Court in 2000.

V. CASE LAW

I considered the following case law prior to recommending discipline:

The Florida Supreme Court has disciplined attorneys who have engaged in similar misconduct. In *Florida Bar v. Whitaker*, 596 So. 2d 672 (Fla. 1992), The Florida Bar filed a complaint against Whitaker alleging that he violated several provisions of the Rules Regulating the Florida Bar. Specifically, Rule 4-1.3 (Diligence) and Rule 4-1.4 (Communication). The aforementioned conduct occurred when Respondent had the client sign a retainer agreement with his firm for representation in a potential civil lawsuit against a daycare provider for molestation of the client's child. Whitaker had agreed to investigate the case, but had not initially agreed to file a lawsuit. Eventually, Whitaker filed claims with the

daycare's insurance company because the daycare center had become insolvent. However, Whitaker failed to file suit within the one year statute of limitations because he mistakenly believed the statute of limitations was four years.

The referee found in part that Whitaker should be admonished as provided in Rule 3-5.1(a) and be placed on probation for 24 months. The Bar appealed the report of referee and on appeal the Supreme Court upheld the factual findings of the referee, but disagreed with the discipline. The court held in part that prior case law demonstrates that a public reprimand is more appropriate in cases such as this which involve neglect of client matters.

Similar to *Whitaker*, Respondent failed to diligently work on his client's case and Respondent failed to adequately communicate with his client. Although Respondent's negligent conduct did not cause actual harm to the client, pursuant to *Whitaker*, a public reprimand is the appropriate discipline for Respondent violating Rule 4-1.3 and Rule 4-1.4.

In *Florida Bar v. Greenspan*, 708 So. 2d 926 (Fla. 1998), the Court found in part that, a public reprimand was an appropriate sanction for an attorney who failed to cooperate with the disciplinary process. The Bar alleged in a three-count complaint that Greenspan failed to comply with certain advertising rules and that he failed to respond to the Bar inquiry in violation of Rule 4-8.4(g). The Bar filed a formal complaint, to which Greenspan failed to respond as required by Rule 3-

7.6(g)(2), which resulted in the entry of a default judgment. Based on the default, the referee recommended that Greenspan be found guilty of the ethical violations charged by the Bar and that he be suspended from the practice of law for twenty (20) days, to be followed by a one-year term of probation.

On review the Court approved the guilty finding but not the sanction. The Court found in part that, "A public reprimand is called for here in light of Greenspan's eighteen-year unblemished record as well as the fact that Greenspan's original transgression was rather minor."

Similar to *Greenspan*, Respondent failed to respond to the Bar in violation of Rule 4-8.4(g). However, unlike *Greenspan*, Respondent did eventually respond to the complaint. Respondent informed the Bar that the failure to timely respond was due in part to the difficult time the Respondent had recently gone through. Taking into consideration the reasoning in *Greenspan*, and considering the mitigating factors, a public reprimand would be an appropriate resolution to this case.

VI. RECOMMENDATION AS TO DISCIPLINARY MEASURES TO BE APPLIED

I recommend that Respondent be found guilty of misconduct justifying disciplinary measures, and that he be disciplined by:

- A. A public reprimand.
- B. Payment of The Florida Bar's costs in these proceedings.

In reaching this decision, the undersigned did consider in part the additional mitigation evidence presented by Respondent at the continued Sanctions Hearing which occurred on January 7, 2014. Respondent called Dr. Vischal Sharma to testify about Respondent's depression and other medical issues he experienced during the period he failed to respond to the Bar. However, although I found Dr. Sharma's testimony credible, the doctor was unable to offer an opinion on whether Respondent was so incapacitated, due to his depression, that he was unable to respond to the Bar.

Additionally, I considered that during the period Respondent failed to respond to the Bar, he was able to respond to an order to show cause in a federal case. Accordingly, based on all the information that has been presented to the undersigned, a public reprimand is an appropriate resolution to this case.

VII. PERSONAL HISTORY, PAST DISCIPLINARY RECORD

Prior to recommending discipline pursuant to Rule 3-7.6(k)(1), I considered the following:

Personal History of Respondent:

Age: 65

Date admitted to the Bar: October 18, 1985

Prior Discipline: The Respondent has one previous sanction as a result of violating the Rules Regulating the Florida Bar. On February 17, 2000, the Supreme

Court of Florida issued an order which publicly reprimanded Respondent in case number SC96,103, TFB No. 1999-11,226(12B). The public reprimand was a result of the Respondent's failure to timely file two separate briefs in the United States Court of Appeals for the Eleventh Circuit, despite being granted an extension of time to file the briefs.

VIII. STATEMENT OF COSTS AND MANNER IN WHICH COSTS SHOULD BE TAXED

I find the following costs were reasonably incurred by The Florida Bar:

Administrative costs pursuant to Rule 3-7.6(q)(1)(I)	\$1,250.00
Lexis Nexis	\$4.10
Bar Counsel Costs	\$294.75
Court Reporters' Fees	<u>\$365.00</u>
TOTAL	\$1,913.85

It is recommended that such costs be charged to respondent and that interest at the statutory rate shall accrue and be deemed delinquent 30 days after the judgment in this case becomes final unless paid in full or otherwise deferred by the Board of Governors of The Florida Bar.

Dated this _____ day of January, 2014.

**The Original of this
document was signed**

JAN 29 2014

**By Frank Mann, Jr.
County Court Judge**

Frank Mann, Jr., Referee

Original To:

Clerk of the Supreme Court of Florida; Supreme Court Building; 500 South Duval Street, Tallahassee, Florida, 32399-1927

Conformed Copies to:

Thomas Harold Ostrander, Respondent, at his record Bar address of 2701 Manatee Avenue West, Suite A, Bradenton, Florida 34205-4952 and his last known address of 514 27th Street West, Bradenton, Florida 34205, and via electronic mail to skydogesq@aol.com

Leonard Evans Clark, Tampa Branch Office, 4200 George J. Bean Parkway, Suite 2580 Tampa, Florida 33607-1496, and via electronic mail to lclark@flabar.org

Adria E. Quintela, Staff Counsel, The Florida Bar, at her designated email address of aquintel@flabar.org



The Florida Bar

651 East Jefferson Street
Tallahassee, FL 32399-2300

John F. Harkness, Jr.
Executive Director

850/561-5600
www.FLORIDABAR.org

November 21, 2017

Mr. Adron Hays Walker
3119 Manatee Avenue W
Bradenton, FL 34205-3350

Re: The Florida Bar v. Thomas Harold Ostrander; TFB File No. 2016-10,172(12B)

Dear Mr. Walker:

Pursuant to Rule 1-3.6 and Rule 1-3.7(b) of The Rules Regulating The Florida Bar, any member who has outstanding restitution shall be deemed a delinquent member and a member seeking reinstatement must complete the attached petition and submit a \$150.00 reinstatement fee.

According to our records, your client has outstanding restitution to Michael James Harrel in the amount of \$5,000.00. By operation of Rule 1-3.6, you are hereby notified that your client is a delinquent member of The Florida Bar, effective the date of this delinquency, to wit: November 21, 2017. Cure of this delinquency will include making payment of restitution, payment of the reinstatement fee and filing a petition for removal of delinquency status (petition attached).

Please be advised that any member who remains delinquent for a period of five years or longer will lose bar membership. A member whose membership has lapsed may return to the practice of law in Florida only through application to the Florida Board of Bar Examiners, which will include taking and passing the bar examination and successful completion of the character and fitness evaluation.

Sincerely,

Melissa M. Mara, CP, FRP
Certified Paralegal
Lawyer Regulation Headquarters

Enclosure – Petition for Removal of Restitution Delinquency

Petition for Removal of Restitution Delinquency

I, Thomas Harold Ostrander, hereby petition The Florida Bar for removal of restitution delinquency and certify:

1. Restitution was ordered by the court or agreed to on August 18, 2016.
2. I have been delinquent in the payment of restitution since November 21, 2017.
3. I owed restitution as follows:

Name of Individual	Amount of Restitution Owed	Amount Paid	Date Paid
_____	\$ _____	\$ _____	_____
_____	\$ _____	\$ _____	_____
_____	\$ _____	\$ _____	_____

4. I did not make the restitution within the time frame *because*:

5. Attached to this petition, I am remitting a \$150.00 reinstatement fee.
6. During this restitution delinquency period I have/have not (indicate proper response) practiced Florida law or rendered advice on matters of Florida law.
7. I understand that if this restitution delinquency is removed I will remain ineligible to deliver legal services or give advice on matters of Florida law by reason of:

____ Not applicable _____ Costs
____ CLER Exemption _____ Other

8. My current business address and telephone number for Bar record purposes (required by Rule 1-3.3):

_____ _____ _____	_____ _____ _____
(Current Mailing Address)	(Physical street address, if different from current mailing address)
_____ _____	_____ _____
(Business Telephone Number)	(required by Rule 1-3.3)

9. Under penalty of perjury, I declare the foregoing facts are true, correct and complete.

Signature of Petitioner

Date

Printed Name

Bar No.

Reply to:
Melissa M. Mara, Certified Paralegal
Lawyer Regulation, Headquarters
651 E. Jefferson Street
Tallahassee, FL 32399-2300
(850) 561-5776 - Telephone
(850) 561-9403 - Facsimile

IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Complainant,

v.

THOMAS HAROLD OSTRANDER,

Respondent.

Supreme Court Case
No. SC-

The Florida Bar File
No. 2016-10,172 (12B)

CONDITIONAL GUILTY PLEA FOR CONSENT JUDGMENT

COMES NOW, the undersigned respondent, Thomas Harold Ostrander, and files this Conditional Guilty Plea pursuant to Rule 3-7.9 of the Rules Regulating The Florida Bar.

1. Respondent is, and at all times mentioned herein was, a member of The Florida Bar, subject to the jurisdiction of the Supreme Court of Florida.
2. Respondent is currently the subject of a Florida Bar disciplinary matter which has been assigned The Florida Bar File No. 2016-10,172 (12B).
3. As to The Florida Bar File No. 2016-10,172 (12B), there has been a finding of probable cause by the grievance committee.
4. Respondent is acting freely and voluntarily in this matter, and tenders this Plea without fear or threat of coercion. Respondent is represented by Adron Hays Walker in this matter.

5. The disciplinary measures to be imposed upon respondent are as follows:

A. Respondent shall be suspended from the practice of law for sixty (60) days.

B. Respondent shall be placed on probation for a period of one (1) year upon reinstatement. As a condition of the probation, respondent shall pay restitution to Michael James Harrell in the amount of \$5,000.00 within the one-year period of probation. Respondent must submit proof of payment of restitution to the Bar's headquarters office in Tallahassee within the time frame for payment of the court's order. Respondent shall provide verifiable proof of payment and receipt which shall consist of a copy (front and back) of the negotiated check or a copy of the check and certified return. In the event the client cannot be located after a diligent search, respondent shall execute an affidavit of diligent search and provide same to The Florida Bar and shall pay the full amount of the restitution to the Clients' Security Fund of The Florida Bar. Failure to timely submit proof of payment of the restitution will result in respondent being deemed a delinquent member pursuant to Rule 1-3.6.

C. Respondent shall pay the bar's costs in this disciplinary proceeding.

6. Respondent acknowledges that, unless waived or modified by the Court on motion of respondent, the court order will contain a provision that prohibits respondent from accepting new business from the date of the order or opinion and shall provide that the suspension is effective 30 days from the date of the order or opinion so that respondent may close out the practice of law and protect the interest of existing clients.

7. The following allegations and rules provide the basis for respondent's guilty plea and for the discipline to be imposed in this matter:

A. The Florida Bar received an Order of Indefinite Suspension from The United States Attorney's Office related to respondent's attempt to represent Michael Harrell in his direct criminal appeal before The United States Court Of Appeals for the Eleventh Circuit. The district court had previously appointed Mark Ciaravella as appellate counsel to represent Mr. Harrell on his appeal. Respondent submitted to the appellate court a "Notice of Appearance" indicating that he would be co-counsel for Mr. Harrell in his appeal. Respondent was neither a member of the Eleventh Circuit's Bar nor was he court-appointed appellate counsel. Mr. Ciaravella informed the court that Mr. Harrell's family had paid respondent the sum of \$5,000.00 to "only 'oversee' and otherwise contribute to the appeal." Mr. Ciaravella submitted a "Motion to Withdraw as Counsel for Appellant", which the court granted.

Appellant's brief and appendix were due by October 20, 2014, and October 27, 2014, respectively. On December 17, 2014, and December 18, 2014, the deputy clerk sent dismissal notices to respondent regarding the overdue brief and appendix. Respondent's secretary informed the deputy clerk that respondent was in the hospital in a diabetic coma. No brief or appendix was ever submitted to the court. The Florida Bar sent respondent a letter by regular U.S. Mail to respondent's official bar address and by electronic mail to respondent's official bar email address requesting that he submit a response to the Eleventh Circuit's Order indefinitely suspending him. Respondent failed to respond to The Florida Bar as required in the letter and failed to contact the grievance committee investigating member.

8. In mitigation, respondent is 67 years old and suffers from serious medical issues related to his problems with diabetes that will require ongoing monitoring and follow-up [Florida Standards for Imposing Lawyer Sanctions 9.32 (h)].

9. By reason of the foregoing, respondent has violated the following Rules Regulating The Florida Bar: Rule 4-1.16 (Declining or Terminating Representation) (a) a lawyer shall not represent a client or, where representation has commenced, shall withdraw from the representation of a client if: (2) the lawyer's physical or mental condition materially impairs the lawyer's ability to

represent the client; Rule 4-5.5 (Unlicensed Practice of Law) (a) a lawyer may not practice law in a jurisdiction other than the lawyer's home state, in violation of the regulation of the legal profession in that jurisdiction, or in violation of the regulation of the legal profession in the lawyer's home state or assist another in doing so; and Rule 4-8.4 (g) (Misconduct) a lawyer shall not fail to respond, in writing, to any official inquiry by bar counsel or a disciplinary agency when bar counsel or the agency is conducting an investigation into the lawyer's conduct.

10. The Florida Bar has approved this proposed plea in the manner required by Rule 3-7.9.

11. If this plea is not finally approved by the Board of Governors of The Florida Bar and the Supreme Court of Florida, then it shall be of no effect and may not be used by the parties in any way.

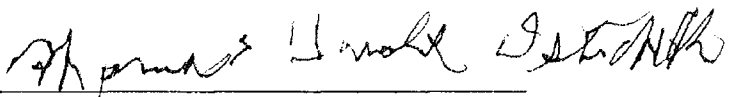
12. If this plea is approved, then respondent agrees to pay all reasonable costs associated with this case pursuant to Rule 3-7.6(q) in the amount of \$1,250.00. These costs are due within 30 days of the court order. Respondent agrees that if the costs are not paid within 30 days of this court's order becoming final, respondent shall pay interest on any unpaid costs at the statutory rate. Respondent further agrees not to attempt to discharge the obligation for payment of the bar's costs in any future proceedings, including but not limited to, a petition for bankruptcy. Respondent shall be deemed delinquent and ineligible to practice law

pursuant to Rule 1-3.6 if the cost judgment is not satisfied within 30 days of the final court order, unless deferred by the Board of Governors of The Florida Bar.

13. Respondent acknowledges the obligation to pay the costs of this proceeding and that payment is evidence of strict compliance with the conditions of any disciplinary order or agreement, and is also evidence of good faith and fiscal responsibility. Respondent understands that failure to pay the costs of this proceeding will reflect adversely on any other bar disciplinary matter in which respondent is involved.

14. This Conditional Guilty Plea for Consent Judgment fully complies with all requirements of the Rules Regulating The Florida Bar.

Dated this 3 day of June, 2016.

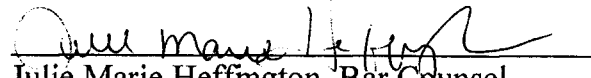

Thomas Harold Ostrander, Respondent
514 27th Street West
Bradenton, FL 34205-4143
(941) 526-9551
Florida Bar ID No.: 508349
skydogesq@aol.com

Dated this 3rd day of June, 2016.


Adron Hays Walker
Barnes Walker
3119 Manatee Avenue W.
Bradenton, FL 34205-3350

(941) 741-8224
Florida Bar ID No.: 302287
awalker@barneswalker.com

Dated this 7 day of June, 2016.


Julie Marie Heffington, Bar Counsel
The Florida Bar, Tampa Branch Office
4200 George J. Bean Parkway, Suite 2580
Tampa, Florida 33607-1496
(813) 875-9821
Florida Bar ID No. 667439
jheffington@floridabar.org

Supreme Court of Florida

THURSDAY, AUGUST 18, 2016

CASE NO.: SC16-1379

Lower Tribunal No(s).:

2016-10,172 (12B)

THE FLORIDA BAR

vs.

THOMAS HAROLD OSTRANDER

Complainant(s)

Respondent(s)

The conditional guilty plea and consent judgment for discipline are approved and respondent is suspended from the practice of law for sixty days, effective thirty days from the date of this order so that respondent can close out his practice and protect the interests of existing clients. If respondent notifies this Court in writing that he is no longer practicing and does not need the thirty days to protect existing clients, this Court will enter an order making the suspension effective immediately. Respondent shall fully comply with Rule Regulating the Florida Bar 3-5.1(h). In addition, respondent shall accept no new business from the date this order is filed until he is reinstated. Respondent is further directed to comply with all other terms and conditions of the consent judgment.

Upon reinstatement, respondent is further placed on probation for one year under the terms and conditions set forth in the consent judgment.

CASE NO.: SC16-1379

Page Two

Judgment is entered for The Florida Bar, 651 East Jefferson Street,
Tallahassee, Florida 32399-2300, for recovery of costs from Thomas Harold
Ostrander in the amount of \$1,250.00, for which sum let execution issue.

Not final until time expires to file motion for rehearing, and if filed,
determined. The filing of a motion for rehearing shall not alter the effective date
of this suspension.

LABARGA, C.J., and PARIENTE, LEWIS, QUINCE, CANADY, POLSTON,
and PERRY, JJ., concur.

A True Copy

Test:



John A. Tomasino
Clerk, Supreme Court



ld

Served:

JULIE MARIE HEFFINGTON
ADRON HAYS WALKER
ADRIA E. QUINTELA



The Florida Bar

651 East Jefferson Street
Tallahassee, FL 32399-2300

John F. Harkness, Jr.
Executive Director

850/561-5600
www.FLORIDABAR.org

October 4, 2016

Mr. Adron Hays Walker
3119 Manatee Avenue W
Bradenton, FL 34205-3350

Re: The Florida Bar v. Thomas Harold Ostrander; TFB File No. 2016-10,172 (12B)

Dear Mr. Walker:

Pursuant to Rule 1-3.6 and Rule 1-3.7(b) of The Rules Regulating The Florida Bar, any member who has outstanding costs shall be deemed a delinquent member and a member seeking reinstatement must complete the attached petition and submit a \$150.00 reinstatement fee.

According to our records, your client has outstanding costs in the amount of \$1,250.00 as of today's date. Therefore, you are hereby notified that your client is a delinquent member of The Florida Bar, effective October 4, 2016. Cure of this delinquency will include making payment of assessed costs (together with any accrued interest), payment of the reinstatement fee and filing of the petition for removal of delinquency status (petition attached).

Please be advised that any member who remains delinquent for a period of five years or longer will lose bar membership. A member whose membership has lapsed may return to the practice of law in Florida only through application to the Florida Board of Bar Examiners, which will include taking and passing the bar examination and successful completion of the character and fitness evaluation.

YOUR PROMPT ATTENTION IS REQUIRED.

Sincerely,

Lisa Chason, Compliance Coordinator
Lawyer Regulation Headquarters

Enclosure – Petition for Removal of Costs Delinquency

Petition for Removal of Costs Delinquency

I, Thomas Harold Ostrander, hereby petition The Florida Bar for removal of costs delinquency and certify:

1. Costs in the amount of \$1,250.00 were assessed against me on August 18, 2016.
2. I have been delinquent in the payment of costs since October 4, 2016.
3. I owe costs in the amount of: \$1,250.00 and a \$150.00 reinstatement fee.
4. I did not pay these costs within the time frame because:

5. During this costs delinquency period I have/have not (indicate proper response) practiced Florida law or rendered advice on matters of Florida law.

6. I understand that if this costs delinquency is removed I will remain ineligible to deliver legal services or give advice on matters of Florida law by reason of:

☐ Not applicable	☐ Restitution
☐ CLER Exemption	☐ Other

7. My current business address and telephone number for Bar record purposes (required by Rule 1-3.3):

(Current Mailing Address)	(Physical street address, if different from current mailing address.)
()	(required by Rule 1-3.3)
(Business telephone number)	

8. Under penalty of perjury, I declare the foregoing facts are true, correct and complete.

Signature of Petitioner	Date
Printed Name	Bar No.

Reply to:
Lisa Chason, Legal Secretary
Lawyer Regulation
651 E. Jefferson Street
Tallahassee, FL 32399-2300
(850) 561-3186 - Telephone
(850) 561-9403 - Facsimile



Supreme Court of Florida

THURSDAY, FEBRUARY 17, 2000

THE FLORIDA BAR,

Complainant,

vs.

THOMAS HAROLD OSTRANDER,

Respondent.

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CASE NO. SC96103

The Court approves the uncontested referee's report and reprimands respondent.

Judgment is entered for The Florida Bar, 650 Apalachee Parkway, Tallahassee, Florida 32399, for recovery of costs from Thomas Harold Ostrander in the amount of \$750.00, for which sum let execution issue.

Not final until time expires to file motion for rehearing and, if filed, determined.

A True Copy

TEST:

Debbie Causseaux

Debbie Causseaux
Acting Clerk, Supreme Court

KBB

cc: Hon. Daniel R. Monaco, Referee

Michael M. Hamrick

Anthony J. Abate

Billy Jack Hendrix

Debbie Joyce Davis

Thomas H. Ostrander

PUBLIC RECORD

M.D.G.

1/17/00
1/17/00



*Tony
Kathi* ✓

IN THE SUPREME COURT OF FLORIDA
(Before a Referee)

THE FLORIDA BAR,

Complainant,

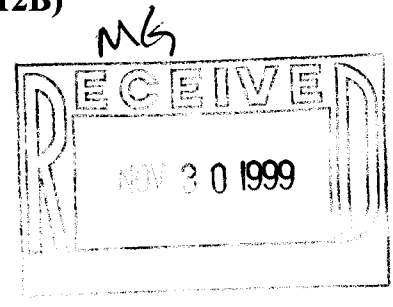
Case No. 96,103

TFB No. 1999-11,226(12B)

v.

THOMAS HAROLD OSTRANDER,

Respondent.



REPORT OF REFEREE

I. Summary of Proceedings: Pursuant to the undersigned being duly appointed as referee to conduct disciplinary proceedings herein according to the Rules Regulating The Florida Bar, the Consent Judgment and any pleadings, notices, motions, orders, transcripts, and exhibits are forwarded to The Supreme Court of Florida with this report and constitute the record in this case.

The following attorneys appeared as counsel for the parties:

For The Florida Bar: Debra Joyce Davis
Assistant Staff Counsel

For The Respondent: Pro se

II. Findings of Fact as to Each Item of Misconduct With Which the Respondent Is Charged: After considering all the pleadings and evidence before me, I find those facts set forth in the Bar's Complaint and admitted in Respondent's Answer constitute the findings of fact in this proceeding. In two separate appeals in the United States Court of Appeals for the Eleventh Circuit, Respondent failed to file his clients' briefs within the time permitted by the Court rules and orders of the Court extending the time to file the briefs. Respondent failed to demonstrate proper regard for the Court's rules and did not adequately represent his clients.

III. Recommendations as to Whether or Not the Respondent should Be Found Guilty: I find the Respondent guilty of violating the following Rules Regulating The

7203 12/6/99
PUBLIC RECORD
CLK
12/6/99 M.D.G.

Florida Bar: Rule 4-1.1 (Competence); Rule 4-1.3 (Diligence); and Rule 4-8.4(d) (Conduct Prejudicial to the administration of justice).

IV. Recommendation as to Disciplinary Measures to Be Applied: I recommend that the Respondent receive a Public Reprimand in Florida, as was imposed for the misconduct in disciplinary proceedings in the United States Court of Appeals for the Eleventh Circuit.

V. Personal History and Past Disciplinary Record: After the finding of guilty and prior to recommending discipline to be recommended pursuant to Rule 3-7.6(k)(1), I considered the following personal history and prior disciplinary record of the respondent, to wit:

Year of Birth: 1948

Date Admitted to Bar: October 10, 1985

Prior Disciplinary convictions and Disciplinary Measures Imposed Therein: None

The Referee notes that the Respondent is not certified in any area of practice.

Aggravating Factors: None

Mitigating Factors: Absence of prior disciplinary record (in Florida); and cooperative attitude toward The Florida Bar proceedings

VI. Statement of Costs and Manner in Which Costs Should Be Taxed: I find the following costs were reasonably incurred by The Florida Bar:

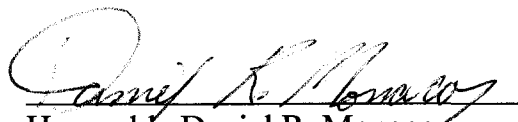
A. Administrative Costs

(Rule 3-7.6(o)(1)(I)).....\$ 750.00

TOTAL COSTS: \$750.00

It is apparent that other costs have or may be incurred. It is recommended that all such costs and expenses, together with the foregoing itemized costs, be charged to the Respondent and that interest at the statutory rate shall accrue and be payable beginning 30 days after the judgment in this case becomes final unless a waiver is granted by the Board of Governors of The Florida Bar.

Dated this 10th day of November, 1999.


Honorable Daniel R. Monaco
Referee

Copies:

Debra Joyce Davis, Assistant Staff Counsel, The Florida Bar, Tampa Airport
Marriott Hotel, Suite C-49, Tampa, Florida 33607

Thomas Harold Ostrander, Respondent, 456 12th Street West, Bradenton, Florida
34205-7821

John Anthony Boggs, Esquire, Staff Counsel, The Florida Bar, 650 Apalachee
Parkway, Tallahassee, Florida 32399-2300



IN THE SUPREME COURT OF FLORIDA
(Before a Referee)

THE FLORIDA BAR,

Case No. 96,103

TFB No. 1999-11,226(12B)

Complainant,

v.

THOMAS HAROLD OSTRANDER,

Respondent.

_____ /

**CONDITIONAL GUILTY PLEA FOR
CONSENT JUDGMENT**

COMES NOW, THOMAS HAROLD OSTRANDER, Respondent, pursuant to Rule 3-7.9, Rules Regulating The Florida Bar, and states his present intention to tender a conditional plea to the below-listed violations as charged in the Complaint filed by THE FLORIDA BAR in this cause, provided and conditioned upon the below-stated discipline being finally approved by the Supreme Court of Florida. The following is the stipulated factual basis:

1. Respondent is, and at all times mentioned herein was, a member of The Florida Bar, subject to the jurisdiction of the Supreme Court of Florida.
2. Respondent is aware that Rule 3-7.6(o), Rules Regulating The Florida Bar, provides for the taxing of costs incurred by THE FLORIDA BAR in a disciplinary proceeding.
3. Respondent is not certified in any area of practice.

7/20/03 12/6/99
PUBLIC RECORD
KMK
12/10/99
M.D.G.

4. Respondent admits the allegations of misconduct concerning his failure to timely file briefs in two separate appeals in the United States Court of Appeals for the Eleventh Circuit as set forth in the Bar's Complaint, which is incorporated herein by reference.

5. Respondent acknowledges that pursuant to Rules 3-4.6 and 3-7.2(j)(2), Rules Regulating The Florida Bar, the adjudication of the Respondent by the United States Court of Appeals for the Eleventh Circuit for the misconduct set forth in the Bar's Complaint is conclusive proof of such misconduct in a disciplinary proceeding in this jurisdiction.

DISCIPLINARY RULES: Rules Regulating The Florida Bar: Rule 4-1.1 (Competence); Rule 4-1.3 (Diligence); and Rule 4-8.4(d) (Conduct prejudicial to the administration of justice).

DISCIPLINE: Respondent will receive a Public Reprimand as was imposed in the foreign disciplinary proceedings.

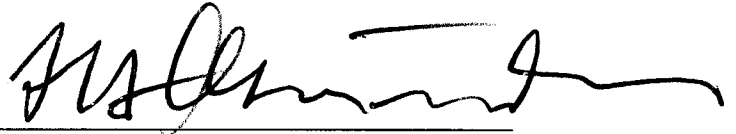
COSTS: Administrative Fee..... **\$750.00**

Total..... **\$750.00**

The Respondent acknowledges that there may be additional costs incurred if:

further proceedings are held. Respondent would be responsible for any future costs.

Dated: 11/12/99



THOMAS HAROLD OSTRANDER

Respondent

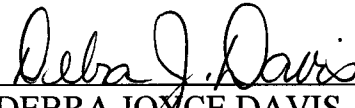
456 12th Street West

Bradenton, Florida 34205-7821

(941) 746-7220

Florida Bar No. 508349

Dated: 11/5/99



DEBRA JOYCE DAVIS

Assistant Staff Counsel

The Florida Bar, Suite C-49

Tampa Airport Marriott

Tampa, Florida 33607-1442

(813) 875-9821

Florida Bar No. 93556

Approved By: Anthony J. Abate, Designated Reviewer
John Anthony Boggs, Staff Counsel

IN THE SUPREME COURT OF FLORIDA
(Before a Referee)

THE FLORIDA BAR,

CASE NO.

Complainant,

TFB NO. 1999-11,226(12B)

v.

THOMAS HAROLD OSTRANDER,

Respondent.

_____ /

COMPLAINT

THE FLORIDA BAR, Complainant, files this Complaint against
THOMAS HAROLD OSTRANDER, Respondent, pursuant to Rule 3-3.2(b),
Rules Regulating The Florida Bar, and alleges:

1. Respondent is, and at all times mentioned herein was, a member of The Florida Bar, subject to the jurisdiction of the Supreme Court of Florida.
2. Respondent is, and at all times mentioned herein was, admitted to practice law before The United States Court of Appeals for the Eleventh Circuit (hereinafter "Eleventh Circuit").
3. On or about July 7, 1994, the Eleventh Circuit appointed the Respondent to represent Julio Carona, an indigent litigant in Case No. 92-2585, Carona v. Singletary, et al.

4. Respondent failed to file Mr. Carona's Anders brief, and the subsequently requested merits brief, within the time permitted by court rules and by orders extending the filing deadlines.

5. On November 22, 1995, the Eleventh Circuit granted the Appellant's motion for late filing of Mr. Carona's brief, and added that Respondent's conduct should be reviewed by the Chief Judge to determine whether referral to a disciplinary committee was appropriate. (A copy of the court's order is attached as Exhibit "A").

6. On or about August 8, 1995, the Eleventh Circuit appointed the Respondent to represent John J. Pearson, an indigent litigant in Case No. 94-3502, U.S. v. Richards, a/k/a Pearson.

7. Respondent failed to file Mr. Pearson's brief by the November 27, 1995 due date. Instead, Respondent filed two motions to withdraw, two motions to stay briefing, and a motion to extend time, all of which were denied.

8. On May 13, 1996, the Eleventh Circuit ordered the Respondent to file Mr. Pearson's brief and record excerpts by June 3, 1996, and warned him that he could be referred for discipline if he did not do so. Respondent failed to comply and instead, filed an emergency motion for extension of time in which to file the brief.

9. The Eleventh Circuit denied Respondent's emergency motion and on its own motion, discharged the Respondent as Mr. Pearson's counsel. (A copy of the court's order is attached and incorporated herein as Exhibit "B").

10. Respondent's conduct in Singletary and Richards was referred to the Eleventh Circuit Committee on Lawyer Qualification and Conduct (hereinafter "the Committee"). The Committee considered Respondent's conduct regarding these two cases and filed a report and recommendation with the court.

11. The Committee found that Respondent's conduct did not meet the standard of conduct expected of an attorney practicing before the Eleventh Circuit, that Respondent did not demonstrate proper regard for the court's rules, and as a result, did not adequately represent his clients before the court.

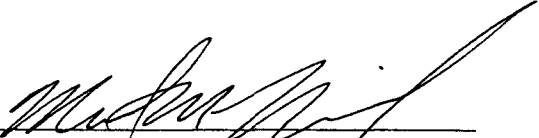
12. The Committee recommended that the court determine that Respondent violated the court's rules and impose a public reprimand.

13. The court accepted the Committee's recommendation and issued an order publicly reprimanding the Respondent. (A copy of this order is attached and incorporated herein as Exhibit "C").

14. By virtue of Rules 3-4.6 and 3-7.2(j)(2), Rules Regulating The Florida Bar, the above adjudication of Respondent by The United States Court of Appeals for the Eleventh Circuit, is conclusive proof of such misconduct in a disciplinary

proceeding in this jurisdiction and sufficient basis for filing of a complaint by The Florida Bar and assignment for hearing before the referee.

15. By virtue of the foregoing, Respondent has violated the following Rules Regulating The Florida Bar: Rule 4-1.1 (competence); Rule 4-1.3 (diligence); and Rule 4-8.4(d) (conduct prejudicial to the administration of justice).



MICHAEL MCRAE HAMRICK
Chair of Grievance Committee "12B"
Post Office Box 551
Bradenton, Florida 34206
(941) 747-171
Florida Bar No. 290556



DEBRA JOYCE DAVIS
Assistant Staff Counsel
The Florida Bar, Suite C-49
Tampa Airport Marriott
Tampa, Florida 33607
(813) 875-9821
Florida Bar No. 93556

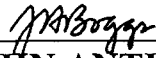
JOHN F. HARKNESS
Executive Director
The Florida Bar
650 Apalachee Parkway
Tallahassee, FL 32399-2300
(850) 561-5600
Florida Bar No. 123390



JOHN ANTHONY BOGGS
Staff Counsel
The Florida Bar
650 Apalachee Parkway
Tallahassee, FL 32399-2300
(850) 561-5600
Florida Bar No. 253847

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the original of the foregoing COMPLAINT was furnished by U. S. regular mail to Debbie Casseaux, Acting Clerk, Supreme Court of Florida, Supreme Court Building, 500 South Duval Street, Tallahassee, Florida, 32399; a copy furnished by U. S. regular mail and by certified mail No. Z-452-950-571, return receipt requested to Thomas Harold Ostrander, Respondent, 456 12th Street West, Bradenton, Florida 34205-7821; a copy furnished by U. S. regular mail to Anthony J. Abate, Designated Reviewer, at Post Office Box 49948, Sarasota, Florida 34230-6948; and a copy furnished by U. S. regular mail to Debra Joyce Davis, Assistant Staff Counsel, The Florida Bar, Tampa Airport Marriott, Suite C-49, Tampa, Florida 33607, this 22 day of July, 1999.



JOHN ANTHONY BOGGS
Staff Counsel

NOTICE OF TRIAL COUNSEL

PLEASE TAKE NOTICE that the trial counsel in this matter is Debra Joyce Davis, whose address is The Florida Bar, Suite C-49, Tampa Airport, Marriott, Tampa, Florida 33607. Respondent need not address pleadings, correspondence, etc. in this matter to anyone other than trial counsel and to Billy Jack Hendrix, Director of Lawyer Regulation, The Florida Bar, 650 Apalachee Parkway, Tallahassee, FL 32399-2300.

FILED
U.S. COURT OF APPEALS
ELEVENTH CIRCUIT

NOV 22 1995

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

MIGUEL J. CORTEZ

No. 92-2585

JULIO CARONA,

Plaintiff-Appellant,

versus

HARRY K. SINGLETARY,
ROBERT A. BUTTERWORTH,

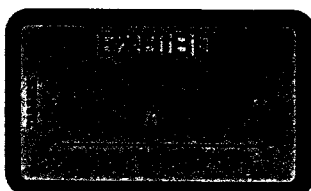
Defendants-Appellees.

On Appeal from the United States District Court for the
Middle District of Florida

O R D E R:

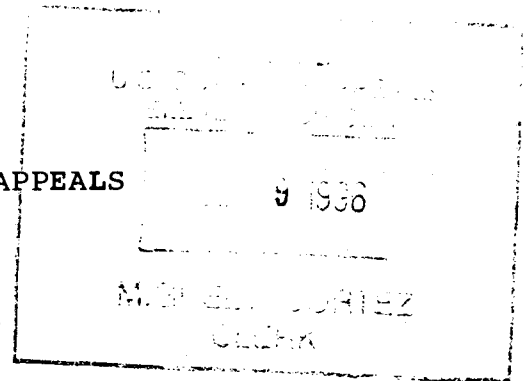
Appellant's motion for late filing of brief is GRANTED;
this attorney's conduct should be reviewed by the Chief Judge to
determine whether referral to disciplinary panel/committee is
appropriate.

/s/ STANLEY F. BIRCH
UNITED STATES CIRCUIT JUDGE



IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 94-3502



UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

PATRICIA RICHARDS, a/k/a
P.D. Richards, a/k/a Pat Pearson,
JOHN J. PEARSON, a/k/a Jack J. Pearson,
a/k/a J.J.,

Defendants-Appellants.

On Appeal from the United States District Court for the
Middle District of Florida

O R D E R:

This matter is before this court on the "emergency motion for extension of time in which to file brief" filed by John J. Pearson's CJA counsel, Thomas H. Ostrander. Mr. Ostrander was required to file his client's brief and record excerpts by 11/27/95, but did not do so. Instead, he filed two motions to withdraw, two motions to stay briefing, and a motion for an extension of time, all of which were denied. On 5/13/96, this court ordered Mr. Ostrander to file his client's brief and record excerpts by 6/3/96, and warned him that if he did not do so, he could be referred for discipline.



Rather than comply, Mr. Ostrander filed the present motion, which rehashes the same excuses that this court has at least twice rejected. Additionally, Mr. Ostrander argues that he should be given a further extension because he was scheduled to attend a seminar (from May 16, 1996 to May 18, 1996) and go on a vacation (from May 21, 1996 through May 26, 1996). He does not explain why he could not prepare the brief and record excerpts during the week of May 27, 1996 through June 3, 1996.

Mr. Ostrander's motion is DENIED. This court, on its own motion, DISCHARGES Mr. Ostrander as counsel for Appellant John J. Pearson. Replacement counsel will be appointed by separate order. A copy of this order shall be sent to this Court's Committee on Lawyer Qualification and Conduct as further evidence of Mr. Ostrander's contumacious conduct.

/s/ Gerald B. Tjoflat
CHIEF JUDGE

THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 96-1002

FILED
U.S. COURT OF APPEALS
ELEVENTH CIRCUIT

MAR 09 1999

THOMAS K. KAHN
CLERK

IN THE MATTER OF:

THOMAS H. OSTRANDER

Disciplinary Proceeding Pursuant to the Rules
Governing Attorney Discipline in the United States
Court of Appeals for the Eleventh Circuit

BEFORE: HATCHETT, Chief Judge, ANDERSON and CARNES, Circuit Judges.

BY THE COURT:

The Committee on Lawyer Qualifications and Conduct ("the Committee") has filed its report and recommendations in this matter. The Committee finds that in two appeals, 92-2585, Carona v. Singietary, et al., and 94-3502, U.S. v. Richards, et al., Mr. Ostrander failed to file his client's brief within the time permitted by the Court's rules and by orders of the Court extending the time to file the brief. The Committee finds that Mr. Ostrander's conduct did not meet the standard of conduct expected of an attorney practicing before the Court, and that Mr. Ostrander did not demonstrate the proper regard for the Court's

EXHIBIT

rules. As a result, the Committee finds that Mr. Ostrander did not adequately represent his clients before the Court.

The Committee therefore recommends that the Court determine that Mr. Ostrander violated this Court's rules and impose discipline.

Thus, the Committee recommends, as Rule 1(B) of Addendum Eight permits, that the Court publicly reprimand Mr. Ostrander.

IT IS THEREFORE ORDERED that the Committee's recommendations are accepted and implemented by this order. Accordingly, Mr. Ostrander is hereby Publicly Reprimanded.

IN THE SUPREME COURT OF FLORIDA
(Before a Referee)

THE FLORIDA BAR,
Complainant,

TFB NO. 1999-11,226(12B)

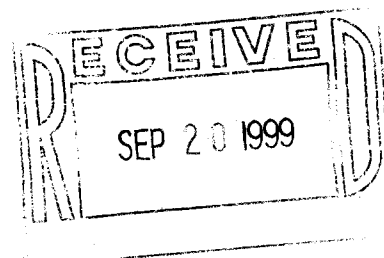
v.

THOMAS HAROLD OSTRANDER,
Respondent.

ANSWER TO COMPLAINT

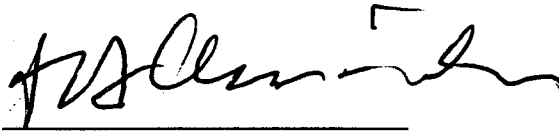
Respondent THOMAS HAROLD OSTRANDER files his Answer as follows:

1. Admitted.
2. Admitted.
3. Admitted.
4. Admitted.
5. Admitted.
6. Admitted.
7. Admitted.
8. Admitted.
9. Admitted.
10. Admitted.
11. Admitted.
12. Admitted.
13. Admitted.



14. Admitted.

15. Admitted.



Thomas H. Ostrander, Esq.
Florida Bar #508349
1101 6th Avenue West, Ste. #103
Bradenton, FL 34205
Phone: 1 (941) 746-7220
Fax: 1 (941) 747-1526

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy, and the original, of the foregoing has been furnished by U.S. Mail to: Debra Joyce Davis, Assistant Staff Counsel, The Florida Bar, Suite C-49, Tampa Airport Marriott, Tampa, FL 33607; and a true and correct copy was also furnished to: John Anthony Boggs, Staff Counsel, The Florida Bar, 650 Apalachee Parkway, Tallahassee, FL 32399-2300, this 16th day of September, 1999.



Thomas H. Ostrander, Esq.

IN THE TWENTIETH JUDICIAL CIRCUIT
IN AND FOR COLLIER COUNTY, FLORIDA

THE FLORIDA BAR,

Supreme Court Case No: 96,103

Complainant,

vs.

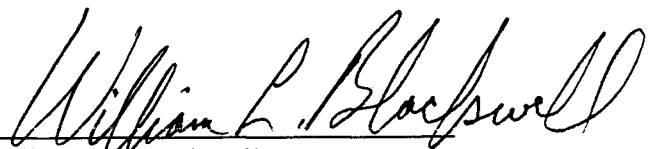
THOMAS HAROLD OSTRANDER,

Respondent.

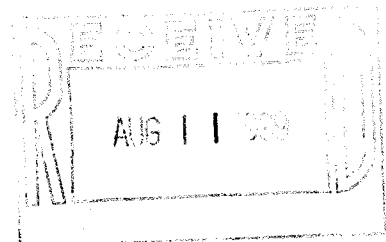
ORDER

THIS MATTER has been referred to the undersigned Chief Judge of the Twentieth Judicial Circuit by the Chief Justice of the Supreme Court of Florida for the purpose of appointing a referee for the Court in the above matter. Therefore, The Honorable Daniel R. Monaco, Judge of the Circuit Court of the Twentieth Judicial Circuit, is appointed as referee for the Court.

DONE AND ORDERED in Chambers at Naples, Collier County, Florida this 6th
day of August, 1999.



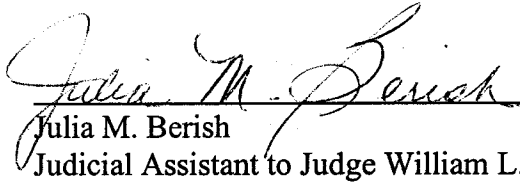
William L. Blackwell
Chief Judge



h2803

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the original of the foregoing Order has been forwarded by regular United States mail, to: Debbie Causseaux, Acting Clerk, The Supreme Court of Florida, 500 South Duval Street, Tallahassee, Florida 32399-1925; copy hand delivered to: The Honorable Daniel R. Monaco, Circuit Judge, Collier County Courthouse, 3301 E. Tamiami Trail, Bldg. L., Naples, FL 34112; and by regular U.S. Mail and by certified mail No. Z 316-547-675, return receipt requested to Thomas Harold Ostrander, Respondent, 456 12th Street West, Bradenton, FL 34205-7821; Thomas Anthony J. Abate, Esquire, Designated Reviewer, P.O. Box 49948, Sarasota, Florida 34230-6958; Debra Joyce Davis, Assistant Staff Counsel, The Florida Bar, Tampa Airport Marriott, Ste. C-49, Tampa, FL 33607; and Billy Jack Hendrix, Director of Lawyer Regulation, The Florida Bar, 650 Apalachee Parkway, Tallahassee, Florida 32399-2300, this 6th day of August, 1999.



Julia M. Berish
Judicial Assistant to Judge William L. Blackwell



THE FLORIDA BAR

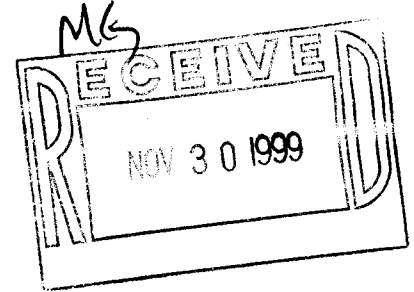
TAMPA AIRPORT MARRIOTT HOTEL, SUITE C-49
TAMPA, FL 33607

JOHN F. HARKNESS, JR.
EXECUTIVE DIRECTOR

813/875-9821

November 5, 1999

The Honorable Daniel R. Monaco, Referee
Collier County Courthouse
3301 East Tamiami Trail
Building L
Naples, Florida 34112



Re: The Florida Bar v. Thomas Harold Ostrander
Case No. 96,103; TFB No. 1999-11,226(12B)

Dear Judge Monaco:

Enclosed please find an executed Conditional Guilty Plea for Consent Judgment and proposed Report of Referee in the above referenced matter. Mr. Ostrander previously received a copy of the proposed Report of Referee and voiced no objections.

If the enclosed report meets with your approval, please sign the same and forward the original to the Supreme Court of Florida, along with the record in this case, and mail copies to the individuals indicated in the stamped, addressed envelopes provided.

Thank you for your time and consideration in this matter.

Sincerely,

Debra Joyce Davis
Assistant Staff Counsel

DJD/dd

Enclosure: Original Conditional Guilty Plea for Consent Judgment
Proposed Report of Referee

cc: Thomas Harold Ostrander (with copies of enclosures)

KLH
12/6/99
PUBLIC RECORD
M.D.G.

DEBBIE CAUSSEAU, ACTING CLERK
Supreme Court of Florida
500 SOUTH DUVAL STREET
TALLAHASSEE 32399-1927
(850) 488-0125

Y

Ms. Debra Joyce Davis
Assistant Bar Counsel
The Florida Bar
Suite C-49
Tampa Airport Marriott Hotel
Tampa, Florida 33607-1442

7/28/99

filed 7/23/99

RE: THE FLORIDA BAR
VS.
THOMAS HAROLD
OSTRANDER

CASE NO. 96,103

TFB NO. 1999-11,226(12B)

I have this date received the below-listed pleadings or documents:

COMPLAINT - (ORIG. & 1 COPY)

Please make reference to the case number in all correspondence and pleadings.

Most cordially,

Debbie Causseau

Acting Clerk
Supreme Court

**ALL PLEADINGS SIGNED BY
AN ATTORNEY MUST INCLUDE
THE ATTORNEY'S FLORIDA
BAR NUMBER.**

DC/kbb

cc: Mr. John Anthony Boggs
Mr. Billy Jack Hendrix ✓
Mr. Michael M. Hamrick
Mr. Anthony J. Abate
Mr. Thomas Harold Ostrander

RECEIVED
JUL 30 1999

PUBLIC RECORD
M.D.G.



THE FLORIDA BAR

650 APALACHEE PARKWAY
TALLAHASSEE, FL 32399-2300

JOHN F. HARKNESS, JR.
EXECUTIVE DIRECTOR

850/561-5600

July 22, 1999

Ms. Debbie Causseaux
Acting Clerk, Supreme Court of Florida
Supreme Court Building
500 South Duval Street
Tallahassee, FL 32399-1927

Re: The Florida Bar v. Thomas Harold Ostrander
TFB File No. 99-11,226 (12B)

Dear Ms. Causseaux:

Pursuant to Rule 3-3.2(a), Rules of Discipline, I have enclosed the above complaint for filing and request that the court assign a referee to try this cause.

Sincerely yours,

Charmaine D. Daniels
Secretary, Lawyer Regulation

Enclosures

cc: Thomas H. Ostrander, Respondent
Certified Mail RRR # Z 452 950 571
Debra J. Davis, Bar Counsel - Tampa Branch
Anthony J. Abate, Designated Reviewer

PUBLIC RECORD
CDC

POSSIBLE VENUE FORM

The Florida Bar v. Thomas Harold Ostrander

File No: 1999-11,226(12B)

1. Residence: Manatee County
2. Offense: Manatee County
3. Office: Manatee County

OTHER PENDING CASES

(IF NONE, PLEASE INDICATE BY WRITING NONE) (Only complete if a case is pending in the Supreme Court)

CASE NUMBER

FILE NUMBER

REFEREE

None

ESTIMATED TRIAL TIME: ONE DAY

PUBLIC RECORD
CDC _____

**IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT**

No. 15-1009

**FILED
U.S. COURT OF APPEALS
ELEVENTH CIRCUIT**

AUG 24 2015

**JOHN LEY
CLERK**

IN THE MATTER OF:

THOMAS H. OSTRANDER

**Disciplinary Proceeding Pursuant to the
Rules Governing Attorney Discipline in the
United States Court of Appeals for the Eleventh Circuit**

ORDER OF INDEFINITE SUSPENSION

On June 15, 2015, this Court issued an Order to Show Cause requiring attorney Thomas H. Ostrander to show cause why he should not be disciplined on account of his conduct in the appeal United States v. Harrell, et al., No. 13-12289. The Order to Show Cause explained that Ostrander, who is not a member of this Court's Bar, impermissibly entered a notice of appearance and attempted to proceed as retained counsel for appellant Michael Harrell. Ostrander persisted in continuing his appellate representation despite an ongoing illness that affected his ability to adequately represent the appellant. Furthermore, Ostrander displayed dilatory conduct by failing to file the appellant's brief and appendix. It also appears that he may have inappropriately accepted appellate attorney's fees from the appellant's family.

The Order to Show Cause stated that Ostrander would be indefinitely suspended from practice before this Court if he failed to file a verified response with the Clerk within fourteen

days of the date of the Order. The Clerk's records show that on June 15, 2015, the Order to Show Cause was sent to Ostrander by certified mail, return-receipt requested, as provided by Rule 12 of Addendum Eight of the Rules of the U.S. Court of Appeals for the Eleventh Circuit. The Order was mailed to his address of record with this Court and with the Florida State Bar. The response was due by June 29, 2015. It was not received.

Because the Clerk's Office did not receive the return-receipt card, on July 6, 2015, the Attorney Discipline Clerk unsuccessfully attempted to telephone Ostrander in order to verify his receipt of the Order to Show Cause. That same day, she sent Ostrander an email directing him to respond immediately to the Order. On July 7, 2015, Ostrander telephoned the Clerk's Office and stated that he had not received the Order. In response, the Attorney Discipline Clerk emailed a copy of it to him and directed him to file his response within fourteen days, setting a deadline of July 21, 2015.

On July 13, 2015, the Clerk's Office received as "unclaimed" the Order to Show Cause that had been mailed to Ostrander on June 15, 2015. That same day, Ostrander telephoned the Clerk's Office, stated that he could not open the Order attached to the Attorney Discipline Clerk's July 7, 2015, email, and requested that a copy of it be faxed to him. Also on that same day, the Attorney Discipline Clerk faxed a copy of the Order to Ostrander and sent an email to him confirming that it had been faxed as he had requested. No response to the Order was received.

Pursuant to Addendum Eight of the Rules of the U.S. Court of Appeals for the Eleventh Circuit, IT IS THEREFORE ORDERED that Thomas H. Ostrander is indefinitely SUSPENDED from practice before this Court.

A handwritten signature in black ink, appearing to read "E. Hamer". The signature is fluid and cursive, with a large initial "E" and a stylized "Hamer".

Chief Judge

IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Complainant,

v.

THOMAS HAROLD OSTRANDER,

Respondent.

Supreme Court Case
No. SC-

The Florida Bar File
No. 2016-10,172 (12B)

**PETITION FOR APPROVAL OF CONDITIONAL GUILTY PLEA FOR
CONSENT JUDGMENT**

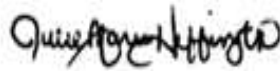
COMES NOW, The Florida Bar, by and through undersigned counsel, and respectfully requests this Court approve the Conditional Guilty Plea for Consent Judgment filed and attached as Exhibit A and says:

1. Respondent is, and at all times mentioned in the above-referenced disciplinary matter was, a member of The Florida Bar, subject to the jurisdiction and disciplinary rules of the Supreme Court of Florida.
2. Respondent tendered a Conditional Guilty Plea for Consent Judgment in this case prior to the filing of a formal complaint with the Supreme Court of Florida.
3. Pursuant to Rule 3-7.9 of the Rules of Discipline of The Florida Bar, Respondent's Consent Judgment has been approved by The Florida Bar.

4. Respondent's Consent Judgment contains within it the proposed discipline as to his violations of the Rules of Professional Conduct of The Florida Bar. Respondent shall receive a 60-day suspension, one year of probation upon reinstatement, restitution of \$5,000.00, and payment of disciplinary costs.

WHEREFORE, The Florida Bar respectfully requests that Respondent's Conditional Guilty Plea for Consent Judgment be accepted and that the proposed discipline be imposed.

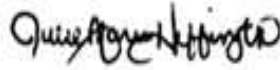
Respectfully submitted,



Julie Marie Heffington, Bar Counsel
The Florida Bar, Tampa Branch Office
4200 George J. Bean Parkway, Suite 2580
Tampa, Florida 33607-1496
(813) 875-9821
Florida Bar No. 667439
jheffington@flabar.org-primary
yserralta@flabar.org-secondary
tampaoffice@flabar.org-tertiary

CERTIFICATE OF SERVICE

I certify that this Petition for Approval of Conditional Guilty Plea for Consent Judgment has been furnished to The Honorable John A. Tomasino, Clerk of The Supreme Court of Florida; with a copy provided to Respondent's Counsel, Adron Walker, at awalker@barneswalker.com; and to Adria E. Quintela, Staff Counsel, The Florida Bar at aquintel@flabar.org, on this 1st day of August, 2016.

A handwritten signature in black ink, appearing to read "Julie Marie Heffington".

Julie Marie Heffington, Bar Counsel

IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Complainant,

v.

THOMAS HAROLD OSTRANDER,

Respondent.

Supreme Court Case
No. SC-

The Florida Bar File
No. 2016-10,172 (12B)

CONDITIONAL GUILTY PLEA FOR CONSENT JUDGMENT

COMES NOW, the undersigned respondent, Thomas Harold Ostrander, and files this Conditional Guilty Plea pursuant to Rule 3-7.9 of the Rules Regulating The Florida Bar.

1. Respondent is, and at all times mentioned herein was, a member of The Florida Bar, subject to the jurisdiction of the Supreme Court of Florida.
2. Respondent is currently the subject of a Florida Bar disciplinary matter which has been assigned The Florida Bar File No. 2016-10,172 (12B).
3. As to The Florida Bar File No. 2016-10,172 (12B), there has been a finding of probable cause by the grievance committee.
4. Respondent is acting freely and voluntarily in this matter, and tenders this Plea without fear or threat of coercion. Respondent is represented by Adron Hays Walker in this matter.

5. The disciplinary measures to be imposed upon respondent are as follows:

A. Respondent shall be suspended from the practice of law for sixty (60) days.

B. Respondent shall be placed on probation for a period of one (1) year upon reinstatement. As a condition of the probation, respondent shall pay restitution to Michael James Harrell in the amount of \$5,000.00 within the one-year period of probation. Respondent must submit proof of payment of restitution to the Bar's headquarters office in Tallahassee within the time frame for payment of the court's order. Respondent shall provide verifiable proof of payment and receipt which shall consist of a copy (front and back) of the negotiated check or a copy of the check and certified return. In the event the client cannot be located after a diligent search, respondent shall execute an affidavit of diligent search and provide same to The Florida Bar and shall pay the full amount of the restitution to the Clients' Security Fund of The Florida Bar. Failure to timely submit proof of payment of the restitution will result in respondent being deemed a delinquent member pursuant to Rule 1-3.6.

C. Respondent shall pay the bar's costs in this disciplinary proceeding.

6. Respondent acknowledges that, unless waived or modified by the Court on motion of respondent, the court order will contain a provision that prohibits respondent from accepting new business from the date of the order or opinion and shall provide that the suspension is effective 30 days from the date of the order or opinion so that respondent may close out the practice of law and protect the interest of existing clients.

7. The following allegations and rules provide the basis for respondent's guilty plea and for the discipline to be imposed in this matter:

A. The Florida Bar received an Order of Indefinite Suspension from The United States Attorney's Office related to respondent's attempt to represent Michael Harrell in his direct criminal appeal before The United States Court Of Appeals for the Eleventh Circuit. The district court had previously appointed Mark Ciaravella as appellate counsel to represent Mr. Harrell on his appeal. Respondent submitted to the appellate court a "Notice of Appearance" indicating that he would be co-counsel for Mr. Harrell in his appeal. Respondent was neither a member of the Eleventh Circuit's Bar nor was he court-appointed appellate counsel. Mr. Ciaravella informed the court that Mr. Harrell's family had paid respondent the sum of \$5,000.00 to "only 'oversee' and otherwise contribute to the appeal." Mr. Ciaravella submitted a "Motion to Withdraw as Counsel for Appellant", which the court granted.

Appellant's brief and appendix were due by October 20, 2014, and October 27, 2014, respectively. On December 17, 2014, and December 18, 2014, the deputy clerk sent dismissal notices to respondent regarding the overdue brief and appendix. Respondent's secretary informed the deputy clerk that respondent was in the hospital in a diabetic coma. No brief or appendix was ever submitted to the court. The Florida Bar sent respondent a letter by regular U.S. Mail to respondent's official bar address and by electronic mail to respondent's official bar email address requesting that he submit a response to the Eleventh Circuit's Order indefinitely suspending him. Respondent failed to respond to The Florida Bar as required in the letter and failed to contact the grievance committee investigating member.

8. In mitigation, respondent is 67 years old and suffers from serious medical issues related to his problems with diabetes that will require ongoing monitoring and follow-up [Florida Standards for Imposing Lawyer Sanctions 9.32 (h)].

9. By reason of the foregoing, respondent has violated the following Rules Regulating The Florida Bar: Rule 4-1.16 (Declining or Terminating Representation) (a) a lawyer shall not represent a client or, where representation has commenced, shall withdraw from the representation of a client if: (2) the lawyer's physical or mental condition materially impairs the lawyer's ability to

represent the client; Rule 4-5.5 (Unlicensed Practice of Law) (a) a lawyer may not practice law in a jurisdiction other than the lawyer's home state, in violation of the regulation of the legal profession in that jurisdiction, or in violation of the regulation of the legal profession in the lawyer's home state or assist another in doing so; and Rule 4-8.4 (g) (Misconduct) a lawyer shall not fail to respond, in writing, to any official inquiry by bar counsel or a disciplinary agency when bar counsel or the agency is conducting an investigation into the lawyer's conduct.

10. The Florida Bar has approved this proposed plea in the manner required by Rule 3-7.9.

11. If this plea is not finally approved by the Board of Governors of The Florida Bar and the Supreme Court of Florida, then it shall be of no effect and may not be used by the parties in any way.

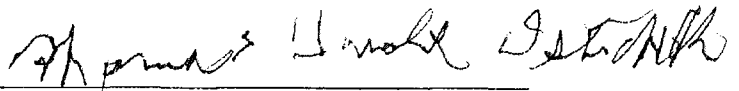
12. If this plea is approved, then respondent agrees to pay all reasonable costs associated with this case pursuant to Rule 3-7.6(q) in the amount of \$1,250.00. These costs are due within 30 days of the court order. Respondent agrees that if the costs are not paid within 30 days of this court's order becoming final, respondent shall pay interest on any unpaid costs at the statutory rate. Respondent further agrees not to attempt to discharge the obligation for payment of the bar's costs in any future proceedings, including but not limited to, a petition for bankruptcy. Respondent shall be deemed delinquent and ineligible to practice law

pursuant to Rule 1-3.6 if the cost judgment is not satisfied within 30 days of the final court order, unless deferred by the Board of Governors of The Florida Bar.

13. Respondent acknowledges the obligation to pay the costs of this proceeding and that payment is evidence of strict compliance with the conditions of any disciplinary order or agreement, and is also evidence of good faith and fiscal responsibility. Respondent understands that failure to pay the costs of this proceeding will reflect adversely on any other bar disciplinary matter in which respondent is involved.

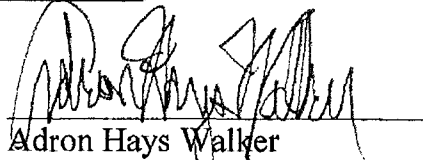
14. This Conditional Guilty Plea for Consent Judgment fully complies with all requirements of the Rules Regulating The Florida Bar.

Dated this 3 day of June, 2016.



Thomas Harold Ostrander, Respondent
514 27th Street West
Bradenton, FL 34205-4143
(941) 526-9551
Florida Bar ID No.: 508349
skydogesq@aol.com

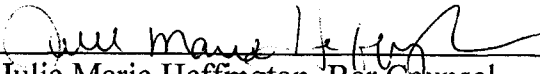
Dated this 3rd day of June, 2016.



Adron Hays Walker
Barnes Walker
3119 Manatee Avenue W.
Bradenton, FL 34205-3350

(941) 741-8224
Florida Bar ID No.: 302287
awalker@barneswalker.com

Dated this 7 day of June, 2016.


Julie Marie Heffington, Bar Counsel
The Florida Bar, Tampa Branch Office
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(813) 875-9821
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jheffington@floridabar.org

Supreme Court of Florida

THURSDAY, AUGUST 18, 2016

CASE NO.: SC16-1379

Lower Tribunal No(s).:

2016-10,172 (12B)

THE FLORIDA BAR

vs.

THOMAS HAROLD OSTRANDER

Complainant(s)

Respondent(s)

The conditional guilty plea and consent judgment for discipline are approved and respondent is suspended from the practice of law for sixty days, effective thirty days from the date of this order so that respondent can close out his practice and protect the interests of existing clients. If respondent notifies this Court in writing that he is no longer practicing and does not need the thirty days to protect existing clients, this Court will enter an order making the suspension effective immediately. Respondent shall fully comply with Rule Regulating the Florida Bar 3-5.1(h). In addition, respondent shall accept no new business from the date this order is filed until he is reinstated. Respondent is further directed to comply with all other terms and conditions of the consent judgment.

Upon reinstatement, respondent is further placed on probation for one year under the terms and conditions set forth in the consent judgment.

CASE NO.: SC16-1379

Page Two

Judgment is entered for The Florida Bar, 651 East Jefferson Street,
Tallahassee, Florida 32399-2300, for recovery of costs from Thomas Harold
Ostrander in the amount of \$1,250.00, for which sum let execution issue.

Not final until time expires to file motion for rehearing, and if filed,
determined. The filing of a motion for rehearing shall not alter the effective date
of this suspension.

LABARGA, C.J., and PARIENTE, LEWIS, QUINCE, CANADY, POLSTON,
and PERRY, JJ., concur.

A True Copy

Test:



John A. Tomasino
Clerk, Supreme Court



Id

Served:

JULIE MARIE HEFFINGTON
ADRON HAYS WALKER
ADRIA E. QUINTELA

IN THE SUPREME COURT OF FLORIDA
CASE NO. SC 22-700
LOWER COURT CASE NO. 081992CF0004510001XX

JACK R. SLINEY

Appellant,

v.

STATE OF FLORIDA

Appellee.

APPENDIX B

Inmate Disciplinary Record



USER ID: I213COA PAGE: 01 +
INMATE RECORD AS OF 07/29/2022 11:51
NAME: SLINEY, JACK R. DOC NO: 0 905288 STATUS: ACTIVE

DOC.NO. COMMITTED NAME AGE MAX: DEATH PRD: NO CREDITS
0 905288 SLINEY, JACK R. 21 TRD: DEATH MPP:
NID: PPRD:
COND.REL.UNPROCES ARS INELIGIBLE
BIRTH: 12/23/1972 OHIO
RACE: WHITE SEX: MALE
YO: NO SP ED: NO INFO
CUST: MAXIMUM 02/21/1994 IM: 5 HO: 5
BAS: INZ SRI: NSR

**** WARNINGS ****

CURRENT FACILITY: 213 UNION C.I. RECEIVED FROM: CHARLOTTE
DATE RECEIVED: 06/12/2014 REASON: W/O NEW SENT.
PENDING TRANSFER: REASON:

OVERALL SENT: DEATH LAST GT AWARD: DAYS ON 06/30/2022
INTERNAL ASSIGN: P3117S S29-DEATH ROW LAST DR:
SS#: FBI NO: FDLE:

INMATE DISCIPLINARY ACTIONS AS OF 07/29/2022 11:51

--- PRIOR INCARCERATION ---
D/R DATE & TYPE DAYS DR VIOLATION CODE & NAME LOCATION D/R STATUS

*** NO DISCIPLINARY ACTIONS ***

IN THE SUPREME COURT OF FLORIDA
CASE NO. SC 22-700
LOWER COURT CASE NO. 081992CF0004510001XX

JACK R. SLINEY

Appellant,

v.

STATE OF FLORIDA

Appellee.

ATTACHMENT C- SECTION 1

*Commonwealth v. Watt (and nine companion cases,
including Mattis), 484 Mass. 742, 146 N.E.3d 414 (2020).*

COMMONWEALTH

v.

NYASANI WATT (and nine companion cases^[1]).

SJC-11693.

Supreme Judicial Court of Massachusetts, Suffolk.

December 10, 2019.

June 4, 2020.

Elizabeth Doherty for Nyasani Watt.

Ruth Greenberg for Sheldon Mattis.

Dara Z. Kesselheim, Assistant District Attorney, for the Commonwealth.

Thomas H. Townsend & Jeanne M. Kempthorne, Assistant District Attorneys, for district attorney for the northwestern district & another, amici curiae, submitted a brief.

Ryan M. Schiff, for Gary Johnson & another, amici curiae, submitted a brief.

Present: GANTS, C.J., GAZIANO, LOWY, BUDD, & CYPHER, JJ.

Homicide. Armed Assault with Intent to Murder. Assault and Battery by Means of a Dangerous Weapon. Firearms. Evidence, Expert opinion, Prior violent conduct, Relevancy and materiality, Firearm. Constitutional Law, Sentence. Jury and Jurors. Practice, Criminal, Capital case, Jury and jurors, Deliberation of jury, Assistance of counsel.

At a murder trial involving two defendants, although it was error to admit testimony from a police officer as an expert on gang activity in the area of the shooting, given that the testimony was not based on facts within the witness's direct personal knowledge, facts already introduced in evidence, or unadmitted but independently admissible evidence, the error was not prejudicial, where the admitted expert testimony regarding the defendants' connection to a particular gang and that gang's feud with a rival gang was cumulative of similar, admissible testimony [745-748]; further, the judge did not abuse her discretion in admitting evidence of a prior shooting in the same area, where the evidence was relevant to show a motive for the shooting at issue, which otherwise appeared senseless [748-749]; moreover, evidence that the defendants possessed multiple firearms was properly admitted to demonstrate that the defendants had access to a type of firearm used to kill one victim and injure another, and evidence that one defendant had on his person at the time of his arrest a firearm that could not have been used in the shooting was overshadowed by and insignificant compared to the evidence of access to the type of firearm used in the shooting [749-750]; finally, although evidence from one defendant's cellular telephone should not have been admitted in evidence, the introduction of the evidence was harmless beyond a reasonable doubt, given that it was cumulative of other evidence presented and posed little risk of prejudice to the defendants in light of the strength of the Commonwealth's case [750-751].

At a murder trial involving two defendants, no substantial likelihood of a miscarriage of justice arose from the absence of a jury instruction on involuntary manslaughter, where the evidence showed that one defendant intentionally shot multiple times at the two victims, and where, although the other defendant might have been entitled to such an instruction had he requested one, the evidence did not support his contention that he merely acted recklessly. [751-753]

743 At a murder trial involving two defendants, the sentence that was imposed on one defendant who was seventeen years old at the time of the killing (life in *743 prison with the possibility of parole after fifteen years) was not unconstitutional, and that defendant was not entitled to an individualized sentencing hearing in which his juvenile status would be considered; however, this court remanded the matter for development of the record with regard to research on brain development after the age of seventeen to inform a determination whether the sentence imposed on the other defendant, who had turned eighteen years old approximately eight months before the shooting (life in prison without the possibility of parole), was constitutional. [753-756]

A Superior Court judge did not err in denying the criminal defendants' motions for a new trial based on a tainted jury, where the defendants failed to meet their burden of demonstrating that the observation by two jurors of nonverbal interactions between the defendants and the victim in the court room constituted exposure to extraneous information or that the jurors' interpretation of those gestures had anything to do with racial bias [757-761]; further, the failure of counsel to investigate a witness's physical ability to overhear one of the defendants did not amount to ineffective assistance, given that the potential usefulness of such an investigation was entirely speculative and that, in any event, the result of such an investigation would have been limited in light of the vigorous impeachment by counsel of the witness's credibility [761-764].

BUDD, J.

A jury in the Superior Court convicted the defendants, Nyasani Watt and Sheldon Mattis, of murder in the first degree, aggravated assault and battery by means of a dangerous weapon, and related offenses,^[2] in connection with a shooting that killed sixteen year old Jaivon Blake and injured fourteen year old Kimoni Elliott. The defendants appeal from their convictions and *744 from the denial of their motions for a new trial. In addition, they ask us to exercise our authority under G. L. c. 278, § 33E, to order a new trial.

After full consideration of the record and the defendants' arguments, we affirm the defendants' convictions and decline to grant either defendant extraordinary relief pursuant to G. L. c. 278, § 33E. However, for the reasons discussed *infra*, we remand the issue of the constitutionality of Mattis's sentencing for an evidentiary hearing.^[3]

Background. We summarize the facts the jury could have found, reserving certain details for discussion. On September 25, 2011, Elliott was visiting Blake at Blake's home near the intersection of Geneva Avenue and Everton Street in the Dorchester section of Boston. In the afternoon, Elliott walked from Blake's home to a nearby convenience store, located at the intersection of Geneva Avenue and Levant Street, to purchase rolling papers for marijuana cigarettes. He waited outside the store looking for someone old enough to make the purchase. An individual identified as Mattis approached on a bicycle and agreed to buy the rolling papers for Elliot. After doing so, Mattis asked Elliott where he was from; Elliott replied, "Everton." The two parted ways, and Elliott met Blake in a nearby parking lot.

As Elliott and Blake began to walk toward Blake's home, they were shot from behind by a male riding a bicycle. Witnesses described the shooter as wearing jeans, a red shirt, and a baseball cap; clothes fitting these descriptions were later seized from the defendants' houses, and two witnesses described Watt as wearing similar clothing on the day of the shooting. Blake suffered a single gunshot wound to the torso and died hours later at a hospital; Elliott survived gunshot wounds to his neck and right arm. Hours later, Watt had changed his clothes, and a friend helped him to take the braids out of his hair so that he could "change his look." Later that evening, he, Mattis, and others were "celebrating because [of] something [Watt] did."

Jeremiah Rodriguez, a key witness for the Commonwealth, testified that he, Watt, and Mattis were playing football on Levant Street in front of Rodriguez's house when they watched Elliott walk to the convenience store. After Mattis went to the store to interact with Elliott, he returned to the area outside Rodriguez's house and said to Watt and Rodriguez, "[B]e easy, because that's them kids." A few minutes later, Rodriguez observed Mattis meet with Watt at the corner of Levant Street and Geneva Avenue, hand Watt a gun, and pat him on the back. Rodriguez also testified that he heard Mattis tell Watt, "[T]hat's them walking up there right now" and that he "needed to go handle that." Watt then rode away on the bicycle. At trial, Rodriguez identified Watt in a surveillance video recording depicting him riding toward the scene of the shooting shortly before it occurred and wearing clothes generally matching eyewitness accounts of the shooter's appearance. Soon thereafter, while on his back porch, Rodriguez heard gunshots.

At trial, the Commonwealth's theory was that Watt and Mattis jointly planned and executed the shooting as part of an escalating gang feud. The defendants' primary theories were misidentification of Watt as the shooter and the unreliability of Rodriguez's testimony establishing Mattis's participation.

The jury convicted both defendants of murder in the first degree on theories of deliberate premeditation and extreme atrocity or cruelty. Watt, who was seventeen at the time of the shooting, received a life sentence with the possibility of parole after fifteen years. Mattis, who was eight months older than Watt, and eighteen at the time, was sentenced to life imprisonment without the possibility of parole.

Discussion. 1. *Direct appeal.* On direct appeal the defendants raise various evidentiary issues, assert error with respect to the jury instructions, and challenge the constitutionality of their sentences.

a. *Evidentiary issues.* i. *Gang expert testimony.* To demonstrate that the motive for the shooting was gang-related, the Commonwealth presented the testimony of Detective Anthony Serra, who testified as both an expert and fact witness. Serra testified about gang activity in the Dorchester area surrounding the scene of the shooting, and specifically about the "Flatline" gang, based on Levant Street, and the Geneva-Everton gang, based in the neighborhood where Blake lived. He further testified that both defendants were associated with Flatline. The defendants were unsuccessful in moving in limine to exclude the testimony and objected to it at trial. On appeal, they argue that there was an inadequate basis for Serra to opine on the defendants' alleged membership in the Flatline gang and on the alleged ongoing feud between Flatline

and Geneva-Everton.^[4] We agree that the testimony should not have been admitted; however, we conclude that the error was not prejudicial. See Commonwealth v. Sullivan, 478 Mass. 369, 375-376 (2017) (preserved issues reviewed for prejudicial error).

Expert testimony must be based on "facts within the witness's direct personal knowledge, facts already introduced in evidence, or unadmitted but independently admissible evidence" (quotations and citation omitted). Commonwealth v. Wardsworth, 482 Mass. 454, 466 (2019). See Mass. G. Evid. § 703 (2020). There is no indication that the basis for Serra's opinion fell into any of the above categories.

First, Serra indicated that his opinion that the defendants were members of the Flatline gang was based on the "collective knowledge" of other officers in the Boston police department. Because it is impossible to ascertain from the record what portion, if any, of such "collective knowledge" was based on personal observations that would have been independently admissible, Serra's opinion regarding the defendants' alleged gang membership improperly was admitted. See Wardsworth, 482 Mass. at 467-468 ("That other officers had formed the opinion that the defendant fit the criteria [for entry in the gang database] does not constitute proper foundation for [the expert's] opinion; the gang database entry did not provide [the expert] with underlying facts or data to which he could apply his own expertise"); Commonwealth v. Nardi, 452 Mass. 379, 392 (2008). ("It is settled that an expert witness may not, under the guise of stating the reasons for his opinion, testify to matters of hearsay ..." [quotation and citation omitted]).

747 Serra's testimony regarding the alleged feud between the two groups similarly was inadmissible. At trial, the detective explained that he first became aware of the feud when he heard about the fatal shooting of a resident of Geneva Avenue on New *747 Year's Day in 2010. Although he had personal experience with individuals from Levant Street who were arrested in connection with the shooting, he had no direct involvement with that incident. He testified that his knowledge of the feud between Flatline and Geneva-Everton came from discussions with other investigators as well as residents in the area who provided tips and information. Again, because there was no indication whether this information, which formed the basis of his opinion, would have been independently admissible at trial, his opinion on this topic improperly was admitted. See Wardsworth, 482 Mass. at 466-471.

Nevertheless, there was little, if any, adverse effect from this testimony. Multiple civilian witnesses who lived on Levant Street and knew both defendants testified that the defendants were affiliated with the Flatline gang. A friend of the defendants testified that Watt told her their group was called Flatline. Another testified that Watt told him that "they" were called Flatline and that they "owned" Levant Street. Two other of the defendants' friends who testified recounted similar conversations with the defendants. The number of witnesses testifying to this fact, combined with the witnesses' close friendship with the defendants, provided a strong case for the Commonwealth that the defendants were in fact members of the Flatline gang. Several of the same witnesses also testified regarding the feud between Flatline and Geneva-Everton. For example, one witness testified that both defendants told her that they had "problems with Geneva." Another witness stated that Mattis told him that he had weapons because they had "drama," and "an issue going on now," which included Mattis previously having been beaten by members of a rival gang.

As the erroneously admitted expert testimony regarding the defendants' connection to Flatline and the feud between Flatline and Geneva-Everton was cumulative of similar admissible testimony, the errors were harmless.^[5] See Commonwealth v. Diaz, 426 Mass. 548, 551-552 (1998) (inadmissible hearsay statement regarding defendant's state of mind cumulative of other properly admitted statements and therefore not prejudicial); Commonwealth v. Perez, 411 Mass. 249, 260-261 (1991) (erroneous admission of defendant's inculpatory statements harmless where *748 cumulative of properly admitted evidence).

748 ii. *Evidence of prior shooting.* Over the defendants' objection, the Commonwealth introduced evidence of a shooting on Levant Street that took place eleven days prior to the shooting of the victims. The Commonwealth offered the evidence in support of its theory that the victims were shot in retaliation for the earlier incident. On appeal, the defendants contend that admitting the evidence of the Levant Street shooting was error because the Commonwealth did not establish a connection between the two shootings. We disagree.

We begin by noting that evidence of motive need not be conclusive to be admissible. Commonwealth v. Ashley, 427 Mass. 620, 624-625 (1998). Rather, it need only provide a link in the chain of proof. Commonwealth v. Gomes, 475 Mass. 775, 784 (2016). The evidence of the Levant Street shooting was relevant to show a motive for a shooting that otherwise appeared senseless. See Commonwealth v. Walker, 460 Mass. 590, 613 (2011). The evidence connecting the two shootings included witness testimony that the defendants were members of the Flatline gang; that there was an ongoing conflict between the Flatline and Geneva-Everton gangs; that the location of the shooting was the headquarters of the Flatline gang; and that Elliot told Mattis that he lived on Everton Street just prior to the shooting. Finally, the two shootings occurred just eleven days apart.^[6]

We further note that, because neither defendant was alleged to have been the shooter at the earlier shooting, there was no danger that the jury improperly would use the earlier shooting as propensity or "bad act" evidence. Compare Commonwealth v. Butler, 445 Mass. 568, 573-576 (2005). Thus, although the evidence of the shooting was detrimental to the defendants' legal strategy, it was not unfairly prejudicial. See Commonwealth v. Facella, 478 Mass. 393, 400-409 (2017). See also Commonwealth v. Wall, 469 Mass. 652, 661 (2014) ("Relevant evidence is admissible as long as the probative value of the evidence is not substantially out-weighed *749 by the danger of unfair prejudice"); Commonwealth v. Keo, 467 Mass. 25, 32 (2014), quoting Commonwealth v. Smiley, 431 Mass. 477, 484 (2000). The judge did not abuse her discretion in admitting evidence of the prior shooting.

iii. *Firearm evidence.* Rodriguez testified that in the months preceding the shooting, both defendants possessed multiple firearms, including a "Glock" and a "40"; another witness testified that she saw Watt with a black gun during that same time period. The jury also learned that Watt was in possession of a .38 caliber firearm when he was arrested. On appeal, the defendants contend that the judge erred in admitting this evidence. Because the defendants failed to preserve this issue, we review to determine if admission of this evidence was error and, if so, whether it created a substantial likelihood of a miscarriage of justice.^[7]

It is true that evidence of other "bad acts," including the possession of firearms, is generally inadmissible to show one's propensity to commit a crime. Commonwealth v. Vazquez, 478 Mass. 443, 449 (2017). See Commonwealth v. McGee, 467 Mass. 141, 156 (2014). However, evidence of other instances of firearm possession is nevertheless admissible to demonstrate, for example, preparation or opportunity as long as the probative value of the evidence is not outweighed by the risk of unfair prejudice to the defendant. Vazquez, supra. See Mass. G. Evid. § 404(b)(2) (2020).

The Commonwealth's ballistics expert testified that the weapon used in the shooting was a .40 caliber firearm; further, a percipient witness testified to seeing the gunman with a black firearm. Thus, testimony that the defendants previously had been seen with a "Glock," a "40," and a black firearm was properly admitted to demonstrate that the defendants had access to the type of firearm that was used to kill Blake and injure Elliot.^[8] See Commonwealth v. Barbosa, 463 Mass. 116, 122 (2012) ("A weapon that could have been used in the course of a crime is admissible, in the judge's discretion, even without direct proof that the particular *750 weapon was in fact used in the commission of the crime").

However, the fact that Watt had a .38 caliber firearm on his person at the time of his arrest does not offer the same probative value, because the evidence established that the victims were shot with .40 caliber bullets. "Where a weapon definitively could not have been used in the commission of the crime, we have generally cautioned against admission of evidence related to it." Barbosa, 463 Mass. at 122. Although this evidence demonstrated Watt's familiarity with and access to firearms, by and large we "have not ... viewed

the tenuous relevancy of evidence of a person's general acquaintance with weapons as outweighing the likelihood that such evidence will have an impact on the jury unfair to a defendant." Commonwealth v. Toro, 395 Mass. 354, 358 (1985). The admission of the testimony that Watt was in possession of a .38 caliber firearm at the time of his arrest was therefore error. However, the error was overshadowed by and insignificant compared to the evidence that Watt had access to the type of firearm that was used in the crime. Compare Barbosa, *supra* at 127; Toro, *supra* at 358-359. The evidence of Watt's possession of the .38 firearm therefore did not create a substantial likelihood of a miscarriage of justice.

iv. *Cellular telephone evidence*. At trial, the Commonwealth presented evidence of the contents of Watt's cellular telephone (cell phone), including contact information, text messages, and incoming and outgoing cell phone calls. The defendants argue that this evidence was admitted in error and warrants reversal. The Commonwealth concedes that the cell phone evidence should have been suppressed, but argues that the error was harmless. We agree with the Commonwealth.

As an initial matter, we note that in Commonwealth v. White, 475 Mass. 583, 588-590 (2016), this court held that a warrant application must sufficiently demonstrate a nexus between the crime alleged and the article to be searched. Here, because the warrant application did not sufficiently demonstrate this nexus, the evidence obtained from Watt's cell phone should not have been admitted.^[9] Because Watt moved to suppress the contents of his cell phone, the admission of this evidence is preserved constitutional error and the burden is on the Commonwealth to show that the introduction of the evidence was harmless beyond a reasonable doubt. See Commonwealth v. Charros, 443 Mass. 752, 765, cert. denied, 546 U.S. 870 (2005).

In evaluating whether introduction of inadmissible evidence was harmless beyond a reasonable doubt, "we consider the importance of the evidence in the prosecution's case; the relationship between the evidence and the premise of the defense; who introduced the issue at trial; the frequency of the reference; whether the erroneously admitted evidence was merely cumulative of properly admitted evidence; the availability or effect of curative instructions; and the weight or quantum of evidence of guilt" (quotation and citation omitted). Commonwealth v. Monroe, 472 Mass. 461, 472-473 (2015). Here, the cell phone evidence was cumulative of other evidence presented and posed little risk of prejudice to the defendants in light of the strength of the Commonwealth's case.

First, the contact list extracted from the cell phone included "Yosimidy," the nickname for Mattis, as well as "RG" and "Tmack," both of whom had been identified as being associated with the Flatline gang. Although this evidence was relevant to show Watt's connection with Mattis and other members of Flatline, multiple witnesses testified regarding the close relationship between Watt and Mattis, as well as Watt's association with Flatline. Thus, the information from the contact list was cumulative. See Commonwealth v. Hobbs, 482 Mass. 538, 550-551 & n.14 (2019) (improperly admitted cell site location information evidence was harmless because it was not incriminating and there was ample other evidence of defendant's guilt); Perez, 411 Mass. at 260-261 (erroneous admission of defendant's inculpatory statements harmless where merely cumulative of properly admitted evidence).

The Commonwealth also introduced evidence of a missed call from Watt to Mattis, followed by a text message to a friend stating, "Tell shedon [sic] to call me a.s.a.p its important please." The Commonwealth argued in closing that the missed call and text message were evidence of the defendants' joint venture, close relationship, and consciousness of guilt. Although the admission of this evidence was error, there was no prejudice stemming from it given that there was nothing inherently incriminating about it. See Commonwealth v. Broom, 474 Mass. 486, 497-498 (2016).

b. *Instruction on involuntary manslaughter.* The defendants argue that the judge erred by failing to provide an instruction on ^{*752} involuntary manslaughter. They contend that, had the jury been given the option to consider involuntary manslaughter, they would have been entitled to find either or both of the defendants guilty under that theory instead. Because neither defendant requested such an instruction, we consider whether the absence of the instruction resulted in a substantial likelihood of a miscarriage of justice. We conclude it did not.

"Involuntary manslaughter is an unlawful homicide unintentionally caused by an act which constitutes such a disregard of probable harmful consequences to another as to amount to wanton or reckless conduct" (quotation and citation omitted). *Commonwealth v. Carrillo*, 483 Mass. 269, 275 (2019). "Wanton or reckless conduct is conduct that creates a high degree of likelihood that substantial harm will result to another." *Id.*, quoting Model Jury Instructions on Homicide 88 (2018) (involuntary manslaughter). See *Commonwealth v. Welansky*, 316 Mass. 383, 399 (1944). Based on the evidence presented to the jury, Watt, the apparent shooter, intentionally shot multiple times at the two victims. "Firing a [firearm] multiple times, directed toward specific individuals, provides a sufficient basis to conclude that the defendant understood the likely deadly consequences of his actions." *Commonwealth v. Pina*, 481 Mass. 413, 424 (2019), quoting *Commonwealth v. Braley*, 449 Mass. 316, 332 (2007). On the facts of this case, no reasonable jury could conclude that Watt was the shooter but that his conduct was simply wanton or reckless.

Mattis, the coventurer, argues that he was entitled to an instruction on involuntary manslaughter because the jury could have concluded that he merely "recklessly" gave a firearm to Watt for self-protection, or to frighten the teen he encountered, but did not share Watt's intent to kill. See *Commonwealth v. Rakes*, 478 Mass. 22, 32 (2017). In support of this contention, he cites *Commonwealth v. Tavares*, 471 Mass. 430, 441 (2015), where we emphasized that it is possible for two or more defendants to participate knowingly in a criminal act with different mental states with respect to that act. We conclude that Mattis might have been entitled to receive an involuntary manslaughter instruction had he requested it, but that it was not error for the judge to fail to provide such an instruction where it was not requested and, in view of the evidence presented, the absence of the instruction did not result in a substantial likelihood of a miscarriage of justice.

Just prior to the shooting, Mattis provided a firearm to Watt along ^{*753} with the instruction, "go handle that." [10] That evening, after the shooting, the two defendants celebrated together. Given Mattis's conduct both before and after the shooting, it is extremely unlikely that a reasonable jury would have found that Mattis handed Watt the firearm solely for self-protection or to frighten the teen; if he had, one would not expect him to be celebrating after the shooting. See *Commonwealth v. Dyou*, 436 Mass. 719, 731-732 (2002) (defendant, whose coventurer shot into occupied motor vehicle, not entitled to involuntary manslaughter instruction as evidence "pointed singularly to an intent to kill," including bringing gun to victim's apartment complex and gloating immediately after murder).

We also note that the defendants mounted a third-party culprit defense. Because the defendants' theory of the case was that they were not involved in the shooting at all, neither defendant ever argued that the evidence only supported the finding that they now claim the jury could have found. And making such an argument would have been inconsistent with the focus of this defense.

For all these reasons, we conclude that the judge did not err in failing to provide an involuntary manslaughter instruction where it was not requested, and that its absence did not create a substantial likelihood of a miscarriage of justice.

c. *Constitutionality of sentences*. Both Watt and Mattis appeal from their mandatory sentences, contending that, due to their ages, seventeen and eighteen respectively, the sentences violate art. 26 of the Massachusetts Declaration of Rights and the Eighth Amendment to the United States Constitution.

i. *Watt*. In *Diatchenko v. District Attorney for the Suffolk Dist.*, 466 Mass. 655 (2013) (*Diatchenko I*), S.C., 471 Mass. 12 (2015), we held that a sentence of life without the possibility of parole pursuant to G. L. c. 265, § 2, is unconstitutional as applied to juveniles, that is, those under the age of eighteen. *Id.* at 658, 660. See G. L. c. 265, § 2, as amended through St. 1982, c. 554, § 3. In effect, our holding reduced the mandatory life sentence for juveniles convicted of murder in the first degree to the next-most severe sentence under the sentencing statute, a mandatory sentence of life with the possibility of parole after fifteen years, *754 which was then the sentence for murder in the second degree.^[11] See *Diatchenko I*, *supra* at 672-673.

Watt, who was seventeen at the time of the killing, was sentenced to life in prison with the possibility of parole after fifteen years. He essentially maintains that a mandatory life sentence for juvenile homicide offenders, even with the possibility of parole, is unconstitutional and that instead he is entitled to an individualized sentencing hearing in which his juvenile status is considered.^[12]

We have considered and rejected identical claims in the past. In *Commonwealth v. Okoro*, 471 Mass. 51 (2015), we rejected the defendant's claim that a mandatory sentence of imprisonment for life with parole eligibility after fifteen years is unconstitutional for a juvenile offender convicted of murder in the second degree. *Id.* at 55-58. Although we left open the question whether ongoing scientific and legal developments might cause us to reconsider our holding, see *id.* at 58, last year in *Commonwealth v. Lugo*, 482 Mass. 94 (2019), we reaffirmed *Okoro*'s holding that "a mandatory life sentence with parole eligibility after fifteen years for a juvenile homicide offender ... is constitutional." *Id.* at 100, citing *Okoro*, *supra* at 60. At that time, we were "unpersuaded that the law and science [had been] firmly established to warrant further consideration." *Lugo*, *supra*. As Watt advances no further reasons to revisit our recent holding, we conclude that his sentence is constitutional.

ii. *Mattis*. Mattis, who turned eighteen years old approximately eight months before the shooting, received a mandatory sentence of life without the possibility of parole pursuant to G. L. c. 265, *755 § 2. He contends that such a sentence is unconstitutional for any individual under the age of twenty-two. We previously have acknowledged that, because juveniles have "diminished culpability and greater prospects for reform, ... they do not deserve the most severe punishments" (quotations omitted). *Diatchenko I*, 466 Mass. at 660, citing *Miller v. Alabama*, 567 U.S. 460, 471 (2012).^[13] We therefore concluded that a term of life without the possibility of parole for an individual under the age of eighteen violates the prohibition against cruel or unusual punishment contained in art. 26. *Diatchenko I*, *supra* at 671.

Mattis points to research that shows that the same developmental traits that exist for those under the age of eighteen apply to those between eighteen and twenty-two years old. Thus, he argues, we should expand our holding in *Diatchenko I* so that, like those under the age of eighteen, homicide offenders between the ages of eighteen and twenty-two are eligible for parole after fifteen years.^[14]

In the six years since we decided *Diatchenko I*, we repeatedly have declined to extend its holding to individuals over eighteen years of age. See *Commonwealth v. Garcia*, 482 Mass. 408, 413 (2019); *Commonwealth v. Colton*, 477 Mass. 1, 18-19 (2017); *Commonwealth v. Chukwuezi*, 475 Mass. 597, 610 (2016). However, we also repeatedly have acknowledged that "researchers continue to study the age range at which most individuals reach adult neurobiological maturity, with evidence that ... [certain] brain functions

are not likely to be fully matured until around age twenty-two," and that such "research may relate to the constitutionality of sentences of life without parole for individuals other than juveniles." Garcia, supra at 412-413, quoting Okoro, 471 Mass. at 60 n.14. See Lugo, 482 Mass. at 100.

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As research in this area has progressed since *Diatchenko I* was decided, it likely is time for us to revisit the boundary between *756 defendants who are seventeen years old and thus shielded from the most severe sentence of life without the possibility of parole, and those who are eighteen years old and therefore exposed to it. We can only do so, however, on an updated record reflecting the latest advances in scientific research on adolescent brain development and its impact on behavior. See Diatchenko I, 466 Mass. at 669-670.

Although we do not fault defense counsel, the record here is insufficient. In Mattis's first motion for a new trial, he challenged the constitutionality of his sentence and requested an evidentiary hearing on the question. He requested funds to retain an expert on brain development in teens and young adults.^[15] At the hearing on Mattis's first motion for a new trial, the Commonwealth opposed the request for evidence to be taken on the ground that the "already known science" would permit the defendant to make his argument.^[16] After the hearing, the judge denied the requests for an evidentiary hearing and expert funds. Mattis again challenged the constitutionality of his sentence in his renewed motion for a new trial, this time submitting expert testimony and a related trial court order from a Kentucky case regarding the imposition of the death penalty on defendants younger than twenty-one years old. The judge ultimately denied Mattis's renewed motion for a new trial.

Because Mattis was prepared to present additional evidence on this issue, it would be manifestly unjust to reject Mattis's constitutional argument based on the insufficiency of the record. Compare Commonwealth v. Epps, 474 Mass. 743, 767 (2016) ("our touchstone must be to do justice," including where "a defendant was deprived of a substantial defense ... [due to] the inability to make use of relevant new research findings"). We therefore take this opportunity to remand this case to the Superior Court for development of the record with regard to research on brain development after the age of seventeen. This will allow us to come to an informed decision as to the constitutionality of sentencing young adults to life without the possibility of parole.^[17]

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*757 2. *Motions for a new trial.* The defendants also appeal from the denial of their motions for a new trial based on juror issues discovered posttrial as well as ineffective assistance of counsel.

a. *Jury contamination.* The defendants argue that the judge improperly denied their motions for a new trial based on a tainted jury. We conclude that there was no significant error of law or abuse of discretion in declining to grant the defendants a new trial on this basis. See Commonwealth v. Grace, 397 Mass. 303, 307 (1986), and cases cited.

After trial, Mattis's counsel became aware that a juror reported seeing Mattis "throwing gang signs" at the surviving victim during the victim's testimony.^[18] Thereafter, in response to a posttrial motion, the judge sent letters to each of the twelve deliberating jurors asking whether they had observed any hand gestures during the trial. The judge conducted a voir dire of the two jurors who indicated that they observed the hand gestures. Based on the jurors' testimony, the judge found that Mattis made gestures that both jurors believed to be "gang signs" directed at the victim,^[19] and that there was "tension between both defendants and the victim in the form of sustained mutual glaring." The judge further found that there was "at least some discussion" of the gestures during jury deliberations "by at least these two jurors."^[20]

Based on the voir dire of the two jurors, the judge determined that the jury were not exposed to an extraneous influence, and that *758 there was no showing that any juror harbored racial animus. She therefore denied the defendants' requests for a further inquiry of all jurors and denied their motions for a new trial. We conclude that the judge neither abused her discretion nor erred in her handling of the posttrial claims of jury contamination.^[21]

i. *Extraneous influence*. The defendants contend on appeal that the "independent prior knowledge" upon which two jurors relied to conclude that the gestures they observed were gang-related was extraneous information that tainted the verdicts.^[22] See note 21, *supra*. To succeed on such a claim, the defendants were required first to demonstrate that the jury were actually exposed to an extraneous matter.^[23] *Commonwealth v. Fidler*, 377 Mass. 192, 201 (1979). Here, after an evidentiary hearing, the judge concluded that neither the gestures nor any ensuing discussion about them constituted extraneous influences. This determination was not an abuse of discretion. See *Commonwealth v. Bright*, 463 Mass. 421, 441-443 (2012) (determination regarding existence of extraneous influence reviewed under abuse of discretion standard).

The defendants' argument conflates extraneous information with *759 the knowledge and experience that individuals bring with them when they sit as jurors. "An extraneous matter is one that involves information not part of the evidence at trial `and raises a serious question of possible prejudice.'" *Commonwealth v. Guisti*, 434 Mass. 245, 251 (2001), quoting *Commonwealth v. Kater*, 432 Mass. 404, 414 (2000). Examples include unauthorized views of the crime scene, improper communications with third parties, and consideration of documents or events not introduced in evidence. See *Fidler*, 377 Mass. at 197 (collecting cases). See also *Commonwealth v. Kincaid*, 444 Mass. 381, 387 (2005) (jurors improperly considered fact of defendant's flight, which was not in evidence); *Commonwealth v. Cuffie*, 414 Mass. 632, 635 (1993) (unauthorized visit to crime scene by juror). Thus, extraneous information in this context refers to "specific facts not mentioned at trial concerning one of the parties or the matter in litigation." *Fidler*, *supra* at 200.

Here, the two jurors made observations of nonverbal interactions between the defendants and the victim in the court room during the victim's testimony.^[24] Each came to the same conclusion regarding the gestures they saw. Whether the jurors were mistaken about the nature of the gestures will likely remain a mystery. However, both applied their life experiences to understand what they saw, as they were instructed to do. See *Commonwealth v. Salazar*, 481 Mass. 105, 117 (2018) ("It is well established that it is proper to ask a jury to rely on their common sense and life experience in assessing evidence and credibility"); *Commonwealth v. Beal*, 474 Mass. 341, 346 (2016) ("Jurors are permitted to draw reasonable inferences from the evidence based on their common sense and life experience").

To expect jurors to perform their duties without the benefit of their life experiences is unrealistic and undesirable. "We cannot expunge from jury deliberations the subjective opinions of jurors, their attitudinal expositions, or their philosophies." *Fidler*, 377 Mass. at 199, quoting *Government of the V.I. v. Gereau*, 523 F.2d 140, 151 (3d Cir. 1975), cert. denied, 424 U.S. 917 (1976). See *Commonwealth v. Williams*, 481 Mass. 443, 451 (2019) ("It would neither be possible nor desirable to select a jury whose members did not bring their life experiences to the court room and to the jury deliberation room").

*760 Because we conclude that no extraneous influences were injected into the jury deliberations, the judge did not err in denying the requests for further inquiry of all jurors and the motions for a new trial on that basis.^[25]

ii. *Alleged racial bias*. The defendants also argue that the judge erred in failing to inquire whether the jurors' interpretation of Mattis's gestures as gang signs (and thus indicia of gang membership) was the product of racial bias. "The presence of even one juror who is not impartial violates a defendant's right to trial by an impartial jury." Commonwealth v. McCowen, 458 Mass. 461, 494 (2010), quoting Commonwealth v. Vann Long, 419 Mass. 798, 802 (1995). However, the defendants failed to make any preliminary showing that racial bias was at play.

To demonstrate that a postverdict juror inquiry regarding possible racial bias is warranted, a defendant bears the burden of proving by a preponderance of the evidence that a racially charged statement was made. McCowen, 458 Mass. at 497. See Pena-Rodriguez v. Colorado, 137 S. Ct. 855, 869 (2017) ("For the inquiry to proceed, there must be a showing that one or more jurors made statements exhibiting overt racial bias that cast serious doubt on the fairness and impartiality of the jury's deliberations and resulting verdict"). "If the defendant meets this burden, the burden then shifts to the Commonwealth to show beyond a reasonable doubt that the defendant was not prejudiced by the jury's exposure to [the] statements." McCowen, *supra*. However, "[i]f the judge finds that the statements were not made, the judge need make no further findings." *Id.* at 495.

Here, although the defendants asked the judge to question each juror regarding potential racial bias, the defendants provided no proof, and in fact did not even allege, that any juror made a statement or otherwise indicated that he or she harbored any *761 racial animus at all. The defendants' hypothesis that the verdicts were tainted by jurors who were not African-American jurors, who interpreted "innocent gestures" by young African-American defendants as gang signs due to implicit or explicit bias, was not borne out by the judge's voir dire of the two jurors or by any other proof.

Because the defendants have failed to meet their initial burden of demonstrating by a preponderance of evidence that the two jurors' observations had anything to do with racial bias, the judge did not err in denying the defendants' request to inquire about such bias. See McCowen, 458 Mass. at 495.

b. *Ineffective assistance of counsel*. The defendants' ineffective assistance of counsel claims center on the testimony of Rodriguez, a key witness for the Commonwealth. At trial, Rodriguez testified that, prior to the shooting, he heard Mattis tell Watt, "[Watt] needed to go handle that," presumably referring to Elliott, whom Mattis had met at the convenience store. This testimony contradicted Rodriguez's earlier statements to police and to the grand jury, where he testified that he did not hear either defendant say anything before the shooting. Based on Rodriguez's testimony, the Commonwealth argued at closing that Mattis was guilty of joint venture murder in the first degree because he specifically targeted the victims and directed Watt to shoot them.

Posttrial, the defendants alleged in a supplemental claim in support of a motion for a new trial that it would have been impossible for Rodriguez to have heard Mattis's statements to Watt from Rodriguez's location, and that trial counsel were ineffective for failing to investigate Rodriguez's surprise testimony.^[26] The defendants supported this contention with an affidavit from a private investigator who averred that neither he nor his assistant could hear anything said by the other when standing in Rodriguez's and the defendants' purported positions. The defendants further requested funds to engage an acoustic expert to prove that Rodriguez's testimony that he heard Mattis speak to Watt was false. The judge denied the request for funds and the motions for a new trial.

On appeal, the defendants renew their claim of ineffective assistance of counsel. To determine whether defense counsel was *762 ineffective in defending a charge of murder in the first degree, we ask whether

there was an error, and if so, whether the error "was likely to have influenced the jury's conclusion." Commonwealth v. Wright, 411 Mass. 678, 682 (1992), S.C., 469 Mass. 447 (2014) (substantial likelihood of miscarriage of justice standard). See G. L. c. 278, § 33E. If the claimed error relates to an attorney's strategic or tactical decision, the decision constitutes error "only if it was manifestly unreasonable when made" (citation omitted). Commonwealth v. Coonan, 428 Mass. 823, 827 (1999).

Without affidavits from trial counsel, we cannot say whether the alleged misstep was a strategic choice. Either way, however, we conclude that the failure to investigate Rodriguez's physical ability to overhear Mattis did not amount to ineffective assistance on the part of either defendant's trial counsel.

First, the defendants assert that, had counsel investigated this claim, they would have been able to prove conclusively that it would not have been possible for Rodriguez to have overheard Mattis. In our view, however, the potential usefulness of an investigation is entirely speculative. The defendants failed to explain how an acoustic expert would have been able to determine with any degree of certainty Rodriguez's physical ability to overhear Mattis, especially where the record does not indicate the conditions under which Rodriguez allegedly heard Mattis's statements, including the volume of Mattis's voice.^[27]

We further note that the jury, who were taken on a view as part of the trial, had the opportunity to observe in person areas connected with the shooting, including the distance between Rodriguez's front porch and the corner of Geneva and Levant Streets. They therefore were able to consider, and determine for themselves, the likelihood that Rodriguez physically was able to overhear the conversation. Commonwealth v. Francis, 390 Mass. 89, 99 (1983) ("When the question whether expert testimony would aid the jury is close, the likelihood of prejudice from the admission or exclusion of that testimony is slight. It is not surprising, therefore, that appellate courts have given great deference to the rulings of trial judges in this area of the law of evidence"). See Commonwealth v. Kingsbury, 378 Mass. 751, 753-754 (1979) (jurors permitted to rely on common sense in determining time of sunset in late October); Commonwealth v. Fitzgerald, 376 Mass. 402, 420 (1978) (jurors able to rely on view and common knowledge to determine that fear might exist in public housing projects).

In any case, even if information helpful to the defendants would have been uncovered had the matter been investigated, its use would have been limited to the impeachment of Rodriguez. Generally, failing to impeach a witness in a particular way does not constitute ineffective assistance. See Commonwealth v. Jenkins, 458 Mass. 791, 805 (2011), citing Commonwealth v. Bart B., 424 Mass. 911, 916 (1997) ("Failure to impeach a witness does not, standing alone, amount to ineffective assistance"). See also Commonwealth v. Hudson, 446 Mass. 709, 715 (2006), quoting Commonwealth v. Fisher, 433 Mass. 340, 357 (2001) ("it is speculative to conclude that a different approach to impeachment would likely have affected the jury's conclusion"). Even on the more favorable standard of review under § 33E, a claim of ineffective assistance based on failure to use particular impeachment methods is difficult to establish. Hudson, *supra*, quoting Fisher, *supra*. Contrast Commonwealth v. Haggerty, 400 Mass. 437, 441-442 (1987) (counsel's failure to investigate whether defendant's conduct proximately caused victim's injuries deprived defendant of only available defense and constituted ineffective assistance of counsel).

Here, in a joint effort,^[28] the defense impeached Rodriguez vigorously with regard to his credibility. On cross-examination, counsel homed in on Rodriguez's inconsistent statements to the grand jury and investigators, and focused sharply on what he claimed to have seen and heard. For example, counsel painstakingly walked Rodriguez through his statements to police and to the grand jury, and then his testimony on direct examination, regarding what Mattis wore the day of the shooting, demonstrating how Rodriguez's story changed for each audience. Counsel also directly questioned Rodriguez about his

changing testimony regarding his ability to overhear Mattis and Watt's conversation, asking him to admit who he had lied to about his changing testimony.

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In addition to calling attention to Rodriguez's varying accounts of his observations of the defendants, trial counsel also effectively explored other avenues of impeachment, including Rodriguez's long history of auditory and visual hallucinations, his motive for ^{*764}testifying for the Commonwealth, and his demonstrated penchant for lying in other circumstances. During closing arguments defense counsel maintained that, given Rodriguez's extreme credibility issues, his testimony inherently was unreliable.

In short, Rodriguez's shortcomings as a witness were thoroughly exposed, especially with regard to his credibility and dishonesty. Even assuming an investigation would have turned up additional impeachment material demonstrating that Rodriguez was untruthful, it would have been cumulative of the ample information trial counsel already had available and used effectively. See, e.g., Commonwealth v. Vaughn, 471 Mass. 398, 414 (2015) (failure to provide cumulative impeachment testimony not ineffective assistance).

Because it is speculative to assume that an investigation would have yielded the result desired by the defendants, and any such result would have been limited to providing additional impeachment material regarding Rodriguez's credibility, an avenue thoroughly explored by the defense, we do not fault trial counsel for not pursuing (or considering) this strategy midtrial.^[29] See Commonwealth v. Satterfield, 373 Mass. 109, 115 (1977) ("in a case where ineffective assistance of counsel is charged, there ought to be some showing that better work might have accomplished something material for the defense"). We therefore conclude that counsel did not err and that, in any case, no substantial likelihood of a miscarriage of justice occurred.

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^{*765} 3. *Review under G. L. c. 278, § 33E.* The defendants contend that, as a result of all the aforementioned issues in combination, justice requires that they be granted a new trial under G. L. c. 278, § 33E. For the reasons explained *supra*, we decline to exercise our extraordinary power to grant such relief pursuant to that statute.

Conclusion. For the foregoing reasons, the defendants' convictions and the orders denying their motions for a new trial and for postconviction relief are affirmed. However, the matter of Mattis's sentence shall be remanded for an evidentiary hearing consistent with this opinion.

So ordered.

[1] Four against Nyasani Watt and five against Sheldon Mattis.

[2] The defendants also were convicted of armed assault with intent to murder, in violation of G. L. c. 265, § 18(b); possession of a firearm without a license, in violation of G. L. c. 269, § 10(a); and carrying a loaded firearm, in violation of G. L. c. 269, § 10(n).

[3] We acknowledge the amicus brief submitted by Gary Johnson and Tyshawn Sanders; and the amicus letter submitted by the district attorney for the northwestern district and the district attorney for the Berkshire district.

[4] The defendants argue that the trial judge abused her discretion in qualifying Detective Anthony Serra as an expert witness. However, they focus their arguments not on his qualifications as a gang expert, but on the basis for his opinion regarding the defendants' gang membership and Flatline's feud with Geneva-Everton. We note that the detective's years of experience with the Boston police department in Dorchester, including on the youth violence strike force — a subdivision of the department focused on youth and gang violence in the city — are sufficient to qualify him to give general expert testimony about gangs in Dorchester. Compare Commonwealth v. Barbosa, 477 Mass. 658, 668 (2017) (detective qualified as expert on gang territory and history in specific section of Boston based on years of experience as officer in that section).

[5] Had the expert witness testified after the civilian witnesses testified to their knowledge of Flatline, the defendants' membership in it, and their feud with Geneva-Everton, the expert's opinion on these issues likely would have been admissible, based on the facts already introduced in evidence. See Mass. G. Evid. § 703(b) (2020).

[6] The defendants contend that there was no evidence that the defendants knew (or believed) that the victims were members of, or affiliated with, the Geneva-Everton gang. However, as mentioned *supra*, Kimoni Elliot testified that he told Mattis that he lived on Everton Street, which is part of the Geneva-Everton gang's territory. Although residing on a particular street is not by itself proof of gang membership, the jury could infer that the defendants believed that Elliot was affiliated with the Geneva-Everton gang because Elliot told Mattis that he lived on Everton Street.

[7] The defendants raised this issue via motions in limine but did not object at trial. The trial preceded *Commonwealth v. Grady*, 474 Mass. 715, 718-719 (2016), in which we held that counsel need not object at trial to preserve their objection to the admission of evidence argued in motions in limine. Because *Grady* does not apply retroactively, we review the defendants' claims to determine whether any error resulted in a substantial likelihood of a miscarriage of justice. See *Commonwealth v. Moore*, 480 Mass. 799, 813 & n.12 (2018). In any case, there was no prejudicial error here.

[8] Glock is a firearm manufacturer that makes a variety of semiautomatic pistols, including several .40 caliber models.

[9] The decision in *Commonwealth v. White*, 475 Mass. 583 (2016), was released after the trial in this case. However, because the defendants' appeals still were pending, the standards set are applied retroactively. See *Commonwealth v. Augustine*, 467 Mass. 230, 257-258 (2014), S.C., 470 Mass. 837 and 472 Mass. 448 (2015).

[10] The defendants argue that their trial counsel were ineffective in failing to challenge Rodriguez on his ability to overhear Mattis speaking to Watt from where Rodriguez was located. As discussed *infra*, we disagree. See part 2.b. However, that issue has no bearing on entitlement to an instruction on involuntary manslaughter.

[11] In 2014, after our decision in *Diatchenko v. District Attorney for the Suffolk Dist.*, 466 Mass. 655 (2013) (*Diatchenko I*), S.C., 471 Mass. 12 (2015), the Legislature amended the sentencing statute to specify increased penalties for juveniles convicted of murder in the first degree. See G. L. c. 279, § 24(b), as amended through St. 2014, c. 189, § 6; *Commonwealth v. Okoro*, 471 Mass. 51, 55 n.4 (2015). Under the new sentencing scheme, a juvenile convicted of murder in the first degree based on extreme atrocity or cruelty is subject to a mandatory sentence of life imprisonment with the possibility of parole after thirty years. See G. L. c. 279, § 24, second par. However, the defendants in this case were sentenced for first-degree murder in 2013, when the sentencing statute, as limited by *Diatchenko I*, mandated a sentence of life with the possibility of parole after fifteen years. See *Diatchenko I*, supra at 673.

[12] Watt's argument on this issue consisted of a statement that he "adopts the arguments of Mr. Lugo and amici," referring to the defendant in *Commonwealth v. Lugo*, 482 Mass. 94 (2019), a case that had yet to be decided when the defendants filed their brief.

[13] In *Miller v. Alabama*, 567 U.S. 460, 470 (2012), the United States Supreme Court held that imposing a mandatory sentence of life in prison without the possibility of parole is a violation of the Eighth Amendment to the United States Constitution as applied to juveniles.

[14] Alternatively, like Watt, Mattis argues for a sentencing hearing in which a judge is able to determine an appropriate sentence based on his particularized circumstances. For the reasons discussed *infra*, we do not have sufficient information to determine whether G. L. c. 265, § 2, is unconstitutional as applied to those eighteen years of age and older; we likewise lack a sufficient basis to determine whether individuals older than eighteen years of age are entitled to an individualized sentencing hearing.

[15] Mattis further requested that the judge hold an evidentiary hearing on the question, and then "report it to the Supreme Judicial Court for resolution."

[16] On appeal, the Commonwealth appears to have switched gears, arguing that the available record is not sufficiently developed to provide a sufficient basis upon which to resolve the question.

[17] Mattis additionally argues on appeal that because he and Watt are only eight months apart in age, the disparity between their sentences violates equal protection guarantees because there is no principled reason to sentence Mattis to life without the possibility of parole and Watt, the shooter, to life with parole eligibility after fifteen years. However, we have held on more than one occasion that "there is a rational basis for making determinations of parole eligibility based on age." *Commonwealth v. Chukwuezi*, 475 Mass. 597, 610 n.21 (2016). See *Commonwealth v. Wiggins*, 477 Mass. 732, 748 (2017). See also *Roper v. Simmons*, 543 U.S. 551, 574 (2005) (age of eighteen "is the point where society draws the line for many purposes between childhood and adulthood").

[18] After trial, the juror mentioned the incident to his neighbor, who was a friend of Mattis's trial counsel. Appellate counsel for Mattis disclosed the juror's comments to the judge.

[19] The first juror questioned was a journalist who had written articles regarding gang-related problems in and around Boston. He stated that he became familiar with gang symbols while working with police assigned to the gang unit. The second juror stated that he recognized the gestures as being similar to those he had seen on television.

[20] When asked whether he spoke with any of the other jurors before or during the deliberations about the gestures, the second juror questioned stated that during deliberations he spoke with another juror who also saw the gestures.

[21] In arguing that the judge failed to investigate thoroughly the impact of the hand gestures and failed to inquire whether racial bias may have affected the outcome of the trial, the defendants contend that the judge erred in light of Commonwealth v. Moore, 474 Mass. 541 (2016). We disagree. In addition to clarifying that, with certain exceptions, Mass. R. Prof. C. 3.5(c), as appearing in 471 Mass. 1428 (2015), allows attorneys to speak to jurors without court authorization, in *Moore*, we made clear that "[n]othing in rule 3.5(c) changes the standards governing requests for and the conduct of postverdict evidentiary hearings." *Moore, supra* at 553. In accordance with those standards, the judge here properly placed the initial burden on the defendants to demonstrate that the jury were exposed to an extraneous influence. See Commonwealth v. Fidler, 377 Mass. 192, 201 (1979). Had the defendants met their burden, the Commonwealth would have been required to demonstrate that the defendants were not prejudiced by the extraneous influence.

[22] The defendants do not press here the argument made in their posttrial motions that the hand gestures themselves were the extraneous information. We have long held that juries are "entitled to observe the demeanor of the defendant[s] during the trial." Commonwealth v. Smith, 387 Mass. 900, 907 (1983). See Commonwealth v. Houghton, 39 Mass. App. Ct. 94, 100 (1995) ("The demeanor of a witness in a courtroom has been considered evidence even if the witness does not take the stand").

[23] Had the defendants met the threshold showing, the burden then would have shifted to the Commonwealth to show beyond a reasonable doubt that the defendants were not prejudiced by the extraneous matter. *Fidler*, 377 Mass. at 201.

[24] As noted by the judge, in addition to the hand gestures made by Mattis, she found that both defendants and the victim engaged in "sustained mutual glaring" during the victim's testimony.

[25] As neither the gestures themselves nor the "independent prior knowledge" that two jurors utilized to make sense of them were extraneous influences, the fact that the gestures were discussed amongst some jurors prior to and during deliberations is not a reason to question the validity of the verdict. "With few exceptions, we adhere to the principle that 'it is essential to the freedom and independence of [jury] deliberations that their discussions in the jury room should be kept secret and inviolable.'" Commonwealth v. Pytou Heang, 458 Mass. 827, 858 (2011), quoting *Fidler*, 377 Mass. at 196. See Commonwealth v. Mahoney, 406 Mass. 843, 856 (1990) ("any disregard by jurors of instructions from the judge not to discuss the case prior to deliberations would not provide a basis to conclude that the verdicts were tainted, in the absence of any concrete facts that the discussions involved matters not in evidence").

[26] Rodriguez testified that the defendants were at the corner of Geneva and Levant Streets and that he was on the front porch of his home on Levant Street when he overheard Mattis. The record is silent as to the distance between those two points.

[27] The affidavits attached to the defendants' posttrial motion for expert funds similarly lacked details regarding the conditions under which the investigator performed his experiment. For this reason, they are of questionable value.

[28] Comparatively speaking, Mattis's counsel conducted a majority of the cross-examination of Rodriguez and devoted a larger share of her closing to raising doubts about his credibility.

[29] Mattis argues that without Rodriguez's testimony that Mattis told Watt that Watt "needed to go handle that," the jury would have had insufficient evidence of joint venture murder in the first degree. This argument is unavailing. Evidence of Mattis's actions prior to the shooting, including his interaction with Elliott, his statements to both Rodriguez and Watt upon his return from his encounter with Elliott, and his handing a firearm to Watt, together with evidence of motive, consciousness of guilt, and "celebrating" after the shooting, provided sufficient evidence of joint venture murder even without Mattis's overheard statements to Watt just prior to the shooting.

Mattis further argues that there was no evidence of intent with respect to the murder victim, Blake, because Blake was not present when Elliott told Mattis that Elliott was from Everton. To the contrary, there was evidence that Mattis was aware of, and intended harm to, both teenagers. When Mattis returned from the convenience store, he told Watt and Rodriguez, "[B]e easy, because that's them kids." He then went on to provide Watt with a firearm and patted Watt on the shoulder prior to the shooting. Even if there was evidence that Mattis had the requisite intent only as to Elliott, "a defendant's intent ... encompasses completely unintended victims (including victims of whom the defendant was unaware) who happen to suffer along with the intended victim." Commonwealth v. Melton, 436 Mass. 291, 297-298 (2002).

IN THE SUPREME COURT OF FLORIDA
CASE NO. SC 22-700
LOWER COURT CASE NO. 081992CF0004510001XX

JACK R. SLINEY

Appellant,

v.

STATE OF FLORIDA

Appellee.

ATTACHMENT C- SECTION 2

Commonwealth v. Watt (and nine companion cases, including Mattis)
Massachusetts Supreme
Judicial, SJC-11693, Court Docket entry, #128, 12/24/2021.

SUPREME JUDICIAL COURT
for the Commonwealth
Case Docket

COMMONWEALTH vs. NYASANI WATT (and nine companion cases)
PARTIALLY SEALED
SJC-11693

CASE HEADER

Case Status	No briefs yet filed	Status Date	06/14/2021
Nature	Murder1 appeal	Entry Date	06/17/2014
Appellant	Defendant	Case Type	Criminal
Brief Status		Brief Due	
Quorum	Gants, C.J., Gaziano, Lowy, Budd, Cypher, JJ.		
Argued Date	12/10/2019	Decision Date	06/04/2020
AC/SJ Number		Citation	484 Mass. 742
DAR/FAR Number		Lower Ct Number	
Lower Court	Suffolk Superior Court	Lower Ct Judge	Christine M. Roach, J.
Route to SJC	Direct Entry: Murder 1		

ADDITIONAL INFORMATION

Transcripts received: 15 volumes. Transcripts dates: 10/30/2013, 10/31/13, 11/6/13, 11/7/13, 11/8/13, 11/12/13, 11/13/13, 11/14/13, 11/15/13, 11/18/13, 11/19/13, 11/20/13, 11/21/13, 11/22/13 and 12/2/13. (Scanned)

Transcripts received: 1 volume. Transcripts date: 3/12/15. (Motion hearing for Sheldon Mattis.) (Scanned)

Transcripts received: No trial transcript on motion for new trial was received.

Transcripts received: 1 volume. Transcripts date: 12/23/16. (Status conference for Nyasani Watt.) (Scanned)

Transcripts received: 1 volume. Transcripts date: 10/22/13. (Scanned)

Transcripts received: 1 volume. Transcript date: 2/2/17. (Scanned)

INVOLVED PARTY

Commonwealth
Plaintiff/Appellee
Red brief & appendix filed
3 Exts, 119 Days

Sheldon Mattis
Defendant/Appellant
On brief of another party
5 Exts, 1856 Days

Nyasani Watt
Defendant/Appellant
Blue br, app & reply br filed
7 Exts, 1641 Days

District Attorney for the Northwestern District
Amicus
Awaiting green brief

District Attorney for the Berkshire District
Amicus
Awaiting green brief

Gary Johnson
Amicus
Awaiting green brief

Tyshawn Sanders
Amicus
Awaiting green brief

District Attorney for the Cape and Islands District
Other interested party

District Attorney for the Eastern District
Other interested party

District Attorney for the Norfolk District
Other interested party

District Attorney for the Plymouth District
Other interested party

ATTORNEY APPEARANCE

[John P. Zanini, A.D.A.](#) - Withdrawn
[Dara Kesselheim, A.D.A.](#)
[Rachael Splaine Rollins, District Attorney](#)
[Cailin M. Campbell, A.D.A.](#)

[Ruth Greenberg, Esquire](#)
[Ryan M. Schiff, Esquire](#)
[Paul R. Rudof, Esquire](#)

[Elizabeth Doherty, Esquire](#)
[Stephen Paul Maidman, Esquire](#) - Withdrawn

[Thomas H. Townsend, A.D.A.](#)

[Jeanne M. Kempthorne, A.D.A.](#)

[Ryan M. Schiff, Esquire](#)

[Ryan M. Schiff, Esquire](#)

[Michael D. O'Keefe, District Attorney](#)
[Elizabeth Anne Sweeney, Esquire](#)

[Jonathan W. Blodgett, District Attorney](#)
[David F. O'Sullivan, Esquire](#)

[Michael W. Morrissey, District Attorney](#)
[Pamela Alford, Esquire](#)

[Timothy J. Cruz, District Attorney](#)
[John P. Zanini, Esquire](#)

DOCUMENTS

[Appellant Watt and Mattis Joint Brief](#) 
[Appellee Commonwealth Brief](#) 
[Appellant Watt and Mattis Joint Reply Brief](#) 

[Amicus DA for Berk and NW Districts Letter In Lieu of Brief](#) 
[Amicus Johnson Brief](#) 

DOCKET ENTRIES

Entry Date	Paper	Entry Text
06/17/2014	#1	Entered. Notice to counsel.
06/20/2014	#2	NOTICE of Appearance filed for Sheldon Mattis by Ruth Greenberg, Esquire.
09/18/2014	#3	MOTION to extend to 12/01/2014 filing of brief of Sheldon Mattis by Ruth Greenberg, Esquire. (ALLOWED to December 1, 2014)
10/14/2014	#4	MOTION to extend to 02/03/2015 filing of brief of Nyasani Watt by Stephen Paul Maidman, Esquire. (ALLOWED)
11/25/2014	#5	MOTION FOR NEW TRIAL, filed for Sheldon Mattis by Ruth Greenberg, Esquire.
11/25/2014	#6	ORDER: Remanded to Suffolk Superior Court.
01/23/2015	#7	STATUS LETTER from Ruth Greenberg, Esquire. See status on file.
02/03/2015	#8	MOTION for a post-verdict evidentiary hearing and for stay of appellate proceedings, filed for Nyasani Watt by Stephen Paul Maidman, Esquire. (Remanded to Superior Court)
02/05/2015	#9	ORDER: Remanded to Suffolk Superior Court.
03/16/2015	#10	STATUS LETTER from Stephen Paul Maidman, Esquire. See status on file.
04/09/2015	#11	STATUS LETTER from Ruth Greenberg, Esquire: See letter on file.
04/16/2015	#12	STATUS LETTER from Stephen Paul Maidman, Esquire. See status on file.
05/20/2015	#13	STATUS LETTER from Stephen Paul Maidman, Esquire. See status on file.
05/29/2015	#14	STATUS LETTER from Ruth Greenberg, Esquire. See status on file.
06/22/2015	#15	STATUS LETTER from Stephen Paul Maidman, Esquire: See letter on file.
06/29/2015	#16	STATUS LETTER from Ruth Greenberg, Esquire. See status on file. (ALLOWED to September 30, 2015 for the reasons stated in the status letter.)
07/22/2015	#17	STATUS LETTER from Stephen Paul Maidman, Esquire. See status on file.
08/19/2015	#18	MOTION FOR STAY OF APPEAL, filed for Nyasani Watt by Stephen Paul Maidman, Esquire.
08/19/2015	#19	MOTION for juror information, filed for Nyasani Watt by Stephen Paul Maidman, Esquire.
08/19/2015	#20	MOTION for funds for a post-verdict investigation of extraneous influences on the jury, filed for Nyasani Watt by Stephen Paul Maidman, Esquire.
08/20/2015	#21	STATUS LETTER from Stephen Paul Maidman, Esquire. See status on file.
08/21/2015	#22	MOTION FOR STAY OF APPEAL, filed for Sheldon Mattis by Ruth Greenberg, Esquire. ** Allowed to November 16, 2015.
09/21/2015	#23	STATUS LETTER from Stephen Paul Maidman, Esquire: See letter on file.
09/28/2015	#24	ORDER: It is Ordered that the defendant's motions for allowance of funds for an investigator and for contact information of jurors hereby is, remanded for disposition to the Suffolk Division, case number SUCR2011-11290,11291, Superior Court Department of the Trial Court. It is further Ordered that the defendant file status reports at thirty (30) day intervals with the Clerk of the Supreme Judicial Court for the Commonwealth. By the Court.
09/28/2015	#25	OPPOSITION to Paper #22 and Request for Briefing Schedule, filed by Commonwealth.
10/21/2015	#26	STATUS LETTER from Stephen Paul Maidman, Esquire: See letter on file.
10/26/2015	#27	MOTION to extend to 12/31/2015 filing of brief of Sheldon Mattis by Ruth Greenberg, Esquire. (ALLOWED to December 31, 2015, for the reasons stated in the motion.)
11/13/2015	#28	APPEAL ON DENIAL OF MOTION for Post Verdict Investigation of Extraneous Influences on the Jury and Motion for Juror Information.
11/16/2015	#29	MOTION to Stay Proceedings, filed for Sheldon Mattis by Ruth Greenberg, Esquire.** Allowed Status due 14 days after a decision in SJC-11582
11/20/2015	#30	STATUS LETTER from Stephen Paul Maidman, Esquire: See letter on file.
12/21/2015	#31	STATUS LETTER from Stephen Paul Maidman, Esquire: See letter on file.
01/21/2016	#32	STATUS LETTER from Stephen Paul Maidman, Esquire: See letter on file.
02/22/2016	#33	STATUS LETTER from Stephen Paul Maidman, Esquire: See letter on file.
03/21/2016	#34	STATUS LETTER from Stephen Paul Maidman, Esquire. See status on file.
04/20/2016	#35	STATUS LETTER from Stephen Paul Maidman, Esquire. See status on file.
05/23/2016	#36	STATUS LETTER from Stephen Paul Maidman, Esquire: See letter on file.
06/22/2016	#37	STATUS LETTER from Stephen Paul Maidman, Esquire: See letter on file.

06/24/2016	#38	MOTION for further stay pending juror interviews, filed for Sheldon Mattis by Ruth Greenberg, Esquire. (The motion for further stay is ALLOWED through October 21, 2016, for the reasons stated in the motion.)
07/21/2016	#39	STATUS LETTER from Stephen Paul Maidman, Esquire: See letter on file.
08/22/2016	#40	STATUS LETTER from Stephen Paul Maidman, Esquire: See letter on file.
09/06/2016	#41	LETTER from Ruth Greenberg, Esquire regarding new mailing address. (Noted)
09/21/2016	#42	STATUS LETTER from Stephen Paul Maidman, Esquire: See letter on file. (Noted. Further status in 60 days.)
11/07/2016	#43	STATUS LETTER from Ruth Greenberg, Esquire: See letter on file.
11/22/2016	#44	STATUS LETTER from Stephen Paul Maidman, Esquire. See status on file.
12/27/2016	#45	STATUS LETTER from Stephen Paul Maidman, Esquire: See letter on file.
01/03/2017	#46	STATUS LETTER from Ruth Greenberg, Esquire: See letter on file.
01/23/2017	#47	STATUS LETTER from Ruth Greenberg, Esquire: See letter on file.
01/25/2017	#48	STATUS LETTER from Stephen Paul Maidman, Esquire: See letter on file.
02/27/2017	#49	STATUS LETTER from Stephen Paul Maidman, Esquire: See letter on file.
03/23/2017	#50	STATUS LETTER from Stephen Paul Maidman, Esquire .
04/04/2017	#51	MOTION FOR NEW TRIAL, filed for Nyasani Watt by Stephen Paul Maidman, Esquire. (Remanded to Suffolk Superior Court)
04/13/2017	#53	STATUS LETTER from Ruth Greenberg, Esquire.
04/24/2017	#54	STATUS LETTER from Stephen Paul Maidman, Esquire: See letter on file.
04/27/2017	#55	ORDER: Remanded to Suffolk Superior Court: Upon consideration of the defendant's motion for new trial filed pursuant to G.L. c. 278, s. 33E, it is ORDERED that the defendant's motion for new trial be, and hereby is, remanded for disposition to the Suffolk Division, case number SUCR2011-11290, Superior Court Department of the Trial Court. An appeal, if any, is to be consolidated with the appeal of the conviction. It is further Ordered that the defendant file status reports at thirty (30) day intervals with the Clerk of the Supreme Judicial Court for the Commonwealth. By the Court
05/30/2017	#56	STATUS LETTER from Stephen Paul Maidman, Esquire: See letter on file.
06/28/2017	#57	STATUS LETTER from Stephen Paul Maidman, Esquire.
07/26/2017	#58	STATUS LETTER from Stephen Paul Maidman, Esquire.
08/25/2017	#59	STATUS LETTER from Stephen Paul Maidman, Esquire.
09/25/2017	#60	STATUS LETTER from Stephen Paul Maidman, Esquire.
10/24/2017	#61	STATUS LETTER from Stephen Paul Maidman, Esquire.
11/09/2017	#62	STATUS LETTER from Ruth Greenberg, Esquire.
11/10/2017	#63	STATUS LETTER from Ruth Greenberg, Esquire.
11/22/2017	#64	STATUS LETTER from Stephen Paul Maidman, Esquire.
12/01/2017	#65	MOTION TO WITHDRAW APPEARANCE for Nyasani Watt by Stephen Paul Maidman, Esquire. (ALLOWED conditioned upon the entry of appearance of successor counsel)
12/12/2017	#66	APPEAL ON DENIAL OF MOTION FOR NEW TRIAL. Appellants' Brief/Appendix due 1/22/18.
12/13/2017	#67	APPEARANCE of Elizabeth Doherty, Esquire for Nyasani Watt.
12/27/2017	#68	ORDER: The defendants shall file status reports regarding the transcripts and juror letters by January 26, 2018. By the Court.
01/22/2018	#69	STATUS LETTER from Elizabeth Doherty, Esquire. (A status report shall be filed within 30 days).
04/17/2018	#70	STATUS LETTER from Ruth Greenberg, Esquire. (A further status report shall be filed within 90 days).
04/25/2018	#71	STATUS LETTER from Ruth Greenberg, Esquire.
04/30/2018	#72	SUPPLEMENTAL STATUS LETTER from Ruth Greenberg, Esquire.
05/07/2018	#73	STATUS LETTER from Ruth Greenberg, Esquire.
05/11/2018	#74	APPEAL ON DENIAL OF DEFENDANT'S SUPPLEMENTAL CLAIM IN SUPPORT MOTION FOR NEW TRIAL and REQUEST FOR FUNDS.
05/21/2018	#75	STATUS LETTER from Elizabeth Doherty, Esquire.
06/15/2018	#76	STATUS LETTER from Ruth Greenberg, Esquire. (ORDER: The brief of defendant Mattis shall be filed on or before November 15, 2018)
06/26/2018	#77	STATUS LETTER from Elizabeth Doherty, Esquire.
07/13/2018	#78	LETTER from Attorney Elizabeth Doherty with a copy of the defendant's Notice of Appeal of the Denial of his Supplemental Claim to his Motion for a New Trial and Request for Funds.
07/18/2018	#79	Received from Superior Court: Record on Appeal of the Denial of defendant's Supplemental Claim to his Motion for a New Trial and Request for Funds.
07/19/2018	#80	NOTICE OF STATUS CONFERENCE: A status conference has been scheduled in this matter for WEDNESDAY, SEPTEMBER 26, 2018, at 11:00 A.M. in Courtroom 1, John Adams Courthouse, Boston, Massachusetts. A status report shall be filed by September 17, 2018. (Botsford, J., presiding as Special Master).

07/26/2018	#81	STATUS LETTER from Elizabeth Doherty, Esquire (Because the defendant's brief will be filed by November 15, 2018, further status reports are not required).
09/26/2018	#82	MOTION to File Joint Brief of One Hundred Pages, and Joint Record Appendix, filed for Nyasani Watt and Sheldon Mattis by Elizabeth Doherty, Esquire and Ruth Greenberg, Esquire. (The motion is ALLOWED, in part, to 80 pages. By the Court.)
10/11/2018	#83	NOTICE: The parties having appeared for a status conference before Special Master Margot Botsford on September 26, 2018, it is reported and recommended that the defendant's brief shall be filed on or before November 15, 2018, and the Commonwealth's brief shall be filed on or before February 13, 2019. The defendant shall file a status report by October 26, 2018.
10/24/2018	#84	ORDER: Upon consideration of the report of the Special Master, it is ORDERED that the defendant's brief shall be filed on or before November 15, 2018, and the Commonwealth's brief shall be filed on or before February 13, 2019. By the Court
10/26/2018	#85	STATUS LETTER from Elizabeth Doherty, Esquire.
10/26/2018	#86	MOTION to extend to 01/04/2019 filing of brief of Sheldon Mattis by Ruth Greenberg, Esquire. (ALLOWED to January 4, 2018. Further enlargements of time should not be anticipated).
11/05/2018	#87	SUPPLEMENTAL STATUS LETTER from Elizabeth Doherty, Esquire. (ALLOWED to January 4, 2018. Further enlargements of time should not be anticipated).
01/04/2019	#88	NOTICE OF AVAILABILITY OF ELECTRONIC FILING: The clerk's office will accept briefs, appendices, motions, status reports, and correspondence through eFileMA effective immediately. Please note that after review and docketing of e-filed briefs and appendices, the clerk will require a limited number of paper copies to be filed. Parties are free to file their briefs and record appendices under the revised rules of appellate procedure prior to their effective date, March 1, 2019.
01/07/2019	#89	SERVICE of joint brief and record appendix for Defendants/Appellants Nyasani Watt and Sheldon Mattis by Elizabeth Doherty, Ruth Greenberg.
01/22/2019	#90	MOTION to Allow Each Defendant Twenty Minutes of Oral Argument, filed for Nyasani Watt and Sheldon Mattis by Elizabeth Doherty, Esquire and Ruth Greenberg, Esquire. (December 1, 2019: The joint motion is motion is ALLOWED. Each defendant shall receive 20 minutes for argument; the Commonwealth shall have 40 minutes for argument.)
01/24/2019	#91	Copy of Motion to Transfer Exhibits filed in Suffolk Superior Court, filed by Attorney Ruth Greenberg.
02/04/2019	#92	LETTER from Ruth Greenberg, Esquire requesting this case to be argued this year.
03/11/2019	#93	LETTER from Ruth Greenberg, Esquire requesting this case to be argued this year.
03/19/2019	#94	Motion to extend to date for filing of appellee's brief filed for Commonwealth by Dara Kesselheim, A.D.A. (ALLOWED to June 28, 2019.)
06/25/2019	#95	MOTION to extend to 07/26/2019 filing of brief of Commonwealth by Dara Kesselheim, A.D.A.. (ALLOWED to July 26, 2019.)
07/23/2019	#96	MOTION to exceed page limit filed for Commonwealth by Dara Kesselheim, ADA. (ALLOWED to eighty pages.)
08/05/2019	#97	Appellee brief filed for Commonwealth by Dara Kesselheim, A.D.A..
08/05/2019	#98	Appendix filed for Commonwealth by Dara Kesselheim, A.D.A..
08/05/2019	#99	Motion to extend to date for filing of appellee's brief filed for Commonwealth by Dara Kesselheim, A.D.A.. (ALLOWED to August 5, 2019).
08/05/2019		The clerk's office has received the Commonwealth's brief and appendix through e-fileMA. The brief has been accepted for filing and entered on the docket. The Commonwealth shall file with the clerk 4 copies of the brief and 3 copies of the appendix within 5 days. The clerk's office may require additional copies if necessary.
08/08/2019	#100	Additional 4 copies of the Commonwealth's brief and 3 copies of the appendix.
08/14/2019	#101	MOTION to strike unauthorized revision of transcript, filed for Sheldon Mattis by Ruth Greenberg, Esquire. (Referred to the Quorum)
08/14/2019	#102	Motion to extend to date for filing of appellant's reply brief filed for Nyasani Watt and Sheldon Mattis by Attorney Elizabeth Doherty and Attorney Ruth Greenberg. (ALLOWED to September 4, 2019).
08/26/2019	#103	Motion to file a reply brief containing 26 pages of argument filed for Nyasani Watt and Sheldon Mattis by Attorney Elizabeth Doherty and Attorney Ruth Greenberg. (ALLOWED)
08/28/2019	#104	Reply brief filed for Nyasani Watt and Sheldon Mattis by Attorney Elizabeth Doherty.
08/28/2019		The clerk's office has received the appellant's reply brief through e-fileMA. The brief has been accepted for filing and entered on the docket. The appellant shall file with the clerk 4 copies of the brief within 5 days. The clerk's office may require additional copies if necessary.
08/30/2019	#105	Additional 4 copies of the defendants' joint reply brief.
09/18/2019		Notice of 12/10/2019, 9:00 AM argument at John Adams Courthouse, Rm 1 (jac1) sent.
09/18/2019	#106	NOTICE of December argument sent.
10/09/2019	#107	ORDERED for argument on December 10. Notice sent.
11/15/2019	#108	Motion for leave to file letter in lieu of brief filed with letter filed for the District Attorneys for the Northwestern and Berkshire Districts by Thomas H. Townsend, A.D.A. and Jeanne M. Kempthorne, A.D.A.. (Referred to the Quorum)
11/20/2019	#109	Amicus brief filed for Gary Johnson and Tyshawn Sanders by Attorney Ryan Schiff.

11/20/2019	#110	Motion to File Amicus Brief Late filed for Gary Johnson and Tyshawyn Sanders by Attorney Ryan Schiff. (Referred to the Quorum)
11/21/2019		The clerk's office has received the amicus brief filed for Gary Johnson & another through e-fileMA. The brief has been accepted for filing and entered on the docket. Four copies of the brief shall be filed with the clerk's office within 5 days. The clerk's office may require additional copies if necessary.
11/26/2019	#111	Additional 4 copies of amicus brief filed by Gary Johnson and Tyshawyn Sanders.
12/10/2019		Oral argument held. (Gants, C.J., Gaziano, J., Lowy, J., Budd, J., Cypher, J.). View Webcast
12/18/2019	#112	(SEALED) LETTER from Commonwealth with CD containing Grand Jury minutes.
01/23/2020	#113	It is ORDERED that the Clerk of the Superior Court shall transmit to the Clerk of the Supreme Judicial Court for the Commonwealth any and all trial and motion exhibits in the above-captioned matter except for currency, firearms, narcotics, or contraband articles. By the Court
03/06/2020	#114	Motion to defer decision pending expansion of record filed for Nyasani Watt and Sheldon Mattis by Attorney Ruth Greenberg. (6/4/2020 Denied).
04/13/2020	#115	STATUS LETTER from Ruth Greenberg, Esquire.
04/21/2020	#116	ORDER waiving 130-Day rule.
05/04/2020	#117	Supplemental Citation with Attachment filed for Sheldon Mattis by Attorney Ruth Greenberg.
06/04/2020	#118	RESCRIPT (Full Opinion): The defendants' convictions and the orders denying their motions for a new trial and for postconviction relief are affirmed. However, the matter of Mattis's sentence shall be remanded for an evidentiary hearing consistent with this opinion. (By the Court)
07/01/2020	#119	Motion to vacate the remand without prejudice or, in the alternative, to intervene, filed by the District Attorneys for the Cape and Islands, Eastern, Norfolk, and Plymouth Districts.
07/02/2020	#120	OPPOSITION to paper #119 filed for Commonwealth by Attorney Dara Kesselheim.
07/03/2020	#121	OPPOSITION to paper #119 filed for Sheldon Mattis by Attorney Ruth Greenberg.
07/06/2020	#122	Reply and Motion to Strike filed by the District Attorneys for the Cape and Islands, Eastern, Norfolk, and Plymouth Districts.
07/08/2020	#123	ORDER: It is ORDERED that the motion of Four District Attorneys to vacate the remand without prejudice or, in the alternative, to intervene, and the motion to strike be, and hereby are, denied. By the Court
07/27/2020		RESCRIPT ISSUED to trial court.
06/10/2021		Assembly of the Record and Copy of Order of Transmittal of Record to Supreme Judicial Court received from Suffolk Superior Court.
06/14/2021	#124	Appearance filed for Sheldon Mattis by Attorney Ryan Schiff.
06/14/2021	#125	Letter from Attorney Ryan Schiff regarding a proposed briefing schedule.
11/19/2021	#126	ORDER: In the event the court determines that further remand is necessary in this matter, it is ORDERED that each of the parties shall file by November 23, 2021, a proposed order of remand describing the nature of findings, in addition to findings concerning the credibility of the the witnesses, that are required to decide the issues presented. By the Court.
11/23/2021	#127	Proposed Order of Remand filed for Commonwealth by Cailin Campbell, A.D.A..
11/23/2021	#128	Response to Court's November 19, 2021 Order filed for Sheldon Mattis by Attorney Ryan Schiff.

ORDER: The defendant, Jason Robinson, was convicted of murder in the first degree and was sentenced to life without the possibility of parole. His appeal from the conviction was entered in 2004, and the direct appeal from his conviction is still pending before the full court. Thereafter, following an evidentiary hearing that included expert testimony addressing the defendant's claim, raised in a motion for a new trial, that Miller v. Alabama, 567 U.S. 460 (2012) and Diatchenko v. District Attorney for the Suffolk Dist., 466 Mass. 655 (2013), should apply to defendants like him who were eighteen to twenty-one at the time of the crimes, the Superior Court judge hearing the matter (Ullman, J.) ordered the record to be transmitted to the clerk for the Commonwealth. [1]

In Commonwealth v. Watt, 484 Mass. 742 (2020), the court affirmed the convictions of murder in the first degree of the defendant Sheldon Mattis and his co-defendant Nyasani Watt. Watt, who turned eighteen years old ten days after the date of the crimes, was sentenced to life with the possibility of parole. Mattis, who turned eighteen years old eight months before the date of the crimes, was sentenced to life without the possibility of parole. On appeal, citing research that shows the same developmental traits that exist for those under the age of eighteen apply to those between eighteen and twenty-two, Mattis claimed that his sentence is unconstitutional and should be for any individual under the age of twenty-two. The court noted that since its decision in Diatchenko v. District Attorney for the Suffolk Dist., 466 Mass. 655 (2013), "it likely is time for us to revisit the boundary between defendants who are seventeen years old and thus shielded from the most severe sentence of life without the possibility of parole, and those who are eighteen years old and therefore exposed to it." Watt, 484 Mass. at 756. To that end, the court remanded the Mattis case to the Superior Court "for development of the record with regard to research on brain development after the age of seventeen." Id. On remand, the Superior Court judge hearing the matter (Roach, J.) conducted an evidentiary hearing in which expert testimony was presented on brain development after the age of seventeen.[2] Thereafter, the Superior Court judge ordered the record to be transmitted to the clerk for the Commonwealth.

On November 19, 2021, the special master (Botsford, J.) held a case management conference with counsel in both cases to discuss the question whether the court should decide the issue presented without the need for findings from a Superior Court judge.

After consideration by the Court, it is ORDERED that both these matters be remanded to the Superior Court and assigned to Judge Robert L. Ullmann for findings. In addition to his other findings, the Superior Court judge is requested to consider and address whether the imposition of a mandatory sentence of life without the possibility of parole for Mattis and those convicted of murder in the first degree who were eighteen to twenty-one at the time of the crime, violates article 26 of the Massachusetts Declaration of Rights.

[1] The court acknowledges the efforts of Judge Robert L. Ullmann and counsel for the parties for their attention to this matter.

[2] The court acknowledges the efforts of Judge Christine M. Roach and counsel for the parties for their attention to this matter.

IN THE SUPREME COURT OF FLORIDA
CASE NO. SC 22-700
LOWER COURT CASE NO. 081992CF0004510001XX

JACK R. SLINEY

Appellant,

v.

STATE OF FLORIDA

Appellee.

ATTACHMENT C- SECTION 3

*Commonwealth v. Mattis, Suffolk (Mass.) Superior Ct., Case
No. 1184CR11291, July 20, 2022.*

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

SUPERIOR COURT
CRIMINAL ACTION
No. ~~0084CR10975~~
SJC-09265
No. 1184CR11291
SJC-11693

COMMONWEALTH

vs.

~~JASON ROBINSON~~

COMMONWEALTH

vs.

SHELDON MATTIS

**FINDINGS OF FACT ON BRAIN DEVELOPMENT AND SOCIAL BEHAVIOR
AND RULING OF LAW ON WHETHER MANDATORY LIFE-WITHOUT-PAROLE
SENTENCES FOR DEFENDANTS AGE 18 THROUGH 20 AT THE TIME OF THEIR
CRIMES VIOLATES THE MASSACHUSETTS DECLARATION OF RIGHTS**

I. INTRODUCTION

Pursuant to G.L. c. 265, § 2(a), the Massachusetts statute that governs the penalties for murder, the defendant in Suffolk Co. Case No. 0084CR10975, Jason Robinson (“Robinson”), and the defendant in Suffolk Co. Case No. 1184CR11291, Sheldon Mattis (“Mattis”), are serving mandatory sentences of life in prison without the possibility of parole based on their convictions for first-degree murder in separate crimes committed when they were respectively 19 and 18 years old.

As of December 2021, both cases were pending before the Supreme Judicial Court (“SJC”) following evidentiary hearings in the Superior Court before two different judges on

issues related to the brain development and social behavior of 18 through 20-year-olds, in some instances including 21-year-olds.

On December 24, 2021, the SJC issued an order remanding both cases to the Superior Court and assigning the cases to this Court (the undersigned judge) for factual findings and to “consider and address whether the imposition of a mandatory sentence of life without the possibility of parole for . . . those convicted of murder in the first degree who were eighteen to twenty-one at the time of the crime violates article 26 of the Massachusetts Declaration of Rights.”

Article 26 of the Massachusetts Declaration of Rights (“article 26”) includes the Commonwealth’s constitutional ban on “cruel or unusual punishments.” After limited additional proceedings described below, the Court now issues Findings of Fact and a Ruling of Law on the article 26 issue.

With regard to the constitutional question that the SJC asked this Court to address, the Court holds that mandatory sentences of life in prison without the possibility of parole (“mandatory life without parole”) for defendants who were 18 through 20 years old at the time of their crimes -- *i.e.*, sentences that preclude a judge from granting parole eligibility -- violate article 26 of the Massachusetts Declaration of Rights. Robinson and Mattis are therefore entitled to a new sentencing hearing.

II. PROCEDURAL HISTORY

A. Commonwealth v. Jason Robinson

Robinson is pursuing a direct appeal of his 2002 convictions on charges of first-degree murder and related offenses based on a robbery and fatal shooting committed on March 27, 2000. When the crimes were committed, Robinson was 19 years old. The evidence at trial

established that Robinson and his co-defendant Tanzerius Anderson (“Anderson”) agreed to rob the victim, who was known to carry a significant amount of cash, and that during the robbery, Anderson fatally shot the victim.¹ Anderson’s conviction was affirmed by the SJC in 2005. See *Commonwealth v. Anderson*, 445 Mass. 195, 196 (2005). Robinson filed a timely notice of appeal, but the appeal was stayed in 2007 so that Robinson could move for a new trial.

Eight years later, in 2015, Robinson filed his new trial motion, seeking a new trial on six grounds, including that closure of the courtroom violated his right to a fair trial and that his mandatory life-without-parole sentence constituted cruel or unusual punishment based on his age at the time of the crime. (Paper # 37.2)

A Superior Court judge allowed Robinson’s new trial motion after finding that the public was unlawfully barred from the courtroom throughout jury selection. The SJC reversed, holding that Robinson procedurally waived his claim that the courtroom closure constituted structural error by not objecting to the closure at the time it happened. *Commonwealth v. Robinson*, 480 Mass. 146, 147 (2018). In addition to reversing the grant of Robinson’s motion for a new trial, the SJC remanded the case “for the motion judge to determine whether the improper courtroom closure created a substantial risk of a miscarriage of justice.” *Id.* at 155. On remand, in September 2018, the Superior Court found that Robinson had not met his burden of showing that he had suffered any substantial prejudice as a result of courtroom closure. In October 2018, the case was re-assigned to this Court for resolution of the other issues raised by Robinson in his new trial motion.

In a Memorandum of Decision and Order dated November 7, 2018 (Paper # 67), this Court denied the remainder of Robinson’s motion for a new trial, except that the Court deferred

¹ Anderson was convicted of first-degree murder on theories of felony murder and extreme atrocity or cruelty. Robinson was convicted of first-degree murder only on a theory of felony murder. See 445 Mass. at 196 and n.1.

to the SJC the issue of whether the evidence was sufficient to convict Robinson of felony murder. The Court deferred this issue primarily because the law of felony murder had changed since the time of Robinson's offense in 2000, and it was unclear to this Court which if any of those changes should be applied to Robinson's case.²

On November 19, 2018, Robinson filed a motion to reconsider this Court's November 7, 2018, decision so that he could create a factual record through expert testimony to support his claim that *Miller v. Alabama*, 567 U.S. 460, 470 (2012), and *Diatchenko v. District Attorney for the Suffolk Dist. ("Diatchenko I")*, 466 Mass. 655, 667-671 (2013), should be applied to defendants who were 19 years old at the time of their crimes, as was Robinson (Paper # 68). *Miller* held that "mandatory life without parole for those under the age of 18 at the time of their crimes violates the Eighth Amendment's prohibition on 'cruel and unusual punishments.'" 567 U.S. at 465. *Diatchenko I* held that "mandatory imposition of a sentence of life in prison without the possibility of parole on individuals who were under the age of eighteen when they committed the crime of murder in the first degree violates the prohibition against 'cruel or unusual punishments' in art. 26 of the Massachusetts Declaration of Rights, and that the discretionary imposition of such a sentence on juvenile homicide offenders also violates art. 26 because it is an unconstitutionally disproportionate punishment when viewed in the context of the unique characteristics of juvenile offenders." 466 Mass. at 658-659 (footnote omitted).

² This Court notes that the SJC has declined to apply *Commonwealth v. Brown*, 477 Mass. 805, cert. denied, 139 S. Ct. 54 (2018), retroactively, see *Commonwealth v. Sun*, 490 Mass. 196, No. SJC-12870, 2022 WL 2517173, at *16 (Mass. July 7, 2022) (slip op. at 50), and the SJC did not ask this Court to address that issue in its December 24, 2021 remand order.

Additional delay resulted from several factors, including consideration of creating a factual record without the need for an evidentiary hearing, which prudently was abandoned, followed by the creation of a factual record through hearings and the COVID-19 pandemic.³

On October 30, 2020, this Court held an evidentiary hearing via Zoom, at which Professor Laurence Steinberg (“Dr. Steinberg”), a developmental psychologist, testified on behalf of Robinson, and a binder of articles on adolescent brain development authored or co-authored by Dr. Steinberg (Exhibit 1) was admitted in evidence.⁴ The Court set a schedule for the submission of post-hearing briefs.

On April 12, 2021, Robinson filed his post-hearing brief, arguing that the holding in *Diatchenko I* should be extended to defendants who, like him, were 19 years old at the time of their crimes, and that the evidence at trial was insufficient to convict him of felony murder. (Paper # 109) On April 14, 2021, the Commonwealth filed its response. (Paper # 110) In it, the Commonwealth changed the position on the constitutional question that it had held throughout Robinson’s appeal and agreed with Robinson’s position to the extent that, absent an individualized sentencing hearing, a sentence of life without parole for a defendant who was 19 years old at the time of his crime was unconstitutional. In effect, the Suffolk County District Attorney took the position that *Miller*, but not *Diatchenko I*, should be extended to defendants who were 18 through 20 years old at the time of their crimes.

On May 7, 2021, this Court ordered the record to be transmitted to the Clerk for the Commonwealth. (Paper # 111) The Court’s primary reason for transmitting the case was its opinion that the issue of mandatory life-without-parole sentences for individuals who were 19

³ See *Committee for Pub. Counsel Servs. v. Chief Justice of the Trial Court*, 484 Mass. 431, 433-434 (2020) (explaining generally disruption of pandemic).

⁴ Dr. Steinberg’s credentials are set forth below.

years old at the time of their crimes should be decided on a broader factual record than the testimony of Dr. Steinberg and articles authored by him.

The subsequent procedural history of this case and the *Mattis* case is set forth in Section C below.

B. Commonwealth v. Sheldon Mattis

Mattis is seeking a reduction in his sentence for his 2013 convictions on charges of first-degree murder and related offenses based on a fatal shooting committed in September 2011.

Mattis and his co-defendant Nyasani Watt (“Watt”) were tried together and convicted in November 2013 of first-degree murder and related offenses. When the crimes were committed, Mattis was 18 years old. The Commonwealth’s theory of the case was that Watt followed the two young pedestrian victims on a bicycle and shot them in the back as they ran away from him. Mattis was tried as Watt’s joint venturer.⁵

In 2014, in conjunction with an appeal of his conviction, Mattis filed an omnibus motion in the SJC (“First Motion”). Upon consideration of the First Motion, the SJC stayed the case and remanded the First Motion to the Superior Court for disposition. In a portion of the First Motion, Mattis sought a hearing pursuant to *Commonwealth v. Fidler*, 377 Mass. 192 (1977), as to alleged extraneous influence on a deliberating juror. A Superior Court judge (Roach, J.) denied the First Motion in a Memorandum and Order dated March 27, 2015. (Paper # 118)

Following the SJC’s ruling in *Commonwealth v. Moore*, 474 Mass. 541 (2016), which addressed issues of post-verdict contact with jurors, Mattis and Watt renewed their request for juror contact to pursue their *Fidler* motion. Judge Roach conducted individual voir dire of two

⁵ Because Mattis turned 18 years old eight months before the murder, he is serving a life sentence without the possibility of parole. Watt turned 18 years old ten days after the murder, and therefore is now eligible for parole no sooner than fifteen years from sentencing, pursuant to the SJC’s ruling in *Diatchenko I*. See *Commonwealth v. Watt*, 484 Mass. 742, 753-754 (2020), citing *Diatchenko I*, 466 Mass. at 672-673.

jurors and issued Preliminary Findings of Fact Following Juror Inquiry in March 2017. (Paper # 139)

Mattis subsequently sought further inquiry of all jurors on the questions of “racial animus in the jury room and black gangs,” and a court order. (Paper # 141) Mattis also filed Defendant’s Memorandum in Support of Motion for New Trial, Reduction in Verdict, and/or Resentencing (Paper # 147), and the Commonwealth filed an opposition. (Paper # 148) Mattis’ co-defendant, Watt, sought relief, as well. On October 31, 2017, Judge Roach issued Memorandum of Decision and Order on Defendants’ Renewed Motion for New Trial in both cases, denying the new trial motions and declining to grant other relief. (Paper # 150)

Both defendants then appealed their convictions and the denial of their motions for a new trial. In June 2020, the SJC affirmed the defendants’ convictions and declined to grant either defendant extraordinary relief pursuant to G.L. c. 278, § 33E. However, the Court stated:

it likely is time for us to revisit the boundary between defendants who are seventeen years old and thus shielded from the most severe sentence of life without the possibility of parole, and those who are eighteen years old and therefore exposed to it. We can only do so, however, on an updated record reflecting the latest advances in scientific research on adolescent brain development and its impact on behavior. See *Diatchenko I*, 466 Mass. at 669-670.

Commonwealth v. Watt, 484 Mass. 742, 755-756 (2020). The SJC remanded Mattis’ case to the Superior Court “for development of the record with regard to research on brain development after the age of seventeen.” *Id.* at 756.

Between January 14, 2021 and March 1, 2021, Judge Roach conducted an evidentiary hearing via Zoom, at which two volumes of exhibits were admitted and Professor Adriana Galvan (“Dr. Galvan”), a developmental cognitive neuroscientist, and Professor Robert Kinscherff (“Dr. Kinscherff”), an attorney and forensic psychologist, testified for Mattis, and Professor Stephen Morse (“Dr. Morse”), an attorney and forensic psychologist, testified for the

Commonwealth.⁶ Thereafter, Judge Roach ordered the record to be transmitted to the Clerk of the Commonwealth (Paper # 187), as this Court had done in the *Robinson* case.

C. Procedural History of Cases Following December 2021 Remand Order

On December 24, 2021, the SJC issued an order remanding the *Robinson* case and the *Mattis* case to the Superior Court and assigning the cases to the undersigned for factual findings on brain development after the age of 17, and to “consider and address whether the imposition of a mandatory sentence of life without the possibility of parole for . . . those convicted of murder in the first degree who were eighteen to twenty-one at the time of the crime violates article 26 of the Massachusetts Declaration of Rights.” See 12/24/21 Order in SJC-09265 and SJC-11693 (“December 2021 Remand Order”).

This Court gave the parties in both cases an opportunity to supplement the record, which the parties declined. On April 8, 2022, the Court, on its own initiative, heard limited additional testimony, and the defendants offered one additional exhibit in evidence, after which the Court heard oral argument.

III. POSITION OF THE PARTIES

The Commonwealth takes the position, consistent with *Miller*, that *mandatory* life-without-parole sentences for defendants who were under age 21 at the time of their crimes, *i.e.*, sentences that preclude a judge from granting parole eligibility, violate article 26 of the Massachusetts Declaration of Rights. Put another way, in the Commonwealth’s view, life-without-parole sentences for defendants convicted of first-degree murder who were 18 through

⁶ The credentials of Dr. Galvan, Dr. Kinscherff, and Dr. Morse are set forth below.

20 years old at the time of their crimes comply with article 26, “as long as there is an individualized sentencing hearing.” (Paper # 194 at 9)⁷

At the April 8, 2022 hearing, Robinson and Mattis took the position that *any* sentence of life without parole for a defendant who was under age 21 at the time of the crime violates article 26 of the Massachusetts Declaration of Rights.

Because the SJC has asked this Court only to address the constitutionality of *mandatory* life-without-parole sentences for defendants who were under age 21 at the time of their crimes, this Court does not decide the issue of whether *any* sentence of life without parole for a defendant convicted of first-degree murder who was under age 21 at the time of the crime violates articles 26. However, the Court briefly addresses this issue near the end of Part V of this decision.

IV. FINDINGS OF FACT

1. The Court has made two types of findings of fact in this opinion. First, the Court has made Preliminary Findings on the expertise and credibility of the witnesses and the reliability of other evidence that provide support for the Court’s findings about age and brain development. Second, the Court has made Core Findings about age and brain development.

Preliminary Analysis and Findings

2. At its core, the issue in this case is whether the science of brain development in 18 through 20-year-olds has progressed to the point that it provides a reliable basis to answer the SJC’s question, and if it has, how the Court should rule on the question. The Court begins by looking at the principles that govern admissibility of expert testimony.

⁷ The Suffolk District Attorney’s Office speaks on behalf of the Commonwealth in these cases. The Court recognizes that the positions of other offices representing the Commonwealth, including the other District Attorney’s Offices and the Attorney General’s Office, may not necessarily be in accordance with the view of the Suffolk District Attorney.

3. To be admissible, expert witness testimony must satisfy five foundational requirements. See *Commonwealth v. Barbosa*, 457 Mass. 773, 783 (2010), *cert. denied*, 563 U.S. 990 (2011); Mass. Guide Evid. § 702 (2022). First, the expert witness testimony must assist the trier of fact. Second, the expert witness must be qualified as an expert in the relevant area of inquiry. Third, the facts or data in the record must be sufficient to enable the expert witness to give an opinion that is not merely speculation. Fourth, the expert opinion must be based on a body of knowledge, a principle, or a method that is reliable. Fifth, the expert's opinion must reflect a reliable application of the body of knowledge, the principle, or the method to the particular facts of the case. The overarching issues are the expertise of the witness and the scientific validity of the principles that underlie the proffered evidence. See *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579, 592-595 (1993); *Commonwealth v. Lanigan*, 419 Mass. 15, 24-25 (1994). As discussed below, the requirements for admission of the expert evidence relied upon by the Court have been met.

4. The four experts who testified in *Robinson* and *Mattis* can provide the opinions that support the findings below to a reasonable degree of scientific certainty based on their qualifications and experience, extensive study results and clinical observations supported by peer-reviewed publications, and evolving but recognized principles that have been subjected to rigorous testing.

5. The core findings of fact in this decision about age and brain development are based on (1) the October 30, 2020 testimony and Supplemental Affidavit (Paper # 79) of Dr. Steinberg in *Robinson* (see *infra* ¶ 6); (2) the January 14, 2021 testimony in *Mattis* and brief April 8, 2022 testimony in both cases of Dr. Galvan (see *infra* ¶ 7); (3) the February 19, 2021 testimony in *Mattis* of Dr. Kinscherff (see *infra* ¶ 8); (4) the March 1, 2021 testimony in *Mattis* of Dr. Morse

(see *infra* ¶ 9); and (5) seven scholarly journal articles, the first six of which were co-authored by Dr. Steinberg and/or Dr. Galvan.⁸

6. Dr. Steinberg, a PhD in human development and family studies and tenured professor at Temple University, is a renowned leader in the field of developmental psychology and adolescence. For over 40 years, he has been the sole author, lead author, or co-author of scores of studies published in peer-reviewed journals, including top journals in his field. See 10/30/20 Hearing, Ex. 1. Dr. Steinberg is the lead author of “Around the World,” a peer-reviewed article that addressed a far-reaching international study on youth and brain maturation. (10/30/20 Hearing, Ex. 1, Tab U) He has received numerous honors and awards. Steinberg at 15-16.⁹ He has been qualified as an expert in the field of developmental psychology approximately 30 times. *Id.* at 16. His research was cited in two of the leading Supreme Court cases on the Eighth Amendment ban on cruel and unusual punishment as applied to juveniles, including *Miller*. See

⁸ The seven articles are: (a) Steinberg, et al., “Around the World, Adolescence is a Time of Heightened Sensation Seeking and Immature Self-Regulation,” *Developmental Science* (March 2018) (*Robinson* Exhibit No. 1, Tab U), cited herein as Steinberg, et al., “Around the World”; (b) Icenogle, Steinberg, et al., “Adolescents’ Cognitive Capacity Reaches Adult Levels Prior to Their Psychosocial Maturity: Evidence for a ‘Maturity Gap’ in a Multinational, Cross-Sectional Sample,” *Law and Human Behavior*, Vol 43, No. 1 at 69-85 (2019) (*Mattis* Exhibits, Vol. 1, Ex. 2; Bates 000036-000070), cited herein as Icenogle, et al., “Adolescents’ Cognitive Capacity”; (c) Rudolph, et al. (including Steinberg and Galvan), “At risk of being risky: The relationship between ‘brain age’ under emotional states and risk preference,” *Developmental Cognitive Neuroscience*, Vol 24 (April 2017) at 93-106 (*Mattis* Exhibits, Vol. 1, Ex. 7; Bates 000192-000208), cited herein as Rudolph, et al., “At risk of being risky”; (d) Cohen, et al., “When Is an Adolescent an Adult? Assessing Cognitive Control in Emotional and Nonemotional Contexts,” 27 *Psych. Sci.* 549 (2016) (*Robinson* Exhibit 1, tab O), cited herein as Cohen, et al., “When Is an Adolescent an Adult?”; (e) Steinberg, “A Social Neuroscience Perspective on Adolescent Risk-taking,” *Devel. Rev.* Vol 28(1): 78-106 (*Mattis* Exhibits, Vol. 2, Ex. 19; Bates 000854-000880), cited herein as Steinberg, “A Social Neuroscience Perspective”; (f) Galvan, “Adolescent Brain Development and Contextual Influences: A Decade in Review,” *Journal of Research on Adolescence*, Vol. 31(4): 843-869 (2021), Exhibit 3 to Commonwealth’s Supplemental Response to Defendants’ Motion for New Trial (“Comm. Supp. Resp.”) (Paper # 120 in *Robinson*; Paper # 184 in *Mattis*), cited herein as Galvan, “Adolescent Brain Development: Decade in Review”; and (g) Casey, et al., “Making the Sentencing Case: Psychological and Neuroscientific Evidence for Expanding the Age of Youthful Offenders,” *Annual Rev. of Criminol.* (2022) 5:321-343, Exhibit 1 to Comm. Supp. Resp., cited herein as Casey, et al., “Making the Sentencing Case.”

⁹ Cites to transcripts of the expert testimony in this case refer to the expert’s name and the pages in the transcript, e.g., Steinberg at 15-16.

Roper v. Simmons, 543 U.S. 551, 572-575, 578 (2005) (death penalty for those under 18 at time of crime violates Eighth Amendment); *Miller*, 567 U.S. at 489.

7. Dr. Galvan, a PhD in neuroscience, is a tenured Professor of Psychology and Director of the Developmental Neuroscience Lab at U.C.L.A. Dr. Galvan is a recognized leader in the field of developmental cognitive neuroscience, and a co-author of over 100 book chapters and studies published in peer-reviewed journals, including top journals in her field. Galvan at 25-26. She has received numerous honors and awards, including the Presidential Early Career Award for Scientists and Engineers, bestowed by the White House, and the Troland Award from the National Academy of Sciences. *Id.* at 26-27.

8. Dr. Kinscherff is a law school graduate and PhD in clinical psychology. Kinscherff at 10, 16. He is a professor in the doctoral psychology program at William James College. *Id.* at 6-7. Dr. Kinscherff has testified as an expert in the field of psychology dozens of times. *Id.* at 12. He is a former Assistant Commissioner for Forensic Mental Health of the Massachusetts Department of Mental Health. *Id.* at 15.

9. Dr. Morse is an attorney and PhD in psychology and social relations. Morse at 8-9, 16. He is a tenured professor of law and professor of psychology and law at the University of Pennsylvania. *Id.* at 13. He has testified as an expert in at least 20 cases since 1977. *Id.* at 15. He is a licensed attorney in Pennsylvania and Massachusetts and is a board-certified forensic psychologist. *Id.* at 16. His special appointments have included Legal Director of the MacArthur Foundation Law and Neuroscience Project in the mid to late 2000s. *Id.* at 24-25. He has written scores of articles including many in leading journals on neuroscience and the law. *Id.* at 26-27.

10. Today, neuroscientists and behavioral psychologists know significantly more about the structure and function of the brains of 18 through 20-year-olds¹⁰ than they did 20 years ago, for three primary reasons. First, although structural magnetic resonance imaging (sMRI) of the brain's anatomy has existed for almost 50 years, functional magnetic resonance imaging (fMRI), which measures physiological changes in the brain, has been widely available in university labs for only the last 15 to 20 years. See Morse at 30-31. Second, until the late 2000s, far more studies focused on the brains of juveniles, *i.e.*, those under age 18, than on the brains of 18 through 20-year-olds or 18 through 21-year-olds. See Steinberg at 104-105. Third, the number, scope and sophistication of developmental cognitive neuroscience studies and developmental psychology studies has continually increased. In March 2018, Dr. Steinberg (as lead author) and others published "Around the World" in *Developmental Science*. See 10/30/20 Hearing, Ex. 1, Tab U. The study, by far the largest study of its kind, used a combination of behavioral tests and self-reporting regarding 5,404 individuals between the ages of 10 and 30 from 11 countries on five continents. *Id.* at 1-2, 4.¹¹ Both Dr. Galvan, a defense expert in *Mattis*, and Dr. Morse, the Commonwealth's expert in *Mattis*, praised the study and found it authoritative and statistically sound. See Galvan at 94-95; Morse at 89. The study showed similar results across countries with

¹⁰ The Court's age-based findings are made as to 18, 19, and 20-year-olds, referred to herein as "18 through 20-year-olds." Many of Dr. Galvan's studies included 21-year-olds in the group of "late adolescents" who were studied, whereas many of Dr. Steinberg's studies did not. Because the Court puts great weight on the similarity in results of studies conducted in two different disciplines, *i.e.*, developmental cognitive neuroscience and developmental psychology, using the different methods of behavioral study and brain imaging, the Court's findings include only that age range that was included in both experts' studies. Put another way, for purposes of assessing the constitutionality of mandatory life-without-parole sentences, the brain science relied upon by the Court lends some support for treating 18 through 21-year-olds differently than older persons, but much stronger support for treating 18 through 20-year-olds differently than older persons.

¹¹ The study was conducted in China, Colombia, Cypress, India, Italy, Jordan, Kenya, the Philippines, Sweden, Thailand, and the United States. *Id.* at 4.

different cultural views about accepted and encouraged behavior in teenagers and discipline of children and teenagers. “Around the World” at 3-4, 13.

11. The Court finds that the four experts who testified in *Robinson* and *Mattis* can provide and have provided expert opinions grounded on reliable theories that support the findings in paragraphs 13-20 below to a reasonable degree of scientific certainty based on their qualifications and experience, and the extensive study results and real-world observations that support their opinions, as noted herein. Consistencies in the results of many behavioral studies, consistencies in the results of many brain imaging studies, and consistencies between the results of these two types of studies, all conducted in different labs in different parts of the country and increasingly in other countries¹², give Dr. Steinberg and Dr. Galvan a high degree of confidence in the validity of their theories, study results, and opinions. See Steinberg at 49-50; Galvan at 191-193. See also brief testimony of Galvan at April 8, 2022 hearing. The increasing scientific rigor of many studies has further increased the confidence of Dr. Steinberg and Dr. Galvan in the validity of their theories, study results, and opinions. See Steinberg at 148-149, 175; Galvan at 54-59, 118, 137-138. The real-world behaviors of 18 to 20-year-olds, as reflected in F.B.I. crime statistics and Centers for Disease Control statistics on addiction and accidents, among other measures of harmful conduct, provide confirmatory support for the brain science findings. See Kinscherff at 104-106; Galvan at 99.

12. While there are limitations to the study results supporting the Core Findings in paragraphs 13-20 below, set forth in paragraph 22, they are inherent in behavioral science research, rapidly evolving scientific research, and/or all scientific research, see Steinberg at 87;

¹² Some studies have included both behavioral and brain imaging components. Steinberg at 91-92.

Morse at 30-35, and do not undermine the reliability of the expert opinions on which the Court relies or the Core Findings of Fact it reaches.

Core Findings of Fact

13. As a group, 18 through 20-year-olds in the United States and other countries have less “self-regulation,” *i.e.*, they are less able to control their impulses in emotionally arousing situations, than individuals age 21-22 and older; their reactions in these situations are more similar to those of 16 and 17-year-olds than they are to those age 21-22 and older. See Galvan at 73-74, 78-84, 85-89, 100-101, 104-105, 214-216, 221-222; Steinberg at 30, 41, 49; Steinberg Supp. Aff. ¶ 21; Steinberg, et al., “Around the World” at 1-4, 15-17 (finding these results in 9 of 11 countries studied); Cohen, et al., “When Is an Adolescent an Adult?” at 549; Icenogle, et al., “Adolescents’ Cognitive Capacity” at 70 (Bates 000037); Rudolph, et al., “At risk of being risky,” §§ 2.11, 3.4, 4.1.

14. As a group, 18 through 20-year-olds in the United States and other countries are more prone to “sensation seeking,” which includes risk-taking in pursuit of rewards, than are individuals under age 18 and over age 21. Because risk-taking in pursuit of rewards peaks during the late teens, rising steadily before this age range and falling steadily thereafter, developmental psychologists and developmental cognitive neuroscientists frequently refer to this phenomenon as the “upside-down U” or “inverted U,” due to its shape on a graph where age is plotted on the x-axis and level of sensation-seeking is plotted on the y-axis. Galvan at 68-70, 73-74, 91-93; Steinberg at 62, 66; see, generally, Galvan, “Adolescent Brain Development: Decade in Review.” See also Steinberg Supp. Aff. ¶ 20; Steinberg, et al., “Around the World” at 1-4, 11-13 (finding these results in 9 of 11 countries studied).

15. As a group, 18 through 20-year-olds are more susceptible to peer influence than are individuals age 21-22 and older, and the presence of peers makes 18 to 20-year-olds more likely to engage in risky behavior. See Steinberg at 43-44, 160-161; Steinberg Supp. Aff. ¶ 24; Galvan at 106, 245-246; Morse at 82; Steinberg, “A social neuroscience perspective” at 91-92, 98; Galvan, “Adolescent Brain Development: Decade in Review” at 852-853.

16. As a group, 18 through 20-year-olds have greater capacity to change than older individuals because of the plasticity of the brain during these years. Galvan at 42-44, 60, 62-63, 67-73, 109-110, 113-114; Casey, et al., “Making the Sentencing Case” at 329.

17. Consistent and reliable results have been obtained in many behavioral studies, sMRI studies, and/or fMRI studies (based on blood flow) that support the findings set forth in paragraphs 13 to 16. Galvan at 60-61, 63-64, 66-69, 76-80, 91-92, 98-101; Steinberg, et al., “Around the World” at 1-4, 7-8, 11-19; Steinberg Supp. Aff. ¶ 20; Steinberg at 65-66. See also additional articles cited *supra* at ¶¶ 13-15.

18. The primary anatomical (brain structure) and physiological (brain function) explanations for the findings set forth in paragraphs 13 to 16 are (1) the influence on the brain of the sharp increase during puberty of certain hormones; (2) the lack of a fully developed prefrontal cortex, the part of the brain that most clearly regulates impulses; and (3) the lack of fully developed connections (or connectivity) between the prefrontal cortex and other parts of the brain, including the ventral striatum, the part of the brain that most clearly responds to rewards and reward-related decision making. Galvan at 42-44, 63-65, 214-216; Steinberg at 22-25, 29-30; Steinberg, “A social neuroscience perspective” at 83-91.

19. The combination of heightened sensation seeking, less than fully developed self-regulation in emotionally arousing situations, and susceptibility to peer pressure, all of which are

associated with a less than fully developed prefrontal cortex and less than fully developed brain connectivity, makes 18 through 20-year-olds as a group particularly vulnerable to risk-taking that can lead to poor outcomes. The real-world behaviors of 18 through 20-year-olds, as reflected in measures of harmful conduct such as F.B.I. crime statistics and Centers for Disease Control statistics on addiction and accidents, support the brain science findings in this regard. Kinscherff at 28-32, 38; Steinberg, “A social neuroscience perspective”; Steinberg Supp. Aff. ¶¶ 25-26.

20. In contrast to how 18 through 20-year-olds respond in emotionally arousing situations, decision making in the absence of emotionally arousing situations, *i.e.*, “cold cognition,” reaches adult levels around age 16. See Icenogle, et al., “Adolescents’ Cognitive Capacity” at 82; Steinberg Supp. Aff. ¶¶ 22-23; Steinberg, “Why we should lower the voting age to 16,” *New York Times* (March 2, 2018) (*Robinson* Hearing Ex. 1, Tab W).

21. Consistent with the above scientific findings, and cognizant of forensic research showing that most individuals who commit crimes in their late teens do not continue to commit crimes after their mid-20’s, forensic psychologists have reduced their preparation of and reliance on long-term risk assessments of criminal defendants who commit violent crimes in their late teens and early 20s because of the reduced utility of such studies. See Kinscherff at 48, 51-52; Casey, et al., “Making the Sentencing Case” at 331-332, 335-336. See also 4/8/22 Hearing Exhibit 1 (age-crime curve).

22. Caveats this Court notes to the study results supporting the Core Findings in paragraphs 13-21 include the following. First, there are significant differences between the subjects in the studies discussed below as a whole and individuals who commit murder as a whole, including but not limited to the fact that potential subjects with serious mental illness are excluded from most studies. See Galvan at 193-195. Second, the subjects who participate in

behavioral and brain scan studies are not a fully randomized pool of the general population. See generally Galvan at 169-174; Morse at 33-34; Steinberg at 92, 177-178, 187-188, 199, 201-202, 208-209. Third, behavioral and brain scan study results look at the individuals in any age bracket as a group; there are significant differences in brain development among the individuals of any particular age or age bracket. See Steinberg at 136-175; Morse at 48-50, 60-61; Galvan at 213-218. Fourth, the conditions of brain science studies, *e.g.*, viewing images on a computer screen and/or being scanned in a lab, differ markedly from the real-world situations in which adolescents commit crimes, Galvan at 142, 219.¹³ Fifth, the brain scan study results in the record establish *correlations* between the anatomy and function of certain parts of the brain and certain behaviors, which is different than establishing actual *causation* of those behaviors. Sixth, historically there were machine and human error problems with some early fMRI studies, but these problems were largely resolved by around 2013. See Steinberg at 52-54; Morse at 73-74. Lastly, while the results of many behavioral and brain scan studies discussed herein reinforce each other, each study is somewhat different and therefore the results do not constitute “replication” strictly speaking, as scientists often use the term. Morse at 44-45, 59-60. These caveats, individually and collectively, do not undermine the Core Findings of Fact.

V. RULING OF LAW AND LEGAL DISCUSSION

Proportionality is the touchstone for analyzing cruel and unusual punishment under the Eighth Amendment to the U.S. Constitution and the Commonwealth’s counterpart to the Eighth Amendment, article 26 of the Massachusetts Declaration of Rights. See *Diatchenko I*, 466 Mass. at 669. See also *Commonwealth v. Concepcion*, 487 Mass. 77, 86 (2021). Moreover, “a

¹³ That said, three of the experts testified that the studies on which they relied accurately predicted real-world behaviors. Galvan at 120; Steinberg at 99; Morse at 36.

sentencer [must] have the ability to consider the mitigating qualities of youth.” *Diatchenko I*, 466 Mass. at 661, quoting *Miller*, 567 U.S. at 476 (internal quotation and additional citation omitted).

In *Miller*, the Supreme Court banned mandatory sentences of life in prison without the possibility of parole for defendants who were under age 18 at the time of their crimes, as cruel and unusual punishment in violation of the Eighth Amendment. 567 U.S. at 489. The Supreme Court held that judges could impose life-without-parole sentences for juveniles in the exercise of their discretion, but not mandatorily based solely on the provisions of a state or federal statute. *Id.*

In *Diatchenko I*, the SJC took the holding in *Miller* one significant step further, holding that *all* life-without-parole sentences for defendants who were under age 18 at the time of their crimes were “cruel or unusual punishment”¹⁴ in violation of article 26 of the Massachusetts Declaration of Rights. 466 Mass. at 671. “The point of [the SJC’s] departure from the Eighth Amendment jurisprudence was [its] determination that, under art. 26, the ‘unique characteristics of juvenile offenders’ should weigh more heavily in the proportionality calculus than the United States Supreme Court required under the Eighth Amendment.” *Commonwealth v. Perez*, 477 Mass. 677, 683 (2017), citing *Diatchenko I*, 466 Mass. at 671.

The SJC has asked this Court to decide, in effect, whether the Supreme Court’s holding in *Miller* should be extended in Massachusetts to all defendants who were age 18 through 20 at the time of their crimes. The Court concludes that it should. Both the Supreme Court and the SJC have established “categorical bans on sentencing practices based on mismatches between the culpability of a class of offenders and the severity of a penalty.” *Diatchenko I*, 466 Mass. at 659.

¹⁴ The SJC has not found any legal significance in the language difference between the Eighth Amendment, which bans “cruel *and* unusual punishment,” and art. 26, which bans “cruel *or* unusual punishment.” See, e.g., *Michaud v. Sheriff of Essex Cnty.*, 390 Mass. 523, 533-534 (1983), and cases cited.

In the nine years since *Diatchenko I* was decided, extensive research in the fields of developmental cognitive neuroscience and developmental psychology has established that, as a class or group, the brains of 18 through 20-year-olds are not as fully developed as the brains of older individuals in terms of their capacity to avoid conduct that is seriously harmful to themselves and others. These scientific findings clearly bear on the “culpability of [this] class of offenders... .” *Id.* As applied to juveniles, the SJC considers life-without-parole sentences to be “strikingly similar, in many respects, to the death penalty... .” *Id.* at 670. Applying the Findings of Fact in this case to this SJC precedent, this Court holds that the non-discretionary (*i.e.*, mandatory) imposition of life-without-parole sentences for defendants who were age 18 through 20 at the time of their crimes is a “sentencing practice[] based on mismatches between the culpability of a class of offenders and the severity of a penalty.” *Id.* at 659. Without minimizing the violence that is almost always involved in the crimes committed by 18 through 20-year-olds that result in first-degree murder convictions, including the crimes at issue in these two cases, the Court concludes that there is a mismatch between the culpability of 18 through 20-year-old offenders as a class and mandatory life-without-parole sentences, *i.e.*, sentences that preclude a judge from granting parole eligibility. Therefore, as applied to 18 through 20-year-olds, the statute that mandates such sentences, G.L. c. 265, § 2, violates article 26 of the Massachusetts Declaration of Rights. This does not mean that, under a given set of facts, a life-without-parole sentence cannot be imposed on such a defendant. The SJC has not asked this Court to decide whether *any* life-without-parole sentence for a defendant who was under age 21 at the time of the crime violates article 26, and therefore the Court does not decide this issue. This ruling means that requiring imposition of a mandatory life sentence in every case, without an individual, case-by-case factual assessment, is unconstitutional.

As noted above, this Court bases its constitutional ruling primarily on 15 years of extensive scientific research establishing that, as a class or group, 18 through 20-year-olds have brains that are not as developed as those of older individuals, and this lack of full brain development makes them more susceptible to behavior harmful to themselves and others. Eighteen through 20-year-olds have less “self-regulation,” *i.e.*, they are less able to control their impulses in emotionally arousing situations, than individuals age 21-22 and older. Their reactions in these situations are more similar to those of 16 and 17-year-olds than they are to those age 21-22 and older. As a group or class, 18 through 20-year-olds are also more prone to “sensation seeking,” *i.e.*, risk-taking in pursuit of rewards, than are individuals under age 18 and over age 21. And 18 through 20-year-olds are more susceptible to peer influence than are individuals age 21-22 and older; the presence of peers makes them more likely to engage in risky behavior than they otherwise would be. Consistent results have been obtained in many behavioral studies, sMRI studies, and fMRI studies. See *supra* at 15-17.

The primary anatomical (brain structure) and physiological (brain function) explanations for these phenomena are the influence on the brain of the sharp increase during puberty of certain hormones, the lack of a fully developed prefrontal cortex, the part of the brain that most clearly regulates impulses, and the lack of fully developed connections (connectivity) between the prefrontal cortex and other parts of the brain including the ventral striatum, the part of the brain that most clearly responds to rewards and reward-related decision making. See *supra* at 16-17.

The combination of heightened sensation seeking, less than fully developed self-regulation in emotionally arousing situations, and susceptibility to peer pressure, all of which are associated with a less than fully developed prefrontal cortex and less than fully developed brain connectivity, makes 18 to 20-year-olds as a group particularly vulnerable to risk-taking that can

lead to poor outcomes. The real-world behaviors of 18 through 20-year-olds, as reflected in F.B.I. crime statistics, Centers for Disease Control statistics on addiction and accidents, and many other measures of harmful conduct, support the brain science findings in this regard. See *supra* at 16-17.

The brain science and forensic science study results described in this opinion lend direct support to the conclusion that mandatory life-without-parole sentences for defendants who were age 18 through 20 at the time of their crimes constitute cruel or unusual punishment under article 26. Perhaps equally important, these study results also comport with the three reasons why the Supreme Court and the SJC drew the line at age 18 for purposes of applying the most severe penalties in our federal and state legal systems, the death penalty (federal) or mandatory life without parole (Massachusetts).

When the Supreme Court ruled in *Roper v. Simmons*, 543 U.S. 551 (2005), that applying the death penalty to defendants who were under age 18 at the time of their crimes constituted cruel and unusual punishment under the Eighth Amendment, the Court cited three general differences between juveniles (*i.e.*, persons under age 18) and adults. The first difference noted between juveniles and adults was that “lack of maturity and an underdeveloped sense of responsibility are found in youth more often than in adults and are more understandable among the young.” *Roper*, 543 U.S. at 569. The second difference was that “juveniles are more vulnerable or susceptible to negative influences and outside pressures, including peer pressure.” *Id.*, citing Steinberg & Scott, Less Guilty by Reason of Adolescence: Developmental Immaturity, Diminished Responsibility, and the Juvenile Death Penalty, 58 *Am. Psychologist* 1009, 1014 (2003). “The third broad difference is that the character of a juvenile is not as well formed as that of an adult. The personality traits of juveniles are more transitory, less fixed.” *Roper*, 543

U.S. at 570. The SJC adopted all three of these differences as reasons for its ruling in *Diatchenko I*. See *Diatchenko I*, 466 Mass. at 660.

The scientific study results in the record in this case call into question why, for purposes of applying these three factors, the line between juveniles and adults should be drawn between age 17 and age 18. A range of study results shows that 18 through 20-year-olds are more subject to peer pressure than older individuals, and brain imaging shows that 18 through 20-year-olds have greater capacity to change than older individuals because of the plasticity of the brain during these years. These study results also provide a reason for why “lack of maturity and an underdeveloped sense of responsibility” are “found in [this age group] more often than in adults and are more understandable... .” *Roper*, 543 U.S. at 569.

That the Supreme Court has expressly limited the protections of *Roper* and *Miller* to defendants under age 18, see *Jones v. Mississippi*, 141 S. Ct. 1307, 1314 (2021); *Roper*, 543 U.S. at 574, is not dispositive, for two reasons. First, the Court does not assume those decisions are fixed in stone, and their conclusions may change as the science changes. See *Watt*, 484 Mass. at 755-756. Second, and leaving future developments aside, the SJC has noted that it “often afford[s] criminal defendants greater protections under the Massachusetts Declaration of Rights than are available under corresponding provisions of the Federal Constitution.” See *Diatchenko I*, 466 Mass. at 668-669, and cases cited therein.¹⁵

¹⁵ See, e.g., *District Attorney for the Suffolk Dist. v. Watson*, 381 Mass. 648, 650, 665 (1980) (concluding that death penalty contravened prohibition against cruel or unusual punishment in art. 26, notwithstanding constitutionality under Eighth Amendment); *Commonwealth v. Mavredakis*, 430 Mass. 848, 855-860 (2000) (defendant's right under art. 12 of Massachusetts Declaration of Rights to be informed of attorney's efforts to render assistance broader than rights under Fifth and Sixth Amendments to United States Constitution); *Commonwealth v. Gonsalves*, 429 Mass. 658, 660-668 (1999) (privacy rights afforded drivers and occupants of motor vehicles during routine traffic stops broader under art. 14 of Massachusetts Declaration of Rights than under Fourth Amendment to United States Constitution); *Commonwealth v. Amirault*, 424 Mass. 618, 628-632 (1997) (confrontation rights greater under art. 12 than under Sixth Amendment to United States Constitution). See also Scott L. Kafker, *State Constitutional Law Declares Its Independence: Double Protecting Rights During a Time of Federal Constitutional Upheaval*, 49 Hastings Const. L.Q. 115, 119 (2022) (“state supreme courts have significant, if not unlimited

In ruling on defendants' motions, the Court has considered but has not strictly applied the three-pronged analysis adopted by the SJC in *Commonwealth v. Jackson*, 369 Mass. 904, 910 (1976), for deciding when a sentence is so disproportionate to the crime that it constitutes cruel or unusual punishment. This analysis "requires (1) an inquiry into the nature of the offense and the offender in light of the degree of harm to society, (2) a comparison between the sentence imposed here and punishments prescribed for the commission of more serious crimes in the Commonwealth, and (3) a comparison of the challenged penalty with the penalties prescribed for the same offense in other jurisdictions." *Commonwealth v. Sharma*, 488 Mass. 85, 89 (2021) (internal quotations and citations omitted). This approach does not apply neatly here; it appears that the SJC has used this three-part analysis solely to determine whether a *particular* sentence violates article 26, not to determine whether a sentencing *practice* violates art. 26. Compare *Cepulonis v. Commonwealth*, 384 Mass. 495, 497-499 (1981) (three-part analysis used to determine that 40-50 year sentence for possession of machine gun did not violate art. 26 or Eighth Amendment); *Perez*, 477 Mass. at 683-686 (three-part analysis used to determine that sentence in non-murder case with parole eligibility after 27 ½ years presumptively disproportionate); *Concepcion*, 487 Mass. at 86-89 (three-part analysis used to determine that life sentence with parole eligibility after 20 years for defendant convicted of first-degree murder committed at age 15 did not violate art. 26 or Eighth Amendment); and *Sharma*, 488 Mass. at 89-92 (sentences imposed on defendant age 17 at time of crimes of life in prison with parole eligibility after 15 years, followed by 7-10 year sentences -- concurrent with each other -- for armed assault with intent to murder remanded for individual determination using three-part test),

freedom of action to provide greater protection under state constitutions") *id.* at 120 & n.20 (giving examples of *Diatchenko I* and *Monschke*).

with *Diatchenko I*, 466 Mass. at 667-671 (not applying three-part test while holding that *all* life-without-parole sentences for defendants under age 18 at the time of their crimes violates art. 26); *id.* at 672 (describing *Cepulonis* as addressing “punishment for particular offense”). The limitation of the three-pronged test in this case, as in *Diatchenko I*, is that first-degree murder is the most serious offense in the Commonwealth, and mandatory life in prison without parole is the most serious punishment in the Commonwealth, so these first two prongs do not lend themselves to a proportionality analysis. See *Commonwealth v. LaPlante*, 482 Mass. 399, 404 n.4 (2019) (deliberate murder case warranting “most severe punishment ... defies direct application of” this test). This leaves this third part of the test, *i.e.*, what has been done in other jurisdictions. Depending on one’s perspective, application of this third prong can either support extending *Miller* to 18 through 20-year-olds or discourage it.

Only one state high court has held that mandatory life-without-parole sentences for defendants who were 18 through 20 years old at the time of their crimes violates the state analog to the Eighth Amendment, a constitutional ban on “cruel punishments.” See *Matter of Monschke*, 197 Wash. 2d 305, 325 (2021), discussed *infra*. However, there are states in which some or all defendants of *any* age who are convicted of the most serious murder charge may receive parole eligibility as part of a life sentence, or a sentence of less than life in prison.¹⁶ In seven states, there is no death penalty and a sentence of life in prison with parole eligibility is always a possible sentence for an adult defendant convicted of the most serious murder charge.¹⁷ In New Jersey and New York, two other states that have no death penalty, life in prison with

¹⁶ This Court endeavored to identify the statutes governing the most serious murder charge in all 50 states and the penalties for each such charge. However, court decisions have modified the law in some states, and this Court lacks the resources to monitor recent developments in the law of 50 different jurisdictions.

¹⁷ Maine, Maryland, North Dakota, Rhode Island, Vermont, West Virginia, and Wisconsin.

parole eligibility is a possible sentence for a defendant convicted of the most serious murder charge unless the judge or jury finds specified aggravating factors. In two of the nine above-referenced states, Maine and New Jersey, a defendant convicted of the most serious murder charge may also be sentenced to a determinate term of years that, based on the defendant's age and the length of the sentence, is often not a *de facto* life sentence. And in Illinois, which does not have the death penalty, a defendant convicted of the most serious murder charge may receive a determinate term of years but may *not* receive a sentence of life with the possibility of parole.¹⁸

Massachusetts is one of only 11 states in which life in prison without parole is the only possible sentence after an adult conviction on the most serious murder charge.¹⁹ Death is the only alternative to a life-without-parole sentence after an adult conviction on the most serious murder charge in sixteen states.^{20, 21} In Alaska, conviction of aggravated first-degree murder carries a mandatory 99-year sentence, which is a *de facto* life without parole sentence.

In 11 of the states that have the death penalty, some defendants convicted of the most serious murder charge may be sentenced to life in prison with parole eligibility.²² However, a sentencing regime that includes the death penalty differs so significantly from a sentencing

¹⁸ See 730 ILCS 5/5-4.5-20(a); 730 ILCS 5/3-3-3(c).

¹⁹ Colorado, Connecticut, Delaware, Hawaii, Iowa, Massachusetts, Michigan, Minnesota, New Hampshire, New Mexico, and Virginia. There were 12 states, but the high court of one of those 12 states, Washington, ruled that mandatory sentences of life without parole for defendants who were age 18 through 20 at the time of their crime violate the state constitutional ban on "cruel punishments." See *Matter of Monschke*, *infra* at 27.

²⁰ Alabama, Arizona, Arkansas, California, Florida, Indiana, Kansas, Louisiana, Mississippi, Missouri, Nebraska, North Carolina, Pennsylvania, South Dakota, Texas, and Wyoming.

²¹ California and Pennsylvania currently have moratoriums on the death penalty. As a result, at this time, life without parole is the only possible sentence upon conviction of the most serious murder offense.

²² Georgia, Idaho, Kentucky, Montana, Nevada, Ohio, Oklahoma, Oregon, South Carolina, Tennessee, and Utah.

regime without the death penalty that this Court does not consider the sentencing laws in those states as support for its holding in this case.

As noted above, in *Matter of Monschke*, 197 Wash. 2d 305 (2021), the Supreme Court of Washington ruled (by a 5-4 vote) that the state's aggravated murder statute was unconstitutional as applied to 18 through 20-year-olds because it denied trial judges discretion to consider the mitigating qualities of youth. *Id.* at 306-307, 326. The court noted that constitutional protections for youthful criminal defendants have grown more protective over the years, *id.* at 313-317, and that the Washington courts would not necessarily defer to legislative line drawing when determining what constitutes cruel punishment, *id.* at 317-319. The court also discussed how what it called the "age of majority"²³ is inherently and necessarily flexible. *Id.* at 319-321. Finding no meaningful developmental difference between the brain of a 17-year-old and the brain of an 18-year-old, the court held that drawing an arbitrary line between these ages for sentencing purposes did not pass constitutional muster. See *id.* at 313, 329.²⁴

In sum, the law in other jurisdictions on mandatory life-without-parole sentences can be used to support or to question the holding reached by this Court.

A principal argument against extending the protections of juvenile sentencing to 18 through 20-year-olds has been that the law recognizes these individuals as adults, and therefore criminal courts should treat them as adults. See, e.g., *Matter of Monschke*, 197 Wash. 2d at 330 (Owens, J., dissenting) ("at this same moment [that individuals obtain the privileges of adulthood], they also obtain the full responsibilities and consequences of adulthood, and the

²³ The term "age of majority" is ambiguous. See *infra*.

²⁴ The dissent noted, among other things, that the majority's ruling does not eliminate line-drawing, it merely changes where the line is drawn, and emphasized the inherent difficulty in deciding which 18 through 20-year-old offenders should receive life-without-parole sentences. *Id.* at 330-331, 333 (Owens, J., dissenting).

court will no longer intervene on their behalf on the basis of age.”). The SJC adopted this reasoning in declining to extend the constitutional ban on life-without-parole sentences for juveniles to this age group:

The age of eighteen ...“is the point where society draws the line for many purposes between childhood and adulthood.” *Roper* [], 543 U.S. [at] 574 []. That such line-drawing may be subject “to the objections always raised against categorical rules,” *id.*, does not itself make [an 18-year-old’s life-without-parole] sentence unconstitutional.

Commonwealth v. Chukwuezi, 475 Mass. 597, 610 (2016). See *Watt*, 484 Mass. at 756 n.17.

However, while society draws the adulthood line at age 18 for “many purposes,” *Chukwuezi*, 475 Mass. at 610, there are significant exceptions to this rule. Through legislation, “the Commonwealth has recognized that merely attaining the age of eighteen years does not by itself endow young people with the ability to be self-sufficient in the adult world.” *Eccleston v. Bankosky*, 438 Mass. 428, 436 (2003). In a variety of contexts, Massachusetts law treats individuals age 18 and slightly older the same as it treats juveniles. See, e.g., *id.* (child support); *Commonwealth v. Cole C.*, 92 Mass. App. Ct. 653, 659 n.8 (2018) (juvenile court jurisdiction); *id.* at n.9 (state custody of delinquent child); G.L. c. 119, § 23(f) (state responsibility for former foster child); G.L. c. 138, § 34A (drinking age). See also *Eccleston*, 438 Mass. at 435 n.13 (“An individual may be considered emancipated for some purposes but not for others” and giving the example of the right to vote versus the end of parental support).

Moreover, the age of legal adulthood has changed between 21 and 18 in various contexts for reasons “unrelated to capacity.” See *Matter of Monschke*, 197 Wash. 2d at 314-315. The ages for military conscription, voting and drinking alcohol provide important examples. For most of the nation’s history, the “age of majority” was 21, not 18. See Vivian E. Hamilton, *Adulthood in Law and Culture*, 91 Tul. L. Rev. 55, 64 (2016). “In 1942 wartime needs prompted Congress to lower the age of conscription from twenty-one to eighteen, a change

that would eventually lead to the lowering of the age of majority generally.” *Id.* See also *Eccleston*, 438 Mass. at 435 n.14 (voting age lowered from 21 to 18 because age of conscription for service in Vietnam War was 18). Similarly, the drinking age has fluctuated, decreasing from 21 to 18 before reverting back to 21. See *Barboza v. Decas*, 311 Mass. 10, 12 (1942) (citing 1937 legislation which punished persons giving alcohol to individuals under 21); *McGuiggan v. New England Tel. & Tel. Co.*, 398 Mass. 152, 159 n.7 (1986) (noting “[t]he legal drinking age [had been] eighteen” but had been raised to 21 pursuant to a 1984 amendment). The 1984 increase in the drinking age was unmistakably due not to any new understanding about brain maturation but rather the incentive of federal funding. See 23 U.S.C. § 158; St.1984, c. 312, amending G.L. c. 138, §§ 12, 14, 30E, 34, 34A, 34B, 34C, and 64. See also *S. Dakota v. Dole*, 483 U.S. 203, 205 (1987) (states’ federal highway funds partially contingent on state legislation compliance with congressional goal of national minimum drinking age).

As the foregoing show, the “age of majority” is a malleable concept that is not consistently based on science, as the decision in the cases at issue here must be. It thus should not mechanically govern highly consequential decisions about application of the criminal law. Further, the decision about what constitutes “cruel or unusual punishment” is a matter for the state courts, not the Legislature. See *Watson*, 381 Mass. at 666-667. See also *id.* at 686-687 (Quirico, J., dissenting); *Matter of Monschke*, 197 Wash. 2d at 325 (limit of judicial deference is violation of constitution under Washington state law); *Goodridge v. Dep’t of Pub. Health*, 440 Mass. 309, 338-339 (2003) (“To label the court’s role as usurping that of the Legislature ... is to misunderstand the nature and purpose of judicial review. We owe great deference to the Legislature to decide social and policy issues, but it is the traditional and settled role of courts to decide constitutional issues.”).

This Court recognizes that incomplete brain development is far from determinative of violent behavior. The great majority of 18 through 20-year-olds do not commit violent crimes. Moreover, dramatically different crime rates in different geographic areas indicate that many factors other than brain age contribute to violent crime. Based on the record in this case, these aggravating factors include access to drugs, access to guns, high childhood stress levels, negative peer influence including affiliating with others involved in criminal activity, mental illness, unstable housing, lack of emotional attachment, and absence of lawful means of earning income, as well as the absence of positive factors such as stable relationships, education, and access to youth and adult programs. See Kinscherff at 91-96, 118-120.²⁵ Having the brain of an average 18 through 20-year-old is neither a satisfactory explanation nor an excuse for the intentional killing of another human being. However, the reality that many factors other than brain development contribute to violent crime does not change the Court's constitutional analysis, for two reasons.

First, the Court's holding does not in any way excuse acts of violence by 18 through 20-year-olds. The consequence of the Court's ruling is that all individuals convicted of first-degree murder in Massachusetts who were 18 through 20 years old at the time of their crime will continue to receive sentences of life in prison and serve at least 15 years in prison, but some of them may become eligible for parole after serving 15 or more years of their sentences. Others, depending on the facts, may be sentenced to life without the possibility of parole, but only if that sentence is warranted.

²⁵ Sociologists observe that "as people move into the roles of adulthood – as they become full-time employees, as they become spouses, as they become parents – there are all kinds of factors that make it less attractive to live a criminal lifestyle." Steinberg at 68. Adults have more "latitude to engage in emotionally meaningful relationships . . . [and] at some point most people decide that the costs and consequences of continued serious criminal misconduct is not preferable to living a more productive life." Kinscherff at 40.

Second, the presence of aggravating factors that increase the likelihood of committing a violent crime is largely beyond the control of any 18 through 20-year-old. The economic circumstances of one's parents or guardians, racial and other discrimination, and other individual and systemic inequalities ensure that some late teens are far more likely than others to live with these aggravating factors, and therefore more likely to perpetrate - and to be victimized by - violent crime. In deciding what constitutes cruel or unusual punishment, a court should consider the systemic impact of its ruling, particularly where the ruling involves a class of persons who, based on their age, have greater capacity than older persons to change.

As noted above, the SJC has not asked this Court to decide whether *any* life-without-parole sentence for a defendant who was under age 21 at the time of the crime violates article 26, and therefore the Court does not decide this issue. There are three separate theories under which intentional killings can be prosecuted as first-degree-murder, *i.e.*, premeditated murder, murder committed with extreme atrocity or cruelty, and felony murder.²⁶ The neuroscience and behavioral science supporting the Court's ruling do not apply with equal force to killings under all three theories. Nor do they apply with equal force to the wide range of individual conduct that can be prosecuted under each of the theories of first-degree murder.

VI. CONCLUSION AND ORDER

Article 26 of the Massachusetts Declaration of Rights establishes "categorical bans on sentencing practices based on mismatches between the culpability of a class of offenders and the severity of a penalty." *Diatchenko I*, 466 Mass. at 659. Moreover, as applied to juveniles, the SJC considers life-without-parole sentences to be "strikingly similar, in many respects, to the death penalty..." *Id.* at 670. On the record of brain science and social science in this case, the

²⁶ The Legislature has enacted different lengths of time before parole eligibility for convictions under each of these three theories. See G.L. c. 127, § 133A; G.L. c. 279 § 24.

imposition of non-discretionary (*i.e.* mandatory) life-without-parole sentences for defendants who were age 18 through 20 at the time of their crimes constitutes a “sentencing practice[] based on mismatches between the culpability of a class of offenders and the severity of a penalty.” *Id.* at 659 . Therefore, this sentencing practice constitutes “cruel or unusual punishment” in violation of article 26 of the Massachusetts Declaration of Rights.

Because Jason Robinson and Sheldon Mattis were respectively 19 years old and 18 years old at the time of their crimes, they are each entitled to a new sentencing hearing.

Dated: July 20, 2022



Robert L. Ullmann
Justice of the Superior Court

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing has been electronically filed with the Clerk of the Florida Supreme Court, and electronically delivered to Honorable Donald H. Mason, jgibbs@ca.cjis20.org; Assistant Attorney General Scott Browne, scott.browne@myfloridalegal.com and capapp@myfloridalegal.com; and Assistant State Attorney Cynthia Ross, cross@sao.cjis20.org and ServiceSAO-CH@sao.cjis20.org, and mailed via U.S.P.S. to Jack Sliney, DOC #305288, Union Correctional Institution on this 16th day of August, 2022.

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