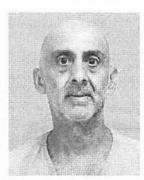
Offender Search Visit an Immate Correctional Institutions Probation Services FDC Jobs Newsroom Statistics

#### Corrections Offender Network

#### Inmate Release Information Detail

(This information was current as of 11/9/2016)



DC Number:	812539
Nome:	VILLARAN, LUIS
Race:	WHITE
Sex:	MALE
Birth Date:	12/19/1958
Custody:	MEDIUM
Release Date:	11/09/2016

Note: This affender meets the criteria for designation as a sexual affender under s. 944.606 F.S., or s. 944.607 F.S., or both, and may be on the Florida Department of Law Enforcement's Sexual Offender/Predator web site

#### Stated Residence Upon Release:

6119 SAVANNAH WAY LAKE WORTH, FL 3346333463

LUIS VILLARAN, LUIS H VILLARAN, LUIS HUMBERTO VILLARAN

#### Current Prison Sentence History:

Offense Date	Offense	Sentence Date	County	Case No.	Prison Sentence Length	
03/15/2013	ADLT SEX W/16-17 YR OLD	04/25/2014	PALM BEACH	1304737	3Y OM OD	

Note: The offense descriptions are truncated and do not necessarily reflect the crime of conviction. Please refer to the court documents or the Florida Statutes for further information or definition.

#### Incarceration History:

	Date In Custody		Date Out Custody		
05/19/2014		11/09/2016			

read several read read several	Now Spiret	Record: 1 of 1

First Frevious Next Last Return to tist New Search Record: 1 of 1

The Florida Department of Corrections updates this information regularly, to ensure that it is complete and accurate, however this information can change quickly. Therefore, the information on this site may not reflect the true current location, status, release date, or other information regarding an inmate.

This database contains public record information on fellony offenders sentenced to the Department of Corrections. This information only includes offenders sentenced to state prison or state supervision. Information contained herein includes current and prior offenses. Offense types include related crimes such as attempts, conspiracies and solicitations to commit crimes. Information on offenders sentenced to county jail, county probation, or any other form of supervision is not contained. The information is derived from court records provided to the Department of Corrections and is made available as a public service to interested citizens. The Department of Corrections makes no guarantee as to the accuracy or completeness of the information contained herein. Any person who believes information provided is not accurate may contact the Department of Corrections.

For questions and comments, you may contact the Department of Corrections, Bureau of Admission and Release, at (850) 488-9167 or go to Prequently Asked Questions About Immates for more information. This information is made available to the public and law enforcement in the interest of public safety.

Search Criteria: DC#: B12839 Search Aliases: NO Offense Category: Release Facility: ALL Stated County of Residence Upon Release: ALL County

Return to Corrections Offender Information Network

#### About Us

As Florida's largest state agency, and the third largest prison system in the country, FDC employs 24,000 members, incarcerates approximately 96,000 inmates and supervises nearly 166,000 offenders in the community.

#### Quick Links

#### Contact Us

501 South Calhoun Street

Main: (850) 488-5021

# FIFTEENTH JUDICIAL CIRCUIT IN AND FOR PALM BEACH COUNTY, FLORIDA PLEA IN THE CIRCUIT COURT

THE FOLLOWING IS TO REFLECT ALL TERMS OF THE NEGOTIATED SETTLEMENT

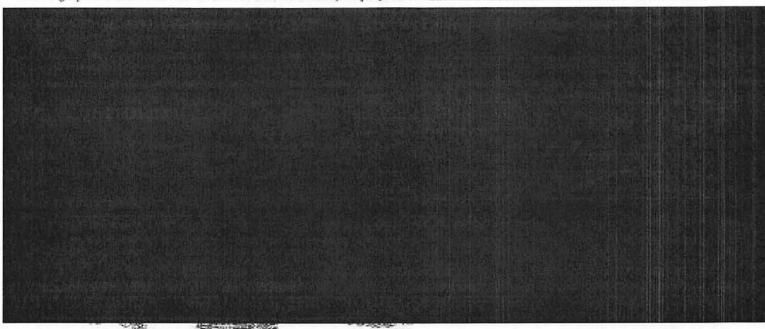
Name: Last: VIII QYQY First: LUIS		M.I.:	
Plea: Guilty Guilty/Best Interest Nolo Contendere			
SCHOOLIST STRINGWELL SEXUAL	Count	Lesser	Degree Z.E
	· <del></del>	·	
	620000000000000000000000000000000000000		
State to Nolle Prosse the following at sentencing:		-	-
ADJUDICATION: Adjudicate ( ) as to Count(s) Withhold [	as to Cour	nt(s)	
If the Defendant is convicted 🎉 possession, sale, trafficking or conspiracy to p	oossess, se	Il or traff	ic in any
controlled substance, Grand Theft of a motor vehicle, Grand Theft of motor vehicling under the influence, vehicular homicide, leaving the scene of an accide	icle parts, t ant involving	leeing or	eluoing, n. or anv
elony in the commission of which a motor vehicle was used, the Defendant's driv	ver's license	shall be	revoked
with a Donastment of Lieburg, Colety and Malor Vehicles for years ()	autoriant to	Court O	refor The
Clerk is directed to make the proper notifications.	34	_	
Clerk is directed to make the proper notifications.  SENTENCE:  Fine \$50 Court Costs \$ Cost of Prosecution \$ Public nearceration: Days Months Years with credit for Defendant agrees that days/months/years is the correct amount of credit iffirmative right to appeal any other credit the Defendant believes he/she may be a Defendant will provide two (2) samples of DNA in Court	Defender F	ees/Ost	6 A.
ncarceration:DaysMonths3_Years with credit for	days	time serv	Co.
Defendant agrees thatdays/months/years is the correct amount of credit	it and waive	s any A	on mina
ffirmative right to appeal any other credit the Defendant believes he/she may be	entitled to.	SHA	425
ffirmative right to appeal any other credit the Defendant believes he/she may be Defendant will provide two (2) samples of DNA in Court PROBATION: Months / Years - Drug Offender if checked [ ]		Clon PC	2014
Donottodik mii provide tiro (2) samples of Drivin over	1	alm a C	On Ro
PROBATION: Months / Years - Drug Offender if checked [ ]	D NO 1 FO	-0a	Sp Spice
ALL CONDITIONS OF PROBATION MUST BE SUCCESSFULLY COMPLETE	UNO LES	S IHAN	NO MATTER
BEFORE PROBATION IS SCHEDULED TO TERMINATE UNLESS STA		JW. SIA	NUAHUY
CONDITIONS OF PROBATION HAVE BEEN EXPLAINED BY DEFENSE OF SPECIAL CONDITIONS OF PROBATION:	OUNSEL.		·*
A. Restitution as per the accompanying order. [ ] (check if ordered)			
B. Fine: S Court Costs: S Drug Trust Fund: S Cos	t of Prosecut	ion: \$	Public
Defender Fees/Costs: \$			
C. Substance abuse evaluation and successful completion of any recommended tre within 30 days) If in custody, release only to	atment (chec	k if order	ed) (enroll
D. No possession or consumption of alcohol or drugs without a valid prescription w	ith random te	esting at	
Defendant's expense [ ] (check if ordered).	\$200 HBH 112 1 3.		
Ehours of Community Service at a rate of no less thanhours per m			
F. Incarceration: Days Months Year, with credit	forday	s time ser	ved.
G. Defendant will provide two (2) samples of DNA in Court			
OTHER COMMENTS OR CONDITIONS:	COV	110	0
LETETRUME STULL OF OLSIGNATED C	7 75	MA	4
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	1		
4/2	14</td <td>0 10</td> <td>1.00</td>	0 10	1.00
	1//	111	1////
CIRCUIT/JUDGE DATE	1	1	////
CIRCUIT JUDGE DATE	XIII	1 11	WAN
Allake -	Juis	0-1	Wara
DESISTANT STATE ATTORNEY DESENSE ATTORNEY	DEFEN	D-VI IDANT	llar
Allebe -	DEFEN 41	0-10 DANT DS11	lkara 4

FIFTEENTH JUDICIAL CIRCUIT IN AND FOR PALM BEACH COUNTY, FLORIDA CIRCUIT COURT

CASE NO: 13CF 004737AXX OBTS NUMBER:	DIV:	W	
STATE OF FLORIDA		NTROL VIOLATOR FIL	En
"Luis villaran	[ ] RETRIAL [ ] RESENTENCE	Circuit Crimina	I Department
2-18-1958 DEFENDANT / M. DATE OF BIRTH RACE GENDER		APR 25	2014
	JUDGMENT	Palm Beach	County
The above defendant, being personally before this C	Court represented by Jenn	Her Labbe	_(attorney)
	Having entered a plea of guilty to the following crime(s):	[ ] Having entered a plea contendere to the follo crime(s):	
COUNT CRIME	OFFE	NSE STATUTE NUMBER(S)	DEGREE
1 Unawful socua with a minor	1 Activity 794	.05(1)	Z-F
and no cause having been shown why the I is hereby ADJUDICATED GUILTY of the	above crime(s).		
and being a qualified offender pursuant to a law.	s. 943.325, the Defendant shall b	e required to submit DNA samp	ies as required by
[ ] and good cause being shown: IT IS ORDE	RED THAT ADJUDICATION O	F GUILT BE WITHHELD.	
SENTENCE STAYED  [ ] The Count hereby stays and with and/or [ ] Community Control separate order).	sholds imposition of sentence as to co under the supervision of the Dept. or	oune(s) and places the Defendant or f Corrections (conditions of probati	n [ ] probation ion set forth in
SENTENCE DEFERRED   1 The Court hereby defers imposit	tion of sentence until		
The Defendant in Open Court was advised of his ri within thirty days following the date sentence is imp advised of his right to the assistance of counsel in ta	ght to appeal from the Judgment posed or probation is ordered pur- king said appeal at the expense o	by filing notice of appeal with suant to this adjudication. The lift the State upon showing of ind	Defendant was also igency.
DONE AND ORDERED in Open Court at Palm Bea	ach County, Florida, this 35	day of Apr. 1 , 20	14
	CIRCUIT JU	DGE	

# IN THE CRIMINAL DIVISION OF THE CIRCUIT COURT OF THE FIFTEENTH JUDICAL CIRCUIT OF FLORIDA, IN AND FOR PALM BEACH COUNTY

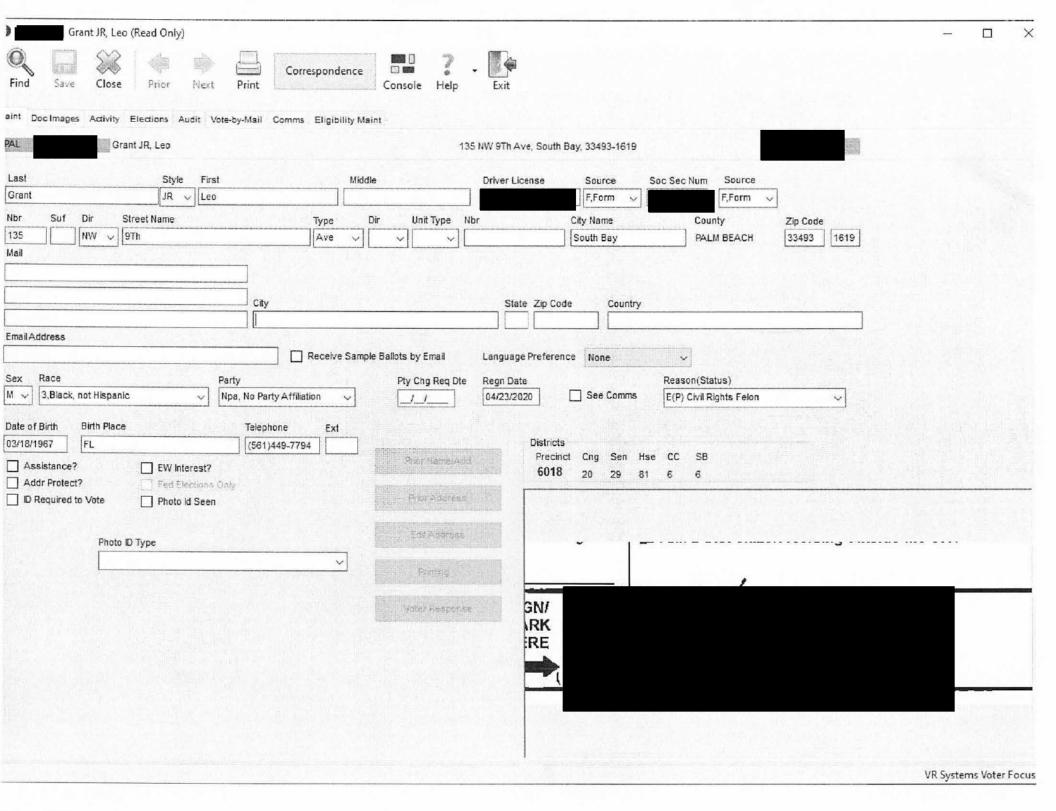
DIV. W: Felony - W (Circuit) CASE NO. 50-2013-CF-004737-AXXX-MB **OBTS NUMBER:** FILED Circuit Criminal Department 1 COMMUNITY STATE OF FLORIDA APR 2 5 2014 CONTROL SHARON R. BOCK VIOLATOR Clerk & Comptroller Palm Beach County **I PROBATION** LUIS VILLARAN VIOLATION DEFENDANT Male 1 December 18, 1958 White1 SOCIAL SECURITY NUMBER GENDER DATE OF BIRTH RACE \*D/S Cascone -The fingerprints below are those of said Defendant taken by Deputy Sheriff \_\_



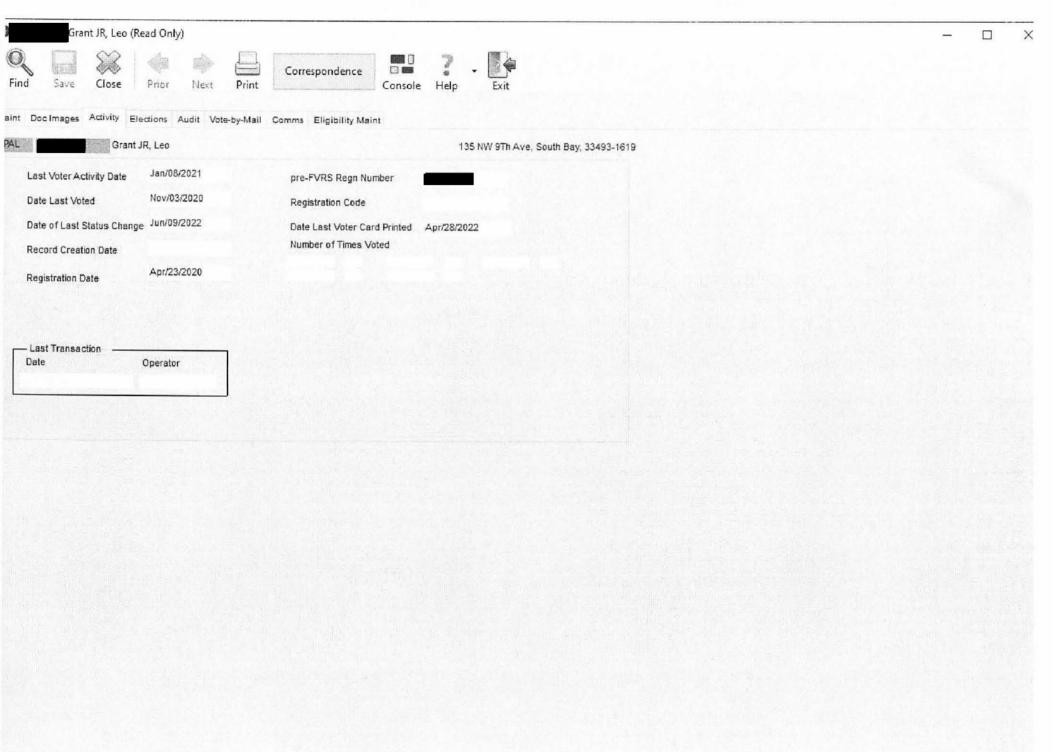
CIRCUIT COURT JUDGE

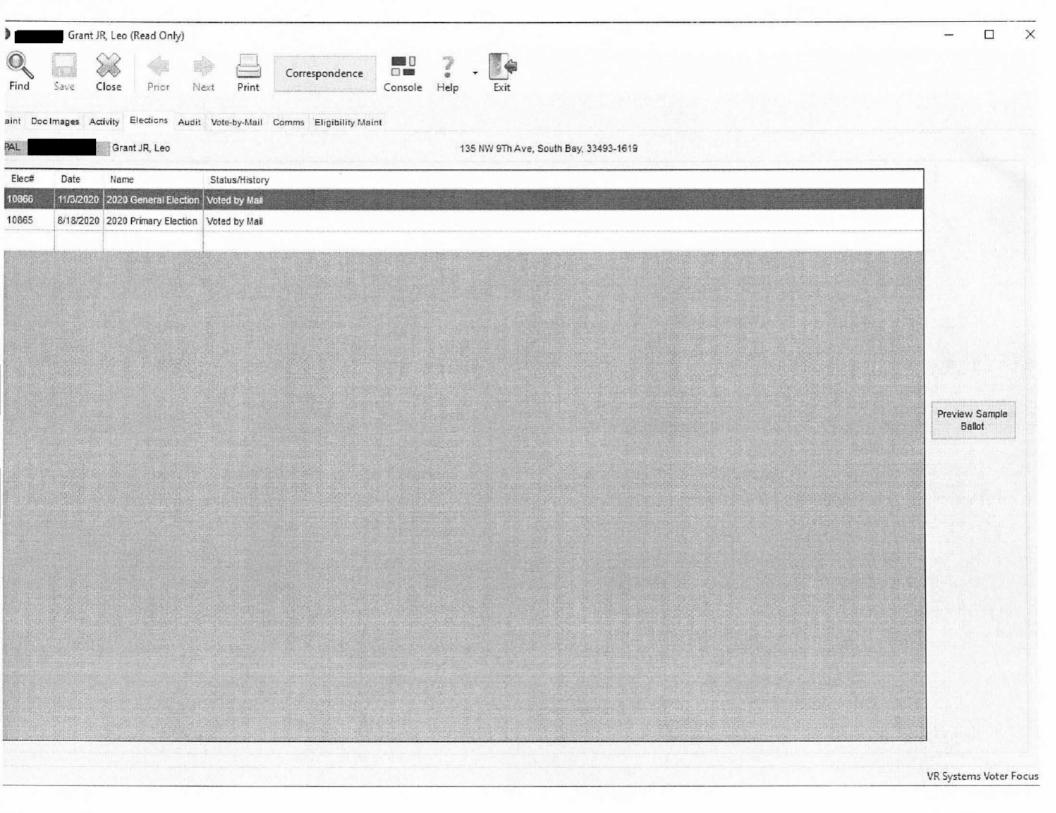
# IN THE CIRCUIT COURT OF THE FIFTEENTH JUDICIAL CIRCUIT IN AND FOR PALM BEACH COUNTY, FLORIDA

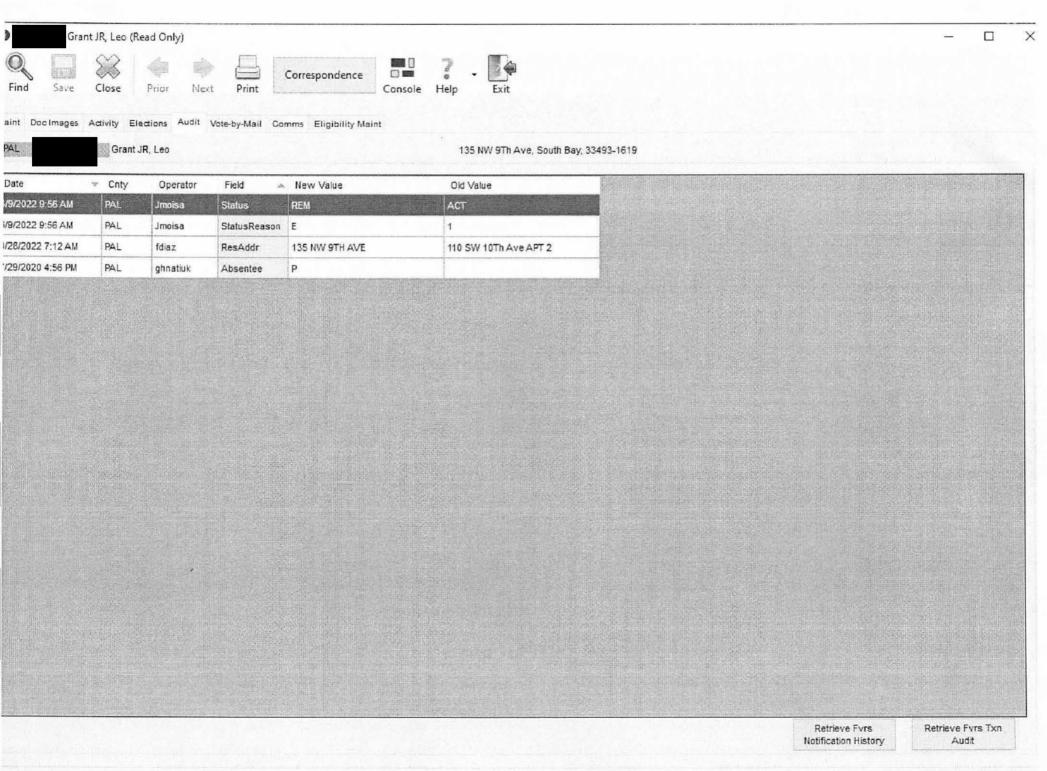
	SENTI	ENCE
	(As to Count(s)	1
	Pro-	Defendant: Luis Villaran
	Circuit Criminal Department	Case Number: 13CF 4737 AX
	~ ~ Z 3 ZU14	OBTS Number:
and no	SHARON R. BOCK Clerk & Comprehendant, being personal party Beach in the total having give tion of sentence, and to show cause why Defendant should no	
	IT IS THE SENTENCE OF THE COURT that:	
The D	efendant pay a fine of \$ pursuant to \$, Flo	orida Statutes, plus all costs and additional charges as outlined in a separate order entered herein
For a lineare	efendant is hereby committed to the custody of the Department of Corrections  [ ] Sheriff of Palm Beach County, Florida  [ ] Department of Corrections as a youthful offend term of	Defendant shall be allowed a total of days as credit for time ed that the composite term of all sentences imposed for the counts
	The instant sentence is based upon the having subsequently revoked the Defende	Court having previously placed the Defendant on probation and ant's probation for violation(s) of condition(s)
directe	ed to deliver the Defendant to the Department of Corrections tents specified by Florida Statute. Additionally, pursuant to	together with a copy of the Judgment and Sentence, and any other sydnesses, the Court retains jurisdiction over the Sydnesses, the Court retains jurisdiction over the
[]	The Sentencing Court objects to the Defendant being place Florida Statute §958.045.	ed into the Youthful Offender Basic Training Program pursuant to
[]		tatutes, The Department of Highway Safety and Motor Vehicles is The Clerk of the Court is Ordered to report the conviction and or Vehicles.
DONE	E AND ORDERED in Open Court at West Palm Beach, Palm	Beach County, Florida this 25 day of Acre L, 20/4
		CIRCUIT JUDGE



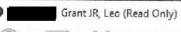
vijeas	Numbered rows 1 through 7 a		ust be comp	leted fo	r a new regi	stration.	<b>!</b> :	G G
	Florida Voter Registration Applica	tion	The downlass	dable/printable	online form (s availabl volendvule-registration		B:585	2
Tine is	: Liftew Registration 🔲 Record Update/Change (e.g., A	ddress, Purly A	Inhation, Name, Signati	ше) Дведь	est lo Replace Voter in	formation Card		Show Signature
1	Are you a citizen of the United States of America?	₽ YES	□ NO	OFFICIAL	ISE ONLY		RCV'D	Cilott digitation
2	🗓 laffing that I am not a convicted felon, or if I am, m	y right to vote	has been restored.				P	
3	1 altimit that I have not been adjudicated mentally in or, if thave, my right to vote has been restored.	ncapacitated w	ith respect to voting				DATE:	
4	Date of Dirth (MAI DENTY) 03 -	8 -	1967	FVRS No:			A	
5	Florida Driver License (FL DL) or Florida identification	(FL ID) Card N	umbe <i>r</i>	If no FL DL or FL ID, then provide	Last 4 digits of Social Security Number	I have NONE of these	APR. 24,	Date Image Scanned
6	IR Grant	1_00		Middle No	1 4	SUIIX ,t,  ), etc.):	,2020	
7	Address Where You Live (legal residence-no P.O. Box)	AptiLovUnit	South BAS	1. Fla	West Palm Book	Zip Code 33493	Palm	
8	Mailing Address (II different from above address)	AptiLe/Unk	Clty	1		ZIp Code		
9	Address Where You Were Last Registered to Volc	Aptillo:/Unk	Cty		State	Zip Code	Beach	
10	Former Nause (if name is changed)	Gender	State or Country of		Telephone No. (op)	7794	S C	
11	☐ Email me SAMPLE BALLOTS if option is available (See Public Record Notice above). My email address is:	n my enunty.					County	
(Che	y Affiliation  or one. If left blank, you will gistered without perty affiliation)  order Democrate Party  Rece/Ethnicity (Check- american Indian/Alae gistered without perty affiliation)  Order Democrate Party  Rece/Ethnicity (Check- american Indian/Alae Base per of Hispan)	kan Native	Check only one if applie I ham an active only the Marine member I ham a spouse or a d	nilanned Ser tependent of :	an activa duty uniforma	l (will need assistance with voting.	REG.	
A IN	tepublican Party of Floride to party affiliation the party (print party name):    Multi racial   Other:	o Origin [	services or merchant I I am a U.S. critizan re			I am interested in becoming a pull worker.	DATE: 4	
12	Oster, I the entermity sweet for officer that I wat protect and sefend the Constitution of the United States and the Constitution of the United States and MARK qualities to report of a reporter as an elector under the Constitution and laws of the State of Florida, and that all information provided in this application is true.					9-253	4/23/2020	







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Grant JR, Leo

135 NW 9Th Ave, South Bay, 33493-1619

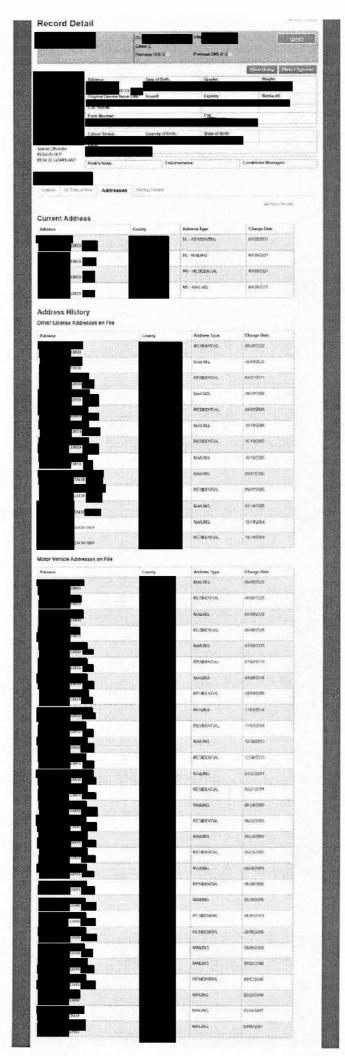
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220084576	4/28/2022 12:00 AM	0	PALM BEACH/administrator	Voter ID Card
215250966	4/10/2022 12:00 AM	0	PALM BEACH/administrator	PUBLICATION
192027742	2/2/2022 12:00 AM	0	PALM BEACH/administrator	Felon Letter
054970573	7/21/2020 12:00 AM	0	PALM BEACH/Administrator	Voter ID Card
048654588	7/11/2020 12:00 AM	0	PALM BEACH/Administrator	Voter ID Card
024930651	5/4/2020 12:00 AM	0	PALM BEACH/Administrator	Voter ID Card

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8-43				*********	110	

### COMPREHENSIVE CASE INFORMATION SYSTEM







Search

Reports

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Back

Expand All

	Case Number		Filed Date	Disposition Date	County	Case Ty	pe	Status	Contested
	1999CF006427AX 01999CF006427AXX		06/10/1999	09/10/1999	PALM BEACH	FELON	Υ	Closed	No
0	Charge Seq#			Descriptio	on		Date	Phase	Trial
0	1		CONVERSION:(	800.04(3) /3806/T/F	/000/06 ) LEWD ASSAU	LT (	09/10/1999	Court Adjudicated Guilty	No Tria
		Date		Action			Statute /	Text	
	Offense:	02/08/1999	Trial: No	Trial	Traffic Disposition: G	uilty			
	Initial:	06/03/1999	Charged			PROPERTY AND ADMINISTRATION OF STREET		06) LEWD ASSAULT	
	Prosecutor:	06/10/1999	Filed					06) LEWD ASSAULT	
	Court:	09/10/1999	Adjudica	ted Guilty	999.99 / CONVERSI	ON:(800.04(3) /3	3806/T/F/000/0	06) LEWD ASSAULT	
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0	3		CONVERSION	N:(800.04(3) / / /F/0	00/06) LEWD ASSAULT	(	09/09/1999	Prosecutor: Nolle Prosequi	No Tria
0	4	C	ONVERSION:(82	27.04(3) /3806/T/F/0	000/06) IMPREGNATION	IOF (	09/09/1999	Prosecutor:Nolle Prosequi	No Tria
Ð		Party Na	ıme		Party Type			Attorney	Bar ID
0	Y, DIVISION			JUDGE					
0	Y, DIVISION			JUDGE	AT DISPOSITION				
0	GRANT, LEO JR	Search Thi	s Party	DEFENI	DANT		MONTGOME	ERY, THOMAS	148310
	DOB: 03/18	/1967					Pla	ce of Birth:	
	Race: Black							Gender: Male	
	License:	5352087090	0					Juvenile: No	
	Address: 245 1	/2 SW 6TH 5	ST 33 BELLE GL	ADE, FL 33430			Domesti	c Violence:	
0	MONTGOMERY,	THOMAS		DEFENI	DANT ATTORNEY				
0	FULTON, DOUG	LASC		ASSIST	STATE'S ATTORNEY				
4	Dockets								
+	Judge Assignm	ent Histor	y						
+	Court Events								
+	Sentences								
	Financial Sumn	nary							
	ecords found								ing and some

This information reflects the financial obligations shown on the Florida Comprehensive Case Information System (CCIS) for THIS CASE ONLY. For the current balances of your financial obligations, you should contact the Clerk of the Court in the county where the financial obligation was imposed. Nothing in CCIS alters any financial obligation imposed by a court.

+ Reopen History

Offender Search Visit on Lumate Correctional Institutions Probation Services FDC John Newsroom Statistics

#### **Corrections Offender Network**

#### Inmate Release Information Detail



DC Number:	101582
oc number.	101000
Name:	GRANT, LEO
Race:	BLACK
Sex	MALE
Birth Date:	03/18/1967
Custody:	CLOSE
Release Date:	10/01/2004

Note: This offender meets the criteria for designation as a sexual offender under s. 944.006 F.S., or s. 944.007 F.S., or both, and may be on the Horitia Benerithent of Lart Enforcement's Social Offender/Produtor with site.

#### Stated Residence Upon Release:

ARS AVENUE B MODRE HAVEN, FL 3347133471

BOSS MAN GRANT, BOX MAN GRANT, NOXMANN GRANT, I CRANT, MAY GRANT, LEO GRANT, LEO JAY GRANT, LEO JR GRANT

#### Current Prison Sentence History:

Offense Date	Offense	Sentence Date	County	Case No.	Prison Sentence Length
07/01/1998	LEWO ASLT/SEX BAT VCTM c16	09/10/1999	PALM BEACH	9906427	1Y DM 1D
01/23/1990	BURGUNDECSTRUCTCV OR ATT	12/08/1999	TAILOR	9000145	SY 014 0D
01/23/1990	BURGLARY TOOLS-POSSESS	12/08/1999	TAYLOR	9000145	3Y 0M 0D
01/23/1990	GRANG THEFT,\$300 LESS 820,000	12/08/1999	TANGR	9000145	3Y 0M 0G
11/30/1989	BURGUNOCCSTRUC/CV OR ATT,	12/08/1999	TAYLOR	9009144	SY OH OD
12/20/1989	TRAFFIC IN STOLEN PROPERTY	12/08/1999	TAYLOR	9000194	BY DH OD

Note: The offerue descriptions are truncated and do not excess any reflect the crime of conviction. Heape refer to the court documents on the Florida Stauteur for further information or defining and the Stauteur for further information or defining and the Stauteur for the Staut

Detainer Date	Agency	Тура	Date Concelled
05/07/1990	HTEY:PERKY P&P	HTFY/PEP	10/01/2004
10/13/1999	TAYLOR CO SO	DETAIN	06/07/2002
11/15/2000	PALM BEACH CO SO	DETAIN	10/01/2004

#### Incarceration History:

30/1986
01/1908
G3/1989
11/1907
01/2004

Prior Prison History; (fine: Data reflected covers periods of inconcerution with the Florida Dept of Corrections since January of 1933)

Offense Date	Offense	Sentence Date	County	Case No.	Prison Sentence Length
02/03/1986	GRAND THEFT, \$100 LESS 520,000	02/13/1986	PALM BEACH	8601327	JY 394 GD
01/31/1986	BURG/BWELL/OCKUP CONVEY	02/13/1986	PALM BEACH	8601323	IY 3H 3D
01/31/1986	BURGLARY TOOLS-POSSESS	02/13/1986	PALM BEACH	6601323	1Y 3H 00
02/03/1996	BURG/BWELL/OCCUP.CONVEY	02/13/1986	PALM BEACH	8601324	19 3H GD
02/93/1986	BURGLARY TOOLS POSSESS	02/13/1986	PALM BEACH	8601324	14 3H 60
12/01/1966	BURGUNOCCSTRUC/CV OR ATT.	02/25/1967	TAYLOR	8600347	JY OH OD
04/23/1988	HURGINOCCSTRUCYCV OR AFT.	06/21/1988	TAYLOR	8600107	JY EM OD
54/23/1988	SAAND THEFF,\$300 LESS 520,000	06/21/1968	TAYLOR	8EG0107	3Y 6H 00
12/23/1999	TRAFFIC IN STOLEN PROPERTY	65/07/1990	TAYLOR	9000070	BY CH UD

First Procedure Next Lines Return to Ust New Hearth Recent: 1 of 1

The Piercia Department of Corrections updates this information regularly, to ensure that it is complete and accurate, hierever this information can change quickly. Therefore, the information on this site may not earliest the true current legistion, status, release data, or other information regarding an innerfals. Recent: 1 of 1

This database contains public record information on felony offendies sentenced to the Department of Corrections. This information only includes offenders sentenced to state prison or state supervision. Information contained herein includes current and prior offenses. Offense types include related oriens such as attempts, conspirated and self-lateline to cereinit crimes. Information on diffenders sentenced to county [all, county production, or any offens from all provisions in service in country sold for from the country lately production, or any offens from all provisions in service in control country lately and country of the from a service to the country of the country of the formation and in mode available as a public service to interested citizens. The Department of Corrections makes no guessiane as to the accuracy or completeness of the information contained herein. Any person who believes information provided to not accurate may contact the Department of Corrections.

for quasiliens and comments, you may consist the Department of Corrections, Bureau of Adolbation and Release, at (300) 166-16167 or go to Imaginary Adoled Questions About tensions for report information. This edocuments in an expedit and less explorement in the interest of position safety.

Sonich Citieria: DC#: 101582 Search Alieses: NO Offense Category: Release Facility: ALL Stated County of Residence Upon Release: ALL County of Commitment: ALL

Seturn to Conventions Officially Information Network

Contact Us

A .	STH JUDICIAL CIRCUIT OF FLORIDA, II	A THE STREET COUNTY
CASE NO. 99-6427 OF		AND PERPALAI BEACH COUNTY
Leo Grant Level Assault DEFENDANT	[ ] COMMUNITY CONTROL VIOLATOR  [ ] PRODATION VIOLATOR	Dct-14-1999 02:37pm 99-412449 ORB 11399 Pg 1956 DOROTHY H. WILKEN, CLERK PB COUNTY, FL
	JUDGMENT	
The above Defendant, being personally before this Cou	t represented by Gay I	Sroel (attorney)
[] Having been tried and found guilty of the following crime(s):	Having entered a plea of guilty to following crime(s):	the [] Having entered a plea of nolo contenders to the following crime(s):
COUNT CRIME  LOWN ASSAULT	OFFENSE STATUTE NUMBER(S)  800.049)	DEGREE CASE OBTS NUMBER
GUILTY of the above crime(s).  [] and having been convicted or found guilty of, or to sexual battery (ch. 794), lewd and lastivious invasion robbery (s. 812.135), or any other of and good cause being shown: IT IS ORDERUSENTENCE  SENTENCE  [] The Court hereby stays and we Community Control under the supersentence	r having entered a plea of nolo contendere or guiss conduct (ch. 800), or murder (s. 782.04), aggrestense specified in section 943.325, the defendation of the ADJUDICATION OF GUILT BE withholds imposition of sentence as to count(s) rvision of the Dept. of Corrections (conditions	and places the Defendant on; Kt is Probation and/or []
The Defendant in Open Court was advised of following the date sentence is imposed or prob of counsel in taking said appeal at the expense	ation is ordered pursuant to this adjudication. "I	notice of appeal with the Clerk of Court within thirty days The defendant was also advised of his right to the assistance  day of
(rev. 1/97)	Ciple	JIT COURT JUDGE

CASE NO. 99-6427 EF A06 DIV. 4 FILED STATE OF FLORIDA Leo Grant 3 DOROTHY H. WILKEN, CLERK Circuit & County Courts FINGERPRINTS OF DEFENDANT The fingerprints below are those of said Defendant taken by I HEREBY CERTIFY the fingerprints shown below are those of the Defendant and were placed thereon by said Defendant in my presence in Open Court this date: DONE AND ORDERED in Open Court at Palm Beach County, Florida, this date. JUDGE, COUNTY/CIRCUIT COURT

# IN THE CIRCUIT COURT OF THE FIFTEENTH JUDICIAL CIRCUIT, IN AND FOR PALM BEACH COUNTY, FLORIDA

## SENTENCE

(As to Co	ount(s))
D	referdant Leo grant
С	ase Number 99-6427 CF AC6
0	BTS Number
The Defendant, being personally before this Court, accompany, and having been given the Defendant an opportunity to be heard and to show cause why defendant should not be sentenced as	adjudicated guilty herein, and the Court having o offer matters in mitigation of sentence, and to
IT IS THE SENTENCE OF THE COURT that:	×
The Defendant pay a fine of \$ pursuant to \$ surcharge (of the fine imposed) required by F.S. 96 Compensation Trust Fund.	0-25, which shall be deposited in the Crimes
The Defendant is hereby committed to the custody of the Department of Corrections  [ ] Department of Corrections [ ] Sheriff of Palm Beach County, Floridation at the last credit for time incarcerated prior to imposition of composite term of all sentences imposed for the counts [ ] consecutive to [ ] concurrent with (c   ] Any active sentence being served. [ ] Specific sentences:	Defendant shall be allowed a total of 100 days f this sentence. It is further ordered that the specified in the order shall run
In the event the above sentence is to the Department of Florida is hereby ordered and directed to deliver the Defwith a copy of the Judgment and Sentence, and any ot	endant to the Department of Corrections together
Pursuant to §§322.055,322.056,322.26, 322.274, Motor Vehicles is directed to revoke the Defendar Ordered to forward a copy of the charging docume and this sentencing order to the Department of H	nt's privilege to drive. The Clerk of the Court is ent, probable cause affidavit(s), judgment of guilt
The defendant in open court was advised of right to ap within thirty days from this date with the Clerk of the Counsel in taking said appeal at the expense of the	Court, and the Defendant's tight to the assistance
DONE AND ORDERED in Open Court at West Palm Bea	ach, Palm Beach County Florida this day
(rev. 1/97)	CIRCUIT COURT JUDGE

 From:
 Strauss, Scott

 To:
 Nick Cox

 Cc:
 Jeremy Scott

Subject: Fwd: Instructions to the Offender (DC3-246) Christopher Henry DC #N14727

Date: Saturday, November 5, 2022 12:30:51 AM

Attachments: <u>image004.pnq</u>

image005.png image006.png image001.png

Hi Jeremy and Nick,

I would like to discuss this matter with you when you are both free.

#### Get Outlook for iOS

From: Winkler, Joe < Joe. Winkler@fdc.myflorida.com>

Sent: Friday, November 4, 2022 4:19 PM

**To:** Strauss, Scott <Scott.Strauss@dos.myflorida.com> **Cc:** McVay, Brad R. <Brad.McVay@dos.myflorida.com>

Subject: RE: Instructions to the Offender (DC3-246) Christopher Henry DC #N14727

## EMAIL RECEIVED FROM EXTERNAL SOURCE

Mr. Strauss,

The Supervising Officer is awaiting a return call from the offender's regarding hi and understanding of instructions. Officer did verify the offender was in the

The Supervising Officer is:

 Labertha Smith (850) 922-3725

Thanks, Joe!

Joe Winkler
Assistant Secretary of Community Corrections
Florida Department of Corrections
501 South Calhoun Street
Tallahassee, Florida 32399

(850) 717-3454 (Office) (407) 494-8282 (Cell)



#### Inspiring Success by Transforming One Life at a Time

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**From:** Strauss, Scott <Scott.Strauss@dos.myflorida.com>

Sent: Tuesday, November 1, 2022 7:37 PM

**To:** Winkler, Joe <Joe.Winkler@fdc.myflorida.com> **Cc:** McVay, Brad R. <Brad.McVay@dos.myflorida.com>

Subject: FW: Instructions to the Offender (DC3-246) Christopher Henry DC #N14727

Importance: High

Hi Joe,

I am following up on this matter. Is there any way you can have confirm if the above offender is

Alternatively, is they way you can provide me the PO's contact

or have them contact me at the number below so I can get some questions clarified?

Thanks,

Scott R. Strauss Interim Director Office of Election Crimes & Security Florida Department of State

Direct: 850-943-2279

Scott.Strauss@dos.myflorida.com

**From:** Winkler, Joe < <u>Joe. Winkler@fdc.mvflorida.com</u>>

Sent: Wednesday, October 26, 2022 9:45 PM

**To:** Strauss, Scott < Scott.Strauss@dos.myflorida.com > **Subject:** RE: Instructions to the Offender (DC3-246)

#### EMAIL RECEIVED FROM EXTERNAL SOURCE

I am not sure. He is I have included a link to the brochure that may help. If you need our officer to get more information, please let me know.

Thanks, Joe!

Joe Winkler
Assistant Secretary of Community Corrections
Florida Department of Corrections
501 South Calhoun Street
Tallahassee, Florida 32399
(850) 717-3454 (Office)
(407) 494-8282 (Cell)



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**From:** Strauss, Scott < Scott.Strauss@dos.myflorida.com >

Sent: Wednesday, October 26, 2022 9:19 PM

**To:** Winkler, Joe < <u>Joe.Winkler@fdc.myflorida.com</u>> **Subject:** RE: Instructions to the Offender (DC3-246)

Thank you. To be clear, i

Scott R. Strauss Interim Director Office of Election Crimes & Security Florida Department of State

Direct: 850-943-2279

Scott.Strauss@dos.myflorida.com

**From:** Winkler, Joe < <u>Joe.Winkler@fdc.myflorida.com</u>>

Sent: Wednesday, October 26, 2022 9:18 PM

**To:** Strauss, Scott <<u>Scott.Strauss@dos.myflorida.com</u>> **Subject:** RE: Instructions to the Offender (DC3-246)

#### EMAIL RECEIVED FROM EXTERNAL SOURCE

6/17/2022.

Thanks, Joe!

Joe Winkler
Assistant Secretary of Community Corrections
Florida Department of Corrections
501 South Calhoun Street
Tallahassee, Florida 32399
(850) 717-3454 (Office)
(407) 494-8282 (Cell)



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**From:** Strauss, Scott < <u>Scott.Strauss@dos.myflorida.com</u>>

Sent: Wednesday, October 26, 2022 8:17 PM

**To:** Winkler, Joe < <u>Joe.Winkler@fdc.myflorida.com</u>> **Subject:** RE: Instructions to the Offender (DC3-246)

Joe,

Christopher Henry appears to have voted. When did he go into the a

?

Scott R. Strauss Interim Director Office of Election Crimes & Security Florida Department of State

Direct: 850-943-2279

Scott.Strauss@dos.myflorida.com

**From:** Winkler, Joe < <u>Joe.Winkler@fdc.myflorida.com</u>>

Sent: Wednesday, October 26, 2022 7:21 AM

**To:** Strauss, Scott < Scott.Strauss@dos.myflorida.com > **Subject:** RE: Instructions to the Offender (DC3-246)

#### EMAIL RECEIVED FROM EXTERNAL SOURCE

When you have a couple minutes, can you call me at (407) 494-8282? It is not urgent, just a quick update on a question you asked me Sunday.

Thanks, Joe!

Joe Winkler
Assistant Secretary of Community Corrections
Florida Department of Corrections
501 South Calhoun Street
Tallahassee, Florida 32399
(850) 717-3454 (Office)
(407) 494-8282 (Cell)



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**From:** Strauss, Scott <<u>Scott.Strauss@dos.myflorida.com</u>>

**Sent:** Tuesday, October 25, 2022 11:02 PM

**To:** Winkler, Joe < <u>Joe.Winkler@fdc.myflorida.com</u>> **Subject:** RE: Instructions to the Offender (DC3-246)

Thanks.

Scott R. Strauss Acting Director Office of Election Crimes & Security Florida Department of State

Cell: 850-943-2279

Scott.Strauss@dos.myflorida.com

**From:** Winkler, Joe < <u>Joe.Winkler@fdc.myflorida.com</u>>

Sent: Tuesday, October 25, 2022 2:19 PM

**To:** Strauss, Scott < <a href="mailto:Scott.Strauss@dos.myflorida.com">Scott.Strauss@dos.myflorida.com</a>>

**Cc:** Ladanowski, Andrew <<u>Andrew.Ladanowski@dos.myflorida.com</u>>; McVay, Brad R.

<<u>Brad.McVay@dos.myflorida.com</u>>; Mercer, Kalen L. <<u>Kalen.Mercer@dos.myflorida.com</u>>; Neff,

Lance < Lance. Neff@fdc.myflorida.com >

**Subject:** FW: Instructions to the Offender (DC3-246)

#### EMAIL RECEIVED FROM EXTERNAL SOURCE

The attachments/links in this message have been scanned by Proofpoint.

Mr. Strauss,

Please find the attached "Instructions to the Offender" for the requested offenders.

Thanks,

Joe!

Joe Winkler
Assistant Secretary of Community Corrections
Florida Department of Corrections
501 South Calhoun Street
Tallahassee, Florida 32399
(850) 717-3454 (Office)
(407) 494-8282 (Cell)



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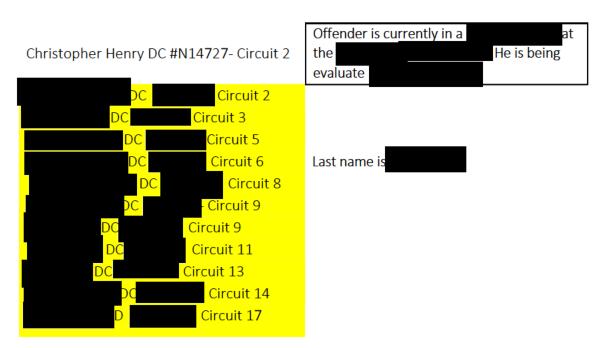
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From: Choquette, Rebecca < Rebecca. Choquette@fdc.myflorida.com >

Sent: Tuesday, October 25, 2022 2:01 PM

**To:** Winkler, Joe < <u>Joe.Winkler@fdc.myflorida.com</u>> **Subject:** RE: Instructions to the Offender (DC3-246)



#### **Becky Choquette**

Florida Department of Corrections Office of Community Corrections 501 South Calhoun Street Tallahassee, Florida 32399 (850) 717-3447 (Office)



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From: Winkler, Joe < <u>Joe.Winkler@fdc.myflorida.com</u>>

Sent: Tuesday, October 25, 2022 7:39 AM

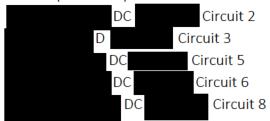
To: RegionalDirectorsCommunityCorrections < <a href="mailto:PP-RD-ROM@mail.dc.state.fl.us">PP-RD-ROM@mail.dc.state.fl.us</a>>

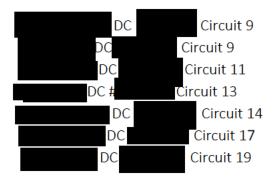
**Subject:** Instructions to the Offender (DC3-246)

Regional Directors,

Please e-mail me and CC Becky Choquette the updated Instructions to the Offender (DC3-246) for the below offenders:

#### Christopher Henry DC #N14727- Circuit 2





Thanks, Joe!

# Joe Winkler Assistant Secretary of Community Corrections Florida Department of Corrections 501 South Calhoun Street Tallahassee, Florida 32399

(850) 717-3454 (Office) (407) 494-8282 (Cell)



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From: Strauss, Scott
To: Nick Cox

Cc: Robert Finkbeiner; Chappell, David; McVay, Brad R.; Jeremy Scott

Subject: Re: Orlando voter fraud cases/update

Date: Thursday, November 10, 2022 9:02:10 AM

Attachments: <u>image001.png</u>

#### Two things:

1. Stipulations; and any pending motions. I previously forwarded out a spreadsheet so I can track every pending motion and any issues including jurisdiction, speedy, circuit, etc. I just want to make sure everything is being accurately tracked and we are all communicating.

Additionally, I would kindly ask that your team email/forward me the motions as well when they come in.

To that end, can you please have your team get with David regarding any stipulations so everything is accurate, and provide me with the updates on the spreadsheet. Thanks

Scott

#### Get Outlook for iOS

From: Nick Cox <Nick.Cox@myfloridalegal.com>
Sent: Thursday, November 10, 2022 8:51:39 AM

The State Control of th

**To:** Strauss, Scott <Scott.Strauss@dos.myflorida.com>

Cc: Robert Finkbeiner < Robert. Finkbeiner @ myfloridalegal.com >; Chappell, David

<David.Chappell@dos.myflorida.com>; McVay, Brad R. <Brad.McVay@dos.myflorida.com>; Jeremy

Scott < Jeremy. Scott@myfloridalegal.com> **Subject:** Re: Orlando voter fraud cases/update

### EMAIL RECEIVED FROM EXTERNAL SOURCE

What are you suggesting that we confer with State about?

Sent from my Verizon, Samsung Galaxy smartphone Get <u>Outlook for Android</u>

**From:** Strauss, Scott <Scott.Strauss@dos.myflorida.com>

**Sent:** Thursday, November 10, 2022 8:46:56 AM **To:** Nick Cox < Nick.Cox@myfloridalegal.com>

Cc: Robert Finkbeiner < Robert. Finkbeiner @myfloridalegal.com >; Chappell, David

<David.Chappell@dos.myflorida.com>; McVay, Brad R. <Brad.McVay@dos.myflorida.com>; Jeremy

Scott <Jeremy.Scott@myfloridalegal.com> **Subject:** Re: Orlando voter fraud cases/update

Hi Bob and Nick,

As a friendly reminder, before you agree to anything, could you please confer with David

Chapple who is running point on these motions and stipulations at Department of State and CC me. It is critical that you communicate with David before any filing. Thanks in advance. Please make sure your colleagues know, and please cc me on at future motions as they come in.

Thanks Scott

#### Get Outlook for iOS

From: Nick Cox <Nick.Cox@myfloridalegal.com>
Sent: Thursday, November 10, 2022 8:41 AM

To: Strauss, Scott <Scott.Strauss@dos.myflorida.com>

**Subject:** Fwd: Orlando voter fraud cases/update

## EMAIL RECEIVED FROM EXTERNAL SOURCE

FYI.... see attached from Orlando.

Sent from my Verizon, Samsung Galaxy smartphone Get <u>Outlook for Android</u>

Francis Dalaya Fields in a SD daya Fields in a Sound of the same

From: Robert Finkbeiner < Robert. Finkbeiner @myfloridalegal.com>

Sent: Thursday, November 10, 2022, 8:23 AM

To: Nick Cox; David Gillespie

Subject: Orlando voter fraud cases/update

Here's the latest on where we are with the voter fraud cases we have:







Robert C. Finkbeiner Chief Assistant Statewide Prosecutor Office of the Attorney General Office of Statewide Prosecution 135 West Central Boulevard Suite 1000 Orlando, Florida 32801 407-245-0893

From:

Strauss, Scott <Scott.Strauss@dos.myflorida.com>

Sent:

Thursday, November 17, 2022 4:21 PM

To:

Nick Cox

Cc:

Jeremy Scott; Stephanie Tew; Nathaniel Bahill; Robert Finkbeiner; McVay, Brad R.; Julie Chaikin

Subject:

FW: Pending Motions

Attachments:

Copy of Copy of MTD Spreadsheet - Nov. 17, 2022 - SRS.xlsx

Importance:

High

#### Good afternoon Nick,

I am following up with the attached spreadsheet. Can you please have your team (who I have included) complete the following spreadsheet and forward it back to me.

As you will see I have included various columns so I can track the cases, including any pending motions, speedy, and when the next calendar call/ and trial is set.

Also, please forward me any pending motions (that have not already been forwarded).

Thanks
Scott R. Strauss
Acting Director
Office of Election Crimes & Security
Florida Department of State
Cell: 850-943-2279

Scott.Strauss@dos.mvflorida.com

From: Strauss, Scott <Scott.Strauss@dos.myflorida.com>

Sent: Tuesday, November 1, 2022 12:07 AM

To: McVay, Brad R. <Brad.McVay@dos.myflorida.com>

Subject: Fw: Pending Motions

See attached.

Scott

From: Strauss, Scott

Sent: Monday, October 31, 2022 3:52 PM

**To:** Nick Cox < Nick.Cox@myfloridalegal.com >; Jeremy Scott < Jeremy.Scott@myfloridalegal.com >; Julie Chaikin < Julie.Chaikin@myfloridalegal.com >; Stephanie Tew < Stephanie.Tew@myfloridalegal.com >; Timothy Donnelly

 $<\!\!\underline{\text{Timothy}.Donnelly@myfloridalegal.com}\!\!>; Paul Dontenville <\!\!\underline{\text{Paul}.Dontenville@myfloridalegal.com}\!\!>; Robert Finkbeiner$ 

< Robert. Finkbeiner@myfloridalegal.com >; Kelsey Hellstrom < kelsey.bledsoe@myfloridalegal.com >; Brian Fernandes

<Brian.Fernandes@myfloridalegal.com>; Nathaniel Bahill <Nathaniel.Bahill@myfloridalegal.com>; Panagiota Papakos

<Panagiota.Papakos@myfloridalegal.com>

Subject: RE: Pending Motions

Thank you Nick for your help. Please see updated Excel. Additionally, thank you Jeremy on your suggestions, which which you will see attached. Please forward me any updates so I can pass along.

Scott R. Strauss
Acting Director
Office of Election Crimes & Security
Florida Department of State

Cell: 850-943-2279

Scott.Strauss@dos.myflorida.com

From: Nick Cox < Nick.Cox@myfloridalegal.com > Sent: Monday, October 31, 2022 11:21 AM

To: Jeremy Scott < Jeremy.Scott@myfloridalegal.com >; Julie Chaikin < Julie.Chaikin@myfloridalegal.com >; Stephanie Tew < Stephanie.Tew@myfloridalegal.com >; Timothy Donnelly < Timothy.Donnelly@myfloridalegal.com >; Paul Dontenville < Paul.Dontenville@myfloridalegal.com >; Robert Finkbeiner < Robert.Finkbeiner@myfloridalegal.com >; Kelsey Hellstrom < kelsey.bledsoe@myfloridalegal.com >; Brian Fernandes < Brian.Fernandes@myfloridalegal.com >; Nathaniel Bahill < Nathaniel.Bahill@myfloridalegal.com >; Panagiota Papakos < Panagiota.Papakos@myfloridalegal.com >

Cc: Strauss, Scott <Scott.Strauss@dos.myflorida.com>

Subject: FW: Pending Motions

#### EMAIL RECEIVED FROM EXTERNAL SOURCE

The attachments/links in this message have been scanned by Proofpoint.

Hey everyone....

Scott Strauss, the director of the Elections Security Office, recently sent me the attached e-mail and form. If you have any motions to dismiss filed, or any other dispositive type motions, he has asked if we would notify/copy him as he wants to keep track of these too. I have copied him so you all have his e-mail. His form shows what information he is seeking. Please do so.

Also, if you have any issues with Dept of State or the Supervisors, Scott has been uber-helpful in the past and can get you answers very quickly.

Thanks.... Nick

From: Strauss, Scott <Scott.Strauss@dos.myflorida.com>

Sent: Sunday, October 30, 2022 5:40 PM
To: Nick Cox < Nick.Cox@myfloridalegal.com >

Cc: McVay, Brad R. <Brad.McVay@dos.myflorida.com>; Jeremy Scott <Jeremy.Scott@myfloridalegal.com>; Julie Chaikin

<Julie.Chaikin@myfloridalegal.com>; Nathaniel Bahill <Nathaniel.Bahill@myfloridalegal.com>

Subject: Pending Motions

Hi Nick.

I have created a spreadsheet to keep track of the pending motions. I am kindly asking that you circulate the attached to your team, complete it, and send back, so I can keep track of everything pending. Feel free to add any information.

Of course, should anything new come in, feel free to email me the information so I can keep for my tracking purposes.

Jeremy, please let me know if I have everything accurate on our matters in Broward and Dade. If not, please change, and send back.

Thanks,

Scott R. Strauss Acting Director Office of Election Crimes & Security Florida Department of State

Cell: 850-943-2279

Scott.Strauss@dos.myflorida.com

Circuit Broward - 17	Judge George Odom George Odom Andrew Siegel George Odom Michael Usan Hunter Davis CAPIAS	Defendant Terry Hubbard Terry Hubbard Nathaniel Singleton Eugene Suggs David Dana Alford Nelson Ronald Steel	Case Humber 22008077CF10A 22008077CF10A 220008078CF10A 220008080CF10A 220008078CF10A	Title of Motion MTD based on Entrapment MTD based on Jurisdiction	Date Filed Sept. 9, 2022 Oct. 3, 2022	Joint Stipulation	Date Response Submitted XX XX	Date Response Due Nov. 21, 2022 Nov. 21, 2022	Date of Hearing Dec. 19, 2022 Dec. 19, 2022	Date of Order	Motion Granted/Denied	Notice of Appeal	Speedy Running No No No No No	Next Hearing Date  Jan. 20, 2023  Jan. 20, 2023  Jan. 6, 2023	Trial	Disposities
Miami Dade - 11 Miami Dade - 11 Hillsborough - 13 Hillsborough - 13 Hillsborough - 13 Hillsborough - 13 Hillsborough - 13 Hillsborough - 13 Hillsborough - 13	Robin Fuson Kimberly Fernandez Laura Ward	Robert Lee Wood Ronald Miller Byron Smith Hubert Jack Tony Patterson Romona Brown/Oiver Douglas Oliver Michael Anderson Nathaniel Hart	F22-15009 F22-15012 22-CF-011042-A 22-CF-011040-A 22-CF-011036A 22-CF-011034-A	MTD based on Jurisdiction MTD based on Jurisdiction MTD based on Jurisdiction	Sept. 15, 2022 Oct. 18, 2022 Oct. 24, 2022	Yes Yes No	Oct. 14, 2022 Nov. 1, 2022 Oct. 31, 2022	Oct. 21, 2022 Nov. 2, 2022 Oct. 31, 2022	None Unknown Dec. 1, 2022	Oct. 21, 2022	Granted	Oct. 31, 2022	Yes Yes Yes Yes Yes	Nov. 28, 2022 Jan. 31, 2023 Jan. 26, 2023		
Orange - 9 Orange - 9 Orange - 9	Jenifer Harris	Peter Washington, Jr. Michelle Stribling Jerry Foster	2022-CF-9611	MTD based on Jurisdiction	Nov. 7, 2022	No										

Palm Beach - 15 Palm Beach - 15 Palm Beach - 15 Palm Beach - 15

Escambia SAO

2022CF008900A

Leo Grant Robert Simpson Luis Villaran Cheryl Ann Leslie

Ralph Clemmons

From:

Nick Cox

Sent:

Tuesday, October 25, 2022 1:42 PM

To: Cc:

Strauss, Scott

Nathaniel Bahill

Subject:

RE: Romona Oliver aka Romona Brown

Thanks, Scott.

Hey Nate, let's see what we can do with the 2022 stuff. If not unique enough for Williams Rule, seems should somehow be admissible under knowledge or consciousness of guilt. Problem is that our charged activity occurred 2 years before. It just seems there has to be a way of getting this in at trial.

Also, if a MTD is filed as we stip to facts, let's be sure the facts and any responsive pleading contain this info as well.

Thanks.... Nick

From: Strauss, Scott <Scott.Strauss@dos.myflorida.com>

Sent: Tuesday, October 25, 2022 10:16 AM To: Nick Cox <Nick.Cox@myfloridalegal.com> Subject: Fwd: Romona Oliver aka Romona Brown

#### Get Outlook for iOS

From: Strauss, Scott

Sent: Tuesday, October 25, 2022 2:16:07 AM

To: Nathaniel Bahill <nathaniel.bahill@myfloridalegal.com>

Cc: jeremy.scott@myfloridalegal.com <jeremy.scott@myfloridalegal.com>

Subject: Romona Oliver aka Romona Brown

Hi Nate,

I have asked the DoE that she be removed. Please understand the following sequence of events to understand Romona Brown's a/k/a Romona Oliver's background.

You may wish to consider a Williams Rule at some point, but I would discuss this internally first.

On March 18, 1999, Brown first registered to vote under Voter ID

Registration #1).

- On December 7, 2000, Brown was sentenced to 22 years for 2nd degree murder.
- On July 2, 2019, Brown was released from prison.
- On July 15, 2019, Brown goes to DMV and declines to register to vote.
- On Feb. 14, 2020, Brown goes to DMV and registers to vote. Brown's new Voter ID is Registration #2).
- On or about Nov. 23, 2020, Brown completes a paper Voter Registration Application. She is provided the same Voter ID: (Registration #3).

- On or about Nov. 3, 2020, Brown Votes.
- On or about Jan. 14, 2022 DoS notifies SOE that Brown is a convicted felon.
- On Jan. 19, 2022, a felon letter from SOE was issued for Voter ID
- On Feb. 21, 2022, the letter was returned to the SOE.
- On Feb. 25, 2022, the SOE published that she would be removed from the rolls b/c she was a felon, but she could
  contest it.
- On March 30, 2022, Brown was removed from voter rolls.
- On May 24, 2022, Brown changes her name to Oliver, and after DoS notified Hillsborough that she was a convicted felon, Brown, now Oliver, goes to DMV and registers to vote with a name change. Her new Voter ID is (Registration #4).

Thanks, Scott

Thanks, Scott

From:

Nick Cox

Sent:

Sunday, October 30, 2022 7:07 PM

To:

Strauss, Scott

Cc:

McVay, Brad R.; Jeremy Scott; Julie Chaikin; Nathaniel Bahill

Subject:

Re: Pending Motions

I called everyone after you and I spoke Friday. The list is accurate as of now. We are expecting more and I have told everyone to copy you with the motions as well. We expect a couple on jurisdiction in Orl, and another in Tampa. At least that is what we have been told. I will send out the spreadsheet too.

I also sent a message to Judge Fernandez' JA in Tampa asking for the Motion Nate told us about to be set another week. I leave Tuesday morning and am gone all week to Panama City.... work related. I will be doing a formal motion tomorrow. Will advise when I hear anything.

Nick

Sent from my Verizon, Samsung Galaxy smartphone Get Outlook for Android

From: Strauss, Scott <Scott.Strauss@dos.myflorida.com>

Sent: Sunday, October 30, 2022 5:39:51 PM
To: Nick Cox < Nick.Cox@myfloridalegal.com>

Cc: McVay, Brad R. <Brad.McVay@dos.myflorida.com>; Jeremy Scott <Jeremy.Scott@myfloridalegal.com>; Julie Chaikin

<Julie.Chaikin@myfloridalegal.com>; Nathaniel Bahill <Nathaniel.Bahill@myfloridalegal.com>

Subject: Pending Motions

#### Hi Nick,

I have created a spreadsheet to keep track of the pending motions. I am kindly asking that you circulate the attached to your team, complete it, and send back, so I can keep track of everything pending. Feel free to add any information.

Of course, should anything new come in, feel free to email me the information so I can keep for my tracking purposes.

Jeremy, please let me know if I have everything accurate on our matters in Broward and Dade. If not, please change, and send back.

Thanks,

Scott R. Strauss
Acting Director
Office of Election Crimes & Security
Florida Department of State
Cell: 850-943-2279

Scott.Strauss@dos.myflorida.com

From: Nick Cox

Sent: Monday, October 31, 2022 1:56 PM

To: Scott Strauss
Cc: Nathaniel Bahill

Subject: Tony Patterson, Hillsborough County filed case

Hey, on the above case, do you think one of your folks could chase down a copy of the ballot Patterson would have voted on in the 2020 general election? I will probably use it in the argument that some of the offices being elected on his ballot were multi-circuit themselves – ie: House, Senate, Congress.

Nate, do we know which precinct Patterson was to vote in?

Thanks.... Nick

From:

Nick Cox

Sent:

Thursday, November 10, 2022 9:10 AM

To:

Strauss, Scott

Cc:

Robert Finkbeiner, Chappell, David; McVay, Brad R.; Jeremy Scott; Julie Chaikin; Stephanie Tew; Paul

Dontenville; Nathaniel Bahill; Panagiota Papakos

Subject:

Re: Orlando voter fraud cases/update

Oh, sure. I read more into the message. I know David has been very helpful as well. We do appreciate how much yall have done to move us along quickly.

Copying our folks here as well to plug them in too.

Take care.... Nick

Sent from my Verizon, Samsung Galaxy smartphone Get Outlook for Android

From: Strauss, Scott <Scott.Strauss@dos.myflorida.com>

Sent: Thursday, November 10, 2022 9:01:59 AM
To: Nick Cox < Nick.Cox@myfloridalegal.com>

Cc: Robert Finkbeiner <Robert.Finkbeiner@myfloridalegal.com>; Chappell, David <David.Chappell@dos.myflorida.com>;

McVay, Brad R. <Brad.McVay@dos.myflorida.com>; Jeremy Scott <Jeremy.Scott@myfloridalegal.com>

Subject: Re: Orlando voter fraud cases/update

#### Two things:

1. Stipulations; and any pending motions. I previously forwarded out a spreadsheet so I can track every pending motion and any issues including jurisdiction, speedy, circuit, etc. I just want to make sure everything is being accurately tracked and we are all communicating.

Additionally, I would kindly ask that your team email/forward me the motions as well when they come in.

To that end, can you please have your team get with David regarding any stipulations so everything is accurate, and provide me with the updates on the spreadsheet.

Thanks

Scott

#### Get Outlook for iOS

From: Nick Cox <Nick.Cox@myfloridalegal.com>
Sent: Thursday, November 10, 2022 8:51:39 AM
To: Strauss, Scott <Scott.Strauss@dos.myflorida.com>

Cc: Robert Finkbeiner <Robert.Finkbeiner@myfloridalegal.com>; Chappell, David <David.Chappell@dos.myflorida.com>;

McVay, Brad R. <Brad.McVay@dos.myflorida.com>; Jeremy Scott <Jeremy.Scott@myfloridalegal.com>

Subject: Re: Orlando voter fraud cases/update

#### EMAIL RECEIVED FROM EXTERNAL SOURCE

What are you suggesting that we confer with State about?

Sent from my Verizon, Samsung Galaxy smartphone

From: Paul Dontenville

**Sent:** Friday, March 25, 2022 1:54 PM

To: Tammy Wade

Cc: Nick Cox; Nathaniel Bahill

Subject: election fraud

#### Hi Tammy,

I spoke with Nate and he is interested in serving in the newly created Election Fraud Prosecutor role. Please let me know if you need me to take any further action.

Thank you,



Paul Dontenville Chief Assistant Statewide Prosecutor Office of the Attorney General Office of Statewide Prosecution 3507 E. Frontage Rd, Suite 200 Concourse Center 4 Tampa, Florida 33607 813-287-7960



November 2, 2022

Nicholas B. Cox Statewide Prosecutor Office of Statewide Prosecution 3507 East Frontage Road, Suite 350 Tampa, Florida 33607

Dear Mr. Cox:

Thank you for your letter of October 26, 2022, regarding Romona Brown, a/k/a Romona Oliver (hereinafter "Ms. Oliver"). I write on behalf of Supervisor Latimer, as his General Counsel.

We were likewise surprised to learn for the first time from a reporter during the week of October 16, 2022, of the name "Romona Oliver" in relation to the arrests and prosecutions in Hillsborough County, leading us to locate a second registration for Ms. Oliver (Voter ID Our surprise emanated from the fact that the July 19, 2022, communication that we received from the Office of Elections Crimes and Security (hereinafter "OECS"), seeking records to be provided to FDLE (the genesis for your prosecutions) did not identify this name or seek any records related to a Romona Oliver. Please see July 19, 2022, email attached for reference. Rather, it sought records for a Romona Brown and provided a specific voter identification number. The requested records for Ms. Brown were promptly located and provided to FDLE. Further, from the time Ms. Oliver registered on May 24, 2022, through the present, we did not receive a felon file or any other notification from the Department of State under section 98.075(5), Florida Statutes, related to eligibility for Ms. Oliver.

Upon learning of the additional registration from the information received from a reporter, our office promptly took the following steps: 1) we sent correspondence to FDLE Special Agent Andy Powell, alerting him to the additional registration that was not identified or sought by OECS (see attached email dated October 20, 2022, without attachments); 2) Supervisor Latimer filed a voter challenge for Ms. Oliver for the current General Election pursuant to section 101.111, Florida Statutes (see attached); and 3) we prepared and sent on October 26, 2022, a letter to Ms. Oliver pursuant to section 98.075(7), notifying her of the felony information and the intent to remove her as a voter upon the conclusion of the due process procedures and timeframe set forth in statute. It is important to note that a challenge filed under section 101.111 flags both a received vote-by-mail ballot and an in-person check-in such that an attempted vote (cast in person as a provisional ballot if a voter still opts to vote after being presented with information about the challenge) would be set aside and referred to a canvassing board (with notice to the

Ms. Oliver is referred to in your letter as "Ramona Brown, a/k/a Ramona Oliver", but the first name spelling is actually with an "o."



voter and opportunity to respond) for adjudication as to the individual's eligibility or lack thereof.

A few other points of note. When a person registers to vote in any county, the application information, to include identifying information (Florida driver license, Florida ID, SSN, or lack thereof), is electronically transmitted to the Department of State for verification and the county is then notified when verification has occurred and a voter identification card should be issued to the voter.

Second, the data pull for the sample ballot mailers was done on October 12, 2022. As discussed above, this was prior to receiving information pertaining to potential ineligibility for Ms. Oliver on or about October 18, 2022.

Finally, Ms. Oliver since registering under voter ID As noted above. the removal process for this new registration, prompted by information received from a source other than the Department of State (see section 98.075(6), Florida Statutes), assuming no response or objection to the information from Ms. Oliver, will be completed upon the expiration of the timeframe set forth in statute.

Thank you again for your communication. Supervisor Latimer conveys that if we can be of any further assistance, please feel free to contact us at your convenience.

Best Regards,

Colleen E. O'Brien

General Counsel for Craig Latimer

olly & O'Bries

Hillsborough County Supervisor of Elections

cc:

Assistant Statewide Prosecutor Nathan Barnhill

601 E. Kennedy Blvd., 16th Floor, Tampa, FL 33602

#### Colleen O'Brien

From:

Colleen O'Brien

Sent:

Thursday, October 20, 2022 3:16 PM

To:

Powell, Andrew

Subject:

FW: 2020 General Election Records

Attachments:

Voter Information Printout.pdf; Voter Activity Printout.pdf; Voter Information

Printout.pdf

Andy,

Good afternoon. We had an inquiry from a reporter this week related to a Romona Oliver. In responding to the inquiry, our Chief Communications Officer discovered a new voter registration ID and record for an individual (Romona Oliver) that appears likely be the same individual as Romona Brown (Voter ID that was originally requested by Pete Antonacci in the email below, and subsequently provided to you as a result.

Having learned of this additional record, I wanted to forward it along to you, along with the voter audit as this was a DHSMV registration.

If you have any questions, please feel free to reach out anytime.

Thank you,

Colleen

#### Colleen E. O'Brien

General Counsel

Representing Craig Latimer, Hillsborough County Supervisor of Elections

Governor's Sterling Award Recipient

Our Vision: To be the best place in America to vote

Direct: (813) 574-1285 Cell: (813) 765-0529 Email: cobrien@votehillsborough.gov

VoteHillsborough.gov

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Please note: Florida has a very broad public records law. Written communications to or from the Supervisor of Elections regarding business constitute public records and are available to the public and media upon request unless the information is subject to a specific statutory exemption. Therefore, your e-mail address and message may be subject to public disclosure.

From: Craig Latimer <clatimer@votehillsborough.gov>

Sent: Tuesday, July 19, 2022 3:11 PM

To: Peg Reese cpreese@votehillsborough.gov>; Gerri Kramer <gkramer@votehillsborough.gov>; Colleen O'Brien

<cobrien@votehillsborough.gov>

Subject: FW: 2020 General Election Records

From: Antonacci, Peter < Peter.Antonacci@dos.myflorida.com >

Sent: Tuesday, July 19, 2022 3:10:29 PM (UTC-05:00) Eastern Time (US & Canada)

To: Craig Latimer < clatimer@votehillsborough.gov >

Subject: 2020 General Election Records

## EXTERNAL EMAIL: Exercise Caution with links or attachments.

The attached list of registered Hillsborough Co. residents voted in the 2020 General Election. Please provide images of the VBM envelope or the record(s) of the in person voting for these residents. I'll send along the name of the FDLE agent who will pick up these records upon your call (partial responses welcomed). Please send along the name of your staff member who the Agent should contact.

Many Thanks in advance for your attention to this request.....

#### HILLSBOROUGH:

D LAST_NAI	ME FIRST_NAME DOB
Smith	Byron 3/6/1957
•	
Patterson	Tony 11/7/1978
Jack	Hubert 3/28/1957
	and the second control of the second control
Brown	Romona 10/19/1966
Oliver	Douglas 9/6/1962
Hart	Nathan 3/5/1973

Please note: Florida has a very broad public records law. Written communications to or from the Supervisor of Elections regarding business constitute public records and are available to the public and media upon request unless the information is subject to a specific statutory exemption. Therefore, your e-mail address and message may be subject to public disclosure.

#### OATH OF PERSON ENTERING CHALLENGE

Section 101.111 Florida Statute Hillsborough County, Florida

#### NOTICE TO PERSON ENTERING CHALLENGE:

In accordance with Florida Statute 101.111(2), any elector or poll watcher filing a frivolous challenge of any person's right to vote commits a misdemeanor of the first degree, punishable as provided in Florida Statute 775.082 or Statute 775.083; however, electors or poll watchers shall not be subject to liability for any action taken in good faith and in furtherance of any activity or duty permitted of such electors or poll watchers by law. Each instance where any elector or poll watcher files a frivolous challenge of any person's right to vote constitutes a separate offense. Copies of this completed form will be provided to the voter who has been challenged as well as the election board of the challenged voter's precinct. Initials of Person Entering Challenge CL

I do solemnly swear th	at my name is			, that I am
a member of the	Democratic  Print Party Affiliation	Print Na party; that I a		or poll watcher; that my
residence address is _		**Prot	ected**	
; and	d that I have reason t	o believe that	The state of the s	
is attempting to vote il	legally and the reaso	ns for my belief are s	Print Challenged Vitated below:	oter's Name
Possible Felon - Poten	tially Ineligible to Vo	ote		
-				- Compa
Signature:	Ratime			
Sworn and subscribed	to before me this	day of	October	20 _22
Signature of Election C	official:		Precinct/E	arly Vote309

Any elector or poll watcher may challenge the right to vote of any voter and must complete the above "Oath of Person Entering Challenge" in two (2) copies. The Clerk shall immediately provide to the challenged voter one copy of the oath of the person entering the challenge and challenged voter shall be allowed to vote a provisional ballot. The second copy of the "Oath of Person Entering Challenge" is attached to the Provisional Ballot Voter's Certificate and Affirmation.

#### **以其以其** Notice to Voter Who Has Been Challenged 異異異

In accordance with the provisions of Florida Statute 101.111, your right to vote in this election has been challenged by the individual listed above. If the basis for the challenge is that your legal residence is not in the precinct noted above, you shall be given the opportunity to execute a change of legal residence in order to execute a regular ballot. Otherwise, you are entitled to cast only a Provisional Ballot in this election.

#### DECLARACIÓN JURADA DEL RECUSANTE

Sección 101.111, Estatutos de Florida Condado de Hillsborough, Florida

#### AVISO PARA EL RECUSANTE:

De conformidad con el Estatuto de Florida 101.111(2), cualquier elector u observador electoral que recuse insustancialmente el derecho electoral de otra persona comete un delito de primer grado, punible según el Estatuto de Florida 775.082 o los Estatutos de Florida 775.083; sin embargo, los electores u observadores electorales no serán legalmente responsables por ninguna medida adoptada de buena fe y en el cumplimiento de cualquier actividad o deber que les sean permitidos por ley. Cada recusación insustancial de los derechos electorales de una persona por parte de un elector u observador electoral constituye una infracción aparte. El votante recusado y la junta electoral de su precinto recibirán una copia de este formulario completo. Iniciales del Recusante \_ CL Craig Latimer Juro solemnemente que mi nombre es \_\_\_\_\_ Nombre (en Imprenta) demócrata pertenezco al partido ; que soy un votante u observador electoral inscripto; Afiliación Política (en Imprenta) \*\*protegida\*\* que mi domicilio es Romona E Oliver \_\_; y que tengo razones para creer que \_\_\_\_\_ Nombre del Votante Recusado (en Imprenta) está intentando votar ilegalmente y dichas razones se indican a continuación: posible criminal - potencialmente no habilitado para votar Firma: Craig Latimer días del mes de de 20 22 Firma del Funcionario Electoral: Precinto/ Centro de Votación Anticipada 309 **異異異** Procedimientos de Recusación 異異異異 Cualquier elector u observador electoral puede recusar el derecho electoral de cualquier votante y debe completar dos (2) copias de la "Declaración Jurada del Recusante". El Encargado le entregará inmediatamente al votante recusado una copia de la declaración del recusante y el votante recusado podrá emitir un voto provisional. La segunda copia de la "Declaración Jurada del Recusante" se adjuntará al Certificado y Declaración Jurada del Votante por Boleta Provisional.

#### ¤¤¤ Aviso para el Votante que Ha Sido Recusado ¤¤¤¤

De conformidad con las disposiciones del Estatuto de Florida 101.111, su derecho a votar en esta elección ha sido recusado por la persona arriba indicada. Si la recusación se debe a que su domicilio no se encuentra en el precinto arriba indicado, tendrá la oportunidad de realizar un cambio de domicilio legal de residencia para poder emitir un voto normal. De lo contrario, solo tendrá derecho a emitir un voto provisional en esta elección.

From: Scott Strauss

To: Nick Cox; Julie Chaikin
Cc: Peter Antonacci

Subject: Fwd: FELONS General Election 2020 Data

Date: Wednesday, July 13, 2022 9:38:50 PM

Attachments: List 1.xlsx

Please see attached spreadsheet.

#### Begin forwarded message:

From: Andrew Ladanowski <andrew@addinsol.com>

**Date:** July 13, 2022 at 8:45:49 PM EDT

To: "Mercer, Kalen L." < Kalen. Mercer@dos.myflorida.com >, "Antonacci, Peter"

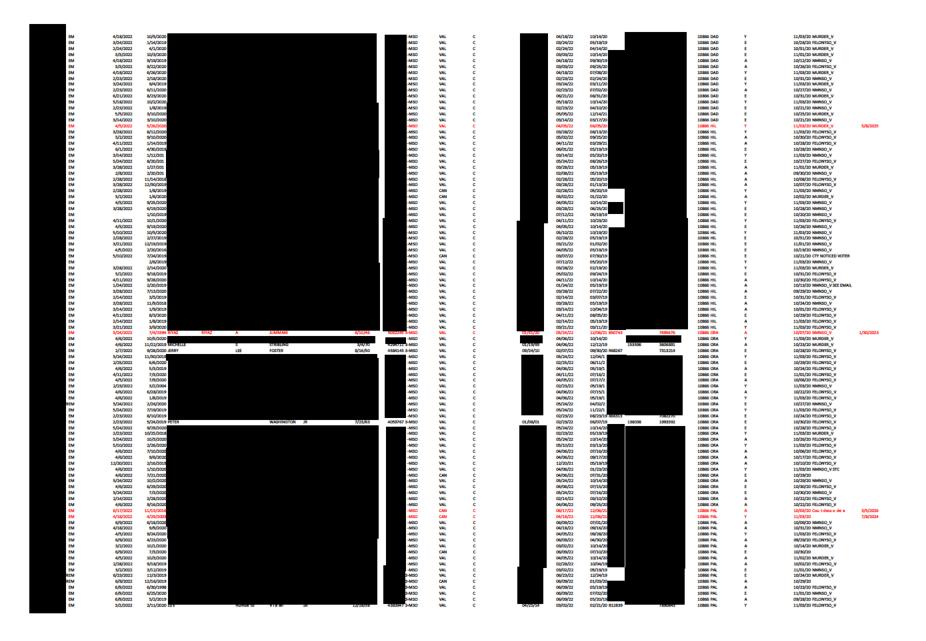
<Peter.Antonacci@dos.myflorida.com>, Scott Strauss

<scottstrauss@outlook.com>

Subject: RE: FELONS General Election 2020 Data

List 1

REG_STATUS	REMOVED_DATE RE	EG_DATE	IRST_NAME F stName MIDDLE_NAME	LAST_NAME NAME_SUFF X	DATE_OF_BIRTH MAT	CH_ID PRIOR	ITY_ORDER MATCH_STA	KTUS MATCH_TYPE	FELON_CONVICTIC MAT	TCH_STATUS_IMA	TCH_CREATED DOC_N	JM FOLE_NUM E	LECTION_ID COUNTY_ID	VOTE_CODE	VOTE_DATE BVRS_COMMENT Supe vs onTe m net on
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## STATEWIDE PROSECUTION COST REPORT AS OF DECEMBER 6, 2022

	DESCRIPTION	VENDOR	AN	IOUNT
2022-0276-MIA	TRAVEL - IN STATE - INCIDENTAL EXPENSES	CLINCHE	\$	3.57
2022-0276-MIA	TRAVEL - IN STATE - MILE ALLOWANCE	CLINCHE	\$	5.34
			\$	5.34
2022-0267-ORL	TRAVEL - IN STATE - INCIDENTAL EXPENSES	GILLESPIE	\$	6.00
0000 0004 TD4			\$	6.00
2022-0261-TPA	TRAVEL - IN STATE - INCIDENTAL EXPENSES	BAHILL	\$	2.85
2022-0261-TPA	TRAVEL - IN STATE - MILE ALLOWANCE	BAHILL	\$	5.78
0000 0000 754			\$	8.63
2022-0263-TPA	TRAVEL - IN STATE - INCIDENTAL EXPENSES	BAHILL	\$	2:85
2022-0263-TPA	TRAVEL - IN STATE - MILE ALLOWANCE	BAHILL	\$	5.78
0000 0070 TD4			\$	8.63
2022-0272-TPA	TRAVEL - IN STATE - INCIDENTAL EXPENSES	BAHILL	\$	2.93
0000 0074 704			\$	2.93
2022-0271-TPA	TRAVEL - IN STATE - INCIDENTAL EXPENSES	BAHILL	\$	2.92
2022-0271-TPA	TRAVEL - IN STATE - MILE ALLOWANCE	BAHILL	\$	5.78
			\$	8.70
2022-0283-WPB	TRAVEL - IN STATE - INCIDENTAL EXPENSES	TEW	\$	1.00
	THE SECRETARY OF THE SECRETARY SECRE		\$	1.00
2022-0277-MIA	TRAVEL - IN STATE - MILE ALLOWANCE	CLINCHE	\$	5.34
			\$	5.34
2022-0264-MIA	MAILING/DELIVERY SERVICES	FEDEX CORP	\$	4.46
			\$	4.46
		TOTAL TO DATE	\$	51.03

From: <u>Cameron Paul</u>

To: Cameron Paul; Gerald Whitney Ray; Kylie Mason; Georgia Pevy; Trevor DeGroot; Elizabeth Albrizio; Edward

Hance; Betsy Stupski; Christina Harris; Ed Tellechea; Enrique Vargas; John Bajger; Kathleen Von Hoene; Laura Daugherty; Patrice Malloy; Scott Palmer; Timothy Dennis; Victoria Butler; Jenna Hodges; John Guard; Lynn Guyton; Cedell Garland; Lee Istrail; Greg Slemp; James Percival; Jeffrey DeSousa; David Bundy; Ryann Flack; Nick Cox; Carol DeGraffenreidt; Kacie Prowant; Celine Funk Granai; Elizabeth Teegen; Richard Martin; Janna Barineau; Elizabeth Guzzo; Cynthia Crum; Pat Gleason; Catherine McNeill; Brian Wright; Kym Oswald; Crystal Fukushima; Jack Hagadorn; Becky Kring; Gary Howze; Natalie Christmas; Rey Anthony Lastre; Nicholas Niemiec;

Chrystal Harwood; Jessica Caruso; Kisha Wilkinson; Liz Brady; Nicholas Weilhammer

**Subject:** News Clips 8.19.22

**Date:** Friday, August 19, 2022 9:05:00 AM

To view today's front pages of the Florida newspapers, click here.

#### News Clips 8.19.22

#### LINKS:

Ashley Moody Warns Florida Business Owners About Spear-Phising Scams, Florida Daily

FLORIDA MEDICAL CARE WORKER ACCUSED OF RIPPING OUT DISABLED PATIENT'S HAIR, Black Enterprise

After new fraud unit launches, 20 felons charged in Florida with election fraud, The Center Square

Florida town in disarray after multiple police officers quit, FOX News

Entire Florida police department quits in this small town, FOX 35 Orlando 29-year-old Miami officer dies after being shot in robbery pursuit, suspect dies at scene, USA Today

Woman says she was bombarded by people wanting to rent her new home in bizarre scam. WBAL News Radio

4 tips to protect your kids online as they head back to school, The Florida Tech Crimson

#### ARTICLES:

## Ashley Moody Warns Florida Business Owners About Spear-Phising Scams, Florida Daily

This week, state Attorney General Ashley Moody issued a Consumer Alert to warn Florida business owners about a recent increase in spear-phishing reports.

There are already more reports of spear-phishing in the first half of this year than received during all of 2021. Spear-phishing is an advanced form of a phishing attack. While phishing attacks cast a wide net via a more generalized message sent to large groups of people, spear-phishing involves narrowly tailored messages using personal information and sent to an individual or smaller group of people—like employees of a specific business.

Often, these messages are designed to appear to be from a manager or company executive. Scammers will typically include the target's full name, title and an urgent message that distracts the target. Often, these messages contain or have links to malicious viruses designed to steal corporate data, usernames, passwords and personnel records.

"Spear-phishing attacks are individualized and more specific than the more common scam messages we see—and that is what makes them more dangerous. As we see an increase in reports of these types of cyberattacks, businesses need to make sure team members are trained to spot and report suspicious messages immediately—to protect themselves, the company and its customers," Moody said.

The following are 10 tips for Florida businesses to help guard against spear-phishing attacks:

- 1. Train employees in security principles. Establish basic security practices and policies for employees, such as requiring strong passwords, or issuing penalties for violating company cybersecurity policies. Have employees double-check the sender's address of a suspicious email before clicking any links. Put in place rules of behavior describing how to handle and protect customer information and other vital data.
- 2. Protect information, computers and networks from cyberattacks. Using the latest software, web browsers and operating systems are the best defenses against viruses, malware and other online threats. Make sure antivirus software conducts scans of the device after each update.
- 3. Provide firewall security for your internet connection. A firewall is a set of related programs that prevent outsiders from accessing data on a private network. Make sure the system's firewall is enabled. If working from home, ensure that an employee's home system is protected by a firewall.
- 4. Create a mobile-device action plan. Require employees to use passwords, encrypt data and install security apps to prevent criminals from stealing information while the phone or mobile device is on public networks. Be sure to set reporting procedures for lost or stolen equipment.
- 5. Make backup copies of important business data and information. Regularly back up the data on all computers. Backup data automatically if possible, or at least weekly, and store the copies either offsite or in a cloud program.
- 6. Control physical access to your computers and create user accounts for each

employee. Prevent access or use of business computers by unauthorized individuals. Laptops in particular can easily be lost or targeted for theft so secure them when unattended. Make sure a separate user account is created for each employee and require strong passwords. Administrative privileges should only be given to trusted information-technology staff and key personnel.

- 7. Secure Wi-Fi networks. To hide a Wi-Fi network, set up a wireless access point or router so it does not broadcast the network name. Protect access to the router by requiring a password.
- 8. Employ best practices on payment cards. Work with banks or processors to ensure the most trusted and validated tools and anti-fraud services are being used. Isolate payment systems from other, less-secure programs and do not use the same computer to process payments and browse the internet.
- 9. Limit employee access to data and information. Limit authority to install software.
- 10. Passwords and authentication. Ensure employees use unique passwords and require workers to change passwords every three months. Consider implementing multifactor authentication that requires additional information beyond a password to gain entry.

If money is lost to a spear phishing scam, immediately contact local law enforcement. Additionally, cybercrimes can be reported to the Federal Bureau of Investigation's Internet Crime Complaint Center.

## FLORIDA MEDICAL CARE WORKER ACCUSED OF RIPPING OUT DISABLED PATIENT'S HAIR, Black Enterprise

A medical care provider accused of ripping the hair out of a disabled patient's hair during a struggle has been arrested in Florida.

According to a press release, Makala Malcolm dragged a disabled adult by her hair, ripping out several braids. She is being charged with one count of abuse of an elderly or disabled adult, a third-degree felony. If she is convicted, she could face up to five years in prison as well as \$5,000 in fines.

In a written statement, Florida Attorney General Ashley Moody stated, "This is appalling. Caregivers are supposed to nurture their patients, not rip out their hair. Thankfully, my Medicaid Fraud Control Unit investigators and local law enforcement stopped this suspect before more harm could be done."

Investigators said that the patient was left with "a bald spot with redness and blood on [their] scalp."

The investigation was carried out by Attorney General Moody's Medicaid Fraud Control Unit and the Leon County Sheriff's Office in Tallahassee. The incident took

place at the Tallahassee location of Sunrise, a private developmental care chain, on Observation Circle, just south of Buck Lake Road, according to The Tallahassee Democrat.

Sunrise is an "Intermediate Care Facility for the Developmentally Disabled" that provides 24-hour, five-days-a-week care for its clients, an arrest affidavit read. The week before the incident, Malcolm returned from suspension "from another situation with an individual," an affidavit said, according to The Democrat.

ABC 15 News reported that the confrontation took place about a month ago, but the 24-year-old Malcolm was apprehended and booked on Tuesday.

The case will be prosecuted by Attorney General Moody's Medicaid Fraud Control Unit through a mutual agreement with the Office of the State Attorney, Jack Campbell, in the Second Judicial Circuit.

Reports have not mentioned a response by Sunrise to Malcom's arrest, the reason for her previous suspension, or her work history.

## After new fraud unit launches, 20 felons charged in Florida with election fraud, The Center Square

(The Center Square) – Within three months of Florida's new election fraud unit being formed, Gov. Ron DeSantis announced on Thursday that 20 individuals had been charged and the state was in the process of arresting them for allegedly voting illegally.

Earlier this year, the state legislature passed an election integrity bill that DeSantis signed into law in May, which among other things created a new state Office of Election Crimes and Security. The office opened July 1 and is the first of its kind in state government, DeSantis said.

The office's new staff began investigating alleged election fraud statewide, working with the Attorney General's office and the Florida Department of Law Enforcement.

"In 2020, Florida ran an efficient, transparent election that avoided the major problems we saw in other states. At the same time, the election was not perfect, which is why we continue our efforts to ensure the integrity of our elections," DeSantis said. "Our new election crimes office has sprung into action to hold individuals accountable for voter fraud. Today's actions send a clear signal to those who are thinking about ballot harvesting or fraudulently voting. If you commit an elections crime, you will be prosecuted to the fullest extent of the law."

The 20 individuals charged Thursday who allegedly voted illegally had been convicted of either murder or a felony sexual offense.

Most convicted felons in Florida who've served their sentence, were successfully

paroled, and passed their probation period can have their voting rights restored under Amendment 4. The amendment became law after Florida voters passed it in a November 2018 ballot proposition. Both state law and Amendment 4 specifically prohibit convicted murderers and sexual offenders from voting even after they've served their sentence, been paroled and their probation period ends.

The 20 individuals were charged with committing a third-degree felony, which carries up to a \$5,000 fine and up to five years in prison.

"As elected leaders, it is incumbent on us to ensure free and fair elections and instill confidence in the voting process," said Attorney General Ashley Moody, who joined DeSantis at a press event held in Broward County on Thursday. "No voting system can stand without the backing and confidence of the people it serves, and thanks to Governor DeSantis, we are reinforcing that trust, and Florida's elections system will serve as the standard-bearer for the rest of the nation."

State Commissioner of Agriculture Nikki Fried, a Democratic candidate for governor, tweeted, "Getting word that DeSantis may be taking over or interfering with the Broward County Supervisor of Elections Office in the middle of an election. If true, he better have a [expletive] good reason for it. And you know he won't."

The individuals who allegedly committed voter fraud did so in Palm Beach, Broward and Miami-Dade counties, "although there are others in other parts of the state," DeSantis said. "These folks voted illegally because they'd been convicted of murder or sexual assault. They do not have the right to vote … under Florida law."

DeSantis noted that in the last two legislative sessions, "we've done more on election integrity than any state in the country," referring to prohibitions on ballot harvesting, changes to absentee ballot requirements, banning "Zuckerbucks," referring to hundreds of millions of dollars spent by a nonprofit created by Facebook's Mark Zuckerberg on the 2020 election, among others.

After the new office was created, DeSantis said, "some people said, 'there's no voter fraud.' Well I'm here to say that [staff in the new office] got to work ... to hold people accountable who violated our election laws.

The alleged felony voters were only one class of voters that violated the law, he said. Investigations are ongoing, for example, of individuals who've voted in two jurisdictions, as well as "folks who are voting who are illegal aliens" who don't have the right to vote because they aren't U.S. citizens.

DeSantis also instructed the state Department of State to send formal notifications to all 67 county Supervisors of Elections to preserve 2020 election records until additional reviews and investigations are completed.

Florida town in disarray after multiple police officers quit, FOX News

A small town in Florida says that six members of its police department submitted resignations.

The Town of Melbourne Village made the announcement on Thursday and said that six members of the small police department submitted their resignations on Monday, and most of them will be effective on Friday.

"These resignations will effectively end the present ability of the Melbourne Village Police Department to provide law enforcement and police protection services within the town," a press release said.

Town officials say that there will be "no lapse in coverage," however, stating that the Brevard County Sheriff's Office (BCSO) will step in and provide law enforcement and protection services within the town's municipal boundaries. The sheriff's office has been covering "many shifts entirely," over the past several years, according to the press release.

The Town Commission will consider a proposed agreement for the sheriff's office law enforcement services, which will "give the town the flexibility to eventually reform the Melbourne Village Police Department, to continue the contract with BCSO, or to receive service from the BCSO through participation in the Brevard County Law Enforcement Municipal Service Taxing Unit," the town said.

"Regardless of the ultimate direction chosen by the Town Commission and citizens of Melbourne Village, rest assured that the Town's residents and businesses will continue to receive comprehensive law enforcement and police protection services at all times," the press release states.

The town also said that its officials won't be answering questions about the resignations.

#### Entire Florida police department quits in this small town, FOX 35 Orlando

BREVARD COUNTY, Fla. - The entire police department that serves a small Central Florida town has quit, officials announced Thursday in a news release.

The Town of Melbourne Village confirmed the six members of the Melbourne Village Police Department submitted their resignations on Monday, with most of the resignations effective on Friday.

"These resignations will effectively end the present ability of the Melbourne Village Police Department to provide law enforcement and police protection services within the Town," the news release stated.

Officials said the Brevard County Sheriff's Office (BCSO) will immediately provide law enforcement and police protection services within the community.

It's not the first time BCSO has done so. For several years, BCSO has reportedly covered several shifts.

The town's commission plans to consider an agreement for the sheriff's office's continued provision of law enforcement services. If the proposal is approved, it will allow for the town to eventually reform its police department and continue to contract with BCSO or to receive service from the sheriff's office through participation with the Brevard County Law Enforcement Municipal Service Taxing Unit.

"Regardless of the ultimate direction chosen by the Town Commission and citizens of Melbourne Village, rest assured that the Town's residents and businesses will continue to receive comprehensive law enforcement and police protection services at all times," officials said in a statement.

## 29-year-old Miami officer dies after being shot in robbery pursuit, suspect dies at scene, USA Today

MIAMI — A 29-year-old police officer who was shot in the head while trying to stop a robbery suspect in Miami has died, officials said.

Det. Cesar Echaverry was shot Monday night as he and other officers closed in a suspect wanted for an earlier robbery in nearby Broward County, police said. His family had remained by his side at Miami's Jackson Memorial Hospital.

"Officer Echaverry died in the line of duty while serving & protecting our community," Miami-Dade Police Director Alfredo Ramirez tweeted Wednesday evening. "Our law enforcement family will continue to stand beside & support the Echaverry family through this difficult time."

Police said Echavarry and other officers began pursuing a white vehicle involved in an earlier armed robbery when its driver tried to flee, ramming into police vehicles and a civilian vehicle whose three occupants were hospitalized in stable condition.

He then tried to escape on foot, but a confrontation and gunfire ensued. The driver, identified as Jeremy Horton, 32, of Acworth, Georgia, was shot and died at the scene.

Horton had been stopped in South Florida on Aug. 8 and cited for having no proof of insurance and driving with an expired tag and a suspended Georgia driver's license, according to Golden Beach Police Chief Rudy Herbello.

Echaverry had been with Miami-Dade Police for five years, and was assigned to the department's robbery intervention detail. His friends told the Miami Herald he was moving up and planned to get married.

Monday's shooting wasn't his first brush with death, the newspaper reported. As a rookie in March 2018, Echaverry was a passenger in a police vehicle that rammed into another car, killing its 45-year-old driver.

The computer on the police vehicle showed Officer John Song was driving at 78 mph in a 40 mph zone a second before the crash. Both officers were airlifted to a hospital. In May a jury acquitted Song of vehicular homicide and reckless driving. The Herald reported that Echaverry testified that he couldn't remember the moments leading up to the crash.

"We'll never forget Officer Echaverry's bravery & sacrifice. Godspeed, brother," Ramirez tweeted.

## Woman says she was bombarded by people wanting to rent her new home in bizarre scam, WBAL News Radio

A Florida woman says at one point her yard was filled with people wanting to rent her new home.

She had just bought it. Fearing this was all a big scam, she called law enforcement.

Watch the full report in the video player above.

"At first, I was like, huh?" said Shawn Mincy.

First-time homeowner Mincy said 20 families had been coming by to rent her new Ocala home that she had purchased not even a month ago.

"One guy sent over \$2,000 to him for the move-in fees since he didn't want to lose the deal," Mincy said.

It got so bad, that she put a sign on her door saying her house is not for rent.

"Oh no, it is not for rent," Mincy said.

One woman, Joya Galbreath, got a tenant approval letter for the home early Wednesday morning not even 12 hours after applying for the same property.

"I was flabbergasted," Galbreath said.

The letter stated: "The home is currently occupied. They will be officially out on 8/25/22, and the home will be officially move-in ready 9/1/22."

Galbreath says the man, an alleged landlord, wanted a \$1,300 deposit.

Sister station WESH asked how much she sent him.

"None. The only thing I sent, was when I did the application I sent \$55," Galbreath said.

She got leery while at the bank and called him.

"I said I don't want this to be a scam. All he said was this is not a scam and went on to say you need to send the money," she said.

Galbreath said he also texted her saying, "Trust me, you're not losing your money. How can I run away with your money when I have a family here in Florida?"

WESH went to the Orlando address listed on the alleged lease approval letter and a driver's license sent to one of the potential renters, but it's private property and there is no trespassing.

Mincy contacted the Marion County Sheriff's Office.

Both women say do your homework. Galbreath went online to find out about scams.

"It said if they ask you to wire money, which is what exactly he was doing and they don't want to meet up with you and he did not want to meet up with me," Galbreath added.

"If it looks like it's too good to be true, then most likely it's too good to be true," Mincy said.

The Marion County Sheriff's Office is investigating.

## 4 tips to protect your kids online as they head back to school, The Florida Tech Crimson

(BPT) - Back to school means new tech and gadgets, from tech devices and online learning platforms to online-only textbooks. With new digital learning devices and platforms comes the need for additional online safety tools and the ability to educate kids on safe online habits.

Before the school year starts, many families will need to tackle this head-on and teach kids the importance of digital safety. Not sure how to start the conversation? Check out these four tips to help protect your kids online as they begin a new school year.

#### 1. Discuss the dangers of identity theft

Did you know that in 2021, more than 1.25 million children in the U.S. were victims of identity theft and fraud? According to Javelin Strategy & Research, over half of all identity theft cases involve children ages 9 and younger. Most victims won't know their identity has been stolen until they're adults and apply for a loan or credit card.

To reduce the risk of identity theft, teach your kids how to protect their personal information online. For younger children, emphasize the importance of keeping their full name, birthday, address and phone numbers private. If you have teenagers, make

sure they understand that they shouldn't share their Social Security numbers or driver's license information.

#### 2. Be mindful of what you post on social media

Potential fraudsters can glean sensitive information from you or your child's social media profiles. You may not think twice about sharing a birthday photo or a snapshot of your family vacation, but scammers can easily use this information to access your accounts or find out where you live.

Sit down as a family and review your social media accounts to increase your digital security. Some ways you can enhance your social media privacy are to:

Make your profiles private Restrict who can see your posts Limit comment access to close friends Limit message requests to approved followers only Never reveal your address or date of birth Disable location sharing on certain apps By following these steps, you can instantly secure your family's social media accounts and teach your children how to be digital security savvy.

#### 3. Review password security best practices

If you use a password that contains personal information — like your birthday or a pet's name — and you reuse passwords, chances are your children do too. Teach your children the importance of password protection and best practices for password security.

#### 4. Check parental controls

Parental controls are a powerful tool to give you peace of mind that your kids' online activity and behavior are in accordance with your family's preferences. Not only do they allow you to monitor your child's screen time and online activity, but you can also use parental controls to block and filter harmful sites.

#### **Cameron Paul**

**Communications Coordinator** Florida Attorney General's Office The Capitol, Suite PL-01 Tallahassee, Fla. 32399-1050 Office: (850) 245-0196

From: Mercer, Kalen L.
To: Antonacci, Peter

Cc: michellecabrera@fdle.state.fl.us; scottMcinerney@fdle.state.fl.us; markmitchell@fdle.state.fl.us;

milessonn@fdle.state.fl.us; christopherwoehr@fdle.state.fl.us; troywalker@fdle.state.fl.us; Scott Strauss; Nick

Cox; Julie Chaikin

Subject: RE: Election Crimes - Packets (5/5)

Date: Thursday, July 14, 2022 11:24:28 AM

Attachments: <u>image001.png</u>

Good morning,

All 25 voter packets sent this morning fit each of the criteria below:

- The voters were registered in Broward County
- Those voters voted in the 2020 General Election
- Those voters are felony sexual offenders or murderers with Guilty convictions

All 25 packets happen to all be from Broward County ONLY due to alphabetical sorting of a larger list consisting of five counties. Five counties and their totals can be found below for the following criteria:

- The voters are felons (90-95% of the data below are felony sexual offenders or murderers with Guilty convictions)
- Those voters voted in the 2020 General Election
- Those voters are have been deemed Ineligible to vote

Broward 53
Dade 74
Hillsborough 34
Orange 29
Palm 16

ecid00003; Suggs, Eugene; page 27 of document ecid00000-00005.pdf (not included in packet: voter Ineligible/removed 03/02/2022)

ecid00006; Hubbard, Terry; page 1 of document ecid00006-00010.pdf (not included in packet: voter Ineligible/removed 06/03/2022)

ecid00014 ; Garner, Arthur; page 46 of document ecid00011-00015.pdf (not included in packet: voter Ineligible/removed 03/02/2022)

#### Kalen Mercer

Office of Election Crimes and Security (850) 245-6588 kalen.mercer@dos.myflorida.com

<sup>\*\*\*</sup>SAMPLE PACKETS TO FOCUS ON FOR THE CALL\*\*\*

**From:** Mercer, Kalen L.

Sent: Thursday, July 14, 2022 10:34 AM

To: Antonacci, Peter < Peter. Antonacci@dos.myflorida.com>

**Cc:** michellecabrera@fdle.state.fl.us; scottMcinerney@fdle.state.fl.us; markmitchell@fdle.state.fl.us; milessonn@fdle.state.fl.us; christopherwoehr@fdle.state.fl.us; troywalker@fdle.state.fl.us; Scott Strauss <scottstrauss@outlook.com>; nick.cox@myfloridalegal.com;

julie.chaikin@myfloridalegal.com

**Subject:** RE: Election Crimes - Packets (5/5)

Voter Registration <u>Status Reason Code explanations</u>. Status Reason is found on first page of each voter packet, right hand side (Voter Maintenance page).

#### Example:



E(F	) Civil Rights Etc.	FVRS code
	or	Set by the county user.
	Civil Rights Felon	The voter is a known felon. Some counties use this code for voters who have
		been adjudicated mentally incapacitated.

#### Kalen Mercer

Office of Election Crimes and Security (850) 245-6588

kalen.mercer@dos.myflorida.com

**From:** Mercer, Kalen L.

**Sent:** Thursday, July 14, 2022 9:55 AM

**To:** Antonacci, Peter < <u>Peter.Antonacci@dos.mvflorida.com</u>>

**Cc:** michellecabrera@fdle.state.fl.us; scottMcinerney@fdle.state.fl.us; markmitchell@fdle.state.fl.us; milessonn@fdle.state.fl.us; christopherwoehr@fdle.state.fl.us; troywalker@fdle.state.fl.us; Scott

Strauss < <a href="mailto:scottstrauss@outlook.com">subject: Election Crimes - Packets (5/5)</a>

The attachment and email contain information that is confidential and exempt from public disclosure under Florida Public Records law.

Attached. (5 of 5)

### **Kalen Mercer**

Office of Election Crimes and Security (850) 245-6588

kalen.mercer@dos.myflorida.com

ecid0021

ecid0022

ecid0023

ecid0024

ecid0025

~

From: Antonacci, Peter
To: Strauss, Scott

Cc:McVay, Brad R.; Nick CoxSubject:RE: Jones and Statutes

**Date:** Wednesday, July 20, 2022 9:12:51 AM

#### Thanks

Helpful guidance but Jones presupposes the applicability of the Amendment 4 rights restoration remedy. In our cases (sex offenders and killers) the targets remain outside of direct Amendment 4 analysis as they were specifically excluded by the words of the amendment and continue to be under the jurisdiction for restoration of any right (disabled by a felony) of the Clemency Board.

**From:** Strauss, Scott <Scott.Strauss@dos.myflorida.com>

**Sent:** Wednesday, July 20, 2022 12:04 AM

**To:** Antonacci, Peter < Peter. Antonacci@dos.myflorida.com>

**Subject:** Jones and Statutes

#### WORK PRODUCT - NOT SUBJECT TO PUBLIC RECORDS REQUEST

Fla. Stat. 104.011 A person who willfully swears or affirms falsely to any oath or affirmation, or willfully procures another person to swear or affirm falsely to an oath or affirmation, in connection with or arising out of voting or elections commits a felony of the third degree. Similarly, a person who willfully submits any false voter registration information commits a felony of the third degree.

Fla. Stat. 104.15 - Whoever, knowing he or she is not a qualified elector, willfully votes at any election is guilty of a felony of the third degree, punishable as provided in <u>s. 775.082</u>, <u>s. 775.083</u>, or <u>s. 775.084</u>.

Scienter Laws 1935, c. 16986, § 3, defining crime of making, transmitting, or delivering, or causing to be made, transmitted, or delivered, any false statement or affidavit with intent that it shall be used under act governing absentee voting, applied only to statements or affidavits known to be false when made. State ex rel. Miller v. Coleman, 130 Fla. 537, 178 So. 157 (1938). Election Law • 695

Florida's laws governing felon re-enfranchisement and voter fraud were not unconstitutionally vague, under Due Process Clause, by allegedly making it difficult or impossible for some felons to determine whether they were eligible to vote after completing all terms, including financial terms, of their sentences; felons and law enforcement could discern from those statutes exactly what conduct was prohibited, namely, that felon could not vote or register to vote if he knew he had failed to complete all terms of his criminal sentence, which was clear standard that included scienter requirement,

provided fair notice to prospective voters, and limited prosecutorial discretion. Jones v. Governor of Florida, C.A.11 (Fla.)2020, 975 F.3d 1016.

Constitutional Law • 4232; Convicts • 22; Election Law • 99; Election Law • 695

To register to vote in Florida, a person must affirm that he is not disqualified from voting because of a felony conviction. <u>Jones v. Governor of Florida</u>, C.A.11 (Fla.)2020, 975 F.3d 1016.

#### **HEADERS FROM JONES OPINION**

Majority

Felons and law enforcement can discern from the relevant statutes exactly what conduct is prohibited: a felon may not vote or register to vote if he *knows* that he has failed to complete all terms of his criminal sentence. See Fla. Stat. §§ 104.011(2), 104.15, 98.0751(1)–(2). This clear standard, which includes a scienter requirement, provides fair notice to prospective voters and "limit[s] prosecutorial discretion." Carhart, 550 U.S. at 150.

The felons' real complaint is that it is sometimes difficult to determine whether a felon has completed the financial terms of his sentence. They offer examples of felons who cannot locate their criminal judgments, cannot determine which financial obligations were imposed for felony as opposed to misdemeanor offenses, or do not know how much they have paid toward their financial obligations. But these concerns arise not from a vague law but from factual circumstances that sometimes make it difficult to determine whether an incriminating fact exists. See United States v. Williams, 553 U.S. 285, 306 (2008) (explaining that a law is not rendered vague by "the possibility that it will sometimes be difficult to determine" the existence of an incriminating fact). These difficulties in proving the facts that determine a felon's eligibility to vote cast no doubt on the clarity of the requirement that felons neither register nor vote if they know they have not satisfied the financial obligations imposed in their sentences. Because there is no uncertainty about "what fact must be proved" to convict a defendant under these statutes, the laws are not vague. Fox, 567 U.S. at 253; see also Williams, 553 U.S. at 305-06.

The challenged laws forbid felons to register or vote if they know they have failed to complete their sentences. The dissenters insist that the law is vague because some felons will not be certain about their eligibility, and a "wrong guess . . . results in severe consequences," possibly including "an arrest for a voting violation." Jordan Dissent at 169 (internal quotation marks omitted). Never mind the fact that no felon who honestly believes he has completed the terms of his sentence commits a crime by registering and voting, see Fla. Stat. §§ 104.011(2), 104.15 (establishing scienter requirements for voting violations), and that at least 85,000 felons felt the law was clear enough for them to go ahead and register. The dissenters' vagueness argument strains credulity.

The felons complain that it is sometimes difficult to ascertain the facts that determine eligibility to vote under Amendment 4 and Senate Bill 7066, but this complaint is only another version of the vagueness argument we have already rejected. The Due Process Clause does not require States to provide individual process to help citizens learn the facts necessary to comply with laws of general application.

And in any event, Florida provides registered voters with adequate process before an individual determination of ineligibility. Before being removed from the voter registration system, voters are entitled to predeprivation notice and a hearing. Fla. Stat. § 98.075(5), (7). And any voter who is dissatisfied with the result is entitled to de novo review of the removal decision in state court. Id. § 98.0755. These procedures provide more than adequate process to guard against erroneous ineligibility determinations. See Mathews, 424 U.S. at 333–35

#### **Dissent**

Second, should any of these 85,000 registrants choose to vote in the upcoming election—as they may believe, in good faith, they have a right to do—they risk criminal prosecution if they turn out to be wrong about their eligibility.

Fourth, if a felon registers based on the belief that he is eligible to vote, and then turns out to be wrong, he may be prosecuted for making a false affirmation in connection with voting. Florida downplays this risk, proclaiming that felons should rest assured that they will not be convicted if they registered in good faith because willfulness must be shown to prove a violation of Fla. Stat. § 104.011. But that comforting assurance—tactically made for an advantage in litigation—is useless, as it does not tell us how the state's prosecutors will choose to prosecute possible or alleged violations of the law.

Felons should not have to register in the hope that a jury will later find good faith should they be prosecuted. See Morgan v. Wofford, 472 F.2d 822, 827 (5th Cir. 1973) ("Especially when criminal sanctions may be involved, we have always been careful to surround the procedures through which the state may deprive a defendant of freedom with safeguards against possible miscarriages of justice.").11

The Director of the Division of Elections testified that, to avoid risk of prosecution, a felon may request an advisory opinion. Under Fla. Stat. § 106.23(2), any person who relies on an advisory opinion in good faith will be immune from prosecution. But that statute does not make clear that the advisory opinion process is available to any individual with questions about his or her eligibility to vote.

From: Strauss, Scott To: Jeremy Scott

Cc: Nick Cox; Nathaniel Bahill; Julie Chaikin

Subject: Caselaw and Statutes

Date: Tuesday, July 26, 2022 1:41:52 PM

Attachments: Westlaw - List of 8 Notes of Decisions for 10415 Unqualified electors willfully voting.doc

10415 Unqualified electors willfully voting.doc
Westlaw - List of 24 Notes of Decisions for 104011 False swearing submission of false voter registr.doc

Jones v Governor of Florida.doc Romero v State.doc United States v Johnson.doc Ibar v State.doc

Moncrief v State Comr of Ins.doc

104011 False swearing submission of false voter registration information prosecution prohibited.doc

Hi Nate and Jeremy,

Kindly find the attached applicable statutes, history and cases.

You may want to use the search tab for statutes 104.011 and 104.15 in Jones.

I will send some goby Informations, PTI, discovery in a follow-up email.

I am happy to discuss at your convenience.

Thanks,

Scott

Scott.Strauss@dos.myflorida.com

Notes Of Decisions (8)

#### Validity

Florida's laws governing felon reenfranchisement and voter fraud were not unconstitutionally vague, under Due Process Clause, by allegedly making it difficult or impossible for some felons to determine whether they were eligible to vote after completing all terms, including financial terms, of their sentences; felons and law enforcement could discern from those statutes exactly what conduct was prohibited, namely, that felon could not vote or register to vote if he knew he had failed to complete all terms of his criminal sentence, which was clear standard that included scienter requirement, provided fair notice to prospective voters, and limited prosecutorial discretion. Jones v. Governor of Florida, C.A.11 (Fla.)2020, 975 F.3d 1016. Constitutional Law 4232; Convicts 22; Election Law 99; Election Law 695

#### Construction and application

Provisions now contained in this section apply to illegal voting at municipal elections in this state. Ex parte Senior, 37 Fla. 1, 19 So. 652 (1896).

#### Validity of elections

Evidence that 32 convicted felons voted in election for county sheriff was insufficient to place the election results in doubt in election contest action brought by defeated candidate; defeated candidate did not present evidence regarding whether potentially-ineligible voters voted for sheriff or for whom they voted, and election supervisor, on election day, had no knowledge of any ineligible or improper votes or authority to reject or not count the disputed votes. Kinney v. Putnam County Canvassing Board by and through Harris, App. 5 Dist., 253 So.3d 1254 (2018). Election Law 76

The receipt of illegal votes at an election does not affect its validity unless the illegal votes were in such numbers as to affect the result. State ex rel. Whitley v. Rinehart, 140 Fla. 645, 192 So. 819 (1939). Election Law 497

Where only one vote separated the contestants in an election to elect three city commissioners, illegal absentee votes sufficient to affect the result were cast, the winning party profited by the doubtful or illegal vote, and the illegal vote by absentee ballot could be segregated from the legal vote, the election as to the absentee votes should be held void. State ex rel. Whitley v. Rinehart, 140 Fla. 645, 192 So. 819 (1939) . Election Law 497

#### Convicted felons

To register to vote in Florida, a person must affirm that he is not disqualified from voting because of a felony conviction. Jones v. Governor of Florida, C.A.11 (Fla.)2020, 975 F.3d 1016. Election Law 96

#### Special or local laws

Special or local law prevailed over former statute prescribing qualifications for electors in election on issue of municipal bonds. State ex rel. Davis v. Ryan, 118 Fla. 42, 158 So. 62 (1934). Municipal Corporations 918(1)

#### Evidence

County failed to demonstrate that majority of electors who participated in bond election were also freeholders, where bond election was held in conjunction with and as part of primary election so that person could have easily, mistakenly and innocently voted for or against bonds although he was not eligible to do so. State v. Sarasota County, 197 So.2d 521

(1967). Counties 178

#### West's Florida Statutes Annotated

Title IX. Electors and Elections (Chapters 97-109)

Chapter 104. Election Code: Violations; Penalties (Refs & Annos)

#### West's F.S.A. § 104.15

#### 104.15. Unqualified electors willfully voting

Currentness

Whoever, knowing he or she is not a qualified elector, willfully votes at any election is guilty of a felony of the third degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.

#### Credits

Laws 1881, c. 3278, § 1; Rev.St.1892, § 2787; Gen.St.1906, § 3830; Laws 1909, c. 5929, § 14; Rev.Gen.St.1920, §§ 5893, 5907; Comp.Gen.Laws 1927, §§ 8157, 8171; Laws 1949, c. 25365, § 1; Fla.St.1949, §§ 875.15, 875.26; Laws 1951, c. 26870, § 8; Laws 1965, c. 65-379, § 5; Laws 1971, c. 71-136, § 34; Laws 1977, c. 77-175, § 35. Amended by Laws 1995, c. 95-147, § 621, eff. July 10, 1995.

Notes of Decisions (8)

#### West's F. S. A. § 104.15, FL ST § 104.15

Current with laws, joint and concurrent resolutions and memorials through July 1, 2022, in effect from the 2022 Second Regular Session. Some statute sections may be more current, see credits for details.

**End of Document** 

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Notes Of Decisions (24)

#### Validity

Legislative enactments regulating conduct of elections come before Supreme Court with extremely strong presumptions of validity. Pasco v. Heggen, 314 So.2d 1 (1975). Election Law 52

Only unreasonable or unnecessary restraints on elective process are prohibited. Pasco v. Heggen, 314 So.2d 1 (1975) . Election Law 55

#### **Constitutional provisions**

Const. 1885, Art. 3, § 26 [see, now, Const. Art. 6, § 1] requiring legislature to pass laws regulating elections and prohibiting under adequate penalties all undue influence thereon from power, bribery, tumult, or other improper practice, contemplated laws regulating primary elections as well as general elections, because of inevitable relationship of the two classes of elections to each other. State ex rel. Gandy v. Page, 125 Fla. 348, 169 So. 854 (1936). Election Law 232(2)

#### Construction and application

Florida's laws governing felon reenfranchisement and voter fraud were not unconstitutionally vague, under Due Process Clause, by allegedly making it difficult or impossible for some felons to determine whether they were eligible to vote after completing all terms, including financial terms, of their sentences; felons and law enforcement could discern from those statutes exactly what conduct was prohibited, namely, that felon could not vote or register to vote if he knew he had failed to complete all terms of his criminal sentence, which was clear standard that included scienter requirement, provided fair notice to prospective voters, and limited prosecutorial discretion. Jones v. Governor of Florida, C.A.11 (Fla.)2020, 975 F.3d 1016. Constitutional Law 4232; Convicts 22; Election Law 99; Election Law 695

Whether a person is registered is material to issue whether he is qualified to vote, but the converse is not true; and, whether a person is authorized to vote is not necessarily material to issue or point of inquiry as to qualification to register. State v. Parsons, App. 4 Dist., 302 So.2d 766 (1974). Election Law 107

False swearing by person when interrogated regarding qualifications as elector or when testimony may be required in any contested election constitutes offense. Leavine v. State, 101 Fla. 1370, 133 So. 870 (1931). Perjury 8

False swearing at election, to constitute offense, must be regarding elector's qualifications. Leavine v. State, 101 Fla. 1370, 133 So. 870 (1931). Perjury 11(2)

False affidavit in connection with registration as elector did not constitute offense relating to registration as freeholder. Leavine v. State, 101 Fla. 1370, 133 So. 870 (1931). Perjury 11(4)

#### Municipal elections

Corrupt Practices Act [this chapter] applies to all elections in State, including municipal elections. State v. Brown, App. 4 Dist., 298 So.2d 487 (1974). Election Law 693

Enactment of an ordinance which incorporated, by reference, the state election code into city ordinances had effect of making state statutes ordinances of the city so that any violations thereof should be prosecuted the same as any other ordinance of the municipality, to wit: in the municipal court where jurisdiction generally is lodged under the municipal charter to try offenses against municipal ordinances. Weithorn v. Adelstein, App. 3 Dist., 201 So.2d 643 (1967), certiorari

denied 207 So.2d 455. Municipal Corporations 636

The Corrupt Practices Act [this chapter], is applicable to municipal elections. Florida Op.Atty.Gen., 064-3, Jan. 15, 1964.

#### Scienter

Laws 1935, c. 16986, § 3, defining crime of making, transmitting, or delivering, or causing to be made, transmitted, or delivered, any false statement or affidavit with intent that it shall be used under act governing absentee voting, applied only to statements or affidavits known to be false when made. State ex rel. Miller v. Coleman, 130 Fla. 537, 178 So. 157 (1938). Election Law 695

Successful impeachment of veracity of statement of campaign workers requires showing of candidate's knowledge of falsity. County Canvassing Board of Primary Elections of Hillsborough County v. Lester, 96 Fla. 484, 118 So. 201 (1928) . Election Law 266

#### **Oaths**

To register to vote in Florida, a person must affirm that he is not disqualified from voting because of a felony conviction. Jones v. Governor of Florida, C.A.11 (Fla.)2020, 975 F.3d 1016. Election Law 96

Right to register and vote is too valuable to be encumbered with oath not required by Constitution, and such superfluous encumbrances should not be enforced by threat of harsh criminal penalties. State v. Parsons, App. 4 Dist., 302 So.2d 766 (1974). Election Law 118

Citizens should not be discouraged from registering to vote by being required to take oath broader than provided by law and thereby subjected to chance or threat of charges of having sworn falsely as to matters concerning which they should never have been required to swear at all. State v. Parsons, App. 4 Dist., 302 So.2d 766 (1974). Election Law 118

#### **Enforcement**

Public officials, authorized by law, as well as the several candidates and the electorate, may report alleged violations of the Florida Election Code to an appropriate prosecuting attorney, who, upon subsequent investigation may take appropriate action as the Election Code and the authority of his office may authorize. Florida Op.Atty.Gen., 072-331, Sept. 28, 1972.

The Florida Election Code, imposes specific duties upon the supervisor of elections, and other public officials, but enforcement of the election laws for which criminal sanctions are imposed lies with the appropriate prosecuting attorneys of the several counties and the determination of guilt in such cases rests with the judiciary. Florida Op.Atty.Gen., 072-331, Sept. 28, 1972.

#### Indictment or information

An information charging that accused, a notary of Dade county, Fla., while in another state, falsely certified that prospective voter appeared before him and swore to affidavit and request for absentee ballot, with intention that affidavit should be used under Laws 1935, c. 16986, governing absentee voting, and that accused caused affidavit to be received by city clerk for use in Dade county, sufficiently established that criminal court of record of Dade county had jurisdiction of offense charged to withstand attack in habeas corpus proceedings. State ex rel. Miller v. Coleman, 130 Fla. 537, 178 So. 157 (1938). Habeas Corpus 474

Information charging false swearing by defendant when interrogated concerning qualifications as elector should allege

defendant was interrogated regarding matters set out in information concerning which he made false statement. Leavine v. State, 101 Fla. 1370, 133 So. 870 (1931). Perjury 19(1)

An indictment for a wilful and corrupt false swearing touching a party's qualifications as an elector, must set forth specifically the occasion of the administration of the oath. The general allegation, "being required by law to take an oath," is not sufficient to such case. Dennis v. State, 17 Fla. 389 (1879). Perjury 23

#### Burden of proof

Complainant has burden of establishing falsity of statement of campaign workers. County Canvassing Board of Primary Elections of Hillsborough County v. Lester, 96 Fla. 484, 118 So. 201 (1928) . Election Law 550

#### **Evidence**

When there was no testimony in record that defendant did not have his habitation, domicile, home or permanent place of abode in Florida for one year, and in Duval county for six months before date of registration for election, conviction on charge that defendant on oath falsely, corruptly, knowingly, willfully and maliciously swore that he resided at a certain address in Jacksonville, Duval county, in election precinct No. 5C of Duval county, when in fact he was living at another address in Jacksonville, Duval county, and in election precinct No. 5D of Duval county, could not be sustained. Faucette v. State, 147 Fla. 754, 3 So.2d 392 (1941). Election Law 725(2)

Evidence was insufficient to establish falsity of statement of campaign workers. County Canvassing Board of Primary Elections of Hillsborough County v. Lester, 96 Fla. 484, 118 So. 201 (1928) . Election Law 266

KeyCite Yellow Flag - Negative Treatment
Declined to Extend by People First of Alabama v. Merrill, N.D.Ala.,
September 30, 2020

975 F.3d 1016 United States Court of Appeals, Eleventh Circuit.

Kelvin Leon JONES, Rosemary McCoy, et al., Plaintiffs-Appellees,

GOVERNOR OF FLORIDA, Florida Secretary of State, Defendants-Appellants.

> No. 20-12003 | (September 11, 2020)

#### **Synopsis**

**Background:** Prospective voters, who had completed their terms of imprisonment and supervision for felony offenses, and voting rights organizations filed putative class action against Florida Governor and Florida Secretary of State, claiming violation of Equal Protection Clause, Twenty-Fourth Amendment, and Due Process Clause arising from requirement of Florida constitutional amendment and implementing reenfranchisement statute that conditioned restoration of felons' voting rights on their payment of all legal financial obligations (LFOs) imposed as part of their sentences. After bench trial, the United States District Court for the Northern District of Florida. No. 4:19-cv-00300-RH-MJF. 4:19-cv-00304-RH-MAF, Robert Hinkle, J., 2020 WL 2618062, declared amendment and unconstitutional and entered permanent injunction allowing any felon, who was unable to pay his fines or restitution or who had failed for any reason to pay his court fees and costs, to register and vote. Governor and Secretary of State appealed.

**Holdings:** The Court of Appeals, William H. Pryor, Chief Judge, held that:

- [1] amendment and statute did not violate Equal Protection Clause;
- [2] amendment and statute did not violate Twenty-Fourth Amendment;

- [3] felon reenfranchisement laws were not void for vagueness; and
- [4] amendment and statute did not deny felons procedural due process.

Reversed and vacated.

William H. Pryor, Chief Judge, joined by Lagoa, Circuit Judge, filed concurring opinion.

Lagoa, Circuit Judge, filed separate concurring opinion.

Martin, Circuit Judge, joined by Wilson, Jordan, and Jill A. Pryor, Circuit Judges, filed dissenting opinion.

Jordan, Circuit Judge, joined by Wilson, Martin, and Jill A. Pryor, Circuit Judges, filed separate dissenting opinion.

Jill A. Pryor, Circuit Judge, joined by Wilson, Martin, and Jordan, Circuit Judges, filed separate dissenting opinion.

West Headnotes (55)

## [1] Constitutional Law—Rational Basis Standard; Reasonableness

Under the Equal Protection Clause, classifications that neither implicate fundamental rights nor proceed along suspect lines are subject to rational basis review. U.S. Const. Amend. 14.

2 Cases that cite this headnote

## [2] Constitutional Law—Elections, voting, and political rights

Whatever may be true of the right to vote generally, felons cannot complain about their loss of a fundamental right to vote because felon disenfranchisement is explicitly permitted under the Equal Protection Clause. U.S. Const.

Amends. 1, 14.

2 Cases that cite this headnote

## [3] Constitutional Law—Elections, voting, and political rights

The Equal Protection Clause does not put states to an all-or-nothing choice when it comes to deciding whether felons may vote. U.S. Const. Amend. 14.

## [4] Constitutional Law Elections, voting, and political rights

The Equal Protection Clause grants to the states a realm of discretion in the disenfranchisement and reenfranchisement of felons which the states do not possess with respect to limiting the franchise of other citizens. U.S. Const. Amend. 14.

## [5] Constitutional Law Elections, voting, and political rights

States may restrict voting by felons in ways that would be impermissible for other citizens, under the Equal Protection Clause. U.S. Const. Amend. 14.

## [6] Constitutional Law—Qualifications of Voters Election Law—Qualifications

A state could not require citizens never convicted of a crime to serve a term of confinement or supervision to access the franchise; such a requirement would have no relation to voting qualifications and so would be invalid under the Equal Protection Clause. U.S. Const. Amend. 14.

## [7] Constitutional Law—Elections, voting, and political rights

Under the Equal Protection Clause, states may unquestionably require felons to complete their terms of imprisonment and parole before regaining the right to vote. U.S. Const. Amend. 14.

## [8] Constitutional Law—Elections, voting, and political rights Election Law—Restoration to citizenship

Requiring felons to complete their sentences prior to regaining their right to vote is directly related to voting qualifications, and thus comports with the Equal Protection Clause, because imprisonment and parole are imposed as punishment for the crimes by which felons forfeited their right to vote. U.S. Const. Amend. 14.

#### 1 Cases that cite this headnote

## [9] Constitutional Law—Elections, voting, and political rights

Under the Equal Protection Clause, although states enjoy significant discretion in distributing the franchise to felons, it is not unfettered. U.S. Const. Amend. 14.

#### [10] Constitutional Law Elections, voting, and

#### political rights

Under the Equal Protection Clause, a state may not rely on suspect classifications in distributing the franchise to felons any more than in other areas of legislation. U.S. Const. Amend. 14.

## [11] Constitutional Law Elections, voting, and political rights

Under the Equal Protection Clause, absent a suspect classification that independently warrants heightened scrutiny, laws that govern felon disenfranchisement and reenfranchisement are subject to rational basis review. U.S. Const. Amend. 14.

## [12] Constitutional Law—Elections, voting, and political rights

Rational basis review, rather than strict scrutiny, applied to determining whether Florida's constitutional amendment reenfranchisement statute violated Equal Protection Clause by requiring felons to complete all terms, including financial terms, of their sentences prior to regaining their right to vote: classification between felons who had completed all terms of their sentences and those who had not did not turn on membership in suspect class, as requirement that felons complete their sentences applied regardless of race, religion, or national origin. U.S. Const. Amend. 14; Fla. Const. art. 6, § 4(a); Fla. Stat. Ann. § 98.0751(2)(a).

## [13] Constitutional Law—Poverty or wealth; indigents and the homeless

Wealth is not a suspect classification under the

Equal Protection Clause. U.S. Const. Amend. 14.

## [14] Constitutional Law—Poverty or wealth; indigents and the homeless

Outside of narrow circumstances, laws that burden the indigent are subject only to rational basis review under the Equal Protection Clause. U.S. Const. Amend. 14.

1 Cases that cite this headnote

#### [15] Constitutional Law—Qualifications of Voters

The Equal Protection Clause restrains the states from fixing voter qualifications which invidiously discriminate. U.S. Const. Amend. 14.

## [16] Constitutional Law Elections, voting, and political rights Constitutional Law Payment of fees or taxes

It is a per se violation of the Equal Protection Clause for a state to make the affluence of the voter or payment of any fee an electoral standard. U.S. Const. Amend. 14.

## [17] Constitutional Law Elections, voting, and political rights Constitutional Law Payment of fees or taxes

In analyzing an equal protection claim, poll taxes are never relevant to voter qualifications, but laws that require the completion of a criminal sentence prior to regaining the right to

vote are relevant to voter qualifications. U.S. Const. Amend. 14.

## [18] Constitutional Law—Elections, voting, and political rights

Constitutional Law—Payment of fees or taxes

The rule that it is a per se violation of the Equal Protection Clause for a state to make the affluence of the voter or payment of any fee an electoral standard does not apply to voting requirements that are related to legitimate voter qualifications, even if some voters must pay to comply with the requirement. U.S. Const. Amend. 14.

## [19] Constitutional Law—Poverty or wealth; indigents and the homeless

In evaluating an equal protection challenge, the exception to rational basis review for laws that condition access to certain judicial proceedings on the ability to pay applies only when the state makes access to judicial processes in cases criminal or quasi criminal in nature turn on ability to pay. U.S. Const. Amend. 14.

## [20] Constitutional Law—Poverty or wealth; indigents and the homeless

Heightened scrutiny for equal protection claims of wealth discrimination is the exception, not the rule, U.S. Const. Amend. 14.

1 Cases that cite this headnote

#### as Precedents

The doctrine of stare decisis is at its weakest when the Court of Appeals interprets the Constitution.

#### [22] Constitutional Law—Rational Basis Standard; Reasonableness

Under the Equal Protection Clause, a classification survives rational basis review if it is rationally related to some legitimate government interest. U.S. Const. Amend. 14.

1 Cases that cite this headnote

#### [23] Constitutional Law—Rational Basis Standard; Reasonableness

Under the Equal Protection Clause, in deciding whether a classification is rational, judicial review is extremely narrow; the classification must be upheld unless plaintiffs negative every conceivable basis which might support it. U.S. Const. Amend. 14.

## [24] Constitutional Law Elections, voting, and political rights

Constitutional Law Elections, voting, and political rights

Convicts—Restoration of rights; removal of disabilities

Election Law—Restoration to citizenship

Florida's constitutional amendment and reenfranchisement statute, requiring felons to complete all terms, including financial terms, of their sentences prior to regaining their right to vote, did not violate Equal Protection Clause as applied to felons who could not afford to pay required amounts; classification between felons

who completed all terms of their sentences and those who had not was rationally related to Florida's legitimate twin interests in disenfranchising those who disregarded law and restoring those who satisfied demands of justice, as Florida could rationally conclude that felons who completed all terms of their sentences, including paying their fines, fees, costs, and restitution, were more likely to responsibly exercise franchise than those who had not. U.S. Const. Amend. 14; Fla. Const. art. 6, § 4(a); Fla. Stat. Ann. § 98.0751(2)(a).

#### 2 Cases that cite this headnote

## [25] Constitutional Law—Rational Basis Standard; Reasonableness

To satisfy rational review for an equal protection challenge to a state law, the state is not required to draw the perfect line between classifications or even to draw a line superior to some other line it might have drawn; the Constitution requires only a rational line. U.S. Const. Amend. 14.

## [26] Constitutional Law—Gradual, incremental, or non-comprehensive approach

Under rational basis review for an equal protection claim, legislative reform may take one step at a time. U.S. Const. Amend. 14.

## [27] Constitutional Law Gradual, incremental, or non-comprehensive approach

A state need not strike at all evils at the same time or in the same way, and a statute is not invalid under the Equal Protection Clause because it might have gone farther than it did. U.S. Const. Amend. 14.

## [28] Constitutional Law—Gradual, incremental, or non-comprehensive approach

Although every reform that benefits some more than others may be criticized for what it fails to accomplish, that reality does not invalidate the measure under the Equal Protection Clause. U.S. Const. Amend. 14.

## [29] Constitutional Law—Rational Basis Standard; Reasonableness

If the relationship between a state's interest and its means of achieving it is at least debatable, then it survives rational basis scrutiny, under the Equal Protection Clause. U.S. Const. Amend. 14.

# [30] Constitutional Law—Statutes and other written regulations and rules Statutes—Powers and duties of legislature in general

A legislative classification may be based on rational speculation unsupported by evidence; for that reason, a law may be rational and survive an equal protection challenge, even if in a particular case the law appears to discriminate irrationally. U.S. Const. Amend. 14.

#### [31] Election Law—Payment of taxes

In determining whether court fees and costs imposed in criminal sentences constitute a poll tax under the Twenty-Fourth Amendment, fines,

which are paid to the government as punishment for a crime, and restitution, which compensates victims of crime, are not "taxes" under any fair reading of that term. U.S. Const. Amend. 24.

#### [32] Internal Revenue Nature of taxes and excises

The term "tax" is a broad one, but it does not cover all monetary exactions imposed by the government.

1 Cases that cite this headnote

## [33] Internal Revenue Nature of taxes and excises Internal Revenue What constitutes a penalty

If a government exaction is a penalty, it is not a "tax."

1 Cases that cite this headnote

#### [34] Penalties—Nature and scope as punishment

If the concept of penalty means anything, it means punishment for an unlawful act or omission.

### [35] Convicts—Restoration of rights; removal of disabilities

Election Law—Payment of taxes
Election Law—Restoration to citizenship

Court fees and costs imposed in criminal sentence did not constitute "tax," within meaning of Twenty-Fourth Amendment, prohibiting denial or abridgement of right to vote by reason of failure to pay any poll tax or other tax, and thus, Florida's constitutional

amendment and reenfranchisement statute, requiring felons to complete all terms, including financial terms, of their sentences prior to regaining their right to vote, did not impose tax on voting in violation of Twenty-Fourth Amendment by requiring felons to pay court fees and costs imposed in their criminal sentences, since court fees and costs were legitimate part of Florida's punishment for crime. U.S. Const. Amend. 24; Fla. Const. art. 6, § 4(a); Fla. Stat. Ann. § 98.0751(2)(a).

#### 1 Cases that cite this headnote

## [36] **Double Jeopardy** Fines, penalties, and forfeitures

**Double Jeopardy** Effect of commencement or service of prior sentence; sentence credit

Under Florida law, the costs of prosecution are criminal punishment for purposes of double jeopardy; they cannot be increased after a defendant begins serving his sentence. U.S. Const. Amend. 5.

## [37] Costs, Fees, and Sanctions—Costs and Fees in Criminal Proceedings

In Florida, like fines and restitution, court fees and costs are also linked to culpability for a crime.

# [38] Costs, Fees, and Sanctions—Amount and Items Taxable Against Defendant Fines—Imposition and liability in general Sentencing and Punishment—Nature and purpose of probation

In Florida, even felony defendants who have their adjudication of guilt withheld are subject to the punitive and rehabilitative powers of the

sentencing court; they must complete a term of probation and may have to pay both fines and costs.

## [39] Costs, Fees, and Sanctions—Court costs in general

In Florida, the punitive nature of court fees and costs is no less applicable to defendants who plead nolo contendere because that plea, like a guilty plea, results in a conviction and gives the court the power to punish.

#### [40] Election Law—Payment of taxes

In determining whether court fees and costs imposed in criminal sentences constitute a poll tax under the Twenty-Fourth Amendment, one purpose of the court fees and costs is to raise revenue, but that does not transform them from criminal punishment into a "tax." U.S. Const. Amend. 24.

#### 1 Cases that cite this headnote

#### [41] Election Law—Payment of taxes

In addition to costs and fees, Florida uses criminal fines to fund both its courts and general government operations, but that additional purpose does not make them "taxes," in determining whether court fees and costs imposed in criminal sentences constitute a poll tax under the Twenty-Fourth Amendment. U.S. Const. Amend. 24; Fla. Stat. Ann. §§ 142.01(1), 316.193(2)(a), 775.083(1).

#### 1 Cases that cite this headnote

# [42] Costs, Fees, and Sanctions—Amount and Items Taxable Against Defendant Costs, Fees, and Sanctions—Court costs in general

In Florida, the fact that many court fees and costs do not vary based on the severity of the offense does not render them nonpunitive.

#### [43] Election Law—Conviction of crime

To register to vote in Florida, a person must affirm that he is not disqualified from voting because of a felony conviction. Fla. Stat. Ann. §§ 104.011(2), 104.15.

## [44] Constitutional Law—Certainty and definiteness; vagueness

Under the Due Process Clause, a law is void for vagueness if it fails to give ordinary people fair notice of the conduct it punishes or is so standardless that it invites arbitrary enforcement. U.S. Const. Amend. 14.

## [45] Constitutional Law—Certainty and definiteness; vagueness

Under the Due Process Clause, a law is not vague because it may at times be difficult to prove an incriminating fact. U.S. Const. Amend. 14.

1 Cases that cite this headnote

#### [46] Constitutional Law Certainty and

#### definiteness; vagueness

Under the Due Process Clause, a law is vague when it is unclear as to what incriminating fact must be proved. U.S. Const. Amend. 14.

#### 1 Cases that cite this headnote

## [47] Constitutional Law—Certainty and definiteness; vagueness

Even laws that are in some respects uncertain may be upheld against a Due Process Clause vagueness challenge if they contain a scienter requirement. U.S. Const. Amend. 14.

## [48] Constitutional Law—Voters, candidates, and elections

**Convicts**—Restoration of rights; removal of disabilities

Election Law—Restoration to citizenship Election Law—Fraud

Florida's laws governing felon reenfranchisement and voter fraud were not unconstitutionally vague, under Due Process Clause, by allegedly making it difficult or impossible for some felons to determine whether they were eligible to vote after completing all terms, including financial terms, of their sentences; felons and law enforcement could discern from those statutes exactly what conduct was prohibited, namely, that felon could not vote or register to vote if he knew he had failed to complete all terms of his criminal sentence, which was clear standard that included scienter requirement, provided fair notice to prospective voters, and limited prosecutorial discretion. U.S. Const. Amend. 14; Fla. Stat. Ann. §§ 98.0751(1)-(2), 104.011(2), 104.15.

## [49] Constitutional Law—Rights, Interests, Benefits, or Privileges Involved in General

The state often deprives persons of liberty or property, protected by the Due Process Clause, through legislative action by enacting general laws that apply to more than a few people. U.S. Const. Amend. 14.

#### 2 Cases that cite this headnote

#### [50] Constitutional Law—Legislative Procedure

When the state deprives persons of liberty or property through legislative action by enacting general laws that apply to more than a few people, the affected persons are not entitled to any process beyond that provided by the legislative process. U.S. Const. Amend. 14.

#### 1 Cases that cite this headnote

## [51] Constitutional Law Protections Provided and Deprivations Prohibited in General

The Due Process Clause may require individual process when a state deprives persons of liberty or property through adjudicative actions, which are actions that concern a relatively small number of persons who are exceptionally affected, in each case upon individual grounds, by the state action. U.S. Const. Amend. 14.

#### 2 Cases that cite this headnote

## [52] Constitutional Law—Factors considered; flexibility and balancing

To determine the process due for adjudicative deprivations, courts apply the familiar balancing test of *Mathews v. Eldridge*, 424 U.S. 319, 96 S.Ct. 893, 47 L.Ed.2d 18. U.S. Const. Amend. 14.

[53] Constitutional Law—Voters, candidates, and elections

**Convicts**—Restoration of rights; removal of disabilities

Election Law—Restoration to citizenship

Florida's constitutional amendment and reenfranchisement statute, requiring felons to complete all terms, including financial terms, of their sentences prior to regaining their right to vote, did not violate felons' right to procedural due process; legislative and constitutional amendment processes gave felons all process they were due before Florida deprived them of right to vote and conditioned restoration of that right on completion of their sentences, and Florida provided predeprivation notice and hearing before removal from voter registration system and de novo review of removal decision in state court, which provided more than adequate process to guard against erroneous voter ineligibility determinations. U.S. Const. Amend. 14; Fla. Const. art. 6, § 4(a); Fla. Stat. Ann. §§ 98.075(5), 98.075(7), 98.0751(2)(a), 98.0755.

1 Cases that cite this headnote

## [54] Constitutional Law—Certainty and definiteness; vagueness

The Due Process Clause does not require states to provide individual process to help citizens learn the facts necessary to comply with laws of general application. U.S. Const. Amend. 14.

[55] Constitutional Law—Voters, candidates, and elections
Election Law—In general; power to regulate qualifications

States are constitutionally entitled to set legitimate voter qualifications through laws of general application and to require voters to comply with those laws through their own efforts; so long as a state provides adequate procedures to challenge individual determinations of ineligibility, due process requires nothing more. U.S. Const. Amend. 14.

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Appeals from the United States District Court for the Northern District of Florida, D.C. Docket Nos. 4:19-cv-00300-RH-MJF; 4:19-cv-00304-RH-MAF Before WILLIAM PRYOR, Chief Judge, WILSON, MARTIN, JORDAN, JILL PRYOR, NEWSOM, BRANCH, GRANT, LUCK, and LAGOA, Circuit Judges.\*\*

#### **Opinion**

WILLIAM PRYOR, Chief Judge, delivered the opinion of the Court, in which NEWSOM, BRANCH, GRANT, LUCK, and LAGOA, Circuit Judges, joined, except with respect to Part III–B–2, in which only NEWSOM and LAGOA, Circuit Judges, joined.

WILLIAM PRYOR, Chief Judge:

\*1025 Florida has long followed the common practice of excluding those who commit serious crimes from voting.

But in 2018, the people of Florida approved a historic amendment to their state constitution to restore the voting rights of thousands of convicted felons. They imposed only one condition: before regaining the right to vote, felons must complete *all* the terms of their criminal sentences, including imprisonment, probation, and payment of any fines, fees, costs, and restitution. We must decide whether the financial terms of that condition violate the Constitution.

Several felons sued to challenge the requirement that they pay their fines, fees, costs, and restitution before regaining the right to vote. They complained that this requirement violates the Equal Protection Clause of the Fourteenth Amendment as applied to felons who cannot afford to pay the required amounts and that it imposes a tax on voting in violation of the Twenty-Fourth Amendment: that the laws governing reenfranchisement and voter fraud are void for vagueness; and that Florida has denied them procedural due process by adopting requirements that make it difficult for them to determine whether they are eligible to vote. The district court entered a permanent injunction that allows any felon who is unable to pay his fines or restitution or who has failed for any reason to pay his court fees and costs to register and vote. Because the felons failed to prove a violation of the Constitution, we reverse the judgment of the district court and vacate the challenged portions of its injunction.

#### I. BACKGROUND

Like many other States, Florida has long prohibited convicted felons from voting. The first Constitution of Florida gave the legislature the power "to exclude ... from the right of suffrage, all persons convicted of bribery, perjury, or other infamous crime." Fla. Const. art. VI, § 4 (1838). The legislature exercised this power to disenfranchise those convicted of an "infamous crime" shortly after the Union admitted Florida in 1845. 1845 Fla. Laws 78. And until late 2018, the Constitution of Florida provided without qualification that "[n]o person convicted of a felony ... shall be qualified to vote or hold office until restoration of civil rights." Fla. Const. art. VI, § 4(a) (2018).

In 2018, the people of Florida amended their constitution to restore the voting rights of some felons. Amendment 4 began as a voter initiative that appeared on the general election ballot in November 2018. The amendment provides that "any disqualification from voting arising from a felony conviction shall terminate and voting rights

shall be restored upon completion of all terms of sentence including parole or probation." \*1026 Fla. Const. art. VI, § 4(a). It does not apply to felons convicted of murder or a felony sexual offense. *Id.* § 4(a)–(b). The amendment passed with about 65 percent of the vote, just over the required 60-percent threshold. *See id.* art. XI, § 5(e).

Shortly after Amendment 4 took effect, the Florida Legislature enacted a statute, Senate Bill 7066, to implement the amendment. This statute defined the phrase "[c]ompletion of all terms of sentence" in Amendment 4 to mean any portion of a sentence contained in the sentencing document, including imprisonment, probation, restitution, fines, fees, and costs. Fla. Stat. § 98.0751(2)(a). The Supreme Court of Florida later agreed with that interpretation and ruled that the phrase "all terms of sentence" includes all financial obligations imposed as part of a criminal sentence. *Advisory Opinion to the Governor re: Implementation of Amendment 4*, 288 So. 3d 1070, 1084 (Fla. 2020).

To vote in Florida, a person must submit a registration form. The form requires registrants to affirm that they are not a convicted felon or that, if they are, their right to vote has been restored. Florida does not require felons to prove that they have completed their sentences during the registration process. The State allows felons to request an advisory opinion on eligibility before registration, and any felon who registers in reliance on an opinion is immune from prosecution. If the registration form is complete and the Division of Elections determines that the registrant is a real person, it adds the person to the voter registration system. If the State later obtains "credible and reliable" information establishing that the person has a felony conviction and has not completed all the terms of his sentence, the person is subject to removal from the voter rolls. See Fla. Stat. § 98.075(5). But any such felon is considered a registered voter, and before removal from the voter registration system, he is entitled to notice-including "a copy of any documentation upon which [his] potential ineligibility is based"—and a hearing, as well as de novo judicial review of an adverse eligibility determination. *Id.* §§ 98.075(7), 98.0755.

At the time of trial, Florida had received 85,000 registrations from felons who believe they were reenfranchised by Amendment 4. State law requires that those registrations be screened for, among other things, the voters' failure to complete the terms of their sentences including financial obligations. *Id.* § 98.0751. Florida has yet to complete its screening of any of the registrations. Until it does, it will not have credible and reliable information supporting anyone's removal from the voter rolls, and all 85,000 felons will be entitled to vote. *See id.* 

§§ 98.075(5) and (7).

Several felons sued Florida officials to challenge the requirement that they pay their fines, fees, costs, and restitution before regaining the right to vote. Among other provisions, they alleged that the reenfranchisement laws violate the Equal Protection and Due Process Clauses of the Fourteenth Amendment and the Twenty-Fourth Amendment.

The district court entered a preliminary injunction in favor of the felons because it concluded they were likely to succeed on their claim under the Equal Protection Clause. It ruled that requiring felons to complete all financial terms of their sentences before regaining the right to vote was unconstitutional wealth discrimination as applied to felons unable to pay the required amounts. The preliminary injunction ordered the officials not to prevent the plaintiff felons from registering or voting based solely on their inability to pay any outstanding financial obligations in their sentences.

\*1027 A panel of this Court affirmed the preliminary injunction on interlocutory appeal. *Jones v. Governor of Fla.*, 950 F.3d 795, 800 (11th Cir. 2020). The panel held that the decision to condition reenfranchisement on the completion of "all terms of sentence" violated the Equal Protection Clause as applied to indigent felons who cannot afford to pay their fines, fees, costs, and restitution. *Id.* It reached this conclusion by applying heightened scrutiny on the ground that Amendment 4 and Senate Bill 7066 discriminate on the basis of wealth. *Id.* at 817. It also suggested in dicta that the laws may fail even rational basis review. *Id.* at 809, 817.

The district court certified a class and a subclass of felons for purposes of final injunctive and declaratory relief. *See* Fed. R. Civ. P. 23(b)(2). The class comprises "all persons who would be eligible to vote in Florida but for unpaid financial obligations." The subclass comprises "all persons who would be eligible to vote in Florida but for unpaid financial obligations that the person asserts the person is genuinely unable to pay."

Before trial, the State adopted what the district court called the "every-dollar method" for determining when felons complete their financial terms of sentence. Under this policy, the State credits all payments a felon makes for any obligations related to his sentence toward the original obligations imposed in the sentence. For example, if a felon establishes a payment plan to complete his terms of sentence, any payments the felon makes for setting up or administering the plan also count toward the original financial obligations imposed in the sentence.

After a felon has paid an amount equal to that imposed in his sentence, the State considers the felon's financial terms of sentence complete for purposes of reenfranchisement.

After a trial on the merits, the district court ruled that Amendment 4 and Senate Bill 7066 violate the Equal Protection Clause as applied to felons who cannot afford to complete their sentences. It applied heightened scrutiny to reach that conclusion based on the panel decision in the earlier appeal, and it alternatively ruled that the laws failed even rational basis review as applied to felons who are unable to pay the required amounts. The district court also ruled that Amendment 4 and Senate Bill 7066 impose a "tax" on voting by requiring felons to pay court fees and costs imposed in their sentences in violation of the Twenty-Fourth Amendment.

The district court did not decide whether Florida's reenfranchisement laws violate the Due Process Clause. It stated that there was "considerable force" to the arguments that the relevant laws are void for vagueness and deny the felons procedural due process. It found that felons are sometimes unable to determine the amount of financial obligations imposed in their sentences or the total amount they have paid toward all related obligations. The amount of financial obligations imposed in a sentence is usually clear from the judgment, which can be obtained from the county of conviction. But many felons no longer have copies of their judgments, and some counties may lack records for older convictions. When judgments contain both misdemeanor and felony offenses, it may not be immediately clear whether all financial obligations were imposed only for a disqualifying felony offense. The district court did not decide whether these facts established a violation of the Due Process Clause, but it stated that its remedy for the other constitutional violations would eliminate any due process concerns.

The district court awarded declaratory and injunctive relief. It declared Amendment \*1028 4 and Senate Bill 7066 unconstitutional insofar as they prohibit otherwise-eligible felons who are "genuinely unable to pay" their financial obligations from voting, require felons to pay "amounts that are unknown and cannot be determined with diligence" to regain their voting rights, and require any felons "to pay fees and costs as a condition of voting." It enjoined any defendant from taking steps to enforce those requirements. But it did not enjoin the requirement that felons pay "a determinable amount of fines and restitution as a condition of voting" if they can afford to do so.

The district court also imposed new procedures to govern

the registration and voting process for felons. Its injunction required the Secretary of State to publish a form to request an advisory opinion from the Division of Elections regarding the existence and amount of any outstanding fines or restitution that could render a felon ineligible to vote. The form allowed requesters to check a box that stated, "I believe I am unable to pay the required amount." If the Division failed to respond to a request within 21 days and if the requester checked the box, the injunction required that the requester be allowed to vote.

The Governor and the Secretary of State appealed. They petitioned this Court for initial hearing en banc and moved to stay most aspects of the permanent injunction pending appeal. We granted both requests.

#### II. STANDARDS OF REVIEW

We review the decision to enter a permanent injunction for an abuse of discretion, but we review the underlying legal conclusions *de novo* and any factual findings for clear error. *See Common Cause/Ga. v. Billups*, 554 F.3d 1340, 1349 (11th Cir. 2009).

#### III. DISCUSSION

We divide our discussion in three parts. We first explain that Amendment 4 and Senate Bill 7066 do not violate the Equal Protection Clause. Next, we explain why the laws do not impose a tax on voting in violation of the Twenty-Fourth Amendment. Finally, we reject the arguments that the challenged laws are void for vagueness and that Florida has denied the felons due process.

A. Amendment 4 and Senate Bill 7066 Do Not Violate the Equal Protection Clause.

The practice of disenfranchising persons who commit serious crimes has a long history that predates the founding of the Republic. George Brooks, Comment, Felon Disenfranchisement: Law, History, Policy, and Politics, 32 Fordham Urb. L.J. 851, 852–53 (2005). As Judge Friendly explained, early American States may have based the practice on the Lockean understanding that those who break the social contract by committing a crime "have abandoned the right to participate in further administering the compact." Green v. Bd. of Elections,

380 F.2d 445, 451 (2d Cir. 1967). And as a practical matter, "it can scarcely be deemed unreasonable for a state to decide that perpetrators of serious crimes shall not take part in electing the legislators who make the laws, the executives who enforce these, the prosecutors who must try them for further violations, or the judges who are to consider their cases." *Id.* 

When the States ratified the Fourteenth Amendment in 1868, 29 of their constitutions permitted or required felon disenfranchisement. *Richardson v. Ramirez*, 418 U.S. 24, 48 & n.14, 94 S.Ct. 2655, 41 L.Ed.2d 551 (1974). Section 2 of the Fourteenth \*1029 Amendment expressly allows States to disenfranchise criminals without having their representation reduced in Congress. U.S. Const. amend. XIV, § 2. Today, almost all States disenfranchise felons in some way, although the recent trend is toward expanding access to the franchise. *Jones*, 950 F.3d at 801 & nn.1–3.

Based on the express provision disenfranchisement in section 2 of the Fourteenth Amendment, the Supreme Court held in Richardson v. Ramirez that the Equal Protection Clause in section 1 of the same amendment does not forbid the practice. 418 U.S. at 54-56, 94 S.Ct. 2655. The Court held that the Equal Protection Clause permits States to disenfranchise all felons for life, even after they have completed their sentences. Id. at 56, 94 S.Ct. 2655. Florida largely followed this practice before the adoption of Amendment 4. It presumptively disenfranchised felons for life upon conviction, subject only to discretionary restoration of voting rights by executive clemency. Jones, 950 F.3d at 802.

This appeal requires us to consider what limits the Equal Protection Clause places on the selective *restoration* of felons' voting rights. By conditioning reenfranchisement on the completion of all terms of sentence, Florida has decided to restore some felons to the franchise but not others. The felons challenge the classification Florida has drawn between felons who have completed all their terms of sentence, including financial terms, and those who have not. They argue that this classification violates the Equal Protection Clause as applied to felons who have completed all other terms of sentence but cannot afford to pay their fines, fees, costs, and restitution.

[1] [2] [3] [4]Under the Equal Protection Clause, classifications that neither implicate fundamental rights nor proceed along suspect lines are subject to rational basis review. *See, e.g., Heller v. Doe ex rel. Doe,* 509 U.S. 312, 319–20, 113 S.Ct. 2637, 125 L.Ed.2d 257 (1993). Whatever may be true of the right to vote generally, felons "cannot complain about their loss of a

fundamental right to vote because disenfranchisement is explicitly permitted under the terms of Richardson." Harvey v. Brewer, 605 F.3d 1067, 1079 (9th Cir. 2010) (O'Connor, J.); accord Johnson v. Bredesen, 624 F.3d 742, 746 (6th Cir. 2010); Hayden v. Paterson, 594 F.3d 150, 170 (2d Cir. 2010); Owens v. Barnes, 711 F.2d 25, 27 (3d Cir. 1983). If the right of felons to vote were fundamental, every law that distinguished between different groups of felons in granting or denying access to the franchise would be subject to "exacting judicial scrutiny." Kramer v. Union Free Sch. Dist. No. 15, 395 U.S. 621, 628, 89 S.Ct. 1886, 23 L.Ed.2d 583 (1969). But the Constitution does not put States to an all-or-nothing choice when it comes to deciding whether felons may vote. As our predecessor Court held decades ago, the Constitution "grants to the states a realm of discretion in the disenfranchisement and reenfranchisement of felons which the states do not possess with respect to limiting the franchise of other citizens." Shepherd v. Trevino, 575 F.2d 1110, 1114 (5th Cir. 1978).

[5] [6] [7] [8] States may restrict voting by felons in ways that would be impermissible for other citizens. For example, no one doubts that a State could not require citizens never convicted of a crime to serve a term of confinement or supervision to access the franchise. Such a requirement would have "no relation to voting qualifications" and so would be invalid under the Equal Protection Clause. Harper v. Va. Bd. of Elections, 383 U.S. 663, 670, 86 S.Ct. 1079, 16 L.Ed.2d 169 (1966). But States may unquestionably require felons to complete their terms of imprisonment \*1030 and parole before regaining the right to vote. See Richardson, 418 U.S. at 55-56, 94 S.Ct. 2655; Hayden, 594 F.3d at 171. The reason for this difference is clear: requiring felons to complete their sentences is directly related to voting qualifications because imprisonment and parole are imposed as punishment for the crimes by which felons forfeited their right to vote.

[9] [10] [11] Although States enjoy significant discretion in distributing the franchise to felons, it is not unfettered. A State may not rely on suspect classifications in this area any more than in other areas of legislation. But absent a suspect classification that independently heightened scrutiny, laws that govern disenfranchisement and reenfranchisement are subject to rational basis review. Shepherd, 575 F.2d at 1114-15. Every other Circuit to consider the question has reached the same conclusion. See Johnson, 624 F.3d at 746; Harvey, 605 F.3d at 1079; Hayden, 594 F.3d at 170; Owens, 711 F.2d at 27. Were the rule otherwise, the "realm of discretion" States enjoy in this area would

prove illusory. Shepherd, 575 F.2d at 1114.

have completed all terms of their sentences, including financial terms, and those who have not. This classification does not turn on membership in a suspect class: the requirement that felons complete their sentences applies regardless of race, religion, or national origin. Because this classification is not suspect, we review it for a rational basis only.

[13] [14]In the earlier appeal from the preliminary injunction, the panel elided this analysis and applied "some form of heightened scrutiny" on the ground that Amendment 4 and Senate Bill 7066 invidiously discriminate based on wealth. Jones, 950 F.3d at 817. That decision was wrong. To reiterate, Florida withholds the franchise from any felon, regardless of wealth, who has failed to complete any term of his criminal sentence-financial or otherwise. It does not single out the failure to complete financial terms for special treatment. And in any event, wealth is not a suspect classification. See, e.g., Maher v. Roe, 432 U.S. 464, 470-71, 97 S.Ct. 2376, 53 L.Ed.2d 484 (1977). Outside of narrow circumstances, laws that burden the indigent are subject only to rational basis review. See M.L.B. v. S.L.J.. 519 U.S. 102, 123-24, 117 S.Ct. 555, 136 L.Ed.2d 473 (1996).

To justify its application of heightened scrutiny, the panel relied on Supreme Court precedents governing poll taxes, *Harper*, 383 U.S. 663, 86 S.Ct. 1079, 16 L.Ed.2d 169; poverty-based imprisonment, *e.g.*, *Bearden v. Georgia*, 461 U.S. 660, 103 S.Ct. 2064, 76 L.Ed.2d 221 (1983); and access to judicial proceedings, *e.g.*, *Griffin v. Illinois*, 351 U.S. 12, 76 S.Ct. 585, 100 L.Ed. 891 (1956). The felons ask us to affirm the permanent injunction based on these same decisions. But none of these precedents, alone or in combination, requires heightened scrutiny for the decision to condition reenfranchisement on the full completion of a criminal sentence.

poll tax under the Equal Protection Clause. This poll tax applied to the Virginia electorate generally; any voter who wished to cast a ballot in a state election had to pay the tax. *Harper*, 383 U.S. at 664 n.1, 86 S.Ct. 1079. Although States have the power to set voter qualifications, the Court explained that the Equal Protection Clause "restrains the States from fixing voter qualifications which invidiously discriminate." *Id.* at 666, 86 S.Ct. 1079. Because poll taxes bear "no relation" to voter qualifications, the Court concluded that Virginia had "introduce[d] a capricious or irrelevant factor" by requiring voters to pay the tax. \*1031

*Id.* at 666, 668, 86 S.Ct. 1079. Under *Harper*, it is a per se violation of the Equal Protection Clause for a State to "make[] the affluence of the voter or payment of any fee an electoral standard." *Id.* at 666, 86 S.Ct. 1079.

Amendment 4 and Senate Bill 7066 are markedly different from the poll tax in Harper. They do not make affluence or the payment of a fee an "electoral standard." Id. They instead impose a different electoral standard: to regain the right to vote, felons, rich and poor, must complete all terms of their criminal sentences. Unlike the poll tax in *Harper*, that requirement is highly relevant to voter qualifications. See Richardson, 418 U.S. at 55, 94 S.Ct. 2655; Hayden, 594 F.3d at 171. It promotes full rehabilitation of returning citizens and ensures full satisfaction of the punishment imposed for the crimes by which felons forfeited the right to vote. That criminal sentences often include financial obligations does not make this requirement a "capricious or irrelevant factor." Harper, 383 U.S. at 668, 86 S.Ct. 1079. Monetary provisions of a sentence are no less a part of the penalty that society imposes for a crime than terms of imprisonment. Indeed, some felons face substantial monetary penalties but little or no prison time.

Because the financial obligations at issue are directly related to legitimate voter qualifications, Harper is inapplicable. The en banc Ninth Circuit rejected a similar request to apply *Harper* to valid voter qualifications that impose a financial burden on some voters. It held that "[r]equiring voters to provide documents proving their identity is not an invidious classification based on impermissible standards of wealth or affluence, even if some individuals have to pay to obtain the documents." Gonzalez v. Arizona, 677 F.3d 383, 409 (9th Cir. 2012) (en banc) (emphasis added), aff'd sub nom. Arizona v. Inter Tribal Council of Az., Inc., 570 U.S. 1, 133 S.Ct. 2247, 186 L.Ed.2d 239 (2013). Like requiring voters to prove their identity, requiring felons to complete their full criminal sentences "falls squarely within the state's power to fix core voter qualifications." Id. The felons' contrary reading of Harper would call into question any law that made voting more expensive for some people than others, even if the additional cost were directly tied to valid voter qualifications.

[17] [18] *Harper* also proves too much to help the felons, which is further evidence that it does not apply. *Harper* held that the Virginia poll tax was unconstitutional *regardless* of whether a voter could pay the tax; it did not matter whether a voter "ha[d] \$1.50 in his pocket or nothing at all, pa[id] the fee or fail[ed] to pay it." 383 U.S. at 668, 86 S.Ct. 1079. But no one doubts that the Equal Protection Clause allows Florida to require felons who are

able to complete the financial terms of their sentences to do so. If completing the financial terms of a sentence were truly "irrelevant" to voter qualifications, id., Florida could not require any felons to satisfy that requirement as a condition of voting. The watered-down version of *Harper* that the felons would have us apply ignores the crucial distinction between poll taxes and Florida's reenfranchisement law: poll taxes are never relevant to voter qualifications, but laws that require the completion of a criminal sentence are. See Richardson, 418 U.S. at 55, 94 S.Ct. 2655. The per se rule of Harper does not apply to voting requirements that are related to legitimate voter qualifications, even if some voters must pay to comply with the requirement. See Gonzalez, 677 F.3d at 409; Crawford v. Marion Cnty. Election Bd., 553 U.S. 181, 189, 128 S.Ct. 1610, 170 L.Ed.2d 574 (2008) (plurality opinion) (explaining that *Harper* invalidates voting restrictions that "are unrelated to voter qualifications"); \*1032 cf. Cipriano v. City of Houma, 395 U.S. 701, 702-04, 89 S.Ct. 1897, 23 L.Ed.2d 647 (1969) (asking whether a law that gave only property taxpayers the right to vote in certain elections was necessary to serve a compelling state interest but not applying the per se rule of *Harper*).

In addition to *Harper*, the panel in the earlier appeal relied on two other lines of Supreme Court precedent to apply heightened scrutiny. *Jones*, 950 F.3d at 817–19. These decisions represent limited exceptions to the general rule that rational basis review applies to claims of wealth discrimination. *See M.L.B.*, 519 U.S. at 123–24, 117 S.Ct. 555. They do not apply here.

The first line of precedent, which culminated in the Bearden decision, applies when the State imprisons a person by reason of his inability to pay a fine. Bearden, 461 U.S. at 667-69, 103 S.Ct. 2064; see also Tate v. Short, 401 U.S. 395, 396-98, 91 S.Ct. 668, 28 L.Ed.2d 130 (1971); Williams v. Illinois, 399 U.S. 235, 240-41, 90 S.Ct. 2018, 26 L.Ed.2d 586 (1970). Williams, Tate, and Bearden all involved criminal defendants whose sentences included fines or restitution. Bearden, 461 U.S. at 662-63, 667, 103 S.Ct. 2064. In each decision, the defendant was unable to pay the required amount solely because of poverty, which led the State to impose an additional term of imprisonment on the defendant that was not part of his original sentence. Id. The Court explained in *Bearden* that "if the State determines a fine or restitution to be the appropriate and adequate penalty for the crime, it may not thereafter imprison a person solely because he lacked the resources to pay it." Id. at 667-68, 103 S.Ct. 2064. But because Amendment 4 and Senate Bill 7066 do not impose an additional term of imprisonment on felons who fail to pay their financial obligations, they are far afield of the laws that *Bearden* and its predecessors considered.

The earlier panel erroneously read these decisions to stand for the proposition that "a state may not extend punishment"—that is, disenfranchisement—"on account of inability to pay fines or fees." Jones, 950 F.3d at 818 (emphasis added). The Supreme Court has never extended beyond the context of poverty-based imprisonment. See Kadrmas v. Dickinson Pub. Schs., 487 U.S. 450, 461 n.\*, 108 S.Ct. 2481, 101 L.Ed.2d 399 (1988) (declining to extend *Bearden*). And *Williams*, the foundational decision in this line of precedent, stated that nothing in its holding "limit[ed] the power of the [State] to impose alternative sanctions" besides imprisonment on defendants who cannot satisfy the monetary terms of their sentences. 399 U.S. at 245, 90 S.Ct. 2018; accord Bearden, 461 U.S. at 671–72, 103 S.Ct. 2064.

But even if *Bearden* applied beyond poverty-based imprisonment, it would not help the felons for a more fundamental reason. Amendment 4 and Senate Bill 7066 do not impose additional punishment because of a felon's failure to pay his fines, fees, costs, and restitution. Florida automatically disenfranchises all felons upon conviction, and the challenged laws only lift that punishment for felons who have completed all terms of their sentences. This case would resemble Bearden if Florida left the right to vote intact upon conviction but then revoked the franchise from any felons who could not pay their fines and restitution. In that scenario, the State would have determined that its "penological interests do not require" disenfranchisement, which would call into doubt the decision to impose disenfranchisement solely because of a felon's inability to pay fines and restitution. Bearden, 461 U.S. at 670, 103 S.Ct. 2064. But Florida does nothing of the kind.

\*1033 [19] The Supreme Court has also applied heightened scrutiny to laws that condition access to certain judicial proceedings on the ability to pay. See M.L.B., 519 U.S. at 110-16, 117 S.Ct. 555 (tracing the development of this exception to Griffin, 351 U.S. 12, 76 S.Ct. 585, 100 L.Ed. 891). But this exception to rational basis review applies only when the State makes "access to judicial processes in cases criminal or quasi criminal in nature turn on ability to pay." Id. at 124, 117 S.Ct. 555 (citation and internal quotation marks omitted). And even when the Supreme Court has extended the right of access to the courts to other kinds of judicial proceedings, it has "felt compelled to justify even ... slight extension[s] of the right." Lewis v. Casey, 518 U.S. 343, 354, 116 S.Ct. 2174, 135 L.Ed.2d 606 (1996). The extension the felons seek is hardly "slight"—the challenged laws do not concern access to

judicial proceedings *at all*. The access-to-courts precedents are wholly inapposite.

[20] The felons resist the conclusion that the *Bearden* and Griffin lines of precedent are limited to the contexts in which they arose, but they identify no decisions that invoke Bearden or Griffin to apply heightened scrutiny to a claim of wealth discrimination outside those contexts. And the dissenters' contention that "the Supreme Court applied Griffin to the voting context in Harper," Jordan Dissent at 1076, is plainly inaccurate. Far from "rel[ying] on Griffin to invalidate ... Virginia['s] poll tax," id., Harper cited Griffin once in passing to support the proposition that "[l]ines drawn on the basis of wealth or property ... are traditionally disfavored," *Harper*, 383 U.S. at 668, 86 S.Ct. 1079 (citing Griffin, 351 U.S. 12, 76 S.Ct. 585, 100 L.Ed. 891). The Court did not provide even a pinpoint citation to any passage in Griffin, much less analysis extending it to the context of voting. Id. The Supreme Court has made clear that heightened scrutiny for claims of wealth discrimination is the exception, not the rule. M.L.B., 519 U.S. at 123-24, 117 S.Ct. 555. Unable to fit their claim into any existing exception, the felons rely on "nothing more than an amalgamation" of multiple theories, each of which lacks merit on its own. Pac. Bell Tel. Co. v. Linkline Commc'ns. Inc., 555 U.S. 438, 452, 129 S.Ct. 1109, 172 L.Ed.2d 836 (2009).

[21]We hold that rational basis review applies and overrule the contrary holding by the panel in the earlier appeal from the preliminary injunction. Jones, 950 F.3d at 800. Stare decisis does not counsel that we should adhere to that earlier decision. See McCarthan v. Dir. of Goodwill Indus.-Suncoast, Inc., 851 F.3d 1076, 1096 (11th Cir. 2017) (en banc). The doctrine of stare decisis "is at its weakest when we interpret the Constitution." Ramos v. Louisiana, — U.S. —, 140 S. Ct. 1390, 1405, 206 L.Ed.2d 583 (2020) (internal quotation marks omitted). Because the panel interpreted the Constitution and not a statute, only we or the Supreme Court can correct its "gravely mistaken" reasoning. Id. That earlier decision is inconsistent with clear Supreme Court precedent and every relevant decision of our sister circuits—indeed, it is, to our knowledge, the only appellate decision ever to apply heightened scrutiny to felon reenfranchisement in the absence of any suspect classification. See id. (considering "consistency with related decisions"). And any reliance interests on that decision—which affirmed a preliminary injunction entered earlier this year in this very litigation—are weak. See Franchise Tax Bd. v. Hyatt, -U.S. —, 139 S. Ct. 1485, 1499, 203 L.Ed.2d 768 (2019) (rejecting "case-specific costs" as a reliance interest that can justify adhering to "an incorrect resolution of an important constitutional question").

\*1034 [22] A classification survives rational basis review if it is rationally related to some legitimate government interest, Heller, 509 U.S. at 320, 113 S.Ct. 2637, and two interests are relevant here. Florida unquestionably has an interest in disenfranchising convicted felons, even those who have completed their sentences. See Richardson, 418 U.S. at 56, 94 S.Ct. 2655. But Amendment 4 and Senate Bill 7066 also reflect a different, related interest. They advance Florida's interest in restoring felons to the electorate after justice has been done and they have been fully rehabilitated by the criminal justice system. The policy Florida has adopted reflects the "more modern view" described in *Richardson* that "it is essential to the process of rehabilitating the ex-felon that he be returned to his role in society as a fully participating citizen when he has completed the serving of his term." Id. at 55, 94 S.Ct. 2655. The twin interests in disenfranchising those who disregard the law and restoring those who satisfy the demands of justice are both legitimate goals for a State to advance. See id. at 55-56, 94 S.Ct. 2655. The question is whether the classification Florida has adopted between felons who have completed their full sentences and those who have not is rationally related to those interests.

The dissenters suggest that Florida's only possible interests are in punishment and debt collection, Jordan Dissent at 1087–89, and that narrow view leads them to conclude that Senate Bill 7066 is irrational, *id.* at 1089. The dissenters dismiss our view that Florida also has an interest in restoring rehabilitated felons to the electorate as "an *ipse dixit* ... [that] merely restates what the law does." *Id.* at 1086. But it is not unusual for a policy to directly achieve an objective itself. *See Adams ex. rel. Kasper v. Sch. Bd. of St. Johns Cnty.*, 968 F.3d 1286, 1314 (11th Cir. 2020) (W. Pryor, C.J., dissenting). And we do not think it is unnatural to find state interests broader than punishment and revenue-raising in a reenfranchisement law.

<sup>[23]</sup>In deciding whether Florida's classification is rational, we are mindful that our review is extremely narrow. *See FCC v. Beach Commc'ns, Inc.*, 508 U.S. 307, 314, 113 S.Ct. 2096, 124 L.Ed.2d 211 (1993) ("This standard of review is a paradigm of judicial restraint."). We must uphold the classification unless the felons "negative every conceivable basis which might support it." *Id.* at 315, 113 S.Ct. 2096 (internal quotation marks omitted). For this reason, the Supreme Court "hardly ever strikes down a policy as illegitimate under rational basis scrutiny." *Trump v. Hawaii*, — U.S. —, 138 S. Ct. 2392, 2420, 201 L.Ed.2d 775 (2018). In the rare instances when it has done so, "a common thread has been that the laws at issue lack any purpose other than a 'bare desire to harm a

politically unpopular group.' " Id. (alteration adopted) (quoting U.S. Dep't of Agric. v. Moreno, 413 U.S. 528, 534, 93 S.Ct. 2821, 37 L.Ed.2d 782 (1973)); see also Romer v. Evans, 517 U.S. 620, 634, 116 S.Ct. 1620, 134 L.Ed.2d 855 (1996); City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 446-47, 450, 105 S.Ct. 3249, 87 L.Ed.2d 313 (1985). There is no evidence that any kind of animus toward indigent felons motivated Florida voters and legislators to condition reenfranchisement on the completion of all terms of sentence. After all, the voters of Florida made it easier for the vast majority of felons—who are disproportionately indigent—to regain their voting rights. So we must uphold their choice if there is any conceivable basis that could justify it. See Heller, 509 U.S. at 319, 113 S.Ct. 2637 ("[R]ational-basis review ... is not a license for courts to judge the wisdom, fairness, or logic of legislative choices." (internal quotation marks omitted)).

\*1035 [24] Under this deferential standard, we readily conclude that Florida's classification survives scrutiny. The people of Florida could rationally conclude that felons who have completed all terms of their sentences, including paying their fines, fees, costs, and restitution, are more likely to responsibly exercise the franchise than those who have not. *See Green*, 380 F.2d at 451. If a State may decide that those who commit serious crimes are presumptively unfit for the franchise, *id.*, it may also conclude that those who have completed their sentences are the best candidates for reenfranchisement.

[25]To be sure, the line Florida drew might be imperfect. The classification may exclude some felons who would responsibly exercise the franchise and include others who are arguably less deserving. But Florida was not required "to draw the perfect line nor even to draw a line superior to some other line it might have drawn." *Armour v. City of Indianapolis*, 566 U.S. 673, 685, 132 S.Ct. 2073, 182 L.Ed.2d 998 (2012). The Constitution requires only "a rational line." *Id.* The line between felons who have completed their sentences and those who have not easily satisfies that low bar.

[26] [27] [28] The classification is rational for other reasons too. Before extending the franchise to even more felons, Florida may have wished to test the waters by reenfranchising only those who complete their full sentences. Under rational basis review, "reform may take one step at a time." Williamson v. Lee Optical of Okla., Inc., 348 U.S. 483, 489, 75 S.Ct. 461, 99 L.Ed. 563 (1955). The State need not "strike at all evils at the same time or in the same way," Semler v. Or. State Bd. of Dental Exam'rs, 294 U.S. 608, 610, 55 S.Ct. 570, 79 L.Ed. 1086 (1935), and "[a] statute is not invalid under

the Constitution because it might have gone farther than it did," *Roschen v. Ward*, 279 U.S. 337, 339, 49 S.Ct. 336, 73 L.Ed. 722 (1929). Although "every reform that benefits some more than others may be criticized for what it fails to accomplish," that reality does not invalidate the measure under the Equal Protection Clause. *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 39, 93 S.Ct. 1278, 36 L.Ed.2d 16 (1973).

Confusion about Florida's voter registration system and the record before the district court leads the dissenters to conclude that Senate Bill 7066 "does not 'rationally' further the goal of re-enfranchising felons," a goal the dissent acknowledges only "[f]or the sake of argument." Jordan Dissent at 1086, 1086-87. The dissenters purport to prove that conclusion with a smoking gun: "the fact that Florida had restored voting rights to 0 felons as of the time of trial." Id. at 143. But that "fact" is not true. Once a felon submits a facially complete registration form and Florida determines that he is a real person, he is added to the voting rolls as a registered voter; he is not then required to prove that he has completed his sentence. To be sure, Florida attempts to identify "registered voters" with felony convictions whose rights have not been restored and, after securing "credible and reliable" information, initiates the process of removing them from the voter registration system. Fla. Stat. §§ 98.075(5) and (7); see also id. at § 98.0751(3) (governing administration of § 98.075(5) in the light of Amendment 4). But at the time of trial, 85,000 felons had submitted facially complete voter registration forms, and Florida had not yet been able to find information justifying the removal of any of them from the voting rolls. Until it does, all 85,000 are entitled to vote. The dissenters' contention that state officials' implementation of Amendment 4 has \*1036 prevented any felons from benefitting from the amendment is false. Eighty-five thousand felons are now registered voters, and each one will remain so unless Florida meets its self-imposed burden of gathering the information necessary to prove his ineligibility. Our dissenting colleagues quibble with our assertion that all of these registered voters are "entitled to vote," see Jordan Dissent at 1087; Martin Dissent at 1064-65 n.3, but they point to no evidence that any of the 85,000 voters will be unable to cast a ballot in an upcoming election.

<sup>[29]</sup>The felons argue that Florida rendered its classification irrational by adopting the "every dollar" method for determining when a sentence is complete, but this argument misunderstands rational basis review. If the relationship between a State's interest and its means of achieving it is "at least debatable," then it survives scrutiny. *Gary v. City of Warner Robins*, 311 F.3d 1334, 1339 (11th Cir. 2002) (quoting *United States v. Carolene* 

*Prods. Co.*, 304 U.S. 144, 154, 58 S.Ct. 778, 82 L.Ed. 1234 (1938)). The "every dollar" policy is at least arguably related to Florida's interest in reenfranchising only those felons who have paid their debt to society and been fully rehabilitated. It ensures that no felons will be reenfranchised unless they have paid amounts equal to those imposed in their criminal sentences. Florida could rationally define "completion" of a sentence in this manner to help ensure that felons who enrolled in payment plans pay no more to complete their sentences than felons who paid their fines, fees, costs, and restitution immediately.

[30] The reasoning of the district court and the panel in the earlier appeal bore no resemblance to rational basis review. Their first error was to assess the rationality of Florida's classification by asking only whether it was rational to prohibit these plaintiffs from voting. See Jones, 950 F.3d at 813 ("Florida's continued disenfranchisement of these seventeen plaintiffs is not rationally related to any legitimate governmental interest." (emphasis added)); Jones v. DeSantis, 462 F. Supp. 3d 1196, 1218-19 (N.D. Fla. 2020) (claiming that a proper approach to rational-basis scrutiny allows a court to "consider[] the rationality of a statute as applied to particular plaintiffs without opining on its rationality more generally." (quoting Jones, 950 F.3d at 814)). A legislative classification "may be based on rational speculation unsupported by evidence." Beach Commc'ns, 508 U.S. at 315, 113 S.Ct. 2096. For that reason, a law may be rational "even if in a particular case [it] appears to discriminate irrationally." In re Wood, 866 F.2d 1367, 1370 (11th Cir. 1989); see also Beller v. Middendorf, 632 F.2d 788, 808 n.20 (9th Cir. 1980) (Kennedy, J.) ("Nearly any statute which classifies people may be irrational as applied in particular cases.").

The dissenters repeat the error of the district court and the panel in the earlier appeal. And they accuse us of ignoring the Supreme Court's decision in City of Cleburne, see Jordan Dissent at 1083-84, which they describe as applying rational-basis review to affirm a judgment "insofar as it [held an] ordinance invalid as applied in this case," City of Cleburne, 473 U.S. at 448, 105 S.Ct. 3249. But applying rational-basis review in a "case" is not the same as applying it to the unique circumstances of a specific plaintiff. After the passage cited by the dissenters, the Supreme Court in City of Cleburne evaluated whether the city's proffered reasons for requiring a permit for a group home of people with intellectual disabilities but not for comparable facilities rationally reflected relevant differences between "the mentally retarded as a group" and others. Id. at 448-50, 105 S.Ct. 3249 (emphasis added). The Court did not focus on factors unique to the particular disabled people involved in \*1037 the appeal—*City of Cleburne* does not justify the dissenters' narrow focus on whether Florida's classification applies rationally to the particular plaintiffs in this appeal.

The second error of the district court and the panel in the earlier appeal was to assume that the law would be rational if most felons could eventually pay their fines, fees, costs, and restitution but irrational if a substantial number could not. See Jones, 950 F.3d at 814. The proportion of felons who can eventually complete their sentences has no bearing on whether it is rational to conclude that felons who do complete sentences—whatever their number—are generally more deserving of reenfranchisement than those who do not. The district court and the panel in the earlier appeal reached a contrary conclusion only by disregarding settled law. See Beach Commc'ns, 508 U.S. at 315, 113 S.Ct. 2096; United States v. Castillo, 899 F.3d 1208, 1213 (11th Cir. 2018). The dissenters echo that flawed reasoning when they contend that any law that would leave a substantial portion of felons unable to benefit from Amendment 4 is "a nullification of the will of the electorate." Jill Pryor Dissent at 1112. But the face of the amendment makes clear that Florida voters do not share the dissenters' view that it is unjust to tell some criminals that they have incurred debts to society that will never be repaid. See Fla. Const. art. VI, § 4(b) (denying automatic reenfranchisement to felony sex offenders murderers). In fact, it is the dissenters who would nullify the will of the Florida electorate by reenfranchising felons whom voters clearly would not have expected to benefit from Amendment 4, including a named plaintiff who jointly owes \$59 million in restitution for conspiracy to commit insurance and wire fraud. Florida's voters intended only to reenfranchise felons who have been fully rehabilitated, and Senate Bill 7066 drew a rational line in pursuit of that goal.

B. Amendment 4 and Senate Bill 7066 Do Not Violate the Twenty-Fourth Amendment.

[31]Ratified in 1964, the Twenty-Fourth Amendment to the Constitution forbids taxes on voting in federal elections:

The right of citizens of the United States to vote in any primary or other election for President or Vice President, for electors for President or Vice President, or for Senator or Representative in Congress, shall not be denied or abridged by the United States or any State by reason of failure to pay any poll tax or other tax.

U.S. Const. amend. XXIV, § 1. The felons argue that

Florida has denied them the right to vote by reason of their failure to pay court fees and costs imposed in their criminal sentences, which they contend are an "other tax" under the Twenty-Fourth Amendment. They do not argue that fines and restitution are taxes, and for good reason. Fines, which are paid to the government as punishment for a crime, and restitution, which compensates victims of crime, are not taxes under any fair reading of that term.

The felons' argument presents two questions: first, whether fees and costs imposed in a criminal sentence are taxes under the Twenty-Fourth Amendment; and second, if fees and costs are taxes, whether Florida has denied the right to vote "by reason of" the failure to pay fees and costs.

#### 1. Court Costs and Fees Are Not Taxes.

[32] [33] The term "tax" is a broad one, but it does not cover all monetary exactions imposed by the government. The Supreme Court has long distinguished taxes from penalties in a variety of contexts. See, e.g., \*1038 United States v. Constantine, 296 U.S. 287, 293-94, 56 S.Ct. 223, 80 L.Ed. 233 (1935); United States v. La Franca, 282 U.S. 568, 572, 51 S.Ct. 278, 75 L.Ed. 551 (1931). This distinction was well established when the Twenty-Fourth Amendment was adopted, and it continues to define the outer limits of the term "tax" today. See Nat'l Fed'n of Indep. Bus. v. Sebelius, 567 U.S. 519, 563, 567-70, 132 S.Ct. 2566, 183 L.Ed.2d 450 (2012) (holding, under the canon of constitutional avoidance, that a federal law levied a tax because it could reasonably be read not to impose a penalty). In short, if a government exaction is a penalty, it is not a tax.

[34] [35] "The difference between a tax and a penalty is sometimes difficult to define," *Child Labor Tax Case*, 259 U.S. 20, 38, 42 S.Ct. 449, 66 L.Ed. 817 (1922), but at least one principle is clear. The Supreme Court has explained in multiple contexts that "if the concept of penalty means anything, it means punishment for an unlawful act or omission." *Nat'l Fed'n of Indep. Bus.*, 567 U.S. at 567, 132 S.Ct. 2566 (quoting *United States v. Reorganized CF & I Fabricators of Utah, Inc.*, 518 U.S. 213, 224, 116 S.Ct. 2106, 135 L.Ed.2d 506 (1996)); *see also La Franca*, 282 U.S. at 572, 51 S.Ct. 278. Court fees and costs imposed in a criminal sentence fall within this definition: they are part of the State's punishment for a crime. They are not taxes.

[36] Several features of the costs and fees at issue make clear that they are punishment for criminal wrongdoing.

Most importantly, they are part of a defendant's criminal sentence—"the punishment imposed on a criminal wrongdoer." Sentence, Black's Law Dictionary (11th ed. 2019). Florida caselaw holds that the costs of prosecution are criminal punishment for purposes of double jeopardy; they cannot be increased after a defendant begins serving his sentence. Martinez v. State, 91 So. 3d 878, 879–80 (Fla. Dist. Ct. App. 2012). And if a felon cannot pay a financial obligation imposed in his sentence, the sentencing court may "convert the statutory financial obligation into a court-ordered obligation to perform community service," Fla. Stat. § 938.30(2), a provision that makes little sense if costs and fees exist primarily to raise revenue and not to punish and rehabilitate offenders.

[37] [38] [39]Like fines and restitution, fees and costs are also linked to culpability. Florida imposes heftier costs on felony offenders than those convicted of misdemeanors or criminal traffic offenses, and it does not impose any fees and costs if a criminal case ends in an acquittal or a nolle prosequi. See id. §§ 938.05(1), 939.06(1). Florida imposes fees and costs only on those who are convicted of a crime or who have their adjudication of guilt withheld, a process that allows the court to suspend the imposition of sentence if it determines "that the defendant is not likely again to engage in a criminal course of conduct and that the ends of justice and the welfare of society do not require that the defendant presently suffer the penalty imposed by law." *Id.* § 948.01(2). But even felony defendants who have their adjudication of guilt withheld are subject to the punitive and rehabilitative powers of the sentencing court: they must complete a term of probation and may have to pay both fines and costs. See State v. Tribble, 984 So. 2d 639, 640–41 (Fla. Dist. Ct. App. 2008); Clinger v. State, 533 So. 2d 315, 316-17 (Fla. Dist. Ct. App. 1988). The punitive nature of fees and costs is no less applicable to defendants who plead nolo contendere because that plea, like a guilty plea, results in a conviction and "gives the court the power to punish." Vinson v. State, 345 So. 2d 711, 715 (Fla. 1977).

The Supreme Court has relied on similar features to conclude that exactions that \*1039 bore a far greater resemblance to taxes than court costs do were in fact penalties. For example, the Court held that a "so-called tax" on the possession of illegal drugs was in reality criminal punishment in part because the exaction was "conditioned on the commission of a crime." Dep't of Revenue of Mont. v. Kurth Ranch, 511 U.S. 767, 781, 114 S.Ct. 1937, 128 L.Ed.2d 767 (1994); see also Nat'l Fed'n of Indep. Bus., 567 U.S. at 566, 132 S.Ct. 2566 (relying on Kurth Ranch to distinguish taxes from penalties). "That condition," the Court explained, was "significant of penal and prohibitory intent rather than the gathering of

revenue." *Kurth Ranch*, 511 U.S. at 781, 114 S.Ct. 1937 (internal quotation marks omitted). The Court relied on similar reasoning to hold that a \$1,000 excise imposed only on those who violated state liquor laws was a penalty, not a tax. *Constantine*, 296 U.S. at 295, 56 S.Ct. 223.

The functional analysis used in National Federation of Independent Business supports our conclusion that the fees and costs in this appeal are penalties, not taxes. The Court explained that exactions imposed only on those who knowingly violate the law are suggestive of a penalty, not a tax. 567 U.S. at 565-66, 132 S.Ct. 2566. The Court also stressed that using a "criminal prosecution" to collect an exaction is "suggestive of a punitive sanction." Id. at 566, 132 S.Ct. 2566. And the Court reasoned that an exaction is likely a tax when the behavior to which it applies is lawful. *Id.* at 568, 132 S.Ct. 2566 ("Neither the Act nor any other law attaches negative legal consequences to not buying health insurance, beyond requiring a payment to the IRS.... [I]f someone chooses to pay rather than obtain health insurance, they have fully complied with the law."). Here, by contrast, fees and costs are imposed only on those who, following criminal prosecution for their unlawful acts, are subject to the punitive and rehabilitative powers of a Florida court. The characteristic features of penalties that the Court noted were absent in National Federation of Independent Business are present here.

[40] [41] [42]To be sure, one purpose of fees and costs is to raise revenue, but that does not transform them from criminal punishment into a tax. Every financial penalty raises revenue for the government, sometimes considerable revenue. In addition to costs and fees, Florida uses criminal fines to fund both its courts and general government operations, but that additional purpose does not make them taxes. See Fla. Stat. § 142.01(1) (establishing the "fine and forfeiture fund" for use "in performing court-related functions"); id. § 775.083(1) (directing that criminal fines be deposited in the fine and forfeiture fund); id. § 316.193(2)(a) (directing the clerk to remit portions of fines for driving under the influence "to the Department of Revenue for deposit into the General Revenue Fund"). Nor does the fact that many fees and costs do not vary based on the severity of the offense render them nonpunitive. Some punishments, like disenfranchisement, are imposed on all felons alike regardless of the severity of their crimes. Because court costs and fees are legitimate parts of a criminal sentence—that is, part of the debt to society that felons must pay for their crimes—there is no basis to regard them as a tax. We hold that fees and costs imposed in a criminal sentence are not taxes under the Twenty-Fourth Amendment, and we reject the felons' Twenty-Fourth Amendment argument on that basis.

2. Florida Does Not Deny the Right to Vote "by Reason of" Failure to Pay a Tax.

Even if fees and costs were taxes, the felons' reliance on the Twenty-Fourth \*1040 Amendment would be misplaced. The Twenty-Fourth Amendment provides that "[t]he right ... to vote ... shall not be denied or abridged ... by reason of failure to pay any poll tax or other tax." U.S. Const. amend. XXIV, § 1. A financial obligation that indirectly burdens the right to vote is permissible under the Twenty-Fourth Amendment when the State has a constitutionally legitimate reason for imposing the voter qualification that creates the indirect burden. But before explaining why, it is necessary to address—and reject—an argument that the State makes.

In addition to its argument that fees and costs are not taxes, the State contends that the Twenty-Fourth Amendment "does not apply when the right to vote has been constitutionally forfeited." Quoting the Ninth Circuit's opinion in *Harvey v. Brewer*, the State contends that because disenfranchised felons have "lost their right to vote, they ... have no cognizable Twenty-Fourth Amendment claim until their voting rights are restored." 605 F.3d at 1080; *see also Johnson*, 624 F.3d at 751. The State maintains that Amendment 4 and Senate Bill 7066 provide only "requirements for *reenfranchisement*," which the Twenty-Fourth Amendment does not govern.

The implication of that logic for the other voting-rights amendments shows why the State's argument is plainly wrong. If the voting-rights amendments protect only those with a pre-existing right to vote and do not apply to so-called "reenfranchisement laws," then a State would not violate the Fifteenth Amendment by denying that right to reenfranchisement only to black felons. A State also would not violate the Nineteenth Amendment by denying the right only to female felons. And it would not violate the Twenty-Sixth Amendment by denying the right only to younger felons. According to the State's logic, none of the voting-rights amendments would have anything to say about discriminatory "reenfranchisement" laws, because reenfranchisement is "an act of grace" extended to a class that has no cognizable rights. To be sure, the State denied that implication of its position at oral argument, see Oral Argument at 7:00-8:00 (Aug. 18, 2020) (conceding that discriminatory reenfranchisement laws would violate the Fifteenth, Nineteenth, and Twenty-Sixth Amendments), and for good reason. Any of the discriminatory

reenfranchisement laws described above would clearly violate the voting-rights amendments.

Consider the Supreme Court's treatment of literacy tests. Some States denied illiterate persons the right to vote after the ratification of the Fifteenth Amendment, a practice the Supreme Court held was then lawful. *See Guinn v. United States*, 238 U.S. 347, 366, 35 S.Ct. 926, 59 L.Ed. 1340 (1915); *Lassiter v. Northampton Cnty. Bd. of Elections*, 360 U.S. 45, 50–53, 79 S.Ct. 985, 3 L.Ed.2d 1072 (1959). But even though States were free to deny the right to vote to *all* illiterate persons, the Fifteenth Amendment forbade them to discriminate within the class of illiterate non-voters by exempting only white citizens from literacy tests. *See Guinn*, 238 U.S. at 364–65, 35 S.Ct. 926.

In the same way, States may deny all felons the right to vote but may not, consistent with the Twenty-Fourth Amendment, discriminate among felons by extending the franchise to some felons while denying it to others by reason of their failure to pay a tax. The Twenty-Fourth Amendment, like the Fifteenth and Nineteenth Amendments before it and the later Twenty-Sixth Amendment, applies whenever the State sets a voter qualification that extends the right to vote to some persons but denies it to others on a prohibited basis. The Twenty-Fourth Amendment \*1041 plainly applies to felon reenfranchisement. The only remaining question is whether Florida denies some felons the right to vote "by reason of" their failure to pay a poll tax or other tax.

The felons argue that the phrase "by reason of" requires "the simple and traditional standard of but-for causation," which asks whether "a particular outcome would not have happened 'but for' the purported cause." Bostock v. Clayton County, — U.S. —, 140 S. Ct. 1731, 1739, 207 L.Ed.2d 218 (2020) (internal quotation marks omitted). Florida law violates the Twenty-Fourth Amendment, the felons argue, because Amendment 4 and Senate Bill 7066 make their failure to pay court fees and costs a but-for cause of the denial of their right to vote. The problem with this argument is that the text of the Twenty-Fourth Amendment does not establish a but-for causal relationship between the failure to pay a tax and the denial of the right to vote.

To be sure, "[t]he phrase 'by reason of' denotes some form of causation." *Husted v. A. Philip Randolph Inst.*, — U.S. —, 138 S. Ct. 1833, 1842, 201 L.Ed.2d 141 (2018) (citing *Gross v. FBL Fin. Servs., Inc.*, 557 U.S. 167, 176, 129 S.Ct. 2343, 174 L.Ed.2d 119 (2009)). But the phrase is not self-defining, and dictionary definitions are of limited value because they tend to define "because

of," "by reason of," and "on account of" only in circular reference to one another. See, e.g., Account, Webster's New International Dictionary (2d ed. 1959) (defining "on account of" as "[f]or the sake of; by reason of; because of"); Reason, Oxford English Dictionary (1933) (defining "[b]y ... reason of" as "on account of"). Indeed, the Supreme Court has explained that the phrase "by reason of" can bear meanings that range from but-for cause, Holmes v. Sec. Inv. Prot. Corp., 503 U.S. 258, 265-66, 112 S.Ct. 1311, 117 L.Ed.2d 532 (1992), all the way to sole cause, Husted, 138 S. Ct. at 1842-43. Absent a more specific definition in the text, we must look to context to determine whether "by reason of" in the Twenty-Fourth Amendment refers to but-for cause, sole cause, or some other relationship. See id. at 1842 (citing Holmes, 503) U.S. at 265-68, 112 S.Ct. 1311); see also Antonin Scalia & Bryan A. Garner, Reading Law: The Interpretation of Legal Texts § 2, at 56 (2012) ("[W]ords are given meaning by their context...."). And the context of the Twenty-Fourth Amendment forecloses the possibility that but-for causation is the relevant standard.

The most relevant context is the text of the other voting-rights amendments to the Constitution. The felons acknowledge this reality. They point to the fact that the "Twenty-Fourth Amendment's text mirrors the Fifteenth, Nineteenth, and Twenty-Sixth Amendments" as evidence that the Twenty-Fourth Amendment, like the other amendments, imposes a categorical ban on certain voting qualifications—a ban that is "not subject to exceptions in the rights-restoration context."

The felons are correct in one respect: just as it would plainly violate the other amendments to reenfranchise only white, male, or 30-year old felons, it would also violate the Twenty-Fourth Amendment to reenfranchise only felons who pay a poll tax—that is, a tax on the franchise itself. But the felons overlook one important difference between the Twenty-Fourth Amendment and the other amendments: the language it uses to describe the relationship between the denial of the right to vote and the prohibited basis of that denial.

Consider the text of all four voting-rights amendments. The Fifteenth Amendment says that the right to vote may not be denied "on account of race, color, or \*1042 previous condition of servitude." U.S. Const. amend. XV, § 1 (emphasis added). The Nineteenth Amendment says that this right may not be denied "on account of sex." Id., amend. XIX (emphasis added). And the Twenty-Sixth Amendment says that it may not be denied to citizens age 18 or older "on account of age." Id., amend. XXVI, § 1 (emphasis added). In contrast, the Twenty-Fourth Amendment alone uses the phrase "by reason of" instead

of "on account of."

A material variation in language suggests a variation in meaning. See Scalia & Garner, Reading Law § 25, at 170-73; see also Akhil Reed Amar, Intratextualism, 112 Harv. L. Rev. 747, 761 (1999) ("[T]he same (or very similar) words in the same document should, at least presumptively, be construed in the same (or a very similar) way. But the flip side of the intratextual coin is that when two (or more) clauses feature different wording, this difference may also be a clue to meaning, and invite different construction of the different words."). So the text of the Constitution creates an inference that the right to vote stands in a different relationship to race, sex, and age than it does to the nonpayment of taxes. To understand this difference in meaning, one should begin with the meanings of the Fifteenth and Nineteenth Amendments, both of which were well established when the Twenty-Fourth Amendment was ratified. With an understanding of those amendments in place, evidence surrounding the ratification of the Twenty-Fourth Amendment makes clear that the difference in language reflects a difference in meaning.

The Fifteenth and Nineteenth Amendments are best understood to forbid any voter qualification that makes race or sex a but-for cause of the denial of the right to vote. The relationship between the right to vote and a person's race is the most thoroughly discussed in Supreme Court precedent, and the but-for causation principle is clear in that context. Race is never a permissible criterion for determining the scope of the franchise. And this understanding extends to the Nineteenth Amendment's prohibition of sex-based voter qualifications.

The Fifteenth Amendment's prohibition on accounting for race as a voter qualification is absolute. This prohibition is powerful enough to "remove ... or render inoperative" any suffrage provision in a state constitution that refers to race, even in the absence of implementing legislation by Congress. Neal v. Delaware, 103 U.S. 370, 389, 26 L.Ed. 567 (1880); accord Guinn, 238 U.S. at 363, 35 S.Ct. 926. The amendment has similar bite even when States impose discriminatory voting qualifications by facially neutral means. In Guinn, the Supreme Court invalidated an amendment to the Constitution of Oklahoma that created a literacy test for voting but exempted from the test any person who was eligible to vote before the ratification of the Fifteenth Amendment. 238 U.S. at 364-67, 35 S.Ct. 926. Although the state constitution "contain[ed] no express words" limiting the franchise "on account of race, color, or previous condition of servitude," the grandfather clause "inherently [brought] that result into existence," which violated the Fifteenth Amendment. *Id.* at 364–65, 35 S.Ct. 926. As the Supreme Court explained in another early decision interpreting the Fifteenth Amendment: "If citizens of one race having certain qualifications are permitted by law to vote, those of another having the same qualifications must be." *United States v. Reese*, 92 U.S. 214, 218, 23 L.Ed. 563 (1875). If changing a voter's race changes his eligibility to vote, the law is invalid. *Cf. Bostock*, 140 S. Ct. at 1739.

\*1043 To be sure, our nation failed to achieve the egalitarian goal of the Fifteenth Amendment to any significant degree until Congress used its power under section 2 of the amendment to enact the Voting Rights Act of 1965. See South Carolina v. Katzenbach, 383 U.S. 301, 308-09, 86 S.Ct. 803, 15 L.Ed.2d 769 (1966). But the amendment established a powerful baseline: States must set voter qualifications without any regard to race. The Fifteenth Amendment does not subject race-based voter qualifications to strict scrutiny-they are per se unconstitutional. See Rice v. Cayetano, 528 U.S. 495, 511-12, 120 S.Ct. 1044, 145 L.Ed.2d 1007 (2000). It ensures that any argument that a race-based voter qualification is "tied rationally to the fulfillment" of an important government interest, id. at 548, 120 S.Ct. 1044 (Ginsburg, J., dissenting) (internal quotation marks omitted), falls on deaf ears. "There is no room under the Amendment for the concept that the right to vote in a particular election can be allocated based on race." Id. at 523, 120 S.Ct. 1044 (majority opinion). If a State acts in any way to make race relevant to voter qualifications, either facially or with a discriminatory purpose, it violates the Fifteenth Amendment. See Reno v. Bossier Par. Sch. Bd., 520 U.S. 471, 481, 117 S.Ct. 1491, 137 L.Ed.2d 730 (1997) (citing City of Mobile v. Bolden, 446 U.S. 55, 62, 100 S.Ct. 1519, 64 L.Ed.2d 47 (1980) (plurality opinion)).

The Nineteenth Amendment forbids the use of sex as a voter qualification in the same way. The Supreme Court has discussed the Nineteenth Amendment in detail only twice—once in a decision upholding the amendment against a challenge to its validity, Leser v. Garnett, 258 U.S. 130, 136, 42 S.Ct. 217, 66 L.Ed. 505 (1922), and once in a decision upholding a poll tax that included an exception for nonvoting women, Breedlove v. Suttles, 302 U.S. 277, 279-80, 58 S.Ct. 205, 82 L.Ed. 252 (1937), overruled by Harper, 383 U.S. 663, 86 S.Ct. 1079, 16 L.Ed.2d 169. In both decisions, the Court confirmed that the Nineteenth Amendment operates just like the Fifteenth Amendment. The Court explained in Leser that the Nineteenth Amendment "is in character and phraseology precisely similar to the Fifteenth." 258 U.S. at 136, 42 S.Ct. 217. And in Breedlove, the Court stated that the Nineteenth Amendment, like the Fifteenth, is an

absolute and self-enforcing prohibition on discriminatory classifications in voting. 302 U.S. at 283, 58 S.Ct. 205 ("[The Nineteenth Amendment] applies to men and women alike and by its own force supersedes inconsistent measures, whether federal or state." (citing *Leser*, 258 U.S. at 135, 42 S.Ct. 217)).

By the time Congress proposed the Twenty-Fourth Amendment in 1962, the Fifteenth and Nineteenth Amendments, which provided that the right to vote could not be denied or abridged "on account of race" or "on account of sex," were clearly and correctly understood to prevent the States from making a person's eligibility to vote turn in any way on race or sex. Under the Fifteenth and Nineteenth Amendments, a but-for-causation test like the one the felons propose accurately reflects the constitutional rule. When a State sets a voter qualification that would allow a person to vote but for the person's race or sex, it violates the Constitution.

But the Twenty-Fourth Amendment did not adopt the language of the Fifteenth and Nineteenth Amendments wholesale. The Twenty-Fourth Amendment prohibits States from denying the right vote "by reason of" the failure to pay a tax, not "on account of" it. If possible, that different language should be given a different meaning. Interpreting the phrase "by reason of" only as a synonym for "on account of" violates well-established principles of textual \*1044 interpretation. See Scalia & Garner, Reading Law § 25, at 170–73.

Ample evidence supports the conclusion that "by reason of" in the Twenty-Fourth Amendment does not refer to but-for causation. To begin, the only Supreme Court decision to apply the amendment does not reflect a but-for causal standard. In Harman v. Forssenius, decided only a year after ratification of the Twenty-Fourth Amendment, the Court considered a Virginia law enacted in anticipation of the amendment that allowed voters to forego payment of their poll taxes and still vote in federal elections if they filed a "certificate of residence" at least six months before the election. 380 U.S. 528, 531-32, 85 S.Ct. 1177, 14 L.Ed.2d 50 (1965). Because the Twenty-Fourth Amendment "nullifies sophisticated as well as simple-minded modes of impairing the right guaranteed" and the certificate requirement "perpetuat[ed] ... the disenfranchising characteristics of the poll tax which the Twenty-fourth Amendment was designed to eliminate," the Supreme Court held that the certificate requirement was an unconstitutional substitute for the poll tax. Id. at 540–42, 85 S.Ct. 1177 (internal quotation marks omitted). The Harman Court based its decision on the rule that a State may not impose "a material requirement solely upon those who refuse to surrender their constitutional right to vote in federal elections without paying a poll tax." *Id.* at 541, 85 S.Ct. 1177.

If the felons are correct that the Twenty-Fourth Amendment prohibits States from setting voter qualifications that make the failure to pay a tax a but-for cause of the denial of the right to vote, then the rule Harman announced was unexpectedly narrow. Under the law challenged in *Harman*, voters were turned away if they failed to either pay a poll tax or file a certificate of registration—each failure was a but-for cause of the denial of the right to vote. So if but-for causation were the relevant standard, most of the analysis in *Harman*, and the entire rule quoted above, would have been unnecessary. The Court could have decided the case by pointing out that the failure to pay a tax was part of the causal chain that led to the denial of the right to vote. So Harman suggests that the Twenty-Fourth Amendment requires a tighter relationship between nonpayment of a tax and denial of the right to vote than but-for causation.

Other settled principles confirm that the Twenty-Fourth Amendment does not adopt a but-for causal standard. Richardson allows States to disenfranchise all felons upon conviction; it makes no exception for felons who were convicted because they failed to pay their taxes. 418 U.S. at 56, 94 S.Ct. 2655. And the Twenty-Fourth Amendment has never been understood to prohibit States from disenfranchising tax felons, even if the failure to pay taxes is a but-for cause of their disenfranchisement. See generally Sloan G. Speck, Comment, "Failure to Pay Any Poll Tax or Other Tax": The Constitutionality of Tax Felon Disenfranchisement, 74 U. Chi. L. Rev. 1549 (2007). The en banc Ninth Circuit has similarly held that requiring voters to present identification at the polls does not violate the Twenty-Fourth Amendment even though obtaining identification "may have a cost." Gonzalez, 677 F.3d at 407. That conclusion is consistent with the plurality opinion in Crawford v. Marion County Election Board. which concluded that Indiana's voter-identification law was facially constitutional, 553 U.S. at 204, 128 S.Ct. 1610, even as it acknowledged that obtaining valid identification could involve paying between \$3 and \$12 to obtain a copy of one's birth certificate, id. at 198 n.17, 128 S.Ct. 1610.

\*1045 Because the phrase "by reason of" cannot refer only to but-for causation, it is necessary to consider other possible meanings. Focusing on the main word in that phrase yields an answer: the Twenty-Fourth Amendment prohibits denials of the right to vote for which the failure to pay a tax is not only the but-for cause, but also the *reason* for the State's action.

The word "reason" has multiple commonly used subsenses. Some of them, of course, are closely related to but-for causation. See, e.g., Reason, Webster's New International Dictionary (2d ed. 1959) ("A ground or cause"). But the Twenty-Fourth Amendment's textual divergence from the Fifteenth, Nineteenth, and Twenty-Sixth Amendments, together with other contextual clues, eliminates these subsenses from consideration. Many of the other subsenses of the word "reason" relate to the concept of justification, itself a kind of causation. For example, "reason" may refer to an "expression or statement offered ... as a justification of an act or procedure" or a "consideration, motive, or judgment ... leading to an action or course of action; a rational ground or motive." Id. This second, justification-based subsense controls the meaning of "by reason of" in the Twenty-Fourth Amendment.

Under this second subsense, the Twenty-Fourth Amendment prohibits denials of the right to vote motivated by a person's failure to pay a tax. It does not prohibit every voting requirement with any causal relationship to the payment of a tax. If a State establishes a legitimate voter qualification for constitutionally legitimate reasons, it does not violate the Twenty-Fourth Amendment—even if the qualification sometimes denies the right to vote because a person failed to pay a tax. To take the most obvious example, a requirement that voters have no felony convictions is lawful even if the but-for cause of a felony conviction is the failure to pay taxes. The Twenty-Fourth Amendment does not forbid the disenfranchisement of tax felons.

That conclusion finds support in *Harman*, the only Supreme Court decision to apply the Twenty-Fourth Amendment. Central to Harman's reasoning was the Court's judgment that the certificate-of-residency alternative was designed as a "substitute" for the poll tax, which in turn "was born of a desire to disenfranchise the Negro." 380 U.S. at 542-43, 85 S.Ct. 1177. The Court also concluded that Virginia's scheme was not necessary to enforce its residency requirements, especially considering that forty-six States were able to limit the electorate to residents without resort to similar measures. *Id.* In the light of those realities, it was clear that Virginia lacked a legitimate justification for its law—the State's bifurcated registration system was motivated by a desire to tax the franchise. Because Virginia had no constitutionally legitimate reason for its law that made the failure to pay a tax a but-for cause of the denial of the right to vote, Harman held that the law violated the Twenty-Fourth Amendment.

Even if court costs and fees imposed in a criminal

sentence were taxes, Amendment 4 and Senate Bill 7066 would not violate the Twenty-Fourth Amendment. To be sure, if these obligations were taxes, the failure to pay them would be a but-for cause of continued disenfranchisement, just as the failure to pay the poll tax was a but-for cause of the denial of the right to vote in Harman. But unlike the law in Harman, Amendment 4 and Senate Bill 7066 are a legitimate exercise of Florida's power to set core voter qualifications. The reason these laws leave some felons disenfranchised—the *justification* for their continued disenfranchisement—is not their failure to pay a tax. It is instead Florida's legitimate interest in restoring to the \*1046 electorate only fully rehabilitated felons who have satisfied the demands of justice. Because the justification for the voting qualifications in Amendment 4 and Senate Bill 7066 is a constitutionally legitimate interest and not the failure to pay a tax, they satisfy the requirements of the Twenty-Fourth Amendment.

The dissenters support their argument against this interpretation with several pages of appeals to legislative history. See Jordan Dissent at 1105-07. Even were we to assume that some recourse to legislative history is appropriate in the interpretation of the Twenty-Fourth Amendment—and we do not, see Scalia & Garner, Reading Law § 66, at 369—the committee reports, floor debates, and press statements from politicians cited by the dissenters would not be the best evidence. In fact, the legislative history supports an interpretation that gives the phrase "by reason of" in the Twenty-Fourth Amendment a different meaning than the phrase "on account of" in the other voting-rights amendments. The House Judiciary Committee considered several proposed versions of a poll-tax amendment, including two that used the same "on account of' language as the Fifteenth and Nineteenth Amendments. Abolition of Poll Tax in Federal Elections: Hearings Before Subcommittee No. 5 of the Committee on the Judiciary, 87th Cong. 1-5 (1962). But the language that the committee reported out, which was eventually presented to the states and ratified as the Twenty-Fourth Amendment, used the different "by reason of" construction. H.R. Rep. No. 1821, at 1-2 (1962). Giving different phrases different meanings makes all the more sense when it can be shown that the drafter considered and rejected consistent language.

### C. Florida Has Not Violated the Due Process Clause.

Although the district court did not decide whether Florida's reenfranchisement laws violate the Due Process Clause, part of its injunction cannot be justified by any of

its other rulings. The district court declared Amendment 4 and Senate Bill 7066 unconstitutional as applied to felons who cannot determine the amount of their outstanding financial obligations with diligence, and it created a process under which felons could request an opinion from the Division of Elections stating their total amount of outstanding fines and restitution. The injunction allowed any felon who did not receive an answer within 21 days to register and vote, and it prohibited the defendants from causing or assisting in the prosecution of any persons who registered or voted under this process. The felons ask us to affirm these aspects of the injunction on the grounds that the relevant Florida laws are void for vagueness and deny them procedural due process.

<sup>[43]</sup>We first address the vagueness challenge. To register to vote in Florida, a person must affirm that he is not disqualified from voting because of a felony conviction. And it is a crime for a person to "willfully submit[] any false voter registration information," Fla. Stat. § 104.011(2), or to "willfully vote[] at any election" "knowing he or she is not a qualified elector," *id.* § 104.15. The felons argue these criminal laws are void for vagueness because Senate Bill 7066 makes it difficult or impossible for some felons to determine whether they are eligible to vote.

[44] [45] [46] [47]Under the Due Process Clause, a law is void for vagueness if it "fails to give ordinary people fair notice of the conduct it punishes" or is "so standardless that it invites arbitrary enforcement." Johnson v. United States, 576 U.S. 591, 595, 135 S.Ct. 2551, 192 L.Ed.2d 569 (2015). But a law "is not vague because it may at times be difficult to prove an incriminating \*1047 fact." FCC v. Fox Television Stations, Inc., 567 U.S. 239, 253, 132 S.Ct. 2307, 183 L.Ed.2d 234 (2012). Instead, a law is vague when "it is unclear as to what fact must be proved." Id. (emphasis added). And even laws that are "in some respects uncertain" may be upheld against a vagueness challenge if they contain a scienter requirement. United States v. Waymer, 55 F.3d 564, 568 (11th Cir. 1995); see also Gonzales v. Carhart, 550 U.S. 124, 149, 127 S.Ct. 1610, 167 L.Ed.2d 480 (2007) ("The Court has made clear that scienter requirements alleviate vagueness concerns.").

[48]The challenged laws are not vague. Felons and law enforcement can discern from the relevant statutes exactly what conduct is prohibited: a felon may not vote or register to vote if he *knows* that he has failed to complete all terms of his criminal sentence. *See* Fla. Stat. §§ 104.011(2), 104.15, 98.0751(1)–(2). This clear standard, which includes a scienter requirement, provides fair notice to prospective voters and "limit[s] prosecutorial

discretion." Carhart, 550 U.S. at 150, 127 S.Ct. 1610.

The felons' real complaint is that it is sometimes difficult to determine whether a felon has completed the financial terms of his sentence. They offer examples of felons who cannot locate their criminal judgments, cannot determine which financial obligations were imposed for felony as opposed to misdemeanor offenses, or do not know how much they have paid toward their financial obligations. But these concerns arise not from a vague law but from factual circumstances that sometimes make it difficult to determine whether an incriminating fact exists. See United States v. Williams, 553 U.S. 285, 306, 128 S.Ct. 1830, 170 L.Ed.2d 650 (2008) (explaining that a law is not rendered vague by "the possibility that it will sometimes be difficult to determine" the existence of an incriminating fact). These difficulties in proving the facts that determine a felon's eligibility to vote cast no doubt on the clarity of the requirement that felons neither register nor vote if they know they have not satisfied the financial obligations imposed in their sentences. Because there is no uncertainty about "what fact must be proved" to convict a defendant under these statutes, the laws are not vague. Fox, 567 U.S. at 253, 132 S.Ct. 2307; see also Williams, 553 U.S. at 305-06, 128 S.Ct. 1830.

The felons argue that the State's "every dollar" policy makes the challenged laws vague, but that policy only narrows the scope of criminal liability. Cf. Ward v. Rock Against Racism, 491 U.S. 781, 795-96, 109 S.Ct. 2746, 105 L.Ed.2d 661 (1989). The challenged laws forbid felons to register or vote if they know they have failed to complete their sentences. And the policy adopts one of the narrowest possible constructions of "failing to complete" a sentence. Under the policy, a felon fails to complete the financial terms of his sentence only if his total payments toward all obligations related to his sentence—even financing costs that accrue after sentencing—are less than the amount imposed in his sentence. This narrowing construction mitigates vagueness concerns instead of enhancing them: a felon cannot reasonably think he has "completed" his terms of sentence if the total amount he has paid toward all related obligations is less than the amount included in his sentence. And only felons in this category are ineligible to vote under the "every dollar" policy.

The dissenters insist that the law is vague because some felons will not be certain about their eligibility, and a "wrong guess ... results in severe consequences," possibly including "an arrest for a voting violation." Jordan Dissent at 1098 (internal \*1048 quotation marks omitted). Never mind the fact that no felon who honestly believes he has completed the terms of his sentence commits a

crime by registering and voting, see Fla. Stat. §§ 104.011(2), 104.15 (establishing scienter requirements for voting violations), and that at least 85,000 felons felt the law was clear enough for them to go ahead and register. The dissenters' vagueness argument strains credulity.

The felons also argue that Florida has denied them procedural due process. See Mathews v. Eldridge, 424 U.S. 319, 332, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976). They assert a liberty interest in the right to vote and argue that Florida has deprived them of that interest without adequate process. We may assume that the right to vote is a liberty interest protected by the Due Process Clause. But see Johnson v. Hood, 430 F.2d 610, 612 (5th Cir. 1970) ("[E]ven an improper denial of the right to vote for a candidate for a state office achieved by state action is not a denial of a right of property or liberty secured by the due process clause." (internal quotation marks omitted) (alteration adopted)). Even so, this argument fails because any deprivation of that right was accomplished through the legislative process and the process for adopting a constitutional amendment, which provide more than adequate procedures for the adoption of generally applicable rules regarding voter qualifications.

[49] [50] [51] [52] In deciding what the Due Process Clause requires when the State deprives persons of life, liberty or property, the Supreme Court has long distinguished between legislative and adjudicative action. See, e.g., Bi-Metallic Inv. Co. v. State Bd. of Equalization, 239 U.S. 441, 445-46, 36 S.Ct. 141, 60 L.Ed. 372 (1915). The State often deprives persons of liberty or property through legislative action—general laws that apply "to more than a few people." *Id.* at 445, 36 S.Ct. 141; see also 75 Acres, LLC v. Miami-Dade County, 338 F.3d 1288, 1296 (11th Cir. 2003) (deeming an action legislative because it was "enacted by a legislative body" performing a "fundamentally legislative" function or, alternatively, was "generally applicable" and "prospective in nature"). When the State does so, the affected persons are not entitled to any process beyond that provided by the legislative process. Bi-Metallic, 239 U.S. at 445, 36 S.Ct. 141 ("General statutes within the state power are passed that affect the person or property of individuals, sometimes to the point of ruin, without giving them a chance to be heard. Their rights are protected in the only way that they can be in a complex society, by their power, immediate or remote, over those who make the rule."); accord 75 Acres, 338 F.3d at 1294. In contrast, the Due Process Clause may require individual process when a State deprives persons of liberty or property through adjudicative actions—those that concern a "relatively small number of persons" who are "exceptionally affected, in each case upon individual grounds," by the state action. *Bi-Metallic*, 239 U.S. at 446, 36 S.Ct. 141; *see also 75 Acres*, 338 F.3d at 1294. To determine the process due for adjudicative deprivations, courts apply the familiar balancing test of *Mathews v. Eldridge*, 424 U.S. 319, 96 S.Ct. 893, 47 L.Ed.2d 18.

[53] The felons were deprived of the right to vote through legislative action, not adjudicative action. Under its Constitution, Florida deprives all felons of the right to vote upon conviction. See Fla. Const. art. VI, § 4(a). This constitutional provision is a law "of general applicability" that plainly qualifies as legislative action. See 75 Acres, 338 F.3d at 1296–97. And even if we accept the argument that Amendment 4 and Senate Bill 7066 deprive felons of the right to vote by conditioning reenfranchisement on \*1049 the completion of all terms of sentence, those laws also qualify as legislative acts. See id. The legislative and constitutional-amendment processes gave the felons all the process they were due before Florida deprived them of the right to vote and conditioned the restoration of that right on completion of their sentences.

[54] The felons complain that it is sometimes difficult to ascertain the facts that determine eligibility to vote under Amendment 4 and Senate Bill 7066, but this complaint is only another version of the vagueness argument we have already rejected. The Due Process Clause does not require States to provide individual process to help citizens learn the facts necessary to comply with laws of general application.

To avail themselves of the Mathews v. Eldridge framework, the felons were obliged to prove a deprivation of liberty based on adjudicative action. See 75 Acres, 338 F.3d at 1294. But the felons do not challenge any individual voter-eligibility determinations that could qualify as adjudicative action, so *Mathews* does not apply. And in any event, Florida provides registered voters with adequate process before an individual determination of ineligibility. Before being removed from the voter registration system, voters are entitled to predeprivation notice and a hearing. Fla. Stat. § 98.075(5), (7). And any voter who is dissatisfied with the result is entitled to de novo review of the removal decision in state court. Id. § 98.0755. These procedures provide more than adequate process to guard against erroneous ineligibility determinations. See Mathews, 424 U.S. at 333-35, 96 S.Ct. 893.

The injunction the district court entered looks nothing like a remedy for a denial of due process. It does not require additional procedures for any existing adjudicative action that deprives felons of a liberty interest in voting. Instead, it *creates* an adjudicative process to aid felons in

complying with nonvague laws of general application. States are certainly free to establish such a process—indeed, Florida has done so through its preregistration advisory-opinion process and accompanying immunity from criminal prosecution. But the notion that due process *mandates* this kind of procedure in the absence of any adjudicative action is unprecedented. The injunction did not remedy any denial of due process, so we cannot affirm it on that ground.

[55] A fundamental confusion in this litigation has been the notion that the Due Process Clause somehow makes Florida responsible not only for giving felons notice of the standards that determine their eligibility to vote but also for locating and providing felons with the *facts* necessary to determine whether they have completed their financial terms of sentence. The Due Process Clause imposes no such obligation. States are constitutionally entitled to set legitimate voter qualifications through laws of general application and to require voters to comply with those laws through their own efforts. So long as a State provides adequate procedures to challenge individual determinations of ineligibility—as Florida does—due process requires nothing more.

### IV. CONCLUSION

We **REVERSE** the judgment of the district court and **VACATE** the challenged portions of its injunction. We **LIFT** the stay of the cross-appeal, Case No. 20-12304, and **DIRECT** the Clerk to sever the cross-appeal, issue a briefing schedule for it, and assign a panel to resolve it.

WILLIAM PRYOR, Chief Judge, joined by LAGOA, Circuit Judge, concurring:

I write separately to explain a difficult truth about the nature of the judicial role. \*1050 Our dissenting colleagues predict that our decision will not be "viewed as kindly by history" as the voting-rights decisions of our heroic predecessors. Jordan Dissent at 1107 (citing Jack Bass, Unlikely Heroes: The Dramatic Story of the Southern Judges Who Translated the Supreme Court's Brown Decision Into a Revolution for Equality (1981)). But the "heroism" that the Constitution demands of judges—modeled so well by our predecessors—is that of "devotion to the rule of law and basic morality." Patrick E. Higginbotham, Conceptual Rigor: A Cabin for the Rhetoric of Heroism, 59 Tex. L. Rev. 1329, 1332 (1981)

(reviewing Bass, *Unlikely Heroes*, *supra*). As a distinguished colleague presciently warned decades ago, there is a "genuine risk" that later judges will "easily misunderstand" this lesson. *Id.* Our duty is not to reach the outcomes we think will please whoever comes to sit on the court of human history. The Constitution instead tasks us with "administering the rule of law in courts of limited jurisdiction," *id.* at 1343, which means that we must respect the political decisions made by the people of Florida and their officials within the bounds of our Supreme Law, regardless of whether we agree with those decisions. And in the end, as our judicial oath acknowledges, we will answer for our work to the Judge who sits outside of human history.

### LAGOA, Circuit Judge, concurring:

I concur fully with the majority opinion. There is nothing unconstitutional about Florida's reenfranchisement scheme. I write separately to express an additional reason why, in my judgment, heightened scrutiny does not apply here.

I.

Since 1838, the Florida constitution has explicitly authorized felon disenfranchisement as a criminal sanction, see Fla. Const. art. VI, § 4 (1838), and Florida has had such a law on the books since 1845, see Act of Dec. 29, 1845, ch. 38, art. 2 § 3, 1845 Fla. Laws 77, 78. Florida continues to disenfranchise felons, and it is not alone in this respect—forty-seven other states and the District of Columbia also practice some form of felon disenfranchisement. See Jones v. Governor of Florida, 950 F.3d 795, 801 n.3 (11th Cir. 2020) (Jones I).

In 1968, Florida took its first step toward reenfranchising felons. In November of that year, Florida voters approved by referendum Florida's current constitution. Its enactment expanded the electorate in two ways. First, while the previous constitution "disenfranchised persons convicted of certain misdemeanors such as petty larceny, under the new 1968 [constitution], only those persons convicted of felonies could be disenfranchised." *Johnson v. Governor of Florida*, 405 F.3d 1214, 1221 (11th Cir. 2005) (en banc). Second, while none of Florida's previous

constitutions provided for the restoration of civil rights, the 1968 constitution provided a path for felons to restore their right to vote: executive clemency. *See* Fla. Const. art. IV, § 8(a) (1968).

Today, felons in Florida—including those with out-of-state and federal convictions—may petition the Clemency Board to have their civil rights restored after completing the carceral terms of their sentence. \*1051 See Fla. Stat. § 940.05; Fla. R. Exec. Clem. 5. Notably, a felon is not required to finish paying his pecuniary obligations before applying for clemency. See Fla. R. Exec. Clem. 10; see also Johnson, 405 F.3d, at 1216 n.1.

Florida's felon civil-rights-restoration scheme has survived numerous constitutional challenges. In 1969, a group of felons challenged on equal protection and due process grounds both the disenfranchisement and the reenfranchisement provisions of the 1968 constitution. See Beacham v. Braterman, 300 F. Supp. 182, 183 (S.D. Fla.), aff'd, 396 U.S. 12, 90 S.Ct. 153, 24 L.Ed.2d 11 (1969). A three-judge panel of the Southern District of Florida upheld the provisions at issue against both challenges, concluding-before the Supreme Court's decision in *Richardson*—that felon disenfranchisement is authorized under the United States Constitution and that clemency, as part of the pardon power, is not subject to judicial control. Id. at 183-84. The Supreme Court summarily affirmed. Beacham v. Braterman, 396 U.S. 12, 90 S.Ct. 153, 24 L.Ed.2d 11 (1969).

In *Johnson*, a group of felons argued that the 1968 constitution was adopted with an invidious discriminatory motive in violation of the Equal Protection Clause and that the requirement that felons pay restitution before being granted clemency violated the Twenty-Fourth Amendment's prohibition on poll taxes. 405 F.3d at 1216 n.1, 1217. The district court granted the State's summary judgment motion on both counts, and this Court, sitting en banc, affirmed. *Id.* at 1217, 1235. We found no evidence that the 1968 Florida constitution was enacted with any racial bias. *Id.* at 1225. And we noted that the payment of restitution was not a prerequisite to applying for executive clemency. *See id.* at 1216 n.1.

Finally, in *Hand v. Scott*, 888 F.3d 1206 (11th Cir. 2018), a group of felons argued that the unfettered discretion the Florida Clemency Board exercised in its administration of the clemency process facially violated the Equal Protection Clause of the Fourteenth Amendment. *Id.* at 1207. While the issue was ultimately mooted before the merits were heard, we granted the State a stay pending appeal and concluded that the State was likely to prevail on the merits of the felons' claim that the Clemency

Board's "broad discretion" to operate its "standardless" clemency process violated equal-protection principles. *Id.* at 1208–10.

In short, Florida's felon civil-rights-restoration process has, for fifty-two years, provided felons a constitutionally permissible path to the restoration of their civil rights, including the right to vote.

On November 6, 2018, Florida voters<sup>2</sup> passed the "Voting Rights Restoration Act"—or "Amendment 4." This ballot initiative further expanded felons' access to reenfranchisement by amending the Florida constitution as follows:

(a) No person convicted of a felony, or adjudicated in this or any other state to be mentally incompetent, shall be qualified to vote or hold office until restoration of civil rights or removal of disability. Except as provided in subsection (b) of this section, any disqualification from voting arising from a felony conviction shall terminate and voting rights shall be restored upon completion of all terms of sentence including parole or probation.

\*1052 (b) No person convicted of murder or a felony sexual offense shall be qualified to vote until restoration of civil rights.

Fla. Const. art. VI, § 4(a)–(b) (amended 2018) (amended text in italics).

In May 2019, the Florida legislature passed Senate Bill 7066 ("SB-7066"), Fla. Stat. § 98.0751, which implemented Amendment 4. As relevant here, SB-7066 did two things. First, it defined "[c]ompletion of all terms of sentence" to include "any portion of a sentence that is contained in the four corners of the sentencing document," including: release from imprisonment; termination of probation, parole or community control; fulfillment of any additional terms ordered by the court; and payment of all restitution to victims and "fines or fees ordered by the court as a part of the sentence or that are ordered by the court as a condition of any form of supervision." Fla. Stat. § 98.0751(2)(a).

Second, it established how the financial obligations could be completed:

Financial obligations required under sub-subparagraph a. or sub-subparagraph b. are considered completed in the following manner or in any combination thereof:

- (I) Actual payment of the obligation in full.
- (II) Upon the payee's approval, either through

appearance in open court or through the production of a notarized consent by the payee, the termination by the court of any financial obligation to a payee, including, but not limited to, a victim, or the court.

(III) Completion of all community service hours, if the court, unless otherwise prohibited by law or the State Constitution, converts the financial obligation to community service.

A term required to be completed in accordance with this paragraph shall be deemed completed if the court modifies the original sentencing order to no longer require completion of such term. The requirement to pay any financial obligation specified in this paragraph is not deemed completed upon conversion to a civil lien.

Id. § 98.0751(2)(a)5.e.3

In this way, then, in implementing Amendment 4, SB-7066 provides felons four new avenues—in addition to the existing executive clemency process—to restore their right to vote upon "completion of all terms of sentence": (1) actual payment of their financial obligations; (2) receipt of a payee's termination of those financial obligations; (3) conversion of any financial obligations to community service hours and subsequent completion of those hours; and (4) judicial modification of the original sentencing order. *See id.* § 98.0751.

II.

The core dispute in this case is whether Florida's felon reenfranchisement scheme, which does not consider a felon's ability to pay his legal financial obligations ("LFOs"), should be subject to some form of heightened scrutiny or mere rational basis review. I agree that heightened scrutiny is inappropriate for the reasons laid out in the majority opinion. In my judgment, heightened scrutiny is also inappropriate because Florida provides indigent felons alternative avenues to attain reenfranchisement.

As the Supreme Court has directed, we must, in the equal protection context:

\*1053 decide, first, whether [the law] operates to the disadvantage of some suspect class or impinges upon a fundamental right explicitly or implicitly protected by the Constitution, thereby requiring strict judicial scrutiny.... If [it does] not, the [law] must still be examined to determine whether it rationally furthers some legitimate, articulated state purpose and therefore does not constitute an invidious discrimination in violation of the Equal Protection Clause of the Fourteenth Amendment.

San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 17, 93 S.Ct. 1278, 36 L.Ed.2d 16 (1973).

The first question—is there a fundamental right involved—has been addressed already: felons who have been disenfranchised have no fundamental right to vote. Indeed, this finding was at the core of the Supreme Court's decision in *Richardson*. There, the Court said that, consistent with the Constitution, states may strip—even permanently—the right of felons to participate in the franchise. *Richardson*, 418 U.S. at 54, 94 S.Ct. 2655 ("As we have seen, however, the exclusion of felons from the vote has an affirmative sanction in § 2 of the Fourteenth Amendment, a sanction which was not present in the case of the other restrictions on the franchise which were invalidated in the cases on which respondents rely.").

Consistent with that principle, we already have applied rational basis review to felon reenfranchisement schemes. See Shepherd v. Trevino, 575 F.2d 1110, 1114-15 (5th Cir. 1978).4 In Trevino, we examined a Texas reenfranchisement scheme that allowed for discretionary reenfranchisement of those convicted in state court but had no analogous mechanism for the reenfranchisement of felons convicted in federal court. Id. at 1111. We had no trouble concluding that only rational basis review applied (and thus, necessarily, that felons had no fundamental right to vote). Id. at 1114-15 ("Therefore, we conclude that selective disenfranchisement or reenfranchisement of convicted felons must pass the standard level of scrutiny applied to state laws allegedly violating the equal protection clause. Such laws must bear a rational relationship to the achieving of a legitimate state interest.").

Every court to have analyzed the issue has reached the same conclusion: felons do not have a fundamental right to vote. *See Harvey v. Brewer*, 605 F.3d 1067, 1079 (9th Cir. 2010) (O'Connor, J.) ("[Felons] cannot complain about their loss of a fundamental right to vote because felon disenfranchisement is explicitly permitted under the

terms of *Richardson*.... Therefore, we do not apply strict scrutiny as we would if plaintiffs were complaining about the deprivation of a fundamental right."); Johnson v. Bredesen, 624 F.3d 742, 746 (6th Cir. 2010) ("Having lost their voting rights, Plaintiffs lack any fundamental interest to assert.... 'It is undisputed that a state may constitutionally disenfranchise convicted felons, and that the right of felons to vote is not fundamental." (quoting Wesley v. Collins, 791 F.2d 1255, 1261 (6th Cir. 1986))); Madison v. State, 161 Wash.2d 85, 163 P.3d 757, 767 (2007) ("However, Richardson clearly distinguished the right that is at stake for felons from the Court's previous holdings that citizens possess a fundamental right to vote."); Owens v. Barnes, 711 F.2d 25, 27 (3d Cir. 1983) ("Plaintiff's argument fails because the right of convicted felons to vote is not 'fundamental.' That was precisely \*1054 the argument rejected in *Richardson*."); Williams v. Taylor, 677 F.2d 510, 514 (5th Cir. 1982) ("Appellant's interest in retaining his right to vote is constitutionally distinguishable from the 'right to vote' claims of individuals who are not felons. Section 2 of the Fourteenth Amendment allows a state to prohibit a felon from voting, and its classification of felons for voting restrictions must bear only a rational relation to the achieving of a legitimate state interest." (citation omitted)).

The second question—is a suspect classification at issue—is also well settled: indigency is not a suspect class. Nor could it be. As Justice Harlan noted, "[e]very financial exaction which the State imposes on a uniform basis is more easily satisfied by the well-to-do than by the indigent." Douglas v. California, 372 U.S. 353, 361, 83 S.Ct. 814, 9 L.Ed.2d 811 (1963) (Harlan, J., dissenting); accord Lewis v. Casey, 518 U.S. 343, 376, 116 S.Ct. 2174, 135 L.Ed.2d 606 (1996) (Thomas, J., concurring). Under any view that indigency was a suspect class under the Fourteenth Amendment, "regulatory measures always considered to be constitutionally valid, such as sales taxes, state university tuition, and criminal penalties, would have to be struck down." Lewis, 518 U.S. at 376, 116 S.Ct. 2174 (Thomas, J., concurring) (citing Douglas, 372 U.S. at 361–62, 83 S.Ct. 814 (Harlan, J., dissenting)).

Applying this principle, the Supreme Court has held that discrimination against the indigent, without more, does not implicate a suspect classification—and thus does not trigger heightened scrutiny. See, e.g., Maher v. Roe, 432 U.S. 464, 471, 97 S.Ct. 2376, 53 L.Ed.2d 484 (1977) ("In a sense, every denial of welfare to an indigent creates a wealth classification as compared to nonindigents who are able to pay for the desired goods or services. But this Court has never held that financial need alone identifies a suspect class for purposes of equal protection analysis.");

*Rodriguez*, 411 U.S. at 29, 93 S.Ct. 1278 (noting that "this Court has never heretofore held that wealth discrimination alone provides an adequate basis for invoking strict scrutiny").

Under the traditional principles of equal protection, it is clear that only rational basis review would apply to Florida's reenfranchisement scheme. Because no suspect class or fundamental right is implicated, neither condition that triggers heightened scrutiny is present in this case. But this does not end the inquiry, as my colleagues in dissent argue that heightened scrutiny is required here because of a line of Supreme Court precedent usually associated with *Bearden v. Georgia*, 461 U.S. 660, 103 S.Ct. 2064, 76 L.Ed.2d 221 (1983).

B.

As explained in the majority opinion, the *Bearden* line of cases applies only in certain well-defined contexts: poverty-based imprisonment and access to judicial proceedings. *See* Maj. Op. at 1030–34. Because this case does not present either of those situations, and because the Supreme Court has cautioned against extending the doctrine beyond them, *see Lewis*, 518 U.S. at 354, 116 S.Ct. 2174, it is not applicable here.<sup>5</sup>

\*1055 There is a reason the doctrine is so limited by subject matter—the Bearden line of cases is a unique amalgamation of constitutional doctrines that does not fit neatly within traditional principles of Fourteenth Amendment jurisprudence. The Supreme Court has never made clear whether the doctrine rests on equal protection or due process principles. Some decisions now associated with this line rested their analyses explicitly on the Due Process Clause. See, e.g., Boddie, 401 U.S. at 382, 91 S.Ct. 780. Others have relied entirely on the Equal Protection Clause. See, e.g., Williams v. Illinois, 399 U.S. 235, 245, 90 S.Ct. 2018, 26 L.Ed.2d 586 (1970). In Bearden, the Supreme Court stated that this was intentional: "Due process and equal protection principles converge in the Court's analysis in these cases." 461 U.S. at 665, 103 S.Ct. 2064. "The equal protection concern relates to the legitimacy of fencing out would-be appellants based solely on their inability to pay core costs," M.L.B. v. S.L.J., 519 U.S. 102, 120, 117 S.Ct. 555, 136 L.Ed.2d 473 (1996), while the "due process concern homes in on the essential fairness of the state-ordered proceedings anterior to adverse state action," id., or, in

other words, on the "fairness of relations between the criminal defendant and the State," *Bearden*, 461 U.S. at 665, 103 S.Ct. 2064. Both concerns are necessary for the application of *Bearden* scrutiny, but neither is alone sufficient. This is because indigency, as we have already seen, is not a suspect class. It is for this reason that *Bearden* cases have only appeared in the two contexts discussed in the majority opinion.

But even if we were to extend the doctrine to the felon-reenfranchisement context, I believe this case would fail to meet its requirements. In *Rodriguez*, the Supreme Court, in distinguishing that case from *Bearden*-type cases, stated that the

individuals, or groups of individuals, who constituted the class discriminated against in our prior [Bearden-type] cases shared two distinguishing characteristics: because of their impecunity they were completely unable to pay for some desired benefit, and as a consequence, they sustained an absolute deprivation of a meaningful opportunity to enjoy that benefit.

411 U.S. at 20, 93 S.Ct. 1278. Neither of these conditions is satisfied here.

On this point, it is worth noting that "actual payment" of LFOs is but one avenue available to the felon who seeks to have his voting rights restored in Florida. SB-7066 provides for three alternative avenues: \*1056 termination of the obligation by the payee; conversion of LFOs to community service hours; and judicial modification of the original sentencing order. And the Florida constitution continues to provide felons the avenue of executive clemency. Thus, felons in Florida generally have five avenues available to them to secure reenfranchisement. Felons unable to pay their LFOs have four avenues available if their convictions were in-state, while indigent felons with out-of-state convictions or federal convictions have two.

As such, indigent felons in Florida are not deprived of reenfranchisement solely because of inability to pay. Nor do they suffer an absolute deprivation of a meaningful opportunity to attain reenfranchisement. Some indigent felons will be granted clemency. Some will have their LFOs converted to community service hours. Some will have their original sentencing order modified by a court. And some will have their debts terminated by the payee. All indigent felons have alternative avenues available, and some will succeed in pursuing those avenues.

In dissent, my colleagues note that "regaining access to the ballot through these methods is highly unlikely." Jordan Dissent at 1081 n.6. And our previous panel decision similarly determined that the non-payment avenues to reenfranchisement "suffer from a common and basic infirmity—they are entirely discretionary in nature," and, as such, none "is a viable stand-in for the automatic reenfranchisement enjoyed by felons" who can afford to pay. *Jones I*, 950 F.3d at 826. But neither the appellees, nor the previous panel decision, nor the dissenters identify any case in which a state provided indigents an alternative route to the attainment of a state-created benefit that the Supreme Court struck down as violative of the *Bearden* principle. And as the Supreme Court has said, "at least where wealth is involved, the Equal Protection Clause does not require absolute equality or precisely equal advantages." *Rodriguez*, 411 U.S. at 24, 93 S.Ct. 1278.

Moreover, the alternative treatment of indigents here is not occasioned due to their indigency, but rather "for some legitimate State interest." Walker v. City of Calhoun, 901 F.3d 1245, 1260 (11th Cir. 2018) ("The sine qua non of a Bearden- or Rainwater-style claim, then, is that the State is treating the indigent and the non-indigent categorically differently. Only someone who can show that the indigent are being treated systematically worse 'solely because of [their] lack of financial resources,'—and not for some legitimate interest—will be able to make out such a claim." (citation omitted) (quoting Bearden, 461 U.S. at 661, 103 S.Ct. 2064)). \*1057 As explained in the majority opinion, "[t]he people of Florida could rationally conclude that felons who have completed all terms of their sentences, including paying their fines, fees, costs, and restitution, are more likely to responsibly exercise the franchise than those who have not." Maj. Op. at 1035. When a felon pays his LFOs, this interest is furthered. But if a felon is unable to pay those LFOs, the alternative avenues available to that indigent felon ensure that he has satisfied some other form of "completion" of his full sentence before being granted access to the franchise. Because completion of a criminal sentence is undoubtedly a valid voter qualification, see Maj. Op. at 1031, the people of Florida have a legitimate interest in enforcing compliance with that requirement.

Finally, the dissent's suggestion that SB-7066's alternatives to payment in full frustrate the intent of Florida's voters when they approved Amendment 4 is contrary to the plain language of that constitutional amendment. First, Amendment 4 expressly conditions reenfranchisement "upon completion of all terms of sentence including parole and probation." The dissent reads this language to include felons who are unable to pay their LFOs because they have "completed' all terms of their sentences that they can." But the constitutional language does not say that, and the dissent's reading

dilutes the mandated connection between the benefit—reenfranchisement—and its required condition—completion of all terms of sentence, including all financial obligations imposed as part of the criminal sentence. "Completion" means "the act of completing" or "the state of being completed." Completion, Webster's New World College Dictionary (3d ed. 1997); see also Completion, The American Heritage Dictionary of the English Language (4th ed. 2000) (same). "Complete" means "fully carried out," "concluded," or "brought to an end." Complete, Merriam-Webster's Dictionary (10th ed. 1993); see also Complete, The American Heritage Dictionary of the English Language (4th ed. 2000) (defining "complete" as "[h]aving come to an end; concluded" or "[t]o bring to a finish or an end"). To fully carry out or to conclude a financial obligation is to pay it in full. Thus, under the plain language of Amendment 4, a felon who is unable to pay his LFOs would not have completed all terms of his sentence and would be ineligible for reenfranchisement.

SB-7066, however, establishes additional methods for a felon to complete all the pecuniary terms of his sentence other than through payment of LFOs for purposes of reenfranchisement. A felon who has his LFOs converted to community service hours, which he then satisfies, or who has his original sentencing order modified to no longer require completion of his LFOs has completed that obligation. At any of these junctions, the felon's pecuniary terms of sentence have been "fully carried out" and "brought to an end."

Second, by its very terms, Amendment 4 does not reenfranchise all, or even most, felons. In enacting Amendment 4, the people of Florida chose to reenfranchise only felons who were not convicted of murder or a felony sexual offense and who had satisfied an express condition—the "completion of all terms of [their] sentence." Fla. Const. art. VI, § 4(a)–(b). To argue \*1058 that the purpose of Amendment 4 was to reenfranchise a particular percentage of felons that this Court deems acceptable is to ignore the words adopted by the people of Florida when they amended their constitution.

I would thus hold that, even if *Bearden*'s heightened scrutiny were extended to the context of felon-reenfranchisement, application of that doctrine is inappropriate here. The due process concerns that animated that decision are wholly absent. And the equal protection component is inapplicable because Florida provides indigent felons alternative avenues to reenfranchisement apart from actual payment of LFOs. Because those alternative avenues further Florida's

legitimate interest in ensuring that only felons who have completed the terms of their sentence are granted access to the franchise pursuant to Amendment 4, no unconstitutional wealth discrimination is occasioned. The "equal protection of the laws [does not] deny a State the right to make classifications in law when such classifications are rooted in reason." *Griffin v. Illinois*, 351 U.S. 12, 21, 76 S.Ct. 585, 100 L.Ed. 891 (1956) (Frankfurter, J., concurring).

III.

My dissenting colleagues take issue with many aspects of Florida's LFO system, as well as Florida's broader policy of funding its justice system through, among other things, the assessment of criminal fees and costs (even though Florida is far from unique in that regard9). Much of their critique articulates a policy preference that Florida's voters and its legislature could and should have done more. But as the Supreme Court has instructed, "[a] statute is not invalid under the Constitution because it might have gone farther than it did[.]" Roschen v. Ward, 279 U.S. 337, 339, 49 S.Ct. 336, 73 L.Ed. 722 (1929). "[E]very reform that benefits some more than others may be criticized for what it fails to accomplish," Rodriguez, 411 U.S. at 39, 93 S.Ct. 1278, so "reform may take one step at a time," Williamson v. Lee Optical of Okla., Inc., 348 U.S. 483, 489, 75 S.Ct. 461, 99 L.Ed. 563 (1955).

Florida took its first step toward felon reenfranchisement in 1968—reenfranchising all misdemeanants and establishing for the first time a discretionary, executive-clemency process that could restore a felon's civil rights. See Fla. Const. art. IV, § 8(a) (1968). With the passage of Amendment 4, Florida took a second step, reenfranchising those felons who were not convicted of murder or a felony sexual offense and who had satisfied an express condition—the "completion of all terms of [their] sentence." Our role in the constitutional system is simply to review that step for compliance with the Constitution, not to lengthen its stride. To proceed otherwise would violate the principles of federalism and separation of powers—the two structural guarantors of individual rights and liberty in our Constitution.

\*1059 For the reasons set forth in the majority opinion and this concurrence, Florida's felon reenfranchisement scheme is constitutional. It falls to the citizens of the State of Florida and their elected state legislators, not to federal

judges, to make any additional changes to it.

MARTIN, Circuit Judge, joined by WILSON, JORDAN, and JILL PRYOR, Circuit Judges, dissenting:

I am pleased to join Judge Jordan's dissent in full. I write separately to elaborate on the due process problems that stem from Florida's actions here and exist separately from the other constitutional deficiencies discussed in Judge Jordan's dissent. In particular, I take issue with the position accepted by the majority that Florida's constitutional amendment imposes no obligation, or even any responsibility, on the State to provide its citizens with the information required in order for them to register to vote. Maj. Op. at 1049.

I.

The District Court's unchallenged findings of fact led it to observe that Florida's implementation of Amendment 4 has been an "administrative train wreck." Jones v. DeSantis ("Jones II") 462 F. Supp. 3d 1196, 1238–39 (N.D. Fla. May 24, 2020). The majority breezes over the infirmities of the process. But I cannot so easily condone a system that is projected to take upwards of six years simply to tell citizens whether they are eligible to vote; that demands of those citizens information based on a legal fiction (of its own making) known as the "every-dollar" method; and which ultimately throws up its hands and denies citizens their ability to vote because the State can't figure out the outstanding balances it is requiring those citizens to pay. This system does not comport with due process of law.

A.

When analyzing a claim for procedural due process, the first question we must ask is whether the plaintiffs have established the deprivation of a constitutionally protected liberty or property interest. See, e.g., Woods v. Comm'r,

Ala. Dep't of Corr., 951 F.3d 1288, 1293 (11th Cir. 2020). The Plaintiffs here have clearly established such a protected interest.

All agree that the right to vote is a fundamental right protected by the Fourteenth Amendment. See, e.g., Reynolds v. Sims, 377 U.S. 533, 561-62, 84 S. Ct. 1362, 1381, 12 L.Ed.2d 506 (1964) ("Undoubtedly, the right of suffrage is a fundamental matter in a free and democratic society."). It is true, of course, that despite its fundamental status, the right to vote may be abridged or altogether withheld by the State. This is the holding of Richardson v. Ramirez, 418 U.S. 24, 94 S. Ct. 2655, 41 L.Ed.2d 551 (1974), in which the Supreme Court held that Fourteenth Amendment condones disenfranchisement. Id. at 54-56, 94 S. Ct. at 2671-72. But Richardson does not tell us what a State may do once the State Legislature—or, in this case, the people—adopts a scheme to restore the fundamental right to vote to its ex-felons.

Once a State promises its citizens restoration of their right to vote based on defined, objective criteria, it has created a due-process interest. This seems obvious based on a few distinct, though related, principles of law. The first is the general idea that "a State creates a protected liberty interest by placing substantive limitations on official discretion." Olim v. Wakinekona, 461 U.S. 238, 249, 103 S. Ct. 1741, 1747, 75 L.Ed.2d 813 (1983). Relevant examples abound. For instance, in \*1060 Kapps v. Wing, 404 F.3d 105 (2d Cir. 2005), the Second Circuit held that New York created a property interest in low-income energy benefits when it adopted a "statutory framework[ "that "set[ ] fixed eligibility criteria" for those benefits. Id. at 114. Also, the Sixth Circuit, in Jasinski v. Tyler, 729 F.3d 531 (6th Cir. 2013), found a due-process interest created by the State's filing of a child-protection petition under Michigan's Child Protection Law. Id. at 541-44. This was so because the relevant statute mandated the filing of a petition when fixed "substantive predicates" were met, and because the outcome of the petition could not be altered by official discretion. Id. at 543-44. The lesson from this body of law is that when a State promises its citizens an entitlement based upon the satisfaction of objective criteria, it creates a due process right for those citizens. Florida did just that, here.

Second, the fundamental nature of the right to vote matters. It has been a generally accepted principle for over 50 years "that the right to vote is one of the fundamental personal rights included within the concept of liberty as protected by the due process clause." <u>United States v. Texas</u>, 252 F. Supp. 234, 250 (W.D. Tex.), <u>aff'd per curiam</u>, 384 U.S. 155, 86 S. Ct. 1383, 16 L.Ed.2d 434

(1966). The right to vote becomes a nullity once people were barred from ever getting on the voter rolls. Thus, States cannot prevent eligible citizens from registering to vote without giving them due process of law. See Hall v. Louisiana, 108 F. Supp. 3d 419, 438 (M.D. La. 2015) (holding no due process violation in part because the plaintiffs "did not encounter any problems registering to vote"), aff'd, 884 F.3d 546 (5th Cir. 2018); see also Bell v. Marinko, 235 F. Supp. 2d 772, 777-78 (N.D. Ohio 2002) (recognizing that the deprivation of voter registration implicates the fundamental right to vote). Florida has, in effect, done just that here. Its Constitution now promises these citizens the right to vote upon completion of their sentences. The people to whom this promise has been made have a constitutional interest in being allowed, to the fullest of their abilities, to exercise that right.

We know, as the Supreme Court has told us, that Florida could have withheld the franchise from people with felony convictions for all eternity. But once 65% of the people of Florida decided that these returning citizens would be allowed to exercise their right to vote upon "completion of all terms of sentence," see Jones II, 462 F.Supp..3d at ——, 2020 WL 2618062, at \*3, and the Florida Legislature set objective criteria for what it means to "complet[e] all terms of sentence," a due-process interest was born.

#### B.

The State, for what it is worth, does not seem to dispute that upon the adoption of Amendment 4 and SB-7066, it created a due-process interest. Instead, the State says its implementation of Amendment 4 does not "deny" the due-process interest at stake. As the State tells it, the only time any interest in the right to vote was implicated was upon a returning citizen's original conviction.

However, the State confuses the right to enfranchisement with the right to <u>re</u>enfranchisement. Deprivation of enfranchisement was lawfully done upon conviction. But deprivation of the right to reenfranchisement occurs when a returning citizen is stymied in his efforts to vote because he does not know when or how he can complete all terms of his sentence. That is what the Plaintiffs allege happened here, and what they proved in the District Court.

### \*1061 II.

We have thus far established that the State deprives returning citizens of a due-process interest in the right to reenfranchisement when it deprives them of the information necessary to exercise that right. Note that this principle does not turn on returning citizens' ability to pay or whether their outstanding legal financial obligations ("LFO") balance consists solely of court costs and fees. Of course, if the majority had agreed that the State's implementation of Amendment 4 violated the Equal Protection Clause or the Twenty-Fourth Amendment, those considerations would be relevant. My point here is that the Plaintiffs' due-process claim should proceed no matter what, albeit in a slightly more limited fashion than if they had also succeeded on their other constitutional claims.

Having established allegations amounting to the deprivation of due-process interest in reenfranchisement, I next examine whether the State's process is, in fact, inadequate.1 Whether State-provided process is constitutionally adequate requires balancing "(A) the private interest affected; (B) the risk of erroneous deprivation of that interest through the procedures used; and (C) the governmental interest at stake." Nelson v. Colorado, 581 U.S. ---, 137 S. Ct. 1249, 1255, 197 L.Ed.2d 611 (2017) (citing Mathews v. Eldridge, 424 U.S. at 335, 96 S. Ct. at 903).

### A.

Returning citizens have a strong interest in the right to reenfranchisement. See Ga. Muslim Voter Project v. Kemp, 918 F.3d 1262, 1270 (11th Cir. 2019) (Jill Pryor, J., concurring) (stating that interests that "implicate[] the right to vote" are "substantial" (quotation marks omitted)). Florida's only argument to the contrary is that other citizens—those who are currently able to exercise their right to vote—have a stronger interest at stake than returning citizens. As a result, Florida makes what I view as the wacky argument that these other citizens' right to vote will be "dilut[ed]" if we recognize returning citizens' interest in reenfranchisement. Reply Br. of Appellant at

26. The language the State cites in support of its "dilution" proposition comes from Reynolds, in which the Supreme Court held that "[r]acially based gerrymandering" and "the conducting of white primaries" deny "the right of suffrage" by "debasement or dilution." \*1062 377 U.S. at 555, 84 S. Ct. at 1378. Reynolds simply reaffirmed the one person, one vote principle, and in no way supports the idea that returning citizens' interest in voting is somehow weaker than the interest of anyone else.

### B.

In order to register, returning citizens must know they have no outstanding LFOs. Navigating this process implicates three distinct administrative concerns: (1) determining the original LFO obligation; (2) determining the amount that has been paid; and (3) processing the voter registration. Based on Judge Hinkle's undisputed factual findings, all three steps of this process are rife with irrationality and ineptitude. Thus, the risk of erroneous deprivation—that is, a returning citizen who should be able to register to vote being waylaid in those efforts—is high.

#### 1.

First, the State's inability to determine the amount of disqualifying LFOs imposed creates a risk of erroneous deprivation. As Judge Hinkle found,<sup>2</sup> "many felons do not know, and some have no way to find out, the amount of LFOs included in a judgment." Jones II, 462 F.Supp.3d at 1220. For instance, Dr. Traci Burch, an expert for the Plaintiffs, testified about her efforts "to obtain information on 153 randomly selected felons." Id. at 1220. Judge Hinkle credited Dr. Burch's testimony that information about original LFO obligations was hard to track down and, when it was possible to obtain, "there were inconsistencies in the available information for all but 3 of the 153 individuals." Id.

Even if Florida were correct that felons convicted in state court "can [easily] access their sentencing records directly through the County Clerks' office," Br. of Appellant at 54, further complications arise. For one, "[m]any counties charge a fee for a copy of a judgment," which Judge Hinkle found many felons cannot afford to pay. Jones II, 462 F.Supp..3d at 1220. For another thing, older judgments can be hard, if not impossible, to find. See id. Finally, "[e]ven if a felon manages to obtain a copy of a judgment, the felon will not always be able to determine which financial obligations are subject to the pay-to-vote requirement." Id.; see also id. at 1221 ("18 months after adopting the pay-to-vote system, the State still does not know which obligations it applies to. And if the State does not know, a voter does not know.").

All these requirements lead to the conclusion that it "is sometimes easy, sometimes hard, sometimes impossible" for a returning citizen to figure out his original LFO obligation. See id. Without this information, these citizens can hardly be expected to know how much they have to pay off.

#### 2.

Second, even if a returning citizen is able to determine his original LFO obligation, then "[d]etermining the amount that has been paid on an LFO" is likewise "often impossible." <u>Id.</u> at 1221.

The State, pointing to its advisory-opinion system for voter eligibility, says the Plaintiffs cannot complain about the inability \*1063 to determine LFO obligations because, since the enactment of SB-7066, only about 30 members of the public have made inquiries of the Florida Department of State about "voter eligibility with regards to financial terms of sentence." Br. of Appellant at 55. This is beside the point. Although the State offers the advisory opinions as a panacea, it explains in its briefing that these advisory opinions actually only give a returning citizen "a legal determination on whether he would violate the laws against false registration and fraudulent voting by registering and voting given the facts and circumstances attendant to his case." Id. The Department of State's current advisory-opinion process does not promise returning citizens accurate information about their outstanding LFOs.

And in any event, this record shows the precise amount of payments made is "sometimes easy, sometimes hard, sometimes impossible" for a returning citizen to determine. <u>Id.</u> at 1224–25, 1227. The District Court

discussed a number of examples of returning citizens struggling mightily to calculate their outstanding LFO balance. One named plaintiff, Clifford Tyson, contacted the Hillsborough County Clerk of Court to help him determine his outstanding LFO balance. Id. at 1223–24. The District Court recounted that it took the Clerk of Court's "financial manager" and "several long-serving assistants" 12 to 15 hours to come up with an answer. Id. Even at the end of that painstaking process, nobody was able "to explain discrepancies in the records" that surfaced. Id.

Under the majority's decision, it remains incumbent on the person seeking to vote to bring all relevant "facts and circumstances" to the State's attention, including the amount of his outstanding LFOs. To the contrary, I believe the State has an obligation to give accurate information to its citizens about how much it believes they must still pay to discharge their obligations under SB-7066. This is particularly so, in light of the State's idiosyncratic "every-dollar" method of calculating payment. Under this method, all payments made in relation to an LFO are to be counted toward the outstanding balance of a criminal sentence, even if a portion of the payment has in fact been allocated elsewhere in the payment process. See id. at 1224–25. So it is the State's position, adopted by the majority, that a returning citizen can qualify to vote if he has paid the amount assessed in his sentencing document, but still has outstanding LFOs if any portion of his payments were, say, pocketed by a debt collection company. As I understand it, this "every-dollar" method is not the mode of accounting any local government uses for any purpose. This is likely because the calculation method was devised midway through this case, apparently as a litigation strategy, and seems completely divorced from how LFO remittances actually work. But, because no formal policy, rule, or statute in Florida provides for the tracking of "every dollar" paid, for many, this "fact" the State demands to know is simply unknowable. This result cannot comport with due process.

Take, for example, Betty Riddle, one of the named plaintiffs in this case. Ms. Riddle requested copies of her felony records from the Clerks of Court in the two counties of her convictions, which date between 1975 and 1988. Jones II, 462 F.Supp..3d at 1208–09. However, she was told the Clerks were unable to find records of the convictions. Id. Ms. Riddle believes she owes approximately \$1,800 in connection with later convictions, but the Clerk's records do not match those maintained by the Florida Department of \*1064 Law Enforcement. Id. Even as a party to this litigation, Ms. Riddle does not know, and has been unable to find out,

how much she must pay to vote. <u>Id.</u> This process has all the certainty of counting jellybeans in a jar. Under the majority's holding, it is entirely consistent with due process that Ms. Riddle cannot access her right to vote, because she does not, and cannot, know how much she needs to pay, even if she could pay.

There is no reason to think Ms. Riddle's situation is unique. For several of the named plaintiffs— Jeff Gruver, Emory Marquis Mitchell, Keith Ivey, Kristopher Wrench, Jermaine Miller, Clifford Tyson, Latoya A. Moreland, and Lee Hoffman—the District Court noted discrepancies in available records or lack of definitive information regarding what they owed. Id. at 1220-21. And again, in a random sample of 153 individuals with felony convictions reviewed by a research team, all but three had inconsistencies in the available information regarding their LFOs. Id. at 1220-21. People who make a bona fide effort to satisfy their LFOs may nevertheless face the risk of criminal prosecution if the records they relied on in tallying "every dollar" paid are inaccurate or do not exist. Florida's reenfranchisement scheme, which demands potentially unknowable facts, does not comport with due process.

3.

Then there is also the processing of voter registrations, another administrative quagmire. To be eligible to vote in Florida, one must submit a registration form. Simple enough. But the process that follows is anything but. If the county Supervisor of Elections deems the form complete on its face, then the Secretary of State's Division of Elections takes up the task of deciding whether the person is real, and, if so, adds that person to the voting roll. In the meantime, and periodically for years thereafter, the Division of Elections reviews registrations for, among other things, disqualifying felony convictions. A person who is uncertain of her eligibility to vote—say, because she does not know whether she has satisfied her LFOs to the State's satisfaction—may choose to wait for the Division of Elections to complete its review process. Then if the Elections Division finds that a person is disqualified for any reason, including unpaid LFOs, the Division is to notify the proper county Supervisor of Elections. Some Supervisors review the Division's work for accuracy, but some do not. Then the Supervisors begin the process of removing people from the voter rolls.

All of this review takes time. In light of the chaos created by the majority's holding that LFOs must be satisfied according to the "every-dollar" method, countless scores of individuals will be uncertain of their eligibility to vote. At the time of the trial, the Florida Division of Elections had identified more than 85,000 registered voters with felony convictions whose eligibility had to be screened. The District Court made a finding of fact, unchallenged by the State, that it will take until 2026 at the earliest, and possibly even into the 2030s, for the State to complete its eligibility determinations. Id. at 1227-28. Some registered voters are undoubtedly eligible to vote. But again, uncertainty will cause some segment of eligible voters not to vote, lest they risk criminal prosecution. This delay and uncertainty attendant in Florida's voter registration processing system also fails to satisfy due process.3

### \*1065 C.

Finally, I observe that the State has offered no countervailing interest to justify the denial of procedures sufficient to permit the reenfranchisement granted by Amendment 4. To be sure, "the Government's interest, and hence that of the public, in conserving scarce fiscal and administrative resources is a factor that must be weighed." Mathews, 424 U.S. at 348, 96 S. Ct. at 909. "At some point the benefit of an additional safeguard to the individual affected by the administrative action and to society in terms of increased assurance that the action is just, may be outweighed by the cost." Id. But we are nowhere near that point. In fact, the State does not argue that the incremental increase in the allocation of resources to ensure accurate decisions about the eligibility of returning citizens to vote would be unduly burdensome. Nor, based on this record, could it. See Ga. Muslim Voter Project, 918 F.3d at 1272 (Jill Pryor, J., concurring) (rejecting a State's arguments of substantial burden under Mathews where it failed to support its assertion). In any event, as I see it, the important interest in this case outweighs any cost considerations the State may have.

\* \* \*

Sixty-five percent of Florida voters conferred the right to reenfranchisement upon returning citizens once they completed all terms of their sentence. With its Constitution amended in this way, Florida gained an obligation to establish procedures sufficient to determine the eligibility of returning citizens to vote, and to notify them of their eligibility in a prompt and reliable manner. The majority's decision to vacate the District Court's injunction and reverse its holding on procedural due process grounds relieves the State of Florida of this obligation expected of it by its people. For this reason, as well as those articulated by Judge Jordan, I dissent from the majority's decision.

JORDAN, Circuit Judge, joined by WILSON, MARTIN, and JILL PRYOR, Circuit Judges, dissenting.

"Failure to pay court fines and fees should never result in the deprivation of fundamental rights, including the right to vote."

American Bar Association, Resolution: Ten Guidelines on Court Fines and Fees, Guideline 5 (Aug. 2018).

In 2018 Florida's voters, by a 64.55% super-majority, enacted Amendment 4 to allow felons to vote "upon completion of all terms of sentence including parole or probation." Since then, the Florida legislature has decreed, see Fla. Stat. § 98.0751, and the Florida Supreme Court has ruled, see Advisory Opinion to Governor re Implementation of Amendment 4, The Voting Restoration Amendment, 288 So. 3d 1070 (Fla. 2020), that Amendment 4 requires felons to satisfy legal financial obligations ("LFOs") before being allowed to vote.

\*1066 But if anyone thought that Florida really cared about collecting unpaid LFOs—whether for crime victims or for its own coffers—that pretense was laid bare at trial, which was held after we affirmed the district court's preliminary injunction. See Jones v. Governor of Fla., 950 F.3d 795 (11th Cir. 2020) ("Jones I"). The district court concluded that Florida's LFO requirement violates the Equal Protection Clause of the Fourteenth Amendment, under both heightened scrutiny and rational basis review. See Jones v. DeSantis, 462 F. Supp. 3d 1196, 1217-31(N.D. Fla. May 24, 2020) ("Jones II"). It also ruled that the LFO requirement violates the Due Process Clause and the Twenty-Fourth Amendment. See id. at 1231-34, 1240-42. And it issued a limited and tailored remedy in the form of an LFO advisory opinion process, a process Florida itself had suggested. See id. at 1247-50.

The evidence showed, and the district court found, that since the passage of Amendment 4 Florida has demonstrated a "staggering inability to administer" its LFO requirement. See id. at 1218. That is an

understatement. Florida cannot tell felons—the great majority of whom are indigent—how much they owe, has not completed screening a single felon registrant for unpaid LFOs, has processed 0 out of 85,000 pending registrations of felons (that's not a misprint—it really is 0), and has come up with conflicting (and uncodified) methods for determining how LFO payments by felons should be credited. See id. at 1227-28. To demonstrate the magnitude of the problem, Florida has not even been able to tell the 17 named plaintiffs in this case what their outstanding LFOs are. See id. So felons who want to satisfy the LFO requirement are unable to do so, and will be prevented from voting in the 2020 elections and far beyond. Had Florida wanted to create a system to obstruct, impede, and impair the ability of felons to vote under Amendment 4, it could not have come up with a better one.

Incredibly, and sadly, the majority says that Florida has complied with the Constitution. So much is profoundly wrong with the majority opinion that it is difficult to know where to begin. But one must start somewhere, so I will first turn to the facts, those "stubborn things," *Campbell v. Fasken*, 267 F.2d 792, 796 (5th Cir. 1959), which though proven at trial and unchallenged on appeal, are generally relegated to the dustbin in the majority opinion.

I

The majority proceeds as though the reality on the ground does not matter, but the record tells a different story. After an eight-day bench trial, the district court issued a 125-page opinion containing the following findings of fact—none of which Florida challenges on appeal.

1. "[T]he overwhelming majority of felons who have not paid their LFOs in full, but who are otherwise eligible to vote, are genuinely unable to pay the required amount, and thus, under Florida's pay-to-vote system, will be barred from voting solely because they lack sufficient funds." *Jones II*, 2020 WL 2618062, at \*16.

This finding is supported by the testimony of Dr. Daniel

A. Smith, which the district court credited in full. *See id.* at 1219, n.82. For example, Dr. Smith testified that of the over one million people convicted of a qualifying felony in Florida who have otherwise completed the terms of their sentences, \*1067 77.4% owe some form of LFO. *See* Tr. at 60; D.E. 334-1 at ¶ 9. In the counties for which Dr. Smith had indigency data, about 70% of those felons who had completed their sentences (except for payment of LFOs) were represented by a public defender, which indicates that they are indigent. *See* Tr. at 73–78; D.E. 334-1 at ¶¶ 42, 46, 50.

The Public Defender for Palm Beach County testified that about 80% of criminal defendants in felony cases are represented by court-appointed counsel at trial because of indigency. She also explained that the statewide data is similar to that in Palm Beach County. See Tr. at 279. The Chief Operating Officer of the Clerk of the Circuit Court for Hillsborough County similarly testified that 80% of criminal defendants in felony cases in that municipality are indigent and represented by court-appointed counsel. See id. at 624.

2. "[M]any felons do not know, and some have no way to find out, the amount of LFOs included in a judgment." *Jones II*, 2020 WL 2618062, at \*16.

Under § 98.0751, which implements Amendment 4, the LFOs that a felon must pay to vote "include only the amount specifically ordered by the court as part of the sentence and do not include any fines, fees, or costs that accrue after the date the obligation is ordered as a part of the sentence."  $\S 98.0751(2)(a)(5)(c)$ . But sentencing documents vary by county, see D.E. 152-93 at 183-84, and do not consistently show which amounts were imposed at sentencing. See D.E. 360-47 at 9-12. The record is replete with examples of situations where the sentencing document does not clearly set out what a felon owes. See Jones II, 462 F.Supp.3d at 1208-14 (recounting examples). For instance, Florida submitted a judgment for one of the plaintiffs. Jeff Gruver, that did not include any financial obligations. See id. at 1219-20. But the record in Mr. Gruver's case also includes a civil judgment for \$801 dated 17 days after Mr. Gruver was sentenced. See id. It is unclear whether the criminal judgment included the same amount and was converted to a civil lien 17 days later, or whether no amount was included in his criminal judgment at all. See id. Mr. Gruver said that with interest and collection fees, the debt has grown to roughly \$2,000. See id. As the district court stated: "One cannot know, from

the information in this record, whether any financial obligation was included in the 'four corners' of Mr. Gruver's criminal judgment." *Id.* 

The district court found that many felons do not know whether they are required to pay LFOs for the following reasons:

- Few felons will know that they must obtain copies of their judgments to determine whether they owe LFOs.
- For those felons who do know that they need a copy of their judgment, few have copies of their judgments because many have served long terms in custody or decades have passed since their judgments were issued.
- Many counties charge a fee for a copy of a judgment, which many felons cannot afford to pay.
- For older felonies, a copy of the judgment may not be available at all or may be available only from barely legible microfilm or microfiche from barely accessible archives.
- Even if a felon has a copy of the judgment, it is not always clear which financial obligations are subject to the LFO requirement (e.g., if the judgment covers multiple offenses, including \*1068 misdemeanors, and does not specify for which offense the fee is owed).

See id. at 1219-21.

3. Even if a felon knows that he owes LFOs, "[d]etermining the amount that has been paid on an LFO presents an even greater difficulty" and "is often impossible." *Jones II*, 2020 WL 2618062, at \*18.

One reason for this difficulty is that there is no single source that collects information on unpaid LFOs, making it very difficult for the state (and the felon) to determine how much is owed. The analysis prepared for the Florida Legislature confirmed this mess. *See* Florida Department of State, 2019 Agency Legislative Bill Analysis for SB 7086, D.E. 351-18 at 5 ("At this time, no single source exists that confirms for the Department or for the convicted felon that he or she has completed all terms of the sentence for every felony."). Florida has made no attempts to solve this problem.

In addition to failing to aggregate LFO information in one centralized place, Florida's records contain substantial inconsistencies. See Jones II, 462 F.Supp.3d at 1220-21, 1222-23. As the district court explained, Dr. Traci R. Burch—a professor of political science working with a team of doctoral candidates from a major research university-made diligent efforts over a long period to obtain information on 153 randomly selected felons. See id. at 1220-21. Dr. Burch's team found "that information was often unavailable over the internet or by telephone and that, remarkably, there were inconsistencies in the available information for all but 3 of the 153 individuals." Id. In other words, there were inconsistencies in the state's records for 98% of the people in the sample. See id. at 1222-23. The district court credited Dr. Burch's testimony. See id. at 1220-21 n.86. See also D.E. 360-47 at 9.

Dr. Burch's expert report provides more detail on the discrepancies in Florida's data, including that the Florida Department of Law Enforcement reports conflict with the clerks' online data regarding LFOs in 79.6% of cases in the sample. See D.E. 360-47 at 9. Dr. Burch testified about other obstacles her research team faced in obtaining information on LFOs, such as that 40% of the 67 counties charged some kind of payment or processing fee to look at their databases, and 15% charged a fee even to access records such as sentencing documents. See Tr. at 164. She and her team struggled to obtain information over the phone because clerks were often unhelpful, and had difficulty obtaining information online because some websites were poorly designed, difficult to use, or inaccessible. See id. at 167-169. In 60% of cases, they could not even get through to clerks on the phone or clerks would not help them ascertain the amount due over the phone. See id. at 184-85.

Another problem is that restitution is usually payable only to the victim directly. \*1069 See Jones II, 462 F.Supp.3d at 1223–35. Florida has no record of restitution payments at all, except in the smaller number of cases when restitution is payable to or through the Clerk of Courts or the Department of Corrections. See id. The district court found that this information "may be unknowable": the felon may have no record of amounts paid (especially if they were paid years or decades ago); individual victims may have died or moved to parts unknown; and corporate victims may have gone out of business or merged into other entities. See id.

4. In many cases, "probably most," felons cannot pay

their outstanding balance without being required to pay additional fees that were not included in their sentence. *See Jones II*, 2020 WL 2618062, at \*20–23.

If a felon sets up a payment schedule because he is unable to pay a judgment all at once, many counties assess a \$25 fee for setting up a payment plan. See id. at 1221–22. And if a felon fails to pay his LFOs, his account may be turned over to a collection agency. See id. These collection agencies, in turn, routinely charge fees of up to 40% and remit to the county only the net amount remaining after deducting the fee. See id. County records often show only the net payment, not the amount retained by the collection agency. See id. And in some counties, online records do not distinguish between LFOs from the four corners of the sentencing documents and any later accrued fees. See Tr. at 133–34, 651, 943–45.

The district court also found that Florida has "adopted two completely inconsistent methods" for applying these additional payments to covered obligations. *See Jones II*, 462 F.Supp..3d at 1221–22. This makes an intolerable situation even worse.

At first, Florida argued that a felon should receive credit only for the amounts that it actually received from his payment (referred to by the district court as the "actual-balance method"). See id. Under this approach, for example, a defendant who paid \$100 to a collection agency might find that only \$60 of his payment went to satisfy the amount owed on his LFOs (as he would receive no credit for the \$40 a collection agency charged and kept to cover its fees). This method leads to the felon often having to pay more than the LFO amount in his judgment to vote, as he must also pay applicable collection or processing fees. See id. at 1223–25.

Then, in March of 2020—less than two months before trial—Florida "abruptly changed course," adopting a different method which the district court called the "every-dollar method." *Id.* at 1225. Under this newly-minted approach, a felon only has to make payments that add up to the aggregate amount of the obligations included in the judgment, no matter the actual purpose for the payment. See id. So, if a felon pays \$100 to a collection agency, the entire \$100 will count to satisfy the LFO requirement—even if \$40 is retained by the collection agency as a collection fee. Florida, however, has not codified this new method; "it is not set out in a statute or rule or even in a formal policy[.]" *Id.* at 1225. So it is anyone's guess whether it will last, or will be replaced by a third, fourth, or fifth method that conveniently suits Florida's then-existing interests and prevents felons from figuring out their LFO obligations.

Even on its own terms, Florida's new approach has intrinsic problems. Because county records routinely show only the \*1070 net payment that the county receives from collection agencies, it may be impossible to calculate the amount that felons paid under this approach. Significantly, the district court found that the every-dollar method undermines Florida's main rationale for the LFO requirement—that a felon must satisfy his entire criminal sentence before being allowed to vote—because under this approach, most felons will not have to satisfy their judgment in full before regaining the right to vote. *See id.* at 1225–27.

For example, as the district court noted, if a felon owed \$100 in restitution, but had to pay a \$4 fee to the Department of Corrections to process his full payment, under the actual-balance method he would have to pay \$104 in total to be eligible to vote. See id. at 1225-26. Under the every-dollar method, however, the felon would only have to pay \$100 in total to be eligible to vote—even though the victim would only receive about \$96 (\$100 the \$4 fee). See id. Indeed, the Director of the Division of Elections admitted at trial that under the every-dollar method, the victim may sometimes receive \$0 in restitution payments—even though restitution was ordered in the judgment-if the amount of payments made towards fees and surcharges equals or exceeds the amount of restitution ordered. See Tr. at 1359. So much for Florida's asserted interest in the full payment of LFOs.

Further highlighting the potential arbitrary results that may result from the every-dollar method, the district court asked the Director of the Division of Elections the following hypothetical at trial. Take an individual who has two felony convictions: one for which he owes \$25 in LFOs, and another for which he owes \$15 in LFOs. Assume that the felon paid \$50 in total towards the first conviction—\$25 for the LFOs in the judgment, plus another \$25 for various fees and surcharges that accrued after sentencing—but only paid \$10 toward the second conviction. What happens then? The Director testified that the felon would not be eligible to vote, as he would still owe LFOs for the second conviction. See id. at 1323. If those same convictions were charged in a single case, however, and the same payments were made, that felon would be eligible to vote—as the total amount paid would exceed the amount of LFOs owed. See id.

5. In the 18 months since Amendment 4 was adopted by Florida voters, Florida has not completed screening

even a single registrant for unpaid LFOs, and it has processed 0 out of 85,000 pending registrations of felons. See Jones II, 2020 WL 2618062, at \*24.

To be eligible to vote in Florida, a person must submit a registration form. *See id.* at 1211–13–, 2020 WL 2618062, at \*9. If the County Supervisor of Elections deems the form complete on its face, the Secretary of State's Division of Elections determines, using personal identifying information, whether the person is real. *See id.* If so, the person is added to the voting roll, subject to later revocation if it turns out that he is ineligible. *See id.* 

The Division of Elections takes the laboring oar at that point, reviewing the registration for disqualifying felony convictions. See id. See also § 98.075(5) ("The department shall identify those registered voters who have been convicted of a felony ..."); § 98.0751(3)(a) ("The department shall obtain and review information pursuant to s. 98.075(5) related to a person who registers to vote and make an initial determination on whether such information is \*1071 credible and reliable regarding whether the person is eligible ... "). If the Division finds a disqualifying felony conviction, it notifies the proper County Supervisor of Elections of the voter's potential ineligibility to be registered. See Jones II, 462 F.Supp.3d at 1213-14. Upon receipt of the notice, the Supervisor sends the registrant a notice giving him 30 days to show eligibility. See id. See also § 98.075(7) (outlining procedures for removal from the voter rolls). The registrant may request a hearing before the Supervisor, and if unsuccessful may file a lawsuit in state court, but hearings are "extremely rare." Jones II, 462 F.Supp.3d at 1213.

The district court found that County Supervisors of Elections sometimes address felony convictions on their own, without awaiting notice from the Division of Elections that a registrant is ineligible. See id. But they do not have the resources to perform the bulk of the screening process. See id. Thus, there was testimony at trial that one County Supervisor had removed some voters due to outstanding LFOs, see Tr. at 927-29, even though the Division had not processed a single felon for unpaid LFOs. That County Supervisor testified that while his office would check for restitution payments if that data was available, they did not "go into the details" because "there is no database in the state of Florida to be able to check all the different court costs that might be outstanding." Id. at 908–09, 912–14, 918–19. Although he said his office would check for information on LFOs with the county's clerk of court or the Comprehensive Case Information System database, that system does not include records for out-of-state cases or federal cases. See *id.* at 920–21. He also acknowledged that he did not receive *any* guidance from the Division of Elections about how to implement the LFO requirement. *See id.* at 909–10, 928.

Another County Supervisor of Elections similarly testified that she was unaware of any reliable database that she or voters can rely on to assess outstanding LFOs. See id. at 483. She recounted that after the passage of § 98.0751, her office occasionally received questions from voters about their eligibility under the new law. See id. at 480–81. Her office initially tried to help voters determine their LFOs by contacting the clerk of court or the relevant collection agency, but often they were unable to get "a definitive answer" and "were just butting [their] heads against the wall." Id. at 481-82. She explained that generally, after a new election law is passed, the Division of Elections writes a rule to "make sure that all 67 [Supervisors of Elections] are treating [their] voters basically in the same manner." Id. at 474. But, she said, since the passage of § 98.0751, there has not been a new rule issued—or any guidance given—as to how to implement the LFO requirement. See id. at 474, 476. In other words, Florida has done nothing to address the LFO problem.

Moreover, the Division of Elections has not screened any registered felons for outstanding LFOs. Specifically, the district court found that "[a]s of the time of trial, the Division ha[d] 85,000 pending registrations of individuals with felony convictions—registrations in need of screening for murder and sexual offenses, for custody or supervision status, and for unpaid LFOs. In the 18 months since Amendment 4 was adopted, the Division has had some false starts but has completed its review of *not a single registration*." *Jones II*, 462 F.Supp.3d at 1227–28 (emphasis added).

The Division of Elections has not even begun screening for unpaid LFOs, except \*1072 for the 17 named plaintiffs in this case, and inexplicably even those reviews had not been completed at the time of trial. *See id.* Indeed, the Director of the Division acknowledged that it was not currently implementing the LFO requirement, and admitted that the Division is still "trying to finalize" its "process in a way that can be understood and implemented." Tr. at 1236, 1265–66.<sup>2</sup>

The district court found that "even if the Division starts turning out work today, and even if screening for LFOs doesn't take longer than screening for murders, sexual offenses, custody, and supervision," the Division's projected screening rate—at best—would be complete in early 2026. See Jones II, 462 F.Supp.3d at 1228. That is at

least three elections (2020, 2022, 2024)—including two presidential elections—away.

Amendment 4 and § 98.0751 significantly increased the workload on the Division of Elections. In addition to screening for felonies, the Division now has to address three new questions: whether a felony conviction is for murder or a sexual offense, whether the individual is still in custody or supervision, and whether the individual has unpaid LFOs. See id. The budget analysis for the Senate Bill that became § 98.0751 therefore projected a need for 21 new employees to process the increased workload. See id. But as the district court found, the Florida Legislature has allocated no funds for new employees, and the Division has hired none. See id. That is a pretty good (and damning) indication of Florida's disdain for Amendment 4.

6. "It is likely that if the State's pay-to-vote system remains in place, some citizens who are eligible to vote, based on the Constitution or even on the state's own view of the law, will choose not to risk prosecution and thus will not vote." *Jones II*, 2020 WL 2618062, at \*25. In other words, the district court found that it is likely that the lack of clarity about LFO obligations will likely deter eligible felons from voting, out of fear that they will be prosecuted if they vote and then later find out that they were not in fact eligible.

Under Florida law, making a false affirmation in connection with voting, as well as fraud in connection with voting, are criminal offenses. See Fla. Stat. §§ 104.011 (false affirmation in connection with voting) & 104.041 (fraud in connection with casting vote). Although the former requires a showing of willfulness, and the latter requires a showing of fraud, felons may not be aware of those requirements. In fact, the 2019 voter registration form includes a warning that "[i]t is a 3rd degree felony to submit false information," and that "[m]aximum penalties are \$5,000 and/or 5 years in prison," without mentioning the statutory requirement of willfulness. See D.E. 343-3; D.E. 152-33.

Florida's voter registration form requires registrants to sign an oath affirming under penalty of perjury that they are eligible to vote. *See* D.E. 343-3; D.E. 152-93 at 189; D.E. 167-3 at 2. Needless to say, it is particularly difficult for registrants to affirm their eligibility without being able to obtain accurate information about their \*1073 LFO

obligations. As the district court stated: "That the Director of the Division of Elections cannot say who is eligible makes clear that some voters also will not know." *Jones II*, 462 F.Supp.3d at 1229–30.

The Director of the Divisions testified that if she "were in the voter's position, [she doesn't] know that [she] would be swearing under oath if [she] wasn't sure" about her eligibility to vote. See Tr. at 1381. She testified that to avoid this "challenge," id., felons who are concerned about the risk of prosecution may request an LFO advisory opinion from the Division, and they will be immune from prosecution if they rely on the advisory opinion in good faith. See id. at 1206–07, 1214–16, 1315. See Fla. Stat. § 106.23(2) (setting forth the advisory opinion process). She could not, however, say how long it would take to get an advisory opinion. See Tr. at 1387–89.

The district court took Florida up on the Director's suggestion. See Jones II, 462 F.Supp.3d at 1241-42, 1241–48. The injunction it crafted sets up an advisory opinion process, and allows an individual to go forward with registration and voting if the Division fails to provide an advisory opinion within 21 days. See id. at 1248. It also prescribes a method for determining inability to pay. See id. The district court explained "that the State can condition voting on payment of fines and restitution that a person is able to pay but cannot condition voting on payment of amounts a person is unable to pay or on payment of taxes, even those labeled fees or costs." Id. at 1203. Thus, the injunction largely mirrors Florida's own advisory opinion process and serves two purposes: (1) it provides a method for determining inability to pay; and (2) if a felon can pay, it requires the state to tell him how much he owes. See id. at 1248.

7. "Fees and costs are imposed in all cases, with few if any exception.... Each type of fee or cost is authorized, indeed usually required, by statute. These are not traditional court costs of a kind usually awarded in favor of a prevailing litigant; they are instead a means of funding the government in general or specific government functions." *Jones II*, 2020 WL 2618062, at \*4.

Florida imposes a flat \$225 assessment in every felony case, \$200 of which is used to fund the clerk's office and \$25 of which is remitted to the Florida Department of Revenue for deposit in the state's general revenue fund.

See id.; Fla. Stat. § 938.05(1)(a). There is also a flat \$3 assessment in every case that is remitted to the Department of Revenue for further distribution in specified percentages for, among other things, a domestic violence program and a law-enforcement training fund. See Jones II, 462 F.Supp.3d at 1206–07; Fla. Stat. § 938.01(1).

As the district court found, Florida has chosen to pay for its criminal-justice system in significant measure through fees routinely assessed against its criminal defendants. See Jones II, 462 F.Supp,3d at 1232–33. See also Fla. Const., art. V, § 14 (providing that all funding for clerks of court must be obtained through fees and costs, with limited exceptions). The district court found that "[e]very criminal defendant who is convicted, and every criminal defendant who enters a no-contest plea of convenience or is otherwise not adjudged guilty but also not exonerated is ordered to pay such amounts." Jones II, 462 F.Supp.3d at 1233. For example, in \*1074 one county, the fees total \$668 for every defendant who is represented by a public defender and \$548 for every defendant who is not, and more if multiple counts are charged. See id.

With these facts in mind, I turn to the plaintiffs' equal protection, due process, and Twenty-Fourth Amendment claims.

# II

In my view, we correctly ruled in *Jones I*, 950 F.3d at 817–25, that heightened scrutiny should apply to the plaintiffs' equal protection claim. But even if heightened scrutiny does not apply, the district court properly concluded that Florida's LFO scheme fails rational basis review. *See Jones II*, 462 F.Supp..3d at 1218–31.

#### A

We held in *Jones I* that "heightened scrutiny applies ... because we are faced with a narrow exception to traditional rational basis review: the creation of a wealth classification that punishes those genuinely unable to pay fees, fines, and restitution more harshly than those able to

pay—that is, it punishes more harshly solely on account of wealth—by withholding access to the ballot box." *Jones I*, 950 F.3d at 809. I wholeheartedly agree.

### 1

The Supreme Court's opinions in Griffin v. Illinois, 351 U.S. 12, 76 S.Ct. 585, 100 L.Ed. 891 (1956), Bearden v. Georgia, 461 U.S. 660, 103 S.Ct. 2064, 76 L.Ed.2d 221 (1983), and their progeny establish that "the state may not treat criminal defendants more harshly on account of their poverty." Jones I, 950 F.3d at 818. In Griffin, 351 U.S. at 16-19, 76 S.Ct. 585, the Supreme Court held that an Illinois rule requiring a criminal defendant to purchase a certified copy of the trial record to appeal his sentence—without any exception for indigent—flouted due process and equal protection. Significantly, the Supreme Court came to this conclusion even though the right to an appeal in a criminal case is not constitutionally guaranteed. See id. at 18, 76 S.Ct. 585 (citing McKane v. Durston, 153 U.S. 684, 687-88, 14 S.Ct. 913, 38 L.Ed. 867 (1894)). In Bearden, 461 U.S. at 661-62, 103 S.Ct. 2064, the Supreme Court held that the Fourteenth Amendment prohibits a state from revoking an indigent defendant's probation for failing to pay a fine and restitution. The Court relied on Griffin and explained that "[d]ue process and equal protection principles converge in [its] analysis in these cases." Id. at 665, 103 S.Ct. 2064 (citing Griffin, 351 U.S. at 17, 76 S.Ct. 585). See also Williams v. Illinois, 399 U.S. 235, 241, 90 S.Ct. 2018, 26 L.Ed.2d 586 (1970) (holding that a state cannot subject convicted defendants to a period of imprisonment beyond the statutory maximum solely because they are too poor to pay the fine imposed); Tate v. Short, 401 U.S. 395, 398, 91 S.Ct. 668, 28 L.Ed.2d 130 (1971) (holding that a state cannot convert a fine into a jail term solely because the defendant is indigent and cannot immediately pay the fine in full).

At times, the Supreme Court has characterized disenfranchisement as "a nonpenal exercise of the power to regulate the franchise." *Trop v. Dulles*, 356 U.S. 86, 96–97, 78 S.Ct. 590, 2 L.Ed.2d 630 (1958) (plurality opinion). Florida acknowledges, however, that its disenfranchisement is punitive. *See* Appellants' Initial En Banc Br. at 3 ("Persons convicted of a felony in Florida are automatically disenfranchised *as part of the punishment for their crimes.*"); *id.* at 4 ("[F]elon disenfranchisement, again, *is a punishment for felony* 

conviction."). Thus, as we explained in \*1075 Jones I, Florida—contrary to Griffin and Bearden—"has chosen to continue to punish those felons who are genuinely unable to pay fees, fines, and restitution on account of their indigency, while re-enfranchising all other similarly situated felons who can afford to pay." See Jones I, 950 F.3d at 819. "Just like in Bearden and in Griffin, the fact that [Florida] originally was entitled to withhold access to the franchise from felons is immaterial; rather, heightened scrutiny is triggered when [it] alleviates punishment for some, but mandates that it continue for others, based solely on account of wealth." Id.3

In *Griffin* and its progeny, "a financial fee imposed by the state was found to discriminate because it effectively prevented indigents from exercising important rights granted by the state to all citizens but conditioned upon a monetary payment." Note, Discrimination Against the Poor and the Fourteenth Amendment, 81 Harv. L. Rev. 435, 435 (1967), cited with approval in Williams, 399 U.S. at 241 n.16, 90 S.Ct. 2018. The Supreme Court has described the classes of persons discriminated against in these cases as having two distinguishing characteristics: "[B]ecause of their impecunity they were completely unable to pay for some desired benefit, and as a consequence, they sustained an absolute deprivation of a meaningful opportunity to enjoy that benefit." San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 20, 93 S.Ct. 1278, 36 L.Ed.2d 16 (1973). Under this framework. heightened scrutiny applies here because the LFO requirement results in an absolute deprivation of the right to vote for felons in any elections that take place while they are indigent.

The majority tries to characterize *Griffin* and *Bearden* as two separate and limited exceptions to rational basis review for claims of wealth discrimination. *See* Maj. Op. at 1031–32. It asserts that *Bearden* applies only when inability to pay is the sole justification for imprisonment, and that *Griffin* applies only when the state conditions access to certain judicial proceedings on the ability to pay. *See id.* at 1031-34. The majority, I believe, is mistaken on both fronts.

Griffin and Bearden are not two separate and discrete exceptions. In fact, Bearden relied on Griffin, and extended its rationale to a new context. See Bearden, 461 U.S. at 664, 103 S.Ct. 2064 ("Griffin's principle of 'equal justice,' which the Court applied there to strike down a state practice of granting appellate review only to persons able to afford a trial transcript, has been applied in numerous other contexts.") (emphasis added). Bearden therefore "provides a doctrinal intervention for eliminating systems that block people from

reenfranchisement due solely to an inability to pay economic sanctions." Beth A. Colgan, Wealth-Based Penal Disenfranchisement, 72 Vand. L. Rev. 55, 143 (2019). And, as relevant here, the Supreme Court has repeatedly and consistently applied *Griffin* in other cases involving state-created rights and benefits. See, e.g., Douglas v. California, 372 U.S. 353, 355, 83 S.Ct. 814, 9 L.Ed.2d 811 (1963) (relying on Griffin to hold that states must appoint counsel to represent indigent defendants in appeals as of right under state law); Mayer v. Chicago, 404 U.S. 189, 194-97, 92 S.Ct. 410, 30 L.Ed.2d 372 (1971) (applying *Griffin* to indigent defendant who sought to \*1076 obtain free transcripts to appeal his conviction on non-felony charges); Boddie v. Connecticut, 401 U.S. 371, 382, 91 S.Ct. 780, 28 L.Ed.2d 113 (1971) (relying, in part, on Griffin to hold that a state cannot make obtaining a divorce contingent on the ability to pay court fees and costs); M.L.B. v. S.L.J., 519 U.S. 102, 107, 117 S.Ct. 555, 136 L.Ed.2d 473 (1996) (holding under Griffin that a state may not "condition appeals from trial court decrees terminating parental rights on the affected parent's ability to pay record preparation fees").

The Supreme Court has also applied the *Griffin* equality principle to cases that do not involve access to the judicial process and criminal law. For example, the Supreme Court applied *Griffin* to the voting context in *Harper v*. Virginia Board of Elections, 383 U.S. 663, 668, 86 S.Ct. 1079, 16 L.Ed.2d 169 (1966). In that case, the Supreme Court relied on Griffin to invalidate a Virginia poll tax. The Court held that a state "violates the Equal Protection Clause of the Fourteenth Amendment whenever it makes the affluence of the voter or payment of any fee an electoral standard." Id. at 666, 86 S.Ct. 1079. The Court explained: "To introduce wealth or payment of a fee as a measure of a voter's qualifications is to introduce a capricious or irrelevant factor. The degree of the discrimination is irrelevant. In this context—that is, as a condition of obtaining a ballot—the requirement of fee paying causes an 'invidious' discrimination that runs afoul of the Equal Protection Clause." Id. at 668, 86 S.Ct. 1079 (citation omitted).

Because it applied *Griffin* to voting, *Harper* indicates that heightened scrutiny should apply here. Indeed, in *McDonald v. Board of Election Commissioners of Chicago*, 394 U.S. 802, 807, 89 S.Ct. 1404, 22 L.Ed.2d 739 (1969), the Supreme Court, citing *Harper* and *Douglas*, again confirmed that when it comes to the franchise, "careful examination ... is especially warranted where lines are drawn on the basis of wealth or race, two factors which would independently render a classification highly suspect and thereby demand a more exacting judicial scrutiny." *See also Bullock v. Carter*, 405 U.S.

134, 144, 92 S.Ct. 849, 31 L.Ed.2d 92 (1972) (applying heightened scrutiny under *Harper* to evaluate a Texas law requiring candidates to pay a filing fee as a condition to having their name placed on the ballot); *Lubin v. Panish*, 415 U.S. 709, 718, 94 S.Ct. 1315, 39 L.Ed.2d 702 (1974) (holding "that in the absence of reasonable alternative means of ballot access, a State may not, consistent with constitutional standards, require from an indigent candidate filing fees he cannot pay"). If there was any doubt on this point, the Supreme Court reiterated in *M.L.B.* that heightened scrutiny applies to wealth classifications in cases involving "[t]he basic right to participate in political processes as voters and candidates." *M.L.B.*, 519 U.S. at 124, 117 S.Ct. 555. That is the exact situation we have here.

\*1077 The majority seeks to avoid the application of Harper by asserting that, unlike the poll tax in that case, the LFO requirement "do[es] not make affluence or the payment of a fee an 'electoral standard.' " Maj. Op. at 1031. Instead, the majority asserts, the LFO requirement makes completing all terms of a sentence an "electoral standard," which is "highly relevant to voter qualifications." Id. To support its contention that Harper does not apply because the restriction on voting is "directly related to legitimate voter qualifications," the majority relies on Gonzalez v. Arizona, 677 F.3d 383, 409 (9th Cir. 2012) (en banc), aff'd sub nom. Arizona v. Inter Tribal Council of Az., Inc., 570 U.S. 1, 133 S.Ct. 2247, 186 L.Ed.2d 239 (2013), and Crawford v. Marion County Election Board, 553 U.S. 181, 128 S.Ct. 1610, 170 L.Ed.2d 574 (2008) (plurality opinion). See Maj. Op. at 1031-32. I don't see how either case supports the majority's position.

In Crawford, the Supreme Court addressed whether a state statute requiring citizens voting in-person to present photo identification violated the Fourteenth Amendment. See 553 U.S. at 185, 128 S.Ct. 1610. The identification requirement did not apply to absentee ballots submitted by mail, and the law permitted indigent voters to cast a provisional ballot. See id. at 186, 128 S.Ct. 1610. A plurality of the Court stated that, under Harper, any burden on voters "must be justified by relevant and legitimate state interests sufficiently weighty to justify the limitation." Id. at 191, 128 S.Ct. 1610 (citation and internal quotation marks omitted). In upholding the statute, the plurality explained that it served legitimate state interests-including preventing voter fraud and protecting public confidence in elections—and did not impose a substantial burden on voters. See id. at 191–200, 128 S.Ct. 1610. Importantly, however, the plurality also said the following: "The fact that most voters already possess a valid driver's license, or some other form of acceptable identification, would not save the statute under our reasoning in *Harper*, if the State required voters to pay a tax or a fee to obtain a new photo identification." *Id.* at 198, 128 S.Ct. 1610. That possibility was not a problem in *Crawford* because the state issued photo identification cards for free. *See id.* The plurality further noted that "the record says virtually nothing about the difficulties faced by ... indigent voters," so the impact the statute would have on that group was unclear. *See id.* at 201, 128 S.Ct. 1610.

Similarly, in *Gonzalez* the Ninth Circuit upheld a state law that required voters to show identification to cast a ballot at the polls. *See* 677 F.3d at 408–10. It concluded that "[r]equiring voters to provide documents proving their identity is not an invidious classification based on impermissible standards of wealth or affluence, even if some individuals have to pay to obtain the documents," because under *Crawford*, the benefits of the law were significant, and "the burden is minimal[.]" *See id.* at 409–410.

Here, in contrast, the LFO requirement is not an identification measure designed to prevent voter fraud or restore the integrity of the electoral process. And the LFOs at issue do not pose a "minimal" burden on felons who wish to vote. The record instead reflects, and the district court found, that hundreds of thousands of felons would be eligible to vote but for their inability to pay LFOs. See Jones II, 462 F.Supp.3d at 1203 ("Florida has adopted a system under which nearly a million otherwise-eligible citizens will be allowed to vote only if they pay an amount of money."). As in Harper, the LFO requirement makes "affluence" the electoral standard, even though "[v]oter qualifications have no relation to wealth[.]" Harper, 383 U.S. at 666, 86 S.Ct. 1079. Given the \*1078 importance of voting in our political system, Harper, Griffin, and Bearden call for heightened scrutiny. Cf. John Hart Ely, Democracy and Distrust 87 (1980) (advocating "participation-oriented" a and "representation-reinforcing" approach to judicial review).

2

Heightened scrutiny also applies for another reason—the right to vote is indisputably fundamental. *See, e.g., Yick Wo v. Hopkins*, 118 U.S. 356, 370, 6 S.Ct. 1064, 30 L.Ed. 220 (1886) (voting "is regarded as a fundamental political right ... preservative of all rights"); *Reynolds v. Sims*, 377

U.S. 533, 561–62, 84 S.Ct. 1362, 12 L.Ed.2d 506 (1964) ("Undoubtedly, the right of suffrage is a fundamental matter in a free and democratic society."). And even if voting is not fundamental for felons who are re-enfranchised, it is certainly a critically important right that demands a searching analysis.

The majority contends that felons do not have a fundamental right to vote because disenfranchisement is permitted under Richardson v. Ramirez, 418 U.S. 24, 94 S.Ct. 2655, 41 L.Ed.2d 551 (1974). See Maj. Op. at 1028-29. That contention is too simplistic, and "amounts to an analytical trick." Ann Cammett, Shadow Citizens: Felony Disenfranchisement and the Criminalization of Debt, 117 Penn. St. L. Rev. 349, 396 (2012). Although Richardson interpreted § 2 of the Fourteenth Amendment to permit states to disenfranchise felons, see 418 U.S. at 54, 94 S.Ct. 2655, it did not address what level of scrutiny would or should apply if a state chose to re-enfranchise felons but conditioned re-enfranchisement on their ability to pay LFOs. See id. at 56, 94 S.Ct. 2655. Richardson cannot control an issue it did not confront (or even discuss). Cf. United States v. Maines, 20 F.3d 1102, 1104 (10th Cir. 1994) (referring to the right to vote as "fundamental" in the context of analyzing whether a felon's civil rights have been restored under 18 U.S.C. § 921(a)(20)); United States v. Bost, 87 F.3d 1333, 1336 (D.C. Cir. 1996) (same).5

As we explained in *Jones I*: "[T]he state's ability to *deprive* someone of a profoundly important interest does not change the nature of the right, nor whether it is deserving of heightened scrutiny when access to it is made to depend on wealth." *Jones I*, 950 F.3d at 823. "To the same extent that felons are not entitled to vote, the plaintiffs in *Williams*, *Tate*, and *Bearden* were no longer entitled to their liberty [due to their convictions]. Nevertheless, because the interest in liberty is so important, the [Supreme] Court held that the state could not rely on the plaintiffs' wealth in deciding whether to deprive them of liberty." *Id.* at 822–823. In the words of Chief Justice Alexander of the Washington Supreme Court:

Although freedom is a fundamental right, it is recognized that freedom can be taken away as punishment for a felony. However, once all of the assigned punishment has been imposed, except for the payment of financial obligations, failure to pay those financial obligations cannot be used to continue depriving felons of their freedom. Freedom, thus, remains a fundamental right. Just as freedom is a fundamental right, so is the \*1079 right to vote.... [F]elons can be deprived of the right to vote,

notwithstanding its fundamental nature, as punishment for a felony. However, voting remains a fundamental right, and when all other conditions of a sentence have been fulfilled, felons cannot be deprived further of their right to vote for failure to pay LFOs.

Madison v. State, 161 Wash.2d 85, 163 P.3d 757, 779–80 (2007) (Alexander, C.J., dissenting) (citations omitted).

Analytically, it helps to think of felons in states that have not used § 2 of the Fourteenth Amendment to disenfranchise them. Given that § 2's permission to disenfranchise persons convicted of crimes is not self-executing, felons in these states retain a fundamental right to vote because they have never had the franchise taken away from them. Florida's citizens, through Amendment 4, have restored a fundamental right that had previously denied to felons through disenfranchisement. See Cherish M. Keller. Re-Enfranchisement Laws Provide Unequal Treatment: Ex-Felon Re-Enfranchisement and the Fourteenth Amendment, 81 Chi.-Kent L. Rev. 199, 215-16 (2006) ("[W]hen a state provides a mechanism by which ex-felons can regain the right to vote, then a fundamental right is at stake.").

A long line of Supreme Court cases further establishes that, even when the right to vote is not constitutionally guaranteed—i.e., not fundamental—"once the franchise is granted to the electorate, lines may not be drawn which are inconsistent with the Equal Protection Clause of the Fourteenth Amendment." Kramer v. Union Free Sch. Dist. No. 15, 395 U.S. 621, 629, 89 S.Ct. 1886, 23 L.Ed.2d 583 (1969) (quoting *Harper*, 383 U.S. at 665, 86 S.Ct. 1079). In Kramer, a New York law provided that certain school district residents could vote in an election for school board members only if they owned (or leased) taxable real property within the district, or were parents of children enrolled in the local public schools. See id. at 622, 89 S.Ct. 1886. Even though elections for those positions were not constitutionally required, the Supreme Court invalidated the law under heightened scrutiny, explaining that "[t]he need for exacting judicial scrutiny of statutes distributing the franchise is undiminished simply because, under a different statutory scheme, the offices subject to election might have been filled through appointment." Id. at 628-29, 89 S.Ct. 1886. Once New York chose to provide citizens the right to elect school board members, it had to do so equally and constitutionally.

Cases similar to *Kramer* abound. *See Cipriano v. Houma*, 395 U.S. 701, 704, 89 S.Ct. 1897, 23 L.Ed.2d 647 (1969) ("[I]f a challenged state statute grants the right to vote in a limited purpose election to some otherwise qualified

voters and denies it to others, 'the Court must determine whether the exclusions are necessary to promote a compelling state interest.' ... [N]o less showing that the exclusions are necessary to promote a compelling state interest is required merely because 'the questions scheduled for the election need not have been submitted to the voters." (quoting Kramer, 395 U.S. at 627, 629, 89 S.Ct. 1886); McDonald, 394 U.S. at 807, 89 S.Ct. 1404 ("[W]e have held that once the States grant the franchise, they must not do so in a discriminatory manner."); Evans v. Cornman, 398 U.S. 419, 422, 90 S.Ct. 1752, 26 L.Ed.2d 370 (1970) ("[T]here can be no doubt at this date that once the franchise is granted to the electorate, lines may not be drawn which are inconsistent with the Equal Protection Clause of the Fourteenth Amendment.") (citations and internal quotation marks omitted); Hill v. Stone, 421 U.S. 289, 297, 95 S.Ct. 1637, 44 L.Ed.2d 172 (1975) ("[A]ny classification restricting \*1080 the franchise on grounds other than residence, age, and citizenship cannot stand unless the district or State can demonstrate that the classification serves a compelling state interest."). So, having given certain felons the right to vote through Amendment 4. Florida must comply with the Fourteenth Amendment's guarantee of equal protection.

Even if the right to vote were not fundamental in this context, heightened scrutiny would still apply under *Griffin*, as that case did not turn on whether the right to appeal a criminal conviction was constitutionally guaranteed. Indeed, in *Griffin*, the Supreme Court recognized that the state was not required to provide criminal defendants a right to appellate review of their convictions. *See Griffin*, 351 U.S. at 18, 76 S.Ct. 585 (citing *McKane*, 153 U.S. at 687–88, 14 S.Ct. 913). Yet the Court held that once a state grants such a right, it should not be permitted to "do so in a way that discriminates against some convicted defendants on account of their poverty." *Id.* So too here.

The other cases that the majority relies on, see Maj. Op. at 1029-30, are distinguishable because they do not concern the denial of the franchise to felons who are unable to pay LFOs. For instance, Shepherd v. Trevino, 575 F.2d 1110 (5th Cir. 1978), did not involve conditioning the restoration of felons' voting rights on their ability to pay LFOs. Instead, the case addressed a Texas statute which provided a mechanism for the re-enfranchisement of convicted state felons who satisfactorily completed the terms of their probation, without providing a similar mechanism for the re-enfranchisement of successful federal probationers. See id. at 1111. The former Fifth Circuit declined to apply heightened scrutiny to this classification, explaining that selective re-enfranchisement of felons is permissible under *Richardson. See id.* at 1114–15. It also noted, however, that § 2 of the Fourteenth Amendment does not remove all equal protection considerations from state-created classifications denying the right to vote to some felons while granting it to others. *See id.* at 1114 ("No one would contend that section 2 permits a state to disenfranchise all felons and then reenfranchise only those who are, say, white. Nor can we believe that section 2 would permit a state to make a completely arbitrary distinction between groups of felons with respect to the right to vote.").

Similarly, though *Harvey v. Brewer*, 605 F.3d 1067 (9th Cir. 2010), affirmed the denial of felons' claim that a re-enfranchisement scheme violated equal protection under rational basis review, the Ninth Circuit noted that the "complaint did not allege that any of [the plaintiffs] were incapable of paying the remainder of the money owed under their sentences." Id. at 1071. As Justice O'Connor, writing for the *Harvey* panel, put it: "[N]o plaintiff alleges that he is indigent, so to the extent that fact might affect the analysis, we explicitly do not address challenges based on an individual's indigent status." Id. at 1079. Harvey therefore does not speak to the indigency issue before us. Cf. Hayden v. Paterson, 594 F.3d 150, 154 (2d Cir. 2010) (analyzing a claim that racial animus motivated the adoption of New York's felon disenfranchisement provisions); Owens v. Barnes, 711 F.2d 25, 26 (3d Cir. 1983) (evaluating claim that Pennsylvania's election code violated equal protection by denying incarcerated convicted felons the right to vote, while permitting unincarcerated felons to vote).

The only case the majority cites that is truly in conflict with our decision in Jones I is Johnson v. Bredesen, 624 F.3d 742 (6th Cir. 2010). In Bredesen, a divided Sixth Circuit panel rejected an equal protection \*1081 challenge to a Tennessee voter reenfranchisement statute which conditioned restoration of felons' voting rights on the payment of court-ordered victim restitution and child support obligations. See id. at 746-50. For two reasons, I submit that the Sixth Circuit's application of rational basis review is not persuasive. First, the Sixth Circuit relied on Richardson to conclude that no fundamental right was at stake following re-enfranchisement, see id. at 746, but as discussed above Richardson did not decide that issue. Second, the Sixth Circuit distinguished *Griffin* by stating that it "concerned fundamental interests[.]" Id. at 749. But the Supreme Court acknowledged in Griffin that the right to appellate review of criminal convictions was not constitutionally required or fundamental, and yet still applied heightened scrutiny. See 351 U.S. at 18, 76 S.Ct. 585.

I would apply heightened scrutiny, just as we did in *Jones* I, and conclude that Florida's LFO scheme does not survive. See Jones I, 950 F.3d at 825-28. The Jones I panel's analysis is exhaustive and compelling, and I do not repeat it at length here. But to summarize, "[t]he form heightened scrutiny took in Bearden was comprised of four considerations: (1) the nature of the individual interest affected; (2) the extent to which it is affected; (3) the rationality of the connection between legislative means and purpose; and (4) the existence of alternative means for effectuating the purpose." Id. at 825 (citations and internal quotation marks admitted). Voting is an important and weighty interest, even if not deemed fundamental in this context. See id. at 825-26. That interest is "profoundly affected" here because the LFO requirement completely denies indigent felons the right to vote, at least in any election that occurs while they are indigent. See id. at 826. And, as I will discuss shortly, the LFO requirement does not rationally serve any conceivable legitimate state interest, and Florida has far better ways to collect felons' debts. See id. at 826-27.6

В

Florida contends that the equal protection claim fails because the plaintiffs cannot \*1082 show that it purposefully discriminated against indigent felons. See Appellants' Initial En Banc Br. at 14–19. The majority does not address this contention, but it is important to show how meritless it is. The Supreme Court expressly held in M.L.B. that such a showing of intent is not required to prevail on a wealth discrimination claim under Griffin. See M.L.B., 519 U.S. at 126–27, 117 S.Ct. 555.

In *M.L.B.*, the Supreme Court distinguished *Washington v. Davis*, 426 U.S. 229, 232, 96 S.Ct. 2040, 48 L.Ed.2d 597 (1976), which involved an equal protection challenge to the requirement that individuals had to pass a written test to be hired as police officers in Washington, D.C. *See id.* Although a greater proportion of black test-takers failed the test than white test-takers, the Court concluded that this disproportionate impact, standing alone, could not prove unconstitutional racial discrimination. In this context, to establish an equal protection violation, the black test-takers had to show purposeful racial discrimination. *See id.* at 242, 96 S.Ct. 2040. The Supreme Court explained in *M.L.B.* that cases like *Griffin* and *Williams*, unlike *Davis*, involve laws that are not

"merely *disproportionate* in impact. Rather, they are wholly contingent on one's ability to pay, and thus visit different consequences on two categories of persons." *M.L.B.*, 519 U.S. at 127, 117 S.Ct. 555 (internal quotation marks and alterations omitted). Because these laws "apply to all indigents and do not reach anyone outside that class," the Court concluded that purposeful discrimination need not be shown. *See id. See also Jones I*, 950 F.3d at 828 ("[T]he Supreme Court has *never* required proof of discriminatory intent in a wealth discrimination case[.]") (citing cases).<sup>7</sup>

Here, as in *M.L.B.*, *Griffin*, and *Williams*, the LFO requirement makes the restoration of the right to vote contingent on a felon's ability to pay. In other words, it continues to disenfranchise all indigent felons, while restoring the right to vote to felons who can pay. Under *M.L.B.*, proof of discriminatory intent is simply not required.

I also note that the Supreme Court has not required a showing of intentional discrimination in other cases involving arbitrary discrimination in the voting/election context. See, e.g., Bush v. Gore, 531 U.S. 98, 104-110, 121 S.Ct. 525, 148 L.Ed.2d 388 (2000) (determining that Florida's recount procedures conflicted with equal protection without analyzing whether intentional discrimination had been shown); Harper, 383 U.S. at 666, 86 S.Ct. 1079 (concluding that a state violates equal protection "whenever it makes the affluence of the voter or payment of any fee an electoral standard" without addressing purposeful discrimination). See also Hunter v. Hamilton Cty. Bd. of Elections, 635 F.3d 219, 234 n.13 (6th Cir. 2011) (explaining that intentional discrimination need not be shown to establish an equal protection violation regarding an arbitrary method of counting provisional ballots because "a showing of intentional discrimination has not been required in \*1083 these cases"). This case does not involve the inconsistent counting of ballots, but it does involve the arbitrary and "unguided differential treatment" of potential voters, see id. at 238, even among those felons seeking to pay their LFOs.

 $\mathbf{C}$ 

Though I would review the LFO requirement under heightened scrutiny, my bottom-line position does not turn on what level of scrutiny applies. Even under rational

basis review, the district court correctly held that the LFO requirement violates equal protection. *See Jones II*, 462 F.Supp.3d at 1218–31.

1

As every student of constitutional law knows, the Supreme Court has not always applied rational basis review with the same level of "bite." See, e.g., Laurence Tribe, American Constitutional Law § 16-5, at 999-1000 (1978): Jeffrey D. Jackson, Classical Rational Basis and the Right to be Free of Arbitrary Legislation, 14 Geo. J.L. & Pub. Pol'y 493, 508 (2016). The more important the interest at stake, the more demanding rational basis review becomes. Compare, e.g., F.C.C. v. Beach Commc'ns, Inc., 508 U.S. 307, 313-15, 113 S.Ct. 2096, 124 L.Ed.2d 211 (1993) ("In areas of social and economic policy, a statutory classification that neither proceeds suspect lines nor infringes fundamental constitutional rights must be upheld against equal protection challenge[s] if there is any reasonably conceivable state of facts that could provide a rational basis for the classification."), with, e.g., Zobel v. Williams, 457 U.S. 55, 65, 102 S.Ct. 2309, 72 L.Ed.2d 672 (1982) (holding that Alaska statutory scheme which distributed income derived from its natural resources based on the length of each citizen's residence violated the equal protection clause under rational basis review because Alaska "show[ed] no valid state interests which are rationally served by the distinction it makes between citizens who established residence before 1959 and those who have become residents since then").

The majority applies the most deferential form of rational basis review. See Maj. Op. at 1033–37. But if heightened scrutiny does not apply under the Griffin-Bearden-Harper line of cases, the fact that voting rights are being denied due to indigency at least warrants a more exacting form of rational basis review. The right to vote—even if not considered fundamental for felons who are re-enfranchised—is certainly an important one in our democracy, and it should not be lumped together with other state-created benefits that lack similar institutional significance.

The majority also says—incorrectly I think—that an as-applied challenge is inappropriate under rational basis review. *See* Maj. Op. at 1036–37. In *Cleburne v. Cleburne Living Center*, 473 U.S. 432, 446–50, 105 S.Ct. 3249, 87

L.Ed.2d 313 (1985), the Supreme Court reviewed, under rational basis, a zoning ordinance that required a special use permit for the operation of a group home for the mentally disabled. It found the ordinance unconstitutional "as applied" in that case. *See id.* at 447, 105 S.Ct. 3249 (stating that reviewing the zoning ordinance as applied "is the preferred course of adjudication since it enables courts to avoid making unnecessarily broad constitutional judgments"). The majority may not like *Cleburne*, but it is not for us to choose which Supreme Court cases we are bound by. "When dealing with binding vertical precedent, a court has no room to decide how much weight or value to give each case." Bryan A. Garner \*1084 et al., The Law of Judicial Precedent § 15, at 155 (2016).

Reviewing statutes as applied to indigents, moreover, seems to be typical in wealth discrimination cases where due process and equal protection guarantees intersect. For instance, in *Griffin*, the Supreme Court evaluated whether a state statute requiring defendants to pay for transcripts needed for an appeal could be applied "so as to deny adequate appellate review to the poor while granting such review to all others." *See* 351 U.S. at 13, 76 S.Ct. 585. It did not (as the majority would have us do here) ask whether a state may require payment for transcripts generally.

And Griffin is not an outlier. In other indigency cases the Supreme Court has not struck down statutes that require payment on their face; it has instead told states that in applying these requirements they must account for those who cannot pay. See Boddie, 401 U.S. at 372-73, 91 S.Ct. 780 (reviewing a challenge to state procedures requiring payment of fees and costs to bring an action for divorce "as applied" to the plaintiffs who were unable to pay the fees); Mayer, 404 U.S. at 195, 92 S.Ct. 410 (emphasizing that "the State must provide a full verbatim record where that is necessary to assure the indigent as effective an appeal would be available to the defendant with resources to pay his own way") (emphasis added); M.L.B., 519 U.S. at 107, 117 S.Ct. 555 (holding that the state "may not deny M.L.B., because of her poverty, appellate review of the sufficiency of the evidence on which the trial court found her unfit to remain a parent") (emphasis added). The district court therefore did not err in reviewing the LFO requirement as applied to individuals who are unable to pay. See Jones II, 462 F.Supp.3d at 1230–31.

In addition, we explained in *Jones I* that even if we do not evaluate the rationality of a statute "as applied" to the plaintiffs who were indigent, the focus of rational basis review is on the "typical" or "mine-run" member of the affected class. *See Jones I*, 950 F.3d at 814–17. That principle, rather than misstating rational basis precedent,

comes directly from the Supreme Court's decision in *Califano v. Jobst*, 434 U.S. 47, 55, 98 S.Ct. 95, 54 L.Ed.2d 228 (1977): "The broad legislative classification must be judged by reference to the characteristics typical of the affected classes rather than by focusing on selected, atypical examples." *See also Mass. Bd. of Ret. v. Murgia*, 427 U.S. 307, 315–17, 96 S.Ct. 2562, 49 L.Ed.2d 520 (1976) (discussed in *Jones I*, 950 F.3d at 814–815). And it picks up on Florida's implicit concession in *Jones I* that the LFO scheme could fail rational basis review if there was "evidence that felons unable to pay their [LFOs] vastly outnumber those able to pay." Appellants' Initial Br. in *Jones I* at 29 (citing *Jobst* and *Murgia*).

The district court found "that the mine-run of felons affected by the pay-to-vote requirement are genuinely unable to pay," *Jones II*, 462 F.Supp.3d at 1219, and Florida does not challenge this finding on appeal. Though the majority says a "substantial number" of felons being unable to pay LFOs does not make the scheme irrational, *see* \*1085 Maj. Op. at 1037, the district court found that "the *overwhelming majority* of felons who have not paid their LFOs in full, but who are otherwise eligible to vote, are genuinely unable to pay[.]" *Jones II*, 462 F.Supp.3d at 1219 (emphasis added). How can a system that seeks to encourage felons to pay LFOs be rational if the vast majority are simply *unable* to pay?

2

Rational basis review is deferential to government action, but it is not "toothless." *Schweiker v. Wilson*, 450 U.S. 221, 234, 101 S.Ct. 1074, 67 L.Ed.2d 186 (1981). Under the rational basis standard, a law that distinguishes between different groups does not violate equal protection if "there is a rational relationship between the disparity of treatment and some legitimate governmental purpose." *Bd. of Trs. of Univ. of Ala. v. Garrett*, 531 U.S. 356, 366–67, 121 S.Ct. 955, 148 L.Ed.2d 866 (2001). The rational basis test thus has two prongs: (1) the law must further a legitimate state interest; *and* (2) there must be "a rational relationship between the government's objective and the means it has chosen to achieve it." *Leib v. Hillsborough Cty. Pub. Transp. Comm'n*, 558 F.3d 1301, 1306 (11th Cir. 2009).

In its earliest equal protection cases applying rational basis review, the Supreme Court expounded on the second prong. For example, in *Gulf, C. & S.F. Ry. Co. v.* 

Ellis, 165 U.S. 150, 153, 17 S.Ct. 255, 41 L.Ed. 666 (1897), the Supreme Court reviewed an equal protection challenge to an act that required railroad companies to pay attorney's fees if they lost, but did not award them attorney's fees if they prevailed. The Supreme Court explained that if a state law creates a classification, it must be "one based upon some reasonable ground-some difference which bears a just and proper relation to the attempted classification—and is not a mere arbitrary selection." Id. at 165-66, 17 S.Ct. 255. Thus, a state "may not say that all men beyond a certain age shall be alone thus subjected [to the payment of attorney's fees], or all men possessed of a certain wealth," as "[t]hese are distinctions which do not furnish any proper basis for the attempted classification." Id. at 155, 17 S.Ct. 255 (emphasis added). See also Atchison, T. & S.F.R. Co. v. Matthews, 174 U.S. 96, 105, 19 S.Ct. 609, 43 L.Ed. 909 (1899) ("Is the classification or discrimination prescribed thereby purely arbitrary, or has it some basis in that which has a reasonable relation to the object sought to be accomplished?").

Over the years, the Supreme Court has repeatedly emphasized that, even under rational basis review, there must be some reasonable relationship between the state's goal and the means chosen to achieve it. See, e.g., Bullock, 405 U.S. at 145, 92 S.Ct. 849 ("[E]ven under conventional standards of review, a State cannot achieve its objectives by totally arbitrary means; the criterion for differing treatment must bear some relevance to the object of the legislation."); Romer v. Evans, 517 U.S. 620, 632, 116 S.Ct. 1620, 134 L.Ed.2d 855 (1996) ("[E]ven in the ordinary equal protection case calling for the most deferential of standards, we insist on knowing the relation between the classification adopted and the object to be attained."); Armour v. Indianapolis, 566 U.S. 673, 681, 132 S.Ct. 2073, 182 L.Ed.2d 998 (2012) (stating that a law will survive rational basis review if "the relationship of the classification to its goal is not so attenuated as to render the distinction arbitrary or irrational") (citation and internal quotation marks omitted). Florida asserts that it has an interest in ensuring "that all felons complete all terms of sentence to repay their debt to \*1086 society," or in other words, "in enforcing the punishments it has imposed for violations of its criminal laws." Appellants' Initial En Banc Br. at 35. See also id. at 38 (describing the state's interest "in demanding a full measure of justice from every felon"). The majority somewhat re-frames Florida's goals, stating that "two interests are relevant here": Florida's "interest in disenfranchising convicted felons" and its related "interest in restoring felons to the electorate after justice has been done and they have been fully rehabilitated[.]" Maj. Op. at 1033-34.

Disenfranchising felons, however, is not the goal of Amendment 4. Quite the opposite, Amendment 4 automatically restored voting rights to felons who completed all the terms of their sentences. *See Advisory Op. to the Att'y Gen. Re: Voting Restoration Amendment*, 215 So. 3d 1202, 1208 (Fla. 2017) ("[T]he chief purpose of the amendment is to automatically restore voting rights to felony offenders[.]"). Nor was disenfranchisement the purpose of § 98.0751, which implemented Amendment 4 and is titled "Restoration of voting rights; termination of ineligibility subsequent to a felony conviction." Framing Florida's goal as *reenfranchising* felons who have completed the terms of their sentences is an *ipse dixit*—it merely restates what the law does, rather than provide an interest furthered by the LFO requirement.

For the sake of argument, however, let's assume the legitimacy of each of the asserted state interests. If we do that, "[t]he only remaining question is whether [Florida] achieved its purpose in a patently arbitrary or irrational way." *U.S. R.R. Ret. Bd. v. Fritz*, 449 U.S. 166, 177, 101 S.Ct. 453, 66 L.Ed.2d 368 (1980). In my view, the answer to that question is yes.

I will start with whether the LFO requirement rationally furthers the goals articulated by the majority. Though Florida may disenfranchise felons under *Richardson*, or choose to re-enfranchise only some felons, it cannot draw arbitrary lines between those felons it re-enfranchises and those it does not. *See Shepherd*, 575 F.2d at 1114 ("Nor can we believe that section 2 would permit a state to make a completely arbitrary distinction between groups of felons with respect to the right to vote."); *Harvey*, 605 F.3d at 1079 ("[A] state could not choose to re-enfranchise voters of only one particular race ..., or re-enfranchise only those felons who are more than six-feet tall.").

In *Harvey*, the Ninth Circuit concluded that a state "has a rational basis for restoring voting rights only to those felons who have completed the terms of their sentences, which includes the payment of any fines or restitution orders." 605 F.3d at 1079. But as previously noted Justice O'Connor, writing for the panel, cautioned that "[p]erhaps withholding voting rights from those who are truly unable to pay their criminal fines due to indigency would not pass the rational basis test, but we do not address that possibility because no plaintiff in this case has alleged he is indigent." *Id.* at 1080.

Re-enfranchising felons who complete the terms of their sentences—except for those who are *unable* to pay LFOs—"amounts to nothing 'more than a naked assertion that [a felon's] poverty by itself,' is a sufficient reason to

disqualify the felon from regaining the right to participate in the exercise of democracy." Bredesen, 624 F.3d at 758 (Moore, J., dissenting) (quoting *Bearden*, 461 U.S. at 671, 103 S.Ct. 2064). See Marc Meredith & Michael Morse, Discretionary Disenfranchisement: The Case of Legal Financial Obligations, 46 J. Legal Stud. 309, 311 (2017) ("Although less-wealthy individuals are not a suspect class, conditioning the restoration \*1087 of the right to vote on LFOs without evaluating whether someone is truly unable to pay might not even satisfy a rational basis test."). The majority bases its entire rational basis analysis on the proposition that felons cannot intelligently exercise the franchise—the right to vote—unless they have fully paid their LFOs. See Maj. Op. at 1034–35. But as Harper teaches, a felon's wealth has no bearing on whether he is qualified to vote. See Harper, 383 U.S. at 668, 86 S.Ct. 1079 ("To introduce wealth or payment of a fee as a measure of voter's qualifications is to introduce a capricious or irrelevant factor. The degree of the discrimination is irrelevant. In this context—that is, as a condition of obtaining a ballot—the requirement of fee paying causes an 'invidious' discrimination that runs afoul of the Equal Protection Clause.") (citation omitted). The notion that the indigent cannot be rehabilitated due solely to their inability to pay is non-sensical.

Critically, the fact that Florida had restored voting rights to 0 felons as of the time of trial indicates that this scheme does not "rationally" further the goal of reenfranchising felons. Instead, it shows that Florida's organs of government are doing their best to slowly but surely suffocate Amendment 4.

The majority says that even though their registrations have not been screened, "all 85,000 [registered] felons will be entitled to vote." Maj. Op. at 1026, 1035-36. It also seems to suggest that felons may go ahead and register, as "[o]nce a felon submits a facially complete registration form ..., he is added to the voting rolls as a registered voter; he is not then required to prove that he has completed his sentence." *Id.* at 1035. But these statements overlook the critical fact that Florida has kept tens of thousands of felons in voting limbo, not knowing their LFO status (and therefore not knowing their eligibility to vote).

Should felons choose to vote after registering, and then later find out that they are not in fact eligible to vote, they may be subject to prosecution. Even the Director of the Division of Elections acknowledged at trial that if she "were in the voter's position, [she doesn't] know that [she] would be swearing under oath if [she] wasn't sure about" her eligibility. *See* Tr. at 1381. She agreed that requiring felons to affirm their eligibility to vote in their

registration forms "is certainly a challenge ... and that's why [the Division] offered up the advisory opinion, to see if that would give them some cover." *Id.* To make matters more treacherous for felons, there is no good-faith safe harbor to protect those who register and vote, but later turn out to be mistaken about their eligibility. *See Jones II*, 462 F.Supp.3d at 1229–30 ("SB7066 provides immunity from prosecution for those who registered in good faith between January 8, 2019, when Amendment 4 took effect, and July 1, 2019, when SB7066 took effect. A proposal to add a good-faith provision for other registrants was rejected.").

Unlike the majority, Florida does not assert that felons should go ahead and vote once they register, instead arguing that it "has an interest in avoiding having felons presumed eligible to vote before an investigation can reasonably be completed, as that would pose a substantial risk of authorizing *ineligible* felons to vote." Appellants' En Banc Reply Br. at 32. If the majority's suggestion that felons can simply vote once they register (without knowing whether they have actually satisfied their LFO requirements) were accurate, that would belie Florida's contention (adopted by the majority) that the purpose of the LFO-requirement is to ensure that felons cannot \*1088 vote until they complete all terms of their sentences.

3

Florida, as noted, maintains that the LFO scheme advances its interest in "all felons complet[ing] all terms of sentence," or in enforcing the punishments it imposes. See Appellants' Initial En Banc Br. at 35. To the extent that Florida's interest is in punishment, as we explained in Jones I, the LFO scheme punishes indigent felons "more harshly than those who committed precisely the same crime.... And this punishment is linked not to their culpability, but rather to the exogenous fact of their wealth." Jones I, 950 F.3d at 812. This cannot be rational.

If Florida's interest is in felons repaying their full debts to society, requiring indigent felons to pay LFOs before regaining the right to vote does not actually aid in collections. See id. at 811 ("The problem with the incentive-collections theory is that it relies on the notion that the destitute would only, with the prospect of being able to vote, begin to scratch and claw for every penny, ignoring the far more powerful incentives that already

exist for them—like putting food on the table, a roof over their heads, and clothes on their backs."); *Jones II*, 462 F.Supp.3d at 1230 ("[O]ne cannot get blood from a turnip or money from a person unable to pay."). The LFO requirement thus erects a barrier to voting for the indigent, "without delivering any money [to the state or to victims] at all[.]" *Zablocki v. Redhail*, 434 U.S. 374, 389–91, 98 S.Ct. 673, 54 L.Ed.2d 618 (1978) (invalidating a state statute that required an individual to show he had satisfied court-ordered child support before being able to marry). *See also Bredesen*, 624 F.3d at 756 (Moore, J., dissenting) ("I fail to see how preconditioning suffrage on a payment that a person is unable to make is in any rational way related to the government's interest in promoting that payment.").

In addition, Florida "has far better ways to collect amounts it is owed." Jones II, 462 F.Supp.3d at 1230. In United States Department of Agriculture v. Moreno, 413 U.S. 528, 529, 93 S.Ct. 2821, 37 L.Ed.2d 782 (1973), the Supreme Court invalidated—under rational basis review—a provision of the Food Stamp Act which permitted individuals who live in households where everyone is related to obtain food stamps, but denied food stamps to those who live in households where at least one person is unrelated. Although the government argued that this scheme would minimize fraud in the administration of the food stamp program—a seemingly unassailable contention under rational basis review—the Supreme Court found that the existence of other provisions aimed specifically at preventing fraud cast doubt on that goal. See id. at 536-37, 93 S.Ct. 2821. The Supreme Court also explained that "in practical effect, the challenged classification simply does not operate so as to rationally further the prevention of fraud." Id. at 537, 93 S.Ct. 2821. If the scheme in Moreno was found constitutionally wanting, Florida's LFO requirement does not stand a chance of surviving.

Here, as in *Moreno*, other statutes aimed at collecting LFOs cast doubt on Florida's purported goal. *See*, *e.g.*, Fla. Stat. § 28.246(6) (authorizing the clerk of court to pursue the collection of financial obligations by referring the account to a \*1089 private attorney or collection agent); Fla. Stat. § 938.35 (authorizing a board of county commissioners or governing body of a municipality to refer the collection of fees, fines, or costs to which it is entitled to a private attorney or collection agent); Fla. Stat. § 775.089(12)(a) (authorizing the court to enter an income deduction order to make deductions from income paid to the defendant to meet the defendant's restitution obligations). And felons are required by law to pay all of their outstanding LFOs whether or not their voting rights are restored. Those LFOs are not wiped out if indigent

felons are allowed to vote.

Moreover, "in practical effect" the LFO requirement does not rationally further Florida's asserted goal. *See Moreno*, 413 U.S. at 537, 93 S.Ct. 2821. The district court's undisputed factual findings show that Florida often cannot tell felons how much they owe. If Florida cannot inform felons about the amount of LFOs they have outstanding—information which they must have in order to satisfy their obligations—how can this system possibly encourage or incentivize felons to complete the terms of their sentences? There is no answer, because no answer is possible.

Florida's newly-minted every-dollar method—created, I think, for this litigation—also undermines the claimed goal of requiring that every felon complete all terms of his sentence, as it allows a felon to regain the right to vote without actually satisfying his LFOs. As discussed earlier, under the every-dollar method, a felon need not pay all of his underlying LFOs, so long as the amount of payments made towards fees and surcharges equals or exceeds the amount of LFOs initially ordered. This could, in some cases, lead to a victim receiving less than the full amount of restitution ordered, or Florida receiving less than the fines, fees, and costs imposed. See Tr. at 1359. Florida that the every-dollar policy "promotes administrability by making it easier to track felon payments while demanding that felons pay the monetary amounts set forth in their sentencing document before regaining eligibility to vote." Appellants' En Banc Reply Br. at 16. But the district court's unchallenged factual findings establish that it does just the opposite, given that county records routinely show only the net payment received from collections agencies, making it extremely difficult (if not impossible) to calculate the amount that felons have already paid under this approach.

Florida further claims that it is "treating all felons equally, regardless of financial circumstance," by requiring that all felons pay their LFOs before regaining the right to vote. See Appellants' Initial En Banc Br. at 35. But, in effect, the LFO requirement precludes indigent felons from voting, while re-enfranchising those felons who can pay—the antithesis of equal treatment. A system that permits non-indigent felons to regain the right to vote, while continuing to disenfranchise indigent felons, cannot be rational. Cf. Bredesen, 624 F.3d at 759 (Moore, J., dissenting) ("Because the Plaintiffs are otherwise eligible for the automatic restoration of the right to vote but are prevented from attaining that right because of their inability to pay a sum, the Tennessee statute effectively sets affluence as a voting qualification and is plainly irrational.").

Two decades ago, the Supreme Court explained in Bush that "[t]he right to vote is protected in more than the initial allocation of the franchise. Equal protection applies as well to the manner of its exercise." 531 U.S. at 104, 121 S.Ct. 525. The Supreme Court held in that momentous case that the recount mechanisms Florida implemented during the 2000 election did not \*1090 "satisfy the minimum requirement for nonarbitrary treatment of voters" because of "the absence of specific standards to ensure its equal application." *Id.* at 105–06, 121 S.Ct. 525. "The formulation of uniform rules" was necessary because "the standards for accepting or rejecting contested ballots might vary not only from county to county but indeed within a single county from one recount team to another." Id. at 106, 121 S.Ct. 525. It is not too much to demand the same here. "The idea that every voter is equal to every other voter in his State," Gray v. Sanders, 372 U.S. 368, 380, 83 S.Ct. 801, 9 L.Ed.2d 821 (1963), applies to felons and non-felons alike. See id. at 380-81, 83 S.Ct. 801 ("Minors, felons, and other classes may be excluded [from voting]. But once the class of voters is chosen and their qualifications specified, we see no constitutional way by which equality of voting power may be evaded.") (citation omitted).

In Florida, whether a felon is deemed eligible to vote may vary county by county, depending on which Supervisor of Elections reviews a felon's registration. This is because the Division of Elections has not provided any guidance whatsoever to Supervisors of Elections on how to implement the LFO requirement, see Tr. at 474, 476, and there is confusion about how to determine how much a felon owes—with different officials following different methods. See Jones, 462 F.Supp.3d at 1222-23 (noting that "one Supervisor of Elections testified she had never heard of the [every-dollar] method the State now embraces"). As one County Supervisor of Elections testified, "usually the Division of Elections writes a rule to help us implement the law. Rules are very important because they make sure that all 67 of us are treating our voters basically in the same manner." Tr. at 474. Yet after the passage of § 98.0751, Florida has issued no new rules for implementing the LFO requirement. See id. "This is not a process with sufficient guarantees of equal treatment." Bush, 531 U.S. at 107, 121 S.Ct. 525.

To recap, Florida has effectively disenfranchised almost the entire class of felons who were given the right to vote by Amendment 4. And it has done so by means that bear no rational relationship to the goals it seeks to achieve.

#### Ш

The majority says that the district court did not decide whether Florida's reenfranchisement scheme violates the Due Process Clause. See Maj. Op. at 1027–28, 1046. In my view, the district court concluded that the LFO requirement violates due process: "The requirement to pay, as a condition of voting, amounts that are unknown and cannot be determined with diligence is unconstitutional." Jones II, 462 F.Supp.3d at 1250. This is a due process holding—not an equal protection holding—as it does not rest on differential treatment of those who are unable to pay, but on Florida's failure to give felons adequate notice or information on how to satisfy the terms of their sentences.

The district court got it right. The LFO requirement violates due process because Florida does not provide felons with adequate notice of their eligibility to vote. Contrary to the majority's assertion, *see* Maj. Op. at 1048–49, the LFO requirement is not merely "legislative," and it is subject to a procedural due process challenge. Figuring out whether felons have paid their LFOs is adjudicative, for the Division of Elections is tasked with both conducting an individualized assessment of a felon's LFOs and determining whether they have been satisfied.

Finally, § 98.0751 is unconstitutionally vague. It does not provide sufficient standards \*1091 for how to determine whether a felon has satisfied the LFO requirement, resulting in arbitrary application.

#### A

"The Fourteenth Amendment's Due Process Clause protects persons against deprivations of life, liberty, or property[.]" Wilkinson v. Austin, 545 U.S. 209, 221, 125 S.Ct. 2384, 162 L.Ed.2d 174 (2005). Our analysis under the Due Process Clause "proceeds in two steps: We first ask whether there exists a liberty or property interest of which a person has been deprived, and if so we ask whether the procedures followed by the State were constitutionally sufficient." Swarthout v. Cooke, 562 U.S. 216, 219, 131 S.Ct. 859, 178 L.Ed.2d 732 (2011).

"A liberty interest may arise from the Constitution itself, by reason of guarantees implicit in the word 'liberty,'

...for it may arise from an expectation or interest created by state laws or policies." Wilkinson, 545 U.S. at 221, 125 S.Ct. 2384 (citations omitted). The right to vote creates a fundamental liberty interest. See, e.g., Harper, 383 U.S. at 670, 86 S.Ct. 1079 ("[T]he right to vote is too precious, too fundamental to be so burdened or conditioned."); Reynolds, 377 U.S. at 554, 84 S.Ct. 1362 ("Undeniably the Constitution of the United States protects the right of all qualified citizens to vote, in state as well as in federal elections."); Cook v. Randolph Cty., 573 F.3d 1143, 1152 (11th Cir. 2009) ("The Constitution certainly protects the right to vote."); Doe v. Rowe, 156 F. Supp. 2d 35, 47–48 (D. Me. 2001) ("[V] arious courts have recognized that the fundamental nature of the right to vote gives rise to a liberty interest entitled to due process protection.") (citing cases).

Though the Constitution permits states to disenfranchise felons, see Richardson, 418 U.S. at 54, 94 S.Ct. 2655, Florida's citizens chose through Amendment 4 to provide a right to vote for felons who have completed all terms of their sentences, thereby creating a liberty interest. And when a state chooses to create a liberty interest, "the Due Process Clause requires fair procedures for its vindication." Swarthout, 562 U.S. at 220, 131 S.Ct. 859 ("There is no right under the Federal Constitution to be conditionally released before the expiration of a valid sentence, and the States are under no duty to offer parole to their prisoners. When, however, a State creates a liberty interest, the Due Process Clause requires fair procedures for its vindication—and federal courts will review the application of those constitutionally procedures."). See also Wolff v. McDonnell, 418 U.S. 539, 558, 94 S.Ct. 2963, 41 L.Ed.2d 935 (1974) ("We think a person's liberty is equally protected, even when the liberty itself is a statutory creation of the State."); Bell v. Burson, 402 U.S. 535, 539, 91 S.Ct. 1586, 29 L.Ed.2d 90 (1971) (repeating "the general proposition" that the Due Process Clause "limit[s] state power to terminate an entitlement whether the entitlement is denominated a 'right' or a 'privilege' "); Martin v. Kemp, 341 F. Supp. 3d 1326, 1338 (N.D. Ga. 2018) ("Having created an absentee voter regime through which qualified voters can exercise their fundamental right to vote, the State must now provide absentee voters with constitutionally adequate due process protection.").10

\*1092 Before a state can deprive a person of a liberty or property interest, due process obligates it to provide him with adequate notice. See, e.g., Snyder v. Massachusetts, 291 U.S. 97, 127, 54 S.Ct. 330, 78 L.Ed. 674 (1934) ("It is fundamental that there can be no due process without reasonable notice and a fair hearing."), overruled in part on other grounds by Malloy v. Hogan, 378 U.S. 1, 84

S.Ct. 1489, 12 L.Ed.2d 653 (1964). That notice must "apprise the affected individual of, and permit adequate preparation for, an impending 'hearing.' "Memphis Light, Gas & Water Div. v. Craft, 436 U.S. 1, 14-15, 98 S.Ct. 1554, 56 L.Ed.2d 30 (1978) (holding that notice that a utility bill was overdue and that service would be disconnected unless payment was made by a certain date violated due process because it "[d]id not advise the customer of the availability of a procedure for protesting a proposed termination of utility service as unjustified"). See also Mullane v. Cent. Hanover Bank & Trust Co., 339 U.S. 306, 314, 70 S.Ct. 652, 94 L.Ed. 865 (1950) ("The notice must be of such nature as reasonably to convey the required information[.]"); Armstrong v. Manzo, 380 U.S. 545, 550, 85 S.Ct. 1187, 14 L.Ed.2d 62 (1965) ("[A]n elementary and fundamental requirement of due process ... is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.").

A Florida statute, § 98.075(7), outlines the procedures for removal from the voter rolls, including notice of the registered voter's ineligibility and an opportunity to request a hearing. But these procedures fall constitutionally short for several reasons.

First, the procedures set forth in § 98.075(7) do not come into play until *after* the Division of Elections begins to screen registrants, determines that they are ineligible to vote, and seeks to remove them from the voter rolls. As the district court found, and Florida does not contest, the Division of Elections has processed 0 out of 85,000 pending registrations of felons. So, for those 85,000 registrants—and all those who will surely follow—the statutory requirement of notice and a hearing is completely illusory. Those appalling numbers, unfortunately, mean nothing to Florida or to the majority.

Second, should any of these 85,000 registrants choose to vote in the upcoming election—as they may believe, in good faith, they have a right to do—they risk criminal prosecution if they turn out to be wrong about their eligibility. Given Florida's lack of clarity regarding how to calculate outstanding LFOs, this will surely be the case for at least some felons. The truth is that many of these registrants will not vote to avoid the risk of prosecution, even if they are in fact eligible, creating a de facto denial of the franchise. See N.A.A.C.P. v. Button, 371 U.S. 415, 433, 83 S.Ct. 328, 9 L.Ed.2d 405 (1963) ("The threat of sanctions may deter their exercise almost as \*1093 potently as the actual application of sanctions."). Florida ignores this reality, and the majority is blind to it.

Third, there is no procedure for a felon to determine his eligibility to vote before registering—even though the voter registration form requires registrants to sign an oath affirming that they are qualified to vote. Florida says that felons who wish to vote may access their records through the county clerk's office or call clerks to obtain information. See Appellants' Initial En Banc Br. at 54. But the record belies that claim, and reflects that such inquiries are usually fruitless. As discussed earlier, the evidence at trial showed that the state's records are often inconsistent or incomplete, clerks are often unhelpful, counties do not maintain records of payments (including collection or payment plan fees), and the state often maintains no records of restitution. Two County Supervisors of Elections testified that there is no reliable database that voters can use to check all the different LFOs they may owe. And even if some records are available, Florida's own witnesses can't say whether the actual-balance method, or the every-dollar method, should be used to determine the amount of LFOs outstanding. Understandably, the district court found that "[t]rying to obtain accurate information" by contacting the supervisor of elections or clerk of court "will almost never work." Jones II, 462 F.Supp.3d at 1220.

Fourth, if a felon registers based on the belief that he is eligible to vote, and then turns out to be wrong, he may be prosecuted for making a false affirmation in connection with voting. Florida downplays this risk, proclaiming that felons should rest assured that they will not be convicted if they registered in good faith because willfulness must be shown to prove a violation of Fla. Stat. § 104.011. But that comforting assurance—tactically made for an advantage in litigation—is useless, as it does not tell us how the state's prosecutors will choose to prosecute possible or alleged violations of the law. Cf. Stenberg v. Carhart, 530 U.S. 914, 940-41, 120 S.Ct. 2597, 147 L.Ed.2d 743 (2000) (declining to accept the attorney general's "narrowing interpretation" of the state's abortion statute as "authoritative" because it did not bind the state courts or local law enforcement authorities). Felons should not have to register in the hope that a jury will later find good faith should they be prosecuted. See Morgan v. Wofford, 472 F.2d 822, 827 (5th Cir. 1973) ("Especially when criminal sanctions may be involved, we have always been careful to surround the procedures through which the state may deprive a defendant of freedom with safeguards against possible miscarriages of justice.").11

#### B

The Director of the Division of Elections testified that, to avoid risk of prosecution, a felon may request an advisory opinion. Under Fla. Stat. § 106.23(2), any person who relies on an advisory opinion in good faith will be immune from prosecution. But that statute does not make clear that the advisory opinion process is available to any individual with questions about his or her eligibility to vote. See § 106.23(2) ("The Division of Elections shall provide advisory opinions when requested by any supervisor of elections, candidate, local officer having election-related duties, political party, affiliated party committee, political committee, or other person or organization engaged in political activity, relating to any provisions or possible violations of Florida election laws...."). The statute, moreover, sets no \*1094 time frame for when the Division must provide an advisory opinion. See id. Tellingly, the Director could not say how long it would take to obtain an advisory opinion, other than to generally state that it could take a week or months. See Tr. at 1387-89. To make matters worse, the Division's own website does not provide guidance on what a request for an advisory opinion should include. See id. at 1393. Florida's lack of good faith in the 18 months since the passage of Amendment 4 is undeniable and palpable. What Florida is really unhappy about is that the district court's advisory opinion process will actually require it to work, to do its job, within a specified time-frame.

Although it was the Director of the Division of Elections who suggested the advisory opinion procedure at trial, Florida now incredibly argues that "[t]he district court offered no legal basis for charging the State with the responsibility of providing felons with information about their own unfulfilled criminal sentences and any payments that they themselves have made toward them." Appellants' Initial En Banc Br. at 53. The majority seems to adopt this argument, stating that the Due Process Clause does not make Florida responsible for "locating and providing felons with the facts necessary to determine whether they have completed their financial terms of sentence." Maj. Op. at 1049.

This is a remarkable holding. I know of no cases (or other authorities) that say or hold that a state can impose a condition for the exercise of a right or privilege, and then refuse to explain to a person what the condition consists of or how to satisfy it. To the contrary, §§ 98.075(5) and 98.0751(3)(a)—Florida's own laws—obligate the Division of Elections to make initial eligibility determinations, and §§ 98.075(7) and 98.0751(3)(b) charge County Supervisors of Elections with making the

ultimate determination of eligibility. Federal law likewise requires states to inform applicants of voter eligibility requirements. *See* 52 U.S.C. § 20507(a)(5)(A). How can Florida make eligibility determinations without figuring out the amount of LFOs that a felon has outstanding? Florida cannot choose to condition the right to vote on payment of LFOs and then throw up its hands and refuse to tell potential voters how to fulfill that condition. "[A] party's ability to take steps to safeguard its interests does not relieve the State of its constitutional obligation." *Mennonite Bd. of Missions v. Adams*, 462 U.S. 791, 799, 103 S.Ct. 2706, 77 L.Ed.2d 180 (1983).<sup>12</sup>

To put this in some perspective, imagine a state that requires, as a condition of renewing drivers' licenses and vehicle registrations, that drivers pay all outstanding citations for parking/traffic infractions. A driver goes to his county agency and is told that he may have some unpaid citations. He asks for information about the citations and their respective amounts so that he can verify their accuracy and pay whatever is outstanding. But the clerk tells him that the state can't give him the information because the debt for the citations has been sold to third-party collection agencies; those agencies charge certain fees (which vary by agency and year) on top of the citation amounts: and the county has no way of knowing what those fees are or what amounts have been paid or credited. The clerk tries to call other state agencies \*1095 (and some of the collection agencies) to get answers, but to no avail, and tells the driver he will have to figure everything out on his own. So the driver has to leave without his license and car registration, and will need to risk driving in violation of the law-and face arrest-in order to get to work, take his children to school, and carry out the other tasks of daily life. Would this state of affairs be constitutionally permissible? Of course not.

Assuming Florida ever gets around to processing felons' registrations—something I have significant doubts about given the record in this case—those who it believes are ineligible would presumably receive notice under § 98.075(7). That statute does not, however, require the County Supervisor of Elections to disclose in the notice the amount of LFOs that a felon owes. See § 98.075(7)(a)(1)(a) (providing that the notice must include a "statement of the basis for the registered voter's potential ineligibility," but not requiring a specific determination of the amount of LFOs owed). And the record reflects that Florida often will be unable to determine that amount itself. See D.E. 360-47 at 8-9. Indeed, one County Supervisor of Elections testified that she would not even feel equipped to handle a hearing on outstanding LFOs, should a voter request one. See Tr. at

501 ("Q. Do you feel adequately equipped with information to handle a hearing on outstanding fines and fees if a voter requests one? A. Not at this ... time.").

Florida's additional argument—that "concerns about the precise amount of a felon's outstanding financial obligations simply do not attend a system in which the sole question for eligibility is whether *any* amount remains outstanding," Appellants' Initial En Banc Br. at 52—is astounding. With no way to figure out how much they owe, or whether they owe anything at all, felons cannot know whether they have satisfied their payment obligations, and so cannot contest their ineligibility if they request a hearing. Nor can they determine how much money they need to allot towards paying off their LFOs in order to obtain the right to vote in future elections. *Cf. Morgan*, 472 F.2d at 827 (holding that a defendant must have a chance to challenge the accuracy of the amount of restitution owed).

Even if felons could be saddled with the initial burden of trying to figure out their LFO status, it is Florida—and only Florida—which has the information and the ability to provide the ultimate answer to the felons' inquiries. There is no third-party aggregator of data to whom the felons can turn.

As the Seventh Circuit has aptly stated: "It is universally agreed that adequate notice lies at the heart of due process. Unless a person is adequately informed of the reasons for denial of a legal interest, a hearing serves no purpose—and resembles more a scene from Kafka than a constitutional process." Chicago Cable Commc'ns v. Chicago Cable Comm'n, 879 F.2d 1540, 1546 (7th Cir. 1989) (citations and internal quotation marks omitted). Cf. Franz Kafka, The Trial (1925). Although § 98.075(7) sets out a procedure in form, in substance it does not provide meaningful notice or information before depriving felons of the right to vote, now guaranteed to them under Florida law. See Bell, 402 U.S. at 541, 91 S.Ct. 1586 ("[I]n reviewing state action in this area [of due process] we look to substance, not bare form, to determine whether constitutional minimums have been honored.") (citation and internal quotation marks omitted); Mullane, 339 U.S. at 315, 70 S.Ct. 652 ("[P]rocess which is a mere gesture is not due process. The means employed must be such as one desirous \*1096 of actually informing the absentee might reasonably adopt to accomplish it.").

The majority rejects the plaintiffs' due process argument because, it says, any deprivation of their right to vote "was accomplished through the legislative process and the process for adopting a constitutional amendment[.]" Maj. Op. at 1048. It is true that "[w]hen the legislature passes a law which affects a general class of persons, those persons have all received procedural process—the legislative process." 75 Acres, LLC v. Miami-Dade Cty., 338 F.3d 1288, 1294 (11th Cir. 2003) (citation and internal quotation marks omitted). But the majority ignores the necessary adjudicative phase of the re-enfranchisement process under Florida's own laws.

On its face, § 98.0751 sets forth an adjudicative process for determining felons' eligibility to vote. It explains that "[t]he department shall obtain and review information pursuant to s. 98.075(5) related to a person who registers to vote and make an initial determination on whether such information is credible and reliable regarding whether the person is eligible," and that "[u]pon making an initial determination of the credibility and reliability of such information, the department shall forward such information to the supervisor of elections pursuant to s. 98.075." § 98.0751(3)(a). It further provides that "[a] local supervisor of elections shall verify and make a final determination pursuant to s. 98.075 regarding whether the person who registers to vote is eligible," and that "the supervisor of elections may request additional assistance from the department in making the final determination, if necessary." § 98.0751(3)(b)–(c).

As these provisions make clear, determining eligibility to vote under Florida law requires evaluating past facts, including the amount of LFOs a felon was ordered to pay, and then calculating the amount that has already been paid (and where or to whom the payments are credited). This requires a number of adjudicative decisions—e.g., deciding whether LFOs are linked to misdemeanor or felony convictions if a felon has both, deciding whether to employ the actual-balance or every-dollar method, and deciding what evidence is enough to prove a payment has been made.

Under Supreme Court and Eleventh Circuit precedent, this process is undeniably individual and adjudicatory. *See Prentis v. Atlantic Coast Line Co.*, 211 U.S. 210, 226, 29 S.Ct. 67, 53 L.Ed. 150 (1908) ("A judicial inquiry investigates, declares, and enforces liabilities as they stand on present or past facts and under laws supposed already to exist. That is its purpose and end. Legislation, on the other hand, looks to the future and changes existing conditions by making a new rule, to be applied thereafter to all or some part of those subject to its power."); *Crymes v. DeKalb Cty.*, 923 F.2d 1482, 1485 (11th Cir. 1991) ("If

the facts utilized in making a decision are specific, rather than general, in nature, then the decision is more likely administrative. Moreover, if the decision impacts specific individuals, rather than the general population, it is more apt to be administrative in nature."). See also Thomas v. New York, 143 F.3d 31, 36 n.7 (2d Cir. 1998) (inquiring whether the action at issue is "fully legislative" such that the legislative process is the only process due or "at least in part[] adjudicative" such that individuals have a right to procedural due process and explaining that "[a]djudicative facts are facts about the parties and their activities"), cited with approval in 75 Acres, 338 F.3d at 1296. Indeed, Florida's procedure for determining whether registrants should be removed from the voter \*1097 rolls is similar to schemes that the Supreme Court has reviewed in other due process cases involving the denial of a state-created benefit. See, e.g., Goldberg v. Kelly, 397 U.S. 254, 260-62, 90 S.Ct. 1011, 25 L.Ed.2d 287 (1970) (reviewing whether a state's procedure for terminating public assistance payments procedural due process); Mathews v. Eldridge, 424 U.S. 319, 340-49, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976) (reviewing whether the procedure for terminating Social Security disability benefit payments complied with due process).

The First Circuit's opinion in Garcia-Rubiera v. Fortuno, 665 F.3d 261 (1st Cir. 2011), is both instructive and persuasive. There, Puerto Rico law required all motor vehicle owners to pay for compulsory, state-issued automobile insurance, but guaranteed a reimbursement for those who had already paid for private insurance. See id. at 263. The relevant statute, however, did not itself set up procedures for reimbursement or tell insureds where or how to find such procedures. See id. In fact, insureds would not find the procedures unless they went in person to the proper office of government and made an "appropriate request" for a copy of the regulation. See id. at 263-64. The First Circuit held that this scheme violated the notice requirements of the Due Process Clause. See id. at 264. In so holding, it explained that enactment of the statute did not provide adequate notice, as it gave "no notice to insureds of how to obtain reimbursement; it merely direct[ed] the Secretary of the Treasury to 'establish a procedure for processing the reimbursement request from any person." *Id.* at 272 (citation omitted). "Absent a trip, in person, to the appropriate office of government and a proper request to inspect the regulation, the Commonwealth has left plaintiffs in the dark as to every aspect of [the procedure]. The Commonwealth's statutory notice argument thus fails." Id. at 274.

Here, similarly, neither Amendment 4 nor § 98.0751 tells felons how to determine whether they have outstanding

LFOs. The legislative process is not the end of the matter, and Florida's current adjudicatory scheme cannot possibly give adequate notice to felons as to whether they will be regaining the right to vote or not. And, as in *Fortuno*, absent a trip or a call to the appropriate government office (or collection agency), felons will not know how these decisions are made—only here, even with such a call or trip, they still may not have access to accurate information about their outstanding LFOs or know whether they are eligible to vote. Thus, "more than statutory notice is required." *Id.* at 275.

#### D

The due process problems do not end there. The Supreme Court has told us that a law may be vague for two independent reasons: "First, it may fail to provide the kind of notice that will enable ordinary people to understand what conduct it prohibits; second, it may authorize and arbitrary even encourage and discriminatory enforcement." Chicago v. Morales, 527 U.S. 41, 56, 119 S.Ct. 1849, 144 L.Ed.2d 67 (1999). In my view, § 98.0751 is impermissibly vague for the latter reason—it fails to "provide explicit standards" on how to implement the LFO requirement so as to avoid "arbitrary and discriminatory" application. See Grayned v. Rockford, 408 U.S. 104, 108, 92 S.Ct. 2294, 33 L.Ed.2d 222 (1972).

"Vague laws invite arbitrary power ... by leaving the people in the dark about what the law demands and allowing prosecutors and courts to make it up." Sessions v. Dimaya, — U.S. —, 138 S. Ct. 1204, 1223–24, 200 L.Ed.2d 549 (2018) (Gorsuch, J., concurring). The lack of \*1098 standards regarding how to implement the LFO requirement—as demonstrated by the evidence at trial and the district court's unchallenged factual findings—allows the Division of Elections and County Supervisors of Elections to "make it up" as they go, outside the legislative process and without any oversight to ensure uniformity.

As already discussed, § 98.0751(3)(a)—(b) provides that the Division shall make an "initial determination" about a registrant's eligibility to vote, and a local Supervisor of Elections must then "verify and make a final determination." But the statute does not provide any guidance on how to determine whether a felon owes LFOs, and in what amount, if those matters are not clear from the four corners of the sentencing document. And

there has been no guidance from Florida officials on what to do if records about a felon's LFOs are unclear or inconsistent. *See* Tr. at 512–13.

The majority says that the law itself is not vague, and instead felons are just uncertain about "factual circumstances" regarding their eligibility to vote. See Maj. Op. at 1047. But these "factual circumstances" are the whole ballgame, and not merely insignificant details. In any event, it is not just felons who are confused about whether they have satisfied the terms of their sentences. Because the Division of Elections has not provided any guidance to County Supervisors of Elections on how to implement the LFO requirement, they too are "left guessing" as to how to impose it. See Wollschlaeger v. Governor, Fla., 848 F.3d 1293, 1319 (11th Cir. 2017) (en banc) (holding that a Florida law that barred health care practitioners from "unnecessarily harassing a patient about firearm ownership" was unconstitutionally vague because reasonable doctors were "left guessing" as to what was prohibited). And a "wrong guess" here results in "severe consequences": the wrongful denial of the right to vote, or an arrest for a voting violation. See id.

The record shows that, because of the absence of clear guidelines, there is a lack of consistency in how County Supervisors of Elections are imposing the LFO requirement. Some may be enforcing it; others may not. One County Supervisor of Elections, for example, testified that his office only checks for restitution. See Tr. at 912-13 ("Q. So is it your testimony that the only legal financial obligation you currently check for is restitution? A. Currently, right now that's what we are looking for ... We are not trying to dig up the fines and fees and that type of thing. I think the law is not clear on that, but that's where we are."). It is unclear what other County Supervisors are doing. Not only does the record before the district court reflect the risk of arbitrary enforcement, the risk seems to be well known. See Gonzalez, Voter Restoration, 44 Nova L. Rev. at 220 ("[T]he restoration of voting rights [in Florida] continues to be complicated and discriminatory. There is no single entity in place to track LFOs, and it will be very expensive to create such a system.... [I]t is unclear how individuals will know the total amount of LFOs they need to pay before regaining their right to vote, or how election officials will know who is able to register.").

What a great system Florida has set up. If the stakes were not so high, it would be laughable and deserving of a Dave Barry article lampooning the state's bureaucratic incompetence and malfeasance. *See, e.g.*, Dave Barry, Best. State. Ever.: A Florida Man Defends His Homeland 22 (2016) ("[O]ur state government is excellent.... No,

that's a lie.").

There is also an incredible lack of uniformity as to what method Florida uses to determine the amount of LFOs owed. The \*1099 Director of the Division of Elections testified at trial that the every-dollar method would be used, but as the district court noted, the Assistant Director of the Division of Elections initially testified, in effect, that the actual-balance method is the proper approach. And one County Supervisor of Elections testified she had never heard of the every-dollar method. See Jones II, 462 F.Supp.3d at 1222–23. As a result of this bureaucratic confusion, and Florida's failure to codify any method, whether a felon is considered to have completed his LFO obligations may depend on who is reviewing that felon's registration form—someone who follows the every-dollar method, or someone who applies the actual-balance method, or someone who comes up with a brand new method. The right to vote-even if considered a state-created benefit for re-enfranchised felons—is too important to be denied in this inconsistent, unorderly, and nonsensical manner.

#### IV

The Twenty-Fourth Amendment, ratified in 1964, provides that the right to vote "shall not be denied or abridged by the United States or any State by reason of failure to pay any poll tax or other tax." U.S. Const. amend. XXIV. This straightforward language confirms the principle that "a tax on the right to vote is constitutionally indefensible." *United States v. Alabama*, 252 F. Supp. 95, 105 (M.D. Ala. 1966) (three-judge court) (Johnson, J., concurring).

The district court concluded that fees and costs routinely imposed by Florida on criminal defendants are "other tax[es]" prohibited by the Twenty-Fourth Amendment, as they are "assessed regardless of whether a defendant is adjudged guilty, bear no relation to culpability, and are assessed for the sole or at least primary purpose of raising revenue to pay for government operations.... A tax by any other name." *Jones II*, 462 F.Supp.3d at 1233. The Supreme Court's only decision interpreting the Twenty-Fourth Amendment, the text and contemporaneous understanding of the Amendment, and Supreme Court cases analyzing what constitutes a "tax" all confirm that the district court was correct.

#### A

Fees and costs routinely imposed on criminal defendants-in operation and in substance-constitute an "other tax" under the Twenty-Fourth Amendment. See United States v. Constantine, 296 U.S. 287, 294, 56 S.Ct. 223, 80 L.Ed. 233 (1935) (explaining that courts "[d]isregard[] the designation of the exaction, and view[] its substance and application" to determine whether a payment is a penalty or a tax). Although Florida law views these fees and costs as part of the "criminal sanction" imposed on those who are convicted, see Martinez v. State, 91 So. 3d 878, 880 (Fla. 5th DCA 2012), that characterization does not bind us in interpreting the Twenty-Fourth Amendment. See, e.g., Macallen Co. v. Massachusetts, 279 U.S. 620, 625, 49 S.Ct. 432, 73 L.Ed. 874 (1929) ("As it many times has been decided neither state courts nor Legislatures, by giving the tax a particular name, or by using some form of words, can take away our duty to consider its nature and effect.").

Let's start with *Harman v. Forssenius*, 380 U.S. 528, 85 S.Ct. 1177, 14 L.Ed.2d 50 (1965), the only case in which the Supreme Court has addressed the Twenty-Fourth Amendment. In *Harman*, the Supreme Court held that a Virginia law requiring those who wished to vote in a federal election to either (1) pay the poll tax required for state elections (then \$1.50), or (2) complete a notarized/witnessed certificate \*1100 of residency before each election, violated the Twenty-Fourth Amendment. *See id.* at 531–34, 85 S.Ct. 1177.

Although the residency certificate itself was not a monetary "tax" of any kind, the Court broadly interpreted the Twenty-Fourth Amendment and ruled that the certificate could not be used as an alternative means of paying a poll tax. See id. at 541, 85 S.Ct. 1177 ("[I]n order to demonstrate the invalidity of [the Virginia law], it need only be shown that it imposes a material requirement solely upon those who refuse to surrender their constitutional right to vote in federal elections without paying a poll tax."). The Court pointed out that the certificate requirement was constitutionally problematic in part because obtaining the certificate from local election officials and then filing it with the city or county treasurer was "plainly a cumbersome procedure" which "amount[ed] to annual re-registration[.]" Id. at 541–42, 85 S.Ct. 1177. Finally, the Court rejected Virginia's argument that "the certificate is a necessary substitute method of proving residence" because "constitutional deprivations may not be justified by some remote administrative benefit to the State." *Id.* at 542, 85 S.Ct. 1177.

*Harman* teaches that a state-imposed and non-monetary condition on voting can violate the Twenty-Fourth Amendment even if the condition is not itself a "tax." With *Harman* in mind, I turn to the fees and costs that Florida imposes on all those convicted of crimes in its courts.

#### В

When the Twenty-Fourth Amendment was ratified, a "tax" was commonly understood as a "[c]ontribution levied on persons, property, or business, for support of government." Concise Oxford Dictionary of Current English 1328 (5th ed. 1964) (emphasis added). This was also the accepted legal meaning. See Ballentine's Law Dictionary 1255 (3d ed. 1969) ("A forced burden, charge, exaction, imposition, or contribution assessed in accordance with some reasonable rule of apportionment by authority of a sovereign state upon the persons or property within its jurisdiction to provide public revenue for the support of the government, the administration of the law, or the payment of public expenses.") (emphasis added); Black's Law Dictionary 28 (4th ed. 1951) ("[A] pecuniary contribution ... for the support of a government.") (emphasis added).

Not only was this the contemporaneous understanding in the early 1960s, but the Supreme Court has long defined "tax" the same way. See, e.g., United States v. La Franca, 282 U.S. 568, 572, 51 S.Ct. 278, 75 L.Ed. 551 (1931) ("A 'tax' is an enforced contribution to provide for the support of government; a 'penalty' ... is an exaction imposed by statute as punishment for an unlawful act."); United States v. State Tax Comm'n of Miss., 421 U.S. 599, 606, 95 S.Ct. 1872, 44 L.Ed.2d 404 (1975) ("[T]he standard definition of a tax" is an "enforced contribution to provide for the support of government") (citation and internal quotation marks omitted). So there should be no dispute about what a "tax" is.

More recently, in *National Federation of Independent Business v. Sebelius*, 567 U.S. 519, 565, 132 S.Ct. 2566, 183 L.Ed.2d 450 (2012), the Supreme Court analyzed

whether a "penalty" (so labeled by Congress) imposed on those who did not comply with the individual mandate to purchase health insurance under the Affordable Care Act was a tax. In concluding that the so-called "penalty" was indeed a tax, the Court considered factors such as the amount of the payment, the lack of a scienter requirement, and the collection of the payment solely by the \*1101 IRS through the normal means of taxation. *See id.* at 566–67, 132 S.Ct. 2566.

Under these authorities, the fees and costs Florida imposes on convicted defendants are taxes within the meaning of the Twenty-Fourth Amendment. As the district court explained, for most categories of fees "the amount is fixed, and with rare exceptions, the amount is comparatively modest[.]" Jones II, 462 F.Supp.3d at 1233. The fees are also ordinarily collected in the same way as civil debts or other taxes owed to the government, including by reference to a collection agency-not necessarily through the criminal justice system. See id. And there is no scienter requirement, as a defendant who pleads no contest and is not adjudged guilty also must pay fees and costs. See id. Moreover, the fees and costs are imposed on felons convicted of crimes that do not have a mens rea element. See, e.g., Fla. Stat. §§ 893.13(1), 893.101(2) (explained in State v. Adkins, 96 So. 3d 412, 415-16 (Fla. 2012)).

Most importantly, the primary purpose of these fees and costs is to raise revenue for the operation of Florida's government. As mentioned earlier, Florida funds its criminal-justice system in large part through fees routinely assessed against criminal defendants. *See* Fla. Const., art. V, § 14 (providing that, with limited exceptions, all funding for clerks of court and county courts must come from fees and costs). Florida law therefore requires that payments of fees and costs be retained in various trust funds to generate revenue for court-related functions, and that the excess be remitted to the Florida Department of Revenue to fund other areas of state government. *See* Fla. Stat. §§ 28.37(3), 213.131, 215.20, 142.01, 960.21.

For example, Fla. Stat. § 938.01(1) requires felons to pay \$3 as a court cost, and that sum is remitted to the Department of Revenue for, among other things, a domestic violence program and a law-enforcement training fund. Similarly, Fla. Stat. § 938.05 imposes a flat \$225 fee in every felony case, \$200 of which is used to fund the clerk's office and \$25 of which is remitted to the Florida Department of Revenue for deposit in the state's general revenue fund. At trial, the Public Defender for Palm Beach County testified that fees total \$668 for every felony defendant who is represented by a public defender.

See Tr. at 284. Examples of the fees and costs included in that figure are "costs associated for a Court Cost Clearing Trust Fund," a "local ordinance cost," and "a Crime Stoppers Trust Fund fee." *Id.* at 287. The Public Defender for Miami-Dade County similarly testified that defendants in his jurisdiction are typically assessed between \$700 and \$800, a sum which includes, among other things, fees that fund programs like "Crime Stoppers," "teen courts," "crime prevention programs," the "Criminal Justice Trust and Education Fund," and "additional court costs that go to the local courts, including \$65 court costs." *Id.* at 355–56.

The majority says that these fees and costs are penalties, and not fines, because they are linked to culpability and are not imposed on defendants who are acquitted. See Maj. Op. at 1038. Although they are also imposed on those who plead no contest and/or have their adjudication of guilt withheld, the majority emphasizes that under Florida law defendants who withhold their adjudication or plead no contest may be subject to punishment. See id. at 1038-39. The majority's contention that these fees and costs are punitive, however, is belied by the fact that they bear no relation to the crimes charged, as "a defendant adjudged guilty of a violent offense ordinarily is assessed the same amount as a defendant who is charged with a comparatively \*1102 minor nonviolent offense, denies guilt, pleads no-contest, and is not adjudged guilty." Jones II, 462 F.Supp.3d at 1233. And, as noted earlier, we are not bound by Florida's own characterization of these fees and costs. See Macallen, 279 U.S. at 625, 49 S.Ct. 432.

But even if there is some incidental punitive purpose for these fees and costs, that does not change the undeniable fact that their *primary* purpose is the raising of revenue. And Supreme Court precedent tell us that it is the primary purpose that matters. See Bailey v. Drexel Furniture Co., 259 U.S. 20, 38, 42 S.Ct. 449, 66 L.Ed. 817 (1922) ("Taxes are occasionally imposed in the discretion of the Legislature on proper subjects with the primary motive of obtaining revenue from them and with the incidental motive of discouraging them by making their continuance onerous. They do not lose their character as taxes because of the incidental motive.") (emphasis added). In Bailey, for example, the Supreme Court analyzed whether a child labor tax law, which imposed a purported "tax" on certain businesses if they employed children in violation of the law, involved a tax or a penalty. The Court concluded that the "exaction" was a penalty, rather than a tax, because the primary purpose of the payment was "practically to achieve" the result of outlawing child labor. See id. at 38-41, 42 S.Ct. 449. The exaction there was the "principal consequence" of violating the child labor law,

demonstrating that it was really a penalty for violations. *See id.* at 38, 42 S.Ct. 449.

In contrast, the fees and costs here do not aim to outlaw any behavior. Nor are they the principal consequence for committing a felony offense-imprisonment, fines, and restitution serve that purpose. The fees and costs here serve primarily to raise revenue for the state, and therefore are taxes. See Bredesen, 624 F.3d at 770-74 (Moore, J., dissenting) (explaining that a 5% administrative fee tacked on to child support and restitution payments constituted a tax under the Twenty-Fourth Amendment); Cammett, Shadow Citizens, 117 Penn. St. L. Rev. at 379 ("[P]ublic cost-recovery fees reflect the efforts of states to pass the costs of criminal justice and other state deficits onto prisoners."). As one of the *amici* correctly explain, "[t]he mere fact of antecedent criminal conviction does not change a 'tax' to something else." Amicus Br. of Tax & Constitutional Law Professors at 13 (noting that if hypothetically Florida imposed an income tax of 10% on individuals convicted of crimes, and prohibited felons from voting if they failed to pay the tax, that would violate the Twenty-Fourth Amendment). I could not have put it any better.

C

Several colleagues in Part III.B.2 advocate for a narrow reading of the Twenty-Fourth Amendment by arguing that the phrase "by reason of" in the Amendment are different in meaning than the phrase "on account of" in the Fifteenth, Nineteenth, and Twenty-Sixth Amendments. See Maj. Op. at 1039–46 (explaining that "on account of" reflects a "but-for-causation" test, but "by reason of" requires "a tighter relationship between nonpayment of a tax and denial of the right to vote than but-for causation" and instead means "motivated by"). As Part III.B.2 does not even garner a plurality of the judges in the majority, I am unsure why this linguistic exegesis is necessary. But given the number of pages dedicated to this contention, I will take a moment to point out its deficiencies.

A straightforward textual analysis shows that "by reason of" has the same meaning as "on account of." Indeed, our colleagues \*1103 acknowledge that dictionaries from the time the Twenty-Fourth Amendment was drafted define the phrases "by reason of" and "on account of" by reference to each other. *See* Maj. Op. at 1040–41. *See also* Webster's Third New International Dictionary of the

English Language 13 (1961) (defining "on account of" as "for the sake of: by reason of: because of") (emphasis added). But rather than confront the inevitable conclusion—that the two phrases are synonymous—our colleagues instead say that this means the dictionary definitions "are of limited value." Maj. Op. at 1041. What they are saying, I think, is that they do not like the result of a simple textual analysis, and therefore feel free to go beyond the text's common understanding because that understanding is not helpful to their position. If that is textualism, textualism is a mirage.

This analytical move is surprising given the current emphasis placed on public understanding of the words used in constitutional text. See, e.g., District of Columbia v. Heller, 554 U.S. 570, 576, 128 S.Ct. 2783, 171 L.Ed.2d 637 (2008) ("In interpreting this text [of the Second Amendment], we are guided by the principle that '[t]he Constitution was written to be understood by the voters; its words and phrases were used in their normal and ordinary as distinguished from technical meaning." ") (quoting United States v. Sprague, 282 U.S. 716, 731, 51 S.Ct. 220, 75 L.Ed. 640 (1931)); Antonin Scalia & Bryan A. Garner, Reading Law: The Interpretation of Legal Texts § 6, at 69 (2012) ("Words are to be understood in their ordinary, everyday meanings—unless the context indicates that they bear a technical sense."). As noted, dictionaries from around the time the Twenty-Fourth Amendment was ratified do provide a helpful definition of "by reason of," demonstrating that it means "because of." See Webster's New Twentieth Century Dictionary of the English Language 1502 (2d ed. 1963) (defining "by reason of" as "because of"). And "where the intention i[s] clear [from the text of a constitutional provision] there is no room for construction and no excuse for interpolation or addition." Sprague, 282 U.S. at 731, 51 S.Ct. 220.13

Rather than rely on these consistent definitions of the phrase "by reason of," our colleagues isolate the word "reason" and then select a definition of that one word to define the entire phrase. See Maj. Op. at 1044-45. But "reason," when used in a phrase, cannot be read in isolation because the "text must be construed as a whole." Scalia & Garner, Reading Law § 24, at 167. See also Smith v. United States, 508 U.S. 223, 233, 113 S.Ct. 2050, 124 L.Ed.2d 138 (1993) ("[A] single word cannot be read in isolation[.]"); King v. St. Vincent's Hosp., 502 U.S. 215, 221, 112 S.Ct. 570, 116 L.Ed.2d 578 (1991) ("Words are not pebbles in alien juxtaposition; they have only a communal existence; and not only does the meaning of each interpenetrate the other, but all in their aggregate take their purport from the setting in which they are used....") (citations and internal quotation marks omitted). "Phrases \*1104 are not always (though they are

sometimes) mere sums of their parts. One cannot necessarily determine the meaning of establishment of religion by simply looking up the founding-era definitions of establishment, of, and religion, just as one cannot determine the communicative content of the phrases at all or for good through the amalgamation of the meaning of the words in those phrases." Stephanie H. Barclay, Brady Earley, & Annika Boone, Original Meaning and the Establishment Clause: A Corpus Linguistics Analysis, 61 Ariz. L. Rev. 505, 528-29 (2019). After all, "even the strictest textualist would acknowledge that the meanings of the words and sentences in a statutory text are a function of their usages within a linguistic community." Bradley C. Karkkainen, "Plain Meaning": Justice Scalia's Jurisprudence of Strict Statutory Construction, 17 Harv. J.L. & Pub. Pol'y 401, 407 (1994).

Our colleagues next lean on a canon of construction that says courts can infer a different meaning if Congress has chosen to use different words in the same document (here, apparently, the Constitution). See Maj. Op. at 1041-42. See generally Crawford v. Burke, 195 U.S. 176, 190, 25 S.Ct. 9, 49 L.Ed. 147 (1904) ("a change in phraseology creates a presumption of a change in intent"). Whatever its relevance elsewhere, that canon is of no assistance in this case. There can be no inference or presumption of a contrary intent when, as here, the different phrases used are synonymous with one another, i.e., when they have the same meaning. Given that our colleagues have offered nothing to explain the choice of the phrase "by reason of" in the Twenty-Fourth Amendment, that "word change as easily supports the inference that Congress merely swapped one synonym for another." Milner v. Dep't of Navy, 562 U.S. 562, 572, 131 S.Ct. 1259, 179 L.Ed.2d 268 (2011). Accord Public Citizen, Inc. v. U.S. Dep't of H.H.S., 332 F.3d 654, 665 (D.C. Cir. 2003) ("[I]n this case, Congress' use of slightly different words to describe various reporting requirements shows little more than the legislature employed a modestly varied vocabulary to express similar meanings."). Justice Holmes' quip that "there is no canon against using common sense in construing laws as saying what they obviously mean," Roschen v. Ward, 279 U.S. 337, 339, 49 S.Ct. 336, 73 L.Ed. 722 (1929), seems apropos here, as "by reason of" and "on account of" mean exactly the same thing.

I also disagree with our colleagues' claim in Part III.B.2 that *Harman* supports their narrow construction of the Twenty-Fourth Amendment. As noted earlier, in *Harman* the Supreme Court invalidated a Virginia law that required voters to either pay a poll tax or annually file a certificate of residency in order to vote in federal elections by broadly construing the Twenty-Fourth Amendment. *See* 380 U.S. at 541–44, 85 S.Ct. 1177.

Analogizing the Twenty Fourth Amendment to the Fifteenth Amendment, the Supreme Court explained that "the Twenty-Fourth Amendment does not merely insure that the franchise shall not be 'denied' by reason of failure to pay the poll tax; it expressly guarantees that the right to vote shall not be 'denied or abridged' for that reason. Thus, like the Fifteenth Amendment, the Twenty-fourth 'nullifies sophisticated as well as simple-minded modes' of impairing the right guaranteed." *Id.* at 540–41, 85 S.Ct. 1177 (citation omitted). *Harman* constitutes an expansive interpretation of the Twenty-Fourth Amendment, not a narrow one.

Given the analogy in *Harman* to the Fifteenth Amendment, I struggle to understand our colleagues' view that the Twenty-Fourth Amendment requires a "tighter relationship between nonpayment of a tax and denial of the right to vote than \*1105 but-for causation." Maj. Op. at 1044. Though the Supreme Court in Harman did not specifically analyze the phrase "by reason of," its holding suggests that the phrase imports some type of causation—as the Court invalidated a non-monetary requirement imposed on voters who refused to pay the poll tax. See 380 U.S. at 541, 85 S.Ct. 1177. A three-judge district court in our circuit, interpreting the Twenty-Fourth Amendment shortly after its passage, also seemed to view "by reason of" as embodying a but-for test. See Gray v. Johnson, 234 F. Supp. 743, 746 (S.D. Miss. 1964) (invalidating a state law that required an elector who was exempt from the payment of a poll tax to obtain an exemption certificate and hold the certificate as a condition for voting because such "onerous requirements are occasioned solely by reason of the failure of the registered voter to pay his poll tax").14

The Supreme Court in *Harman*, moreover, described the history of the Twenty-Fourth Amendment, and that history suggests that it was intended to prohibit disenfranchisement based on poverty: "Prior to the proposal of the Twenty-fourth Amendment in 1962, federal legislation to eliminate poll taxes, either by constitutional amendment or statute, had been introduced in every Congress since 1939.... Even though in 1962 only five States retained the poll tax as a voting requirement, Congress reflected widespread national concern with the characteristics of the tax." *Id.* at 538–39, 85 S.Ct. 1177. Specifically, "Congressional hearings and debates indicate a general repugnance to the disenfranchisement of the poor occasioned by the failure to pay the tax." Id. at 539, 85 S.Ct. 1177 (emphasis added). "In addition, and of primary concern to many, the poll tax was viewed as a requirement adopted with an eye to the disenfranchisement of Negroes and applied in a discriminatory manner." Id. at 540, 85 S.Ct. 1177. "It is

against this background that Congress proposed, and three-fourths of the States ratified, the Twenty-Fourth Amendment abolishing the poll tax as a requirement for voting in federal elections." *Id.* <sup>15</sup>

Legislative history further shows that supporters of the Twenty-Fourth Amendment understood it as a broad directive. See Amicus Br. of Tax & Constitutional Law Professors at 3–6 (outlining legislative history); Amicus Br. of Voting Rights Scholars at 10–12 (same); Bredesen, 624 F.3d at 773-75 (Moore, J., dissenting) (same). For example, in a report recommending the passage of the resolution proposing the Twenty-Fourth ioint Amendment, the House Committee on the Judiciary stated that "[t]he purpose of this proposed constitutional amendment is to prevent the \*1106 United States or any State from denying or abridging the right of citizens of the United States to vote ... because of an individual's failure to pay any poll tax or other tax." H.R. Rep. No. 87-1821, at 2 (1962) (emphasis added). The report further states that the Amendment would "prevent both the United States and any State from setting up any substitute tax in lieu of a poll tax as a prerequisite for voting" and "prevent[] the nullification of the amendment's effect by a resort to subterfuge in the form of other types of taxes." Id. at 5.

In floor debates, Representative Neil Gallagher of New Jersey said that "[a]ny charge for voting unjustly discriminates against people of limited means. And whatever the amount of money, a citizen of the United States should not have to pay for his constitutional right to vote." 108 Cong. Rec. 17667 (1962). Representative Dante Fascell of Florida expressed a similar view: "[T]he payment of money, whether directly or indirectly, whether in a small amount or in a large amount, should never be permitted to reign as a criterion of democracy. There should not be allowed a scintilla of this in our free society." 108 Cong. Rec. 17657 (1962). Representative Seymour Halpern of New York agreed: "This amendment will prevent the imposition not only of a poll tax but of any other tax as a prerequisite to voting and ... it is broad enough to prevent the defeat of its objectives by some ruse or manipulation of terms." 108 Cong. Rec. 17669 (1962). Representative Edward Boland of Massachusetts proclaimed that "[w]hile the amount of the poll tax now required is small, there should not be any price tag or any kind of tax on the right to vote." 108 Cong. Rec. 17666 (1962). Representative Henry B. Gonzalez of Texas echoed that sentiment: "[t]here should not be any price tag or any other kind of tag on the right to vote." Abolition of Poll Tax in Federal Elections: Hearing on H.J. Res. 404, 425, 434, 594, 601, 632, 655, 663, 670 & S.J. Res. 29 Before Subcomm. No. 5 of the H. Comm. on the Judiciary, 87th Cong., 2d Sess. 15 (1962).

News reports from around the time the Twenty-Fourth Amendment was ratified also confirm its expansive understanding. Senator Spessard Holland of Florida, who introduced the Amendment in the Senate, told the *Miami Herald* that he "believe[d] fervently that no price should be placed on the right to vote, and that the South 'needs so badly to be in an affirmative position on civil rights.' "David Kraslow, "Poll Tax Fate Could be Decided This Year," *Miami Herald*, Jan. 28, 1963, at 17. President Lyndon B. Johnson remarked upon the Amendment's passage that "there can be no one too poor to vote." *See* Nan Robertson, "24th Amendment Becomes Official; Johnson Hails Anti-Poll Tax Document at Ceremonies," *N.Y. Times*, Feb. 5, 1964, at 14.

The fees and costs Florida imposes "exact[] a price for the privilege of exercising the franchise." Harman, 380 U.S. at 539, 85 S.Ct. 1177. That is exactly what the framers of the Twenty-Fourth Amendment sought to prevent. See Bredesen, 624 F.3d at 775 (Moore, J., dissenting) ("The drafters and supporters of the Twenty-Fourth Amendment plainly intended that the Amendment reach those payments of money that placed a price on the franchise, regardless of whether those taxes could also be characterized as debts or fees."); Ryan A. Partelow, The Twenty-First Century Poll Tax, 47 Hastings Const. L.Q. 425, 458 (2020) ("Once distilled, the principles at issue in both Harman and the legislative history of the Twenty-Fourth Amendment evidence that LFO disenfranchisement is plainly within the meaning of \*1107 the [A]mendment's text as drafted by its framers.").16

As in *Harman* and *Gray*, the fees and costs here impose a material burden on voting. See Harman, 380 U.S. at 541, 85 S.Ct. 1177; *Gray*, 234 F. Supp. at 746. "By the time of sentencing, Floridians with felonies are typically assessed at least \$500 in mandatory fees and costs, though the precise amount varies by county even for the same underlying felony offense." Amicus Br. of the Fines and Fees Justice Center, et al., at 6. Paying hundreds of dollars in fees and costs is an "onerous" burden to those with limited means, see Harman, 380 U.S. at 541, and 70 to 80, 85 S.Ct. 1177 percent of Florida felons are indigent. They should not be forced to choose between "putting food on the table, a roof over their heads, and clothes on their backs," Jones I, 950 F.3d at 811—or paying fees that Florida uses to fund government operations—in order to exercise the right to vote granted to them by Amendment

#### V

Our predecessor, the former Fifth Circuit, has been rightly praised for its landmark decisions on voting rights in the 1950s and 1960s. *See generally* Jack Bass, Unlikely Heroes: The Dramatic Story of the Southern Judges Who Translated the Supreme Court's *Brown* Decision Into a Revolution for Equality 259–77 (1981). I doubt that today's decision—which blesses Florida's neutering of Amendment 4—will be viewed as kindly by history.

## JILL PRYOR, Circuit Judge, joined by WILSON, MARTIN, and JORDAN, Circuit Judges, dissenting.

Nearly a century has passed since Langston Hughes pined for an America where "opportunity is real" and "[e]quality is in the air we breathe." In Florida, people convicted of felonies who have paid all the societal debts they can possibly pay were on the threshold of that America, welcomed home by Florida's electorate. Florida's voters had decided on their own initiative that the franchise should be restored to their fellow citizens. But Florida's legislature slammed the door shut, barring perhaps a million would-be voters from any real and equal opportunity to rejoin their fellow Floridians and denying the electorate their choice to grant that opportunity. The legislature's action abrogated the protections of the Fourteenth and Twenty-Fourth Amendments on the right to vote, as Judge Martin and Judge Jordan eloquently explain in their dissents. I join their dissents in full. I write separately only to add context and echo the outrage of my fellow dissenting colleagues.

Following a nationwide trend toward reenfranchisement,<sup>2</sup> Florida's voters \*1108 amended their state's constitution to provide that except for people convicted of murder or a sexual offense, "disqualification from voting arising from a felony conviction *shall terminate* and voting rights *shall be restored* upon completion of all terms of sentence including parole or probation." Fla. Const. art. VI, § 4 (emphasis added). Widespread media coverage of Amendment 4, a citizen's initiative, estimated that it would restore voting rights to over one million Florida citizens who have served their sentences and fulfilled all conditions of their parole and probation.

Florida's formerly disenfranchised citizens began registering to vote on January 8, 2019, when Amendment 4, known as the Voting Restoration Amendment, went into effect. In a matter of weeks, though, Florida's legislature was "aiming at a bill [interpreting Amendment 4] that had a maximal disenfranchisement result." Doc. 286-13 at 13, 88-94 (expert report of J. Morgan Kousser, Ph.D., citing, among other evidence, legislators' statements, competing House and Senate bills introduced in response to Amendment 4, and the known lack of a central data repository tracking legal financial obligations); cited with approval in Jones v. DeSantis ("Jones II"), No. 4:19-cv-300-RH/MJF, 462 F. Supp. 3d 1196 (N.D. Fla. May 24, 2020). Senate Bill 7066 defined "all terms of sentence" to include fees, fines, and restitution ordered upon conviction of a felony. With the passage of SB 7066 into law as Florida Statutes § 98.0751, the legislature<sup>3</sup> conditioned every person's ability to vote under Amendment 4 on the payment of sums of money—what we call legal financial obligations, or LFOs.

Florida characterizes § 98.0751 as the legislature's necessary attempt to tie up loose ends of Amendment 4. But that characterization greatly downplays the statute's impact. The statute denies the franchise to "the overwhelming majority" of people who stood to benefit from Amendment 4.4 *Jones II*, 462 F.Supp.3d at 1219; *see Jones v. Governor of Fla.* ("Jones I"), 950 F.3d 795, 815 (11th Cir. 2020) (detailing an expert's opinion that over 80 percent of people "with felony convictions who had completed their terms of incarceration, parole, or probation ... had outstanding LFOs"). The statute may in effect deny the franchise to virtually everyone who may have benefitted from the amendment. And it accomplishes this end seemingly by design.

The legislators who supported § 98.0751 knew—or at best were willfully blind to the fact that—the statute would completely deprive a large majority of Floridians with felony convictions of voting rights restoration. LFOs often are substantial—even in cases where the defendant is indigent. The record reflects that since 1996 Florida had added more than 20 new categories of financial obligations for people convicted of crimes, with virtually no exemptions for people unable to pay.5 These financial obligations often are untethered from the seriousness of the offense. As Judge Jordan points out, Florida assesses \$225 against every person convicted of a felony. See Jordan Dissent at 1073-74 (citing Fla. Stat. § 938.05(1)(a)). Some financial obligations are actually imposed based on indigency: For example, Florida charges \$50 to apply for a public defender, a constitutionally-required service for which only indigent

defendants qualify. See Gideon v. Wainwright, 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963). In this topsy-turvy system, the district court found, "in one county, the fees total at least \$698 for every defendant who is represented by a public defender and at least \$548 for every defendant who is not." Jones I, 950 F.3d at 816 (quoting district court's preliminary injunction order). That county is not an outlier. One expert who compiled data from 58 of 67 Florida counties calculated that, of "individuals with felony convictions who had completed their terms of incarceration, parole, or probation," nearly 60 percent had outstanding LFOs of at least \$500, and nearly 40 percent had at least \$1,000 outstanding. Id. at 815; see id. (calling the expert's analysis "arguably a conservative one").

The district court found "as a fact that the overwhelming majority of felons who have not paid their LFOs in full, but who are otherwise eligible to vote, are genuinely unable to pay the required amount." *Jones II*, 462 F.Supp.3d at 1219. Florida does not dispute this factual finding.

Neither the extent of LFOs nor the inability of Floridians with felony convictions to pay them was a mystery to Florida's legislature. Of course, it was the legislature that imposed many if not most of the financial obligations Floridians with felony convictions shoulder. See, e.g., Fla. Stat. §§ 938.03 (imposing mandatory fee of \$50 to fund the Crimes Compensation Trust Fund and clerk of court's office); 938.06 (imposing a fee of \$20 for the Crime Stoppers Trust Fund). And there can be no doubt that the sponsors of SB 7066 and the legislators who voted for it knew that most criminal defendants are indigent—such data was part of the legislative record.7 In short, the legislators knew8—or deliberately shut their eyes to9—both the extent of the financial obligations Florida courts impose and the fact that most people convicted of felonies in Florida genuinely cannot afford to pay these obligations.

Section 98.0751 expressly conditions reenfranchisement on payment of LFOs, which the vast majority of Floridians with felony convictions cannot pay. Under the statute, Amendment 4 is a nullity for most people who stood to benefit from it.

In practice, though, even those who could afford to pay LFOs, people the electorate undeniably intended to reenfranchise with Amendment 4, may be denied that opportunity. That's because the Florida legislature also knew when it passed SB 7066 that administering the law would be a bureaucratic nightmare. *See Jones II*, 462 F.Supp.3d at 1219–31 (detailing Florida's "staggering

inability to administer the pay-to-vote system"). The bill's sponsor "openly admitted that Florida did not have a centralized system in place [to track LFOs] and that it would be very difficult for the state agencies to perform the tasks that they were somehow supposed to after S.B. 7066 went into effect." Doc. 286-13 at 13 (Kousser expert report). The legislature "repeatedly discussed" the fact that "it would take eleven databases, stored in different agencies, in addition to \*1111 restitution information that often no one at all kept track of, to determine whether someone had fulfilled all of his financial obligations." Id. "The legislature knew that the information—restitution plus fines plus fees plus court costs—they piled into the bill's requirements, ... the more likely it would be that the task could never be completed—by staffers or returning citizens." Id. at 13–14 (emphasis added). If it is that difficult for the *State* of Florida to determine how much, if anything, a person owes, imagine how difficult it must be for the average person trying to find out if he is eligible. The district found that in some cases it is "impossible." Jones II, 462 F.Supp.3d at 1208.

Based on information provided by the State itself, the district court found that Florida has made no real effort to help its citizens figure out how much, if anything, they must pay to vote. The budget analysis for SB 7066 projected a need for 21 additional Department of State employees to process the increased workload. Yet the legislature allocated no funds for additional employees. The Department hired no one—that's right, not a single person—to process the over 85,000 registration applications it had received before trial. 10 By April of 2020, when the trial was held, Florida's officials had not completed review of even *one* of these applications. By Florida's most optimistic estimates, the time it will take to review these applications to determine registrants' eligibility to vote will deny even those who could afford to pay outstanding LFOs the right to vote in the next two presidential elections, not to mention half a dozen or more other elections.

So what we know is that Florida imposes substantial, often exorbitant, financial obligations on people convicted of felonies—the overwhelming majority of whom are indigent—with no exceptions for those unable to pay. The State doesn't track LFOs and has no mechanism for providing people seeking to register under Amendment 4 with notice of what and how much, if anything, they owe.

Florida doesn't seriously deny this. Instead, it responds that it's just too bad if people can't figure out on their own how much they owe, because the State has no obligation to tell them whether they're eligible to vote

under § 98.0751 or how much they would need to pay to get the right to vote back. And here's the kicker: people aren't entitled to know how much they owe, Florida says, because they couldn't afford to pay it anyway. No harm, no foul. See Reply Br. of Appellants at 25–26 ("If [the district court's] factual findings are correct, there is zero risk of improper deprivation of voting eligibility for the overwhelming majority of felons ... because regardless of how much process is given to a felon who is unable to pay the financial terms of his sentence, that felon will remain ineligible to vote." (citation omitted)). This cavalier attitude is hard to believe, yet there it is in the record of this case for all to see.

From a potential Amendment 4 registrant's point of view, she cannot vote unless she can (1) figure out on her own how much she owes, and then (2) pay that amount. For the reasons my dissenting colleagues and I have explained, it's unlikely that she is capable of paying and perhaps even more unlikely that she is \*1112 capable of figuring out how much she owes. So when she attempts to register, she must make her best guess that she has no unpaid LFOs—under threat of felony prosecution. Although Florida downplays this threat by noting that a person can only be prosecuted for an intentional false affirmation of eligibility, the record suggests that the threat may be more real than the State makes it out to be. See Jones II, 462 F.Supp.3d at 1230-31 (discussing evidence showing Division of Election making referrals for prosecution for false registration when the only evidence of intent appeared to be a signed affirmation of eligibility). And regardless of the likelihood of an actual prosecution, the registration form warns the would-be registrant that it's a felony to make a false statement on the form. It does not say that the false statement must be willful or intentional. What greater disincentive could there be for someone who has served her time than the threat of returning to prison for trying to register to vote? Section 98.0751 made registering to vote a risky, if not impossible, task. The impossibility of it seems to have been the whole point.

In arguing this appeal, the State told us outright what it has been showing us all along: The State doesn't care if "the proportion of felons able to complete their sentence" with LFOs included is "0%." Reply Br. of Appellants at 15–16. If this is not a nullification of the will of the electorate, I don't know what would be. And it is a dream deferred for the men and women who, having paid their debt to society to the extent of their capacity—often by having served lengthy prison sentences and periods under supervision—are deprived of the franchise that Amendment 4 promised to automatically restore. The majority today deprives the plaintiffs and countless others like them of opportunity and equality in voting through its denial of the plaintiffs' due process, Twenty-Fourth Amendment, and equal protection claims. I dissent.

#### **All Citations**

975 F.3d 1016, 28 Fla. L. Weekly Fed. C 1823

#### Footnotes

- \* Judges Rosenbaum and Brasher are recused.
- The Supreme Court has upheld the constitutionality of such felon-disenfranchisement schemes against challenges brought under the Equal Protection Clause of the Fourteenth Amendment. In *Richardson v. Ramirez*, 418 U.S. 24, 94 S.Ct. 2655, 41 L.Ed.2d 551 (1974), the Court—harmonizing the Amendment's first and second sections—held that section two of the Fourteenth Amendment authorized an "affirmative sanction" of felon disenfranchisement. *See id.* at 41–55, 94 S.Ct. 2655.
- The Florida constitution may be amended by referendum "if the proposed amendment or revision is approved by vote of at least sixty percent of the electors voting on the measure." Fla. Const. art. XI, § 5(e).
- Florida Statute § 98.0752(2)(a)5.d. sets forth the parameters for the judicial modification established in the last paragraph of § 98.0752(2)(a)5.e.

- In *Bonner v. City of Prichard*, 661 F.2d 1206, 1207 (11th Cir. 1981) (en banc), the Eleventh Circuit adopted all Fifth Circuit decisions issued before October 1, 1981, as binding precedent.
- 5 It should also be noted that each of the Bearden cases involved, through no more than two degrees of separation, a fundamental liberty interest. In the criminal cases where imprisonment was at issue, the fundamental liberty interest at issue is plain: "Freedom from bodily restraint has always been at the core of the liberty protected by the Due Process Clause from arbitrary governmental action." Foucha v. Louisiana, 504 U.S. 71, 80, 112 S.Ct. 1780, 118 L.Ed.2d 437 (1992) (citing Youngberg v. Romeo, 457 U.S. 307, 316, 102 S.Ct. 2452, 73 L.Ed.2d 28 (1982)). And in the civil cases, the Supreme Court has explicitly required the identification of a fundamental liberty interest to trigger Bearden scrutiny. Compare Boddie v. Connecticut, 401 U.S. 371, 374, 91 S.Ct. 780, 28 L.Ed.2d 113 (1971) (waiving filing fees, on due process grounds, for marriage dissolution because marriage and divorce are fundamental interests), with United States v. Kras, 409 U.S. 434, 445, 93 S.Ct. 631, 34 L.Ed.2d 626 (1973) (declining to waive filings fees required to secure discharge of bankruptcy because bankruptcy discharge entails no "fundamental interest"). Only one case—Mayer v. Chicago, 404 U.S. 189, 92 S.Ct. 410, 30 L.Ed.2d 372 (1971)—does not meet this criterion. In Mayer, the Court waived a filing fee for an indigent defendant who violated a statute that imposed only fines. Nevertheless, that case is distinguishable for the very reason identified in the majority opinion—it, at the very least, arose in the access-to-courts context. See Christopher v. Harbury, 536 U.S. 403, 412–15, 122 S.Ct. 2179, 153 L.Ed.2d 413 (2002) (describing M.L.B. v. S.L.J., Griffin v. Illinois, Mayer and Boddie as "prior cases on denial of access to courts [that] have not extended over the entire range of claims that have been brought under that general rubric elsewhere"). And Justice Thomas has identified the peculiarity of the Mayer decision in this line of precedent. See M.L.B. v. S.L.J., 519 U.S. 102, 140-45, 117 S.Ct. 555, 136 L.Ed.2d 473 (1996) (Thomas, J., dissenting).
- Indigent felons with out-of-state convictions can seek executive clemency in Florida, see Fla. R. Exec. Clem. 5, 10B, or have their rights restored in the state of their conviction, see Schlenther v. Dep't of State, Div. of Licensing, 743 So. 2d 536, 537 (Fla. Dist. Ct. App. 1998) ("Once another state restores the civil rights of one of its citizens whose rights had been lost because of a conviction in that state, they are restored and the State of Florida has no authority to suspend or restore them at that point. The matter is simply at an end."). Indigent felons with federal convictions can seek executive clemency, see Fla. R. Exec. Clem. 5, 10B, or a presidential pardon, see U.S. Const. art. II, § 2, cl. 1.
- The *Bearden* Court itself referred repeatedly to the fact that the indigents at issue were being punished "solely" for their indigency. *See Bearden*, 461 U.S. at 661, 664, 667, 674, 103 S.Ct. 2064. Their status as indigents was not merely a substantial reason for their punishment, but the *sole* reason. *See id.* at 674, 103 S.Ct. 2064 ("[T]his is no more than imprisoning a person *solely* because he lacks funds to pay the fine, a practice we condemned in *Williams* and *Tate*." (emphasis added)).
- The felons' and dissent's invocation of the canon of constitutional avoidance to argue that "completion" means "completion to the best of one's ability" is of no avail. That canon "has no application in the absence of statutory ambiguity." *United States v. Oakland Cannabis Buyers' Coop.*, 532 U.S. 483, 494, 121 S.Ct. 1711, 149 L.Ed.2d 722 (2001). Here, there is no such ambiguity.
- A fifty-state survey conducted by the Brennan Center for Justice, the National Center for State Courts, and NPR shows that Florida is, in fact, firmly in the majority when it comes to the fees charged to felons. See Joseph Shapiro, State-by-State Court Fees, NPR (May 19, 2014), https://www.npr.org/2014/05/19/312455680/state-by-state-court-fees (citations omitted). Forty-nine out of fifty States charge criminal defendants for electronic monitoring services. See id. Forty-four out of fifty States charge defendants for costs of supervision. See id. Forty-three States and the District of Columbia charge defendants for the use of a public defender. See id. And forty-one out of fifty States charge felons for room and board. See id. In total, thirty-one states (including Florida) charge defendants for all four types of costs. See id.
- For the reasons expressed in Judge Jordan's dissent, the majority is mistaken in its framing of the due process question as one

concerning a legislative, rather than adjudicative, action. The Plaintiffs do not say Amendment 4, SB-7066, or the Florida constitutional provision that strips individuals of the right to vote upon a felony conviction, see Fla. Const. art. VI, § 4(a), were enacted without due process of law. This alone makes the majority's reliance on Bi-Metallic Investment Co. v. State Board of Equalization, 239 U.S. 441, 36 S. Ct. 141, 60 L.Ed. 372 (1915), misguided. The majority also focuses exclusively on the removal of people from voter rolls in its analysis under Mathews v. Eldridge, 424 U.S. 319, 96 S. Ct. 893, 47 L.Ed.2d 18 (1976). However, I view the scope of the due process interest here to be much broader. People are deprived of a protected due process interest when they cannot register to vote because they lack reliable information about their outstanding balances. People are likewise deprived of a protected due process interest when they don't vote for fear of criminal prosecution while they wait for the Division of Elections to review their voter registrations—a process that apparently takes years to complete. Meanwhile, elections will come and go. Because the Division's determinations are necessarily individualized and fact-specific, Florida's voter reenfranchisement scheme is one for which "persons [are] ... exceptionally affected, in each case upon individual grounds" and entitled to due process. See Bi-Metallic, 239 U.S. at 446, 36 S. Ct. at 142–43. I reject the majority's conclusion to the contrary.

- The District Court's findings of fact are, of course, reviewed for clear error. <u>U.S. Commodity Futures Trading Comm'n v. S. Tr. Metals, Inc.</u>, 894 F.3d 1313, 1322 (11th Cir. 2018). And the State's briefing does not argue that any of the facts relevant to this claim were erroneous.
- The majority opinion says the 85,000 people who are waiting to be screened are "entitled to vote." This statement is not consistent with the evidence as well as Florida's litigation position in this case. The Division of Elections Director testified that she herself would not feel comfortable taking an oath that she was eligible to vote if she were in the shoes of a returning citizen who was unsure of the amount they owed. The wisdom reflected by her discomfort is demonstrated by at least two things. First, Florida argues to us here that it has an interest in avoiding any presumption that the people who have registered are entitled to vote. Also, the Florida legislature considered and rejected a bill that gave a safe harbor to protect from prosecution those who vote believing that they have paid their LFOs but were later shown to have amounts outstanding.

The facts from this record show it will take until at least 2026 to pass on the eligibility of the 85,000 citizens whose voter registration applications are currently pending.

- As former and current election administrators have explained in their amicus brief, this state of affairs forces election administrators to "engage in a multi-step, individualized process to determine whether an individual voter has an outstanding felony-LFO," and to "shoulder an impossible burden, requiring them to stretch budgets or divert staff to conduct research that is not within their expertise and for which they often lack access to necessary data[.]" Amicus Br. of Current and Former Election Administrators at 21, 24–25. That is why other states, such as Wisconsin, require its department of corrections to keep track of who is ineligible to vote and to maintain a list of people currently ineligible to vote on account of a conviction. See id. at 21.
- In an email dated August 29, 2019, the Director of the Division of Elections outlined some of the challenges Florida faces "in trying to determine financial obligations imposed by a sentencing document." In that same email, the Director said: "My staff simply are not versed or professionally trained at this level to understand court documents to this level." D.E. 153-4 at 1, 4–6. If Division employees are hopelessly lost, how can felons possibly hope to figure out their LFO status?
- The majority correctly notes that in *Williams*, the Supreme Court stated that courts may impose alternative sanctions, aside from imprisonment on defendants, who cannot satisfy the monetary terms of their sentences. *See* Maj. Op. at 1032. But this does not permit a state to disproportionately punish an indigent felon—by denying him an important right—solely because of his indigency.
- 4 As a full court we have already applied *Harper* to felons and voting in an en banc case. In *Johnson v. Governor of Florida*, 405 F.3d

1214 (11th Cir. 2005) (en banc), felons challenged Florida's then-existing disenfranchisement law. The law provided that a felon who completed his sentence could apply for clemency to have his civil rights restored. *See id.* at 1216 n.1. One of the plaintiffs' claims was that the restoration scheme violated constitutional and statutory prohibitions against poll taxes. We recognized that "[a]ccess to the franchise cannot be made to depend on an individuals' financial resources." *Id.* (citing *Harper*, 383 U.S. at 668, 86 S.Ct. 1079). We affirmed the district court's grant of summary judgment for the defendants on these claims, but that was "[b]ecause Florida [did] not deny access to the restoration of the franchise based on ability to pay[.]" *Id.* "Under Florida Rules of Executive Clemency, ... the right to vote can still be granted to felons who cannot afford to pay restitution." *Id.* 

- Three Justices of the Supreme Court have already indicated that they believe the right to vote here is fundamental. In her dissent from the denial of the plaintiffs' application to vacate the stay we issued, Justice Sotomayor, joined by Justices Ginsburg and Kagan, stated that "[t]his case implicates the 'fundamental political right' to vote." *Raysor v. DeSantis*, --- U.S. ----, 140 S. Ct. 2600, --- L.Ed.2d ---- (2020) (Sotomayor, J., dissenting) (quoting *Purcell v. Gonzalez*, 549 U.S. 1, 4, 127 S.Ct. 5, 166 L.Ed.2d 1 (2006)).
- As we explained in Jones I, indigent felons may terminate their LFOs (1) "[u]pon the payee's approval," (2) upon completing community service hours, if converted by the court, or (3) by a discretionary grant of clemency. See Jones I, 950 F.3d at 826; § 98.0751(2)(a)(5)(d)-(e). But regaining access to the ballot through these methods is highly unlikely. As for the first option, neither victims nor collection agencies are likely to agree to forgive felons' debts. See Jones I, 950 F.3d at 826. Community service conversion is unavailable to felons whose debts have been converted to civil liens and for those with federal convictions, and it could take years to complete community service hours, during which time felons may miss many opportunities to vote. See id. And all three avenues "are entirely discretionary in nature," whereas felons who are able to pay "enjoy near immediate, automatic re-enfranchisement as of right." Id. The Public Defender for Miami-Dade County testified about some of these difficulties at trial, see Tr. at 378-81, 412, and the literature supports his testimony. See Carol Gonzalez, Is the Rising Trend of Voter Restoration Leading to Permanent Disenfranchisement of Felons? Florida Joins the Voter Restoration Trend, 44 Nova L. Rev. 195, 220 (2020) ("IT] he process of petitioning a judge to convert outstanding LFOs into community service was not laid out in the bill. As a result, many things are unclear; for instance, whether a lawyer will be needed to petition the judge in order to get the LFOs turned into community service."). The concurrence suggests that these alternatives make Florida's LFO scheme constitutional, see Lagoa Concurrence at 73-74, but the Supreme Court has told us that the state has the burden of showing that such alternatives are "effective" for the exercise of the right in question. See Mayer, 404 U.S. at 195, 92 S.Ct. 410. Florida has not made any factual showing of effectiveness here.
- Florida disputes that the LFO requirement precludes all indigent felons from voting, while not reaching non-indigent felons, because a felon who can afford to pay LFOs but chooses not to also will not have his voting rights restored. See Appellants' En Banc Reply Br. at 2. But the same argument could have been made in M.L.B., which involved a Mississippi requirement of paying record preparation fees to appeal an order terminating parental rights. See 519 U.S. at 106–07, 117 S.Ct. 555. In addition, there is no evidentiary support for Florida's suggestion that non-indigent felons are choosing not to pay LFOs and then seeking to vote. Indeed, the record reflects that most felons are indigent, and the district court's injunction requires evidence that the felon cannot pay. See Jones II, 462 F.Supp.3d at 1250–51.
- The majority says that *Cleburne* did not focus on the "particular disabled people involved in the appeal," but on "the mentally retarded *as a group.*" Maj. Op. at 1036–37. But here, similarly, the district court examined how the LFO requirement applies to indigents as a group and did not simply focus on the unique circumstances of the specific plaintiffs. Recall that the district court certified a subclass comprised of felons "who would be eligible to vote in Florida but for unpaid [LFOs] that [they] assert[] [they are] genuinely unable to pay." D.E. 321 at 18.
- The majority's statement that "Florida ha[s] not yet been able to find information justifying the removal of *any* of them from the voting rolls," Maj. Op. at 1035, is also misleading. Florida has not even started implementing the LFO screening process, *see* Tr. at 1236, even though Amendment 4 was enacted in 2018.

- Though the majority "assume[s] that the right to vote is a liberty interest protected by the Due Process Clause," it cites *Johnson v. Hood*, 430 F.2d 610, 612 (5th Cir. 1970), to suggest that the right to vote in a state election is not a right secured by the Due Process Clause. *See* Maj. Op. at 1048. *Johnson* is not germane for a couple of reasons. First, unlike *Johnson*, this case involves the right to vote in *both* federal and state elections. Second, we later held in *Duncan v. Poythress*, 657 F.2d 691, 700 (5th Cir. Unit B Sept. 28, 1981), that "the due process clause of the fourteenth amendment prohibits action by state officials which seriously undermine the fundamental fairness of the electoral process." We explained that *Johnson* "involved [a] garden variety challenge [] to the manner in which ballots were counted by state election officials"; it did not concern "fundamentally unfair election practices or purposeful conduct which threatened the democratic system." *Id.* at 704. Thus, we declined to read *Johnson* "as precluding federal relief in th[e] very different case of a fundamental breakdown of the democratic system." *Id.* The plaintiffs here do not bring a "garden variety" challenge to the method in which ballots are counted, but instead assert a lack of adequate procedures to inform them of their eligibility to vote. *Johnson* is therefore inapplicable.
- And, as noted earlier, the Florida Legislature rejected a proposal to add a good-faith safe harbor to SB7066. *See Jones II*, 462 F.Supp.3d at 1229–30.
- As 19 states and Washington D.C. have explained, "many States task their court systems, not their residents, with maintaining a record of outstanding LFOs and amounts paid. Indeed, it is perfectly reasonable to expect the government actors that impose LFOs to keep track of those obligations." Amicus Br. of District of Columbia, Illinois, California, Colorado, et al. at 27–30 (describing the approaches of other states).
- Modern dictionaries likewise reflect that "on account of" and "by reason of" both mean "because of." See Webster's Dictionary of English Usage 687 (1989) ("On account of is commonly used as a compound preposition equivalent to because of... On account of was first recorded in this use in 1792, and has long been established as standard in both British and American English."); Bryan A. Garner, Garner's Modern American Usage 121 (2003) ("by reason of is usually an artificial way of saying because of"); The American Heritage Dictionary of the English Language 11 (5th ed. 2018) (defining "on account of" as "Because of; for the sake of"). See also id. at 1465 (defining "by reason of" as "[b]ecause of").
- The other cases that our colleagues rely on in Part III.B.2—*Crawford*, 553 U.S. at 204, 128 S.Ct. 1610, and *Gonzalez*, 677 F.3d at 407—do not support their view. *See* Maj. Op. 1044–45. *Crawford* does not analyze the Twenty-Fourth Amendment, but instead evaluates whether a statute requiring voters to present photo identification violates the Fourteenth Amendment. As mentioned earlier, the *Crawford* plurality noted that the statute would not pass muster under *Harper* if the state "required voters to pay a tax or a fee to obtain a new photo identification," but the state issued free photo identification cards. *See* 553 U.S. at 198, 128 S.Ct. 1610. In *Gonzalez*, the Ninth Circuit determined that requiring voters to provide identification at the polls did not constitute a tax or impose a material burden on voters for refusing to pay a tax, and thus did not violate the Twenty-Fourth Amendment. *See* 677 F.3d at 407–08. *Gonzalez*, however, did not analyze the phrase "by reason of."
- Though the Twenty-Fourth Amendment outlaws financial barriers to voting in *federal* elections, as discussed earlier, the Supreme Court invalidated the imposition of a poll tax on *state* elections in *Harper* under the Equal Protection Clause. *See Harper*, 383 U.S. at 666–67, 86 S.Ct. 1079.
- Our colleagues further assert in Part III.B.2 that "the Twenty-Fourth Amendment has never been understood to prohibit States from disenfranchising tax felons[.]" Maj. Op. at 1044. Yet the very commentator they cite concludes that "the Twenty-Fourth Amendment's plain language precludes states from disenfranchising tax felons for federal elections," and that "the disenfranchisement of tax felons is facially unconstitutional under the Twenty-Fourth Amendment." Sloan G. Speck, "Failure to

Pay Any Poll Tax or Other Tax": The Constitutionality of Tax Felon Disenfranchisement, 74 U. Chi. L. Rev. 1549, 1551, 1569 (2007). Only by proposing an "extratextual" analysis—a "preliminary frame"—can that commentator opine that tax felons can be disenfranchised. See id. at 1580.

- 1 Langston Hughes, *Let America Be America Again*, https://www.poetryfoundation.org/poems/147907/let-america-be-america-again.
- Jones v. Governor of Fla., 950 F.3d 795, 801 (11th Cir. 2020). Reenfranchisement of people convicted of felonies who have served their sentences enjoys broad support, from the American Civil Liberties Union to the American Probation and Parole Association (APPA), a nonprofit organization counting as members over 1,700 individual probation or parole officers and more than 200 probation and parole agencies. The APPA advocates for "restoration of voting rights upon completion of an offender's prison sentence." En Banc Br. of Amici Curiae Am. Probation & Parole Assoc. at 8–9. Police officers, too, have advocated for rights restoration because reintegration of formerly incarcerated people reduces recidivism. See En Banc Br. of Amici Curiae the District of Columbia et al. at 16–17.
- I use "the legislature" here to refer to the majority that passed SB 7066. The bill passed both houses of Florida's legislature "on a straight party-line vote. Without exception, Republicans voted in favor, and Democrats voted against." *Jones II*, 462 F.Supp.3d at 1236–37.
- Despite evidence suggesting that voters were unaware that Amendment 4 would require payment of all restitution, fines, and fees accompanying a sentence before voting rights would be restored, Florida vehemently rejects any suggestion that "all terms of sentence" in Amendment 4 could be understood to exclude LFOs. The State relies on the Florida Supreme Court's holding that "all terms of sentence" included LFOs. See Advisory Op. to the Governor Re: Implementation of Amendment 4, the Voting Restoration Amendment, 288 So. 3d 1070 (Fla. 2020). And it emphasizes that proponents of Amendment 4 represented to the Florida Supreme Court in an earlier proceeding to secure Amendment 4's spot on the ballot that financial obligations were a "term[] of sentence." But whether voters believed that LFOs were part of the sentence that must be completed before voting rights would be restored is largely beside the point. Florida's arguments do not convince me on what I see as the real question, whether voters who passed Amendment 4 thought it would function the way SB 7066 made it function.

When it comes to this question, Florida has offered no evidence that voters believed a person who was genuinely unable to pay his LFOs would be denied the franchise. Denying reenfranchisement to people who can prove that they are truly unable to pay would not serve the purposes of the sentence completion requirement because they will have paid their debt to society insofar as they are able. Indeed, when it decided the meaning of "all terms of sentence" the Florida Supreme Court "did not address what 'completion' of these amounts means." *Jones II*, 462 F.Supp.3d at 1208 (citing *Advisory Op.*, 288 So. 3d at 1074–75). Those who are genuinely unable to pay the balance of their LFOs have "completed" all terms of their sentences that they can. As Judge Jordan explains, the Constitution prohibits denying the franchise based on inability to pay—and we should not presume that the voters intended an unconstitutional result. Moreover, is it reasonable to conclude that Florida's voters thought when they passed Amendment 4 that it would deny the franchise to the overwhelming majority of Floridians who ever had a felony conviction? I don't think it is.

- Rebekah Diller, Brennan Center for Justice, *The Hidden Costs of Florida's Criminal Justice Fees* 5–7 (2010) ("Brennan Center Report"),
  - $https://www.brennancenter.org/sites/default/files/2019-08/Report\_The \%20 Hidden-CostsFlorida's-Criminal-Justice-Fees.pdf.$
- 6 Brennan Center Report at 6. Florida does not waive the fee even if an applicant is found to be indigent and therefore entitled to a

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public defender	Id. at 7; see	generally Fla.	Stat. §	\$ 27.52	(1)(b)
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- 7 See, e.g., H.R. Staff Analysis, H.B. 1381, Reg. Sess. (Fla. 1998), http://archive.flsenate.gov/data/session/1998/House/bills/analysis/pdf/HB1381S1Z.CP.pdf; see also Doc. 360-48 (Florida Court Clerks and Comptrollers data explaining "minimal collections expectation" for more than two-thirds of all fines and fees levied from 2013–2018 due to indigency).
- SB 7066 was not the only bill relating to Amendment 4 that the legislature considered, and an alternate proposal that was rejected highlights the legislature's knowledge of SB 7066's impact. Florida law provides that a sentencing court may convert LFOs to civil liens when defendants cannot pay them. See Fla. Stat. § 938.30(6)–(9), see Jones II, 462 F.Supp.3d at 1206–07 (explaining that civil liens are "often use[d] for obligations a criminal defendant cannot afford to pay"). The legislature considered a bill that would have allowed indigent people to regain their voting rights under Amendment 4 because it would have allowed those whose LFOs had been converted to civil liens to register. Ultimately, though, the legislature rejected that proposal in favor of SB 7066, which contains no such exception. See Jones II, 462 F.Supp.3d at 1235–36 (describing SB 7086).
- As an example of willful blindness, "[r]epeatedly during the debates over what became S.B. 7066, [one of its sponsors] repeated that he did not want to see any data about how many people would be affected by S.B. 7066." Doc. 286-13 at 12 (Kousser expert report); see id. at 80–82 (describing how SB 7066's sponsor repeatedly denied any interest in whether the bill was unfair to poorer Floridians; he told a fellow representative, "as I have addressed numerous times, I intentionally wanted to stay blind to the data" regarding the number of people SB 7066 would prohibit from voting because they could not afford to pay LFOs).
- On the eve of trial, the Florida Department of State "entered into an interagency agreement with the Florida Commission on Offender Review," a department that "apparently will provide staffing assistance." *Jones II*, 462 F.Supp.3d at 1229. Florida offered no evidence that its partnership with the Commission would speed up the review process, however. *See id.*
- Langston Hughes, *Harlem*, https://www.poetryfoundation.org/poems/46548/harlem.

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314 So.3d 699 District Court of Appeal of Florida, Third District.

Alex ROMERO, Petitioner,

V.

The STATE of Florida, Respondent. Richard Gugula, Petitioner,

 $\mathbf{v}$ 

The State of Florida, Respondent. Jerome London, Petitioner,

V

The State of Florida, Respondent. Ventura Gomez, Petitioner,

V.

The State of Florida, Respondent. Reginald Brown, Petitioner,

V.

The State of Florida, Respondent.

No. 3D20-0032, No. 3D20-0033, No. 3D20-0034, No. 3D20-0035, No. 3D20-0036

Opinion filed January 20, 2021.

#### **Synopsis**

**Background:** In three separate cases, the Circuit Court, 11th Judicial Circuit, Miami-Dade County, Renatha S. Francis, Yery Marrero, and Dava J. Tunis, JJ., affirmed defendants' convictions for threatening a law enforcement officer. Defendants petitioned for second-tier certiorari review and the cases were consolidated.

[Holding:] The District Court of Appeal, Miller, J., held that statute prohibiting threatening law enforcement officers, which did not specify any scienter requirement, was not facially unconstitutionally overbroad in violation of the First Amendment.

Petition denied.

West Headnotes (16)

## [1] **Criminal Law** Extent of Review as Determined by Mode Thereof

On second-tier certiorari, the District Court of Appeal's inquiry is limited to whether the circuit court afforded procedural due process and whether the circuit court applied the correct law, or, as otherwise stated, departed from the essential requirements of law. U.S. Const. Amend. 14.

1 Cases that cite this headnote

#### [2] Criminal Law—Certiorari

A ruling constitutes a departure from the essential requirements of law, such that second-tier certiorari review may be granted, when it amounts to a violation of a clearly established principle of law resulting in a miscarriage of justice.

## [3] Constitutional Law—Presumptions and Construction as to Constitutionality Constitutional Law—Doubt

Courts are charged with the duty, if reasonably possible, and consistent with constitutional rights, to resolve doubts as to the validity of a statute in favor of its constitutional validity and to construe a statute, if reasonably possible, in such a manner as to support its constitutionality.

## [4] Constitutional Law—Substantial impact, necessity of

When a statute encroaches upon activity protected by the First Amendment, the challenger may bring a substantial overbreadth

facial challenge. U.S. Const. Amend. 1.

Whether a regulation is overbroad, in violation of the First Amendment, depends on its application to real-world conduct, not fanciful hypotheticals. U.S. Const. Amend. 1.

### [5] Constitutional Law First Amendment in General

The First Amendment overbreadth doctrine represents a departure from the traditional rule that a person may not challenge a statute on the ground that it might be applied unconstitutionally in circumstances other than those before the court; accordingly, the doctrine allows a litigant to raise a facial violation, even if the conduct of the party would not enjoy protection under the First Amendment. U.S. Const. Amend. 1.

## [9] Constitutional Law—Use as last resort; sparing use

The overbreadth doctrine as it relates to the First Amendment is strong medicine that is used sparingly and only as a last resort. U.S. Const. Amend. 1.

#### [6] Constitutional Law-Facial invalidity

Under certain circumstances, even where there is some legitimate application and the parties were not engaged in activity protected by the First Amendment, a statute may be declared facially unconstitutional. U.S. Const. Amend. 1.

#### [10] Constitutional Law—Overbreadth in General

Prior to finding a law overbroad on its face in violation of the First Amendment, a court should first determine that the regulation is not susceptible to a reasonable limiting construction. U.S. Const. Amend. 1.

## [7] Constitutional Law—Substantial impact, necessity of

In order to succeed in an overbreadth challenge under the First Amendment, the litigant must demonstrate from the text of the statute and from actual fact that a substantial number of instances exist in which the statute cannot be applied constitutionally. U.S. Const. Amend. 1.

# [11] Constitutional Law—Viewpoint or idea discrimination Constitutional Law—Content-Based Regulations or Restrictions

The First Amendment means, as a general matter, that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content. U.S. Const. Amend. 1.

## [12] Constitutional Law—Content-Based Regulations or Restrictions

#### [8] Constitutional Law—Overbreadth in General

The Constitution demands that content-based

restrictions on speech be presumed invalid and that the Government bear the burden of showing their constitutionality. U.S. Const. Amend. 1.

#### [13] Constitutional Law—True threats

States are free to ban speech amounting to a "true threat" without running afoul of the First Amendment. U.S. Const. Amend. 1.

## [14] Constitutional Law—Public employees or officials, threats against Threats, Stalking, and Harassment—Validity

Statute prohibiting threatening law enforcement officers, which did not specify any scienter requirement, was not facially unconstitutional for overbreadth in violation of the First Amendment, and thus defendants' conviction for threatening a law enforcement officer pursuant to the statute was constitutional; the word "threaten" implied some element of volition, namely a communicated intent to "inflict harm," consistent with the body of law governing true threats. U.S. Const. Amend. 1; Fla. Stat. Ann. § 836.12.

#### [15] Criminal Law—Acts prohibited by statute

The mere omission from a criminal enactment of any mention of criminal intent is not interpreted as dispensing with such a requirement.

#### [16] Criminal Law—Acts prohibited by statute

Criminal statutes are construed to include

broadly applicable scienter requirements, even where the statute does not contain them, so as to avoid the statutes' potentially overbroad reach; accordingly, the presumption in favor of scienter requires a court to read into a statute only that mens rea which is necessary to separate wrongful conduct from otherwise innocent conduct.

\*700 Petitions for Writ of Certiorari from the Circuit Court for Miami-Dade County, Appellate Division, Renatha Francis, Yery Marrero, and Dava J. Tunis, Judges, Lower Tribunal No. 18-109, Lower Tribunal No. 18-24, Lower Tribunal No. 18-197, Lower Tribunal No. 18-22, Lower Tribunal No. 18-34.

#### **Attorneys and Law Firms**

Carlos J. Martinez, Public Defender, and John Eddy Morrison, Assistant Public Defender, for petitioners.

Ashley Moody, Attorney General, and Richard L. Polin, Assistant Attorney General, for respondent.

Before SCALES, HENDON, and MILLER, JJ.

#### **Opinion**

#### MILLER, J.

\*701 In these consolidated cases, petitioners seek second-tier certiorari review of appellate decisions by the circuit court affirming their respective convictions and sentences imposed by the county court for violations of section 836.12(2), Florida Statutes (2019). Relying heavily upon the seminal Supreme Court decision in Virginia v. Black, 538 U.S. 343, 123 S. Ct. 1536, 155 L. Ed. 2d 535 (2003), petitioners raise a facial constitutional challenge to the statute for overbreadth under the First Amendment. We conclude the statute is amenable to a construction under which it does not reach a substantial amount of constitutionally protected speech in furthering the State's valid, even "overwhelming, interest in protecting the safety of its" officers and "in allowing [them] to perform [their] duties without interference from threats of physical violence." Watts v. United States, 394 U.S. 705, 707, 89 S. Ct. 1399, 1401, 22 L. Ed. 2d 664 (1969). Thus, we find no departure from the essential

requirements of law and deny the writs.

#### **BACKGROUND**

After uttering certain menacing statements, each petitioner was charged by information with one count of threatening a law enforcement officer.<sup>2</sup> Petitioners argued in the trial court that section 836.12, Florida Statutes (2019), is unconstitutionally overbroad, contending the legislature's failure to specify any requirement of scienter runs afoul of the First Amendment. In some cases, the judge specifically found any overbreadth issue could be resolved by way of a jury instruction. Regardless, in all cases, the county court upheld the constitutionality of the statute. Ensuing appeals to the circuit court appellate division proved unfruitful, and the instant petitions followed.

#### STANDARD OF REVIEW

[1] [2]On second-tier certiorari, our "inquiry is limited to whether the circuit court afforded procedural due process and whether the circuit court applied the correct law," or, as otherwise stated, departed \*702 from the essential requirements of law." Custer Med. Ctr. v. United Auto. Ins. Co., 62 So. 3d 1086, 1092 (Fla. 2010) (citation omitted). "A ruling constitutes a departure from the essential requirements of law when it amounts to 'a violation of a clearly established principle of law resulting in a miscarriage of justice.'" Miami-Dade Cnty. v. Omnipoint Holdings, Inc., 863 So. 2d 195, 199 (Fla. 2003) (citation omitted).

#### **ANALYSIS**

<sup>[3]</sup>As due process was clearly afforded below, we focus our review on whether, in upholding section 836.12, Florida Statutes, the circuit court departed from clearly established constitutional law. Our analysis is guided by the axiom that courts are charged with the "duty[,] if reasonably possible, and consistent with constitutional rights, to resolve doubts as to the validity of a statute in favor of its constitutional validity and to construe a statute, if reasonably possible, in such a manner as to support its constitutionality." Corn v. State, 332 So. 2d 4, 8 (Fla. 1976).

#### I. Overbreadth

[4] [5] The First Amendment, applicable to the States through the Fourteenth Amendment, provides that 'Congress shall make no law ... abridging the freedom of speech.' "Black, 538 U.S. at 358, 123 S. Ct. at 1547 (alteration in original). Consequently, "[w]hen a statute encroaches upon activity protected by the First Amendment, the challenger may bring a 'substantial overbreadth' facial challenge." Ex parte Bradshaw, 501 S.W.3d 665, 671 (Tex. Ct. App. 2016) (citing United States v. Stevens, 559 U.S. 460, 473, 130 S. Ct. 1577, 1587, 176 L. Ed. 2d 435 (2010)). The First Amendment overbreadth doctrine "represents a departure from the traditional rule that a person may not challenge a statute on the ground that it might be applied unconstitutionally in circumstances other than those before the court." Bates v. State Bar of Ariz., 433 U.S. 350, 380, 97 S. Ct. 2691, 2707, 53 L. Ed. 2d 810 (1977) (citations omitted). Accordingly, the doctrine allows a litigant to raise a facial violation, even if the conduct of the party would not enjoy protection under the First Amendment. Broadrick v. Oklahoma, 413 U.S. 601, 615, 93 S. Ct. 2908, 2918, 37 L. Ed. 2d 830 (1973).

[6] [7] [8]Under certain circumstances, even where there is some legitimate application and the parties were not engaged in activity protected by the First Amendment, a statute may be declared facially unconstitutional. See Osborne v. Ohio, 495 U.S. 103, 112 n.8, 110 S. Ct. 1691, 1697 n.8, 109 L. Ed. 2d 98 (1990) ("[D]efendants [are permitted] to challenge statutes on overbreadth grounds, regardless of whether the individual defendant's conduct is constitutionally protected."). In order to succeed in an overbreadth challenge, the litigant "must demonstrate from the text of [the statute] and from actual fact that a substantial number of instances exist in which the [statute] cannot be applied constitutionally." N.Y. State Club Ass'n, Inc. v. City of N.Y., 487 U.S. 1, 14, 108 S. Ct. 2225, 2234, 101 L. Ed. 2d 1 (1988). "Whether a regulation is overbroad depends on its application 'to real-world conduct, not fanciful hypotheticals." "Hoglan v. Robinson, No. 7:15-cv-00694, at \*4, 2018 WL 1570821 (W.D. VA. Mar. 30, 2018) (quoting Stevens, 559 U.S. at 485, 130 S. Ct. at 1594 (Alito, J., dissenting)).

<sup>[9]</sup> [10] "The overbreadth doctrine is 'strong medicine' that is used 'sparingly and only as a last resort.' "N.Y. State Club Ass'n, Inc., 487 U.S. at 14, 108 S. Ct. at 2234 (quoting Broadrick, 413 U.S. at 613, 93 S. Ct. at 2916). Indeed, as was so aptly observed by one of the county court judges below, "[p]rior to finding a law \*703

overbroad on its face, a court should 'first determine that the regulation is not "susceptible to a reasonable limiting construction." ' "O.P-G. v. State, 290 So. 3d 950, 959 (Fla. 3d DCA 2019) (citation omitted).

#### **II. True Threats**

[11] [12] [A]s a general matter, 'the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content.' "Ashcroft v. Am. Civil Liberties Union, 535 U.S. 564, 573, 122 S. Ct. 1700, 1707, 152 L. Ed. 2d 771 (2002) (citation omitted). Consequently, "the Constitution 'demands that content-based restrictions on speech be presumed invalid ... and that the Government bear the burden of showing their constitutionality.' "United States v. Alvarez, 567 U.S. 709, 716-17, 132 S. Ct. 2537, 2544, 183 L. Ed. 2d 574 (2012) (citation omitted) (alteration in original).

Nonetheless, "[f]rom 1791 to the present, ... our society, like other free but civilized societies, has permitted restrictions upon the content of speech in a few limited areas." R.A.V. v. City of St. Paul, 505 U.S. 377, 382-83, 112 S. Ct. 2538, 2542-43, 120 L. Ed. 2d 305 (1992). These limited categories consist of "well-defined and narrowly limited classes of speech" or expressive conduct which are "of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality." Chaplinsky v. New Hampshire, 315 U.S. 568, 571-72, 62 S. Ct. 766, 769, 86 L. Ed. 1031 (1942).

#### a. Watts v. United States, 394 U.S. 705 (1969).

[13] As relevant to this case, states are free to ban speech amounting to a "true threat" without running afoul of the First Amendment. Black, 538 U.S. at 359, 123 S. Ct. at 1547 (citations omitted). The true threats doctrine finds its genesis in the oft-cited Supreme Court case of Watts v. United States, 394 U.S. 705, 89 S. Ct. 1399, 22 L. Ed. 2d 664 (1969). There, during the Vietnam War, while attending a protest, Watts stated he would resist the draft and, "[i]f they ever make me carry a rifle the first man I want to get in my sights is L.B.J." Id. at 706, 89 S. Ct. at 1401. Watts was charged and convicted under a statute prohibiting any individual from "knowingly and willfully" making "any threat to take the life or to inflict bodily harm upon the President of the United States." Id.

at 705, 89 S. Ct. at 1400.

The Court determined the relevant statute was "certainly ... constitutional on its face," given the Nation's "valid, even an overwhelming, interest in protecting the safety of its Chief Executive and in allowing him to perform his duties without interference from threats of physical violence." Id. at 707, 89 S. Ct. at 1401. Nevertheless, as the statute "ma[de] criminal a form of pure speech," it had to be "interpreted with the commands of the First Amendment clearly in mind." Id. at 707, 89 S. Ct. at 1401. Thus, "a threat must be distinguished from what is constitutionally protected speech." Id. at 707, 89 S. Ct. at 1401. The Court ultimately concluded Watts's statement, "[t]aken in context," including its "expressly conditional nature ... and the reaction of the listeners," was mere political hyperbole that did not qualify as a "true 'threat'" under the statute. Id. at 708, 89 S. Ct. at 1402.

#### b. Virginia v. Black, 538 U.S. 343 (2003).

Over three decades later, in Virginia v. Black, the Court reaffirmed the proposition that among the categories of speech states may regulate, consistent with the First Amendment, are true threats. \*704 538 U.S. at 359, 123 S. Ct. at 1547 (citations omitted). At issue was the constitutionality of a provision of a Virginia statute proscribing the burning of a cross with "an intent to intimidate a person or group of persons." Id. at 347, 123 S. Ct. at 1541 (citation omitted). Defining true threats as encompassing "those statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals," the Court upheld the statutory provision. Id. at 359, 123 S. Ct. at 1548 (citation omitted). The Court explained the speaker "need not actually intend to carry out the threat," as the prohibition on such threats "'protect[s] individuals from the fear of violence' and 'from the disruption fear engenders,' in addition to protecting people 'from the possibility that the threatened violence will occur." "Id. at 360, 123 S. Ct. at 1548 (alteration in original) (citation omitted).

A majority determined, "[a] ban on cross burning carried out with the intent to intimidate ... is proscribable under the First Amendment, " and "the First Amendment permits content discrimination 'based on the very reasons why the particular class of speech at issue ... is proscribable.' "3 Id. at 362-63, 123 S. Ct. at 1549-50 (fourth alteration in original) (citation omitted).

c. Elonis v. United States, 575 U.S. 723 (2015). More recently, the Court decided Elonis v. United States, 575 U.S. 723, 135 S. Ct. 2001, 192 L. Ed. 2d 1 (2015). There, Elonis was charged with violating a federal statute, criminalizing the transmission of any communication containing a threat to kidnap or injure another. The statute lacked a mens rea requirement.

At trial, the court rejected Elonis's request for a special instruction that would have required the Government to prove he specifically intended to threaten his targets. Id. at 723, 135 S. Ct. at 2007. His request was denied, and the jury was instructed,

A statement is a true threat when a defendant intentionally makes a statement in a context or under such circumstances wherein a reasonable person would foresee that the statement would be interpreted by those to whom the maker communicates the statement as a serious expression of an intention to inflict bodily injury or take the life of an individual.

<u>Id.</u> at 723, 135 S. Ct. at 2007. This rejection enabled the Government to inform the jurors that Elonis's subjective intent was irrelevant. Elonis was convicted.

The Supreme Court considered the adequacy of the instruction in light of Morissette v. United States, 342 U.S. 246, 72 S. Ct. 240, 96 L. Ed. 288 (1952), and the fact "that a defendant must be 'blameworthy in mind' before ... found guilty." Elonis, 575 U.S. at 723, 135 S. Ct. at 2009. Concluding "[t]he jury was instructed that the Government need prove only that a reasonable person would regard Elonis's communications as threats, and ... 'wrongdoing must be conscious to be criminal,' " the Court overturned the conviction. Id. at 723, 135 S. Ct. at 2012 (citation omitted). It further noted the requisite scienter "is satisfied if the defendant transmits a communication for the purpose of issuing a threat, or with \*705 knowledge that the communication will be viewed as a threat." Id. at 723, 135 S. Ct. at 2012.

#### III. Section 836.12, Florida Statutes

[14]It is against this background that we examine whether the circuit court departed from the essential requirements of law in deeming the text of the challenged statute constitutionally compliant. Section 836.12(2), Florida Statutes, signed into law in 2016, provides, in relevant part:

Any person who threatens a law enforcement officer, a

state attorney, an assistant state attorney, a firefighter, a judge, or an elected official, or a family member of such persons, with death or serious bodily harm commits a misdemeanor of the first degree, punishable as provided in s. 775.082 or s. 775.083.

Following the statutory enactment, our high court approved standard jury instructions for use in prosecuting violators. Ese In re Standard Jury Instructions in Criminal Cases—Report 2016-06, 217 So. 3d 965 (Fla. 2017). Pursuant to the instructions, the State is charged with proving the accused "knew that the person threatened was within the class of protected persons identified in the statute." Id. at 965.

We agree with the broad proposition advanced by petitioners that, in the context of a statute proscribing threats, proof of scienter is necessary to guard against the impermissible regulation of the lawful exercise of constitutionally protected speech. Without such proof, remarks made in jest or mere puffery, political hyperbole, or involuntary communications could conceivably subject an accused to prosecution. See Brandenburg v. Ohio, 395 U.S. 444, 448, 89 S. Ct. 1827, 1830, 23 L. Ed. 2d 430 (1969) (finding advocating violence as moral propriety or moral necessity "is not the same as preparing a group for violent action and steeling it to such action") (quoting Noto v. United States, 367 U.S. 290, 298, 81 S. Ct. 1517, 1521, 6 L. Ed. 2d 836 (1961)). Hence, here, the phrasing of the statute is "hardly ideal." Carrell v. United States, 165 A.3d 314, 319 (D.C. Ct. App. 2017) (citation omitted). Nonetheless, this does not compel a finding that the circuit court appellate panel strayed from clearly established precedent. See State Farm Fla. Ins. Co. v. <u>Sanders</u>, — So.3d — , — , 45 Fla. L. Weekly D870, D871, 2020 WL 1870776 (Fla. April 15, 2020) ("A classic example of a departure from the essential requirements of the law is a trial court's failure to follow binding precedent.") (citing State v. Walsh, 204 So. 3d 169 (Fla. 1st DCA 2016); Powell v. City of Sarasota, 857 So. 2d 326 (Fla. 2d DCA 2003)).

[15] [16] "For several centuries (at least since 1600) the different common law crimes have been so defined as to require, for guilt, that the defendant's acts or omissions be accompanied by one or more of the various types of fault (intention, knowledge, recklessness or—more rarely—negligence)." Elonis, 575 U.S. at 723, 135 S. Ct. at 2015 (Alito, J., concurring in part and dissenting in part) (quoting 1 W. LaFave, Substantive Criminal Law § 5.5 (2003)). However, the "mere omission from a criminal enactment of any mention of criminal intent" is not interpreted as dispensing with such a requirement. Elonis, 575 U.S. at 723, 135 S. Ct. at 2009 (citation omitted); see N.D. v. State, 315 So.3d 102, 105 (Fla. 3d

DCA Nov. 4, 2020) ("[B]ecause 'guilty knowledge or mens rea was a \*706 necessary element in the proof of every crime' at common law, it is presumed that the legislature also intends to include a guilty knowledge element in its criminal statutes, absent an express statement to the contrary.") (quoting State v. Giorgetti, 868 So. 2d 512, 515 (Fla. 2004)). Rather, "criminal statutes [are construed] 'to include broadly applicable scienter requirements, even where the statute ... does not contain them," "Elonis, 575 U.S. at 723, 135 S. Ct. at 2009 (quoting United States v. X-Citement Video, Inc., 513 U.S. 64, 70, 115 S. Ct. 464, 468, 130 L. Ed. 2d 372 (1994)), "so as to avoid the statutes' potentially overbroad reach." Osborne, 495 U.S. at 119, 110 S. Ct. at 1701; see also United States v. Balint, 258 U.S. 250, 251, 42 S. Ct. 301, 302, 66 L. Ed. 604 (1922) ("[T]he general rule at common law was that the scienter was a necessary element in the indictment and proof of every crime."). Accordingly, the court is charged with reading that mens rea "necessary to separate wrongful conduct from 'otherwise innocent conduct' " into the statute. Carter v. United States, 530 U.S. 255, 269, 120 S. Ct. 2159, 2169, 147 L. Ed. 2d 203 (2000) (citation omitted).

"[I]n light of the[se] background rules of the common law, in which the requirement of some mens rea for a crime is firmly embedded," here, the failure to specify the same cannot be deemed, in and of itself, fatal. Staples v. United States, 511 U.S. 600, 605, 114 S. Ct. 1793, 1797, 128 L. Ed. 2d 608 (1994) (internal citation omitted); see also § 775.01, Fla. Stat. ("The common law of England in relation to crimes, except so far as the same relates to the modes and degrees of punishment, shall be of full force in this state where there is no existing provision by statute on the subject."). Instead, we must determine whether the circuit court acted within the bounds of the law in tacitly determining the statute is subject to a constitutionally viable limiting construction.

Under the plain language of the statute, only a perpetrator who "threatens" another with "death or serious bodily harm" is subject to punishment. § 836.12(2), Fla. Stat. By criminalizing only communications of unlawful violence, the legislature clearly endeavored to remove protected speech from the sweep of the statute. However, the word "threaten" remains undefined.

We are cognizant that "[t]he word 'threat' does not itself contain a mens rea requirement." Elonis, 575 U.S. 723, 135 S. Ct. at 2019 (Thomas, J., dissenting). Nonetheless, in the context presented here, the word lends itself to a definition that renders the statute susceptible to a limited construction that removes any chilling effect on constitutionally protected expression.

"[W]here a statute does not specifically define words of common usage, such words are construed in their plain and ordinary sense." State v. Brake, 796 So. 2d 522, 528 (Fla. 2001) (citing State v. Mitro, 700 So. 2d 643, 645 (Fla. 1997)). Although "threaten" is arguably subject to a myriad of varied and nuanced definitions, as was recently observed by our sister court in Puy v. State, 294 So. 3d 930, 933 (Fla. 4th DCA 2020), "Merriam-Webster online dictionary's first definition for 'threat' is 'an expression of intention to inflict evil, injury, or damage." (Quoting Merriam-Webster, https://www.merriam-webster.com/dictionary/threat (last visited Apr. 13, 2020)); see also Threat Webster's Third New International Dictionary (2002) (defining "threat" as "an expression of an intention to inflict evil, injury, or damage"). There, the Fourth District Court of Appeal expounded upon the meaning to preserve the constitutionality of section 836.10, Florida Statutes. The court found that "whether a written communication constitutes a threat under section 836.10 depends on whether the message was 'sufficient \*707 to cause alarm in reasonable persons." Puy, 294 So. 3d at 933 (quoting Smith v. State, 532 So. 2d 50, 53 (Fla. 2d DCA 1988)).

In the same vein, Black's Law Dictionary defines "threat" as a "communicated intent to inflict harm or loss on another or on another's property, esp. one that might diminish a person's freedom to act voluntarily or with lawful consent; a declaration, express or implied, of an intent to inflict loss or pain on another." Threat, Black's Law Dictionary (11th ed. 2019). Garner's Dictionary of Legal Usage equates "threaten" with menace and defines both words as "to project to another person potential or even imminent harm [usually] by words, actions, posture, or facial expressions." Threaten, Garner's Dictionary of Legal Usage (3d ed. 2011). Lastly, the American Heritage Dictionary defines "threat" as "[a]n expression of an intention to inflict pain, harm, or punishment," Threat, The American Heritage Dictionary (5th ed. 2020), and Lexico, an online dictionary powered by Oxford, describes the word as "[a] statement of an intention to inflict pain, injury, damage, or other hostile action on someone in retribution for something done or not done." Lexico powered by https://www.lexico.com/definition/threat (last visited Jan. 20, 2021).

Although by no means comprising an exhaustive list, woven through the fabric of all cited definitions is a common thread of some element of volition, namely a communicated intent to "inflict harm," consistent with the body of law governing true threats. Thus, here, particularly in light of the fact the legislature is presumed

to be aware of preexisting Supreme Court precedent when passing new legislation, the term threaten must be narrowly construed as encompassing only true threats, defined as "those statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual." Black, 538 U.S. at 359, 123 S. Ct. at 1548 (citations omitted); see also Adler-Built Indus., Inc. v. Metro. Dade Cnty., 231 So. 2d 197, 199 (Fla. 1970) ("The Legislature is presumed to be acquainted with judicial decisions on the subject concerning which it subsequently enacts a statute.") (citation omitted). This reading supplies the omitted mens rea element, separating wrongful from innocent conduct and shielding otherwise-protected speech, including mere hyperbole, exaggeration, or humor, from criminal liability. Carter, 530 U.S. at 269, 120 S. Ct. at 2169 (citation omitted).

So construed, the failure by the legislature to specify scienter does not conflict with the First Amendment. <u>See United States v. Payne</u>, No. 2:16-cr-00046-GMN-PAL, at \*9, 2017 WL 8941311 (D. Nev. Jan. 3, 2017) ("[B] ecause courts routinely construe criminal threat statutes to apply

only to true threats" the fact that a statute, such as this one, "does not contain statutory language distinguishing between threats and 'true threats' ... does not render [the statute] overbroad.") (citations omitted). Thus, we find no "violation of a clearly established principle of law resulting in a miscarriage of justice" in the decisions by the circuit court. Omnipoint Holdings, Inc., 863 So. 2d at 199 (citation omitted); see N.D., 315 So.3d at 104, 45 Fla. L. Weekly at D2478 ("As threats to injure or kill are not constitutionally protected, a defendant's First Amendment rights are not violated by laws prohibiting such threats.") (citation omitted). Hence, petitioners have failed to meet the standard for issuance of the writs.

Petitions denied.

#### **All Citations**

314 So.3d 699, 46 Fla. L. Weekly D198

#### **Footnotes**

- "[A] law should not be invalidated for overbreadth unless it reaches a substantial number of impermissible applications." New York v. Ferber, 458 U.S. 747, 771, 102 S. Ct. 3348, 3362, 73 L. Ed. 2d 1113 (1982).
- Alex Romero, riding as a passenger in an unidentified vehicle, rolled down his window as an officer was picking up her daughter from daycare and stated, "Officer ... I got you now," while making a gun gesture. Richard Gugula made statements regarding bullet proof vests, shotguns, and seeing police officers soon. Additionally, after getting arrested, he stated he would cause others to call police and would be waiting for them. Jerome London, while in custody, made a statement about getting a hitman to kill a sergeant if taken to jail. Ventura Gomez, while at a holding facility, commented that once he was released, he would get a gun, hunt for the arresting officers and shoot them like dogs. He further said the City of Miami Beach would know him as a cop killer. Reginald Brown, during the course of an arrest, stated he would kill both arresting officers and their families as soon as he was released.
- A plurality of a fracture opinion by the Court further found a prima facie provision of the statute stating "[t]he burning of a cross, by itself, is sufficient evidence from which [the jury could] infer the required intent" to be unconstitutional as it allowed the government to "arrest, prosecute, and convict a person solely on the fact of cross burning itself." <u>Black</u>, 538 U.S. at 364-65, 123 S. Ct. at 1550-51.
- In adhering to this body of precedent, we reject the contention that approval of Florida Standard Jury Instruction 8.22(a) constitutes an infringement on the separation of powers doctrine.

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Declined to Follow by United States v. Minor, 1st Cir.(Me.), April 11, 2022

981 F.3d 1171 United States Court of Appeals, Eleventh Circuit.

UNITED STATES of America, Plaintiff-Appellee,

Deangelo Lenard JOHNSON, Defendant-Appellant.

> No. 19-10915 | (December 2, 2020)

#### **Synopsis**

**Background:** In prosecution for possession of firearm after conviction for misdemeanor crime of domestic violence, the United States District Court for the Middle District of Florida, No. 3:18-cr-00090-MMH-JBT-1, Marcia Morales Howard, J., 2018 WL 5766346, denied defendant's motion to dismiss indictment, and after stipulated-facts bench trial, defendant was convicted of the charged offense. Defendant appealed.

**Holdings:** The Court of Appeals, Rosenbaum, Circuit Judge, held that:

- as a matter of apparent first impression, **knowledge** of status as domestic-violence misdemeanant requires **knowledge** of conviction for misdemeanor crime against current or former spouse, parent, or guardian, which crime required knowingly or recklessly engaging in at least the slightest offensive touching, and
- [2] defendant's substantial rights were not affected by plain error as to indictment's failure to allege defendant's **knowledge** of his status as domestic-violence misdemeanant, nor by the absence of a stipulation to such **knowledge**.

#### Affirmed.

Martin, Circuit Judge, filed an opinion concurring in part and dissenting in part.

West Headnotes (26)

#### [1] Weapons Domestic violence

For an underlying offense to qualify as a misdemeanor crime of domestic violence, as predicate for conviction for possession of firearm after conviction for misdemeanor crime of domestic violence, it is enough that the victim of the underlying offense was in fact the offender's current or former spouse, parent, or guardian, regardless of whether the underlying offense required as an element a domestic relationship between the offender and the victim. 18 U.S.C.A. §§ 921(a)(33)(A), 922(g)(9).

#### [2] Criminal Law—Indictment or Information Criminal Law—Sufficiency of evidence Criminal Law—Review De Novo

Generally, the Court of Appeals engages in de novo review of challenges to an indictment or to the sufficiency of the evidence, but when a defendant fails to raise an argument in district court, appellate review is for plain error.

#### [3] Criminal Law—Review

Defendant, by stipulating that facts were sufficient to convict him at bench trial in prosecution for possession of firearm after conviction for misdemeanor crime of domestic violence, did not invite error, as basis for barring appellate review, concerning insufficiency of evidence of his **knowledge** that he was a domestic-violence misdemeanant; such **knowledge** had not been understood to be an element of the offense at time of bench trial, and

defendant explained in district court that he was agreeing to stipulated bench trial solely because he believed his underlying misdemeanor offense fell within statutory exception for restoration of civil rights. 18 U.S.C.A. §§ 921(a)(33)(B)(ii), 922(g)(9), 924(a)(2); Fla. Stat. Ann. § 784.03(1).

## [4] **Criminal Law**—Jurisdiction and proceedings for review; preservation of error

Defendant waived appellate review, except for plain error review, as to legal sufficiency of indictment, and sufficiency of evidence at stipulated-facts bench trial, regarding his **knowledge** of his status as domestic-violence misdemeanant, as element of possession of firearm after conviction for misdemeanor crime of domestic violence, where he never argued in district court that he had been unaware of his previous conviction in Florida for a misdemeanor for engaging in physical violence against his wife, though he argued in motion to dismiss federal indictment that the Florida misdemeanor offense fell within federal statutory exception for restoration of civil rights, and at sentencing he sought downward variance based on assertions that his civil rights had not been abrogated and that nobody had told him he could not possess a firearm. 18 U.S.C.A. §§ 921(a)(33)(B)(ii), 922(g)(9), 924(a)(2); Fla. Stat. Ann. § 784.03(1).

#### 1 Cases that cite this headnote

### [5] Criminal Law—Necessity of Objections in General

To establish plain error, defendant must show that: (1) an error occurred; (2) the error was plain or obvious; and (3) it affected his substantial rights; then, if defendant can demonstrate the three plain error components, the Court of Appeals may exercise its discretion to remedy the error, but only if the error seriously affects the fairness, integrity, or public

reputation of judicial proceedings.

#### 2 Cases that cite this headnote

## [6] Criminal Law—Necessity of Objections in General

An error is "plain error," as element for reversal on plain error review, if it is obvious and clear under current law.

#### 3 Cases that cite this headnote

# [7] Indictments and Charging Instruments—Purpose of Accusation Indictments and Charging Instruments—Nature, Elements, and Incidents of Offenses in General

An indictment must contain the elements of the offense charged, must fairly inform the defendant of the charge against which he must defend, and must enable the defendant to plead an acquittal or conviction in bar of future prosecutions for the same offense.

#### [8] Weapons Elements of offense in general

To convict a defendant of possession of firearm after conviction for misdemeanor crime of domestic violence, the government must prove all of the following elements: (1) the defendant knew he possessed; (2) a "firearm" as defined by the statute; (3) that had traveled in interstate commerce; and (4) defendant knew he had previously been convicted of a misdemeanor crime of domestic violence. 18 U.S.C.A. §§ 922(g)(9), 924(a)(2).

#### 7 Cases that cite this headnote

## [9] Criminal Law—Jurisdiction and proceedings for review; preservation of error Weapons—Intent, knowledge, purpose

Failure of indictment, for possession of firearm after conviction for misdemeanor crime of domestic violence, to allege that defendant had he was a domestic-violence misdemeanant when he possessed the firearm was plain error, as element for reversal on plain error review following bench trial, though indictment tracked statutory language of one of the two statutes cited in the indictment; the statutory language did not unambiguously set forth the requirement of **knowledge** of status as domestic-violence misdemeanant. 18 U.S.C.A. §§ 922(g)(9), 924(a)(2).

## [10] Indictments and Charging Instruments Necessity and sufficiency of using statutory language

While it is generally enough for an indictment to track statutory language, simply tracking statutory language does not suffice when the resulting indictment fails to fully, directly, and expressly, without any uncertainty or ambiguity, set forth all the elements necessary to constitute the offense intended to be punished.

#### [11] Criminal Law—Burden of showing error

For a defendant to show that a plain error affected his substantial rights, as required for reversal on plain error review, the defendant bears the burden of demonstrating a reasonable probability that, without the error, the outcome of the proceeding would have been different, and a reasonable probability is a probability sufficient to undermine confidence in the outcome.

#### 1 Cases that cite this headnote

## [12] Weapons → Miscellaneous particular issues Weapons → Domestic violence

A persons knows he is a domestic-violence misdemeanant, as required for conviction for possession of firearm after conviction for misdemeanor crime of domestic violence, if he knows all the following: (1) that he was convicted of a misdemeanor crime; (2) that to be convicted of that crime, he must have knowingly or recklessly engaged in at least the slightest offensive touching; and (3) that the victim of his misdemeanor crime was his current or former spouse, parent, or guardian. 18 U.S.C.A. §§ 921(a)(33)(A), 922(g)(9), 924(a)(2).

#### 2 Cases that cite this headnote

## [13] Criminal Law Matters excepted in statute defining offense

Where affirmative defenses are created through statutory exceptions, the ultimate burden of persuasion remains with the prosecution, but the defendant has the burden of going forward with sufficient evidence to raise the exception as an issue.

## [14] Criminal Law—Creation and Definition of Offenses

To evaluate whether a federal statutory exception serves as an element of a crime, the court considers three factors: (1) the statutory language and structure, to see whether they yield any clues about the exception's role; (2) the statute's legislative history, to learn whether Congress intended for the exception to serve as an element of the crime; and (3) whether the government is in a good position to find

evidence that could prove the exception's applicability.

#### Ann. § 784.03(1)(a).

#### [15] Weapons Domestic violence

In defining misdemeanor crimes of domestic violence, for the federal offense of possession of firearm after conviction for misdemeanor crime of domestic violence, the general definitional statute for firearms offense sets out, in separate subparagraphs, elements for a misdemeanor crime of violence and statutory exceptions that are effectively affirmative defenses, in contrast to both subparagraphs setting forth elements. 18 U.S.C.A. §§ 921(a)(33)(A, B), 922(g)(9).

#### 2 Cases that cite this headnote

## [16] Criminal Law—Jurisdiction and proceedings for review; preservation of error

Plain error in indictment for possession of firearm after conviction for misdemeanor crime of domestic violence, in failing to allege defendant's knowledge of status domestic-violence misdemeanant, and plain error in failing to include a stipulation to such knowledge in stipulated facts for bench trial, did not affect defendant's substantial rights, as would be required for reversal on plain error review, where facts from stipulated-facts bench trial, and undisputed facts in presentence report (PSR), established defendant's knowledge that he was a domestic-violence misdemeanant; defendant stipulated that he had pled guilty to misdemeanor "domestic battery" under Florida law after originally being charged with a felony, the victim was defendant's wife, at a minimum the offense required that defendant recklessly engaged in at least the slightest offensive touching, he spent six months in jail, and he asserted in the federal prosecution that he had believed he could possess a firearm because he was a Florida misdemeanant who had not lost his civil rights. 18 U.S.C.A. 921(a)(33)(B)(ii), 922(g)(9), 924(a)(2); Fla. Stat.

### [17] Criminal Law—Necessity of Objections in General

When a defendant does not object to a district court's factual findings, he is bound by them and may not argue on appeal that they contained error.

## [18] Criminal Law—Ascertainment by court; advising and informing accused

A knowing and intelligent plea requires that the defendant was informed of the crime's elements.

#### [19] Criminal Law—Criminal Intent and Malice

A defendant generally must know the facts that make his conduct fit the definition of the offense, even if he does not know that those facts give rise to a crime.

#### 1 Cases that cite this headnote

#### [20] Weapons Effect of subsequent circumstances

For possession of firearm after conviction for misdemeanor crime of domestic violence, statutory exception to status as domestic-violence misdemeanant, for an offender whose civil rights have been restored, does not apply to an offender whose civil rights were never abrogated. 18 U.S.C.A. §§ 921(a)(33)(B)(ii), 922(g)(9), 924(a)(2).

#### 1 Cases that cite this headnote

#### [21] Criminal Law—Constitutional questions

While the Court of Appeals generally reviews de novo the constitutionality of a statute, it reviews for plain error constitutional challenges that were not raised in the District Court.

## [22] Constitutional Law—Relationship to equal protection guarantee

While the Fifth Amendment contains no express equal-protection clause, the Fifth Amendment's guarantee of due process under the law embodies within it the concept of equal justice under the law. U.S. Const. Amend. 5.

## [23] **Criminal Law**—Jurisdiction and proceedings for review; preservation of error

With respect to defendant convicted on stipulated facts in bench trial of possession of firearm after conviction for misdemeanor crime of domestic violence, any error was not plain error as to alleged equal protection violation arising from statutory exception to status as domestic-violence misdemeanant applying only to offenders whose civil rights had been restored, but not to offenders, like defendant, whose civil rights had never been abrogated; no Supreme Court decision, or decision from the circuit's Court of Appeals, had directly resolved the equal protection issue. U.S. Const. Amend. 5; 18 U.S.C.A. §§ 921(a)(33)(B)(ii), 922(g)(9), 924(a)(2).

## [24] Criminal Law—Necessity of Objections in General

When no precedent from the Supreme Court or the circuit's Court of Appeals directly resolves a legal issue, no plain error on that issue can exist.

# [25] Commerce Weapons and explosives Weapons Violation of other rights or provisions Weapons Domestic violence

Federal criminal statute prohibiting the possession of a firearm after a conviction for a misdemeanor crime of domestic violence, for a firearm "in or affecting commerce," does not exceed the power of Congress under the Commerce Clause. U.S. Const. art. 1, § 8, cl. 3; 18 U.S.C.A. § 922(g)(9).

#### 5 Cases that cite this headnote

## [26] Courts—Number of judges concurring in opinion, and opinion by divided court

Under the prior-precedent rule, a panel of the Court of Appeals must follow the precedent of earlier panels unless and until the prior precedent is overruled or undermined to the point of abrogation by the Supreme Court or the Court of Appeals sitting en banc.

#### 3 Cases that cite this headnote

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Appeal from the United States District Court for the Middle District of Florida, D.C. Docket No. 3:18-cr-00090-MMH-JBT-1

Before MARTIN, ROSENBAUM, and TALLMAN,\* Circuit Judges.

#### **Opinion**

#### ROSENBAUM, Circuit Judge:

In 1996, Congress prohibited anyone convicted of a misdemeanor that involved domestic violence from possessing a firearm. *See* 18 U.S.C. § 922(g)(9). Senator Frank Lautenberg, who sponsored the legislation, noted that at that time, each year, somewhere between 1,500 and several thousand women were killed in domestic-violence incidents involving guns, and guns were present in 150,000 cases involving domestic violence. 142 Cong. Rec. 22985 (1996) (statement of Sen. Lautenberg).

Yet, Senator Lautenberg observed, many of the perpetrators of "serious spousal or child abuse ultimately are not charged with or convicted of felonies. At the end of the day, due to outdated laws or thinking, perhaps after a plea bargain, they are, at most, convicted of a misdemeanor." Id. at 22985. Seeking to "close this dangerous loophole," United States v. Hayes, 555 U.S. 415, 426, 129 S.Ct. 1079, 172 L.Ed.2d 816 (2009) (quoting 142 Cong. Rec. 22986 (1996) (statement of Sen. Lautenberg)), Congress banned those who have been convicted of a "misdemeanor crime of domestic violence"—one where the victim was essentially a member or former member of the perpetrator's family, and the crime necessarily involved physical force-from possessing a firearm. See 18 U.S.C. §§ 921(a)(33)(A), 922(g)(9).

Recently, in *Rehaif v. United States*, — U.S. —, 139 S. Ct. 2191, 2194, 204 L.Ed.2d 594 (2019), the Supreme Court clarified that a domestic-violence misdemeanant does not violate this prohibition on firearm possession if he does not know he is a domestic-violence misdemeanant at the time he possesses a gun. This case raises the question of what it means for a person to know he is a domestic-violence misdemeanant. As we explain below, we conclude that a person knows he is a domestic-violence misdemeanant, for *Rehaif* purposes, if he knows all the following: (1) that he was convicted of a

misdemeanor crime, (2) that to be convicted of that crime, he must have engaged in at least "the slightest offensive touching," *United States v. Castleman*, 572 U.S. 157, 163, 134 S.Ct. 1405, 188 L.Ed.2d 426 (2014) (internal citations omitted), and (3) that the victim of his misdemeanor crime was, as relevant here, his wife.

\*1176 The record establishes that Defendant-Appellant Deangelo Johnson knew all these things at the time he was found in possession of a gun. So we reject Johnson's challenge to his conviction for being a domestic-violence misdemeanant while possessing a firearm. We similarly find no merit to his equal-protection and Commerce Clause arguments. For these reasons, we affirm Johnson's conviction.

#### I.

In 2010, law enforcement responded to a call and found that Deangelo Johnson had "punched, strangled, and threatened to pistol whip" his wife. The responding officer observed numerous bruises and scratches all over Johnson's wife.

Based on Johnson's conduct, the State of Florida charged him with the felony crime of domestic violence by strangulation and assault. Represented by counsel, Johnson engaged in plea negotiations with the state. Ultimately, Johnson pled guilty to and was convicted of misdemeanor battery against his wife, in violation of Fla. Stat. § 784.03(1). He eventually was sentenced to six months in jail for this conviction.

Eight years later, in 2018, police officers found a gun on the floor of Johnson's car while he was being arrested for an outstanding warrant. A federal grand jury indicted Johnson for having been "previously convicted of a misdemeanor crime of domestic violence, that is, Domestic Battery," and knowingly possessing a firearm, in violation of 18 U.S.C. §§ 922(g)(9) and 924(a)(2). The indictment did not allege that Johnson knew of his status as a domestic-violence misdemeanant when he possessed the firearm.

Johnson moved to dismiss his federal indictment for failure to state an offense. He argued that his Florida offense did not qualify as a misdemeanor crime of domestic violence for purposes of 18 U.S.C. § 922(g)(9) because he had never lost his civil rights, and 18 U.S.C. § 921(a)(33)(B)(ii) renders § 922(g)(9) inapplicable to any person who has been convicted of a misdemeanor crime of domestic violence but, as relevant here, has had his

civil rights restored. Johnson did not challenge the indictment on the basis that he did not know that he had been convicted of the misdemeanor in 2010 for battery against his wife.

The district court denied Johnson's motion to dismiss, relying on *Logan v. United States*, 552 U.S. 23, 128 S.Ct. 475, 169 L.Ed.2d 432 (2007). In *Logan*, the Supreme Court held that a near-identical rights-restoration exception in the Armed Career Criminal Act ("ACCA"), 18 U.S.C. § 921(a)(20), applied to only those individuals who had had their civil rights restored but not to those who had never lost their civil rights in the first place. 552 U.S. at 37, 128 S.Ct. 475.

Johnson then waived his right to a jury trial and agreed to a stipulated-facts bench trial. Under those stipulated facts, Johnson confirmed that he had previously been convicted of a misdemeanor crime of domestic violence when he pled guilty in 2010 to committing Florida misdemeanor domestic battery against his wife. He also confirmed that officers later found a pistol on the floor of his car when they arrested him for an outstanding warrant. The district court made oral findings of fact and concluded that based on the stipulated facts, Johnson was guilty of violating 18 U.S.C. § 922(g)(9).

\*1177 Johnson's presentence investigation report ("PSR") recommended a total offense level of 12, with a criminal-history category of II, corresponding to an advisory Guidelines sentencing range of 12 to 18 months' imprisonment. Johnson did not object to the facts or Guidelines calculations in his PSR.

At Johnson's sentencing hearing, Johnson argued for a variance to a sentence of time served plus one day because he did not "know that he was not supposed to possess a firearm." Johnson explained that he was unaware of the firearm prohibition because he was not a convicted felon-and therefore not advised he could not possess a firearm—and as a misdemeanant, he was not prohibited from possessing a firearm by Florida law. The district court acknowledged that "this is an unusual offense in that it isn't often that individuals end up before the Court charged with something that they can genuinely say they didn't know was unlawful, and that under the circumstances of this case, it is significant." The court imposed the sentence Johnson requested, reasoning that "under the somewhat unusual facts of this case that is an appropriate sentence."

Johnson timely appealed his conviction. We stayed briefing until the Supreme Court issued its decision in *Rehaif* holding that, under 18 U.S.C. § 922(g), knowledge

of status is an element of unlawful possession of a firearm. Johnson now relies on *Rehaif* in seeking to vacate his conviction. He asserts that both the indictment and the stipulated facts at the bench trial were insufficient under Rehaif because they failed to allege and prove that Johnson knew he was a domestic-violence misdemeanant. Separately, he argues that Section 922(g)unconstitutional because (1) it violates equal-protection rights by treating him less favorably than similarly situated people convicted of misdemeanor crimes of domestic violence who lost their civil rights and had them restored, and (2) it violates the Commerce Clause.

We begin with Johnson's *Rehaif* arguments. As we have noted, *Rehaif* clarified that to convict a defendant of illegal possession of a firearm under Section 922(g), the government must prove that "the defendant knew he possessed a firearm and also that he knew he had the relevant status when he possessed it." 139 S. Ct. at 2194. Johnson's relevant status under Section 922(g) is that of a domestic-violence misdemeanant under 18 U.S.C. § 922(g)(9).

<sup>[1]</sup>For purposes of Section 922(g)(9), 18 U.S.C. § 921(a)(33)(A) defines the term "misdemeanor crime of domestic violence" as an offense that is a misdemeanor under federal, state, or tribal law and "has, as an element, the use or attempted use of physical force, or the threatened use of a deadly weapon, committed by a current or former spouse, parent, or guardian of the victim...." Under this definition, it is enough that the victim "was in fact the offender's spouse (or other relation specified in [the definition] )"—regardless of whether the predicate misdemeanor requires as an element a domestic relationship between the perpetrator and the victim. *Hayes*, 555 U.S. at 418, 129 S.Ct. 1079.

As we have noted, Johnson makes two *Rehaif*-based challenges. First, he contends that the indictment failed to state an offense because it did not allege that Johnson knew of his status; and second, Johnson argues that the stipulated facts at his bench trial were insufficient to prove that he knew his status as a domestic-violence misdemeanant.

# A. We review Johnson's *Rehaif* claims for plain error

<sup>[2]</sup>Before we get to the merits of Johnson's arguments, we must identify the \*1178 applicable standard of review. Generally, we engage in de novo review of challenges to

an indictment or to the sufficiency of the evidence. *United States v. Sperrazza*, 804 F.3d 1113, 1119 (11th Cir. 2015); *United States v. Taylor*, 480 F.3d 1025, 1026 (11th Cir. 2007). But when a defendant fails to raise an argument in district court, we review for plain error. *United States v. Reed*, 941 F.3d 1018, 1020 (11th Cir. 2019); *Sperrazza*, 804 F.3d at 1119.

<sup>[3]</sup>Here, the government asserts that we should not review Johnson's sufficiency-of-the-evidence argument at all because he invited error by stipulating that the facts were sufficient to convict him. We disagree.

Johnson explained in district court that he proceeded to a stipulated bench trial solely because he did not know that he was prohibited under Section 922(g) from possessing a firearm, since misdemeanants in Florida are not deprived of their civil rights. Because the elements of Section 922(g) were understood (and were applied under binding precedent, see United States v. Jackson, 120 F.3d 1226, 1229 (11th Cir. 1997), abrogated by Rehaif, — U.S. ----, 139 S. Ct. 2191, 204 L.Ed.2d 594), at the time Johnson stipulated, the facts to which he agreed were sufficient to prove the elements of Section 922(g). Of course, since Johnson's bench trial and sentencing, Rehaif has clarified the elements of Section 922(g). Now, there can be no doubt that under Rehaif, the elements the district court accounted for were incomplete. Johnson's acknowledgement that the evidence he stipulated to was sufficient to satisfy the elements of the crime as laid out by then-binding precedent does not preclude him from asserting that the stipulation is not sufficient in light of the Supreme Court's subsequent issuance of *Rehaif.*<sup>2</sup>

<sup>[4]</sup>But while Johnson did not invite error in the district court, neither did he raise the claims that he now makes on appeal. Johnson argues that he did raise them when he moved to dismiss his indictment and when defense counsel discussed his lack of **knowledge** at sentencing. We are not persuaded.

Johnson contended in his motion to dismiss the indictment that he had not committed a misdemeanor crime of domestic violence as 18 U.S.C. § 921(a)(33)(a) defines the term because he fell under an exception that Section 921(a)(33)(B)(ii) recognizes. As we have mentioned, that section renders non-qualifying an otherwise-qualifying predicate offense under Section 922(g)(9) if, as relevant to Johnson's argument, the defendant's civil rights have been restored since he was convicted. Johnson did not argue that his civil rights had been restored. Rather, because Johnson never lost his civil rights in connection with his conviction for a Florida domestic-violence misdemeanor, he contended that he

was covered by the Section 921(a)(33)(B)(ii) exception.

That argument is different from Johnson's *Rehaif*-based contention on appeal that the indictment is insufficient because it fails to charge that Johnson knew he was a domestic-violence misdemeanant. In fact, as the district court ruled and as we explain later, *see infra* at II.C.2, a different Supreme Court case from *Rehaif—Logan*, 552 U.S. 23, 128 S.Ct. 475, 169 L.Ed.2d 432—forecloses Johnson's Section 921(a)(33)(B)(ii)-based argument. To be clear, at no point in the district-court proceedings did Johnson ever argue or even suggest that he was unaware that he had previously been convicted in Florida of a misdemeanor for engaging in physical violence against his wife.

\*1179 Similarly, at Johnson's sentencing hearing, Johnson contended only that he did not know that he was not allowed to possess a gun because no one ever told him and because Florida never abrogated his civil rights. Johnson did not make the separate argument that he did not know that he had been convicted of a misdemeanor for using physical force against his wife.

<sup>[5]</sup>Because Johnson did not raise his *Rehaif* arguments in the district court, we review for plain error. *Reed*, 941 F.3d at 1020. To establish plain error, Johnson must show that (1) an error occurred, (2) the error was plain or obvious, and (3) it affected his substantial rights. *United States v. Moriarty*, 429 F.3d 1012, 1019 (11th Cir. 2005). If Johnson can demonstrate the three plain-error components, we may exercise our discretion to remedy the error, but only if the error seriously affects the fairness, integrity, or public reputation of judicial proceedings. *Id*.

# B. Rehaif error occurred in the district court, and that error was plain

1. Johnson's indictment contained error, and that error is plain

<sup>[6]</sup>We begin by reviewing the district court's order on Johnson's motion to dismiss his indictment for plain error. An error is plain if it is "obvious" and "clear under current law." *United States v. Lange*, 862 F.3d 1290, 1296 (11th Cir. 2017) (internal citation omitted).

<sup>[7]</sup>Indictments must "contain[] the elements of the offense charged and fairly inform[] a defendant of the charge

against which he must defend, and, second, enable [] him to plead an acquittal or conviction in bar of future prosecutions for the same offense." *Hamling v. United States*, 418 U.S. 87, 117, 94 S.Ct. 2887, 41 L.Ed.2d 590 (1974). Here, we focus on the first half of this equation, which requires an indictment to include the elements of the crime charged. *Id*.

<sup>[8]</sup> [9] Under current law, as clarified by *Rehaif*, to establish a violation of Section 922(g)(9), the government must prove all of the following elements: (1) the defendant knew he possessed (2) a "firearm" (as defined by the statute) that (3) had traveled in interstate commerce, and (4) he knew he had previously been convicted of a misdemeanor crime of domestic violence. *See Rehaif*, 139 S. Ct. at 2195-96. Johnson's indictment fails to allege that he knew he was a domestic-violence misdemeanant when he possessed the firearm in this case. So it is insufficient and plainly erroneous under current law.

The government argues that this omission does not constitute plain error because Johnson's indictment tracked the language of Sections 922(g)(9) and 924(a)(2), including the **knowledge** element. And it is true that the indictment did charge, in relevant part, that Johnson, "having been previously been convicted of a misdemeanor crime of domestic violence, that is, Domestic Battery, in the County Court, Duval County, Florida, on or about June 14, 2010, did *knowingly* possess, in and affecting interstate commerce, a firearm that is, a Cobra, .380 caliber pistol." (emphasis added). But inconsistent with *Rehaif*, the indictment charged **knowledge** with respect to only Johnson's possession of the firearm, not as to Johnson's status as a domestic-violence misdemeanant.

[10] While it is generally enough for an indictment to track statutory language, as Johnson's did, simply tracking statutory language does not suffice when the resulting indictment fails to "fully, directly, and expressly, without any uncertainty or ambiguity, set forth all the elements necessary to constitute the offen[s]e intended to be punished." \*1180 Hamling, 418 U.S. at 117, 94 S.Ct. 2887 (citation and internal quotation marks omitted). That was certainly the case here, since Section 922(g)'s phrasing did not materially change after we decided Jackson, where we held that Section 922(g) did not require the defendant to know his relevant status to be found guilty. 120 F.3d at 1229. Against that background, no indictment that merely tracked Section 922(g)'s statutory language could unambiguously set forth all elements of the crime. And for that reason, the indictment was plainly erroneous. See Reed, 941 F.3d at 1021 (finding plain error when the "indictment failed to allege that he knew [his status]"); *United States v. Moore*, 954 F.3d 1322, 1337 (11th Cir. 2020) (same).<sup>3</sup>

The government also tries to shoehorn this case into fitting within our decisions in *United States v. Gray*, 260 F.3d 1267 (11th Cir. 2001), and *United States v. Woodruff*, 296 F.3d 1041 (11th Cir. 2002). We determined that the indictments at stake there were not defective even though they did not allege a mens rea element.

But *Gray* and *Woodruff* are materially different. Each dealt with an indictment for Hobbs Act robbery that alleged that the defendant "unlawfully" "t[ook]" "property" "by means of ... force, violence, and fear of injury." *Gray*, 260 F.3d at 1283; *Woodruff*, 296 F.3d at 1046. We upheld the sufficiency of those indictments because "the requisite state of mind may be inferred from other allegations in the indictment." *Gray*, 260 F.3d at 1283; *Woodruff*, 296 F.3d at 1046. Indeed, a person cannot take property by means of force, violence, and fear of injury without knowing he is doing that.

In contrast, a person could hypothetically be convicted of a state-law battery offense without realizing that it qualified as a misdemeanor crime of domestic violence. So unlike with the Hobbs Act robbery offenses at issue in *Gray* and *Woodruff*, the **knowledge** requirement pertaining to Johnson's status could not be inferred from the allegations in the indictment. And the rule in *Gray* and *Woodruff* cannot save the indictment here.

2. The lack of evidence in the stipulated facts proving that Johnson knew he was a domestic-violence misdemeanant constituted error, and that error was plain

As for Johnson's sufficiency-of-the-evidence claim, as the government appropriately concedes, the error there was plain to the extent that the stipulated facts did not demonstrate that Johnson had **knowledge** of his status as a domestic-violence misdemeanant. As we have explained, that was clearly contrary to the law as we understand it after *Rehaif*. *See Rehaif*, 139 S. Ct. at 2200; *Reed*, 941 F.3d at 1021.

# C. The plain errors did not affect Johnson's substantial rights

[11] Having concluded that plain error infected both the

indictment and the sufficiency \*1181 of the evidence based on the stipulated facts, we consider whether either of these errors affected Johnson's substantial rights. To show that an error affected his substantial rights, Johnson bears the burden of demonstrating a reasonable probability that, without the error, the outcome of the proceeding would have been different. Molina-Martinez v. United States, — U.S. —, 136 S. Ct. 1338, 1343, 194 L.Ed.2d 444 (2016); United States v. Margarita Garcia, 906 F.3d 1255, 1267 (11th Cir. 2018). A reasonable probability is a "probability sufficient to undermine confidence in the outcome." Margarita Garcia, 906 F.3d at 1267 (internal quotation marks omitted). To determine whether Johnson's substantial rights have been affected, we review the entire record. Reed, 941 F.3d at 1021.

Whether the plain errors here had any impact on Johnson's substantial rights hinges on the evidence of whether Johnson record showing knew his status—domestic-violence misdemeanant-when possessed the gun. If this evidence is lacking, then Johnson can meet his burden to demonstrate a reasonable probability that the outcome of his case would not have been the same in the absence of the errors. But if not, then he cannot establish a reasonable probability that the outcome of his case would have differed, and his Rehaif challenges fail.

1. Rehaif's **Knowledge**-of-Status Requirement We begin identifying what Rehaif's knowledge-of-status requirement demands. Rehaif was convicted of possessing a firearm as a non-citizen illegally in the United States, in violation of 18 U.S.C. §§ 922(g)(5) and 924(a)(2). Rehaif, 139 S. Ct. at 2194. He argued that he did not know that his presence in the United States was unlawful. Id. at 2195. The Supreme Court held that the language of Sections 922(g) and 924(a)(2) required proof that when Rehaif possessed the gun, he knew that he was a non-citizen who was "illegally or unlawfully in the United States." Id. at 2198. To explain what it meant by this, the Court pointed to Liparota v. United States, 471 U.S. 419, 105 S.Ct. 2084, 85 L.Ed.2d 434 (1985), as illustrative of the type of knowledge required. *Rehaif*, 139 S. Ct. at 2198.

In *Liparota*, the defendant challenged his conviction for "knowingly us[ing] transfer[ring], acquir[ing], alter[ing], or possess[ing] [Food Stamps] in any manner not authorized by [the statute] or the regulations." *Liparota*, 471 U.S. at 420, 105 S.Ct. 2084. The Supreme Court

determined that the government had to show not only that the defendant had used, transferred, acquired, altered, or possessed Food Stamps, but also that the defendant knew that he was acting in a way that the applicable statute or regulations did not authorize. *Id.* at 423-25, 105 S.Ct. 2084.

Significantly, though, the Court cautioned, the government did not need to demonstrate that the defendant "had **knowledge** of specific regulations governing food stamp acquisition or possession" that made his transfer or possession of food stamps unlawful. *Id.* at 434, 105 S.Ct. 2084. In other words, *Liparota* did not "create[] a defense of '**mistake of law**.'" *Id.* at 425, 105 S.Ct. 2084 n.9. To explain this concept further, the Court pointed to the offense of knowing receipt of stolen goods. *Id.* It noted that not knowing that receipt of stolen goods is a crime is no defense to that offense, but not knowing the goods were stolen is. *Id.* 

Given this understanding, it is not surprising that in *Elonis v. United States*, 575 U.S. 723, ——, 135 S. Ct. 2001, 2010, 192 L.Ed.2d 1 (2015), the Supreme Court characterized *Liparota* as having construed the \*1182 statute there "to require knowledge of the facts that made the use of the food stamps unauthorized." And the Court summarized its cases as having "explained that a defendant generally must 'know the facts that make his conduct fit the definition of the offense,' even if he does not know that those facts give rise to a crime." *Id.* at 2009 (quoting *Staples v. United States*, 511 U.S. 600, 608 n.3, 114 S.Ct. 1793, 128 L.Ed.2d 608 (1994)).

So for example, in *Staples*, the Court considered what the government had to prove to establish a violation of the law that made it illegal for anyone to possess a machinegun that was not properly registered with the federal government. 511 U.S. at 602, 114 S.Ct. 1793. The Court held that the government was required to demonstrate, in relevant part, that the defendant knew that the weapon he possessed had the characteristics that caused it to fall within the statutory definition of a machinegun. *Id.* In other words, the Court explained, the defendant "must know the facts that make his conduct illegal...." *Id.* at 619, 114 S.Ct. 1793. But the defendant did not need to know the statutory definition of a machinegun to be convicted. *See id.* 

To determine what facts Johnson needed to know in light of *Rehaif*, we now turn to the statutory definition of "misdemeanor crime of domestic violence" under Section 921(a)(33). This section includes two subsections. As we will explain, subsection (a)(33)(A) contains the elements of this offense, while subsection (a)(33)(B) contains

affirmative defenses.

a. Section 921(a)(33)(A) contains the elements that establish whether a <u>person knows he is a</u> domestic-violence misdemeanant

Applying the principles from the teachings of *Rehaif*, Liparota, Elonis, and Staples to Section 922(g)(9)'s status requirement, we conclude that, at the time he possessed the firearm, the defendant must have known that he was convicted of a misdemeanor, and he must have known the facts that made that crime qualify as a misdemeanor crime of domestic violence. But Section 922(g)(9) introduces a slight twist: one of the facts that makes a crime qualify as a misdemeanor crime of domestic violence is that the crime must categorically require the use or threatened use of physical force. See 18 U.S.C. § 921(a)(33)(A)(ii); see also Castleman, 572 U.S. at 168, 134 S.Ct. 1405. That may create the misimpression that Rehaif requires technical **knowledge** of the law. It doesn't. The Court did not conclude that Congress expected a person to have performed a *Descamps*<sup>5</sup> analysis on his misdemeanor crime of conviction to determine whether any element of the statute under which he was convicted categorically required the use or threatened use of "physical force."

Rather, the **knowledge**-of-status requirement demands that the defendant have known only that, to be convicted of his misdemeanor crime, he must have engaged in or threatened to engage in conduct that constitutes "physical force" as the Supreme \*1183 Court has defined it for purposes of a misdemeanor crime of domestic violence under Section 922(g)(9)—whether or not the defendant actually knew that the Supreme Court had defined the term and what that definition was. In *Castleman*, the Supreme Court established that conduct consisting of "even the slightest offensive touching" satisfies Section 921(A)(33)(a)(ii)'s definition of "physical force." 572 U.S. at 163, 134 S.Ct. 1405 (internal citation omitted).

 $^{[12]}So$ as relevant here. to satisfy Rehaif's **knowledge**-of-status requirement under Section 922(g)(9), the evidence must establish that Johnson knew all the following: (1) he had been convicted of a 18 misdemeanor under state law, U.S.C. 921(a)(33)(A)(i); (2) to be convicted of that misdemeanor, he must have knowingly or recklessly6 engaged in at least "the slightest offensive touching"; and (3) the victim was his current or former spouse at the time he committed the crime, 18 U.S.C § 921(a)(33)(A)(ii). When we review the record for these things, we keep in mind that there need not be "extraordinary evidence that would conclusively

demonstrate [Johnson's] state of mind. Rather, as in any other criminal prosecution requiring *mens rea*, [state of mind may be proven] by reference to facts and circumstances surrounding the case...." *Liparota*, 471 U.S. at 434, 105 S.Ct. 2084; *see also Ratzlaf v. United States*, 510 U.S. 135, 149 n.19, 114 S.Ct. 655, 126 L.Ed.2d 615 (1994) ("A jury may, of course, find the requisite **knowledge** on defendant's part by drawing reasonable inferences from the evidence....").

b. Section 921(a)(33)(B) does not set forth elements of what it means for a <u>person to know he is a</u> domestic-violence misdemeanant

Before we leave this discussion to evaluate the evidence of record and determine whether it sufficiently establishes that Johnson had the necessary **knowledge**, we pause to explain why, in demonstrating a domestic-violence misdemeanant's **knowledge** of his status, the government does not bear the burden of proving the misdemeanant's **knowledge** of the items specified in Section 921(a)(33)(B).

Up until now, we have discussed Section 921(a)(33)(A) primarily. But Section 921(a)(33) also contains a subparagraph (B). That paragraph provides,

- **(B)(i)** A person shall not be considered to have been convicted of such an offense for purposes of this chapter, unless—
- (I) the person was represented by counsel in the case, or knowingly and intelligently waived the right to counsel in the case; and
- (II) in the case of a prosecution for an offense described in this paragraph for which a person was entitled to a jury trial in the jurisdiction in which the case was tried, either
  - (aa) the case was tried by a jury, or
  - \*1184 (bb) the person knowingly and intelligently waived the right to have the case tried by a jury, by guilty plea or otherwise.
- (ii) A person shall not be considered to have been convicted of such an offense for purposes of this chapter if the conviction has been expunged or set aside, or is an offense for which the person has been pardoned or has had civil rights restored (if the law of the applicable jurisdiction provides for the loss of civil rights under such an offense) unless the pardon,

expungement, or restoration of civil rights expressly provides that the person may not ship, transport, possess, or receive firearms.

We now explain how Section 921(a)(33)(B) fits into the legislative scheme.

[13]We see two possibilities: (1) Section 921(a)(33)(B) sets forth elements of the definition of "misdemeanor crime of domestic violence," or (2) it states what are effectively affirmative defenses. The difference between an element and an affirmative defense is important: while the government must prove **knowledge**, "[w]here affirmative defenses are created through statutory exceptions, the ultimate burden of persuasion remains with the prosecution, but the defendant has the burden of going forward with sufficient evidence to raise the exception as an issue." *United States v. Laroche*, 723 F.2d 1541, 1543 (11th Cir. 1984). So while the evidence must be enough to establish all the elements of **knowledge**, it need not prove that affirmative defenses did not apply, unless the defendant first introduced evidence that one did.

Neither Johnson nor the government makes any specific argument that Section 921(a)(33)(B) sets forth elements for proving a person knows he is a domestic-violence misdemeanant.<sup>8</sup> And we agree with their apparent implicit conclusion that Section 921(a)(33)(B) represents what are effectively affirmative defenses, since as we explain below, both our test for assessing whether something constitutes an element and our precedent require that answer.

[14]To evaluate whether a statutory exception serves as an element of a crime, we consider three factors. *United States v. Kloess*, 251 F.3d 941, 944 (11th Cir. 2001). We start with the statutory language and structure to see whether they yield any clues about the exception's role. *Id.* Second, we review the statute's legislative history to learn whether Congress intended for the exception to serve as an element of the crime. *Id.* And third, we assess whether the government is in a good position to find evidence that could prove the exception's applicability.9 *Id.* 

\*1185 [15]Beginning with the statutory language and structure, we first observe that Section 921(a)(33) is divided into two parts: (A) and (B). Subparagraph (A) begins, "Except as provided in subparagraph (C),10 the term 'misdemeanor crime of domestic violence' means an offense that—...." Subparagraphs (B)(i) and (B)(ii) each start, "A person shall not be considered to have been convicted of such an offense for purposes of this chapter," "unless," in the case of subparagraph (B)(i), and "if," in the case of subparagraph (B)(ii), certain conditions exist.

Perhaps these words could indicate congressional intent to make the subparagraph (B) factors elements of the definition of "misdemeanor crime of domestic violence." But based on the rest of our analysis, we don't think so.

According to its statutory language, the purpose of subparagraph (A) is to state what the term "misdemeanor crime of domestic violence" means. See 18 U.S.C. § 921(a)(33)(A) ("the term 'misdemeanor crime of domestic violence' means an offense that ..."). Congress did not place the provisions of subparagraphs (A) and (B) in a single section—though it could have. We think that separating the subparagraph (A) provisions from those in subparagraph (B) suggests that Congress envisioned different roles for the two subparagraphs. Based on the structure Congress chose, we believe Congress viewed subparagraph (A) as setting forth the elements of a "misdemeanor crime of domestic violence" and subparagraph (B) as articulating what are effectively affirmative defenses.

As for the legislative history, we found statements from a single Senator stating his view that subparagraph (B) "has no real substantive effect" and "really does not change anything," 142 Cong. Rec. 11842 (Statement of Sen. Lautenberg). And we found a Congressional Research Service report published a few months after the bill passed, characterizing Section 921(a)(33)(B)(i) as "statutory defenses to the validity of the predicate conviction." Cong. Rsch. Serv., Gun Ban for Persons Convicted of Misdemeanor Crime of Domestic Violence: Ex Post Facto Clause and Other Constitutional Issues (Dec. 30, 1996). Though both suggest that the subparagraph (B) components are intended to be defenses and not elements, we haven't found anything that purports to be indicative of the sense of the Congress. So we do not consider legislative history in our analysis.

When we look to whether the government is in a good position to prove the exculpatory exceptions set forth in subparagraph (B), we conclude that relative to the defendant, it is not. In explaining why, we start with subparagraph (B)(ii), which excepts from the definition of "misdemeanor \*1186 crime of domestic violence" any otherwise qualifying conviction that has been "expunged or set aside, or is an offense for which the person has been pardoned or has had civil rights restored." 18 U.S.C. § 921(a)(33)(B)(ii).

We have previously analyzed a similar exception to determine whether it was an element or an affirmative defense. In *United States v. Jackson*, 57 F.3d 1012 (11th Cir. 1995), we looked at 18 U.S.C. § 921(a)(20)'s definition of "crime punishable by imprisonment for a

term exceeding one year." At that time, the statute said,

What constitutes a conviction of such a crime shall be determined in accordance with the law of the jurisdiction in which the proceedings were held. Any conviction which has been expunged, or set aside or for which a person has been pardoned or has had civil rights restored shall not be considered a conviction for purposes of this chapter, unless such pardon, expungement, or restoration of civil rights expressly provides that the person may not ship, transport, possess, or receive firearms.

Jackson, 57 F.3d at 1015 (quoting 18 U.S.C. § 921(a)(20) (West Supp. 1994) (emphasis added by Jackson Court)).

We concluded that the italicized part of the statutory defenses was not an element. See id. at 1016-17. In reaching this conclusion, we quoted the Tenth Circuit for the proposition that the defendant is in a better position than the government to show that his conviction has been expunged, his civil rights have been restored, or he has been pardoned:

As a practical matter, requiring the government to negate the possibility, in every § 922(g)(1) case, that each defendant's prior convictions had been expunged or set aside, that a pardon had been granted, or that civil rights had been restored, would impose an onerous burden. A defendant ordinarily will be much better able to raise the issue of whether his prior convictions have been expunged or set aside, whether a pardon has been granted, or whether civil rights have been restored.

Id. at 1016 (quoting United States v. Flower, 29 F.3d 530, 535 (10th Cir. 1994)). We, of course, are bound by Jackson. See United States v. Steele, 147 F.3d 1316, 1318 (11th Cir. 1998) (en banc). So we conclude that the defendant is better situated than the government to demonstrate any of the defenses listed under subparagraph (B)(ii).

That brings us back to Section 921(a)(33)(B)(i). As a reminder, that provision excepts from the definition of "misdemeanor crime of domestic violence" convictions where the defendant was not represented by (or did not knowingly and intelligently waive the right to be represented by) counsel and those where the defendant was entitled to be tried by a jury but was not and did not knowingly and intelligently waive the right to try the case to a jury.

Although we focused on a restoration-of-civil-rights exception in *Jackson*, we also relied on another of our precedents, *United States v. Ruo*, 943 F.2d 1274, 1276 (11th Cir. 1991), which helps explain why it would also be harder for the government to shoulder the burden of

demonstrating the exceptions in subparagraph (B)(i) here. We cited *Ruo* for the proposition that as a practical matter, it makes sense for the defendant to bear the weight of demonstrating defects in prior convictions. *Id.* We explained,

[U]nder § 924(e), the burden is properly placed on the defendant raising the challenge to show the constitutional invalidity of the prior convictions. Any given conviction might suffer any of a myriad of constitutional defects. It would approach the absurd to undertake to prove \*1187 guilt all over again in every predicate conviction.... Instead, the government's burden is properly met when it introduces evidence that there are at least three prior violent felony convictions. The defendant must then point out any defects in a particular prior conviction.

Jackson, 57 F.3d at 1016 (quoting Ruo, 943 F.2d at 1276). Though Section 924(e) did not list exceptions built into it, the point is that we have previously concluded that the defendant is in the better position to know of the facts subparagraph (B)(i) says remove a conviction from the definition of "misdemeanor crime of domestic violence."

Plus, returning for a moment to our first consideration—the language and structure of the statute—that subsections (i) and (ii) both appear under subparagraph (B) suggests that Congress viewed the two provisions to have a similar function in the overall structure of Section 922(a)(33). So since subsection (B)(ii) is an affirmative defense, it is more likely that subsection (B)(i) is as well.

In short, we conclude that the government does not have an affirmative obligation to prove or disprove the defendant's **knowledge** of the components listed in subparagraph (B) to demonstrate that the defendant knew he was a domestic-violence misdemeanant, unless the defendant first brings forward evidence suggesting that his prior conviction is excepted from the definition of "misdemeanor crime of domestic violence."

2. The record establishes that, for purposes of Rehaif's **knowledge** requirement, Johnson knew he was a domestic-violence misdemeanant

[16] [17] Now that we've established what **knowledge** a domestic-violence misdemeanant must possess under *Rehaif*, we consider whether the record here demonstrates that Johnson had that **knowledge** at the time he was found with the firearm in this case. To make this determination, we look here to Johnson's stipulation at trial and the

undisputed facts in his PSR, which the district court adopted as factual findings. As we have explained, when a defendant does not object to a district court's factual findings, he is bound by them and may not argue that they contained error. *United States v. Wade*, 458 F.3d 1273, 1277 (11th Cir. 2006). Review of these documents reveals that the record includes sufficient evidence to establish that Johnson had the requisite knowledge of his status as a domestic-violence misdemeanant when he was found with the gun in his possession.

First, Johnson knew at the time he possessed the gun that he had been convicted of the misdemeanor crime of battery under Florida Statute § 784.03(1). We know this because he stipulated at the bench trial that he had pled guilty to the charge of "domestic battery" under the laws of the State of Florida,11 and Johnson's Florida \*1188 conviction identified the statute of conviction as Florida Statute § 784.03(1)(a), Florida's battery statute. Johnson's PSR states that he was originally charged with domestic battery by strangulation and assault, which Florida Statute § 784.041 renders a felony. That he eventually pled to the misdemeanor instead also supports the notion that he knew he was convicted of a misdemeanor under Florida law. Plus, Johnson ultimately spent six months in jail as a result of that conviction—another indication that he must have been aware of it. Finally, during this case, Johnson admitted he knew he was a misdemeanant when he explained that he did not know he was prohibited from possessing a firearm because he was only a misdemeanant, and misdemeanants in Florida do not lose their civil rights.

Second, Johnson knew that the misdemeanor to which he pled guilty—battery—required that he had, at a minimum, recklessly engaged in at least "the slightest offensive touching." *Castleman*, 572 U.S. at 163, 134 S.Ct. 1405 (internal citations omitted). The offense of battery under Florida law requires that the defendant have "[a]ctually and intentionally touche[d] or str[uck] another person against the will of the other," Fla. Stat. § 784.03(1)(a)(1.). A person cannot intentionally touch someone against her will without, at a minimum, recklessly committing at least "the slightest offensive touching."

[18] And Johnson stipulated at his bench trial here that with the assistance of counsel, he "knowingly and intelligently waived his right to a jury trial and pled guilty" to the offense of battery. The Supreme Court has explained that a knowing and intelligent plea requires that the defendant have been informed of the crime's elements. *Bradshaw v. Stumpf*, 545 U.S. 175, 183, 125 S.Ct. 2398, 162 L.Ed.2d 143 (2005). Since Johnson stipulated that he knowingly and intelligently pled guilty to battery, the record

establishes that, at the time he pled guilty to battery, he knew he was pleading guilty to that offense, and he knew that one of the elements of that offense required him to have "[a]ctually and intentionally touche[d] or str[uck] another person against the will of the other." Fla. Stat. § 784.03(1)(a)(1.). That means that the record shows that Johnson knew an element of his offense of conviction required that he had necessarily engaged in at least "the slightest offensive touching."

And third, as we have just noted and as Johnson stipulated to at his bench trial here, the victim of Johnson's prior Florida misdemeanor battery was his wife. Obviously, Johnson knew she was his wife.

So the record establishes that Johnson knew at the time he was found with the firearm in this case that he had previously been convicted of a misdemeanor crime of domestic violence. And for that reason, no reasonable probability exists that the outcome would be different on remand.<sup>12</sup> We \*1189 therefore conclude that the plain errors in the indictment and in the sufficiency of the evidence stipulated to at the bench trial did not affect Johnson's substantial rights.<sup>13</sup>

We are not persuaded by Johnson's contentions to the contrary. Johnson's arguments rest mainly on the fact that he did not "know he was prohibited from federal possession of a firearm." He points to the fact that his Florida conviction never resulted in the loss of his civil rights, including his right to possess a firearm under Florida law. He also relies on the district court's statement at sentencing that "this is an unusual offense" because Johnson was charged with something he could "genuinely say [he] didn't know was unlawful."

[19] While we can understand Johnson's frustration with the situation, these facts pertain to whether Johnson knew he personally was prohibited from possessing a firearm under federal law, not whether he knew he committed a misdemeanor crime of domestic violence. But under Rehaif's knowledge-of-status requirement, that a defendant does not recognize that he personally is prohibited from possessing a firearm under federal law is no defense if he knows he has a particular status and that status happens to be one prohibited by § 922(g) from possessing a firearm. United States v. Maez, 960 F.3d 949, 954-55 (7th Cir. 2020). Rather, that is a **mistake of** law, which is not a defense. See Liparota, 471 U.S. at 425 n.9, 105 S.Ct. 2084. As we have mentioned, "a defendant generally must 'know the facts that make his conduct fit the definition of the offense,' even if he does not know that those facts give rise to a crime." Elonis, 575 U.S. at -, 135 S.Ct. at 2009 (quoting *Staples*, 511 U.S. at 608

#### n.3, 114 S.Ct. 1793).

\*1190 And to the extent that Johnson continues to assert that Section 921(a)(33)(B)(ii)'s exception to the definition of a domestic-violence misdemeanant for anyone whose civil rights have been restored applies to him because Florida never abrogated his rights in the first place, that argument is foreclosed under Logan, 552 U.S. 23, 128 S.Ct. 475, 169 L.Ed.2d 432. In *Logan*, the Supreme Court considered a materially indistinguishable exception that applies to the Armed Career Criminal Act. Id. at 26, 128 S.Ct. 475. The provision at issue there—18 U.S.C. § 921(a)(20)—authorized the disregarding of a prior conviction if the conviction "has been expunged, or set aside," or the offender "has been pardoned or has had civil rights restored." Id. Like Johnson, Logan had never had his civil rights abrogated in the first place, despite his otherwise-qualifying convictions under the Armed Career Criminal Act. Id. He contended that Section 921(a)(20)'s exception for those who had had their civil rights restored after an otherwise-qualifying conviction reached him. Id.

The Supreme Court disagreed. *See id.* It reasoned that the plain language of the provision, which used the word "restored," did not support Logan's construction. *Id.* at 31-32, 128 S.Ct. 475.

[20] For further support, the Court pointed to Section 921(a)(33)(B)(ii), the very exception Johnson invokes here. The Court noted that it provides, in relevant part, that "[a] person shall not be considered to have been convicted of [a misdemeanor crime of domestic violence] [for purposes of Section 922(g)(9)] if the conviction ... is an offense for which the person ... has had civil rights restored (if the law of the applicable jurisdiction provides for the loss of civil rights under such an offense)...." Logan, 552 U.S. at 36, 128 S.Ct. 475 (quoting 18 U.S.C. § 921(a)(33)(B)(ii)) (emphasis added by Logan Court). As the Court explained, "the emphasized parenthetical qualification shows that the words 'civil rights restored' do not cover a person whose civil rights were never taken away."14 Id. So Johnson's argument that he does not satisfy the definition of domestic-violence misdemeanant because Florida never abrogated his civil rights necessarily fails. And since Section 921(a)(33)(B)(ii) does make Section 921(a)(33)'s definition "misdemeanor crime of domestic violence" inapplicable to someone whose civil rights were never breached in the first place, there was nothing for the government to refute with respect to the valid affirmative defenses encompassed within Section 921(a)(33)(B)(ii).15

#### \*1191 II.

<sup>[21]</sup>Next, we turn to Johnson's contentions that Section 922(g)(9) is unconstitutional because (1) it violates Johnson's equal-protection rights under the Due Process Clause of the Fifth Amendment; and (2) it violates the Commerce Clause. Although we generally review de novo the constitutionality of a statute, we review such claims, when they are not raised in the district court, for plain error. *United States v. Wright*, 607 F.3d 708, 715 (11th Cir. 2010). As with the *Rehaif* claims, Johnson did not make his constitutional arguments in the district court. So we review them for plain error.

#### A.

<sup>[22]</sup>The terms of the Fourteenth Amendment guarantee equal protection of state law. U.S. Const. amend. XIV. When it comes to the concept of equal protection under federal law, the Fifth Amendment carries the load. *Hampton v. Mow Sun Wong*, 426 U.S. 88, 100, 96 S.Ct. 1895, 48 L.Ed.2d 495 (1976). Unlike the Fourteenth Amendment, the Fifth Amendment contains no express equal-protection clause. *See* U.S. amend. V. But the Fifth Amendment's guarantee of due process under the law embodies within it the concept of equal justice under the law. *Hampton*, 426 U.S. at 100, 96 S.Ct. 1895.

[23] Johnson contends that Logan's reading of Section 921(a)(33)(B)(ii), as applied to him, causes Section 922(g) to violate equal protection. As we have explained, under Logan, domestic-violence misdemeanants whose civil rights were never abrogated by the state where they were convicted are not excepted from Section 921(a)(33)'s definition of who has committed a "misdemeanor crime of domestic violence" for purposes of Section 922(g). 522 U.S. at 26, 118 S.Ct. 285. Yet those whose convictions—whether for misdemeanor crimes of domestic violence or for felonies-resulted in the forfeiture of their civil rights but who later had those civil rights restored do not violate Section 922(g) by possessing a firearm. See 18 U.S.C. § 921(a)(33)(B)(ii), that domestic-violence Johnson argues misdemeanants who never lost their civil rights in the first place are therefore unconstitutionally treated less favorably than those—both domestic-violence misdemeanants and felons—who have had their civil rights restored.

<sup>[24]</sup>No Supreme Court or Eleventh Circuit case holds that Section 922(g)'s application to domestic-violence misdemeanants who never lost their civil rights but not to

felons and to domestic-violence misdemeanants whose rights were abrogated but then restored violates equal protection. In this Circuit, when no Supreme Court or Eleventh Circuit precedent directly resolves a legal issue, no plain error on that issue can exist. *United States v. Lejarde-Rada*, 319 F.3d 1288, 1291 (11th Cir. 2003). *Lejarde-Rada* governs the situation here. So here, Johnson cannot establish plain error.

#### В.

[25] Johnson also argues that Section 922(g)(9) violates the Commerce Clause both facially and as applied. He contends that the Commerce Clause does not allow Congress to criminalize the intrastate possession \*1192 of a firearm merely because the firearm once traveled in interstate commerce.

Once again, Johnson did not raise his argument in the district court. So once again, we apply plain-error review. This time, though, as Johnson recognizes, binding precedent addresses this issue. And that binding precedent rejects Johnson's position. In *United States v. McAllister*, we held that Section 922(g), which makes it illegal for a qualifying person to "possess *in or affecting commerce*, any firearm or ammunition," is a constitutional exercise of Congress's power under the Commerce Clause. 77 F.3d 387, 390 (11th Cir. 1996) (citing 18 U.S.C. § 922(g)) (emphasis added by *McCallister* court). We explained that Section 922(g) regulates firearms "that have a connection to interstate commerce; the statute explicitly requires such a connection" with its "in or affecting" language. *Id*.

[26]Since we issued *McAllister*, others have also challenged Section 922(g) as an unconstitutional reach beyond what the Commerce Clause authorizes. And we have held there, as we hold here, that Circuit precedent forecloses that argument. *See United States v. Nichols*, 124 F.3d 1265, 1266 (11th Cir. 1997); *Wright*, 607 F.3d at 715. Under our prior-precedent rule, we must follow the precedent of earlier panels unless and until the prior precedent is overruled or undermined to the point of abrogation by the Supreme Court or this Court sitting en banc. *Steele*, 147 F.3d at 1318. As neither exception applies here, we reject Johnson's Commerce Clause argument.

For the reasons we have explained, we affirm Johnson's conviction.

#### AFFIRMED.

MARTIN, Circuit Judge, concurring in part and dissenting in part:

As set forth in the majority opinion, Deangelo Johnson was convicted for violating 18 U.S.C. § 922(g)(9). This statute makes it unlawful for a person who has been convicted of a "misdemeanor crime of domestic violence" to possess a firearm. Last year, the Supreme Court clarified that a section 922(g) conviction requires the government to "show that the defendant knew he possessed a firearm and also that he knew he had the relevant status when he possessed it." Rehaif v. United States, 588 U.S. —, 139 S. Ct. 2191, 2194, 204 L.Ed.2d 594 (2019). Rehaif abrogated our prior precedent, see, e.g., United States v. Jackson, 120 F.3d 1226, 1229 (11th Cir. 1997) (per curiam), which required only a showing that a defendant knew he possessed a firearm but not that he knew his prohibited status. See United States v. Innocent, 977 F.3d 1077, 1082 (11th Cir. 2020); see also Rehaif, 139 S. Ct. at 2210 n.6 (Alito, J., dissenting). This development in the law recognized that "[w]ithout **knowledge** of [his prohibited] status," a defendant's "behavior may instead be an innocent mistake to which criminal sanctions normally do not attach." Rehaif, 139 S. Ct. at 2197. Respectfully, I believe the majority's approach dilutes the **knowledge**-of-status requirement from Rehaif that may result in the government sending people to prison for "innocent mistake[s]."

But I am not completely at odds with the majority opinion. For example, I agree that Mr. Johnson cannot establish plain error on his claim that section 922(g)(9) violates equal protection. I also agree with the majority that Mr. Johnson cannot establish plain error on his claim that section 922(g)(9) violates the Commerce Clause. But I do not agree that Mr. Johnson was \*1193 properly convicted under section 922(g)(9) because there is no proof he knew he had a status that prohibited his possession of a firearm. I therefore respectfully dissent.

III.

Here, I will highlight the legal background relevant to my understanding of this case. Section 922(g) describes various categories of people who are prohibited from possessing a firearm. That list includes felons, 18 U.S.C. § 922(g)(1); people committed to a mental institution, id. § 922(g)(4); immigrants unlawfully in the United States, id. § 922(g)(5); people dishonorably discharged from the Armed Forces, id. § 922(g)(6); and, relevant here, people convicted of a "misdemeanor crime of domestic violence," id. § 922(g)(9). Those who "knowingly violate[ ]" section 922(g) shall be fined, imprisoned for up to ten years, or both. Id. § 924(a)(2). In Rehaif, the Supreme Court considered the "scope of the word 'knowingly'" in the statute. 139 S. Ct. at 2194. It held that "knowingly" is a requirement for both a defendant's conduct (that the defendant must have knowingly possessed a firearm), and his relevant status (that he knew he was, for example, a felon, an immigrant unlawfully in the United States, or a domestic-violence misdemeanant). See id.

Under Rehaif then, in order for Mr. Johnson to be convicted under section 922(g)(9), he must have known both that he possessed a firearm and that he was convicted of a misdemeanor crime of domestic violence. A "misdemeanor crime of domestic violence" might seem familiar in the lay sense, but its statutory definition is actually "quite complex." See United States v. Triggs, 963 F.3d 710, 715 (7th Cir. 2020). The term "misdemeanor crime of domestic violence" means an offense that

is a misdemeanor under Federal, State, or Tribal law; and has, as an element, the use or attempted use of physical force, or the threatened use of a deadly weapon, committed by a current or former spouse, parent, or guardian of the victim, by a person with whom the victim shares a child in common, by a person who is cohabiting with or has cohabited with the victim as a spouse, parent, or guardian, or by a person similarly situated to a spouse, parent, or guardian of the victim.

18 U.S.C. § 921(a)(33)(A). Thus, to be absolutely clear, under Rehaif, in order for a person to be convicted of possessing a firearm under section 922(g)(9), he must have known that he was convicted of a misdemeanor crime of domestic violence that had, "as an element, the use or attempted use of physical force, or the threatened use of a deadly weapon." Id.

And that's not all. Under section 921(a)(33)(B), a person "shall not be considered to have been convicted" of a misdemeanor crime of domestic violence under certain circumstances. <u>Id.</u> § 921(a)(33)(B). For our purposes here, a person "shall not be considered to have been convicted" of a misdemeanor crime of domestic violence if he "has

had civil rights restored (if the law of the applicable jurisdiction provides for the loss of civil rights under such an offense)." Id. § 921(a)(33)(B)(ii). As I read the majority opinion, it characterizes section 921(a)(33)(B) as effectively setting forth affirmative defenses, such that the government is not required to "prove or disprove the defendant's knowledge of the components listed in subparagraph (B) to demonstrate that the defendant knew he was a domestic-violence misdemeanant, unless the defendant first brings forward evidence suggesting that his prior conviction is excepted from the definition of 'misdemeanor \*1194 crime of domestic violence.' "Maj. Op. at 1187; see id. at 1183-87. Under this view, a defendant would have to come forward with evidence that he viewed his prior conviction as excepted under section 921(a)(33)(B) from the definition of a "misdemeanor crime of domestic violence," and only then must the government disprove the defendant's view in order to show he knew he was convicted of a misdemeanor crime of domestic violence.

I will accept the majority's characterization for the sole purpose of my analysis here. But I also emphasize what the majority recognizes in passing: once a defendant raises an exception under section 921(a)(33)(B), "the ultimate burden of persuasion remains with the prosecution." Maj. Op. at 1184; see United States v. Laroche, 723 F.2d 1541, 1543 (11th Cir. 1984).

#### П

Now for the facts of this case. In 2010, before his conviction under section 922(g)(9) at issue here, Mr. Johnson pled guilty to and was convicted of the misdemeanor "Battery (Domestic)" in Florida state court. Specifically, Mr. Johnson was convicted of violating Florida Statutes § 784.03(1)(a). That provision says the "offense of battery occurs" when a person "[a]ctually and intentionally touches or strikes another person against the will of the other" or "[i]ntentionally causes bodily harm to another person." Fla. Stat. § 784.03(1)(a). Nothing in the record before us indicates that Mr. Johnson was ever made aware of the elements of his prior offense or that it might be a misdemeanor crime of domestic violence under federal law. And because his misdemeanor conviction did not prohibit Mr. Johnson from possessing a firearm under Florida law, see Fla. Stat. § 790.23(1) (2010), Johnson was not advised of his prohibited status when he entered his plea. His experience stands in

contrast to most people who are sentenced for felony convictions who are advised of their status that prohibits them from possessing firearms.

During a traffic stop in 2018, a police officer saw a gun, which Mr. Johnson \*1195 bought for protection, on the floorboard of Johnson's vehicle. A federal grand jury indicted Mr. Johnson, charging him with possession of a firearm after being convicted of a misdemeanor crime of domestic violence in violation of section 922(g)(9). Mr. Johnson moved to dismiss his indictment under Federal Rule of Criminal Procedure 12(b)(3)(B)(v) for failure to state an offense. He argued that his domestic violence misdemeanor conviction fell under the exception in section 921(a)(33)(B). As set out above, that section says a person "shall not be considered to have been convicted" of a misdemeanor crime of domestic violence if he "has had civil rights restored (if the law of the applicable jurisdiction provides for the loss of civil rights under such an offense)." 18 U.S.C. § 921(a)(33)(B)(ii). In moving to dismiss his indictment, Mr. Johnson observed that Florida "never suspended his civil rights" because Florida does not prohibit domestic-violence misdemeanants from possessing a firearm, and thus "his rights did not require restoration." The District Court declined to dismiss Mr. Johnson's indictment. Mr. Johnson then proceeded with a stipulated bench trial, and he was found guilty. When sentencing Mr. Johnson for violating section 922(g)(9), the District Court observed that "it isn't often that individuals end up before the Court charged with something that they can genuinely say they didn't know was unlawful."

errors, the outcome of the proceeding would have been different. Reed, 941 F.3d at 1021.

demonstrate a reasonable probability that, but for the

Applying this test, I agree with the majority that there were Rehaif errors here and that they were plain. See Maj. Op. at 1179-80.2 But I part ways with the majority's holding that those errors did not affect Mr. Johnson's substantial rights. Id. at 1188-89, 118 S.Ct. 285. According to the majority opinion, "to satisfy Rehaif's knowledge-of-status requirement under Section 922(g)(9), the evidence must establish that Johnson knew all the following: (1) he had been convicted of a misdemeanor under state law; (2) to be convicted of that misdemeanor, he must have knowingly or recklessly engaged in at least 'the slightest offensive touching'; and (3) the victim was his current or former spouse at the time he committed the crime." Id. at 1195-96 (footnotes and citations omitted).3 \*1196 The majority says these prongs are easily satisfied, so Mr. Johnson's substantial rights were not affected because he was due to be convicted under section 922(g)(9) regardless of Rehaif. Id. at 28-32, 118 S.Ct. 285.

I have three primary concerns about the majority's analysis. First, the majority fails to require, contrary to Rehaif, that Mr. Johnson actually knew his offense was a misdemeanor crime of domestic violence. Second, the majority relies on what Mr. Johnson knew at the time he was tried for the section 922(g)(9) violation (which is irrelevant under Rehaif), instead of what he knew when he had the firearm (which is what matters under Rehaif). Third, the majority errs in finding that the test for plain error review is not satisfied. I will address each of these misgivings in turn.

#### Ш

With this legal and factual background in mind, I now turn to Mr. Johnson's Rehaif challenges to his indictment as well as the sufficiency of the evidence at trial. The majority correctly observes that Mr. Johnson did not raise his Rehaif arguments in the District Court. Maj. Op. at 1178. That means we review those challenges for plain error. See United States v. Reed, 941 F.3d 1018, 1020 (11th Cir. 2019). Plain error exists when (1) there was error, (2) the error was plain, (3) the error affected the defendant's substantial rights, and (4) the error "seriously affect[ed] the fairness, integrity, or public reputation of a judicial proceeding." United States v. Humphrey, 164 F.3d 585, 588 n.3 (11th Cir. 1999). To show that an error affected his substantial rights, a defendant must

Α

My first concern about the majority's approach relates to the government's proof of the "knowledge" requirement in order to obtain a conviction under section 922(g). Rehaif held that the government must show that a defendant "knew he had the relevant status" when he possessed the firearm. Rehaif, 139 S. Ct. at 2194. Therefore, I read Rehaif as requiring the government to show that Mr. Johnson knew he was "convicted in any court of a misdemeanor crime of domestic violence," which "means an offense that ... has, as an element, the use or attempted use of physical force." 18 U.S.C. §§

921(a)(33)(A)(ii), 922(g)(9). In other words, I understand Rehaif to require the government to show that Mr. Johnson actually knew he was convicted of an offense that had, "as an element, the use or attempted use of physical force" and thus qualified as a misdemeanor crime of domestic violence. Id. § 921(a)(33)(A)(ii). Because it requires knowing a specific legal "element of the offense," knowledge of status under section 922(g)(9) is a "question of law." See Rehaif, 139 S. Ct. at 2198.

The majority opinion requires the government to show less than I think the statute and Rehaif require. The majority requires only that the government show a defendant knew his conviction required particular conduct, regardless of whether the defendant actually knew his conduct qualifies his offense as a misdemeanor crime of domestic violence. For instance, under its test, the majority requires that the defendant knew that, to be convicted of his offense, "he must have knowingly or recklessly engaged in at least 'the slightest offensive touching.' "Maj. Op. at 1182-83 (footnote omitted). Likewise, in applying its test to Mr. Johnson, the majority observes that Johnson stipulated at his bench trial that he "pled guilty to battery" and thus knew he "engaged in at least 'the slightest offensive touching.' " Id. at 1188-89, 118 S.Ct. 285. But again, those facts might show Mr. Johnson knew of his conduct and the offense to which he pled guilty, but they do not show that Mr. Johnson knew his offense was a misdemeanor crime of domestic violence under federal law.

The Supreme Court said the government must show that a defendant "knew he had the relevant status" when he possessed the firearm. Rehaif, 139 S. Ct. at 2194. By this, I take the Supreme Court to mean that the government must show the defendant knew he had "been convicted in any court of a misdemeanor crime of domestic violence." 18 U.S.C. § 922(g)(9). It is irrelevant under section 922(g) and Rehaif that a defendant knows that an offense requires certain conduct for a conviction if he does not know that conduct ultimately makes the offense a misdemeanor \*1197 crime of domestic violence. I acknowledge that this is a subtle distinction, but it is one that matters. In Rehaif, the Supreme Court recognized that a "mistake of law" is no defense when a defendant "claims to be 'unaware of the existence of a statute proscribing his conduct' " (which is not at issue here). Rehaif, 139 S. Ct. at 2198. Yet it is a defense when, as in section 922(g)(9), that **mistake** of law "negat[es] an element of the offense." Id. Namely, a defendant who does not know that he has been convicted of a misdemeanor crime of domestic violence "does not have the guilty state of mind that the statute's language and purposes require." Id.

My difference with the majority's position is exactly that: Mr. Johnson's **mistake of law**—that he did not know his prior offense was a misdemeanor crime of domestic violence—negates an element of the section 922(g)(9) offense. I think the majority fails to engage with Rehaif's recognition that this **mistake of law** negates an element of the offense.4 Instead the majority asserts, citing to cases involving other statutes, that a defendant need only know the facts making his conduct unlawful. See Maj. Op. at 1180-83. But even if a defendant knows the facts that resulted in his conviction for what is, in fact, a misdemeanor crime of domestic violence, he does not necessarily know it was a misdemeanor crime of domestic violence. In Rehaif, the Supreme Court said that, as is the case here, "a mistake of law is a defense if the mistake negates the 'knowledge' ... required to establish a material element of the offense.' "Rehaif, 139 S. Ct. at 2198.

I believe the government must show that a defendant knew he was "convicted in any court of a misdemeanor crime of domestic violence," which means he knew he was convicted of "an offense that ... has, as an element, the use or attempted use of physical force." 18 U.S.C. §§ 922(g)(9). That requires 921(a)(33)(A)(ii), government to prove the defendant was aware that his prior conviction included the element of use or attempted use of force. The majority says this requirement is met by a defendant's knowledge of his conduct. See Maj. Op. at 1180-83 & n.7. I think the government's burden is heavier than that. For example, if a defendant pleads guilty to a battery offense, he very well may be informed of the elements of that offense by the judge during his plea colloguy or through a stipulation. In this hypothetical circumstance, there is a record showing that he knew he was convicted of an offense that "has, as an element, the use or attempted use of physical force." 18 U.S.C. § 921(a)(33)(A)(ii). Unlike this hypothetical, I don't believe the record here is sufficient to attribute this **knowledge** to Mr. Johnson.

В

While my first concern about the majority's position looks to what the government must show the defendant knew, my second concern is about when the government must show he knew it. Rehaif requires that the defendant "knew he had the relevant status when he possessed" the firearm. Rehaif, 139 S. Ct. at 2194 (emphasis added). As

an initial matter, I do not understand the majority's test to comport with this part of Rehaif. Rather, the majority opinion requires only that "Johnson knew all" necessary facts, Maj. Op. at 1187-88, and then relies on Mr. Johnson's **knowledge** \*1198 at the time of the proceedings on the section 922(g)(9) charge. Specifically, the majority looks to only two documents in the record to determine what Mr. Johnson knew: Johnson's stipulation at the trial of his section 922(g)(9) charge and the presentence investigation report from his sentencing after he was convicted for that crime. Id. at 28, 118 S.Ct. 285. Based on these two documents, the majority concludes that Mr. Johnson knew his offense "required that he had necessarily engaged in at least 'the slightest offensive touching.' "Id. at 28, 31, 118 S.Ct. 285. But neither of those documents show that Mr. Johnson "knew ... when he possessed" the firearm that he was a domestic-violence misdemeanant. Rehaif, 139 S. Ct. at 2194 (emphasis added). The documents merely tell us what he knew as he progressed through his section 922(g)(9) proceedings.

Federal courts see many defendants who have never before faced federal charges, and I've observed that they get quite an education about what can constitute a federal crime between the time they are arrested and the time they ultimately face trial or are sentenced. For instance, the majority only cites Mr. Johnson's stipulation to show his purported **knowledge** of "the elements of [his battery] offense." Maj. Op. at 1188. The stipulation says Mr. Johnson "knowingly and intelligently waived his right to a jury trial and pled guilty" to the battery offense. According to the majority's reading of Bradshaw v. Stumpf, 545 U.S. 175, 125 S. Ct. 2398, 162 L.Ed.2d 143 (2005), Mr. Johnson's knowing and intelligent plea means he was "informed of the crime's elements." Maj. Op. at 1188. But the problem is that nowhere in that stipulation does it say Mr. Johnson knew the nature of his plea (and thus the elements of his offense) when he possessed the firearm. The most we can say is that the stipulation shows Mr. Johnson had **knowledge** of the nature of his plea during the section 922(g)(9) proceedings. The majority says that the stipulation and presentence investigation report "identify what Johnson knew at the time that he pled guilty to the underlying" battery offense. Id. at 29, 118 S.Ct. 285 n.11. Again, I don't think they do. Perhaps now Mr. Johnson understands the nature of his prior conviction. But nothing in Rehaif is concerned about after-the-fact **knowledge** like this. I worry that the majority's reliance on documents purportedly showing Mr. Johnson's **knowledge** after he possessed the firearm will pave the way for the government to rely on such deficient evidence in the future.

 $\mathbf{C}$ 

My final concern with the majority's position is its conclusion that the test for plain error review is not satisfied. See Maj. Op. at 1188-89. For the reasons discussed here, I would easily conclude that Mr. \*1199 Johnson has shown that the Rehaif errors affected his substantial rights. I've found nothing in the record showing that Mr. Johnson knew, at the time he possessed the firearm, that his prior conviction had, "as an element, the use or attempted use of physical force," 18 U.S.C. § 921(a)(33)(A)(ii), and consequently was a misdemeanor crime of domestic violence. This being the case, if Mr. Johnson had known that the government needed to prove he knew his status, it would have made no sense for him to stipulate to that point, instead of putting the government to its proof. Thus, he has shown a reasonable probability that the outcome of the proceeding would have been different. Reed, 941 F.3d at 1021. Mr. Johnson's resulting prison sentence, when he did not know the status for which he was convicted, makes it clear to me that this error "seriously affect[ed] the fairness, integrity, or public reputation of a judicial proceeding." Humphrey, 164 F.3d at 588 n.3.

Were it up to me, I would follow the Seventh Circuit's approach in Triggs. Like Mr. Johnson, Robert Triggs challenged his section 922(g)(9) conviction under Rehaif. Triggs, 963 F.3d at 712. The Seventh Circuit held that Mr. Triggs established plain error because he "carried his burden to establish a reasonable probability that he would not have pleaded guilty had he known of the government's Rehaif burden." Id. at 717. The Seventh Circuit observed that Mr. Triggs had a "potentially viable avenue of defense" because the "government had to prove that he knew he had been convicted of a 'misdemeanor crime of domestic violence," " and the record nowhere showed that the "elements" of his prior conviction were ever provided or explained to him. See id. at 715-16. As in Triggs, nothing in this record indicates that Mr. Johnson knew, at the time when he possessed the firearm, that he had been convicted of a misdemeanor crime of domestic violence, which requires he knew his battery offense had, "as an element, the use or attempted use of physical force." 18 U.S.C. § 921(a)(33)(A)(ii). This comes as no surprise to me, as the legal definition of a misdemeanor crime of domestic violence is "quite complex." Triggs, 963 F.3d at 715. Indeed, the "[m]embers of [the Supreme] Court have been unable to agree on the meaning" of a crime of domestic violence,

even "after briefing, argument, and careful study" in numerous cases. Rehaif, 139 S. Ct. at 2208 (Alito, J., dissenting). If the Supreme Court has been grappling for years with the meaning of a crime of a domestic violence, I think Mr. Johnson certainly has a "plausible defense" that he didn't know that meaning either. See Triggs, 963 F.3d at 717. He therefore didn't know his status and so has "establish[ed] a reasonable probability" that the outcome of the proceeding would have been different "had he known of the government's Rehaif burden." Id.

But even putting aside my other misgivings and the wisdom of <u>Triggs</u>, I think this record affirmatively shows a reasonable probability that the outcome of the proceeding would have been different. Namely, when Mr. Johnson moved to dismiss the indictment, he argued that his domestic violence misdemeanor conviction fell under the exception in section 921(a)(33)(B)(ii). As a refresher, that section says a person "shall not be considered to have been convicted" of a misdemeanor crime of domestic violence if he "has had civil rights restored (if the law of the applicable jurisdiction provides for the loss of civil rights under such an offense)." 18 U.S.C. § 921(a)(33)(B)(ii). In Mr. Johnson's view, he qualified for that exception because he was never prohibited from possessing a gun under Florida law.

Remember, according to the majority opinion, when a defendant puts forward evidence that he viewed his prior conviction as excepted under \*1200 section 921(a)(33)(B) from the definition of a "misdemeanor crime of domestic violence" (which Mr. Johnson did, as shown by his motion to dismiss), the government has the burden of persuasion and must disprove that view in order to show the defendant knew he was convicted of a misdemeanor crime of domestic violence. Maj. Op. at 1187-88; see also id. at 1183-87. Regardless of whether Mr. Johnson's section 921(a)(33)(B) argument would ultimately be meritorious, see id. at 1189-91, the question under the plain error analysis is whether there is a reasonable probability that the outcome of the proceeding would have been different. Reed, 941 F.3d at 1021. If Mr.

Johnson had known that the government had to "disprove" his view that "his prior conviction [was] excepted from the definition of 'misdemeanor crime of domestic violence,' "Maj. Op. at 1187, it seems clear that Mr. Johnson would have put the government to its proof on this issue.<sup>6</sup>

#### IV

I view today's decision as relieving the government of its burden to obtain convictions under section 922(g). Both the statute and Rehaif require more for a section 922(g) conviction than the government will now be called upon to show. As I understand this decision, the government will not now need to show, as Rehaif requires, that a defendant actually knew his offense was a misdemeanor crime of domestic violence. And under the majority's decision, the government can rely on a defendant's knowledge after his actual possession of the firearm, as opposed to, again as Rehaif requires, his knowledge when he possessed the firearm. I also believe the majority's decision does all that while conducting a flawed plain error review and creating a split with the Seventh Circuit in Triggs.<sup>7</sup>

Like the District Court, I view this as an "unusual offense," because Mr. Johnson was charged with something he can "genuinely say [he] didn't know was unlawful." For his conviction under this statute, that matters. I respectfully dissent.

### **All Citations**

981 F.3d 1171, 28 Fla. L. Weekly Fed. C 2222

### **Footnotes**

- \* Honorable Richard C. Tallman, United States Circuit Judge for the Ninth Circuit, sitting by designation.
- Initially, Johnson was sentenced to two days in jail and a year of probation. But after two violations of probation, the court revoked his probation and sentenced him to six months in jail.

- 2 Rehaif applies to Johnson's case on direct appeal. See Reed, 941 F.3d at 1021.
- In one of their letters of supplemental authority, the government asserts that *Moore* supports its position because we stated that "[t]he absence of an element of an offense in an indictment is not tantamount to failing to charge a criminal offense against the United States." 954 F.3d at 1333. We are disappointed by this argument, which relies on an out-of-context quotation to mischaracterize our opinion in *Moore*. The language that the government invokes from *Moore* comes from our analysis explaining that a *Rehaif* defect in an indictment does not deprive the district court of subject-matter jurisdiction, *see id.* at 1332-37; it has nothing to do with the point for which the government relies on it. In fact, in that same case, we held that the *Rehaif* defect in the indictment there, which similarly tracked the applicable statutory language, *see id.* at 1332-33, was plain error because it failed to specifically charge that the defendant knew of his status, *see id.* at 1337. There, though, the government conceded plain error.
- Rehaif described the same thing from Liparota a little differently. It said that the Court "required the Government to prove that the defendant knew that his use of food stamps was unlawful—even though that was a question of law." 139 S. Ct. at 2198. We think Elonis's characterization better helps to describe the type of knowledge that is required and to avoid the confusion that Rehaif suggests can occur in trying to differentiate between concepts of knowledge of the law and knowledge of the effect of a so-called collateral matter (here, status) under the law. See id.
- 5 Descamps v. United States, 570 U.S. 254, 133 S.Ct. 2276, 186 L.Ed.2d 438 (2013).
- 6 See Voisine v. United States, —— U.S. ———, 136 S. Ct. 2272, 2282, 195 L.Ed.2d 736 (2016).
- The Dissent asserts that *Rehaif* requires the government to "prove the defendant was aware that his prior conviction included the element of use or attempted use of force." Dissent at 50. We don't disagree with this principal. We just believe that to prove knowledge that the prior conviction included an element of use or attempted use of physical force, the government must show that the defendant knew that his prior offense necessarily required for conviction (i.e., an element) that he engaged in at least "the slightest offensive touching"—the definition the Supreme Court has identified for the meaning of "physical force" in Section 921(a)(33). See Castleman, 572 U.S. at 163, 134 S.Ct. 1405.
- The Dissent suggests that the parties do not raise this issue and indicates its preference that we not decide this issue. See Dissent at 1194 n.1. We don't think that is a tenable option under the circumstances here. While no party specifically argues that the Section 921(a)(33)(B) provisions do or do not constitute elements of a "misdemeanor crime of domestic violence" under Section 921(a)(33), Johnson most assuredly does contend that the Rehaif errors here constituted plain errors that affected his substantial rights because, Johnson claims, the government did not establish that he knew he was a domestic-violence misdemeanant. To ascertain whether that is the case, we must first identify what the evidence of record was required to show to demonstrate whether Johnson knew he was a domestic-violence misdemeanant. That requires us to determine what parts of Section 921(a)(33) specify elements of the definition of "misdemeanor crime of domestic violence." Assuming without deciding that Section 921(a)(33)(B) sets forth affirmative defenses is not consonant with evaluating whether the plain errors here affected Johnson's substantial rights, since if the Section 921(a)(33)(B) components were elements, the government would be required to prove them, and we would need to study the record to see whether it contained sufficient evidence to establish each of these components.
- The Dissent takes issue with this third factor—whether the government is in a good position to find evidence that could prove the exception's applicability. *See* Dissent at 42 n.1. But our precedent has adopted this factor as part of the test for whether a provision constitutes an element or an affirmative defense, and we are bound by our prior-precedent rule to follow that

precedent. See United States v. Steele, 147 F.3d 1316, 1318 (11th Cir. 1998) (en banc). Plus, as we have noted, the prosecution still has the ultimate burden of persuasion on affirmative defenses. Laroche, 723 F.2d at 1543.

- Section 921(a)(33) does not contain a subparagraph (C). But as we discuss above, subparagraph (B) does set forth statutory exceptions to when a person may be considered to have been convicted of a "misdemeanor crime of domestic violence." We therefore construe the reference to subparagraph (C) to be a typographical error intended to refer to subparagraph (B).
- The Dissent seems to suggest that Johnson could not have known these things at the time he possessed the firearm because the evidence that proves he did came from his stipulation at the bench trial, which occurred after he possessed the gun. See Dissent at 1198 (e.g., "[N]either [the stipulation nor the PSR] show that Mr. Johnson 'knew ... when he possessed' the firearm that he was a domestic-violence misdemeanant.") (quoting Rehaif, 139 S. Ct. at 2194 (emphasis added)). We respectfully disagree. In this case, the contents of the stipulation and the PSR identify what Johnson knew at the time that he pled guilty to the underlying misdemeanor crime of domestic violence. For example, he knew at the time he pled guilty to the misdemeanor that he was pleading guilty to a misdemeanor because, the stipulation shows, he pled down from a felony, and he eventually spent six months in jail for his conviction. To spend time in jail for this offense, it must have been a misdemeanor or a felony. And he stated he knew it was not a felony. Indeed, that was his defense: that he was not told that he could not possess a firearm because he had not been convicted of a felony, and misdemeanants in Florida do not lose their civil rights. So while these facts are documented in the stipulation and PSR, which were created after Johnson possessed the gun, they are sufficient to infer he knew these facts before he possessed the gun.
- 12 The Dissent argues that our conclusion creates a split with the Seventh Circuit's decision in *United States v. Triggs*, 963 F.3d 710 (7th Cir. 2020), because " 'complexity of the statutory definition' of a misdemeanor crime of domestic violence gives defendants 'at least a plausible argument' that they were unaware they were convicted of such an offense." Dissent at 1200 n.7 (quoting Triggs, 963 F.3d at 716). We think not. True, the Seventh Circuit noted "the complexity of the statutory definition," but that alone was not the reason why that court remanded the case. Rather, unlike here, in Triggs, the defendant pled guilty to his Section 922(g)(9) offense, and the proceedings that led to the defendant's underlying domestic-violence misdemeanor conviction were "messy." Id. at 716. So the Seventh Circuit was able to conclude that Triggs had a "colorable argument that he was unaware that he was convicted of a misdemeanor crime of domestic violence," without ever analyzing what it means for a domestic-violence misdemeanant to know he is a domestic-violence misdemeanant. *Id.* The record here does not give us that option. Unlike Triggs, Johnson was convicted after a bench trial, not a guilty plea, and the proceedings that led to his conviction for a misdemeanor crime of domestic violence were straight-forward, not "messy." As a result, we must proceed through the analysis in order, identifying what it means for a domestic-violence misdemeanant to know he is a domestic-violence misdemeanant and then assessing the record to see whether it contains sufficient evidence to establish the defendant's requisite knowledge. By doing so, we do not create a split with *Triggs* because *Triggs*'s decision to remand rested on "the complexity of the statutory definition" in combination with the "messy" state-court-conviction record.
- The Dissent suggests that the outcome here would have been different in the absence of the *Rehalf* errors because "if Mr. Johnson had known that the government needed to prove he knew his status, it would have made no sense for him to stipulate to that point, instead of putting the government to its proof." Dissent at 1199. We respectfully disagree. The sole reason why Johnson went to trial here was because he never lost his civil rights as a result of his conviction for a misdemeanor crime of domestic violence, and he thought that was a defense under Section 921(a)(33)(B)(ii). Johnson never suggested during his trial here that he did not know that he had been convicted of a misdemeanor crime that had as an element the use of at least "the slightest offensive touching" against his wife. And as we have explained, the record here establishes that Johnson, in fact, knew at the time he possessed the firearm here that he had been convicted of a misdemeanor crime that had as an element the use of at least "the slightest offensive touching" against his wife.
- Senator Lautenberg's statement on what became codified at 18 U.S.C. § 921(a)(33) reflects, as the Supreme Court in *Logan* believed, that Congress was aware that most people convicted of a misdemeanor do not lose their civil rights. *See* 142 Cong. Rec.

S11872, S11877-78 (1996) (Statement of Sen. Lautenberg) ("Loss of [civil] rights generally does not flow from a misdemeanor conviction, and so this language is probably irrelevant to most, if not all, of those offenders covered because of the new ban [on firearm possession by domestic-violence misdemeanants].").

- The Dissent suggests that the outcome of Johnson's proceeding would have differed in the absence of the *Rehaif* errors since the government would have been required to prove that Section 921(a)(33)(B)(ii)'s affirmative defenses did not apply to Johnson because Johnson invoked that exception to argue that he did not qualify as a domestic-violence misdemeanant. *See* Dissent at 1199-1200. But Johnson relied on Section 921(a)(33)(B)(ii) only because his civil rights were never abrogated. Section 921(a)(33)(B)(ii), though, provides no exception to the definition of domestic-violence misdemeanant for an otherwise-qualifying individual whose civil rights were never taken. A defendant cannot make an affirmative defense relevant by raising a ground that is not even arguably covered by that affirmative defense. Simply put, Johnson never properly raised an affirmative defense under Section 921(a)(33)(B)(ii) because he did not allege any of the conditions set forth by that section that would exempt him from having committed a "misdemeanor crime of domestic violence," so the government had no obligation to prove that that exception does not apply.
- For a few reasons, it is not obvious to me that section 921(a)(33)(B) sets out affirmative defenses as opposed to elements of the offense. First, as the majority recognizes, the text "could indicate congressional intent to make the subparagraph (B) factors elements." Maj. Op. at 1185. And I give weight to the term "unless" in the phrase "[a] person shall not be considered to have been convicted of such an offense for purposes of this chapter, unless" certain conditions are met. See 18 U.S.C. § 921(a)(33)(B)(i). The term "unless" introduces necessary conditions, such that it certainly could indicate congressional intent to make those conditions elements. Cf. Santiago-Lugo v. Warden, 785 F.3d 467, 473 (11th Cir. 2015) (explaining the term "[u]nless" as used in a statute "lays out what must occur").

Most importantly though, I have deep reservations about putting the burden on a criminal defendant to avoid being convicted of a crime on the basis that he "is better situated than the government to demonstrate" those conditions. Maj. Op. at 1186. It is true in every "criminal case the defendant has at least an equal familiarity with the facts and in most a greater familiarity with them than the prosecution. It might, therefore, be argued that to place upon all defendants in criminal cases the burden of going forward with the evidence would be proper." Tot v. United States, 319 U.S. 463, 469, 63 S. Ct. 1241, 1245–46, 87 L.Ed. 1519 (1943). "But the argument proves too much." Id. Finally, my concerns are deepened by the fact that, as the majority observes, see Maj. Op. at 1184-85, neither party briefed this issue. That being the case, I would have preferred that the majority assume without deciding that section 921(a)(33)(B) sets out affirmative defenses, thus saving the issue for when it is actually briefed and before our Court. I do think this is a "tenable option" when Mr. Johnson has not raised this issue for our plain error review. See Id. at 1184 n.8. Notwithstanding my concerns about the majority's characterization, I accept it only for purposes of my analysis here.

- The majority also correctly holds that Mr. Johnson did not invite error by stipulating that the facts were sufficient to convict him. Maj. Op. at 1177-78.
- I understand the majority's test to apply only to Mr. Johnson's case, rather than to all criminal defendants subject to section 922(g)(9). Otherwise, the majority's test improperly excludes people convicted of a misdemeanor under non-state law, such as "Federal" or "Tribal" law, as well as people convicted of a misdemeanor crime of domestic violence involving victims other than current or former spouses, such as children. See 18 U.S.C. § 921(a)(33)(A).
- The majority says, "under Rehaif's knowledge-of-status requirement, that a defendant does not recognize that he personally is prohibited from possessing a firearm under federal law" is a "mistake of law, which is not a defense." Maj. Op. at 1189. But that, of course, is not the mistake of law I refer to here. Instead, I refer to a mistake of law that "negat[es] an element of the offense." See Rehaif, 139 S. Ct. at 2198.

- I read <u>Stumpf</u> differently than the majority. The majority says <u>Stumpf</u> "explained that a knowing and intelligent plea requires that the defendant have been informed of the crime's elements." Maj. Op. at 30. But <u>Stumpf</u> said only that a plea is knowing and intelligent "where the record accurately reflects that the nature of the charge and the elements of the crime were explained to the defendant by his own, competent counsel" or "by the trial judge." <u>Stumpf</u>, 545 U.S. at 183, 125 S. Ct. at 2405. <u>Stumpf</u> does not say that a defendant's statement that he knowingly and intelligently pled guilty is sufficient to show he knew the elements of his offense. Rather, all it says is that "where the record accurately reflects" that a defendant knew the elements of his offense, then he knowingly and intelligently pled guilty. <u>Id.</u> We simply don't have that here. We cannot assume that Mr. Johnson knew the elements of his offense solely because he stipulated that he knowingly and intelligently pled guilty to the battery offense. This is especially true since he made that stipulation during his section 922(g)(9) proceedings and after he possessed the firearm.
- The majority says the outcome of the proceeding would not have been different because Mr. Johnson "never properly raised an affirmative defense under Section 921(a)(33)(B)(ii)." Maj. Op. at 1190 n.15. This assertion is troubling. The question on plain error review is <u>not</u> whether Mr. Johnson had a proper affirmative defense that "arguably" would have succeeded. <u>Id.</u> Instead, the question is whether Mr. Johnson would have required the government to disprove his view (regardless of whether his view is proper) that an exception applied had he known the government needed to do so. I certainly think so, and if so, there is a reasonable probability that the outcome of the proceeding would have been different. <u>Reed</u>, 941 F.3d at 1021.
- The majority disavows its split with <u>Triggs</u> because <u>Triggs</u> involved "messy" proceedings. Maj. Op. at 1188 n.12. I don't think this is a proper distinction. The Seventh Circuit said that the "complexity of the statutory definition" (before ever discussing any "messy" proceedings) "open[ed] a potentially viable avenue of defense." <u>Triggs</u>, 963 F.3d at 716. I, like the Seventh Circuit, believe that "the complexity of the statutory definition" of a misdemeanor crime of domestic violence gives a defendant "at least a plausible argument" that he was unaware he had been convicted of such an offense. <u>Id.</u> However, the majority, unlike the Seventh Circuit, gives no leeway for the complex statutory definition to be relevant, so long as the defendant knew the facts making his conduct unlawful. <u>See</u> Maj. Op. at 1180-83 even assuming the Seventh Circuit remanded in <u>Triggs</u> based in part on "messy" proceedings, those proceedings were characterized that way because the "elements" of the prior offense were never provided to Mr. Triggs. <u>See Triggs</u>, 963 F.3d at 716. This being the case, I view the proceedings here to be "messy" too and see a split with the Seventh Circuit on that ground as well.

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Disagreed With by People v. Neal, Ill.App. 2 Dist., December 31, 2020
938 So.2d 451
Supreme Court of Florida.

Pablo IBAR, Appellant, v. STATE of Florida, Appellee.

No. SC00–2043. | March 9, 2006. | Rehearing Denied Sept. 7, 2006.

#### **Synopsis**

**Background:** Defendant was convicted, after a jury retrial in the Circuit Court, Broward County, Dale Ross, Chief Judge, of three counts of first-degree murder, and he received three death sentences. Defendant appealed.

### **Holdings:** The Supreme Court held that:

- [1] admission, as nonhearsay substantive evidence, of prior inconsistent testimony applies only to testimony of eyewitnesses and victims;
- [2] error was harmless as to admission, as substantive evidence, of hearsay prior identification evidence;
- [3] error was harmless as to admission, under state of mind exception to hearsay rule, evidence relating to alibi of person who defendant claimed could have committed the murders; and
- [4] predicates to introduction of evidence of witness' reputation for untruthfulness were not met.

### Affirmed.

Wells, J., filed an opinion concurring in part and dissenting in part, in which Cantero and Bell, JJ., concurred.

West Headnotes (54)

### [1] Criminal Law-Identity

Statutory provision that an out-of-court of identification of a person, made after perceiving the person, is not hearsay if the declarant testifies at trial and is subject to cross-examination concerning the statement, involves statements of identification made by a witness to, or by the victim of, a crime or event, but not statements of identification made by a person who merely sees or is shown a picture of defendant, but who was not a witness to or victim of the crime or event. West's F.S.A. § 90.801(2)(c).

#### 5 Cases that cite this headnote

# [2] Criminal Law—Substantive use of statements corroborating or impeaching testimony

Transcript of witness' identification testimony in grand jury proceeding was admissible as substantive evidence, as nonhearsay inconsistent prior statement made under oath in prior proceeding, where witness, at trial, denied that he had identified defendant from photographic lineup and at grand jury proceeding. West's F.S.A. § 90.801(2)(a).

# [3] Criminal Law—Substantive use of statements corroborating or impeaching testimony

Statements made under oath, for purposes of rule allowing admission, as nonhearsay, of a witness' inconsistent prior statements made under oath in prior proceeding, include statements made at grand jury proceedings. West's F.S.A. § 90.801(2)(a).

### [4] Criminal Law—Hearsay

Error was harmless as to admission as substantive evidence, at guilt phase of capital murder trial, of hearsay evidence that trial witness, who was not an eyewitness and who at trial denied having identified defendant, had previously identified defendant photographic lineup; prior identification testimony of four other witnesses was properly admitted for impeachment purposes, and other witnesses and items, such as surveillance video tape of the murders, were sufficient to allow jury to conclude that defendant was one of the perpetrators of the three murders. West's F.S.A. § 90.801(2)(c).

#### 4 Cases that cite this headnote

# [5] Criminal Law Presumption as to Effect of Error; Burden

The State, as the beneficiary of any error, must demonstrate beyond a reasonable doubt that the complained-of errors did not contribute to the verdict, i.e., that there is no reasonable possibility that the errors contributed to the conviction.

### 8 Cases that cite this headnote

# [6] Criminal Law—Adding to or changing grounds of objection

Defendant's trial court objection to prosecution's use, as substantive rather than impeachment evidence, of trial witnesses' prior out-of-court identifications of defendant did not preserve for appellate review a claim that the prosecution improperly called witnesses for the sole purpose of impeaching their testimony.

### 1 Cases that cite this headnote

### [7] Criminal Law—Death or disability of witness

Transcript of testimony of witness at prior capital murder trial, which trial ended with hung jury, was admissible at the retrial, where witness died before the retrial.

# [8] Criminal Law—Adding to or changing grounds of objection

Defendant's objection, at capital murder retrial, that at the original trial, the photograph a witness had discussed when denying she had identified defendant from a photograph had not been marked for identification, did not preserve for appellate review a claim that the now-unavailable witness' prior testimony was offered by State, at retrial, for improper purpose of opening the door for State to call its own witness to testify that the now-unavailable witness made an identification during the investigation of the murders.

# [9] Criminal Law—Grounds for Admission of Former Testimony

The use of prior testimony is allowed where: (1) the testimony was taken in the course of a judicial proceeding; (2) the party against whom the evidence is being offered was a party in the former proceeding; (3) the issues in the prior case are similar to those in the case at hand; and (4) a substantial reason is shown why the original witness is not available.

### 1 Cases that cite this headnote

#### body

Statements admitted under the state of mind exception to the hearsay rule, to prove or explain subsequent acts or subsequent conduct of the declarant, are properly admitted only if they involve the state of mind of the declarant and there is evidence demonstrating that the declarant acted in accord with the state of mind or intent. West's F.S.A. § 90.803(3)(a)(2).

#### 1 Cases that cite this headnote

# [11] Criminal Law—Then-existing state of mind or body

Statement, proffered by State, of man who defendant alleged could have committed the murders in Florida, that the man intended to travel to North Carolina on the weekend of the murders, was not admissible in capital murder prosecution under state of mind exception to hearsay rule, to prove or explain subsequent acts or subsequent conduct of declarant, in absence of evidence demonstrating that the man acted in accordance with his stated intent; the only evidence was that the man returned home on Sunday and that he returned on an airplane, and gap in time between stated intention and alleged actual commission of act of traveling to North Carolina was too great to support an inference that the man was in North Carolina when the murders were committed. West's F.S.A. § 90.803(3)(a)(2).

### 1 Cases that cite this headnote

### [12] Criminal Law—Hearsay

Error was harmless as to admission under state of mind exception to hearsay rule, at guilt phase of capital murder trial, of statement, proffered by State, of man who defendant alleged could have committed the murders in Florida, that the man intended to travel to North Carolina on the weekend of the murders; a wealth of evidence connected defendant to the murders and

indicated that he was one of the intruders captured on the surveillance videotape at the scene of the murders. West's F.S.A. § 90.803(3)(a)(2).

### [13] Criminal Law—Res Gestae; Excited Utterances

A spontaneous statement, for purposes of exception to hearsay rule for spontaneous statements, must be made at the time of, or immediately following, the declarant's observation of the event or condition described. West's F.S.A. § 90.803(1).

#### 3 Cases that cite this headnote

### [14] Criminal Law—Res Gestae; Excited Utterances

The spontaneous statement exception to the hearsay rule requires that the statement must be made without the declarant first engaging in reflective thought. West's F.S.A. § 90.803(1).

#### 2 Cases that cite this headnote

### [15] Criminal Law—Res Gestae; Excited Utterances

The statements admitted under the spontaneous statement exception to the hearsay rule are limited to statements which describe or explain an event. West's F.S.A. § 90.803(1).

### 2 Cases that cite this headnote

### [16] Criminal Law—After Commission of Crime

Defendant's out-of-court statement identifying himself to accomplice's roommate, i.e., his statement "I'm Pablo," did not describe or explain an event, as would be required for admission of the statement under spontaneous statement exception to hearsay rule, at guilt phase of capital murder prosecution. West's F.S.A. § 90.803(1).

#### 1 Cases that cite this headnote

#### [17] Criminal Law—Particular cases

Defendant's out-of-court statement identifying himself to accomplice's roommate, i.e., his statement "I'm Pablo," was admissible under exception to hearsay rule for a statement by a party that is offered against that party. West's F.S.A. § 90.803(18).

### [18] Criminal Law—Experiments and Tests; Scientific and Survey Evidence

Florida courts do not follow the *Daubert* test for admission of scientific evidence, and instead follow the *Frye* test.

#### 3 Cases that cite this headnote

### [19] Criminal Law—Particular tests or experiments

Expert testimony on shoeprint impressions did not involve a new or novel scientific theory, and thus, neither the *Daubert* test nor the *Frye* test for admission of scientific evidence was applicable.

#### 4 Cases that cite this headnote

### [20] Criminal Law Electronic surveillance; telecommunications

In absence of evidence that murder victim's former live-in girlfriend had known that murder victim had tape recorded their telephone conversation in which they fought about the former girlfriend picking up her clothes and jewelry from murder victim's house and fought about the former girlfriend's new boyfriend, the statute regarding admission of intercepted communications precluded admission of the tape recording to show the former girlfriend had a motive to kill the victim, in capital murder prosecution of a third party. West's F.S.A. § 934.03(2)(d).

# [21] Witnesses—Place and time of acquiring reputation

Predicates to introduction of reputation evidence regarding witness' character for untruthfulness, that the other witness who will offer the reputation evidence must be aware of the person's general reputation in the community, and that the community must be sufficiently broad to provide adequate knowledge and a reliable assessment, were not satisfied; reputation testimony was based on opinions of only three people, one of whom did not live in the community. West's F.S.A. §§ 90.405, 90.609.

#### 4 Cases that cite this headnote

# [22] Witnesses—Place and time of acquiring reputation Witnesses—Knowledge or means of knowledge

**Witnesses** Knowledge or means of knowledge of impeaching witness

As predicates to the introduction of reputation evidence regarding a witness' character for truthfulness or untruthfulness, the other witness who will offer the reputation evidence must be aware of the person's general reputation in the community, and the community must be

sufficiently broad to provide adequate knowledge and a reliable assessment. West's F.S.A. §§ 90.405, 90.609.

#### 5 Cases that cite this headnote

# [23] Criminal Law—Review De Novo Criminal Law—Reception of evidence

In reviewing the trial court's ruling on a motion to suppress, the appellate court accords a presumption of correctness to the trial court's determination of historical facts, but the appellate court independently reviews mixed questions of law and fact that ultimately determine constitutional issues.

#### [24] Criminal Law—Critical stages

A defendant's state constitutional right to counsel's presence applies at each crucial stage of the proceedings, while under the federal Constitution, a defendant is entitled to counsel at each critical stage of the proceeding. U.S.C.A. Const.Amend. 6; West's F.S.A. Const. Art. 1, § 16.

#### 3 Cases that cite this headnote

### [25] Criminal Law—Lineup or showup

A pre-charge lineup is not a critical or crucial stage, for purposes of federal and state constitutional rights to presence of counsel, because formal proceedings have not actually begun. U.S.C.A. Const. Amend. 6; West's F.S.A. Const. Art. 1, § 16.

### 5 Cases that cite this headnote

# [26] Criminal Law—Custodial interrogation in general

**Criminal Law** Absence or denial of counsel

The right to counsel when an accused or suspect is in custody or under arrest applies when there is an official interrogation, in which case the Fifth Amendment right to counsel is triggered and *Miranda* warnings are given. U.S.C.A. Const.Amend. 5.

#### 1 Cases that cite this headnote

### [27] Criminal Law—Warnings

An official "interrogation," as element for Fifth Amendment right to counsel, refers to words or actions that are reasonably likely to elicit an incriminating response from the suspect. U.S.C.A. Const.Amend. 5.

#### [28] Criminal Law—Warnings

A prearrest investigatory lineup does not elicit any response from the suspect, and thus, it does not constitute an "interrogation," as element for Fifth Amendment right to counsel. U.S.C.A. Const.Amend. 5.

# [29] Criminal Law—Offenses, Tribunals, and Proceedings Involving Right to Counsel

The Sixth Amendment right to the assistance of counsel is offense specific and applies only to the offense or offenses with which the defendant has actually been charged, and not to any other offense he may have committed but with which he has not been charged. U.S.C.A. Const.Amend. 6.

#### 5 Cases that cite this headnote

### [30] Criminal Law—Investigation, arrest, and identification

Defendant was not entitled to mistrial in capital murder prosecution after detective testified that the first lead in solving the case came from police homicide unit in another county, though such testimony allegedly improperly suggested that defendant had been held in the other county on another homicide, where defendant merely objected after the testimony was given and requested a mistrial, without also requesting a curative instruction.

#### 1 Cases that cite this headnote

# [31] Criminal Law Discretion of court Criminal Law Issues related to jury trial

A motion for a mistrial is addressed to the sound discretion of the trial judge, and the trial judge's ruling on such a motion will not be reversed absent an abuse of discretion.

#### 1 Cases that cite this headnote

# [32] Criminal Law—Mode of making objection Criminal Law—Necessity of motion

Generally, the objecting party should both move to strike the improper testimony and request a curative instruction telling the jury to disregard the improper testimony.

### [33] Criminal Law—Sufficiency

Detective's testimony, based on his notes from

interviewing a witness, that defendant had a fight with his roommate over money and drugs, did not constitute other act evidence, and thus, mistrial was not warranted, in capital murder prosecution; at least two other men lived at house with defendant and roommate, any of them could have been the owner of the money and drugs, and detective did not identify defendant as the owner of the money and drugs. West's F.S.A. § 90.404(2).

### [34] Criminal Law Grounds in general

A mistrial should be granted only in circumstances where the error committed was so prejudicial as to vitiate the entire trial.

#### 2 Cases that cite this headnote

#### [35] Criminal Law—Post-arrest silence; custody

Defendant's conduct in being somewhat reluctant and evasive in answering some of detective's questions did not clearly invoke his right to terminate questioning and remain silent, and thus, detective's testimony that he had sensed that defendant did not want to communicate with him so he had shown defendant the surveillance photograph and asked defendant "How did I get this?" did not constitute improper comment on defendant exercising his right to remain silent. U.S.C.A. Const.Amend. 5.

#### 1 Cases that cite this headnote

# [36] Criminal Law—Opportunity for or necessity of responding

The test to be applied, regarding improper comment on defendant exercising his right to remain silent, is whether the comment is fairly susceptible of being interpreted by the jury as a

comment on the defendant's exercise of that right. U.S.C.A. Const.Amend. 5.

sentencing system, is not unconstitutional.

# [37] Criminal Law—Right to Remain Silent Criminal Law—Right to remain silent

Once a suspect initially waives his or her *Miranda* right to remain silent, the suspect must clearly invoke the right, to terminate questioning. U.S.C.A. Const.Amend. 5.

# [38] Criminal Law—Issues relating to multiple charges or defendants

Detective's references to co-defendant's gang affiliation, criminal history, and evidence of consciousness of guilt did not warrant mistrial, in capital murder prosecution; such references occurred during detective's recitation of evidence found in search of co-defendant's home, defendant did not attempt to stop detective's recitation, and defendant did not request curative instruction.

### [39] Sentencing and Punishment Procedure

Florida's capital sentencing system does not unconstitutionally rely upon judicial fact-finding, as opposed to jury fact-finding. U.S.C.A. Const.Amend. 6.

# [41] Sentencing and Punishment—Claim of innocence or residual doubt as to guilt

It is improper for the court to consider lingering doubt or residual doubt as a mitigating factor, at capital sentencing.

# [42] Sentencing and Punishment—Claim of innocence or residual doubt as to guilt

At capital sentencing, it is improper for a defendant to relitigate the determination of his guilt by presenting evidence of or arguing lingering doubt.

# [43] Sentencing and Punishment—Sympathy and mercy

Sentencing and Punishment Opinion evidence

Sentencing and Punishment Arguments and conduct of counsel

At capital sentencing, defendant did not have a constitutional right to ask the jury for mercy, ask for a jury pardon, or elicit personal opinions from witnesses about the death penalty.

### [44] Sentencing and Punishment Unanimity

Lack of unanimity in jury recommendation of imposition of death penalty was not unconstitutional.

**Sentencing and Punishment** ← Verdict or Recommendation of Jury

Sentencing and Punishment Procedure

[40]

The advisory role of the jury, in Florida's capital

# [45] Sentencing and Punishment—Indictments and charging instruments

Indictment for capital murder was not required to provide notice of the aggravators for capital sentencing.

2 Cases that cite this headnote

# [46] Sentencing and Punishment → Verdict or Recommendation of Jury

Verdict forms for capital sentencing were not required to indicate which aggravators were found by the jury.

1 Cases that cite this headnote

# [47] Sentencing and Punishment Planning, premeditation, and calculation

Murders of three victims were "cold," as element of cold, calculated, and premeditated (CCP) aggravator, at penalty phase of capital murder trial; the murders were execution-style killings, and defendant and his accomplice had ample opportunity to reflect on their actions and abort any intent to kill, but instead they shot each victim in the back of the head.

4 Cases that cite this headnote

# [48] Sentencing and Punishment Planning, premeditation, and calculation

The three murders were calculated, as element of cold, calculated, and premeditated (CCP) aggravator, at penalty phase of capital murder trial; defendant and accomplice arrived at home of one victim with Tec-9 gun, at one point

during the murders either defendant or accomplice went into bedroom and came out with second gun, at such point defendant had time to reflect on the killings, murders were not committed immediately upon the intrusion, victims were tied up, and one victim was beaten for more than 20 minutes.

3 Cases that cite this headnote

# [49] Sentencing and Punishment Planning, premeditation, and calculation

A pretense of legal or moral justification, which would preclude a finding of cold, calculated, and premeditated (CCP) aggravator, at penalty phase of capital murder trial, is any colorable claim based at least partly on uncontroverted and believable factual evidence or testimony that, but for its incompleteness, would constitute an excuse, justification, or defense as to the homicide.

# [50] Sentencing and Punishment Escape or other obstruction of justice

Evidence established the avoiding arrest aggravator, at penalty phase of capital murder trial, relating to murder of homeowner and two guests; defendant often frequented homeowner's bar, homeowner videotaped events at the bar and frequently reviewed them, homeowner may have recognized defendant from shaking hands with him at the bar, defendant wore something over his head to conceal his identity when he broke into the home, homeowner resisted, and the victims were tied up.

[51] Sentencing and Punishment → Escape or other obstruction of justice

In evaluating the sufficiency of the evidence to establish the avoiding arrest aggravator, at penalty phase of capital murder trial, the appellate court will look at whether the victims knew and could identify their killer, but this fact alone is insufficient to prove the aggravator beyond a reasonable doubt.

# [52] Sentencing and Punishment → Vileness, heinousness, or atrocity

Instantaneous or near instantaneous deaths by gunshot, unaccompanied by additional acts to mentally or physically torture the victim, do not meet the requirements of the heinous, atrocious, or cruel (HAC) aggravator, at penalty phase of capital murder trial.

#### 1 Cases that cite this headnote

# [53] Sentencing and Punishment → Vileness, heinousness, or atrocity

Evidence established heinous, atrocious, or cruel (HAC) aggravator, at penalty phase of capital murder trial; defendant and accomplice entered home and beat homeowner almost continually until shooting him, homeowner suffered blunt injuries to his head, face, neck, teeth, and hands, after 14 and a half minutes he was shot, while his two female guests were lying on the floor, face down, they saw and heard all of the injuries inflicted on homeowner, one guest tried to escape to bedroom but was chased by defendant and then tied with electrical cords, and after another seven minutes all victims were shot.

### 2 Cases that cite this headnote

# [54] Sentencing and Punishment Factors Related to Offense

Death sentences constituted proportional

punishment for three capital murders; murders were committed execution-style, and aggravating factors were previous conviction for another felony involving use or threat of violence to person, commission of capital felony during robbery or burglary, commission of capital felony for purpose of avoiding or preventing lawful arrest, capital felony was especially heinous, atrocious, or cruel (HAC), and capital felony was committed in cold, calculated, and premeditated (CCP) manner.

### 2 Cases that cite this headnote

### **Attorneys and Law Firms**

\*457 Peter Raben, Miami, FL, for Appellant.

Charles J. Crist, Jr., Attorney General, Tallahassee, Florida, and Leslie T. Campbell, Assistant Attorney General, West Palm Beach, FL, for Appellee.

### **Opinion**

#### PER CURIAM.

Pablo Ibar appeals his three convictions for first-degree murder and his three sentences of death. We have jurisdiction. *See* Art. V, § 3(b)(1), Fla. Const. For the reasons expressed below, we affirm the convictions and the sentences.

### FACTS AND PROCEDURAL HISTORY

On August 25, 1994, Pablo Ibar and Seth Penalver were charged with three counts of first-degree murder, one count of burglary, one count of robbery, and one count of attempted robbery. Penalver and Ibar were initially tried together. The first jury trial ended with a hung jury. Ibar and Penalver were eventually tried separately. Both Ibar and Penalver were ultimately convicted and sentenced to death.

On Sunday, June 26, 1994, a Palm Beach County police

officer discovered a Mercedes SL convertible on fire on a road twelve miles south of South Bay. The car was registered to Casmir Sucharski,<sup>2</sup> owner of a nightclub called Casey's Nickelodeon. The officer who discovered the car notified the Miramar Police Department. A Miramar police officer went to Sucharski's home to tell him that his car had been found. The officer knocked on the door and received no answer. He stuck his card in the door and left.

The next morning, Monday, June 27, 1994, Marie Rogers' mother reported her missing to the Broward County Sheriff's Department. Rogers had gone to Casey's Nickelodeon on Saturday, June 25, 1994, with her friend, Sharon Anderson, and did not return home. Deputy Christopher Schaub went to Casey's Nickelodeon and learned that Sucharski left the club early Sunday morning with Rogers and Anderson. Schaub then went to Sucharski's residence. Anderson's car was in the driveway but no one answered the door. Schaub found a Miramar Police Department business card in the door and a blue T-shirt on the porch. He peered inside and saw three bodies.

The police identified the individuals found in the residence as Sucharski, Rogers, \*458 and Anderson. All three died of gunshot wounds. Because Sucharski had recently installed a video surveillance camera in his home, there was a videotape of the actual murders. The tape revealed that on Sunday, June 26, 1994, at 7:18 a m., two men entered through the back sliding door of Sucharski's home. The intruder alleged to be Ibar initially had something covering his face, but he eventually removed it. The other intruder, alleged to be Seth Penalver, wore a cap and sunglasses, which were never removed, and carried a firearm. The videotape showed that one of the intruders had a Tec-9 semiautomatic handgun with him when he entered the home. The other intruder displayed a handgun only after he went into another room and left the camera's view. At one point, the intruder alleged to be Penalver hit Sucharski with a Tec-9 in the face, knocked him to the floor, and beat him on the neck, face, and body. This attack on Sucharski lasted for nearly twenty-two minutes. The man later identified as Ibar shot Sucharski, Rogers, and Anderson in the back of the head. The intruder alleged to be Penalver then shot Anderson and Sucharski in the back.

During this time, the intruders searched Sucharski's home. They rummaged through the home and entered the bedrooms and the garage. Sucharski was searched and his boots removed. Sucharski struggled and was repeatedly hit by both intruders. The intruders were seen putting things in their pockets. The State presented evidence that

Sucharski kept ten to twenty thousand dollars in cash, carried a gun, and owned a Cartier watch. The watch was not found and Sucharski's gun holster was empty.

Police took frames from the videotape and produced a flyer that was sent to law enforcement agencies. Three weeks after the murders, the Miramar police received a call from the Metro–Dade Police Department informing them that they had a man in custody on a separate and unrelated charge who resembled the photo on the flyer. The man in custody at the Metro–Dade Police Department was Pablo Ibar. Ibar was interviewed by Miramar investigators. He told police he lived with his mother, and that on the night of the murders he had been out with his girlfriend, whom he called both Latasha and Natasha.

Ibar actually lived with several friends in a rented home on Lee Street in Hollywood, Florida. One of his roommates was Jean Klimeczko. Klimeczko initially identified Ibar and Penalver as the men on the videotape. Klimeczko told police that early on the morning of the murders, Ibar and Penalver rushed into the Lee Street home, grabbed a Tec-9 that was kept at the house, and left. At the second trial, however, Klimeczko had no memory of his earlier statements. Other witnesses who had given earlier statements to police that the men in the photo looked like Ibar and Penalver also denied making identifications.

The jury found Ibar guilty on each charge and, by a vote of nine to three, recommended a sentence of death for the murder of each victim. The trial court found the following aggravating factors: (1) Ibar was previously convicted of another felony involving the use or threat of violence to the person; (2) the capital felony was committed while Ibar was engaged in the commission of a robbery or burglary; (3) the capital felony was committed for the purposes of avoiding or preventing lawful arrest; (4) the capital felony was especially heinous, atrocious, or cruel; and (5) the capital felony was committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification.

\*459 The trial court found two statutory mitigating factors: (1) Ibar had no significant history of prior criminal activity (given medium weight); and (2) Ibar's age at the time of the crime was twenty-two (given minimal weight). The trial court found nine nonstatutory mitigating factors: (1) Ibar was a good and respectful young adult; was a good, obedient and caring child; committed good deeds and had good characteristics; had a loving relationship with his mother; is a caring person (considered collectively and given medium weight); (2) Ibar is a good worker (given minimal weight); (3) Ibar

can be rehabilitated in prison, is unlikely to endanger other prison inmates, and would make a peaceful adjustment to prison life (given very little weight); (4) Ibar was a good friend (given minimal weight); (5) Ibar exhibited good courtroom behavior and a good attitude (given minimal weight); (6) Ibar is religious (given minimal weight); (7) Ibar's family and friends care for and love him and he married his fiancé while in jail (given minimal weight); (8) Ibar comes from a good family (given minimal weight); and (9) Ibar expressed remorse (given minimal weight).

The trial court accepted the jury's recommendation and sentenced Ibar to death. Ibar raises eight issues in this appeal: (1) whether certain out-of-court statements were "statements of identification" as contemplated by section 90.801(2)(c), Florida Statutes (1995); (2) whether the trial court erred in admitting witness testimony for purpose of impeaching that testimony; (3) whether the trial court erred in admitting the transcript of testimony given by a deceased witness in a prior trial; (4) whether the trial court erred in allowing the State to introduce hearsay evidence and certain expert testimony; (5) whether the trial court erroneously precluded the admission of evidence regarding third-party motive and animosity and reputation evidence; (6) whether the trial court erred in allowing the admission of evidence regarding a live lineup; (7) whether the integrity of the trial was affected by references to certain evidence denying Ibar due process; (8) whether the death penalty in this case violates the Florida and Federal Constitutions. We address these issues below.

#### LAW AND ANALYSIS

I.

### **Identification Witnesses**

Ibar's first two claims involve the testimony of Roxana Peguera, Marlene Vindel, Maria Casas, Jean Klimeczko, Ian Milman, Melissa Munroe, and Tanya Quiñones. He argues that the prior identifications of the defendant by Peguera, Vindel, Casas, Klimeczko, Milman, and Munroe should not have been admitted as substantive evidence. In

addition, Ibar contends that these witnesses as well as Quinones were called as witnesses simply for the purpose of impeachment. The State contends the prior identifications by these witnesses were properly admitted under section 90.801(2)(c), Florida Statutes (1999). The State also argues that the defendant did not object to the six witnesses based on the theories now being advanced and therefore the issues have not been preserved for appellate review. The record reflects that the defense did object to the identification evidence in question being used as substantive evidence, but did not object to these six witnesses on the basis of being called as witnesses simply for the purpose of impeachment.

During the investigation, police showed these witnesses a photograph created from the video surveillance tape taken at the victim's home. The witnesses testified at trial that when they were initially shown \*460 the photo, they identified the person in the photo as Ibar or someone who resembled Ibar. In an attempt to show that the initial identifications were more definite, the State then called police investigators to testify that these six witnesses had actually confirmed the identity of the person in the photo as Ibar. The investigators' testimonies were not admitted as impeachment, however; they were admitted as substantive evidence under section 90.801(2)(c), Florida Statutes (1999).

- We agree with the defendant that the prior identifications testified to by the officers should not have been admitted as substantive evidence under section 90.801(2)(c). Section 90.801(2)(c) provides as follows:
  - (2) A statement is not hearsay if the declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement and the statement is:

....

(c) One of identification of a person made after perceiving the person.

This statutory provision has been interpreted by a number of courts as involving statements of identification made by a witness to or victim of a crime or event. This interpretation of the statute gives meaning to the wording of the statute and its use of the term "perceiving" and is in keeping with the interpretation given to the statute by a number of our district courts of appeal.

The Fourth District Court of Appeal in *Stanford v. State*, 576 So.2d 737 (Fla. 4th DCA 1991), addressed the meaning and intent of section 90.801(2)(c). In *Stanford*, the trial court allowed the victim's daughter and another person to testify concerning out-of-court statements the

victim made to them which included the victim naming the defendant as her assailant. The trial court allowed these statements as substantive evidence under section 90.801(2)(c), that is, statements of identification made after perceiving a person. In disagreeing with the trial court on this point, the district court said:

We believe that the typical situation contemplated by the code and the case law is one where the victim sees the assailant shortly after the criminal episode and says, "that's the man." Hence, the phrase "identification of a person made after perceiving him" refers to the witness seeing a person after the criminal episode and identifying that person as the offender. We do not believe this code provision was intended to allow other out-of-court statements by a witness to others naming the person that the witness believes committed the crime. To extend the rule that far would permit countless repetitions by a witness to others, regardless of time and place, of the witnesses' belief as to the guilty party, a result we do not believe intended by the drafters of the rule.

*Id.* at 739–40 (footnote omitted); *see also State v. Richards*, 843 So.2d 962 (Fla. 3d DCA 2003); *Simmons v. State*, 782 So.2d 1000 (Fla. 4th DCA 2001). This interpretation of the statute has continued and formed the basis of the Second District Court of Appeal's decision in *Smith v. State*, 880 So.2d 730 (Fla. 2d DCA 2004).

In Smith, the Second District addressed the identical statutory provision in a situation involving witnesses to the criminal episode. At Smith's trial the State presented the testimony of several witnesses who were present in the Charleston Park neighborhood of Lee County, Florida, on the night Timmie Ray Mabry was killed. Three of the witnesses, Chad Moreland, Iris Moreland, and Jason Kafus, had given prior recorded statements to the police, and in those statements had either said \*461 they saw defendant Smith shoot the victim or saw him running with the gun shortly after the shooting. The three had also said they heard Smith say he had shot someone. However, at trial, Chad Moreland said he did not see Smith with a weapon and did not hear Smith make any incriminating statement. Iris Moreland, Chad's sister, stated at trial that she was not at the scene of the shooting and did not hear Smith make any statement. Jason Kafus testified that he was not at the scene when the shooting occurred and that he did not recall giving a statement to police.

As a result of this trial testimony, the State was allowed to call as a witness Detective Jeff Brown, the lead investigator in the case. Detective Brown had interviewed a number of witnesses in the case, including the Morelands and Kafus, and he identified the tape-recorded statements of each. The tapes were then played to the jury

in their entireties. The tapes were allowed in as substantive evidence under the recorded recollection exception to the hearsay rule. The defendant was convicted of the lesser crime of manslaughter with a firearm and shooting into an occupied vehicle. On appeal and after determining that the tape recordings did not satisfy the requirements of recorded recollection, the Second District addressed the State's argument that the tape recordings were admissible as substantive evidence under section 90.801(2)(c).

In holding that only portions of the statements were admissible as substantive evidence of identification, the Second District quoted with approval a line of cases including Stanford that discussed the admissibility of evidence under section 90.801(2)(c). The cases relied on and cited by the court involved a variety of out-of-court identifications from lineups, photopaks, and showups. These cases also have one feature in common—the person whose out-of-court identification was at issue was either a victim of or a witness to the criminal episode. For example, in Lewis v. State, 777 So.2d 452 (Fla. 4th DCA 2001), the victim of a cariacking described his assailant to the police.<sup>3</sup> A short time later, the defendant was taken to the location where the victim was, and the victim identified him. At trial, the victim was unable to identify the defendant as his assailant. Over objection, the police officer was allowed to testify concerning the prior identification. On appeal the Fourth District affirmed and found the identification admissible under section 90.801(2)(c) as a statement of identification made after perceiving the defendant. The court went on to opine that one of the principles applicable to the admission of this type of identification as substantive evidence is the inherent reliability of identifications made shortly after the crime. See also A.E.B. v. State, 818 So.2d 534 (Fla. 2d 2002) (finding admissible under section 90.801(2)(c) an out-of-court identification made by a witness who saw the juvenile approach the victim's house and go into the backyard); Ferreira v. State, 692 So.2d 264 (Fla. 5th DCA 1997) (finding admissible the eyewitness out-of-court identification of the defendant from a photographic lineup one week after the murder); Brown v. State, 413 So.2d 414 (Fla. 5th DCA 1982) (finding admissible the victim's out-of-court statement of identification despite the fact that the victim testified at trial that he was mistaken in his prior identification). Without discussing the perimeters of section 90.801(2)(c), this Court in \*462 Evans v. State, 838 So.2d 1090 (Fla.2002), found admissible the out-of-court statements of identification made by two eyewitnesses to a shooting.

While other courts, most notably the federal courts, have under similarly worded statutes found admissible

statements of identification made by persons other than victims and witnesses to the crime, we believe the view espoused by our district courts will better serve the ends of justice. To expand the rule to allow as substantive evidence an out-of-court identification made by anyone who sees or is shown a picture of the defendant could result in the defendant being convicted through the testimony of persons who have no relationship or connection to the criminal offense. As the *Stanford* court also opined, expansion of the rule could lead to an endless repetition of out-of-court identifications.

[2] Although Ian Milman's prior testimony concerning identification was not admissible as substantive evidence under section 90.801(2)(c), it was admissible as substantive evidence under section 90.801(2)(a). Section 90.801(2)(a) provides that an out-of-court statement is not hearsay if the declarant, in this case Milman, testifies at the trial and is subject to cross-examination about the statement. In addition, the prior statement must be made under oath at a trial, hearing, or other proceeding or in a deposition. Lastly, the prior statement must be inconsistent with the declarant's present testimony.

Milman testified at Ibar's second trial that he was shown photos and initialed them just to show that he looked at them. Milman said that the man in the still photo was not Ibar; he indicated that he never said the person was Ibar and had never said it was Ibar at the grand jury proceeding. Detective Paul Manzella testified that Milman positively identified Ibar. The State impeached Milman using the grand jury transcript. The trial judge dismissed the jury from the courtroom and then discussed Milman's prior grand jury testimony with the parties. The judge pointed to the language in Milman's grand jury testimony that specifically contradicted his trial testimony. Thus, the trial judge was within his discretion in determining that Milman's identification of Ibar was admissible as substantive evidence. See Johnston v. State, 863 So.2d 271 (Fla.2003) (holding that a trial judge's ruling on the admissibility of evidence will not be disturbed on appeal absent an abuse of discretion).

We also find that Melissa Munroe's prior identification statement was also admissible as substantive evidence under section 90.801(2)(a). Munroe was living with Penalver at the time of the crime. She had previously told police that the man in the still photo resembled Ibar and she signed the back of the photo. At trial, the State questioned Munroe about whether she had seen Penalver and Ibar the weekend of the murders. Munroe said she did not remember when she had seen them together, but that it could have been a month or two before she read about the murders in the newspaper. The State attempted to

impeach Munroe with her previous grand jury testimony. Munroe explained that what she previously told the grand jury was not inconsistent with her trial testimony because the police initially manipulated her statements. She explained that she just continued to go along with what the police initially wrote in their report. As with Milman, the trial judge deemed Munroe a "turncoat witness." With this finding, the judge allowed Munroe's prior testimony to be admitted for its truth under section 90.801(2)(a).

[3] Statements made under oath include those statements made at grand jury proceedings. See \*463 State v. Green, 667 So.2d 756, 759 (Fla.1995). At trial, the prosecutor showed Munroe the same photos that had been shown to her at the grand jury proceeding and asked her to indicate whether the person in the photos looked like Ibar. When Munroe said "no," the prosecutor then read from Munroe's 1994 grand jury testimony, which stated that the persons in the photos looked like Ibar and Penalver. Munroe's trial testimony is inconsistent with her prior grand jury testimony. The grand jury testimony is therefore admissible for its substantive value as an exception to the hearsay rule under section 90.801(2)(a). The trial judge did not abuse his discretion in admitting Munroe's prior identification as substantive evidence.

[4] [5] Although the trial judge erred in allowing several of the identification statements to be considered as substantive evidence, we find the error harmless. *See State v. DiGuilio*, 491 So.2d 1129 (Fla.1986). In *DiGuilio*, we explained that the State, as the beneficiary of any error, must demonstrate beyond a reasonable doubt that the complained-of errors did not contribute to the verdict. That is to say, the State must prove that "there is no reasonable possibility that the error contributed to the conviction." *Id.* at 1135 (citing *Chapman v. California*, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967)).

A close examination of the evidence presented in this case, both the properly admitted and the inadmissible evidence, demonstrates the harmlessness of the error in this instance. In addition to the statements of Peguera, Vindel, Casas, and Klimeczko identifying Ibar, which Ibar concedes was proper as impeachment evidence but not substantive evidence, there were other witnesses and items of evidence from which the jury could conclude that Ibar was one of the perpetrators of this triple homicide. First, there was a videotape of the murders. The perpetrator identified as Ibar removed his disguise and his face was visible on the videotape. This videotape was played for the jury. Gary Foy, one of Sucharski's neighbors, testified that he saw two men leaving in Sucharski's Mercedes-Benz. He stated that he did not get a good look at the driver of the car, but he got a good look

at the passenger. Foy identified Ibar as the passenger in the Mercedes. Klimeczko testified that at some point both Penalver and Ibar came to the residence on Lee Street in a big, black, shiny new car. Although Milman denied that he had ever positively identified Ibar as the person in the still photograph made from the videotape, he did say that the person in the photograph resembled Ibar. Moreover, the trial judge admitted as substantive evidence Milman's grand jury testimony in which he positively identified Ibar. Munroe's statement placing Ibar and Penalver together during the weekend of the murder was also admitted as substantive evidence. On the issue of identification, the jury also heard evidence from Kimberly San and David Phillips that placed Ibar and Penalver in the Mercedes. Both Peguera and her mother testified that the person in the photograph resembled Ibar. We conclude that any error in admitting some of these identification statements as substantive evidence rather than as impeachment evidence was harmless error. DiGuilio, 491 So.2d at 1135.

<sup>[6]</sup> We agree with the State that the defendant's claim that the witnesses were called for the sole purpose of impeaching their testimony is not a matter that has been preserved for appellate review because there was no objection made on this basis in the trial court. *See Steinhorst v. State*, 412 So.2d 332, 338 (Fla.1982) ("[I]n order for an argument to be cognizable on appeal, it must be the specific contention \*464 asserted as legal ground for objection, exception, or motion below."). Moreover, while parts of these witnesses' testimonies were impeached, there was other evidence gleaned from these witnesses that was not impeached and was used by the State to put together the various pieces of evidence that linked Ibar to these murders.

door for the State to call its own witness to testify that she made an identification during the investigation. Ibar credits his mother Maria Casas's testimony at the first trial for resulting in a hung jury because she so vehemently denied identifying him in the surveillance photo.

<sup>[9]</sup> "The use of prior testimony is allowed where (1) the testimony was taken in the course of a judicial proceeding; (2) the party against whom the evidence is being offered was a party in the former proceeding; (3) the issues in the prior case are similar to those in the case at hand; and (4) a substantial reason is shown why the original witness is not available." *Thompson v. State*, 619 So.2d 261, 265 (Fla.1993) (citing *Hitchcock v. State*, 578 So.2d 685 (Fla.1990); *Johns–Manville Sales Corp. v. Janssens*, 463 So.2d 242 (Fla. 1st DCA 1984); *Layton v. State*, 348 So.2d 1242 (Fla. 1st DCA 1977)). Casas's testimony meets all four elements and was admissible on this basis.

The first trial was a judicial proceeding, and Casas was subject to crossexamination on substantially the same issues involved in this trial. Casas's unavailability at the second trial is undisputed due to her death. Thus, all the elements of *Thompson* have been satisfied.

Furthermore, Ibar failed to properly preserve this issue for review. Defense counsel objected that the photo Casas discussed at the first trial was never marked for identification. Thus, the objection at trial is not the same as the issue raised on appeal. Therefore, the issue was not properly reserved for our review. *See Morrison v. State*, 818 So.2d 432, 446 (Fla.2002). For these reasons, we deny relief on this claim.

II.

### Prior Testimony/Unavailable Witness

[7] [8] Ibar next alleges it was error to allow his mother's testimony from his first trial to be read to the jury in this trial because the jury was unable to personally witness his mother, Maria Casas, testify, and assess her credibility. He also argues that it was error to allow the testimony to be read because at the first trial, his mother vehemently denied that she identified Ibar in a photo; therefore, the only purpose for reading this testimony was to open the

III.

### **Admission of Hearsay Evidence**

Ibar makes several claims concerning the admission of testimony from Ian Milman, Kimberly San, and Fred Boyde. He alleges that Milman's testimony concerning a statement made by Alex Hernandez and San's testimony that Ibar identified himself were inadmissible hearsay. Additionally, he argues that the testimony of the State's shoe print expert should not have been admitted because the evidence has no basis in science.

Ibar contends the trial court erroneously permitted Milman to testify that Alex Hernandez stated his intention to travel to North Carolina on the weekend of the murders. Ibar alleges that Hernandez was not properly investigated and could not be ruled out as a suspect. In order to show that Hernandez was out of town and was therefore properly eliminated as a suspect, the State introduced testimony from Milman, another tenant at the Lee \*465 Street home. The defense objected to the evidence, arguing it was inadmissible hearsay and not an exception to the hearsay rule. The trial court allowed the testimony under section 90.803(3), Florida Statutes (1999), as pertaining to Hernandez's state of mind that he intended to go out of town on the weekend of the murders.

### Section 90.803(3) provides, in pertinent part:

[T]he following are not inadmissible as evidence, even though the declarant is available as a witness:

....

- (3) Then-existing mental, emotional, or physical condition.—
- (a) A statement of the declarant's then-existing state of mind, emotion, or physical sensation, including a statement of intent, plan, motive, design, mental feeling, pain, or bodily health, when such evidence is offered to:

• • • •

- 2. Prove or explain subsequent acts of subsequent conduct of the declarant.
- § 90.803(3), Fla. Stat. (1999).

A hearsay statement of intent or plan is admissible under section 90.803(3) when offered to "[p]rove or explain acts of subsequent conduct of the declarant." § 90.803(3)(a)(2). In this case, the statement that Hernandez planned to go to North Carolina was offered to prove that he subsequently went to North Carolina. While this is the kind of testimony contemplated by the rule, such a statement is only admissible if there is other sufficient evidence to draw the inference that the act or plan was executed. *See* Charles W. Ehrhardt, *Florida Evidence*, § 803.3b, at 788 (2005).

Several Florida cases discuss this hearsay exception and illustrate its proper application. In *Muhammad v. State*, 782 So.2d 343, 359 (Fla.2001), a mother testified that she was talking on the phone to her son when he was killed.

When the State asked the mother what the son was talking about, the mother testified that her son was on his way to the courthouse to get a business license and that he expressed excitement about his future. This Court indicated that the evidence was inadmissible because the son's statement was not offered to prove he subsequently went to the courthouse, it was offered to prove that he was excited about his future and would garner sympathy from the jury. Id. at 359. Thus, the admission of the statement fell outside of the purpose of the rule, i.e., to prove a subsequent act. Likewise in Brooks v. State, 787 So.2d 765 (Fla.2001), the State introduced the victim's hearsay statement that she was going to Crestview with her boyfriend, who was not the defendant Brooks. This Court found that statements of intent under this exception were only admissible to indicate the future act of the declarant, not the future act of another person. *Id.* at 770–71. Thus, the victim's statement of intent to go to Crestview with her boyfriend could only be used to show she went to Crestview with her boyfriend. Because the evidence was offered to show that the defendant followed the victim and her boyfriend to Crestview, it was inadmissible. See id.

In contrast, in *Monlyn v. State*, 705 So.2d 1 (Fla.1997), this Court found a hearsay statement made by the defendant to a fellow inmate to be admissible under this hearsay exception. An inmate at the jail testified that on the day before Monlyn escaped from jail, Monlyn told him that he was going to escape, get a shotgun, and kill the first person he saw with a car. In affirming the trial court's denial of Monlyn's motion to suppress the statement, we said, "This is exactly the kind of evidence contemplated by section 90.803(3)(a) 2 ... \*466 as satisfying the state of mind exception to explain subsequent conduct." *Id.* at 5.4

[10] [11] These cases illustrate that statements admitted under the state of mind exception to the hearsay rule are properly admitted only if they involve the state of mind of the declarant and there is evidence demonstrating that the declarant acted in accord with the state of mind or intent. In this case, Hernandez's state of mind, his "intention" to go to North Carolina, is relevant to the intermediate issue of whether he was in town and could have committed the murders. If there is sufficient evidence to draw the inference that he went to North Carolina, and the evidence is offered for that purpose, then the evidence would be admissible. The only evidence offered by the State in this case is Milman's testimony that Hernandez returned home on Sunday and the hearsay statement made by Hernandez to Milman about taking a plane home. There is nothing else in this record to support the inference that Hernandez actually went to North Carolina. Cf. Monlyn, 705 So.2d at

3 (indicating the evidence demonstrating that Monlyn committed the acts expressed in the hearsay statement). Here, however, the gap between the stated intention and the actual commission of the act is too great to support an inference that Hernandez was in North Carolina at the time the murders were committed. Thus, the trial court should not have admitted the evidence under the state of mind exception to the hearsay rule.

[12] However, the error of admitting this evidence is harmless. This Court has defined the harmless error test as placing "the burden on the state, as the beneficiary of the error, to prove beyond a reasonable doubt that the error complained of did not contribute to the verdict or, alternatively stated, that there is no reasonable possibility that the error contributed to the conviction." State v. DiGuilio, 491 So.2d at 1135. The commission of an error by the trial court is only considered harmless where there is no reasonable possibility that the error contributed to the verdict. See Walton v. State, 847 So.2d 438, 446 (Fla.2003). Considering this error in light of the evidence the jury properly had in front of it, there is no reasonable possibility that the error contributed to the conviction. There was a wealth of evidence that connected Ibar to this crime and indicated that he was one of the intruders captured on videotape at the scene of the murders. The question of whether Hernandez was or was not out of town at the time of the murders would not have reasonably affected the jury's finding that Ibar was one of the murderers.

[13] [14] [15] [16] Ibar next argues that the trial court erroneously admitted the testimony of Kim San that she saw Ibar in her home on the Sunday morning of the murders. San testified that Penalver and Ibar came to her house that morning in a black Mercedes. San knew Penalver because they were living together. But when she saw the other man, she asked, "Who the hell are you?" Defense counsel objected to this testimony on the basis of hearsay. At that point, however, San had not given a hearsay statement. When the prosecutor asked, "Well, did this person respond?" San responded, "He said, yes, I'm Pablo." Defense counsel again objected, arguing that the statement "I'm Pablo" was hearsay. The State argued that it was a spontaneous statement. The court overruled the objection. Later, San repeated the \*467 statement, and defense counsel objected on relevancy grounds. The hearsay exceptions statute, section 90.803 provides that various types of evidence are not inadmissible, including spontaneous statements, defined as follows:

(1) Spontaneous statement.—A spontaneous statement describing or explaining an event or condition made while the declarant was perceiving the event or condition, or immediately thereafter, except when such

statement is made under circumstances that indicate its lack of trustworthiness.

§ 90.803(1), Fla. Stat. (1999). A spontaneous statement must be made "at the time of, or immediately following, the declarant's observation of the event or condition described." J.M. v. State, 665 So.2d 1135, 1137 (Fla. 5th DCA 1996). This exception requires that "the statement must be made without the declarant first engaging in reflective thought." Id. The statements admitted under section 90.803(1) are limited to statements which "describe or explain" an event. Charles W. Ehrhardt, Florida Evidence § 803.1, at 772 (2005 ed.). Ibar's statement "I'm Pablo" did not "describe or explain" an event. The two cases the State cites in support both demonstrate that the declarant responded to an event. See McGauley v. State, 638 So.2d 973, 974 (Fla. 4th DCA 1994) (holding that wife's response to officer's question "Who jumped out of the back window?," which identified the defendant, was a spontaneous statement); McDonald v. State, 578 So.2d 371, 373 (Fla. 1st DCA 1991) (holding that the victim's statement to her friend in a sexual battery case immediately after the incident was admissible as a spontaneous statement). Because the statement "I'm Pablo" did not describe or explain an event, the trial court should have sustained the objection.

[17] Although we find the statement inadmissible as a spontaneous statement, we find it was admissible as an admission by the defendant pursuant to section 90.803(18), Florida Statutes (1999). This exception to the hearsay rule provides for the admission into evidence of a statement by a party that is offered against that party. It is undisputed that the statement was made by the defendant and it was being offered against him. Therefore, it was admissible under 90.803(18).

[18] [19] Ibar also challenges the State's footwear impression expert. He argues that courts are reconsidering this type of identification testimony on the ground that it has no basis in science. Ibar cites federal and other state that follow **Daubert** v. Merrell Pharmaceuticals, Inc., 509 U.S. 579, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993), as the standard for the admissibility of experts' testimony. Florida courts do not follow **Daubert**, but instead follow the test set out in Frye v. United States, 293 F. 1013, 1014 (D.C.Cir.1923). See Brim v. State, 695 So.2d 268, 275 (Fla.1997). Frye sets forth the test to be utilized when a party seeks the admission of expert testimony concerning new or novel scientific evidence. In this case, however, there was no new or novel scientific theory being presented by the shoe print expert. Thus, neither **Daubert** nor Frye is applicable. This case is similar to Spann v. State, 857 So.2d 845 (Fla.2003), where this Court held that a Frye hearing was

not necessary for the admission of an expert's testimony on **handwriting** analysis because **handwriting** analysis has been utilized by the courts for over 100 years and is not a new or novel science. Shoe print evidence has been utilized for at least as long. *See*, *e.g.*, *Whetston v. State*, 31 Fla. 240, 12 So. 661 (1893) (explaining that footprints found at or near the scene of a crime which correspond to those of the \*468 accused can be admitted into evidence). The use and reliance on footprint evidence is not new or novel and is not subject to *Frye* analysis. Thus, there was no error in the trial court's admission of this testimony.

IV.

### **Exclusion of Answering Machine Audiotape**

precluded the defense from eliciting evidence of a third-party motive and the poor reputation for veracity of a State's witness. Ibar sought to introduce as evidence a tape recording made on Sucharski's answering machine just days before the murders. In that recording Sucharski's ex-live-in girlfriend Kristal Fisher called Sucharski and wanted to get her clothes and jewelry from his house. A transcript of the recording indicates that the two fought about the clothes and jewelry and about Fisher's new boyfriend.

Section 934.06, Florida Statutes (1999), prohibits the contents of an intercepted communication from being received in evidence in any trial "if the disclosure of that information would be in violation of this chapter." A lawful interception of communications occurs when all of the parties to the communication have given prior consent. See § 934.03(2)(d), Fla. Stat. (1999). There is no indication in the tape or the testimony that Fisher knew Sucharski was taping their conversation. Defense counsel wanted to introduce the taped conversation through the testimony of Sucharski's employee Peter Bednarz, who could identify Sucharski's and Fisher's voices, and who knew that they were fighting. Bednarz was not a party to the phone conversation; nor was Fisher called by either party to testify at trial. Because there was no evidence that Fisher knew of the recording, the trial court's refusal to admit the recording was not an abuse of discretion.

V.

### Reputation Testimony Regarding Kimberly San

[21] Ibar next argues that defense counsel should have been permitted to impeach Kimberly San's credibility. As discussed above, San testified for the State that Penalver and someone else who said he was Pablo showed up at her house in a black Mercedes on the morning of the murders. Ibar proffered the testimony of Robert James Lillie, a Margate police officer who had, in the past, come into contact with San in his capacity as a police officer. Lillie would have testified that San "is not a truthful, truth telling person. She's a liar." Lillie's opinion was based on information from a secretary at the prosecutor's office that San made untrue accusations against Lillie. The secretary did not live in San's community. Lillie also stated that San's mother and brother expressed opinions that San was not truthful. The trial court did not allow the testimony, finding that the testimony was not based on the perception of the community, but only on the opinions of a small number of people.

[22] Section 90.609, Florida Statutes (1999), provides as follows:

A party may attack or support the credibility of a witness, including an accused, by evidence in the form of reputation, except that:

- (1) The evidence may refer only to character relating to truthfulness.
- (2) Evidence of a truthful character is admissible only after the character of the witness for truthfulness has been attacked by reputation evidence.

\*469 As a predicate to the introduction of such reputation evidence, however, section 90.405, Florida Statutes (1999), requires the witness to be aware of the person's general reputation in the community and that the community must be sufficiently broad to provide adequate knowledge and a reliable assessment. See Larzelere v. State, 676 So.2d 394 (Fla.1996); Charles W. Ehrhardt, Florida Evidence, § 405.1, at 257-58 (2005) ed.). Lillie testified that he had known San and her family for many years, but the reputation testimony came only from his discussion with San's brother, mother, and an employee of the State Attorney's office who did not live in the community. In light of these limitations, the trial court did not abuse its discretion in excluding the evidence. See Larzelere, 676 So.2d at 400 (finding no abuse of discretion for the exclusion of reputation evidence when the evidence came from a limited

community).

VI.

### **Motion to Suppress Lineup Evidence**

Ibar contends the trial court erroneously denied his motion to suppress the live lineup and the statements made by Gary Foy identifying him at that lineup. He alleges that he was "in custody" at the time Miramar police arrived at the Miami–Dade homicide unit with a warrant requiring him to participate in a lineup. Ibar requested his counsel be present for the lineup, but police told him that they did not want to wait for his counsel to arrive and they proceeded without counsel. The State argues that Ibar was not in the custody of the Miramar police on the triple homicide and had not been charged on these crimes; therefore, Ibar's right to counsel had not been triggered.

<sup>[23]</sup> In reviewing the trial court's ruling on a motion to suppress, we accord a presumption of correctness to the trial court's determination of historical facts; however, we independently review mixed questions of law and fact that ultimately determine constitutional issues arising in the context of the Fourth and Fifth Amendments and, by extension, article I, section 9 of the Florida Constitution. *See Connor v. State.* 803 So.2d 598, 608 (Fla.2001).

[24] [25] "Under the state constitution, a defendant's right to counsel's presence applies at each crucial stage of the proceedings; under the federal constitution, defendant is entitled to counsel at each critical stage of the proceeding." State v. Jones, 849 So.2d 438, 441 (Fla. 3d DCA 2003) (citing Smith v. State, 699 So.2d 629, 638 (Fla.1997)); see also Traylor v. State, 596 So.2d 957, 968 (Fla.1992). Although "[i]t is well settled that viewing a post-charge/arrest live lineup is a critical or crucial stage," Jones, 849 So.2d at 441, a pre-charge lineup is not a critical or crucial stage because formal proceedings have not actually begun. The United States Supreme Court has stated that the formal proceedings begin when the government makes a commitment to prosecute, which occurs when the defendant is arraigned, indicted, or formally charged. See Kirby v. Illinois, 406 U.S. 682, 688-91, 92 S.Ct. 1877, 32 L.Ed.2d 411 (1972) (plurality opinion) (holding that a lineup conducted after a defendant's arrest, but before arraignment, indictment, or formal charges is merely investigatory in nature; therefore, the defendant is not entitled to presence of counsel at such a lineup). When the government makes a formal commitment to prosecute, the Sixth Amendment right to counsel attaches. *See id.* at 689, 92 S.Ct. 1877 ("[I]t is only then that the government has committed itself to prosecute, and only then that the adverse positions of government and defendant have solidified."). The pre-arrest investigatory lineup \*470 in this case was not a "critical stage" of the proceedings because when the lineup was conducted, it was not apparent that the government had decided to prosecute Ibar for the triple homicide.

<sup>[26]</sup> [27] [28] Ibar maintains that his arrest in Dade County on unrelated charges established that he was "in custody" or "under arrest." The right to counsel when an accused or suspect is "in custody" or "under arrest" applies when there is an official interrogation, in which case the Fifth Amendment right to counsel is triggered and *Mirandas* warnings are given. *See Sapp v. State*, 690 So.2d 581, 585 (Fla.1997). An official interrogation refers to words or actions that are reasonably likely to elicit an incriminating response from the suspect. *See Rhode Island v. Innis*, 446 U.S. 291, 301, 100 S.Ct. 1682, 64 L.Ed.2d 297 (1980). A prearrest investigatory lineup does not elicit any response from the suspect; therefore, it is not an interrogation and the Fifth Amendment right to counsel is not triggered.

[29] Furthermore, the Sixth Amendment right to the assistance of counsel is "offense specific" and applies only to the offense or offenses with which the defendant has actually been charged, and not to any other offense he may have committed but with which he has not been charged. See, e.g., Hendricks v. Vasquez, 974 F.2d 1099 (9th Cir.1992); West v. State, 923 P.2d 110 (Alaska Ct.App.1996) (holding that the fact that the right to the assistance of counsel has attached in a particular case does not entitle the defendant to demand representation in connection with factually and legally unrelated matters in which the state has made no accusation and taken no adversary action); State v. Williams, 922 S.W.2d 845 (Mo.Ct.App.1996) (holding that in a murder prosecution, the defendant's Sixth Amendment right to counsel for an unrelated murder had not attached where no formal proceedings had been brought against him for that murder). At the time Ibar was subjected to the live lineup, he had not been charged for the triple homicide and his Sixth Amendment right to counsel had not been triggered. Therefore, the trial court properly denied Ibar's motion to suppress.

VII.

### **Motions for Mistrial**

[30] Ibar raises several issues concerning the admission of evidence that he alleges should have resulted in a mistrial. Manzella testified that the first lead in solving this case came from the Miami-Dade County police homicide unit. Ibar argues that it was improperly admitted evidence because the jury could have inferred that Ibar was being held on another homicide in Miami. Ibar argues that the trial court erred in failing to grant his motion for mistrial based on this evidence. There was no objection made to this testimony at the time it was admitted. Counsel only raised an objection in a sidebar discussion on another topic. In fact, during the initial stage of the sidebar conference, defense counsel said he did not object to the testimony. However, later in the discussion defense counsel said he did object but had not objected at the time because he did not want to draw the jury's attention to the fact that Ibar was in the Miami-Dade homicide unit. It was only at this point that defense counsel objected and moved for a mistrial.

[31] [32] A motion for a mistrial is addressed to the sound discretion of the trial judge, and the trial judge's ruling on such a motion will not be reversed absent an \*471 abuse of discretion. *See Anderson v. State*, 841 So.2d 390 (Fla.2003). Generally, the objecting party should both move to strike the improper testimony and request a curative instruction telling the jury to disregard the improper testimony. *See Ferguson v. State*, 417 So.2d 639 (Fla.1982); *Williams v. State*, 443 So.2d 1053 (Fla. 1st DCA 1984). In this instance, defense counsel simply objected, after the fact, and requested a mistrial. No request was made for a curative instruction. Under these circumstances we cannot say that the trial judge abused his discretion in denying the motion for mistrial.

[33] Ibar next claims that it was error for the jury to hear that Ibar had a fight with Klimeczko over money and drugs. When Detective Manzella made a reference to drugs at the Lee Street home during his trial testimony, defense counsel moved for mistrial based on the fact that the trial judge had precluded Klimeczko from making any reference to the fact that a dispute over drugs was the reason Ibar kicked him out of the Lee Street house. The trial court denied the motion and found that Manzella's statement was sufficiently vague in that there was no indication from the statement that Klimeczko stole drugs from Ibar.

[34] A mistrial should be granted only in circumstances

where "the error committed was so prejudicial as to vitiate the entire trial." *Duest v. State*, 462 So.2d 446, 448 (Fla.1985). When taken in context, the officer's limited reference to notes he made while interviewing a witness did not amount to the admission of *Williams*<sup>6</sup> rule evidence. As the trial court found, Ibar kicked Klimeczko out because he took money and drugs, but there is no indication whose money and drugs Klimeczko took. Since the testimony on this case was that at least four men lived in the Lee Street house, any one of them could have been the owner of the money and drugs. Under these circumstances, we cannot say that Manzella's reference affected the outcome of the trial.

his motion for a mistrial because Manzella made a statement that constituted a comment on Ibar's right to remain silent. Manzella testified that during his interrogation of Ibar he sensed that Ibar did not want to communicate with him so he showed Ibar the surveillance photo and asked Ibar, "How did I get this?" Defense counsel objected and moved for a mistrial. In response, the State offered to clarify the officer's statement with further questioning. The court denied Ibar's motion for mistrial. The State continued questioning Manzella, and Manzella explained that because he was getting limited information from Ibar during questioning, he showed Ibar the photo. He asked Ibar how he got the photo. Defense counsel objected again.

[36] [37] We have held that commenting on a defendant's exercise of his right to remain silent is serious error. *See Rimmer v. State*, 825 So.2d 304, 322 (Fla.2002). The test to be applied in such instances is whether the statement is fairly susceptible of being interpreted by the jury as a comment on the defendant's exercise of that right. *See id.* at 323 (citing *State v. Kinchen*, 490 So.2d 21, 22 (Fla.1985)). Additionally, once a suspect initially waives his or her *Miranda* rights, the suspect must "clearly" invoke the right to terminate \*472 questioning. *See, e.g., State v. Owen*, 696 So.2d 715 (Fla.1997).

The trial judge correctly found that Ibar did not clearly invoke his right to terminate questioning. While Ibar may have been somewhat reluctant and evasive in answering some questions, he continued to talk to and cooperate with the police and even signed a consent to permit a search of his residence. Thus, the officer's recitation of these events was not a comment on Ibar's right to remain silent. The trial judge did not abuse his discretion in denying the motion for mistrial. *See Goodwin v. State*, 751 So.2d 537 (Fla.1999).<sup>7</sup>

[38] Ibar also argues the trial court improperly allowed the

State to introduce references to co defendant Penalver's gang affiliation, criminal history, and evidence of consciousness of guilt. This testimony was presented during the testimony of Detective Mark Suchomel, who was asked about a search conducted at the home of Melissa Munroe. Detective Suchomel was asked to outline the items taken during the search. Included in the items removed, Detective Suchomel listed a soccer ball with gang graffiti and a Department of Corrections offender identification card with Penalver's name. Defense counsel did not object while the detective was testifying. Only after Detective Suchomel testified did counsel request a sidebar, object, and moved for a mistrial. Counsel did not request a limiting instruction.

The objection in this case came well after the offending testimony was elicited. Counsel did not attempt to stop the officer during his recitation of the evidence found in the search. Thus, the defendant never gave the trial judge an opportunity to rule on the admissibility of the evidence. See Rowe v. State, 120 Fla. 649, 163 So. 22, 23 (1935) (indicating that the purpose of an objection is to prevent a question from being answered until after a ruling of the court can be obtained); Charles W. Ehrhardt, Florida Evidence, § 104.1, at 21 (2005 ed.). Moreover, the defendant did not request a curative instruction. See Williams v. State, 443 So.2d 1053, 1054 (Fla. 1st DCA 1984) (holding that where the objectionable evidence is not of such an inflammatory nature as to deny a fair trial, the proper procedure is to object and request a curative instruction). Therefore, we cannot say under the circumstances presented here that the trial judge abused his discretion in denying the motion for mistrial.

### VIII.

### **Sentencing Issues**

Finally, Ibar raises several claims involving the sentencing phase of his trial, including the constitutionality of the death penalty. The jury found Ibar guilty of three counts of first-degree murder and single counts of armed burglary, armed robbery and attempted armed robbery. The penalty phase jury recommended a sentence of death by a nine-to-three vote on each of the murder counts. The judge sentenced Ibar to death on each of the three murder counts. Ibar was also sentenced to twenty-five years for armed burglary, twenty-five years

for armed robbery, and ten years for attempted armed robbery. Two of the five aggravators were based on prior felonies (contemporaneous murder and that the murders were committed in the course of a felony).

[39] [40] Ibar argues that the Florida system unconstitutionally relies upon judicial fact-finding and not jury fact-finding. This claim, and variations of this claim, \*473 have been addressed and decided adversely to Ibar. See Duest v. State, 855 So.2d 33, 49 (Fla.2003); Blackwelder v. State, 851 So.2d 650, 654 (Fla.2003). Ibar also claims that the advisory role of the jury is unconstitutional and that the jury misunderstands its role. These claims have also been addressed and decided adversely to Ibar. See Jones v. State, 855 So.2d 611, 619 n. 5 (Fla.2003).

[41] [42] [43] Ibar also takes exception to the limitation the trial court put on defense counsel's arguments to the jury and argues that it was unconstitutional to prohibit defense counsel from asking the jury for mercy, asking for a jury pardon, discussing whether the jury had lingering doubt, or eliciting personal opinions about the death penalty from witnesses. Ibar argues that these prohibitions should be revisited in light of Ring v. Arizona, 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002). It is improper for the court to consider lingering doubt or residual doubt as a mitigating factor. See Darling v. State, 808 So.2d 145, 162 (Fla.2002); Sims v. State, 681 So.2d 1112, 1117 (Fla.1996); Preston v. State, 607 So.2d 404-411 (Fla.1992); Aldridge v. State, 503 So.2d 1257, 1259 (Fla.1987). Moreover, it is improper for a defendant to relitigate the determination of his guilt by presenting evidence of or arguing lingering doubt. See Duest v. State, 855 So.2d at 40. This principle has not changed since Ring, and there is nothing in the Ring decision that would require a different result.

[44] [45] [46] Ibar argues that the lack of unanimity in the jury recommendation is unconstitutional. This claim has been addressed and decided adversely to Ibar. See Blackwelder 851 So.2d at 654. Ibar also argues that the indictment was defective because it did not provide notice of the aggravators, and he argues that the verdict forms should have indicated which aggravators were found by the jury. These claims have also been addressed adversely to Ibar. See Kormondy v. State, 845 So.2d 41, 54 (Fla.2003) ("Ring does not require either notice of the aggravating factors that the State will present at sentencing or a special verdict form indicating the aggravating factors found by the jury.").

Next, Ibar argues that there was insufficient evidence of the existence of the aggravating circumstances to support

his sentence. He argues that the cold, calculated, and premeditated (CCP) aggravator, the avoid arrest aggravator, and the heinous, atrocious, or cruel (HAC) aggravator were not proven beyond a reasonable doubt. He also argues that when these aggravators are eliminated, his death sentence is not proportional. We find no merit to these claims.

[47] [48] [49] Ibar claims the trial court improperly found CCP in this case because there was no heightened state of premeditated design to kill because, as the video demonstrates, the murders happened very quickly. This Court recently set forth a thorough discussion of CCP in Lynch v. State, 841 So.2d 362 (Fla.2003), defining each element of CCP. The murders in the instant case meet the cold element of CCP, as set forth in Lynch, because they were execution-style killings. See also Walls v. State, 641 So.2d 381, 388 (Fla.1994). In addition, as in Walls, Ibar and his accomplice had ample opportunity to reflect on their actions and abort any intent to kill. But instead they shot each victim in the back of the head. "As to the 'calculated' element of CCP, this Court has held that where a defendant arms himself in advance, kills execution-style, and has time to coldly and calmly decide to kill, the element of 'calculated' is supported." Lynch, 841 So.2d at 372. According to the testimony of Klimeczko, Ibar and Penalver arrived \*474 at the Lee Street home and took the Tec-9 gun early on Sunday morning. At one point during the murders, the gunman with the hat and sunglasses went into a bedroom and came out with a second gun. During this time, Ibar had time to reflect on the killings. There was also "heightened premeditation" in this case. This element has been found when a defendant has the opportunity to leave the crime scene and not commit the murder but, instead, commits the murder anyway. See Alston v. State, 723 So.2d 148, 162 (Fla.1998). Because the videotape shows that the murders were not committed immediately upon the intruders' entrance to the home, that the victims were tied up, and that Sucharski was beaten for more than twenty minutes, it is evident that the defendants could have left the scene before killing the three victims. Thus, the calculated element of CCP is met. The final element of CCP is a lack of legal or moral justification. "A pretense of legal or moral justification is 'any colorable claim based at least partly on uncontroverted and believable factual evidence or testimony that, but for its incompleteness, would constitute an excuse, justification, or defense as to the homicide.' "Nelson v. State, 748 So.2d 237, 245 (Fla.1999) (quoting Walls v. State, 641 So.2d 381, 388 (Fla.1994)). In this case, there is no legal or moral justification posited for these killings. Thus, the CCP aggravator was properly found.

[50] [51] Next, Ibar claims that there was no evidence that he was attempting to avoid arrest when he committed these crimes. He argues that the avoid arrest aggravator was erroneously found because the victims were not law enforcement officers. He contends that there was no positive evidence of witness elimination, but a mere hypothesis. In evaluating the avoid arrest aggravator, this Court

will look at whether the victims knew and could identify their killer, but ... this fact alone is insufficient to prove the aggravator beyond a reasonable doubt. *See Farina v. State*, 801 So.2d 44, 54 (Fla.2001). We have held that the following evidence is also pertinent when reviewing this aggravator: "[W]hether the defendant used gloves, wore a mask, or made any incriminating statements about witness elimination; whether the victims offered resistance; and whether the victims were confined or were in a position to pose a threat to the defendant." *Id.* 

Nelson v. State, 850 So.2d 514, 526 (Fla.2003). In the instant case, there was record testimony that Ibar often frequented Sucharski's bar and that Sucharski videotaped events at the bar and frequently reviewed them. There is also evidence that Sucharski may have recognized Ibar from shaking hands with him at the bar. That information, coupled with the fact that Ibar wore something over his head to conceal his identity, the fact that Sucharski resisted, and that the victims were confined, all support this aggravator. Thus, we conclude that the avoid arrest aggravator was also properly found.

[52] [53] Ibar next argues that HAC was erroneously found because the State did not present evidence of mental torture. Instantaneous or near instantaneous deaths by gunshot, unaccompanied by additional acts to mentally or physically torture the victim, does not meet the requirements of HAC. See Rimmer v. State, 825 So.2d 304, 327–28 (Fla.2002); see also Ferrell v. State, 686 So.2d 1324, 1330 (Fla.1996) ("Execution-style killings are not generally HAC unless the state has presented other evidence to show some physical or mental torture of the victim."). However, the acts of mental and physical torture are depicted on the videotape in \*475 this case. Ibar and his accomplice entered the home and beat Sucharski almost continually until shooting him. Sucharski suffered blunt injuries to his head, face, neck, teeth, and hands. His index finger was fractured. After fourteen and a half minutes, he was shot. The women were lying on the floor, face down. They saw and heard all of the injuries inflicted on Sucharski. At one point, Rogers was pushed to the floor near the kitchen table. Anderson tried to escape to the bedroom but was chased by Ibar and then tied with electrical cords. After another seven minutes, all of the victims were shot. These deaths

were not "instantaneous" or "near instantaneous." The videotape demonstrates that the men tortured the victims, either physically or mentally, for some time.

[54] Finally, we review the sentences for proportionality. In this case, we find the sentences of death are proportional. The State relies on Rimmer v. State, 825 So.2d 304 (Fla.2000), Alston v. State, 723 So.2d 148 (Fla.1998), and Bush v. State, 682 So.2d 85 (Fla.1996), to support its argument that death is the appropriate penalty in these cases. In Rimmer, the defendant was convicted of first-degree murder for the execution-style killings of two employees of a car stereo store. See 825 So.2d at 308. The criminal episode lasted for fifteen to twenty minutes. See id. at 310. The trial court found six aggravating factors: "(1) the murders were committed by a person convicted of a felony and under a sentence of imprisonment; (2) the defendant was previously convicted of another capital felony and a felony involving use or threat of violence to the person; (3) the murders were committed while the defendant was engaged in a robbery and kidnaping; (4) the murders were committed for the purpose of avoiding or preventing lawful arrest; (5) the murders were especially heinous, atrocious, or cruel (HAC); and (6) the murders were cold, calculated, and premeditated (CCP)." Id. at 311. The trial court found no statutory mitigation and five nonstatutory mitigators. This Court affirmed Rimmer's conviction and sentence. Id. at 332.

Bush and Alston involved execution-style murders as well. In Bush, this Court affirmed a death sentence where the trial court found three aggravators—prior violent felony, murder committed during a felony, and CCP—and no mitigators. See 682 So.2d at 86. In Alston, the trial court found five aggravators: prior violent felonies; the murder was committed during a robbery/kidnapping and for pecuniary gain; the murder was committed for the purpose of avoiding a lawful arrest; HAC; and CCP. The court found no statutory mitigators and gave little or no weight to the five nonstatutory mitigators. See 723 So.2d at 153. Based on its review of the aggravating and mitigating factors, this Court found Alston's death sentence proportional. See id. at 162.

Although the cases cited by the State contain little or no mitigation, and the trial court in this case found mitigation in favor of Ibar that touched on his family life and cooperation, this Court has found the death penalty to be proportional even where several mitigating factors were found but there was substantial aggravation. In *Smithers v. State*, 826 So.2d 916, 931 (Fla.2002), we upheld the imposition of a death sentence as being proportional where three aggravators (previous violent felony/contemporaneous murder, HAC, and CCP) were

found. In Smithers, the trial court also found two statutory mitigators (the murder was committed while under the influence of extreme mental or emotional disturbance, and the defendant's capacity to appreciate the criminality \*476 of his conduct or conform his conduct to the requirements of the law was substantially impaired) along with several nonstatutory mitigators (the defendant was a good husband and father, had a close relationship with siblings, suffered physical and emotional abuse as a child, regularly attended church, was a model inmate, made several contributions to the community, and confessed to the crime). Id.; see also Pagan v. State, 830 So.2d 792, 815-17 (Fla.2002) (affirming death sentence where prior violent felony, murder committed while in the course of an armed robbery, and CCP aggravators applied and numerous mitigating circumstances existed); Pope v. State, 679 So.2d 710, 716 (Fla.1996) (holding death penalty proportional where two aggravating factors, murder committed for pecuniary gain and prior violent felony, outweighed two statutory mitigating circumstances, commission while under influence of extreme mental or emotional disturbance and impaired capacity to appreciate criminality of conduct, and several nonstatutory mitigating circumstances); Heath v. State, 648 So.2d 660 (Fla.1994) (affirming defendant's death sentence based on presence of two aggravating factors of prior violent felony and murder committed during course of robbery, despite the existence of the statutory mitigator of extreme mental or emotional disturbance); Melton v. State, 638 So.2d 927, 930-31 (Fla.1994) (holding death penalty proportional where two aggravating factors of murder committed for pecuniary gain and prior violent felony outweighed moderate nonstatutory mitigation). We therefore find Ibar's sentence to be proportional.

### **CONCLUSION**

Based on the foregoing findings and conclusions, we affirm Ibar's convictions and sentences of death for the three murders.

It is so ordered.

PARIENTE, C.J., and ANSTEAD, LEWIS, and QUINCE, JJ., concur.

WELLS, J., concurs in part and dissents in part with an opinion, in which CANTERO and BELL, JJ., concur.

### WELLS, J., concurring in part and dissenting in part.

I concur in the majority's decision to affirm the convictions and the sentences. However, I write to expressly disagree with the majority's holding that the hearsay exclusion provided in section 90.801(2)(c), Florida Statutes (1999), is limited to statements of identification made by eyewitnesses, including victims, to a crime or event. The plain language of the statute contains no such limitation. I believe the type of identification at issue in this case, which involves the identification of an assailant in a surveillance photograph, falls within the scope of this statutory exclusion.

The majority holds that the trial court committed error when it admitted out-of-court statements by six individuals confirming that Ibar was the man depicted in a photograph made from a surveillance video taken of the crime. These six individuals were acquaintances of Ibar, but they were not eyewitnesses to the crime. The majority restricts the application of section 90.801(2)(c) to eyewitness identifications because doing so "is in keeping with the interpretation given to the statute by a number of our district courts of appeal." Majority op. at 460. I disagree that the decisions cited by the majority support a limitation on this statutory hearsay exclusion. More importantly, I believe that the plain language of the statute is clearly written to encompass a wide range of identifications, including the identifications at issue in this case.

\*477 Section 90.801(2)(c) provides that an out-of-court identification by a declarant is excluded from the definition of hearsay if the statement of identification is one "of a person made after perceiving the person." The only requirement of this statutory provision is that the declarant perceives the identified person before identification. There is no requirement that perception take place at the scene of the crime. Thus, the identifications at issue in this case clearly fall within the statutory language since the statements by the six individuals were based on their prior perception of the surveillance photograph.<sup>8</sup>

The district court cases cited by the majority do not support the majority's decision to limit the scope of this broadly worded statutory exclusion. Although the majority correctly notes that findings of admissibility under section 90.801(2)(c) in Florida case law have all involved eyewitness identifications, it does not logically follow that the statute must be limited only to those kinds of identifications. Notably, the majority fails to point to a

single decision where an identification by a non-eyewitness was found to fall outside the scope of the exclusion. In fact, it appears to be a question of first impression in Florida whether out-of-court identifications by non-eyewitnesses are admissible under section 90.801(2)(c).

I also do not agree with the majority's conclusion that the identifications in this case are similar to the identification statement found to be inadmissible by the Fourth District in Stanford v. State, 576 So.2d 737 (Fla. 4th DCA 1991). In that decision, the Fourth District Court of Appeal held that the victim's statement naming the individual she believed to be her attacker was not admissible under section 90.801(2)(c). The victim did not view a lineup. photo-array, or surveillance photograph before she gave the defendant's name. She simply named the defendant based on her memory of the attack. Id. at 738-40. This Court has similarly found that an eyewitness statement describing an assailant is not an identification for purposes of section 90.801(2)(c) because a description does not involve "perceiving" the person identified. Puryear v. State, 810 So.2d 901, 903–06 (Fla.2002); Swafford, 533 So.2d at 276 ("The witness in this case never made an identification of the person he had seen; he only gave a description. This testimony does not meet the definition of 'identification' as used in subsection 90.801(2)(c)."). The decisions in Stanford, Puryear, and Swafford do not, as the majority suggests, support the proposition that the perceiving required by the statute must occur at the time of the crime. To the contrary, the main point of these decisions was that the perceiving required by the statute must occur at the time of identification. Thus, if anything, these decisions support a finding of admissibility in this case.

The majority also misplaces its reliance on the rationale that identifications made by eyewitnesses shortly after a crime are inherently more reliable than in-court identifications. Majority op. at 461-62 (citing Lewis v. State, 777 So.2d 452 (Fla. 4th DCA 2001)). The general principle that out-of-court identifications are more reliable is relevant both to eyewitnesses and non-eyewitnesses. A non-eyewitness bases an identification on his or her familiarity with the assailant, but this familiarity \*478 can fade just as much as an eyewitness's recollection of a criminal event. An out-of-court identification by a non-eyewitness is especially more reliable if the assailant's appearance has significantly changed since the time of the crime or if there is reason to believe the declarant has been influenced or intimidated into changing his or her testimony. As the facts of this case demonstrate, memory loss and improper influence are factors that can affect a non-eyewitness's ability or

willingness to make an in-court identification. Six different witnesses told police during the investigation that the assailant in the surveillance photograph was Ibar or someone who resembled Ibar, but each of the witnesses changed their story in subsequent testimony.

The corresponding federal rule excluding statements of identification is instructive in this case.9 Federal Rule of Evidence 801(d)(1)(C) contains the same language as the Florida exclusion and has been interpreted to cover a broad range of identifications.<sup>10</sup> The commentary to the federal rule and the case law interpreting the federal rule cite to the same underlying principle recognized in Florida that favors out-of-court identifications. See Fed.R.Evid. 801(d)(1)(C) advisory committee's note, 28 U.S.C. app. at 903 (2000) ("The basis is the generally unsatisfactory and inconclusive nature of courtroom identifications as compared with those made at an earlier time under less suggestive conditions."); United States v. Owens, 484 U.S. 554, 562-63, 108 S.Ct. 838, 98 L.Ed.2d 951 (1988) (holding that the federal rule is directed in part at the problem of memory loss which makes it impossible to provide in-court identifications or to testify about details of the events underlying an earlier identification); United States v. Elemy, 656 F.2d 507, 508 (9th Cir.1981) (finding that out-of-court identifications are more reliable than those made under the suggestive conditions prevailing at trial). Like the Florida statute, the federal rule is aimed at solving the problem presented by a witness who by the time of trial is no longer willing or able to make an identification.

One federal court of appeals has expressly held that an identification by a non-evewitness can fall within the hearsay exclusion for statements of identification. See United States v. Ingram, 600 F.2d 260 (10th Cir.1979). In facts very similar to this case, the prosecution in *Ingram* presented testimony by two witnesses who were acquainted with the defendant and who had confirmed in statements to police officers during the investigation that the defendant was one of the assailants depicted in surveillance photographs taken of the crime. At trial, the prosecution submitted the written statements because the witnesses \*479 would not testify that the defendant was the individual in the photo. The Tenth Circuit Court of Appeals held that the statements were admissible as substantive evidence of the assailant's identity under rule 801(d)(1)(C). See id. at 261 & n\*.

I would interpret section 90.801(2)(c) as the Tenth Circuit interpreted the federal rule in *Ingram*. I believe that the Tenth Circuit correctly held that the statements were admissible under the plain language of the rule. The majority incorrectly concludes that *Ingram* conflicts with

the views espoused by our district courts. Majority op. at 462. As noted above, our district courts have never addressed whether an out-of-court identification by a non-witness falls within the scope of section 90.801(2)(c). To the contrary, Florida case law suggests that perception at the time of identification is the important requirement of the rule. *Puryear*, 810 So.2d at 903–06; *Swafford*, 533 So.2d at 276; *Stanford*, 576 So.2d at 739–40. This is entirely consistent with the holding in *Ingram*.

The majority claims that federal courts have "expanded" the rule in a way that will result in "defendant[s] being convicted through the testimony of persons who have no relationship or connection to the criminal offense." Majority op. at 462. The position taken by the federal courts is not an "expansion," but only an application of the plain language of the rule. In addition, the majority's reasoning fails to recognize that Florida case law already allows the conviction of defendants through the testimony of persons who can identify the defendant but who have no relationship to the crime. See, e.g., State v. Benton, 567 So.2d 1067, 1068 (Fla. 2d DCA 1990) ("A lay witness may offer his opinion about the identification of another person ... from a photo 'if there is some basis for concluding that the witness is more likely to correctly identify the defendant from the photograph than is the jury.' It is not necessary that the identification witness be an eyewitness to the crime itself.") (citations omitted; emphasis added).

The majority overstates the effect that a finding of admissibility in this case could have by claiming that an expansion of the rule could lead, as the *Stanford* court warned, to an "endless repetition of out-of-court identifications." Majority op. at 462. The casual naming of the accused suspect in *Stanford* is entirely distinguishable from the situation where a witness who is familiar with the accused is shown a surveillance photograph. Identifications based on surveillance photographs would typically only occur in the presence of police officers and are not likely to be "endlessly repeated."

Contrary to the majority's suggestion, the proximity of the crime to the six identifying individuals is not at issue in this case. The issue is whether the dangers of hearsay are concerning enough in this situation to prevent the admission of identifications which were made out of court. The majority, however, overlooks the fact that section 90.801(2)(c) eliminates the major danger of hearsay by requiring the identifying declarant to testify at trial and be subject to cross-examination concerning the identification statement. See State v. Freber, 366 So.2d 426, 428 (Fla.1978) (expanding the rule to allow

identification evidence as substantive evidence because requiring "the declarant's presence in court and availability for cross-examination eliminate[s] the usual danger of hearsay testimony"); see also United States v. Jarrad, 754 F.2d 1451, 1456 (9th Cir.1985) (finding that the main reason the statement of identification is not hearsay is that "compliance with the rule eliminates the major danger of hearsay testimony" since both the declarant and the witness are available for cross-examination).

\*480 Moreover, if Congress or the Florida Legislature had intended to limit the rule to allow only statements by eyewitnesses, they could have adopted specific language to this effect. Other states have deliberately departed from the federal rule and adopted language that clearly limits the hearsay exclusion to eyewitnesses. New York, for example, limits the admissibility of statements of identification to statements by witnesses who "observed the person claimed by the people to be the defendant either at the time and place of the commission of the offense or upon some other occasion relevant to the case."

N.Y.Crim. Proc. § 60.25(1)(a)(i) (McKinney 2003). California similarly limits the exclusion by requiring the statement to be "an identification of a party or another as

a person who participated in a crime or other occurrence." Cal. Evid.Code § 1238(a) (Deering 2005). Because the language of the Florida statute is much broader and contains no similar restrictions, there is no basis upon which this Court can interpret the statute to be limited to eyewitness identifications. In sum, by limiting the statute in such a way, the majority has rewritten the word "declarant" as "witness or victim" without any support in the statutory language or case law.

For these reasons, I disagree with the majority and would find that a statement by a non-eyewitness identifying an assailant in a surveillance photograph is an admissible statement of identification under section 90.801(2)(c).

CANTERO and BELL, JJ., concur.

### **All Citations**

938 So.2d 451, 31 Fla. L. Weekly S149

### Footnotes

- 1 See Penalver v. State, 926 So.2d 1118 (Fla. 2006).
- 2 Casmir Sucharski was also known as Butch Casey.
- This Court in both *Puryear v. State*, 810 So.2d 901 (Fla.2002), and *Swafford v. State*, 533 So.2d 270 (Fla.1988), has clearly said that descriptions are not identifications as contemplated under section 90.801(2)(c).
- The evidence presented in *Monlyn* demonstrated that Monlyn in fact escaped from jail, stole clothing, money and a shotgun from his uncle, beat the victim to death with the shotgun, and stole the victim's truck. *Monlyn v. State*, 705 So.2d 1, 3 (Fla.1997).
- Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966).
- 6 Williams v. State, 110 So.2d 654 (Fla.1959). Evidence of other criminal acts is only admissible if it meets the requirements of section 90.404(2), Florida Statutes (1999), which codifies Williams.
- After denying the motion for mistrial, the trial judge offered to give a curative instruction, but the defendant never requested

such instruction.

- This Court has previously held that identifications based on a photograph are within the scope of the hearsay exclusion. *Swafford v. State*, 533 So.2d 270, 276 (Fla.1988) ("An 'identification of a person after perceiving him,' subsection 90.801(2)(c), is a designation or reference to a particular person *or his or her photograph* and a statement that the person identified is the same as the person previously perceived.") (emphasis added).
- 9 Federal Rule of Evidence 801(d)(1)(C) provides in pertinent part:
  - (d) Statements which are not hearsay. A statement is not hearsay if—
  - (1) Prior Statement by Witness.—The declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is ... (C) one of identification of a person made after perceiving the person;....
- See generally 29 Am.Jur.2d Evidence § 678 (1994) ("The rule is not limited to statements of identification made soon after the criminal incident, but applies also to statements of identification made soon after perceiving the suspect or his likeness in the identification process.... The rule excluding statements of identification from the definition of hearsay applies to prior statements of identification made in a wide range of circumstances, including statements made after the declarant's examination of a display of photographs, of a sketch of the accused, or to verbal identifications. The identifier need not even have witnessed the event in question.") (footnotes omitted).

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415 So.2d 785 District Court of Appeal of Florida, First District.

Russell Bruce MONCRIEF, Appellant, v. STATE of Florida, COMMISSIONER OF INSURANCE, Appellee.

> No. UU-174. | June 8, 1982.

### **Synopsis**

Licensed bail bondsman appealed an order of the Department of Insurance fining him on three counts of administrative complaint and placing him on probation for one year. The District Court of Appeal held that: (1) common-law right of bail bondsman to delegate his authority to unlicensed agent has been abrogated by statute, so that bondsman could not lawfully employ unlicensed runner to assist in apprehension and surrender of defendants; (2) conduct found by hearing officer with respect to alteration of a jail card was not tantamount to untrustworthiness; and (3) evidence did not establish that undefined term "normal business hours," within statute in rule requiring bondsman to maintain office accessible to the public during normal business hours, required office to be open in the morning.

Affirmed as to Count I and reversed as to Counts II and III.

West Headnotes (10)

### [1] Criminal Law—Ignorance or mistake of law

Ignorance or mistake of law will not excuse an act in violation of the laws so long as the laws clearly and unambiguously proscribe the conduct alleged.

### [2] Bail Sureties

Common-law right of bail bondsman to delegate his authority to unlicensed agent has been abrogated by statute requiring that all runners be licensed. West's F.S.A. §§ 648.25(6), 648.30.

3 Cases that cite this headnote

### [3] Bail Sureties

Bail bondsman could properly be found to be in violation of statute for employing person not licensed as a runner to assist in the apprehension and surrender of defendants. West's F.S.A. §§ 648.25(6), 648.30, 648.37(1)(c).

# [4] Bail—Sureties Constitutional Law—Financial institutions, transactions, and services

Definition of "runner" in statute concerning licensing of bail bondsmen and runners is not violative of due process on grounds of vagueness or overbreadth. West's F.S.A. § 648.25(6); U.S.C.A.Const.Amend. 14.

1 Cases that cite this headnote

### [5] Bail Sureties

Where order imposing penalty on licensed bail bondsman was substantially supported by the evidence as to one count, the Department of Insurance was justified in rejecting the hearing officer's recommended penalty and imposing its substitute penalty as one which it could impose within the range of its discretion.

648.34(2)(c).

### [6] Bail Sureties

Conduct of licensed bail bondsman in deliberately altering a jail card relating to one of his clients in the honest belief that certain information on the card was incorrect, and immediately reporting the alteration to booking officer when he discovered that his original belief was ill-founded, was not tantamount to untrustworthiness within meaning of licensing statute. West's F.S.A. § 648.45(1)(j).

### [7] Bail Sureties

Where matter at issue in administrative complaint against licensed bail bondsman was not one involving policy of the Department of Insurance, it was one which the agency was required to prove by conventional facts, i.e., expert testimony, documentary opinion, or other appropriate evidence, and having accepted recommended findings of hearing officer, the Department was not then at liberty to draw the opposite conclusion without presenting evidence on the issue.

### 1 Cases that cite this headnote

### [8] Bail Sureties

Where neither statute nor rule providing that place of business of licensed bail bondsman be accessible to public during normal business hours defined the term "normal business hours," the Department of Insurance, in proceeding on administrative complaint alleging violation of statute and rule, was required to prove by conventional facts that office should have been accessible to the public, as the Department contended, between the hours of 8:00 or 9:00 a. m. until 4:00 to 6:00 p. m. West's F.S.A. §

### [9] Bail Sureties

Where the Department of Insurance sought to establish an industrywide policy requiring bail bondsmen to maintain offices open to the public during the specified hours, such was a case where policy making by rules was preferable to orders.

### 2 Cases that cite this headnote

### [10] Bail—Sureties

In proceeding on administrative complaint that licensed bail bondsman failed to keep his office open during "normal business hours" as required by statute and rule, testimony by agent of the Department of Insurance that in his "experience" bondsmen were available during early morning hours was not insufficient to establish that "normal business hours" as referred to in statute and rule required office to be open during morning. West's F.S.A. § 648.34(2)(c).

### 1 Cases that cite this headnote

### **Attorneys and Law Firms**

\*786 James C. Weart, Sanford, for appellant.

Thomas A. T. Taylor, S. Strom Maxwell and Steven R. Scott, Tallahassee, for appellee.

### **Opinion**

\*787 PER CURIAM.

Moncrief, a licensed bail bondsman, appeals an order of the Department of Insurance (Department) fining him a total of \$500.00 on all three counts of an administrative complaint and placing him on probation for a period of one year for violating each of the three counts. A hearing officer of the Division of Administrative Hearings recommended certain findings, which the Department accepted, while at the same time rejecting the recommended conclusions that Moncrief be issued only a letter of admonition for one of the alleged charges, and that no penalties be imposed for the other two charges.

We affirm the Department's order as to Count I, but reverse it as to Counts II and III. The pertinent evidence and findings in support of each count are as follows:

### COUNT I

Count I charged that the appellant knowingly hired one Delbert Leroy Sams to perform the duties of a bail bond runner, although Sams was not licensed as a runner, in violation of Sections 648.30<sup>1</sup> and 648.45(1)(b), Florida Statutes (Supp.1976).<sup>2</sup> Following the administrative hearing, the hearing officer made the following findings of fact as they relate to the facts alleged under Count I:

Shortly after Respondent opened his bail bond office, he was approached by Sams who represented himself as a bounty hunter who could pick up "skips" and others the bail bondsman wanted for surrender under their bonds. Sams represented that he was a member of the Florida Assurity Association, that he so worked for several bail bondsmen and was qualified to pick up skips for bail bondsmen. Sams produced an impressive badge, business cards and arrest forms for the bondsman to sign which would authorize Sams to pick up the individuals who had skipped out on their bonds.

At this time Respondent had no skips to pick up and suggested Sams contact him later; and, during the period between June and September, 1978, Sams picked up some five (5) to eight (8) individuals on whom Respondent had written a bond and returned these people to Respondent. For these services, Respondent paid Sams a percentage of the bond.

This relationship with Sams terminated when the latter gave Respondent a worthless check.

Subsequently, Sams learned that his "bounty

hunting" was unauthorized and applied for licensure as a bail bond runner. During Petitioner's investigation of Sams' application, his association with Respondent became known and Respondent told Petitioner's agents of his relationship with Sams. This led to an investigation of Respondent and to the charges here preferred.

The hearing officer concluded from the above findings that although the employment of Sams by Moncrief to pick up "skips" was in violation of the law, and although Moncrief should have been aware that Sams could not apprehend skips without the latter's licensing as a runner, he nevertheless recommended that Moncrief be issued only a letter of admonition because the "employment stemmed from lack of knowledge on the part of respondent [Moncrief] and not from an intent to violate the laws regulating bail bondsmen."

<sup>[1]</sup> The record substantially reveals that Moncrief was aware that Sams was not licensed. Moncrief's lack of knowledge pertained not to a mistake of fact, but to a mistake of law—his belief that he was not required to have Sams licensed because he was not exclusively in his employ. As to \*788 the latter, the courts universally recognize that ignorance or mistake of law will not excuse an act in violation of the laws so long as the laws clearly and unambiguously proscribe the conduct alleged. *See* 21 Am.Jur.2d *Criminal Law* § 94 (1965).

[2] [3] The main thrust, however, of Moncrief's argument as it pertains to that portion of the Department's order sustaining Count I of the administrative complaint is that Moncrief had a common law right as a bail bondsman to delegate his authority to an agent, a right specifically recognized by the United States Supreme Court in Taylor v. Taintor, 83 U.S. (16 Wall.) 366, 21 L.Ed. 287 (1873); consequently, he was not required to license Sams since Sams was not a "runner" as defined by Sections 648.25(6)<sup>3</sup> and 648.37(1)(c),<sup>4</sup> Florida Statutes. This argument is without merit. The common law right of a bail bondsman to delegate his authority to an unlicensed agent has been abrogated by statute in Florida. See Register v. Barton, 75 So.2d 187 (Fla.1954). The licensing requirement is all inclusive by virtue of Section 648.30, Florida Statutes, which indisputably provides that all runners shall be licensed. Section 648.25(6) includes in its definition of a "runner" "a person employed by a bail bondsman to assist ... in the apprehension and surrender of the defendant." Sams was hired by Moncrief to perform this very function. Thus, Sams was either a "runner" or was performing "the functions, duties or ... runners." prescribed for Further, Fla.Admin.Code Rule 4-1.06 specifically placed a duty on Moncrief to have Sams licensed.

<sup>[4]</sup> The appellant's contention that the statutory definition of "runner" in Section 648.25(6) is violative of due process because of a vagueness or overbreadth is without merit. *Cf. Jr. Food Stores of West Florida, Inc. v. Division of Alcoholic Beverages and Tobacco*, 390 So.2d 1244 (Fla. 1st DCA 1980).

<sup>[5]</sup> Because the order as it relates to Count I was substantially supported by the evidence, the Department was justified in rejecting the hearing officer's recommended penalty and imposing its substituted penalty as it was one which it could impose within its range of discretion. *See Fla. Real Estate Comm'n. v. Webb*, 367 So.2d 201 (Fla.1978); *Hartnett v. Department of Ins.*, 406 So.2d 1180, 1181, n. 1 (Fla. 1st DCA 1981).

### COUNT II

The evidence supporting the Department's order as to Count II was, however, far less substantial than that under Count I. Count II alleged that Moncrief's alteration of a jail card rendered him untrustworthy. As to the evidence supporting that charge, the reviewing agency accepted the hearing officer's findings of fact, yet drew the opposite conclusion from that recommended, holding on the facts found that the alteration of a jail card was, under the circumstances, reflective of untrustworthiness, and therefore was, as denounced by Section 648.45(1)(j), "a source of detriment, injury or loss to the public." We disagree.

The hearing officer specifically found:

On or about February 28, 1978, Respondent was given the jail card of Willie Frank Boone by the booking officer to use in preparing a bailbond. Boone had previously been bonded by Respondent and he was somewhat familiar with Boone's record. While the card was in his custody, Respondent thought one entry \*789 on the card was an error and interlined that item. Further perusal of the card led Respondent to realize the card had not been in error. When he returned the card to the booking officer, he told the booking officer of the changes he had made to the card. This caused considerable consternation in the booking officer and led to procedural changes to not allow custody of the jail cards to be given to bail bondsmen. The change to the jail card made by Respondent could not benefit Respondent financially or otherwise. However, the change could have affected the sentencing of the accused.

that while Moncrief deliberately altered a jail card relating to one of his clients, he did so in the honest belief that certain information on the card was incorrect. When he discovered, to the contrary, that his belief was ill-founded, he immediately reported the alteration to the booking officer. We agree with the hearing officer's conclusion that such action is not tantamount to untrustworthiness. "Trustworthy" is defined in *Webster's New Collegiate Dictionary* (1976) as the state of being worthy of confidence or of being dependable. If untrustworthiness means the opposite, namely the status of one lacking in confidence or dependability, then the findings do not reveal that appellant's conduct fell within the statute's terms.

The crucial issue narrows simply to whether the alteration of the jail card was, under the circumstances, equivalent to untrustworthy conduct. We consider that the answer to this question rests upon the following general principles from *Bowling v. Dept. of Ins.*, 394 So.2d 165, 172 (Fla. 1st DCA 1981):

[W]hen the standards of conduct to be enforced are not explicitly fixed by statute, or by rule, but depend on ... debatable expressions ...; when the conduct to be assessed is past, beyond the actor's power to conform it to agency standards announced prospectively; and when the proceeding may result in the loss of a valuable business or professional license, the critical matters in issue must be shown by evidence which is indubitably as "substantial" as the consequences.

[7] Here, as in *Bowling*, because the matter at issue is not one involving Department policy, it was therefore one which the agency was required to prove by conventional facts—i.e., expert testimony, documentary opinion, or other evidence "appropriate in form [to] the nature of the issues involved." Anheuser-Busch, Inc. v. Dept. of Business, 393 So.2d 1177, 1183 (Fla. 1st DCA 1981). No facts were adduced revealing that Moncrief's conduct necessarily rendered him untrustworthy or undependable. Having accepted the recommended findings, the Department was not then at liberty to draw the opposite conclusion—as it was as to the recommendations pertaining to Count I—that Moncrief's conduct necessarily rendered him untrustworthy. Department had wished to present evidence directed to that issue, it should have done so. Other evidence might have been presented, from say Moncrief's peer group, that the intentional alteration of a jail card would be considered untrustworthy behavior under any

circumstance. Such a conclusion could not be drawn from the findings before us, however; no more than could, for example, the agency's conclusion that a teacher's effectiveness as an employee of a school board had been reduced because of the commission of certain conduct, without substantial evidence directed to that issue. *See Boyette v. Professional Practices Council*, 346 So.2d 598, 600 (Fla. 1st DCA 1977); *Jenkins v. State Bd. of Ed.*, 399 So.2d 103, 105 (Fla. 1st DCA 1981).

The Department was required to establish its allegations under Count II by a record foundation. In adopting the recommended findings that Moncrief had mistakenly altered the card, had returned the card to the booking officer with his admission of the change, and that the alteration could not benefit Moncrief financially or otherwise, the Department must be considered to have effectively rejected and dismissed as unfounded all implications of untrustworthy conduct. Cf. \*790 Jenkins v. State Bd. of Ed., supra. Accordingly, the penalty imposed as to Count II is vacated.

### **COUNT III**

In Count I, both the conduct alleged and the standard prescribed for such conduct were established by substantial evidence. The charge under Count II failed in that the conduct alleged was not substantially supported by evidence. On the other hand, the conduct alleged as to Count III was clearly established since there is no factual dispute that Moncrief's office was not open during the specified morning hours during March, 1979. The only material issue is whether the standard sought to be enforced for such conduct was satisfied by the necessary quantum of evidence. We find that it was not.

[8] Moncrief was fined \$100 because he failed, as charged in Count III, to maintain his office during "normal business hours" in violation of Section 648.34(2)(c)<sup>5</sup> and Rule 4–1.04, Florida Administrative Code.<sup>6</sup> Neither the statute nor the rule defines the term "normal business hours." The Department was therefore required to prove by conventional facts that Moncrief's bonding office should have been accessible to the public, as the Department contends, between the hours of 8:00 or 9:00 a. m. until 4:00 to 6:00 p. m. The hearing officer's recommended conclusion in this regard was equivocal; it stated that Moncrief failed to have his office open during the morning hours prior to April, 1979, in violation of the rule, however the violation was not willful.

The material evidence as to Count III reveals the following: That from early 1978 until April, 1979, Moncrief's office was usually opened around noon by a secretary who remained there until 6:00 p. m.; that Moncrief normally arrived between 2:00 and 4:00 p. m., and kept his office open until midnight. Additionally, at the time of the specified period of violations, a 24-hour answering service was available to page Moncrief when he was not at his office. Finally, the evidence reflected that on one occasion when the office was closed, Moncrief had a sign posted inside the office, visible from the outside, stating a telephone number where he could be reached, as well as a time clock on the window advising when he would return.

<sup>[9]</sup> As in Anheuser-Busch, Inc. v. Dept. of Business, supra, this is a case in which policy-making by rules is preferable to orders. This is so because the Department seeks to establish an industry-wide policy requiring bondsmen to maintain offices open to the public during certain specified hours. If the matter in issue were one of Department policy, a Department rule would be well-nigh conclusive. Cf. Bowling v. Dept. of Ins., supra at 174. Yet, because there was no rule announcing the agency's policy prospectively, the Department now seeks to extract its policy by an order from events viewed retrospectively.

We decline to accept the agency's contention that the term normal business hours means, as a matter of common knowledge, the so-called typical work day from 8:00 or 9:00 a. m. through 5:00 or 6:00 p. m. Since the Department now contends that such hours are typical of the bonding industry, it was, in the absence of a rule articulating its policy, obliged to demonstrate such evidence by ordinary methods of proof, i.e., by adjudicative facts rather than by legislative facts. See Bowling v. Dept. of Ins., supra at 174 for the distinction between the two terms. It could have presented evidence that there was some agreement, manual, or common understanding among bondsmen that they were required to maintain their \*791 offices during the mornings. The evidence on this issue was hardly substantial. In answer to the question whether any interpretation had been placed on the term normal business hours by the agency, the Department's agent, Mr. Thayer, responded:

A. I think the interpretation would be that unless otherwise published and, then, it would be ... the normal business hours have been construed to be the normal daytime operating hours available to the public.

If the bail bondsman should say my hours are from 4:00 o'clock in the afternoon till 4:00 o'clock the next morning, if it's published the people are aware of that,

then perhaps that would be his normal business hours.

But generally, it would be construed that people needing bonds or needing to check records or Department personnel, then they don't do that after hours. The normal business hours are construed to be somewhere between 8:00 and 9:00 and 4:00 and 5:00, 6:00 in the afternoon.

The source of Mr. Thayer's interpretation did not come from established Department policy; it was based instead upon his experience. Observe the following:

Q. Now I believe you also stated that it had been your experience that during the early morning hours that there would be bondsmen available.

Can you tell me which bondsmen or agencies that you have checked with and found this to be true?

- A. Do you want me to name a specific agency?
- Q. If you can think of one offhand.
- A. I don't know any particular one that ... I've been with the Department eight years all over Florida. You know, I don't know any particular one that I would choose to pick out and say that's the particular one.
- Q. In other words, you're just saying that it's your opinion, really, that this is practice.
- A. Well, I wouldn't say its my opinion, it's my experience.

[10] Mr. Thayer's "experience" did not document the number of bondsmen's offices that were actually open during the morning; indeed it did not substantially rebut Moncrief's testimony that he considered his normal work day to be from noon until midnight due to the large volume of work then transacted, and the fact that he rarely ever was called upon to write bonds during the morning. If anything, Thayer's testimony corroborated Moncrief's by its acknowledgement that different hours could be maintained if a public notice were posted advising the hours of accessibility. Mr. Thayer's testimony of his experience as to the normal hours of a bonding business can hardly be deemed substantial evidence supporting a retrospective characterization of conduct requiring the imposition of a penalty upon the actor's license. Accordingly, the Department's order as it relates to Count III must be vacated.

The order is affirmed as it relates to Count I and reversed as to Counts II and III.

ERVIN, SHAW and WENTWORTH, JJ., concur.

### **All Citations**

415 So.2d 785

### **Footnotes**

1 Section 648.30 provides:

No person shall act in the capacity of a professional bail bondsman, limited surety agent, or runner, or perform any of the functions, duties or powers prescribed for bail bondsmen or runners under the provisions of this chapter unless that person shall be qualified and licensed as provided in this chapter.

- Section 648.45(1)(b) permits the Department to suspend or revoke any license for violation of any law relating to bail bonding in the course of dealings under the license.
- 3 Section 648.25(6), Fla.Stat. provides:

"Runner" shall mean a person employed by a bail bondsman for the purpose of assisting the bail bondsman in presenting the defendant in court when required, or employed by the bail bondsman to assist in the apprehension and surrender of the defendant or the court, or keeping the defendant under necessary surveillance. This does not affect the right of a bail bondsman to hire counsel, or to ask assistance of law enforcement officers.

4 Section 648.37(1)(c), Fla.Stat. provide:	4	Section	648.370	(1)(	(c),	Fla.	Stat.	provide
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It must affirmatively appear from the application:

That the applicant will be employed by only one bail bondsman, who will supervise the work of the applicant, and be responsible for the runner's conduct in the bail bond business.

### 5 Section 648.34(2)(c) provides:

(c) That the place of business of the applicant will be located in this state and that such applicant will be actively engaged in the bail bond business and maintain a place of business accessible to the public.

### 6 Rule 4–1.04 provides:

Section 648.34(2)(c), Florida Statutes, is interpreted to mean that every bail bondsman or general lines agent engaged in the bail bonds business be currently engaged in that business; that a place of business suitably designated as such must be maintained open and accessible to the public to render services during normal business hours.

**End of Document** 

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### West's Florida Statutes Annotated

Title IX. Electors and Elections (Chapters 97-109)

Chapter 104. Election Code: Violations; Penalties (Refs & Annos)

### West's F.S.A. § 104.011

# 104.011. False swearing; submission of false voter registration information; prosecution prohibited

Effective: July 1, 2019

Currentness

- (1) A person who willfully swears or affirms falsely to any oath or affirmation, or willfully procures another person to swear or affirm falsely to an oath or affirmation, in connection with or arising out of voting or elections commits a felony of the third degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.
- (2) A person who willfully submits any false voter registration information commits a felony of the third degree, punishable as provided in s. 775.082 or s. 775.083.
- (3) A person may not be charged or convicted for a violation of this section for affirming that he or she has not been convicted of a felony or that, if convicted, he or she has had voting rights restored, if such violation is alleged to have occurred on or after January 8, 2019, but before July 1, 2019.

### **Credits**

Laws 1868, c. 1637, subc. 12 § 1; Rev.St.1892, § 2786; Gen.St.1906, § 3828; Rev.Gen.St.1920, § 5891; Comp.Gen.Laws 1927, § 8154; Laws 1931, c. 14715, § 15; Comp.Gen.Laws Supp.1936, § 8202 (6); Fla.St.1949, §§ 103.15, 875.14; Laws 1951, c. 26870, § 8; Laws 1971, c. 71-136, § 19; Laws 1977, c. 77-175, § 33. Amended by Laws 1994, c. 94-224, § 38, eff. Jan. 1, 1995; Laws 1997, c. 97-13, § 31, eff. Jan. 1, 1998; Laws 2019, c. 2019-162, § 26, eff. July 1, 2019.

Notes of Decisions (24)

### West's F. S. A. § 104.011, FL ST § 104.011

Current with laws, joint and concurrent resolutions and memorials through July 1, 2022, in effect from the 2022 Second Regular Session. Some statute sections may be more current, see credits for details.

**End of Document** 

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104.011. False swearing; submission of false voter registration, FL ST § 104.011									

From: Antonacci, Peter
To: Nick Cox

**Subject:** FW: Elections Fraud Complaint

**Date:** Tuesday, July 26, 2022 2:46:31 PM

Attachments: <u>image001.png</u>

Case#TL-32-0010

FYI

From: Owen McCaul < McCaulO@leoncountyfl.gov>

**Sent:** Tuesday, July 26, 2022 2:17 PM

**To:** Antonacci, Peter < Peter. Antonacci@dos.myflorida.com> **Subject:** FW: - Elections Fraud Complaint

### EMAIL RECEIVED FROM EXTERNAL SOURCE

The attachments/links in this message have been scanned by Proofpoint.

Mr. Antonacci,

ASA Eddie Evans suggested that I call you on the and matters. I thought I had your number over at State but I do not. Attached you will find the FDLE reports we received on we contacted FDLE back in April on SAS Mike Kennedy advised last week that they were ready to interview Please feel free to call me if you have any questions. Or I can call you, whichever you prefer.



Office of the State Attorney SECOND JUDICIAL CIRCUIT

Owen B. McCaul Assistant State Attorney General Counsel Drug Court/Extraditions/Baker Acts, Etc. (850) 606-6013

From: Kennedy, Michael < Michael Kennedy@fdle.state.fl.us>

**Sent:** Tuesday, July 19, 2022 4:13 PM

**To:** Owen McCaul < McCaulO@leoncountyfl.gov >

**Subject:** RE: - Elections Fraud Complaint

Hello Owen,

It was good talking with you. Per our conversation, here are the reports for use the know if you need anything else.

Mike

From: Owen McCaul < McCaulO@leoncountyfl.gov>

**Sent:** Tuesday, July 19, 2022 3:26 PM

**To:** Kennedy, Michael < <u>Michael Kennedy@fdle.state.fl.us</u>> **Subject:** Fwd: - Elections Fraud Complaint

**CAUTION:** This email originated outside of FDLE. Please use caution when opening attachments, clicking links, or responding to this email.

Mike: can you email me the reports or please? We had them on disc but the disc wasn't retained, I think.

### Get Outlook for iOS

From: Eddie Evans < <u>EvansE@leoncountyfl.gov</u>> Sent: Tuesday, July 19, 2022 3:10:31 PM

To: Owen McCaul < McCaulO@leoncountyfl.gov>

Subject: FW: - Elections Fraud Complaint

See attached from Pete on a new complaint that he says appears to have a lot of merit for prosecution. I talked to him today about these voter fraud investigations and he said FDLE will still be leading the investigations on this election cases. We can discuss details when you return next week.

From: Antonacci, Peter < Peter. Antonacci@dos.myflorida.com >

**Sent:** Tuesday, July 19, 2022 1:04 PM

**To:** Eddie Evans < <u>EvansE@leoncountyfl.gov</u>>

**Subject:** FW: - Elections Fraud Complaint

Attached is the omplaint the SOS received in January 2022 that we discussed earlier today..... It portrays a career election fraud criminal at work and a vigilant Supervisor of Elections concerned about corrupted voter rolls.....

Please let me know if I can be helpful as well as the Office decision on this one.....

Thanks



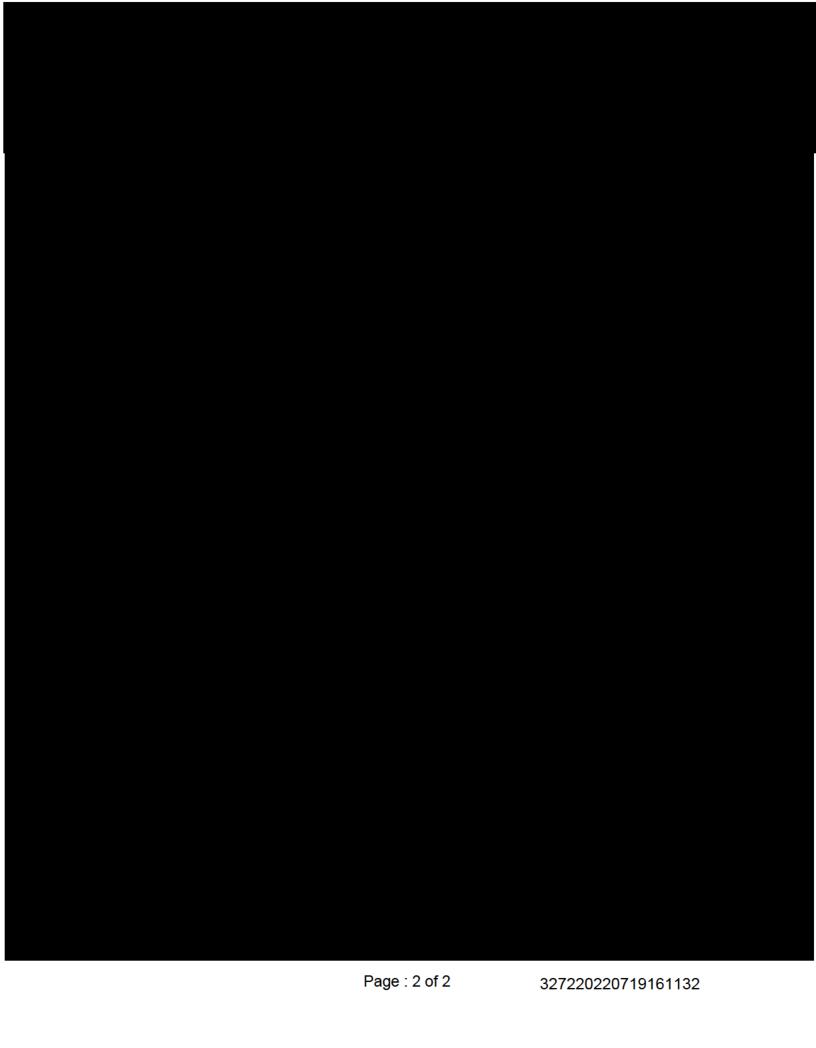
# FLORIDA DEPARTMENT OF LAW ENFORCEMENT

THIS REPORT IS INTENDED ONLY FOR THE USE OF THE AGENCY TO WHICH IT WAS DISSEMINATED AND MAY CONTAIN INFORMATION THAT IS EITHER PRIVILEGED OR CONFIDENTIAL AND EXEMPT FROM DISCLOSURE UNDER APPLICABLE LAW. ITS CONTENTS ARE NOT TO BE DISTRIBUTED OUTSIDE YOUR AGENCY.

Page: 1 of 1 327220220719161132

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Page: 1 of 2 327220220719161132

 From:
 Strauss, Scott

 To:
 Nick Cox

 Cc:
 Antonacci, Peter

Subject: Target

**Date:** Saturday, August 6, 2022 9:46:38 AM

Attachments: Case#TL-32-0010-IR#2.pdf

Case#TL-32-0010-IR#3.pdf Case#TL-32-0010-IR#4.pdf Case#TL-32-0010-IR#1.pdf

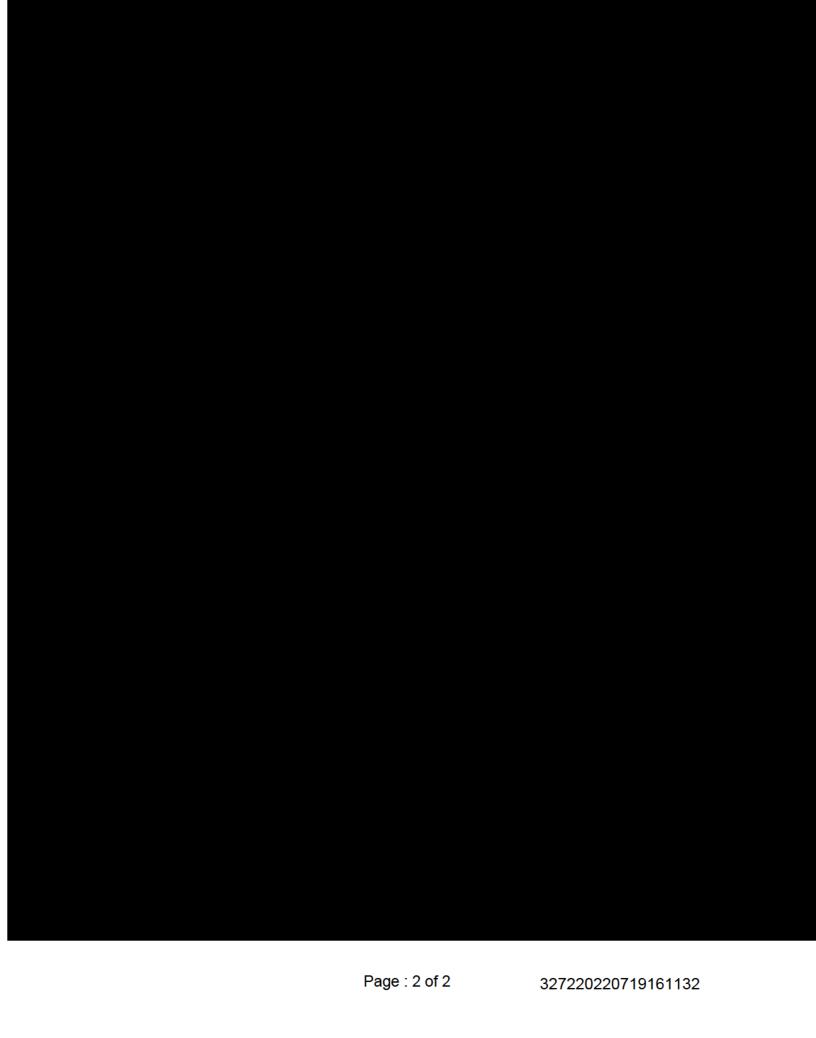
### Nick,

See attached from Leon County, I am not sure if this was the target you referred. Peter may have more specifics surrounding this target.

### FLORIDA DEPARTMENT OF LAW ENFORCEMENT

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Page: 1 of 2 327220220719161132

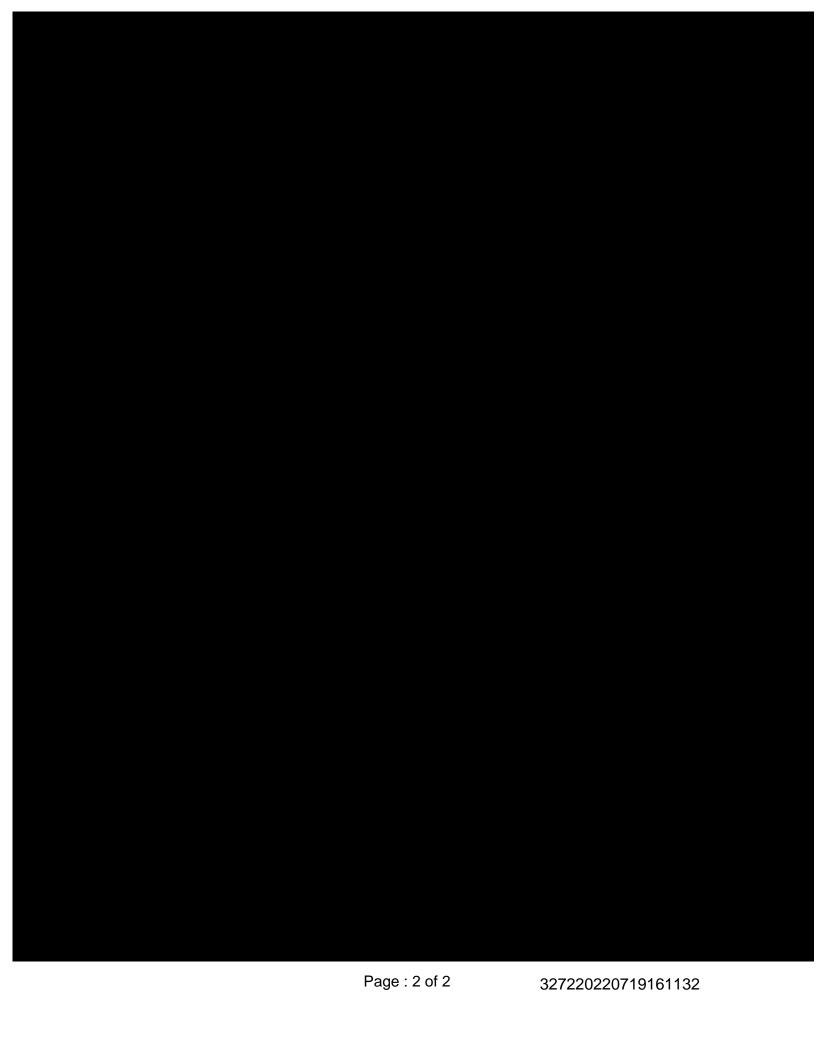


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Page: 1 of 1 327220220719161132

 From:
 Antonacci, Peter

 To:
 Strauss, Scott

 Cc:
 Nick Cox

 Subject:
 Re: Target

**Date:** Saturday, August 6, 2022 11:06:09 AM

Attachments: Case#TL-32-0010-IR#2.pdf

Case#TL-32-0010-IR#3.pdf Case#TL-32-0010-IR#4.pdf Case#TL-32-0010-IR#1.pdf

Jack Campbell has declined prosecution on the grounds that the matter has too man complications....Seriously

Sent from my iPhone

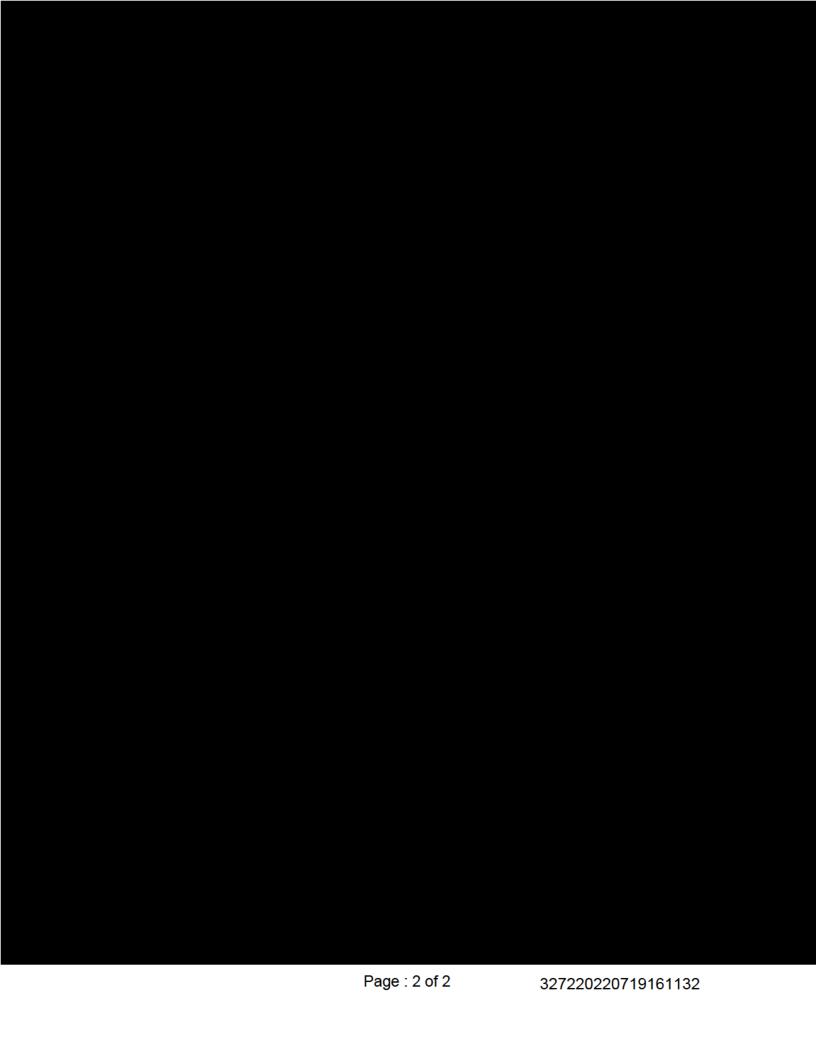
On Aug 6, 2022, at 9:43 AM, Strauss, Scott <Scott.Strauss@dos.myflorida.com> wrote:

Nick,

See attached from Leon County, I am not sure if this was the target you referred. Peter may have more specifics surrounding this target.

DISSEMINATED AND MAY CONTAIN INFORMATION THAT IS EITHER PRIVILEGED OR CONFIDENTIAL AND EXEMPT FROM DISCLOSURE UNDER APPLICABLE LAW. ITS CONTENTS ARE NOT TO BE DISTRIBUTED OUTSIDE YOUR AGENCY.

Page: 1 of 2 327220220719161132



# FLORIDA DEPARTMENT OF LAW ENFORCEMENT INVESTIGATIVE REPORT

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Page: 1 of 1 327220220719161132

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Page: 1 of 1 327220220719161132

From: <u>Antonacci, Peter</u>

To: Nick Cox; Scott McInerney
Subject: Evidence Preservation

Date:Tuesday, August 16, 2022 12:22:52 PMAttachments:Final version letter 8.16.22.docx

The attached Draft is near to Final with a scheduled distribution to the SOEs Thursday afternoon.....Pl call with any questions....

Dear Supervisor (X),

I write to bring your attention to a matter of great public importance. Through no fault of your own, records demonstrate that the convicted felons listed in the attached Exhibit A were registered to vote and voted in your county during the 2020 General Election. *See* Exhibit A. The convicted felons listed in Exhibit A fall into one of three categories: (1) convicted murderers, (2) convicted sex offenders, or (3) felons who were serving a probationary sentence at the time of casting a ballot. Records also demonstrate that certain voters in your county, *see* Exhibit B, may have cast more than one ballot during the 2020 General Election. This information was obtained pursuant to Section 98.075(2)(b)1, Florida Statutes, in collaboration with 25 other states. Depending on the facts and circumstances of each case, the individuals in Exhibits A and B may have committed criminal violations of the Florida Elections Code.

To ensure the integrity of any investigation involving the foregoing matters, it is imperative to preserve the physical voting record of these individuals, including any registration applications, original records of individual in-person voting with signatures, and vote-by-mail ballot return envelopes, which may later be needed for evidentiary purposes to prove elements of a crime. As you know, the law requires retention of all ballots, forms, and other election materials for a minimum of 22 months after an election and for any additional time in accordance with the schedule promulgated by the Division of Library and Information Services. *See* § 101.545, Fla. Stat.; Rule 1B-24.003(1)(c), Fla. Admin. Code; *see also* 52 U.S.C. § 20701.

Please consider this a formal request to preserve and maintain for later access and review all of the original records in your possession for the 2020 General Election relating to the individuals listed in Exhibits A and B. *See* General Records Schedule GS3 for Election Records, p. viii. ("A. Litigation – When a public agency has been notified or can reasonably anticipate that a potential cause of action is pending or underway, that agency should immediately place a hold on disposition of any and all records related to that cause."). Note that the contents of Exhibits A and B constitute active criminal investigative information and are exempt from public records disclosure pursuant to Section 119.071(2)(c), Florida

Statutes. Accordingly, please assert the above exemption and do not produce the contents of Exhibits A

or B in response to any public records request. See also § 838.21, Fla. Stat.

While I acknowledge this represents additional labors during the 2022 election cycle, the requested

action is unavoidable to preserve the option of bringing accountability to those corrupting our electoral

process.

It goes without saying that your calls in these regards are welcome.

Sincerely,

Peter Antonacci

Office of Election Crimes and Security

From: Mercer, Kalen L.

 To:
 Nick Cox; Scott McInerney

 Cc:
 Antonacci, Peter; Strauss, Scott

 Date:
 Friday, August 19, 2022 4:57:02 PM

Attachments: statement.pdf

Mr. Cox and Mr. McInerney,

Please see the attached statement from Peter Antonacci.

Due to the size of the PDF files associated with the 60 cases referenced herein, you will be receiving multiple emails, separated by county.

Thank you,

## **Kalen Mercer**

Elections Consultant
Office of Election Crimes and Security
(850) 245-6588
<a href="mailto:kalen.mercer@dos.myflorida.com">kalen.mercer@dos.myflorida.com</a>



RON DESANTIS
Governor

CORD BYRD
Secretary of State

August 19, 2022

Congratulations on yesterday's event.

As you know, we have compiled a list of several hundred more targets to arrest in the future. Preferably, the OSWP could prosecute the next round of cases, while I seek out State Attorneys receptivity for future partnership.

For your convenience, please find attached, 60 additional cases of sex offenders, murderers, and felons who were on supervision that voted in the 2020 General Election in Miami-Dade, Broward, Palm Beach and Orange counties (Hillsborough to be handled separately this round). Similar to the last list of targets, each case packet contains sufficient information to prove unlawful registration and unlawful voting: voter registration, 2020 voting history and DHSMV information.

Of course, Scott, Kalen, Andrew and I are standing by for any speedy technical assistance.

Doubtless lessons were learned over the last 30 days that can be here applied to efficiently bring these bad actors to justice. These "How To(s)" in effectuating arrests will surely accelerate the process.

We look forward to continued partnership and success.

Peter Antonacci

 From:
 Strauss, Scott

 To:
 Nick Cox

 Cc:
 Jeremy Scott

Subject: Fwd: Instructions to the Offender (DC3-246) Christopher Henry DC #N14727

Date: Saturday, November 5, 2022 12:30:51 AM

Attachments: <u>image004.pnq</u>

image005.pnq image006.pnq image001.pnq

Hi Jeremy and Nick,

I would like to discuss this matter with you when you are both free.

#### Get Outlook for iOS

From: Winkler, Joe < Joe. Winkler@fdc.myflorida.com>

Sent: Friday, November 4, 2022 4:19 PM

**To:** Strauss, Scott <Scott.Strauss@dos.myflorida.com> **Cc:** McVay, Brad R. <Brad.McVay@dos.myflorida.com>

Subject: RE: Instructions to the Offender (DC3-246) Christopher Henry DC #N14727

## EMAIL RECEIVED FROM EXTERNAL SOURCE

Mr. Strauss,

The Supervising Officer is awaiting a return call from the offender' egarding
his Officer did verify the offender was
in the He can receive visitors but is

The Supervising Officer is:

 Labertha Smith (850) 922-3725

Thanks, Joe!

Joe Winkler
Assistant Secretary of Community Corrections
Florida Department of Corrections
501 South Calhoun Street
Tallahassee, Florida 32399

(850) 717-3454 (Office) (407) 494-8282 (Cell)



## Inspiring Success by Transforming One Life at a Time

Respect ★ Integrity★ Courage ★ Selfless Service ★ Compassion

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**From:** Strauss, Scott <Scott.Strauss@dos.myflorida.com>

Sent: Tuesday, November 1, 2022 7:37 PM

**To:** Winkler, Joe <Joe.Winkler@fdc.myflorida.com> **Cc:** McVay, Brad R. <Brad.McVay@dos.myflorida.com>

Subject: FW: Instructions to the Offender (DC3-246) Christopher Henry DC #N14727

Importance: High

Hi Joe,

I am following up on this matter. Is there any way you can have confirm if the above offender is ? Alternatively, is they way you can provide me the PO's contact or have them contact me at the number below so I can get some guestions clarified?

Thanks,

Scott R. Strauss Interim Director Office of Election Crimes & Security Florida Department of State

Direct: 850-943-2279

Scott.Strauss@dos.myflorida.com

**From:** Winkler, Joe < <u>Joe. Winkler@fdc.mvflorida.com</u>>

Sent: Wednesday, October 26, 2022 9:45 PM

**To:** Strauss, Scott < Scott.Strauss@dos.myflorida.com > **Subject:** RE: Instructions to the Offender (DC3-246)

### EMAIL RECEIVED FROM EXTERNAL SOURCE

I am not sure. He is a link to the brochure that may help. If you need our officer to get more information, please let me know.

Thanks, Joe!

Joe Winkler
Assistant Secretary of Community Corrections
Florida Department of Corrections
501 South Calhoun Street
Tallahassee, Florida 32399
(850) 717-3454 (Office)
(407) 494-8282 (Cell)



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Sent: Wednesday, October 26, 2022 9:19 PM

**To:** Winkler, Joe < <u>Joe.Winkler@fdc.myflorida.com</u>> **Subject:** RE: Instructions to the Offender (DC3-246)

Thank you. To be clear,

Scott R. Strauss Interim Director Office of Election Crimes & Security Florida Department of State

Direct: 850-943-2279

Scott.Strauss@dos.myflorida.com

**From:** Winkler, Joe < <u>Joe.Winkler@fdc.myflorida.com</u>>

Sent: Wednesday, October 26, 2022 9:18 PM

**To:** Strauss, Scott <<u>Scott.Strauss@dos.myflorida.com</u>> **Subject:** RE: Instructions to the Offender (DC3-246)

### EMAIL RECEIVED FROM EXTERNAL SOURCE

6/17/2022.

Thanks, Joe!

Joe Winkler
Assistant Secretary of Community Corrections
Florida Department of Corrections
501 South Calhoun Street
Tallahassee, Florida 32399
(850) 717-3454 (Office)
(407) 494-8282 (Cell)



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**From:** Strauss, Scott < <u>Scott.Strauss@dos.myflorida.com</u>>

Sent: Wednesday, October 26, 2022 8:17 PM

**To:** Winkler, Joe < <u>Joe.Winkler@fdc.myflorida.com</u>> **Subject:** RE: Instructions to the Offender (DC3-246)

Joe,

Christopher Henry appears to have voted. When did he go into

Scott R. Strauss Interim Director Office of Election Crimes & Security Florida Department of State

Direct: 850-943-2279

Scott.Strauss@dos.myflorida.com

**From:** Winkler, Joe < <u>Joe.Winkler@fdc.myflorida.com</u>>

Sent: Wednesday, October 26, 2022 7:21 AM

**To:** Strauss, Scott < Scott.Strauss@dos.myflorida.com > **Subject:** RE: Instructions to the Offender (DC3-246)

## EMAIL RECEIVED FROM EXTERNAL SOURCE

When you have a couple minutes, can you call me at (407) 494-8282? It is not urgent, just a quick update on a question you asked me Sunday.

Thanks, Joe!

Joe Winkler
Assistant Secretary of Community Corrections
Florida Department of Corrections
501 South Calhoun Street
Tallahassee, Florida 32399
(850) 717-3454 (Office)
(407) 494-8282 (Cell)



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**From:** Strauss, Scott <<u>Scott.Strauss@dos.myflorida.com</u>>

**Sent:** Tuesday, October 25, 2022 11:02 PM

**To:** Winkler, Joe < <u>Joe.Winkler@fdc.myflorida.com</u>> **Subject:** RE: Instructions to the Offender (DC3-246)

Thanks.

Scott R. Strauss Acting Director Office of Election Crimes & Security Florida Department of State

Cell: 850-943-2279

Scott.Strauss@dos.myflorida.com

**From:** Winkler, Joe < <u>Joe.Winkler@fdc.myflorida.com</u>>

Sent: Tuesday, October 25, 2022 2:19 PM

**To:** Strauss, Scott < < <u>Scott.Strauss@dos.myflorida.com</u> >

**Cc:** Ladanowski, Andrew <<u>Andrew.Ladanowski@dos.myflorida.com</u>>; McVay, Brad R.

<<u>Brad.McVay@dos.myflorida.com</u>>; Mercer, Kalen L. <<u>Kalen.Mercer@dos.myflorida.com</u>>; Neff,

Lance < Lance. Neff@fdc.myflorida.com >

**Subject:** FW: Instructions to the Offender (DC3-246)

### EMAIL RECEIVED FROM EXTERNAL SOURCE

The attachments/links in this message have been scanned by Proofpoint.

Mr. Strauss,

Please find the attached "Instructions to the Offender" for the requested offenders.

Thanks,

Joe!

Joe Winkler
Assistant Secretary of Community Corrections
Florida Department of Corrections
501 South Calhoun Street
Tallahassee, Florida 32399
(850) 717-3454 (Office)
(407) 494-8282 (Cell)



## Inspiring Success by Transforming One Life at a Time

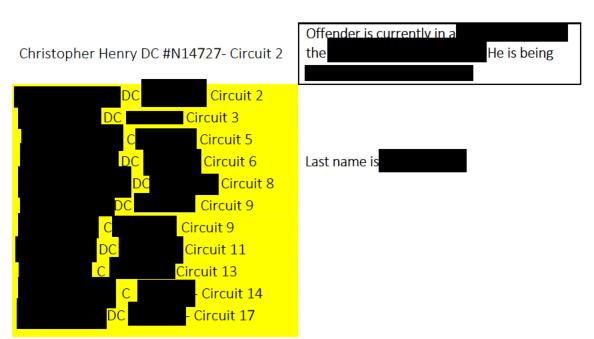
Respect ★ Integrity★ Courage ★ Selfless Service ★ Compassion

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From: Choquette, Rebecca < Rebecca. Choquette@fdc.myflorida.com >

Sent: Tuesday, October 25, 2022 2:01 PM

**To:** Winkler, Joe < <u>Joe.Winkler@fdc.myflorida.com</u>> **Subject:** RE: Instructions to the Offender (DC3-246)



#### **Becky Choquette**

Florida Department of Corrections Office of Community Corrections 501 South Calhoun Street Tallahassee, Florida 32399 (850) 717-3447 (Office)



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From: Winkler, Joe < Joe. Winkler@fdc.myflorida.com >

Sent: Tuesday, October 25, 2022 7:39 AM

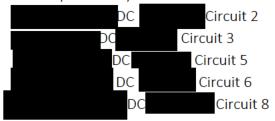
To: RegionalDirectorsCommunityCorrections < <a href="mailto:PP-RD-ROM@mail.dc.state.fl.us">PP-RD-ROM@mail.dc.state.fl.us</a>>

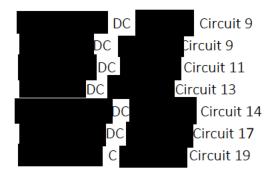
**Subject:** Instructions to the Offender (DC3-246)

Regional Directors,

Please e-mail me and CC Becky Choquette the updated Instructions to the Offender (DC3-246) for the below offenders:

Christopher Henry DC #N14727- Circuit 2





Thanks, Joe!

Joe Winkler
Assistant Secretary of Community Corrections
Florida Department of Corrections
501 South Calhoun Street
Tallahassee, Florida 32399
(850) 717-3454 (Office)
(407) 494-8282 (Cell)



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 From:
 Nick Cox

 To:
 Jeremy Scott

 Cc:
 Julie Chaikin

**Subject:** Re: Instructions to the Offender (DC3-246) Christopher Henry DC #N14727

Date: Saturday, November 5, 2022 7:25:27 AM

Attachments: image004.png

image005.png image006.png image001.png

From what I am surmising here, this guy is

If the thought of DOS is to charge him, we need to talk. I'm not

interested in us charging

Thanks.... Nick

From: Strauss, Scott <Scott.Strauss@dos.myflorida.com>

**Sent:** Saturday, November 5, 2022 12:30:39 AM **To:** Nick Cox < Nick.Cox@myfloridalegal.com>

Cc: Jeremy Scott < Jeremy.Scott@myfloridalegal.com>

Subject: Fwd: Instructions to the Offender (DC3-246) Christopher Henry DC #N14727

Hi Jeremy and Nick,

I would like to discuss this matter with you when you are both free.

#### Get Outlook for iOS

**From:** Winkler, Joe < Joe. Winkler@fdc.myflorida.com>

Sent: Friday, November 4, 2022 4:19 PM

**To:** Strauss, Scott <Scott.Strauss@dos.myflorida.com> **Cc:** McVay, Brad R. <Brad.McVay@dos.myflorida.com>

Subject: RE: Instructions to the Offender (DC3-246) Christopher Henry DC #N14727

## EMAIL RECEIVED FROM EXTERNAL SOURCE

Mr. Strauss,

The Supervising Officer is awaiting a return call from the offender's

Officer did verify the offender was

in the

He can receive visitors but is

The Supervising Officer is:

 Labertha Smith (850) 922-3725 Thanks, Joe!

Joe Winkler
Assistant Secretary of Community Corrections
Florida Department of Corrections
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Tallahassee, Florida 32399
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**Importance:** High

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Thanks,

Scott R. Strauss Interim Director Office of Election Crimes & Security Florida Department of State

Direct: 850-943-2279

Scott.Strauss@dos.myflorida.com

**From:** Winkler, Joe < <u>Joe.Winkler@fdc.myflorida.com</u>>

Sent: Wednesday, October 26, 2022 9:45 PM

**To:** Strauss, Scott < Scott.Strauss@dos.myflorida.com > **Subject:** RE: Instructions to the Offender (DC3-246)

### EMAIL RECEIVED FROM EXTERNAL SOURCE

I am not sure. He is housed at a link to the brochure that may help. If you need our officer to get more information, please let me know.

Thanks, Joe!

Joe Winkler
Assistant Secretary of Community Corrections
Florida Department of Corrections
501 South Calhoun Street
Tallahassee, Florida 32399
(850) 717-3454 (Office)
(407) 494-8282 (Cell)



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Direct: 850-943-2279

Scott.Strauss@dos.myflorida.com

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Sent: Wednesday, October 26, 2022 9:18 PM

**To:** Strauss, Scott <<u>Scott.Strauss@dos.myflorida.com</u>> **Subject:** RE: Instructions to the Offender (DC3-246)

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6/17/2022.

Thanks, Joe!

Joe Winkler
Assistant Secretary of Community Corrections
Florida Department of Corrections
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Joe,

Christopher Henry appears to have voted. When did he

Scott R. Strauss Interim Director Office of Election Crimes & Security Florida Department of State

Direct: 850-943-2279

Scott.Strauss@dos.myflorida.com

**From:** Winkler, Joe < <u>Joe. Winkler@fdc.mvflorida.com</u>>

Sent: Wednesday, October 26, 2022 7:21 AM

**To:** Strauss, Scott < Scott.Strauss@dos.myflorida.com > **Subject:** RE: Instructions to the Offender (DC3-246)

## EMAIL RECEIVED FROM EXTERNAL SOURCE

When you have a couple minutes, can you call me at (407) 494-8282? It is not urgent, just a quick update on a question you asked me Sunday.

Thanks, Joe! Joe Winkler
Assistant Secretary of Community Corrections
Florida Department of Corrections
501 South Calhoun Street
Tallahassee, Florida 32399
(850) 717-3454 (Office)
(407) 494-8282 (Cell)



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**From:** Strauss, Scott < <u>Scott.Strauss@dos.myflorida.com</u>>

**Sent:** Tuesday, October 25, 2022 11:02 PM

**To:** Winkler, Joe < <u>Joe.Winkler@fdc.myflorida.com</u>> **Subject:** RE: Instructions to the Offender (DC3-246)

Thanks.

Scott R. Strauss
Acting Director
Office of Election Crimes & Security
Florida Department of State

Cell: 850-943-2279

Scott.Strauss@dos.myflorida.com

**From:** Winkler, Joe < <u>Joe.Winkler@fdc.myflorida.com</u>>

Sent: Tuesday, October 25, 2022 2:19 PM

**To:** Strauss, Scott < <u>Scott.Strauss@dos.myflorida.com</u>>

**Cc:** Ladanowski, Andrew <<u>Andrew.Ladanowski@dos.myflorida.com</u>>; McVay, Brad R. <<u>Brad.McVay@dos.myflorida.com</u>>; Mercer, Kalen L. <<u>Kalen.Mercer@dos.myflorida.com</u>>; Neff, Lance <<u>Lance.Neff@fdc.myflorida.com</u>>

**Subject:** FW: Instructions to the Offender (DC3-246)

#### EMAIL RECEIVED FROM EXTERNAL SOURCE

The attachments/links in this message have been scanned by Proofpoint.

Mr. Strauss,

Please find the attached "Instructions to the Offender" for the requested offenders.

Thanks, Joe!

Joe Winkler
Assistant Secretary of Community Corrections
Florida Department of Corrections
501 South Calhoun Street
Tallahassee, Florida 32399
(850) 717-3454 (Office)
(407) 494-8282 (Cell)



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Respect ★ Integrity★ Courage ★ Selfless Service ★ Compassion

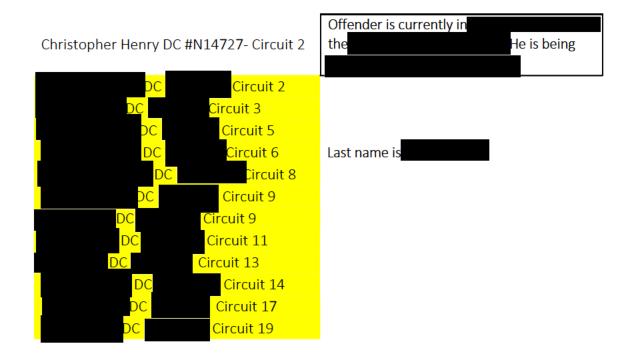
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**From:** Choquette, Rebecca < <u>Rebecca.Choquette@fdc.myflorida.com</u>>

**Sent:** Tuesday, October 25, 2022 2:01 PM

**To:** Winkler, Joe < <u>Joe.Winkler@fdc.myflorida.com</u>>

**Subject:** RE: Instructions to the Offender (DC3-246)



#### **Becky Choquette**

Florida Department of Corrections Office of Community Corrections 501 South Calhoun Street Tallahassee, Florida 32399 (850) 717-3447 (Office)



### Inspiring Success by Transforming One Life at a Time

Respect ★ Integrity★ Courage ★ Selfless Service ★ Compassion

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From: Winkler, Joe < <u>Joe.Winkler@fdc.myflorida.com</u>>

**Sent:** Tuesday, October 25, 2022 7:39 AM

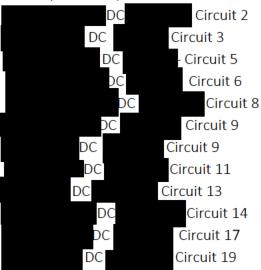
**To:** RegionalDirectorsCommunityCorrections < <a href="mailto:PP-RD-ROM@mail.dc.state.fl.us">PP-RD-ROM@mail.dc.state.fl.us</a>>

**Subject:** Instructions to the Offender (DC3-246)

Regional Directors,

Please e-mail me and CC Becky Choquette the updated Instructions to the Offender (DC3-246) for the below offenders:

Christopher Henry DC #N14727- Circuit 2



Thanks, Joe!

Joe Winkler
Assistant Secretary of Community Corrections
Florida Department of Corrections
501 South Calhoun Street
Tallahassee, Florida 32399
(850) 717-3454 (Office)
(407) 494-8282 (Cell)



## Inspiring Success by Transforming One Life at a Time

Respect  $\star$  Integrity  $\star$  Courage  $\star$  Selfless Service  $\star$  Compassion

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From: Jeremy Scott
To: Nick Cox
Cc: Julie Chaikin

Subject: Re: Instructions to the Offender (DC3-246) Christopher Henry DC #N14727

Date: Saturday, November 5, 2022 7:28:57 AM

Attachments: <u>image004.png</u>

image005.png image006.png image001.png

This is

#### Get Outlook for iOS

**From:** Nick Cox < Nick.Cox@myfloridalegal.com> **Sent:** Saturday, November 5, 2022 7:25:26 AM

**To:** Jeremy Scott < Jeremy.Scott@myfloridalegal.com> **Cc:** Julie Chaikin < Julie.Chaikin@myfloridalegal.com>

Subject: Re: Instructions to the Offender (DC3-246) Christopher Henry DC #N14727

From what I am surmising here, this guy is

If the thought of DOS is to charge him, we need to talk. I'm not

interested in us charging

Thanks.... Nick

From: Strauss, Scott <Scott.Strauss@dos.myflorida.com>

**Sent:** Saturday, November 5, 2022 12:30:39 AM **To:** Nick Cox < Nick.Cox@myfloridalegal.com>

Cc: Jeremy Scott < Jeremy. Scott@myfloridalegal.com>

Subject: Fwd: Instructions to the Offender (DC3-246) Christopher Henry DC #N14727

Hi Jeremy and Nick,

I would like to discuss this matter with you when you are both free.

Get Outlook for iOS

From: Winkler, Joe < Joe. Winkler@fdc.myflorida.com>

Sent: Friday, November 4, 2022 4:19 PM

**To:** Strauss, Scott <Scott.Strauss@dos.myflorida.com> **Cc:** McVay, Brad R. <Brad.McVay@dos.myflorida.com>

Subject: RE: Instructions to the Offender (DC3-246) Christopher Henry DC #N14727

# EMAIL RECEIVED FROM EXTERNAL SOURCE

Mr. Strauss,

The Supervising Officer is awaiting a return call from the	offender'	rega	arding
his	fficer	did verify the offend	der was
in the	e car	n	

The Supervising Officer is:

 Labertha Smith (850) 922-3725

Thanks, Joe!

Joe Winkler
Assistant Secretary of Community Corrections
Florida Department of Corrections
501 South Calhoun Street
Tallahassee, Florida 32399
(850) 717-3454 (Office)
(407) 494-8282 (Cell)



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**Cc:** McVay, Brad R. <Brad.McVay@dos.myflorida.com>

Subject: FW: Instructions to the Offender (DC3-246) Christopher Henry DC #N14727

Importance: High

Hi Joe,

I am following up on this matter. Is there any way you can have confirm if the above offender is

Alternatively, is they way you can provide me the PO's contact or have them contact me at the number below so I can get some questions clarified?

Thanks,

Scott R. Strauss Interim Director Office of Election Crimes & Security Florida Department of State

Scott.Strauss@dos.myflorida.com

Direct: 850-943-2279

**From:** Winkler, Joe < <u>Joe. Winkler@fdc.mvflorida.com</u>>

Sent: Wednesday, October 26, 2022 9:45 PM

**To:** Strauss, Scott <<u>Scott.Strauss@dos.myflorida.com</u>> **Subject:** RE: Instructions to the Offender (DC3-246)

#### EMAIL RECEIVED FROM EXTERNAL SOURCE

I am not sure. He is a link to the brochure that may help. If you need our officer to get more information, please let me know.

Thanks, Joe!

Joe Winkler
Assistant Secretary of Community Corrections
Florida Department of Corrections
501 South Calhoun Street
Tallahassee, Florida 32399
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(407) 494-8282 (Cell)



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Sent: Wednesday, October 26, 2022 9:19 PM

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Thank you. To be clear,

Scott R. Strauss Interim Director Office of Election Crimes & Security Florida Department of State

Direct: 850-943-2279

Scott.Strauss@dos.myflorida.com

**From:** Winkler, Joe < <u>Joe.Winkler@fdc.myflorida.com</u>>

Sent: Wednesday, October 26, 2022 9:18 PM

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#### EMAIL RECEIVED FROM EXTERNAL SOURCE

6/17/2022.

Thanks, Joe!

Joe Winkler

Assistant Secretary of Community Corrections Florida Department of Corrections 501 South Calhoun Street Tallahassee, Florida 32399 (850) 717-3454 (Office) (407) 494-8282 (Cell)



# Inspiring Success by Transforming One Life at a Time

Respect ★ Integrity★ Courage ★ Selfless Service ★ Compassion

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Sent: Wednesday, October 26, 2022 8:17 PM

**To:** Winkler, Joe < <u>Joe.Winkler@fdc.myflorida.com</u>> **Subject:** RE: Instructions to the Offender (DC3-246)

Joe,

Christopher Henry appears to have voted. When did he go into

Scott R. Strauss
Interim Director
Office of Election Crimes & Security
Florida Department of State

Direct: 850-943-2279

Scott.Strauss@dos.myflorida.com

**From:** Winkler, Joe < <u>Joe.Winkler@fdc.myflorida.com</u>>

Sent: Wednesday, October 26, 2022 7:21 AM

**To:** Strauss, Scott < Scott.Strauss@dos.myflorida.com > **Subject:** RE: Instructions to the Offender (DC3-246)

# EMAIL RECEIVED FROM EXTERNAL SOURCE

When you have a couple minutes, can you call me at (407) 494-8282? It is not urgent, just a quick update on a question you asked me Sunday.

Thanks, Joe!

Joe Winkler
Assistant Secretary of Community Corrections
Florida Department of Corrections
501 South Calhoun Street
Tallahassee, Florida 32399
(850) 717-3454 (Office)
(407) 494-8282 (Cell)



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**From:** Strauss, Scott <<u>Scott.Strauss@dos.myflorida.com</u>>

Sent: Tuesday, October 25, 2022 11:02 PM

**To:** Winkler, Joe < <u>Joe.Winkler@fdc.myflorida.com</u>> **Subject:** RE: Instructions to the Offender (DC3-246)

Thanks.

Scott R. Strauss
Acting Director
Office of Election Crimes & Security
Florida Department of State
Cell: 850-943-2279

#### Scott.Strauss@dos.myflorida.com

**From:** Winkler, Joe < <u>Joe.Winkler@fdc.myflorida.com</u>>

Sent: Tuesday, October 25, 2022 2:19 PM

**To:** Strauss, Scott < <a href="mailto:Scott.Strauss@dos.myflorida.com">Scott.Strauss@dos.myflorida.com</a>>

**Cc:** Ladanowski, Andrew <<u>Andrew.Ladanowski@dos.myflorida.com</u>>; McVay, Brad R.

<<u>Brad.McVay@dos.myflorida.com</u>>; Mercer, Kalen L. <<u>Kalen.Mercer@dos.myflorida.com</u>>; Neff,

Lance < Lance. Neff@fdc.myflorida.com>

**Subject:** FW: Instructions to the Offender (DC3-246)

#### EMAIL RECEIVED FROM EXTERNAL SOURCE

The attachments/links in this message have been scanned by Proofpoint.

Mr. Strauss,

Please find the attached "Instructions to the Offender" for the requested offenders.

Thanks, Joe!

Joe Winkler
Assistant Secretary of Community Corrections
Florida Department of Corrections
501 South Calhoun Street
Tallahassee, Florida 32399
(850) 717-3454 (Office)
(407) 494-8282 (Cell)



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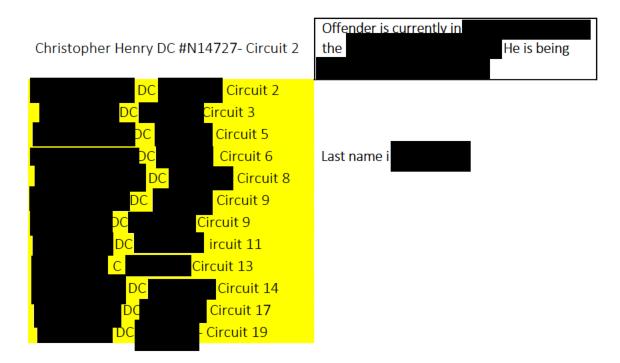
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From: Choquette, Rebecca < Rebecca. Choquette@fdc.myflorida.com >

**Sent:** Tuesday, October 25, 2022 2:01 PM

**To:** Winkler, Joe < <u>Joe.Winkler@fdc.myflorida.com</u>> **Subject:** RE: Instructions to the Offender (DC3-246)



#### **Becky Choquette**

Florida Department of Corrections Office of Community Corrections 501 South Calhoun Street Tallahassee, Florida 32399 (850) 717-3447 (Office)



# Inspiring Success by Transforming One Life at a Time

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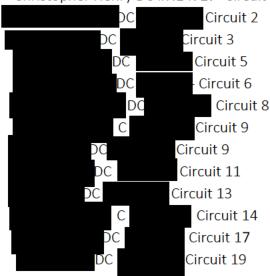
**To:** RegionalDirectorsCommunityCorrections < <a href="mailto:PP-RD-ROM@mail.dc.state.fl.us">PP-RD-ROM@mail.dc.state.fl.us</a>>

**Subject:** Instructions to the Offender (DC3-246)

Regional Directors,

Please e-mail me and CC Becky Choquette the updated Instructions to the Offender (DC3-246) for the below offenders:





Thanks, Joe!

Joe Winkler

Assistant Secretary of Community Corrections Florida Department of Corrections 501 South Calhoun Street Tallahassee, Florida 32399 (850) 717-3454 (Office) (407) 494-8282 (Cell)



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From: Nick Cox To: Jeremy Scott Cc: Julie Chaikin

Subject: Re: Instructions to the Offender (DC3-246) Christopher Henry DC #N14727

Date: Saturday, November 5, 2022 7:41:21 AM

Attachments: image004.png

image005.png image006.png image001.png

#### Thank you, Jeremy!

# Sent from my Verizon, Samsung Galaxy smartphone

Get Outlook for Android

**From:** Jeremy Scott < Jeremy. Scott@myfloridalegal.com>

Sent: Saturday, November 5, 2022 7:30:18 AM To: Nick Cox < Nick.Cox@myfloridalegal.com>

Cc: Julie Chaikin < Julie. Chaikin@myfloridalegal.com>

Subject: Re: Instructions to the Offender (DC3-246) Christopher Henry DC #N14727

I will get to the bottom of it.

JS

#### Get Outlook for iOS

**From:** Nick Cox < Nick.Cox@myfloridalegal.com> Sent: Saturday, November 5, 2022 7:25:26 AM

**To:** Jeremy Scott < Jeremy. Scott@myfloridalegal.com> Cc: Julie Chaikin < Julie. Chaikin@myfloridalegal.com>

Subject: Re: Instructions to the Offender (DC3-246) Christopher Henry DC #N14727

From what I am surmising here, this guy is

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Thanks.... Nick

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Hi Jeremy and Nick,

I would like to discuss this matter with you when you are both free.

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**To:** Strauss, Scott <Scott.Strauss@dos.myflorida.com> **Cc:** McVay, Brad R. <Brad.McVay@dos.myflorida.com>

Subject: RE: Instructions to the Offender (DC3-246) Christopher Henry DC #N14727

# EMAIL RECEIVED FROM EXTERNAL SOURCE

Mr. Strauss,

The Supervising Officer is awaiting a return call from the offender's regarding his Officer did verify the offender was in the

The Supervising Officer is:

 Labertha Smith (850) 922-3725

Thanks, Joe!

Joe Winkler
Assistant Secretary of Community Corrections
Florida Department of Corrections
501 South Calhoun Street
Tallahassee, Florida 32399
(850) 717-3454 (Office)
(407) 494-8282 (Cell)



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Importance: High

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Thanks,

Scott R. Strauss Interim Director Office of Election Crimes & Security Florida Department of State

Direct: 850-943-2279

Scott.Strauss@dos.myflorida.com

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Sent: Wednesday, October 26, 2022 9:45 PM

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## EMAIL RECEIVED FROM EXTERNAL SOURCE

I am not sure. He is	have included
a link to the brochure that may help. If you need our officer to get more information	ation, please
let me know.	

Thanks, Joe!

Joe Winkler
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6/17/2022.

Thanks, Joe!

Joe Winkler
Assistant Secretary of Community Corrections
Florida Department of Corrections
501 South Calhoun Street
Tallahassee, Florida 32399
(850) 717-3454 (Office)
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#### EMAIL RECEIVED FROM EXTERNAL SOURCE

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Thanks, Joe!

Joe Winkler
Assistant Secretary of Community Corrections
Florida Department of Corrections
501 South Calhoun Street
Tallahassee, Florida 32399
(850) 717-3454 (Office)
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Thanks.

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Office of Election Crimes & Security
Florida Department of State

Cell: 850-943-2279

Scott.Strauss@dos.myflorida.com

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**Cc:** Ladanowski, Andrew < <u>Andrew.Ladanowski@dos.myflorida.com</u>>; McVay, Brad R.

<<u>Brad.McVay@dos.myflorida.com</u>>; Mercer, Kalen L. <<u>Kalen.Mercer@dos.myflorida.com</u>>; Neff,

Lance < Lance. Neff@fdc.mvflorida.com >

**Subject:** FW: Instructions to the Offender (DC3-246)

# EMAIL RECEIVED FROM EXTERNAL SOURCE

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Mr. Strauss,

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Assistant Secretary of Community Corrections
Florida Department of Corrections
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Tallahassee, Florida 32399
(850) 717-3454 (Office)
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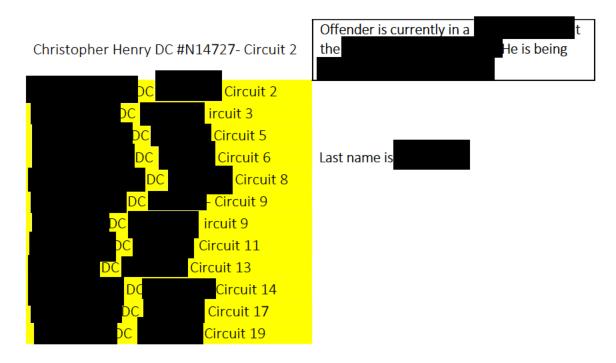
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From: Choquette, Rebecca < Rebecca. Choquette@fdc.myflorida.com >

Sent: Tuesday, October 25, 2022 2:01 PM

**To:** Winkler, Joe < <u>Joe.Winkler@fdc.myflorida.com</u>> **Subject:** RE: Instructions to the Offender (DC3-246)



#### **Becky Choquette**

Florida Department of Corrections Office of Community Corrections 501 South Calhoun Street Tallahassee, Florida 32399 (850) 717-3447 (Office)



# Inspiring Success by Transforming One Life at a Time

Respect ★ Integrity★ Courage ★ Selfless Service ★ Compassion

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From: Winkler, Joe < Joe. Winkler@fdc.myflorida.com >

Sent: Tuesday, October 25, 2022 7:39 AM

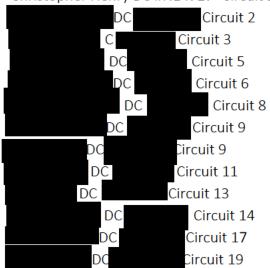
To: RegionalDirectorsCommunityCorrections < <a href="mailto:PP-RD-ROM@mail.dc.state.fl.us">PP-RD-ROM@mail.dc.state.fl.us</a>>

**Subject:** Instructions to the Offender (DC3-246)

Regional Directors,

Please e-mail me and CC Becky Choquette the updated Instructions to the Offender (DC3-246) for the below offenders:





Thanks, Joe!

Joe Winkler
Assistant Secretary of Community Corrections
Florida Department of Corrections
501 South Calhoun Street
Tallahassee, Florida 32399
(850) 717-3454 (Office)
(407) 494-8282 (Cell)



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