IN THE CIRCUIT COURT OF THE SECOND JUDICIAL CIRCUIT, IN AND FOR WALTON COUNTY, FLORIDA

CASE NO.: 25CF123
FELONY

STATE OF FLORIDA,
Plaintiff,

v.

JOSEPH JAMES TURNER,
Defendant,

_____/

DEFENDANT'S OMNIBUS RESPONSE TO THE STATE'S RESPONSES AND MOTION TO COMPEL TO FULL, UNREDACTED CELLEBRITE OF THE IPAD IN QUESTION INCLUDING PHOTOS, VIDEOS, MESSAGES, AND APPLICATIONS

COMES NOW the Defendant, JOSEPH JAMES TURNER, by and through his undersigned Counsel and Response to the responses the State has filed in the past week regarding its intentional taking of statements pursuant to investigative subpoenas in violation of the Florida rules of Criminal Procedure and would show for Cause as follows:

FACTS AND TIMELINE OF EVENTS

1. The undersigned wishes to clearly lay out the facts of what occurred from March 2, 2026, through present for the benefit of any reviewing body.

Date	Time	Act
3/2/26	10:46 AM CT 11:46 AM ET	Suzanne Harris served with an investigative subpoena for March 6, 2026 at 10:30 AM, unknown to defense until filed by State in response.
3/2/26	11:00AM CT 12:00PM ET	Donna Johns served with an investigative subpoena for March 6, 2026 at 9:30AM, unknown to defense until filed by State in response.
3/2/26	4:43PM CT 5:43PM ET	15 Witness Defense List filed

3/6/26	10:30AM CT 11:30AM ET	Donna Johns attends her statement with ASA Mitchell
3/9/26	1:35PM CT 2:35PM ET	Bogenschutz sends an email to Mitchell stating that she had heard that Defense witnesses are being subpoenaed and interviewed at the State Attorney's Office and his position on a motion to quash.
3/9/26	1:47PM CT 2:47PM ET	Bogenschutz follows up with an email attaching her witness list, filed one week prior.
3/10/26	9:47AM CT 10:47AM ET	Mitchell responds with 1) File any motions you feel need to be filed 2) I anticipate asking the Court to set this for May trial cycle. Just wanted to give you notice. 3) The DPA (deferred prosecution agreement) will be revoked on our April motion day. 4) Have a good day.
3/10/26	12:00PM CT 1:00PM ET	Bogenschutz submits emergency motion to quash to efiling, serving the Office of the State Attorney
3/10/26	12:07PM CT 1:07PM ET	Bogenschutz emails the judicial assistant a copy of the just-filed emergency motion, cc'ing Josh Mitchell.
3/10/26	4:25PM CT 5:25PM ET	Compelled statement of Defense witness Suzanne Harris taken without notice to the undersigned. The statement on the subpoena was noticed for the 6th, so there was communication between the parties between 3/2/26 and the date the statement was taken changing the subpoena date by agreement or else a second subpoena was issued that has not been presented by Mitchell.
3/10/26	5:35PM CT 6:35PM ET	Statement of Suzanne Harris concludes.
3/10/26	5:36 CT 6:36 ET	Order quashing subpoenas is granted in part, state is ordered to respond.
3/11/26		Mitchell receives an email from Suzanne Harris
3/11/26		Mitchell Conducts second interview over the phone a continuation/modification of the first.

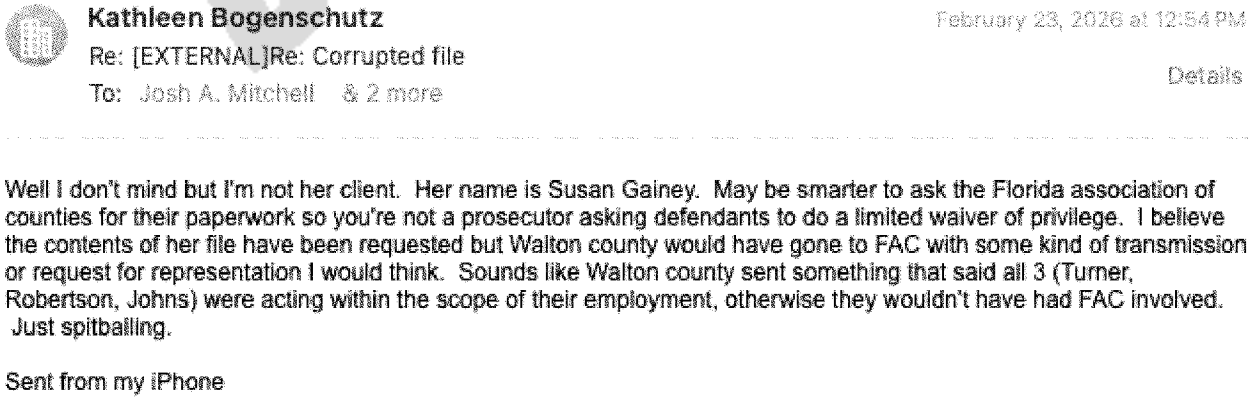
2. In the weeks prior to these filings, the undersigned had provided multiple discovery submissions that included the organization charts of the Sheriff's Office pursuant to an upcoming deposition, and filings from a civil suit filed by Theresa Lowery and defended by Walton County.

3. Those filings, including a recently filed Amended Complaint, which has been provided as reciprocal discovery as late as April 2, 2026, indicate that a major factor in that federal civil case will be whether the parties were acting within the scope of their employment.

4. The undersigned made the point in an email to Mitchell that she will type here so that other portions of the email aren't unnecessarily included (excerpt from email 2/23/26)

> "Further we have been informed that Walton County has made the determination that both Quinn and Joe were acting within the scope of their employment during the acts charged in this case. Could you please look into who made that decision (and the decision to pay for their legal defense) and provide us with all memoranda and paperwork on that? It would appear to be Brady information. Further if it is Clay Adkinson or someone associated with his office, as I suspect it probably is, it would be impeaching information as well.
>
> If you do not believe we are entitled to this information, please let me know so that I can add it to a Brady motion.
>
> Thanks.

5. Mitchell responded asking for the contact information of the civil attorney assigned to Mr. Turner, and if she minded Mitchell reaching out, yielding the following response:



Kathleen Bogenschutz February 23, 2026 at 12:54 PM
Re: [EXTERNAL]Re: Corrupted file Details
To: Josh A. Mitchell & 2 more

Well I don't mind but I'm not her client. Her name is Susan Gainey. May be smarter to ask the Florida association of counties for their paperwork so you're not a prosecutor asking defendants to do a limited waiver of privilege. I believe the contents of her file have been requested but Walton county would have gone to FAC with some kind of transmission or request for representation I would think. Sounds like Walton county sent something that said all 3 (Turner, Robertson, Johns) were acting within the scope of their employment, otherwise they wouldn't have had FAC involved. Just spitballing.

Sent from my iPhone

6. The State focused on subpoenaing these Defense witnesses is because the undersigned shared with the state that one of the Defenses in the civil case was that

that all parties were acting within the scope of their employment, this is the reason that Johns, Robertson, and Turner, were all offered a civil defense paid for by the Florida Association of Counties.

7. Thus the source of the information regarding this "scope of employment" defense was provided by the undersigned as reciprocal discovery and in email to the State about a week prior to filing the witness list.
8. Moreover, there was a suspicion that the County itself had made a determination that all parties were acting within the scope of their employment, otherwise they would not have been offered attorneys paid for by FAC.
9. The undersigned was the source of the information on the civil case that convinced Mitchell his case was precarious enough to finally begin using investigative subpoenas.
10. While the "scope of employment" Defense is a defense that may be raised, it is certainly not the singular defense in this case, and it wasn't discussed prior to the civil case heating up, requiring responses.
11. The crux of the defense has always been that Charles Galloway had no reasonable expectation of privacy in these messages and had, by his actions, effectively consented to them being read by third parties.
12. At the time that the undersigned was informed that Mitchell was taking statements from listed Defense witnesses, there was no information as to when said subpoenas were issued and this information was not known until Mitchell attached the served subpoenas to his response.

13. The most instructive fact to this case is that Mitchell in his response admits that he had not had Alan Osborne served with an investigative subpoena and that the triggering factor in not attempting further service was this Court's Order, not the witness list that was filed (Excerpt from State's Response).

> 15. The State has made no additional effort to serve its subpoena on Samuel Alan Osborne since receiving the Court's Order Granting in Part Defendant's Emergency Motion to Quash pending further order of the Court

14. In fact, the above statement leaves room for other attempts to serve Alan Osborne after the witness list was filed.
15. The undersigned was told that Alan Osborne attended the County Commission meeting on March 10, 2026, and she was able to confirm this by watching the livestream of the meeting.
16. She was also told that the prosecutor's investigator, who has now been listed as a witness and served Harris and Johns was present at that meeting.
17. It is unclear why a state attorney investigator would be attending a county commission meeting where it appears the main topic of discussion was an airport.
18. There is no rule or case in the state of Florida that states that if the State serves an investigative subpoena at some point prior to the filing of a Defense witness list, the State has then "beaten the shot clock" and may then ignore Fl. R. Cr. P. 3.220, taking compelled statements whenever they want, changing the dates and times at their whim, without notice to the defense.

19. If that were the case, the state would serve investigative subpoenas at the beginning of each case and then utilize that to continue doing as they please even years into complicated homicides.
20. The purpose behind an ASA issuing an investigative subpoena is to obtain a statement under oath about possible crimes that have been committed.
21. It is clear from the statute it is not just the service of a subpoena that is precluded after a witness list was filed, but the taking of the statement without notice to the Defense, without the opportunity to attend, and without the opportunity to question the witness.
22. While it appears Mr. Mitchell may have beaten the shot clock as to the service of the subpoena, (a fact that was unknown to the undersigned at the time she filed her witness list, she just heard a rumor that there was an attempt to serve a witness, and looking back on it, the source may well have been Osborne, who was not served) he knew the witness list was filed days prior to taking statements from Johns and Harris.
23. When the statement from Donna Johns was taken, the witness list had been filed for approximately four (4) days.
24. When the statement from Suzanne Harris was taken, the witness list had been filed for approximately eight (8) days.
25. Further, the prosecutor knew the undersigned was seeking judicial review of the propriety of the State's actions at the time that the Harris statement commenced, with the order quashing the subpoenas being delivered one (1) minute after the statement ended.

26. At the end of the Harris statement, there is a mention of an opportunity for the witness to contact Mitchell if they have anything they can think of in addition to their prior statement.
27. Then, after the subpoena was quashed by court order, Harris contacted Mitchell telling him she had more information than she had previously given in her compelled statement the prior day; Mitchell called Harris the following day and allowed her to continue her statement that was taken pursuant to his investigative subpoena the day before.
28. Everyone on the call agrees this modification of the prior statement is "voluntary," but it is clearly a continuation of a subpoenaed statement taken the day before.
29. In late February, Mitchell was informed by the undersigned that a civil suit was being defended by the County of Walton by stating that Quinn Robertson and Joseph Turner acted within the scope of their employment.
30. In fact, both Robertson and Turner were offered free (to them) legal defenses in that civil suit because of that preliminary determination.
31. This has never been the sole or primary defense in the entire case, and there are multiple other things that these witnesses would testify to that are of interest to the Defense but are glossed over by the State in their response.
32. The State is taking great pains to torture the facts at bar to suit the narrative that saved the prosecution in their cited case of Dufour, that the undersigned could not have had any good faith basis to list any of these witnesses. Id.
33. The State further accuses, in their pleading, the undersigned of committing the crime of obstruction of justice because she has utilized the remedies of the court system

when she was told that the State had moved forward on taking *ex parte* statements from defense witnesses.

34. First, the remedy was that the State would have still been able to depose these witnesses, just on an even playing field with the Defense where there was notice and an opportunity to attend, hardly an "obstruction of justice."

35. Second, the State glosses over the other facts that were gleaned from these statements that are of great use to the Defense in an argument that Galloway had no reasonable expectation of privacy in these messages because of how little he protected his privacy and how many ways he was informed of and participated in the broadcasting of his personal data and messages to others.

36. There is no law that the Defense cannot anticipate that a subpoena (or several) might be sent to state witnesses, particularly after Defense counsel was employed at the same job as Mr. Mitchell for over a decade and was the source of his information regarding the civil case; further, there is no law that says that witnesses cannot talk about being called on the phone about a subpoena and that information cannot be transmitted to a Defense attorney by the Walton County rumor mill, who then files a witness list in good faith, listing only witnesses she could reasonably expect to call at trial.

37. The reason the State was subpoenaing these witnesses is because the undersigned made the State aware of the Defense being put forth in the civil case on behalf of Walton County that both Defendants were acting within the scope of their employment.

38. The point was that it was disingenuous for the State Attorney's Office to be prosecuting the defendants for criminal acts when they are being defended by county-paid attorneys under the theory that they were acting within the scope of their employment.
39. This has not been the defense since the beginning of the case--in fact, the civil case was not even filed until December.
40. The undersigned had a good faith basis to list all witnesses she listed on 3/2/26 and will explain below.
41. On 3/9/26 the undersigned learned a statement was taken from at least one witness[1] at some point the prior week and sent an email to Mr. Mitchell.
42. The undersigned followed up her email with another attaching her filed witness list and referencing the extraordinary reminder she included in her witness list because she suspected Mr. Mitchell would need a reminder about the triggering action of a Defense witness list.

[1] The undersigned does not remember if she was told which witness(es) were interviewed or whether there were multiple that were subpoenaed to the State Attorney's Office, but suffice it to say she was told that Mr. Mitchell was continuing forward with taking compelled statements and had already taken at least one from now-Defense-witnesses.

Kathleen Bogenschutz March 9, 2026 at 2:35 PM
Investigative Subpoenas Details
To: Josh A. Mitchell, Cc: Stephen Webster

I listed Donna Johns, Alan Osborne, and Suzanne Harris as defense witnesses. I heard you have been interviewing them pursuant to investigative subpoenas without notice to the defense. This is problematic. See State v. Barreiro, 432 So.2d 138 (Fla. 3d DCA 1983). You certainly would have had every ability to subpoena these witnesses prior to the Information being filed (as I suspect the elected State Attorney now wishes you had), and interviewing them without notice to me prior to my listing them as witnesses last week, but I do believe that since I've listed them as witnesses, you do not have a right to then circumvent the rules of discovery in taking statements from them without it being a deposition.

Please advise if you have taken statements from any of my listed witnesses (list filed last week) so far and what your position is on a motion to quash. You are free to depose them with me present, by my reading of the rules, but taking statements from them without there being notice to me is no longer permitted. See also Munsell v. Bludworth, 474 So.2d 1286 (Fla. 4th DCA 1985). Feel free to call me if you don't think my reading of this rule (and the "gentle reminder" I included as part of my witness list) are correct statements of the law.

Sincerely,

Kathleen Bogenschutz, Esq.
Bogenschutz PLLC
521 N Adams Street
Tallahassee, FL 32301
katie@bogenschutzpllc.com
www.bogenschutzpllc.com
(850)273-8327

Found in Sent - katie@bogenschutzpllc.com via Box

Kathleen Bogenschutz March 9, 2026 at 2:47 PM
Re: Investigative Subpoenas Details
To: Josh A. Mitchell, Cc: Stephen Webster

Attached please find my witness list of 3-2-26 citing to the Rules of Criminal Procedure. I've included a bit of the case law below in my earlier email. Please let me know if there has been a discovery violation and turn everything over so that I can decide how to proceed.

See More from Bogenschutz PLLC

PDF **Defense witness list filed 3-2-26.pdf**

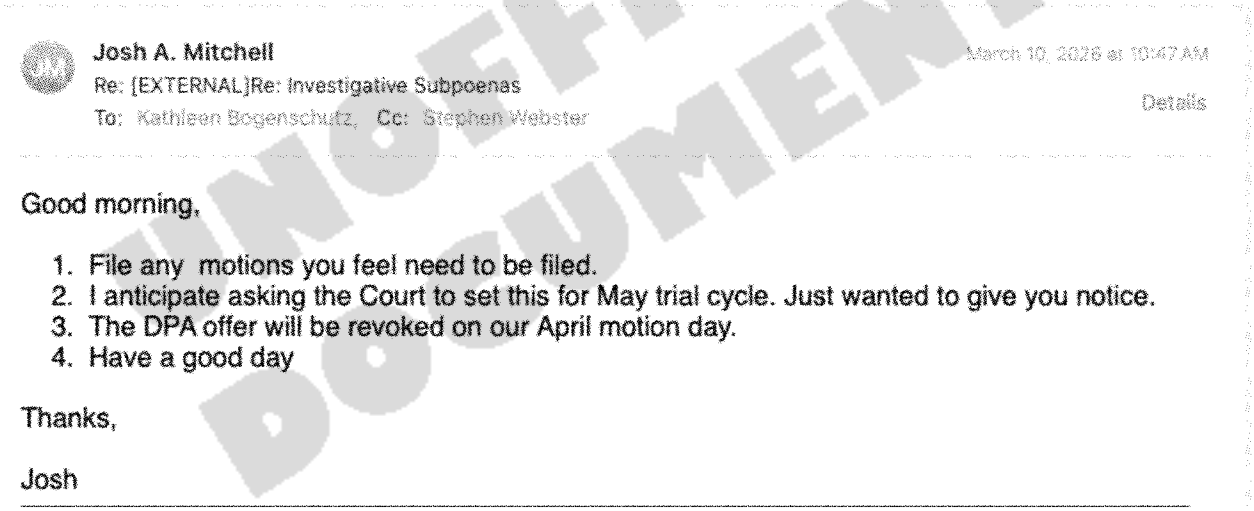
43. The undersigned's office is in Tallahassee, which is on Eastern time. Therefore, the second email above would have been sent to Mr. Mitchell at 1:47PM Central time on 3/9/26.

44. The undersigned was giving Mr. Mitchell an opportunity to let her know if he had missed her witness list that came in through e-filing, as the undersigned, too, has made errors with paperwork, particularly as a prosecutor with a high volume of paperwork coming through in a given day.

45. Mr. Mitchell did not take the opportunity to blame this error on a paperwork issue.

46. The undersigned was also giving Mr. Mitchell an opportunity to claim ignorance as to the law, the rule, and the applicable case law, or to self-educate and thereafter halt the statement scheduled for a few hours later from Suzanne Harris.

47. A response came the following morning 3/10/25 at 10:47AM eastern, which would have been 9:47AM central time.



Josh A. Mitchell
Re: [EXTERNAL]Re: Investigative Subpoenas
To: Kathleen Bogenschutz, Cc: Stephen Webster
March 10, 2026 at 10:47 AM
Details

Good morning,

1. File any motions you feel need to be filed.
2. I anticipate asking the Court to set this for May trial cycle. Just wanted to give you notice.
3. The DPA offer will be revoked on our April motion day.
4. Have a good day

Thanks,

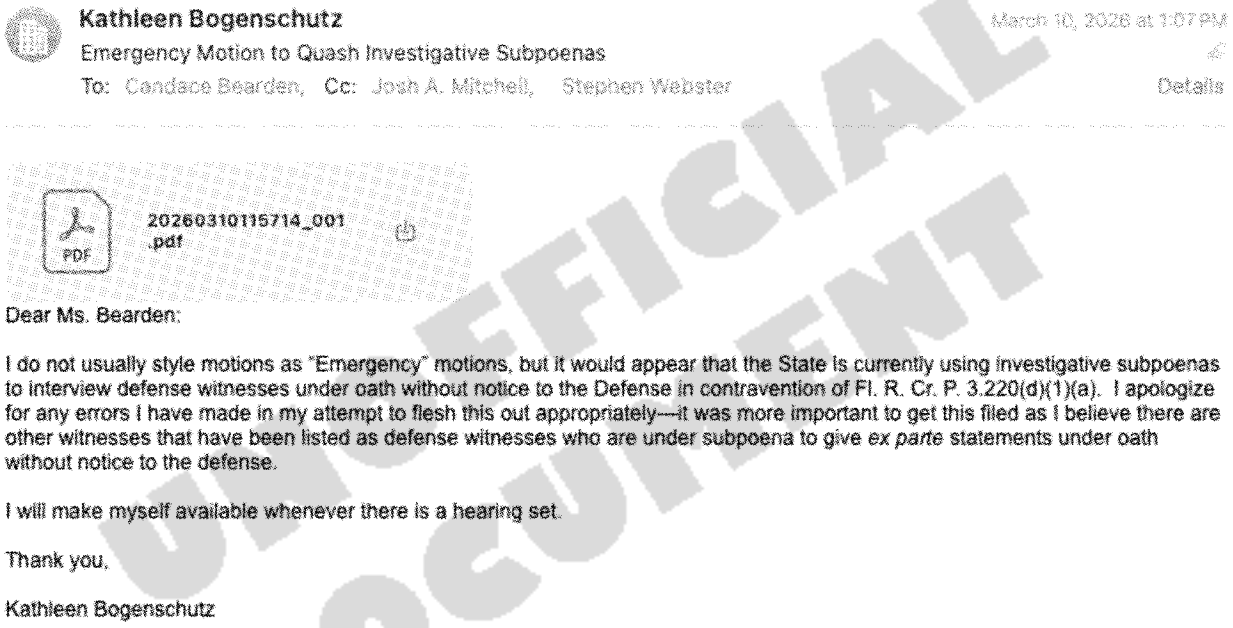
Josh

48. Mr. Mitchell did not state that there were any clerical errors, errors of fact, or errors of law made by him, the undersigned, or anyone else.

49. He did not state that he thought he was in the right because he had had witnesses served in the hours before her witness list was filed (a fact unknown to the undersigned before his response) and that he thought that allowed him to take compelled and immunized statements from either of those witnesses at any time in the future without

notice to the defense, as he did a full eight (8) days after the witness list was filed with Suzanne Harris.

50. The email with the emergency motion was sent at 1:07PM Eastern, which would have been 12:07PM Central, thus, Mr. Mitchell was aware that there was a pending emergency motion to quash the subpoena for his afternoon statement scheduled for Suzanne Harris four (4) hours prior to beginning the statement.



Kathleen Bogenschutz March 10, 2026 at 1:07 PM

Emergency Motion to Quash Investigative Subpoenas

To: Candace Bearden, Cc: Josh A. Mitchell, Stephen Webster Details

PDF 20260310115714_001 .pdf

Dear Ms. Bearden:

I do not usually style motions as "Emergency" motions, but it would appear that the State is currently using investigative subpoenas to interview defense witnesses under oath without notice to the Defense in contravention of Fl. R. Cr. P. 3.220(d)(1)(a). I apologize for any errors I have made in my attempt to flesh this out appropriately—it was more important to get this filed as I believe there are other witnesses that have been listed as defense witnesses who are under subpoena to give *ex parte* statements under oath without notice to the defense.

I will make myself available whenever there is a hearing set.

Thank you,

Kathleen Bogenschutz

51. Both the above email and the emails between the parties before it were opportunities for Mr. Mitchell, if he was unaware of the nuances of 3.220, to self-educate on the topic and to put a pause on taking additional statements pursuant to investigative subpoenas.

52. Knowing now that Mr. Mitchell is attempting to make the argument that the undersigned is in the wrong, having served his subpoenas a few hours before her witness list was filed, there can be no question that Mitchell knew the rule, knew what he was doing, and believed it not to apply to him.

53. Even by this logic (logic which has no basis in case law or the rules), Mr. Mitchell agreed to a second subpoena of Suzanne Harris for 3/10/26, the actual date of the statement she gave, a statement which began with Mr. Mitchell putting on the record that Ms. Harris was under subpoena and that the statement was immunized.
54. Thus, Mr. Mitchell, knowing that the witness list was filed, changed the date and time of the statement of Ms. Harris from the date and time he'd listed in the subpoena, but left the subpoena in effect.
55. Knowing that the undersigned had filed the above emergency motion, having been put on notice by the email the prior day inquiring if he'd seen her witness list and giving him the citations to cases and to the rule, ASA Josh Mitchell began the statement of Suzanne Harris that was compelled and immunized at 4:25PM Central time and concluded that statement at 5:35PM CT on 3/10/25, eight (8) days after she was listed as a Defense witness.
56. At 6:36PM Eastern, thus 5:36PM Central, the judicial assistant for this Court emailed an Emergency Order Granting in Part the Defendant's Motion to quash.
57. On 3/10/26 Donna Johns emailed Mr. Mitchell to give him more information about the (compelled via investigative subpoena) statement she had given on 3/6/26.
58. It is unclear whether Mr. Mitchell spoke to her on the phone, continuing her compelled and immunized statement from 3/6/26, but if he did, it was unrecorded or else not provided to the undersigned.
59. On 3/11/26, after the order was issued, Suzanne Harris emailed Mr. Mitchell to tell him more information and Mr. Mitchell called her and recorded the phone call in which she

clarifies statements she made on 3/10/26, her compelled and immunized statement, rendering this phone call a continuation of the prior statement.

60. Mr. Mitchell did not give notice to the undersigned before taking this second statement from her and recording it.

61. The second statement was a continuation of the first statement, clarifying things Harris testified to under oath the prior day, and incorporates it by reference.

62. The "practice" of law is called such because of the understanding that there is a fair amount of on-the-job learning; this learning does not cease because one logs a certain number of years, trials, or accolades.

63. Mr. Mitchell has not said this was a mistake; in fact, by his words and actions, he has indicated that it most certainly was not.

64. All factors in Mitchell's responsive pleadings indicate that he thinks he was justified in continuing forward with the *ex parte* subpoenaed (and thus, immunized) statement of at least two (2) Defense-listed witness despite having been informed of the rule by the undersigned via email, and having been fed the pleading, the rule, and the applicable case law by the undersigned.

65. Further, he thinks he was justified in continuing that statement on the following day after this Court issued its order.

66. In fact, his email reply to the undersigned indicated that it most certainly was not an error; he invited the Defense to file whatever pleadings they saw fit, stated he was revoking an offer for diversion[2], and also stated he was going to ask for a trial date.

A Brief Discussion of Dufour v. State, 495 So.2d 154 at 161-2 (Fla. 1986)

[2] Both Mr. Turner and Mr. Robertson rejected diversion last Summer.

67. Because the prosecutor seems to hang his hat on Dufour in accusing the undersigned of perpetrating a fraud on the court, the undersigned will discuss it briefly here, for record purposes.

68. As previously stated, the undersigned read Dufour and the related case law prior to filing a witness list in this case and believes she followed the guidance it provides.

69. In Dufour, a witness who had disavowed any knowledge of the case was listed along with ***all other State witnesses*** by the Defense. Id.

70. The Florida Supreme Court found there to be indicia of bad faith on the part of Defense counsel, including that every State witness was listed by the Defense without a thought as to whether the Defense had any intention to call them to the stand. Id.

71. The witness in question (mentioned in the excerpt the undersigned has typed below), had, in fact, disavowed any knowledge that might make her a relevant witness in the case at the time that the Defense listed her as a witness. Id.

72. The Defense in Dufour was attempting to preclude the State from doing further investigation with any witnesses, which is overbroad; further, the Court found, the Defense was acting in bad faith by listing witnesses they could not even articulate reasons to call. Id.

73. The undersigned in her witness list only included witnesses she believed she might, as she stated in her motion to quash, reasonably call in her case in chief or need to recall as Defense witnesses if her cross examination of the witness led to an "outside the scope of direct" objection.

74. Thus, the State listed thirty eight (38) witnesses, and the Defense listed only fifteen (15) of those witnesses, with one additional civilian not listed by the State.
75. The undersigned will attend the hearing with a typed document containing more the information that she thinks may be obtained or upon information and belief she may be obtained from each of these witnesses on April 7, should the Court need more information than the chart below to make a finding that the Defense listed all witnesses in good faith.
76. The Defense, however, objects to giving the State its work product further than the record it intends to make with this document given the allegations the State has made against the undersigned, while misreading Dufour. Id.
77. The information contained in this pleading is information either known to Mr. Mitchell, should be known to Mr. Mitchell, or is available in the public domain prior to the filing of the undersigned's Motion to Quash.
78. The crimes charged are for trespassing into a county computer system, which was certainly part of the scope of both Defendants' employment, as they were employees of the county, and for intercepting the messages on the iPad.
79. It is unclear why the ASA thinks what happened to the messages after the interception or trespass is relevant evidence as to whether the interception or trespass was within the scope of the employment, particularly as both Defendants went to great lengths to attempt to get a criminal investigation into Galloway opened by the Sheriff's Office as well as by meeting with this particular ASA in person about opening a criminal investigation.

80. Both Robertson and Turner were hired to ferret out fraud, waste, and abuse and did their best to bring this to the attention of the Sheriff's Office and the Office of the State Attorney.

81. A commissioner raising the topic of messages having to do with county business (county business by the estimation of Mary King, Jason Cook, Jeremy Rowlands, Quinn Robertson, and Joe Turner) during a commission meeting, particularly after being ignored by both the Sheriff's Office and the Office of the State Attorney does not sound like it is outside the scope of the employment of the County Administrator or Assistant County Administrator.

82. The State can point to no law that indicates that discussing this issue with well-connected advisors in the community who have an idea about local history, as both Robertson and Turner were recent transplants to the area and have been extremely involved in commission meetings in the past is somehow outside the scope of their employment.

83. Alan Osborne has a Youtube channel and announced that the subpoenas were being served on 3/5/26 in a posting he made under the title of "State attorney to investigate 1.5 years after charges."

84. On March 12, 2026, he posts again referencing thumb drives in the subject line, he also posts multiple times in the past couple of years referencing public corruption in the county commission and the efforts Robertson and Turner were making to get the attention of the Sheriff's Office and the State Attorney's Office during their tenure.

85. Turner and Robertson met directly with the assigned prosecutor in this case to get him to open an investigation into some of the items they found in that iPad.

86. During her statement, Donna Johns makes a statement about seeing payments being made to Chas Galloway that could be seen in the iPad from a wealthy developer who was, at the time, in the process of trying to sell a property to the County Commission.
87. In that video, Osborne refers to multiple other meetings of the County Commission where he has stated publicly that he bought Charles Galloway's computers, usernames, passwords, and data from him.
88. Thus, Galloway has consented to ***anyone*** reading through his messages after putting them out into the public discourse by selling them to Osborne for fast cash and personally taping a thumb drive containing them to Harris's door.
89. Further, there is a good argument that the owner of the data that was "wiretapped" is Alan Osborne, who, if deposed, is likely going to state that he consented to the messages being distributed.
90. The undersigned listed Johns in good faith, as she could testify to the contents of county business in the messages, messages that ***still*** have not been provided to the Defense even though the entire iPad was cellebrited.
91. If Theresa Lowery was using her private cell phone to circumvent public records laws by texting county business to Galloway, and the messages qualify as public records, there can be no case here.
92. Harris, who knew Osborne had purchased the hardware, passwords, and all data from the victim, and testified under oath that the "victim" was the person who dropped the thumb drive with the data off at her office, as she was able to identify him from the surveillance video, is also listed in good faith.

93. Surely selling one's data and passwords to a person known to have a Youtube channel (Osborne) and dropping a thumb drive and taping it to the door of someone known to make things public (Harris) underscores the argument that public records or not, Galloway consented to the release of this data.

94. The scenario that presents itself is an absolute mess of information that the undersigned wanted to be present for so she could interject with questions, like "Did you tell Clay Adkinson that the person who dropped off the thumb drive taped to your door was Charles Galloway? Did Adkinson tell you to destroy the surveillance video or just tell you that you didn't need to save it? Did you show Adkinson that video and did he agree it was Galloway?"

95. Finally, Alan Osborne is arguably the listed victim here because he appears to have purchased the data that was released from Charles Galloway, except for the fact that Osborne wanted the messages released as well and even copied his data to give to another County Commissioner, Brad Drake.

96. To suggest that the undersigned wanted to "thwart" the truth coming out when the only concern was fair play is a serious misstatement of what occurred; the State would have been able to depose these witnesses, just with notice to the Defense.

97. The undersigned suspects that the reason the full download of the iPad has still not been provided to the Defense is the mushroom cloud of embarrassment for County Officials contained therein, but that any lewd conduct contained therein is all of adults according to Inv. Riddick.

98. The undersigned now makes a demand for the full, unredacted cellebrite of the iPad to include any records of money paid to Charles Galloway for any

"consulting" or "marketing" contained therein taking the investigator at his word that there is no CSAM contained on the cellebrite.

99. The witnesses listed by the undersigned are the following and the undersigned has included a few words as to their relevance and why the undersigned has listed them as a Defense witness in good faith, facts that she believes should already be known to the prosecution so that the record is clear why each was listed.

100. This is not an exhaustive list of what each witness might testify to, but is simply for the purpose of showing the Court that there is a good-faith basis for the undersigned to have listed each of these witnesses.

101. Further, in his response inviting the undersigned to file pleadings, the State even mentioned he was going to ask for a trial date.

Witness	***Defense interest in listing witness***
Clay Adkinson	County Attorney, fact witness, present at board meetings, met with Defendants regarding their concerns, was told that Galloway dropped the thumb drive off at Suzanne Harris's office by Suzanne Harris, never told Harris to preserve that surveillance video.
Luis Negrete	Supervisor of the FDLE investigator assigned to this case, Keith Riddick, with whom Riddick discussed Charles Galloway lying publicly (via a listserv) about the facts of this case, can also testify to the knowledge of FDLE as to who the subject of their investigation was.
Jason Cook	Already deposed by both Defense teams, IT director in Walton County who brought the iPad to Quinn Robertson because the private text messages contained "county business." Also warned Galloway at least three times that his messages were actively being sync'd to this iPad and asked him to un-sync it prior to the December 2023 reading of the messages by Donna Johns. Galloway never took any action to protect his data or follow up.
Charles Galloway	Already deposed. Acknowledged that he was told three (3) times that his texts and photos were actively syncing with the iPad and that he chose to do nothing about it. By the end of the deposition admitted that he "probably didn't" have a reasonable expectation of privacy in the messages, which alone might be fatal to the State's case, and yet the charges remain.

Danny Glidewell	County Commissioner, former Sheriff's deputy. Theresa Lowery served as his aide and was relaying messages to Galloway from Glidewell via text in the small number of messages that were released.
Suzanne Harris	Not a public servant, but provided messages to Donna Johns. The undersigned and Counsel for Mr. Webster have had conversations with her attorney, Kay Simpson, previously and were aware that she was likely to testify (and did testify) in her statement with Mitchell that ***she believes Charles Galloway dropped off the thumb drive to her. Meaning, she thinks that the victim leaked the text messages himself. Harris told Clay Adkinson about the video and her suspicion that it was Galloway but there is no information as to whether Adkinson saw Galloway on the video and identified him as well.*** The undersigned knew this when she listed her as a witness. Charles Galloway had no expectation of privacy in any of his messages at any time after he personally leaked them to Suzanne Harris and effectively consented to the messages being part of the public domain after giving them to her and selling them to Osborne.
Dede Hinote	Assistant County Administrator during the time that Galloway was employed through present day. Can speak to the org chart of the agency and the duties of each person in the org chart in a greater sense. Since Mr. Robertson was fired, the county has gone through one other acting county administrator who was fired in a public meeting and has another now that has served in other areas of the government. She has background information regarding the internal workings of the commission because of her (relatively) lengthy tenure in the same position as Mr. Turner. Further, she was pressured to hire Galloway for this PIO job that he outsourced on the county purchasing card. Thus, Galloway was being paid a salary to do the marketing work, then used his credit card to outsource the job to others.
Donna Johns	This is the board member who read the messages in the Council meeting, which is what spurred the entire criminal investigation.
Mary King	Ms. King was in numerous meetings regarding the facts in this case, and more importantly is known to be a note-taker, which is of particular interest to the undersigned. She stated that the messages in question contained "county business," read them, and has, too, not been charged with a crime (nor should she be), which is another strike toward forcing the State to turn over the full cellebrite.
S. Alan Osborne	Mr. Osborne decided to pay (in USD) Charles Galloway for all of the data in his iCloud account at some point during this fiasco, ***lending further credence to the fact that Galloway had no expectation of privacy in any of the data contained on the iPad and has functionally consented to any of the messages being***

	disseminated for any purpose. The undersigned knew of this when she listed him as a witness. She also knew that he had provided Commissioner Drake with a thumb drive of all of the contents upon his request. By virtue of Lowery exchanging messages in writing with a person having the reputation of Galloway, Lowery knew or should have known she ran the risk of Galloway somehow publishing all of their messages, whether by his own incompetence, stupidity, carelessness, or even purposely. Most witnesses being asked to speak to the reputation of Galloway in the community have stated that he is known to be both untruthful and erratic.
Genara Roop	Ms. Roop is the custodian of records for Walton County. She is excellent at her job and Walton County is lucky to have her in their employ. She would likely testify to what is a public record, what is not, and whether someone would have had to go through every message on that iPad to determine what was public record and what was not. She can also testify to the fact that Walton County was not permitted to simply "wipe" the iPad of Galloway's messages because of the possible destruction of public records.
Jeremy Rowlands	Mr. Rowlands is a relatively new employee of the County who was issued the iPad in question by Jason Cook, the IT director. After attempting to log in to the iPad, he returned it to Jason Cook, telling Cook that someone else was already logged in and that he (Rowlands) could see his (Galloway's) messages in real time. Neither Rowlands nor Cook has been charged in this case, and the undersigned does not include this statement to suggest they should be. No one should.
Stan Sunday	Stan Sunday was the Acting County Administrator who was installed after the firing of Quinn Robertson. Sunday, as the Acting County Administrator, consented to a full extraction of the iPad device during the FDLE investigation. WCSO apparently did some kind of extraction of the device via Grayshift/Graykey, ***but did not obtain consent or a search warrant to do so for some reason*** at least a warrant or consent to search that the undersigned can find in the discovery she was provided.

102. There are twenty-three (23) other witnesses listed by the State that the undersigned has not listed and one (1) listed by the undersigned that has not been listed by the State.

103. Ms. Lyn Scott, the witness listed by the undersigned, has made some posts on Facebook that indicate she may have been a witness or surveilled other witnesses, which Ms. Suzanne Harris addressed in the statement that the undersigned contends

was taken via investigative subpoena (compelled testimony) by the State in contravention of Fl. R. Cr. P. 3.220.

104. To flesh out the record completely, the undersigned is including the Dufour case as an attachment and reprinting the salient portions in this motion below:

> [A]ppellant contends that the trial court erred in declining to impose sanctions for an alleged violation by the prosecution of the provisions of Florida Rule of Criminal Procedure 3.220(b)(3). We must first examine the rule's terms to ascertain whether or not any violation occurred below, and, if so, whether any prejudice accrued therefrom to the appellant. [citations omitted].
>
> Rule 3.220 sets forth the respective rights and obligations of the parties concerning discovery in the criminal context. Section (b)(3) of the rule indicates that if the Defense has chosen to demand of the State a list of the latter's witnesses, it must, within seven days of the receipt of that list, furnish to the state a list of its expected witnesses. At that point, the rule limits the prosecution's otherwise plenary power to subpoena witnesses and take ex parte testimony as to any violation of the criminal law within its jurisdiction [citations omitted]. After receiving the Defense witness list, the prosecutor may not subpoena any individual on that list without notifying Defense counsel and allowing them to attend the interview and examine the witness.
>
> The alleged violation below involved witness Stacey Sigler. Sigler was originally listed on the state's witness list provided to the Defense under rule 3.220(a)(1)(i). The Defense merely duplicated this list and submitted it as its own, thereby attempting to force the requirement of notice between Sigler and the prosecution. Relying on dictum in State v. Barreiro, 432 So.2d 138, 140 n.5 (Fla. 3d DCA 1983) *review denied*, 441 So.2d 631 (1983), which indicated that "[i]f Defense counsel wants to protect against the state's *ex parte* examination of a witness he can do so by furnishing the witness's name on his list of Defense witnesses," the Defense attempted to gain, and was denied, admission to an interview between Sigler and the state's attorney. The Defense subsequently moved for dismissal of the indictment or the exclusion of Sigler's testimony as sanctions for the state's behavior in excluding the Defense from the interview.
>
> Because we find that no violation of the discovery rules took place below, we approve the trial court's refusal to impose any sanctions. Appellant's construction of the discovery provisions is overbroad and

would cut the rule loose from its logical moorings. It is not enough to merely duplicate the list of state's witnesses and thus transform Sigler into a witness "whom the Defense counsel expects to call as [a witness] at the trial or hearing." Fla. R. Crim. P. 3.220(b)(3).

No indication exists that Defense counsel, in good faith, intended to call Sigler as a witness. In fact, because Sigler proclaimed ignorance of the crime until the meeting complained of, she apparently lacked the requisite personal knowledge required of a witness. Application of the rule's provisions to the instant facts, as urged by appellant, would frustrate the purpose underlying the rule. When properly applied, rule 3.220(b)(3) serves the protective purpose of preventing the state from driving an unfair wedge between Defense counsel and its key witnesses, through ex parte examination, during sensitive pretrial stages. It is not intended to inhibit the prosecution's power to prepare its case by disallowing all ex parte communication with its witnesses.

We disapprove of tactics such as those employed by the Defense below, because the inclusion of an unwarranted abundance of names on the Defense witness list can ultimately only dilute the rule's protective power. ***The Defense is certainly not prohibited from listing as its own those witnesses already listed by the state, but it must do so conscientiously, naming only those it actually expects to call.*** [emphasis added] Otherwise, by attempting to use the rule as a sword, rather than the shield it is intended to be, the Defense risks losing any protection which that shield might have offered.

The court additionally rejected the application of rule 3.220(b)(3) because it found, under the circumstances, that Sigler approached the prosecutor voluntarily. In spite of the initial subpoena, the court found that Sigler approached the authorities, on the advice of her attorney in order to negotiate for immunity. Noting that the interview took place two days after the subpoena date, the court found her approach voluntary and the rule inapplicable. Because we cannot disagree that Sigler was improperly listed as a Defense witness and that her testimony was given voluntarily we approve of the trial court's refusal to impose sanctions [citations omitted]. Dufour v. State, 495 So.2d 154 at 161-2 (Fla. 1986)

105. Dufour (excerpted above) was read by the undersigned and digested, as were the cases that preceded it prior to filing her witness list and motion to quash. Id.

106. This is why the undersigned referred to her decision as to which witnesses should be listed as "surgical."

107. There is no case law and no rule that states that the Defense is precluded from filing a witness list at any point in time during discovery; however, there is a rule, a rule that the State was advised of in a pleading, in an email, in an emergency motion, and then in a court order, that precludes the State from taking subpoenaed statements from Defense witnesses without notice.

108. ASA Mitchell knew that a witness list had been filed, at least as of the time that he took the statement from Suzanne Harris because he had responded to an email from the undersigned inviting her to file whatever motions she wanted.

109. At the time he began his statement with Suzanne Harris ASA Mitchell knew the undersigned had filed a witness list with her name eight (8) days prior, that the undersigned was seeking an emergency order to quash the subpoena, and still he proceeded forward.

110. The day after this Court's order, instead of contacting the undersigned and giving her notice, particularly after receiving the Court's Order at 5:36PM on March 10, 2026, he twice called Ms. Harris on 3/11/26, and recorded both calls, although only one had a substantive conversation.

111. The first was an attempt to make contact and the second continued the sworn statement she had begun the day prior.

112. The undersigned submits that this directly violates the order of the Court issued on 3/10/26, as it is a continuation of the statement taken by Mitchell on 3/10/26, which itself was not permitted by 3.220.

113. The State is also concerned as to why the undersigned would specifically remind the State of the fact that the rules of depositions apply in this one witness list when she had not previously advised him of such.

114. The undersigned has now filed the Amended Complaint in the civil case which argues that the parties were all acting within the scope of their employment in some counts and in the alternative were not in others.

115. This has no bearing on whether Turner will be able to continue using the free (to him) attorney from the Florida Association of Counties because they have made the preliminary determination that he was, in fact, acting within the scope of his employment.

116. The motion to dismiss filed by Walton County further discusses whether the messages were "of public concern" as a Defense to the charge of invasion of privacy against Walton County.

117. Surely both Robertson and Turner would be within the scope of their employment dealing with something that would be of public concern.

118. Who better to indicate if something is of public concern than two individuals in the community who are perhaps even overly engaged with their local government (Harris and Osborne) and the Commissioner who attempted to read the messages into the record (Johns)?

119. Mitchell still went forward with the statement and now seeks to cast aspersions on Defense counsel for some kind of "trickery" when the undersigned offered him every offramp available while citing to the rule and applicable case law.

120. This was no "gotcha" by a Defense attorney, this was an ASA who was warned he shouldn't take statements in the discovery pleading citing specifically to rule 3.220, then again in an email with caselaw citations, then again in an emergency motion, and then, even after receiving an order telling him he needed to comply with the rules, he called the same witness the following day and took more information from her and recorded it in continuation of the prior day's statement.

CONCLUSION

Because Mitchell was confronted multiple times with the law and the facts and he continued forward, there can be no conclusion other than the fact that he was doing this on purpose, trying to salvage an unsalvageable case. The more troubling aspect is that despite every "offramp" provided, Mitchell is now attempting to accuse the undersigned of a fraud on the court simply because his subpoenas predated her witness list by a few hours, a fact she didn't know until he included them in his response.

The salient portion the court should consider is that Mitchell never claimed ignorance of the witness list prior to taking the statement of Donna Johns. More importantly, if he was ignorant of the filing of the witness list, he was told in a time and date stamped email by Defense counsel with citations and a time stamped attachment wherein she fed him the rule and the applicable case law prior to the statement by Harris. Then she filed an emergency motion that he knew was pending in front of this Court, again, citing to the rules of criminal procedure and applicable case law, and he still did not alter his course. Then, after receiving the order, he got an email from the witness, called her back the following day, and continued the statement from March 10, 2026, not

recognizing that this continuation of the prior day's statement was also problematic given the lack of notice to the undersigned.

The service of the subpoenas, at least the two attached to the response from the state, is not the wrongdoing. The wrongdoing is taking a compelled statement without notice to the Defense when regular deposition rules should apply—all the State had to do was give notice to the Defense and they chose not to.

Further, Mr. Mitchell attempts to make an argument to the merits of the case suggesting that the Court should consider what the Defense is in this case and then misstates the Defense. The Defense in this case has always been that Charles Galloway had no reasonable expectation of privacy in messages that he personally synchronized to a County-owned iPad. Charles Galloway stated as much in his deposition that after speaking to Defense counsel during that deposition, he realized he "probably didn't" have any reasonable expectation of privacy. For some reason, even after that blow, Mitchell has continued forward with the charges.

In other depositions, there have been suggestions in the questions asked that these texts might be considered public records because they are between Galloway and a county employee who was utilizing her own personal cellular phone to pass messages about county business between Commissioner Glidewell and Galloway. Further, as Mr. Mitchell learned during his interview of Suzanne Harris, Alan Osborne had purchased both Galloway's computer equipment and passwords from him prior to the messages being read at the Commission meeting, which further underscores the Defense that Galloway could not have had any expectation of privacy in these messages that rises to

consenting to their release, and, it seems there is an argument that the messages did not even belong to Galloway at the time they were read.

The undersigned urges this Court to consider the fact that the prosecutor is not explaining an oversight but doubling and tripling down on something that this Court has properly already determined was improper. A voluntary statement is permitted. A subpoenaed and immunized statement is not. The undersigned has taken the expense of having both statements transcribed as well as the subsequent oral statement from Ms. Harris and will have them at the hearing so that the Court can properly make a finding that these statements were taken pursuant to a subpoena (compelled) without notice to the Defense.

The State's failure to acknowledge an error either in fact or law is disturbing. Any prosecutor who had any concern with wearing the proverbial "white hat" and who knew emergency motions were pending would not have moved forward taking these statements, he would have set up a deposition. Any prosecutor who was concerned with fair play would have notified the Defense that this witness from whom they'd taken a sworn, compelled, immunized statement had something further to say, particularly after this Court's order. Mr. Mitchell simply had the witness parrot that this second statement was voluntary because the subpoena was quashed, nevermind that the sole reason the second statement was needed was because Harris had forgotten something in her first statement, and charged ahead.

Frankly, nothing even particularly harmful to the Defense even came out during these statements, despite the contentions of the State. If Galloway had no reasonable expectation of privacy in the messages and by virtue of his actions had functionally

consented to their release, they could have been put up on a billboard on I-10, much less distributed to civilians. Galloway didn't even have a possessory right to the messages if Suzanne Harris is taken at her word that the messages, at the time they were read, were the property of Alan Osborne, not Galloway. Further, the employee handbook for which Galloway signed even states that there is no right to privacy in any county-owned device, and Galloway was warned three times in writing that his messages were still transmitting even after he quit and chose to do nothing. The State admits that Robertson had a right to go through the iPad and had the right to consent to others going through it as well, otherwise it would not have accepted the consent of the successor County Administrator to permit the cellebrite download of the whole thing, the entirety of which has not been provided to the Defense as of this date.

There are no rules preventing what the Defense has done. There are, however, rules preventing what the State has done. The State has responded to these charges not by admitting a mistake but by doubling down. Further, by agreement, the State modified Harris's subpoena after she was listed as a Defense witness to change her statement to a more convenient time for her. Her original date of statement was 3/6/26, and some time after the witness list was sent, likely the following day after the filing of the witness list, the date was changed to 3/10/26.

Perhaps the most unhinged argument from a career prosecutor is the accusation that the undersigned has committed an obstruction of justice simply by utilizing due process of law to prevent an *ex parte* statement of Defense witnesses. There is no prevention of an investigation here, the State still would be able to take sworn testimony from the witnesses, just with notice to the Defense, on an even playing field. Further,

most investigative subpoenas are served prior to the filing of a case, not over a year into a prosecution, wherein, it can be argued, the Defense has been extremely proactive in engaging in discovery. Mr. Mitchell has been the assigned prosecutor in this case for nearly two (2) years, and sat on the case for months without taking these statements prior to filing it and in the months after filing it. There is nothing obstructive about asking for the rules to be followed, and to suggest that engaging in due process of law is obstruction on the part of the Defense is anathema to the duty of a prosecutor to seek justice, not just a conviction.

WHEREFORE the undersigned respectfully requests that the Court find the State to be in violation of Fl. R. Cr. P. 3.220, and to enter an order giving the State five (5) business days to turn over the full, unredacted cellebrite of the iPad in question, specifically including all messages, all media, and any and all financial transactions contained thereupon.

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished via e-filing to the Office of the State Attorney, SAO2_leon@leoncountyfl.gov, this 2nd day of April, 2026.

/s/Kathleen M. Bogenschutz
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495 So.2d 154
Supreme Court of Florida.

Donald William DUFOUR, Appellant,
v.
STATE of Florida, Appellee.

No. 65694
|
Sept. 4, 1986.
|
Rehearing Denied Oct. 27, 1986.

Synopsis

Defendant was convicted by jury in the Circuit Court, Orange County, Michael F. Cycmanick, J., of first-degree murder and sentenced to death, and he appealed. The Supreme Court, Adkins, J., held that: (1) affidavit supporting search warrant established probable cause; (2) admission of fellow inmate's testimony did not violate defendant's right to counsel; (3) trial court could limit cross-examination of defendant's associate who was facing other charges and could allow introduction of his former statement to rebut implications of improper motive and recent fabrication; (4) prosecutor's remarks during closing argument were permissible comment on evidence and invited response; (5) defendant's absence at hearing as result of hospitalization following hunger strike was voluntary; (6) prosecution had not violated discovery rule by conducting ex parte interview of listed defense witness that defense did not intend to call; (7) trial court could force defendant to wear leg shackles during trial; (8) jurors were not tainted by knowledge of "strange" phone call dismissed juror had received; and (9) sentencing instructions were adequate, and death penalty was properly imposed.

Affirmed.

Overton, J., concurred in result only in conviction and concurred in sentence.

West Headnotes (19)

[1] **Search, Seizure, and Arrest** ⇐ Particular Cases

Affidavit supporting warrant to search residence of suspected murderer established probable cause necessary for that search, where it disclosed specific facts as to type of murder weapon and unique jewelry last seen on victim's person, it identified informant who had stated when he had seen gold jewelry and weapon of that caliber in possession of defendant and close associate, and statements were corroborated by detective's independent investigation.

5 Cases that cite this headnote

[2] **Search, Seizure, and Arrest** ⇐ Dwellings in general

Magistrate issuing search warrant could determine that jewelry taken from victim and gun used in homicide could be located in defendant's apartment, notwithstanding that affidavit

supporting that warrant stated only that those items had been seen in possession of defendant or close associate; items could reasonably be presumed to be located either on defendant's person or in his home.

6 Cases that cite this headnote

[3] **Criminal Law** ⇐ Informants; inmates

Admission of fellow inmate's testimony did not violate defendant's right to counsel, where inmate had approached authorities on his own initiative and was neither encouraged nor discouraged from obtaining further information. U.S.C.A. Const.Amend. 6.

3 Cases that cite this headnote

[4] **Criminal Law** ⇐ For prosecution

Prosecutor's reference in opening statement to anticipated testimony of fellow inmate was not irrelevant collateral crime evidence, where that testimony was relevant and admissible to define relationship between State's witness and defendant.

1 Case that cites this headnote

[5] **Self-Incrimination** ⇐ Invocation

Trial court had not abused discretion by limiting cross-examination of defendant's associate with respect to questions to which associate could be expected to exercise right against self-incrimination, where that associate was awaiting criminal charges in other states and essence of his bias was established through direct and cross-examination.

1 Case that cites this headnote

[6] **Witnesses** ⇐ Particular evidence in general

Trial court could limit cross-examination of defendant's associate by excluding reference to that associate's confession to series of unsolved crimes, where State had insufficient evidence to prosecute those crimes and jury had been adequately exposed to associate's extensive felony record and tendency to bargain with State.

[7] **Witnesses** ⇐ Prior Consistent Statements

Witness' testimony may not ordinarily be bolstered with corroboration with his own prior consistent statements.

[8] **Witnesses** ⇐ Particular statements

Trial court could allow introduction of State witness' former statement as prior consistent testimony tending to rebut implications of improper motive or recent fabrication, where defense had raised those implications

through impeachment during cross-examination.

7 Cases that cite this headnote

[9] **Criminal Law** ⇐ Reference to evidence as uncontradicted as comment on failure to testify

Prosecutor's comment during closing argument, that nobody had said that particular witness' testimony was incorrect, did not impermissibly direct jurors' attention to defendant's failure to take stand, but was permissible comment on evidence.

6 Cases that cite this headnote

[10] **Criminal Law** ⇐ Comments on evidence or witnesses

Prosecutor's statement during closing argument, that jury had not heard evidence that defendant had any legal papers in cell with him, was "invited response," where it rebutted defense statement during closing argument which hinted that fellow inmate could have based his testimony upon those papers.

18 Cases that cite this headnote

[11] **Criminal Law** ⇐ During preliminary proceedings and on hearing of motions

Defendant's absence at pretrial motions hearing as result of hospitalization following hunger strike was voluntary, and hearing could be conducted without him. West's F.S.A. RCrP Rule 3.180(b).

4 Cases that cite this headnote

[12] **Criminal Law** ⇐ Consultation between accused or counsel and witnesses

Prosecution did not violate discovery rules by excluding defense from interview with witness listed on defense witness list that was merely copy of State's witness list, in absence of evidence that defense had good-faith intent to call that witness. West's F.S.A. RCrP Rule 3.220(b)(3).

[13] **Criminal Law** ⇐ Particular cases

Jury was not unduly prejudiced, and defendant was not denied fair trial, by trial court requirement that defendant wear leg shackles during trial, where requirement was intended to prevent possible harm to persons in courtroom and trial court had granted defense counsel's request to place table in front of defense table to hide those shackles.

5 Cases that cite this headnote

[14] **Criminal Law** ⇐ Fairness and justice in general

Determinations of whether substantial justice requires declaration of mistrial, and related questions involving juror conduct,

are lodged within sound discretion of trial court.

4 Cases that cite this headnote

[15] **Criminal Law** ⇐ Communications by or with jurors

Trial court's instruction which explained circumstances surrounding "strange" telephone call to husband of juror who was dismissed as result and assured jury that call had no connection with trial and that their telephone numbers were not made public was sufficient to cure any taint which may have resulted from jurors' knowledge of that call, in light of call's tenuous connection with trial.

1 Case that cites this headnote

[16] **Sentencing and Punishment** ⇐ Instructions

Trial court had no duty to instruct jury that life sentence could be imposed on defendant convicted of first-degree murder even in absence of mitigating circumstances.

1 Case that cites this headnote

[17] **Sentencing and Punishment** ⇐ Other offenses, charges, or misconduct

Details of prior felonies involving use or threat of violence are properly admitted in penalty phase of capital trial, and evidence inadmissible in guilt phase of that trial may be relevant and admissible in evaluating aggravating and mitigating circumstances.

2 Cases that cite this headnote

[18] **Sentencing and Punishment** ⇐ Escape or other obstruction of justice

Sentencing and Punishment ⇐ Witnesses

Finding that murder had been committed for purpose of avoiding lawful arrest was unsupported by evidence, in absence of showing that dominant or sole motive for that murder was elimination of witnesses.

[19] **Sentencing and Punishment** ⇐ Planning, premeditation, and calculation

Defendant's announcement of intention to commit murder and subsequent execution-style shooting sufficiently established cold, calculated, and premeditated murder with no pretense of moral or legal justification, and death penalty could be imposed in presence of three proper aggravating circumstances and absence of any mitigating circumstances. West's F.S.A. § 921.141(5)(i).

1 Case that cites this headnote

Attorneys and Law Firms

***156** James B. Gibson, Public Defender, and Brynn Newton, Asst. Public Defender, Daytona Beach, for appellant.

Jim Smith, Atty. Gen., and W. Brian Bayly, Asst. Atty. Gen., Daytona Beach, for appellee.

Opinion

ADKINS, Justice.

Donald William Dufour appeals his conviction of first-degree murder and the death sentence imposed. We have jurisdiction, article V, section 3(b)(1), Florida Constitution, and affirm both.

The evidence at trial established the following scenario. State witness Stacey Sigler, appellant's former girlfriend, testified that on the evening of September 4, 1982, the date of the murder, appellant announced his intention to find a homosexual, rob and kill him. He then requested that she drop him off at a nearby bar and await his call. About one hour later, appellant called Sigler and asked her to meet him at his brother's home. Upon her arrival, appellant was going through the trunk of a car she did not recognize, and wearing new jewelry. Both the car and the jewelry belonged to the victim.

Appellant had met the victim in the bar and driven with him to a nearby orange grove. There, appellant robbed the victim and shot him in the head and, from very close range, through the back. Telling Sigler that he had killed a man and left him in an orange grove, he abandoned the victim's car with her help.

According to witness Robert Taylor, a close associate of appellant's, appellant said that he had shot a homosexual from Tennessee in an orange grove with a .25 automatic and taken his car. Taylor, who testified that he had purchased from appellant a piece of the stolen jewelry, helped appellant disassemble a .25 automatic pistol and discard the pieces in a junkyard.

State witness Raymond Ryan, another associate of appellant's, also testified that appellant had told him of the killing, and that appellant had said "anybody hears my voice or sees my face has got to die." Noting appellant's possession of the jewelry, Ryan asked him what he had paid for it. Appellant responded "You couldn't afford it. It cost somebody a life." Ryan further testified that he had seen appellant and Taylor dismantle a .25 caliber pistol.

Henry Miller, the final key state's witness, testified as to information acquired from appellant while an inmate in an isolation cell next to appellant's. In return for immunity from several armed robbery charges, Miller testified that appellant had ***157** told him of the murder in some detail, and that appellant had attempted to procure through him witness Stacey Sigler's death for $5,000.

At the penalty phase of the trial, Taylor testified over objection to the details of a Mississippi murder for which appellant had been convicted of first-degree murder. The jurors unanimously recommended death and appellant was so sentenced.

Appellant urges that reversal of his conviction is warranted upon a number of grounds. First,

he contends that the trial court erred in denying his motion to suppress evidence seized during a search of his residence. The insufficiency of the affidavit supporting the warrant, it is argued, renders the warrant invalid and the fruits of the search inadmissible. An examination of the affidavit, however, leaves little doubt that it amply established the necessary probable cause.

The affidavit, sworn to by an Orange County detective, first indicated that the victim had been murdered with a .25 caliber pistol, and identified certain unique jewelry last seen on the victim's person. The heart of the affidavit centered upon the statement of Raymond Ryan. Ryan stated that appellant informed him that he had killed a person for his gold jewelry, and that he (Ryan) had seen some of this jewelry in the possession of appellant and Robert Taylor. Finally, Ryan indicated that appellant and Taylor "were very close friends and frequently visit each other's apartment, and have committed other crimes together," and that he had seen in Taylor's possession a .25 caliber automatic.

[1] Appellant initially argues that the weaknesses rendering the affidavits insufficient in *Yesnes v. State,* 440 So.2d 628 (Fla. 1st DCA 1983), and *King v. State,* 410 So.2d 586 (Fla. 2d DCA 1982), similarly inflict the instant affidavit. We disagree.

A crucial factor distinguishes the affidavits in *Yesnes* and *King* from the instant affidavit. In the first two cases, the affidavits were based on the substantially uncorroborated statements of shadowy and unknown confidential informants. The *Yesnes* court, for instance, applying the "totality of the circumstances" test set forth in *Illinois v. Gates,* 462 U.S. 213, 103 S.Ct. 2317, 76 L.Ed.2d 527 (1983), found the affadavit "totally lacking in facts sufficient to show the requisite veracity or reliability of the unnamed informants and the information supplied by them." 440 So.2d at 632. Here, the disclosure of the source of the information and the specificity of the facts disclosed, combined with the detective's independent investigation tending to corroborate Ryan's statements, manifestly established the probable cause justifying the search.

The weakness present in *King* is likewise absent in the instant affidavit. In that case, the confidential informant never indicated when he saw the illegal act—the defendant's possession of marijuana. The affidavit was therefore insufficient because the offense could have occurred years before; the magistrate was unable to determine any time limitations from the information before him.

The instant affidavit, however, dated October 11, 1982, indicated that the victim's body had been discovered on September 6, 1982. Additionally, Ryan alleged that he had seen Taylor in possession of the murder weapon within the past ten days. These factors amply served to provide for the magistrate a time frame in which to conclude that the jewelry and the handgun could well be contained in appellant's apartment.

[2] Appellant lodges his final attack on the affidavit under the authority of *Blue v. State,* 441 So.2d 165 (Fla. 3d DCA 1983). Such an argument is without merit. Contrary to appellant's assertions, the affidavit under these

circumstances required no explicit statement that the jewelry and gun could be located in appellant's apartment. Because the items could reasonably be presumed to be located either on the appellant's person or in his home, it was not arbitrary for the magistrate to make that determination. ***158** *Bastida v. Henderson,* 487 F.2d 860 (5th Cir.1973); *State v. Malone,* 288 So.2d 549 (Fla. 1st DCA 1974).

Appellant next argues that the testimony of Richard Miller, a fellow inmate during his incarceration after the murder, should have been suppressed under the authority of *United States v. Henry,* 447 U.S. 264, 100 S.Ct. 2183, 65 L.Ed.2d 115 (1980). Having reviewed *Henry* and the Court's more recent pronouncement in *Maine v. Moulton,* 474 U.S. 159, 106 S.Ct. 477, 88 L.Ed.2d 481 (1985), we find no such impermissible interference with appellant's sixth amendment right to counsel in this case, and reject this claim.

In *Henry,* the Court found an informant's testimony inadmissible when the informant, the defendant's cellmate, was approached by the police and instructed to "be alert" to any statement the defendant might make. The informant thereby became a government agent for the illicit purpose of obtaining incriminating statements from the accused in the absence of counsel. The Court, in applying *Massiah v. United States,* 377 U.S. 201, 84 S.Ct. 1199, 12 L.Ed.2d 246 (1964), and finding that Henry's right to counsel had been violated, essentially affirmed that the government would not be permitted to obtain by trickery or stealth incriminating evidence it could not have legitimately obtained. In analyzing whether the government had impermissibly "deliberately elicited" the information from the defendant through its informant, 447 U.S. at 272, 100 S.Ct. at 2187, the Court focused upon certain elements of the government/informant relationship: the government's initial contacting of the witness, known to have a history as a paid informant, its subsequent instructions to "be alert" to the defendant's statements, and the "contingent fee" arrangement providing for the witnesses' compensation. These elements indicated an orchestrated plan reflective of the government's intention to set the stage for an interference with Henry's right to the assistance of counsel.

In the subsequent *Moulton* decision, the court found that the state had "knowingly circumvented Moulton's right to have counsel present at a confrontation between Moulton and a police agent," 106 S.Ct. at 490, and so violated the defendant's sixth amendment rights. In spite of the opinion's fairly broad language equating the state's "knowing exploitation ... of an opportunity to confront the accused without counsel being present" with its "intentional creation of such an opportunity," 106 S.Ct. at 487, the Court found such "knowing exploitation" on fairly outrageous facts.

First, the individual acting as a government agent, Colson, was no mere cellmate of Moulton's. Rather, he was a codefendant, facing trial on the same charges as Moulton, and apparently aligned with Moulton against the state in the adversarial process. Upon reaching an agreement with the authorities, Colson used this position to uncover incriminating evidence which legitimately lay beyond the authorities' reach.

Secondly, although Colson originally approached the police, it was the latter who conceived and set into motion, albeit with Colson's consent, the flagrant violations of Moulton's rights which followed. The authorities first placed a recording device on Colson's telephone, with instructions to activate the device upon receiving either anonymous phone threats or calls from Moulton. By this means, three conversations were recorded between Colson and Moulton. In the third conversation, Moulton asked Colson to set aside an entire day so that the two of them could meet and plan their defense.

The authorities then obtained Colson's consent to be equipped with a body wire transmitter in order to monitor and record the meeting. Although the police acknowledged at trial their awareness that the two were meeting to discuss the charges on which they both had been indicted, Colson was instructed "not to attempt to question [Moulton], just be himself in the conversation." 106 S.Ct. at 481. At the meeting, the two discussed and planned their alibis, and so necessarily detailed the commission of various crimes. Through joking and ***159** pretensions of forgetfulness, Colson induced Moulton to repeatedly incriminate himself. Upon the admission into evidence of several portions of this tape, Moulson was convicted.

[3] We cannot find that either *Henry* or *Moulton* compel a finding that appellant's sixth amendment rights have been violated in this case. A review of the facts discloses no "stratagem deliberately designed to elicit an incriminating statement." *Miller v. State,* 415 So.2d 1262, 1263 (Fla.1982), *cert. denied,* 459 U.S. 1158, 103 S.Ct. 802, 74 L.Ed.2d 1005 (1983), quoting *Malone v. State,* 390 So.2d 338, 339 (Fla.1980), *cert. denied,* 450 U.S. 1034, 101 S.Ct. 1749, 68 L.Ed.2d 231 (1981). First, Miller approached the authorities on his own initiative, indicating scheming on his part rather than the government's. *Bottoson v. State,* 443 So.2d 962 (Fla.1983), *cert. denied,* 469 U.S. 873, 105 S.Ct. 223, 83 L.Ed.2d 153 (1984); *Barfield v. State,* 402 So.2d 377 (Fla.1981).

We affirm the vitality of this factor in a sixth amendment right to counsel analysis, noting that the *Moulton* Court's statement that "the identity of the party who instigated the meeting at which the Government obtained incriminating statements was not decisive or even important to our decisions in *Massiah* or *Henry,*" 106 S.Ct. at 486–87, refers to the initiation of contact between the accused and the agent, rather than the agent and the government. In *Henry,* in fact, a crucial element of the state's intentional creation of a situation likely to induce Henry to make incriminating statements involved its initial contacting of the agent and its subsequent instructions to "be alert" to Henry's statements.

Finally, we cannot find the "knowing exploitation" forbidden by *Moulton* in the absence of more action on the state's behalf tending to indicate a deliberate elicitation of incriminating information. After approaching authorities with information of appellant's planned escape attempt, Miller was neither encouraged nor discouraged from obtaining further information. As we held in *Johnson v. State,* 438 So.2d 774, 776 (Fla.1983), *cert. denied,* 465 U.S. 1051, 104 S.Ct. 1329, 79 L.Ed.2d 724 (1984), "*Henry* and *Malone* do

not impose on the police an affirmative duty to tell an informer to stop talking and not approach them again nor do they require that informers be segregated from the rest of a jail's population." We find no violation of appellant's right to counsel.

[4] In his third argument on appeal, appellant contends that the trial court erred in denying several motions for mistrial. Principally, appellant contends that the prosecutor's mention in his opening argument of Miller's anticipated testimony concerning appellant's escape attempt introduced to the jury irrelevant collateral crime evidence. In light of our holding above as to the admissibility of Miller's testimony, we disagree. The testimony was relevant and admissible as defining the relationship between the state's witness and appellant. *Yesbick v. State,* 408 So.2d 1083 (Fla. 4th DCA), *review denied,* 417 So.2d 331 (Fla.1982). Appellant's several other motions for mistrial similarly lack merit.

Appellant next contends that the trial court abused its discretion in limiting the cross-examination of state witness Robert Taylor. Taylor, appellant's co-defendant in a Mississippi murder prosecution, awaited trial on murder charges in Georgia at the time he testified in appellant's trial. Prior to trial, the state filed several motions *in limine* seeking to limit the scope of cross-examination of Taylor. The trial court granted two of these motions, prohibiting the defense from asking Taylor any questions in response to which he could be expected to exercise his right against self-incrimination, and from mentioning Taylor's confession to an Orange County sheriff of a number of crimes.

[5] We cannot find that the trial court abused its discretion in either respect. In granting the first motion, the court did not prohibit the defense from impeaching the witness regarding the murder charge. Rather, it prohibited the defense from delving ***160** into the facts of a pending case. The jury learned of the charges, and that Taylor hoped to have the state attorney intervene on his behalf at the trial. Because the essence of the witnesses' bias was established through direct and cross-examination, we can find no error in the trial court's "preventing the cross-examination from ... becoming, under the guise of impeachment, a general attack on the character of the witness." *Steinhorst v. State,* 412 So.2d 332, 338 (Fla.1982).

[6] Similarly, we find the exclusion of the Orange County "confessions" proper. The state's uncontradicted motion established that Taylor "confessed" to a series of unsolved crimes on which the state had insufficient evidence to prosecute, thus clearing the police files in return for a promise not to forward the cases to the state attorney for prosecution. Since the jury was adequately exposed to Taylor's extensive felony record and his tendency to bargain with the state, no need existed for further cross-examination, especially upon such a flimsy foundation.

[7] **[8]** Appellant next argues that the trial court erred in allowing witness Detective Hansen to read into evidence portions of a statement made by Taylor in 1982, under section 90.801(2)(b), Florida Statutes (1983), as prior consistent testimony tending to rebut implications of improper motive or recent fabrication. While noting that a witnesses'

testimony may not ordinarily be bolstered with corroboration with his own prior consistent statements, *Van Gallon v. State,* 50 So.2d 882 (Fla.1951); *McElveen v. State,* 415 So.2d 746 (Fla. 1st DCA 1982), we find that the statements in this case fall within the rule's narrowly drafted terms and were properly admitted. First, through its references in cross-examination to Taylor's negotiations with the state attorney's office involving armed robbery charges, the defense adequately impeached the witnesses' credibility, raising the specters of both improper motive and recent fabrication. Because, too, the statement in question was made at the time of Taylor's arrest in October 1982, prior to the robbery plea negotiations, *Wilson v. State,* 434 So.2d 59 (Fla. 1st DCA 1983), and the actual filing of the Georgia murder charge, the trial court could properly have found that the statement was made prior to the existence of Taylor's motive to fabricate.

[9] In his sixth point on appeal, appellant argues that a mistrial was required after certain comments in the prosecutor's closing argument impermissibly directed the jurors' attention to appellant's failure to take the stand. Fla.R.Crim.P. 3.250. An examination of the statements in question and the context from which they arose, however, leads us to conclude that the statements directed the jury's attention to defense counsel and the evidence presented rather than to appellant's failure to testify. First, in the context of reviewing the bargain that witness Miller had struck with the state in exchange for his testimony, the prosecutor said:

> Nobody has come here and said, Mr. Miller's testimony was wrong, or incorrect, or that that was not the deal he was offered.

Far from commenting on appellant's failure to testify, we find that an examination of the statement in context makes clear that "Mr. Miller's testimony" refers only to his testimony on his negotiations with law enforcement authorities. As such, the statement merely permissibly commented on the evidence. *United States v. Fogg,* 652 F.2d 551 (5th Cir.1981), *cert. denied,* 456 U.S. 905, 102 S.Ct. 1751, 72 L.Ed.2d 162 (1982); *State v. Bolton,* 383 So.2d 924 (Fla. 2d DCA 1980).

[10] Second, we find that the prosecutor's statement to the jury that "[Y]ou haven't, number one, heard any evidence that Donald Dufour had any legal papers in the cell with him" merely rebutted the statement of the defense in its closing argument hinting that witness Miller had access to and could have based his testimony upon appellant's "legal papers." This comment merely referred to the lack of any evidence on the question, *White v. State,* 377 So.2d 1149 (Fla.1979), and fell into the category of an "invited response" by the ***161** preceding argument of defense counsel concerning the same subject. *State v. Mathis,* 278 So.2d 280 (Fla.1973). The trial court thus acted properly in denying these motions for mistrial.

[11] Appellant next argues that the trial court committed reversible error in finding appellant's absence at a pretrial motions hearing voluntary and conducting it in his absence. Although appellant would liken the facts of the instant case to the absence found reversible in *Francis v. State,* 413 So.2d 1175 (Fla.1982), we agree with the state that appellant voluntarily absented himself from the proceeding within the terms of Florida Rule of Criminal Procedure 3.180(b) by embarking on a "hunger strike"

culminating in his hospitalization during the hearing. The trial court acted well within its discretion in so ruling.

Next, appellant challenges the trial court's denial of his motions for a continuance. Finding that the requisite showing of a palpable abuse of the court's discretion in so ruling has not been made, *Jent v. State,* 408 So.2d 1024 (Fla.1981), *cert. denied,* 457 U.S. 1111, 102 S.Ct. 2916, 73 L.Ed.2d 1322 (1982); *Magill v. State,* 386 So.2d 1188 (Fla.1980), *cert. denied,* 450 U.S. 927, 101 S.Ct. 1384, 67 L.Ed.2d 359 (1981), we reject this claim.

In his ninth point on appeal, appellant contends that the trial court erred in declining to impose sanctions for an alleged violation by the prosecution of the provisions of Florida Rule of Criminal Procedure 3.220(b)(3). We must first examine the rule's terms to ascertain whether or not any violation occurred below, and, if so, whether any prejudice accrued therefrom to the appellant. *James v. State,* 453 So.2d 786, 790 (Fla.1984), *cert. denied,* 469 U.S. 1098, 105 S.Ct. 608, 83 L.Ed.2d 717 (1984).

Rule 3.220 sets forth the respective rights and obligations of the parties concerning discovery in the criminal context. Section (b)(3) of the rule indicates that if the defense has chosen to demand of the state a list of the latter's witnesses, it must, within seven days of the receipt of that list, furnish to the state a list of its expected witnesses. At that point, the rule limits the prosecution's otherwise plenary power to subpoena witnesses and take ex parte testimony as to any violation of the criminal law within its jurisdiction. *Able Builders Sanitation Co. v. State,* 368 So.2d 1340 (Fla. 3d DCA), *dismissed,* 373 So.2d 461 (1979); § 27.04, Fla.Stat. (1985). After receiving the defense witness list, the prosecutor may not subpoena any individual on that list without notifying defense counsel and allowing them to attend the interview and examine the witness.

The alleged violation below involved witness Stacey Sigler. Sigler was originally listed on the state's witness list provided to the defense under rule 3.220(a)(1)(i). The defense merely duplicated this list and submitted it as its own, thereby attempting to force the requirement of notice and the right to attend any meeting between Sigler and the prosecution. Relying on dictum in *State v. Barreiro,* 432 So.2d 138, 140 n. 5 (Fla. 3d DCA 1983), *review denied,* 441 So.2d 631 (1983), which indicated that "[i]f defense counsel wants to protect against the state's ex parte examination of a witness, he can do so by furnishing the witness's name on his list of defense witnesses," the defense attempted to gain, and was denied, admission to an interview between Sigler and the state's attorney. The defense subsequently moved for dismissal of the indictment or the exclusion of Sigler's testimony as sanctions for the state's behavior in excluding the defense from the interview.

[12] Because we find that no violation of the discovery rules took place below, we approve the trial court's refusal to impose any sanctions. Appellant's construction of the discovery provisions is overbroad and would cut the rule loose from its logical moorings. It is not enough to merely duplicate the list of state's witnesses and thus transform Sigler into a witness "whom the defense counsel expects

to call as [a witness] at the trial or hearing." Fla.R.Crim.P. 3.220(b)(3).

***162** No indication exists that defense counsel, in good faith, intended to call Sigler as a witness. In fact, because Sigler proclaimed ignorance of the crime until the meeting complained of, she apparently lacked the requisite personal knowledge required of a witness. Application of the rule's provisions to the instant facts, as urged by appellant, would frustrate the purpose underlying the rule. When properly applied, rule 3.220(b)(3) serves the protective purpose of preventing the state from driving an unfair wedge between defense counsel and its key witnesses, through ex parte examination, during sensitive pretrial stages. It is not intended to inhibit the prosecution's power to prepare its case by disallowing all ex parte communication with its witnesses.

We disapprove of tactics such as those employed by the defense below, because the inclusion of an unwarranted abundance of names on the defense witness list can ultimately only dilute the rule's protective power. The defense is certainly not prohibited from listing as its own those witnesses already listed by the state, but it must do so conscientiously, naming only those it actually expects to call. Otherwise, by attempting to use the rule as a sword, rather than the shield it is intended to be, the defense risks losing any protection which that shield might have offered.

The court additionally rejected the application of rule 3.220(b)(3) because it found, under the circumstances, that Sigler approached the prosecutor voluntarily. In spite of the initial subpoena, the court found that Sigler had approached the authorities, on the advice of her attorney, in order to negotiate for immunity. Noting that the interview took place two days after the subpoena date, the court found her approach voluntary and the rule inapplicable.

Because we cannot disagree that Sigler was improperly listed as a defense witness, and that her testimony was given voluntarily, we approve of the trial court's refusal to impose sanctions. *Mobley v. State,* 327 So.2d 900 (Fla. 3d DCA 1976), *cert. denied,* 341 So.2d 292 (Fla.1976).

Appellant next argues that the trial court's forcing him to wear leg shackles during the trial led to undue jury prejudice and violated his fundamental right to a fair trial by vitiating his right to a presumption of innocence. Appellant cites *Estelle v. Williams,* 425 U.S. 501, 96 S.Ct. 1691, 48 L.Ed.2d 126 (1976), for the principle that forcing a defendant to face trial in prison garb impermissibly risks an impairment of his presumption of innocence. In *Estelle,* however, the Court cited *Illinois v. Allen,* 397 U.S. 337, 90 S.Ct. 1057, 25 L.Ed.2d 353 (1970), in which the Court upheld the practice of shackling the defendant when necessary to control a contumacious defendant, and noted that in some circumstances physical restraints may further an essential state policy. 425 U.S. at 505, 96 S.Ct. at 1693.

The court below found the shackles necessary in view of appellant's planned escape attempt from the Orange County jail and his conviction of two murders in Mississippi and subsequent placement on death row. The court explained that while "if he tried to escape he would be

unsuccessful ... someone may be hurt. I don't want that to occur."

[13] The court did attempt to minimize any prejudice accruing to appellant by granting defense counsel's request to place a table in front of the defense table in order to hide the leg shackles. Under these circumstances, and from the lofty stance of appellate review, we will not second-guess the considered decision of the trial judge. We therefore reject appellant's claim.

In his eleventh point on appeal, appellant contends that the trial court erred in denying appellant's motion for mistrial after the jury learned that one juror had received a "strange" phone call and been dismissed. The caller dialed the number, asked if "Mr. Girdner", the juror's husband—not the juror—was in, and hung up. Although the phone call could not be linked to the trial in any sense, the trial court, pursuant to defense ***163** counsel's urgings, in an "abundance of caution" dismissed the juror from service immediately prior to closing arguments.

Contrary to the court's instruction, the dismissed juror mentioned the phone call to other members of the jury. The court then called the jury in, explained the circumstances surrounding the call and the juror's dismissal, and assured the jury that the call had no connection with the trial and that their phone numbers were not made public. Finally, the court determined that the jurors had no reservations about their further service.

[14] **[15]** Determinations of whether substantial justice requires a mistrial and related questions involving juror conduct are both lodged within the sound discretion of the trial court. *Doyle v. State,* 460 So.2d 353 (Fla.1984). In light of the tenuous connection between the trial and the call, the court's instruction to the jury was sufficient to cure any taint which may have resulted from the jurors' knowledge of the call. *Clark v. State,* 443 So.2d 973 (Fla.1983), *cert. denied,* 467 U.S. 1210, 104 S.Ct. 2400, 81 L.Ed.2d 356 (1984); *State v. Tresvant,* 359 So.2d 524 (Fla. 3d DCA 1978), *cert. denied,* 368 So.2d 375 (1979). We therefore reject appellant's contention.

[16] We now reach appellant's claims as to error in the sentencing portion of the proceeding. First, appellant argues that the trial court erred in denying his proposed special instructions on the jury's sentencing recommendation. We cannot find the court's refusal to deviate from the standard jury instructions improper, as the court had no duty to instruct the jury that a life sentence could be imposed even in the absence of any mitigating circumstances. In fact, we recently rejected such a contention in *Kennedy v. State,* 455 So.2d 351 (Fla.1984), *cert. denied,* 469 U.S. 1197, 105 S.Ct. 981, 83 L.Ed.2d 983 (1985).

[17] Next, appellant argues that the trial court erred in admitting into evidence during the penalty phase extensive details of an earlier murder he had committed in Mississippi. While appellant acknowledges that details of prior felonies involving the use or threat of violence to the person are properly admitted in the penalty phase of a capital trial, and that evidence inadmissible in the guilt phase may be relevant and admissible in evaluating aggravating and mitigating circumstances,

Perri v. State, 441 So.2d 606 (Fla.1983); *Alvord v. State,* 322 So.2d 533 (Fla.1975), *cert. denied,* 428 U.S. 923, 96 S.Ct. 3234, 49 L.Ed.2d 1226 (1976), he contends that the trial court here "went too far." We find this argument meritless. *Justus v. State,* 438 So.2d 358 (Fla.1983), *cert. denied,* 465 U.S. 1052, 104 S.Ct. 1332, 79 L.Ed.2d 726 (1984); *Delap v. State,* 440 So.2d 1242 (Fla.1983), *cert. denied,* 467 U.S. 1264, 104 S.Ct. 3559, 82 L.Ed.2d 860 (1984).

In his fourteenth point on appeal, appellant argues that the trial court erred in denying his motion to strike death as a possible penalty because the charging indictment had failed to allege the aggravating factors possibly subjecting him to the death penalty. We reject this argument once again. *Hitchcock v. State,* 413 So.2d 741 (Fla.), *cert. denied,* 459 U.S. 960, 103 S.Ct. 274, 74 L.Ed.2d 213 (1982); *Sireci v. State,* 399 So.2d 964 (Fla.1981), *cert. denied,* 456 U.S. 984, 102 S.Ct. 2257, 72 L.Ed.2d 862 (1982).

[18] Appellant next argues that the trial court erred in finding that two of the aggravating factors found were proven beyond a reasonable doubt. First, we agree that the court erroneously found that the murder had been committed for the purpose of avoiding a lawful arrest, section 921.141(5)(e), Florida Statutes (1981), since the evidence failed to establish the requisite proof of an intent to avoid arrest or detection through the killing. No showing was made that the dominant or sole motive for the murder was the elimination of witnesses. *Bates v. State,* 465 So.2d 490 (Fla.1985); *Riley v. State,* 366 So.2d 19 (Fla.1978), *cert. denied,* 459 U.S. 981, 103 S.Ct. 317, 74 L.Ed.2d 294 (1982).

***164 [19]** We affirm the trial court's finding, however, that appellant's announcement of his intention to commit a murder and the subsequent execution-style shooting sufficiently established a cold, calculated and premeditated murder with no pretense of any moral or legal justification. § 921.141(5)(i), Fla.Stat. (1981). Because the court below found three proper aggravating and no mitigating circumstances, the result it reached, in spite of the error as to one factor, was correct and the death penalty properly imposed. *Harmon v. State,* 438 So.2d 369 (Fla.1983); *State v. Dixon,* 283 So.2d 1 (Fla.1973), *cert. denied,* 416 U.S. 943, 94 S.Ct. 1950, 40 L.Ed.2d 295 (1974).

Finally, appellant raises a number of claims attacking the constitutionality of Florida's capital sentencing statute which he acknowledges this Court has rejected in the past. *Ferguson v. State,* 417 So.2d 639 (Fla.1982); *Lewis v. State,* 398 So.2d 432 (Fla.1981). We do so again.

Upon our independent review of the evidence as required by Florida Rule of Appellate Procedure 9.140(f), we have found no insufficiency thereof. Finding no reversible error in either the guilt or penalty phases of appellant's trial, we affirm both the conviction and sentence imposed.

It is so ordered.

McDONALD, C.J., and BOYD, EHRLICH and SHAW, JJ., concur.

OVERTON, J., concurs in result only in the conviction, and concurs with the sentence.

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