

**UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
FORT MYERS DIVISION**

ADAM MURRAY COSTELLO,
Petitioner,

Case No.: 2:25-cv-74-JLB-NPM

vs.

SECRETARY, DEPARTMENT OF
CORRECTIONS,
Respondent.

_____ /

EXHIBIT 1

**LEE**
COUNTY**KEVIN KARNES**
CLERK OF THE CIRCUIT COURT & COMPTROLLER**FLORIDA'S CLERKS OF COURT
AND COMPTROLLERS****ccis** Bring You
COMPREHENSIVE CASE
INFORMATION SYSTEM

NichelD

Expand All

Case Number	Filed Date	Disposition Date	County	Case Type	Status	Contested
362016CF000371000ACH [16-CF-000371]	09/02/2016	03/12/2018	LEE	Adult - Felony	Reopened Case Closed	No

Charge Seq #	Description	Date	Phase	Trial
1	LEAVING THE SCENE OF A CRASH - DEATH	03/12/2018	Court:Adjudicated Guilty	No Trial
2	Tampering With or Fabricating Physical Evidence	03/12/2018	Court:Adjudicated Guilty	No Trial

Party Name	Party Type	Attorney	Bar ID
STEINBECK, MARGARET OGILVIE	JUDGE		
STEINBECK, MARGARET OGILVIE	JUDGE AT DISPOSITION		
STATE OF FLORIDA	STATE ATTORNEY		
COSTELLO, ADAM MURRAY Search This Party	DEFENDANT		
court	FILED AS		

Dockets

Page : 1

ALL

Image	Doc #	Action Date	Description	Pages
	214	12/03/2024	Order from 6th DCA Filed	
	213	12/02/2024	Mandate Affirmed Filed	2
	212	10/28/2024	Order from 6th DCA Filed	1
	211	09/17/2024	Order from 6th DCA Filed	1
	210	02/19/2024	Order from 6th DCA Filed	1
	209	12/08/2023	Order from 6th DCA Filed	1
	208	10/12/2023	Order from 6th DCA Filed	1
	207	07/06/2023	Evidence Custody Form Filed	1
	205	06/02/2023	Record on Appeal Sent to Attorney General	
	206	06/02/2023	Record on Appeal Sent to 6th DCA	
	204	06/02/2023	Transcript of Record - Index of Appeal Filed	21
	203	06/01/2023	Evidence Custody Form Filed	1
	202	04/19/2023	Acknowledgment of New Case - Appeal Filed	1
	201	04/17/2023	Notice of Appeal Sent to 6th DCA	
	195	04/12/2023	Notice of Appeal to District Court Filed	1
	196	04/12/2023	Directions to Clerk Filed	2
	197	04/12/2023	Directions to Clerk Filed	2
	198	04/12/2023	Designation to Court Reporter Filed	1
	199	04/10/2023	Notice of Filing Filed	1
	200	04/10/2023	Transcript Filed	58
	194	03/16/2023	Order Denying Motion for Post-Conviction Relief Filed	99
	192	02/15/2023	Record of Exhibit List Filed	1
	193	02/15/2023	Record of Exhibit List Filed	1
	190	02/14/2023	Court Minutes Filed	4
	189	02/14/2023	Present With Attorney	
	191	02/14/2023	Motion Hearing Withdraw Plea- Reserve Ruling	
	188	12/16/2022	Order to Transport Filed	2
	186	12/15/2022	Notice of Hearing Filed	1
	187	12/15/2022	Motion to Transport Filed	2
	185	12/09/2022	Order on Motion	4
	184	12/05/2022	Motion Filed	3
	183	05/16/2022	Reply Filed	7
	182	05/11/2022	State Response to Motion Filed	69
	181	03/17/2022	Order Directing State to Respond Filed	1
	180	03/03/2022	Motion to Withdraw Plea Filed	11
	179	01/18/2022	Mandate Reversed and Remanded Filed	6
	178	01/05/2022	Order Filed	1
	177	12/22/2021	Order from 6th DCA Filed	1
	176	08/03/2021	Order from 6th DCA Filed	1
	175	06/11/2021	Order from 6th DCA Filed	1
	173	05/12/2021	Order from 6th DCA Filed	1
	174	05/12/2021	Acknowledgment of New Case - Appeal Filed	1
	170	05/11/2021	Transcript of Record - Index of Appeal Filed	19
	169	05/11/2021	Notice of Appeal Sent to 6th DCA	
	171	05/11/2021	Record on Appeal Sent to Attorney General	



Image	Doc #	Action Date	Description	Page
	172	05/11/2021	Record on Appeal Sent to 6th DCA	
	166	05/10/2021	Notice of Appeal to District Court Filed	1
	167	05/10/2021	Directions to Clerk Filed	2
	168	05/10/2021	Designation to Court Reporter Filed	1
	165	04/19/2021	Order Denying Motion for Post-Conviction Relief Filed	3
	164	03/01/2021	Motion Filed	3
	163	09/17/2020	Objection Filed	1
	162	09/14/2020	Reply Filed	7
	161	09/09/2020	State Response to Motion Filed	5
	159	08/10/2020	Transcript of Proceedings Filed	47
	160	08/10/2020	Notice of Filing Filed	1
	158	07/14/2020	Order Directing SAO to Respond to 3.850 Motion Filed	2
	156	03/05/2020	Limited Notice Of Appearance Filed	1
	157	03/05/2020	Motion for Post-Conviction Relief Filed	10
	154	07/02/2018	Court Minutes Filed	3
	155	07/02/2018	Order Granting Motion Filed	1
	152	07/02/2018	Present With Attorney	
	153	07/02/2018	Motion Hearing M/to return property - granted	
	150	05/10/2018	Notice of Hearing Filed	1
	151	05/10/2018	Notice of Hearing Filed	1
	149	05/08/2018	Motion for Return of Property Filed	2
	148	03/26/2018	Record of Exhibit List Filed	1
	146	03/19/2018	Sentence & Judgment Recorded and Filed	8
	147	03/19/2018	Uniform Commitment to Custody Filed	1
	139	03/15/2018	Bond Returned to Depositor/Bondsman	
	140	03/15/2018	Bond Returned to Depositor/Bondsman	
	136	03/13/2018	Remand Booking Report Filed	2
	137	03/12/2018	Final Disposition Filed	3
	145	03/12/2018	Final Disposition Filed	3
	130	03/12/2018	Amended Information and Notice to Clerk Filed	4
	131	03/12/2018	Criminal Punishment Code Scoresheet Filed	4
	132	03/12/2018	Credit for Time Served Worksheet Filed	1
	133	03/12/2018	Plea Agreement Between State and Defense Filed	4
	134	03/12/2018	Amended Information and Notice to Clerk Filed	4
	135	03/12/2018	Fingerprints Taken Filed	1
	143	03/12/2018	Present With Attorney	
	144	03/12/2018	Pre-Sentence Investigation Waived	
	127	02/27/2018	Notice of Appearance to Bondsman Mailed & Filed	1
	129	02/26/2018	Court Minutes Filed	3
	128	02/26/2018	Present With Attorney	
	126	02/21/2018	Notice of Appearance to Bondsman Mailed & Filed	1
	125	02/20/2018	Notice of Appearance to Bondsman Mailed & Filed	1
	121	02/16/2018	Subpoena(s) Returned and Filed	1
	122	02/16/2018	Subpoena(s) Returned and Filed	1
	123	02/16/2018	Subpoena(s) Returned and Filed	1
	124	02/16/2018	Subpoena(s) Returned and Filed	1
	117	02/15/2018	Subpoena(s) Returned and Filed	1
	118	02/15/2018	Subpoena(s) Returned and Filed	1
	119	02/15/2018	Subpoena(s) Returned and Filed	1
	120	02/15/2018	Subpoena(s) Returned and Filed	1
	105	02/07/2018	Subpoena(s) Returned and Filed	1
	106	02/07/2018	Subpoena(s) Returned and Filed	1
	107	02/07/2018	Subpoena(s) Returned and Filed	1
	108	02/07/2018	Subpoena(s) Returned and Filed	1
	109	02/07/2018	Subpoena(s) Returned and Filed	1
	110	02/07/2018	Subpoena(s) Returned and Filed	1
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	115	02/07/2018	Subpoena(s) Returned and Filed	1
	116	02/07/2018	Subpoena(s) Returned and Filed	1
	98	01/26/2018	Subpoena(s) Returned and Filed	1
	99	01/26/2018	Subpoena(s) Returned and Filed	1
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	102	01/26/2018	Subpoena(s) Returned and Filed	1
	103	01/26/2018	Subpoena(s) Returned and Filed	1

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Image	Doc #	Action Date	Description	Page
	104	01/26/2018	Subpoena(s) Returned and Filed	1
	93	01/26/2018	Subpoena(s) Returned and Filed	1
	94	01/26/2018	Subpoena(s) Returned and Filed	1
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	96	01/26/2018	Subpoena(s) Returned and Filed	1
	97	01/26/2018	Subpoena(s) Returned and Filed	1
	92	01/25/2018	Notice of Appearance to Bondsman Mailed & Filed	1
	89	01/22/2018	Subpoena(s) Returned and Filed	1
	91	01/18/2018	Court Minutes Filed	3
	90	01/18/2018	Present With Attorney	
	88	01/16/2018	Notice of Discovery (Supplemental) Filed	1
	86	01/11/2018	Answer to Demand for Discovery (Amended) Filed	1
	87	01/11/2018	Notice of Discovery (Supplemental) Filed	2
	71	12/07/2017	Subpoena(s) Returned and Filed	1
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	77	12/07/2017	Subpoena(s) Returned and Filed	1
	78	12/07/2017	Subpoena(s) Returned and Filed	1
	79	12/07/2017	Subpoena(s) Returned and Filed	1
	80	12/07/2017	Subpoena(s) Returned and Filed	1
	81	12/07/2017	Subpoena(s) Returned and Filed	1
	82	12/07/2017	Subpoena(s) Returned and Filed	1
	83	12/07/2017	Subpoena(s) Returned and Filed	1
	84	12/07/2017	Notice of Intent to Offer Certified Business Records Filed	2
	85	12/07/2017	Notice of Discovery (Supplemental) Filed	1
	69	12/06/2017	Notice of Taking Deposition Filed	2
	70	12/06/2017	Notice of Taking Deposition Filed	2
	68	12/05/2017	Subpoena(s) Returned and Filed	1
	67	12/01/2017	Notice of Appearance to Bondsman Mailed & Filed	1
	62	11/28/2017	Notice of Appearance to Bondsman Mailed & Filed	1
	64	11/28/2017	Court Minutes Filed	3
	66	11/28/2017	Court Minutes Filed	3
	65	11/28/2017	Present By Attorney	
	63	11/27/2017	Present With Attorney	
	59	11/21/2017	Order Denying Motion Filed	3
	60	11/21/2017	Order Filed	1
	61	11/20/2017	Answer to Demand for Discovery (Amended) Filed	2
	57	11/17/2017	Notice of Discovery (Supplemental) Filed	1
	58	11/17/2017	Notice of Discovery (Supplemental) Filed	1
	56	11/16/2017	Notice of Discovery (Supplemental) Filed	1
	54	11/07/2017	Notice of Appearance to Bondsman Mailed & Filed	1
	55	11/07/2017	Notice of Appearance to Bondsman Mailed & Filed	1
	51	11/02/2017	Answer to Demand for Discovery (Amended) Filed	2
	52	11/02/2017	Notice of Discovery (Supplemental) Filed	1
	53	11/02/2017	Pretrial Conference Order Filed	1
	50	10/31/2017	Amended Witness List Filed	2
	49	10/25/2017	Notice of Discovery (Supplemental) Filed	1
	48	10/20/2017	Notice of Discovery (Supplemental) Filed	1
	47	10/18/2017	Amended Information and Notice to Clerk Filed	4
	46	10/10/2017	Amended Notice of Taking Deposition(s) Filed	2
	45	09/29/2017	Notice of Taking Deposition Filed	2
	17	09/27/2017	Subpoena(s) Returned and Filed	1
	18	09/27/2017	Subpoena(s) Returned and Filed	1
	19	09/27/2017	Subpoena(s) Returned and Filed	1
	20	09/27/2017	Subpoena(s) Returned and Filed	1
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	22	09/27/2017	Subpoena(s) Returned and Filed	1
	23	09/27/2017	Subpoena(s) Returned and Filed	1
	24	09/27/2017	Subpoena(s) Returned and Filed	1
	25	09/27/2017	Subpoena(s) Returned and Filed	1
	26	09/27/2017	Subpoena(s) Returned and Filed	1
	27	09/27/2017	Subpoena(s) Returned and Filed	1
	28	09/27/2017	Subpoena(s) Returned and Filed	1
	29	09/27/2017	Subpoena(s) Returned and Filed	1

Image	Doc #	Action Date	Description	Page
	30	09/27/2017	Subpoena(s) Returned and Filed	1
	31	09/27/2017	Subpoena(s) Returned and Filed	1
	32	09/27/2017	Subpoena(s) Returned and Filed	1
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	40	09/27/2017	Subpoena(s) Returned and Filed	1
	41	09/27/2017	Subpoena(s) Returned and Filed	1
	42	09/27/2017	Subpoena(s) Returned and Filed	1
	43	09/27/2017	Subpoena(s) Returned and Filed	1
	44	09/26/2017	Pretrial Conference Order Filed	1
	16	09/26/2017	Amended Witness List Filed	2
	9	09/19/2017	Order Filed	1
	10	09/19/2017	Order Filed	1
	11	09/19/2017	Order Denying Motion to Suppress Filed	1
	12	09/19/2017	Order Granting Motion Filed	1
	13	09/19/2017	Order Granting Motion Filed	1
	14	09/19/2017	Order Granting Motion Filed	1
	15	09/19/2017	Order Filed	1
	8	09/01/2017	Notice of Filing Filed	2
	7	08/31/2017	Notice of Taking Deposition Filed	2
	5	08/30/2017	Notice of Intent to Offer Certified Business Records Filed	2
	6	08/30/2017	Notice of Filing Filed	2
	1	08/30/2017	Record of Exhibit List Filed	1
	4	08/29/2017	Court Minutes Filed	3
	2	08/29/2017	Present With Attorney	
	3	08/29/2017	Motion Hearing Granted in Part; Denied in Part	
		08/24/2017	Notice of Taking Deposition Filed	2
		08/09/2017	Notice of Taking Deposition Filed	2
		08/04/2017	Notice of Appearance to Bondsman Mailed & Filed	1
		08/02/2017	Answer to Demand for Discovery (Amended) Filed	2
		07/31/2017	Pretrial Conference Order Filed	1
		07/28/2017	Answer to Demand for Discovery (Amended) Filed	2
		07/19/2017	Subpoena(s) Returned and Filed	1
		07/19/2017	Subpoena(s) Returned and Filed	1
		07/19/2017	Subpoena(s) Returned and Filed	1
		07/19/2017	Subpoena(s) Returned and Filed	1
		07/19/2017	Subpoena(s) Returned and Filed	1
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		07/19/2017	Subpoena(s) Returned and Filed	1
		07/19/2017	Subpoena(s) Returned and Filed	1
		07/17/2017	Answer to Demand for Discovery (Amended) Filed	2
		07/06/2017	Subpoena(s) Returned and Filed	1

Image	Doc #	Action	Date	Description	Page
			07/06/2017	Subpoena(s) Returned and Filed	1
			06/28/2017	Notice of Hearing Filed	1
			06/28/2017	Notice of Appearance to Bondsman Mailed & Filed	1
			06/27/2017	Notice of Similar Fact Evidence (Williams Rule) Filed	2
			06/27/2017	Notice of Hearing Filed	2
			06/26/2017	Notice of Discovery (Supplemental) Filed	1
			06/23/2017	Notice of Appearance to Bondsman Mailed & Filed	1
			06/20/2017	Case Management Conference Order Filed	1
			06/19/2017	Amended Witness List Filed	2
			06/16/2017	Motion to Suppress Filed	5
			06/16/2017	Motion to Suppress Statement Filed	5
			06/16/2017	Witness List Filed	2
			06/16/2017	Motion in Limine Filed	2
			06/16/2017	Motion in Limine Filed	2
			06/16/2017	Motion in Limine Filed	2
			06/16/2017	Motion in Limine Filed	2
			06/16/2017	Motion in Limine Filed	2
			06/16/2017	Motion in Limine Filed	3
			05/25/2017	Amended Notice of Taking Deposition(s) Filed	2
			05/24/2017	Answer to Demand for Discovery (Amended) Filed	2
			05/24/2017	Answer to Demand for Discovery (Amended) Filed	2
			05/23/2017	Notice of Taking Deposition Filed	2
			05/23/2017	Notice of Taking Deposition Filed	2
			05/12/2017	Notice of Appearance to Bondsman Mailed & Filed	1
			05/10/2017	Amended Information and Notice to Clerk Filed	4
			05/10/2017	Pretrial Conference Order Filed	1
			05/03/2017	Notice of Appearance to Bondsman Mailed & Filed	1
			04/28/2017	Order to Continue Filed	2
			04/19/2017	Notice of Discovery (Supplemental) Filed	1
			04/19/2017	Notice of Taking Deposition Filed	2
			04/18/2017	Notice of Discovery (Supplemental) Filed	2
			03/08/2017	Notice of Discovery (Supplemental) Filed	1
			03/02/2017	Answer to Demand for Discovery (Amended) Filed	2
			02/27/2017	Answer to Demand for Discovery (Amended) Filed	2
			02/15/2017	Amended Notice of Taking Deposition(s) Filed	2
			02/15/2017	Amended Notice of Taking Deposition(s) Filed	2
			01/30/2017	Notice of Appearance to Bondsman Mailed & Filed	1
			01/26/2017	Case Management Conference Order Filed	1
			01/17/2017	Notice of Taking Deposition Filed	2
			01/17/2017	Notice of Taking Deposition Filed	2
			01/06/2017	Notice of Taking Deposition Filed	2
			01/06/2017	Notice of Taking Deposition Filed	2
			11/21/2016	Notice of Appearance to Bondsman Mailed & Filed	1
			11/16/2016	Amended Information and Notice to Clerk Filed	4
			11/16/2016	Case Management Conference Order Filed	1
			11/16/2016	Speedy Trial Waived	
			10/31/2016	Stip for Substitution of Counsel and Order Granting Filed	3
			10/27/2016	Not of Appearance/Wvr of Arrgn/Wrttn Plea NG/Dmd Disc Filed	1
			10/14/2016	Answer to Demand for Discovery Filed	5
			10/05/2016	Notice of Appearance to Bondsman Mailed & Filed	1
			10/04/2016	Felony Hearing/Continuance Form Filed	1
			09/30/2016	Not of Appearance/Wvr of Arrgn/Wrttn Plea NG/Dmd Disc Filed	1
			09/30/2016	Notice of Appearance of Counsel Filed	1
			09/30/2016	Demand for Copy of Information Filed	1
			09/30/2016	Notice of Designation of E-Mail Address Filed	1
			09/20/2016	Corrected State Reporting Error FATAL INJURY AND SERIOUS BODILY INJURY CANNOT BOTH BE Y 09/15/16 Citation	
			09/14/2016	Mandatory Court Appearance - Fatality	
			09/11/2016	Original Traffic Citation Filed	1
			09/09/2016	Information and Notice to the Clerk Filed	4
			09/09/2016	TRACK SET TO COMPLEX	
			09/06/2016	Copy of Surety Bond Filed	2
			09/06/2016	Copy of Surety Bond Filed	2
			09/03/2016	Record of First Appearance and Booking Report Filed	4
			09/03/2016	LE Warrant Returned Served and Filed	18
			09/03/2016	Certificate of Compliance/FCIC/NCIC Requirement Filed	1
			09/03/2016	Pretrial Disclosure Regarding App for Indigent Status Filed	1
			09/03/2016	No Contact Ordered	
			09/03/2016	Bonded Out	
			09/03/2016	Bonded Out	

Image	Doc #	Action Date	Description	Page
		09/02/2016	Case Opened by LE Warrant and Affidavit to Arrest	370
		09/02/2016	Warrant Returned Pending Correction Incorrect DOB on affidavit	
		09/02/2016	In Custody	
		09/02/2016	LE Warrant and Affidavit to Arrest Filed	19
		09/02/2016	LE Warrant and Affidavit to Arrest Filed	18

Judge Assignment History	<input type="checkbox"/>
Court Events	<input type="checkbox"/>
Sentences	<input type="checkbox"/>
Financial Summary	<input type="checkbox"/>
Reopen History	<input type="checkbox"/>

**UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
FORT MYERS DIVISION**

ADAM MURRAY COSTELLO,
Petitioner,

Case No.: 2:25-cv-74-JLB-NPM

vs.

SECRETARY, DEPARTMENT OF
CORRECTIONS,
Respondent.

_____ /

EXHIBIT 2

IN THE CIRCUIT COURT OF THE TWENTIETH JUDICIAL CIRCUIT IN AND FOR
LEE COUNTY, FLORIDA CRIMINAL ACTION

STATE OF FLORIDA

vs.

ADAM MURRAY COSTELLO

CASE NO: 16-CF-000371 - (MOS)
(MWM)
DCM TRACK: COMPLEX

Race: White Sex: Male

D.O.B.: 11/12/1974

SS #: [REDACTED]

AMENDED (4TH INFORMATION)

INFORMATION FOR:

- 1) Leaving the Scene of a Crash - Death, F.S. 316.027(2)(c),(2)(f) First Degree Felony
- 2) Tampering With or Fabricating Physical Evidence, F.S. 918.13, Third Degree Felony

IN THE NAME AND BY THE AUTHORITY OF THE STATE OF FLORIDA:

STEPHEN B. RUSSELL, State Attorney of the Twentieth Judicial Circuit of the STATE OF FLORIDA,
by and through the undersigned Assistant State Attorney, prosecuting for the STATE OF FLORIDA,
in the County of Lee under oath information makes that Adam Murray Costello,

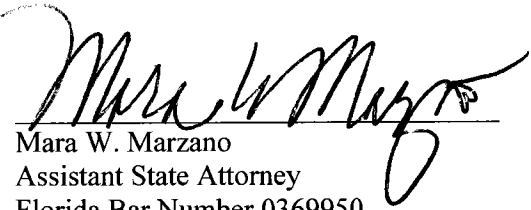
Count(s):

1. On or about June 19, 2016 in Lee County, Florida, was the driver of a motor vehicle involved in a crash resulting in death to Adam Roger King, a human being, a vulnerable road user, and Defendant knew or should have known a crash occurred, but failed to stop or remain at the scene of the crash, or as close thereto as possible, until he/she gave personal information and rendered aid as required by Florida Statutes 316.062, contrary to Florida Statute 316.027(2)(c),
2. Between June 19, 2016 and July 31, 2016 in Lee County, Florida, did unlawfully and knowingly alter, destroy, conceal, or remove any record, document, or thing, to-wit: deletion of facebook information or account, cellular phone utilizing number 239 218-4928 or DVR from a surveillance camera, with the purpose to impair its verity or availability in a proceeding or investigation knowing that a criminal trial or proceeding or investigation by a duly constituted prosecuting authority, law enforcement agency, grand jury or legislative committee of this state is pending or is about to be instituted contrary to Florida Statute 918.13(1)(a),

against the peace and dignity of the STATE OF FLORIDA,

STEPHEN B. RUSSELL
STATE ATTORNEY

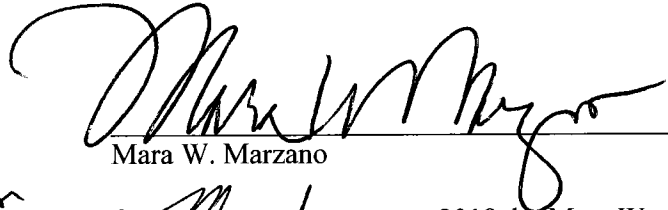
BY:



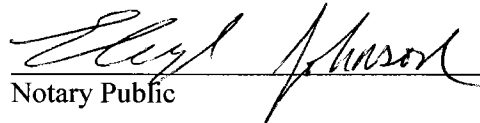
Mara W. Marzano
Assistant State Attorney
Florida Bar Number 0369950
3315 E. Tamiami Trail, Suite 602
Naples, Florida 34112
(239) 252-8470
eService: ServiceSAO-LEE@sao.cjis20.org

STATE OF FLORIDA, COUNTY OF LEE

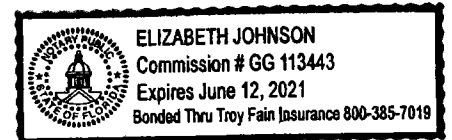
Personally appeared before me, Mara W. Marzano, Assistant State Attorney of the Twentieth Judicial Circuit of the State of Florida, being personally known to me, who being duly sworn, says that this information is filed in good faith and certifies that testimony under oath from the material witness or witnesses for the offense has been received which if true, would constitute the offense therein charged.


Mara W. Marzano

Sworn to and Subscribed before me this 12th day of March, 2018, by Mara W. Marzano, personally known to me.


Notary Public

My commission expires: _____



RE: Adam Murray Costello, 16-CF-000371

**OFFICE OF THE STATE ATTORNEY
TWENTIETH JUDICIAL CIRCUIT OF FLORIDA
NOTICE TO THE CLERK**

TO: Clerk of the Courts, Lee County

RE: Adam Murray Costello, defendant Court Case Number: 16-CF-000371

Race: White Sex: Male

D.O.B.: 11/12/1974 SSN: [REDACTED]

Date of Arrest: September 2, 2016

Agency Booking Report No. 2016-06161

OBTs: 3607131460

Agency Name: Fort Myers Police Department

BOOKING CHARGES

Count(s):

Number of Counts: 1 - Hit And Run Fail To Stop Remain At Crash Involve Death, F.S. 316.027
(2c), First Degree Felony

Number of Counts: 1 - Evidence-Destroying Tamper With Or Fabricate Physical, F.S. 918.13, Third
Degree Felony

SAO DISPOSITION

Count(s):

1. Filed as Charged: 316.027(2)(c)
Leaving the Scene of a Crash - Death
First Degree Felony
2. Filed as Charged: 918.13
Tampering With or Fabricating Physical Evidence
Third Degree Felony

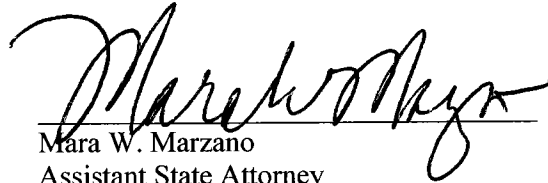
Distribution:

Clerk of Court
Defendant / Defense Counsel - Shannon H. McFee
Sheriff's Department - Jail
Arresting Agency - Fort Myers Police Department
SAO File

STEPHEN B. RUSSELL
STATE ATTORNEY

Date: 3/12/18

BY:



Mara W. Marzano
Assistant State Attorney
Florida Bar Number 0369950
3315 E. Tamiami Trail, Suite 602
Naples, Florida 34112
(239) 252-8470
eService: ServiceSAO-LEE@sao.cjis20.org

Distribution:

Clerk of Court
Defendant / Defense Counsel - Shannon H. McFee
Sheriff's Department - Jail
Arresting Agency - Fort Myers Police Department
SAO File

**UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
FORT MYERS DIVISION**

ADAM MURRAY COSTELLO,
Petitioner,

Case No.: 2:25-cv-74-JLB-NPM

vs.

SECRETARY, DEPARTMENT OF
CORRECTIONS,
Respondent.

_____ /

EXHIBIT 3

IN THE CIRCUIT COURT OF THE TWENTIETH JUDICIAL CIRCUIT IN AND FOR
LEE COUNTY CRIMINAL ACTION

STATE OF FLORIDA

vs.

CASE NO: 16CF371

ADAM MURRAY COSTELLO

(MWM)

PLEA AGREEMENT WAIVER OF RIGHTS

This is an Agreement by the State of Florida, by Stephen B. Russell, State Attorney for the Twentieth Judicial Circuit, by and through the undersigned Assistant State Attorney, Mara W. Marzano and by one ADAM MURRAY COSTELLO, hereinafter referred to as "Defendant". This Agreement related to certain negotiations undertaken by the parties hereto, and is in confirmation of those negotiations.

1. The Defendant has been charged in case number 16CF371 with Leaving the Scene of a Crash with Death and Tampering with Evidence.
2. The Defendant understands that the charge of Leaving the Scene of a Crash with Death carries a maximum penalty of 30 years in prison.
3. The Defendant understands the charge of Tampering with Evidence carries a maximum penalty of 5 years in prison.
4. The Defendant hereby agrees to enter and the State of Florida will accept a plea of no contest with an Adjudication of Guilt for both charges in 16CF371. The Defendant will be adjudicated on these counts for which he pleads, subject to the terms and conditions set forth below.
5. The Defendant agrees that there is a factual basis for entry of such pleas, and further admits that such is in his best interest.
6. The Defendant understands the he has the right to be represented by an attorney at every stage of the proceedings and if necessary, an attorney will be appointed to represent him. The Defendant is aware he has the right to a trial by jury and have the assistance of counsel at that trial. The Defendant is aware of and knows that he has the right to compel the attendance of witnesses on his behalf, the right to confront and cross-examine witnesses who may testify against him and the right to exercise his privilege against self-incrimination by not testifying at trial. The Defendant acknowledges that by entering the plea of no contest as called for in this Agreement, that there will be no trial and the he is giving up and waiving his right to a trial by jury, the right to cross-examine witnesses against him, the right to compel the attendance of witnesses on his behalf and the privilege not to testify in his trial. The Defendant further understands that by pleading no contest as called for in this Agreement, that the Defendant is giving up the right to appeal all matters relating to this case, including all Motions to Suppress and Motions in Limine, Williams Rule Notice filed by the State and specific issues of guilt or innocence. The Defendant is represented by counsel in this proceeding and enters this Agreement having

AMC HM
MWM

RE: PLEA WAIVER OF RIGHTS ADAM MURRAY COSTELLO 16CF371

conferred with counsel and being fully satisfied with counsel's representation of him, and he specifically acknowledges that he has not been threatened coerced or forced in any manner, nor has he been made any promise not contained in this Agreement.

7. The Defendant is familiar with and has reviewed the discovery and evidence in this case and stipulates and agrees that the State of Florida can establish a prima facie case of guilt against him on all charges to which he enters a plea.
8. The Defendant, by the terms and conditions as set forth in this Agreement, hereby agrees to fully cooperate with the State of Florida in its investigation and prosecution of illegal activities, and related crimes.

Subject to the terms and conditions set forth herein, the State of Florida agrees to the following:

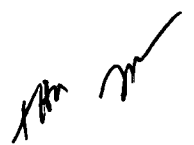
9. Decline to file any additional criminal charges relating to or arising from the Defendant's criminal conduct arising out of the transactions or incidents which form the basis for the Information filed in this case which are disclosed to the State of Florida by the Defendant.
10. The Defendant shall receive a stipulated, agreed sentence to the following:
 - A. The Defendant shall be sentenced in Count One to 10.5 years Florida State Prison with a 4 year minimum mandatory. As to Count Two the Defendant shall be sentenced to 5 years Florida State Prison.
 - B. The Defendant shall be adjudicated guilty of both counts which shall be run concurrently.
 - C. No fine.
 - D. Standard Court Costs.
 - E. \$100.00 costs of prosecution.
 - F. Restitution has been addressed and resolved by civil litigation and is not being requested.
 - G. The Defendant's privilege to drive shall be revoked for 3 years. The revocation shall not begin until the Defendant is released from custody. The Defendant must comply with the statutory provisions of Florida Statute 316.027(e) in order to obtain a driver's license.
 - H. The Defendant shall complete 120 community service hours in a trauma center or hospital that regularly receives victims of vehicle accidents, under the supervision of a registered nurse, an emergency room physician, or an emergency medical technician pursuant to a voluntary community service program operated by the

Amc JLM mm

RE: PLEA WAIVER OF RIGHTS ADAM MURRAY COSTELLO 16CF371

trauma center or hospital, if one exists. This term is enforceable as a contempt of court and would not violate the plea Agreement.

- I. The Defendant shall participate in a victim's impact panel session in this judicial circuit if such a panel exists, or if such a panel does not exist, attend a department-approved driver improvement course relating to the rights of vulnerable road users relative to vehicles on the roadway. This term is enforceable as a contempt of court and would not violate the plea Agreement.
 - J. The Defendant agrees to testify fully, truthfully, completely and accurately under oath before the State Attorney's Office of the Twentieth Judicial Circuit, his Assistants or Investigators and Officers of the Fort Myers Police Department as to all matters related to or arising from his knowledge and/or involvement in any criminal activity. He also agrees that he will testify fully, truthfully, completely and accurately in any and all hearings, depositions, proceedings and trials.
 - K. Upon the Defendant's violation of this Agreement as set forth in subparagraph (10)(J), the Defendant shall no longer be entitled to the above sentence and the Agreement would be null and void. The Defendant agrees that he would be re-sentenced by the Court with a range of 126.3 months up to the maximum of 35 years for these charges.
 - L. The Defendant agrees to recordation of said testimony either stenographically, electronically, or mechanically, at the discretion of said Prosecutor, his Assistants or Investigators.
 - M. The Defendant shall be remanded to custody upon the acceptance of this Agreement by the Court and if released from custody prior to the completion of this Agreement shall notify said Prosecutor, his Assistants and Investigators in letting them know his whereabouts and how to contact said Defendant at all reasonable hours of the day or night.
 - N. The Defendant shall not commit any violations of any Federal, State, County or Municipal laws.
11. The State of Florida, upon any substantial failure to fulfill any of the terms, conditions or obligations of this Agreement by the Defendant, shall no longer be bound by the terms and conditions of this Agreement. The Defendant would be sentenced by the Court with a range of 126.3 months up to the maximum of 35 years for these charges.
12. This Agreement does not protect the Defendant from prosecution for perjury. Such a prosecution may be premised upon any information provided by the Defendant and all

Amc 

RE: PLEA WAIVER OF RIGHTS ADAM MURRAY COSTELLO 16CF371

such information may be used against him, including information obtained during any proffer statement, hearings, depositions, proceedings and trials.

13. This contract shall be considered as being fulfilled by the Defendant and complete upon the final disposition of any and all charges against any and all individuals or Defendants that may be charged, or informed against as a result of the investigation into illegal activities set forth herein, and the same have been disposed of by either acquittal, conviction or plea of no contest or guilty, and the Defendant shall cooperate during any Appellate process that may result from any of the foregoing.
14. Defendant hereby waives all rights to a speedy trial conferred by the constitutions of the United States and Florida, and by the provisions of Florida Rules of Criminal Procedure, Rule 3.191; and any applicable Statue of Limitations under F.S. 775.15.
15. No additional promises, agreements and conditions have been entered into other than those set forth in this Agreement and none will be entered into unless in writing and signed by all the parties.
16. The Defendant acknowledges that he has read, reviewed and discussed the foregoing Agreement with his undersigned counsel. The Defendant acknowledges that he is fully aware and understanding of all terms and conditions of this Agreement, and that he enters into this Agreement freely, voluntarily, knowingly, intelligently by and with the advice of counsel.

Dated this 08 of March, ~~2017~~ 2018

mm
17 Mar
Ame

Adam Costello

Defendant: Adam Murray Costello

STEPHEN B. RUSSELL
STATE ATTORNEY
TWENTIETH JUDICIAL CIRCUIT

Witness:

Shannon H. McFee

Shannon H. McFee
Attorney for Defendant
Law Office of Shannon McFee
2671 Airport Road South, Suite 301
Naples, FL 34112

Mara W. Marzano

Mara W. Marzano
Assistant State Attorney
Florida Bar Number 0369950
Post Office Box 399
Fort Myers, Florida 33902
(239)533-1330
Eservice: ServiceSAO-LEE@sao.cjis20.org

Ame 17 Mar mm

**UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
FORT MYERS DIVISION**

ADAM MURRAY COSTELLO,
Petitioner,

Case No.: 2:25-cv-74-JLB-NPM

vs.

SECRETARY, DEPARTMENT OF
CORRECTIONS,
Respondent.

_____ /

EXHIBIT 4

IN THE CIRCUIT COURT OF THE TWENTIETH JUDICIAL
CIRCUIT IN AND FOR LEE COUNTY, FLORIDA

STATE OF FLORIDA,

Case No. 16-CF-371

vs.

Lee County Justice Center
1700 Monroe Street
Fort Myers, FL 33901

ADAM COSTELLO,

March 12, 2018

Defendant.

TRANSCRIPT OF PROCEEDINGS

BEFORE THE HONORABLE MARGARET STEINBECK
CIRCUIT JUDGE

APPEARANCES:

For the State:

MARA MARZANO, ESQ.
MICHAEL COLOMBO, JR., ESQ.
Office of the State Attorney
2000 Main Street, 6th Floor
Fort Myers, FL 33901
(239) 533-1000

For the Defendant:

SHANNON H. McFEE, ESQ.
2671 Airport Pulling Road
Suite 301
Naples, FL 34112
(239) 775-9697

Transcription Service:

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239.481.1300

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transcript produced by transcription service.

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WITNESSES: DIRECT CROSS REDIRECT RECROSS

State of Florida:

Adam Costello 10

EXHIBITS: IDENTIFIED ADMITTED

(None)

1 THE COURT: We're here in State v Costello,
2 16-CF-371. I'm Judge Margaret Steinbeck. I'll
3 ask counsel to state their appearances for the
4 record.

5 MS. MARZANO: Mara Marzano and Michael
6 Colombo, Jr. for the State.

7 MR. McFEE: Your Honor, Shannon McFee on
8 behalf of Adam Costello.

9 THE COURT: Okay. So this is scheduled for
10 the Court to potentially accept a plea from Mr.
11 Costello pursuant to a plea agreement. The Court
12 received in chambers a courtesy copy of what
13 appears to be a fully executed plea agreement
14 dated March 8th of 2017. The Court has had an
15 opportunity to review that agreement. I have a
16 couple of questions.

17 Is the defendant still interested in going
18 forward with the plea today?

19 MS. MARZANO: I'm sorry, Judge. There's a
20 typo on that. It should be 2018.

21 THE COURT: And I read it and read the typo
22 too. You would think I would have figured that
23 out. Okay.

24 Is the defendant still interested in entering
25 a no contest plea in exchange for the negotiated

1 sentence?

2 MR. McFEE: He is, Your Honor. There is a
3 housekeeping matter that would need to be
4 accomplished prior to doing so. The State has
5 filed a fourth amended information in this case,
6 and that's the information he would actually be
7 entering the plea to.

8 THE COURT: What's the change in the fourth
9 amended info?

10 MS. MARZANO: It just adds --

11 MR. McFEE: One item --

12 MS. MARZANO: -- one item --

13 MR. McFEE: -- as to --

14 MS. MARZANO: -- to the tampering charge, and
15 it's by agreement of the parties. It was done as
16 part of our negotiation to add that.

17 THE COURT: Okay. So it would actually be
18 the -- actually you're filing it in open court
19 right now.

20 MS. MARZANO: Yes, I am.

21 THE COURT: Okay. So it would actually be a
22 plea to this particular information that is dated
23 today's date?

24 MS. MARZANO: Yes, Your Honor.

25 THE COURT: Okay. So you can submit that for

1 filing in open court. I'll give that to the
2 clerk.

3 The -- are the next of kin of the victim in
4 agreement with the negotiated resolution?

5 MS. MARZANO: Yes, Your Honor. They have
6 been fully briefed, discussed, consulted
7 throughout the process, and they are in
8 agreement, although they will be wanting to make
9 some statements this morning to Your Honor, not
10 to change anything with the agreement but just to
11 let Your Honor know a little bit more about Mr.
12 Adam King. And if possible, if Your Honor could
13 accept the plea, and then we could do that, and
14 then Your Honor could sentence Mr. Costello.
15 That's -- that's what we're requesting.

16 THE COURT: Okay.

17 MR. McFEE: The understanding, Your Honor,
18 was that we would be waiving a PDR or, I'm sorry,
19 a predisposition report, presentence
20 investigation and allow for the sentencing today.

21 THE COURT: Okay. Counsel had set 30 minutes
22 for the acceptance of the plea for this hearing.
23 Are we gonna be able to accomplish what we need
24 to accomplish in 30 minutes?

25 MS. MARZANO: I believe that the victim

1 statements will be fairly short. I -- I thought
2 we had asked for an hour, but maybe I am
3 mistaken. I don't know.

4 THE COURT: I think my judicial assistant put
5 an hour on there at my request, but I wanna make
6 sure that you all -- I do need to recess in
7 advance of noon because I have a conference call
8 involving judges from around the state of Florida
9 that I would like to be on time for. It's the
10 conclusion of the legislative session and in my
11 role as chair of the trial court budget
12 commission so it's -- it's a call that I would
13 like to be on time for. So that's why I'm asking
14 you to proceed accordingly. Do you expect that
15 we would be able to do that?

16 MS. MARZANO: I'm hoping so, yes, Your Honor.
17 I believe so.

18 MR. McFEE: I do, Your Honor. That's why we
19 did the plea agreement in -- in advance so that
20 all of the terms and conditions, issues involved,
21 Mr. Costello's very aware of.

22 THE COURT: Okay. So the questions that I
23 had with regard to the terms are the -- is the
24 language that provides for Mr. Costello to
25 accomplish certain obligations that would only be

1 enforceable as contempt of court and not a
2 violation of the plea agreement. Specifically
3 I'm referring to Paragraph 10(h) and (i), I think
4 are the two places that that appears. How would
5 you envision that happening, Ms. Marzano?

6 MS. MARZANO: If, when Mr. Costello's
7 released from custody, he does not comply with
8 those, he could be brought in on a contempt
9 charge. I think those have to be ordered by the
10 Court, and part of the agreement does not provide
11 for any paper to follow so we felt that was the
12 best way to effectuate it. And if he doesn't go
13 ahead and do those things, one, he will never be
14 able to obtain a driver's license based on the
15 charges and the statute, and two, he could be
16 charged with contempt.

17 THE COURT: Okay. Is probation an obligation
18 of this particular crime?

19 MS. MARZANO: No.

20 THE COURT: I'm talking about Count I.

21 MS. MARZANO: No, Your Honor.

22 THE COURT: It's not? Okay.

23 MS. MARZANO: I don't believe so.

24 THE COURT: Okay. So taken to its extreme,
25 contempt of court if you have a jury trial is a

1 year incarceration if you're found guilty of
2 contempt, nonjury it's six months. So that would
3 be the risk of noncompliance there, Mr. Costello.

4 So with everything that you've heard and
5 you've read, do you personally wish to go forward
6 with this plea?

7 THE DEFENDANT: Yes, ma'am.

8 THE COURT: Okay. I'm gonna put you under
9 oath. Do you solemnly swear the testimony you
10 give in this proceeding will be the truth, the
11 whole truth and nothing but the truth?

12 THE DEFENDANT: Yes.

13 THE COURT: Please state your full name.

14 THE DEFENDANT: Adam Murray Costello.

15 THE COURT: Mr. Costello, I'm going to ask
16 Ms. Marzano, are you gonna do a colloquy for me?

17 MS. MARZANO: Yes, Your Honor. If you want
18 me to, I can.

19 THE COURT: To ask you some questions on my
20 behalf so I can make sure you understand the
21 rights that you're waiving by entering a no
22 contest plea to the charges in the fourth amended
23 information. Have you previously seen a copy of
24 this, Mr. McFee --

25 MR. McFEE: I have, Your Honor.

1 THE COURT: -- and Mr. Costello? So you
2 don't need it to refer to?

3 MR. McFEE: Right.

4 THE COURT: You're waiving reading?

5 MR. McFEE: Yes, Your Honor.

6 THE DEFENDANT: Yeah.

7 THE COURT: Okay.

8 MR. McFEE: Your Honor, would you like us to
9 stand for this?

10 THE COURT: No, you can remain seated.

11 Mr. Costello, even though these rights are
12 written on the written plea agreement, they're
13 required to be part of the record orally here in
14 open court. I'll ask you to listen carefully and
15 answer truthfully.

16 You may proceed, Ms. Marzano.

17 MS. MARZANO: Thank you, Judge.

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1 Thereupon,

2 ADAM COSTELLO

3 the Defendant, having been first duly sworn, was
4 examined and testified as follows:

5 DIRECT EXAMINATION

6 BY MS. MARZANO:

7 Q. Good morning, sir. Can you please state your
8 name for the record?

9 A. Adam Murray Costello.

10 Q. And sir, what is your date of birth?

11 A. 11-12-74.

12 Q. And what are the last four digits of your
13 Social Security number?

14 A. 4276.

15 Q. Have you ever been known by an alias or any
16 other name?

17 A. No, ma'am.

18 Q. Where were you born?

19 A. Birmingham, Alabama.

20 Q. And how far have you gone in school?

21 A. I have a bachelor's degree in accounting.

22 Q. Can you read and write and understand the
23 English language, sir?

24 A. Yes, ma'am.

25 Q. Are you under the influence today of drugs or

1 alcohol?

2 A. No, ma'am.

3 Q. Are you taking any medications today?

4 A. For blood pressure.

5 Q. Okay. But that does not affect your ability

6 --

7 A. No, ma'am.

8 Q. -- to think clearly, correct?

9 A. Correct.

10 Q. All right. Do you understand why you're here
11 today?

12 A. Yes, I do.

13 Q. All right. In a amended -- in an information
14 that was amended this morning you're still charged
15 with the charge of leaving the scene of a crash with
16 death, as well as obstructing or tampering with
17 evidence. You understand that the leaving the scene
18 of a crash with death is punishable by 30 years in
19 Florida state prison as a maximum penalty, correct?

20 A. Yes, I do.

21 Q. And you understand that the obstruction or
22 tampering charge carries a maximum of three -- I'm
23 sorry, five years in prison as it's a third degree
24 felony? You understand that?

25 A. Yes.

1 Q. How today will you be pleaing to the charges?

2 A. No contest.

3 Q. By entering the plea you understand that you
4 would have had the right to a trial by jury? Do you
5 understand that?

6 A. I do understand.

7 Q. And you also understand that by entering into
8 this plea agreement today you will be waiving your
9 right to have the jury determine your guilt or
10 innocence, you understand that?

11 A. Yes, I do understand.

12 Q. You understand that you'll give up the right
13 to see or hear the State's witnesses who would have
14 testified and to have Mr. McFee question them on your
15 behalf?

16 A. Yes, I do understand.

17 Q. You have the right to subpoena and call your
18 own witnesses and submit evidence on your behalf.
19 You understand you're giving that up as well?

20 A. Yes, I do.

21 Q. You understand that you have the right to
22 testify or to remain silent in this case?

23 A. Yes, I do.

24 Q. You understand that you have the right to
25 make the State prove these charges beyond every

1 reasonable doubt?

2 A. Yes.

3 MS. MARZANO: In fact, Mr. McFee, you filed,
4 I believe, two motions to -- to suppress as well
5 as several motions in limine, and the State filed
6 a Williams Rule notice. Are those by the terms
7 of the plea agreement and with Mr. Costello's
8 agreement are not going to be reserved for
9 appeal, correct?

10 MR. McFEE: That is correct.

11 BY MS. MARZANO:

12 Q. And you understand that, Mr. Costello?

13 A. Yes, I do.

14 MR. McFEE: Judge, none of those were
15 dispositive issues.

16 BY MS. MARZANO:

17 Q. All right. Mr. Costello, I'm showing you the
18 last -- or -- or a score sheet. You've seen this
19 before, correct?

20 A. Yes, correct.

21 Q. And you've seen that the terms are that you
22 face a lowest permissible sentence of 126.3 months
23 Florida state prison up to 30 potential years in
24 prison. You understand that?

25 A. Yes, I do.

1 Q. And is this the score sheet that you're
2 familiar with?

3 A. Yes.

4 Q. And you agree that it is true and accurate?

5 A. Yes.

6 Q. And you've had the opportunity to review it
7 with counsel?

8 A. Yes, I have.

9 Q. I'm showing you, Mr. Costello, a plea
10 agreement and waiver of rights form. You have seen
11 this before, correct?

12 A. Correct.

13 Q. And, in fact, it's been read to you fully,
14 correct?

15 A. Correct.

16 Q. And you understand the terms of this plea
17 form, correct?

18 A. Correct.

19 Q. And you discussed it with Mr. McFee?

20 A. Yes, I have.

21 Q. Correct? And you've signed this plea form
22 and initialed every page?

23 A. Yes.

24 Q. Are you entering this plea today of your own
25 free will?

1 A. Yes, I am.

2 Q. And are you being forced or threatened by
3 anyone to make you plea here today?

4 A. No, I am not.

5 Q. Other than what's contained in the plea
6 agreement that I just showed you and what we've
7 discussed on the record, has anyone promised you
8 anything in exchange for this plea?

9 A. No.

10 Q. You understand that the terms of the plea
11 require that you will be sentenced to 10.5 years
12 Florida state prison with a four-year minimum
13 mandatory on Count I, and Count II will be a sentence
14 of five years Florida state prison. You'll be
15 adjudicated on both counts, and they will run
16 concurrently. You will not receive a fine.

17 There are standard court costs. There's a
18 hundred dollar cost of prosecution. Restitution has
19 been addressed and will be resolved by civil
20 litigation, and it is not being requested at this
21 time.

22 Your driving privilege will be revoked for
23 three years, and the revocation shall not begin until
24 you're released from custody. The defendant must --
25 you, Mr. Costello, must comply with the statutory

1 provisions of Florida Statute 316.027(e) in order to
2 obtain a driver's license.

3 You will be required to complete 120
4 community service hours in a trauma center or
5 hospital that regularly receives victims of
6 automobile or vehicle accidents under the supervision
7 of a registered nurse, an emergency room physician or
8 an emergency medical technician pursuant to a
9 voluntary community service program operated by a
10 trauma center or hospital if one exists. And this is
11 the term that we talked about being enforceable as a
12 contempt of court but would not violate your plea
13 agreement.

14 You also, sir, will be required to
15 participate in a victim's impact panel session in
16 this judicial circuit if such a panel exists; or if
17 such a panel does not exist, you will have to attend
18 a Department approved driver improvement course
19 relating to the rights of vulnerable road users
20 relative to vehicles on the roadway. Again, this is
21 another term that would be enforceable as a contempt
22 of court issue and would not violate your plea
23 agreement.

24 You also have agreed to testify truthfully,
25 fully and completely and accurately before the State

1 Attorney's Office of the Twentieth Judicial Circuit
2 as to matters relating to, arising from your
3 knowledge and/or involvement in any criminal
4 activity. You agree you would testify truthfully,
5 fully, completely and accurately in any and all
6 hearings, depositions, proceedings and trials.

7 Upon the violation of this agreement as set
8 forth in Paragraph 10(j), you would no longer be
9 entitled to the above sentence, and it would -- this
10 agreement would be null and void. You would agree
11 that you would be resentenced by the Court with a
12 range of 126.3 months up to a maximum of 35 years for
13 these charges.

14 The -- you agreed to recordation of any
15 statements, either stenographically, electronically
16 or mechanically at the discretion of the said
17 prosecutor, his assistants or investigators.

18 And you shall be remanded to custody today
19 upon the acceptance of this agreement by the Court.
20 And if you are ever released from custody prior to
21 the completion of any of the terms of this agreement,
22 you will notice -- notify the prosecutor, letting
23 them know or the prosecutors know your whereabouts
24 and how to contact you at all reasonable hours of the
25 day or night.

1 The defendant, you, shall not commit any
2 violations of any federal, state, county or municipal
3 law.

4 You understand that -- you understand the
5 terms of -- and what you'll be sentenced to, correct?

6 A. Yes. That is correct.

7 Q. Do you believe you're pleaing today because
8 it is in your best interest?

9 A. Yes, I do.

10 Q. Are you aware of any physical evidence that
11 you believe should be tested for DNA, and do you
12 understand there will be nothing further tested in
13 this case?

14 MR. McFEE: Do you agree?

15 THE DEFENDANT: I agree.

16 MS. MARZANO: Okay. Mr. McFee, you're not
17 aware of any DNA evidence that would exonerate
18 your client?

19 MR. McFEE: No, not that has not been already
20 tested.

21 MS. MARZANO: Okay.

22 BY MS. MARZANO:

23 Q. Mr. Costello, are you satisfied with the
24 advice of your attorney, Mr. McFee?

25 A. Absolutely.

1 Q. Has he done everything that you've asked him
2 to and answered all of your questions?

3 A. Yes, he has.

4 Q. Okay. Now we discussed that you had some
5 motions that were filed. You also -- have you
6 discussed any potential defenses that you have with
7 Mr. McFee?

8 A. Yes.

9 Q. All right. Do you understand that at least
10 for the first four years of Count I you will not be
11 entitled to gain time on that charge, but in regard
12 to gain time or early release there are no guarantees
13 as to whether you'll receive that. That's up to the
14 Department of Corrections.

15 A. Yes.

16 MS. MARZANO: Counsel, have you reviewed all
17 the discovery in this case with your client?

18 MR. McFEE: We have.

19 BY MS. MARZANO:

20 Q. And Mr. Costello, do you understand that if
21 you're not a citizen of the United States that you
22 could be subjected to deportation?

23 A. Yes.

24 Q. If the offense to which you are pleading is a
25 sexually violent offense or sexually motivated

1 offense or if you have previously been convicted of
2 such an offense, the plea may subject you to
3 involuntary civil commitment as a sexually violent
4 predator upon completion of your sentence. Do you
5 understand this warning and understand that that's
6 given to all defendants?

7 A. Yes.

8 Q. All right.

9 MS. MARZANO: Your Honor, I would stipulate
10 to a factual basis. Counsel, will you stipulate
11 to a factual basis and venue?

12 MR. McFEE: We would, Your Honor.

13 MS. MARZANO: And if -- Your Honor, I would
14 ask that you take judicial notice of the court
15 file and the initial arrest affidavit that's in
16 there.

17 THE COURT: The court costs are \$415. Cost
18 of prosecution -- hundred dollar -- excuse me,
19 \$415 court costs per schedule and a hundred
20 dollar cost of prosecution, but I think a 316
21 offense had some additional monetaries?

22 UNIDENTIFIED SPEAKER: There's a \$33 circuit
23 traffic offense court costs and a \$5 leaving the
24 scene of the accident court cost.

25 THE COURT: Okay. And that's all the

1 mandatories?

2 UNIDENTIFIED SPEAKER: Correct.

3 THE COURT: Those will be assessed, Mr.
4 Costello. With that understanding, do you wish
5 to go forward?

6 THE DEFENDANT: Yes, ma'am.

7 THE COURT: Okay.

8 MS. MARZANO: May I approach, Your Honor,
9 with this --

10 THE COURT: Yes.

11 MS. MARZANO: -- documentation? And I can
12 tell the Court that this is a guideline sentence.

13 THE COURT: You had previously provided the
14 score sheet to me --

15 MS. MARZANO: Okay.

16 THE COURT: -- so I was aware of that, and
17 I'm going to give the original plea agreement and
18 waiver of rights to the clerk to file. And --
19 oh, you've done a separate --

20 MR. McFEE: Judge, that --

21 THE COURT: -- felony plea form. Okay.

22 MR. McFEE: Judge, that can be discarded. I
23 -- I just simply had asked the Court to
24 incorporate by reference the plea agreement. I
25 did not know if the Court wanted that or not. So

1 we could certainly discard that.

2 THE COURT: No, I -- there's not a
3 requirement to use that.

4 MR. McFEE: That's fine.

5 THE COURT: So -- but I don't -- I'm not
6 gonna discard it. I don't wanna destroy
7 anything.

8 MR. McFEE: Would the -- would the Court like
9 to give it back to us?

10 THE COURT: I'll return it since it has not
11 become part of the official file.

12 MR. McFEE: Your Honor, we'd also ask the --
13 on those financial obligations that Mr. Costello
14 be given 90 days to pay upon his release from
15 state prison. So that way it doesn't complicate
16 matters with it being shown as not paid
17 (inaudible) so we'd ask for that.

18 THE COURT: Any objection?

19 MS. MARZANO: No, Your Honor.

20 THE COURT: That's fine.

21 MS. MARZANO: At this time, Your Honor, I
22 would ask the Court to accept the plea, and then
23 we have some victim impact statements that we
24 would like to present to the Court.

25 THE COURT: Okay. I do find a factual basis

1 and venue based on the stipulation, the probable
2 cause affidavit in the court file as well as
3 evidence taken by the Court at various
4 evidentiary hearings throughout the pendency of
5 this action.

6 I also find that Mr. Costello is competent,
7 alert and able to tender a plea, which, Mr.
8 Costello, I believe you've done voluntarily. So
9 I do formally accept your no contest plea to both
10 counts of the fourth amended information.

11 I would ask the State to present victim
12 impact testimony and evidence at this point.

13 MS. MARZANO: Thank you, Your Honor. At this
14 time I'm going to ask that the easel be set up,
15 and I have marked State's S-1, which will be a
16 grouping of photographs which will be put into
17 the record following the -- the --

18 THE COURT: Okay.

19 MS. MARZANO: -- the statement. And I would
20 call Tom O'Brien.

21 Mr. McFee has seen the photographs so he is
22 not objecting as far as I know.

23 THE COURT: Okay.

24 UNIDENTIFIED SPEAKER: Face the Court and
25 raise your right hand.

1 (Whereupon, the witness was sworn by the
2 Clerk.)

3 MR. O'BRIEN: Thanks, Your -- Your Honor.

4 THE COURT: And Mr. O'Brien, if you wanna
5 pull that microphone closer, and you can even
6 bend it down so that you're comfortable. I know
7 this --

8 MR. O'BRIEN: Okay. That better?

9 THE COURT: You may proceed. Thank you.

10 MR. O'BRIEN: You want me to start?

11 THE COURT: You may proceed; yes, sir.

12 MR. O'BRIEN: Thank you.

13 My name is Tom O'Brien. I came into Adam's
14 life approximately 14 years ago. I'll get it.
15 After dating Adam's mother, Traci, for a little
16 over a year we decided to purchase a house
17 together, Alex, Adam, Traci and I, myself, all
18 moved in our house together.

19 During those 14 years I have many memories of
20 Adam. Adam growing up was all boy. In fact, the
21 first year we moved in he was doing backflips
22 into our pool. One -- one he lost his footing
23 and split his head open. Emergency room, eight
24 stitches later he stopped doing backflips.

25 In a couple years we decided to go to Busch

1 Gardens for the day. It happened to be the day
2 of the grand opening of a new rollercoaster,
3 Sheikra. We waited in line till we came up to
4 the height requirement. He was just under the
5 required height. Adam, frustrated and angry, I
6 took him to the side and went to the souvenir
7 shop, bought him a pair of socks, folded 'em up
8 three times and then put 'em in his shoes. He --
9 he passed the height requirement and went on that
10 coaster four times that day.

11 As a family, we all went to my home in
12 Chicago so Adam could see snow for the first
13 time. I think he was more interested in
14 basements in houses, as he had never seen that
15 either.

16 We all went camping at the Wisconsin Dells,
17 haunted houses, water parks, water duck boats,
18 riding bikes in the campground. Some of our
19 activities.

20 We flew to a resort in Arizona, a J.W.
21 Marriott, as I had work convention there. Alex,
22 Adam, Traci spent the day in the pool, lazy
23 river, eating hamburgers, fries and ice cream.
24 Alex and Adam, Traci took excursions in a Hummer
25 into the desert and into the mountains.

1 We all went on several charter fishing trips,
2 as Adam loved fishing, and one -- one time, one
3 of the largest fish caught in a pool.

4 Over the years he grew both physically and
5 mentally. He -- he didn't like cleaning around
6 the house, but he kept his room spotless. Never
7 really gave him an allowance, but I would pay him
8 to do work around the house. This is where I
9 noticed another side of him. His work, whether
10 it be trimming trees or cleaning the garage, will
11 be done to perfection. Although he never really
12 cared for school, give him a job, it would be
13 done beyond expectation.

14 Before I knew it he was turning 16. Traci's
15 parents, his Aunt Laurie, and Traci and myself
16 bought him a 2005 Mustang. Suddenly car parts
17 started arriving weekly. He would spend hours in
18 the garage assembling, disassembling his Mustang,
19 from headlights to taillights to stereo to
20 differentials, pinstriping and more. He learned
21 all this on his own.

22 These are just a few of the memories of Adam.
23 There will be no more memories, as these ended
24 the night of June 19th, which resulted in his
25 death from a hit-and-run vehicle. Now is the

1 time for punishment of the person responsible for
2 taking Adam King's life and ending new memories.

3 Thank you, Your Honor.

4 MS. MARZANO: Next we will have Richard
5 Echevarria.

6 UNIDENTIFIED SPEAKER: Face the Court and
7 raise your right hand.

8 (Whereupon, the witness was sworn by the
9 Clerk.)

10 MR. ECHEVARRIA: Your Honor, may I proceed?

11 THE COURT: You may.

12 MR. ECHEVARRIA: I came here today on behalf
13 of Traci's request to speak on behalf of her
14 friends. Excuse me, I'm very nervous.

15 We had a very close friend group. We started
16 about in high school, and I'm glad we met. You
17 know, Adam really changed my life for the better.
18 He really put a big effect -- effect on us since
19 we met him.

20 And I can give you thousands -- thousands of
21 ways that he changed my life and how he affected
22 it, but I think the number one thing that he
23 taught me from all our adventures, from all of
24 the conversations we had, was -- was to always
25 stay strong.

1 Adam was a -- was never scared of anything
2 really. I mean, we -- we could be out doing
3 something mischievous and, you know, he wouldn't
4 worry about getting in trouble. He wouldn't
5 worry about anything at all. And I -- I told
6 him, you're crazy. You know, he'd always make
7 fun of me for being like the most responsible one
8 in the group, and he always told me just -- you
9 just gotta let loose and be okay.

10 And at the time of his death, you know, I was
11 patiently waiting because my girlfriend was
12 pregnant, and I told him about it; and, you know,
13 he told me there's only one way to go at it, and
14 you just gotta be ready. You gotta be strong
15 because once that child comes into your life it's
16 not about you no more. It's about him. And I
17 think what he meant was -- by that is to be
18 strong no matter what. Whatever challenges that
19 you may face coming -- coming into your life, you
20 just gotta be prepared and be ready and be strong
21 about it.

22 Yeah. I -- I have nothin' else much to say.
23 I do very -- I do miss him very much, but he'll
24 always be in my heart.

25 Thank you.

1 THE COURT: Thank you for speaking.

2 MS. MARZANO: I believe that Ms. Miller,
3 Adam's mother, will read a statement from
4 somebody by the name of Chris Patt (phonetic
5 spelling).

6 THE COURT: Okay.

7 UNIDENTIFIED SPEAKER: Please face the Court
8 and raise your right hand.

9 (Whereupon, the witness was sworn by the
10 Clerk.)

11 MS. KING: Thank you, Your Honor.

12 This statement was given to me by Chris Patt,
13 who was my son's boss at his work, and it goes:

14 Your Honor, my name is Chris Patt. I am
15 Adam's boss, as well as friend. Adam was a great
16 person, always willing to help out wherever he
17 was needed, no matter what the task. He was on
18 his way to being named the night shift manager.
19 He didn't know -- know it, but I knew when I told
20 him he would have been ecstatic.

21 The morning I found out that -- about Adam's
22 death I was heartbroken and very nervous to tell
23 the rest of the crew because I knew how bad it
24 would affect everyone. After speaking with the
25 general manager we decided to have a meeting with

1 everyone and allow everyone to have the day off.
2 When we told them, you could see it in their
3 faces how everyone became silent in disbelief.

4 I personally met with Adam's family and
5 talked with them about Adam and shared some
6 memories I had from him with work. Ever since
7 that day we have Adam's work shirt hanging up in
8 the shop. We had everyone in the dealership sign
9 and write one of the Adam's -- sign on one of
10 Adam's shirt sleeves, and we gave it to Adam's
11 mom during a ride that was constructed in honor
12 of Adam's death, as well as riding past the
13 location which it happened.

14 Adam's death affected the whole dealership,
15 and still today we talk about Adam and think of
16 some of the funny and, yes, stupid things he did;
17 but all in all, Adam's death taught me to never
18 take a single day for granted and that life is
19 very precious.

20 On behalf of the whole Jaguar and Land Rover
21 dealership, we miss you, Adam.

22 Thank you.

23 MS. MARZANO: Next the State would call
24 Laurie Gast (phonetic spelling).

25 UNIDENTIFIED SPEAKER: Please face the Court

1 and raise your right hand.

2 (Whereupon, the witness was sworn by the
3 Clerk.)

4 MS. GAST: Thank you. Thank you for allowing
5 me the opportunity.

6 Trying to find the words for a victim impact
7 statement is proving to be one of the hardest
8 things I've ever had to do and a task that I pray
9 I never have to do again.

10 This immeasurable pain and heartache has
11 unfortunately been overshadowed by the pursuit of
12 justice for Adam. I know that justice won't
13 bring him back, but I hope that it will aid in
14 our healing process.

15 I know I'm supposed to take this opportunity
16 to talk about how my life has been impacted by
17 Adam's death, but my personal battle between my
18 love for him and the hate that I'm carrying for
19 the circumstances surrounding his death are so
20 raw that it will take a lifetime to understand
21 the impact of this.

22 I will always cherish the love and memories
23 that I have for Adam, and I will pray that some
24 day I find peace in the hate that I have for the
25 circumstances surrounding his death.

1 Finding a way to verbalize the impact of
2 Adam's death that it has had on me is somewhat
3 impossible. This will impact me for the rest of
4 my life. From now on I will always have to speak
5 of him in the past tense.

6 Adam King was a son. Adam King was a
7 brother. Adam King was a grandson. Adam King
8 was a friend. Adam King was a nephew. He was my
9 nephew. Just knowing that never again will I
10 hear his voice say the words, I love you, Aunt
11 Laurie, this alone will impact the rest of my
12 life.

13 Adam had a big heart. He was shy but
14 confident. He was evolving. He was finding out
15 who he really was, getting comfortable with who
16 he was to become. He was passionate about his
17 work, his Mustang, his motorcycle. He was
18 fiercely loyal to his friends. He was an 18-
19 year-old boy, the future was his or so we
20 thought.

21 It's been almost two years since I was woken
22 up by a phone call telling me that he was dead.
23 That horrifying call was only made worse when I
24 was told that he was killed by a hit-and-run
25 driver, that the man who did this made the

1 conscious decision to hit, kill and run with no
2 regard for human life. From his rearview mirror
3 he saw the lifeless body of 18-year-old Adam
4 King. Dead. Yet he chose to drive away. What
5 kind of person could do this? There is a name
6 for that kind of person, and his name is Adam
7 Costello.

8 This could have been an accident, a
9 senseless, careless, tragic accident; but the
10 moment that Adam Costello made the conscious
11 decision to run and hide the truth, it became a
12 violent, heinous crime.

13 For almost two years Adam Costello has to
14 continue to deny that he is responsible for this.
15 Adam Costello tried to cover this up. In my
16 heart and in my opinion I will always believe
17 that he has obstructed the justice and tampered
18 with the evidence.

19 Adam Costello tried to hide the truth. Adam
20 Costello did everything in his power to deny his
21 responsibility for the fact that he was guilty of
22 killing Adam King. For the past 21 months he has
23 diligently worked at trying to get away with
24 this. Showing up in this courtroom, in the same
25 room as Adam's mom, and showing no remorse

1 because he still felt that there was an
2 opportunity that he could get away with this.

3 Now that his last card has been played and
4 finally he will be going to prison for his
5 actions, will today be the day that he will act
6 remorseful? Today I don't want to hear his
7 remorse. He had 21 months that he chose not to
8 be remorseful. Any words or actions from him
9 today will never be enough to heal the pain and
10 agony that I and my family have had to endure for
11 the past 21 months, let alone the rest of our
12 lives.

13 What happens after today is between him and
14 God. Adam Costello killed Adam King on June 19th
15 of 2016. He's been killing this family ever
16 since, as we have had to watch him deny his
17 responsibility for this while we're trying to
18 mourn our own deep and personal loss.

19 I pray that this Court will prosecute Adam
20 Costello to the fullest extent of the law. I
21 pray that he will finally take the responsibility
22 for his actions while paying the harsh
23 consequences that he deserves. I pray that
24 today, finally, justice will be served for Adam
25 King.

1 I'm sorry. Thank you. I'm sorry.

2 MS. MARZANO: Alex King.

3 UNIDENTIFIED SPEAKER: Go ahead and face the
4 Clerk, raise your right hand.

5 (Whereupon, the witness was sworn by the
6 Clerk.)

7 MR. KING: First I'm gonna read the statement
8 written by my father for him.

9 I, Roger King, Adam's King's father, am
10 speaking through my son, Alex King, to address
11 this Court and specifically regarding Adam
12 Costello.

13 First I would like to emphasize the impact of
14 Adam's murder has had on my life. It is the loss
15 of the physical and tactile contact with my son.
16 I hope the Costello family learns how I feel once
17 you lose a loved one to the prison system, unable
18 to see, touch, smell or hear Adam Costello at
19 will. At least they can console themselves with
20 the weekly or monthly visit in the prison.
21 However, I cannot ever hold my child again, ever.
22 The depth of my loss is infinite.

23 Yet my Adam is still with me, as it says on
24 his urn. Adam is. He is with me in thoughts,
25 spirit and depth of feeling. Adam Roger King is,

1 and this feeling and belief will never leave me.

2 My disdain for Adam Costello will not let me
3 properly address him directly in this court.

4 This man will feel a greater impact by me
5 addressing the Court through Alex rather than if
6 I address him personally and directly.

7 I request Adam Costello make a physical
8 action of remembrance, such as sending a postcard
9 daily remembering my Adam Roger King and mailed
10 for the duration of his sentence should the Court
11 allow it.

12 The loss of my son's precious life and the
13 depth of my grief should always be in the
14 forefront of Adam Costello's mind.

15 With a heavy heart, Roger Stern King, Adam
16 Roger King's father.

17 As for me, we all have our good memories with
18 Adam, and those are never going to leave us; but
19 the main impact of Adam's death, I think, is the
20 things that we're gonna miss in the future. I
21 lost the best man for my wedding. I lost the
22 father of my nephews and nieces. I lost an uncle
23 to my future children. Those all lost a
24 grandfather. My parents lost a son, and my
25 grandparents lost a grandchild; and nothing can

1 ever replace that. No one can ever bring any of
2 that back to us.

3 As far as Adam's life, as much as he worked
4 hard and -- at Jaguar dealership and he studied a
5 little bit for school, he was trying to get
6 towards his GED, the conversation I had with him
7 most often was telling him about the military.
8 He had a lot of questions for me about it, and he
9 always wanted to either join the Marine Corp or
10 become an Army Ranger one day; and I talked to
11 him a lot about that. And often, just the type
12 of person he was, you could tell from his work --
13 work -- work ethic, excuse me, at least at
14 Jaguar, he always did his best, worked his
15 hardest at everything he did. But his ultimate
16 goal was to go into the military and fight and
17 serve for his country with everything he has.

18 He wanted -- he always looked out for
19 everybody, even anybody that he didn't know. He
20 wanted to go and fight for our freedom to live in
21 this country, and we lost -- we lost a great
22 person in that regard.

23 MS. MARZANO: And lastly, Your Honor, I will
24 recall Traci Miller.

25 THE COURT: You're still under oath, ma'am.

1 MS. MILLER: Okay.

2 THE COURT: You can go ahead and have a seat.

3 MS. MILLER: Thank you, Your Honor. Thank
4 you for this opportunity.

5 My son, Adam, was the true definition of a
6 free spirit. He was full of love, even if
7 sometimes he didn't show it. He was loyal to the
8 bone. He was full of controversy and turmoil.
9 If he had something to say, there was no stopping
10 him, and he was so passionate about everything he
11 did. So stubborn about anything he didn't want
12 to do. He had a little bit of everybody in this
13 room in him.

14 Your Honor, I see that Mr. Costello is
15 remorseful and feels very bad; but I am not
16 responsible for his feelings, and I do not feel
17 sorry for him. He did a despicable thing, and he
18 continued with his deceit for a year and nine
19 months, knowing how much suffering he caused.
20 His punishment is deserved and brought on by him
21 and him alone.

22 Getting justice for my son has consumed my
23 life since the night he was killed. Trying to
24 bury my grief until justice was served has taken
25 a toll on my health. Now that my grief can come

1 welling to the surface, the love, the loss, the
2 future that I dreamed of for Adam, the future
3 that Adam dreamed of for himself, I don't know
4 what to do with that.

5 Your Honor, I would like to tell you the --
6 my story of the night that Adam Costello slammed
7 his truck into my son and his motorcycle, causing
8 my son to hit a palm tree. Mr. Costello saw my
9 son's precious body break into pieces, and he
10 just drove away. When the police came to our
11 home at 3:00 a.m. to tell me that my 18-year-old
12 son was killed by a hit-and-run driver, I died.
13 I felt like I was imploding and exploding at the
14 same time. I saw my beating heart laying in my
15 hands. My brain melted into a pool of
16 unfathomable grief. All I could do was scream
17 and bawl and retch and crawl on the floor in
18 disbelief, yelling no, no, no. Sorry. Not my
19 baby. Please come home, Adam.

20 Then the anger set in. How could someone do
21 such a horrible thing. Alex and Cass and Tom
22 wrapped me in their arms until complete and utter
23 exhaustion set in. Then we all wrapped Alex in
24 our arms as he broke down, his brother was dead.

25 There is a short poem I'd like to read. It's

1 titled Mom, He Only Took My Hand, and it's
2 unknown author.

3 "Last night while I was trying to sleep,
4 My son's voice I did hear,
5 I opened my eyes and looked around,
6 But he did not appear.
7 He said, "Mom, you've got to listen,
8 You've got to understand,
9 God didn't take me from you, mom,
10 He only took my hand.
11 When I called out in pain that morning,
12 The instant that I died,
13 He reached down and took my hand -- hand,
14 And pulled me to His side.
15 He pulled me up and saved me
16 From the misery and pain.
17 My body was so -- was hurt so badly inside,
18 I could never be the same.
19 My search is really over now,
20 I've found happiness within,
21 All the answers to my empty dreams,
22 And all that might have been.
23 I love you so much and miss you so,
24 But I'll always be nearby.
25 My body's gone forever,

1 But my spirit -- spirit will never die.

2 And so, you must go on now,

3 Live one day at a time.

4 Just understand, God did not take me from
5 you,

6 He only took my hand."

7 Thank you.

8 MS. MARZANO: And that's all, Your Honor.

9 Thank you.

10 MR. McFEE: Your Honor, Mr. Costello's mother
11 would like to address the Court.

12 THE COURT: Okay.

13 MR. McFEE: Your Honor, this is Susan
14 Costello.

15 (Whereupon, the witness was sworn by the
16 Clerk.)

17 MS. COSTELLO: I just had a few short words
18 to say. I'm truly, truly sorry for the King
19 family. If there was anything I could do to
20 change the situation, I would. I know what it's
21 like to lose someone you love. I lost my son, he
22 was 37, from heart failure, and my husband died
23 in a car accident 14 months later. So I know a
24 little bit about grief.

25 I know that, you know, Adam has been a

1 wonderful son. He has never done anything wrong.
2 He was a superlative student in school. He was
3 an honor roll student all through elementary,
4 high school and all through college. He's always
5 tried to do the right thing. He's never broken a
6 law.

7 I don't know why this happened; but if there
8 was anything I could do to change it, like I
9 said, I would. The last almost two years has
10 been horrible for us. Every day has been so
11 terribly hard. Adam has a lot of remorse. I've
12 seen him cry over and over again.

13 It was nothing that he intended to do on
14 purpose. It was an accident.

15 And that's all I have to say.

16 MR. McFEE: And Your Honor, Mr. Costello has
17 something he'd like to read if he can.

18 THE COURT: You may.

19 MR. McFEE: Would you like him to do it from
20 here or up there, Judge?

21 THE COURT: Which would he prefer?

22 MR. McFEE: Where would you prefer? Up
23 there?

24 THE DEFENDANT: Sure.

25 MR. McFEE: Go ahead.

1 THE DEFENDANT: Okay.

2 (Whereupon, the defendant was sworn by the
3 clerk.)

4 THE DEFENDANT: Having lost my father in a
5 traffic accident seven years ago, 14 months after
6 my older brother tragically died, I do understand
7 the pain of losing a loved one suddenly. After
8 experiencing and witnessing the pain that my
9 mother endured having lost her son, I would never
10 intentionally harm someone else's child. And
11 Mrs. King, I am truly sorry for your loss.

12 That we sit here today with this case having
13 come to a resolution, the truth is that over
14 these past 20 months I've lived in my own prison
15 because of the guilt and remorse I feel. I don't
16 expect you to do so any time soon, but I do pray
17 and ask that one day you will be able to forgive
18 me, not so much for me but for the healing
19 process of yourself.

20 These words cannot express how truly sorry I
21 am, and I pray that everyone affected by this
22 tragedy will find healing.

23 That's it.

24 THE COURT: Thank you.

25 Is there any legal cause why sentence should

1 not be pronounced at this time?

2 MR. McFEE: No, Your Honor.

3 THE COURT: Mr. Costello, based on your plea
4 to the fourth amended information of no contest,
5 I adjudicate you guilty of both of those counts.

6 With regard to Count I, I sentence you as
7 agreed to ten-and-a-half years of prison or
8 otherwise stated, ten years, six months. I will
9 apply whatever credit you have, and I do wanna
10 talk about that so that we can resolve any
11 discrepancies in that regard today.

12 The first four years of that sentence are
13 imposed as a minimum mandatory sentence pursuant
14 to Florida law and your plea agreement.

15 With regard to Count II, I adjudicate you and
16 sentence you as agreed to five years in prison to
17 run concurrent with the sentence I've just
18 announced as to Count I.

19 I assess the monetary obligations that have
20 already been described, and they shall be due and
21 payable in full 90 days after your release from
22 Department of Corrections.

23 I order a three year driver's license
24 suspension pursuant to Florida law and require
25 you to apply consistent with your plea -- plea

1 agreement following the three year suspension.

2 I order 120 community service hours and your
3 attendance at a victim impact panel as specified
4 more specifically in the written plea agreement.

5 I also order and direct that you will testify
6 truthfully as specified more specifically in the
7 plea agreement and as further described by Ms.
8 Marzano on the record this morning.

9 Is there anything other than credit that the
10 Court needs to clarify? Ms. Marzano?

11 MS. MARZANO: No, Your Honor.

12 MR. McFEE: No, Your Honor.

13 THE COURT: Okay. So what does the clerk
14 believe Mr. Costello's credit is?

15 UNIDENTIFIED SPEAKER: I am showing two days
16 from September 2nd, 2016 to September 3rd, 2016
17 when he bonded out.

18 THE COURT: Do you agree that's an accurate
19 calculation of your credit?

20 THE DEFENDANT: Yes, ma'am.

21 THE COURT: So I apply the two days credit as
22 specified. Mr. Costello, I remand you to serve
23 your sentence.

24 I will remind you that you have reserved the
25 right to appeal the jurisdiction of the Court and

1 the legality of the sentence. If you do wish to
2 file an appeal, it must be filed in writing with
3 the Clerk of Court, the notice, within 30 days.
4 You should advise Mr. McFee if you think I lacked
5 jurisdiction or this is an illegal sentence
6 because you can appeal those issues, as you know.

7 You are remanded, sir.

8 THE DEFENDANT: Thank you, Your Honor.

9 (End of recording.)

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1 STATE OF FLORIDA

2 TWENTIETH JUDICIAL CIRCUIT

3

4 I, Debra A. Cail, do hereby certify that:

5 The foregoing pages numbered 1-46 contain a
6 full transcript of the proceedings in the matter
7 described in the caption on Page 1 hereof
8 transcribed by me to the best of my knowledge and
9 ability from the electronic recording provided by
10 the court.

11 I am not counsel for, related to, or employed
12 by any of the parties in the above-entitled
13 cause.

14 I am not financially or otherwise interested
15 in the outcome of this case.

16 I am an approved transcriber for the
17 Twentieth Judicial Circuit Court.

18

19

20 /s/Debra A. Cail

21

22 August 6, 2020

23

24

25

**UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
FORT MYERS DIVISION**

ADAM MURRAY COSTELLO,
Petitioner,

Case No.: 2:25-cv-74-JLB-NPM

vs.

SECRETARY, DEPARTMENT OF
CORRECTIONS,
Respondent.

_____ /

EXHIBIT 5

3/19/2018 4:36 PM Filed Lee County Clerk of Courts

State of Florida

In the Circuit Court, 20th Judicial Circuit,
in and for Lee County, Florida

VS

Division **Felony**

Costello, Adam Murray

Case Number **16-CF-000371**

JUDGMENT

The defendant, Costello, Adam Murray being personally before this court represented by Shannon Howard McFee, the attorney of record, and the state represented by Mara Waxman Marzano, and having

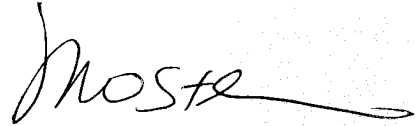
☒ entered a Plea of nolo contendere to the following crime(s), count(s) 1 , 2

<u>Cnt</u>	<u>Crime</u>	<u>Offense Statute</u>	<u>Degree</u>	<u>Case Number</u>	<u>OBTs Number</u>
1	Leaving the Scene of a Crash - Death	316.027(2c2f)	Felony - First Degree	16-CF-000371	3607131460
2	Tampering With or Fabricating Physical Evidence	918.13	Felony - Third Degree	16-CF-000371	3607131460

☒ And no cause being shown why the defendant should not be adjudicated guilty, IT IS ORDERED THAT the defendant is hereby ADJUDICATED GUILTY of the above crime(s). Count(s) 1, 2

☒ And being a qualified offender pursuant to section 943.325, the defendant shall be required to submit DNA samples as required by law. Count(s) 1, 2

DONE AND ORDERED in open court in Lee County, Florida, this 12th day of March, 2018.



Judge Margaret O Steinbeck

State of Florida

VS

Costello, Adam Murray

In the Circuit Court, 20th Judicial Circuit,
in and for Lee County, FloridaDivision **Felony**Case Number **16-CF-000371**

CHARGES / COSTS / FEES

The Defendant is hereby ordered to pay the following fees:

(Refer to the further recommended provisions listed at the end of this document for additional information if applicable.)

- ☒ A sum of \$50.00 pursuant to section 938.03, Florida Statutes (Crime Compensation Trust Fund).
- ☒ A sum of \$3.00 as a court cost pursuant to section 938.01, Florida Statutes (Criminal Justice Trust Fund).
- ☒ A sum of \$2.00 as a court cost pursuant to section 938.15, Florida Statutes (Criminal Justice Education by Municipalities and Counties).
- ☒ A sum of \$100.00 pursuant to section 938.27, Florida Statutes (Prosecution/Investigative Costs).
- ☒ A sum of \$65.00 pursuant to section 939.185, Florida Statutes (Additional Court Costs).
- ☒ A sum of \$50.00 pursuant to section 775.083(2), Florida Statutes (Court Costs Crimes Prevention).
- ☒ A sum of \$20.00 pursuant to section 939.06, Florida Statutes (Crime Stoppers Trust Fund).
- ☒ A sum of \$30.00 pursuant to section 318.18 (13)(a), Florida Statutes (State Court Facilities Fund).
- ☒ A sum of \$3.00 pursuant to section 318.18 (17), Florida Statutes (State Law Enforcement Radio Trust Fund).
- ☒ A sum of \$225.00 pursuant to section 938.05, Florida Statutes (Additional Court Costs).

DONE AND ORDERED in open court in Lee County, Florida, this 12th day of March, 2018.



Judge Margaret O Steinbeck

Defendant: Costello, Adam Murray

Case Number: 16-CF-000371

OBTS Number: 3607131460

SENTENCE (As to Count 1)

The defendant, being personally before this court, accompanied by the defendant's attorney of record, Shannon Howard McFee, and having been adjudicated guilty herein, and the court having given the defendant an opportunity to be heard and to offer matters in mitigation of sentence, and to show cause why the defendant should not be sentenced as provided by law, and no cause being shown

It is the sentence of the Court that:

☒ The defendant is hereby committed to the custody of the Department of Corrections.

Be Imprisoned:

☒ For a term of 10 Year(s) 6 Month(s) (Department of Corrections State Prison).

Split Sentence:

Not Applicable

Defendant: Costello, Adam Murray

Case Number: 16-CF-000371

OBTS Number: 3607131460

SPECIAL PROVISIONS

(As to Count 1)

By appropriate notation, the following provisions apply to the Sentence imposed:

Mandatory/Minimum Provisions:Leaving the Scene
of a crash:It is further ordered that the 4 years minimum imprisonment provision of section 316.027(2)(c)(2)(F),
Florida Statutes, is hereby imposed for the sentence specified in this count.**Other Provisions:**

Jail Credit

It is further ordered that the defendant shall be allowed a total of 2 Day(s) as credit for time
incarcerated before imposition of this sentence.**CREDIT FOR TIME SERVED IN RESENTENCING AFTER VIOLATION OF PROBATION OR COMMUNITY CONTROL**

Not Applicable

Consecutive/Concurrent as to Other CountsIt is further ordered that the sentence imposed for this count shall run Concurrent with the sentence set forth in count(s) 2
of this case.**Consecutive/Concurrent as to Other Convictions**

Not Applicable

Defendant: Costello, Adam Murray

Case Number: 16-CF-000371

OBTS Number: 3607131460

SENTENCE (As to Count 2)

The defendant, being personally before this court, accompanied by the defendant's attorney of record, Shannon Howard McFee, and having been adjudicated guilty herein, and the court having given the defendant an opportunity to be heard and to offer matters in mitigation of sentence, and to show cause why the defendant should not be sentenced as provided by law, and no cause being shown

It is the sentence of the Court that:

☒ The defendant is hereby committed to the custody of the Department of Corrections.

Be Imprisoned:

☒ For a term of 5 Year(s) (Department of Corrections State Prison).

Split Sentence:

Not Applicable

Defendant: Costello, Adam Murray

Case Number: 16-CF-000371

OBTS Number: 3607131460

SPECIAL PROVISIONS

(As to Count 2)

By appropriate notation, the following provisions apply to the Sentence imposed:

Mandatory/Minimum Provisions:

Not Applicable

Other Provisions:

Jail Credit



It is further ordered that the defendant shall be allowed a total of 2 Day(s) as credit for time incarcerated before imposition of this sentence.

CREDIT FOR TIME SERVED IN RESENTENCING AFTER VIOLATION OF PROBATION OR COMMUNITY CONTROL

Not Applicable

Consecutive/Concurrent as to Other Counts

It is further ordered that the sentence imposed for this count shall run Concurrent with the sentence set forth in count(s) 1 of this case.

Consecutive/Concurrent as to Other Convictions

Not Applicable

Defendant: Costello, Adam Murray

Case Number: 16-CF-000371

OBTS Number: 3607131460

In the event the above sentence is to the Department of Corrections, the Sheriff of Lee County, Florida, is hereby ordered and directed to deliver the defendant to the Department of Corrections at the facility designated by the department together with a copy of this judgment and sentence and any other documents specified by Florida Statute.

The defendant in open court was advised of the right to appeal from this sentence by filing notice of appeal within 30 days from this date with the clerk of this court and the defendant's right to the assistance of counsel in taking the appeal at the expense of the state on showing of indigency.

In imposing the above sentence, the court further recommends:

- ☒ Attend & Complete Victim Impact Panel
- ☒ Community Service - Perform 120 Hours
- ☒ Community Service will be done in Trauma Center or Hospital where victims are from car accidents.
- ☒ DNA Taken at Lee County Jail
- ☒ Driver's License Suspended - Revoked - Term 3 Year(s)
- ☒ Starting upon release, victim Impact or driving improvement class that deals with Vulnerable drivers. Shall testify under Oath before SA as a specified in written agreement.

COMMENTS:

Not Applicable

DONE AND ORDERED in open court in Lee County, Florida, this 12th day of March, 2018.



Judge Margaret O Steinbeck

FINGERPRINTS OF DEFENDANT

State of Florida











Case Number: **16-CF-000371**

vs

Adam Murray Costello

SSN: [REDACTED]

AKA:

1. Right Thumb	2. Right Index	3. Right Middle	4. Right Ring	5. Right Little
				
6. Left Thumb	7. Left Index	8. Left Middle	9. Left Ring	10. Left Little
				

*Notate in the appropriate finger blocks if defendant is missing one or more fingers. If not missing, all ten impressions must be provided with deformities notated.

Fingerprints taken by:

J Camacho
Name (Print)

12060

Bailey
Title

I hereby certify that the above and foregoing are the fingerprints of the defendant, **Adam Murray Costello** and that they were placed thereon by the defendant in my presence in open court this date.

Done and Ordered in open court in Lee County, Florida, this 12th day of

March, 2018.

Margaret A. Steel
Judge

**UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
FORT MYERS DIVISION**

ADAM MURRAY COSTELLO,
Petitioner,

Case No.: 2:25-cv-74-JLB-NPM

vs.

SECRETARY, DEPARTMENT OF
CORRECTIONS,
Respondent.

_____ /

EXHIBIT 6

IN THE CIRCUIT COURT OF THE TWENTIETH JUDICIAL CIRCUIT
IN AND FOR LEE COUNTY, FLORIDA

STATE OF FLORIDA,
Plaintiff,

v.

Case No. 16-CF-371

ADAM MURRAY COSTELLO,
Defendant.

MOTION TO VACATE SENTENCE FOR INEFFECTIVE ASSISTANCE OF COUNSEL

COMES NOW the Defendant, by and through the undersigned attorney pursuant to Fla. R. Crim. P. 3.850, and moves to vacate the incarcerative portion of the sentence imposed in this case, and for resentencing, because the Defendant's plea was involuntary because trial counsel provided ineffective assistance to the Defendant, and in support thereof would state:

Summary

1. The Defendant was represented at trial of this case by Shannon H. McFee (hereinafter "Trial Counsel"). Trial Counsel provided ineffective assistance to the Defendant by failing to review and correct the Criminal Punishment Code scoresheet prepared pursuant to § 921.0024 Florida Statutes (2015) in this case. The Scoresheet improperly included 120 points for victim injury, resulting in a lowest permissible sentence of 126.3 months incarceration. The correct lowest permissible sentence would have been 36.3 months incarceration had the addition points not been improperly included. Trial Counsel failed to recognize that the 120 points for victim injury were improperly applied and therefore affirmatively misadvised advised the Defendant concerning the sentence he was likely to receive. Any reasonable lawyer would have correctly assessed the Scoresheet and properly advised the Defendant of the correct lowest permissible

sentence. The failure of Trial Counsel to do so was ineffective assistance which violated the Defendant's Sixth Amendment right to counsel.

Facts and Procedural History of the Case

2. As required by Fla. R. Crim. P. 3.850(c), the following information is provided:

(a) The Judgment and Sentence addressed herein were rendered by this Court on 19 March 2018.

(b) The judgment was entered following a plea proceeding on 12 March 2018. The Defendant was sentenced the same day.

(c) No direct appeal was taken.

(d) No prior pro-se motion for postconviction relief has been filed.

(e) The Defendant requests this Court to vacate the sentence in this case and to resentence the Defendant using a corrected scoresheet, or to grant such other relief as may be reasonable, just, and proper.

3. The Defendant was charged by an amended information filed 12 March 2018 with leaving the scene of a traffic crash involving death, a first degree felony under § 316.027(2)(c) and (f) Florida Statutes (2015), and tampering with evidence, a third degree felony under § 918.13 Florida Statutes (2015). The Defendant entered pleas of nolo contendere and was convicted on both charges. Judgement and sentence were rendered on 19 March 2018. The Defendant was sentenced to 10 years and 6 months incarceration on the charge of leaving the scene with a minimum mandatory term of incarceration of 4 years, and to five years incarceration on the charge of tampering with evidence, with the sentences to run concurrently.

4. On 12 March 2018, at or near the time of the plea, Trial Counsel filed a written "Plea Agreement Waiver of Rights" with this Court. The same provides in relevant part that the

Defendant agreed to the following: "The Defendant shall be sentenced in Count One to 10.5 years Florida State Prison with a 4 year minimum mandatory. As to Count Two the Defendant shall be sentenced to 5 years Florida State Prison."

5. On 12 March 2018, at or near the time of the plea, the State Attorney filed a Criminal Punishment Code scoresheet prepared pursuant to § 921.0024 Florida Statutes (2015) in this case. In section III the scoresheet included 120 points for victim injury, resulting in a lowest permissible sentence of 126.3 months incarceration.

6. The Defendant was sentenced as provided by the plea agreement. On the charge in count one of the information he was sentenced to 10.5 years incarceration with a minimum mandatory term of 4 years. On the charge on count two of the information he was sentenced to 5 years incarceration. The sentences of incarceration were to be concurrent. Certain court costs and fees and other special conditions were imposed.

Ineffective Assistance of Counsel

7. The Defendant now moves to vacate the incarcerative portion of his sentence in the instant case because his attorney failed to provide effective assistance of counsel. In reviewing such claims, Florida courts apply the rule in *Strickland v. Washington*, 466 U.S. 668 (1984):

Claims of ineffective assistance of trial counsel require a showing of deficient performance and prejudice. *See generally Strickland v. Washington*, 466 U.S. 668... (1984). First, a defendant must establish conduct on the part of counsel that is outside the broad range of competent performance under prevailing professional standards. *See Gore v. State*, 846 So.2d 461, 467 (Fla.2003). Second, the deficiency must be shown to have so affected the fairness and reliability of the proceedings that confidence in the outcome is undermined. *See id.* The two prongs are related, in that "the benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as

having produced a just result.” *Rutherford v. State*, 727 So.2d 216, 219 (Fla.1998) (quoting *Strickland*, 466 U.S. at 686...).

State v. Davis, 872 So. 2d 250, 253 (Fla. 2004); *Happ v. State*, 922 So. 2d 182, 186 (Fla. 2005).

8. The *Strickland* Court held that the standard requires the defendant to show that “there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” 466 U.S. at 694. The Court held that a reasonable probability is “a probability sufficient to undermine confidence in the outcome.” *Id.* A defendant bears the burden of establishing the claim. *See Freeman v. State*, 761 So. 2d 1055, 1069 (Fla. 2000) (a “defendant has the burden of alleging a specific, serious omission or overt act upon which the claim of ineffective assistance of counsel can be based”).

The First Prong of Strickland: Deficient Performance

9. Prior to advising the Defendant concerning the likely sentence in this case, Trial Counsel failed to ascertain whether the 120 victim injury points in section III of the scoresheet were properly included. Had he done the appropriate research, Trial Counsel could have easily ascertained that the same victim injury points were not properly assessed in the instant case.

10. In *Sims v. State*, 998 So. 2d 494, 496 (Fla. 2008), Sims was driving a truck when he struck and killed a victim. Sims left the scene of the accident without ever stopping the truck. *Id.* He was charged with leaving the scene of a crash resulting in the death of a person under § 316.027(1)(b) Florida Statutes (2001), and was found guilty as charged in the information. *Id.* At the sentencing hearing the trial court added 120 victim injury points to Sims’ Criminal Punishment Code scoresheet. *Id.* at 497. The Fifth District Court of Appeal affirmed the sentence, concluding that victim-injury points were properly imposed. *Id.* The Supreme Court granted review. *Id.* at 498-99.

11. In *Sims* the Supreme Court held: “Based upon the plain language of section 921.0021(7)(a)[Florida Statutes (2001)], which defines ‘victim injury’ for the purpose of scoring victim-injury points, we conclude that under these facts, the imposition of such points for leaving the scene in violation of section 316.027(1)(b) was incorrect.” *Id.* at 505. The Supreme Court reasoned:

Section 921.0021(7)(a) provides: “Victim injury” means the physical injury or death suffered by a person as a *direct result* of the primary offense, or any additional offense, for which an offender is convicted and which is pending before the court for sentencing at the time of the primary offense. (Emphasis supplied.) This “direct result” language clearly imparts and includes a causation requirement, which must exist between the death of the victim and the charged offense of leaving the scene of an accident resulting in death.

Id. at 505 (italics as in the report of *Sims*).

Accordingly, here, a similar interpretation of section 921.0021(7)(a), requiring the existence of a causal connection to impose victim-injury points, is warranted. Moreover, if the imposition of a restitution award, which results in monetary loss, entails a causation requirement, a causal connection is also required for the imposition of victim-injury points, which can lead to the much more significant loss of personal liberty through the imposition of a longer sentence. Finally, in interpreting Florida Rule of Criminal Procedure 3.701(d)(7), which provides when victim injury “shall be” scored under the sentencing guidelines, this Court concluded that the Sentencing Guidelines Commission had recommended that victim injury be scored when the “injury occurred *during* the offense which led to the conviction.” *Fla. R. Crim. Pro. re Sentencing Guidelines (Rules 3.701 & 3.988)*, 509 So.2d 1088, 1089 (Fla.1987) (emphasis supplied). For these reasons, we conclude that a causal connection must clearly exist between the charged offense and the death of the victim to impose victim-injury points.

998 So. 2d at 505-06 (italics as in the report of *Sims*).

The death of the victim was the direct result of the initial impact, rather than the underlying offense which occurred only after the

death. So, the causal connection, which is absolutely necessary to impose victim-injury points, simply does not exist in this case

998 So. 2d at 507. Thus the *Sims* Court clearly held that to assess victim injury points, it must be established that the “injury occurred during the offense which led to the conviction.” 998 So. 2d at 505.

12. Here, as in *Sims*, the offense for which the victim injury points was assessed was leaving the scene of a crash involving death. Therefore the same result would be required in the instant case. To impose victim injury points, “a causal connection must clearly exist between the charged offense and the death of the victim to impose victim-injury points.” *Sims* at 505. In the instant case that could not possibly have occurred. To be guilty of leaving the scene of a crash involving death, it would be necessary for a death to have occurred before the Defendant allegedly left the scene. If no death had occurred, it would not be possible to find that the Defendant left the scene of a death. Because the death had necessarily occurred before the Defendant allegedly left the scene, the act of leaving the scene could not possibly have caused the death.

13. *Sims* was decided by the Supreme Court in 2008. The events giving rise to the instant case were alleged to have occurred in 2016. Therefore Trial Counsel should have been aware of the rule in *Sims*. Nevertheless Trial Counsel affirmatively advised the Defendant that the State’s proposed sentence of 10 years and 6 months was the minimum sentence that this Court could impose absent some mitigating circumstance under § 921.0026. Apparently here no such mitigating circumstance existed. The Defendant accepted that advice and entered into the proposed plea agreement.

14. However the State’s proposed sentence of 10 years and 6 months was NOT the minimum sentence that this Court could impose absent some mitigating circumstance. Had the

erroneously included 120 points for victim injury been omitted from the scoresheet, the total sentence points would have been 76.4. That would have resulted in a lowest permissible sentence of 36.3 months. ($76.4 - 28 = 48.4$; $48.4 \times .75 = 36.3$). See § 921.0024(2); Fla. R. Crim. P. 3.704(26).

15. Rather than a failure to advise, the advice of Trial Counsel in the instance case involved advice which incorporated an error of law or, as some courts have referred to it, “affirmative” or “positive misadvice.” In *Ey v. State*, 982 So. 2d 618, 622 (Fla. 2008), the Supreme Court held that such affirmative misadvice about even collateral matters may constitute a legally cognizable claim for ineffective assistance of counsel when that misadvice affects the voluntariness of a plea. “When a defendant enters a plea in reliance on affirmative misadvice and demonstrates that he or she was thereby prejudiced, the defendant may be entitled to withdraw the plea even if the misadvice concerns a collateral consequence as to which the trial court was under no obligation to advise him or her.” *Ghanavati v. State*, 820 So. 2d 989, 991 (Fla. 4th DCA 2002). See also *Fernandez v. State*, 199 So. 3d 500, 504 (Fla. 2d DCA 2016), citing *Ey*; *Gunn v. State*, 841 So. 2d 629, 631 (Fla. 2d DCA 2003); *Roberti v. State*, 782 So. 2d 919, 920 (Fla. 2d DCA 2001).

16. The affirmative advice which Trial Counsel gave the Defendant was in error. The minimum sentence that this Court could impose absent some mitigating circumstance was not 10 years and 6 months; it was less than half of that. Here the affirmative misadvice given to the Defendant by trial counsel mislead him to believe that the minimum sentence which he could receive in the instant case was 10 years and 6 months. Had he known the truth he would not have entered into the plea agreement.

17. Any reasonable attorney would have ascertained the correct application of victim injury points to a charge of leaving the scene of a crash involving death. Had Trial Counsel done so, he would have ascertained that the correct minimum sentence was less than half of the sentence to which he advised the Defendant to agree. The failure of Trial Counsel to do so was ineffective assistance of counsel because it rendered the plea involuntary. The Defendant would not have agreed to the proposed sentence had he not been affirmatively misled by Trial Counsel.

The Second Prong of Strickland: Prejudice to the Defendant

18. In the instant case the aforesaid failures of Trial Counsel to provide effective assistance resulted in prejudice to the Defendant. The Defendant entered into the plea agreement because he was affirmatively misled by Trial Counsel to believe that 10 years, 6 months, was the minimum sentence he might receive. As a direct result of the failure of trial counsel to recognize and assert the errors in the sentencing scoresheet, the Defendant entered into a plea agreement based on that affirmative misadvice. As explained supra, the plea agreement in this case was predicated upon a fallacy. Had the Defendant known that the actual lowest permissible sentence he might have received was substantially less than the agreed-upon sentence, he would not have entered into that agreement.

19. Prejudice to the Defendant arose from the failure of trial counsel to recognize and assert the correct lowest permissible sentence which might be imposed in this case. As a result of the ineffective assistance of trial counsel the Defendant entered into a plea agreement which was based on a fallacy. He is presently serving a 10 year, 6 month, sentence which is not required by the statutory and decisional law of Florida. Had the Defendant known that the actual lowest permissible sentence he might have received was substantially less than that agreed-upon sentence, he would not have entered into the plea agreement in this case.

Conclusion

20. Thus the two prongs of the test in *Strickland v. Washington* and its progeny are both met. The unprofessional error of trial counsel by failing to recognize and assert the correct minimum sentence which might be imposed in this case was “outside the wide range of professionally competent assistance.” *Strickland* at 694. “[T]here is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” *Strickland* at 694. “A reasonable probability is a probability sufficient to undermine confidence in the outcome.” *Id.*

21. As required by Fla. R. Crim. P. 3.850(n), the Defendant certifies that he has read this motion and understands its content, that this motion is filed in good faith and with a reasonable belief that it is timely, has potential merit, and does not duplicate previous motions that have been disposed of by this Court, and that the facts stated in this motion are true and correct. The Defendant understands English, being a native speaker thereof.

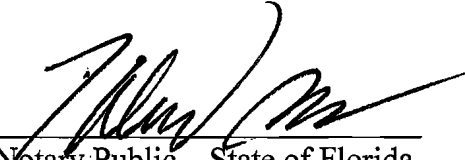
WHEREFORE the Defendant now requests this Honorable Court to vacate the sentence imposed in this case because trial counsel provided ineffective assistance, or to grant such other relief as may be reasonable, just, and proper.

Under penalties of perjury, I declare that I have read the foregoing motion and that the facts stated in it are true.


Adam Murray Costello

STATE OF FLORIDA)
)
COUNTY OF CHARLOTTE)

The foregoing instrument was sworn to and subscribed before me in my physical presence this 4th day of March, 2020, by Adam Murray Costello, who produced Florida Department of Corrections identification, and who swore or affirmed that he executed the foregoing instrument for the purposes expressed therein and that the statements he made or adopted therein are true.

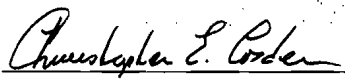


Notary Public – State of Florida
Commission Number:
Commission expires:



CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing motion has been furnished by email, through the Florida Courts e-filing Portal as provided by Fla. R. Jud. Admin. 2.516(b)(1), to Amira D. Fox, State Attorney (at ServiceSAO-LEE@sao.cjis20.org), 2000 Main Street, Sixth Floor, Fort Myers, Florida 33901, on this 5th day of March, 2020.



Christopher E. Cosden
Counsel for the Defendant
Florida Bar No. 0813478
Post Office Box 9368
Fort Myers, Florida 33902
telephone 239-334-2030
email cosdenlaw@att.net

**UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
FORT MYERS DIVISION**

ADAM MURRAY COSTELLO,
Petitioner,

Case No.: 2:25-cv-74-JLB-NPM

vs.

SECRETARY, DEPARTMENT OF
CORRECTIONS,
Respondent.

_____ /

EXHIBIT 7

**IN THE CIRCUIT COURT OF THE TWENTIETH JUDICIAL CIRCUIT IN AND FOR
LEE COUNTY, FLORIDA CRIMINAL ACTION**

STATE OF FLORIDA,

Plaintiff,

vs.

Case No. 16-CF-371

ADAM COSTELLO,

Defendant.

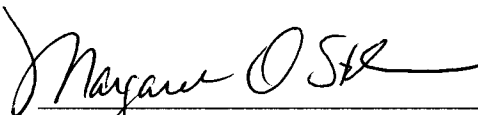
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**ORDER DIRECTING STATE TO RESPOND TO DEFENDANT'S 3.850 MOTION BY
SEPTEMBER 11, 2020**

THIS CAUSE comes before the Court on Defendant's "Motion To Vacate Sentence For Ineffective Assistance Of Counsel," pursuant to Fla. R. Crim. P. 3.850, filed by counsel March 5, 2020, a copy of which the Clerk never provided to the Court. Further, counsel failed to provide a courtesy copy to the Court. Having now been made aware of and reviewed the motion, it is hereby:

ORDERED AND ADJUDGED that the State shall file a response **on or before September 11, 2020**, stating why the requested relief should not be granted. The response **shall cite all applicable case law, and shall attach all relevant portions of the record which support or refute each claim, including, but not limited to, transcripts of hearings or proceedings, charging documents, pleadings, plea forms, orders, guidelines scoresheets, criminal punishment code scoresheets, and all other supporting documentation, such as appellate briefs or jail cards.**

Timely motions seeking an extension of time will be considered upon a showing of good cause. **DONE AND ORDERED** in Chambers at Fort Myers, Lee County, Florida, this 13 day of July, 2020.

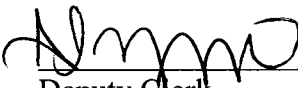


Margaret O. Steinbeck
Circuit Judge

Certificate of Service

I HEREBY CERTIFY that a true and correct copy of the foregoing order has been furnished to: **Christopher E. Cosden, Esq.**, P.O. Box 9368, Ft. Myers, FL 33902; **Office of the State Attorney**, P.O. Box 399, Ft. Myers, FL 33902-0399; and **Court Administration (14)**, 1700 Monroe St., Ft. Myers, FL 33901, this 14 day of July, 2020.

LINDA DOGGETT
Clerk of Court

By: 
Deputy Clerk

**UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
FORT MYERS DIVISION**

ADAM MURRAY COSTELLO,
Petitioner,

Case No.: 2:25-cv-74-JLB-NPM

vs.

SECRETARY, DEPARTMENT OF
CORRECTIONS,
Respondent.

_____ /

EXHIBIT 8

IN THE CIRCUIT COURT OF THE TWENTIETH JUDICIAL CIRCUIT IN AND FOR
LEE COUNTY, FLORIDA CRIMINAL ACTION

STATE OF FLORIDA

CASE NO: 16-CF-000371 - (MOS)
(DMB)

vs.

ADAM MURRAY COSTELLO

STATE'S RESPONSE TO THE DEFENDANT'S
"MOTION TO VACATE SENTENCE FOR INEFFECTIVE ASSISTANCE OF COUNSEL," FILED ON MARCH
5, 2020

COMES NOW the STATE OF FLORIDA, by and through the undersigned Assistant State Attorney, pursuant to Court Order, and files the following response to the Defendant's "Motion to Vacate Sentence for Ineffective Assistance of Counsel," filed by postconviction counsel on March 5, 2020, pursuant to Fla R. Crim. P. 3.850. The State submits that the motion should be summarily denied with prejudice.

FACTS & PROCEDURAL HISTORY

On March 12, 2018, the Defendant was charged by way of fourth amended information with one count of leaving the scene of a crash – death, a first degree felony and one count of tampering with or fabricating physical evidence, a third degree felony¹. On March 12, 2018, the Defendant entered a plea, as charged, in exchange for an agreed upon sentence of 10 ½ years in the Department of Corrections on count one, with a concurrent 5 years in the Department of Corrections on count two, along with other terms and conditions (PT², Pages 43-44)³. The Defendant did not file an appeal. On March 5, 2020, the Defendant timely filed the instant rule 3.850 motion for postconviction relief, and the State has been ordered to respond.

ISSUE

Whether the Defendant's claim that the victim injury points could not be assessed in this case due to the holding of *Sims v. State*, 998 So.2d 494, 496 (Fla. 2008) is legally insufficient.

RESPONSE

A motion for postconviction relief can be denied without an evidentiary hearing when: (1) the motion, files, and records in the case conclusively show that the prisoner is entitled to no relief, or (2) the motion or a particular claim is legally insufficient. *Anderson v. State*, 627 So.2d 1170 (Fla. 1993). The defendant bears the burden of establishing a prima facie case based upon a legally valid claim. *Kennedy v. State*, 547 So.2d 912 (Fla. 1989). The Florida Supreme Court has stated, "[a] defendant may not simply file a motion for postconviction relief containing conclusory allegations that his or her trial counsel was ineffective and then expect to receive an evidentiary hearing." *Lecroy v. Dugger*, 727 So.2d 236, 239 (Fla. 1998). Instead, "the defendant must allege specific facts that, when considering the totality of the circumstances, are not conclusively rebutted

¹ See 4th Amended Information, filed in the court file on March 12, 2018 – not attached.

² PT is the transcript from the March 12, 2018, plea and sentencing in the instant case. It has not been attached to the instant response. The State will refer to the transcript as PT throughout this response.

³ See also Judgment & Sentence, filed in the court file on March 19, 2018 – not attached.

RE: ADAM MURRAY COSTELLO, 16-CF-000371

by the record and that demonstrate a deficiency on the part of counsel which is detrimental to the defendant.” *Id.*

In order to demonstrate ineffective assistance of counsel, the defendant must be able to show both that counsel's performance was deficient and that counsel's deficient performance prejudiced his defense. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). To satisfy the first prong of *Strickland*, the defendant must be able to show that counsel made errors so serious that he was not functioning as the “counsel” guaranteed the defendant by the Sixth Amendment. In order to satisfy the prejudice prong of *Strickland*, the defendant must be able to demonstrate a reasonable probability that but for counsel's errors, the result of the proceeding would have been different. *Id.* at 694. “A reasonable probability is a probability sufficient to undermine confidence in the outcome.” *Id.*

Judicial scrutiny of defense counsel's performance must be highly deferential. *Strickland*, 466 U.S. at 689. “Strategic decisions do not constitute ineffective assistance of counsel if alternative courses could have been considered and rejected and counsel's decision was reasonable under the norms of professional conduct.” *Occhicone v. State*, 768 So.2d 1037, 1048 (Fla. 2000). In fact, the Florida Supreme Court has recognized that “every effort [must] be made to eliminate the distorting effects of hindsight... and a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance...” *Id.* Furthermore, “[a]n error by counsel, even if professionally unreasonable, does not warrant setting aside the judgment of a criminal proceeding if the error had no effect on the judgment.” *Strickland*, 466 U.S. at 691.

In *Hill v. Lockhart*, 474 U.S. 52 (1985), the United States Supreme Court established a test for analyzing ineffective assistance of counsel claims relating to guilty pleas. The first prong is the same as the deficient performance prong of *Strickland*. *Id.* at 58-9. Regarding the second prong, a defendant must demonstrate “a reasonable probability that, but for counsel's errors, the defendant would not have pleaded guilty and would have insisted on going to trial.” *Id.* at 59.

[I]n determining whether a reasonable probability exists that the defendant would have insisted on going to trial, a court should consider the totality of the circumstances surrounding the plea, including such factors as whether a particular defense was likely to succeed at trial, the colloquy between the defendant and the trial court at the time of the plea, and the difference between the sentence imposed under the plea and the maximum possible sentence the defendant faced at a trial.

Grosvenor v. State, 874 So.2d 1176, 1181-82 (Fla. 2004); *see also Deck v. State*, 985 So.2d 1234, 1238 (Fla. 2d DCA 2008)(“to show prejudice in a plea bargain case, [the defendant] must show only that without the misadvice of counsel, there was a reasonable probability he would not have pleaded guilty and would have chosen to go to trial.”)(*citing Brown v. State*, 967 So.2d 440, 443 (Fla. 4th DCA 2007)).

RE: ADAM MURRAY COSTELLO, 16-CF-000371

In *Rankin v. State*, 861 So.2d 1222 (Fla. 2d DCA 2003), the Second District Court of Appeal stated,

[a] claim that a plea was involuntarily entered based on trial counsel's failure to object to an inaccurate scoresheet is a cognizable rule 3.850 claim. However, a defendant raising such a claim must allege that he would not have entered his plea had he been aware of the correct guidelines sentencing range.

Id. at 1224.

Furthermore, the Defendant should be aware that a defendant who successfully withdraws a plea: (1) will not automatically receive another plea offer and (2) may be "sentenced to a longer term of imprisonment than the sentence he presently serves." *Green v. State*, 857 So.2d 304, 305 (Fla. 2d DCA 2003); *see also White v. State*, 995 So.2d 1172, 1174 ("[i]f probation is revoked after such hearing, White would again be facing the statutory maximum of fifteen years in prison for this second-degree felony, as if the plea agreement had not existed"). In the instant case, the Defendant could face the possibility of a maximum penalty of 35 years in the Department of Corrections if his motion is successful.

The Defendant claims that counsel was ineffective for misadvising him regarding the lowest permissible sentence on his scoresheet because the 120 victim injury points for death could not be assessed against him because he pled to leaving the scene of a crash with death (Defendant's Motion, Pages 4-7). To properly invoke this Court's review of a claim of scoresheet error raised under Fla. R. Crim. P. 3.850 pursuant to a plea, the Defendant must seek to withdraw his plea. *See Purifoy v. State*, 10 So. 3d 197, 200 (Fla. 2d DCA 2009); *Goins v. State*, 889 So. 2d 918 (Fla. 2d DCA 2004). Rather than seeking to withdraw his plea, the Defendant merely seeks to vacate his sentence (Defendant's Motion, Page 9). Because the Defendant's motion fails to request withdrawal of the plea, and does not allege that he would have proceeded to trial, the State submits that the motion is facially insufficient. *See Dominguez v. State*, 98 So.3d 198, 200 (Fla. 2d DCA 2012) *receded from by Parks v. State*, 223 So.3d 380 (Fla. 2d DCA 2017); *see also Hill, supra* 474 U.S. at 59. However, the Defendant cannot amend the motion in good faith because it is also legally insufficient and conclusively rebutted by the records in the instant case; therefore, the State submits it should be summarily denied with prejudice.

In support of his position, the Defendant cites to *Sims v. State*, 998 So.2d 494, 496 (Fla. 2008) (Defendant's Motion Pages 4-6). The Defendant alleges that counsel misadvised him regarding the minimum sentence he could receive based on this incorrect scoresheet, and had he known that his minimum was actually only 36.3 months he would not have entered a plea (Defendant's Motion, Pages 4-7).

The Defendant's allegations are conclusively rebutted by the record. First, even if the scoresheet did not have any victim injury points, the leaving a scene of a crash with death charge required a 4 year minimum mandatory sentence. *See Fla. Stat. 316.027(2)(c)(2016)*. Moreover,

RE: ADAM MURRAY COSTELLO, 16-CF-000371

the *Sims* case applied to an earlier version of Fla. Stat. 921.0021(7), which did not include Fla. Stat. 921.0021(7)(e). *See Sims, supra* 998 So.2d 494. In 2007, the Florida State Legislature adopted 921.0021(7)(e), which states:

Notwithstanding paragraph (a), if the conviction is for an offense described in s. 316.027 and the court finds that the offender caused victim injury, sentence points for victim injury may be assessed against the offender.

Fla. Stat. 921.0021(7)(e)(2007-2020). This refutes the Defendant's contention that the 120 victim injury points could not have been applied to his case⁴. Likewise, this refutes the Defendant's contention that counsel was ineffective. Therefore, this claim should be summarily denied with prejudice as it is conclusively rebutted by the record.

CONCLUSION

WHEREFORE, the STATE OF FLORIDA prays that this Honorable Court issue an order summarily denying the Defendant's motion with prejudice.

AMIRA D. FOX
STATE ATTORNEY

BY: /s/ Danielle M. Butler
Danielle M. Butler
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⁴ Of note, during the plea colloquy the Defendant was specifically asked about the scoresheet, and stated that he had an opportunity to review it with counsel, that it was accurate, and that he understood it (PT, Pages 13-14).

RE: ADAM MURRAY COSTELLO, 16-CF-000371

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above and foregoing has been furnished to the Honorable Margaret O. Steinbeck, Circuit Judge, Lee County Justice Center, 1700 Monroe Street, Fort Myers, Florida 33901; to the Court Administrator's Office, LEE County Justice Center, 1700 Monroe Street, Fort Myers, Florida 33901; and to Christopher E. Cosden, Counsel for the Defendant, PO Box 9368, Fort Myers, Florida 33902 (cosdenlaw@att.net) by United States mail or electronic delivery this 9th day of September 2020.

/s/ Danielle M. Butler
Danielle M. Butler
Assistant State Attorney

**UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
FORT MYERS DIVISION**

ADAM MURRAY COSTELLO,
Petitioner,

Case No.: 2:25-cv-74-JLB-NPM

vs.

SECRETARY, DEPARTMENT OF
CORRECTIONS,
Respondent.

_____ /

EXHIBIT 9

IN THE CIRCUIT COURT OF THE TWENTIETH JUDICIAL CIRCUIT
IN AND FOR LEE COUNTY, FLORIDA

STATE OF FLORIDA,
Plaintiff,

v.

Case No. 16-CF-371

ADAM MURRAY COSTELLO,
Defendant.

_____ /

DEFENDANT’S REPLY TO
“STATE’S RESPONSE TO THE DEFENDANT’S ‘MOTION TO VACATE SENTENCE
FOR INEFFECTIVE ASSISTANCE OF COUNSEL’ FILED ON MARCH 5, 2020”

COMES NOW the Defendant, by and through the undersigned attorney, and replies to the pleading entitled “State’s Response to the Defendant’s ‘Motion to Vacate Sentence for Ineffective Assistance of Counsel,’ Filed on March 5, 2020”, and would state:

1. The State first argued:

The Defendant claims that counsel was ineffective for misadvising him regarding the lowest permissible sentence on his scoresheet because the 120 victim injury points for death could not be assessed against him because he pled to leaving the scene of a crash with death (Defendant’s Motion, Pages 4-7). To properly invoke this Court’s review of a claim of scoresheet error raised under Fla. R. Crim. P. 3.850 pursuant to a plea, the Defendant must seek to withdraw his plea. *See Purifoy v. State*, 10 So. 3d 197, 200 (Fla. 2d DCA 2009); *Goins v. State*, 889 So. 2d 918 (Fla. 2d DCA 2004).

State’s Response at 3.

2. The State’s reliance upon *Goins* and *Purfoy* is misplaced. Purfoy sought to correct his sentence under Fla. R. Crim. P. 3.800(a). The district court held: “Mr. Purifoy’s claim was not cognizable under rule 3.800(a) because the alleged error is not apparent from the face of the

record.” 10 So. 3d at 200. The district court then held: “Furthermore, Mr. Purifoy’s rule 3.800(a) motion could not have been treated as a motion under Florida Rule of Criminal Procedure 3.850 because he did not seek to withdraw his plea”, *Id.*, citing *Goins*. The *Purfoy* court did not explain that part of its ruling, not did it offer any explanation or reason for the application of the rule to the facts.

3. In *Goins* the Defendant moved to enforce a plea agreement under rule 3.850.

In his motion, Goins alleged that his sentence was not executed in accordance with the written plea agreement. Goins did not, however, seek to withdraw his plea. Because Goins did not seek the appropriate relief, the trial court correctly denied his motion. *See Green v. State*, 857 So.2d 304 (Fla. 2d DCA 2003). Accordingly, we affirm the trial court’s order without prejudice to Goins’ right to file in the trial court, within sixty days of the date of this court’s mandate, a motion seeking to withdraw his plea pursuant to rule 3.850. If filed within sixty days, the motion should be considered timely and not deemed successive.

Goins at 919. As in *Purfoy*, the *Goins* court did not explain its ruling, not did it offer any explanation or reason for the application of the rule to the facts.

4. The *Goins* court cited *Green v. State* in support of its bare application of the rule. In *Green*, the district court had, in a earlier opinion,

reversed the trial court’s summary denial of Green’s rule 3.850 motion because his claim of ineffective assistance of counsel was facially sufficient and was not refuted by the record. Specifically, Green alleged that he would not have pleaded guilty to charges of sale and possession of cocaine or admitted violating his probation on a previous cocaine charge but for his counsel’s incorrect advice that he would receive credit for time spent in prison on the previous charge against the sentences imposed on the new charges.

Thus the facts in *Green* were very similar to the facts in the instant case:

On remand for an evidentiary hearing, Green had the burden of proving his claim of ineffective assistance of counsel. *See Schofield v. State*, 681 So.2d 736, 738 (Fla. 2d DCA 1996). Green testified in support of his allegation that his counsel’s incorrect

advice about the length of his sentence induced him to enter his guilty plea. The State failed to present any evidence to refute Green's allegation. Green's competent, substantial, and unrefuted evidence compels the conclusion that Green carried his burden to prove ineffective assistance of counsel under *Strickland v. Washington*, 466 U.S. 668... (1984). The trial court's conclusion to the contrary was incorrect.

857 So. 2d at 305. The Green court then held:

Green did not, however, seek to withdraw his plea. When asked repeatedly if he sought to withdraw his plea and proceed to trial, Green insisted on his entitlement to the jail time credit that his prior counsel had incorrectly advised he would receive. However, the only relief available to Green under these circumstances was to be allowed to withdraw his plea. *See Trenary v. State*, 453 So.2d 1132, 1133-34 (Fla. 2d DCA 1984). Because Green did not seek appropriate relief, the trial court correctly denied his motion.

857 So. 2d at 305-06. However *Green* court misstated the rule in *Trenary*. The *Trenary* court did not hold that the only relief available to Trenary was withdrawal of his plea:

The law is well settled that if a defendant enters a plea in reasonable reliance on his attorney's advice, which in turn was based on the attorney's honest mistake or misunderstanding, ***the defendant should be allowed to withdraw his plea***. *Costello v. State*, 260 So.2d 198 (Fla.1972); *Brown v. State*, 245 So.2d 41 (Fla.1971).

453 So. 2d at 1133-34 (emphasis added). The *Trenary* court held that in such circumstances a defendant ***should be allowed to withdraw his plea***, not that withdrawal of a plea is the only relief available.

5. The basis for the holding in *Trenary* can easily be discerned from an examination of the Florida Supreme Court opinions in *Brown* and *Costello*, which the *Trenary* court cited as the authority for its opinion. The *Brown* Court held:

From the evidence it appears without any serious question that appellant would not have changed his plea of not guilty to that of guilty except for the understanding of his attorney, erroneously as it may have been, that under the circumstances in the case defendant

would be placed on probation and not sentenced to serve a term of imprisonment. The record does not reveal the slightest indication of trickery, fraud or overreaching on the part of either of the attorneys in the case. It is equally clear that the trial judge made no previous commitment as to what disposition he would ultimately make of the case prior to the time sentence was imposed.

245 So. 2d at 43. Therefore the *Brown* court concluded that Brown should “be allowed to withdraw his plea of ‘guilty’ and stand trial on the charges.” *Id.* at 44. However nothing in *Brown* stands for the rule that the only relief available to a person who is erroneously advised by his attorney is withdrawal of his plea.

6. In *Costello* the defendant entered a guilty plea to a charge of first degree murder and was sentenced to death. 260 So. 2d at 199. He later sought to withdraw his plea because “one of his attorneys told him the judge would not impose the death sentence if he entered such a plea.” *Id.* at 199-200. His motion was denied by the trial court. *Id.* at 200. On appeal the Supreme Court held:

Guilty pleas are voided where judges or prosecutors actually promise defendants they will be given lesser sentences than they in fact receive.... We do not believe the result should be different when a defendant has a reasonable basis for relying upon his attorney's mistaken advice that the judge will be lenient.... The effect upon the defendant is the same; in each case he exchanges his constitutional right to a jury trial for a promise of leniency.

Id. at 201 (citations omitted). The *Costello* Court concluded “that under the particular facts in this case the defendant did not freely enter the guilty plea. *Id.* Therefore the Court allowed Costello the relief that he sought, withdrawal of his plea. *Id.* at 202. However nothing about the opinion in *Costello* stands for the proposition that withdrawal of a plea is the only relief available.

7. Thus the basis for the “rule” in *Goins* and *Purfoy* as cited by the State is not at all what the State claims it to be. It is apparent from the origin of that line of cases in *Trenary*, *Costello*,

and *Brown*, that in circumstances like the instant case a defendant should be allowed to withdraw his plea should the defendant seek, not that withdrawal of the plea is the only relief available.

8. Then the State argued that “[t]he Defendant alleges that counsel misadvised him regarding the minimum sentence he could receive based on this incorrect scoresheet, and had he known that his minimum was actually only 36.3 months he would not have entered a plea” and “[t]he Defendant's allegations are conclusively rebutted by the record.” State’s Response at 3. In support the State asserted: “even if the scoresheet did not have any victim injury points, the leaving a scene of a crash with death charge required a 4 year minimum mandatory sentence”.

9. The Defendant entered a plea based on the incorrect advice of his trial attorney as to the minimum sentence he could receive. The Defendant asserted in the instant motion:

The affirmative advice which Trial Counsel gave the Defendant was in error. The minimum sentence that this Court could impose absent some mitigating circumstance was not 10 years and 6 months; it was less than half of that. Here the affirmative misadvice given to the Defendant by trial counsel mislead him to believe that the minimum sentence which he could receive in the instant case was 10 years and 6 months. Had he known the truth he would not have entered into the plea agreement.

Motion, paragraph 16. That statement is the Defendant’s motion is true and correct whether the minimum sentence was the proper scoresheet sentence (36.3 months) or the mandatory minimum sentence (4 years).

10 Finally the State argued:

the *Sims* case applied to an earlier version of Fla. Stat. 921.0021(7), which did not include Fla. Stat. 921.0021(7)(e). See *Sims*, supra 998 So.2d 494. In 2007, the Florida State Legislature adopted 921.0021 (7)(e), which states:

Notwithstanding paragraph (a), if the conviction is for an offense described in s. 316.027 ***and the court finds that the offender caused victim injury,***

sentence points for victim injury may be assessed against the offender.

Fla. Stat. 921.0021(7)(e)(2007-2020). This refutes the Defendant's contention that the 120 victim injury points could not have been applied to his case.

State's Response at 4 (emphasis added).

11. The State's statement of the law is correct. Both *Sims* and § 921.0021(7)(e) Florida Statutes (2015) contain an element of causation. The Defendant so stated in his instant motion, quoting *Sims*:

Section 921.0021(7)(a) provides: "Victim injury" means the physical injury or death suffered by a person as a *direct result* of the primary offense, or any additional offense, for which an offender is convicted and which is pending before the court for sentencing at the time of the primary offense. (Emphasis supplied.) This "direct result" language clearly imparts and includes a causation requirement, which must exist between the death of the victim and the charged offense of leaving the scene of an accident resulting in death.

Id. at 505 (italics as in the report of *Sims*).

Motion, paragraph 11.

12. The *Sims* Court clearly held that to assess victim injury points, it must be established that the "injury occurred during the offense which led to the conviction." 998 So. 2d at 505. Section 921.0021(7)(e) provides almost exactly the same thing: "sentence points for victim injury may be assessed against the offender" where the sentencing court finds "that the offender caused victim injury".

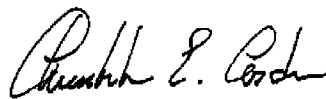
13. In the instant case, however, the sentencing court made no such finding. No evidence was presented to the Court at any time in this case which would support a finding that the Defendant "caused" injury to the victim. No evidence is known to exist which might support such a finding.

14. The State concluded its argument by asserting “Likewise, this refutes the Defendant’s contention that counsel was ineffective.” State’s Response at 4. The State specifically agreed that the plain language of § 921.0021(7)(e) requires a finding of causation if victim injury points are to be added to the scoresheet. That assertion by the State supports, and does not refute, the Defendant’s position that trial counsel affirmatively misadvised the Defendant.

WHEREFORE the facts stated in the Defendant’s motion are not conclusively resolved by the Court record. The Defendant is entitled to be heard by the Court to present evidence regarding the affirmative misadvice by trial counsel which resulted in prejudice against him. The Defendant requests an evidentiary hearing at this Court’s earliest convenience.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing motion has been furnished by email, through the Florida Courts e-filing Portal as provided by Fla. R. Jud. Admin. 2.516(b)(1), to Amira D. Fox, State Attorney (at ServiceSAO-LEE@sao.cjis20.org), 2000 Main Street, Sixth Floor, Fort Myers, Florida 33901, and to the Hon. Margaret O. Steinbeck (at KValdez@CA.CJIS20.ORG), Lee County Judicial Center, 1700 Monroe Street, Fort Myers, Florida 33901 on this 14th day of September, 2020.



Christopher E. Cosden
Counsel for the Defendant
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telephone 239-334-2030
email cosdenlaw@att.net

**UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
FORT MYERS DIVISION**

ADAM MURRAY COSTELLO,
Petitioner,

Case No.: 2:25-cv-74-JLB-NPM

vs.

SECRETARY, DEPARTMENT OF
CORRECTIONS,
Respondent.

_____ /

EXHIBIT 10

IN THE CIRCUIT COURT OF THE TWENTIETH JUDICIAL CIRCUIT IN AND FOR
LEE COUNTY, FLORIDA CRIMINAL ACTION

STATE OF FLORIDA

CASE NO: 16-CF-000371 - (MOS)
(DMB)

vs.

ADAM MURRAY COSTELLO

STATE'S NOTICE OF OBJECTION TO THE "DEFENDANT'S REPLY TO 'STATE'S RESPONSE TO THE
DEFENDANT'S 'MOTION TO VACATE SENTENCE FOR INEFFECTIVE ASSISTANCE OF COUNSEL,'
FILED ON MARCH 5, 2020'"

COMES NOW the STATE OF FLORIDA, by and through the undersigned Assistant State Attorney, and files its notice of objection to the Defendant's reply to the State's response; there is no entitlement to file a reply to the State's response in Fla. R. Crim. P. 3.850. *See Rollins v. State*, 246 So.3d 1284, 1287 (Fla. 2d DCA 2018); *see also Evans v. State*, 764 So.2d 822, 823 (Fla. 2000).

AMIRA D. FOX
STATE ATTORNEY

BY: /s/ Danielle M. Butler
Danielle M. Butler
Assistant State Attorney
Florida Bar Number 0084963
2000 Main Street, 6th Floor
Fort Myers, Florida 33901
(239) 533-1330
eService: ServiceSAO-LEE@sao.cjis20.org

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above and foregoing has been furnished to the Honorable Margaret O. Steinbeck, Circuit Judge, Lee County Justice Center, 1700 Monroe Street, Fort Myers, Florida 33901; to the Court Administrator's Office, LEE County Justice Center, 1700 Monroe Street, Fort Myers, Florida 33901; and to Christopher E. Cosden, Counsel for the Defendant, PO Box 9368, Fort Myers, Florida 33902 (cosdenlaw@att.net) by United States mail or electronic delivery this 17th day of September 2020.

/s/ Danielle M. Butler
Danielle M. Butler
Assistant State Attorney

**UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
FORT MYERS DIVISION**

ADAM MURRAY COSTELLO,
Petitioner,

Case No.: 2:25-cv-74-JLB-NPM

vs.

SECRETARY, DEPARTMENT OF
CORRECTIONS,
Respondent.

_____ /

EXHIBIT 11

IN THE CIRCUIT COURT OF THE TWENTIETH JUDICIAL CIRCUIT
IN AND FOR LEE COUNTY, FLORIDA

STATE OF FLORIDA,
Plaintiff,

v.

Case No. 16-CF-371

ADAM MURRAY COSTELLO,
Defendant.

_____/

MOTION FOR HEARING ON DEFENDANT'S MOTION TO VACATE CONVICTION

COMES NOW the Defendant, by and through the undersigned attorney, and requests this Honorable Court to enter an order allowing the Defendant to schedule a hearing on his motion to vacate the judgment and sentence in this case, and providing that the Defendant is entitled to be present for hearing on that motion, and in support thereof would state:

1. On 12 March 2018 the Defendant was charged by an amended information with leaving the scene of a traffic crash involving death, a first degree felony under § 316.027(2)(c) and (f) Florida Statutes (2015), and with tampering with evidence, a third degree felony under § 918.13 Florida Statutes (2015). The same day the Defendant entered pleas of nolo contendere under a plea agreement and was convicted on both charges. Judgement and sentence were rendered on 19 March 2018. The Defendant was sentenced to 10 years and 6 months incarceration on the charge of leaving the scene with a minimum mandatory term of incarceration of 4 years, and to five years incarceration on the charge of tampering with evidence, with the sentences to run concurrently.

2. On 05 March 2020 the Defendant moved for postconviction relief, requesting this Court to vacate his judgment and sentence because his plea was not knowingly and voluntarily entered. The Defendant alleged in that motion that the attorney who had represented him at the time of his plea affirmatively misadvised him about the sentence to which he had agreed. The details are set out in the motion and need not be repeated here.

3. Subsequently, on 14 July 2020, this Court entered an order directing the State Attorney for the 20th Judicial Circuit to respond to the same motion. The State Attorney filed a Response on 09 September 2020, nearly six months ago. The Defendant filed a Reply to the State's response on 14 September 2020. On 17 September 2020 the State filed a objection to the Defendant's reply. No further entries appear in this Court's docket.

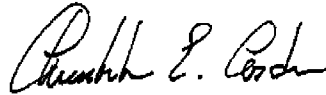
4. The Defendant's claim that his trial counsel misadvised him can not be resolved from the court record in this case. No record entries document conversations between the Defendant in this criminal case and his attorney. The only way in which this Court can ascertain the substance of whatever advice, if any, which may have been given by counsel to the Defendant is to hear the testimony of the attorney and the Defendant.

5. Where a defendant in a criminal case has alleged that his plea was involuntary because his trial counsel affirmatively misadvised him about his potential sentence and the defendant has provided a specific factual allegation to support his claim of misadvice, the Second District Court of Appeal has held that a hearing on the claim is required. *See Jamison v. State*, 186 So. 3d 37, 40-41 (Fla. 2d DCA 2016).

WHEREFORE the Defendant requests this Court to order that the undersigned attorney be allowed to schedule a hearing on the Defendant's motion for postconviction relief in this case, and to order that the Defendant may be present for that hearing.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing motion has been furnished by email through the Florida Courts E-Filing Portal as provided by Fla. R. Jud. Admin. 2.516(b)(1) to Amira D. Fox, State Attorney for the 20th Judicial Circuit (to ServiceSAO-LEE@sao.cjis20.org), Post Office Box 399, Fort Myers, Florida 33902 on this 1st day of March, 2021.



Christopher E. Cosden
Counsel for the Defendant
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**UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
FORT MYERS DIVISION**

ADAM MURRAY COSTELLO,
Petitioner,

Case No.: 2:25-cv-74-JLB-NPM

vs.

SECRETARY, DEPARTMENT OF
CORRECTIONS,
Respondent.

_____ /

EXHIBIT 12

**IN THE CIRCUIT COURT OF THE TWENTIETH JUDICIAL CIRCUIT IN AND FOR
LEE COUNTY, FLORIDA** **CRIMINAL ACTION**

STATE OF FLORIDA,

Plaintiff,

vs.

Case No. 16-CF-371

ADAM COSTELLO,

Defendant.

_____ /

ORDER DENYING 3.850 MOTION
and DENYING REQUEST FOR HEARING

THIS CAUSE comes before the Court on Defendant's "Motion To Vacate Sentence For Ineffective Assistance Of Counsel," pursuant to Fla. R. Crim. P. 3.850, filed by counsel March 5, 2020, and Defendant's "Motion for Hearing on Defendant's Motion to Vacate Conviction," filed by counsel on March 1, 2021. Having reviewed the March 5, 2020, motion, the State's response, Defendant's reply, the March 1, 2021, motion, the case file, and the applicable law, the Court finds as follows:

1. Defendant was charged with leaving the scene of a crash involving death and tampering with evidence.

2. Defendant entered a negotiated plea agreement with the State. The plea agreement specifies that the maximum sentence for count one was 30 years in prison and for count two was five years in prison. According to the plea agreement, Defendant was sentenced to 10.5 years in prison on count one with a four year minimum mandatory sentence, and five years in prison on count two.

3. The scoresheet provided a lowest permissible sentence of 126.3 months in prison. 120 victim impact points were imposed.

4. Defendant did not appeal.

5. To prevail on a claim of ineffective assistance of counsel, Defendant must demonstrate that: (1) counsel's performance was deficient, and (2) there is a reasonable probability that the outcome of the proceedings would have been different. Strickland v. Washington, 466 U.S. 668 (1984); Williamson v. Dugger, 651 So. 2d 84 (Fla. 1994).

6. The Court notes that in reviewing claims of ineffective assistance of counsel, it must apply a strong presumption that counsel's conduct falls within the range of reasonable professional assistance and must avoid the distorting effects of hindsight. The standard is reasonably effective counsel, not perfect or error-free counsel. Coleman v. State, 718 So. 2d 827 (Fla. 4th DCA 1998); Schofield v. State, 681 So. 2d 736 (Fla. 2d DCA 1996). It is further noted that, in general, tactical or strategic decisions of counsel do not constitute ineffective assistance of counsel. Gonzales v. State, 691 So. 2d 602 (Fla. 4th DCA 1997).

7. As to a claim of ineffective assistance of counsel arising out of the plea process, in order to satisfy the "prejudice" requirement, a defendant must show that there is a reasonable probability that, but for counsel's errors, he would have not entered a plea and would have insisted on going to trial. Hill v. Lockhart, 474 U.S. 52 (1985).

8. In his 3.850 motion Defendant argued that counsel was ineffective for failing to object to the victim injury points on the scoresheet, citing Sims v. State, 998 So. 2d 494 (Fla. 2008), for the premise that to assess victim injury points, it must be established that the injury occurred during the offense which led to the conviction. Defendant argued that he was prejudiced because he was advised the minimum sentence was 10.6 years, when the minimum sentence without the victim impact points would have been 36.3 months.

9. Fla. Stat. §921.021 was amended in 2007 to add (7)(e), which provides that "Notwithstanding paragraph (a), if the conviction is for an offense described in s. 316.027 and

the court finds that the offender caused victim injury, sentence points for victim injury may be assessed against the offender.” Defendant was charged in count one with a violation of Fla. Stat. §316.027(2)(c).¹ Defendant pled no contest and agreed there was a factual basis that he left the scene of a crash between he and the victim, in which the victim died. The victim impact points were accurately assessed in this situation where the victim died as a result of Defendant’s vehicle striking the victim. Counsel’s performance was not deficient. The Court would have denied any objection to the victim impact points, even had counsel raised such an objection. Defendant was not prejudiced because there was no reasonable probability Defendant would have insisted on going to trial and facing the maximum sentence of 35 years in prison. Defendant has failed to allege any facts that, if true, would establish either prong of Strickland.

Accordingly, it is

ORDERED AND ADJUDGED that Defendant’s 3.850 motion is DENIED without hearing. Defendant may file a written notice of appeal within thirty days of the date this order is entered.

DONE AND ORDERED in Chambers at Fort Myers, Lee County, Florida



eSigned by Margaret Steinbeck 04/19/2021 14:23:15 N+SipbBK

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¹ The 4th Amended Information, filed March 12, 2018, expressly charged that Defendant “was the driver of a motor vehicle involved in a crash resulting in death to [the victim].”

**UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
FORT MYERS DIVISION**

ADAM MURRAY COSTELLO,
Petitioner,

Case No.: 2:25-cv-74-JLB-NPM

vs.

SECRETARY, DEPARTMENT OF
CORRECTIONS,
Respondent.

_____ /

EXHIBIT 13



Second District Court of Appeal

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Case No: 2D

21-1384

Search

ADAM MURRAY COSTELLO

vs

STATE OF FLORIDA

Date Filed: 05/11/2021 Status: Closed Proceeding: APPEAL Nature: Final
 Type: Criminal Category: 3.850 Circuit: 20th Judicial Circuit

	Date	Type	Pleading	Note
	01/18/2022	Event	West Publishing	
	01/18/2022	Mandate	Mandate	
	12/22/2021	Order	Deny Miscellaneous Motion-79a	Appellant's request for oral argument is denied.
	12/22/2021	Disposition	Reversed	and remanded.
	09/17/2021	Brief/Record	Appellant Reply Brief	
	09/01/2021	Brief/Record	Appellee Answer Brief	
	08/02/2021	Order	MISCELLANEOUS ORDER	The Attorney General's office shall serve an answe
	06/22/2021	Event	Request for Oral Argument	
	06/22/2021	Brief/Record	Initial Appellant Brief on Merits	
	06/11/2021	Order	ORDER GRANTING EOT FOR INITIAL BRIEF	Appellant's motion for extension of time is grante
	06/11/2021	Motion	Mot. for Extension of time to file Initial Brief	UNOPPOSED MOTION FOR EXTENSION OF TIME TO FILE INI
	05/18/2021	Letter	Letter - A.G. will not be filing a brief	
	05/12/2021	Order	set up as summary; brief advice	
	05/12/2021	Letter	Acknowledgment Letter 1	

	05/11/2021	Brief/Record	Received Records	REDACTED
	05/11/2021	Notice	Notice of Appeal Filed	

**UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
FORT MYERS DIVISION**

ADAM MURRAY COSTELLO,
Petitioner,

Case No.: 2:25-cv-74-JLB-NPM

vs.

SECRETARY, DEPARTMENT OF
CORRECTIONS,
Respondent.

_____ /

EXHIBIT 14

IN THE SECOND DISTRICT COURT OF APPEAL
LAKELAND, FLORIDA

ADAM MURRAY COSTELLO,
Appellant,

Case No. 2D21-1384

v.

L.T. No. 16-CF-371

STATE OF FLORIDA,
Appellee.

_____/

Appeal from the Circuit Court of the Twentieth Judicial Circuit,
in and for Lee County

INITIAL BRIEF OF APPELLANT ADAM MURRAY COSTELLO

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PREFACE

The Appellant, Adam Murray Costello, is the Defendant in the Circuit Court of the Twentieth Judicial Circuit in and for Lee County, Florida, wherein his motion for postconviction relief was denied without a hearing. The Appellant will be referred to as the Appellant or the Defendant; the Appellee will be referred to as the State of Florida or the State. The following symbol will be used:

(R.____) - Record on Appeal.

JURISDICTION

This Court has jurisdiction over this direct appeal pursuant to Article V, § 4(b)(1), Florida Constitution, and Fla. R. App. P. 9.030(b)(1)(A).

STATEMENT OF THE CASE AND FACTS

In this case the Defendant, Adam Murray Costello, was charged by a Fourth Amended Information filed 12 March 2018 with leaving the scene of a traffic crash involving death, a first degree felony under § 316.027(2)(c) and (f) Florida Statutes (2015).

He was also charged with tampering with evidence, a third degree felony under § 918.13 Florida Statutes (2015). R.046-48. The latter charge is not the subject of the Defendant's postconviction motion or the instant appeal. The Defendant was represented in the trial court by Shannon H. McFee (hereinafter "Trial Counsel"). R.058.

The Defendant entered pleas of nolo contendere and was convicted on both charges. Judgement and sentence were rendered on 19 March 2018. R.050-57. The Defendant was sentenced to 10 years 6 months of incarceration on the charge of leaving the scene with a minimum mandatory term of incarceration of 4 years, and to 5 years of incarceration on the charge of tampering with evidence, with the sentences to run concurrently. R.052-55. No issues were reserved for appeal and no direct appeal was taken.

At or near the time of the plea, the State Attorney filed a Criminal Punishment Code scoresheet prepared pursuant to § 921.0024 Florida Statutes (2015) in this case. R.048-41. In section III the scoresheet included 120 points for victim injury, resulting in a lowest permissible sentence of 126.3 months incarceration. T.040. Also at or near the time of the plea

Trial Counsel filed a written “Plea Agreement Waiver of Rights”.

R.042-45. The same provided in relevant part that the Defendant agreed to the following: “The Defendant shall be sentenced in Count One to 10.5 years Florida State Prison with a 4 year minimum mandatory. As to Count Two the Defendant shall be sentenced to 5 years Florida State Prison.” R.043.

The Defendant was sentenced as provided by the plea agreement. On the charge in count one of the information he was sentenced to 10 years 6 months incarceration with a minimum mandatory term of 4 years. R.052-53. On the charge on count two of the information he was sentenced to 5 years incarceration.

R.054. The sentences of incarceration were to be concurrent.

R.055. Certain court costs and fees and other special conditions were imposed. R.051.

On 05 March 2020 the Defendant timely moved under Fla. R. Crim. P. 3.850 to vacate the incarcerative portion of his sentence because his attorney failed to provide effective assistance of counsel. R.058-67. He argued that Trial Counsel provided ineffective assistance to the Defendant by failing to review and

correct errors in the Criminal Punishment Code scoresheet in this case. R.061-65. The Scoresheet improperly included 120 points for victim injury, resulting in a lowest permissible sentence of 126.3 months incarceration. R.040, R.061-63. The correct lowest permissible scoresheet sentence under § 921.0024 would have been 36.3 months incarceration (notwithstanding the four year mandatory minimum under § 316.027(c)) had the additional points not been improperly included. R.063-64. Trial Counsel failed to recognize that the 120 points for victim injury were improperly applied and therefore affirmatively misadvised advised the Defendant concerning the sentence he was likely to receive. R.064-65.

In his postconviction motion the Defendant asserted that any reasonable lawyer would have correctly assessed the Scoresheet and properly advised the Defendant of the correct lowest permissible sentence. R.065. The failure of Trial Counsel to do so was ineffective assistance which violated the Defendant's Sixth Amendment right to counsel. R.065. The Defendant asserted that he was prejudiced because the Defendant agreed to accept a

sentence which he believed, based on the affirmative misadvice of counsel, was the minimum sentence under the Criminal Punishment Code. R.065. Had the Defendant known that the actual lowest permissible sentence he might have received was substantially less than the agreed-upon sentence, he would not have entered into that agreement; he only did so because he was affirmatively misadvised by trial counsel. R.065.

On 14 April 2020 the postconviction court ordered the State Attorney to respond to the Defendant's motion for postconviction relief. R.068-69. The State Attorney filed a timely response. R.117-121. The Defendant filed a reply to the State's response. R.122-28. On 01 March 2021, after the postconviction court failed to act for nearly six months, the Defendant moved for a hearing on his original postconviction motion. R.130-32.

On 19 April 2021 the postconviction court entered an order denying the Defendant's postconviction motion and the Defendant's motion for a hearing. R.133-35. The Defendant filed a timely notice of appeal. R.136. This appeal follows.

SUMMARY OF ARGUMENT

The Defendant agreed to enter a plea of nolo contendere to the charge of leaving the scene of a traffic crash involving death, a first degree felony under § 316.027(2)(c) and (f) Florida Statutes (2015). He entered that plea instead of proceeding to trial because his attorney at the time of the plea affirmatively mislead him to believe that 10 years 6 months was the lowest permissible sentence he could receive under § 921.00265 Florida Statutes (2015). The Defendant's mistaken belief, and therefore his plea, was directly and solely the result of incorrect advice given him by Trial Counsel.

Had the Defendant understood that the actual minimum sentence was less than half of the agreed sentence, he would not have entered that plea. The Defendant was prejudiced by receiving a sentence more than twice as long as the minimum sentence he could have received under § 921.00265 and § 316.027(c).

The postconviction court improperly denied the Defendant's motion under Fla. R. Crim. P. 3.850 without a hearing. Denial of the relief requested in that motion was error under the rule in *Strickland v. Washington*, 466 U.S. 668 (1984).

ARGUMENT

DENIAL OF THE DEFENDANT’S MOTION FOR POSTCONVICTION RELIEF WITHOUT A HEARING WAS REVERSIBLE ERROR.

Standard of Review

In reviewing postconviction claims of ineffective assistance of counsel, Florida courts apply the rule in *Strickland v. Washington*, 466 U.S. 668 (1984):

Claims of ineffective assistance of trial counsel require a showing of deficient performance and prejudice. *See generally Strickland v. Washington*, 466 U.S. 668... (1984). First, a defendant must establish conduct on the part of counsel that is outside the broad range of competent performance under prevailing professional standards. *See Gore v. State*, 846 So.2d 461, 467 (Fla.2003). Second, the deficiency must be shown to have so affected the fairness and reliability of the proceedings that confidence in the outcome is undermined. *See id.* The two prongs are related, in that “the benchmark for judging any claim of ineffectiveness must be whether counsel’s conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result.” *Rutherford v. State*, 727 So.2d 216, 219 (Fla.1998) (quoting *Strickland*, 466 U.S. at 686...).

State v. Davis, 872 So. 2d 250, 253 (Fla. 2004); *Happ v. State*, 922 So. 2d 182, 186 (Fla. 2005).

The *Strickland* Court held that the standard requires the defendant to show that “there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” 466 U.S. at 694. The Court held that a reasonable probability is “a probability sufficient to undermine confidence in the outcome.” *Id.* A defendant bears the burden of establishing the claim. *See Freeman v. State*, 761 So. 2d 1055, 1069 (Fla. 2000) (a “defendant has the burden of alleging a specific, serious omission or overt act upon which the claim of ineffective assistance of counsel can be based”).

The First Prong of Strickland: Deficient Performance

In the instant case the Defendant entered pleas of nolo contendere to the charges of leaving the scene of a traffic crash involving death, a first degree felony under § 316.027(2)(c) and (f) Florida Statutes (2015), and tampering with evidence, a third degree felony under § 918.13 Florida Statutes (2015). R.046-48.

He was convicted on both charges; judgement and sentence were rendered on 19 March 2018. R.050-57.

The Defendant was represented in the trial court at all relevant times by Shannon H. McFee (hereinafter “Trial Counsel”). R.050; R.058. In his postconviction motion the Defendant asserted that trial counsel affirmatively misadvised him that the minimum sentence he could receive based on the sentencing scoresheet prepared under § 921.0024 Florida Statutes (2015) in this case. R.061; R.038-41. Trial Counsel failed to review and correct the same scoresheet; he failed to ascertain whether the 120 victim injury points in section III of the scoresheet were properly included. Because the postconviction motion was denied without a hearing no witness testified about the advice given by Trial Counsel to the Defendant.

Here the sentencing scoresheet improperly included 120 points for victim injury, resulting in a lowest permissible sentence of 126.3 months incarceration. R.038-40. The correct lowest permissible sentence on the scoresheet would have been 36.3 months incarceration had the additional points not been improperly

included. (A statutory four year minimum mandatory sentence was required by § 316.027(2)(c) Florida Statutes (2015)).

Trial Counsel failed to recognize that the 120 points for victim injury were improperly applied. Therefore he affirmatively misadvised the Defendant concerning the sentence the Defendant was likely to receive. Any reasonable lawyer would have correctly assessed the Scoresheet and properly advised the Defendant of the correct lowest permissible sentence. The failure of Trial Counsel to do so was ineffective assistance which violated the Defendant's Sixth Amendment right to counsel.

Had he done the appropriate research, Trial Counsel could have easily ascertained that the 120 victim injury points were not properly assessed in the instant case. In *Sims v. State*, 998 So. 2d 494, 496 (Fla. 2008), Sims was driving a truck when he struck and killed a victim. Sims left the scene of the accident without ever stopping the truck. *Id.* He was charged with leaving the scene of a crash resulting in the death of a person under § 316.027(1)(b) Florida Statutes (2001), and was found guilty as charged in the information. *Id.* At the sentencing hearing the trial court added

120 victim injury points to Sims' Criminal Punishment Code scoresheet. *Id.* at 497. The Fifth District Court of Appeal affirmed the sentence, concluding that victim-injury points were properly imposed. *Id.* The Supreme Court granted review. *Id.* at 498-99.

In *Sims* the Supreme Court held: "Based upon the plain language of section 921.0021(7)(a)[Florida Statutes (2001)], which defines 'victim injury' for the purpose of scoring victim-injury points, we conclude that under these facts, the imposition of such points for leaving the scene in violation of section 316.027(1)(b) was incorrect." *Id.* at 505. The Supreme Court reasoned:

Section 921.0021(7)(a) provides: "Victim injury" means the physical injury or death suffered by a person as a *direct result* of the primary offense, or any additional offense, for which an offender is convicted and which is pending before the court for sentencing at the time of the primary offense. (Emphasis supplied.) This "direct result" language clearly imparts and includes a causation requirement, which must exist between the death of the victim and the charged offense of leaving the scene of an accident resulting in death.

Id. at 505 (italics as in the report of *Sims*).

Accordingly, here, a similar interpretation of section 921.0021(7)(a), requiring the existence

of a causal connection to impose victim-injury points, is warranted. Moreover, if the imposition of a restitution award, which results in monetary loss, entails a causation requirement, a causal connection is also required for the imposition of victim-injury points, which can lead to the much more significant loss of personal liberty through the imposition of a longer sentence. Finally, in interpreting Florida Rule of Criminal Procedure 3.701(d)(7), which provides when victim injury “shall be” scored under the sentencing guidelines, this Court concluded that the Sentencing Guidelines Commission had recommended that victim injury be scored when the “injury occurred *during* the offense which led to the conviction.” *Fla. R.Crim. Pro. re Sentencing Guidelines (Rules 3.701 & 3.988)*, 509 So.2d 1088, 1089 (Fla.1987) (emphasis supplied). For these reasons, we conclude that **a causal connection must clearly exist between the charged offense and the death of the victim to impose victim-injury points.**

998 So. 2d at 505-06 (italics as in the report of *Sims*, boldface added).

The death of the victim was the direct result of the initial impact, rather than the underlying offense which occurred only after the death. So, the causal connection, which is absolutely necessary to impose victim-injury points, simply does not exist in this case

998 So. 2d at 507. Thus in *Sims* the Florida Supreme Court

concluded that to assess victim injury points, it must be established that the “injury occurred *during the offense* which led to the conviction.” 998 So. 2d at 505 (emphasis added).

In *Manhard v. State*, 282 So. 3d 941, 948 (Fla. 1st DCA 2019), *review denied*, SC19-2133, 2020 WL 1894688 (Fla. Apr. 16, 2020), *certiorari denied*, *Manhard v. Florida*, 141 S.Ct. 562 (2020), the district court recognized that in *Sims* the Florida Supreme Court “clarified that the ‘direct result’ language included a causation element linking the death of the victim and the charged offense. *Sims*, 998 So. 2d at 505.” The *Manhard* court held: “A conviction under ‘vehicular homicide or any other offense in which the crime actually involved the impact that caused the death... would have satisfied the causation requirement for the imposition of victim-injury points.” 282 So. 3d at 948, quoting *Sims*, 998 So. 2d at 505. *Manhard* had been convicted of DUI manslaughter, which satisfied the causation requirement because it linked the death with the charged offenses. Therefore, the victim-injury points were properly assessed because *Manhard*’s conviction of DUI manslaughter established the requisite causation. *Manhard* at 948.

Here, unlike *Manhard*, the Defendant was charged with no other offense which might have satisfied the requirement of causation in the statute and in *Sims*. In the instant case, as in *Sims*, the offense for which the victim injury points was assessed was leaving the scene of a crash involving death. R.042; R.046; R.050. Therefore the same result as in *Sims* would be required in the instant case. To impose victim injury points, “a causal connection must clearly exist between the charged offense and the death of the victim to impose victim-injury points.” *Sims* at 505.

In 2007, after the district court opinion in *Sims*, the Legislature added a new provision to 921.0021(7) Florida Statutes:

Notwithstanding paragraph (a), if the conviction is for an offense described in s. 316.027 and the court finds that the offender caused victim injury, sentence points for victim injury may be assessed against the offender.

Ch. 2007-211, § 4, Laws of Fla. That was effective 01 July 2007. *Id.* at § 5; it is codified at § 921.0021(7)(e) Florida Statutes (2015).

Under some circumstances Ch. 2007-211, § 4, would allow assessment of victim injury points. However to do so a court must

find “that the offender caused victim injury....” In the instant case the circuit court made no such finding. In the instant case no record evidence exists which would support any such finding. Therefore, even after the 2007 change to the statute, the rule in *Sims* still applies to the instant case. A causal connection must clearly exist between the charged offense and the death of the victim to impose victim-injury points. *Sims* at 505.

Here the Defendant plead to the charge of leaving the scene of a crash involving death. R.042; R.046; R.050. In the instant case absolutely no evidence existed tending to show that the Defendant did anything or failed to do anything which caused the death. No such evidence was available to the State. No record evidence would even suggest causation of the death by the Defendant. In the alternative that fact could be established by an admission by the accused. Here neither occurred. Unlike *Manhard*, the Defendant was charged with nothing to which a plea would necessarily be an admission of causing death.

In addition, to be guilty of leaving the scene of a crash involving death, it would be necessary for a death to have occurred

before the Defendant allegedly left the scene. If no death had occurred before the Defendant left the scene, it would not be possible to find that the Defendant left the scene of a death.

In the instant case no evidence exists to show whether the victim died before or after the Defendant left the scene. However even if the Defendant left the scene after the victim died, no evidence exists to show that the act of leaving the scene could possibly have caused that death.

Sims was decided by the Supreme Court in 2008. The events giving rise to the instant case were alleged to have occurred in 2016. Therefore Trial Counsel should have been aware of the rule in *Sims*. Nevertheless Trial Counsel affirmatively advised the Defendant that the State's proposed sentence of 10 years 6 months was the minimum sentence that the trial court could impose absent some mitigating circumstance under § 921.0026. Apparently here no such mitigating circumstance existed. The Defendant accepted that advice and entered into the proposed plea agreement.

However the State's proposed sentence of 10 years 6 months was **not** the minimum sentence that the trial court could impose

absent some mitigating circumstance. Had the erroneously included 120 points for victim injury been omitted from the scoresheet, the total sentence points would have been 76.4. That would have resulted in a lowest permissible sentence of 36.3 months. ($76.4 - 28 = 48.4$; $48.4 \times .75 = 36.3$). See § 921.0024(2); Fla. R. Crim. P. 3.704(26).

The misadvice given by Trial Counsel in the instance case was not simply a failure to properly advise the Defendant. Here the advice given by Trial Counsel incorporated errors of law or, as some courts have referred to it, was “affirmative” or “positive misadvice.” In *Ey v. State*, 982 So. 2d 618, 622 (Fla. 2008), the Supreme Court held that such affirmative misadvice about even collateral matters may constitute a legally cognizable claim for ineffective assistance of counsel when that misadvice affects the voluntariness of a plea. “When a defendant enters a plea in reliance on affirmative misadvice and demonstrates that he or she was thereby prejudiced, the defendant may be entitled to withdraw the plea even if the misadvice concerns a collateral consequence as to which the trial court was under no obligation to advise him or her.”

Ghanavati v. State, 820 So. 2d 989, 991 (Fla. 4th DCA 2002). *See also Fernandez v. State*, 199 So. 3d 500, 504 (Fla. 2d DCA 2016), citing *Ey; Gunn v. State*, 841 So. 2d 629, 631 (Fla. 2d DCA 2003); *Roberti v. State*, 782 So. 2d 919, 920 (Fla. 2d DCA 2001).

The affirmative advice which Trial Counsel gave the Defendant was error. Even considering the minimum mandatory sentencing provision in § 316.027(2)(c), the minimum sentence that the circuit court could impose absent some mitigating circumstance was not 10 years and 6 months; it was less than half of that. Here the affirmative misadvice given to the Defendant by trial counsel mislead him to believe that the minimum sentence which he could receive in the instant case was 10 years 6 months. Had he known the truth he would not have entered into the plea agreement; he so stated in his sworn postconviction motion. R.064. Because the postconviction court denied the Defendant's motion without a hearing the Defendant never had the opportunity to testify to that fact.

Any reasonable attorney would have ascertained the correct application of victim injury points to a charge of leaving the scene of

a crash involving death. Had Trial Counsel done so, he would have ascertained that the correct minimum sentence was less than half of the sentence to which he advised the Defendant to agree. The failure of Trial Counsel to do so was ineffective assistance of counsel because it rendered the plea involuntary. The Defendant would not have agreed to the proposed sentence had he not been affirmatively mislead by Trial Counsel.

The Second Prong of Strickland: Prejudice to the Defendant

In the instant case the aforesaid failures of Trial Counsel to provide effective assistance resulted in prejudice to the Defendant. The Defendant entered into the plea agreement because he was affirmatively mislead by Trial Counsel to believe that 10 years 6 months was the minimum sentence he might receive. As a direct result of the failure of trial counsel to recognize and assert the errors in the sentencing scoresheet, the Defendant entered into a plea agreement based on that affirmative misadvice. As explained supra, the plea agreement in this case was predicated upon a fallacy. Had the Defendant known that the actual lowest

permissible sentence he might have received was substantially less than the agreed-upon sentence, he would not have entered into that agreement. The Defendant so stated in his sworn postconviction motion. R.064.

Prejudice to the Defendant arose from his loss of his right to liberty resulting from the failure of trial counsel to recognize and assert the correct lowest permissible sentence which might be imposed in this case. As a result of the ineffective assistance of trial counsel the Defendant entered into a plea agreement which was based on a fallacy. He is presently serving a 10 year 6 month sentence which is not required by the statutory and decisional law of Florida. Had the Defendant known that the actual lowest permissible sentence he might have received was substantially less than that agreed-upon sentence, he would not have entered into the plea agreement in this case.

Application of the Rule in *Strickland* to the Instant Case

Thus the two prongs of the test in *Strickland v. Washington* and its progeny are both met. The unprofessional error of trial

counsel by failing to recognize and assert the correct minimum sentence which might be imposed in this case was “outside the wide range of professionally competent assistance.” *Strickland* at 694. “[T]here is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” *Strickland* at 694. “A reasonable probability is a probability sufficient to undermine confidence in the outcome.” *Id.*

Error by the Postconviction Court

In the instant case the Defendant filed his motion for postconviction relief on 05 March 2020. R.058. The postconviction court ordered a response. R.068. The State Attorney filed a response on 09 September 2020. R.117. The Defendant filed a Reply on 14 September 2020. R.122. Because the postconviction court had taken no further action, on 01 March 2021 the Defendant moved for a hearing on his original postconviction motion. R.130. Then, on 19 April 2021, over a year after the original motion for postconviction relief, the circuit issued an order denying the postconviction motion without a hearing. R.133-35.

The substance of the ruling by the postconviction court was the following:

8. In his 3.850 motion Defendant argued that counsel was ineffective for failing to object to the victim injury points on the scoresheet, citing Sims v. State, 998 So. 2d 494 (Fla. 2008), for the premise that to assess victim injury points, it must be established that the injury occurred during the offense which led to the conviction. Defendant argued that he was prejudiced because he was advised the minimum sentence was 10.6 years, when the minimum sentence without the victim impact points would have been 36.3 months.

9. Fla. Stat. §921.021 was amended in 2007 to add (7)(e), which provides that “Notwithstanding paragraph (a), if the conviction is for an offense described in s. 316.027 and the court finds that the offender caused victim injury, sentence points for victim injury may be assessed against the offender.” Defendant was charged in count one with a violation of Fla. Stat. §316.027(2)(c).¹ Defendant pled no contest and agreed there was a factual basis that he left the scene of a crash between he and the victim, in which the victim died. The victim impact points were accurately assessed in this situation where the victim died as a result of Defendant’s vehicle striking the victim. Counsel’s performance was not deficient. The Court would have denied any objection to the victim impact points, even had counsel raised such an objection. Defendant was not prejudiced because there

was no reasonable probability Defendant would have insisted on going to trial and facing the maximum sentence of 35 years in prison. Defendant has failed to allege any facts that, if true, would establish either prong of Strickland.

¹ The 4th Amended Information, filed March 12, 2018, expressly charged that Defendant “was the driver of a motor vehicle involved in a crash resulting in death to [the victim].”

R.134-35.

That ruling was error for several reasons. The postconviction court was correct that § 921.0021 was amended in 2007. Chapter 2007-211, § 4, Laws of Florida added paragraph 7(e) to § 921.0021 is addressed supra. After the 2007 change to § 921.0021(7)(e), assessment of victim injury points would require a court must find “that the offender caused victim injury....” In the instant case the court made no such finding and no record evidence would support any such finding. Therefore, even after the 2007 change to the statute, the rule in *Sims* still applies to the instant case. A causal connection must clearly exist between the charged offense and the death of the victim to impose victim-injury points. *Sims* at 505.

The Defendant entered a plea of nolo contendere to the charge that he

was the **driver of a motor vehicle involved in a crash** resulting in death to Adam Roger King, a human being, a vulnerable road user, and Defendant knew or should have known a crash occurred, but **failed to stop or remain at the scene of the crash**, or as close thereto as possible, until he/she gave personal information and rendered aid as required by Florida Statutes 316.062, contrary to Florida Statute 316.027(2)(c)....

R.034 (emphasis added); R.050. To whatever extent a plea of nolo contendere may be an admission of facts, the Defendant admitted only to the facts charged in the Fourth Amended Information.

R.034.

In *Brawn v. State*, 177 So. 2d 547, 548 (Fla. 2d DCA 1965), thos Court held: “a plea of guilty was an admission of the truth of facts alleged in the information.” This Court need not reach the question of whether the same is true of a plea of nolo contendere because here the Defendant was not charged with causing the death of the victim; he was charged only with leaving the scene of a crash which resulted in that death.

Nothing about the charge or the plea states or implies any element of causation of the crash. He was charged only with being “the driver of a motor vehicle involved in a crash” and “fail[ing] to stop or remain at the scene of the crash”. R.034. If the Defendant had been driving a vehicle which was lawfully stopped and a motorcyclist had run into him and died, the Defendant would have faced the same charge had he left the scene. No element of causation exists in the charge to which the Defendant plead. Therefore it is not possible to determine causation from a plea to the charge of leaving the scene.

The postconviction court ruled: “The 4th Amended Information, filed March 12, 2018, expressly charged that Defendant ‘was the driver of a motor vehicle involved in a crash resulting in death to [the victim].’” R.135, footnote 1. That is correct. The Defendant has never denied being the driver of that vehicle. Then the postconviction court ruled: “Defendant pled no contest and agreed there was a factual basis that he left the scene of a crash between he and the victim, in which the victim died.” R.135. That is also correct.

But the Defendant never admitted or agreed to anything involving causation of the death of the victim. He agreed that he unlawfully left the place where the victim died. However he never agreed that he did anything to cause that death. “[S]entence points for victim injury may be assessed against the offender” only where “the court finds that the offender caused victim injury”.

§ 921.0021(7)(e). Therefore a finding of a causal connection and a factual basis for that finding must clearly exist between the charged offense and the death of the victim to impose victim-injury points. *Sims* at 505. Here the circuit court made no such finding. No record evidence would provide a basis for such a finding.

The postconviction court then ruled: “The Court would have denied any objection to the victim impact points, even had counsel raised such an objection.” R.135. Had the circuit court made such a ruling, § 921.0021(7)(e) and the rule in *Sims v. State* would have provided a clear basis for an appeal.

The postconviction court concluded: “Defendant was not prejudiced because there was no reasonable probability Defendant would have insisted on going to trial and facing the maximum

sentence of 35 years in prison.” R.135. The postconviction court cited no basis for that conclusion. None exists.

The trial court denied the Defendant’s postconviction motion without a hearing. R.135. Had the postconviction court heard the Defendant, he would have testified that when he entered his plea, he was under the mistaken impression that a sentence of 10 years 6 months was the lowest permissible sentence without a downward departure under § 921.00265. That mistake arose from affirmative misadvice by Trial Counsel. If the Court had heard the Defendant he would have testified that he would have elected a trial under the present circumstances.

Fla. R. Crim. P. 3.850(f)(5) provides:

If the motion is legally sufficient but all grounds in the motion can be conclusively resolved either as a matter of law or by reliance upon the records in the case, the motion shall be denied without a hearing by the entry of a final order. If the denial is based on the records in the case, a copy of that portion of the files and records that conclusively shows that the defendant is entitled to no relief shall be attached to the final order.

Here the postconviction motion could not be resolved as a matter of law as addressed supra. The postconviction court reached several conclusions which where not supported by record evidence. When the postconviction court denied the motion it neither allowed a hearing nor attached record excerpts showing the Defendant was entitled to no relief. For those reasons alone the order of the postconviction court was error.

CONCLUSION

Thus the Defendant entered a plea mistakenly believing that the agreed upon sentence was the lowest permissible sentence he could receive under § 921.00265. His mistaken belief was the direct result of incorrect advice given him by trial counsel. The Defendant was prejudiced by receiving a sentence more than twice as long as the minimum sentence he could have received under § 921.00265 and § 316.027(c). Therefore the postconviction court improperly denied relief.

WHEREFORE the Defendant requests this Honorable Court to reverse the order of the postconviction court denying relief, to order

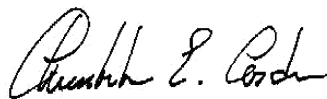
a hearing on the Defendant's postconviction motion, and to grant such other relief as may be reasonable, just, and proper.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Initial Brief has been furnished by email (to CrimAppTPA@myfloridalegal.com) to the Attorney General of Florida, 3507 East Frontage Road, Suite 200, Tampa, Florida 33607, as provided by Fla. R. Jud. Admin. 2.516(b)(1), on this 22nd day of June, 2021.

CERTIFICATE OF FONT AND WORD COUNT COMPLIANCE

I HEREBY CERTIFY, as required by Fla. R. App. P. 9.045(e), that this brief complies with the font requirements of rule 9.045(b) and the word count requirements of rule 9.210(a)(2)(B).



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**UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
FORT MYERS DIVISION**

ADAM MURRAY COSTELLO,
Petitioner,

Case No.: 2:25-cv-74-JLB-NPM

vs.

SECRETARY, DEPARTMENT OF
CORRECTIONS,
Respondent.

_____ /

EXHIBIT 15

**IN THE DISTRICT COURT OF APPEAL OF FLORIDA
SECOND DISTRICT**

ADAM MURRAY COSTELLO,

Appellant,

v.

CASE NO. 2D21-1384

L.T. No. 16-CF-00371

STATE OF FLORIDA,

Appellee.

_____ /

**ON APPEAL FROM THE CIRCUIT COURT
OF THE TWENTIETH JUDICIAL CIRCUIT,
IN AND FOR LEE COUNTY, FLORIDA**

ANSWER BRIEF OF APPELLEE

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STATEMENT OF THE CASE AND FACTS

Appellant was charged by 4th Amended Information with Leaving the Scene of a Crash resulting in death to Adam Roger King, pursuant to § 316.027(2)(c), Florida Statutes, a first-degree felony, (Count 1); and Tampering with or Fabricating Evidence, pursuant to § 918.13 Florida Statutes, a third degree felony (Count 2). (R34). The information specifically charged Appellant as follows.

1. On or about June 19, 2016 in Lee County, Florida, was the driver of a motor vehicle involved in a crash resulting in death to Adam Roger King, a human being, a vulnerable road user, and Defendant knew or should have known a crash occurred, but failed to stop or remain at the scene of the crash, or as close thereto as possible, until he/she gave personal information and rendered aid as required by Florida Statutes 316.062, contrary to Florida Statute 316.027(2)(c),
2. Between June 19, 2016 and July 31, 2016 in Lee County, Florida, did unlawfully and knowingly alter, destroy, conceal, or remove any record, document, or thing, to-wit: deletion of facebook information or account, cellular phone utilizing number 239 218-4928 or DVR from a surveillance camera, with the purpose to impair its verity or availability in a proceeding or investigation knowing that a criminal trial or proceeding or investigation by a duly constituted

prosecuting authority, law enforcement agency, grand jury or legislative committee of this state is pending or is about to be instituted contrary to Florida Statute 918.13(1)(a),

(R34).

Appellant entered a negotiated plea to the charges and was sentenced to 10 years and 6 months in State Prison. (R50-56). Appellant's criminal punishment scoresheet reflects a minimum permissible sentence of 126.3 months and a maximum sentence of 35 years in State Prison. (R38-40).

Appellant's March 8, 2018, plea agreement reflects he agreed to be sentenced to 10.5 years on Count 1 with a 4-year minimum mandatory, and 5 years on Count 2, with the sentences to run concurrently. (R43). Appellant's plea was accepted, and he was sentenced to the agreed upon sentence on March 12, 2018. (R50-56). Appellant did not move to withdraw the plea or appeal his sentence.

On March 5, 2020, Appellant filed a "Motion to Vacate Sentence for Ineffective Assistance of Counsel." His motion claimed his plea was involuntary because trial counsel provided ineffective assistance to the Defendant by failing to review and correct the

Criminal Punishment scoresheet. In this motion, Appellant claimed the scoresheet improperly included 120 points for the death of the victim and that his lowest permissible sentence should have been 36.3 months. He asked the court to vacate his sentence and resentence Appellant using a corrected scoresheet. (R58). Appellant claimed that counsel was ineffective for failing to “ascertain whether the 120 victim injury points in section III of the scoresheet were properly included.” (R61). In his motion, Appellant relied on the Fifth District Court of Appeal’s decision in Sims v. State, 998 So.2d 494, 496 (Fla. 2008) which found the assessment of victim injury points for leaving the scene of a violation of § 316.027(1)(b) was incorrect. (R61-63). Appellant claimed trial counsel should have been aware of the Sims decision and incorrectly advised Appellant. Appellant claimed he would not have agreed to the proposed sentence if he had not been misled by trial counsel. (R65).

The trial court ordered the State to respond to Appellant’s motion to vacate. The State responded. (R117-120). The State argued Appellant’s claim was legally insufficient as follows.

The Defendant claims that counsel was ineffective for misadvising him regarding the

lowest permissible sentence on his scoresheet because the 120 victim injury points for death could not be assessed against him because he pled to leaving the scene of a crash with death (Defendant's Motion, Pages 4-7). To properly invoke this Court's review of a claim of scoresheet error raised under Fla. R. Crim. P. 3.850 pursuant to a plea, the Defendant must seek to withdraw his plea. See Purifoy v. State, 10 So. 3d 197, 200 (Fla. 2d DCA 2009); Goins v. State, 889 So. 2d 918 (Fla. 2d DCA 2004). Rather than seeking to withdraw his plea, the Defendant merely seeks to vacate his sentence (Defendant's Motion, Page 9). Because the Defendant's motion fails to request withdrawal of the plea, and does not allege that he would have proceeded to trial, the State submits that the motion is facially insufficient. See Dominguez v. State, 98 So.3d 198, 200 (Fla. 2d DCA 2012) receded from by Parks v. State, 223 So.3d 380 (Fla. 2d DCA 2017); see also Hill, supra 474 U.S. at 59. However, the Defendant cannot amend the motion in good faith because it is also legally insufficient and conclusively rebutted by the records in the instant case; therefore, the State submits it should be summarily denied with prejudice.

In support of his position, the Defendant cites to Sims v. State, 998 So.2d 494, 496 (Fla. 2008) (Defendant's Motion Pages 4-6). The Defendant alleges that counsel misadvised him regarding the minimum sentence he could receive based on this incorrect scoresheet, and had he known that his minimum was actually only 36.3 months he would not have entered a plea (Defendant's Motion, Pages 4-7).

The Defendant's allegations are conclusively rebutted by the record. First, even

if the scoresheet did not have any victim injury points, the leaving a scene of a crash with death charge required a 4 year minimum mandatory sentence. See Fla. Stat. 316.027(2)(c)(2016). Moreover, the Sims case applied to an earlier version of Fla. Stat. 921.0021(7), which did not include Fla. Stat. 921.0021(7)(e). See Sims, supra 998 So.2d 494. In 2007, the Florida State Legislature adopted 921.0021(7)(e), which states:

Notwithstanding paragraph (a), if the conviction is for an offense described in s. 316.027 and the court finds that the offender caused victim injury, sentence points for victim injury may be assessed against the offender.

Fla. Stat. 921.0021(7)(e)(2007-2020). This refutes the Defendant's contention that the 120 victim injury points could not have been applied to his case⁴ Likewise, this refutes the Defendant's contention that counsel was ineffective. Therefore, this claim should be summarily denied with prejudice as it is conclusively rebutted by the record.

(R119-120).

The trial court summarily denied Appellant's 3.850 motion and request for hearing finding as follows.

8. In his 3.850 motion Defendant argued that counsel was ineffective for failing to object to the victim injury points on the scoresheet, citing Sims v. State, 998 So. 2d 494 (Fla.

2008), for the premise that to assess victim injury points, it must be established that the injury occurred during the offense which led to the conviction. Defendant argued that he was prejudiced because he was advised the minimum sentence was 10.6 years, when the minimum sentence without the victim impact points would have been 36.3 months.

9. Fla. Stat. §921.0021 was amended in 2007 to add (7)(e), which provides that "Notwithstanding paragraph (a), if the conviction is for an offense described ins. 316.027 and the court finds that the offender caused victim injury, sentence points for victim injury may be assessed against the offender." Defendant was charged in count one with a violation of Fla. Stat. §316.027(2)(c). 1 Defendant pled no contest and agreed there was a factual basis that he left the scene of a crash between he and the victim, in which the victim died. The victim impact points were accurately assessed in this situation where the victim died as a result of Defendant's vehicle striking the victim. Counsel's performance was not deficient. The Court would have denied any objection to the victim impact points, even had counsel raised such an objection. Defendant was not prejudiced because there was no reasonable probability Defendant would have insisted on going to trial and facing the maximum sentence of 35 years in prison. Defendant has failed to allege any facts that, if true, would establish either prong of Strickland.

(R134-135).

SUMMARY OF THE ARGUMENT

The 120 injury points for death on Appellant's scoresheet were properly assessed under § 921.0021(7)(e) Florida Statutes. Appellant was not misled or misadvised, and his plea was knowing and voluntary. Appellant failed to establish deficiency or prejudice and failed to establish ineffective assistance of counsel under Strickland. Therefore, the trial court did not err in denying Appellant's motion to vacate.

ARGUMENT

ISSUE I

THE TRIAL COURT DID NOT ERR IN SUMMARILY DENYING APPELLANT'S MOTION TO VACATE SENTENCE FOR INEFFECTIVE ASSISTANCE OF COUNSEL.

Appellant claims the trial court erred in summarily denying his “Motion to Vacate Sentence for Ineffective Assistance of Counsel” in which he claimed trial counsel was ineffective for failing to object to 120 victim injury points on his criminal punishment scoresheet.

The standard of review of a summary denial of a rule 3.850 motion is de novo. See McLin v. State, 827 So.2d 948, 954 (Fla. 2002) (“To uphold the trial court's summary denial of claims raised in a 3.850 motion, the claims must be either facially invalid or conclusively refuted by the record.”).

Lebron v. State, 100 So.3d 132, 133 (Fla. 5th DCA 2012).

Whether counsel was ineffective under Strickland v. Washington, 466 U.S. 668 (1984), is reviewed de novo. Stephens v. State, 748 So. 2d 1028 (Fla. 1999) (requiring de novo review of ineffective assistance of counsel); Sims v. State, 754 So. 2d 657,

670 (Fla. 2000). Both prongs of the Strickland test, i.e., deficient performance and prejudice, present mixed questions of law and fact reviewed de novo on appeal. Cade v. Haley, 222 F.3d 1298, 1302 (11th Cir. 2000) (stating that, although a district court's ultimate conclusions as to deficient performance and prejudice are subject to plenary review, the underlying findings of fact are subject only to clear error review, citing Byrd v. Hasty, 142 F.3d 1395, 1396 (11th Cir. 1998)).

As this Court has stated,

Strickland v. Washington, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), is the bedrock upon which we construct any analysis of an ineffectiveness of counsel claim. Strickland demands that a defendant demonstrate first that counsel's performance was deficient and second that the deficient performance prejudiced the defense. Id. at 687, 104 S.Ct. 2052. "[T]he defendant must show that counsel's representation fell below an objective standard of reasonableness" based on professional norms. Id. at 688, 104 S.Ct. 2052; accord Schwab v. State, 814 So.2d 402, 408 (Fla.2002). Next, "[t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Strickland, 466 U.S. at 694, 104 S.Ct. 2052; accord Schwab, 814 So.2d at 408. A postconviction court's finding that trial counsel's performance was not deficient is a determination that no ineffective assistance of counsel occurred, and the postconviction court may deny the motion without

reaching Strickland 's prejudice prong.

Odegard v. State, 137 So. 3d 505, 507–08 (Fla. 2d DCA 2014). If a claim fails to satisfy the prejudice prong, the court does not need to make a ruling on the performance prong, and vice versa. Johnson v. State, 593 So.2d 206 (Fla. 1992).

In 2007, the Florida Legislature revised § 921.0021 to include § 921.0021(7)(e). House Bill 25 amended § 921.0021, to authorize victim injury points when a person is convicted of leaving the scene of an accident involving death or injury. The amendment was enacted in response to Florida's appellate courts' interpretation of § 921.0021 as requiring proof that the victim's death or injury was the direct result of the offender's act of leaving the scene of the crash before the court could assess victim injury points. See Florida Staff Analysis, H.B. 25, 4/11/2007. Section 921.0021(7)(e) states:

Notwithstanding paragraph (a), if the conviction is for an offense described in s. 316.027 and the court finds that the offender caused victim injury, sentence points for victim injury may be assessed against the offender.

§ 921.0021(7)(e), Fla. Stat.

Furthermore, the offense of leaving the scene of an accident involving death is a first-degree felony punishable by a mandatory minimum term of imprisonment of 4 years up to a maximum term of thirty years. § 316.027(2)(c), Florida Statutes; § 775.082, Florida Statutes. Therefore, the lowest permissible sentence without victim injury points would be 4 years, not 36.3 months as Appellant claims.

The sentencing scoresheet in this case is accurate. The victim injury points were properly assessed against Appellant under § 921.0021(7)(e) Florida Statutes. The Legislature's clear purpose in enacting § 921.0021(7)(e) was to authorize the assessment of victim injury points when a defendant is convicted of leaving the scene of an accident with death when the death is a result of the crash but not necessarily due to the defendant leaving the scene. In this case, the victim died as a result of Appellant's vehicle striking the victim.

Trial counsel cannot be deemed ineffective for raising and argument based on Sims v. State, 998 So. 2d 494 (Fla. 2008). The crime in Sims preceded the legislature's amendment to § 921.0021. If trial counsel had objected to the assessment of 120 victim injury

points for death based on Sims, it would have been meritless because the subsequent amendment to the statute permitted assessment of the injury points for the crime of leaving the scene of a crash involving death. Appellant's scoresheet was correct, and he was not misadvised or misled by trial counsel regarding the minimum sentencing guidelines and cannot establish deficiency under Strickland. "Trial counsel cannot be deemed ineffective for failing to raise a meritless argument." Ferrell v. State, 29 So.3d 959, 976 (Fla. 2010).

At the plea hearing, the trial court found a factual basis for the plea "based on the stipulation, the probable cause affidavit in the court file as well as evidence taken by the Court at various evidentiary hearings throughout the pendency of this action." (R92). In denying Appellant's motion to vacate, the same judge who presided over Appellant's plea and sentencing found

victim impact points were accurately assessed in this situation where **the victim died as a result of Defendant's vehicle striking the victim.** Counsel's performance was not deficient. **The Court would have denied any objection to the victim impact points, even had counsel raised such an objection.**

(R135) (emphasis added).

The record reveals the trial court found Appellant caused the victim injury and the 120 injury points for death were properly assessed against Appellant under § 921.0021(7)(e). Appellant was not misadvised, and his plea was knowing and voluntary. If counsel had objected to the points being assessed the trial court would have denied the objection. Appellant failed to establish deficiency or prejudice and failed to establish ineffective assistance of counsel under Strickland. Therefore, the trial court did not err in denying Appellant's motion to vacate.

Furthermore, as the State noted in its response to Appellant's motion to vacate below, if Appellant were to prevail on his ineffective assistance claim and withdrew his plea, he would not automatically receive a lesser sentence or be entitled to another plea offer. Appellant would be in the same position as he was before he entered the plea agreement, facing the same possible maximum penalty of 35 years in prison.

CONCLUSION

Based on the authorities and arguments presented herein, the State respectfully requests this Court to affirm the trial court's summary denial of Appellant's motion for postconviction relief.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that, on September 1, 2021, I electronically filed the foregoing with the Clerk of the Court using the e-portal filing system, which will send a notice of electronic filing to the following: Christopher E. Cosden, P.O. Box 9368, Fort Meyers, Florida 33902, at: cosdenlaw@att.net

CERTIFICATE OF FONT COMPLIANCE

I HEREBY CERTIFY that the size and style of type used in this brief is 14-point Bookman Old Style, in compliance with Florida Rule of Appellate Procedure 9.045(b). This brief contains 2544 words.

/s/ Katherine Coombs Cline
COUNSEL FOR APPELLEE

**UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
FORT MYERS DIVISION**

ADAM MURRAY COSTELLO,
Petitioner,

Case No.: 2:25-cv-74-JLB-NPM

vs.

SECRETARY, DEPARTMENT OF
CORRECTIONS,
Respondent.

_____ /

EXHIBIT 16

IN THE SECOND DISTRICT COURT OF APPEAL
LAKELAND, FLORIDA

ADAM MURRAY COSTELLO,
Appellant,

Case No. 2D21-1384

v.

L.T. No. 16-CF-371

STATE OF FLORIDA,
Appellee.

_____/

Appeal from the Circuit Court of the Twentieth Judicial Circuit,
in and for Lee County

REPLY BRIEF OF APPELLANT ADAM MURRAY COSTELLO

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ARGUMENT

DENIAL OF THE DEFENDANT'S MOTION FOR POSTCONVICTION RELIEF WITHOUT A HEARING WAS REVERSIBLE ERROR.

The First Prong of *Strickland*: Deficient Performance

In *Strickland v. Washington*, 466 U.S. 668 (1984), the United States Supreme Court held that claims of ineffective assistance of trial counsel require a showing of (1) deficient performance by counsel and (2) prejudice to the Defendant. In the Answer Brief in this case the State addressed only the Defendant's argument regarding deficient performance of trial counsel. Answer Brief at 10-13. The State did not address the Defendant's argument regarding prejudice.

The State first argued:

In 2007, the Florida Legislature revised § 921.0021 to include § 921.0021(7)(e). House Bill 25 amended § 921.0021, to authorize victim injury points when a person is convicted of leaving the scene of an accident involving death or injury. The amendment was enacted in response to Florida's appellate courts' interpretation of § 921.0021 as requiring proof that the victim's death or injury was the direct result of the offender's

act of leaving the scene of the crash before the court could assess victim injury points.

Answer Brief at 10. That argument was in response to Defendant's assertion in his initial brief that Trial Counsel failed to recognize that 120 points for victim injury were improperly applied. Therefore he affirmatively misadvised the Defendant concerning the sentence the Defendant was likely to receive. Initial Brief at 9.

The State's argument is misplaced. As explained in the Initial Brief, in 2007 the Legislature indeed revised § 921.0021 Florida to include § 921.0021(7)(e), which provides that where a "conviction is for an offense described in s. 316.027 and the court finds that the offender caused victim injury, sentence points for victim injury may be assessed against the offender." See Initial Brief at 14; Ch. 2007-211, § 4, Laws of Fla.

However to impose sentence points for victim injury, a court must find "that the offender caused victim injury". Ch. 2007-211, § 4, Laws of Fla., as codified at § 921.0021(7)(e) Fla. Stat. (2015). As explained in the Initial Brief, in the instant case the circuit court made no finding that the Defendant caused any injury to anyone,

nor does any record evidence exist which would support any such finding. *See* Initial Brief at 15.

Therefore, even after the 2007 change to the statute, the rule in *Sims v. State*, 998 So. 2d 494, 496 (Fla. 2008) still applies to the instant case. The *Sims* Court held that “a causal connection must clearly exist between the charged offense and the death of the victim to impose victim-injury points.” 998 So. 2d at 505-06.

Section 921.0021(7)(e) contains the same requirement (a finding “that the offender caused victim injury”) following enactment of Ch. 2007-211, § 4, Laws of Fla. The argument is set out in full in the Initial Brief and need not be repeated here.

In a 2019 opinion in *Manhard v. State*, 282 So. 3d 941, 948 (Fla. 1st DCA 2019), *review denied*, SC19-2133, 2020 WL 1894688 (Fla. Apr. 16, 2020), *certiorari denied*, *Manhard v. Florida*, 141 S.Ct. 562 (2020), the district court recognized that in *Sims* the Florida Supreme Court “clarified that the ‘direct result’ language included a causation element linking the death of the victim and the charged offense. *Sims*, 998 So. 2d at 505.” The same is true here. The

argument is set out in full in the Initial Brief and need not be repeated here.

The State also argued:

Furthermore the offense of leaving the scene of an accident involving death is a first-degree felony punishable by a mandatory minimum term of imprisonment of 4 years up to a maximum term of thirty years. § 316.027(2)(c), Florida Statutes; § 775.082, Florida Statutes. Therefore, the lowest permissible sentence without victim injury points would be 4 years, not 36.3 months as Appellant claims.

Answer Brief at 11. The State is correct. However the length of a sentence which might eventually imposed should the Defendant be again convicted is not at issue here. In his Initial Brief the Defendant acknowledged that a 4 year mandatory minimum sentence applied to this case. Initial Brief at 2, 3, 4, 10. In the Initial Brief the Defendant asserted that even considering the minimum mandatory sentencing provision in § 316.027(2)(c), the minimum sentence that the circuit court could have properly imposed absent some mitigating circumstance was not 10 years and 6 months; it was less than half of that. Initial Brief at 18.

The State then argued:

Trial counsel cannot be deemed ineffective for raising and argument [sic] based on Sims v. State, 998 So. 2d 494 (Fla. 2008). The crime in Sims preceded the legislature's amendment to § 921.0021. If trial counsel had objected to the assessment of 120 victim injury points for death based on Sims, it would have been meritless because the subsequent amendment to the statute permitted assessment of the injury points for the crime of leaving the scene of a crash involving death.

Answer Brief at 11-12.

As explained supra and at length in the Initial Brief, the rule that to assess victim injury points a court must find “that the offender caused victim injury” was restated in Ch. 2007-211, § 4, Laws of Fla. That had been the law of Florida before the 2007 statutory revision, and it was still very much in effect after being restated in Ch. 2007-211. The full argument is set out in the Initial Brief and need not be repeated here.

The State then asserted that at the hearing where the Defendant entered his plea “the trial court found a factual basis for the plea ‘based on the stipulation, the probable cause affidavit in the court file as well as evidence taken by the Court at various evidentiary hearings throughout the pendency of this action.’

(R92).” Answer Brief at 12. That is a correct statement of fact.

However whether or not a factual basis existed to enter a plea is not contested here. What is at issue, and completely absent, is a factual basis for the assessment of victim injury points.

Finally the State argued that in the order on the Defendant’s motion to withdraw his plea, the postconviction court found:

victim impact points were accurately assessed in this situation where **the victim died as a result of Defendant’s vehicle striking the victim**. Counsel’s performance was not deficient. **The Court would have denied any objection to the victim impact points, even had counsel raised such an objection.**

(R135) (emphasis added).

Answer Brief at 12-13. Then the State asserted: “The record reveals the trial court found Appellant caused the victim injury and the 120 injury points for death were properly assessed against Appellant under § 921.0021(7)(e).” Answer Brief at 13.

Neither the postconviction court nor the State cited any record evidence which might support those statements. Absolutely no record evidence exists to support either the finding by the postconviction court that “the victim died as a result of Defendant’s

vehicle striking the victim” or the assertion by the State that victim injury points were properly assessed.

No record evidence would even suggest, much less establish, causation of the death of anyone by the Defendant. No doubt exists that the decedent died as the result of a vehicle crash. However the mechanics and causation of that crash are not discernable from evidence in the record on appeal. Nothing at all in the record on appeal might establish that any particular sequence of events occurred, or who may have been responsible for any of those events.

In some cases causation could be established by an admission by an accused, but that did not happen here. In the instant case the Defendant entered a plea of nolo contendere to the charge that he

was the **driver of a motor vehicle involved in a crash** resulting in death to Adam Roger King, a human being, a vulnerable road user, and Defendant knew or should have known a crash occurred, but **failed to stop or remain at the scene of the crash**, or as close thereto as possible, until he/she gave personal information and rendered aid as required by

Florida Statutes 316.062, contrary to Florida Statute 316.027(2)(c)....

R.034 (emphasis added); R.050.

To whatever extent a plea of nolo contendere may be an admission of facts, the Defendant admitted only to the facts charged in the Fourth Amended Information. R.034. In *Brawn v. State*, 177 So. 2d 547, 548 (Fla. 2d DCA 1965), this Court held: “a plea of guilty was an admission of the truth of facts alleged in the information.” Here the Defendant was not charged with causing the death of the victim; he was charged only with leaving the scene of a crash which resulted in that death. Therefore admission to the charge in the Fourth Amended Information would establish only that the Defendant left the scene, not that he caused the death.

The Second Prong of *Strickland*: Prejudice

In the Answer brief in this case the State addressed only the Defendant’s argument regarding deficient performance of trial counsel. Answer Brief at 10-13. The State did not address the Defendant’s argument regarding prejudice. Apparently the State concedes that the Defendant was prejudiced by the failure of trial

counsel to correctly address the sentence he should expect to receive.

CONCLUSION

Thus the Defendant entered a plea mistakenly believing that the agreed upon sentence was the lowest permissible sentence he could receive under § 921.00265 Florida Statutes (2015). His mistaken belief was the direct result of incorrect advice given him by trial counsel. The Defendant was prejudiced by receiving a sentence more than twice as long as the minimum sentence he could have received under § 921.00265 and § 316.027(c). Therefore the postconviction court improperly denied relief.

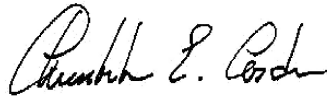
WHEREFORE the Defendant requests this Honorable Court to reverse the order of the postconviction court denying relief, to order a hearing on the Defendant's postconviction motion, and to grant such other relief as may be reasonable, just, and proper.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Initial Brief has been furnished by email (to CrimAppTPA@myfloridalegal.com) to the Attorney General of Florida, 3507 East Frontage Road, Suite 200, Tampa, Florida 33607, as provided by Fla. R. Jud. Admin. 2.516(b)(1), on this 17th day of September, 2021.

CERTIFICATE OF FONT AND WORD COUNT COMPLIANCE

I HEREBY CERTIFY, as required by Fla. R. App. P. 9.045(e), that this brief complies with the font requirements of rule 9.045(b) and the word count requirements of rule 9.210(a)(2)(B).



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**UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
FORT MYERS DIVISION**

ADAM MURRAY COSTELLO,
Petitioner,

Case No.: 2:25-cv-74-JLB-NPM

vs.

SECRETARY, DEPARTMENT OF
CORRECTIONS,
Respondent.

_____ /

EXHIBIT 17

DISTRICT COURT OF APPEAL OF FLORIDA
SECOND DISTRICT

ADAM MURRAY COSTELLO,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

No. 2D21-1384

December 22, 2021

Appeal pursuant to Fla. R. App. P. 9.141(b)(2) from the Circuit Court for Lee County; Margaret O. Steinbeck, Judge.

Christopher E. Cosden, Fort Myers, for Appellant.

Ashley Moody, Attorney General, Tallahassee, and Katherine Coombs Cline, Assistant Attorney General, Tampa, for Appellee.

SILBERMAN, Judge.

Adam Murray Costello appeals the order summarily denying his motion for postconviction relief filed pursuant to Florida Rule of Criminal Procedure 3.850. We reverse with instructions for the

postconviction court to strike the motion with leave for Mr. Costello to amend.

Mr. Costello was charged with leaving the scene of a crash resulting in death (count one), a first-degree felony punishable by thirty years' imprisonment, and tampering with physical evidence (count two), a third-degree felony punishable by five years' imprisonment. He pleaded nolo contendere pursuant to a negotiated plea agreement and was sentenced to concurrent sentences of ten and a half years' imprisonment with a four-year minimum mandatory term on count one and five years' imprisonment on count two.

Mr. Costello claimed that his trial counsel provided ineffective assistance by failing to note that victim injury points had been improperly included in his Criminal Punishment Code scoresheet and by affirmatively misadvising him as to the lowest permissible sentence he could receive if found guilty at trial. He asserted that counsel misadvised him that the lowest permissible sentence was 126.3 months' imprisonment when it should have been 36.3 months. He argued that victim injury points are only proper when the underlying offense caused the victim injury and that his

scoresheet improperly assessed 120 victim injury points when there was no evidence that the victim died because he fled the scene of the accident. He asked the court to vacate his sentence.

The postconviction court summarily denied the claim on the merits, finding that the claim was conclusively refuted by the record because victim injury points were appropriate. See Fla. R. Crim. P. 3.704(d)(9) (stating that victim injury points are scored when there is "physical injury or death suffered by a person as a direct result of any offense pending before the court for sentencing"); *Sims v. State*, 998 So. 2d 494, 506–07 (Fla. 2008) (holding that victim injury points are properly assessed when the evidence indicates that the victim's death was a direct result of the underlying offense of fleeing the scene of a crash resulting in death).

An error in the scoresheet could render a plea involuntary where the defendant shows that the sentence pled to was *based on* the minimum permissible sentence according to the erroneous scoresheet calculation and that the defendant would not have entered into the plea if he or she would have been aware of the correct sentencing range.

Wright v. State, 174 So. 3d 400, 402 (Fla. 4th DCA 2015)

(emphasis added) (citing *Towery v. State*, 977 So. 2d 774, 775–76 (Fla. 2d DCA 2008)).

Mr. Costello's claim as to the improper inclusion of victim injury points is not conclusively refuted by the record or the postconviction court's order. The court did not include any attachments refuting the claim, and the record does not include any information regarding the victim's cause of death.¹ *See Harrell v. State*, 79 So. 3d 231, 232 (Fla. 2d DCA 2012).

However, Mr. Costello's claim is facially insufficient because it does not include a request to withdraw his plea. *See Agent v. State*, 19 So. 3d 1114, 1115 (Fla. 2d DCA 2009) ("[O]ur review of the record also indicates that Agent's rule 3.850 motion was facially insufficient because it does not include an affirmative request to withdraw the plea."). Rather, Mr. Costello merely requested that the postconviction court vacate his sentence and resentence him using a corrected scoresheet. That is impermissible. *See Johnson v. State*, 60 So. 3d 1045, 1052 (Fla. 2011) ("[A] defendant who establishes that his plea was entered involuntarily is entitled to

¹ For this same reason, we are unable to determine whether assessment of victim injury points would have been appropriate pursuant to section 921.0021(7)(e), Florida Statutes (2016), which permits victim injury points if "the court finds that offender caused victim injury."

withdraw the plea but not to unilaterally rewrite the plea agreement to his advantage.").

Accordingly, we reverse the summary denial of Mr. Costello's rule 3.850 motion and remand the case to the postconviction court with instructions to strike the motion with leave to amend. *See Fla. R. Crim. P. 3.850(f)(2)*. On remand, if Mr. Costello chooses to amend his motion and seeks to withdraw his plea, the postconviction court shall either attach those portions of the record that conclusively refute Mr. Costello's claim or conduct an evidentiary hearing.

Reversed and remanded.

SLEET and ROTHSTEIN-YOUAKIM, JJ., Concur.

Opinion subject to revision prior to official publication.

**UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
FORT MYERS DIVISION**

ADAM MURRAY COSTELLO,
Petitioner,

Case No.: 2:25-cv-74-JLB-NPM

vs.

SECRETARY, DEPARTMENT OF
CORRECTIONS,
Respondent.

_____ /

EXHIBIT 18

M A N D A T E

from

DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA

SECOND DISTRICT

THIS CAUSE HAVING BEEN BROUGHT TO THIS COURT BY APPEAL, AND
AFTER DUE CONSIDERATION THE COURT HAVING ISSUED ITS OPINION;

YOU ARE HEREBY COMMANDED THAT SUCH FURTHER PROCEEDINGS
BE HAD IN SAID CAUSE, IF REQUIRED, IN ACCORDANCE WITH THE OPINION OF
THIS COURT ATTACHED HERETO AND INCORPORATED AS PART OF THIS ORDER,
AND WITH THE RULES OF PROCEDURE AND LAWS OF THE STATE OF FLORIDA.

WITNESS THE HONORABLE ROBERT MORRIS CHIEF JUDGE OF THE
DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA, SECOND DISTRICT, AND
THE SEAL OF THE SAID COURT AT LAKELAND, FLORIDA ON THIS DAY.

DATE: January 18, 2022

SECOND DCA CASE NO. 21-1384

COUNTY OF ORIGIN: Lee

LOWER TRIBUNAL CASE NO. 16-CF-371

CASE STYLE: ADAM MURRAY COSTELLO v. STATE OF FLORIDA



Mary Elizabeth Kuenzel
Mary Elizabeth Kuenzel
Clerk

cc: (without attached opinion)
ATTORNEY GENERAL, TAMPA
CHRISTOPHER E. COSDEN, ESQ.

C. SUZANNE BECHARD, A.A.G.
KATHERINE COOMBS CLINE, A.A.G.

mep

**UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
FORT MYERS DIVISION**

ADAM MURRAY COSTELLO,
Petitioner,

Case No.: 2:25-cv-74-JLB-NPM

vs.

SECRETARY, DEPARTMENT OF
CORRECTIONS,
Respondent.

_____ /

EXHIBIT 19

IN THE CIRCUIT COURT OF THE TWENTIETH JUDICIAL CIRCUIT
IN AND FOR LEE COUNTY, FLORIDA

STATE OF FLORIDA,
Plaintiff,

v.

Case No. 16-CF-371

ADAM MURRAY COSTELLO,
Defendant.

_____/

MOTION TO WITHDRAW PLEA
BASED UPON INEFFECTIVE ASSISTANCE OF COUNSEL

COMES NOW the Defendant, by and through the undersigned attorney pursuant to Fla. R. Crim. P. 3.850, and moves to withdraw his plea in this case because the Defendant's plea was involuntary because trial counsel provided ineffective assistance to the Defendant, and in support thereof would state:

Summary

1. The Defendant was represented before the trial court in this case by Shannon H. McFee (hereinafter "Trial Counsel"). Trial Counsel provided ineffective assistance to the Defendant by failing to review and correct the Criminal Punishment Code scoresheet prepared pursuant to § 921.0024 Florida Statutes (2015) in this case. The Scoresheet improperly included 120 points for victim injury, resulting in a lowest permissible sentence of 126.3 months incarceration. The correct lowest permissible sentence would have been 36.3 months incarceration had the addition points not been improperly included. Trial Counsel failed to recognize that the 120 points for victim injury were improperly applied and therefore affirmatively misadvised advised the Defendant concerning the sentence he was likely to receive. Any reasonable lawyer would have correctly assessed the Scoresheet and properly advised the

Defendant of the correct lowest permissible sentence. The failure of Trial Counsel to do so was ineffective assistance which violated the Defendant's Sixth Amendment right to counsel.

Facts and Procedural History of the Case

2. As required by Fla. R. Crim. P. 3.850(c), the following information is provided:

(a) The Judgment and Sentence addressed herein were rendered by this Court on 19 March 2018.

(b) The judgment was entered following a plea proceeding on 12 March 2018. The Defendant was sentenced the same day.

(c) No direct appeal was taken.

(d) No prior pro-se motion for postconviction relief has been filed.

(e) The Defendant requests this Court to allow the Defendant to withdraw his plea, or to grant such other relief as may be reasonable, just, and proper.

3. The Defendant was charged by an amended information filed 12 March 2018 with leaving the scene of a traffic crash involving death, a first degree felony under § 316.027(2)(c) and (f) Florida Statutes (2015), and tampering with evidence, a third degree felony under § 918.13 Florida Statutes (2015). The Defendant entered pleas of nolo contendere and was convicted on both charges. Judgement and sentence were rendered on 19 March 2018. The Defendant was sentenced to 10 years and 6 months incarceration on the charge of leaving the scene with a minimum mandatory term of incarceration of 4 years, and to five years incarceration on the charge of tampering with evidence, with the sentences to run concurrently.

4. On 12 March 2018, at or near the time of the plea, Trial Counsel filed a written "Plea Agreement Waiver of Rights" with this Court. The same provides in relevant part that the Defendant agreed to the following: "The Defendant shall be sentenced in Count One to 10.5

years Florida State Prison with a 4 year minimum mandatory. As to Count Two the Defendant shall be sentenced to 5 years Florida State Prison.”

5. On 12 March 2018, at or near the time of the plea, the State Attorney filed a Criminal Punishment Code scoresheet prepared pursuant to § 921.0024 Florida Statutes (2015) in this case. In section III the scoresheet included 120 points for victim injury, resulting in a lowest permissible sentence of 126.3 months incarceration.

6. The Defendant was sentenced as provided by the plea agreement. On the charge in count one of the information he was sentenced to 10.5 years incarceration with a minimum mandatory term of 4 years. On the charge on count two of the information he was sentenced to 5 years incarceration. The sentences of incarceration were to be concurrent. Certain court costs and fees and other special conditions were imposed.

7. The Defendant moved this Court to correct his sentence. This Court denied that motion without a hearing by an order entered 19 April 2021. The Defendant appealed to the Second District Court of Appeal in case number 2D21-1284. The Second District Court reversed the order of this Court entered 19 April 2021 by an opinion issued 2 December 2021. The Second District Court held that the Defendant’s claim was facially insufficient because it did not include a request to withdraw his plea. Opinion at 4. Therefore the Second District Court reversed the summary denial of the Defendant’s rule 3.850 motion and remanded the case to the postconviction court with instructions to strike the Defendant’s motion with leave to amend. Opinion at 5.

8. The Second District Court issued its Mandate on 18 January 2022. The mandate returned jurisdiction to this Court. *See State v. Miyasato*, 805 So.2d 818, 824 (Fla. 2d DCA 2001) (“In general, the mandate in any case functions to end the jurisdiction of the appellate court and to return full jurisdiction of the case to the trial court.”). Prior to issuance of the Mandate, on

05 January 2022, this Court issued an order allowing the Defendant to enter an amended motion. This Court was without jurisdiction to enter that order at that time. *See Daniels v. State*, 712 So. 2d 765, 765 (Fla. 1998).

Ineffective Assistance of Counsel

9. The Defendant now moves to withdraw his plea in the instant case because his attorney failed to provide effective assistance of counsel. In reviewing such claims, Florida courts apply the rule in *Strickland v. Washington*, 466 U.S. 668 (1984):

Claims of ineffective assistance of trial counsel require a showing of deficient performance and prejudice. *See generally Strickland v. Washington*, 466 U.S. 668... (1984). First, a defendant must establish conduct on the part of counsel that is outside the broad range of competent performance under prevailing professional standards. *See Gore v. State*, 846 So.2d 461, 467 (Fla.2003). Second, the deficiency must be shown to have so affected the fairness and reliability of the proceedings that confidence in the outcome is undermined. *See id.* The two prongs are related, in that “the benchmark for judging any claim of ineffectiveness must be whether counsel’s conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result.” *Rutherford v. State*, 727 So.2d 216, 219 (Fla.1998) (quoting *Strickland*, 466 U.S. at 686...).

State v. Davis, 872 So. 2d 250, 253 (Fla. 2004); *Happ v. State*, 922 So. 2d 182, 186 (Fla. 2005).

10. The *Strickland* Court held that the standard requires the defendant to show that “there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” 466 U.S. at 694. The Court held that a reasonable probability is “a probability sufficient to undermine confidence in the outcome.” *Id.* A defendant bears the burden of establishing the claim. *See Freeman v. State*, 761 So. 2d 1055, 1069 (Fla. 2000) (a “defendant has the burden of alleging a specific, serious omission or overt act upon which the claim of ineffective assistance of counsel can be based”).

The First Prong of Strickland: Deficient Performance

11. Prior to advising the Defendant concerning the likely sentence in this case, Trial Counsel failed to ascertain whether the 120 victim injury points in section III of the scoresheet were properly included. Had he done the appropriate research, Trial Counsel could have easily ascertained that the same victim injury points were not properly assessed in the instant case.

12. In *Sims v. State*, 998 So. 2d 494, 496 (Fla. 2008), Sims was driving a truck when he struck and killed a victim. Sims left the scene of the accident without ever stopping the truck. *Id.* He was charged with leaving the scene of a crash resulting in the death of a person under § 316.027(1)(b) Florida Statutes (2001), and was found guilty as charged in the information. *Id.* At the sentencing hearing the trial court added 120 victim injury points to Sims' Criminal Punishment Code scoresheet. *Id.* at 497. The Fifth District Court of Appeal affirmed the sentence, concluding that victim-injury points were properly imposed. *Id.* The Supreme Court granted review. *Id.* at 498-99.

13. In *Sims* the Supreme Court held: "Based upon the plain language of section 921.0021(7)(a)[Florida Statutes (2001)], which defines 'victim injury' for the purpose of scoring victim-injury points, we conclude that under these facts, the imposition of such points for leaving the scene in violation of section 316.027(1)(b) was incorrect." *Id.* at 505. The Supreme Court reasoned:

Section 921.0021(7)(a) provides: "Victim injury" means the physical injury or death suffered by a person as a *direct result* of the primary offense, or any additional offense, for which an offender is convicted and which is pending before the court for sentencing at the time of the primary offense. (Emphasis supplied.) This "direct result" language clearly imparts and includes a causation requirement, which must exist between the death of the victim and the charged offense of leaving the scene of an accident resulting in death.

Id. at 505 (italics as in the report of *Sims*).

Accordingly, here, a similar interpretation of section 921.0021(7)(a), requiring the existence of a causal connection to impose victim-injury points, is warranted. Moreover, if the imposition of a restitution award, which results in monetary loss, entails a causation requirement, a causal connection is also required for the imposition of victim-injury points, which can lead to the much more significant loss of personal liberty through the imposition of a longer sentence. Finally, in interpreting Florida Rule of Criminal Procedure 3.701(d)(7), which provides when victim injury “shall be” scored under the sentencing guidelines, this Court concluded that the Sentencing Guidelines Commission had recommended that victim injury be scored when the “injury occurred *during* the offense which led to the conviction.” *Fla. R.Crim. Pro. re Sentencing Guidelines (Rules 3.701 & 3.988)*, 509 So.2d 1088, 1089 (Fla.1987) (emphasis supplied). For these reasons, we conclude that a causal connection must clearly exist between the charged offense and the death of the victim to impose victim-injury points.

998 So. 2d at 505-06 (italics as in the report of *Sims*).

The death of the victim was the direct result of the initial impact, rather than the underlying offense which occurred only after the death. So, the causal connection, which is absolutely necessary to impose victim-injury points, simply does not exist in this case

998 So. 2d at 507. Thus the *Sims* Court clearly held that to assess victim injury points, it must be established that the “injury occurred during the offense which led to the conviction.” 998 So. 2d at 505.

14. Here, as in *Sims*, the offense for which the victim injury points was assessed was leaving the scene of a crash involving death. Therefore the same result would be required in the instant case. To impose victim injury points, “a causal connection must clearly exist between the charged offense and the death of the victim to impose victim-injury points.” *Sims* at 505. In the instant case that could not possibly have occurred. To be guilty of leaving the scene of a crash involving death, it would be necessary for a death to have occurred before the Defendant allegedly left the scene. If no death had occurred, it would not be possible to find that the Defendant left the scene of a death. Because the death had necessarily occurred before the

Defendant allegedly left the scene, the act of leaving the scene could not possibly have caused the death.

15. *Sims* was decided by the Supreme Court in 2008. The events giving rise to the instant case were alleged to have occurred in 2016. Therefore Trial Counsel should have been aware of the rule in *Sims*. Nevertheless Trial Counsel affirmatively advised the Defendant that the State's proposed sentence of 10 years and 6 months was the minimum sentence that this Court could impose absent some mitigating circumstance under § 921.0026. Apparently here no such mitigating circumstance existed. The Defendant accepted that advice and entered into the proposed plea agreement.

16. However the State's proposed sentence of 10 years and 6 months was NOT the minimum sentence that this Court could impose absent some mitigating circumstance. Had the erroneously included 120 points for victim injury been omitted from the scoresheet, the total sentence points would have been 76.4. That would have resulted in a lowest permissible sentence of 36.3 months. ($76.4 - 28 = 48.4$; $48.4 \times .75 = 36.3$). See § 921.0024(2); Fla. R. Crim. P. 3.704(26).

17. Rather than a failure to advise, the advice of Trial Counsel in the instance case involved advice which incorporated an error of law or, as some courts have referred to it, "affirmative" or "positive misadvice." In *Ey v. State*, 982 So. 2d 618, 622 (Fla. 2008), the Supreme Court held that such affirmative misadvice about even collateral matters may constitute a legally cognizable claim for ineffective assistance of counsel when that misadvice affects the voluntariness of a plea. "When a defendant enters a plea in reliance on affirmative misadvice and demonstrates that he or she was thereby prejudiced, the defendant may be entitled to withdraw the plea even if the misadvice concerns a collateral consequence as to which the trial court was under no obligation to advise him or her." *Ghanavati v. State*, 820 So. 2d 989, 991 (Fla. 4th DCA

2002). *See also Fernandez v. State*, 199 So. 3d 500, 504 (Fla. 2d DCA 2016), citing *Ey*; *Gunn v. State*, 841 So. 2d 629, 631 (Fla. 2d DCA 2003); *Roberti v. State*, 782 So. 2d 919, 920 (Fla. 2d DCA 2001).

18. The affirmative advice which Trial Counsel gave the Defendant was in error. The minimum sentence that this Court could impose absent some mitigating circumstance was not 10 years and 6 months; it was less than half of that. Here the affirmative misadvice given to the Defendant by trial counsel mislead him to believe that the minimum sentence which he could receive in the instant case was 10 years and 6 months. Had he known the truth he would not have entered into the plea agreement.

19. Any reasonable attorney would have ascertained the correct application of victim injury points to a charge of leaving the scene of a crash involving death. Had Trial Counsel done so, he would have ascertained that the correct minimum sentence was less than half of the sentence to which he advised the Defendant to agree. The failure of Trial Counsel to do so was ineffective assistance of counsel because it rendered the plea involuntary. The Defendant would not have agreed to the proposed sentence had he not been affirmatively mislead by Trial Counsel.

The Second Prong of Strickland: Prejudice to the Defendant

20. In the instant case the aforesaid failures of Trial Counsel to provide effective assistance resulted in prejudice to the Defendant. The Defendant entered into the plea agreement because he was affirmatively mislead by Trial Counsel to believe that 10 years, 6 months, was the minimum sentence he might receive. As a direct result of the failure of trial counsel to recognize and assert the errors in the sentencing scoresheet, the Defendant entered into a plea agreement based on that affirmative misadvice. As explained *supra*, the plea agreement in this case was predicated upon a fallacy. Had the Defendant known that the actual lowest permissible

sentence he might have received was substantially less than the agreed-upon sentence, he would not have entered into that agreement.

21. Prejudice to the Defendant arose from the failure of trial counsel to recognize and assert the correct lowest permissible sentence which might be imposed in this case. As a result of the ineffective assistance of trial counsel the Defendant entered into a plea agreement which was based on a fallacy. He is presently serving a 10 year, 6 month, sentence which is not required by the statutory and decisional law of Florida. Had the Defendant known that the actual lowest permissible sentence he might have received was substantially less than that agreed-upon sentence, he would not have entered into the plea agreement in this case.

Conclusion

22. Thus the two prongs of the test in *Strickland v. Washington* and its progeny are both met. The unprofessional error of trial counsel by failing to recognize and assert the correct minimum sentence which might be imposed in this case was “outside the wide range of professionally competent assistance.” *Strickland* at 694. “[T]here is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” *Strickland* at 694. “A reasonable probability is a probability sufficient to undermine confidence in the outcome.” *Id.*

23. As required by Fla. R. Crim. P. 3.850(n), the Defendant certifies that he has read this motion and understands its content, that this motion is filed in good faith and with a reasonable belief that it is timely, has potential merit, and does not duplicate previous motions that have been disposed of by this Court, and that the facts stated in this motion are true and correct. The Defendant understands English, being a native speaker thereof.

WHEREFORE the Defendant now requests this Honorable Court to allow him to withdraw his plea this case because trial counsel provided ineffective assistance, or to grant such other relief as may be reasonable, just, and proper.

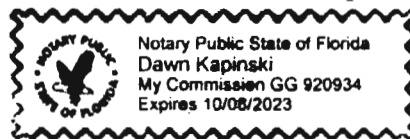
The Defendant acknowledges that if he is allowed to withdraw his plea, and if he is eventually convicted of a crime, he may be sentenced by this Court to any lawful sentence for the crime charged, notwithstanding his original sentence.

Under penalties of perjury, I declare that I have read the foregoing motion and that the facts stated in it are true.


Adam Murray Costello

STATE OF FLORIDA)
)
COUNTY OF CHARLOTTE)

The foregoing instrument was sworn to and subscribed before me in my physical presence this 2nd day of March, 2022, by Adam Murray Costello, who produced Florida Department of Corrections identification, and who swore or affirmed that he executed the foregoing instrument for the purposes expressed therein and that the statements he made or adopted therein are true.



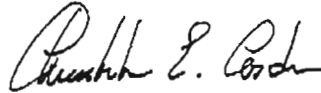
Notary Public – State of Florida
Commission Number:
Commission expires:

D. Kapinski

FDCC #
B16188
Charlotte
County.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing motion has been furnished by email, through the Florida Courts e-filing Portal as provided by Fla. R. Jud. Admin. 2.516(b)(1), to Amira D. Fox, State Attorney (at ServiceSAO-LEE@sao.cjis20.org), 2000 Main Street, Sixth Floor, Fort Myers, Florida 33901, on this 3rd day of March, 2022.



Christopher E. Cosden
Counsel for the Defendant
Florida Bar No. 0813478
Post Office Box 9368
Fort Myers, Florida 33902
telephone 239-334-2030
email cosdenlaw@att.net

**UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
FORT MYERS DIVISION**

ADAM MURRAY COSTELLO,
Petitioner,

Case No.: 2:25-cv-74-JLB-NPM

vs.

SECRETARY, DEPARTMENT OF
CORRECTIONS,
Respondent.

_____ /

EXHIBIT 20

**IN THE CIRCUIT COURT OF THE TWENTIETH JUDICIAL CIRCUIT IN AND FOR
LEE COUNTY, FLORIDA CRIMINAL ACTION**

STATE OF FLORIDA,

Plaintiff,

vs.

Case No. 16-CF-371

ADAM COSTELLO,

Defendant.

/

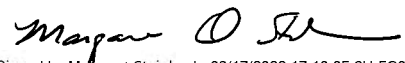
**ORDER DIRECTING STATE TO RESPOND TO DEFENDANT'S 3.850 MOTION BY
MAY 18, 2022**

THIS CAUSE comes before the Court on Defendant's "Amended Motion To Withdraw Plea Based Upon Ineffective Assistance Of Counsel," pursuant to Fla. R. Crim. P. 3.850, filed by counsel March 3, 2022. Having reviewed the motion, it is hereby:

ORDERED AND ADJUDGED that the State shall file a response **on or before May 18, 2022**, stating why the requested relief should not be granted. The response **shall cite all applicable case law, and shall attach all relevant portions of the record which support or refute each claim, including, but not limited to, transcripts of hearings or proceedings, charging documents, pleadings, plea forms, orders, guidelines scoresheets, criminal punishment code scoresheets, and all other supporting documentation, such as appellate briefs or jail cards.**

Timely motions seeking an extension of time will be considered upon a showing of good cause.

DONE AND ORDERED in Chambers at Fort Myers, Lee County, Florida



eSigned by Margaret Steinbeck 03/17/2022 17:10:05 6U-5C0Pq

Electronic Service List
Christopher E. Cosden <cosdenlaw@att.net>, <cosden@att.net>
State Attorney 20th Circuit <eService@sao20.org>
Court Administration <staffattorney-lee@ca.cjis20.org>

**UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
FORT MYERS DIVISION**

ADAM MURRAY COSTELLO,
Petitioner,

Case No.: 2:25-cv-74-JLB-NPM

vs.

SECRETARY, DEPARTMENT OF
CORRECTIONS,
Respondent.

_____ /

EXHIBIT 21

IN THE CIRCUIT COURT OF THE TWENTIETH JUDICIAL CIRCUIT IN AND FOR
LEE COUNTY, FLORIDA CRIMINAL ACTION

STATE OF FLORIDA

CASE NO: 16-CF-000371 - (MOS)
(KSW)

vs.

ADAM MURRAY COSTELLO

STATE'S RESPONSE TO DEFENDANT'S
"AMENDED MOTION TO WITHDRAW PLEA BASED UPON INEFFECTIVE ASSISTANCE
OF COUNSEL" FILED ON MARCH 2, 2022

COMES NOW the STATE OF FLORIDA, by and through the undersigned Assistant State Attorney, pursuant to Court Order, and files the following response to Defendant's "Amended Motion To Withdraw Plea Based Upon Ineffective Assistance of Counsel", pursuant to Rule 3.850 filed by postconviction counsel on March 3, 2022. The State submits that the motion should be summarily denied with prejudice.

FACTS

On March 12, 2018, the Defendant was charged by way of the fourth amended information with one count of Leaving the Scene of a Crash-Death, a first degree felony and one count of Tampering With or Fabricating Physical Evidence, a third degree felony. On March 12, 2018, the Defendant entered a plea as charged, in exchange for an agreed upon sentence of 10.5 years in the Department of Corrections with a 4 year minimum/mandatory on count one; and 5 years in the Department of Corrections to run concurrent on count two. Defendant did not file an appeal. On March 5, 2020, Defendant filed a Motion To Vacate Sentence For Ineffective Assistance of Counsel. The State filed its response on September 9, 2020 and this Court filed an order denying Defendant's motion on April 19, 2021. Defendant appealed the denial order to the Second District Court of Appeal. The Second District Court of Appeals reversed the denial order by Mandate on January 18, 2022 and remanded to this Court with instructions to strike Defendant's motion with leave to amend. On March 3, 2022, Defendant filed the instant amended motion and this Court ordered the State to respond by May 18, 2022.

ISSUE

Whether Defense Counsel was ineffective for failing to challenge the victim injury points assessed on the scoresheet?

RESPONSE

The standard to be applied in determining ineffective assistance of counsel claims is found in the seminal case of *Strickland v. Washington*, 466 U.S. 668 (1984). The court in *Strickland* stated that the purpose of the requirement of effective assistance is a fair trial. In order for the court to find ineffective assistance of counsel, the defendant is required to show two things: (1) that defense counsel's performance was deficient, and (2) the deficient performance prejudiced the defendant. *Id.* at 687; *see also Troy v. State*, 57 So.3d 828, 834 (Fla. 2011), reh'g denied (Mar. 24, 2011). In regards to the first prong, the defendant must establish that "counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the

RE: ADAM MURRAY COSTELLO, 16-CF-000371

defendant by the Sixth Amendment.” *Strickland, supra*, at 687. As for the second prong, the defendant must show there is a reasonable probability that, but for counsel’s unprofessional errors, the results of the proceeding would have been different. A “reasonable probability” is a probability sufficient to undermine confidence in the outcome. *Id.* at 694. Without a showing of both prongs, the defendant is not entitled to post conviction relief.

While the defendant’s conviction and sentence in this case were the result of a plea, the U.S. Supreme Court in *Hill v. Lockhart*, 474 U.S. 52, 58 (1985), made clear that *Strickland* applies to pleas, as well. The court stated that in plea cases the issue is “whether counsel’s constitutionally ineffective performance affected the outcome of the plea process....[I]n order to satisfy the ‘prejudice’ requirement, the defendant must show that there is a reasonable probability that, but for counsel’s errors, he would not have pleaded guilty and would have insisted on going to trial.” *Id.* at 59; *see also State v. Dickey*, 928 So.2d 1193, 1197 (Fla. 2006). In *Grosvenor v. State*, the Florida Supreme Court held that to determine whether the defendant would have insisted on going to trial, “a court should consider the totality of the circumstances surrounding the plea, including such factors as whether a particular defense was likely to succeed at trial, the colloquy between the defendant and the trial court at the time of the plea, and the difference between the sentence imposed under the plea and the maximum possible sentence the defendant faced at a trial.” *Grosvenor v. State*, 874 So.2d 1176, 1181-82 (Fla. 2004).

In this case, the Defendant claims that Defense Counsel was ineffective for failing to ascertain whether the 120 victim injury points in section III of the scoresheet were properly included. Defendant further asserts that with the appropriate research Defense Counsel would have found that these points were not properly assessed. Defendant relies on *Sims v. State*, 998 So.2d 494, 496 (Fla. 2008) (Defendant’s Motion, pgs. 5-7). Defendant alleges in order to assess victim injury points to the charge of leaving the scene of a crash involving death there must be a causal connection between the charged offense and the death of the victim to include victim injury points on the scoresheet. (Defendant’s motion, pg. 6).

The causal connection can be found in Florida State Statute 921.021 which was amended in 2007 to add:

(7)(e) Notwithstanding paragraph (a), if the conviction is for an offense described in s.316.027 and the court finds that the offender caused victim, sentence points for victim injury may be assessed against the offender.

On March 12, 2018, Defendant pled to the information against him that states in pertinent part:

On or about June 19, 2016 in Lee County, Florida was the driver of a motor vehicle involved in a crash **resulting in death** to Adam Roger King...

(State’s Exhibit A, Information **emphasis added**).

RE: ADAM MURRAY COSTELLO, 16-CF-000371

In addition, there are several parts in the Defendant's plea colloquy where he himself acknowledges the death of the victim and his responsibility. The Defendant presented the following sworn testimony during his plea colloquy:

STATE: All right. Do you understand why you're here today?

DEFENDANT: Yes, I do.

STATE: All right. In a amended--in an information that was amended this morning you're still charged with the charge of leaving the scene of a crash with death, as well as obstructing or tampering with evidence. You understand that the leaving the scene of a crash with death is punishable by 30 years in Florida state prison as a maximum penalty, correct?

DEFENDANT: Yes, I do.

(State Exhibit B, Plea Transcript, pg. 11).

In the exchange above, Defendant twice asserts that he knows he is pleading to a charge involving death. Later during the plea colloquy the following questions and answers occur:

STATE: Your Honor, I would stipulate to a factual basis. Counsel, will you stipulate to a factual basis and venue?

MR. MCFEE: We would, Your Honor.

STATE: And if -- Your Honor, I would ask that you take judicial notice of the court file and the initial arrest affidavit that's in there.

COURT: Okay. I do find a factual basis and venue based on the stipulation, the probable cause affidavit in the court file as well as evidence taken by the Court at various evidentiary hearings throughout the pendency of this action. I also find that Mr. Costello is competent, alert and able to tender a plea, which, Mr. Costello, I believe you've done voluntarily. So I do formally accept your no contest plea to both counts of the fourth amended information.

(State's Exhibit B, pgs. 20-23).

The probable cause affidavit mentioned by the Court above states:

"Bernal advised the following: He was westbound on Colonial Blvd from Cleveland Ave. Bernal was travelling behind King on his motorcycle. Bernal observed a white pickup truck turn onto Colonial Blvd in front of him, possibly from the light at Deleon St. Bernal then observed the white pickup truck change from lane 2 suddenly into lane 1 and strike King."

(State's Exhibit C, Probable Cause Affidavit, pg. 2).

RE: ADAM MURRAY COSTELLO, 16-CF-000371

The state submits that with the parties' stipulations to a factual basis, this Court taking judicial notice of the initial arrest affidavit and this Court's formal acceptance of his plea to both counts of the information there is ample record documentation to support the assessment of the 120 death points on his scoresheet. Therefore, this refutes Defendant's assertion that Defense Counsel was ineffective. The State submits this claim should be summarily denied with prejudice; the record conclusively refutes it.

CONCLUSION

WHEREFORE, the STATE OF FLORIDA prays that this Honorable Court issue an order summarily denying the Defendant's motion with prejudice.

AMIRA D. FOX
STATE ATTORNEY

BY: /s/ Kelly S. Worcester
Kelly S. Worcester
Assistant State Attorney
Florida Bar Number 0024831
2000 Main Street, 6th Floor
Fort Myers, Florida 33901
(239) 533-1330
eService: eservice@sao20.org

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above and foregoing has been furnished to the Honorable Margaret O. Steinbeck, Circuit Judge, Lee County Justice Center, 1700 Monroe Street, Fort Myers, Florida 33901; to the Court Administrator's Office/Staff Attorney's Office, Lee County Justice Center, 1700 Monroe Street, Fort Myers, Florida 33901; and to the Attorney for the Defendant, Christopher E. Codsen, Law Office of Christopher E. Codsen, P.O. Box 9368, Fort Myers, FL 33902 this 11th day of May 2022.

/s/ Kelly S. Worcester
Kelly S. Worcester
Assistant State Attorney

IN THE CIRCUIT COURT OF THE TWENTIETH JUDICIAL CIRCUIT IN AND FOR
LEE COUNTY, FLORIDA CRIMINAL ACTION

STATE OF FLORIDA
vs.
ADAM MURRAY COSTELLO

CASE NO: 16-CF-000371 - (MOS)
(MWM)
DCM TRACK: COMPLEX

Race: White Sex: Male
D.O.B.: 11/12/1974
SS #: [REDACTED]

AMENDED (4TH INFORMATION)

INFORMATION FOR:

- 1) Leaving the Scene of a Crash - Death, F.S. 316.027(2)(c),(2)(f) First Degree Felony
- 2) Tampering With or Fabricating Physical Evidence, F.S. 918.13, Third Degree Felony

IN THE NAME AND BY THE AUTHORITY OF THE STATE OF FLORIDA:

STEPHEN B. RUSSELL, State Attorney of the Twentieth Judicial Circuit of the STATE OF FLORIDA,
by and through the undersigned Assistant State Attorney, prosecuting for the STATE OF FLORIDA,
in the County of Lee under oath information makes that Adam Murray Costello,

Count(s):

1. On or about June 19, 2016 in Lee County, Florida, was the driver of a motor vehicle involved in a crash resulting in death to Adam Roger King, a human being, a vulnerable road user, and Defendant knew or should have known a crash occurred, but failed to stop or remain at the scene of the crash, or as close thereto as possible, until he/she gave personal information and rendered aid as required by Florida Statutes 316.062, contrary to Florida Statute 316.027(2)(c),
2. Between June 19, 2016 and July 31, 2016 in Lee County, Florida, did unlawfully and knowingly alter, destroy, conceal, or remove any record, document, or thing, to-wit: deletion of facebook information or account, cellular phone utilizing number 239 218-4928 or DVR from a surveillance camera, with the purpose to impair its verity or availability in a proceeding or investigation knowing that a criminal trial or proceeding or investigation by a duly constituted prosecuting authority, law enforcement agency, grand jury or legislative committee of this state is pending or is about to be instituted contrary to Florida Statute 918.13(1)(a),

against the peace and dignity of the STATE OF FLORIDA,

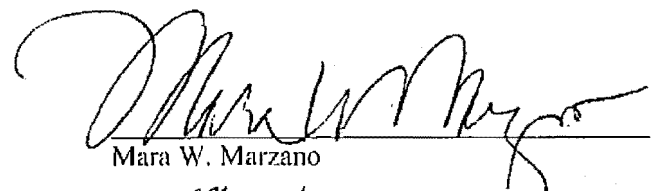
STEPHEN B. RUSSELL
STATE ATTORNEY

BY: 

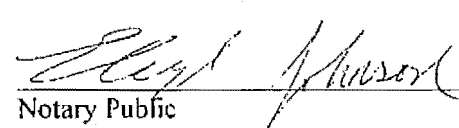
Mara W. Marzano
Assistant State Attorney
Florida Bar Number 0369950
3315 E. Tamiami Trail, Suite 602
Naples, Florida 34112
(239) 252-8470
eService: ServiceSAO-LEE@sao.cjis20.org

STATE OF FLORIDA, COUNTY OF LEE

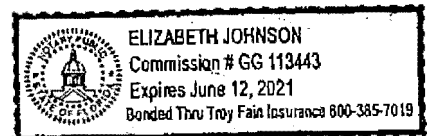
Personally appeared before me, Mara W. Marzano, Assistant State Attorney of the Twentieth Judicial Circuit of the State of Florida, being personally known to me, who being duly sworn, says that this information is filed in good faith and certifies that testimony under oath from the material witness or witnesses for the offense has been received which if true, would constitute the offense therein charged.


Mara W. Marzano

Sworn to and Subscribed before me this 12th day of March, 2018, by Mara W. Marzano, personally known to me.


Notary Public

My commission expires:



RE: Adam Murray Costello, 16-CF-000371

Page 2

**OFFICE OF THE STATE ATTORNEY
TWENTIETH JUDICIAL CIRCUIT OF FLORIDA
NOTICE TO THE CLERK**

TO: Clerk of the Courts, Lee County

RE: Adam Murray Costello, defendant Court Case Number: 16-CF-000371

Race: White Sex: Male

D.O.B.: 11/12/1974 SSN: [REDACTED]

Date of Arrest: September 2, 2016

Agency Booking Report No. 2016-06161

OBTs: 3607131460

Agency Name: Fort Myers Police Department

BOOKING CHARGES

Count(s):

Number of Counts: 1 - Hit And Run Fail To Stop Remain At Crash Involve Death, F.S. 316.027 (2c), First Degree Felony

Number of Counts: 1 - Evidence-Destroying Tamper With Or Fabricate Physical, F.S. 918.13, Third Degree Felony

SAO DISPOSITION

Count(s):

1. Filed as Charged: 316.027(2)(c)
Leaving the Scene of a Crash - Death
First Degree Felony
2. Filed as Charged: 918.13
Tampering With or Fabricating Physical Evidence
Third Degree Felony

Distribution:

Clerk of Court

Defendant / Defense Counsel - Shannon H. McFee

Sheriff's Department - Jail

Arresting Agency - Fort Myers Police Department

SAO File

STEPHEN B. RUSSELL
STATE ATTORNEY

Date: 3/12/18BY: 

Mara W. Marzano
Assistant State Attorney
Florida Bar Number 0369950
3315 E. Tamiami Trail, Suite 602
Naples, Florida 34112
(239) 252-8470
eService: ServiceSAO-LEE@sao.cjis20.org

Distribution:

Clerk of Court
Defendant / Defense Counsel - Shannon H. McFee
Sheriff's Department - Jail
Arresting Agency - Fort Myers Police Department
SAO File

Filing # 111558498 E-Filed 08/10/2020 05:07:51 PM

IN THE CIRCUIT COURT OF THE TWENTIETH JUDICIAL
CIRCUIT IN AND FOR LEE COUNTY, FLORIDA

STATE OF FLORIDA,

Case No. 16-CF-371

vs.

Lee County Justice Center
1700 Monroe Street
Fort Myers, FL 33901

ADAM COSTELLO,

March 12, 2018

Defendant.

TRANSCRIPT OF PROCEEDINGS

BEFORE THE HONORABLE MARGARET STEINBECK
CIRCUIT JUDGE

APPEARANCES:

For the State:

MARA MARZANO, ESQ.
MICHAEL COLOMBO, JR., ESQ.
Office of the State Attorney
2000 Main Street, 6th Floor
Fort Myers, FL 33901
(239) 533-1000

For the Defendant:

SHANNON H. McFEE, ESQ.
2671 Airport Pulling Road
Suite 301
Naples, FL 34112
(239) 775-9697

Transcription Service:

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Fort Myers, FL 33919
239.481.1300

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transcript produced by transcription service.

B

TABLE OF CONTENTSWITNESSES:DIRECT CROSS REDIRECT RECROSSState of Florida:

Adam Costello 10

EXHIBITS:IDENTIFIEDADMITTED

(None)

1 THE COURT: We're here in State v Costello,
2 16-CF-371. I'm Judge Margaret Steinbeck. I'll
3 ask counsel to state their appearances for the
4 record.

5 MS. MARZANO: Mara Marzano and Michael
6 Colombo, Jr. for the State.

7 MR. McFEE: Your Honor, Shannon McFee on
8 behalf of Adam Costello.

9 THE COURT: Okay. So this is scheduled for
10 the Court to potentially accept a plea from Mr.
11 Costello pursuant to a plea agreement. The Court
12 received in chambers a courtesy copy of what
13 appears to be a fully executed plea agreement
14 dated March 8th of 2017. The Court has had an
15 opportunity to review that agreement. I have a
16 couple of questions.

17 Is the defendant still interested in going
18 forward with the plea today?

19 MS. MARZANO: I'm sorry, Judge. There's a
20 typo on that. It should be 2018.

21 THE COURT: And I read it and read the typo
22 too. You would think I would have figured that
23 out. Okay.

24 Is the defendant still interested in entering
25 a no contest plea in exchange for the negotiated

1 sentence?

2 MR. McFEE: He is, Your Honor. There is a
3 housekeeping matter that would need to be
4 accomplished prior to doing so. The State has
5 filed a fourth amended information in this case,
6 and that's the information he would actually be
7 entering the plea to.

8 THE COURT: What's the change in the fourth
9 amended info?

10 MS. MARZANO: It just adds --

11 MR. McFEE: One item --

12 MS. MARZANO: -- one item --

13 MR. McFEE: -- as to --

14 MS. MARZANO: -- to the tampering charge, and
15 it's by agreement of the parties. It was done as
16 part of our negotiation to add that.

17 THE COURT: Okay. So it would actually be
18 the -- actually you're filing it in open court
19 right now.

20 MS. MARZANO: Yes, I am.

21 THE COURT: Okay. So it would actually be a
22 plea to this particular information that is dated
23 today's date?

24 MS. MARZANO: Yes, Your Honor.

25 THE COURT: Okay. So you can submit that for

1 filing in open court. I'll give that to the
2 clerk.

3 The -- are the next of kin of the victim in
4 agreement with the negotiated resolution?

5 MS. MARZANO: Yes, Your Honor. They have
6 been fully briefed, discussed, consulted
7 throughout the process, and they are in
8 agreement, although they will be wanting to make
9 some statements this morning to Your Honor, not
10 to change anything with the agreement but just to
11 let Your Honor know a little bit more about Mr.
12 Adam King. And if possible, if Your Honor could
13 accept the plea, and then we could do that, and
14 then Your Honor could sentence Mr. Costello.
15 That's -- that's what we're requesting.

16 THE COURT: Okay.

17 MR. McFEE: The understanding, Your Honor,
18 was that we would be waiving a PDR or, I'm sorry,
19 a predisposition report, presentence
20 investigation and allow for the sentencing today.

21 THE COURT: Okay. Counsel had set 30 minutes
22 for the acceptance of the plea for this hearing.
23 Are we gonna be able to accomplish what we need
24 to accomplish in 30 minutes?

25 MS. MARZANO: I believe that the victim

6

1 statements will be fairly short. I -- I thought
2 we had asked for an hour, but maybe I am
3 mistaken. I don't know.

4 THE COURT: I think my judicial assistant put
5 an hour on there at my request, but I wanna make
6 sure that you all -- I do need to recess in
7 advance of noon because I have a conference call
8 involving judges from around the state of Florida
9 that I would like to be on time for. It's the
10 conclusion of the legislative session and in my
11 role as chair of the trial court budget
12 commission so it's -- it's a call that I would
13 like to be on time for. So that's why I'm asking
14 you to proceed accordingly. Do you expect that
15 we would be able to do that?

16 MS. MARZANO: I'm hoping so, yes, Your Honor.
17 I believe so.

18 MR. McFEE: I do, Your Honor. That's why we
19 did the plea agreement in -- in advance so that
20 all of the terms and conditions, issues involved,
21 Mr. Costello's very aware of.

22 THE COURT: Okay. So the questions that I
23 had with regard to the terms are the -- is the
24 language that provides for Mr. Costello to
25 accomplish certain obligations that would only be

1 enforceable as contempt of court and not a
2 violation of the plea agreement. Specifically
3 I'm referring to Paragraph 10(h) and (i), I think
4 are the two places that that appears. How would
5 you envision that happening, Ms. Marzano?

6 MS. MARZANO: If, when Mr. Costello's
7 released from custody, he does not comply with
8 those, he could be brought in on a contempt
9 charge. I think those have to be ordered by the
10 Court, and part of the agreement does not provide
11 for any paper to follow so we felt that was the
12 best way to effectuate it. And if he doesn't go
13 ahead and do those things, one, he will never be
14 able to obtain a driver's license based on the
15 charges and the statute, and two, he could be
16 charged with contempt.

17 THE COURT: Okay. Is probation an obligation
18 of this particular crime?

19 MS. MARZANO: No.

20 THE COURT: I'm talking about Count I.

21 MS. MARZANO: No, Your Honor.

22 THE COURT: It's not? Okay.

23 MS. MARZANO: I don't believe so.

24 THE COURT: Okay. So taken to its extreme,
25 contempt of court if you have a jury trial is a

1 year incarceration if you're found guilty of
2 contempt, nonjury it's six months. So that would
3 be the risk of noncompliance there, Mr. Costello.

4 So with everything that you've heard and
5 you've read, do you personally wish to go forward
6 with this plea?

7 THE DEFENDANT: Yes, ma'am.

8 THE COURT: Okay. I'm gonna put you under
9 oath. Do you solemnly swear the testimony you
10 give in this proceeding will be the truth, the
11 whole truth and nothing but the truth?

12 THE DEFENDANT: Yes.

13 THE COURT: Please state your full name.

14 THE DEFENDANT: Adam Murray Costello.

15 THE COURT: Mr. Costello, I'm going to ask
16 Ms. Marzano, are you gonna do a colloquy for me?

17 MS. MARZANO: Yes, Your Honor. If you want
18 me to, I can.

19 THE COURT: To ask you some questions on my
20 behalf so I can make sure you understand the
21 rights that you're waiving by entering a no
22 contest plea to the charges in the fourth amended
23 information. Have you previously seen a copy of
24 this, Mr. McFee --

25 MR. McFEE: I have, Your Honor.

1 THE COURT: -- and Mr. Costello? So you
2 don't need it to refer to?

3 MR. McFEE: Right.

4 THE COURT: You're waiving reading?

5 MR. McFEE: Yes, Your Honor.

6 THE DEFENDANT: Yeah.

7 THE COURT: Okay..

8 MR. McFEE: Your Honor, would you like us to
9 stand for this?

10 THE COURT: No, you can remain seated.

11 Mr. Costello, even though these rights are
12 written on the written plea agreement, they're
13 required to be part of the record orally here in
14 open court. I'll ask you to listen carefully and
15 answer truthfully.

16 You may proceed, Ms. Marzano.

17 MS. MARZANO: Thank you, Judge.

18

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1 Thereupon,

2 ADAM COSTELLO

3 the Defendant, having been first duly sworn, was
4 examined and testified as follows:

5 DIRECT EXAMINATION

6 BY MS. MARZANO:

7 Q. Good morning, sir. Can you please state your
8 name for the record?

9 A. Adam Murray Costello.

10 Q. And sir, what is your date of birth?

11 A. 11-12-74.

12 Q. And what are the last four digits of your
13 Social Security number?

14 A. 4276.

15 Q. Have you ever been known by an alias or any
16 other name?

17 A. No, ma'am.

18 Q. Where were you born?

19 A. Birmingham, Alabama.

20 Q. And how far have you gone in school?

21 A. I have a bachelor's degree in accounting.

22 Q. Can you read and write and understand the
23 English language, sir?

24 A. Yes, ma'am.

25 Q. Are you under the influence today of drugs or

1 alcohol?

2 A. No, ma'am.

3 Q. Are you taking any medications today?

4 A. For blood pressure.

5 Q. Okay. But that does not affect your ability

6 --

7 A. No, ma'am.

8 Q. -- to think clearly, correct?

9 A. Correct.

10 Q. All right. Do you understand why you're here
11 today?

12 A. Yes, I do.

13 Q. All right. In a amended -- in an information
14 that was amended this morning you're still charged
15 with the charge of leaving the scene of a crash with
16 death, as well as obstructing or tampering with
17 evidence. You understand that the leaving the scene
18 of a crash with death is punishable by 30 years in
19 Florida state prison as a maximum penalty, correct?

20 A. Yes, I do.

21 Q. And you understand that the obstruction or
22 tampering charge carries a maximum of three -- I'm
23 sorry, five years in prison as it's a third degree
24 felony? You understand that?

25 A. Yes.

12

1 Q. How today will you be pleading to the charges?

2 A. No contest.

3 Q. By entering the plea you understand that you
4 would have had the right to a trial by jury? Do you
5 understand that?

6 A. I do understand.

7 Q. And you also understand that by entering into
8 this plea agreement today you will be waiving your
9 right to have the jury determine your guilt or
10 innocence, you understand that?

11 A. Yes, I do understand.

12 Q. You understand that you'll give up the right
13 to see or hear the State's witnesses who would have
14 testified and to have Mr. McFee question them on your
15 behalf?

16 A. Yes, I do understand.

17 Q. You have the right to subpoena and call your
18 own witnesses and submit evidence on your behalf.
19 You understand you're giving that up as well?

20 A. Yes, I do.

21 Q. You understand that you have the right to
22 testify or to remain silent in this case?

23 A. Yes, I do.

24 Q. You understand that you have the right to
25 make the State prove these charges beyond every

1 reasonable doubt?

2 A. Yes.

3 MS. MARZANO: In fact, Mr. McFee, you filed,
4 I believe, two motions to -- to suppress as well
5 as several motions in limine, and the State filed
6 a Williams Rule notice. Are those by the terms
7 of the plea agreement and with Mr. Costello's
8 agreement are not going to be reserved for
9 appeal, correct?

10 MR. McFEE: That is correct.

11 BY MS. MARZANO:

12 Q. And you understand that, Mr. Costello?

13 A. Yes, I do.

14 MR. McFEE: Judge, none of those were
15 dispositive issues.

16 BY MS. MARZANO:

17 Q. All right. Mr. Costello, I'm showing you the
18 last -- or -- or a score sheet. You've seen this
19 before, correct?

20 A. Yes, correct.

21 Q. And you've seen that the terms are that you
22 face a lowest permissible sentence of 126.3 months
23 Florida state prison up to 30 potential years in
24 prison. You understand that?

25 A. Yes, I do.

1 Q. And is this the score sheet that you're
2 familiar with?

3 A. Yes.

4 Q. And you agree that it is true and accurate?

5 A. Yes.

6 Q. And you've had the opportunity to review it
7 with counsel?

8 A. Yes, I have.

9 Q. I'm showing you, Mr. Costello, a plea
10 agreement and waiver of rights form. You have seen
11 this before, correct?

12 A. Correct.

13 Q. And, in fact, it's been read to you fully,
14 correct?

15 A. Correct.

16 Q. And you understand the terms of this plea
17 form, correct?

18 A. Correct.

19 Q. And you discussed it with Mr. McFee?

20 A. Yes, I have.

21 Q. Correct? And you've signed this plea form
22 and initialed every page?

23 A. Yes.

24 Q. Are you entering this plea today of your own
25 free will?

1 A. Yes, I am.

2 Q. And are you being forced or threatened by
3 anyone to make you plea here today?

4 A. No, I am not.

5 Q. Other than what's contained in the plea
6 agreement that I just showed you and what we've
7 discussed on the record, has anyone promised you
8 anything in exchange for this plea?

9 A. No.

10 Q. You understand that the terms of the plea
11 require that you will be sentenced to 10.5 years
12 Florida state prison with a four-year minimum
13 mandatory on Count I, and Count II will be a sentence
14 of five years Florida state prison. You'll be
15 adjudicated on both counts, and they will run
16 concurrently. You will not receive a fine.

17 There are standard court costs. There's a
18 hundred dollar cost of prosecution. Restitution has
19 been addressed and will be resolved by civil
20 litigation, and it is not being requested at this
21 time.

22 Your driving privilege will be revoked for
23 three years, and the revocation shall not begin until
24 you're released from custody. The defendant must --
25 you, Mr. Costello, must comply with the statutory

1 provisions of Florida Statute 316.027(e) in order to
2 obtain a driver's license.

3 You will be required to complete 120
4 community service hours in a trauma center or
5 hospital that regularly receives victims of
6 automobile or vehicle accidents under the supervision
7 of a registered nurse, an emergency room physician or
8 an emergency medical technician pursuant to a
9 voluntary community service program operated by a
10 trauma center or hospital if one exists. And this is
11 the term that we talked about being enforceable as a
12 contempt of court but would not violate your plea
13 agreement.

14 You also, sir, will be required to
15 participate in a victim's impact panel session in
16 this judicial circuit if such a panel exists; or if
17 such a panel does not exist, you will have to attend
18 a Department approved driver improvement course
19 relating to the rights of vulnerable road users
20 relative to vehicles on the roadway. Again, this is
21 another term that would be enforceable as a contempt
22 of court issue and would not violate your plea
23 agreement.

24 You also have agreed to testify truthfully,
25 fully and completely and accurately before the State

1 Attorney's Office of the Twentieth Judicial Circuit
2 as to matters relating to, arising from your
3 knowledge and/or involvement in any criminal
4 activity. You agree you would testify truthfully,
5 fully, completely and accurately in any and all
6 hearings, depositions, proceedings and trials.

7 Upon the violation of this agreement as set
8 forth in Paragraph 10(j), you would no longer be
9 entitled to the above sentence, and it would -- this
10 agreement would be null and void. You would agree
11 that you would be resentenced by the Court with a
12 range of 126.3 months up to a maximum of 35 years for
13 these charges.

14 The -- you agreed to recordation of any
15 statements, either stenographically, electronically
16 or mechanically at the discretion of the said
17 prosecutor, his assistants or investigators.

18 And you shall be remanded to custody today
19 upon the acceptance of this agreement by the Court.
20 And if you are ever released from custody prior to
21 the completion of any of the terms of this agreement,
22 you will notice -- notify the prosecutor, letting
23 them know or the prosecutors know your whereabouts
24 and how to contact you at all reasonable hours of the
25 day or night.

1 The defendant, you, shall not commit any
2 violations of any federal, state, county or municipal
3 law.

4 You understand that -- you understand the
5 terms of -- and what you'll be sentenced to, correct?

6 A. Yes. That is correct.

7 Q. Do you believe you're pleaing today because
8 it is in your best interest?

9 A. Yes, I do.

10 Q. Are you aware of any physical evidence that
11 you believe should be tested for DNA, and do you
12 understand there will be nothing further tested in
13 this case?

14 MR. McFEE: Do you agree?

15 THE DEFENDANT: I agree.

16 MS. MARZANO: Okay. Mr. McFee, you're not
17 aware of any DNA evidence that would exonerate
18 your client?

19 MR. McFEE: No, not that has not been already
20 tested.

21 MS. MARZANO: Okay.

22 BY MS. MARZANO:

23 Q. Mr. Costello, are you satisfied with the
24 advice of your attorney, Mr. McFee?

25 A. Absolutely.

1 Q. Has he done everything that you've asked him
2 to and answered all of your questions?

3 A. Yes, he has.

4 Q. Okay. Now we discussed that you had some
5 motions that were filed. You also -- have you
6 discussed any potential defenses that you have with
7 Mr. McFee?

8 A. Yes.

9 Q. All right. Do you understand that at least
10 for the first four years of Count I you will not be
11 entitled to gain time on that charge, but in regard
12 to gain time or early release there are no guarantees
13 as to whether you'll receive that. That's up to the
14 Department of Corrections.

15 A. Yes.

16 MS. MARZANO: Counsel, have you reviewed all
17 the discovery in this case with your client?

18 MR. McFEE: We have.

19 BY MS. MARZANO:

20 Q. And Mr. Costello, do you understand that if
21 you're not a citizen of the United States that you
22 could be subjected to deportation?

23 A. Yes.

24 Q. If the offense to which you are pleading is a
25 sexually violent offense or sexually motivated

1 offense or if you have previously been convicted of
2 such an offense, the plea may subject you to
3 involuntary civil commitment as a sexually violent
4 predator upon completion of your sentence. Do you
5 understand this warning and understand that that's
6 given to all defendants?

7 A. Yes.

8 Q. All right.

9 MS. MARZANO: Your Honor, I would stipulate
10 to a factual basis. Counsel, will you stipulate
11 to a factual basis and venue?

12 MR. McFEE: We would, Your Honor.

13 MS. MARZANO: And if -- Your Honor, I would
14 ask that you take judicial notice of the court
15 file and the initial arrest affidavit that's in
16 there.

17 THE COURT: The court costs are \$415. Cost
18 of prosecution -- hundred dollar -- excuse me,
19 \$415 court costs per schedule and a hundred
20 dollar cost of prosecution, but I think a 316
21 offense had some additional monetaries?

22 UNIDENTIFIED SPEAKER: There's a \$33 circuit
23 traffic offense court costs and a \$5 leaving the
24 scene of the accident court cost.

25 THE COURT: Okay. And that's all the

1 mandatories?

2 UNIDENTIFIED SPEAKER: Correct.

3 THE COURT: Those will be assessed, Mr.
4 Costello. With that understanding, do you wish
5 to go forward?

6 THE DEFENDANT: Yes, ma'am.

7 THE COURT: Okay.

8 MS. MARZANO: May I approach, Your Honor,
9 with this --

10 THE COURT: Yes.

11 MS. MARZANO: -- documentation? And I can
12 tell the Court that this is a guideline sentence.

13 THE COURT: You had previously provided the
14 score sheet to me --

15 MS. MARZANO: Okay.

16 THE COURT: -- so I was aware of that, and
17 I'm going to give the original plea agreement and
18 waiver of rights to the clerk to file. And --
19 oh, you've done a separate --

20 MR. McFEE: Judge, that --

21 THE COURT: -- felony plea form. Okay.

22 MR. McFEE: Judge, that can be discarded. I
23 -- I just simply had asked the Court to
24 incorporate by reference the plea agreement. I
25 did not know if the Court wanted that or not. So

1 we could certainly discard that.

2 THE COURT: No, I -- there's not a
3 requirement to use that.

4 MR. McFEE: That's fine.

5 THE COURT: So -- but I don't -- I'm not
6 gonna discard it. I don't wanna destroy
7 anything.

8 MR. McFEE: Would the -- would the Court like
9 to give it back to us?

10 THE COURT: I'll return it since it has not
11 become part of the official file.

12 MR. McFEE: Your Honor, we'd also ask the --
13 on those financial obligations that Mr. Costello
14 be given 90 days to pay upon his release from
15 state prison. So that way it doesn't complicate
16 matters with it being shown as not paid
17 (inaudible) so we'd ask for that.

18 THE COURT: Any objection?

19 MS. MARZANO: No, Your Honor.

20 THE COURT: That's fine.

21 MS. MARZANO: At this time, Your Honor, I
22 would ask the Court to accept the plea, and then
23 we have some victim impact statements that we
24 would like to present to the Court.

25 THE COURT: Okay. I do find a factual basis

1 and venue based on the stipulation, the probable
2 cause affidavit in the court file as well as
3 evidence taken by the Court at various
4 evidentiary hearings throughout the pendency of
5 this action.

6 I also find that Mr. Costello is competent,
7 alert and able to tender a plea, which, Mr.
8 Costello, I believe you've done voluntarily. So
9 I do formally accept your no contest plea to both
10 counts of the fourth amended information.

11 I would ask the State to present victim
12 impact testimony and evidence at this point.

13 MS. MARZANO: Thank you, Your Honor. At this
14 time I'm going to ask that the easel be set up,
15 and I have marked State's S-1, which will be a
16 grouping of photographs which will be put into
17 the record following the -- the --

18 THE COURT: Okay.

19 MS. MARZANO: -- the statement. And I would
20 call Tom O'Brien.

21 Mr. McFee has seen the photographs so he is
22 not objecting as far as I know.

23 THE COURT: Okay.

24 UNIDENTIFIED SPEAKER: Face the Court and
25 raise your right hand.

1 (Whereupon, the witness was sworn by the
2 Clerk.)

3 MR. O'BRIEN: Thanks, Your -- Your Honor.

4 THE COURT: And Mr. O'Brien, if you wanna
5 pull that microphone closer, and you can even
6 bend it down so that you're comfortable. I know
7 this --

8 MR. O'BRIEN: Okay. That better?

9 THE COURT: You may proceed. Thank you.

10 MR. O'BRIEN: You want me to start?

11 THE COURT: You may proceed; yes, sir.

12 MR. O'BRIEN: Thank you.

13 My name is Tom O'Brien. I came into Adam's
14 life approximately 14 years ago. I'll get it.
15 After dating Adam's mother, Traci, for a little
16 over a year we decided to purchase a house
17 together, Alex, Adam, Traci and I, myself, all
18 moved in our house together.

19 During those 14 years I have many memories of
20 Adam. Adam growing up was all boy. In fact, the
21 first year we moved in he was doing backflips
22 into our pool. One -- one he lost his footing
23 and split his head open. Emergency room, eight
24 stitches later he stopped doing backflips.

25 In a couple years we decided to go to Busch

1 Gardens for the day. It happened to be the day
2 of the grand opening of a new rollercoaster,
3 Sheikra. We waited in line till we came up to
4 the height requirement. He was just under the
5 required height. Adam, frustrated and angry, I
6 took him to the side and went to the souvenir
7 shop, bought him a pair of socks, folded 'em up
8 three times and then put 'em in his shoes. He --
9 he passed the height requirement and went on that
10 coaster four times that day.

11 As a family, we all went to my home in
12 Chicago so Adam could see snow for the first
13 time. I think he was more interested in
14 basements in houses, as he had never seen that
15 either.

16 We all went camping at the Wisconsin Dells,
17 haunted houses, water parks, water duck boats,
18 riding bikes in the campground. Some of our
19 activities.

20 We flew to a resort in Arizona, a J.W.
21 Marriott, as I had work convention there. Alex,
22 Adam, Traci spent the day in the pool, lazy
23 river, eating hamburgers, fries and ice cream.
24 Alex and Adam, Traci took excursions in a Hummer
25 into the desert and into the mountains.

1 We all went on several charter fishing trips,
2 as Adam loved fishing, and one -- one time, one
3 of the largest fish caught in a pool.

4 Over the years he grew both physically and
5 mentally. He -- he didn't like cleaning around
6 the house, but he kept his room spotless. Never
7 really gave him an allowance, but I would pay him
8 to do work around the house. This is where I
9 noticed another side of him. His work, whether
10 it be trimming trees or cleaning the garage, will
11 be done to perfection. Although he never really
12 cared for school, give him a job, it would be
13 done beyond expectation.

14 Before I knew it he was turning 16. Traci's
15 parents, his Aunt Laurie, and Traci and myself
16 bought him a 2005 Mustang. Suddenly car parts
17 started arriving weekly. He would spend hours in
18 the garage assembling, disassembling his Mustang,
19 from headlights to taillights to stereo to
20 differentials, pinstriping and more. He learned
21 all this on his own.

22 These are just a few of the memories of Adam.
23 There will be no more memories, as these ended
24 the night of June 19th, which resulted in his
25 death from a hit-and-run vehicle. Now is the

1 time for punishment of the person responsible for
2 taking Adam King's life and ending new memories.

3 Thank you, Your Honor..

4 MS. MARZANO: Next we will have Richard
5 Echevarria.

6 UNIDENTIFIED SPEAKER: Face the Court and
7 raise your right hand.

8 (Whereupon, the witness was sworn by the
9 Clerk.)

10 MR. ECHEVARRIA: Your Honor, may I proceed?

11 THE COURT: You may.

12 MR. ECHEVARRIA: I came here today on behalf
13 of Traci's request to speak on behalf of her
14 friends. Excuse me, I'm very nervous.

15 We had a very close friend group. We started
16 about in high school, and I'm glad we met. You
17 know, Adam really changed my life for the better.
18 He really put a big effect -- effect on us since
19 we met him.

20 And I can give you thousands -- thousands of
21 ways that he changed my life and how he affected
22 it, but I think the number one thing that he
23 taught me from all our adventures, from all of
24 the conversations we had, was -- was to always
25 stay strong.

1 Adam was a -- was never scared of anything
2 really. I mean, we -- we could be out doing
3 something mischievous and, you know, he wouldn't
4 worry about getting in trouble. He wouldn't
5 worry about anything at all. And I -- I told
6 him, you're crazy. You know, he'd always make
7 fun of me for being like the most responsible one
8 in the group, and he always told me just -- you
9 just gotta let loose and be okay.

10 And at the time of his death, you know, I was
11 patiently waiting because my girlfriend was
12 pregnant, and I told him about it; and, you know,
13 he told me there's only one way to go at it, and
14 you just gotta be ready. You gotta be strong
15 because once that child comes into your life it's
16 not about you no more. It's about him. And I
17 think what he meant was -- by that is to be
18 strong no matter what. Whatever challenges that
19 you may face coming -- coming into your life, you
20 just gotta be prepared and be ready and be strong
21 about it.

22 Yeah. I -- I have nothin' else much to say.
23 I do very -- I do miss him very much, but he'll
24 always be in my heart.

25 Thank you.

1 THE COURT: Thank you for speaking.

2 MS. MARZANO: I believe that Ms. Miller,
3 Adam's mother, will read a statement from
4 somebody by the name of Chris Patt (phonetic
5 spelling).

6 THE COURT: Okay.

7 UNIDENTIFIED SPEAKER: Please face the Court
8 and raise your right hand.

9 (Whereupon, the witness was sworn by the
10 Clerk.)

11 MS. KING: Thank you, Your Honor.

12 This statement was given to me by Chris Patt,
13 who was my son's boss at his work, and it goes:

14 Your Honor, my name is Chris Patt. I am
15 Adam's boss, as well as friend. Adam was a great
16 person, always willing to help out wherever he
17 was needed, no matter what the task. He was on
18 his way to being named the night shift manager.
19 He didn't know -- know it, but I knew when I told
20 him he would have been ecstatic.

21 The morning I found out that -- about Adam's
22 death I was heartbroken and very nervous to tell
23 the rest of the crew because I knew how bad it
24 would affect everyone. After speaking with the
25 general manager we decided to have a meeting with

1 everyone and allow everyone to have the day off.
2 When we told them, you could see it in their
3 faces how everyone became silent in disbelief.

4 I personally met with Adam's family and
5 talked with them about Adam and shared some
6 memories I had from him with work. Ever since
7 that day we have Adam's work shirt hanging up in
8 the shop. We had everyone in the dealership sign
9 and write one of the Adam's -- sign on one of
10 Adam's shirt sleeves, and we gave it to Adam's
11 mom during a ride that was constructed in honor
12 of Adam's death, as well as riding past the
13 location which it happened.

14 Adam's death affected the whole dealership,
15 and still today we talk about Adam and think of
16 some of the funny and, yes, stupid things he did;
17 but all in all, Adam's death taught me to never
18 take a single day for granted and that life is
19 very precious.

20 On behalf of the whole Jaguar and Land Rover
21 dealership, we miss you, Adam.

22 Thank you.

23 MS. MARZANO: Next the State would call
24 Laurie Gast (phonetic spelling).

25 UNIDENTIFIED SPEAKER: Please face the Court

1 and raise your right hand.

2 (Whereupon, the witness was sworn by the
3 Clerk.)

4 MS. GAST: Thank you. Thank you for allowing
5 me the opportunity.

6 Trying to find the words for a victim impact
7 statement is proving to be one of the hardest
8 things I've ever had to do and a task that I pray
9 I never have to do again.

10 This immeasurable pain and heartache has
11 unfortunately been overshadowed by the pursuit of
12 justice for Adam. I know that justice won't
13 bring him back, but I hope that it will aid in
14 our healing process.

15 I know I'm supposed to take this opportunity
16 to talk about how my life has been impacted by
17 Adam's death, but my personal battle between my
18 love for him and the hate that I'm carrying for
19 the circumstances surrounding his death are so
20 raw that it will take a lifetime to understand
21 the impact of this.

22 I will always cherish the love and memories
23 that I have for Adam, and I will pray that some
24 day I find peace in the hate that I have for the
25 circumstances surrounding his death.

1 Finding a way to verbalize the impact of
2 Adam's death that it has had on me is somewhat
3 impossible. This will impact me for the rest of
4 my life. From now on I will always have to speak
5 of him in the past tense.

6 Adam King was a son. Adam King was a
7 brother. Adam King was a grandson. Adam King
8 was a friend. Adam King was a nephew. He was my
9 nephew. Just knowing that never again will I
10 hear his voice say the words, I love you, Aunt
11 Laurie, this alone will impact the rest of my
12 life.

13 Adam had a big heart. He was shy but
14 confident. He was evolving. He was finding out
15 who he really was, getting comfortable with who
16 he was to become. He was passionate about his
17 work, his Mustang, his motorcycle. He was
18 fiercely loyal to his friends. He was an 18-
19 year-old boy, the future was his or so we
20 thought.

21 It's been almost two years since I was woken
22 up by a phone call telling me that he was dead.
23 That horrifying call was only made worse when I
24 was told that he was killed by a hit-and-run
25 driver, that the man who did this made the

1 conscious decision to hit, kill and run with no
2 regard for human life. From his rearview mirror
3 he saw the lifeless body of 18-year-old Adam
4 King. Dead. Yet he chose to drive away. What
5 kind of person could do this? There is a name
6 for that kind of person, and his name is Adam
7 Costello.

8 This could have been an accident, a
9 senseless, careless, tragic accident; but the
10 moment that Adam Costello made the conscious
11 decision to run and hide the truth, it became a
12 violent, heinous crime.

13 For almost two years Adam Costello has to
14 continue to deny that he is responsible for this.
15 Adam Costello tried to cover this up. In my
16 heart and in my opinion I will always believe
17 that he has obstructed the justice and tampered
18 with the evidence.

19 Adam Costello tried to hide the truth. Adam
20 Costello did everything in his power to deny his
21 responsibility for the fact that he was guilty of
22 killing Adam King. For the past 21 months he has
23 diligently worked at trying to get away with
24 this. Showing up in this courtroom, in the same
25 room as Adam's mom, and showing no remorse

1 because he still felt that there was an
2 opportunity that he could get away with this.

3 Now that his last card has been played and
4 finally he will be going to prison for his
5 actions, will today be the day that he will act
6 remorseful? Today I don't want to hear his
7 remorse. He had 21 months that he chose not to
8 be remorseful. Any words or actions from him
9 today will never be enough to heal the pain and
10 agony that I and my family have had to endure for
11 the past 21 months, let alone the rest of our
12 lives.

13 What happens after today is between him and
14 God. Adam Costello killed Adam King on June 19th
15 of 2016. He's been killing this family ever
16 since, as we have had to watch him deny his
17 responsibility for this while we're trying to
18 mourn our own deep and personal loss.

19 I pray that this Court will prosecute Adam
20 Costello to the fullest extent of the law. I
21 pray that he will finally take the responsibility
22 for his actions while paying the harsh
23 consequences that he deserves. I pray that
24 today, finally, justice will be served for Adam
25 King.

1 I'm sorry. Thank you. I'm sorry.

2 MS. MARZANO: Alex King.

3 UNIDENTIFIED SPEAKER: Go ahead and face the
4 Clerk, raise your right hand.

5 (Whereupon, the witness was sworn by the
6 Clerk.)

7 MR. KING: First I'm gonna read the statement
8 written by my father for him.

9 I, Roger King, Adam's King's father, am
10 speaking through my son, Alex King, to address
11 this Court and specifically regarding Adam
12 Costello.

13 First I would like to emphasize the impact of
14 Adam's murder has had on my life. It is the loss
15 of the physical and tactile contact with my son.
16 I hope the Costello family learns how I feel once
17 you lose a loved one to the prison system, unable
18 to see, touch, smell or hear Adam Costello at
19 will. At least they can console themselves with
20 the weekly or monthly visit in the prison.
21 However, I cannot ever hold my child again, ever.
22 The depth of my loss is infinite.

23 Yet my Adam is still with me, as it says on
24 his urn. Adam is. He is with me in thoughts,
25 spirit and depth of feeling. Adam Roger King is,

1 and this feeling and belief will never leave me.

2 My disdain for Adam Costello will not let me
3 properly address him directly in this court.

4 This man will feel a greater impact by me
5 addressing the Court through Alex rather than if
6 I address him personally and directly.

7 I request Adam Costello make a physical
8 action of remembrance, such as sending a postcard
9 daily remembering my Adam Roger King and mailed
10 for the duration of his sentence should the Court
11 allow it.

12 The loss of my son's precious life and the
13 depth of my grief should always be in the
14 forefront of Adam Costello's mind.

15 With a heavy heart, Roger Stern King, Adam
16 Roger King's father.

17 As for me, we all have our good memories with
18 Adam, and those are never going to leave us; but
19 the main impact of Adam's death, I think, is the
20 things that we're gonna miss in the future. I
21 lost the best man for my wedding. I lost the
22 father of my nephews and nieces. I lost an uncle
23 to my future children. Those all lost a
24 grandfather. My parents lost a son, and my
25 grandparents lost a grandchild; and nothing can

1 ever replace that. No one can ever bring any of
2 that back to us.

3 As far as Adam's life, as much as he worked
4 hard and -- at Jaguar dealership and he studied a
5 little bit for school, he was trying to get
6 towards his GED, the conversation I had with him
7 most often was telling him about the military.
8 He had a lot of questions for me about it, and he
9 always wanted to either join the Marine Corp or
10 become an Army Ranger one day; and I talked to
11 him a lot about that. And often, just the type
12 of person he was, you could tell from his work --
13 work -- work ethic, excuse me, at least at
14 Jaguar, he always did his best, worked his
15 hardest at everything he did. But his ultimate
16 goal was to go into the military and fight and
17 serve for his country with everything he has.

18 He wanted -- he always looked out for
19 everybody, even anybody that he didn't know. He
20 wanted to go and fight for our freedom to live in
21 this country, and we lost -- we lost a great
22 person in that regard.

23 MS. MARZANO: And lastly, Your Honor, I will
24 recall Traci Miller.

25 THE COURT: You're still under oath, ma'am.

1 MS. MILLER: Okay.

2 THE COURT: You can go ahead and have a seat.

3 MS. MILLER: Thank you, Your Honor. Thank
4 you for this opportunity.

5 My son, Adam, was the true definition of a
6 free spirit. He was full of love, even if
7 sometimes he didn't show it. He was loyal to the
8 bone. He was full of controversy and turmoil.
9 If he had something to say, there was no stopping
10 him, and he was so passionate about everything he
11 did. So stubborn about anything he didn't want
12 to do. He had a little bit of everybody in this
13 room in him.

14 Your Honor, I see that Mr. Costello is
15 remorseful and feels very bad; but I am not
16 responsible for his feelings, and I do not feel
17 sorry for him. He did a despicable thing, and he
18 continued with his deceit for a year and nine
19 months, knowing how much suffering he caused.
20 His punishment is deserved and brought on by him
21 and him alone.

22 Getting justice for my son has consumed my
23 life since the night he was killed. Trying to
24 bury my grief until justice was served has taken
25 a toll on my health. Now that my grief can come

1 welling to the surface, the love, the loss, the
2 future that I dreamed of for Adam, the future
3 that Adam dreamed of for himself, I don't know
4 what to do with that.

5 Your Honor, I would like to tell you the --
6 my story of the night that Adam Costello slammed
7 his truck into my son and his motorcycle, causing
8 my son to hit a palm tree. Mr. Costello saw my
9 son's precious body break into pieces, and he
10 just drove away. When the police came to our
11 home at 3:00 a.m. to tell me that my 18-year-old
12 son was killed by a hit-and-run driver, I died.
13 I felt like I was imploding and exploding at the
14 same time. I saw my beating heart laying in my
15 hands. My brain melted into a pool of
16 unfathomable grief. All I could do was scream
17 and bawl and retch and crawl on the floor in
18 disbelief, yelling no, no, no. Sorry. Not my
19 baby. Please come home, Adam.

20 Then the anger set in. How could someone do
21 such a horrible thing. Alex and Cass and Tom
22 wrapped me in their arms until complete and utter
23 exhaustion set in. Then we all wrapped Alex in
24 our arms as he broke down, his brother was dead.

25 There is a short poem I'd like to read. It's

1 titled Mom, He Only Took My Hand, and it's
2 unknown author.

3 "Last night while I was trying to sleep,
4 My son's voice I did hear,
5 I opened my eyes and looked around,
6 But he did not appear.

7 He said, "Mom, you've got to listen,
8 You've got to understand,

9 God didn't take me from you, mom,

10 He only took my hand.

11 When I called out in pain that morning,
12 The instant that I died,

13 He reached down and took my hand -- hand,
14 And pulled me to His side.

15 He pulled me up and saved me
16 From the misery and pain.

17 My body was so -- was hurt so badly inside,
18 I could never be the same.

19 My search is really over now,

20 I've found happiness within,

21 All the answers to my empty dreams,
22 And all that might have been.

23 I love you so much and miss you so,

24 But I'll always be nearby.

25 My body's gone forever,

1 But my spirit -- spirit will never die.

2 And so, you must go on now,

3 Live one day at a time.

4 Just understand, God did not take me from
5 you,

6 He only took my hand."

7 Thank you.

8 MS. MARZANO: And that's all, Your Honor.

9 Thank you.

10 MR. McFEE: Your Honor, Mr. Costello's mother
11 would like to address the Court.

12 THE COURT: Okay.

13 MR. McFEE: Your Honor, this is Susan
14 Costello.

15 (Whereupon, the witness was sworn by the
16 Clerk.)

17 MS. COSTELLO: I just had a few short words
18 to say. I'm truly, truly sorry for the King
19 family. If there was anything I could do to
20 change the situation, I would. I know what it's
21 like to lose someone you love. I lost my son, he
22 was 37, from heart failure, and my husband died
23 in a car accident 14 months later. So I know a
24 little bit about grief.

25 I know that, you know, Adam has been a

1 wonderful son. He has never done anything wrong.
2 He was a superlative student in school. He was
3 an honor roll student all through elementary,
4 high school and all through college. He's always
5 tried to do the right thing. He's never broken a
6 law.

7 I don't know why this happened; but if there
8 was anything I could do to change it, like I
9 said, I would. The last almost two years has
10 been horrible for us. Every day has been so
11 terribly hard. Adam has a lot of remorse. I've
12 seen him cry over and over again.

13 It was nothing that he intended to do on
14 purpose. It was an accident.

15 And that's all I have to say.

16 MR. McFEE: And Your Honor, Mr. Costello has
17 something he'd like to read if he can.

18 THE COURT: You may.

19 MR. McFEE: Would you like him to do it from
20 here or up there, Judge?

21 THE COURT: Which would he prefer?

22 MR. McFEE: Where would you prefer? Up
23 there?

24 THE DEFENDANT: Sure.

25 MR. McFEE: Go ahead.

1 THE DEFENDANT: Okay.

2 (Whereupon, the defendant was sworn by the
3 clerk.)

4 THE DEFENDANT: Having lost my father in a
5 traffic accident seven years ago, 14 months after
6 my older brother tragically died, I do understand
7 the pain of losing a loved one suddenly. After
8 experiencing and witnessing the pain that my
9 mother endured having lost her son, I would never
10 intentionally harm someone else's child. And
11 Mrs. King, I am truly sorry for your loss.

12 That we sit here today with this case having
13 come to a resolution, the truth is that over
14 these past 20 months I've lived in my own prison
15 because of the guilt and remorse I feel. I don't
16 expect you to do so any time soon, but I do pray
17 and ask that one day you will be able to forgive
18 me, not so much for me but for the healing
19 process of yourself.

20 These words cannot express how truly sorry I
21 am, and I pray that everyone affected by this
22 tragedy will find healing.

23 That's it.

24 THE COURT: Thank you.

25 Is there any legal cause why sentence should

1 not be pronounced at this time?

2 MR. McFEE: No, Your Honor.

3 THE COURT: Mr. Costello, based on your plea
4 to the fourth amended information of no contest,
5 I adjudicate you guilty of both of those counts.

6 With regard to Count I, I sentence you as
7 agreed to ten-and-a-half years of prison or
8 otherwise stated, ten years, six months. I will
9 apply whatever credit you have, and I do wanna
10 talk about that so that we can resolve any
11 discrepancies in that regard today.

12 The first four years of that sentence are
13 imposed as a minimum mandatory sentence pursuant
14 to Florida law and your plea agreement.

15 With regard to Count II, I adjudicate you and
16 sentence you as agreed to five years in prison to
17 run concurrent with the sentence I've just
18 announced as to Count I.

19 I assess the monetary obligations that have
20 already been described, and they shall be due and
21 payable in full 90 days after your release from
22 Department of Corrections.

23 I order a three year driver's license
24 suspension pursuant to Florida law and require
25 you to apply consistent with your plea -- plea

1 agreement following the three year suspension.

2 I order 120 community service hours and your
3 attendance at a victim impact panel as specified
4 more specifically in the written plea agreement.

5 I also order and direct that you will testify
6 truthfully as specified more specifically in the
7 plea agreement and as further described by Ms.
8 Marzano on the record this morning.

9 Is there anything other than credit that the
10 Court needs to clarify? Ms. Marzano?

11 MS. MARZANO: No, Your Honor.

12 MR. McFEE: No, Your Honor.

13 THE COURT: Okay. So what does the clerk
14 believe Mr. Costello's credit is?

15 UNIDENTIFIED SPEAKER: I am showing two days
16 from September 2nd, 2016 to September 3rd, 2016
17 when he bonded out.

18 THE COURT: Do you agree that's an accurate
19 calculation of your credit?

20 THE DEFENDANT: Yes, ma'am.

21 THE COURT: So I apply the two days credit as
22 specified. Mr. Costello, I remand you to serve
23 your sentence.

24 I will remind you that you have reserved the
25 right to appeal the jurisdiction of the Court and

1 the legality of the sentence. If you do wish to
2 file an appeal, it must be filed in writing with
3 the Clerk of Court, the notice, within 30 days.
4 You should advise Mr. McFee if you think I lacked
5 jurisdiction or this is an illegal sentence
6 because you can appeal those issues, as you know.

7 You are remanded, sir.

8 THE DEFENDANT: Thank you, Your Honor.

9 (End of recording.)
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1 STATE OF FLORIDA

2 TWENTIETH JUDICIAL CIRCUIT

3

4 I, Debra A. Cail, do hereby certify that:

5 The foregoing pages numbered 1-46 contain a
6 full transcript of the proceedings in the matter
7 described in the caption on Page 1 hereof
8 transcribed by me to the best of my knowledge and
9 ability from the electronic recording provided by
10 the court.

11 I am not counsel for, related to, or employed
12 by any of the parties in the above-entitled
13 cause.

14 I am not financially or otherwise interested
15 in the outcome of this case.

16 I am an approved transcriber for the
17 Twentieth Judicial Circuit Court.

18

19

20

/s/Debra A. Cail

21

22

August 6, 2020

23

24

25

FILED 04/02/2016

STATE OF FLORIDA
VS
ADAM MURRAY COSTELLO

IN THE COUNTY COURT
LEE COUNTY
STATE OF FLORIDA



DOB: 02/15/1990

Last Known Address: 1900 Virginia Ave #602, Fort Myers, FL 33901

Social Security Number: [REDACTED]

FL DL Number: C234-013-74-412-6

On June 19, 2016 at approximately 11:01 pm, Adam Murray Costello, did knowingly commit the following offenses:

1. Leaving the Scene of a Traffic Crash Involving Death, in violation of Florida State Statute 316.027(2)(c)
2. Tampering with Evidence, in violation of Florida State Statute 918.13(1)(a)

There is probable cause to believe this in that Officer Lesa Breneman, a Police Officer with the Fort Myers Police Department, conducted an investigation that revealed the following facts:

On June 19, 2016 at approximately 2301 hours, the Fort Myers Police Department received a 911 call in reference to a traffic crash that had just occurred on Colonial Blvd near the intersection of Summerlin Rd. The 911 caller was Timothy Bernal.

Officer Michael Perry was the first officer on scene and observed a motorcycle lying the eastbound lane 1 of Colonial Blvd. Officer Perry also observed the motorcycle operator lying on the grass median adjacent to a tree. The motorcycle operator was still wearing a helmet and was lifeless. Lee County Emergency Medical Services arrived on scene and pronounced the motorcyclist deceased at 2310 hours. Officer Perry noted that there were no other vehicles at the scene of the crash except the one belonging to the witness Bernal.

Traffic Homicide Investigators Lesa Breneman and Gustavo Goncalves were contacted and responded to the scene. The motorcyclist was identified as Adam King (07/21/1997).

Officer Goncalves photographed and measured the crash scene and Officer Breneman spoke with Bernal. Officer Breneman got a sworn taped statement from Bernal. Bernal advised the following: He was westbound on Colonial Blvd from Cleveland Ave. Bernal was travelling behind King on his motorcycle. Bernal observed a white pickup truck turn onto Colonial Blvd in front of him, possibly from the light at Deleon St. Bernal then observed the white pickup truck change from lane 2 suddenly into lane 1 and strike King. Bernal watched King drive up onto the median and strike the tree. Bernal noted the white pickup truck continued westbound after striking King, without stopping at any point to render aid or provide driver's information. Bernal stopped his vehicle near where King came to final rest and prepared to provide medical aid to King. Bernal noted the pickup truck continued toward the Midpoint Bridge/McGregor Blvd area but he could not confirm which direction the truck went from there. Bernal described the pickup truck which struck King and fled as white in color, newer model, with a topper on the bed of the truck. Bernal stated that damage to the truck would be to the front driver's door and fender.

Officer Breneman then spoke with Shame Romero. Romero provided a taped sworn statement. Romero was another witness to the crash. Romero stated that he was westbound on Colonial Blvd next to a white pickup truck. The pickup truck swerved into Romero's lane. Romero then watched the pickup truck change lanes into lane 1, where the motorcyclist was, and strike the motorcyclist. Romero observed the white pickup truck continue westbound on Colonial Blvd towards the Midpoint Bridge/McGregor Blvd intersection. Romero made a U-turn right after the crash and returned to where King lay at final rest to provide medical aid. Romero passed the white pickup truck going in the opposite direction. Romero believed the pickup truck had a flat front driver's side tire. Romero advised that damage to the white pickup truck would be to the driver's door area. Romero also believed that he observed a topped on the bed of the pickup truck.

Officer Breneman and Officer Goncalves surveyed the scene of the crash and located a left front tire mud flap. The part number on the mud flap belonged to a Toyota. Officer Breneman then located a driver's side heated outside glass mirror and a black plastic shell of the driver's side mirror amidst the crash debris. The part numbers on the glass and the shell of the outside mirror were consistent with a Toyota. Officer Breneman collected the mud flap and mirror and plastic shell piece as evidence.

Adam King was transferred to the Medical Examiner's Office. Pam Strassel was the Medical Examiner Investigator.

On June 21, 2016 at 0717 hours, attorney Scott Moorey contacted the Fort Myers Police Department to advise that he represents Adam Costello, later identified as Adam Murray Costello (11/12/1974). Moorey further advised that the white pickup truck involved in the fatal car crash on June 19, 2016 is registered to Adam Costello and Moorey stated that the pickup truck was located at 3912 Arlington St, Fort Myers, FL. Moorey additionally notified the call taker that Costello has invoked his right to an attorney and advised law enforcement to not speak to Costello without him preset.

Officer David Gaide responded to 3912 Arlington St and observed a white 2015 Toyota Tundra, bearing Florida tag 006RDK, in the front yard of the residence. The registered owner of the 2015 Toyota Tundra was Adam Costello. Officer Goncalves responded to Arlington St and observed the Toyota had extensive driver's side door and fender damage and was missing the driver's side outside mirror. The Toyota also had blue paint transfer on the driver's side, consistent with striking King's motorcycle which is royal blue in color.

Moorey and Costello met with Officer Goncalves at 3912 Arlington St. Costello signed a Consent to Search Form for the Toyota Tundra. Moorey signed the consent form as a witness. The consent form granted Officer Goncalves permission to remove the Toyota from the front yard of the residence and search the exterior and interior of the Toyota. The house at 3912 Arlington St is owned by Susan Costello, whom Moorey identified as Costello's mother. Officer Breneman confirmed via Lee County Property Appraisals website that the parcel, 3912 Arlington St, is in fact owned by Susan Costello. The Toyota was towed to the Fort Myers Police Impound lot.

The Fort Myers Police Department did not receive any stolen vehicle reports for a white pickup truck from June 18, 2016-June 21, 2016 and more specifically did not receive a stolen vehicle report from Adam Costello for his white 2015 Toyota Tundra.

On June 22, 2016, Detective Charles Newell completed a CLEAR report on Adam Costello which identified Costello's cellular phone number as 239-218-4928. Additionally, The CLEAR report identified Costello's home and business address as 3912 Arlington St.

On June 22, 2016, Officer Breneman authored and received a search warrant from Judge Josephine Gagliardi for Costello's Verizon cellular phone data and records (239-218-4928). Officer Breneman electronically sent the warrant to Verizon Wireless.

On June 22, 2016, Officer Breneman interviewed Gordon Durant via telephone. Durant advised that he has known Costello and Daniel Sinclair, aka James Daniel Sinclair, since he was younger and grew up with them. Durant was raised in the Fort Myers area. Durant advised that on June 19, 2016, Daniel Sinclair posted on his Facebook page that he was at Twin Peaks, a restaurant and bar in Fort Myers, with Adam Costello drinking beer. The Facebook post was at 1423 hours on June 19, 2016. Durant saw the Facebook post himself on his cellular phone. Durant stated that the post was then altered to remove Costello's name from the post as Costello had deleted his Facebook page. Durant further advised that Costello is a heavy alcohol drinker. He also advised that Costello is always on his cellular phone and has it with him at all times. Durant works in air conditioning and knows that Costello lives on Arlington St and has for at least three years. Durant has done work at Costello's Arlington St house before. Durant is also familiar with Costello's white Toyota Tundra which he stated Costello has owned for one and a half to two years. Durant advised that he has never seen anyone else drive Costello's vehicles as long as he has known him. Durant has not spoken with Costello since January 2016. Durant believes that Costello was driving the Toyota the night of the crash and was likely drinking alcohol and believes that Sinclair will not cooperate with the police and will cover for Costello. Durant provided Sinclair's cellular phone number as 239-634-7877.

Officer Breneman located Daniel Sinclair's Twitter feed which indicates that he was at Twin Peaks on June 19, 2016 at 1123 hours "drinking beer".

Officer Breneman responded to Sinclair's house on June 22, 2016 but no one answered the door. Officer Breneman did note that Sinclair had surveillance cameras on the exterior of his house, including one next to the front door and one on each corner of the front of the house. There was also a real estate sign on an empty lot on Sinclair's street with "Available, Dan Sinclair, 239-633-7877" written on it. Officer Breneman called Sinclair's cellular phone number on June 23, 2016 and left a voice message. Officer Breneman did not receive a call back from Sinclair and on June 24, 2016, Officer Breneman received a letter from attorney

Aaron O'Brien that he is representing Sinclair and at the time, Sinclair would not be providing a statement to law enforcement.

On June 23, 2016, Officer Goncalves and Crime Scene Technician Marissa Poppell responded to the FMPD Impound lot and searched and processed the Toyota Tundra for possible touch DNA and possible latent fingerprint evidence. A swab was taken of the steering wheel. Upon putting fingerprint powder along the blue paint transfer scratch on the driver's door, Poppell observed that there were distinct horizontal and vertical swipe marks, finger width. The wipe marks appeared to have been from someone attempting to wipe the scratch/paint marks off of the Toyota (see picture).

On June 23, 2016, Officer Breneman authored and received a search warrant from Judge Josephine Gagliardi for Costello's Facebook records. Officer Breneman electronically sent the warrant to Facebook.

On June 24, 2016, Officer Breneman received a copy of a receipt from Twin Peaks from a credit card transaction in the name J. Sinclair (last four numbers of the card were 7737). The receipt was provided by Fred Burgess, the owner of Twin Peaks. The receipt was closed out 1521 hours on June 19, 2016. Included on the receipt were 3 alcoholic beverages and a trout meal. Officer Breneman also received still images from inside Twin Peaks of J. Sinclair and another male with him. Officer Breneman was able to confirm the identity of the two men as (James) Daniel Sinclair and Adam Costello. Costello was wearing a dark colored shirt with white stripes horizontally on it and Sinclair was wearing his campaign t-shirt. Officer Breneman received a copy of the surveillance video from Twin Peaks from June 19, 2016 from Ryan Lampel, their IT person.

On June 24, 2016, Officer Breneman met with Heather Henry. Henry was at the Red Bones, 3604 Palm Beach Blvd, on June 19, 2016. Henry knows Sinclair from past meeting. While at Red Bones that night, Henry met a male who introduced himself as "Adam". Henry stated Adam was wearing a dark shirt, possibly a polo-shirt, with horizontal white stripes. Henry stated Sinclair and Adam (later determined to be Adam Costello) entered the bar around 8pm and left before 10pm. White did not see what car or cars Costello and Sinclair arrived in or left in as she was inside the bar at the time. Sinclair bought Henry a drink. Henry observed both Sinclair and Costello drinking beer and stated that they both appeared intoxicated. Costello told Henry that he and Sinclair had been drinking all day. Henry advised that her friend, Wendy White, was sponsoring an event at Red Bones that night and was at the bar with Henry, Sinclair and Costello. Henry showed Officer Breneman text messages between her and White on June 24, 2016. Officer Breneman took a photograph of the text messages. White stated to Henry that she spoke to Sinclair after the crash. White typed "He said he didn't do it and that they were set up". White also wrote "They left redbones and went there" and "Dan and his friend were sitting with us remember". Henry provided a sworn taped statement. White also indicated that she was talked to Sinclair on June 24, 2016.

Officer Breneman then located and interviewed White. White provided a sworn taped statement. White stated she has known Sinclair through business dealings since 2003. White believes she met Costello before June 19, 2016 at Red Bones but she didn't get his phone number or email address until that date. White stated that she was drinking alcohol and so were Costello and Sinclair. White believed Sinclair and Costello arrived around 7pm and left around 9pm. White did not see what car or cars Costello and Sinclair arrived in or left in as she was inside the bar at the time. White advised that she had spoken to Sinclair since the crash on June 19, 2016. Sinclair told her that he was at home at the time of the crash. Sinclair told White that there were several burglaries in the area of Costello's house and maybe that had something to do with

Costello's vehicle. White stated that Costello and Sinclair may have been at Cabos and/or Blu Sushi in downtown Fort Myers on June 19, 2016 as well.

On June 24, 2016 Officer Breneman met with Chad Svoboda, the owner of Red Bones. Svoboda and Officer Breneman reviewed the video surveillance footage from Red Bones on June 19, 2016. Officer Breneman observed Sinclair and Costello enter through the outside bar and walk to the inside bar at 1905 hours. The bar seats where Sinclair and Costello were seated are in an area without direct video coverage however they can be seen at various points in the bar after 1905 hours. Costello and Sinclair leave Red Bones at 2116 hours. There is no video surveillance coverage on the exterior of Red Bones. Officer Breneman obtained a copy of the video footage from Svoboda.

On June 25, 2016, Officer Breneman authored and received a search warrant from Judge Josephine Gagliardi for Sinclair's Facebook records. Officer Breneman electronically sent the warrant to Facebook.

On June 25, 2016, Officer Breneman authored and received a search warrant from Judge Josephine Gagliardi for Sinclair's Verizon cellular phone data and records (239-634-7877). Officer Breneman electronically sent the warrant to Verizon Wireless.

On June 29, 2016 at approximately 1300 hours, Officer Breneman met with Costello and his attorney at 1420 Royal Palm Sq Blvd. Officer Breneman served a search warrant on Costello seizing two buccal swabs from his cheek and fingerprint standards. Approximately 45 minutes later, Officer Breneman conducted a traffic stop of Costello in an attempt to serve a search warrant on his cell phone. Prior to serving the search warrant, Officer Breneman called 239-218-4928 twice. Each time the call rang several times then went to voicemail; it did not go directly to voicemail nor give an error message that the line was no longer in service. Costello advised that earlier that morning he "lost" his cell phone with number 239-218-4928. Costello showed Officer Breneman two cell phones that he had on the front passenger seat of the vehicle he was driving and stated "these aren't mine". Officer Breneman seized these two cell phones, immediately removing the batteries and submitted them to the Evidence Section pending issuance of a search warrant. The phone were both Tracfone; one was a black Tracfone cellular phone, model number A462C, MEID HEX A100004AC9523D and the other was a black Tracfone cellular phone, model number Z716BL, serial number 326E64643BDF.

On June 29, 2016 at approximately 1430 hours, Officer Breneman met with Sinclair and his attorney, Spencer Cordell, at the Fort Myers Police Department. Sinclair came to the police department voluntarily. Officer Breneman served a search warrant on Sinclair seizing two buccal swabs from his cheek and fingerprint standards. Officer Breneman then advised Sinclair that he was free to leave. Sinclair indicated that he wanted to provide a statement as to the events of June 19, 2016. Sinclair stated that he was with Costello on June 19, 2016 and they visited numerous bars/restaurants throughout the day including: Twin Peaks, Blue Sushi (McGregor), Blu Sushi (downtown), Cabos, Ford's Garage, Red Bones and finally the Wing House. Sinclair stated they were both drinking water and alcohol. Sinclair stated he was driving himself and Costello throughout the day in his red Audi convertible. Costello came to his house in the morning and they both got into Sinclair's Audi. After leaving the Wing House (the last stop of the day), Sinclair drove back to his house and Costello came inside for a few minutes then left. Sinclair claimed not to know what car Costello was driving when he left Sinclair's house the night of June 19, 2016. Sinclair knows that Costello owns a white pickup truck and advised it may have been in front of his house but he isn't sure. Sinclair claimed he did not see what vehicle Costello came to his house in or left in at the end of

their day together. Sinclair indicated that Costello contacted him after the crash and claimed that he was not involved in the fatal hit and run. Costello told Sinclair that he "came home that night to a crashed truck". Sinclair could not advise why Costello did not call the police at that time. Based on the statements given by Sinclair, Officer Breneman advised Sinclair that he was going to seize his cellular phone. Officer Breneman believed that there was information pertaining to this fatal hit and run investigation on Sinclair's cellular phone, particularly the text messages and phone calls between Costello and Sinclair. As soon as Officer Breneman advised Sinclair that she was going to seize his phone, Sinclair stated "no" and took his phone from the holster attached to his belt. Sinclair entered the passcode to his phone and began to push the screen. Sinclair stated that he wanted to log off of his Facebook and other applications. Officer Breneman could not see the screen and did not know if Sinclair was attempting to delete evidence. Officer Breneman grabbed a hold of Sinclair's hand with the phone in is and told Sinclair to stop using the phone. Sinclair finally set the phone on the desk and after discussion with Cordell and consulting the State Attorney's Office, Sinclair allowed Officer Breneman to retrieve the phone from the desk without resistance. Officer Breneman submitted the cell phone seized from Sinclair to the Evidence Section pending issuance of a search warrant. The interview with Sinclair was video and audio taped.

On June 30, 2016, Officer Breneman authored and received a search warrants from Judge Lee Schreiber for the Samsung cellular phone seized from Sinclair an the two Tracfone cellular phones seized from Costello. The search warrants were sent to Sergeant Richard Meeks for the purposes of him conducting the forensic download of the phones.

On June 30, 2016, Officer Breneman interviewed Alecs Dean. Dean lives at 3835 Arlington Ave. Dean provided the following information: Dean knows Adam Costello. Costello lives down the street from Dean on Arlington Ave for the past two years or so. Dean is involved with the neighborhood watch program. Dean is familiar with Costello's white Toyota Tundra pickup truck and advised he thinks Costello purchased it approximately one year ago. Dean stated he pays attention to vehicles that come and go on Arlington St and he has never seen anyone drive Costello's Toyota but Costello. Dean stated the Costello usually backs his vehicle into the yard adjacent to the fence, particularly on the weekends, because Costello has a boat on a trailer that he keeps in the back yard on the other side of the fence. Dean believes he last saw Costello driving the Toyota prior to the crash on Saturday, June 18, 2016 in the afternoon. On June 21, 2016, Dean was present near Costello's house when Officer Goncalves was having the Toyota towed. Scott Moorey approached Dean and asked if he had seen anyone "messing" with Costello's vehicle and stated that Costello wasn't in town the past weekend. Dean spoke with Costello in person on June 22, 2016. Costello told Dean that as soon as he saw the damage to his Toyota, he called his attorney who in turn called the police department. Dean has been in Costello's house before on Arlington St and stated that there is a key rack hanging in the kitchen. Dean mentioned that he received an email from his local Community Policing Officer, either Kelsey Evenson or David Conticelli, about vehicle break-ins in the area but none were on Arlington St. Officer Breneman received a copy of the email sent by Officer Evenson dated June 24, 2016 which advised that there were break-ins to unlocked vehicles in the general area, however no vehicle thefts.

On July 5, 2016, Officer Breneman emailed Cordell in an effort to re-interview Sinclair. Cordell responded on July 11, 2016 and asked for any questions requested of Sinclair to be emailed.

On July 6, 2016 Officer Breneman submitted a search warrant, signed by Judge Elizabeth Krier, to Google, Inc. Costello's phone on June 19, 2016 was an Android cellular phone as provided by Verizon Wireless. A

Google search of Costello indicated that Costello's email address is costellocapital@gmail.com. Costello is an insurance agent and his cellular phone number and email address are online for business purposes.

On July 13, 2016, Officer Breneman was notified by Tina Maurice, Crime Scene Technician and Latent Fingerprint Examiner, that the latent fingerprint retrieved from the gearshift of the Toyota belonged to Adam Costello. Maurice indicated that the print was from Costello's palm and it did not have any overlay of other prints on top of it. Maurice sent the print card from the gearshift and Costello's print standards to FDLE for confirmation.

On July 13, 2016, Detective Nicholas Toma interviewed Nestor Barreiro. Barreiro stated that he detailed Costello's white Toyota Tundra a few months ago. At that time, Barreiro and Costello began a conversation in reference to Costello's truck and Costello advised Barreiro that the Toyota is his "baby" and Costello made it clear that he does not ever let anyone drive it. Prior to this interview, Barreiro posted a comment to Facebook stating the above information. On the same date that Barreiro posted the comment, he received a call from a blocked number warning him to remove the post. Barreiro provided a sworn taped statement.

On July 13, 2016, Officer Breneman met with attorney Chris Crowley and his client, David Levin. Levin provided a sworn taped statement. Levin indicated that he was willing to be interviewed on his own free will and he was not promised anything or coerced in any way from Officer Breneman or the State Attorney's Office in return for him giving the interview. Levin advised the following. Levin knows Dan Sinclair and has for several years. Levin was not initially familiar with the traffic crash which killed Adam King on June 19, 2016. On June 23, 2016, Levin and Sinclair were both at a community meeting. After the meeting concluded, Sinclair approached Levin and told him that his name was going to be mentioned in reference to the traffic crash involving King. A day or two later (June 24-25), Sinclair called Levin and during the conversation Sinclair told Levin that he had given Costello the video surveillance equipment from his house to "preserve evidence". Levin believed that Sinclair referred to the equipment as a "deck". Levin stated the deck was equivalent to a recording device or DVR for the home security cameras at Sinclair's house. A few days after that conversation, Sinclair again called Levin and asked "you didn't tell anyone about that [DVR] did you?" Levin stated that Sinclair sounded concerned during the conversation.

On July 13, 2016, Officer Breneman drove to Sinclair's residence, 6840 Dabney St. Officer Breneman observed the video cameras on each corner of Sinclair's house attached to the soffit and covering the front and sides of the house as well as a camera to the left side of the front door. Officer Breneman photographed the cameras and their locations. While at Sinclair's house, Officer Breneman noted that the front yard near the roadway was flooded. There was more than a foot of water in the grass, which would have made it difficult for a vehicle to park there.

Officer Breneman believes that based on the timeline of events that occurred on June 19, 2016 as provided by Sinclair in his sworn statement that the video surveillance footage from his house at 6840 Dabney Street will provide valuable evidence as to the location and occupants of the Toyota Tundra involved in the hit and run the traffic crash shortly before it occurred at 2301 hours.

Officer Breneman is familiar with home video surveillance systems and knows that storage of the footage is typically captured on a DVR (digital video recorder) and depending on the storage capacity of the DVR, the recordings captured are typically maintained for a period of 30 days or more.

On July 13, 2016, Officer Breneman spoke with Charles Cohen, Claims Adjuster for Safeco Insurance. Cohen is handling the claim involving Costello's Toyota Tundra from June 21, 2016. Cohen advised Officer Breneman via telephone (678-417-3094) that a claim was submitted under Costello's insurance policy, X5952030, on June 21, 2016. The claim was initiated by Scott Moorey. Cohen advised that he had not yet spoken with the insured, Adam Costello. Cohen could only advised that Moorey contacted Safeco Insurance and advised that the Toyota was the subject of a traffic homicide investigation and the Toyota was being held by the Fort Myers Police Department. The claim number is 471579826039. The phone call to report the claim was not recorded.

On July 14, 2016, Officer Breneman authored a search warrant for Sinclair's house, 6840 Dabney Street. The warrant was signed and authorized by Judge Joseph Fuller. Officer Breneman, Lt Jeff Bernice, LCSO Deputy Ed Sommers and LCSO Sgt Dan Leffin responded to 6840 Dabney St. Since the address is within Lee County but not within the City of Fort Myers, Deputy Sommers served the search warrant. Deputy Sommers knocked on the door numerous times and identified himself as a Lee County Sheriff's Office Deputy. Deputy Sommers yelled numerous times that he had a search warrant for the house and requested access from anyone inside the residence. No one came to the door. When Deputy Sommers first arrived at the residence, he looked through the window in the garage door and observed that the interior light in the garage was open and a red convertible Audi was in the garage. Officer Breneman knows through her interview with Sinclair, that he owns and drives a red Audi convertible. Deputy Sommers read the search warrant to the house at 1311 hours. While Deputy Sommers continued to request access to the house at the front door, Officer Breneman walked to the back of the house near the sliding glass door. Officer Breneman observed a large dog inside the house. When Deputy Sommers would knock, the dog would back but instead of going to the front door where the knocking was occurring, the dog went towards the kitchen area of the house. Officer Breneman then called Spencer Cordell on the telephone. Officer Breneman did not reach him at his office but did reach him on his cellular phone. Officer Breneman advised Cordell that she had a warrant for Sinclair's house. Cordell stated he would call Sinclair and call Officer Breneman right back. A few minutes later, Cordell called Officer Breneman back and stated that he was on his way to Sinclair's house. Officer Breneman directly asked Cordell if Sinclair was inside the residence and Cordell stated "I am not at liberty to say". Deputy Sommers had been knocking and announcing his presence and intent at that point for approximately 15 minutes. Based on the above facts, Sgt Leffin made the decision to forcibly enter the house. Lt Bernice was asked to assist with the entry into Sinclair's house. Deputy Sommers and Lt Bernice forcibly opened the front door and as the door opened, they observed Sinclair inside the residence walking from the kitchen area.

Sinclair was asked to step outside and he complied. Sinclair advised that he was waiting for his attorney to arrive before opening the door. Deputy Sommers then read the search warrant out loud to James Daniel Sinclair at 1330 hours. Sinclair video recorded Deputy Sinclair reading the warrant to him utilizing his iPhone 6. When Sinclair heard what the search warrant was a search for (the video surveillance equipment) he uttered, "that hasn't worked for a year and a half but go ahead". This statement made by Sinclair was captured on Officer Breneman's body-worn camera. Deputy Sommers then seized Sinclair's iPhone under the purview of the search warrant. Deputy Sommers requested Officer Breneman and Lt Bernice's assistance with conducting the search of the residence. In the master bedroom, the officers located several CD/DVD's without company or recording labels on them. In the living room, officers located several CD/DVD's without company or recording labels on them.

On the kitchen table, Officer Breneman observed a brand new video door bell system which had been removed from the box and was lying next to the box on the table. The video doorbell appeared new and was removed from the box for installation.

Inside of the office of the home, Officer Breneman observed a closet. On the top shelf of the closet were a Dell monitor and a mouse. There was cord attached the back of the monitor and the other end was hanging loose. Next to the monitor were several unplugged wires. The wires were those that attach to the rear of a video surveillance DVR box. The ends of the wires were yellow with a silver treaded coupling nut. Officer Breneman is familiar with the Night Owl and Lorex brand video camera surveillance systems and these are identical cables as used with those systems. The cables are BNC Video cables. Near the end of each cable was a white manufacturers label wrapped around the cord with "To DVR" written on the label.

On the shelf in the living room, Officer Breneman located a Q-SEE brand video surveillance camera not installed. The cables attached to the camera were BNC cables. Q-SEE is a brand of video surveillance cameras sold at retailers such as Home Depot, Walmart, Sam's Club and online retailers. Q-SEE has a line of 8 camera High Definition (HD) systems with DVR's included which use BNC cables. The DVR's for the Q-SEE system come in 500GB, 1TB and 2TB storage capacity sizes online.

Sinclair made the statement to Deputy Sommers that the video surveillance system "hasn't worked for a year and a half" but what Officer Breneman discovered was a missing surveillance system DVR, not a non-functioning one.

On the kitchen counter, Officer Breneman located a Samsung tablet and a black Geek Squad thumb drive. Deputy Sommers located a Dell desktop computer tower, serial number 00045693159938, on the desk in the office of Sinclair's house. The Dell computer was plugged in and attached to a monitor. Deputy Sommers seized the Dell computer.

Deputy Sommers, with the assistance of Officer Breneman, seized the items relating to the search warrant as evidence. Deputy Sommers transferred custody of the evidentiary items to Officer Breneman. A copy of the search warrant and return was left with Sinclair by Deputy Sommers.

On July 18, 2016, Officer Breneman met with Jacquelyn Levine. Levine provided a sworn taped statement. Levine advised that she spoke with Sinclair via telephone on June 23, 2016 around 1730 hours. The phone conversation was prompted by Levine asking Sinclair about the news story that Levine had seen with Sinclair mentioned. Sinclair then called Levine and told her that he could not tell her who was driving the vehicle that killed Adam King because "it would be incriminating". Levine has not spoken to Sinclair since that date.

On July 18, 2016, Officer Breneman interviewed David Levin again. Levin advised that he spoke with Sinclair via telephone on July 14, 2016 at approximately 0957 hours. Sinclair called Levin. Sinclair again told Levin that he gave the 'DVR' for the home surveillance footage to Costello. Sinclair stated "I gave it to him". Sinclair also advised Levin that he had already told his attorney about the 'DVR' and he didn't do anything wrong so the 'DVR' isn't worth mentioning. Sinclair also told Levin not to cooperate with the police; cooperation doesn't help because it didn't help in Levin's case. This phone call took place several hours before the search warrant was served on Sinclair's house where it was determined that the 'DVR' for his home surveillance system was missing.

On July 21, 2016, Officer Breneman met with Kelly Andriano and Andrew Kempel of the Florida Department of Law Enforcement, FDLE. Andriano is an analyst who specializes in phone record GPS/RTT data. Andriano analyzed Costello's Verizon phone records, 239-218-4928. Andriano observed that Costello made a phone call at 2253 hours on June 19, 2016 to 239-707-5561 which lasted 482 seconds. Andriano was able to track the starting cell tower for that call which placed Costello's phone near Plantation Rd travelling in a northern direction. The phone call ended on a cell tower placing the phone on the east side of the tower near Colonial Blvd and Summerlin Rd. The next two cell towers which Costello's phone ping off of are consistent with him travelling to Arlington St. The most direct route from Sinclair's house on Dabney St to Costello's house on Arlington St is via Plantation Rd north to Colonial Blvd then west to McGregor Blvd then north towards Arlington St. The cell phone analysis performed by Andriano is consistent with Costello's phone travelling that route. Andriano completed a report on her findings as they pertain to Costello's cellular phone.

On July 22, 2016, Officer Breneman met with Joshua Jackson. Jackson is the subscriber of cell phone number 239-707-5561. Jackson confirmed that he spoke with Costello on June 19, 2016 at 2253 hours. Jackson had a copy of his phone records. Jackson could not remember the exact content of the conversation that he had with Costello at that time but he was certain that he had spoken with Costello at phone number 239-218-4928 at that time. Jackson stated that has personally never seen anyone but Costello drive Costello's Toyota Tundra.

On July 21, 2016, Officer Breneman met with Maria Michelle Newhard. Newhard advised that she had been casually dating Costello recently. Newhard stated that she spoke with Costello on June 19 and 20, 2016 but the calls were relating to her dying father. Newhard showed Officer Breneman the text messages on her phone between her and Costello which confirmed that the majority of the conversation was in reference to Newhard's father or just casual conversation. Costello did send one message to Newhard on July 3, 2016 at 1038 hours which read "Article on Winknews.com says 2 cars were stolen last night in McGregor Reserve. Right next to my house. Another stolen on Gasparilla last week. All in my hood. 3 more since mine was". Costello did not talk to Newhard about the traffic crash but did advise her that his vehicle was stolen. Officer Breneman took a photograph of the above text message. Newhard advised that she learned about the traffic crash involving Costello's truck from his best friend, Joseph Dozier. Dozier called Newhard and advised her that Costello was okay but his vehicle was stolen and involved in a traffic crash and Costello cannot talk about it. Newhard was aware that Costello changed his cellular phone number. Newhard's last contact with Costello on 239-218-4928 was via text message at 1043 hours on July 29, 2016; the same morning that Costello advised Officer Breneman that he "lost" his cell phone. Officer Breneman attempted to locate Dozier at the address on his driver's license records but the house was vacant.

On July 21, 2016, pursuant to a subpoena issued to the Winghouse, Officer Breneman received a copy of video surveillance footage from the Winghouse. The footage was only from one camera within the dining room but does capture the entrance to the men's bathroom. The footage shows Sinclair entering the men's bathroom at 2144 hours and exiting at 2147 hours. The footage also shows Costello entering the men's bathroom at 2152 hours and exiting the men's bathroom at 2155 hours. Costello and Sinclair are seen leaving through the front door of the WingHouse and exiting at 2238 hours on the surveillance footage.

On July 21, 2016, Officer Breneman received a list of all stolen vehicle reports from the Fort Myers Police Department from June 12, 2016-July 3, 2016. Officer Breneman got the list from Angela Montalvo, the Fort

Myers Police Department Records Supervisor. The report shows 14 motor vehicle thefts during that time frame, none of which were filed by Adam Costello in reference to his 2015 Toyota Tundra. None of the stolen vehicles were on streets adjacent to McGregor Blvd either.

On August 4, 2016, Officer Breneman received a report from Kelly Andriano of the Florida Department of Law Enforcement, FDLE. Andriano is an analyst who specializes in phone record GPS/RTT data. Andriano analyzed Sinclair's Verizon phone records, 239-634-7877. Andriano was able to track the cell phone towers which Sinclair's cellular phone were pinging on June 19, 2016. Between 2137 hours and 2245 hours, Sinclair's phone was in the area of Cleveland Ave and Colonial Blvd and on Plantation Rd near Sinclair's house. Sinclair's cell phone remains in the area of his house from approximately 2246 hours until the next morning.

The cellular phone analysis conducted by Andriano is consistent with Sinclair's account of the events on June 19, 2016. In his sworn statement, Sinclair stated that he was with Costello at the WingHouse and that was their last stop of the day. When they left the WingHouse, Sinclair and Costello drove in Sinclair's vehicle to Sinclair's house. At that time, Sinclair goes into his house to bed and Costello leaves Sinclair's house. Sinclair claimed to not know how Costello left his house and did not see Costello's vehicle. The home surveillance footage from the video camera attached to Sinclair's house could certainly have provided vitally important evidence in the hit and run fatality investigation.

On August 5, 2016, Officer Breneman received the information from Facebook for Costello and Sinclair's Facebook pages pursuant to the search warrants. Officer Breneman observed that Costello's Facebook page response for June 17-23, 2016 contained no friends list, no IP addresses, no status updates, no photos, no videos, no wall posts, no shares, no minifeeds, no unified messages, no groups, no events, no phone numbers and no secret conversations. The response from Facebook was essentially blank but indicated that Costello's Facebook page was created on 09/04/2014 with the email costellocapital@gmail.com. The response also indicated that the Facebook account was still active.

Sinclair's Facebook page included his phone number, 239-634-7877, and several email addresses. Sinclair's page information included June 18-25, 2016. Officer Breneman observed that Sinclair sent 10 messages to 10 different people where he mentioned being with "Adam" on June 19, 2016 and mentioned "drinking" and "pub crawl" and he invited others to join. Sinclair messaged "Mones TiTi Shey Shey" on June 20, 2016 at 0913 hours and indicated that he was at "Twin Peaks, Blu on McGregor and downtown, Cabo, Ford's, the lodge and then red bones" with "Adam". The initial Facebook post by Sinclair at Twin Peaks, which Officer Breneman has seen, was not included in the data from Facebook and has since been completely deleted.

On August 8, 2016, Officer Breneman contacted Renae Ladd via telephone at (937) 608-8373. Officer Breneman questioned Ladd about a text message string between her and Costello on June 27, 2016. Ladd wrote "It's not the news I'm worried about its what Dan did". Ladd advised that she was referring to posts that Sinclair wrote on Facebook which she deemed as 'shady'. Ladd stated that she had a conversation with Costello about the traffic crash and during the conversation, Costello was vague. Costello told Ladd that he went to lunch with Sinclair on Father's Day and eventually went home; Costello woke up and found his vehicle was involved in the traffic crash. Costello did not tell Ladd who was in the vehicle or if he was involved and did not state that his vehicle was stolen. Ladd advised that she has not spoken with Costello since that conversation.

While searching through the unlocked Tracfone (FMPD Item 35) located with Adam Costello in the vehicle he was driving pursuant to the search warrant, Officer Breneman also observed a text message conversation between Costello and Patty Costello (239-243-6259) on June 25, 2016. Patty Costello wrote "Dan's texts starts with "Please..." And ends with "Can you fill me in?" He is acting like he is ignorant to the case, which we all know, he is not. Then he says to the Aunt of the boy-that it was the boy's fault. That was not smart".

Also on June 25, 2016, John Costello (321-243-1032) writes to Adam Costello "Denver has 17 hit and runs everyday! Wow!".

On June 27, 2016, Adam Costello writes a text to (828) 361-8766 which states "very soon. Just my luck: Just got rear ended. Waiting on the Sheriff. Can u believe it?" The person at the other number writes back ""that sucks. Better keep quiet".

On June 28, 2016, Adam Costello texts John at (239) 849-1930 and writes, "Lance told me to continue to using my regular phone for normal calls".

A search of the Google history on the Tracfone indicated searches for "circumstantial evidence" and "driver charged with hit-a".

The earliest calls/texts on this Tracfone were on June 24, 2016. In the call logs were calls to Sinclair's number (239-634-7877) on June 24, 2016 (2 calls), June 25, 2016 (1 call), June 27, 2016 (4 calls) and June 28, 2016 (4 calls).

In addition, there were downloads to the phone from www.stimmel-law.com referencing a PDF file called "Convicted by the Camera" and downloads from Toyota referencing a feature available in the Toyota Tundra called "Scout-GPS".

Officer Breneman took pictures of the above mentioned text messages, call logs and Google searches. Sergeant Meeks did not perform the download of Tracfone Item 35 since doing so will destroy the phone and the phone was unlocked and not password protected.

On August 19, 2016, Officer Lesa Breneman interviewed Osvaldo Morrobel (1466-3 Park Shore Cir, Fort Myers, FL 33901 (239) 246-1246. The interview was captured on Officer Breneman's body-worn camera. Morrobel advised that he has known both Sinclair and Costello for more than 10 years. Morrobel went to high school with Costello. Morrobel stated that he has distanced himself from Sinclair in the past 2 years but he was at a barge party Memorial Day weekend 2016 and Sinclair and Costello were there along with Costello's girlfriend, Jennifer King. Morrobel stated that neither Costello nor Sinclair have said anything to him about the traffic crash that occurred on June 19, 2016. Morrobel stated that Costello would never lend his truck out to anyone. Morrobel also advised that he was the Facebook post from June 19, 2016 with Sinclair and Costello both tagged in it at Twin Peaks before it was deleted. Morrobel advised that he believes that Sinclair would cover for Costello but there is no way that Costello would cover for Sinclair. Morrobel also mentioned that he has heard from several people that Costello was involved in a hit and run in Lehigh Acres, FL several years ago where he reported his vehicle stolen. Officer Breneman is attempting to locate that report. Morrobel stated he has never been inside Sinclair's house.

Officer Breneman then attempted to interview Jennifer King. Officer Breneman called King on the cell phone number provided by her father at 1704 Travis Ave, North Fort Myers, FL 33903 (239) 896-6545. King positively identified herself at the start of the phone call. Officer Brenman asked if she could speak to her about this investigation and King immediately became hostile and defensive. King stated that she would not talk to Officer Breneman without an attorney. Officer Breneman explained to King that she is a witness and not a suspect. King stated that she doesn't know if Costello is guilty or innocent but he's a "good guy". King advised she was not with Costello on June 19, 2016 and stated she has not spoken to him since May. King ended the conversation by asking for the spelling of Officer Breneman's name.

Officer Breneman then called Joseph Dozier at (239) 810-0913. Michelle Newhard provided Dozier's name as the person who told her about the crash involving Costello's truck and told Newhard that the truck was stolen. Dozier stated that he had been friends with Costello for years. Dozier also know Scott Moorey, Costello's attorney. Dozier advised that Costello told him that his truck was stolen and that's it. Costello told Dozier that Moorey told him not to talk to anyone. Dozier advised that he does not associate with Sinclair anymore but he knows him.

Based on the above evidence, Officer Breneman has probable cause to believe that Adam Murray Costello did commit the crimes of Leaving the Scene of a Traffic Crash Involving the Death of Adam King and Tampering with Evidence for concealing/destroying his cellular phone (239) 218-4928 and for deleting his Facebook account under Adam Costello (costellocapital.com).

**LEAVING THE SCENE OF A CRASH INVOLVING
[DEATH] [SERIOUS BODILY INJURY] [INJURY]
§ 316.027(2), Fla. Stat.**

To prove the crime of Leaving the Scene of a Crash Involving Death, the State must prove the following four elements beyond a reasonable doubt:

- 1. Costello was the driver of a vehicle involved in a crash or accident occurring on public or private property resulting in [injury to] [death of] any person.**
- 2. Costello knew that he was involved in a crash or accident.**
- 3. a. Costello knew, or should have known from all of the circumstances, including the nature of the crash or accident, of the injury to or death of the person.**
- 4. a. Costello willfully failed to stop at the scene of the crash or accident or as close to the crash or accident as possible and remain there until he had given "identifying information" to the driver (Adam King) and to any police officer investigating the crash or accident.**

[or]

- b. Costello willfully failed to render "reasonable assistance" to the injured person (Adam King) if such treatment appeared to be necessary or was requested by the injured person.**

If the State proves that the defendant willfully failed to give any part of the "identifying information" or willfully failed to give reasonable assistance, the State satisfies this element of the offense.

§ 316.062, Fla. Stat.

"Identifying information" means the name, address, vehicle registration number, and, if available and requested, the exhibition of the defendant's license or permit to drive.

"Reasonable assistance" includes carrying or making arrangements to carry the injured person to a physician or hospital for medical treatment.

**TAMPERING WITH OR FABRICATING
PHYSICAL EVIDENCE**

§ 918.13 Fla. Stat.

To prove the crime of Tampering with Physical Evidence, the State must prove the following two elements beyond a reasonable doubt:

1. Costello knew that an investigation by a duly constituted [prosecuting authority] [law enforcement agency of this state was pending.
2. a. Costello [destroyed] [concealed] [removed] any [record] [document] [thing] [cellular phone with number (239) 218-4828] and Facebook records from the costellocapital.com Facebook account], with the purpose to impair its availability in the investigation.

Officer Lesa Breneman hereby requests that an arrest warrant be issued for the arrest of white male Adam Murray Costello, DOB 11/12/1974, last known address of: 1900 Virginia Ave #602, Fort Myers, FL 33901 for violation of Florida State Statute Florida State Statute 316.027(2)(c) to wit: Leaving the Scene of a Traffic Crash Involving Death and violation of Florida State Statute 918.13(1)(a) to wit: Tampering with Evidence, contrary to the statutes in such case made and provided, and against the peace and dignity of the State of Florida.



Officer Lesa Breneman

Sworn to and Subscribed before
Me this 1st day of September, 2016.


Notary Public/Known to Me
#02094

**UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
FORT MYERS DIVISION**

ADAM MURRAY COSTELLO,
Petitioner,

Case No.: 2:25-cv-74-JLB-NPM

vs.

SECRETARY, DEPARTMENT OF
CORRECTIONS,
Respondent.

_____ /

EXHIBIT 22

IN THE CIRCUIT COURT OF THE TWENTIETH JUDICIAL CIRCUIT
IN AND FOR LEE COUNTY, FLORIDA

STATE OF FLORIDA,
Plaintiff,

v.

Case No. 16-CF-371

ADAM MURRAY COSTELLO,
Defendant.

_____ /

DEFENDANT’S REPLY TO
“STATE’S RESPONSE TO DEFENDANT’S ‘AMENDED MOTION TO WITHDRAW PLEA
BASED ON INEFFECTIVE ASSISTANCE OF COUNSEL’ FILED ON MARCH 2, 2022”

COMES NOW the Defendant, by and through the undersigned attorney, and replies to the pleading entitled “State’s Response to Defendant’s ‘Amended Motion to Withdraw Plea Based on Ineffective Assistance of Counsel’ Filed on March 2, 2022”, which was filed 11 May 2022, and would state:

1. The State first correctly related the procedural history of the case. Response at 1. The State then correctly stated the standard for determination of a motion under the rule in *Strickland v. Washington*, 466 U.S. 668 (1984). Response at 1-2.

2. The State then correctly stated that the Defendant asserted in his instant motion that his Trial Counsel provided ineffective assistance to the Defendant by failing to review and correct the Criminal Punishment Code scoresheet prepared pursuant to § 921.0024 Florida Statutes (2015) in this case. Trial Counsel failed to recognize that the 120 points for victim injury were improperly applied and therefore Trial Counsel affirmatively misadvised advised the Defendant concerning the sentence he was likely to receive.

3. Then the State argued:

Defendant alleges in order to assess victim injury points to the charge of leaving the scene of a crash involving death there must be a causal connection between the charged offense and the death of the victim to include victim injury points on the scoresheet. (Defendant's motion, pg. 6).

The causal connection can be found in Florida State Statute 921.021 which was amended in 2007 to add:

(7)(e) Notwithstanding paragraph (a), if the conviction is for an offense described in s.316.027 and the court finds that the offender caused victim, sentence points for victim injury may be assessed against the offender.

State's Response at 2.

4. Neither the State's identification of the statute nor the text of the statutory quotation in the State's Response is correct. Apparently the State intended to quote § 921.0021(7)(e), which provides: "Notwithstanding paragraph (a), if the conviction is for an offense described in s. 316.027 and the court finds that the offender caused victim injury, sentence points for victim injury may be assessed against the offender." The quotation of the mis-identified statute by the State omitted the critical word "injury".

5. The State is correct that the Defendant asserts that in order to assess victim injury points to the charge of leaving the scene of a crash involving death there must be a causal connection between the charged offense and the death of the victim to include victim injury points on the scoresheet. However the State's argument that "[t]he causal connection can be found in Florida State Statute 921.021..." is based on an error of fact. No "causal connection" can be found anywhere in the text of the Florida Statutes. It should be obvious that no fact which the

State must prove might be found in statutory text. Any “causal connection” must be established by evidence.

6. The instant motion arose from the complete absence of record evidence tending to show a causal connection between any action by the Defendant and the death of the individual named in the Fourth Amended Information. The plain language of § 921.0021(7)(e) provides that where “the conviction is for an offense described in s. 316.027 **and the court finds that the offender caused victim injury**, sentence points for victim injury may be assessed against the offender.” (Emphasis added.) Here the sentencing court made no such finding. Of equal or greater importance, no evidence exists in the record of this case upon which this Court might find that the Defendant caused victim injury to the individual who died in the traffic crash.

7. The State then argued that “there are several parts of the Defendant’s plea colloquy where he himself acknowledges the death of the victim and his responsibility.” Response at 3. The Defendant has not contested and does not now contest that a person died in the traffic crash which resulted in the present charge. However the Defendant has never made any statement of any nature which admits or implies that the Defendant caused any injury to anyone.

8. In the instant case the Defendant entered a plea of nolo contendere. “A plea of nolo contendere establishes what the information alleges and no more.” *Duer v. Moore*, 765 So. 2d 743, 744 (Fla. 1st DCA 2000). The *Duer* court cited *Vinson v. State*, 345 So. 2d 711 (Fla. 1977) in support. In *Vinson* the Florida Supreme Court held that “under a plea of nolo contendere, the allegations of the indictment stand as impliedly admitted....” 345 So. 2d at 715. In *Vernold v. State*, 376 So. 2d 1166, 1167 (Fla. 1979), the Supreme Court held that a plea of nolo contendere by a Defendant “admitted the facts alleged in the information”, citing *Vinson*.

9. Thus, by entering a plea of nolo contendere, and by the acceptance of the plea by the circuit court, the Defendant admitted the facts stated in the Fourth Amended Information but nothing else. The Fourth Amended Information charged:

On or about June 19, 2016 in Lee County, Florida, [the Defendant] was the driver of a motor vehicle involved in a crash resulting in death to Adam Roger King, a human being, a vulnerable road user, and Defendant knew or should have known a crash occurred, but failed to stop or remain at the scene of the crash, or as close thereto as possible, until he/she gave personal information and rendered aid as required by Florida Statutes 316.062, contrary to Florida Statute 316.027(2)(c)[.]

Thus the Defendant admitted to having driven a motor vehicle, being involved in a crash resulting in the death of a human being where he knew or should have known that a crash occurred, and failing to stop or remain at the scene as required by statute. However the plain language of the Fourth Amended Information contains nothing at all about how the crash occurred or who may have been responsible for causing it. Thus the Defendant admitted to nothing about the causation of the crash or the causation of the injuries to the decedent.

10. Under § 90.410 Florida Statutes (2015) the Defendant's plea of nolo contendere is not substantively admissible for any reason in this post-conviction proceeding. In *State v. Raydo*, 713 So. 2d 996, 1001 (Fla. 1998), the Supreme Court held: "A defendant entering a plea of nolo contendere does not admit guilt." Raydo had entered pleas of nolo contendere to prior offenses and was awaiting disposition of the charges. The State sought to impeach his testimony with those pleas. *Id.* The *Raydo* Court explained:

the credibility of a testifying defendant or witness may be attacked pursuant to section 90.610(1) only by prior convictions. Section 90.610, Florida Statutes (1995), entitled "Conviction of certain crimes as impeachment," sets forth that:

A party may attack the credibility of any witness, including an accused, by evidence that the witness *has been convicted* of a crime if the crime was punishable by death or imprisonment in excess of 1 year under the law under which the witness *was convicted*, or if the crime involved dishonesty or false statement regardless of the punishment....

§ 90.610(1)(emphasis added).

To resolve the precise issue in this case, we need not reach a decision as to the scope of the term “conviction” pursuant to section 90.610(1). In this case, we need look no further than the express statutory prohibition of **section 90.410, Florida Statutes** (1995). This section **explicitly precludes evidence of a nolo contendere plea in any criminal proceeding: “Evidence of ... a plea of nolo contendere ... is inadmissible in any civil or criminal proceeding.”** (Emphasis added). This specific section of the Evidence Code prohibiting nolo contendere pleas from being admitted into evidence takes precedence over the more general impeachment provisions of section 90.610(1).

Raydo, 713 So. 2d at 1001 (italics as in original, boldface added, footnotes omitted). Section 90.410 was most recently amended in 1978.

11. The *Raydo* Court clearly and explicitly held: “A defendant entering a plea of nolo contendere does not admit guilt.” 713 So. 2d at 1001. The Court further held that evidence of a plea of nolo contendere is inadmissible in any civil or criminal proceeding. *Id.* Therefore the State’s argument that the Defendant somehow admitted to a causal connection between the traffic based on his plea of nolo contendere must fail because the plea is not admissible “in any civil or criminal proceeding” under § 90.410.

12. Finally the State asserted that a statement by a witness which was repeated in the probable cause affidavit in the underlying case was a basis for a finding that the Defendant caused the traffic crash and was therefore responsible for the death of the decedent. Response at 3. The witness (one “Bernal”) did not testify in this case. The statement of the witness was an

out-of-court statement which was not quoted but was paraphrased an affidavit by a police officer. The State appears to suggest that the statement should be used to establish the truth of the matter asserted in the paraphrased comments by the witness contained in the affidavit.

13. The paraphrased statement of the witness is not admissible both because it is not the actual statement of the witness and because it is inadmissible hearsay. *See* §§ 90.801 and 90.802 Fla. Stat. (2015). The paraphrased statement by the witness is also hearsay within hearsay and therefore not admissible to evidence as provided by § 90.805 Fla. Stat. (2015).

14. The Defendant has had no opportunity to cross examine the witness whose purported hearsay-within-hearsay paraphrased statement is in the affidavit. Therefore substantive use of the paraphrased statement would be offensive to the Defendant's constitutional right cross examine witnesses against him.

15. In addition "police reports and their contents generally constitute inadmissible hearsay". *Teague v. State*, 26 So. 3d 616, 618 (Fla. 1st DCA 2009), citing *Burgess v. State*, 831 So. 2d 137, 141 (Fla. 2002). The police report here is not within any of the exceptions in §§ 90.803 and 90.804. Section 90.803(8) contains a specific exclusion for matters observed by a police officer in a criminal case. That exclusion has direct application here to the affiant's report of the witness statement.

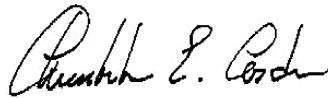
16. The Florida Supreme Court has ruled that "hearsay cannot be considered merely because it is part of the court file." Although a trial court may take judicial notice of court records under § 90.202(6) Fla. Stat., it does not follow that this provision permits the wholesale admission of hearsay statements contained within those court records. Inadmissible documents are not automatically admissible just because they were included in a judicially noticed court file. The Supreme Court held that "documents contained in a court file, even if that entire court file is

judicially noticed, are still subject to the same rules of evidence to which all evidence must adhere.” *Burgess v. State* at 141, citing *Stoll v. State*, 762 So .2d 870, 876-77 (Fla. 2000).

WHEREFORE the facts stated in the Defendant’s instant motion are not conclusively resolved by the Court record. The State had not presented any record evidence to refute the argument in the motion. Therefore the Defendant is entitled to be heard by the Court to present evidence regarding the affirmative misadvise by trial counsel which resulted in prejudice against him. The Defendant requests an evidentiary hearing at this Court’s earliest convenience.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing motion has been furnished by email, through the Florida Courts e-filing Portal as provided by Fla. R. Jud. Admin. 2.516(b)(1), to Amira D. Fox, State Attorney (at ServiceSAO-LEE@sao.cjis20.org), 2000 Main Street, Sixth Floor, Fort Myers, Florida 33901, and to the Hon. Margaret O. Steinbeck (at KValdez@ca.cjis20.org), Lee County Judicial Center, 1700 Monroe Street, Fort Myers, Florida 33901 on this 16th day of May, 2022.



Christopher E. Cosden
Counsel for the Defendant
Florida Bar No. 0813478
Post Office Box 9368
Fort Myers, Florida 33902
telephone 239-334-2030
email cosdenlaw@att.net

**UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
FORT MYERS DIVISION**

ADAM MURRAY COSTELLO,
Petitioner,

Case No.: 2:25-cv-74-JLB-NPM

vs.

SECRETARY, DEPARTMENT OF
CORRECTIONS,
Respondent.

_____ /

EXHIBIT 23

IN THE CIRCUIT COURT OF THE TWENTIETH JUDICIAL CIRCUIT
IN AND FOR LEE COUNTY, FLORIDA

STATE OF FLORIDA,
Plaintiff,

v.

Case No. 16-CF-371

ADAM MURRAY COSTELLO,
Defendant.

_____ /

MOTION FOR HEARING ON DEFENDANT'S MOTION TO WITHDRAW PLEA

COMES NOW the Defendant, by and through the undersigned attorney, and requests this Honorable Court to enter an order allowing the Defendant to schedule a hearing on his motion to vacate the judgment and sentence in this case, and providing that the Defendant is entitled to be present for hearing on that motion, and in support thereof would state:

1. On 12 March 2018 the Defendant was charged by an amended information with leaving the scene of a traffic crash involving death, a first degree felony under § 316.027(2)(c) and (f) Florida Statutes (2015), and with tampering with evidence, a third degree felony under § 918.13 Florida Statutes (2015). The same day the Defendant entered pleas of nolo contendere under a plea agreement and was convicted on both charges. Judgement and sentence were rendered on 19 March 2018. The Defendant was sentenced to 10 years and 6 months incarceration on the charge of leaving the scene with a minimum mandatory term of incarceration of 4 years, and to five years incarceration on the charge of tampering with evidence, with the sentences to run concurrently.

2. On 05 March 2020 the Defendant moved for postconviction relief under Fla. R. Crim. P. 3.850, requesting this Court to correct his sentence. This Court denied that motion without a hearing by an order entered 19 April 2021. The Defendant appealed to the Second District Court of Appeal. The Second District Court reversed the same order of this Court by an opinion issued 2 December 2021. *Costello v. State*, 330 So. 3d 1052 (2021). The Second District Court held that the Defendant's claim was facially insufficient because it did not include a request to withdraw his plea. *Id.* at 1053. Therefore the Second District Court reversed the summary denial of the Defendant's rule 3.850 motion and remanded the case to this Court with instructions to allow the Defendant to move to withdraw his plea. *Id.* at 1054.

3. On 03 March 2022 the Defendant, through undersigned counsel, moved to withdraw his plea. On 17 March 2022 this Court ordered the State to respond. The State filed its response on 11 May 2022. The Defendant filed a reply on 16 May 2022.

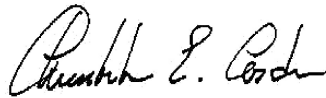
4. No further pleadings or orders have been filed in this case since 16 May 2022. Although nearly seven months have passed no further entries appear in this Court's docket.

5. The Defendant's claim that his trial counsel misadvised him can not be resolved from the court record in this case. No record entries document conversations between the Defendant in this criminal case and his attorney. The only way in which this Court can ascertain the substance of whatever advice, if any, which may have been given by counsel to the Defendant is to hear the testimony of witnesses. Where, as here, a defendant in a criminal case has alleged that his plea was involuntary because his trial counsel affirmatively misadvised him about his potential sentence and the defendant has provided a specific factual allegation to support his claim of misadvice, the Second District Court of Appeal has held that a hearing on the claim is required. *See Jamison v. State*, 186 So. 3d 37, 40-41 (Fla. 2d DCA 2016).

WHEREFORE the Defendant requests this Court to order that the undersigned attorney be allowed to schedule a hearing on the Defendant's motion for postconviction relief in this case, and to order that the Defendant may be present for that hearing.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing motion has been furnished by email through the Florida Courts E-Filing Portal as provided by Fla. R. Jud. Admin. 2.516(b)(1) to Amira D. Fox, State Attorney for the 20th Judicial Circuit (to ServiceSAO-LEE@sao.cjis20.org), Post Office Box 399, Fort Myers, Florida 33902 on this 5th day of December, 2022.



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**UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
FORT MYERS DIVISION**

ADAM MURRAY COSTELLO,
Petitioner,

Case No.: 2:25-cv-74-JLB-NPM

vs.

SECRETARY, DEPARTMENT OF
CORRECTIONS,
Respondent.

_____ /

EXHIBIT 24

**IN THE CIRCUIT COURT OF THE TWENTIETH JUDICIAL CIRCUIT IN AND FOR
LEE COUNTY, FLORIDA CRIMINAL ACTION**

STATE OF FLORIDA,

Plaintiff,

vs.

Case No. 16-CF-371

ADAM COSTELLO,

Defendant.

_____ /

**ORDER DIRECTING AN EVIDENTIARY HEARING ON DEFENDANT’S RULE 3.850
AMENDED MOTION**

THIS CAUSE comes before the Court on Defendant’s amended motion titled “Motion To Withdraw Plea Based Upon Ineffective Assistance Of Counsel,” pursuant to Fla. R. Crim. P. 3.850, filed by counsel March 3, 2022, and Defendant’s “Motion for Hearing on Defendant’s Motion to Withdraw Plea,” filed by counsel on December 5, 2022. Having reviewed the motions, the State’s response, Defendant’s reply, the case file, and the applicable law, the Court finds as follows:

1. Defendant was charged with leaving the scene of a crash involving death and tampering with evidence.
2. Defendant entered a negotiated plea agreement with the State. The plea agreement specifies that the maximum sentence for count one was 30 years in prison and for count two was 5 years in prison. According to the plea agreement, Defendant was sentenced to 10.5 years in prison on count one with a 4 year minimum mandatory sentence, and 5 years in prison on count two.
3. The scoresheet provided a lowest permissible sentence of 126.3 months in prison. 120 victim impact points were imposed.
4. Defendant did not appeal.
5. On March 5, 2020, Defendant filed a motion to vacate sentence for ineffective

assistance of counsel, pursuant to Rule 3.850. On July 14 2020, the State was ordered to respond, and it did so on September 9, 2020. Defendant filed a reply on September 14, 2020, and the State filed a notice of objection to the Defendant's reply on September 17, 2020.

6. On April 19, 2021, this Court issued an Order denying Defendant's 3.850 motion. Defendant filed an appeal with the Second District Court of Appeal, 2D21-1384. On December 22, 2021 the Second District Court of Appeal issued an opinion reversing the summary denial of Defendant's 3.850 motion, and remanding for an order giving Defendant leave to amend the 3.850 motion. The mandate was filed on January 18, 2022.

7. On January 5, 2022, this Court issued an Order vacating denial and giving Defendant leave to amend 3.850 motion.

8. On March 3, 2022, Defendant filed the instant motion raising one claim. The State was ordered to respond, and it did so on May 11, 2022. On May 16, 2022, Defendant filed a reply to the State's response. The Court notes that Defendant did not request leave of court to file a reply, and the State did not file an objection.

9. To prevail on a claim of ineffective assistance of counsel, Defendant must demonstrate that: (1) counsel's performance was deficient, and (2) there is a reasonable probability that the outcome of the proceedings would have been different. *Strickland v. Washington*, 466 U.S. 668 (1984); *Williamson v. Dugger*, 651 So. 2d 84 (Fla. 1994).

10. The Court notes that in reviewing claims of ineffective assistance of counsel, it must apply a strong presumption that counsel's conduct falls within the range of reasonable professional assistance and must avoid the distorting effects of hindsight. The standard is reasonably effective counsel, not perfect or error-free counsel. *Coleman v. State*, 718 So. 2d 827 (Fla. 4th DCA 1998); *Schofield v. State*, 681 So. 2d 736 (Fla. 2d DCA 1996). It is further noted

that, in general, tactical or strategic decisions of counsel do not constitute ineffective assistance of counsel. *Gonzales v. State*, 691 So. 2d 602 (Fla. 4th DCA 1997).

11. As to a claim of ineffective assistance of counsel arising out of the plea process, in order to satisfy the “prejudice” requirement, a defendant must show that there is a reasonable probability that, but for counsel’s errors, he would have not entered a plea and would have insisted on going to trial. *Hill v. Lockhart*, 474 U.S. 52 (1985).

12. Defendant argues that counsel was ineffective for failing to object to the victim injury points, citing *Sims v. State*, 998 So. 2d 494 (Fla. 2008) for the premise that there must be causation in order to impose victim injury points. Defendant argues that he was prejudiced because he was advised the minimum sentence was 10.6 years, when the minimum sentence without the victim impact points would have been 36.3 months. In sum, Defendant claims that his trial counsel provided ineffective assistance by failing to note that victim injury points had been improperly included in his Criminal Punishment Code scoresheet and by affirmatively misadvising him as to the lowest permissible sentence he could receive if found guilty at trial.

13. The Court finds that Defendant alleges a claim that is facially sufficient, which is not conclusively refuted by the record. Accordingly, the Court will allow an evidentiary hearing on Defendant’s amended motion, at which time Defendant will be provided an opportunity to demonstrate how counsel’s performance was deficient and how he was prejudiced.

14. Should Defendant’s amended motion be granted after the evidentiary hearing commences, the State is not obligated to revive any plea offer, or to present Defendant with a plea agreement. Accordingly, it is


ORDERED AND ADJUDGED that an evidentiary hearing will be held on the one issue raised in Defendant’s 3.850 amended motion.

It is further **ORDERED AND ADJUDGED** that within **thirty (30) days** of the date this order is rendered, counsel for Defendant shall obtain a hearing date, file a Notice of Hearing, and submit to the Court a proposed Order to Transport to ensure Defendant's presence at the evidentiary hearing. The parties are advised that there is no automatic right to pre-hearing discovery under Fla. R. Crim. P. 3.850, and limited discovery into relevant and material matters will only be permitted upon a motion which sets forth good cause.

It shall be the responsibility of any party intending to rely upon the testimony of Defendant's former trial counsel to take the appropriate steps to ensure that Defendant's former trial counsel is present to testify at the evidentiary hearing.

This order is a non-final, non-appealable order. Rule 3.850(i).

DONE AND ORDERED in Chambers at Fort Myers, Lee County, Florida


eSigned by Margaret Steinbeck 12/09/2022 16:13:24 e92uEpKV

Electronic Service List

Christopher E. Cosden <cosdenlaw@att.net>, <cosden@att.net>
State Attorney 20th Circuit <cService@sao20.org>

**UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
FORT MYERS DIVISION**

ADAM MURRAY COSTELLO,
Petitioner,

Case No.: 2:25-cv-74-JLB-NPM

vs.

SECRETARY, DEPARTMENT OF
CORRECTIONS,
Respondent.

_____ /

EXHIBIT 25

IN THE CIRCUIT COURT OF THE TWENTIETH JUDICIAL CIRCUIT
IN AND FOR LEE COUNTY, FLORIDA CRIMINAL ACTION

STATE OF FLORIDA)
)
 vs.) CASE NO. 16CF000371
)
 ADAM MURRAY COSTELLO,)
)
 Defendant.)
 _____)

Transcript of proceedings held before the Honorable Margaret
Steinbeck, Circuit Court Judge, Lee County Justice Center,
Courtroom 7A, Fort Myers, Florida, on February 14, 2023.

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ORIGINAL

A P P E A R A N C E S

Kelly Worcester, Assistant State Attorney,
20th Judicial Circuit,
Fort Myers, Florida 33902;
representing the State of Florida.

Christopher E. Cosden, Esquire,
Post Office Box 9368
Fort Myers, Florida 33902;
representing the Defendant.

I N D E X

<u>STATE'S WITNESSES:</u>	<u>DIRECT</u>	<u>CROSS</u>	<u>REDIRECT</u>	<u>RECROSS</u>
Judge Shannon McFee	29	35	38	40

DEFENDANT'S WITNESSES:

Susan Costello	10	12	--	--
Adam Murray Costello	13	17	28	--

<u>STATE'S EXHIBITS:</u>	<u>MARKED</u>	<u>ADMITTED</u>
No. 1 - Amended Information	25	--
No. 2 - Transcript of Plea proceedings	25	26
No. 3 - Score Sheet	17	19

DEFENDANT'S EXHIBITS:

Exhibit A - Chapter 2007-211 Laws of Florida	36	--
Exhibit B - <u>Sims v. State</u>	37	--

P R O C E E D I N G S

THE COURT: Good afternoon. We are here in State of Florida versus Adam Murray Costello, 16CF371. I'm Judge Margaret Steinbeck. I will ask counsel to state their appearances.

MS. WORCESTER: Kelly Worcester on behalf of the State.

MR. COSDEN: Christopher Cosden for the defendant.

THE COURT: Okay. And the defendant I see is before the Court. We are set for hearing on the defendant's amended motion to withdraw plea that was filed -- I don't have the date but...

MR. COSDEN: I believe it was March 3rd of 2022, Your Honor.

THE COURT: March 3rd of 2022 and defense ready to proceed?

MR. COSDEN: Defense is ready, Your Honor. Before we proceed we would invoke the rule, please.

THE COURT: Okay. And is the State ready to proceed?

MS. WORCESTER: Yes, ma'am.

THE COURT: So the rule of sequestration of witnesses has been invoked which is a rule that provides that witnesses may not discuss their testimony with anyone other than the lawyers until the Court has ruled and you may also not be present in the courtroom to hear other witnesses'

1 testimony. Is there any other admonition that you wish me
2 to give, Ms. Worcester?

3 MS. WORCESTER: No, ma'am.

4 THE COURT: Mr. Cosden?

5 MR. COSDEN: No, Your Honor, nothing else.

6 THE COURT: Do you need any time to talk to any of the
7 witnesses who are not in the courtroom?

8 MR. COSDEN: No, Your Honor. The defendant's first
9 witness will be Mrs. Costello, so if the Court wants her to
10 leave during preliminary matters, of course, that's the
11 Court's option but there is really no need for her to
12 leave.

13 THE COURT: Well, are you going to make any kind of
14 openings statement?

15 MR. COSDEN: Yes, Your Honor, I am.

16 THE COURT: Okay. Well then you would be referring to
17 anticipated testimony?

18 MR. COSDEN: No, Your Honor, I would not.

19 THE COURT: Okay. Any objection to witnesses staying
20 in for openings, Ms. Worcester?

21 MS. WORCESTER: No, ma'am, but I never did receive a
22 witness list from Mr. Cosden, so I'm unaware who his
23 witnesses are.

24 MR. COSDEN: Well, Your Honor, I have never received a
25 witness list from the State either but as we know discovery

1 in a post conviction motion is very limited and allowed
2 only by order of the Court, so there has for all practical
3 purposes been no discovery.

4 THE COURT: So is it your position there is no
5 requirement to disclose witnesses in advance of an
6 evidentiary hearing on a motion to withdraw plea filed
7 under Rule 3.850?

8 MR. COSDEN: I know of none.

9 THE COURT: Okay. Ms. Worcester, any objection then?
10 Do you have any contrary authority?

11 MS. WORCESTER: I don't have any authority. I did
12 discuss with Mr. Cosden early on that I would be calling
13 the Honorable Shannon McFee as my witness, so he says he
14 didn't know my witness, that is who I told him.

15 THE COURT: Okay, but both parties are prepared to
16 proceed?

17 MS. WORCESTER: Yes, ma'am.

18 THE COURT: Okay, and the -- Mr. Cosden indicated that
19 he wants to make an opening.

20 MR. COSDEN: Please, Your Honor.

21 THE COURT: You may.

22 MR. COSDEN: May it please the Court. Your Honor,
23 this case arose following a collision between a truck and a
24 motorcycle on Colonial Boulevard on June 29th of 2016. The
25 defendant was charged in September of 2016 by information

1 with leaving the scene of an accident with death and with
2 tampering with evidence. Now, a fourth amended information
3 was filed on March 12th of 2018 again charging the
4 defendant with leaving the scene of an accident and
5 tampering with -- tampering with evidence.

6 Now, on March 12th of 2018, the same day, the
7 defendant entered pleas of nolo contendere according to a
8 plea agreement and was sentenced to ten years, six months
9 in the Department of Corrections with a four-year mandatory
10 minimum sentence for leaving the scene of an accident.
11 Defendant was also sentenced to five years concurrent for
12 tampering with evidence. That tampering with evidence
13 charge is not part of the present motion.

14 At the time that he entered the plea the defendant had
15 been led to believe by his attorney that ten years, six
16 months was the minimum sentence that he could receive under
17 the criminal punishment code without a downward departure.

18 Now, after the defendant became aware that that was
19 not correct he filed a motion under Rule 3.850 to vacate
20 the incarceration portion of the sentence because his
21 attorney had failed to provide effective assistance. That
22 motion was summarily denied by this Court. Defendant
23 appealed to the Second District. The Second D.C.A.
24 reversed this Court, remanded the case with direction that
25 the defendant be allowed to move to withdraw his plea.

1 Defendant did so on March 3rd of 2022. That's the motion
2 that is presently before this Court.

3 Now, the defendant's sentencing score sheet which is,
4 of course, in the court file improperly include 120 points
5 for victim injury resulting in the lowest permissible
6 sentence of 126.3 months' incarceration. That was error.
7 The lowest permissible sentence under 921.0024, the
8 criminal punishment code, would have been 36.3 months'
9 incarceration had the additional points not been improperly
10 included. Now, that is notwithstanding the four-year
11 mandatory minimum under 316.027(c), so the lowest
12 permissible sentence would have been four years based on
13 the mandatory minimum.

14 Now, trial counsel failed to recognize that the
15 120 points for victim injury were improperly applied and,
16 therefore, he affirmatively misadvised the defendant
17 concerning the sentence. Any reasonable lawyer would have
18 correctly assessed the score sheet and would have properly
19 advised the defendant. So had trial counsel properly
20 advised the defendant he would not have entered the plea
21 and that is, of course, the basis for his withdrawal of the
22 plea. So we are seeking today to allow the defendant to
23 withdraw his plea that was entered on March 12th of 2018.

24 THE COURT: So I don't know what you mean when you say
25 Count 2 is not part of the motion. If I grant the relief

1 requested, the defendant's plea to both Counts 1 and 2
2 would be withdrawn. The State, of course, is free then to
3 pursue prosecution of the fourth amended information or if
4 there is another amendment and the State won't be obligated
5 to offer any kind of plea agreement but the plea was
6 entered to both Counts 1 and 2, so they are at issue in
7 that regard but you are saying that the reason that I
8 should grant the motion is based on misadvice with regard
9 to victim injury points on Count 1.

10 MR. COSDEN: That's correct, Your Honor.

11 THE COURT: Have I restated that correctly?

12 MR. COSDEN: Yes, that's correct.

13 THE COURT: And, Mr. Costello, you understand if I
14 grant the relief requested the State is free to continue to
15 prosecute you with regard to the original charges or any
16 other charges that might be appropriately filed?

17 THE DEFENDANT: Yes, ma'am.

18 THE COURT: Okay. So I don't know if Ms. Worcester
19 wishes to make an opening. Do you?

20 MS. WORCESTER: Just a short one, Your Honor.

21 THE COURT: Okay.

22 MS. WORCESTER: That the law that needs to be applied
23 in this case as far as the victim injury points is found at
24 921.0021(7)(e) and that came out in the Florida statutes in
25 2016 and it permits victim injury points if the Court finds

1 that offender caused victim injury points. So if -- so I
2 will be questioning counsel as to his interaction with
3 Mr. Costello in regards to that.

4 MR. COSDEN: Your Honor, may I -- may I add something
5 very, very brief, please, that the Court just raised?

6 THE COURT: Sure.

7 MR. COSDEN: Okay. On the tampering with evidence
8 charge, Your Honor, Mr. Costello was sentenced on -- in
9 March of 2018. That is third degree felony. So for all
10 practical purposes he has served that entire sentence
11 already. So if he were to be charged again with tampering
12 with evidence he would, of course, get credit for time
13 served and by the time that that's resolved he would have
14 served more than the maximum sentence, so the point is
15 really moot.

16 THE COURT: Fine. You have the burden, so would you
17 call your first witness.

18 MR. COSDEN: Yes, Your Honor.

19 THE COURT: And other witnesses should step outside of
20 the courtroom. Do not discuss your testimony with anyone
21 other than the attorneys until the Court has ruled and I
22 may not be ruling today, so that's a prohibition. And you
23 were going to call Mrs. Costello.

24 MR. COSDEN: I will call Susan Costello, yes, Your
25 Honor, please.

1 SUSAN COSTELLO,
2 having first been duly sworn, was examined and testified as
3 follows:

4 THE COURT: You may be seated.

5 MR. COSDEN: May it please the Court.

6 DIRECT EXAMINATION

7 BY MR. COSDEN:

8 Q. Ma'am, what is your full name, please?

9 A. Susan Costello.

10 Q. Ms. Costello, do you live here in Fort Myers?

11 A. Yes, I do.

12 Q. How long have you lived in Fort Myers?

13 A. I have lived in Fort Myers, I was born here, 56 years.

14 Q. Do you know Adam Costello, the defendant in this case?

15 A. Yes, he's my son.

16 Q. Now, prior to the plea in this case did you ever
17 accompany Mr. Costello to the office of the attorney who
18 represented him in this case?

19 A. Yes, I did.

20 Q. Okay. Who was that attorney?

21 A. Honorable Judge McFee, Shannon McFee.

22 Q. And where was his office, in what city?

23 A. It's in Naples, Florida.

24 Q. Okay. How many times did you go to Mr. McFee's office
25 in Naples with Mr. Costello?

1 A. I don't remember the exact count but almost every
2 single time I went with Adam. Maybe two times I didn't go.

3 Q. Okay. So while you were present with Mr. McFee and
4 Mr. Costello, did Mr. McFee ever discuss a potential plea
5 agreement with Mr. Costello?

6 A. Yes.

7 Q. Okay. Do you remember how many times Mr. McFee
8 discussed a potential plea agreement with Mr. Costello while you
9 were there?

10 A. I remember two times.

11 Q. Now, do you recall now what Mr. McFee said to
12 Mr. Costello about a potential plea agreement?

13 A. Yes, ten and a half years.

14 Q. Okay. Now, you said that Mr. McFee discussed that
15 with Mr. Costello twice in your presence. Was that number, ten
16 and a half years, Mr. McFee's assessment on both occasions?

17 A. Yes.

18 Q. Okay. What else did Mr. McFee say to Mr. Costello
19 about a potential plea agreement as much as you remember?

20 A. You better take this because if you don't you are
21 going to get 30 years.

22 MR. COSDEN: Thank you, Your Honor. I have no further
23 questions for Mrs. Costello at this time.

24 THE COURT: Any questions, Ms. Worcester?

25 MS. WORCESTER: Just a couple.

CROSS-EXAMINATION

BY MS. WORCESTER:

Q. Was there a time when you were present when the plea discussions were 15 years?

A. I don't recall that.

Q. Okay. How do you -- how do you know how this ten and half years came about?

A. That was what Mr. McFee told my son he was going to get. They would accept ten and a half years.

Q. They meaning who?

A. The family.

Q. Okay, and that was because of what? Did you have any conversations about why they were accepting the ten and a half years?

A. Not that I can recall.

Q. And you are saying that that was a discussion just twice in your presence?

A. Twice in my presence.

Q. So you can't testify to any other discussions that your son might have had with Mr. McFee as to pleas or even about his case?

A. Can you repeat that, please?

Q. Is there anything else you can tell us about discussions that Mr. McFee had with your son in regards to his case?

1 A. Yes.

2 Q. Okay.

3 A. That he could get the maximum if we went to court.

4 Q. Right, and he showed you that that particular charge
5 the maximum was 30 years?

6 A. Yes.

7 MS. WORCESTER: No further questions.

8 MR. COSDEN: I have no further questions for this
9 witness, Your Honor.

10 THE COURT: You may step down. Please call your next
11 witness then.

12 MR. COSDEN: Defendant would call the defendant, Adam
13 Costello.

14 THE COURT: Mr. Costello, please stand and raise your
15 hand. The clerk will put you under oath. You can have a
16 seat in the witness stand.

17 ADAM MURRAY COSTELLO,
18 having first been duly sworn, was examined and testified as
19 follows:

20 MR. COSDEN: May it please the Court.

21 THE COURT: Please.

22 DIRECT EXAMINATION

23 BY MR. COSDEN:

24 Q. Sir, what is your full name, please?

25 A. Adam Murray Costello.

1 Q. Sir, are you the defendant in this case?

2 A. Yes, sir.

3 Q. Now, when this case was resolved in the court
4 originally, did you enter a plea?

5 A. Yes.

6 Q. Who represented you when you entered that plea?

7 A. Shannon McFee.

8 Q. Okay. Now, prior to the time that you entered a plea
9 in this case, did you discuss the matter with Mr. McFee?

10 A. Yes.

11 Q. Did you ever go to his office?

12 A. Yes.

13 Q. Where was his office?

14 A. In Naples.

15 Q. Did your mother ever go --

16 THE COURT: Would you pull that microphone a little
17 closer to you?

18 BY MR. COSDEN:

19 Q. Did your mother ever go with you to Mr. McFee's
20 office?

21 A. Yes, sir.

22 Q. And what is your mother's name?

23 A. Susan Costello.

24 Q. Is she the lady who testified here a few minutes ago?

25 A. Yes, sir.

1 Q. Okay. How many times did you go to Mr. McFee's office
2 with Mrs. Costello?

3 A. My recollection would be around a dozen.

4 Q. Okay. How many times did you go there without
5 Mrs. Costello?

6 A. I'm not sure I did. It has been close to seven years,
7 so I don't think I went without her.

8 Q. Okay. Now, did Mr. McFee ever discuss a potential
9 plea agreement with you?

10 A. Yes.

11 Q. Do you remember how many times you and Mr. McFee spoke
12 about a potential plea agreement?

13 A. It was a few times, probably three, maybe four.

14 Q. Okay. What did Mr. McFee tell you about a potential
15 plea agreement in this case?

16 A. He told me that the State had presented an offer, my
17 lowest permissible guideline sentence. He showed me my score
18 sheet. It showed a lowest permissible guideline sentence of
19 precisely what was being offered.

20 Q. Okay. Would that be ten and a half years?

21 A. Yes, sir.

22 Q. Okay. How many times did Mr. McFee discuss the score
23 sheet with you?

24 A. Well, it was the focus of the plea agreement, so each
25 time we discussed the plea agreement we focused on the score

1 sheet.

2 Q. Okay. Now, did you believe what he told you that the
3 minimum sentence on the score sheet was ten and a half years?

4 A. Of course.

5 Q. Okay. Now, did Mr. McFee ever tell you that the
6 minimum potential sentence in this case was less than ten and a
7 half years?

8 A. No, absolutely not.

9 Q. Okay. Had Mr. McFee told you that the potential
10 minimum sentence was less than ten and a half years, would you
11 have entered a plea to ten and a half years?

12 A. No.

13 Q. Was your entry of the plea to ten and a half years
14 based upon your understanding of the potential minimum sentence
15 and what Mr. McFee told you?

16 A. Yes.

17 Q. Had you believed, had you had some information from
18 somebody anywhere that the potential minimum sentence in this
19 case was less than ten and a half years would you have entered a
20 plea to ten and a half years?

21 A. No.

22 Q. Okay. Now, did Mr. McFee ever discuss a case called
23 Sims v. State with you before you entered your plea?

24 A. No, he didn't.

25 MR. COSDEN: Thank you. I have no further questions

1 for Mr. Costello at this time, Your Honor.

2 THE COURT: Ms. Worcester, do you have any questions?

3 MS. WORCESTER: Just a few.

4 CROSS-EXAMINATION

5 BY MS. WORCESTER:

6 Q. Mr. Costello, I'm going to show you State's Exhibit 3
7 which is the score sheet that was ultimately presented in this
8 case.

9 A. Okay.

10 MS. WORCESTER: Let the record reflect I'm showing it
11 to counsel.

12 May I approach the witness?

13 THE COURT: You may.

14 BY MS. WORCESTER:

15 Q. Now, you indicated to Mr. Cosden that you did look at
16 the score sheet with Mr. McFee and actually discuss it?

17 A. Yes.

18 Q. Okay. And do you recognize that as the score sheet
19 you discussed?

20 A. Yes.

21 Q. I will turn the pages.

22 A. It is hard for me to see close up with these glasses.
23 The prescription is not correct.

24 Q. Okay. So this would have been the first page. This
25 shows the offense and then the second offense.

1 A. Yes.

2 Q. And then here is victim injury points is 120 points.

3 A. Yes.

4 Q. Okay. Then this continues and they add it up and then
5 this shows you the minimum amount of points that you can get.

6 A. Yes.

7 Q. Up to the maximum which because of what the two
8 charges were, one was 30 and one was five so that made 35 years.

9 A. Yes.

10 Q. And Mr. McFee went over this with you, correct?

11 A. Correct.

12 Q. Okay, and you see on this form on page two or on page
13 one, I'm sorry, the 120 victim injury points?

14 A. Yes.

15 Q. Okay. That's what causes it to be -- for the low end
16 to be 126?

17 A. Right.

18 MR. COSDEN: Objection, Your Honor, predicate as to --
19 as to -- strike that, not predicate. Calls for opinion by
20 the witness.

21 THE COURT: I won't consider it a legal opinion. With
22 that caveat, overruled.

23 BY MS. WORCESTER:

24 Q. So you are telling the Court that you did go over this
25 with your attorney and he explained what all of those points

1 were?

2 THE COURT: To a microphone, please.

3 MS. WORCESTER: Sorry.

4 BY MS. WORCESTER:

5 Q. So Mr. McFee explained all of those points and what
6 they added up to for you?

7 A. Yes.

8 Q. When you talked about this score sheet?

9 A. I knew nothing about the law so...

10 Q. That's not the question.

11 A. Yeah. Yes.

12 Q. He did talk to you about this score sheet?

13 A. Yes.

14 MS. WORCESTER: May I admit State's Exhibit No. 3?

15 MR. COSDEN: No objection --

16 THE COURT: Admitted.

17 MR. COSDEN: -- to that in evidence, Your Honor,
18 although it is certainly part of the court file.

19 THE COURT: That's fine. It's admitted.

20 (State's Exhibit No. 3 was admitted into evidence.)

21 MS. WORCESTER: I just wanted the record to be clear
22 for this hearing, that's why.

23 BY MS. WORCESTER:

24 Q. Now, you said that Mr. McFee was your lawyer from the
25 very beginning, correct?

1 A. Correct -- oh, excuse me. Actually, he was not.

2 Q. Okay. When did he come on board?

3 A. It might have been three months in, thereabouts.

4 Q. Okay. So pretty much from the beginning?

5 A. Yes.

6 Q. And he talked to you about this case fairly regular,

7 told you what he was doing?

8 A. I would say so.

9 Q. And he took depositions?

10 A. Yes.

11 Q. And this case involved a car crash?

12 A. Yes.

13 Q. And there were independent witnesses to the car crash
14 that gave statements, correct?

15 MR. COSDEN: Objection, Your Honor, outside the scope
16 of direct and irrelevant for this purpose.

17 THE COURT: Overruled.

18 BY MS. WORCESTER:

19 Q. And there were witnesses that witnessed the actual car
20 crash, correct?

21 A. Yes.

22 Q. And he took their depositions?

23 A. Yes.

24 Q. Okay. So did he have a conversation with you about
25 the car crash and the fact that he would have to prove -- or the

1 State would have to prove a causation element, that is that you
2 caused the crash?

3 MR. COSDEN: Objection, Your Honor. First, assuming a
4 fact not in evidence. Second, irrelevant. Third, outside
5 the scope.

6 THE COURT: So I will ask counsel to come up at
7 sidebar.

8 (WHEREUPON, the following sidebar discussion took
9 place.)

10 THE COURT: Overruled on all grounds in that the issue
11 is whether or not this defendant would have accepted --

12 MR. COSDEN: Your Honor, I cannot hear you.

13 THE COURT: Then I don't know that we need to do. I
14 thought maybe you might not want me talking about this in
15 front of the witness but overruled on all grounds because
16 he has put in issue whether or not he would have accepted
17 the plea and what he talked to his lawyer about in terms of
18 how elements of proof and strength of other witnesses'
19 statements is very much at issue and within the scope and
20 relevant.

21 MR. COSDEN: Your Honor, what was --

22 THE COURT: What was your third ground? You objected
23 on relevance and what was your third ground? Maybe I have
24 forgotten.

25 MR. COSDEN: Outside the -- fact not in evidence.

1 THE COURT: Okay.

2 (End of sidebar discussion.)

3 BY MS. WORCESTER:

4 Q. So when Mr. McFee was talking to you about taking a
5 possible plea, he wanted to discuss with you any defenses or any
6 questions that would -- the State would have to prove in your
7 case, correct?

8 A. Yes.

9 Q. And did he in fact do that?

10 A. Yes.

11 Q. Was there at one point an offer from the State and it
12 may have been early on, it may have been a little bit into it of
13 a 15-year offer?

14 A. Yes.

15 Q. Okay. And what did Mr. McFee tell you about that
16 offer?

17 A. Well, we didn't have deep discussions of that
18 particular offer because he just told me it was not reasonable,
19 so it wasn't worth discussing.

20 Q. Okay. So -- and you agreed with that that it wasn't
21 reasonable?

22 A. Yes.

23 Q. So when did you receive the ten and a half year offer?

24 A. Well, it was pretty late, shortly before I was
25 sentenced, so I don't --

1 Q. Okay.

2 A. I couldn't recall a date.

3 Q. Do you recall that you were given that offer because
4 you were going to give something back to the State?

5 A. Yes.

6 MR. COSDEN: Objection, Your Honor. Again, assuming a
7 fact not in evidence and outside of the scope of direct.

8 THE COURT: Overruled on both grounds.

9 BY MS. WORCESTER:

10 Q. So you, in fact, entered into the plea agreement for
11 the ten and a half years with the State because you were going
12 to give them some information or some testimony against another
13 defendant?

14 A. Well, ultimately, I accepted it because it was my
15 lowest permissible which is what I was told and I was also told
16 anything less would be a downward departure and I would never
17 receive that so --

18 Q. Okay.

19 A. -- that's why.

20 Q. Okay.

21 A. That's why I accepted it.

22 Q. So did you ask Mr. McFee any questions about it being
23 the lowest permissible sentence?

24 A. Well, not too many because he's the lawyer. I just
25 trusted what he told me.

1 Q. Okay. And that was based on again the score sheet
2 that's in evidence?

3 A. Yes.

4 Q. The ten and a half?

5 A. Precisely.

6 Q. Okay. And you entered a plea to this Court to these
7 charges on March 12th of 2018, correct?

8 A. Correct.

9 Q. And do you recall being placed under oath?

10 A. Yes.

11 Q. Okay. And that means you were to tell the truth?

12 A. Yes.

13 Q. Okay. And you were asked several questions by the
14 Assistant State Attorney Ms. Marzano?

15 A. Yes.

16 Q. During the plea?

17 A. Yeah.

18 Q. Okay. One of the questions you were asked was --
19 well, first of all, I'm sorry, let me backtrack. Before you
20 entered your plea there was an amended information entered into
21 the court file with your acknowledgment, you and your attorney's
22 acknowledgment, correct?

23 A. Correct.

24 Q. Okay. And you had went over that with your attorney
25 before?

1 A. Just before the hearing.

2 Q. Right. But it wasn't a surprise that it was -- it was
3 all part of the plea agreement you all were talking about to get
4 the ten and a half years?

5 A. Yes. Well, he had requested that, the amendment.

6 Q. Right. So that it would work out to get the ten and a
7 half years like you were told?

8 A. He told me that was in my favor, so yes.

9 Q. Okay.

10 MS. WORCESTER: Let the record reflect I'm showing
11 defense counsel what has been marked State's Exhibit 1.

12 BY MS. WORCESTER:

13 Q. And you had a chance to go over the amended --

14 A. Information?

15 Q. -- information?

16 A. Yes.

17 Q. Right?

18 A. Right.

19 Q. Okay. In fact, Ms. Marzano went over it as part of
20 the plea colloquy?

21 A. Yes.

22 Q. Okay. And on --

23 MS. WORCESTER: Your Honor, I'm going to be admitting
24 the transcript of the plea into evidence, too, as State's
25 Exhibit No. 2.

1 THE COURT: You are going to offer it?

2 MS. WORCESTER: Yes, ma'am.

3 THE COURT: Okay. Any objection?

4 MR. COSDEN: No objection, Your Honor. It is already
5 in the court file.

6 THE COURT: Admitted.

7 (State's Exhibit No. 2 was admitted into evidence.)

8 MS. WORCESTER: I would like to give this to the Court
9 so it is easier to go along with while I'm talking to
10 Mr. Costello.

11 Page 11, Your Honor.

12 BY MS. WORCESTER:

13 Q. Mr. Costello, Ms. Marzano posed the question in an
14 amended information that was amended this morning, you are still
15 charged with the charge of leaving the scene of a crash with
16 death as well as obstructing or tampering with evidence. You
17 understand that the leaving the scene of the crash with death is
18 punishable by 30 years in Florida State Prison. Do you remember
19 what you said to her?

20 A. Yes.

21 Q. Okay. Okay. And then on page 13, she actually showed
22 you that score sheet that we have been talking about that you
23 have already seen, she walked over and showed it to you. Do you
24 remember that?

25 A. I recall her asking me about it.

1 Q. Okay. And the question was have you seen this before
2 and what was your answer?

3 A. Yes.

4 Q. Okay. And you have seen that the terms are that you
5 face at the lowest permissible sentence of 126 months in Florida
6 State Prison?

7 A. Yes.

8 Q. Up to 30 years. Okay. So you said yes to that?

9 A. Correct.

10 Q. And is this the score sheet you are familiar with?
11 What was your answer?

12 A. Yes.

13 Q. Okay. And you agree that it is a true and accurate
14 score sheet? What was your answer?

15 A. Yes, that's what I was told.

16 Q. Okay. But you went over it with your attorney prior
17 to you talking about it with Ms. Marzano?

18 A. Yes.

19 Q. And then Ms. Marzano asked you if -- on page 20 if you
20 stipulate to a factual basis for the plea.

21 A. Yes.

22 Q. Okay. And, yes, she asked you and you answered yes,
23 correct?

24 A. Correct.

25 Q. And did the -- your attorney tell you what a factual

1 basis was?

2 A. I don't recall that.

3 MS. WORCESTER: Okay. I don't have any further
4 questions.

5 MR. COSDEN: Brief redirect, please, Your Honor.

6 THE COURT: You may.

7 REDIRECT EXAMINATION

8 BY MR. COSDEN:

9 Q. Counsel asked you a question about the plea proceeding
10 and counsel asked you whether you were asked by Ms. Marzano,
11 quote, and I'm on page 16 of the transcript, line seven, and you
12 have seen that terms that you face a lowest permissible sentence
13 of 126.3 months Florida State Prison up to 30 potential years in
14 prison, do you understand that? And your response to that is,
15 yes, I do understand. Is that correct?

16 A. Correct.

17 Q. So not only did your attorney tell you that you faced
18 a lowest permissible sentence of 126.3 months, that being, of
19 course, ten years six months, Florida State Prison, the
20 prosecutor told you the same thing, correct?

21 A. Exactly, correct.

22 MR. COSDEN: All right. Thank you, Your Honor. I
23 have no further questions for this witness.

24 THE COURT: You may step down.

25 MR. COSDEN: Your Honor, I have no further witnesses.

1 I will have argument, please.

2 THE COURT: Okay. State.

3 MS. WORCESTER: The State calls the Honorable Shannon
4 McFee.

5 JUDGE SHANNON MCFEE,
6 having first been duly sworn, was examined and testified as
7 follows:

8 THE COURT: Please be seated.

9 MS. WORCESTER: May I proceed?

10 THE COURT: Yes.

11 DIRECT EXAMINATION

12 BY MS. WORCESTER:

13 Q. Please state your name for the record.

14 A. Shannon McFee.

15 Q. How are you employed?

16 A. With the State of Florida.

17 Q. And do you have a certain position at this time?

18 A. I am a Circuit Court Judge for the 20th Judicial
19 Circuit.

20 Q. Back in 2018 what were you?

21 A. I was a criminal defense lawyer.

22 Q. Okay, and did you have an occasion to represent a man
23 known as Adam Murray Costello?

24 A. Yes.

25 Q. And was that in Case No. 16CF371?

1 A. It was.

2 Q. And he was charged with leaving the scene of a crash
3 with death and tampering or fabricating physical evidence?

4 A. That's correct.

5 Q. We have heard from Mr. Costello that you came on board
6 maybe three months after the inception of the case. Would that
7 be correct?

8 A. It was in October. I became involved in October of
9 2016.

10 Q. Okay, and when you first became involved with the case
11 did you have extensive discussions with Mr. Costello about the
12 case?

13 A. I did, as well as his former attorney who had asked me
14 to get involved and take the case over from him, we did an
15 extensive amount of discussions and breakdown of the case for
16 sure.

17 Q. Okay. And how long had you been a criminal defense
18 attorney at the time that you took this case?

19 A. It was in October of 2016. I became a defense
20 attorney in March of 1994, so 22 years at the time, 23 years.

21 Q. And had you -- I'm sorry. Had you handled a
22 substantial amount of criminal cases?

23 A. My entire practice was criminal defense and juvenile
24 defense for those -- that entire time frame.

25 Q. And had you hired -- had you handled a multitude of

1 traffic cases such as with fatalities?

2 A. Yes.

3 Q. Now, this particular charge, leaving the scene of a
4 crash with death, carries its own points and then there can be
5 injury, victim injury points added?

6 A. Correct.

7 Q. Correct?

8 A. Correct.

9 Q. Under what circumstances can victim injury points be
10 added?

11 A. Well, for a large portion of my life in defense you
12 couldn't add victim injury points to a leaving the scene with a
13 death because the way the statute read at the time prior to 2007
14 was that it had to be a direct result of the offense for which
15 the person pled or was found guilty. That changed in 2007. The
16 statute changed to then indicate that you could get those death
17 points on a leaving the scene with a death if the Court makes a
18 finding that you caused the death or the injury under those
19 circumstances. So he was arrested in 2016. That had been the
20 law for approximately nine years subsequent to that -- or prior
21 to that, I'm sorry.

22 Q. And you knew that, correct?

23 A. Correct.

24 Q. So as part of your discussions with Mr. Costello did
25 you talk to him about the potential for victim injury points in

1 this case?

2 A. Absolutely. I mean, that was a very big part of our
3 case. Ultimately, when the day is done the State actually had
4 their first score sheet that they submitted was incorrect. They
5 did not include those death points and when I saw that I'm
6 thinking, okay, this is -- this is good. Maybe they aren't
7 going to go with, you know, the approach that Adam didn't cause
8 the death. That obviously was an error on their part. They
9 recognized that. I actually had multiple conversations with
10 others about this issue including one of their family friends
11 was Joe D'Alessandro who used to be the elected --

12 MR. COSDEN: Objection, Your Honor. Hearsay.

13 THE COURT: Sustained.

14 BY MS. WORCESTER:

15 Q. But you had conversations with other people in regards
16 to the victim injury points?

17 A. Absolutely.

18 Q. Okay, and there was some -- were there some that said,
19 no, they don't go on?

20 MR. COSDEN: Objection, Your Honor, calls for hearsay.

21 THE COURT: Sustained.

22 BY MS. WORCESTER

23 Q. Was there conflicting testimony among your peers?

24 MR. COSDEN: Again, Your Honor, objection, calls for
25 hearsay.

1 THE COURT: Sustained.

2 BY MS. WORCESTER:

3 Q. Okay. Did you go over that particular issue with
4 Mr. Costello?

5 A. I did.

6 Q. How many times would you say you talked about it?

7 A. We would have spoken about it at least twice because
8 to me it was a very clear issue. The statute is very clear in
9 its language and so we discussed it. I know we discussed it in
10 me going back to the State saying, hey, can you just get rid of
11 the death points and let's do a plea to something less than that
12 with a mandatory minimum but not adding the death points but
13 that -- obviously, it wasn't agreed to, so we did. We discussed
14 it a number of occasions with Adam and his mother.

15 Q. Did you ever tell the defendant that the low end of
16 his score sheet could be 36.2?

17 A. No, absolutely not. If there was any discussion at
18 all about that that would have been with the original score
19 sheet that they sent that had that low end without the death
20 points but I knew it was wrong. The statute was clear.

21 Q. And eventually the score sheet that was entered during
22 the plea had the 120 points on it?

23 A. Correct.

24 Q. And you felt -- did you have ample time to explain to
25 Mr. Costello what those points were and why he was getting them?

1 A. Yes.

2 Q. Did you, in fact, take depositions of the eyewitnesses
3 to see if there was a cause?

4 A. We did. There was at least two that I recall, a
5 Mr. Burnell and Mr. Ramiro. One was a youth at the time of the
6 accident. The other was an adult. And we -- in the deposition
7 in the discovery that I determined -- looked at, they were going
8 to indicate who was at fault.

9 MR. COSDEN: Objection, Your Honor, hearsay.

10 THE COURT: Overruled. It is not being offered for
11 the truth but rather what was a factor in the plea. It
12 seems obvious to me from the record and, therefore, I
13 overrule the hearsay objection.

14 BY MS. WORCESTER:

15 Q. So after you took those two people's deposition did
16 you discuss with the defendant that issue once again?

17 A. Not specifically after I did their deposition. There
18 were 40 -- I think 48 witnesses in the case. I did all of the
19 depositions in our total evaluation of the case. That was one
20 of the factors we were considering. Frankly, the eyewitnesses
21 gave very inconsistent testimony as to the type of vehicle and
22 such, so that was going to be one of our approaches in trial
23 that they don't really know who caused what. That would have
24 been an issue but where it came up in our discussions was if we
25 go to trial and if we lose the testimony will have been that he

1 caused the accident and at that point he would be getting the
2 death points. That at least was the thought and recognizing
3 that he was facing 35 years, 30 plus the five, we discussed
4 where I thought the Judge would come if he was found guilty
5 after trial, what he could have gotten versus what the plea
6 offer was because that ten and half year plea offer did not come
7 early. That came very, very late in the process. The first
8 time we got the ten and a half. It was started at 30, then
9 dropped to 15, then it went to 10.5 once there was an agreement
10 for some cooperation.

11 Q. And your understanding of the law at that time was
12 victim injury points assessed against your client or they
13 were -- that was a proper assessment against your client?

14 A. I will say my understanding of the law then and now is
15 that victim injury points count if the defendant is shown to be
16 the cause of the accident and I don't believe it's the sole
17 cause, the cause of the accident.

18 MS. WORCESTER: I have no further questions.

19 MR. COSDEN: Your Honor, before we proceed may I
20 please have two documents marked as exhibits?

21 THE COURT: Sure.

22 MS. WORCESTER: Can I see what they are?

23 CROSS-EXAMINATION

24 BY MR. COSDEN:

25 Q. Mr. McFee, it was your testimony a few minutes ago

1 that the law as to injury points in leaving the scene case
2 changed in 2007; is that correct?

3 A. Yes, sir.

4 MR. COSDEN: Okay. Please let the record reflect that
5 I'm showing what has been marked as Defense Exhibit A to
6 counsel.

7 May I approach the witness, please, Your Honor?

8 THE COURT: You may.

9 BY MR. COSDEN:

10 Q. Sir, I'm showing you what has been marked as Defense
11 Exhibit A. I would ask that you turn to the third page of that
12 exhibit, please.

13 A. Yes, sir.

14 Q. And please look about three quarters of the way down
15 the page there is a paragraph with the letter E in front of it
16 that is underlined.

17 A. Yes, sir.

18 Q. Now, is that the change in the law to which you
19 referred a few minutes ago?

20 A. Yes, sir.

21 Q. Okay. So we are looking at Chapter 2007-211 of Laws
22 of Florida and in 2007 the legislature added the language
23 notwithstanding Paragraph A if the conviction is for an offense
24 described in Section 316.027 and the Court finds that the
25 offender caused victim injury sentencing points for victim

1 injury may be assessed against the offender; is that correct?

2 A. Yes, sir.

3 Q. Okay.

4 MR. COSDEN: Your Honor, please let the record reflect
5 that I'm showing what has been marked as State's -- Defense
6 Exhibit B to counsel. May I approach the witness, please?

7 THE COURT: Yes.

8 BY MR. COSDEN:

9 Q. Sir, I am showing you what has been marked as Defense
10 Exhibit B. Defense Exhibit B is a report of a case called Sims,
11 S-I-M-S, v. State that is found at 998 Southern Second 494; is
12 that correct?

13 A. Yes, sir.

14 Q. Okay. I would ask that you turn to page eight of that
15 document which is actually page 506 of the original report of
16 Sims.

17 A. Yes, sir.

18 Q. There is a portion of that page that is highlighted.
19 Could you read that to us, please?

20 A. Sure, and I would note that that appears to coincide
21 with 7-A of the statute as it existed in 2007 as well. Section
22 921.0021(7)(a) provides victim injury means the physical injury
23 or death suffered by a person as a direct result of the primary
24 offense or any additional offense for which an offender is
25 convicted and which is pending before the Court for sentencing

1 at the time of the primary offense. Would you like me to keep
2 reading the highlighting?

3 Q. Please, Your Honor.

4 A. The direct result language clearly in parts include a
5 causation requirement which must exist between the death and the
6 victim and the charged offense of leaving the scene of an
7 accident resulting in death.

8 MR. COSDEN: Your Honor, I have no further questions.

9 THE WITNESS: Would you like me to explain, sir?

10 MR. COSDEN: May I have the exhibits back, please?

11 THE WITNESS: Would you like me to explain why one
12 doesn't apply to the other?

13 MR. COSDEN: No, sir.

14 THE COURT: The exhibits go to the clerk. They have
15 been marked for the record, so they become part of the
16 record even though they are not admitted but, yes, you may
17 have them back to give to the clerk.

18 MR. COSDEN: I don't think there is any real need to
19 admit these, Your Honor. They are part of the law of the
20 Florida.

21 THE COURT: Any redirect, Ms. Worcester?

22 REDIRECT EXAMINATION

23 BY MS. WORCESTER:

24 Q. Your Honor, please explain what you wanted to explain
25 to defense counsel.

1 A. May I have the exhibits again?

2 THE COURT: Sure. Would you get them, Ms. Worcester,
3 and pass them?

4 THE WITNESS: The Sims case was a case that I was
5 obviously very well aware of at the time of Adam's case.
6 The Sims case gave me great hope that the victim injury
7 points would not count. So I went into the Sims case with
8 the understanding that they would not count based on this.
9 In looking at it, the language that has been cited that was
10 highlighted by counsel marks as Paragraph A of the actual
11 law 921.0021. That is what Subparagraph A says but then
12 when you go to the additional language was added in 2007 it
13 is notwithstanding Paragraph A, so despite that it then
14 says the conviction for an offense described in 316.027
15 which is our leaving the scene with a death and the Court
16 finds the offender caused the victim injury, sentence
17 points for the victim injury may be assessed against the
18 offender.

19 So when I looked at it I said this is 2007 this law
20 passed but the Supreme Court came out in 2008 so I'm
21 hopeful again that perhaps they interpreted this law
22 differently. In reviewing the Supreme Court ruling the
23 Fifth District Court of Appeals ruled in 2004 on this very
24 issue in Sims. Sims was an appeal from the Fifth D.C.A.
25 that happened in 2004 was the appellate decision, so the

1 accident happened well before 2004 in the Sims matter. It
2 was the old law that Sims was decided under and the
3 defendant in Sims had to be prosecuted, sentenced according
4 to the law which existed at the time, not which
5 subsequently was passed after he was convicted in the trial
6 court. So I knew that because we are in 2016, 2007 law
7 would apply to our facts.

8 BY MS. WORCESTER:

9 Q. And that's what you operated under when you reviewed
10 the score sheet and looked at the 120 victim points?

11 A. Correct.

12 Q. Which raised the low end to the ten and a half?

13 A. Correct.

14 Q. And you explained that to the defendant?

15 A. Absolutely.

16 MS. WORCESTER: No further questions.

17 MR. COSDEN: Very briefly, Your Honor.

18 THE COURT: Okay.

19 RE CROSS EXAMINATION

20 BY MR. COSDEN:

21 Q. Sir, you would agree with me that the -- the change to
22 the law that we have been discussing that's expressed in Chapter
23 2007.211 Florida statutes was in 2007, correct?

24 A. The change in the law was in 2007, yes, sir.

25 Q. Yes. You would agree with me that the Supreme Court

1 decided Sims in 2008, correct?

2 A. They did based upon facts that occurred well before
3 2004.

4 Q. Okay.

5 A. And the law that existed in 2004.

6 MR. COSDEN: All right. Thank you. I have no other
7 questions.

8 THE COURT: Anything further?

9 MS. WORCESTER: Yes -- no, ma'am.

10 THE COURT: Thank you. Thank you. You may step down.

11 THE WITNESS: Thank you. Am I excused?

12 THE COURT: I believe so.

13 MS. WORCESTER: Yes, sir.

14 THE COURT: The State rests?

15 MS. WORCESTER: Yes, ma'am.

16 THE COURT: Okay. Any rebuttal evidence, Mr. Cosden?

17 MR. COSDEN: No, Your Honor. Thank you. Argument
18 only.

19 THE COURT: Argument. You are the movant, so I will
20 hear from you first.

21 MR. COSDEN: Judge, this case is about whether or not
22 Mr. McFee properly advised the defendant. Now, Mr. McFee
23 apparently told the defendant that victim injury points
24 were appropriate in this case. Now, apparently Mr. McFee
25 did that based on a 2007 change to the law which provides

1 very clearly that if the conviction is for an offense
2 described in Section 316.027 which applies and the Court
3 finds that the offender caused the victim injury, sentence
4 points for victim injury may be assessed.

5 The Supreme Court held essentially the same thing in
6 the Sims case. Sims had been driving his truck when he
7 struck and killed the victim and Mr. Sims left the scene of
8 the accident without ever stopping his truck and was
9 charged with violating Section 316.027.

10 Now, Mr. McFee read a portion of the opinion in Sims
11 which provides the victim injury means the physical injury
12 or death suffered by a person as a direct result of the
13 primary offense or any additional offense for which an
14 offender is convicted. This direct result language clearly
15 imparts and includes a causation requirement. Well, that
16 is entirely consistent with the 2007 change to the statute.
17 The Court further held -- and does Your Honor have a copy
18 of Sims or --

19 THE COURT: Yes, I do.

20 MR. COSDEN: Okay. The Court further held and this is
21 at page 506 of the original opinion, page eight of the copy
22 that I handed up a little bit ago, right-hand column, first
23 full paragraph. Crucial to the determination whether a
24 causal connection exists between the death of the victim
25 and the alleged offense of leaving the scene of an accident

1 resulting in death is a determination of when this
2 particular criminal offense began. Sims was not charged
3 with vehicular homicide or any other offense in which the
4 crime actually involved the impact that caused the death.
5 Instead, Sims was only charged with the offense of leaving
6 the scene of an accident resulting in death.

7 Well, exactly the same is true here. There was no
8 charge involving causation of the death of anybody.
9 Mr. Costello was charged with leaving the scene of an
10 accident involving a death. That's what he pled to. Now,
11 there is before this Court absolutely nothing, no evidence,
12 no testimony, no nothing upon which this Court may find
13 that Mr. Costello caused the death of anybody.
14 Mr. Costello did not ever admit to causing the death of
15 anybody. Nothing in the charge against Mr. Costello
16 requires a finding that he caused the death of anybody. He
17 is simply charged with leaving the scene of an accident
18 involving a death. We do not know because there is no
19 evidence before this Court how the death of the victim in
20 this case was caused. We simply do not know.

21 Now, in this case, therefore, in order to add
22 120 points to the score sheet the State would have to prove
23 that Mr. Costello caused the death of a victim. And there
24 is no evidence, no admission, no nothing upon which the
25 Court -- upon which this Court might now make that finding.

1 Therefore, it is clear that the 120 points for victim
2 injury are not supported by any record evidence.

3 Therefore, Mr. Costello was seriously misadvised. He
4 believed at the time that he entered his plea that the
5 minimum mandatory -- not the minimum mandatory sentence,
6 the minimum criminal punishment code sentence was ten and a
7 half years based on advice that he was given by his
8 attorney. Mr. Costello has said that. Mr. Costello's
9 mother said that and that's what Mr. McFee said. They have
10 all agreed.

11 At the time of the plea the prosecutor re-enforced
12 that. The prosecutor said the same thing. Now, we know
13 from looking at the score sheet and from the testimony here
14 today that that was simply an error of fact. At the time
15 that Mr. Costello entered his plea there was nothing,
16 nothing at all before this Court which would have
17 established that Mr. Costello should be sentenced to ten
18 and a half years as a presumptive minimum sentence.

19 Now, there is a minimum mandatory sentence of four
20 years in the statute but that's less than half of what
21 Mr. Costello was eventually sentenced to and which he
22 agreed to be sentenced to based on misinformation from his
23 attorney. If there were some evidence before this Court
24 somewhere at sometime that Mr. Costello caused the death of
25 anybody, well, the charge might have been different and the

1 result might have been different but that does nothing for
2 any of us. What we have to look at is what the facts were
3 at the time the plea was entered and the facts were that --
4 excuse me -- Mr. Costello was misadvised by his attorney.
5 Therefore, he should be allowed to withdraw his plea.
6 Thank you.

7 MS. WORCESTER: Your Honor has heard testimony from an
8 attorney that represented -- the Honorable Shannon McFee
9 that represented Mr. Costello and he has told this Court
10 that he went over this case and that he has handled many
11 cases like this and that he himself thought Sims might
12 apply in this circumstance and was hoping he could get it
13 to apply. However, after doing diligent discovery where he
14 took the depositions of multiple -- I think he said 40
15 witnesses, he found two witnesses that would if they had
16 went to trial testify that the defendant caused the
17 accident.

18 MR. COSDEN: Objection. Facts not in evidence, Your
19 Honor.

20 THE COURT: Overruled.

21 MS. WORCESTER: That was part of the advice that he
22 discussed with the defendant. So for the defendant to come
23 in here now and say he was misadvised because he wasn't
24 supposed to get the 120 victim injury points, that's
25 certainly disingenuous because he does -- the Judge did

1 testify that they did talk about this extensively. He pled
2 to the information which I will need to hand this to the
3 clerk and which was testified or was questioned by Ms.
4 Marzano during his sentencing that he was the driver of a
5 motor vehicle involved in a crash resulting in death to
6 Adam Roger King. That was what he -- that is what he pled
7 to on that particular day. A crash, a death. The Court --

8 THE COURT: That charge does not take the next step
9 which is for the defendant have caused the death, so that
10 charge is -- that charge supports leaving the scene of a
11 crash involving the death but there is two parts to
12 Subsection E of 921.002(7). If the conviction is for an
13 offense described in Section 316.027 and the Court finds
14 that the offender caused victim injury then sentence points
15 are included.

16 MS. WORCESTER: And at the time of the defendant's
17 plea during his plea colloquy this Court did find that he
18 caused the death.

19 MR. COSDEN: Objection, Your Honor, facts not in
20 evidence.

21 THE COURT: Show me where I made that finding and how
22 did I make it? I mean, what evidence would I have had to
23 make it?

24 MS. WORCESTER: I found it when I was going through
25 it.

1 THE COURT: Okay. So it is in the transcript of the
2 plea colloquy which is Exhibit 2?

3 MS. WORCESTER: Yes, ma'am. It is towards the end
4 of --

5 MR. COSDEN: May we have a page and line, please?

6 MS. WORCESTER: 44, page 44, the Court -- the first
7 time the Court talks. Mr. Costello, based on your plea to
8 the fourth amended information of no contest, I adjudicate
9 you --

10 MR. COSDEN: Hang on just a moment. I think we are
11 on -- I think our pages are numbered differently.

12 MS. WORCESTER: This came out of the clerk's.

13 MR. COSDEN: Well, so did this. Okay. Keep reading
14 and --

15 MS. WORCESTER: No, I will wait for you.

16 MR. COSDEN: Okay. After the close of all witnesses
17 the Court asks is there any legal cause why the sentence
18 should not be pronounced at this time. That is page 50,
19 line 22. Mr. McFee says, no, Your Honor, and then the
20 Court says, Mr. Costello, based on your plea to the fourth
21 amended information. Is that where you are?

22 MS. WORCESTER: Yes, sir, that's where I am.

23 MR. COSDEN: Okay. Go ahead.

24 MS. WORCESTER: That's not the section I needed.

25 There was a point in time when the Court said that you took

1 judicial notice of the court file, the affidavit which
2 contained the statements --

3 MR. COSDEN: Whoa. Wait a minute. Where does the
4 Court say that?

5 MS. WORCESTER: All right. Just give me a minute. It
6 is on page 22 of the one that I handed the Court at the
7 very bottom of the page.

8 THE COURT: That's a long way from me saying I made
9 any finding that Mr. Costello caused the death of the
10 victim.

11 MS. WORCESTER: Well, Your Honor --

12 THE COURT: I do find a factual basis and venue based
13 on the stipulation of the probable cause affidavit in the
14 court file as well as evidence taken by the Court at
15 various evidentiary hearings throughout the pendency of
16 this action. That's where you think I am making a finding
17 of fact with regard to causation? Is that what you are
18 reciting to me?

19 MS. WORCESTER: Yes, ma'am. Yes, ma'am.

20 THE COURT: I don't read it that way.

21 MS. WORCESTER: I still say that we are here because
22 he is claiming to be misadvised, not that it wasn't found.
23 Misadvised about it. Clearly Judge McFee advised him ad
24 nauseam about the 120 victim injury points. That's what we
25 are here for, not whether he gets them or not but that he

1 was misadvised.

2 THE COURT: Right. It was a plea and I'll ask
3 Mr. Cosden these questions. So, of course, it was a plea.
4 There was no evidence with regard to the actual accident
5 itself. The Court was in a position to determine whether
6 there was a factual basis and venue which I did determine
7 but the testimony today was that the depositions of
8 witnesses would have testified at trial that the defendant
9 caused the death of the victim and let's imagine that we
10 had a trial instead of a plea and as Mr. -- then Mr. McFee,
11 now Judge McFee testified, the Judge, whoever was
12 presiding, based on the evidence found presented at trial
13 the Judge found that there was a conviction, the jury would
14 have found that and the Judge found that the defendant, in
15 this case Mr. Costello, caused victim injury, then sentence
16 points for victim injury would be properly assessed
17 pursuant to Section 7-E. Do you agree?

18 MR. COSDEN: Your Honor, I'm not sure I understand the
19 question.

20 THE COURT: Well, what do you think --

21 MR. COSDEN: Maybe I can respond to that and make
22 sense of what you are -- what the Court is asking me. Had
23 the case gone to trial I do not know what the witnesses
24 would have testified about. Certainly, had the case gone
25 to trial and had some witness testified --

1 THE COURT: Could you go to a microphone, please?
2 Thank you. Had the case gone to trial and had a witness
3 testified --

4 MR. COSDEN: Had the case gone to trial and had some
5 witness testified that Mr. Costello caused the death of the
6 victim, then and only then could victim injury points have
7 been added. But we do not know because there has been no
8 testimony by any eyewitness how that might have been
9 established.

10 Now, had Mr. McFee said to Mr. Costello, Mr. Costello,
11 if this case goes to trial and if it is established that
12 you caused the death of the victim and then left the scene,
13 then perhaps it would have been possible for victim injury
14 points to be added. Now, I think that would be a fair
15 statement of the law. However, that didn't happen. If
16 that had happened, if there had been evidence that was
17 clear that Mr. Costello had caused the accident, that would
18 have certainly been known to the State and it is likely
19 that he would have been charged not with leaving the scene
20 of an accident causing death but with some sort of
21 vehicular homicide. Which version, I have no idea. But
22 that didn't happen. That never happened. The State filed
23 five informations in this case, an original and four
24 amended. He was never charged with anything that required
25 proof of causing of death.

1 Now, I do not know what Mr. McFee saw. I do not know
2 who Mr. McFee talked to. I do not know what evidence was
3 available to Mr. McFee but on the evidence available to the
4 State and on the evidence available to this Court which is
5 the essentially none other than the facts stated in the
6 information, there is no basis for a finding that would
7 support addition of victim injury points.

8 THE COURT: So is it your theory that then Lawyer
9 McFee misadvised the defendant because he advised the
10 defendant that victim injury points were appropriately
11 included on a score sheet where the evidence at trial would
12 likely show that the defendant caused the accident and the
13 death of the victim?

14 MR. COSDEN: I think the correct statement would be,
15 Your Honor, that victim injury points would be appropriate
16 on a score sheet if there is evidence that the defendant
17 caused the death of the victim. Now, we are a long way
18 from that with what we know now. We do know that the State
19 never charged Mr. Mc -- or Mr. Costello with causing the
20 death of the victim. It's simply not there. Now, the
21 State could have done that. The charge is up to the State.
22 We don't control that, but the State never charged him with
23 that. So I think it is fair to assume as we must that the
24 State would have charged the most serious offense that the
25 State thought that it could prove. That's ordinarily what

1 the State does and in this case that's not what the State
2 did. The State did not charge --

3 THE COURT: So you think I should assume --

4 MR. COSDEN: -- him with causation.

5 THE COURT: -- there was no evidence that the
6 defendant caused the death because the State didn't charge
7 it? That's not the Court's consideration.

8 MR. COSDEN: No, Your Honor.

9 THE COURT: The Court's consideration is whether or
10 not the defendant received bad advice from his attorney
11 that caused him to accept a plea that he otherwise wouldn't
12 have taken. That's the ultimate issue, right?

13 MR. COSDEN: That's correct, that's the ultimate
14 issue.

15 THE COURT: And your position is that he did receive
16 bad advice because you believe there would have been no
17 evidence that Mr. Costello caused the death of the victim
18 and that, therefore, there would have been no lawful way to
19 include the victim injury points that were included on
20 Mr. Costello's score sheet.

21 MR. COSDEN: I think that's a compound question, Your
22 Honor. Let me break it in half. There is no evidence
23 before this Court tending to show that Mr. Costello caused
24 the death of the victim. We know because Mr. McFee told us
25 that he advised the defendant that he believed, rightly or

1 wrongly, that there was such evidence.

2 Now, I don't know what Mr. McFee knew when he advised
3 the defendant. I have no way to know that. But at the
4 very least Mr. McFee should have told Mr. Costello if the
5 State can prove that you caused the death of the victim
6 they can add victim injury points but there has been no
7 testimony from anybody that Mr. McFee actually said that.
8 The testimony here today from both Mr. McFee and from
9 Mr. Costello and from Mrs. Costello was that victim injury
10 points will be included, must be included and, therefore,
11 ten and a half years is the lowest sentence that
12 Mr. Costello could receive. That was error.

13 THE COURT: So I did not interpret Mr. McFee's
14 testimony in the same way that you did because I recall
15 distinctly Mr., now Judge, McFee testifying that he
16 explained to the defendant the score sheet and the
17 inclusion of victim injury points and that if the defendant
18 was shown to be a cause of the accident, not the sole cause
19 but a cause of the accident that resulted or caused, either
20 way you want to say it, the death of the victim that those
21 points would be included on his score sheet. So there was
22 advice about the inclusion of the victim injury points on
23 the score sheet which Mr. McFee believed was accurate based
24 on the evidence in the case that he had learned through the
25 course of discovery, not that there was no conversation

1 about victim injury points and not that they will
2 automatically be included in every case but that they were
3 appropriately included in Mr. Costello's case. That's the
4 way I understood that testimony. And I think you are
5 saying that you think they were not appropriately included
6 in Mr. Costello's case and, therefore, I should grant the
7 motion to withdraw plea.

8 MR. COSDEN: Mr. Costello has told us that he was not
9 advised correctly about victim injury points. Now,
10 unfortunately, we can't go back and figure out now exactly
11 what words Mr. McFee spoke to Mr. Costello but we know from
12 the testimony of all three witnesses that Mr. Costello
13 believed that victim injury points were necessarily to be
14 included.

15 Now, we do not know because we have no way to know
16 what would have happened if Mr. McFee had told
17 Mr. Costello, look, if the State can prove up that you
18 caused the death, then victim injury points would be
19 included but nobody has said that anybody said that or that
20 Mr. Costello believed it. Therefore, the conclusion that
21 Mr. McFee drew that victim injury points must be included
22 was simply not supported by anything that is before this
23 Court.

24 Now, I'm not going to tell the Court what the evidence
25 is going to be if this case goes to trial, okay. I don't

1 know that but I am telling the Court that Mr. Costello
2 thinks he was misadvised because he was told that ten and a
3 half years was the lowest sentence he could get. He was
4 not told, well, if the State proves up causation of death,
5 then you will get ten and a half years. He was told ten
6 and a half years is the lowest sentence you are going to
7 get. That would necessarily include the 120 victim injury
8 points. Otherwise, the lowest sentence he could get would
9 be four years.

10 THE COURT: I don't think there is any dispute about
11 that but you think the evidence before the Court is that
12 Mr. McFee told the defendant given the nature of this
13 charge 120 victim injury points are automatic.

14 MR. COSDEN: That's certainly what my recollection of
15 the evidence is. That's also Mr. Costello's recollection
16 of the evidence.

17 THE COURT: And do you believe that Mr. McFee's
18 explanation of his understanding of the law not as applied
19 to Mr. Costello's case but just the state of the law at the
20 time of Mr. Costello's plea was an error in some way?

21 MR. COSDEN: Yes.

22 THE COURT: Not as applied, just like --

23 MR. COSDEN: Yes, I think Mr. McFee's explanation of
24 the law to Mr. Costello was in error, yes.

25 THE COURT: No, his explanation to us in court today.

1 Do you think that was in error in some way?

2 MR. COSDEN: No, I don't think his explanation today
3 was in error. I think he correctly stated what the law was
4 at the time of the plea and still is now but Mr. McFee
5 apparently when advising Mr. Costello assumed for whatever
6 reason, I don't know why, that the State could prove
7 causation of death. It seems to me, now this is -- this is
8 my opinion, not anybody else's. It seems to me very likely
9 that if the State believed that it could show that
10 Mr. Costello caused the death of somebody, the charge would
11 not have been leaving the scene of an accident with death,
12 the charge would be something more serious, something
13 involving a homicide but that's my opinion. That's not
14 supported by evidence. I don't know what the evidence
15 might have been. But what the Court needs to consider is
16 what the evidence was at the time of the plea.

17 THE COURT: Okay. Thank you. I will issue a written
18 ruling.

19 MR. COSDEN: Your Honor, may I have one moment,
20 please?

21 Your Honor, when the Court entered the order to
22 transport Mr. Costello from the Department of Corrections
23 the Court asked that the sheriff hold him until he is
24 released by the Court. I would ask now that Mr. Costello
25 be allowed to stay in Fort Myers until such time as this

1 Court issues a written ruling.

2 THE COURT: That's fine because I don't think it will
3 be long.

4 MR. COSDEN: Thank you, Your Honor.

5 MS. WORCESTER: May we be excused, Your Honor?

6 THE COURT: Yes.

7 (WHEREUPON, the proceedings were concluded at 3:11
8 p.m.)
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1 STATE OF FLORIDA)

2 COUNTY OF LEE)

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4 I, Tammy S. Hoffmann, do certify that I did
5 stenographically report the foregoing proceedings and that the
6 typewritten transcript, consisting of pages numbered 3 through
7 58, is a true record.

8 Dated this 27th day of March, 2023.

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12 Tammy S. Hoffmann, RMR FPR
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**UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
FORT MYERS DIVISION**

ADAM MURRAY COSTELLO,
Petitioner,

Case No.: 2:25-cv-74-JLB-NPM

vs.

SECRETARY, DEPARTMENT OF
CORRECTIONS,
Respondent.

_____ /

EXHIBIT 26

**IN THE CIRCUIT COURT OF THE TWENTIETH JUDICIAL CIRCUIT IN AND FOR
LEE COUNTY, FLORIDA CRIMINAL ACTION**

STATE OF FLORIDA,

Plaintiff,

vs.

Case No. 16-CF-371

ADAM COSTELLO,

Defendant.

**ORDER DENYING DEFENDANT'S RULE 3.850 AMENDED MOTION
AFTER EVIDENTIARY HEARING**

THIS CAUSE came before the Court for hearing on February 14, 2023, on Defendant's amended motion titled "Motion To Withdraw Plea Based Upon Ineffective Assistance Of Counsel," pursuant to Fla. R. Crim. P. 3.850, filed by counsel March 3, 2022. Having reviewed the motion, the State's response, Defendant's reply, the case file, the applicable law, and considered evidence and argument presented at the hearing, the Court makes the following findings of fact and reaches the following conclusions of law:

Procedural History

1. Defendant was arrested on September 2, 2016, pursuant to an Amended Warrant to Arrest charging him with Leaving the Scene of a Traffic Crash Involving Death and Tampering with Evidence, crimes arising from a traffic crash that occurred in Fort Myers, Lee County, Florida, on June 19, 2016. *See* Arrest Warrant and supporting affidavit, attached hereto as Court Exhibit A. Defendant was subsequently formally charged with those crimes. *See* 4th Amended Information attached hereto as Court Exhibit B.

2. Defendant pled "no contest" pursuant to a negotiated plea agreement with the State, which was formally accepted by the Court at a hearing on March 12, 2018. The plea agreement specified that the maximum sentence for count one was 30 years in prison and for count two was

5 years in prison. According to the plea agreement, Defendant was sentenced to 10.5 years in prison on count one with a 4 year minimum mandatory sentence, and 5 years in prison on count two. *See* Plea Agreement Waiver of Rights attached hereto as Court Exhibit C.

3. The scoresheet used for sentencing pursuant to the plea agreement provided a lowest permissible sentence of 126.3 months in prison. 120 victim injury points were imposed. *See* Criminal Punishment Scoresheet attached hereto as Court Exhibit D.

4. Defendant did not appeal.

5. On March 5, 2020, Defendant filed a motion to vacate sentence for ineffective assistance of counsel, pursuant to Rule 3.850. On July 14, 2020, the State was ordered to respond, and it did so on September 9, 2020. Defendant filed a reply on September 14, 2020, and the State filed a notice of objection to the Defendant's reply on September 17, 2020.

6. On April 19, 2021, this Court issued an order denying Defendant's 3.850 motion. Defendant filed an appeal with the Second District Court of Appeal, 2D21-1384. On December 22, 2021, the Second District Court of Appeal issued an opinion reversing the summary denial of Defendant's March 5, 2020, 3.850 motion, and remanding for an order giving Defendant leave to amend the 3.850 motion. *Costello v. State*, 330 So.2d 1052 (Fla. 2d DCA 2021).

7. On January 5, 2022, this Court issued an Order vacating the denial of the Defendant's March 5, 2020, 3.850 motion and giving Defendant leave to amend.

8. On March 3, 2022, Defendant filed the instant motion raising one claim. Defendant argues that counsel was ineffective for failing to object to the victim injury points on his scoresheet, citing *Sims v. State*, 998 So. 2d 494 (Fla. 2008), for the premise that there must be causation in order to impose victim injury points. Defendant argues that he was prejudiced because he was advised the minimum sentence was 10.6 years, when the minimum sentence without the victim

injury points would have been 36.3 months. In sum, Defendant claims that his trial counsel provided ineffective assistance by failing to note that victim injury points had been improperly included in his Criminal Punishment Code Scoresheet and by affirmatively misadvising him as to the lowest permissible sentence he could receive if found guilty at trial.

9. The State was ordered to respond, and did so on May 11, 2022. In its written response, the State argued that the Defendant's motion should be summarily denied with prejudice. More specifically, the State argued, *inter alia*, "that with the parties' stipulations to a factual basis, this Court taking judicial notice of the initial arrest affidavit and this Court's formal acceptance of [Defendant's] plea to both counts of the information there is ample record documentation to support the assessment of the 120 death points on [Defendant's] scoresheet."

10. On May 16, 2022, Defendant filed a reply to the State's response.¹

11. On December 9, 2022, this Court issued an Order directing an evidentiary hearing on Defendant's March 3, 2022, amended 3.850 motion.

12. The hearing was held on February 14, 2023. The Defendant was present with counsel and testified on his own behalf, along with his mother, Susan Costello. The State called Defendant's trial defense counsel, Shannon H. McFee,² as a witness.

¹ The Defendant did not request leave of court to file a reply, and the State did not file an objection.

² Shannon H. McFee is now a Circuit Judge in the 20th Judicial Circuit, but he was an attorney in private practice representing the Defendant as lead defense counsel throughout discovery, motions practice, plea negotiations, and at the March 12, 2018, plea acceptance hearing in this case. To avoid confusion, the Court will refer to Judge McFee as "Mr. McFee," as he was known at the time of his representation of the Defendant.

Conclusions of Law

13. To prevail on a claim of ineffective assistance of counsel, Defendant must demonstrate that: (1) counsel's performance was deficient, and (2) there is a reasonable probability that the outcome of the proceedings would have been different. *Strickland v. Washington*, 466 U.S. 668 (1984); *Williamson v. Dugger*, 651 So. 2d 84 (Fla. 1994). The Court notes that in reviewing claims of ineffective assistance of counsel, it must apply a strong presumption that counsel's conduct falls within the range of reasonable professional assistance and must avoid the distorting effects of hindsight. The standard is reasonably effective counsel, not perfect or error-free counsel. *Coleman v. State*, 718 So. 2d 827 (Fla. 4th DCA 1998); *Schofield v. State*, 681 So. 2d 736 (Fla. 2d DCA 1996). It is further noted that, in general, tactical or strategic decisions of counsel do not constitute ineffective assistance of counsel. *Gonzales v. State*, 691 So. 2d 602 (Fla. 4th DCA 1997).

14. As to a claim of ineffective assistance of counsel arising out of the plea process, in order to satisfy the "prejudice" requirement, a defendant must show that there is a reasonable probability that, but for counsel's errors, he would have not entered a plea and would have insisted on going to trial. *Hill v. Lockhart*, 474 U.S. 52 (1985).

15. The Second District Court of Appeal, quoting *Wright v. State*, 174 So.3d 400, 402 (Fla. 4th DCA 2015), wrote in its December 22, 2021, opinion in the instant case that "[a]n error in the scoresheet could render a plea involuntary where the defendant shows that the sentence pled to was *based on* the minimum permissible sentence according to the erroneous scoresheet calculation and that the defendant would not have entered into the plea if he or she would have been aware of the correct sentencing range." *Costello*, 330 So.2d at 1054.

16. *Sims v. State*, 998 So. 2d 494, 506–07 (Fla. 2008), citing sections 316.027(1)(b) and 921.0021(7)(a), Florida Statutes (2001), held that victim injury points are properly assessed

when the evidence indicates that the victim's death was a direct result of the underlying offense of fleeing the scene of a crash resulting in death. The *Sims* opinion explained that, pursuant to section 921.0021(7)(a), for injury points to be assessed, there must be a causal connection between the death of the victim and the charged offense of leaving the scene of an accident resulting in death. In other words, the victim's death must have been caused by the offense of leaving the scene. *See May v. State*, 747 So.2d 459 (Fla. 4th DCA 1999)(where victim dragged after being hit, injury was a direct result of the offender leaving the scene and injury points were properly assessed).

17. Notably, the holding in *Sims* was based on the Florida Supreme Court's interpretation of subsection (7)(a) of the 2001 version of section 921.0021, Florida Statutes. In 2007, the legislature amended section 921.0021, to add subsection (7)(e), which provides that, "[n]otwithstanding paragraph (a), if the conviction is for an offense described in s. 316.027 and the court finds that **the offender caused victim injury**, sentence points for victim injury may be assessed against the offender." Laws 2007, c. 2007-211 §4. (Emphasis added.) Legislative staff analysis of the amendment recognized that, pursuant to section 921.0021(7)(a), "[g]enerally, victim injury points are not assessed for the offense of leaving the scene of an accident involving injury or death because the injury or death is not a direct result of the offender leaving the scene." Fla. H.R., HB 25 (2007), Staff Analysis (April 3, 2007). HB 25 (2007) amended section 921.0021, adding subsection (7)(e), to authorize a judge to assess victim injury points when a person is convicted of leaving the scene of an accident involving injury or death, with the effect "of significantly increasing the lowest permissible sentence for the offense." *Id.*

18. The plain language of section 921.0021(7)(e), Florida Statutes (2016), provides that, if a conviction is for an offense described in section 316.027, points for victim injury "may" be assessed "if the court finds that the offender caused victim injury." Section 921.0021(7)(e)

expressly provides that points may be assessed in these circumstances notwithstanding the “direct result of the primary offense” requirement of section 921.0021(7)(a).

19. Absent agreement of the defendant, victim injury points must be supported by evidence in the record. *See Hall v. State*, 598 So.2d 230, 231 (Fla. 2d DCA 1992)(“Because there is evidence in the record to support the trial court’s finding, we find no abuse of discretion in the scoring of the victim’s injury.”). Additionally, *Alleyne v. United States*, 570 U.S. 99 (2013), arguably may require jury fact-finding where victim injury points increase the lowest permissible sentence.³ However, it is clear that a defendant may agree to inclusion of victim injury points as part of a plea bargain. *See Saffold v. State*, 310 So.3d 55, 57 (Fla. 4th DCA 2021)(victim injury points cannot be assessed unless defendant stipulates that penetration occurred or agrees to inclusion of the points as part of a plea bargain); *Ayos v. State*, 275 So.3d 178 (Fla 4th DCA 2019) (no error to include 160 sexual penetration points on the sentencing scoresheet following defendant’s no contest plea, or if any error occurred, the error was harmless, where, among other factors, counsel implicitly stipulated to penetration and defendant did not object to the scoresheet).

Findings of Fact

20. Mr. McFee entered his notice of appearance as counsel of record for the Defendant on October 27, 2016, and represented the Defendant through July, 2018. Mr. McFee had been a criminal defense attorney for over 20 years at the time and he had represented numerous defendants in traffic cases involving fatalities. Mr. McFee was aware of the holding in *Sims v. State*, 998 So. 2d 494 (Fla. 2008), at the time. He was also aware that *Sims* applied the law in effect at the time

³ *See Vereen v. State*, 267 So.3d 548, 550 (Fla. 1st DCA 2019), which recognized, but did not decide the issue, and noted the split of authority between *Bean v. State*, 264 So.3d 947, 951 (Fla. 4th DCA 2019)(finding *Alleyne* inapplicable to “scoring of victim injury points”), and *Lakey v. State*, 172 So.3d 989, 989 (Fla. 5th DCA 2015)(“Because the jury did not make a specific finding of penetration rather than union, it was improper to include points for penetration.”).

of the crime in that case. Whether victim injury points could be assessed pursuant to section 921.0021(7)(e), Florida Statutes, was not an issue in *Sims*. Mr. McFee considered the issue and interpreted 921.0021(7)(e) to allow victim injury points to be assessed if the Defendant was found to have caused the injury or death of the victim. Mr. McFee testified that he believed that victim injury points could lawfully be assessed against the Defendant if the Defendant was “a cause,” not necessarily the only cause, of the accident.

21. The Defendant and Mr. McFee talked *at least* two times about the sentencing scoresheet, including specifically about the victim injury points. Early in the case, the State provided a proposed scoresheet that did not include any victim injury points. Mr. McFee thought this omission of victim injury points was probably an oversight on the State’s part. As anticipated, this scoresheet was later revised by the State to include victim injury points. After discussions with the Defendant (and his mother) Mr. McFee tried to convince the State to delete the “death points” on the revised proposed scoresheet but the State would not agree.

22. Prior to the plea in March, 2018, Mr. McFee discussed the crash and potential defenses with the Defendant, conducted over 40 depositions, and represented the Defendant at a number of pretrial evidentiary hearings. Based on the evidence in discovery, in particular the depositions of eyewitnesses Timothy Bernal and Shame Romero, Mr. McFee concluded that the scoresheet that included victim injury points was accurate. While Mr. McFee conceded that there were some inconsistencies in the testimony of the eyewitnesses to the crash, Mr. McFee was confident that if the case went to trial and the Defendant was convicted, the Defendant would be found to have been a cause of the death of the victim and victim injury points would be included

on the sentencing scoresheet.⁴

23. Mr. McFee credibly testified that he thoroughly discussed the inclusion of the victim injury points with the Defendant prior to the Defendant accepting the plea. Mr. McFee did not tell the Defendant that the “low end” of the guidelines would be 36.3 months without the victim injury points. Instead, Mr. McFee explained the victim injury points and why Mr. McFee believed they were properly included on the scoresheet that was the basis for the State’s plea offer. Mr. McFee also told the Defendant (in the presence of the Defendant’s mother) that if the Defendant was convicted at trial he could get the maximum sentence.

24. The 10.5 year prison sentence offer accepted by the Defendant came late in the case.⁵ Prior to that offer, the State made an offer for 15 years prison which was never seriously considered by the Defendant. Ultimately, the Defendant agreed to cooperate with the State in another prosecution and the parties agreed to a 10.5 year sentence on count one and a concurrent 5 year sentence on count two. *See* Court Exhibit C. That offer was based in part on a scoresheet that included 120 victim injury points and showed 126.3 as the lowest permissible prison sentence in months. *See* Exhibit D. The Defendant relied, at least in part, on this scoresheet in determining to accept the State’s plea offer.

25. In entering his plea, Defendant affirmatively waived his right to trial. He also expressly agreed that the scoresheet, which he knew included victim injury points, was true and accurate. *See* Court Exhibit F, pp. 12-14. Through counsel, Defendant also agreed to a factual basis. *Id.* at p. 20. The Court found a factual basis based on the stipulation, the probable cause

⁴ The probable cause affidavit, attached hereto as Exhibit A, supports Mr. McFee’s conclusion that the evidence at trial would have provided a factual basis for the victim injury points. This was a two vehicle crash where the vehicle driven by the Defendant reportedly changed lanes, colliding with a motorcyclist who died at the scene.

⁵ On January 18, 2018, the case was set for trial call on February 26, 2018. At trial call, the case was scheduled for a 4-5 day trial to begin March 12, 2018. Defendant entered a plea on March 12, 2018. *See* Court Exhibit E.

affidavit in the court file, as well as evidence taken by the Court at various evidentiary hearings throughout the pendency of the action. *Id.* at pp. 22-23.

26. Defendant testified that if he'd known the lowest permissible guidelines sentence was less than 10.5 years he never would have entered a plea.⁶ Defendant agreed to the deal because he understood he likely could not do better at sentencing after a conviction at trial.

Analysis and Conclusions

27. In addition to arguing that the holding in *Sims* precluded assessment of victim injury points in this case, Defendant's postconviction counsel argues that the sentencing scoresheet was in error because there was no record evidence to support the inclusion of those points. Counsel is correct that there was no record evidence regarding causation presented at the sentencing hearing (and, of course, no jury finding based on this evidence). However, the Defendant agreed to inclusion of the points as part of the plea bargain in this case. As Mr. McFee credibly testified, the victim injury points were an issue throughout the case and Mr. McFee tried, but failed, to negotiate a sentence based on a scoresheet that did not include those points.

28. Mr. McFee's unrebutted credible testimony at the February 14, 2023, hearing is that, if the Defendant went to trial and was convicted, the evidence would support a finding that the Defendant caused injury or death to the victim. Therefore, Mr. McFee told the Defendant that the 120 points for victim injury were properly included on the scoresheet. The Defendant has not shown that this advice was erroneous. Accordingly, the Defendant has failed to show that his plea was based on misadvice of counsel.

⁶ This testimony assumes that victim injury points should not have been included on the scoresheet to increase the lowest permissible guidelines sentence, as argued by Defendant's postconviction counsel, erroneously believing that *Sims* controlled.


29. Defendant has also failed to show that he would not have entered into the plea agreement if he had understood that the victim injury points were not *required* by law to be included by the judge at sentencing after a conviction at trial. Mr. McFee thoroughly discussed the victim injury points with the Defendant. Defendant testified that he agreed to the 10.5 year plea offer because he understood he likely could not do better at sentencing after a conviction at trial. He has not shown that this was a misunderstanding.

Accordingly, it is

ORDERED and **ADJUDGED** that the Defendant's amended 3.850 motion filed March 3, 2022, is **DENIED**. This is a final order. The Defendant has the right to appeal within 30 days of the rendition of this order.

If Defendant remains in the Lee County jail pursuant to the order for transport for the February 14, 2023, hearing, he shall be returned to the custody of the Department of Corrections forthwith.

DONE AND ORDERED in Chambers at Fort Myers, Lee County, Florida, this 16th day of March, 2023.


Margaret O. Steinbeck
Circuit Judge

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by electronic service to: **Office of the State Attorney** at ServiceSAO-LEE@sao20.org, **Christopher E. Cosden, Esq.** at cosdenlaw@att.net, and **Court Administration (31)** at StaffAttorney-Lee@CA.CJIS20.ORG; this 16th day of March, 2022.

By: 

Deputy Clerk/Judicial Assistant

Exhibit “A”

9/2/2016 12:21 PM Filed Lee County Clerk of Courts

IN THE CIRCUIT COURT OF THE TWENTIETH JUDICIAL CIRCUIT IN AND FOR
LEE COUNTY, FLORIDA CRIMINAL ACTION

AMENDED WARRANT TO ARREST

STATE OF FLORIDA

16CF371

vs.

ADAM MURRAY COSTELLO

Race: White	Sex: Male	D.O.B.: 11/12/1974	SSN #: [REDACTED]
Height: 5'9"	Weight:	Eyes:	Hair:
Address: 1900 Virginia Avenue, #602 Fort Myers, FL 33901			

IN THE NAME OF THE STATE OF FLORIDA:

TO ALL AND SINGULAR SHERIFFS AND OTHER ARRESTING OFFICERS OF THE STATE OF FLORIDA.

WHEREAS, Officer Lesa R. Breneman, Fort Myers Police Department, has this day made oath before me, in Lee County, Florida, that Adam Murray Costello,

1. On or about June 19, 2016 in Lee County, Florida, was the driver of a motor vehicle involved in a crash resulting in death to Adam Roger King, a human being, and Defendant knew or should have known a crash occurred, but failed to stop or remain at the scene of the crash, or as close thereto as possible, until he/she gave personal information and rendered aid as required by Florida Statutes 316.062, contrary to Florida Statute 316.027(2)(c),

2. Between June 19, 2016 and July 31, 2016 in Lee County, Florida, did unlawfully and knowingly alter, destroy, conceal, or remove any record, document, or thing with the purpose to impair its verity or availability in a proceeding or investigation knowing that a criminal trial or proceeding or investigation by a duly constituted prosecuting authority, law enforcement agency, grand jury or legislative committee of this state is pending or is about to be instituted contrary to Florida Statute 918.13(1)(a),

contrary to the statute in such cases made and provided, and against the peace and dignity of the STATE OF FLORIDA.

THESE THEN ARE to command you forthwith to arrest the said Adam Murray Costello and bring him before me to be dealt with according to law.

Given under my hand and seal this 2nd day of September, 2016.

Judge, Lee County

S. J. L.

Warrant to Arrest:

Adam Murray Costello

Arresting Agency CR #: 2016-06161

SAO Warrant #: 2306304

2

RE: Adam Murray Costello

LEE COUNTY, STATE OF FLORIDA

STATE OF FLORIDA VS. ADAM MURRAY COSTELLO

CHARGE(S):

- 1) Leaving the Scene of a Crash - Death, F.S. 316.027(2)(c), First Degree Felony
- 2) Tampering With or Fabricating Physical Evidence, F.S. 918.13, Third Degree Felony

Returnable the _____ day of _____, A.D., _____.
Appearance Bond fixed at \$ <u>76 be set at 1st App</u>
FILED THIS _____ DAY OF _____, _____.

RECEIVED THIS WARRANT

FEES: Arrest\$ _____

_____ day of _____, A.D.,
_____, and executed it on the _____
day of _____, A.D., _____,
by arresting the within-named and having him
now before the Court, _____,
_____.

Return _____

Committing to Jail _____

Mileage _____

Release _____

Approving Bond _____

TOTAL: \$ _____

Arresting Officer _____

WITNESS(ES) FOR STATE:

Fort Myers Police Department

Arresting Agency CR#: 2016-06161

SAO Warrant #: 2306304

MWM:ell

OFFICE OF THE STATE ATTORNEY
TWENTIETH JUDICIAL CIRCUIT OF FLORIDA
Post Office Box 399
FORT MYERS, FLORIDA 33902
(941) 336-2700

Memorandum – Amended

To: Lee County Sheriff's Department, Records Division

From: State Attorney's Office, Felony Intake Division

Re: Preliminary Extradition Instruction on Warrant For:

Name: Adam Murray Costello

Race: Sex: DOB: 11/12/1974

Charge(s):

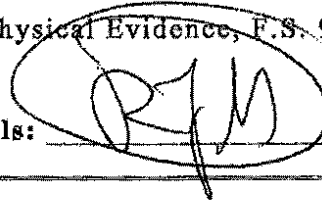
1) Leaving the Scene of a Crash - Death, F.S. 316.027(2)(c), First Degree Felony

2) Tampering With or Fabricating Physical Evidence, F.S. 918.13, Third Degree Felony

Date:

9 / 2 / 2016

Initials:



FOR PURPOSES OF ENTRY OF THE ABOVE-DESCRIBED WARRANT INTO THE FCIC AND NCIC COMPUTER SYSTEMS, OUR PRELIMINARY INSTRUCTIONS REGARDING THE LIMITS OF EXTRADITION FOR THIS WARRANT ARE AS CHECKED BELOW:

- ☒ ENTIRE U.S.
- ☐ CONTINENTAL U.S.
- ☐ EASTERN AND SOUTHWEST U.S.
- ☐ EASTERN U.S.
- ☐ SOUTHEAST U.S.
- ☐ ADJACENT STATES
- ☐ FLORIDA ONLY (FCIC ONLY)

THE ABOVE INSTRUCTIONS ARE VALID AT THE TIME OF ISSUANCE ONLY. PLEASE RECONFIRM EXTRADITION WITH STATE ATTORNEY'S OFFICE PRIOR TO ACTUAL EXTRADITION.

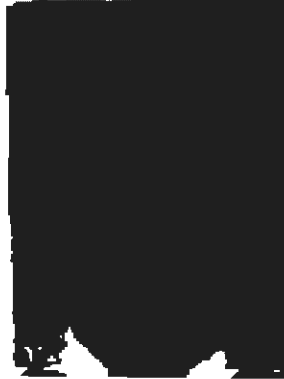
THE STATE ATTORNEY'S OFFICE RESERVES ITS RIGHT NOT TO EXTRADITE ANY SUBJECT AT ANY TIME, BASED UPON THE CASE SITUATION, FUGITIVE'S LOCATION, OR OTHER FACTORS EXISTING AT THE TIME THE FUGITIVE IS LOCATED.

THIS MEMO SHOULD BE ATTACHED TO THE RECORDS COPY OF WARRANT

MWM:ell

STATE OF FLORIDA
VS
ADAM MURRAY COSTELLO

IN THE COUNTY COURT
LEE COUNTY
STATE OF FLORIDA



DOB: 11/12/1974

Last Known Address: 1900 Virginia Ave #602, Fort Myers, FL 33901

Social Security Number: [REDACTED]

FL DL Number: C234-013-74-412-6

On June 19, 2016 at approximately 11:01 pm, Adam Murray Costello, did knowingly commit the following offenses:

1. **Leaving the Scene of a Traffic Crash Involving Death, in violation of Florida State Statute 316.027(2)(c)**
2. **Tampering with Evidence, in violation of Florida State Statute 918.13(1)(a)**

There is probable cause to believe this in that Officer Lesa Breneman, a Police Officer with the Fort Myers Police Department, conducted an investigation that revealed the following facts:

On June 19, 2016 at approximately 2301 hours, the Fort Myers Police Department received a 911 call in reference to a traffic crash that had just occurred on Colonial Blvd near the intersection of Summerlin Rd. The 911 caller was Timothy Bernal.

Officer Michael Perry was the first officer on scene and observed a motorcycle lying the eastbound lane 1 of Colonial Blvd. Officer Perry also observed the motorcycle operator lying on the grass median adjacent to a tree. The motorcycle operator was still wearing a helmet and was lifeless. Lee County Emergency Medical Services arrived on scene and pronounced the motorcyclist deceased at 2310 hours. Officer Perry noted that there were no other vehicles at the scene of the crash except the one belonging to the witness Bernal.

Traffic Homicide Investigators Lesa Breneman and Gustavo Goncalves were contacted and responded to the scene. The motorcyclist was identified as Adam King (07/21/1997).

Officer Goncalves photographed and measured the crash scene and Officer Breneman spoke with Bernal. Officer Breneman got a sworn taped statement from Bernal. Bernal advised the following: He was westbound on Colonial Blvd from Cleveland Ave. Bernal was travelling behind King on his motorcycle. Bernal observed a white pickup truck turn onto Colonial Blvd in front of him, possibly from the light at Delcon St. Bernal then observed the white pickup truck change from lane 2 suddenly into lane 1 and strike King. Bernal watched King drive up onto the median and strike the tree. Bernal noted the white pickup truck continued westbound after striking King, without stopping at any point to render aid or provide driver's information. Bernal stopped his vehicle near where King came to final rest and prepared to provide medical aid to King. Bernal noted the pickup truck continued toward the Midpoint Bridge/McGregor Blvd area but he could not confirm which direction the truck went from there. Bernal described the pickup truck which struck King and fled as white in color, newer model, with a topper on the bed of the truck. Bernal stated that damage to the truck would be to the front driver's door and fender.

Officer Breneman then spoke with Shame Romero. Romero provided a taped sworn statement. Romero was another witness to the crash. Romero stated that he was westbound on Colonial Blvd next to a white pickup truck. The pickup truck swerved into Romero's lane. Romero then watched the pickup truck change lanes into lane 1, where the motorcyclist was, and strike the motorcyclist. Romero observed the white pickup truck continue westbound on Colonial Blvd towards the Midpoint Bridge/McGregor Blvd intersection. Romero made a U-turn right after the crash and returned to where King lay at final rest to provide medical aid. Romero passed the white pickup truck going in the opposite direction. Romero believed the pickup truck had a flat front driver's side tire. Romero advised that damage to the white pickup truck would be to the driver's door area. Romero also believed that he observed a topped on the bed of the pickup truck.

Officer Breneman and Officer Goncalves surveyed the scene of the crash and located a left front tire mud flap. The part number on the mud flap belonged to a Toyota. Officer Breneman then located a driver's side heated outside glass mirror and a black plastic shell of the driver's side mirror amidst the crash debris. The part numbers on the glass and the shell of the outside mirror were consistent with a Toyota. Officer Breneman collected the mud flap and mirror and plastic shell piece as evidence.

Adam King was transferred to the Medical Examiner's Office. Pam Strassel was the Medical Examiner Investigator.

On June 21, 2016 at 0717 hours, attorney Scott Moorey contacted the Fort Myers Police Department to advise that he represents Adam Costello, later identified as Adam Murray Costello (11/12/1974). Moorey further advised that the white pickup truck involved in the fatal car crash on June 19, 2016 is registered to Adam Costello and Moorey stated that the pickup truck was located at 3912 Arlington St, Fort Myers, FL. Moorey additionally notified the call taker that Costello has invoked his right to an attorney and advised law enforcement to not speak to Costello without him present.

Officer David Gaide responded to 3912 Arlington St and observed a white 2015 Toyota Tundra, bearing Florida tag 006RDK, in the front yard of the residence. The registered owner of the 2015 Toyota Tundra was Adam Costello. Officer Goncalves responded to Arlington St and observed the Toyota had extensive driver's side door and fender damage and was missing the driver's side outside mirror. The Toyota also had blue paint transfer on the driver's side, consistent with striking King's motorcycle which is royal blue in color.

Moorey and Costello met with Officer Goncalves at 3912 Arlington St. Costello signed a Consent to Search Form for the Toyota Tundra. Moorey signed the consent form as a witness. The consent form granted Officer Goncalves permission to remove the Toyota from the front yard of the residence and search the exterior and interior of the Toyota. The house at 3912 Arlington St is owned by Susan Costello, whom Moorey identified as Costello's mother. Officer Breneman confirmed via Lee County Property Appraisals website that the parcel, 3912 Arlington St, is in fact owned by Susan Costello. The Toyota was towed to the Fort Myers Police Impound lot.

The Fort Myers Police Department did not receive any stolen vehicle reports for a white pickup truck from June 18, 2016-June 21, 2016 and more specifically did not receive a stolen vehicle report from Adam Costello for his white 2015 Toyota Tundra.

On June 22, 2016, Detective Charles Newell completed a CLEAR report on Adam Costello which identified Costello's cellular phone number as 239-218-4928. Additionally, The CLEAR report identified Costello's home and business address as 3912 Arlington St.

On June 22, 2016, Officer Breneman authored and received a search warrant from Judge Josephine Gagliardi for Costello's Verizon cellular phone data and records (239-218-4928). Officer Breneman electronically sent the warrant to Verizon Wireless.

On June 22, 2016, Officer Breneman interviewed Gordon Durant via telephone. Durant advised that he has known Costello and Daniel Sinclair, aka James Daniel Sinclair, since he was younger and grew up with them. Durant was raised in the Fort Myers area. Durant advised that on June 19, 2016, Daniel Sinclair posted on his Facebook page that he was at Twin Peaks, a restaurant and bar in Fort Myers, with Adam Costello drinking beer. The Facebook post was at 1423 hours on June 19, 2016. Durant saw the Facebook post himself on his cellular phone. Durant stated that the post was then altered to remove Costello's name from the post as Costello had deleted his Facebook page. Durant further advised that Costello is a heavy alcohol drinker. He also advised that Costello is always on his cellular phone and has it with him at all times. Durant works in air conditioning and knows that Costello lives on Arlington St and has for at least three years. Durant has done work at Costello's Arlington St house before. Durant is also familiar with Costello's white Toyota Tundra which he stated Costello has owned for one and a half to two years. Durant advised that he has never seen anyone else drive Costello's vehicles as long as he has known him. Durant has not spoken with Costello since January 2016. Durant believes that Costello was driving the Toyota the night of the crash and was likely drinking alcohol and believes that Sinclair will not cooperate with the police and will cover for Costello. Durant provided Sinclair's cellular phone number as 239-634-7877.

Officer Breneman located Daniel Sinclair's Twitter feed which indicates that he was at Twin Peaks on June 19, 2016 at 1123 hours "drinking beer".

Officer Breneman responded to Sinclair's house on June 22, 2016 but no one answered the door. Officer Breneman did note that Sinclair had surveillance cameras on the exterior of his house, including one next to the front door and one on each corner of the front of the house. There was also a real estate sign on an empty lot on Sinclair's street with "Available, Dan Sinclair, 239-633-7877" written on it. Officer Breneman called Sinclair's cellular phone number on June 23, 2016 and left a voice message. Officer Breneman did not receive a call back from Sinclair and on June 24, 2016, Officer Breneman received a letter from attorney

Aaron O'Brien that he is representing Sinclair and at the time, Sinclair would not be providing a statement to law enforcement.

On June 23, 2016, Officer Goncalves and Crime Scene Technician Marissa Poppell responded to the FMPD Impound lot and searched and processed the Toyota Tundra for possible touch DNA and possible latent fingerprint evidence. A swab was taken of the steering wheel. Upon putting fingerprint powder along the blue paint transfer scratch on the driver's door, Poppell observed that there were distinct horizontal and vertical swipe marks, finger width. The wipe marks appeared to have been from someone attempting to wipe the scratch/paint marks off of the Toyota (see picture).

On June 23, 2016, Officer Breneman authored and received a search warrant from Judge Josephine Gagliardi for Costello's Facebook records. Officer Breneman electronically sent the warrant to Facebook.

On June 24, 2016, Officer Breneman received a copy of a receipt from Twin Peaks from a credit card transaction in the name J. Sinclair (last four numbers of the card were 7737). The receipt was provided by Fred Burgess, the owner of Twin Peaks. The receipt was closed out 1521 hours on June 19, 2016. Included on the receipt were 3 alcoholic beverages and a trout meal. Officer Breneman also received still images from inside Twin Peaks of J. Sinclair and another male with him. Officer Breneman was able to confirm the identity of the two men as (James) Daniel Sinclair and Adam Costello. Costello was wearing a dark colored shirt with white stripes horizontally on it and Sinclair was wearing his campaign t-shirt. Officer Breneman received a copy of the surveillance video from Twin Peaks from June 19, 2016 from Ryan Lampel, their IT person.

On June 24, 2016, Officer Breneman met with Heather Henry. Henry was at the Red Bones, 3604 Palm Beach Blvd, on June 19, 2016. Henry knows Sinclair from past meeting. While at Red Bones that night, Henry met a male who introduced himself as "Adam". Henry stated Adam was wearing a dark shirt, possibly a polo-shirt, with horizontal white stripes. Henry stated Sinclair and Adam (later determined to be Adam Costello) entered the bar around 8pm and left before 10pm. White did not see what car or cars Costello and Sinclair arrived in or left in as she was inside the bar at the time. Sinclair bought Henry a drink. Henry observed both Sinclair and Costello drinking beer and stated that they both appeared intoxicated. Costello told Henry that he and Sinclair had been drinking all day. Henry advised that her friend, Wendy White, was sponsoring an event at Red Bones that night and was at the bar with Henry, Sinclair and Costello. Henry showed Officer Breneman text messages between her and White on June 24, 2016. Officer Breneman took a photograph of the text messages. White stated to Henry that she spoke to Sinclair after the crash. White typed "He said he didn't do it and that they were set up". White also wrote "They left redbones and went there" and "Dan and his friend were sitting with us remember". Henry provided a sworn taped statement. White also indicated that she was talked to Sinclair on June 24, 2016.

Officer Breneman then located and interviewed White. White provided a sworn taped statement. White stated she has known Sinclair through business dealings since 2003. White believes she met Costello before June 19, 2016 at Red Bones but she didn't get his phone number or email address until that date. White stated that she was drinking alcohol and so were Costello and Sinclair. White believed Sinclair and Costello arrived around 7pm and left around 9pm. White did not see what car or cars Costello and Sinclair arrived in or left in as she was inside the bar at the time. White advised that she had spoken to Sinclair since the crash on June 19, 2016. Sinclair told her that he was at home at the time of the crash. Sinclair told White that there were several burglaries in the area of Costello's house and maybe that had something to do with

Costello's vehicle. White stated that Costello and Sinclair may have been at Cabos and/or Blu Sushi in downtown Fort Myers on June 19, 2016 as well.

On June 24, 2016 Officer Breneman met with Chad Svoboda, the owner of Red Bones. Svoboda and Officer Breneman reviewed the video surveillance footage from Red Bones on June 19, 2016. Officer Breneman observed Sinclair and Costello enter through the outside bar and walk to the inside bar at 1905 hours. The bar seats where Sinclair and Costello were seated are in an area without direct video coverage however they can be seen at various points in the bar after 1905 hours. Costello and Sinclair leave Red Bones at 2116 hours. There is no video surveillance coverage on the exterior of Red Bones. Officer Breneman obtained a copy of the video footage from Svoboda.

On June 25, 2016, Officer Breneman authored and received a search warrant from Judge Josephine Gagliardi for Sinclair's Facebook records. Officer Breneman electronically sent the warrant to Facebook.

On June 25, 2016, Officer Breneman authored and received a search warrant from Judge Josephine Gagliardi for Sinclair's Verizon cellular phone data and records (239-634-7877). Officer Breneman electronically sent the warrant to Verizon Wireless.

On June 29, 2016 at approximately 1300 hours, Officer Breneman met with Costello and his attorney at 1420 Royal Palm Sq Blvd. Officer Breneman served a search warrant on Costello seizing two buccal swabs from his cheek and fingerprint standards. Approximately 45 minutes later, Officer Breneman conducted a traffic stop of Costello in an attempt to serve a search warrant on his cell phone. Prior to serving the search warrant, Officer Breneman called 239-218-4928 twice. Each time the call rang several times then went to voicemail; it did not go directly to voicemail nor give an error message that the line was no longer in service. Costello advised that earlier that morning he "lost" his cell phone with number 239-218-4928. Costello showed Officer Breneman two cell phones that he had on the front passenger seat of the vehicle he was driving and stated "these aren't mine". Officer Breneman seized these two cell phones, immediately removing the batteries and submitted them to the Evidence Section pending issuance of a search warrant. The phones were both Tracphones; one was a black Tracfone cellular phone, model number A462C, MEID HEX A100004AC9523D and the other was a black Tracfone cellular phone, model number Z716BL, serial number 326E64643BDF.

On June 29, 2016 at approximately 1430 hours, Officer Breneman met with Sinclair and his attorney, Spencer Cordell, at the Fort Myers Police Department. Sinclair came to the police department voluntarily. Officer Breneman served a search warrant on Sinclair seizing two buccal swabs from his cheek and fingerprint standards. Officer Breneman then advised Sinclair that he was free to leave. Sinclair indicated that he wanted to provide a statement as to the events of June 19, 2016. Sinclair stated that he was with Costello on June 19, 2016 and they visited numerous bars/restaurants throughout the day including: Twin Peaks, Blue Sushi (McGregor), Blu Sushi (downtown), Cabos, Ford's Garage, Red Bones and finally the Wing House. Sinclair stated they were both drinking water and alcohol. Sinclair stated he was driving himself and Costello throughout the day in his red Audi convertible. Costello came to his house in the morning and they both got into Sinclair's Audi. After leaving the Wing House (the last stop of the day), Sinclair drove back to his house and Costello came inside for a few minutes then left. Sinclair claimed not to know what car Costello was driving when he left Sinclair's house the night of June 19, 2016. Sinclair knows that Costello owns a white pickup truck and advised it may have been in front of his house but he isn't sure. Sinclair claimed he did not see what vehicle Costello came to his house in or left in at the end of

their day together. Sinclair indicated that Costello contacted him after the crash and claimed that he was not involved in the fatal hit and run. Costello told Sinclair that he "came home that night to a crashed truck". Sinclair could not advise why Costello did not call the police at that time. Based on the statements given by Sinclair, Officer Breneman advised Sinclair that he was going to seize his cellular phone. Officer Breneman believed that there was information pertaining to this fatal hit and run investigation on Sinclair's cellular phone, particularly the text messages and phone calls between Costello and Sinclair. As soon as Officer Breneman advised Sinclair that she was going to seize his phone, Sinclair stated "no" and took his phone from the holster attached to his belt. Sinclair entered the passcode to his phone and began to push the screen. Sinclair stated that he wanted to log off of his Facebook and other applications. Officer Breneman could not see the screen and did not know if Sinclair was attempting to delete evidence. Officer Breneman grabbed a hold of Sinclair's hand with the phone in it and told Sinclair to stop using the phone. Sinclair finally set the phone on the desk and after discussion with Cordell and consulting the State Attorney's Office, Sinclair allowed Officer Breneman to retrieve the phone from the desk without resistance. Officer Breneman submitted the cell phone seized from Sinclair to the Evidence Section pending issuance of a search warrant. The interview with Sinclair was video and audio taped.

On June 30, 2016, Officer Breneman authored and received a search warrants from Judge Lee Schreiber for the Samsung cellular phone seized from Sinclair and the two Tracfone cellular phones seized from Costello. The search warrants were sent to Sergeant Richard Meeks for the purposes of him conducting the forensic download of the phones.

On June 30, 2016, Officer Breneman interviewed Aleks Dean. Dean lives at 3835 Arlington Ave. Dean provided the following information: Dean knows Adam Costello. Costello lives down the street from Dean on Arlington Ave for the past two years or so. Dean is involved with the neighborhood watch program. Dean is familiar with Costello's white Toyota Tundra pickup truck and advised he thinks Costello purchased it approximately one year ago. Dean stated he pays attention to vehicles that come and go on Arlington St and he has never seen anyone drive Costello's Toyota but Costello. Dean stated the Costello usually backs his vehicle into the yard adjacent to the fence, particularly on the weekends, because Costello has a boat on a trailer that he keeps in the back yard on the other side of the fence. Dean believes he last saw Costello driving the Toyota prior to the crash on Saturday, June 18, 2016 in the afternoon. On June 21, 2016, Dean was present near Costello's house when Officer Goncalves was having the Toyota towed. Scott Moorey approached Dean and asked if he had seen anyone "messing" with Costello's vehicle and stated that Costello wasn't in town the past weekend. Dean spoke with Costello in person on June 22, 2016. Costello told Dean that as soon as he saw the damage to his Toyota, he called his attorney who in turn called the police department. Dean has been in Costello's house before on Arlington St and stated that there is a key rack hanging in the kitchen. Dean mentioned that he received an email from his local Community Policing Officer, either Kelsey Evenson or David Conticelli, about vehicle break-ins in the area but none were on Arlington St. Officer Breneman received a copy of the email sent by Officer Evenson dated June 24, 2016 which advised that there were break-ins to unlocked vehicles in the general area, however no vehicle thefts.

On July 5, 2016, Officer Breneman emailed Cordell in an effort to re-interview Sinclair. Cordell responded on July 11, 2016 and asked for any questions requested of Sinclair to be emailed.

On July 6, 2016 Officer Breneman submitted a search warrant, signed by Judge Elizabeth Krier, to Google, Inc. Costello's phone on June 19, 2016 was an Android cellular phone as provided by Verizon Wireless. A

Google search of Costello indicated that Costello's email address is costellocapital@gmail.com. Costello is an insurance agent and his cellular phone number and email address are online for business purposes.

On July 13, 2016, Officer Breneman was notified by Tina Maurice, Crime Scene Technician and Latent Fingerprint Examiner, that the latent fingerprint retrieved from the gearshift of the Toyota belonged to Adam Costello. Maurice indicated that the print was from Costello's palm and it did not have any overlay of other prints on top of it. Maurice sent the print card from the gearshift and Costello's print standards to FDLE for confirmation.

On July 13, 2016, Detective Nicholas Toma interviewed Nestor Barreiro. Barreiro stated that he detailed Costello's white Toyota Tundra a few months ago. At that time, Barreiro and Costello began a conversation in reference to Costello's truck and Costello advised Barreiro that the Toyota is his "baby" and Costello made it clear that he does not ever let anyone drive it. Prior to this interview, Barreiro posted a comment to Facebook stating the above information. On the same date that Barreiro posted the comment, he received a call from a blocked number warning him to remove the post. Barreiro provided a sworn taped statement.

On July 13, 2016, Officer Breneman met with attorney Chris Crowley and his client, David Levin. Levin provided a sworn taped statement. Levin indicated that he was willing to be interviewed on his own free will and he was not promised anything or coerced in any way from Officer Breneman or the State Attorney's Office in return for him giving the interview. Levin advised the following. Levin knows Dan Sinclair and has for several years. Levin was not initially familiar with the traffic crash which killed Adam King on June 19, 2016. On June 23, 2016, Levin and Sinclair were both at a community meeting. After the meeting concluded, Sinclair approached Levin and told him that his name was going to be mentioned in reference to the traffic crash involving King. A day or two later (June 24-25), Sinclair called Levin and during the conversation Sinclair told Levin that he had given Costello the video surveillance equipment from his house to "preserve evidence". Levin believed that Sinclair referred to the equipment as a "deck". Levin stated the deck was equivalent to a recording device or DVR for the home security cameras at Sinclair's house. A few days after that conversation, Sinclair again called Levin and asked "you didn't tell anyone about that [DVR] did you?" Levin stated that Sinclair sounded concerned during the conversation.

On July 13, 2016, Officer Breneman drove to Sinclair's residence, 6840 Dabney St. Officer Breneman observed the video cameras on each corner of Sinclair's house attached to the soffit and covering the front and sides of the house as well as a camera to the left side of the front door. Officer Breneman photographed the cameras and their locations. While at Sinclair's house, Officer Breneman noted that the front yard near the roadway was flooded. There was more than a foot of water in the grass, which would have made it difficult for a vehicle to park there.

Officer Breneman believes that based on the timeline of events that occurred on June 19, 2016 as provided by Sinclair in his sworn statement that the video surveillance footage from his house at 6840 Dabney Street will provide valuable evidence as to the location and occupants of the Toyota Tundra involved in the hit and run the traffic crash shortly before it occurred at 2301 hours.

Officer Breneman is familiar with home video surveillance systems and knows that storage of the footage is typically captured on a DVR (digital video recorder) and depending on the storage capacity of the DVR, the recordings captured are typically maintained for a period of 30 days or more.

On July 13, 2016, Officer Breneman spoke with Charles Cohen, Claims Adjuster for Safeco Insurance. Cohen is handling the claim involving Costello's Toyota Tundra from June 21, 2016. Cohen advised Officer Breneman via telephone (678-417-3094) that a claim was submitted under Costello's insurance policy, X5952030, on June 21, 2016. The claim was initiated by Scott Moorey. Cohen advised that he had not yet spoken with the insured, Adam Costello. Cohen could only advised that Moorey contacted Safeco Insurance and advised that the Toyota was the subject of a traffic homicide investigation and the Toyota was being held by the Fort Myers Police Department. The claim number is 471579826039. The phone call to report the claim was not recorded.

On July 14, 2016, Officer Breneman authored a search warrant for Sinclair's house, 6840 Dabney Street. The warrant was signed and authorized by Judge Joseph Fuller. Officer Breneman, Lt Jeff Bernice, LCSO Deputy Ed Sommers and LCSO Sgt Dan Leffin responded to 6840 Dabney St. Since the address is within Lee County but not within the City of Fort Myers, Deputy Sommers served the search warrant. Deputy Sommers knocked on the door numerous times and identified himself as a Lee County Sheriff's Office Deputy. Deputy Sommers yelled numerous times that he had a search warrant for the house and requested access from anyone inside the residence. No one came to the door. When Deputy Sommers first arrived at the residence, he looked through the window in the garage door and observed that the interior light in the garage was open and a red convertible Audi was in the garage. Officer Breneman knows through her interview with Sinclair, that he owns and drives a red Audi convertible. Deputy Sommers read the search warrant to the house at 1311 hours. While Deputy Sommers continued to request access to the house at the front door, Officer Breneman walked to the back of the house near the sliding glass door. Officer Breneman observed a large dog inside the house. When Deputy Sommers would knock, the dog would back but instead of going to the front door where the knocking was occurring, the dog went towards the kitchen area of the house. Officer Breneman then called Spencer Cordell on the telephone. Officer Breneman did not reach him at his office but did reach him on his cellular phone. Officer Breneman advised Cordell that she had a warrant for Sinclair's house. Cordell stated he would call Sinclair and call Officer Breneman right back. A few minutes later, Cordell called Officer Breneman back and stated that he was on his way to Sinclair's house. Officer Breneman directly asked Cordell if Sinclair was inside the residence and Cordell stated "I am not at liberty to say". Deputy Sommers had been knocking and announcing his presence and intent at that point for approximately 15 minutes. Based on the above facts, Sgt Leffin made the decision to forcibly enter the house. Lt Bernice was asked to assist with the entry into Sinclair's house. Deputy Sommers and Lt Bernice forcibly opened the front door and as the door opened, they observed Sinclair inside the residence walking from the kitchen area.

Sinclair was asked to step outside and he complied. Sinclair advised that he was waiting for his attorney to arrive before opening the door. Deputy Sommers then read the search warrant out loud to James Daniel Sinclair at 1330 hours. Sinclair video recorded Deputy Sinclair reading the warrant to him utilizing his iPhone 6. When Sinclair heard what the search warrant was a search for (the video surveillance equipment) he uttered, "that hasn't worked for a year and a half but go ahead". This statement made by Sinclair was captured on Officer Breneman's body-worn camera. Deputy Sommers then seized Sinclair's iPhone under the purview of the search warrant. Deputy Sommers requested Officer Breneman and Lt Bernice's assistance with conducting the search of the residence. In the master bedroom, the officers located several CD/DVD's without company or recording labels on them. In the living room, officers located several CD/DVD's without company or recording labels on them.

On the kitchen table, Officer Breneman observed a brand new video door bell system which had been removed from the box and was lying next to the box on the table. The video doorbell appeared new and was removed from the box for installation.

Inside of the office of the home, Officer Breneman observed a closet. On the top shelf of the closet were a Dell monitor and a mouse. There was cord attached the back of the monitor and the other end was hanging loose. Next to the monitor were several unplugged wires. The wires were those that attach to the rear of a video surveillance DVR box. The ends of the wires were yellow with a silver treaded coupling nut. Officer Breneman is familiar with the Night Owl and Lorex brand video camera surveillance systems and these are identical cables as used with those systems. The cables are BNC Video cables. Near the end of each cable was a white manufacturers label wrapped around the cord with "To DVR" written on the label.

On the shelf in the living room, Officer Breneman located a Q-SEE brand video surveillance camera not installed. The cables attached to the camera were BNC cables. Q-SEE is a brand of video surveillance cameras sold at retailers such as Home Depot, Walmart, Sam's Club and online retailers. Q-SEE has a line of 8 camera High Definition (HD) systems with DVR's included which use BNC cables. The DVR's for the Q-SEE system come in 500GB, 1TB and 2TB storage capacity sizes online.

Sinclair made the statement to Deputy Sommers that the video surveillance system "hasn't worked for a year and a half" but what Officer Breneman discovered was a missing surveillance system DVR, not a non-functioning one.

On the kitchen counter, Officer Breneman located a Samsung tablet and a black Geek Squad thumb drive. Deputy Sommers located a Dell desktop computer tower, serial number 00045693159938, on the desk in the office of Sinclair's house. The Dell computer was plugged in and attached to a monitor. Deputy Sommers seized the Dell computer.

Deputy Sommers, with the assistance of Officer Breneman, seized the items relating to the search warrant as evidence. Deputy Sommers transferred custody of the evidentiary items to Officer Breneman. A copy of the search warrant and return was left with Sinclair by Deputy Sommers.

On July 18, 2016, Officer Breneman met with Jacquelyn Levine. Levine provided a sworn taped statement. Levine advised that she spoke with Sinclair via telephone on June 23, 2016 around 1730 hours. The phone conversation was prompted by Levine asking Sinclair about the news story that Levine had seen with Sinclair mentioned. Sinclair then called Levine and told her that he could not tell her who was driving the vehicle that killed Adam King because "it would be incriminating". Levine has not spoken to Sinclair since that date.

On July 18, 2016, Officer Breneman interviewed David Levin again. Levin advised that he spoke with Sinclair via telephone on July 14, 2016 at approximately 0957 hours. Sinclair called Levin. Sinclair again told Levin that he gave the 'DVR' for the home surveillance footage to Costello. Sinclair stated "I gave it to him". Sinclair also advised Levin that he had already told his attorney about the 'DVR' and he didn't do anything wrong so the 'DVR' isn't worth mentioning. Sinclair also told Levin not to cooperate with the police; cooperation doesn't help because it didn't help in Levin's case. This phone call took place several hours before the search warrant was served on Sinclair's house where it was determined that the 'DVR' for his home surveillance system was missing.

On July 21, 2016, Officer Breneman met with Kelly Andriano and Andrew Kempel of the Florida Department of Law Enforcement, FDLE. Andriano is an analyst who specializes in phone record GPS/RTT data. Andriano analyzed Costello's Verizon phone records, 239-218-4928. Andriano observed that Costello made a phone call at 2253 hours on June 19, 2016 to 239-707-5561 which lasted 482 seconds. Andriano was able to track the starting cell tower for that call which placed Costello's phone near Plantation Rd travelling in a northern direction. The phone call ended on a cell tower placing the phone on the east side of the tower near Colonial Blvd and Summerlin Rd. The next two cell towers which Costello's phone ping off of are consistent with him travelling to Arlington St. The most direct route from Sinclair's house on Dabney St to Costello's house on Arlington St is via Plantation Rd north to Colonial Blvd then west to McGregor Blvd then north towards Arlington St. The cell phone analysis performed by Andriano is consistent with Costello's phone travelling that route. Andriano completed a report on her findings as they pertain to Costello's cellular phone.

On July 22, 2016, Officer Breneman met with Joshua Jackson. Jackson is the subscriber of cell phone number 239-707-5561. Jackson confirmed that he spoke with Costello on June 19, 2016 at 2253 hours. Jackson had a copy of his phone records. Jackson could not remember the exact content of the conversation that he had with Costello at that time but he was certain that he had spoken with Costello at phone number 239-218-4928 at that time. Jackson stated that has personally never seen anyone but Costello drive Costello's Toyota Tundra.

On July 21, 2016, Officer Breneman met with Maria Michelle Newhard. Newhard advised that she had been casually dating Costello recently. Newhard stated that she spoke with Costello on June 19 and 20, 2016 but the calls were relating to her dying father. Newhard showed Officer Breneman the text messages on her phone between her and Costello which confirmed that the majority of the conversation was in reference to Newhard's father or just casual conversation. Costello did send one message to Newhard on July 3, 2016 at 1038 hours which read "Article on Winknews.com says 2 cars were stolen last night in McGregor Reserve. Right next to my house. Another stolen on Gasparilla last week. All in my hood. 3 more since mine was". Costello did not talk to Newhard about the traffic crash but did advise her that his vehicle was stolen. Officer Breneman took a photograph of the above text message. Newhard advised that she learned about the traffic crash involving Costello's truck from his best friend, Joseph Dozier. Dozier called Newhard and advised her that Costello was okay but his vehicle was stolen and involved in a traffic crash and Costello cannot talk about it. Newhard was aware that Costello changed his cellular phone number. Newhard's last contact with Costello on 239-218-4928 was via text message at 1043 hours on July 29, 2016; the same morning that Costello advised Officer Breneman that he "lost" his cell phone. Officer Breneman attempted to locate Dozier at the address on his driver's license records but the house was vacant.

On July 21, 2016, pursuant to a subpoena issued to the Winghouse, Officer Breneman received a copy of video surveillance footage from the Winghouse. The footage was only from one camera within the dining room but does capture the entrance to the men's bathroom. The footage shows Sinclair entering the men's bathroom at 2144 hours and exiting at 2147 hours. The footage also shows Costello entering the men's bathroom at 2152 hours and exiting the men's bathroom at 2155 hours. Costello and Sinclair are seen leaving through the front door of the WingHouse and exiting at 2238 hours on the surveillance footage.

On July 21, 2016, Officer Breneman received a list of all stolen vehicle reports from the Fort Myers Police Department from June 12, 2016-July 3, 2016. Officer Breneman got the list from Angela Montalvo, the Fort

Myers Police Department Records Supervisor. The report shows 14 motor vehicle thefts during that time frame, none of which were filed by Adam Costello in reference to his 2015 Toyota Tundra. None of the stolen vehicles were on streets adjacent to McGregor Blvd either.

On August 4, 2016, Officer Breneman received a report from Kelly Andriano of the Florida Department of Law Enforcement, FDLE. Andriano is an analyst who specializes in phone record GPS/RTT data. Andriano analyzed Sinclair's Verizon phone records, 239-634-7877. Andriano was able to track the cell phone towers which Sinclair's cellular phone were pinging on June 19, 2016. Between 2137 hours and 2245 hours, Sinclair's phone was in the area of Cleveland Ave and Colonial Blvd and on Plantation Rd near Sinclair's house. Sinclair's cell phone remains in the area of his house from approximately 2246 hours until the next morning.

The cellular phone analysis conducted by Andriano is consistent with Sinclair's account of the events on June 19, 2016. In his sworn statement, Sinclair stated that he was with Costello at the WingHouse and that was their last stop of the day. When they left the WingHouse, Sinclair and Costello drove in Sinclair's vehicle to Sinclair's house. At that time, Sinclair goes into his house to bed and Costello leaves Sinclair's house. Sinclair claimed to not know how Costello left his house and did not see Costello's vehicle. The home surveillance footage from the video camera attached to Sinclair's house could certainly have provided vitally important evidence in the hit and run fatality investigation.

On August 5, 2016, Officer Breneman received the information from Facebook for Costello and Sinclair's Facebook pages pursuant to the search warrants. Officer Breneman observed that Costello's Facebook page response for June 17-23, 2016 contained no friends list, no IP addresses, no status updates, no photos, no videos, no wall posts, no shares, no minifeeds, no unified messages, no groups, no events, no phone numbers and no secret conversations. The response from Facebook was essentially blank but indicated that Costello's Facebook page was created on 09/04/2014 with the email costellocapital@gmail.com. The response also indicated that the Facebook account was still active.

Sinclair's Facebook page included his phone number, 239-634-7877, and several email addresses. Sinclair's page information included June 18-25, 2016. Officer Breneman observed that Sinclair sent 10 messages to 10 different people where he mentioned being with "Adam" on June 19, 2016 and mentioned "drinking" and "pub crawl" and he invited others to join. Sinclair messaged "Mones TiTi Shey Shey" on June 20, 2016 at 0913 hours and indicated that he was at "Twin Peaks, Blu on McGregor and downtown, Cabo, Ford's, the lodge and then red bones" with "Adam". The initial Facebook post by Sinclair at Twin Peaks, which Officer Breneman has seen, was not included in the data from Facebook and has since been completely deleted.

On August 8, 2016, Officer Breneman contacted Renae Ladd via telephone at (937) 608-8373. Officer Breneman questioned Ladd about a text message string between her and Costello on June 27, 2016. Ladd wrote "It's not the news I'm worried about its what Dan did". Ladd advised that she was referring to posts that Sinclair wrote on Facebook which she deemed as 'shady'. Ladd stated that she had a conversation with Costello about the traffic crash and during the conversation, Costello was vague. Costello told Ladd that he went to lunch with Sinclair on Father's Day and eventually went home; Costello woke up and found his vehicle was involved in the traffic crash. Costello did not tell Ladd who was in the vehicle or if he was involved and did not state that his vehicle was stolen. Ladd advised that she has not spoken with Costello since that conversation.

While searching through the unlocked Tracfone (FMPD Item 35) located with Adam Costello in the vehicle he was driving pursuant to the search warrant, Officer Breneman also observed a text message conversation between Costello and Patty Costello (239-243-6259) on June 25, 2016. Patty Costello wrote "Dan's texts starts with "Please..." And ends with "Can you fill me in?" He is acting like he is ignorant to the case, which we all know, he is not. Then he says to the Aunt of the boy-that it was the boy's fault. That was not smart".

Also on June 25, 2016, John Costello (321-243-1032) writes to Adam Costello "Denver has 17 hit and runs everyday! Wow!".

On June 27, 2016, Adam Costello writes a text to (828) 361-8766 which states "very soon. Just my luck: Just got rear ended. Waiting on the Sheriff. Can u believe it?" The person at the other number writes back ""that sucks. Better keep quiet".

On June 28, 2016, Adam Costello texts John at (239) 849-1930 and writes, "Lance told me to continue to using my regular phone for normal calls".

A search of the Google history on the Tracfone indicated searches for "circumstantial evidence" and "driver charged with hit-a".

The earliest calls/texts on this Tracfone were on June 24, 2016. In the call logs were calls to Sinclair's number (239-634-7877) on June 24, 2016 (2 calls), June 25, 2016 (1 call), June 27, 2016 (4 calls) and June 28, 2016 (4 calls).

In addition, there were downloads to the phone from www.stimmel-law.com referencing a PDF file called "Convicted by the Camera" and downloads from Toyota referencing a feature available in the Toyota Tundra called "Scout-GPS".

Officer Breneman took pictures of the above mentioned text messages, call logs and Google searches. Sergeant Meeks did not perform the download of Tracfone Item 35 since doing so will destroy the phone and the phone was unlocked and not password protected.

On August 19, 2016, Officer Lesa Breneman interviewed Osvaldo Morrobel (1466-3 Park Shore Cir, Fort Myers, FL 33901 (239) 246-1246. The interview was captured on Officer Breneman's body-worn camera. Morrobel advised that he has known both Sinclair and Costello for more than 10 years. Morrobel went to high school with Costello. Morrobel stated that he has distanced himself from Sinclair in the past 2 years but he was at a barge party Memorial Day weekend 2016 and Sinclair and Costello were there along with Costello's girlfriend, Jennifer King. Morrobel stated that neither Costello nor Sinclair have said anything to him about the traffic crash that occurred on June 19, 2016. Morrobel stated that Costello would never lend his truck out to anyone. Morrobel also advised that he was the Facebook post from June 19, 2016 with Sinclair and Costello both tagged in it at Twin Peaks before it was deleted. Morrobel advised that he believes that Sinclair would cover for Costello but there is no way that Costello would cover for Sinclair. Morrobel also mentioned that he has heard from several people that Costello was involved in a hit and run in Lehigh Acres, FL several years ago where he reported his vehicle stolen. Officer Breneman is attempting to locate that report. Morrobel stated he has never been inside Sinclair's house.

Officer Breneman then attempted to interview Jennifer King. Officer Breneman called King on the cell phone number provided by her father at 1704 Travis Ave, North Fort Myers, FL 33903 (239) 896-6545. King positively identified herself at the start of the phone call. Officer Breneman asked if she could speak to her about this investigation and King immediately became hostile and defensive. King stated that she would not talk to Officer Breneman without an attorney. Officer Breneman explained to King that she is a witness and not a suspect. King stated that she doesn't know if Costello is guilty or innocent but he's a "good guy". King advised she was not with Costello on June 19, 2016 and stated she has not spoken to him since May. King ended the conversation by asking for the spelling of Officer Breneman's name.

Officer Breneman then called Joseph Dozier at (239) 810-0913. Michelle Newhard provided Dozier's name as the person who told her about the crash involving Costello's truck and told Newhard that the truck was stolen. Dozier stated that he had been friends with Costello for years. Dozier also know Scott Moorey, Costello's attorney. Dozier advised that Costello told him that his truck was stolen and that's it. Costello told Dozier that Moorey told him not to talk to anyone. Dozier advised that he does not associate with Sinclair anymore but he knows him.

Based on the above evidence, Officer Breneman has probable cause to believe that Adam Murray Costello did commit the crimes of Leaving the Scene of a Traffic Crash Involving the Death of Adam King and Tampering with Evidence for concealing/destroying his cellular phone (239) 218-4928 and for deleting his Facebook account under Adam Costello (costellocapital.com).

**LEAVING THE SCENE OF A CRASH INVOLVING
[DEATH] [SERIOUS BODILY INJURY] [INJURY]
§ 316.027(2), Fla. Stat.**

To prove the crime of Leaving the Scene of a Crash Involving Death, the State must prove the following four elements beyond a reasonable doubt:

- 1. Costello was the driver of a vehicle involved in a crash or accident occurring on public or private property resulting in [injury to] [death of] any person.**
- 2. Costello knew that he was involved in a crash or accident.**
- 3. a. Costello knew, or should have known from all of the circumstances, including the nature of the crash or accident, of the injury to or death of the person.**
- 4. a. Costello willfully failed to stop at the scene of the crash or accident or as close to the crash or accident as possible and remain there until he had given "identifying information" to the driver (Adam King) and to any police officer investigating the crash or accident.**

[or]

- b. Costello willfully failed to render "reasonable assistance" to the injured person (Adam King) if such treatment appeared to be necessary or was requested by the injured person.**

If the State proves that the defendant willfully failed to give any part of the "identifying information" or willfully failed to give reasonable assistance, the State satisfies this element of the offense.

§ 316.062, Fla. Stat.

"Identifying information" means the name, address, vehicle registration number, and, if available and requested, the exhibition of the defendant's license or permit to drive.

"Reasonable assistance" includes carrying or making arrangements to carry the injured person to a physician or hospital for medical treatment.

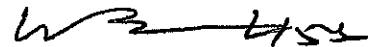
**TAMPERING WITH OR FABRICATING
PHYSICAL EVIDENCE**

§ 918.13 Fla. Stat.

To prove the crime of Tampering with Physical Evidence, the State must prove the following two elements beyond a reasonable doubt:

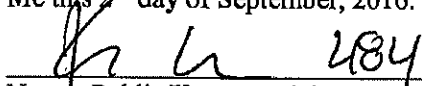
1. Costello knew that an investigation by a duly constituted [prosecuting authority] [law enforcement agency of this state was pending.
2. a. Costello [destroyed] [concealed] [removed] any [record] [document] [thing] [cellular phone with number (239) 218-4828] and Facebook records from the costellocapital.com Facebook account], with the purpose to impair its availability in the investigation.

Officer Lesa Breneman hereby requests that an arrest warrant be issued for the arrest of white male Adam Murray Costello, DOB 11/12/1974, last known address of: 1900 Virginia Ave #602, Fort Myers, FL 33901 for violation of Florida State Statute Florida State Statute 316.027(2)(c) to wit: Leaving the Scene of a Traffic Crash Involving Death and violation of Florida State Statute 918.13(1)(a) to wit: Tampering with Evidence, contrary to the statutes in such case made and provided, and against the peace and dignity of the State of Florida.



Officer Lesa Breneman

Sworn to and Subscribed before
Me this 2nd day of September, 2016.



Notary Public/Known to Me

Exhibit “B”

Filing # 69096797 E-Filed 03/12/2018 09:15:23 AM

IN THE CIRCUIT COURT OF THE TWENTIETH JUDICIAL CIRCUIT IN AND FOR
LEE COUNTY, FLORIDA CRIMINAL ACTION

STATE OF FLORIDA

vs.

ADAM MURRAY COSTELLO

CASE NO: 16-CF-000371 - (MOS)
(MWM)
DCM TRACK: COMPLEX

Race: White Sex: Male

D.O.B.: 11/12/1974

AMENDED (4TH INFORMATION)

INFORMATION FOR:

- 1) Leaving the Scene of a Crash - Death, F.S. 316.027(2)(c),(2)(f) First Degree Felony
- 2) Tampering With or Fabricating Physical Evidence, F.S. 918.13, Third Degree Felony

IN THE NAME AND BY THE AUTHORITY OF THE STATE OF FLORIDA:

STEPHEN B. RUSSELL, State Attorney of the Twentieth Judicial Circuit of the STATE OF FLORIDA, by and through the undersigned Assistant State Attorney, prosecuting for the STATE OF FLORIDA, in the County of Lee under oath information makes that Adam Murray Costello,

Count(s):

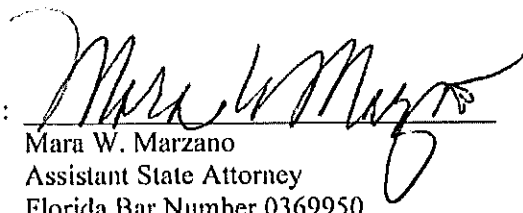
1. On or about June 19, 2016 in Lee County, Florida, was the driver of a motor vehicle involved in a crash resulting in death to Adam Roger King, a human being, a vulnerable road user, and Defendant knew or should have known a crash occurred, but failed to stop or remain at the scene of the crash, or as close thereto as possible, until he/she gave personal information and rendered aid as required by Florida Statutes 316.062, contrary to Florida Statute 316.027(2)(c),
2. Between June 19, 2016 and July 31, 2016 in Lee County, Florida, did unlawfully and knowingly alter, destroy, conceal, or remove any record, document, or thing, to-wit: deletion of facebook information or account, cellular phone utilizing number 239 218-4928 or DVR from a surveillance camera, with the purpose to impair its verity or availability in a proceeding or investigation knowing that a criminal trial or proceeding or investigation by a duly constituted prosecuting authority, law enforcement agency, grand jury or legislative committee of this state is pending or is about to be instituted contrary to Florida Statute 918.13(1)(a),

against the peace and dignity of the STATE OF FLORIDA,

STEPHEN B. RUSSELL
STATE ATTORNEY

Exhibit "B"

BY:


Mara W. Marzano
Assistant State Attorney
Florida Bar Number 0369950
3315 E. Tamiami Trail, Suite 602
Naples, Florida 34112
(239) 252-8470
eService: ServiceSAO-LEE@sao.cjis20.org

STATE OF FLORIDA, COUNTY OF LEE

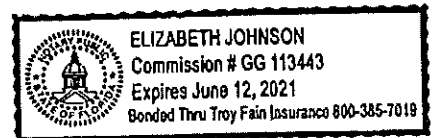
Personally appeared before me, Mara W. Marzano, Assistant State Attorney of the Twentieth Judicial Circuit of the State of Florida, being personally known to me, who being duly sworn, says that this information is filed in good faith and certifies that testimony under oath from the material witness or witnesses for the offense has been received which if true, would constitute the offense therein charged.


Mara W. Marzano

Sworn to and Subscribed before me this 12th day of March, 2018, by Mara W. Marzano, personally known to me.


Notary Public

My commission expires: _____



RE: Adam Murray Costello, 16-CF-000371

**OFFICE OF THE STATE ATTORNEY
TWENTIETH JUDICIAL CIRCUIT OF FLORIDA
NOTICE TO THE CLERK**

TO: Clerk of the Courts, Lee County

RE: Adam Murray Costello, defendant Court Case Number: 16-CF-000371

Race: White Sex: Male

D.O.B.: 11/12/1974 SSN: [REDACTED]

Date of Arrest: September 2, 2016

Agency Booking Report No. 2016-06161

OBTS: 3607131460

Agency Name: Fort Myers Police Department

BOOKING CHARGES

Count(s):

Number of Counts: 1 - Hit And Run Fail To Stop Remain At Crash Involve Death, F.S. 316.027
(2c), First Degree Felony

Number of Counts: 1 - Evidence-Destroying Tamper With Or Fabricate Physical, F.S. 918.13, Third
Degree Felony

SAO DISPOSITION

Count(s):

1. Filed as Charged: 316.027(2)(c)
Leaving the Scene of a Crash - Death
First Degree Felony
2. Filed as Charged: 918.13
Tampering With or Fabricating Physical Evidence
Third Degree Felony

Distribution:
Clerk of Court
Defendant / Defense Counsel - Shannon H. McFee
Sheriff's Department - Jail
Arresting Agency - Fort Myers Police Department
SAO File

STEPHEN B. RUSSELL
STATE ATTORNEY

Date: 3/12/18BY: 

Mara W. Marzano
Assistant State Attorney
Florida Bar Number 0369950
3315 E. Tamiami Trail, Suite 602
Naples, Florida 34112
(239) 252-8470
eService: ServiceSAO-LEE@sao.cjis20.org

Distribution:

Clerk of Court
Defendant / Defense Counsel - Shannon H. McFee
Sheriff's Department - Jail
Arresting Agency - Fort Myers Police Department
SAO File

Exhibit “C”

IN THE CIRCUIT COURT OF THE TWENTIETH JUDICIAL CIRCUIT IN AND FOR
LEE COUNTY CRIMINAL ACTION

STATE OF FLORIDA

vs.

CASE NO: 16CF371

ADAM MURRAY COSTELLO

(MWM)

PLEA AGREEMENT WAIVER OF RIGHTS

This is an Agreement by the State of Florida, by Stephen B. Russell, State Attorney for the Twentieth Judicial Circuit, by and through the undersigned Assistant State Attorney, Mara W. Marzano and by one ADAM MURRAY COSTELLO, hereinafter referred to as "Defendant". This Agreement related to certain negotiations undertaken by the parties hereto, and is in confirmation of those negotiations.

1. The Defendant has been charged in case number 16CF371 with Leaving the Scene of a Crash with Death and Tampering with Evidence.
2. The Defendant understands that the charge of Leaving the Scene of a Crash with Death carries a maximum penalty of 30 years in prison.
3. The Defendant understands the charge of Tampering with Evidence carries a maximum penalty of 5 years in prison.
4. The Defendant hereby agrees to enter and the State of Florida will accept a plea of no contest with an Adjudication of Guilt for both charges in 16CF371. The Defendant will be adjudicated on these counts for which he pleads, subject to the terms and conditions set forth below.
5. The Defendant agrees that there is a factual basis for entry of such pleas, and further admits that such is in his best interest.
6. The Defendant understands the he has the right to be represented by an attorney at every stage of the proceedings and if necessary, an attorney will be appointed to represent him. The Defendant is aware he has the right to a trial by jury and have the assistance of counsel at that trial. The Defendant is aware of and knows that he has the right to compel the attendance of witnesses on his behalf, the right to confront and cross-examine witnesses who may testify against him and the right to exercise his privilege against self-incrimination by not testifying at trial. The Defendant acknowledges that by entering the plea of no contest as called for in this Agreement, that there will be no trial and the he is giving up and waiving his right to a trial by jury, the right to cross-examine witnesses against him, the right to compel the attendance of witnesses on his behalf and the privilege not to testify in his trial. The Defendant further understands that by pleading no contest as called for in this Agreement, that the Defendant is giving up the right to appeal all matters relating to this case, including all Motions to Suppress and Motions in Limine, Williams Rule Notice filed by the State and specific issues of guilt or innocence. The Defendant is represented by counsel in this proceeding and enters this Agreement having

Exhibit "C"

ANC THM JAW

RE: PLEA WAIVER OF RIGHTS ADAM MURRAY COSTELLO 16CF371

conferred with counsel and being fully satisfied with counsel's representation of him, and he specifically acknowledges that he has not been threatened coerced or forced in any manner, nor has he been made any promise not contained in this Agreement.

7. The Defendant is familiar with and has reviewed the discovery and evidence in this case and stipulates and agrees that the State of Florida can establish a prima facie case of guilt against him on all charges to which he enters a plea.
8. The Defendant, by the terms and conditions as set forth in this Agreement, hereby agrees to fully cooperate with the State of Florida in its investigation and prosecution of illegal activities, and related crimes.

Subject to the terms and conditions set forth herein, the State of Florida agrees to the following:

9. Decline to file any additional criminal charges relating to or arising from the Defendant's criminal conduct arising out of the transactions or incidents which form the basis for the Information filed in this case which are disclosed to the State of Florida by the Defendant.
10. The Defendant shall receive a stipulated, agreed sentence to the following:
 - A. The Defendant shall be sentenced in Count One to 10.5 years Florida State Prison with a 4 year minimum mandatory. As to Count Two the Defendant shall be sentenced to 5 years Florida State Prison.
 - B. The Defendant shall be adjudicated guilty of both counts which shall be run concurrently.
 - C. No fine.
 - D. Standard Court Costs.
 - E. \$100.00 costs of prosecution.
 - F. Restitution has been addressed and resolved by civil litigation and is not being requested.
 - G. The Defendant's privilege to drive shall be revoked for 3 years. The revocation shall not begin until the Defendant is released from custody. The Defendant must comply with the statutory provisions of Florida Statute 316.027(e) in order to obtain a driver's license.
 - H. The Defendant shall complete 120 community service hours in a trauma center or hospital that regularly receives victims of vehicle accidents, under the supervision of a registered nurse, an emergency room physician, or an emergency medical technician pursuant to a voluntary community service program operated by the

AMC JLB MM

RE: PLEA WAIVER OF RIGHTS ADAM MURRAY COSTELLO 16CF371

trauma center or hospital, if one exists. This term is enforceable as a contempt of court and would not violate the plea Agreement.

- I. The Defendant shall participate in a victim's impact panel session in this judicial circuit if such a panel exists, or if such a panel does not exist, attend a department-approved driver improvement course relating to the rights of vulnerable road users relative to vehicles on the roadway. This term is enforceable as a contempt of court and would not violate the plea Agreement.
- J. The Defendant agrees to testify fully, truthfully, completely and accurately under oath before the State Attorney's Office of the Twentieth Judicial Circuit, his Assistants or Investigators and Officers of the Fort Myers Police Department as to all matters related to or arising from his knowledge and/or involvement in any criminal activity. He also agrees that he will testify fully, truthfully, completely and accurately in any and all hearings, depositions, proceedings and trials.
- K. Upon the Defendant's violation of this Agreement as set forth in subparagraph (10)(J), the Defendant shall no longer be entitled to the above sentence and the Agreement would be null and void. The Defendant agrees that he would be re-sentenced by the Court with a range of 126.3 months up to the maximum of 35 years for these charges.
- L. The Defendant agrees to recordation of said testimony either stenographically, electronically, or mechanically, at the discretion of said Prosecutor, his Assistants or Investigators.
- M. The Defendant shall be remanded to custody upon the acceptance of this Agreement by the Court and if released from custody prior to the completion of this Agreement shall notify said Prosecutor, his Assistants and Investigators in letting them know his whereabouts and how to contact said Defendant at all reasonable hours of the day or night.
- N. The Defendant shall not commit any violations of any Federal, State, County or Municipal laws.
11. The State of Florida, upon any substantial failure to fulfill any of the terms, conditions or obligations of this Agreement by the Defendant, shall no longer be bound by the terms and conditions of this Agreement. The Defendant would be sentenced by the Court with a range of 126.3 months up to the maximum of 35 years for these charges.
12. This Agreement does not protect the Defendant from prosecution for perjury. Such a prosecution may be premised upon any information provided by the Defendant and all

Asc [Signature]

RE: PLEA WAIVER OF RIGHTS ADAM MURRAY COSTELLO 16CF371

such information may be used against him, including information obtained during any proffer statement, hearings, depositions, proceedings and trials.

13. This contract shall be considered as being fulfilled by the Defendant and complete upon the final disposition of any and all charges against any and all individuals or Defendants that may be charged, or informed against as a result of the investigation into illegal activities set forth herein, and the same have been disposed of by either acquittal, conviction or plea of no contest or guilty, and the Defendant shall cooperate during any Appellate process that may result from any of the foregoing.
14. Defendant hereby waives all rights to a speedy trial conferred by the constitutions of the United States and Florida, and by the provisions of Florida Rules of Criminal Procedure, Rule 3.191; and any applicable Statue of Limitations under F.S. 775.15.
15. No additional promises, agreements and conditions have been entered into other than those set forth in this Agreement and none will be entered into unless in writing and signed by all the parties.
16. The Defendant acknowledges that he has read, reviewed and discussed the foregoing Agreement with his undersigned counsel. The Defendant acknowledges that he is fully aware and understanding of all terms and conditions of this Agreement, and that he enters into this Agreement freely, voluntarily, knowingly, intelligently by and with the advice of counsel.

Dated this 08 of March, ~~2017~~ 2018

Amc
17th

Adam Costello

Defendant: Adam Murray Costello

STEPHEN B. RUSSELL
STATE ATTORNEY
TWENTIETH JUDICIAL CIRCUIT

Witness:

Shannon H. McFee
Shannon H. McFee
Attorney for Defendant
Law Office of Shannon McFee
2671 Airport Road South, Suite 301
Naples, Fl. 34112

Mara W. Marzano
Mara W. Marzano
Assistant State Attorney
Florida Bar Number 0369950
Post Office Box 399
Fort Myers, Florida 33902
(239)533-1330
Eservice: ServiceSAO-LEE@sao.ejis20.org

Amc
17th

Exhibit “D”

RULE 3.992(a) CRIMINAL PUNISHMENT CODE SCORESHEET

The Criminal Punishment Code Scoresheet Preparation Manual is available at:
http://www.dc.state.fl.us/pub/sen_cpm/index.html

1. SENT. DATE 10/18/2017 3/12/2018	2. PREP'S NAME RAYBUCK	3. COUNTY LEE	4. SENTENCING JUDGE STEINBECK, MARGARET
5. NAME (LAST, FIRST, MID, SUF) COSTELLO, ADAM, MURRAY,	6. DOB 11/12/1974	8. RACE WHITE	10. PRI. OFF. DATE 08/19/2016
13. UNIFORM DOCKET #	7. DC # 228216	9. GENDER MALE	11. PRIMARY DOCKET # 1600371
			12. PLEA

I. PRIMARY OFFENSE: If Qual., check A S C XR (A=Att, S=Solc, C=Consp, R=Rec's)
 FELONY F.S.# DESCRIPTION OFFENSE LEVEL POINTS

DEGREE
 1ST DEG 316.027(2)(C) LEAVE CRASH W/DEATH 08
 (Level - Points: 1=4, 2=10, 3=16, 4=22, 5=28, 6=36, 7=56, 8=74, 9=92, 10=116)
 Prior capital felony triples Primary offense points - NO I. 74.0

II. ADDITIONAL OFFENSE(S): Supplemental page attached - NO
 Docket# FEL/MM F.S.# OFFENSE QUALIFY COUNTS POINTS TOTAL
 DEGREE LEVEL A S C R
 1600371 3RD DEG 918.13(1)(A) 03 001 X 2.4 = 2.4
 DESCRIPTION: OBSTRUCT CRIME INVESTIGATION UC#:
 (Level-Points: M=0.2, 1=0.7, 2=1.2, 3=2.4, 4=3.6, 5=5.4, 6=18, 7=28, 8=37, 9=46, 10=58)
 Prior capital felony triples Add. off. points - NO Suppl. page points 0.0
 II. 2.4

III. VICTIM INJURY

	Number	Total		Number	Total
2nd Deg. Murder	240 X	0.0 = 0.0	Slight	4 X	0.0 = 0.0
Death	120 X	1.0 = 120.0	Sex Penet.	80 X	0.0 = 0.0
Severe	40 X	0.0 = 0.0	Sex Cont.	40 X	0.0 = 0.0
Moderate	18 X	0.0 = 0.0			

III. 120.0

IV. PRIOR RECORD: Supplemental page attached - NO

FEL/MM F.S.#	OFFENSE QUAL	DESCRIPTION	NBR	PTS	TOTAL
DEGREE	LEVEL	ASCR			
(Lev-Pnts: M=0.2, 1=0.5, 2=0.8, 3=1.6, 4=2.4, 5=3.6, 6=9, 7=14, 8=19, 9=23, 10=29)					
Supplemental page points:					0.0
IV.					0.0
Page 1 Subtotal:					196.4

Effective Date: For offenses committed under the Criminal Punishment Code
 effective for offenses committed on or after October 1, 1998, and subsequent
 revisions.

Exhibit "D"

NAME (LAST, FIRST, MI) COSTELLO, ADAM,	DOCKET # 1600371
---	---------------------

Page 1 Subtotal: 196.4

- V. Legal Status violation = 4 Points
 ___ Escape ___ Failure to appear ___ Fleeing ___ Supersedeas bond
 ___ Incarceration ___ Pretrial Intervention or diversion Program
 ___ Court Imposed or post prison release community supervision
 resulting in a conviction
 VI. Community Sanction violation before the court for sentencing VI. 0.0
 ___ Probation ___ Community Control ___ Pretrial Intervention or diversion
 ___ 6 points for any violation other than new felony conviction x
 ___ each successive violation OR
 ___ New felony conviction = 12 points x ___ each successive
 violation if new offense results in conviction before or at the
 same time as sentence for violation of probation OR
 ___ 12 Points x ___ each successive violation for a violent
 felony offender of special concern when the violation is not
 based solely on failure to pay costs, restitution OR
 ___ New felony conviction = 24 points x ___ each successive violation
 for a violent felony offender of special concern if new
 offense results in a conviction before or at the same for
 violation of probation
 VII. Firearm/Semi-Automatic or Machine Gun = 18 or 25 points VII. 0.0
 VIII. Prior Serious Felony = 30 Points VIII. 0.0
 Subtotal Sentence Points 196.4
 IX. Enhancements (only if the primary offense qualifies for enhancement)

Law Enf. Protect	Drug Trafficker	Motor Vehicle Theft	Criminal Gang Offense	Domestic Violence in the Presence of Related Child (offenses committed on or after 03/12/2007)	Adult-on-Minor Sex Offense (offenses committed on or after 10/01/2014)
___X 1.5/2.0/2.5	___X 1.5	___X 1.5	___X 1.5	___X 1.5	___X 2.0
Enhanced Subtotal Sentence Points					IX. 0.0
TOTAL SENTENCE POINTS					196.4

Effective Date: For offenses committed under the Criminal Punishment Code effective for offenses committed on or after October 1, 1998, and subsequent revisions.

SENTENCE COMPUTATION

If total sentence points are less than or equal to 44, the lowest permissible sentence is any non-state prison sanction. If the total sentence points are 22 points or less, see Section 775.082(10), Florida Statutes, to determine if the court must sentence the offender to a non-state prison sanction.

If total sentence points are greater than 44:

196.4 minus 28 = 168.4 x .75 = 126.3
total sentence points lowest permissible prison
sentence in months

If total sentence points are 60 points or less and court makes findings pursuant to both Florida Statutes 948.20 and 397.334(3), the court may place the defendant into a treatment-based drug court program.

The maximum sentence is up to the statutory maximum for the primary and any additional offenses as provided in s.775.082, F.S., unless the lowest permissible sentence under the code, exceeds the statutory maximum. Such sentences may be imposed concurrently or consecutively. If total sentence points are greater than or equal to 363, a life sentence may be imposed.

35.0
maximum sentence
in years

TOTAL SENTENCE IMPOSED

		Years	Months	Days
<input checked="" type="checkbox"/> State Prison	<input type="checkbox"/> Life	<u>10</u>	<u>6</u>	
<input type="checkbox"/> County Jail	<input type="checkbox"/> Time Served			
<input type="checkbox"/> Community Control				
<input type="checkbox"/> Probation	<input type="checkbox"/> Modified			

Please check if sentenced as ☐ habitual offender, ☐ habitual violent offender, ☐ violent career criminal, ☐ prison releasee reoffender, or a ☒ mandatory minimum applies.

☐ Mitigated Departure ☒ Plea Bargain ☐ Prison Diversion Program

Other Reason _____

JUDGE'S SIGNATURE

Mayan O Sr

Effective Date: For offenses committed under the Criminal Punishment Code effective for offenses committed on or after October 1, 1998, and subsequent revisions.

RULE 3.992(b) CRIMINAL PUNISHMENT CODE SUPPLEMENTAL SCORESHEET

NAME (LAST, FIRST, MIDDLE, SUFFIX)	DOCKET	UNIFORM CASE NUMBER	DATE OF SENT
COSTELLO, ADAM, MURRAY,	1600371		10/18/2017

II. ADDITIONAL OFFENSE(S):

Docket#	FEL/MM	F.S.#	OFFENSE	QUALIFY	COUNTS	POINTS	TOTAL
	DEGREE		LEVEL	A S C R			
(Level-Points:M=0.2,1=0.7,2=1.2,3=2.4,4=3.6,5=5.4,6=18,7=28,8=37,9=46,10=58)						II.	0.0

IV. PRIOR RECORD:

FEL/MM	F.S.#	OFFENSE	QUAL	DESCRIPTION	NBR	PTS	TOTAL
DEGREE		LEVEL	ASCR				
(Level-Points:M=0.2,1=0.5,2=0.8,3=1.6,4=2.4,5=3.6,6=9,7=14,8=19,9=23,10=29)						IV.	0.0

Reasons for Departure - Mitigating Circumstances
(reasons may be checked here or written on the scoresheet)

- ☐ Legitimate, uncoerced plea bargain
- ☐ The defendant was an accomplice to the offense and was a relatively minor participant in the criminal conduct.
- ☐ The capacity of the defendant to appreciate the criminal nature of the conduct or to conform that conduct to the requirements of law was substantially impaired.
- ☐ The defendant requires specialized treatment for a mental disorder that is unrelated to substance abuse or addiction, or for a physical disability, and the defendant is amenable to treatment.
- ☐ The need for payment of restitution to the victim outweighs the need for a prison sentence.
- ☐ The victim was an initiator, willing participant, aggressor, or provoker of the incident.
- ☐ The defendant acted under extreme duress or under the domination of another person.
- ☐ Before the identity of the defendant was determined, the victim was substantially compensated.
- ☐ The defendant cooperated with the State to resolve the current offense or any other offense.
- ☐ The offense was committed in an unsophisticated manner and was an isolated incident for which the defendant has shown remorse.
- ☐ At the time of the offense the defendant was too young to appreciate the consequences of the offense.
- ☐ The defendant is to be sentenced as a youthful offender.
- ☐ The defendant is amenable to the services of a postadjudicatory treatment-based drug court program and is otherwise qualified to participate in the program.
- ☐ The defendant was making a good faith effort to obtain or provide medical assistance for an individual experiencing a drug-related overdose.

Pursuant to 921.0026(3) the defendant's substance abuse or addiction does not justify a downward departure from the lowest permissible sentence, except for the provisions of s.921.0026(2)(m).

Effective Date: For offenses committed under the Criminal Punishment Code effective for offenses committed on or after October 1, 1998, and subsequent revisions.

Exhibit “E”

IN THE CIRCUIT COURT OF THE TWENTIETH JUDICIAL CIRCUIT IN AND FOR
LEE COUNTY, FLORIDA

State of Florida vs Adam Murray Costello

Case Number: 16-CF-000371

Minutes

Time: 931 Court Room: Courtroom 7-A
Judge: Margaret O Steinbeck State Attorney: ~~E. P. Smith~~ 369950
Court Reporter: Smart Defense Attorney: McFee, Shannon Howard
Deputy Sheriff: Lubrun/ Sherman Deputy Clerk: R. Waitekus
Date of Action: 02/26/2018 Custody Status: BO
DOB: 11/12/1974 Gender: Male Race: White
Arrest Date: 09/02/2016 Arrest Agency: Fort Myers Police Location: Fort Myers

Count	Description	Statute - Degree	Filed Status	Reopened Reason
1.	Leaving the Scene of	316.027(2c2f) - FF	FI	
Bond: IS250K-13528	Type: PSB	Status: PO		Amount: 200,000.00
2.	EVIDENCE-DESTROYING	918.13 - FT	FI	
Bond: IS15K-355593	Type: PSB	Status: PO		Amount: 15,000.00

APPEARANCE

☒ Present w/attorney ☐ Present by/attorney ☐ Present w/o attorney
☐ Present w/interpreter ☐ Interpreter Services Requested-Language _____
☐ Failed to appear ☐ BW Ordered-Hold No Bond ☐ BW Ordered-Bond Set @ \$ _____
☐ ROR Revoked ☐ PTS Revoked
☐ Bond Estreature Ordered ☐ Set Aside Estreature ☐ Set Aside BW (Notify Clerk's Office/LCSO)

CONTINUANCE

☒ Cont. to 3-12-18 @ 900 (AM) PM in Courtroom 4A 4B (7A) 7B 8A 8B _____
Continued by State Defense Judge
for ERC ☒ TR SE CMC PTC Plea Pre-Trial Diversion Pre-Trial Diversion 6A
☐ Speedy Trial Waived ☐ Speedy Trial Tolled _____
☐ Screen for MHC DC PTD
☐ Pre-Sentence Investigation/Pretrial Disposition Report ☐ Ordered ☐ Waived ☐ None

PLEA

☐ Guilty Ea Ct Ct(s) _____
☐ Nolo Contendere Ea Ct Ct(s) _____
☐ As Charged Amended Offense Lesser Offense Ea Ct Ct(s) _____
☐ State Orally Amends Information in Open Court as to Ct (s) _____
Charge(s) _____
Statute(s) _____ Degree _____ Misdemeanor / Felony
☐ Formal Filing of Information is Waived ☐ Information Filed in Open Court ☐ Entering Plea to Traffic Citation

ADJUDICATION

☐ Adjudicated Guilty Ea Ct Ct(s) _____
☐ Adjudication Withheld Ea Ct Ct(s) _____
☐ Adjudicated Delinquent (Juvenile)

DISPOSITION

☐ Nolle Prose Ea Ct Ct(s) _____
☐ Dismissed Ea Ct Ct(s) _____
☐ Merged & Dismissed Merge Count(s) into Count _____ for Sentencing & Dismissal

VERDICT

☐ Guilty by Jury Ct(s) _____ ☐ Not Guilty by Jury Ct(s) _____
☐ Mistrial _____
☐ Guilty of Lesser Offense _____ Statute _____
☐ Remanded into Custody w/out Bond

Adam Costello
DEFENDANT / ATTORNEY FL BAR #

If you are a person with a disability who needs any accommodation in order to participate in this proceeding, you are entitled, at no cost to you, to the provision of certain assistance. Please contact Brooke Dean, Operations Division Manager, whose office is located at Lee County Justice Center, 1700 Monroe Street, Fort Myers, FL 33901, and whose telephone number is (239) 533-1771, at least 7 days before your scheduled court appearance receiving this notification if the time before the scheduled appearance are hearing or voice impaired, call 711.

Exhibit "E"

Continuation of proceedings on 02/26/2018
For **Adam Murray Costello**

On Case: **16-CF-000371**

SENTENCE (Previously Pled Nolo / Guilty on _____ Found Guilty by Jury on _____)

PRISON: _____ MM/YY _____ Each Ct _____ Count(s) _____
 _____ Ea Ct Concurrent _____ and Concurrent w/ _____
 _____ Consecutive _____ Ct(s) _____
 _____ Minimum Mandatory _____ MM/YY _____ Ct(s) _____
 _____ Sentence Suspended _____

JAIL: _____ DD/MM/YY _____ Each Ct _____ Count(s) _____
 _____ Ea Ct Concurrent _____ and Concurrent w/ _____
 _____ Consecutive _____ Ct(s) _____
 _____ As a Condition of Probation _____ Followed By Probation _____
 _____ CTS _____ DD _____ DOC to Compute Prison Time & Prior Jail Time _____
 _____ Weekend Jail Time Fri 6PM to Sun 6 PM _____ Day Work Program _____
 _____ Beginning _____ Days Prior to Sentencing _____
 _____ Sentence Suspended _____ Days from VOP/VOCC Arrest on Split Sentence _____

COMM CONTROL: _____ MM/YY _____ Each Ct _____ Count(s) _____
 _____ Each Count Concurrent _____ And Concurrent with Case(s) _____

PROBATION: _____ MM/YY _____ Each Ct _____ Count(s) _____
 _____ S-State _____ R-County _____ Drug Offender Probation _____ Intensive Supervision _____
 _____ Sex Offender Probation _____ FDLE Fingerprints taken in Court (Sex Offenders/Predators) _____
 _____ Each Count Concurrent _____ and Concurrent with Case(s) _____
 _____ Consecutive _____ Ct(s) _____
 _____ One Time Cost of Supervision \$ _____
 _____ May petition the Court for _____ Early Termination _____ Half early out of Supervision (Once all conditions are met) _____
 _____ No early termination of Supervision _____ May transfer probation to _____
 _____ Curfew From _____ AM / PM to _____ AM / PM _____
 _____ Curfew maybe modified by Probation for treatment and/or work purposes _____
 _____ Report to Probation today _____ Report to Probation upon Release within _____

SENTENCING PROVISIONS

_____ Perform _____ hours of Community Service within _____ DD / MM / YY _____
 _____ Sentenced as _____ Habitual Felony Offender _____ Habitual Violent Felony Offender _____ Prison Release Re-Offender _____
 _____ An Adult _____ Youthful Offender _____ Ct(s) _____
 _____ DNA Testing-Taken _____ at LCJ _____ in Court _____
 _____ No Contact w/ Victim (s) _____ No Violent Contact w/ Victim(s) _____
 _____ DL SUSP / REV _____ DD / MM / YY _____ May Apply for Hardship License after Six Months _____
 _____ DUI Attend _____ Victim Impact Panel _____ Lee Memorial High Risk Driver's/Trauma Course _____
 _____ DUI-Attend DUI School _____ Phase 1 _____ Phase 2 _____
 _____ DUI -Impound Vehicle for _____ Days as a condition of Probation unless statutory conditions are met _____
 _____ Ignition Interlock Device Ordered for _____ DD/MM _____
 _____ Be evaluated/screened for Substance Abuse by SalusCare, Inc. (or equivalent program) enter & complete outpatient aftercare; follow recommendations. Complete on 1st attempt _____ No possession or consumption of illicit drugs or alcohol _____
 _____ Drug Testing Without probable cause at own expense; during period of supervision _____
 _____ Remain in Custody until bed space becomes available _____
 _____ Attend & Complete Program: _____ RSAT _____ Life Skills Program _____ Anti-Theft School _____ Mile Post Program _____
 _____ Anger Management Program _____ Batterer's Intervention Program _____ Sign up within 30 days _____
 _____ Advent eLearning: _____ Alcohol and Substance _____ Marijuana Education _____ Anger Management _____ Parenting _____ Shoplifting _____
 _____ Traffic Safety _____
 _____ Stay away from Place of Arrest _____
 _____ Other _____
 _____ Remanded into Custody _____ Release from Custody on this case only _____

REVOCATION HEARINGS: (_____ State _____ County)

_____ Arraigned _____ PL NG/Denies VOP/VOCC _____ PL G/Admits VOP/VOCC _____
 _____ Hrg set for _____ Rev Hrg Cont to _____ VOP Advisement Cont to _____
 _____ Date _____ @ _____ AM / PM in Courtroom 4A 7A 7B 8A 8B _____
 _____ Adjudicated Guilty _____ Ct(s) _____
 _____ Adjudication Withheld _____ Ct(s) _____
 _____ Court finds defendant guilty of violation(s); ruling read into Court record (no need to record each violation) _____
 _____ Probation/Community Control _____ Modified _____ Reinstated _____ Continue on Probation _____ Revoked _____
 _____ Probation extended for _____ MO / YR from original term date _____
 _____ Same terms and conditions apply as previously imposed _____
 _____ All Standard, Special Terms, Conditions, & Financials are terminated _____
 _____ Dismiss Warrant _____ (Notify Clerk's Office/LCSO)

Continuation of proceedings on 02/26/2018

For **Adam Murray Costello**On Case: **16-CF-000371****MOTIONS**

☐ Set Bond ☐ Reduce Bond ☐ Revoke Bond ☐ Revoke PTR ☐ Revoke ROR
☐ Bond Set @ \$ _____
☐ Motion to Suppress ☐ Motion in Limine ☐ Competency Hearing ☐ W/draw as Counsel ☐ W/draw Plea
☐ New Trial ☐ Continuance ☐ Dismiss ☐ Clarify or Correct Sentence
☐ Early Term of Probation ☐ State ☐ County
☐ HFO Hrg ☐ HVFO Hrg ☐ PRR Hrg ☐ Post Conviction (3.850) ☐ Nelson Farretta Hrg ☐ Jimmy Rice Hrg
☐ Expunge/Seal (Outstanding monetary obligations must be addressed in court & the \$42.00 fee must be paid to Clerk's Office before case is officially expunged /sealed)
☐ Motion for Judgment of Acquittal
☐ Pretrial Supervision ☐ Bond Required ☐ Alt Bond ☐ GPS Monitoring ☐ Drug Testing ☐ Alcohol Monitor
☐ Other _____

MOTION RESULTS

☐ Granted ☐ Denied ☐ Reserves Ruling ☐ Withdrawn ☐ Cancelled prior to court ☐ Not Addressed
☐ Other _____

FINE ASSESSMENTS

☐ Fine \$ _____ (775.083) ☐ Ea Ct
☐ \$ _____ Ct 1; \$ _____ Ct 4
☐ \$ _____ Ct 2; \$ _____ Ct 5
☐ \$ _____ Ct 3; \$ _____ Ct 6
☐ \$ _____
☐ 5% Surcharge \$ _____ (938.04) ☐ Ea Ct
☐ \$ _____ Ct 1; \$ _____ Ct 4
☐ \$ _____ Ct 2; \$ _____ Ct 5
☐ \$ _____ Ct 3; \$ _____ Ct 6
☐ \$ _____
☐ Fine Waived/Reduced 893.135 (4)

MANDATORY ASSESSMENTS

☐ Court Cost
 (775.083 / 938.01 / 938.03 / 938.05 / 938.06 / 939.185)
☐ \$413.00 ☐ \$383.00 ☐ Other \$ _____
 If Ordered Under - Reason:

☐ \$2.00 Law Enforcement Education (938.15 w/ Ord.)
☐ \$33.00 Certain Traffic Offense Court Cost (318.17/318.18)
☐ \$135.00 DUI Add'l Court Costs (938.07)
☐ \$70.00 Reckless Driving Court Cost (318.18 / 316.192)
☐ \$65.00 Racing Court Cost (318.18)
☐ \$5.00 Leaving the Scene Add'l Court Cost (316.061)
☐ \$195.00 BUI Add'l Court Cost (938.07 / 327.35)
☐ \$201.00 Domestic Violence Surcharge (938.08)
☐ Count(s) _____
☐ \$151.00 Rape Crisis Trust Fund (938.085)
☐ Count(s) _____
☐ \$151.00 Crimes Against Minors (938.10)
☐ Count(s) _____
☐ \$5000.00 Civil Penalty (796.07)

DISCRETIONARY ASSESSMENTS

☐ \$ _____ Alcohol & Drug Abuse Program
☐ Up to fine amount (938.21)
☐ \$100.00 FDLE Trust Fund/State Crime Lab (938.055)
☐ \$ _____ Investigative Fee to:
☐ FMP ☐ LCS ☐ FDLE ☐ Statewide Pros
☐ Other _____ (938.27)
☐ Worthless Check Diversion Fee \$ _____ (832.08)
☐ Diversion Cost of Supervision \$ _____ (948.09)
☐ Victim Restitution/Crime Compensation \$ _____

ATTORNEY FEES & SURCHARGES

☐ \$50.00 Public Def Application Fee (27.52)
☐ Add'l Application Fees \$ _____
 (Must be Addressed on the Record)
☐ Defense Attorney Costs at Conviction (938.29)
☐ \$50.00 ☐ \$100.00 ☐ Other \$ _____
☐ Cost of Prosecution (938.27)
☐ \$50.00 ☐ \$100.00 ☐ Other \$ _____

RESTITUTION

☐ Court Orders Restitution & Reserves on Amount _____
☐ Restitution \$ _____ to _____
☐ Minimum Payment of \$ _____ per Month to:
☐ As a Condition of Probation
☐ Restitution is Ordered Joint & Several with Co-defendant(s)
☐ Continue Restitution payments of:
☐ \$ _____ each month (VOP)

DISPOSITION OF MONETARY OBLIGATIONS

☐ Monetary Obligations Due within _____ DD/MM/YY
☐ Monetary Obligations, excluding Restitution & Attorney Fees, & COS
☐ Fees May Be Converted to Community Service at \$10 per Hour
☐ Monetary Obligations Reduced to Judgment (excluding Restitution)
☐ Previous Only
☐ Monetary Obligations Referred to Clerk of Court Collections
☐ Monetary Obligations to be paid to Department of Corrections
☐ Monetary Obligations Due & Owing Carried Forward (VOP)
☐ Minimum Payment of \$ _____ per Month Toward _____
☐ Financial Obligations

Unpaid financial obligations still remaining 90 days after payment due date will be referred by the Clerk of Court to a collection agency and an additional fee of up to 40% of the outstanding balance owed will be added at that time (28.246).

Failure to comply with payment of financial obligations may result in a suspension of your driver license privilege (322.245).

Mandatory assessments are imposed and shall be included in the judgment without regard to whether the assessment was announced in open court.

Received by: _____

LCSC

Date

Judge

1/18/2018 2:02 PM Filed Lee County Clerk of Courts: PageID 765

IN THE CIRCUIT COURT OF THE TWENTIETH JUDICIAL CIRCUIT IN AND FOR
LEE COUNTY, FLORIDA

State of Florida vs Adam Murray Costello

Case Number: 16-CF-000371

Time: 9:10 Minutes
 Court Room: Courtroom 7-A
 Judge: Margaret O Steinbeck State Attorney: 369950
 Court Reporter/Smart: Shannon Howard McFee
 Deputy Sheriff: Lubrun/ Sherman Defense Attorney: R. Waitekus
 Date of Action: 01/18/2018 Deputy Clerk: BO
 Custody Status: BO

DOB: 11/12/1974 Gender: Male Race: White
 Arrest Date: 09/02/2016 Arrest Agency: Fort Myers Police Location: Fort Myers

Count	Description	Statute - Degree	Filed Status	Reopened Reason
1.	Leaving the Scene of	316.027(2c2f) - FF	FI	
Bond: IS250K-13528	Type: PSB	Status: PO		Amount: 200,000.00
2.	EVIDENCE-DESTROYING	918.13 - FT	FI	
Bond: IS15K-355593	Type: PSB	Status: PO		Amount: 15,000.00

APPEARANCE

☒ Present w/attorney ☐ Present by attorney ☐ Present w/o attorney
☐ Present w/interpreter ☐ Interpreter Services Requested-Language _____
☐ Failed to appear ☐ BW Ordered-Hold No Bond ☐ BW Ordered-Bond Set @ \$ _____
☐ ROR Revoked ☐ PTS Revoked
☐ Bond Estreature Ordered ☐ Set Aside Estreature ☐ Set Aside BW (Notify Clerk's Office/LCSO)

CONTINUANCE

☒ Cont. to 2-26-18 @ 900 AM PM in Courtroom 4A 7A 7B 8A 8B
 Continued by State Defense Judge
 for ERC ☒ TR SE CMC PTC Plea Pre-Trial Diversion Pre-Trial Diversion 6A
☐ Speedy Trial Waived ☐ Speedy Trial Tolted
☐ Screen for MHC DC PTD
☐ Pre-Sentence Investigation/Pretial Disposition Report ☐ Ordered ☐ Waived ☐ None

4-5 days

PLEA

☐ Guilty Ea Ct Ct(s)
☐ Nolo Contendere Ea Ct Ct(s)
☐ As Charged Amended Offense Lesser Offense Ea Ct Ct(s)
☐ State Orally Amends Information in Open Court as to Ct (s)
☐ Charge(s) _____
☐ Statute(s) _____ Degree _____ Misdemeanor / Felony
☐ Formal Filing of Information is Waived ☐ Information Filed in Open Court ☐ Entering Plea to Traffic Citation

ADJUDICATION

☐ Adjudicated Guilty Ea Ct Ct(s)
☐ Adjudication Withheld Ea Ct Ct(s)
☐ Adjudicated Delinquent (Juvenile)

DISPOSITION

☐ Nolle Prosse Ea Ct Ct(s)
☐ Dismissed Ea Ct Ct(s)
☐ Merged & Dismissed Merge Count(s) into Count _____ for Sentencing & Dismissal

VERDICT

☐ Guilty by Jury Ct(s) ☐ Not Guilty by Jury Ct(s)
☐ Mistrial
☐ Guilty of Lesser Offense Statute
☐ Remanded into Custody w/out Bond

Adam Costello

DEFENDANT / ATTORNEY

FL BAR #

If you are a person with a disability who needs any accommodation in order to participate in this proceeding, you are entitled, at no cost to you, to the provision of certain assistance. Please contact Brooke Dean, Operations Division Manager, whose office is located at Lee County Justice Center, 1700 Monroe Street, Fort Myers, FL 33901, and whose telephone number is (239) 533-1771, at least 7 days before your scheduled court appearance, or immediately upon receiving this notification if the time before the scheduled appearance is less than 7 days; if you are hearing or voice impaired, call 711.

Continuation of proceedings on 01/18/2018

For **Adam Murray Costello**On Case: **16-CF-000371****SENTENCE** (Previously Pled Nolo / Guilty on _____ Found Guilty by Jury on _____)

PRISON: _____ MM/YY _____ Each Ct _____ Count(s) _____
 _____ Ea Ct Concurrent _____ and Concurrent w/ _____
 _____ Consecutive _____ Ct(s) _____
 _____ Minimum Mandatory _____ MM/YY _____ Ct(s) _____
 _____ Sentence Suspended _____

JAIL: _____ DD/MM/YY _____ Each Ct _____ Count(s) _____
 _____ Ea Ct Concurrent _____ and Concurrent w/ _____
 _____ Consecutive _____ Ct(s) _____
 _____ As a Condition of Probation _____ Followed By Probation _____
 _____ CTS _____ DD _____ DOC to Compute Prison Time & Prior Jail Time _____
 _____ Weekend Jail Time Fri 6PM to Sun 6 PM _____ Day Work Program _____
 _____ Beginning _____ Days Prior to Sentencing _____
 _____ Sentence Suspended _____ Days from VOP/VOCC Arrest on Split Sentence _____

COMM CONTROL: _____ MM/YY _____ Each Ct _____ Count(s) _____
 _____ Each Count Concurrent _____ And Concurrent with Case(s) _____

PROBATION: _____ MM/YY _____ Each Ct _____ Count(s) _____
 _____ S-State _____ R-County _____ Drug Offender Probation _____ Intensive Supervision _____
 _____ Sex Offender Probation _____ FDLE Fingerprints taken in Court (Sex Offenders/Predators) _____
 _____ Each Count Concurrent _____ and Concurrent with Case(s) _____
 _____ Consecutive _____ Ct(s) _____
 _____ One Time Cost of Supervision \$ _____
 _____ May petition the Court for _____ Early Termination _____ Half early out of Supervision (Once all conditions are met) _____
 _____ No early termination of Supervision _____ May transfer probation to _____
 _____ Curfew From _____ AM / PM to _____ AM / PM _____
 _____ Curfew maybe modified by Probation for treatment and/or work purposes _____
 _____ Report to Probation today _____ Report to Probation upon Release within _____

SENTENCING PROVISIONS

_____ Perform _____ hours of Community Service within _____ DD / MM/YY _____
 _____ Sentenced as _____ Habitual Felony Offender _____ Habitual Violent Felony Offender _____ Prison Release Re-Offender _____
 _____ An Adult _____ Youthful Offender _____ Ct(s) _____
 _____ DNA Testing-Taken _____ at LCJ _____ in Court _____
 _____ No Contact w/ Victim(s) _____ No Violent Contact w/ Victim(s) _____
 _____ DL SUSP / REV _____ DD / MM / YY _____ May Apply for Hardship License after Six Months _____
 _____ DUI Attend _____ Victim Impact Panel _____ Lee Memorial High Risk Driver's/Trauma Course _____
 _____ DUI-Attend DUI School _____ Phase 1 _____ Phase 2 _____
 _____ DUI -Impound Vehicle for _____ Days as a condition of Probation unless statutory conditions are met _____
 _____ Ignition Interlock Device Ordered for _____ DD/MM _____
 _____ Be evaluated/screened for Substance Abuse by SalusCare, Inc. (or equivalent program) enter & complete outpatient aftercare; follow recommendations. Complete on 1st attempt _____ No possession or consumption of illicit drugs or alcohol _____
 _____ Drug Testing Without probable cause at own expense; during period of supervision _____
 _____ Remain in Custody until bed space becomes available _____
 _____ Attend & Complete Program: _____ RSAT _____ Life Skills Program _____ Anti-Theft School _____ Mile Post Program _____
 _____ Anger Management Program _____ Batterer's Intervention Program _____ Sign up within 30 days _____
 _____ Stay away from Place of Arrest _____
 _____ Other _____
 _____ Remanded into Custody _____ Release from Custody on this case only _____

REVOCATION HEARINGS: (_____ State _____ County)

_____ Arraigned _____ PL NG/Denies VOP/VOCC _____ PL G/Admits VOP/VOCC _____
 _____ Hrg set for _____ Rev Hrg Cont to _____ VOP Advisement Cont to _____
 _____ Date _____ @ _____ AM / PM in Courtroom 4A 7A 7B 8A 8B _____
 _____ Adjudicated Guilty _____ Ct(s) _____
 _____ Adjudication Withheld _____ Ct(s) _____
 _____ Court finds defendant guilty of violation(s); ruling read into Court record (no need to record each violation) _____
 _____ Probation/Community Control _____ Modified _____ Reinstated _____ Continue on Probation _____ Revoked _____
 _____ Probation extended for _____ MO / YR from original term date _____
 _____ Same terms and conditions apply as previously imposed _____
 _____ All Standard, Special Terms, Conditions, & Financials are terminated _____
 _____ Dismiss Warrant _____ (Notify Clerk's Office/LCSO)

Continuation of proceedings on 01/18/2018
For **Adam Murray Costello**

On Case: **16-CF-000371**

MOTIONS

Set Bond _____ Reduce Bond _____ Revoke Bond _____ Revoke PTR _____ Revoke ROR _____
Bond Set @ \$ _____
Motion to Suppress _____ Motion in Limine _____ Competency Hearing _____ W/draw as Counsel _____ W/draw Plea _____
New Trial _____ Continuance _____ Dismiss _____ Clarify or Correct Sentence _____
Early Term of Probation _____ State _____ County _____
HFO Hrg _____ HVFO Hrg _____ PRR Hrg _____ Post Conviction (3.850) _____ Nelson Farretta Hrg _____ Jimmy Rice Hrg _____
Expunge/Seal (Outstanding monetary obligations must be addressed in court & the \$42.00 fee must be paid to Clerk's Office before case is officially expunged /sealed)
Motion for Judgment of Acquittal _____
Pretrial Supervision _____ Bond Required _____ Alt Bond _____ GPS Monitoring _____ Drug Testing _____ Alcohol Monitor _____
Other _____

MOTION RESULTS

Granted _____ Denied _____ Reserves Ruling _____ Withdrawn _____ Cancelled prior to court _____ Not Addressed _____
Other _____

FINE ASSESSMENTS

Fine \$ _____ (775.083) _____ Ea Ct _____
\$ _____ Ct 1; \$ _____ Ct 4
\$ _____ Ct 2; \$ _____ Ct 5
\$ _____ Ct 3; \$ _____ Ct 6
\$ _____
5% Surcharge \$ _____ (938.04) _____ Ea Ct _____
\$ _____ Ct 1; \$ _____ Ct 4
\$ _____ Ct 2; \$ _____ Ct 5
\$ _____ Ct 3; \$ _____ Ct 6
\$ _____
Fine Waived/Reduced 893.135 (4)

MANDATORY ASSESSMENTS

Court Cost
(775.083 / 938.01 / 938.03 / 938.05 / 938.06 / 939.185)
\$413.00 \$383.00 Other \$ _____
If Ordered Under - Reason:

_____ \$2.00 Law Enforcement Education (938.15 w/ Ord.)
_____ \$33.00 Certain Traffic Offense Court Cost (318.17/318.18)
_____ \$135.00 DUI Add'l Court Costs (938.07)
_____ \$70.00 Reckless Driving Court Cost (318.18 / 316.192)
_____ \$65.00 Racing Court Cost (318.18)
_____ \$5.00 Leaving the Scene Add'l Court Cost (316.061)
_____ \$195.00 BUI Add'l Court Cost (938.07 / 327.35)
_____ \$201.00 Domestic Violence Surcharge (938.08)
_____ Count(s) _____
_____ \$151.00 Rape Crisis Trust Fund (938.085)
_____ Count(s) _____
_____ \$151.00 Crimes Against Minors (938.10)
_____ Count(s) _____
_____ \$5000.00 Civil Penalty (796.07)

DISCRETIONARY ASSESSMENTS

\$ _____ Alcohol & Drug Abuse Program
Up to fine amount (938.21)
_____ \$100.00 FDLE Trust Fund/State Crime Lab (938.055)
\$ _____ Investigative Fee to:
FMP _____ LCS _____ FDLE _____ Statewide Pros
Other _____ (938.27)
Worthless Check Diversion Fee \$ _____ (832.08)
Diversion Cost of Supervision \$ _____ (948.09)
Victim Restitution/Crime Compensation \$ _____

ATTORNEY FEES & SURCHARGES

_____ \$50.00 Public Def Application Fee (27.52)
Add'l Application Fees \$ _____
(Must be Addressed on the Record)
_____ Defense Attorney Costs at Conviction (938.29)
_____ \$50.00 _____ \$100.00 _____ Other \$ _____
_____ Cost of Prosecution (938.27)
_____ \$50.00 _____ \$100.00 _____ Other \$ _____

RESTITUTION

_____ Court Orders Restitution & Reserves on Amount _____
_____ Restitution \$ _____ to _____
_____ Minimum Payment of \$ _____ per Month to: _____
_____ As a Condition of Probation
_____ Restitution is Ordered Joint & Several with Co-defendant(s)
_____ Continue Restitution payments of:
\$ _____ each month (VOP)

DISPOSITION OF MONETARY OBLIGATIONS

_____ Monetary Obligations Due within _____ DD/MM/YY
_____ Monetary Obligations, excluding Restitution & Attorney Fees, & COS
_____ Fees May Be Converted to Community Service at \$10 per Hour
_____ Monetary Obligations Reduced to Judgment (excluding Restitution)
_____ Previous Only
_____ Monetary Obligations Referred to Clerk of Court Collections
_____ Monetary Obligations to be paid to Department of Corrections
_____ Monetary Obligations Due & Owing Carried Forward (VOP)
_____ Minimum Payment of \$ _____ per Month Toward _____
_____ Financial Obligations

Unpaid financial obligations still remaining 90 days after payment due date will be referred by the Clerk of Court to a collection agency and an additional fee of up to 40% of the outstanding balance owed will be added at that time (28.246).

Failure to comply with payment of financial obligations may result in a suspension of your driver license privilege (322.245).

Mandatory assessments are imposed and shall be included in the judgment without regard to whether the assessment was announced in open court.

Received by:

LCSO

Date

Judge

Exhibit “F”

Filing # 111558498 E-Filed 08/10/2020 05:07:51 PM

IN THE CIRCUIT COURT OF THE TWENTIETH JUDICIAL
CIRCUIT IN AND FOR LEE COUNTY, FLORIDA

STATE OF FLORIDA,

Case No. 16-CF-371

vs.

Lee County Justice Center
1700 Monroe Street
Fort Myers, FL 33901

ADAM COSTELLO,

March 12, 2018

Defendant.

TRANSCRIPT OF PROCEEDINGS

BEFORE THE HONORABLE MARGARET STEINBECK
CIRCUIT JUDGE

APPEARANCES:

For the State:

MARA MARZANO, ESQ.
MICHAEL COLOMBO, JR., ESQ.
Office of the State Attorney
2000 Main Street, 6th Floor
Fort Myers, FL 33901
(239) 533-1000

For the Defendant:

SHANNON H. McFEE, ESQ.
2671 Airport Pulling Road
Suite 301
Naples, FL 34112
(239) 775-9697

Transcription Service:

MERIT COURT REPORTING, INC.
6213 Presidential Court, Suite 100
Fort Myers, FL 33919
239.481.1300

Proceedings recorded by digital sound recording;
transcript produced by transcription service.

Exhibit "F"

TABLE OF CONTENTSWITNESSES:DIRECT CROSS REDIRECT RECROSSState of Florida:

Adam Costello 10

EXHIBITS:IDENTIFIEDADMITTED

(None)

1 THE COURT: We're here in State v Costello,
2 16-CF-371. I'm Judge Margaret Steinbeck. I'll
3 ask counsel to state their appearances for the
4 record.

5 MS. MARZANO: Mara Marzano and Michael
6 Colombo, Jr. for the State.

7 MR. McFEE: Your Honor, Shannon McFee on
8 behalf of Adam Costello.

9 THE COURT: Okay. So this is scheduled for
10 the Court to potentially accept a plea from Mr.
11 Costello pursuant to a plea agreement. The Court
12 received in chambers a courtesy copy of what
13 appears to be a fully executed plea agreement
14 dated March 8th of 2017. The Court has had an
15 opportunity to review that agreement. I have a
16 couple of questions.

17 Is the defendant still interested in going
18 forward with the plea today?

19 MS. MARZANO: I'm sorry, Judge. There's a
20 typo on that. It should be 2018.

21 THE COURT: And I read it and read the typo
22 too. You would think I would have figured that
23 out. Okay.

24 Is the defendant still interested in entering
25 a no contest plea in exchange for the negotiated

1 sentence?

2 MR. McFEE: He is, Your Honor. There is a
3 housekeeping matter that would need to be
4 accomplished prior to doing so. The State has
5 filed a fourth amended information in this case,
6 and that's the information he would actually be
7 entering the plea to.

8 THE COURT: What's the change in the fourth
9 amended info?

10 MS. MARZANO: It just adds --

11 MR. McFEE: One item --

12 MS. MARZANO: -- one item --

13 MR. McFEE: -- as to --

14 MS. MARZANO: -- to the tampering charge, and
15 it's by agreement of the parties. It was done as
16 part of our negotiation to add that.

17 THE COURT: Okay. So it would actually be
18 the -- actually you're filing it in open court
19 right now.

20 MS. MARZANO: Yes, I am.

21 THE COURT: Okay. So it would actually be a
22 plea to this particular information that is dated
23 today's date?

24 MS. MARZANO: Yes, Your Honor.

25 THE COURT: Okay. So you can submit that for

5

1 filing in open court. I'll give that to the
2 clerk.

3 The -- are the next of kin of the victim in
4 agreement with the negotiated resolution?

5 MS. MARZANO: Yes, Your Honor. They have
6 been fully briefed, discussed, consulted
7 throughout the process, and they are in
8 agreement, although they will be wanting to make
9 some statements this morning to Your Honor, not
10 to change anything with the agreement but just to
11 let Your Honor know a little bit more about Mr.
12 Adam King. And if possible, if Your Honor could
13 accept the plea, and then we could do that, and
14 then Your Honor could sentence Mr. Costello.
15 That's -- that's what we're requesting.

16 THE COURT: Okay.

17 MR. McFEE: The understanding, Your Honor,
18 was that we would be waiving a PDR or, I'm sorry,
19 a predisposition report, presentence
20 investigation and allow for the sentencing today.

21 THE COURT: Okay. Counsel had set 30 minutes
22 for the acceptance of the plea for this hearing.
23 Are we gonna be able to accomplish what we need
24 to accomplish in 30 minutes?

25 MS. MARZANO: I believe that the victim

6

1 statements will be fairly short. I -- I thought
2 we had asked for an hour, but maybe I am
3 mistaken. I don't know.

4 THE COURT: I think my judicial assistant put
5 an hour on there at my request, but I wanna make
6 sure that you all -- I do need to recess in
7 advance of noon because I have a conference call
8 involving judges from around the state of Florida
9 that I would like to be on time for. It's the
10 conclusion of the legislative session and in my
11 role as chair of the trial court budget
12 commission so it's -- it's a call that I would
13 like to be on time for. So that's why I'm asking
14 you to proceed accordingly. Do you expect that
15 we would be able to do that?

16 MS. MARZANO: I'm hoping so, yes, Your Honor.
17 I believe so.

18 MR. McFEE: I do, Your Honor. That's why we
19 did the plea agreement in -- in advance so that
20 all of the terms and conditions, issues involved,
21 Mr. Costello's very aware of.

22 THE COURT: Okay. So the questions that I
23 had with regard to the terms are the -- is the
24 language that provides for Mr. Costello to
25 accomplish certain obligations that would only be

1 enforceable as contempt of court and not a
2 violation of the plea agreement. Specifically
3 I'm referring to Paragraph 10(h) and (i), I think
4 are the two places that that appears. How would
5 you envision that happening, Ms. Marzano?

6 MS. MARZANO: If, when Mr. Costello's
7 released from custody, he does not comply with
8 those, he could be brought in on a contempt
9 charge. I think those have to be ordered by the
10 Court, and part of the agreement does not provide
11 for any paper to follow so we felt that was the
12 best way to effectuate it. And if he doesn't go
13 ahead and do those things, one, he will never be
14 able to obtain a driver's license based on the
15 charges and the statute, and two, he could be
16 charged with contempt.

17 THE COURT: Okay. Is probation an obligation
18 of this particular crime?

19 MS. MARZANO: No.

20 THE COURT: I'm talking about Count I.

21 MS. MARZANO: No, Your Honor.

22 THE COURT: It's not? Okay.

23 MS. MARZANO: I don't believe so.

24 THE COURT: Okay. So taken to its extreme,
25 contempt of court if you have a jury trial is a

1 year incarceration if you're found guilty of
2 contempt, nonjury it's six months. So that would
3 be the risk of noncompliance there, Mr. Costello.

4 So with everything that you've heard and
5 you've read, do you personally wish to go forward
6 with this plea?

7 THE DEFENDANT: Yes, ma'am.

8 THE COURT: Okay. I'm gonna put you under
9 oath. Do you solemnly swear the testimony you
10 give in this proceeding will be the truth, the
11 whole truth and nothing but the truth?

12 THE DEFENDANT: Yes.

13 THE COURT: Please state your full name.

14 THE DEFENDANT: Adam Murray Costello.

15 THE COURT: Mr. Costello, I'm going to ask
16 Ms. Marzano, are you gonna do a colloquy for me?

17 MS. MARZANO: Yes, Your Honor. If you want
18 me to, I can.

19 THE COURT: To ask you some questions on my
20 behalf so I can make sure you understand the
21 rights that you're waiving by entering a no
22 contest plea to the charges in the fourth amended
23 information. Have you previously seen a copy of
24 this, Mr. McFee --

25 MR. McFEE: I have, Your Honor.

1 THE COURT: -- and Mr. Costello? So you
2 don't need it to refer to?

3 MR. McFEE: Right.

4 THE COURT: You're waiving reading?

5 MR. McFEE: Yes, Your Honor.

6 THE DEFENDANT: Yeah.

7 THE COURT: Okay.

8 MR. McFEE: Your Honor, would you like us to
9 stand for this?

10 THE COURT: No, you can remain seated.

11 Mr. Costello, even though these rights are
12 written on the written plea agreement, they're
13 required to be part of the record orally here in
14 open court. I'll ask you to listen carefully and
15 answer truthfully.

16 You may proceed, Ms. Marzano.

17 MS. MARZANO: Thank you, Judge.

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1 Thereupon,

2 ADAM COSTELLO

3 the Defendant, having been first duly sworn, was
4 examined and testified as follows:

5 DIRECT EXAMINATION

6 BY MS. MARZANO:

7 Q. Good morning, sir. Can you please state your
8 name for the record?

9 A. Adam Murray Costello.

10 Q. And sir, what is your date of birth?

11 A. 11-12-74.

12 Q. And what are the last four digits of your
13 Social Security number?

14 A. 4276.

15 Q. Have you ever been known by an alias or any
16 other name?

17 A. No, ma'am.

18 Q. Where were you born?

19 A. Birmingham, Alabama.

20 Q. And how far have you gone in school?

21 A. I have a bachelor's degree in accounting.

22 Q. Can you read and write and understand the
23 English language, sir?

24 A. Yes, ma'am.

25 Q. Are you under the influence today of drugs or

1 alcohol?

2 A. No, ma'am.

3 Q. Are you taking any medications today?

4 A. For blood pressure.

5 Q. Okay. But that does not affect your ability

6 --

7 A. No, ma'am.

8 Q. -- to think clearly, correct?

9 A. Correct.

10 Q. All right. Do you understand why you're here
11 today?

12 A. Yes, I do.

13 Q. All right. In a amended -- in an information
14 that was amended this morning you're still charged
15 with the charge of leaving the scene of a crash with
16 death, as well as obstructing or tampering with
17 evidence. You understand that the leaving the scene
18 of a crash with death is punishable by 30 years in
19 Florida state prison as a maximum penalty, correct?

20 A. Yes, I do.

21 Q. And you understand that the obstruction or
22 tampering charge carries a maximum of three -- I'm
23 sorry, five years in prison as it's a third degree
24 felony? You understand that?

25 A. Yes.

1 Q. How today will you be pleading to the charges?

2 A. No contest.

3 Q. By entering the plea you understand that you
4 would have had the right to a trial by jury? Do you
5 understand that?

6 A. I do understand.

7 Q. And you also understand that by entering into
8 this plea agreement today you will be waiving your
9 right to have the jury determine your guilt or
10 innocence, you understand that?

11 A. Yes, I do understand.

12 Q. You understand that you'll give up the right
13 to see or hear the State's witnesses who would have
14 testified and to have Mr. McFee question them on your
15 behalf?

16 A. Yes, I do understand.

17 Q. You have the right to subpoena and call your
18 own witnesses and submit evidence on your behalf.
19 You understand you're giving that up as well?

20 A. Yes, I do.

21 Q. You understand that you have the right to
22 testify or to remain silent in this case?

23 A. Yes, I do.

24 Q. You understand that you have the right to
25 make the State prove these charges beyond every

1 reasonable doubt?

2 A. Yes.

3 MS. MARZANO: In fact, Mr. McFee, you filed,
4 I believe, two motions to -- to suppress as well
5 as several motions in limine, and the State filed
6 a Williams Rule notice. Are those by the terms
7 of the plea agreement and with Mr. Costello's
8 agreement are not going to be reserved for
9 appeal, correct?

10 MR. McFEE: That is correct.

11 BY MS. MARZANO:

12 Q. And you understand that, Mr. Costello?

13 A. Yes, I do.

14 MR. McFEE: Judge, none of those were
15 dispositive issues.

16 BY MS. MARZANO:

17 Q. All right. Mr. Costello, I'm showing you the
18 last -- or -- or a score sheet. You've seen this
19 before, correct?

20 A. Yes, correct.

21 Q. And you've seen that the terms are that you
22 face a lowest permissible sentence of 126.3 months
23 Florida state prison up to 30 potential years in
24 prison. You understand that?

25 A. Yes, I do.

1 Q. And is this the score sheet that you're
2 familiar with?

3 A. Yes.

4 Q. And you agree that it is true and accurate?

5 A. Yes.

6 Q. And you've had the opportunity to review it
7 with counsel?

8 A. Yes, I have.

9 Q. I'm showing you, Mr. Costello, a plea
10 agreement and waiver of rights form. You have seen
11 this before, correct?

12 A. Correct.

13 Q. And, in fact, it's been read to you fully,
14 correct?

15 A. Correct.

16 Q. And you understand the terms of this plea
17 form, correct?

18 A. Correct.

19 Q. And you discussed it with Mr. McFee?

20 A. Yes, I have.

21 Q. Correct? And you've signed this plea form
22 and initialed every page?

23 A. Yes.

24 Q. Are you entering this plea today of your own
25 free will?

1 A. Yes, I am.

2 Q. And are you being forced or threatened by
3 anyone to make you plea here today?

4 A. No, I am not.

5 Q. Other than what's contained in the plea
6 agreement that I just showed you and what we've
7 discussed on the record, has anyone promised you
8 anything in exchange for this plea?

9 A. No.

10 Q. You understand that the terms of the plea
11 require that you will be sentenced to 10.5 years
12 Florida state prison with a four-year minimum
13 mandatory on Count I, and Count II will be a sentence
14 of five years Florida state prison. You'll be
15 adjudicated on both counts, and they will run
16 concurrently. You will not receive a fine.

17 There are standard court costs. There's a
18 hundred dollar cost of prosecution. Restitution has
19 been addressed and will be resolved by civil
20 litigation, and it is not being requested at this
21 time.

22 Your driving privilege will be revoked for
23 three years, and the revocation shall not begin until
24 you're released from custody. The defendant must --
25 you, Mr. Costello, must comply with the statutory

1 provisions of Florida Statute 316.027(e) in order to
2 obtain a driver's license.

3 You will be required to complete 120
4 community service hours in a trauma center or
5 hospital that regularly receives victims of
6 automobile or vehicle accidents under the supervision
7 of a registered nurse, an emergency room physician or
8 an emergency medical technician pursuant to a
9 voluntary community service program operated by a
10 trauma center or hospital if one exists. And this is
11 the term that we talked about being enforceable as a
12 contempt of court but would not violate your plea
13 agreement.

14 You also, sir, will be required to
15 participate in a victim's impact panel session in
16 this judicial circuit if such a panel exists; or if
17 such a panel does not exist, you will have to attend
18 a Department approved driver improvement course
19 relating to the rights of vulnerable road users
20 relative to vehicles on the roadway. Again, this is
21 another term that would be enforceable as a contempt
22 of court issue and would not violate your plea
23 agreement.

24 You also have agreed to testify truthfully,
25 fully and completely and accurately before the State

1 Attorney's Office of the Twentieth Judicial Circuit
2 as to matters relating to, arising from your
3 knowledge and/or involvement in any criminal
4 activity. You agree you would testify truthfully,
5 fully, completely and accurately in any and all
6 hearings, depositions, proceedings and trials.

7 Upon the violation of this agreement as set
8 forth in Paragraph 10(j), you would no longer be
9 entitled to the above sentence, and it would -- this
10 agreement would be null and void. You would agree
11 that you would be resentenced by the Court with a
12 range of 126.3 months up to a maximum of 35 years for
13 these charges.

14 The -- you agreed to recordation of any
15 statements, either stenographically, electronically
16 or mechanically at the discretion of the said
17 prosecutor, his assistants or investigators.

18 And you shall be remanded to custody today
19 upon the acceptance of this agreement by the Court.
20 And if you are ever released from custody prior to
21 the completion of any of the terms of this agreement,
22 you will notice -- notify the prosecutor, letting
23 them know or the prosecutors know your whereabouts
24 and how to contact you at all reasonable hours of the
25 day or night.

1 The defendant, you, shall not commit any
2 violations of any federal, state, county or municipal
3 law.

4 You understand that -- you understand the
5 terms of -- and what you'll be sentenced to, correct?

6 A. Yes. That is correct.

7 Q. Do you believe you're pleading today because
8 it is in your best interest?

9 A. Yes, I do.

10 Q. Are you aware of any physical evidence that
11 you believe should be tested for DNA, and do you
12 understand there will be nothing further tested in
13 this case?

14 MR. McFEE: Do you agree?

15 THE DEFENDANT: I agree.

16 MS. MARZANO: Okay. Mr. McFee, you're not
17 aware of any DNA evidence that would exonerate
18 your client?

19 MR. McFEE: No, not that has not been already
20 tested.

21 MS. MARZANO: Okay.

22 BY MS. MARZANO:

23 Q. Mr. Costello, are you satisfied with the
24 advice of your attorney, Mr. McFee?

25 A. Absolutely.

1 Q. Has he done everything that you've asked him
2 to and answered all of your questions?

3 A. Yes, he has.

4 Q. Okay. Now we discussed that you had some
5 motions that were filed. You also -- have you
6 discussed any potential defenses that you have with
7 Mr. McFee?

8 A. Yes.

9 Q. All right. Do you understand that at least
10 for the first four years of Count I you will not be
11 entitled to gain time on that charge, but in regard
12 to gain time or early release there are no guarantees
13 as to whether you'll receive that. That's up to the
14 Department of Corrections.

15 A. Yes.

16 MS. MARZANO: Counsel, have you reviewed all
17 the discovery in this case with your client?

18 MR. McFEE: We have.

19 BY MS. MARZANO:

20 Q. And Mr. Costello, do you understand that if
21 you're not a citizen of the United States that you
22 could be subjected to deportation?

23 A. Yes.

24 Q. If the offense to which you are pleading is a
25 sexually violent offense or sexually motivated

1 offense or if you have previously been convicted of
2 such an offense, the plea may subject you to
3 involuntary civil commitment as a sexually violent
4 predator upon completion of your sentence. Do you
5 understand this warning and understand that that's
6 given to all defendants?

7 A. Yes.

8 Q. All right.

9 MS. MARZANO: Your Honor, I would stipulate
10 to a factual basis. Counsel, will you stipulate
11 to a factual basis and venue?

12 MR. McFEE: We would, Your Honor.

13 MS. MARZANO: And if -- Your Honor, I would
14 ask that you take judicial notice of the court
15 file and the initial arrest affidavit that's in
16 there.

17 THE COURT: The court costs are \$415. Cost
18 of prosecution -- hundred dollar -- excuse me,
19 \$415 court costs per schedule and a hundred
20 dollar cost of prosecution, but I think a 316
21 offense had some additional monetaries?

22 UNIDENTIFIED SPEAKER: There's a \$33 circuit
23 traffic offense court costs and a \$5 leaving the
24 scene of the accident court cost.

25 THE COURT: Okay. And that's all the

1 mandatories?

2 UNIDENTIFIED SPEAKER: Correct.

3 THE COURT: Those will be assessed, Mr.
4 Costello. With that understanding, do you wish
5 to go forward?

6 THE DEFENDANT: Yes, ma'am.

7 THE COURT: Okay.

8 MS. MARZANO: May I approach, Your Honor,
9 with this --

10 THE COURT: Yes.

11 MS. MARZANO: -- documentation? And I can
12 tell the Court that this is a guideline sentence.

13 THE COURT: You had previously provided the
14 score sheet to me --

15 MS. MARZANO: Okay.

16 THE COURT: -- so I was aware of that, and
17 I'm going to give the original plea agreement and
18 waiver of rights to the clerk to file. And --
19 oh, you've done a separate --

20 MR. McFEE: Judge, that --

21 THE COURT: -- felony plea form. Okay.

22 MR. McFEE: Judge, that can be discarded. I
23 -- I just simply had asked the Court to
24 incorporate by reference the plea agreement. I
25 did not know if the Court wanted that or not. So

1 we could certainly discard that.

2 THE COURT: No, I -- there's not a
3 requirement to use that.

4 MR. McFEE: That's fine.

5 THE COURT: So -- but I don't -- I'm not
6 gonna discard it. I don't wanna destroy
7 anything.

8 MR. McFEE: Would the -- would the Court like
9 to give it back to us?

10 THE COURT: I'll return it since it has not
11 become part of the official file.

12 MR. McFEE: Your Honor, we'd also ask the --
13 on those financial obligations that Mr. Costello
14 be given 90 days to pay upon his release from
15 state prison. So that way it doesn't complicate
16 matters with it being shown as not paid
17 (inaudible) so we'd ask for that.

18 THE COURT: Any objection?

19 MS. MARZANO: No, Your Honor.

20 THE COURT: That's fine.

21 MS. MARZANO: At this time, Your Honor, I
22 would ask the Court to accept the plea, and then
23 we have some victim impact statements that we
24 would like to present to the Court.

25 THE COURT: Okay. I do find a factual basis

1 and venue based on the stipulation, the probable
2 cause affidavit in the court file as well as
3 evidence taken by the Court at various
4 evidentiary hearings throughout the pendency of
5 this action.

6 I also find that Mr. Costello is competent,
7 alert and able to tender a plea, which, Mr.
8 Costello, I believe you've done voluntarily. So
9 I do formally accept your no contest plea to both
10 counts of the fourth amended information.

11 I would ask the State to present victim
12 impact testimony and evidence at this point.

13 MS. MARZANO: Thank you, Your Honor. At this
14 time I'm going to ask that the easel be set up,
15 and I have marked State's S-1, which will be a
16 grouping of photographs which will be put into
17 the record following the -- the --

18 THE COURT: Okay.

19 MS. MARZANO: -- the statement. And I would
20 call Tom O'Brien.

21 Mr. McFee has seen the photographs so he is
22 not objecting as far as I know.

23 THE COURT: Okay.

24 UNIDENTIFIED SPEAKER: Face the Court and
25 raise your right hand.

1 (Whereupon, the witness was sworn by the
2 Clerk.)

3 MR. O'BRIEN: Thanks, Your -- Your Honor.

4 THE COURT: And Mr. O'Brien, if you wanna
5 pull that microphone closer, and you can even
6 bend it down so that you're comfortable. I know
7 this --

8 MR. O'BRIEN: Okay. That better?

9 THE COURT: You may proceed. Thank you.

10 MR. O'BRIEN: You want me to start?

11 THE COURT: You may proceed; yes, sir.

12 MR. O'BRIEN: Thank you.

13 My name is Tom O'Brien. I came into Adam's
14 life approximately 14 years ago. I'll get it.
15 After dating Adam's mother, Traci, for a little
16 over a year we decided to purchase a house
17 together, Alex, Adam, Traci and I, myself, all
18 moved in our house together.

19 During those 14 years I have many memories of
20 Adam. Adam growing up was all boy. In fact, the
21 first year we moved in he was doing backflips
22 into our pool. One -- one he lost his footing
23 and split his head open. Emergency room, eight
24 stitches later he stopped doing backflips.

25 In a couple years we decided to go to Busch

1 Gardens for the day. It happened to be the day
2 of the grand opening of a new rollercoaster,
3 Sheikra. We waited in line till we came up to
4 the height requirement. He was just under the
5 required height. Adam, frustrated and angry, I
6 took him to the side and went to the souvenir
7 shop, bought him a pair of socks, folded 'em up
8 three times and then put 'em in his shoes. He --
9 he passed the height requirement and went on that
10 coaster four times that day.

11 As a family, we all went to my home in
12 Chicago so Adam could see snow for the first
13 time. I think he was more interested in
14 basements in houses, as he had never seen that
15 either.

16 We all went camping at the Wisconsin Dells,
17 haunted houses, water parks, water duck boats,
18 riding bikes in the campground. Some of our
19 activities.

20 We flew to a resort in Arizona, a J.W.
21 Marriott, as I had work convention there. Alex,
22 Adam, Traci spent the day in the pool, lazy
23 river, eating hamburgers, fries and ice cream.
24 Alex and Adam, Traci took excursions in a Hummer
25 into the desert and into the mountains.

1 We all went on several charter fishing trips,
2 as Adam loved fishing, and one -- one time, one
3 of the largest fish caught in a pool.

4 Over the years he grew both physically and
5 mentally. He -- he didn't like cleaning around
6 the house, but he kept his room spotless. Never
7 really gave him an allowance, but I would pay him
8 to do work around the house. This is where I
9 noticed another side of him. His work, whether
10 it be trimming trees or cleaning the garage, will
11 be done to perfection. Although he never really
12 cared for school, give him a job, it would be
13 done beyond expectation.

14 Before I knew it he was turning 16. Traci's
15 parents, his Aunt Laurie, and Traci and myself
16 bought him a 2005 Mustang. Suddenly car parts
17 started arriving weekly. He would spend hours in
18 the garage assembling, disassembling his Mustang,
19 from headlights to taillights to stereo to
20 differentials, pinstriping and more. He learned
21 all this on his own.

22 These are just a few of the memories of Adam.
23 There will be no more memories, as these ended
24 the night of June 19th, which resulted in his
25 death from a hit-and-run vehicle. Now is the

1 time for punishment of the person responsible for
2 taking Adam King's life and ending new memories.

3 Thank you, Your Honor.

4 MS. MARZANO: Next we will have Richard
5 Echevarria.

6 UNIDENTIFIED SPEAKER: Face the Court and
7 raise your right hand.

8 (Whereupon, the witness was sworn by the
9 Clerk.)

10 MR. ECHEVARRIA: Your Honor, may I proceed?

11 THE COURT: You may.

12 MR. ECHEVARRIA: I came here today on behalf
13 of Traci's request to speak on behalf of her
14 friends. Excuse me, I'm very nervous.

15 We had a very close friend group. We started
16 about in high school, and I'm glad we met. You
17 know, Adam really changed my life for the better.
18 He really put a big effect -- effect on us since
19 we met him.

20 And I can give you thousands -- thousands of
21 ways that he changed my life and how he affected
22 it, but I think the number one thing that he
23 taught me from all our adventures, from all of
24 the conversations we had, was -- was to always
25 stay strong.

1 Adam was a -- was never scared of anything
2 really. I mean, we -- we could be out doing
3 something mischievous and, you know, he wouldn't
4 worry about getting in trouble. He wouldn't
5 worry about anything at all. And I -- I told
6 him, you're crazy. You know, he'd always make
7 fun of me for being like the most responsible one
8 in the group, and he always told me just -- you
9 just gotta let loose and be okay.

10 And at the time of his death, you know, I was
11 patiently waiting because my girlfriend was
12 pregnant, and I told him about it; and, you know,
13 he told me there's only one way to go at it, and
14 you just gotta be ready. You gotta be strong
15 because once that child comes into your life it's
16 not about you no more. It's about him. And I
17 think what he meant was -- by that is to be
18 strong no matter what. Whatever challenges that
19 you may face coming -- coming into your life, you
20 just gotta be prepared and be ready and be strong
21 about it.

22 Yeah. I -- I have nothin' else much to say.
23 I do very -- I do miss him very much, but he'll
24 always be in my heart.

25 Thank you.

1 THE COURT: Thank you for speaking.

2 MS. MARZANO: I believe that Ms. Miller,
3 Adam's mother, will read a statement from
4 somebody by the name of Chris Patt (phonetic
5 spelling).

6 THE COURT: Okay.

7 UNIDENTIFIED SPEAKER: Please face the Court
8 and raise your right hand.

9 (Whereupon, the witness was sworn by the
10 Clerk.)

11 MS. KING: Thank you, Your Honor.

12 This statement was given to me by Chris Patt,
13 who was my son's boss at his work, and it goes:

14 Your Honor, my name is Chris Patt. I am
15 Adam's boss, as well as friend. Adam was a great
16 person, always willing to help out wherever he
17 was needed, no matter what the task. He was on
18 his way to being named the night shift manager.
19 He didn't know -- know it, but I knew when I told
20 him he would have been ecstatic.

21 The morning I found out that -- about Adam's
22 death I was heartbroken and very nervous to tell
23 the rest of the crew because I knew how bad it
24 would affect everyone. After speaking with the
25 general manager we decided to have a meeting with

1 everyone and allow everyone to have the day off.
2 When we told them, you could see it in their
3 faces how everyone became silent in disbelief.

4 I personally met with Adam's family and
5 talked with them about Adam and shared some
6 memories I had from him with work. Ever since
7 that day we have Adam's work shirt hanging up in
8 the shop. We had everyone in the dealership sign
9 and write one of the Adam's -- sign on one of
10 Adam's shirt sleeves, and we gave it to Adam's
11 mom during a ride that was constructed in honor
12 of Adam's death, as well as riding past the
13 location which it happened.

14 Adam's death affected the whole dealership,
15 and still today we talk about Adam and think of
16 some of the funny and, yes, stupid things he did;
17 but all in all, Adam's death taught me to never
18 take a single day for granted and that life is
19 very precious.

20 On behalf of the whole Jaguar and Land Rover
21 dealership, we miss you, Adam.

22 Thank you.

23 MS. MARZANO: Next the State would call
24 Laurie Gast (phonetic spelling).

25 UNIDENTIFIED SPEAKER: Please face the Court

1 and raise your right hand.

2 (Whereupon, the witness was sworn by the
3 Clerk.)

4 MS. GAST: Thank you. Thank you for allowing
5 me the opportunity.

6 Trying to find the words for a victim impact
7 statement is proving to be one of the hardest
8 things I've ever had to do and a task that I pray
9 I never have to do again.

10 This immeasurable pain and heartache has
11 unfortunately been overshadowed by the pursuit of
12 justice for Adam. I know that justice won't
13 bring him back, but I hope that it will aid in
14 our healing process.

15 I know I'm supposed to take this opportunity
16 to talk about how my life has been impacted by
17 Adam's death, but my personal battle between my
18 love for him and the hate that I'm carrying for
19 the circumstances surrounding his death are so
20 raw that it will take a lifetime to understand
21 the impact of this.

22 I will always cherish the love and memories
23 that I have for Adam, and I will pray that some
24 day I find peace in the hate that I have for the
25 circumstances surrounding his death.

1 Finding a way to verbalize the impact of
2 Adam's death that it has had on me is somewhat
3 impossible. This will impact me for the rest of
4 my life. From now on I will always have to speak
5 of him in the past tense.

6 Adam King was a son. Adam King was a
7 brother. Adam King was a grandson. Adam King
8 was a friend. Adam King was a nephew. He was my
9 nephew. Just knowing that never again will I
10 hear his voice say the words, I love you, Aunt
11 Laurie, this alone will impact the rest of my
12 life.

13 Adam had a big heart. He was shy but
14 confident. He was evolving. He was finding out
15 who he really was, getting comfortable with who
16 he was to become. He was passionate about his
17 work, his Mustang, his motorcycle. He was
18 fiercely loyal to his friends. He was an 18-
19 year-old boy, the future was his or so we
20 thought.

21 It's been almost two years since I was woken
22 up by a phone call telling me that he was dead.
23 That horrifying call was only made worse when I
24 was told that he was killed by a hit-and-run
25 driver, that the man who did this made the

1 conscious decision to hit, kill and run with no
2 regard for human life. From his rearview mirror
3 he saw the lifeless body of 18-year-old Adam
4 King. Dead. Yet he chose to drive away. What
5 kind of person could do this? There is a name
6 for that kind of person, and his name is Adam
7 Costello.

8 This could have been an accident, a
9 senseless, careless, tragic accident; but the
10 moment that Adam Costello made the conscious
11 decision to run and hide the truth, it became a
12 violent, heinous crime.

13 For almost two years Adam Costello has to
14 continue to deny that he is responsible for this.
15 Adam Costello tried to cover this up. In my
16 heart and in my opinion I will always believe
17 that he has obstructed the justice and tampered
18 with the evidence.

19 Adam Costello tried to hide the truth. Adam
20 Costello did everything in his power to deny his
21 responsibility for the fact that he was guilty of
22 killing Adam King. For the past 21 months he has
23 diligently worked at trying to get away with
24 this. Showing up in this courtroom, in the same
25 room as Adam's mom, and showing no remorse

1 because he still felt that there was an
2 opportunity that he could get away with this.

3 Now that his last card has been played and
4 finally he will be going to prison for his
5 actions, will today be the day that he will act
6 remorseful? Today I don't want to hear his
7 remorse. He had 21 months that he chose not to
8 be remorseful. Any words or actions from him
9 today will never be enough to heal the pain and
10 agony that I and my family have had to endure for
11 the past 21 months, let alone the rest of our
12 lives.

13 What happens after today is between him and
14 God. Adam Costello killed Adam King on June 19th
15 of 2016. He's been killing this family ever
16 since, as we have had to watch him deny his
17 responsibility for this while we're trying to
18 mourn our own deep and personal loss.

19 I pray that this Court will prosecute Adam
20 Costello to the fullest extent of the law. I
21 pray that he will finally take the responsibility
22 for his actions while paying the harsh
23 consequences that he deserves. I pray that
24 today, finally, justice will be served for Adam
25 King.

1 I'm sorry. Thank you. I'm sorry.

2 MS. MARZANO: Alex King.

3 UNIDENTIFIED SPEAKER: Go ahead and face the
4 Clerk, raise your right hand.

5 (Whereupon, the witness was sworn by the
6 Clerk.)

7 MR. KING: First I'm gonna read the statement
8 written by my father for him.

9 I, Roger King, Adam's King's father, am
10 speaking through my son, Alex King, to address
11 this Court and specifically regarding Adam
12 Costello.

13 First I would like to emphasize the impact of
14 Adam's murder has had on my life. It is the loss
15 of the physical and tactile contact with my son.
16 I hope the Costello family learns how I feel once
17 you lose a loved one to the prison system, unable
18 to see, touch, smell or hear Adam Costello at
19 will. At least they can console themselves with
20 the weekly or monthly visit in the prison.
21 However, I cannot ever hold my child again, ever.
22 The depth of my loss is infinite.

23 Yet my Adam is still with me, as it says on
24 his urn. Adam is. He is with me in thoughts,
25 spirit and depth of feeling. Adam Roger King is,

1 and this feeling and belief will never leave me.

2 My disdain for Adam Costello will not let me
3 properly address him directly in this court.

4 This man will feel a greater impact by me
5 addressing the Court through Alex rather than if
6 I address him personally and directly.

7 I request Adam Costello make a physical
8 action of remembrance, such as sending a postcard
9 daily remembering my Adam Roger King and mailed
10 for the duration of his sentence should the Court
11 allow it.

12 The loss of my son's precious life and the
13 depth of my grief should always be in the
14 forefront of Adam Costello's mind.

15 With a heavy heart, Roger Stern King, Adam
16 Roger King's father.

17 As for me, we all have our good memories with
18 Adam, and those are never going to leave us; but
19 the main impact of Adam's death, I think, is the
20 things that we're gonna miss in the future. I
21 lost the best man for my wedding. I lost the
22 father of my nephews and nieces. I lost an uncle
23 to my future children. Those all lost a
24 grandfather. My parents lost a son, and my
25 grandparents lost a grandchild; and nothing can

1 ever replace that. No one can ever bring any of
2 that back to us.

3 As far as Adam's life, as much as he worked
4 hard and -- at Jaguar dealership and he studied a
5 little bit for school, he was trying to get
6 towards his GED, the conversation I had with him
7 most often was telling him about the military.
8 He had a lot of questions for me about it, and he
9 always wanted to either join the Marine Corp or
10 become an Army Ranger one day; and I talked to
11 him a lot about that. And often, just the type
12 of person he was, you could tell from his work --
13 work -- work ethic, excuse me, at least at
14 Jaguar, he always did his best, worked his
15 hardest at everything he did. But his ultimate
16 goal was to go into the military and fight and
17 serve for his country with everything he has.

18 He wanted -- he always looked out for
19 everybody, even anybody that he didn't know. He
20 wanted to go and fight for our freedom to live in
21 this country, and we lost -- we lost a great
22 person in that regard.

23 MS. MARZANO: And lastly, Your Honor, I will
24 recall Traci Miller.

25 THE COURT: You're still under oath, ma'am.

1 MS. MILLER: Okay.

2 THE COURT: You can go ahead and have a seat.

3 MS. MILLER: Thank you, Your Honor. Thank
4 you for this opportunity.

5 My son, Adam, was the true definition of a
6 free spirit. He was full of love, even if
7 sometimes he didn't show it. He was loyal to the
8 bone. He was full of controversy and turmoil.
9 If he had something to say, there was no stopping
10 him, and he was so passionate about everything he
11 did. So stubborn about anything he didn't want
12 to do. He had a little bit of everybody in this
13 room in him.

14 Your Honor, I see that Mr. Costello is
15 remorseful and feels very bad; but I am not
16 responsible for his feelings, and I do not feel
17 sorry for him. He did a despicable thing, and he
18 continued with his deceit for a year and nine
19 months, knowing how much suffering he caused.
20 His punishment is deserved and brought on by him
21 and him alone.

22 Getting justice for my son has consumed my
23 life since the night he was killed. Trying to
24 bury my grief until justice was served has taken
25 a toll on my health. Now that my grief can come

1 welling to the surface, the love, the loss, the
2 future that I dreamed of for Adam, the future
3 that Adam dreamed of for himself, I don't know
4 what to do with that.

5 Your Honor, I would like to tell you the --
6 my story of the night that Adam Costello slammed
7 his truck into my son and his motorcycle, causing
8 my son to hit a palm tree. Mr. Costello saw my
9 son's precious body break into pieces, and he
10 just drove away. When the police came to our
11 home at 3:00 a.m. to tell me that my 18-year-old
12 son was killed by a hit-and-run driver, I died.
13 I felt like I was imploding and exploding at the
14 same time. I saw my beating heart laying in my
15 hands. My brain melted into a pool of
16 unfathomable grief. All I could do was scream
17 and bawl and retch and crawl on the floor in
18 disbelief, yelling no, no, no. Sorry. Not my
19 baby. Please come home, Adam.

20 Then the anger set in. How could someone do
21 such a horrible thing. Alex and Cass and Tom
22 wrapped me in their arms until complete and utter
23 exhaustion set in. Then we all wrapped Alex in
24 our arms as he broke down, his brother was dead.

25 There is a short poem I'd like to read. It's

1 titled Mom, He Only Took My Hand, and it's
2 unknown author.

3 "Last night while I was trying to sleep,

4 My son's voice I did hear,

5 I opened my eyes and looked around,

6 But he did not appear.

7 He said, "Mom, you've got to listen,

8 You've got to understand,

9 God didn't take me from you, mom,

10 He only took my hand.

11 When I called out in pain that morning,

12 The instant that I died,

13 He reached down and took my hand -- hand,

14 And pulled me to His side.

15 He pulled me up and saved me

16 From the misery and pain.

17 My body was so -- was hurt so badly inside,

18 I could never be the same.

19 My search is really over now,

20 I've found happiness within,

21 All the answers to my empty dreams,

22 And all that might have been.

23 I love you so much and miss you so,

24 But I'll always be nearby.

25 My body's gone forever,

1 But my spirit -- spirit will never die.

2 And so, you must go on now,

3 Live one day at a time.

4 Just understand, God did not take me from
5 you,

6 He only took my hand."

7 Thank you.

8 MS. MARZANO: And that's all, Your Honor.

9 Thank you.

10 MR. McFEE: Your Honor, Mr. Costello's mother
11 would like to address the Court.

12 THE COURT: Okay.

13 MR. McFEE: Your Honor, this is Susan
14 Costello.

15 (Whereupon, the witness was sworn by the
16 Clerk.)

17 MS. COSTELLO: I just had a few short words
18 to say. I'm truly, truly sorry for the King
19 family. If there was anything I could do to
20 change the situation, I would. I know what it's
21 like to lose someone you love. I lost my son, he
22 was 37, from heart failure, and my husband died
23 in a car accident 14 months later. So I know a
24 little bit about grief.

25 I know that, you know, Adam has been a

1 wonderful son. He has never done anything wrong.
2 He was a superlative student in school. He was
3 an honor roll student all through elementary,
4 high school and all through college. He's always
5 tried to do the right thing. He's never broken a
6 law.

7 I don't know why this happened; but if there
8 was anything I could do to change it, like I
9 said, I would. The last almost two years has
10 been horrible for us. Every day has been so
11 terribly hard. Adam has a lot of remorse. I've
12 seen him cry over and over again.

13 It was nothing that he intended to do on
14 purpose. It was an accident.

15 And that's all I have to say.

16 MR. McFEE: And Your Honor, Mr. Costello has
17 something he'd like to read if he can.

18 THE COURT: You may.

19 MR. McFEE: Would you like him to do it from
20 here or up there, Judge?

21 THE COURT: Which would he prefer?

22 MR. McFEE: Where would you prefer? Up
23 there?

24 THE DEFENDANT: Sure.

25 MR. McFEE: Go ahead.

1 THE DEFENDANT: Okay.

2 (Whereupon, the defendant was sworn by the
3 clerk.)

4 THE DEFENDANT: Having lost my father in a
5 traffic accident seven years ago, 14 months after
6 my older brother tragically died, I do understand
7 the pain of losing a loved one suddenly. After
8 experiencing and witnessing the pain that my
9 mother endured having lost her son, I would never
10 intentionally harm someone else's child. And
11 Mrs. King, I am truly sorry for your loss.

12 That we sit here today with this case having
13 come to a resolution, the truth is that over
14 these past 20 months I've lived in my own prison
15 because of the guilt and remorse I feel. I don't
16 expect you to do so any time soon, but I do pray
17 and ask that one day you will be able to forgive
18 me, not so much for me but for the healing
19 process of yourself.

20 These words cannot express how truly sorry I
21 am, and I pray that everyone affected by this
22 tragedy will find healing.

23 That's it.

24 THE COURT: Thank you.

25 Is there any legal cause why sentence should

1 not be pronounced at this time?

2 MR. McFEE: No, Your Honor.

3 THE COURT: Mr. Costello, based on your plea
4 to the fourth amended information of no contest,
5 I adjudicate you guilty of both of those counts.

6 With regard to Count I, I sentence you as
7 agreed to ten-and-a-half years of prison or
8 otherwise stated, ten years, six months. I will
9 apply whatever credit you have, and I do wanna
10 talk about that so that we can resolve any
11 discrepancies in that regard today.

12 The first four years of that sentence are
13 imposed as a minimum mandatory sentence pursuant
14 to Florida law and your plea agreement.

15 With regard to Count II, I adjudicate you and
16 sentence you as agreed to five years in prison to
17 run concurrent with the sentence I've just
18 announced as to Count I.

19 I assess the monetary obligations that have
20 already been described, and they shall be due and
21 payable in full 90 days after your release from
22 Department of Corrections.

23 I order a three year driver's license
24 suspension pursuant to Florida law and require
25 you to apply consistent with your plea -- plea

1 agreement following the three year suspension.

2 I order 120 community service hours and your
3 attendance at a victim impact panel as specified
4 more specifically in the written plea agreement.

5 I also order and direct that you will testify
6 truthfully as specified more specifically in the
7 plea agreement and as further described by Ms.
8 Marzano on the record this morning.

9 Is there anything other than credit that the
10 Court needs to clarify? Ms. Marzano?

11 MS. MARZANO: No, Your Honor.

12 MR. McFEE: No, Your Honor.

13 THE COURT: Okay. So what does the clerk
14 believe Mr. Costello's credit is?

15 UNIDENTIFIED SPEAKER: I am showing two days
16 from September 2nd, 2016 to September 3rd, 2016
17 when he bonded out.

18 THE COURT: Do you agree that's an accurate
19 calculation of your credit?

20 THE DEFENDANT: Yes, ma'am.

21 THE COURT: So I apply the two days credit as
22 specified. Mr. Costello, I remand you to serve
23 your sentence.

24 I will remind you that you have reserved the
25 right to appeal the jurisdiction of the Court and

1 the legality of the sentence. If you do wish to
2 file an appeal, it must be filed in writing with
3 the Clerk of Court, the notice, within 30 days.
4 You should advise Mr. McFee if you think I lacked
5 jurisdiction or this is an illegal sentence
6 because you can appeal those issues, as you know.

7 You are remanded, sir.

8 THE DEFENDANT: Thank you, Your Honor.

9 (End of recording.)

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1 STATE OF FLORIDA

2 TWENTIETH JUDICIAL CIRCUIT

3

4 I, Debra A. Cail, do hereby certify that:

5 The foregoing pages numbered 1-46 contain a
6 full transcript of the proceedings in the matter
7 described in the caption on Page 1 hereof
8 transcribed by me to the best of my knowledge and
9 ability from the electronic recording provided by
10 the court.

11 I am not counsel for, related to, or employed
12 by any of the parties in the above-entitled
13 cause.

14 I am not financially or otherwise interested
15 in the outcome of this case.

16 I am an approved transcriber for the
17 Twentieth Judicial Circuit Court.

18

19

20 /s/Debra A. Cail

21

22 August 6, 2020

23

24

25

**UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
FORT MYERS DIVISION**

ADAM MURRAY COSTELLO,
Petitioner,

Case No.: 2:25-cv-74-JLB-NPM

vs.

SECRETARY, DEPARTMENT OF
CORRECTIONS,
Respondent.

_____ /

EXHIBIT 27

Case View ADAM MURRAY COSTELLO VS STATE OF FLORIDA

 Verified Party

6TH DISTRICT COURT OF APPEAL

ADAM MURRAY COSTELLO,
Appellant(s)

v.

STATE OF FLORIDA,
Appellee(s).

CASE NUMBER
6D2023-2400

CLASSIFICATION NOA Final - Circuit Criminal - 3.850 Non Summary

DOCKET DATE 04/17/2023

ORIGINATING COURT Circuit Court for the Twentieth Judicial Circuit, Lee County
16-CF-000371

OPEN / CLOSED Closed

STATUS DATE 12/02/2024

PARTIES

Shows the first few parties on the case.

ADAM MURRAY COSTELLO
APPELLANT


CHRISTOPHER E. COSDEN, ESQ.
REPRESENTATION







STATE OF FLORIDA
APPELLEE


ATTORNEY GENERAL, TAMPA
REPRESENTATION






ORAL ARGUMENTS

No future oral arguments were found.

DOCKET ENTRIES					
Docket Date	Type	Subtype	Description	On Behalf Of	View
12/03/2024	Order	Article I, Section 16(b)(10)b., Fla.	Article I, section 16(b)(10)(b) of the Florida Constitution provides that all		

Docket Date	Type	Subtype	Description	On Behalf Of	View
		Const. Order - Near Expiration of Time	state-level appeals and collateral attacks on any judgment must be complete within two years of the date of appeal in noncapital cases unless a court enters an order with specific findings as to why the court was unable to comply and the circumstances causing the delay. Pursuant to the administrative procedures and definitions set forth in Supreme Court of Florida Administrative Order No. AOSC19-76, this case was not completed within the required time because the case was initiated in this court near the end of the two-year time period. The first notice of appeal was filed May 10, 2021. The instant notice of appeal was filed in the lower tribunal on April 12, 2023, and this Court's mandate issued on December 2, 2024. This order is for reporting purposes only. It does not affect the decision in this case or the date of the mandate if one has issued, and it has no effect on related proceedings in the lower tribunal or in federal court.		
12/02/2024	Misc. Events	West Publishing	West Publishing		
12/02/2024	Mandate	Mandate	Mandate		
10/28/2024	Order	Order on Motion for Rehearing	Appellant's motion for rehearing, motion for written opinion and motion to certify conflict is denied.		
09/20/2024	Post-Disposition Motions	Motion for Rehearing	MOTION FOR REHEARING and MOTION FOR WRITTEN OPINION and MOTION TO CERTIFY CONFLICT	COSTELLO, ADAM MURRAY	
09/17/2024	Disposition by Opinion	Affirmed	Affirmed - PCA		
09/17/2024	Order	Order on Motion/Request for Oral Argument	Appellant's request for oral argument is denied.		
06/06/2024	Notice	Unavailability	Unavailability	COSTELLO, ADAM MURRAY	

Docket Date	Type	Subtype	Description	On Behalf Of	View
02/19/2024	Order	Order on Motion To Strike	Deny Motion to Strike-13a ~ ppellant's motion to strike portions of Appellee's answer brief is denied.		
01/16/2024	Response	Response	RESPONSE ~ RESPONSE TO APPELLANT'S MOTION TO STRIKEPORTIONS OF APPELLEE'S ANSWER BRIEF	STATE OF FLORIDA	
01/05/2024	Notice	Notice	Notice ~ NOTICE OF SUBSTITUTION OF COUNSEL	STATE OF FLORIDA	
12/26/2023	Brief	Reply Brief	Appellant Reply Brief	COSTELLO, ADAM MURRAY	
12/26/2023	Motions Other	Motion To Strike	Motion To Strike ~ MOTION TO STRIKE PORTIONS OF ANSWER BRIEF	COSTELLO, ADAM MURRAY	
12/08/2023	Order	Order on Motion for Extension of Time to Serve Answer Brief	ORDER GRANTING EOT FOR ANSWER BRIEF ~ Appellee's motion for extension of time to serve answer brief is granted to the extent that the answer brief is accepted as filed.		
12/01/2023	Brief	Answer Brief	Appellee Answer Brief	STATE OF FLORIDA	
11/13/2023	Motions Extensions	Motion for Extension of Time to Serve Answer Brief	Mot. for Extension of time to file Answer Brief ~ APPELLEE'S MOTION FOR EXTENSIONOF TIME TO FILE ANSWER BRIEF	STATE OF FLORIDA	
10/12/2023	Order	Order on Motion for Extension of Time to Serve Answer Brief	ORDER GRANTING EOT FOR ANSWER BRIEF ~ Appellee's motion for extension of time to serve answer brief is granted. The answer brief shall be served within thirty days from the date of this order.		
09/29/2023	Motions Extensions	Motion for Extension of Time to Serve Answer Brief	Mot. for Extension of time to file Answer Brief ~ APPELLEE'S MOTION FOR EXTENSIONOF TIME TO FILE ANSWER BRIEF	STATE OF FLORIDA	
07/31/2023	Notice	Notice of Agreed Extension of Time	Stipulation for Extension of Time ~ APPELLEE'S NOTICE OF AGREED	STATE OF FLORIDA	

Docket Date	Type	Subtype	Description	On Behalf Of	View
			EXTENSION OF TIME//60 - AB DUE 9/29/23 (LAST REQUEST)		
07/07/2023	Notice	Notice of Appearance	Notice of Appearance	STATE OF FLORIDA	
06/30/2023	Motions Relating to Oral Argument	Motion/Request for Oral Argument	Request for Oral Argument	COSTELLO, ADAM MURRAY	
06/30/2023	Brief	Initial Brief	Initial Appellant Brief on Merits	COSTELLO, ADAM MURRAY	
06/02/2023	Record	Record on Appeal	Received Records ~ ***REDACTED*** STEINBECK- 459 PAGES	KARNES, CLERK, KEVIN	
04/19/2023	Letter	Acknowledgment Letter	Acknowledgment Letter 1		
04/17/2023	Notice	Notice of Appeal	Notice of Appeal Filed	COSTELLO, ADAM MURRAY	
04/17/2023	Misc. Events	Fee Status	NF1:No Fee-3.850		
1 to 26 of 26					

PARTIES

Role	Name	Status	Representation
Appellant	COSTELLO, ADAM MURRAY	Active	COSDEN, ESQ., CHRISTOPHER E.
Appellee	STATE OF FLORIDA	Active	GENERAL, TAMPA, ATTORNEY TAYLOR, A.A.G., CERESSE CRAWFORD
Judge/Judicial Officer	Steinbeck, Margaret Ogilvie, Hon.	Active	
Lower Tribunal Clerk	KARNES, CLERK, KEVIN	Active	
1 to 4 of 4			

ORAL ARGUMENTS

Oral Argument Date	Location / Room	Type	Status	Video Streaming Link
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No records were found.

No records were found.

**UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
FORT MYERS DIVISION**

ADAM MURRAY COSTELLO,
Petitioner,

Case No.: 2:25-cv-74-JLB-NPM

vs.

SECRETARY, DEPARTMENT OF
CORRECTIONS,
Respondent.

_____ /

EXHIBIT 28

IN THE SIXTH DISTRICT COURT OF APPEAL
LAKELAND, FLORIDA

ADAM MURRAY COSTELLO,
Appellant,

Case No. 6D23-2400

v.

L.T. No. 16-CF-371

STATE OF FLORIDA,
Appellee.

_____/

Appeal from the Circuit Court of the Twentieth Judicial Circuit,
in and for Lee County

INITIAL BRIEF OF APPELLANT ADAM MURRAY COSTELLO

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RECEIVED, 06/30/2023 02:46:21 PM, Clerk, Six District Court of Appeal

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PREFACE

The Appellant, Adam Murray Costello, is the Defendant in the Circuit Court of the Twentieth Judicial Circuit in and for Lee County, Florida, wherein his motion for postconviction relief was denied following a hearing. The Appellant will be referred to as the Appellant or the Defendant; the Appellee will be referred to as the State of Florida or the State. The following symbol will be used:

(R.____) - Record on Appeal.

JURISDICTION

This Court has jurisdiction over this direct appeal pursuant to Article V, § 4(b)(1), Florida Constitution, and Fla. R. App. P. 9.030(b)(1)(A).

STATEMENT OF THE CASE AND FACTS

In this case the Defendant, Adam Murray Costello, was charged by a Fourth Amended Information filed 12 March 2018 with leaving the scene of a traffic crash involving death, a first degree felony under § 316.027(2)(c) and (f) Florida Statutes (2015).

R.036. He was also charged with tampering with evidence, a third degree felony under § 918.13 Florida Statutes (2015). R.036. The latter charge is not the subject of the Defendant's postconviction motion or the instant appeal. The Defendant was represented in the trial court by Shannon H. McFee (hereinafter "Trial Counsel").

R.422, line 22 - R.423, line 1; R.052; R.072; R.074.

The Defendant entered pleas of nolo contendere and was convicted on both charges. Judgment and sentence were rendered on 19 March 2018. R.052-59. The Defendant was sentenced to 10 years 6 months of incarceration on the charge of leaving the scene with a minimum mandatory term of incarceration of 4 years, and to 5 years of incarceration on the charge of tampering with evidence, with the sentences to run concurrently. R.054-58. No issues were reserved for appeal and no direct appeal was taken.

At or near the time of the plea, the State Attorney filed a Criminal Punishment Code Scoresheet prepared pursuant to § 921.0024 Florida Statutes (2015). R.040-43. In section III the Scoresheet included 120 points for victim injury, resulting in a lowest permissible sentence of 126.3 months incarceration. R.040.

Also at or near the time of the plea Trial Counsel filed a written “Plea Agreement Waiver of Rights”. R.044-47. The same provided in relevant part that the Defendant agreed to the following: “The Defendant shall be sentenced in Count One to 10.5 years Florida State Prison with a 4 year minimum mandatory. As to Count Two the Defendant shall be sentenced to 5 years Florida State Prison.” R.045.

The Defendant was sentenced as provided by the plea agreement. On the charge in count one of the information he was sentenced to 10 years 6 months incarceration with a minimum mandatory term of 4 years. R.054-55. On the charge in count two of the information he was sentenced to 5 years incarceration. R.056. The sentences of incarceration were to be concurrent. R.055, R.057. Certain court costs and fees and other special conditions were imposed. R.053.

On 05 March 2020 the Defendant timely moved under Fla. R. Crim. P. 3.850 to vacate the incarcerative portion of his sentence because his attorney failed to provide effective assistance of counsel. R.060-69. The Defendant asserted that Trial Counsel

provided ineffective assistance to the Defendant by failing to review and correct errors in the Criminal Punishment Code Scoresheet in this case. R.063-67. The Scoresheet improperly included 120 points for victim injury, resulting in a lowest permissible sentence of 126.3 months incarceration. R.040, R.062. The correct lowest permissible scoresheet sentence under § 921.0024 would have been 36.3 months incarceration (notwithstanding the four year mandatory minimum under § 316.027(c)) had victim injury points not been improperly included. R.065-66. Trial Counsel failed to recognize that the 120 points for victim injury were improperly included and therefore affirmatively misadvised the Defendant concerning the sentence he was likely to receive. R.065-67.

In his postconviction motion the Defendant asserted that any reasonable lawyer would have correctly assessed the Scoresheet and properly advised the Defendant of the correct lowest permissible sentence. R.067. The failure of Trial Counsel to do so was ineffective assistance which violated the Defendant's Sixth Amendment right to counsel. R.067. The Defendant asserted that he was prejudiced because the Defendant agreed to accept a

sentence which he believed, based on the affirmative misadvice of counsel, was the minimum sentence under the Criminal Punishment Code. R.067. Had the Defendant known that the actual lowest permissible sentence he might have received was substantially less than the agreed-upon sentence, he would not have entered into that agreement; he only did so because he was affirmatively misadvised by trial counsel. R.067.

On 14 April 2020 the postconviction court ordered the State Attorney to respond to the Defendant's motion for postconviction relief. R.070-71. The State Attorney filed a timely response. R.119-123. The Defendant filed a reply to the State's response. R.124-30. On 01 March 2021, after the postconviction court failed to act for nearly six months, the Defendant moved for a hearing on his original postconviction motion. R.131-33.

On 19 April 2021 the postconviction court entered an order denying the Defendant's postconviction motion and the Defendant's motion for a hearing. R.134-36. The Defendant appealed to the Second District Court of Appeal. On 22 December 2021 that court reversed the order of the postconviction court. R.138-42.

The Second District Court held that the Defendant's "claim as to the improper inclusion of victim injury points is not conclusively refuted by the record or the postconviction court's order. The court did not include any attachments refuting the claim, and the record does not include any information regarding the victim's cause of death." R.141.

However the Second District Court also held that the Defendant's claim was facially insufficient because it did not include a request to withdraw his plea. R.141. Rather he merely requested that the postconviction court vacate his sentence and resentence him using a corrected scoresheet. R.141. Therefore the Second District Court reversed the summary denial of the Defendant's rule 3.850 motion and remanded the case to the postconviction court with instructions to strike the motion with leave to amend. R.142. The Mandate issued on 18 January 2022. R.037.

On 03 March 2022 the Defendant moved to withdraw his plea. R.143-53. The Defendant again argued that Trial Counsel had failed to provide effective assistance of counsel by failing to review

and correct errors in the Criminal Punishment Code Scoresheet in this case. R.147-50. The Scoresheet improperly included 120 points for victim injury, resulting in a lowest permissible sentence of 126.3 months incarceration. R.040, R.147. The correct lowest permissible scoresheet sentence under § 921.0024 would have been 36.3 months incarceration (notwithstanding the four year mandatory minimum under § 316.027(c)) had the additional points not been improperly included. R.149. Trial Counsel failed to recognize that the 120 points for victim injury were improperly applied and therefore affirmatively misadvised the Defendant concerning the sentence he was likely to receive. R.149-50.

In his postconviction motion the Defendant asserted that any reasonable lawyer would have correctly assessed the Scoresheet and properly advised the Defendant of the correct lowest permissible sentence. R.150. The failure of Trial Counsel to do so was ineffective assistance which violated the Defendant's Sixth Amendment right to counsel. R.150. The Defendant asserted that he was prejudiced because the Defendant agreed to accept a sentence which he believed, based on the affirmative misadvise of

counsel, was the minimum sentence under the Criminal Punishment Code. R.067. Had the Defendant known that the actual lowest permissible sentence he might have received was substantially less than the agreed-upon sentence, he would not have entered into that agreement; he only did so because he was affirmatively misadvised by trial counsel. R.150-51.

The Defendant asserted that had Trial Counsel done the appropriate research, he could have easily ascertained that the same 120 victim injury points were not properly assessed in the instant case. R.147. The Defendant again based his argument on the rule in *Sims v. State*, 998 So. 2d 494,496 (Fla. 2008). R.147-48. The Defendant asserted that to impose victim injury points, “a causal connection must clearly exist between the charged offense and the death of the victim to impose victim-injury points.” R.148, quoting *Sims* at 505. Here no evidence of the necessary causal connection is known to exist.

The postconviction court ordered the State to respond. R.154. The State filed a timely response. R.155-223. The Defendant filed a reply on 16 May 2022. R.224-30.

When the postconviction court had done nothing for six months after the pleadings were complete, the Defendant moved for a hearing on his motion on 05 December 2022. R.231-33. The postconviction court entered an order for an evidentiary hearing. R.234-37. An evidentiary hearing was scheduled for 14 February 2023. R.238.

At the evidentiary hearing on the Defendant's motion to withdraw his plea, the original Scoresheet and a transcript of the original plea proceedings were admitted to evidence. R.243; R.412, lines 12-20; R.418, line 23 - R.419, line 7. A transcript of the same hearing is contained in the Record on Appeal. R.394-451. At the time of the hearing the postconviction court reserved ruling. T.449, lines 17-18.

The postconviction court ultimately denied the Defendant's motion to withdraw his plea. R.295-393. A timely Notice of Appeal was filed. R.452. This appeal follows.

SUMMARY OF ARGUMENT

The Defendant agreed to enter a plea of nolo contendere to the charge of leaving the scene of a traffic crash involving death, a first degree felony under § 316.027(2)(c) and (f) Florida Statutes (2015). He entered that plea instead of proceeding to trial because his attorney at the time of the plea mislead him to believe that 10 years 6 months was the lowest permissible sentence he could receive under § 921.00265 Florida Statutes (2015). The Defendant's mistaken belief, and therefore his plea, was directly and solely the result of that affirmative misadvice given him by Trial Counsel.

Had the Defendant understood that the actual minimum sentence was less than half of the agreed sentence, he would not have entered that plea. The Defendant was prejudiced by receiving a sentence more than twice as long as the minimum sentence he could have received under § 921.00265 and § 316.027(c).

The postconviction court improperly denied the Defendant's motion to withdraw his plea under Fla. R. Crim. P. 3.850 because no record evidence supported the findings of that court. Therefore denial of the relief requested by the Defendant was reversible error.

ARGUMENT

DENIAL OF THE DEFENDANT'S MOTION TO
WITHDRAW HIS PLEA WAS REVERSIBLE
ERROR BECAUSE NO RECORD EVIDENCE
SUPPORTED THE FINDINGS OF THE
POSTCONVICTION COURT.

Standard of Review

The Defendant moved the postconviction court to allow him to
withdraw his plea based on affirmative misadvice of trial counsel.

R.143-53. In reviewing postconviction claims of ineffective
assistance of counsel, Florida courts apply the rule in *Strickland v.*
Washington, 466 U.S. 668 (1984):

Claims of ineffective assistance of trial counsel
require a showing of deficient performance and
prejudice. *See generally Strickland v.*
Washington, 466 U.S. 668... (1984). First, a
defendant must establish conduct on the part
of counsel that is outside the broad range of
competent performance under prevailing
professional standards. *See Gore v. State*, 846
So.2d 461, 467 (Fla.2003). Second, the
deficiency must be shown to have so affected
the fairness and reliability of the proceedings
that confidence in the outcome is undermined.
See id. The two prongs are related, in that “the
benchmark for judging any claim of
ineffectiveness must be whether counsel’s
conduct so undermined the proper functioning

of the adversarial process that the trial cannot be relied on as having produced a just result.” *Rutherford v. State*, 727 So.2d 216, 219 (Fla.1998) (quoting *Strickland*, 466 U.S. at 686...).

State v. Davis, 872 So. 2d 250, 253 (Fla. 2004); *Happ v. State*, 922 So. 2d 182, 186 (Fla. 2005).

The *Strickland* Court held that the standard requires the defendant to show that “there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” 466 U.S. at 694. The Court held that a reasonable probability is “a probability sufficient to undermine confidence in the outcome.” *Id.*

A defendant bears the burden of establishing the claim. See *Freeman v. State*, 761 So. 2d 1055, 1069 (Fla. 2000) (a “defendant has the burden of alleging a specific, serious omission or overt act upon which the claim of ineffective assistance of counsel can be based”). In *Campbell v. State*, 247 So. 3d 102, 106 (Fla. 2d DCA 2018), the Second District Court addressed the standard of review to be applied after a defendant meets the *Freeman* burden:

“[W]hen a defendant presents competent substantial evidence in support of his ineffective assistance claim[s], the burden shifts to the State to present contradictory evidence.” *Williams v. State*, 974 So. 2d 405, 407 (Fla. 2d DCA 2007)] (citing *Green v. State*, 857 So.2d 304, 305 (Fla. 2d DCA 2003); accord *Thomas v. State*, 117 So.3d 1191, 1194 (Fla. 2d DCA 2013) (“**Generally, a defendant has the burden to present evidence at a postconviction evidentiary hearing, and once he does so, even if only through the presentation of his own testimony, the State must present contradictory evidence.**”).

Campbell at 106 (emphasis added).

Where there is “no conflicting testimony that required the [postconviction] court to assess the relative credibility of different witnesses,” the issue is not one of witness credibility. *Feldpausch v. State*, 826 So.2d 354, 356 (Fla. 2d DCA 2002); *see also* *Yarbrough v. State*, 871 So.2d 1026, 1029 (Fla. 1st DCA 2004) (“[T]he evidentiary hearing raised virtually no disputed issues.... Thus, the [postconviction] court needed only to apply these established facts to the law regarding ineffective assistance of counsel.”). **“[I]f a defendant's testimony is unrefuted and the postconviction court has not articulated a reason to disbelieve the defendant, the court cannot choose to disregard the defendant's testimony.”** *Thomas*, 117 So.3d at 1194.

Campbell at 107 (emphasis added).

The First Prong of Strickland: Deficient Performance

In the instant case the Defendant entered pleas of nolo contendere to the charges of leaving the scene of a traffic crash involving death, a first degree felony under § 316.027(2)(c) and (f) Florida Statutes (2015), and tampering with evidence, a third degree felony under § 918.13 Florida Statutes (2015). R.048-49; R.075, line 21 - R.076, line 15; R.079, lines 4-7; R.083, lines 1-2. He was adjudicated guilty on both charges R.115, lines 3-5. Judgment and sentence were rendered on 19 March 2018. R.052-59.

The Defendant was represented in the trial court at all relevant times by Shannon H. McFee (hereinafter “Trial Counsel”). R.422, line 13 - R.423, line 9; R.047; R.052. In his motion to withdraw his plea the Defendant asserted that trial counsel affirmatively misadvised him that the minimum sentence he could receive based on the sentencing Scoresheet prepared under § 921.0024 Florida Statutes (2015). R.143, 149-50. Trial Counsel failed to review and correct the same Scoresheet; he failed to

ascertain whether the 120 victim injury points in section III of the Scoresheet were properly included. T.147-50.

At the hearing on the Defendant's motion to withdraw his plea, Trial Counsel testified that in 2007 the Florida Statutes "changed to then indicate that you could get those death points on a leaving the scene with a death if the Court makes a finding that you caused the death or the injury under those circumstances." R.424, lines 16-19. Trial Counsel was correct that § 921.0021(7) changed in 2007. *See* Ch. 2007-211 Laws of Florida. Trial Counsel was also correct that after that change 120 victim injury points could be included, but only where a court finds that the offender caused victim injury. *Id.* Of course any such finding must be supported by competent substantial evidence.

Chapter 2007-211 Laws of Florida amended § 921.0021(7) Florida Statutes to include a new paragraph:

(e) Notwithstanding paragraph (a), if the conviction is for an offense described in s. 316.027 and the court finds that the offender caused victim injury, sentence points for victim injury may be assessed against the offender.

For a court to find “that an offender caused victim injury” record evidence supporting such a finding would be required. Here no such record evidence exists.

At the hearing on the Defendant’s motion to withdraw his plea Trial Counsel testified that he believed that if this case had gone to trial, the State may have been able to present evidence that the Defendant had “caused victim injury”:

Q.[by ASA Worcester] Did you, in fact, take depositions of the eyewitnesses to see if there was a cause?

A.[by Trial Counsel] We did. There was at least two that I recall, a Mr. Burnell and Mr. Ramiro. One was a youth at the time of the accident. The other was an adult. And we – in the deposition in the discovery that I determined – looked at, they were going to indicate who was at fault.

R.427, lines 2-8.

However no witness testified at the hearing on the Defendant’s motion to withdraw his plea, or at any other time, about anything that had happened at the scene of the accident before the Defendant left the scene. No testimony was ever taken from anyone which could address the cause of the accident.

Even if transcripts of the discovery depositions which were the basis of Trial Counsel's opinion had been included in the trial court file (and they were not), such deposition transcripts would be inadmissible hearsay for the purpose of determining causation. Trial Counsel's opinion regarding the impact of potential testimony by witnesses might provide a basis for advice to his client. However Trial Counsel's opinion about out-of-court statements of witnesses at depositions was clearly not competent substantial evidence of anything which may have happened at the scene at the time of the accident.

Trial Counsel testified that he believed the witnesses "were going to indicate who was at fault." R.427, lines 7-8. Counsel for the Defendant objected to Trial Counsel's testimony about the deposition testimony because it was hearsay. R.427, line 9. The objection was overruled by the postconviction court: "Overruled. It is not being offered for the truth but rather what was a factor in the plea. It seems obvious to me from the record and, therefore, I overrule the hearsay objection." R.427, lines 10-13.

Overruling that objection was error because evidence of who may have been at fault in the accident goes directly to whether victim injury points were properly included on the Scoresheet. Therefore this court should not consider Trial Counsel's testimony that he believed the witnesses were going to indicate who was at fault for any purpose. Trial Counsel's subjective belief about what the potential testimony of two potential witnesses is simply not relevant to any issue before this court.

Scoresheet Error

Had he done the appropriate research, Trial Counsel could have easily ascertained that the 120 victim injury points were not properly assessed in the instant case. In *Sims v. State*, 998 So. 2d 494, 496 (Fla. 2008), Sims was driving a truck when he struck and killed a victim. Sims left the scene of the accident without ever stopping the truck. *Id.* He was charged with leaving the scene of a crash resulting in the death of a person under § 316.027(1)(b) Florida Statutes (2001), and was found guilty as charged in the information. *Id.* At the sentencing hearing the trial court added

120 victim injury points to Sims' Criminal Punishment Code Scoresheet. *Id.* at 497. The Fifth District Court of Appeal affirmed the sentence, concluding that victim-injury points were properly imposed. *Id.* The Supreme Court granted review. *Id.* at 498-99.

In *Sims* the Supreme Court held: "Based upon the plain language of section 921.0021(7)(a)[Florida Statutes (2001)], which defines 'victim injury' for the purpose of scoring victim-injury points, we conclude that under these facts, the imposition of such points for leaving the scene in violation of section 316.027(1)(b) was incorrect." *Id.* at 505. The Supreme Court reasoned:

Section 921.0021(7)(a) provides: "Victim injury" means the physical injury or death suffered by a person as a *direct result* of the primary offense, or any additional offense, for which an offender is convicted and which is pending before the court for sentencing at the time of the primary offense. (Emphasis supplied.) **This "direct result" language clearly imparts and includes a causation requirement, which must exist between the death of the victim and the charged offense of leaving the scene of an accident resulting in death.**

Id. at 505 (italics as in the report of *Sims*, boldface added).

Accordingly, here, a similar interpretation of section 921.0021(7)(a), requiring the existence of a causal connection to impose victim-injury points, is warranted. Moreover, if the imposition of a restitution award, which results in monetary loss, entails a causation requirement, a causal connection is also required for the imposition of victim-injury points, which can lead to the much more significant loss of personal liberty through the imposition of a longer sentence. Finally, in interpreting Florida Rule of Criminal Procedure 3.701(d)(7), which provides when victim injury “shall be” scored under the sentencing guidelines, this Court concluded that the Sentencing Guidelines Commission had recommended that victim injury be scored when the “injury occurred *during* the offense which led to the conviction.” *Fla. R.Crim. Pro. re Sentencing Guidelines (Rules 3.701 & 3.988)*, 509 So.2d 1088, 1089 (Fla.1987) (emphasis supplied). For these reasons, we conclude that **a causal connection must clearly exist between the charged offense and the death of the victim to impose victim-injury points.**

998 So. 2d at 505-06 (italics as in the report of *Sims*, boldface added).

The death of the victim was the direct result of the initial impact, rather than the underlying offense which occurred only after the death. So, the causal connection, which is absolutely necessary to impose victim-injury points, simply does not exist in this case

998 So. 2d at 507. Thus in *Sims* the Florida Supreme Court concluded that to assess victim injury points, it must be established that the “injury occurred *during the offense* which led to the conviction.” 998 So. 2d at 505 (emphasis added).

In *Manhard v. State*, 282 So. 3d 941, 948 (Fla. 1st DCA 2019), *review denied*, SC19-2133, 2020 WL 1894688 (Fla. Apr. 16, 2020), *certiorari denied*, *Manhard v. Florida*, 141 S.Ct. 562 (2020), the district court recognized that in *Sims* the Florida Supreme Court “clarified that the ‘direct result’ language included a causation element linking the death of the victim and the charged offense. *Sims*, 998 So. 2d at 505.” The *Manhard* court held: “A conviction under ‘vehicular homicide or any other offense in which the crime actually involved the impact that caused the death... would have satisfied the causation requirement for the imposition of victim-injury points.” 282 So. 3d at 948, quoting *Sims*, 998 So. 2d at 505. Manhard had been convicted of DUI manslaughter, which satisfied the causation requirement because it linked the death with the charged offenses. Therefore, the victim-injury points were

properly assessed because Manhard's conviction of DUI manslaughter established the requisite causation. *Manhard* at 948.

Here, unlike *Manhard*, the Defendant was charged with no other offense which might have satisfied the requirement of causation. In the instant case, as in *Sims*, the offense for which the victim injury points was assessed was leaving the scene of a crash involving death. R.040; R.044; R.048; R.052. Therefore the same result as in *Sims* would be required in the instant case. To impose victim injury points, "a causal connection must clearly exist between the charged offense and the death of the victim to impose victim-injury points." *Sims* at 505.

In 2007, after the district court opinion in *Sims*, the Legislature added a new provision to 921.0021(7) Florida Statutes:

Notwithstanding paragraph (a), if the conviction is for an offense described in s. 316.027 and the court finds that the offender caused victim injury, sentence points for victim injury may be assessed against the offender.

Ch. 2007-211, § 4, Laws of Fla. That was effective 01 July 2007. *Id.* at § 5; it is codified at § 921.0021(7)(e) Florida Statutes (2015).

Error by the Postconviction Court

Under some circumstances Ch. 2007-211, § 4, would allow assessment of victim injury points. However to do so a court must find “that the offender caused victim injury....” In the instant case no record evidence exists which would support any such finding. In addition nothing in Ch. 2007-211, § 4, changed or even addressed the rule in *Sims* that “a causal connection must clearly exist between the charged offense and the death of the victim to impose victim-injury points.” 998 So. 2d at 506.

Therefore, even after the 2007 change to the statute, the rule in *Sims* still applies to the instant case because “a causal connection must clearly exist between the charged offense and the death of the victim.” 998 So. 2d at 506. But even if it did not, the plain language of § 921.0021(7) Florida Statutes after the amendment by Ch. 2007-211, § 4, still requires that a court find “that the offender caused victim injury” before it can assess sentence points for victim injury.

As explained supra absolutely no evidence existed in the instant case to show that the Defendant did anything or failed to do

anything which caused any death. The State presented no such evidence at any hearing. In the alternative that fact could be established by an admission by the accused. Here neither occurred. Unlike *Manhard*, the Defendant was charged with nothing to which a plea would necessarily be an admission of causing death.

In addition, to be guilty of leaving the scene of a crash involving death, it would be necessary for a death to have occurred before the Defendant allegedly left the scene. If no death had occurred before the Defendant left the scene, it would not be possible to find that the Defendant left the scene of a death.

In the instant case no evidence exists to show whether the victim died before or after the Defendant left the scene. However even if the Defendant left the scene after the victim died, no evidence exists to show that the act of leaving the scene could possibly have caused that death.

Sims was decided by the Supreme Court in 2008. The events giving rise to the instant case were alleged to have occurred in 2016. Therefore Trial Counsel should have been aware of the rule in *Sims* and the proper application of the same. However the

Defendant testified that Trial Counsel never discussed the Supreme Court opinion in *Sims* with him. R.409, lines 22-24. Trial Counsel testified that he was aware of the opinion in *Sims*. T.432, line 4 - R.433, line 7. However he never denied that he had failed to discuss the Supreme Court opinion in *Sims* with the Defendant.

Trial Counsel affirmatively advised the Defendant that the State's proposed sentence of 10 years 6 months was the minimum sentence that the trial court could impose absent some mitigating circumstance under § 921.0026. Apparently here no such mitigating circumstance existed. The Defendant accepted that advice and entered into the proposed plea agreement.

However the State's proposed sentence of 10 years 6 months was **not** the minimum sentence that the trial court could impose absent some mitigating circumstance. Had the erroneously included 120 points for victim injury been omitted from the Scoresheet, the total sentence points would have been 76.4. That would have resulted in a lowest permissible sentence of 36.3 months under the Criminal Punishment Code. ($76.4 - 28 = 48.4$; $48.4 \times .75 = 36.3$). See § 921.0024(2); Fla. R. Crim. P. 3.704(26).

Section 316.027(2)(c) Florida Statutes required a four year mandatory minimum sentence, less than half the sentence the Defendant had been mislead to believe was the minimum sentence that the trial court could impose absent some mitigating circumstance.

The misadvice given by Trial Counsel in the instant case was not simply a failure to properly advise the Defendant. Here the advice given by Trial Counsel incorporated errors of law or, as some courts have referred to it, was “affirmative” or “positive misadvice.” In *Ey v. State*, 982 So. 2d 618, 622 (Fla. 2008), the Supreme Court held that such affirmative misadvice about even collateral matters may constitute a legally cognizable claim for ineffective assistance of counsel when that misadvice affects the voluntariness of a plea. “When a defendant enters a plea in reliance on affirmative misadvice and demonstrates that he or she was thereby prejudiced, the defendant may be entitled to withdraw the plea even if the misadvice concerns a collateral consequence as to which the trial court was under no obligation to advise him or her.” *Ghanavati v. State*, 820 So. 2d 989, 991 (Fla. 4th DCA 2002). *See also*

Fernandez v. State, 199 So. 3d 500, 504 (Fla. 2d DCA 2016), citing *Ey*; *Gunn v. State*, 841 So. 2d 629, 631 (Fla. 2d DCA 2003); *Roberti v. State*, 782 So. 2d 919, 920 (Fla. 2d DCA 2001).

The affirmative advice which Trial Counsel gave the Defendant was error. Even considering the minimum mandatory sentencing provision in § 316.027(2)(c), the minimum sentence that the circuit court could impose absent some mitigating circumstance was not 10 years and 6 months; it was less than half of that. Here the affirmative misadvice given to the Defendant by trial counsel mislead him to believe that the minimum sentence which he could receive in the instant case was 10 years 6 months.

The Defendant stated in his sworn motion to withdraw his plea that had he known the truth he would not have entered into the plea agreement. R.150. The Defendant explained at the hearing on the motion to withdraw his plea:

Q.[by counsel for the Defendant] Now, did Mr. McFee ever tell you that the minimum potential sentence in this case was less than ten and a half years?

A.[the Defendant] No, absolutely not.

Q. Okay. Had Mr. McFee told you that the potential minimum sentence was less than ten and a half years, would you have entered a plea to ten and a half years?

A. No.

Q. Was your entry of the plea to ten and a half years based upon your understanding of the potential minimum sentence and what Mr. McFee told you?

A. Yes.

Q. Had you believed, had you had information from somebody anywhere that the potential minimum sentence in this case was less than ten and a half years would you have entered a plea to ten and a half years?

A. No.

R.409, lines 5-21.

Any reasonable attorney would have ascertained the correct application of victim injury points to a charge of leaving the scene of a crash involving death. Had Trial Counsel done so, he would have ascertained that the correct minimum sentence was less than half of the sentence to which he advised the Defendant to agree. The failure of Trial Counsel to do so was ineffective assistance of counsel because it rendered the plea involuntary. The Defendant

would not have agreed to the proposed sentence had he not been affirmatively mislead by Trial Counsel.

The Second Prong of Strickland: Prejudice to the Defendant

In the instant case the aforesaid failures of Trial Counsel to provide effective assistance resulted in prejudice to the Defendant. The Defendant entered into the plea agreement because he was affirmatively mislead by Trial Counsel to believe that 10 years 6 months was the minimum sentence he might receive. As a direct result of the failure of trial counsel to recognize and assert the errors in the sentencing Scoresheet, the Defendant entered into a plea agreement based on that affirmative misadvice. As explained supra, the plea agreement in this case was predicated upon a fallacy. Had the Defendant known that the actual lowest permissible sentence he might have received was substantially less than the agreed-upon sentence, he would not have entered into that agreement. The Defendant so stated in his sworn postconviction motion and again in his testimony. R.150; R.409, lines 5-21.

Prejudice to the Defendant arose from his loss of his right to liberty resulting from the failure of trial counsel to recognize and assert the correct lowest permissible sentence which might be imposed in this case. As a result of the ineffective assistance of trial counsel the Defendant entered into a plea agreement which was based on a fallacy. He is presently serving a 10 year 6 month sentence which is not required by the statutory and decisional law of Florida. Had the Defendant known that under § 921.00265 and § 316.027(2)(c) Florida Statutes the actual lowest permissible sentence he might have received was substantially less than that agreed-upon sentence, he would not have entered into the plea agreement in this case. T.409, lines 5-21.

Application to the Instant Case

Thus the two prongs of the test in *Strickland v. Washington* and its progeny are both met. The unprofessional error of Trial Counsel by failing to recognize and assert the correct minimum sentence which might be imposed in this case was “outside the wide range of professionally competent assistance.” *Strickland*

at 694. “[T]here is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” *Strickland* at 694. “A reasonable probability is a probability sufficient to undermine confidence in the outcome.” *Id.*

Order of the Postconviction Court

The postconviction court ruled on the Defendant’s motion to withdraw his plea in a written order entered 16 March 2023.

R.295-304. The court first reviewed the procedural history of the case and the rule in *Strickland v. Washington* and its application by Florida courts. R.295-98.

Then the postconviction court reviewed the Florida Supreme Court opinion in *Sims v. State*. R.298-99. The postconviction court ruled:

Notably, the holding in *Sims* was based on the Florida Supreme Court’s interpretation of subsection (7)(a) of the 2001 version of section 921.0021, Florida Statutes. In 2007, the legislature amended section 921.0021, to add subsection (7)(e), which provides that, “[n]otwithstanding paragraph (a), if the conviction is for an offense described in s. 316.027 and the court finds that **the offender caused victim injury**, sentence

points for victim injury may be assessed against the offender.” Laws 2007, c. 2007-211 §4. (Emphasis added.)

R.299 (emphasis as in original order).

The plain language of section 921.0021(7)(e), Florida Statutes (2016), provides that, if a conviction is for an offense described in section 316.027, points for victim injury “may” be assessed “if the court finds that the offender caused victim injury.” Section 921.0021(7)(e) expressly provides that points may be assessed in these circumstances notwithstanding the “direct result of the primary offense” requirement of section 921.0021(7)(a).

R.299-300.

Therein the postconviction court was absolutely correct. The post-2007 version of the statute provides that points for victim injury may be assessed if the court finds that the offender caused victim injury. *See* Ch. 2007-211, § 4, Laws of Fla.

However, like any other finding by a court, a finding that the offender caused victim injury must be based on competent substantial evidence. Here no competent substantial evidence exists to support a finding that victim injury points could be

assessed in this case. As to victim injury points the trial court ruled:

Mr. McFee considered the issue and **interpreted 921.0021(7)(e) to allow victim injury points to be assessed** if the Defendant was found to have caused the injury or death of the victim. Mr. McFee testified that **he believed that victim injury points could lawfully be assessed against the Defendant if the Defendant was “a cause,” not necessarily the only cause, of the accident.**

....

Based on the evidence in discovery, in particular the depositions of eyewitnesses Timothy Bernal and Shame Romero, **Mr. McFee concluded that the scoresheet that included victim injury points was accurate.**

....

Mr. McFee was confident that if the case went to trial and the Defendant was convicted, **the Defendant would be found to have been a cause of the death of the victim** and victim injury points would be included on the sentencing scoresheet.

R.301-02 (emphasis added).

However no such evidence was before the postconviction court. No such evidence is in the record on appeal. Apparently the court based its ruling only on the opinion of Trial Counsel that

some trial testimony might support a finding that the Defendant caused the death of the victim. However well informed Trial Counsel may have been, he was not an eyewitness to the accident. He certainly could not testify to those events. Had Trial Counsel attempted to repeat at the hearing on the Defendant's motion what some other person had told him about the cause of the accident, such testimony would have been objected to as hearsay. The postconviction court properly sustained other objections when Trial Counsel attempted to repeat what others had told him. R.425, lines 12-13; R.425, lines 21-22; R.425, line 24 - R.426, line 1.

In a footnote immediately following the end of the above quotation the postconviction court opined:

The probable cause affidavit, attached hereto as Exhibit A, supports Mr. McFee's conclusion that the evidence at trial would have provided a factual basis for the victim injury points. This was a two vehicle crash where the vehicle driven by the Defendant reportedly changed lanes, colliding with a motorcyclist who died at the scene.

R.302, footnote 4. However that probable cause affidavit was not in evidence. If it had been offered in evidence it would have been

objected to as hearsay. Certainly the probable cause affidavit was an out-of-court statement. If it had been offered for the truth of the matters asserted therein it would have been inadmissible hearsay. See § 90.801 and § 90.802 Florida Statutes. Any statements of persons other than the affiant contained in the probable cause affidavit would have been multi-level hearsay. Section 90.803(7) Florida Statutes addresses a hearsay exception for public records and reports. However the § 90.803(7) exception “exclud[es] in criminal cases matters observed by a police officer or other law enforcement personnel”. That exclusion has clear application to the probable cause affidavit cited by the postconviction court.

Then the postconviction court ruled:

Counsel is correct that there was no record evidence regarding causation presented at the sentencing hearing (and, of course, no jury finding based on this evidence). However, the Defendant agreed to inclusion of the points as part of the plea bargain in this case.

R.303. The court was correct that the Defendant “agreed to inclusion of the points as part of the plea bargain in this case.” However the Defendant explained at length in his motion to

withdraw his plea, and in his testimony at the hearing on that motion, (and again supra,) that he would not have entered a plea had he known that the agreed-upon sentence was not the minimum potential sentence. R.150; R.409, lines 5-21.

Then the postconviction court ruled:

Mr. McFee's unrebutted credible testimony at the February 14, 2023, hearing is that, if the Defendant went to trial and was convicted, the evidence would support a finding that the Defendant caused injury or death to the victim. Therefore, Mr. McFee told the Defendant that the 120 points for victim injury were properly included on the scoresheet. The Defendant has not shown that this advice was erroneous. Accordingly, the Defendant has failed to show that his plea was based on misadvice of counsel.

R.303.

As explained supra, the testimony of Trial Counsel evinced his opinion that testimony might have been presented at trial to show that the Defendant had caused the death of the victim. However no such evidence was admitted in this case at any time. No statement of any witness who claimed to have actually seen the accident has been admitted to evidence or even appears in the record. The

opinion of Trial Counsel of what the evidence might eventually be, however well informed, is not competent substantial evidence of causation of the accident. The Defendant has explained at length that no record evidence exists to support Mr. McFee's opinion. The State presented no such evidence. The postconviction court did not cite to any such evidence.

Finally the postconviction court ruled:

Defendant has also failed to show that he would not have entered into the plea agreement if he had understood that the victim injury points were not required by law to be included by the judge at sentencing after a conviction at trial. Mr. McFee thoroughly discussed the victim injury points with the Defendant. Defendant testified that he agreed to the 10.5 year plea offer because he understood he likely could not do better at sentencing after a conviction at trial. He has not shown that this was a misunderstanding.

R.304.

The Defendant testified that if Trial Counsel had told him that the potential minimum sentence was less than ten and a half years, he would not have entered a plea to ten and a half years. R.409, lines 9-12. He testified that his entry of the plea to ten and a half

years was based on his understanding of the potential minimum sentence and what Trial Counsel told him. R.409, lines 13-16. The Defendant testified that had he believed that the potential minimum sentence in this case was less than ten and a half years he would not have entered a plea to ten and a half years. R.409, lines 17-21.

That testimony by the Defendant is completely un rebutted. In *Williams v. State*, 974 So. 2d 405, 407 (Fla. 2d DCA 2007), the district court held that a defendant has the burden of proving his claim of ineffective assistance of counsel at an evidentiary hearing on a rule 3.850 motion. “However, when a defendant presents competent substantial evidence in support of his ineffective assistance claim, the burden shifts to the State to present contradictory evidence.” *Id.*, citing *Green v. State*, 857 So. 2d 304, 305 (Fla. 2d DCA 2003).

The same is true here for the same reason. “[I]f a defendant’s testimony is unrefuted and the postconviction court has not articulated a reason to disbelieve the defendant, the court cannot choose to disregard the defendant’s testimony.” *Thomas v. State*,

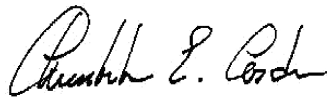
117 So. 3d 1191, 1194 (Fla. 2d DCA 2013); *see also Campbell v. State*, 247 So. 3d at 106, citing *Thomas*. *See also Beasley v. State*, 964 So. 2d 213, 216-17 (Fla. 2d DCA 2007) (reversing an order of a postconviction court denying relief because findings were not supported by competent substantial evidence where the postconviction court chose not to believe appellant's testimony even though it was unrefuted); *Matton v. State*, 872 So. 2d 308, 312 (Fla. 2d DCA 2004) (reversing a postconviction court because the court had no evidence whatsoever upon which to base a finding where appellant's testimony was unrefuted); *Feldpausch v. State*, 826 So. 2d 354, 356 (Fla. 2d DCA 2002) (holding that where there was no conflicting testimony that required a postconviction court to assess credibility of different witnesses, the postconviction court erred by rejecting the testimony of an attorney simply because the postconviction court did not wish to believe him).

CONCLUSION

Thus the Defendant entered a plea mistakenly believing that the agreed upon sentence was the lowest permissible sentence he

could receive under § 921.00265. His mistaken belief was the direct result of incorrect advice given him by trial counsel. The Defendant was prejudiced by receiving a sentence more than twice as long as the minimum sentence he could have received under § 921.00265 and § 316.027(c). Therefore the postconviction court improperly denied relief.

WHEREFORE the Defendant requests this Honorable Court to reverse the order of the postconviction court denying relief and to grant such other relief as may be reasonable, just, and proper.



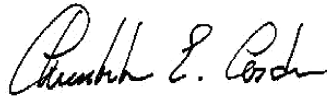
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Initial Brief has been furnished by email (to CrimAppTPA@myfloridalegal.com) to the Attorney General of Florida, 3507 East Frontage Road, Suite 200, Tampa, Florida 33607, as provided by Fla. R. Jud. Admin. 2.516(b)(1), on this 30th day of June, 2023.

CERTIFICATE OF FONT AND WORD COUNT COMPLIANCE

I HEREBY CERTIFY, as required by Fla. R. App. P. 9.045(e), that this brief complies with the font requirements of rule 9.045(b) and the word count requirements of rule 9.210(a)(2)(B).



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**UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
FORT MYERS DIVISION**

ADAM MURRAY COSTELLO,
Petitioner,

Case No.: 2:25-cv-74-JLB-NPM

vs.

SECRETARY, DEPARTMENT OF
CORRECTIONS,
Respondent.

_____ /

EXHIBIT 29

**IN THE DISTRICT COURT OF APPEAL OF FLORIDA
SIXTH DISTRICT**

ADAM MURRAY COSTELLO,

Appellant,

Appeal no. 6D23-2400

v.

STATE OF FLORIDA,

Lee Cir. no. 16-CF-000371

Appellee.

_____ /

ON APPEAL FROM THE CIRCUIT COURT
OF THE TWENTIETH JUDICIAL CIRCUIT,
IN AND FOR LEE COUNTY, FLORIDA

ANSWER BRIEF OF APPELLEE

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INTRODUCTION

This case involves Appellant's appeal from a final order denying his Fla.R.Crim.Pro. 3.850 amended motion to withdraw his "no contest" plea based upon a claim of ineffective assistance of counsel (R295-304).

References in this brief to the *Record on Appeal*, filed with this Court on June 2, 2023, are designated by the letter "***R***," followed by the pertinent page number listed on the bottom of each record page.

STATEMENT OF THE CASE AND FACTS

The Fatal Crash

At about 11:01 p.m. on the night of June 19, 2016, the Fort Myers Police Department received a 911 call from Timothy Bernal regarding a crash that had just occurred (R310). Bernal advised Officer Lesa Breneman that he had been traveling behind a motorcycle operated by Adam King, and observed a white pickup truck turn onto Colonial Boulevard in front of him, change from one lane to another, and then strike into King's motorcycle (R310-311). Right after the motorcycle was struck, Bernal watched the motorcycle drive up onto a median and hit a tree (R311).

In the meantime, the white pickup fled from the scene without stopping or to render aid (R311). However, Bernal stopped his vehicle near where the motorcyclist came to rest, to provide medical aid to King (R311). Another witness to the crash, Shame Romero, likewise saw the white pickup swerve into his lane, change lanes and then strike the motorcyclist (R311). Romero also pulled over to provide medical aid (R311). Both eyewitnesses noted that the white pickup had damage to the front driver's door and fender (R311). Romero believe the pickup had a flat front driver's side tire (R311).

Fort Myers' Officer Michael Perry was first at the scene, seeing the motorcycle and its operator lying adjacent to a tree (R310). Officer Perry

found the motorcyclist lifeless and still wearing a helmet (R310). After surveying the scene of the crash, officers located a left front tire mud flap for a Toyota, as well as a driver's outside mirror with plastic shell also for a Toyota (R311). Soon, Lee County EMTs arrived and pronounced the motorcyclist Adam King as deceased at 11:10 p.m. (R310).

Two days later, on June 21, 2016, Ft. Myers defense attorney Scott Moorey contacted the Ft. Myers' police and advised he represented Appellant ADAM MURRAY COSTELLO, the owner of the white pickup truck involved in the fatal car crash (R311). The officers proceeded to inspect the white pickup parked at Appellant's residence—a 2015 Toyota Tundra—registered to Appellant (R311). They observed extensive damage to the driver's side door and fender, noticing the driver's side mirror was missing (R311). The officers found blue paint transferred onto the pickup's driver's side, the same color as decedent King's royal blue motorcycle (R311).

The next day, June 22, 2016, Officer Breneman interviewed Gordon Durant and Daniel Sinclair, who had both grown up with Appellant in the Ft. Myers area (R312). Durant told Officer Breneman that on June 19, 2016 (the day of the crash), Sinclair had sent a Facebook post noting that he and Appellant were at Ft. Myers' bar Twin Peaks "drinking beer," and that Appellant "is a heavy alcohol drinker" (R312). Soon after, Appellant's name

was removed from that Facebook post when Appellant deleted his Facebook page (R312). Following that, Officer Breneman contacted the owner of Twin Peaks, and was provided still images and a surveillance video showing Daniel Sinclair and Adam Costello sitting inside Twin Peaks on June 19, 2016 (R313).

The officer also met with Sinclair and his attorney (R314). Sinclair advised he was with Appellant throughout the day on June 19, 2016 visiting numerous bars and restaurants—drinking both water and alcohol (R314). He said he did not know what vehicle Appellant came in later that evening when they were together. According to Sinclair, Appellant had contacted him after the crash and said that he (Appellant) was not involved in the fatal hit-and-run (R315). Rather, Appellant told him that he “came home that night to a crashed truck” (R315).

Officer Breneman next interviewed Heather Henry, who joined Sinclair and Appellant at the Red Bones bar on June 19, 2016, seeing them both drinking beer and appearing intoxicated (R313). According to Ms. Henry, Appellant told her that “he and Sinclair had been drinking all day” (R313).

The officers also reviewed Sinclair’s Facebook page that listed his phone number and email addresses (R320). His page showed Sinclair had sent messages to ten people mentioning he was with “Adam” (Appellant) on

June 19, 2016, and inviting them to join them for a “pub crawl” and “drinking” (R320). Sinclair’s Facebook messages noted he was going with “Adam” to “Twin Peaks,” “Blu,” “Cabo,” “Ford’s,” “The Lodge” and then “Red Bones” (R320). In his sworn statement, Sinclair stated he was also with Appellant at the “Winghouse,” which was their “last stop of the day” (R320).

In addition, Alecs Dean, a neighbor of Appellant’s, told the officer that that he’s never seen anyone else drive Appellant’s white Toyota Tundra pickup truck (R315). Similarly, Nestor Barreiro, who details Appellant’s white pickup, advised Officer Breneman that the Toyota is Appellant’s “baby” which he never lets anyone else drive it (R316).¹

Officer Breneman also interviewed Maria Newhard, who had recently been dating Appellant (R319). According to Newhard, Appellant had advised her that “his vehicle was stolen” (R319). Newhard heard from a mutual friend (Joseph Dozier) that Appellant’s “vehicle was stolen and involved in a traffic crash” (R319).

Next, Officer Breneman spoke with Joseph Dozier, who stated he’s “been friends with [Appellant] for years” (R322). According to Dozier, Appellant “told him that his truck was stolen and that’s it” (R322).

¹ Several witnesses familiar with Appellant, including Durant (R312), Dean (R315), Barriero (R316) and Jackson (R319), confirmed that others did not drive Appellant’s white Toyota pickup.

Following that, Officer Breneman received a list of recently-stolen vehicle reports which listed 14 stolen vehicles during that time period in the Ft. Myers area (R320). Notwithstanding, none were filed in reference to a theft of Appellant's 2015 Toyota Tundra pickup (R320).

On July 21, 2016, Officer Breneman met with two agents from the Florida Department of Law Enforcement (FDLE)—Kelly Adriano and Andrew Kempel, who specialize in phone record GPS/RTT data (R319). After an analysis of Appellant's Verizon cell phone records and with tracking cell phone towers in the area where the subject crash occurred, Adriano completed a report finding that the cell phone analysis of Appellant's phone "is consistent with [Appellant's] phone traveling that route" (R319).

Tina Maurice, the Ft. Myers' police latent fingerprint examiner, retrieved a latent print from the gearshift of Appellant's white Toyota pickup (R316). She found that the latent print belonged to Appellant, and there was not any overlay of other prints on top of it (R316).

Appellant Charged

Subsequently, on September 9, 2016, the Lee County State Attorney filed a two-count Information against Appellant, charging: (1) leaving the scene of a crash with death in violation of F.S. §316.027(2)(c) (a first degree felony), and, (2) tampering with or fabricating physical evidence in violation

of F.S. §918.13(1)(a) (third degree felony) (R20-22).

A year and a half later, on March 12, 2018, a Fourth Amended Information was filed by the State, alleging that Appellant was a driver “involved in a crash *resulting in death* to Adam Roger King,” and failed to stop or remain at the scene (R36-38). That latest amendment also added language to Count Two, stating Appellant had unlawfully and knowingly deleted Facebook, cellular phone and DVR surveillance camera information which hindered and impaired the State’s investigation of the case (R36-38).

Plea Agreement Executed

In the meantime, on March 8, 2018, the State and Appellant had negotiated a written plea agreement, which was signed by Appellant and his criminal defense counsel Shannon H. McFee, Esq. (R163).² It provided that Appellant would enter a “no contest” plea to each of the two charged counts and receive an adjudication of guilt on each count (R44-47). The agreement noted that Count One carries a maximum penalty of 30 years imprisonment, while Count Two has a 5-year maximum (R44). In the agreement Appellant and his counsel both confirmed there was a “factual basis” for entry of the

² At the present time Shannon H. McFee is a sitting circuit judge for Florida’s Twentieth Judicial Circuit (R297, 422). < https://www.ca.cjis20.org/About-The-Court/jud_profile.aspx?judge=mcfee >

pleas (R44). The State further agreed to decline filing other additional charges arising from Appellant's criminal conduct in the case (R45).

The parties stipulated in the Agreement to a sentence on Count One of 10.5 years with a 4-year minimum mandatory; and on Count Two a sentence of 5 years; each count to run concurrently and with adjudications of guilt (R45). In addition, standard court costs and costs of prosecution would be assessed (R45-46). In the event of a violation of or noncompliance with the terms, the negotiated sentence would be null and void, and Appellant would be resentenced to a new sentence somewhere between 126.3 months and the 35-year maximum on the two charges (R46).

Prior to the plea hearing before the trial court, a Rule 3.992(a) Criminal Punishment Code Scoresheet was prepared for this case (R40). In the section for Victim Injury, "Death" was noted with 120 points assessed for that factor (R40). That rendered a Total Sentence Imposed of 10 years and 6 months in the State Prison (R42).

2018 Plea Hearing

Days later, on March 12, 2018 a plea hearing was before Lee Circuit Judge Margaret Steinbeck (R163 *et seq.*). Appellant appeared at the hearing together with his defense counsel Shannon McFee, Esq. (R163). The trial court questioned Appellant with the standard inquiry regarding voluntariness

of his plea (R172-182). During questioning Appellant advised the court that he had a Bachelor's Degree in Accounting, and that he could read, write and understand the English language (R172). He confirmed understanding that leaving the scene of a crash with death is punishable by up to 30 years in the state prison; and that the obstruction and tampering of evidence charge was punishable by up to five years imprisonment (R173). Appellant acknowledged he'd seen the score sheet showing he faced the "lowest permissible sentence" of 126.3 months, as well as up to "30 potential years" of imprisonment (R175-176). He agreed at the hearing that the Rule 3.992(a) score sheet [showing a lowest 126.3 month term] was "true and accurate," and that he had the opportunity to review it with counsel (R176).

Pursuant to the plea agreement Appellant further understood he was to be sentenced on Count One to 10.5 years at the state prison with a 4-year minimum mandatory; on Count Two would receive a 5-year prison term; and would be adjudicated guilty on both counts which would run together concurrently (R177). Both the prosecutor and Appellant's counsel stipulated to a factual basis (R182). For victim impact evidence, the State presented photographs, testimony and statements from six witnesses familiar with decedent Adam King (R185-205).

Based upon the above representations, the trial court accepted

Appellant's plea and found a factual basis upon Appellant's stipulations and the officers' Probable Cause Affidavit and other presented evidence (R184-185). The court further found Appellant to be "competent, alert and able to tender a plea," which was entered "voluntarily (R185).

Final Judgment & Sentence

The next week, on March 19, 2018, the trial court entered a final judgment adjudicating Appellant guilty of: (1) leaving the scene of a crash with death in violation of F.S. §316.027(2)(c) first degree felony), and, (2) tampering with or fabricating physical evidence in violation of F.S. §918.13(1)(a) (third degree felony) (R52). As to Count One, the trial court sentenced Appellant to a prison term of 10.5 years, with a 4-year minimum mandatory (R54-55). The trial court further prescribed a 5-year prison term on Count Two, with the two sentences to run concurrently (R56-57).

Appellant's Motion to Vacate Sentence

Two years later, on March 5, 2020, Appellant filed a Rule 3.850 motion to vacate his sentence as "involuntary" and due to "ineffective assistance of counsel" (R60-69). According to Appellant, during the 2018 plea negotiations and hearing his defense counsel, Shannon H. McFee, Esq., had "failed to recognize" that the State had "improperly included 120 points for

victim injury,” which resulted in an “incorrect” lowest sentence of 126.3 months (R60). Rather, Appellant alleged, the “correct” lowest permissible sentence was actually a much lesser 36.3 months (R60-61).

In its response, the State asserted that defense counsel's performance was not deficient, nor was there ineffective performance that prejudiced Appellant's defense. *Strickland v. Washington*, 466 U.S. 668, 687 (1984) (R119-120). Additionally, the State noted that Appellant's claim to just vacate the sentence “excess” is erroneous, rather than seeking withdrawal of his entire plea and proceed *de novo* or to jury trial (R121). The State further pointed out that Appellant's reliance on *Sims v. State*, 998 So. 2d 494, 496 (Fla. 2008) was misplaced, as that case involved an earlier superseded and different 2001 version of F.S. §921.0021(7)—that had existed *before* Section 921.0021(7)(e) was implemented in 2007 by the Florida Legislature (R122).³ See: *Laws 2007*, c.2007-211 §4.

Thereafter, on April 19, 2021, Lee Circuit Judge Margaret Steinbeck entered an order summarily denying Appellant's 3.850 motion, as well as denying the request for a hearing (R134-136).

³ In HB 25 (2007), the Florida Legislature amended F.S. §921.0021, adding subsection 7(e), to authorize a judge to assess victim injury points when a person is convicted of leaving the scene of an accident involving injury or death, with the effect “of significantly increasing the lowest possible sentence for the offense.” (R299).

Appeal to Second DCA

From there, Appellant appealed the trial court's summary denial of his 3.850 motion to the Second District Court of Appeal (R137, Florida Second DCA Appeal no. 2D21-1384).

On December 22, 2021, the Second District reversed the summary denial of Appellant's 3.850 motion and remanded for further proceedings (R138-142). See: *Costello v. State*, 330 So.3d 1052 (Fla.2d DCA, 2021). The panel found that Appellant's claim was "not conclusively refuted" by the record, as it did "not include any information regarding the victim's cause of death" (R141).⁴ Due the absence of any such information regarding the victim's death, the Second District's panel was "unable to determine whether assessment of victim injury points would have been appropriate pursuant to Section 921.0021(7)(e), Florida Statutes (2016)" (R141 note 1). Moreover, the panel found Appellant's earlier claim to be "facially insufficient" since it lacked an affirmative request to *withdraw* his plea (R141). It was impermissible, the panel ruled, for Appellant to merely request the postconviction court to vacate his sentence and just resentence him (R141).

⁴ The record of Appellant's prior Second DCA Appeal no. 2D21-1384 had not included the Ft. Myers Police Department's 14-page Probable Cause Affidavit, which is, however, contained in the record of this appeal (R310-323).

Appellant's 2022 Amended Motion to Withdraw Plea

Several months following, on March 3, 2022 pursuant to Rule 3.850, Appellant filed his motion to withdraw plea based upon ineffective assistance of counsel (R143-153). He essentially asserted the same allegations and grounds as two years earlier in his motion to vacate sentence, except seeking to withdraw his entire “no contest” plea entered 4 years earlier on March 18, 2018 (R143-153).

On May 11, 2022, the prosecutor filed the State's response in opposition to Appellant's motion to withdraw plea (R155-223). The State asserted that Appellant's prior defense counsel had not provided ineffective assistance, nor had he misadvised him on the lowest possible sentence (R156-158). In her response, the prosecutor noted that the “causal connection” to the victim's (Adam King's) death is derived from the 2007 amendment to F.S. §921.0021, which states:

(7)(e) Notwithstanding paragraph (a), if the conviction is for an offense described in s.316.027 and the court finds that the offender *caused victim injury*, sentence points for victim injury may be assessed against the offender.”

Moreover, the prosecutor's response reflected that on March 12, 2018 the Appellant had previously pled “no contest” to the Information asserting he “was the driver of a motor vehicle involved in a crash *resulting in death* to Adam Roger King...” (R156). And at the plea hearing Appellant had verified

he'd seen the score sheet showing he faced the "lowest permissible sentence" of 126.3 months, was then aware of a maximum sentence up to "30 potential years" imprisonment (R175-176). The State's response also noted that Appellant had expressly agreed at the plea hearing that the Rule 3.992(a) score sheet was "true and accurate," and that he had the opportunity to review it with his counsel (R176). During his plea he had personally acknowledged was charged with leaving a crash scene with a death (R157, 173). Lastly, Appellant had stipulated to the crime's "factual basis" (R157, 182). The trial court thereafter accepted Appellant's plea and found a "factual basis" from Appellant's stipulations, the officers' probable cause affidavit and other presented evidence, and concluded his plea was "voluntary" (R184-185).

Evidentiary Hearing on Motion to Withdraw Plea

Subsequently, on February 14, 2023 an evidentiary hearing on Appellant's amended 3.850 motion to withdraw plea was held before Judge Steinbeck at the Lee County Circuit Court (R394-451).

Testimony of Defense Counsel Shannon H. McFee, Esq.—

At the hearing, Shannon McFee testified he'd become the Appellant's defense counsel in October 2016, about three months following inception of

the case (R422-423). By that time, attorney McFee had been a specialist in criminal defense and juvenile defense matters for about 22-23 years who had handled a multitude of traffic with fatality cases (R423-424).⁵ He explained that in 2007 the situation with imposition of “victim injury points” had changed significantly with leaving the scene offenses, which now allows the court’s assessment of points for causation of death (R424).

Mr. McFee noted that he had “absolutely” talked with Appellant about the potential assessment of victim injury points (R424-425). Initially the State had submitted a score sheet to him that did not include “death points,” which he thought was a “good” development but a probable error (R425). Later, he discussed the issue with Appellant and his mother at least twice —about approaching the State for a plea deal without adding the “death points”— although it wasn’t agreed to (R426).

However, Mr. McFee stressed he never told Appellant the low end of his score sheet could be “36.2” (R426). Initially the State’s plea offers started at 30 years, later dropped to 15, and lastly went down to 10.5 years with an agreement for cooperation (R428). Mr. McFee’s paramount concern was for

⁵ Prior to taking the bench, Mr. McFee, an honors graduate of the Florida State University College of Law, was an established criminal defense lawyer who served as President of the Collier County Association of Criminal Defense Lawyers. Earlier, he served as an Assistant State Attorney for the 20th Judicial Circuit. See: <<https://lawyers.justia.com/lawyer/shannon-mcfee-1520081> >

Appellant being found guilty and facing the prospect of a 35-year maximum sentence, i.e. 30 years for Count 1 and 5 years on Count 2 (R427-428).

More specifically, from depositions of over 40 witnesses, especially of eyewitnesses Bernal (sic) and Romero (sic), indications were pointing to Appellant as the at-fault party (R427).⁶ In Mr. McFee's view of the evolving law on Section 921.0021(7)(e), victim injury points count if a defendant is shown to be "a cause" of the accident, even if not the sole cause (R428). He summarized that the Legislature added Subsection (7)(e) in 2007 to F.S. §921.0021, allowing—where a defendant caused victim injury or death in violation of F.S. §316.027—for the court to assess victim injury points (R429-430). Since the subject crash happened in 2016, Mr. McFee testified that he then "knew" that the 2007 law "would apply to our facts" (R432-433).⁷

⁶ Per the Lakeland Police Department's probable cause affidavit, Timothy Bernal had observed Appellant's white pickup turn in front of him, change from one lane to another and strike decedent's motorcycle, which drove up onto a median and struck a tree (R310-311). The white pickup then fled the scene without stopping or rendering aid (R311). Another eyewitness, Shame Romero, also saw the white pickup swerve into his lane, change lanes and then strike the motorcyclist (R311). These witnesses noted the white pickup had damage to its front driver's door, fender and a flat front driver's side tire (R311).

⁷ Accordingly, Mr. McFee also knew the decisions in *Sims v. State*, 869 So.2d 45 (Fla.5th DCA, 2004), quashed, 998 So.2d 494 (Fla., 2008)—substantially relied upon in this appeal by Appellant—would *not* apply here as they stemmed from a 2001 crash involving death and a 2004 Fifth DCA opinion written *before* the statutory change of Subsection (7)(e) to F.S. §921.0021 (R432-433; St. Johns Circuit Case no. CF01-1373, date of crash 5/13/2001).

Testimony of Appellant Adam Costello—

Also testifying at the evidentiary hearing, Appellant stated that he spoke 3-4 times with Mr. McFee about a potential plea agreement (R408). According to Appellant, Mr. McFee had told him that his lowest permissible guideline sentence was ten and a half years (R408). He also showed him his score sheet, which listed 120 “victim injury points” (R408, 411). Appellant believed that his “minimum sentence” on the score sheet was 10½ years, and nothing less (R409). If Mr. McFee had told him that the minimum sentence was actually a lesser amount (i.e. “36.2” years), Appellant stressed he would have “absolutely not” have entered into the 10.5 year plea deal (R409).

On cross-examination, Appellant admitted he was aware of “independent witnesses” that witnessed the actual car crash (R413). He and Mr. McFee had discussed that the State would have to prove that he had “caused the crash,” and they also discussed his potential defenses (R413-415). Appellant acknowledged he knew the maximum sentence was 35 years, i.e. 30 years on Count One and 5 years on Count Two (R411). Early in discussions, Appellant was aware the State had made a 15-year offer, which he and Mr. McFee agreed wasn’t reasonable and not worth discussing (R415). It was pretty late in the case—just before sentencing—that they

received the State's 10.5 year offer, which he accepted (R415). Even then, Appellant admitted that the 10½ year offer was conditioned on his giving the State some information or testimony against another defendant (R416).

Further, Appellant agreed he entered his plea on March 12, 2018, and was then put under oath (R417). He acknowledged that when questioned at the plea hearing by the prosecutor he had confirmed his "lowest permissible sentence of 126 months in Florida State Prison" (R420). Not only did his defense attorney tell him that, but the prosecutor told him the same thing (R421). Appellant also confirmed that at the plea hearing he did "stipulate to a factual basis for the plea," for which he had answered "yes" (R420).

Order Denying Appellant's Rule 3.850 Motion

The following month, on March 16, 2023, Judge Steinbeck entered an order denying Appellant's motion to withdraw his plea upon ineffective assistance of counsel (R295-304). In her order, the trial judge made the following findings and conclusions of law:

1. That the holding in *Sims*, supra, was based upon the Supreme Court's interpretation of the prior 2001 version of F.S. §921.0021 (R299). However, in 2007, the legislature amended that section and with subsection (7)(e), which allows a court to assess victim injury points "when the offender caused victim injury" (R299).

2. At the plea hearing, Appellant knowingly stipulated and expressly agreed that the scoresheet *included* victim injury points (R301-302).
3. As a criminal defense attorney for over 20 years, Mr. McFee had represented numerous defendants in traffic cases involving fatalities (R300-301). In Mr. McFee's opinion, the 2007 amendment to F.S. §921.0021(7)(e) allowed the court to impose victim injury points if a defendant was "a cause," not necessarily the "only cause" of the accident (R301).
4. After conducting over 40 depositions in the case—in particular those of eyewitnesses Bernal and Romero—and discussing the crash and defenses with Appellant, Mr. McFee concluded that inclusion of the victim injury points was accurate and that Appellant would have likely been found "a cause" of the victim's death if the case had proceeded to jury trial (R301).
5. That Mr. McFee "credibly testified" he had thoroughly discussed inclusion of the victim injury points with Appellant—which "were an issue throughout the case"—and explained to him they were properly included on the scoresheet (R302-303). Accordingly, Appellant affirmatively waived his right to jury trial and expressly agreed to the scoresheet with victim injury points (R302).

6. Moreover, that the Ft. Myers police officers' probable cause affidavit supports Mr. McFee's opinion and conclusion "that the evidence at trial would have provided a factual basis for the victim injury points" (R302 at note 4).
7. Rejecting Appellant's contention that he would not have entered the plea if he knew the lowest guideline sentence was less than 10.5 years, the trial court found that Appellant had "agreed to the deal since he understood he likely could not do better at sentencing after conviction at trial" (R303).
8. With his confirmation at plea entry regarding the scoresheet containing victim injury points, the trial judge concluded that Appellant "has not shown that his was a misunderstanding" (R304).

Accordingly, the trial court's order denying Appellant's amended Rule 3.850 motion to withdraw plea was rendered on March 16, 2023 (R304).

Notice of Appeal

Subsequently, on April 12, 2023, Appellant filed a timely Notice of Appeal from the final order entered March 16, 2023 (R452).

SUMMARY OF THE ARGUMENT

The trial court below had properly denied Appellant's amended 3.850 motion to withdraw his plea. Following a lengthy evidentiary hearing, abundant information and evidence is present in the record to support the trial court's findings and conclusions that Appellant had not been subject to ineffective assistance of counsel in entering his 2018 plea. Appellant's counsel had responsibly evaluated the strength of the State's case against him. With the Florida legislature's 2007 statutory amendment, defense counsel correctly advised Appellant that victim injury points would likely be assessed against him if he had proceeded to jury trial. Moreover, the trial court properly applied the controlling legal precedents of *Strickland v. Washington*, *Hill v. Lockhart* and other similar Florida precedents in evaluating whether defense counsel's representation was deficient and/or whether there was prejudice to Appellant.

In any event, the record contains ample sufficient evidence to support the trial court's determination. The trial court did not abuse its discretion in denying Appellant's motion to withdraw his plea.

ARGUMENT

(as restated by Appellee)

The Trial Court Did Not Abuse Its Discretion in Denying Appellant's Amended Rule 3.850 Motion to Withdraw His Plea, Nor in Rejecting Appellant's Ineffective Assistance of Counsel Claims in View of the Absence of Deficient Performance and the Lack of Prejudice.

“The denial of a motion to withdraw plea is reviewed under the abuse of discretion standard.” *Griffin v. State*, 114 So.3d 890, 897 (Fla. 2013). See also: *Crawley v. State*, 851 So.2d 739, 740 (Fla. 2d DCA, 2003) (“The standard of review for the trial court’s denial [of a motion to withdraw plea after sentencing] is abuse of discretion”).

Generally, to obtain relief on ineffective assistance of counsel claims under *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052 (1984), a defendant is required to establish both: (1) deficient performance based on errors or omissions that are “of such magnitude as to constitute a serious error or substantial deficiency falling measurably outside the range of professionally acceptable performance”; and, (2) prejudice caused by counsel's deficient performance that is of “such a degree as to undermine confidence in the correctness of the result.” *Thompson v. State*, 759 So. 2d 650, 660 (Fla. 2000). “Unless a defendant makes both showings, it cannot be said that the conviction ... resulted from a breakdown in the adversary process that renders the result unreliable.” *Strickland*, 466 U.S. at 687.

Thus, “[u]nder the *Strickland* analysis, the failure of a defendant to establish either of its two requirements, deficient performance and prejudice, renders an ineffective assistance of counsel claim without merit.” *Nelson v. State*, 73 So.3d 77, 86 (Fla. 2011) (citing *Strickland*, 466 U.S. at 697 (authorizing courts to dispose of ineffectiveness claims after addressing only one prong of the analysis)).

A claim of ineffective assistance of counsel presents “a mixed question of law and fact.” *Farr v. State*, 124 So.3d 766, 775 (Fla. 2012); *Strickland*, 466 U.S. at 698. When reviewing a trial court's ruling that was made after an evidentiary hearing, appellate courts defer to the trial court's findings on factual issues, but review its legal conclusions de novo. *Stephens v. State*, 975 So. 2d 405, 413 (Fla. 2007).

As long as the trial court's findings are supported by competent substantial evidence, the appellate court will not substitute its judgment for that of the trial court on questions of fact, the credibility of witnesses, or the weight given to the evidence by the trial court.” *Stephens*, 975 So.2d at 413. See also: *Caballero v. State*, 851 So. 2d 655, 661 (Fla. 2003) (“[W]e do not second-guess the trial court's factual findings; instead, we limit our review to ensuring that the trial court applied the correct rule of law and, if so, that there is competent, substantial evidence to support its findings.”).

In this appeal, Appellant raises a 3.850 postconviction claim challenging the “voluntariness” of his plea which asserts the ineffective assistance of his defense counsel. He contends counsel’s deficiencies render his plea involuntary. In this regard, in *Hill v. Lockhart*, 474 U.S. 52, 106 S.Ct. 366 (1985), the U.S. Supreme Court established a two-prong test for determining claims of ineffective assistance of counsel relating to a defendant’s plea.

The first prong noted in *Hill* is the same as the “deficient performance” prong of *Strickland*, that is, the defendant must specifically identify acts or omissions of counsel that were manifestly outside the wide range of reasonably competent performance under prevailing professional norms. *Hill*, 474 U.S. at 58–59. See also: *Lynch v. State*, 2 So.3d 47, 56–57 (Fla.2008). As to the second prong, the Supreme Court in *Hill* held that a defendant must demonstrate “a reasonable probability that, but for counsel's errors, [the defendant] would not have pleaded guilty and would have insisted on going to trial.” *Hill*, 474 U.S. at 59; See also: *Grosvenor v. State*, 874 So.2d 1176, 1181 (Fla.2004). A defendant does not have to show that he actually would have prevailed at trial, but the strength of the government's case against the defendant should be considered in evaluating whether the defendant really would have gone to trial instead if he had received adequate advice from his counsel. *Grosvenor*, 874 So.2d at 1181.

Counsel's effectiveness is determined according to the "totality of the circumstances." *Strickland*, 466 U.S. at 690. Therefore, in determining whether a reasonable probability exists that the defendant would have insisted on going to trial, a court should consider the *totality of the circumstances* surrounding the plea, including such factors as whether a particular defense was likely to succeed at trial, the colloquy between the defendant and the trial court at the time of the plea, and the difference between the sentence imposed under the plea and the maximum possible sentence the defendant faced at trial. *Grosvenor*, 874 So.2d at 1181–82. "Unless a defendant makes *both* showings, it cannot be said that the conviction or death sentence resulted from a breakdown in the adversary process that renders the result unreliable." *Lynch*, 2 So.3d at 57 (quoting *Strickland*, 466 U.S. at 687).

Furthermore, the offense of leaving the scene of an accident involving death is a serious first-degree felony punishable by a mandatory minimum term of imprisonment of 4 years up to a maximum term of 30 years. §316.027(2)(c), Florida Statutes; § 775.082, Florida Statutes. Therefore, the absolute lowest permissible sentence without any victim injury points would have been four years, not the "36.3" months as Appellant repeatedly asserts.

The sentencing scoresheet (R40-42) prepared by the prosecutor in this case is accurate. The "victim injury points" were properly assessed here

against Appellant under §921.0021(7)(e) Florida Statutes. In this regard, the Legislature's clear purpose in enacting §921.0021(7)(e) was to authorize the assessment of victim injury points when a defendant is convicted of leaving the scene of a fatal accident—when the death is a result of the crash, but not necessarily due to the defendant leaving the scene. In this case, the victim seemingly died as a direct result of Appellant's vehicle striking the victim, with two (2) independent eyewitnesses to the event who provided critical details.

Nor can Appellant's defense counsel be deemed ineffective for not raising an argument against victim injury points based upon the pre-amendment case of *Sims v. State*, 869 So.2d 45 (Fla.5th DCA, 2004), quashed, 998 So.2d 494 (Fla., 2008). As noted above, the crime in *Sims*—a fatal crash occurring on May 13, 2001—had long preceded the legislature's 2007 later amendment to §921.0021.

It was in 2007 that the Florida Legislature had revised F.S. §921.0021 to include subsection 921.0021(7)(e). House Bill 25 amended § 921.0021 to authorize victim injury points when a person is convicted of leaving the scene of an accident which involved death or injury. The amendment was enacted in response to Florida's appellate courts' prior interpretations of §921.0021 as requiring proof that the victim's death or injury was the direct result of the offender's act of leaving the scene of the crash before the court could assess

victim injury points. See: *Florida Staff Analysis*, H.B. 25, 4/11/2007. Section 921.0021(7)(e) states:

Notwithstanding paragraph (7)(a), if the conviction is for an offense described in s. 316.027 and the court finds that *the offender caused victim injury*, sentence points for victim injury may be assessed against the offender. §921.0021(7)(e), Fla. Stat. 11

If, *arguendo*, Mr. McFee had objected below to the assessment of the 120 victim injury points for a death based on *Sims*, it would have been meritless since the 2007 amendment to the statute readily permits assessment of injury points for the crime of leaving the scene of a crash involving death. Appellant's scoresheet was correct, and he was not misadvised or misled by his defense attorney as to the minimum sentencing guidelines; hence, he cannot establish a "deficiency" under *Strickland*. As stressed in *Ferrell v. State*, 29 So.3d 959, 976 (Fla. 2010)—"Trial counsel cannot be deemed ineffective for failing to raise a meritless argument."

In any event, the record amply supports the trial court's detailed findings and reasons concluding that Appellant had not been provided ineffective assistance of counsel, as well as correctly applied controlling legal precedent: (a) that in 2007 the Florida legislature had added Section 921.0021(7)(e) authorizing trial courts to assess victim injury points where a person convicted of leaving the scene of an accident had caused death or injury (R299); (b) that Appellant had expressly stipulated and agreed that the scoresheet

included victim injury points which were “true and accurate” (R301-302); (c) that Appellant’s defense counsel—Mr. McFee—had expertise in criminal traffic cases involving fatalities and reasonably concluded that courts could impose victim injury points against defendants like Appellant who were “a cause” of an accident resulting in death (R301); (d) that after over 40 depositions in the case—especially those of crash eyewitnesses Bernal and Romero—Mr. McFee had “credibly testified” that victim injury points were a constant issue, and if a jury trial was held it was “likely” that those victim injury points would be assessed against Appellant (R301); (e) that Appellant affirmatively waived his right to jury trial and expressly agreed to the scoresheet listing victim injury points (R302); (f) the Ft. Myers police officers’ Probable Cause Affidavit supports Mr. McFee’s opinion and conclusion “that the evidence at trial would have provided a factual basis for the victim injury points” (R302 at note 4); (g) the trial court plainly rejected Appellant’s claim that he would not have pled if previously aware the lowest guideline sentence was “less than” 10.5 years; rather, the trial court found Appellant had “agreed to the deal since he understood he likely could not do better at sentencing after conviction at trial” (R303); and, (h) that regarding the scoresheet issues, Appellant “has not shown that his was a misunderstanding” (R304).

In the totality of the case, the trial court correctly summarized that there was a sufficient “factual basis” for the plea “based on the [Appellant’s] stipulation, the Probable Cause Affidavit in the court file as well as evidence taken by the Court at various evidentiary hearings throughout the pendency of this action.” (R302-303).

Accordingly, the record does not demonstrate that Mr. McFee had rendered a deficient performance in representing Appellant, nor is there an arguable showing of prejudice per *Strickland*. There was no breakdown in the adversarial process. See: *Nelson*, 73 So.3d at 86. With abundant record support to the trial court’s findings and conclusions herein following an evidentiary hearing, an appellant court defers to the trial court’s findings and does not substitute its judgment for that of the trial court on questions of fact, credibility or weight of evidence. *Stephens*, 975 So.2d at 413. Nor did the trial judge misapply controlling legal precedent.

In sum, Appellant has not arguably demonstrated an abuse of discretion by the trial court. See: *Griffin*, 114 So.3d at 897.

CONCLUSION

Based upon the foregoing arguments and authorities, the Appellee STATE OF FLORIDA respectfully requests this Honorable Court to AFFIRM the trial court's denial of Appellant's amended Rule 3.850 motion to withdraw his plea to the offenses of (1) leaving the scene of an accident with death, and (2) tampering with or fabricating physical evidence.

Respectfully submitted,

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CERTIFICATE OF FONT COMPLIANCE

I HEREBY CERTIFY that the size and style of type used in this brief is 14-point Arial, in compliance with Florida Rule of Appellate Procedure 9.045(b). This brief complies with the word-count requirements of Florida Rule of Appellate Procedure 9.210(a)(2)(B). The brief contains __6,252__ words, as calculated by the word-processing system including footnotes, but excluding the content authorized to be excluded under the rule.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to CHRISTOPHER E. COSDEN, ESQ., P.O. Box 9368, Fort Myers, Florida via the e-file system and email to: cosdenlaw@att.net, this ___1___ day of ___December___, 2023.

/s/ Samuel R. Mandelbaum, Esq.
COUNSEL FOR APPELLEE

**UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
FORT MYERS DIVISION**

ADAM MURRAY COSTELLO,
Petitioner,

Case No.: 2:25-cv-74-JLB-NPM

vs.

SECRETARY, DEPARTMENT OF
CORRECTIONS,
Respondent.

_____ /

EXHIBIT 30

IN THE SIXTH DISTRICT COURT OF APPEAL
LAKELAND, FLORIDA

ADAM MURRAY COSTELLO,
Appellant,

Case No. 6D23-2400

v.

L.T. No. 16-CF-371

STATE OF FLORIDA,
Appellee.

_____/

Appeal from the Circuit Court of the Twentieth Judicial Circuit,
in and for Lee County

REPLY BRIEF OF APPELLANT ADAM MURRAY COSTELLO

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PREFACE

The Appellant, Adam Murray Costello, is the Defendant in the Circuit Court of the Twentieth Judicial Circuit in and for Lee County, Florida, wherein his motion for postconviction relief was denied following a hearing. The Appellant will be referred to as the Defendant or the Appellant; the Appellee will be referred to as the State or the State of Florida. The following symbol will be used:

(R.____) - Record on Appeal.

Filed concurrently with this brief is a motion to strike portions of the Answer Brief on the basis that those portions are based solely on facts not in evidence.

ARGUMENT

DENIAL OF THE DEFENDANT’S MOTION TO
WITHDRAW HIS PLEA WAS REVERSIBLE
ERROR BECAUSE NO RECORD EVIDENCE
SUPPORTED THE FINDINGS OF THE
POSTCONVICTION COURT.

The only issue presented in this appeal from denial of Defendant’s motion to withdraw his plea is whether he was properly advised as to the minimum incarcerative sentence he could be required to serve in the instant case. The State began to discuss that issue on page 25 of its Answer Brief:

Furthermore, the offense of leaving the scene of an accident involving death is a serious first-degree felony punishable by a mandatory minimum term of imprisonment of 4 years up to a maximum term of 30 years. § 316.027(2)(c), Florida Statutes; § 775.082, Florida Statutes. Therefore, the absolute lowest permissible sentence without any victim injury points would have been four years, not the “36.3” months as Appellant repeatedly asserts.

The sentencing scoresheet (R40-42) prepared by the prosecutor in this case is accurate. The “victim injury points” were properly assessed here against Appellant under § 921.0021(7)(e) Florida Statutes. In this regard, the Legislature’s clear purpose in enacting

§ 921.0021(7)(e) was to authorize the assessment of victim injury points when a defendant is convicted of leaving the scene of a fatal accident – when the death is a result of the crash, but not necessarily due to the defendant leaving the scene.

Answer Brief at 25-26.

The possibility of a maximum sentence of 30 years for leaving the scene of a crash involving death is undisputed. *See* § 316.027(2)(c) Florida Statutes (making leaving the scene of a crash which results in death a first degree felony); § 775.082(3)(b) (imposing a maximum term of imprisonment of 30 years for a first degree felony). Mandatory imposition of a 4 year minimum sentence for leaving the scene of an crash involving death is also undisputed. *See* § 316.027(2)(c); Initial Brief at 26.

The total points properly included on the sentencing scoresheet in this case is disputed. The Scoresheet includes 120 points for victim injury. R.40. Defendant asserted in his Initial Brief that to properly impose victim injury points, a clear causal connection must exist between the charged offense and the death of the victim. Initial Brief at 22.

Defendant argued that no evidence was presented to establish the cause of the crash in this case. No witness testified at the hearing on the Defendant's motion to withdraw his plea, or at any other time, about anything that had happened at the scene of the crash before the Defendant left the scene. No testimony was ever taken from anyone which could address the cause of the crash. No transcripts of eyewitness testimony appear in the record on appeal. Even if transcripts of the discovery depositions which were the basis of Trial Counsel's opinion had been included in the trial court file (and they were not), such deposition transcripts would be inadmissible hearsay for the purpose of a determination of causation of a crash by a court.

Here the determination of causation was based solely on the opinion of Trial Counsel. Trial Counsel's opinion (if correct) regarding the impact of potential testimony by witnesses would provide a basis for advice to his client. However Trial Counsel's opinion about out-of-court statements of witnesses at depositions was clearly not competent substantial evidence of anything which may have happened at the scene at the time of the crash.

In its Answer Brief the State argued that following enactment of Ch. 2007-211, § 4, Laws of Florida, which is codified at § 921.0021(7)(e) Florida Statutes, victim injury points can be properly assessed for any violation of § 316.027(2)(c):

It was in 2007 that the Florida Legislature had revised F.S. §921.0021 to include subsection 921.0021(7)(e). House Bill 25 amended §921.0021 to authorize victim injury points when a person is convicted of leaving the scene of an accident which involved death or injury. The amendment was enacted in response to Florida's appellate courts' prior interpretations of §921.0021 as requiring proof that the victim's death or injury was the direct result of the offender's act of leaving the scene of the crash before the court could assess victim injury points. See: Florida Staff Analysis, H.B. 25, 4/11/2007. Section 921.0021(7)(e) states:

Notwithstanding paragraph (7)(a), if the conviction is for an offense described in s. 316.027 and the court finds that the offender caused victim injury, sentence points for victim injury may be assessed against the offender.
§921.0021(7)(e), Fla. Stat. 11

If, arguendo, [Trial Counsel] had objected below to the assessment of the 120 victim injury points for a death based on *Sims*[*v. State*, 998 So. 2d 494 (Fla. 2008)], it would

have been meritless since the 2007 amendment to the statute readily permits assessment of injury points for the crime of leaving the scene of a crash involving death. Appellant's scoresheet was correct, and he was not misadvised or misled by his defense attorney as to the minimum sentencing guidelines; hence, he cannot establish a "deficiency" under *Strickland* [*v. Washington*, 466 U.S. 668 (1984)]. As stressed in *Ferrell v. State*, 29 So.3d 959, 976 (Fla. 2010)—"Trial counsel cannot be deemed ineffective for failing to raise a meritless argument."

Answer Brief at 26-27.

The State's argument requires a misreading of the plain language of § 921.0021(7). In Chapter 2007-211, Laws of Florida, the Legislature amended § 921.0021(7) Florida Statutes to include a new paragraph:

(e) Notwithstanding paragraph (a), if the conviction is for an offense described in s. 316.027 and the court finds that the offender caused victim injury, sentence points for victim injury may be assessed against the offender.

For a court to find "that the offender caused victim injury" under § 921.0021(7)(e), record evidence supporting such a finding would be required. Here no such record evidence exists. Here no

competent substantial evidence of fault for the crash appears in the record on appeal.

At the hearing on the Defendant's motion to withdraw his plea Trial Counsel testified that he believed that if this case had gone to trial, the State may have been able to present evidence that the Defendant had "caused victim injury":

Q.[by ASA Worcester] Did you, in fact, take depositions of the eyewitnesses to see if there was a cause?

A.[by Trial Counsel] We did. There was at least two that I recall, a Mr. Burnell [sic] and Mr. Ramiro. One was a youth at the time of the accident. The other was an adult. And we – in the deposition in the discovery that I determined – looked at, they were going to indicate who was at fault.

R.427, lines 2-8.

However no witness testified at the hearing on the Defendant's motion to withdraw his plea, or at any other time, about anything that had happened at the scene of the crash. No testimony was ever taken from any eyewitness to the crash, or any accident investigator, or anyone else who might address the cause of the crash.

No witness depositions are included in the trial court file or in the record on appeal. But even if transcripts of the discovery depositions which were the basis of Trial Counsel's opinion had been filed in the trial court, such deposition transcripts would be hearsay for the purpose of determining causation and therefore not admissible in evidence.

Here the State apparently relied on an affidavit of a police officer, which does appear in the record on appeal. R.310-23. That affidavit alludes to statements by one Timothy Bernal and one Shane Romero. R.311. The affidavit relates a police officer's impressions of statements of those persons. However no recitation of the words actually spoken by either individual is included in the police officer's affidavit.

Accompanying this Reply Brief is Defendant's motion to strike substantial portions of Appellee's Answer Brief. That motion is based on both the fact that the police officer's affidavit has never been admitted to evidence in any court, and the fact that the same affidavit would not be admissible to evidence in a Florida court.

The officer's affidavit is hearsay within the meaning of § 90.801 Florida Statutes. On its face it is an out-of-court statement. Nevertheless the State asks this Court to use facts statements therein to establish the truth of the matters asserted therein. That would be reliance on inadmissible hearsay.

Hearsay is inadmissible except as provided by statute. § 90.802. In a criminal case "matters observed by a police officer" are specifically excluded from evidence by § 90.803(8) Florida Statutes, the public records exception to the rule excluding hearsay. Therefore admission of the officer's affidavit to evidence would have been error if a party had sought to admit it to evidence in the trial court. In the instant case no party has ever requested to admit the same affidavit to evidence. But even if a party had sought to admit that out-of-court statement to evidence, it could not have been properly admitted because it would be hearsay if used to prove the truth of the matters asserted. §§ 90.801, 90.802.

Even if the officer's affidavit had been admitted to evidence, recitation of the statements of others repeated therein would have been hearsay within hearsay. Hearsay within hearsay would only be

admissible if each part of the statement were to fall within an exception to the hearsay rule. See § 90.805 Fla. Stat.; *Johnson v. State*, 969 So. 2d 938, 949 (Fla. 2007). The affiant officer has never testified in this case. The others persons who may have made statements which were alluded to by the officer in her affidavit have neither testified or made statements included in the record on appeal.

In addition the actual statements of witnesses were not contained in the officer's affidavit. The affidavit in the record, from which the State's recitation of "facts" is taken, contains only the officer's impression of what others are purported to have said. Such impressions of a witness would not admissible in evidence even if a party had sought to admit them in the trial court and if they had been admitted. Neither happened.

Trial Counsel's opinions about out-of-court statements are not competent substantial evidence of anything which may have happened at the scene at the time of the crash. Nevertheless the State argued that "the Ft. Myers police officers' Probable Cause Affidavit supports [Trial Counsel]'s opinion and conclusion 'that the

evidence at trial would have provided a factual basis for the victim injury points' (R302 at note 4)". Answer Brief at 28.

Trial Counsel testified at the hearing on Defendant's motion to withdraw his plea that he believed witnesses "were going to indicate who was at fault." R.427, lines 7-8. Counsel for the Defendant objected to Trial Counsel's testimony about the deposition testimony because it was hearsay. R.427, line 9. The objection was overruled by the postconviction court: "Overruled. It is not being offered for the truth but rather what was a factor in the plea. It seems obvious to me from the record and, therefore, I overrule the hearsay objection." R.427, lines 10-13.

Overruling that objection was error because evidence of who may have been at fault in the crash goes directly to whether victim injury points were properly included on the Scoresheet. R.040. Whether or not victim injury points were properly included in the scoresheet was the central issue before the postconviction court and is the central issue in this appeal.

This Court should not consider Trial Counsel's testimony that he believed the witnesses were going to indicate who was at fault

for any purpose. Trial Counsel's subjective belief about the potential testimony of two potential witnesses (who never testified before the court below) is simply not relevant to any issue before this Court. The issue here is whether Trial Counsel properly advised Defendant about the lowest permissible sentence as shown on the Scoresheet.

If the lowest permissible sentence, as shown on the Scoresheet, was 10.5 years then the advice by Trial Counsel was correct. If the lowest permissible sentence were 3.6 years on the Scoresheet without victim injury points (but with a 4 year mandatory minimum sentence under § 316.027(2)(c)), then Trial Counsel affirmatively misadvised Defendant.

The State also argued: "the trial court plainly rejected Appellant's claim that he would not have pled if previously aware the lowest guideline sentence was 'less than' 10.5 years; rather, the trial court found Appellant had 'agreed to the deal since he understood he likely could not do better at sentencing after conviction at trial'". Answer Brief at 27.

In his postconviction motion Defendant asserted that any reasonable lawyer would have correctly assessed the Scoresheet and properly advised Defendant of the correct lowest permissible sentence. R.150. The failure of Trial Counsel to do so was ineffective assistance which violated Defendant's Sixth Amendment right to counsel. R.150. Defendant asserted that he was prejudiced because Defendant agreed to accept a sentence which he believed, based on the affirmative misadvise of counsel, was the minimum sentence under the Criminal Punishment Code. R.150. Had Defendant known that the actual lowest permissible sentence he might have received was substantially less than the agreed-upon sentence, he would not have entered into that agreement; he only did so because he was affirmatively misadvised by trial counsel. R.150-51.

Defendant asserted that had Trial Counsel done the appropriate research, he could have easily ascertained that the same 120 victim injury points were not properly assessed in the instant case. R.147. Defendant based his argument on the rule in *Sims v. State*, 998 So. 2d 494, 496 (Fla. 2008). R.147-48. Defendant

asserted that to impose victim injury points, “a causal connection must clearly exist between the charged offense and the death of the victim to impose victim-injury points.” R.148, quoting *Sims* at 505.

The State argued that an objection to the assessment of 120 victim injury points on the sentencing scoresheet “would have been meritless since the 2007 amendment to the statute readily permits assessment of injury points for the crime of leaving the scene of a crash involving death.” Answer Brief at 27. That assertion conflicts with the plain language of the statute. Section 921.0021(7)(e) Florida Statutes, as amended by Chapter 2007-211 Laws of Florida, provides: “if the conviction is for an offense described in s. 316.027 and the court finds that the offender caused victim injury, sentence points for victim injury may be assessed against the offender.”

Thus the plain language of 921.0021(7)(e) requires a finding “that the offender caused victim injury” before the court could impose victim injury points. Any such finding must be based on competent substantial evidence. Here, however, no evidence at all was introduced in the trial court to support the proposition that a

causal connection existed between the charged offense and the death of the victim to impose victim-injury points.

Lack of Evidence of Causation of Crash

The State argued that such evidence can be discerned from evidence in the record. The State asserted: “after over 40 depositions in this case – especially those of crash eyewitnesses Bernal and Romero – [Trial Counsel] had ‘credibly testified’ that victim injury points were a constant issue, and if a jury trial was held it was ‘likely’ that those victim injury points would be assessed against Appellant (R301)”. Answer Brief at 28. The citation is to the order of the trial court which is the subject of the instant appeal.

The State also argued: “the Ft. Myers police officers’ Probable Cause Affidavit supports [Trial Counsel]’s opinion and conclusion ‘that the evidence at trial would have provided a factual basis for the victim injury points’ (R302 at note 4)”. The citation is to the order of the trial court which is the subject of the instant appeal.

That argument by the State is supported by no record evidence. No depositions of Bernal or Romero (or anyone else)

appear in the record on appeal. The “credible testimony” of Trial Counsel was limited to his opinion about what the State might eventually prove. R.427, lines 2-8.

Trial Counsel could and did testify as to what advice he gave Defendant and why. However Trial Counsel was not an eyewitness to any fact in the underlying case. His testimony, credible or not, could not be applied to establish what did or did not happen at the scene of the crash.

No witness testified at the hearing on the Defendant’s motion to withdraw his plea, or at any other time, about anything that had happened at the scene of the crash before the Defendant left the scene. No testimony was ever taken from anyone which might address the cause of the crash. If the State had desired to have witness testify to what they say at the scene of the crash, the State could have done so. However the State presented no such testimony.

Postconviction Court Interpretation of § 921.0021

The postconviction court read § 921.0021(7)(e) Florida Statutes to mean that victim injury points may be assessed even if the injury was not a direct result of the offense of leaving the scene:

18. The plain language of section 921.0021(7)(e), Florida Statutes (2016), provides that, if a conviction is for an offense described in section 316.027, points for victim injury “may” be assessed “if the court finds that the offender caused victim injury.” Section 921.0021(7)(e) expressly provides that points may be assessed in these circumstances notwithstanding the “direct result of the primary offense” requirement of section 921.0021(7)(a).

R.299-300.

Here, as explained supra, no competent substantial evidence of the causation of victim injury was presented to the trial court. Neither the police officer’s impression of what witnesses may have said, as related in the probable cause affidavit, nor the opinion of Trial Counsel was competent substantial evidence of what happened at the time of the crash.

Therefore this Court need not reach the issue of whether or not “direct” causation is required. The trial court correctly found:

“19. Absent agreement of the defendant, victim injury points must be supported by evidence in the record.” R.300. Here, however, no evidence of either direct cause of the crash or indirect cause of the crash was presented in the court below.

Findings by the Postconviction Court

The postconviction court found:

23. [Trial Counsel] credibly testified that he thoroughly discussed the inclusion of the victim injury points with the Defendant prior to the Defendant accepting the plea. [Trial Counsel] did not tell the Defendant that the “low end” of the guidelines would be 36.3 months without the victim injury points. Instead, [Trial Counsel] explained the victim injury points and why [Trial Counsel] believed they were properly included on the scoresheet that was the basis for the State's plea offer. [Trial Counsel] also told the Defendant (in the presence of the Defendant's mother) that if the Defendant was convicted at trial he could get the maximum sentence.

....

25. In entering his plea, Defendant affirmatively waived his right to trial. He also expressly agreed that the scoresheet, which he knew included victim injury points, was true and accurate. See Court Exhibit F, pp. 12-14.

Through counsel, Defendant also agreed to a factual basis. Id. at p. 20.

R.302.

As asserted in the Motion to Withdraw Plea and as explained in the Initial Brief, Trial Counsel affirmatively misadvised the Defendant as to the minimum sentence under the Criminal Punishment Code. The argument need not be repeated here. As asserted in the Motion, had Trial Counsel not affirmatively misadvised the Defendant, he would not have entered the plea:

19. Any reasonable attorney would have ascertained the correct application of victim injury points to a charge of leaving the scene of a crash involving death. Had Trial Counsel done so, he would have ascertained that the correct minimum sentence was less than half of the sentence to which he advised the Defendant to agree. The failure of Trial Counsel to do so was ineffective assistance of counsel because it rendered the plea involuntary. The Defendant would not have agreed to the proposed sentence had he not been affirmatively misled by Trial Counsel.

R.150.

The postconviction court made the following finding of fact:

[Trial Counsel] credibly testified that he thoroughly discussed the inclusion of the

victim injury points with the Defendant prior to the Defendant accepting the plea. [Trial Counsel] did not tell the Defendant that the “low end” of the guidelines would be 36.3 months without the victim injury points. Instead, [Trial Counsel] explained the victim injury points and why [he] believed they were properly included on the scoresheet that was the basis for the State’s plea offer.

R.302. The postconviction court also found: “[Postconviction] Counsel is correct that there was no record evidence regarding causation presented at the sentencing hearing (and, of course, no jury finding based on this evidence).”

As discussed supra the postconviction court found: “Absent agreement of the defendant, victim injury points must be supported by evidence in the record.” R.300. Given that the postconviction court also found that no evidence was presented as to causation at the sentencing hearing (or at any other time), the postconviction court should have simply concluded that no basis existed for application of victim injury points. Absent competent substantial record evidence of causation denial of the Defendant’s motion to withdraw his plea was reversible error.

However the postconviction instead found:

[Trial Counsel]'s unrebutted credible testimony at the February 14, 2023, hearing is that, if the Defendant went to trial and was convicted, the evidence would support a finding that the Defendant caused injury or death to the victim. Therefore, [Trial Counsel] told the Defendant that the 120 points for victim injury were properly included on the scoresheet. The Defendant has not shown that this advice was erroneous. Accordingly, the Defendant has failed to show that his plea was based on misadvice of counsel.

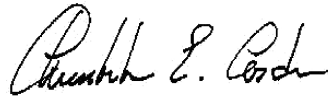
R.303. Thus the postconviction court relied only upon assertions by Trial Counsel as to what potential trial evidence might show as a basis for imposition of victim injury points. The postconviction court had no competent substantial evidence from any witness upon which to base its conclusion. The court below based its conclusion only upon opinion testimony by a lawyer as to what he thought the evidence might show.

CONCLUSION

Thus the Defendant entered a plea mistakenly believing that the agreed upon sentence was the lowest permissible sentence he could receive under § 921.00265. His mistaken belief was the direct result of incorrect advice given him by trial counsel. The Defendant

was prejudiced by receiving a sentence more than twice as long as the minimum sentence he could have received under § 921.00265 and § 316.027(c). Therefore the postconviction court improperly denied relief.

WHEREFORE the Defendant requests this Honorable Court to reverse the order of the postconviction court denying relief and to grant such other relief as may be reasonable, just, and proper.



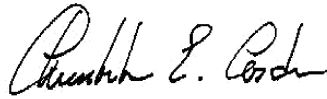
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Initial Brief has been furnished by email (to CrimAppTPA@myfloridalegal.com) to the Attorney General of Florida, 3507 East Frontage Road, Suite 200, Tampa, Florida 33607, as provided by Fla. R. Jud. Admin. 2.516(b)(1), on this 26th day of December, 2023.

CERTIFICATE OF FONT AND WORD COUNT COMPLIANCE

I HEREBY CERTIFY, as required by Fla. R. App. P. 9.045(e), that this brief complies with the font requirements of rule 9.045(b) and the word count requirements of rule 9.210(a)(2)(B).



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**UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
FORT MYERS DIVISION**

ADAM MURRAY COSTELLO,
Petitioner,

Case No.: 2:25-cv-74-JLB-NPM

vs.

SECRETARY, DEPARTMENT OF
CORRECTIONS,
Respondent.

_____ /

EXHIBIT 31

**SIXTH DISTRICT COURT OF APPEAL
STATE OF FLORIDA**

Case No. 6D2023-2400
Lower Tribunal No. 16-CF-000371

ADAM MURRAY COSTELLO,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

Appeal from the Circuit Court for Lee County.
Margaret O. Steinbeck, Judge.

September 17, 2024

PER CURIAM.

AFFIRMED.

WOZNIAK and WHITE, JJ., and LAMBERT, B.D., Associate Judge, concur.

Christopher E. Cosden, Fort Myers, for Appellant.

Ashley Moody, Attorney General, Tallahassee, and Cerese Crawford Taylor, Senior Assistant Attorney General, Tampa, for Appellee.

NOT FINAL UNTIL TIME EXPIRES TO FILE MOTION FOR REHEARING
AND DISPOSITION THEREOF IF TIMELY FILED

**UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
FORT MYERS DIVISION**

ADAM MURRAY COSTELLO,
Petitioner,

Case No.: 2:25-cv-74-JLB-NPM

vs.

SECRETARY, DEPARTMENT OF
CORRECTIONS,
Respondent.

_____ /

EXHIBIT 32

IN THE SIXTH DISTRICT COURT OF APPEAL
LAKELAND, FLORIDA

ADAM MURRAY COSTELLO,
Appellant,

Case No. 6D23-2400

v.

L.T. No. 16-CF-371

STATE OF FLORIDA,
Appellee.

_____/

MOTION FOR REHEARING
and
MOTION FOR WRITTEN OPINION
and
MOTION TO CERTIFY CONFLICT

COMES NOW the Appellant (hereinafter the “Defendant”), by
and through the undersigned attorney under Fla. R. App. P. 9.330,
and moves for rehearing in this cause, and for a written opinion
which would allow review by the Florida Supreme Court, and for
certification of conflict, and in support thereof would state:

Summary

This case came before this Court on direct appeal from the
denial of a motion to withdraw his plea in of the Circuit Court of the
Twentieth Judicial Circuit. R.143-53. The Defendant was convicted

of leaving the scene of a traffic crash involving death, a first degree felony under § 316.027(2)(c) and (f) Florida Statutes (2015).

R.052-59. He was sentenced to 10 years 6 months of incarceration on the charge of leaving the scene with a minimum mandatory term of incarceration of 4 years, and to 5 years of incarceration on a second charge of tampering with evidence, with the sentences to run concurrently. R.054-58. The sentence on the second charge has now been completely served.

The Defendant moved to withdraw his plea. R.143-53. The Defendant asserted that Trial Counsel had failed to provide effective assistance of counsel by failing to review and correct errors in the Criminal Punishment Code Scoresheet in this case. R.147-50. The Scoresheet improperly included 120 points for victim injury, resulting in a lowest permissible sentence of 126.3 months incarceration. R.040, R.147. The correct lowest permissible scoresheet sentence under § 921.0024 would have been 36.3 months incarceration (notwithstanding the four year mandatory minimum sentence under § 316.027(c)) had the additional points not been improperly included. R.149. Trial Counsel failed to

recognize that the 120 points for victim injury were improperly applied and therefore affirmatively misadvised the Defendant concerning the sentence he was likely to receive. R.149-50. On 17 September 2024 this Court resolved the instant appeal with a per curiam affirmance without opinion.

Proper Use of a Per Curiam Affirmance Without Opinion

The proper use of a per curiam affirmance without opinion by a Florida appellate court was addressed by the Florida Supreme Court over fifty years ago in an opinion on a motion for rehearing:

Traditionally it may be pointed out that a “per curiam” is the opinion of the court in which the judges are all of one mind and the question involved is so clear that it is not considered necessary to elaborate it by an extended discussion.... **The attribute of a per curiam, when the “question presented is so clear that it is not considered necessary to elaborate it by extended discussion,”** may imply a variety of connotations.... **It may be employed to dispose of cases in which anything written on the points raised would add nothing to the law.**

Newmons v. Lake Worth Drainage District, for Use and Benefit of Martin, 87 So. 2d 49, 50-51 (Fla. 1956) (emphasis added). The

Supreme Court repeated the rule that such opinions are appropriate where “the question involved is so clear that it is not considered necessary to elaborate it by an extended discussion” in *Foley v. Weaver Drugs*, 177 So. 2d 221, 224 (Fla. 1965).

More recently, the Fourth District Court of Appeal addressed the proper employment of a per curiam opinion reviewing a trial court order:

It is fundamental black letter law that a per curiam disposition affirming a trial court order without a written opinion, occurs when the points of law raised are so well settled that a further writing would serve no useful purpose.

Elliott v. Elliott, 648 So. 2d 137, 138 (Fla. 4th DCA 1994).

The rule in *Newmons v. Lake Worth Drainage District*, *Foley v. Weaver Drugs*, and *Elliott v. Elliott* clearly establishes when a per curiam affirmance without opinion is appropriate. A per curiam disposition affirming a trial court order without a written opinion should only issue when the points of law raised are so well settled that a further writing would serve no useful purpose.

That is not the situation in the instant case. As explained herein the substance of the per curiam affirmance without opinion

in this case is in direct conflict with opinion of the Florida Supreme Court in *Sims v. State*, 998 So. 2d 494 (Fla. 2008).

History of this Case

The facts giving rise to the instant appeal are essentially undisputed. The Defendant, Adam Murray Costello, was charged by a Fourth Amended Information filed 12 March 2018 with leaving the scene of a traffic crash involving death, a first degree felony under § 316.027(2)(c) and (f) Florida Statutes (2015). R.036. He was also charged with tampering with evidence, a third degree felony under § 918.13 Florida Statutes (2015). R.036. The latter charge is not the subject of the Defendant's postconviction motion or the instant appeal. The Defendant was represented in the trial court by Shannon H. McFee (hereinafter "Trial Counsel"). R.422, line 22 - R.423, line 1; R.052; R.072; R.074, lines 7-8.

The Defendant entered pleas of nolo contendere and was convicted on both charges. Judgment and sentence were rendered on 19 March 2018. R.052-59. The Defendant was sentenced to 10 years 6 months of incarceration on the charge of leaving the

scene with a minimum mandatory term of incarceration of 4 years, and to 5 years of incarceration on the charge of tampering with evidence, with the sentences to run concurrently. R.054-58. No issues were reserved for appeal and no direct appeal was taken.

At or near the time of the plea, the State Attorney filed a Criminal Punishment Code Scoresheet prepared pursuant to § 921.0024 Florida Statutes (2015). R.040-43. In section III the Scoresheet included 120 points for victim injury, resulting in a lowest permissible sentence of 126.3 months incarceration. R.040. Also at or near the time of the plea Trial Counsel filed a written “Plea Agreement Waiver of Rights”. R.044-47. The same provided in relevant part that the Defendant agreed to the following: “The Defendant shall be sentenced in Count One to 10.5 years Florida State Prison with a 4 year minimum mandatory. As to Count Two the Defendant shall be sentenced to 5 years Florida State Prison.” R.045.

The Defendant was sentenced as provided by the plea agreement. On the charge in count one of the information he was sentenced to 10 years 6 months incarceration with a minimum

mandatory term of 4 years. R.054-55. On the charge in count two of the information he was sentenced to 5 years incarceration. R.056. The sentences of incarceration were to be concurrent. R.055, R.057. Certain court costs and fees and other special conditions were imposed. R.053. The sentence on the second charge has now been completely served.

On 05 March 2020 the Defendant timely moved under Fla. R. Crim. P. 3.850 to vacate the incarcerative portion of his sentence because his attorney failed to provide effective assistance of counsel. R.060-69. The Defendant asserted that Trial Counsel provided ineffective assistance to the Defendant by failing to review and correct errors in the Criminal Punishment Code Scoresheet in this case. R.063-67. The Scoresheet improperly included 120 points for victim injury, resulting in a lowest permissible sentence of 126.3 months incarceration. R.040, R.062. The correct lowest permissible scoresheet sentence under § 921.0024 would have been 36.3 months incarceration (notwithstanding the four year mandatory minimum under § 316.027(c)) had victim injury points not been improperly included. R.065-66. Trial Counsel failed to recognize

that the 120 points for victim injury were improperly included and therefore affirmatively misadvised the Defendant concerning the sentence he was likely to receive. R.065-67.

In his postconviction motion the Defendant asserted that any reasonable lawyer would have correctly assessed the Scoresheet and properly advised the Defendant of the correct lowest permissible sentence. R.067. The failure of Trial Counsel to do so was ineffective assistance which violated the Defendant's Sixth Amendment right to counsel. R.067. The Defendant asserted that he was prejudiced because the Defendant agreed to accept a sentence which he believed, based on the affirmative misadvice of counsel, was the minimum sentence under the Criminal Punishment Code. R.067. Had the Defendant known that the actual lowest permissible sentence he might have received was substantially less than the agreed-upon sentence, he would not have entered into that agreement; he only did so because he was affirmatively misadvised by trial counsel. R.067.

On 19 April 2021 the postconviction court entered an order denying the Defendant's postconviction motion and the Defendant's

motion for a hearing. R.134-36. The Defendant appealed to the Second District Court of Appeal. On 22 December 2021 that court reversed the order of the postconviction court. R.138-42. The Second District Court held that the Defendant's "claim as to the improper inclusion of victim injury points is not conclusively refuted by the record or the postconviction court's order. The court did not include any attachments refuting the claim, and the record does not include any information regarding the victim's cause of death." R.141.

However the Second District Court also held that the Defendant's claim was facially insufficient because it did not include a request to withdraw his plea. R.141. Rather he merely requested that the postconviction court vacate his sentence and resentence him using a corrected scoresheet. R.141. Therefore the Second District Court reversed the summary denial of the Defendant's rule 3.850 motion and remanded the case to the postconviction court with instructions to strike the motion with leave to amend. R.142. The Mandate issued on 18 January 2022. R.137.

On 03 March 2022 the Defendant moved to withdraw his plea. R.143-53. The Defendant again argued that Trial Counsel had failed to provide effective assistance of counsel by failing to review and correct errors in the Criminal Punishment Code Scoresheet in this case. R.147-50. The Scoresheet improperly included 120 points for victim injury, resulting in a lowest permissible sentence of 126.3 months incarceration. R.040, R.147. The correct lowest permissible scoresheet sentence under § 921.0024 would have been 36.3 months incarceration (notwithstanding the four year mandatory minimum under § 316.027(c)) had the additional points not been improperly included. R.149. Trial Counsel failed to recognize that the 120 points for victim injury were improperly applied and therefore affirmatively misadvised the Defendant concerning the sentence he was likely to receive. R.149-50.

In his postconviction motion the Defendant asserted that any reasonable lawyer would have correctly assessed the Scoresheet and properly advised the Defendant of the correct lowest permissible sentence. R.150. The failure of Trial Counsel to do so was ineffective assistance which violated the Defendant's Sixth

Amendment right to counsel. R.150. The Defendant asserted that he was prejudiced because the Defendant agreed to accept a sentence which he believed, based on the affirmative misadvice of counsel, was the minimum sentence under the Criminal Punishment Code. R.150-51. Had the Defendant known that the actual lowest permissible sentence he might have received was substantially less than the agreed-upon sentence, he would not have entered into that agreement; he only did so because he was affirmatively misadvised by trial counsel. R.150-51.

The Defendant asserted that had Trial Counsel done the appropriate research, he could have easily ascertained that the same 120 victim injury points were not properly assessed in the instant case. R.147. The Defendant again based his argument on the rule in *Sims v. State*, 998 So. 2d 494, 496 (Fla. 2008). R.147-48. The Defendant asserted that to impose victim injury points, “a causal connection must clearly exist between the charged offense and the death of the victim to impose victim-injury points.” R.148, quoting *Sims* at 505. Here no evidence of the necessary causal connection is known to exist.

The postconviction court ordered the State to respond. R.154. The State filed a timely response. R.155-223. The Defendant filed a reply on 16 May 2022. R.224-30.

When the postconviction court had done nothing for six months after the pleadings were complete, the Defendant moved for a hearing on his motion on 05 December 2022. R.231-33. The postconviction court entered an order for an evidentiary hearing. R.234-37. An evidentiary hearing was scheduled for 14 February 2023. R.238.

At the evidentiary hearing on the Defendant's motion to withdraw his plea, the original Scoresheet and a transcript of the original plea proceedings were admitted to evidence. R.243; R.412, lines 12-20; R.418, line 23 - R.419, line 7. A transcript of the same hearing is contained in the Record on Appeal. R.394-451. At the time of the hearing the postconviction court reserved ruling. T.449, lines 17-18.

The postconviction court ultimately denied the Defendant's motion to withdraw his plea. R.295-393. A timely Notice of Appeal was filed. R.452. A direct appeal to this Court followed.

Affirmance by This Court

This Court resolved the direct appeal of the orders of the trial court by a per curiam affirmance without an opinion which was entered 17 September 2024. This Court cited no record evidence which tended to establish that the challenged ruling by the trial court was not error. If such record evidence had existed it would have been very easy to cite to it and affirm the ruling of the trial court on that basis.

Motion for Rehearing

Fla. R. App. P. 9.330(a) provides: “A motion for rehearing shall state with particularity the points of law or fact that, in the opinion of the movant, the court has overlooked or misapprehended in its decision....” As explained supra and at length in the Initial Brief, § 921.0021(7)(a) Florida Statutes provides: “‘Victim injury’ means the physical injury or death suffered by a person as a direct result of the primary offense, or any additional offense, for which an offender is convicted and which is pending before the court for sentencing at the time of the primary offense.”

In the instant case absolutely no record evidence tended to establish that the victim injury was in any way due to the Defendant leaving the scene, or that the Defendant was in any way responsible for injury to the victim. No witness testified at the hearing on the Defendant's motion to withdraw his plea, or at any other time, about anything that had happened at the scene of the accident before the Defendant left the scene. No testimony was ever taken from anyone which could address the cause of the accident in this case. No such evidence exists.

Here no doubt exists about the meaning of the relevant statute, which provides: "Victim injury' means the physical injury or death suffered by a person **as a direct result** of the primary offense, or any additional offense, for which an offender is convicted...." § 921.0021(7)(a) Florida Statutes (2015) (emphasis added). In 2007, after the district court opinion in *Sims*, the Legislature added a new provision to 921.0021(7) Florida Statutes:

Notwithstanding paragraph (a), if the conviction is for an offense described in s. 316.027 and the court finds that the offender caused victim injury, sentence points for

victim injury may be assessed against the offender.

Ch. 2007-211, § 4, Laws of Fla. That was effective 01 July 2007. *Id.* at § 5; it is codified at § 921.0021(7)(e) Florida Statutes (2015).

Under some circumstances Ch. 2007-211, § 4, would allow assessment of victim injury points. However to do so a court must find “that the offender caused victim injury....” In the instant case no record evidence exists which would support any such finding. In addition nothing in Ch. 2007-211, § 4, changed or even addressed the rule in *Sims* that “a causal connection must clearly exist between the charged offense and the death of the victim to impose victim-injury points.” 998 So. 2d at 506.

Therefore, even after the 2007 change to the statute, the rule in *Sims* still applies to the instant case because “a causal connection must clearly exist between the charged offense and the death of the victim.” 998 So. 2d at 506. The plain language of § 921.0021(7) Florida Statutes after the amendment by Ch. 2007-211, § 4, still requires that a court find “that the offender caused victim injury” before it can assess sentence points for victim injury.

Statutory Interpretation

When interpreting statutes, the Florida Supreme Court has instructed courts to “follow the ‘supremacy-of-text principle’ – namely, the principle that [t]he words of a governing text are of paramount concern, and what they convey, in their context, is what the text means.” *Ham v. Portfolio Recovery Associates, LLC*, 308 So. 3d 942, 946 (Fla. 2020), quoting Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 56 (2012). See also *State v. Crose*, 378 So. 3d 1217, 1233 (Fla. 2d DCA 2024), quoting *Ham* and *Scalia & Garner*.

The United States Supreme Court commands that lower courts follow the same rule: “in interpreting a statute a court should always turn first to one, cardinal canon before all others. We have stated time and again that courts must presume that a legislature says in a statute what it means and means in a statute what it says there. [Citations omitted.] When the words of a statute are unambiguous, then, this first canon is also the last: ‘judicial inquiry is complete.’” *Connecticut National Bank v. Germain*, 503 U.S. 249, 253-54 (1992).

“A fundamental canon of statutory construction is that, unless otherwise defined, words will be interpreted as taking their ordinary, contemporary, common meaning.” *Perrin v. United States*, 444 U.S. 37, 42 (1979), citing *Burns v. Alcala*, 420 U.S. 575, 580-81 (1975). *See also Wisconsin Central Ltd. v. United States*, 585 U.S. 274, 284 (2018), quoting *Perrin*; *New Prime Inc. v. Oliveira*, 586 U.S. 105, 106 (2019), quoting *Perrin* and *Wisconsin Central*.

This Court has explained many times over many years that, when the meaning of the statute’s terms is plain, our job is at an end. The people are entitled to rely on the law as written, without fearing that courts might disregard its plain terms based on some extratextual consideration. *See, e.g., Carcieri v. Salazar*, 555 U.S. 379, 387... (2009); *Connecticut Nat. Bank v. Germain*, 503 U.S. 249, 253-254... (1992); *Rubin v. United States*, 449 U.S. 424, 430.. (1981).

Bostock v. Clayton County, Georgia, 590 U.S. 644, 673-74 (2020).

Application to the Instant Case

In *Sims* the Supreme Court held: “Based upon the plain language of section 921.0021(7)(a)[Florida Statutes (2001)], which defines ‘victim injury’ for the purpose of scoring victim-injury

points, we conclude that under these facts, the imposition of such points for leaving the scene in violation of section 316.027(1)(b) was incorrect.” *Id.* at 505. The Florida Supreme Court reasoned:

Section 921.0021(7)(a) provides: “Victim injury” means the physical injury or death suffered by a person as a *direct result* of the primary offense, or any additional offense, for which an offender is convicted and which is pending before the court for sentencing at the time of the primary offense. (Emphasis supplied.) **This “direct result” language clearly imparts and includes a causation requirement, which must exist between the death of the victim and the charged offense of leaving the scene of an accident resulting in death.**

Id. at 505 (italics as in the report of *Sims*, boldface added).

Therefore the *Sims* Court concluded “that **a causal connection must clearly exist between the charged offense and the death of the victim to impose victim-injury points.**” 998 So. 2d at 506 (boldface added).

As explained in the Initial Brief, *Sims* was decided by the Supreme Court in 2008. The events giving rise to the instant case were alleged to have occurred in 2016. Therefore Trial Counsel should have been aware of the rule in *Sims* and the proper

application of the same. However the Defendant testified that Trial Counsel never discussed the Supreme Court opinion in *Sims* with him. R.409, lines 22-24. Trial Counsel testified that he was aware of the opinion in *Sims*. T.432, line 4 - R.433, line 7. However he never denied that he had failed to discuss the Supreme Court opinion in *Sims* with the Defendant.

Trial Counsel affirmatively advised the Defendant that the State's proposed sentence of 10 years 6 months was the minimum sentence that the trial court could impose absent some mitigating circumstance under § 921.0026. Apparently here no such mitigating circumstance existed. The Defendant accepted that advice and entered into the proposed plea agreement.

However the State's proposed sentence of 10 years 6 months was **not** the minimum sentence that the trial court could impose absent some mitigating circumstance. Had the erroneously included 120 points for victim injury been omitted from the Scoresheet, the total sentence points would have been 76.4. That would have resulted in a lowest permissible sentence of 36.3 months under the Criminal Punishment Code. $(76.4 - 28 = 48.4;$

48.4 x .75 = 36.3). *See* § 921.0024(2); Fla. R. Crim. P. 3.704(26).

Section 316.027(2)(c) Florida Statutes required a four year mandatory minimum sentence, less than half the sentence the Defendant had been misled to believe was the minimum sentence that the trial court could impose absent some mitigating circumstance.

The misadvice given by Trial Counsel in the instant case was not simply a failure to properly advise the Defendant. Here the advice given by Trial Counsel incorporated errors of law or, as some courts have referred to it, was “affirmative” or “positive misadvice.” In *Ey v. State*, 982 So. 2d 618, 622 (Fla. 2008), the Supreme Court held that such affirmative misadvice about even collateral matters may constitute a legally cognizable claim for ineffective assistance of counsel when that misadvice affects the voluntariness of a plea. “When a defendant enters a plea in reliance on affirmative misadvice and demonstrates that he or she was thereby prejudiced, the defendant may be entitled to withdraw the plea even if the misadvice concerns a collateral consequence as to which the trial court was under no obligation to advise him or her.” *Ghanavati v.*

State, 820 So. 2d 989, 991 (Fla. 4th DCA 2002). *See also* *Fernandez v. State*, 199 So. 3d 500, 504 (Fla. 2d DCA 2016), citing *Ey*; *Gunn v. State*, 841 So. 2d 629, 631 (Fla. 2d DCA 2003); *Roberti v. State*, 782 So. 2d 919, 920 (Fla. 2d DCA 2001).

As explained supra the affirmative advice which Trial Counsel gave the Defendant was error. Even considering the minimum mandatory sentencing provision in § 316.027(2)(c), the minimum sentence that the circuit court could impose absent some mitigating circumstance was not 10 years and 6 months; it was less than half of that. Here the affirmative misadvice given to the Defendant by trial counsel mislead him to believe that the minimum sentence which he could receive in the instant case was 10 years 6 months. This Court ignored that error when it entered its per curiam affirmance without opinion.

Motion for Written Opinion

Fla. R. App. P. 9.330(a) provides: “When a decision is entered without opinion, and a party believes that a written opinion would provide a legitimate basis for supreme court review, the party may

request that the court issue a written opinion.” Appellant so requests because in this case a written opinion would provide a legitimate basis for review by the Florida Supreme Court.

If this Court had entered a written opinion and affirmed the ruling of the trial court, such opinion would necessarily and directly conflict with the opinion of the Florida Supreme Court in *Sims v. State*, 998 So. 2d 494 (Fla. 2008), as explained *supra*. Such an opinion would also conflict with the opinions of the Florida Supreme Court in *Alachua County. v. Watson*, 333 So. 3d 162, 169 (Fla. 2022) (the “plain meaning of the statute is always the starting point in statutory interpretation”), and *Larimore v. State*, 2 So. 3d 101, 106 (Fla. 2008) ([t]o discern legislative intent, a court must look first and foremost at the actual language used in the statute”).

Therefore the per curiam affirmance of the trial court by this Court is in direct conflict with the Florida Supreme Court in at least those three cases. Thus a written opinion would provide a legitimate basis for review by the Florida Supreme Court under Fla. R. App. P. 9.030(2)(A)(iv) and Art. V, § 3(b)(3) of the Florida Constitution.

Motion to Certify Conflict

If this Court is not inclined to reconsider the substance of this case, Appellant requests this Court to issue a written opinion and to certify conflict with *Newmons v. Lake Worth Drainage District*, *Foley v. Weaver Drugs*, and *Elliott v. Elliott* to the Florida Supreme Court. That would allow the Supreme Court to further consider the proper employment of a per curiam affirmance without opinion.

Appellant also requests this Court to issue a written opinion and to certify conflict with the opinions of the Florida Supreme Court in *Sims v. State*, 998 So. 2d 494 (Fla. 2008), *Alachua County v. Watson*, 333 So. 3d 162, 169 (Fla. 2022), and *Larimore v. State*, 2 So. 3d 101, 106 (Fla. 2008). That would allow the Supreme Court to further consider the proper standard for a court to disregard the plain language of a statute.

Conclusion

The undersigned attorney appreciates that this Court is unable to write a detailed opinion in every case that comes before it. However, if the facts and law raised in the instant case are so

well settled that a further writing would serve no useful purpose, then a simple statement of the facts and citation to the applicable authority would be an easy thing to do.

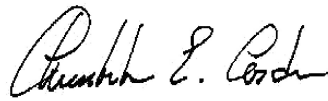
Given the conflict of the decision in this case with the opinions of the Florida Supreme Court in *Sims v. State, Alachua County. v. Watson*, and *Larimore v. State*, rehearing would be appropriate. In the alternative a written opinion expressing the reasoning of this Court would provide an avenue for review by the Florida Supreme Court.

WHEREFORE Appellant requests this Honorable Court to rehear this case and to issue an opinion consistent with existing precedent cited supra regarding statutory interpretation. In the alternative, Appellant requests this Court to issue a written opinion, and to certify conflict with the opinions of the Supreme Court in *Newmons v. Lake Worth Drainage District, for Use and Benefit of Martin*, and *Foley v. Weaver Drugs*, and the opinion of the Fourth District Court in *Elliott v. Elliott* regarding proper use of a per curiam affirmance without opinion. Appellant also requests this Court to certify conflict with *Sims v. State, Alachua County. v.*

Watson, and *Larimore v. State*. In either event Appellant requests a written opinion so that Appellant can request review by the Florida Supreme Court.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing motion has been furnished by email, as provided by Fla. R. Jud. Admin. 2.516(b)(1), to the Attorney General of Florida (to CrimAppTPA@myfloridalegal.com), 3507 East Frontage Road, Suite 200, Tampa, Florida 33607 on this 20th day of September, 2024.



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telephone 239-334-2030
email cosdenlaw@att.net

**UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
FORT MYERS DIVISION**

ADAM MURRAY COSTELLO,
Petitioner,

Case No.: 2:25-cv-74-JLB-NPM

vs.

SECRETARY, DEPARTMENT OF
CORRECTIONS,
Respondent.

_____ /

EXHIBIT 33

**IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
SIXTH DISTRICT**

October 28, 2024

ADAM MURRAY COSTELLO,
APPELLANT(S),
V.

CASE NO.: 6D2023-2400
L.T. NO.: 16-CF-000371


STATE OF FLORIDA,
APPELLEE(S).

BY ORDER OF THE COURT:

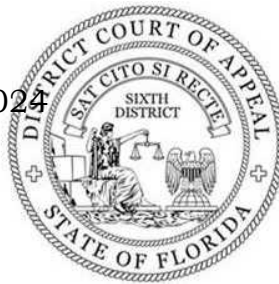
Appellant's motion for rehearing, motion for written opinion and motion to certify conflict is denied.

I hereby certify that the foregoing is a true copy of the original court order.

6D2023-2400 October 28, 2024



Stacey Pectol
Clerk



PANEL: WOZNIAK and WHITE, JJ., and LAMBERT, B.D., Associate Judge

cc:

CHRISTOPHER E. COSDEN, ESQ.
ATTORNEY GENERAL, TAMPA
KEVIN KARNES, CLERK

CERESE CRAWFORD TAYLOR,
A.A.G.

**UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
FORT MYERS DIVISION**

ADAM MURRAY COSTELLO,
Petitioner,

Case No.: 2:25-cv-74-JLB-NPM

vs.

SECRETARY, DEPARTMENT OF
CORRECTIONS,
Respondent.

_____ /

EXHIBIT 34

M A N D A T E

from

**DISTRICT COURT OF APPEAL OF
THE STATE OF FLORIDA
SIXTH DISTRICT**

THIS CAUSE HAVING BEEN BROUGHT TO THIS COURT BY NOTICE OF APPEAL, AND AFTER DUE CONSIDERATION THE COURT HAVING ISSUED ITS OPINION OR DECISION;

YOU ARE HEREBY COMMANDED THAT SUCH FURTHER PROCEEDINGS BE HAD IN SAID CAUSE, IF REQUIRED, IN ACCORDANCE WITH THE OPINION OF THIS COURT ATTACHED HERETO AND INCORPORATED AS PART OF THIS ORDER, AND WITH THE RULES OF PROCEDURE AND LAWS OF THE STATE OF FLORIDA.

WITNESS THE HONORABLE DAN TRAVER, CHIEF JUDGE OF THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA, SIXTH DISTRICT, AND THE SEAL OF THE SAID COURT AT LAKELAND, FLORIDA ON THIS DAY.

DATE: December 2, 2024

SIXTH DCA CASE NO. 6D2023-2400

COUNTY OF ORIGIN: Lee County


LOWER TRIBUNAL CASE NO. 16-CF-000371

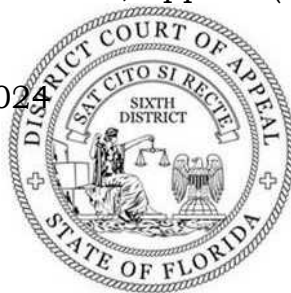
CASE STYLE: ADAM MURRAY COSTELLO, Appellant(s)

v.

STATE OF FLORIDA, Appellee(s).

6D2023-2400 December 2, 2024


Stacey Pectol
Clerk



cc:

CHRISTOPHER E. COSDEN, ESQ.
ATTORNEY GENERAL, TAMPA
KEVIN KARNES, CLERK

HON. MARGARET OGILVIE
STEINBECK
CERESE CRAWFORD TAYLOR,
A.A.G.