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IN THE CIRCUIT COURT OF THE
FOURTH JUDICIAL CIRCUIT, IN
AND FOR DUVAL COUNTY, FLORIDA.

CASE NO: 16-2015-CF-7825-AXXX

DIVISION: CR-E

STATE OF FLORIDA

-vs-

MICHAEL HAIM,

Defendant.

STATE OF FLORIDA)
COUNTY OF DUVAL)

MOTIONS before the Honorable STEVEN B. WHITTINGTON, Judge of the Circuit Court, Division CR-E, as cause in this matter came to be heard on the 8th of November, 2018, before Karen Waugerman, a Notary Public in and for the State of Florida at Large and Registered Professional Reporter.

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THOMAS GEORGE FALLIS and JANIS MARGARET WARREN, Esquires, Private Attorneys, appearing on behalf of the Defendant.

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November 8, 2018

THE COURT: All right. We're here on State versus Haim. Several defense motions to be heard today. State ready to proceed?

MR. MIZRAHI: Yes, Your Honor.

MR. FALLIS: Yes, Your Honor.

Would it be all right if I remain seated?

THE COURT: It will be.

MR. FALLIS: Your Honor, I guess on the motions I guess I can pretty much, unless the Court has a preference to tell you how I'd like to proceed.

THE COURT: Go ahead.

MR. FALLIS: Your Honor, this is the easy part first. My motion, my sixth motion in limine which prohibits the -- any mention of the dependency or any civil collateral case should not be -- any evidence be admitted. The State has conceded that, Your Honor, so I would ask that you issue an order granting it.

THE COURT: All right. The defense's sixth motion in limine without objection from the State?

MR. MIZRAHI: Yes, Your Honor, and we do not object. The transcripts of the dependency trial may be coming in for impeachment purposes, but we'll just refer to them as a prior proceeding like we normally do, but we won't make mention of dependency trial or any rulings resulting from that trial.

THE COURT: Under --

MR. FALLIS: I agree, Judge, I'm talking about any judgments --

THE COURT: Right.

MR. FALLIS: -- is what I was addressing.

Also my seventh motion in limine in which we ask that you prohibit any mention of any alleged domestic violence or any fear the alleged victim had of the defendant.

My understanding is the State has also conceded this motion given the law which I have presented.

MR. MIZRAHI: That's correct, Your Honor.

THE COURT: All right. Without objection from the State the defendant's

seventh motion in limine is granted.

MR. FALLIS: We get to the difficult ones, Your Honor, which I think would require some argument. Unless, of course, the Court has read my motions and the law and the opinions and the Court has determined a ruling, then maybe we don't have to belabor. If the Court hasn't, I'm happy to proceed.

THE COURT: I have not ruled or made up my mind yet so I'll hear argument.

MR. FALLIS: That will be fine.

Judge, my 5th motion in limine there was a 22 -- old .22-caliber shell casing, which was mostly destroyed, found near the -- near -- in the same area where the body was found, Judge, however, that area was eight-foot by six-foot, if I understand correctly from the ETs, and they can't pinpoint where. However, it was in such a condition that FDLE could not put it to any weapon and they did take weapons out of my client's house, 22. They could not connect it to any weapons. And so therefore, Your Honor, I believe that has absolutely -- it is not relevant, number one. And if it were to

be admitted it was more prejudicial than probative of anything.

And I've given you the cases, Judge, two cases in particular, Agatheas, A-G-A-T-H-E-A-S V State at 77 So.3d. And also Metayer, M-E-T-A-Y-E-R V State at 89 So.3d 1003. Both those cases -- these cases involve guns, Your Honor, and they say quite frankly the guns that were found are owned by the defendant in the case, could not be related to the crime and, therefore, they were not relevant and they were certainly prejudicial and would be error to admit them. I think based on that authority I'm asking the Court to grant my motion in this case, too, unless the State had come up with a nexus, which after all this discovery, Your Honor, admission by FDLE they cannot.

MR. MIZRAHI: Your Honor, I respectfully disagree. The two cases that the defense cites address cases where firearms were specifically excluded as being responsible for the crime in question. At that point the Court said more prejudicial than probative to admit unrelated firearm to a case and we

would obviously agree with that case law.

In this particular case we have a shell casing that is found in the dirt in the area that the victim is found. That is the nexus because it's near the body.

Mr. Fallis is right to the extent we can't conclusively show that that firearm casing was responsible for the victim's death, but certainly there is some relevance to that because it was found in the same area.

Initially, the forensic anthropologist will testify there was a circular defect in the victim's bone that was consistent with a firearm and was consistent with a firearm being used at or near the time of death, perimortem as opposed to postmortem, and no evidence of healing within that wound.

So the forensic anthropologist cannot a hundred percent say this was a gunshot wound because other things could make circular indentations into the bone, but it's certainly consistent and reasonable to argue that that was, in fact, a bullet wound in the victim's bones.

So when you combine that circular indentation in the victim's bone along with the shell casing, there is certainly a nexus with which to argue that these things are relevant to prove the crime charged.

THE COURT: Where on the body was this circular defect found?

MR. MIZRAHI: It's essentially like the hip/pelvis, it has another name for it.

MS. WARREN: Left ischium.

MR. MIZRAHI: The ischium bone. Essentially the bullet as testified by the forensic anthropologist traveled through the intestine area of the victim, from front to back, and to the hip, that back ischium bone. I'll get the spelling for the court reporter in a minute. And then that circular defect was, in fact, consistent with the firearm.

MR. FALLIS: Excuse me, Your Honor, may I address that?

THE COURT: Let me ask Mr. Mizrahi one more question. So is there any question that it's a .22 casing that is found?

MR. MIZRAHI: There is no question it's a .22 casing that's found. Well, that's what

our expert will testify in his opinion it's a .22 casing.

THE COURT: And there was a .22-caliber firearm found in the possession of the defendant?

MR. MIZRAHI: Correct.

THE COURT: Okay. All right. Mr. Fallis.

MR. MIZRAHI: The motion doesn't address the firearm, whether the firearm would be admissible.

MR. FALLIS: However, they tested the firearms. They cannot link it to that shell, that is conclusive. The firearms were tested, they cannot be linked to that shell; however, I think he made my argument for me. He says, the forensic anthropologist says it could be or may not be caused by other reasons. And that's speculative, Your Honor.

And number two, the pathologist says definitely that was not -- that indentation or whatever on the ischium was not caused by the bullet.

THE COURT: Who said that?

MR. FALLIS: The pathologist, the

Medical Examiner who actually examined the remains said it wasn't.

So Your Honor, it's entirely speculative. And I think even if you -- it might be relevant by some jump, it is certainly more prejudicial than probative unless they can show some kind of a nexus.

So Your Honor, for those reasons I would ask that the Court deny -- I mean, grant my motion in limine.

THE COURT: All right. State, give me your best, sort of, summary of what the forensic anthropologist would say.

MR. MIZRAHI: To rebut one particular issue, the shell casing could not be identified to any weapon because it was not of value. So to say it did not match, it can't match any gun. So it wasn't like it was excluded as being responsible.

MR. FALLIS: I'm sorry.

MR. MIZRAHI: Go ahead, Mr. Fallis.

MR. FALLIS: What I suggest makes it less relevant, Your Honor.

THE COURT: All right. Mr. Mizrahi.

MR. MIZRAHI: Let me find -- it's

probably better if I just read.

Gross radial graphic and microscopic analysis was conducted and revealed one circular depressed area with commuted and radiating fractures on the anterior surface of the left ischium, I-S-C-H-I-U-M. The defect measured 8.5 by 8.5 millimeters, a small hinge fracture was seen in superior surface of the defect. The circular defect was not inconsistent with a perimortem gunshot wound.

That's what the report says. And in her depo she amplifies that further as the way I previously indicated where she says something other than a gunshot wound could have inflicted it, but it would have to be circular in nature. So she can't rule out all possibilities, but it's certainly consistent, not inconsistent, with a bullet. The nature of where it is, you'd have to see the picture to see before, it's on the inside of the bone not the outside of the bone. So had to have come through the body in order to inflict that kind of injury which certainly makes it more consistent with a firearm as

opposed to a hammer or some other circular object that would have inflicted that because it doesn't come from the back forward, it comes from the inside.

THE COURT: What does the Medical Examiner say?

MR. MIZRAHI: I did not see that she said -- I don't think she made a ruling one way or another. I would have to review that deposition. I don't think she said this is not a gunshot wound. That's not my recollection of what she said.

MR. FALLIS: Your Honor, that term of art which I'm sure you've heard over the years, not inconsistent with, does not mean is consistent with. And that's what I think is needed to make it even relevant, okay. Otherwise once again, it's speculation. I mean, it's not -- what else can I say, Judge? She's not -- that's a term of art that we've heard over the years, okay, when they want to say something and they can't say it, okay. And they use that not inconsistent as opposed to -- she could have easily said it's consistent with but she has not said that,

Judge.

THE COURT: Okay.

MR. MIZRAHI: And the only thing that the pathologist says, the forensic pathologist says is she doesn't know what that is.

Is it still your testimony there is a theory this could have been a bullet hole, are you still of the opinion you don't know?

I don't know the means.

Can you verify the fact this person died of a gunshot wound as a result of a gunshot wound?

I cannot make that determination.

So actually similar to the forensic pathologist. The forensic pathologist, excuse me, forensic anthropologist whose expertise is more on study of decaying bones, giving opinions as to those which goes beyond what the forensic pathologist says.

So when you combine that fact with the fact that the casing is with the victim -- assume there was no bullet hole, I still think it's relevant that the casing is found with the body which leads to some reasonable

inference that she was killed with a gun because the shell casing is in the ground with her which is not a normal place to find shell casings buried in the ground next to her body.

THE COURT: How far from the remains was the shell casing found?

MR. MIZRAHI: Inches to feet. We don't know for sure because when you're excavating the grave there is not a measurement. It's sifted out. When you take the ground out and sift it that's when they find it with the remains. When they are sifting for evidence.

If the Court looks at the photographs you will see the excavation area is feet, whatever the number of feet are, it's close. It's not across the yard, it is in the same general vicinity of the grave which makes it relevant, I think relevant and relative to the remains.

THE COURT: Is the State's theory that's where she was killed?

MR. MIZRAHI: It could be. I mean, to know for sure? No. But certainly it's reasonable to argue, one, she could have been

killed there; and two, the perpetrator could have gotten rid of the evidence there, like the body, including the potential shell casing.

THE COURT: Okay. Anything else on this motion?

MR. FALLIS: I don't think so, Your Honor. I think we pretty much exhausted it. Knowing that, once again, eight feet, 64 square feet, okay, and that shell casing could have been there years ago, could have been there when somebody came back. I know there is evidence -- you know, I used to hunt squirrels, okay.

THE COURT: What's that?

MR. FALLIS: Used to hunt squirrels, all right. And that could have been discarded. There has to be some kind of a nexus and they're asking you, they're asking the jury to speculate. And that's something, Your Honor, that is not permissible in a court of law.

THE COURT: All right. Your next motion?

MR. FALLIS: Next motion, Judge, might

as well get to the motion to dismiss.

Your Honor, my client is charged, and I suggest inartfully, okay, I suggest if you go through all your files, look at all the homicide cases you will not see a pleading like this. And what I mean is that he is charged for Murder 2, Count 1 and Murder 2 for unlawfully due to an act imminently dangerous to another, an act and evincing a depraved mind regardless of human life, although without any premeditated, of course, rules out Murder 1, to affect the death by committing an unspecified act or series of acts which resulted in the death.

Your Honor, that means absolutely nothing in a charging sheet. As I put in my motion, Judge, in fact, also the Florida Rules of Criminal Procedure 3.140 annotated, which I will be reciting from, Your Honor, which addresses informations and indictments, okay.

The State, as I said, the victim is dead, Judge. That is not at issue, okay. The information states that. Death was caused by the criminal act of the defendant.

There was an unlawful killing of the victim by an act imminently dangerous to another and demonstrating a depraved mind. Definitions section, an act includes a series of related actions arising from and performed pursuant to a single design or purpose. Imminently dangerous to another and demonstrating a depraved mind is an act or series of acts. Once again, Judge, that's what they are. We're talking about acts which are facts. Acts that a person of ordinary judgment would know is reasonably certain to kill or do serious bodily injury. Is done from ill will hatred, spite or evil intent. Is of such a nature that the act itself indicates an indifference to human life.

This is one that you really -- once again 3.140(B) demands that the indictment or information of which the defendant is to be tried on be plain, concise, and definitely read the statement of essential facts constituting the offense charged.

Judge, we have absolutely no facts that describe any act undetermined. So if we are to mount a defense we have to know what we're

defending. What is this act that illustrates a depraved mind? Who knows? There could be, and I'm not suggesting these are defenses, but we have to have a defense and we have to be told so we can prepare a defense cause that's the standard, that they have to give us enough information to prepare a defense. I mean, they are all different defenses to homicides -- I mean, there's accident; there's self-defense some times, I'm not saying these are the issues; there's heat of passion; there's of course always justification, but as far as instruction. But Judge, we have to be on notice.

Now what the State sent me and I read this morning the case law that the State sent me, I was preempted again, has nothing to do with the basis of my motion. They're just saying that they can argue in the alternative and I agree they can. If they want to say she was shot or she was strangled, they can do that. The law -- and the law is clear, I don't need the State to tell me that. They still have to tell us what acts or facts show a depraved mind. And they have not done

that. They say unspecified, we don't know. Well they have to know something, Judge, because that charging sheet, and I'll get into the fact of Bill of Particulars which we'll discuss which is not always a remedy, okay, the remedy is an amendment to the information, okay, because this information, Your Honor, it goes back to the jury.

THE COURT: The information doesn't go back to the jury.

MR. FALLIS: Well, is read to the jury, I'm sorry.

THE COURT: It is read.

MR. FALLIS: It is read to the jury, okay. And this is what they have to base their -- they have to base their decision on. They're not given anything here that the State will have to prove by evidence to base their decision. Just saying we think -- we think it was an act, whatever, whatever the act was cause that's what they're saying in the information which tells us nothing, tells the Court nothing. And more importantly, tells the jury nothing.

And Second Degree Murder is not like

manslaughter or some of the other homicides, vehicular homicide, okay. And even in the case -- so you have to have a certain state of mind. And that state of mind evinced by acts. Okay. And the information is completely void of that.

Now I will go, Judge, I will turn to -- now there is not a whole bunch of case law because I think it's very basic. And truthfully, this is the first time in all the years, and I've done quite a few homicides, that I've ever seen an information so inartfully worded, okay. I mean, it looks like they just want to get it filed.

I was waiting until we finished discovery, Judge, to find out exactly what I'm defending against, okay. To see if something came up in discovery, which may or may not play a part, but they're not in the charging sheet, the State has to elect what they're charging. They can charge in the alternative because that's what the cases say and I agree with them that the State has presented.

The cases that the State presented some

have to do with jury instructions, some of them have to do with alternate theories which I suggest they can have. But they all allege some kind of facts, either strangulation in some of them, shooting in another one. And what they're talking about is State being able to say, well, in one case she was either poisoned or she was strangled, we don't know. But they can argue both, but they stated that in the charging sheet. So the defendant was prepared to defend.

Your Honor, I believe, and unless the State tells me I don't know how to read the law, there are facts in those cases, okay. So I think we're not arguing the same thing. I am conceding the State can argue alternatively, but tell me what the alternative facts and acts are. And, Your Honor, I cannot make that out from here.

THE COURT: I understand. All right. Mr. Mizrahi.

MR. MIZRAHI: I've provided these cases to counsel as he indicated, and Your Honor, have the four cases in order, I'll cite them as we go through them.

The first one, Your Honor, is the case of Martinez V State, 368 So.2d 338. This is a Florida Supreme Court case, Your Honor. It stands for the proposition that generally speaking an information is sufficient if it follows the language of the statute and it need not set forth proof which the State intends to establish its case.

This is the underlying principle of a charging document. The purpose of the charging document is not to provide facts with which the defense can defend its case. That's what discovery is for. The purpose of the charging document is to provide the defense the opportunity to know the nature of the charge that the State is seeking to have him convicted of and to ensure that it's specific enough so there is no double jeopardy or no chance that the defendant could be charged with another crime resulting from that course of conduct. That whole concept of during a statement of particulars saying where, when, date, time, place and here's the charge.

That is what the law requires. The

Supreme Court in no way, shape or form requires any to wit, any specificity with how the Second Degree Murder is charged.

Now although I found some cases that dealt with Second Degree Murder, a better example, Your Honor, I know the Court and Mr. Fallis are aware of this long standing case in the Supreme Court and the law of the State of Florida which is the second case I've cited to Your Honor, Everett, E-V-E-R-E-T-T, V State, 97 So.2d 241, again the Supreme Court. This case along with dozens and dozens of others stands for the proposition in any First Degree Murder case the State need only allege premeditated murder. In other words, need only track the statute. And the State can with an indictment stating the defendant killed with a premeditated intent can go under a felony murder theory. And the State is not required to elect that felony murder theory in the charging document, we don't have to do that. The Supreme Court of Florida says you don't have to do it.

So if you can go forward on a First

Degree Murder charge and just say premeditated murder and at trial present evidence of a robbery or burglary or sexual battery that was not alleged in the indictment, the Supreme Court says that's perfectly permissible. Likewise, it is permissible to set out a Second Degree Murder and then present the evidence that supports that Second Degree Murder during the course of the trial.

The next case I would cite is Ingleton, I-N-G-L-E-T-O-N, V State, 700 So.2d 735. This is the one Mr. Fallis was referencing that talked about the State of Florida proceeding under an alternative theory which was either strangulation or poisoning. What the -- and I would term if the Court went to headnote six, which is on page five of the printed opinion, which is page 740 of the book opinion, it says in this case the State requested the Court to remove the language by strangling Wendy Prior, the victim, from the indictment in order to try the defendant for First Degree Murder on the theory that he caused her death by some form of affixation

or by providing her cocaine.

So actually what Mr. Fallis said, we elected in the indictment both theories was not true. In fact, what happened in the case is the State sought to delete one of the versions that they put in the indictment so they can go under two which is exactly what the State is doing in this particular case.

The final case I would cite is a First DCA case which is Mitchell V State, 888 So.2d 665, First DCA case, as I mentioned. I found this one interesting because this is an aggravated assault case where the defendant was charged with a specific to wit: Aggravated assault. So set forth the elements of aggravated assault in the charging document, but went on to say, to wit: Shot a firearm in the direction of the victim. So actually very specific in the charging document as to the conduct the State was seeking to charge the defendant with.

The jury came back with a verdict saying the defendant did not discharge. Seems to be completely contrary to the charging document itself. And the defense obviously moved,

well, they charged us with discharging it and they didn't prove that, therefore, we should walk essentially because they didn't prove what they alleged.

Court goes on to say all the to wit in the factual to wit language was merely superfluous, that it is not a material element to the crime charged and that's what the State needs to prove. Any excess language is not damaging to the case. And he was still convicted of the aggravated assault.

So unless the Court has some questions.

THE COURT: Was there a Bill of Particulars filed or a statement demanding a Bill of Particulars filed?

MR. MIZRAHI: I have not filed a statement of particulars. I do not believe one was filed. It could have been, just never called up but I have not filed a Statement of Particulars.

THE COURT: Better question, defense, have you asked for that to be done?

MR. FALLIS: Your Honor, I did have that conversation with actually his predecessor

Mr. Moody about that and ASA said first I would like to argue the insufficiency of the information and then if necessary after that I would -- I would ask for one. I have to go over that when I discuss the rule itself, okay, as to whether or not, one, actually the Court can order one on its own if the Court finds that the information is insufficient.

However, the case he just cited, Your Honor, did say --

MR. MIZRAHI: I wasn't done yet.

MR. FALLIS: I'm sorry.

THE COURT: Go ahead, Mr. Mizrahi.

MR. MIZRAHI: That's all right. Cause there was a question I wanted to respond to.

THE COURT: Yes, sir.

MR. MIZRAHI: Your Honor, one of the things I wanted to -- in terms of statement of particulars going forward to specify the means by which the defendant killed the victim, I want to give the Court an example of why I don't think that the law supports that as being necessary. And I would give you an example of a case and I know the Court's aware of cases in Florida and

throughout the country where the State has proceeded without having the victim's body or the victim's body is in such a state that we don't know about the cause and manner of death.

And in those situations we may have ample evidence, like, an eyewitness seeing the defendant say, I'm going to kill you right now; and the defendant then could actually confess to the killing, go further and say, I did kill the victim. But if the defendant doesn't specify the means in which the defendant kills the victim, and the victim's body is gone, we can never charge the defendant because we're unable to specify how. That's nonsensical if we're establishing the material elements of the crimes charged that is the only thing the State needs to allege in his charging document and the Bill or Statement of Particulars because I can tell you if the Court grants a defense motion for Statement of Particulars we will say that the crime took place and particular location during -- in between certain hours and between two

dates cause it could have happened past midnight. But, you know, obviously if the Court orders me to elect a theory it could be hundreds of theories. The State could go -- if the Courts allow the State to go under multiple theories, those theories could be hundreds. You could strangle, you could choke, you could stab, you could burn. We don't know because the evidence was destroyed. But we are able to establish by evidence assuming we are at trial, it is our burden to establish the three elements of Second Degree Murder. And that's what we have to alleged in the information. Thank you. Your turn.

MR. FALLIS: Are you done?

MR. MIZRAHI: I'm done.

THE COURT: Mr. False, yes, sir, your response.

MR. FALLIS: The State's last case he cited did, in fact, state facts on aggravated assault. It said that the defendant unlawfully with a deadly weapon, to wit: A firearm without intent to kill intentionally made an unlawful threat by word or act to do

violence to the person while having the apparent ability to do so, shot a firearm in the direction of the victim.

I mean, that's an act that was defined, okay. So the defendant knew what he was up against. They want to go on an alternate theory, fine, allege it.

Let me go to the rule itself.

THE COURT: Well, his response to that, I think, if I didn't misunderstand Mr. Mizrahi, was in the end result of that case is they didn't have to put all that in there. They did but the point of the case was they didn't need to. They didn't need to be that specific.

So do you have a case that says they need to be, not that specific, he shot a firearm in that direction, but at least specific enough of alleging the cause of death, whether by gun, knife?

MR. FALLIS: Well the rule itself says telling you by what acts, okay, acts.

THE COURT: The jury instruction doesn't require that. Jury instruction says the death was caused by the criminal act of the

defendant. It doesn't -- I mean, the instruction is requiring particular --

MR. FALLIS: Which is something they are going to present at trial. The jury can find that by whatever evidence that they present. Doesn't have to be in an instruction itself. The instruction relates back to evidence.

THE COURT: I understand.

MR. FALLIS: That's not an escape, Judge. However, Judge, I've got the unedited version of 3.140 which I think really speaks really clearly to what's necessary here. Okay. Under 3 -- all 3.140, Judge. Five says alternative or destructive allegations, for an offense to be committed by doing one or more several acts or by one or more several means, one or more several intents, it is permissible to allege in disjunctive or alternative such acts. Once again acts, okay. And that's -- which I don't disagree with, they can do that. And they've done it.

Now this last case he talked about, Judge, that is no precedence, I have no idea what the case is talking about where a body wasn't found. You cannot make your ruling

unless the law, okay, what he -- what the State is reciting to you as a case that happened in this jurisdiction and facts, that's not precedent, that's something this Court can consider.

Now, Statement of Particulars, Judge, you asked that question, the Court on motion shall order the prosecuting attorney to furnish Statement of Particulars when an indictment or information on which the defendant's to be tried fails to inform the defendant of the particulars of the offense, okay. And it also says, any reasonable doubts concerning the construction of this rule, that's on the end, shall be resolved in favor of the defendant.

So in other words, Judge, saying, well, maybe yes, maybe no, you know something, I have to by rule resolve it on the side of the defendant, to grant us that.

Now, in addition, Judge, once again they are reciting a Statement of Particulars, okay. Says a Statement of Particulars cannot cure a fundamental defect in an indictment. That's Black V State at 3600142. Where the

question is certified. And State tried to compensate by giving a Statement of Particulars, but the Statement of Particulars cannot, okay, if you find that that's fundamental defect in the information that gives us facts that we can defend against. That won't do.

I suggest, Judge, that he needs to amend the information; however, the view because you have, only you have the authority to order it, even on your own motion, on your sua sponte you can order it. You're encouraged to do that, okay.

Once again, the purpose of the Bill of Particulars, if you order so, is to give the defendant notice of particular acts relied upon by the State to establish the crime charged. That's under Hunter V State 200 So.2d 577.

Again, Your Honor, a Bill of Particulars may be awarded where an accused is entitled to more details, specifications of the ultimate facts alleged in the indictment. Ellis V State, 74 Florida Supreme Court, that's 76 698.

Finally, Judge, they address homicide in the last part of that. And it says, while it is necessary to set forth particular in the indictment or information the manner of death and the means by which it was affected yet no technical terms are required, and manner and means by which the deceased came to his death in ordinary language.

So a person of common understanding -- it would be sufficient for a person of common understanding, that's Michael V State 40 (inaudible) 265.

So Judge, the rule I think can't be any more specific. And I suggest you're not going to find a plethora of cases because 99.9, and maybe even more, of the informations or indictments that I've ever -- that you've ever come across always allege the acts, Your Honor.

And that's why, you know, some times things aren't litigated that much because they're just so common and as a matter of course. So Your Honor, I don't think that what the State gave you as authority is authority for what we are arguing here.

THE COURT: All right. I think I understand.

MR. FALLIS: I'm asking you to --

THE COURT: I understand your argument. You're saying the information needs to say at least something along these lines, the act was he shot her, or he stabbed her or he strangled her or they can allege all three, for example.

MR. FALLIS: Correct.

THE COURT: Has to be something like that.

MR. FALLIS: Correct, Your Honor, so we can defend all theories, we have to be on notice what we are defending. We are defending facts, we are defending acts. We have no idea.

THE COURT: Anything else from any one of you?

MR. FALLIS: No, Your Honor.

MR. MIZRAHI: No, Your Honor.

THE COURT: All right. Let me hear your argument on the next motion.

MR. FALLIS: Judge, the next motion I have that I sent you --

COURT REPORTER: I'm sorry, I didn't hear you.

MR. FALLIS: I'm sorry?

COURT REPORTER: I did not hear you.

MR. FALLIS: You can't hear me?

COURT REPORTER: I cannot, you are looking down, Mr. Fallis.

MR. FALLIS: Well, I don't want to shout but if I have to I will.

THE COURT: Well, if you were standing it would be easier, I don't want you to have to stand cause I know the reason why. So just keep your voice up and she'll be able to hear you.

MR. FALLIS: Now you recall, Judge, we had a hearing, my first motion and second motion in limine which you gave an order saying that you would allow the statement that was made -- allegedly made that daddy hurt mommy, okay.

After that ruling -- now you came to that, Your Honor, by argument by Mr. Moody telling you that that statement was made. You rightfully ruled against all the other statements about being run over and all that

stuff and I'm not arguing that, okay.

THE COURT: I think the State conceded that point.

MR. FALLIS: Yes, the State conceded actually. All right.

Now, after doing discovery, deposing both Miss Brenda Medders, okay, also Detective McCallum, who was in and out looking through some kind of two-way glass, okay, it was determined that that statement that daddy hurt mommy was never made, quote, daddy hurt mommy.

THE COURT: This is by the way a motion -- for the record, you're now arguing your fourth motion in limine.

MR. FALLIS: I guess I am, but -- well, the ends have changed, Judge, it's different reasons, okay, the fourth motion saying that statement was not made. But even before that, any statement, okay, it doesn't have to be child hearsay. State said strictly child hearsay, any statement by any witness, especially a juvenile, minor, okay, are always open to suspicion; however, in my fourth motion in limine I cited a case which

tells the Court -- if you find this to be valid, then my other case is moot, the other motion is moot, okay. Cause it says that Brenda Medders, being an agent that worked for CPT, was an agent of the state. And the statement that she took was a violation, okay, of due process, confrontation.

And I cited the case, Hernandez case, Judge, which I have cited with that motion which states that it has to be -- that it is testimonial and it was given to a CPT worker who, quote, is an agent of the State.

So, Your Honor, if you grant that by most cases I don't need to speak to the other more lengthy one which I have given you the appendix on. And why it's, quote, not reliable and why Miss Medders was not.

THE COURT: All right. I may have missed it. I've got a third motion in limine that you cite Crawford, but doesn't have a citation to Hernandez. What's the Hernandez case?

MR. MIZRAHI: It's the third case he sent you, Crawford.

THE COURT: Okay. I see it now, I'm

sorry.

MR. FALLIS: It is Hernandez, correct?

THE COURT: It's in the motion, I just missed it. Hernandez is cited.

MR. FALLIS: You can look at that. If you find that to be valid, the next argument isn't necessary, but I want to do it anyway, okay.

THE COURT: All right. So let's talk about the third motion. So your motion is she's a State agent, testimony doesn't come in -- should not come in under Crawford and the case law that follows.

MR. FALLIS: Right.

THE COURT: Supreme Court's decision in Crawford.

MR. FALLIS: Correct.

THE COURT: All right. Mr. Mizrahi. Let me just address the third motion.

MR. MIZRAHI: Mr. Fraser is testifying, he is subject to cross examination. And the defense will be afforded an opportunity to cross examine him on this issue. His lack of specific memory is not a bar to cross examination. The level of cross examination

that he's entitled to is not specified in Crawford or Hernandez or any other case. In fact, I think, I assume at the hearing, and I did not give a copy of this to Mr. Fallis, although I think I e-mailed or Mr. Moody may have e-mailed to him previous. Remember, the Hernandez case is going under a child hearsay hearing theory, not statement of identification theory.

And the case that's right on point is a Second DCA case it's AEB V State and it's 818 So.2d 534. And the defendant's constitutional right of confrontation was not implicated in the case where the witness identified the defendant in a photospread or some identification due to the witness having memory loss that prevented the witness from recalling any details surrounding the identification of the defendant.

So the witness identifies the defendant to police. The witness has memory loss, is able to testify in the trial; however, has no recollection of anything having to do with the identification, and it's still admissible.

THE COURT: Yeah, I addressed that case, I know I cited it --

MR. MIZRAHI: Right.

THE COURT: -- in my order, so that's why it sounds somewhat familiar, that issue. The Crawford issue in terms of being able to -- what constitutes adequate ability to cross examine.

So, I mean, any response to that, Mr. Fallis?

MR. FALLIS: Yes, Your Honor. First of all, I respectfully disagree with the Court's ruling on that.

THE COURT: I understand.

MR. FALLIS: That rule about identification was like when somebody just gets -- sees something off, yeah, that's the guy, okay, that's what that was about. So I think that misapplied, but that's not important anyway, doesn't matter.

What matters is it's a statement that was given to Miss Medders, okay. And she, upon her questioning -- I don't care if it's identification or any other kind, if she is not qualified, and I have documented why she

is not qualified and almost by her own admission, okay, and the way she conducted the interview completely goes against all protocol and against the law. And there are cases which I'll be happy to cite to, that tell you how these interviews are suppose to take place.

THE COURT: Well, would that not go to the weight it should be given?

MR. FALLIS: No, it goes to admissibility, Judge.

THE COURT: What goes to admissibility would be interviewer's lack of --

MR. FALLIS: Reliability is what the issue is, Judge, and you have to make a determination of reliability. You have to make that determination, especially when it comes to child statement, okay.

And the Court, and I'm reading the cases, say how that's suppose to be done. No leading questions, they are suppose to, number one, be asked if they know the difference between right and wrong, a lie and the truth and the consequences. She, by her own admissions, never asked the child that.

That is fundamental. So I don't care if you make a finding that, hey, that could have been an identification statement, it still wasn't elicited the way it was suppose to be, the interview was not conducted.

So, Judge, I didn't cite it in my motion but I brought them up this morning, I didn't have a chance, unfortunately my secretary is out, didn't have a chance to print them out but I'll be happy to give your staff attorneys the cite which tell you how an interview is to be conducted.

THE COURT: So what --

MR. FALLIS: And they have dialogues in there.

THE COURT: This is now onto the --

MR. FALLIS: Fourth.

THE COURT: Fourth motion. Okay. Are you talking about some rule of evidence about competency of child witness? Where do you cite to that says that I'm a gatekeeper? Cause I know I'm a gatekeeper on child hearsay where they are describing an act of abuse which I think everybody has agreed that doesn't apply to this case, kid has to be an

actual victim and a witness to a crime. So I know I'm a gatekeeper in those situations. You're saying I'm a gatekeeper to this statement coming in through Miss Medders, that she was unqualified to elicit the statement. What rule are you citing to that makes me gatekeeper as to that?

MR. FALLIS: Well, if we were at trial, Your Honor, I would ask you -- objection, Your Honor, and give you the reasons how the statement was not elicited properly, okay, as required, you'd have to not allow them to proceed on it. You are a gatekeeper, Judge, on any kind of -- and it is hearsay. Doesn't have to be child hearsay, it's just got to be hearsay. Doesn't have to be child hearsay, victim hearsay; just child hearsay in itself or any hearsay.

For you have to allow it, you have to show there's an indicia of reliability. That goes to any hearsay, Judge, not just child hearsay. If you find that, you know, there is absolutely no indicia of reliability, that statement, which is a statement that was never made again, okay. And I would cite to

you where in her deposition, her sworn testimony she admits she can't say that that statement was ever made. What it was was a conclusion, Judge, after you heard daddy pushed mommy down. And she asked -- she, as a matter of fact, I've had Judges, experts -- bring experts in to show why child witness was improperly interrogated and the Judge ruled right out because they violated all the rules. All right. And that is not just victim, any child hearsay.

So it was -- that statement was never made, Judge. So if you find that it was made with identification that's erroneous too because that statement was never made. Nobody is going to come in here and tell the Court that that statement was made. That was a conclusion by Mr. Moody, okay, after he heard that daddy pushed, daddy ran her over, daddy shot her, that daddy hurt mommy.

And I've given you, Judge, the -- and you can look at it on your own but I've given you the deposition of Miss Brenda Medders.

THE COURT: I've read it.

MR. FALLIS: Okay. And you know in the

deposition she cannot say that statement was ever made. I did question her on the ways and means of which she elicited the statements. Giving child alternative, A or B, same thing as leading question, Judge, absolutely against protocol which I've also included in my motion how she -- she was not licensed, Judge, she was an intern. She did not have formal training by CPT. She had on the job, I don't know who that came from, okay. But we have certifications in place and we have rules and protocol to make sure this kind of stuff doesn't happen.

Now, we can't allow it to happen in this case, Judge, because the State wants it and that was the State's conclusion. And Mr. Moody said, well, she said he hurt mommy, that should be enough after you ruled out the other statements, okay. Well, Judge, you can't allow a statement to come in that was never made.

THE COURT: All right. So it's two points, one, statement of identification because it's not an actual statement and, two, even if it was a statement the

reliability is --

MR. FALLIS: Correct.

THE COURT: -- suspect through the method it was used to elicit it and I should not allow it. Those are your two principle arguments as to this motion.

MR. FALLIS: Correct. And if you read the appendage, which I hope you will --

THE COURT: I've read everything you sent me.

MR. FALLIS: Oh, okay, great, I don't need to argue or reargue.

THE COURT: Well, let me hear from Mr. Mizrahi next.

MR. MIZRAHI: Well, I'll take the second part first, Your Honor. I think that I am in absolute disagreement with Mr. Fallis. The law in no way, shape or form puts on the Court the gatekeeping responsibility to determine the reliability of hearsay evidence; otherwise, why do we have a trier of fact? Only where the statute specifically grants the Court that duty is the Court suppose to then determine reliability, like child hearsay statute where the Court must

perform gatekeeping function before this is admitted. But the Court is not, I think, by Mr. Fallis' argument every piece of hearsay, including a defendant's statement, including an excited utterance, including a statement of medical diagnosis that the Court does gatekeeping function to determine reliability of that statement. And that's just simply not the case, it's not the law. Mr. Fallis is completely conflating the issues of child hearsay and the issue of the statement of identification. And there's not one case out there that supports the concept the Court is to judge the reliability of a statement of identification.

Now, the Court does ensure that due process is followed with regard to identification to make sure we don't have an unnecessarily suggestive identification process. The defense's filing a motion to suppress based on that, maybe the Court would have some authority to determine whether or not the identification process was unduly suggestive and violated the defendant's due process right, but that's not what we have

here, obviously the child knows the defendant. So I don't think that would even be filed cause there is no factual basis for it.

So how if what Mr. Fallis says is true, the Court would be determining how long a police officer, who normally does these type of identifications, in this case the police officer is watching outside the room via the mirror, that the Court would be inquiring about what kind of training the police had in order to do identifications? That's just simply not the case. That's not truth, there is no case law that supports it, and there's no statutory rule making authority that gives the Court that authority.

With regard to the statement, I disagree with counsel again cause I believe the statement was made. Again, we're talking about statement of identification and what defense counsel's argument equating it to let's say a bank robbery, if a person witnessed a bank robbery and they came in and looked at a series of photographs and said, that's him, that's him, that's him. And then

the police officer came in and testified and was asked the question, did you talk to the witness? Yes. Did you show him a series of photographs? Yes. Did the witness -- what happened? Well the witness identified the perpetrator of the robbery. That's not the words the witness used. The witness said that's him. But the detective is able to come in and say she identified the perpetrator of the robbery.

Here the witness in this case, Miss Medders and/or Detective McCallum would be able to come in court and say the witness, the child in this case, identified the perpetrator of the one who hurt his mother. Whether or not it was specifically his words or not is not what's relevant.

I will say that if you look to what the defense cites in their motion, which was filed as part of the record, was whether or not the child said what the Court has already allowed admissible, he says Aaron was asked if his father went with his mother. He said his father stayed home, his mother went to the store. The child was asked again if he

had seen his mother get hurt and he nodded yes. The child was then asked how? And he said that his dad had pushed her down.

I think if you combine those two statements, it is dad hurt mom. And so if the Court wanted to modify its ruling to put in the specifics that's written in the report, I guess the Court could, but certainly it is not a basis with which to exclude the statement of identification that Aaron Fraser said dad hurt mom, pushed down mom, she was hurt which is indicated in the report. And he says it again. Thank you.

MR. FALLIS: Judge, I can argue due process as well in the motion I can argue right now, let you know what I'm saying.

THE COURT: You can argue it now.

MR. FALLIS: All right, Judge. You are the gatekeeper of relevancy, correct?

THE COURT: I would agree with that.

MR. FALLIS: All right. Now, if the child cannot say when supposedly daddy hurt mommy, that they cannot say, you read the deposition, she never asked that question. Was it last week, was it last year, last

month? We don't know. So it makes it completely irrelevant and a violation.

Now what the State is asking you to say, well, you combine those two statements and we can make up a statement daddy hurt mommy. We cannot manufacture statements, Judge, and you cannot allow the State to ask a witness knowingly that that statement was never made, by the witness' own admission that that statement was never made. And allow it to go to the jury. You cannot do that because certainly it is -- wouldn't be relevant because it wasn't made. And number two, it is surely more prejudice than probative of anything.

So Judge, I can't understand what the State's arguing here. You can do it strictly on due process under relevancy, we don't know when this occurred, how it occurred, and all kind of different ways that, quote, daddy hurt mommy, which makes no sense. We know she wasn't run over.

And then also there was a point where the child is asked did daddy hurt mommy and he says no. So there is inconsistencies

there as well.

And if you read the Medders' testimony, I mean, her deposition she says that in her deposition. She can't tell you if she had to ask certain questions she certainly said she can't -- she never ever asked the child the difference between the truth and a lie, and the importance of telling the truth.

And of course, all those questions that should have been asked, and also her qualifications as an interviewer, okay, all go to ensure the indicia of reliability, which you have to find that there is to allow any of these hearsay statements in.

And you have to find them relevant. I'm telling you, Judge, there are so many ways that you need to revisit your original motion on different grounds. And if I had to file due process I will file a due process, even spell out even further, you have the time right now to do that, but I don't think I need to do that given what you already have before you you can make that determination yourself.

THE COURT: All right. In addition to

the lack of indicia of reliability, the statement was never made, you would make an argument it should not come in because it's not relevant --

MR. FALLIS: For one.

THE COURT: -- to prove or disprove a material fact in dispute because you don't know when the boy is talking about in terms of the time.

MR. FALLIS: Correct.

THE COURT: All right. Mr. Mizrahi, you want to respond to that, you didn't hear that argument?

MR. MIZRAHI: Well, yeah, I haven't sufficiently --

MR. FALLIS: It's in my motion.

MR. MIZRAHI: I'm not going to address that, but I will say the child, you have to look at in the context which the Court has excluded some of the evidence, rightfully so, with regards to the entire statement the child gives, but when you look at the totality of the statement, the fact that the child's mother is missing, this is the day after the child's mother being missing

they're asking where his mother is and these are the answers he's giving. They are not talking about hey, has your mother ever been hurt or anything like that? And the context of telling in the interview I think it's clear that the child is referencing to why his mother is not around and not picking him up from daycare that day or why she didn't take him to daycare that day.

THE COURT: The context?

MR. MIZRAHI: It is the context of the entire interview. And I think in that context it is relevant to a material issue and that's my argument.

THE COURT: All right. Nothing else on that motion I think that's it.

In terms of the motions in limine, I did see motions for --

MR. FALLIS: Yes, I do have the other ones.

THE COURT: -- inducements.

MR. MIZRAHI: Your Honor, I have -- again, can't believe I forgot it, I have printed out for defense counsel, our case management system records every time a

witness has been listed in a particular case. I have those printouts for Mr. Fallis and Miss Warren, I just left in my office, I'll get them to them today or tomorrow. I do have printouts of every time those two witnesses were listed.

During the course of deposition of one of the witnesses, he indicates that he may have been involved in the case that was not -- that he was not formally listed in our case management system. There is no way for me to figure those things out other than to ask the particular witness, which we -- obviously one of them has been deposed, we have the other one scheduled for deposition next week. Hopefully after that deposition we will have covered everything that these witnesses have done. That's the best I can do to comply with the defendant's request that I show all inducements.

THE COURT: As for witness [redacted] and [redacted]?

MR. MIZRAHI: Correct.

MR. FALLIS: Your Honor, I'd like to respond, I would disagree. [redacted]

Judge, admitted to only working on one case. I'm sorry, [redacted] mentioned working only on one case; however, through my own investigation I have found at least four or five others in which he wore a wire, okay. And I also know who the prosecutors were who had those cases and I even told Mr. Mizrahi who they were, so go find out and let me know so I can formally investigate that. So he denied that in his deposition. He denied a whole bunch of other things which we'll have a field day on when the day comes; however, they have the means, I don't have the means, Judge, meaning the State Attorney's Office, and asking my fellow prosecutors, did you use [redacted]? Although I've given him cases where I knew who the prosecutors were.

I also contacted defense lawyers, the defense lawyers who were defending the defendants in the cases to which [redacted] was working on in which he actually testified, gave depositions, and some he didn't give a deposition, he just did the wiring and whatever, okay. Then they wind up pleading, letting them know they have

[redacted] and that kind of thing. He was very active.

THE COURT: Mr. Mizrahi says he's given -- he doesn't -- he hasn't given them to you, his printout, but he has it. Is that stuff going to be on there?

MR. FALLIS: Wait till I see it.

MR. MIZRAHI: Well, I can envision a scenario, we had this come up in our office before, Your Honor, that there were cases where [redacted] and/or [redacted] maybe helping the police in a case but never formally get -- never normally get listed by the State Attorney's Office. I have no way of figuring that out other than to ask them. Certainly no formal benefits of their own cases were given.

I will be -- I will provide everything having to do with them being listed formally as a witness.

And I will also, which I don't think I've done but I will do, I will print out a list of their criminal histories and show Mr. Fallis who the prosecutors were, and he can discover then whether any formal benefits

were given to them based on any cooperation they may have had in a particular case. That is all I can -- there is nothing else I can do. I don't know what else I can do other than to give you what I have.

MR. FALLIS: Judge, by not being listed doesn't mean they were not agents of the State, okay. If they are working for the police, police are certainly agents of the State. They are obligated to give us everything that these people have ever done in this vein, where they have either given information, worn wires. And they have, I know they have, in order to cross examination, the defense lawyer tore [redacted] up and he got three other cases out of him which he did not admit having any part in.

So Judge, when they start playing this industry of jailhouse snitches it's at their peril and they need to be prepared to defend what they do. And I suggest to you it's gotten to the point right now where it's despicable what they do with these so called informants.

MR. MIZRAHI: I object to that. I object to that, Mr. Fallis, don't call me despicable.

THE COURT: Here's what we are going to do: These last two motions I'm not going to decide today, I'm not going to decide any of these today, I'm certainly not going to decide those motions today.

MR. FALLIS: Which ones?

THE COURT: Well I'm not going to decide any of them, but specifically going to reserve on the motions for inducements.

Mr. Mizrahi, provide things that you were talking about a moment ago and see if there is not some understanding that y'all can reach about things within your State's position to turn over. I think there is no dispute as to what you should turn over if you have it. I don't think that's been in dispute. Finding it, that's not in dispute. If it later becomes a dispute based on what you know, you can be specific and say I think they've got X, Y and Z and I can do it. But we're going to have a trial in this case in the fairly near future. And it's a trial

that's emotional and it's hard, lots at stake, emotions run high. We're not going to interrupt one another. And if you've got things to say that are unpleasant, say it off the record, say it outside the presence of the jury for sure, okay.

MR. FALLIS: Sure.

MR. MIZRAHI: Yes, Your Honor.

THE COURT: All right.

MR. FALLIS: Now lets talk about it, Judge, will you be able to keep this case? You said you're going to ask the chief.

THE COURT: I don't know, I haven't even asked yet.

Let's go to a preliminary question, it is set for trial December 3rd?

MR. FALLIS: Yeah.

MR. MIZRAHI: Yes, sir.

THE COURT: I said -- December 3rd is what I meant to say.

MR. FALLIS: That's what you said.

THE COURT: December 3rd. Is the defense ready for trial December 3rd?

MR. FALLIS: Absolutely not, Judge, I told you the reasons.

THE COURT: I know, so you're going to move -- let's address that then, you are moving to continue the trial?

MR. FALLIS: Correct, Judge.

THE COURT: Any objection?

MR. MIZRAHI: No, Your Honor.

THE COURT: All right. I'm going to grant the defense's motion to continue the trial now set for December 3rd which means final pre-trial November 26th I believe. I need to bring you back before the end of the year cause I'm going to have rulings on all these motions with the possible exception of the inducements which I'm hoping y'all can work out frankly, if you don't I will decide, but I'm going to have rulings on everything else.

So I want to pass it to December 3rd for a pre-trial. I hope to have orders completed by then. And then at that point we can set a new trial date, whether that's with a successor Judge in this division or with me, but by then please have everything done so that we can pick a date. I think everything is pretty much done, it sounds like. The

reason for the continuance is not related to being unprepared, so we'll just pick a date that we can all count on. All right. Does that make sense?

MR. FALLIS: Yes, sir. We have depositions next week, I think should be the last of the depositions. In the event, any motions come out of those depositions, I can never tell.

THE COURT: If they do we'll hear them.

MR. FALLIS: Okay. Okay.

THE COURT: So strike the November 26th final pre-trial, make December 3rd pre-trial, not jury selection, and I'll see you all back then.

MR. MIZRAHI: Thank you.

MR. FALLIS: Thank you, Judge.

(Hearing concluded.)

C E R T I F I C A T E

STATE OF FLORIDA)

COUNTY OF DUVAL)

I, Karen Waugerman, Registered Professional Reporter, certify that I was authorized to and did stenographically report the foregoing proceedings and that the transcript is a true and complete record of my stenographic notes.

DATED this 30th day of August, 2019.

/s/ Karen Waugerman

KAREN WAUGERMAN, RPR