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IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA

FOURTH DISTRICT

GABRIEL BRIAN NOCK,	)	
	)	
Appellant,	)	
	)	
vs.	)	Case No. 4D14-1240
	)	
STATE OF FLORIDA,	)	
	)	
Appellee.	)	

INITIAL BRIEF OF APPELLANT

On Appeal from the Circuit Court of the
17th Judicial Circuit of Florida,
In and For Broward County (Criminal Division)

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PRELIMINARY STATEMENT

Appellant was the Defendant and Appellee was the Prosecution in the Criminal Division of the Circuit Court of the Seventeenth Judicial Circuit, in and for Broward County, Florida.

In the brief, the parties will be referred to as they appear before this Court.

The symbol “T” will denote the Transcript on Appeal

The symbol "R" will denote the Record on Appeal.

The symbol “SR” will denote the Supplemental Record.

The symbol “SR2" will denote the Second Supplemental Record.

The symbol “ST” will denote the Supplemental Transcript.

STATEMENT OF THE FACTS

Larry Ellison

In the early afternoon on Tuesday, March 10, 2009, Larry Ellison was at the Sebastian Street Beach, a gay beach in Fort Lauderdale. Romantic partners George Douglas and Raymond Wieder, and Kevin DeWitt and James Hanna were friends of Ellison and were also at the beach and saw Ellison there. T. 1062-4, 1076-1080, 1088-1091, 1098-1102. Ellison, a gay man, was 68 years old, although he appeared as if he were in his eighties; retired; resided alone in Wilton Manors. T. 1062-4, 1076-1080, 1088-1091, 1098-1102, 1137. He had physically difficulties getting out of a beach chair and swallowing food. T. 1063.

While at the beach, Ellison's four friends saw him in the company of a younger man, in his mid to late twenties. T. 1064-1070, 1080-1085, 1091-7, 1102-1106. Ellison introduced the younger man as "Gabriel" to his friends. T. 38, 1064-1070, 1080-1085, 1091-7, 1102-1106. When speaking to Douglas and Wieder, Ellison confirmed that he would see them later that evening at the Tropics, a restaurant in Wilton Manors. T. 1091-3. When he introduced the man to DeWitt and Hanna, who owned a home in Delaware, Gabriel told them that he was from Delaware. 1093, 1103-5. Hanna was weary of Gabriel and, using a hand signal, tried to warn Ellison. T. 1106-8. Ellison signaled back that Hanna should mind his own business or not be concerned. T. 1109. At about 1:30 or 2:00 p.m., Ellison and Gabriel left the beach together in Ellison's car. T. 1067, 1076-7, 1105-6.

At 7:15 p.m., on March 10, 2009, Paul Guralchuk, Ellison's friend, was awaiting his arrival at Tropics for their 7:30 dinner reservation. T. 1133-9.

Guralchuk had the key to Ellison's home. T. 1136. For several years, Guralchuk was concerned over Ellison's health, as he appeared frail, had trouble walking, problems swallowing solid food. T. 1137-9. When Ellison was a no-show at 7:55, Guralchuk became concerned, went to Ellison's home, and did not see Ellison's car in the driveway; which was odd, since Ellison walked and did not drive after dark. T. 1139-1141. Guralchuk entered the residence and found Ellison lying face down on the kitchen floor. Guralchuk then phoned 911 and later learned that Ellison was dead. T. 1142-5. While Guralchuk believed that Ellison would not have liked "wrestling" activities, he knew that he had a gregarious personality; liked to be the center of attention; kept his home immaculately clean and neat; and that he was physically attracted to younger men, with lean bodies. T. 1148. He knew Ellison took great sexual risks and would have sexual relationships with men he barely knew. T. 1148.

BSO Investigation

Broward Sheriff's Office Detective Luis Rivera began his investigation of Ellison's death at about 9:30 p.m., on March 10. T. 6, 32, 35, 1298-1301. When Rivera arrived at Ellison's Wilton Manors townhouse, he spoke to the law enforcement personnel present at the scene and noticed Ellison's car was not in its parking space. T. 6-9, 32, 35, 1298-1301, 1304-5. Inside the residence he saw Ellison's body, face down on the kitchen floor, and he smelled a strong odor of bleach. T. 8, 1306, 1309-1311. Rivera spoke to Ellison's neighbors; his friends, particularly DeWitt, Hanna and Guralchuk; and interviewed a landscaper, James Goth, and Goth's partner, Armando Cereco, who had seen Ellison with a younger man, eating on back porch of Ellison's home, earlier in the day.

T. 35-6, 1306, 1313, 1628-1634. Rivera was still at the death scene when Associate Broward Medical Examiner, Khalil Wardak, arrived at 4:15 a.m., on March 11. T. 8-9, 1161-2, 1169-1171, 1213, 1312, 1215.

Medical Examiner's Autopsy and Opinions

Wardak first saw that Ellison's body was fully clothed, lying on the kitchen floor; bleach had discolored his clothing and areas of his skin; bodily fluids had expelled from his nose post-mortem; and there was a wound on the left side of his head caused by some sort of trauma, which was "[p]ossibly" consistent with a fall, although not consistent with blunt force trauma. T. 1171-9, 1184-5, 1246. Ellison's eyes were very bloodshot, with patches of blood in their corners, a condition known as petechia; a result of pressure applied to a vein, blocking the return blood flow to the heart and causing small blood vessels to rupture. T. 1181-3, 1233. Petechia is present when the brain is deprived of oxygen due to asphyxia. T. 1233.

The internal autopsy disclosed extensive deep muscle tissue injuries along the sides of Ellison's neck, near the sternum and clavicle, which were consistent with application of pressure to the neck. T. 1188, 1313-4. The hemorrhages were more extensive on the right side of the neck and less severe, with no visible contusions, on the left side. T. 1193-7, 1236. Blood deposits or hemorrhages within the internal neck injuries meant that Ellison was alive when he bled and a pooled blood spot on Ellison's face was caused by the pressure applied there. T. 1190-1191. Other marks on the surface of Ellison's face and neck were caused by bleach, post-mortem. T. 1192-3, 1232.

Wardak knew of a practice of volitional, non-lethal asphyxia for erotic

pleasure, which he coined "horse-play." T. 1197-9, 1237-8. It was risky behavior done to induce a "high" or lightheadedness from asphyxiation, typically induced by physically depressing the arteries or veins on sides of the neck to slow the blood flow to the brain. T. 1238. Properly done, erotic asphyxia would not cause injuries to the front of the neck. T. 1238-9. A variety of ways existed to induce erotic asphyxiation; including placing ones arm around the recipient's neck, in a triangle configuration, with the elbow placed in front of and not touching the front of the recipient's neck. T. 1239-1240. Such arm positioning was similar to a martial arts or law enforcement maneuver known as a "choke hold." T. 1239-1241. When performed properly, with a rapid, forceful and strong application of even pressure, a choke hold will cause loss of consciousness within five to ten seconds. T. 1241-4. Conversely, erotic asphyxia used less force and prolonged pressure to induce pleasure. T. 1244. Loss of consciousness can occur during erotic asphyxia when pressure to applied too long. T. 1244. Wardak opined that if Ellison, who weighed 210 pounds, had been standing upright when receiving erotic asphyxia, he would have likely lost consciousness, not been able to manage his own weight and would have fallen or dropped. T. 1243-5.

Wardak believed that "horse-play," would not have caused Ellison's internal injuries, because, with properly applied pressure, by means of towel-wrapped ligature around the neck, there would not have been deep muscle tissue hemorrhages. T. 1197-9. He felt Ellison's injuries resulted from focused pressure, not from an arm, but from a thumb or finger pressing on the area above the injured muscles. T. 1199. Wardak, however, failed to note this

injury in his autopsy report and mentioned it for the first time at trial. T. 1219-1220, 1229-1301.

Beside the deep neck muscle hemorrhages, there were no injuries or breaks to any of the cartilage or bony structures that supported and gave shape to Ellison's neck, such as the larynx and the hyoid bone, which are typically damaged during a violent strangulation assault. T. 1334-6. While acknowledging that any sort of asphyxiation is potentially fatal, Wardak conceded that the autopsy allowed for more than one conclusion concerning the manner and cause of Ellison's death. T. 1216-7. Also, there was no evidence of, as in typical, violent manual strangulation homicides, dime or quarter-sized contusions on the neck caused by the fingertip or hand pressure by the attacker; nor were there any scraps on the neck from the decedent's own fingernails, showing he resisted the attack. T. 1217-8, 1229.

Wardak concluded, due to focal injuries, Ellison died of asphyxiation by manual strangulation; in that he was choked manually and was unable to breath. T. 1200-1202-4, 1215-8. He ruled out accidental death, because the toxicology analysis showed no evidence of medication overdose; although Diltiazem, a calcium channel blocker, prescribed to persons with high blood pressure, was present T. 1202-3; 1247-8. He opined Ellison's death a homicide and the presence of bleach prevented him from concluding any other manner of death. T. 8-9, 1202-4.

BSO Investigation Continued

Rivera witnessed the autopsy and then returned to Ellison's home, on March 11. T. 1315-6. He then learned that Ellison's wallet, credit cards, laptop

computer and car were missing. T. 9-10, 37, 1316. He enlisted the BSO Economic Crimes Unit to find open credit card accounts in Ellison's name. T. 1316-7, 1291. On March 12, Ileana Rodriguez, a Citibank internal investigator, received a BSO request, via a financial industry security clearing house, for information on Ellison's Citibank card usage. T. 1284-6, 1290-1291. On March 13, she found that the card was used after 4:00 p.m., on March 10, at various retail locations in Broward County, a Target and stores at the Pembroke Pines Mall, including the "Oro Gold" kiosk, and relayed that information to the BSO. T. 1286-1290, 1317, 1333-1340.

On March 12, before receiving the credit card information, Rivera had Goth, the landscaper, aid in creating a composite sketch of the man he saw at Ellison's home on March 10. T. 36-8. The sketch was distributed to law enforcement in a three-county area, as an "alert flyer," although he received no responses back to his flyer. T. 38.

When Rivera received information on Ellison's posthumous credit card usage on March 13, he and other BSO detectives went to the Pembroke Pines Mall and obtained store and mall common area video surveillance recordings of when the cards were used, which all occurred on March 10. T. 12, 41-6, 1317-8, 1322. From these recordings he made still photos of the person who used Ellison's card. T. 1318-1327. At the mall, Rivera met Sophia Jaborov, a sales clerk at the Oro Gold kiosk. T. 46-8, 1124, 1286-1290, 1327. She told him she sold products to a man using Ellison's credit card, who called himself "Larry;" told her he was a police officer vacationing from New York; and asked her out on a date and gave her his telephone number. T. 24, 1124-8, 1329. Rivera showed Jaborov a

still from the mall surveillance video and she identified the person depicted as the man who used Ellison's credit card and gave the detectives the man's phone number. T. 1127-1131, 1329. The detectives had Jaborov phone the number, but the call went directly into voice mail without ringing. T. 59-60, 1130-1131, 1332.

While obtaining the video recordings and phone number was a huge break for Rivera's investigation; he still did not know the card user's identity. T. 1330. While he put copies of the surveillance video recordings and stills into BSO evidence, Rivera did not disseminate any of these images to any law enforcement agency or officer outside the BSO. T. 36-8, 47. On March 14, Rivera learned that Ellison's credit card was used at two stores in Miami Beach on March 11. T. 62, 1357-8. Rivera and BSO Detective Nicholson went to Miami Beach to investigate these transactions and to obtain video surveillance recordings, although they failed to inform law enforcement within that jurisdiction that they were coming or that they investigating a Broward County crime. T. 62-4, 66-7. Surveillance videos from these stores showed Ellison's car present at the time the person who used the card in Broward County, on March 10, used it there, on March 11. T. 62, 1357-1374.

Real-Time Tracking

Rivera next enlisted the aid of the BSO SID Technical or Covert Electronic Surveillance Unit to get records of the suspect telephone number. T. 1274, 1330; vol. 4, p. 18. Detectives Thomas and Belanger, members of this unit, learned that the suspect number was assigned to a Verizon cellular telephone and he obtained its usage records. Vol. 4, p. 18; T. 1276-6, 1330-1331. Rivera

assigned BSO Detective Efrain Torres to apply for a pen-register/trap and trace order to direct Verizon to provide the BSO with raw data to enable it access to information concerning the particular cell tower used by the phone to which the number was assigned. T, 47-9, 55; Vol. 4, p. 19-20. The pen-register/trap and trace order was entered on March 13. T. 56; Vol. 4, p. 21-2; R. 243-4.

Once Verizon placed the pen-register on the suspect number, the BSO, using Pen-link computer software, connected to Verizon computers to track the outgoing signal of the suspect cell phone as it connected itself to cell towers within its location. 49-50, 57; Vol. 4, pp. 23-28. Any given cell tower had multiple sectors and any one sector covered an area from one quarter to five miles in radius. Vol. 4, pp. 27-8, 40-42. The Pen-link software did not disclose the precise whereabouts of a cell phone transmitting a signal to a cell tower sector; nor did it provide information regarding the strength of the signal being transmitted. Vol. 4, pp. 28-9; T. 1276. For the BSO to locate and hone in on the exact whereabouts of the suspect cell phone, in addition to Pen-link, it used a tracking device, such as a "Triggerfish," which enabled it to engage in real-time or prospective cell site monitoring, which, in turn, enabled it to gauge the signal strength of the suspect cell phone to the cell tower and, by means of the signal strength, locate the exact whereabouts of the cell phone sending the signal. ST. 3, 15, 17, Vol. 4, pp. 46-7, 50-61; T. 57-9 R. 228-232.

On the morning of March 16, Thomas notified Rivera that the pen-register/trap and trace alerted that the suspect cell phone was on, after having been off for the previous three days. T. 60, 71, 1278-9, 1357. Pen-link tracked the suspect cell phone signal to cell towers in the South Beach area

of Miami Beach. T. 71, 1278-9. At that time, BSO had no physical evidence linking a particular person to having caused Ellison's death. T. 33-4, 70. It merely knew that a suspect, possibly using two different first names, used Ellison's credit card in Broward County and Miami Beach on March 10 and March 11 - - five days earlier. T. 68-70. At around noon, on March 16, Rivera and five other BSO detectives, including Belanger and Thomas, drove toward Miami Beach in three separate, unmarked BSO vehicles. T. 14-6, 74-5, 78-9, 1374-6. All six detectives were in plain clothes. T. 78-9. Each one had a video still photo of the person who used Ellison's credit card posthumously; all carried their service weapons and were physically capable of making an arrest. T. 14, 80, 1375-6. Before going to Miami Beach, no BSO deputy notified Miami Beach Police or Miami-Dade Sheriff's Office they were coming to their jurisdiction to investigate a Broward County crime; nor did he request assistance from the Florida Highway Patrol or the Florida Department of Law enforcement, each having statewide jurisdiction, to jointly investigate Ellison's death in Miami-Dade County. T. 71-3; 1282. The BSO did not know what they would find in Miami Beach; they did not know if the suspect cell phone was being used by a person or if it had been left on a park bench; nor did they know if the person currently using it was the same individual depicted in the store videos. T. 75.

Appellant's Arrest

When tracing suspect cell phone signal's connection to cell towers, by means of Pen-link, Thomas and Belanger also used a "real-time" tracking device, in such as a "Triggerfish," enabling them to gauge the phone's signal strength to the cell tower and back to the suspect phone. T. 49-50, 57-9, 76. 1376; Vol.

4, pp. 23-28, 40-42, 50-61; ST. 3, 15, 17; R. 228-232. After arriving in South Beach, Belanger or Thomas informed Rivera that they sighted the person who appeared to match the video still depiction, after the tracking equipment sensed the suspect cell phone signal getting stronger from a location inside a Starbuck's coffee shop, at 1500 Ocean Drive. T. 76-8, 80-81, 94, 1375-6; Vol. 4, pp. 50-61; R. 228-232. Rivera immediately drove to that location, which was within the tourist area. T. 81, 1375. According to Rivera, the person depicted in the still generally matched other white or Hispanic men present in South Beach and it was important that the cell phone signal was getting stronger in order to distinguish these other men from the person they were trying to find. T. 81.

Although neither Thomas nor Belanger observed the person they tracked commit any crime, Belanger exited his unmarked BSO vehicle, flagged down two uniformed Miami Beach police officers, whose presence in the area was serendipitous. T. 81-2, 1376-7. Belanger told the patrolmen that he was a BSO deputy involved in an active investigation and had them detain the man whose likeness was similar to the person depicted in the video still on BSO's behalf, Appellant, Gabriel Nock. T. 83-4. Once detained, Appellant was not free to leave and was later handcuffed by the Miami Beach officers. T. 84, 86-90, 1283.

About fifteen minutes after receiving Belanger's call, Rivera arrived at 1500 Ocean Drive and saw Appellant standing with the two Miami Beach patrolmen, un-handcuffed. T. 16-7. He seized a cell phone on Appellant's person and confirmed that it used the suspect number tracked by BSO and confirmed that Appellant resembled the person depicted in the video stills. T. 34-5, 86. At

the time Appellant possessed a tote bag, embossed with Ellison's initials, that was taken from Ellison's home. T. 16-7, 19, 86, 1377. The top of the tote bag was opened and in it Rivera found items similar to the ones taken from Ellison's home. T. 86, 95-6, 1377-8. BSO seized the tote bag, its contents, as well as Ellison's credit card, business cards, car keys and a Delaware identification card from Appellant's person. T. 1379.

Rivera told Appellant his name, his agency and that he was a homicide detective. T. 18, 1379, 1381. Appellant replied, "this must be about the car" or "is this about the car I was in?" T. 18, 1379, 1381. He then asked if his detention or arrest concerned a Delaware warrant. T. 18-9. Although Rivera was ignorant of a warrant from Delaware or another jurisdiction concerning Mr. Nock, he knew that the man seen with Ellison at the beach claimed to be from Delaware. T. 19, 26. He then lied to Appellant, agreeing he was being detained on a Delaware warrant. T. 19, 26. Rivera also claimed that he told Appellant that his detention concerned the car. T. 1381. Rivera first learned of an open Delaware warrant for Appellant's arrest after he brought Mr. Nock to BSO headquarters. T. 101, 105. Nevertheless, at the time he arrested Appellant in Miami Beach, Rivera did not know if Mr. Nock had any involvement in Ellison's death or whether he had just used his credit cards. T. 101, 105.

Before Appellant was placed in a BSO vehicle, the Miami Beach patrolmen had handcuffed him and their handcuffs were replaced with BSO handcuffs. T. 19, 21-2, 87-8. Rivera found Appellant cooperative, as he expressed a willingness to answer questions in Broward County; although he intended to arrest him notwithstanding. T. 20, 27, 1381-2. When Rivera took physical

custody of Appellant, he did not inform the Miami Beach Police Department or Miami-Dade Sheriff's Office about his out-of-jurisdiction police activities; nor did he ask the Miami Beach officers to draft a report concerning Appellant's apprehension. T. 89-91, 93, 1382. Before returning to Broward County, Rivera did not bring Appellant to a Miami Beach Police Department or Miami-Dade Sheriff's detention facility or before a Miami-Dade County judicial magistrate; instead, he took Mr. Nock directly to BSO headquarters and interrogated him T. 89-91, 93, 1382. Subsequently, in his probable cause affidavit, Rivera averred that Appellant was arrested in Miami Beach. T. 94.

Before leaving Miami Beach, Appellant asked Rivera if he wanted to know where the car was, which Rivera understood to mean Ellison's car. T. 19, 21, 27. Appellant guided Rivera to the car, in an indoor parking lot, which was not far from the sight of his initial detention. T. 28-30, 1383-4, 1466. The car was searched and Appellant's clothing was found inside. T. 1383-4.

<u>BSO Interrogation of Appellant</u>

At BSO headquarters, Rivera put Appellant into an interrogation room, equipped with an audio and video recording device. T. 1385-6, 1466-9. All interrogations at BSO headquarters, including Appellant's, were audio and video recorded and while Rivera took contemporaneous, handwritten notes of what Appellant said, they were not verbatim and, subsequently, he relied on the video to draft his investigation report and for his in-court testimony. T. 1471-3.

Rivera Mirandized Appellant and, after he waived his rights, Rivera commenced questioning; although he did not tell Mr. Nock that he was investigating a homicide or that Ellison was dead. He let Appellant believe

he was investigating his possession of items taken from Ellison's home. T. 1384-6, 1473-4. After Appellant admitted the property he possessed was not his, Rivera questioned him about his activities in Fort Lauderdale and how he came to possess these items. T. 1387, 1392, 1473-4. Appellant stated that he had not met Ellison before and, inter alia, that he bought the items from a friend he met on Fort Lauderdale Beach for three hundred dollars. T. 1392-8, 1474-8.

After the first hour and a half of questioning, Rivera disbelieved Appellant's account of his activities and confronted him with his knowledge that he was seen on Fort Lauderdale Beach with Ellison, that he told people there that he was from Delaware and that he was also seen with Ellison at his home. T. 1401, 1477-8. Appellant initially stuck with his first version of events. Then, after a cigarette break, Rivera showed him photographs of Ellison and Appellant denied he recognized him. T. 1402-4. Rivera then showed Appellant stills from Pembroke Pines mall surveillance videos, questioned him about the credit card transactions and stressed he needed to be truthful. T. 1404. In response, Mr. Nock asked for and Rivera denied him another cigarette break, although he let him use the toilet. T. 1405-8. Afterward, Mr. Nock acknowledged that he knew Ellison. T. 1407-8. When Rivera asked him what he knew about Ellison, Appellant shook his head, saying, "he wasn't suppose to die, it wasn't suppose to happen that way," and then provided more details. T. 1408.

Appellant told Rivera that he left the beach with Ellison to prostitute himself for money, as Ellison wanted to pay him for oral sex. T. 1413. They went to Ellison's home, stopping at a Publix along the way; the same Publix where Mr. Nock subsequently used Ellison's credit card. T. 1414-5, 1425. T. 1425.

Ellison wanted Appellant to engage certain sex acts and told him that he had a wrestling and biceps "fetish." T. 1413, 1416. He described how Ellison performed fellatio on him in the upstairs bedroom of his townhouse, in exchange for eighty dollars. T. 1413-4. According to Rivera, Appellant said, that in addition to giving him fellatio, Ellison had him engage him in "wrestling moves." T. 1416. When he applied the wrestling move on Ellison, Ellison "would tap out," in that Ellison tapped his fingers to indicate that the pressure Appellant applied in the wrestling move was too or insufficiently forceful. T. 1418.

After sex and wrestling, Appellant took Ellison's wallet and credit cards before exiting the bedroom. T. 1417. They then went downstairs to the kitchen, where they ate ice cream on the back porch, and Appellant helped Ellison carry his garbage can and recycling bin to the front of his house. T. 1416.

With regard to how Ellison died, according to Rivera, Appellant said that Ellison put his head down and stopped breathing; that Ellison was not supposed to die. T. 1416. He told Rivera that while they were in the kitchen he had put Ellison into a headlock using his arm and then. T. 1416-8. During the interrogation, using Rivera as a mannequin, Appellant physically demonstrated what he did. T. 1416-8. Appellant applied a headlock to Ellison and Ellison admired his arm muscles and said he was enjoying what he was doing to him. T. 1418. Appellant held Ellison in a headlock for a few minutes, although he did not state an exact amount of time. T. 1418-9. Ellison then collapsed, Appellant let go of him and he dropped to the floor like a dead weight. T. 1418-9. Appellant said that while Ellison tapped when they wrestled in the

bedroom, he did not tap when Appellant held him in a headlock in the kitchen. T. 1418.

After Ellison hit the floor, he made a noise that sounded as though he was struggling for air. T. 1418. Appellant did not call 911; instead, he tried to awaken Ellison, but he did not respond. T. 1419. At that point, Appellant became scared. T. 1419. Rivera asked why, if Appellant thought Ellison fell accidentally, he did not call 911 and Mr. Nock did not articulate "why;" although he said that Ellison failed to wake up, he put an electrical cord around Ellison's neck to make it appear that he was a victim of a robbery. T. 1420-1422. He immediately felt remorseful and removed the cord. T. 1421-2. Mr. Nock then put his head down, saying, "I should of known better." T. 1420.

Panicking and not knowing what else to do, Appellant then found a half gallon bottle of bleach in the house and poured it on the kitchen floor, in order to cover up his presence there. T. 1420. He poured bleach, because he felt no one would believe him. T. 1422. Appellant wanted to get as far away from Ellison's house as possible and, before leaving, he grabbed whatever items he could. T. 1420.

Appellant admitted that after Ellison was dead, he took some of his belongings, the bleach bottle, and his car. T. 1422-3. He drove around for a few minutes, parked and reflected on just what occurred. T. 1422-4. He next drove to a 7-11, then to the mall and then to Target before he stopped at a strip club. After the strip club he drove to a parking garage discarded some of his clothing and the bleach bottle. T. 1423.

At about 4:30 p.m., on March 16, while the interrogation was ongoing,

Rivera demanded Appellant give more details of events. T. 1424. Appellant told him that he was not felling well, as he had become nervous and had taken Xanax pills when he saw the Miami Beach patrolmen approach him. T. 1424. Rivera told Appellant that Xanax became effective within an hour of its ingestion. T. 1425. Appellant then said he took Xanax when he used the toilet, although Rivera had searched him earlier, found no Xanax in his possession and watched him use the toilet. T. 1425. Rivera called for paramedics, who took Mr. Nock to the hospital T. 1424, 1426-8. Appellant was treated; cleared; and Rivera returned him to the interrogation room and resumed questioning. T. 1428-9. Toward the end of the interrogation, Rivera questioned Appellant on how he met Ellison and asked whether he targeted a gay man on the beach and Appellant replied he had. T. 1409.

Appellant's Case-In-Chief

Appellant elicited testimony from John Marranuccini, a forensic pathologist and former Florida state medical examiner. T. 1636-7. Marranuccini reviewed the entire medical examiner's file, including the complete autopsy report and the medical examiner's photographs; police reports; crime scene photos; toxicology reports; and Appellant's interrogation statement. T. 1641-2. He agreed with Wardak that the manner of death was a homicide and its cause was asphyxia. T. 1642. He testified that asphyxia death can result from consensual activity for personal entertainment, such as sexual or erotic asphyxia, and occurs when one puts pressure on the neck or face of another during sex to induce partial asphyxia or lowering of oxygen levels, which supposedly increases sexual excitement and intensity. T. 1663-4.

Marranuccini compared Appellant's interrogation statement to Wardak's scientific findings and concluded that Ellison's death was consistent with voluntary, erotic asphyxiation activities, during which Appellant's arm was positioned around the decedent's neck, in an arm-bar or carotid sleeper type maneuver, to induce asphyxia; an explanation he could not ruled out. T. 1642, 1644, 1653-4, 1667

He explained that a carotid sleeper hold compresses blood vessels on the side of the neck, without compressing the air tube. T. 1655. The pressure on these blood vessels depletes brain oxygen and causes unconsciousness within ten seconds. T. 1655. It does not induce erotic asphyxia pleasure. T. 1656. The police arm-bar choke hold, similar to the carotid sleeper, can cause instantaneous death when applied incorrectly or if the subject moves and pressure application shifts from the carotid artery to the trachea. T. 1656-7. Erotic asphyxia is supposed to induce pleasure, not unconsciousness, by inducing a twilight type of consciousness. T. 1656-7. To avoid too much oxygen deprivation, erotic asphyxia participants use signals to prevent strangulation, but, since erotic asphyxia causes some oxygen deprivation, prolonged sessions can affect the recipient's brain communication function. T. 1659, 1738. Ellison died as a result of Appellant's poor or inadequate technique in applying erotic asphyxia. T. T. 1665.

Marranuccini disagreed with Wardak, ruling out manual strangulation, because there was no evidence of hand or finger imprints on the front of the neck; there was a lack of intense abrasions on the side of the neck; no abrasions on the front of the neck, caused by the decedent's own fingernails while trying

to thwart a strangulation attack; no damage to the Adam's apple, thyroid cartilage, or other cartilage or bony structures within the neck; and, based on the crime scene photo, there was no sign of a struggle or that Ellison thrashed against an attacker, which typically occurs during a manual strangulation. T. 1644-1650, 1660-1661, 1667, 1732. On the other hand, Ellison's injuries were consistent with Appellant's use of an arm-bar hold to asphyxiate Ellison for erotic pleasure, evinced by more extensive internal hemorrhages in the large muscles on one side of the his neck than the other. T. 1661-4. The contusion on the right side of Ellison's head was consistent the decedent falling out of Appellant's hold and falling to the floor, when he suddenly became dead weight, and the placement of Ellison's body was also consistent with Appellant's explanation. T. 1663, 1666-7.

STATEMENT OF THE CASE

Appellant was indicted by the grand jury of the Circuit Court of the Seventeenth Judicial Circuit, in and for Broward County, Florida. R. 3-5. It charged Mr. Nock the with first degree, premeditated murder of Ellison by asphyxiation, strangulation or choking while in the commission of a robbery (Count I) and tampering with physical evidence (Count II). R. 3-5. The State gave notice that it sought habitual felony offender sanctions against Appellant. R. 14.

Appellant filed two motions to suppress evidence, on two separate claims: (1) the BSO illegally used real-time, cellular telephone number tracking to locate, arrest and seize incriminating evidence from him without a warrant; and (2) his arrest by the BSO, its seizure of evidence, as well as the interrogation

results, were illegally obtained, because it acted beyond its jurisdictional authority in arresting him, without a warrant, in Miami Beach. R. 233-9, 263-315, 407-413.

Warrantless Real-Time Cellular Telephone Number Tracking

Appellant claimed his federal and Florida constitutional rights were violated by the BSO's use of prospective, real-time, cell cite data, and a cellular telephone signal tracking device, without a warrant. R. 233-9, 263-315. This device utilized information supplied by means of the pen-register/trap and trace order and Pen-link software, for locating the particular cell tower sector used by his cell phone number, to monitor his phone's signal strength, turning the cell phone into a homing device to pinpoint his exact whereabouts in Miami Beach. R. 233-9, 263-315. The State contended, inter alia, that Appellant had no expectation of privacy of his whereabouts when using a cell phone, citing this Court's decision in Tracey v. State.[1]

Prior to the motion hearing, the trial court entered an order, based on the parties' stipulation that "the device used to locate Gabriel Nock on March 16, 2009, may be referred to or considered a tracking device." R. 232. The stipulation and order was entered after Appellant moved to compel the State to disclose certain computer data BSO used or generated in tracking, locating and arresting Appellant in Miami Beach. R. 220-222; ST. 2-16. In exchange for withdrawing his motion to compel, the prosecutor stipulated to Appellant's proffer, that the BSO used a tracking device, manufactured under the brand name

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[1] Tracey v. State, 69 So. 3d 992 (Fla. 4th DCA 2011), reversed 152 So. 3d 504, 509 (Fla. 2014).

"Triggerfish," among others, which located cell phone users based on the signal strength of a particular cell phone to the cell phone tower. ST. 7, 15-7. The State, when it made the stipulation, knew Appellant intended to use it as proof that the BSO tracked him with such a devise within a motion to suppress evidence. ST. 15-7.

At the hearing, the prosecutor, at first, tried to orally withdraw from the stipulation order and then orally offered the same and other stipulations, accepted by Appellant, to the same facts within the stipulation order, as well as stipulations that the tracking device lead the BSO to a Starbucks coffee shop from which Appellant, who had used its restroom, exited and was arrested by the BSO. Vol. 4, pp 45-61. The trial court denied Appellant's motion to suppress, finding, notwithstanding the State's stipulations of fact, there was no evidence that BSO used a tracking device; there was no evidence that BSO tracked Appellant to a private location, i.e. a restroom inside a Starbucks; and, assuming a warrantless tracking device was used, Appellant had no expectation of privacy when using a cellular phone in public, per Tracey.[2] SR. 4-6.

BSO Extra-Jurisdiction Arrest of Appellant

Appellant also moved to suppress evidence based his warrantless arrest by the BSO, outside of its law enforcement jurisdiction, in Miami Beach. R. 407-413. He maintained that BSO used the color of their office to facilitate his arrest outside of its jurisdiction; the arrest was not the result of "continuous and uninterrupted," "fresh pursuit;" there were no exigent circumstances; and, under the totality of the circumstances, his arrest was not

[2] Ibid.

a "citizen's arrest," upon probable cause, independent of information obtained under the color of their office. R. 407-413; T. 115-132. The trial court denied the motion. T. 138.

Motion In Limine Re Rule of Completeness

Prior to trial, Appellant moved in limine to, inter alia, compel the State to elicit the entire context of Appellant's interrogation statements concerning the events that lead up to Ellison's death, under the Rule of Completeness, the principles of due process, and the Fifth and Sixth Amendments R. 426-435. Appellant learned the prosecutor intended to elicit Appellant's interrogation statement through Rivera's trial testimony and not by introducing audio/video recording of the interrogation. R. 426-9. Appellant was concerned that the prosecutor, through his direct-examination of Rivera, would selectively edit portions of his statement in which he admitted causing Ellison's death and the resulting testimony would be out-of-context and affirmatively mislead the jury about its circumstances. He sought an order, under section 90.108(1), Florida Statutes (2014), compelling the State to admit the complete context of his statements and not be bound or charged with their elicitation for purposes of section 90.806, Florida Statutes (2014), impeachment. R. 430-435; T. 558-560, 644-650, 652-3, 1003-6. The trial court denied the motion, ruling that it would not compel the State to elicit Appellant's "self-serving" statements and, if Mr. Nock elicited them when cross-examining Rivera, his credibility could be impeached by his prior felony convictions. T. 1006-9. Appellant renewed his Rule of Completeness objection during the State's direct-examination of Rivera. R. 1420-1421, 1431-1437. He argued that compelling the State to elicit his

complete, in-context interrogation statements did not make admissible his prior felony convictions to impeach his credibility; rather, to be impeached he would have to elicit exculpatory statements, non-germane to Rivera's misleading testimony. T. 1432. The trial court did not change its prior ruling and suggested that Appellant not cross-examine Rivera about his statement to avoid prior conviction impeachment. T. 1435-7.

Cross-examination of Rivera

On cross-examination of Rivera, Appellant elicited the omitted portions of his interrogation statement, under the Rule of Completeness. On direct-examination, Rivera testified that Appellant described how Ellison died and, on cross-exam, he testified, that within his description, Appellant explained Ellison's death was accidental. T. 1416-8, 1440-1441, 1516.

On direct-exam, Rivera testified that Appellant said Ellison "wasn't suppose to die, it wasn't suppose to happen that way." T. 1416. On cross-exam, Rivera admitted that the complete statement was, "it wasn't suppose to happen, he stopped breathing." T. 1481, 1483, 1486. Appellant made this statement after the first hour and a half of the interrogation and, afterward, he took full responsibility for Ellison's death. T. 1517-9.

On direct, Rivera testified that Appellant said Ellison offered to pay him eighty dollars to give him fellatio. On cross, he admitted Ellison made his offer at the beach, along with offers to get Mr. Nock a meal and for him to be his house guest. T. 1483-4.

On direct, Rivera stated Appellant told him that Ellison had a biceps and wrestling "fetish." On cross, he clarified that "fetish" was his own

interpretation of what Appellant said and Mr. Nock never used the word "fetish." T. 1413, 1416, 1484.

On direct, Rivera testified Appellant stated, with regard to Ellison having stopped breathing while in a wrestling hold, that he tried to awaken Ellison after he dropped to the kitchen floor, Ellison did not respond and he did not know what to do. T. 1418-9. On cross, Rivera conceded that Appellant next said that he never intentionally hurt anybody and that he did not intend to hurt Ellison. T. 1486-8. He also told Rivera that Ellison "quit breathing on me;" and not that Ellison passed out or lost consciousness. T. 1416, 1487-8.

On direct, Rivera stated that Appellant told him that he grabbed Ellison's laptop computer, car keys and other items, other than the wallet and credit cards, after he poured bleach onto the floor. On cross, Rivera admitted that, within the same context, he also said that these items were not important to him; and he took them after Ellison was dead, to make it appear they were taken in a robbery, which was also the reason he put a cord around Ellison's neck. T. 1417, 1420-1422, 1490-1491, 1501. He removed the cord because he felt it was wrong. T. 1421-2, 1516. In the same context, Rivera remarked to Appellant that he used Ellison's belongings and credit card "like crazy," and Mr. Nock replied that he was desperate and foolish and that his mind was elsewhere at the time. T. 1501.

On direct, Rivera testified Appellant said that he and Ellison engaged in oral sex and consensual wrestling moves in the bedroom. On cross, he conceded that Appellant also said that he let Ellison give him oral in the kitchen, after they ate ice cream. T. 1413-9, 1493-6. In the same context, Appellant told

Rivera that, as Ellison performed fellatio, he wanted to again feel pressure from Mr. Nock's tightening biceps and that Appellant never used the word "choke." T. 1495-6.

On direct, Rivera testified that Appellant stated Ellison "would tap out," with regard to wresting. On cross, Rivera stated he asked Appellant about "the biceps thing," and other bedroom activities. Appellant replied that Ellison liked the squeezing and the feeling of pressure and that when he squeezed too much or applied too much pressure Ellison "tapped out." T. 1494. On cross, Rivera also acknowledged that Appellant demonstrated how Ellison tapped and that tapping was a signal meaning the pressure applied was too little, too much or that he wanted to stop. In the bedroom, Ellison tapped for Appellant to stop the pressure and he then thanked him, saying he liked it. T. 1416-8, 1495. Also on cross, Rivera stated that when Appellant demonstrated the wrestling move, he explained that, unlike in the bedroom, Ellison did not "tap out" in the kitchen; instead he got heavy in his arms and fell to the floor after a minute or two of pressure, during which he had believed Ellison was fine. T. 1418, 1497, 1500-1501.

On direct, Rivera stated Appellant told him that when he let go of Ellison he hit the floor; landed face down; and made a noise, as if he was struggling for air. On cross, he agreed that Appellant said, in response to his questions concerning how Ellison's head got hit, that while he held Ellison, his weight suddenly came down on his arm and caused his arm to give way. T. 1418-9, 1503.

On direct, Rivera testified Appellant told him that he poured bleach on the kitchen floor to cover up his presence in Ellison's home. On cross, he

admitted, in the same context, Appellant also said that before he did, he panicked, because he did not know CPR and that he checked, but found Ellison did not have a pulse. T. 1420, 1503-4. Appellant also told Rivera that, after pouring bleach, he talked to Ellison for thirty minutes, knowing he was dead, and then contemplated suicide, because Ellison died on him. T. 1503-5. In response to Rivera's question that Appellant was just trying to get his mind right, Mr. Nock replied, "you never get your mind right" and that it was still not right. T. 1505.

On direct, Rivera testified Appellant told him about the places he went to after leaving Ellison's home on March 10, including a 7-11 store, where he bought a gift card, and to a strip club. T. 1422-3. On cross, Rivera agreed he had not known about the strip club until Appellant told him about it and that he used the gift card there. T. 1505-6.

On direct, Rivera testified that for the first hour and a half of the interrogation Appellant told him a story that did not jive with information received from other witnesses. T. 1401. On cross, he acknowledged that, later in the interrogation, he questioned Mr. Nock again about events at the beach and Appellant admitted that he had initially lied to him and said that everyone he met at the beach were nice people. T. 1506-7. He also told Rivera that Ellison was a "real good guy;" he made no disparaging remarks about him; and he made no disparaging remarks about gay men; although he understood that Appellant "targeted" gay men, because they were easy targets. T. 1613-6.

Appellant also told Rivera that he knew Ellison had a dinner date scheduled on March 10; Ellison stopped at a Publix on home from the beach; he smoked

Marlboro cigarettes; they had peanut butter cookies with their ice cream; Ellison had told him that he had been a part-time zookeeper in Chicago; and he corrected the time line of when he used Ellison's credit card – – all of which Rivera had not known before. T. 1507-1510.

On direct, Rivera testified that, at about 4:30, while pressing for more details, Appellant said he was not feeling well and that he had taken Xanax pills when Miami Beach police officers approached him. T. 1424. On cross, Rivera affirmed that he took a break from the interrogation at 3:33 p.m. and left the room. T. 1511. After questioning resumed, a point came when Appellant was dozing off; although before he did, he had already told Rivera he had taken the Xanax pills earlier in the day. T. 1512. Rivera acknowledged that Appellant eventually appeared so sleepy he called for paramedics, who took him to the hospital, where he was treated with intravenous fluids. T. 1512. Rivera and Appellant returned to the interrogation room at around 8:45 p.m. and reviewed what they discussed before the hospital visit and Appellant explained events the same way. T. 1515-6. Before the interrogation ended, Nicholson questioned Appellant more assertively, asking if Ellison could have discovered his theft of the wallet and credit cards and confronted him over it. T. 1516-7. Appellant maintained that no such confrontation occurred and that Ellison did not know he had taken these items. T. 1517.

Jury Charge Conference and Closing Argument

Appellant objected to the inclusion of the weighing the evidence instruction concerning a witness's prior felony convictions affecting testimonial credibility. T. 1568-1570. The trial court overruled his

objection; and admitted evidence, upon the parties' stipulation, that Appellant had nine prior felony convictions; and gave a limiting instruction that the convictions were not evidence of guilt, but should only be considered with regard to a "declarant's" credibility. T. 1569, 1626-7, 1835.

During the State's closing argument, Appellant objected and moved for mistrial over the prosecutor's characterization of Rivera's cross-examination testimony about matters omitted in his direct-examination testimony of Mr. Nock's interrogation as witness-testimony, the credibility of which should be weighed in light of Appellant's prior felony convictions. T. 1855-7, 1866-7, 1912, 1918, 1926, 1927, 1937-9. The trial court overruled the objections and denied a mistrial. T. 1866, 1912, 1918, 1926, 1927, 1941.

Verdict and Sentencing

The jury found Appellant guilty as charged of first degree murder tampering with physical evidence. R. SR2; T. 1946. Upon the parties' stipulation that Appellant's prior felony convictions and the relationship of the dates of their commission to the date of the crimes at bar, the trial court could find that Appellant qualified for habitual felony offender sanctions. T. 1957-1961. The trial court found that Mr. Nock qualified for habitual felony offender sanctions as to Count II. T. 1965. It adjudicated Appellant guilty as per the jury's verdict and sentenced him to life imprisonment, as to Count I, and, as to Count II, a concurrent term of 120 months imprisonment. R. 483-9, 519-522; T. 1966.

Notice of Appeal was timely filed. R. 531-3.

SUMMARY OF THE ARGUMENT

Point I: The trial court erred in denying Appellant's motion to suppress evidence concerning the BSO's use of real-time, cellular telephone signal strength tracking, which it used to locate and arrest Appellant in Miami Beach. It use of this technology without a warrant, premised on probable cause that the person who possessed a cell phone using the suspect number committed a crime, was illegal.

Point II: The trial court erred in denying Appellant's motion to suppress evidence concerning his arrest by the BSO, in Miami Beach, outside its jurisdictional authority. At the time Appellant was arrested, neither BSO detectives nor Miami Beach police officers observed or had probable cause to believe Appellant committed a crime in Miami Beach. Any probable cause for the BSO to believe that Appellant committed a crime was based on information obtained by the BSO under color of their office and the arrest was not pursuant fresh pursuit or exigent circumstances.

Point III: The trial court abused its discretion and erred by denying Appellant's motion in limine and overruling his subsequent objections to compel the State to introduce exculpatory, in-context portions, of out-of-court recorded statements contemporaneously with inculpating portions. The State's omission of the exculpating portions was done purposefully, to mislead the jury concerning the actual context of Appellant's statement. After Appellant elicited the omitted portions, the trial court, again, erred by granting leave to the State to impeach Appellant's credibility concerning the admission of the excluded portions with evidence of his prior felony convictions.

ARGUMENT

POINT I

THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTION TO SUPPRESS EVIDENCE, IN THAT BSO UNLAWFULLY UTILIZED WARRANTLESS REAL-TIME CELLULAR TELEPHONE SIGNAL STRENGTH TRACKING IN ORDER TO LOCATE APPELLANT'S WHEREABOUTS.

The BSO unlawfully located the cellular telephone possessed by Mr. Nock, by means of real-time, cellular telephone signal strength tracking without a warrant premised on probable cause. The use of this mechanism resulted in Appellant's arrest, seizure of physical evidence and the eliciting of his custodial interrogation statement. The trial court erred in denying Appellant's motion to suppress evidence. A motion to suppress is a mixed question of fact and law and this Court's standard of review, as to the trial court's conclusion of law, is de novo; while trial court's factual findings are to be applied, so long as they are based on competent, substantial evidence. Davis v. State, 151 So.3d 4, 6 (Fla. 4th DCA 2014).

Initially, the trial court's order denying Appellant's motion to suppress is not based on competent, substantial evidence. Id. Prior to the motion hearing, it entered an order recognizing the parties' stipulation that that BSO used a tracking device, as described in Appellant's second revision of his seventh motion to compel discovery, to locate the origination point of the signal emanating from the cell phone using the suspect phone number (R. 220-227, 232). In Appellant's motion to compel, he described the tracking device as one similar to a "Triggerfish," which can locate the whereabouts of a cell phone using its signal strength to an area the size of a hotel room (R. 220-227).

The State's attempt to withdraw from its stipulation was a nullity for two reasons. First, it failed to move the trial court to vacate its order of stipulation upon an affidavit showing of good cause that the stipulation was involuntary or a product of fraud, misrepresentation or mistake of fact. Dortch v. State, 137 So.3d 1173, 1176 (Fla. 4th DCA 2014); Henrion v. New Era Realty IV, Inc., 566 So. 2d 1295, 1298 (Fla. 4th DCA 1991). Once entered, the stipulation order is binding on the parties and the court and a party does not waive the stipulation by failing to remind the court of the order where the opposing party violates it. Id. Second, notwithstanding the State's attempt to withdraw from the order, at the hearing, the prosecutor voluntarily offered the same stipulations and Appellant accepted them (Vol. 4, pp. 50-61). The content of the order of stipulation and parties' oral stipulations were competent, substantial evidence. See Farmer v. City of Ft. Lauderdale, 427 So.2d 187, 189 (Fla. 1983); see Leon Shaffer Golnick Advertising, Inc. v. Cedar, 423 So.2d 1015, 1016-7 (Fla. 4th DCA 1982); c.f. State v. Foxworth, 757 So.2d 1270, 1271 (Fla. 4th DCA 2000); c.f. State v. Brugman, 588 So.2d 279, 279 (Fla. 2d DCA 1991).

In light of the stipulation order (R. 232) and the oral stipulations (Vol. 4, pp. 50-61), the trial court's finding that "there is no basis in the evidence to reach the conclusion" that the BSO "used an unknown tracking device, which allegedly tracks to a specific cell phone using signal strength in order to 'track' Defendant," was not based on competent, substantial evidence and this Court can disregard it (SR. 4-6). Davis v. State, supra at 6. Indeed, the opposite was true; the BSO used a real-time cell phone signal tracking which

enabled detectives to locate Appellant’s exact whereabouts by means of his cell phone’s signal strength, as described by the Florida Supreme Court in Tracey v. State, supra at 507-8, 516-7.

At the time Torres applied for and received the pen register/trap and trace order, on March 13, BSO did not know whether the homicide death of Ellison was unlawful or whether the unknown person who posthumously used Ellison’s credit card was involved in his death (T. 40-47, 70). It only knew that on the evening of Ellison’s death, a person, calling himself “Larry,” used the card at a kiosk in a Broward County mall, and other places, and was video recorded doing so (T. 40-47). Even after getting the phone number from Jaborov, the BSO had no basis in fact to believe the suspect number was indeed connected to the card user (T. 59-60).

To obtain a pen register/trap and trace order, police must know the telephone number at issue (Vo. 4, pp. 19-20). Florida law requires a court order to direct the cellular carriers to provide police access to the raw data from a cell-tower concerning a particular number (T. 49). The statutory standard for a court to issue such an order is that the information acquired from the pen register will be helpful or “relevant” to a police investigation (T. 49). Tracey v. State, 152 So. 3d 504, 509 (Fla. 2014); § 934.32, Fla. Stat. (2009).

Torres’ application for a Chapter 934 order stated that it sought “‘real time cellular site information’ pursuant to F.S. 934.42" (R. 281-3). Section 934.42, Florida Statutes (2009), was not the proper vehicle to obtain such information. This statute concerns mobile tracking devices, such as Global Positioning tracking devices, as discussed in United States v. Jones, 132 S.

Ct. 945 (2012), the placement of which is a search within the meaning of the Fourth Amendment and requires a warrant based on probable cause. Id at 949; § 934.42(6).

The application for a pen register/trap and trace should have been made under section 934.32, Florida Statutes (2009), which merely required the applicant to aver he is a police officer and certify the information sought "is relevant to an ongoing criminal investigation. Such an order does not authorize police to use any device or mechanism more intrusive than a pen register/trap and trace. The magistrate issuing the order cannot require the applicant to provide greater factual specificity than is required under section 934.32. § 934.33(5), Fla. Stat. (2009).

Torres' application included all necessary information for a mobile tracking device order, under section 934.42; which requires more specificity than needed for pen register/trap and trace. Id, §§ 934.32 and 934.33(5), Fla. Stat. In addition to his name, his office and his affirmation that the order will likely provide relevant information to an ongoing criminal investigation, Torres stated that Ellison was found dead; Ellison was seen in the company of a Latin male shortly before this death; Ellison's death was a homicide; Ellison's car, computer and wallet were stolen; Ellison's credit card was used shortly after his death; a Latin male used Ellison's credit card while representing himself as "Larry;" video surveillance recordings captured the likeness of the card's user; the user gave his telephone number to a vendor who accepted the card; and that Torres "believe[d] that the requested order to release location information by 'real time cellular site information' is

currently the least obtrusive means of locating the suspect(s) of a Homicide as well as identifying additional suspects and co-conspirators" (R. 281-3). However, as an application for a mobile tracking device, it was facially deficient. It failed to aver that tracking would take place outside of Broward County and, because it contained no proof that the person who used the suspect phone number committed a homicide or any other crime, the totality of its content did not meet the probable cause threshold of a warrant application. (T. 75). United States v. Jones, supra at 949.

The order Torres received for the pen register/trap and trace on the suspect phone number did not authorize "'real time cellular site information'" or real-time "cell site information location" ("CSIL") (R. 285-8; Vol. 4, p. 19). On March 16, three days after the order was served, BSO first obtained raw data from Verizon and, using Pen-link, tracked the signal generated by the phone using the suspect number to cell towers servicing an area radiating one quarter to five miles from where the cell was transmitting its signal, somewhere in South Beach (Vol. 4, pp. 22-28; T. 70-71, 74-7; R. 281, 286). The Pen-link did not detect a cell phone's signal strength and it did not pinpoint its precise location (Vol. 4, p. 26, 28-9; T. 69-71, 77). Upon arriving in South Beach, Belanger and Thomas, who were tracking the suspect number's signal, told Rivera the signal was getting "stronger" (T. 78, 8-81); however, they would not have known the signal strength had they merely been Pen-link (Vol. 4, p. 29). Consequently, based on the parties' stipulations and BSO testimony concerning the limitations of Pen-link, BSO illegally tracked Appellant's cell phone to its exact location without a warrant to do so. Tracey v. State, supra at 506.

The trial court's order ruling that Appellant did not have a reasonable expectation of privacy with regard to his whereabouts when using a cellular telephone was also erroneous (4-6). Id. The authority the trial court relied on was overruled by the Florida Supreme Court, where it held that "regardless of [a person's] location on public roads, the use of his cell phone in order to track him in real time [is] a search within the purview of the Fourth Amendment for which probable cause [is] required. Id at 526. As in Tracey, there was no probable cause to support the BSO tracking of Appellant's cell phone and no basis for a warrant for a warrant. There is no good faith exception for the BSO warrantless real-time cellular telephone tracking of Mr. Nock. In Tracey, the underlying facts occurred in 2007 and the Supreme Court held that the good faith exception to the exclusionary rule for objectively reasonable law enforcement activity did not apply, because there was no warrant or binding appellant precedent that authorized their tracking activities. Id at 506, 526. Similarly, in Herring v. State, 168 So. 3d 240 (Fla. 1st DCA 2015), the First District, reversing a conviction based on police unlawful used real time cell signal tracking done in 2011, noted that, at that time, there was no warrant or binding appellate precedent upon which a good faith exception could apply. Id at 242, 243.

The trial court erred in finding that there was no evidence of unlawful real-time cell phone signal tracking at bar and for ruling that had there been, Mr. Nock did not have a reasonable expectation of privacy in his personal whereabouts when using a cell phone. The BSO illegally tracked Appellant without a warrant and this detention, arrest, the seizure of tangible evidence

in his possession and control and his interrogation statement to police were all fruits of the poisonous tree and ought to have been suppressed. J.R. v. State, 149 So.3d 1196, 1198 (Fla. 4th DCA 2014). This Court should reverse Appellant's convictions and remand to the trial court for a new trial, with directions to suppress all evidence against Appellant derived from the illegal tracking.

POINT II

THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTION TO SUPPRESS EVIDENCE, AS HIS ARREST, THE SEIZURE OF ALL TANGLE EVIDENCE FROM HIS POSSESSION AND CONTROL AND HIS INTERROGATION STATEMENT WERE ILLEGAL OBTAINED, IN THAT THE BSO WAS WITHOUT JURISDICTIONAL AUTHORITY TO ARREST HIM IN MIAMI BEACH, MIAMI-DADE COUNTY.

The BSO acted under the color of their office to obtain access to information, not available to the public at-large, which lead them to find Appellant in Miami Beach and, thereafter, used the color of their office to illegally arrest him, outside of their jurisdictional authority. The illegal arrest lead to the seizure of tangible evidence and Appellant's interrogation statement, used by the State in its murder prosecution and evidence tampering prosecution. This Court's standard of review of the trial court's denial of Appellant's motion to suppress, based on the BSO's unlawful, extra-jurisdictional arrest, is de novo. Davis v. State, supra at 6.

In Phoenix v. State, 455 So. 2d 1024 (Fla. 1984), the Florida Supreme Court held that municipal police officers or county sheriff's deputies, acting outside their jurisdictional authority, can make arrests as though they are private citizens where they actually obverse a crime being committed in their presence, or arrest a person they believe has committed a felony and have probable cause to believe and do believe the person to be arrested is guilty of that felony; so long as, in making the arrest, the officers, outside of their jurisdiction, do not use the color of their office. Id at 1025. "Under color of their office" means that in making an extra-jurisdictional arrest, police or sheriff's deputies cannot use the powers of their office to observe unlawful activity or

gain access to evidence not available to a private citizen. Id; Moncrieffe v. State, 55 So. 3d 736, 740 (Fla. 4th DCA 2011); Ripley v. State, 898 So. 2d 1078, 1080 (Fla. 4th DCA 2005).

At bar, BSO detectives were outside their jurisdictional authority when they arrested Appellant in Miami Beach, Miami-Dade County (T. 14-23, 33-31, 69-94. At the time they arrested him they had no physical evidence that identified a suspect in any crime in Ellison's home (T. 33). The evidence of Ellison's credit card usage, which lead the BSO to obtain surveillance videos of credit card transactions, was available to them only by means of the color of their office, as the average citizen does not have access to the financial industry security information (T. 1284-6, 1290-1291, 1317, 1333-1340). Then, the BSO acted "under color of their office" to obtain the pen register/trap and trace order that lead them to find Appellant by means of his cell phone's signal strength, which, under Florida law, is only obtainable by law enforcement (T. 48-50). See § 934.32, Fla. Stat.

Although law enforcement officers may conduct criminal investigations and gather information and evidence outside their jurisdictional authority, upon a good faith belief that the crime, or the subject matter of their investigation, was committed within their jurisdiction, see Nunn v. State, 121 So. 3d 566 (Fla. 4th DCA 2013); see also State v. Sills, 852 So.2d 390 (Fla. 4th DCA 2003), it cannot make arrests of suspects, under color of their office, outside of their jurisdiction. Moncrieffe v. State, supra at 740; Ripley v. State, supra at 1080. At bar, the activities of Rivera and other BSO detectives, in following investigative leads into Miami Beach without informing or seeking assistance

of Miami Beach Police or the Miami-Dade Sheriff, on or before March 16, were not inappropriate, even though it was done under color of their office (T. 62-71). See Nunn v. State, supra. In fact, Rivera's intention in going to Miami Beach on March 16 was merely to investigate the cell phone, potentially acquire evidence and potentially observe some sort of criminal activity (T. 75-6). Until the pen register indicated that the suspect cell phone was back on and sending a signal to a Miami Beach cell tower, on March 16, Rivera did not know the whereabouts of any suspect and was re-canvassing the Fort Lauderdale beach, on March 14, looking for a person resembling the depiction in the video stills (T. 66).

However, when they found Appellant, who, at the time, merely resembled the video still depiction of Ellison's credit card user, BSO had no inkling if he actually was the same person who used the card, since the card had not been used for the previous five days, or whether he had access to Ellison's car, or if he had anything to do with the crimes at Ellison's residence (T. 39-40, 69-70, 75, 82, 86). Moreover, Belanger and Thomas, who first sited Appellant in South Beach (76-81), did not observe him commit a crime; they merely saw him walk across a Miami Beach street before they flagged down two Miami Beach patrolmen and instructed them to detain Appellant (T. 81-4). There was no evidence that the Miami Beach officers, when they detained Appellant, were aware of facts concerning the BSO investigation. In fact, BSO failed to notify any Miami Beach Police Department or Miami-Dade Sheriff's Office personnel of its activities in Miami Beach; it did not share any information about its investigation with these agencies at any time; and it did not request the Miami Beach patrolmen

who detained Appellant to document their involvement in its investigation (T. 63-4, 71-3, 75, 90).

The BSO detention and arrest of Mr. Nock was not a citizen's arrest; they did not see him commit a crime in Miami Beach; they did not have probable cause that he committed a crime in Miami Beach; and their knowledge that he committed any crime was based on information obtained under the color of their law enforcement office – their access to financial industry records and the pen register/trap and trace. Phoenix v. State, supra; Moncrieffe v. State, supra; Ripley v. State, supra; c.f. Nunn v. State, supra at 567 (defendant was arrested by police with proper jurisdictional authority). The fact that Miami Beach patrolmen detained and handcuffed Appellant did not insulate the BSO's illegal, extra-jurisdictional arrest of Mr. Nock. There was no evidence showing that, at the time they detained him, either Miami Beach officer saw Appellant commit or about to commit a crime. The "fellow officer rule" does not legitimize Appellant's detention, because Thomas and Belanger, in directing the patrolmen to detain Mr. Nock could only act as private citizens and were not "fellow officers" within the rule. See State v. Bowers, 87 So. 3d 704 (Fla. 2012). The fact that Thomas and Belanger hailed the patrolmen to act on their behalf, absent any evidence of a mutual cooperation agreement between their agency and the BSO, Moncrieffe v. State, supra, and without conveying any factual basis to justify the detention before the fact, was a tacit admission that they were without legal authority to detain or arrest Appellant.

All evidence establishing that Appellant was involved in alleged crimes that took place at Ellison's home was obtained as a result of the BSO's illegal

detention and arrest of Appellant in Miami Beach, upon information acquired exclusively under the color of their office. Phoenix v. State; Moncrieffe v. State; Ripley v. State. This includes Appellant's post-detention statements that concerned Ellison's car, his acknowledgment that he may be subject to a Delaware arrest warrant, his possession of the phone having the suspect number, his possession of items belonging to Ellison, his admissions concerning the location of Ellison's car and his interrogation statements. Moncrieffe; Ripley. (16-21, 27-30, 85-6, 91, 93, 95, 105). The fact that Appellant was "cooperative" with BSO detectives and "agreed" to accompany them to BSO headquarters after his detention and arrest is of no import (T. 20, 25, 96). Mr. Nock was not free to leave from the moment he was detained by the Miami Beach patrolmen and, notwithstanding his cooperation, BSO intended to keep him in their custody and immediately return him to Broward County (T. 86-8, 90, 93, 105). Ripley v. State, supra at 1080-1081.

The trial court erred in denying Appellant's motion to suppress based on his detention and arrest by the BSO outside of their jurisdictional authority and absent any grounds to justify it as a citizen's arrest. This Court should reverse Appellant's convictions and remand for a new trial, with directions that all evidence obtained as a result of Appellant's illegal detention and arrest be suppressed.

<u>POINT III</u>

THE TRIAL COURT ABUSED ITS DISCRETION AND ERRED IN DENYING APPELLANT'S MOTION IN LIMINE AND OVERRULING HIS OBJECTIONS, ON RULE OF COMPLETENESS GROUNDS, AND FOR ADMITTING HIS PRIOR CONVICTIONS TO IMPEACH HIS CREDIBILITY REGARDING HIS ELICITING OF THE IN-CONTEXT, EXCULPATING PORTIONS OF HIS INTERROGATION STATEMENT PURPOSELY OMITTED BY THE STATE.

The trial court abused its discretion and erred in denying Appellant's motions and objections to compel the State to contemporaneously admit in-context, exculpating portions of his interrogation statement within its case-in-chief. These portions, purposely omitted by the prosecutor, concerned Appellant's involvement in Ellison's death. The omission of these portions intentionally mislead the jury concerning Appellant's legal intent at the time Ellison died. The trial court also abused its discretion and erred by binding or charging Appellant for the elicitation of the omitted portions and for admitting the State's evidence of his prior felony convictions to impeach his credibility regarding the omitted portions. Under both sections 90.108(1) and 90.806, Florida Statutes (2014), the omitted portions, though exculpatory, concerned evidence proving the essential elements of the crimes charged and legal defenses to those crimes. The omissions should have been admitted within the State's case and Appellant should not have been burdened with the admission of his prior felony convictions. This Court's standard of review is whether the trial court abused its discretion. <u>See</u> <u>Kaczmar v. State</u>, 104 So. 3d 990, 1001 (Fla. 2012).

The "Rule of Completeness" is codified under section 90.108(1), Florida Statutes (2014). It states:

> When a writing or recorded statement or part thereof is introduced by a party, an adverse party may require him or her at that time to introduce any other part or any other writing or recorded statement that in fairness ought to be considered contemporaneously. An adverse party is not bound by evidence introduced under this section.

Appellant moved in limine, pursuant to section 90.108(1), to compel the state to introduce omitted portions of his recorded interrogation statement, admitted into evidence through the testimony of the interrogator, Rivera (R. 426-435; T. 558-560, 644-650, 652-3, 1003-6; 1432). The trial court refused to compel the State to introduce "self-serving" statements made by Mr. Nock and ruled if Appellant were to elicit such statements when cross-examining Rivera it would admit evidence of his prior felony convictions to impeach his credibility, per section 90.806, Florida Statutes (2014)(T. 1006-9, 1435-7).

The State, in its direct-examination of Rivera, elicited only part of Appellant's complete statement with regard to events immediately surrounding Ellison's death. As illustrated in the Statement of the Case, above, the partial introductions, made during Rivera's direct-examination, were misleading, as it omitted critical evidence concerning Appellant's intent when Ellison died. These omissions should have been admitted under section 90.108(1), contemporaneously within the State's direct-examination of Rivera and Mr. Nock should not have been bound or charged for their introduction. The State's purpose in omitting these portions was exactly for the purpose which this section seeks to prevent; the intentional misleading of the jury. Id.

While some of these statement were exculpatory, others were inculpatory, such as taking Ellison's property posthumously to stage a robbery-murder scene

(T. 1417, 1420-1422, 1490-1491, 1501); admitting to having gone to a strip club and using the gift card he bought at 7-11 (T. 1422-3) and Appellant's contemplation of suicide (T. 1503-5). See Sloan v. State, 104 So. 3d 1271 (Fla. 4th DCA 2013). Rivera's cross-examination testimony that Appellant told him he thought that Ellison and Ellison's friends he met on the beach were nice or good people were not hearsay (T. 1513-6), because their niceness or goodness was not offered for the truth that they were nice or good, see Massey v. State, 109 So.3d 324, 327 (Fla. 4t DCA 2013), and, therefore, was not self-serving hearsay, which otherwise subjected him to section 90.806 impeachment. Other out-of-court statement by Appellant were admitted as impeachment of Rivera's inconsistent testimony, such as Appellant never having used the word "choke" to describe his act of putting pressure on Ellison's neck (T. 1416-8, 1494-5, 1497, 1500-1501); that Appellant never used the word "fetish" to describe Ellison's desire to wrestle (T. 1413, 1416, 1484); and that Appellant stated that Ellison stopped breathing, not that he passed out or lost consciousness (.T. 1416, 1487-8). See § 90.608(5), Fla. Stat. 2014). Still other statements introduced during cross-examination were informative of his spending time with Ellison, but were neither inculpating nor exculpating with regard to the crimes charged, such as Appellant never having made disparaging remarks about gay men; that Ellison told him of his dinner plans; that they ate peanut butter cookies with their ice cream; and that Ellison had been a part-time zookeeper (T. 1507-1510, 513-6).

Of the State-omitted interrogation statements that could be deemed exculpating, under section 90.108(1), their introduction by Appellant did not warrant section 90.806 prior conviction credibility impeachment. The focus of

the Rule of Completeness, this Court has held, is fairness to the adverse party when the proponent of a written or recorded statement introduces only part of the statement and omits the in-context remainder which relates to the crimes charged and would give the introduced statement an entirely different meaning. Metz v. State, 59 So. 3d 1225, 1226-7 (Fla. 4th DCA 2011). Where the proponent omits in-context portions of that statement, which cause the admitted portions to be misleading, the proponent "open[s] the door" to the introduction of the omitted portion to correct the misleading nature of what was initially admitted. Foster v. State, 40 Fla. L. Weekly D2205 (Fla. 2d DCA September 30, 2015); Dessett v. State, 951So. 2d 46, 48 (Fla. 4th DCA 2007); see Bozeman v. State, 698 So. 2d 629, 630-631 (Fla. 4th DCA 1997).

At bar, the State intentionally omitted Appellant's statement that Ellison stopped or quit breathing, his death was accidental and that he did not intend to hurt Ellison and had never intentionally hurt anyone (T. 1416, 1418-9, 1481, 1483, 1486-8); that after their sex in the bedroom, Appellant and Ellison had consensual sex in the kitchen, where Ellison wanted him to apply the same wrestling move as he did in the bedroom and while Ellison gave a "tapping" signal when "wrestling" in the bedroom, he never did so in the kitchen, leading Appellant to believe he wanted the pressure, and, thereafter, he felt the weight of Ellison's body on his arm and let go of him (T. 1416-8, 1494-5, 1497, 1500-1501); and that Ellison was not aware he took his wallet and credit cards and never confronted him about it afterward (T. 1516-7).

The State's exclusion of the in-context, exculpating, portions was designed to mislead the jury with regard to Appellant's intent when he caused

Ellison to be asphyxiated in the kitchen. It was done create an illusion that the State's evidence showed Mr. Nock committed felony murder by using force against Ellison before, during or after the taking of the wallet; and that the force was unrelated to consensual asphyxiation, but rather, it was to rob him (T. 1762, 1767-8, 1827, 1854, 1887-8, 1922-3). But for the State's chicanery to create the illusion of an underlying felony, it would have failed to prove first degree murder. See Bigham v. State, 995 So. 2d 207, 211-3 (Fla. 2007), citing Hoefert v. State, 617 So. 2d 1046, 1218-9 (Fla. 1993).

To prevent the proponent of a recorded statement from intentionally misleading a jury regarding the statement's actual meaning, section 90.108(1) requires that the omitted portions be contemporaneously included when the initially admitted portion are introduced and prohibits the adverse party from being bound for causing the introductions of the omitted portions. This did not occur at bar. The trial court's refusal to compel the State to introduce the omitted portions of Appellant's statement contemporaneously with the elicited portions was erroneous. It was also error for the trial court to bind or charge Appellant for introducing the omissions during its cross-examination of Rivera, thus allowing the State impeach Appellant's credibility with his nine prior felony convictions, causing the initial error not to be harmless beyond a reasonable doubt. State v. DiGuiio, 491 So. 2d 1129 (Fla. 1986); Foster v. State, supra.

The authority relied on by the trial court to deny Appellant's Rule of Completeness objections was inapposite to the facts at bar. In Kaczmar, the State omitted a portion of the defendant's secretly recorded statement to an undercover officer investigating the defendant for attempting to frame his friend for the murder with which he was charged. The portion omitted was the defendant's statement that he was framing his friend because he was innocent. Id at 1000. The Supreme Court held that when Appellant elicited the hearsay statement in which he claimed his innocence, the State was free to impeach it under section 90.806. Id at 1000-1001. However, the defendant's claim of innocence, to the extent it was an exculpatory hearsay statement, was not germane to any essential element of proof of crimes charged against him and out of context and logically inconsistent with the plot to frame another man for the same murder.

This Court's opinions in Kelly v. State, 857 So. 2d 949 (Fla. 4th DCA 2003), and Llanos v. State, 770 So. 2d 725 (Fla. 4th DCA (2000), appear to hold that where a defendant elicits any exculpatory portions of his or her out-of-court statements, whether or not to cure a misleading impression left by the State's omission of those portions, the defendant can be impeached, under section 90.806. However, the published facts in Kelly do not discuss the context or nature of the portions of the defendant's statement introduced by the State; nor is there a discussion on the context or nature of the omitted portions introduced by the defendant, giving rise to 90.806 impeachment.

In Llanos, 90.806 impeachment evidence was admitted when, after the prosecutor elicited part of the defendant's recorded statement, that he did not

want the victim to call police in a kidnapping, burglary and battery prosecution, the defendant elicited the in-context remaining portions, that he did not want the victim to call police because he was remorseful, he loved her and wanted to resume their relationship. Id at 726. However, such statements do not concern an element necessary for the State to prove the caccused's crimes. Such statements were superfluous to any element of proof, there was nothing misleading concerning the evidence supporting the elements of proof and section 90.806 impeachment was proper. C.f. Foster v. State, supra; c.f. Metz v. State, supra at 1226-7. In fact, the trial court, in Llanos, could have properly excluded the defendant's exculpatory statements as being irrelevant to a material issue of fact. Pulcini v. State, 41 So. 3d 338, 348 (Fla. 4th DCA 2010); Dessett v. State, supra at 48-9.

The facts at bar are akin to those in Foster, supra. There, the State, in a burglary and theft prosecution, elicited police testimony that the defendant, who possessed a wallet taken from at burgled vehicle, stated that he found the wallet. On cross-examination, the office testified that the complete statement was that he "found the wallet inside of a garbage can and that he was going to turn it in to police as found property." Id. The Second District held that the trial court erred in admitting 90.806 impeachment against the defendant, because the remainder of the statement was relevant and the prosecutor, by eliciting only a portion of it, "'opened the door'" to the entire statement, which, in fairness, and pursuant to the truth-seeking function of a trial, should be admitted in its entirety. Id. Foster went on to hold that the 90.806 impeachment of the defendant's credibility was harmful error, because

it could not be concluded that the admission of a non-testifying defendant's prior felony convictions, in light of his defense that he had merely found the wallet, did not affect the jury's verdict beyond a reasonable doubt. Id, citing State v. DiGuilio, supra.

At bar, Mr. Nock's defense was that Ellison's death was an accident that occurred during an episode of consensual asphyxiation. The medical evidence did not refute this claim (T. 1197-9, 1202-3, 1216-1220, 1229-1301, 1247-8, 1642-4, 1653-4, 1663-4, 1667). Ironically, the State's sole source of evidence to prove Ellison's homicide death was a murder and that Appellant committed it was Mr. Nock's interrogation statement. C.f. Kaczmar, supra. Consequently, the omitted, exculpatory portions of Appellant's interrogation statement were relevant to the State's burden of proof regarding the element of intent and Mr. Nock's legal defense. Under section 90.108(1), the trial court abused its discretion and erred by not compelling the State to admit the portions contemporaneously during Rivera's direct-examination testimony and erred in allowing the State to impeach Appellant's credibility under section 90.806. As in Foster, supra, and for the same reasons, the error in admitting Appellant's prior conviction was not harmless beyond a reasonable doubt. State v. DiGuilio, supra. This Court should reverse Appellant's conviction and remand for a new trial with directions that if the State seeks to admit Appellant's interrogation statement, all relevant, exculpating portions must be admitted contemporaneously with the inculpating portions.

CONCLUSION

Based on the foregoing arguments and the authorities cited therein, Appellant respectfully requests this Court to reverse the trial court's rulings and remand this cause with proper directions.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the Initial Brief of Appellant has been furnished to Celia Terenzio, Assistant Attorney General, 1515 N. Flagler Drive, Suite 900, West Palm Beach, FL 33401, by e-service at CrimAppWPB@myfloridalegal.com; and electronically filed with this Court on this 12th day of January, 2016.

/s Ian Seldin
Of Counsel

CERTIFICATE OF FONT SIZE

I HEREBY CERTIFY this brief is written in 12 point Courier New font in compliance with Fla. R. App. P. 9.210(a)(2).

/s Ian Seldin
Of Counsel