IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA, PETITIONER,	CASE NO. SC20-1419
v.	L.T. CASE NO. 5D19-590
JOHNATHAN DAVID GARCIA, RESPONDENT.	

MOTION TO STRIKE A PORTION OF PETITIONER'S REPLY BRIEF OR FOR LEAVE TO FILE A SUR-REPLY

The Respondent, Johnathan David Garcia, by and through the undersigned counsel, respectfully moves, pursuant to Florida Rules of Appellate Procedure 9.300 and 9.210, to strike the first sentence of the last paragraph in section II. B. of the Petitioner's Reply Brief on the Merits. In the alternative, Respondent seeks leave from the Court to file a brief sur-reply narrowly limited to the issue raised for the first time in the last paragraph of section II. B. of Petitioner's Reply. In support of this motion, the Respondent asserts the following:

In the State's Reply Brief on the Merits, on page 20, the State writes:

> Either way, the State **did** "offer[] . . . evidence": two sworn affidavits discussing the facts above. Affidavits can establish all manner of facts at

> pretrial hearings in criminal cases, *see, e.g., State v. Arthur*, 390 So. 2d 717, 720 (Fla. 1980) ("[E]vidence may be presented in the form of transcripts or affidavits."), and Respondent has not shown why this context is different.

Pet. RB at 20 (emphasis in original). The "two sworn affidavits" refer to the affidavits contained in the applications for the arrest warrant and search warrant officers obtained prior to the State filing its motion to compel the smartphone passcode.[1] App'x to IB at 3–4, 9–11. And "the facts above" refers to the three assertions made on page 19 of the State's Reply: "[f]irst, the victim told police that Respondent had been stalking her days before the crime and that on the night in question she heard his car leaving her boyfriend's residence where the phone was found"; "second, the victim identified the phone as Respondent's and when police asked her to call Respondent's phone, the black Samsung began ringing"; and "third, the phone number for Respondent in the police report matches the Samsung[.]"

The State claims in the first sentence of the last paragraph to section II. B. of its Reply arguments that the State "**did** 'offer[] . . .

[1] The undersigned counsel conferred with Petitioner's counsel by phone and, in addition to expressing the concerns contained in this motion, confirmed that these are the two affidavits to which this line from Petitioner's Reply refers.

evidence'"—the two affidavits used to acquire the warrants. Pet. RB at 20 (emphasis in original). The quoted phrase "offer[] . . . evidence" references the following argument in Respondent's Answer Brief: "The burden is on the State alone to prove the foregone conclusion exception. The State offered no evidence at its own motion hearing. It therefore failed to meet any evidentiary burden." Resp. AB at 64. Based on the context of this assertion in the Reply itself, along with the context of the quoted phrase as it was used in Respondent's Answer Brief, this sentence alleges (or at a minimum is likely to be interpreted by the reader to allege) that these affidavits were provided to the trial court at the hearing on the State's motion to compel and were considered by the trial judge, the Honorable Gail Adams, when she granted the State's motion. The record shows that neither is accurate.

A review of the transcript of the hearing shows that the only materials offered to the trial court at the hearing were a copy of the Second District's *State v. Stahl* opinion, a copy of the Fourth District's *G.A.Q.L. v. State* opinion, and the search warrant itself. App'x to IB at 6–7. Judge Adams' subsequent question after being offered a copy of the search warrant as to whether "what's in the phone [has] to do

with the stalking" demonstrates that Judge Adams was unaware of the contents of the application for the search warrant itself. App'x to IB at 7. A review of the court minutes attached to this motion also shows that no affidavits were offered into evidence at the hearing. Attachment A. And a review of the arrest and search warrants shows that they were each granted by judges other than Judge Adams, so Judge Adams did not review the referenced affidavits when they were originally used to acquire the warrants, either. Appx' to IB at 7, 12 (the arrest warrant application was reviewed by the Honorable Patricia Strowbridge and the search warrant application was reviewed by the Honorable Wayne Wooten).

Briefs that do not comply with the rules of appellate procedure governing their contents can be struck upon motion of the opposing party. *See, e.g., Greenfield v. Westmoreland*, 156 So. 3d 1 (Fla. 3d DCA 2007); *White v. White*, 627 So. 2d 1237 (Fla. 1st DCA 1993); *Williams v. Winn-Dixie Stores, Inc.*, 548 So. 2d 829 (Fla. 1st DCA 1989); *Davis v. Sails*, 306 So. 2d 615 (Fla. 1st DCA 1975). Florida Rule of Appellate Procedure 9.210(d) governs the contents of reply briefs, requiring that reply briefs "contain argument in response and rebuttal to argument presented in the answer brief." The first

sentence of the last paragraph of section II. B. of the Reply violates this rule in two ways: it improperly raises a new allegation of fact and it is not (and cannot be) supported with an appropriate citation to the record below.

Rule 9.210(d)—unlike subdivision (b) detailing the contents of an initial brief—does not allow for the inclusion of a statement of the case and facts. The reasoning for this can be plainly inferred: factual assertions should be made only in the initial and answer briefs so that each party has the opportunity to contest, correct, or comment on them. Permitting an appellant/petitioner to inject new factual assertions into a reply brief deprives the appellee/respondent the opportunity to comment on their accuracy or veracity. As evidenced here in the sentence at issue from the State's Reply, permitting appellants/petitioners to add new factual allegations raises the distinct possibility that appellants/petitioners might insert inaccurate factual assertions without objection. This new factual assertion that two affidavits were provided to the trial court at the hearing on the State's motion to compel is improper under rule 9.210(d) and should be stricken.

Additionally, rule 9.210(b)(3) requires that factual assertions come "with references to the appropriate pages of the record or transcript[.]" Yet, citations to any portion of the record below are conspicuously absent in the final paragraph of section II. B. of the Reply Brief. Pet. RB at 20. A review of the transcript of the hearing on the State's motion to compel contained in the State's own appendix to its Initial Brief, as well as the court minutes from that hearing provided along with this motion, show that no evidence was offered or admitted during the motion to compel hearing. There can be no record citations to support the State's claim that two affidavits were offered into evidence because the record below shows that no affidavits were offered into evidence. Since this claim in the first sentence of the last paragraph of section II. B. is without record citation and Respondent contends that no record citation could be made to support it, that statement should be stricken.

Finally, if the statement is allowed to stand, Respondent seeks leave to file a brief, limited sur-reply addressing the issue of what kind of evidence can be considered to prove a foregone conclusion. If the statement is stricken in acknowledgment that there is no record of evidence being presented to the trial court at the motion to compel

hearing, then Respondent believes the question of whether affidavits offered as hearsay evidence can be admitted at a motion to compel hearing to satisfy the foregone conclusion exception is moot. If no evidence was offered at the hearing, it is of no particular consequence at this point in time what kind of evidence might have been offered. But if the statement remains unstricken, then the Respondent should be afforded a limited opportunity to respond to Petitioner's challenge as to "why this context is different" from an *Arthur* hearing such that affidavits that would normally be admissible in the latter should not suffice for the former.

The State has injected a new factual assertion into its Reply Brief, the final brief submitted to this Court. In doing so, it has preempted the Respondent from commenting on its accuracy or veracity. More troubling still, based on Respondent's understanding of the statement's meaning, the claim is not supported by the record below. And the claim itself introduces a challenge to the Respondent to distinguish motion to compel hearings from *Arthur* hearings in regards to whether hearsay is admissible to prove a foregone conclusion. The statement should be stricken as improper under rule 9.210. In the alternative, the Respondent seeks leave from the Court

to file a brief sur-reply narrowly limited to the question of whether the two affidavits were or could be relied upon by the trial court as hearsay evidence.

Respectfully submitted,

ROBERT WESLEY, B.C.S.
Public Defender

By: _____

ROBERT THOMPSON ADAMS IV
Florida Bar No. 107152
Assistant Public Defender
radams@circuit9.org
407-270-0402

CATHERINE CONLON, B.C.S.
Florida Bar No. 663271
Assistant Public Defender
cconlon@circuit9.org

DAVID L. REDFEARN, B.C.S.
Florida Bar No. 21228
Assistant Public Defender
dredfearn@circuit9.org

MARIE TAYLOR
Florida Bar No. 1003697
Assistant Public Defender
mtaylor@circuit9.org

Office of the Public Defender
435 N. Orange Ave., Suite 400
Orlando, FL 32801

Counsel for Respondent

ATTACHMENT A

STATE OF FLORIDA
VS.

IN THE CIRCUIT COURT OF THE
NINTH JUDICIAL CIRCUIT IN AND
FOR ORANGE COUNTY, FLORIDA

CASE NUMBER: 2018-CF-005112-A-O
DIVISION: Adams, Gail A

JOHNATHAN DAVID GARCIA, Defendant

DOB: 8/28/1981

ORDER

This cause coming on this day for: **Hearing**, with Asst State Attorney, DIV. 10, present and you, the defendant, **JOHNATHAN DAVID GARCIA** being now Not Present **and represented by OFFICE OF PUBLIC DEFENDER, ESQUIRE** Present

Count: 1	THROWING DEADLY MISSILE AT, WITHIN, OR INTO A BUILDING	790.19	Second Degree - Felony
Count: 2	AGGRAVATED STALKING WITH A CREDIBLE THREAT	784.048(3)	Third Degree - Felony
Count: 3	AGGRAVATED STALKING WITH A CREDIBLE THREAT	784.048(3)	Third Degree - Felony
Count: 4	CRIMINAL MISCHIEF WITH DAMAGE OF MORE THAN $200	806.13(1)(B)(2)	First Degree - Misd
Count: 5	CRIMINAL MISCHIEF	806.13(1)(B)(1)	Second Degree - Misd

COURT ORDERS:
Court Minutes

States motion to compel: Granted, over strenuous objection by defense.

The defendant is to turn over the passcode to his phone to the State by 3-5-19 no later than 9:00 AM.

Dates to remain as previously set.

DONE, ORDERED and FILED in Open Court on March 4, 2019

Honorable Judge: Gail A. Adams
Gail A Adams

JOHNATHAN DAVID GARCIA / 2742 CORAL REEF DR
ORLANDO, FL, 32826

Deputy Clerk in Attendance:
Office of Tiffany M. Russell, Orange County Clerk of the Circuit and County Courts

COPIES TO:

____ Probation Email	____ ACS	____ State Atty	____ Defense Atty
____ Dockets	____ C.F.S.C.	____ Other	____ Defendant

PAYMENT LOCATIONS (Monday – Friday) If paying by check/money order, please make check/money order payable to Orange County Clerk of Courts.

Downtown 425 N. Orange Ave., Suite 250/410 Orlando, FL. 32801	**Northeast Branch** 450 N. Lakemont Ave. Winter Park, FL. 32792	**Northwest Branch** 1111 N. Rock Springs Rd. Apopka, FL. 32703
West Orange Branch 475 Story Rd. Ocoee, FL. 34761 Monday through Friday		**Goldenrod Branch** 684 Goldenrod Road Orlando, FL 32822

CERTIFICATE OF SERVICE

I hereby certify that this original document has been E-Filed on October 1, 2021, through the Florida Courts E-Filing Portal and E-Served to:

Jeffrey Paul Desousa
Chief Deputy Solicitor General
Office of the Attorney General
The Capitol, PL-01
Tallahassee, FL 32399
jeffrey.desousa@myfloridalegal.com

Christopher J. Baum
Senior Deputy Solicitor General
christopher.baum@myfloridalegal.com

Jason H. Hilborn
Assistant Solicitor General
Jason.hilborn@myfloridalegal.com

ROBERT WESLEY, B.C.S.
Public Defender

By: _____

ROBERT THOMPSON ADAMS IV
Florida Bar No. 107152
Assistant Public Defender
435 North Orange Avenue Suite 400
Orlando, Florida 32801
radams@circuit9.org
(407) 270-0402