IN THE CIRCUIT COURT OF THE SECOND JUDICIAL CIRCUIT,
IN AND FOR LEON COUNTY, FLORIDA
CRIMINAL ACTION

STATE OF FLORIDA, Plaintiff, v. DARREL HARVEY, Defendant.	Case No. 37-2017-CF-000526

DEFENDANT'S SECOND OR SUCCESSIVE MOTION FOR POST-CONVICTION RELIEF

COMES NOW the Defendant, DARREL HARVEY, by and through undersigned counsel, pursuant to Fla. R. Crim. P. 3.850, and hereby moves this Court for an Order vacating or setting aside his Judgement and Sentence and holding an evidentiary hearing, among other relief, and in support thereof states as follows:

PROCEDURAL BACKGROUND

1. On February 13, 2017, Mr. Harvey was arrested in the above-styled case; he was charged by Information on March 24, 2017 with the following counts: (1) Travelling to Meet a Minor, (2) Soliciting of a Minor via Computer, and (3) Tampering with Physical Evidence.

2. On October 10, 2017, Mr. Harvey filed his first Motion to Dismiss, under Fla. R. Crim. Pro. 3.190(c)(4), arguing Entrapment under Fla. Stat. 777.201.

3. On October 30, 2017, Mr. Harvey filed his Second Motion to Dismiss, under Fla. R. Crim. Pro. 3.190(c)(4), arguing that Count II, as charged as it was in the information with the removal of reference to Chapters 794, 800 and 827, provided "insufficient allegations to apprise [*i.e. notice*] the Defendant as to what "other unlawful sexual conduct" he was attempting to commit."

4. On January 10, 2018, Mr. Harvey amended his Second Motion to Dismiss, adding the argument that the State illegally changed the language of the Statute in charging Count I of the Information by adding the language "or another person believed to be a child."

5. On January 30, 2018, the State traversed Mr. Harvey's Motions to Dismiss as to entrapment. Mr. Harvey moved to strike the traverse as insufficient and belatedly filed.

6. A hearing was held on January 31, 2018. The Court found there to be issues of material fact in dispute and dismissed by order on February 2, 2018 all of Mr. Harvey's Motions to Dismiss. Grounds were not articulated for the dismissal of the arguments concerning the charging language of the Information.

7. Nevertheless, on February 13, 2018, the State filed an Amended Information, correcting the date as charged in Count III, and adding the statutory language of "illegal act described in Chapter 794, Chapter 800, or Chapter 827" to Count II; otherwise the Information remained unchanged.

8. On March 16, 2018 Mr. Harvey file a Motion to Dismiss under Fla. R. Crim. Pro 3.190(b) for a Brady violation, arguing the State had not turned over the original online profile used by undercover police in their operation.

9. The case was set for trial on March 22, 2018. However, a mistrial was announced on that day as only five jurors were available and neither party wanted to proceed as such.

10. On March 28, Mr. Harvey's counsel Frank Sheffield withdrew, and attorney James Judkins filed his notice of appearance on the Defendant's behalf.

11. On March 29, 2018, the Court filed an order denying Mr. Harvey's renewed Motions to Dismiss based on entrapment and the invalidity of the Information.

12. Trial was reset for May 21, 2018.

13. On May 20, 2018 Mr. Harvey's counsel filed a proposed jury instruction based upon the 39.203(1)(A) "good faith" defense. The instruction was subsequently denied by the court, prior to jury selection, on May 21, 2018.

14. On May 23, 2018 Mr. Harvey was found guilty by the jury on all three counts.

15. On May 24, 2018 Mr. Harvey was sentenced on Counts I and III (Count II was dismissed pursuant to motion) to 36 months DOC concurrently, and 5 years of Sex Offender Probation to run consecutively on Count I.

16. On May 31, 2018 Mr. Harvey filed a motion renewing his motion for Judgement of Acquittal following the jury verdict; he argued: Count II is unconstitutionally vague, as charged, and furthermore is subsumed into Count I; there was no competent substantial evidence in the record to support Mr. Harvey attempted to engage in "other unlawful sexual conduct" for Count I, as "other unlawful conduct" is not defined by statute; and concerning Count III that as a matter of law Mr. Harvey did not destroy evidence as the text messages were archived in the "cloud".

17. On June 4, 2018 Mr. Harvey filed his Motion for a New Trial, arguing that the court failed to properly instruct the jury concerning Mr. Harvey's duties and immunity under sections 39.201(1)(a), 39.203(1)(a) and 39.205(1).

18. Both motions were denied by written order on June 7, 2018, without hearing.

19. Following his Judgment and Sentence, on June 14, 2018, Mr. Harvey filed his Notice of Appeal on June 28, 2018 and pursued a direct appeal through the entire process.

20. The grounds for his appeal were as follows:

A. The trial court failed to dismiss a defective information, failed to grant a judgment of acquittal and subsequently erroneously instructed the jury based on the language the State chose to use in the charging document.

B. The trial court erred in denying Harvey's motion for judgment of acquittal where the State established only that Harvey may have deleted evidence existing in the memory of his cellular telephone, and the evidence resided elsewhere.

C. Fundamental sentencing error occurred when the trial court took Harvey's protestations of innocence into account immediately prior to imposing sentence.

D. The trial court committed sentencing error in imposing inappropriate special conditions of probation.

21. During the appellate process, Mr. Harvey filed on January 15, 2019 a 3.800 Motion to Correct Sentence focused on errors in the probationary portion of his sentence.

22. The Motion was granted in part and denied in part, and on February 1, 2019 a corrected Judgement and Sentence was filed.

23. On November 10, 2020 the First District Court of Appeals filed its mandate affirming the trial court's decisions.

24. Following the First DCA's mandate, appellate counsel withdrew.

25. On November 16, 2020, Mr. Harvey filed a pair of *pro se* motions under Fla. R. Crim. Pro. 3.800 and 3.850.

26. The grounds of the 3.850 were as follows: Ground One argued that the addition of "another person believed to be a child" was unlawfully added to the charging document; Ground Two argued that the court fundamentally errored in admitting the State's Williams Rule evidence; and Ground Three argued fundamental error by the State for a Brady Violation.

27. Both motions were denied, without hearing, by written order on November 20, 2020.

28. A December 3, 2020 Motion for rehearing on the post-conviction motions was also denied by written order without hearing.

29. The preceding procedural history is not exhaustive but addresses what the undersigned believes to be relevant to the foregoing motion.

ARGUMENT AND INCORPORATED MEMORANDUM OF LAW

30. As Mr. Harvey's Judgement & Sentence did not become final until the DCA issued its mandate on November 10, 2020, this post-conviction motion is timely pursuant to §3.850(b).

31. The present motion is a successive motion for collateral relief under §3.850(h).

32. Per the procedural history above, Mr. Harvey filed a *pro se* 3.850 motion on December 16, 2020.

33. Mr. Harvey's 3.850 was reviewed upon its merits and denied by written order, without hearing on November 20, 2020 for being legally insufficient, or not stating a ground cognizable under 3.850.

34. Although not favored by courts, successive 3.850 motions are permitted by Fla. R. Crim. Pro. 3.850(h).

35. When filing a successive motion for postconviction relief, the burden is on the movant to allege grounds that are new and different than those raised in the previous motion and justify his or her failure to raise the asserted grounds in the previous motion. *Koons v. State*, 165 So.3d 718 (Fla. 5th DCA 2015).

36. The detailed procedural history, laid out above, including the grounds argued on the various motions and appeals, demonstrates that the grounds raised herein are new and different from any post-conviction motion or appeal filed in this matter so far.

37. Additionally, as Mr. Harvey filed his original 3.850 motion *pro se*, without the aid or advice of counsel, he should be provided leniency by the court for not having asserted all grounds available to him originally.

A. <u>It was Ineffective Assistance of Counsel to Fail to Raise the Section 39.203 Good Faith Immunity Defense by Pre-Trial Motion</u>

38. It is well settled that a claim for ineffective assistance of counsel is cognizable under Fla. R. Crim. Pro. 3.850. *Henry v. State*, 933 So.2d 28 (Fla. 2nd DCA 2006). *Hagen v. State*, 8989 So.2d 977 (Fla. 5th DCA 2005) (Defendant's claim of ineffective assistance of counsel ... should have been asserted in a post-conviction motion, instead of on direct appeal).

39. Section 39.201 of the Florida Statues makes all people "mandatory reporters" should "any person who knows, or has reasonable cause to suspect a child is in need of supervision and care and has no parent, legal custodian, or responsible adult relative

immediately known and available to provide supervision," or "has reasonable cause to suspect, that a child is the victim of sexual abuse or juvenile sexual abuse..." Fl. Stat. 39.201(1)

40. Section 39.205(1) charges any "person who knowingly and willfully fails to report to the central hotline known or suspected child abuse, abandonment or neglect" with a felony of the third degree.

41. In order to ameliorate mandatory reporting and its penalties, Section 39.203 of the Florida Statutes provides for an immunity defense should a "good faith" mandatory reporter land in legal trouble as a consequence of his or her participating in good faith or reporting. The pertinent language reads:

> *Any person, official, or institution participating in good faith in any act authorized or required by this chapter, or reporting in good faith any instance of child abuse, abandonment, or neglect to the department or any law enforcement agency, shall be* ***immune*** *from any civil* ***or criminal liability*** *which might otherwise result by reason of such action. Fl. Stat. 39.203(1)(a).*

42. Rule 3.190 of the Fla. R. Crim. Pro. provides avenues for Defendants to file motions to dismiss for "[a]ll defenses available ... other than not guilty," and seek evidentiary hearings in support thereof. Specifically, the rule "provides that immunity may be raised "at anytime." *Meek v. State*, 566 So.2d 1318 (Fla. 4th DCA).

43. Pursuant to a similar statutory "good faith" immunity provision, in *Pope v. State* the Defendant Thomas Pope utilized Fla. R. Crim. Pro. 3.190 and moved to dismiss his possession of heroin and marijuana under Fl. Stat. 893.21(1) "which provides that anyone "acting in good faith who seeks medical assistance for an individual experiencing a drug-related overdose" is immune from prosecution for drug possession." *Pope v. State*, 246 So.3d 1282 (Fla. 1st DCA 2018).

44. Likewise, in *Jenny v. State*, the Defendant asserted his immunity defenses by 3.190 Pre-Trial Motion to Dismiss. *Jenny v. State*, 447 So.2d 1351 (Fla. 1984).

45. Questions of immunity are mixed questions of law and fact.

46. "The question of whether a defendant is entitled to immunity under Stand Your Ground law is a mixed question of law and fact because to answer it one must determine the governing law as stated in the statute, find the operative facts, and apply the law to those facts." *Bouie v. State*, 292 So.3d 471 (Fla. 2nd DCA 2020).

47. In *Meek v. State* for example—concerning transactional immunity that "precludes the exercise of a court's jurisdiction"—the appellate court noted that "the state has cited evidence in the record that indicates the appellant is not entitled to immunity," and reversed on that issue "remand[ing] [the] cause to the trial court for resolution of the immunity issue." *Meek v. State*, 566 So.2d 1318 (Fla. 4th DCA 1990) at 1321.

48. Likewise in *Pope v. State*, where "good faith" immunity was at issue, the defendant's actions in calling for medical help for a friend suffering an overdose, and then subsequently leaving the friend on the porch and refusing to answer EMS's questions, formed the core of the inquiry at the Motion to Dismiss hearing. The question, of course, being whether Mr. Pope's actions demonstrated action in good faith or not, such that he would qualify for immunity under the statute. *Pope v. State*, 246 So.3d 1282 (Fla. 1st DCA 2018).

49. It is therefore clear that qualification for immunity under a "good faith" statute is a mixed question of law and fact that can only be determined through some manner of evidentiary hearing.

50. It is likewise clear that Fla. R. Crim. Pro. 3.190 provides the appropriate vehicle for a pre-trial evidentiary hearing to resolve the assertion of an immunity defense.

51. True immunity is not an affirmative defense. *Martinez v. State*, 44 So.3d 1219 (Fla. 1st DCA 2010). Immunity protects a qualified defendant from prosecution, not just conviction.

52. Accordingly, "a defendant may raise the question of statutory immunity pretrial and, when such a claim is raised, the trial court must determine whether the defendant has shown by a preponderance of the evidence that the immunity attached." *Peterson v. State*, 983 So.2d 27 (Fla. 1st DCA 2008) at 29.

53. In the instant case, upon the departure of attorney Frank Sheffield and the retention of attorney James Judkins, Mr. Harvey made clear to attorney Judkins that he did not want to pursue an entrapment defense, as it was not true according to the facts. Rather he wanted to pursue the statutory immunity protections provided for a good faith reporter.

54. Nevertheless, Mr. Harvey's attorney did not raise the issue of Chapter 39 Immunity until trial. Per the procedural history above, the first time Mr. Harvey's attorney made any use of "good faith" immunity was on May 20, 2018, when attorney Judkins filed a proposed jury instruction asserting the statutory language of section 39.203 (presumably as an affirmative defense).

55. The jury instruction was subsequently denied without evidentiary hearing. And following the denial, attorney Judkins was not able to even file a writ of prohibition on the matter as is the generally acknowledged remedy for denials of qualification of immunity. *Rosario v. State*, 165 So.3d 852 (Fla. 1st DCA 2015) (In the context of the denial of a motion to dismiss on Stand Your Ground immunity, prohibition has typically been the preferred remedy because the issue involves a determination of whether the circuit court has continuing jurisdiction over the defendant.)

56. Failing to assert Mr. Harvey's Good Faith Immunity Defense at a pre-trial motion to dismiss, and only attempting to assert it as an affirmative defense at trial, amounted to ineffective assistance of counsel.

57. Failing to raise a proper defense is a broadly acknowledged ground for evaluating ineffective assistance of counsel. *Grosvenor v. State*, 874 So.2d 1176 (Fla. 2004)(concerning counsel's failure to advise of a voluntary intoxication defense). *Straitwell v. State*, 834 So.2d 918 (Fla. 2nd DCA 2003)(concerning failure to advise of voluntary intoxication defense). *Lukehart v. State*, 70 So.3d 503 (Fla. 2011)(concerning failure to raise a diminished capacity defense). *Monroe v. State*, 76 So.3d 1049 (Fla. 5th DCA 2011)(concerning failure to raise an affirmative defense).

58. To state a claim of ineffective assistance of counsel in violation of the Sixth Amendment, a defendant must allege (1) counsel's performance was deficient, and (2) the deficient performance must have prejudiced the defense so as to deprive the defendant of a fair trial. *Strickland v. Washington*, 466 U.S. 668 (1984).

59. The benchmark for judging claims of ineffective assistance of counsel is whether the conduct of counsel so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result. *Downs v. State*, 453 So.2d 1102 (Fla. 1984)(quoting *Strickland*).

60. When claiming ineffective assistance of counsel there is a strong presumption of reasonableness that must be overcome, and strategic or tactical decisions by counsel are virtually unchallengeable. *Downs* at 1108. Nevertheless, patently unreasonable decisions, even though characterized as "tactical," are not immune. *Roesch v. State*, 627 So.2d 57 (Fla. 2nd DCA 1993).

61. For example, in *State v. Hester*, counsel advised his client to waive his right to a pre-trial evidentiary hearing on Stand Your Ground Immunity for fear that the client's testimony at hearing could be used substantively against him at trial, to negative effect. The court found this decision to be strategic and not a product of ineffective assistance of counsel. *State v. Hester*, 319 So.3d 126 (Fla. 3rd DCA 2021).

62. Conversely, in *Cabrera v. State*, despite the defendant's urging to pursue an entrapment defense, counsel declined, reasoning that "she did not think it a viable [defense] based on Pinellas County drug arrest and evidence of a connection between Mr. Cabrera and the confidential informant who allegedly entrapped him." The court found this tactic unreasonable, holding that "[i]n the absence of another viable defense ... the failure to pursue the entrapment defense constituted ineffective assistance of counsel." *Cabrera v. State*, 766 So.2d 1131 (Fla. 2nd DCA 2000).

63. In the instant case, there was no strategic reason to decline asserting immunity by pre-trial motion to dismiss and assert it instead as an affirmative defense at trial.

64. Original counsel, Frank Sheffield, did not assert Mr. Harvey's immunity defense at all.

65. Subsequent attorney James Judkins, who appointed to the case on March 28, 2018, did not assert Mr. Harvey's immunity until the eve of trial, two months later, on May 21, 2018. Accordingly, Mr. Judkins, though a latecomer to the case, had ample time to seek a pre-trial hearing.

66. Moreover, a review of the trial record shows that the provisions of Chapter 39 constituted the core of attorney Judkins' chosen defense. Yet because he asserted the defense merely through a requested jury instruction (which was denied), the immunity defense became haphazard and watered down, without fully seeking the statutory and procedural rights provided by 39.203 and a pre-trial hearing under 3.190.

67. For example, during *motion-in-limine* argument Mr. Harvey's counsel appropriates the nature of section 39.203 immunity and transform it into a *mens rea* argument attacking the elements of the charge:

> He had to have the intent to solicit, lure, induce, et cetera. If what his intent was, was not to solicit for the purposes of sex or for some other criminal purpose but for gathering information for the purposes of reporting to law enforcement, it is not an entrapment defense but attacks the very elements of the crime itself, Your Honor.

(Volume 1, pages 12 and 13 of the record).

68. Further, in opening statements counsel again refers to Mr. Harvey's "intentions" and alludes to evidence that could form the evidentiary basis for evaluating qualification for immunity. For example:

> So what the evidence will lead you to conclude, if she's 14, he's got to report it. If he's -- she's 18, then there's nothing to report. But he's got to know, otherwise he could be prosecuted himself, because people can find these messages like this one.

(Volume 1, page 52 of the Record).

69. There is no evidence that the presentation of Mr. Harvey's immunity defense was done in this manner for any particularly strategic reason. The evidence did not depend upon the defendant's pre-trial testimony which might expose his statements to cross-examination or substantive use at trial; seeking "immunity" did not conflict with counsel's chosen defense strategy (indeed it formed the core of it); nor was there any apparent concern about telegraphing a defense strategy, as the jury instruction was filed pre-trial.

70. Instead, it appears counsel simply failed to raise immunity pre-trial. The result was Mr. Harvey's counsel had to proceed on—as the counsel in *Cabrera v. State* put it—a "bastardized" theory of immunity, without being able to call it that, and without being able to invoke the actual language of the statute.

71. In effect, Mr. Harvey's counsel, while well aware of his client's desire to raise the matter of immunity, and while reasonably qualifying for it on the plain language of the statute, neither asserted it pre-trial, nor attempted to have the matter cleanly adjudicated at trial.

72. By asserting the immunity defense solely via jury instruction, and failing to insist upon any sort of evidentiary hearing, the immunity defense was treated soley as an application for an affirmative defense (instead of true immunity), allowing the court to dismiss the instruction without evidentiary hearing. *See infra* ¶¶ 97 through 99.

73. Per *Roesch v. State*, 627 So.2d 57 (Fla. 2nd DCA 1993), counsel's decisions and approach to asserting Mr. Harvey's immunity were patently unreasonable, despite any possible claim to tactic or strategy. Counsel's failure to seek a pre-trial immunity hearing can only be interpreted as error.

74. And as a result, Mr. Harvey was denied a significant substantive right. Indeed, the core of Mr. Harvey's argument at trial was that he lacked the *mens rea* of the crime, that his intent in communicating with the alleged child was not for the purpose of unlawful solicitation, but for the good faith reporting of a potentially abused, neglected or abandoned child as he believed he had a duty to do under 39.205. And yet, attorney Judkins' error prevented Mr. Harvey from making actual use of the statute in his defense.

75. Indeed, it is important to note that throughout the entire trial, including closing argument, attorney Judkins never invoked the defense of entrapment at all. His entire defense focused in immunity, of which he had closed the door upon himself before the trial even started.

76. Seeing as a proper pre-trial hearing and adjudication upon the question of immunity could be dispositive in Mr. Harvey's case, his counsel's failure to assert immunity under Fla. R. Crim. Pro. 3.190 so undermined the proper functioning of the adversarial process that the case cannot be relied on as having produced a just result. *Downs v. State*, 453 So.2d 1102 (Fla. 1984).

77. Accordingly, Mr. Harvey requests this court vacate and set aside his Judgement and Sentence for ineffective assistance of counsel, or in the alternative to hold an evidentiary thereon.

B. <u>It was Fundamental Error to Deny Mr. Harvey an Evidentiary Hearing on Section 3.203 Immunity at Trial</u>

78. This ground is properly asserted under Fla. R. Crim. Pro. 3.850 pursuant to *Johnson v. State*, 460 So.2d 954 (Fla. 5th DCA 1984).

79. In *Johnson* the court found that "a fundamental error may be presented for the first time on appeal or collaterally attacked in post-conviction proceedings such as by motion under 3.850." *Johnson* at 957. In *Johnson* the fundamental issue was double jeopardy.

80. Likewise, in *Meek v. State*, 566 So.2d 1318 (Fla. 4th DCA 1990), the court found that a fundamental issue (in this case immunity) could be asserted for the first time via motion

for collateral relief. "[I]mmunity, like double jeopardy, is a fundamental issue that may be raised post-trial." *Meek* at 1321.

81. Section 39.203 of the Florida Statutes grants defendants a substantive right to assert immunity from prosecution and to avoid being subjected to a trial.

82. The "cardinal rule" of statutory construction is "that a statute should be construed so as to ascertain and give effect to the intention of the legislature as expressed in the statute." *Reeves v. State*, 957 So.2d 625 (Fla. 2007).

83. "[S]tatutory enactments are to be interpreted so as to accomplish rather than defeat their purpose." *Id.* at 269.

84. For example, in *Dennis v. State*, when the issue was whether Stand Your Ground Immunity under 776.032(1) should be asserted procedurally under Fla. R. Crim. Pro. 3.190(c)(4) or 3.190(b), the Florida Supreme Court read the plain language of the statute to provide a substantive right "to not be arrested, detained, charged, or prosecuted as a result of the use of legally justified force ... not merely ... that a defendant cannot be convicted as a result of legally justified force." *Dennis v. State*, 51 So.3d 456 (Fla. 2010).

85. Accordingly, the court found that an immunity hearing under 776.032(1) may only realistically be accomplished under 3.190(b), which allows for factual disputes in the assertion of immunity at pre-trial hearing, as opposed to 3.190(c)(4) which requires the facts be undisputed and would allow the prosecution to defeat the purpose of the statute with a simple traverse. *Dennis* at 462.

86. The plain language of 776.032(1) that the court relied upon in reaching this conclusion reads as follows:

> *[A] person who uses force as permitted in s. 776.012, s. 776.013, or s. 776.031 is justified in using such force and is immune from criminal prosecution and civil action for the use of such force...*

87. Section 39.203 contains similar language:

Any person, official, or institution participating in good faith in any act authorized or required by this chapter, or reporting in good faith any instance of child abuse, abandonment, or neglect to the department or any law enforcement agency, shall be immune from any civil or criminal liability which might otherwise result by reason of such action.

88. Like section 776.032(1), section 39.203 is clearly designed to provide a defendant a substantive right to avoid being subjected to a trial, not merely assert immunity as an affirmative defense at trial.

89. Nevertheless, should a defendant for strategic reasons choose to waive asserting immunity at pre-trial hearing, immunity can still be asserted at trial as an affirmative defense. *State v. Hester*, 319 So.3d 126 (Fla. 3rd DCA 2021).

90. In fact, the presentation of an immunity defense at trial moots and subsumes any previous error that occurred at an immunity hearing. *Boston v. State*, 296 So.3d 580 (Fla. 1st DCA 2020).

91. However, the fundamental error in this case is that the court did not permit Mr. Harvey the opportunity to present immunity as an affirmative defense.

92. As discussed in Section A above, regardless whether immunity is asserted pre-trial or at trial, once a defendant raises the question of statutory immunity a court must provide for an evidentiary hearing in order to resolve the issue on its merits.

93. In the instant case, at trial Mr. Harvey was provided neither a full evidentiary hearing on the question of immunity to find the operative facts, nor was he provided an opportunity to apply the operative law to those facts. *See Bouie v. State*, 292 So.3d 471 (Fla. 2nd DCA 2020).

94. Although the court allowed judicial notice to be taken of certain parts of the Chapter 39 statutory ensemble concerning mandatory reporting, the court only allowed argument concerning the statutes insofar as it provided evidence of Mr. Harvey's "intent" in

relation to elements of the charge. It did not permit the inclusion of the statute in the jury instructions.

95. The State was quick to point this distinction out to the jury:

> Now, they were able to get into evidence the statute. Okay. You'll have this back there with you, but this isn't the law that you are to apply in this case. This is the law. It has the elements, everything -- all the law that you are to apply, how to evaluate the evidence, the credibility of witnesses, it's all contained in here.

(Volume III, page 615 of the Record)

96. In other words, Mr. Harvey was not able to argue immunity as an affirmative defense as the court denied inclusion of the immunity statute in the jury instructions.

97. No doubt the question of immunity was raised by Mr. Harvey when his counsel filed the proposed jury instruction on May 20, 2018. So, the question remains, was Mr. Harvey provided a hearing on the issue? It did not occur under Fla. R. Crim. Pro 3.190, and it didn't happen as an affirmative defense argued to the jury.

98. In fact, no evidentiary hearing was held whatsoever concerning Mr. Harvey's qualification for section 39.203 Immunity. The issue was raised by the State before jury selection even began, in order to determine the scope of questioning:

> I wasn't sure if they were planning to address anything about that defense in jury selection. The State does object to that. So if they're going to be talking about it in jury selection, I'd request we talk about this now.

(Jury Selection, page 4 of the Record)

99. The trial court had heard no evidence at this point, however proceeded to hear argument upon the matter and rule against Mr. Harvey.

> THE COURT: All right. The request is denied. This is not the type of case where this good faith defense is applicable. Whether or not he was participating in any act authorized or required by law, I'm not going to find that the facts justify an instruction in that regard.
>
> And so there won't be any mention of a good faith defense during the jury selection process. And this instruction will not be given, unless, for some reason, there is something raised during the course of the evidence that merits that I readdress it. But I don't anticipate that.

(Jury Selection, page 9 of the Record)

100. It is clear the court believed itself (in error) to be merely ruling upon an affirmative defense, and not the assertion of a true immunity defense.

101. Even were that the case, the court's ruling touches upon issues of fundamental error.

102. When a challenged jury instruction involves an affirmative defense, as opposed to an element of the crime, fundamental error only occurs when a jury instruction is so flawed as to deprive the defendant of a fair trial. *Morgan v. State*, 127 So.3d 708 (Fla. 5th DCA 2013).

103. Here the denial of the immunity instruction altogether, the core of Mr. Harvey's defense, was so flawed that it deprived him of a fair trial.

104. Moreover, the issue of an affirmative defense should not be resolved by a judgment of acquittal and should be submitted to the jury where the facts are disputed. *See Dias v. State*, 812 So.2d 487, 491 (Fla. 4th DCA 2002).

105. Whereas a judgment of acquittal hearing follows the presentation of at least the State's evidence, the trial court's perfunctory pre-jury selection hearing had the benefit of no evidence, and should not have resolved the issue of immunity at that point of the proceedings.

106. Nevertheless, the court should have recognized that Mr. Harvey's assertion of a good faith immunity defense could not be resolved without an evidentiary hearing. Evidentiary

Hearings are routinely held concurrent with the admission of evidence at trial, and issues ruled upon at the appropriate point in the trial process. Clearly this did not happen in this case, which amounted to fundamental error appropriately asserted under Fla. R. Crim. Pro. 3.850.

107. Accordingly, Mr. Harvey requests this court vacate his Judgment and Sentence, or in the alternative hold an evidentiary hearing to resolve the issue of immunity.

C. Mr. Harvey is Fundamentally Entitled to an Evidentiary Hearing on Section 39.203 Immunity

108. As laid out above, despite Mr. Harvey raising the question of section 39.203 statutory immunity, at no time during the proceedings was he afforded a clean and focused evidentiary hearing on the matter; either pre-trial, due to the ineffective assistance of his counsel, or at trial due to the fundamental error of the trial court.

109. The question of immunity is fundamental and appropriately raised by Fla. R. Crim. Pro 3.850.

110. In *Meek v. State*, the defendant raised the issue of immunity for the first time in a motion for post-conviction relief. The court, comparing immunity to double jeopardy (wherein the primary purpose of the double jeopardy clause "is to prevent a trial from taking place at all, rather than to prescribe procedural rules that govern the conduct of a trial"), and finding that double jeopardy can clearly be asserted for the first time post-conviction, held the comparable fundamental nature of immunity allowed the matter also to be raised post-conviction. *Meek v. State*, 566 So.2d 1318 (Fla. 4th DCA 1990).

111. The District Court remanded *Meek* to the trial court to resolve the immunity issue, regardless of the State's insistence that the record expressed evidence disqualifying the defendant for immunity. *Meek* at 1321.

112. In the instant case, the question of Mr. Harvey's qualification for immunity under section 39.203 has not been ruled upon on the merits, and according to *Meek* may be asserted for the first time in a post-conviction proceeding.

113. According to the record, the most substantive hearing provided Mr. Harvey concerning his assertion of section 39.203 occurred immediately before jury selection on May 21, 2018.

114. As discussed *supra*, ¶ 97, the matter of immunity was discussed in the context of a jury instruction, which the State sought an immediate ruling upon in order to determine the scope of questioning at jury selection.

115. Based upon both the State and Defendant counsels' representation of the facts, and the court's own memory of discovery already in the record, the court ruled that the instant case "is not the type of case where this good faith defense is applicable." *See supra* ¶98.

116. After further argument, wherein defense counsel requested to present evidence (and was denied), the court reaffirmed its denial of the instruction:

> THE COURT: All right. It's denied. I mean, this is -- this instruction goes with child abuse and whether or not there is some good faith need or to report the child abuse and the liability for that if there in fact wasn't any child abuse, the fact that he had a good faith, a good faith belief that there was something of that nature going on. And it just doesn't fit the facts of this case. The request is denied.

(Jury Selection, page 11 of the Record)

117. Clearly the Court believed itself to be ruling upon an issue of mixed law and fact—yet the hearing carried no earmarks of an evidentiary hearing. Witnesses were not called; testimony was not taken; and evidence was not submitted.

118. "Neither the submission of affidavits nor argument of counsel is sufficient to constitute an evidentiary hearing. Since the purpose of an evidentiary hearing is to allow a party to 'have a fair opportunity to contest the factual issues, this purpose is not effectuated if a party is not allowed to testify." *Sperdute v. Household Realty Corp.*, 585 So.2d 1168, 1169 (Fla. 4th DCA 1991).

119. For example in *United Automobile Insurance Company v. Professional Medical Group, Inc.*, where the trial court attempted to substitute discovery proceedings in place of an evidentiary hearing on something as mundane as the reasonableness of attorneys fees, the District Court found that to be a violation of Due Process. *United Automobile Insurance Company v. Professional Medical Group, Inc.*, 318 So.3d 1261 (Fla. 3rd DCA 2021).

120. Moreover, the nature of Mr. Harvey's assertion of section 39.203 immunity could not be so lightly ruled upon without making an evidentiary record.

121. Section 39.203 is a scantly interpreted statute. A review of the citation history of the section in Westlaw reveals only eleven (11) cases citing to it.

122. Yet, as discussed supra, ¶¶ 81 through 88, the plain language of section 39.203 encompasses actions authorized or required under Chapter 39.

123. Although the State insists that Mr. Harvey could not qualify for section 39.203 immunity because he did not "report", Mr. Harvey maintains his insistence that his actions were undertaken for the purpose of acquiring information in order to report, according to statute.

124. Neither the Court nor the State cited any authority (nor does any such authority even exist) supporting the conclusion that Mr. Harvey does not qualify for the protection of section 39.203 immunity.

125. An evaluation of "good faith"—such as is required by section 39.203—is a fundamentally fact intensive inquiry. "Good faith" is a state of mind that can only be measured by evidence of a defendant's intentions against the objective evidence of his actions.

126. Since the law is clear that qualification for immunity cannot be determined without an evidentiary hearing, and that such a hearing may take place at any time; and the record is clear that despite asserting the statutory protections no evidentiary hearing was ever held; therefore Mr. Harvey is entitled to seek, post-conviction, a hearing upon his qualification for immunity under section 39.203.

WHEREFORE, Defendant, Darrel Harvey, respectfully requests (1) the entry of an Order vacating and setting aside the Judgement and Sentence for ineffective assistance of counsel, or in the alternative hold an evidentiary hearing thereon; (2) the entry of an Order vacating or setting aside his Judgement and Sentence for the fundamental error of denying the affirmative defense of immunity, or in the alternative to hold an evidentiary hearing thereon; and (3) to hold an evidentiary hearing on the issue of "good faith" immunity under section 39.203 of the Florida Statutes.

Respectfully submitted on October 1, 2021.

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I, DARREL HARVEY, have reviewed and understand the contents of this motion. All of the facts stated herein are accurate and true. This motion is filed in good faith, with reasonable belief that it is timely filed. The motion has potential merit, nor does the motion duplicate previous motions that have been disposed of by the court. I read and write the English language.

Darrel Harvey

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by electronic mail to:

Khari James, Esq.
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on October 1, 2021.

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