IN THE DISTRICT COURT OF APPEAL
FIFTH DISTRICT OF FLORIDA

CASE NO.: 5D2024-_____

TAMARA L. SYTCH,

Petitioner,

v.

JAMES F. PENTE; ULTIMATE MOTOR CARS, LLC, a Florida Limited Liability Corporation; and WHITNEY L. HILL, as Personal Representative of the Estate of JULIAN L. LASSETER, deceased,

Respondents.
_____/

PETITION FOR WRIT OF COMMON LAW CERTIORARI

Petitioner/Defendant, TAMARA L. SYTCH ("Petitioner"), files this Petition for Writ of Common Law Certiorari pursuant to Florida Rule of Appellate Procedure 9.100, to review an Order of the Volusia County Circuit Court which erroneously overrules Ms. Sytch's objections to Respondent/Plaintiff's Notice of Production from Non-Parties and denies her Motion for Limited Stay.[1] This Order should be quashed because it

[1]Petitioner is simultaneously filing an emergency motion requesting this Court to stay the lower court case, or minimally the requested discovery, pending the outcome of this appellate proceeding, pursuant to

permits production of communications and medical records in violation of Ms. Sytch's Fifth Amendment right against self-incrimination, her right to privacy under the Fourth Amendment and Florida Constitution, and permits disclosure of materials unrelated to this automobile accident case and in violation of attorney-client and work-product privileges.

The appendix will be cited as "A," followed by the appropriate page number.

JURISDICTION

This Court has jurisdiction under Article V, Section 4(b)(3), of the Florida Constitution and Florida Rules of Appellate Procedure 9.030(b)(3).

Orders requiring discovery are proper subjects for certiorari since erroneously compelled disclosures, once made, constitute irreparable harm which cannot be remedied by way of appeal. *See Allstate Ins. Co. v. Langston*, 655 So. 2d 91, 94 (Fla. 1995) ("Discovery of certain kinds of information 'may reasonably cause material injury of an irreparable nature.' This includes 'cat out of the bag' material that could be used to injure another person or party outside the context of the litigation".); *Old Republic Nat. Title Ins. Co. v. Home American Credit, Inc.*, 844 So. 3d 818, 819 (Fla. 5th DCA 2003 (orders erroneously granting discovery are subject to

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Rule of Appellate Procedure 9.310(f). A stay was first sought below, but was denied by the trial court. [A.250-51].

certiorari review, if they depart from the essential requirements of law and cause material injury throughout the remainder of the proceedings, effectively leaving no adequate remedy on appeal); *Kinsale Ins. Co. v. Murphy*, 285 So. 3d 411, 412 (Fla. 1st DCA 2019) (same). Discovery orders seeking production of documents are peculiarly suited for review by certiorari "because when discovery is wrongfully granted the complaining party is beyond relief." *See Saints 120, LLC v. Moore*, 292 So. 3d 1209, 1211 (Fla. 1st DCA 2020).

The subject Order departs from the essential requirements of law by overruling Ms. Sytch's objections to the subject subpoenas and discovery and erroneously compelling production of: (1) all of her jail communications in violation of her Fifth Amendment right against self-incrimination, and her right to privacy under the Florida Constitution and Fourth Amendment, without any evidence that she waived such rights, and (2) her confidential medical records.

Certiorari lies to review an order, such as the one at issue, compelling discovery in a civil case over an objection that it violates the Fifth Amendment privilege against self-incrimination. *See Aguila v. Frederic*, 306 So. 3d 1166, 1169 (Fla. 3d DCA 2020). An order compelling potentially self-incriminating testimony qualifies as irreparable harm

justifying the issuance of a writ of certiorari. *See Wahnon v. Coral & Stones Unlimited Corp.*, 314 So. 3d 487, 491 (Fla. 3d DCA 2020). The availably of certiorari to address a party's right to object to discovery on Fifth Amendment grounds is well established. *See Aguila*, 306 So. 3d at 1169 (Fla. 3d DCA 2020) ("[c]ertiorari will lie to review an order compelling discovery in a civil case over an objection that the order violates the Fifth Amendment privilege against self-incrimination."); *see also Magid v. Winter*, 654 So. 2d 1037, 1039 (Fla. 4th DCA 1995) ("A trial court order that compels a witness to answer all questions raised, even those which may incriminate the witness, should be considered overbroad and a departure from the essential requirements of law"); *J.R. Brooks & Son, Inc. v. Donovan*, 592 So. 2d 795, 795-96 (Fla. 3d DCA 1992) (where deposition posed innocuous as well as questions that could provide foundation for possible criminal prosecution, court departed from essential requirements of law causing material injury by not determining propriety of privilege on question-by-question basis).

Likewise, certiorari is available to address orders compelling production of communications and medical records which violate of a party's right to privacy and which are otherwise irrelevant. In Florida, a citizen's right to privacy is independently protected by the state constitution

since the voters of Florida amended the state constitution to include an express right of privacy. Art. I, § 23, Fla.Const; *Rasmussen v. S. Florida Blood Serv., Inc.,* 500 So. 2d 533, 536 (Fla. 1987). It has been held that Florida's right of privacy "embraces more privacy interests, and extends more protection to the individual in those interests, than does the federal Constitution. Art. I, § 23, Fla. Const.; *Mozo v. State*, 632 So. 2d 623, 632–33 (Fla. 4th DCA 1994), *approved*, 655 So. 2d 1115 (Fla. 1995). Although the general concept of privacy encompasses an enormously broad and diverse field of personal action and belief, there can be no doubt that the Florida amendment was intended to protect the right to determine whether or not sensitive information about oneself will be disclosed to others. *Id*. Irreparable harm can be presumed where a discovery order compels production of matters implicating privacy rights. *See Wharran v. Morgan*, 351 So. 3d 632, 636 (Fla. 2d DCA 2022) (medical records implicate privacy rights); *Holland v. Barfield*, 25 So. 3d 953, 955-56 (Fla. 5th DCA 2010) (trial court erred in ordering production of computer hard drive and cell phone as such production exposed confidential privileged information in violation of the constitutional right to privacy, right against self-incrimination and attorney-client and work-product privileges).

Minimally, an order requiring such expansive and invasive production without an in-camera inspection to determine the relevancy of the information provided is improper. *See, e.g., James v. Veneziano*, 98 So. 3d 697, 698-99 (Fla. 4th DCA 2012) (quashing order requiring production of ten years of medical records without first conducting in-camera inspection); *McEnany v. Ryan*, 44 So. 3d 245, (Fla. 4th DCA 2010) (where party fails to show link between most of the subpoenaed medical records and the date of the accident, an in-camera inspection is warranted to protect the petitioner's privacy rights and to determine whether there is good cause for the disclosure, such that the need for the information outweighs the possible harm to petitioner).

As will be explained further below, the trial court's decision to allow unfettered production of Petitioner's communications and medical records departed from the essential requirements of law and will cause material harm throughout the remainder of the proceedings as well as in her criminal case.

FACTS UPON WHICH PETITIONER RELIES

A. The motor vehicle collision, wrongful death lawsuit, criminal plea and appeal.

This case arises from a motor vehicle collision that occurred on March 25, 2022. [A.6-9, 46-53]. Respondent, Whitney L. Hill, as Personal

Representative of the Estate of Julian L. Lasseter, deceased ("Respondent"), sued Petitioner alleging that she negligently operated a vehicle owned by Defendant, James F. Pente, which collided with a motor vehicle being driven by Respondent's decedent. [A.7-9, 47-53]. Respondent alleged that Petitioner was intoxicated and driving on a suspended license at the time of the collision. [A.47-50]. In response to the amended complaint, and throughout discovery, Petitioner repeatedly asserted her Fifth Amendment right against self-incrimination. [A.14-42, 43-93,142-61,177-201].

On August 15, 2023, Petitioner entered a plea of nolo contendere to the charges against her, one count of DUI causing Julian Lasseter's death (second-degree felony), one count of driving with a suspended license causing Julian Lasseter's death (third-degree felony), and six misdemeanor counts of DUI with damage to property or persons in Case No.: 2022-30284-CFDB in the Circuit Court, Seventh Judicial Circuit, in and for Volusia County, Florida. [A.110-112].[2] However, at her sentencing hearing, the court denied Petitioner's motion for downward departure, and sentenced her to time served on the misdemeanors and a total prison

[2]Simultaneously with this Petition, Petitioner is filing a Request for judicial notice asking this Court to take judicial notice of the related criminal case, in Case No.: 2022-30284-CFDB.

sentence of 17.6625 years for the felonies, to be followed by eight (8) years of probation. [A.105-06]. Petitioner was detained at the Volusia County Jail from May 13, 2022, through December 20, 2023, when she was transported to the Florida Department of Corrections, and is currently housed at Lowell Correctional Institution. [*See* https://pubapps.fdc.myflorida.com/offenderSearch/detail.aspx?Page=Detail&DCNumber=J82154&TypeSearch=AI].

Petitioner appealed her judgment and sentence to this Court in Case No. 5D2023-3715, which appeal remains pending. [A.105-06, 108].

B. Respondent's improper discovery from Non-Parties and Petitioner's responses.

On November 1, 2022, Respondent filed a notice of production for Non-Party in which it advised that she would subpoena Volusia County EMS for "[a]ll" of Ms. Sytch's "records for treatment to include, but not be limited to: all medical records, medical bills, patient information/history forms, charts, reports, MRI films and reports, x-ray films and reports, radiographic films and reports or photographs within your possession or under your control which are known to or reasonably believed by you to contain information pertaining to physical examinations, medical histories, diagnoses, hospitalization, treatment, surgical operations, prescribed medications, or other medical care, therapy, or testing including

consultation and referrals to or from other physicians, psychiatrists or psychologists." [A.34-40].

With regard to Halifax Health, the subpoena sought the same records, but qualified Respondent sought those records "from March 25, 2022 through the Present." [A.34-40]. In response, Petitioner objected and asserted her Fifth Amendment privilege, relevance and invasion of privacy. [A.41-42].

On January 23, 2024, Respondent filed another Notice of Production from Non-Party, advising she intended to subpoena Securus Technologies, LLC, for "[a]ll communications to or from Tamara Sytch to include texts, calls, messages, video connects, and communications generated via the Securus mobile app from March 2022 through the Present." [A.72-75]. From the records custodians of "Volusia County EMS" and "Halifax Health," the requested subpoenas were similar to those of November 1, 2022, but now sought "[a]ll" of Ms. Sytch's "records for treatment from March 25, 2022 through the Present" from both entities. [A.72, 76-79].

Petitioner responded by filing Amended Objections. [A.80-84]. Therein, she invoked her Fifth Amendment privilege and right to privacy under the Florida Constitution, and further objected that the subpoenas were irrelevant, an invasion of privacy, harassing, overly broad, not

reasonably calculated to lead to discovery of evidence, not reasonably related in time, and in violation of work-product and attorney-client privilege. [A.80-84].

In her supporting Memorandum, she re-asserted her prior objections and emphasized that the request improperly included all communications, without limitation, for the span of her incarceration, including years after the subject accident. [A.85-93]. Petitioner further explained that the carte blanche request for all forms of communications likely included irrelevant materials as well as privileged communications between her and her attorneys in her civil and criminal matters and that the subpoenas were an overly broad and unduly burdensome fishing expedition that impermissibly sought irrelevant material and materials protected by her constitutional rights to privacy. [A.88-92]. She again asserted her Fifth Amendment rights, as her appeal of her criminal judgment and sentencing remained pending, and contended that the subpoenas were an attempt to circumvent the work-product and attorney-client privileges previously raised. [A.90-91]. As to Volusia County EMS and Halifax Health, she again explained that the materials sought were irrelevant and that that her medical records were confidential by virtue of the right of privacy contained in the Florida Constitution. [A.91-92]. Further, Petitioner explained that, at a minimum,

the trial court should conduct an in-camera inspection of any materials to ensure that no privileged records were disclosed and that her right to privacy was protected. [A.92].

In a responsive Memorandum, Respondent asserted that the purpose of the discovery to Securus was to obtain communications that "may contain information related to the subject fatal motor vehicle accident." [A.91-112]. Respondent claimed the subpoenas to the medical care providers sought "information containing [Petitioner's] intoxication at the time of the accident." [A.95]. Respondent asserted, without citation, that "in no event can [Petitioner's] sentence be enhanced such that she could receive a lengthier sentence". [A.94]. Thus, Respondent essentially claimed that the time for Petitioner to raise a Fifth Amendment objection had expired. [A.96]. Respondent also claimed, again without citation or reference, that "the documents that have been requested are documents that would have certainly been obtained by the State in prosecuting its case. It can hardly be said that the Plaintiff obtaining the same documents already in possession of the State would result in further incrimination or adverse consequences in the criminal case." [A.97-98].

Again without citation, Respondent also asserted that inmates have no reasonable expectation of privacy in their phone conversations or

communications. [A.98]. Respondent likewise argued Petitioner had no reasonable expectation of privacy in her attorney-client communications or attorney work-product because she was warned that her jail communications were monitored or recorded. [A.98].

C. The discovery hearing and the trial courts oral rulings.

At the April 3, 2024, hearing on the subject discovery, Petitioner reasserted her objections to the subpoenas arguing that the requests for two years of jail communications and medical records violated her right to privacy and Fifth Amendment privilege and were overbroad because they were not limited by date, subject matter, topic, and relevance. [A.113-41]. Petitioner, accordingly, requested that Respondent narrow her subpoenas. [A. 117]. Petitioner explained that the subpoena to Securus did not exclude conversations that she had with counsel, doctors, or her psychologist, and those conversations were privileged. [A.116-20]. Further, and significantly, Petitioner explained there was no record evidence that she had been warned her calls would be recorded. [A.118-19].

In contrast, Respondent claimed Petitioner could no longer invoke her Fifth Amendment privilege because she had been sentenced and that she had no right to privacy. [A. 134-35]. Respondent maintained that the wide range of dates was not overbroad because the subpoenas sought

information that could potentially lead to the discovery of admissible evidence. [A.127]. Respondent went so far as to claim Petitioner had waived the attorney-client privilege in any communications made over the jail system, but suggested she could exclude such conversations to avoid any potential concern. [A.130].

After hearing arguments, the trial court stated its belief "we all know that" Petitioner waived any privilege and had no right to privacy in prison communications, and that "there is no reasonable expectation of privacy on a prison line." [A.118, 121]. However, the court questioned, "assuming arguendo those notices [are] all placed everywhere and those type of communications are in fact right for anyone" to see, whether the range of dates Plaintiff requested was too broad. [A.127-28]. The court inquired whether Respondent knew that inmates in the subject facility were warned they were being recorded, and Respondent explained it was her "information and belief" but she could seek confirmation from the facility. [A.131-32].

Seemingly recognizing that the subpoenas sought inappropriate materials, the trial court sustained Petitioner's objections in part, verbally ordering that the subpoenas be revised. [A.133, 136]. With regard to the overbreadth of the medical records requested, the court instructed the

subpoena be narrowed to "her medical condition as the time of the accident, shortly thereafter." [A.136]. The court also sustained the objections to the overbreadth of the jail communications request finding: "It needs be more specific as to the type of communications that you're seeking …." [A.136-37]. However, continuing to question the applicability of the Fifth Amendment privilege on a prison line, the trial court permitted Petitioner ten days to further brief whether the Fifth Amendment privilege attached to jail communications. [A.137-38]. The court also instructed Respondent to file the warnings provided to inmates. [A.138-39].

D. The parties' additional briefing and the amended subpoenas.

As requested by the trial court, Petitioner filed a Memo of Law and Motion for Limited Stay of Civil Case Pending Resolution of Appeal in Related Criminal Case, in which she reasserted her objections to the overbroad subpoenas and responded to the court's questions during the hearing regarding the application of the privilege against self-incrimination to jail communications. [A.142-61]. Petitioner explained again that she maintained a Fifth Amendment privilege, as well as a right to privacy under the Fourth Amendment and Florida Constitution. [A.143-44]. Further, Petitioner argued that Respondent failed to present any evidence that she had received any warnings that her communications were recorded or

monitored. [A.144-45]. She also explained that regardless of any warnings, the requests were overbroad, and therefore, the court was required to conduct an in-camera review of any production. [A.152-54]. Petitioner also moved for a limited stay of the proceedings while her criminal prosecution and appeal remained pending. [A.154-58].

In response to the court's request at the hearing, Respondent filed a Notice of Filing, listing items "1. Smart Communication's Messages Notice 2. Connection Disclaimer 3. Email from Volusia County Corrections Record Custodian regarding inmate communication warnings." [A.162-76]. However, the filings contain no explanation as to when and how the purported "Smart Communication's Messages Notice" and "Connection Disclaimer" were provided to inmates, or even whether the notices were actually provided to Petitioner or anyone else to that matter. [A.162-76].

Item 3, identified in the Notice of Filing as "Email from Volusia County Corrections Record Custodian regarding inmate communication warnings," consists of email communications between Respondent's counsel, alleged Volusia County Records Custodian Kimberly Yeary, and Jose Rodriguez, whose email signature identified him as a "Field Support Technician" for "ICSolutions." [A.170-76]. In these emails, Rodriguez states that generally that a called party and an inmate were warned before each phone call that

the call would be recorded and subject to monitoring at anytime. [A.170-73]. He also states that the inmate and visitors were also warned and saw a disclaimer that all personal visits were subject to monitoring and recording, and a message at the top of each tablet warned all messages were subject to search and there was no expectation of privacy. [A.170]. The emails are silent as to his qualifications or knowledge to be able to testify as to the matters contained within his emails and are otherwise as to how these warnings were given, when these warnings were given, and to whom they were given; they contain no reference to Petitioner, either expressly or by implication.

E. The Proposed "Revised" Subpoenas and further objections by Petitioner.

On April 19, 2024, Respondent filed a revised Notice of Production from Non-Party, in which she advised that she would obtain the attached Revised Subpoenas from Securus Technologies, LLC, Volusia County EMS, and Halifax Health.[3] [A.177-86]. The so-called revised subpoenas sought production from Volusia County EMS of all Ms. Sytch's "records for treatment **from March 25, 2022** to include, but not be limited to: all medical records, medical bills, patient information/history forms, charts, reports, MRI films and reports, x-ray films and reports, radiographic films and

[3]The revised subpoenas were not filed with the court.

reports or photographs within your possession or under your control which are known to or reasonably believed by you to contain information pertaining to physical examinations, medical histories, diagnoses, hospitalization, treatment, surgical operations, prescribed medications, or other medical care, therapy, or testing including consultation and referrals to or from other physicians, psychiatrists or psychologists ….” (revisions bolded). [A.181].

The revised subpoena sought production from Halifax Health of “[a]ll records for treatment for Tamara Sytch’s hospitalization **beginning on March 25, 2022** to include, but not be limited to: all medical records, medical bills, patient information/history forms, charts, reports, MRI films and reports, x-ray films and reports, radiographic films and reports or photographs within your possession or under your control which are known to or reasonably believed by you to contain information pertaining to physical examinations, medical histories, diagnoses, hospitalization, treatment, surgical operations, prescribed medications, or other medical care, therapy, or testing including consultation and referrals to or from other physicians, psychiatrists or psychologists….” (revisions bolded). [A.183].

The revised subpoena to Securus Technologies, LLC sought “[a]ll communications, excluding communications from her attorneys, to or from

Tamara Sytch to include texts, calls, messages, video connects, and communications generated via Securus and the Securus mobile app from March 2022 through the Present that relate to this civil litigation arising out of a fatal motor vehicle accident on March 25, 2022 in which Julian Lasseter was killed, Sytch's criminal cases, all communications between Sytch and Co-Defendant James Pente, the consumption of alcohol, the events on March 25, 2022 leading up to the motor vehicle accident on March 25, 2022, her purchase of a motor vehicle, transfers of title to any motor vehicle, purchasing and/or payment for automobile insurance, securing automobile insurance, her status as a licensed driver, any court events, Sytch's medical status, any motor vehicle accident(s), any arrests after March 25, 2022, and any other communications that may be related to the foregoing." [A.185].

As evident, Respondent only revised the subpoena to Volusia County EMS to change "from March 25, 2022, through the Present" to read "from March 25, 2022," and only revised the subpoena to Halifax Health to change "from March 25, 2022, through the Present" to read "beginning on March 25, 2022." [A.34-40, 181, 183].

In her Objections to Plaintiff's Notice of Production from Non-Party, Dated 4/19/24, Petitioner again objected to the subpoenas on the grounds

of irrelevance, invasion of privacy, harassing, overly broad, not reasonably calculated to lead to discovery of evidence, not reasonably related in time, and in violation of work-product, attorney-client privilege, the Fourth Amendment and Florida Constitution right to privacy, and the Fifth Amendment right to be free from self-incrimination. [A.187-201]. Petitioner also explained that the emails regarding the notices given to inmates and filed notices were hearsay and incompetent as evidence to establish that she was, in fact, warned that her jail communications would be monitored or recorded. [A.199-200]. Further, the proposed subpoenas did not comport with the court's ruling at the April 3, 2024, hearing wherein the court sustained her objections that the initial subpoenas were overbroad and ordered Respondent to narrow them down to the time of the accident or shortly thereafter. [A.193-94]. Instead, the "revised" subpoenas continued to request all documentation from the medical care providers "from March 25, 2022" and "beginning March 25, 2022," and from Securus Technologies "from March 25, 2022 through the Present." [A.194-95].

Respondent claimed the filings showed that Petitioner was expressly warned that her communications were monitored, recorded, or searched and that she had no expectation of privacy. [A.203]. Respondent also reiterated her previous position that Petitioner could no longer assert her

Fifth Amendment privilege because she was no longer subject to jeopardy, indictment, or an increased sentence. [A.204-205].

By order dated May 22, 2024, the trial court overruled Petitioner's objections to the subpoenas and denied the motion for a limited stay. [A.250-52].

NATURE OF RELIEF SOUGHT

Petitioner seeks an Order granting this Petition for Writ of Common Law Certiorari and quashing the trial court's Order because it erroneously permits disclosure of her personal communications and medical records in violation of her Fifth Amendment right against self-incrimination as well as her right to privacy under the Fourth Amendment and Florida Constitution and permits Respondent carte blanche intrusion into irrelevant and overbroad materials.

ARGUMENT

I. THE TRIAL COURT DEPARTED FROM THE ESSENTIAL REQUIREMENTS OF LAW IN OVERRULING PETITIONER'S FIFTH AMENDMENT PRIVILEGE OF SELF-INCRIMINATION WHERE HER CRIMINAL CASE CONTINUES ON APPEAL.

"The Fifth Amendment privilege ... can be asserted in any proceeding, civil or criminal, administrative or judicial, investigatory or adjudicatory." *Kastigar v. United States*, 406 U.S. 441, 444, 92 S. Ct. 1653, 1656, 32 L. Ed. 2d 212 (1972). The Fourteenth Amendment incorporates

the Fifth Amendment so that the privilege against self-incrimination is protected from both federal and state action. *See Wahnon*, 314 So. 3d at 491.

"[I]n order to be testimonial, an accused's communication must itself, explicitly or implicitly, relate a factual assertion or disclose information. Only then is a person compelled to be a 'witness' against himself." *Doe v. United States*, 487 U.S. 201, 210, 108 S. Ct. 2341, 2347, 101 L. Ed. 2d 184 (1988). An assertion, however, need not be direct. Indeed, "[i]t is settled law that the privilege against self-incrimination may be properly asserted during discovery proceedings if the civil litigant has reasonable grounds to believe that direct answers to deposition or interrogatory questions would furnish a link in the chain of evidence needed to prove a crime against him." *See Aguila*, 306 So. 3d at 1170.

A court, when weighing the application of the protections afforded by the Fifth Amendment privilege, must err on the side of the litigant asserting the privilege, unless it is "perfectly clear" the answer will not incriminate. "The privilege must be sustained if it is not 'perfectly clear, from a careful consideration of all the circumstances in the case, that the witness is mistaken, and that the answer[s] *cannot possibly* have such tendency' to

incriminate." *Raas v. Borgia*, 644 So. 2d 121, 122 (Fla. 2d DCA 1994) (quoting *United States v. Goodwin*, 625 F.2d 693, 700-01 (5th Cir. 1980)).

In the absence of a promise of immunity, a convicted felon with an appeal pending has a Fifth Amendment privilege not to incriminate herself, and this privilege continues throughout the pendency of an appeal so that the trial court order departs from the essential requirements of law. *See Landenberger v. State*, 519 So. 2d 712, 713 (Fla. 1st DCA 1988); *Libertucci v. State*, 395 So. 2d 1223, 1225 n.1 (Fla. 3d DCA 1981); *King v. State*, 353 So. 2d 180, 181 (Fla. 3d DCA 1977). To be clear, the Fifth Amendment Right extends to convicted felons who seek relief as to the length of their sentences. *See Mitchell v. United States*, 526 U.S. 314, 327 (1999) (Because petitioner faced imprisonment from one year upwards to life, depending on the circumstances of the crime, to say that she had no right to remain silent but instead could be compelled to cooperate in the deprivation of her liberty would ignore the Fifth Amendment privilege at the precise stage where, from her point of view, it was most important); *Landeverde v. State*, 769 So. 2d 457, 464 (Fla. 4th DCA 2000) (because witness had a pending motion to reduce his sentence, his exposure to incrimination was readily apparent).

Thus, because Petitioner currently has an appeal pending as to her criminal judgment, her Fifth Amendment rights remain valid and outstanding so that Defendant is entitled to relief from the trial court order. *See King*, 353 So. at 181; *see also Barrow v. State*, 940 So. 2d 1235, 1236 (Fla. 5th DCA 2006) (party was unable to compel such a statement or testimony from defendant due to constitutional Fifth Amendment right against self-incrimination since the defendant had a pending direct appeal of his judgment and life sentence); *Landeverde*, 769 So. 2d at 463 (where a person has been sentenced to probation, court can revoke or modify same and therefore he retains his Fifth Amendment rights); *Landenberger*, 519 So. 2d at 712–13 (because appellant, who plead nolo contendere plea, appealed his sentence, his Fifth Amendment privilege not to testify continued throughout the pendency of the appeal; potential for an enhanced sentence served as sufficient justification for invoking the privilege).

II. THE TRIAL COURT DEPARTED FROM THE ESSENTIAL REQUIREMENTS OF LAW IN PERMITTING DISCOVERY OF PETITIONER'S PHONE AND OTHER JAIL COMMUNICATIONS WHERE RESPONDENT FAILED TO PROVIDE LEGALLY SUFFICIENT EVIDENCE THAT SHE WAIVED HER RIGHT TO PRIVACY AND WHERE THE PRODUCTION IS OVERBROAD AND IRRELEVANT.

The right to privacy is a constitutional right and courts establish *high* standards of proof for the waiver of constitutional rights. *See Colorado v. Connelly*, 479 U.S. 157, 185 (1986). In fact, there is a presumption against the waiver of constitutional rights. *Brookhart v. Janis*, 384 U.S. 1, 4 (1966). In applying the Florida right of privacy, although the subjective belief must be legitimate, the separate and distinct test of a reasonable expectation of privacy is eliminated. *See Mozo v. State*, 632 So. 2d at 633. Under this view, any margin of error with regard to the interpretation of the right of privacy in Florida should be in favor of the individual. *Id*. 634. Further, courts have held that individuals have a reasonable expectation of privacy with respect to phone calls, text messages, call history and the like which are the very communications at issue here. *See generally, United States v. Finley,* 477 F.3d 250, 259 (5th Cir.2007) (finding legitimate expectation of privacy in call history of cell phone); *City of Ontario v. Quon,* 560 U.S. 746, 759, 130 S.Ct. 2619, 2626, 177 L.Ed.2d 216 (2010) (finding expectation of privacy in text messages on cell phone); *United States v. Gomez*, 807 F.

Supp. 2d 1134, 1140 (S.D. Fla. 2011) (an individual has a reasonable expectation of privacy in a cell phone's text messages); *United States v. Wall,* 08–60016–CR, 2008 WL 5381412, at *3 (S.D. Fla. Dec. 22, 2008) (noting that government did not contest that viewing of text messages on defendant's cell phone constituted a search).

Here, the trial court erred in finding, without any competent evidence, much less any meeting the high standard required, that Petitioner waived her right to privacy with respect to texts, calls, messages, video connects, and communications from Securus Technologies. Rather, all that the Court relied on was Respondent's filing which consisted solely of: a "Smart Communication's Message Notice" which is nothing more than a screenshot of what appears to be an electronic tablet screen with no authentication or indicia of reliability or even an explanation as to how it pertains to the discovery sought or to Petitioner; a "connection disclaimer" that likewise does not contain any indication or other evidence of what this document pertains to, how it is utilized or most importantly how it relates to Petitioner and the information subpoenaed; and an email from a purported "records custodian" for Volusia Corrections, the Respondent's attorney, and "Field Support Technician" for a company called ICSolutions named Jose Rodriguez who attempts to speak in general as to warnings given to

inmates. Not only are all of these documents unauthenticated but they are replete with hearsay and nothing in these emails identifies how Mr. Rodriguez has the requisite knowledge to testify as to the accuracy of the information he is providing for a company that is not the one subpoenaed. More importantly, Mr. Rodriguez speaks in general terms, and his email does not and cannot prove that these warning were actually given to anyone, much less to Petitioner at any relevant time with respect to the subpoenaed items. It cannot be emphasized that enough that none of these individuals are associated with or even attest to Securus Technologies' polices and procedures, but rather, merely discuss warnings given to unnamed inmates in an unidentified institution. This vague and otherwise inadmissible evidence was insufficient to establish waiver of a constitutional right. Accordingly, the trial court erred in finding a waiver of the right to privacy.

Moreover, the unfettered discovery into Petitioner's private communication is overbroad and irrelevant and for this reason alone, the discovery ordered departs from the essential requirements of law. It cannot be emphasized enough that a litigant is not entitled *carte blanche* to irrelevant discovery. *See Bd. of Trustees of Internal Improvement Tr. Fund v. Am. Educ. Enterprises, LLC*, 99 So. 3d 450, 457 (Fla. 2012). Discovery

is not permitted into matters that are privileged or irrelevant. *See, e.g., Allstate Ins. Co. v. Boecher*, 733 So. 2d 993, 995 (Fla. 1999) (discovery must be relevant to case and must not be protected by privilege). Also impermissible is discovery of relevant, non-privileged matters when the discovery is a mere "fishing expedition," or where it will be an invasion of privacy or where it is designed to harass, embarrass, or for disruption. *See* Fla. R. Civ. P. 1.280(c); *S. Florida Blood Serv., Inc. v. Rasmussen*, 467 So. 2d 798, 801 (Fla. 3d DCA 1985), approved, 500 So. 2d 533 (Fla. 1987)(even discovery of relevant, non-privileged information is prohibited to prevent undue invasion of privacy, annoyance, embarrassment, oppression, harassment, burden or expense); *see also Sugarmill Woods Civic Ass'n, Inc. v. S. States Utilities*, 687 So. 2d 1346, 1350-51 (Fla. 1st DCA 1997) (discovery should be prohibited where it is a "mere fishing expedition"). The overbreadth of Plaintiff's sweeping discovery requests as to any and all communications make it clear that the subject discovery is an impermissible "fishing expedition" that should not be countenanced. *See, e.g.*, Fla. R. Civ. P. 1.280(c); *Sugarmill Woods Civic Ass'n, Inc.*, 687 So. 2d at 1350-51; *Rasmussen*, 467 So. 2d at 801.

III. THE TRIAL COURT DEPARTED FROM THE ESSENTIAL REQUIREMENTS OF LAW IN PERMITTING BROAD AND IRRELEVANT DISCOVERY OF PETITIONER'S PRIVATE MEDICAL RECORDS.

The subject order, which permits unlimited discovery from Petitioner's medical care providers from March 26, 2022, to present, clearly departs from the essential requirements of law. A person's medical records enjoy a confidential status by virtue of the right to privacy contained in Article 1, section 23 of the Florida Constitution. *Tanner v. Hart*, 313 So. 3d 805, 807 (Fla. 2d DCA 2021) (quashing order compelling ten years of all medical information which did not first determining its relevance and balance the need for such information against constitutionally protected privacy rights); *see also Barker v. Barker*, 909 So. 2d 333, 337 (Fla. 2d DCA 2005). "Discovery orders that require the disclosure of claimed confidential information are reviewed with greater caution than those that are simply burdensome or costly due to overbreadth." *Rousso v. Hannon*, 146 So. 3d 66, 71 (Fla. 3d DCA 2014). "When personal medical records are sought, the . . . interest in fair and efficient resolution of disputes by allowing broad discovery must be balanced against the individual's competing privacy interests to prevent an undue invasion of privacy." *Barker*, 909 So. 2d at 338 (*citing Rasmussen,* 500 So. 2d at 535).

Here, the discovery sought from the medical providers, which includes "all" medical records from the accident to date is irrelevant to the issues in this automobile accident case and unnecessarily invades Ms. Sytch's right to privacy. *See, e.g., Poston v. Wiggins*, 112 So. 3d 783, 786 (Fla. 1st DCA 2013). To be entitled to any records, and Petitioner maintains that no such entitlement can be shown, Respondent must demonstrate a link between her medical records and the accident, sufficient to show there is good cause for disclosure, such that the need for the information outweighs the possible harm to Petitioner. *See McEnany*, 44 So. 3d at 247 (movant failed to demonstrate link between most records of opponent's medical condition and drug ingestion on the date of the accident, requiring in-camera inspection); *see also Bergmann v. Freda*, 829 So. 2d 966 (Fla. 4th DCA 2002) (case remanded for in-camera inspection where request for any an all medical records failed to demonstrate link with case and private medical records); *Pusateri v. Fernandez*, 707 So. 2d 892, 893 (Fla. 2d DCA 1998) (discovery should be denied when the information sought is neither relevant to the pending claim nor will it lead to the discovery of admissible evidence). As no causal link can be demonstrated between the subject accident and all of Petitioner's medical records from the date of the accident to the present, the trial court order departed from the essential

requirements of law. Even though the rules of civil procedure allow for broad discovery, the discovery must be confined to matters “admissible or reasonably calculated to lead to admissible evidence in the case” so that carte blanche investigation of a person's entire mental health history is not allowed. *See Russell v. Stardust Cruisers, Inc.*, 690 So. 2d 743, 745 (Fla. 5th DCA 1997); *Tanner*, 313 So. 3d at 808 (it has been held that requiring disclosure of “any and all” medical records undeniably casts too wide a net).

Further, at the hearing, the trial court recognized that the information sought was overbroad, and needed to be narrowed. The revised subpoenas do not even narrow the discovery sought to the time instructed by the trial court, the date of accident or shortly thereafter, but continue to seek extensive medical records from the date of accident and ongoing. Thus, the subpoenas must be narrowed to a relevant time period. Minimally, an in-camera review of the medical records must be conducted before the information is produced to narrow the production to information relevant to Petitioner’s cause of action. *See, e.g., James, 98 So. 3d, 698-99; McEnany*, 44 So. 3d at 247.

CONCLUSION

Petitioner/Defendant, TAMARA L. SYTCH, requests that the Order be quashed. Minimally, Petitioner, requests the matter be remanded for an in-camera inspection limiting discovery consistent with arguments made herein and binding Florida law.

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CERTIFICATE OF COMPLIANCE

We certify that this brief complies with the line spacing, type size, and word-count requirements set forth in Rules 9.045 and 9.210, Florida Rules of Appellate Procedure, as it has been prepared in Arial 14-point font and contains 6,096 words.

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CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that on June 21, 2024, a true and correct copy of the foregoing was filed with the Florida Courts e-filing Portal and served on all those on the attached Service List, either via Notice of Electronic Filing generated by the ePortal system or another authorized manner.

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