

## **Neil Gillespie**

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**From:** "Amy Hasselbring" <ahasselbring@bowenschroth.com>  
**To:** <neilgillespie@mfi.net>  
**Cc:** "Derek Schroth" <dschroth@bowenschroth.com>  
**Sent:** Monday, April 25, 2016 10:47 AM  
**Attach:** Application Edward C. Spaight.pdf  
**Subject:** JNC Application - Spaight

Mr. Gillespie,

Attached is the application of Edward C. Spaight. Thanks.

Amy McCain Hasselbring  
Florida Registered Paralegal and  
Legal Assistant to Derek A. Schroth  
Bowen & Schroth, P.A.  
600 Jennings Avenue  
Eustis, FL 32726  
Telephone: 352-589-1414 Ext. 316  
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**APPLICATION FOR NOMINATION TO THE CIRCUIT COURT**

(Please attach additional pages as needed to respond fully to questions.)

**DATE:** September 27, 2015 Florida Bar No.: 70722

**GENERAL:** Social Security No.: [REDACTED]

1. Name Edward C Spaight E-mail: edward@spaight.net

Date Admitted to Practice in Florida: September 25, 2009

Date Admitted to Practice in other States: Maine - May 14, 2002

2. State current employer and title, including professional position and any public or judicial office.

Office of the Public Defender for the Fifth Judicial Circuit

3. Business address: 110 N Apopka Avenue

City Inverness County Citrus State FL ZIP 34450

Telephone (352) 341-6777 FAX (352) 341-6783

4. Residential address: 2526 E Celina Street

City Inverness County Citrus State FL ZIP 34453

Since September, 2009 Telephone (352) 436-3889

5. Place of birth: Poughkeepsie, New York

Date of birth: April 20, 1970 Age: 45

6a. Length of residence in State of Florida: 6 years, 4 months

6b. Are you a registered voter?  Yes  No

If so, in what county are you registered? Citrus

7. Marital status: Married

If married: Spouse's name Veronica Spaight

Date of marriage December 14, 1996

Spouse's occupation Kindergarten Teacher - Seven Rivers Christian

If ever divorced give for each marriage name(s) of spouse(s), current address for each former spouse, date and place of divorce, court and case number for each divorce.

n/a

8. Children

<i>Name(s)</i>	<i>Age(s)</i>	<i>Occupation(s)</i>	<i>Residential address(es)</i>
Lindsay Clare Spaight	15	Student	2526 E Celina Street, Inverness, FL 34453
Susan Spaight	8	Student	Same

9. Military Service (including Reserves)

<i>Service</i>	<i>Branch</i>	<i>Highest Rank</i>	<i>Dates</i>
n/a			
Rank at time of discharge	_____	Type of discharge	_____
Awards or citations	_____		

**HEALTH:**

10. Are you currently addicted to or dependent upon the use of narcotics, drugs, or intoxicating beverages? If yes, state the details, including the date(s).

No

11a. During the last ten years have you been hospitalized or have you consulted a professional or have you received treatment or a diagnosis from a professional for any of the following: Kleptomania, Pathological or Compulsive Gambling, Pedophilia, Exhibitionism or Voyeurism?

Yes  No

If your answer is yes, please direct each such professional, hospital and other facility to furnish the Chairperson of the Commission any information the Commission may request with respect to any such hospitalization, consultation, treatment or diagnosis. ["Professional" includes a Physician, Psychiatrist, Psychologist, Psychotherapist or Mental Health Counselor.]

Please describe such treatment or diagnosis.

11b. In the past ten years have any of the following occurred to you which would interfere with your ability to work in a competent and professional manner?

- Experiencing periods of no sleep for 2 or 3 nights
- Experiencing periods of hyperactivity
- Spending money profusely with extremely poor judgment
- Suffered from extreme loss of appetite

- Issuing checks without sufficient funds
- Defaulting on a loan
- Experiencing frequent mood swings
- Uncontrollable tiredness
- Falling asleep without warning in the middle of an activity

Yes  No

If yes, please explain.

12a. Do you currently have a physical or mental impairment which in any way limits your ability or fitness to properly exercise your duties as a member of the Judiciary in a competent and professional manner?

Yes  No

12b. If your answer to the question above is Yes, are the limitations or impairments caused by your physical or mental health impairment reduced or ameliorated because you receive ongoing treatment (with or without medication) or participate in a monitoring or counseling program?

Yes  No

Describe such problem and any treatment or program of monitoring or counseling.

13. During the last ten years, have you ever been declared legally incompetent or have you or your property been placed under any guardianship, conservatorship or committee? If yes, give full details as to court, date and circumstances.

No

14. During the last ten years, have you unlawfully used controlled substances, narcotic drugs or dangerous drugs as defined by Federal or State laws? If your answer is "Yes," explain in detail. (Unlawful use includes the use of one or more drugs and/or the unlawful possession or distribution of drugs. It does not include the use of drugs taken under supervision of a licensed health care professional or other uses authorized by Federal law provisions.)

No

15. In the past ten years, have you ever been reprimanded, demoted, disciplined, placed on probation, suspended, cautioned or terminated by an employer as result of your alleged consumption of alcohol, prescription drugs or illegal use of drugs? If so, please state the circumstances under which such action was taken, the name(s) of any persons who took such action, and the background and resolution of such action.

No

16. Have you ever refused to submit to a test to determine whether you had consumed and/or were under the influence of alcohol or drugs? If so, please state the date you were requested to submit to such a test, the type of test required, the name of the entity requesting that you submit to the test, the outcome of your refusal and the reason why you refused to submit to such a test.

No

17. In the past ten years, have you suffered memory loss or impaired judgment for any reason? If so, please explain in full.

No

**EDUCATION:**

18a. Secondary schools, colleges and law schools attended.

<i>Schools</i>	<i>Class Standing</i>	<i>Dates of Attendance</i>	<i>Degree</i>
Siena College	unknown	1988-1992	B.A. Political Science Cum laude
Western New England College School of Law	3/153	1997-2001	J.D. Magna cum laude

18b. List and describe academic scholarships earned, honor societies or other awards.

Western New England Law Review  
Note Editor, 2000-01, Junior Staff, 1999-00

Honors: George Thompson Memorial Scholarship, 2000-01  
Joanne Grummel Memorial Scholarship, 1999-2000  
CALI Excellence for the Future Awards for excellent achievement in the study of:  
Business Organizations, Constitutional Law, Constitutional Law II, Conflict of Laws,  
Consumer Protection, Criminal Law, Evidence, Labor Law and Property

**NON-LEGAL EMPLOYMENT:**

19. List all previous full-time non-legal jobs or positions held since 21 in chronological order and briefly describe them.

<i>Date</i>	<i>Position</i>	<i>Employer</i>	<i>Address</i>
1992-95	Legislative Associate	New York State Senator Stephen M Saland	Legislative Office Bldg Albany, NY 12247
1995-96	Campaign Manager	Bud Waker for Congress	1153 US 44 Clintondale, NY 12515
1996-2001	Program Research Specialist	New York State Dept of Labor	State Office Campus Albany, NY 12211

**PROFESSIONAL ADMISSIONS:**

20. List all courts (including state bar admissions) and administrative bodies having special admission requirements to which you have ever been admitted to practice, giving the dates of admission, and if applicable, state whether you have been suspended or resigned.

<i>Court or Administrative Body</i>	<i>Date of Admission</i>
Maine State Bar	2002
United States District Court for the District of Maine	2002
First Circuit Court of Appeals	2007
Penobscot Indian Nation Tribal Court	2007

**LAW PRACTICE:** (If you are a sitting judge, answer questions 21 through 26 with reference to the years before you became a judge.)

21. State the names, dates and addresses for all firms with which you have been associated in practice, governmental agencies or private business organizations by which you have been employed, periods you have practiced as a sole practitioner, law clerkships and other prior employment:

<i>Position</i>	<i>Name of Firm</i>	<i>Address</i>	<i>Dates</i>
Supervising Attorney	Office of the Public Defender, 5 <sup>th</sup> Circuit	110 N Apopka Ave Inverness, Florida 34450	Sept 2014 - Present
Attorney	Office of the Public Defender, 5 <sup>th</sup> Circuit	110 N Apopka Ave Inverness, Florida 34450	May 2009 - Sept 2014
Attorney - part time	Catherine W. Real, PA	2110 W Platt St Tampa, Florida 33606	April 2011 - April 2014

Attorney	Vafiades, Brontas & Kominsky, LLP	23 Water St Bangor, Maine 04401	Aug 2002 - May 2009
Law Clerk	State of Maine Superior Court	2 Turner St Auburn, Maine 04210	Aug 2001 - Aug 2002

22. Describe the general nature of your current practice including any certifications which you possess; additionally, if your practice is substantially different from your prior practice or if you are not now practicing law, give details of prior practice. Describe your typical clients or former clients and the problems for which they sought your services.

I am the Supervising Attorney for the Citrus County office of the Public Defender. In that capacity, I supervise four felony and two misdemeanor attorneys as well as an administrative staff. I am responsible for the day to day operation of the Citrus County office. My personal caseload is primarily what would be considered "major" crimes, including homicide and attempted homicide, capital sexual battery, armed robbery and similar offenses. I have also served as second chair on four cases where the State had filed a notice of intent to seek the death penalty, but none of those cases has proceeded to trial. I also handle all of the Juvenile cases that come into my office, as well as all Sexually Violent Predator (Jimmy Ryce) cases in Citrus County.

23. What percentage of your appearance in courts in the last five years or last five years of practice (include the dates) was in:

Court		Area of Practice	
Federal Appellate	_____ %	Civil	_____ %
Federal Trial	_____ %	Criminal	<u>100</u> %
Federal Other	_____ %	Family	_____ %
State Appellate	<u>1</u> %	Probate	_____ %
State Trial	<u>99</u> %	Other	_____ %
State Administrative	_____ %		
State Other	_____ %		
	_____ %		
TOTAL	<u>100</u> %	TOTAL	<u>100</u> %

24. In your lifetime, how many (number) of the cases you have tried to verdict or judgment were:

Jury?	<u>16</u>	Non-jury?	<u>60</u>
Arbitration?	<u>0</u>	Administrative Bodies?	<u>2</u>

25. Within the last ten years, have you ever been formally reprimanded, sanctioned, demoted, disciplined, placed on probation, suspended or terminated by an employer or

tribunal before which you have appeared? If so, please state the circumstances under which such action was taken, the date(s) such action was taken, the name(s) of any persons who took such action, and the background and resolution of such action.

No

26. In the last ten years, have you failed to meet any deadline imposed by court order or received notice that you have not complied with substantive requirements of any business or contractual arrangement? If so, please explain in full.

No

**(Questions 27 through 30 are optional for sitting judges who have served 5 years or more.)**

- 27a. For your last 6 cases, which were tried to verdict before a jury or arbitration panel or tried to judgment before a judge, list the names and telephone numbers of trial counsel on all sides and court case numbers (include appellate cases).

State of Florida v. J.S. (Juvenile) 2014-CJ-236

Lisa Burgess, Assistant State Attorney (352) 341-6670

State of Florida v. Crystal Ann Austin 2014-CF-662

Julia Metts and Jeffrey Foster, Assistant State Attorneys (352) 341-6670

State of Florida v. A.V. (Juvenile) 2014-CJ-165

Lisa Burgess, Assistant State Attorney (352) 341-6670

State of Florida v. Edward Lee Powell 2014-CF-501

Brian Trehy, Assistant State Attorney (352) 341-7056

State of Florida v. Shannon Michael (Jimmy Ryce) 2012-MH-36

Brian Trehy, Assistant State Attorney (352) 341-7056

State of Florida v. Billy Packer (Jimmy Ryce) 2012-MH-36

Brian Trehy, Assistant State Attorney (352) 341-7056

- 27b. For your last 6 cases, which were settled in mediation or settled without mediation or trial, list the names and telephone numbers of trial counsel on all sides and court case numbers (include appellate cases).

State of Florida v. Emerald Marie Smith 2014-CF-1272

Brian Caughey, Assistant State Attorney (352) 341-6670



State of Florida v. Brett Bartley 2015-CF-256  
Lisa Burgess, Assistant State Attorney (352) 341-6670

State of Florida v. A.D. (Juvenile) 2014-CJ-153  
Lisa Byrgess, Assistant State Attorney (352) 341-6670

State of Florida v. Constantina Dina Emmanuel 2014-CF-102  
William Hamilton, Assistant State Attorney (352) 671-5817

State of Florida v. Alexander Stathas 2014-CF-794  
William Catto, Assistant State Attorney (352) 341-6670

State of Florida v. Gregory Scott Holub 2013-CF-272  
Julia Metts and Jeff Foster, Assistant State Attorneys (352) 341-6670

- 27c. During the last five years, how frequently have you appeared at administrative hearings?  
0 average times per month
- 27d. During the last five years, how frequently have you appeared in Court?  
15 average times per month
- 27e. During the last five years, if your practice was substantially personal injury, what percentage of your work was in representation of plaintiffs? n/a% Defendants? n/a%
28. If during any prior period you have appeared in court with greater frequency than during the last five years, indicate the period during which this was so and give for such prior periods a succinct statement of the part you played in the litigation, numbers of cases and whether jury or non-jury.  
n/a

29. For the cases you have tried to award in arbitration, during each of the past five years, indicate whether you were sole, associate or chief counsel. Give citations of any reported cases.

n/a

30. List and describe the six most significant cases which you personally litigated giving case style, number and citation to reported decisions, if any. Identify your client and describe the nature of your participation in the case and the reason you believe it to be significant. Give the name of the court and judge, the date tried and names of other attorneys involved.

State of Florida v. Gregory Scott Holub, 2013-CF-272. Hon. Richard A. Howard, Judge, Circuit Court, Citrus County. Julia Metts and Jeffrey Foster, Assistant State Attorneys. Trial held September 16-18, 2014 (ended in Mistrial). Defendant entered a plea on October 7, 2014. Mr. Holub was charged with Second Degree Murder in what was essentially a drug deal gone bad. While the overwhelming weight of the evidence pointed to Mr. Holub as the shooter, I was able to draw out a number of inconsistencies in the testimony of several witnesses - including some law enforcement witnesses. After the mistrial I heard that one of the jurors had said that everybody was lying, but that my client probably had been the shooter. Due to my efforts in the first trial, my client was offered a plea to 24 years in the department of corrections. He had been facing life in prison and was 30 years old at the time.

State of Florida v. Benjamin Dick, 2014-CF-367. Hon. Richard A. Howard, Judge, Circuit Court, Citrus County. Pete Magrino, Assistant State Attorney. T. Devon Sharkey, Assistant Public Defender. Mr. Dick was charged with First Degree Murder for killing his mother. The State was seeking death. I was the second chair to Mr. Sharkey, and was responsible for preparation of the penalty phase of Mr. Dick's trial. There was no doubt as to Mr. Dick's guilt. My mitigation team and I were able to put together a compelling argument for a life sentence for Mr. Dick, to which the State ultimately agreed. Mr. Dick entered his plea on March 11, 2015. He was 23 years old at the time of the offense and was facing the very real possibility of spending the rest of his life on death row.

State of Florida v. Jason Turem, 2013-CF-892. Hon. Richard A. Howard, Judge, Circuit Court, Citrus County. Melissa Pendergrass, Assistant State Attorney. Charity Braddock, Assistant Public Defender, co-counsel. Trial held March 19, 2014. Mr. Turem was charged with Arson. He was alleged to have set fire to a shed in his former girlfriend's yard. What was significant about this case was Mr. Turem's appearance. His head is shaved, and he has large ram's horns tattooed on either side of his head. He has a large swastika on his neck and various other tattoos on his face arms and hands. We were able to convince the jury to look past Mr. Turem's odious appearance and consider the evidence (particularly the lack of evidence) against him. Mr. Turem was found not guilty.

State of Florida v. Russell Glen Elmer, 2010-CF-416. Hon. Richard A. Howard, Judge, Circuit Court, Citrus County. Lisa Herndon, Assistant State Attorney. Michael Lamberti, Assistant Public Defender, co-counsel. Trial Held February 3-4, 2011. Reversed and Remanded October 12, 2012, 114 So.3d 198. Mr. Elmer was charged with crimes against his stepdaughter that were alleged to have taken place over twenty years prior. This case was significant to me in that it confirmed for me the importance of providing

the highest quality representation for a reviled accused person; as well as the importance of making objections and preserving the record for appeal. After trial, Mr. Elmer was sentenced to life in prison. Following remand from the Court of Appeals, however, Mr. Elmer entered a plea to what essentially amounted to time already served in prison followed by probation. Mr. Elmer is a free man today.

State of Florida v. A.D. (Juvenile), 2014-CJ-153. Hon. Mary P. Hatcher, Judge, Circuit Court, Citrus County. Lisa Burgess, Assistant State Attorney. This case is significant because of the profound impact that the legal system was able to have on this young woman's life in a positive way. A.D. had one of the most horrific childhoods I have ever encountered. Essentially discarded by her biological parents, A.D. eventually ended up a victim of sex trafficking at an age when she should have been in middle school. A.D. came before the Juvenile Court in the Spring of 2015 on a violation of probation for a host of minor charges. She was seventeen years old and five months pregnant at the time - in danger of losing her child to the system and in danger of becoming just another young person on the adult criminal docket on the road to prison. With the Judge's assistance, we were able to get A.D. into Trauma Informed Counseling that addressed A.D.'s core issues. Today, A.D. is living in her own apartment with her infant son, and her prognosis is excellent.

State of Florida v. Quinton Ross, 2011-CF-460. Hon. Richard A. Howard, Judge, Circuit Court, Citrus County. Brian Trehy, Assistant State Attorney. This case was significant because an innocent man - who was charged with a horrible crime - was exonerated due to the high quality of representation he received from the Office of the Public Defender. Mr. Johnson was in a dating relationship with a woman who had a 4 year old son. Mr. Johnson was accused of having molested the child, who gave very compelling videotaped testimony to law enforcement. Something didn't feel right about the accusations in this case, however. Through my investigation I learned that the maternal grandmother of the child was engaged in a custody dispute with the mother over the child and his sister. I learned that a similar allegation of molestation had been made by the child against the mother's former boyfriend - who is currently serving time in prison in another state for child molestation. I learned that, like my client, the former boyfriend was African-American. Armed with this information, I conducted a deposition of the child, who eventually admitted that he had, in fact, fabricated the allegations against my client at the urging of his grandmother. The charges against my client (which carried the possibility of life in prison) were dropped as a result. (Nolle Prosequi May 7, 2012).

31. Attach at least one example of legal writing which you personally wrote. If you have not personally written any legal documents recently, you may attach writing for which you had substantial responsibility. Please describe your degree of involvement in preparing the writing you attached.

I was entirely responsible for preparing the attached writing sample. The senior partner whose name also appears on the brief had been the trial attorney. He made no substantive changes to the writing I had done.

#### **PRIOR JUDICIAL EXPERIENCE OR PUBLIC OFFICE:**

- 32a. Have you ever held judicial office or been a candidate for judicial office? If so, state the court(s) involved and the dates of service or dates of candidacy.

No

32b. List any prior quasi-judicial service:

<i>Dates</i>	<i>Name of Agency</i>	<i>Position Held</i>
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n/a

Types of issues heard:

32c. Have you ever held or been a candidate for any other public office? If so, state the office, location and dates of service or candidacy.

No

32d. If you have had prior judicial or quasi-judicial experience,

(i) List the names, phone numbers and addresses of six attorneys who appeared before you on matters of substance.

n/a

(ii) Describe the approximate number and nature of the cases you have handled during your judicial or quasi-judicial tenure.

n/a

(iii) List citations of any opinions which have been published.

n/a

(iv) List citations or styles and describe the five most significant cases you have tried or heard. Identify the parties, describe the cases and tell why you believe them to be significant. Give dates tried and names of attorneys involved.

n/a

(v) Has a complaint about you ever been made to the Judicial Qualifications Commission? If so, give date, describe complaint, whether or not there was a finding of probable cause, whether or not you have appeared before the Commission, and its resolution.

n/a

(vi) Have you ever held an attorney in contempt? If so, for each instance state name of attorney, approximate date and circumstances.

n/a

(vii) If you are a quasi-judicial officer (ALJ, Magistrate, General Master), have you ever been disciplined or reprimanded by a sitting judge? If so, describe.

n/a

**BUSINESS INVOLVEMENT:**

33a. If you are now an officer, director or otherwise engaged in the management of any business enterprise, state the name of such enterprise, the nature of the business, the nature of your duties, and whether you intend to resign such position immediately upon your appointment or election to judicial office.

n/a

33b. Since being admitted to the Bar, have you ever been engaged in any occupation, business or profession other than the practice of law? If so, give details, including dates.

No

33c. State whether during the past five years you have received any fees or compensation of any kind, other than for legal services rendered, from any business enterprise, institution, organization, or association of any kind. If so, identify the source of such compensation, the nature of the business enterprise, institution, organization or association involved and the dates such compensation was paid and the amounts.

No

**POSSIBLE BIAS OR PREJUDICE:**

34. The Commission is interested in knowing if there are certain types of cases, groups of entities, or extended relationships or associations which would limit the cases for which you could sit as the presiding judge. Please list all types or classifications of cases or litigants for which you as a general proposition believe it would be difficult for you to sit as the presiding judge. Indicate the reason for each situation as to why you believe you might be in conflict. If you have prior judicial experience, describe the types of cases from which you have recused yourself.

No

**MISCELLANEOUS:**

35a. Have you ever been convicted of a felony or a first degree misdemeanor?

Yes \_\_\_\_\_ No  If "Yes" what charges? \_\_\_\_\_

Where convicted? \_\_\_\_\_ Date of Conviction: \_\_\_\_\_

35b. Have you pled nolo contendere or pled guilty to a crime which is a felony or a first degree misdemeanor?

Yes \_\_\_\_\_ No  If "Yes" what charges? \_\_\_\_\_

Where convicted? \_\_\_\_\_ Date of Conviction: \_\_\_\_\_

35c. Have you ever had the adjudication of guilt withheld for a crime which is a felony or a first degree misdemeanor?

Yes \_\_\_\_\_ No  If "Yes" what charges? \_\_\_\_\_

Where convicted? \_\_\_\_\_ Date of Conviction: \_\_\_\_\_

36a. Have you ever been sued by a client? If so, give particulars including name of client, date suit filed, court, case number and disposition.

No

- 36b. Has any lawsuit to your knowledge been filed alleging malpractice as a result of action or inaction on your part?

No

- 36c. Have you or your professional liability insurance carrier ever settled a claim against you for professional malpractice? If so, give particulars, including the amounts involved.

No

- 37a. Have you ever filed a personal petition in bankruptcy or has a petition in bankruptcy been filed against you?

No

- 37b. Have you ever owned more than 25% of the issued and outstanding shares or acted as an officer or director of any corporation by which or against which a petition in bankruptcy has been filed? If so, give name of corporation, your relationship to it and date and caption of petition.

No

38. Have you ever been a party to a lawsuit either as a plaintiff or as a defendant? If so, please supply the jurisdiction/county in which the lawsuit was filed, style, case number, nature of the lawsuit, whether you were Plaintiff or Defendant and its disposition.

No

39. Has there ever been a finding of probable cause or other citation issued against you or are you presently under investigation for a breach of ethics or unprofessional conduct by any court, administrative agency, bar association, or other professional group. If so, give the particulars.

No

40. To your knowledge within the last ten years, have any of your current or former co-workers, subordinates, supervisors, customers or clients ever filed a formal complaint or formal accusation of misconduct against you with any regulatory or investigatory agency, or with your employer? If so, please state the date(s) of such formal complaint or formal accusation(s), the specific formal complaint or formal accusation(s) made, and the background and resolution of such action(s). (Any complaint filed with JQC, refer to 32d(v).

Yes. Maynard McNulty. Florida Bar File No. 2012-31,113(5A). Mr. McNulty alleged ineffective assistance of counsel and claimed that I failed to inform him of a plea offer. A copy of my March 22, 2012 letter to Heidi E. Brewer, Bar Counsel, detailing the allegations, background and facts of the case is attached hereto, together with a copy of Ms. Brewer's letter, dated August 22, 2012 stating that, "there is insufficient evidence from the materials provided that the attorney has violated any of the rules ... which govern attorney discipline. Accordingly, continued disciplinary proceedings in this matter are inappropriate."

41. Are you currently the subject of an investigation which could result in civil, administrative or criminal action against you? If yes, please state the nature of the investigation, the

agency conducting the investigation and the expected completion date of the investigation.

No

42. In the past ten years, have you been subject to or threatened with eviction proceedings? If yes, please explain.

No

- 43a. Have you filed all past tax returns as required by federal, state, local and other government authorities?

Yes  No  If no, please explain. \_\_\_\_\_

- 43b. Have you ever paid a tax penalty?

Yes  No  If yes, please explain what and why. \_\_\_\_\_

- 43c. Has a tax lien ever been filed against you? If so, by whom, when, where and why?

No

#### **HONORS AND PUBLICATIONS:**

44. If you have published any books or articles, list them, giving citations and dates.

n/a

45. List any honors, prizes or awards you have received. Give dates.

Maine Volunteer Lawyers Project, Lew Vafiades Pro Bono Award, 2008

Maine Volunteer Lawyers Project Pro Bono Publico Awards 2007 & 2008

46. List and describe any speeches or lectures you have given.

n/a

47. Do you have a Martindale-Hubbell rating? Yes  If so, what is it? \_\_\_ No

#### **PROFESSIONAL AND OTHER ACTIVITIES:**

- 48a. List all bar associations and professional societies of which you are a member and give the titles and dates of any office which you may have held in such groups and committees to which you belonged.

Florida Bar Association

- 48b. List, in a fully identifiable fashion, all organizations, other than those identified in response to question No. 48(a), of which you have been a member since graduating from law school, including the titles and dates of any offices which you have held in each such organization.

Maine State Bar Association, Family Law Section: Vice Chair 2008-2009,  
Secretary/Treasurer 2006-2008

Penobscot County (Maine) Bar Association, Board of Directors 2005-2009

48c. List your hobbies or other vocational interests.

I enjoy kayaking, biking and hiking. I have participated in local community theatre and am active in my church and my children's school community. I am also a proud cross country and karate dad.

48d. Do you now or have you ever belonged to any club or organization that in practice or policy restricts (or restricted during the time of your membership) its membership on the basis of race, religion, national origin or sex? If so, detail the name and nature of the club(s) or organization(s), relevant policies and practices and whether you intend to continue as a member if you are selected to serve on the bench.

No

48e. Describe any pro bono legal work you have done. Give dates.

Maine Volunteer Lawyers Project 2002-2009. I represented several indigent clients in Family Law Cases. Also volunteered time for Maine Volunteer Lawyers Project as "Lawyer of the Day" on several occasions. I referred dozens of cases to attorneys to take on pro bono. In 2008, I was awarded the Lew Vafiades Pro Bono Award by the Maine Volunteer Lawyers Project for my efforts.

#### **SUPPLEMENTAL INFORMATION:**

49a. Have you attended any continuing legal education programs during the past five years? If so, in what substantive areas?

Yes. Criminal law, including death penalty; Professionalism.

49b. Have you taught any courses on law or lectured at bar association conferences, law school forums, or continuing legal education programs? If so, in what substantive areas?

Yes. Taught Business Law - Husson College, Bangor, Maine 2006-2007.

Lecturer, Maine State Bar Association 2006 Family Law Institute (Grandparents' Rights)

50. Describe any additional education or other experience you have which could assist you in holding judicial office.

I served as the Chairman of the Planning Board for the City of Brewer, Maine for three years. In that role, I was tasked with leading a seven member board that approved (or denied) proposals submitted by members of the public. I moderated presentations, discussions, debates and votes. I was also appointed by the Chief Judge of the State of Maine to serve on the State Court Library committee, which oversaw all of the Law Libraries in the state. In that role, I worked with judges, attorneys and law librarians from around the state to help transition the libraries into the digital age.

51. Explain the particular potential contribution you believe your selection would bring to this position.

I have experience working in all three branches of government - beginning with my time as a Legislative Associate with the New York State Senate right after college, to my time with the Department of Labor as I worked my way through law school and including my work as a Judicial Law Clerk for three judges of the Maine Superior Court. For approximately eight years I practiced primarily Family Law in the State of Maine, and in that time I became the vice-chair of the Family Law Section of the State Bar Association.



When I moved to Florida I went from never having handled a criminal case at the trial level to working on death penalty cases and managing an office within six years. I have worked with clients from all walks of life - from representing people in divorces in upscale communities such as Bar Harbor to representing indigent clients - including children - who have been charged with sometimes unthinkable crimes. I have unique insight into the fact that every person who is coming before the courts - whether it be in a family matter, a civil or criminal case - deserves the full attention and respect of the judicial system, and my full attention and respect as a judge.

52. If you have previously submitted a questionnaire or application to this or any other judicial nominating commission, please give the name of the commission and the approximate date of submission.

n/a

53. Give any other information you feel would be helpful to the Commission in evaluating your application.

#### **REFERENCES:**

54. List the names, addresses and telephone numbers of ten persons who are in a position to comment on your qualifications for judicial position and of whom inquiry may be made by the Commission.

Hon. Michael Graves, Public Defender, 5<sup>th</sup> Judicial Circuit

123 N. Sinclair Avenue

Tavares, Florida 32778

(352) 272-7980

John Spivey, Executive Assistant Public Defender, 5<sup>th</sup> Judicial Circuit

123 N. Sinclair Avenue

Tavares, Florida 32778

(352) 272-1725

Hon. Patricia V. Thomas, Circuit Judge, 5<sup>th</sup> Judicial Circuit

110 N Apopka Avenue

Inverness, Florida 34450

(352) 341-6701

Hon. Mary P. Hatcher, Circuit Judge, 5<sup>th</sup> Judicial Circuit  
110 N. Apopka Avenue  
Inverness, Florida 34450  
(352) 341-6709

Hon. Richard A. Howard, Circuit Judge, 5<sup>th</sup> Judicial Circuit  
110 N. Apopka Avenue  
Inverness, Florida 34450  
(352) 341-6705

Julia Metts, Assistant State Attorney, 5<sup>th</sup> Judicial Circuit  
110 N. Apopka Avenue  
Inverness, Florida 34450  
(352) 341-6670

Hon. Joe Meek, Citrus County Commissioner  
3411 W. Wild Dunes Place  
Lecanto, Florida 34461  
(813) 393-8352

Hon. Jimmie T. Smith, Representative, Florida District 34  
6205 E. Willow Street  
Inverness, Florida 34452  
(352) 464-5556

Tricia Jenkins, Assistant Public Defender, 5<sup>th</sup> Judicial Circuit  
204 NW 3<sup>rd</sup> Avenue  
Ocala, Florida 34475  
(352) 857-6243

Darla Graber, Citrus County Teen Court Coordinator  
110 N. Apopka Avenue  
Inverness, Florida 34450  
(352) 341-6722

## CERTIFICATE

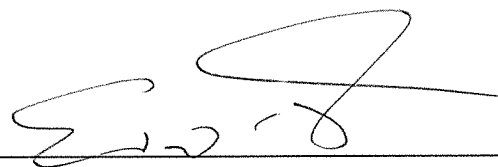
I have read the foregoing questions carefully and have answered them truthfully, fully and completely. I hereby waive notice by and authorize The Florida Bar or any of its committees, educational and other institutions, the Judicial Qualifications Commission, the Florida Board of Bar Examiners or any judicial or professional disciplinary or supervisory body or commission, any references furnished by me, employers, business and professional associates, all governmental agencies and instrumentalities and all consumer and credit reporting agencies to release to the respective Judicial Nominating Commission and Office of the Governor any information, files, records or credit reports requested by the commission in connection with any consideration of me as possible nominee for appointment to judicial office. Information relating to any Florida Bar disciplinary proceedings is to be made available in accordance with Rule 3-7.1(l), Rules Regulating The Florida Bar. I recognize and agree that, pursuant to the Florida Constitution and the Uniform Rules of this commission, the contents of this questionnaire and other information received from or concerning me, and all interviews and proceedings of the commission, except for deliberations by the commission, shall be open to the public.

Further, I stipulate I have read, and understand the requirements of the Florida Code of Judicial Conduct.

Dated this 30th day of September, 2015.

Edward C Spaight

Printed Name



Signature

*(Pursuant to Section 119.071(4)(d)(1), F.S.), . . . The home addresses and telephone numbers of justices of the Supreme Court, district court of appeal judges, circuit court judges, and county court judges; the home addresses, telephone numbers, and places of employment of the spouses and children of justices and judges; and the names and locations of schools and day care facilities attended by the children of justices and judges are exempt from the provisions of subsection (1), dealing with public records.*

## FINANCIAL HISTORY

1. State the amount of gross income you have earned, or losses you have incurred (before deducting expenses and taxes) from the practice of law for the preceding three-year period. This income figure should be stated on a year to year basis and include year to date information, and salary, if the nature of your employment is in a legal field.

Current year to date	53,600		
List Last 3 years	70,000 - 2014	71,000 - 2013	61,000 - 2012

2. State the amount of net income you have earned, or losses you have incurred (after deducting expenses but not taxes) from the practice of law for the preceding three-year period. This income figure should be stated on a year to year basis and include year to date information, and salary, if the nature of your employment is in a legal field.

Current year to date	53,600		
List Last 3 years	66,000 - 2014	71,000 - 2013	61,000 - 2012

3. State the gross amount of income or losses incurred (before deducting expenses or taxes) you have earned in the preceding three years on a year by year basis from all sources other than the practice of law, and generally describe the source of such income or losses.

Current year to date	0		
List Last 3 years	0	0	0

4. State the amount of net income you have earned or losses incurred (after deducting expenses) from all sources other than the practice of law for the preceding three-year period on a year by year basis, and generally describe the sources of such income or losses.

Current year to date	0		
List Last 3 years	0	0	0

**FORM 6  
FULL AND PUBLIC  
DISCLOSURE OF  
FINANCIAL INTEREST**

**PART A – NET WORTH**

Please enter the value of your net worth as of December 31 or a more current date. [Note: Net worth is not calculated by subtracting your *reported* liabilities from your *reported* assets, so please see the instructions on page 3.]

My net worth as of October 1, 2015 was \$10,000.

**PART B - ASSETS**

**HOUSEHOLD GOODS AND PERSONAL EFFECTS:**

Household goods and personal effects may be reported in a lump sum if their aggregate value exceeds \$1,000. This category includes any of the following, if not held for investment purposes; jewelry; collections of stamps, guns, and numismatic items; art objects; household equipment and furnishings; clothing; other household items; and vehicles for personal use.

The aggregate value of my household goods and personal effects (described above) is \$ 25,000

**ASSETS INDIVIDUALLY VALUED AT OVER \$1,000:**

DESCRIPTION OF ASSET (specific description is required – see instructions p. 3)

VALUE OF ASSET

DESCRIPTION OF ASSET (specific description is required – see instructions p. 3)	VALUE OF ASSET
Home - 2526 E Celina Street, Inverness, Florida	163,000

**PART C - LIABILITIES**

LIABILITIES IN EXCESS OF \$1,000 (See instructions on page 4):

NAME AND ADDRESS OF CREDITOR

AMOUNT OF LIABILITY

NAME AND ADDRESS OF CREDITOR	AMOUNT OF LIABILITY
Mortgage - Suntrust Mortgage, PO Box 26149, Richmond, VA 23260	123,482
Student Loan - US Dept.of Education, PO Box 36008, Knoxville, TN 37930	112,856

JOINT AND SEVERAL LIABILITIES NOT REPORTED ABOVE:

NAME AND ADDRESS OF CREDITOR

AMOUNT OF LIABILITY

NAME AND ADDRESS OF CREDITOR	AMOUNT OF LIABILITY

**PART D - INCOME**

You may **EITHER** (1) file a complete copy of your latest federal income tax return, *including all W2's, schedules, and attachments*, **OR** (2) file a sworn statement identifying each separate source and amount of income which exceeds \$1,000 including secondary sources of income, by completing the remainder of Part D, below.

I elect to file a copy of my latest federal income tax return and all W2's, schedules, and attachments.  
 (if you check this box and attach a copy of your latest tax return, you need not complete the remainder of Part D.)

**PRIMARY SOURCE OF INCOME (See instructions on page 5):**

NAME OF SOURCE OF INCOME EXCEEDING \$1,000	ADDRESS OF SOURCE OF INCOME	AMOUNT
Office of the Public Defender, Fifth Judicial Circuit (State of Florida)	200 E Gaines Street Tallahassee, Florida 32399	\$65,343.28
Seven Rivers Christian School (Wife's Income)	4221 W Gulf to Lake Highway Lecanto, Florida 34461	27,050.50

**SECONDARY SOURCES OF INCOME** [Major customers, clients, etc., of businesses owned by reporting person—see instructions on page 6]

NAME OF BUSINESS ENTITY	NAME OF MAJOR SOURCES OF BUSIENSS' INCOME	ADDRESS OF SOURCE	PRINCIPAL BUSINESS ACTIVITY OF SOURCE
n/a			

**PART E – INTERESTS IN SPECIFIC BUSINESS [Instructions on page 7]**

	BUSINESS ENTITY #1	BUSINESS ENTITY #2	BUSINESS ENTITY #3
NAME OF BUSINESS ENTITTY	n/a		
ADDRESS OF BUSINESS ENTITY			
PRINCIPAL BUSINESS ACTIVITY			
POSITION HELD WITH ENTITY			
I OWN MORE THAN A 5% INTEREST IN THE BUSINESS			
NATURE OF MY OWNERSHIP INTEREST			

**IF ANY OF PARTS A THROUGH E ARE CONTINUED ON A SEPARATE SHEET, PLEASE CHECK HERE**

**OATH**

I, the person whose name appears at the beginning of this form, do depose on oath or affirmation and say that the information disclosed on this form and any attachments hereto is true, accurate, and complete.



**SIGNATURE**

**STATE OF FLORIDA**  
**COUNTY OF** Citrus  
 Sworn to (or affirmed) and subscribed before me this 30 day of September, 2015 by Edward C. Spaight  
Marissa Benavides Perea  
 (Signature of Notary Public—State of Florida)  
 MARISSA BENAVIDES-PEREA  
 (Print, Type, or Stamp Commissioned Name of Notary Public)  
**NOTARY PUBLIC**  
**STATE OF FLORIDA**  
 Comm# FF080833  
 Expires 1/5/2018  
 Personally Known  OR Produced Identification   
 Type of Identification Produced \_\_\_\_\_

## JUDICIAL APPLICATION DATA RECORD

The judicial application shall include a separate page asking applicants to identify their race, ethnicity and gender. Completion of this page shall be optional, and the page shall include an explanation that the information is requested for data collection purposes in order to assess and promote diversity in the judiciary. The chair of the Commission shall forward all such completed pages, along with the names of the nominees to the JNC Coordinator in the Governor's Office (pursuant to JNC Uniform Rule of Procedure).

(Please Type or Print)

Date: September 30, 2015

JNC Submitting To: Fifth Judicial Circuit

Name (please print): Edward C Spaight

Current Occupation: Assistant Public Defender

Telephone Number: (352) 436-3889 Attorney No.: 70722

Gender (check one):  Male  Female

Ethnic Origin (check one):  White, non Hispanic

Hispanic

Black

American Indian/Alaskan Native

Asian/Pacific Islander

County of Residence: Citrus



FLORIDA DEPARTMENT OF LAW ENFORCEMENT

DISCLOSURE PURSUANT TO THE  
FAIR CREDIT REPORTING ACT (FCRA)

The Florida Department of Law Enforcement (FDLE) may obtain one or more consumer reports, including but not limited to credit reports, about you, for employment purposes as defined by the Fair Credit Reporting Act, including for determinations related to initial employment, reassignment, promotion, or other employment-related actions.

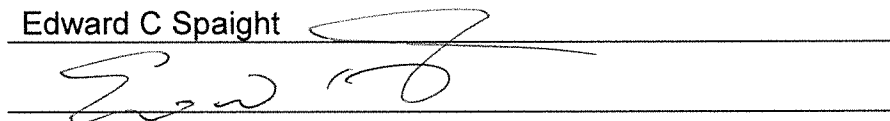
CONSUMER'S AUTHORIZATION FOR FDLE  
TO OBTAIN CONSUMER REPORT(S)

I have read and understand the above Disclosure. I authorize the Florida Department of Law Enforcement (FDLE) to obtain one or more consumer reports on me, for employment purposes, as described in the above Disclosure.

Printed Name of  
Applicant:

Edward C Spaight

Signature of Applicant:



Date: September 30, 2015



Attachment for Question 31  
Writing Sample

UNITED STATES COURT OF APPEALS  
FOR THE FIRST CIRCUIT

Docket No. 06-2474, 06-24755

UNITED STATES OF AMERICA,  
Appellee

v.

LARRY DEAN ALEXANDER,  
Defendant/Appellant

APPEAL FROM THE UNITED STATES DISTRICT  
COURT FOR THE DISTRICT OF MAINE

BRIEF OF DEFENDANT/APPELLANT  
Larry Dean Alexander

Marvin H. Glazier, Esquire  
Edward C. Spaight, Esquire  
VAFIADES, BROUNTAS & KOMINSKY, LLP  
Key Plaza - 23 Water Street  
P.O. Box 919  
Bangor, ME 04402-0919  
(207) 947-6915

Attorneys for Defendant/Appellant  
Larry Dean Alexander

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STATEMENT OF ISSUES PRESENTED

1. Whether sufficient evidence exists on the record to support the finding that the Appellant knowingly possessed firearms in violation of Title 18, United States Code, Section 922(g).
  
2. Whether sufficient evidence exists on the record to support the finding that the Appellant illegally possessed firearms in violation of Title 26, United States Code, Sections 5861 and 5871.
  
3. Whether the trial court erred in denying Defendant's motion for a new trial.

STATEMENT OF THE CASE

1. Statement of Proceedings/Jurisdiction

On August 11, 2004, an Indictment was entered against Defendant/Appellant Larry Dean Alexander, Docket No. 04-64-B-W, in the United States District Court for the District of Maine, charging him with one count of Possession of an Unregistered Short Barreled Shotgun, pursuant to 26 U.S.C. §5861(d) and 5871; one count of Possession of a Firearm After Conviction of a Felony, pursuant to 18 U.S.C. §922(g)(1), and one count of Possession of a Firearm After Conviction of a Misdemeanor Crime of Domestic Violence, pursuant to 18 U.S.C. §922(g)(9). The United States District Court for the District of Maine assumed jurisdiction over this matter by virtue of Title 18, United States Code, Sections 3231 and 3232, as well as Rule 18 of the Federal Rules of Criminal Procedure. The Appellant pleaded not guilty to the charges at his arraignment on February 23, 2005.

A one-day jury trial was held on September 9, 2005 in the United States District Court for the District of Maine. At the conclusion of the trial, the Defendant was found guilty of all three counts.

Defendant subsequently filed a motion for a new trial, which was denied by the Court on May 4, 2006. On June 5, 2006, Defendant filed a pro se Motion for Mistrial, which was denied by the Court on July 5, 2006.



Final Judgment was entered on October 13, 2006. The Appellant filed the present appeal from the final judgment of his conviction. This Court has subject matter jurisdiction over this appeal pursuant to Title 28, United States Code, Section 1291.

## 2. Brief Statement of Facts

The Defendant, Larry Dean Alexander (hereinafter Alexander), resided in Sullivan, Maine, with his girlfriend, Nicole Sargent, and her family. It was stipulated at trial that Alexander had been convicted of a felony, and that he had been convicted of a misdemeanor crime of domestic violence.

It is not disputed that on or about December 11, 2003, a young man named Marc Wallace was arrested while in possession of a Mossberg 12-gauge shotgun. It is also not disputed that when Wallace was arrested, the shotgun in his possession had a barrel length less than eighteen inches. What is in dispute is: a) Larry Dean Alexander's role in Wallace obtaining the shotgun; b) whether Alexander at any time possessed the shotgun; c) whether the degree of contact, if any, that Alexander had with the shotgun was sufficient for Alexander to know, or have reason to know that the shotgun had a short barrel; and d) whether the barrel of the gun was shorter than the legal limit at any time while the shotgun could be deemed to be in Alexander's possession.

Alexander did not testify at trial, nor did his girlfriend, Nicole Sargent, who had indicated that if she were called to testify, she would invoke her right against self incrimination. (Trans. p. 98-104).

The witnesses at trial included Marc Wallace, who received leniency in sentencing for his own possession of the shotgun at issue here in exchange for his testimony against Alexander; Kelly Ross, Wallace's girlfriend; Ernest Morse, Wallace's brother; and two witnesses who did not claim to be present on the date of the alleged sale of the shotgun, Brent McSweyn, an agent of the Bureau of Alcohol, Tobacco and Firearms, as well as Michelle Presnell, the registered owner of the shotgun. It is not contended that Alexander ever owned the shotgun at issue here. The Government's evidence tends to show that at some point the shotgun was owned by Nate Sargent, the brother of Alexander's girlfriend.

The only consistent evidence presented at trial was that on some date, probably in late November, 2003 - though the exact date was not in evidence - Alexander and his girlfriend, Nicole Sargent, were present at the home of Marc Wallace. The testimony of all witnesses that were present is also that a car belonging to Nicole Sargent was parked outside of the residence, but no witness testified that Alexander was actually in the car at any relevant time.

Beyond these facts, the witnesses' accounts vary wildly.

By Wallace's account, Alexander handed Wallace the shotgun at the doorway to Wallace's residence, and Wallace gave \$50.00 to Alexander. (Trans. p. 32, 25-26). Wallace did not testify that

the shotgun was in any way wrapped or covered at the time it came into his possession, but rather that he looked it over prior to handing Alexander the money, and that "it seemed okay." (Trans. p. 26). Wallace then testified that the group "sat around for awhile" before Alexander and Sargent left. (Trans. p. 27).

By Kelly Ross' account, the transaction took place not at the doorway to Wallace's residence, but rather outside of the residence, next to the vehicle. Ross specifically testified that the alleged exchange did not take place inside the residence nor in the doorway, as Wallace had testified. (Trans. p. 49). Ross testified further that she saw Alexander reach into the trunk of the vehicle, pull out a gun wrapped in a blanket, and hand it to Wallace. She also testified that she did not see a gun at the time of the exchange, only a blanket being passed. (Trans. p. 50). Ross then testified that Alexander and Sargent left without going into the residence. (Trans. p. 49-50).

Ross' testimony was also inconsistent with the earlier statements she had given to law enforcement that the transaction had taken place inside of the house, and that Alexander come into the house and had then gone back outside to get the shotgun. (Trans. p. 52-53, 90).

Wallace's brother, Ernest Morse, like Ross, to the extent that his testimony could be considered evidence that a transaction took place, places the alleged transaction outside of

the residence. He testified that Alexander, Sargent, Wallace and Ross all came into the house; then they all went outside, but that he didn't go with them. (Trans. p. 63). He then testified that Alexander and the others came back into the house, talked amongst themselves for a while, and then Alexander and Sargent left. (Trans. p. 63). Morse testified that he did not even see the shotgun until later that day, and that he did not know where the shotgun had come from. (Trans. p. 64).

Several weeks after the alleged transaction, during a domestic violence call to Marc Wallace's residence, Wallace was arrested for possession of a sawed-off shotgun. (Trans. p. 19-21). Following his arrest and indictment, Wallace was offered a reduction in his sentence in exchange for his testimony against Alexander. (Trans. p. 18-19).

### 3. Brief Statement of Arguments

- A. There was no credible testimony that Alexander at any given time had both the power and the intention to exercise dominion or control over the shotgun, nor to exercise dominion or control over the area in which the shotgun was located. The Government did not, as a result, produce evidence sufficient to support a finding that Alexander illegally possessed a firearm in violation of Title 18, United States Code, Section 922(g).
- B. The Government did not meet its burden of proving that Alexander was aware, or had reason to be aware of the characteristics of the shotgun. Specifically, the Government did not prove that Alexander knew or had reason to know that the barrel of the shotgun was less than eighteen inches in length. As a result, Alexander's conviction for violation of 26 U.S.C. §5861(d) and 5871 must be vacated.
- C. Because the verdict is against the demonstrable weight of the credible evidence and because the judgment in this case results in a blatant miscarriage of justice, Alexander was entitled to a new trial. It was error for the Court to deny his Motion for a New Trial.

ARGUMENT

I. THE GOVERNMENT DID NOT PRODUCE SUFFICIENT EVIDENCE TO SUPPORT A FINDING THAT ALEXANDER EITHER ACTUALLY OR CONSTRUCTIVELY POSSESSED A FIREARM IN VIOLATION OF TITLE 18, UNITED STATES CODE, SECTION 922(G).

"Possession of firearms can be either actual or constructive," for purposes of 18 U.S.C. §922(G). (*U.S. v. Powell*, 50 F.3d 94, 100 (1<sup>st</sup> Cir. 1995) (citing *U.S. v Rogers*, 41 F.3d 25, 29 (1<sup>st</sup> Cir. 1994))). The Government failed to meet its burden by credible evidence of demonstrating that Mr. Alexander had either actual or constructive possession of the shotgun at issue here.

In this case, several of the witnesses presented evidence that was simply not credible. This included:

The testimony of Mark Wallace, who had entered into an agreement with the Prosecution to plead guilty to related charges and to cooperate with the case against Mr. Alexander, contained a number of inconsistencies. Notably, Wallace testified that Alexander had never been to his house before the day of the alleged firearm transaction, but then changed his testimony to acknowledge that Mr. Alexander, had, indeed, been to his house on several occasions prior to the date in question. (Trans. p. 33, 37).

Furthermore, Mark Wallace's testimony about the alleged transaction was seriously impeached by the testimony of other witnesses, including his girlfriend. Wallace testified that he was standing in the doorway at the time of the transaction. (Trans. p. 32). Kelly Ross and Ernest Morse stated Wallace was outside. (Trans. p. 48-49, 63). Wallace further testified that he "did not remember" if he had seen the gun a week before or not (Trans. p. 36), while Kelly Ross testified to having driven with Wallace to view the gun the week before the alleged transaction. (Trans. p. 47-48).

Wallace's credibility, indeed the credibility of Wallace, Ross and Morse, are all impeached by Special Agent Brent McSweyn, who testified that both Wallace and Ross had told him during interviews that the transaction had taken place inside of the house - not in the doorway as Wallace testified, and not in the dooryard, as was testified to by Ross and Morse. (Trans. p. 90).

Furthermore, the testimony provided by Kelly Ross was inconsistent with statements made to police closer to the time of the alleged transaction. In her statement, Ross said that Mr. Alexander and his girlfriend went into the house on the day of the alleged transaction, that Alexander then went back outside to the car and returned with a shotgun wrapped in a blanket. (Trans. p. 52-53). At trial, however, Ross testified that everyone was outside and Wallace was standing by the car.



(Trans. p. 48-49). Ross testified that she did not see Alexander handle the shotgun, but only that she saw Alexander remove a blanket from the trunk of the car. (Id.). Ross further testified at trial that she did not think everyone went back into the house following the alleged transaction, which is inconsistent with her statements to police and inconsistent with the testimony of Mark Wallace and Ernest Morse. Moreover, Ross's testimony that the money for the gun was exchanged outside the house is contrary to Wallace's testimony that the money was exchanged inside the house.

Finally, the credibility of Brent McSweyn is suspect in that he testified that while he tape recorded his interviews with several of the witnesses in the case, he failed to record either of his interviews with the Defendant. (Trans. p. 83-84). This is notable, in part, due to the fact that at trial McSweyn was not able to recall portions of his interviews with the Defendant, but was able to recall alleged statements by Alexander that are damaging to him.

As a result of the foregoing, the Government failed to produce credible evidence that Alexander actually possessed the firearm at issue here.

Nor did the Government produce credible evidence to show that Alexander constructively possessed the firearm.

Describing what constitutes constructive possession, the *Powell* Court held:

A person who, although not in actual possession, knowingly has both the power and the intention at a given time to exercise dominion or control over a thing, or to exercise dominion or control over the area in which that thing is found, whether directly or through another person, is then in constructive possession of the thing. *Powell*, 50 F.3d at 100 (quoting *Rogers*, 41 F.3d at 30).

As argued above, there was no credible testimony that Alexander at any given time had both the power and the intention to exercise dominion or control over any firearm.

Nor did Alexander at any time exercise dominion or control over the area in which the shotgun was located (See *Powell*, *supra*).

There was no testimony that the vehicle the firearm was allegedly transported in belonged to Alexander. Indeed, the testimony tends to show that the vehicle belonged to Alexander's girlfriend, Nicole Sargent. Furthermore, there was no testimony, whatsoever, that places Alexander inside the vehicle at any relevant time.

The Government did not, as a result, produce evidence sufficient to support a finding that the Appellant illegally possessed a firearm in violation of Title 18, United States Code, Section 922(g), and his convictions must be vacated as a result.

II. THE GOVERNMENT DID NOT PRODUCE SUFFICIENT EVIDENCE TO SUPPORT A FINDING THAT ALEXANDER KNOWINGLY POSSESSED A FIREARM WITH A BARREL LENGTH OF LESS THAN EIGHTEEN INCHES.

In order for the jury to convict [Defendant] of possession of an unregistered firearm, the government was required to present sufficient evidence that [he] knowingly possessed the type of firearm specifically described in 26 U.S.C. §5845(a), i.e., that he knew the firearm had a barrel length of less than eighteen inches. *United States v. Michel*, 446 F.3d 1122, 1129 (10<sup>th</sup> Cir. 2006) (citing *Staples v. United States*, 511 U.S. 600, 612, 619, 114 S.Ct. 1793, 128 L.Ed.2d 608 (1994)).

The *Michel* Court went on to state that, "while the government was not required to establish that [the Defendant] knew the gun was unregistered ... the government was required to prove beyond a reasonable doubt that [the Defendant] knew the firearm in his possession had a barrel shorter than eighteen inches." *Id* at 1130 (emphasis in original).

It was stipulated that the shotgun was not registered to Larry Dean Alexander. (Trans. 10-11). As argued above, the Government failed to prove that Alexander actually or constructively possessed the shotgun. (See Section I, *supra*). Even if the Court finds that Alexander did possess the shotgun, however, there was insufficient evidence to prove that Alexander was aware that the shotgun had a barrel length of less than eighteen inches.

The testimony of Kelly Ross was that when Alexander had possession of the shotgun, it was wrapped in a blanket. (Trans. p. 48-49). Alexander could not have had the ability to be aware

of the barrel length where the shotgun was so obscured from his view.

Ernest Morse testified that he did not even see the shotgun until after Alexander had left, and that he did not know where the shotgun had come from. (Trans. p. 64). Morse provided no evidence, as a result, that Alexander could have been aware of the shotgun's characteristics. Notably, there was no testimony from Morse that he observed the shotgun to be short-barreled on the day of the alleged exchange. The only testimony from Morse regarding the length of the barrel was when he saw and handled the shotgun the following day - after it had been in the possession of Marc Wallace.

The testimony of Brent McSweyn is suspect, as noted above, because McSweyn failed to tape either of his interviews with Alexander. (Trans. p. 83). During McSweyn's first interview of Alexander, McSweyn testified that Alexander saw the firearm once while it was in the possession of Nate Sargent, Nicole's brother, and that at that time the shotgun was of standard length. (Trans. p. 74-75). McSweyn then testified that Alexander told him in a subsequent interview that he (Alexander) had handled the firearm once "in its present condition" while Nate Sargent was in possession of it. (Trans. p. 77-78). This testimony does not meet the Government's burden of proof.

Furthermore, the testimony of Marc Wallace does not demonstrate that Alexander had an opportunity to observe the

shotgun in its present condition. Even if the remainder of Wallace's testimony is believed, and even if the shotgun barrel was short at the time of the alleged exchange, there was insufficient evidence provided by Wallace to show that Alexander had an opportunity to be aware of the characteristics of the shotgun. Wallace did not counter the testimony of Kelly Ross that the shotgun was wrapped in a blanket at the time it was allegedly exchanged.

There was also no evidence that Alexander was the individual who sawed off the shotgun. Indeed, it seems clear from the evidence that someone other than Alexander sawed off the shotgun.

In addition, there was no testimony provided by the Prosecution, whatsoever, to prove the length of the shotgun barrel on the date of the alleged transaction. The only accurate measurement provided by the Prosecution of the length of the barrel was made after the gun was seized, on or about December 11, 2003 - which is, in the Prosecution's best case scenario, at least several weeks after the last time Mr. Alexander could have possessed the shotgun. The Government did not prove the length of the shotgun on the date in question, and it is very possible that the gun could have been shortened while it was in the possession of Mark Wallace.

Moreover, Marc Wallace had good reasons to lie and to point the finger at Dean Alexander in this regard. His motives provide reasonable doubt that the shotgun was in a sawed-off condition, or that the barrel had been sawed to less than eighteen inches when, and if, it was possessed by Alexander.

Furthermore, even if Alexander did have an opportunity to observe the shotgun after it had been sawed off, he could not reasonably have been aware that it was short.

It is important to note that in order for a firearm to be of a legal length, it must have a total length of at least twenty-six (26) inches, and have a barrel length of at least eighteen (18) inches. (Trans. p. 86). The shotgun at issue in this case actually exceeds the minimum total length. The total length of the shotgun is twenty-six and three-quarters inches (26 3/4'). (Trans. p 87).

The issue in this case is that the barrel of the shotgun was "between 15 1/2 and 15 5/8 inches". (Trans. p. 88). This is only a difference of at most two and one half inches from the legal length. Even to the extent that the Government may have been able to demonstrate that Alexander may have at some point come into contact with the shotgun after it was sawed-off, the Government can not prove beyond a reasonable doubt that Alexander was aware that the barrel length was less than eighteen inches.

The lack of evidence that Alexander knew or had reason to know the specific characteristics of the shotgun is similar to the recent First Circuit case, *United States v. Nieves-Castano*, 480 F.3d 597 (1<sup>st</sup> Cir. 2007). Nieves-Castano was convicted under 18 U.S.C. §922(o) for possession of a machine gun. The Defendant in that case did not testify. The testimony presented by government agents who interviewed Nieves-Castano was that she had been storing the gun, an AK-47, in a golf bag for a friend, and that she had on at least one occasion opened the golf bag and observed the gun. (Id. at 600). This Court overturned Nieves-Castano's conviction, finding that the evidence was, "simply insufficient to establish, beyond a reasonable doubt, the defendant's knowledge that the rifle possessed the characteristics of an automatic weapon." (Id. at 602).

Similarly here, Alexander did not testify. Agent McSweyn testified that Alexander stated that he once handled the gun in its present condition, (Trans. p. 76), but gave no further information as to what "handled the gun in its present condition" meant. Nor was there any evidence to describe the ability, or lack of ability, on the part of Alexander to observe the shotgun in a way that he either knew or should have known that the shotgun had a barrel of less than eighteen inches.

"Although ownership of the weapon is not required for conviction, mere possession of the weapon is insufficient. The

government must also prove beyond a reasonable doubt that the defendant knew the weapon had the characteristics that brought it within the statutory definition." (Id. at 599 (citations omitted)).

Moreover, the mere fact that the shotgun was sawed-off does not mean that Alexander either knew or should have known that it was shorter than the legal requirement. (See, *United States v. Orozco-Martinez*, 440 F.Supp.2d 915, 920 n.3 (E.D. Wis. 2006), stating, "I would add that it is legal to saw off a shotgun, so long as the overall length is not less than 26 inches or the barrel length less than 18 inches"). The *Orozco-Martinez* Court found further that, "it is not hard to conceive of a person reasonably believing a 17.5 inch shotgun is over 18 inches and therefore perfectly legal." (Id at 920).

In this case, where the shotgun was over fifteen and one-half inches, the Government did not meet its burden of proving beyond a reasonable doubt that Alexander knew the barrel length was less than eighteen inches.

As a result of the foregoing, the Government did not produce sufficient evidence to support a finding that Alexander knowingly possessed a firearm with a barrel length of less than eighteen inches, and his conviction pursuant to 26 U.S.C. §5861(d) and 5871 should be vacated.



III. IT WAS ERROR FOR THE COURT TO DENY ALEXANDER'S MOTION FOR A NEW TRIAL.

A Defendant is entitled to a new trial if "the verdict is against the demonstrable weight of the credible evidence or results in a blatant miscarriage of justice" *Acevedo-Garcia v. Monroig*, 351 F.3d 547, 565 (1st Cir. 2003).

In this case, as noted above, several of the witnesses presented evidence that was inconsistent and simply not credible. (See Section I, *supra*).

Next, as also argued above (See Section I, *supra*), Mr. Alexander's conviction for knowing possession of a short barreled shotgun was not supported by the evidence and results in a miscarriage of justice.

As a result of the foregoing, the verdict is "against the demonstrable weight of the credible evidence" (*Acevedo-Garcia*), and the verdict furthermore "results in a blatant miscarriage of justice." (*Id.*) Defendant is, therefore, entitled to a new trial, and the Court committed error by failing to grant his motion in this regard.

CONCLUSION

For all the foregoing reasons, the Appellant's convictions for violation of Title 18, United States Code, Section 922(G), and for violation of Title 26 United States Code Sections 5861(d) and 5871, should be reversed.

Respectfully submitted,

Dated: May 25, 2007

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Marvin H. Glazier, Esquire

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Edward C. Spaight, Esquire

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Attorneys for Defendant/Appellant,  
Larry Dean Alexander

Attachment for Question 40  
Formal Bar Complaint by Former Client

March 22, 2012

Heidi E, Brewer, Bar Counsel  
The Florida Bar  
651 East Jefferson Street  
Tallahassee, Florida 32399-2300

Re: Complaint by Maynard McNulty against Edward Cornelius Spaight  
The Florida Bar File No. 2012-31, 113 (5A)

Dear Ms. Brewer:

I am in receipt of the your letter dated March 9, 2012, and the attached Complaint, dated February 27, 2012 regarding Maynard McNulty.

The following is my response.

#### Facts of the Case

On April 17, 2011, Maynard McNulty entered the Winn Dixie store in Beverley Hills, Florida. He walked up to a register carrying a box of Pillsbury cake mix. He informed the clerk that he had a bomb and demanded that she put all of the money in a bag. He also demanded that she put the cake mix in the bag. Mr. McNulty also told the clerk not to call anyone or he would set off the bomb.

The clerk put cash and the cake mix into a bag. Mr. McNulty then grabbed the bag and walked out the exit doors. The clerk alerted her managers that she had been robbed. A manager followed Mr. McNulty on foot, while the clerk went to get her vehicle. The clerk and the manager followed Mr. McNulty in her car, while they were on the phone to 911.

Mr. McNulty realized he was being followed, and dropped the bag on the ground. The clerk and manager recovered the bag, which contained the cake mix and a \$50.00 bill.

Mr. McNulty was found hiding on the back porch of a residence a short distance away. He had \$481.38 on his person – which added to the \$50.00 that was already recovered, matched the \$531.38 that had been taken from Winn Dixie. Mr. McNulty stated to the arresting officer, “Yeah, you guys got me,” and he was identified as the robber by the clerk.

Mr. McNulty’s first appearance was held on April 19, 2011. At that time he was charged with Strongarm Robbery, a second degree felony. He was also charged at that time with an unrelated Theft and Dealing in Stolen Property. The Office of the Public Defender was

appointed to both cases at that time.<sup>1</sup>

I first met with Mr. McNulty at the jail on May 3, 2011. At that time, he told me that he had a very limited criminal history, consisting of only two prior misdemeanor offenses. Mr. McNulty failed to inform me at that time that he had, in fact, been convicted of a similar offense in New Jersey approximately fifteen years prior, and that he had previously served time in a New Jersey prison.

At our initial meeting, Mr. McNulty indicated to me that he has an alcohol problem and that he had been going through a number of stressors in his life, particularly related to his girlfriend, who had recently taken the couple's infant child and returned to New Jersey. He indicated to me that at the time of the offense he had been on a three month drinking binge. Mr. McNulty requested that I file a motion to lower his bond, which was then set at \$10,000, again reiterating to me that he had no prior criminal history.

In a discussion with the prosecuting attorney on May 16, 2011, I learned of Mr. McNulty's prior criminal history. I was informed that if Mr. McNulty was willing to help get the property back on the Theft and Dealing in Stolen Property case, that case would likely be dismissed.<sup>2</sup> At that time I was also informed that Mr. McNulty "scored" 25.05 months in the Department of Corrections, but that the Assistant State Attorney intended to extend a plea offer of five years in the Department of Corrections, due to Mr. McNulty's prior history - including the fact that he had previously committed a similar offense.

The State never extended a formal, written plea offer in this case.

Mr. McNulty's arraignment and bond hearing both took place on May 20, 2011. The Motion for a bond reduction was denied. The case was set for a status conference on June 29, 2011. Mr. McNulty posted bond on June 2, 2011, and called me to let me know he had gotten out of jail.

Mr. McNulty came to my office a few days later and brought me a hand-written document titled, "Diagnosis," which stated:

Substance Induced Mood Disorder, Major Depressive Disorder - recurrent, moderate with psychotic features, Panic Disorder without agoraphobia, Impulse Control Disorder, Generalized Anxiety Disorder, Etoh Abuse & Aspd traits, BiPolar & Borderline Personality, Morning Meds - Seroquel 50 mgs, Wellbutrin 150 mgs., Folic Acid, Vit. B1, multi vit.; Afternoon - 25 mgs., Seroquel; Evening Meds - Seroquel 100 mgs., Depakote 1000 mgs., Vistaril 50 mgs. As Needed

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<sup>1</sup> The Theft and Dealing in Stolen Property Case was dropped on May 19, 2011.

<sup>2</sup> The stolen property was a refrigerator that Mr. McNulty had sold that belonged to the landlord of the apartment he was renting.

I was informed that Mr. McNulty was not then under the care of any psychiatrist or counselor, and was informed that all of the listed diagnoses had been made in the past, when Mr. McNulty lived in New Jersey. He had come to Florida approximately 5 years prior. I informed Mr. McNulty that I would have him evaluated by a psychiatrist to look into the issue of whether he was insane at the time of the offense, as well as to look into any mitigating factors.

Mr. McNulty met with Dr. James T. Hogan, Ph.D. in my office on August 17, 2011. Dr. Hogan issued a report on August 20, 2011, in which Dr. Hogan stated that Mr. McNulty was likely malingering. He further stated that, "Mr. McNulty claimed deficits or symptoms in the neurological, emotional, psychotic and memory areas that are highly unlikely in a typical patient."

Also importantly, Dr. Hogan stated:

As we closed the interview, he admitted that he had been drinking during this period in his life and feeling depressed about his girlfriend and son. What seemed to me an effort to deflect my focus from alcoholic blackouts, he mentioned the possibility of a fugue state. From the diagnostic manual's description of a fugue state, Mr. McNulty's behavior seemed inconsistent with that diagnosis. From the descriptions available, his actions were goal directed, if injudicious.

Dr. Hogan determined that Mr. McNulty was competent to proceed. In the section of his report titled, "Appreciation of the Range and Nature of the Possible Penalties," Dr. Hogan wrote, "[Mr. McNulty] stated that its maximum penalty is 15 years. However, he recalled that Mr. Spaight estimated that he might be looking at two years in prison while recognizing that no final agreement has been reached."

With regard to Mr. McNulty's mental state at the time of the offense, Dr. Hogan was unconvinced that Mr. McNulty had experienced a "fugue" state, which is a mental health related blackout. He stated:

There are two major problems with the fugue issue. The first, found in the literature, that there is still disagreement as to whether such a diagnosis is valid, or the product of advocative therapy. The second is that there is no clinical evidence in this case beyond the claims of Mr. McNulty. That is, I am unaware of clinical evidence, perhaps from incidents in New Jersey, that such behavior has been documented, apart from any legal entanglements.

Finally, with regard to mitigating factors, Dr. Hogan stated:

While there may be mitigating factors, if his account is accurate, which I do not believe, there is no evidence of psychotic symptoms beyond his claim of hearing

voices. That is a claim often found in the forensic area, especially in prison, but the rest of the picture of an active psychosis typically is missing, as in this case. ... Also considering the tendency to exaggerate symptoms provided by the SIMS and M-FAST [diagnostic tests], there do not appear to be grounds extant upon which to base an insanity defense.

Dr. Hogan's report, which was clearly not favorable to Mr. McNulty's defense, was never shared with the Assistant State Attorney. A full copy of Dr. Hogan's report is available upon request.

When I shared Dr. Hogan's report with Mr. McNulty, he requested that I get a second opinion. I informed him that I was not authorized to do so. Mr. McNulty informed me that he would seek out his own second opinion, and indicated his intention to go to The Centers, a local mental health organization.

Prior to Mr. McNulty's September 21, 2011 status conference, the Assistant State Attorney had indicated that he might be willing to accept a plea to the bottom of the sentencing guidelines, 25.05 months to resolve the case. Mr. McNulty was adamant that he did not want to go to prison, and continued to insist that he had experienced a "fugue" state, which should mitigate his sanction.

On September 21, 2001, Mr. McNulty was given a final "plea or set" court date of December 1, 2011. At that time, he would be required to either take a plea or have the matter set for trial.

I met with Mr. McNulty in my office on November 10, 2011. We discussed his options for December 1. He could set the set the matter for trial – which was not a viable option given the confession and eyewitness identification; he could plead to 25.05 months in prison, an offer which I believed the state would accept at that time; or he could plead "open" to the court and request a pre-sentence investigation report.

Judge Howard, the trial judge, will often agree to place a "cap" on the liability of a Defendant who is pleading "open" to the court, meaning that the potential prison sentence would be less than the statutory maximum. I did inform Mr. McNulty of that fact on November 10, and then again when we spoke in my office on November 28, 2011.

When we met in my office on November 28, Mr. McNulty told me that he was not willing to plead to two years in prison, and that he wanted to ask for a plea to the court with a Pre-sentence Investigation and a cap.

On December 1, 2011, Judge Howard agreed to afford Mr. McNulty the opportunity to have a pre-sentence investigation report prepared in exchange for an open plea to the court, but the Judge refused to cap Mr. McNulty's liability.

Mr. McNulty decided on December 1, 2011 that he preferred to plea open to the Court, rather than take 25.05 months that day, because pleading open meant that he would not have to go to prison that day. Mr. McNulty believed that after reviewing the pre-sentence investigation report and seeing his mental health history, that the judge would sentence him to something less than the 25.05 months called for in the guidelines.<sup>3</sup>

I expressed to Mr. McNulty that while pleading open to the court in this manner exposed him to the risk of receiving a more severe sentence than the bottom of the guidelines, I felt it was more likely that the sentence ultimately imposed was likely to be somewhere in the ballpark of the two-year bottom of the guidelines, rather than near the statutory maximum.

Mr. McNulty signed a Waiver of Rights and Open Plea to the Court acknowledging the following:

- a. That he had discussed with me the facts of the case and any defenses that might be available.
- b. That he was satisfied that I had represented him to the best of my ability and had done all that could be expected of me.
- c. That he had not been promised any reward nor had it been suggested that he would be rewarded in any manner, or that he would be given any leniency in return for entering the plea; and
- d. That no person had used any threats, force, pressure or intimidation to induce him to make the plea. (Exhibit "A" Waiver of Rights and Open Plea to the Court, December 1, 2011).

At the time he tendered his open plea to the Court, Mr. McNulty acknowledged that the judge could sentence him to any legal sentence, up to the statutory maximum of fifteen years in prison.

The following exchange took place between Mr. McNulty and the Court:

THE COURT: Okay. So you're looking at the – well, maximum potential penalty is 15 years in prison and/or a \$10,000 fine. The sentencing guidelines call for somewhere around 20 months Department of Corrections.

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<sup>3</sup>Mr. McNulty's belief was bolstered by the fact that Judge Howard sentenced two men with similar offenses and who also had mental health issues to below guidelines sentences on December 1 as Mr. McNulty watched from the gallery.



Even though you're not entitled to a presentence investigation, I feel because of the unique facts of this case and your own mental challenges that a PSI will help me make the right decision. Is that your understanding?

THE DEFENDANT: Yes. Thank you, Your Honor.

THE COURT: Now you understand the State could be seeking as little as 20 months in the Department of Corrections or even 15 years. I've not put any cap on this.

If I look at your presentence investigation, otherwise convinced, I could give you as much as 15 years in state prison. You understand that?

THE DEFENDANT: I understand, Your Honor.

THE COURT: Your attorney's indicated to me that his focused argument for a downward departure mitigation will be that you suffer from a mental illness unrelated to – or a mental disorder or a mental illness unrelated to substance abuse. You understand that?

THE DEFENDANT: Yes, Your Honor.

THE COURT: There's no guarantees that's going to work. You understand that?

THE DEFENDANT: I do understand that, Your Honor. (Transcript, Change of Plea Hearing, December 1, 2011, p. 16-17). Exhibit "B." A full copy of the Hearing Transcript is available upon request.

A short time later, the following exchange took place:

THE COURT: Okay. Okay. So does the State have anything it wants to put on the way of record or for facts or otherwise?

MR. SHORE: No. The only thing I want to clarify for the record is actually his bottom of the guidelines is about 25 months.

THE COURT: 25 months?

MR. SHORE: Yes, sir.

THE COURT: Okay. So the low-end for what you're looking at, Mr. McNulty, is 25

months, but I told your attorney and I've told you in person while you're upon your oath that I'm going to keep every option open to me. You understand that?

THE DEFENDANT: Yes, Your Honor. (Transcript, Change of Plea Hearing, December 1, 2011, p. 20-21). Exhibit "C." A full copy of the Hearing Transcript is available upon request.

A Pre-sentence Investigation Report was ordered, and sentencing was set for January 26, 2012.

The resulting Pre-sentence Investigation Report was not favorable for Mr. McNulty. One remark, that Judge Howard focused on at sentencing was, "The defendant reported that he had used alcohol and drugs in the past. He acknowledged that he drinks occasionally, but does not feel that he has a drinking or substance abuse problem." (Exhibit "D" Presentence Investigation Report, January 19, 2012, page 8). A full copy of the Presentence Investigation Report is available upon request.

The officer who prepared the Pre-sentence Investigation Report also attached a copy of the November 8, 2011 Psychiatric Diagnostic Assessment from The Centers, which contained the following passage:

[Mr. McNulty] advises that he has periods of time wherein he doesn't remember what he does, so I am not sure about his reliability. He says he is here of his own accord, though he has been off meds for at least four years. He says that his public attorney did not direct him here, though he very shortly after coming here did sign a release of our records for the public defenders office, the investigator.. So, again, I am not sure of his reliability. A full copy of the Presentence Investigation Report and all attachments is available upon request.

Mr. McNulty began to get very nervous in the days leading up to the sentencing. He called me and I spoke with him on January 18, 24 and 25, 2012. He expressed to me on January 24 that he wanted to just take the 25.05 months. I told him I would see what I could do. The Assistant State Attorney did not object to Mr. McNulty accepting a plea to 25.05 months, but at that point it was up to the judge as to whether he would accept a plea to 25.05 months.

On January 26, 2012, immediately prior to the sentencing hearing, the Assistant State Attorney and I approached the bench. I informed the Court that Mr. McNulty wished to enter a plea to 25.05 months in the Department of Corrections. The Court declined to allow Mr. McNulty to change his plea.

At the Sentencing Hearing, I requested that the Court grant a downward departure from the Sentencing Guidelines. I argued that Mr. McNulty's offense was not committed in a

sophisticated manner and the he suffered from a mental health condition not related to substance abuse. I noted has psychiatric history and the fact that there is a family history of mental illness. I requested that the court send Mr. McNulty to the Florida Center for Addictions and Dual Disorders in Avon Park. Mr. McNulty and his parents also pleaded for leniency.

Judge Howard, however, focused upon the nature of Mr. McNulty's offense, his prior history involving a similar offense, and as stated above, the section of the Pre-sentence Investigation Report stating that Mr. McNulty, " does not feel that he has a drinking or substance abuse problem."

The Judge sentenced Mr. McNulty to nine years in the Department of Corrections, with a special condition that he could receive treatment at the Florida Center for Addictions and Dual Disorders in Avon Park, if allowed to do so by the Department of Corrections.

Addressing each of the specific allegations made by Mr. McNulty's:

1. That on November 28 or 29, I "didn't even know of the offer of 25 months."

As noted above, the State never made a formal written plea offer in this case. Originally, the Assistant State Attorney indicated that he would be seeking five years in prison. Prior to Mr. McNulty's September 21, 2011 status conference, the Assistant State Attorney had indicated that he might be willing to accept a plea to the bottom of the sentencing guidelines, 25.05 months, to resolve the case. Mr. McNulty was adamant that he did not want to go to prison, and continued to insist that he had experienced a "fugue" state, which should mitigate his sanction.

On November 28 or 29 there was no formal offer for me to be aware of. When I met with Mr. McNulty on November 28, he informed me that he did not want to go to prison on December 1, that he was unwilling to take a plea to two years in prison, and that he preferred to plead open to the court, believing that the judge would sentence him to something less than two years in prison.

2. That I sold Mr. McNulty and his parents "a dream" that the judge would depart downward.

I never sold Mr. McNulty a dream. I encouraged him to take the bottom of the guidelines prior to December 1, 2011. Mr. McNulty believed that the judge would do better than that. Mr. McNulty believed that when the judge saw his long history of mental illness and saw that he was getting treatment at the Centers, the judge would depart from the sentencing guidelines. He was also emboldened by the fact that two men with mental health issues received downward departures from Judge Howard while Mr. McNulty watched from the gallery on December 1, 2011.

The reports from the Centers that were included with the Presentence Investigation

Report, however, implied that Mr. McNulty was only seeking treatment in order to avoid his legal troubles. Mr. McNulty's counselor specifically questioned his reliability. The Court never saw the report from Dr. Hogan that suggested Mr. McNulty was probably malingering.

The other item that torpedoed Mr. McNulty, however, was when he told the Officer who was writing the Presentence Investigation Report that he did not feel that he had an alcohol problem.

This case was a full confession with an eyewitness. Trial was not a viable option.

Mr. McNulty could have taken a plea to 25.05 months on December 1, 2011, but he did not want to go to prison that day. The only alternative to having the case set for trial or to take a plea to 25.05 months was to "plea open" to the court with the benefit of a Presentence Investigation Report. Mr. McNulty was aware when he pleaded open that there was no cap on his liability and that he could have gotten up to fifteen years in prison.

Mr. McNulty chose to plead open on December 1, 2011, because that meant that he would not go to prison that day. He engaged in false hope against my advice.

I did not believe that the judge would sentence Mr. McNulty to nine years in prison. I had always believed that the judge would sentence him to at most four or five years. (Which was in line with the Assistant State Attorney's initial assessment of the case). I also informed Mr. McNulty that I believed it was unlikely that the judge would go below the sentencing guidelines.

Once my client made his decision to plead open, I advocated for him and tried to get the best resolution I could. Ultimately, however, it was Mr. McNulty's decision to throw himself on the mercy of the court.

3. That I, "lied about the events that would take place on the 1<sup>st</sup> of December"

I believed that the judge would agree to place a "cap" on Mr. McNulty's liability in exchange for a plea open to the court, as the judge will often do. I expected that the judge would agree to a cap of between three and five years in prison, and I informed Mr. McNulty of my belief. I could not, and did not, promise that the judge would agree to cap Mr. McNulty's liability.

On December 1, the judge declined to cap Mr. McNulty's liability. Mr. McNulty knew that his options were either to plea to 25.05 months, or to plea open, with the possibility that he could get fifteen years. He did not want to go to prison on December 1, and decided to plead open.

4. That I, refused to take the case to trial, stated that Mr. McNulty had no choice, never

wanted to fight and never accepted the first offer which was in Mr. McNulty's best interest.

There was a full confession and an eyewitness identification. There were no viable suppression issues, and the doctor who examined Mr. McNulty determined that there was no issue of insanity at the time. Yes, I advised Mr. McNulty that if he took the case to trial he would lose. As a previously convicted felon, he would not have been entitled to the benefit of a Pre-sentence Investigation Report. My belief is that after a trial, Mr. McNulty would have received at least the nine year sentence, and would likely have gotten more.

I am not permitted to accept offers from the state on Mr. McNulty's behalf. That is his decision. As indicated above, the State never made a formal offer in this case. Initially, the Assistant State Attorney indicated he would be seeking five years. Over time, I was able to get the State Attorney to be willing to accept the bottom of the guidelines. I told Mr. McNulty that I believed it was in his best interest to take the 25.05 months, but he did not want to go to prison.

5. That I never went for the Downward Departure, that Mr. McNulty was seeing his own psychiatrist, and therapist, which are grounds for the Departure, and Mr. McNulty was on Medication.

None of the items listed by Mr. McNulty are valid bases for a downward departure.

The therapist that Mr. McNulty was seeing, as noted above, questioned Mr. McNulty's veracity and motives.

The psychiatrist who I had evaluate Mr. McNulty stated that he believed that Mr. McNulty was malingering, and that he did not believe Mr. McNulty's description of his symptoms.

There was no basis for me to argue that Mr. McNulty suffers from a specialized condition for which he is unable to receive treatment in prison.

With regard to the issue of medications, the following exchange took place at the December 1, 2011 Change of plea hearing:

THE COURT: Okay. Do you are you taking any medications today?

THE DEFENDANT: Yes.

THE COURT: Okay. Do these medications help you deal with the stresses of life?

THE DEFENDANT: They're getting better.

THE COURT: Very good. Do you think you make better decisions with the medication or with out the medication.

THE DEFENDANT: With it. The longer the better. (Transcript, Change of Plea Hearing, December 1, 2011, p. 19). Exhibit "E." A full copy of the Hearing Transcript is available upon request. .

6. That I misrepresented Mr. McNulty's case from start to finish, and did not allow Mr. McNulty to take an offer in his best interest, and told his parents untruths during the case.

Mr. McNulty refused to accept any offer that meant, with certainty, that he would be sentenced to prison. I never prevented him from taking any offers.

I never told his parents any "untruths".

7. After much arguing on December 1, I lied to Mr. McNulty

The "arguing" between me and Mr. McNulty was due to the fact that I was strongly suggesting to Mr. McNulty that a plea to 25.05 months, even though that meant going to prison that day, was in his best interests – particularly when the judge refused to put a cap on Mr. McNulty's liability.

I never promised that the judge would depart downward from the sentencing guidelines. Once my client made the decision to plead open to the Court, I advocated for him to the best of my ability. I requested the most lenient sentence possible, and proposed a treatment option at the Florida Center for Addictions and Dual Disorders.

Mr. McNulty understood that once he pleaded open to the Court, I was not in a position to promise anything. It was entirely up to the judge.

8. I was unable to get the 25.05 months on January 26, 2012.

As noted above, Mr. McNulty began to get very nervous in the days leading up to the sentencing. He called me and I spoke with him on January 18, 24 and 25, 2012. He expressed to me on January 24 that he wanted to just take the 25.05 months. I told him I would see what I could do. I never said, "no problem." The Assistant State Attorney did not object to Mr. McNulty accepting a plea to 25.05 months, but at that point it was up to the judge as to whether he would accept a plea to 25.05 months.

On January 26, 2012, immediately prior to the sentencing hearing, the Assistant State Attorney and I approached the bench. I informed the Court that Mr. McNulty wished to enter a plea to 25.05 months in the Department of Corrections. The Court declined to allow Mr. McNulty to change his plea. (Transcript, Sentencing Hearing, January 26, 2012, p. 4-6) Exhibit

“F.” A full copy of the January 26, 2012 Transcript is available upon request.

As noted above, I did not think the judge would sentence Mr. McNulty as harshly as he did. I believed that the “worst case” would be in the neighborhood of four to five years, as was originally suggested by the Assistant State Attorney. I know that the Assistant State Attorney shared my assessment of the likely maximum.

Mr. McNulty knew exactly what he was doing when he pleaded open to the court. He is well aware of his own criminal history, and simply refused to accept any plea offer that meant, with certainty, that he would have to go to prison. On December 1, 2012, Mr. McNulty ceded all of the decision making authority to the judge, and received a sentence that was far more severe than Mr. McNulty was willing to agree to.

Thank you for your consideration of this matter. If you require anything additional from me, please let me know.

---

Edward Cornelius Spaight  
#70722  
Assistant Public Defender  
110 N. Apopka Ave.  
Inverness, Florida 34453  
(352) 341-6777

cc: Maynard McNulty, Central Florida Reception Center DCU 44542, 7000 Hc Kelly Road,  
Orlando, FL 32831 (With Attachments)

**CERTIFICATE OF DISCLOSURE**  
(Corporate/Government Employment)

I HEREBY CERTIFY that on this 22<sup>nd</sup> day of March, 2012, a true copy of the foregoing disclosure was furnished to Howard H. Babb, Esq., my supervisor at the Fifth Judicial Circuit Office of the Public Defender, with which I was associated at the time of the acts giving rise to the complaint in the Florida Bar File No. 2012-31, 113(5A).

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Edward Cornelius Spaight



# THE FLORIDA BAR

651 EAST JEFFERSON STREET  
TALLAHASSEE, FL 32399-2300

JOHN F. HARKNESS, JR.  
EXECUTIVE DIRECTOR

850/561/5600  
WWW.FLORIDABAR.ORG

August 22, 2012

Mr. Maynard McNulty U44542  
Columbia Correctional Institution  
216 SE Corrections Way  
Lake City, FL 32025-2013

Re: Complaint by Maynard McNulty against Edward Cornelius Spaight  
The Florida Bar File No. 2012-31,113 (5A)

Dear Mr. McNulty:

All correspondence and documents have been carefully reviewed.

In your complaint you allege that Mr. Spaight provided you with ineffective assistance of counsel in your criminal case, failed to inform you of an offer made by the State and misled you. Mr. Spaight has submitted his response which includes an explanation of the matter and actions taken.

The case materials provided include a copy of the Waiver of Rights and Open Plea to the Court that you signed. This document clearly demonstrates that you acknowledged that you had been advised by counsel of the nature of the charges against you, of the potential sentence you might receive if the case were tried, of your right to trial which you were freely and voluntarily waiving, and that you were satisfied with the legal services you had been provided.

Bar counsel must analyze the complaint and the supporting evidence from the standpoint of whether or not, as a prosecutorial agency, the case stands a reasonable chance of being won if litigated. One of the considerations Bar Counsel must weigh in deciding whether to close a file or proceed further to seek disciplinary measures is the weight of the available evidence. If the Bar seeks to discipline the lawyer, it is required by Supreme Court ruling to show, by "clear and convincing" evidence that there has been a violation of one or more of the Rules Regulating The Florida Bar.

My review of this file reveals there is insufficient evidence from the materials provided that the attorney has violated any of the rules adopted by the Supreme Court of Florida which govern attorney discipline. Accordingly, continued disciplinary proceedings in this matter are inappropriate.



Mr. Maynard McNulty U44542

August 22, 2012

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In light of the foregoing, our file has been closed. Pursuant to the Bar's records retention schedule, the computer record and file will be disposed of one year from the date of closing.

Sincerely,



Heidi E. Brewer, Bar Counsel  
Attorney Consumer Assistance Program  
ACAP Hotline 866-352-0707

cc: Mr. Edward Cornelius Spaight