

IN THE CIRCUIT COURT OF THE FIFTEENTH  
JUDICIAL CIRCUIT, CRIMINAL DIVISION  
IN AND FOR PALM BEACH COUNTY, FLORIDA

CASE NO. 2017CF008722AMB DIVISION: "X"

STATE OF FLORIDA

vs.

SHEILA KEEN-WARREN,

Defendant.

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**STATE'S MOTION TO PERPETUATE WITNESS TESTIMONY**

COMES NOW THE STATE OF FLORIDA, by and through the undersigned Assistant State Attorney, respectfully moves this Honorable Court to enter an order granting its Motion to take Deposition to Perpetuate Testimony of State witness, Jay Mullins, pursuant to Rule 3.190(i) of the Fla. R. Crim. P., and in support hereof states the following:

1. The Defendant is charged with First Degree Murder with a Firearm.
2. Trial is currently scheduled for 4/9/2021 at 9 am before this Court.
3. Jay Mullins has not yet been deposed by the Defendant.
4. Jay Mullins is a material witness and necessary to prevent the failure of justice.
5. The Defendant will not stipulate to the perpetuation of testimony for any witness at this time.

6. JAY MULLINS'S perpetuated testimony will only be used in the event that at the time of trial, he is unavailable based upon a court finding.

### **PROCEDURAL HISTORY**

The above styled case is considered a "cold case" with the crime occurring in 1990 and an arrest resulting in 2017. The eventual arrest was due in large part to the progression and evolution of DNA testing and comparisons to fibers located in a Chrysler LeBaron the suspect was alleged to have driven to the scene of the crime. Multiple other items of evidentiary value were recovered during the investigation. Many of these items were packaged or collected by, Mike Free, a crime scene investigator. Free and Jay Mullins, a latent print examiner, worked together frequently and also in this case. Most importantly, Jay Mullins, a latent print examiner and crime scene technician at the time, was present when the Chrysler LeBaron was processed at PBSO headquarters. Free and Jay Mullins collected fibers from the LeBaron, which then were linked through DNA to the Defendant. Sadly, on August 26<sup>th</sup> 2020, Mr. Free passed away. In addition to being present during the processing of the vehicle and the collection of hairs and fibers, Jay Mullins is able to identify Free's signature and writing on multiple items of evidentiary value. Therefore, Jay Mullins is a material witness needed to authenticate both his and Free's collected evidence. Currently, Jay Mullins resides out of state in Cincinnati, Ohio.

## THE PANDEMIC AND ITS IMPACT

The World Health Organization has declared the outbreak of the Coronavirus Disease 2019 (COVID-19) a pandemic. *See* No. *AOSC20-15*, Fl. Sup. Ct., March 17, 2020. As of October 13<sup>th</sup>, there have been 7,728,436 confirmed cases of COVID and 213, 626 deaths in the United States. *World Health Organization, 10/14/2020- 11:30 am, <https://covid19.who.int/region/amro/country/us/>*. Older people, and people of all ages with pre-existing medical conditions (such as diabetes, high blood pressure, heart disease, lung disease, or cancer) appear to develop serious illness more often than others. *Id.* at <https://www.who.int/emergencies/diseases/novel-coronavirus-2019/question-and-answers-hub/q-a-detail/q-a-on-on-covid-19-for-older-people>.

Both the Florida Supreme Court and this circuit's Chief Judge recognized and issued an administrative order addressing the "Coronavirus disease 2019 (COVID-19)" and the outbreak as a "state of emergency." *See ADMINISTRATIVE ORDER NO.: 12.510 -03/2020.6, March 2020; See also* No. *AOSC20-15*, Fl. Sup. Ct., March 17, 2020. While some cases are fatal, it is unknown how a person will be affected by the virus. *World Health Organization, 10/14/2020- 11:30 am <https://www.who.int/emergencies/diseases/novel-coronavirus-2019/question-and-answers-hub>*. At the time of this filing, the numbers of those affected and of fatalities has continued to rise.

## APPLICABLE LAW

When a State witness may be unavailable for trial, the burden is on the State to file a motion to perpetuate testimony. Blanton v. State, 978 So.2d 149 (2008).

Where there is a legitimate concern that a witness will not be able to testify at trial, the proper procedural vehicle is to request a deposition to perpetuate testimony; such a request places opposing counsel on notice of the deposition's potential use at trial. Vilseis v. State, App. 4 Dist., 117 So.3d 867 (2013). The decision whether to grant a motion to perpetuate testimony lies within the discretion of the trial court. Riechmann v. State, 966 So.2d 298 (2007), revised on rehearing, rehearing denied, certiorari denied 129 S.Ct. 352, 555 U.S. 879, 172 L.Ed.2d 137.

When considering the perpetuation, the United States Constitution's Sixth Amendment's Confrontation Clause provides: "In all criminal prosecutions, the accused shall enjoy the right ... to be confronted with witnesses against him..." and according to our Supreme Court, the Confrontation Clause ensures: (1) that the witness will give the testimony under oath, impressing upon the witness the seriousness of the matter and protecting against a lie by the possibility of penalty of perjury, (2) that the witness will be subject to cross-examination, and (3) that the jury will have the chance to observe the demeanor of the witness, which aids the jury in assessing credibility. Knox v. State, 98 So. 3d 679, 681–82 (Fla. 4th DCA 2012) citing Harrell v. State, 709 So.2d 1364, 1368 (Fla.1998).

This right is why the Florida Rules of Criminal procedure state the Defendant is to be noticed and witness to the perpetuation so he has an opportunity to cross examine his accusers and advise with counsel. Fla. R. Crim. Pro. 3.190(i)(3), and Wilson v. State, 479 So. 2d 273, 274 (Fla. 2d DCA 1985). Courts are very clear that the Defendant at a deposition to perpetuate has a right to confront just as he would in trial. Brown v. State, 721 So. 2d 814, 817 (Fla. 4th DCA 1998). When discussing what this right means in terms of trial, courts have repetitively found satellite testimony and the Defendant's ability to confront via satellite testimony to be sufficient. Harrell v. State, 709 So.2d 1364 (Fla.1998).

In Harrell, the Supreme Court held as a matter of first impression that the admission of trial testimony through the use of a live satellite transmission by a witness does not violate the federal or state constitution Confrontation Clauses. Id. While that case involved a witness who was out of the country and thus not subject to compulsory process, the court made clear:

*“Although [the lack of compulsory process for witnesses residing outside the United States] is an important consideration, it is not a mandatory prerequisite. In other words, we are not saying today that the satellite procedure can only be used for witnesses who reside outside of this state. We can envision situations where a witness in Tallahassee, who is unable to travel due to illness or disability, can testify via satellite in a courtroom in Miami. However, in every criminal case, there is a strong presumption in favor of face-to-face testimony. The*

*burden would be on the moving party to provide substantial justification as to why a person who lives within the reach of the court's subpoena power should not be required to be physically present to testify.”*

Id. See also; Slawinski v. State, 895 So.2d 483, 484 (Fla. 4th DCA 2005) (trial court did not abuse its discretion in allowing an out-of-state witness to testify by live satellite video because the witness's father's frail condition required the witness to care for his father personally and run his business); Lima v. State, 732 So.2d 1173, 1174–75 (Fla. 3d DCA 1999) (trial court correctly allowed the out-of-state victim to testify via satellite because the victim had a permanent injury to her leg from a motorcycle accident, needed to wear a special brace, could not walk long distances, could not carry her children, needed another adult to help her travel, and did not have a person with whom to leave her children.)

The more intricate consideration is whether, at the time of trial, the State is able to establish the witness is unavailable. (McMillon v. State, 4DCA., 552 So.2d 1183 (1989) (holding “Mere taking of deposition to perpetuate testimony does not ipso facto qualify it for admission at a subsequent trial or hearing unless waived by opposing party; deposition can be used only by agreement of the parties or when it becomes necessary due to incapacity or inability of witness to attend and testify.”)).

## ARGUMENT

A global pandemic which is greatly impacting the United States creates a legitimate concern that the State's most important witness may be rendered unavailable at the time of trial. Even if the witness may physically be well enough to attend trial, it is unclear what, if any travel restrictions may be in place at the time of trial. Without the admission of the fibers, that State would face significant obstacles establishing the identification of the Defendant.

Procedurally, the Defendant will have the right to confront the witness via Zoom or equivalent capabilities. The aforementioned case law makes clear that satellite testimony, now more commonly utilized through the internet, is sufficient to satisfy any concerns regarding the Confrontation Clause. Counsel, if they are also concerned about potential risk and exposure could also attend via ZOOM or in person if they so choose.

While the court and the parties navigate these truly unprecedented times, this will no doubt be the first nor last circumstance that requires a new understanding and adaptation of what would be normal procedure. However, fortunately for the court, this is largely what is colloquially dubbed a "no harm, no foul" situation. If, perish the thought, Mr. Mullins is unavailable due to illness or death, the perpetuation was in fact, necessary. If he is alive and able to testify, he will be present

to testify. This would essentially allow the defendant a chance to preview his testimony, a further benefit to the perpetuation.

WHEREFORE, the undersigned Assistant State Attorney requests this Honorable Court to enter an order granting its Motion to take Deposition to Perpetuate Testimony of State witness, Jay Mullins.

CERTIFICATE OF SERVICE

I DO HEREBY CERTIFY THAT a true and correct copy of the foregoing Motion has been furnished by E-SERVICE to RICHARD G. LUBIN ESQ at DEFENSE@LUBINLAW.COM, this the \_\_\_6th\_\_\_ day of November, 2020.

Respectfully submitted,

DAVID ARONBERG  
STATE ATTORNEY

/s/



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