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No. 2D14-4628

**IN THE SECOND DISTRICT COURT OF APPEAL
FOR THE STATE OF FLORIDA**

DAVID PETER VALESANO, JR.,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

On Appeal from the Circuit Court of the Thirteenth Judicial Circuit
in and for Hillsborough County, Florida
L.T. Nos. 13-CF-10114 & 13-CF-16104, Hon. Chet A. Tharpe

REPLY BRIEF OF DAVID PETER VALESANO, JR.

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ARGUMENT

I. ISSUE 1: THE STATE MISPLACES ITS RELIANCE ON *WINGO*, *SCHMIDT*, AND *WELLS* AND MISREADS *BARNHILL* AND *GOLDSTEIN*

The State misplaces its reliance on two unpublished cases (*Schmidt* and *Wells*) and a published case (*Wingo*) that did not involve the issue presented here. Additionally, the State misreads *Barnhill* and *Goldstein*.[1] The State is incorrect.

Previously, Mr. Valesano argued this Court should reverse his sentences and remand for resentencing before a different judge in light of Judge Tharpe's personal policy of denying probation to all child pornography defendants, as he previously stated in *Barnhill* and *Goldstein*. Valesano Br. at 14-29. In response, the State speculates that Judge Tharpe somehow managed to unring that bell and, given his silence on this record, managed to avoid applying the personal policy he had stated so passionately in *Barnhill* and *Goldstein*. State Br. at 4-12. The State claims this is so because, after this Court decided *Barnhill* and *Goldstein*, this Court has nonetheless affirmed Judge Tharpe's sentences for child pornography possessors in one published case, *Wingo* v. *State*, 162 So. 3d 1141 (Fla. 2d DCA 2015), and two unpublished cases, *Schmidt* v. *State*, 2015 Fla. App. LEXIS 12705 (Fla. 2d DCA Aug. 26, 2015) (per curiam), and *Wells* v. *State*, 2015 Fla. App. LEXIS 12686 (Fla. 2d DCA Aug. 26, 2015) (per curiam). The State is mistaken.

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[1] *Barnhill* v. *State*, 140 So. 3d 1055 (Fla. 2d DCA 2014) (en banc); *Goldstein* v. *State*, 154 So. 3d 469 (Fla. 2d DCA 2015).

As an initial matter, unpublished per curiam affirmances do not constitute persuasive or binding precedent. *See Dep't of Legal Affairs* v. *Dist. Court of Appeal*, 434 So. 2d 310, 311 (Fla. 1983) ("per curiam affirmances without opinion have no precedential value"). Indeed, "because such decisions have no precedential value, a court may take the view that it desires not to consider such cases in any circumstance, and it may properly disregard such a reference in briefs or arguments presented to it." *Id.* at 313. As it happens, that is precisely how this Court handles citations to per curiam affirmances without opinion: when such citations appear in separate proceedings, it rejects them for all purposes.[2] *See Stilson* v. *Allstate Ins. Co.*, 692 So. 2d 979, 981 (Fla. 2d DCA 1997) ("On appeal, two circuit court judges signed a per curiam affirmance without issuing a written opinion. A third circuit judge dissented without a written opinion. Thus, the decision cannot serve as precedent in another proceeding." (citation omitted)). For that reason, it would be improper for this Court to rely on *Schmidt* or *Wells* for any purpose in this appeal.

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[2] Indeed, there are sound policy why courts should reject such citations to unpublished per curiam affirmances:

> No one can ascertain what was argued to the original court first rendering a decision. More importantly, however, would be the uncertainty of the law. All lawyers, and lay people also for that matter, should be able to research and have available all existing law. If there is a body of law floating around in unwritten or unpublished opinions, only those persons privy to those cases know those pronouncements. This creates unwarranted confusion and disparity in the orderly presentation of issues.

Dep't of Legal Affairs, 434 So. 2d at 312. Relying on citations to unpublished opinions can result in only one thing: a shadow legal code. That is a bad idea.

Wingo is a published case, however, and for that reason it presents a different problem for the State: namely, *Wingo* did not raise any issue regarding Judge Tharpe's personal policy of denying probation to all child pornography defendants. Instead, it raised the quite different issue whether Judge Tharpe committed fundamental error and denied a defendant due process when he considered impermissible factors during sentencing (i.e., the fact that, 11 months after the defendant had performed Internet searches regarding child pornography and child prostitution in other countries, law enforcement executed a search warrant and found his bags were packed). *See Wingo* v. *State*, No. 2D14-2653 (Fla. 2d DCA).[3]

It is axiomatic that appellate courts can decide only the issues that an appellant raises. *E.g.*, *Prince* v. *State*, 40 So. 3d 11, 13 (Fla. 4th DCA 2010) ("An appellant who presents no argument as to why a trial court's ruling is incorrect on an issue has abandoned the issue—essentially conceding that [the ruling] was correct."). Because Mr. Wingo did not argue Judge Tharpe's sentence was *per se* reversible in light of *Barnhill* and *Goldstein*, it follows that this Court did not decide that question *sub silentio*. *Cf. HCA Health Servs. of Fla., Inc.* v. *Hillman*, 906 So. 2d 1094, 1101 (Fla. 2d DCA 2004) ("Given the sparse facts and lack of discus-

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[3] Because *Wingo* is a published case from this Court, this Court can take judicial notice of its own file. *Hillsborough County Bd. of County Comm'rs* v. *Public Employees Relations Comm'n*, 424 So. 2d 132, 134 (Fla. 1st DCA 1982) ("appellate courts may, when appropriate, take judicial notice of their own records").

sion by the appellate court in *Wilkin*, we did not find it to be a sufficient precedent, in and of itself, upon which to base our reversal.").

Aside from misplacing its reliance on *Wingo*, *Schmidt*, and *Wells*, the State also misreads *Barnhill* and *Goldstein*. Specifically, the State speculates that Judge Tharpe "heeded" the holdings of *Barnhill* and *Goldstein* and "corrected the way that he imposed sentences" in child pornography cases. State Br. at 11. But the proof is in the pudding: Judge Tharpe continues to sentence child pornography defendants to even more draconian sentences than he did before, even though other trial judges sentence the same defendants to far less time. *Compare Barnhill* v. *State*, 140 So. 3d 1055 (Fla. 2d DCA 2014) (en banc) (describing Judge Tharpe's 22-year sentence), *with* App. A (describing Judge Tesche's 10-year sentence).

Lest there be any confusion, it bears mention that *Barnhill* involved a defendant who had collected child pornography continuously for 10 years, amassed 415,000 images[4] of child pornography, and placed those images in an "elaborate organizational structure." App. A at 4, 7. In contrast, Judge Tharpe sentenced Mr. Valesano to 30 years' imprisonment even though he had collected child pornography for only three months, possessed only 3,000 images of child pornography, and organized it. R. 591-93. Apparently, Judge Tharpe "heeded" the lessons of *Barnhill*

[4] In other words, Mr. Barnhill collected more than 138 times as many images of child pornography as Mr. Valesano.

and *Goldstein* so well that he now sentences less culpable defendants to longer terms of imprisonment than he did before.

Moreover, the State misunderstands what this Court said in *Goldstein*. *See* State Br. at 11. When *Goldstein* explained trial judges should learn from past experience, 154 So. 3d 469, 476 (Fla. 2d DCA 2015), it did not resolve whether Judge Tharpe could unring his own bell and learn from his mistakes in *Barnhill* and *Goldstein*. Rather, this Court was merely explaining the obvious proposition that judges are elected and appointed to bring their personal experiences to bear in exercising their judicial judgment. In any event, the Circuit Court for Hillsborough County may have already recognized Judge Tharpe's inability to let go of his personal policy of imprisoning all possessors of child pornography, which perhaps explains why it disbanded its sex crimes division altogether in December 2014. *See* Hillsborough County Administrative Order A-2014-061, *available at* http://www.fljud13.org/Portals/0/AO/DOCS/A-2014-061.pdf.

As Mr. Valesano previously argued, for justice to be done, it must also appear to be done. *See Nawaz* v. *State*, 28 So. 3d 122, 125 (Fla. 1st DCA 2010) ("for justice to be done, it must also appear to be done"); *Atkinson Dredging Co.* v. *Henning*, 631 So. 2d 1129, 1130 (Fla. 4th DCA 1994) ("'justice must satisfy the appearance of justice,' even though this 'stringent rule may sometimes bar trial by judges who have no actual bias and who would do their very best to weigh the

scales of justice equally between contending parties'"'); *Scott* v. *Anderson*, 405 So. 2d 228, 239 (Fla. 1st DCA 1981) ("[t]he appearance of justice requires, under such circumstances, that the contempt conviction be set aside and be redetermined by another judge"). The State claims *Nawaz*, *Atkinson Dredging Co.*, and *Scott* are factually distinguishable, but it does not explain how that is so, nor does it attempt to dispute the overarching legal proposition for which they stand. State Br. at 12. Here, the mere appearance of justice requires reassignment to a different trial judge on remand.

Indeed, consistent with *Nawaz*, *Atkinson Dredging Co.*, and *Scott*, federal courts recognize that reassignment on remand to preserve the appearance of justice does not require litigants or courts to impugn or "question the . . . judge's actual ability, integrity, or impartiality." *United States* v. *Torkington*, 874 F.2d 1441, 1447 (11th Cir. 1989). Instead, reassignment merely "respond[s] to the appearance of a lack of neutrality and act[s] to preserve in the public mind the image of absolute impartiality and fairness of the judiciary." *Id.* Reassignment in such circumstances is necessary because "it is not merely of some importance but is of *fundamental* importance that justice should not only be done, but should manifestly and undoubtedly *be seen* to be done." *United States* v. *White*, 846 F.2d 678, 696 (11th Cir. 1988) (emphases in original and punctuation omitted).

Accordingly, federal courts routinely order reassignment whenever a judge would have "great difficulty in putting aside his prior conclusions," *Torkington*, 874 F.2d at 1447, has become "hardened against" a party and would have "tremendous difficulty putting his [prior] findings out of his mind," *White*, 846 F.2d at 696, has made statements "indicating a perceived predisposition," *United States* v. *Taylor*, 972 F.2d 1247, 1252 (11th Cir. 1992), or has employed "strong language" that suggests "the . . . judge may have trouble putting aside his previous views," *Chudasama* v. *Mazda Motor Corp.*, 123 F.3d 1353, 1373 (11th Cir. 1997).

There is little doubt that Judge Tharpe's statements in *Barnhill* and *Goldstein* demonstrate that he has developed extraordinarily strong views and a substantial blind spot when it concerns the sentencing of child pornography defendants. Because he had been assigned to Hillsborough County's sex crimes division for many years, this was perhaps inevitable and definitely understandable. *See Barnhill*, 140 So. 3d at 1061 (child pornography cases "are disturbing by their very nature," so appellate courts are "not unsympathetic to the difficulty that each trial judge must face when presiding over such cases"). Nevertheless, "trial judges are required to rise above the disturbing nature of these and other crimes and to provide every defendant a fair opportunity to be heard by an impartial judge who will consider only the evidence presented." *Id.* Unfortunately, Judge Tharpe's statements in *Barnhill* and *Goldstein* make it impossible for him to serve that role in

child pornography cases any longer. And even if he could continue to serve that role, it would be impossible for him to continue to *appear* to serve that role impartially. Accordingly, this Court should relieve Judge Tharpe of the heavy burden he has repeatedly demonstrated he can no longer carry, reverse his sentences, and remand for resentencing before a different trial judge.

II. Issue 2: The State's Defense Of Mr. Valesano's 30-Year Sentence Is Misguided

As a matter of statutory interpretation, the State may be correct that "the extent of a downward departure is not subject to appellate review." § 921.006(1), *Fla. Stat.* But assuming the extent of the downward departure is subject to appellate review, the State's defense of Mr. Valesano's 30-year sentence is misguided.

For example, the State argues Mr. Valesano's commission of the crime was sophisticated because, after he collected his child pornography, he categorized it. State Br. at 17-18. This argument misconceives how sophistication with respect to the commission or concealment of a crime works. As soon as Mr. Valesano's file-sharing program downloaded the images, he had committed the crime of second-degree felony possession of child pornography (10 images or more) in violation of § 827.071(5) and § 775.0847(2) & (3), *Fla. Stat.* Categorization of previously downloaded child pornography is neither an element of that crime, nor a means to conceal it. And Mr. Valesano committed his crime in a truly artless way: he simply downloaded a file-sharing program, which committed the crime for him. Aggravat-

ing a child pornography sentence due to after-the-fact categorization would be akin to aggravating a sentence for marijuana possession because a defendant subsequently categorized his different kinds of marijuana. In both cases, it does not make sense because such after-the-fact categorization has nothing to do with whether the actual crime was committed or concealed with any sophisticated means. *Cf.* U.S.S.G. § 2B1.1 cmt. 9(b) (2014) ("'sophisticated means' means especially complex or especially intricate offense conduct pertaining to the *execution or concealment* of an offense" (emphasis added)).[5]

Next, the State contends Mr. Valesano "had been viewing and possessing child pornography, albeit on and off, for five or six years," which, according to the State, "implies" he had "possessed far more than 3,000 images over the course of time." State Br. 18-19. That is not what Mr. Valesano stated, and the State's contrary and speculative inferences lack record foundation. Rather, Mr. Valesano explained he had downloaded child pornography through a file-sharing program on two prior occasions. R. 567-68. The record does not reflect how many images he

[5] Additionally, to the extent the sentences were based on the categorization of Mr. Valesano's large 712,000-image collection of child erotica and adult pornography (which was legal) rather than his substantially smaller 3,000-image collection of child pornography (which was illegal), R. 589, the sentences would be illegal. *Cf. Craun* v. *State*, 124 So. 3d 1027, 1030 (Fla. 2d DCA 2013) ("A sentencing court may not rely on 'unsubstantiated allegations of misconduct or speculation that the defendant probably committed other crimes' when it imposes sentence."); *Reese* v. *State*, 639 So. 2d 1067, 1068 (Fla. 4th DCA 1994) ("Unsubstantiated allegations of misconduct may not be considered by a trial judge at a criminal sentencing hearing and to do so violates fundamental due process.").

downloaded during those two prior episodes, and sentencing cannot be based on speculative inferences or implications—rather, it must be based on facts. *See Craun* v. *State*, 124 So. 3d 1027, 1030 (Fla. 2d DCA 2013) ("A sentencing court may not rely on 'unsubstantiated allegations of misconduct or speculation that the defendant probably committed other crimes' when it imposes sentence."); *Reese* v. *State*, 639 So. 2d 1067, 1068 (Fla. 4th DCA 1994) ("Unsubstantiated allegations of misconduct may not be considered by a trial judge at a criminal sentencing hearing and to do so violates fundamental due process.").

The State also points to Mr. Valesano's collection of bondage and bestiality child pornography. State Br. at 19-20. But Mr. Barnhill had 415,000 images that included such bondage and bestiality child pornography, and he received a substantially more lenient sentence. *See* App. A; *Barnhill*, 140 So. 3d at 1058. And the record does not reflect how many images of bondage and bestiality child pornography Mr. Valesano possessed.

Ultimately, the question is whether any reasonable person could believe 30 years' imprisonment is the best sentencing option for a 52-year-old man who merely possessed child pornography over a three-month period when he had not committed a contact offense, never had sexual conversations with children over the Internet, passed a polygraph test, had a mental health counselor testify he was a good candidate for therapy and presented low risks to recidivate, had good support sys-

tems in place, and had numerous family members, friends, and colleagues testify warmly and enthusiastically in his defense at sentencing and offer their availability as a support network.[6] For the reasons stated, those undisputed mitigating circumstances—which Judge Tharpe had no authority to reject[7]—should not equate to two consecutive statutory maximum 15-year sentences.

CONCLUSION

For the foregoing reasons, the Court should reverse Mr. Valesano's sentences and remand for resentencing before a different Circuit Judge.

Respectfully submitted,

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[6] As it happens, many courts recognize the child pornography sentencing guidelines are broken and reject sentences over 200 months when the defendant is a first-time offender, has never engaged in sexual misconduct with a child, and poses little to no threat to children. *E.g.*, *United States* v. *Dorvee*, 616 F.3d 174, 176 (2d Cir. 2010) (rejecting 240-month sentence as substantively unreasonable); *United States* v. *Grober*, 624 F.3d 592, 595 (3d Cir. 2010) (affirming 60-month sentence and rejecting Government's request for 240-month guideline sentence).

[7] *Spencer* v. *State*, 645 So. 2d 377, 385 (Fla. 1994) ("Whenever a reasonable quantum of competent, uncontroverted evidence of mitigation has been presented, the trial court must find that the mitigating circumstance has been proved.").

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on October 5, 2015, I electronically served the following via the Florida e-portal: AAG Elba Caridad Martin-Schomaker (elba.martinschomaker@myfloridalegal.com & crimapptpa@myfloridalegal.com), Office of the Attorney General, 3507 E. Frontage Road, Suite 200, Tampa, FL 33607-7013.

October 5, 2015 /s/ Thomas Burns
Thomas A. Burns

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this brief was prepared in Times New Roman, 14-point font, in compliance with Rule 9.210(a)(2) of the Florida Rules of Appellate Procedure.

October 5, 2015 /s/ Thomas Burns
Thomas A. Burns