FIRST DISTRICT COURT OF APPEAL
STATE OF FLORIDA

No. 1D19-1992

RICK SWEARINGEN, individually and in his official capacity, and FLORIDA DEPARTMENT OF LAW ENFORCEMENT,

Appellants,

v.

CHRISTOPHER PRETZER, an individual; MARK L. WOOD, an individual; RICHARD A. BARSKY, an individual; and FLORIDA CARRY, INC., a Florida not-for-profit corporation,

Appellees.

On appeal from the Circuit Court for Leon County.
Kevin J. Carroll, Judge.

December 21, 2020

MAKAR, J.

To protect the privacy of lawful gun-owners, Florida statutory law requires that specified records of the Department of Law Enforcement—the state agency tasked with expeditiously processing applications for firearm purchases and conducting criminal history background checks—are to be destroyed within

forty-eight hours upon the Department's communication to a licensed firearms seller of its approval (or nonapproval) of the potential buyer's background. § 790.065(4)(a), Fla. Stat. (2020). For lack of a better phrase, subsection (4)(a) will be referred to as the "destruction statute."

The Department is under strict statutory time limits: it must process firearms applications without delay, which it failed to do as to the plaintiffs in this case. *See generally* § 790.065(2)(c), Fla. Stat. (2020) (specifying timeframes for Department actions). Those plaintiffs, whose privacy interests are protected by the destruction statute, filed suit against the Department seeking redress for the delays in the processing of their applications. They simultaneously filed an emergency motion, which the trial judge granted, that temporarily prevented the Department from destroying the records that would otherwise be subject to the destruction statute. The order, temporarily preserving the records as potential evidence in this litigation, is what's at issue in this appeal.

Preservation orders, such as the one at issue, are a common and accepted exercise of judicial power that safeguard the integrity of the judicial process, whose central feature is evidence-based fact-finding. It is universally recognized that this power is necessary to preserve public trust in the judicial process, which would be undermined if potentially relevant evidence is destroyed without any judicial review. *See Silvestri v. Gen. Motors Corp*., 271 F.3d 583, 590 (4th Cir. 2001) (judicial power to prevent or sanction destruction of evidence based on "the need to preserve the integrity of the judicial process in order to retain confidence that the process works to uncover the truth"). As one court has noted:

> Aside perhaps from perjury, no act serves to threaten the integrity of the judicial process more than the spoliation of evidence. Our adversarial process is designed to tolerate human failings—erring judges can be reversed, uncooperative counsel can be shepherded, and recalcitrant witnesses compelled to testify. But, when critical documents go missing, judges and litigants alike descend into a world of *ad hocery* and half measures—and our civil justice system suffers.

United Med. Supply Co., Inc. v. United States, 77 Fed. Cl. 257, 258–59 (2007). Temporarily preventing the destruction of potentially relevant evidence is an exceptionally modest use of judicial power that protects the integrity of the adjudicative process, affords due process to the party seeking preservation of the evidence, and bolsters public confidence in the court system. It promotes accuracy in fact-finding by ensuring that relevant information is not destroyed; and it deters efforts to destroy such information, penalizing it in egregious cases.

All federal courts, including those in Florida, uniformly recognize a trial court's authority to adjudicate motions for preservation of evidence, which are the accepted and routine procedural method of doing so. *See, e.g.*, *Arkin v. Gracey-Danna, Inc.*, No. 8:16-CV-1717-T-35AAS, 2016 WL 3959611, at *1 (M.D. Fla. July 22, 2016) ("A federal court may issue preservation orders as part of its inherent authority to manage its own proceedings."); *Zaccone v. Ford Motor Co.*, No. 2:15-CV-287-FTM-38CM, 2016 WL 2744837, at *1 (M.D. Fla. May 11, 2016) (issuing preservation order, noting that federal courts have implied/inherent authority to issue preservation orders); *Robinson v. Gielow*, No. 3:14CV223/LAC/EMT, 2015 WL 4459880, at *3 (N.D. Fla. July 21, 2015) (same, but denying preservation order where danger of destruction not shown); *Disney Enters., Inc. v. Hotfile Corp.*, No. 11-20427-CIV-JORDAN/MCALILEY, 2011 WL 13100321, at *2 (S.D. Fla. Apr. 19, 2011) (same); *Angrignon v. KLI, Inc.*, No. 08-81218-CIV-COHN/SELTZER, 2009 WL 10666946, at *1 (S.D. Fla. Apr. 13, 2009) (same). State courts recognize this authority as well. *See, e.g.*, *People v. Wartena*, 156 P.3d 469, 473 (Colo. 2007) ("Acting to avoid or mitigate a failure to preserve evidence, the court may order that evidence cannot be destroyed, or may permit the consumptive testing of evidence.").

Given this background, the Department in this appeal does not contest the power of Florida courts to issue preservation orders[1] or make an issue of the administrative process for issuance

[1] In general, Florida courts follow the lead of federal courts in interpreting their powers under similar discovery provisions. *Saewitz v. Saewitz*, 79 So. 3d 831, 834 n.3 (Fla. 3d DCA 2012) (noting that Florida courts "may look to federal case law

of such orders. It makes no argument that the order temporarily preventing the destruction of potential evidence is procedurally improper or fails to meet standards for orders of this type. Instead, it makes only two limited arguments, one legal and one policy based.

First, it asserts that its retention of the records subjects it to penalties for the commission of a felony, but that argument overlooks that the statutory basis for criminal liability requires that the Department's action must be done "intentionally and maliciously." § 790.065(4)(d), Fla. Stat. ("Any officer or employee, or former officer or employee of the Department of Law Enforcement or law enforcement agency who intentionally and maliciously violates the provisions of this subsection commits a felony of the third degree . . . ."). The Department's compliance with the trial court's order, however, is neither an intentional nor malicious act—the Department is merely doing what the trial court has ordered. Compliance with a court order isn't an intentional and malicious act for purposes of statutory liability.

Second, the Department says that it must preserve records of all potential plaintiffs, which it says is burdensome. But the preservation order only relates to the handful of current plaintiffs in this lawsuit, making the Department's argument inapt. Whether the preservation of other electronic records might prove burdensome were a class action pursued and certified is for another day. Because neither of the Department's arguments has merit, affirmance is in order.

On this record, the trial judge acted well within his discretion by temporarily preventing the destruction of potentially relevant

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construing similar or identical" procedural rules such as Florida Rule of Civil Procedure 1.350(a) and Federal Rule of Civil Procedure 34(a)). Federal courts have generally adopted a two-part inquiry in assessing motions to preserve evidence, and do not apply the four-part test for a preliminary injunction, principally because two factors—likelihood of success on the merits and public interest considerations—play no role in evidence preservation matters. *See, e.g.*, *Treppel v. Biovail Corp.*, 233 F.R.D. 363, 369–72 (S.D.N.Y. 2006) (discussing the development of the two-part test).

evidence; preservation orders of this type are recognized as proper for a number of pragmatic reasons that apply here.

First of all, the records sought are potentially relevant to the plaintiffs' claims because they may show the basis for the Department's delays or the mindset or intent of the staff or officials involved in the decision-making process. The applicable enforcement statute, which imposes liability on governmental entities for non-compliance, also includes fines (up to $5,000) on governmental officials where "a violation was *knowing and willful*," thereby supporting an order temporarily preserving records that may establish knowing and willful violations. § 790.33(3)(c), Fla. Stat. (2020) (emphasis added). It is important for the plaintiffs to establish that delays occurred in the processing of their applications; it is equally important that they be able to determine *why* delays occurred and whether violations of statutory deadlines were *knowing and willful* (e.g., date stamps that show complete inactivity on the file, received records not acted upon, comments or annotations in the files). Destruction of potentially relevant records thwarts this line of inquiry.

Next, had the trial court denied the plaintiffs' emergency request, the consequences would be immediate and irreparable. Records would have been destroyed that are potentially relevant to the plaintiffs' claims without anyone, including a judicial officer, having seen and reviewed them to determine their relevance. On this point, the plaintiffs can't be faulted for not knowing with precision whether the records of their applications will prove to be relevant; after all, they haven't seen them and don't know what they might reveal. Indeed, neither the trial judge nor this court has seen the records subject to the preservation order (the records must be preserved, but they have not yet been disclosed at this point).

Notably, if the records at issue must be destroyed in 48 hours as the statute specifies—no matter the circumstances—bizarre results are possible. Suppose the trial judge, in the first 24 hours after the Department's approval of a plaintiff's background, was able to review the records and deem them relevant; must they be snatched from her hands and destroyed 24 hours later? What if the records show a pattern of willfully denying approvals to a racial

minority or residents in a rural, predominantly Republican area of a Panhandle county; must they too be razed before those persons adversely affected can seek justice? Is a court powerless to prevent their destruction based on strict construction principles? Of course not.

In addition, the temporary order does no harm to the legislative purpose of the destruction statute. The Legislature specified one core reason for the statute's existence: to protect the privacy of firearms applicants by prohibiting a government-controlled list or registry of gun owners. § 790.335(1)(a)-(b), Fla. Stat. (2020) (*see* Appendix, which contains the legislative findings and intent against governmental firearms registration). This legislative purpose simply isn't implicated in this case. Instead, it is firearms applicants themselves, the plaintiffs, who seek the records for their own litigation purposes against the Department. By bringing this suit, they have waived their privacy rights in the information, if deemed relevant, by affirmatively seeking records related to their own firearm applications. As such, no risk of a governmentally-created and governmentally-controlled registry or list of Florida gun owners exists;[2] only the rights of a handful of gun owners are at issue, with each owner willingly seeking to prevent destruction of his own records. It would be an odd result to interpret the statute, one designed to protect the plaintiffs, as denying them access to evidence needed to protect their rights as potential gun owners. The intent of the destruction statute is intended to be a shield that protects the privacy of gun owners; it is not a sword that prevents them from proving denial of their rights.

In conclusion, the Department's two limited arguments on appeal (i.e., the Department will be criminally sanctioned for failing to destroy the records and the preservation order is burdensome) are without merit. The trial court acted appropriately and its temporary order preserving evidence is affirmed.

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[2] The prohibition against governmental lists, registries or records of owners of firearms is set forth in section 790.335(2), Florida Statutes (*see* Appendix).

AFFIRMED.

RAY, C.J., concurs in part and concurs in result with opinion; KELSEY, J., dissents with opinion.

* * *

Appendix

(1) Legislative findings and intent.--
(a) The Legislature finds and declares that:
1. The right of individuals to keep and bear arms is guaranteed under both the Second Amendment to the United States Constitution and s. 8, Art. I of the State Constitution.
2. A list, record, or registry of legally owned firearms or law-abiding firearm owners is not a law enforcement tool and can become an instrument for profiling, harassing, or abusing law-abiding citizens based on their choice to own a firearm and exercise their Second Amendment right to keep and bear arms as guaranteed under the United States Constitution. Further, such a list, record, or registry has the potential to fall into the wrong hands and become a shopping list for thieves.
3. A list, record, or registry of legally owned firearms or law-abiding firearm owners is not a tool for fighting terrorism, but rather is an instrument that can be used as a means to profile innocent citizens and to harass and abuse American citizens based solely on their choice to own firearms and exercise their Second Amendment right to keep and bear arms as guaranteed under the United States Constitution.
4. Law-abiding firearm owners whose names have been illegally recorded in a list, record, or registry are entitled to redress.
(b) The Legislature intends through the provisions of this section to:
1. Protect the right of individuals to keep and bear arms as guaranteed under both the Second Amendment to the United States Constitution and s. 8, Art. I of the State Constitution.
2. Protect the privacy rights of law-abiding firearm owners.
(2) Prohibitions.--No state governmental agency or local government, special district, or other political subdivision or

official, agent, or employee of such state or other governmental entity or any other person, public or private, shall knowingly and willfully keep or cause to be kept any list, record, or registry of privately owned firearms or any list, record, or registry of the owners of those firearms.

§ 790.335(1)(a)-(b), Fla. Stat. (2020).

Not final until disposition of any timely and authorized motion under Fla. R. App. P. 9.330 or 9.331.

RAY, C.J., concurring in part and concurring in result with opinion.

I agree with Judge Makar that courts have the inherent authority to prevent destruction of potentially relevant evidence and on that basis I conclude that the trial court did not err in preserving the records at issue in this litigation. As such, I concur in affirmance.

KELSEY, J., dissenting with opinion.

In a contest between a clear, valid, unchallenged statute and a trial court's general "inherent authority," the statute must prevail. The trial court improperly ordered FDLE to preserve records that the Florida Statutes plainly require FDLE to destroy, and to maintain records that the statutes plainly prohibit FDLE from maintaining. *See* § 790.065(4)(a), Fla. Stat. (2019) (requiring all background-check records to be destroyed within 48 hours after FDLE responds to the request for the background check); § 790.065(4)(c), Fla. Stat. (prohibiting the State from maintaining records of the names of firearms purchasers or transferees) (collectively, the "records-destruction statutes"); *see* § 790.335(2), (4), Fla. Stat. (imposing sanctions for violation of records-destruction requirement). Properly interpreting and giving effect to these valid statutes, we should reverse the trial court's order

purporting to enjoin FDLE from complying with the records-destruction statutes.

I. Procedural History.

Appellees' lawsuit does not challenge the records-destruction statutes that the trial court enjoined. Instead, the complaint is based on *different* statutes: those governing how long FDLE has to complete background checks. The time for processing background checks is governed by the 2018 Marjory Stoneman Douglas High School Public Safety Act. *See* § 790.0655(1)(a), Fla. Stat. (defining the mandatory waiting period between purchase and delivery of a firearm as the *longer of* three days (excluding weekends and holidays) and "the completion of the records checks required under s. 790.065"); § 790.065(2)(c)2., Fla. Stat. (allowing FDLE only "24 working hours" to "determine the disposition of the [applicant's] indictment, information, or arrest and inform the licensee [firearms seller] as to whether the potential buyer is prohibited from receiving or possessing a firearm") (collectively, the "timeliness statutes"); *see also* § 790.065(2)(a)4., Fla. Stat. (prohibiting firearm sales or transfers to individuals who are mentally defective or have been committed to a mental institution); § 790.065(2)(c)1., Fla. Stat. (adding firearms disability for persons against whom injunctions have been entered for protection against domestic violence or repeat violence).[1]

The individual Appellees attempted to buy firearms and did not receive approval within the time they thought appropriate under the governing statutes. Their complaint alleged that FDLE's delays in completing mandatory background checks violated the timeliness statutes and infringed on the individual Appellees' constitutional rights.[2] The gravamen of their complaint was that

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[1] The trial court did not interpret the timeliness statutes, so the applicable time standard for FDLE's processing of applications is not before us.

[2] The parties have advised the Court that they have since filed an amended complaint and a second amended complaint below, raising substantively the same claims and attempting to create a class action of additional individual plaintiffs. *See* Fla. R. App. P.

firearms purchases and transfers should be granted automatically after three days even if background checks are not completed by then. The complaint alleged the exact or approximate date on which the respective Appellees' background checks were initiated, and that as of the date of filing suit the background checks were still pending. It alleged that FDLE was delaying disposition of applications "regardless of whether FDLE possesses competent substantial evidence" for denial.

Appellees sought declaratory and injunctive relief, asserting that the alleged delays unlawfully infringed on their Second Amendment rights. They also sought per-day fines for the delays as compensation for that infringement. The complaint did not challenge or even mention the records-destruction statutes.

Only two days after filing suit, and before FDLE had been served with the complaint, Appellees moved for preservation of all records in FDLE's possession related to all pending applications (not just Appellees') in which (in Appellees' view) the statutory deadline had passed without resolution of the background checks. Appellees had not propounded any discovery requests. They asserted the matter was an emergency because the records were subject to destruction within 48 hours under section 790.065(4)(a). They argued that destruction of these records would impair their ability to prove their claims in the lawsuit—but they did not allege in their complaint or argue in their motion that the records-destruction statutes were unconstitutional.[3]

9.130(f) ("In the absence of a stay, during the pendency of a review of a nonfinal order, the lower tribunal may proceed with all matters, including trial or final hearing, except that the lower tribunal may not render a final order disposing of the cause pending such review absent leave of the [appellate] court."). We have FDLE's second appeal, from a later order involving additional named plaintiffs but the same legal issues, in Case No. 1D20-662.

[3] Appellees also argued in their motion that section 790.335 recognized exceptions to the records-destruction statutes for litigation and prosecution of cases, but later (correctly) abandoned that argument as not being supported by the statute.

Appellees sought an ex parte hearing on that motion, and the trial court set a hearing for the following day. Although FDLE had not yet been served with the complaint, it became aware of the lawsuit, filed a response to the motion, and appeared at the hearing. FDLE also filed the sworn affidavit of an employee who attested that the statutorily-required background checks for all three individual Appellees were conducted, and were completed on May 14 as to Appellees Wood and Barsky, and May 15 as to Appellee Pretzer. By the time of the hearing, all three individual Appellees' firearm purchases had been approved.

The trial court conducted a thirty-minute hearing, then rendered the order under review, titled as a temporary order granting a motion for protection of evidence. The court's order noted that this was a thirty-minute emergency hearing and that the records in question were set to be destroyed automatically thirty minutes after the hearing ended. The court also noted, "The Court has not had enough time to consider its ruling on Plaintiffs' motion."

The order required FDLE to maintain the records of the individual Appellees, not to be released without further order of the court. The order instructed FDLE not to "employ heroic measures or make any changes to their computer systems to comply with this order." Rather, the court suggested FDLE could preserve the individual Appellees' records with "screen shots, screen capture, or printouts," if that were possible without changing the computer system.

II. Analysis.

The non-final order is appealable under Florida Rule of Appellate Procedure 9.130(a)(3)(B), because it grants temporary injunctive relief. *See Terex Trailer Corp. v. McIlwain*, 579 So. 2d 237, 240 (Fla. 1st DCA 1991). A purely legal question is presented, so our standard of review is de novo. *Armstrong v. Harris*, 773 So. 2d 7, 11 (Fla. 2000).

The majority improperly recasts FDLE's arguments as being limited to the agency's potential exposure to statutory sanctions

upon complying with the trial court's injunction order. In fact, FDLE argues here, as it did below, that it is required to comply with the records-destruction and list-prohibition statutes. FDLE uses the sanction provisions to aid in interpreting the statute and to illustrate the consequences of any failure to comply with the statutes, but its core position is that it must comply with the duly-enacted records-destruction statutes and that the trial court improperly enjoined those statutes. That is the issue we should be addressing. The majority's side-step of that issue to discuss garden-variety discovery issues misses the mark entirely. In addition, not a single case cited in the majority opinion upholds a discovery order that violates a valid and clearly applicable statute.

The trial court's order is erroneous for three reasons. First, it fails to give a plain-meaning interpretation and due force to the records-destruction statutes. Second, the order improperly elevates a court's general procedural authority above contrary substantive statutes. Third, it fails to satisfy the legal requirements that apply to all injunction orders.

A. Statutory Interpretation.

We must start with the plain language of the records-destruction statutes that the trial court enjoined. These statutes clearly and unambiguously require records to be destroyed, and prohibit creating or retaining any list of gun owners:

> (4)(a) Any records containing any of the information set forth in subsection (1) pertaining to a buyer or transferee who is not found to be prohibited from receipt or transfer of a firearm by reason of Florida and federal law which records are created by the Department of Law Enforcement to conduct the criminal history record check shall be confidential and exempt from the provisions of s. 119.07(1) and may not be disclosed by the Department of Law Enforcement or any officer or employee thereof to any person or to another agency. The Department of Law Enforcement shall destroy any such records forthwith after it communicates the approval and nonapproval numbers to the licensee and, in any event, such records

> shall be destroyed within 48 hours after the day of the response to the licensee's request.
>
> . . . .
>
> (c) Nothing in this chapter shall be construed to allow the State of Florida to maintain records containing the names of purchasers or transferees who receive unique approval numbers or to maintain records of firearm transactions.

§ 790.065(4)(a), (c), Fla. Stat.

These statutes are perfectly clear. Records relating to non-prohibited buyers or transferees must be destroyed "forthwith" and never later than 48 hours after the day of response. The State may not keep records of approved purchasers or transferees, and it may not "maintain records of firearm transactions." The Legislature made no exceptions. That should be the end of the inquiry, because we are bound to interpret statutes according to their plain meaning. *See Srygley v. Cap. Plaza, Inc.*, 82 So. 3d 1211, 1212 (Fla. 1st DCA 2012) ("Established rules of statutory construction demand that when interpreting a statute, courts should give terms their plain meaning. . . . When the plain meaning of a statute is clear, a court should look no further than the language of the statute.").

Despite this clear and controlling interpretive directive, Appellees ask us to create an exception for discovery, and the majority reasons that trial courts' "inherent authority" to prevent spoliation of evidence supersedes the Legislature's clear statutory mandates that records be destroyed and not kept. This reasoning overlooks the fundamental and undeniable fact that these statutes directly address the subject matter of the issue: preservation or destruction of records. This reasoning also improperly presumes that the Legislature was ignorant of basic concepts of discovery. The majority must think the Legislature never thought of the possibility that the records-destruction statutes might result in the destruction of records that litigants might want to see, or that someone else might want to acquire. That assumption is unsupportable.

To the contrary, basic principles of statutory construction that we usually honor require us to presume that the Legislature was fully aware of the concepts of discovery in litigation and trial courts' inherent authority to manage litigation and related discovery. *See Corey v. Unknown heirs by Neuffer*, 301 So. 3d 380, 385 (Fla. 2d DCA 2020) (recognizing that the Legislature is presumed to be familiar with existing law including judicial decisions relevant to a statute, and the legal concept of an agreement for deed; "Presumably, the legislature does not act in ignorance.").[4] To the contrary, as illustrated perfectly by the statutes the majority appends, the Legislature clearly intended to protect these records from any disclosure. *See* § 790.335(1), Fla. Stat. (emphasizing policy the Legislature intended to implement).

If we applied these fundamental principles of statutory construction as we ought to, we would have no difficulty concluding that the records-destruction statutes mean exactly what they say and allow no exceptions for litigation discovery. The Legislature created *eighteen* exceptions to these statutes. *See* § 790.335(3)(a)–(r), Fla. Stat. The only exception related to civil litigation allows creation of records or papers "relating to firearms involved in . . . civil proceedings relating to the surrender or seizure of firearms including protective injunctions, Baker Act commitments, and sheriff's levies pursuant to court judgments, and voluntary surrender by the owner or custodian of the firearm." § 790.335(3)(p), (q), Fla. Stat. This limited exception demonstrates that the Legislature was well aware of how firearms records can become relevant in civil litigation. Yet no exception applies to

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[4] Further, the majority's invocation of a court's inherent authority to prevent spoliation, and the majority's exclusive reliance on spoliation cases, are particularly inapposite because by definition, there has to be a duty to preserve evidence before there can be spoliation. *See Pena v. Bi-Lo Holdings, LLC*, 45 Fla. L. Weekly D506 (Fla. 3d DCA Mar. 4, 2020) (quoting authorities holding that a duty to preserve evidence must exist before a court can find spoliation occurred and take steps to remedy it). Under the records-destruction statutes, far from there being any duty to preserve records, there is an explicit *requirement* of destruction.

Appellees' motion for temporary injunction. If the Legislature had intended to craft any exceptions for discovery such as the reasoning Appellees invoke, the Legislature would have done so. It did not. That should be the end of the matter. The majority's attempt to craft an "inherent authority" exception that the Legislature did not authorize contradicts the plain meaning of the statute.

B. Substance Over Procedure.

Even if the majority's reasoning and conclusion were not demonstrably contrary to basic tenets of statutory construction, it would still be wrong because it elevates procedure over substance. The substantive law enacted in the records-destruction statutes must prevail over the procedural authority of a trial court to regulate discovery. We recently expounded on the substantive-procedural dichotomy in a termination of parental rights case in which the parent's argument was rooted in procedure, which we concluded conferred no substantive right. Our observations there apply here as well, distinguishing between court-made practice and procedure, and the superior legislatively-made substantive rights:

> The supreme court does not have the authority to create substantive rights, only rules of practice and procedure. *Cf.* Art. V, § 2, Fla. Const. (authorizing the supreme court to "adopt rules for the practice and procedure in all courts"); *see Haven Fed. Sav. & Loan Ass'n v. Kirian*, 579 So. 2d 730, 732 (Fla. 1991) (distinguishing between "substantive law, which is within the legislature's domain," and "matters of practice and procedure," over which the supreme court has "exclusive authority to regulate"); *Boyd v. Becker*, 627 So. 2d 481, 484 (Fla. 1993) ("While the Florida Constitution grants this Court exclusive rule-making authority, this power is limited to rules governing procedural matters and does not extend to substantive rights. Art. V, § 2(a), Fla. Const."); *Allen v. Butterworth*, 756 So. 2d 52, 59 (Fla. 2000) ("Generally, the Legislature has the power to enact substantive law, while the Court has the power to enact procedural law.").

> Rule 8.530(a)'s notice requirement necessarily is a matter of practice or procedure. *Cf. Kirian*, 579 So. 2d at 732 ("[P]ractice and procedure encompass the course, form, manner, means, method, mode, order, process or steps by which a party enforces substantive rights or obtains redress for their invasion." (internal quotation omitted)); *id.* (describing practice and procedure "as the machinery of the judicial process as opposed to the product thereof" (quotation once again omitted)).

B.T. v. Dep't of Child. & Fams., 300 So. 3d 1273, 1284 (Fla. 1st DCA 2020).

Here, the trial court elevated considerations of Appellees' claimed procedural convenience over a *directly contrary* substantive statute that was not even challenged in the litigation. This was improper. FDLE has not only the right, but the express, substantive, statutory obligation, to destroy the records Appellees sought. Appellees' request was purely procedural, and thus was required to give way to the substantive statute. *See also Morton Plant Hosp. Ass'n, Inc. v. Shahbas*, 960 So. 2d 820, 823–26 (Fla. 2d DCA 2007) (holding that constitutional amendment requiring disclosure of medical records was substantive law that preempted previous procedural defenses of relevance and privilege). For this reason also, the trial court erred in ordering FDLE to retain records that the statute expressly directs FDLE to destroy.

C. Facially Deficient Motion and Order.

Finally, we should reverse because Appellees failed to demonstrate entitlement to an injunction. To obtain an injunction, the moving party must demonstrate "(1) a substantial likelihood of success on the merits, (2) a lack of an adequate remedy at law, (3) the likelihood of irreparable harm absent the entry of an injunction, and (4) that injunctive relief will serve the public interest." *State, Dep't of Health v. Bayfront HMA Med. Ctr., LLC*, 236 So. 3d 466, 472 (Fla. 1st DCA 2018). Appellees failed to make the required showing.

Appellees did not show a substantial likelihood of success in enjoining operation of the records-destruction statute (section 790.065(4)(a)), or the no-list statute (section 790.065(4)(c)). All duly-enacted statutes are presumed constitutional. *See Libertarian Party of Fla. v. Smith*, 660 So. 2d 807, 807 (Fla. 1st DCA 1995). To enjoin operation of a presumptively valid statute, the moving party must allege, and the trial court must find upon appropriate facts and reasoning, that "the statute is being illegally applied or . . . the statute or the challenged part of it is unconstitutional on unadjudicated grounds." *Cone v. King*, 196 So. 697, 698 (Fla. 1940).

The primary difficulty with Appellees' attempt to enjoin operation of these two statutes is that Appellees never alleged or argued that these statutes were unconstitutional, either facially or as applied to them. Rather, their complaint challenged only FDLE's compliance with the timeliness statutes. Their motion argued that the records were necessary to provide evidence in the case—*not* that the records-destruction and no-list statutes were unconstitutional. Further, because this issue was completely unaddressed, the trial court could not and did not conclude that the records-destruction statutes were unconstitutional. The trial court made no findings or conclusions at all in the injunction order, but did make it clear that there had been no time to even consider such issues: "The Court has not had enough time to consider its ruling on Plaintiffs' motion." Appellees' motion was completely insufficient to support entry of a temporary injunction against operation of these presumptively valid statutes. The resulting order was likewise fatally deficient. *See* Fla. R. Civ. P. 1.610 (setting forth detailed requirements for all injunction orders).

Further, Appellees' allegations and arguments fall short of establishing that they have no adequate remedy at law or would be irreparably harmed without obtaining their records from FDLE. They alleged that the infringement on their constitutional rights resulted from delay in and of itself. They quantified the delay in their allegations about when they applied and how long it took to get a disposition. The record also contains the affidavit of an FDLE employee establishing the duration of the delay. The original FDLE records are unnecessary to establish duration.

As to proving what caused the alleged delay, FDLE argues persuasively that either the cause of the delay is irrelevant; or, if relevant at all, that Appellees have typical discovery available to them, and have not alleged or shown that they cannot obtain the desired information by other means. FDLE already filed the affidavit of its employee familiar with the processing of Appellees' applications. Appellees can seek discovery of this employee's knowledge as well as the knowledge of other employees about FDLE's processes and procedures. For applicant-specific information, criminal history information can be obtained independently of FDLE's internal records, including from Appellees themselves. If after such discovery Appellees can demonstrate that absence of the exact records FDLE obtained and reviewed deprived them of access to the courts, they have the remedy of appeal available to them, which is an adequate remedy at law. If anything, the unavailability of the records themselves after destruction would seem to prejudice only FDLE in preparing its defense if it were to become relevant to do so, but even then it would be possible to produce witnesses who can attest to protocols and likely difficulties with obtaining and verifying background information rapidly. The complaint and record before us are utterly inadequate to support enjoining operation of section 790.065(4)(a) and section 790.065(4)(c) of the Florida Statutes. We should reverse for this reason as well.

Robert J. Sniffen and Jeffrey D. Slanker of Sniffen & Spellman, P.A., Tallahassee, for Appellants.

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