Filing # 28171381 E-Filed 06/05/2015 05:28:19 PM

IN THE SUPREME COURT OF FLORIDA

DONTAE MORRIS, :

Appellant, :

vs. : Case No. SC14-1317

STATE OF FLORIDA, :

Appellee. :

:

APPEAL FROM THE CIRCUIT COURT
IN AND FOR HILLSBOROUGH COUNTY
STATE OF FLORIDA

# INITIAL (CAPITAL) BRIEF OF APPELLANT

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RECEIVED, 06/05/2015 05:28:37 PM, Clerk, Supreme Court

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## STATEMENT OF THE CASE AND FACTS

On July 15, 2010, the Grand Jury for Hillsborough County returned an indictment charging Appellant, Dontae Morris, with two counts of the first-degree premeditated murder of Officers Davis Curtis and Jeffrey Kocab with a firearm; one count of escape from custody in violation of § 944.40, Fla. Stat.; and one count of possession of a firearm by a convicted felon in violation of § 790.23(1), Fla. Stat. (1:R112-14) The date of the offenses was June 29, 2010. Id.

On July 22, 2010, the State filed a notice of its intention to seek the death penalty. (1:R136) On May 18, 2012, the court filed a written order adjudicating Appellant competent to proceed based on the stipulation by counsel as to the written findings of the experts. (3:R520)

On December 21, 2012, Appellant filed a motion in limine to exclude all statements made by Mr. Morris while he was in medical observation at the jail. (7:R1297-1368) The court held a hearing January 25, 2013 (Vol. 12), and granted the motion in part and denied it in part. (7:R1294-96) The court excluded five of the six statements, but ruled that "the statement where he repents for (and admits to) killing 5 people is relevant [to] the material issue the jury must decide." (8:1453-54) The court ruled that the State "must redact the portion of that statement wherein he repents for killing 5 people." Id.

On March 6, 2013, Appellant filed a motion to reconsider the defense motion in limine and attached the deposition of Dr. Valerie McClain, a psychologist. (3:R551-600; 4:601-73, 674-78) After a hearing on March 7, 2013 (Vol. 13), the court ruled that the statement was admissible, and the defense could not present expert or lay opinion or evidence of Mr. Morris' mental condition at the time the statement was made. (Supp. R1-5)

Because of extensive pre-trial media coverage in Tampa, the court ordered a change of venue and jury selection and took place in Orange County on November 4-7, 2013, before the Honorable William Fuente. (Vols. 16-23) During jury selection, Appellant moved to strike the panel after a prospective juror (who failed to inform the court that she had been exposed to outside information about this case during individual sequestered voir dire) made statements informing other jurors that Appellant was "wasting taxpayers' money" because he was previously "found guilty of first-degree murder" and "sentenced" for the "same crime" for which he was on trial, and that he had been "indicted for the second time for murder." (20:T889-90, 891, 904-907; 21:T981-84) The court denied the motion, and Appellant renewed his motion to strike the panel and reserved his objection at the time the jury was sworn. (21:T984; 23T1214, 1219)

Mr. Morris was tried by a jury before Judge Fuente on Counts I through III on November 12-19, 2013. The following transpired:

At 2:16 a.m. on June 29, 2010, Officer Curtis stopped a maroon Toyota driven by a woman named Cortnee Brantley because

the car did not have a tag. The stop was captured on Officer Curtis' dashcam recording system and later played to the jury. (10:R1862; 24:R1302; 25:T1553-70) During the stop, the officer asked for Brantley's information and asked the male in the passenger seat if he had "any ID" on him. (25:T1554) When Brantley said the passenger did not have identification, Officer Curtis asked him for his last name, and the passenger said, "Morris." (25:T1554) The officer asked him to spell it and he said, "M-O-R-R-I-S." (25:T1555) He then asked him for his first name and the passenger said, "Donte, D-O-N-T-A-E." Id. The officer asked him his "middle," and the passenger said, "R." (25:T1555) Officer Curtis asked the passenger his birthdate and age. (25:T1554) He gave his age as 24, and he provided a birthdate of 8-24-85. (10:1862; 25:T1555)

Officer Curtis asked Ms. Brantley why she did not get a replacement tag, and if the tag had been stolen. (25:T1555) Ms. Brantley explained why the actual owner of the car had not replaced the tag, and Officer Curtis told her that she could not drive it without a tag. (25:T1556) Brantley said she had been stopped before and the officer told her to get a tag and to put her registration in the window. (10:1862; 25:T1556-57)

During the stop, Officer Kocab arrived to act as backup. (10:1862; 24:1301; 25:T1559) Officer Curtis ran the passenger's information through his computer and discovered an outstanding warrant. Both officers approached the passenger side of the car and opened the door. Officer Curtis asked the passenger if he

knew anything about a warrant, and he said "I ain't got no warrant." (25:T1560) Curtis opened the door and said, "Okay. Step over here. Turn around and step and put your hands behind your back." (25:T1560) The passenger got out and turned around. He bent down slightly and then turned and shot both officers in the head in a rapid motion. (10:1862) The shooter fled. After seeing her passenger leave, Ms. Brantley drove away from the scene. (10:R1862)

After the shooting the police discovered that the mobile dispatch terminal in Officer Curtis' patrol car showed the name and photograph of Dontae Morris. (24:T1380-81) A notepad with Mr. Morris' name and birthdate written in it and Ms. Brantley's driver's license were found on the front seat of Officer Curtis' patrol car. (10:R1707-11; 24:T1358) There were tire tracks from a car accelerating at the scene. (24:T1383) No shell casings were found. (24:T1395)

An autopsy showed that Officer Curtis died of an intermediate-range gunshot wound to the head with hollow point ammunition, and that the weapon was less than two feet away. (26:T1657, 1660, 1662, 1666) Officer Kocab was also killed by a gunshot wound to the head. (26:T1673) The distance between the muzzle and the wound was between 6 inches and two feet, but it was further away than in Curtis' case. (26:T1674) Both officers would have lost consciousness immediately and they would have been brain-dead almost immediately. (26:T1679, 1685-86) Both officers were 31 years old. (26:T1691)

That night a K-9 tracking officer found part of a zipper on top of a chain linked fence. (24:133524, 1364, 1397) DNA analysis performed on the zipper showed that the zipper had a mixture of DNA from at least three individuals as determined through STR autosomal testing. (30:T2238) Officer Kocab was excluded, but Officer Curtis and Mr. Morris could not be excluded. (30:T2238-39) Using a method of combined probability, Thomas Wahl, a private forensic DNA consultant, concluded that the combined probability that the DNA came from Officer Curtis was approximately one in ten individuals. (30:T2239) With regard to Mr. Morris, it was one in thirteen individuals. (30:T2239) Wahl stated that if Hillsborough County had a million residents, there would be approximately 77,000 who would be included as a possible contributor of the DNA mixture found on the zipper. (30:T2240)

Later that day, the Camry involved in the traffic stop was located at the Bristol Bay Apartments, 2.8 miles from the crime scene. (24:T1399, 1408; 25:T1441) The Camry was backed into a parking space facing a wooded area in the back of the complex. (24:T1409-10, 1415) The car did not have a license plate but the identification number matched the car Officer Curtis stopped. (24:T1410, 1439) The car had grass and mud embedded in the fender well. (24:T1422) There was dried soil or mud and grass behind the right front wheel well on the passenger side. (28:T1959-60) Three latent prints in the car belonged to Cortnee Brantley — one from the driver's side rear quarter panel, one from the exterior driver side front door, and the third was found on the Dell

laptop found on the rear passenger floorboard. (28:T1995-96) None of the prints found in the car belonged to Mr. Morris. (28:T1996-97)

There was trace evidence of blood on the outside of the passenger side roof of the car. (24:T1424; 25:T1446) Swabs taken from the exterior passenger side rear door were also positive for blood. (30:T2258-60) DNA from the interior door handle from the passenger side front door was a mixture and it could not be determined whether or not Mr. Morris was a contributor. (29:T2157) However, there were types present which were similar to Mr. Morris' DNA, so he could not be excluded. (29:T2158)

Brantley was found in the apartment complex, about 500 yards away from the car. (24:T1417) She was taken to the Police Department in Tampa and interviewed for six-and-a-half to seven hours, but she refused to identify the front seat passenger. (26:T1601-1602, 1606-1607)

On the night of the shooting, the police talked to Ynalia Keen, a teenager who told police that she saw someone run from the scene. (24:T1347) At trial, Keen, who was then 20 years old, testified that she was living on North 50th Street at the time. (25:T1458) She left her apartment around 2:00 in the morning on foot with a friend to go to the Shell gas station for something to eat. (25:T1462-63) They were standing outside waiting for another person to accompany them when they heard two gunshots. (25:T1463-64)

Keen testified that she saw someone standing on the outside of the car. (25:T1464) When they heard gunshots they went back into the house and turned off the lights because they were afraid of the gunfire. (25:T1465-66, 1486-87) Keen claims she went to the kitchen window to see where the person was running, but admitted that she left her one-year-old child asleep on the couch in the front room. (25:T1470; 1487-88) She testified that she saw a black male wearing blue jeans cut through the parking lot and jump the small fence and then jump a taller fence. (25:T1470) She stated that she did not see the man's face because it was dark, but then agreed that she saw only the side of the man's face. (25:T1474, 1497)

Keen and her mother went to where the police had been shot. Keen's mother called 9-1-1 and she gave her name to the police. (25:T1478) The next day, Keen identified a photograph as the man she saw that night. (25:T1474, 1475) Keen denied seeing Mr. Morris' face on television between the time she saw the man in the parking lot and when she made the photo identification, saying that they did not have any cable. (25:T1499, 1501) She also denied seeing his picture before she identified him. (25:T1500) She claimed she never knew there was a reward offered. (25:T1501)

Keen claimed that after the event, she did not discuss the incident with any of the other people who were present. (25:T1503) Keen admitted that she did not see the man get out of

the car. (25:T1505) She admitted that she had a bad memory and had trouble remembering things. (25:T1506)

Keen had to move several times after this incident. (25:T1506) The day before the trial, Keen told the State Attorney that she was having trouble getting money to pay for a deposit on a lease she signed. (25:T1507) She was told that the State Attorney would contact the landlord to see if he could put the deposit on the back end of the lease so she could pay it over time. (25:T1507) However, her aunt paid the money. (25:T1507-1508)

City of Tampa Sergeant Charles Massucci testified that he met with Ynalia Keen on June 30, 2010, at 2:40 p.m., and showed her a photopack of six pictures. (26:T1700) Mr. Morris' picture was in the bottom middle. (26:T1702) Ms. Keen identified Mr. Morris. (26:T1703) In response to Massucci's question to Keen about where she saw the man, Ms. Keen wrote: "Seen him on the back road with a group of people. He had ran by my house when the people was shot. Seen him at the Shell store." (26:T1704) Massucci testified that those were the places from which Keen recognized the man. (26:T1704)

Keen explained that she was underage and terrified when she wrote on the photographs, "Seen him at the Shell store." (25:T1502) She claimed she didn't remember writing it, but did not deny that it was her handwriting. (25:T1502)

Alfred Thompson was walking on 50th Street when he saw the police pull over a burgundy or red car driven by a black female.

(25:T1512-13) A black male was in the front passenger seat. (25:T1513) After Thompson passed the car, he heard two gunshots and hid in front of the red car. (25:T1514) He saw a black male run down the sidewalk, go through an apartment building, and jump a chain link fence, but he did not get a good enough view to identify the male. (25:T1517-18) Thompson thought the man was wearing a two-tone vest. (25:T1524)

Temika Jones, a 26 year old at the time of trial, testified that in 2010 she knew Mr. Morris as "Quelo." (26:T1746) On the night the officers were shot, she saw Mr. Morris in the Johnson Kenneth Court Apartments sometime after midnight. (26:T1747, 1756) It was a brief meeting which lasted around 3 minutes. (26:T1757) Mr. Morris was dressed in a dark blue vest with a white shirt underneath it, dark khaki "cargo pants" shorts, and white tennis shoes. (26:T1747-48, 1749-50) The vest may have had pockets either up top or down below and they may have had a zipper, but she was not sure. (26:T1748)

Mr. Morris called Jones around 2:00 in the morning and told her he wanted to take her out. (26:T1750, 1756) She gave him her number and they were supposed to go out for breakfast later that morning. (26:T1750) Later that day, some detectives showed her a photograph, and she identified the person in the photograph as Quelo because of the head shape and the clothing he was wearing. (26:T1751) However, from the quality of the photograph, she could not be certain. (26:T1756)

Jones admitted that in 2010 she did not know Mr. Morris very well. (26:T1754) She had seen him once or twice a couple of months before the incident. (26:T1754) On one occasion, she gave him a ride somewhere. (26:T1758) She saw him at J Court and they exchanged numbers and he called her later. (26:T1755) He was in a white car. (26:T1761) There was no one else driving. Id. When he called later, he said he wanted to "get at" her, meaning he wanted a romantic encounter. (26:T1755) She showed the police the call she received from Quelo. (26:T1759) The number from which he called her was (813) 531-3906. (26:T1760) In court, Jones identified Mr. Morris as the man she saw that night. (26:T1762)

Salvatore Augeri testified that he interviewed Temika Jones on July 1, 2010, and showed her a still photograph taken from the dashcam video from Officer Curtis' vehicle. (26:T1771-73) Jones wrote: "It looks like him cuz of the head shape and the outfit that he has on." (26:T1774) Officers Kocab and Curtis were also in the picture. (26:T1775) Jones gave him her cell number, (813) 735-8809. (26:T1775)

Ashley Price testified that she knew Mr. Morris as "Quelo" and she met him through her sister's boyfriend, Javonte Dennard, who was also called "Pedro." (27:T1780) Her sister is Tiffany Price. (27:T1780) In June of 2010, she was intimate with Mr. Morris on one occasion. (27:T1783)

On the day the two officers were shot, Mr. Morris called her around 3:30 in the morning. (27:T1783) He wanted a ride but she did not give him one. (27:T1784) He did not say where he was or

who he was with. (27:T1784) He called her in the morning, but she did not answer the phone. (27:T1785) She spoke to him around noon on her sister's phone. (27:T1785)

According to Price, Mr. Morris told her he "did it" because he wanted to get away, and he told her to watch the news. (27:T1785-86) She claimed he said the officers had gone back to run his name and he was afraid he had a warrant. (27:T1788) He said he was out of the car when he shot them and that he was the passenger and had given the officer his name. (27:T1788-89) He said he got the gun from under the seat and there were two officers and he shot them in the head. (27:T1789-90) He also said they were "Crackers," meaning that they were white. (27:T1790) He told her he was going to try to go to Jacksonville. (27:T1790)

The next day, June 30, 2010, Price went to the police and told them what Mr. Morris told her. (27:T1791) They did not come to her. Id. What Price told the police was the same as her testimony at trial. (27:T1791) In March of 2011, Mr. Morris called her through her sister Tiffany. (27:T1791-92) He asked her to go to the jail to visit her, but she did not go even though she told him she would. (27:T1792)

Ashley Price admitted she was a three-time convicted felon and she had a pending charge. (27:T1781-82) She admitted she was on probation at the time of the murders and since then, she had violated her probation. (27:T1793) On cross-examination, Price admitted that she had seen Mr. Morris only one time and that he

was not her type because he was too dark. (27:T1801) However, she claimed that they were close and he confided in her. (27:T1802)

Price admitted that she told Detective Durkin she knew Mr. Morris very very well. (27:T1806) However, Mr. Morris did not tell her where he went to high school. (27:T1806) She admitted that she never met his family and she did not know what he wanted to do for a career. (27:T1810) Price admitted that after the shooting, the police were looking for Mr. Morris and going through Johnson Kenneth Court with armored vehicles knocking on doors. (27:T1902-1803) She denied that the police threatened to arrest her or call the Department of Children and Families about her children. (27:T1812) She explained that she was charged with the felonies in July of 2010 after she talked to police. (27:T1817)

Price received financial help from the police in the form of funds to help her move. (27:T1811) Price thought the police assisted her with either first and last months' rent or a security deposit. (27:T1826-27) They tried to help her through Metropolitan Ministries and other charities, but it was not successful. (27:T1827) The prosecutor questioned Price about why she had to move, asking: "Is that because of threats made to you and your family?" (27:T1827) Counsel objected and moved for a mistrial, which was denied. (27:T1829, 1834-36, 1839-45)

The parties agreed that the court should give a curative instruction to the jury to the effect that the threats had nothing to do with Mr. Morris. (27:T1847-48) A curative

instruction was given to the jury, which stated that the parties agreed that "any reference to any suggested threat to Ms. Price . . . has nothing whatsoever to do with Mr. Morris." (27:T1848)

Sergeant Massucci testified that one month before trial, the Tampa Police Department gave $1,800 to an apartment complex and $200 to Ashley Price for a deposit and first months' rent and for moving expenses. (27:T1850) Massucci worked for several months with charitable organizations trying to relocate Price, but he was unsuccessful. (27:T1852)

Detective Kevin Durkin testified that he interviewed Ashley Price on June 30, 2010. (27:T1856) Ms. Price told him that after the murder she received a phone call from Dontae Morris and that he asked her for a ride. (27:T1857) She did not give him a ride, and he did not say where he was or who he was with. (27:T1857) Price said Mr. Morris called her again around noon. Id.

Over defense objection, the detective testified that Ashley Price told him that Mr. Morris told her that he was the one who shot the police officers. Price told him that Mr. Morris told her that he shot one of them in the head and he also told her how many officers he shot. (27:T1862) Mr. Morris told her that he shot them because one of them went back to run his name at his patrol car and he was afraid he had a warrant. (27:T1862) Price told the detective that Mr. Morris also said he got a firearm from underneath the seat and that the officers were white. (27:T1862) Price told him that Mr. Morris said he got out of the car and shot them. (27:T1862)

Price's interview took place on June 30, 2010, and at that time the dashcam video was not released to the press. (27:T1852) There were no press releases to the public regarding where in their bodies the officers were shot. (29:T2115) The police did not tell the public where the shooter retrieved the firearm from before the shooting. (29:T2116) Nor was it released that Officer Curtis had obtained and ran the names of the occupants of the car through his computer. (29:T2116)

Mr. Morris turned himself on July 2, 2010. (26:T1614; 30:T2198) He is five-foot-eight and he weighed 160 pounds. (26:T1614) Photographs were taken of Mr. Morris at the time of his arrest, four days after the murders. (26:T1615)

The State introduced and played a recording of repeated phrases, which was made by Mr. Morris as required voice recognition for an application to use the phone system at the jail. (25:T1572-79)

While Mr. Morris was in jail, he made a phone call to his stepbrother, Dwayne Callaway on March 4, 2011.[1] (25:T1580) Callaway used "three-way" calling to bring in a friend named Javonte Dennard ("Pedro"), who had a baby with and was living with, Tiffany Price, Ashley Price's sister. (26:T1704-1707, 1712-1714) Mr. Morris told Dennard that Ashley Price was "unrighteous" right now, and that he needed Dennard to talk to Ashley Price and tell her that all she had to do was to tell his attorney the truth. (26:T1714) Mr. Morris told Dennard that Ashley Price was

[1] Appellant objected to the testimony of Sergeant Massucci

telling everyone they had sex, but that he did not have a chance to have sex with her, even though he wanted to. (26:T1714-15) Mr. Morris said he could not be mad at Ashley Price because he knew she was saying those things because they "probably done threatened her to take her children." (26:T1715)

Mr. Morris also asked if Dennard remembered his "fake baby Mama," and said "unrighteous all the way, through and through" and there was "no need to be." (26:T1715) He said he just needed them to tell the truth to his attorney and that they were the only thing holding him in jail. (26:T1715-16) Mr. Morris said that the police were making people "lie on him" and that his attorneys could bring that fact into court. (26:T1716)

Mr. Morris said he wanted to talk to Tiffany Price's sister and let her know he wasn't mad at her. (26:T1718) Dennard gave them a number and hung up and Callaway called Tiffany Price. (26:T1721) Mr. Morris told Tiffany Price that he needed her to call her sister and Tiffany called Ashley Price. (26:T1723)

When Ashley Price answered, Mr. Morris asked her if she knew "who this is," and she responded, "It's Quelo." (26:T1723) He told her he needed to talk to her and she asked if he wanted to put her on visitation. (26:T1724) She said she could come the next day around two or three, and Mr. Morris said he would put her down for three. (26:T1724) He asked her if she knew why he wanted to talk to her. (26:T1724) She said that Tiffany just told her about the detective saying something about a written

(..continued)
identification of the voices on the phone call. (26:T1707-1708)

statement. (26:T1724) He asked her, "Why you talking like that, man?" and she asked, "Talking like what?" (26:T1724) He said, "Oh, man. Come on, man. What's going on with y'all, man?" Id. She said, "Nothing that I know of." (26:T1724) He said, "Well, I'm gonna talk to you. Come tomorrow, man. . . . I'm gonna see what's going on." (26:T1724-25)

After Price hung up, Mr. Morris told his stepbrother that he was going to see what's going on with her. (26:T1725) He said, "I hope she don't keep up with the foolishness," and said that he just needed his attorney to talk to her and for her to tell them the truth. (26:T1726) Javonte Dennard was brought into the call and Mr. Morris said, "[A]ll of them probably in cahoots." (26:T1730) "It's like they . . . got my life in their hand, bro. . . . All over some foolishness." (26:T1730)

Detective Charles Massucci testified that cell phone records were obtained for (813) 531-3906, the number provided by Temika Jones for "Quelo." (29:T2092) That phone was in the name "Billy Ray" and there was no residential address listed. (26:T1769; 29:T2133) They also obtained records for (863) 844-1193, which did not have a subscriber name, but the address listed for the phone was 907 North Parsons Avenue, Brandon, which was a residence owned by Cortnee Brantley's mother. (29:T2092, 2133) Massucci had contact with Cortnee Brantley at that address. Id.

Phone records showed that on June 28, 2010, at 4:23 p.m. a text was sent from (813) 405-6341 to (863) 844-1193 that read: "Cortnee, dis Rika. Fa my birthday I want YU to do me some body

plats. BT, but if YU do charge me, which I knw YU probably NT going to. But yeah, BT, how much will you?" (29:T2106-2107)

The text records for the Billy Ray number showed that on June 29, 2010 at 1:54 a.m. there was a text from Temika Jones' number, (813) 735-8809, that read "who is dis?" with a signature line of "Whirl da world!" (29:T2096) At 1:56 a reply text was sent from the Billy Ray phone to the (813) 735-8809 phone which read: "Quelo. Damn, ma. Niggas be at you like that." (29:T2097) However, the detective admitted that they never recovered the phone with the number (813) 531-3906 assigned to "Billy Ray," and they could not place it in Mr. Morris' hands. (29:T2119)

Records also showed there was a call made from the Billy Ray number at 2:04 a.m. on June 29, 2010, that was 29 seconds long and placed to (863) 844-1193. (28:T2063) The tower used was 5.1 to seven miles from the crime scene. (28:T2063) A phone call made at 2:13 a.m. from the Billy Ray phone to an undetermined subscriber was sent to a cell tower which was between .9 miles and 1.2 miles almost directly south of the crime scene. (28:T2067) The call started at the time when Officer Curtis stopped the Toyota Camry (2:13 a.m.) and was three minutes and two seconds long. (28:T2067-68) A call at made at 2:16 to the same number went to the same cell tower at the time when Officer Curtis had returned to his patrol vehicle. (28:T2068) An incoming call was received at 2:17 from the same number. (28:T2069) The same cell tower was used. (28:T2070)

The homicides occurred at approximately 2:18 in the morning according to the dashcam video. (28:T2048) There was an incoming call answered at 2:17:04 from the same unknown person that lasted for 34 seconds. There was an incoming call at 2:19 (which was after the shooter fled) from (863) 844-1193 that was 10 seconds long. (28:T2070-72) That call originated at a tower that was 1.3 to 1.5 miles from the crime scene. (28:T2071) There was an outgoing call from the Billy Ray phone to the same (863) number at 2:22 that lasted 27 seconds. (28:T2073) At 2:27:56, approximately 10 minutes after the shooting, there was an outgoing call made from the Billy Ray number to the (863) 844-1193 number, which used a cell tower just to the east of the crime scene. (29:T2089-90)

Records showed a text was sent from the Billy Ray phone to the same number on June 29, 2010, at 2:30 in the morning. (28:T2031) The message was "Get a ride. Don't need 2 be parked by the spot neither." (28:T2032; 29:T2100) Records from the receiving phone matched. (28:R2034) Another text was sent about a minute later from the (863) number: "No. Still N here. B T way, round corner I ND to move it somewhere else though." (29:T2101) The signature was "ON MY OWN LEVEL." Id. At 2:32 the Billy Ray phone sent a text to the (863) number that read: "Just lean back till 2 morro. Your phone in your name?" (29:T2101-2102) Very quickly thereafter the (863) number sent a text to the 531 number, "No," with the same signature line. (29:T2102) At 2:33 the Billy Ray phone sent a text to the (863) number: "Bet I'm

about to turn my shit off till 2 morro. I love you." (29:T2103) The response came at 2:34 and read, "I love you with my last breath." (29:T2103) Billy Ray responded, "Yeah. Just lean back. Stay loyal." (29:T2104) The (863) number responded at 2:35: "Of course . . . Till death do us part." (29:T2104) The Billy Ray phone responded at 2:36: "Yeah. I'm out, with love." (29:T2105)

At 2:40 the (863) phone sent three texts to (407) 480-0024, (813) 506-7006, (727) 563-4114, and (813) 863-2299. All of the messages say: "U haven't seen me . . . . . U don't know where I'm at . . . . . Please don't tell anyone anything. Erase these messages!" (29:T2110-11)

At 2:41, the (813) 863-2299 number responded, "what." (29:T2112) The (863) number responded: "Just make like i never existed! (29:T2112) The response was: "I'm jus tryin to make sure my baby safe." The (863) phone wrote: "Your baby is home," and the other phone responded, "Wasn't talking like that . . . . You left." (29:T2113) The (863) number wrote: "No. It's okay. I'm nt trying start nothing, but you don't know me anymore, please." (29:T2113)

Over defense objection, Detective Melvin Duran, who was a detective at the time of these events, identified the voice and image of the shooter on the dashcam video as that of Dontae Morris. (26:T1628-40) Over defense objection, Hillsborough County Sheriff's Deputy Steven Gray identified the voice of the shooter on the dashcam video as that of Dontae Morris. (27:T1886-92) Over renewed objection, Deputy Michael Gelis, a detention deputy with

the Hillsborough Sheriff's Office, testified that he had about 4 months of contact with Mr. Morris and that he heard Mr. Morris speak. (27:T1895) He identified the voice of the passenger as that of Mr. Morris. (27:T1896)

Deputy Hector Estrada, an employee of the Falkenburg Road Jail, and Deputy Adam Camara, a detention deputy, also identified the voice of the passenger as Mr. Morris over defense objection. (27:T1898-1901, 1903-1906) Deputy Camara testified that he had frequent contact with Mr. Morris for two years. (27:T1903)

Deputy Ruben Clemente testified that he worked at the Falkenburg Road Jail. (28:T2006) While he was observing Mr. Morris, Clemente heard Mr. Morris said "I repent for killing." (28:T2007) Clemente was about four feet away at the time, but he did not remember if Mr. Morris had facial hair at the time or whether he had a close haircut or long hair. (28:T2008) He did remember that Mr. Morris was wearing a gown. (28:T2008) Clemente admitted that Mr. Morris did not mention either Officer Kocab or Officer Curtis. (28:T2008) He did not mention the date of June 2010, nor did he mention Cortnee Brantley. (28:T2008-2009)

Mr. Morris did not testify.

On November 15, 2013, the jury found Appellant guilty as charged. (8:R1484-85; 31:T2417) The State announced its nolle prosequi of the charge of possession of a firearm by a convicted felon in Count 4. (39:T2841)

The penalty phase was held on November 19, 2013. (Vols. 33-34) The State presented the testimony of Sergeant Massucci and

Geryl Coleman, along with a certified copy of the conviction to establish the facts of a prior conviction for the murder of Rodney Jones. (33:T2500-2508, 2509-10, 2587-90) Victim impact letters were read by Kelly Curtis and Sara Kocab Remdon, the officers' widows, and letters from Stephanie Kocab, Officer Kocab's sister, and Sandy Kocab, Officer Kocab's mother, were also read into the record. (8:R1507-1516; 33:2515-19, 2522-24, 2526-27, 2530-34)

Appellant presented the testimony of Mr. Morris' mother, Selecia Watson, along with his God-Aunt Sharlotte Hamilton. (33:T2540-85, 2615-36) Mr. Morris' cousins, Artis Ponds and Devon Hamilton, also testified. (33:T2592, 2602-2609)

Three aggravating circumstances were presented to the jury: 1) the existence of a previous conviction of another capital felony or a felony involving the use or threat of use of force to the person; 2) that the capital felony was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape; 3) that the victim in the capital felony was a law enforcement officer engaged in the performance of his official duties. (34:T2670-72) The jury recommended a sentence of death for both murders by a vote of 12 to 0. (8:R1504-1506; 34:T2689-90)

The court held a Spencer hearing on March 13-14, 2014. (36:T2715-47) The defense presented Dr. Valerie McClain who testified that based test scores Mr. Morris' intellectual functioning was in the borderline to low range. (36:T2724-31) The

State presented Dr. Emily Lazarou, who opined that Mr. Morris' I.Q. was between 100 and 110.[2] (37:T2783)

On May 30, 2014, the court filed its sentencing order and sentenced Mr. Morris to death for the murders in open court, specifically finding that the "mitigating circumstances established by the preponderance of the evidence do not outweigh the aggravating circumstances proved beyond a reasonable doubt." (9:R1602-21; 39:T2836-40) The court sentenced Mr. Morris to 15 years imprisonment to run concurrently for the charge of escape in Count 3. (9:R1626-23; 39:T2842) The court found that the State proved the three aggravating circumstances beyond a reasonable doubt, but refused to consider the aggravator that the capital felony was committed for the purpose of avoiding arrest because it was based on the same evidence and merged with the aggravating circumstance that the victims were law enforcement officers. (9:R1605-1607) The court accorded the two remaining aggravators "great weight." Id. The court also accorded the jury recommendation "great weight." (9:R1607)

The court found twenty-two[3] mitigating circumstances were proven by a preponderance of evidence: 1) Dontae Morris (Appellant) was born prematurely to a 16-year-old unwed mother (minimal weight); 2) Appellant's father was murdered when he was 2 years old (no weight); 3) Appellant was raised by his maternal

[2] Over defense objection, the State presented victim impact information that the court agreed not to consider. (36:T2749-50, 2750-63; 37:T2770-76)

[3] The court order has two mitigators listed as "4." (9:R1611-12)

grandmother Phyllis Hunter during his early years, but her health was fragile and she could not, and did not, adequately care for him (minimal weight); 4) Appellant's mother did not bond with her child; she suffered severe post-partum depression and was a child herself (moderate weight); 5) Appellant started to bond with his step-grandfather, but he became a crack addict and left the family and Dontae Morris (minimal weight); 6) Appellant was raised without a father or any other male role model (moderate weight); 7) Appellant's mother subsequently gave birth to two more children, Dwayne Callaway, and Audra Callaway; she eventually married their father, Dwayne Callaway, Sr. (Minimal weight); 8) Appellant's mother attempted to make a home with a supportive nuclear family (minimal weight); 9) Appellant's mother grew tired of the limited success of her efforts to integrate Dontae Morris into her new traditional family unit and the attendant strife; accordingly Dontae Morris felt more and more isolated, alone, rejected and left out (minimal weight); 10) Appellant had to watch his siblings receive the support and affection of a father, a critical developmental support he never had (minimal weight); 11) Appellant assumed the role of "man of the house" when he was only 14 years old when his mother left Callaway, and Appellant had to suffer through a long and bitter divorce (minimal weight); 12) Appellant's was asked to leave the family home when his mother started to live with another man, Gary Watson (moderate weight); 13) Appellant's former step-father caused conflict in the home, sabotaged the discipline of

Appellant, and manipulated the children into disobedience (moderate weight); 14) Appellant was forced to live with his paternal grandparents who failed to control or discipline him and his behavior deteriorated (minimal weight); 15) Appellant's close ties to his aunt and cousins was severed when they moved to Jacksonville and Appellant lost their positive influence and healthy support (minimal weight); 16) Appellant's early teenage years were unstable and he moved and attended multiple schools (minimal weight); 17) Appellant became involved in the juvenile justice system and his mother sought counseling for him, but the system failed to provide the help she requested (moderate weight); 18) Appellant got no meaningful help or guidance when he was in the juvenile system (moderate weight); 19) Appellant supported and maintained a relationship with his seven-year-old son (moderate weight); 20) Appellant has maintained a caring relationship with his family members while in jail (minimal weight); 21) Appellant expressed remorse for the killings while in jail (minimal weight); 22) Death is not appropriate given the cumulative weight of the mitigating factors (moderate weight). (9:T1610-19)

The court also found that the State's rebuttal of Mr. Morris' mental mitigation evidence at the Spencer hearing "[did] not diminish the weight or quality of the mental mitigation evidence" and accorded it moderate weight. (9:1610)

On June 5, 2014, Appellant filed a motion for new trial and renewed motion for judgment of acquittal, and on June 10, 2014,

Appellant filed an amended motion. (9:R1643-55, 1656-68) On June 24, 2014, the court denied the motion for new trial. (9:R1670-75)

Appellant filed a timely notice of appeal on June 26, 2014. (9:R1676)

## SUMMARY OF THE ARGUMENT

I. Appellant was denied his constitutional right to an impartial jury when the court denied his motion to strike the panel after a prospective juror made statements informing other jurors that Appellant was "wasting taxpayers' money" because he was previously "found guilty of first-degree murder" and "sentenced" for the "same crime" for which he was on trial, and that he had been "indicted for the second time for murder." There is a presumption of prejudice when jurors are exposed to evidence of collateral crimes that are inadmissible at trial. Information that Appellant had a previous conviction for murder irreparably tainted the jury.

II. The trial court erred in denying Appellant's motion to exclude the redacted statement, "I repent for killing," made while he was on psychiatric observation at the jail because, as redacted, the statement was an irrelevant general statement, and whatever probative value it may have had, was outweighed by its prejudicial effect. When the court prohibited Appellant from introducing lay and expert testimony to demonstrate that he was experiencing a psychotic break when he made the statement, the court denied Appellant his Sixth and Fourteenth Amendment rights to confrontation and presentation of evidence. The evidence was admissible to show context and to impeach the hearsay statement.

III. Lay opinion testimony that identified the voice and

image of the passenger in the Toyota as that of Appellant invaded the province of the jury because the law enforcement officers who made the identifications were in no better position to make an identification than the jurors were.

IV. The State improperly bolstered Ashley Price's testimony with hearsay testimony from a detective recounting what she told him a day after the murders. On direct examination, the prosecutor made it abundantly clear that Price gave the same account to police as she gave at trial, and Appellant's cross-examination of Price did not demonstrate that her testimony had been recently fabricated or influenced by money to relocate or other favorable treatment.

V. The trial court erred in denying Appellant's motion for mistrial after the prosecutor asked Ashley Price whether she had to move because of threats made to her and her family when the prosecution admitted that none of the threats were attributable to Appellant. The curative instruction did not remedy the prejudice because the State introduced a phone call Appellant made to Price from the jail, in which Appellant indicated he was concerned that she was talking to police, and in which he asked her to see him at the jail. During closing argument, the prosecutor argued that Appellant made "desperate efforts" to contact Price so he could manipulate her and influence her testimony. In light of the evidence of the phone call and given the closing argument, the jury would have attributed the threats to Appellant in spite of the curative instruction. Because the jury was not instructed to

consider the evidence only in determining the credibility of the witness, the jury would have considered the threats as evidence of guilt.

VI. Appellant was denied his due process right to a fair trial because of the cumulative errors, and for that reason, a new trial is required.

## ARGUMENT

### ISSUE I

WHETHER APPELLANT'S CONSTITUTIONAL RIGHTS TO AN IMPARTIAL JURY AND TO DUE PROCESS WERE INFRINGED WHEN THE COURT DENIED HIS MOTION TO STRIKE THE JURY PANEL AFTER ONE MEMBER OF THE VENIRE MADE COMMENTS WHICH INDICATED THAT APPELLANT HAD BEEN INDICTED FOR, AND CONVICTED OF, ANOTHER MURDER.

Appellant was denied his rights under the federal and state constitutions to a fair and impartial jury and to due process of law when the court refused to strike the panel after a prospective juror made comments that informed the other jurors that Appellant had previously been indicted for, and convicted of, murder. Evidence of the prior murder was not admissible in the guilt phase of the trial, and the revelation of the prior murder was presumptively harmful.

Because of extensive media coverage, the court granted a change of venue for Appellant's previous trial for the first-degree murder and attempted robbery of Rodney Jones, which took place in March of 2013. In this case, a change of venue was granted and jury selection began in Orange County on November 4, 2013. In order to avoid the possibility of contamination of the venire, the court conducted individual voir dire concerning the extensive pre-trial media coverage. (16:T119-19:T715)

During jury selection, the prosecutor (Jay Pruner) questioned jurors about their feelings about the death penalty. Mr. Pruner asked juror number 144, Gloria Kaasa, if she believed she was capable of performing the weighing process of the

aggravating circumstances versus the mitigating circumstances.

(20:T889) Ms. Kaasa replied:

> I have a little theory. If you are in court and you have been charged and found guilty of first-degree murder, you are wasting our taxpayer's money to do another performance and another performance. So I would have to hear – If you are sentenced for one thing and brought in for the same crime, yes, you are wasting taxpayer's money; you're guilty, guilty, guilty.

(20:T889) The following exchange with Ms. Kaasa occurred:

> MR. PRUNER: Okay. What would be before you would be a punishment for the crime for which you have heard evidence of earlier in the guilt phase.
>
> MS. KAASA: And you did a repeat performance, yes.
>
> MR. PRUNER: Well, okay, I understand that. Let's take out of the theory of the idea of a repeat performance so to speak, because the evidence of aggravation may include something unrelated to that, okay, so that's not necessarily what's involved. Does that make sense?
>
> Okay. Is your view such that you would automatically vote for the imposition of the death penalty for someone that you voted earlier to convict of first-degree murder?
>
> MS. KAASA: If they were indicted for the second time for murder, yes.
>
> MR. PRUNER: Okay. Would you under – If those circumstances – Well, let's not get into that.

(20:T889-90)

At that point, Appellant's counsel, Byron Hileman, asked to approach. The court denied the request and told the prosecutor, "Clarify this." (20:T890) The prosecutor asked the court to approach because he wanted to "ask for guidance." (20:T890) The

following discussion took place among the parties, including Scott Harmon, the other prosecutor:

> MR. HILEMAN: She said if he's charged for the second time. She said it about three different times. She's implied it. I think we need to question her individually if we are going to question her at all.
>
> THE COURT: I think she's confused. One at a time.
>
> MR. PRUNER: I'm going to leave her alone. She's perhaps a loose cannon. I don't know what she's about to say.
>
> MR. HARMON: I think at some point we need to individually voir dire her. She may have some knowledge of another murder.
>
> THE COURT: One at a time.
>
> MR. HARMON: She may have knowledge of another homicide.
>
> THE COURT: Leave her alone for now, we will talk to her about it.

(20:T890-91)

The prosecutor and the court agreed with defense counsel that they needed to conduct an individual voir dire with Ms. Kaasa, and during a break, the court questioned Ms. Kaasa individually. (20:T904-907) Ms. Kaasa told the court:

> If this is the case I think it is, I am familiar with it. When they were saying about Tampa and the two police and that sort of thing, I have a daughter that lives in the area and I am somewhat familiar with it and that's why I was trying to get across.

(20:T905) The court reminded her that earlier in the week they talked about exposure and the judge asked her if she didn't recall at that time. Id. Ms. Kaasa said she didn't

remember until they started saying that two policemen were killed. (20:T906) The court asked Ms. Kaasa what she remembered, and she said:

> I remember it was like in the Fall of the year, probably between Thanksgiving and Christmas, and what I couldn't understand he was already – he is probably in prison now or was because he had committed a murder prior to that.

(20:T906) Ms. Kaasa said she did not mention anything about it to the other jurors. (20:T906) The court then excused Ms. Kaasa for cause. (20:T907)

After the defense began to questioned the panel, Appellant moved to strike the jury panel, arguing:

> MR. HILEMAN: I believe it is incumbent upon me to move to strike the jury panel on these grounds, Ms. Kaasa, number 144 ambiguously twice referred to her view that the death penalty would be appropriate especially if someone had been charged with another crime, and she at one point finally clarified that and said she had knowledge – of course this is out of the presence of the jury – of another murder charge against the defendant. But that was the clear implication of what she said in court with the jury panel present, which is what caused me and other Defense counsel to ask to approach the bench because we felt that was the clear meaning of the ambiguous statement that she made, that she made it twice.
>
> We do not believe that we can rely upon the jury panel not to have been influenced by the suggestion by this lady that Mr. Morris had some very serious charge, perhaps a homicide charge, which was an implication prior to or in addition to the one in which he's charged and is on trial here with.
>
> MS. MEEKS (Co-counsel for the defense): She said it would be a waste of money if he's been found guilty and brought back to court, waste of taxpayer money was the direct term.

MR. HILEMAN: That's correct.

MS. MEEKS: And that was in the presence of the jury when she spoke of previously having been found guilty.

(21:T981-82) The State responded:

MR. HARMON: judge, my memory of this is that she said it would be a waste of taxpayer money to come back and do this again. It don't believe that there was enough said that the rest of the jurors could interpret it to determine he was convicted of another case, another crime.

I would suggest that there is enough – there wasn't enough information revealed by her in open court before the remainder of the rest of the venire to infringe on the defendant's due process rights or the integrity of the trial. So we would object to striking the panel.

THE COURT: To the Court's recollection the lady interjected the responses herself. She, when Mr. Pruner was explaining to her, my perception was Mr. Pruner didn't understand what she was asking. I thought what she was asking was if he's found guilty why should we bother with the second phase. That's what I was thinking.

MR. HARMON: Right.

THE COURT: And obviously she was thinking something else. Fortunately, I think you asked to approach the bench and we just left it alone and brought her back afterwards, and out of the presence of the jury that's when she – thank goodness out of the presence of the jury she told us all that she now recalled about a prior situation where this defendant had been – gotten out of prison I think or been convicted of another crime or so.

Again, the record will speak for itself. And I recall she did say a waste of taxpayer money, I recall that, in the presence of the jury.

But I'll respectfully deny the request to strike the panel and start all over again. I don't think that's sufficient to rise to the level of that remedy.

(21:T983-84)

Before the jury was sworn, Appellant reserved its motion to strike the panel, and made it clear that the defense was accepting the jury subject to that exception and specifically stating that the defense was not waiving the motion to strike. (23:T1214) Counsel also represented that Mr. Morris accepted the panel, subject to his reservation of the motion to strike the panel. (23:T1219)

The due process clause of the Fourteenth Amendment[4] guarantees the right of state criminal defendants to be tried by an impartial jury. Long v. State, 151 So. 3d 498, 501 (Fla. 1st DCA 2014) (citing Woods v. Dugger, 923 F.2d 1454, 1456 (11th Cir. 1991)); Sheppard v. Maxwell, 384 U.S. 333, 362 (1966) ("Due process requires that the accused receive a trial by an impartial jury free from outside influences."). The Fourteenth Amendment incorporates the essence of the Sixth Amendment[5] right to be

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[4] Section 1 of the Fourteenth Amendment to the United States Constitution states:

> **Section 1.** All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

[5] The Sixth Amendment to the United States Constitution states:

> In all criminal prosecutions, the accused shall

tried by a panel of impartial, indifferent jurors whose verdict must be based upon the evidence developed at the trial. Long (quoting Irvin v. Dowd, 366 U.S. 717, 722 (1961)).

"In the constitutional sense, trial by jury in a criminal case necessarily implies at the very least that the evidence developed against a defendant shall come from the witness stand in a public courtroom where there is full judicial protection of the defendant's right of confrontation, of cross-examination, and of counsel." Turner v. Louisiana, 379 U.S. 466, 472-73 (1965) (holding that the defendant was denied his right to fair trial by an impartial jury when the two deputy sheriffs who gave key testimony had charge of jury during the three-day trial and had fraternized with them outside courtroom during performance of their duties).

In addition, under article I, section 16, of the Florida Constitution, and Florida Rule of Criminal Procedure 3.251, an accused has the right to trial by an impartial jury. Richardson v. State, 666 So. 2d 223, 224 (Fla. 2d DCA 1995). See also Jackson v. State, 729 So. 2d 947, 951 (Fla. 1st DCA 1998) ("Jackson has a constitutional right to trial by a fair and impartial jury.").

(..continued)

> enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of

An accused's right to an impartial jury under the Florida and United States Constitution and the Rules of Criminal Procedure is infringed when he is tried by a jury which has improperly obtained knowledge of other charges against him. See Wilding v. State, 427 So. 2d 1069 (Fla. 2d DCA 1983). In Wilding, 427 So. 2d 1069, during the voir dire examination of prospective jurors, one juror stated that he would try to listen to the testimony presented during the trial and be fair and impartial, but he had some knowledge of previous charges against the appellant. Unlike in this case, the juror did not disclose the nature of the charges. Wilding's counsel immediately challenged the entire jury panel by moving for mistrial, and the court denied the motion. The court reversed, holding that Wilding was deprived of his right to an impartial jury "because the jury panel was bound to be unfairly prejudiced by virtue of their knowledge of his arrest for another crime." Id. at 1069. The court held that the error was prejudicial, stating:

> It is true that the information imparted to the jury by the prospective juror was received by them prior to the commencement of the state's case. However, the prejudice to the appellant is almost as certain to be as great, if not greater, when the information is received in this manner rather than when it is a part of the prosecution's evidence and subject to protective procedures.

Id. at 1070.

"A jury is bound to be unfairly prejudiced against the accused by reason of the knowledge of his arrest for another

(..continued)
Counsel for his defence.

crime." Marrero v. State, 343 So. 2d 883 (Fla. 2d DCA 1977) (holding that it was error to try the defendant before a jury that had sat through voir dire in a prior trial on unrelated charges); Kelly v. State, 371 So. 2d 162, 163 (Fla. 1st DCA 1979) (holding that it was error to deny Kelly's motion to strike a panel when several members of the venire had been present earlier in the week when a jury was chosen for an earlier trial of Kelly's on different charges).

The defendant is deprived of his right to a fair and impartial jury if the jurors are informed that there are other charges pending against the defendant. See Pender v. State, 530 So. 2d 391 (Fla. 1st DCA 1988) (reversing a conviction for burglary and grand theft because jury was informed before trial that there were two incidents involving burglary and grand theft before court agreed to sever the charges).

In Holt v. State, 987 So. 2d 237 (Fla. 1st DCA 2008), Holt was charged with the armed robbery of two different victims. The trial court denied a defense motion to sever the charges, and before jury selection, the court read both charges. After jury selection, the court severed the charges and Holt moved to strike the jury panel on the grounds that the jury's knowledge that he had been charged with two counts of armed robbery would be unfairly prejudicial to his defense. See id. at 239. In spite of the substantial evidence against Holt, the court reversed, holding that Holt was deprived of his constitutional right to an impartial jury because of the possibility that jurors were

unfairly prejudiced by their knowledge of his other robbery charge. See id. at 240.

In Jackson, 729 So. 2d 947, the state filed a four-count information charging Jackson with one count of possession of a firearm by a violent career criminal; one count of possession of a short-barreled shotgun; one count of possession of cocaine and one count of possession of less than 20 grams of marijuana. The first count was severed and tried separately and the State agreed not to mention anything about the other counts. Before voir dire the judge merely asked the prosecutor in front of the prospective jurors, "Is the state presenting this matter on all four counts?" Id. at 950. The defense motion to strike the panel was denied. The appellate court reversed, holding that Jackson was deprived of his constitutional right to a fair and impartial jury because of the possibility that the jury panel was unfairly prejudiced by virtue of their knowledge of his arrest for other crimes. Id. at 951.

In order for the statement of one venire member to taint the panel, the venire member must mention facts that would not otherwise be presented to the jury. Johnson v. State, 903 So. 2d 888, 896–97 (Fla. 2005). In this case, Appellant's prior conviction was inadmissible in the guilt phase of the trial.

Exposure to information that a defendant was previously convicted of murder would require disqualification of prospective jurors exposed to the information when evidence of the previous conviction is inadmissible in the guilt phase of this trial, and

as such, is not introduced. See Bolin v. State, 736 So. 2d 1160, 1165-66 (Fla. 1999) (holding that the possibility that jurors may have been exposed to pre-trial publicity detailing Bolin's other convictions and other inadmissible evidence required a retrial regardless of whether or not the jurors indicated that they would not be influenced by media reports).

In Overton v. State, 757 So. 2d 537 (Fla. 3d DCA 2000), the defendant was charged with armed burglary, among other things. He had been convicted of a previous murder and sentenced to death, but the court denied a motion for change of venue. Thirteen prospective jurors indicated a familiarity with the prior case, but only five of them were excluded. Of the remaining jurors who knew about the case, three of them served on the jury when the court denied the defendant additional peremptory challenges. Those jurors indicated that they could be fair and impartial in spite of their knowledge of the unrelated murder case. The appellate court reversed, noting that "[i]f the appellant's status as a condemned killer had inadvertently come into evidence during the course of this trial, there is no question that he would have been entitled to a mistrial." Id. at 539 n.3.

A trial court abuses its discretion if it refuses to strike a jury panel when a prospective juror makes a comment that he or she knows the defendant from prior contact that suggests the defendant has committed other offenses. See Turner v. State, 51 So. 3d 542 (Fla. 5th DCA 2010) (holding that the court erred in failing to grant the defendant's motion to strike the jury panel

after a member of the venire indicated that she knew the defendant because she used to be a correctional officer at the county jail); Richardson, 666 So. 2d 223 (holding that trial court erred in denying defendant's motion to strike the venire when a prospective juror suggested that she knew defendant through her employment as corrections officer, thereby implying that he was convicted felon who previously served time); Evans v. State, 36 So. 3d 185 (Fla. 4th DCA 2010) (stating that a defendant's right to a fair and impartial jury is violated when jurors are inadvertently informed that the defendant has prior criminal charges or convictions because a prospective juror commented that he knows the defendant from his employment at the county jail).

The denial of a motion to strike the jury panel is reviewed for an abuse of discretion. Williams v. Osking, 105 So. 3d 653, 655 (Fla. 4th DCA 2013). "The trial court's discretion . . . is subject to a defendant's right to an impartial jury under the sixth amendment of the United States Constitution and article I, section 16 of the Florida Constitution." Overton, 757 So. 2d at 538.

A trial judge abuses his discretion in denying a motion to strike a jury panel when a member of the panel reveals inadmissible bad acts of the defendant. See Dippolito v. State, 143 So. 3d 1080, 1084-85 (Fla. 4th DCA 2014). In Dippolito, the defendant was charged in a high-profile case with solicitation to commit the murder of her husband. Incriminating videos showing

the defendant and her lover (who was working with police) and showing the defendant and an undercover police posing as a hit man, were shown on local and national televisions shows, including the reality show "Cops." In spite of the extensive coverage, the judge refused to conduct individual voir dire regarding the media coverage and one of the prospective jurors mentioned an allegation in the paper that the defendant attempted to poison her husband with antifreeze, a fact that the judge had previously excluded as inadmissible. The defendant unsuccessfully moved to strike the jury panel and for a mistrial. See id. at 1081-82.

In Dippolito, the court found the juror's comment "analogous to comments informing prospective jurors of a defendant's criminal history, other pending charges, or arrests." Id. at 1085 (citing Evans, 36 So. 3d 185 at 186; Holt, 987 So. 2d at 239; and Wilding, 427 So. 2d at 1069). The court reversed for failure to hold individual voir dire and for failure to strike the jury pool after the juror tainted the pool by revealing the inadmissible bad act of the defendant. See id. at 1084-85.

The court held that regardless of the video evidence of Dippolito soliciting the murder of her husband, the error was not harmless because if the evidence had been improperly introduced at trial, it would have been presumed harmful, writing:

> The state argues any error was harmless "[i]n light of the video evidence of Appellant soliciting the undercover officer to kill her husband [.]" Yet the harmless error test "does not re-weigh the sufficiency of the evidence but focuses on how the error affects the trier of

> fact." Holt, 987 So. 2d at 240. Here, we cannot conclude that this error was harmless beyond a reasonable doubt "because of the possibility that jurors were unfairly prejudiced by their knowledge" of this closely related allegation. Id. (finding error was not harmless because "[j]urors could have assumed that because Appellant was charged with another robbery, he was the perpetrator of the robbery being tried as well"); see also Jackson v. State, 729 So. 2d 947, 951 (Fla. 1st DCA 1998) (finding error was not harmless "because of the possibility that the jury panel was unfairly prejudiced by virtue of their knowledge of his arrest for other crimes"). We note that, if this type of evidence had been improperly introduced at trial, it would have been presumed harmful. See Kopsho v. State, 84 So. 3d 204, 212 (Fla.), cert denied, -- U.S. --, 133 S.Ct. 190, 184 L.Ed.2d 97 (2012).

Id. at 1085-86.

In this case, the error was presumptively harmful. Ms. Kaasa's comments informed the jury that Appellant was "wasting taxpayers' money" because he was previously "found guilty of first-degree murder" and "sentenced" for the "same crime" for which he was on trial, and that he had been "indicted for the second time for murder."

If irrelevant, evidence of uncharged criminal activity "is presumed harmful error because of the danger that a jury will take the bad character or propensity to crime thus demonstrated as evidence of guilt of the crime charged." Straight v. State, 397 So. 2d 903, 908 (Fla. 1981); Keen v. State, 504 So. 2d 396, 401 (Fla. 1987), *disapproved in part on other grounds*, Owen v. State, 596 So. 2d 985, 990 (Fla. 1992). If Appellant's status as a convicted murderer had inadvertently been revealed at trial, there is no question that a mistrial would have been required.

See Overton, 757 So. 2d 537, 539 n.3. The prejudicial effect is the same, if not greater, when convictions for collateral crimes are revealed during voir dire. See Wilding, 427 So. 2d 1069, 1070.

Because the revelation occurred in open court, Ms. Kaasa's statements tainted the venire. There would have been no way to question other members of the venire regarding what they understood about Ms. Kaasa's statements without incurring further damage. Furthermore, a curative instruction would have further alerted the jury to the importance of Ms. Kassa's statements.

The error is not harmless. The harmless error test requires the state to prove beyond a reasonable doubt that the error did not contribute to the defendant's conviction. State v. DiGuilio, 491 So. 2d 1129, 1139 (Fla. 1986).

> The test is not a sufficiency-of-the-evidence, a correct result, a not clearly wrong, a substantial evidence, a more probable than not, a clear and convincing, or even an overwhelming evidence test. . . . The focus is on the effect of the error on the trier-of-fact. . . . The burden to show the error was harmless must remain on the state. If the appellate court cannot say beyond a reasonable doubt that the error did not affect the verdict, then the error is by definition harmful.

Id. at 1139. Because it cannot be shown beyond a reasonable doubt that this highly prejudicial information did not affect the jury, a new trial is required.

## ISSUE II

WHETHER THE TRIAL COURT ERRED IN ALLOWING THE STATE TO INTRODUCE A REDACTED STATEMENT THAT DID NOT REFER TO THE CRIMES IN THIS CASE AND WHICH WAS MADE BY APPELLANT WHILE HE WAS HAVING A PSYCHOTIC BREAK; AND WHEHTER EXCLUSION OF APPELLANT'S EXPERT AND THE WITNESSES WHO OBSERVED APPELLANT'S MENTAL ILLNESS VIOLATED HIS SIXTH AMENDMENT RIGHT TO COMPULSORY PROCESS AND CONFRONTATION AND HIS FOURTEENTH AMENDMENT RIGHT TO DUE PROCESS.

The trial court erred in allowing the State to present a redacted admission made by Mr. Morris while he was under psychiatric observation in the jail, and further erred in preventing the defense from presenting evidence which would put the statement into context by showing that Appellant was having a psychotic episode at the time he made it.

Before trial in the case involving the killing of Rodney Jones, Appellant filed a motion to exclude all of the statements overheard by deputies while Appellant was in medical observation at the Hillsborough County jail in November of 2011. (7:R1297-1368) Appellant attached the handwritten jail logs made by the deputies of their observations of Appellant's activities. Id.

The State filed a memorandum of law stating that it would offer into evidence six statements, which included: "I repent for my sins and to God. I accept you God and repent for all that I have done. I repent for killing 5 people." (3:R546-48) The State conceded that it would have to restrict the statement "I repent for killing 5 people" to "I repent for killing." (3:R547)

At a hearing on the motion, Colonel James Previtera, the Commander in charge of the Falkenburg Road Jail, testified that Mr. Morris' case was considered to be high profile. On November 10, 2011, Mr. Morris made a request to see a psychologist and he told the deputies that he believed that the guards or someone at the jail were going to kill him. (12:T20) Defense counsel also contacted Previtera and told him that family members were reporting that Mr. Morris was making irrational statements and that he was having delusions or hallucinations. (12:T22) Previtera admitted that the statements made by Mr. Morris were "uncharacteristic." (12:T24) In response, deputies were assigned to sit outside the cell and do nothing but watch Mr. Morris, and the psychiatric staff was contacted. (12:T20, 23)

Deputy Reuben Clemente testified that on November 15, 2011, at 6:53 p.m., he was stationed in front of Mr. Morris' cell and he could hear him and see his face through a flap that was opened. (12:T31-32) Mr. Morris made statements about accepting God and repenting for all he had done. (12:T32) He also said, "I repent for killing five people." (12:T32) He made other statements about Christian salvation and accepting Jesus Christ and he appeared to be coherent. (12:T33)

Over defense objection that Clemente was offering an opinion on mental illness and he was not an expert, Clemente testified that Mr. Morris appeared to be rational and his statements appeared to make sense. (12:T33-34) However, he admitted he was not present when other deputies heard Mr. Morris say that the

deputies were trying to kill him or when the deputies reported that Mr. Morris was making no sense. Id. When he made the statement, Mr. Morris was kneeling and talking to God and he was not yelling. (12:T34-35)

Appellant argued that simply redacting "five people" and leaving, "I repent for killing" was not sufficient because there was no nexus or factual connection between the statement and this case. (12:T6-7) Counsel argued that the State could not selectively redact language, and argued that presenting "I repent for killing" would leave the jury to speculate as to what that meant. (12:T8) Appellant argued that the evidence would violate the Williams rule because the jury would speculate about uncharged acts. (12:T8-10) Counsel argued that because the statement was non-specific, the prejudice outweighed the probative value. (12:T39)

Counsel also argued that if the statement came in, it would open the door to the defense bringing in all of the other things said by Mr. Morris to place the statement "in perspective." (12:T10-11) Appellant argued that the defense should be able to show that Mr. Morris was delusional and ranting -- that he made clearly untrue and false confessions about being a child molester and said that the deputies were trying to rape and kill him. (12:T11)

The court filed an order granting the motion in part and denying it in part.[6] (7:R1294-96) In the order, the court

[6] The original motion and the February 18, 2013, order were filed

excluded five of the six statements, but ruled that "the statement where he repents for (and admits to) killing 5 people is relevant [to] the material issue the jury must decide." (8:1453-54) The court ruled that the State "must redact the portion of that statement wherein he repents for killing 5 people." Id.

On February 19, 2013, the State deposed Dr. Valerie McClain because the defense listed her as witness to rebut the statement. (3:R555, 557) On March 6, 2013, Appellant filed a motion to reconsider the defense motion in limine and attached the deposition of Dr. McClain. (3:R551-600; 4:601-73, 674-78) The motion explained that Dr. McClain met with Mr. Morris three times during the time period at issue and that she reviewed all of the jail logs, and that Dr. McClain diagnosed Mr. Morris as suffering from a major depression with psychotic features and that his behavior as documented demonstrated psychotic behavior and ideation. (3:R553) Appellant also filed a written argument on his motion to reconsider (8:1446-50), arguing:

> Consequently, the court will be compelled in fairness to permit the defendant to present evidence attacking and rebutting the trustworthiness and reliability of the statement and the arguing that little weight should be given to it by the jury. Thus, defendant will be forced [to] put on a case in chief and call various witnesses whose testimony will support an argument for reducing the weight to be given the admitted statement.

(8:R1449)

(..continued)
in Case No. 11-CF-896, and refiled in this case on November 12, 2013. (24:T1240-41, 1246-47) The court filed an amended order

Appellant argued that the defense would have to call Dr. McClain and Mr. Morris' mother Selecia Watson, who was the first person to observe the bizarre behavior and statements which led to Mr. Morris being put on suicide watch. (4:R677; 8:R1449) Appellant would be compelled to call as witnesses the other four corrections officers to testify that they heard and observed other irrational, bizarre, and delusional or hallucinatory statements and behavior before, during, and after the statement in question "to show from context that it is entitled to little weight." Id. Appellant stated that the defense would also have to show the jury videos of jail visits in which Mr. Morris exhibited irrational, bizarre, and psychotic behavior. Id.

A hearing was held on March 7, 2013 via telephone. (Vol. 13) In addition to the argument in the motion, Appellant argued that Mr. Morris told his mother he was unable to sleep and that he was hearing voices and that if he slept, they were coming to steal his soul. (13:T59) He also talked about people plotting against him. (13:T59) Appellant assured the court that Mr. Morris' mother would not offer any opinion; she would merely testify as to her observations. (13:T68)

The court entered a written order denying the motion for reconsideration.[7] (Supp. R1-5) The court ruled that because the

(..continued)
specifically for this case on November 13, 2013. (8:R1452-54)

[7] Before trial, the defense renewed its motion in limine, and the court agreed that the order applied to every case in which the State attempted to introduce the evidence. (23:T1231-32) Before Deputy Clemente's testimony, Defense renewed its objection to the statement that Mr. Morris made that he repented for killing five people. (28:T2003-2004)

case did not involve an "insanity defense" and because Mr. Morris was competent to stand trial and did not make the statement as a result of interrogation, the defense "will not be permitted to offer expert opinion or lay evidence of [Mr. Morris'] mental condition or status at the time he uttered the admission." (Supp. R3-4) The court ruled that Appellant could present other evidence or statements by Morris or observations of Morris' conduct or actions during the time period deputies were observing him, but ruled that "under no circumstances . . . [would] either party be permitted to offer lay or expert evidence of that portion of his statement wherein he mentions killing of 5 persons or lay or expert evidence of Morris' mental state at the time he made the statement." (Supp. R4)

**A. The statement was not relevant and it suggested collateral offenses. The probative value of the statement was outweighed by the prejudice to Appellant.**

Even though evidence may be admissible as an admission by a party under an exception to the hearsay rule, the evidence must still be relevant to a material issue at trial. See Gardner v. State, 821 So. 2d 1220, 1221 (Fla. 2d DCA 2002) (citing Lee v. State, 737 So. 2d 1116, 1117 (Fla. 2d DCA 1999), and stating "even though evidence may be admissible under an exception to the hearsay rule, the evidence must still be relevant to a material issue at trial"); Moore v. State, 701 So. 2d 545, 549 (Fla. 1997) ("Although a party's own statement, offered against the party,

can satisfy the admissions exception to the prohibition against hearsay, it is still subject to the general requirement that only relevant evidence may be admitted."). See also Delgado v. State, 573 So. 2d 83 (Fla. 2d DCA 1990) (holding the defendant's statement that he had previously "killed ten men" was not relevant to whether he had deliberately killed the victim).

In this case, the statement was not relevant and Appellant was prejudiced because the jury was misled as to the nature and the context of the statement. Appellant never said, "I repent for killing." He said "I repent for killing five people," a statement that was inadmissible because it revealed other offenses. Neither the original statement nor the redacted statement specifically refer to the murders of the two police officers. The deputy admitted that Mr. Morris did not mention the officers or any other facts specific to these murders.

It was only after the court modified the statement that the court made it admissible and relevant. In other words, when the modified statement was presented to the jurors, who had no idea that Appellant was suspected of other murders, the ambiguous statement was presented as unambiguous. That is because the jury had every reason to believe that Mr. Morris was making a specific admission regarding the murders in this crime alone, when that was not the case.

A general admission to prior criminal conduct of the same type, which is not linked to the offense for which the defendant is being tried, is inadmissible. See Lee, 737 So. 2d 1116. In

Lee, an undercover officer purchased a small amount of crack cocaine from a woman. About six weeks later, the officer ascertained her name and went to her house and arrested her. While being transported to jail, Lee told the officer that she had sold and used crack cocaine. The Second District reversed because the State failed to demonstrate that the general admission was relevant because it was not linked to the offenses of sale and possession of cocaine on the day the officer bought cocaine from Lee.

A court should not be allowed to change the meaning of an admission, from an admission to general crimes to an admission to specific crimes, by redacting references to other crimes. By contrast, in State v. Lamar, 538 So. 2d 548 (Fla. 3d DCA 1989), the defendant told an officer who was questioning him about the murder for which he was being tried, "I got away with the murder in Chicago, and I'll get away with this one." When the officer asked Lamar to clarify the statement, Lamar further remarked: "I beat it, and I'll beat this one." In Lamar, the defendant was clearly talking about the murder for which he was being tried, and redacting the "murder in Chicago" did not change the nature of his admission as it did in this case.

Because the statement, "I repent for killing," is a general statement, it is irrelevant and shows merely a propensity to kill, which is inadmissible. The fact that the evidence of collateral crimes comes from prior statements of the defendant

does not exempt it from the Williams[8] rule. Delgado v. State, 573 So. 2d 83, 85 (Fla. 2d DCA 1990) (citing Jackson v. State, 451 So. 2d 458 (Fla. 1984)). "Where the collateral crime evidence consists of prior statements of the defendant, the argument for inadmissibility is, in fact, more cogent." Id. (quoting Green v. State, 190 So. 2d 42, 47 (Fla. 2d DCA 1977)). See also Lee, 737 So. 2d 1116 ("If anything, the fact that the collateral crime evidence came from Lee's own lips tended to exacerbate its vice.").

Even if the statement were relevant, its probative value pales in contrast to the prejudice inherent in the statement. See, e.g., Armstrong v. State, 931 So. 2d 187 (Fla. 5th DCA 2006); Jackson, 451 So. 2d 458. "The trial court should exercise discretion to exclude modestly relevant evidence when the danger of unfair prejudice from its admission substantially outweighs its probative value." Mims v. State, 872 So. 2d 453, 455 (Fla. 2d DCA 2004) (citing Hill v. State, 768 So. 2d 518, 520 (Fla. 2d DCA 2000)).

In Jackson, the defendant was charged with two murders that occurred on the same evening. Jackson testified that he did not commit the murders because he was with his wife that evening. During trial a witness who was not present at the shooting testified that Jackson pointed a gun at him and boasted that he was a "thoroughbred killer" from Detroit. This Court held that the statement was irrelevant, impermissible, and prejudicial. See

[8] Williams v. State, 110 So. 2d 654 (Fla. 1959).

id. at 461. The Court stated that "the 'thoroughbred killer' statement may have suggested Jackson had killed in the past, but the boast neither proved that fact, nor was that fact relevant to the case sub judice." Id. The court concluded that the statement was prohibited by the Williams Rule and § 90.404(2). See id. at 461.

By contrast, in Swafford v. State, 533 So. 2d 270 (Fla. 1988), the defendant was charged with the rape and murder of a woman who was found shot nine times, with two shots to the head. Two months after the murder the defendant suggested to an acquaintance that they "get a girl." According to the witness, Swafford said, "We'll get one and we'll do anything we want to to her," and he said that he would "get rid of her," "waste her," and that he would "shoot her in the head twice." The acquaintance asked "don't that bother you?" Swafford told him, "you just get used to it." See id. at 273.

This Court held that the statement was admissible as an admission to the charged crime, stating: "Swafford's statement that 'you just get used to it,' when viewed in the context of his having just said that they could get a girl, do anything they wanted to with her and shoot her twice in the head so there wouldn't be any witnesses, was evidence which tended to prove that he had committed just such a crime in Daytona Beach only two months before." Id. at 273-72. In this case, Mr. Morris' statement provided no referential details from which the jury could determine that he was talking about these offenses.

Unlike in this case, in Smith v. State, 866 So. 2d 51, 53-63 (Fla. 2004), the admission was made during the crime and provided circumstantial evidence of identity of the shooter. In Smith, immediately after shooting one of the victims, Smith said "that was the 13th or 14th people" that he had shot. The statement was relevant to rebut Smith's claim that another man, the driver of the car, was the actual shooter. The statement was important because the witness who heard the statement could not see the actual shooting because it was too dark.

When a statement does not specifically refer to the crime for which a defendant is being tried, not only is it inadmissible, it is unfair to present the statement without context. For example, in Armstrong, 931 So. 2d 187, the defendant was charged with a strong arm robbery, which occurred in December of 2004. About a month after the crime, a deputy interviewed the defendant about another robbery that took place in November, which involved a firearm. Over defense objection, the court allowed the State to elicit that Armstrong told the deputy during the interview for the unrelated robbery, "I will f--- with people I don't know, I will steal somebody's s---, but I ain't never hurt nobody in my f------ life, man. I have never hurt nobody." Id. at 189.

In Armstrong, the court held that the statement was inadmissible because it was made during an investigation for an unrelated crime and that it served only to show bad character and propensity to commit the charged crime. See id. at 192. Aside

from the fact that Armstrong himself was describing his character trait, the court held that the statement was inadmissible because, as in this case, Armstrong was not referring to any specific crime. See id. at 192. Realizing the statement was not a confession, the Armstrong court concluded, "Assuming this statement constituted an admission against interest or was somehow relevant, its admission at trial created a danger of unfair prejudice, which substantially outweighed any probative value." Id. at 193 (citing § 90.403, Fla. Stat.).

The court in Armstrong was concerned that "the jury was not told about the context in which this statement was made." Id. at 193. As in this case, the defense declined to put the statement in context by revealing other highly prejudicial information:

> The court gave the defense the opportunity to provide this information but the defense declined. This was a reasonable trial tactic because while this may have explained the context of the statement, it would have also informed the jury that Armstrong was a suspect in a more dangerous robbery — one involving a shooting — that could have been even more damaging to his case.

Armstrong, at 193.

In this case, the court's ruling provided no solution. It would force Appellant into introducing other horribly damaging statements made by Mr. Morris, such as a statement that he was a child molester (which was not true), to show that Mr. Morris was making irrational statements. Furthermore, if Appellant introduced any of Mr. Morris' other statements which met the definition of hearsay, then the State could introduce Appellant's

prior convictions to impeach those statements. See Huggins v. State, 889 So. 2d 743 (Fla. 2004).

**B. Under the Rules of Evidence Appellant was entitled to impeach the statement, and the court's exclusion of this evidence violated the Due Process Clause of the Fourteenth Amendment[9] and the Compulsory Process or Confrontation Clause of the Sixth Amendment[10], and Art. 1, §§ 9 and 16 of the Florida Constitution.**

The court erred in ruling that because Mr. Morris was not raising an insanity defense and because he was found competent to stand trial in May of 2012 (3:R520), that he could not present evidence to show that his statement was made during a psychotic break in November of 2011. Appellant was not raising questions about his mental capacity at the time of the offenses in June of 2010, he was raising questions about his mental status when he made the overheard statement in November of 2011, about 17 months later.

Appellant's counsel made it clear that Dr. McClain would not have testified that Appellant's statement was untrue; she would have given her opinion that at the time, Appellant was suffering a psychotic break. Appellant's mother would have testified that Appellant was acting so strangely that she asked defense counsel and the jail to intervene, and the deputies would have testified to the bizarre behavior Mr. Morris exhibited while under observation. The jury would then have made its own decision regarding the weight to be given the statement.

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[9] See text in Issue I.

[10] See test in Issue I.

"[W]hile the court has the initial gatekeeping function regarding admissions as it does other evidence, such as an initial relevance determination, the contours of the admission go to the weight of the evidence and are appropriate for the jury's consideration." State v. Campbell, 157 So. 3d 346, 350 (Fla. 2d DCA 2015) (reversing an order granting a judgment of acquittal notwithstanding a verdict, holding that the meaning of the defendant's admissions to his girlfriend was a matter of fact for the jury).

The trial judge did not understand that, whether or not the statement was subject to outright exclusion because Mr. Morris was delusional or hallucinating at the time, Mr. Morris could certainly present evidence that the statement was not reliable for those same reasons. See McNair v. State, 75 S.W.3d 69, 73 (Tex. App. 2002) (holding that the trial court must decide whether incriminating statements are admissible in spite of the defendant's mental illness; however, the jury had the right to assign the weight to be given the statements in light of evidence from psychiatrists' testimony that McNair had chronic schizophrenia and bipolar disorder).

> Admissions under section 90.803(18) are dissimilar from judicial admissions made in a pleading or pursuant to Florida Rule of Civil Procedure 1.370. Those formal admissions are binding in the case, and a party may not offer evidence to dispute them. *However, an admission made under section 90.803(18), which is sometimes called an evidentiary admission, is not conclusive. The evidence is admissible under the exception, and the party who made the out-of-court statement may offer evidence to dispute its truthfulness.*

Charles W. Ehrhardt, Florida Evidence § 803.18 (2014 ed.) (emphasis added).

Because the Florida Rules of Evidence define an admission of a party opponent as an "exception" to the hearsay rule (and not an "exclusion" as does the Federal Rules of Evidence), section 90.806(1) clearly allows the presentation of evidence to attack the credibility of the declarant as if the declarant had testified as a witness. See § 90.806(1), Fla. Stat. See also Kaczmar v. State, 104 So. 3d 990 (Fla. 2012) (stating that pursuant to § 90.806(1,) once the defendant introduced his own hearsay statement, the State could introduce evidence of his prior felonies to impeach his credibility).

A defendant may impeach his own statement that is introduced through another witness as an admission. See U.S. v. Dent, 984 F.2d 1453, 1460 (7th Cir. 1993), *called into question on other grounds by* Crawford v. Washington, 541 U.S. 36 (2004) (stating that under Fed.R.Evid. 806, the defendant could impeach his own statement). Furthermore, section 90.608(4), allows any party to attack the credibility of a witness by "showing a defect of capacity, ability, or opportunity in the witness to observe, remember, or recount the matters about which the witness testified."

A witness may be impeached by evidence that he has a severe mental illness. Gonzalez v. Wong, 667 F.3d 965, 983 (9th Cir. 2011) (citing United States v. Butt, 955 F.2d 77, 82–83 (1st Cir.

1992) ("For over forty years, federal courts have permitted the impeachment of government witnesses based on their mental condition at the time of the events testified to."). See also Felton v. State, 949 So. 2d 342 (Fla. 4th DCA 2007) (holding the defendant was denied his Sixth Amendment right to confront witnesses when the court prohibited him from cross-examining the victim about the fact she was on methadone at the time of the incident, and noting that the State opened the door to such testimony, which would show the "whole story"); Berry v. State, 788 So. 2d 1107 (Fla. 2d DCA 2001) (noting that counsel could be ineffective for failing to call an expert to impeach the sole eyewitness with evidence that the drugs he was taking for his mental illness could cause confusion and hallucinations); Tullis v. State, 556 So. 2d 1165, 1167 (Fla. 3d DCA 1990) (noting that if the defendant's cellmate was having delusions at the time Tullis made admissions to him about the murder or "if it were shown by other relevant evidence that the delusions had affected the witness' ability to observe, remember, and recount," the defense would be allowed to cross-examine him about the delusions).

In U.S. v. Shay, 57 F.3d 126 (1st Cir. 1995), the defendant was charged with conspiracy and aiding and abetting an attempt to blow up his father's car. At trial, the government relied in part on incriminating statements that Shay made to the police, the media, and fellow inmates. The defendant argued that his statements were unreliable and should be disregarded and

attempted to present a psychiatrist to testify that he suffered from a mental disorder that causes its victims to make false and grandiose statements without regard to the consequences. The trial court prevented the defense from offering this testimony, concluding that under Fed.R.Evid. 702 the jury was capable of determining the reliability of Shay's statements without the testimony. As in this case, the trial judge was also concerned that the psychiatrist's testimony could wander into evidence of diminished capacity.

In Shay, the circuit court determined that, under the controlling rules of evidence,[11] Shay would be allowed to attack the reliability of his own out-of-court statement. The court also concluded that the trial court erred in excluding the testimony even though there was other evidence that the statements were inconsistent, exaggerated, and not credible, stating:

> [W]hether or not the jury had the capacity to *generally* assess the reliability of these statements in light of the other evidence in the case, it plainly was unqualified to determine without assistance the *particular* issue of whether Shay Jr. may have made false statements against his own interests because he suffered from a mental disorder. Common understanding conforms to the notion that a person ordinarily does not make untruthful inculpatory statements.

[11] The court decided that Fed.R.Evid. 608 applied to statements of a party opponent. That section, which is like § 90.806, provides: "When a hearsay statement, or a statement defined in Rule 801(d)(2)(C), (D), or (E), has been admitted in evidence, the credibility of the declarant may be attacked, and if attacked, may be supported, by any evidence which would be admissible for those purposes if declarant had testified as a witness."

57 F.3d at 133 (emphasis in original)[12]. In this case, unlike in Shay, the jury was not provided with any context for the statement or any reason to doubt the veracity of it.

In her deposition, Dr. McClain explained that she spoke with Mr. Morris on three occasions and talked to Mr. Morris' mother and sister, and she reviewed the jail observation logs. Dr. McClain opined that at the time the statement was made, Mr. Morris was suffering from major depression with "psychotic episodes," and while he was being observed, Mr. Morris was having a psychotic episode, during which he had a "break with reality." (3:R596; 4:R621, 622) The doctor opined that Mr. Morris' religious background got pushed into a "more psychotic phase." (3:R596-97) She pointed to portions of the jail logs that showed psychotic thinking, including Mr. Morris statement, "Someone put something on me to kill those people. Someone stole my soul." (3:R598)

Dr. McClain noted that Mr. Morris was pacing and was very agitated. (3:R599) He said he understood why people hated him and talked about being a "young buck child molester," and he was talking incoherently to himself. (3:R599-600) Dr. McClain found it significant that Mr. Morris refused his tray because he believed the jail had poisoned it. He believed the guards wanted to rape him, and that his food was to make him sick. (3:R600) He

[12] However, because the trial court did not hold an evidentiary hearing on the issue, the court remanded for a hearing to make a determination under Fed.R.Evid. 403 regarding "if its prejudicial, misleading, wasteful, confusing, or cumulative nature substantially outweighs its probative value." Id. at 134.

was talking to himself and singing while walking in circles. (3:R600) Dr. McClain concluded that Mr. Morris was delusional or psychotic as opposed to "coming clean" about things. (4:R606).

The jail observation logs show that Mr. Morris was isolated and on restriction in a cell by himself. He was pacing in his cell (7:R1307-15, 1320-21, 1330-31), talking to himself (7:R1308, 1312, 1313, 1314, 1320, 1334-35, 1354-55, 1362), flailing his arms and legs, and singing to himself (7:R1320, 1352). He was acting paranoid and talking incoherently. The deputies observed him talking to two imaginary people sitting next to him. He claimed that his food was poisoned and he forced himself to throw up.

It is clear that the jail was treating Mr. Morris as a suicide threat because the jail made him wear a suicide gown or "turtle suit" and he had to brush his teeth with his finger because he was not allowed to have a toothbrush. (7:R1313, 1322) He was also denied a blanket when he complained of being cold, and he was given individual sheets of toilet paper as a precaution. (7:R1307, 1309, 1311, 1315, 1318, 1329)

The logs indicate that on November 11, Mr. Morris said, "Just rape me and put me back in my cell like nothing happened." (7:R1308) On that same date, Mr. Morris was observed saying that God had saved him and God told him to change his ways. (7:R1309) Later, Mr. Morris asked the deputy, "Are you guys going to kill me?" (7:R1310) The deputy wrote, "Morris seems to think that 'we' are waiting for him to fall asleep so 'we' can harm him."

(7:R1310) Mr. Morris told the deputy that someone told him that the deputies were going to rape and kill him. Id. He refused his lunch and requested sleeping pills because he could not sleep. (7:R1311) The deputy wrote: "[Morris] stating voices are telling his that he has AIDS." (7:R1311) Later, it was noted that Mr. Morris appeared agitated and said he was going to Heaven and not to Hell. (7:R1312) He refused to eat his evening meal and he was pacing and talking to himself. (7:R1312)

On November 12, Mr. Morris told a deputy, "The Voodoo has been trying to kill me for a long time," and "God is in control." (7:R1320) The deputy heard Mr. Morris make other statements such as, "The devil is a liar," and "Cast out the demons." (7:R1321) He also said his little brother put Voodoo on him to die and go to Hell. (7:R1321) He said that the world was out to get him. (7:R1321) He said he was responsible for giving his whole bloodline AIDS, even though he did not have it. (7:R1322) He claimed that people were talking about him in the "mod" and that he could hear them through the vents. (7:R1322) He said he was being sacrificed so his family could live. (7:R1322) He also refused breakfast and the deputy wrote that he was "acting paranoid." (7:R1323) Mr. Morris said that the voices told him that the evening shift was going to rape him until he kills himself. (7:R1323) He said he was refusing his meals because they were laced with drugs. (7:R1323) A deputy wrote that Morris was "making no sense." (7:R1325) He refused lunch saying that they were trying to rape him. (7:R1325)

On November 13, Mr. Morris said, "Someone put something on me to kill those people. Someone stole my soul." (7:R1332) He also said, "I shot the white guy cause my girl Teresa put something on me." (7:R1333) He talked to himself. (7:R1334-35) He said, that everyone was a part of this and everyone was coming in there to get him. (7:R1335) He appeared to be talking to someone named "Dred." (7:R1336)

On November 14, Mr. Morris was again talking to himself and pacing. (7:R1337, 1340) He said that "they" are "both" right beside him. (7:R1340)

On the same date as the statement, November 15, Mr. Morris was shaking for no reason and talking to himself. That night he said he was he was "a young buck child molester" and he understood why people hate him. (7:R1345) Just before that, the deputy was concerned and asked Mr. Morris if he was "doing all right." (7:R1345) After saying that he repented for killing five people, Mr. Morris said that Jesus was coming to get him and that he accepted Jesus and was going to Heaven. (7:R1346)

The next day, the deputies reported that Mr. Morris was talking incoherently to himself and flailing his arms and legs. (7:R1348, 1349) He said that they were still sending the evil spirits at him and he kept shaking them off. (7:R1349) He refused his tray one time because it was not vegetarian, and a second time because he believed they poisoned it because they wanted to rape him. (7:R1349) He forced himself to throw up the food he did eat. (7:R1349) He began yelling that they could not kill the part

of him that was going to Heaven. (7:R1349) He asked the deputy why was he there because he was dead. (7:R1350) The deputy wrote that Mr. Morris stated: "Lt. and everyone else is telling me to kill him." (7:R1350)

Expert psychological testimony is admissible in certain circumstances to explain a defendant's actions, demeanor, or state of mind. For example, in Dorbad v. State, 12 So. 2d 255 (Fla. 1st DCA 2009), the defendant was charged with the shooting death of a young woman who was his boarder. In his first trial, the State placed emphasis on the fact that after the shooting, Dorbad's demeanor was "calm." In his second trial, Dorbad wanted to present evidence from a psychiatrist who reviewed Dorbad's 911 phone call on the evening of the shooting, along with other evidence from law enforcement regarding his demeanor. See id. at 256-57. Dorbad proffered the psychiatrist's opinion that after the shooting Dorbad was under stress and "acting in a manner I would characterize as withdrawn, shock like manner; someone who is being flat, withdrawn, unemotional." The psychiatrist opined that "[p]eople respond to shocking or traumatic events in a variety of ways, from hysteria . . . to complete catatonia or complete unresponsiveness," and that a layman would assume that a person who accidentally shot someone would be acting hysterically. See id. at 257.

In Dorbad, the trial court excluded the testimony and the appellate court reversed, holding that under sections 90.702 and 90.704, the evidence was admissible, stating:

> Dr. Greer's expert testimony on demeanor in stressful situations would allow the jury to consider two opposing views of the evidence and assist the jury in determining what weight to place on evidence of appellant's calm demeanor. Thus, it would clearly aid in the jury's understanding of the evidence.

Id. at 259.

Admissions and custodial confessions are similar, except for the fact that the judge makes the first determination regarding whether or not a custodial statement was obtained legally. However, once the court decides that a confession is voluntary, the jury is entitled to hear relevant evidence on the issue of voluntariness, and the trial judge has to instruct the jury to give such weight to the confession as the jury feels it deserves under all the circumstances. See Boyer v. State, 825 So. 2d 418, 419-20 (Fla. 1st DCA 2002) (citing United States v. Hall, 93 F.3d 1337, 1344 (7th Cir.1996)).

> Once a confession is admitted into evidence, however, the defendant is entitled to present to the jury evidence pertaining to the circumstances under which the confession was made. The reason for this rule is that it is the jury's function to determine the weight to be accorded the confession in determining guilt.

Palmes v. State, 397 So. 2d 648, 653 (Fla. 1981) (holding that it was error for the trial court to prohibit the defendant's testimony about his state of mind, and stating, "It is conceivable that a confession, freely and voluntarily given and therefore admissible, may be untrue. Therefore the defendant must be allowed to tell the jury why he made it.").

The credibility of a defendant's confession is a material issue for the jury to decide; therefore, evidence putting a confession into context is relevant and admissible. See Smith v. State, 424 So. 2d 726, 730 (Fla. 1982) (holding that the State was entitled to present pretrial exculpatory statements made by the defendant to impeach his other exculpatory pre-arrest statements and to put his confession into context).

In Boyer, 825 So. 2d 418, the defendant asserted that his confession was false and involuntary because he was mentally and physically debilitated from an extended bout of drinking. After the court denied his motion to suppress on those grounds, Boyer wanted to present the testimony of an expert in false confessions, which would include testimony on the parameters for evaluating a confession to determine its veracity. The trial court ruled that the doctor met the requirements to be considered an expert, but excluded the testimony on the grounds that the State would then present their expert and the evidence would not help the jury. On appeal, the court held that the trial court erred in excluding the expert's testimony because "It is for the jury to determine the weight to give to Dr. Ofshe's testimony, and to decide whether they believed his theory or the more commonplace explanation that the confession was true." Id. at 420.

In Dawson v. State, 20 So. 3d 1016 (Fla. 4th DCA 2009), the defense wanted to present a psychologist to "impeach the integrity" of the defendant's confession by showing the

susceptibility of a 16 year old to suggestion when being interviewed by three detectives. The trial judge excluded the evidence, ruling (in addition to a discovery violation), that the evidence was "irrelevant" and that the testimony would suggest diminished capacity. See id. at 1019.

In Dawson, the appellate court reversed, stating that a defendant is entitled to present evidence pertaining to the circumstances under which a confession is made because it is up to the jury to determine the weight to be given to a confession. The court stated that a defendant's state of mind is relevant to that inquiry. See id. at 1020 (citing Palmes, 397 So. 2d at 653).

Because there is no rule of evidence or case law prohibiting this evidence, Appellant had a constitutional right to present it.[13]

> The right of an accused in a criminal trial to due process is, in essence, the right to a fair opportunity to defend against the State's accusations. The rights to confront and cross-examine witnesses and to call witnesses in one's own behalf have long been recognized as essential to due process.

Chambers v. Mississippi, 410 U.S. 284, 294 (1973) "Few rights are more fundamental than that of an accused to present witnesses in his own defense." Id. at 302.

In Crane v. Kentucky, 476 U.S. 683 (1986), the defendant sought to present evidence to the jury concerning the duration of

[13] The trial judge was persuaded by the fact that "Defense counsel offered no authority to support the admissibility of opinion testimony of the mental state of any declarant at the time he made a statement other than during interrogation or interview." (Supp. R2)

the interrogation and the fact that he was badgered by six officers "to suggest that the statement was unworthy of belief." The court stated, "In the absence of any valid state justification, exclusion of this kind of exculpatory evidence deprives a defendant of the basic right to have the prosecutor's case encounter and 'survive the crucible of meaningful adversarial testing.'" Id. at 690-91 (citing United States v. Cronic, 466 U.S. 648, 656 (1984)).

In Crane, the Court reiterated that "evidence surrounding the making of a confession bears on its credibility as well as its voluntariness." Id. at 688 (citing Jackson v. Denno, 378 U.S. 368, 368 n.13 (1964)). The Court wrote: "As the Court noted in Jackson, because 'questions of credibility, whether of a witness or of a confession, are for the jury,' the requirement that the court make a pretrial voluntariness determination does not undercut the defendant's traditional prerogative to challenge the confession's reliability during the course of the trial." Id. at 688 (citing Jackson).

The Court held that the exclusion of the proffered evidence denied Crane a "meaningful opportunity to present a complete defense" in violation of both the Due Process Clause of the Fourteenth Amendment and the Compulsory Process or Confrontation Clause of the Sixth Amendment, writing:

> Confessions, even those that have been found to be voluntary, are not conclusive of guilt. And, as with any other part of the prosecutor's case, a confession may be shown to be "insufficiently corroborated or otherwise . . . unworthy of belief." Lego v. Twomey, [404 U.S. 477, 485-86

> (1972)]. Indeed, stripped of the power to describe to the jury the circumstances that prompted his confession, the defendant is effectively disabled from answering the one question every rational juror needs answered: If the defendant is innocent, why did he previously admit his guilt? Accordingly, regardless of whether the defendant marshaled the same evidence earlier in support of an unsuccessful motion to suppress, and entirely independent of any question of voluntariness, a defendant's case may stand or fall on his ability to convince the jury that the manner in which the confession was obtained casts doubt on its credibility.

Id. at 698.

In McIntosh v. State, 532 So. 2d 1129 (Fla. 4th DCA 1988), the court cited Crane and held that the trial court erred in refusing to permit the defendant to present evidence of her mother's domination and control over her and her drug addiction to attack the credibility of her confession.

In this case, Appellant was entitled to impeach the statement as if he were a witness at trial with extrinsic evidence that Mr. Morris was having a psychotic break. Furthermore, the State opened the door to the testimony, and the evidence was necessary to show the "whole story" behind the alleged admission.

Review of a trial court's ruling on the admissibility of evidence is for abuse of discretion; however, the court's discretion is limited by the rules of evidence and the applicable case law. See Sheppard v. State, 151 So. 3d 1154, 1169 (Fla. 2014); Hinojosa v. State, 857 So. 2d 308, 309 (Fla. 2d DCA 2003); McCray v. State, 919 So. 2d 647, 649 (Fla. 1st DCA 2006).

The error is not harmless because, in closing argument, the prosecutor suggested that the statement was a confession that Mr. Morris made to the deputy: "Ms. Meeks' argument . . . and her cross examination towards Ms. Price about her familiarity with the defendant, this is the same man who says, I repent for killing in front of a complete stranger four feet away from him in the Hillsborough County jail, all right." (31:T2355)

The test for harmless error is whether an appellate court can say beyond a reasonable doubt that the error did not affect the verdict. See DiGuilio, 491 So. 2d 1129, 1139. Because the statement was presented as a confession to these specific offenses, the error in allowing it to be admitted and the error in prohibiting Appellant's impeachment of the statement warrant a new trial.

## ISSUE III

WHETHER ALLOWING LAW ENFORCEMENT OFFICERS TO IDENTIFY THE VOICE AND THE IMAGE OF THE SHOOTER ON THE DASHCAM VIDEO AND THE VOICE ON A JAIL PHONE CALL AS THE VOICE AND IMAGE OF APPELLANT INVADED THE PROVINCE OF THE JURY.

The court erred in allowing law enforcement officers to give lay opinions identifying Mr. Morris' voice and image because the officers had no special knowledge of, or familiarity with, Mr. Morris. A police officer's lay opinion identifying a defendant's voice or image, based solely on his comparison of the voice or image to another source which can be viewed by the jury, invades the province of the jury. See Proctor v. State, 97 So. 3d 313, 313-315 (Fla. 5th DCA 2013).

Over defense objection that the testimony "invaded the province of the jury," the court allowed Detective Duran, the lead detective in this case, to identify the voice of the shooter on the dashcam video as that of Mr. Morris.[14] (26:T1628, 1631-35) The State claimed that Detective Duran was familiar with Mr.

[14] Appellant's counsel also argued that the State failed to lay a proper predicate, and that the detective should not be permitted to speak to the ultimate issue of the identity of the shooter. (26:T1633) The court overruled the objection, stating: "I'll find that constitutes a lay opinion and it's not improper under 90.701, 702 and 703. Note your objection. Overruled." (26:T1634) Appellant also objected to the detective's identification of the image of the shooter on the video as Mr. Morris on the same grounds, arguing that the jury had "equal capability of determining who they think is in that video as [does] this witness." (26:T1636) Counsel argued that the officer was bolstering the State's case "in the area where the jury has an independent opportunity to make that judgment" because the officer was not an eyewitness and he had no personal knowledge aside from the videos he reviewed. (26:T1636-37)

Morris' voice only because he listened to ten to twenty of Mr. Morris' recorded phone calls from the jail and because he watched ten to twenty of the videotaped visitations. (26:T1627-29) The detective admitted that he had no specialized training in voice recognition. (26:T1644)

Over defense objection, Duran also identified Mr. Morris' image based on the fact that he spent a substantial amount of time viewing the dashcam video and photographs made from it and compared them to photographs of Mr. Morris. (26:T1638, 1639-40) Duran admitted he had brief contact with Mr. Morris in person only on the night he was arrested, to take buccal swabs from him and when he walked Mr. Morris out of the Tampa Police Department. (26:T1639)

Over the same defense objection, Sergeant Massucci identified Mr. Morris' voice on a recorded telephone call made to Ashley Price by comparing the voice on the call with the voice of Mr. Morris on other jail phone calls.[15] (26:T1706)

In Proctor, the court reversed convictions for uttering a forged instrument and grand theft because the trial court allowed a detective to identify the defendant as the man cashing two stolen checks after he compared the bank's surveillance video with Proctor's photo and signature found in a state driver's license database. The appellate court concluded that "[t]he

[15] Appellant renewed his previous objection to the voice identification. (26:T1707-1708) After the phone call was played to the jury, Appellant moved for a mistrial, arguing that the jurors were in the same position as law enforcement to make the identification. (26:T1740-42) Court denied the motion. (26:T1742)

jurors should have been allowed to determine for themselves whether Proctor was the person shown in the surveillance video." See also Bowers v. State, 104 So. 3d 1266 (Fla. 4th DCA 2013) (indicating that, if preserved, an officer's identification of the defendant in a surveillance video after he compared a photograph of the defendant to the video would have invaded the province of the jury).

Over Appellant's renewed objection, Hillsborough County Sheriff's Deputy Steven Gray identified Mr. Morris' voice on the dashcam video as that of the front seat passenger who shot the officers. (27:T1889) Gray admitted he had no special training in voice identification and that his opinion would be no better than anyone else's regarding someone's voice, but he claimed he watched over a hundred hours of Mr. Morris' video visitation over a monitor at the jail as it was happening.[16] (27:T1886-88, 1889, 1890-92)

It is error to allow an officer to identify a defendant's voice or image when the office has no prior knowledge or special familiarity with the defendant. See, e.g., Edwards v. State, 583 So. 2d 740 (Fla. 1st DCA 1991) (holding that a deputy's identification of the defendant on a video of drug transactions that he monitored invaded the province of the jury because the deputy did not assert that he had any prior knowledge of, or a special familiarity with, the defendant that would enable him to

(..continued)

[16] Defense counsel renewed the objection to deputies testifying that they recognized Mr. Morris' voice and image. (27:T1892-93)

identify her or that he was particularly qualified as an expert in videotape identification).

"When factual determinations are within the realm of an ordinary juror's knowledge and experience, such determinations and the conclusions to be drawn therefrom must be made by the jury." Ruffin v. State, 549 So. 2d 250, 251 (Fla. 5th DCA 1989); Alvarez v. State, 147 So. 3d 537, 542 (Fla. 4th DCA 2014)(holding that reversal was required because an officer testified that, based on extensive viewing of a surveillance video, he determined the two people who committed the robbery and murders were a light-skinned male who was white or Hispanic, and a dark-skinned male); Razz v. State, 155 So. 3d 447, 448 (Fla. 4th DCA 2015) (same).

In Ruffin v. State, 549 So. 2d 250 (Fla. 5th DCA 1989), the State introduced a videotape of a drug purchase made by an undercover officer, and over objection, three police officers who were not present for the undercover transaction testified that, in their opinion, Ruffin was the man in the videotape. The Fifth District held that this opinion testimony invaded the province of the jury because the officers were not witnesses to the crime, were not specially familiar with the defendant, or were not qualified as experts in identification, writing:

> This was an invasion of the province of the jury. When factual determinations are within the realm of an ordinary juror's knowledge and experience, such determinations and the conclusions to be drawn therefrom must be made by the jury. See McGough v. State, 302 So. 2d 751, 755 (Fla. 1974). [The three officers] were not eyewitnesses to the crime, they did not have any special familiarity with Ruffin,

> and they were not qualified as any type of experts in identification.

Id. at 251. See also Charles v. State, 79 So. 3d 233 (Fla. 4th DCA 2012), (holding that a detective's lay identification of the defendant as the person in a surveillance video invaded the province of jury, and stating that the "jurors should have been left to determine for themselves whether [Charles] was the person in the surveillance video").

State v. Cordia, 564 So. 2d 601 (Fla. 2d DCA 1990), is distinguishable on its facts. In Cordia the defendant was a police officer accused of making a false bomb report and the State sought to introduce identification of the voice on the phone call by two fellow police officers who knew the defendant professionally "for a significant period of time," and had spoken to him in person and over the telephone and police radio. See id. at 601.

"Error in admitting improper testimony may be exacerbated where the testimony comes from a police officer." Proctor, 97 So. 3d at 315 (citing Martinez v. State, 761 So. 2d 1074, 1080 (Fla. 2000)). "There is the danger that jurors will defer to what they perceive to be an officer's special training and access to background information not presented during trial." Id.; Charles, 79 So. 3d at 235.

In addition, in this case, three other law enforcement officers, Deputies Michael Gelis, Hector Estrada, and Adam Camara, who were detention deputies at the jail, were allowed to

testify that the shooter on the video was Mr. Morris. Although they knew Mr. Morris from their contact with him at the jail, the fact that they were identified as detention deputies was highly prejudicial for two reasons. First, their testimony highlighted the fact that Mr. Morris was in jail for an extended period of time because Deputy Camara testified that he had contact with Mr. Morris for two years. (27:T1903) Second, the fact that they were identified as law enforcement officer lent credence to their identifications.

Courts have reversed solely because the witnesses identifying the defendant's image or voice were law enforcement officers. See, e.g., Hardie v. State, 513 So. 2d 791 (Fla. 4th DCA 1987) (reversing a conviction for grand theft on the grounds that officers identifying the defendants on a videotape should not have been identified as police officers and noting that the police officers who identified photographs of the defendants knew them from prior contact); Day v. State, 105 So. 3d 1284 (Fla. 2d DCA 2013) (holding that allowing a police officer to identify the defendant from a video was proper because the officer knew the defendant from prior contacts with her, but reversing because revealing that the witness was an officer was prejudicial); State v. Price, 701 So. 2d 1204, 1206-07 (Fla. 3d DCA 1997) (holding that the trial court did not err in granting a new trial because the State elicited identification testimony from a police officer who testified that he knew the defendant from working in his neighborhood). See also Edwards, 583 So. 2d 740, 741 (noting that

the officer's identification of Edwards might be admissible on retrial if the State laid the proper predicate and if were not identified to the jury as a police officer).

Although these courts have reasoned that identifying the witness as a law enforcement officer suggests that the defendant has committed other crimes, the prejudicial effect is the same, if not greater, in this case because the victims were also law enforcement officers and the testimony revealed that Mr. Morris was in jail for a least two years.[17]

In this case, at least five law enforcement officers identified Mr. Morris as the shooter on the dashcam video. When a police officer, who is generally regarded by the jury as disinterested and objective and therefore highly credible is the corroborating witness, the danger of improperly influencing the jury becomes particularly grave. Barnes v. State, 576 So.2d 439, 439 (Fla. 4th DCA 1991) (holding that an officer could not testify to the victim's prior consistent statement (citing Perez v. State, 371 So. 2d 714, 716-17 (Fla. 2d DCA 1979))). See also Bartlett v. State, 993 So. 2d 157, 166-167 (Fla. 1st DCA 2008)(noting that with regard to self-defense the jury could have held the opinions of the lead investigator in higher regard than the testimony of any other lay witness, thereby reinforcing the

[17] After the officers testified, Appellant moved for a mistrial, arguing that some of the officers had limited or no personal familiarity with Mr. Morris. (28:T1923-28, 1931-32) Counsel also argued that Appellant was prejudiced because the witnesses were law enforcement officers who viewed the videotape when friends and family of Mr. Morris or other lay witnesses could not do so because it was sealed pursuant to court order. Id. The court

prejudice).

An appellate court reviews a trial court's decision to admit evidence under an abuse of discretion standard; however, that discretion is limited by the rules of evidence. Hudson v. State, 992 So. 2d 96, 107 (Fla. 2008). The harmless error test places the burden on the state, as the beneficiary of the error, to prove beyond a reasonable doubt that the error complained of did not contribute to the verdict or, alternatively stated, that there is no reasonable possibility that the error contributed to the conviction. See DiGuilio, 491 So. 2d 1129, 1135.

The major issue in this case was identification. The jury was in a position to determine if Mr. Morris was the shooter based on its view of him from November 4 to November 15, 2013, during voir dire and trial. The State also introduced recordings of Mr. Morris' voice, from which the jury could make a comparison. There was no reason to present the testimony of the law enforcement officers, other than to present evidence to which the jurors would defer, in place of their own opinion, based on the status of the witnesses as law enforcement officers. The evidence was cumulative and unnecessary, and its only function was to usurp the function of the jury.

(..continued)
denied the motion. (28:T1934-36).

## ISSUE IV

WHETHER THE COURT ERRED IN ALLOWING A DETECTIVE TO REPEAT WHAT ASHLEY PRICE TOLD HIM REGARDING WHAT MR. MORRIS TOLD HER AND WHETHER THE TESTIMONY IMPROPERLY BOLSTERED PRICE'S TESTIMONY WHEN THERE WAS NO IMPLICATION OF RECENT FABRICATION.

The trial court erred in allowing the State to bolster Ashley Price's testimony by presenting Detective Durkin to repeat hearsay statements that Price made on the day after the murder.

During Ashley Price's direct examination, the prosecutor specifically asked her if she went to the police the day after the murder and told them the same information she told the jury, and Price answered "yes." (27:T1791)

During cross-examination, Price admitted she was on probation at the time of the murders, that she was on probation for new charges at the time of trial, and that she was facing consequences for violation of probation. (27:T1793) She also admitted that before she went to the police, there was a manhunt going on in the Johnson Kenneth Court complex and the police were knocking on doors and arresting people. (27:T1802-1803) She denied being threatened with charges and she denied that anyone talked about calling the Department of Children and Families about her small children. (27:T1812)

Price did admit that she received financial assistance from the police in the form of funds to relocate (27:T1811); however, defense counsel's cross-examination focused on the fact that Price claimed that Mr. Morris confessed to her even though she

did not know him very well. Price admitted that she went out with Mr. Morris only once and she claimed she wasn't interested in him because he was too dark. (27:T1801) Price admitted that Mr. Morris never told her any personal information such as where he went to high school. She never met his family, and she did not know what he wanted to do with his life. (27:T1809-10)

On redirect, Price made it clear that the three new felonies arose in July of 2010, after she spoke to the police about this case and that she was not given any benefit on those charges. (27:T1817) She also testified that the Tampa Police Department assisted her in relocating by paying a security deposit, and although she did not answer, the prosecutor asked Price if she had to relocate because of threats made to her and her family.[18] (27:T1827)

Over defense objection the State called Detective Kevin Durkin to repeat what Ashley Price told him on June 30, 2010, the day after the murders. (27:T1856) Appellant objected on hearsay grounds, explaining they did not dispute what Price told the police. Counsel stated:

> Number one, we believe this is cumulative. Number two, we believe that it is hearsay. She has testified to this. We did not, we did not dispute what she said she said. There was some talk about times and dates, but there was no dispute about what she said. So this

[18] The State called Sergeant Massucci to testify that a month before trial the Tampa Police Department gave Ashley Price $200 and gave a housing complex $1,200 for a deposit and the first two months' rent and $600 to reimburse her aunt for money she paid to the complex. (27:T1849-50) Massucci also reiterated that Price told Detective Durkin that Mr. Morris confessed to her on June 30, 2010, three years before trial and that the dashcam video has never been released. (27:T1852-53)

is hearsay is not hearsay offered for the purpose of a prior inconsistent statement. We have never alleged there was any inconsistent statement.

THE COURT: You are saying you did not suggest that she did not make this statement?

MR. HILEMAN: No, sir, we did not.

THE COURT: Mr. Harmon?

MR. HARMON: Your Honor, we are offering these statements by Ms. Price made in June 2010 to rebut the allegation now in place with the impeachment of Ms. Price that she received a recent benefit and to rebut the allegation of recent fabrication. . . .

MR. HILEMAN: We made – we did raise the issue of benefit. Ms. Meeks raised that. That has been directly answered by the timing issue which Massucci testified to. We did not raise an implication of recent fabrication of the story. Nobody disputes she said what she said on June 30th, 2010. All we tried to do was to impeach her in the normal fashion as to whether she was influenced. And he rebutted that by showing the influence came after the fact, whatever it might have been.

MR. HARMON: The allegation by that type of impeachment was that recent benefit influenced her in-court testimony, and this evidence is being offered to prove or to disprove or to rebut that allegation of recent fabrication or influence of her testimony.

THE COURT: How does the details of what she said, I mean rehashing the details of what she said through another witness refute that?

MR. HARMON: It refutes it by showing consistency in her statement.

THE COURT: I'm sorry?

MR. HARMON: It refutes it by showing her statements in court were consistent with what she said before the recent impeachable evidence before she received that financial benefit that may have influenced her or motivated her to change her testimony. The whole reason for impeachment is to show that it's unreliable. This shows it is reliable and the benefit she received did not influence her or motivate her to change her testimony.

MR. HILEMAN: We have not disputed the original statement June 30 in its content, Judge. We did question motive, and he rebutted that effectively with regard to the financial influence.

THE COURT: All right. How much further you intend to go with this?

MR. HARMON: Just to go through her – I'm not going to go through it detail by detail.

THE COURT: Well, that's what you are doing.

MR. HILEMAN: Yeah.

MR. HARMON: Well, some of it with the points that she testified to. I'm not having him testify to her specific statement.

THE COURT: You asked every detail so far about what she said.

MR. HARMON: Well, that's the point, to show that her statement was consistent. Like I said, I'm not going to go through the entire 45 minute conversation they had or anything like that.

MR. HILEMAN: It's not alleged it was inconsistent with what she said June 30th, Judge.

THE COURT: All right. I'll overrule the objection. Get to the point. Let's move on. Continue, please.

(27:T1859-61)

The detective was allowed to repeat that Ashley Price told him that Mr. Morris told her that he was the one who shot the police officers. Mr. Morris told her that he shot one of them in the head and he also told her how many officers he shot. Price told the detective that Mr. Morris told her that he shot them because one of them went back to run his name at his patrol car and he was afraid he had a warrant. Price told the detective that Mr. Morris also said he got a firearm from underneath the seat

and that the officers were white. (27:T1862) Mr. Morris said he got out of the car and shot them. (27:T1862)

Prior consistent statements can be admitted as non-hearsay if the following conditions are met: the person who made the prior consistent statement testifies at trial and is subject to cross-examination concerning that statement; and the statement is offered to rebut an express or implied charge of improper influence, motive, or recent fabrication. Taylor v. State, 855 So. 2d 1, 23 (Fla. 2003) (citations omitted); see also § 90.801(2)(b), Fla. Stat. However, a witness's prior consistent statements used for rehabilitation must have been made before the existence of a fact said to indicate bias, interest, corruption, or other motive to falsify the prior consistent statement. Id.

The gist of the defense cross-examination was that it was improbable that Mr. Morris would have called Ashley Price on the day of the shootings and confessed to her because she did not know him very well. "A prior consistent statement is not admissible under section 90.801(2)(b) merely because the opposing lawyer has attacked the credibility of the witness or challenged the truthfulness of the statement given by the witness at trial." J.B.J. v. State, 17 So. 3d 312, 318 (Fla. 1st DCA 2009) (quoting Monday v. State, 792 So. 2d 1278, 1280 (Fla. 1st DCA 2001)).

Although the defense brought out that Ms. Price had criminal charges in the interim and that the police might have given her help in relocating, the defense never asserted that there was any "recent fabrication" or that any special treatment by law

enforcement caused her story to differ from the one told to police on June 30, 2010. In fact, the defense's position was that the original statement to police was a fabrication, either because the police threatened to take Price's children from her, or because she was on probation at the time, or because the police were rounding up people in the Kenneth Johnson Apartments.

A prior consistent statement is not admissible unless defense counsel's cross examination insinuates recent fabrication. See Bradley v. State, 787 So. 2d 732, 743 (Fla. 2001) (holding that a prior consistent statement was not admissible because the defense did not charge the detective with having recently fabricated a story about whether or not the defendant told him that he had cleaned his van before it was seized). In order for the prior consistent statements to be admissible, there has to be an implication that the witness has changed his or her story in response to improper influences such as favorable treatment by police or monetary considerations. See Stewart v. State, 558 So. 2d 416 (Fla. 1990) (holding that the witness' prior consistent statement was admissible to combat an implication of recent fabrication due to an attempt to get favorable treatment by the State on other charges); see also Rodriguez v. State, 57 So. 3d 961 (Fla. 4th DCA 2011) (holding that co-defendant's prior consistent statement was admissible to rebut an implication of recent fabrication because of a favorable plea deal).

In this case, the State introduced Price's prior consistent statement on direct examination when the prosecutor asked her if her testimony was the same story she told the police. See Howard v. State, 152 So. 3d 825, 828-829 (Fla. 2d DCA 2014) (noting that after the co-defendant's substantive testimony on direct examination, the State elicited the prior consistent statement by asking the witness "whether these were facts that he had told police during his prior interview, and [the co-defendant] confirmed that they were"). Because it was clear from Price's direct examination that she told the same story to the police on the day after the murders, Appellant's cross-examination could not have suggested that the assistance from the police or the State improperly influenced her testimony.

When the detective repeated Price's statement to him, the testimony merely served to impermissibly bolster her testimony. It is well established that prior consistent statements are generally not admissible to bolster a witness's testimony at trial. Bradley, 787 So. 2d 732, 743. The danger in admitting a prior consistent statement in evidence is that the statement might acquire added credibility when it is repeated by a more trustworthy witness. Monday v. State, 792 So. 2d 1278, 1280 (Fla. 1st DCA 2001).

> A witness's prior consistent statement may not be used to bolster his trial testimony. Lamb v. State, 357 So. 2d 437 (Fla. 2d DCA 1978); Roti v. State, 334 So. 2d 146 (Fla. 2d DCA 1976). The rationale prohibiting the use of prior consistent statements is to prevent "putting a cloak of credibility" on the witness's testimony. Brown v. State, 344 So. 2d 641 (Fla. 2d DCA 1977). When a police officer, who is

> generally regarded by the jury as disinterested and objective and therefore highly credible is the corroborating witness, the danger of improperly influencing the jury becomes particularly grave.

Barnes v. State, 576 So. 2d 439, 439 (Fla. 4th DCA 1991) (citations omitted). See also Peterson v. State, 874 So. 2d 14, 17 (Fla. 4th DCA 2004); Carter v. State, 951 So. 2d 939, 944 (Fla. 4th DCA 2007); Perez v. State, 371 So. 2d 714, 716-17 (Fla. 2d DCA 1979).

Review of a trial court's ruling on the admissibility of evidence is for abuse of discretion; however, the court's discretion is limited by the rules of evidence and the applicable case law. See Sheppard v. State, 151 So. 3d 1154, 1169 (Fla. 2014); Hinojosa v. State, 857 So. 2d 308, 309 (Fla. 2d DCA 2003); McCray v. State, 919 So. 2d 647, 649 (Fla. 1st DCA 2006). However, whether evidence is admissible in evidence under an exception to the hearsay rule is a question of law subject the *de novo* standard of review. Browne v. State, 132 So. 3d 312, 316 (Fla. 4th DCA 2014) (citing Powell v. State, 99 So. 3d 570, 573 (Fla. 1st DCA 2012)).

The error is not harmless because Price admitted that she had not known Mr. Morris for very long and she did not know him well. Also, in closing argument, the prosecutor highlighted the prior consistent statement by reminding the jury that Detective Durkin "came in and told you what she told him." (31:T2351-52) For that reason, a new trial is required.

## ISSUE V

WHTHER THE COURT ABUSED ITS DISCRETION IN DENYING APPELLANT'S MOTION FOR MISTRIAL WHEN THE PROSECUTOR ASKED ASHLEY PRICE IF SHE HAD TO MOVE BECAUSE OF THREATS TO HER AND HER FAMILY WHEN THE STATE CONCEDED THAT THE THREATS HAD NOTHING TO DO WITH APPELLANT.

The trial court erred in denying Appellant's motion for mistrial when the State mentioned that Ashley Price had to move because she was being threatened due to her cooperation with the prosecution.

During the State's attempt to rehabilitate Ashley Price, after the defense brought out on cross-examination that the police gave her monetary assistance to relocate, the prosecutor asked Price, "Is that because of threats made to you and your family?" (27:T1827) Before Price could respond, Appellant objected, and the court pointed out that the fact that a witness is threatened is not relevant unless it was the defendant doing it. (27:T1828) The prosecutor argued that Price's relocation was necessary, and that the State should be able to explain why she was given assistance by the Tampa Police Department. (27:T1828-29)

Appellant moved for a mistrial, arguing that the implication was that Price was threatened by Mr. Morris or someone having to do with him. (27:T1829-30) The prosecutor admitted that Price had been threatened by members of the community after she testified in the prior case and there was no evidence that Mr. Morris was involved. (27:T1830-31)

The court sustained the objection, and the defense renewed its motion for mistrial, arguing that the State introduced evidence that Mr. Morris called Ashley Price from the jail, which implied that he was either trying to intimidate, threaten, or influence her. (27:T1831-35) Counsel argued that testimony about the phone call combined with the threats "created irreparable prejudice" that could not be remedied by a curative instruction. (27:T1833-36, 1844-45) Appellant argued that the jury would not know that the threats came from the neighborhood after she testified in the Rodney Jones case. (27:T1838-39)

The judge ruled that it was appropriate to rehabilitate the witness by letting her explain why she had financial assistance, but it had to be clear that it had nothing to do with any implied or suggested threats by Mr. Morris. (27:T1840-41) The court denied the motion for mistrial. (27:T1845)

The court gave the following curative instruction, the wording of which was stipulated:

> With respect to just before you recessed, let me just say to the jury that any reference to any suggested threat to Ms. Price, the witness who was testifying, the attorneys for the State and Defense agree that this has nothing whatsoever to do with Mr. Morris.

(T1848)

The prosecutor's suggestion was improper and unnecessary because there was no need to explain why the police helped Price with money to move. The State elicited Price's testimony that she told the same story to the police the day after the murders, and the defense did not dispute that. Therefore, any help the police

gave her in relocating did not influence her testimony. Because the threats could not be attributed to Mr. Morris, they were inadmissible.

"[E]vidence of threats made against witnesses is inadmissible to prove guilt unless the threats are shown to be attributable to the defendant." Koon v. State, 513 So. 2d 1253, 1256 (Fla. 1987).

> An attempt by a defendant or third person to induce a witness not to testify or to testify falsely is admissible on the issue of defendant's guilt, provided it is shown that the attempt was made with the actual participation, knowledge, or authorization of the defendant. Duke v. State, 106 Fla. 205, 142 So. 886 (1932). Absent a link to the defendant, the issue of whether a witness is subject to improper influence is irrelevant and collateral to the issue of whether the defendant committed the crime for which he is charged and its admission over objection is grounds for the granting of mistrial and the denial thereof would be reversible error. Johnson v. State, 355 So. 2d 200 (Fla. 3d DCA 1978). Furthermore, the admission of such evidence could only serve to create undue prejudice in the minds of the jury against the accused. Coleman v. State, 335 So. 2d 364 (Fla. 4th DCA 1976).

Jones v. State, 385 So. 2d 1042, 1043 (Fla. 1st DCA 1980) *disapproved on other grounds*, Justus v. State, 438 So. 2d 358 (Fla. 1983).

In Koon, the court held that evidence of threats by third parties was admissible on cross-examination of a defense witness to show why he was testifying for the defense. In this case, Price was a State witness, and the improper suggestion happened during re-direct examination. Furthermore, the State did not seek to introduce the evidence to explain why Price testified as she

did – she testified just as the State hoped she would. Evidence that Price was threatened was not being elicited to explain a "lapse" in recollection. Cf. Melehan v. State, 126 So. 3d 1118 (Fla. 4th DCA 2012) (noting that evidence of threats by third parties was being used to explain why the witness claimed he did not remember the facts he espoused in deposition). Nor was the State attempting to explain the witness' reluctance to testify or to explain a prior inconsistent statement. Cf. Madison v. State, 726 So. 2d 835, 836-37 (Fla. 4th DCA 1999) (holding that evidence of third-party threats was admissible to explain why the witness was silent upon initial questioning); Lopez v. State, 716 So. 2d 301 (Fla. 3d DCA 1998) (holding that evidence of third-party threats was admissible to explain the witness' in-court recantation). Nevertheless, what the insinuation did do was to garner sympathy for Price and bolster her testimony by showing that she persevered in spite of the threats.

Even when a third-party threat is admissible, the threat is only admissible if the prejudice of admitting it is outweighed by the probative value. Madison, 726 So. 2d at 837 (citing State v. Price, 491 So. 2d 536, 537 (Fla. 1986) (holding that evidence the witness was threatened was so prejudicial as to be inadmissible)); Koon, 513 So. 2d at 1256 (stating that evidence of threats may be so prejudicial as to require exclusion). Assuming arguendo that the threats were admissible (which they were not), the prejudice to Appellant outweighed the probative value of rehabilitating a witness in an area in which she needed

no rehabilitation because there was no evidence that recent assistance from the police altered her story or affected her testimony in the least.

In addition, in light of the evidence of the prior phone call where Mr. Morris asked Price to come to the jail, the curative instruction would not have been adequate. This is because the judge did not instruct the jury that evidence of any threats could not be used as evidence of guilt. See Lopez, 716 So. 2d at 307 n.7 (stating that a court should give a limiting instruction "telling the jury to consider the evidence only for the purpose of assessing the witness's credibility and not as evidence of guilt" (citations omitted)).

A mistrial is required, even if a curative instruction is given, when improper evidence is of the type that would be difficult for the jurors to disregard. See Walsh v. State, 418 So. 2d 1000 (Fla. 1982) (holding that a mistrial was appropriate when the defendant testified he took a lie detector test and passed it). The giving of a curative instruction will often obviate the necessity of a mistrial; however, there are some instances in which the prejudice is so great that it is impossible "to unring the bell." Graham v. State, 479 So. 2d 824, 825-826 (Fla. 2d DCA 1985). A trial court's ruling on a motion for mistrial is reviewed under an abuse of discretion standard. See Salazar v. State, 991 So. 2d 364, 371 (Fla. 2008).

In this case, a new trial is required because, during closing argument, the prosecutor emphasized the State's assertion

that Mr. Morris attempted to pressure or manipulate Ashley Price to influence her testimony:

> Now, if you want any other evidence of the credibility of Ms. Price, you need look no further than the defendant's attempts from the Hillsborough county jail in March of 2011 to try to contact her, the determined efforts he makes, these desperate efforts to contact a witness who's going to testify to his confession to her.
>
> You heard that jail phonecall, it came before her testimony. And it may not have been as significant at the time when you heard it. Think about it now. And I'm going to play a couple of portions of it for you. I want you to hear the determination and the efforts in the defendant's voice to try to get to Ashley Price and get her to come see him. . . .
>
> Now, I want you to think to yourself, why is this defendant so concerned in March of 2011 with talking with Ashley Price? Why is he so concerned that she's not, quote "righteous[?]" Why is she [sic] trying to attempt to contact her and manipulate her?

(31:T2354-56)

After that, the prosecutor talked at length about the content of the phone call and the people Mr. Morris contacted to get to Price. (31:T2356-58) The prosecutor also played portions of the call to the jury. (31:T2357, 2358-59, 2360) He argued that Mr. Morris wanted to manipulate Price, saying:

> He tells her "you need to come see me." He wants her to come to the jail to see him so that he can do the same thing that he did on the night of this murder when he contacted Cortnee Brantley by text message. . . . This manipulation started right from the very beginning, and that was minutes, minutes after the murder this defendant was doing that.

(31:T2360)

> This kind of evidence, folks, that kind of evidence, manipulation, trying to manipulate a witness that

> gives such powerful testimony, that kind of evidence simply drips of guilt.

(31:T2361)

Although the prosecutor was careful not to use the word "threaten," the clear implication is that Mr. Morris was guilty because of his improper attempts to pressure Price. Therefore, any threats to Ms. Price would necessarily have been attributed to Mr. Morris. Given that the jurors were not instructed to disregard the insinuation as evidence of guilt, in light of the closing argument, it cannot be said that the error did not affect the verdict, and reversal is required.

## ISSUE VII

WHETHER THE CUMULATIVE ERROR IN THE GUILT PHASE DENIED APPELLANT HIS RIGHT TO A FAIR TRIAL UNDER THE FIFTH, SIXTH, AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION AND UNDER ARTICLE I, §§ 9, and 16 OF THE FLORIDA CONSTITUTION.

In addition to the denial of Appellant's constitutional right to an impartial jury (Issue I) and his constitutional right to confrontation and compulsory process (Issue II), Appellant was denied his due process right[19] to a fair trial by the cumulative effect of the errors made by the trial court.

> Where multiple errors are discovered in the jury trial, a review of the cumulative effect of those errors is appropriate because "even though there was competent substantial evidence to support a verdict . . . and even though each of the alleged errors, standing alone, could be considered harmless, the cumulative effect of such errors [may be] such as to deny to defendant the fair and impartial trial that is the inalienable right of all litigants in this state and this nation."

McDuffie v. State, 970 So. 2d 312, 328 (Fla. 2007) (citing Brooks v. State, 918 So. 2d 181, 202 (Fla. 2005), and Penalver v. State,

[19] The Fifth Amendment to the United States Constitution provides:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

926 So. 2d 1118, 1137 (Fla. 2006), and concluding "that the errors that occurred in this case, when viewed cumulatively, cannot be considered harmless beyond a reasonable doubt").

Where multiple errors are found, even if deemed harmless individually, the cumulative effect of such errors may deny to defendant the fair and impartial trial that is the inalienable right of all litigants. Hurst v. State, 18 So. 3d 975, 1015 (Fla. 2009).

In DiGuilio, 491 So.2d at 1139, the Court set out the test to be applied in determining whether an error is harmful:

> The test is not a sufficiency-of-the-evidence, a correct result, a not clearly wrong, a substantial evidence, a more probable than not, a clear and convincing, or even an overwhelming evidence test. Harmless error is not a device for the appellate court to substitute itself for the trier-of-fact by simply weighing the evidence. The focus is on the effect of the error on the trier-of-fact. The question is whether there is a reasonable possibility that the error affected the verdict. The burden to show the error was harmless must remain on the state. If the appellate court cannot say beyond a reasonable doubt that the error did not affect the verdict, then the error is by definition harmful.

See also Williams v. State, 863 So. 2d 1189, 1189-90 (Fla. 2003) (reaffirming the harmless error test in DiGuilio).

Appellant's jury was made aware that he had been convicted of a previous first-degree murder during voir dire. At trial, the court made numerous errors that bolstered the testimony of Ashley Price, a witness who claimed that Appellant confessed these murders to her in detail. In addition, the prosecutor insinuated that Appellant threatened Ashley Price when there was no evidence

to support the insinuation.

The court erred in admitting a statement made by Appellant, which did not specifically refer to these offenses, as a de facto confession. Although the statement was made by Appellant while he was in psychiatric observation and suffering a psychotic break, the court would not allow Appellant to place the statement in context by showing he was delusional and psychotic at the time. The court also erred in allowing officers to identify the voice and image of the shooter on the dashcam video as that of Mr. Morris although their lay opinion invaded the province of the jury.

Because it cannot be said that the cumulative effect of the numerous errors cited herein did not affect the verdict, reversal for a new trial is required.

## CONCLUSION

In light of the foregoing arguments and authorities, Appellant respectfully requests that this Court vacate his convictions and remand the case to the trial court for a new trial.

CERTIFICATE OF SERVICE

I certify that a copy has been e-mailed to the Attorney General's Office at capappTPA@myfloridalegal.com, through the Court's portal, on this 5th day of June, 2015.

CERTIFICATION OF FONT SIZE

I hereby certify that this document was generated by computer using Microsoft Word with Courier New 12-point font in compliance with Fla. R. App. P. 9.210 (a)(2).

Respectfully submitted,

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