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IN THE SUPREME COURT OF FLORIDA
CASE NO: SC15-391

(Lower Court Case No:09-004654 CF10A)

JAMES HERARD,

Appellant,

vs.

STATE OF FLORIDA,

Appellee.
_____/

AMENDED INITIAL BRIEF OF APPELLANT JAMES HERARD

ON APPEAL FROM THE CIRCUIT COURT OF THE 17th JUDICIAL CIRCUIT IN AND FOR BROWARD COUNTY, FLORIDA
CASE NO. 09-004654 CF10A
HONORABLE PAUL BACKMAN, CIRCUIT JUDGE

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PRELIMINARY STATEMENT

The following symbols, abbreviations and references will be utilized throughout this Amended Initial Brief of Appellant:

The term "Appellant" shall refer to the Defendant in the Circuit Court below, James Herard.

The term "Appellee" shall refer to the prosecution in the Circuit Court, the State of Florida, and the Office of the Attorney General, on appeal.

The Record in this appeal consists of eight (8) volumes of pleadings contained in pages 1-1417. A Corrected Supplemental Record has also been prepared containing pages 1776-3023. References to the original Record and Corrected Supplemental Record shall be indicated by an "R" followed by the appropriate PDF page number (R).

References to the transcripts of the trial court proceedings, including the pre-trial hearings, trial, penalty phase, *Spencer* hearing and sentencing consist of volumes 9-57, contained in pages 1 – 3382. References to the transcripts shall be indicated by a "T" followed by the appropriate PDF page number. (T).

References to the Exhibits introduced at trial are contained in Volume 58 contained in pages 1570 – 1775 and shall be designated by "EX#" followed by the page number (EX#___)

The corrected supplemental trial transcripts are contained in pages 1-259 and shall be referenced by "TT" followed by the appropriate page number (TT ____).

All emphasis indicated have been supplied by Appellant unless otherwise specified herein.

STATEMENT OF THE CASE

The Charges

On March 4, 2009, a 21 Count, five (5) co-defendant Indictment was returned by the Grand Jury in Broward County charging James Herard a/k/a J-LOC and co-defendants, Jonathan Jackson[1] a/k/a BLUE, Tharod Bell[2] a/k/a SMOKE, Charles Faustin[3] a/k/a PSYCHO, and Calvin

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[1] Pursuant to guilty pleas, Jackson was sentenced to 25 years in prison and Weatherspoon was sentenced to 15 years in prison.

[2] Tharod Bell entered a guilty plea and was sentenced to 50 years in prison.

[3] Charles Faustin pled guilty to two Counts of second-degree murder and admitted he was the driver during the Jean-Pierre shooting, and participated in the Tamarac robbery. He also admitted to racketeering, conspiracy to racketeer, attempted murder, armed robbery and other charges. Faustin was sentenced to 40 years in prison as part of his plea agreement in Broward. Mr. Faustin is already serving a Life sentence for his

Weatherspoon a/k/a SLICC in 21 Counts. James Herard was charged with premeditated murder, armed robbery, RICO, conspiracy to commit RICO, Directing the Activities of a Gang, and related offenses. (R 16). The case came to be known as the "Dunkin Donuts Robberies" case. James Herard was charged as follows: Count I – First Degree Murder of Eric Jean-Pierre (firearm); Count II – First Degree Murder of Kiem Huynh (firearm); Count III – Racketeering (RICO) [13 predicate acts]; Count IV – Conspiracy to commit RICO; Count V – Directing the Activities of a Gang; Count VI – Armed Robbery of Miguel Guerrero (firearm); Count VII – Armed Robbery of Gary Metayer (firearm); Count VIII – Attempted First Degree Murder of Jacob Rivera; Count IX – Aggravated Battery of Keith Williams; Count X – Attempted First Degree Murder of Tremaine Williams; Count XI – Attempted First Degree Murder of Chazdin Edwards; Count XII – Attempted First Degree Murder of Jamie Mozie; Count XIII – Attempted First Degree Murder of Demetrick Caldwell; Count XIV – Armed Robbery of MD Miah (firearm); Count XV – Armed Robbery of Artie Edmonds (firearm); Count XVI – Armed Robbery of Corey Marchand (firearm); Count XVII – Armed Robbery of Deny Jean-Louis (firearm); Count XVIII – Attempted Robbery of

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participation in the Delray Beach Dunkin Donuts robbery prosecuted by the Palm Beach County State Attorney's Office.

Wilson Perez (firearm)[4]; Count XIX – Attempted Robbery of Idelfonzo Sanchez (firearm)[5]; Count James Herard – Robbery Chao Le Kim (firearm); and Count XXI – Robbery of Richard Sills and/or Taiwan Gayne (firearm).

The Indictment alleged that James Herard and his co-defendants unlawfully participated in an enterprise, a gang called the "Bacc Street Crips," through a pattern of racketeering activity by "...engaging in at least two incidents of racketeering conduct that had the same intents, results, accomplices, victims, or methods of commission, or were interrelated by distinguishing characteristics, and were not isolated incidents" including the following: **Incident # 1** - Racketeering – armed robbery; **Incident # 2** - Racketeering – attempted murder - first degree on October 13, 2008 of Jacob Rivera; **Incident # 3** - Racketeering – aggravated battery on October 13, 2008 against Keith Williams; **Incident # 4** - Racketeering – attempted murder – first degree on October 19, 2008 to effect the deaths of Tremaine Williams, Chazdin Edwards, and James Mozie; **Incident # 5** - Racketeering– murder – first degree on November 14, 2008 in effecting the death of Eric Jean-Pierre; **Incident # 6** - Racketeering - murder – first

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[4] In the midst of trial, the State *nolle prossed* Count XVIII (attempted robbery with a firearm). (R 926).

[5] In the midst of trial, the State *nolle prossed* Count XIX (attempted robbery with a firearm). (R 926).

degree on November 15, 2008 in effecting the death of Demetrick Caldwell; **Incident # 7** – Racketeering – armed robbery on November 24, 2008 from MD Miah, Artie Edmonds and/or Corey Marchand; **Incident # 8** - Racketeering – armed robbery on November 26, 2008 involving Henry Bornstein and/or Jerald Lakin; **Incident # 9** – Racketeering – attempted felony murder – first degree on November 26, 2008 to effectuate the death of Henry Bornstein; **Incident # 10** - Racketeering – armed robbery on November 26, 2008 by depriving or intending to temporarily or permanently deprive Denny Jean-Louis, Wilson Perez and/or Idelfonzo Sanchez; **Incident # 11** - Racketeering – armed robbery on November 27, 2008 of Chao Le Kim; **Incident # 12** – Racketeering – murder – first degree on November 27, 2008 involving the murder of Kiem Huynh; and **Incident # 13** - Racketeering – robbery on December 3, 2008 involving the unlawful taking from Richard Sills and/or Taiwan Gayee.

Pursuant to the True Bill, James Herard was arrested in Broward County and ordered held without bond. (R 1-16). A Notice of Invocation of Rights was filed. On April 1, 2009, a not guilty plea was entered on James Herard's behalf. (R 16). The same date, the State filed its Notice of Intent to Seek Death Penalty pursuant to Florida Rule of Criminal Procedure

3.202. (R 21). The Notice did not contain any of the aggravating factors upon which the State would later rely. *Id.*

Lead counsel and co-counsel were appointed by the Court to represent James Herard. (R 22-23; 24-25). Discovery ensued with the State filing its Discovery Submission, Supplemental Discovery and Amended Discovery. (R 26-38; 52-53; 54; 63; 64; 65; 67-68; 69-70; 74-75; 76; 78; 79; 80; 81; 82; 83; 84-85; 86; 89; 90; 91; 92; 93; 98; 99-100; 101-103; 104; 105; 106-107; 114; 118; 149; 150; 159; 170; 171; 172; 178; 188; 189; 191; 193; 218; 230; 260; 274-275; 351; 361; 386-387; 389). Scores of discovery depositions were taken and the case was prepared for trial.

James Herard filed several *pro se* Motions for *Nelson*[6] and *Faretta*[7] hearings, seeking to discharge Court-Appointed Counsel and proceed *pro se*. (R 115-117; 119-124; 134-136; 137-138; 139-140; 156-158;161-163; 182-183; 184-185; 195-196; 205-207; 226-227; 228-229; 256-257; 262-263; 266-267; 364-365; 368-369).

At one point, on February 2, 2012, the Court entered an Order permitting the Defendant to represent himself *pro se*. (R 208). However, the Court later revoked the Order and maintained that First and Second

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[6] *Nelson v. State*, 274 So.2d 256 (Fla. 4th DCA 1973).
[7] *Faretta v. California*, 422 U.S. 806, 95 S.Ct. 2525 (1975).

Chair Counsel would continue to represent James Herard throughout the proceedings. (R 250). The Motions were denied and James Herard proceeded to trial represented by both a First and Second Chair counsel.

The Defendant also filed numerous *pro se* speedy trial demands, each of which were denied and/or stricken by the Court. See, e.g., (R 141-145; 147; 148; 204; 244-245; 246-247; 353-354).

Motions to Suppress Evidence

A Motion to Suppress Physical Evidence was filed on James Herard's behalf. (R 372-374). Thereafter, a Motion to Suppress James Herard's admissions and statements was filed with the Court. (R 376-378; 379-381). No response by the State was filed as to either Motion. A hearing commenced on the Motion to Suppress Statements on November 19, 2013, (R 382; 384; T 1418-1487; 1488-1503).

At the outset of the suppression hearing, the State agreed to suppression of the physical evidence obtained by law enforcement as a result of the field interview of James Herard. That evidence included the Field Interrogation Card and other information obtained from James Herard. Not all evidence sought to be suppressed was addressed by the State's concession.

The defense contended that suppression of James Herard's statements was warranted under to Rule 3.190(i), Fla.R.Crim.P., the 5th, 6th and 14th Amendments to the United States Constitution, applicable provisions of the Florida Constitution, and *Miranda v. Arizona*, 384 U.S. 436 (1966) and it's progeny. Herard asserted, *inter alia*, that the statements obtained from him were not freely, knowingly and voluntarily given in light of the Defendant's rights guaranteed by the Due Process Clause of the 14th Amendment to the United States Constitution and by Article I, Section 9 of the Florida Constitution, and they were only made based on coercion and unlawful behavior by law enforcement following James Herard's unequivocable invocation of his 5th Amendment rights.

James Herard asserted that he verbally told the first officers that he invoked his right to counsel – he said he wanted a lawyer. His contended subsequent statements were not freely, knowingly, or voluntarily made.

James Herard alleged that promises were made to him during the questioning, citing several examples. (R 920-921). He alleged he was deprived of basic needs – denied access to the restroom and sleep. He claimed the deprivation was intentional. In total, James Herard was in

interrogations rooms for approximately 25 hours of questioning by law enforcement and was on videotape for approximately 17 hours.

While locked in an interrogation room, James Herard knocked on the door to request that he be allowed to go to the bathroom. No one came to the door. Herard was forced to urinate in a McDonald's cup while in the interrogation room. (T 1437).

Two DVDs of James Herard's interview (audio and video) were introduced at the pretrial suppression hearing. (State's Exhibits # 1 and 2). A *Miranda* Rights Waiver Form was also introduced. (State's Exhibit #3). (T 1435). The DVDs were published, but not transcribed by the Court Reporter. (T 1434).

On February 10, 2014, the Court entered its Order denying the Defendant's Motion to Suppress Statements (R 815-823), holding that:

> "In sum, this Court finds that Defendant knowingly, intelligently and voluntarily waived his right to counsel during all three aforementioned interviews. He was not coerced nor deprived of any of his basis needs during questioning. Furthermore, this Court finds under *Sapp, Id.*, that Defendant's anticipatory invocation of his *Miranda* Rights Form signed on the morning of December 4, 2008, is inapplicable to his 6:00 pm interview for the aforementioned reasons." (R 823)

Immediately before swearing the jury, Judge Backman heard argument concerning James Herard's Second Motion to Suppress

Admissions and Statements. The Motion was premised on violations of *Miranda* and that the "statements made by the Defendant are not supported by an independent *prima facie* proof of the corpus delecti of the crime." (R 919-921; T 1654-1655). The Prosecutor argued that the DVD "stands for itself." (T 1655). The Court stated to the defense "thanks for bringing that up. The answer to that [the defense's Second Motion to Suppress] is a definitive no." (T 1656). The Court denied the Supplemental Motion to Suppress "based upon the same grounds the Court had an opportunity to hear during the playing and replaying of Mr. Herard's statement." (T 1657).

Death Penalty Motions

A multitude of death penalty motions were filed on James Herard's behalf. The majority attacked Florida's death penalty scheme as being unconstitutional on it's face and as applied, specific contesting Section 921.141, Fla.Stat. The defense filed a Motion for Statement of Particulars as to Aggravating Circumstances of Theory of Prosecution and to Dismiss Indictment for Lack of Notice as to Aggravating Circumstances (R 276-282); Motion for Notice of Aggravating Factors (R 283-297); Motion for Compel Disclosure of Mitigating Circumstances (R 298-300); Motion for

Disclosure of Impeaching Information (R 301-302); Motion for Disclosure of Penalty Phase Evidence (R 303-305; 306-308); Motion for Statement of Particulars and Request for Notice of Aggravating Circumstances (R 309-334); Motion for Transcripts of Grand Jury Proceedings with Memorandum of Law (R 335-344); Motion for Production of Favorable Evidence (R 345-347); and Renewed Motion for Statement of Particulars as to Aggravating Circumstances and Theory of Prosecution (R 348-350).

Thereafter, fifty-four (54) additional separate death penalty motions and related pleadings were filed on behalf of the Defendant. (R 390-804; T 2475-2512). No written Orders are contained in the Record concerning the Motions, but oral rulings were made throughout the hearing. Each of the Motions were denied. (CR 2475-2481).

The Trial - I

Jury selection initially commenced on February 11, 2014, with the Defendant wearing a "stun belt" pursuant to the Court's *sua sponte* Order. (R 809). One-page jury questionnaires, containing eighteen (18) basic questions were suppled to each juror. (R 837-891). Thereafter, voir dire commenced.

Motion to Dismiss on Due Process Grounds

After several days of jury selection, James Herard's Second Chair Counsel learned that the Florida Governor signed a Death Warrant in *State v. Robert L. Henry*, and one of James Herard's attorneys was involved in the *Henry* case.

Counsel made arrangements for the *Henry* case to be handled by another Death Registry Counsel, since both James Herard and his defense counsel desired to go forward with James Herard's trial since they believed they had selected favorable jurors. The State requested the Court strike the panel and recess James Herard's case. Over defense objection, the Court granted the State's request. A defense Motion to Dismiss was filed based upon the State's conduct and Due Process violations. (R 915-917). The Motion was denied by the Court.

The Trial - II

Jury selection commenced again on March 26, 2014. (T 1-1651). A 12-member jury and 6 alternates were selected and sworn. (R 1043-1044).

Prior to and throughout trial, Judge Backman entered *sua sponte* Orders for the Defendant to wear a Stun Belt. (R 809). The Court ordered Broward Sheriff's Office to "... medically clear James Herard, to be fitted for a stun

belt, fully charged." (R 809). The Court further ordered that "[T]he stun belt shall remain on Mr. Herard during the pendency of his trial." The Court entered identical Orders thereafter on April 24, 2014 (R 929); June 2, 2014 (R 1071); September 10, 2014 (R 1112); (R 1142) and October 21, 2014 (R 1198; 1217) and the Defendant was forced to wear a stun belt throughout the proceedings.

Following voir dire, opening statements commenced on April 29, 2014. Thereafter, the State of Florida elicited testimony from 39 witnesses in it's case in chief in a case which spanned 16 days. (R 1040). The prosecution introduced 43 exhibits. At the conclusion of the State's case, the defense moved for Judgment of Acquittal.

The defense also proffered the testimony of it's expert witness, Dr. DeClue. The motion was denied. (R 1041). The Court denied a 24-hour continuance for the defense interrogation expert, Dr. DeClue, to watch 17 hours of James Herard's interrogation and testify further. (T 2703-2704).

The Defendant exercised his 5th Amendment rights under the United States Constitution and elected not to testify at trial. A colloquy was conducted. (T 2705-2706).

The defense called two witnesses before resting, renewing all objections, and lodging an *ore tenus* Motion for Judgment of Acquittal as to all Counts. (T 2703; 2710). At the close of all of the evidence, the defense renewed it's Motion for Judgement of Acquittal based "upon a different standard." (T 2706-2707). The State offered no response, relying on it's previous arguments. (T 2707). The Court stated "I think every question that has been raised is a question of fact, all of which belongs to the trier of fact in this case, the jury." (T 2707). The Court denied the defense Motion for Judgment of Acquittal. (*Id.*)

Neither the State nor defense sought any lesser included offenses on Counts I or II. (T 2708-2709). The jury was instructed by the Court and retired to deliberate. (T 2845) During the course of the deliberations several questions were lodged by the jury. (R 944-949; 951-961).

On May 16, 2014, the jury returned verdicts of guilt on all Counts, save Count XVII where a not guilty verdict was returned. (T 1043; 1058; 3058; R 962-981). A Disposition Order was entered by the Court. (R 1026).

The Penalty Phase (8-4)

The Penalty phase was conducted on June 3rd and 4th, 2014. (R 1082). Following opening statements, the State called Detective Brian Hardy as it's sole witness, and then rested its case.

The defense presented testimony from Dr. Raiford and Dr. Gelmaud, and civilian witnesses, Harry Geruenus, Kenyer Tilla, Edna Cereford, Addeline Redelus, and Wilda Frederick. The State called Detective Visners in rebuttal. Following closing arguments, the jury was charged and deliberated for approximately an hour and a half before rendering its **advisory sentence wherein the jury, by a vote of 8 – 4, "advises and recommends to the Court that it impose the Death Penalty upon the Defendant, James Herard**, for the first-degree murder of Eric Jean-Pierre." (R 1082; 1085).

A post-trial Motion for New Trial based on general grounds was filed on behalf of the Defendant. (R 1055-1056). The Motion was denied.

On June 6, 2014, the Court entered an Order appointing an expert to determine the Defendant's competency[8]. (R 1087-1088).

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[8] Notably, James Herard's competency was never ordered to be assessed at or around the time of his arrest and interrogation despite the fact that James Herard appeared at his Initial Appearance on December 4, 2008, and instead of answering the Judge's

A Sentencing Memorandum was presented on behalf of James Herard. (R 1175-1187). The State filed a Reply thereto. (R 1189-1194).

Spencer Hearing

A *Spencer* hearing was conducted on September 12th, 20th, and 22nd, 2014 (R 1126); T 3217-3330, 1519-1569). Four witnesses were called by the defense: Omar Hunter, Charlene Marcelin, Guerson Mesadieu, and James Herard.

James Herard had ten additional witnesses he initially wanted to call to testify on his behalf at the *Spencer* hearing, but after taking a break, was convinced by defense counsel not to call them. (CR 1827-1828). Following James Herard's testimony, the defense rested. The State called no additional witnesses. (CR 1830).

James Herard's Testimony at _Spencer_ Hearing

James Herard elected to testify on his own behalf at the *Spencer* Hearing. (R 1799). James Herard testified "I believe I am innocent. I am not guilty." (CR 1810).

James Herard testified that he started attending The Baptist Church with his cousin, Patrick. At first, he just attended morning services.

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questions, barked his answers like a dog. See "James Herard Barking" on YouTube.com (https://www.youtube.com/watch?v=_2TEWRx4w_4)

Eventually, he was attending church in the morning and the afternoon. Later, he got into the Youth Program run by Ms. Marcelin[9]. (R 1801). James Herard testified "we did most of the things like study the Bible to just hanging out. And like more of an atmosphere, like a character atmosphere. And I played football and we did car washes and those kinds of things too." (R 1801).

James Herard discussed growing up with Mr. Mesadieu[10]. (R 1802). He went to the same church at Bethany. James Herard testified that Mesadieu was like a brother to him. (R 1803). He also discussed growing up and his relationship with Mr. Hunter. (R 1805).

When asked about his mother, James Herard testified that his "mom was everything." (CR 1806). Herard detailed the types of assistance he provided his mother. (R 1806-1808). Further, he testified concerning an incident in the Broward County Jail when he stopped a fellow inmate, who

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[9] Charlene Marcelin testified that she knew Mr. Herard in her role as a Youth Leader at Bethany Baptist Church, where James Herard volunteered in the program. (CR 1791). She testified that James Herard has "a big heart." (CR 1792). She stated that at times he was "knucklehead," and "oftentimes did not listen when we tried to correct his behaviors." (CR 1792). She testified that his reaction was a result of his home situation and him not having a father. He had no structure at home, and did not have the support system that he needed. She testified that James Herard was very immature. (CR 1794).

[10] Guerson Mesadieu testified that he and James Herard knew each other from middle school through high school. They grew up together. (CR 1795).

was cutting his arm with a razor, from committing suicide (CR 1881). James Herard gave several examples of individuals who he helped in jail. (R 1816).

James Herard repeatedly claimed his innocence. (CR 1818-1819), stating:

> You know what I mean, this whole confession was baloney. You know if you eliminate the whole statement from my trial, there is nothing to support the State's theory that I committed these crimes.
>
> (CR 1820).

James Herard further stated:

> "I know the Supreme Court is going to overturn this. The Supreme Court is going to look at this case." (*Id.*)

He called his first-degree murder conviction "absurd." (CR 1821). The State did not question the Defendant. (CR 1823). James Herard addressed the Judge, maintaining his innocence. He stated "**I know the Supreme Court won't allow me to die for something I didn't commit**." (CR 1821) [Emphasis added]

The Death Sentence Imposed

Sentencing was conducted on January 23, 2015. Judge Backman entered a 20-page Sentencing Order and ruled that James Herard was more responsible for the November, 2008, murder of Eric Jean-Pierre in

Lauderhill than the person who actually pulled the trigger, and therefore deserved the harshest possible sentence. (R 1274-1294)

In the Court's Sentencing Order, Judge Backman found the following statutory aggravating factors: 1) Previous conviction of a predicate felony; 2) The capital felony was committed in a cold, calculated and premeditated manner (CCP); and that 3) The capital felony was committed by a criminal gang member.

The Court found the following statutory mitigating factors: 1) Defendant was under the influence of extremely mental or emotional disturbance; 2) Age of Defendant; 3) Crime was committed by another person; 4) The Defendant acted under extreme duress; and 5) The Defendant could not appreciate the criminality of his conduct or conform his conduct to the requirements of law.

Despite the **jury's 8-4 recommendation**, James Herard was sentenced to death for Jean-Pierre's death. (Count I) (R 1292). On Count II, James Herard was sentenced to life in Florida State Prison, with no eligibility for parole. As to the remaining sixteen (16) Counts for which he was found guilty, James Herard was sentenced to life in Florida State Prison. The Court imposed minimum mandatory 10/20/Life sentences as to Counts II,

VIII, X, XIII, XIV, and the Court advised that James Herard could be and was sentenced to life imprisonment under the 10/20/Life statute. (R 1292).

A Notice of Appeal was timely filed. (R 1306). This appeal ensues.

STATEMENT OF THE FACTS

Motion to Suppress

Nineteen-year-old James Herard was originally arrested in Lauderhill, FL on December 2, 2008 for the robbery of a dog. He was immediately taken into custody. After his arrest, James Herard was alleged to have made incriminatory statements

A Motion to Suppress Statements filed on James Herard's behalf incorporated all of the statements alleged to have been made by James Herard, statements made to members of the law enforcement, specifically from the Sunrise, Plantation, Delray, BSO, and Lauderhill police departments. (T 1422).

The State alleged that James Herard made several statements to various law enforcement officers from December 2, 2008 to December 4, 2008. The Court conducted a hearing on the Motion on November 19th and 20th, 2013, at which time the State elicited testimony from three witnesses: Dets. Trevor Goodwin, Bryan Hardy and Shawn Visners.

The Prosecutor submitted a DVD of James Herard's interrogation at the BSO Public Safety Bldg. into evidence. (T 1423). The State played an audiotape of the interrogation of Herard. The tape was played, but not made part of the record. (T 1489-90).

With regards to the initial interrogation of James Herard at the Lauderhill Police Dept. on the night of December 2, 2008, concerning the dog robbery, the Court had an opportunity to review State's Exhibit 3, the Defendant's Rights Waiver Form, and State's Exhibit 4, a DVD of the Defendant waiving his rights and being interrogated.

A portion of the detective's interrogation of James Herard at Lauderhill Police Department was likewise recorded. (T 1822). Via the detective, the State introduced a DVD of the statement (Exhibit 4). (T 1826). The DVD was played, but was not made a part of the appellate transcripts as it was "mostly inaudible to court reporter." (T 1827). The prosecution intermittently asked the detective questions concerning what was depicted. (T 1827-1828). The Court viewed the video in which Lauderhill Det. Ericka Williams read the Defendant his *Miranda* warnings prior to questioning him. At the point where the detective asked the Defendant if he understood his rights and was willing to speak to her

without an attorney, James Herard stated "I don't agree to that." (T 1421) [Emphasis added]. James Herard made it clear to the detectives that he wanted to speak to a lawyer. (T 1421).

Det. Williams told him that was fine and was gathering her paperwork to exit the interrogation room when she alleged the Defendant asked "How long do I have to wait for an attorney?" The detective had a brief conversation with James Herard and told him that he would be booked and processed. According to the detective, James Herard stated "Do I have to wait for an attorney? I want to talk." Judge Backman set forth in his Order denying the Motion to Suppress Statements that James Herard then said something to the effect of "I'm too smart for that. I'm good, never mind. I want to sign the paper." Det. Williams asked "Do you want to talk to us?" and the Defendant allegedly replied "Yes." At that point, James Herard gave a statement regarding the theft of the dog. (R 816).

BSO Sgt. Ruben and other detectives went to the Lauderhill Police Dept. There, law enforcement interrogated James Herard on tape for approximately 12 hours.

A *Miranda* Rights Waiver Form was signed by James Herard on December 3, 2008 at 3:26 a.m. (T 1440). Det. Goodwin testified that when

he interviewed James Herard, the detective did not know how long Herard had been held in the interrogation room prior to his arrival. (T 1441).

Later in the day on December 4th, Det. Visners visited James Herard in the Broward County Main Jail and took another statement from Herard despite the fact that Herard's constitutional rights had been invoked at James Herard's Initial Appearance.

Officer Goodwin testified that he went to Lauderhill Police Dept. when he learned that Detective Hardy had James Herard, Mr. Jackson and Calvin Weatherspoon in custody in reference to the robbery of a dog. (R 1426). When Goodwin arrived at the police station, he saw a vehicle in the parking lot which the co-defendant, Jackson, had been stopped in concerning the Lauderhill arrest. The vehicle became important to Goodwin as it appeared to be the same vehicle captured on the video surveillance surrounding the businesses around the Dunkin Donuts at the time of the robberies. The vehicle was a white Toyota Camry. (T 1427).

On the video, Goodwin stated that Herard was Mirandized at Lauderhill. Goodwin admitted that he did not witness that; he relied on information from Detective Hardy. (T 1442). According to Goodwin, Detective Hardy never told him that the actual interview was memorialized

on a DVD. No one from Lauderhill Police Department ever showed Goodwin a DVD of Herard making a prior statement. No one from Lauderhill ever showed him a rights waiver form. (T 1444). According to Goodwin, no one from Lauderhill told him that Mr. Herard had asked for an attorney. Officer Goodwin testified he that "wasn't going to take anybody's word it [*Miranda*] was done, so he read *Miranda* to Herard when he got Herard back to the office." (T 1442).

Goodwin stated that Herard was in the interrogation room at the BSO Public Safety Building for approximately 12 hours. (T 1447). Each time Herard fell asleep, the detectives would purposely come in and wake him. According to Goodwin, he asked Herard if he had previously asked for a lawyer and Herard answered in the negative. (T 1448). Herard said that he didn't want to speak with law enforcement unless he could make a telephone call. Herard was allowed to make a call to his cousin, Patrick.

Det. Goodwim admitted utilizing the "Reid Technique[11]" in interrogating James Herard. That involved lying to the Defendant repeatedly. Goodwin denied telling Herard that if talked, he could get 10 or 20 years as opposed to life imprisonment. (T 1448-49). Goodwin stated

[11] The defense argued that the Reid Technique, created and promoted by Reid and Associates, predictably contributes to false confessions.

that he only repeated what James Herard's cousin said to Herard on the phone - that he should talk. According to Goodwin, "if you listen to the entirety of the conversation, speaking in Creole, translated the said [sic] they want the shooter, but I'm the shooter." (T 1449). Goodwin admitted telling Herard that he could talk with him now or go to prison, "they had enough evidence." (T 1449). Goodwin admitted telling Herard that it would be better for him if he spoke to law enforcement. (T 1450).

Goodwin admitted that Herard was questioned by a number of different detectives from different agencies. At first, James Herard denied being the shooter or in any way involved in the crimes. Ultimately, he told Goodwin that he was the shooter in the Tamarac Dunkin Donuts robbery. (T 1450).

Detective Hardy spoke to Herard about what he believed occurred in Lauderhill. Herard stated that he heard about the homicide. The detective testified that he only met with Herard for 10 or 15 minutes and that Herard made no confessions or admissions of any kind. James Herard had already been interviewed by Detective Walters and Williams.

Det. Hardy testified that Herard asked for BSO Detective Berenna to come into the room. In total, Detective Hardy recalled being with Herard

approximately one hour. At that point, Herard was transported to the Broward County Main Jail. (T 1464). Detective Hardy admitted that in his conversation with James Herard about the shootings in Lauderhill, Herard made no admissions or confessions. (T 1467).

James Herard's Initial Appearance on the charges was conducted at 8:30 am on December 4, 2008. The defense submitted a copy of the invocation of Herard's rights filed at the Magistrate hearing on December 4, 2008, prior to the Sunrise detective going to the jail to interrogate him. (T 1490).

Despite James Herard's invocation of his rights, Sunrise Detectives Visners and Ransone met with Herard later in the Broward County Jail. Detective Visners re-administered the *Miranda* rights. (T 1472). A Sunrise Police Department waiver of rights form was executed by Herard. Thereafter, the detectives interrogated Herard about the Sunrise Dunkin' Donuts robbery without any recording, either audio and/or video. (T 1475).

Detective Link joined in the interrogation. (ST 13). The officer told James Herard that he could talk to his girlfriend after he spoke to the officer about the incident in Sunrise. (ST 13-14). James Herard was permitted to make a call, but was only able to get voicemail. (ST 16). The officer tried

contacting her number three times, and then stated that he would keep calling her after James Herard spoke about Tamarac. (ST 18).

James Herard denied being involved in the Tamarac incident. The officer said that his car was there, but James Herard responded that ... "my car being there doesn't necessarily mean I was there [unintelligible/talk over] ..." (ST 18). James Herard stated "I know that I wasn't at no Tamarac." (ST 23).

Trial

The State contended at trial that James Herard, Jackson, Bell, Weatherspoon and Charles Faustin were all members of a criminal street gang known as "The Bacc Street Crips." (T 1687). The Prosecutor called the Crips an organization whose purpose was to commit crimes and that the gang and each defendant was part of the "BACC Street Crips" gang that planned and carried out a series of Dunkin Donuts and 7 Eleven store robberies.

The defendants were charged with engaging in a "robbery spree" which started at a Dunkin Donuts on June 20, 2008. Approximately five (5) months later, the defendants were charged with robbing stores in Sunrise,

Delray Beach, a 7 Eleven in Pompano Beach, and ultimately, on Thanksgiving Day, November 27th, a final Dunkin Donuts.

The Armed Robbery of a Pitbull on December 2, 2008 and the Arrest of James Herard

On December 2, 2008, Richard Sills and his friend, Taiwan Gay were walking Sills' 6-month-old Pitbull and saw two unknown people get out of a white Toyota. (T 1736-1737). A person Sills had never seen before came up from behind with a ski mask and poked a gun at his stomach. The two people grabbed the dog and ran. (T 1741). Detectives pulled up and apprehended the suspects. Approximately 5 to 10 minutes later, the same white car that dropped off the two suspects came back to the scene, presumably to pick up the two men. The driver was apprehended. The driver's name was learned to be Jonathan Jackson a/k/a "Blu."

Sills testified that he was able to see the face of the person with the gun, and identified him as James Herard. Sills' testimony was impeached concerning seeing James Herard's face. (T 1748-1749). For example, Det. Mosley acknowledged that Sills told her in his sworn statement that he never saw James Herard's face. (T 1778).

Taiwan Gay's testimony mimicked Mr. Sills'. (T 1780-1783). However, Mr. Gay testified that he saw James Herard take off a blue mask at one point, and was able identify James Herard in court.

Mr. Gay swore in a statement to law enforcement that he did not tell the officers he saw someone throw a gun in a nearby pond, but there was evidence that he not only saw it, he reported it. He later saw officers searching in and around the water for the gun.

Det. Ervina Mosley of the Lauderhill Police Department testified that on December 2, 2008, she was assigned to the Burglary Suppression Unit. (T 1756-1757; 1799-1780). While conducting surveillance, Det. Mosley saw a white Toyota which had the handle missing on the right rear passenger door. (T 1759). The detective saw two people get out of the car and soon thereafter saw them running away. Via Det. Mosley, the State introduced a Rights Waiver Form signed by James Herard. The detective admitted on cross examination that during the interrogation when James Herard was asked if he had a firearm that day, he told her that he had a Samsung .22.[12]

Det. Williams testified that she recalled having a conversation that day with Det. Mosley on the cell phone. (T 1803). Law enforcement was

[12] In actuality, Samsung makes cell phones and other electronics, but not guns.

looking for a white Camry which was believed to have been involved in the Dunkin Donuts robberies. (T 1812). Det. Williams saw a white car drive by. She relayed the information to Det. Walters. She saw the white Camry pull off the road, and saw two black males exit, walking east bound. One of the black males, later believed to be James Herard, had a blue skully knit cap on top of his head. James Herard was alleged to have made eye contact with the detective as she drove slowly past him. (T 1806). She saw one of the individuals pull his ski mask down over his face. The detective made a U-Turn and observed the Defendant and another black male. She again relayed the information to Det. Mosley. (T 1808). She waited, and subsequently saw James Herard run up behind Sills and strike him. (T 1809). As James Herard struck Sills, the other individual, later learned to be Calvin Weatherspoon, grabbed the leash and the dog from Mr. Gay and the two ran off with the dog. Det. Williams called for assistance, and the two suspects were quickly apprehended. (T 1812).

Det. Williams testified that James Herard made the statement that "that was a sweet-ass dog. I had to get him." She admitted that Lauderhill officers searched for a firearm, even sending the BSO dive team to search a nearby canal. No gun was ever located. (T 1816). The detective

identified James Herard in court as being the same individual she saw on the date of the dog snatching incident. (T 1806-1807).

The white Camry turned out to be owned by Anna Grange, Jackson's child's teacher. The car was not returned to her, but law enforcement later took her formal statement. (T 1830).

Det. Williams testified that she contacted Det. Hardy on scene and discussed the case. (T 1831). On cross examination, the detective admitted that she never saw a gun in James Herard's hands, and did not see James Herard throw anything. (T 1833). In his statement, James Herard told the detectives that he did not have a gun. (T 1835).

Det. Williams testified at trial that she was familiar with the "Reid Technique", utilized to obtain confessions or get suspects to make statements, and learned that it was standard practice to lie to suspects. (T 1842-1883). The detective recalled telling the Defendant that "you can help yourself out" by making a statement and admitting his involvement. (T 1846). Det. Williams admitted that there came a point in time during the interrogation when James Herard stated that he wanted to cease speaking to law enforcement and wanted to speak with a lawyer. (T 1846). The detective testified that the officers did not just cease questioning at that

point. They asked whether James Herard wanted to speak to a lawyer, they later said "to clarify," even though Detective Williams admitted that she had heard James Herard state unequivocally that "I want to talk to a lawyer." (T 1846-1847). The detective admitted that the officers were taught that when somebody asks for a lawyer, law enforcement was to cease questioning immediately. The detective recalled telling James Herard "you can only hurt yourself if you don't speak to us."

June 20, 2008 - Dunkin Donuts, Plantation

Miguel Guerrero testified that he was working at the Dunkin Donuts in Plantation on June 20, 2008. (T 2499). The donut shop was robbed as they were closing, and the robbery was caught on video surveillance. The surveillance footage was published, but not transcribed. (T 2501). Mr. Guerrero explained what was depicted. He was unable to recognize any of the suspects as they all wore hoodies and had bandanas covering their face. (T 2505). He testified that he was hit with a shotgun during the robbery.

Gary Metayer testified that he was working at the Dunkin Donuts in Plantation that day. Mr. Metayer was working at the Plantation Dunkin Donuts when James Herard got a job there. James Herard worked there

about two months. (T 2510). Mr. Metayer testified that he trained James Herard. He knew James Herard from working together at a restaurant called "Sweet Tomatoes." (T 2508). The two were friends and socialized. They went to church together, went to the gym, and played football.

Mr. Metayer was working with Miguel Guerrero on June 20, 2008, when the Dunkin Donuts was robbed. Mr. Metayer opened the cash drawer. He turned over the money to the robbers as directed. The witness opined that the one who had a similar body build to James Herard was the robber without the shotgun. (T 2520).

The Plantation Police came to visit Mr. Metayer a second time in December, 2008, under the guise that they wanted to talk to him about the case. At that point, he told them of his knowledge of James Herard. (T 2528). Mr. Metayer testified that when the police came to see him the second time, he felt like he was a suspect since he was the one who had recommended James Herard for the job and was friendly with him. (T 2537).

Sgt. Sean Visners testified that he became involved in the investigation of the robbery at Dunkin Donuts in Sunrise. (T 2539). Sgt. Visners had an opportunity to interview James Herard on December 4,

2008, at the Broward County Main Jail[13]. Sgt. Visners was with Det. Ransone at the time, as he was the lead detective on the attempted murder that occurred on November 14, 2008, in Sunrise.

Sgt. Visners explained how he completed a *Miranda* Rights Waiver Form and James Herard agreed to speak with him. Sgt. Visners testified that he tried to record the interview, but was unable to as James Herard was apprehensive about being recorded. The detectives spoke to James Herard about the Sunrise Dunkin Donuts robbery.

Sgt. Visners testified that he asked James Herard questions concerning the Crips gang. According to Sgt. Visners' testimony, James Herard identified himself as a member of the Bacc Street Crips. The Sergeant testified that the Crips dressed in blue and their arch enemies, the Bloods, in red.

The detective asked James Herard the whereabouts of the shotgun. James Herard stated he thought he knew where it was, but refused to tell the officers.

October 13, 2008

Denise Brown of Lauderhill testified concerning a shooting on October 13, 2008. (T 1877). She and her sister, Raquel, and step-sister,

[13] After James Herard's invocation of rights.

Nekisha, were standing in the road talking. At approximately 1:45 am, Ms. Brown saw some guys all dressed in black. As she pointed out the guys to the others, "they lined in a straight line and started shooting." (T 1878). It was about seven people she said. (T 1887). She was unable to make out anybody's face or identify anyone. She did not believe that she had ever seen any of the people before. She did not recall if any of the individuals concealed their faces. She saw something that looked like a shotgun. She testified "it was long." (T 1880).

After she heard the gunfire, she tried to run into her house. She and her stepsister hid behind the bushes. She overheard one of the individuals say "we came here to finish what we came to do." (T 1881). She saw a Spanish man running, and saw that he had been shot. (T 1882). She didn't know the person. After the people left, she noticed that a friend's PT Cruiser had been shot up. (T 1886).

Ms. Brown was there when the Homicide detectives came from Lauderhill Police Department. She told the police she could not identify who was responsible. (T 1886). She wasn't injured. Her friends weren't injured. She reiterated that she could not see any faces, but knew the

individuals were black. (T 1887). She specifically could not identify the person who shot the gun. (T 1890).

Lauderhill Police Dept. Crime Scene Technician Amy Flagler testified that on October 13, 2008 at 3:15 am, she responded to process a shooting scene. (T 1978). When she arrived, she observed yellow crime scene tape roping off an area and a blue PT Cruiser with the driver's window and driver's back windows shattered. (T 1979). She recovered a yellow shotgun casing from the scene. There was also a red shotgun casing found.

CSI Flagler testified that she processed fingerprints at the scene and placed the lifted latent fingerprints into a chamber along with fumed superglue. CSI Flagler explained to the jury that the superglue adheres to any moisture fingerprints leave behind, making it easier to see. Additionally, she used black powder to initially locate the latent prints lifted. She was unable to locate any prints on the shotgun casings. (T 1983; 1986).

October 13, 2008

Det. Hardy testified that on October 13, 2008, he was the lead detective with regards to the Jacob Riviera investigation. Det. Hardy

testified that there were two 20-gauge shotgun shells found at the scene. (T 1857).

Elaine Consuegra-Rodriguez, a Firearm and Tool Mark Examiner, from the Broward Sheriff's Office Crime Laboratory, was asked to analyze fired shotgun casings in the case where Jacob Rivera was shot. (T 2117-2122). She analyzed the five fired shotgun shells. She determined that two of the shotgun shells were 20-gauge Winchesters, and that three were 12-gauge Winchesters. She determined that the two 20-gauge cartridges were fired from the same gun and that the three 12-gauge cartridges were fired in the same gun. However, law enforcement had no firearms to compare them with. (T 2124).

October 19, 2008

On October 19, 2008, another crime was committed in Lauderhill, FL where the firearm evidence included 20-gauge shotgun shells, commonly known as "birdshot." Four individuals were shot. No one was killed. (T 1858).

Crime Scene Technician Emily Kahn from the Lauderhill Police Department responded on October 19, 2008, to Broward General Medical Center. (T 1999) There, she took photographs and documented the people

who had been injured. There were four gunshot victims. (T 2000). She collected clothing and from there went to the scene in Lauderhill. When she arrived, the scene was roped off. She immediately saw potential evidence including firearms and related evidence, i.e., cartridges, sandals and a bandana. (T 2002). She photographed the scene. CSI Kahn testified that she kept the blue bandana to preserve it for potential DNA testing.

CSI Civilian Officer Hill worked on this case involving footwear impressions. He was unable to provide any particular shoe prints which matched those worn by James Herard. (T 1975).

Tremaine Williams was the victim shot in his left thigh with a shotgun in Lauderhill at the corner store at Mission Plaza. (T 2161). A lot of people were there. Mr. Williams was there when several people were shot. He named each person. He was unable to identify who shot him, but was told who did it. From what he recalls, an unknown individual came up walking like he was drunk. He was staggering and pulled out a shotgun and started shooting. (T 2164). On cross-examination, Mr. Williams was shown a photographic line up. He picked out a person named "Tony", and told the detective he was 100% sure he was the person who committed the

shooting. Tony spent approximately a month in jail before his release. (T 2165; 2498).

Det. Hardy was the lead detective with regards to the shooting at 55197 Mission Lake Plaza. (T 2492). He met with Tremaine Williams. He knew him by the name of "Nana." Det. Hardy testified that the area of Mission Lake Plaza had a lot of gang activity, specifically, the "5519 Boys." Det. Hardy believed that Tremaine Williams was a member of that gang. (T 2494). That gang was a sub-set of the Bloods. According to Det. Hardy, "Lauderhill is known for two sections, Deepside and Shallowside. Deepside as the area between Sunrise Blvd. and Oakland Park Blvd. from the Turnpike west to 60th Avenue. In Det. Hardy's interview of James Herard, the detective told James Herard that the area is Blood territory. That is where Edwards and James Mosey were shot. (T 2496).

November 14, 2008

Glenroy Cole, a civilian, testified that on the evening of November 14, 2008, he was sleeping when he woke up to the sound of a gunshot. (T 2023). He looked through his window and saw a man lying face down in the street. He called 911. (T 2023).

BSO Detective Scott Caperton became involved in the investigation in Lauderhill on November 14, 2008 (T 2026). He testified that he received a call at about 3:00 am from the duty officer who advised him that another detective was also being dispatched and that they both were to respond to the scene. Det. Caperton was the lead Crime Investigator in the investigation. (T 2028).

Det. Caperton went to 5501 SW 21st Street in Lauderhill, FL. (T 2028). When he arrived, other officers had already secured the scene. A victim was lying next to a large pool of blood in the roadway. There were tire tracks and blood leading away from the scene.

Detective Caperton first made contact with detectives from the City of Lauderhill Police Department and obtained preliminary information. (T 2029). The Lauderhill detectives already had a suspect in custody, detained, with his hands bagged because the detectives wanted to collect GSR (gunshot residue) samples from the hands. The detective saw a white Chevy Monte Carlo and the person's name was Ryan Dillon. (T 2032). Det. Slagel-Grant videotaped the scene while Det. Caperton took still photographs. (T 2034). The Medical Examiner was called to the scene. (T 2036).

When the detective, examined the victim's wound, he had a hole and then pellet dots around it. Based upon the detective's training and experience, he was permitted to testify that it "looked like birdshot to me." (T 2043). Mr. Dillon was ultimately let go. (*Id.*) The detective pulled out the victim's wallet and saw identification indicating the name, Eric Jean-Pierre. (T 2051).

CSI Flagler went to the Medical Examiner's Office to attend the autopsy of Eric Jean-Pierre and took photos of Jean-Pierre's injuries and his clothing. She gathered evidence that the Medical Examiner and staff collected during the autopsy. (T 1990).

BSO Lab Technician Rodriguez analyzed items concerning the homicide involving Eric Jean-Pierre, including multiple pellets and a plastic shot cup. (T 2131). The technician opined that the two 20-gauge yellow Winchester shotgun shells in the case involving Jacob Rivera were fired from the same shotgun where Demetrick Caldwell was the victim. Further, that firearm was utilized in a case where Chazden Edwards, Anthony McBride, James Mosey and Tremaine Williams were victims. (T 2135). Mr. Jean-Pierre was shot with the same firearm.

The Associate Medical Examiner with Broward County, Dr. Lance Davis, testified as to his work conducting an autopsy on Eric Jean-Pierre. (T 2143-2144). He first became involved in the investigation when he received a call at approximately 4:30 am of a deceased person, believed to be the victim of a homicide, at an address in Lauderhill. When the doctor responded, he found a deceased black male on the pavement, lying face down with an irregular shotgun wound to the left chest. (T 2144). The doctor opined that Mr. Jean-Pierre died as a result of a shotgun wound. (T 2147). The doctor testified that the manner of death was homicide. (T 2154).

Prosecutors conceded at trial that James Herard was not the trigger man, and that Jean-Pierre's death was not related to a robbery. Prosecutors argued that James Herard's participation in the crime was by directly encouraging Tharod Bell to kill the victim as part of a "body count competition," and that Jean-Pierre was chosen at random.

November 15, 2008

Det. Jason Zinn from the City of Sunrise Police Department, Burglary Unit, testified that he was on road patrol on November 15, 2008. (T 2073). A call came in, and he arrived at the scene at 1:04 am. He saw an

individual on the first floor of the building who had been shot and was lying on the floor in the hallway. (T 2075). The detective testified that he could tell immediately that the person had been shot with a shotgun. The individual was learned to be Demetrick Caldwell. The detective put out a BOLO for a white Toyota Camry, unknown year. (T 2077). Det. Zinn became the lead officer with regard to the investigation of Mr. Caldwell's death.

The detective took the clothing from the victim, which indicated where he had been shot, and a red bandana. (T 2080). Det. Zinn admitted that he never got the name of the suspect, never got a description, and never got an estimate of the individual's height or weight. (T 2085). Det. Zinn did not get involved in taking statements, and that ended his involvement in the case. (T 2085).

Sgt. Daniel Ransone testified that in November, 2008, he was a detective assigned to the Detective Bureau in the Criminal Investigations Division. (T 2088). He became involved in an investigation where Demetrick Caldwell was shot and injured on November 15, 2008.

Demetrick Caldwell testified that in November, 2008, he stayed in Sunrise, FL at his grandmother's house. (T 2166). He was shot on

November 15, 2008, sometime between 3:00-4:00 am. He was walking back to his grandmother's house and noticed a white Camry following him, which made him suspicious. (T 2168). The white car pulled over by the corner store. An individual got out of the passenger's seat and went into the trunk and got a shotgun which was wrapped in a blue shirt.

Mr. Caldwell saw the white car circle around the block and follow him. Caldwell was wearing all black with a red bandana tied around his neck, but testified that he was not a member of a gang. (T 2170). When he saw the white Camry again, he observed an individual get out of the passenger seat with a shotgun. The shotgun was cocked and shots were fired. Caldwell ran, trying to get to his grandmother's house. He slipped and fell as he was trying to run away. After he slipped, he was shot twice; once in his arm and once in his back. He testified that he had buckshot in his spine and a punctured lung. (T 2173). He was taken the hospital.

The shooter did not conceal his face or identity in any way, but Caldwell had never seen him before any time in his life. (T 2174). Caldwell identified James Herard in the courtroom, but admitted that he had never seen him before and was impeached concerning his in-court identification of James Herard as Herard was the only black man in the courtroom. On

cross examination, Caldwell admitted that he never called the police to tell them that he was able to identify the shooter after initially stating in his sworn statement that he did not know or recognize Herard. (T 2176-2177). Caldwell described the shooter as "about five foot seven inches." (T 2177). Caldwell first identified James Herard 5 ½ years after the shooting. (T 2178).

November 24, 2008

Corey Marchand was approximately 16 years old on November 24, 2008. Following a basketball game, Marchand and his friend, Arty Edmonds, went to Dunkin Donuts for donuts, coffee and hot chocolate. (T 2184). They were the only customers in the store. As they were getting ready to leave, three people came into the Dunkin Donuts and demanded everyone get on the floor. They were all dressed in black and their faces were covered. (T 2185). One person was heavy set and the other two were skinny. The heavy-set guy who robbed Marchand had a pistol. (T 2185). The robber who dealt with Arty Edmonds had a handgun. The person who beat up the clerk had a shotgun. (*Id.*). Marchand had $20 and his cell phone taken. (T 2186). Video surveillance of the incident was

admitted into evidence without objection and published to the jury. (T 2187). The DVD was not transcribed.

M.D. Miah, the store clerk from the November 24, 2008 robbery likewise testified as a State witness. He did not see anyone's face that night. (T 2193).

November 26, 2008 – Dunkin Donuts in Delray Beach

Paul Baratta was at Dunkin Donuts in Delray Beach on November 26, 2008. (T 2337). When he approached the entrance of the Dunkin Donuts, he saw "four, five hooded guys ..." (T 2338). The person right in front of his car shot him. (T 2341). He waited approximately two minutes. When he got out of his car, he knew that he had been blinded. (T 2341).

Henry Bornstein testified that he was a patron at the Dunkin Donuts in Delray Beach on November 26, 2008. (T 2343). When Mr. Bornstein looked up, he saw a short guy with a full mask on his face with a shotgun in his hand. (T 2345). The man shot him twice in the chest. His wallet and his credit cards were taken. Via Mr. Bornstein, the State introduced a surveillance video, which showed portions of what happened during the robbery. The DVD was published, but again, not transcribed. (T 2348).

November 27, 2008 (Thanksgiving) - Armed Robbery of Dunkin Donuts in Tamarac

Jabdishehai Patel and his daughter were working at the Dunkin Donuts in Tamarac, FL on Thanksgiving, 2008. (T 2300). Video cameras in the store recorded the robbery. Mr. Patel heard a "boom." (T 2302). His daughter ran to him and led him out the back door to the main road. He never saw who came in that night and when shown the videotape, did not recognize any of the people who wore masks. (T 2304). Mr. Patel was unable to identify any of the robbers. (T 2306).

Frank Dennis testified that he too was at the Dunkin Donuts on Thanksgiving night, 2008. The witness was shown the video surveillance and intermittently asked questions concerning what was depicted. (T 2307-2310). He was unable to identify anybody on the tape. (T 2312).

Long Huynh testified that on Thanksgiving night, 2008, Huynh and family members were on their way to Hard Rock Café and stopped in Dunkin Donuts in Tamarac. (T 2318). Huynh heard a loud noise, with a gun noise, and turned around. The witness saw a man with a mask and a gun. He told them to lie face down and not to move. One of Huynh's brothers, Kiem Huyhn, was at the door and was shot. (T 2319). Kiem Huynh was a Dunkin Donuts customer who was shot in the back as a

warning to other store patrons during the Thanksgiving Day 2008 robbery in Tamarac. He died nine days later. (T 2320). Long Huynh was unable to pick out any of the people involved from a line-up. (T 2320).

Chau Le was also at the Dunkin Donuts and testified at trial. (T 2322). Her purse, an I-Phone and approximately $4,000 were taken. (T 2326).

Rebecca MacDougall, an Associate Medical Examiner at the Broward County Medical Examiner's Office, had an opportunity to review an autopsy performed by Dr. Voiko on December 8, 2008 of Keim Huynh. Dr. MacDougall was not present during the actual autopsy. The doctor opined Mr. Huynh was the victim of a homicide caused by a shotgun wound of the back. (T 2329). The defense objected to the admission of the autopsy photographs and testimony related thereto as they relied upon the opinion of another medical examiner. (T 2330, 2335).

Det. Treavor Goodwin testified as to his involvement in investigation regarding a robbery of a Dunkin Donuts in Tamarac on November 27, 2008, Thanksgiving night. (T 2369). He arrived at the scene and received a summary from the deputies as to what happened. He was the Lead Detective. While he was on scene, a Captain from the Palm Beach Sheriff's Office arrived and conferred with him. From that point on, Det.

Goodwin began to investigate the case as being similar to other Dunkin Donuts robbery cases. (T 2372).

Det. Capelton and Det. Slagel-Grant became involved in this investigation when called out Thanksgiving night, November 27, 2008, to the scene of a robbery of a Dunkin Donuts in Tamarac. They received information that there was an armed robbery and a victim had been shot and transported to the hospital. (T 2052-2053). Once Detectives Capelton and Slagel-Grant received preliminary information, they did a walk thru of the scene. (T 2053-2054).

When Detective Capelton first walked up to the Dunkin Donuts, he saw a yellow 20-gauge shotgun cartridge lying in the parking lot. Later, the police discovered a 20-gauge casing on the north side of the parking lot. That stuck out to Det. Capelton because the 20-gauge cartridge found was birdshot, and was yellow in color. (T 2055). The detective and Det. Slagel-Grant went to the hospital first, but could not get access to the victim. However, the detectives met with robbery detectives from the Broward Sheriff's Office.

Det. Capelton was already involved investigating another crime when he and Det. Slagel-Grant again got a call asking them to respond to the

City of Lauderhill Police Department in reference to suspects in custody that had been arrested for theft of a dog. (T 2056). When Det. Capelton first met James Herard, James Herard had been placed in an interview room. He was photographed by Det. Capelton. The detective told him that they were going to swab his fingernails and hands and look at the bottom of his shoes as part of their investigation. (T 2057). The detective made a note that James Herard asked him which crime he was there for. (T 2057).

Det. Hardy testified that he was working with other agencies including the Broward Sheriff's Office, Sunrise Police Department, Plantation Police Department and Delray Beach Police Department and were sharing information. (T 1859).

Det. Hardy testified that on Thanksgiving, November 27, 2008, he was contacted by Detective Scott Caperton, a Crime Scene Detective with the Sheriff's Office. (T 1860). The two were working together because of the link between the crimes each were investigating.

The Alleged Link – Shotgun Shells and a White Car

The detectives believed the link between the crimes to be shotgun shells found at both scenes and a white Camry used in some of the crimes. The defining feature of the Toyota Camry was a missing door handle. (T

18160). Once Det. Hardy realized the connection with the broken door handle, he contacted BSO Sgt. Adam Rubin. (T 1861). After he contacted Sgt. Rubin, detectives from BSO went to the Lauderhill Police Dept. The three individuals in custody at that time were Calvin Weatherspoon, Jonathan Jackson and James Herard. Det. Hardy spoke to each as part of his investigation. (T 1862). He identified James Herard in the courtroom as being one of the three individuals turned over to the Sheriff's Office.

Approximately 12 hours later, Det. Hardy went to the Sheriff's Office to interrogate James Herard. (T 1863). James Herard was arrested approximately at 12:00 pm on December 2nd. He was transferred, in custody, to BSO about 12 hours later. There, he was interrogated for another 13 hours. (T 1863-1864).

Bacc Street Crips

Tamika Troy identified James Herard in court at trial and stated that she also knew him as J-Loc. The witness testified that stands for "James, Life of a Crip." (R 2195). J-Loc was in the Bacc Street Crips gang. She too was a member. The leader of that gang was BluJay. BluJay's real name was Jonathan Jackson. He was sometimes called just "Blu." (T

1938). She became a member of the Bacc Street Crips after fighting one of the girls as an initiation.

Ms. Troy testified that she knew Blu to carry a composition notebook with gang information. (T 1940). She called it Blu's Diary for that gang. The composition notebook was titled "Gorilla Mafia Crips". Ms. Troy testified that the Gorilla Mafia Crips was a separate gang unrelated to the Bacc Street Crips. (T 1964-1965).

Ms. Troy testified that she did not ever participate in any of the robberies that the Bacc Street Crips committed, but was present when J-Loc committed the shooting. She saw J-Loc and LowKey getting things out of the trunk. She did not know what they were going to do, but they had parked by LowKey's Baby Mama's house. (T 1944).

She heard two gunshots and jumped back in the car. Everybody else jumped in the car, including LowKey - and they left. (T 1945). She went upstairs in Blu's house but later heard "a lot of commotion" coming from downstairs. It sounded like people were fighting. (T 1946). When she heard LowKey screaming, she stepped downstairs and glanced in. He was screaming in agony. Blu was spelling out the letters "Liar" on his chest with

a hot iron. She smelled the odor of burned skin. (T 1947). Ms. Troy was taken down to Lauderhill after execution of the Search Warrant.

Keith Williams

Keith Williams testified as a State witness that he lived in Lauderhill, specifically an area known as "Deepside" in October, 2008. (T 1980). At the time, he was a member of a gang known as the 109 Bacc Street Crips. (T 1991). Williams testified that he had been a member of the gang for a couple of months. Williams explained that entry into the gang required an initiation. He had to get beat up by five individuals for 12 seconds. He was able to, and did, defend himself. One of the people he had to fight was J-Loc. Williams identified James Herard in court as the person he knew as J-Loc. (T 1893). Williams testified did not know his real name, but that J-Loc was his gang name.

Over defense objection, the State was permitted to introduce into evidence a white board with photographs of each of the defendants named in the Indictment. The white board contained the alleged hierarchy of the Bacc Street Crips. At the top was Jonathan Jackson – "Blu." He was the "OG" in the gang, meaning he was in charge. (T 1897). James Herard was one layer below Blu.

Williams testified that he was jumped by the members of the Blood gang in Deepside. Their colors are red, like blood. After he was jumped, Williams told Blu what had occurred. According to Williams, Blu was mad at Williams for getting jumped and at the rival gang member for jumping him. Blu wanted to immediately go there and "kill the dude that jumped me." (T 1901). Blu told Williams to get a 12-gauge shotgun and "kill a dude that jumped me." (T 1902). The plan was for Williams to stand in front of the house and J-Loc to go around the back. J-Loc had a 20-gauge shotgun.

Williams testified that when he got to the location, he was paranoid since he had never killed anybody before, and did not want to kill anyone then. After J-Loc jumped the gate, Williams was to walk up to the people standing in front of the house and shoot. (T 1904). He was supposed to kill them. (T 1908). He didn't do that. Instead, he fired one shot in the ground and one into the air. He ran back to the car, but he heard one or two gunshots. When Williams got back to Blu's house, his own gang jumped him. (T 1908). He testified that J-Loc pinned him to the wall. Blu took an iron and burned Williams repeatedly on the chest. Mr. Williams was permitted to open his shirt and show the jury his chest. (T 1910).

Crime Investigator Thomas Hill took photographs of the overlay of the iron and photographs of the burn marks with the overlay over it. (T 1972). The photos were admitted and published to the jury.

On cross examination, Williams testified that in 2008 he was taking medications for his mental illness, but sometimes would not take them. When he didn't take his medication, Williams would "hear voices and see things." (T 1914). Williams admitted that he was charged with attempted murder in his case, not with conspiracy to commit murder, which he could have faced in this case. Williams testified that he was initially arrested for attempted murder, but the Grand Jury returned a No True Bill. (T 1929-1931). Williams testified that he entered a plea to the charge for that case and was pending sentencing. He acknowledged that he was a foot solider in the gang.

Williams testified that he saw a 12-gauge and 20-gauge shotguns in Blu's house. (T 1918-1919). The shotguns were Jonathan Jackson's guns. He admitted that he never saw James Herard fire the gun that night. (T 1922). He admitted that at the time of the incident, he was having memory issues and that his "brain wasn't right." (T 1925-1926). He wasn't taking his

prescribed medications and was hearing voices. After the incident, he was committed to the mental health unit of the hospital for 4 days. (T 1928).

Det. Hardy testified that the connecting feature of the investigations involved the same ballistics – a 20-gauge birdshot shotgun shells.

Anna Kaye Grange

Anna Kaye Grange testified that she was James Herard's girlfriend and that the two were dating in 2008. She identified James Herard. She testified that at the time James Herard was living with Jackson and that he was also known as Blu or BluJay. James Herard was also known as J-Loc. The witness testified that stands for "James, Life of a Crip." (R 2195). Two of Jackson's girlfriends also lived there, Charlene, and Mimi (aka Lady Savage). There were members of the gang called the Crips.

Ms. Grange testified that James Herard always "flagged his blue flag," which meant he always carried a blue bandana in his pocket to identify his gang membership. Ms. Grange identified other people who were oftentimes at Jackson's house including Psych, Bell (a/k/a Smoke), and Slicc. (T 2199). Ms. Grange testified that she became aware that they were in a gang shortly before Thanksgiving, 2008. They talked about gang related activities, and James Herard told her certain things.

Ms. Grange testified that there were nights that James Herard left with a shotgun, and everyone was dressed in black. James Herard had a mask for his face. (T 2202). James Herard would come back with money. She saw him give the money to Jackson, who would count it and separate it. She testified that when James Herard would go out dressed like that, he drove her car, a 1993 white Toyota Camry. (T 2204). The right back door handle was broken.

Ms. Grange recalled seeing James Herard flipping through the T.V. saying "I wonder if we made it on the news?" (T 2204). That was the morning after talking about the "body." She also noticed someone else's credit cards and a purse. She recalled the purse contained credit cards with a Chinese name on it. This was in relation to the Chinese woman's properly. (T 2209).

The night that Jackson, Slicc, and J-Loc got arrested, the police told Ms. Grange that she would not be getting her car back as it was being held as evidence. That night, Bell and Faustin came to the house and got James Herard's shotgun. The shotgun had black tape on the handle.

On cross examination, Ms. Grange admitted telling the police that she was upset when she found out that James Herard had another girl in his life. (T 2212).

Ms. Grange testified that when she was "dragged down to give information by the police," she was threatened with being charged as an accessory to murder. (T 2212). She told the police what they wanted to hear because she didn't want to go to jail. (T 2213). She admitted that she didn't know what happened – she wasn't there. (T 2213). She admitted that Bell said he got a body, James Herard did not. (T 2214). She testified that she was given information by the detective, and was told by the detective what information she needed to provide to him so she didn't go to jail. (T 2216).

During cross examination, Ms. Grange referenced her testimony from the case in West Palm Beach and the fact that she said the same thing. (T 2221). A Motion for Mistrial was lodged. (T 2222). The Motion was denied. (T 2224).

James Herard's Statements

James Herard's recorded statements were played at trial. In one the statements, James Herard took full responsibility for the shootings and some of the other crimes.

Det. Goodwin conducted a recorded interrogation. (T 2389). James Herard was in the interview room for "12, 13, 14 hours maybe." (T 2390). The questioning was intermittent. When James Herard stated that he was tired, the detectives would not let him take even a short nap. The DVD of the interrogation was published to the jury, over objection. (T 2391). The State introduced a certified Creole translation of the portion of the DVD where James Herard called his cousin. The DVD was published but not made a part of the transcript as the Court Reporter deemed it inaudible from the beginning. (T 2395). The DVD was stopped intermittently while Det. Goodwin was testifying so questions could be posed to the detective throughout the interrogation. (T 2402). The audio portion of the DVD was continued, paused and repeatedly not been made part of the transcript. (T 2404-2405).

A second DVD, the continuation of the interview, was likewise published to the jury. (T 2411). It contained a recording of everything that

transpired in the interrogation room. Again, portions of the DVD were totally inaudible. (T 2412; 2413). On cross examination, the defense established that James Herard was initially in a BSO interrogation room, for approximately 13 hours. (T 2414). He had been in a Lauderhill interrogation room for 12 hours prior to that. (T 2415).

Det. Goodwin acknowledged that he used the Reid Technique when interrogating James Herard. (T 2417). He utilized all nine steps of the technique. He testified he was unaware of the dangers of false confessions involved in using the Reid Technique. (T 2417-2419).

The detective conceded at trial that James Herard had been in custody for over a day being interrogated. (T 2420). The detective admitted that at one point when James Herard said he was tired and fell asleep. The detective came in nine minutes later to wake him and continue the interrogation. This too was part of the Reid Technique. (T 2421). The detective's use of the Reid Technique was detailed to the jury. (T 2421-2432).

BSO Sgt. Adam Rubin testified that he was the supervising sergeant of the Violent Crimes Unit. (T 2473). He became involved in the investigation of a series of robberies at various Dunkin Donuts locations.

He supervised the Robbery Unit. On December 2, 2008, Sgt. Rubin learned that James Herard was in custody at the Lauderhill Police Department. He and other detectives responded there. The sergeant met with Det. Hardy from the Lauderhill PD outside the police department. Det. Hardy showed the sergeant a photo of a vehicle that he believed fit the description of the vehicle they were looking for in the robberies. (T 2475). It was a white 4-door Camry and was missing a door handle. (T 3476). Eventually, Sgt. Rubin and Sgt. Glassman met with James Herard in the Lauderhill Police Dept. Interview Room. The sergeants' goal was to get James Herard to talk to them. They introduced themselves as being from the Broward Sheriff's Office.

The sergeant estimated he was in the interrogation room for five minutes with James Herard. The sergeant testified as to noticing a Sunrise Police officer when walking down the stairs. (T 2484). The sergeant took no role in the actual interview with James Herard. (T 2487).

After following Mr. Caldwell, James Herard stated that he got out of the car with the shotgun and approached Mr. Caldwell from behind. When Mr. Caldwell saw James Herard armed with a shotgun, he took off running. James Herard fired two shots at Caldwell as he fled. (T 2102-2103).

On cross examination, Det. Hardy was questioned concerning the Invocation of Rights Form filed on James Herard's behalf on December 4, 2008. (T 2109). He denied ever seeing it. The detective testified that no one brought the Invocation filed with the Court to his attention, so the detective had James Herard sign a new *Miranda* form and interrogated him. He and Det. Visners took the statement. There was no tape recording or video recording as the interrogation took place in the Broward County Main Jail. (T 2110).

Firearm Evidence

Firearm and Tool Markings Examiner Alan Greenspan testified that in December, 2008, he became involved in this case with Examiner Ms. Elaine Consuegra-Rodriguez. Mr. Greenspan worked on firearms related evidence that was collected from a Dunkin Donuts in Tamarac. He also worked on firearms related evidence seized pursuant to the Search Warrant of a home in the City of Lauderhill. (T 2228-2229). Finally, he reviewed firearm evidence from a robbery of a Dunkin Donuts in Delray Beach. All of the evidence involved yellow Winchester 20-gauge shot shells. Some were fired, some unfired. He was never given any firearms to

compare. (T 2229). He opined that all of the weapons were in the same shot line at one time or another. (T 2235).

Defense Witnesses

On May 13, 2014, the Court heard the testimony of Herard's defense witnesses. Jonathan Tenbrook testified that in December, 2008, he was employed by the Broward County Public Defender's Office and was an interviewer for the Public Defender's Early Representation Unit. (T 2658). Via the witness, the defense introduced an Invocation of Rights Form submitted to the Court on December 4, 2008, signed by James Herard in front of a witness. (T 2659). The Rights Form invoked James Herard's right to counsel and specified that the Defendant did not desire to discuss the case with anyone without counsel present. All questions pertaining to the case were directed to go through the Public Defender's Office. (T 2660).

Kenier Tima, James Herard's cousin and former roommate, testified that he and James Herard resided in the fall of 2008 at 2014 NW 44th Avenue, Ft. Lauderdale with their "Aunty" (T 2665), James Herard's mother. Tima lived with James Herard and his mother for approximately 10 years. He testified that he shared a bedroom with James Herard and that

there were 2 beds in the room. He stated that were some nights James Herard would not come home, but on most nights, James Herard resided there with he and his aunt. (T 2666).

Dr. Gregory DeClue

Dr. Gregory DeClue was permitted to proffer testimony outside the presence of the jury, but disallowed from testifying as an expert witness before the jury. (T 2670). Dr. DeClue proffered that he is a licensed psychologist in the State of Florida. He explained his extensive educational background. (T 2670). He has been a licensed psychologist in the State of Florida since 1984. He worked in police psychology for 20 years. (T 2671). He has published over 40 articles, written one book that had been published, and a book chapter. He stated that the book which was published was titled "Interrogations and Disputed Confessions, A Manual for Forensic Psychologists." (T 2672). Dr. DeClue testified as to his extensive work in the area of false confessions. (T 2672-2674). Specifically, he discussed the Reid Technique.

Dr. DeClue proffered that he was asked to review case materials provided to ascertain whether the Reid Technique was used in the interrogation of James Herard. After reviewing the case materials and the

condensed DVD of the interrogation, he concluded that the Reid Technique was, in fact, used in this case. (T 2674-2675). The doctor testified that the Reid Technique can lead to false confessions and explained how and why.

The doctor testified that in cases in which the Reid Technique was used to interrogate a suspect, there had been "multiple exonerations." (T 2676). Finally, the doctor was able to proffer that of the first 250 cases from the Innocent Project which resulted in DNA exonerations, it was determined that 40 of those people confessed to crimes for which they were eventually exonerated. (T 2677). Dr. DeClue was cross examined by the prosecution. (T 2670-2677).

With regards to this case, Dr. DeClue proffered that he reviewed almost 5 of the 17 hours of video. (T 2684). He reviewed the condensed DVD shown to the jury and on re-direct examination, he testified again that during the 5 hours of video he observed, the Reid Technique being used and what the technique entailed. (T 2685). The doctor's testimony was disallowed.

Search Warrant

Mr. Greenspan assisted in the execution of a Search Warrant at 2414 NW 52nd Avenue, Lauderhill on December 3, 2008, where Jackson and

others resided. (T 2246). The residence was in a complete state of disarray. (T 2287). There were clothes everywhere.

The defense objected to several pictures taken during the execution of the Search Warrant. For example, papers, documents and ledgers concerning separate gangs, the Westside Crips and Gorilla Crips, were allowed into evidence over defense objection as to relevancy. (T 2250-2252). One of the pictures depicted a letter. Photo 9 of 30 "... it is a letter written by looks like a 13-year-old kid. Basically, it is talking, you want to be part of a gang, things of that nature." (T 2250). Mr. Greenspan detailed where items of evidence were seized. An unfired yellow 20-gauge shotgun cartridge was found during the search. (T 2255). Law enforcement also found a banana-style magazine and two yellow colored shotgun shell cartridges, 20-gauge, a notebook, articles of clothing, and notes.

The defense renewed its objection to the evidence and specifically the notebook which Herard claimed was testimonial and letters which were unauthenticated and unauthored, as being irrelevant to James Herard's prosecution. (T 2258). The State argued that the evidence went towards establishment of the organization as part of the RICO Counts. (T 2258-2259).

The evidence was published to the jury. The State also published what it termed "a hierarchy structure." (T 2265). The composition notebook included the "10 Commandments" of the gang. The State introduced the ledger, over continuing objection (T 2263) which had BluJay written at the top and J-Loc on a list of names. Likewise, a computer printout was admitted that stated "Westside Crips." (T 2264).

SUMMARY OF ARGUMENT

I. The trial court reversibly erred by denying the Defendant's Motion to Dismiss after the jury panel was stricken without sufficient cause in violation of James Herard's rights to Due Process of Law and fair adversarial proceedings. The Appellant maintains on appeal, as he did below, that the Court erred in failing to dismiss the charges based upon the Due Process violation necessitated by the State's conduct. Specifically, the Court ordered the voir dire stricken after the State and defense had whittled down the jury pool and the defense was extremely pleased with the jurors who had been selected and the State was not. The State requested the jurors already selected be stricken, presumably to gain a strategic or tactical advantage.

There was no reason for James Herard's Second Chair Counsel to be taken off the case during jury selection. Although the Death Warrant had been signed in *State v. Robert Henry*, another Capital Counsel was involved in Henry's case so no impediment existed to Attorney Kulik proceeding with the jury selection and trial in the *Herard* case. Over defense objection, the jury panel was stricken, and the Appellant believes the State exercised bad faith in the matter it struck the defense favorable potential jury, warranting dismissal of the charges. Reversal and discharge is warranted.

II. The trial court reversibly erred by refusing to suppress James Herard's statements which were not freely, knowingly, and voluntarily made in contravention of 5th and 14th Amendments to the United States Constitution, applicable portions of the Florida Constitution and *Miranda v. Arizona*. Specifically, the defense objected to admission of statements James Herard made to various law enforcement officials from December 2, 2008, through December 4, 2008.

At the suppression hearing, it became clear that the DVD of the interrogation was started and stopped on many occasions during the questioning of witnesses. From the Record, it is impossible for this Court to

determine which portions of the DVD the witnesses or counsel were referring to. Thus, the alleged confession is "gobbley gook." When initially interrogated by the Lauderhill Police, James Herard invoked his right to counsel and stated that he wanted an attorney. Nevertheless, the officers went forward with questioning once they claimed it appeared that James Herard did not want to wait for his attorney.

Further, when the Lauderhill detectives finished questioning the Defendant, he was transported to the Broward Sheriff's Office via a Sunrise Police Department patrol car, and thereafter was questioned by a variety of detectives throughout the early morning and afternoon of December 3, 2008. A videotaped statement taken of James Herard, approximately 12 hours in length, was admitted into evidence. The detective entered and re-read the Defendant his *Miranda* warnings and James Herard allegedly agreed to speak with law enforcement. Shortly thereafter, James Herard asked to speak with his cousin. The call was made, the conversation put on speaker mode, and James Herard's cousin told him that he should speak to the detective.

The officers did not answer the door of the interrogation room when James Herard knocked on two occasions, and James Herard was forced to

urinate in a McDonald's cup as he was not let out of the interrogation room to go to the bathroom. Finally, after defense counsel invoked James Herard's rights to counsel and to remain silent at James Herard's Initial Appearance, he was again interviewed and another statement obtained. Based upon the totality of the circumstances, the statements made by James Herard were involuntary, made under coercive circumstances, and should not have been admitted at trial. The detectives questioning James Herard utilized the controversial "Reid Technique" known for prompting false confessions, and error occurred warranting reversal and remand for new trial.

Additionally, the trial court reversibly erred in refusing to grant the Defendant's Second Motion to Suppress Statements, Admissions and Confessions based upon the State's failure to prove the corpus delecti of the crimes separate and apart from the Defendant's statements.

III. The trial court abused it's discretion in allowing physical evidence unrelated to the charges to be introduced at trial, and by allowing physical evidence seized from Jackson's house to be utilized against James Herard in the State's case-in-chief. These documents included a gang organizational book for the Gorilla Crips Gang, which was unrelated to the

Bacc Street Crips, which the State asserted James Herard was a member of. It also included a BB gun and firearms not related to any charges in the Indictment. Further, no evidence established that James Herard resided in Jackson's residence, because he did not. Because the evidence lacked probative value and any value was far outweighed by the dangers of unfair prejudice and confusion, reversible error occurred when the Court allowed the evidence to be admitted at trial. Reversal and remand for a new trial is required.

IV. The trial court reversibly erred by refusing to allow James Herard's expert witness to testify concerning the Reid Technique and law enforcement interrogation techniques. The defense contended that the expert had technical or other specialized knowledge which would assist the trier of fact in understanding the evidence and determining the facts in issue. The doctor himself teaches law enforcement how to conduct a proper interrogation of a suspect. The evidence should have been allowed under Section 90.702, Fla.Stat. and *Daubert*. Accordingly, the Court reversibly erred in failing to allow the defense evidence, warranting a new trial.

V. James Herard was improperly and inappropriately sentenced to death. First, Florida Statute 921.141 is unconstitutional under the 5th, 6th and 14th Amendments to the United States Constitution and Article I, Section 22 of the Florida Constitution, The Florida Capital Sentencing Scheme which James Herard was convicted under violated the 6th, 8th and 14th Amendments to the United States Constitution at the time that James Herard was tried. A unanimous jury never sentenced James Herard to Death.

Poole's decision to "recede" the *Hurst* claims, does not negate the need for re-sentencing proceedings. In this case, applying the reasoning of *Poole* to James Herard's case would violate the 8th Amendment to the United States Constitution. The 8th Amendment requires that the ultimate decision to impose a sentence of death rather than Life must be made by a unanimous jury. Further, even if the 8th Amendment does not require jury unanimity in death sentencing, it at least requires a jury to make the ultimately decision to impose a death sentence. The 8th Amendment requires the jury have meaningful input into a capital sentencing decision, and forbids a system in which by voting for guilt a jury is unconsciously voting for a death sentence. Thus, applying the reasoning of *Poole* to

James Herard's case would violate the 8th Amendment to the United States Constitution. The sentence imposed should be reversed and this matter remanded for re-sentencing proceedings or reversed and a sentence of life imprisonment imposed.

ARGUMENTS

I. THE TRIAL COURT REVERSIBLY ERRED BY DENYING THE DEFENDANT'S MOTION TO DISMISS ON DUE PROCESS GROUNDS AFTER A "DEFENSE FAVORABLE POTENTIAL JURY PANEL" WAS STRICKEN WITHOUT SUFFICIENT CAUSE

Standard of Review:

The constitutional right to Due Process of Law is violated when the State's conduct "offends some principle of justice so rooted in the traditions and conscience of our people to be ranked as fundamental." *Medina v. California*, 505 U.S. 437, 444 (1992) [quoting *Patterson v. New York*, 432 U.S. 197, 202 (1977)].

Argument:

After several days of *voir dire*, with each party winnowing down the pool, a Death Warrant was signed by the Florida Governor for the execution of Robert Laverne Henry. Mr. Henry's Second Chair attorney was Attorney Kulik. Mr. Kulik was serving as penalty phase attorney for

James Herard. Attorney Kulik was forced to halt his representation of James Herard when the Warrant was signed. Attorney Kulik and James Herard objected, noting that Mr. Henry was also represented by other counsel for purposes of contesting the Warrant and that Attorney Kulik could continue with narrowing the same jury panel. Nevertheless, the Court halted jury selection and trial was recessed over the weekend in James Herard's case. At that time, the defense had lodged twenty-six (26) strikes for cause to the remaining panel of fifty-one (51) people and "considered themselves in an advantageous position in terms of obtaining a favorable jury." (R 916).

Attorney Kulik and co-counsel, Attorney Melody Smith, appeared in front of Judge Siegel on the *Henry* case and requested the Court allow Attorney Smith to solely handle the Death Warrant phase of the *Henry* case while Attorney Kulik continued with trial in the *Herard* case. Attorney Smith, a Collateral Capital Attorney well versed in handling Death Warrant matters assured the Court that she was willing to immediately take full responsibility to handle the *Henry* case on her own while Attorney Kulik continued with the *Herard* matter. Prosecutors from Michael Satz's office argued that the *Herard* trial should cease immediately.

Judge Siegel denied Attorney Kulik's request to have Attorney Smith take over sole representation on the Henry case, and James Herard's counsel filed an Emergency Petition for Writ of Certiorari in *Robert L. Henry v.* State, SC14-318, with the Florida Supreme Court outlining the suggested substitution so that the *Herard* trial could continue and not impact James Herard's Due Process rights. The Supreme Court issued an Order to Show Cause directed to the State the same day.

The venire selected was stricken by Judge Backman despite the issuance of the Order to Show Cause requiring the State to respond to the Florida Supreme Court. (R 916). After the Court struck the panel, the State filed its Response to the Order to Show Cause avoiding the merits, arguing that the issue was moot as the trial judge had already released the panel. On that basis, the Writ was denied. The defense thereafter contended that dismissal of the charges against James Herard was warranted on Due Process grounds. (R 915-917). The Court entertained argument. (T 1658). The Defendant objected to striking the panel. (T 1660). The Motion to Dismiss on Due Process grounds was denied.

The defense maintained that it was quite pleased with the potential jurors selected thus far, and inferred that the State was not. The defense

argued that appropriate arrangements were in place for Henry to be properly represented while Attorney Kulik proceeded as Second Chair counsel. James Herard desired to continue with the jurors selected thus far.

"Beyond the fact that '[i]t is settled law that trial begins when the selection of a jury to try the case commences, it is axiomatic that the selection of a jury in a criminal case is a critical stage of any trial." *Peri v. State*, 426 So.2d 1021, 1024 (Fla. 3d DCA 1983) (quoting *State v. Melendez*, 244 So.2d 137, 139 (Fla. 1971)).

The defense argued that even though the jury was not sworn, the Court committed reversible error in refusing to dismiss the case on Due Process grounds. (T 1561). The defense argued that the standard was good faith, not the highest standard, citing *Fassi v. Kentucky*, 591 So. 2d 977 (Fla. 5th DCA 1991). (T 1663).

The State argued in opposition. The Court stated to defense counsel:

> "Mr. Kulik, what you are asking me to do is put my mind in the mind of the Supreme Court, indicating but for the Court's striking the jury, they would have granted your relief.
>
> That's an absolute impossibility for this Court to do. If in fact Mr. Herard is convicted and if in fact the jury recommends death and if in fact the Court were to follow that recommendation in doing it, actually, you would get the opportunity or appellate counsel would get the opportunity to

find out exactly what was in the mind of the Supreme Court and how they would have acted.

I take it that would be a critical issue on appeal. I think it is one that might be written." (T 1668)

In *Goodman*, the Defendant, an African-American male, was on trial for battery of a law enforcement officer and other charges. The state attempted to exercise a peremptory challenge against an African-American juror, but the trial judge disallowed the challenge after a *Batson/Neil* hearing was held. After the jury was selected, but before they were sworn, the state "*nolle prossed*" the case. Only 30 minutes later, the state refiled the charges. The Defendant moved to dismiss, alleging that the state's decision to dismiss and refile the charges was for the purpose of avoiding the jury selected in the prior trial, in violation of defendant's due process rights and the prohibition against double jeopardy. The trial judge granted the motion on both grounds, and the State appealed.

The State Attorney in *Goodman* gave no particular reason for her decision to nolle pros immediately prior to the initial trial, either at that time or at the later hearing on the motion to dismiss. In fact, at the hearing on the motion to dismiss, the prosecutor simply stated that she did not believe there was enough evidence in the record for a finding of bad faith. *Id* at 941-942.

The *Goodman* Court concluded that:

> We disagree with the state that a finding of bad faith was indispensable. It is clear to us that the trial court found that the nol pros was done solely to avoid the jury just selected, and that the jury just selected included a member whom the state had sought to excuse peremptorily in violation of the rule against insidious racial discrimination in the exercise of peremptory challenges. We conclude that it is a denial of due process for the state to *nol pros* in order to avoid having a jury so constituted.

The Fourth District Court of Appeal affirmed the dismissal on due process grounds, but reversed as to the Defendant's double jeopardy argument since the jury had not been sworn.

Judge Schwartz concurred in the conclusion that no double jeopardy violation had occurred, but then stated:

> "I add the observation that this conclusion may not mean that the defendant is wholly without constitutional remedy. Almost without question, Koenig was deliberately deprived of a recognized, protectable, 'valued' right to be tried by a regularly constituted jury in whose selection he had participated and the composition of which he obviously approved. See *Crist [v. Bretz*], 437 U.S. 28, 37, 98 S. Ct. 2156, 2166, 57 L. Ed. 2d 24, (1978). . . . [c.o.] Particularly since, as is also self-evident, the reason that this occurred was based solely upon the perceived undesirability of the jury itself, thus implicating and contravening the very reason for the existence of the right, the trial court's action may have deprived the appellant of his generalized fifth and fourteenth amendment rights to due process.

Sub judice, the Court determined that there was no bad faith on behalf of the State. (T 1670-1672). The Court was, simply put, wrong. While there is no record of the evidence establishing the State's good cause for striking the jurors who had been selected, the defense considered the jurors favorable. James Herard's state and federal constitutional rights to Due Process of Law and fair adversarial proceedings were violated when the potential jurors were stricken. Reversal is warranted.

II. THE TRIAL COURT REVERSIBLY ERRED BY REFUSING TO SUPPRESS JAMES HERARD'S STATEMENTS PURSUANT TO THE 5th AND 14th AMENDMENTS TO THE UNITED STATES CONSTITUTION AND *MIRANDA v ARIZONA* AS THEY WERE NOT VOLUNTARY, WERE MADE AFTER BE REQUESTED COUNSEL, AND SUBSEQUENTLY AFTER HIS COUNSEL INVOKED HIS RIGHT TO COUNSEL AND TO REMAIN SILENT

Standard of Review:

"The State bears the burden of proving that the waiver of the *Miranda* rights was knowing, intelligent and voluntary." *Ramirez v. State*, 739 So. 2d 568, 575 (Fla. 1999). Likewise, the State has the burden to show, by a preponderance of the evidence, that Appellant's oral confession was freely and voluntarily made. See *Brewer v. State*, 386 So. 2d 232, 236 (Fla. 1980). [T]he ultimate issue of voluntariness is a legal

rather than factual question." *Ramirez*, 739 So. 2d at 575. Therefore, the appellate Court has *de novo* review of these legal issues. See *Brancaccio v. State,* 773 So. 2d 582, 583 (Fla. 4th DCA 2000).

In the federal context, a district court's findings of fact regarding a motion to suppress statements is to be respected unless clearly erroneous, but the application of law to those facts is reviewed *de novo*. *Jacobs v. Singletary*, 952 F.2d 1282, 1291 (11th Cir. 1992); *United States v. Nash*, 910 F.2d 749, 752 (11th Cir. 1990).

Argument:

The Fifth Amendment guarantees that "[n]o person . . . shall be compelled in any criminal case to be a witness against himself." U.S. Const. Amend. V. To protect that right, the Supreme Court held in *Miranda v. Arizona* that once a defendant "indicates in any manner, at any time prior to or during questioning, that he wishes to remain silent, the interrogation must cease" and that "any statement taken after the person invokes his privilege cannot be other than the product of compulsion, subtle or otherwise." 384 U.S. 436, 473-74, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

Two motions to suppress were filed by the defense. Defense counsel summarized the case surrounding the suppression issue, stating:

> "James was arrested in Lauderhill for a robbery. When he was arrested for this particular robbery, the jurisdictions basically put two and two together. When they see he's seen leaving a white Toyota Camry with a particular defect in the car, that being one of the handles wasn't working properly."

Below, James Herard sought suppression of statements he made to law enforcement officials. The trial court examined the initial interrogation at the Lauderhill Police Department on the night of December 2, 2008, and then two interrogations at the BSO Public Safety Bldg., with the last being at approximately 6:00 pm after James Herard's counsel had formally invoked his right to remain silent and notified the Court and State that James Herard was represented by counsel.

It is well settled that *Miranda* safeguards an individual's unfettered "right to choose between speech and silence. . .throughout the interrogation process." *Miranda v. Arizona*, 384 U.S. 436, 469, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966). *Miranda* makes clear that officials must "scrupulously honor" a suspect's right to end questioning: "[i]f the individual indicates in any manner, at any time prior to or during questioning, that he wishes to remain silent, the interrogation must cease." *Id.* at 473-74, 479.

The Supreme Court defined with greater clarity the scope of a suspect's right to end questioning in *Michigan v. Mosley*, 423 U.S. 96, 96 S. Ct. 321, 46 L. Ed. 2d 313 (1975). According to *Mosley*: "[t]hrough the exercise of his option to terminate questioning [the suspect] can control the time at which questioning occurs, the subjects discussed, and the duration of the interrogation [and] the admissibility of statements obtained after the person in custody has decided to remain silent depends under *Miranda* on whether his "right to cut off questioning" was "scrupulously honored." *Id.* at 103-04.

Miranda "warnings are required before any statement may be admitted into evidence at trial which was elicited from a person in custody through interrogation." *Endress v. Dugger*, 880 F.2d 1244, 1248 (11th Cir.1989), cert. denied, 495 U.S. 904, 110 S. Ct. 1923, 109 L. Ed. 2d 287 (1990). "Since the warnings are required only in the situation of a custodial interrogation, many courts have addressed the issues of when a person is in "custody' or has been "interrogated' for the purposes of *Miranda*." *Id.*

In *Michigan v. Mosley*, the Supreme Court addressed "under what circumstances, if any, a resumption of questioning" after a defendant has invoked his right to remain silent "is permissible." 423 U.S. 96, 101, 96 S. Ct. 321, 46 L. Ed. 2d 313 (1975). The Court rejected extreme rules in either

direction that would "permit the continuation of custodial interrogation after a momentary cessation" or impose "a blanket prohibition against the taking of voluntary statements or a permanent immunity from further interrogation," instead charting a middle ground: "the admissibility of statements obtained after the person in custody has decided to remain silent depends under Miranda on whether his 'right to cut off questioning' was 'scrupulously honored.'" *Id.* at 102-04. Applying that standard, the *Mosley* Court held that admitting the defendant's statements—obtained in a second interview conducted a few hours after the defendant had invoked his rights in a first interview about a different crime, by a different police officer, in a different location—did not violate *Miranda*. *Id.* at 104-05, 107.

Although *Mosley* provided "no clear guidance on the specific circumstances under which questioning may be resumed," the courts have identified four relevant factors: 1) whether "the initial interrogation ended immediately" upon invocation of the right to remain silent; 2) whether "a substantial amount of time elapsed" before questioning resumed; 3) whether the suspect "was again read his rights" before the second round of questioning; and 4) whether the second round of questioning was done "by

a different officer about an unrelated crime." *Gore v. Sec'y for Dep't of Corr.,* 492 F.3d 1273, 1296-97 (11th Cir. 2007). In Gore, the Court stated "We have not held that the absence of a single *Mosley* factor is dispositive," and have instead looked "to the circumstances as a whole." *Id.* at 1298-99. So, for example, a second interview may be permissible under *Mosley* even if it concerns the same crime as the first. See *United States v. Nash*, 910 F.2d 749, 752 (11th Cir. 1990); *United States v. Bosby*, 675 F.2d 1174, 1181-82 (11th Cir. 1982); see also *Gore*, 492 F.3d at 1298-99 (refusing, in habeas context, to say that state court's decision on this point was "objectively unreasonable"). No such analysis was applied by the Court in this case, and Herard maintains that his initial invocation of his right to counsel and formal invocation filed by counsel tainted all of the questioning thereafter.

James Herard was read his *Miranda* warnings prior to being interrogated in connection with the robbery of a dog. Early on, James Herard unequivocally invoked his right to counsel. Law enforcement officials re-engaged James Herard in conversation later, and justified the subsequent interrogation on expanded subjects as a re-initiation the previous discussions. Despite the trial court's conclusion to the contrary, it

was not "abundantly clear" that Defendant's statement to the Lauderhill detectives was knowingly, intelligently and voluntarily given. In short, once James Herard invoked his right to counsel all questioning should have ceased, thus making the initial statements made to Lauderhill detectives unconstitutionally and unlawfully obtained. (R 816-817).

When Lauderhill detectives finished questioning the Defendant and he was being transported to the Broward Sheriff's Office, he allegedly made a statement. This statement was never addressed by the Court in it's pre-trial Order yet the statement was introduced at trial over a standing defense objection. The Appellant maintains that this statement too should have been suppressed.

With regards to the statements made at the BSO Public Safety Bldg., James Herard asserted that they too were not voluntary and were made based upon promises of leniency and coercive tactics. In all, James Herard was in custody approximately 25 hours and despite the trial court's finding to the contrary, was not given sufficient bathroom breaks or other breaks between questioning.

Finally, James Herard had already invoked his right to counsel via a filing in the court record, yet Det. Visners took Herard's statement later the

same day on December 4, 2008, when he was prohibited from directly communicating with the represented Defendant.

The United States Supreme Court has determined that the right to have counsel present during an interrogation is indispensable to the protection of the Fifth Amendment Privilege against self-incrimination. *Miranda v. Arizona*, 384 U.S. 436 (1966) "The Fifth Amendment privilege is so fundamental to our system. . . and the expedient of giving an adequate warning . . . so simple [that] we will not pause to inquire in individual cases whether the defendant was aware of his rights without a warning being given." *Id.* at 468. Here, law enforcement violated James Herard's rights.

In *Roberts v. State* 874 So.2d 1225, 1227 (Fla. 4th DCA 2004), the court stated:

> In *Miranda,* the Supreme Court said that the right to have counsel present during an interrogation is indispensable to the protection of the Fifth Amendment privilege against self-incrimination. The Court described the right-to-counsel warning which must be given: [W]e hold that an individual held for interrogation must be **clearly informed that he has the right to consult with a lawyer and to have the lawyer with him during interrogation**.... As with the [other] warnings . . . this warning is an absolute prerequisite to interrogation.
>
> *Miranda*, 384 U.S. at 471–72, 86.

The court in *Roberts v. State* further stated:

> No amount of circumstantial evidence that the person may have been aware of this right will suffice to stand in its stead. Only through such a warning is there ascertainable assurance that the accused was aware of this right.

Roberts, 874 So.2d 1225, 1229

The State's entire case, as to all Counts, was based on James Herard's statements. The defense argued that the statements were all of the evidence that existed other than speculation that he was the tall, slim man with a shotgun in the underlying crimes. There was no physical evidence linking James Herard to the crimes. There was no DNA evidence to tie James Herard to the offenses. No fingerprints established James Herard's involvement in the crimes. All the State had was the coerced, involuntary, unlawfully obtained statement of James Herard. (T 3770).

When Herard was at the Lauderhill Police Department, he was interrogated by two detectives: Det. Erica Williams and Det. Walters. They placed James Herard on video. The defense argued at the hearing that Herard wasn't properly afforded his 5th and 6th Amendment rights when he made clear to the detectives he wanted to speak with an attorney.

The next morning on December 4th, James Herard appeared in court and his counsel formally invoked James Herard's right to counsel and right

to remain silent. Nevertheless, Detective Visners visited Mr. Herard in the Broward County Main Jail and interrogated him again.

Herard's Motions to Suppress incorporated all of the statements made to law enforcement. (R 1421-1423). The State introduced into evidence at the suppression hearing the disc of Mr. Herard's interrogation and the reading of the *Miranda* rights into evidence. (R 1423). The prosecutor advised that there was no need to publish the entire 12-hour video. *Id.*

BSO Officer Trevor Goodwin testified at the hearing on James Herard's Motion to Suppress that he had been employed 27 years at the Broward Sheriff's Office, and was a motorcycle officer at the time of the hearing. In 2008, he had been assigned to the robbery division as a detective. (R 1424-25). Det. Goodwin became involved in the investigation of Dunkin Donuts robberies which occurred in Broward County, FL.

According to Officer Goodwin, he first became involved in the investigation around Thanksgiving, 2008, when a Dunkin Donuts on Commercial and State Road 7 in Tamarac was robbed. (R 1425). Det. Goodwin first learned of Herard when Goodwin's sergeant received a call from Detective Hardy in Lauderhill to come to the Lauderhill Police Dept.

Detective Hardy was on the task force investigating the recent Dunkin Donuts robberies.

Goodwin spoke to Herard at the Lauderhill Police Department in an interrogation room. Officer Goodwin next had contact with James Herard when he went to transport the defendants to his office to interrogate them. The defendants were each being escorted from the Lauderhill interrogation room. While they were going down the stairs, Goodwin testified that Herard saw officers wearing BSO and Sunrise police department uniforms and Herard stated "Sunrise, what is Sunrise doing here? Oh, ya, Sunrise. Where is Delray?" (T 1430) The officer was permitted to testify over objection that the statement had meaning to him as there was a Dunkin Donuts robbery that occurred in Delray the night before the robbery in Tamarac. The robbery in Tamarac occurred on Thanksgiving Day and the one in Delray occurred the night before Herard's arrest.

James Herard was transported to the BSO Public Safety building where Detective Goodwin met him. (T 1432-33). It was determined that Herard would be allowed to eat before law enforcement interrogated him. The officer believed they stopped and picked up McDonalds. Herard's interrogation started 35-40 minutes later.

Goodwin testified that his interview with Herard at the BSO Public Safety Building was audio and videotaped. The audio and video recordings were admitted as State's Exhibit 1 and 2. Officer Goodwin identified the *Miranda* form which Herard signed. Goodwin testified that he went over the form line by line and had Herard initial that he understood. Goodwin testified that the entire process was recorded on video. (T 1434). The tape was not made a part of the record and the statement was not transcribed by the Court Reporter at the suppression hearing, but was at trial although virtually inaudible. Various portions of the tape were then played, with questions posed by the prosecutor to Officer Goodwin intermittently. At one point, Mr. Herard was depicted lying on the ground and appeared to be sleeping. (T 1436). Goodwin continued to speak to Mr. Herard for "quite some time." (T 1436).

Goodwin was questioned about a portion of the video where Herard asked to go to the bathroom. Herard repeatedly knocked on the locked door but no one answered. James Herard ended up having to urinate into a McDonald's cup. (T 1437). According to Goodwin, Delray officers were in the monitoring room watching Mr. Herard, but did not respond. When

Goodwin went to talk to Herard, one of the Delray officers told him to "be careful", advising Goodwin that Herard had urinated in a cup. (T 1438).

The defense argued Herard was not properly Mirandized by the police officers. The defense argued that initially Detectives Walters or Williams, or both, asked Herard if he agreed to speak to law enforcement. The defense position was that all questioning should have stopped at that juncture. The Court erred in determining that Herard reinitiated conversation by "asking how long do I have to wait here." The defense argued to the contrary.

The defense position was that Herard was not properly advised of all of this rights pursuant to the 5th Amendment, his statements were involuntary, and he was denied access to counsel. See *Minnick v. Mississippi*, 498 U.S. 146 US S.Ct., 111 S.Ct. 846 (1990) and *Arizona v. Robertson*, 486 US 675, 108 S.Ct. 2093 (1998). The Appellant maintained that the trial court's error in refusing to suppress the statement warrants reversal.

Here, the State failed to establish by a preponderance of the evidence that there was a knowing, intelligent and voluntary waiver of not only Herard's rights against self-incrimination, but as to the right to access

to counsel. All questions of the Defendant should have ceased once Herard stated he wanted to speak to a lawyer.

In this case, the police re-Mirandizing Herard later did not dissipate the taint since he was never afforded access to counsel in the interim. Therefore, his request for an attorney was never honored. Instead, the Lauderhill Police interrogated Herard the morning after the robbery arrest, and at that juncture, Herard made a request for counsel. The police twisted the issue to "do you want to talk to us or not?" That wasn't Herard's question. His question was "how long do I have to wait for a lawyer? I want a lawyer." (T 1494). The officer said do you want to talk to us or not. They never fully addressed Herard's 5th and 6th Amendment rights, they only addressed his 5th Amendment rights. The Court took the motion under advisement. (T 1501).

After reviewing a DVD of James Herard's interrogation, the Court stated "I'll admit 17 or 16 hours is a long one. But the reality, only 6 of those constituted his statement. And he got to sleep and eat all of the rest of the time. It wasn't that he was being deprived of anything." (T 2697).

The Appellant admits that under certain circumstances, the failure to suppress statements obtained in violation of *Miranda* can be harmless

error." *Owen v. Alabama*, 849 F.2d 536, 540 (11th Cir.1988); see also *Parker v. Singletary*, 974 F.2d 1562, 1574 (11th Cir. 1992). Here, the error was not harmless. "To qualify as harmless, an error must not contribute to the defendant's conviction." *Owen*, 849 F.2d at 540. "If, upon its reading of the trial record, the appellate court is firmly convinced that the evidence of guilt was so overwhelming that the trier of fact would have reached the same result without the tainted evidence, then there is insufficient prejudice to mandate the invalidation of the conviction." *Cape v. Francis*, 741 F.2d 1287, 1294-95 (11th Cir.1984), cert. denied, 474 U.S. 911, 106 S. Ct. 281, 88 L. Ed. 2d 245 (1985); see also *Owen*, 849 F.2d at 540.

Here, the error was far from harmless. James Herard's statements permeated and constituted the State's entire case. Without it, the scant circumstantial evidence does not support a conviction for any of the offenses or underlying charges. See, *Wong Sun v. United States*, 371 U.S. 471 (1963).

Based upon the totality of the circumstances, the Court reversibly erred in allowing James Herard's statements at trial. Reversal and remand for a new trial is warranted.

III. REVERSIBLE ERROR OCCURRED WHEN THE TRIAL COURT ALLOWED THE INTRODUCTION OF PHYSICAL EVIDENCE UNRELATED TO THE CHARGES

Standard of Review:

A trial judge's ruling on the admissibility of evidence will not be disturbed absent an abuse of discretion. See: *Fitzpatrick v State*, 900 So. 2d 495, 514 (Fla. 2005); *Alston v. State*, 723 So. 2d 148, 156 (Fla. 1998); see also *Kearse v. State*, 662 So. 2d 677, 684 (Fla. 1995); *Blanco v. State*, 452 So. 2d 520, 523 (Fla. 1984).

Argument:

The Prosecutor introduced into evidence several items which were unduly prejudicial to James Herard and lack probative value. See Section 90.403, Fla.Stat. For example, a journal was taken from a house where Jonathan Jackson, and the other individuals resided in the City of Lauderhill. The defense argued that James Herard did not live there and had no connection to the items. The defense contended that the "composition notebook was filled with that gang's Rules, Regulations, By-Laws, Constitution, even their Ten Commandments" (T 1688) were inadmissible at Herard's trial. James Herard sought suppression of the physical evidence seized from Jackson's house. This involved a BB gun

and a magazine clip for an AR-15. He argued that the evidence was unlawfully searched and seized in violation of his state and federal constitutional rights. The Appellant asserted that fundamental error occurred in the admission of the evidence seized pursuant to the Search Warrant at Jackson's home which lacked relevancy to his case.

The admission of evidence seized from Jackson's home which were unrelated to the charges in this Indictment "reach down into the validity of the trial itself to the extent that a verdict of guilty or jury recommendation of death could not have been obtained without the assistance of the alleged error," constitutes fundamental error requires. *Poole v. State,* 997 So. 2d 382, 390 (Fla. 2008).

James Herard maintains on appeal that the trial court reversibly erred in allowing items of physical evidence to be introduced in light of their lack of relevancy to the crimes charged. From the Journal, it appeared that Jackson was the "OG", or leader, of more than one gang and the items seized dealt with the other gang. No evidence tied James Herard to the other gang Jackson allegedly led. James Herard was only involved in the Bacc Street Crips. There was no evidence to the contrary. The evidence showed that Jackson was in charge of at least two other gangs; the

Westside Gang and the Gorilla Crips Gang. As such, Jackson had in the residence documents concerning other gangs than the Bacc Street Crips. Law enforcement seized those items pursuant to a Search Warrant, and introduced them at trial despite their lack of relevance and the extreme prejudice which resulted therefrom. See Section 90.403, Fla.Stat. Here, defense counsel objected to the admission of the evidence at trial. He later renewed all previous objections.

Based upon the 4th, 5th, 6th and 14th Amendments to the United States Constitution and applicable provisions of the Florida Constitution, the evidence from Jackson's residence was improperly searched, seized, and introduced at trial. Reversal and remand is warranted.

IV. THE TRIAL COURT REVERSIBLY ERRED BY REFUSING TO ALLOW JAMES HERARD'S EXPERT WITNESS TO TESTIFY CONCERNING THE REID TECHNIQUE INTERROGATIONS AND FALSE CONFESSIONS

Standard of Review:

In *Daubert*, the Court held that, when "faced with a proffer of expert scientific testimony, . . . the trial judge must determine . . . whether the expert is proposing to testify to (1) scientific knowledge that (2) will assist the trier of fact to understand or determine a fact in issue." *Id.* at 592, 113 S. Ct. at 2796. Daubert applies not only to testimony about scientific

concepts but also to testimony about the actual applications of those concepts. *Daubert v. Merrell Dow Pharm., Inc.,* 509 U.S. 579, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993).

On appeal, this Court reviews the admission of expert testimony under an abuse of discretion standard. *Simmons v. State*, 934 So.2d 1100, 1116 (Fla. 2007) and *Old Chief v. United States*, 519 U.S. 172, 174 (1997).

Argument:

James Herard maintains that the trial court reversibly erred by refusing to allow the defense expert witness to testify concerning the interrogations and resultant statements in this case. The expert was prepared to testify concerning "the Reid Technique[14]" of interrogation and to provide information not known to the typical lay person. A proffer was given and issue properly preserved. (T 2670-2686).

The defense argued that Section 90.702, Fla.Stat., was modified and that the *Daubert* standard had been adopted in federal and state courts. The defense position was the witness had technical or other specialized knowledge which would assist the trier of fact in understanding the evidence and determining a fact in issue. (T 2691-2692). The Court

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[14] As far back as 1966, in the seminal case of *Miranda v. Arizona*, the United States Supreme Court expressed wariness of the Reid Technique.

refused to allow the testimony. The Court cited *United States v. Michael Jaclis*, 784 F.Supp.2d 59 (D.Mass. 2011) in which the Court found that proffered expert lacked the experience to be qualified as an expert on false confessions. The Court determined that false confessions were not caused by the application of the Reid Technique and are the result of improper interrogation procedures where behavior that the courts have ruled to be objectionable, "such as threatening inevitable consequences, making a promise of leniency in return for the confession, denied a subject their rights, and conducting an excessively long interrogation." (T 2687-2703).

The defense renewed its request to allow Dr. DeClue to testify as to the narrow area in which the doctor had specialized knowledge which would assist the tryer of fact in understanding evidence in this case. (T 2687).

The State contended that applying *Daubert*, there was no science to the research Dr. DeClue referred to in his proffer. (T 2688). The State "urged" the Court to look at a case from Michigan, *People v. Kowalski*, 492 Mich. 106 (Mich. Sup.Ct. 2012). (T 2689). *Daubert v. Merrill Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S.Ct. 2786 (1993). The State argued testimony concerning the doctor's analysis of the Reid Technique

was a doctor's personal opinion based upon training and experience, which is what *Daubert* eliminated. The Prosecution argued that the evidence failed under *Daubert.*

The Court further cited *Perez v. BellSouth Tellecom, Inc.*, 138 So.3d 492 (Fla. 3rd DCA 2014), review denied 153 So.3d 908 (Fla. 2014), for the proposition that the subject of an expert's testimony must be scientific knowledge and that in order to qualify as scientific knowledge, so as to become admissible, the inference or excretion must be derived by a scientific method. The touchtone of scientific method is scientific testing. General acceptance in the scientific community alone is no longer sufficient under *Daubert*. (T 2698).

Further, the Court analyzed the testimony under Section 90.403, Fla.Stat. and found that "any, probative value is far outweighed by the unfair prejudice to the State's right to a fair trial, the great risk of misleading the jury and the jury may assign undue weight to such testimony. (T 2700).

The defense renewed James Herard's Motion to Suppress and added Dr. DeClue's testimony to it, arguing that James Herard's testimony was involuntary. (R 2702).

It is well settled that the trial judge is the "gatekeeper of the evidence" and has a fundamental duty that the proffered expert testimony was relevant and reliable. *Daubert*[15] 509 U.S. at 589. In *IN Re: Amendments to the Florida Evidence Code*, 278 So.3d 551 (Fla. 2019), this Court approved using the "*Daubert*" standard in the procedural evidence rules to qualify expert testimony and witnesses at trial. This Court should consider this case in accordance with the law in effect at the time of the Court's decision. *Hedvall v. State*, 2019 Fla.App. LEXIS 16751 (November 6, 2019), *Vitiello v. State*, 281 So.3d 554, 556, n. 4 (Fla. 5th DCA 2019).

James Herard maintains that the trial court's refusal to allow his expert witness, Dr. DeClue, to testify was reversible error.

V. JAMES HERARD WAS UNLAWFULLY AND IMPROPERLY SENTENCED TO DEATH BY A JUDGE BASED UPON AN 8-4 JURY RECOMMENDATION

Standard of Review:

The Court reviews whether an error is fundamental under a *de novo* standard of review. *State v. Smith*, 241 So. 3d 53, 55 (Fla. 2018).

Argument:

James Herard maintains that his state and federal constitutional rights were violated when he was sentenced to Death on Count I. James

[15] *Daubert v. Merrill Dow Pharms., Inc.*, 509 U.S. 579 (1993).

Herard was not the shooter who inflicted the murder. The jury recommended death by a vote of 8-4 (R 962-981). He was sentenced under an unconstitutional sentencing sentence. See *Hurst v. Florida*. His sentence violates the 5th, 6th and 14th Amendments to the United States Constitution and applicable portions of Florida law.

The Appellant also contends that the Florida death penalty in effect at the time was unconstitutional because it failed to adequately narrow the class of cases eligible for the death penalty.

A) James Herard was Sentenced Under an Unconstitutional Sentencing Scheme in Violation of the 5th, 6th, and 14th Amendments to the United States Constitution and Article 1, Section 22 of the Florida Constitution

In January 2016, the United States Supreme Court issued its decision in *Hurst v. Florida*, 136 S.Ct. 616 (2020), holding that Florida's former capital sentencing scheme violated the Sixth Amendment because it "required the judge to hold a separate hearing and determine whether sufficient aggravating circumstances existed to justify imposing the death penalty" even though "[t]he Sixth Amendment requires a jury, not a judge, to find each fact necessary to impose a sentence of death." *Hurst v. Florida*, 136 S. Ct. at 619.

In *Hurst*, this Court held that:

> Before the trial judge may consider imposing a sentence of death, the jury in a capital case must unanimously and expressly find all the aggravating factors that were proven beyond a reasonable doubt, unanimously find that the aggravating factors are sufficient to impose death, unanimously find that the aggravating factors outweigh the mitigating circumstances, and unanimously recommend a sentence of death. *Hurst,* 202 So. 3d at 57.

That sentencing scheme was in effect at the time of James Herard's prosecution, conviction and sentence.

In *Hurst,* the court stated:

> "We hold this sentencing scheme unconstitutional. The 6th Amendment requires a jury, not a judge, to find each fact necessary to impose a sentence of death. A jury's mere recommendation is not enough."

Florida's sentencing scheme, which required the judge alone to find the existence of an aggravated circumstance, is at this juncture, without doubt, unconstitutional. See *Hurst v. Florida* at 619; 624. In reaction to the *Hurst* decision, the Florida Legislature amended the death penalty statute. Further, since the judge's ruling in the instant case, this Court too has found that the Florida death penalty statute in effect was unconstitutional in *Perry v. State*, 210 So.3d 630 (2016).

> "In addressing the second certified question of whether the Act may be applied in pending prosecutions, we necessarily review

> the constitutionality of the Act in light of our opinion in *Hurst*. In that opinion, we held that as a result of the longstanding adherence to unanimity in criminal jury trials in Florida, the right to a jury trial set forth in Article 1, Section 22 of the Florida Constitution requires that in cases in which the penalty phase jury is not waived, the findings necessary to increase the penalty from a mandatory life sentence to death must be found beyond a reasonable doubt by a unanimous jury." *Hurst v. State*, 202 So.3d 40, 74 (2106).

Those findings specifically include unanimity as to all aggravating factors to be considered, unanimity that sufficient aggravating factors exist for the imposition of the death penalty, unanimity that the aggravating factors outweigh the mitigation circumstances, and unanimity in the final jury recommendation for death. (*Id.*)

Since the appellant herein was sentenced under an unconstitutional statute, this court should reverse and remand his death sentence and order a new penalty phase hearing.

B) *Poole*'s Decision to "Recede From" *Hurst* Claims Does Not Negate the Need for Resentencing Proceedings

In *State v. Poole*, 297 So. 3d 487 (Fla. 2020) and *Owen v. State*, __So.3d __, 2020 WL 3456746 (Fla. June 25, 2020), this Court "recede[d] from *Hurst v. State,* except to the extent that it held that a jury must unanimously find the existence of statutory aggravating circumstance beyond a reasonable doubt," *Poole*, 297 So. 3d at 491. If *Poole* sets forth

the law in Florida that this Court believes applies to James Herard's death sentence, the law of Florida and James Herard's death sentence are inconsistent with at least three provisions of the federal Constitution and its Florida counterparts in multiple respects.[16]

In the aftermath of *Hurst v. State*, this Court rejected that position. See *Franklin v. State*, 209 So. 3d 1241, 1248 (Fla. 2016) ("We also reject the State's contention that Franklin's prior convictions for other violent felonies insulate Franklin's death sentence from *Ring* and *Hurst v. Florida*."); *Jolmson v. State*, 205 So. 3d 1285, 1289 (Fla. 2016) ("We reject the State's contention that Johnson's contemporaneous convictions for other violent felonies insulate Johnson's death sentences from *Ring* and *Hurst v. Florida*. *Hurst*, 202 So. 3d at 53 n.7.").

This Court wrote in *Poole*:

> The jury in Poole's case unanimously found that, during the course of the first-degree murder of Noah Scott, Poole committed the crimes of attempted first-degree murder of White, sexual battery of White, armed burglary, and armed robbery. Under this Court's longstanding precedent

[16] Apart from the constitutional invalidity of the *Poole* framework as a general matter, which is discussed *infra*, the application of that framework specifically to *Hurst* – who appeal of a decision decided under prior law was pending in the Court when that law was unforeseeably upended to his disadvantage – would violate James Herard's federal due process rights as enunciated in *Bouie v. City of Columbia*, 378 U.S. 347, 353-354 (1964) as well as the *ex post facto* and Equal Protection principles canvassed *supra* at pp. 57-59. *Shuttlesworth v. City of Birmingham*, 382 U.S. 87, 90-92 (1965); *Cole v. Arkansas*, 333 U.S. 196 (1948).

> interpreting *Ring v. Arizona* and under a correct understanding of *Hurst v. Florida* this satisfied the requirement that a jury unanimously find a statutory aggravating circumstance beyond a reasonable doubt. See *Poole II*, 151 So. 3d at 419. In light of our decision to recede from *Hurst v. State* except to the extent it requires a jury unanimously to find the existence of a statutory aggravating circumstance, we reverse the portion of the trial court's order vacating Poole's death sentence.
>
> *Poole,* 297 So. 3d at 508.

Thus, silently abrogating the post-*Hurst* cases, this Court appears to hold that the constitutional requirements for the imposition of a capital sentence were satisfied when the guilt-phase jury found James Herard guilty of crimes that were also aggravating circumstances. At that point the jury had, albeit unknowingly, created a situation in which "death is presumed to be the proper sentence," and the Constitution did not require the judge to receive any further input from the jury before imposing that sentence. *Poole*, 297 So. 3d at 502.

Upholding James Herard's death sentence on this basis would be unconstitutional.

C) Applying the Reasoning of *Poole* to James Herard's Case Would Violate the Eighth Amendment

The Eighth Amendment requires the State to ensure that the death penalty is reliably inflicted only on the most morally culpable subset of

those criminals who commit the most serious homicides (see, e.g., *Roper v. Simmons*. 543 U.S. 551, 568 (2005); *Godfrey v. Georgia*, 446 U.S. 420, 428 (1980)).

The Supreme Court has consistently recognized that the death penalty is "qualitatively different" from all other punishments, and therefore "demands extraordinary procedural protection against error." The Court has repeatedly described two aspects of capital punishment that make it "different in kind" from any form of imprisonment, including life imprisonment: first, the "finality" of the punishment makes any error "irrevocable or irreversible;" and second, the death penalty is different in its "severity or enormity." See, e.g., *Atkins v. Virginia*, 536 U.S. 304 (2002), Scalia, dissenting.

The essentially non-existent sentencing role that *Poole* allocates to the jury is not only at odds with decades of binding precedent, but also disregards centuries of common law history, contemporary consensus in the States, and "the unique nature of the death penalty and the heightened reliability demanded by the Eighth Amendment in the determination whether the death penalty is appropriate in a particular case." *Sumner v. Shuman*, 483 U.S. 66, 72 (1987). Only a unanimous jury

verdict can supply the requisite assurance of reliability. See *Brief of Law Professors and Social Scientists as Amici Curiae in Support of Petitioner in Ramos v. Louisiana*, 140 S. Ct. 1390 (2020) (No. 18-5924), 2019 WL 2549461.

The system sanctioned by *Poole* is irreconcilably inconsistent with the Eighth Amendment, and therefore applying the Florida death penalty statute as interpreted by *Poole* to James Herard violates the United States Constitution.

D) The Eighth Amendment Requires that the Ultimate Decision to Impose a Sentence of Death Rather Than Life Must be Made by a Unanimous Jury

The Appellant contends that *Poole* is irreconcilable with the Eighth Amendment's requirement that the ultimate decision to impose a sentence of death rather than life must be made by a unanimous jury. Contrary to the position of the *Poole* majority, unanimous-jury sentencing in capital cases is now a requirement of the Eighth Amendment to the federal Constitution. As the Court is aware, see *Poole*, 297 So. 3d at 513 (Labarga, J., dissenting), only Alabama and now, again, Florida, hold the contrary position, which James Herard asserts is inconsistent with both contemporary standards of decency and the overwhelming consensus of

American jurisdictions. *Poole* is at odds with the judgment of the Florida Legislature rendered in 2017, and still firmly in place, that a death sentence without unanimous jury approval cannot be applied. As this Court concluded four years ago, the requirement of jury unanimity reflects the vital role of the jury as the conscience of the community. It is deeply rooted in common law, is required in capital cases by the Eighth Amendment, and made applicable to the states pursuant to the Fourteenth Amendment.

Capital sentencing procedures that have been repudiated as a result of the "evolving standards of decency that mark the progress of a maturing society," *Atkins v. Virginia*, 536 U.S. 304, 312 (2002), violate the Eighth Amendment, see *Woodson v. North Carolina*, 428 U.S. 280 (1976); *Roberts v. Louisiana*, 428 U.S. 325,332-33 (1976), as do capital sentencing procedures which are out of touch with the overwhelming consensus of contemporary practice in jurisdictions nationwide. See, e.g., *Beck v. Alabama,* 447 U.S. 625, 635 (1980).

These considerations demonstrate that the Eighth Amendment demands a unanimous jury determination in favor of a death sentence before a state may impose that sentence. To give James Herard anything less would violate his state and federal constitutional rights based upon the

split recommendation by the jury as to punishment.

E) Even if the Eighth Amendment Does Not Require Jury Unanimity in Death Sentencing, it at Least Requires a Jury to Make the Ultimate Decision to Impose a Death Sentence

James Herard maintains that the Eighth Amendment requires both jury sentencing and jury unanimity in capital cases. However, this Court need not accept that jury unanimity is a federal constitutional requirement in order to conclude that the application of *Poole* in this case would violate James Herard's Eighth Amendment rights. It is enough for the Court to agree that the Eighth Amendment at least requires, as Justices Stevens, Breyer, and others have explained, that a jury make the ultimate decision to impose a death sentence, whether unanimously or not. See, e.g., *Harris v. Alabama*, 513 U.S. 504, 515-26 (1995) (Stevens, J., dissenting); *Ring*, 536 U.S. at 615-18 (Breyer, J., concurring). Such a requirement reflects the vital role of the jury in reflecting a "reasoned moral response." See, e.g., *Penry v. Johnson*, 532 U.S. 782, 797 (2001) to the balance of aggravation and mitigation. The reason is straightforward. See, e.g., *Reynolds v. Florida*, 139 S. Ct. 27, 28-29 (2018) (Breyer, J., statement respecting the denial of certiorari). As more and more states abandon the death penalty altogether, the split in national opinion on whether the death penalty itself is

"cruel and unusual" has deepened. Even in retentionist jurisdictions, increasing numbers of people believe that the death penalty continues to be imposed based on convictions that may tum out to be unreliable and that it is often applied in a geographically, racially, and socio-economically biased manner.

In this situation, juries, rather than "a single government official," i.e., a Judge, *Ring* 536 U.S. at 619 (Breyer, J., concurring), are the only mechanism that can provide a death sentence comporting with the Eighth Amendment: an expression of the "conscience of the community on the ultimate question of life or death," *Witherspoon v. Illinois*, 391 U.S. 510, 519 (1968), and whether the particular crime at hand is "so grievous an affront to humanity that the only adequate response may be the penalty of death," *Gregg*, 428 U.S. at 184 (opinion of Stewart, Powell, and Stevens, JJ.). Even if this Court does not accept that the Eighth Amendment requires jurors to be unanimous in making a death determination, it should at least decide that the Eighth Amendment requires a jury to make the ultimate decision. For that reason, *Poole* cannot be constitutionally applied to James Herard and a Life sentence must be imposed or this matter remanded for re-sentencing.

F) The Eighth Amendment Requires that a Jury have Meaningful Input into a Capital Sentencing Decision

Poole cannot be squared with the Eighth Amendment, and should not be applied to James Herard, because even if jury unanimity in capital sentencing is not a federal constitutional requirement, and even if a jury need not make the ultimate decision to impose the death penalty, the Eighth Amendment certainly does require that a jury have some meaningful input into a capital sentencing decision. Meaningful jury input in death sentencing is required to ensure that each individual decision to impose capital punishment comports with prevailing moral standards. *Woodson*, 428 U.S. at 302-05. Applying *Poole* to James Herard would deny him of that federal constitutional protection.

The core tenant of present-day Eighth Amendment capital-trial jurisprudence is that "the sentence imposed at the penalty stage should reflect a reasonable moral response to the defendant's background, character, and crime" (*Abdul-Kabir v. Quarterman*, 550 U.S. 233, 252 (2007), on the basis that "justice ... requires ... that there be taken into account the circumstances of the offense together with the character and propensities of the offender." *Eddings v. Oklahoma*, 455 U.S. 104, 112 (1982). Whether the circumstances of the crime as well as the defendant's

character and history render him "death-worthy" are reasoned moral decisions that must be made by a jury which conducts sober deliberations on those questions, and feels the weight of their importance. *Cf. Caldwell v. Mississippi*, 472 U.S. 320, 328-228 (1985). That did not happen in this case.

In this case, the importance of the jury's advisory verdict was repeatedly minimized by the trial judge, the prosecutors and defense counsel. The Eighth Amendment required, at a minimum, that the jury be an important factor in the sentencing phase of a capital case, not simply a spectator offering comments. See, *Reynolds v. Florida*, 139 S.C.t. 27, 27-29 (2018) (Breyer, J., statement respecting denial of certiorari); *Id.* at 32-36 (Sotomayor, J., dissenting from denial of certiorari); *Kaczmar v. Florida*, 138 S.Ct. 1973, 1973-1974 (2018) (Sotomayor, J., dissenting from the denial of certiorari); *Guardado v. Jones*, 138 S.Ct. 1131, 1132 (2018) (Sotomayor, J., dissenting from denial of certiorari); *Middleton v. Florida*, 138 S.Ct. 829, 830 (2018) (Ginsburg, Breyer, Sotomayor, JJ., dissenting from denial of certiorari); *Truehill v. Florida*, 138 S.Ct. 3 (2017) (Ginsburg, Breyer, Sotomayor, JJ., dissenting from denial of certiorari).

G) The Eighth Amendment Forbids a System in Which by Voting for Guilt a Jury is Unconsciously Voting for a Death Sentence

Florida's system in which by voting for guilt a jury is unconsciously voting for a death sentence-which may be imposed without the jury ever affirmatively determining that death rather than life is the appropriate punishment-is unconstitutional. See *Woodson*, 428 U.S. at 293; *Jackson v. Dugger*, 857 F.2d 1469, 1473-74 (11th Cir. 1988) (vacating death sentence because Florida presumption, relied on by *Poole*, 297 So. 3d at 502, that death is appropriate once the existence of an aggravating circumstance is established, "vitiates the individualized sentencing determination required by the Eighth Amendment"). See also *Lockett v. Ohio*, 438 U.S. 586 (1978); *cf. Poole*, 297 So. 3d at 503 (Jury's role following guilt phase findings limited to recommending mercy if warranted). The Appellant contends that the 8th Amendment forbids imposition of a death sentence based on the vote of a guilt-phase jury that was unaware it was effectively deciding whether a death sentence would be imposed.

James Herard's jurors were led to believe that their only task was to decide guilt or innocence, making a sentencing recommendation, and that the final sentencing decision rested squarely with the judge. *Poole* abruptly

converted those jurors' guilt-phase verdict into a death warrant in violation of the 8th Amendment.

H) Applying the Reasoning of *Poole* to James Herard's Case Would Violate the Sixth Amendment

The Appellant maintains that the regime sanctioned by *Poole* diminishes the jury's factfinding role below the Sixth Amendment floor established long ago. Because a jury verdict at trial will be carried during all subsequent stages of the proceedings and review, Florida's capital punishment system that seeks to make death flow from the fact of conviction of the crimes on trial, while insulating jurors from consideration of that prospect, violates the Sixth Amendment. *Adams v. Texas*, 448 U.S. 38, 50 (1980).

One of the aggravating factors found by the Court at bar is the statutory aggravating factor delineated in Fla. Stat. Ann. § 921.141(6)(b) (2020) is that the defendant was "previously convicted of ... a felony involving the use or threat of violence to the person." On its face, this factor is void for vagueness, see,' *Johnson v. United States*, 576 U.S. 591, 595-97 (2015), and Florida death sentences cannot constitutionally be based upon it.

Even if the statute were not invalid on its face, reading it as Poole

does makes it involved as applied because *Poole*'s re-writing of the statute reduces the jury's role below the floor laid down by the Sixth Amendment in *Hurst v. Florida*[17].

This Court has repeatedly recognized that the contours of the statutory aggravating factor are fact-dependent, requiring consideration of

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[17] Any reliance on *Almendarez-Torres v. United States*, 523 U.S. 224 (1998) to deny James Herard's *Hurst*-based claims would be a stark violation of the Sixth Amendment. As *Apprendi* itself recognized, "it is arguable that *Almendarez-Torres v. United States* [a decision primarily concerned with federal statutory construction -] was incorrectly decided" insofar as it implied that a prior conviction might be an exception to the "general rule" that the Sixth Amendment (as incorporated into the Fourteenth) requires that "any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." *Apprendi,* 530 U.S. at 490. Only a single paragraph in *Almendarez-Torres* speaks to the Sixth Amendment caselaw; that paragraph involves nothing more than an analogy (*see* 523 U.S. at 547, observing that *Almendarez-Torres's* argument that a sentence-enhancing finding "would trigger a constitutional 'elements' requirement . . . would seem anomalous in light of existing case law that permits a judge, rather than a jury, to determine the existence of factors that can make a defendant eligible for the death penalty . . . .")and the analogy is to three Sixth Amendment cases that have since been overruled: *Walton v. Atizona*, 497 U.S. 639 (1990); *Hildwin v. Florida,* 490 U.S. 638 (1989) (*per curiam*); and *Spaziano v. Florida*, 468 U.S. 447 (1984). None of these cases survive *Ring* and *Hurst*. Unsurprisingly, then, a majority of United States Supreme Court Justices have subsequently concluded that *Almendarez-Torres* was indeed wrongly decided. See *Shepard v. United States*, 544 U.S. 13, 27-28 (2005) (Thomas, J., concurring in part and concurring in the judgment) ("*Almendarez- Torres* ... has been eroded by this Court's subsequent Sixth Amendment jurisptudence, and a majority of the Court now recognizes that *Almendarez- Tones* was wrongly decided. See 523 U.S., at 248-249 .. (Scalia, J., joined by Stevens, Souter, and Ginsburg, JJ., dissenting); *Apprendi, supra*, at 520-521. . . (Thomas, J., concurring)."). See also *Mathis v. United States*, 136 S. Ct. 2243, 2259 (2016) (Thomas, J., concurring) (The "Sixth Amendment problem persists regardless of whether 'a court is determining whether a prior conviction was entered, or attempting to discern what facts were necessary to a prior conviction. '").

more than just the legal elements of the crime.

In *Bevel v. State*, 983 So.2d 505 (Fla. 2008), this Court stated the established tule that "whether a crime constitutes a prior violent felony is determined by the surrounding facts and circumstances of the prior crime." *Id*. at 518 (citing *Rose v. State*, 787 So. 2d 786, 800 (Fla. 2001)).

Here, the violation of *Hurst v. Florida* is manifest. See *Mathis v. United States*, 136 S. Ct. 2243, 2252 (2016). Re-sentencing is required.

l) The Penalty Phase Jury Instruction was Unconstitutional

James Herard contends that the trial court fundamentally erred by failing to instruct the jury that it must determine beyond a reasonable doubt whatever the aggravating factors were sufficient to justify the death penalty and whether those factors outweighed the mitigating circumstances. The Appellant understands that this Court has repeatedly held that "these determinations are not subject to the beyond a reasonable doubt standard of proof." See, e.g., *Allen v. State*, SC 19-1313 (Fla. June 3, 2021); *Newberry v. State*, 288 So.3d 1040, 1047 (Fla. 2019) (citing *Rogers v. State* 285 So.3d 872, 878-879 (Fla. 2019)); see also *Rogers*, 285 So.3d at 886 (holding that "the sufficiency and weight of the aggravating factors and

the final recommendation of death" are not elements and "are not subject to the beyond a reasonable doubt standard of proof").

Here, the Penalty Phase jury instruction was clearly erroneous. *Poole*, 297 So.3d at 507. James Herard urges this Court to reconsider precedent on this issue and reduce his sentence to Life imprisonment, or, alternatively, remand for re-sentencing.

J) The Trial Judge Failed to Narrow the Class of Cases Eligible for Sentencing Under the Death Penalty

A capital punishment scheme must genuinely narrow the category of cases subject to the death penalty. *Furman v. Georgia*, 408 US 236 (1972); *Zant v. Stephens*, 462 US 862 (1983). The Florida death penalty scheme, even post *Hurst & Poole*, fails to comply with this constitutional requirement. Every conceivable fact and situation which could support a charge of 1st degree murder includes at least one of Florida's aggravating factors. The Legislature could have simply combined the 16 aggravating factors enumerated in Section 921.141, Fla.Stat. into one aggravating factor which could be succinctly stated as follows:

> "Any person convicted of 1st degree murder in Florida is eligible for the death penalty unless the jury finds there is sufficient mitigation to justify the imposition of a life sentence."

The sixteen (16) aggravating circumstances listed in the statute must be construed together and, combined and, when combined, failed to narrow the class of cases of 1st degree murder that are eligible for the death penalty. Thus, James Herard urges this court to declare Florida Statute 921.141 unconstitutional as applied to James Herard because it violates the 5th, 6th, 8th, and 14th Amendments of the United States Constitution, and applicable provisions of the Florida Constitution, by failing to sufficiently narrow the class of cases that are eligible of the death penalty.

CONCLUSION

Death is indeed different. *Miller v. Alabama,* 567 U.S. 460, 132 S.Ct. 2455 (2012). It is unwarranted in this case. The jury recommended imposition of the death penalty by a vote of 8-4, and this case is in the "pipeline" of cases wherein, at a minimum, re-sentencing is required.

Based upon the foregoing cases, authorities, policies and arguments, the Appellant, James Herard, respectfully requests this Honorable Court vacate the sentence of death and remand with directions that the trial court dismiss the charges or order a new trial as to Issue I, order a new trial as to Issues II and III, and vacate the sentence of death and remand with

directions that the Appellant receive a Life sentence or re-sentencing as to Issue IV.

CERTIFICATE OF COMPLIANCE WITH RULE 9.045, FLA. R. APP. P. AND RULES 2.250 AND 2.50(a), FLORIDA RULES OF JUDICIAL ADMINISTRATION

Pursuant to Rule 9.045, Fla.R.App.P. and Rules 2.520 and 2.520(a), Florida Rules of Judicial Administration, the Appellant certifies that this document is typed in 14 point, Arial.

This document complies with the type-volume limit of Rule 9.045, Fla.R.App.P. because, excluding the parts of the document exempted by Rule 9.045, Fla.R.App.P. this document contains 23,499 words from the Statement of the Case to Conclusion.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on **June 10, 2021**, I electronically filed the foregoing with the Clerk of the Court using the eDCA system and forwarded an electronic copy via email to Office of the Attorney General (CrimAppWpb@myfloridalegal.com).

Respectfully submitted,

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