Filing # 145739128 E-Filed 03/15/2022 01:42:17 PM

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.
_____/

REPLY 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

LAW OFFICES OF RICHARD ROSENBAUM
Richard L. Rosenbaum, Esq.
Fla. Bar No: 394688
315 SE 7th Street, Suite 300
Fort Lauderdale, FL 33301
Telephone (954) 522-7007
Facsimile (954) 522-7003
Primary Email: Richard@RLRosenbaum.com
Secondary Email: Pleadings@RLRosenbaum.com

RECEIVED, 03/15/2022 01:43:39 PM, Clerk, Supreme Court

TABLE OF CONTENTS

	Page No.
Table of Contents	i-iii
Table of Citations and Authorities	iv-vii
Preliminary Statement	1-2
Summary of Argument	2-8
Arguments:	
I. THE TRIAL COURT REVERSIBLY ERRED BY DENYING JAMES HERARD'S MOTION TO DISMISS ON DUE PROCESS GROUNDS AFTER A "DEFENSE FAVORABLE" POTENTIAL JURY PANEL WAS STRICKEN WITHOUT SUFFICIENT CAUSE	8-11
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 JAMES HERARD'S RIGHTS	12-28

TABLE OF CONTENTS (cont'd)

		Page No.
III.	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 JAMES HERARD'S RIGHTS	28-30
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	31-36
V.	JAMES HERARD WAS UNLAWFULLY AND IMPROPERLY SENTENCED TO DEATH BY A JUDGE BASED UPON AN 8-4 JURY RECOMMENDATION	36-47
A)	The Florida Death Sentencing Scheme Applied was Unconstitutional	37-38
B)	The Death Penalty is Barred by the 6th, 8th and 14th Amendments to the United States Constitution	38-41
C)	*Poole*'s Decision to "Recede From" *Hurst* Claims Does Not Negate the Need for Resentencing Proceedings	41-42
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	42-43

TABLE OF CONTENTS (cont'd)

		Page No.
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	43-44
F)	The Penalty Phase Jury Instruction was Unconstitutional	44-45
G)	The Trial Judge Failed to Narrow the Class of Cases Eligible for Sentencing Under the Death Penalty	45-47
Conclusion		48
Certificate of Type, Size, and Font		48-49
Certificate of Service		49

TABLE OF CITATIONS AND AUTHORITIES

Page

Cases

Allen v. State, SC 19-1313 (Fla. June 3, 2021) 45

Caso v. State, 524 So. 2d 422 (Fla. 1988) 26

Caylor v. State, 78 So.3d 482 (Fla. 2011) 48

Colorado v. Connelly, 479 U.S. 157 (1986) 17

Crist v. Bretz, 437 U.S. 28, 98 S. Ct. 2156, 57 L. Ed. 2d 24, (1978) 11

Daubert v. Dow Pharmaceuticals, 509 U.S. 579, 113 S.Ct. 2789 (1993) 7, 35, 36

Deviney v. State, 112 So. 3d 57 (Fla. 2013) 27

Duest v. Dugger, 555 So. 2d 849 (Fla. 1990) 32

Fassi v. State, 591 So. 2d 977 (Fla. 5th DCA 1991) 10

Godfrey v. Georgia, 446 U.S. 420 (1980) 42

Harris v. Alabama, 513 U.S. 504 (1995) 44

Hildwin v. Florida, 490 U.S. 638 (1989) 38

Hurst v. Florida, 136 S.Ct. 616 (2016) ..... passim

Johnson v. United States, 576 U.S. 591 (2015) 44

Kissimmee Util. Auth. v. Better Plastics, Inc, 526 So. 2d 4 (Fla. 1988) 33

Major League Baseball v. Morsani, 790 So. 2d 1071 (Fla. 2001) 33

Michigan v. Mosely, 324 96, 104, S.Ct. 321 (1975) 14

Newberry v. State, 288 So.3d 1040 (Fla. 2019) 45

TABLE OF CITATIONS AND AUTHORITIES (cont'd)

Page

North Carolina v. Butler, 441 U.S. 369, 99 S.Ct. 1755 (1979) 14

O'Connor v. State, 835 So.2d 1226 (Fla. 4th DCA 2003) 31

Oregon v. Bradshaw, 462 U.S. 1039, 103 S. Ct. 2830, 77 L. Ed. 2d 405 (1983) 22

Parker v Dugger, 660 So. 2d 1388 (Fla 1990) 33

Penna v. State, 2021 Fla.App.LEXIS 1564 (Fla. 4th DCA December 22, 2021) [4D20-345] 19, 20, 21

Penry v. Johnson, 532 U.S. 782 (2001) 44

People v. Anderson, 42 NY 2nd 35 (1977) 24

People v. Ross, 67 Cal. 2d 64, 60 Cal. Rptr. 254, 429 P.2d 606 (Cal. 1967) 28

Peri v. State, 426 So.2d 1021 (Fla. 3d DCA 1983) 10

Perry v. State, 210 So.3d 630 (Fla. 2016) 41

Proffitt v. Florida, 428 U.S. 242 (1976) 38

Quarles v. State, 290 So. 3d 505 (Fla. 4th DCA 2020) 20, 22

Rogers v. State 285 So.3d 872 (Fla. 2019) 45

Roper v. Simmons. 543 U.S. 551 (2005) 42

Rose v. State, 985 So.2d 500 (Fla. 2008) 29

Schneckloth v. Bustamonte, 412 U.S. 218, 93 S.Ct. 2041 (1973) 24

Shelly v. State, 262 So.3d 1 (Fla. 2008) ..... passim

Sheppard v. State, 2022 Fla. LEXIS 426 (Fla. March 10, 2022) 34

Spaziano v. Florida, 468 U.S. 447 (1984) 38

State v. DiGuilio, 491 So. 2d 1129 (Fla. 1986) 21, 27, 28

TABLE OF CITATIONS AND AUTHORITIES (cont'd)

Page

State v. Frierson, 926 So. 2d 1139 (Fla. 2006) 27

State v. Goodman, 696 So.2d 940 (Fla. 4th DCA 1997) 10, 11

State v. Melendez, 244 So.2d 137 (Fla. 1971) 10

State v. Poole, 297 So. 3d 487 (Fla. 2020) ..... passim

Stephens v. State, 787 So.2d 747 (Fla. 2001) 49

Sumner v. Shuman, 483 U.S. 66 (1987) 43

Webb v. State, 757 So. 2d 608 (Fla 5th DCA 2000) 33

Welch v. State, 992 So.2d 206 (Fla. 2008) 20, 22

Williams v. State, 967 So.2d 735 (Fla. 2007) 33, 34

Witherspoon v. Illinois, 391 U.S. 510 (1968) 44

Wong Sun v. United States, 371 U.S. 471, 83 S. Ct. 407, 9 L. Ed. 2d 441 (1963) 27

Zant v. Stephens, 462 US 862 (1983) 46

Other Authorities

5th Amendment, United States Constitution ..... passim

6th Amendment, United States Constitution ..... passim

8th Amendment, United States Constitution ..... passim

14th Amendment, United States Constitution ..... passim

Article I, Section 22, Florida Constitution 7,41

Rule 9.210(a)(2), Fla.R.App.P 49

Section 90.702, Fla.Stat 7,35

Section 921.141, Fla.Stat 39,47,48

TABLE OF CITATIONS AND AUTHORITIES (cont'd)

Page

Section 921.141(5)(n), Fla.Stat.....47

Section 90.403, Fla.Stat.....29,31,26

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, and references to the Amended Initial Brief shall be indicated by an "IB" followed by the appropriate page number (IB ___).

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. All references to the Amended Answer Brief of Appellee, filed by the State of Florida, shall be indicated to as "AB" followed by the appropriate page number (AB).

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).

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

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#___)

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

SUMMARY OF THE ARGUMENT

I. The trial court reversibly erred by denying the Defendant's Motion to Dismiss after the jury panel was stricken in bad faith and 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, at the State's request, the Court ordered the voir dire stricken after the State and defense had winnowed down the jury pool, and the defense was extremely pleased with the jurors who had been selected, and the State was

presumably 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 in the midst of jury selection. Although the Death Warrant had been signed in *State v. Robert Henry*, a separate experienced Capital Counsel was involved in Henry's case, so no impediment existed to Attorney Kulik finishing jury selection and trial as Second Chair in the *Herard* case. Over defense objection, the jury panel was stricken. The Appellant maintains the State exercised bad faith in striking a 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 the 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 Herard. From the Record, it is impossible for this Court to

determine which portions of the DVD the witnesses or counsel were referring to in front of the jury while publishing the statements to the jury.

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. Law enforcement "implied" that Herard still had his *Miranda* protections rather than explicitly telling him so.

Next, law enforcement claimed Herard made an incriminatory statement concerning the presence of officers from jurisdictions in which the crimes were committed while he was being transported out of the Lauderhill Police Department. The State asserts that although the trial court never ruled on this aspect of the Motion to Suppress, the statement was admissible nonetheless.

When the Lauderhill detectives finished questioning the Defendant, he was transported to the Broward Sheriff's Office via a Sunrise Police Department patrol car, in custody 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 testified he read and re-read the Defendant his *Miranda* warnings, and James Herard agreed

to speak. 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 and tell the truth.

Subsequently, the officers did not answer the door of the interrogation room when James Herard knocked on two separate occasions; James Herard was forced to urinate in a McDonald's cup when he was not let out of the interrogation room to go to the bathroom in between interrogations. Herard claimed he was sleep deprived and the officers kept waking him seeking a confession to the crimes. Finally, after defense counsel invoked James Herard's rights to counsel and to remain silent at James Herard's Initial Appearance and filed a Notice of the Invocation with the Court, Herard was again interviewed and another incriminatory 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.

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" and another gang which were unrelated to the Bacc Street Crips, which the State claimed James Herard was a member of. It also included a BB gun and firearms not related to any charges in the Indictment. Because the evidence seized lacked probative value and any perceived 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 prohibiting allow James Herard from introducing expert witness testimony as to police interrogations and false confessions. This included testimony concerning the Reid Technique and other 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. He has a multitude of other accomplishments and written a book on false confessions. The evidence should have been allowed, in whole or in part, under Section 90.702, Fla.Stat. and *Daubert v. Dow*

Pharmaceuticals, 509 U.S. 579, 113 S.Ct. 2789 (1993). The Court reversibly erred in failing to allow the defense evidence, *in* toto, 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, 8th 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.

The Court's decision in *Poole* to "recede" from 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 is violative of the 5th, 6th and 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. Here, the vote was not unanimous for death – **the jury recommended death 8 votes to 4**. 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. That did not occur in Herard's case.

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 Florida and United States Constitutions. 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 JAMES HERARD'S MOTION TO DISMISS ON DUE PROCESS GROUNDS AFTER A "DEFENSE FAVORABLE" POTENTIAL JURY PANEL WAS STRICKEN WITHOUT SUFFICIENT CAUSE

Each party had winnowed the pool. The defense felt the jurors selected thus far were "defense favorable." (R 916). The State's actions thereafter in seeking and obtaining discharge of the panel violated Herard's rights to Due Process of law, fair adversarial proceedings and to a venire already screened. Under what in retrospect appears to have been a ruse by the State, the purported defense favorable jurors were discharged at the State's request. The defense objected to the discharge of the prospective panel, noting that Mr. Henry was also represented by other appointed counsel for purposes of contesting the Warrant, and that Attorney Kulik should have continued with finalizing Herard's jury. Nevertheless, the Court halted jury selection. At that

point, the defense "considered themselves in an advantageous position in terms of obtaining a favorable jury." (R 916).

The State acknowledges that "Kulik wished to continue with the [Herard] trial." (AB 16). However, the State omits the most important fact: Herard desired to continue with his present counsel and it was his right which was being violated, not counsel's.

The State maintains that Herard's "baseless assumptions" form the crux of his arguments as to this issue. First, the State claims it did not act in bad faith. Second, the State asserts no Due Process violation occurred under state or federal law. (AB 20). The State is incorrect in this regard. (AB 18).

Attorney Smith had already been appointed solely to 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 would immediately take over sole 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 and prosecutors from the same State Attorney's Office urged the Court to order Kulik to remain on the *Henry* case without a meaningful hearing. The venire

selected was stricken by the Court despite the issuance of the Order to Show Cause requiring the State to respond to the Florida Supreme Court. (R 916).

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)). In the midst of jury selection, 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, citing *Fassi v. State*, 591 So. 2d 977 (Fla. 5th DCA 1991). (T 1663).

The Appellant cited *State v. Goodman*, 696 So.2d 940 (Fla. 4th DCA 1997) in support of his argument that a Due Process violation occurred.

The *Goodman* Court held:

> 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. *Id.* at 942

In *Goodman,* 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 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.

Here, the State argues that it's insistence on Second Chair counsel remaining on the *Henry* case and starting Herard's jury selection process "from scratch" was not a Due Process violation.

Sub judice, the Court determined that there was no bad faith on behalf of the State without conducting an evidentiary hearing. At a minimum, a hearing was required to determine if the State acted in bad faith. (T 1670-1672). James Herard maintains his state and federal constitutional rights to Due Process of Law and fair trial were violated by the State's bad faith conduct at bar.

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 JAMES HERARD'S RIGHTS

Not surprisingly, the State contends that Herard freely, knowingly, voluntarily, and intelligently waived his rights under the 4th, 5th and 14th Amendments to the United States Constitution in making each of his statements. (AB 20). In so doing, the State ignores the unequivocal fact that Herard informed law enforcement he wanted an attorney before questioning continued on December 2, 2008. Specifically, he asserted below that he was promised leniency in exchange for a confession; he was not permitted to go to use the bathroom, and had to urinate in a McDonald's cup; and that he was sleep deprived and susceptible to coercion while under duress.

In it's Answer Brief, the State argues that "[H]erard misconstrues the facts and law in his argument." (AB 21). The State sets forth in the Statement of the Case and Facts that "[H]erard gave statements to a number of detectives after he was arrested," (AB 11) yet fails to set forth any of the important circumstances which made up "the totality of the circumstances" and led to Herard's statements and the resultant *Miranda* violations. Those circumstances formed the factual basis for Herard's claim of involuntariness.

Further, as to the Appellant allegedly misconstruing the law, the State begins it's analysis of the law with *Miranda v. Arizona*, the same landmark case upon which Herard relied below, and on appeal.

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).

In the Order denying Herard's Motion to Suppress Statement, 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 on December 4, 2008 at approximately 6:00 pm, after James Herard's counsel had formally invoked his right to remain silent in a court proceeding and filed a Notice of Invocation of Rights with the Clerk, the State and the Court.

In the State's Brief, it acknowledges that "...a court's analysis of the waiver issue begins with a presumption that 'a defendant did not waive his

rights,'" citing *North Carolina v. Butler*, 441 U.S. 369, 373, 99 S.Ct. 1755 (1979). (AB 26). 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; *Michigan v. Mosely*, 324 96, 104, S.Ct. 321 (1975).

The Supreme Court clarified 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).

In *Mosley*, the Court stated:

> "[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.

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. at 101. 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. Thus, 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.

James Herard does not contest that he was originally read his *Miranda* warnings prior to being interrogated in connection with the robbery of a dog. He signed a Rights Waiver Form and a video of him beginning to waive his rights at the Lauderhill Police Department is depicted therein. However, when asked if he wished to speak without an attorney, Herard stated "I don't agree to that." (R 817). Law enforcement officials re-engaged James Herard in conversation a short time later, and justified the subsequent interrogation on expanded subjects as a re-initiation of the previous discussions. The State

candidly admits in it's Brief that after invoking his rights, the detective implied to Herard that he did not need to speak. (AB 35).

Once James Herard invoked his right to counsel all questioning should have ceased, thus making the statements made to Lauderhill detectives after Herard did not agree to being questioned without counsel were unconstitutionally and unlawfully obtained. (R 816-817). Further, law enforcement had an obligation to explicitly remind Herard of his *Miranda* rights. This was not done, warranting suppression.

Below, Herard challenged the voluntariness of various statements made to law enforcement. Accordingly, the burden of proof rested with the State to establish by a preponderance of the evidence that statement (confession) was freely, knowingly, voluntarily, and intelligently given. *Colorado v. Connelly*, 479 U.S. 157, 168 (1986). The trial judge reversibly erred by denying Herard's Motion to Suppress and by admitting the statements, described confessions by the State in front of the jury, into evidence at trial. Herard maintains the trial judge's rulings concerning the statements violated Herard's state and federal constitutional rights, warranting reversal and remand for a new trial.

In order for a statement to be admissible after the defendant invokes his right to counsel, the State is required to prove that the subject initiated the further conversation, is reminded of his rights, and knowingly and voluntarily

waives those rights, any incriminating statements made during the conversation may be properly admitted. *Shelly v. State*, 262 So.3d 1, 11 (Fla. 2008).

Here, the State asserts, and the Court below found that factually Herard initiated further conversation and that he was reminded "... of his rights by implying that he did not have to do so." (AB 35). The Appellant maintains that simply "implying" that Herard enjoyed rights did not rise to the standard of "reminding him of those rights as required under Florida Law."

In *Shelly*, the Florida Supreme Court determined whether the *Moss* standard or the *Welch* standard should be applied when Shelly reinitiated communications after invocation of his right to counsel.

In *Moss*, the 4th District stated, "if the accused invoked his right to counsel, courts may admit his responses to further questioning only on finding that he (a) initiated further discussions with the police, and (b) knowingly and intelligently waive the rights he had invoked. The 4th District Court of Appeal, in *Moss*, found that the defendant reinitiated conversation with law enforcement "was a strategy to 'wear down [Moss'] resistance and make him change his mind' about talking with the detective before consulting a lawyer." *Moss* at 544. However, *Moss* was overruled in part by *Shelly*.

In *Shelly,* the Court stated:

> "Although both the *Moss* and *Welch* standards appear to be nearly identical, there exists one crucial difference. Both involve a suspect that has (1) invokes his or her right to counsel or right to silence; (2) engaged in further conversation with police; and (3) waived his or her previously involved rights. Importantly, however, missing from the *Moss* standard is the requirement in *Welch* that the accused be reminded of his or her rights."
>
> [Emphasis in original] *Shelly* at 11.

Herard maintains that his inquiry of how long it would take for a court appointed attorney to arrive does not constitute re-initiation of an interrogation. Herard wanted an attorney, but because of many factors, including law enforcement stalling Herard for hours, Herard agreed to give a statement without the benefit of counsel. This was done despite law enforcement failing to re-advise or remind Herard of his rights, only "implying" that he did not need to talk. While Herard thereafter signed a *Miranda* rights waiver form, an analysis of the totality of the circumstances shows that the trial court erred in determining that it was Herard who re-initiated his interrogation in violation of the law.

Herard presents strikingly similar *Miranda* to those raised in a recent case from the 4th District Court of Appeal, *Penna v. State*, 2021 Fla.App.LEXIS 1564 (Fla. 4th DCA December 22, 2021) [4D20-345]. In *Penna*, the Court began it's decision by stating:

> The defendant appeals from his convictions for two counts of first-degree murder, one count of robbery with a weapon, and one count

> of false imprisonment with a weapon. Despite the horrible facts underlying these convictions, we are compelled to reverse these convictions and remand for a new trial due to a violation of the defendant's *Miranda* rights.
>
> After the defendant had invoked his *Miranda* rights, but later made spontaneous statements regarding his crimes to a deputy guarding him at a hospital, the deputy failed to specifically give the defendant his *Miranda* rights again before asking him questions which were reasonably likely to elicit, and did elicit, incriminating responses which the state presented at trial in their entirety. Because those elicited incriminating responses proved and/or corroborated each of the crimes, and further undermined the defendant's insanity defense, the trial court erred in denying certain portions of the defendant's pre-trial motion to suppress his incriminating responses. This error was not harmless. Thus, we must reverse and remand for a new trial. *Id.* at *1-2

In *Penna*, the 4th District Court of Appeal relied upon this Court's decision in *Shelly* and discussed *Welch*. The Court noted the importance of the *Shelly* court later rephrasing it's holding that an accused be "specifically given" his or her *Miranda* rights after an alleged re-initiation. The Court interpreted the re-phrased holding as:

> Importantly, the *Shelly* court later re-phrased its holding using slightly different language: "*Welch* ... specifically includ[es] a requirement that the accused be specifically given his or her *Miranda* rights after an alleged reinitiation." *Id.* at 13 (bold and underlining added).
>
> Given the *Shelly* court's later re-phrased holding that the accused be "specifically given" his or her *Miranda* rights after an alleged reinitiation, we have interpreted that re-phrased holding as follows: "In other words, police must again re-read the *Miranda* rights before commencing further conversation." *Quarles v. State*, 290 So. 3d 505, 507 (Fla. 4th DCA 2020) (emphasis added). *Id* at *33

The *Penna* Court allowed spontaneous utterances made by the defendant after he had invoked his rights to be admitted at trial. However, during a conversation with the deputy after the invocation, Penna spoke to the deputy who followed up his query. The Court found that constituted an interrogation and that the statement given as a result thereof was inadmissible.

The *Penna* Court stated:

> At best, the deputy's second comment was a veiled reminder of the defendant's right to remain silent. However, none of the deputy's comments reasonably can be interpreted as having specifically reminded the defendant of his right to counsel, the very right which he exercised. *Id.* at *39-4

The "veiled reminder" in *Penna* was the equivalent of the "implication" of Herard's *Miranda* rights at bar. In *Penna*, the Court stated:

> We understand the argument that a reasonable person in the defendant's position may have been able to remember his *Miranda* rights without having a police officer specifically give the *Miranda* rights again. However, we are bound to follow our supreme court's requirement in *Shelly* that "the accused be **specifically given** his or her *Miranda* rights after an alleged reinitiation." 262 So. 3d at 13 [Emphasis added] *Id.* at *40

Finally, in *Penna*, after finding some of the statements made by the defendant to law enforcement after the defendant's invocation inadmissible, the Court conducted a harmless error analysis. The *Penna* Court stated:

> Applying *DiGuilio* here, the trial court's errors in denying certain portions of the defendant's motion to suppress, in the manner which we have addressed above, were not harmless. We acknowledge

> that, even without the improperly admitted statements, the evidence proving the defendant committed the murders and other crimes was overwhelming. However, the *DiGuilio* test is not an "overwhelming evidence test." *Id.* at 1139. The state has not proven "beyond a reasonable doubt that the error[s] complained of did not contribute to the verdict or, alternatively stated, that there is no reasonable possibility that the error[s] contributed to the conviction." *Id.* at 1135.
>
> As the defendant has argued, "It is no exaggeration to say that [the deputy's] testimony [reciting the defendant's incriminating statements] was the centerpiece of the State's case." As the state highlighted during its closing arguments, those elicited incriminating responses proved and/or corroborated each of the crimes, and further undermined the defendant's insanity defense. *Id* at *45

In an Opinion concurring in part and dissenting in part, Judge Artua wrote separately, stating:

> Thus, while I agree that the panel in this case is bound by *Quarles*, I would certify the following question to the supreme court as being one of great public importance:
>
> DID *SHELLY V. STATE*, 262 SO. 3D 1 (FLA. 2018), ABANDON THE "TOTALITY OF THE CIRCUMSTANCES" TEST SET FORTH IN *OREGON V. BRADSHAW*, 462 U.S. 1039, 103 S. Ct. 2830, 77 L. Ed. 2d 405 (1983), IN FAVOR OF THE REQUIREMENT RECOGNIZED IN *QUARLES V. STATE*, 290 SO. 3D 505 (FLA. 4th DCA 2020), THAT LAW ENFORCEMENT MUST RE-READ *MIRANDA* RIGHTS BEFORE COMMENCING FURTHER INTERROGATION WITH A SUSPECT WHO HAS RE-INITIATED COMMUNICATION SUBSEQUENT TO INVOCATION OF HIS OR HER *MIRANDA* RIGHTS?
> *Id* at *50

On March 9, 2022, the Court granted the State's motion for certification of a question of great public importance and certified to the Florida Supreme Court the following question of great public importance:

> WHETHER A DEFENDANT'S FIFTH AMENDMENT *MIRANDA* RIGHTS ARE AUTOMATICALLY VIOLATED WHEN AN OFFICER FAILS TO RE-READ A *MIRANDA* WARNING FOLLOWING A DEFENDANT'S VOLUNTARY RE-INITIATION OF CONTACT?

The State asserts that the facts meet the standards set forth in *Welch v. State*, 992 So.2d 206, 214 (Fla. 2008), wherein the Court determined the requirements for admissibility of a reinitiated interrogation. *Welch* was more recently followed in *Shelly*.

The second statement alleged to have been made by Herard when Lauderhill detectives finished questioning the Defendant and he was being transported to the Broward Sheriff's Office. Goodwin interrogated Herard at the Lauderhill Police Department. Officer Goodwin next had contact with James Herard when he went to transport the defendant to his office to interrogate them. While Herard and his co-defendants were being escorted from the Lauderhill interrogation room, Officer Goodwin testified that Herard saw officers wearing BSO and Sunrise police department uniforms. He was permitted to tell the jury that 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 significant meaning to him as there was a

Dunkin Donuts robbery that occurred in Tamarac and Delray. Officer Goodwin believed Herard's statement was incriminatory in that he was aware of the law enforcement officers in each of the jurisdictions where crimes were committed.

This second statement was never addressed by the trial court judge in it's pre-trial Suppression Order, yet the statement was allowed to be introduced at trial over a standing defense objection to all of the statements on 5th and 14th Amendment grounds, and applicable provisions of Florida law.

In it's Answer Brief, the State concedes that the voluntariness of this statement was never ruled upon by the trial judge. This statement tied together the RICO predicate acts and racketeering activities, and the error in admission cannot be deemed harmless.

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

The State quickly discards Herard's argument that he was sleep deprived, therefore vitiating the voluntariness of his statement. Although the State is quick to point to the "naps" Herard was permitted to take, he contends

that he was already sleep deprived when arrested and thereafter was in custody for approximately 25 hours. Sleep deprivation has been held to violate *Miranda*. See, e.g., *Schneckloth v. Bustamonte*, 412 U.S. 218, 93 S.Ct. 2041 (1973); *People v. Anderson*, 42 NY 2nd 35 (1977).

Finally, James Herard had already invoked his right to counsel via a filing in the court record on the morning of Herard's Initial Appearance, yet Det. Visners interrogated Herard later the same day on December 4, 2008, when he should have been prohibited from directly communicating with the represented Defendant. Herard did not reinitiate contact with law enforcement. He was not re-advised of his rights. Herard was in custody, being held in a cell when called out for an interview by the detectives. Herard's statement was not initiated by Herard, but was coercively obtained in violation of the Florida and United States Constitution.

Herard's counsel argued that 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 who committed 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. The State's case rested

on the coerced, involuntary, unlawfully obtained statement of James Herard. (T 3770).

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).

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 questioning of the Defendant should have ceased once Herard stated he wanted to speak to a lawyer and without proper re-initiation, further interrogation was unlawful.

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).

Harmless Error Analysis

The Appellant acknowledges that *Miranda* violations are subject to a harmless error analysis. *See Caso v. State*, 524 So. 2d 422, 425 (Fla. 1988). To affirm a conviction despite error at trial, the State must prove beyond a reasonable doubt that the error "did not contribute to the verdict or, alternatively stated, that there is no reasonable possibility that the error contributed to the conviction." *State v. DiGuilio*, 491 So. 2d 1129, 1135 (Fla. 1986). Under *DiGuilio*, the focus of this Court is on the overall effect of the error on the trier of fact; not to substitute itself for the trier of fact and reweigh the evidence. *See Id.* at 1139. Further, if a defendant's statement resulted from a law enforcement officer's illegal action, that evidence is "fruit of the poisonous tree" and the trial court should exclude it from trial. *See State v. Frierson*, 926 So. 2d 1139, 1143 (Fla. 2006) (quoting *Wong Sun v. United States*, 371 U.S. 471, 488, 83 S. Ct. 407, 9 L. Ed. 2d 441 (1963)). *Deviney v. State*, 112 So. 3d 57, 79 (Fla. 2013).

Further, as explained by this Court in *Diguilio*:

> [H]armless error analysis must not become a device whereby the appellate court substitutes itself for the jury, examines the permissible evidence, excludes the impermissible evidence, and

> determines that the evidence of guilt is sufficient or even overwhelming based on the permissible evidence.
> Overwhelming evidence of guilt does not negate the fact that an error that constituted a substantial part of the prosecution's case may have played a substantial part in the jury's deliberation and thus contributed to the actual verdict reached, for the jury may have reached its verdict because of the error without considering other reasons untainted by error that would have supported the same result.
>
> ...
>
> The test is not a sufficiency-of-the-evidence, a correct result, a not clearly wrong, a substantial evidence, a more probable than not, a clear and convincing, or even an overwhelming evidence test. Harmless error is not a device for the appellate court to substitute itself for the trier-of-fact by simply weighing the evidence. The focus is on the effect of the error on the trier-of-fact. The question is whether there is a reasonable possibility that the error affected the verdict. The burden to show the error was harmless must remain on the state. If the appellate court cannot say beyond a reasonable doubt that the error did not affect the verdict, then the error is by definition harmful.
>
> *Diguilio*, 491 So. 2d at 1136-39 (citation omitted) (quoting *People v. Ross*, 67 Cal. 2d 64, 60 Cal. Rptr. 254, 429 P.2d 606, 621 (Cal. 1967) (Traynor, C.J., dissenting), *rev'd sub nom. Ross v. California*, 391 U.S. 470, 88 S. Ct. 1850, 20 L. Ed. 2d 750 (1968)).

Under the standard articulated by this Court in *DiGuilio*, Herard's confession cannot be deemed harmless error. His interrogation and transcripts of the recorded interrogation were provided to the jury. The focal point of the trial surrounded Herard's statements. It is difficult to dispute that such a confession most likely played a role in Herard's conviction.

The prosecutor used Herard's interrogation statements as the crux of his evidence of guilt. Further, in his closing argument, the prosecutor repeatedly mentioned Herd's confession during the interrogation and played several clips of the taped confession. Therefore, it is impossible to say that Herard's confession did not contribute to the verdict. Thus, the admission of Herard's confession cannot be deemed harmless error warranting reversal and remand.

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

Despite the State's protestations to the contrary, the trial court reversibly erred by allowing evidence seized pursuant to a Search Warrant executed on Jonathan Jackson's home. The evidence was timely objected to. This evidence, together with the Defendant's unlawfully obtained statements as set forth in Issue II, formed the basis of the charges and the conviction.

Citing *Rose v. State*, 985 So.2d 500, 509 (Fla. 2008), the State asserts Herard's claims as to this issue were waived and without merit. (AB 40-41). Mistakenly, the State claims Herard only contested admission of Jonathan Jackson's composition notebook. (AB 40). In actuality, in addition to Jackson's journal which contained the gang "rules and regulations, by-laws, constitution, and 10 Commandments" was sought to be suppressed along with the BB gun

and magazine clip for an AR-15 (IB 94-96) and that the Court's denial is subject to review by this Court.

Herard maintains that the search and seizure of the aforementioned evidence was unlawful, and that the evidence should have been suppressed or limited in that it lacks relevance to the charged crimes and the prejudicial effect far outweighed it's probative value. See Section 90.403, Fla.Stat. Further, the doctrine of waiver should not apply as argument was articulated and the issue raised clear. Indeed, the State responded to it.

On the merits, the State maintains that the Search Warrant for Jackson's home was valid, that the evidence was relevant to the prosecution, and that the trial court did not abuse it's discretion in allowing the evidence and testimony related thereto to be allowed at trial. Herard maintains that the trial court abused it's discretion, ruled unreasonably as to this issue, and that suppression of the evidence was warranted.

At trial, Herard's counsel objected to the letters, ledger, journal books and the computer printout on grounds of relevancy, hearsay and lack of authentication. The trial court overruled the objections, pointed to the fact that Herard was charged in Count III with racketeering. (T 2250-2252; 2258-2259). Herard maintains that simply because he was charged with RICO did not make unlawfully seized, highly prejudicial evidence which Herard had no connection

to, save brief references to him as a member of the Bacc Street Crips admissible. Instead of limiting the materials to those which referenced Herard, the Court allowed evidence of two other separate gangs for which Jackson was believed to be associated with.

At most, only those items with a connection to Herard should have been allowed, and the trial court reversibly erred by admitting substantial evidence pertaining to separate and distinct organized gangs.

The State asserted in a conclusory fashion that "the surveillance photographs, eye witness testimony, gang witness testimony, and Herard's statements guaranteed his conviction of the crimes charged. If any error occurred, it was harmless." (AB 44). The Appellant maintains that the items lacked relevance to this prosecution, and were unduly prejudicial. Section 90.403, Fla.Stat.; *O'Connor v. State*, 835 So.2d 1226 (Fla. 4th DCA 2003).

The evidence at issue was part of the foundation upon which the State relied upon which to establish the murder and racketeering counts, the error in admitting the evidence cannot be considered harmless. Reversal and remand for a new trial 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

James Herard maintains that the trial court reversibly erred by refusing to allow the defense expert witness to testify concerning law enforcement's interrogation techniques and the concept of false confessions. The expert was prepared to testify concerning "the Reid Technique" of interrogation and to provide information concerning interrogation techniques and false confessions not known to the typical lay person.

Despite Herard's repeated arguments of error as a result of the trial court's refusal to allow his expert forensic psychologist to testify concerning the Reid Technique and the concept of false confessions, the State contends that the issue was not sufficiently briefed, thus waived. (AB 44-45). To the contrary, Herard's arguments concerning the Court's error in the exclusion of his expert witness was articulated below, the expert's testimony proffered, and was properly raised as a separate numbered issue on appeal. (IB 96-100). The argument contained Record citations and case law in support of Herard's argument. The State's waiver argument is an improper application of the law and facts of this case. (AB 44-45). Here, Herard developed a full argument, relying on the state and federal constitutions, Florida statutes, and case law in

support of his position. Despite the State's protestations, this issue should be resolved on the merits.

The State cites this Court's decision in *Duest v. Dugger*, 555 So. 2d 849 (Fla. 1990), in support of it's waiver argument. *Duest* involved an appeal of the trial court's denial of a motion for post-conviction relief following an evidentiary hearing. Duest raised a number of claims in his appellate brief to this Court, but also sought to raise eleven other claims "by simply referring to arguments presented in his motion for postconviction relief." 555 So.2d at 851-52. In *Duest,* the Court stated that "merely making reference to arguments below without further elucidation does not suffice to preserve issues," and found these claims to be waived. *Id.* at 852. This Court has found *Duest* distinguishable from the several cases, and therefore not controlling. See, e.g. *Parker v Dugger*, 660 So. 2d 1388, 1389 (Fla 1990); *Webb v. State*, 757 So. 2d 608 (Fla 5th DCA 2000).

Here, Herard lodged an argument concerning the improper exclusion of expert witness testimony. He lodged argument in support of his position and presented a leading Florida Supreme Court case, *Williams v State*, 967 So. 2d 735,748(Fla. 2007) He set forth the case law surrounding the standard of review for such expert testimony, and lodged argument as to why the expert

testimony should have been admitted, as well as why the error was not harmless.

As the Florida Supreme Court has noted: "Waiver is the voluntary and intentional relinquishment of a known right, or conduct which implies the voluntary and intentional relinquishment of a known right." *Major League Baseball v. Morsani*, 790 So. 2d 1071, 1077 n.12 (Fla. 2001) (citing *Kissimmee Util. Auth. v. Better Plastics, Inc*, 526 So. 2d 46, 48 (Fla. 1988). Herard did not waive this issue.

The State responds to Herard's argument by asserting well settled law that admission of evidence is within the Court's discretion and that the trial court's ruling will be affirmed unless there has been an abuse of discretion. *Williams v. State*, 967 So.2d 735, 748 (Fla. 2007). A Court abuses it's discretion where no reasonable person would take the view adopted by the trial court. Herard maintains that such abuse occurred herein, warranting reversal and remand for a new trial. *Sheppard v. State*, 2022 Fla. LEXIS 426 (Fla. March 10, 2022).

The State argues that the expert's proposed testimony was not relevant. The Appellant maintains that the State is, simply put, incorrect. Herard sought to have Dr. DeClue testify to educate the Jury about the Reid interrogation method and the resultant false confessions attributed to the method. The State

objected. (T 2597). The defense argued that the expert was not going to offer an opinion on the truthfulness of Herard's confession, only educate the Jury about the technique and the concept of the false confessions. A proffer was made of the doctor's testimony. (T 2670-2686). Nevertheless, the Court entered an Order prohibiting the doctor from testifying. (T 2693-2702). The Court held that the testimony would only be relevant if Herard were to testify that he had been coerced, and that the statement false. The Court determined that expert testimony based on research and literature about false confessions was unreliable and not generally accepted in the scientific community.

In this case, Judge Backman abused his discretion in prohibiting the State's expert from testifying without question, Dr. DeClue is an expert in his field. Dr. DeClue had an extensive history in the area and had been permitted to testify as an expert on many occasions. Dr. DeClue's testimony would have assisted the Jury in understanding the interrogation of Herard and his statements.

Under *Daubert* and Section 90.702, Fla.Stat., Herard was required to establish that 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). A proffer was given and issue properly preserved. (T 2670-2686). At trial, the defense renewed its request to allow Dr. DeClue to

testify as to the narrow area in which the doctor had specialized knowledge. (T 2687). The Court abused it's discretion by precluding the testimony.

At bar, the trial judge determined that Dr. DeClue's testimony was inadmissible unless Herard testified that he had been coerced and his statement false. (T 2597-2634). The Court further held that the theory of false confessions was not reliable as it was not based on the scientific method in that it could not be scientifically tested, was not peer reviewed, and was not generally accepted in the scientific community.

Contrary to the trial court's findings and the State's arguments on appeal, the expert was not going to testify as to "...a couple of techniques out of context, without a direct application to this case ...". (T 2700). Instead, Dr. DeClue's testimony would have included his expertise in the Reid Technique of interrogation and false confessions. (T 2676). Further, the testimony was far more probative than prejudicial. See Section 90.403, Fla.Stat. Herard maintains that the expert's testimony was admissible under *Daubert* and that Judge Backman abused his discretion by precluding the defense expert's testimony.

The Court below found that applying *Daubert*, the doctor's testimony constituted personal opinion based upon his training and experience, which is what *Daubert* eliminated. The Prosecution successfully argued that the

evidence failed under *Daubert*. On appeal, the State maintains that the trial court did not err when it refused to allow the defense to call an expert witness in false confessions.

The Court found that in conducting an analysis under Section 90.403, Fla.Stat., 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 Court's findings were incorrect based upon the Record and the law. Reversal and remand for a new trial is warranted.

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

James Herard maintains that his state and federal constitutional rights were violated when he was sentenced to Death on Count I of the Indictment wherein he was convicted of shooting Eric Jean-Pierre and causing his death. James Herard was not the shooter who caused the murder. The jury recommended death by a vote of 8-4 (R 962-981). Herard was sentenced under an unconstitutional sentencing scheme. See *Hurst v. Florida,* 136 S.Ct. 616 (2020). Herard maintains that 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) The Florida Death Sentencing Scheme Applied was Unconstitutional

The Parties agree on only one matter concerning the Judgment imposing Death by Injection as the proper penalty in this case; the Standard of Review being de novo. (IB 100-118; AB 54). From there, Herard splits ways from the State, maintaining, as asserted below, that the Death Sentencing Scheme utilized by the Court at the time of Herard's prosecution and sentencing, resulting in a finding of guilty and 8-4 Jury recommendation, was invalid.

In response to Appellant's sentencing claims, the Appellee contends that the Death Sentence imposed in this case "... was proper under Florida law and the United States Constitution." (AB 53-67). Surprisingly, the State never concedes or acknowledges that the Florida Death Penalty Scheme Herard was sentenced under was unconstitutional as held by the United States Supreme Court in *Hurst v. Florida*. Nevertheless, the State argues that "[T]he United States Supreme Court found the Florida scheme constitutional in *Proffitt v. Florida*, 428 U.S. 242, 247-253 (1976)." (AB 60). The State relies upon the Sentencing Scheme in effect in the 1970s to support it's argument that "there was no requirement for the sentence to be imposed by a jury. *Spaziano v.*

Florida, 468 U.S. 447, 460-463, 104 S.Ct. 3154 (1984); *Hildwin v. Florida*, 490 U.S. 638, 109 S.Ct. 2055 (1989)." (AB 60). Here, the Judge, not the jury, imposed Death contrary to the 6th, 8th, and 14th Amendments to the United States Constitution and application portions of the Florida Constitution.

B) The Death Penalty is Barred by the 6th, 8th and 14th Amendments to the United States Constitution

The State points to the "critical role" juries in Florida have concerning death cases. (AB 60-61). Herard does not contest the jury's importance, but contends that despite "singing the jury's phrase," the Office of the Attorney General seeks to avoid the impact of *Hurst*, when read in conjunction with *Poole* by permitting the jury to only recommend a sentence of Life. Here, Herard maintains that the findings necessary to increase the penalty from a mandatory Life sentence to Death were not found beyond a reasonable doubt by a unanimous jury as required by law.

Throughout it's sentencing argument, the State attempts to convince the Court that the Judge ordered the Death penalty imposed after a non-unanimous jury recommendation for Death by a vote of 8-4, was proper. To the contrary, reversal and imposition of a Life sentence, or reversal and remand for re-sentencing is warranted.

The State analyzes Herard's unlawful sentencing claims under the 6th and 8th Amendments, and his attacks on the Death Penalty statute. Herard

maintains the procedure used and substantive issues make Section 921.141, Fla. Stat. unconstitutional because it fails to "adequately narrow" the individuals deemed "the worst of the worst" upon who a Death sentence should be justified.

The defense challenged the constitutionality of the aggravators applied. Nevertheless, the State contends that the aggravator under Section 921.141, Fla.Stat. of Herard being a gang member was not challenged below and thus the Court should find the issue unpreserved. (AB 62). However, the State neglects to inform the Court that the constitutionality of the gang member aggravator was indeed challenged below

In *Hurst v. Florida*, 136 S.Ct. 616 (2020), the United States Supreme Court held 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*, the Florida Supreme 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.

In *Hurst,* the court held:

> "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 prior sentencing scheme, which required the judge alone to find the existence of an aggravated circumstance and allowed the jury to only make a sentencing recommendation, was found unconstitutional. See *Hurst v. Florida* at 619; 624. Following *Hurst*, the Florida Legislature amended the death penalty statute, but it is the predecessor statute under review herein. 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 (Fla. 2016). The Florida Supreme Court held in *Hurst v. State*, 202 So.3d 40, 74 (2106) that:

> " ... 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."

Those findings specifically include unanimity as to aggravating factors, 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, or resentence Herard to Life imprisonment.

C) *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. Obviously, *Poole* involved the guilt phase jury's unanimous finding of an aggravator satisfied the requirement that it make a unanimous finding of aggravation rendering Death eligible. *Poole*. Here, Herard maintains that the jury decided a sentence – Life imprisonment, and to uphold the Judge's decision to impose Death violates the 6th and 8th Amendments.

Herard maintains that imposition of the Death Penalty, on these facts, under the "old" Death Penalty statute, violates the Florida and United States Constitutions. Upholding James Herard's death sentence on this basis would be unconstitutional.

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)).

Based upon "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.

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.

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.

Respectfully, 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 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 State offers no substantial response, simply arguing the jury instructions were proper. 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.

G) 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 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.

At to the Appellant's Death sentence, Herard maintains that the sentence violates the 5th, 6th, 8th and 14th Amendments to the United States Constitution and applicable portions of the Florida Constitution, as should be reversed and stricken. A Life sentence should be imposed as a result of Herard's sentence under what the United States Supreme Court described as an unconstitutional sentencing scheme in *Hurst v. Florida*, 202 So.3d 40 (Fla. 2016). Alternatively, Herard is entitled to new penalty phase proceedings.

Herard attacks Section 921.141, Fla.Stat. as being unconstitutional on it's face and as applied in his case. A plethora of "death penalty motions" were filed on Herard's behalf combatting the Florida Death Penalty Scheme and statute. Although the State seemingly concedes that two of the aggravators were contested, the State argues that the third aggravator, being a criminal gang member under Section 921.141(5)(n), Fla.Stat. was unpreserved as trial counsel never challenged the aggravator, citing *Caylor v. State*, 78 So.3d 482, 496 (Fla. 2011).

In *Caylor*, this Court found Caylor's claim of insufficiency of the evidence to establish an aggravator was procedurally barred because the

constitutionality of the aggravator was not challenged in the trial court. *Id.* at 495-496.

The situation at bar is easily distinguishable from *Caylor*, factually. Here, Herard filed numerous motions attacking the constitutionality of every aspect of Section 921.141, Fla.Stat. The gang aggravator was not waived, and if the Court determined otherwise since this is a Death case, the Doctrine of Waiver should not be applied.

Sub judice, Herard argues that 6th Amendment violations occurred when he was sentenced under a statute which was been declared unconstitutional by the United States Supreme Court in *Hurst v. Florida*, 136 S.Ct. 616 (2016).

The Appellee contends that Herard's "entire argument is predicated on an erroneous interpretation of the 6th Amendment's requirements. (AB 56). To the contrary, it is Florida which has erroneously interpreted the constitutional implications of James Herard's Death sentence.

In it's Brief, the State goes to lengths analyzing Florida "new Death penalty statute" and the steps the jury must make under the new statute before recommending a Death sentence. (AB 57-59). However, the State ignores the fact that Herard was charged under an unconstitutional Death penalty statute, thus the new one is inapplicable to his appeal. Reversal is required.

CONCLUSION

Death is different. 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, as well as those set forth in Herard's Amended Initial Brief, 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 , III and IV, and vacate the sentence of death and remand with directions that the Appellant receive a Life sentence or re-sentencing as to Issue V. Herard's case is not the "worst of the worst" for which the Death penalty is reserved. *Stephens v. State*, 787 So.2d 747, 765 (Fla. 2001).

CERTIFICATE OF COMPLIANCE WITH RULE 9.045, FLA. R. APP. P.; FLORIDA RULE OF JUDICIAL ADMINISTRATION RULE 2.520(a) AND FLA. JUDICIAL ADMIN. RULE 2.520

Pursuant to Rule 9.045, Florida Rules of Appellate Procedure. Florida Rule of Judicial Administration Rule 2.520(a) and Florida Judicial

Administration Rule 2.520, the Appellant certifies that this Initial Brief of Appellant 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 10,935 words.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 15th **day of MARCH, 2022,** 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 (CrimAppMia@myfloridalegal.com).

Respectfully submitted,

LAW OFFICES OF RICHARD ROSENBAUM
Primary Email: Richard@RLRosenbaum.com
Secondary Email: Pleadings@RLRosenbaum.com

S/RICHARD L. ROSENBAUM
Richard L. Rosenbaum, Esq.
Fla. Bar No: 394688
315 SE 7th Street
Suite 300
Fort Lauderdale, FL 33301
Telephone (954) 522-7007
Facsimile (954) 522-7003