IN THE SUPREME COURT OF FLORIDA

CASE NO. SC05-703

COREY SMITH,

Appellant,

vs.

THE STATE OF FLORIDA,

Appellee.

ON APPEAL FROM THE CIRCUIT COURT
FOR THE ELEVENTH JUDICIAL CIRCUIT OF FLORIDA
IN AND FOR MIAMI -DADE COUNTY
LOWER TRIBUNAL NO. F00040026A

Amended INITIAL BRIEF OF APPELLANT

TERESA MARY POOLERFlorida
Bar No. 329061
1481 N.W. North River Drive
Miami, Florida 33125
(305) 710-7209
COUNSEL FOR APPELLANT

TABLE OF CONTENTS

TABLE OF CITATIONS

CASES **PAGE(s)**

CONSTITUTIONS, STATUTES & RULES

INTRODUCTION

This is a direct appeal from judgements and convictions and two sentences of death entered following a jury trial before the Honorable Scott Bernstein of the Eleventh Judicial Circuit, in and for Miami-Dade County, Florida. In this brief, the record on appeal is cited as AR.@ and the transcript of the proceedings as AT.@.

STATEMENT OF THE CASE AND THE FACTS

The Indictment

In December, 2000, Corey Smith was indicted by the Grand Jury in Miami Dade County Florida for criminal acts that arose in connection with the AJohn Doe@ gang. Seven others were indicted with him in the fifteen count indictment. Smith was charged with one count of conspiracy to engage in a criminal enterprise, one count of engaging in the criminal enterprise, one count of trafficking in marijuana, and one count of trafficking in cocaine. He was also indicted on three counts of first degree murder and three counts of conspiracy to commit first degree murder. (R. 47-66).

The indictment was amended September 22, 2004, two weeks prior to the start of the trial. The amended indictment added two more counts of first degree murder, one count of second degree murder, and one additional count of conspiracy to commit first degree murder. (R. 70-93). The theory of the criminal conspiracy, contained in the indictment and presented at trial, was that Mr. Smith and his co-defendants operated the

AJohn Doe@ organization. This criminal enterprise distributed cocaine, in both powder and crack form, and marijuana, to the Overtown, Liberty City and Coconut Grove areas of Miami over a six year period. During that time, the members of the enterprise in various combinations killed or conspired to kill individuals who posed a threat to the operation of the John Doe organization, or were in the way.

Corey Smith was named in the indictment as the leader of the organization. Smith was indicted for killing drug dealer Leon Hadley (Count VI), Melvin Libsomb (Count VII), Cynthia Brown (Count X), Jackie Pope(Count XII), Marlon Beneby, (Count XIII) and Angel Wilson (Count XVI). He was also indicted in separate counts, for conspiring to kill Hadley (Count V), Brown (Count IX) and Pope (Count XI). The indictment further alleged that Mr. Smith and his co-defendants conspired to kill Anthony Fail, a former employee, and in furtherance of this conspiracy shot into a house occupied by several adults and children. (Count XVI).

PreTrial Motions

Mr. Smith was appointed both first and second seat attorneys. On June 3, 2004, Defense filed a Motion to Suppress , (R. 285-288), a Motion to Sever Counts of the Indictment, a Motion to Sever Defendants and a Motion to Dismiss, based on the State=s failure to comply with Article IV of the Interstate Agreement on Detainers. (R. 266-284). The Motion to Sever Counts alleged the shooting of Jackie Pope was misjoined as there was no evidence to connect it to the conspiracy .(R. 281). Subsequently, the Defense filed a Demand for Speedy trial.

The Motion to Dismiss was denied by the court on September 14, 2004 after Defense agreed that the Motion was moot because a continuance had been granted the previous June . (T. 9/14, 4). The record does not reflect that the Motion to Sever the counts pertaining to the Jackie Pope homicide was ever heard. Testimony was taken on the Motion to Suppress on September 14, 2004. . The Defense presented no argument and the Motion to Suppress was denied. (T. 9/14, 68).

The Trial/Guilt Phase

The events which lead to Mr. Smith=s indictment took place from 1994-1999. The Grand Jury handed down the first indictment in December, 2000. The case was not tried for four years, because of the amount of preparation necessary. The first State Discovery Response listed 431 witnesses, organized by what homicide or incident each witness pertained to. (R. 109-121). In the Amended response , the State provided 484 documents (R. 122-135). Additional witnesses and documents were provided as the case progressed.

A team of five prosecutors tried the case. Corey Smith had two lawyers.The trial took place over a period of five months. Jury selection began October 4, 2005 and lasted for nine days. The trial from opening statement to verdict, took twenty- two days. The penalty phase occurred after a break of two months and lasted two days.

The State called eighty four witnesses. Smith did not testify and the Defense called one witness. The State called two rebuttal witnesses. On December 3, 2004 Corey Smith was found guilty of, among other things, four counts of first degree murder. (R. 2694-

2698). The penalty phase began February 7, 2005. The State called eight witnesses. The Defense called six witnesses for mitigation and the State called two in rebuttal. The jury recommended Smith receive a life sentence for the homicides of Leon Hadley (by a vote of 12-0) and Jackie Pope (by a vote of 6-6). The jury recommended Smith be sentenced to death for the homicides of Cynthia Brown (by a vote of 10-2) and Angel Wilson (by a vote of 9-3).

The State didn=t produce any physical evidence at trial directly linking Smith to the homicides. The State witnesses fell into three categories. The testimony of witnesses not essential to the issues on appeal will be omitted or summarized with references to the transcript provided. First, there were fifty two Aprofessional@ witnesses: police investigators, responding officers, crime scene technicians, and medical examiners and various forensic experts. One of these witnesses, Officer Ricky Taylor, was also a victim of a shooting that Smith was not charged with.

Fifteen civilian witnesses testified. Their testimony concerned legal identification of the homicide victims or their personal knowledge of the circumstances surrounding the various homicides, for example, hearing gunshots. Two of these civilian witnesses were present during the shooting into the into the Harvey residence. None of the civilian witnesses directly implicated Smith in any of the homicides.

Seventeen convicted felons , most of whom were incarcerated while they were testifying were called by the State to testify to the circumstances of one or more of the crimes Smith was charged with. These witnesses connect Smith to the homicides as well

as put him in at the head of the alleged drug enterprise

On October 4, 2004, the day jury selection began, the court ordered that a magnetometer (metal detector) be set up immediately outside the courtroom, a seventh floor courtroom at one end of the building. (R. 687). No motion was filed by either side for this metal detector, there was no hearing or precipitating disturbance. After the magnetometer was set up on October 5, all persons going in to the court room, including jurors and attorneys, were subject to a second magnetometer screening and an additional search of their persons and possessions, in addition to the one required upon entry to the courthouse.

During the trial the Defense objected to the extensive security measures, which included armed guards in the courtroom, and a stun belt on the defendant as and the additional magnetometer. The defense requested a factual basis for the security measures, described as highly prejudicial. No basis was given and no hearing was held. These security measures became even more intense and extensive throughout the trial. The jurors **and** the defense attorneys were subject to searches. The courtroom security will be discussed with transcript references in Argument 1.

Five panels of fifty potential jurors were questioned by the court and the attorneys before they reached seventy who were qualified to sit on a death penalty case. An entire panel (panel number 4) had to be stricken due to the their responses to the questions, particularly from one of the jurors who stated he knew the name John Doe, and it was Aconnected with a gang@. (T. 567).

The State divided the voir dire of the remaining panel of seventy among their team of attorneys. One of the attorneys, Mr. Cholakis, questioned the jury about their prior knowledge of this case and the possibility of media coverage. When he characterized the events that occurred in the case as @drug wars@ an objection was sustained. The court asked if the term Adrug wars@ was in the indictment and said its usage would be prejudicial to the defendant. (T. 929-930).

Shortly thereafter Mr. Cholakis referred to a group of homicides that occurred between the John Doe group and another group led by Anthony Fail. A Defense objection was sustained. (T. 932). The court declined, at the State=s request, to read the indictment. (T. 933). Shortly thereafter, Mr. Cholakis again referred to shootings and homicides Abetween these two groups@. (T. 936). A Motion for Mistrial was made and denied after brief argument. (T. 937). On October 14, out of the jury=s presence, the Defense argued again for a mistrial, citing . Cholakis= mention in voir dire of facts not in evidence. The court again denied the motion. (T. 1007).

During jury selection, Smith=s mother, Willie Mae Smith, a potential defense witness , was asked to leave the courtroom when the rule was invoked. (T. 838). After she left the courtroom and was passing through the hallway, she said to the seventy potential jurors assembled in the hall, AGod Bless you and have a blessed day@. Ms. Smith=s remark was reported to the court the next day. (T. 1148). The court asked the jurors, individually and in groups, whether her comment would have any effect on them and their ability to be fair to Mr. Smith. (Argument 2 has a more complete statement of the

jurors= response.). Several of the jurors indicated that Ms. Smith=s remarks seemed intimidating. The Defense moved to have the panel stricken and the motion was denied. (T. 1236). The court entered a written order that Mrs. Smith was not to have contact with the jurors, enter the Justice Building unless called as a witness, or come within 1,000 feet of the Justice Building. (R. 718).

The court excused a number of jurors for agreed upon cause. The court allowed a State peremptory challenge for Ms. Lowe, an African American juror. Defense objected that the reason given was not race neutral. (T. 1442).The Defense objected to the State peremptory challenge of Ms. Campana, another African American. (T. 1447).The Defense objected to the challenge of Mr. Gilbert, an African American male. (T. 1448). The Defense moved again to strike the panel based on the incident with Ms. Smith the prior day, and the motion was denied. (T. 1459). The Defense did not accept the panel based on the objections raised previously, however Smith indicated he was satisfied in response to the court=s questioning. (T. 1459).

After the jury was sworn, the case was delayed for a week because the Judge was teaching in a Judicial college. On October 25, prior to the opening statements, the Defense moved to prevent the State from using photographs of the decedents in the opening statement. The court reviewed the photographs, found that they were not prejudicial and allowed the State to use them. (T. 1483).

The prosecutor began her opening statement as follows, AIf you compete with me you will be killed. If you steal from me you will be killed. And above all, if you snitch on

me you will be killed.@ The objection was sustained. (T. 1488). The State described the homicide of Domenic Johnson, and stated that Cynthia Brown saw what occurred and told the police what she knew.(T. 1491). Defense objection was overruled. The prosecutor then told the jury that the Grand Jury indicted Corey Smith for the Domenic Johnson homicide. An objection was sustained. (T. 1491). The State said that the State sought the death penalty against Smith in the Domenic Johnson homicide. An objection was sustained, the Motion for Mistrial was denied.The Motion to Strike was granted. (T. 1492). At sidebar, the court reversed its ruling, noting that the court could take judicial notice of the State=s intent to seek the Death Penalty.

In her opening statement the prosecutor told the jury that Corey Smith was in charge of an organization of persons that sold drugs, primarily in the Liberty City area of Miami . The State alleged that Domenic Johnson, who sold drugs, was shot and killed by Smith in 1996, and Cynthia Brown told the police that she saw what happened. Smith was indicted for the murder of Domenic Johnson. The State said that the evidence was going to show that prior to the date the Domenic Johnson homicide was set to go to trial Smith learned that Brown was the only witness against him. He arranged for Brown=s boyfriend, Chazre Davis, to kill Ms. Brown. Her body was found in a motel on Tamiami Trail days before Smith=s trial for the murder of Domenic Johnson. As a result, the case was dropped by the State.

The prosecutor stated that the evidence would show that Corey Smith was one of three people who Agunned down@ Leon Hadley in the Liberty City area. Smith let Mark

Roundtree Atake the fall@ for Hadley=s death, and paid off his family. (T. 1502). The prosecutor stated that Smith was responsible for the death of Melvin Lipscomb. Lipscomb was a customer at one of the John Does drug holes that the State claimed were operated by Corey Smith. The rule in the drug holes run by John Doe was Atake it and go@, meaning no talking or arguing was allowed. One evening, Lipscomb got loud when he went to purchase drugs. He was chased out of the hole and killed by one of Corey Smith=s Ahenchman@ because he broke the rules. (T. 1504).

The State contended the evidence would show that Jackie Pope, a deaf mute who acted as a lookout for the drug dealers, was killed by someone who worked for the John Doe organization, acting under Smith=s orders. Pope was shot and wounded on New Year=s Eve, 1996, in Liberty City. A police officer on patrol in the area was shot that night .Charlie Brown, a friend of Corey Smith, was arrested for shooting the officer after Pope gave a statement to the authorities implicating Brown. Pope was shot in the Pork and Beans housing project in Liberty City. (T. 1507).

The State called Marlon Beneby, another of Smith=s victims. Beneby sold drugs for the John Doe organization. He was killed on Smith=s orders because he mixed his own drugs with John Doe drugs to make extra money. (T. 1508). The prosecutor stated that Anthony Fail was another drug dealer who fell out with Cory Smith. He began robbing the drug holes that sold John Doe brand drugs, and Smith ordered him to be killed. Smith=s Ahitmen@ drove around the Liberty City area looking for Fail. The hitmen shot up Fail=s car, but Fail was not in it at the time. Angel Wilson, Fail=s girlfriend ,was driving the car.

She was shot and killed. (T. 1511). Subsequently, a house belonging the Harveys, Fail=s friends, was shot into during a drive by shooting. Women and children were in the house. No one was killed but occupants of the house sustained injuries. (T. 1511). The State concluded their opening statement by asserting that the evidence in the case would show that Corey Smith was AJohn Doe@. (T. 1512).

The Defense stated in their opening that the evidence would show that the Liberty City area of Miami was known as an Aopen air drug market@. (T. 1514). In the early nineties, Corey Smith sold marijuana to make money, like a lot of other young men did. He marked his drugs with a AJohn Doe@ logo to get repeat business. The Defense stated that the evidence would show that many people were killed in Liberty City during the period from 1994 to 1999. These deaths were caused by an excess of drugs, an excess of alcohol, and an excess of money. Corey Smith did not encourage the death of anyone in Liberty City at that time. (T. 1517).

The Defense stated that the evidence would show that Mark Roundtree and Leon Hadley=s brother had problems. (T. 1518). Roundtree killed Hadley, was convicted of the murder and was serving time for it. The Defense stated that Melvin Lipscomb was chased down and killed by Antonio Godfrey, and Smith did not participate in, encourage or cause the death of Melvin Lipscomb.(T. 1520). The Defense stated that the evidence would show that Smith was wrongly arrested for the death of Domenic Johnson, because the police ignored the statement of a witness who said someone else did it. The Defense stated that Cynthia Brown was a drug abuser, and died during an evening of abusing

drugs, Aa coke party@ with her boyfriend Chazare Davis. (T.1525). The Defense stated that there was no Alogical reason@ to connect Corey Smith with the death of Jackie Pope. (T. 1529). Tthe Defense stated that the evidence would show that Marlon Beneby was killed in front of a bunch of people during a fight with Travis Gallashaw. (T. 1530). The fight had nothing to do with Smith.The Defense stated that the evidence would show that when Angel Wilson was killed Corey Smith was locked up in the Dade County Jail. (T. 1531).

After the Defense made their opening the jury was excused. The Defense made an objection to the screening of the jurors that was going on. (T. 1545). The court stated that the security procedures were up to the Court Liaison. (T. 1546). Testimony on the case began on the afternoon of October 25. The first day of testimony concerned the Wilson homicide. Three civilian witnesses testified that they heard the gunshots, saw the car Wilson was in, and saw a car leaving. One of the witnesses saw Wilson in the car. None of the witnesses could identify the shooters(s).

The first witness October 26 said he heard gunshots, saw the white car A shot up@, and saw bullet holes in his front door the morning after. A firearms expert testified that the bullet holes Wilson=s car were consistent with the car being shot into with a high velocity gun such as an AK-47. No gun match was ever made. (T. 1777).

The State then called a crime scene technician for the Leon Hadley homicide, and then called Leon Hadley=s mother, who made the legal identification of her son.

On October 27, Julian Lamar Mitchell, the first convicted felon to testify, was

brought into the courtroom in handcuffs and a red jumpsuit marked AD. C. J.@. (Dade County Jail). The handcuffs were removed from the witness in front of the jury. (T. 1831). The Defense objected to the Atheatrical presentation@ of the witness, on the grounds that the handcuffs and red jumpsuit were unduly prejudicial to Corey Smith. The State responded that if the witness escaped, it would be easier to find him in a jumpsuit. (T. 1832). The Defense objected to all the extra security precautions and stated , AWe have never had a conversation with the Court are (sic) anyone else about the security concerns in this case.@ (T. 1833). The court responded, A I find it shocking for you to say that you=ve...that no one has ever talked to you about the security concerns in this case.@ (T. 1833).

Mitchell testified that he wasn=t getting any special deal for his testimony. (T. 1836). He testified that he cut hair in Liberty City. Business was bad after dread locks came in style, so he had to sell drugs to make a living. (T. 1839). Mitchell initially sold drugs for a group called the ALynch Mob@ where he got to know Corey Smith. Smith left the Lynch Mob in the 1990's and Mitchell, after a stint in jail, began working for him. He attained the rank of lieutenant, basically a supervisor. (T. 1850).

Mitchell knew Leon Hadley, who sold drugs. Hadley was shot by A Fat Keith@, but survived. Mitchell testified that Hadley was then murdered. An individual named Mark Roundtree went to jail for the killing, and Corey Smith authorized Julian Mitchell to make payments to Roundtree=s family. (T. 1861).

Mitchell, with the aid of a map, pointed out the drug holes in the Liberty City area,

particularly around 62nd Street and 12th Avenue, the site of the APork and Beans@ housing project. He identified the gangs who ran the various holes. Over objection, the State introduced a chart of the hierarchy of the John Doe Gang, and Mitchell was permitted to testify about who the individuals on the chart were, and what the individuals did for the John Doe organization. (T. 1874). He also gave an overview of how the sales worked on the streets and the accounting method used.

Mitchell was acquainted with Melvin Lipscomb, a/k/a Shorty. Mitchell saw Shorty shot and killed after he went into a drug hole and caused a disturbance. The shooter was AGarhead@, identified by Mitchell as one of Corey Smith=s lieutenants. After the shooting, Mitchell grabbed the drugs from the stash and took off running with Garhead. Later they talked to Corey Smith, who told Garhead to lay low. (T. 1916). Mitchell testified that he knew Smith had been charged with killing Domenic Johnson. After Smith=s arrest for the Johnson killing while Smith was out on bond, Mitchell overheard Smith and his mother Smith discussing how to kill a woman so that it would not look like murder. (T. 1923). Afterwards, Smith told Mitchell he was setting aside money for the boyfriend of the girl he wanted killed. Mitchell learned that the State=s case against Corey Smith for the Domenic Johnson homicide was subsequently dropped. At a celebration after the case was dropped, Smith told Mitchell he had a lady A killed or whatever, in order to win his case.@ (T. 1926).

Mitchell testified that Smith and Anthony Fail had a falling out. Fail was barred from taking money from one of the drug holes and in retaliation, robbed the drug hole.

Fail=s name was put on a list of people to be killed. Subsequently, Fail=s car was fired on and Fail=s girlfriend, who was driving the car at the time, was killed. (T. 1939). At that time Smith was in jail on an unrelated crime. (T. 1940).

On cross examination Mitchell acknowledged that though he said he had received no special benefit from the State, he had not been charged in the indictment as part of AJohn Doe@ in State court, and was serving Federal time. He advised that on the streets he was not called a lieutenant, or given any other name or title indicating rank, and whoever made the chart gave that name to him and others. (T. 1963). The witness acknowledged that he was never charged with the murder of Melvin Lipscomb, though he helped hide the drugs and ran off with the killer. (T. 1980). Mitchell also admitted on cross examination that he had driven a car to a strip club called Foxxy Lady, where two of the occupants of the car got out and killed a man. Mitchell was never charged in connection with that homicide. (T. 1997).Mitchell ther admitted he was driving a stolen motorcycle when he got into an accident. His friend AWorm@, riding on the back, was killed. Mitchell left him and ran off. Eventually the police caught up with him and questioned him about the accident. Mitchell then gave the police information about Corey Smith and John Doe, and was never charged in connection with the accident which resulted in the death of Worm. (T. 2002).

The State called Jevon Bell, who said he was going to buy drugs with Melvin Lipscomb the night Lipscomb was killed. He testified Lipscomb got into an argument while buying drugs and someone at the Ahole@ pulled out a gun. Bell ran. He did not see

Lipscomb get shot, or know the person who pulled out the gun. (T. 2085).

On October 28, the State called Danny Dunston who was on supervised release from Federal Prison for charges stemming from drug dealing. He testified that he packaged drugs in various locations around Miami. He said he saw Smith give money to various people for Mark Roundtree. (T. 2114). On cross examination he admitted that he never heard anyone discussing killing other drug dealers.(T. 2143).

On that date the State also called Oscar Anderson. He stated he was in the general vicinity of 15th Ave and 58th street to buy drugs the night of August 27, 1995 and got shot. He was using drugs at the time and was not sure who shot him. An objection was made to his being brought to testify in a red prisoner outfit, similar to what witness Mitchell had been wearing. (T. 2155).

The State called Carlos Reynolds, who identified himself as a Adope dealer.@ (T. 2249). He was in prison and stated that he got no special deal for testifying. He described a feud between Corey Smith and Leon Hadley=s brother ABlind@. Hadley had problems with an individual named Fat Keith . Fat Keith shot Hadley, sending him to the hospital. After Hadley got out, he showed up at the corner where Reynolds, Mark Roundtree and several other, not including Corey Smith, were hanging out. Hadley said when he got off the crutches, he was going to seek retaliation (or words to that effect). (T. 2296). The witness took the threat to include Corey Smith.

During cross examination Reynolds revealed that he had been in prison with

Mark Roundtree, who was serving time for killing Leon Hadley. (T. 2309). He admitted that Roundtree was his cousin. (T. 2318).

On November 1, after another discussion of court security, (T. 2341-43), the State called Philip White. White testified that he was in Federal custody but had not been given any special deal for testifying against Smith. (T. 2364). White testified that he was present when Leon Hadley made threats against Corey Smith. He also witnessed Smith and two others in black Dickies crossing through an alley a few days before Hadley was killed. The Dickies signified that the person wearing them was going to war or kill someone. (T. 2377).Mr. White testified that he drove Smith and a guy named Cook around the area looking for Leon Hadley. They found Hadley in front of a store in Liberty City. White saw Smith jump out of the car with an AK-47 and shoot at Hadley, but the gun jammed. Smith got back in the car, and Cook leaned out of the car and shot Hadley, who died as a result of the injuries. (T. 2386).

On cross examination White admitted that his cousin Mark Roundtree had been convicted of the murder of Leon Hadley. (T. 2392). The witness conceded that even though he knew Roundtree was arrested and convicted of killing Leon Hadley, he never previously offered to help him by testifying to the story he had told in court that day. (T. 2414). He also said Cook was dead and could not corroborate his story.

A civilian witness testified she saw Cynthia Brown walking in the vicinity before Johnson was killed. The witness did not see the shooting but heard gunshots.

On November 2, Charles Clark testified that he was on Federal probation but had not cut a State deal to testify in the case. He sold drugs in the area of Liberty City frequented by Mr. Smith and the other witnesses. Clark saw Jackie Pope walking through the Pork and Beans housing project, near 62nd Street in the Liberty City area of Miam, the night Pope was killed. Shortly afer he saw Pope walking, Clark heard gunshots. Clark ran in the direction of the shots, and testified he saw Jackie Pope trying to crawl under a car. He did not see who shot him. (T. 2553).

A police department chemist testified that he had swabbed the hands of decedent Domenic Johnson who did not have gunshot residue on his hands.

Herbert Daniels was called next and testified he had made agreements to testify for the Federal government but had no agreement with the State. He stated he worked for Corey Smith, first as a watchout and then bagging up or cooking the drugs. Smith appeared to him to be the leader because everyone reported to him. (T. 2611).

He testified heard Smith tell Roundtree,, not to worry about the Hadley homicide because he (meaning Roundtree) hadn=t done it. (T. 2613). Daniels claimed he

saw Smith speaking to Chazre Davis, prior to the murder of Cynthia Brown. Daniels testified he heard Davis ask Smith AWhat do you want me to do with her?@ (T. 2617).

Shundreka Anderson testified she worked for Corey Smith. In November, 1996, she saw Domenic Johnson and . Smith arguing angrily in the vicinity of a store on 62nd Street. She testified that later that night she saw Corey Smith with a gun in his hand, looking for Johnson and walking off in his direction. A little later she heard a noise like a car tire going flat, went looking for Johnson and saw him on the ground, shot. (T. 2690). She testified she knew that Cookie (Cynthia Brown) witnessed Smith shooting Johnson. Ms. Anderson told Brown to mind her business. (T. 2700).

Detective Frank Alphonso of the City of Miami Police Department investigated the Domenic Johnson homicide. The State called him on November 3, to prove that Smith knew Cynthia Brown was a witness to that homicide. The State=s theory was that by proving that Smith knew Brown was cooperating with the police and becoming a witness against Corey Smith in the Domenic Johnson homicide, the State was proving that Corey Smith had motive to kill Cynthia Brown.

The State sought to introduce statements made by Ms. Brown to Alphonso, but argued they were not being brought in for the truth of the matter contained

therein, and were not hearsay. An objection was made but was overruled. (T. 11/3, 1197).[1] The State was allowed to elicit from Alphonso that he had advised Corey Smith that a witness had implicated him in the Johnson homicide. (T. 11/3, 1205).

Alphonso testified that six months after the Johnson case against Smith was dismissed, the police executed a search warrant at the home of Smith=s mother. In a room occupied by Corey Smith they found a copy of Alphonso=s police report, containing information given to the police by Cynthia. Brown. The Defense objected to the admission of this report as hearsay. The report was admitted with certain portions of it redacted , and was published to the jury. (T. 11/3 1212).After Alphonso testified the Defense moved for a mistrial. The motion

[1] The transcripts for November 3 and the morning of November 8 are not numbered consecutively. Reference to those areas of the transcript will be made with the date and page number as it is in the record prepared by the Clerk.

was denied. (T. 11/3 1250).

At the time of Alphonso=s testimony, the Defense did not request a curative instruction for the admission of the contents of the police report or any conversations with witness Cynthia Brown. (T. 11/3 1233).

After a week recess in the trial the Defense asked for a curative instruction regarding Brown=s statements contained in the police report. When the jury returned the court advised them to consider the statements of Cynthia Brown in the report not for the truth but rather to show motive. (T. 11/8, 1398).The Defense requested that the entire document be admitted into evidence, not just the redacted parts. The State said Alphonso would be testifying again, and the court deferred ruling.

After Alphonso testified, the State called Eric Mitchell, Julian Mitchell=s brother. He testified that he was serving time in State prison and had cooperated with the Federal government in the AJohn Doe@ case, but had not made any plea deals with the State for testimony in this case. (T. 11/3, 1262). Eric Mitchell testified he worked in the Lynch Mob serving drugs. He saw Fat Keith and Leon Hadley fighting and saw Fat Keith shoot Hadley. Shortly thereafter, he saw Hadley, on crutches from the injuries from the prior shooting, shot and killed. Mitchell didn=t see who shot Hadley=s but Smith later said to him later how fast he had run from the scene.so Mitchell knew Smith was at Hadley=s murder.

Mitchell knew Anthony Fail was cut off from getting money from the drug holes and began to rob them. He said Smith told him and others they should shoot Anthony Fail. (T. 11/3 ,1318).

On cross examination the witness stated he was in prison for Fleeing and Eluding a Police Officer and Possession of a Controlled Substance, which had happened about a year prior. He denied any deal with the State.

The State called Marlon Beneby=s girlfriend, who made the identification. (T. 11/3, 1352). The Medical Examiner who performed Beneby=s autopsy introduced autopsy photos of Marlon Beneby, who died a month after the shooting from the wound he suffered. The Defense objected that the photos were unduly prejudicial. The photos were admitted. (T. 11/3, 1323).

The State then called Ricky Taylor, a former City of Miami Police officer who was wounded on New Years Eve 1996, in the vicinity of the Pork and Beans project in Liberty City. He could not identify who shot him. Juanita Pierce testified she was in Liberty City on New Year=s Eve 1996, in the vicinity of the police shooting. She said a bullet hit the wall near her, ricocheted and hit her in the buttocks. The Defense objected to her testimony because it was improper Williams Rule evidence. The court struck her testimony in a sidebar, however, the jury was never instructed to disregard her testimony. A motion for Mistrial was denied. (T. 11/8 1430).

The State introduced a picture of Officer Taylor after he was shot which the Defense objected to because it was gruesome. The picture was admitted . (T. 3085).

Carrie Jones testified that she worked with the AJohn Doe@ gang in the nineties. Because of her drug habit she was incarcerated but was currently drug free. (T. 3094). She was convicted on three felony cases for drugs, one of which had sixteen counts. (T. 3102). Ms. Jones testified that on New Year=s Eve when the Officer got shot, she saw Charlie Brown (CB) with a rifle. CB saw some white officers, according to her, said he was going to AShoot them crackers@ and shot several times. She testified to this in trial against Charlie Brown, who received 30 years in prison.

The State then called a police officer who responded to the scene of the Beneby shooting. Beneby was still alive on the scene. The officer testified that it looked like someone had tried to wash the blood away from where Beneby had fallen. The last witness November 8 was Tyree Lampley, who testified he saw Travis Gallashaw and shoot Beneby (ABig Shorty@).AGarhead@ was also present. The witness did not see Corey Smith at the shooting scene.

Anthony Fail took the witness stand on November 9. He identified himself as a Ahit man@ for various drug dealers in Liberty City. Fail testified that Smith offered him money to kill Athat junkie bitch@ (Cynthia Brown) (T. 3283) but they

disagreed on the method so he did not take the job. Also, Fail was concerned because he was on house arrest at the time and could not go out at night. (T. 3284). Fail said he had a falling out with Smith and afterwards he knew that he was not safe. His girlfriend Angel Wilson was killed in December 1996, when Smith was in jail. Fail sought revenge on the AJohn Doe@ people and shot up several cars containing AJohn Doe@ workers in the Liberty City area near 62nd Street and 12th Avenue. His grandmother=s house in Liberty City was then shot up. In December, after Angel=s death, Fail was at a friend=s house for a party, and a car pulled up and shot into the house. In the house were a number of adults and a few children. No serious injuries were sustained. (T. 3327).

The Defense attempted to elicit on cross examination that Anthony Fail had admitted to a number of murders but was not charged with them. The court ruled that the Defense could not go into Fail=s prior convictions. The court also ruled that Fail could not be asked any questions about specific homicides, even though the Defense proffered that the information elicited by question would show that Fail was in fact getting a benefit from the state for testifying. (T. 3348).

Cassandra Harvey testified she was at her mom=s house for a party in 1998 when the house was shot at and into numerous times. The State also presented Germina Taylor, who was in the Harvey home for the party. She saw a green Taurus drive by, heard someone yell AGet down@ and heard shooting. She saw

the three people in the car who did the shooting and Smith was not one of them. (T. 3418).

On November 10, Dr Emma Lew, Deputy Chief Medical Examiner for Miami Dade County, testified. She was assigned the Cynthia Brown case. Her testimony was solicited from the prosecutor with questions that resulted in Dr. Lew testifying in narrative form. Despite repeated objections, the court allowed her to do so, and denied the Motion for Mistrial. (T. 3506). The State posed a hypothetical question to Dr. Lew about the cause of death. . The State repeated the hypothetical after Defense objections to the question were sustained. A Motion for Mistrial was denied. (T. 3594).

One of the theories advanced by the Defense for Ms. Brown=s death was that she died of Asexual asphyxia@. During the cross examination, Dr. Lew stated that people don=t usually hold their breath during sex. The Judge would not allow Dr. Lew to explain the term or the practice of sexual asphyxia to the jury. (T. 3556).

Veteran prosecutor David Waksman testified over objection (T. 3601) that he prosecuted Corey Smith in 1997 for the murder of Domenic Johnson. He testified that Cynthia Brown was his only witness, and that she was killed a few days before the case against Corey Smith was set to go to trial. (T. 3615).

A toxicologist testified that Cynthia Brown was using cocaine and alcohol

on the day that she died. He testified that the amount in her system was not a toxic level.

The next day the State presented Regina McKire, who testified that she was with Cynthia Brown on the day she died, and was drinking and doing cocaine with her. She and her boyfriend drove Brown and her boyfriend Chazre Davis (ACrip@) to a motel on Eighth Street. (T. 3675). The next witness was the manager of the motel who testified to finding Brown=s body the following morning. An Emergency Medical technician with Fire/Rescue testified that Brown was dead when he got there.

The State then called Demetrius Jones who testified he sold drugs and as a result became a convicted felon, and was currently incarcerated . He smoked some Aweed@ with Domenic Johnson the night Johnson was killed. At some point he saw Johnson arguing with Smith, saw Smith pull out a handgun, and dived for cover. When he looked up, Smith was gone and Johnson was on the ground. Jones saw Johnson was dead or dying, and removed money, drugs and a handgun from his body. (T. 3793).

Jones testified he told Cynthia Brown not to say that Smith was involved with the murder. Jones offered to lie for Smith and say he saw someone else kill Johnson. (T. 3804). He gave a statement to that effect to the State Attorney=s Office. Smith put Jones on the payroll but did not require him to do any work. (T.

3809).

On cross examination Jones admitted that he had made a plea deal and gotten a reduction in sentence to testify against Smith. At sidebar, the Defense advised that the witness had admitted in a prior statement to shooting seven people, and had been given immunity for it. (T. 3820). The Defense wanted to question Jones about those shootings to show his motivation to testify against Smith, and was biased to testify in favor of the State. The court would not allow it. (T . 3852).

The State called Carlos Walker, another incarcerated felon who stated he worked for John Doe as a watchout and then moved up in the organization. He stated that Smith showed him a document that he referred to as a Adeposition@ wherein Jackie Pope was Asnitching@ on Charlie Brown for the shooting of Officer Ricky Taylor. Jackie Pope was killed a few weeks later. Subsequently, Mr. Walker claimed he was present for a conversation with Smith, ACrip@ and three others. Smith told Crip he wanted Cynthia Brown strangled or suffocated. Walker attended the party after the Johnson murder case against Smith was dropped and learned Brown had been killed.

In response to the State=s questions, Walker testified that he lied to the Defense attorneys in his deposition, because he was afraid of Corey Smith. (T. 3907). In the deposition taken of Walker as part of the pretrial discovery, Walker denied

knowledge of Smith=s involvement in the murders of Jackie Pope or Cynthia Brown. Walker testified that he was present when Beneby (ABig Shorty@) was killed by Trav Gallashaw. Walker said he loaned his car to one of the Ahit men@ for the organization the night Angel Wilson was killed. The next time he drove the car, which was a few days later, the car was shot at. His toe was Ablown off.@ (T. 3922).

Prior to cross examination, the Defense moved for a mistrial on the grounds that the trial testimony of the witness was substantially different from the statement he gave in deposition. The witnesses new statement implicated Corey Smith in two homicides. The Defense argued that the State should have advised the Defense of the new statement. The Defense Motion for Mistrial was denied. (T. 3923). The court held no hearing, formally or informally, to determine how the Defense was prejudiced as a result of learning for the first time, as the witness testified, that his testimony in court was substantially different than his testimony in deposition.

During cross examination the witness again admitted he had given different answers in the deposition, specifically, that he never had any conversations with Smith about the Brown murder and never heard any conversations about how Brown should die. (T. 3948). He stated that his fear of Corey Smith motivated his perjury.

On November 16, the State called a police detective who responded to the scene of the Harvey shooting and documented the damage done by the bullets to the house. The next witness was five time convicted felon Antonio Allen, who testified that he saw an individual named Calvin Cook driving around in Smith=s car the night Hadley was murdered. He also saw Big Shorty (Marlon Beneby) immediately after he was shot, and helped move his body and poured bleach on the bloodstains.

The State then called James Harvey. Harvey stated he was serving a thirty year sentence and had no plea deals with the State or Federal government. (T. 4058). Harvey testified he was Anthony Fail=s brother. On the night Angel Wilson was murdered, Wilson and Anthony Fail had stopped by Harvey=s house. Harvey was concerned because he had seen a car repeatedly drive past the house. After he told Fail, they told Wilson to go home. (T. 4065). Fail remained with Harvey and Angel Wilson left driving Fail=s car. He learned the next day that the car Angel Wilson was driving had been shot into shortly after Wilson left, and she was killed.

Several days later Harvey was at a party at his mother=s house when a group of men drove by in a green Taurus and shot at the house. (T. 4069). Smith was not present at either the Wilson shooting or the shooting at the Harvey house. (T. 4072).

Dr. Bruce Hyma then testified that he reviewed the report of Dr. Barnhardt, who did the autopsy on Kenwan Maynard and concluded he died of multiple gunshot wounds. (T. 4089). The homicide of Kenwan Maynard was the subject of Williams Rule which was filed two weeks before the trial began. A police officer then testified about the scene of a shooting at the Foxxy Lady Bar .

Detective Willie Smith testified that acting on a tip he and members of a police unit targeted to drug suppression went to an address, knocked on the door and Antonio Allen answered. Allen, realizing the police were upon him, ran, and the police then entered the apartment and seized a large quantity of packaged drugs. (T. 4128). Subsequently the police got Allen=s consent to search the bedroom where they found money, drugs and firearms. Allen apologized to his mother in front of the officer for bringing drugs into the house. A chemist testified that she analyzed the contents of the baggies provided by Detective Smith and it was in fact cocaine.

The State called Trisha Geter, Smith=s former girlfriend on November 18. She testified that she was serving a federal sentence of twenty five years. As a condition of her plea agreement, she was required to answer truthfully if questioned by authorities. No specific mention was made about testifying against Corey Smith or the John Doe gang. (T. 4303). Geter testified she met Corey Smith in 1990 or 1991 when he and her little brother were in juvenile together.

She had an on and off romantic relationship with Corey Smith. At some point, Smith told her he called the organization AJohn Doe@ because he had the Abest weed in town... killer weed@ and John Doe is a body in the morgue with a toe tag on it. (T. 4308). She testified that Smith told her that he was going to kill Hadley before Hadley killed him. According to Geter, after Hadley was shot and killed Smith called Mark Roundtree and told him to be cool. Geter also testified that Smith told AGarhead@ to kill AShort@ (Melvin Lipscomb), specifically by saying ADo his ass@. (T. 4327) because Short had Adisrespected the hole@ .

Geter also testified that Smith told her he did not kill Domenic Johnson, and was going to kill Cynthia Brown because she was trying to take his life by testifying against him. Geter testified that when Smith was incarcerated, she placed calls for him by accessing the three way calling system. (T. 4337).

On the following day, the State presented Detective Alphonso and two other officers who assisted in obtaining and executing a search warrant for the premises Smith resided in. During the search the officers found a deposition and a newspaper article about the murder of Cynthia Brown. The State characterized the article as a Asouvenir@ and the Defense objected and moved for a mistrial.(T. 4493).

The first witness on the following day (November 22) was the custodian of records from Bell South who testified about several phone numbers were linked

to Corey Smith. A firearms expert testified that grenades seized from Smith=s home were homemade. Detective Alphonso testified about the items he found in Smith=s home. Detective Dearmas and Officer Carrillo from the City of Miami then testified that they did a surveillance on a residence and saw three black males leave in a blue LeSabre. Carrillo testified that he followed the car until the three abandoned it and bailed out.

The State then called an FBI Agent who testified that he was present when the individuals in the blue Le Sabre were arrested for a shooting that occurred several days prior at the Harvey residence. He admitted on cross examination that to the best of his knowledge, Corey Smith was in jail at that time.

A detective for the Metro Dade Police Department testified he was involved in executing a search warrant at the residence of Eric Stokes, which yielded money, ammunition and a bullet-proof vest, among other things. Detective Alphonso was recalled to describe the items he had found pursuant to searches at various residences.

A chemist from the DEA then testified that he analyzed the evidence found at various of the search sites and found it to be drugs. Detective Brooklyn then testified that he assisted in the execution of a search warrant for the home of Julian Lamar Mitchell, and they found, among other things, ammunition, a receipt from Corey Smith for $5,000, and tally sheets and ledger books.

The following day the State called Detectives Harrell and Rond, who testified to the items found pursuant to search warrants at the residences of individuals identified by the State as members of the AJohn Doe@ organization. The State recalled Agent Beamer, who testified to the process used to obtain wiretaps, and what lines were actually tapped and what conversations were taped by law enforcement in furtherance of the investigation into AJohn Doe@. (T. 5015).

The tapes were introduced through witness Julian Lamar Mitchell.. (T. 5083). Mitchell spent a full day on the stand listening to recorded conversations, most of which were of short duration. He then explained to the jury the Acodes@ used, what was meant by what was said, essentially . For example, ASkittles@ meant crack rocks. These conversations were between various individuals identified as part of the AJohn Doe@ gang, including Corey Smith. Mitchell was not a party to any of them.

At the end of the first day of testimony from Julian Lamar Mitchell, the Court objected to a second day of tapes. The Court pointed out that the evidence was extraordinarily repetitive. (T. 5398). The State was told they had one more hour the next day to present the rest of the tapes that they had.

The next day, November 29, the Defense objected to Mitchell giving his opinion on what the tapes contained. (T. 5436). The witness began to summarize what was contained on the tapes and the Defense objected. The

objection was overruled and Mitchell testified to, among other things, conversations between Smith and Willie Mae Smith and between Smith and Mark Roundtree. Other conversations concerned drug holes being closed down, football games, and the lack of available product.

The last State witness was a detective from the City of Miami Police Department who testified that based on the wiretaps, Smith=s house arrest officer was investigated because Smith was on the streets when he should not have been violating the terms of his release. (T. 5565). After this witness, the State rested their case. (T. 5573).

Motion for Judgement of Acquittal

After the close of the State=s case the Defense argued for a Judgement of Acquittal based on the lack of credibility of the State=s witnesses and the insufficiency of the evidence. The Court, after confirming with State and Defense that the legal standard was whether the State had proven a *prima facie* case, denied the motion. (T. 5602).

The Defense renewed the Motions for Mistrial which had been made during the course of the trial, as follows: (1) The jury panel had contact with the Defendant=s mother, which tainted the panel. (2) The court then voir dired members of the panel in a group, further tainting them. (3) The State=s referral in voir dire, without any evidence, to the characterization of the case as a drug

wars, and continuing to do so after sustained objections. (4) During direct examination of witness Carlos Walker, the State solicited testimony that the witness was in fear of Corey Smith. (5) The extensive security measures were prejudicial and destroyed the presumption of innocence. (6) The police report of Detective Alphonso regarding the Domenic Smith murder was hearsay and improperly admitted. (7) The improper hypothetical questions presented to the Medical Examiner were prejudicial and (8) it was error to introduce the wiretaps using Julian Lamar Mitchell as the Ainterpreter@. The Motions were denied.

Defense Case

The only witness called by the Defense was attorney Larry Hanfield, who had represented Mr. Smith in the Domenic Johnson homicide. The substance of his testimony was that he had done everything he could for his client. He testified that when he received discovery from the State, in the ordinary course of his practice, he would send it to his client for review. (T. 5619).

Closing Arguments

During the course of closing arguments, the State made numerous improper arguments which were objected to and sustained:

$ The State argued that Mark Roundtree had been ordered by Smith to check out the scene of the Cynthia Brown homicide and report back to him. Objection sustained for improper argument, no supporting evidence. (T

5819).

- The State argued that Demetruis Jones lied because he was afraid of Corey Smith . The prosecutor said, AAnd how true we know that is in this courtroom today@. Objection sustained for improper argument and personal opinion. (T. 5829).
- The State argued that Smith instructed ACrip@to kill Brown with Ano bullets, no evidence, nothing to be left behind. Objection sustained, improper argument assuming facts not in evidence, objection sustained and re-asked ***twice*** and again sustained . (T. 5835).
- The State argued, immediately after the prior objection was sustained ,that Carlos Walker said he heard Smith say ANo bullets, no evidence@. Objection sustained . (T. 5835).
- The State then said Carlos Walker testified AIt had to be strangling or suffocation.@ The objection was sustained. (T. 5835).
- The State argue after Cookie (Cynthia Brown) was dead, Crip stabbed her. The objection was sustained. (T. 5843).
- The State argued that Smith had kept a newspaper article abut Cynthia Brown=s death (this had been referred to in the trial as a souvenir). The objection was sustained. (T. 4849).
- The State told the jury that witness David Waksman taught identification

evidence techniques to the police. The objection was sustained as improper vouching. (T. 5876).

. Much of her the first prosecutor=s closing argument (T. 5838) was a virtual reading of the incident report which detailed the information Cynthia Brown had give to the police about Corey Smith killing Domenic Johnson. Even though the document had been admitted as non-hearsay, the State used the contents in her argument as if they were true. The Defense objections to the use of the police report, in the grounds it was hearsay, were overruled.

The Defense made their closing argument, and the State had the final word in rebuttal. A different prosecutor argued:

- That a witness not called by the State would give better testimony.[2] Objection for improper argument sustained. (T. 5936).
- The State argued that the case against Corey Smith for the murder of Domenic Johnson was a lock. Objection sustained for improper argument,

[2] The witness, AJudog@ (Julius Stevens), was one of the co-defendants in this indictment, charged in the killings of Jackie Pope and Angel Wilson. His case was pending.

no supporting evidence. (T. 5937).

- The State argued that Mitchell was sent by Corey Smith to pay Chazre Davis after Brown was killed. Objection sustained. (T. 5938).
- The State argued AIf Detective Alphonso wanted to make up stuff to frame Corey Smith... he would have done a better job... than the statement you heard.@ Objection sustained . (T. 5943).
- The State argue if the detective wanted to fabricate a case the police had Smith=s fingerprints on file and could have used them . Objection sustained to fact not in evidence .(T. 5944).
- The State argued that the mirrors were moved in the Brown homicide hotel room so they could check for cameras so the murder would not be caught on tape. Objection sustained for facts not in evidence. (T. 5948).
- Finally the State argued that Smith did not want to go to court on the murder of Domenic Johnson because he had seen what happened to Mark Roundtree when he went to court on the murder of Leon Hadley. The prosecutor then stated ABecause no one knows better what happened to Leon Hadley than Mr. Smith.@ Defense objected on the grounds that the State=s argument was a comment on the Defendant=s right to remain silent. Objection was sustained. (T. 5950).

The verdict

December 3, 2004 the jury returned verdicts of guilty as follows: Count I (Rico/Conspiracy) ; Count II (Racketeering/RICO); Count III (Conspiracy to Traffick (*sic*) in Cannabis, over 50 but less than 2,000 pounds); Count IV (Conspiracy to Traffick (*sic*)in Cocaine, more than 400 grams but less than 150 kilograms); Count V, (Conspiracy to Commit First Degree Murder of Leon Hadley); Count VI (First Degree Murder of Leon Hadley, with a firearm); Count VII (Lesser included crime of Manslaughter of Mevin Lipscomb); Count IX (Conspiracy to Commit First Degree Murder of Cynthia Brown); Count X (First Degree Murder of Cynthia Brown);Count XI, (Conspiracy to Commit First Degree Murder of Jackie Pope); Count XII (First Degree Murder of Jackie Pope, without a Firearm); Count XIII (Lesser included crime of Manslaughter of Marlon Beneby); Count XV (Conspiracy to Commit First Degree Murder of Anthony Fail) and Count XVI (First Degree Murder of Angel Wilson, without a Firearm.).

Post verdict Motions

The Defense filed a motion for a new trial based on the State=s withholding favorable evidence. The evidence was a statement made by Mark Roundtree, a listed State witness. Roundtree was convicted of the murder of Leon Hadley in 1996 and received a life sentence. Corey Smith was charged in the indictment with killing Hadley. The State provided Smith with a statement Roundtree made on 1/25/01, wherein Roundtree alleged that he, Mr. Smith and two other

individuals shot Hadley. Roundtree was listed as a State witness, but was not called by the State at trial. Based on the sworn statement implicating Smith, the defense had no reason to call him.

Two months after the trial ended the State provided the defendant with Amended Discovery, which disclosed that Roundtree made a statement to a polygraph examiner in July 2004, wherein he stated he had perjured himself in the January 2001 statement. Roundtree stated that the reason he admitted (falsely) involvement in the Leon Hadley homicide was to get on the witness list for Cory Smith. In the sentencing memorandum, the Defense asserted that they would have called Roundtree had they been made aware of these statements. (R. 3016).

Penalty Phase

Prior to the penalty phase, the defense filed a Motion to Withdraw (R. 2713-2715) and a Motion to Bar Further Criminal Proceedings. (R. 2710-2712). The Motion to withdraw was based on Mr. Smith=s refusal to co-operate with them in the preparation of the penalty phase, and have his family co-operate with them. In a hearing on December 27, the court questioned Smith about his refusal to assist his attorneys. Smith did not indicate his dissatisfaction with counsel, and indicated he was aware of the consequences of not dealing with his lawyers. (T. 12/27, 11). The court found that Smith had made his choices knowing of the

consequences, and there was no basis to allow the attorneys to withdraw. The Defense Motion was denied. The Motion to Bar Further Criminal Proceedings was withdrawn by the Defense. (T. 12/27, 12).

Prior to the penalty phase, the Defense filed a Motion to Declare Statute 921.141(1), Florida Statutes Unconstitutional, or for Special Penalty Phase Verdict Form and Instructions.(R. 2816-2820); a Motion for a Statement of Particulars as to Aggravating Circumstances (R. 2821- 2823); a Motion Objecting to Standard Jury Instructions on Reasonable Doubt (R 2829-2834), a Motion for Special Verdict form Containing Finding of Fact by the Jury (R. 2843-2845), a Motion to Preclude the Imposition of Capital Punishment on the Ground that the Death Penalty, as presently Administered, is *Per se*, Cruel and Unusual Punishment (R. 2846-2855). The Defense also filed a Motion for New Trial based on a Violation of *Brady v. Maryland*. (R. 2856-2860).

The penalty phase began on February 7, 2005 . The court heard the motion for new trial first. The *Brady* violation was based on a statement made by Mark Roundtree, before the trial, which the State had just provided to the Defense. The Defense argued for a new trial on the basis that the statement was relevant to the trial portion, because the if the defense had known what he had said, he

(Roundtree)would have testified at trial (T. 2/7, 14)[3]. The Motion for a New Trial was denied (T. 2/7, 19). The other five Motions were denied. (T. 2/7. 40).

After the opening statements, the State called five victim impact witnesses who were family members of the homicide victims. After the last one testified, the court advised it had came to light that one of the jurors had gotten arrested over the Christmas holidays and had a hearing in front of another judge in the building that very day. (T. 2/8 , 53). The Court excused her, over Defense objection. The Court then questioned the other jurors about whether this would affect their decisions. They all said that it would not. The Defense made a Motion to Strike the panel, based on irreparable taint and that Motion was denied. (T. 2/8, 65).

The State called David Waksman and a Police officer to testify to community impact,and Dr. Emma Lew to testify to what Cynthia Brown endured prior to her passing away.

The Defense called Phillip White, who testified that he had not been charged with the death of Leon Hadley. The Defense also called Demetrius Jones. The Defense proffered in sidebar that he wanted to question Jones about the people

---

[3] The transcripts of the penalty phase in the Record provided are not numbered consecutively to the trial transcripts, and will be referred to by the date and the page number.

he had killed, to show the State was giving him treatment that was disproportionate to the treatment afforded Smith, who was facing the Death Penalty. The court ruled those questions could not be asked. The Defense did not question Jones further.(T. 2/8, 143).

The Defense called Detective Alphonso who testified that Julius Stevens had told him that he and two others (not Corey Smith) had killed Angel Wilson. The following day the Defense called Willie Mae Smith who testified that Corey Smith had always helped take care of his grandmother. George Slatterey testified that Mark Roundtree had confessed to him that he killed Leon Hadley. (T. 2/9, 83). The State then called in rebuttal Detective Alphonso who testified that the sole witness against Mark Roundtree recanted her testimony. The State also called Trish Geter, Smith=s one time girlfriend, who said that Smith did not spend much time with his grandmother, and that the grandmother was taken care of by someone else.

After hearing arguments from counsel and given instructions by the Court, the jury retired. The jury recommended Smith receive a life sentence for the homicides of Leon Hadley (by a vote of 12-0) and Jackie Pope (by a vote of 6-6). The jury recommended that Smith receive the death penalty for the homicides of Cynthia Brown (by a vote of 10-2) and Angel Wilson (by a vote of 9-3).

SUMMARY OF THE ARGUMENT

The trial court erred in ordering extensive and additional courtroom security, without a finding that these measures were required by the circumstances of the case or the defendant=s courtroom behavior. These measures were highly prejudicial to the defendant as they gave the jury the impression that Mr. Smith was a dangerous, violent individual who needed armed security in and around the courtroom. Despite the Defense=s repeated requests, no finding was made on the record of the facts or circumstances that warranted the extra security. The defendant was required to wear a stun belt, and there was no evidence on the record that he had ever conducted himself in a manner that warranted it.

The court erred in not striking the panel of prospective jurors who were exposed to the defendant=s mother=s Ablessing@ and inappropriate, frightening demeanor after she had been excused from the courtroom.

Much of the State=s case pertaining to the criminal enterprise depended on conversations between alleged members of the enterprise overheard and recorded on wiretaps. The conversations appeared to be about vegetables, candy, shoes and clothing, not about drugs and money. After the tapes of the wiretaps were duly introduced, a federal prisoner who was not a party to these conversations, was allowed to give his opinion about what the conversations were **actually** about. The court erred in allowing his opinion testimony since he

was not an expert in the area, other than being convicted for drug offenses himself.

The court erred in admitting Detective Alphonso=s police report of a homicide that was not charged in this indictment. In that police report Cynthia Brown told the police that Smith had killed Domenic Johnson, and that she was afraid of Smith. The State argued that this report was non-hearsay, not admitted for the truth of its contents, but rather to show that Smith had possession of it, and, by inference, had knowledge of its contents and therefore motive to kill Brown. Despite the State=s assertion that the report was not being brought in for the truth of its contents, the prosecutor in her closing argued the statements contained in the police reports for their truth. The contents of the police report were highly prejudicial to Mr. Smith.

The court erred by limiting Defense cross examination in three areas which were crucial to the Defense theory of the case. The court would not allowing the Defense to question the Medical Examiner about sexual asphyxiation as a possible cause of death for Cynthia Brown. The court did not allow the Defense to question witness Anthony Fail about the murder he had committed for which he was not being prosecuted. The Defense was also not allowed to question witness Demetrius Jones about the shooting or shootings for which he had gotten immunity. The information that the Defense would have been able to elicit in

response the these questions on cross examination of these two convicted felons was essential to show the bias of these witnesses and their motives to lie.

The prosecutors made numerous objectionable statements, arguments, and misstatements of the law throughout the trial. More egregiously, they continued making the same improper statements, and asking the same improper questions and hypotheticals ***after*** objections had been sustained. The cumulative effect of this prosecutorial misconduct denied the defendant the right to a fair trial.

The State deliberately withheld information from the defendant about prior statements made by two witnesses that had a direct bearing on the credibility of these witnesses, in violation of *Brady v. Maryland*. Mark Roundtree admitted he was willing to perjure himself to be on the Corey Smith witness list and get a reduction in his sentence. This statement was never provided to the Defense.

Witness Carlos Walker gave a deposition to Defense counsel in which he denied any knowledge of Corey Smith=s involvement in two homicides. On the witness stand in front of the jury, Walker implicated Smith in these two murders. The State never advised the Defense that Walker had changed his testimony between the deposition and the trial. The State=s failure to advise the Defense that Walker was going to testify differently in court than in his deposition directly and and negatively affected the Defense=s ability to cross examine the witness. The court erred in not granting a mistrial for the State=s discovery violation.

ARGUMENT 1

THE TRIAL COURT ERRED IN ORDERING EXTENSIVE SECURITY PRECAUTIONS IN AND AROUND THE COURTROOM, WHICH WERE HIGHLY PREJUDICIAL TO THE DEFENDANT, WITHOUT GIVING THE DEFENDANT NOTICE AND AN OPPORTUNITY TO BE HEARD, IN VIOLATION OF HIS SIXTH AND FOURTEENTH AMENDMENT RIGHTS TO A FAIR TRIAL

a) The court made no finding that the excessive security precautions were necessary prior to implementing them.

The trial judge is ultimately responsible for what happens during a trial. Often the judge will have to balance compelling but competing interests, such as in this case: the right of a defendant to be presumed innocent and get a fair trial against the preservation of safety and order in the courtroom. Central to the right to a fair trial, guaranteed by the Sixth and Fourteenth Amendments, is the principle that "one accused of a crime is entitled to have his guilt or innocence determined solely on the basis of the evidence introduced at trial, and not on grounds of official suspicion, indictment, continued custody, or other circumstances not adduced as proof at trial." *Taylor v. Kentucky*, 436 U.S. 478, 485 (1978). As Chief Justice Warren noted in his concurring opinion in *Estes v. Texas*, 381 U.S. 532, 552 (1965), due process requires the courts to safeguard against "the intrusion of

factors into the trial process that tend to subvert its purpose." Id. at 560. The courts must guard against "the atmosphere in and around the courtroom [becoming] so hostile as to interfere with the trial process...." Id. at 561.

The Supreme Court has recognized that certain practices pose such a threat to the "fairness of the fact finding process" that they must be subjected to "close judicial scrutiny." *Estelle v. Williams*, 425 U.S. 501, 503-504 (1976). In *Williams*, the court noted that where a defendant is forced to wear prison clothes when appearing before the jury, "the constant reminder of the accused's condition implicit in such distinctive, identifiable attire may affect a juror's judgment." Id., at 504-505. In *Illinois v. Allen*, 397 U.S. 337 (1970), the Court recognized that a defendant may be prejudiced if he appears before the jury bound and gagged. "Not only is it possible that the sight of shackles and gags might have a significant effect on the jury's feelings about the defendant, but the use of this technique is itself something of an affront to the very dignity and decorum of judicial proceedings that the judge is seeking to uphold." Id., at 344. Yet the Court observed that in certain extreme situations, "binding and gagging might possibly be the fairest and most reasonable way to handle" a particularly obstreperous and disruptive defendant. Ibid.

Reviewing courts have found that it is possible that the sight of a security force within the courtroom might under certain conditions "create the impression in the

minds of the jury that the defendant is dangerous or untrustworthy." *Kennedy v. Cardwell*, 487 F.2d 101, 108 (CA6 1973). Corey Smith was not shackled during this trial, nor is there any evidence on the record that he was wearing prison garb. However, the obvious security precautions and the noticeably large number of security personnel present in and around the courtroom during the trial were strong and pernicious reminders of his status as a prisoner. These security measures, not unlike shackles or handcuffs, created the impression that the man on trial was perceived as an individual capable of violent and dangerous behavior.

In this case the record is clear that the trial court allowed unnecessary and prejudicial security measures, which were objected to by the defense repeatedly, as follows:

- A second magnetometer was set up, which the potential jurors, spectators and attorneys had to pass through before going into the court room. As counsel described it, the entire half of the seventh floor was Acordoned off@. This was ***in addition*** to the magnetometer at the entrance to the Justice Building, which all the jurors had to pass through.
- Two armed police officers supervised the search of the parties that came into that end of the hallway, including jurors.
- At all times there were multiple numbers of Miami-Dade police officers inside and outside the courtroom. All officers were carrying weapons visible to the

general public. There were also armed State Attorney=s Office investigators, and a number of City of Miami police officers and corrections officers in the courtroom throughout the proceeding.

- Mr. Smith, who was seated two or three feet from some of the jurors, was wearing a stun belt which defense counsel stated that the jurors Acould not help but see@.
- After the jury was selected and sworn, in addition to being subjected to a second magnetometer, their personal belongings were searched on a daily basis.
- The attorneys for Corey Smith were also searched in front of the jurors.
- At some point in the trial, spectators were forced to identify themselves and give photo identification before being allowed to enter the courtroom.
- The record reflects that at least two witnesses for the State were brought into court in bright red jumpsuits with D. C. J. (Dade County Jail) stenciled on them, wearing handcuffs.

The inescapable conclusion drawn by anyone with even minimal contact with that seventh floor courtroom was that the man on trial was dangerous and a security risk.

The further implication not lost on any juror with common sense was that the court authorities considered the man on trial, in theory one presumed innocent, as a

threat to the community.

The order for the second magnetometer was signed October 4, the magnetometer was apparently set up sometime October 5, and the Defense brought it up and objected to it on October 6. (T. 274). Defense stated that the jurors were required to be scanned, and there were two police officers in the hallway Abrandishing firearms@. (T. 273). The court held no hearing and made no finding of necessity for the additional security measures, as Defense requested, but noted that since his was the only chambers and courtroom on the floor, the floor was not Acordoned off.@ (T.274). The Defense then noted that the jurors were not being screened. The court declined to strike the panel and recommended that if any of the parties had a problem, they take it up with corrections or Police Liaison. (T. 274). The magnetometer was kept in place.

The Defense also noted that Smith was wearing as stun belt, and that it was close to the jury and they could see it. The Court advised he could not see it. (T. 274). The record unfortunately is not clear where Mr. Smith was in relation to the jury, and though the issue of the stun belt was mentioned several times, the record was not clarified.

On October 14, after five panels of prospective jurors had been narrowed down to seventy, the Defense made a Motion for Mistrial based on the extensive security measures. Defense stated that the attorneys for Smith, ***in front of the***

panel, had to be Awanded@ to get in to the court room. (T. 1009). Counsel asked for a factual basis for the additional security. The court responded that problems with security had to be taken up with Liaison. The motion was denied. (T. 1010).

On October 25, both sides made their opening statements. After the lunch recess, the Defense objected to the additional court security. The jurors were now wanded as they walked into the courtroom, and had not been previously. (T. 1545.) In addition, defense counsel advised the court that because the jury room was near the holding cell, the jurors had seen Smith coming out of the courtroom handcuffed. (T. 1546).

No motion for mistrial was made at the time. The court advised the Corrections officers not to take Corey Smith out of the courtroom when he might run into the jury. The court also advised that the security measures were not the concern of the court but rather of court liaison. (T. 1547).

On October 27, witness Julian Lamar Mitchell was brought into the court in handcuffs and a prisoner jumpsuit, with two detectives watching him. (T. 1831). Defense objected to this presentation. During a break in his testimony the court readdressed the security concerns. The defense described the Ahighly prejudicial climate@ surrounding the trial which included six armed policemen in the court, witnesses being brought into court handcuffed, and the jurors **after** they were selected being subjected to a second search of their persons and property before

they entered the courtroom.

The court found that the presentation of the witness was not prejudicial because he was in fact a prisoner. (T. 1832). The court said there had Ajust@ been testimony that Smith had a witness killed, and was contacting people on the outside. The court found those circumstances to be sufficient to justify the security measures. (T. 1995). The court found that requiring the jurors to go through a second magnetometer and have their handbags searched was not prejudicial to the defendant because it was similar to what they would go through at an airport. (T. 1957).The court also declined to find the requirement that Smith wear a stun belt as prejudicial in Aa case of this magnitude@ and reiterated that the stun belt was not visible to him. (T. 1959).

On November 1, prior to the jury being brought in, Assistant State Attorney George Cholakis told the court of an incident that had occurred on October 28 (the last day of testimony). (T.2341-2343). A corrections officer in court related that he had heard a spectator ask who the blonde prosecutor was. According to an unnamed witnesses, Smith was then seen making a pulling motion with his finger, as if he was shooting, which was seen to be directed at this spectator.

Mr. Smith wanted to be heard by the court. He told the court that he had not made any threatening gestures, that he was fighting for his life and AI ain=t got time to be playing games@. (T. 2348). The judge then stated that it was the court=s

observation that Smith had at all times been respectful to all parties in the action. (T. 2348). The prosecutor then reminded the court that during jury selection, he had noticed that Mr. Smith had been staring at the prosecutors inappropriately. (T. 2350).

The State handed the court a copy of a Motion to Increase Court Security and Reconsider the Order Requiring Disclosure of Witness Order. (R. 958-960). The basis of the Motion was the State=s concern that if the Defendant knew the order in which witnesses would be called, he would have something done to intimidate them. (T. 2355). The Defense argued that they needed some advance notice of what witnesses were being called, so they could have their files ready in court, and be prepared for their cross examination. The State agreed that as long as the Defense did not tell the Defendant what witnesses were being called by the State until the day they were actually being called, there was no problem.

Later on that day (Nov. 1), prosecutor Aponte-Frank interrupted the testimony of an officer for a sidebar (T. 2422) and advised the court that Phillip White, the witness who had just testified, recognized one of the spectators as a Aknown killer@. The jury was excused. The spectator in question left. The Detective to whom the witness spoke said he was told that the alleged killer was named ADewey@ and the witness believed Dewey had resources and would harm him or his family. (T. 2429).

The court indicated they had no trouble banning anyone from the courtroom, but the spectators who the State believed were intimidating had not been identified. The State and Defense agreed that the least intrusive measure was to have all spectators photographed or videotaped as they came into the courtroom. The court deferred ruling on courtroom closure or other security measures until after conferring with legal counsel for the Administrative Office of the Court.

After the last witness of the day testified, the State advised the court that court liaison officers were asking people who were coming through the metal detectors for their identification. The court indicated it had not ordered that, but then determined it was a better policy than closing the courtroom. (T. 2512). The Defense objected.

During a break in the testimony the next day, ASA Cholakis moved to have one of the spectators excluded from the gallery. (T. 2627). This request was done in chambers in the presence of Defense counsel. The Defense objected, and further objected to the security measure, which included the second metal detector, large numbers of guards, and now increased security and exclusion of spectators. Defense counsel argued that the increased security gave the impression that the defendant was Aguilty until proven innocent.@ (T. 2629).

The conversation in chambers about the issue with the spectator was not on the record. Apparently the State told the court that the spectator was one of the

two that Smith was supposed to be making hand signals to. (T. 2630). The Defense on the record requested an evidentiary hearing and the request was denied.

The court was did not give specific or reliable reasons for the imposition of these security measures in overruling the objections, and failing to grant the mistrials the Defense requested. A trial judge is given a great deal of discretion in determining what security procedures may be necessary to insure the integrity of the process. In *Resnick v. State*, 319 So 2d 167 (Fla 1DCA 1975) a Florida court addressed the excessive security measures in the courtroom and corridors during the progress of the trial to the prejudice of the defendants. The reviewing court was able to glean from the record in that case that the trial judge had been advised by **reliable** (emphasis added) Federal and State officials of their understanding that a plot existed to bring about an armed invasion of the courtroom, the assassination of one of the defendants and the escape of the other. In response, the judge and security officials brought excessive security measures into being. The court held that when a judge is so advised of pending potential violence, he has the inherent authority and the duty to invoke such security as under existing circumstances appears to be reasonably necessary for the protection, not only of the judge, but of all lawfully before the Court.

In the instant case, the record is devoid of any real threats of potential

violence. The spectator in the courtroom that was excluded was never linked to Smith except by speculation. The alleged Aknown killer@ was never identified nor linked to Smith. One unanswered question is who or what caused the Court to put all these security measures in place and what was the impetus for him signing the order October 4, 2004 for the second magnetometer. None of these courtroom Adisturbances@ had occurred at that time. There is no motion in the file and nothing on the record.

The Supreme Court in *Deck v. Missouri* 544S.S. 622 (2005)(discussing the use of shackles on the accused) concluded that "due process of law" required a ***judicial determination*** (emphasis added) that shackles were necessary. The Fifth and Fourteenth Amendments prohibit the use of physical restraints visible to the jury absent a trial court determination, in the exercise of its discretion, that they are justified by a State interest specific to a particular trial. Such a determination may of course take into account the factors that courts have traditionally relied on in gauging potential security problems and the risk of escape at trial.@

In Smith=s case the record contains no formal or informal findings of threats to courtroom security or a risk of escape . The court stated on more than one occasion that courtroom security was not the court=s problem, and the Defense was told to talk to Police liaison about it. Quite contrary to expressing fear, the court remarked that Mr. Smith was behaving very well and had been polite and

pleasant at all times. The record did indicate that the State had concerns about their witnesses being intimidated **outside** the courtroom and prior to their testimony. However, those are not the type of issues that are addressed or resolved by placing metal detectors in front of the courtroom.

The record does reveal that during the course of the trial, emotions ran high with the State. This was manifested in an incident on October 26. During the process of striking jurors, the Defense advised the Court that Mr. Cholakis, one of the prosecutors, was Ahassling@ Mr. Smith and getting into a conversation with him. The court admonished that there were to be no conversations between the State and Mr. Smith. Cholakis then told the court Smith had been Astaring him down@ in an attempt to intimidate the prosecution. The Judge told Cholakis to Asit somewhere else.@ (T. 1440).

An intimidating stare, an ambiguous gesture, and a courtroom spectator with a criminal record do not add up to the the type of threat necessary for the court to impose security measures which are highly prejudicial. These excessive, unusual and extraordinary security measures gave the jurors reason to think that the defendant was dangerous, violent, and a security risk **before** they heard any evidence of his guilt.

There is no ABad Guy@ exception to the Constitution and due process requirements. Regardless of what the Indictment said, the trial court was

responsible for making sure that the jury did not presume him guilty before they heard any of the evidence. The security measures imposed in this case deprived Smith of a fair trial.

b) The security measures were inherently prejudicial.

The question presented in *Holbrook v. Flynn*, 475 U.S. 560 (1986) was whether a criminal defendant was denied his constitutional right to a fair trial when, at his trial with five co-defendants, the customary courtroom security force was supplemented by four uniformed state troopers sitting in the first row of the spectator's section. The court found that the presence of the four uniformed guards was not so inherently prejudicial that it denied the defendant his right to a fair trial. However, the Court wrote, "[w]e do not minimize the threat that a roomful of uniformed and armed policemen might pose to a defendant's chances of receiving a fair trial." Id. at 570. In *Williams,* supra, 425 U.S., at 504, the Supreme Court stated that "reason, principle, and common human experience, counsel against a presumption that any use of identifiable security guards in the courtroom is inherently prejudicial@ and urged a case-by-case approach for each set of circumstances.

In Corey Smith=s case, the record is clear that not only were there more than four armed guards inside the courtroom, there were armed guards outside the courtroom, the jurors were subjected to additional searches and security, as were

the spectators, the attorneys were searched in front of the jurors, witnesses were brought in handcuffed, and the defendant was forced to wear a stun belt. Unlike *Holbrook*, there was only one person on trial here.

The Court reasoned in *Holbrook*, that the four troopers sitting in the courtroom were unlikely to have been taken as a sign of anything other than a normal official concern for the safety and order of the proceedings. AIndeed, any juror who for some other reason believed defendants particularly dangerous might well have wondered why there were only four armed troopers for the six defendants. A (475 U.S. at 571).

That reasoning does not apply to Corey Smith=s case, as there were no co-defendants, and six armed uniformed officers in the courtroom at times. The jurors may well have wondered why there were so many police officers for one defendant. It is hard to see how any speculation about this would resolve in Corey Smith=s favor.

The test for inherent prejudice is "not whether jurors actually articulated a consciousness of some prejudicial effect, but rather whether 'an unacceptable risk is presented of impermissible factors coming into play.' " *Holbrook v. Flynn*, 475 U.S. at 570 (quoting *Estelle v. Williams*, 425 U.S. 501 (1976)). This test requires the court to examine two factors: first, whether there is an "impermissible factor coming into play" and second, whether it poses an "unacceptable risk." The

Williams Court held that a risk becomes unacceptable when there is a "probability of deleterious effects." *Williams*, 425 U.S. at 504.

Courts have also held that there is greater danger of prejudice if a jury is aware that arrangements are extraordinary. *Dorman v. United States*, 140 U.S.App.D.C. 313, 327, (1970).There were many courtrooms in the Justice Building with trials going on at the same time Corey Smith=s case was being heard. A juror for *The State of Florida v. Corey Smith* making her way to the Judge Scott Bernstein=s seventh floor courtroom in the Justice Building, would only have to take the escalator up to realize that none of the other courtrooms had magnetometers in front of them.

Criminal court judges, defense lawyers and prosecutors, and law enforcement officers are used to dealing with the unpleasant aspects of the criminal justice system. They are hardened to the armed security in the courtroom, and defendants in handcuffs and chains. They nonchalantly pass through security checks on a daily basis. This trial and the security surrounding it was not Abusiness as usual@ for the jurors selected to hear this case, and it is through their eyes the security measures must be evaluated.

The atmosphere surrounding this trial was not consistent with the presumption that the man on trial was innocent. Corey Smith was branded as a dangerous individual. The atmosphere surrounding the trial made it appear that

his culpability had already been determined. The prejudicial effect on the jury was inevitable.

ARGUMENT 2

THE TRIAL COURT ERRED IN NOT STRIKING THE JURY PANEL WHO HAD BEEN EXPOSED TO AN OUT OF COURT COMMENT BY THE DEFENDANT=S MOTHER WHICH SEVERAL MEMBERS OF THE VENIRE DISAPPROVED OF OR FOUND INAPPROPRIATE

Under ordinary circumstances, the comment, AGod Bless you and have a blessed day@ is a common salutation and may be a welcome pleasantry. However, when the person giving the blessing is the mother of the accused in a murder trial, and the persons being blessed are the prospective jurors in her son=s case, that seemingly innocuous comment has the potential for affecting the fairness of her son=s trial.

The Due Process clause of the Fourteenth Amendment guarantees the right of State criminal defendants to be tried by an impartial jury. The Fourteenth Amendment incorporates the essence of the Sixth Amendment right to be tried "by a panel of impartial, 'indifferent' jurors [whose] verdict must be based upon the evidence developed at the trial." *Irvin v. Dowd*, 366 U.S. 717, 722, (1961).

When a comment is made to a juror or jurors outside the presence of the court, it is in the court=s discretion to determine what remedy is required. The

standard of review is abuse of discretion. See e.g., *Street v. State*, 636 So.2d 1297 (Fla. 1994). In Corey Smith=s case, the Court became aware of the issue at approximately 3:05 the afternoon after the remark was made (T. 1122) and began an investigation immediately. Juror 61, Ms. Cromer, had apparently heard the remark and was called into the courtroom alone for questioning. Ms. Cromer said that a woman, who she did not know, had walked down the hallway and said to the assembled jurors, AGod bless you and have a blessed day@ . Ms Cromer opined that if she had heard it, they all (meaning the jurors assembled in the hallway) had heard it. (T. 1125).

Mr. Escandon, Juror 62, was then questioned individually. Escandon believed about half of the seventy prospective jurors in the hallway heard Ms. Smith=s comment and some of them responded to her. (T. 1127). He stated that five or six of the prospective jurors, whose names he did not know, were discussing this comment at lunch and one of them thought it was inappropriate. Those jurors were aware that the person making the comments was Smith=s mother. (T. 1128).

Mr. Escandon then exited to join the panel outside in the hallway, in order to identify the jurors he spoke to at lunch.(T. 1132). The entire panel was brought in and then excused on the pretext that work was being done in the courtroom to change the temperature. (T. 1135). Mr. Escandon was brought back in alone and

was able to identify the jurors who had been talking at lunch.

The court then questioned each of those jurors individually. Juror 1 was not the juror who had said Ms. Smith=s comment was inappropriate. (T. 1142). The court

then questioned Juror 2, who said that some of the jurors were talking about the Alady in the white suit@ and asking what religion she came from. Juror 2 had not heard the remark . (T. 1144). Juror 4 had heard the remark but did not know that it was the defendant=s mother who spoke, and said several jurors responded back. (T. 1148). Juror 6 said that a number of jurors who heard the remark speculated that the person making the comment was the defendant=s mother. Juror 6 said she thought the comment was inappropriate because it might influence other jurors= emotions. (T. 1151). Juror 6 said she gave her opinion to Juror 62. (Escandon). Juror 10 said she heard the comment also. The court at that time did not question any of these jurors about how the remark might influence them.

The State and Defense moved the court to question each juror individually about what they had heard and if it had affected them and their ability to be fair to Corey Smith. (T. 1156.). Both the State and Defense argued that the jurors would be less than candid when answering questions in front of other jurors, or might have their opinions and answers swayed by hearing what the other jurors

had to say.

After hearing argument the court decided to question the jurors in groups of five at a time, (T. 1161), and then brought them in to the courtroom according to the rows they were seated in, which was five to seven jurors at a time. In the first group, six of the seven denied that the remark would affect them. Ms. Nunez (Juror 6) said,@ Not specifically@ and qualified it by saying she would have to hear the testimony. (T. 1165).None of the Jurors in the second group, Jurors 8 through 14, indicated they would be affected by the comment.

In the next group, (Jurors 15 through 20), Juror Compana though the comment was Aout of place@ but could not articulate why. (T. 1183.) Juror Lowe said he thought the comment was inappropriate because it was a religious comment made in a civil proceeding. (T. 1184).None of the prospective jurors in the fourth group, Jurors 21 through 26, heard the comment. Jurors 27 through 36 were questioned and Juror Smith said he heard the comment from the woman in the white dress. (T. 1188). Several other prospective jurors then admitted they had heard the comment and had seen her. When asked as a group, none of them indicated that the comment would affect them. (T. 1193). Jurors 37 through 41 also denied as a group they would be or were influenced by anything the mother had said, as did Jurors 42 through 51.

The remainder of the jurors were brought into the courtroom in a group.

Prospective Juror Hector was adamant that Ms. Smith=s remark was inappropriate. He felt that the woman was dressed like a religious figure in a white robe and he said that she spoke like she had an agenda. (T.1 226). Another juror said that he felt some unease, that there might be some safety concerns and that she (Ms. Smith) might be trying to influence someone=s decisions . (T. 1222). When Juror Hector was questioned by the Defense, he described Ms. Smith as a Ablack angel@. He said that she was very loud, and that she made the comment more than once. (T. 1226). Ten other jurors were present in the courtroom, when Juror Hector made that comment. Other jurors commented on Ms. Smith=s long dreadlocks and white robes.

The Defense moved to strike the panel, arguing that even though most of the panel said they were neutral to Ms. Smith, after they had time to think about it, they might actually hold the mother=s attempted influence against the defendant. (T. 1236). The motion was denied. The court opined that in certain sections of the community AGod Bless you and have a blessed day@ was a common salutation. (T. 1238). The Defense argued that to some jurors the remark might seem Aweird@ or as part of a sect, which could be prejudicial to Mr. Smith. (T. 1238.)

After some discussion, the court agreed with the State that the proper remedy was to strike individual jurors if it became a problem. (T. 1242). The court also

issued an order that Ms. Smith was not to be in the courthouse. (R. 718)

The record is clear that many on the venire expressed dissatisfaction with Ms. Smith=s conduct. Prior to hearing any testimony, some of the potential jurors had formed an opinion of, or had heard other jurors= opinions of a defense witness. Ms. Smith was not just any witness, but the mother of the defendant, creating further risk that any unfavorable opinion of her held by the jury would be carried over to her son.

Discretion is abused only where no reasonable man would take the view adopted by the trial court. If reasonable men could differ as to the propriety of the action taken by the trial court, then it cannot be said that the trial court abused its discretion. *Canakaris v. Canakaris*, 382 So.2d 1197 at 1203.

In *Scull v. State*, 533 So.2d 1137 (Fla.1988) the jury foreman was embraced by the victim=s mother during the trial. The court dismissed the foreman and then the judge asked each juror whether he or she had witnessed the exchange and, if so, would he or she be influenced by it in rendering their sentence recommendation. Each replied that they **would not be influenced in any way** (emphasis added) by witnessing the embrace. The court held that any prejudice to Scull that may have occurred through this misconduct was cured by the dismissal of the foreman. Even though several jurors in *Scull* witnessed this exchange and did not report it, the individual voir dire conducted by the trial court

was found sufficient to determine whether the jurors were improperly influenced by witnessing the embrace.

The facts in the instant case are very much different. Several jurors in the panel exposed to Ms. Smith=s comment thought her comment was inappropriate. Several of the jurors described Ms. Smith as a religious figure. One of them in the presence of ten others, stated he felt there might be some safety concerns.

No one involved in the trial, not the court, not the State or Defense , nor Mr. Smith, enjoyed the idea of wasting the nine grueling days that had already been put in selecting the potential jurors that they had. At the time Ms. Smith made her comment, a jury had not been sworn and no witnesses had testified. In fact, the voir dire was not even finished. The only prejudice that would have occurred had the panel been dismissed would have been to the court=s schedule.

Mr. Smith was on trial for his life. Seventy jurors stood in the hallway outside the courtroom, near the metal detector. They were surrounded by armed police officers. Twelve of them would ultimately decide the fate of Corey Smith, whether he was guilty or not guilty, and whether he would live or die. Out of the courtroom like a Ablack angel@ emerged a large figure with long dreadlocks, dressed in white flowing robes. Loudly, and repeatedly, she called upon God to bless them, and exhorted them to AHave a blessed day@. This Ablack angel@ was the defendant=s mother. She would be testifying later at the penalty phase, if

needed, to try to save her son=s life.

The question presented to this reviewing court is simply this: Could any reasonable man say that members of that panel in that hallway were appropriate to hear her son=s case?

ARGGUMENT 3

THE COURT ERRED BY ALLOWING THE STATE TO USE A NON-QUALIFIED EXPERT TO AINTERPRET@ THE WORDS AND PHRASES USED BY VARIOUS PERSONS ON TAPED CONVERSATIONS PLAYED TO THE JURY

During the course of the investigation law enforcement taped thousands of hours of conversations between various parties they believed were selling John Doe drugs. At trial tapes of some of these conversations were offered in evidence to show the level of organization among the parties. The jury was given transcripts.(T. 5086)

None of the conversations on the tapes the State played talked about drugs by name. The State called Julian Mitchell to Atranslate@ or interpret the tapes. He was not a party to them, but told the jury what he believed the participants in the conversations really meant. The courts have held that law enforcement and others may testify about codes used by drug dealers to thwart detection. *U. S. V., Brown*, 872 F. 2d 385 (C.A. 11(Fl 1989)) (Agent allowed to give opinion that terms

such as Apaper@ Acandy@ and A dresses@ referred to cocaine.) These individuals are qualified as experts by their experience and expertise. The State did not request Mitchell be qualified as an expert.

As a general rule, lay witnesses may not testify in the form of opinions or inferences; it is the function of the jury to draw those inferences. *Kersey v. State*, 73 Fla. 832, 840 (1917). An exception to this rule is found in section 90.701, Florida Statutes, which permits a lay witness to proffer testimony in the form of an inference and opinion where:

(1) The witness cannot readily, and with equal accuracy and adequacy, communicate what he or she has perceived to the trier of fact without testifying in terms of inferences or opinions and the witness's use of inferences or opinions will not mislead the trier of fact to the prejudice of the objecting party; and

(2) The opinions and inferences do not require a special knowledge, skill, experience, or training. 90.701, Fla. Stat. (1997).

Opinion testimony of a lay witness is only permitted if it is based on what the witness has personally perceived. *Nationwide Mut. Fire Ins. Co. v. Vosburgh,* 480 So.2d 140 (Fla. 4th DCA 1985). Acceptable lay opinion testimony typically involves distance, time, size, weight, and identity. *Vosburgh*, 480 So.2d at 143.

Mitchell was not a party to the conversations and was not present when they

occurred. His testimony about what the parties on the tape were talking about was his opinion. For example, the person speaking on the tape said:

(TRAVIS): Man, where you get them Nautica pants, man. (T. 5103).

The prosecutor asked Mitchell what the person was talking about, and Mitchell replied A....When he says Nautica pants, he means cocaine.@

The meaning of the code word was subject to the situation the parties were in. The prosecutor asked AWhen Travis was saying 15 dollars, was he talking about a 10 dollar bill and a five dollar bill?@ The witness responded, A No, he=s talking about 1500 or 15 thousand, it depends on what he was trying to purchase...@ (T. 5114). The witness explained that: AI don=t have to say marijuana on the phone. I could throw up any type of little code for you to understand what I am saying.@ (T. 5101).

Some of what Mitchell testified was more than interpreting the word used for its. He actually speculated on what the party speaking was doing or going to do .For example one exchange went as follows:

> Travis: Man fuck dat ghetto bird.
> Dread: Yeah they expects it.
> Travis: Okay man cause you taking all day.(T. 5141)

The witness, after identifying ghetto birds as police helicopters, stated AI **guess** Dread saw the helicopters in the air. Dread was sacred to bring them drugs over to the house in the car. He let Trav know. Trav told him to F the

ghetto bird, telling him to come on anyway.@

Mitchell testified for a full day. The court the told the State they only had an hour the following day to present whatever else was on the tapes, because the tapes were extremely repetetive. (T. 5402). The following day, the Defense objected to Mitchell=s testimony on the basis of hearsay, and that he was not qualified as an expert witness. (T. 5422). Mitchell was allowed to testify. The State was allowed to have Mr. Mitchell summarize what was on the tapes. The Defense objected to the witness summarizing the contents of the tapes for the jury. (T. 5436).

Mr. Mitchell was not testifying to size, weight or other conditions. He was testifying to matters which did require some specialized knowledge or experience. His testimony then was not admissible as a lay witness giving opinion testimony. Mitchell was never qualified as an expert in the area he testified about, which was narcotics transactions. Even if one could assume that he was an expert, based on his criminal record and admitted association with drug dealers, there is still an issue of the reliability of his testimony. He was not present when the recorded conversations took place, did not know the circumstances surrounding the snippets of conversations he heard, and could only speculate as to what was going on at the times these conversations occurred.

Mitchell himself stated that the words used as code had different meanings based on the particular circumstances (A15" could mean $1500 or $15,000 for example.) He was also asked about what he thought the parties on the tapes were doing or going to do.

.Mitchell stated at one point in his testimony that he Aguessed@ what something said on the tapes meant. Mitchell may have had general knowledge of the meanings of these conversations, but had no personal or individual knowledge.

Courts should hold to the principle that it is the function of the court to not permit cases to be resolved on the basis of evidence for which a predicate of reliability has not been established. *Poulin v. Fleming*, 782 So.2d 452 (Fla. 5DCA 2001). No predicate of reliability was established for the testimony of Julian Mitchell Ainterpreting@ the meaning of hours of taped conversations between people he knew. His testimony was potentially misleading to the jury and should not have been allowed.

ARGUMENT 4

THE COURT ERRED IN ALLOWING THE STATE TO INTRODUCE AS NON-HEARSAY A POLICE REPORT WHICH CONTAINED OUT OF COURT STATEMENTS OF A WITNESS ACCUSING COREY SMITH OF A HOMICIDE NOT CHARGED IN THIS CASE, AND EXPRESSING HER FEAR OF HIM, WHEN THE STATE WAS OFFERING THE POLICE REPORT FOR THE TRUTH OF ITS CONTENTS AND THE NON-HEARSAY REASON GIVEN BY THE STATE WAS PRETEXTUAL

If an (out of court) statement is offered for the truth of the facts contained in the statement, then the statement is hearsay and must fall within one of the recognized hearsay exceptions outlined in section 90.803 to be admitted into evidence. See *Hutchinson v. State*, 882 So.2d 943, 950-51 (Fla. 2004). However, if the statement is offered for some purpose other than its truth, the statement is not hearsay and is generally admissible if relevant to a material issue in the case. See *Harris v. State*, 843 So.2d 856 (Fla.2003); *State v. Baird*, 572 So.2d 904 (Fla.1990).

The State in the instant case introduced Detective Alphonso=s police report concerning the homicide of Domenic Johnson. The police report was found in a search of a bedroom in Willie Mae Smith=s home. The bedroom was occupied by Corey Smith, and the report was on a night stand next to the bed. (T. 11/3, 1212). The State claimed that the police report was being introduced **not** to prove that Smith murdered Johnson, and not to prove that Cynthia Brown said she saw Corey Smith shoot Domenic Johnson, but to show that Smith Awas aware Cynthia Brown was pointing to him as the shooter.@ (T. 11/ 3, 1214). The State=s theory was that Smith therefore had motive to have Brown murdered.

When the Defense objected, the State offered to redact everything but the statement that Brown made. Out of the presence of the jury, the State and Defense went through the police report to remove any extraneous matters that

might be considered hearsay. The Defense specifically objected to the portion of the report that said Ms. Brown refused to be interviewed for Asafety reasons@ (T.11/3, 1224) That objection was overruled. After the parties finished going through the report the Defense renewed their objection to the admission of the document, redacted or not, and the court overruled the objection. (T. 11/3, 1233).

When an out of court statement containing accusatory information is offered into evidence for something other than its truth, and concerns the commission of a crime, the test for its admissibility is whether the probative value of the statement is outweighed by its prejudicial effect. (See *Conley v. State* 620 So. 2d 180, Fla. 1993) The information contained in the police report was highly prejudicial to Smith: not only did was he accused of yet another murder (which he was not charged for in this indictment) but he was accused of intimidating the witness and causing her to moved away because she was so afraid. The information may have been given more gravitas because it was contained in a police report, an official document, which was presented to the jury for review.

Any evidence of collateral crimes or prior bad acts is presumptively prejudicial. (See *Gore v. State*, 719 So. 2d 1197, 1199, (Fla. 2001) . The evidence contained in the police report about Mr. Smith=s prior bad acts was highly prejudicial to him, not because it showed his bad character, but because it further bolstered the State=s theory that Smith ran his drug organization through

fear and intimidation.

The Defense originally declined to have a limiting instruction read to the jury (T. 11/3, 1233) . Five days later, the defense requested a limiting instruction. During discussion of what the limiting instruction should say, the one of the prosecutors remarked, AWe are trying to prove the murder of Domenic.@ (T. 11/8, 1404).

The jury was instructed as follows:

> I want to start off this morning by reading a specific instruction to you.
> Just to give it some context, at the beginning of, I think it was on Wednesday Francisco Alphonso, testified. Then a detective, now Sergeant with the Miami Police Department.
>
> An exhibit was introduced into evidence. That was passed around, which you all read. That was a police report. And this instruction relates back to that police report, that witness.
> The police report written by Detective Francisco Alphonso, introduced into evidence by the State, reflecting the investigation into the murder of Domenic Johnson, is to be considered for a limited purpose.
> It is not to be considered as proof that Corey Smith, in fact killed Domenic Johnson but rather for the limited purpose.
> It is to be considered for the limited purpose of proving motive or knowledge of the defendant, Corey Smith.(T. 11/8,1406).

In *Bruton v. United States,* 391 U.S. 123 (1968) the Supreme Court found that limiting instructions were insufficient as a matter of law to allow the admission of a codefendant's confession implicating Bruton into their joint trial, when the codefendant did not take the stand. The Court discussed whether jurors might be

able to follow the trial court instruction to disregard the contents of the confession that implicated the codefendant. The question was reduced to whether, in light of the competing values at stake, the courts may rely on the " 'crucial assumption' " that the jurors followed " 'the instructions given them by the trial judge.' " *Marshall v. Lonberger*, 459 U.S. 422, 438, n. 6, (1983) (quoting *Parker v. Randolph*, 442 U.S. 62, 73, (1979).

The limiting instruction regarding what the police report was to be considered for, assuming the jury had understood it and taken it to heart in the first place, was undermined completely by the way the State used the police report in her closing argument. The prosecutor argued the contents of the police report as if it was the truth. A blow up of the police report was placed in front of the jury. While prejudice can be minimized if statement is not part of the closing argument (See *Banks v. State*, 790 So. 2d 1004, (Fla. 2001)). The prosecutor intentionally used the police report in her closing so as to maximize its prejudicial effect on the jury.

In closing, while referring to the blow up of the police report, prosecutor Miller told the jury:

- That Ms. Brown=s statement was consistent with the statement of another witness (T. 5839).
- That the Detective had to meet with the witness in another city because she was afraid of the defendant. (T. 5840.)

- That the defendant was a very dangerous man. (T. 5840.)
- Ms. Brown was afraid for her safety as well as her family=s.(T. 5840).

The Defense objections and Motions for Mistrial to the use of the report in this fashion in closing were overruled and denied. It is clear that Ms. Vargas= inadvertent statement during the argument over the limiting instruction, A We are trying to prove the murder of Domenic,@ was actually the state=s true purpose for introducing the police report. The State was trying to prove that Smith killed Domenic Johnson. The State was trying to prove that Smith was dangerous and the witness was in fear from him. The non-hearsay reason given by the State for the admission of the document, to prove the defendant=s knowledge, was a pretense, and the police report should not have been admitted in the first place. The Defense Motion for Mistrial should have been granted after the State began arguing the police report in closing.

Recently, the Florida Supreme Court reexamined the law in *Keen v. State*, 775 So. 2d 263, 274 (Fla. 2000), and reaffirmed its prior holdings in *Baird*, *Conley* and *Wilding v. State,* 674 So. 2d 114 (Fla. 1996). "When the only possible relevance of an out-of-court statement is directed to the truth of the matters stated by a declarant, the subject matter is classic hearsay even though the proponent of such evidence seeks to clothe such hearsay under a non-hearsay label."

The error in admitting this evidence was not harmless. *Goodwin v. State*, 751

So.2d 537, 542 (Fla.1999) (finding that the State must prove beyond a reasonable doubt that the error did not contribute to the verdict); *Wilding*, 674 So.2d at 114.("Placing information before the jury that a non-testifying witness gave police reliable information implicating the defendant in the very crime charged clearly could affect the verdict.")

The harmless error test "[p]laces the burden on the state, as the beneficiary of the error, to prove beyond a reasonable doubt that the error complained of did not contribute to the verdict or, alternatively stated, that there is no reasonable possibility that the error contributed to the conviction." *State v. DiGuilio*, 491 So.2d 1129, 1135 (Fla.1986). The commission of an error by the trial court is only considered harmless where there is no reasonable possibility that the error contributed to the verdict.

Ms. Brown a young woman with a child was a relatively sympathetic victim. She abused drugs but there was no evidence that she was involved in selling or dealing them. She lived in a dangerous world, and she ended up dead before her time. The evidence in the police reports, her statements of fear, clearly created sympathy for her from the jury, and created ill will towards Smith that interfered with their analysis of the evidence. The burden is on the State to show that any information contained in the police report did not contribute to the verdict that Corey Smith had killed her.

ARGUMENT 5

THE TRIAL COURT ERRED IN LIMITING THE CROSS EXAMINATION WHERE THE PROFFERED CROSS EXAMINATION WOULD PROVIDE AN ADDITIONAL EXPLANATION FOR THE CAUSE OF DEATH OF ONE VICTIM, AND WOULD PROVIDE MOTIVE TO LIE AND BIAS AS TO THE OTHER TWO WITNESSES.

The Confrontation Clause of the Sixth Amendment guarantees the right of an accused in a criminal prosecution "to be confronted with the witnesses against him." The right of confrontation, "means more than being allowed to confront the witness physically." *Davis v. Alaska*, 415 U.S., at 315. Indeed, " '[t]he main and essential purpose of confrontation is to secure for the opponent the opportunity of cross-examination.' " Id., at 315-316. Of particular relevance here, "[w]e have recognized that the exposure of a witness' motivation in testifying is a proper and important function of the constitutionally protected right of cross-examination." *Davis*, supra, at 316-317,(citing *Greene v. McElroy*, 360 U.S. 474 (1959)).

The Confrontation Clause of the Sixth Amendment does not prevent a trial judge from imposing limits on defense counsel's inquiry into the potential bias of a prosecution witness. The United States Supreme Court has stated that "trial judges retain wide latitude ... to impose reasonable limits on such cross-

examination based on concerns about, among other things, harassment, prejudice, confusion of the issues, the witness' safety, or interrogation that is repetitive or only marginally relevant." *Delaware v. Van Arsdall*, 475 U.S. 673, 679, (1986); see also *State v. Ford,* 626 So.2d 1338, 1347 (Fla.1993). The Supreme Court has observed "the Confrontation Clause guarantees an opportunity for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish." *Delaware v. Fensterer*, 474 U.S. 15, 20, (1985).

The trial judge limited the Defendant=s cross examination of three essential and damaging State witnesses during the course of the trial, and the limitation was not reasonable or based on any of the concerns set forth in *Delaware v. Van Arsdall*, supra. Limitation of cross-examination is subject to an abuse of discretion standard. *Geralds v. State*, 674 So.2d 96, 100 (Fla. 1996); *Jones v. State*, 580 So.2d 143, 145 (Fla.1991).

Anthony Fail and Demetrius Jones gave damaging testimony about Smith=s connection to various homicides. There was no physical evidence linking Smith to any of the deaths he was charged with, so their testimony was crucial for the State to prove their case. Both Anthony Fail and Demetrius Jones had extensive criminal history. Anthony Fail stated under oath that he had been given no benefit for testifying against Mr. Smith. Jones also swore that he had been given no

benefit for testifying.(T. 3268).

During a pre-trial deposition Anthony Fail admitted killing someone named Carlton Tanner. On cross examination, the Defense asked him if he had shot a man named Carlton Tanner. The State objected on relevance and improper impeachment grounds. At sidebar, Defense proffered that Anthony Fail confessed to the murder of Carlton Tanner, admitted it on deposition, and was never charged for it. The State claimed that they knew nothing about the murder of Carlton Tanner by Anthony Fail. The Defense referred to the State=s position as Adisingenuous@, since the State knew or should have known what was contained in the deposition.

The Defense argued that the uncharged murder was a benefit the witness received for testifying against Corey Smith. The court ruled that any testimony about a specific murder was irrelevant and sustained the objection. (T. 3348).

In *Williams v. State*, 600 So.2d 509 (Fla. App. 3 Dist., 1992) the Third District held that any evidence tending to establish that a witness is appearing for the State for any reason other than to tell the truth should not be kept from the jury. The question presented is in that case was whether the fact that the State's informant--a witness to the drug transaction--had an outstanding bench warrant for driving with a suspended license, was relevant evidence which should have been admitted as impeachment evidence. The court held that the evidence was

wrongfully excluded.

The Defense made it clear their position was that Anthony Fail was getting a free pass on a murder in exchange for his testimony about Corey Smith. The jury should have been permitted to hear this to make a fully informed determination of the witnesses credibility. The better off a witness is made in exchange for testifying, the stronger their motive is to embellish, to lie, or to fabricate in order to satisfy the State. Getting away with murder is about as good as it can get for a witness.

Demetrius Jones admitted that he shot seven people before and after he was connected with the John Doe gang (T. 3819). He received immunity for those seven shootings. Defense argued that his motive for testifying was to Aget around the fact he shot seven people, and he admitted to it, which shows his bias.@ (T. 3820). The court refused to allow the defense to question Jones about the seven shootings, agreeing with the State=s analysis that the defense could impeach with convictions to show bias, but the nature of the charged was not admissible**.**

In order for this jury to accurately assess whether Jones had a motive to lie, or how strong his motive to lie was, they should have been able to hear **exactly** what he was getting in exchange for his testimony. The State did not want the jury to know how many other crimes were going unpunished so that Corey Smith could be convicted. They were aware that their case rested on the strength of the

testimony of convicted felons and miscreants. The Defense was not soliciting testimony about the individual crimes to show that the witnesses had bad character, but rather to show the strength of the motivation Mr. Fail or Mr. Jones had to lie.

The error committed by the court in limiting the cross examination was not harmless. The harmless error test, as set forth in *Chapman*, places the burden on the state, as the beneficiary of the error, to prove beyond a reasonable doubt that the error complained of did not contribute to the verdict or, alternatively stated, that there is no reasonable possibility that the error contributed to the conviction. See *Chapman v. California*, 386 U.S. 15.(1967) . The harmless error analysis in *Chapman* was adopted by the Florida Supreme Court in *State v. DiGuilio*, cited *supra*.

The State called Anthony Fail and Demetrius Jones as witnesses, knowing what they were and what they had done. The State believed their testimony was crucial to link Cory Smith to the murders occurring during the time in the indictment. Had the jury been permitted to hear what the defense wished to question them about, and found out how much these witnesses had at stake, the verdict, or at least those verdicts that hinged on the testimony of these witnesses may have been different.

In this case, however, the trial court prohibited inquiry into the possibility that

Fail would be biased as a result of the State's failure to charge him with a murder he admitted. The court also prohibited inquiry into Jones= potential bias after he received immunity for seven shootings. By cutting off all questioning about events that the State conceded had taken place and that a jury might reasonably have found furnished these witnesses a motive for favoring the prosecution in their testimony, the court's ruling violated respondent's rights secured by the Confrontation Clause.

The Court limited the cross examination of the Medical Examiner who determined the cause of death of Cynthia Brown. Dr. Lew testified that Brown died from asphyxiation. Brown had petechia (tiny hemorrhages) to her eyes indicative of asphyxia (T. 3452) and pulmonary edema (fluid in the lungs) consistent with asphyxia. (T. 3478) Dr. Lew testified asphyxia could be caused by many different mechanisms, including strangulation, smothering, drowning, carbon monoxide poisoning, and positional asphyxia. (T. 3469-3470). Dr. Lew also testified that Brown had no other injuries on her body. (T. 3476).

During cross examination the Defense attempted to ask Dr. Lew about sexual asphyxia. The State objected that the question was irrelevant, and the objection was sustained. At sidebar, after the objection, the Defense explained that Asexual asphyxia@ or Aerotic asphyxiation@ is a sexual practice where one party cuts off the air supply to the other party in an attempt to heighten the sexual experience.

(T. 3556). The Defense theorized that the circumstances in which her body was found, in bed in a motel, naked except for her panties with a mirror propped up so that the occupants of the bed could see themselves supported the argument that Brown=s death occurred accidently when the sex got out of control.

The court ruled the Defense could ask the witness if sexual asphyxia applied, but was not going to let her explain it. The court stated that the Defense Ashould get their own witness@. (T. 3557). The Defense did not pursue the line of questioning further.

During direct examination the State had questioned the Medical Examiner extensively about how someone could die of asphyxia, including a discussion of positional asphyxia, when the victim fall down behind a refrigerator, for example, and the weight of their body blocks their airflow. (T. 3470).

There was no evidence in this case that Ms. Brown was anywhere near a refrigerator when she died. There was evidence that she was in a motel room, semi-naked, with her boyfriend, with a mirror propped up so that the activity on the bed could be observed. The Defense had a good faith basis for a line of questioning concerning sexual asphyxiation. The jury should have been allowed to hear that accidental death from asphyxiation could occur during a sex act, and make their own determination if it provided Corey Smith with a defense to murder.

ARGUMENT 6

THE TRIAL COURT ERRED BY NOT GRANTING A MISTRIAL AFTER THE PROSECUTOR PRESENTED THE MEDICAL EXAMINER WITH AN IMPROPER HYPOTHETICAL, AND SOLICITED AN OPINION FROM THE WITNESS ON THE SAME FACTS AFTER TWO DEFENSE OBJECTIONS WERE SUSTAINED.

During redirect examination of Dr. Emma Lew, who performed the autopsy on Cynthia Brown, the prosecutor asked the witness a hypothetical question. The prosecutor started,ALet=s assume for a moment a woman named Cynthia is a material witness in a homicide case.@ The Defense objection was overruled. (T. 3586)

The prosecutor continued,AAssume the defendant in that homicide hired her boyfriend to kill her. Further assume, for the purposes of this hypothetical, that the defendant in this homicide case did not want bullets involved.@ The Defense objection was overruled. (T. 3586).

The State continued,AAssume the defendant in the homicide case that hires the boyfriend does not want bullets involved because he does not want it to come back to him. And assume also that he wants her strangled or suffocated. Assume the lady, the material witness Cynthia, was taken to a hotel room by (her) boyfriend...and assume the boyfriend places a pillow over her face and assume she struggles to get her breath, to get the pillow off of her face, but she dies from

asphyxia, from a lack of oxygen. Are your findings, Dr. Lew, consistent with that hypothetical?@

Prior to the witness= response the Defense objected and the court called for a side bar and admonished both sides for making speaking objections.(T. 3588). The objection to the hypothetical question was sustained. (T. 3590).

The prosecutor then re-asked the question as follows, AAssume a person charged in this homicide case hired a friend of hers to kill her but did not want bullets involved. Assume that the defendant in this homicide case wanted her strangled or suffocate rather than bullets. Assume she is taken someplace, to a hotel, by her boyfriend. In that hotel on a bed, assume for the purposes of this hypothetical only, that the boyfriend put a pillow over her face and she struggles for breath. She dies from lack of oxygen.Based on your training and expertise and your analysis of that hypothetical, are the physical findings of asphyxia consistent with that scenario?@ (T. 3592). The Defense objected, and the objection was sustained.

The court was correct in sustaining the objection. Assumptions of fact in a hypothetical question asked of an expert witness must be based upon facts established by competent, substantial evidence. *Fekany v. State Road Department*, 115 So.2d 418 (Fla.App., 1959) and *Young v. Pyle*, 145 So.2d 503 (Fla.App., 1962). *Roberts v. State*, 189 So.2d 543 (Fla. App. 1 Dist., 1966).

After the objection was sustained, the prosecutor , without reciting the facts, asked the doctor to consider the acts in the prior question (to which an objection had been twice sustained) and render her opinion, as follows:

Q: Dr. Lew, assume those same facts for the purposes of the hypothetical?

A: Yes.

Q: The second set of facts I just gave you.

A: Yes.

Q: Are those facts consistent with the physical findings of the manner of death, asphyxia?

A: The physical findings are consistent with the cause of death of asphyxia. (T. 3592-3593).

The Medical Examiner, in testifying that her findings were consistent with the hypothetical, gave the prosecutor what she wanted. The prosecutor did not just seek an opinion on the cause of death, she sought an opinion on the cause of death and the motive behind it. The Defense moved for a mistrial and it was denied. (T. 3594).

The error here was not harmless. The State cannot meet the burden set forth in *Chapman* and show beyond a reasonable doubt that the improper solicitation of an expert opinion did not contribute to the verdict. See *Chapman*, 386 U.S. at 24. The focus is on the effect of the error, in this case, the Aexpert opinion@

rendered by the Medical Examiner, on the trier-of-fact. The question is whether there is a reasonable possibility that the error affected the verdict.

In this case, there was no physical evidence or eyewitness testimony connecting Smith to the physical act of killing Cynthia Brown. The only evidence that connected Smith to Brown=s death came in the form of testimony from drug dealers, drug abusers, convicted felons and others whose credibility was suspect. The motive for her killing was the subject of innuendo and speculation by the State. Under those circumstances, the opinion by the medical examiner that Brown=s death was consistent with the State=s theory, including the fact that Smith was behind it, very likely contributed to the jury=s verdict of guilt as to the homicide of Cynthia Brown.

ARGUMENT 7

THE COURT ERRED IN NOT GRANTING A NEW TRIAL FOR THE STATE=S INTENTIONAL FAILURE TO PROVIDE THE DEFENSE WITH A WITNESS STATEMENT WHICH WAS MATERIALLY FAVORABLE TO THE DEFENSE

Mark Roundtree , (a/k/a Marcellus Roundtree) was convicted by a jury in Miami-Dade County Florida for the murder of Leon Hadley in September 1996, and was serving at term of Natural Life for it. (R . 2901). Subsequent to Roundtree=s conviction, Corey Smith was charged with the same homicide, the killing of Leon Hadley, in this indictment. The state listed Mark Roundtree as a

witness against Corey Smith in the guilt phase of the trial. (R. 110, item #58).

In discovery provided to Defense on February 23, 2001, the State gave the Defense a copy of a statement made by Roundtree to George Slatterey. (R. 124, item # 47). In this statement, Roundtree admitted that he shot Hadley with an AK-47 and Smith shot Hadley with a nine millimeter.

Roundtree was not called as a witness at trial by either the State or the Defense. The Defense had no reason to call him based on his testimony contained in the January 2001 statement. However, the Defense listed George Slatterey as a witness for the penalty phase. (R. 2795). During the discovery process, the Defense learned that Roundtree had made another statement in July 2004, wherein he admitted that he had given a perjured statement against Smith so he could testify against him and get a sentence reduction. The Defense learned of this when the State filed an Amended Discovery Exhibit-Penalty Phase. (R. 2797). The document stated as follows:

> Mark Roundtree made a statement to George Slattery in July 2004. He denied committing the homicide of Leon Hadley. He stated that Corey Smith committed the homicide of Leon Hadley . He stated that he previously implicated himself in the homicide so that he could serve as a witness in proceedings against Corey Smith. (R. 2797).

The Defense filed a Motion for an Evidentiary Hearing immediately after learning of this statement. (R. 2835-2837) and a Motion for a New Trial (R.

2856-2860). The motion for new trial was denied February 7. (T. 2/7, 19).

The State=s case rested almost entirely on testimony of convicted sentenced felons, acquaintances of Corey Smith, who were testifying to have their sentences reduced or avoid further prosecution. The Defense attempted to show that the State witnesses were liars who were perjuring themselves to secure favorable treatment. The statement made by Mark Roundtree supported this theory. Roundtree admitted perjuring himself to be able to testify against Corey Smith.

The Supreme Court has held "that the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." *Brady v. Maryland*, 373 U.S., at 87. The duty to disclose such evidence is applicable even though there has been no request by the accused, *United States v. Agurs*, 427 U.S. 97, 107 (1976). The duty encompasses impeachment evidence as well as exculpatory evidence, *United States v. Bagley*, 473 U.S. 667, 676 (1985). Such evidence is material "if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." Id., at 682; see also *Kyles v. Whitley*, 514 U.S. 419, 433 434 (1995). In order to comply with Brady, therefore, "the individual prosecutor has a duty to learn of any favorable evidence

known to the others acting on the government's behalf in this case, including the police." *Kyles*, 514 U.S., at 437. The Court in *Kyles* stated that a showing of materiality does not require demonstration by a preponderance that the disclosure of the suppressed evidence would have resulted in the Defendant=s acquittal.(See also *United States v. Bagley* , AUndisclosed evidence can require a new trial even if it is more likely than not that the jury seeing the new evidence would still convict@) A defendant must show that the State=s failure to disclose undermines the outcome of the trial.

If Mark Roundtree was called as a witness by the Defense, he would have, in the words Defense Attorney G. P. Della Ferra, AValidated our defense.@ (T. 2/7/06, 6). Roundtree=s testimony would have shown that the Defense theory was in fact a reality: being on the Corey Smith witness list was seen as the ultimate AGet out of Jail @ card . This theory was further validated in December, 2004, after Corey Smith was found guilty, but before the penalty phase began. A Circuit Court Judge in Miami Dade County signed an order to vacate Mark Roundtree=s Judgment and Sentence for the murder of Leon Hadley, and resentenced him to nine years in the State Prison, with credit for time served. Roundtree became a free man. (R. 2905).

ARGUMENT 8

THE COURT ERRED IN NOT HOLDING A HEARING TO DETERMINE

PREJUDICE TO THE DEFENSE AFTER THE TESTIMONY OF WITNESS CARLOS WALKER WHERE THE STATE FAILED TO DISCLOSE TO THE DEFENSE THAT WITNESS CARLOS WALKER HAD CHANGED HIS STATEMENT AFTER HE WAS DEPOSED BUT PRIOR TO HIS TESTIMONY AT TRIAL

Carlos Walker, a six time convicted felon, (T. 3882) testified on direct examination that he and Smith talked about the Domenic Johnson homicide. He stated he had a conversation with Smith where Smith talked to him about getting witness Cynthia Brown killed. ACorey told me that Cookie was snitching on him and she got to come up dead for him to win the trial.@ (T. 3908) During direct examination, in response to the prosecutor=s questioning, Walker stated that he had lied in the deposition taken by Defense counsel in March 2003, and he had lied because he was scared of retaliation from Smith. (T. 3908). In the deposition, the witness stated to defense counsel that he had **never** talked to Smith about the Brown homicide or the Jackie Pope homicide. The prosecutor knew, or should have known, what Walker said in that deposition. The prosecutor was aware that the witness=s testimony at trial would be different from his sworn statement taken at deposition.

The Defense was not made aware of this change in testimony. After Walker testified, but before cross examination, the Defense moved for a mistrial, based

on the State=s failure to disclose that Walker=s trial testimony would be different from his deposition testimony, specifically as to the murders of Cynthia Brown and Jackie Pope. (T. 3923). In addition, Walker now said that he perjured himself because he was scared, implying that Corey Smith had in some way intimidated or threatened him. The State responded AHe knows what the issues are. He also has the witness=s prior statement where he gave the same testimony.@ Defense responded AHe answered exactly opposite.@ The Court: AI understand that. Impeach him while you can. Motion for mistrial is denied.@ (T. 3923).

The criminal rules that codify the prosecutor's obligation to provide discovery include Florida Rule of Criminal Procedure 3.220(b) (prosecutor's discovery obligation) and 3.220(j) (continuing duty to disclose). Walker had given **three** statements prior to trial: his initial statement wherein he implicated Smith in the death of Ms. Brown and Jackie Pope, his sworn deposition where denied knowing Smith was involved in those homicides, and his last statement, give sometime between the deposition and trial. In that statement, probably not given formally, and not reduced to writing, he told the prosecutor he had lied on the deposition and was sticking to his original story. That last statement is the subject of the discovery violation.

In *Scipio v. State*, 928 So. 2d, 1138 (Fla. 2006), decided recently, this Court reviewed a similar issue. In *Scipio*, the medical examiner=s investigator, after

being deposed, reexamined the evidence and realized he had come to the wrong conclusion about a piece of evidence. The State knew this but failed to tell the Defense, who was completely surprised at trial, as his testimony was a basis for their defense claim. The Florida Supreme Court concluded that Aunder our discovery rules and our case law the State committed a discovery violation when it failed to disclose to Scipio a material change in the State investigator's deposition statement. Further, the Fifth District's reliance on our decision in *Evans* is consistent with our case law stressing disapproval of trial by ambush.@

The facts in *State v. Evans*, 770 So. 2d 1174 (Fla. 2000) are somewhat similar to what occurred in this case. A witness in Evans told the police and said in a pre-trial deposition that she did not know anything about the crime the Defendant was charged with. She was called as a witness by the State at trial and said she did see the Defendant shoot the victim. She also admitted in cross examination that she had given a statement to the prosecutor a month prior to the trial consistent with her trial testimony but not consistent with the testimony she gave previously. This Court held that the "failure to disclose a significant change in a witness's testimony is as much a discovery violation as a complete failure to disclose a witness."

The State=s failure to apprise the Defense that Walker was not going to testify consistent with his deposition, and that he now claimed he was afraid of Corey

Smith, constituted a clear discovery violation. Once a discovery violation has occurred, the trial court is required to determine what prejudice to the defendant has resulted. However, as this Court explained in *Scipio,* AOne cannot determine whether the state's transgression of the discovery rules has prejudiced the defendant (or has been harmless) without giving the defendant the opportunity to speak to the question.@ The question of "prejudice" in a discovery context is not dependent upon the potential impact of the undisclosed evidence on the fact finder but rather upon its impact on the defendant's ability to prepare for trial.(Citing *Wilcox v. State*, 367 So. 2d 1020, (Fla. 1979)).

The inquiry is whether there is a reasonable possibility that the discovery violation "materially hindered the defendant's trial preparation or strategy." *State v. Schopp*, 653 So. 2d 1016. (Fla. 1995) at 1020."[O]nly if the appellate court can say beyond a reasonable doubt that the defense was not procedurally prejudiced by the discovery violation can the error be considered harmless." Id. at 1021.

The trial court erred by failing to give the Defense the opportunity to show how their trial preparation was hindered by State=s failure to disclose the witness=s recantation of his discovery statement. The statement included the witness=s assertion that his perjury was as a result of his fear of Corey Smith. Attorneys rely on depositions to understand their case better and to determine what witnesses they need to concentrate on. Even the most diligent defense

attorney, reviewing Walker=s deposition in preparation for trial, would have been reasonable in thinking the witness would not hurt the defense, and move on to prepare for a more damaging witness. Regardless of what Walker had said previously, the Defense relied on what he said in that deposition to determine what if any investigation needed to be done of the witness, how his testimony fit in with other witnesses in the overall defense strategy, and how to map out an effective cross examination .

The two lawyers who represented Mr. Smith were very experienced, but their job was daunting. The State witness list had hundreds of witnesses on it. An effective preparation strategy would dictate that the witnesses who were going to furnish the most damaging testimony would be allocated the most intense preparation, the most lawyers= time and investigative resources.

The State knew that the Defense relied on the statement in that deposition. The State=s failure to disclose that Walker was going to testify differently, and in fact implicate Smith in two homicides, undermined the Defense ability to prepare effectively for the trial.

ARGUMENT 9

THE TRIAL COURT ERRED IN NOT GRANTING A NEW TRIAL WHERE THE TRIAL WAS FUNDAMENTALLY FLAWED BY THE CUMULATIVE EFFECT OF PROSECUTORIAL MISCONDUCT, WHICH COULD HAVE

REASONABLY BEEN EXPECTED TO AFFECT THE OUTCOME OF THE TRIAL

AYou can throw a skunk into the jury room and tell them not to smell it, but it doesn=t do any good.@ (*O'Rear v. Fruehauf Corp*., 554 F.2d 1304, 1309 (5th Cir.1977).)(The trial court judge was referring to the plaintiff=s attorney=s repeated references to another lawsuit that was pending against the defendant. Numerous objections by the defense were sustained.) The point made by this rustic yet pithy analogy is that once a jury has heard something, it lingers with them.

During the course of this long, drawn out trial and difficult trial the prosecutors made numerous improper comments, misstatements of the law, and improper arguments in front of the jury. At least four times the Court sustained a defense objection to the impropriety, and the prosecutor, as if he or she had not heard the ruling continued with the same line of questioning or argument.

The prosecutorial misconduct that marred this trial are as follows:

$ During voir dire of the seventy one potential jurors who remained after preliminary questioning had been done of five panels (250 potential jurors) on the ninth day of jury selection, prosecutor Cholakis characterized the facts of the case as Aa drug war@ . He said this again twice after the objection was sustained. Twelve people in that assembled venire were ultimately chosen for the jury and were exposed to those highly prejudicial

comments. (T. 929-930).

- During opening statement, the first thing the prosecutor said, after her introduction was: AIf you compete with me you will be killed. If you steal from me you will be killed. And above all, if you snitch on me you will be killed.@ The defense objection was sustained. (T. 1488).
- During the testimony of Detective Alphonso, the State characterized a newspaper found in the home of Corey Smith as a Asouvenir@. The defense objection was sustained.
- During the testimony of Dr. Lew, the prosecutor asked an improper hypothetical question and the objection was sustained. The prosecutor asked essentially the same question and an objection was sustained. She then asked for the medical examiner=s opinion based on the facts in the improper hypothetical, without going in to the facts again. Ther mistrial was denied.
- During their closing argument the State made improper arguments or comments that Defense objections to were sustained numerous times.
- During closing argument, the State said ANo one knows better what happened to Leon Hadley than Mr. Smith.@ Hadley is one of the people Smith was charged with killing. The defense objection was sustained.

While prosecutors should be encouraged to prosecute cases with earnestness

and vigor, they should not be at liberty to strike "foul blows." See *Berger v. United States,* 295 U.S. 78, 88, (1935). As the United States Supreme Court observed over sixty years ago, "It is as much [the prosecutor's] duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one."

A defendant is entitled to a fair trial, not a perfect one . *Lutwak v. United States*, 344 U.S. 604 (1953). In the heat of a trial, even the most careful prosecutor may say something improper. Sometimes, depending on their level of experience, they just didn=t know any better. And then of course there are those prosecutors who believe in Awin at all costs@ and will do or say in a trial whatever they think they can get away with. Regardless of the reason, if the misconduct or impropriety rises to a certain level, the Defendant may be denied a fair trial.

Not all instances of prosecutorial misconduct warrant reversal of a case. A While isolated incidents of overreaching may or may not warrant a mistrial, in this case the *cumulative* (emphasis added) effect of one impropriety after another was so overwhelming as to deprive Nowitzke of a fair trial.@ *Nowitzke v. State*, 572 So.2d 1346, 1350 (Fla.1990) (reversing the conviction on a capital case based on prosecutorial errors that misled the jury and discredited the insanity defense).

In the instant case, the trial court sustained many objections to the

prosecutors= questions, comments or arguments. For the most part, no curative instruction was given. The jury was not told to disregard the impropriety. As was noted in *United States v. McLain*, 823 F.2d 1457, 1462 n. 8 (11th Cir.1987), "a jury cannot always be trusted to follow instructions to disregard improper statements." In each instance the State had **already** made their point. The damage had already been done and the State had already put a thought or a point of view in the minds of the jury. From the very beginning, in voir dire, the State was trying to create the impression that the case came about as a result of drug wars. This highly inflammatory and prejudicial description was not supported by the evidence. The State repeated this characterization, even after the court sustained the objection to it, twice.

In *Penalver v. State*, 926 So. 2d 1118, the Florida Supreme Court determined that improperly admitted evidence and the State=s suggestion without evidence that the defense tampered with a witness was sufficient cumulative error to warrant reversal. The Court concluded Penalver was denied a fair trial by the prejudicial admission of irrelevant and inadmissible evidence repeatedly elicited by the State over appropriate defense objections. The Court also applied the harmless error analysis and found that based on the record, the court couldn=t say there was no reasonable possibility the errors cited by Penalver did not contribute to the guilty verdict.

Application of the harmless error test requires an examination of the entire record by the appellate court, including a close examination of the permissible evidence on which the jury could have legitimately relied, and in addition an even closer examination of the impermissible evidence which might have possibly influenced the jury verdict. (*DiGuilio*, supra).

The Florida Supreme Court examined the record in *Gore v. State*, (supra), a capital murder case and found that the totality of the improper questions and comments by the prosecutor during his cross-examination of Gore and during closing argument warranted reversal. Gore=s defense counsel objected to most of the prosecutor's improper comments and questions. The most significant improprieties concerned the improper admission of collateral crime evidence, which the Court found presumptively prejudicial. The Court stated, AWe cannot conclude beyond a reasonable doubt that, collectively, these errors were harmless and did not affect the verdict, especially since there was no physical evidence directly linking Gore to the murder, Gore did not confess, and the State's case was circumstantial.@ See *DiGuilio*, 491 So.2d at 1139.

In *DeFreitas v. State*, 701 So. 2d 593, (Fla 4 1997) the Fourth District was asked to determine when prosecutorial misconduct amounts to fundamental error and thus becomes an exception to the contemporaneous objection and motion for mistrial rule. To answer this question the court looked at a number of cases where the cumulative and collective effect of the prosecutor=s conduct amounted to fundamental error. In these cases the defense attorneys did not object to prosecutors comments, however, where the misconduct was egregious enough

the reviewing court found it to be fundamental error.

Defense counsel objected to the improper comments made by the prosecutors. They did not in most instances ask for a curative instruction. The court did not on its own tell the jury to disregard the improper comment. The Defense requested a mistrial after the objections were sustained. Some of the prosecutor=s comments were egregious, for example, the prosecutor=s implication that Corey Smith should explain what happened to Leon Hadley. That prosecutor also vouched for the credibility of the lead investigator on one of the homicides, by suggesting that if the Detective was going to Aframe@ Corey Smith, he could have done a better job. The prosecutor later told the jury that the police had Smith=s fingerprints which they could have planted in the motel room Cynthia Brown was found in to strengthen their case.

The prosecutors were cited a number of times for arguing facts not in evidence. In every trial the court instructs the jury that what the lawyers say is not evidence. Most trials are shorter than *State v. Corey Smith*, and don=t have as many day or week long recesses. The memory of what the evidence actually is, what witnesses said, is fresh in the jury=s minds. They can and do make their own determination of what they believe the evidence showed, based on their own recollection, regardless of what either attorney says. In this case, there was a time lapse of over a month between the first witness and the end of the case.

There were eighty four witnesses, probably ten times more than the average felony jury trial in State court. The lawyers= arguments become more significant when the jurors= recollections of testimony are less clear.

The totality of the circumstances in this case indicate a strong possibility that the prosecutorial misconduct had a deleterious effect on the jury. When the prosecutorial argument taken as a whole is 'of such a character that neither rebuke nor retraction may entirely destroy their sinister influence ... a new trial should be granted, regardless of the lack of objection or exception.' *Peterson v. State* , 376 So. 2d 1230, 1234 (Fla. 4 DCA 1979). Because the cumulative and collective effect of these inappropriate comments, questions and arguments contributed to the jury verdict, Corey Smith did not receive a fair trial.

CONCLUSION

In view of the foregoing grounds, this Court must reverse Appellant's convictions and sentences for a new trial.

Respectfully submitted,

_____

TERESA MARY POOLER
Florida Bar No. 329061
1481 NW North River Drive
Miami, Florida 33125
(305)324-6020

CERTIFICATE OF SERVICE

I certify that a true copy of Appellant's amended initial brief was mailed to the Office of the Attorney General, 444 Brickell Avenue, Suite 650, Miami, Florida 33131 on this 17th day of November, 2006.

_____
TERESA MARY POOLER

CERTIFICATE OF FONT

The undersigned certifies that the font used in this brief is proportionately spaced 14 point Times New Roman.

_____

TERESA MARY POOLER