**IN THE SUPREME COURT OF FLORIDA**

**WILLIE H. NOWELL**

**Case Number SC06-276**

**Appellant,**

**v.**

**STATE OF FLORIDA**

**Appellee.**
**_____/**

**APPEAL FROM THE CIRCUIT COURT**
**IN AND FOR BREVARD COUNTY, FLORIDA**

# INITIAL BRIEF OF APPELLANT


**EISENMENGER, BERRY& PETERS, P.A.**

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## STATEMENT OF FACTS AND CASE

The Appellant, WILLIE NOWELL, was indicted by a Brevard County, Florida Grand Jury on July 16, 2002. (Vol. III p. 440-443). The indictment included the following counts:

1. First Degree Premeditated Murder (re: Michelle Gill)
2. Attempted First Degree Premeditated Murder (re: Kelvis Smith)
3. Killing of Unborn Child by Injury to Mother
4. Armed burglary of structure while inflicting great bodily harm or death.
5 Robbery with a firearm while inflicting great bodily harm or death.
6. Kidnapping while inflicting great bodily harm or death (re: Kelvis Smith)
7. Kidnapping while inflicting great bodily harm or death (re: Michelle Gill)
8. Grand theft of motor vehicle
10. Possession of firearm by a convicted felon.

There was a count 9 to the indictment, but it did not involve an accusation against Mr. Nowell. Rather, it involved an accusation against the co-defendant in this case, Jermaine Bernard Bellamy. The prosecutions of Mr. Nowell and Mr. Bellamy were severed by order of the trial court. (motion at Vol X. p 1599-1600; amended motion at Vol. X, p. 1607-1609; order granting severance at Vol. X, p. 1610-1611).

Prior to trial, the Defendant filed numerous motions attacking Florida's death penalty scheme as being unconstitutional. These include:

1. Motion to Declare Florida's Death Penalty Unconstitutional. (Vol. XI, p. 1657-1662.

2. Motion to Bar Imposition of Death Sentence on Grounds that Florida's Capital Sentencing Procedure is Unconstitutional under Ring v. Arizona. (Vol. XI, p. 1663-1680).

3. Memo in Support of Defendant's Motion to Declare Florida's Death Penalty Unconstitutional (Vol. XI., p. 1687-1726).

4. Motion to Declare Section 921.141, Florida Statutes Unconstitutional and/or to declare Section 921.141(5)(i) Florida Statutes Unconstitutional. (Vol XI, p. 1726-1736).

5. Motion to Declare Section 921.141 and 921.141(5)(a) Florida Statutes Unconstitutional as applied. (Vol. XI., p. 1737-1740).

6. Motion to Declare Section 921.141 and/or 931.141(5)(d), Florida Statutes and/or the (5)(d) Standard Instruction Unconstitutional Facially and as applied and to Preclude Their Application. (Vol. XI, p. 1741-1745).

7. Motion to Declare Section 921.141 and/or Section 921.141(5)(e), Florida Statutes and/or its Standard Instruction Unconstitutional Facially and as Applied and to Preclude its Use at Bar. (Vol. XI, p. 1746-1752).

8. Motion to Declare Section 921.141 and/or Section 921.141(5)(f) Florida Statutes and or the (5)(f) Standard Jury Instruction Unconstitutional as Applied. (Vol. XI, p. 1753-1757).

9. Motion to Declare Section 921.141 and/or 921.141(g)(h), Florida Statutes and or Standard (5)(h) Jury Instruction Unconstitutional as Applied. (Vol. XI, p. 1758-1769).

These motions were denied after hearing by the trial court. (Vol. XII, p. 1889-1890).

Trial in this case commenced with jury selection on September 26, 2005. (Volume XVII, et. seq.). During jury selection, the State sought to exercise a challenge against a gentleman whose last name is "Ortega." (Vol. XX, pg. 641). Ortega was described as a person of Hispanic background. (Vol. XX, pg. 642). The Defense objected to the peremptory challenge and asked for a *Neil* inquiry. The Court inquired of counsel for the State as to his reasons for the challenge. The Assistant State Attorney initially stated the following:

> "My reasons are two-fold. Number one, as I look at it, he appears young and of a similar age to the defendant. I would think that Mr. Ortega would relate to the defendant based on age.
> "Second of all, I noted that his wife works for Devereux, which is a childcare nurturing facility.
> "I am concerned, based on philosophies within the family, that he may not be able to follow the law when it comes to the actual, in any phase of this particular proceeding. (Vol. XX, pg 643)

The trial court asked the Assistant State Attorney what specific answers Ortega gave that would warrant such a concern. (Vol. XX, pg. 643-44). The Assistant State Attorney answered there were no such specific answers. (Vol. XX, pg. 644). The Assistant State Attorney elaborated:

> "My race-neutral reason is, in spite of the fact that he said he could follow the law, I don't particularly like him. I don't think he is going to be the kind of juror that I would like. And for those reasons which were race neutral, I'm asking the Court to proceed with allowing me my peremptory challenge." (Vol. XX, pg 645).

The Assistant State Attorney continued:

> "And this is why, because we have peremptoral [sic] challenges, the problem I have with it is, in the past it's not like somebody's face. The problem is, well, listen, you can't strike anybody from now on because of race. All minorities have a right to sit, they have a right to sit, can't strike them because of race.
> "My reason for striking him is that he's young and appears to be the same or similar age as the defendant, that's the first reason. I think that's sufficient for a peremptory challenge, whether or not it goes for cause for his inability to actually follow the law.
> "I think he would associate himself with the defendant because of his age. I think he looks at the defendant and says, you know, that could be me. As a result, it's going to be more difficult for him, if not impossible, to actually do what's asked of him in terms of following the law.
> "For that primary reason that [sic] I'm asking that he be striken." (Vol. XX, pg. 646.)

The trial court asked if there were any young males left on the prospective panel, and both sides agreed a gentlemen named "Collins" was such a person. (Vol. XX, pg. 654-655). There is no suggestion in the record that Mr. Collins is a minority. Later in the trial, it was learned that Mr. Ortega was a 2000 graduate of the

University of Florida. (Vol. XXII, p. 915). The trial court then allowed the State's peremptory strike of Mr. Ortega. (Vol. XX, pg. 655). Collins was not struck by the State, and remained on the jury. The Defendant objected to the composition of the panel. (Vol. XX, pg. 656). Counsel for the Defendant renewed his objection to the peremptory strike and the composition of the jury prior to beginning the penalty phase of the trial. (Vol. XXXII, pg. 80-81).

Following the selection of the jury over Defendant's objections, the trial commenced.

The Defendant's theory of defense was that the surviving victim, Kelvis Smith, was not a reliable witness and his identification of the Defendant was the result of his animosity towards the Defendant. (Vol. XXI, page 753, et. seq.). In fact, the defense began its opening statement by saying:

> "Ladies and gentlemen, this is the story of a man with a motive, this is the story of a man with so much hatred that he would actually lie about who shot him….What you're going to find out about Big K [street name for Kelvis Smith] is that he is a convicted felon. He is a man whose hatred is so great that he would lie…Back in April of 2002, Mr. Nowell was walking the streets. While he was walkin the streets doing nothing to anyone, he was gunned down, he was shot, he was shot by somebody in our community…The police had suspects in that particular case, the family of Big K and Big K himself. They never prosecuted that case but they knew, or at least believed they knew who was responsible for that. This is the story of Kelvis Smith."

(Vol. XXI, page 753-754). Part of that argument included the fact that during the time periods after the shooting where Mr. Smith was communicating with the 911

dispatcher and paramedics, he never mentions the name of the Defendant as the person who shot him. (Vol. XXI, pp.757 et. seq.).

The State called nineteen (19) witnesses. Their names are listed below with brief summaries of their testimony.

1. Officer Mark Foskey. (Volume XXI, pp. 774-841). Officer Foskey is employed by the Palm Bay Police Department in their communications section. (Vol. XXI, pg. 774). At the time of Ms. Gill's death, Foskey was working road patrol for Palm Bay Police Department. (Vol. XXI, pg. 775). He received a 911 call and was dispatched to 762 Hampton Drive, Palm Bay. (Vol. XXI, p. 775). He and Officer Sampson broke in the door and found a black male (Mr. Smith) sitting on a bed bleeding profusely from his face. (Vol. XXI, p. 781). He found the remains of another person (Ms. Gill) in the southeast bedroom of the residence. (Vol. XXI, p. 784). Photographs of the deceased and of the residence in general were admitted through this witness. Foskey testified the deceased was still warm to the touch when he arrived and noted blood was still dripping off her body. (Vol. XXI, p. 830). It was his belief she had been very recently killed. (Vol. XXI, p. 830). He defined "recently" as being within the last two or three minutes at the most. (Vol. XXI, p. 830).

2. Officer John Sampson. Officer Sampson received a call at about 1:00 a.m. on June 15, 2002, and arrived approximately the same time as Officer Foskey.

(Vol. XXI, p. 844). The officers found Mr. Smith sitting on the side of the bed, face slightly down. (Vol XXI, p. 850). His face was completely covered with blood and blood was steadily coming out of his mouth. (Vol. XXI, p. 850). Smith did not speak in any discernable manner to Officer Sampson. (Vol. XXI, p. 850). Sampson stayed with Mr. Smith until EMS people arrived. (Vol. XXI, p. 851). Sampson noted dispatch conversations are recorded, but was unaware whether the dispatch tapes in this case had been preserved. (Vol. XXI, p. 864). There was no evidence presented as to the location of the dispatch tape, and it was never placed in evidence.

3. Richie Acevedo. Mr. Acevedo is a firefighter/paramedic with Brevard County Fire and Rescue. (Vol. XXI, p. 876). He was called to and arrived at 762 Hampton Drive in Palm Bay on June 15, 2002. (Vol XXI, p. 877). He met and treated Mr. Smith. (Vol. XXI, p. 882, et. seq.). Acevedo assessed Smith's condition as "critical." (Vol. XXI, p. 885). On cross examination, Mr. Acevedo conceded he had stated in a pretrial deposition that Smith "talked fine to me," during the time Acevedo was interacting with Smith. (Vol. XXI, p. 892).

4. Jason Smith. Mr. Smith is a firefighter paramedic with the City of Palm Bay, Florida. (Vol. XXII. 919). He responded, as did Mr. Acevedo, to Mr. Smith in the residence. (Vol. XXII, p. 924-925). He described finding Mr. Smith in a "semitripod position." (Vol. XXII, p. 925). His head was positioned over his

knees. (Vol. XXII. 925). It was clear to Paramedic Smith that Kelvis Smith had suffered a "major traumatic event, "obviously from the mouth as well as the face, and obvious respiratory distress." (Vol. XXII. 925). Kelvis Smith was bleeding from the face. (Vol. XXII. 926). Kelvis Smith did not identify who had done this to him at that time. (Vol. XXII. 927). He was not asked who did this to him, at least in the presence of Paramedic Smith. (Vol. XXII. 927). Paramedic Smith described Kelvis Smith's condition as "critical, very critical." (Vol. XXII. 933). On cross examination, Paramedic Smith conceded Kelvis Smith was alert and oriented. (Vol. XXII. 935). He mentioned having trouble breathing and that his arms were hurting. (Vol. XXII. 937). Paramedic Smith noticed marijuana on the floor of the residence. (Vol. XXII. 940). It was found in a bag. (Vol. XXII. 941).

5. Mark Bell. Mark Bell is employed by Brevard County Fire and Rescue. (Vol. XXII, p. 959). Upon contact with Kelvis Smith, Bell had to unwrap cord in order to free the patient's arms. (Vol. XXII, p. 964). Bell took the cord with him to Holmes Regional Medical Center. (Vol. XXII, p. 965). Bell described Mr. Smith's condition as critical and life threatening. (Vol. XXII, p. 971). He did not recall asking Mr. Smith who had done this to him. (Vol. XXII, p. 971-972). He indicated it was something he would ask normally, but does not recall asking it in this particular instance. (Vol. XXII, p. 972). Bell indicated Smith was answering his questions with verbal responses. (Vol. XXII. 974). Bell described Smith's

speech as "gargled" due to the fluids in his mouth. (Vol. XXII, p. 976). Smith told Bell he had been shot. (Vol. XXII. p. 977). His heart rhythm was good, as was his blood pressure. (Vol. XXII, p. 977-978). Bell testified the fact that blood pressure was good meant the person was in stable condition. (Vol. XXII, p. 979).

6. Kelvis Smith. Kelvis Smith is the survivor of the attack at 762 Hampton Drive, Palm Bay, Florida on June 15, 2002. He was romantically involved with the deceased, Michelle Gill, and they lived at the 762 Hampton Drive address beginning in 2001. (Vol. XXII, p. 986-987). Ms. Gill was pregnant with his child as of June 15, 2002. (Vol. XXII, p. 988). Smith believed she was approximately seven and a half months into her pregnancy. (Vol. XXII. 988). Mr. Smith knew Mr. Nowell, but not as Willie Nowell, but rather "Chill Will" or "Willie." (Vol. XXII, p. 988). Over defense objections, Smith identified the Defendant in court. (Vol. XXII, p. 989-990). When Mr. Smith arrived home, he testified he saw two gentlemen in his house. (Vol. XXII, p. 1000). The house had been ransacked. He testified Mr. Nowell had a gun pointed towards him. (Vol. XXII, pg. 1000). Smith testified he recognized the other person as Jermaine Bellamy. (Vol. XXII, p. 1000). He stated both were wearing gloves. (Vol. XXII, p. 1000). He stated Mr. Nowell was wearing a light brown "Dickie" suit. (Vol. XXII, p. 1000). Anticipating cross examination by defense counsel, the State asked Mr. Smith if he had previously testified under oath that Mr. Nowell was wearing dark clothing, either blue or

black. (Vol. XXII, p. 1060). He stated Mr. Bellamy was wearing a black t-shirt with blue shorts with black tennis shoes. (Vol. XXI, p. 1001). Smith stated Nowell had a .45 caliber pistol. (Vol. XXII, p. 1002). Bellamy is alleged to have had a .32 or .38 revolver. (Vol. XXII, p. 1003). Smith stated Nowell requested Smith go to the living room and lie down face first, at which point Nowell tied him up. (Vol. XXII, p. 1004). Ms. Gill was sitting on the floor, with Mr. Bellamy having a gun pointed at her, according to Mr. Smith. (Vol. XXII, p. 1005). Smith stated Mr. Nowell took his phone, car keys, and his wallet, which contained approximately $800.00 in it. (Vol. XXII, p. 1008). Smith stated he had been making money by selling drugs up until Ms. Gill became pregnant. (Vol. XXII, p. 1009). He stated he gave up selling drugs when Ms. Gill became pregnant. (Vol. XXII, p. 1009). Smith testified Ms. Gill had used marijuana and was a heavy cigarette smoker prior to being pregnant, but was not smoking during pregnancy. (Vol. XXII, p. 1009). When Gill did smoke, she smoked Newports. (Vol. XXII, p. 1010). Smith never smoked. (Vol. XXII, p. 1010). Smith's brother Detrick did not smoke, nor did a Mr. Bray. (Vol. XXII p. 1010). Smith described Gill's emotional state as "real bad" and she was crying. (Vol XXII, p. 1014). A safe was opened, but was empty. (Vol. XXII, p. 1015). They next went to the kitchen area, where Smith stated Nowell lit up a cigarette, which appeared to be a Newport. (Vol. XXII, p. 1016). Smith did not know what Nowell did with the cigarette.

(Vol. XXII, p. 1025). Later, Smith stated he asked Nowell "what [this] was about." (Vol. XXII, p. 1018). Nowell is alleged to have said that Smith had shot him. (Vol. XXII, p. 1018). Smith stated he replied that he didn't shoot Nowell and that Nowell knew Smith had not shot him. (Vol. XXII, p. 1018). Smith stated the first time he even knew Nowell had been shot was when Nowell told him that evening. (Vol. XXII, p. 1019). Two questions later, after prompting by the prosecutor, Nowell stated he had heard Nowell and Bellamy had been shot from information on the "street" and from a couple of his cousins. (Vol. XXII, p. 1019). Mr. Smith denied having shot Mr. Nowell or Mr. Bellamy on April 19, 2002. (Vol. XXII, p. 1023). He further stated he did not know who had shot Nowell and Bellamy. (Vol XXII, p. 1023). Smith then describes a conversation between Nowell and Bellamy regarding what to do with Smith and Gill. (Vol. XXII, p. 1023). Nowell is alleged to have said that if they let Smith and Gill go, they would try to "kill us." (Vol. XXII, p. 1023). Mr. Bellamy is alleged to have then held "up his right hand and goes like this here (demonstrating) across his throat. (Vol. XXII, p. 1023-1024). Smith and Gill were then directed to go to a closet and sit. (Vol. XXII, p. 1026-1027). Nowell allegedly asks Smith for the keys to his truck, and is told he already has them. (Vol. XXII, p. 1028). Nowell left the room and Bellamy is alleged to have remained in the room with a gun trained on Smith and Gill. (Vol. XXII, p. 1029). Smith hears the front door slam and then hears his

truck crank up. (Vol. XXII, p. 1030). Nowell then came back in a few minutes later. (Vol. XXII, p. 1030). Smith states he then saw Nowell and Bellamy whispering to each other. (Vol. XXII, p. 1031). Smith then sees both the guns coming across from the side of the closet and open fire. (Vol. XXII, p. 1031). He sees bullets coming down the wall. (Vol. XXII. 1031). He sees Ms. Gill shaking. (Vol. XXII, p. 1031). Smith says he leaned over and said "Chill, you shot her. Chill you shot her. You said you weren't going to do nothing to her." (Vol. XXII, p. 1031). Smith then testified he [Smith] turned his "head, bam, lights out." (Vol. XXII, p. 1031). After regaining consciousness, he was able to make his way to a telephone and call for help. (Vol. XXII, p. 1033). He had difficulty locating a phone, and had to make his way through the house before finding one in the master bedroom. (Vol. XXII, p. 1034). Smith had learned from a deaf friend the sign language alphabet. (Vol. XXII, p. 1046). He used that language to assist him in communicating with the police while he was in the hospital. (Vol. XXII, p. 1047). He testified he identified Mr. Nowell in a photo lineup at the hospital. (Vol. XXII, p. 1051). Smith stated both Mr. Nowell and Mr. Bellamy shot Michelle Gill. (Vol. XXIII, p. 1107). Smith stated he never hated Mr. Nowell or Mr. Bellamy and was shocked to see them in his house when he arrived home that night. (Vol. XXIII, p. 1108). The Assistant State Attorney asked if Ms. Gill said anything before the guns were discharged, and Smith said other than that she was yelling and crying,

he could not remember anything specific. (Vol. XXIII, p. 1108-1109). On cross examination, Smith agreed he had testified previously in deposition that he had used sign language to spell out the name N-O-W-E-L-L when in fact he had not done so. (Vol. XXIII, p. 1111). Smith agreed he had on several past occasions stated Mr. Nowell was dressed in black when Smith saw him at his house that night. (Vol. XXIII, p. 1112-1113). Smith never identified his alleged assailants to any law enforcement officer or EMT the night of the shooting. (Vol. XXIII, p. 1132). Mr. Smith stated he was certain he "never communicated Willie Nowell's name or description to anyone, family members, friends, or police, until the day that they showed in [his] hospital room." (Vol. XXIII, p. 1134). It is therefore noteworthy that the videotaped conversation between police and Mr. Smith taken at the hospital begins with Detective Santiago stating to Smith "[w]e understand that you know who shot you, is that true?" (Vol. XXIII, p. 1093). At the hospital, Mr. Smith was unable to speak, except through sign language. (Vol. XXIII, p. 1136). Mr. Smith's mother does not understand sign language. (Vol. XXIII, p. 1136). Mr. Smith agreed that during his videotaped interview at the hospital, he never used sign language to spell out "Nowell", "Will," or "Chill." (Vol. XXIII, p. 1138-1139).

7. Mark Mynheir. Officer Mynheir is a police officer with the City of Palm Bay. (Vol. XXIII, p. 1141). Although at the time of the trial in this case he was a

road patrol officer, he was a detective at the time of the offense prosecuted here. (Vol. XXIII, p. 1141). Upon becoming involved in this case, he was asked to compile a photographic lineup of potential suspects for Kelvis Smith to identify. (Vol. XXIII, p. 1142). In April of 2002, Mynheir had participated in the investigation of the shooting of Mr. Nowell and Mr. Bellamy. (Vol. XXIII, p. 1142). Mynheir spoke with Bellamy only, but testified neither Bellamy or Mr. Nowell identified the person who shot them. (Vol. XXIII, p. 1146). Because Smith was a suspect in the shooting of Bellamy and Nowell, Bellamy and Nowell became suspects in the shooting of Smith. (Vol. XXIII, p. 1146). Mynheir was accompanied to the hospital by Detective Santiago. (Vol. XXIII, p. 1148). Smith identified Nowell and Bellamy as the people who fired the shots that night. (Vol. XXIII, p. 1151). Mynheir agreed he had found no physical evidence linking Mr. Nowell to the crime or crime scene. (Vol. XXIII, p. 1165-1166). There was no DNA evidence, no blood evidence, no eyewitnesses saying they saw Mr. Nowell in Mr. Smith's pickup truck, and no evidence found in Mr. Smith's green pickup truck linking it to Mr. Nowell. The only link is Kelvis Smith, and whether the jury believes him.

8. George Santiago. George Santiago was a detective with the Palm Bay Police Department at the time of this offense. He is now a road patrol officer. (Vol. XXIV. p. 1182). He participated in the interview of Mr. Smith at Holmes

Regional discussed earlier where Mr. Smith communicated via sign language. (Vol. XXIV, p. 1188). With regard to Detective Santiago's statement on the videotaped interview that "we understand that you know who shot you, is that true," (Vol. XXIII, p. 1093) the detective asserted this statement was not based on any information given to him on any occasion prior to him making the statement. (Vol. XXIV, p. 1205). Santiago also indicated his reference to the "men" who shot Smith was not based on any previously obtained information. (Vol. XXIV, p. 1207). Going into the lineup, Santiago conceded he had two suspects in mind, and he wanted to be sure Smith picked both suspects. (Vol. XXIV, p. 1207-1208). Santiago did not conduct any investigation as to Mr. Nowell's whereabouts at the time of the shooting. (Vol. XXIV, p. 1217-1218).

9. Lisa Gates. Lisa Gates was employed at Ryan's Steakhouse, where Michelle Gill worked. (Vol. XXIV, p. 1225). Mr. Nowell also worked there. (Vol. XXIV, p. 1226). Gates last saw Ms. Gill within a day or two of the shooting. (Vol. XXIV, p. 1230). Ms. Gates was aware of Ms. Gill's pregnancy at that time. (Vol. XXIV, p. 1228).

10. Jo DeArmon. Ms. DeArmon also worked at Ryans Steakhouse. (Vol. XXIV, p. 1231). Ms. DeArmon knew both Mr. Nowell and Ms. Gill. (Vol. XXIV, p. 1231). She recalls last seeing Ms. Gill at approximately 10:30 p.m. to 10:45 p.m. on the 14th of Jun3, 2002. (Vol. XXIV, p. 1234). Ms. Gill was waiting for a ride.

(Vol. XXIV, p. 1234). She did not know who picked up Ms. Gill ultimately. (Vol. XXIV, p. 1238).

11. Dr. Sajid Qaiser. Dr. Qaiser is a medical examiner with Brevard County. (Vol. XXIV, p. 1240). He performed the autopsy on Ms. Gill. (Vol. XXIV, p. 1244). Ms. Gill exhibited multiple gunshot wounds to the body, totaling eleven. (Vol. XXIV p. 1249). Three of the gunshot wounds were described as "penetrating" (i.e. entry wound, but no exit wound) and eight were described as "perforating" (i.e. entry and exit wound). (Vol. XXIV, p. 1267). Two of the gunshot wounds were to the head. (Vol. XXIV, p. 1249). Dr. Qaiser could not say which gunshot wound was made first. (Vol. XXIV, p. 1283). He did determine the cause of Ms. Gill's death was the gunshot wounds to the head. (Vol. XXIV, p. 1283-1284). He determined Ms. Gill was carrying a fetus, which he estimated to be at a gestational age of approximately 26 to 28 weeks. (Vol XXIV, p. 1286). The fetus died as a result of lack of oxygen, according to Dr. Qaiser. (Vol. XXIV, p. 1286). The time of Ms. Gill's death was estimated at 1:00 a.m. on June 15, 2002. (Vol. XXIV, p. 1294). He could not testify as to the sequence of the bullets fired as they related to entry into Ms. Gill's body, nor could he determine the distance from which the shots were fired. (Vol. XXIV, p. 1295 and 1299). Ms. Gill tested positive for the presence of cannabis. (Vol. XXIV, p. 1296-

1297). He collected fingernails from Ms. Gill for testing to determine if any DNA transfers occurred. (Vol. XXIV, p. 1302-1303).

12. Detective Ernie Diebel. Detective Diebel is employed by the Palm Bay Police Department. (Vol. XXV, p. 1326). In the early morning hours of June 15, 2002, he received a call reference a homicide having occurred at 762 Hampton Drive in Palm Bay, Florida. (Vol. XXV, p. 1327). Diebel went to Holmes Regional Medical Center because he had been told Mr. Smith had been transported there. (Vol. XXV, p. 1328). When he arrived, he observed Mr. Smith to be semi-conscious with two gunshot wounds to his face. (Vol. XXV, p. 1329). He observed bullet holes under each eye. (Vol. XXV, p. 1329). The left side hole was larger and had indications of "black burning or a powder burn around it." (Vol. XXV, p. 1329). Diebel did not attempt to speak to Mr. Smith. (Vol. XXV, p. 1335). Neither Smith nor any one in his family made any assertions Mr. Nowell was responsible for Mr. Smith's shooting at that time. (Vol. XXV, p. 1346). He did take photographs. (Vol. XXV, p. 1335). He also took possession of an electric cord. (Vol. XXV, p. 1335). He later appeared at the 762 Hampton address, and noticed a vacuum cleaner with its cord cut. (Vol. XXV, p. 1337). The cord remaining on the vacuum cleaner appeared similar to the cord recovered at the hospital. (Vol. XXV, p. 1337-1338). The State Attorney then turned his attention to an investigation Detective Diebel conducted on April 19, 2002 at 2254

Washington Street in Palm Bay. Diebel received a call regarding a shooting with two victims. (Vol. XXV, p. 1340). The victims of this shooting were Willie Nowell and Jermaine Bellamy. (Vol. XXV, p. 1341). Diebel spoke with Bellamy at the hospital, but did not speak to Mr. Nowell. (Vol. XXV, p. 1341). Neither Diebel nor anyone he was familiar with received any request pursue charges against the person or persons who shot Mr. Nowell and Mr. Bellamy. (Vol. XXV, p. 1342). Diebel received a call suggesting that Kelvis Smith and Detrick Whitherspoon might be suspects. (Vol. XXV, p. 1344). Mr. Smith and Mr. Whitherspoon are cousins. (Vol. XXV, p. 1344). Another individual by the name of Kent Osborn was identified as a possible suspect. (Vol. XXV, p. 1345).

13. Officer Harold Ballard. Officer Ballard is employed by the Palm Bay Police Department. On April 19, 2002, he responded to 2254 Washington Street in Palm Bay, Florida. (Vol. XXV, p. 1356). He came upon Mr. Nowell in the driveway of that residence and Mr. Bellamy inside of the house. (Vol. XXV, p. 1358). The two were transported to Holmes Regional Medical Center. (Vol. XXV, p. 1359).

14. Willie Mae Bristol. Ms. Bristol is Kelvis Smith's mother. (Vol. XXV, p. 1361). After the shooting of Mr. Smith and Ms. Gill, Ms. Bristol and other family members went into the Hampton street residence after the residence was no longer considered a crime scene (Vol. XXV, p. 1363) where they found a couple

of empty shells for bullets. (Vol. XXV, p. 1362). Upon finding them, she called the detective and turned them over to him. (Vol. XXV, p. 1364). She also observed some holes in the walls of the closet. (Vol. XXV, p. 1367). She testified she did not know who her son believed shot Ms. Gill and him until Mr. Smith identified Bellamy and Nowell during the videotaped photo lineup at the hospital. (Vol. XXV, p. 1368). Ms. Smith does not understand sign language and did not communicate in any way with Mr. Nowell regarding who shot him prior to the videotaped photo lineup. (Vol. XXV, p. 1369). From the time Mr. Smith was in the hospital, Ms. Bristol was at his side, and no communication regarding who shot Mr. Smith occurred. (Vol. XXV, p. 1370). Thus, there is no explanation for the detective's comment at the start of the videotape suggesting Mr. Smith had let someone know he knew who shot him.

15. Terri Carter. Terri Carter is a crime scene technician with Palm Bay Police Department. (Vol. XXV, p. 1375). She observed the screened porch had almost no furniture on it. (Vol. XXV, p. 1382). And one of the screens was broken and a window was broken in the back of the home. (Vol. XXV, p. 1382). There was a telephone found in the master bedroom with blood on it. (Vol. XXV, p. 1382). She took various photographs of the crime scene. (Vol. XXV, p. 1383). She was the person who actually retrieved the bullet casings from Ms. Bristol. (Vol. XXV, p. 1385). Drywall was removed from the residence. (Vol. XXV, p.

1388). A cigarette pack and a lighter were taken and placed in evidence bags. (Vol. XXV, p. 1393). They were processed for latent fingerprints. (Vol. XXV, p. 1394). There was a cigarette butt found in the hallway. (Vol. XXV, p. 1399). That cigarette butt was sent to Wuesthoff hospital for DNA analysis. (Vol. XXVI, p. 1421). Carter did not know the results. (Vol. XXVI, p. 1421). Cigarette butts were also found in various other locations in the residence and in the pick up truck. (Vol. XXVI, p. 1438). These were collected and sent for analysis. (Vol. XXVI, p. 1438, 1439). Fingerprints were obtained from Mr. Smith's truck, and none of those fingerprints matched Mr. Nowell's. (Vol. XXVI, p. 1428). Ms. Carter did not vacuum the crime scene for hair samples. (Vol. XXVI, p. 1430). She found no latent prints anywhere matching Mr. Nowell. (Vol. XXVI, p. 1433). Law enforcement was unable to determine who those fingerprints belonged to. (Vol. XXVI, p. 1441).

16. Tom Hellebrand. Mr. Hellebrand is another crime scene technician for the City of Palm Bay Police Department. (Vol. XXVI, p. 1442). He was called to assist in the investigation of the death of Ms. Gill. (Vol. XXVI, p. 1442). He was not the lead investigator in this case. (Vol. XXVI, p. 1443). His responsibility was looking for spent firearm casings and fired bullets. (Vol. XXVI, p. 1446). He also collected a "blood standard card of a known standard of blood from Mr. Nowell. (Vol. XXVI, p. 1453). He also took a stain card and collected blood from the

crime scene. (Vol. XXVI, p. 1454). Those samples were sent to the Florida Department of Law Enforcement Crime Lab. (Vol. XXVI, p. 1454). He collected various cigarette butts. (Vol. XXVI, p. 1455-1456). He had not at the time of trial heard of any results from the testing of the blood swabs he took. (Vol. XXVI, p. 1458). At the end of the direct examination of Mr. Hellebrand, the trial court noted some of the jurors appeared to be falling asleep. (Vol. XXVI, p. 1459). During cross examination, Hellebrand agreed he came into possession of nail clippings from Ms. Gill. (Vol. XXVI, p. 1460-1461). He did not have these nail clippings analyzed. (Vol. XXVI, p. 1461). He does not know if anyone else had them analyzed. (Vol. XXVI, p. 1461). One of the cigarette butts that still had ash on it was found near a window sill in the hallway outside an air-conditioning unit. (Vol. XXVI, p. 1462). Hellebrand knew of no DNA evidence linking Mr. Nowell to the crime scene, nor was their any blood, fingerprints or hair linking Nowell to the crime scene. (Vol. XXVI, p. 1463-1464). He was not instructed to look for any foot or shoe print evidence. (Vol. XXVI, p. 1464). Latex gloves were found inside the house, but Hellebrand did not know where they came from. (Vol. XXVI, p. 1446-1447). The gloves were collected for future evaluation. (Vol. XXVI, p. 1447). He does not know if they were ever sent off to the crime lab. (Vol. XXVI, p. 1468). One of the gloves was found on the screened porch, and one was found

in the master bedroom. (Vol. XXVI, p. 1468). The State then moved the latex gloves into evidence. (Vol. XXVI, p. 1471).

17. Dale Gilmore. Dale Gilmore is employed by Wuesthoff Reference Labs. (Vol. XXVI, p. 1473). There was a stipulation to his expertise in the area of DNA. (Vol. XXVI, p. 1473). The DNA markers from the cigarette butts were consistent with a female. (Vol. XXVI, p. 1478-1479). A second butt had the same result. (Vol. XXVI, p. 1479). A cigarette butt found contained DNA from more than one person, and at least one of the DNA samples was from a male. (Vol. XXVI, p. 1480). Mr. Nowell was excluded with 100% certainty as a possible source of that DNA. (Vol. XXVI, p. 1481).

18. John Hollister. John Hollister is employed by Palm Bay Police Department as a crime scene technician. (Vol. XXVI, p. 1485). He removed pieces of drywall from the Hampton residence. (Vol. XXVI, p. 1489).

19. Omar Felix. Omar Felix is employed by the FDLE Orlando Crime Lab. (Vol. XXVI, p. 1496). He received various bullets and casings relevant to the shooting of Ms. Gill and Mr. Smith. (Vol. XXVI, p. 1500). As to some .32 caliber casings, they were all fired with the same unknown .32 caliber gun. (Vol. XXVI, p. 1501). As to the .45 caliber casings, they were all fired from the same .45 caliber firearm. (Vol. XXVI, p. 1501).

Following Mr. Felix's testimony, the State rested. The Defense moved for judgment of acquittal, and that motion was denied. (Vol. XXVI, p. 1510 et. seq. 1531 et. seq).

The Defense called eight witnesses, including the Defendant. (Vol. XXVII, p. 1554 et. seq.). They are as follows:

1. Barney Weiss. Barney Weiss is a district division manager for the Palm Bay Police Department. (Vol. XXVII, p. 1554). His responsibilities include records, all property, evidence, supply, automation, computers, fleet, etc…. (Vol. XXVII, p. 1555). He authenticated a CAD report from June 15, 2002. (Vol. XXVII, p. 1559). It is a record of conversations between dispatchers and other officers, though not necessarily a verbatim record of those conversations. (Vol. XXVII, p. 1561).

2. Dawn Subrin. Dawn Subrin is a dispatcher with Palm Bay Police Department. She interpreted the CAD report. The particular call came from 762 Hampton Drive. (Vol. XXVII, p. 1567). The complainants name was Kelvis Smith. (Vol. XXVII, p. 1567). The call came in at 1:17 a.m. on June 15, 2002. (Vol. XXVII, p. 1568). At 1:28:04 a.m., there was a notation on the CAD report that the victim was unable to provide "ADDLT suspect," which she explained meant Mr. Smith was "unable to provide additional suspect information." (Vol. XXVII, p. 1581).

3. Dawn Dougherty. Dawn Dougherty has a five year old son fathered by Mr. Nowell. (Vol. XXVII, p. 1587). In June 2002, that son would have been two years old. (Vol. XXVII, p. 1587). Michelle Gill was a co-worker and friend of Ms. Dougherty. (Vol. XXVII, p. 1587). She believes she met Kelvis Smith on one occasion. (Vol. XXVII, p. 1588). She worked at Ryan's Steakhouse with Ms. Gill on the night she was killed. (Vol. XXVII, p. 1593). Ms. Dougherty saw Ms. Gill leave with someone after work. (Vol. XXVII, p. 1595). Dougherty then went home. (Vol. XXVII, p. 1596). She arrived home around 11:15 to 11:20 p.m. (Vol. XXVII, p. 1596). After arriving home, she took a shower, got dressed, and went to a liquor store to pick up something to drink and returned home. (Vol. XXVII, p. 1597). She left her house for the liquor store (Crane Creek Liquors) around 12:00. (Vol. XXVII, p. 1597-1598). The liquor store was a couple of blocks from her residence. (Vol. XXVII, p. 1598). The entire trip to the liquor store and back to her residence took approximately ten minutes. (Vol. XXVII, p. 1599). She made a phone call to Mr. Nowell, asking for some money for their child. (Vol. XXVII, p. 1599). Based on that conversation, they set up a meeting. (Vol. XXVII, p. 1599). They were to meet at "Cleo's". (Vol. XXVII, p. 1599). Cleo's is a small bar in Palm Bay on Florida Avenue. (Vol. XXVII, p. 1600). It is about a ten minute drive for Ms. Dougherty to get to Cleo's. (Vol. XXVII, p. 1600). She indicated she got to Cleo's a little after 12:00 midnight. (Vol. XXVII, p. 1600). She met

with Mr. Nowell there. (Vol. XXVII, p. 1601). Mr. Nowell approached her. (Vol XXVII, p. 1601). No one was with him. (Vol. XXVII, p. 1602). Nowell and Dougherty engaged in a brief conversation. (Vol. XXVII, p. 1603). Nowell gave her $100.00 (Vol. XXVII, p. 1605), and she left. (Vol. XXVII, p. 1603). She left around 12:30 a.m. (Vol. XXVII, p. 1603). She did not recall what Nowell was wearing, but did not see any blood on him. (Vol. XXVII, p. 1603-04).

4. Sallie McHellon. Ms. McHellon has known Mr. Nowell for about six years. (Vol. XXVII, p. 1620). She also knew Ms. Gill. (Vol. XXVII, p. 1621). She testified she saw Mr. Nowell at Cleo's beginning around 11:15 and 11:30 p.m. the night of the shooting. (Vol. XXVII, p. 1624). She testified Mr. Nowell was still there shooting pool when she got ready to leave between 2:00 and 2:30. (Vol. XXVII, p. 1625). He bought her a beer while she was there. (Vol. XXVII, p. 1625). He was wearing a sky blue outfit and sneakers. (Vol. XXVII, p. 1625). The longest during that period he might have been out of her sight was ten to fifteen minutes. (Vol. XXVII, p. 1626).

5. Darrius Johnson. Darrius Johnson is a friend of Mr. Nowell. (Vol. XXVII, p. 1641). Mr. Johnson testified he met Mr. Nowell at Cleo's the evening before the shooting. (Vol. XXVII, p. 1647). Nowell was dressed in a blue outfit. (Vol. XXVII, p. 1648). Nowell was already at Cleo's when Johnson arrived at around 10:30 p.m. (Vol. XXVII, p. 1648). Johnson left Cleo's at 12:45 to 1:00

a.m. (Vol. XXVII, p. 1650). Nowell was still there when he left. (Vol. XXVII, p. 1650).

6. Taj Shepherd. Taj Shepherd has known Mr. Nowell for seven years. (Vol. XXVII, p. 1658). He arrived at Cleo's at 11:30 p.m. on the night Ms. Gill was killed. (Vol. XXVII, p. 1660). He left between 12:30 and 1:00 a.m. that night. (Vol. XXVII, p. 1660). Mr. Nowell was there when Shepherd was there and was still there when Mr. Shepherd left. (Vol. XXVII, p. 1660). Shepherd described Mr. Nowell as wearing a light blue top and bottom. (Vol. XXVII, p. 1661).

7. John Phillip Bryant. Mr. Bryant is Mr. Nowell's brother. (Vol. XXVII, p. 1673). He knows Mr. Smith, and knew Ms. Gill. (Vol. XXVII, p. 1674). He described Ms. Gill as "kin" to him. (Vol. XXVII, . 1675). On the night Ms. Gill was killed, Mr. Nowell was wearing a "velour Carolina blue jumpsuit." (Vol. XXVII, p. 1680). He and Mr. Nowell arrived at Cleo's approximately 9:30 to 10:00 p.m. that evening. (Vol. XXVII, p. 1684). Bryant left at approximately 1:10 to 1:15 a.m. (Vol. XXVII, p. 1688). Nowell was still there. (Vol. XXVII, p. 1688-1689).

8. The defense, with a stipulation from the State, admitted evidence of surveillance tape from a Mobile gas station at the corner of University Boulevard and Babcock Street taken at 2;15 a.m. on the morning of June 15, 2002. (Vol. XXVII, p. 1705, 1707).

9. Willie Nowell. Mr. Nowell is the Defendant in this case. He first testified regarding his apparel in the video from the gas station. He was wearing a Carolina top and bottom pullover. (Vol XXVII, p. 1713). He denied shooting Ms. Gill. (Vol. XXVII, p. 1715). He denied shooting Kelvis Smith. (Vol. XXVII, p. 1715). He was shot on April 19, 2002. (Vol. XXVII, p. 1715-1717). He was shot in the leg. (Vol. XXVII, p. 1716).

He testified he arrived at Cleo's around 10:00 p.m. or a little bit thereafter. (Vol. XXVII, p. 1723). He recalls leaving Cleo's around 1:30 a.m. (Vol. XXVII, p. 1724). After leaving Cleo's he walked down to his mother's house to retrieve his car. (Vol. XXVII, p. 1724-1725). They rode around town for a short while then went to the Mobile station. (Vol. XXVII, p. 1725). He denied knowing Ms. Gill was pregnant. (Vol. XXVII, p. 1726) He denied knowing where Ms. Gill and Mr. Smith lived. (Vol. XXVII, p. 1726). Nowell had never been to Smith's house. (Vol. XXVII, p. 1726). Mr. Nowell had eighteen gold teeth and a goatee on June 15, 2002. (Vol. XXVII, p. 1727).

After that, Mr. Nowell rested his case. (Vol. XXVIII, p. 1766). The Defense renewed his motions for judgment of acquittal. (Vol. XXVIII, p. 1770). Those motions were again denied. (Vol. XXVIII, p. 1772). The State elected not to put on any rebuttal evidence. The Defendant again renewed his motions for judgment of acquittal. (Vol. XXVIII, p. 1800).

The case then proceeded to closing argument. During closing argument, the Prosecutor made the following comments to the jury:

1. The State spoke as the voice of the deceased, saying:

> "Michelle Gill speaks to you through the evidence. Michelle Gill tells you about that evening and early morning hourse before she died. And along with the testimony of Mr. Smith, Michelle tells you this. I was pregnant, approximately seven months, I had a viable child in me. It was Kelvis's child. I worked at Ryan's Steakhouse where I've worked for years.
> "I worked with Willie Nowell. Willie knew me, he knew Kelvis. I didn't hurt Willie. I didn't threaten him. I didn't point a gun at him. I didn't call him names. There's nothing to suggest that that poor sole [sic] did a thing other than work and go home and carry her child."

(Vol. XXIX, p. 1881).

2. The State then made the following argument:

> What was Michelle Gill doing? What was in her mind? She was crying, begging, she was begging. Michelle Gill, what was going on in her mind? I'm going to die. Ladies and gentlemen, if she didn't think she was going to die when they first walked in, when they herded those two people into that closet, let there be no doubt that those people knew what their fate was.
>
> "Let there be no doubt when the hand came across the throat, their fate was sealed and it was sealed in their presence, and Mr. Smith and Ms. Gill could do nothing but wait for it to happen. Nothing, except think about being killed, think about being killed. To think about her."

(Vol XXIX p 1884).

3. The State next argued that "none of the testimony suggests that Mr. Bellamy (co-defendant) got any closer to Ms. Gill than to hold a gun on her while she whimpered and begged." (Vol. XXIX, p. 1886).

4. The State referred to the deceased and Mr. Smith as "caged in essence, caged human beings." (Vol. XXIX, p. 1888). The objection to this was sustained. (Vol. XXIX, p 1889). A motion for mistrial based on this and the previous comments was denied. (Vol. XXIX, p. 1889-1890).

5. The State then invokes the name of the Almighty, thanking God the jury is allowed to make the determination about what happened during Mr. Smith's alleged identification of the Defendant at the hospital. (Vol. XXIX, p. 1893).

6. The Assistant State Attorney then made the following argument:

> "What did he say? What is another reason why this is going to be imprinted in his mind forever? I saw the bullets coming down the wall. I saw them coming down the wall. *Can you imagine? I can't even imagine that. He must have been terrified, along with his girlfriend*. Will he ever forget? Is he equivocal? No. [emphasis added]
>
> "Does he have a college degree? No. By his own admission he understands what goes on in the streets. But by his own admission he's been in trouble before with the law. Welcome to Mr. Smith's world.
>
> "Mr. Smith's world where Willie Nowell and Jermaine Bellamy can take a .45 caliber handgun and a .32 caliber handgun and walk you into a closet and shoot her eleven times.

(Vol. XXIX, p. 1895).

7. The Assistant State Attorney then returned to his speculation regarding Ms. Gill's though processes:

> "What was Michelle Gill thinking when the first bullet struck her? The second bullet? The third –"

(Vol. XXIX, p. 1895-1896). The Defense again objected, and the Court overruled the objection after the Assistant State Attorney asserted his belief that what was going on in the victim's minds was crucial to the question of the Defendant's guilt. (Vol. XXIX, p. 1896). A motion for mistrial was again denied. *Id.*

The jury returned a verdict of guilty as to all counts. (Vol. XXXI, p. 2201-2254). The Defendant filed a motion for new trial (Vol. XIV, pages 2275-2276). That motion was denied. (XIV, pages 2358-2359).

A sentencing proceeding was held October 17 through October 19, 2005. (Vol. XXXII through XXXV). The State of Florida presented no additional witnesses, but did place a copy of Mr. Nowell's prior conviction in the record. (Vol. XXXII, p 92-93). The Defendant presented 8 witnesses in the penalty phase. They are as follows:

1. Maria Bryant. Maria Bryant is the Defendant's mother. (Vol. XXXII, p. 129). She was beaten by Mr. Nowell's father "for breakfast, lunch and dinner." (Vol. XXXII, page 130). She and Mr. Nowell's father lived together for a while, but Nowell never supported his son. (Vol. XXXII, page 131). He was not present for Mr. Nowell's emotional needs. (Vol XXXII, page 131). She was 16 years old

when she gave birth to the Defendant. (Vol XXXII, page 132). She married another gentleman by the name of Bryant in 1979. (Vol. XXXII, page 133). As a small child, the Defendant was constantly sick. (Vol. XXXII, page 134). He was regularly taken to the hospital. (Vol. XXXII, page 135). His head was 50% the size of a normal infant his age (at nine months). (Vol. XXXII, page 136). He was undernourished, underweight, and not developing mentally as he should. (Vol. XXXII, page 137-8). Eventually, the State of Florida removed Mr. Nowell from her care and placed him in foster care because he was malnourished. (Vol. XXXII, page 138-139). He stayed in foster care until he was four or five years old. (Vol XXXII, page 140). Ms. Bryant had other children in foster care at various times. *Id.* Mr. Nowell's biological father never tried to be a part of his life. (Vol. XXXII, page 142). When Mr. Nowell returned to his mother's home, she would administer punishment with a belt, to the point where she broke the skin on occasion. (Vol. XXXII, page 143-144). At age 11 or 12, Mr. Nowell was sent to live with his grandmother who lived in Nassau, Bahamas. (Vol. XXXII, page 145). Mr. Nowell attended church and in fact played the drums in church. (Vol. XXXII, page 146). He would help in other ways at the church. *Id.* When he was about 13, Nowell began spending significant time with Alma Jean Small, a woman twice his age. (Vol. XXXII, page 148). Ms. Small cut up Mr. Nowell one day. (Vol. XXXII, page 151). Mr. Nowell turned himself in upon hearing he was a suspect in

Ms. Gill's death. (Vol. XXXII, page 156). Mr. Nowell has five children. (Vol. XXXII, page 159). He was described as being a very loving father to his children. (Vol XXXII, p. 160).

2. Pastor Ronald Green. Pastor Green knew the Defendant through church. (Vol. XXXIII, page 208-209). He described the neighborhood where Mr. Nowell grew up as pretty rough. (Vol. XXXIII, page 209). He described the Bryant home as "fun," and "family oriented" (Vol. XXXIII, page 210). He described the Defendant as "fun, funny, very out-gong and definitely very respectful." (Vol. XXXIII, page 211). Mr. Nowell was "someone you could trust." (Vol. XXXIII, page 211). Mr. Nowell participated in Sunday School. (Vol. XXXIII, page 215). Around age 13, he stopped attending church. (Vol. XXXIII, page 216).

3. Lisa Gates. Lisa Gates was the general manager at Ryan's restaurant. (Vol. XXXIII, page 228). She hired Mr. Nowell. *Id*. She described Mr. Nowell as the "best cook I ever had." (Vol. XXXIII, page 229). She said the job of cook there was a stressful position, with very little pay. (Vol. XXXIII, page 230). She stated she wished she could triple his pay because he was doing the job of three people. (Vol. XXXIII, page 230). He could take over in the kitchen at the restaurant in the evening after someone else had been working there and within a half an hour he would have the place organized, smile at the guy who left the place looking like a disaster, and wish him a good night. (Vol. XXXIII, page 230-231).

Mr. Nowell was described as being good for morale, and also as willing to help the other employees, many of whom were elderly and unable to do their work as efficiently as one might like. (Vol. XXXIII, page 231). On one occasion, the manager left a large sum of money on her desk, and left her office with the door open to do something else, and forgot about the money and her open office door. When she returned, she saw Mr. Nowell outside the door, who told her "You left something on the desk in there." (Vol. XXXIII, page 232). On another occasion, Mr. Nowell escorted an employee out of the building when it became apparent she was being belligerent to the manager. (Vol. XXXIII, page 233). He had good relationships with many of the regular customers. (Vol. XXXIII, page 234-6).

4. Carol Smith. Carol Smith was a corrections officer at the Central Florida Reception Center. (Vol. XXXIII, page 247). She knew Mr. Nowell both in and out of prison. (Vol. XXXIII, page 249). She eventually had a child with Mr. Nowell. (Vol. XXXIII, page 250). She is now with the U.S. Postal Service and is a sergeant in the United States Army. (Vol. XXXIII, pg 247). She described Mr. Nowell as a loving father to his child. (Vol. XXXIII, page 251). She served in Iraq. (Vol. XXXIII, page 252). She described a letter Mr. Nowell sent her telling her things were going to be all right. (Vol. XXXIII, page 252). He would write her three to four letters a day and would call her when she was in Kuwait. (Vol. XXXIII. page 252).

5. Dr. William Riebsame. Dr. Riebsame is a licensed psychologist who examined Mr. Nowell. He determined Mr. Nowell's IQ at 74. (Vol. XXXIII, page 282). He estimated Nowell's IQ to be low average to average range. (Vol. XXXIII, page 283). Dr. Riebsame found evidence of 1) substance abuse, 2) a learning disability, 3) attention deficit hyperactivity disorder, 4) antisocial personality disorder, 5) impulsivity and 6) sexual abuse history. (Vol. XXXIII, page 286-288). He was unaware of any prior psychological or psychiatric treatment of Mr. Nowell. (Vol. XXXIII, page 286).

6. John Bryant. Mr. Bryant is the Defendant's step-father. He is an expeditor for Harris Corporation. (Vol. XXXIII, page 319). He described Mr. Nowell as nurturing, even up to the present day. (Vol. XXXIII, page 321). He discussed Mr. Nowell's relationship with Alma Small. (Vol. XXXIII. page 322-4) Ultimately, Ms. Small stabbed Mr. Nowell when he was about 17 years old after he told her of his intent to terminate their relationship. (Vol. XXXIII, page 324).

7. Alma Jean Small. Ms. Small agreed Mr. Nowell came to live with her when he was around 16 years old, but would not answer questions regarding her alleged sexual relationship with the Defendant. (Vol. XXXIII, page 341). She would not answer questions regarding whether she attacked Mr. Nowell, but was aware he was cut and was bleeding and that she had argued with him. (Vol. XXXIII, page 345).

8. Patrick Ford. Patrick Ford is a correction officer with the Brevard County Sheriff's Department. (Vol. XXXIII, page 348). He testified about his interaction with Mr Nowell at the Courthouse. He testified he did not have any problems or difficulties with Mr. Nowell while he was at the Moore Justice Center. (Vol. XXXIII, page 350). He testified he had nothing negative to say about Mr. Nowell. (Vol. XXXIII, page 350).

During the Argument phase of the jury recommendation proceeding, the Prosecutor made the following comments the Defendant would argue were improper:

> 1) "We hear the word mercy. Mercy is a word that makes us feel good, we want to be the kind of person that can grant mercy, that's capable of doing that. Justice grants mercy when mercy is applicable.
> "In this particular case and as I speak and as Defense counsel speaks, I ask that you keep in your minds eye whether mercy is a part of justice in this case."
> "I submit to you it is not, because mercy was not granted to Michelle Gill. There was no mercy when Mr. Nowell and Mr. Bellamy had the opportunity to dispense mercy, when they had the opportunity to see Ms. Gill, to see that she was pregnant, to se her carrying, to see her begging. When they had an opportunity to see that she was aware that her only means of safety and protection was in that very same closet with his hands tied behind his back, they were able to see that no one had a weapon other than the killers, they were able to see this.
> "And yet, in spite of that scene, in spite of those moments, Mr. Nowell, while those two helpless human beings, seated in a closet, disengaged from the rest of the world, no hope—"

(Vol. XXXV, pg 443-444). The defendant objected to these comments, but the trial court overruled the objection and motion for mistrial. (Vol. XXXV, page 444). Later in his closing argument, the prosecutor returned to this theme:

> "Mercy. State asks that you recommend mercy if mercy is warranted. And mercy wasn't given in this case, not by Mr. Nowell, not by Mr. Bellamy. There was no mercy there, none whatsoever."

(Vol. XXXV, page 472). The Assistant State Attorney concluded his argument with the above comment. The defense again objected and moved for a mistrial (Vol. XXXV, page 472). The objection was overruled and the motion for mistrial denied. (Vol. XXXV, page 473).

The Assistant State Attorney next argued:

> "Eliminating your witness is nothing more than an attempt to prevent a lawful arrest. See, it's different for you all. Imagine the, imagine the fear that this man [the defendant] had when heard that this Kelvis Smith lived.

(Vol. XXXV, pages 449-451). The Court denied the motion for mistrial made by defense counsel, but did instruct the jury to disregard the "imagine" comment. (Vol. XXXV, page 451). The Defendant argued any curative instruction would be insufficient to cure the error. (Vol. XXXV, page 451).

Counsel for the State next argued the possibility the Defendant might kill again. (Vol. XXXV, page 463).

The jury issued an advisory sentence voting seven to five in favor of death. (Vol. XIV, page 2323). Following a "Spencer" hearing held on December 12, 2005 (Vol. II, pages 243-338), Judge Rainwater issued her sentence on January 31, 2006. Judge Rainwater found as follows:

1. Aggravating Factors:

(a) The Court found the Defendant had been convicted of a felony involving the use or threat of violence to a person based on a 1994 conviction for Aggravated Battery with a Deadly Weapon. (Vol. XV, page 2379). This factor was given moderate weight. (Vol. XV, page 2379).

(b) The crime for which the defendant was to be sentenced was committed while he was engaged in the commission of or an attempt to commit crimes of first degree murder, robbery or kidnapping. This aggravating circumstance was given great weight. (Vol. XV, p. 2379).

(c) The crime for which the Defendant was to be sentenced was committed for the purpose of avoiding or preventing a lawful arrest. (Vol. XV, page, 2380). This factor was given great weight. (Vol. XV, page 2381).

(d) The crime for which the Defendant was to be sentenced was a homicide and was committed in a cold, calculated and premeditated manner without any pretence of moral or legal justification. (Vol XV, page 2381). This factor was given great weight. (Vol XV, page 2382).

2. Mitigating Factors:

(a) The crime for which the defendant is to be sentenced was committed while he was under the influence of extreme mental or emotional disturbance. (Vol XV, page 2384). This mitigator was given little weight. (Vol XV, page 2384).

(b) The capacity of the Defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was substantially impaired. (Vol XV, page 2384). This mitigator was given little weight. (Vol XV page 2384).

(c) The age of the Defendant at the time of the crime. The trial court gave this factor very little weight. (Vol XV, page 2385)

(d) The Defendant has an alcohol or a drug problem. (Vol XV, page 2385). The trial court stated that even if this mitigator had been proven by the greater weight of the evidence, it would be given very little weight. (Vol XV, page 2385)

(e) The Defendant has the capacity for rehabilitation. (Vol XV, page 2385) The court gave this very little weight. (Vol. XV, page 2385).

(f) The Defendant voluntarily surrendered to authorities. (Vol XV, page 2385). The court gave this very little weight. (Vol XV, page, 2385).

(g) The Defendant was a good son and a good friend. (Vol XV, page 2386). The Court gave this very little weight. (Vol XV, page 2386)

(h) The Defendant was removed at an early age from his mother and raised in a foster home; the Defendant grew up without his father and was raised by his mother and step-father; and the Defendant was the victim of neglect as a child. (Vol XV, page 2386). These mitigators have been given some weight. (Vol XV, page 2386).

(i) The Defendant suffered a traumatic incident as a victim of an assault and the Defendant was sexually abused. (Vol XV, page 2386). These factors were given some weight. (Vol XV, page 2386)

(j) The Defendant was physically abused. (Vol XV, page 2386). This factor was not proven by the greater weight of the evidence and was not considered by the court. (Vol XV, page 2386).

(k) The Defendant was a good employee. (Vol XV, page 2387). This factor was given some weight by the court. (Vol XV, page 2387)

(l) The Defendant received no psychological or psychiatric treatment. (Vol XV, page 2387). This factor has not been proven by the greater weight of the evidence and was given very little weight. (Vol XV, page 2387).

(m) The Defendant has handled himself acceptably and appropriately at trial. (Vol XV, page 2387). This factor has been given very little weight. (Vol XV, page 2387).

(n) The Defendant will adjust well to prison life. (Vol XV, page 2387). This factor has been given little weight. (Vol XV, page 2387).

(o) The Defendant exhibited good behavior in jail prior to and after the verdict. (Vol XV, page 2387). This factor was given very little weight. (Vol XV, page 2387).

(p) The Defendant was under the influence of alcohol and/or marijuana at the time of the offense. (Vol XV, page 2388). This factor was not proven to the Court's satisfaction by the greater weight of the evidence and was not considered by the court. (Vol XV, page 2388).

(q) The Defendant was involved in religious activities at a young age. (Vol XV, page 2388). This factor was given very little weight. (Vol XV, page 2388).

(r) The Defendant has family and friends who care for and love him. (Vol XV, page 2388). This factor was given very little weight. (Vol XV, page 2388).

(s) The Defendant may have been exposed to negative influences in his life. (Vol XV, page 2388). This factor was given some weight by the court. (Vol XV, page 2388).

(t) Society can be protected by a sentence of life imprisonment. (Vol XV, page 2388). This factor was given very little weight. (Vol XV, page 2388).

(u) Diminished mental capacity. (Vol XV, page 2389). This factor was not considered by the court because it determined it was not proven by the greater weight of the evidence. (Vol XV, page 2389).

After announcing its findings, the trial court sentenced the Defendant to death with regard to the murder of Ms. Gill. (Vol. XV, page 2389-2390).

Appeal from this sentence is automatic by law.

## SUMMARY OF ARGUMENTS

Mr. Nowell was deprived a fair trial and is entitled to a new trial based on several critical errors by the trial court. First, the trial judge allowed the State to use a peremptory challenge on a Hispanic gentleman named Ortega. The State complained about the notion that "you can't strike anybody from now on because of race." He stated his reason for striking Ortega, "in spite of the fact that he said he could follow the law, I don't particularly like him," adding "I don't think he is going to be the kind of juror that I would like." He elaborated by saying "he's young and appears to be the same or similar age as the defendant," and "I think he would associate himself with the defendant because of his age. I think he looks at the defendant and says, you know, that could be me. As a result, it's going to be more difficult for him, if not impossible, to actually do what's asked of him in terms of following the law." There was a white male on the jury of approximately the same age as Mr. Ortega, who the Assistant State Attorney did not strike. Therefore, the peremptory strike was based on the view a young Hispanic male would identify with an alleged criminal, while the young white male would not. The Appellant appropriately objected to the strike, and objected to the composition of the panel. Harmless error analysis does not apply in these situations, and even if it did, the harm here is obvious, given the verdict and more fundamentally, the

seven to five vote for death. A six to six vote would have constituted a recommendation for life imprisonment.

Second, the Assistant State Attorney made numerous improper comments during the closing argument of the guilt phase of the trial. First, he spoke as the voice of the deceased. Second, he speculated as to what was going through the mind of the deceased during the last moments of her life. Third, he argued Mr. Smith and the deceased were "caged in essence, caged human beings." Fourth, the State then invokes the name of the Almighty, thanking God the jury is allowed to make the determination about what happened during Mr. Smith's alleged identification of the Defendant at the hospital. Additionally, he Assistant State Attorney then violates the "golden rule" with the following argument:

> "What did he say? What is another reason why this is going to be imprinted in his mind forever? I saw the bullets coming down the wall. I saw them coming down the wall. *Can you imagine? I can't even imagine that. He must have been terrified, along with his girlfriend*.

This nothing less than an invitation for the jurors to envision themselves as Mr. Smith and/or Ms. Gill. It has absolutely no relevancy to the issues the jurors are asked to adjudge, and, like the other arguments made by the State, they serve no other purpose than to inflame. The Assistant State Attorney then returns to his speculation regarding Ms. Gill's though processes:

> "What was Michelle Gill thinking when the first bullet struck her? The second bullet? The third –"

The Defense again objected, and the Court overruled the objection after the Assistant State Attorney asserted his belief that what was going on in the victim's minds was crucial to the question of the Defendant's guilt. Remarkably, the trial court accepted this argument, and the motion for mistrial was again denied. The Defendant was entitled to a trial where he could fairly contest the identification of him as one of the assailant by a person who the State believes may have previously shot Nowell.

Third, in addition to the errors in the guilt phase closing argument, the State was permitted to make additional improper arguments during closing in the penalty phase of the trial. The State argued that since Mr. Nowell and Mr. Bellamy failed to dispense mercy, the jury should show no mercy for Mr. Nowell. He also improperly asked the jury to once again "imagine" the fear the Defendant's must have felt when they heard Mr. Smith survived. Counsel for the State then improperly argued that failing to recommend the death penalty might result in the Defendant killing again. The errors here cannot be considered harmless given the seven to five vote for death.

Fourth, the trial court erred in failing to find Florida's death penalty statute unconstitutional in light of the U.S. Supreme Court decision in *Ring, infra*.,

Fifth, the trial court erred in finding as an aggravating circumstance the alleged reason for the killing was to avoid arrest. The assertion is completely unsupported by the evidence, and more fundamentally, is inconsistent with the State's two (at best) theories of prosecution. The first theory is that the killing was revenge motivated. The second theory was that Nowell and Bellamy sought to kill both Smith and Gill because Smith would kill them later. The standard for finding this aggravating circumstance is that the proof of intent to avoid arrest by murdering a possible witness must be very strong before the murder can be considered as an aggravating circumstance.

**ARGUMENT 1: THE TRIAL COURT ERRED IN ALLOWING THE STATE'S PEREMPTORY STRIKE OF JUROR ORTEGA, A MINORITY, IN VIOLATION OF *BATSON V. KENTUCKY*, 476 U.S. 79 AND *STATE V. NEIL*, 457 SO. 2D 481 (FLA. 1984).**

Following voir dire of the prospective jurors, the State sought to exercise a peremptory challenge a juror with the last name "Ortega." (Vol. XX pg. 641). Orgega was described as a person of Hispanic background. (Vol XX pg. 642). The Defense objected to the peremptory challenge and asked for a *Neil* inquiry. The Court inquired of counsel for the State as to his reasons for the challenge. The Assistant State Attorney initially stated the following:

> "My reasons are two-fold. Number one, as I look at it, he appears young and of a similar age to the defendant. I would think that Mr. Ortega would relate to the defendant based on age.
> "Second of all, I noted that his wife works for Devereux, which is a childcare nurturing facility.
> "I am concerned, based on philosophies within the family, that he may not be able to follow the law when it comes to the actual, in any phase of this particular proceeding. (Vol XX, pg 643)

The trial court asked the Assistant State Attorney what specific answers Ortega gave that would warrant such a concern. (Vol. XX, pg. 643-44). The Assistant State Attorney answered there were no such specific answers." (Vol. XX, pg. 644). The Assistant State Attorney elaborated:

> "My race-neutral reason is, in spite of the fact that he said he could follow the law, I don't particularly like him. I don't think he is going to be the kind of juror that I would like. And for those reasons which were race neutral, I'm asking the Court to proceed with allowing me my peremptory challenge." (Vol XX, pg 645).

The Assistant State Attorney continued:

> "And this is why, because we have peremptoral [sic] challenges, the problem I have with it is, in the past it's not like somebody's face. The problem is, well, listen, you can't strike anybody from now on because of race. All minorities have a right to sit, they have a right to sit, can't strike them because of race.
> "My reason for striking him is that he's young and appears to be the same or similar age as the defendant, that's the first reason. I think that's sufficient for a peremptory challenge, whether or not it goes for cause for his inability to actually follow the law.
> "I think he would associate himself with the defendant because of his age. I think he looks at the defendant and says, you know, that could be me. As a result, it's going to be more difficult for him, if not impossible, to actually do what's asked of him in terms of following the law.
> "For that primary reason that [sic] I'm asking that he be striken."
> (Vol XX, pg. 646.)

The trial court asked if there were any young males left on the prospective panel, and both sides agreed a gentlemen named "Collins" was such a person. (Vol. XX, pg. 654-655). There is no suggestion in the record that Mr. Collins is a minority. Later in the trial, it was learned that Mr. Ortega was a 2000 graduate of the University of Florida. (Vol. XXII, p. 915)The trial court then allowed the State's peremptory strike of Mr. Ortega. (Vol. XX, pg. 655). Collins was not struck by the State, and remained on the jury. The Defendant objected to the composition of the panel. (Vol. XX, pg. 656).

In *Melbourne v. State,* 679 So.2d 759 (Fla.1996), this Court articulated the three-step procedure for challenging peremptory strikes of jurors on the ground of

racial bias. A party objecting to the other side's use of a peremptory challenge on racial grounds must 1) make a timely objection on that basis, b) show that the venireperson is a member of a distinct racial group, and c) request that the court ask the striking party its reason for the strike. All of these requirements were met by the Defendant in this case. Where these initial requirements are met, the court must ask the proponent of the strike to explain the reason for the strike.

At this point, the burden of production shifts to the proponent of the strike (in this case, the State) to come forward with a race-neutral explanation. If the explanation is facially race-neutral and the court believes that, given all the circumstances surrounding the strike, the explanation is not a pretext, the strike will be sustained. The court's focus is not on the reasonableness of the explanation but rather its genuineness. Throughout this process, the burden of persuasion never leaves the opponent of the strike to prove purposeful racial discrimination.

A pretextual reason for a strike may exist when a juror is struck from the jury panel based on a reason equally applicable to an unchallenged juror. *See Daniel v. State,* 697 So.2d 959 (Fla. 2d DCA 1997). The failure to strike Mr. Collins makes quite clear the pretextual nature of the strike in this case. In fact, in the instant case, to assert that the State's peremptory challenge was pretextual may be too generous. It appears the State's reason, as it was fleshed out over the course of the discussion with the trial judge, was because a minority of similar age to the

Defendant may too closely identify with a person the State believes is a criminal. The State's proffered rationale for its strike may have in fact been overtly racially motivated, especially given the fact that another non-minority male juror of similar age to the Defendant passed through to the jury without objection from the State. The Defendant properly objected to the strike, and objected to the jury as a whole, and thus preserved the issue for appeal. At a minimum, the State did not offer a race neutral reason for the strike. Age and race appear clearly on the record to have been the two reasons for the strike. The Assistant State Attorney did not "like" Mr. Ortega because of his age and therefore his theoretical ability to identify with someone the State characterizes as a murderer. According to the State, Mr. Ortega could look at the Defendant and think "that could be me." Apparently, the white juror, Mr. Collins, would have no such inclination. The State of Florida had no dislike of this similarly situated white male. Moreover, in discussing its rationale for the strike, the State complained on the record how one could no longer strike a potential juror because of race.

For this reason alone, the Defendant is entitled to a new trial.

ARGUMENT 2: THE TRIAL COURT ERRED IN DENYING THE DEFENDANT'S OBJECTONS AND MOTIONS FOR MISTRIAL DURING THE STATE'S GUILT PHASE CLOSING ARGUMENT

In assessing the propriety of the State's closing argument, this Court has held in *Brooks v. State 918 So.2d. 181 (Fla. 2005)*[To merit a new trial, the prosecutor's comments "must either deprive the defendant of a fair and impartial trial, materially contribute to the conviction, be so harmful or fundamentally tainted as to require a new trial, or be so inflammatory that they might have influenced the jury to reach a more severe verdict than that it would have otherwise." *Spencer v. State, 645 So.2d 377, 383 (Fla. 1994)*]. This is what happened in the instant case.

During closing argument in the guilt phase of this case, the prosecutor made countless improper comments. They are as follows:

1. The State spoke as the voice of the deceased, saying:

> "Michelle Gill speaks to you through the evidence. Michelle Gill tells you about that evening and early morning hourse before she died. And along with the testimony of Mr. Smith, Michelle tells you this. I was pregnant, approximately seven months, I had a viable child in me. It was Kelvis's child. I worked at Ryan's Steakhouse where I've worked for years.
> "I worked with Willie Nowell. Willie knew me, he knew Kelvis. I didn't hurt Willie. I didn't threaten him. I didn't point a gun at him. I didn't call him names. There's nothing to suggest that that poor sole [sic] did a thing other than work and go home and carry her child."

(Vol. XXIX, pg. 1881).

2. The State next improper comment occurred when the State made the following argument:

> What was Michelle Gill doing? What was in her mind? She was crying, begging, she was begging. Michelle Gill, what was going on in her mind? I'm going to die. Ladies and gentlemen, if she didn't think she was going to die when they first walked in, when they herded those two people into that closet, let there be no doubt that those people knew what their fate was.
>
> "Let there be no doubt when the hand came across the throat, their fate was sealed and it was sealed in their presence, and Mr. Smith and Ms. Gill could do nothing but wait for it to happen. Nothing, except think about being killed, think about being killed. To think about her."

(Vol. XXIX, page 1884). In *Hutchinson v. State, 882, So.2d 943 (Fla. 2004)*, this Court stated "[a] 'golden rule' argument asks the jurors to place themselves in the victim's position, asks the jurors to imagine the victim's pain and terror or imagine how they would feel if the victim were a relative." That is precisely what happened in this case. There is absolutely no element of any of the offenses charged that necessitated that argument, and even if there was, this specific type of comment has been repeatedly prohibited by courts over the years.

3. The State's next improper comment occurred when the State argued that "none of the testimony suggests that Mr. Bellamy (co-defendant) got any closer to Ms. Gill than to hold a gun on her while she whimpered and begged." (Vol. XXIX at page 1886).

4. The State referred to the deceased and Mr. Smith as "caged in essence, caged human beings." (Vol. XXIX, p. 1888). The objection to this was sustained. (Vol. XXIX, p 1889). A motion for mistrial based on this and the previous comments was denied. (Vol. XXIX, p. 1889-1890).

5. Undeterred by the Defense objections, the State then invokes the name of the Almighty, thanking God the jury is allowed to make the determination about what happened during Mr. Smith's alleged identification of the Defendant at the hospital. (Vol. XXIX, p. 1893). In *Bonifay v. State,* 680 So.2d 413 (Fla.1996), this Court cautioned against "the use or approval of arguments which use references to divine law because argument which invokes religion can easily cross the boundary of proper argument and become prejudicial argument." As part of a larger pattern of misconduct by the State in its argument to the jury, this error compounds the others.

6. The Assistant State Attorney then violates the "golden rule" with the following argument:

> "What did he say? What is another reason why this is going to be imprinted in his mind forever? I saw the bullets coming down the wall. I saw them coming down the wall. *Can you imagine? I can't even imagine that. He must have been terrified, along with his girlfriend*. Will he ever forget? Is he equivocal? No.
>
> "Does he have a college degree? No. By his own admission he understands what goes on in the streets. But by his own admission he's been in trouble before with the law. Welcome to Mr. Smith's

world.

> "Mr. Smith's world where Willie Nowell and Jermaine Bellamy can take a .45 caliber handgun and a .32 caliber handgun and walk you into a closet and shoot her eleven times.

(Vol. XXIX, p 1895). This nothing less than an invitation for the jurors to envision themselves as Mr. Smith. It has absolutely no relevancy to the issues the jurors are asked to adjudge, and, like the other arguments made by the State, they serve no other purpose than to inflame.

7. The Assistant State Attorney then returns to his speculation regarding Ms. Gill's thought processes:

> "What was Michelle Gill thinking when the first bullet struck her? The second bullet? The third –"

(Vol. XXIX, p. 1895-1896). The Defense again objected, and the Court overruled the objection after the Assistant State Attorney asserted his belief that what was going on in the victim's minds was crucial to the question of the Defendant's guilt. (Vol. XXIX, p 1896). A motion for mistrial was again denied. *Id.* Again, this Court, in *Hutchinson, supra.*, stated:

> An "imaginary scenario" argument is a subtle form of the "golden rule" argument that asks the jury to put his or her "own imaginary words in the victim's mouth, *i.e.,* 'Don't hurt me. Take my money, take my jewelry. Don't hurt me.' " *Urbin v. State,* 714 So.2d 411, 421 (Fla.1998). This type of argument is prohibited because it is an attempt to "unduly create, arouse and inflame sympathy, prejudice and passions of [the] jury to the detriment of the accused." *Id.* (quoting *Barnes v. State,* 58 So.2d 157, 158 (Fla.1951)).

Under this Court's decision in *Bertolotti v. State,* 476 So.2d 130 (Fla.1985), such violations of the "Golden Rule" against placing the jury in the position of the victim, and having them imagine their pain are clearly prohibited. 476 So.2d 15 133. In *Garron v. State, 528 So.2d 353 (Fla. 1988)* the prosecutor argued "[Y]ou can just imagine the pain this young girl was going through as she was laying there on the ground dying···· Imagine the anguish and the pain that Le Thi Garron felt as she was shot in the chest and drug [sic] herself from the bathroom into the bedroom where she expired." There is absolutely no difference in what was argued in the *Garron* case and what was argued here.

The State's arguments in this case clearly violate countless decisions of this Court and others regarding proper argument. The Defendant is entitled to a new trial.

ARGUMENT III: THE TRAL COURT ERRED IN OVERRULING DEFENSE OBJECTIONS AND MOTIONS FOR MISTRIAL WHERE THE PROSECUTOR MADE IMPROPER COMMENTS DURING HIS CLOSING ARGUMENT IN THE PENALTY PHASE OF THE TRIAL.

During closing argument in the penalty phase of the trial, the prosecutor made the following comments which the Defendant would argue were improper:

> 1) "We hear the word mercy. Mercy is a word that makes us feel good, we want to be the kind of person that can grant mercy, that's capable of doing that. Justice grants mercy when mercy is applicable.
> "In this particular case and as I speak and as Defense counsel speaks, I ask that you keep in your minds eye whether mercy is a part of justice in this case."
> "I submit to you it is not, because mercy was not granted to Michelle Gill. There was no mercy when Mr. Nowell and Mr. Bellamy had the opportunity to dispense mercy, when they had the opportunity to see Ms. Gill, to see that she was pregnant, to see her carrying, to see her begging. When they had an opportunity to see that she was aware that her only means of safety and protection was in that very same closet with his hands tied behind his back, they were able to see that no one had a weapon other than the killers, they were able to see this.
> "And yet, in spite of that scene, in spite of those moments, Mr. Nowell, while those two helpless human beings, seated in a closet, disengaged from the rest of the world, no hope—"

(Vol. XXXV, pg 443-444). The defendant objected to these comments, but the trial court overruled the objection and motion for mistrial. (Vol. XXXV, p. 444). Later in his closing argument, the prosecutor returned to this theme:

> "Mercy. State asks that you recommend mercy if mercy is warranted. And mercy wasn't given in this case, not by Mr. Nowell, not by Mr. Bellamy. There was no mercy there, none whatsoever."

(Vol. XXXV, page 472). The Assistant State Attorney concluded his argument with the above comment. The defense again objected and moved for a mistrial (Vol XXXV, page 472). The objection was overruled and the motion for mistrial denied. (Vol XXXV, page 473).

Normally, the standard for review as to the propriety of arguments is whether the trial court abused its discretion. However, this Court has addressed the specific type of argument used here in no uncertain terms. In *Urbin v. State 714 So.2d 411 (Fla., 1998)* this Court was faced with a prosecutor who argued "If you are tempted to show this defendant mercy, if you are tempted to show him pity, I'm going to ask you to do this, to show him the same amount of mercy, the same amount of pity that he showed Jason Hicks on September 1, 1995, and that was none." *Id. at 421*. This Court stated:

> "This line of argument is blatantly impermissible under *Rhodes v. State*, 547 So.2d 1201, 1206 (Fla.1989) (finding same mercy argument improper because it was "an unnecessary appeal to the sympathies of the jurors calculated to influence their sentence recommendation"), and *Richardson v. State,* 604 So.2d 1107, 1109 (Fla.1992) (finding error where prosecutor asked jury to show defendant "as much pity as he showed his victim")."

This argument was improper in the cases just cited, and it was equally improper in this case. It served no purpose but to inflame the passions of the jury. It is especially harmful in a case where the vote for death was seven to five. The trial

court abused its discretion in rejecting the defense objections to this line of argument.

The Assistant State Attorney next argued:

> "Eliminating your witness is nothing more than an attempt to prevent a lawful arrest. See, it's different for you all. Imagine the, imagine the fear that this man [the defendant] had when heard that this Kelvis Smith lived.

(Vol. XXXV, p 449-451). The Court denied the motion for mistrial made by defense counsel, but did instruct the jury to disregard the "imagine" comment. (Vol XXXV, page 451). The Defendant argued any curative instruction would be insufficient to cure the error. (Vol XXXV, page 451).

Counsel for the State next argued the possibility the Defendant might kill again. (Vol XXXV, page 463). This argument has been deemed improper by this Court. *See, e.g. Teffeteller v. State, 439 So.2d 840 (Fla. 1983), Knight v. State 746 So.2d 432 (Fla. 1998), Hance v. Zant 696 F.2d 940 (11th Cir. 1983)*

In this case, the State did not offer any additional witnesses in the penalty phase to the jury. Instead, it offered a copy of the Defendant's prior felony conviction, and it offered its closing argument. Their entire pitch to the jury was based on a series of improper arguments, which the trial court did nothing to stop. The Defendant is entitled to a new sentencing proceeding.

ARGUMENT IV: THE TRIAL COURT ERRED IN FAILING TO FIND THE DEATH PENALTY UNCONSTITUTIONAL.

The Defendant filed several motions arguing the Florida's death penalty laws are unconstitutional. *Section 921.141, Florida Statutes* (R. Vol. XI, pages 1657-1662, 1663-1680, 1687-1726, 1727-1736, 1737=1740, 1741-1745, 1746-1752, 1753-1757, 1758-1769). These motions were denied by the trial court. (Vol. I, page 12, Vol. 12, pp 1889-1891). The Defendant renewed these arguments at trial. During the trial, this Court issued its ruling in *State v. Steele, 921 So.2d 538 (Fla. 2005)*. In that decision, this Court noted "Florida is the only state in the country that allows the death penalty to be imposed even though the penalty-phase jury may determine by a mere majority vote both whether aggravators exist and whether to recommend the death penalty." *921 So.2d at 350.* However, this Court held the system in place withstands constitutional scrutiny, without coming to a final conclusion on the applicability of the United States Supreme Court's decision in *Ring v. Arizona,* 536 U.S. 584 (2002). The recommendation of death in the instant case came via a 7 to 5 vote of the jurors.

The Defendant maintains that the *Ring* decision dictates this Court declare the Florida Death Penalty Statute unconstitutional.. Florida's capital sentencing statute suffers from the identical flaw leading the United States Supreme Court to declare the Arizona death penalty statute unconstitutional. Florida law, like

Arizona law, makes imposition of the death penalty contingent on a judge's factual findings regarding the statutory aggravating circumstances. Section 775.082(1), Florida Statutes alludes to the first degree murder as a "capital felony" and states specifically a defendant may be sentenced to death only if :"the proceeding held to determine sentence according to the procedure set forth in Section 921.141 results in findings by the court that such person shall be punished by death, otherwise, such person shall be punished by life imprisonment. Section 921.141(3) Florida Statutes, provides in turn that "notwithstanding the recommendation of a majority of the jury, the court, after weighing the aggravating and mitigating circumstances, shall enter a sentence of life imprisonment or death." To enter a sentence of death, the judge must make "specific written findings of fact based upon the circumstances in subsections (5) [aggravating circumstances' and (6) [mitigating circumstances] and upon the records of the trial and the sentencing proceedings." If the judge fails to "make the findings requiring the death sentence" within a specified period of time, the "court shall impose a life sentence." *Id.*

Thus, in Florida, as in Arizona, although the maximum sentence authorized for some homicides is death, a defendant convicted of first-degree murder cannot be sentenced to death without additional findings of fact made by the judge, and not the jury. The Statute is therefore unconstitutional under the Sixth, Eighth and

Fourteenth Amendments and Article I Sections 2, 9, 216, 17 and 22 of the Florida Constitution, when read with *Ring, supra.*

ARGUMENT V: THE TRIAL COURT ERRED IN FINDING AS A STATUTORY AGGRAVATOR THAT THE DEFENDANT COMMITTED THE CRIME TO AVOID ARREST.

This Court, in *Garron v. State, 528 So.2d 353 (Fla.,1988)* held, with regard to findings regarding the statutory aggravator of committing the murder to avoid arrest as follows:

> "Similarly, the second aggravating circumstance is also invalid. The trial judge found that the offense was committed to avoid arrest based on the evidence that appellant shot Tina while she was talking on the telephone with the operator asking for the police. We have stated that when the victim of the murder is not a police officer, proof of intent to avoid arrest by murdering a possible witness must be very strong before the murder can be considered as an aggravating circumstance. *Riley v. State,* 366 So.2d 19, 22 (Fla.1978), *cert. denied,* 459 U.S. 981, 103 S.Ct. 317, 74 L.Ed.2d 294 (1982). *See White v. State,* 403 So.2d 331, 338 (Fla.1981), *cert. denied,* 463 U.S. 1229, 103 S.Ct. 3571, 77 L.Ed.2d 1412 (1983) (elimination of witness must be "dominant motive" behind murder where victim is not a police officer). Here, there is no proof as to the true motive for the shooting of Tina. Indeed, the motive appears unclear. The fact that Tina was on the telephone at the time of the shooting hardly infers any motive on the appellant's part. Thus, the second aggravating circumstance cannot stand."

In the instant case, the State offered two theories regarding the offense. First, they argued it was revenge for Mr. Smith's alleged attack on Mr. Nowell and Mr. Bellamy in April 2002. Second, they offered the theory the killing was the result of an agreement between Mr. Bellamy and Mr. Nowell that if they were to let Smith and Gill live, Smith would kill them. Nowhere in the record is there any evidence supporting the notion that the killing was to avoid arrest. Therefore, there is a lack of evidence upon which to find beyond a reasonable doubt this

aggravating factor exists. The jury's ostensible finding, and the trial court's specific finding on this issue, is utterly unsupported by the evidence. Therefore, the trial court erred in making such a finding.

## CONCLUSION

The Appellant respectfully requests this Court either order a new trial on the grounds set forth herein, or in the alternative grant him a new sentencing hearing, or in the alternative vacate his death sentence and sentence him to a term of life in prison.

## CERTIFICATE OF SERVICE

**I HEREBY CERTIFY** that a true and correct copy of the foregoing has been furnished by hand to Barbara Davis, Attorney General, State of Florida, 444 Seabreeze Boulevard, Daytona Beach, Florida 32118 this 30th day of October, 2006.


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## CERTIFICATE OF FONT

**I HEREBY CERTIFY** the size and style of the type used in this brief is point proportionally spaced Times New Roman, 14 point.

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