IN THE SUPREME COURT OF FLORIDA

CASE NO. SC07-2174

HARREL BRADDY,

Appellant,

-vs-

STATE OF FLORIDA,

Appellee.

AMENDED INITIAL BRIEF OF APPELLANT

APPEAL FROM THE CIRCUIT COURT OF THE
ELEVENTH JUDICIAL CIRCUIT OF FLORIDA
IN AND FOR MIAMI-DADE COUNTY

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IN THE SUPREME COURT OF FLORIDA

CASE NO. SC07-2174

HARREL BRADDY,

Appellant,

-vs-

STATE OF FLORIDA,

Appellee.

AMENDED INITIAL BRIEF OF APPELLANT

INTRODUCTION

This is a direct appeal from judgments of conviction and sentence of death, imposed by the Honorable Leonard Glick, Judge of the Eleventh Judicial Circuit in and for Miami-Dade County, Florida. In this brief, the clerk's record on appeal is cited as "R.," and the transcript of the proceedings as "T." References to non-sequentially paginated transcripts are indicated by the volume number followed by the page number. "SR1" denotes the supplemental record filed October 30, 2009, and "SR2" indicates the supplemental record filed contemporaneously with the initial brief. Unless noted otherwise, all emphasis is supplied.

STATEMENT OF THE CASE AND FACTS

At around 2:30 p.m. on November 8, 1998, Harrel Braddy sat in the rear of a police car handcuffed, shackled, and wearing an immobilizing leg-brace. (T. 1987-88, 2070-71, 2074-75). Detective Greg Smith, who stood six feet three inches and weighed 240 pounds, seized Mr. Braddy by his shirt, dragged him from the rear seat, and threw him up against the car. (T. 2074-75, 2144, 2173). Smith threw his forearm against Harrel Braddy's throat, using it to pin him to the car. (T. 2126). Smith was shaking with rage. (T. 2145). Cursing at Mr. Braddy, Detective Smith repeatedly demanded to know where Quatisha Maycock was. (T. 2075).

By the time Detective Smith attacked him, Harrel Braddy had been in police custody for twenty hours, and thrice had attempted to invoke his right to silence.

Detectives Juan Murias and Giancarlo Milito had arrested Mr. Braddy a little before 7:00 p.m. on November 7. (T. 1905-12). That morning, a woman found in Palm Beach County named Shandelle Maycock had accused him of assaulting her and kidnapping her along with her five-year-old daughter Quatisha. (T. 1900, 1902). At 5:05 p.m., the detectives went to the woman's apartment in Carol City. (V. 51 p. 505). An hour later, they went to Mr. Braddy's house to arrest him, arriving at 6:30. (T. 1905-07). The two detectives saw him leaving in a Lincoln Town Car and followed him to a gas station. There, they arrested Mr. Braddy and took him to the Miami-Dade Police homicide. (T. 1915-16).

The police did not commence their interrogation until two-and-one-half hours later. At 9:35 p.m., the detectives had Mr. Braddy sign a *Miranda* rights warning form. (T. 1951). Mr. Braddy told the detectives that he knew Ms. Maycock, and had seen her the night before, but he denied any wrongdoing. (T. 2048-49; 2051-55).

Beginning at about 12:15 a.m. on November 8, Mr. Braddy refused to speak to Detectives Chambers and Suco. (T. 1957; V. 30 p. 87). He put his head down, and "he wouldn't talk to us." (V. 30 p. 76). He "didn't say a word," for thirty to forty minutes. (V. 30 pp. 88). The detectives nevertheless continued to interrogate Mr. Braddy. (T. 1957; V. 30 pp. 76-77, 87-88).

At 6:15 a.m., the detectives lied to Mr. Braddy in order to provoke him: They told him his mother had had a heart attack and was in the hospital. (T. 1979, 2119). At 7:45 a.m. on November 8, Mr. Braddy asked to speak to Detective Chambers by himself. He told Chambers he wanted to be alone, and "made a statement concerning not incriminating himself." (T. 1957; V. 30 p. 85; V. 52 pp. 232, 238-39). Nevertheless, Detective Suco re-entered the room and they pressed on with the interrogation. (T. 1958). It was only after the detectives disregarded Mr. Braddy's desire not to incriminate himself that he made his first inculpatory statement, telling them that Quatisha was where he left Shandelle. (T. 2060; V. 30 pp. 48, 89).

Then, at 9:00 a.m., Mr. Braddy told the detectives he did not want to talk to them any more, and they should just take him to jail. (T. 2061; V. 30 pp. 75, 78-79). The detectives left and went to breakfast with Assistant State Attorney Abbe Rivkin, locking Mr. Braddy in the interrogation room. (T. 2062). They re-entered the room at 11:30 a.m. (T. 2063). According to Detective Suco, he found Mr. Braddy standing on top of a chair with his shoes off. (T. 2064). The detective claimed that Mr. Braddy jumped down and said he would take them to where he had left Quatisha. (T. 2064).

The detectives fitted Mr. Braddy with restraints, including a metal leg-brace. (T. 2070). This prevented Mr. Braddy from bending his leg, and forced him to walk with a "limp or gimp." (T. 2070-71). They then drove to the site off of Route 27 where Shandelle Maycock had been found, arriving at 12:30 p.m. (T. 2702-74). An extensive search was under way (T. 2073-74).

Detective Suco drove around for approximately two hours, with Mr. Braddy suggesting places to look. (T. 2073). It was then that Detective Smith seized Mr. Braddy and used his forearm against Mr. Braddy's throat to pin him to the car. Smith's fellow detectives did nothing to separate him from Harrel Braddy. Instead, they allowed Smith to take Mr. Braddy away alone for further questioning as he ordered the limping Mr. Braddy: "Let's go. Walk goddamn it. Get your ass

down the road." (V. 30 p. 99). That "road" was a dirt trail alongside a canal in the Everglades. (T. 2175-76).

According to the state, the two suddenly became "buddies." (T. 2664). Detective Suco, who was not present for the conversation, said they had a "wonderful chit-chat." (V. 30 p. 98). Smith claimed they had a "very personal" conversation, about family and hunting (T. 2145-46, 2173). Smith "constantly" brought up the location of the missing girl. (V. 30 p. 117). Mr. Braddy, still fitted with the leg-brace, limped along for some two miles over the course of about an hour. (T. 2175-76). During the course of this "conversation" with the man who had just assaulted him, Mr. Braddy asked how long it takes for a body to surface, and suggested that perhaps the child had fallen into the water after he left her. (T. 2146-47).

Later, Mr. Braddy was talking to Detective Pasquale Diaz. Detective Smith "had taken a position behind" them. (T. 2148). Mr. Braddy told Diaz that they were looking in the wrong place and he had left the child somewhere else. (T. 2199-2200). At 4:00 p.m., the search moved to Broward County. (T. 1969, 2079). Detectives Smith and Diaz rode in the car with Harrel Braddy. (T. 2150, 2202).

At I-75, Mr. Braddy took the detectives to three bridges. In the presence of Detectives Diaz and Smith, he again asked how long it would take a body to surface. (T. 2206; V. 30 p. 124). He denied throwing the child into the water,

stating that he left her on the side of the road. (T. 2207). He told Detective Smith that an autopsy would show that he did not abuse the child. (T. 2156).

The detectives drove Mr. Braddy back to headquarters at about 5:00 p.m. (T. 2206). When they returned, they noticed that the ceiling grating in the interrogation room had been pushed up. (T. 2208). They moved Mr. Braddy to another interrogation room. (T. 2208). The detectives did not re-read *Miranda* warnings, nor had they done so at any time over the past twenty hours. (T. 2231). Under continuing interrogation, Mr. Braddy told Detectives Hoadley and Diaz that he had attacked Shandelle Maycock and kidnapped both her and her daughter. He stated that he left Ms. Maycock on the side of the road on Route 27, then drove to I-75 with her daughter. (T. 2220-21). He said that he left the child, alive, at I-75. (T. 2222). According to the detectives, Mr. Braddy stated that he could not bring the child home because she would tell people what he had done. (T. 2441).

On November 7-8, the police searched the car, found no indication of blood or other useful evidence, and released it to Enterprise Leasing. (T. 2094-96, 2409-11). On November 10, they decided that they wanted to search the car yet again, and obtained and executed another warrant. (T. 2095, 2444-47; R. 2820). This time they found a blood stain that turned out to be consistent with Shandelle Maycock's DNA. (T. 2394, 2407).

The State Attorney charged Harrel Braddy with first-degree murder, second-degree murder, two counts of kidnapping, burglary with assault, child neglect, and attempted escape. (R. 70-73).

Mr. Braddy moved to suppress his statements. (SR2). At the hearing, the state presented the testimony of the detectives who arrested and interrogated him. Mr. Braddy testified[1] that the police ignored his repeated requests for an attorney. (SR2 pp. 10, 16, 20-23, 27-28). Detective Suco struck him on the top of the head, spat in his face, and threatened to send officers to "tear up" his home and arrest his wife and daughter. (SR2 p. 15-16, 20). When he refused to sign a rights waiver form and repeated that he wanted an attorney, Suco hit him on the head, dug his fingers between Mr. Braddy's shoulder-blades, and wrenched Mr. Braddy's neck, after which he signed the *Miranda* waiver. (SR2 17). Suco repeated these attacks later in the interrogation. (SR2 p. 20). When Smith attacked him at the Palm Beach site, the detective repeatedly hit Mr. Braddy in the throat with his fists. (SR2 23). Jail medical records introduced at the hearing confirmed that Mr. Braddy suffered neck injuries. (R. 1963). Smith threatened to shoot him or throw him in the canal and claim he was trying to escape. (SR2 23). Mr. Braddy testified he just tried to tell the detectives what they wanted to hear. (SR2 p. 28).

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[1] Mr. Braddy adopted the statements in his motion and then submitted to cross-examination. (SR 10-16).

The trial court denied the motion, concluding Mr. Braddy had never invoked his right to silence, and that Detective Smith's attack did not taint the statements that followed. (V. 43 pp. 65-69).

At trial, Shandelle Maycock testified that she had met Harrel and Cyteria Braddy through a friend. (T. 1669-71). Because she was a single mother, they offered to help her, and Harrel told her they would be there for her. (T. 1672). Later, Mr. Braddy often did help. He helped her turn her water back on, he lent her money, and he would frequently give her rides home from work (T. 1674-75, 1678). He located an apartment for her and helped her move in. (T. 1638, 1651). On one occasion he made a sexual advance toward her, and she rebuffed him. (T. 1677). He later apologized, and she continued to consider him a friend. (T. 1678).

On November 6, he gave her a ride to pick up her daughter Quatisha. (T. 1689, 1694-96). Back at her apartment, she told him to leave because someone else was coming over. (T. 1702). According to Ms. Maycock, he became angry and accused her of "using" him. He choked her until she passed out, then choked her to unconsciousness again. (T. 1702-04; 1723-24). She awoke inside the Lincoln Town Car he was driving. (T.1703-04). Quatisha was in the car as well. (T. 1716). She took her daughter and leapt out of the speeding car. (T. 1740). Mr. Braddy put her in the trunk, and returned Quatisha to the car. (T. 1746-49). Thirty to forty-five minutes later, he removed her from the trunk, and choked her again

until she passed out. (T. 1754-56). The following morning she awoke in the midst of some bushes. (T. 1757). She found her way to the side of Route 27, where she was able to flag down a car. (T. 1763-66).

Ms. Maycock's landlord, David Lawyer, testified that he heard loud voices sometime after midnight on November 7. (T. 1640-42). Later, he saw Mr. Braddy standing at the driver's door of a Lincoln Town Car. (T. 1645). Quatisha was standing near the passenger door, but he did not see Shandelle. (T. 1645).

Willie Turner was fishing in a canal along I-75 when he found Quatisha Maycock's body. (T. 2328-34). Dr. Joshua Perper determined that she was killed by a single blunt-force trauma causing a depressed skull-fracture that could have been caused by falling against rocks. (T. 2536-39, 2541). The injury would have caused unconsciousness within a fraction of a second. (T. 2539). There were signs of post-mortem triangular injuries, which Dr. Perper testified were consistent with alligator teeth, and one arm had been torn from the body. (T. 2509). There was evidence of similar perimortem injuries to the head. (T. 2515).

Over objection, the trial court permitted the state to introduce the second warrant for the search and seizure of the Lincoln Town Car. (T. 2281; R. 2821). The warrant states a judicial finding of probable cause that the car was used in a kidnapping, attempted murder or murder, and that "blood … serological … or trace evidence" of the crime was within it. (R. 2817-18).

During his testimony, Detective Milito told jurors that Mr. Braddy had a record of violent crimes, testifying he was afraid for his safety "because the history I had of him." (T. 1914). The trial court denied defense counsel's motion for mistrial. (T. 1929-33).

The prosecutor, Abbe Rifkin, marshalled a host of improper arguments designed to deprive Harrel Braddy of a fair trial. She accused defense counsel of misleading the jury saying, "I mean their whole thing is manipulation, misrepresentation," and falsely claimed they had misstated the evidence. (T. 2723-24). When counsel tried to suggest that the fatal injury occurred during the jump from the car, she inveighed against the defense for attacking Shandelle Maycock. (T. 2720). She dismissed the defense as nonsense and claimed defense counsel "must have been at a different trial." (2718; 2725). She bolstered the detectives, and told the jury that Mr. Braddy's exercise of the right to silence was just a plan to "manipulate and stonewall and stretch things out." (T. 2661). Ms. Rifkin commented on Mr. Braddy's exercise of his Fourth Amendment rights, and even his exercise of the right to trial. (T. 2659, 2663). She criticized Mr. Braddy for not living up to religious principles, and she told the jurors it would be a "miscarriage of justice" if they were to find him guilty of lesser-included offenses (T. 2683).

The jury convicted Harrel Braddy on all counts as charged. (T. 2799).

In the penalty phase, the prosecution presented evidence that Mr. Braddy had previously been convicted of violent felonies, and presented witness testimony concerning those crimes. (T. 2926-45; SR1 22-52). With regard to a 1984 armed burglary, however, it introduced an arrest affidavit, and had Detective Suco read it to the jury. (T. 2919-24; 3462-89). The court overruled the defense objection to this hearsay. (T. 2929). The state presented Victim Impact testimony from Shandelle Maycock. Among other things, she testified that the crimes and procedural delays had caused her to develop Crohn's disease. (T. 2914).

In mitigation, the defense presented Mr. Braddy's parents, his siblings, his wife, his children and his childhood friends. They cherish him, describing him as loving and beloved, a stalwart support even during his incarcerations. (T. 3013-20, 3025-34, 3213-34; S.R. 55, 74-75). His death would devastate them. (T. 3020, 3034, 3053, 3076, 3185).

Even while incarcerated, Mr. Braddy encouraged his children's academic pursuits: his daughter Alexis is studying child development at F.S.U.; his daughter April earned a Phd. at the University of Florida; his son Harrel Junior is a kindergarten teacher. (T. 3013-40). His grown son Noel and his baby girl Andrea had passed away, which "took something out of him." (T. 3050-51).

Cyteria Braddy, Mr. Braddy's wife of 35 years, testified of her enduring love for him and his importance to the children. (T. 3213-16). On cross-examination,

the prosecutor asked Cyteria whether she knew of extramarital affairs; she did not, and the State presented no evidence of their existence. (T. 3240).

Mr. Braddy was a devout member of his church, where he was a deacon, tithed generously and played music – bass, steel drums and lead guitar. (T. 3051, 3072-75). His childhood friends the Taylor brothers – Shadrick, Jerry and Timothy – loved him like a brother; in fact, the gospel band they formed with him was called "The Taylor Brothers." (S.R. 73, 102-3). Mr. Braddy had saved Shadrick Taylor from drowning. (T. 3092). The defense also called Dr. Brad Fisher, who testified to Mr. Braddy's history of model prison behavior, opining that he was not likely to present a danger there. (T. 2983-84).

Though the defense proffered 25 mitigating circumstances, the court limited it to arguing them as a single mitigating factor. (T. 3387-88). This left the defense having to argue that its entire mitigation case was "a single mitigating factor that you assign weight to, but it involves a lot of different things." (T. 3392).

The prosecutor cast off all restraint in her penalty phase closing arguments. She "vouched" for the use of the death penalty in this case, telling the jury that there had already been an extra-judicial determination that Harrel Braddy should be executed, explaining that "the Legislature has set out what the determination is that the State has to make in bringing a case like this to you as a death penalty case …" (T. 3312-13). She made several "Golden Rule" arguments, telling jurors to put

themselves in the child's position, creating an imaginary script ("It's dark and they are driving . . . Where's mommy? Where's mommy?"), and instructing the jury to sit for five minutes imagining themselves in Quatisha's place. (T. 3331, 3333-34). She falsely instructed them that a vote for life would be to ignore their duty and "do what's easy" instead. (T. 3355). She denounced Harrel Braddy as a man who was violent since the day of his birth and scolded him for infidelities she had never proven. (T. 3515-16; 3351). She again attacked defense counsel, warning he would "scream" and "shout" to distract them. (T. 3314). Finally, she argued that Harrel Braddy's case in mitigation should be weighed as aggravation against him. (T. 3340-42).

The jury returned a recommendation in favor of death by a vote of 11 to 1. (T. 3463). The trial judge sentenced Harrel Braddy to death. He found the victim under 12, felony murder, avoiding arrest, cold calculated and premeditated, and prior violent felony aggravating circumstances, giving each "great weight." (R. 3692-3706). The court gave no weight to age (48) as a mitigating circumstance. He gave "little weight" to Mr. Braddy's prison record and rehabilitation potential, the alternative of life imprisonment, his relationships with and contributions to his friends, the impact execution would have on his family, his family background and positive relationships with his parents and brothers, and his involvement in the

church. He gave "moderate weight" to Mr. Braddy's appropriate behavior at trial, and his positive relationships with his wife and children. (R. 3692-3706).

SUMMARY OF THE ARGUMENT

The police were able to extract incriminating statements from Mr. Braddy only after refusing to honor repeated invocations of his right to silence, and then physically attacking him, while he was immobilized by various restraining devices, on an isolated stretch of I-27.

Mr. Braddy invoked his right to silence three times. The police utterly ignored the first two invocations, and failed to scrupulously honor the third At no time did they issue fresh *Miranda* warnings. During a subsequent search in the Everglades off Route 27, Officer Greg Smith dragged the shackled prisoner out of the police car and throttled him, jamming his forearm against Braddy's throat. Notwithstanding this assault, the other officers kept Smith close to Braddy over the next several hours. Twenty-seven hours following his arrest, without ever having had his *Miranda* warnings refreshed, Mr. Braddy gave incriminating statements which satisfied the police.

In view of the police officers' repeated refusals to honor his invocations of his right to silence; their physical attack against him; and their failure ever to reissue *Miranda* warnings; Mr. Braddy's incriminating statements should have been suppressed.

While Mr. Braddy was serving as his own counsel, the trial court treated him with undisguised animus. It repeatedly rebuked him for speaking, capriciously ruled against him, castigated his character, and mocked his pro se status. This judicial intemperance gave rise to a reasonable fear of bias. The judge therefore erred in denying and refusing to rule on Mr. Braddy's motions to disqualify.

The State failed to prove venue as alleged in the indictment. The indictment states that the crimes of murder and second-degree murder occurred in Dade County. The proof at trial placed those crimes in Palm Beach and Broward Counties.

Over objection, the trial court allowed the State to introduce a search warrant for the car, which sets forth a judicial finding of probable cause that the car was used to commit the charged crimes, and contained blood evidence of these crimes. The trial court erred in admitting this highly prejudicial hearsay evidence that a judge had passed upon the State's case and found it to be meritorious.

Over objection, a police detective testified that, due to what he had learned of the defendant's criminal history, he was afraid of him and put him in handcuffs even before arresting him. This presumptively prejudicial character attack required a mistrial.

The evidence was insufficient to establish the crimes of (a) child neglect, (b) escape, and (c) burglary. (a) Mr. Braddy was not a "caregiver" for Quatisha

Maycock, as required for a child neglect conviction. (b) The circumstantial evidence of attempted escape – Mr. Braddy was standing on a chair in with his shoes off, and the grating above was later found to have been bent – was equally consistent with the reasonable hypothesis of intent to commit suicide. (c) Because Mr. Braddy's entry into Ms. Maycock's home was concededly consensual, and there was no evidence of surreptitious "remaining in," *Delgado v. State*, 776 So.2d 233 (Fla. 2000) requires that the burglary conviction be vacated.

The prosecutor repeatedly engaged in misconduct, including: (a) denigrating defense counsel for "manipulat[ing]" and "misrepresent[ing]" the evidence, and for engaging in perfectly appropriate cross-examination; (b) introducing evidence of Mr. Braddy's invocations of his right to silence and characterizing them as attempts to "manipulate and stonewall and stretch things out;" (c) further commenting on Mr. Braddy's silence by pointing out his failure to contradict testimony; and (d) treating his exercise of his right to trial as an exercise in narcissism. The cumulative impact of these and other prohibited arguments deprived Mr. Braddy of a fair trial.

In penalty phase closing argument, the prosecutor presented a textbook case of unscrupulous overreaching: (a) vouching for the legitimacy of her case for the death penalty by intimating that her office would not otherwise have sought it; (b) making a golden rule argument calling on jurors put themselves in the child's

place, inventing an imaginary script in which she cried out, "Where's mommy? Where's mommy?" ultimately telling jurors to "sit for five minutes and let yourself think of the fear"; (c) exhorting the jurors not to "take the easy way out" by voting for life; (d) assailing the defendant's character by depicting him as having been "violent … since birth," and by making unsubstantiated accusations of marital infidelity; (f) assailing defense counsel's character for "screaming" in order to distract the jurors from the truth, and for challenging the veracity of a police witness; (g) characterizing the defendant's mitigating evidence of a loving family as tending rather to aggravate his crimes, and suggesting that the very act of presenting this mitigation reflected poorly on him. The prosecutor's sweeping misconduct in its penalty phase argument requires this Court to vacate Mr. Braddy's sentence.

The trial court erroneously required the defense to argue all of its mitigating evidence as comprising but a single mitigating factor, rather than multiple mitigating factors which, in view of the State's evidence of five aggravating factors, "distort[ed] the weighing process."

The trial court erroneously allowed, as victim impact evidence, testimony from Shandelle Maycock that, as a result of the offenses, she had developed Crohn's Disease, a genetic, immunological defect. The error was compounded by

the trial court's previous refusals to permit the defense access to Ms. Maycock's medical records.

Over defense objection, the State introduced, for the purpose of establishing a prior felony conviction, an arrest affidavit containing a hearsay account of the victims' statements, violating the defendant's confrontation rights.

ARGUMENT

I. THE POLICE DISREGARDED THE DEFENDANT'S REPEATED INVOCATIONS OF HIS RIGHT TO SILENCE, RESORTED TO PHYSICAL FORCE TO COERCE INCRIMINATING STATEMENTS, AND USED AN INADEQUATE *MIRANDA* FORM, INVIOLATION OF THE FIFTH, EIGTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE I SECTIONS 9 AND 17 OF THE FLORIDA CONSTITUTION.

Detective Suco read Mr. Braddy his rights at 9:35 p.m. on November 7, and he agreed to talk to the detectives. (R. 1802). This was the first and only time the detectives warned him of his rights. They never refreshed the *Miranda* rights warning. From the 9:35 warning onward, Mr. Braddy maintained his innocence in the face of the detectives' accusations.

At 12:15 a.m. on November 8, Mr. Braddy stopped talking. Having been told that he had a right to remain silent, he asserted that right by putting his head down and refusing to say another word. (V. 30 pp. 76, 88). The detectives did not acknowledge this invocation of rights, and continued the interrogation. (V. 30 pp. 77, 87).

At 7:45 a.m. on November 8, Mr. Braddy asked to speak to Detective Chambers alone, and told him he did not want to incriminate himself. (V. 30 p. 85; V. 52 pp. 232, 238-39). Chambers briefly left the room, but he and Detective Suco resumed the interrogation within 15 minutes. (V. 30 p. 85; V. 52 p. 232). After

this second failed attempt to invoke his rights, Mr. Braddy made his first inculpatory statement, saying that he last saw Quatisha Maycock where he had left her mother. (V. 30 pp. 48, 89).

Then at 9:00 a.m., Mr. Braddy told the detectives he did not want to talk to them any more. (V. 30 pp. 75,78-79). They left him, but returned at 11:30 a.m. (V. 30 p. 90). According to the detectives, Mr. Braddy offered to take them to where he had left Quatisha. (V. 30 p. 49). They did not remind him of the rights he had invoked.

At noon, the detectives drove Mr. Braddy to the site in Palm Beach County where Shandelle Maycock had been found, arriving thirty minutes later. (V. 30 p. 51). Mr. Braddy sat in the car in handcuffs and shackles and wearing an immobilizing brace as the search continued. (V. 30 pp. 50, 52; V. 52 pp. 218-20).

At around 2:30 p.m., Detective Greg Smith seized Mr. Braddy by his shirt, dragged him from the rear seat, and threw him up against the car. (V. 30 pp. 112, 118, 133). Smith pressed his forearm against Harrel Braddy's throat, repeatedly demanding where Quatisha was. (V 30. p. 133). He then told Mr. Braddy, "Let's go. Walk goddamn it. Get your ass down the road," and continued to question him, without refreshing the *Miranda* warnings. (V. 30 p. 99). During Smith's questioning, Mr. Braddy asked how long it takes a body to surface. (V. 30 p. 117).

After being questioned by Detectives Smith and Diaz, Mr. Braddy told them to search near I-75 in Broward county. They departed at around 4:00 p.m. (V. 30 p. 55, 118). Mr. Braddy made further incriminating statements to the two detectives, again asking them how long it would take a body to surface, and stating that an autopsy would show that he did not abuse the girl. (V. 30 pp. 124-25, 154). The detectives returned Mr. Braddy to homicide headquarters, where they resumed interrogation and Mr. Braddy made a final statement to Detectives Hoadley and Diaz. (V. 52 p. 283). Again, no one re-read the *Miranda* warnings.

The police extracted Mr. Braddy's statements by disregarding his rights, and by resort to violence. The use of these statements to win his conviction and execution is repugnant to our constitutions, and violated the Fifth, Eighth and Fourteenth Amendments to the United States Constitution, as well as well as Article I, sections 9 and 17 of the Florida Constitution.[2]

A. The State Failed to Scrupulously Honor The Defendant's Right to Remain Silent.

In *Miranda v. Arizona*, 384 U.S. 436 (1966), the Supreme Court of the United States recognized that custodial interrogation is inherently coercive. The

[2] On review of a motion to suppress, the Court accords a presumption of correctness to a trial court's findings of historical of fact, but reviews mixed questions of law and fact *de novo*. *Connor v. State*, 803 So. 2d 598, 608 (Fla. 2001).

Court held that police must warn a suspect of his or her rights to silence and counsel. Thereafter:

> If the individual **indicates in any manner**, at any time prior to or during questioning, **that he wishes to remain silent**, the interrogation must cease. At this point he has shown that he intends to exercise his Fifth Amendment privilege; any statement taken after the person invokes his privilege cannot be other than the product of compulsion, subtle or otherwise. Without the right to cut off questioning, the setting of in-custody interrogation operates on the individual to overcome free choice in producing a statement after the privilege has been once invoked. If the individual states that he wants an attorney, the interrogation must cease until an attorney is present.

Id. at 473-74 (footnote omitted). The Florida Constitution likewise requires that, "if the suspect indicates in any manner that he or she does not want to be interrogated, interrogation must not begin or, if it has already begun, must immediately stop." *Traylor v. State*, 596 So. 2d 957, 966 (Fla. 1992).

In *Davis v. United States*, 512 U.S. 452 (1994), the Court held that an ambiguous request *for counsel* does not prohibit further questioning under *Miranda* and *Edwards v. Arizona*, 451 U.S. 477 (1994), and interrogators need not pause to clarify an equivocal request. In *State v. Owen*, 696 So. 2d 715 (Fla. 1997), this Court extended *Davis* to invocations of the core Fifth-Amendment right to remain silent. The Court determined that police need only cease interrogation where an invocation of the right to silence is unambiguous. To determine whether a defendant's invocation is "unambiguous," the Court asks whether "a reasonable

police officer in the circumstances would understand the statement to be an assertion of the right to remain silent." *Id*. at 718.

Three times Mr. Braddy unambiguously invoked his right to silence, and twice his interrogators simply ignored him. The third time, the detectives admittedly knew that Mr. Braddy wanted to cease questioning, and they halted the interrogation. They nevertheless failed to scrupulously honor this invocation, and improperly renewed the interrogation in violation of *Welch v. State*, 992 So. 2d 206, 214 (Fla. 2008) and *Oregon v. Bradshaw*, 462 U.S. 1039 (1983). (V. 30 p. 75).

1. Mr. Braddy Repeatedly Invoked His Right to Remain Silent

First Invocation

Mr. Braddy first exercised his right to silence by literally exercising that right: He remained silent and refused to answer questions. *See Pierre v. State*, 22 So. 3d 759 (Fla. 4th DCA 2009) (defendant said he was not saying any more and remained silent for "nearly a minute"); *State v. Hodges*, 77 P.3d 375 (Wash. App. 2003).[3] Starting at about 12:15 a.m. on November 8, Mr. Braddy "wouldn't talk to

[3] *See also People v. Jaramillo*, 2004 WL 68651 (Cal. App. 2004) (unpublished opinion); *United States v. Montana*, 958 F.2d 516 (2d Cir. 1992); *United States v. Wallace*, 848 F.2d 1464, 1475 (9th Cir. 1988).

us." (V. 30 p. 87). He put his head down, and "did not say another word" for thirty to forty minutes, while the detectives continued to question him. (V. 30 pp. 76, 88). According to Detective Suco, Mr. Braddy said:

> "I can't tell you. Even if I am found innocent, my family will not talk to me again."
>
> We kept talking to him. He put his head down. We kept talking to him and he didn't say a word after that.
>
> * * *
>
> We kept talking to him saying, "We need to find her, we need to find her," and **he wouldn't talk to us.**

(V. 30 pp. 77, 87).

Harrel Braddy had the right to cease interrogation, and he exercised that right. The detectives could not reasonably have understood otherwise. This is particularly clear in light of the words the detectives used to advise Mr. Braddy of his *Miranda* rights. With respect to the right to counsel, they told him he had the right to have a lawyer present if he wanted one. (R. 1802). This told Mr. Braddy he could exercise the right to counsel by requesting an attorney. As to his right to silence, the warning form states: "You have the right to remain silent and you do not have to talk to me unless you wish to do so. You do not have to answer any of my questions." (R. 1802). In contrast to the right to counsel, this warning told Mr. Braddy he could exercise his rights by choosing not to talk and refusing to answer questions. This is what Mr. Braddy did for more than half an hour. *See Doody v.*

Schriro, 548 F.3d 847, 865 (9th Cir. 2008) ("With his silence, Doody gave every appearance of trying to exercise his right to remain silent in the precise fashion described earlier by the officers.").[4]

Second Invocation

Mr. Braddy again attempted to invoke his right to silence when he told Detective Chambers he did not want to "incriminate himself." At 7:45 a.m. on November 8, Mr. Braddy told Detective Chambers he wanted to be alone, and "made a statement concerning not incriminating himself."[5] (V. 30 p. 85; V. 52 pp. 232, 238-39). Detective Chambers momentarily ceased his interrogation, but he and Detective Suco resumed questioning at 8:00 a.m. (V. 30 p. 85; V. 52 p. 232).

Mr. Braddy unambiguously invoked his *Miranda* rights when he stated he did not wish to incriminate himself. In *Miranda*, the Court developed "protective devices" in order to safeguard "one of our Nation's most cherished principles – that **the individual may not be compelled to incriminate himself.**" 384 U.S. at 457-58. An invocation of *Miranda* rights that actually quotes the language of *Miranda*

[4] The *Doody* court did not ultimately reach the issue of whether Doody's silence had invoked his rights. *Id.* at 865 n.7.

[5] Although he could not recall the precise words Mr. Braddy used to invoke his rights, Detective Chambers agreed with the prosecutor that Mr. Braddy did not use the following language to do so: "I don't want to talk to any of you guys anymore," "I don't want to tell you where this girl is," "I want a lawyer, forget about it, I'm just not talking, I'm not speaking to any of you anymore," "he wanted to invoke his right against self incrimination." (V. 52 pp. 239-40).

can scarcely be called ambiguous. *See State v. Day*, 619 N.W.2d 745, 749-50 (Minn. 2000). Prior to this failed invocation, Mr. Braddy had not made any incriminating statements. When Suco and Chambers resumed interrogation, he stated that the last time he saw Quatisha was in the same place where he dropped off Shandelle Maycock. (V. 30 pp. 48, 89).

Third Invocation

After some 14 hours in custody and 12 hours of interrogation, the detectives finally honored Mr. Braddy's third invocation of his right to remain silent:

> [DEFENSE]: … Does there come a time when Braddy tells you specifically that he no longer wants to speak to you?
>
> [DET. SUCO]: Yes, it was around 9:00 in the morning on Sunday morning. [November 8.]

(V. 30 pp. 75, 78). The detectives then went to McDonald's, leaving Mr. Braddy alone in the interrogation room. (V. 30 p. 49). They returned between 10:30 and 11:00 a.m.

Mr. Braddy invoked his rights with perfect clarity. He wanted to end the interrogation: he no longer wished to speak to the detectives, and he wanted to leave. The test is whether "a reasonable police officer in the circumstances would understand the statement to be an assertion of the right to remain silent." *Owen*, 696 So. 2d at 718. An officer would have to willfully misunderstand Mr. Braddy's words in order to believe they might indicate a willingness to continue

questioning.[6] What is more, the detectives not only *should* have understood this to be an invocation, they actually *did* understand it to be an invocation and ceased questioning. *See Cuervo v. State*, 967 So. 2d 155, 163 (Fla. 2007) ("[Deputy] Garcia understood Cuervo's response as an election not to talk to the officers and clearly conveyed that understanding to [Detective] Palmieri."); *Pierre v. State*, 22 So. 3d 759 (Fla. 4th DCA 2009) ("The only interpretation that can be made from the tape is that, as a reasonable police officer, Detective Campbell understood Pierre's statement to be a demand that questioning cease.").

2. The State Failed to Scrupulously Honor Mr. Braddy's Invocation of His Right to Remain Silent

Police must "scrupulously honor" a defendant's invocation of the right to silence. "[T]he admissibility of statements obtained after the person in custody has decided to remain silent depends under *Miranda* on whether his 'right to cut off questioning' was 'scrupulously honored.' " *Cuervo*, 967 So. 2d at 164 n.9 (quoting *Michigan v. Mosley*, 423 U.S. 96, 104 (1975)). This Court looks to five factors in determining the legitimacy of renewed questioning after an invocation: (1)

[6] *Ford v. State*, 801 So. 2d 318 (Fla. 1st DCA 2001) does not teach otherwise. In *Ford*, the district court found no unambiguous invocation where the defendant stated "Just take me to jail," three times. *Id*. at 319. Mr. Braddy's request to go to jail, unlike Ford's, was coupled with a statement of his desire to end the questioning. Ford's requests, moreover, were made in a context where police discussed jail as the alternative to execution. 801 So. 2d at 320 n.1. ("[A]fter you asked him that, if he'd rather die than go to jail, he said he does care about that and just to take him to jail, right?").

whether police re-administered *Miranda* warnings; (2) whether they immediately ceased questioning in response to the invocation; (3) whether police waited a significant amount of time before reinitiating the interrogation; (4) whether the renewed questioning occurred in a different location; and (5) whether the later questioning concerned a different crime. *Globe v. State*, 877 So. 2d 663, 670 (Fla. 2004) (citing *Henry v. State*, 574 So. 2d 66, 69 (Fla. 1991)).

None of these factors favor the admissibility of Mr. Braddy's statements. The detectives did not honor Mr. Braddy's invocation by silence at all. They simply continued to ask questions. When Mr. Braddy told Detective Chambers he did not want to incriminate himself, the police did pause their interrogation. However, they did not reread the *Miranda* warnings. They resumed questioning within fifteen minutes, in the same interrogation room, and regarding the same crime.

While the detectives may have initially honored the third invocation, they improperly resumed the interrogation. Detective Suco testified that when he returned from breakfast, Mr. Braddy told him he would take the detectives to where he left Quatisha. (V. 30 p. 49). This act did not of itself constitute a waiver of his invocation. *Oregon v. Bradshaw*, 462 U.S. 1039, 1044-45 (1983) (plurality opinion). In *Bradshaw*, the defendant invoked his right to counsel, but reinitiated conversation with the police. The Court concluded that the reinitation alone did

not establish a waiver of the prior invocation. Instead, it pointed to the fact that police immediately reminded Bradshaw that he did not need to speak with them, and re-read his *Miranda* warnings before resuming interrogation. *Id.* 1045-46. Indeed, the police read *Miranda* a third time before obtaining Bradshaw's confession. 462 U.S at 1049 (Powell, J. concurring).

Relying on *Bradshaw*, this Court recently explained the relevant inquiry:

> [W]hen an accused has invoked the right to silence or right to counsel, if the accused initiates further conversation, **is reminded of his rights**, **and knowingly and voluntarily waives those rights**, any incriminating statements made during this conversation may be properly admitted

Welch v. State, 992 So. 2d 206, 214 (Fla. 2008). In *Welch*, the defendant invoked his right to silence, and questioning ceased. *Id.* at 213. Welch asked for some water, and an agent took him to a water cooler, where he asked the agent what would happen to him next, and then offered to tell his side of the story *Id.* The agents reread the *Miranda* warnings and resumed questioning. The Court relied on the combination of defendant-re-initiation and refreshed *Miranda* warnings to find the second confession admissible:

> Where, as here, the accused had invoked his right to silence but later initiated a conversation with law enforcement and subsequently exercised a voluntary, knowing, and intelligent waiver **after being advised of his rights for the second time**, the resulting confession is admissible under *Bradshaw*.

Id. at 215; *see also State v. Blackburn*, 840 So. 2d 1092 (Fla. 5th DCA 2003) (defendant reinitiated and police reread *Miranda* warnings).

The renewed interrogation of Mr. Braddy falls afoul of *Welch*. The police never reread the rights warnings, obtained a new waiver, or cautioned Mr. Braddy in any way. Just the opposite: during the renewed questioning at the scene, they physically assaulted him. Physical coercion during police interrogation is the antithesis of the rights embodied by *Miranda* warnings.

3. *Owen*'s Extension of *Davis* to Silence is Contrary to Reason and the Constitution

Mr. Braddy unambiguously invoked his right to silence three times. The Supreme Court of the United States has, moreover, never held that the "unambiguous" or "unequivocal" standard applies to invocations of the right to remain silent. In *Davis v. United States*, 512 U.S. 452 (1994), the United States Supreme Court held that police need not pause to clarify equivocal requests for *counsel*. In *State v. Owen*, 696 So. 2d 715 (Fla. 1997), this Court extended *Davis* to invocations of the right to silence. In applying *Davis* to the right to remain silent, *Owen* adopts a position that violates the Fifth and Fourteenth Amendments.[7]

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[7] To be sure, this Court is not alone in applying *Davis* to the right to silence. *See People v. Martinez*, __ Cal. Rptr. 3d __, 2010 WL 114933 (Cal. 2010) ("A plurality of state courts, and at least five of the 11 federal circuit courts, have specifically applied *Davis* to invocations of the right to remain silent.") (citing cases).

The *Miranda* right to counsel exists to protect the core Fifth-Amendment right to remain silent. 384 U.S. at 469, 477; *Davis*, 512 U.S. at 457. From *Miranda* onwards, the Supreme Court has drawn a distinction between the right to silence and the Fifth-Amendment right to counsel.

> Once warnings have been given, the subsequent procedure is clear. If the individual indicates in any manner, at any time prior to or during questioning, that he wishes to remain silent, the interrogation must cease. … If the individual states that he wants an attorney, the interrogation must cease until an attorney is present.

Miranda, 384 U.S. at 473-74 (footnote omitted). The Court imposed distinct consequences to the violation of the rights to silence and counsel. When a suspect asks for an attorney, there can be no questioning until that request is honored. If the suspect signals his desire to remain silent, interrogation must end for an unspecified period of time. *Id.*; *see Edwards v. Arizona*, 451 U.S. 477, 485 (1994); *Michigan v. Mosley*, 423 U.S. 96, 102-04 (1975) (explaining that the language of *Miranda* means neither that interrogation may immediately resume nor that questioning is permanently barred). In *Mosley*, the Court distinguished the rights to silence and counsel based on the procedural safeguards triggered by invocation. 423 U.S. at 104 n.10. *Edwards* drew the same distinction. *Edwards* created a "rigid prophylactic rule" in contrast to the more flexible re-initiation standard of *Mosley*.

The Supreme Court imposed different consequences for the invocation of the right to silence and the right to counsel. It likewise imposed different triggers. To cease questioning, the defendant must signal his desire "in any manner." To invoke the right to counsel, the defendant must "state that he wants an attorney." The plain language of *Miranda* thus requires much greater precision to invoke the right to counsel. To equate the standards for invocation would be to read the words "indicates in any manner" out of *Miranda*, replacing them with the word "state." This Court applied just this reading in *Owen*. In so doing, it violated *Miranda* and the Fifth and Fourteenth Amendments.

Applying *Davis* to the right to remain silence has yielded absurd results. In *United States v. Sherrod*, 445 F.3d 980, 982 (7th Cir. 2006), the defendant told police: "I'm not going to talk about nothin'" The court found this ambiguous: "A suspect telling a police officer that "he's 'not going to talk about nothin'" is as much a taunt – even a provocation – as it is an invocation of the right to remain silent." In *Delao v. State*, No. 10-05-00323-CR, 2006 WL 3317718, at 2 (Tex. App. Nov. 15, 2006) (unpublished decision), *aff'd.* 235 S.W.3d 235 (Tex.Crim.App. Sep 26, 2007), the defendant was schizophrenic and had a 55 IQ. The police told him that if he invoked his right to silence, he could go home. He repeatedly asked to go home saying, for example: "Well, can I go home, man? … I gotta go home … Can I go home now?" *Id.* at 4-5. The court found this

invocation "at most" ambiguous. In *Anderson v. Terhune*, 467 F.3d 1208, 1211-12 (9th Cir. 2006), *rev'd en banc*, 516 F.3d 781 (9th Cir. 2008), the defendant stated: "I plead the fifth." The detective responded, "Plead the fifth. What's that?" The panel found that "I plead the fifth," could be an ambiguous invocation. 467 F.3d 1211-12.[8]

Even the clearest invocations run the risk of being considered legally ambiguous under *Davis*. At least one court held that an otherwise clear invocation was ambiguous because the defendant was "not emphatic," and he *may have meant the opposite of what he said*. In *United States v. Ford*, 2006 WL 3533080 (U.S. D. Kan. 2006) (unpublished opinion), the court wrote:

> While defendant did not need to be coaxed to speak, his interrogators did coax defendant to say what they apparently wanted to hear. When defendant said, "I'm not answering anything else," he repeated it two or three times. But, he was not emphatic. … **It's not clear that the comments were intended to be taken literally. … Sometimes people say they won't do what they know they are going to do, or they make statements in contradiction to what they really think.** For instance, a person might say it's not going to rain, when he thinks it is going to rain. In context, defendant's statement that he wasn't going to answer anything else did not appear to clearly announce a decision to invoke his *Miranda* rights.

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[8] *See generally*, Marcy Strauss, *The Sounds Of Silence: Reconsidering The Invocation Of The Right To Remain Silent Under Miranda*, 17 Wm. & Mary Bill Rts. J. 773 (2009); Wayne D. Holley, *Ambiguous Invocations Of The Right To Remain Silent: A Post-Davis Analysis And Proposal*, 29 Seton Hall L. Rev. 558 (1998).

Id. at 2. *Miranda* rights exist to empower the otherwise powerless to protect their Fifth-Amendment rights. The application of *Davis* to the right to silence permits police and courts to side-step an invocation wherever they can conceive of an alternate meaning to the defendant's words, no matter how fanciful. This Court's extension of *Davis* is inconsistent with *Miranda* and incompatible with the Fifth Amendment.[9]

B. The State Resorted to Physical Force to Obtain The Defendant's Statements.

An involuntary statement is inadmissible to prove a defendant's guilt. *Brown v. Mississippi*, 297 U.S. 278 (1936). In order to to be found voluntary, a statement "must not be extracted by any sort of threats or violence, nor obtained by any direct or implied promises, however slight, nor by the exertion of any improper influence. . . ." *Brewer v. State*, 386 So. 2d 232, 235 (Fla. 1980) (quoting *Bram v. United States*, 168 U.S. 532, 542-23 (1897). A defendant's mind must be "free to act uninfluenced by either hope or fear." *Id.*

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[9] Professor Janet Ainsworth explores how women and some minorities are more likely to use the linguistic styles courts will find ambiguous. Janet E. Ainsworth, *In a Different Register: The Pragmatics of Powerlessness in Police Interrogation*, 103 Yale L.J. 259 (1993). *See also* Peter M. Tiersma & Lawrence M. Solan, *Cops And Robbers: Selective Literalism In American Criminal Law*, 38 Law & Soc'y Rev. 229 (2004).

It was after the police failed to honor Mr. Braddy's invocations of the right to silence that Detective Gregory Smith attacked him. Detective Smith admittedly assaulted Harrel Braddy. Mr. Braddy was helpless at the time – handcuffed, shackled, and wearing an immobilizing leg-brace. (V. 30 pp. 50, 52; V. 52 pp. 218-20). As Smith himself admitted, at approximately 2:30 p.m. he seized Mr. Braddy by the shirt, dragged him from the car and slammed him up against it. (V. 30 pp. 112, 133). He pressed his forearm against Mr. Braddy's throat and repeatedly demanded to know where Quatisha was, using "pretty harsh words." (V 30. p. 133). In response, Harrel Braddy said he would take them to where he had last seen Quatisha. The detective then told Mr. Braddy: "Let's go. Walk goddamn it. Get your ass down the road." (V. 30 p. 99).[10] During the ensuing interrogation, Detective Smith obtained incriminating statements including the question how long it takes a body to surface, and the statement that an autopsy would show that he did not abuse her. (V. 30 pp. 117, 124-25). This coercive interrogation alone rendered all subsequent statements presumptively involuntary. *Brewer*, 386 So. 2d at 286.

The state conceded that Mr. Braddy's statements to Detective Smith in Palm Beach County were inadmissible, saying:

> The State has no intention of offering the statements that, any statement that the defendant made to Detective Smith with regard to,

[10] Detective Suco emphatically stated that Detective Smith said this, though Smith denied it. (V. 30 pp. 99, 133).

> well, there were no statements that he made to Smith indicating where the victim was.
>
> The statement was made, this was up in Palm Beach, the physical force was up in Palm Beach.

V. 43 pp. 45-46). Despite its representation to the court, the state introduced these statements in its case-in-chief.[11] (T. 2143-48).

The state likewise failed to overcome the presumption of coercion that attached to the statements to Detective Diaz in Palm Beach, and the later statements on I-75 and at headquarters. In determining whether a subsequent statement is untainted by the coercion, courts look to the totality of the circumstances, including renewed *Miranda* warnings, the passage of time, and the

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[11] In contrast to the state's promise, the court's ruling on this issue – if any – was less than clear. The ruling appears to be directed to those statements the state had already conceded to be coerced. The court concluded that there was "walking around," which the state characterized as "just killing time" and:

> It certainly didn't produce any evidence that helped the police officers. So I don't think that the situation with Greg Smith, as intolerable as it is and should not be tolerated, led to a direct piece of inculpatory evidence so the time line there attenuated any of the problems with that physical confrontation. And that continuing down the time line that we have a result of speaking with Diaz, the defendant took the officers down to the alligator alley area, things were said, things were talked about, but ultimately there were no results, quite frankly, as far as getting the body of the child at that time.

(V. 43 pp. 67-68). To the extent the court found the coercive effect of Smith's questioning to be attenuated – even as to statements made in the same place and in the presence of the officer who assaulted Mr. Braddy – it erred as discussed below.

presence of officers involved in the original coercion. *See Brewer*, 386 So. 2d 236-37); *Lyons v. Oklahoma*, 322 U.S. 596 (1943); *Leon v. Wainwright*, 734 F.2d 770 (11th Cir. 1984).

The most important of these factors is a renewed *Miranda* warning. Cases finding a second confession admissible almost invariably rely on a fresh rights warning between the coercion and the subsequent statement. The state principally relied on *Leon v. State*, 410 So. 2d 201 (Fla. 3d DCA 1982). There the Court relied in part on the fact that "a complete set of *Miranda* warnings was meticulously given, understood, and waived before the subsequent statements." *Id.* at 204. In *Lyons*, a pre-*Miranda* decision, the Supreme Court noted that authorities warned Lyons of his rights before the second confession. 322 U.S. at 604. Other decisions admitting post-coercion statements point to intervening reminders of Fifth Amendment rights. *See, e.g., Holland v. McGillis*, 963 F.2d 1044 (7th Cir. 1992). Indeed, each of the post-*Miranda* decisions that the *Leon* court relied upon involved a rights warning before the second statement. *See Berry v. State*, 582 S.W.2d 463 (Tex.Crim.App.1979); *State v. Oyarzo*, 274 So. 2d 519 (Fla. 1973); *Brown v. State*, 304 So.2d 17, 25 (Ala. 1974); *State v. Shular*, 400 So. 2d 781 (Fla. 3d DCA 1981) (statement untainted by illegal arrest where defendant was warned of his rights and actually consulted with counsel).

Even *Miranda* warnings are not in themselves sufficient to dissipate the taint of coercive conduct. In *Brewer*, the police did not physically abuse the defendant, but coerced the first statement by "threats and promises." He was then brought to a first-appearance hearing where a *judge* advised him of his rights. The Court held that the ensuing written confession should have been suppressed. In *United States v. Lopez*, 437 F.3d 1059, 1066-67 (10th Cir. 2006), the second confession was suppressed despite renewed *Miranda* warnings, a twelve-hour interval between statements, and "a night's sleep and a meal." In the present case, the Miami-Dade detectives made no effort to rewarn Harrel Braddy. Twenty-two hours had elapsed between the first and only warnings and the time he sat across the table from Detective Hoadley. (R. 1802; V. 52 p. 283).

The failure to re-read *Miranda* warnings is particularly significant in this case. The Court does not review coercive interrogations in a vacuum. It considers the totality of the circumstances. *See Brewer*, 386 So. 2d at 237. Even before Smith assaulted Mr. Braddy, the detectives had ignored two attempts to assert his rights, and they avoiding reading the *Miranda* warnings as required to resume interrogation after the "re-initiation." Courts have placed a special emphasis on reminders of *Miranda* rights in admitting the products of renewed interrogation. *See Welch v. State*, 992 So. 2d 206 (Fla. 2008) and *Oregon v. Bradshaw*, 462 U.S. 1039 (1983); *Michigan v. Mosley*, 423 U.S. 96 (1975). The detectives' steadfast

refusal to remind Harrel Braddy of his rights, in light of his repeated attempts to invoke his them and the *Bradshaw* violation, is fatal to the attempt to dissipate the taint from Smith's attack.

Other relevant factors likewise do not establish dissipation of the presumed coercion. Courts often consider whether the subsequent statement is obtained by officers unrelated to the original coercion. *See, e.g. Lyons*, 322 U.S. at 596 (1943); *Brewer*, 386 So. 2d at 236; *Leon*, 410 So. 2d 202-04. Detective Hoadley was present for the attack, and there is no indication that he tried to prevent or end it. (V. 52 p. 274). When Diaz questioned Mr. Braddy at the Palm Beach site, he did so in the presence of Smith. (V. 30 pp. 148-49). When they went to I-75, it was Detectives Smith and Diaz who rode with Mr. Braddy. (V. 30 p. 119). Both were there when Mr. Braddy directed them where to search, and both were present for the "how long does it take a body to float?" remark. (V. 30 p. 124, 154). When Diaz resumed the interrogation at the homicide office, he began by referring back to statements Mr. Braddy made on I-75. (V. 30 p. 158).

C. The *Miranda* Rights Waiver Form Was Insufficient to Inform the Defendant of His Right to Consult with Counsel Before Interrogation.

The *Miranda* waiver form failed to inform Mr. Braddy of his right to consult counsel *before* interrogation. The warnings form stated:

> If you want a lawyer to be present during questioning, at his time or at anytime hereafter, you are entitled to have the lawyer present. Do you understand that right?

(R. 1802). This warning was inadequate to protect Mr. Braddy's rights under article I, Section 9 of the Florida Constitution The Court has previously rejected challenges to the Miami-Dade warning form at issue here. *See Chavez v. State*, 832 So. 2d 730, 750 (Fla. 2002); *Johnson v. State*, 750 So. 2d 22, 25 (Fla. 1999); *Cooper v. State*, 739 So. 2d 82, 84 n. 8 (Fla. 1999). Nevertheless, the Court must reconsider these opinions in light of *State v. Powell*, 998 So. 2d 531 (Fla. 2008).[12]

In *Powell*, the Court held that law enforcement officers must inform a defendant of his right to have counsel present both prior to and during interrogation. The Court wrote:

> Under article I, section 9 of the Florida Constitution, as interpreted in *Traylor v. State*,[13] a defendant has a right to a lawyer's help, that is, **the right to consult with a lawyer before being interrogated** and to have the lawyer present during interrogation.

998 So. 2d at 540. The Court went on to quote *Miranda*: "[t]he need for counsel to protect the Fifth Amendment privilege comprehends not merely a right to consult with counsel prior to questioning, but also to have counsel present during any questioning." *Id*. at 541 (quoting *Miranda*, 384 U.S. at 469-70).

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[12] In *Florida v. Powell*, 130 S.Ct. 1195 (2010), the Supreme Court of the United States reversed *Powell* to the extent it relied on the United States Constitution.

[13] *Traylor v. State*, 596 So. 2d 957 (Fla. 1992).

In its previous decisions the Court relied on a flawed premise to conclude that police need not inform a suspect of the right to consult with a lawyer prior to interrogation. The Court dispensed with the issue by way of a footnote in *Cooper*, stating that the Miami-Dade warning tracked the language of *Miranda*. 739 So. 2d at 85 n.8. *Chavez* and *Johnson* merely rely on *Cooper*. 832 So. 2d at 750; 750 So. 2d at 25. In *Powell*, the Court recognized that a suspect is guaranteed two distinct forms of access to counsel: Both the right to consult with counsel before questioning and the right to have counsel present during questioning. In light of *Powell*, the Court must revisit and overrule *Cooper*, *Johnson*, and *Chavez*.

D. The State Cannot Prove Beyond a Reasonable Doubt that the Error in Admitting the Defendant's Statements Was Harmless.

The state bears the burden of proving that the trial court's error was harmless beyond a reasonable doubt. *State v. DiGuilio*, 491 So. 2d 1129, 1135 (Fla.1986). The harmless error test "is not guided by a sufficiency-of-the-evidence, correct-result, not-clearly wrong, substantial-evidence, more-probable-than-not, clear-and-convincing, or overwhelming-evidence test." *Rigterink v. State*, 2 So. 3d 221, 256 (Fla. 2009). Before error can be deemed harmless, the state must prove beyond a reasonable doubt that the error did not contribute to the conviction. *DiGuilio*, 491 So. 2d 1138 (Fla. 1986). Error contributes to the verdict where the improper evidence may have been relied on, even though the jury may have reached the

same result without the error. *DiGuilio*, 491 So. 2d at 1136, (citing *People v. Ross*, 429 P.2d 606 (1967) (Traynor, C.J. dissenting), *rev'd sub nom*, *Ross v. California*, 391 U.S. 470 (1968). The state can hardly prove that the jury did not "rely on" the most damning piece of evidence against Harrel Braddy where they made it the feature of their case against him.

II. THE TRIAL COURT ERRED IN FAILING TO RULE ON OR GRANT MR. BRADDY'S MOTIONS TO DISQUALIFY WHICH ALLEGED A REASONABLE FEAR OF BIAS BASED ON THE COURT'S REFUSAL TO HEAR DEFENSE ARGUMENT BEFORE RULING, AND A PATTERN OF RUDENESS AND MOCKERY.

On June 19, 2006, Mr. Braddy moved to represent himself. Following a *Faretta*[14] inquiry, the trial court determined Mr. Braddy was competent to do so. (V 89. pp. 12-20). Over the next several months, the trial court evinced growing antipathy toward Mr. Braddy, refusing to let him speak, denying the most anodyne requests, addressing him with rudeness and mockery. By October 3, 2006, the trial court openly castigated the defendant. Nothing in his in-court conduct warranted this intemperance. Apprehensive about receiving a fair trial, Mr. Braddy moved for recusal to no avail.

[14] *Faretta v California*, 422 U.S. 806 (1975).

A. The Trial Court's Intemporate Conduct Toward The Pro Se Defendant

On June 26, the first hearing after Mr. Braddy's election to proceed pro se, the prosecutor asserted that she had complied with all defense discovery requests long ago, and that, on that basis, the trial court in 1999 had denied a defense motion for sanctions for discovery violations. (V. 90 pp. 5, 13, 37-38). When Mr. Braddy, speaking as his own lawyer, responded by pointing out that "[t]he docket sheet will show the motion was not ruled upon," the trial court rebuked him for speaking: **"I am not asking about the docket sheet. For timing, I'm asking this lawyer if you don't mind what is your recollection of the resolution of the motion to dismiss."** (V. 90 p. 36). When the prosecutor responded with her recollection that the motion had been ruled upon, Mr. Braddy demurred: "No, sir. It wasn't ruled on." The trial court rebuked him again: "Okay. It wasn't a question to you. It was State." (V. 90, p. 37). As the prosecutor ultimately conceded, Mr. Braddy was correct: the motion had never been ruled upon. *Id.*

The trial court then denied the outstanding 1999 motion for discovery, concluding, based on the prosecutor's assertion alone, that the defense was not entitled to anything more than what she had already produced. Specifically, it ruled irrelevant, without yet having heard from the defendant, the medical records on Shandelle Maycock, whose physical and mental condition were pertinent both

to her credibility, and to the state's claim of victim impact.[15] (V. 90 pp. 47-49). When the defendant tried to explain his right to these records, the court cut him off: "No. We are not going back to [that]. Your objection has been noted. Okay. We are not doing this … If you don't like the ruling you appeal . . . It's over … End of story. Don't bring it up again please …" (V. 90 pp. 51-52).

At the next hearing on July 10, Mr. Braddy re-urged his request to see Ms. Maycock's records, citing Florida Rule of Criminal Procedure 3.220.[16] The trial court interrupted: "Listen, listen, your record is made. I turned it down. We are not changing it." When the defendant attempted to proffer the Rule's applicability, the trial court interrupted him again: **"Excuse me, I know what the law is see because I am actually a lawyer and a Judge.** The answer to your question is will I change my decision the answer is no.**"** (V. 91 p. 13).

The trial court's antipathy simmered through the following three months, during which it repeatedly addressed Mr. Braddy with discourtesy. ("Stop it," V.

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[15] Ms. Maycock assertedly developed ulcers and Crohn's disease as a result of the emotional impact of her daughter's death and the delays in bringing the case to trial. (V. 90 pp. 48-49; V. 152, R. 2914).

[16] Rule 3.220(b)(1)(J) requires that the prosecutor produce the results of any physical or mental examinations made in connection with the case.

90 p. 19); “Stop,” (V. 90 p. 52); “Could I address –,” “No.” *id.*; “No, we’re not going to debate. . .Stop. Stop,” V. 111 p. 32).[17]

On October 3, 2006, the trial court’s antipathy boiled over.

Among the issues to be resolved that day were whether the defendant would be permitted to depose the state’s witnesses, which of the state’s witnesses remained to be deposed, and the defendant’s access to postage stamps for the purpose of filing and serving his notices and pleadings.

The prosecutor moved to prohibit Mr. Braddy from conducting or even attending depositions, characterizing him as an “extreme escape risk,” who was especially dangerous to civilian witnesses. (V. 55 p. 10). She proffered that Mr. Braddy had previously submitted to defense counsel written lists of deposition questions, and that he could do the same for standby counsel, thereby obviating the need for him to attend the depositions. (V. 55 p. 12). Mr. Braddy attempted to controvert these assertions: “Judge, could I have argument to her? Because she made certain allegations that I need to straighten out.” (V. 55 p. 21). The trial court refused: **“No, no. Listen, this isn’t a cat fight …”** *Id.*

The trial court ultimately denied the prosecutor’s motion on the expressed assumption that Braddy might lie about whether standby counsel posed the

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[17] During these months, the defendant filed four motions to recuse the trial court, on the basis of its mounting antipathy. (V. 5 pp. 537-99; v. 6 pp. 1106-1110; V. 5 pp. 1114-32; V. 9 p. 1027; V. 54 p. 5; V. 59 p. 6)

submitted questions. (**"[H]e's now going to claim the lawyer didn't ask all the questions that I wanted him to ask.** … [Y]ou know what's going to happen. [H]e's going to say, I told the lawyer to ask this question and he didn't do it," creating a "serious problem.") (V. 55 pp. 14-15.)

The parties also disagreed about which depositions remained to be taken. The defendant had presented a list of 44 witnesses. The trial court asked whether "all of these people been deposed." Mr. Braddy and the prosecutor both responded "No." The trial court rebuked the defendant for responding: **"Excuse me. I'm not talking to you."** (V. 55 pp. 13-15).

Towards the end of the proceeding, standby counsel informed the court that Mr. Braddy needed postage stamps to mail his pro se pleadings to the clerk, the prosecutor, the court and standby counsel. Otherwise, Mr. Braddy's ability to defend himself would be "seriously impeded." (V. 55 p. 36). The trial court responded that Mr. Braddy was "[s]eriously impeded because he was representing himself," telling him to get the postage from his family, who were present in court that day. (V. 55 pp. 36-37). Mr. Braddy objected: "the jail is required by their own … SOP" and the state is required by "the Supreme Court in Bound versus Smith[18]" to furnish indigent pro se defendants with litigation-related postage. To this the court responded: **"Let me tell you something. This State is not providing**

[18] 430 U.S. 817 (1977).

anything to you. Trust me on that one." (V. 55 p. 37). When Mr. Braddy said that the court could order the State to provide him stamps for his litigation, the court replied, **"I could, but I'm not."** (V. 55 p. 38).[19]

Asking permission to speak, "Can I say something before we go," Mr. Braddy objected to the biased tone of the proceedings:

> … I been coming here for almost eight years, not one officer can tell you that Braddy have violated any rules, have failed to obey their commands or anything like that and I come over here, Judge …

The trial court cut in with a mocking reference to Mr. Braddy's 1984 conviction for attempted murder of a law enforcement officer:

> COURT: I assume that you're talking about the officers that don't allege that you tried to kill an officer?
>
> DEFENDANT: Judge, I'm not speaking about that.
>
> COURT: Other officers other than those people?
>
> DEFENDANT: Judge, I'm not speaking about that.
>
> COURT: Other than those people?
>
> DEFENDANT: I'm speaking about since November 8th, 1998.
>
> COURT: Oh, okay.

(V. 55 pp. 39-40).

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[19] An indigent incarcerated pro se defendant is entitled to postage stamps for his litigation. *See, e.g., King v. Atiyeh*, 814 F.2d 565, 568 (9th Cir. 1986) (indigent inmates "must be provided with postage stamps at state expense to mail legal documents," citing *Bounds v. Smith*, 430 U.S. at 824-25).

When Mr. Braddy pursued his complaint of bias, the trial court warned that him that it had "the authority to suspend that business about you representing yourself." (V. 55 p. 44).

One week later, the defendant filed a motion to disqualify the trial court, alleging that the court had "rudely and angrily snapped at [him] to 'stop it,'" evidencing bias which "frightened the defendant" and made him "reluctant to voice" his positions. (V 10 pp. 1158-6). He filed another motion to disqualify on October 19, alleging a "continuing pattern of rudeness, bias and prejudice against the defendant in favor of the state." (V 10 pp. 1166-76). The trial court failed to rule on either motion until Jun 18, 2007. (V. 43 pp. 121-24).

B. The trial court's failure to rule on the appellant's motions to disqualify requires reversal.

A trial judge must rule on a motion to disqualify "immediately." Fla. R. Jud. Admin. 2.330; see also § 38.10 (Fla. Stat. 19980). If the trial court fails to rule on the motion within thirty days, the motion must be deemed granted, and the judge is disqualified. Fla. R. Admin. P. 2.330(j); *see Tableau Fine Art Group, Inc. v Jacobini*, 853 So. 2d 299 (Fla. 2003). A judge may not rule on other issues while a motion to disqualify is pending. *See Suggs v. State*, 631 So. 2d 333 (Fla. 5th DCA 1994); *Berkowitz v. Rieser*, 625 So. 2d 971 (Fla. 2d DCA 1993). In this case, the trial court failed to rule on Mr. Braddy's motions to disqualify filed on October 11

and 19, 2006, even in the face of a motion requesting that the court conduct a hearing. (R. 1205-19). The judge went on to rule on numerous issues, and presided over Mr. Braddy's trial. "When a trial court fails to act in accord with the statute and procedural rule on a motion to disqualify, an appellate court will vacate a trial court judgment that flows from that error." *Fuster-Escalona v. Wisotsky*, 781 So. 2d 1065 (Fla. 2000).

C. On the merits, the trial court's intemperance warranted disqualification.

It is one thing to warn a litigant that he would be foolish to dispense with counsel. It is quite another to treat a pro se litigant as though he is a fool, repeatedly rebuking him, refusing to let him speak or mocking him when he does so.

When Mr. Braddy became a pro se litigant, the trial court began to express its disdain and distrust of him, interrupting his objections and proffers; demeaning him as a non-lawyer; disparaging his character; and treating him with contempt. The trial court's intemperance caused Mr. Braddy to reasonably fear that he would not receive a fair trial. His motions to disqualify should have been granted.

"[E]very litigant is entitled to nothing less than the cold neutrality of an impartial judge." *State v. Parks*, 141 Fla. 516, 194 So. 613, 615 (1939). Canon 2 of the Code of Judicial Conduct requires a judge to "act at all times in a manner

that promotes public confidence in the integrity and impartiality of the judiciary," and to avoid conduct that would make an objective, reasonable observer question the judge's impartiality. Model Code Jud. Conduct Canon 2. Judicial demeanor is critical to the appearance of impartiality. "Judicial intemperance invariably conveys the message of a closed mind. … Participants will never accept that a decision rendered by a combatant is fair." *In re O'Dea*, 622 A.2d 507, 516 (Vt. 1993); Model Code Jud. Conduct Canon 3B(4).[20]

Nowhere does judicial intemperance do more to mar the appearance of impartiality than in the case of a pro se litigant. "People appearing pro se and without legal training are the ones least able to defend themselves against rude, intimidating … judges." *In the Matter of Hammermaster*, 985 P.2d 924, 936 (Wash. 1999). A judge must treat pro se litigants with the same dignity and courtesy he owes everyone in his courtroom. *Id*. Respectful judicial demeanor towards all parties equally "is the primary method of ensuring self-represented litigants do not experience or perceive bias, particularly by refraining from harping on a litigant's pro se status …" Cynthia Gray, *Reaching Out or Overreaching:*

[20] See, also, Canon 3B(6), requiring the judge to ensure dignified and courteous conduct by lawyers and "others subject to his direction and control." The right to an impartial judge is guaranteed by article I, section 9 of the Florida Constitution and the Fourteenth Amendment to the Federal Constitution.

Judicial Ethics and Self-Represented Litigants, 27 J. Nat'l Admin. L. Judiciary 97, 117 (Spring 2007).

Where a judge's manner is disrespectful and demeaning, his impartiality may reasonably be questioned, and he may be disqualified. A motion to disqualify[21] is legally sufficient, and must be granted, if it alleges facts (which must be viewed from the movant's perspective, and taken as true) that would create in a reasonably prudent person a well-founded fear of not receiving a fair and impartial trial. *Fischer v. Knuck*, 497 So. 2d 240, 242 (Fla. 1986); *MacKenzie v. Super Kids Bargain Store, Inc.*, 565 So. 2d 1332 (Fla. 1990); *Hayslip v. Douglas*, 400 So. 2d 553, 556 (Fla. 4th DCA 1981).

For example, in *Jimenez v. Ratine,* 954 So. 2d 706 (Fla. 2d DCA 2007), movant alleged that the judge made comments exhibiting hostility toward counsel, such as accusing him of unprofessional behavior, routinely reminding him of his obligations of good faith, professing a need to "issue written orders in open court with witnesses present," and expressing incredulity about his assertions. *Jimenez*, 954 So. 2d at 708. Finding the cumulative effect of these allegations to be legally

[21]A motion to disqualify is reviewed under a *de novo* standard, *see* 38.19, Fla. Stat., *Armstrong v. Harris*, 773 So. 2d 7 (Fla. 2000); is governed substantively by section 38.10, Florida Statutes, which provides for disqualification on the basis of bias or prejudice; and procedurally by Florida Rule of Judicial Administration 2.160, which provides that "[a] motion to disqualify shall show. . .that the party fears that he or she will not receive a fair trial or hearing because of specifically described prejudice or bias of the judge." Fla. R. Jud. Admin. 2.160(d)(1).

sufficient, the appeals court noted that the judge's comments "went beyond expressions of mere frustration, admonishment, or annoyance," but "rose to the level of castigating counsel's personal integrity and honesty." *Id.* *See also Cabada v. Costelloe*, 888 So. 2d 756 (Fla. 4th DCA 2004) (judge's sarcastic and demeaning comments, including apparent disbelief of litigant's explanation of financial situation and "hunch" that litigant would flee before next hearing, legally sufficient for disqualification).[22]

The trial court in this case treated Mr. Braddy, a pro se litigant entitled to dignity and courtesy, with lacerating intemperance. It rebuked him for speaking. It mocked him for his pro se status. It capriciously ruled against him, not just on

[22] *And see Colarusso v. Colarusso*, 20 So. 3d 985, 986 (Fla. 3rd DCA 2009) ("judge's decidedly negative commentary concerning his personal opinion of the petitioner's behavior" legally sufficient); *Lamendola v. Grossman*, 430 So. 2d 960, 961 (Fla. 3rd DCA 1983) (judge displayed antagonism towards counsel, made derogatory remarks about him and threatened to retaliate against him for going over her head); *Marshall v. Bookstein*, 789 So. 2d 455, 456 (Fla. 4th DCA 2001) (judge expressed bias against counsel, "angrily denouncing their 'tactics' and deriding them as substandard 'Miami Lawyers'"); *Brown v. St. George Island, Ltd.*, 561 So. 2d 253, 257 (Fla. 1990) (judge's statement that he believed litigant had lied and might do so again); *Deauville Realty Co. v. Tobin*, 120 So. 2d 198 (Fla. 3rd DCA 1960), *cert. denied*, 127 So. 2d 678 (Fla. 1961) (same); *DeMetro v. Barad*, 576 So. 2d 1353, 1355 (Fla. 3rd DCA 1991) (same); *Peterson v. Asklipious*, 833 So. 2d 262, 263 (Fla. 4th DCA 2002) (same); *City of Hollywood v. Witt*, 868 So. 2d 1214, 1217 (Fla. 4th DCA 2004) (judge's comments that movant's witnesses and counsel lacked veracity); *Coucher v. Light*, 731 So. 2d 835 (Fla. 5th DCA 1999) ("judge commented several times about the veracity of a witness" during summary judgment hearing).

standard discovery requests, but even on his request for postage for filing and serving his pleadings. It gratuitously humiliated him in open court.

The trial court did not have an easy task. This was a death penalty case which had been pending for eight years. Mr. Braddy had been through five pairs of lawyers before electing to proceed pro se. As a pro se litigant, Mr. Braddy was assiduous in asserting his rights, and in preserving those rights for appeal. But he was courteous and professional in his conduct – to the court, to the prosecutor, and to standby counsel, notwithstanding provocations.

While the trial court's exasperation with Mr. Braddy may be understandable, its conduct "went beyond expressions of mere frustration, admonishment, or annoyance," *Jimenez*, 954 So.2d at 708, to a profound castigation that would inspire fear of bias in any reasonable litigant. For that reason, Mr. Braddy's motions for recusal should have been granted.

III. THE STATE FAILED TO ESTABLISH VENUE AS ALLEGED IN THE INDICTMENT, IN VIOLATION OF HIS CONSTITUTIONAL RIGHT TO BE TRIED IN THE COUNTY IN THE COUNTY WHERE THE CRIME WAS ALLEGEDLY COMMITED.

The state violated Mr. Braddy's right to be tried in the county where the alleged crimes occurred. The Florida Constitution declares:

> In all criminal prosecutions the accused shall … have a speedy and public trial by impartial jury in the county where the crime was committed. If the county is not known, the indictment or information may charge venue in two or more counties conjunctively and proof

> that the crime was committed in that area shall be sufficient; but before pleading the accused may elect in which of those counties the trial will take place.

Art. I, § 16(a), Fla. Const. "Venue is a necessary part of the indictment, and must be proven as laid." *Rimes v. State*, 103 So. 550, 551 (Fla. 1931). Where the state fails to establish that the crime occurred in the venue alleged in the indictment, the conviction must be reversed. *See McClellion v. State*, 858 So. 2d 379 (Fla. 4th DCA 2003).[23]

The indictment charges that Mr. Braddy committed the offenses of murder and attempted murder in Dade County. (R. 70-71). The state's own proof, if believed, shows that these crimes occurred in Broward and Palm Beach Counties. With regard to murder, the evidence showed that Quatisha Maycock was found in a canal along "Alligator Alley," and she sustained perimortem wounds consistent with alligator bites. (T. 2515). As to the attempted murder, Shandelle Maycock herself testified that the attempted murder occurred where she was found in Palm Beach County.

The state did not invoke the exception permitting it to "charge venue in two or more counties conjunctively." Had it done so, Mr. Braddy would have had the

[23] This issue presents a question to be reviewed *de novo*. *See State v. Glatzmayer*, 789 So. 2d 297, 301 n. 7 (Fla. 2001).

right to choose the county in which he was to be tried. Instead, the indictment alleges that the crimes were committed in Dade County and Dade County only.

The state may not now avail itself of section 910.05, Florida Statutes. That section provides: "If the acts constituting one offense are committed in two or more counties, the offender may be tried in any county in which any of the acts occurred." § 910.05, Fla. Stat. (1998). The state did not allege that that the "acts constituting the offenses occurred anywhere other than Dade County. *See, e.g. Martin v. State*, 488 So. 2d 653, 655 (Fla. 1st DCA 1986) ("We conclude that venue was properly placed in Duval County pursuant to section 910.05, in that the indictment alleged that the acts constituting trafficking in cannabis and criminal conspiracy to traffic in cannabis took place in more than one county." Even if the state had properly alleged venue under section 910.05, the proof would not satisfy that sections requirements. "Venue statutes are typically construed coextensively with the law of criminal attempts: if the criminal ob-ject was so far effectuated by acts in the county of the forum that a prosecution for the attempted offense could there be laid, had the offense failed of comple-tion, the same acts may be regarded as among those 'constituting' or 'requisite to the commission' of the offense culminated in another county." *Crittendon v. State*, 338 So. 2d 1088, 1090 (Fla. 1st DCA 1976). The facts alleged against Mr. Braddy – kidnapping both victims and committing an assault upon Shandelle Maycock – do not of themselves

establish an attempt to commit murder. The state failed to allege and prove venue in this case, and the cause must be remanded for a new trial.

IV. THE TRIAL COURT ERRED IN ADMITTING HEARSAY EVIDENCE THROUGH A WARRANT AND AFFIDAVIT STATING THAT A JUDGE HAD DETERMINED THAT THE DEFENDANT'S CAR WAS USED IN A KIDNAPPING, MURDER OR ATTEMPTED MURDER, IN VIOLATION OF SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS AND ARTICLE I SECTIONS 9, 16 AND 17.

Over objection, the trial court permitted the state to introduce the second search warrant and affidavit for the Lincoln Town Car. (T. 2281). The affidavit states as "facts" that Mr. Braddy cleaned the inside of the car, and that Quatisha might have bled inside it. (R. 2821). The warrant states a judicial finding of probable cause that the car was used in a kidnapping, attempted murder or murder, and that "blood … serological … or trace evidence" of the crime is within it. (R. 2817-18).

The trial court erred when it admitted this highly prejudicial hearsay. Information forming the basis for an application for a warrant is inadmissible hearsay.[24] *Jimenez v. State*, 703 So. 2d 437, 440 (Fla. 1997), *receded from on other grounds, Delgado v. State*, 776 So. 2d 233 (Fla. 2000). "Although a trial

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[24] The admissibility of evidence is generally reviewable for abuse of discretion. However the question of whether a statement falls within the definition of hearsay is reviewed *de novo*. *Camerlango v. State*, 989 So. 3d 740, 742 (Fla. 4th DCA 2008).

court may take judicial notice of court records, *see* § 90.202(6), Fla. Stat. (1997), it does not follow that this provision permits the wholesale admission of all hearsay statements contained within those court records." *Stoll v. State*, 762 So. 2d 870, 876 (Fla. 2000). Through this hearsay, the prosecution succeeded in introducing the fact that a judge had passed upon the state's case and found it meritorious. The trial court's error defeated Mr. Braddy's constitutional right to confront the witnesses against him. U.S. Const. amends. VI, VIII, XIV; Art. I, §§ 16 and 17.

V. THE TRIAL COURT ERRED IN DENYING THE DEFENDANT'S MOTION FOR MISTRIAL WHERE THE ARRESTING OFFICER TESTIFIED HE WAS IN FEAR OF MR. BRADDY BECAUSE OF HIS CRIMINAL HISTORY IN VIOLATION OF ARTICLE I, SECTIONS 9 AND 17 OF THE FLORIDA CONSTITUTION AND THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

The state launched an improper character attack on Harrel Braddy by telling jurors he had a dangerous criminal history. "[E]vidence of any crime committed by a defendant, other than the crime or crimes for which the defendant is on trial, is inadmissible in a criminal case where its sole relevancy is to attack the character of the defendant or to show the defendant's propensity to commit crime." *Willis v. State*, 669 So. 2d 1090 (Fla. 3d DCA 1996) (quoting *Vazquez v. State*, 405 So. 2d 177, 179 (Fla. 3d DCA 1981)), *approved in relevant part, quashed in part*, 419 So. 2d 1088 (Fla. 1982); § 90.404(2)(a), Fla. Stat. (2007); § 90.404(1), Fla. Stat. (2007).

Over defense objection, Detective Milito testified he was fearful of Mr. Braddy because of his criminal "history." Detective Milito testified:

> Well, when I noticed Mr. Braddy's demeanor, how it changed, and for our safety, due to the circumstances, I placed the handcuffs on him. I advised him I was going to handcuff him, he wasn't under arrest at the moment, but **it was for his safety and my safety dealing with the history that I had of him.**

(T. 1914). The trial court denied defense counsel's motion for mistrial.[25] (T. 1929-33).

Detective Milito unmistakably told jurors that Mr. Braddy had a "history" of previous violent crimes. The trial judge's contention that the jury would understand the detective to be referring to Mr. Braddy's "history" with respect to the allegations in *this* case is at best strained. In *Cole v. State*, 701 So. 2d 845 (Fla. 1997), a *civilian* witness testified that she "was nosey and knew some history on [the defendant]." *Id.* at 853. The judge offered a curative instruction, but denied a motion for mistrial. This Court held that the trial court did not abuse its discretion. *Id.* In this case, a police detective testified that his knowledge of Mr. Braddy's history made him afraid. The jury could hardly have expected that a seasoned detective was especially timorous in the presence of every person suspected of a

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[25] The court reviews the denial of a motion for mistrial for abuse of discretion. *Smith v. State*, 7 So. 3d 473, 502 (Fla. 2009).

serious crime. The only rational inference the jury could make was that Milito knew something particularly alarming about Mr. Braddy's criminal record.

This evidence is presumptively harmful. *See Gore v. State*, 719 So. 2d 1197, 1199 (Fla. 1998); *Czubak v. State*, 570 So. 2d 925, 928 (Fla. 1990). Detective Milito's testimony informed the jury that the police knew Mr. Braddy to be a man with a dangerous past. The only purpose served by introducing this testimony was what Justice Cardozo once called "the endeavor to load the defendant down with the burden of an evil character." *People v. Zackowitz*, 172 N.E. 466, 467 (N.Y. 1930) (Cardozo, C.J.).

VI. THE TRIAL COURT ERRED IN ALLOWING THE PROSECUTOR TO ENGAGE IN IN MISCONDUCT THAT (A) DENIGRATED DEFENSE COUNSEL AND THE DEFENSE, (B) BOLSTERED POLICE TESTIMONY, (C) COMMENTED UPON THE DEFENDANT'S EXERCISE OF CONSTITUTIONAL RIGHTS, (D) PERSONALLY ATTACKED HIM, (E) ADVISED THE JURY IT WAS THEIR DUTY TO REJECT LESSER OFFENSES, AND (F) MISSTATED THE EVIDENCE, IN VIOLATION OF THE DEFENDANT'S RIGHTS TO A FAIR TRIAL AS GUARANTEED BY SECTIONS 9 AND 16 OF THE FLORIDA CONSTITUTION AND THE FOURTEENTH AMENDMENT TO THE FEDERAL CONSTITUTION.

A prosecutor has an ethical duty to seek justice rather than pursuing a conviction at all costs. *See Lewis v. State*, 711 So. 2d 205 (Fla. 3d DCA 1998).

> 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."

Gore v. State, 719 So. 2d 1197, 1201 (Fla. 1998) (*quoting Berger v. United States*, 295 U.S. 78, 88 (1935)). Here the prosecution repeatedly ventured improper arguments. Not satisfied with merely striking hard blows, it instead struck foul ones. *See Berge*r, 295 U.S. at 88. This prosecutorial misconduct deprived Harrel Braddy of due process of law, trial by an impartial jury, and a reliable sentencing process.[26] U.S. Const. amend. VI, VIII, XIV: Art. I, §§ 9, 16, 17, Fla. Const.

A. Attacks on Defense Counsel/Denigration of Defense.

The prosecution repeatedly attacked defense counsel and denigrated the conduct of the defense. "A prosecutor may not ridicule a defendant or his theory of defense." *Riley v. State*, 560 So. 2d 279, 280 (Fla. 3d DCA 1990); accord *Lewis v. State*, 711 So. 2d 205 (Fla. 3d DCA 1998). Ms. Rifkin nevertheless denounced counsels' conduct of the defense, accused them of misrepresentation, and ridiculed the defense.

The prosecutor directly charged the defense with misrepresenting the evidence to the jury:

> He brought that up in cross-examination with Detective Suco. Remember? And Detective Suco said oh, yeah, we asked him if he wanted to, but he refused. **Why would he refuse? I mean their whole thing is manipulation, misrepresentation.** Of course he's going to refuse.

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[26] The court reviews error in overruling defense objections to improper argument for abuse of discretion. *Brooks v. State*, 762 So. 2d 879, 902 (Fla. 2000).

(T. 2724). Ms. Rifkin also alleged that the defense misrepresented the evidence when it suggested Mr. Braddy was restrained with a "belly-belt" at time of Detective Smith's assault. Over objection, she told jurors "nobody ever testified they saw him with a belly belt." (T. 2723). In fact, Detective Chambers testified that police did attach Mr. Braddy's handcuffs to a belly belt and described how this would further restrict Mr. Braddy's ability to move. (T. 1987-88).[27]

Florida courts have condemned these arguments for more than 30 years. In *Carter v. State*, 356 So. 2d 67 (Fla. 1st DCA 1978), the court denounced the argument that defense counsel was trying to "distort the record" and "mislead [the jury.]" Derogatory remarks attacking the integrity of counsel deprive a party of a fair trial. *Owens Corning Fiberglas Corp. v. Morse*, 653 So. 2d 409, 411 (Fla. 3d DCA 1995); *see Sanchez v. Nerys*, 954 So. 2d 630 (Fla. 3d DCA 2007) (arguments that counsel was "pulling a fast one," "hiding something," and "trying to pull something"); *Sun Supermarkets, Inc. v. Fields*, 568 So. 2d 480, 481 (Fla. 3d DCA 1990).

One theory advanced by the defense was that Quatisha's fatal injuries occurred when she and her mother leapt from the car. (T. 2693). The prosecution

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[27] During the motion to suppress, Detective Hoadley stated that Mr. Braddy was restrained with a belly-belt. (V. 42 p. 247).

seized on this to attack counsel, arguing that the defense was improperly blaming Shandelle for her daughter's death:

> Again and again and again and again, from day one, this defendant has been trying to blame this victim. He's been pinning in on all Shandelle Maycock [sic]. He's doing it again. He's trying to blame Shandelle Maycock for killing her child. If she hadn't jumped out of the car, she wouldn't – the child wouldn't have died. That's what they are telling you.

(T. 2720). Over objection, the prosecution also criticized the defense for using cross-examination to establish that Dennis MacArthur was the real killer:

> [MS. RIFKIN]: Not – they want to put it on Dennis MacArthur, not even Dennis MacArthur. You heard about the fight in 1997, they had to bring that up.

(T. 2722).

Florida courts consistently condemn arguments disparaging counsel's conduct of the defense. For example, in *Adams v. State*, 830 So. 2d 911, 915 (Fla. 3d DCA 2002), the court found improper an argument that "implied to the jury that defense counsel acted in a demeaning, discourteous and unprofessional manner during the cross-examination …" *See Landry v. State*, 620 So. 2d 1099 (Fla. 4th DCA 1993) ("And I guess it's part of that little saying when you don't have the facts you argue the law, or when you don't have the law, you argue the facts. And when you don't have either, you just sort of try to conjure up, sign (sic) your fists and say no one is believable.").

The prosecutor attacked counsel and the defense as nonsensical. The first sentence of her rebuttal argument was: "Perhaps the defendant was in a different trial." (T. 2718).

> **Their whole closing makes absolutely no sense. Their arguments make absolutely no sense.**
>
> You heard the testimony from Doctor Perper yesterday. Mr. Della Fera told you that Doctor Perper said that these rocks did not cause that injury. **We must have been in a different trial.** Doctor Perper clearly said that the injury, the depression injury to the left side of the head is consistent with those rocks.

(T. 2725). The "different trial" comments are nearly identical to one disapproved in *Servis v. State*, 855 So. 2d 1190, 1193 (Fla. 5th DCA 2003). There the prosecutor argued that "the defense wants you to believe …" and concluded, "Well, I mean, I don't know what trial that we're listening to here." Ms. Rifkin's attempt to ridicule Mr. Braddy's defense as nonsense was equally improper. *See D'Ambrosio v. State*, 736 So. 2d 44 (Fla. 5th DCA 1999) ("Repeatedly referring to the defendant's defense as innuendo, speculation and 'a sea of confusion' that defense counsel 'prays you will get lost in' is an improper attack of the defense and defense counsel."); *Izquierdo v. State*, 724 So. 2d 124 (Fla. 3d DCA 1998) (calling defense a "pathetic fantasy"); *Lewis v. State*, 711 So. 2d 205 (Fla. 3d DCA 1998) ("You see different types of defenses. It is my job to present the evidence and it is their job to question the evidence. But you know, the manner with which they're questioning it, there's no other term for it, it's just lame.").

B. Bolstering.

The state may not bolster its witnesses by arguing police have no motive to lie, that they are more credible because they are law enforcement officers, or that they had no interest in the outcome of the case. *See Lewis v. State*, 780 So. 2d 125, 130 (Fla. 3d DCA 2001); *Brown v. State,* 787 So. 2d 229, 231 (Fla. 2d DCA 2001); *Servis v. State*, 855 So. 2d 1190, 1194-95 (Fla. 3d DCA 2003); *Caraballo v. State*, 762 So. 2d 542, 544-45. (Fla. 5th DCA 2000). One form of bolstering is the argument that police would have done a better job of lying. In *Caraballo*, the prosecutor argued: "The judge is going to tell you to consider whether the witness was honest and straightforward in answering the lawyers' questions. Now, if deputy Sherry were going to make something up, he would have done a better job of it." *Id.* at 544. Here the prosecutor introduced the topic of the detective's motivation. (T. 2724). Shortly thereafter, she told jurors:

> What could the police have done up in Palm Beach County if they really wanted to make it up? Well, if they really wanted to make it up, they could have made up a sworn statement and nobody would have known any difference. They could have said that he tried to run and we shot him in the back. They could have said that at Alligator Alley, he fell while he was climbing on the rocks and, oops, the alligators got him. If they wanted to make stuff up, they could have made up that he confessed to the whole thing right then and there.

(T. 2725). This is nothing more than a more expansive version of the argument condemned in *Caraballo*.

C. Comment on the Defendant's Exercise of His Rights to Silence, to be Free from Unreasonable Searches & Seizures, and Jury Trial.

Any argument "fairly susceptible" of being interpreted as a comment on a defendant's failure to testify violates the right to remain silent guaranteed by the Fifth Amendment of the United States Constitution and Article I, Section 9 of the Florida Constitution. *Rodriguez v. State*, 753 So. 2d 29, 37 (Fla. 2000); *State v. DiGuilio*, 491 So. 2d 1129, 1131 (Fla. 1986). The standard for determining whether a comment is "fairly susceptible" of being thus interpreted is a liberal one. *Id.*

The prosecutor directly commented on Harrell Braddy's exercise of his right to remain silent. She told the jury that Mr. Braddy's attempts to remain silent were part of a plan to "**manipulate and stonewall and stretch things out.**" (T. 2661). In aid of this argument, she explicitly told jurors that Mr. Braddy had attempted to exercise his right to silence. She presented testimony that Mr. Braddy had put his head down and refused to speak to the detectives, and that he later told them he would not speak to them anymore. (T. 1957, 1959, 2061).[28]

[28] The question raised here is not whether Mr. Braddy made an "unambiguous" or "unequivocal" invocation as required to terminate questioning under *State v. Owen*, 696 So. 2d 715 (Fla. 1997). The court must apply *DiGuilio*'s liberal standard for evaluating whether a comment is fairly susceptible of being interpreted as a comment on silence.

The prosecutor also repeatedly highlighted Mr. Braddy's failure to answer questions or volunteer information. For example she brought out the fact that Mr. Braddy did not tell Detective Diaz whether Quatisha was unconscious after the jump from the car.[29] (T. 2217-18). Florida Courts have held that, where the defendant has executed a waiver of rights, the prosecution may present testimony that he refused to answer "one question of many." *Valle v. State*, 474 So. 2d 796, 801 (Fla. 1985), *receded from on other grounds in State v. Owen*, 696 So. 2d 715 (Fla.1997); *Beckham v. State*, 884 So. 2d 969 (Fla. 1st DCA 2004); *Ragland v. State*, 358 So. 2d 100 (Fla. 3d DCA 1978). But this case does not involve a failure to answer a particular question. The prosecutor made repeated comments about Mr. Braddy's failure both to answer questions and to volunteer information for which he was never asked.

If the defendant is the only person who could contradict the State's evidence, the argument that the evidence is uncontradicted is a comment on the defendant's silence. *Rodriguez*, 753 So. 2d at 38. According to the state's evidence, immediately after Detective Smith assaulted Mr. Braddy, Smith and Braddy

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[29] These remarks are just a few examples of the improper questioning. Others included the fact that Mr. Braddy never told detectives why he rented the Lincoln Town Car (T. 2048), or that he was hypoglycemic, or he associated with the "immoral" Shandelle Maycock (T. 2050), or volunteered that he cleaned out the interior of the car (T. 2052), that he did not direct detectives to the boat ramp (T. 2159, 2203), and that early in the interrogation, he did not tell the detectives Quatisha's location (T. 1958)

became "buddies." (T. 2664). This claim, while incredible, was harmful to the defense argument that Mr. Braddy's statements were coerced. To bolster this improbable account, the prosecution argued:

> … I don't understand this guy bonding, but they started bonding over hunting. Detective Smith knew about hunting, he knew about hunting. You even heard the detective say – I don't understand that kind of behaviors that he had just yanked him out of the door and suddenly they're buddies. I don't understand it, but that's what the evidence shows. *There's absolutely nothing to contradict it.*

(T. 2663).

The prosecution also commented on Mr. Braddy's decision to exercise his *Fourth* amendment rights. "[C]omments on the Fourth Amendment and Fifth Amendment are considered 'constitutional error of the same magnitude.'" *Kearney v. State*, 846 So. 2d 618, 620 (Fla. 4th DCA 2003) (quoting *Gomez v. State*, 572 So. 2d 952 (Fla. 5th DCA 1991); *see also United States v. Moreno*, 233 F.3d 937, 941 (7th Cir. 2000). Ms. Rifkin argued: "They signed a consent to search. What does he do? He starts to hesitate on the last consent to search." (T. 2659). There could be no legitimate purpose for this comment. As the prosecutor pointed out in the next paragraph, the searches were authorized by warrants. The comment was designed to have jurors treat any hesitation in the exercise of a constitutional right as evidence of guilt in violation of U.S. Const. amends. IV, VIII, XIV; Art. I, §§ 9, 12, 16, 17, Fla. Const.

The state even commented on Mr. Braddy's exercise of his right to trial. Like comments on the right to silence, arguments using the exercise of right to trial by jury against a defendant violate the Federal and State constitutions. *See United States v. Ochoa-Zarate*, 540 F.3d 613, 617-19 (7th Cir. 2008); *Cunningham v. Zant*, 928 F.2d 1006, 1019-20 (11th Cir. 1991); U.S. Const. amends. V, VIII, XIV; Art. I, §§ 9, 16, 17, Fla. Const.[30] Ms. Rifkin argued:

> He was in charge of the situation. He had two hundred people up there looking around, following his word. **He was the center of attention just like he is right now**. And he was milking this.

(T. 2663). The prosecutor told the jury that the entire trial was merely an exercise to gratify Mr. Braddy's desire for attention. The comment had no legitimate purpose, and served only to inflame the jury. *See Cunningham v. Zant*, 928 F.2d at 1020.

D. Inflammatory Personal Attack.

Closing argument "must not be used to inflame the minds and passions of the jurors so that their verdict reflects an emotional response to the crime or the defendant rather than the logical analysis of the evidence in light of the applicable

[30] *See also People v. Herrero*, 756 N.E.2d 234 (Ill. App. 1 Dist. 2001) ("For prosecutor Hughes to have commented on Herrero's decision to exercise his constitutional right to a jury is outrageous, casting a shadow over the proceedings that simply cannot be ignored. Courts cannot countenance prosecutors invading the substantive rights of the accused by making comments that would penalize a defendant for the use of his constitutional rights.")

law." *Bertolloti v. State*, 476 So. 2d 130, 134 (Fla. 1985). The prosecution made such an inflammatory personal attack when it excoriated Mr. Braddy for failing to live up to his religious principles:

> What do we know about this defendant as far as his loving and giving heart when it comes to giving aid? He describes himself as a religious man to Detective Suco, does he not? He can talk the talk, but he can't walk the walk. Because if you're religious, if you believe in the Good Book, then you live by the Word. The word of charity, the lack of selfishness.

(T. 2649). This argument was not relevant to any of the legitimate issues before the jury. The prosecutor argued this solely to further inflame their passions against Mr. Braddy.

This Court has repeatedly warned against arguments invoking religion. *See, e.g., Brooks v. State*, 762 So. 2d 879, 902 (Fla. 2000); *Lawrence v. State*, 691 So. 2d 1068, 1074 (Fla. 1997); *Bonifay v. State*, 680 So. 2d 413, 418 n.10 (Fla. 1996). Such arguments "can easily cross the boundary of proper argument and become prejudicial argument." *Bonifay*, 680 So. 2d at 418 n.19. The State's improper argument here crossed that boundary.

E. Duty to Reject Lesser Offenses.

The prosecution further argued that jurors had a duty to reject lesser-included offenses:

> [MS. RIFKIN]: To find him guilty of anything less than an intentional premeditated first-degree murder, either by premeditation or felony would be to minimize what occurred.
>
> [DEFENSE]: Objection, Your Honor.
>
> THE COURT: All right. The objection is sustained. Rephrase it, please.
>
> [MS. RIFKIN}: To find him guilty of anything less would not be supported by the evidence, and it would be a **miscarriage of justice**.

(T. 2682-83). Through this argument, the prosecutor told jurors that a conviction of a lesser offense as urged by the defense would be a miscarriage of justice – i.e., a violation of their duty as jurors. It is error for the prosecution to "exhort the jury to 'do its job.'" *United States v. Young*, 470 U.S. 1, 18 (1985). "There should be no suggestion that a jury has a duty to decide one way or the other; such an appeal is designed to stir passion and can only distract a jury from its actual duty: impartiality." *United States v. Mandelbaum*, 803 F.2d 42, 44 (1st Cir. 1986) (quoted in *Reddish v. State*, 525 So. 2d 928 (Fla. 1st DCA 1988)). In *Reddish*, the court condemned the argument that the jury would be "in violation of your oath [sic] as jurors" if they "succumb[ed] to the defense argument" as "an impermissible attempt by the prosecution to instruct the jury as to its duties and functions." *Id.* at 930. Ms. Rifkin told jurors to reject lesser-included offenses not just because she had proven the greater offenses, but because it was their duty to do so. In addition to this, Mr. Rifkin directly told the jury it was their "duty" to

"make a determination that the state has proved the case beyond a reasonable doubt …" (T. 2674).

F. Misstating the Evidence.

Ms. Rifkin also misstated the evidence. To contradict the defense argument that Quatisha's injuries occurred during the jump from the car, she argued that that the "brush burns" or "road rash" injuries were made by alligators dragging the child across the rock. (T. 2726). Dr. Perper, however, flatly contradicted this theory in his testimony. (T. 2517-18). Attempts to "pervert or misstate the evidence" constitute prosecutorial misconduct. *See Akin v. State*, 98 So. 609, 613 (Fla. 1923).

G. Harmful Error

Defense counsel objected to the prosecutor's allegation that they were misrepresenting the evidence, her argument criticizing them for the legitimate use of cross-examination, the argument that to convict Mr. Braddy of lesser offenses would be a miscarriage of justice, and to her attempt to misstate Dr. Perper's testimony. (T. 2722-23, 2725-26, 2683). The Court considers "the properly preserved comments … combined with additional acts of prosecutorial overreaching …" *Ruiz v. State*, 743 So. 2d 1, 7 (Fla. 1999); *see Merck v. State*, 975 So. 2d 1054, 1061 (Fla. 2007) ("The Court considers the cumulative effect of

objected-to and unobjected-to comments when reviewing whether a defendant received a fair trial"). When the objected-to and unobjected-to comments are taken together, the state cannot prove beyond a reasonable doubt that the prosecutor's misconduct did not contribute to the verdict. *DiGuilio*, 491 So. 2d at 1136.

VII. THE EVIDENCE IS LEGALLY INSUFFICIENT TO SUPPORT A CONVICTION FOR BURGLARY, IN VIOLATION OF THE DUE PROCESS CLAUSES OF THE STATE AND FEDERAL CONSTITUTIONS.

In 1998, burglary was defined as: "[E]ntering or remaining in a dwelling, a structure, or a conveyance with the intent to commit an offense therein, unless the premises are at the time open to the public or the defendant is licensed or invited to enter or remain." § 810.02, Fla. Stat. (1998). In *Delgado v. State*, 776 So. 2d 233, 240-42 (Fla. 2000), this Court held that a defendant could not be convicted of burglary based on "remaining in" unless that "remaining in" was done surreptitiously. Despite legislative attempts to "overrule" this decision,[31] the Court has declined to recede from *Delgado*, and has squarely held that it applies to offenses that occurred prior to February 1, 2000. *State v. Ruiz*, 863 So. 2d 1205, 1210 (Fla. 2003). In the present case, the entry into Shandelle Maycock's apartment was consensual, and there was no evidence that Mr. Braddy remained

[31] *See* Ch. 2001-58 § 1 and ch. 2004-93 § 1, Laws of Fla., creating and amending § 810.015, Fla. Stat.

surreptitiously.[32,33] The trial court erred in denying Mr. Braddy's motion for a judgment of acquittal and in instructing the jury to return a guilty verdict on the burglary count if it found he had "remained therein after permission to remain had been withdrawn . . ."[34] (R. 2934; T. 2765).

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[32] The state did not contend that Mr. Braddy's entry into the apartment was not consensual. Instead, it argued that *Delgado* does not apply because Ms. Maycock eventually asked him to leave. *Delgado*, however, still applies where the record establishes that the victim explicitly communicated that consent to remain had been withdrawn. *See Bledsoe v. State*, 764 So. 2d 927 (Fla. 2d DCA 2000); *Stenson v. State*, 756 So. 2d 118, 120 (Fla. 3d DCA 2000) (opinion on motion for rehearing).

[33] The sufficiency of the evidence is reviewed *de novo*, viewing the evidence in the light most favorable to the state, to determine if there is competent substantial evidence to support the conviction. *See Pagan v. State*, 830 So. 2d 792, 803 (Fla. 2002).

[34] In 2001, the Legislature enacted section 810.015 with the stated intent that *Delgado* "be nullified." § 810.015, Fla. Stat. (2001). In *State v. Ruiz*, 863 So. 2d 1205, 1210 (Fla. 2003) and *Floyd v. State*, 850 So. 2d 383, 402 n.29 (Fla. 2002), this Court held that by its plain language section 810.015 did not apply to offenses committed before February 1, 2000. In 2004, the Legislature amended section 810.15 in an attempt to overrule *Ruiz* and *Floyd*. This Court and the district courts have continued to follow *Ruiz*, applying *Delgado* to cases where the offense occurred prior to February 1, 2000. *See, e.g.*, *Lynch v. State*, 2 So. 3d 47 (Fla. 2008) ("*Delgado* applies to burglaries committed before February 1, 2000, which had not been finally adjudicated at the time this Court issued its opinion in that case …"); *State v. Robinson*, 936 So. 2d 1198 (Fla. 1st DCA 2006); *Wiggins v. State*, 933 So. 2d 1224 (Fla. 1st DCA 2006); *Gatto v. Sate*, 942 So. 2d 1025 (Fla. 4th DCA 2006).

The attempt to legislatively "overrule" Delgado violates the separation of powers established by article II, section 3 of the Florida Constitution. *See Smith v. State*, 547 So. 2d 613 (Fla. 1989), *supersceded by statute on other grounds as stated in Valdes v. State*, 3 So. 3d 1067 (Fla. 2009). Retroactive application of section

VIII. THE EVIDENCE IS LEGALLY INSUFFICIENT TO SUPPORT A CONVICTION FOR CHILD NEGLECT, IN VIOLATION OF THE DUE PROCESS CLAUSES OF THE STATE AND FEDERAL CONSTITUTIONS.

The crime of child neglect punishes negligence by "caregivers." § 827.03(a). Harrel Braddy was not Quatisha Maycock's caregiver, and the Court must reverse Mr. Braddy's conviction on count VI of the indictment.[35]

Section 827.03 defines child neglect as a caregiver's failure to care for, supervise, or protect a child. § 827.03(3), Fla. Stat. 1998. "Caregiver" is in turn defined as "a parent, adult household member, or other person responsible for a child's welfare." § 827.01(1).

Mr. Braddy does not fall within the definition of caregiver. He was a frequent visitor to Shandelle Maycock's home, but did not live there, and Ms. Maycock testified that he never slept over. (T. 1822-23). He gave Shandelle rides, but he only drove Quatisha on November 6, when he drove Shandelle to pick Quatisha up. (T. 1678). Mr. Braddy did not stand in *loco parentis*, he did not

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810.015 would also violate the constitutional prohibition of ex post facto laws. U.S. Const. Art. I, §10; Art. I § 10 Fla. Const. *see Lynce v. Mathis*, 519 U.S. 433, 442 (1997); *Smith*, 547 So. 2d at 616-17.

[35] "[A]n argument that the evidence is totally insufficient as a matter of law to establish the commission of a crime need not be preserved. Such complete failure of the evidence meets the requirements of fundamental error – i.e., an error that reaches to the foundation of the case and is equal to a denial of due process. *F.B. v. State*, 852 So. 2d 226, 230-31 (Fla. 2003).

supervise or direct the child, nor did he have a legal duty to do so. He was not a caregiver within the meaning of the statute, and the conviction for child neglect cannot stand. *Compare Durand v. State*, 820 So. 2d 281 (Fla. 5th DCA 2002) (defendant was a caregiver where victim's family lived in Durand's house and he was involved in the supervision and direction of the child); *State v. Christie*, 939 So. 2d 1078 (Fla. 3d DCA 2005) (public school teacher a caregiver because she stands in *loco parentis* and owes a duty to supervise the students placed within her care).

IX. THE CIRCUMSTANTIAL EVIDENCE WAS LEGALLY INSUFFICIENT TO PROVE ESCAPE, IN VIOLATION OF THE DUE PROCESS CLAUSES OF THE STATE AND FEDERAL CONSTITUTIONS.

The state may prove its case using circumstantial evidence. But if the evidence of the defendant's guilt is circumstantial, the state must exclude every reasonable hypothesis of innocence. *See Long v. State*, 689 So. 2d 1055 (Fla. 1997). This same rule applies to the sufficiency of the state's proof of a defendant's intent. *See, e.g., Norton v. State*, 709 So. 2d 87 (Fla. 1998) (evidence, though sufficient to prove that defendant shot victim in back of head, was insufficient to establish premeditated intent to kill). A court will reverse where there is no competent, substantial evidence to exclude the hypothesis of innocence. *Long*, 689 So. 2d at 1058. "Evidence that creates nothing more than a strong

suspicion that a defendant committed the crime is not sufficient to support a conviction." *Id.*

To establish a prima facie case of escape, the state is required to prove "The physical act of leaving … custody coupled with the intent to avoid lawful confinement" *Helton v. State*, 311 So. 2d 381 (Fla. 1st DCA 1975). The detectives testified that (1) Mr. Braddy was standing on a chair with his shoes off. (T. 2064), and (2) they later discovered that the grating above that chair had been bent or pulled away. (T. 2066). Because this circumstantial evidence is entirely consistent with the hypothesis that Mr. Braddy intended to commit suicide, it is insufficient to establish escape.

X. THE PROSECUTOR'S PENALTY PHASE CLOSING ARGUMENT WAS REPLETE WITH IMPERMISSIBLE COMMENTS: VOUCHING FOR THE LEGITIMACY OF HER CASE FOR DEATH; GOLDEN RULE ARGUMENTS; INSTRUCTING THE JURORS THAT A VOTE FOR LIFE IS TAKING "THE EASY WAY OUT;" ATTACKING THE DEFENDANT AND DEFENSE COUNSELS' CHARACTERS; AND TRANSFORMING CLASSIC MITIGATION INTO AGGRAVATION, IN VIOLATION OF THE DEFENDANT'S RIGHTS TO A FAIR TRIAL BY AN IMPARTIAL JURY, AS GUARANTEED BY ARTICLE 1, SECTIONS 9, 16, AND 17 OF THE STATE CONSTITUTION, AND THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE FEDERAL CONSTITUTION.

As in the guilt phase, the prosecutor's misconduct deprived Harrel Braddy of the due process of law, trial by an impartial jury, and a reliable sentencing process. The prosecution "provided a 'textbook' example of unprofessional and overzealous

advocacy." *Brooks v. State*, 762 So. 2d 879, 905 (Fla. 2000). As the Court observed in *Brooks*: "This type of excess is especially egregious in this, a death case, where both the prosecutors and courts are charged with an extra obligation to ensure that the trial is fundamentally fair in all respects." *Id.*

A. Vouching

Again and again, the prosecutor used the authority of her office and her decision to seek the death penalty to persuade jurors that execution was the only appropriate punishment. A prosecutor may not suggest to jurors that the state would not execute those who do not deserve death. *See Brooks v. State*, 762 So. 2d 879, 901-02 (Fla. 2000); *Ruiz v. State*, 743 So. 2d 1, 5 (Fla. 1999); *Pait v. State*, 112 So. 2d 380, 384-85 (Fla. 1959); *Lavin v. State*, 754 So. 2d 784, 786 (Fla. 3d DCA 2000). Such arguments are a form of "vouching"[36] which suggest that the prosecutor has additional evidence of guilt or aggravation, imply the prosecutor's personal or professional opinion, and tell jurors that the defendant would not be before them if the state had not already determined that he must be executed. For example, in *Pait* the prosecutor stated: "Before each murder trial that is prosecuted in this circuit, where I'm the State Attorney, a conference is held between me and my assistants to determine whether or not the facts in the case justify the State's

[36] *Brooks*, 762 So. 2d at 902.

giving maximum punishment under the law." 112 So. 2d 383-84. The Court condemned the argument, observing:

> [T]he statement of the prosecutor to the effect that he and his staff always confer on the facts of a case to determine whether they would ask the maximum penalty and referring back to his remarks on voir dire with reference to sending the defendant 'to the electric chair', we think transcended the limitations of appropriate argument to the jury … It is not appropriate to undertake to give the jury the benefit of the composite judgment of the State Attorney's staff allegedly reached on the basis of investigations and discussions taking place before the trial.

Id. at 384-85.

Ms. Rifkin, made her "prosecutorial expertise"[37] a feature of her argument:

> **The death penalty is not applied to every murder case.** It just isn't because, of course, each case is taken on its own merits. Each case is taken on its own fact. Each defendant is looked at for his own merits, his own background. Of course we'll get to that later when we start to talk.

(T. 3312). The defense objected that the state was "vouching for the death penalty," but the court overruled. (T. 3312).

Immediately, the prosecutor continued:

> **[W]here the State is seeking the death penalty, what we have to look at are those murder cases that are so egregious, those defendants who commit acts that are so egregious, who have backgrounds that are so bad that they have earned the death penalty.**

* * *

[37] *See Brooks*, 762 So. 2d at 901.

> The State's burden is to prove the aggravators beyond a reasonable doubt. And the Legislature has set out **what the determination is that the State has to make in bringing a case like this to you as a death penalty case**, okay.

(T. 3312-13). The defense again objected, and the court told the prosecutor to "move along." (T. 3313).

Later, the prosecutor told the jury that Mr. Braddy was only on trial because he had "earned the death penalty":

> Let's not forget what happened here. There's a reason she's [sic] sitting here with you. Let's not forget what happened here. This is a case **where the defendant has earned the death penalty** …

(T. 3355).

The prosecutor thus told the jurors that there had already been an extra-judicial determination that Harrell Braddy should be sentenced to death, and that indeed he would not even be there otherwise. Ms. Rifkin's remarks are similar to the prosecutor's comment in *Brooks*, though more pervasive and egregious. In *Brooks*, the prosecutor argued: "I would submit now that the State does not seek the death penalty in all first-degree murders because it's not always proper, not always appropriate." 762 So. 2d at 901. The Court stated:

> [T]he prosecutor here was undoubtedly correct in stating that the State does not seek the death penalty in all first-degree murder cases. However, while that certainly is a true statement, it is also irrelevant and tends to cloak the State's case with legitimacy as a bona-fide death penalty prosecution, much like an improper "vouching" argument.

Id. at 902. Less than six months ago, this Court held improper an argument that closely mirrors Ms. Rifkin's:

> The State doesn't seek the death penalty in all first degree murders, it's not always proper to do that.... But where the facts, where there are facts surrounding the murder that demand the death penalty, the state has an obligation to come forward and seek the death penalty. This is one of those cases.

Ferrell v. State, 35 Fla. L. Weekly S53 (Fla. Jan. 14, 2010).

B. Golden Rule

The state inflamed the jurors' passions by making an improper "Golden Rule" argument. "In general, a 'golden rule' argument encompasses requests that the jurors place themselves in the victim's position, that they imagine the victim's pain and terror, or that they imagine that their relative was the victim." *Pagan v. State*, 830 So. 2d 792, 812 (Fla. 2002) (quoting *Williams v. State*, 689 So. 2d 393, 399 (Fla. 3d DCA 1997)). "A seasoned prosecutor involved in a capital case knows better than to make an improper 'Golden Rule' argument." *Lugo v. State*, 845 So.2d 74, 107 (Fla. 2003).[38] Nevertheless, Ms. Rifkin repeatedly invited jurors to imagine themselves in Quatisha Maycock's position, over defense objection.

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[38] In *Lugo* the Court determined that the isolated and unobjected-to remark did not rise to the level of fundamental error. 845 So. 2d 106-07.

The prosecutor first called upon jurors to put themselves in Quatisha's place during her guilt-phase closing argument:

> But taking the child out to Alligator Alley in the middle of the night -- and if anybody from their own experience has been on Alligator Alley or any kind of road like that, we know it's pitch black.
>
> * * *
>
> You're five. You'd just seen what he's done to your mother. You're falling out of a moving car, you're five and it's dark. That's terrifying.
>
> * * *
>
> You're five. You jumped out of a moving car. You seen what he's done to your mother, and you're terrified.

(T. 2656-57, 2666).

In the penalty phase, the prosecutor – without record evidence – first created an emotional script of what Quatisha might have said:

> [MS. RIFKIN]: What happens? It's dark and they are driving. And they are driving, and they are driving, and they are driving.
>
> Where's mommy? Where's mommy?
>
> [DEFENSE]: Objection, Judge. Improper argument.
>
> COURT: Overruled.

(T. 3331). Such arguments creating an imaginary first-person script are a form of prohibited Golden Rule argument. In *Urbin v. State*, 714 So. 2d 411 (Fla. 1998), the Court held:

> By literally putting his own imaginary words in the victim's mouth, *i.e.*, "Don't hurt me. Take my money, take my jewelry. Don't hurt

> me," the prosecutor was apparently trying to "unduly create, arouse and inflame the sympathy, prejudice and passions of [the] jury to the detriment of the accused."

Id. at 421 (quoting *Barnes v. State*, 58 So. 2d 157, 159 (Fla.1951)); *see also McDonald v. State*, 743 So. 2d 501, 505 (Fla. 1999). In *Taylor v. State*, 640 So. 2d 1127, 1133-35 (Fla. 1st DCA 1994), the Court found harmful error where the prosecutor speculated that the victim's last words were, "Don't hurt my Mommy anymore."

As in the guilt phase, the prosecutor invited jurors to imagine themselves in Quatisha's place, substituting "you" for her name in describing her experience:

> "It's dark, it's pitch black. You've seen all of this. And then, you get thrown in … it's even worse probably if you left her there to die and drive away and she fell in. You even have more time to think about it. You have more time to be afraid."

(T. 3333, 35).

Ms. Rifkin went on to *instruct* jurors to imagine themselves in Quatisha's place during their deliberations:

> [Ms. Rifkin]: But the time between U.S-27 and when she gets hit in the head, I want you to go back there and sit for five minutes and let yourself think of the fear.
>
> [DEFENSE]: Objection. Golden Rule, Judge. I have a motion.

(T. 3333-34). The court sustained the objection and instructed the jury to disregard the comment, but denied the subsequent motion for mistrial. (T. 3369-70).

The state's argument was nearly identical to one the Court recently questioned in *Davis v. State*, 928 So. 2d 1089, 1121 (Fla. 2005). There the prosecutor suggested that in their deliberations, jurors should sit in silence for two minutes in order to appreciate the five minutes the victim remained conscious. The Court decided *Davis* on the *Strickland*[39] standard for ineffective assistance of counsel. The Court concluded that trial counsel may have been deficient but, while it was a "close case," no *Strickland*-prejudice was established. *Id.* at 1122.

C. Easy way out

The state told the jury it could not "take the easy way out" and vote for life. (T. 3355). This argument was a near carbon-copy of arguments this Court rejected in *Urbin v. State*, 714 So. 2d 411 (Fla. 1998) and *Brooks v. State*, 762 So. 2d 879 (Fla. 2000) and *Ferrell v. State*, 35 Fla. L. Weekly S53 (Fla. Jan. 14, 2010).

In *Urbin* the prosecutor argued:

> "[M]y concern is that some of you may be tempted to take the easy way out, to not weigh the aggravating circumstances and the mitigating circumstances and not want to fully carry out your responsibility and just vote for life. … I'm going to ask you to follow the law. I'm going to ask you to do your duty."

714 So. 2d at 421. The Court concluded that the prosecutor improperly "asserted that any juror's vote for a life sentence would be irresponsible and a violation of the

[39] *Strickland v. Washington*, 466 U.S. 668 (1984)

juror's lawful duty." *Id.* The argument, moreover, misstated the law because a juror is not obliged to vote for death even where the aggravators outweigh the mitigation. *Id.* at 421 n.12 (citing *Henyard v. State*, 689 So.2d 239, 249-50 (Fla. 1996)).

In *Brooks*, the prosecutor "clearly overstepped the bounds of proper argument" by stating:

> I'm concerned about the temptation some of you may have, and that is that you may want to take the easy way out and not weigh out all the aggravating circumstances, not analyze the law or the facts, take the easy way out and just quickly vote for life.
>
> I submit to you, don't do that; follow the law, do your duty.

762 So. 2d at 903. The Court held these comments, among others, to be "egregiously improper." *Id.* at 904.

Most recently, the Court held that a prosecutor "invited the jury to disregard the law," when he argued:

> Some of you may be tempted to take the easy way out, and by that, I mean, you may be tempted not to weigh all of these aggravating circumstances and to consider the mitigating circumstances. That you may not want to carry out your full responsibility under the law and just decide to take the easy way out and to vote for death. I'm sorry, vote for life … I ask you not to be tempted to do that, I ask you to follow the law, to carefully weigh the aggravating circumstances, to consider the mitigating circumstances, and you will see these aggravating circumstances clearly outweigh any mitigating circumstances if there are any. And then under the law and the facts death is a proper recommendation.

Ferrell, slip op. 50-51.

Here, Ms. Rifkin argued:

> Life does means life. Is that the appropriate sentence here?
>
> It's not what's good enough. It's what's appropriate. That's what you have been charged with doing as a jury, as a jury in this state, as sworn jurors, as people who have sworn to follow the law as it is set out in these instructions. That's your job. **Not to do what's good enough. Not to do what's easy.** Your job is to do the hard one. Your job is to give him the consideration he's entitled to and the State the consideration that Its [sic] entitled to.

(T. 3355).

Ms. Rifkin misstated the law, and conveyed precisely the same message as that condemned in *Ferrell*, *Urbin* and *Brooks*: A vote for life would be taking the easy way out in violation of their duty as jurors. As in *Brooks*, this argument was "egregiously improper" and deprived Mr. Braddy of a fair trial.

D. Attacking Mr. Braddy's Character as "Violent Since Birth" and Unfaithful to His Wife.

The prosecution improperly mounted an inflammatory personal attack against Mr. Braddy. A prosecutor may not engage in attacks on the character of the defendant calculated to inflame the jurors' passions. *King v. State*, 623 So. 2d 486, 488 (Fla. 1993). In particular, prosecutors may not portray a defendant as having a violent character. *Brooks v. State*, 762 So. 2d 879, 900 (Fla. 2000); *Urbin v. State*, 714 So. 2d 411, 420 n.9. Nevertheless, the prosecutor argued:

> The defendant has previously been convicted of a violent felony. Not one, not two. Twelve. Four separate crimes, four separate dates. **This**

> **is a guy who cannot live out in the community without hurting someone.**
>
> Now, ladies and gentlemen of the jury, **you don't just wake up one morning and say I'm going to be violent today. I will submit to you that this has been since birth. He's been this way since birth.** And no matter what he says or no matter what he does with his family, this is cruel, heinous.

(T. 3315-16).

This Court rejected similar arguments in *Brooks* and *Urbin*. In *Brooks*, the prosecutor argued that the defendant was a person with a "true deep seated violent character," was a man of "long-standing violence," and was "violent to the core." In *Urbin*, the prosecutor made nearly identical comments. Ms. Rifkin took the argument one better, telling jurors that Harrel Braddy had been violent since the day of his birth.

The prosecutor also insinuated and then argued that Mr. Braddy had been unfaithful to his wife. Cyteria Braddy testified that Harrel was a good and loving husband. (T. 3215-34). Over defense objection, the court permitted the state to attempt to impeach Ms. Braddy by alleging that her busband had cheated on her with two women. The prosecutor began by asking:

> [MS. RIFKIN]: Mrs. Braddy, as far as you know, did your husband have extramarital relationships outside of your marriage?

After the judge overruled the defense objection and denied a motion for mistrial, Ms Braddy replied:

> THE WITNESS: Do I know? No, I don't know of any. I don't. I don't know of any.

(T. 3240). At this point it was clear that the state would not be able to use Ms. Braddy's testimony to establish these alleged affairs. Undeterred, Ms. Rifkin used her own questions: "Are you aware of your husband being involved in a relationship with June Wallace?" (T. 3240). Ms. Braddy replied that she was not. (T. 3241). Ms. Rifkin asked the same question regarding a woman named Dolores Capers. Again, the answer was no. (T. 3241).

"It is impermissible for the state to insinuate impeaching facts while questioning a defense witness without evidence to back up those facts." *Shimko v. State*, 883 So. 2d 341, 343 (Fla. 4th DCA 2004) (citing *Smith v. State*, 414 So. 2d 7, 7 (Fla. 3d DCA 1982)); *see also Thornton v. State*, 852 So. 2d 911, 912 (Fla. 3d DCA 2003); *Marsh v. State*, 202 So. 2d 222, 224 (Fla. 3d DCA 1967). Ms. Rifkin effectively made herself a witness. Her questions conveyed to the jury that evidence of these affairs existed, even though she knew she could not enter it in evidence. The prosecutor compounded this error by arguing the unadmitted "facts" to the jury:

> Good husband? You heard from Mrs. Braddy yesterday. Good husband is someone who's there for his spouse. A good husband is someone who provides for his spouse. A good husband is not someone who's out with others while his wife is raising the children.

(T. 3351). Ms. Rifkin thus improperly argued facts not in evidence, “facts” the jury only knew about because of her own testimony on cross-examination. *See Shimko*, 883 So. 2d at 343; *Robinson v. State*, 989 So. 2d 747 (Fla. 2d DCA 2008).

E. Attacks on Defense Counsel

As it did in the guilt phase, the prosecution improperly attacked defense counsel. The prosecutor told the jury that defense counsel would “scream” and “shout” in order to confuse or distract them:

> Now, Mr. Lenamon is going to get up here, and he's – I know he's going to scream about – I think he told you HAC, CCP.

(T. 3314). The defense objected, and the court asked the prosecutor to rephrase the comment. Later, Ms. Rifkin, argued:

> So they're going to be arguing about the ones and screaming about the ones that they can. Because if you scream loud enough, maybe you can drown out the shouts of the ones that are written in stone.

(T. 3326). The defense objected, and the court asked the prosecutor “please” not to use the word “shout.”

As discussed above, arguments accusing the defense of attempting to confuse or distract the jury are improper. *See Sanchez v. Nerys*, 954 So. 2d 630 (Fla. 3d DCA 2007) (arguments that counsel was “pulling a fast one,” “hiding something,” and “trying to pull something”); *Servis v. State*, 855 So. 2d 1190, 1193 (Fla. 5th DCA 2003) (accusing counsel of “throw[ing] whatever they can against

the wall and see[ing] what sticks”); *D’Ambrosio v. State*, 736 So. 2d 44 (Fla. 5th DCA 1999); *Lewis v. State*, 711 So. 2d 205 (Fla. 3d DCA 1998) (“You see different types of defenses. It is my job to present the evidence and it is their job to question the evidence. But you know, the manner with which they're questioning it, there's no other term for it, it's just lame.”)

The prosecution also castigated counsel for his legitimate conduct of the defense. The prosecutor predicted that counsel would question the credibility of Detective Hoadley’s allegation that Mr. Braddy made the statements supporting the witness-elimination aggravator. She characterized the defense as improperly “attacking” law enforcement:

> They're going to attack the police in this case. You heard it in opening statements. They are going to attack and tell you that they are lying.
>
> * * *
>
> **The reason he had to attack Detective Hoadley** is because if you believe Detective Hoadley, if you believe what he said, then the aggravator, as far as eliminating a witness, is proven. **So he had to make Detective Hoadley look like a liar.**
>
> * * *
>
> What you're going to hear from the Defense is that Detective Hoadley is a liar, liar, liar.
>
> * * *
>
> And then Mr. Lenamon went into, **if you recall his attack**, he indicated to you that she was conscious at the time?

(T. 3357, 3361-63).

The prosecutor falsely told jurors that counsel's attempts to question the evidence against his client were improper and illegitimate. These arguments served to "shift[] the jury's focus from an objective analysis of the evidence to an emotional and personal analysis of defense counsel as an individual." *Adams v. State*, 830 So. 2d 911, 915-16 (Fla. 3d DCA 2002); *see also Lewis v. State*, 780 So. 2d 125 (Fla. 3d DCA 2001).

The prosecutor also used this argument to bolster the credibility of Detective Hoadley. She told jurors that if they believed the detective, the witness-elimination aggravator was proven, and then repeatedly warned jurors that the defense would "attack" the detective and call him a liar. (T. 3357, 3361-63). Attempting to refute this anticipated "attack," Ms. Rifkin stated: "That's why you go out to speak to family members. Not to concoct anything. There's no reason to concoct anything. *They don't get paid extra to concoct things.*" (T. 3364). This was a classic example of bolstering a police officer's credibility. Arguments that an officer has nothing to gain from his testimony or has no interest in the case are impermissible. *See Servis v. State*, 855 So. 2d 1190, 1195 (Fla. 5th DCA 2003); *Brown v. State*, 787 So. 2d 229 (Fla. 2d DCA 2001); *Davis v. State*, 663 So. 2d 1379 (Fla. 4th DCA 1995) (Pariente, J.).

F. Diminishing Mitigation

The State told jurors to treat mitigating evidence as non-statutory aggravation. Florida's death-penalty statute strictly limits the factors the jury and judge may consider in aggravation. § 921.141, Fla. Stat. (1998); *see State v. Steele*, 921 So. 2d 538, 544 (Fla. 2005) (*citing Miller v. State*, 373 So. 2d 882, 885 (Fla. 1979)). The Court must "guard against any unauthorized aggravating factor going into the equation which might tip the scales of the weighing process in favor of death." *Miller*, 373 So. 2d at 885. Here the state used non-statutory aggravators to put its thumb on those scales. Treating "conduct that actually should militate in favor of a lesser penalty" as aggravation results in a denial of due process. U.S. Const. amend. XIV; Art. I § 9, Fla. Const.; *Zant v. Stephens*, 462 U.S. 862, 885 (1983), *quoted in Walker v. State*, 707 So. 2d 300, 314 (Fla. 1997).

A large part of the mitigation case focused on Mr. Braddy's family background and his positive role within the family. This is a recognized mitigating factor. *Hurst v. State*, 819 So. 2d 689, 699 (2002). The prosecutor commenced her argument against the mitigation by, conceding that, "this is a lovely, lovely, lovely family," then instructing the jurors that this mitigation actually militated in *favor* of the death penalty: "**You know, his family highlights, highlights the fact that the aggravators outweigh the mitigators.**" (T. 3340-41).[40]

[40] The court overruled the defendant's objection. (T. 3341).

Ms. Rifkin actually criticized Mr. Braddy for even presenting this mitigating evidence: "His family has already been hurt by this defendant. Why were these people brought in to demonstrate things to you? 12, 13 of them. Not only family, but the friends." (T. 3341). She reinforced this point, musing: "All 13. Why were those 13 people brought in to you? One or two would have done it." (T. 3342). This argument in no way rebutted the mitigating evidence. Instead, it told the jury that the very act of presenting mitigation was yet another of Harrel Braddy's misdeeds to be counted against him in sentencing him to death.

G. Harmful Error

As observed above, the court does not consider improper prosecutorial arguments singly. It looks to the cumulative harm, and considers the preserved errors in the context of the unobjected-to misconduct. *See Ruiz v. State*, 743 So. 2d 1, 7 (Fla. 1999); *Merck v. State*, 975 So. 2d 1054, 1061 (Fla. 2007) ("The Court considers the cumulative effect of objected-to and unobjected-to comments when reviewing whether a defendant received a fair trial"). Defense counsel objected to many of the most serious instances of misconduct. He objected to vouching arguments, the Golden Rule arguments, the attacks on counsel, the insinuations of infidelity, and the attempts to convert mitigating evidence into aggravation. (T. 3240, 3312-14, 3326, 3331, 3333-34, 3341-42, 3351, 3369-70).

The state cannot prove beyond a reasonable doubt that the prosecutor's misconduct did not contribute to the verdict. *DiGuilio*, 491 So. 2d at 1136. The Golden Rule argument alone requires reversal. "[Golden Rule] arguments constitute reversible error, if a contemporaneous objection is made, because they strike at the very heart of our justice system …" *SDG Dadeland Assoc., Inc. v. Anthony,* 979 So. 2d 997, 1003 (Fla. 3d DCA 2008). The prosecutor asked the jury to return a death verdict in light of the state's own pre-trial decision, it urged the jurors to imagine themselves in the place of the child, it called for death for a man violent from birth, and it told the jury to treat mitigation as a reason for death. Having told the jury to use these factors in sentencing Harrel Braddy to death, it cannot now prove these errors did not contribute to the verdict, particularly in light of the non-unanimous verdict. *See Johnson v. State*, 35 Fla. L. Weekly S43 (Jan. 15, 2010).

XI. THE TRIAL COURT ERRONEOUSLY LIMITED DEFENSE COUNSEL'S PENALTY PHASE CLOSING BY REQUIRING HIM TO ARGUE ALL OF THE MITIGATING EVIDENCE AS COMPRISING A SINGLE MITIGATING FACTOR, IN VIOLATION OF THE SECTION 921.141, ARTICLE I, SECTIONS 9 AND 17 OF THE STATE CONSTITUTION AND THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE FEDERAL CONSTITUTION

The Court has held that a judge need not instruct jurors on each proposed "non-statutory" mitigating factor. *Gore v. State*, 706 So. 2d 1328, 1334 (Fla.

1997); *Robinson v. State*, 574 So. 2d 108, 111 (Fla. 1991).[41] This does not mean, however, that mitigators not enumerated in subsdection 921.141(6) must be treated collectively as a single mitigating factor. In *Robinson*, the Court rejected a challenge to the standard instruction, stating: "We do not agree that the instruction requires or encourages jurors to consider everything within these categories as a single factor, thereby distorting the weighing process." 574 So. 2d at 111.

Here, however, the trial required defense counsel to argue the nonstatutory mitigation as a single factor. During the defense closing argument, the court ruled that counsel was misleading the jury by "equating each one of those items, 20 or 25 items, as separate mitigating factors." (T. 3387). The judge explained:

> I'm just trying to tell you that the law says that you can't do it in terms of there are 25 separate mitigating factors. There are 25 items that are incorporated into one mitigating factor. While you can talk about each one of them and, you know, the import of each one of them, you can't make it sound like they are separate mitigating factors.

(T. 3387-88). The court's error left the defense to argue that its entire mitigation case wa "a single mitigating factor that you assign weight to, but it involves a lot of different things." (T. 3392). By forcing counsel to argue "a single mitigating factor" in the face of five aggravating factors, the court "distort[ed] the weighing

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[41] This issue presents a question of law. Questions of law are reviewed *de novo*. *State v. Glatzmayer*, 789 So. 2d 297, 301 n. 7 (Fla. 2001).

process," thereby denying Harrell Braddy a fair and reliable sentencing proceeding. U.S. Const. amends. VI, VIII, XIV; Art. I, §§ 9, 16, 17, Fla. Const.

XII. THE TRIAL COURT ERRONEOUSLY ALLOWED THE STATE TO PRESENT UNRELIABLE AND PREJUDICIAL VICTIM IMPACT TESTIMONY THAT SHANDELLE MAYCOCK CONTRACTED CROHN'S DISEASE, A GENETIC DEFECT, AS A RESULT OF THE EPISODE, IN VIOLATION OF SECTION 921.141, ARTICLE I, SECTIONS 9 AND 17 OF THE STATE CONSTITUTION AND THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE FEDERAL CONSTITUTION..

The state used Shandelle Maycock's "victim impact" testimony to blame Harell Braddy for causing a medical condition. This considerably exceeded the scope of victim-impact testimony permitted by the state and federal constitutions. In *Payne v. Tennessee*, 501 U.S. 88 (1991), the Supreme Court held that there is no *per se* rule against the admission of evidence "about the victim and about the impact of the murder on the victim's family." *Id.* at 827. It recognized, however, that unduly prejudicial victim-impact testimony may nevertheless violate the right to due process. *Id.* at 825. The State presented victim-impact evidence against Mr. Braddy that deprived him of due process.

Over objecion, Shandelle Maycock testified:

> … I am unable to hold a job. I have developed Chron's [sic] disease from the stress of the event and reliving the events that took my child's life.

(T. 2914).

Victim impact testimony is admissible to show "moral culpability" or blameworthiness. *Payne*, 501 U.S. at 825. This culpability turns in part on the foreseeable consequences of a defendant's actions. *Payne*, 508 U.S. at 838 (Souter, J., concurring). Every murderer knows that he will leave survivors "who will suffer harms and deprivations from the victim's death." Causation of a particular medical condition goes far beyond the type of foreseeable consequence useful in assessing Harrel Braddy's moral culpability. This is particularly true given that **Crohn's Disease is a genetic, immunological defect.** Defense counsel had no way to rebut this questionable lay testimony. In fact, the court had denied the defense access to Ms. Maycock's medical records. Ms. Maycock's inflammatory testimony was unduly prejudicial and violated the constitutional right to due process. U.S. Const. amend. 14, Art. I, § 9, Fla. Const.

XIII. TO PROVE A PRIOR FELONY CONVICTION, THE STATE INTRODUCED INADMISSIBLE HEARSAY EVIDENCE, IN VIOLATION OF SECTION 90.802, FLORIDA STATUTES, SECTIONS 9, 16, AND 17 OF THE STATE CONSTITUTION AND THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE FEDERAL CONSTITUTION.

Over defense objection, the trial court permitted the state to introduce the arrest affidavit and plea colloquy from case number 84-1192CF10, relating to convictions for armed burglary, robbery and kidnapping. (R. 3462-89). Detective Succo read the affidavit to the jury, recounting Officer Theodor Sorenson's

summary of the evidence in that case. This included Sorenson's own recitation of Lorraine and Joseph Cole's account of what happened to them. (T. 2921-25). The prosecution used this hearsay to suggest that Mr. Braddy would have killed the Cole's if he had the chance. (T. 3315).

The state maintained that hearsay was admissible because … "the rules are relaxed. Hearsay is admissible in some form." (T. 2845). The Sixth Amendment and article I, section 16 guarantee the accused the opportunity to confront his or her accusers. Before the state can introduce an out-of-court statement against a defendant, it must show (1) that the witness is unavailable and (2) that the defendant had a prior opportunity to cross-examine the witness. *Crawford v. Washington*, 541 U.S. 36 (2004).[42] This right of confrontation applies with full force to capital penalty proceedings. *Rodgers v. State*, 948 So. 2d 655, 663 (Fla. 2006).[43] The Coles did not testify, the defense had no prior opportunity to cross-examine them, and the state did not establish their unavailability.[44] Regardless of

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[42] The taking of a discovery deposition does not satisfy the requirement of a prior opportunity to cross-examine the witness. *Blanton v. State*, 978 So. 2d 149 (Fla. 2008).

[43] In *Rodgers*, the court reviewed the *Crawford* error *de novo*.

[44] The state's only showing in this regard was that the Coles would be very old today, and that Detective Suco had not found them at the address where they had lived twenty-three years before the trial. (T. 2845, 2919-20).

whether it was used in the guilt or penalty phase of the trial, the use of this hearsay against Mr. Braddy violated his right of confrontation.

The state suggested a second reason the hearsay was admissible: The arrest affidavit was admissible because Mr. Braddy stipulated to it as the basis of his plea in that case. (T. 2845). The prosecutor offered no authority for the proposition that once a defendant has stipulated that a document forms a factual basis for a plea in one case, he has waived hearsay objections to the admission of that document against him as substantive evidence in all future proceedings. Moreover, it is simply not true that Mr. Braddy stipulated to the contents of the affidavit. During the plea colloquy, the following transpired:

> THE COURT: … Will you accept as a factual basis the probable cause affidavit the police brought out?
>
> THE DEFENDANT: I haven't seen it.
>
> [DEFENSE COUNSEL]: But, Judge, yes, we stipulate to the probable cause affidavit as well as the Information in terms of what the State would present at trial against Mr. Braddy.

(R. 3468). Neither Mr. Braddy nor his attorney stipulated to the truthfulness or admissibility of the hearsay within the affidavit. Counsel merely conceded that it reflected what the state would try to prove.

XIV. THE IMPOSITION OF THE DEATH SENTENCE BASED ON JUDICIAL FACT-FINDING IS CONTRARY TO *RING V. ARIZONA*, 536 U.S. 584, 589 (2002).

The judicial fact-finding required by Section 921.141 violates the Sixth and Fourteenth amendments as interpreted by *Apprendi v. New Jersey*, 530 U.S. 466 (2000), and *Ring v. Arizona*, 536 U.S. 584, 589 (2002). In light of *Apprendi*, "the relevant 'statutory maximum' is not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose *without* any additional findings." *Blakely v. Washington*, 542 U.S. 296, 303-04 (2004) (emphasis in the original). Moreover:

> [B]road discretion to decide what facts may support an enhanced sentence, or to determine whether an enhanced sentence is warranted in any particular case, does not shield a sentencing system from the force of our decisions. *If the jury's verdict alone does not authorize the sentence, if, instead, the judge must find an additional fact to impose the longer term, the Sixth Amendment requirement is not satisfied.*

Cunningham v. California, 549 U.S. 270, 127 S.Ct. 856, 869 (2006).

There can be no doubt that the Florida capital sentencing scheme violates the Sixth Amendment as interpreted by *Apprendi*, *Ring*, *Blakely*, and *Cunningham*. A Florida defendant convicted of first-degree murder may be sentenced to death if

and only if the judge makes findings of fact rendering the defendant death-eligible. § 921.141(3), Fla. Stat. (1999).[45]

XV. CUMULATIVE ERROR

The cumulative effect of the above errors deprived Harrel Braddy of due process of law, and a reliable sentencing process, in violation of the Eighth and Fourteenth Amendments and Article I sections 9 and 17. The prosecution relied on compelled statements, inadmissible evidence and improper argument to win convictions and a death sentence. Cumulatively, these errors must undermined any confidence in the outcome of Mr. Braddy's trial and sentencing.

CONCLUSION

For the foregoing reasons, the convictions and sentence of death must be vacated, and this cause must be remanded for trial.

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[45] The prior-conviction exception the Court has carved out does not render Harrel Braddy's sentence constitutional. The Court has held that there is no Sixth Amendment violation where one of the aggravating circumstances is a prior violent felony. *See, e.g., Doorbal v. State*, 837 So. 2d 940, 963 (Fla. 2003). Section 921.141 does not define death-eligibility by the existence of a single aggravator. Should the Court hold that the jury *is* the factfinder under section 921.141, the non-unanimous verdict independently violated Harrel Braddy's right to a unanimous jury. *Bottoson*, 833 So. 2d 693, 714-15 Fla. 2002) (Shaw, J., concurring); *id.* at 709-10 (Anstead, C.J., concurring); *id.* at 723-24 & n.63 (Pariente, J., concurring).

Respectfully submitted,

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CERTIFICATE OF SERVICE

I Andrew Stanton, counsel for the Appellant, HEREBY CERTIFY that a true and correct copy of the foregoing was served courier to counsel for the Appellee Sandra Jaggard, Assistant Attorney General, Office of the Attorney General, 444 Brickell Avenue, Suite 950, Miami, FL 33131, on May 14, 2010.

____

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CERTIFICATE OF FONT

Undersigned counsel certifies that the type used in this brief is 14 point proportionately spaced Times New Roman.

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