IN THE SUPREME COURT OF FLORIDA

CASE NO. SC07-2174

HARREL BRADDY,

Appellant,

-vs-

STATE OF FLORIDA,

Appellee.

REPLY 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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INTRODUCTION

References to the record on appeal will be made as in the Initial Brief. The Amended Initial Brief and Amended Answer Brief will be referred to simply as "Initial Brief" and "Answer Brief." Unless noted otherwise, all emphasis is supplied.

SUMMARY OF THE ARGUMENT

Mr. Braddy invoked his right to silence by remaining silent, stating his desire not to incriminate himself, and telling the detectives he did not wish to speak with them anymore. While the United States Supreme Court has rejected invocation by the exercise of the right to silence, this Court should not adopt this position as a matter of state law. *See Berghuis v. Thompkins*, 130 S.Ct. 2250 (2010). The remaining invocations are unaffected by *Berghuis* and were unequivocal. To dispute this, the State argues against straw-men and relies on facts not supported by the record. The State's argument that Mr. Braddy reinitiated interrogation is contrary to *Welch v. State*, 992 So. 2d 206 (Fla. 2008).

The State's argument that Detective Smith's violent attack did not produce coerced statements is refuted by the record. Contrary to the State's claims, Smith interrogated Mr. Braddy after the attack and was present for subsequent interrogations.

The trial judge's sarcasm, abuse, and mockery merited disqualification. The State's claim that the motions to disqualify were untimely is contradicted by the record.

The State's reliance on *Tucker v. State*, 459 So. 2d 306 (Fla. 1984) to salvage the prosecution's failure to prove venue is misplaced. The Court's opinion in *Tucker* actually *supports* Mr. Braddy's argument.

The State made improper comments in the guilt phase, including an accusation that counsel engaged in "misrepresentation" and kept "making this stuff up, comments on Mr. Braddy's exercise of Constitutional rights, and launching an inflammatory personal attack. Confronted with this misconduct, the State now ignores the substance of the comments raised on appeal and characterizes the prosecutor's arguments in a way unsupported by the record.

The convictions for burglary, child neglect, and escape cannot stand. The burglary conviction falls squarely within the rule of *Delgado v. State*, 776 So. 2d 233 (Fla. 2000). *Bradley v. State*, 33 So. 3d 664 (Fla. 2010), has no bearing on the facts of this case. Having convicted Mr. Braddy of kidnapping Quatisha Maycock, the State cannot also argue he was her babysitter. The State's evidence actually negates the hypothesis that Mr. Braddy was attempting to escape.

The State made improper arguments in the penalty phase. To counter this fact, the State again ignores the language at issue and builds straw-men to knock

down. The State assigns innocent constructions to these improper comments, but these explanations cannot apply when the substance of the comments and their context is reviewed. In one instance, State ignores the fact that the prosecutor put her words – "Where's Mommy? Where's Mommy?" – into the victim's mouth. an argument long condemned by the courts of this state.

Singly and collectively, the errors below require a new trial.

ARGUMENT[1]

I. MOTION TO SUPPRESS STATEMENTS.

A. The State Failed To Scrupulously Honor Mr. Braddy's Right To Remain Silent.

First Invocation – Invocation By Silence

It is indisputable that Mr. Braddy *exercised* his right to remain silent for some thirty to forty minutes. (V. 30 pp. 76, 88). "He put his head down. We kept talking to him and he didn't say a word after that."[2] (V. 30 p. 77). The question is

[1] Given the limited space available, counsel has elected to focus the Reply Brief on only a subset of the State's arguments. This should not be interpreted as an abondment of the remaining issues on appeal.

[2] The State disputes this, but Detective Suco's testimony on the point is clear and the detective documented the incident in his report. (V. 30 pp. 76-77, 87-88). As the detective described, this took place at approximately 12:15 a.m. on November 8. The appellant has not argued that Mr. Braddy's alleged uncooperativeness at

whether this exercise of the right to silence was sufficiently unequivocal to invoke that right.

After the filing of the Initial Brief, the Supreme Court decided *Berghuis v. Thompkins*, 130 S.Ct. 2250 (2010), and held that the defendant's silence was insufficient to invoke his *Miranda*[3] right to remain silent. This Court is not bound by that holding. Article I, Section 9, of the Florida Constitution independently guarantees the right against self-incrimination and is not coextensive with or limited by the Fifth Amendment. *See Miller v. State*, 42 So. 3d 204, 220-22 (Fla. 2010); *Traylor v. State*, 596 So. 2d 957 (Fla. 1992). As detailed in the Initial Brief, to hold that the exercise of the right to silence is too equivocal to invoke it would be inconsistent with the right and with the warnings Mr. Braddy received, and would yield absurd results. Initial Brief 30-34. This Court should reject *Thompkins* as a matter of state law.

Second Invocation – Right Against Self-Incrimination

Mr. Braddy unambiguously invoked his right to remain silent by stating he did not want to incriminate himself. (V. 30 p. 85; V. 52 pp. 232, 238-39). The Supreme Court has used the same language in describing the very right to be

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around 4:00 a.m., or his reference to his family not speaking to him again, were invocations. These are strawmen of the State's devising.

[3] *Miranda v. Arizona*, 384 U.S. 436 (1966).

protected by the *Miranda* warnings, "one of our Nation's most cherished principles – that **the individual may not be compelled to incriminate himself.**" 384 U.S. at 457-58. The State argues that this invocation is equivocal because Mr. Braddy had previously asked to be warned of his rights before signing consents to search had made a "crypt[ic] biblical reference" and did not tell the detectives what they wanted him to.[4] Answer Brief at 38. None of these points has any bearing on the clarity of the invocation. *Compare State v. Day*, 619 N.W.2d 745, 749-50 (Minn. 2000) ("I don't want to tell you guys anything to say about me in court.").

Third Invocation

Mr. Braddy's statement that he was tired of talking to the detectives and wanted to go to jail[5] was unambiguous and understood to be so. Detective Suco testified:

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[4] The State further asserts that Mr. Braddy used the short break Detective Chambers gave him upon hearing the invocation to attempt an escape. Here the State misapprehends the record. The State's evidence concerning the bent ceiling grate suggested that it was damaged while the detectives were away getting breakfast later in the morning.

[5] In his report, Detective Suco wrote, "Harrel Braddy stated that he is tired of talking to us and wanted to go to jail." (Vol. 30 p.78). During his direct testimony during the motion to suppress, Suco stated: "Actually, he did say he was tired of talking, he wanted to go to jail." (V. 30 p. 38). In argument on the motion to suppress, the prosecutor argued that "the defendant said, I don't want to speak any more, I want to go to jail," but the officers "did not further interrogate him" until Mr. Braddy volunteered new information. (V. 43 pp. 41-42).

> [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 State now argues that the invocation was equivocal because "Defendant merely stated that if the police were not going to believe him, he was tired of talking and wanted to go to jail." Answer Brief at 39. This was not the testimony at the motion to suppress. While the State cites to the suppression hearing at pages 77-78 of volume 30, they contain no reference to the detectives not believing Mr. Braddy. The detectives did not add this language until trial. (T. 2061). The prosecutor characterized this as "breaking off questioning." Shortly before this, Suco agreed with the prosecutor that Mr. Braddy wanted to end questioning:

> Q. Okay. Did there come a time when the defendant told you that he didn't want to speak to you anymore?
>
> A. Yes.

(T. 2060).

The detectives' understanding of Mr. Braddy's invocation is not irrelevant. In *Cuervo v. State*, 967 So. 2d 155, 163 (Fla. 2007), this Court found it significant that a police officer clearly understood the defendant's statement as an invocation:

"[Deputy] Garcia understood Cuervo's response as an election not to talk to the officers and clearly conveyed that understanding to [Detective] Palmieri." *See also Pierre v. State*, 22 So. 3d 759 (Fla. 4th DCA 2009)[6]

Failure To Scrupulously Honor Invocations

The State never honored Harrel Braddy's invocation by silence at all. As detailed in the Initial Brief, the short break that followed Mr. Braddy's invocation of his right against self-incrimination fails under the five-factor test employed in *Globe v. State*, 877 So. 2d 663, 670 (Fla. 2004). Initial Brief 27-28. The State maintains that the statements made after the "tired of talking to you" invocation are admissible under *Oregon v. Bradshaw*, 462 U.S. 1039, 1044-45 (1983). However, this Court has explained its test for the admissibility of suspect-reinitiated interrogation: "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." *Welch v. State*, 992 So. 2d 206, 215 (Fla. 2008). The police did not re-read the *Miranda* warnings, remind Mr. Braddy of rights, or obtain a second waiver. The State has

[6] The State relies on *Walker v. State*, 957 So. 2d 560 (Fla. 2007). There the "invocation" was one long held to be equivocal. *See Davis v. United States*, 512 U.S. 452 (1994) ("maybe I should talk to a lawyer" insufficient).

failed to meet the test of *Welch*. Instead, it asks the Court to hold that defendant reinitiation, without more, always satisfies *Miranda* and the Fifth Amendment.

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

Detective Smith's physical attack on Mr. Braddy is indefensible. The trial court found as much. (Vol. 43 p. 67). The State now argues, and the court found, that Mr. Braddy's subsequent statements were admissible because they were not the product of custodial interrogation, not the answers the detectives wanted, and were insufficiently incriminating.

The State maintains that Mr. Braddy's statements are admissible because Detective Smith was not interrogating Mr. Braddy for the purpose of obtaining incriminating evidence. Answer Brief at 40-41. Of course the evidence he sought *was* incriminating, and the State cites no authority for admitting coerced statements obtained for a "good-faith" purpose. The State argues that Mr. Braddy did not in fact tell Smith where to find Quatisha. In fact, in response to Smith's assault Mr. Braddy immediately agreed to take the detectives to the child. (V. 30 pp. 113-14). There is no basis for arguing that Mr. Braddy's statements were either uncoerced or admissible despite coercion because they were untrue or insufficiently incriminating. Indeed, one of the reasons coerced statements are inadmissible is because they are inherently unreliable. *See Jackson v. Denno*, 378 U.S. 368, 386 (1964). Moreover, "The privilege against self-incrimination protects the individual

from being compelled to incriminate himself in any manner; it does not distinguish degrees of incrimination." *Miranda*, 384 U.S. at 476.

Mr. Braddy's coerced statements to Smith were the direct result interrogation. The State claims that Smith merely engaged in "small talk" with Mr. Braddy, and "Defendant's next response to custodial interrogation occurred only hours later and only after Smith was no longer with him when Defendant told Diaz that Quatisha was not in Palm Beach but off of Alligator Alley." Answer Brief 40-41. The record flatly contradicts this claim. Detective Smith testified:

> It was pretty much an ongoing conversation. As I said before, I was extremely emotional about this. I was very concerned about the welfare of this little girl and the possibility of her still being alive in such a rugged area, **and I would remind him constantly**, you know, **"We got to find this girl. We got to find this girl,"** and that was pretty much the type of conversation we had throughout that time period.

(V. 30 p. 117). It was during this time that Mr. Braddy made the first statement about a body floating – an incriminating statement the State used against him. (V. 30 p. 117). The State also did not hesitate to use the hunting and fishing statements in its closing arguments. (T. 2655, 2663, 2673).[7]

[7] In any event, Mr. Braddy had been in custody and subject to interrogation for more than twelve hours by the time he made his coerced statements to Detective Smith. There is no requirement that a statement must be directly responsive to a particular question before suppression is required. *Hayward v. State*, 24 So. 3d 17, 36 (Fla. 2009) and *Johnson v. State*, 660 So. 2d 648, 659 (Fla. 1995), relied upon by the State both involved statements volunteered in the absence of any custodial interrogation at all.

The record also controverts the claim that Smith was "no longer with" Mr. Braddy when he told Detective Diaz to go to I-75. Smith was walking behind the two throughout their conversation. (V. 30 p. 136, 148-49). The "limited group of officers" who went to I-75 included Detective Smith, who rode in the same car as Mr. Braddy and was with him throughout the subsequent search. (V. 30 p. 119). Contrary to the State's claim, Mr. Braddy made further inculpatory statements at the I-75 scene, including statements that he left Quatisha at the roadside as well as the second "how long does it take a body to float" and autopsy remarks. (V. 30 p. 123-125). Detective Smith was present for each of these.

II. DISQUALIFICATION.

The State contends that Mr. Braddy failed to timely file his motions for recusal; and that the motions were legally insufficient. (Amended Answer, pp. 49-55). Mr. Braddy replies to each contention in turn.

The motions were timely. Mr. Braddy has appealed two recusal motions, those made on October 11, 2006, and October 19, 2006.

The October 11th Motion.

The October 11th motion was based on the trial court's conduct at a hearing on October 3, 2006. During this hearing, the trial court: (a) rudely rebuked Mr. Braddy for responding to the State's motion to bar the pro se defendant from conducting depositions ("No, no … this isn't a cat fight"), and to the court's own

question about the depositions remaining to be taken ("I'm not talking to you") (V55 p. 12-15); (b) predicted Mr. Braddy would lie about his instructions to standby counsel if precluded from conducting his own depositions ("he's now going to claim the lawyer didn't ask all the questions I wanted him to ask") (V55 pp. 14-15); (c) rudely and capriciously denied Mr. Braddy his constitutionally-protected right to postage for filing and service of legal pleadings ("Let me tell you something. This State is not providing anything to you. Trust me on that one.") (V55 p. 37); and (d) cut off Mr. Braddy's objection to the biased tone of the proceedings with both a mocking reference to his 20-year-old attempted murder conviction ("I assume that you're talking about the officers that don't allege that you tried to kill [them]"), and a threat to suspend his right to self-representation ("that business about you representing yourself"). (V55 p. 44).

On October 11, 2006, **eight days after the hearing**, Mr. Braddy filed a motion to disqualify, on the bases, inter alia, that the trial court had "rudely and angrily snapp[ed]" at him, had not "afford[ed] [him] the fair opportunity for rebuttal," had "angrily threatened to revoke [his] right to conduct his own defense," and had caused him to fear that the trial court would punish his efforts to secure an unbiased hearing by revoking his constitutional rights. (R. 1158-1162).

Thus, contrary to the State's assertion, the October 11th motion was filed within the ten days required under Rule 2.330(e). While it is true that Mr. Braddy

did not specifically allege that the trial court had called him a liar, his allegation of rudeness and animus comprehends name-calling. Furthermore, while Mr. Braddy did not specifically allege the postage ruling, his allegations of rudeness and vindictive revocation of constitutional rights – to be heard, to represent himself, and to a fair trial – comprehend the capricious refusal of Mr. Braddy's constitutional right to postage for filing and service of his pro se pleadings.

The October 19th Motion.

The October 19th motion was based on the trial court's conduct at a hearing eight days before, on October 11, 2006, when it "cut him off" while making objection to the biased nature of the proceedings. (V. 50 pp. 33-34). Mr. Braddy alleged that this act was part of a "continuing pattern of rudeness, bias and prejudice against the defendant in favor of the state." (V. 10 p. 3). The motion's citation to events more than ten days before its filing established the context for the defendant's reasonable apprehension, based on the events of October 11th, that he could not receive a fair trial. Thus the October 19th motion was timely.

The motions were legally sufficient. The State attacks the legal sufficiency of the motions obliquely, through attacking the character of Mr. Braddy – he was such a repellent litigant that the trial court was warranted in its incivility and intemperance. Answer Brief 6-9. For example, the State's complaint that Mr. Braddy had sought to disqualify a different trial judge on different grounds seven

years earlier is plainly irrelevant. The State further argues that Mr. Braddy "made false claims" about the outcome of remote discovery motions, that he "reargued issues" despite being told not to do so," that he asked for things he had already gotten, and that "he went on a tirade" about his family "pa[ying] for everybody's salary in this courtroom." Answer Brief 52-54. The State has mischaracterized some of these matters. As the prosecutor eventually conceded, Mr. Braddy was right and she was wrong about several of the discovery rulings, (V. 50 pp. 13-14); as his attorneys eventually conceded, they had not turned over his files after their withdrawal; in rearguing the motion to Maycock's medical records, he raised fresh grounds; and he did not deliver a "tirade" – he simply pleaded for postage for serving his pro se pleadings after the judge flippantly suggested that he ask his family for stamps. (V. 55 pp. 35-37).

But the issue is not whether the trial court was understandably provoked to harbor animus towards Mr. Braddy. The issue is whether its expressions of animus created a reasonable apprehension that this pro se capital litigant would not receive a fair trial. The trial court frankly expressed its distrust and disdain of Mr. Braddy. It repeatedly cut him off, made sarcastic remarks, and attacked his veracity.[8] A

[8] This behaviour continued even after Mr. Braddy accepted counsel. (When he was informed that Mr. Braddy – who had just thrown up – was sick, the judge retorted, "What a big surprise … What is his problem, other than delaying the proceedings some more? What is the problem? What's the problem?" (V. 30 p. 81). On a later

trial judge is required to "act at all times" in such a way as to inspire confidence in his impartiality. Model Code Jud. Conduct Canon 2. Judicial intemperance towards counsel or litigants violates this canon. S*ee In re Zebedee Wright*, 694 So. 2d 734, 735 (Fla. 1997) (public reprimand warranted where trial judge "conducted himself in a manner that was rude, abusive, insulting, and inappropriate" when addressing assistant state attorney, and "acted in an overbearing and dictatorial manner" to victim, refusing her right to make a statement"); *In re Sheldon Schapiro*, 845 So. 2d 170, 171-173 (Fla. 2003) (public reprimand for judge who repeatedly made rude and sarcastic comments to litigants, "routinely berated and unnecessarily embarrassed attorneys," mocked their arguments, and openly questioned their competence), and is a legally sufficient reason for recusal. *See Jiminez v. Ratine*, 954 So. 2d 706 (Fla. 2d DCA 2007). Because the trial court's intemperance reasonably inspired Mr. Braddy to fear unfairness, it should have granted his motions for recusal.

III. VENUE.

The State argues that Mr. Braddy's objection is unpreserved, citing *Tucker v. State*, 459 So. 2d 306 (Fla. 1984). Answer Brief 56-57. The State fails to grasp the distinction between *allegata* and *probata*. *Tucker* in fact establishes that Mr.

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date, Mr. Braddy tried to speak and the judge told the capital defendant, "Stop it. You're not a party." (V. 43 p. 49).

Braddy's venue claim *is* preserved. In *Tucker*, the indictment failed to allege venue *at all*, but Tucker failed to object. The Court held that this error was not fundamental. The Court distinguished the defective pleading in *Tucker* from a failure to *prove* venue as alleged in an indictment:

> **Had Tucker been able to show that the crime of which he was convicted was not committed in Dade County, or that the prosecution had not presented sufficient proof that the crime occurred in the county where the trial was held, the conviction clearly could not stand.** Nonetheless, the Florida constitution does not mandate an allegation of venue in an indictment.

Id. at 308 (citations omitted); *see also McClellion v. State*, 858 So. 2d 379, 381 (Fla. 4th DCA 2003) (The state's argument that the appellant waived venue is premised on cases allowing amendment of an information during trial where there is no prejudice to the defendant. The problem in this case, however, is one of proof.).

The Answer Brief asserts that its fictitious preservation bar is appropriate as a pretrial motion would permit the prosecution to remedy the deficiency. Because the issue is one of proof, it is not ripe until the prosecution actually attempts to prove its allegations. Florida courts routinely review the issue when raised by motion for judgment of acquittal or post-trial motion.[9] *See, e.g., Jackson v.* State,

[9] In the present case, there is no practical difference between a motion made at the close of the State's case and one interposed after the verdict. Because the prosecution charged Mr. Braddy by indictment, it could not amend that pleading to conform to the proof.

37 So. 3d 370 (Fla. 2d DCA 2010) (judgment of acquittal); *McClellion*, (judgment of acquittal); *Crider v. State*, 625 So. 2d 957 (Fla. 5th DCA 1993) (post-verdict judgment of acquittal); *Dreyer v. State*, 594 So. 2d 327 (Fla. 2d DCA 1992) (JOA); *Navarre v. State*, 608 So. 2d 525 (Fla. 1st DCA 1992) (no pre- *or* post-trial motion); *Pennick v. State*, 453 So. 2d 542 (Fla. 3d DCA 1984) (judgment of acquittal); *McKinnie v. State*, 32 So. 786 (Fla. 1902) (motion for new trial). The State, moreover, could not proceed pursuant to section 910.05, Florida Statutes. *Crittendon v. State*, 338 So. 2d 1088, 1090 (Fla. 1st DCA 1976) provides the most thorough analysis of that statute by a Florida Court. The *Crittendon* court reviewed the development of the legislation as well as the interpretation of similar statutes in other states. It concluded that 910.05 applies where the actions in the venue would amount to an attempt to commit the crime. *Id.* at 1090. The court criticized a Kansas decision approving venue where the victim was removed from her house prior to the killing in a different venue. *Id.*

VI. GUILT-PHASE PROSECUTORIAL MISCONDUCT.

A. Attacks on Defense Counsel/Denigration of Defense.

Accusing Counsel of "Manipulation" and "Misrepresentation."

The State maintains that the prosecution merely "point[ed] out that the evidence showed Defendant's statements were not recorded because of his refusal and that the refusal was consistent with the defense," and that in this context the

prosecutor did not accuse counsel of misrepresentation.[10] Answer Brief at 67. The prosecutor's own words show otherwise. Ms. Rifkin pointed out that defense counsel cross-examined Detective Suco on the absence of a recorded statement, and pointed out that Suco said Mr. Braddy refused. She did not stop there, however. She next stated "**I mean their whole thing is manipulation, misrepresentation.**" (T. 2724). "Context" does nothing to justify a straightforward accusation that defense counsel engaged in misleading and unethical conduct.

Accusation That Counsel "Keep[s] Making This Stuff Up" About Belly-Belt.

The State argues that the prosecution properly accused defense counsel of "making up" evidence because it was fair reply to defense arguments.[11] Answer Brief at 67-68. It reasons that because the defense argued that the belt left Mr. Braddy even more helpless during Detective Smith's attack, the prosecution was entitled to point to a "lack of evidence" on this point. The State was free to point to testimony that the belt was not used. This it did not do. Instead, the prosecution attacked defense counsel:

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[10] The State points to defense references to manipulation, misstatement and misleading. Answer Brief at 66. Defense counsel, however, directed those words to the actions of the police, not the conduct of counsel. (T. 2686).

[11] "A prosecutor's comments are not improper where they fall into the category of an 'invited response' by the preceding argument of defense counsel concerning the same subject." *Walls v. State*, 926 So. 2d 1156, 1167 (Fla. 2006).

> Let's talk about the police motivation. The Defense brought up in the closing arguments that the police lied to the defendant and that they talked to him for 30 hours, and that the detective pushed him up against the car and **they keep making this stuff up about** – they keep talking about this belly belt.
>
> The reason they're talking about the belly belt – **nobody ever testified they saw him with a belly belt**. What they want you to believe is that Detective Smith, when he grabbed him out of the car –

(T. 2722-23). Far from a fair reply, this attack was in fact false, since Detective Chambers had testified to the use and effect of the belt. (T. 1987-88).

Attacking Counsel For Legitimate Conduct Of The Defense.

The defense argued that Quatisha Maycock's death was a result of the leap from the car. (T. 2693). The prosecution responded by attacking the defense for raising this argument. The State asserts that it "merely pointed out that even though Defendant had repeatedly blamed Maycock, he still guilty of kidnapping because she did not consent to getting in the car or taking Quatisha and guilty of felony murder even if Quatisha died while attempting to escape the kidnapping." Answer Brief at 68. As quoted in the Initial Brief, this is not what Ms. Rifkin said. Initial Brief at 62. Instead, she argued that by asserting this defense, counsel was making an improper attack on Shandelle Maycock.

In the same vein, the State argues that the prosecutor "merely pointed out that the lack of evidentiary support [for] the argument" that Dennis MacArthur or James Shotwell was the guilty party. Answer Brief at 66. Again, this is not what

Ms. Rifkin said. Instead, she criticized the defense for even *cross-examining* Ms. Maycock concerning Dennis MacArthur: "[T]hey want to put it on Dennis MacArthur, not even Dennis MacArthur. **You heard about the fight in 1997, they had to bring that up.**"[12] (T. 2722).

Ridiculing the defense as nonsense and the "different trial" argument.

The State makes no effort to defend the prosecutor's argument that "Their whole closing makes absolutely no sense. Their arguments make absolutely no sense." (T. 2725). Such denigration of the defense is unquestionably improper. *See Chin v. Caiaffa,* 35 Fla. L. Weekly D1742 (Fla. 3d DCA Sept. 2, 2010) (argument that defense was "frivolous"); *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) ("it's just lame.").

The Answer Brief likewise does not address the argument that the defense "must have been at a different trial," or attempt to distinguish it from the nearly

[12] This argument was also misleading. It was the State that brought out the details of the 1997 incident. The defense originally sought to question Ms. Maycock concerning the incident – which had been classified as domestic violence – in order to show that she and MacArthur had a domestic relationship. (T. 1777-83). Ultimately, the defense only asked Ms Maycock if she recalled an incident April of 1997 and if she had described her relationship with MacArthur as a "boyfriend/girlfriend" relationship. (T. 1792-93). On redirect, the prosecution elicited testimony that Ms. Maycock had permitted MacArthur to claim Quatisha as a dependant on his tax returns. (T. 1818-19). In April, 1997, the two fought because MacArthur was unwilling to give Ms. Maycock the money she expected to receive from this arrangement, and the police were called. (T. 1818-19).

identical remark condemned in *Servis v. State*, 855 So. 2d 1190, 1193 (Fla. 5th DCA 2003). (T. 2718, 2725).

B. Bolstering.

The State contends that it may bolster a witness in fair reply to defense arguments questioning the witness's credibility, citing *Pagan v. State*, 830 So. 2d 792 (Fla. 2002). Answer Brief at 69. In *Pagan*, however, the defense questioned a victim's description of the killer. 830 So. 2d at 809. The witness testified, to her terror during the crime and her inability to estimate heights and weights. In rebuttal, the prosecutor argued that the victim's terror excused her inability to give accurate descriptions. The Court found no error, explaining:

> These statements were, however, **a fair statement of the evidence produced during the trial** and fair rebuttal of the defense closing argument. *See Hamilton v. State*, 703 So. 2d 1038 (Fla. 1997) (finding prosecutorial comment during closing argument fair comment **when based on evidence presented at trial**).

Id. The prosecution here did not make a "fair statement of the evidence produced during trial." Instead, Ms. Rifkin urged jurors to believe the police officers because if they were being dishonest they would have lied more outrageously or, indeed, murdered Mr. Braddy. This argument bears no resemblance to *Pagan*, but closely mirrors the argument disapproved in *Caraballo v. State*, 762 So. 2d 542, 544-45. (Fla. 5th DCA 2000).

C. Comment On The Exercise Of Constitutional Rights.

Comments On Exercise Of Right To Remain Silent.

Through its police witnesses, the prosecution directly commented on the facts that Mr. Braddy remained mute and refused to answer the detective's questions, and that he later told the detectives in no uncertain words that he did not wish to speak to them any further. (T. 1957, 1959, 1979, 2061). The prosecution later commented on this evidence as part of Mr. Braddy's attempt to "manipulate and stonewall and stretch things out." (T. 2661). The State, however, ignores these comments on silence raised by the Initial Brief. Instead it contends that the prosecution was properly commenting on the statements Mr. Braddy actually made. Answer Brief at 70.

The State argues that "the defendant must have remained silent for the State to comment on such silence." Answer Brief at 69. Of course, Mr. Braddy in fact remained silent for thirty to forty minutes, and later told detectives he did not want to speak to them. (V. 30 pp. 88). A defendant's initial waiver of rights does not give the prosecution *carte blanche* to comment on all post-waiver exercises of those rights. *See State v. DiGuilio*, 491 So. 2d 1129, 1131 (Fla. 1986); *Senn v. State*, 947 So. 2d 596, 597 (Fla. 4th DCA 2007). The impropriety of the prosecutor's comments on silence is, moreover, distinct from the question of whether Mr. Braddy's invocations were sufficiently unequivocal under *Owen v.*

State, 862 So. 2d 687 (Fla. 2003). In *Fitzpatrick v. State*, 900 So. 2d 495, 516 (Fla. 2005), the Court found error where a detective testified that Fitzpatrick said, "Maybe I need to see a lawyer," despite the fact that the United States Supreme Court held that this same statement was not an unequivocal invocation in *Davis v. United States*, 512 U.S. 452 (1994) ("Maybe I should talk to a lawyer" insufficient). *See also Jones v. State*, 777 So. 2d 1127, 1129 (Fla. 4th DCA 2001). The rule of *Owen*, *Davis*, and *Berghuis v. Thompkins*, 130 S.Ct. 2250 (2010), is directed at out-of-court police behavior, and the deterrent effect of suppressing evidence. *DiGuilio* forbids *in*-court testimony penalizing the exercise of a constitutional right. The prosecution's comments were "fairly susceptible" of being interpreted as a comment on silence, and were therefore improper.

Comment on Waiver of Fourth Amendment Rights

The State argues that there could be no improper comment on Mr. Braddy's exercise of his Fourth Amendment rights because he waived them. Again, the State ignores the substance of Mr. Braddy's claim. The prosecution elicited testimony of Mr. Braddy's reluctance to waive his rights, and from this hesitation created an inference of guilt. (T. 2045, 2659). Contrary to the State's assertion, there was no legitimate purpose for this comment. The sufficiency of the consent

and warrant was not an issue for the jury to decide. The State's claim[13] that the first search of the car was not thorough because the technicians were waiting for a search warrant makes no sense. In fact, the detectives *did* obtain a warrant, *did* process the car (finding no blood), and released it. (T. 2094-96).

Comment on Exercise of Right to Trial

The prosecutor argued that "Mr. Braddy was the center of attention just like he is right now. And he was milking this." (T. 2663). The suggestion that the entire trial was merely an exercise to gratify Mr. Braddy's desire for attention was a comment on Mr. Braddy's exercise of his right to trial. The Answer Brief declines to dispute this.

D. Inflammatory Personal Attack.

Again, the State argues against a straw-man and ignores the comments raised as error. The State avers that it commented on religion in order to show motive because Mr. Braddy met Shandelle Maycock through the church and she had believed his interest in her to be charitable. Answer Brief 71-72. Mr. Braddy has not raised a discussion of these matters as error. **The issue presented is the prosecution's attempt to inflame the jury by telling them Mr. Braddy is a bad Christian:** "He can talk the talk but he can't walk the walk. Because if you're

[13] The testimonial basis for this argument is unclear. The portion of the transcript cited in the Answer Brief is part of the defense closing argument and there are references to the warrants, car, or crime scene technicians.

religious, if you believe in the Good Book, then you live by the Word." (T. 2649). *That* argument had no legitimate place in a criminal trial.

E. Duty to Reject Lesser Offenses.

The Answer Brief argues that the prosecutor merely explained the law relating to the greater and lesser offenses and told jurors why the evidence supported the greater offense. Answer Brief at 73. Ms. Rifkin, however, went on to tell jurors "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." This argument told jurors that a verdict of a lesser offense would minimize the gravity of the offense, in violation of their duty as jurors. *See United States v. Young*, 470 U.S.1 (1985); *Reddish v. State*, 525 So. 2d 928 (Fla. 1st DCA 1988); *United States v. Mandelbaum*, 803 F.2d 42, 44 (1st Cir. 1986); *United States v. Castro-Davis*, 612 F.3d 53, 68 (1st Cir. 2010) (holding improper the argument, "And you hold them accountable for what they did, all three of them. You hold them accountable.")

F. Misstating the Evidence.

The State correctly points out that Dr. Perper testified to "numerous antemortem, perimortem and postmortem" injuries. Answer Brief at 73. Nonetheless, he flatly rejected the possibility that the "brush burn" or "road-rash" injuries were caused by dragging against the rocks. (T. 2517-18). The prosecutor's

argument, "Take a look at the rocks. They are rough. She's moving around on the rocks. How did she get the brush burns after death?" misstated the evidence.

G. Harmful Error

The State refuses to acknowledge this Court does not review preserved improper comments standing alone. In truth, "[t]he Court considers the cumulative effect of objected-to and unobjected-to comments when reviewing whether a defendant received a fair trial" *Merck v. State*, 975 So. 2d 1054, 1061 (Fla. 2007). Even where there has been no objection, the Court, unlike the State, does not evaluate the prosecution's misdeeds singly. *See Wade v. State*, 41 So. 3d 857, 871 (Fla. 2010) (examining misconduct cumulatively for fundamental error).

VII. BURGLARY.

In *Delgado v. State*, 776 So. 2d 233, 240 (Fla. 2000), the Court held, "that the 'remaining in' language [in section 810.02] applies only in situations where the remaining was done surreptitiously." *See also, Hanson v. State*, 941 So. 2d 1109, 1149 (Fla. 2006); *State v. Ruiz*, 863 So. 2d 1205, 1210 (Fla. 2003). The Court went on to characterize the error in *Delgado*, thus:

> This is not a case where there was merely insufficient evidence to support the burglary charge. The jury in this case was instructed that a defendant can be found guilty of burglary, even if the initial entry was consensual, if the victims later withdrew their consent.

776 So. 2d 242. This case falls squarely within the rule of *Delgado*.

The State, however, maintains that the Court must affirm based on *Bradley v. State*, 33 So. 3d 664 (Fla. 2010). In *Bradley*, the victim's wife conspired with Bradley to stage a home-invasion robbery and murder the victim. The Court concluded that Bradley couldn't rely on the wife's consent where, "once [the victim] saw them enter his home, he immediately rose from his chair and ordered the intruders to 'get out.'" *Id.* at 683. The Court explained: "We never intended our decision in Delgado to imply that a coinhabitant or co-owner could irrevocably consent to entry by his or her coconspirators for the purpose of subjecting the other inhabitant or owner to a crime." This reasoning is obviously inapplicable to the present case. Mr. Braddy entered with consent and he did not remain surreptitiously. *Delgado* commands that the burglary conviction be reversed.

VIII. CHILD NEGLECT.

Having convicted Harrel Braddy of kidnapping, the state now claims that he was also Quatisha Maycock's babysitter. Answer Brief 77-79. The state argues that the Court must apply the definition of "other person responsible for a child's welfare" found in section 39.01(47).[14]

Even under subsection 39.01(47) the State's argument fails. In relevant part, 39.01(47) defines "caregiver" as including "an adult sitter or relative entrusted

[14]The Third District Court of Appeal rejected ths argument in *State v. Christie*, 939 So. 2d 1078 (Fla. 3d DCA 2005).

with a child's care." § 39.01(47), Fla. Stat. (1998). Under any reading of the record, no one "entrusted" Mr. Braddy with the child's care. The Virginia court of appeals' decision in *Snow v. Commonwealth*, 537 S.E.2d 6 (Va. App. 2000), upon which the state also relies, is likewise unhelpful. There the person responsible for the children's welfare was their uncle. *Id.* at 9.

IX. ESCAPE.

The State's evidence is not inconsistent with Mr. Braddy's hypothesis. Detective Suco found Mr. Braddy standing on top of a chair *with his shoes off*. (T. 2064). Given this, the fact that the metal grate was pushed in is entirely consistent with the hypothesis that Mr. Braddy was testing the strength of the grating in preparation for a suicide attempt. The State's hypothesis, on the other hand, is inconsistent with its own evidence. The State points to photographs of the bent grating. Answer Brief at 81. These same photographs show that the bent grating was the smallest in the room. (R. 49, 51-52). Larger grates can be seen all around the bent one. The State's hypothesis would require one to believe that Mr. Braddy – described by the State as twice the size of the detectives who interrogated him – chose the smallest opening possible to make his shoeless escape.

Although trial counsel did not argue the state's failure to present evidence inconsistent with this theory, "this Court has a mandatory obligation to independently review the sufficiency of the evidence in every case in which a

sentence of death has been imposed." *Miller v. State*, 35 Fla. L. Weekly S323 (Fla. June 23, 2010); *see also* Fla. R. App. P. 9.142(a)6. In *Victorino v. State*, 23 So. 3d 87, 103 (Fla. 2009), the appellant made only a "boiler-plate" motion for judgment of acquittal, failing to preserve his sufficiency challenge. This Court nevertheless considered the question as part of its duty of independent review. *Id.* In *Smith v. State*, 28 So. 3d 838, 874, the Court examined the record to determine whether that there was sufficient evidence "to affirm whether sufficient evidence exists to support a conviction" on "each of the charged crimes."

X. PENALTY-PHASE IMPROPER ARGUMENT.

A. Vouching

The prosecution plainly informed the jurors that there had been an extra-judicial determination that Mr. Braddy should be sentenced to death. The Answer Brief avoids discussing any of the words used by the prosecutor, but states that "the State never mentioned its decision to seek the death penalty," and that "the State was merely describing to the jury the process through which it was to determine the appropriate sentence in this matter." Answer Brief 83-84, 86-87. To the contrary, Ms. Rifkin told jurors that when the State seeks a death sentence, "**what we have to look at** are those murder cases that are so egregious …" (T. 3312). More bluntly, she told them 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, okay." (T. 3312).

The prosecutor went on to emphasize this point by telling jurors that the "reason [Mr. Braddy]'s sitting here with you," was that he had earned the death penalty. (T. 3355). The State argues that the "this comment was merely suggesting that enormity of the aggravation that was based on Defendant's own conduct merited the imposition of the death penalty." Answer Brief at 87. The State ignores the language at issue. The prosecution did not limit itself to comment on the aggravating circumstances. It told jurors that Mr. Braddy would not even be there in front of them if he did not deserve to die.

B. Golden Rule

The courts of this State have made it crystal-clear: An argument presenting an imaginary, first-person script of what the victim may have said is inflammatory, improper, and a golden rule violation. *Urbin v. State*, 714 So. 2d 411, 421 (Fla. 1998) ("Don't hurt me. Take my money, take my jewelry. Don't hurt me."); *McDonald v. State*, 743 So. 2d 501, 505 (Fla. 1999); *Taylor v. State*, 640 So. 2d 1127, 1133-35 (Fla. 1st DCA 1994) ("Don't hurt my Mommy anymore."). Ms. Rifkin made just such an argument:

> 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?

(T. 3331).

In the face of this flagrant error, the State offers no answer whatsoever. Indeed, it never even acknowledges the argument. It points to *Wade v. State*, 41 So. 3d 857, 870-71 (Fla. 2010), wherein the Court held that a series of arguments, firmly based on the evidence, *and which did not invite the jurors to put themselves in the victims' position*, did not violate the Golden Rule. Answer Brief at 84. How this decision silently overruled *Urbin* is left unexplained.

Wade is equally unhelpful to the State with regard to the prosecutor's other Golden Rule arguments. Ms. Rifkin's arguments directly and specifically placed the jurors in Quatisha Maycock's shoes: "And then, you get thrown in," "You even have more time to think about it. You have more time to be afraid." (T. 3333, 35).

The State does not argue that the request that the jury spend five minutes imagining the victim's fear was proper. Instead it suggests that the argument, standing alone, did not warrant a mistrial where the jury was instructed to disregard it. (Answer Brief at 87).

C. Easy way out.

The prosecutor told Mr. Braddy's jury that as "sworn jurors" they should "not do what's good enough … [n]ot do what's easy," and vote for life, in violation of *Urbin v. State*, 714 So. 2d 411 (Fla. 1998), *Brooks v. State*, 762 So. 2d 879 (Fla.

2000), and *Ferrell v. State*, 29 So. 3d 959 (Fla. 2010). (T. 33553). The State now argues that the argument was permissible under *Wade v. State*, 41 So. 3d 857 (Fla. 2010). In *Wade*, the Court's per curiam opinion distinguished *Wade* from *Urbin*, concluding that the State did not tell Wade's jury it had a duty to return a death verdict.[15] *Id.* 870-71.

The improper argument in this case, however, more closely resembles that in *Urbin*, *Brooks*, and *Ferrell*. In *Urbin*, the prosecutor told jurors they should not "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," but instead should "follow the law … to do your duty." *Urbin* at 421. In *Brooks*, the prosecutor expressed concern that jurors would quickly vote for life without first weighing the aggravating circumstances and told them to do their duty, and "weigh everything out." *Brooks* at 903. In *Ferrell*, the prosecution likewise told jurors of its fear that they might take the easy way out by voting for life and not weighing aggravators against mitigators, and urged them to "carry out your full responsibility," and "follow the law." *Ferrell* at 987. None of these arguments directly told jurors they had a duty to vote for death. Like Ms. Rifkin, however, the prosecutors in these cases told jurors that to simply vote for life

[15] It is unclear how helpful to the State *Wade* is. A majority of the Court agreed that the prosecutor's argument was in fact improper. *Wade*, 41 So. 3d 880 (Pariente, J. concurring, joined by three other justices).

would be a cop-out and contrary to their duty. These arguments misstated the law and implied that jurors may be required to vote for death. *See Wade*, 41 So. 3d at 880 (Pariente, J. concurring). Indeed, Ms. Rifkin went on to compound this argument as she finished her closing argument by telling the jury that the only just recommendation is death, even though, "you may not like it, and you may not want to do it …" (T. 3366). Again the prosecutor misled jurors into thinking they might be *required* to sentence Mr. Braddy to death.

D. Inflammatory Character Attacks.

Violent "Since Birth"

The State maintains that Mr. Braddy put his "character for nonviolen[ce]" at issue when the defense told jurors Mr. Braddy had "panicked" during prior crimes and put on testimony that he would be a good prisoner despite his crimes.[16] Answer Brief at 88. For this the State relies upon *Gore v. State*, 784 So. 2d 418 (Fla. 2001). *Gore* bears no relation to the issue here. Gore testified that he was "not a violent person," and the Court held that the State was entitled to rebut this with evidence of other acts of violence. *Id.* at 423. The State points to nowhere in the record where the defense claimed Mr. Braddy had not been violent. Even if he had, the State would only be entitled to rebut this claim with specific acts of

[16] The State avers that defense counsel also argued that the violent crimes were "not within his character." Answer Brief at 88. The portions of the record cited by the State rebut this claim.

violence. Nothing in *Gore* empowered the prosecutor to inflame the jury by inveighing against Mr. Braddy as violent "since birth."

Insinuating Infidelity

The State contends that the prosecution had a "good faith basis" for insinuating that Mr. Braddy had engaged in an extramarital relationship with June Wallace and Dolores Capers. Answer Brief at 85. The prosecutor never made a professional statement establishing a good faith basis for this cross-examination. *See* Charles W. Erhardt, Florida Evidence § 405.1 (2007 Edition). With regard to June Wallace, the prosecutor cited to the existence of a shooting charge dismissed more than two decades earlier. (T. 3144-48). The defense, however, pointed out concerns about the reliability of these claims given the existence of contradictory statements. (T. 3146). With regard to Dolores Capers, Ms. Rifkin stated nothing whatsoever about a basis to believe there was an affair. What is more, by the time the prosecutor asked Ms. Braddy about Wallace and Capers she knew that Ms. Braddy knew nothing and that the only effect of this questioning would be to insinuate otherwise admissible evidence.

E. Attacks on Defense Counsel

Defense counsel's function was to dispute the State's case in aggravation and to challenge the State's evidence. The prosecutor told jurors that to do so was improper and unprofessional, that he would "scream" and "shout" in order to

"drown out" aggravating circumstances. She characterized defense efforts to test the detectives' credibility as "attacking" the officers. (T. 3314, 3326, 3357, 3361-63). This assault was improper and "shifted 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). It also left counsel in the unenviable position of knowing that a vigorous defense could be held against him. *Compare Bates v. Bell*, 402 F.3d 635, 646-47 (6th Cir. 2005) (prosecutor improperly argued that defense objections were intended as a diversionary tactic).

F. Diminishing Mitigation

The State contends that the success enjoyed by Harrel Braddy's siblings could diminish the weight assigned to mitigation, citing *Lugo v. State*, 2 So. 3d 1 (Fla. 2008), *cert. denied*, 130 S.Ct. 182 (2009). Answer Brief 85-86. This is not what the prosecution argued. The prosecutor did not urge jurors to give less weight to the mitigation presented concerning Mr. Braddy's important place in his family. Instead she told the jurors this evidence was a reason to impose the death penalty. The State now claims that when it criticized Mr. Braddy for calling his friends and family to testify to mitigation, it was warning against deciding the case based on sympathy for them. This is not what the prosecutor said in the remarks now challenged. Instead she expressly told the jurors Mr. Braddy had harmed his

family by calling them to testify: "**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). Thus the prosecution transmuted mitigation into aggravation.

CONCLUSION

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

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 October 13, 2010.

_____

ANDREW STANTON
Assistant Public Defender

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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ANDREW STANTON
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