IN THE SUPREME COURT OF FLORIDA

CASE NO.: SC09-1659
L.T. NO.: 90-5417CF10B

LANCELOT URILEY ARMSTRONG,

Appellant,

-vs-

THE STATE OF FLORIDA,

Appellee.

ON APPEAL FROM THE CIRCUIT COURT OF THE
SEVENTEENTH JUDICIAL CIRCUIT OF FLORIDA
IN AND FOR BROWARD COUNTY, FLORIDA

INITIAL BRIEF OF APPELLANT

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INTRODUCTION

This is an appeal pursuant to Fla. R. App. P. 9.142 from a final Order imposing the death penalty entered by the Honorable Michael L. Gates, Circuit Court Judge. Lancelot Uriley Armstrong was the Defendant below and The State of Florida brought the prosecution. In this brief, the parties will be referred to as they stood in the proceedings below. The symbols "T." "R." and "E." will designate the transcript, record and exhibits of the proceedings below, respectively, followed by the Clerk's designated volume and stamped page number. Es. (R/Vol. #:p#; T/Vol. #:p#; E/Vol. #:p#).

STATEMENT OF THE CASE

Defendant seeks review of a sentencing Order entered on August 7, 2009, committing the Defendant to the custody of the Department of Corrections to be sentenced to death. (R/Vol. 5: 798-803).

By Indictment dated March 7, 1990, the Defendant, along with co-defendant Ercely Wayne Coleman a/k/a Wayne Allen Coleman, was charged with Count I. Murder in the First Degree, Count II. Attempt Murder, First Degree and Count III. Armed Robbery. (R/Vol. 1: 1-2). On April 17, 1991, a jury convicted the Defendant of all counts, as charged and, on June 20, 1991, the Defendant was sentenced to death

by the predecessor Judge, the Honorable James I. Cohn as to Count I. Murder in the First Degree and sentenced to two (2) consecutive life sentences as to Count II. Attempted Murder, First Degree and Count III. Armed Robbery, to run consecutive to the death sentence. On direct appeal, this Court affirmed the convictions and sentences. Armstrong v. State, 642 So. 2d 730 (Fla. 1994). Cert. denied, 514 U.S. 1085 (1995).

The Defendant subsequently appealed the denial of his motion for post conviction relief and by opinion dated October 30, 2003, this Court vacated the Defendant's death sentence and remanded the cause for a resentencing before a new jury. Armstrong v. State, 862 So. 2d 705 (Fla. 2003). (R/Vol. 1: 4-42). The Mandate commanding further proceedings in accordance with this Court's October 30, 2003 opinion was issued on February 20, 2004. (R/Vol. 1: 3).

A capital resentencing proceeding commenced on April 10, 2007. The evidentiary portion of the penalty phase began on April 16, 2007. On April 25, 2007, the jury issued an advisory sentence as to Count I. Murder in the First Degree and recommended death by a nine-to-three vote. (R/Vol. 3: 448). On August 7, 2009, the Trial Court resentenced the Defendant to death as to Count I. Murder in the First Degree. (R/Vol. 5: 798-803). A timely Notice of Appeal was filed on September 1, 2009. (R/Vol. 5: 813-851).

STATEMENT OF THE FACTS

The factual background of this case is laid out in the opinion rendered by this Court in Defendant's direct appeal at Armstrong v. State, 642 So. 2d 730 (Fla. 1994). A brief summary of this Court's rendition of the facts are as follows: On February 17, 1990, the Defendant and a co-defendant, Michael Coleman, went to a Church's Fried Chicken restaurant asking to see Kay Allen, who was the assistant manager of the restaurant and the Defendant's former girlfriend. Id. at 733. Although Allen asked the Defendant to leave, he remained at the restaurant and eventually Allen accompanied him to the vehicle he was driving while Coleman remained inside the restaurant. Id. at 733. Allen testified that she and the Defendant and Coleman went back into the restaurant where Coleman and the Defendant ordered her to get the money from the safe. Id. at 733. Allen testified that she pushed the silent alarm and, shortly thereafter, the Defendant returned to the car while Coleman remained in the restaurant with Allen to collect the money from the safe. Id. at 733. Other testimony reflected that the police were notified of the silent alarm and Deputy Sheriffs Robert Sallustio and John Greeney went to the restaurant where they found the Defendant sitting in a blue Toyota. Id. at 733. Greeney had ordered the Defendant out of the car and holstered his gun to conduct a "pat down." Id. at 733. Sallustio noticed movement within the restaurant, heard shots being fired from the restaurant and from the direction of the car,

and felt a shot to his chest. Id. at 733. The Defendant apparently managed to get his gun and began firing at the officers. Id. at 733. Sallustio was shot three times, but still managed to run from the Defendant and radio for assistance. Id. at 733. The other officer arrived, finding Greeney, who had been shot at close range, dead on the scene. Id. at 733.

The Defendant and Coleman had fled the scene and were later apprehended in Maryland, where a Maryland doctor removed two bullets from the Defendant's arm. Id. at 733. On direct appeal, this Court affirmed the Defendant's convictions and death sentence. Armstrong v. State, 642 So. 2d 730 (Fla. 1994). Cert. denied, 514 U.S. 1085 (1995). This Court later granted post conviction relief and vacated the death sentence and remanded for a resentencing hearing. Armstrong v. State, 862 So. 2d 705 (Fla. 2003). (R/Vol. 1: 4-42).

Jury selection for the capital resentencing hearing pursuant to this Court's Mandate began on April 10, 2007. (R/Vol. 1: 3); (R/Vol. 1: 4-42); (T/Vol. 21: 24). The jury panel was accepted on April 11, 2007. (T/Vol. 22: 327). Thereafter, the State and Defense resolved a defensive challenge for cause by agreement to excuse the challenged juror. (T/Vol. 22: 396). The agreed upon panel was sworn in on April 16, 2007, after which the evidentiary portion of the penalty phase proceeded. (T/Vol. 23: 414).

I. GRUESOME PHOTOGRAPHS:

During the State's presentation of evidence, the State called upon the testimony of Detective Edel. Through Det. Edel's testimony, the State introduced the victim's bloody shirt as State's 19. (T/Vol. 24: 530-531); (T/Vol. 24: 540-541). Det. Edel also testified that he responded to the victim's autopsy for the post mortem examination. (T/Vol. 24: 531). According to Det. Edel, he recovered projectiles from the body of Dep. Greeney. (T/Vol. 24: 531). The projectiles were admitted into evidence as State's 20 and 21, over defense objection. (T/Vol. 24: 532-534). Next, the State sought to admit a vile of Dep. Greeney's blood. (T/Vol. 24: 537). The Defense objected based on relevancy, stating, "I don't see how a vile with blood taken at an autopsy has anything to do with this case." (T/Vol. 24: 537-538). Without first seeking a response from the State, the Trial Court overruled the objection and received the vile of blood as State's 22. (T/Vol. 24: 538).

The State then questioned Det. Edel about a photograph of the victim taken at the autopsy, asking, "Does this truly reflect Deputy Greeney at the autopsy?" (T/Vol. 24: 538). The defense objected arguing that the picture is unduly prejudicial. (T/Vol. 24: 538). Again, without soliciting a response from the State, the Trial Court overruled the objection and received the autopsy photograph as State's 23. (T/Vol. 24: 538); (E/Vol. 19-20).

A bloody picture of the victim taken at the scene was objected to by the defense based upon undue prejudice. (T/Vol. 24: 540-541). The defense argued that a bloody shirt and vile of blood was already in evidence and that this photograph tends to emphasize the bloodiness. (T/Vol. 24: 540-541). The defense went on to concede the Defendant's guilt of first degree murder and state that the introduction of this photograph will only act to inflame the jury. (T/Vol. 24: 541). The State responded that the photograph was introduced at the original trial and shows the way the victim was when he was found on his back with his gun holstered. (T/Vol. 24: 541). The objection was overruled and the photograph was introduced as State's 24. (T/Vol. 24: 542); (E/Vol. 38: 21-22).

The State showed its witness, Dr. Villa, the photographs admitted as States 23 and 24 and asked Dr. Villa if he went to the scene. (T/Vol. 25: 674-675). The State then elicited testimony from Dr. Villa that "…the deceased was laying there around the pool of blood, very bloody, with what appeared to be several gunshot wounds." (T/Vol. 25: 675). During Dr. Villa's testimony, the State admitted two photographs of the victim's wounds into evidence, without objection, as State's 90 and 91. (T/Vol. 25: 678-680); (E/Vol. 38: 130-133). The defense did object, however, to the State's introduction of an enlarged bloody photograph of the victim's head. (T/Vol. 25: 683). The defense argued that there had already been a number of defense objections

concerning unduly prejudicial photographs and that there was a previously admitted enlarged bloody photograph. (T/Vol. 25: 683). The defense pointed out that the Trial Court had also already admitted several photographs showing the victim with "…bloody froth and bloody mixtures around his facial area…" and that introduction of yet another enlarged bloody picture will further prejudice the jury. (T/Vol. 25: 683). The State countered that the other two pictures are of exit wounds while this photograph indicated soot in the left ear from a grazed wound. (T/Vol. 25: 683). The defense said there is no question that there is soot in the left ear and stipulated to the presence of soot. (T/Vol. 25: 684). The Trial Court overruled the objection and the enlarged photograph was introduced as State's 92. (T/Vol. 25: 684). State's 92 is a close-up of the Victim's head depicting blood dripping down and all over the victim's face. (E/Vol. 38: 134-135). The State did not present as an aggravating factor that "the capital felony was especially heinous, atrocious, or cruel." §921.141(5)(h), Fla. Stat. (2007).

II. PROBABLE TAMPERING:

State witness, Detective Auer testified that he had been a Deputy Sheriff with Broward Sheriff's Office for twenty-five (25) years and was involved in the investigation of this case. (T/Vol. 26: 878-879). During the course of Det. Auer's investigation, he issued a B.O.L.O. containing the Defendant's vehicle information.

(T/Vol. 26: 882); (E/Vol. 38: 185-186). As a result of the B.O.L.O., Det. Auer travelled to the State of Maryland, where the Defendant had been arrested. (T/Vol. 26: 882-883); (T/Vol. 26: 886). Maryland law enforcement collected a number of items and evidence that was handed over to Det. Auer, including projectile fragments removed from the Defendant by medical professionals in the State of Maryland. (T/Vol. 26: 887-888).

The State had previously elicited the testimony of Dr. Carag, who was the surgeon from Maryland that removed the bullets from the Defendant's arm. (T/Vol. 25: 716-717). Dr. Carag testified that he removed two fragments, a large fragment and a small fragment, and delivered those fragments to a Maryland police officer. (T/Vol. 25: 718); (T/Vol. 25: 720).

Through the testimony of Det. Auer, the State sought to introduce into evidence a projectile fragment removed by Dr. Carag and the Defendant objected and conducted a voir dire, which revealed that the evidence bag sought to be introduced into evidence contained one fragment even though Det. Auer originally collected several fragments from the State of Maryland. (T/Vol. 26: 888-889). Auer did not have an explanation as to what may have happened to the other fragments, stating that he was told there were several fragments in the canister but that he never actually looked inside. (T/Vol. 26: 889).

Dr. Carag was specifically asked about whether there was a fragment missing from State's evidence exhibit, which was marked for identification as "Z5":

Q. Well, you have a very specific recollection of there being two fragments. When you examined the exhibit, you could only find one fragment?

A. Yes.

(T/Vol. 25: 721). Dr. Carag did not know what happened to the missing fragment. (T/Vol. 25: 721). Det. Auer also could not explain what happened to the fragments:

Q. What happened to the other fragments?

A. That is not for me to answer. I did not do the examination. I don't know if there was more than one. I was told several. It was sealed by me and turned over to the lab still sealed.

(T/Vol. 26: 889).

The Trial Court acknowledged that Dr. Carag had testified that that "…there were two or three fragments entirely. And at the present time there is only one…" (T/Vol. 26: 890-891). The defense argued chain of custody stating that the apparent tampering precludes admission of the exhibit into evidence because there are items that, on the face of the exhibit, were taken out or are otherwise missing. (T/Vol. 26: 891-892). The Trial Court reserved ruling. (T/Vol. 26: 893).

Argument was later presented by the State and defense wherein the State argued that the State is permitted to introduce evidence that has been lost or destroyed unless there is a showing of bad faith that can be contributed to the State or unless it is shown that the destruction was purposeful. (T/Vol. 27: 928-929). In advancing this argument, the State primarily relied upon the case of Arizona v. Youngblood, 488 U.S. 51 (1988). (T/Vol. 27: 928-929).

The defense argued that the Defendant is only required to show a likelihood of tampering, citing cases such as Taplis v. State, 703 So.2d 453 (Fla. 1997). (T/Vol. 27: 932-934). The defense argued that the rule of law requires exclusion of the evidence, stating "…the evidence of the contamination, evidence of the tampering, the evidence of the exhibit not being in the form in which it was originally delivered to the State of Florida is tainted of this, clear for all to see." (T/Vol. 27: 935).

The Trial Court, relying on Arizona v. Youngblood, overruled the objection, stating, "The Court will find that the defendant has not demonstrated any prejudice and the Defendant has not shown any bad faith on the State and it shall be received into evidence." (T/Vol. 27: 937).

III. JURY INSTRUCTION:

The jury was instructed: "If you find the aggravating circumstances do not justify the death penalty, your advisory sentence should be one of life imprisonment

without possibility of parole for twenty-five (25) years." (R/Vol. 3: 425); (T/Vol. 30: 1460). The jury was also instructed that "…if by six or more votes the jury determines that LANCELOT ARMSTRONG should not be sentenced to death, your advisory sentence will be:

> The jury advises and recommends to the court by a vote of ____ to ____, that it imposes a sentence of life imprisonment upon LANCELOT ARMSTRONG without the possibility of parole for twenty-five (25) years.

(R/Vol. 3: 429-430); (T/Vol. 30: 1466).

The jury submitted a question, asking, "Will the 17 yrs he served be included in his 25 yrs sentence?" (R/Vol. 3: 446). The Trial Court relayed the jury question to counsel, stating, "Will the 17 years he served be included in his sentence?" (T/Vol. 30: 1487).

The State's position was that the question should be answered by telling the jury that the Defendant would receive credit for time served. (T/Vol. 30: 1487-1488). The State based its position on the case of Downs v. State, 572 So. 2d 895 (Fla. 1990). The defense responded, arguing that the Downs, ruling was based upon the fact that in Downs, the defense argued that a life sentence would put the defendant away for twenty-five (25) years and, therefore, the response telling the jury that the defendant would receive credit for time served was clarifying defense counsel's inappropriate or misleading remark. (T/Vol. 30: 1488-1489). The defense argued that the Defendant in

this case never made an argument as to the length of time a life sentence would subject him to as was done by the defense attorney in Downs. (T/Vol. 30: 1489). The Trial Court was troubled by the language in Downs, which states, "Under the facts presented, we find that the trial court did not abuse its discretion." Id. at 901. (T/Vol. 30: 1491).

The State then proffered the case of Green v. State, 907 So. 2d 489 (Fla. 2005). The State read into the record the jury question and court's answer from the Green, opinion:

> **Q.** Judge, does a life sentence without a possibility of parole start in the year 1987 or does it start today?
>
> **A.** The defendant if sentenced to life without parole would be entitled to credit for all time jail served against a life sentence. However, there is no guarantee that the defendant would be granted parole at or after 25 years."

Id. at 496. (T/Vol. 30: 1493-1494).

The Defendant was prepared to agree that the question be answered as it was answered in Green, stating that, if the jury is going to be instructed that the Defendant will receive credit for time served, the jury should also be instructed that parole would not be guaranteed after twenty-five (25) years. (T/Vol. 30: 1495-1496).

The Trial Court ruled that "…the Court is going to respond that the defendant

receives credit for the time he served on this charge, period." (T/Vol. 30: 1502). Consistent with this ruling, the jury was instructed, "The defendant will receive credit for the time served on this charge." (T/Vol. 30: 1506). The jury was not instructed that parole would not be guaranteed after twenty-five years, as requested by the defense. (T/Vol. 30: 1506).

On April 25, 2007, the jury issued an advisory sentence as to Count I of the Indictment, by a vote of nine (9) to three (3), recommending to the Court that it impose the death penalty upon Lancelot Armstrong. (R/Vol. 3: 448); (T/Vol. 34: 1862-1863).

A Spencer hearing was conducted on November 15, 2007 and November 30, 2007. (T/Vol. 36-37). The Trial Court entered its sentencing order on August 7, 2009, sentencing the Defendant to death. (R/Vol. 5: 758-794).

POINT ON APPEAL

I. WHETHER THE TRIAL COURT ABUSED ITS DISCRETION IN ADMITTING INTO EVIDENCE A VILE OF BLOOD AND GRUESOME PHOTOGRAPHS THAT WERE NOT INDEPENDENTLY RELEVANT AND THAT RESULTED IN UNFAIR PREJUDICE?

II. WHETHER THE TRIAL COURT ABUSED ITS DISCRETION IN ADMITTING INTO EVIDENCE A BULLET FRAGMENT WHERE THE DEFENSE CARRIED ITS BURDEN OF SHOWING PROBABLE TAMPERING THEREBY WARRANTING EXCLUSION?

III. WHETHER THE TRIAL COURT ABUSED ITS DISCRETION BY PROVIDING AN INADEQUATE AND MISLEADING INSTRUCTION TO THE JURY THAT THE DEFENDANT WOULD RECEIVE CREDIT FOR TIME SERVED SHOULD HE RECEIVE A LIFE SENTENCE WITHOUT THE POSSIBILITY OF PAROLE FOR TWENTY-FIVE (25) YEARS WITHOUT ADDITIONALLY INSTRUCTING THE JURY THAT PAROLE IS NOT GUARANTEED AT OR AFTER TWENTY-FIVE YEARS?

IV. WHETHER THE CUMULATIVE EFFECT OF THE EVIDENTIARY ERRORS, EVEN IF INDIVIDUALLY DEEMED HARMLESS, CUMULATIVELY DEPRIVED THE DEFENDANT OF A FAIR AND IMPARTIAL TRIAL?

SUMMARY OF THE ARGUMENT

The trial court abused its discretion in admitting gruesome photographs, one of which was taken after the victim was removed from the scene and another which depicted a gory bloody inflaming image of the victim with blood dripping all over the victim's face. These photographs, along with the introduction of the victim's bloody shirt, a vile of the victim's blood and testimony from the doctor that conducted the autopsy that the crime scene was "very bloody" and that the victim was "in a pool of blood" did not provide any probative value and even if there was probative value, it was outweighed by the potential for unfair prejudice.

The Trial Court abused its discretion in admitting a bullet fragment into evidenced where the defense carried its burden of showing probable tampering. The doctor who removed the bullet fragments from the Defendant's arm testified that the evidence bag contained two (2) fragments, yet, at trial, the evidence bag only contained one (1) fragment and neither witness could explain the obvious discrepancy nor did the State present evidence that tampering did not occur.

The Trial Court abused its discretion in answering a jury question as to whether the Defendant would receive credit for the seventeen (17) years of time he has already served on this charge because the Trial Court provided the jury with an incomplete and misleading answer. The Trial Court answered the jury that, yes, the Defendant would

receive credit for all time served should they recommend a life sentence without the possibility of parole for twenty-five (25) years. However, the Trial Court declined to instruct the jury, as requested by the defense, that the Defendant was not guaranteed to be released on parole after serving twenty-five (25) years. The Trial Court's failure to give a complete and accurate instruction on the issue of time served led the jury to believe that the Defendant would be released in eight (8) years, causing prejudice to the Defendant.

Even if the foregoing errors are found to be individually harmless, the cumulative effect of these errors deprived the Defendant of a fair and impartial trial.

ARGUMENT

I.

THE TRIAL COURT ABUSED ITS DISCRETION IN ADMITTING INTO EVIDENCE A VILE OF BLOOD AND GRUESOME PHOTOGRAPHS THAT WERE NOT INDEPENDENTLY RELEVANT AND THAT RESULTED IN UNFAIR PREJUDICE.

In reviewing the admission of photographs, an abuse of discretion standard applies. Welch v. State, 992 So. 2d 206, 216 (Fla. 2008). Relevant evidence is inadmissible if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of issues, misleading the jury, or needless presentation of cumulative evidence. §90.403, Fla. Stat. (2007).

Photographs having the potential of unduly influencing a jury should be admitted only if they have some relevancy to the facts in issue. Reddish v. State, 167 So. 2d 858, 863 (Fla. 1964). Gruesome photographs should not be admitted if they were made after the bodies have been removed from the scene unless they have some particular relevance. Id. at 863.

In Reddish, the defendant was found guilty of first degree murder and sentenced to death. Id. at 860. During the course of the trial, the State introduced into evidence two photographs of the dead bodies that were taken at the morgue and not at the scene of the crime. Id. at 860. This Court found no justifiable relevancy for the admission of the photographs since the cause of death had been clearly established and there was no fact or circumstance in issue necessitating or justifying the introduction of photographs of dead bodies. Id. at 863.

The case at hand is comparable to Reddish. In the case at hand, like Reddish, the State introduced into evidence several photographs of the victim's dead body. In the case at hand, like Reddish, one of the objectionable photographs was not taken at the scene of the crime but instead was a photograph taken at the time of the autopsy. (E/Vol. 38: 19-20). The State asked Det. Edel, "Does this truly reflect Deputy Greeney at the autopsy?" (T/Vol. 24: 538). As was stated in Reddish, this gruesome

photograph made after the body was removed from the scene should not be admitted.

The second photograph admitted over objection in the case at hand was at the scene of the crime but yielded no justifiable relevancy. The State argued that the photographs were relevant to show soot in the left ear from a grazed wound. (T/Vol. 25: 683). But, since the defense conceded there was soot in the left ear and stipulated to the presence of soot there was no fact or circumstance in issue necessitating or justifying the introduction of the photograph of the dead body. (T/Vol. 25: 684).

This Court found reversible error due to the admission of a gruesome photograph of the deceased lying on a mortuary slab in the case of Dyken v. State, 89 So. 2d 866 (Fla. 1956). In Dyken, the State argued that there was no error in the admission of the photograph because "it showed the fatal wound of the deceased." Id. at 866. This Court found that the photograph was not independently relevant since the location of the wound was freely conceded and abundantly proved by other evidence. Id. at 866. This Court reversed the first degree murder conviction without recommendation of mercy holding that the photograph could have had no purpose or effect other than to inflame the minds of the jurors. Id. at 867.

Just as the location of the wound was conceded in Dyken, in the case at hand, the defense had stipulated to the presence of soot in the left ear, thereby rendering State's 92 irrelevant. State's 92 depicts a close-up of the victim's head with blood

dripping all over the victim's face. (E/Vol. 38: 134-135). In the case at hand, like Dyken, the photograph had no purpose or effect other than to inflame the minds of the jurors and therefore, like Dyken, the death sentence should be reversed.

The admission of the bloody photographs was for the purpose of inciting the jury as was the introduction of a vile of the victim's blood and the victim's bloody shirt, both of which provided no evidentiary value. Similarly, the testimony from Dr. Villa that "…the deceased was laying there around the pool of blood, very bloody…" could have had no purpose or effect other than to inflame the minds of the jurors. (T/Vol. 25: 675).

II.

THE TRIAL COURT ABUSED ITS DISCRETION IN ADMITTING INTO EVIDENCE A BULLET FRAGMENT WHERE THE DEFENSE CARRIED ITS BURDEN OF SHOWING PROBABLE TAMPERING THEREBY WARRANTING EXCLUSION.

A trial judge's decision regarding the admissibility of evidence is reviewed for an abuse of discretion. Floyd v. State, 850 So.2d 383, 399 (Fla. 2002). Relevant evidence is inadmissible when there is an indication of probable tampering. Murray v. State, 838 So. 2d 1073, 1082 (Fla. 2002). *(Citing,* Peek v. State, 395 So. 2d 492, 495 (Fla. 1980); Dodd v. State, 537 So. 2d 626 (Fla. 3rd DCA 1988).*)*. A defendant bears the initial burden of demonstrating the probability of tampering but, once this burden

has been met, the burden shifts to the State to submit evidence that tampering did not occur. Id. at 1082. *(Citing*, State v. Taplis, 684 So. 2d 214, 215 (Fla. 5th DCA 1996); Taplis v. State, 703 So. 2d 453, 454 (Fla. 1997).*)*.

In Murray, a conviction and death sentence stemming from a first degree murder, burglary with assault and sexual battery conviction was reversed. Id. at 1087. The testimony in the Murray, trial revealed a discrepancy concerning a bottle of lotion that was placed in a bag with the murder victim's nightgown where the bottle of lotion was not in the bag when it was received for analysis. Id. at 1083. In this regard, an officer testified that he collected a bottle of lotion and a nightgown and placed them both in the same bag and gave the bag to FDLE for analysis. Id. at 1083. However, the analyst testified that the bag contained the nightgown but not the bottle of lotion. Id. at 1083. The discrepancy was never explained. Id. at 1083.

This Court held that because the testimony revealed an obvious discrepancy, the defendant met his burden of showing the probability of evidence tampering, and hence the burden shifted to the State to explain the discrepancy or to submit evidence that tampering did not occur. Id. at 1083. The State failed to meet its burden in explaining the discrepancy or in submitting evidence that tampering did not occur and therefore the Murray, Court held that admission of the evidence was in error. Id. at 1083.

The case at hand is comparable to Murray. In the case at hand, the testimony

revealed an obvious discrepancy. In the case at hand, Dr. Carag testified that two (2) fragments were delivered to Maryland law enforcement yet the evidence bag contained only one (1) fragment at the time of trial. (T/Vol. 25: 718); (T/Vol. 25: 720-721). As a result of the obvious discrepancy in the number of fragments contained within the evidence bag, the Defendant met his burden of showing the probability of evidence tampering and since neither Dr. Carag or Det. Auer could explain the discrepancy, the State failed to meet its burden in explaining the discrepancy or in submitting evidence that tampering did not occur. (T/Vol. 25: 721); (T/Vol. 26: 889). As a result, the Trial Court in the case at hand erred in admitting the evidence.

The principal of law outlined in Murray, should have been applied by the Trial Court in the case at hand in ruling on the defense objection. Had the Murray, rule of law been applied, the evidence at issue would have been excluded. Instead, in admitting the evidence over defense objection, the Trial Court improperly relied on the State's proffered case of Arizona v. Youngblood, 488 U.S. 51, 52 (1988).

In Youngblood, the defendant was convicted of child molestation, sexual assault, and kidnapping. Arizona v. Youngblood, 488 U.S. 51, 52 (1988). Misidentification was the defense at trial. Id. at 54. An issue arose at trial regarding the proper preservation of samples collected from the victim and used to conduct DNA testing. Id. at 52-54. The Arizona court of appeals reversed the conviction stating "

'when identity is an issue at trial and the police permit the destruction of evidence that could eliminate the defendant as the perpetrator, such loss is material to the defense and is a denial of due process.' " Id. at 54.

The United States Supreme Court reviewed the Arizona court of appeals decision under a *Brady* analysis as laid out in the case of Brady v. Maryland, 373 U.S. 83 (1963). Id. at 55-56. The issue presented for review was whether the Due Process Clause of the Fourteenth Amendment requires the State to preserve evidentiary material that might be useful to a criminal defendant. Id. at 52. Accordingly, the Court looked to the presence or absence of bad faith and the police's knowledge of the exculpatory value of the evidence at the time it was lost or destroyed and whether that evidence would be potentially useful to the defense. Id. at 56-58.

The case at hand is distinguishable from Youngblood, in that the facts at hand do not present a defense of misidentification nor do the facts at hand present an objection based upon exculpatory *Brady* evidence. Rather, the case at hand, as argued by the defense to the Trial Court, presents an issue of exclusion of evidence based on apparent tampering.

The Defendant advanced the correct rule of law, as laid out in the case of Taplis v. State, 703 So. 2d 453 (Fla. 1997). In Taplis, this Court accepted review based on an alleged conflict with the rule of law laid out in the district court case of Dodd v. State,

537 So. 2d 626 (Fla. 3rd DCA 1988). In Dodd, the district court ruled that "[r]elevant physical evidence is admissible unless there is some indication of *probable* tampering with the evidence." Id. at 627. Ultimately, the Taplis, Court found no conflict with Dodd. Taplis v. State, 703 So. 2d 453, 454 (Fla. 1997).

In Dodd, the district court reversed a conviction for trafficking and conspiracy to traffic in cocaine because the cocaine was improperly admitted into evidence where there were indications of probable tampering. Dodd v. State, 537 So. 2d 626, 628 (Fla. 3rd DCA 1988). The indications of probable tampering were due to conflicting descriptions of the bag and gross discrepancies in the recorded weights and packaging details and therefore, the district court found that it was plain that the contraband received by the crime lab was *not* in the same condition as was testified to by the officer who seized the contraband. Id. at 628.

The facts of Dodd, are comparable to the case at hand. In the case at hand, there is an indication of probable tampering due to the clearly plain fact that at the time of introduction of the evidence, there was a fragment missing from the exhibit. Dr. Carag testified that there were two (2) fragments delivered yet, at the time of the introduction, the exhibit only contained one (1) fragment, which can only mean that the evidence was *not* in the same condition at trial as it existed at the time the exhibit was delivered by Dr. Carag.

In conclusion, the facts of the case at hand and the objection raised in the case at hand are distinguishable from that of the State advanced case of Arizona v. Youngblood, 488 U.S. 51, 52 (1988). Instead, the case at hand presents an objection under facts comparable to the cases of Dodd v. State, 537 So. 2d 626 (Fla. 3rd DCA 1988); and Murray v. State, 838 So. 2d 1073 (Fla. 2002). Therefore, the Trial Court's reliance on Youngblood, in overruling defense objection and admitting the fragment into evidence was an abuse of discretion. Had the Trial Court relied upon the precedent of Dodd, and Murray, the evidence would properly have been excluded.

III.

THE TRIAL COURT ABUSED ITS DISCRETION BY PROVIDING AN INADEQUATE AND MISLEADING INSTRUCTION TO THE JURY THAT THE DEFENDANT WOULD RECEIVE CREDIT FOR TIME SERVED SHOULD HE RECEIVE A LIFE SENTENCE WITHOUT THE POSSIBILITY OF PAROLE FOR TWENTY-FIVE (25) YEARS WITHOUT ADDITIONALLY INSTRUCTING THE JURY THAT PAROLE IS NOT GUARANTEED AT OR AFTER TWENTY-FIVE YEARS.

Abuse of discretion is the standard when reviewing a trial court's instructions given during jury deliberations. Green v. State, 907 So. 2d 489, 496 (Fla. 2005). A trial court " 'should not give instructions which are confusing, contradictory, or misleading. Wadman v. State, 750 So. 2d 655, 658 (Fla. 4th DCA 1999). Where an instruction is confusing or misleading, prejudicial error occurs where the jury might reasonably have been misled. Id. at 658.

During the penalty phase in Green, the trial court instructed the jury that its recommendation should be either death or life imprisonment without possibility of parole for twenty-five (25) years. Green v. State, 907 So. 2d 489, 496 (Fla. 2005). During deliberations, the jury asked, "Judge, does a life sentence without the possibility of parole for 25 years start with the year 1987 or does it start with today?" Id. at 496. The State requested the jury be told that Green would receive credit for all

the time he had served in jail. Id. at 496. The defense requested the jury be told to simply rely on the instructions that had been given. Id. at 496. Alternatively, the defense requested that it be explained to the jury that it's highly unlikely that a person is going to be released after twenty-five (25) years just because they become eligible for parole. Id. at 496. Ultimately, the trial court answered the jury question, stating, "The defendant, if sentenced to life without possibility for parole for 25 years, would be entitled to credit for all time jail served [sic] against a life sentence. However, there is no guarantee that the defendant would be granted parole at or after 25 years." Id. at 496. This Court found that the explanation to the jury that the defendant would not be guaranteed release at or after twenty-five (25) years was not an abuse of discretion. Id. at 499.

The Trial Court in the case at hand should have answered the jury question as the similar question in Green, was answered. In the case at hand, the jury question was whether the Defendant will receive credit for the seventeen (17) years he has already served. (R/Vol. 3: 446);(T/Vol. 30: 1487). The Trial Court chose to exercise its discretion to answer this question by informing the jury that the Defendant will receive credit for the time he has served on this charge. (T/Vol. 30: 1502). The Trial Court's failure to instruct the jury that the Defendant would not be guaranteed release on parole at or after twenty-five (25) years rendered the instruction that the Defendant would

receive credit for all time served incomplete and misleading. Since the jury in the case at hand was aware that the Defendant had already served seventeen (17) years on this charge, the failure to provide the additional instruction led the jury to believe that the Defendant would be released in eight (8) years, which is not an accurate understanding. This incomplete and misleading instruction prejudiced the Defendant since an accurate understanding of the law would have led the jury to believe that, while the Defendant was entitled to time served, he was *not* guaranteed release after twenty-five (25) years.

As recognized by this Court in reaching the Green, decision, informing the jury that parole is not guaranteed at or after twenty-five (25) years would have served to inform any jurors leaning towards the death penalty based on the perception that the Defendant could be paroled in the near future due to credit for time served that he could stay in jail for a longer period of time and that there was no guarantee that he would in fact be paroled. Id. at 498. To merely inform the jury that the Defendant will receive credit for time served is misleading as it does not fully inform them of the possibilities as it relates to the Defendant's true possible prison term.

IV.

THE CUMULATIVE EFFECT OF THE EVIDENTIARY ERRORS, EVEN IF INDIVIDUALLY DEEMED HARMLESS, CUMULATIVELY DEPRIVED THE DEFENDANT OF A FAIR AND IMPARTIAL TRIAL.

Where multiple errors are discovered in the jury trial, a review of the cumulative effect of those errors is appropriate because even if each of the alleged errors, standing alone, could be considered harmless, the cumulative effect of such errors may be such as to deny a defendant the fair and impartial trial that is the inalienable right of all litigants. McDuffie v. State, 970 So.2d 312, 328 (Fla. 2007). *(Citing,* Brooks v. State, 918 So. 2d 181, 202 (Fla. 2005)*).* (quoting, Jackson v. State, 575 So. 2d 181, 189 (Fla. 1991)).

In the case at hand, the evidentiary issues raised herein, even if individually found to be harmless errors, when taken cumulatively, undermined the impartiality of the proceeding and deprived the Defendant of his inalienable right to a fair trial.

CONCLUSION

Based upon the foregoing arguments and cited authorities, the Defendant/Appellant respectfully requests that this Honorable Court reverse the Trial Court's sentencing Order entered on August 7, 2009, committing the Defendant to the custody of the Department of Corrections to be sentenced to death.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Initial Brief of Appellant was sent by U.S. mail to the Office of Attorney General, Department of Legal Affairs, criminal appellate division, 1515 N. Flagler Dr. 9th floor, West Palm Beach, FL 33401; to Jeff Anderson, Assistant Public Defender, 421 Third Street, 6th Floor, West Palm Beach, Florida 33401; to Patrick Rastatter, 524 S. Andrews Avenue, Suite 301 North, Fort Lauderdale, Florida 33301-2845; David Rowe, 110 E. Broward Boulevard, Suite 1700, Fort Lauderdale, Florida 33020-4201; Donovan Parker, 230 S. 28th Avenue, Hollywood, Florida 33020-4204; the Office of Criminal Conflict Counsel, Melanie Casper, 605 North Olive Avenue, Second Floor, West Palm Beach, Florida 33401; Lancelot Armstrong, DC 693504, Union Correctional Institution, 7819 N.W. 228th Street, Raiford, Florida 33026 and the Office of the State Attorney, Assistant State Attorney Carolyn McCann, Broward County Courthouse, 201 S.E. 6th Street, 6th Floor, Fort Lauderdale, Florida 33301 on this 2nd day of August, 2010.

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CERTIFICATE OF FONT COMPLIANCE

I HEREBY CERTIFY that the foregoing Appellate Brief complies with the font requirements of Fla. R. App. P. 9.210 and is written in Times New Roman 14-point font.

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