IN THE SUPREME COURT OF FLORIDA

WADADA DELHALL,	)	
	)	
Appellant,	)	
	)	
v.	)	
	)	CASE NO. SC09-87
STATE OF FLORIDA,	)	L.T. NO. F01-37081
	)	
Appellee.	)	
	)	

INTIAL BRIEF OF APPELLANT

On Appeal from the Circuit Court of the
Eleventh Judicial Circuit in and
for Miami-Dade County, Florida

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PRELIMINARY STATEMENT

Appellant, Wadada Delhall ("Wadada"), was the Defendant in the Circuit Court of the Eleventh Judicial Circuit, in and for Miami-Dade County, Florida. Appellee, State of Florida ("State"), was the Plaintiff.

References to the Record on Appeal will be designated by the symbol “R” followed the appropriate volume and corresponding page number(s).

References to the Trial Transcript will be designated by the symbol “R” followed by the appropriate record volume, followed by the symbol “T” followed by the corresponding transcript page number(s).

References to the Supplemental Record on Appeal, consisting of additional trial transcripts, will be designated by the symbol “R Supp” followed the appropriate volume number; followed by the corresponding page number(s).

JURISDICTIONAL STATEMENT

This Court has jurisdiction to review the judgment and sentence of a trial court imposing the death penalty. Article V, § 3(b)(1), Florida Constitution; Rule 9.030(a)(1)(A)(1), Florida Rules of Appellate Procedure.

STATEMENT OF THE CASE AND FACTS

On November 29, 2001, Hubert McCrae died after being shot in front of his business, Ray's Auto Repair, at 2143 Opa-Locka Blvd., in Miami. R 121 T 1063. Wadada Delhall ("Wadada") was indicted for first-degree murder, use of a firearm in a felony, and possession of a firearm by a convicted felon. R 1 45-46.

The State's opening statement began: "Kill the witness, set your brother free." R 121 T 1032. The defense objected, renewing its pretrial *Williams* rule objection to introduction of extensive evidence from the trial of Wadada's brother, Negus Delhall, concerning the 1998 shooting death of Gilbert Bennett. Id.; R 2 371. Later in the State's opening, after extended discussion of Negus' case, the defense objected: "The Negus Delhall case has been a feature of this case." R 121 T 1038.

Miami-Dade Officer Hufnagel testified he got to the crime scene at 6:53 pm, and that, as he lay shot and dying, McCrae told him the person who shot him was "the brother of the guy who shot the man who owned the business before," R 121 T 1081, and described the shooter's vehicle as a small gray Mazda. R 121 T 1070.

Fred Williams, working on an automobile at a nearby shop, heard several shots and looked up to see where they were coming from. R 124 T 1434. Williams

said the shots were coming from the direction of Ray's Auto Shop. R 124 T 1435. Williams saw a car pull up and a man get out and go into Ray's. R 124 T 1449. A man exited Ray's with a gun and entered a small white car with tinted windows on the passenger side, firing one more shot. R 124 T 1436, 1438, 1443. The man also fired a shot after the car started to drive off. R 124 T 1440. Though Williams did not see the man's face, he described him as 5'11", slim, with a brown complexion, wearing a long sleeved shirt, light colored belt and jeans. R 124 T 1436-1438.

Rolando Rodriquez, at a nearby shop, heard six shots, R 124 T 1452-1454, and hid behind the car he was fixing, seeing an old Mazda coming from where the shots were fired, moving south. He then heard another shot. R 124 T 1456-1459.

Hubert McCrae had been an eyewitness to a different homicide: the shooting death of Gilbert Bennett, killed in 1998 at the same address where McCrae had now been shot and killed. In 1998, McCrae had identified Wadada's brother, Negus Delhall, ("Negus"), as the shooter. R 121 T 1188. Negus had been arrested, charged and held in jail awaiting trial when McCrae was shot. R 123 T 1415.

At Wadada's trial, the State presented extensive evidence concerning the Bennett homicide, along with the investigation of McCrae's murder:

Miami-Dade Crime Scene Officer Chavez testified that he investigated the Gilbert Bennett (Richie B) shooting in 1998. R 121 T 1176. When the State sought to introduce Chavez' sketches and testimony about the Bennett crime scene, the trial court overruled the defense's "objection based on previous *Williams* rule issue. I believe this goes directly to Negus Delhall's issue." R 121 T 1177.

Chavez described the Bennett crime scene in detail. R 121 T 1177-1184. When the State tendered a photograph of Bennett's lifeless body after paramedics had failed to revive him, the defense asserted a continuing *Williams* rule objection. R 121 T 1180. When the State introduced latent fingerprints from the Bennett scene, the defense continued its *Williams* rule objection. R 121 T 1184. Chavez said latent prints, lifted by another person at the Bennett scene, R 121 T 1186-87, were identified by yet another person as belonging to Negus, R 121 T 1188-89, and the defense added hearsay to its *Williams* rule objection. R 121 T 1189.

The State called Negus' *Arthur* hearing attorney from the Bennett case, Paul Gerson, who did not recall ever showing McCrae's Affidavit naming Negus as the shooter, to anyone in Negus' family. R 123 T 1349, 1308-09. Public defender Howard Lubel, said he was not prepared to try Negus' case in 2001. R 130 T 2316.

Detective Hoadley interviewed McCrae about Bennett's killing, and he described the shooter, R 123 T 1291-94, picking Negus from a photo lineup. R 123 T 1297. Hoadley testified at the *Arthur* hearing when Negus was denied bond. Id.

The State introduced McCrae's Affidavit identifying Negus as Bennett's killer over hearsay and *Williams* rule objections. R 123 T 1307. Hoadley said he was told McCrae was murdered, R 123 T 1314; went to Ray's looking for witnesses, R 123 T 1314-15; and Stewart Notice said Erwin Bruce saw Bennett's shooting. R 123 T 1327-1329, 1331. Hoadley said Clarence Gooden, a lunch truck driver in the area, was willing to talk with him about the case. R 123 T 1314-15.

Clarence Gooden told Wadada's jury that he witnessed the Bennett killing, R 123 T 1364, describing the shooting in detail, and how he saw Bennett "lying on the ground in a pool of blood." R 123 T 1367. He parked at Ray's, heard shots and saw someone he had seen before, but did not know, exit, look at him and leave. Bennett lay on the floor "in a pool of blood." R 123 T 1361, 1366-1367. While he did not want to get involved, Bruce and others got his name and had a discussion in front of him, warning him not to talk. Gooden first testified Wadada was present,

R 123 T 1369-1370,[1] but was told only after "the homicide" who Wadada was. The trial court noted: "You need to specify which homicide." R 123 T 1375-1376.

Miami-Dade Crime Scene Investigator Garrido said he arrived at Ray's Auto in the dark. McCrae lay between a vehicle and the door. R 121 T 1105. Garrido took photos as Chavez collected projectiles. R 121 T 1133. Garrido was unable to lift any fingerprints, R 121 T 1168; was not told the type of car the shooter drove, R 121 T 1161; was unaware two guns were used, R 121 T 1144; saw nothing at the scene showing a .38 caliber was fired, and that the shell casings at the scene were from three manufacturers: Federal®, Wolf® and Remington®. R 121 T 1170, 1172.

Miami-Dade Criminalist Hertel said he reviewed the file concluding that two guns were used to kill McCrae. R 128 T 2011, 2032. Hertel, a firearm and tool mark examiner, R 128 T 2011, 2032, said that, while he could not be certain, he believed the shell casings and projectiles at the crime scene were all fired from a *single* .9 mm or .38 caliber weapon, R 128 T 2037, 2050-2052; that different brands of shell casings were found at the scene, R 128 T 2037; and that the unspent cartridge from a book bag said to belong to Wadada was made by a different manufacturer than the eleven shell casings found at the crime scene. R 128 T 2058.

[1] On cross, Gooden said he did not know who the third person was. R 123 T 1380.

In 2001, Marcia Berry was dating Wadada, whom she called "Wads." R 124 T 1475. Berry had a Mazda Protégé, and recognized a photo of it. R 124 T 1477. She described the car's color as "sand," and said the tint was fading as the car was old. R 124 T 1478, 1479. Berry owned the car with her sister, Doris, who rarely used it. R 124 T 1479. She allowed Wadada to drive her car and helped him get an apartment in Pembroke Pines. R 124 T 1481. Wadada drove Berry to and from work. R 124 T 1482. On November 29, 2001, Berry testified that she left work at 3:00 p.m. and was picked up by Wadada and his brother, Ativa, who was driving. R 124 T 1483. She testified that they went to Berry's aunt's house as they planned to go shopping, R 124 T 1485, but decided not to go as it was getting late. R 124 T 1487. Berry was left at her apartment, R 124 T 1489, staying home to set up her printer. R 124 T 1491. Berry next saw Wadada at 10:00, 11:00, or 12:00 p.m. that night, R 124 T 1493, when Berry called saying she was hungry. R 124 T 1492. Wadada took her to Checkers to get something to eat before they closed at 11:00 or 12:00 p.m. R 124 T 1494.

Police spoke to Berry on December 5, 2001, taking a statement. R 124 T 1494. Berry and her sister, Doris, signed rights waivers and consent to search their apartment, R 124 T 1497, as well as the Mazda. R 124 T 1498. Berry never kept

ammunition in her car or book bag, and had no idea why a cartridge was found in her car. R 124 T 1499. After the police visit, Berry stopped seeing Wadada. R 124 T 1499. She said she had loved Wadada, that Wadada had acted as a father and brother to his youngest brother, Pepe, R 124 T 1505, and had been taking care of his brothers from his late teens until she became involved with him. R 124 T 1506.

On December 5, 2001, Berry called Wadada to pick her up early from work. Police were at Wadada's house and said she could not speak to him. R 124 T 1512. Police said they were taking Berry's car and she said she had no ride home. R 124 T 1512. Police picked Berry up from her job at American Express, in Plantation. R 124 T 1510, and took her home, where they remained from 2:00 pm to 8:30 pm, R 124 T 1516, questioning her without telling her about the McCrae murder, except to say they had Wadada in for questioning. Police took Berry to the homicide division and interviewed her before a court reporter. R 124 T 1516-1517.

Berry said Wadada and Ativa were not getting along. She saw more of the younger brother, Pepe, who lived with Wadada. R 124 T 1518. Berry testified that Ativa drove her and Wadada to her aunt's house on November 29, 2001, but did not recall who drove as they returned to her apartment. R 124 T 1526. Her

recollection was based on a review of her December 5, 2001 statement to police. R 124 T 1528.

Ms. Berry did not think it was any of her business what Wadada did when he was not with her. R 124 T 1532. She knew he was on probation, but did not know why. R 124 T 1531. When the prosecutor asked Berry, "[D]id you know he was a convicted felon for carrying a concealed firearm?" the defense objected and moved for a mistrial, R 124 T 1531, and the trial Court denied the motion. R 124 T 1554.

Berry was not sure what time Detective Bayas picked her up at work, but she had waited quite a while. R 124 T 1534. Berry said Detective Bayas questioned her at her apartment along with Sergeant Rayborn. R 124 T 1536. Berry said she was questioned about the car and how she met Wadada, but was unsure whether this was at her home or the police station. R 124 T 1537. Wadada had told Berry he worked at a car wash in Opa-Locka. R 124 T 1539. Berry testified that she did not see Wadada and Ativa fighting or arguing November 29, 2001. R 124 T 1540. Wadada used Berry's car as often as he liked, as long as she was not using it. R 124 T 1540.

Berry was not with Wadada all night November 29, 2001, R 124 T 1543; she did not try to give Wadada an alibi, R 124 T 1543; and if she knew he was wanted

for murder, she would not have lied. R 124 T 1543. Berry did not recall speaking to Wadada at the station, R 124 T 1545, and did not recall going to the Miami Dade County Jail with Wadada November 27, 2001, to visit Negus. R 124 T 1546. Berry testified Wadada never asked her for an alibi, R 124 T 1547, and said she did not know when McCrae was murdered, or even who he was. R 124 T 1548.

Thomas Charles, a since retired Miami-Dade Police Officer, R 125 T 1650, stated that on December 5, 2001, he went to Apartment 207, at 10640 Washington Street, in Pembroke Pines, and was met by Detective Bayas from homicide. R 125 T 1654. He photographed the apartment and Mazda Protégé, R 125 T 1654, and placed seals on the car, R 125 T 1659-60, before being towed to Two Can Towing. R 125 T 1655. The next day, Charles photographed Wadada, R 125 T 1658, and visited Two Can Towing to search the Mazda. The seals Charles had placed on the car the day before were all intact. R 125 T 1659-60. Charles described items found in the Mazda, R 125 T 1661, as the trial court overruled the defense's continuing objection to admitting evidence from the car, R 125 T 1661, as well as a receipt for a payment relating to Wadada's probation. R 125 T 1662. Charles said he also found an application for a job bearing the name "Wadada Delhall." R 125 T 1666.

Charles found a blue book bag in the car's right rear, R 125 T 1672, with a receipt bearing the name "Wadada Delhall." R 125 T 1672. A black book bag in the backseat bore records and a .9 mm cartridge. R 125 T 1673-74. The defense reasserted a continuing objection to the fruits of the Mazda's search. R 125 T 1674. The cartridge was made by Winchester®. R 125 T 1676. The Mazda was dusted for prints, R 125 T 1677-78, but not tested for gunshot residue as Charles was not told to do so and because the car had been exposed to the elements. R 125 T 1682.

Miami-Dade Latent Fingerprint Examiner Nikolov, R 125 T 1685, reviewed the work of Michael Collier, a former examiner at the department. R 125 T 1687. Collier had examined two paper items, one a job application, and found no prints. R 125 T 1688. Collier had also examined the shell casings dusted for prints, which Nikolov reviewed, R 125 T 1688, and did not find it unusual to find no prints on shell casings, as heat created as they are fired often destroys prints. R 125 T 1688.

Of the latents Collier processed, only State's Exhibit #125, from the Mazda, had value, matching Wadada's right palm. R 125 T 1689. Nikolov rolled Wadada's prints in court and they matched Exhibit #125. R 125 T 1690. Nikolov agreed Collier had misidentified a latent print, but later said it was not a mistake, as it was of very low quality. R 125 T 1692-1693. The latent matching Wadada was from

the Mazda's right front door. R 125 T 1694. Nikolov said Collier was not mistaken this time, as the latent was verified by another examiner. R 125 T 1695. After Nikolov reviewed Collier's work, another examiner re-compared the latent print with Wadada's standard fingerprint card. R 125 T 1698-99.

On November 29, 2001, Miami-Dade Detective Bayas arrived at the McCrae crime scene. R 125 T 1573. He interviewed Fred Williams and took his sworn statement. R 125 T 1575. He returned to the scene on November 30, 2001, canvassing the area, R 125 T 1576, without any substantial leads. R 125 T 1576.

Bayas assisted Detective Butchko in finding Wadada, R 125 T 1576, and, on December 5, 2001, went to Apartment 207, 10640 Washington Street, in Pembroke Pines, looking for him. R 125 T 1579. When Tiese Caldwell answered the door, Bayas, Butchko, and Sergeant Rayborn all entered the apartment. R 125 T 1580.

When Bayas testified that Butchko had interviewed Caldwell, the defense hearsay objection was overruled. R 125 T 1581. Bayas said Caldwell told Butchko no one else was in the apartment besides her children, R 125 T 1581-82; that he heard a rustling sound and went into the bedroom, opened a closet door, looked inside saw someone. R 125 T 1583-84. Bayas ordered the person out of closet and

restrained him. The defense asserted a continuing objection based on its pretrial motion to suppress the fruits of Wadada's illegal seizure and arrest. R 125 T 1586.

Detective Bayas was then permitted to testify that Wadada had told him that he was hiding in the closet because he was on probation. R 125 T 1595.

According to Bayas, Wadada was not yet under arrest. R 125 T 1596. Bayas said he handed Caldwell a consent-to-search form which she signed. R 125 T 1596. The defense objection to admission of evidence obtained from the search and seizure at the apartment, as asserted in its pretrial motion to suppress, was overruled. Bayas said he gave Wadada a consent-to-search form, which he signed without asking about the form, though he seemed to understand. R 125 T 1600-01. The search yielded nothing of evidentiary value. R 125 T 1605.

A four door Mazda Protégé was parked at the stairwell, R 125 T 1602, which Bayas found was registered to Berry. R 125 T 1605. Bayas contacted Berry and offered to pick her up at work. R 125 T 1605. Bayas and Rayborn took Berry home to her sister, Doris, R 125 T 1608, they both signed consent-to-search forms for the apartment, R 125 T 1609, and Marcia Berry signed her consent-to-search for the Mazda. R 125 T 1610. Bayas said he never told Berry that Wadada was a murder suspect, as he did not want to influence her judgment. R 125 T 1612.

Bayas agreed that at the time he went looking for Wadada in Broward County, he did not have probable cause to arrest him, R 125 T 1620, and agreed the only way he could get Wadada to go to the station was if he were to see Wadada commit a crime, or if Wadada agreed to go with him. R 125 T 1621.

Detective Bayas admitted that when Detective Butchko asked Tiese Caldwell if they could look around the apartment, she asked whether they had a search warrant. R 125 T 1621. Bayas said they left it at that and that there was not going to be a search of the apartment. R 125 T 1621. Bayas agreed the detectives' purpose for going to the apartment was to find Wadada; agreed Caldwell told them Wadada was not there; agreed the detectives could not legally search the apartment R 125 T 1621-1622, and agreed that when Wadada stepped out of the closet, he did not have anything in his hand and was not doing anything illegal. R 125 T 1624.

Bayas said the rustling sound made him suspicious as he was told no one else was home, R 125 T 1624; that when Wadada identified himself downstairs, the handcuffs were removed, R 125 T 1624; and that Wadada was free to go at this point, R 125 T 1626, though Butchko asked him to come to the station, and they took him to an interview room at Miami-Dade Police Headquarters. R 125 T 1626.

Bayas said he spoke with Berry before taking her to the station for a sworn statement. The notes from the conversations were placed in a police report when she was taken to the station at 10:00 or 11:00 p.m. R 125 T 1633; R 125 T 1630. Bayas said his pre-interview with Berry indicated she was not with Wadada at the time of the killing, R 125 T 1636; that he always pre-interviews witnesses before taking statements, R 125 T 1641; that he chose 3:00 p.m. on November 29, 2001, as his point of reference in questioning Berry, R 125 T 1643; and that Berry told him she was at work prior to 3:00 p.m. on November 29, 2001. R 125 T 1645.

Miami-Dade Detective Butchko testified that he was called to a homicide at 2143 Opa-Locka Boulevard, at 7:15 p.m., on November 29, 2001. R 127 T 1807. He arrived at 8:00 or 8:15 p.m., and was appointed lead detective. R 127 T 1810.

Butchko testified that Officer Michael Hufnagel, who was at the scene when Buchko arrived, R 127 T 1810, told Butchko that victim McCrae had made a statement before he died. R 127 T 1811. While at the scene, Butchko learned that another homicide had been committed there several years earlier. R 127 T 1811.

None of the witnesses Detective Butchko spoke with at the scene could give a complete description of the shooter. R 127 T 1813.

On November 30, 2001, Butchko spoke with Sergeant Bill Hellman and gathered information on the murder of Gilbert Bennett. The defendant in that case was Negus Delhall. R 127 T 1813-14. Butchko then began looking for Wadada. Hellman told Butchko Wadada's last known address was 3826 NW 52nd Avenue, Pembroke Pines, but when Butchko first went to that address, no one was at home, R 127 T 1814, and it soon turned out to be an old address for Nicola Fagan, Wadada's estranged wife, R 127 T 1815, who no longer lived there. R 127 T 1817.

Butchko obtained another address for Nicola Fagan: 10640 Washington Street, in Pembroke Pines. On December 5, 2001, Detectives Butchko, Estopinan, Bayas, and Sergeant Rayborn, went to that address, R 127 T1817-19, knocked and a black female, Tiese Caldwell, answered. R 127 T1825-1826. There were children in the apartment. R 127 T1826. Asked who lived at the address, she said Wadada Delhall. R 127 T 1825. Asked if he was home, she said no, R 127 T 1825, and that she was a visitor. R 127 T1826. Butchko asked if Caldwell was sure no one else was home and a defense hearsay objection was overruled. Butchko said Caldwell told him no one else was home, R 127 T1827, and refused a search of the premises without a warrant, allowing police in only to interview her. R 127 T1827.

Butchko testified that, while interviewing Caldwell, Detective Bayas heard a sound and asked Caldwell if anyone else was in the apartment. She said no. Bayas drew his firearm and entered the bedroom, yelling, "get down on the floor." R 127 T 1830. Butchko drew his firearm and entered the room, where Bayas had a black male facing down on the floor. R 127 T 1830. Bayas handcuffed the man and took him downstairs. According to Butchko, at this time Wadada was not under arrest. R 127 T 1833. Bayas learned that the man was Wadada Delhall. R 127 T 1833. Butchko did not believe he had probable cause to arrest Wadada, R 127 T 1834, and said he removed the handcuffs. Wadada was very cooperative. R 127 T1834.

Butchko testified Wadada said he was hiding because he was on probation, R 127 T 1834; that he was told he was not under arrest, but police were investigating a homicide and wanted to talk to him at the station; that he agreed to go with them, R 127 T 1836; that Wadada was not threatened or promised anything, R 127 T 1837; and that, according to Butchko, when he asked if he could search the apartment, Wadada agreed and signed a consent form. R 127 T 1837. Butchko described the Mazda's color as gray or grayish gold. R 127 T 1840-1845.

Butchko said Wadada was not handcuffed during his backseat ride to the station, and that if he had been arrested, he would have been in the front seat with a

detective in the seat behind him. R 127 T 1845. Before Wadada was read *Miranda* warnings, Butchko got background information to gauge his education and mental state. R 127 T 1847. The *Miranda* card was admitted into evidence over the continued and standing defense objection to subsequent statements. R 127 T 1848.

Wadada stated he dropped out of school in the twelfth grade R 127 T 1850. Butchko read *Miranda* warnings from a form, R 127 T 1851, and Wadada filled it out. R 127 T 1852-53. Wadada read the final statement on the form aloud and signed it, including the date and time. R 127 T 1854. Wadada stated his birth date of 1/30/77, his age of 24, and his address at 10640 Washington Street, Pembroke Pines, Apartment 207. R 127 T 1855. He said he worked at a restaurant owned by relatives, and that he had a second job at his aunt's hair salon. R 127 T 1855.

Police asked Wadada about his activities on "12-5-01,"[2] and Wadada said he worked until 4:00 or 5:00 p.m., then went with his Aunt Debbie to pick up Marcia Berry at her job. Wadada said they then went to the mall to buy pants, but that he then stayed with Berry for the rest of the night at their apartment. R 127 T 1860.

[2] Detective Butchko testified that the date of the events about which Wadada was being questioned was "12-5-01." R 127 T 1860. This presents some confusion, as police had picked Wadada up for questioning on 12-5-01, detaining him for the remainder of the day. McRae was killed on November 29, 2001. R 127 T 1878.

Butchko said Wadada told him he had no contact with his brother, Ativa; that the last time he spoke with Ativa was September 11, 2001; and that he was no longer close to Ativa, R 127 T 1862. Butchko said Wadada told him he was at work on November 29, 2001 until 4:00 or 5:00 p.m. R 127 T 1864; that Wadada said he was unsure, but believed he had walked to his Aunt Debbie's house, R 127 T1866, left with his Aunt Debbie to pick Berry up at her job at American Express at 6:30 p.m., and that the three then went together to the Broward Mall. R 127 T1866; and that Wadada said they were at the mall a short time before Debbie left Wadada and Berry at Berry's father's house. Butchko testifed that Wadada did not say he had used Berry's car to pick her up, and said Ativa was with him. R 127 T 1867.

Butchko testified that Wadada had told him he and Berry left Berry's father's house in his Chevrolet, drove to their apartment and stayed the night R 127 T 1868. Butchko testified that Wadada had told him Negus Delhall was in jail for murder or attempted robbery, R 127 T 1869, and that Wadada had gone to visit Negus in jail one week before the previous weekend. R 127 T 1870.[3]

[3] At this point, the prosecutor claimed one of the jurors of Jamaican descent was falling sleep. A discussion ensued outside the jury's presence and the trial court spoke to jurors about the importance of being attentive. R 127 T 1871-77.

Butchko testified that Wadada visited Negus in jail on November 27, 2001, R 127 T 1878, and was upset by talking about his brother being in jail for a murder he did not commit. R 127 T 1879. Wadada denied involvement in the McCrae homicide. R 127 T 1881. Butchko tried to downplay the crime's gravity to get Wadada to admit to it. R 127 T 1882. Butchko left the room at 3:30 p.m., telling Wadada to think about what they had discussed. R 127 T 1883. Butchko testified he believed Wadada was not under arrest and was still free to leave, R 127 T 1883, claiming Wadada was told three times he was not under arrest. R 127 T 1883-1884.[4]

Butchko returned to the room at 4:30 p.m., and continued questioning Wadada, R 127 T 1884, who continued to deny any involvement. R 127 T 1884.

Butchko then sought help from Bill Clifford, R 127 T1884, who advised Wadada of his rights at 5:27 p.m. R 127 T 1886. At some point, Clifford left the room to speak with Butchko about Wadada's alibi. Butchko contacted Detective Bayas and told him to contact Berry. Clifford said Butchko told him that Bayas had told Butchko that the alibi did not check out, R 127 T 1887, and that Clifford

[4] While Butchko said Wadada was told three times he was not under arrest, R 127 T 1883-1884, Butchko did not claim that Wadada was told he was free to leave.

returned to the interview room with this information. R 127 T 1887. At 9:30 p.m., Clifford came out of the room with Wadada's signed confession. R 127 T 1887.

Butchko said that, after this confession, Wadada was not free to leave. R 127 T 1892. Butchko testified he then went back into the interview room to continue questioning Wadada, R 127 T 1893, who seemed more at ease after the confession. R 127 T 1895. Even after the confession, Butchko did not tell Wadada he was under arrest for murder. R 127 T 1895. Detective Estopinan was present with Butchko as he continued questioning Wadada. R 127 T 1896. Miami-Dade Police did not have a policy of recording these types of interviews in 2001. R 127 T 1896.

Butchko testified that, at some point after 9:30 p.m., Butchko asked Wadada about picking up his girlfriend, Marcia Berry, on November 29, 2001 R 127 T1898, and that Wadada stated he had the car the entire day, did not work that day after taking Berry to work that morning, and picked Berry up from work at American Express in Plantation around 5:00 p.m. R 127 T 1899. Butchko said Wadada told him he had a firearm in a green book bag in the car, R 127 T 1899, first stating it was a .38 caliber or .9 mm, but then correcting himself to say it was a .9 mm. R 127 T 1900. Butchko said that Wadada said he bought the gun on the street in Overtown, that there was one bullet in the chamber and others in the

magazine, but that he did not know how many. R 127 T 1900. Though Butchko thought only one gun was used, R 127 T 1900, he testified that Wadada said he had a second gun, a silver .38 revolver, but did not know how many bullets were in the revolver. R 127 T 1900. Butchko testified that Wadada said he had both guns with him on November 29, 2001, R 127 T 1900, and had bought the revolver from a "base-head" in Overtown, paying $200 for both guns. R 127 T 1901.[5]

Detective Butchko was surprised when Wadada said that he had used two firearms in the shooting, as this did not match the crime scene. R 127 T 1901. Butchko was skeptical of the two-gun scenario. R 127 T 1902.

Butchko testified that Wadada said he had picked Berry up and took her to the Pembroke Mall, where they remained 20 to 30 minutes as she bought pants, that they then went back to the apartment at 10640 Washington Street, in Pembroke Pines, where he dropped Berry off at about 6:00 p.m., driving away alone in the Mazda. R 127 T1902-1903. Butchko testified that Wadada told him that, as he was driving towards the warehouse, he was bothered by the thought that, if he were to shoot McRae, he may have to go into court against his brother, R 127 T 1913, but decided to leave it in God's hands, thinking that if God did not want

[5] Butchko said a "base-head" is someone who uses crack cocaine. R 127 T 1901.

him to kill McCrae, then McCrae would not be there. R 127 T 1913. Butchko said that he wrote this down in his notes, and read it in court: "If God didn't want me to shoot the victim, then don't let the victim be there." R 127 T 1914.

Butchko testified that Wadada told him he drove into the warehouse and past Ray's Auto, where he saw McCrae working on a dark colored SUV. R 127 T 1914; that he left the complex, but then came back, R 127 T 1915; that he then drove past Ray's Auto again, R 127 T 1916; and that the passenger side of the vehicle faced the shop. R 127 T 1916. Based on the direction Wadada said he was driving, Butchko knew the passenger side would not be facing the auto shop, and that Wadada was wrong in his statement, R 127 T 1917, but let Wadada continue talking, though he knew what Wadada was saying was incorrect. R 127 T 1917. Butchko testified that Wadada then stated that he had jumped out of the car with the semi-automatic in his right hand and the revolver in his left, R 127 T 1917, with the victim on the passenger side of the SUV when Wadada was about ten feet from him and started firing both guns at the victim, R 127 T 1917, seven times from the semi-automatic and four from the revolver. R 127 T 1918.

Based on what Butchko believed were discrepancies between what Butchko said Wadada had told him and witness statements that the gunman had exited the

passenger side of the car, Butchko believed there was someone else in the vehicle, R 127 T 1919, and Wadada's brother, Ativa, was a second gunman. R 127 T 1920. Butchko testified that Wadada told him that, after shooting McCrae, he got back in the car and fled westbound toward Opa-Locka Boulevard, firing a shot to make any witnesses duck, R 127 T 1921, and that he then went to Miami Lakes to see a girl named "Pookie," though he did not know where she lived. R 127 T 1923. Butchko said Wadada said he then went to Northwest 103rd Street, in Hialeah, and sold both guns to a Hispanic male for $50, R 127 T 1923, driving to a music studio in Pembroke Pines to work on some records. R 127 T 1923.

Butchko stated that Wadada referred to McCrae as "Fat Man," rather than "Fat Cat," R 127 T 1924, saying the word on the street was that "Fat Man" was snitching on his brother, R 127 T 1925, and that in October 2001, Wadada confronted McCrae about testifying against Negus and McCrae said he would not, but Wadada did not believe he had convinced McCrae not to testify. R 127 T 1927. Butchko said Wadada told him he was shaken up when he visited his brother, and Negus had broken down and cried. R 127 T 1928. This was when, according to Butchko, Wadada decided to kill McCrae, R 127 T 1928, and the day of the killing, he thought of just trying to scare him by showing him the gun. R 127 T 1929.

At 11:15 p.m., Butchko and Estopinan left the room, Wadada was offered food and drinks, R 127 T 1931, and Butchko and Estopinan returned half an hour later, R 127 T 1932, telling him they did not believe he was alone in the car and that Wadada had said his brother, Ativa, was with him earlier. R 127 T 1932-33. Butchko said Wadada replied he dropped Ativa off at his girlfriend's house and shot McCrae himself. R 127 T 1933. Butchko said Wadada had said earlier there were three in the car: Ativa, Jahari (Berry's cousin), and himself. R 127 T 1933.

Butchko said he became curious because Wadada had said earlier he had not seen Ativa since September 11, 2001, and was now saying he was with him on November 29, 2001, the day of the killing. R 127 T 1934. Butchko and Estopinan interrogated Wadada until 1:27 a.m. R 127 T 1934. Butchko testified that Wadada then said he was going to tell them the whole truth, R 127 T 1935; that Wadada said Ativa had been with him and Wadada had told Ativa where to drive to get to the scene, R 127 T 1935; that they arrived in Berry's car and that Ativa had not fired any shots. R 127 T 1936. Wadada was then given food, R 127 T 1937, and Butchko sent for a stenographer to take down Wadada's statement. R 127 T 1939.

When a stenographer arrived at about 3:30 a.m. on December 6, 2001, R 127 T 1950, Butchko testified that Wadada became angry, saying that everything he

had told them was a lie, R 127 T 1940; that Ativa was not with him, R 127 T 1940; and that, "I can't face my mother by saying my brother is involved in this." R 127 T 1940. Wadada was then formally arrested for first degree murder. R 127 T 1943. On December 6, 2001, at 8:30 a.m., Wadada was photographed. R 127 T 1948.

Detective Butchko had gone to the apartment complex before the time they found Wadada in the closet and spoke to the manager. R 127 T 1961. At that time, Butchko had a photograph of Wadada, R 127 T 1961, but said he did not recognize Wadada as he was being taken out of his bedroom. R 127 T 1961. Butchko said Wadada was not arrested at that time, but was detained, R 127 T 1962, and that he did not have jurisdiction to arrest Wadada in Broward County. R 127 T 1962.

Butchko said that now the Miami-Dade Police videotapes statements. R 127 T 1966. Butchko conceded Wadada told him McCrae told Wadada he was not a witness against Negus, R 127 T 1993; that there was no eyewitness identification of the shooter; that no firearms were ever recovered, R 128 T 1997; that before he went to Wadada's apartment, Butchko knew the shooter's car was described as "dark gray," R 128 T 1998; that without Wadada's confession, he had no case against him, R 128 T 1998; and that Wadada told Butchko he lied to him "about all the circumstances in the case," and was not involved in the killing. R 128 T 1998.

Ativa had invoked his rights, refusing to speak to Butchko. R 128 T 1999.

On December 5, 2001, Sergeant Yolanda Rayborn was a supervisor in the homicide bureau of the Miami-Dade Police Department. R 130 T 2377. On that date, Rayborn, along with Detectives Butchko, Bayas and Estopinan, proceeded to Apartment 207, at 10640 Washington Street, in Pembroke Pines. R 130 T 2378.

Rayborn said Tiese Caldwell answered the door, R 130 T 2381; that Butchko asked if Wadada lived there, and Caldwell said "yes"; that Butchko asked if anyone else was home besides she and her children, and Caldwell said "no," R 130 T 2381; that Caldwell refused to consent to search the apartment without a warrant, R 130 T 2381; and that Butchko interviewed Caldwell as Rayborn watched the children and Bayas stood near the bedrooms. R 130 T 2382. Rayborn suddenly heard Bayas screaming from a bedroom in a loud, excited voice, R 130 T 2383, ran into the bedroom and saw Bayas handcuffing Wadada on the floor. R 130 T 2383.

Sergeant Rayborn did not see any of the other detectives check Wadada's pockets to see whether he had any weapons on him. R 130 T 2388.

William Clifford began work at the Miami-Dade Police Department in 2001, R 125 T 1700, and assisted Butchko by interviewing Wadada. Clifford said that

when Butchko brought Wadada to the interview room, Wadada seemed confident, R 125 T 1710, and that he told Wadada the interview was voluntary. R 125 T 1715.

The State introduced the consent form signed by Wadada, and the defense objected to its admission as the fruit of an illegal arrest. R 125 T 1711-1714. Clifford stated that Wadada was read the form explaining his rights and signed it. R 125 T 1719. The defense renewed its continuing objection to this evidence as fruit of an illegal arrest, as asserted in the pretrial suppression motion. 125 T 1722.

During the prosecution's questioning of Clifford on direct examination, the following exchange occurred:

[PROSECUTOR]: And did you ask him if he had ever been arrested before?

[STATE WITNESS]: Yes.

[PROSECUTOR]: What did he answer you specifically?

[STATE WITNESS]: He told me he had been arrested for a burglary.

R 125 T 1731.

Wadada's defense counsel objected, R 125 T 1734, and moved for a mistrial. R 125 T 1734, though the defense later withdrew the motion. R 125 T 1737.

Clifford testified Wadada told him he had no knowledge of McCrae's murder and did not know McCrae, R 125 T 1750; that Clifford told him it would

be easy for police to verify if he was telling the truth; and that he said he did not know McCrae, but knew who he was. R 125 T 1751. Clifford said he then asked questions to see if he could link Wadada to being in the area when the homicide occurred, but that Wadada denied any knowledge of the killing. R 125 T 1752. Clifford said Wadada said he was with his girlfriend, Marcia Berry, when the murder took place, and she would be able to verify this, R 125 T 1753, so he took a break to tell Butchko what Wadada had said about Berry being able to verify his whereabouts when the murder occurred. R 125 T 1755. Clifford said Butchko said he was on the phone with a detective who was with Berry, R 125 T 1756, and that Berry told the detective she was not with Wadada. R 125 T 1756. Clifford said he then told Wadada what he was told Berry said and that Wadada told Clifford he killed McCrae so he could not testify against his brother, Negus. R 125 T 1757-58.

Clifford said that Wadada said he believed he was going to lose his brother if he did not kill the witness, R 125 T 1758, so he drove to the shop, got out, shot McCrae and drove away. R 125 T 1758. Clifford said he gave Wadada a blank sheet of paper to write a statement, R 125 T 1759, and Wadada wrote a statement confessing to killing McCrae. R 125 T 1759. When the State sought to move this written statement into evidence, the defense renewed its continuing objection to its

admission as the fruit of an illegal seizure and arrest. R 125 T 1759. The statement began, "I am sorry for being in this prodickument (sic)," R 125 T 1761, and went on to say Wadada tried to get money for a lawyer without success and felt he was running out of time, so he shot McCrae. R 125 T 1762. Clifford said he then asked Wadada to read and sign the consent form (State's Exhibit #126). R 125 T 1767.

Clifford said he relied on Butchko for information in interviewing Wadada, R 126 T 1769; that Butchko spent time with Wadada before Clifford's interview and denied knowledge or involvement in the crime. R 126 T 1771. Clifford did not know whether Butchko tried to stop Wadada from making denials. R 126 T 1772. Clifford admitted telling Wadada "listen, he is your brother so I may understand why you did this," R 126 T 1772, but denied telling Wadada that if he confessed he would get manslaughter instead of life, R 126 T 1773; denied threatening Wadada that if he did not confess the police would pick up his little brother and bring him into the investigation, R 126 T 1774; denied telling Wadada if he was not straight with him, Butchko would use physical violence on him, R 126 T 1785; and denied that, after Wadada had written a statement not to Clifford's satisfaction, Clifford told Wadada he needed to write more to admit involvement in the shooting, or Clifford would walk away and Wadada would get life in prison. R 126 T 1788.

Clifford acknowledged that no part of the interview with Wadada was audiotaped or videotaped. R 126 T 1778.

Clifford said Wadada said attorney Gerson gave him McCrae's name after Clifford told him someone would say Wadada knew McCrae. R 126 T 1790. Clifford denied knowing Wadada knew McCrae's name for three months and went to speak with him, R 126 T 1790; denied knowing Bruce asked the lunch truck driver to show him his driver's license to see if he was McCrae, R 126 T 1790-91; and denied knowing McCrae was known exclusively as "Fat Cat." R 126 T 1791.

The State then rested, R 129 T 2146, and the trial court denied the defense motion for judgment of acquittal. R 129 T 2147.

Wadada Delhall took the stand and testified that his mother, Grace Allen, was deported back to Jamaica in 1999 or 2000. R 129 T 2175. His mother held Wadada accountable for his brothers. R 129 T 2175. He first learned that Negus was a fugitive in either April or May of 1998, when detectives came looking for him. R 129 T 2175. At that time, he was living with his girlfriend, Nicola Fagan, his brother, Jemal, and Dwight Atkins, in Miami Lakes. R 129 T 2176. Wadada had a carwash in Opa-Locka near 22nd Avenue and 18th Court. R 129 T 2177. The carwash was a couple of blocks from the warehouse where the homicide occurred.

Wadada knew of the warehouse but had never gone there in 1998. R 129 T 2177. Wadada was helped in the carwash by Erwin Bruce and a few of Wadada's other friends. R 129 T 2177. Anthony Scarlet, who visited Wadada in jail, was a close friend who used to hang out with Wadada and Bruce in 2001. R 129 T 2178.

Wadada testified that he was arrested in 1999 for fleeing and eluding and reckless driving. R 129 T 2184. In custody, he was beaten into unconsciousness by police, who later claimed he had tried to draw the officer's gun. R 129 T 2183. Wadada testified he never tried to draw the officer's gun, R 129 T 2183, but pled guilty to the charges so he could get out and help his family, as bills were piling up and his house was being foreclosed. R 129 T 2185. That plea resulted in Wadada receiving three felony convictions. R 129 T 2186. Wadada was later arrested for carrying a gun and pled guilty, creating his fourth felony conviction. R 129 T 2187.

In April, May and June of 2001, Wadada had a lot of contact with Ativa, but that contact ended when the two had a disagreement over a car in September 2001, while still living at 3826 NW 52nd Avenue, in Pembroke Park. R 129 T 2188. After the fight, Wadada moved out. By that time, Negus was in jail. R 129 T 2189.

In August 2001, Negus asked Wadada to get him an attorney. R 129 T 2190. Wadada was arrested for driving with a stolen tag when a friend put his aunt's tag on his car. He was released September 7, 2001. R 129 T 2190.

A man in jail with Negus told him about Mr. Gerson, R 129 T 2192, who Wadada later met in a parking lot and paid $2,500 to handle Negus' *Arthur* Hearing. R 129 T 2192-94. Other than that and a telephone call, he never met with Gerson, R 129 T 2195, and never again had contact with him. R 129 T 2196. Wadada testified he never went to Negus's *Arthur* Hearing. Between September, when he got out of jail, and the time he was arrested, he saw Ativa only twice: once at a barber shop and once at the house of Ativa's baby's mother. R 129 T 2198.

Wadada sometimes drove a car belonging to his girlfriend, Marcia Berry. He kept music records in her car, books, and a job application. R 129 T 2199. Wadada also allowed his friends to use the car. R 129 T 2200.

Wadada said he visited Negus in jail on November 27, 2001. R 129 T 2200. Wadada knew Clarence Gooden, who drove through his carwash selling food from a truck. R 129 T 2201. Wadada has seen Gooden with Bruce, Terrence, Anthony

and Ativa, all of whom knew who Gooden was. R 129 T 2201. Wadada knew Stewart Notice, who hung out with Bruce until Wadada was jailed. R 129 T 2202.

When police came to his apartment on December 5, 2001, Wadada said he was in his closet getting clothes. He heard a walkie-talkie and froze for a minute trying to figure out what was happening. R 129 T 2202-03. He said he was sitting down taking out his shoes when the officer rushed in, pointed a gun at him and told him to put his hands behind his back. R 129 T 2203. About sixty seconds elapsed between the time he heard the radio and when police rushed him. R 129 T 2203.

In his bedroom, when the detective asked Wadada his name, he answered "Wadada Delhall," and the detective handcuffed him. R 129 T 2204. He asked why they were handcuffing him, but police did not answer. Butchko and Bayas escorted Wadada downstairs, R 129 T 2205, put him in one car and then someone said to put him in another car, though he did not know whether it was Butchko or Estopinan. R 129 T 2206. At this time, he was still handcuffed. R 129 T 2207. The only time the cuffs were taken off was when police asked Wadada to sign a consent to search the apartment. Wadada did not want to sign it, but was told that if he did not, his cousin and her kids would have to sit outside in the grass until they came back with a warrant. R 129 T 2207. He signed, the cuffs were put back

on again and he was placed in the car. R 129 T 2207. There was no conversation in route to the station. Upon arrival, police took Wadada to a room, asking him to sign his consent to search the car. R 129 T 2209. The windowless room was a little bigger than a closet, with a chair and a table. R 129 T 2209.

Wadada said he told police he did not want to sign the consent to search the car and police told him that if he did not sign, they would take the car and get a warrant which could take three days. R 129 T 2209. Wadada signed the consent to search because he knew his girlfriend needed the car. R 129 T 2210. Wadada said police gave him papers he thought was a consent to search the car, but turned out to contain a *Miranda* waiver. He said there were several pages, maybe six, though he was unsure. R 129 T 2210. He did not read what he signed and said police kept telling him to sign and that they needed consent to search the car. R 129 T 2210.

Wadada remained handcuffed behind his back inside the small room. R 129 T 2210. After he signed the papers he was handcuffed in front. R 129 T 2211.

Butchko entered about a half hour later and asked Wadada background questions. R 129 T 2211. Wadada was untruthful with respect to where he worked because he had no job, yet needed one because he was on probation. R 129 T 2212. There were three files on the table: one for Wadada, one for Ativa, and one for

Nicola Fegan. R 129 T 2213. Under questioning, Wadada said he did not know why Negus was in jail and did not know anything about any witnesses involved in Negus's case. R 129 T 2213. Butchko asked Wadada if he had gone to Opa-Locka and killed a witness. R 129 T 2215. Though police never used force on Wadada, Clifford told him police were getting frustrated with him and were going to beat him if he did not start telling them something about the case. R 129 T 2215. Wadada repeatedly denied knowing about killing a witness. R 129 T 2216.

Wadada said Butchko told him that, were he in Wadada's position, he would probably do the same for his brother, R 129 T 2216-17, and that Butchko and Estopinan played good cop/bad cop. R 129 T 2217. Estopinan played good cop, Butchko bad. Estopinan said he didn't want Butchko to put his hands on Wadada, while Butchko would get mad, insisting he knew Wadada committed the homicide. R 129 T 2218. This part of the interrogation lasted about six hours. R 129 T 2218.

Wadada was moved to a different room and Clifford came in. R 129 T 2218. Clifford told Wadada that he had been listening and that police were thinking about beating him, as well as bringing his brother, Jamel Gardner, into the police station. R 129 T 2218. As to the events of November 29, 2001 Wadada said the following:

Wadada dropped his girlfriend off at school, picked her back up, took her to work, and went to her cousin's house. Around 3:00 p.m., his brother went home from school, and Wadada picked him up from the apartment, picked his girlfriend, Berry, up from work around 4:00 or 5:00 p.m., and then drove back to her aunt's house. R 129 T 2220. Wadada planned to go to the mall with his girlfriend, but after waiting for her aunt to finish cooking, they decided not to go. R 129 T 2221.

Wadada was not honest in saying he last saw Ativa in September 2001, because he did not know why police were asking him about Ativa. R 129 T 2223. When he left Berry's aunt's house, he went to Berry's house and stayed about twenty five minutes before taking his brother Jamel home. R 129 T 2224. He went to the studio, where Jack, the manager; a friend, Ineka; and her baby's father, Jabingy, were, R 129 T 2224, and stayed four or five hours. R 129 T 2225. He did not leave the studio until picking Berry up to go to eat at Checkers. R 129 T 2225.

Wadada told Clifford this, though not in as much detail, saying only that he was with his girlfriend. R 129 T 2225. Clifford then said he was going to call and find out if Wadada was with his girlfriend. R 129 T 2225. Wadada said Clifford came back in the room and told Wadada his alibi was hung and that he had better start thinking about helping himself because police would start beating him in a

minute. R 129 T 2226. Clifford told Wadada police would pick up his brother, Jamel, and the two would be in the same seat, R 129 T 2226; that he was going to jail for violating his probation, and had better help himself by getting police to come down to manslaughter, R 129 T 2227; that if he confessed the sentence would run concurrently with the violation of probation, and that he could get only three to five years added to the time for violating his probation. R 129 T 2227.

Wadada, just released for the stolen tag, where he could take a one-year plea or go to trial and face eight years, thought it made sense, as Clifford said, to take a manslaughter plea and get the sentences run concurrently, instead of having himself and his little brother go to prison for murder. R 129 T 2229.

Wadada had experienced being violently attacked by police, R 129 T 2229, and was thinking about when he was beaten into unconsciousness as Clifford was saying police were ready to beat him. R 129 T 2230. He was thinking what his little brother going to jail would do to his mother when he was deciding what to do, thinking she would die if his brother went to jail. R 129 T 2230. He was also thinking he was going to jail anyway for the probation violation. R 129 T 2230.

Wadada testified Clifford told him to help himself and his little brother by confessing. R 129 T 2230. He told Wadada three or four times he was facing life,

but never that he was facing death. R 129 T 2231. Clifford told him if he wanted to help himself he would write a statement, R 129 T 2231, and just write he was sorry for being in this predicament, and the things he would do to help his jailed brother. R 129 T 2231. Wadada did not think this meant he was going to confess to a killing, R 129 T 2231, but that he was just going say he went to see Negus, got him a lawyer, and went to church to help him and "stuff like that." R 129 T 2232.

Gerson never told him the witness' name. R 129 T 2232. Clifford told him what to write and to say what he would do to help his brother. R 129 T 2234. Wadada testified Clifford said he should write that he was running out of time because Negus was going to trial. R 129 T 2234. Wadada said he was putting down small things on the paper about what he did to help his brother, without implicating himself in the crime. R 129 T 2235. When he gave Clifford the paper, Clifford read it and said, "you are not putting yourself as involved in any crime. I can't help you with this," R 129 T 2236, and that if Wadada did not put himself in the crime, he would leave him with the guys outside to do what they wanted with him. R 129 T 2236. Wadada asked Clifford if he wanted him to say he shot the man and Clifford said, "Yes. Put that." R 129 T 2236. Clifford told Wadada to sign the document, and then drew some lines on the paper. R 129 T 2236.

When Wadada said he wanted to make a small change to the statement and scratch out the last line Clifford had told him to put in, Clifford got up, said something like, “fell for the oldest trick in the book,” and walked out of the room. R 129 T 2237. Wadada was angry at himself for being tricked. R 129 T 2237. He was then left in the room for an hour. R 129 T 2238. Police returned saying they wanted to ask more questions, moving him back to the first room. Wadada asked to make a phone call and called his girlfriend, Marcia Berry, telling her where he was, although she already knew. Wadada told Berry what he had written and she said not to say anything else if he didn’t do anything wrong. R 129 T 2238-2239.

Butchko questioned Wadada again, saying he knew there was someone with him, R 129 T 2240. Wadada said he never told Butchko he sold guns to a “base-head,” that he was “putting it in God’s hands,” the route to the scene, the number of shots fired, or that he knew “Fat Man.” R 129 T 2243. Wadada said he never told Butchko he and Ativa did the crime; Butchko was the one who said that. R 129 T 2244. Wadada denied he, Negus, Bruce, Scarlet or Cody sold drugs near the warehouse. R 129 T 2250. Focusing on the 1998 Bennett homicide, the State suggested as follows:

PROSECUTOR: And that's where your brother took the contract to kill Richie B because **you all** couldn't find Conroy Turner?

MR. DELHALL: I don't know who is Conroy Turner.

PROSECUTOR: ***You couldn't find Conroy Turner so you killed Richie B his best friend unless Richie told you where Conroy was to be found?***

COUNSEL: ***Objection, sidebar.***

MR. DELHALL: No, sir. Who Richie B?

PROSECUTOR: Richie B's best friend was Conroy Turner. Conroy ripped you guys off for some dope and your brother agreed to kill Richie B because Richie B wouldn't say where Conroy Turner could be found so that Conroy Turner could pay you back for the dope that he ripped off.

* * *

PROSECUTOR: And once, once you found out and your brother found out that he was wanted by police in Miami-Dade County and there was a warrant for his arrest for the murder of Richie B, someone

actually cared that Richie B was killed, you didn't figure on that did you, Mr. Delhall?

MR. DELHALL: I don't know nothing about what you talking about.

COUNSEL: Objection, I have a motion to make.

COURT: Do you. Come sidebar.

R 129 T 2251-2252 (emphasis added).

Wadada objected to the State's suggestion he was involved in the Bennett homicide, and moved for a mistrial. The trial court denied that the prosecutor had made such a suggestion, overruled the objection and denied the motion for mistrial:

[DEFENSE]: Judge, I'm moving for a mistrial. Miss Levine is indicating my client was involved in another homicide.

THE COURT: She never said that.

[DEFENSE]: I think she did.

THE COURT: She did not.

[DEFENSE]: I believe she did.

THE COURT: I believe she didn't. Is that the motion?

[DEFENSE]: That's the motion. I'm going to have a continuing objection to anything about my client having any involvement in any other homicide.

THE COURT: Okay motion is denied.

R 129 T 2252. The prosecutor then accused Wadada of another uncharged crime:

PROSECUTOR: Once you found that your brother was wanted for the murder of Richie B, Gillbert Bennet was his real name. ***You assisted him in leaving town***; isn't that correct?

R 129 T 2253 (emphasis added). When the State sought to implicate Wadada in the murder with which Negus was accused, the defense asserted that the State was implicating Wadada in a separate and distinct homicide, and it requested a continuing objection to anything implicating Wadada in the 1998 Bennett, or "Richie B," homicide. R 129 T 2253.

Wadada denied knowing Bruce helped Negus skip town. R 129 T 2253. He denied being the driver in 1999, when police chased a car he was in. R 129 T 2255. He said his lawyer advised him to take a plea of convenience, but did not agree this meant he lied to the court by entering the plea. R 129 T 2257. He said police beat him because he would not say who was driving, and denied that, as he was about to

be fingerprinted, he pushed officer Schraub. He denied that, as Schraub tried to subdue him, Wadada reached for Schraub's gun. R 129 T 2258-2261.

When Negus was captured and brought to Florida, Wadada visited him three times. R 129 T 2268. Wadada paid Gerson to represent Negus, but when Wadada got out of jail, he learned Negus had not made bail. R 129 T 2270.

Wadada denied seeing Gerson more than once, R 130 T 2271; denied knowing anything about an Affidavit, R 130 T 2271; denied Bruce was friends with Gooden or that he got Bruce to trick Gooden into showing him his driver's license, R 130 T 2272; denied that when he learned Gooden was not the witness, he knew it was McCrae, R 130 T 2273; denied that when he went to see Negus on November 27, 2001, Negus told him the State was seeking death, R 130 T 2273; denied that Negus told him his trial was December 10, 2001, R 130 T 2274; denied he was seeing Ativa during this time, saying everyone knew he and Ativa were not getting along, R 130 T 2275; denied he was in a car with Jahari, Ativa, and Berry November 29, 2001, R 130 T 2276; and denied going to Ray's on the date of the shooting, R 130 T 2278. Wadada denied shooting Mr. McCrae. R 130 T 2279-80.

Wadada said Clifford dictated the signed statement to him . R 130 T 2287. Wadada denied knowing who the witness in Negus' case was, and he denied

visiting Gerson or seeing the Affidavit, stating he first saw it in court. R 130 T2287. Wadada denied asking Clifford to speak to Berry. Instead, Clifford asked if he had an alibi. Clifford asked for Berry's number and called her. R 130 T 2288.

When the prosecutor asked Wadada on cross whether he had proof that he was incarcerated during Negus' *Arthur* hearing, Wadada replied that he did:

> PROSECUTOR: And you paid him money and on September 6 you tell us today you have the proof that you were incarcerated?
>
> MR. DELHALL: Yes, I have the proof.
>
> PROSECUTOR: You have it with you today?
>
> MR. DELHALL: Yes.

R 129 T 2270. The defense sought to introduce a booking report, showing Wadada was arrested August 27, 2001, and released September 7, 2001, to show he was, in fact, incarcerated during Negus's September 6, 2001 *Arthur* Hearing. R 130 T 2294. The State claimed a *Richardson* violation and the trial court agreed without inquiring into each of the *Richardson* prongs. R 130 T 2303. When the defense suggested there was no prejudice to the State and requested a short continuance to subpoena a records custodian to authenticate the booking report, the court refused.[6]

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[6] THE COURT: How are you going to be able to authenticate it without your client testifying [as to authenticity] because he can't.

The State questioned Wadada about his 1999 arrest and what happened at the police station. Wadada said when he was taken to the station in 1999, he never tried to take the officer's gun. Wadada said police injured his head when he was on the floor trying to protect himself from punches and kicks. He blacked out after two or three kicks. R 130 T 2307. When he was released, Wadada gave photographs of his injuries to his attorney Scott Saul. R 130 T 2307.

The State then called Broward Sheriff's Deputy Schraub to rebut Wadada's account of the altercation after his 1999 arrest for fleeing and eluding and resisting arrest that resulted in his head injury. R 130 T 2340. Schraub stated that on December 2, 1999, R 130 T 2345, he saw a vehicle at a traffic light whose expiration decal looked defaced or damaged, and tried to get information from the tag bureau, which took too long over the radio. R 130 T 2347-2349. Deputy Coreman, who was directly behind the vehicle, assisted in trying to effect a traffic stop, R 130 T 2349, activating his emergency siren, R 130 T 2350, and the driver began to accelerate, R 130 T 2350-51, exceeding the 25 mph limit. The deputies

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COUNSEL: I'm going to ask the Court for a short continuance. I'm going to subpoena the custodian.

THE COURT: There are no short continuances. This case is getting finished tomorrow. R 130 T 2300.

backed off when the car began to speed, as was the office's policy. The car crashed and Schraub saw a black male exit the driver's side. R 130 T 2352.

Schraub apprehended Wadada, who pulled away as Schraub tried to handcuff him, though he was eventually cuffed, R 130 T 2354, and taken to a station with no cage for holding prisoners. Wadada was leg-shackled to a bench and read his rights, which he invoked. R 130 T 2357. Schraub found a murder warrant for Negus Delhall and a robbery warrant for Bobo Delhall. R 130 T 2358. Schraub said the Delhalls had given police each other's names or aliases and, unsure who he had in custody, R 130 T 2359, decided to fingerprint Wadada, removing his handcuffs, but leaving his legs shackled. R 130 T 2359.

Schraub said that on the way to the fingerprint room, Wadada pushed back against him and Schraub pushed him forward against a table, and that Wadada swung around and started throwing punches at Schraub. R 130 T 2361-2362. They struggled and, according to Schraub, Wadada tried to take his gun. R 130 T 2362.

Schraub said that other deputies jumped in as he yelled, "he's got my gun." He said Wadada was maced, calmed down and his face hosed off. R 130 T 2363. Fire Rescue was called because of the mace and because Wadada had a bump on his head. R 130 T 2364. Schraub said Fire Resuce offered to take Wadada to the

hospital, but that he refused. R 130 T 2364. The Sheriff's Office policy requires that if a prisoner who is being transferred to jail has an injury, he is examined by the nurse, and the nurse may request a prisoner be taken to a hospital. R 130 T 2365. As far as Schraub recalls, Wadada was admitted to jail without going to the hospital, and that sending him to the hospital was not in his report. R 130 T 2366.

On cross, Schraub admitted it was possible when officers arrived, Wadada's hand was not on his gun, R 130 T 2369, and that Wadada had a visible injury after the struggle, R 130 T 2370, though the photos of his injuries were destroyed. R 130 T 2372. Schraub testified that Wadada was not disrespectful. R 130 T 2374.

In its closing argument, the State argued: that Negus Delhall had been involved in the drug trade, killed Gilbert Bennett in 1998, and fled the jurisdiction, R 131 T 2409-2412, 2413, 2422, 2423, 2514; reminded jurors of Officer Hufnagel's testimony that McCrae had told him it was Negus Delhall's brother who had shot him, R 131 T 2415-2416, 2421; and referred to the unspent cartridge from Berry's car that was never linked to the shooting. R 131 T 2422, 2515, 2518.

The jury returned guilty verdicts on all three counts. R 131 T 2569-2570.

During the penalty phase of Wadada's trial, Broward Sheriff's Deputy Lashbrook testified that on September 14, 1999, he responded to 3716 Southwest

52nd Avenue concerning a shooting. Lashbrook said shots were fired as he arrived and there was evidence of a burglary, R 135 T 92; that there were hurricane shutters on the ground, evidence of a fight, clothing that had been ripped or taken off of someone, two shell casings on the floor and blood evidence in an apartment R 135 T 93, whose occupant, Phelps, had been taken to the hospital, R 135 T93. Wadada was at the scene with facial injuries, but conscious. R 135 T 94. Lashbrook obtained a search warrant for Wadada's residence and found firearms, ammunition and hurricane panels at Wadada's residence, which had been kept in a storage room at 3716 Southwest 52nd Avenue. R 135 T 94-95.

The prosecutor showed Lashbrook photographs of the scene and the defense requested a sidebar. R 135 T96. The defense asserted a *Richardson* violation as it had not seen some of the photographs. R 135 T 97. The trial court asked the defense to take a look at all of the pictures during lunch. R 135 T 101.

Lashbrook obtained a search warrant for Fagan's and Wadada's residence at 3826 Southwest 52nd Avenue. R 135 T 163. Crime scene technicians were present for the search and took photographs. R 135 T 164. The trial court overruled the defense objection to admission of photographs depicting a gun and ammunition, asserting there was nothing showing that they belonged to Wadada. R 135 T 164.

Shell casings were found in the victim's apartment, and a photo display was prepared for identification by witnesses. R 135 T 167. An arrest warrant was issued for Bobo Delhall for the shooting. Wadada was arrested for burglary. R 135 T 167. Lashbrook did not know the case's disposition. R 135 T 168. The State published the certified conviction: "Circuit County Court, in and for Broward County, case 98-18454CRU, date 9/7/01, charges of burglary of a structure, a change of plea of guilty in the best interest, withhold of adjudication, *nolle pros* to the attempted robbery, two years probation beginning on 9/6/2000, subsequent reinstatement on 9/7/01, waiver of costs of supervision on the probation." R 135 T 168.

Lashbrook testified: that the charges that the State Attorney filed did not mention a gun or shooting, R 135 T 174; that there was nothing in the certified conviction saying Wadada was convicted of anything having to do with a shooting or possession of a firearm, R 135 T 174; and that Wadada was charged with, and placed on probation for, Burglary of a Structure, R 135 T 174.

Lashbrook agreed the photographs showed that Wadada took hurricane shutters to protect his property and that Wadada had facial injuries, R 135 T 175, but Lashbrook did not know why no photos were taken of Wadada's injuries since

he did not take the photos. R 135 T 176. Lashbrook agreed it was common for him not to know a case's disposition, R 135 T 177; that the conviction says "plea of guilty best interest," R 135 T 178; and that Wadada pled to Burglary. R 135 T 181.

The trial court denied the defense motion for mistrial based on admission of testimony Bobo Delhall had shot a man in an unrelated case and the circumstances surrounding that shooting as it related to an aggravating factor, and the admission of photos counsel had objected to was a *Richardson* violation. R 135 T 104-105.

The State called Broward Sheriff's Deputy Percival to corroborate Deputy Schraub's testimony about the 1999 altercation after Wadada's arrest for fleeing and eluding. R 136 T 189, *et seq*. Percival heard a commotion and saw Wadada "attempting to get away from the grasp of Detective Schwab (sic)" R 136 T 198. The altercation lasted two or three minutes. R 136 T 198. Percival never saw Wadada reach for Schraub's gun and was only told this happened. R 136 T 200. Percival acknowledged he was twice Wadada's size and Schraub was much larger; that police were armed; that Wadada's legs were shakled; and that Wadada had been arrested for misdemeanors, other than fleeing and eluding. R 136 T 201-204. Though Schraub had acknowledged Fire Rescue had to be called because Wadada

had a head injury [R 130 T 2364], Percival denied that Wadada was injured. R 136 T 204. Percival said Schraub was "extremely upset" and "yelling." R 136 T 210.

The State called three family victim impact witnesses: Irma McCrae, R 136 T 214; Roslyn McCrae, R 136 T 218; and Andrew Benjamin. R 136 T 220.

The defense called nine family members and friends: Joseph Delhall, R 135 T 108-137; Marcia Delhall, R 135 T 138-156; Shawna Webster, R 136 T 226; Njina Caldwell, R 136 T 242; Jamal Gardner, R 136 T 265; Grace Allen, R 137 T302; Ethlyn Lee, R 137 T 431; Robert Lee, R 137 T 442; Tiese Caldwell, R 138, T 454; Danisha Smith, R 138 T 482; and Linda Lawrence. R 138 T 490.

The jury recommended death, voting eight (8) to four (4). R 139 T 619. A Spencer hearing was held September 8, 2008. R140 T 3-61. On December 15, 2008, the trial Court entered its written Sentencing Order, R 50 T 5717-5727, finding the following aggravating circumstances:

I. The capital felony was a homicide and was committed in a cold, calculated and premeditated manner without any pretense of moral or legal justification. (Great weight).

II. The defendant was previously convicted of another capital felony or of a felony involving the use of threat or violence to another person. (Great weight).

III. The capital felony was committed by a person previously convicted of a felony and under sentence of imprisonment or placed on community control or on felony probation. (Great weight).

IV. The capital felony was committed to disrupt or hinder the lawful exercise of any government function or the enforcement of laws. (Great weight).

R 50 T 5718-5721.

The trial court's Sentencing Order considered the following mitigating circumstances, according each of such circumstances the indicated weight:

I. The capital felony was committed while the defendant was under the influence of extreme mental or emotional disturbance. (No weight).

II. The defendant acted under extreme duress or under the substantial domination of another person. (No weight).

III. Age of defendant at the time of the crime. (No weight).

IV. Any other aspect of the defendant's character or record and circumstances of the offense which warrant mitigation:

a. The defendant's family background and positive relationships with family members. (Little weight).

b. Impact of the defendant's execution upon family and friends. (Little weight).

c. Life in prison without parole as an alternative to the death penalty. (No weight).

d. Positive behavior adjustment in prison. (Little weight).

R 50 T 5722-5724.

After considering the foregoing aggravating and mitigating circumstances, the trial Court sentenced Wadada as follows:

Count I: First-Degree Murder -- Sentenced to Death.

Count II: Use/Display of Firearm in Commission of Felony – Suspended.

Count III: Possession of a Firearm by Convicted Felon – Fifteen years' imprisonment with a three-year minimum mandatory.

R 50 T 5726.

Wadada filed Notice of Appeal. R 50 T 5739. This Initial Brief follows.

SUMMARY OF ARGUMENT

[I] The trial court reversibly erred in denying the motion for mistrial as the State impermissibly implicated Wadada in the Gilbert Bennett murder.

[II] The trial court reversibly erred in overruling defense objections to what the State inaccurately termed *Williams* rule evidence, rendering evidence of other crimes a feature of the trial.

[III] The trial court reversibly erred in overruling objections to admitting victim McCrae's affidavit in violation of the Sixth Amendment's Confrontation Clause clarified in *Crawford v. Washington*, 541 U.S. 36 (2004).

[IV] The trial court reversibly erred in prohibiting the defense from introducing evidence Wadada was in jail during Negus' *Arthur* hearing after the prosecutor had asked Wadada whether he had proof that he was in jail at the time of that hearing, shifting the burden and harming Wadada's credibility.

[V] The trial court reversibly erred in overruling objections to the victim's testimonial hearsay statements under police questioning, violating the Sixth Amendment as clarified in *Crawford v. Washington*, 541 U.S. 36 (2004).

[VI] The trial court reversibly erred in failing to suppress statements obtained by illegal entry into and search of Wadada's bedroom and his arrest.

[VII] The trial court reversibly erred in admitting an unspent cartridge from a car Wadada at times drove because nothing connected it to the shooting.

[VIII] The trial court reversibly erred in instructing the penalty phase jury that burglary is *per se* a "felony involving the use or threat of violence."

[IX] The trial court reversibly erred in overruling defense objections to State penalty phase closing argument that mitigators were merely "excuses."

[X] The prosecutor's penalty phase closing argument impermissibly inflamed the jury's passions and prejudices with elements of emotion and fear, and the trial court reversibly erred in overruling objections to such argument.

ARGUMENT

I. THE TRIAL COURT REVERSIBLY ERRED IN DENYING WADADA'S MOTION FOR MISTRIAL BASED ON STATE QUESTIONING IMPLICATING WADADA IN THE GILBERT BENNETT MURDER.

The State essentially placed Wadada on trial for an additional crime on cross-exam, implying he was involved in the Gilbert Bennett (Richie B) homicide:

> [PROSECUTOR]: And that's where your brother took the contract to kill Richie B because **you all** couldn't find Conroy Turner?
>
> MR. DELHALL: I don't know who is Conroy Turner.
>
> [PROSECUTOR]: ***You couldn't find Conroy Turner so you killed Richie B his best friend unless Richie told you where Conroy was to be found?***
>
> COUNSEL: ***Objection, sidebar.***
>
> * * *
>
> PROSECUTOR: And once, once you found out and your brother found out that he was wanted by police in Miami Dade County and there was a warrant for his arrest for the murder of Richie B, ***someone actually cared that Richie B was killed, you didn't figure on that did you, Mr. Delhall?***

MR. DELHALL: I don't know nothing about what you talking about.

COUNSEL: ***Objection, I have a motion to make***.

COURT: Do you. Come sidebar.

R 129 T 2251-2252 (emphasis added).

The defense objected to the prosecutor's suggestion that Wadada had been involved in the Bennett murder and moved for a mistrial. The trial court denied that the prosecutor had made such a suggestion, overruling the defense objection and denying the defense's motion for mistrial. R 129 T 2252.

But the prosecutor's assertion: "[y]ou couldn't find Conroy Turner so you killed Richie B his best friend unless Richie told you where Conroy was to be found," R 129 T 2251, and accompanying language, clearly accused Wadada of being involved in the Bennett murder. This was no isolated remark, particularly because the trial court allowed the State to introduce extensive testimony and physical evidence pertaining to the Bennett murder over defense objections.

Seventy-six (76) years ago, in *Foy v. State,* 115 Fla. 245, 155 So. 657 (1934), this Court stated the rule against a prosecutor's engaging in such innuendo and accusations in an effort to lead the jury to believe that the accused should be found guilty because he has, as the result of such innuendo, ostensibly committed

other crimes for which he is not on trial, or that he is associated with persons accused of other crimes:

> [T]he prosecution in a criminal case cannot . . . through pursuing a method of questioning defendant and his witness on cross examination that is principally designed, by means of innuendo and suggestions of general criminality on accused's part, to lead the jury to believe that the accused should be found guilty of the particular crime charged, because of his being suspected or accused of other offenses, or because of his connections or association with other accused persons under indictment for different crimes not constituting part of the charge on trial.

Foy v. State, 155 So. at 658. Accord *Robertson v. State*, 829 So.2d 901 (Fla. 2002). See also *Garvey v. State*, 754 So.2d 130 (Fla. 3rd DCA 2000) (the "conviction below for aggravated battery with a knife is reversed for a new trial because the prosecutor improperly asked the defendant on cross-examination whether it was 'true that you also have cut [another person] with a knife'"); *DeFreitas v. State*, 701 So.2d 593 (Fla. 4th DCA 1997) (cross-examination of assault defendant asking if he had hit his sister on head with baseball bat equaled prosecutorial misconduct).

As the First District held in reversing the first-degree murder conviction in *Hunter v. State*, 973 So.2d 1174 (Fla. 1st DCA 2007), merely implying a defendant was involved in a similar crime impermissibly denigrates the defendant's character:

> Appellant was being tried for first-degree murder where the victim's body was never recovered and decided to testify on his own behalf. During cross-examination, the prosecutor asked Appellant if he had previously testified in a trial twenty years ago where a man was charged with killing someone whose body was never found. The trial court sustained defense counsel's objection to this question, denied Appellant's motion for mistrial, and directed the jury to disregard the question. This question reflected poorly on Appellant's character *because it implied that he was directly involved in a similar crime*. Appellant's character and credibility were the main focus of this trial; thus, the trial court should have granted the motion for mistrial.

Hunter v. State, 973 So.2d at 1176 (emphasis added).

The State exceeded implying that Wadada was involved in the Bennett homicide rendering his trial unfair; denial of Motion for mistrial is reversible error.

II. THE TRIAL COURT REVERSIBLY ERRED IN OVERRULING DEFENSE OBJECTIONS TO WHAT THE STATE INACCURATELY TERMED *WILLIAMS* RULE EVIDENCE RENDERING EVIDENCE OF OTHER CRIMES A FEATURE OF THE TRIAL.

The State filed a pretrial *Notice of Intent to Rely on Evidence of Other Crimes, Wrongs or Acts*, including "all facts and circumstances in *State v. Negus Delhall*." R 2 343. The State's *Notice* purported to be filed pursuant to § 90.404(2)(c)(1), Fla. Stat., and *Williams v. State*, 110 So.2d 654 (Fla. 1959). R 2 343.

The defense moved to strike the State's *Notice*, as "all the facts and circumstances of that case are not relevant to this case"; that "evidence of the

Negus Delhall trial will distract the jury from the issue at hand and the Negus Delhall case will become the 'feature' of th[i]s case"; and that "its probative value is substantially outweighed by the danger of unfair prejudice." R 2 371.

When Mr. Bennet was killed, the State of Florida charged Negus Delhall with the crime, not Wadada, and yet at Wadada's trial, the State persisted in its strategy to manipulate, alter and distort the jury's perception of Wadada by focusing on illegal acts attributed solely to his brother.[7]

The defense repeatedly objected to the trial court's extensive admission of evidence from Negus' trial, which entailed a separate, distinct homicide committed by a different person. *Cf. Acevedo v. State*, 787 So.2d 127 (Fla. 3rd DCA 2001).[8]

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[7] See *Richardson v. State*, 566 So.2d 33 (Fla. 1st DCA 1990) ("We agree with appellant's contention that admission of the evidence concerning the collateral criminal activity of his brother was error. No evidence was presented connecting appellant to the collateral crimes. . . . Accordingly, we hold that the extensive testimony regarding the alleged co-conspirator's collateral crime activity was inadmissible as irrelevant to the pending conspiracy charge against appellant. We further note that such evidence carried with it the danger of distorting the jury's perception of appellant by focusing on the illegal acts of his brother."

[8] For *Williams* Rule evidence to be admissible, the State must show that the *defendant himself* committed the collateral act:

> Under [the *Williams*] Rule, before evidence of a collateral act can be admitted at trial, the State must prove by clear and convincing evidence that the defendant committed the collateral act. See *State v. Norris*, 168 So.2d 541 (Fla.1964). The Florida Supreme Court has explained: "[I]n

Nonetheless, the trial court allowed Clarence Gooden to tell Wadada's jury that he was an eyewitness to Bennett's 1998 murder, R 123 T 1364; allowing him to describe Bennett's killing in detail, R 23 T 1364-1367; and to tell jurors that he had seen Bennett "lying on the ground in a pool of blood." R 123 T 1367.

The trial court admitted testimony on the content of Officer Hoadley's witness interviews at the Bennett killing, R 123 T 1291; witness descriptions of the shooter, R 123 T 1294; and photo lineup identification, R 123 T 1297-1299; details of the search for and capture of Bennett's killer, R 123 T 1305; and both the evidence presented at, and result of, the shooter's bond hearing. R 123 T 1307-12.

> order for the evidence [of a collateral act] to be admissible there must be proof of a connection between the defendant and the collateral occurrences. *In this respect mere suspicion is insufficient.* The proof should be clear and convincing." *Id.* at 543 (emphasis added); *see also Smith v. State*, 743 So.2d 141, 143 (Fla. 4th DCA 1999) (finding the trial court erred in admitting evidence of collateral crimes where there was not clear and convincing evidence that the defendant committed the collateral crimes).

Acevedo, 787 So.2d at 129-130 (original emphasis). See also *Denmark v. State*, 646 So.2d 754, 758 n.6 (Fla. 2nd DCA 1994) ("this evidence was also inadmissible under the *Williams* rule...In utilizing this rule, the state is required to prove by clear and convincing evidence that the *defendant on trial* committed the uncharged crime") (original emphasis); *Armstrong v. State*, 377 So.2d 205, 206 (Fla. 2nd DCA 1979) ("The *Williams* rule regarding admissibility of prior criminal activity does not apply because the prior criminal activity was not that of a defendant.").

At Wadada's trial, Officer Chavez described, in detail, the layout and contents of the Bennett crime scene. R 121 T 1177-1184. Latent fingerprint lifts from the Bennett crime scene were admitted into evidence, R 121 T 1186-89, as was, significantly, a photograph of Bennett's lifeless, disrobed and bullet-ridden torso, still bearing the equipment paramedics had used before failing to revive him. R 121 T 1180.

Fingerprint Analyst Woodson testified concerning his identification of fingerprints found at the scene of the Bennett homicide as belonging to Negus Delhall, who had previously used the alias "Nigel Delson." R 123 T 1272-1279.

In what appears to have been his confusion between the two distinct cases, Officer Hertel testified that he reviewed ballistics file 665222Z, opened "*in 1998*" by Jess Galan, who wrote a report dated "January 11th, 2002, about the firearms evidence in 665222Z," R 128 T 2031, and that, from that report, Hertel was able to determine that "in 2002, Mr. Galan was able to say there were two different firearm (sic) that were used in the evidence," and that since 2002, Hertel reviewed "that evidence," and had then determined that two separate firearms were used in "this case." R 128 T 2031-2032. Hertel went on to testify extensively about ballistics evidence, and numerous exhibits were admitted into evidence, without

specifying whether his testimony related to ballistics file 665222Z, which he told the jury had been opened *in 1998*, R 128 T 2031, or whether his testimony related to the November 29, 2001 McCrae homicide, R 128 T 2032-2052, until he was handed State's Exhibit #124, which he identified as a box containing an unspent cartridge found in a backpack "from a separate scene," and labeled as follows: "The case number 665222Z. The date December 6, '01." R 128 T 2052. This testimony left ambiguous which homicide the ballistics evidence pertained to.

The trial court allowed the State to cross-examine Wadada extensively about the Bennett killing, and allowed the prosecutor to accuse Wadada, without any evidentiary basis, of killing Bennett. R 129 T 2251-52.[9]

In sum, four State witnesses testified about the details of the Bennett murder including ballistics examiner Hertel who was confused the two cases. The State was also permitted to cross-examine Wadada at length about the Bennett homicide, accusing him of killing Bennet (Point I, *supra*). Extensive physical and demonstrative evidence was admitted in to evidence at Wadada's trial from the Bennett killing, including a photograph of Bennett's disrobed dead body.

[9] The State also questioned Wadada extensively concerning the details of a prior 1999, arrest and a plea of convenience for fleeing and eluding and resisting arrest, as well as a number of other alleged prior bad acts. R 129 T 2255-2266.

In *Henry v. State*, 574 So.2d 73 (Fla. 1991), this Court reversed the defendant's conviction for the first-degree murder of his estranged wife and remanded the case for a new trial because of the erroneous admission of excessive testimony concerning *the defendant's* murder, *the same-day*, of his estranged wife's son. Though recognizing this evidence was relevant to that case as being part of a prolonged criminal episode, this Court explained it was nevertheless inadmissible:

> Some reference to the boy's killing may have been necessary to place the events in context, to describe adequately the investigation leading up to Henry's arrest and subsequent statements, and to account for the boy's absence as a witness. However, it was totally unnecessary to admit the abundant testimony concerning the search for the boy's body, the details from the confession with respect to how he was killed, and the medical examiner's photograph of the body. Even if the state had been able to show some relevance, this evidence should have been excluded because the danger of unfair prejudice substantially outweighed its probative value. § 90.403, Fla. Stat. (1985). Indeed, it is likely that the photograph alone was so inflammatory that it could have unfairly prejudiced the jury against Henry.

Henry v. State, 574 So.2d at 75. See also *Long v. State*, 610 So.2d 1276, 1280-81 (Fla. 1992) (though evidence connected with the defendant's arrest in a collateral crime was admissible to establish identity and connect him to the victim of the charged offense, *details* of the collateral crime were not admissible).

Even when evidence of a collateral crime is properly admissible, this Court has warned, "the prosecution should not go too far in introducing evidence of other

crimes. The state should not be allowed to go so far as to make the collateral crime a feature instead of an incident." *Randolph v. State*, 463 So.2d 186, 189 (Fla.1984).

As in *Henry*, while "some reference" to the Bennett homicide may have been permissible in order to establish a possible motive, there is no justification for admitting the extensive evidence admitted here. See *Steverson v. State*, 695 So.2d 687, 690 (Fla. 1997) (where trial court admitted four witnesses and photographs concerning a collateral crime wherein *the defendant* shot and wounded a police officer to avoid apprehension, this Court held that, "as in *Henry*, while 'some reference' to the police officer's shooting would have been permissible, there is absolutely no justification for admitting the extensive evidence received here.").

Here, the State made an extensive and wide array of evidence from the 1998 Bennett killing a key feature throughout every stage of Wadada's trial for the 2001 McCrae homicide without ever linking Wadada in any manner to the Bennett murder, other than the prosecutor's own accusations, quoted in Point I, *supra*.

The extensive admission of such evidence without any evidentiary linkage to Wadada, therefore, also manipulated, altered and distorted "the jury's perception of

[Wadada] by focusing on the illegal acts of [other persons]." *Richardson v. State*, 566 So.2d 33, 34 (Fla. 1st DCA 1990).[10]

Thus, any probative value that the evidence of the bare fact that McCrae was a witness against Wadada's brother may have had in showing that Wadada had a motive to commit the acts alleged in Wadada's Indictment, was substantially outweighed by the danger of unfair prejudice in admitting the extensive evidence admitted here concerning the details of that separate homicide, effectively placing Wadada on trial also for the Bennett killing, tending to confuse and mislead the jury, and indicating it should have been excluded under section 90.403, Fla. Stat.

Moreover, the State made the Bennett homicide a key issue in this case as the prosecution rehashed it in both its opening statement[11] and closing argument.[12]

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[10] See also *Denmark v. State*, 646 So.2d 754 (Fla. 2nd DCA 1994) (admission of evidence of prior violent criminal acts by third parties, offered to provide context by showing feud between neighborhoods, was prejudicial error as any probative value was substantially outweighed by danger of unfair prejudice); *Gilley v. State*, 996 So.2d 936 (Fla. 2nd DCA 2008) (admission of extensive evidence of other crimes committed by codefendants tried separately, including one codefendant's murder of another victim, was reversible error in trial for murder and attempted murder, where the murder of the other victim was only marginally relevant to explain the circumstances of the crimes with which defendant was charged and the extensive evidence of the other murder served as a large distraction for the jury).

[11] The defense objected to the prosecutor's opening statement highlighting the Bennett homicide from its inception. R 121 T 1032. After an extended discussion

Admission of this excessive amount of evidence from a crime involving the shooting of someone not a victim in this case by someone not a defendant in this case--including four witnesses' testimony about the details of the Bennett murder, ballistics testimony confusing the two cases, second-hand fingerprint and photo lineup identifications, the accused's cross-examination about the Bennett killing that suggested he was involved, and extensive physical and demonstrative evidence from the Bennett homicide, replete with a photograph of Bennett's disrobed dead body--made that other homicide a feature of this capital murder trial, rendering any probative value that evidence showing McCrae was a witness against Wadada's brother might have had, substantially outweighed by its unfairly prejudicial effect.

This case should be reversed and remanded for a new trial at which the jury's attention is properly focused on the actual charges at issue in this case.

III. THE TRIAL COURT ERRED IN OVERRULING WADADA'S OBJECTION TO ADMISSION OF VICTIM MCCRAE'S AFFIDAVIT IN VIOLATION OF SIXTH

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of the Bennett homicide in the prosecutor's opening statement, the defense objected: "The Negus Delhall case has been a feature of this case." R 121 T 1038.

[12] The defense also objected to the prosecutor's references to the Bennett killing during the State's closing argument, R 131 T 2409, 2410-2411, as well as the prosecutor's innuendo that Wadada had an agreement with Negus in which Negus "agreed" to kill Gilbert Bennett for a drug deal gone bad: "Picture if you will a few days or so before April 24th, 1998, the defendant's brother was involved in the drug trade and the defendant's brother agreed to kill –" R 131 T 2409.

AMENDMENT'S CONFRONTATION CLAUSE UNDER *CRAWFORD V. WASHINGTON*, 541 U.S. 36 (2004).

Hubert McCrae's Affidavit identifying Negus Delhall as Gilbert Bennett's killer was admitted over defense objection, R 123 T 1307-1308, in order to show that: (a) Wadada had a motive to kill McCrae in order to save his own brother's life, and (b) Wadada had seen the affidavit and therefore knew McCrae's identity.[13]

The admission of McCrae's affidavit was error, as: (a) it was testimonial in nature, and (b) the defense had no prior opportunity for cross-examination.

Crawford v. Washington, 541 U.S. 36, 124 S.Ct. 1354 (2004), receded from a reliability test earlier used in determining admissibility of testimonial hearsay. Out-of-court testimonial statements are now barred under the Sixth Amendment unless: (a) the witness is unavailable, *and* (b) the defense had a prior opportunity to cross-examine the witness, regardless of the statement's reliability. *Id*. at 53-59.

As the defense had no opportunity to cross-examine McCrae's affidavit testimony in relation to the present case--which hinged largely on the State's

[13] As noted in Point IV, *infra*, in cross-examining Wadada, the State implied he was at Negus' *Arthur* hearing. Wadada testified he was in jail at the time, and the prosecutor asked if he had proof "with you here today?" R 129 T2270. The defense was prohibited, however, from introducing a booking report stating he was arrested on a tag charge August 27, 2001, and released September 7, 2001, showing he was in jail during Negus' September 6, 2001 *Arthur* Hearing. R 130 T 2294, 2303.

theory that Negus had, in fact, killed Bennett--the affidavit should not have been admitted over objection, and its admission spawned a Sixth Amendment violation.

"[A]ffidavits were among the core class of testimonial statements described in *Crawford* that are subject to the Confrontation Clause." *Melendez-Diaz v. Massachusetts*, --- U.S. ----, 129 S.Ct. 2527, 2532, 2538-40 (2009).[14]

This was not a casual remark to a private citizen, but a formal affidavit to government officers. See *Crawford*, 541 U.S. at 51, 124 S.Ct. 1354 ("An accuser who makes a formal statement to government officers bears testimony in a sense that a person who makes a casual remark to an acquaintance does not."). McCrae's affidavit was testimonial and its admission without an opportunity for defense cross-examination requires reversal and remand for a new trial.

IV. THE TRIAL COURT ERRED IN PROHIBITING THE DEFENSE FROM INTRODUCING PROOF WADADA WAS IN JAIL DURING NEGUS' *ARTHUR* HEARING AFTER THE PROSECUTOR HAD ASKED WADADA IF HE HAD PROOF HE WAS IN JAIL, SHIFTING THE BURDEN AND HARMING WADADA'S CREDIBILITY.

[14] See also *Washington v. State*, 18 So.3d 1221 (Fla. 4th DCA 2009)(same); *State v. Belvin*, 986 So.2d 516 (Fla. 2008) (breath test affidavit prepared by unavailable breath test technician is testimonial hearsay and the lack of a prior opportunity to cross-examine the technician violated the Confrontation Clause under *Crawford*); *State v. Lopez*, 974 So.2d 340, 347 (Fla. 2008) ("a discovery deposition does not satisfy the opportunity for cross-examination that is required under *Crawford*.").

When the State asked Wadada if he had proof he was incarcerated at the time of Negus' *Arthur* hearing in the Bennett homicide,[15] he replied that he did.[16]

The defense sought to introduce a booking report that Wadada was arrested August 27, 2001, and released September 7, 2001, showing he was in jail during the September 6, 2001 *Arthur* Hearing. R 130 T 2294. The State initially objected to its admission based on: (a) relevance, and (b) authentication. R 130 T 2294.

Later, when the trial court asked the prosecutor whether there was any real dispute that Wadada was incarcerated on the date that the prosecutor had implied he was present at Negus' *Arthur* hearing, the prosecutor claimed that she had never seen the booking report before, that the booking report had not been disclosed by

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[15] This line of questioning unfairly shifted the burden to the defendant. *Ramirez v. State*, 1 So.3d 383, 386 (Fla. 4th DCA 2009) ("the State impermissibly shifted the burden of proof by focusing on the defendant's failure to produce photographs and a doctor's report to substantiate her claim of injury. The State had the burden to prove the defendant committed the crime. The trial court abused its discretion when it allowed the State to shift that burden to the defendant through its questions and comments that implied the defendant should have produced photographic evidence and medical reports to support her version of events") (citations omitted).

[16] PROSECUTOR: And you paid him money and on September 6 you tell us today you have the proof that you were incarcerated?
MR. DELHALL: Yes, I have the proof.
PROSECUTOR: You have it with you today?
MR. DELHALL: Yes. R 129 T 2270.

the defense in discovery, and that the defense's failure to produce the booking report in discovery constituted a *Richardson* violation. R 130 T 2296, 2297.[17]

Wadada requested a short continuance to subpoena the records custodian to authenticate the booking report, but the court denied a continuance. R 130 T 2300.

The court found the defense failure to produce the booking report was a *Richardson* violation, without holding a *Richardson* inquiry making the required inquiries and findings. Instead, the trial court ruled that its finding that there was a *Richardson* violation made the booking report *ipso facto* inadmissible.[18]

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[17] The State's contention that *the defense* had committed a discovery violation was incorrect. The booking report was in constructive possession of the State, which had a duty to produce it in discovery. *Gorham v. State,* 597 So.2d 782 (Fla.1992) ("It is well-settled that the state is charged with constructive knowledge and possession of evidence held by state agents, including law enforcement officers"); *State v. Coney,* 294 So.2d 82 (Fla. 1973) (criminal records need not be in State attorney's actual possession before discovery may be had as they are in State's constructive possession); *Hrehor v. State*, 916 So.2d 825 (Fla. 2nd DCA 2005) (defense did not commit discovery violation by not disclosing Florida DCFS records as they were, by definition, in the constructive possession of the State). Rule 3.220(b)(1)(B) requires the State to produce "all police and investigative reports of any kind prepared for or in connection with the case" that are "within the state's possession or control." Thus, the discovery rules themselves required the State to provide the defense with any statement contained in "police . . . reports of any kind," *id*., including statements contained in the police booking report from his arrest pertaining to a prior conviction which the State intended to rely upon at trial.

[18] THE COURT: I'm telling you it's a Richardson violation so it's inadmissible at this time. R 130 T 2303.

When the defense noted there was no prejudice to the State, R 130 T 2303, the prosecutor retreated to her authentication objection, R 130 T 2303-2304, before concluding: "I stand on the fact this is a Richardson violation. There is no one here to authenticate that document," R 130 T 2304-2305, and the trial court replied: "Ok. You might get a free shot at this one. Bring in the jurors." R 130 T 2305.

At a *Richardson* inquiry on a discovery violation, a court must ask and make findings whether a violation was: (1) willful; (2) substantial; and (3) prejudicial to a party's trial preparation. *State v. Evans*, 770 So.2d 1174, 1183 (Fla. 2000) ("when the trial court did conduct a *Richardson* hearing, such hearing was inadequate. . . . The trial court in this case did not inquire into any of the above factors.").

In a discovery violation, exclusion of evidence is a "remedy of last resort." *Dawson v. State*, 20 So.3d 1016 (Fla. 4th DCA 2009). If a violation has not been found to be willful or blatant, excluding evidence is generally too severe a sanction when the only prejudice to the State is an inability to obtain evidence for impeachment. *Id*. Exclusion as a sanction for a violation of the discovery rules "should only be imposed when there is no other adequate remedy." *Grace v. State*, 832 So.2d 224, 227 (Fla. 2nd DCA 2002) (abuse of discretion to exclude belatedly disclosed witness who could have provided evidence in support of defense and

exclusion not harmless as defendant did not have corroborative testimony to support defense theory); *Casseus v. State*, 902 So.2d 294, 295 (Fla. 4th DCA 2005) ("extreme sanction of excluding evidence as a sanction for a discovery violation should be used only as a last resort; relevant evidence should not be excluded from the jury unless no other remedy suffices, and it is incumbent upon the trial court to conduct an adequate inquiry to determine whether other reasonable alternatives can be employed to overcome or mitigate any possible prejudice."). Failing to hold a *Richardson* inquiry was harmful as there is a reasonable possibility Wadada was prejudiced by excluding evidence he replied under State questioning he possessed, deleting in jurors' minds any credibility to his testimony he was in jail during Negus' *Arthur* hearing and could not have known of McCrae's Affidavit. *Johnson v. State*, 728 So.2d 1204 (Fla. 3rd DCA 1999) (where evidence is erroneously excluded for discovery violation, "the reviewing court must determine whether the erroneously excluded evidence could have had an effect on the jury favorable to the defendant[]."). Excluding evidence, the existence of which was questioned by the State, was harmful to Wadada's credibility when he testified that he had no knowledge about McCrae's Affidavit. Wadada was precluded from producing evidence that the State challenged him to produce. While Wadada testified he saw

something confirming his testimony that he was in jail during the *Arthur* hearing, as in *Grace*, "the fact [Wadada] did not have any corroborative testimony to support his defense supports [his] argument that the error contributed to the verdict," *Id.*, at 227, requiring reversal and remand for a new trial.

V. THE TRIAL COURT REVERSIBLY ERRED IN OVERRULING DEFENSE OBJECTIONS TO VICTIM'S TESTIMONIAL HEARSAY STATEMENTS VIOLATING THE SIXTH AMENDMENT AS CLARIFIED IN *CRAWFORD V. WASHINGTON*, 541 U.S. 36 (2004).

At trial, Officer Hufnagel testified he arrived at the scene of the shooting and questioned McCrae about who shot him. R 121 T 1067. The State asked Hufnagel McCrae's response to his question and the trial court overruled the defense hearsay objection. R 121 T 1068. Hufnagel stated: "The information that I was basing my questioning on was about the subject. He wanted to get into how he knew the sub[ject] and we wanted to get into the story behind the shooting." R 121 T 1068. According to Hufnagel, McCrae told him: "He stated that the guy who--the brother who--the guy who shot the man who use to own the business that they were in, the bay that they were in was the subject that shot him." R 121 T 1068.

Hufnagel testified that he asked about the car and McCrae described it. R 121 T1069. Paramedics treated Mr. McCrae before he died. R 121 T 1070. The

State re-asked Hufnagel what McCrae had told him, and the trial court overruled the defense "asked and answered" objection. R 121 T 1081. Hufnagel again testified that McCrae "said it was the brother of the guy who shot the man who owned the business before." R 121 T 1081.

Prior to trial, the defense filed a Motion *in limine* to exclude Hufnagel's hearsay testimony. R 2 373-374. At a hearing, R 112 T 110-114, the State argued, as alternative hearsay exceptions, that this testimony was admissible as a dying declaration or excited utterance. R 112 T 110. Defense counsel, however, stated:

> [DEFENSE]: This conversation that Mr. McCr[ae], the victim had was a question and answer somewhat (sic) with the police officer. It was more of like which would I think bring it more toward hearsay in the *Crawford* issue because it's not such excited utterance. . . . He is responding in a cold, cool manner to the police officer's question.

R 112 T 112-113. Ignoring the contradiction to the holding in *Crawford v. Washington*, 541 U.S. 36, 124 S.Ct. 1354 (2004), the trial Court concluded:

> THE COURT: Whether it is a question and answer session or [a] person says to the first person who shows up, So and so shot me, it really doesn't make a difference.

R 112 T 113. The trial Court ruled that McCrae's responsive statements, elicited by Officer Hufnagel's questions, identifying the shooter as Negus' "brother", and describing the shooter's vehicle, were admissible as excited utterances. R 112 T 113-114.

On point with whether the admission of such statements violated the Sixth Amendment is this Court's opinion in *Hayward v. State*, 24 So.3d 17 (Fla. 2009).[19] Under the facts in *Hayward*, however, the *Crawford* error was held to be harmless.

In *Hayward*, the victim identified the perpetrator in general terms as a "'black male' with a cap." More than one witness provided police virtually the same description the victim had given the officer. One eyewitness testified the perpetrator was a black man with some sort of head covering or hat, and Hayward himself had testified the perpetrator was a "black guy with [a] mask on." Testimony that the shooter was a black man with some sort of head covering was, therefore, properly introduced at trial through two witnesses other than the victim, and the jury would have heard that testimony even if the officer had not testified.

[19] *Hayward v. State*, 24 So.3d 17 (Fla. 2009) (murder victim's statement to officer that his shooter was black with a black stocking cap was testimonial and its admission as an excited utterance violated the Confrontation Clause because the victim spoke of past events which could only be investigated or prosecuted, made the statement in response to police questioning, was trying to help police investigate, locate and prosecute shooter, and was not in peril as help had arrived).

Hayward also confessed to the burglary, a confession he never repudiated, confirming all of the events during the robbery, and there was "extensive forensic evidence tying Hayward to the murder." *Hayward v. State*, 24 So.3d at 33-34.[20]

In this case, in contrast, the State presented no testimony identifying the shooter other than Mr. McCrae's alleged response statements to Officer Hufnagel pointing to a brother of Negus. Eyewitness descriptions of the shooter's car varied from Mr. McCrae's description, and there was no forensic evidence that Wadada was involved in the shooting.

Though police testified that, after lengthy interrogation, Wadada gave them a confession which he, moments later, told them was false, and which, unlike the confession in *Hayward*, stood at odds with the physical layout of the crime scene and evidence that there must have been an accomplice. The confession touted by police in this case, again repudiated by Wadada's live testimony at trial, was obtained under circumstances distinguishable from those in *Hayward* where Hayward readily admitted involvement in the burglary, gave evidence-compatible details of the robbery and murder, and did not thereafter deny it as coerced or false.

[20] The forensic evidence in *Hayward* was key: "At issue in [that] case was the identity of [the] killer. Central to this issue was the presence of Hayward's blood on a number of items found at or near the crime scene." *Hayward*, 24 So.3d at 39.

Absent McCrae's testimonial hearsay statement, admitted in violation of the Sixth Amendment's Confrontation Clause, the evidence was largely circumstantial.

Officer Hufnagel's testimony that McCrae had told him it was the brother of Bennett's alleged killer (Negus Delhall) who had shot him, along with the description of the car involved in the shooting, was the most incriminating and emotionally charged piece of evidence against Wadada, and was repeated in both the State's opening, R 121 T 1037, and closing, R 131 T 2415-2416, 2421, rendering the trial unfair and requiring reversal and remand for a new trial.

VI. THE TRIAL COURT REVERSIBLY ERRED IN DENYING WADADA'S MOTION TO SUPPRESS STATEMENTS OBTAINED BY ILLEGAL ENTRY AND SEARCH OF HIS BEDROOM AND ILLEGAL ARREST.

An evidentiary hearing was held on the defense motion to suppress Wadada's statements to police due to their unlawful entry into his bedroom, his illegal seizure and arrest, and consequently involuntary statements. R 73 T 4-185. The State's case at the evidentiary hearing was presented through the testimony of Sergeant Rayborn, R 73 T 5-44; Detective Bayas, R 73 T 46-104; and William Clifford, R 73 T 109-150. The defense called an additional police witness, Thomas Charles. R 73 T 151-177.

Essentially, the testimony adduced by the State was that Miami-Dade Police Sergeant Rayborn, along with Detectives Butchko, Bayas and Estopinan, went to

Apartment 207, at 10640 Washington Street, Pembroke Pines, in Broward County. Ms. Tiese Caldwell answered the door. Butchko asked whether Wadada lived there, to which she said "yes," and whether anyone was home besides her and the children, to which Caldwell answered "no." She refused consent to search the apartment without a warrant. Butchko interviewed Caldwell while Rayborn entertained the children and Bayas stood near the bedrooms. The others suddenly heard Bayas screaming in a loud, excited voice. When they all ran into the bedroom with their weapons drawn, they saw Bayas with his gun pointed down at Wadada on the floor. Bayas claimed to have heard a rustling noise in the bedroom, saw no one, opened a walk-in closet door, without alerting the other officers, and found Wadada, who looked like the person in a picture police had of him in the apartment. Police removed Wadada from his bedroom, taking him out of his apartment and down the stairs in handcuffs. Police called a crime scene technician from Miami-Dade to photograph the Broward apartment. According to police, Wadada, who they had told was not under arrest, then agreed to accompany them to Miami-Dade County, where he was questioned by several police agents throughout the day and all night. R 73 T 4-150.

Though police claim that they told Wadada he was not under arrest, id., police never claim to have told Wadada that he was free to leave.

The defense called Officer Thomas Charles, who produced a report stating he received information from Detective Bayas that Wadada was arrested and taken into custody at his Broward County apartment. R 73 T 151-177. The trial court denied the motion to suppress without stating a rationale. R 77 T 3. Wadada's statements to police, introduced throughout the trial, should have been suppressed and excluded from evidence as they were obtained by an illegal entry, search, seizure and arrest.

A warrantless search is presumptively unreasonable. To be upheld, it must fall within one of the carefully delineated exceptions to the warrant requirement. *Katz v. United States*, 389 U.S. 347, 88 S.Ct 507 (1967). The State has the burden of showing a warrantless search falls within one of these exceptions. *Coolidge v. New Hampshire*, 403 U.S. 443, 91 S.Ct 2022 (1971). If a defendant's statements are the fruit of a seizure of his person in violation of the Fourth Amendment, those statements must be suppressed, unless the State can show that the causal chain between the illegal arrest and the statement is broken. *Brown v. Illinois*, 422 U.S. 590, 95 S.Ct. 2254 (1975).

At bar, police conceded they had no search or arrest warrant, lacked probable cause to obtain a warrant, and consent to search the apartment was requested and unequivocally denied. The occupant reiterated her lack of consent when police drew guns and charged into the bedroom after one detective claimed he had heard a noise.

An occupant's consent to an interview as police sat on the couch did not authorize entering the bedroom. *Gonzalez v. State*, 578 So.2d 729 (Fla. 3rd DCA 1991) (defendant's wife's acquiescence to request to enter home "to speak with her" was not consent to search and search on entering home was unreasonable warrantless search).

The scope of consent may be limited in time or area, or withdrawn at any time. *State v. Wells*, 539 So.2d 464 (Fla. 1989). Police lacked consent to enter the bedroom.

As there was no warrant or consent, the question arises whether officers' entry into the bedroom was a "protective sweep" for officers' safety. But a protective sweep is authorized only when: (a) police are making an in-home arrest, *and* (b) there are articulable facts which, taken together with rational inferences from those facts, would warrant a reasonably prudent officer to believe the area to be swept harbors individuals posing danger to those at the arrest scene. *Runge v. State*, 701 So.2d 1182 (Fla. 2nd DCA 1997). See also *Meece v. State*, 742 So.2d 319 (Fla. 2nd DCA 1999).

The officers' entry into Wadada's bedroom cannot be justified as a protective sweep because police were not making a lawful in-home arrest. The occupant's consent was limited to sitting on the couch for an interview. Consent to look around was specifically denied. Whereas police lawfully executing a legal arrest may conduct a protective sweep under the limited circumstances outlined in *Runge*,

because there was no cause for arrest, and because only an extremely limited consent to an interview had been provided, police were required to terminate the interview and leave the premises if they felt the limitations placed on their entry into the apartment unduly exposed them to danger. Thus, the State cannot establish the first prong of *Runge* and the entry into the bedroom cannot be justified as a "protective sweep."

The evidence fails to satisfy *Runge*'s second requirement. Detective Bayas claims he heard a "rustling noise" in the bedroom and entered. While an officer making an arrest may have justifiable concern about interference with the arrest, hearing a rustling noise during a consensual interview with an occupant does not show a specific articulable suspicion that a danger to police lurked in another room.[21]

The officers' entry into the bedroom, an area that enjoys the highest level of constitutional safeguards, violated Wadada's right to be free from unreasonable search and seizure, guaranteed by the Fourth Amendment to the United States Constitution and Art. I, § 12 of the Florida Constitution. Wadada's statements to police, as fruit of that violation, should have been suppressed and excluded from evidence at trial.

A defendant's statement obtained by unlawful seizure of his person must be suppressed. As police concede they lacked probable cause to arrest Wadada, the State

[21] The rustling sound could have conceivably been made by the wind, a house pet, or even a paramour whom the occupant had no duty to disclose to police.

claims he was not under arrest; that his encounter with police in his bedroom was a citizen encounter requiring no evidentiary threshold; and that his agreement to go with police was voluntary, untainted by police misconduct. That argument lacks merit.

Fourth Amendment protections trigger when there has been a show of official authority for which a reasonable person would believe he is not free to end the encounter and leave. *Dees v. State*, 564 So.2d 1166 (Fla. 1st DCA 1990). It would be folly to suggest a reasonable person would have felt free to refuse a police "request" to go with them after they forcefully removed him from his bedroom and home.

In *Davis v. State*, 744 So. 2d 586 (Fla. 2nd DCA 1999), where a detective saw Davis through an open door of her home, showed her badge and gun and "asked" her to step outside and put her hands on a car, a "reasonable person, under similar circumstances would believe he had to comply." Id at 587. In *Findley v. State*, 771 So.2d 1235 (Fla. 2nd DCA 2000), the court stated: "[W]here, as here, two uniformed police officers walk uninvited into a person's home and ask that person to step outside, a reasonable man would feel he had no choice to comply." Id., at 1237. Once outside, Findley "consented" to a search. The court held: "[I]llegal police action presumptively taints the voluntariness of a subsequent consent," and it is the State's burden to show by "clear and convincing evidence that there has been an unequivocal

break in the chain of illegality sufficient to dissipate the taint of the prior illegal police action and thus render the consent freely and voluntarily given." Id. at 1237.

The State's claims Wadada was told he was not under arrest and that any taint from the illegal seizure of his person was purged, rests on a notion rejected in *Adams v. State*, 830 So.2d 911 (Fla. 3rd DCA 2002). Adams was tackled, cuffed, told he was not under arrest, driven to the station, uncuffed and again told he was not under arrest. He denied involvement in the murder. Police questioned Adams, who continued to deny involvement, reading him *Miranda* rights, "though they claim he was still not under arrest at the time." In eerie similarity to the case at bar: "[a]fter an all night interrogation, given by several different officers who utilized numerous different interrogation techniques, the defendant confessed that he was in the car during the crime. However, hours later, when a stenographer came to take the defendant's statement, the defendant again denied involvement in the crime." Id., at 913.

Adams moved to suppress and the trial court ruled that while a *de facto* arrest occurred, events at the station, like reading *Miranda* warnings, dissipated the taint of the illegal arrest. The appellate court disagreed: "The defendant's encounter with the first police officer influenced his beliefs about the defendant's freedom to leave the

police station. There were no actions or statements by the police at the station which communicated to the defendant that he had freedom to leave." Id., at 914.

At bar, Wadada's belief about any freedom to leave was dictated by his initial encounter with police. He was dragged out of his bedroom at gunpoint, in handcuffs, in the presence of nine police officers scattered about his apartment and parking lot, notwithstanding Ms. Caldwell's vociferous objections to the police entry into the bedroom. Once downstairs, Butchko told Bayas to secure the car parked in front of Wadada's apartment, and Wadada was told police wanted to question him about his involvement in a murder. Under these circumstances, it would have bordered on a delusion for Wadada, or any reasonable person, to have believed he was free to go.

Circumstances at the station not only failed to negate any taint, but exacerbated belief Wadada was in custody. As in *Adams*, he was not told he was free to leave and was read *Miranda* rights, which anyone who has watched television knows, and as the Third District implied in *Adams*, is a hallmark of arrest. When he continued to profess innocence despite hours of questioning, he was left alone for an hour to consider admitting involvement in the killing. He was asked to submit to a polygraph to prove his innocence and told he failed and that his girlfriend did not confirm his alibi. Every circumstance suggested he was not free to leave. No evidence of intervening

circumstances would constitute a break in the causal connection between his illegal *de facto* arrest and alleged confession. His confession should have been suppressed.

VII. THE TRIAL COURT ERRED IN ADMITTING AN UNSPENT CARTRIDGE FOUND IN A CAR WADADA SOMETIMES DROVE AS THERE WAS NOTHING TO CONNECT THE CARTRIDGE TO THE SHOOTING.

Wadada moved *in limine* to exclude two unspent cartridges from Berry's car, as "the state does not have any corroborating evidence with respect to the cartridges"; as ".9 mm and .223 cartridges are commonplace and are not unique"; as the ".9 mm cartridge was a different name than the ones found at the crime scene"; and as there was no "scientific evidence to give relevance to the seized cartridges." R 3 463-464.

At the hearing, the State conceded the .223 cartridge was not admissible, R 112 T 115, yet insisted on introducing the .9 mm cartridge since, "[o]f course, the .9 mm being a similar type of bullet that was used in the murder. I think it's relevant and goes to the weight of the evidence." R 112 T 116. The defense noted there are millions of unspent .9 mm cartridges, and the mere fact that one such cartridge was found a week after the shooting in a car Wadada sometimes drove did not render it admissible, as "its prejudicial effect would easily outweigh any probative value." R 112 T 117.

The .9 mm cartridge found in a backpack in Wadada's girlfriend's car was admitted into evidence subject to the pretrial objections in the motion *in limine*. R 125

T 1673-74. The cartridge was made by Winchester®, R 125 T 1676—a different manufacturer than any of the eleven spent shell casings at the scene. R 128 T 2037. Firearms Examiner Hertel testified there are "hundreds" of manufacturers of .9 mm cartridges. R 128 T 2055-2056. No firearm was ever located, R 128 T 1998, and no connection ever established between the .9 mm cartridge from Wadada's girlfriend's car admitted into evidence, and the spent shell casings at the scene of the shooting.

That this ammunition, manufactured by a different company from any of the spent shell casings at the scene and available on the open market, was found a week after the shooting in a car Wadada sometimes drove, does not legitimately raise an inference, as the State sought to draw, that Wadada was the killer because he had joint access to a similar caliber cartridge as the spent shell casings found at the scene.

The admission of this unspent cartridge, unlinked in any manner to the shooting, was reversible error. *Cooper v. State*, 778 So.2d 542 (Fla. 3rd DCA 2001) (ammunition found in defendant's possession not relevant in first-degree murder case, even though it was the same type of ammunition used in murder, where expert failed to show it was unique or rare); *Sosa v. State*, 639 So.2d 173, 174 (Fla. 3rd DCA 1994) (trial court erred in admitting unspent cartridges found in defendant's vehicle where defendant was charged with firing at victim's car as there was no link established

between those particular cartridges and shooting); *Moore v. State*, 1 So.3d 1177, 1178 (Fla. 5th DCA 2009) ("if there was no evidence linking any of these firearms to the charged crime, evidence of the firearms would be *irrelevant*, and should have been excluded upon proper objection"); *Huhn v. State*, 511 So.2d 583 (Fla. 4th DCA 1987) (holding trial court erred in admitting firearm found in glove compartment of defendant's car in armed kidnapping and aggravated assault with a firearm prosecution, and agreeing with the proposition that "because the particular gun was not linked to the offenses charged, it served the purpose only of conveying to the jury that Huhn's having guns tended to support the testimony that he had a gun when engaged in the charged crimes"). See also *Fugate v. State*, 691 So.2d 53, 54 (Fla. 4th DCA 1997) (holding trial counsel's failure to object to the admission of a firearm owned by the defendant and found some distance from the scene of an aggravated assault with a firearm, where there was no link between that particular firearm and the charged offense, constituted ineffective assistance of counsel: "Because there was nothing to connect the gun to the crime charged, the evidence was irrelevant and inadmissible") (citing *Sosa* and *Huhn*). This evidence should have been excluded.

The prosecutor made repeated references to the cartridge from Wadada's girlfriend's car in closing argument, R 131 T 2422, 2515, 2518, requiring reversal.

VIII. TRIAL COURT ERRED IN INSTRUCTING PENALTY PHASE JURY THAT BURGLARY IS *PER SE* "FELONY INVOLVING THE USE OR THREAT OF VIOLENCE."

Instructing the penalty phase jury on the aggravating factor involving previous conviction of a felony involving the use or threat of violence, the trial court told jurors that burglary was, as a matter of law, a felony involving the use or threat of violence:

* * *

> Two, Wadada Delhall has been previously convicted of another capital offense or of a felony involving the use or threat of violence to some person.
>
> ***The crimes of burglary and/or resisting arrest with violence are felonies involving the use or threat of violence to another person***.

R 139 T 1605 (emphasis added). In *Johnson v. State,* 465 So.2d 499 (Fla.1985), this Court held burglary is not *per se* a crime involving violence or threat of violence, and:

> [W]hether a previous conviction of burglary constitutes a felony involving violence under section 921.141(5)(b), Florida Statutes (1981), depends on the facts of the previous crime. Those facts may be established by documentary evidence, including the charging or conviction documents, or by testimony, or by a combination of both.

Id. at 505; *Barclay v. State*, 470 So.2d 691 (Fla. 1985) (breaking and entering does not, on its face, prove prior violent felony conviction comprising aggravating factor); *Rose v. State*, 787 So.2d 786 (Fla. 2001) ("whether a crime constitutes a prior violent felony is determined by the surrounding facts and circumstances of the prior crime.").

The trial court's instruction that burglary was a felony involving the use or threat of violence left jurors to conclude that if they found Wadada had committed a burglary, this statutory aggravating factor would necessarily apply, regardless of the fact there was no evidence Wadada engaged in violence in the course of the burglary. As this Court stated in this regard, in *Williams v. State*, 967 So.2d 735 (Fla. 2007):

> [T]his Court has stated that the finding of a prior violent felony conviction aggravator attaches to life-threatening crimes in which the perpetrator comes in direct contact with a human victim. Further, whether a crime constitutes a prior violent felony is determined by the surrounding facts and circumstances of the prior crime.

Id,, 967 So.2d at 762. As no *evidence* showed Wadada committed a life-threatening crime during the burglary, the aggravator did not apply. While the trial court did not rely on this factor in sentencing due to the lack of evidence, the jury's advisory verdict may reasonably have been skewed by this erroneous instruction, particularly in view of the State's argument that this was a violent offense in closing. See Issue VIII.

IX. THE TRIAL COURT ERRED IN OVERRULING DEFENSE OBJECTIONS TO STATE PENALTY PHASE CLOSING ARGUMENT THAT WADADA'S EVIDENCE IN MITIGATION WERE "EXCUSES."

In its closing argument in penalty phase proceedings, the State disparaged Wadada's "every single" item of evidence in mitigation as mere "excuses":

[THE STATE]: ***I suggest to you every single thing that was presented to you in mitigation, which I really think was one thing, stretched it out may make it more, but it's one, it's an excuse***. That's not mitigation. Sympathy is not mitigation.

[DEFENSE]: Objection, Judge, motion.

THE COURT: Overruled Go ahead, please.

R 139 T 549-550 (emphasis added).

In *Brooks v. State*, 762 So.2d 879 (Fla. 2000), this Court reiterated that characterizing mitigating circumstances as "excuses" is "clearly an improper denigration of the case offered by [defendants] in mitigation." 762 So.2d at 904.

As Wadada presented mitigating evidence the 8-to-4 jury might reasonably have considered more than "excuses," returning a recommendation of life rather than death, the State's argument that mitigators were "excuses" denied Wadada the fair trial guaranteed by the Sixth Amendment, requiring a new penalty proceeding.

X. THE PROSECUTOR'S PENALTY PHASE CLOSING ARGUMENT IMPERMISSIBLY INFLAMED THE PASSIONS AND PREJUDICES OF THE JURY WITH ELEMENTS OF EMOTION AND FEAR.

The State's penalty closing argument repeatedly used emotionally-charged, denigrating terms to characterize Wadada, appealing to jurors' fear and prejudice

by repeatedly casting him as dangerous,[22] suggesting he would be dangerous in the future by arguing that he "can't be fixed," R 139 T 560, and urging jurors to imagine how he's "going to effect other people," R 139 T 556; misrepresenting a prior burglary of a structure conviction as a crime of violence by imputing his brother's violence to Wadada, R 139 T 527-528; imputing dishonesty to Wadada's mother for not recalling unsupported events the prosecutor alone had alleged, R 139 T 522, 523; and impugning the credibility of a mitigation witness by referring to her pending unrelated charges, R 138 T 466-467.

The prosecutor used the term "violent" sixteen times in its closing argument, R 139 T 522, 527, 528, 529, 536, 542, 545, 560, labeling Wadada "lawless," R 139 T 521, 522, 544, 545, 554, and referring to his family as "the pack" or "band," imputing relatives' acts to Wadada: "brothers run rampid [sic]." R 139 T 555.

The State urged jurors to rely on the impermissible non-statutory aggravator of future dangerousness. The State's argument that Wadada is "dangerous," R 139

[22] PROSECUTOR: He's smart. That's dangerous smart. R 139 T 523.
PROSECUTOR: How much more dangerous do you get? R 139 T 530.
PROSECUTOR: He is dangerous." R 139 T 559.
PROSECUTOR: His previous crimes of violence show he's dangerous. It escalated- - R 139 T 560.
PROSECUTOR: His violence speaks for itself. You know what? Sometimes it's really sad a person can't be fixed. R 139 T 560.
PROSECUTOR: How is he going to affect other people? R 139 T 556.

T 523, 530, 556, 559, 560, and "can't be fixed," R 139 T 556, combined with its call for jurors to consider how he is "going to affect other people," R 139 T 560, invited jurors to deliberate about a non-statutory aggravating factor that the jury may not consider. *See Teffeteller v. State*, 439 So.2d 840, 845 (Fla. 1983) ("There is no place in our system of jurisprudence for [future dangerousness] argument.").

In cross-examining Wadada's mother concerning her testimony about Wadada's childhood school behavior, the State asked, over objection, about childhood school records that were not in evidence and which no testimony corroborated. Without school records, the State argued in closing that Wadada had been repeatedly placed in detention, suspended from school, and involved in a fight.

In addition, in what amounted to testimony by the State about items not in evidence, during the State's closing argument, the prosecutor imputed dishonesty to Wadada's mother for responding that she could not recall suspensions not in evidence and insinuated solely by the prosecutor.[23]

[23] PROSECUTOR: The suspensions that his mother didn't want to tell you about to engaging in a burglary resulting in violence against the victim. R 139 T522.

PROSECUTOR: Think about what the mother said. Didn't want to tell you about school. R 139 T 523.

The prosecutor also unfairly impeached mitigation witness, Tiese Caldwell, in a heated exchange, questioning her in detail about unrelated pending criminal charges.[24] The prosecutor, during closing argument, comments further.[25]

The State may not attack a defense witness's credibility by showing that criminal charges are pending against her. *Bedford v. State*, 589 So.2d 245 (Fla. 1991) (the State may not impeach a defense witness by asking whether the State was prosecuting her); *Jackson v. State*, 522 So.2d 802 (Fla.1988) (witness's pending charges concerning distinct offense not proper subject for impeachment).

The State argued that Wadada exhibited an *escalating pattern of violent conduct*: yet another impermissible non-statutory aggravator.[26] As this Court noted

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[24] PROSECUTOR: Ms Caldwell, you have an open case and you're charged with organized scheme to defraud. . . .

PROSECUTOR: Do you have a pending case which you're charged with organized scheme to defraud, grand theft, and identity theft? Yes? . . .

PROSECUTOR: And you stole money from the bank and from its customers Right? . . .

PROSECUTOR: And you made a deal on that case to testify against the father of your four children so you won't get in trouble? . . .

[25] PROSECUTOR: She lived in that apartment any time she was down on her luck, she lived with him. What did he teach her? The laundry? Wow. Great. Stop it. It's ridiculous. She got caught in that identity theft ring. R 139 T 552.

[26] PROSECUTOR: From a school child, he was violent. R 139 522.

in *Hitchcock v. State*, 673 So.2d 859 (Fla. 1996), "the State is not permitted to present evidence of a defendant's criminal history, which constitutes inadmissible non-statutory aggravation, under the pretense that it is being admitted for some other purpose." *Id.*, at 861 (citing *Geralds v. State*, 601 So.2d 1157 (Fla.1992)). Indeed:

> This rule is of particular force and effect during the penalty phase of a capital murder trial where the jury is determining whether to recommend the death penalty for the criminal accused....[Receiving inadmissible nonstatutory aggravation] has the effect of unfairly prejudicing the defendant in the eyes of the jury and creates the risk the jury will give undue weight to such information in recommending the penalty of death.

Geralds v. State, 601 So.2d at 1163.

The State's argument about photographs from a prior burglary sought to cast the offense as violent using facts not in evidence. R 139 T 527-528. No record facts supported the State's argument that Wadada planned to confront anyone or initiated any violent act, or why *Wadada* himself had been injured.[27] The photo

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PROSECUTOR: Let's move up to '95, '96, '97, '98, and we know Negus is in trouble. What's happening is he's in trouble because he's starting to proceed in violence. R 139 T 545.

PROSECUTOR: His previous crimes of violence show he's dangerous. It escalated- - R 139 T 560.

[27] PROSECUTOR: This was not in the night. This is not where nobody is there this is during a hurricane when people are very concerned about their

the prosecutor used to argue that Wadada's conduct during the burglary had been violent, State's Exhibit #211, was described innocuously by Deputy Lashbook.[28] No evidence whatsoever of a struggle involving Wadada had been presented through Deputy Lashbrook.[29]

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property. There is a plan there Mr. Phelps, you can see from the pictures put into evidence, he has the electric screw driver he's trying to put those metal shutters up

COUNSEL: Objection, facts not in evidence.

PROSECUTOR: It is.

THE COURT: Sustained Please comment on the things introduced in this case by way of the evidence presented.

PROSECUTOR: Sure Look at 211, the electric screw driver and the screw driver bolts. It's 211 composite and there is a struggle. That makes it violent. And we had the testimony his face is beat up that didn't come from the screw driver that came from Mr. Phelps. Think about it.

COUNSEL: Objection, facts not in evidence.

THE COURT: Please comment on only those things introduced in this case by way of evidence presented.

PROSECUTOR: That comes from the struggle where he goes back and tells his brother and then—

COUNSEL: Objection, facts not in evidence. R 139 T 527-528.

[28] PROSECUTOR: And could you tell the members of the jury what they're looking at in 211?

WITNESS: An electrical drill bit, looks like a tool box and miscellaneous clothing.

PROSECUTOR: And could you tell the members of the jury what they're looking at in 211?

WITNESS: An electrical drill bit, looks like a tool box and miscellaneous clothing. R 135 T 161. (See also Exhibit 211 at R 7 1372-1373).

[29] COUNSEL: Okay you mentioned there was some facial injuries to Wadada?

WITNESS: Yes.

"[W]hether a previous conviction of burglary constitutes a felony involving violence...depends on the facts of the previous crime. Those facts may be established by documentary evidence, including the charging or conviction documents, or by testimony, or by a combination of both." *Johnson v. State*, 465 So.2d 499 (Fla. 1985). Here, only the State's argument cast the burglary as violent. The certified conviction reveals no violent act. R 135 T 168. No documentary evidence or testimony supported the State's argument that Wadada's burglary of a structure was a violent crime. While the trial court did not rely on the burglary as an aggravator, the State argued these facts not in evidence to the jury.

The State transferred Bobo's violence to Wadada. The State argued Wadada was responsible for his brother's violent acts and continually tried to link Wadada to his brother's use of a firearm, though testimony did not show he used a gun.[30] Imputing another's acts to Wadada does not fairly establish his burglary of a

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> COUNSEL: Why weren't there any photographs taken of that?
> WITNESS: I couldn't tell you. I didn't take the photographs. As a matter of fact, I didn't even see Wadada until later that evening.
> COUNSEL: So you didn't go to the scene and see Wadada who had been injured?
> WITNESS: No. I went to the shooting scene. R 135 T 175-176.

[30] PROSECUTOR: The brother escalates the violence, no question, but he was the leader. Remember? He's the leader of the family. He's violent. That's no ordinary burglary. That's a violent burglary. R 139 T 528.

structure was a violent crime, the State argument to the contrary notwithstanding.[31]

In an overall emotional and inflammatory argument, the State labeled Wadada's religious beliefs "revolting," R 139 T 532; said his "actions eat at the heart of our system," R 139 T 560; and called this a "contract kill." R 139 T 532.[32]

The prosecutor repeatedly engaged in egregious misconduct in its penalty phase closing argument, exceeding the bounds of fair comment and venturing into the zone of improper argument, rendering the penalty phase of this serious capital proceeding unfair. As this Court stated in *Ruiz v. State*, 743 So.2d 1 (Fla. 1999):

> [T]he role of counsel in closing argument is to assist the jury in analyzing th[e] evidence, not to obscure the jury's view with personal opinion, emotion, and non-record evidence. . . . The role of the attorney in closing argument is to assist the jury in analyzing, evaluating and applying *the evidence.* It is not for the purpose of permitting counsel to testify . . . To the extent an attorney's closing argument ranges beyond these boundaries it is improper. . . . [H]e may not express his personal opinion on the merits of the case or the credibility of witnesses. Furthermore, he may not suggest that evidence which was not presented at trial provides additional grounds

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[31] PROSECUTOR: Let's talk about the convictions of violence and what they are because they, might sound, um, burglary . . ." R 139 T 527.

PROSECUTOR: So we start with the violent crime of burglary. R 139 T527.

PROSECUTOR: That's no ordinary burglary. That's a violent burglary. R139 T 528

[32] The State must prove the CCP aggravator beyond reasonable doubt. *Jent v. State*, 408 So.2d 1024, 1032 (Fla.1981). CCP ordinarily applies in "contract murders." *McCray v. State*, 416 So.2d 804, 807 (Fla.1982). No evidence adduced at trial indicated, as the prosecutor here suggested, that this was a "contract kill."

> for finding defendant guilty. The power and force of the government tend to impart an implicit stamp of believability to what the prosecutor says. That same power and force allow him, with a minimum of words, to impress on the jury that the government's vast investigatory network, apart from the orderly machinery of the trial, knows that the accused is guilty or has non-judicially reached conclusions on relevant facts which tend to show he is guilty.

Ruiz v. State, 743 So.2d at 4 (citations and internal quotation marks omitted).

The closing repeatedly cast Wadada as violent and dangerous; suggested future dangerousness as he "can't be fixed" and that jurors should consider how he's "going to effect other people"; misrepresented a prior burglary as violent by imputing a brother's violence to Wadada; imputed dishonesty to his mother for not recalling events the State alone alleged; raised a witness's pending charges; and argued facts not in evidence. *Brooks v. State*, 762 So.2d 869 (Fla. 2000) (used "executed" six times, characterized accused as having "deep-seated, violent character…longstanding violence"); *Gore v. State*, 719 So.2d 1197 (Fla.1998) ("clearly improper" to "engage in vituperative or pejorative characterizations of a defendant"); *King v. State*, 623 So.2d 486 (Fla. 1993) (closing "must not be used to inflame the minds and passions of the jurors so that their verdict reflects an emotional response to the crime or the defendant"); *Urbin v. State*, 714 So.2d 411 (Fla. 1998) (casting defendant as having "violent, brutal and vicious character," as

"cold-blooded killer, a ruthless killer" and showing "deepseeded [sic] violence. It's vicious violence. It's brutal violence"); *Garron v. State,* 528 So.2d 353 (Fla.1988) ("When comments in closing argument are intended to and do inject elements of emotion and fear into the jury's deliberations, a prosecutor has ventured far outside the scope of proper argument."); *Bertolotti v. State,* 476 So.2d 130 (Fla.1985) (argument "must not be used to inflame the minds and passions of the jurors so that their verdict reflects an emotional response to the crime or the defendant rather than the logical analysis of the evidence in light of the applicable law").

CONCLUSION

For the foregoing reasons, this Court should reverse and remand this case for a new trial, penalty phase proceeding, and/or resentencing hearing.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I CERTIFY a copy hereof was furnished to AAG Sandra Jaggard, Rivergate Plaza, Suite 650, 444 Brickell Ave, Miami, FL 33131 and Wadada Delhall, L31022, FSP, 7819 NW 228th St., Raiford, FL 32026 by U.S. Mail, this 1st day of November, 2010.

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