IN THE SUPREME COURT OF FLORIDA

WADADA DELHALL,	)	
	)	
Appellant,	)	
	)	
v.	)	
	)	CASE NO. SC 09-87
STATE OF FLORIDA,	)	L.T. NO. F01-37081
	)	
Appellee.	)	
	)	

REPLY BRIEF OF APPELLANT

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

MELODEE A. SMITH
Florida Bar No. 33121
LAW OFFICES OF MELODEE A. SMITH
101 NE 3rd Ave. Suite 1500
Ft. Lauderdale, FL 33301
Tel: (954) 522.9297
Fax: (954) 522.9298
MSmith@SmithCriminalDefense.com

Attorney for Appellant

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OBJECTION TO STATE'S REORGANIZATION OF THE INITIAL BRIEF

The State's Answer Brief impermissibly reorganizes the issues presented in the Initial Brief, lumping Points I and II together as though they were a single issue, then presenting arguments on each of these distinct points in random order, mixing the applicable legal standards and obscuring Appellant's Points I and II.

The State's Answer Brief also comingles Points IX and X, which, though both dealing with the State's penalty phase closing arguments, nonetheless raise distinct species of improper argument controlled by differing standards and requiring individual and independent treatment by the Court.

As the court noted in *Rolling v. State ex rel. Butterworth*, 630 So.2d 635, 636 n.1 (Fla. 1st DCA 1994), "[a]n Appellee should address the issues in the same order as they are presented in the Initial Brief so that the court can be certain which arguments are being addressed." See also *Dania Jai-Alai Palace, Inc. v. Sykes*, 450 So.2d 1114, 1122 (Fla.1984) ("answer briefs should be prepared in the same manner as the initial brief, so that the issues before the Court are joined").

Further obscuring the points actually raised in the Initial Brief, the State has also mislabeled each of the points' headings, omitting material portions of Appellant's arguments and altering their precise assertions.

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

Even though the State's Answer Brief reorganizes the Initial Brief, lumping Points I and II as one issue, Point I will be discussed here as originally presented.

The State's waiver argument, Answer Brief at 49, lacks merit. At hearing on the State *Notice of Intent to Rely on Evidence of Other Crimes, Wrongs or Acts*, and motion to strike, the trial court ruled the State did not suggest Wadada was involved in Bennett's killing.[1] Still, the State clearly stated Wadada was involved:

[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?

[DEFENSE COUNSEL]: Objection, sidebar.

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[1] At that hearing, the following transpired:

> [DEFENSE]: It is irrelevant that there was a contract killing and that [Wadada] was supposedly involved in [it]. This is more prejudicial that probative. If you allow this because she said five minutes ago, she said that she believed our client was involved in this.
>
> THE COURT: Right, but that's your opinion. ***She is not going to be able to say that to this jury.***

(V.112 97) (emphasis added).

R 129 T 2251-2252. Wadada objected to the State's assertion that he was involved in Bennett's murder and moved for mistrial. The trial court denied the State made such a assertion, denying a mistrial. R 129 T 2252. But the State clearly accused Wadada of being involved in Bennett's murder—and it was no isolated remark as the State, over objection, introduced extensive evidence from Bennett's murder.

The State ignores reversible error cases holding that when jurors are improperly led to believe that the defendant has committed another crime that he should be found guilty. *Foy v. State*, 115 Fla. 245, 155 So. 657 (1934) ("the 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"); *Robertson v. State*, 829 So.2d 901 (Fla. 2002); *Garvey v. State*, 754 So.2d 130 (Fla. 3rd DCA 2000) ("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] with a knife'"); *DeFreitas v. State*, 701 So.2d 593 (Fla. 4th DCA 1997) (asking defendant if he once hit his sister with bat was prosecutorial misconduct); and *Hunter v. State*, 973 So.2d 1174 (Fla. 1st DCA 2007) (where State asked in "no body" murder trial if accused once testified in trial of man charged with killing where no body was found, trial court sustained defense objection, denied mistrial and directed jury to disregard, court held: "This question reflected poorly on [defendant's] character *because it implied that he was directly involved in a similar crime*. [His] character and credibility were the main focus of this trial; thus, the trial court should have granted the motion for mistrial.").

Citing no law in support of its position, and burying the issue in Point II, the State claims "while the State did use the word 'you' in describing the group of people involved in the Bennett murder, a review of the entire line of questions indicated that the State consistent[ly] asserted that Negus and [Wadada's] friends were the people involved in the Bennett murder. As such...the use of this word did not indicate that Defendant committed the Bennett murder." Answer Brief at 55 (record cites omitted). That argument ignores the plain meaning of "you," points to nothing else in the record to support its conclusion--and the "entire line of questions" shows the State asserted Wadada was responsible for Bennett's death.

II. THE TRIAL COURT ERRED IN OVERRULING WADADA'S OBJECTIONS TO WHAT THE STATE TERMED *WILLIAMS* RULE EVIDENCE MAKING EVIDENCE OF OTHER CRIMES A FEATURE OF TRIAL

Even though the State's Answer Brief reorganizes the Initial Brief, lumping Points I and II as one issue, Point II will be discussed here as originally presented.

The State says Wadada moved *in limine,* and that at "hearing on that motion, [he] agreed the Bennett murder was relevant." Answer at 50. But that hearing was on a State Notice citing *Williams*.[2] Wadada asserted all facts of that case were *not* relevant,[3] and argued its *details* were *not* relevant.[4]

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[2] The State *Notice of Intent to Rely on Evidence of Other Crimes, Wrongs or Acts* cited § 90.404(2)(c)(1), and *Williams v. State*, 110 So.2d 654 (Fla. 1959). R 2 343.

[3] Wadada objected to the Notice as "overbroad…all the facts…of that case are not relevant…evidence of [Bennett's case] will distract the jury from the issue at hand and the [Bennett] case will become the 'feature' of the case." R 2 371.

[4] The hearing was on a *Williams* Rule Notice and motion to strike. R112 T 81-99. The State claim that Wadada "agreed the Bennett murder was relevant," Answer at 50, is not in the record. Wadada was "awaiting all the facts and circumstances in the [Bennett] case." R112 T 82. "[S]he wants to present bad act evidence of my client's brother, showing that he is a contract killer. She is going to try to tie that into…this case, where the bad act evidence is going to flow over...All she needs to do is present testimony that [Negus] was charged with murder. That McCrae…was the only eyewitness who could identify him and that my client…eliminated him. Everything else is irrelevant and prejudicial....Everything else is irrelevant and prejudicial and she knows that and she is trying to get around that." R112 T 93-94.

Although the State explicitly introduced evidence of the Bennett murder as *Williams* Rule evidence, R 2 371, it now claims that it was not *Williams* Rule evidence, citing distinguishable cases wherein evidence of other crimes was "inextricably intertwined" and "inseparable" from the charged crime, Answer Brief at 50; that evidence of the Bennett murder was relevant to prove motive, id., at 51; that the Bennett murder did not become a feature of the trial, id., at 52-54; and that the fact that Wadada "only objected to two questions during [Wadada's] cross examination and did so on the grounds that the questions suggested that he had committed that murder," id., page 54, rendered the "feature" issue unpreserved.

But while the *bare fact* of the 1998 Bennett homicide was arguably relevant to show motive, its *details* were not "inextricably intertwined" or "inseparable" from the 2001 McCrae killing, and the Answer Brief makes no showing how they were. The State's contention that Wadada "only objected to two questions during [Wadada's] cross examination and did so on the grounds that the questions suggested that he had committed that murder," id., page 54, fails to mention all of the other evidence from the Bennett case Wadada objected to, as well as his pretrial objection to the State's *Williams* Rule notice, arguing evidence of the Bennett homicide "will become the 'feature' of the case before the bar." R 2 371.

Wadada objected to the extensive admission of evidence from Negus's trial, involving a distinct homicide committed 3 years earlier by a different person.[5] No evidence linked Wadada to the Bennett killing, which was tied solely to his brother. *Richardson v. State*, 566 So.2d 33 (Fla. 1st DCA 1990) ("admission of the evidence concerning the collateral criminal activity of [defendant's] brother was error. No evidence was presented connecting appellant to the collateral crimes.").

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[5] 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 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 v. State, 787 So.2d 127, 129-130 (Fla. 3rd DCA 2001) (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"); *Armstrong v. State*, 377 So.2d 205 (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.").

Still, the trial court admitted eyewitness testimony concerning Bennett's homicide, describing that killing in detail, and telling *Wadada's* jurors the witness saw Bennett "lying on the ground in a pool of blood," R 123 T 1364-1367; testimony on the content of witness interviews in Bennett's killing, R 123 T 1291; witness descriptions of Bennett's killer, R 123 T 1294; photo lineup identification, R 123 T 1297-1299; details of the search and capture of Bennett's murderer, R 123 T 1305; the evidence presented, and the result obtained, at Bennett's killer's bond hearing, R 123 T 1307-12; an affidavit identifying Bennett's killer, R 123 T 1307; the detailed layout and contents of the Bennett murder scene, R 121 T 1177-1184; latent fingerprints from the Bennett crime scene, R 121 T 1186-89; a photograph of Bennett's lifeless, wounded torso with emergency equipment still attached, R 121 T 1180; and fingerprint identification from the Bennett scene, R 123 T 1272-1279. The trial court also allowed the State to cross-examine Wadada about the Bennett homicide, and (as discussed in Point I) allowed the State to assert, without any evidentiary basis, that Wadada was involved in Bennett's killing. R 129 T 2251-52.

This Court, in *Henry v. State,* 574 So.2d 73 (Fla. 1991), reversed a defendant's conviction for the first-degree murder of his wife based on erroneous admission of excessive testimony concerning a same-day murder of his wife's son.

Recognizing the evidence was relevant to the charged offense as part of a prolonged criminal episode, the Court explained it was nonetheless 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 of accused's arrest in collateral crime admissible to show identity or connect him to victim, details of collateral crime not admissible).

Even if properly admissible, this Court has warned the State "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); *Steverson v. State*, 695 So.2d 687 (Fla. 1997) (where *four witnesses* from collateral crime wherein accused shot officer to avoid arrest were admitted, this Court held: "[W]hile 'some reference' to the police

officer's shooting would have been permissible, there is absolutely no justification for admitting the extensive evidence received here"); *Denmark v. State*, 646 So.2d 754 (Fla. 2nd DCA 1994) (evidence of others' crimes to show context of feud unfairly prejudicial); *Gilley v. State*, 996 So.2d 936 (Fla. 2nd DCA 2008) (admitting evidence of crimes of separately charged codefendants, including another murder, was reversible error as that murder marginally relevant to explain murder charged).

Still, the State here made details of Bennett's killing a key issue, calling *four witnesses* to testify about details of Bennett's murder, highlighting its significance in opening, R 121 T 1032, 1038, and closing argument. R 131 T 2409, 2410-2411.

Although the State claims, citing no law nor logic and mischaracterizing the pronoun "you" as indefinite: "any error in the brief use of this indefinite word ["you" in claiming who killed Bennett] would be harmless," Answer at 55, "[t]he burden to show the error was harmless must remain on the state," *State v. DiGuilio*, 491 So.2d 1129 (1986). The State fails to bear this burden.

III. THE TRIAL COURT ERRED IN OVERRULING WADADA'S OBJECTION TO ADMISSION OF VICTIM MCCRAE'S AFFIDAVIT IN VIOLATION OF SIXTH AMENDMENT'S CONFRONTATION CLAUSE UNDER *CRAWFORD V. WASHINGTON*, 541 U.S. 36 (2004)

Wadada rests on the argument and citations of authorities in his Initial Brief.

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

Despite the State's effort to cure on appeal the trial court's error in finding a defense discovery violation as well as the trial court's failure to make required inquiries and findings, a hearing pursuant to *Richardson v. State*, 246 So.2d 771 (Fla. 1971), did not occur and no findings were made. The State attempts to remedy the errors by arguing: "inquiry the trial court conducted did cover all of the areas required [by *Richardson*] and any technical defects in the manner in which the trial court obtained the information would be harmless," Answer Brief at 60. But far from a "technical defect," the trial court's ruling that the *defense* committed a discovery violation by not producing a *police* booking report is contrary to Florida law which holds that police reports are in the constructive possession of the State, dared Wadada to produce it, obstructed him from doing so and capitalized on its own discovery violation, making Wadada appear, in jurors' eyes, to be lying about his whereabouts at the time of the *Arthur* hearing. At a *Richardson* inquiry, a trial court must determine whether a violation occurred at all and, if it has, whether any violation was: (1) willful; (2) substantial; or (3) prejudicial. *State v. Evans*, 770

So.2d 1174 (Fla. 2000). The judge here found defense nondisclosure of a police booking report was a defense discovery violation absent such findings, and that the finding of a *Richardson* violation *itself* made the booking report *ipso facto* inadmissible. R 130 T 2303. The State's claim that the judge found a "willful" violation, Answer Brief at 64, is unsupported by the record. Nor did it make a finding whether any violation was prejudicial, despite a defense assertion the State suffered no prejudice. When the defense noted there was no prejudice, R 130 T 2303, the State simply retreated to its authentication objection, R 130 T 2303-2304, stating: "I stand on the fact this is a *Richardson* violation. There is no one here to authenticate that document." R 130 T 2304-2305. Rather than addressing whether *the State* had a duty to disclose the police booking report and, even if it did not, whether the State was prejudiced, the judge told the State: "Ok. You might get a free shot at this one. Bring in the jurors." R 130 T 2305.

Because the police booking report is in the constructive possession of the State, any argument that a defense discovery violation occurred is meritless.[6]

[6] *Gorham v. State*, 597 So.2d 782 (Fla. 1992) ("state is charged with constructive knowledge and possession of evidence held by state agents"); *State v. Coney*, 294 So.2d 82 (Fla. 1973) (criminal records need not be in State's actual possession as it has constructive possession); *Hrehor v. State*, 916 So.2d 825 (Fla. 2nd DCA 2005) (no defense violation as State had constructive possession of DCFS records).

Florida Rule of Criminal Procedure 3.220(b)(1)(B), itself requires the State 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.” The Rules of Discovery thus require the State provide any statement contained in “police...reports of any kind,” *id*., including those in a police booking report.

Suggesting the report was unrelated to this case, Answer Brief at 62, is trivializing the significance of the report – and if it was so trivial, then why did the State vehemently fight to exclude it? The State’s refrain that it "was not prosecuting…on the theory that he learned of McCrae’s existence and status as a witness against Negus at the *Arthur* hearing," id., at 62, is belied by the State’s insinuation he was lying about his absence, nixing any notion that "the records...were neither exculpatory nor impeaching." Id., at 64.

The judge should have simply granted a short continuance for the custodian to authenticate the booking report after the State insinuated *at trial* he was lying about being in jail. R 130 T 2300.

In discovery violations, excluding evidence is a “remedy of last resort.” *Dawson v. State*, 20 So.3d 1016 (Fla. 4th DCA 2009). If a violation is not willful or blatant, exclusion is too severe a sanction as the only prejudice to the State is an

inability to obtain impeachment evidence. *Id*. Exclusion for a discovery violation "should only be imposed when there is no other adequate remedy." *Grace v. State*, 832 So.2d 224 (Fla. 2nd DCA 2002); *Casseus v. State*, 902 So.2d 294 (Fla. 4th DCA 2005) ("it is incumbent on the trial court to conduct an adequate inquiry to determine whether other reasonable alternatives can be employed to overcome or mitigate any possible prejudice.").

This error is harmful: with a reasonable possibility that Wadada was prejudiced by the exclusion of evidence he possessed and replied upon during State questioning, any credibility -of his testimony that he was in jail during the *Arthur* hearing and that he could not have then known of the Affidavit -was destroyed. *Johnson v. State*, 728 So.2d 1204 (Fla. 3rd DCA 1999) (where evidence is erroneously excluded for a discovery violation, "the reviewing court must determine whether the erroneously excluded evidence could have had an effect on the jury favorable to the defendant"). Precluding Wadada from producing evidence that corroborated his testimony "supports [his] argument that the error contributed to the verdict," *Grace*, at 227.

V. THE TRIAL COURT REVERSIBLY ERRED IN OVERRULING DEFENSE OBJECTION TO VICTIM'S

TESTIMONIAL HEARSAY STATEMENTS VIOLATING *CRAWFORD V. WASHINGTON*, 541 U.S. 36 (2004)

Arguing lack of preservation, the State claims Wadada did not use the words "confrontation clause" at the hearing on his motion *in limine*, and that "[w]hile he used the word 'Crawford,' he did so in asserting a statement made in response to a question could not be an excited utterance." Answer Brief, page 70.[7] But the actual context in which defense counsel raised the *Crawford* issue follows:

> [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.

R 112 T 112. Having been placed on notice of the precise legal argument now raised on appeal (testimonial hearsay), and in direct contradiction to the holding in *Crawford v. Washington*, 541 U.S. 36, 124 S.Ct. 1354 (2004), the trial court ruled:

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[7] "[M]agic words are not needed to make a proper objection." *Williams v. State*, 414 So.2d 509 (Fla. 1982) (objection preserved *ex post facto* issue where "notice of a challenge against the retroactive application of the statute was clearly given").

> 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. Thus, the trial court ruled McCrae's statements, elicited under police questioning, were admissible as excited utterances, R 112 T 113-114, over defense objections they were "more toward hearsay in the *Crawford* issue." R 112 T 112.

Officer Hufnagel testified he arrived at the scene and questioned McCrae about who shot him. R 121 T 1067. The State asked McCrae's response to this question and the trial court overruled the defense objection as follows:

> [DEFENSE]: I'm going to object to hearsay.
>
> THE COURT: ***We dealt with this before***. The objection is overruled. You can answer the question.

R121 T 1068 (emphasis added). Hufnagel replied: "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," id., and that McCrae "stated that the guy who--the brother who--the guy who shot the man who use to own the business they were in, the bay they were in was the

subject that shot him." Id. When the State re-asked Hufnagel what McCrae said (over asked-and-answered objection) R 121 T 1081, Hufnagel said McCrae "said it was the brother of the guy who shot the man who owned the business before." Id..

Inaccurate is the State's assertion that the judge's ruling that McCrae's statement was inadmissible as a dying declaration "was based on a misunderstanding of the law and facts" as "the trial court indicated that it believed that someone had to tell McCrae that he was going to die for the predicate for a dying declaration to be laid," Answer Brief at 72. The judge actually stated: "It doesn't appear to be [a dying declaration] because generally speaking you have to be in fear of pending death and usually a doctor tells you you are not going to make it. Sometimes the detectives even say the doctors told us you are not going to make it, but the issue of whether or not it's an excited utterance I think is stronger than any dying declaration argument that the state has." R 112 T 111-112.

Though the State claims McCrae "spoke to Hufnagel about his death being likely," Answer Brief at 72, Hufnagel actually testified McCrae *asked if he was going to make it*, and Hufnagel told him "he needs to hold on" and that "fire rescue was on their way." R 121 T 1066-67. Using its revised account of McCrae's words to suggest he knew he was going to die, the State argues this be held a dying

declaration, citing *Cobb v. State*, 16 So.3d 207 (Fla. 5th DCA 2009). But the victim in *Cobb* "stated he was afraid he was going to die." *Id.* The dying declaration's admission in *Cobb* was harmless "because the statement was not relevant to proving any element of the crimes charged," *id.*, and "any error in admitting [the] dying declarations would have been harmless based on [accomplice] testimony implicating" the accused. *Id.*, at 212 n.3. Here, the statement, ruled inadmissible as a dying declaration, was not by a man indicating he feared he would die; did not duplicate testimony identifying Wadada; and went to an essential element: Identity.

On point is *Hayward v. State*, 24 So.3d 17 (Fla. 2009), where a deathbed statement that the shooter was a black man with a cap was testimonial and its admission as an excited utterance violated *Crawford* as he spoke of past events; spoke in response to police questioning; was trying to help investigate, find and prosecute the shooter; and was not in danger as help had arrived. In *Hayward*, the error was harmless as the victim identified his shooter as a "black male with a cap," eyewitnesses gave virtually the same description, and Hayward himself identified a "black guy with [a] mask." Two eyewitnesses beyond the victim thus testified the shooter was a black man with a head covering, and the jury would have heard that testimony even if the officer had not testified. Hayward confessed

to the burglary, a confession he never repudiated, confirming details of the robbery, and extensive forensic evidence tied him to the murder.[8] At bar, no testimony but McCrae's testimonial hearsay pointed to a brother of the killer of the business's former owner. Descriptions of the shooter's car differed from McCrae's, and no forensic evidence implicated Wadada. Although police said, after lengthy interrogation, Wadada gave a confession which he, moments later, repudiated and which, unlike the confession in *Hayward*, conflicted with the physical layout of the crime scene and evidence of two subjects, the confession touted by police, was again repudiated by Wadada's testimony at trial, was obtained under circumstances distinct from those in *Hayward*, where the accused readily admitted involvement in a burglary giving evidence-compatible details of a robbery and murder, pointing to another person as the gunman. *Id.*, at 33-34.

Absent McCrae's testimonial hearsay admitted in violation of *Crawford*, evidence was circumstantial. Police testimony that, before he died, McCrae identified Bennett's killer's brother as his shooter, was the most incriminating and emotionally charged piece of evidence in this case, echoed in the State's opening, R 121 T 1037, and closing, R 131 T 2415-2416, 2421, rendering the trial unfair.

[8] The forensic evidence in *Hayward* was damning: "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.

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

The State's Answer Brief offers three reasons why the Court should affirm:

> **[A]** Defendant was discovered during a ***protective sweep*** justified by specific facts to establish a concern for officer safety and his brief detention was a proper response to the circumstances. **[B]** Moreover, the police did have ***probable cause to arrest*** him so that his subsequent statements would not be subject to suppression even if the police acted improperly in apartment and **[C]** the ***taint of any actions in the apartment was attenuated*** from the statement. Answer Brief, page 76 (emphasis added).

A. *State's Newly Raised Argument that Search Was "Protective Sweep"*

Although the State argues--for the first time on appeal--that Wadada was "discovered during a protective sweep," Answer Brief at 72, the State took a position in the trial court emphatically *opposing* applicability of a protective sweep exception, arguing Wadada's counsel "anticipated that the State would argue that officers were conducting a 'protective sweep.' Defendant was both presumptuous and wrong." [9]

[9] Supp. Record, *State's Argument in Response to Defendant's Motion to Suppress*, unnumbered page 3. See also *id*., *note 2* ("For some unknown reason, defendant continues to argue in his written summation that a 'protective sweep' occurred").

Even if the State's new position on appeal that searching Wadada's bedroom and closet was a protective sweep were to have some merit, the State would still be bound by its position in the trial court, so that--justifiable or not--the protective sweep exception is inapplicable. E.g., *Harper ex rel. Daley v. Toler*, 884 So.2d 1124, 1135 (Fla. 2nd DCA 2004) ("a party may not ordinarily take one position in proceedings at the trial level and then take an inconsistent position on appeal"); *Johnston v. State*, 870 So.2d 877 (Fla. 1st DCA 2004) (appellate court would decline on direct appeal to consider State's argument inconsistent with State's earlier position at trial level).

The State takes considerable literary license in re-writing record facts to better suit its argument. But circumstances relied on in the Answer Brief to bolster the trial court's ruling (which expressed no rationale) are unsupported by the record:

The State argues that Caldwell gave "consent to enter the apartment";[10] and told police no one was home except she and her children; that Wadada was a suspect

[10] Even though the State here contends that "it was undisputed that Caldwell gave the police consent to enter the apartment," State's Answer Brief, page 77, the record actually reveals the only consent Detective Butchko obtained from Caldwell was a narrowly limited consent for the officers to sit *on the couch* and ask her questions. R 72 T 124. Though Caldwell refused consent for police to venture further or search the apartment, R 72 T 123, Bayas went to the bedroom door, id. T 69, and ran inside upon hearing a noise, despite Caldwell's protests. Id., T 125. Bayas did not alert the other detectives, but "decided to proceed on [his] own." R 73 T 101.

in McCrae's homicide;[11] and was uncooperative with police in the past;[12] that as Caldwell was interviewed, Detective Bayas heard a noise in the bedroom, peered into the bedroom and still *did not know* the cause of the noise he heard again. From these circumstances, the State concludes Bayas was justified in entering Wadada's bedroom and opening the closet to seize him, and that the officers' actions in detaining Wadada and removing him from his bedroom were reasonable. Answer Brief at 77.

A warrantless search is presumptively unreasonable, and must fall within one of the carefully delineated exceptions to the warrant requirement. *Katz v. U.S.*, 389 U.S. 347, 88 S.Ct 507 (1967). The State bears the burden of showing the search falls within one such exception. *Coolidge v. New Hampshire*, 403 U.S. 443, 91 S.Ct 2022 (1971).

The protective sweep exception, whose applicability the State emphatically disavowed in the trial court, yet on whose standards the State seeks to rely on appeal, was articulated in *Maryland v. Buie*, 494 U.S. 325, 110 S.Ct. 1093 (1990). A protective sweep is "a quick and limited search of the premises, *incident to an arrest*

[11] Detective Butchko actually testified at the suppression hearing that he wanted to speak with either Wadada or Atiba, as there was no positive identification or physical evidence indicating Wadada was involved in the crime. R 72, T 105-106.

[12] Although the State imputes Detective Hoadley's knowledge concerning his earlier contacts with Wadada to the detectives who proceeded to search Wadada's bedroom and closet, Hoadley actually testified at the suppression hearing that he spoke to Detective Butchko "very briefly in passing in the office, told him about my concerns about the case, and it was a very brief meeting." (R 72 T 28-29). There was no testimony as to what Hoadley told Butchko "very briefly in passing."

and conducted to protect the safety of police officers or others." *Id.*, 494 U.S. at 327 (emphasis added). *Buie*, relied upon by the State, Answer Brief at 76, comes into play where a premises search, at a bare minimum, occurs "incident to an arrest." *Id.* As police here were not on the premises to make an arrest, the protective sweep exception to the warrant requirement could not justify a search of the private bedroom or closet.

Thus, Florida's Third District Court of Appeal, in *Gonzalez v. State*, 578 So.2d 729 (Fla. 3rd DCA 1991), in an opinion binding upon the trial court in this case,[13] held the "search cannot be upheld as a reasonable 'protective sweep' of the premises incident to effecting an arrest with a warrant under *Buie*, because the police had no warrant for the arrest of anyone, were not on the premises to make an arrest, and had no probable cause to effect an arrest of any kind." *Gonzalez*, at 733 (citation omitted).

Here, police had no warrant, probable cause or consent to search. While Bayas heard a "rustling noise" whose cause he *did not know*, this *lack of knowledge* created no "exigent circumstance" (an exception the State relied on in the trial court, yet has

[13] In *Pardo v. State*, 596 So.2d 665 (Fla. 1992), this Court stated the rule:

> [T]he decisions of the district courts of appeal represent the law of Florida unless and until they are overruled by this Court. . . . If the district court of the district in which the trial court is located has decided the issue, the trial court is bound to follow it.

Id., at 666 (cites and internal quotes omitted). As neither this Court nor the Third District had held contrary to *Gonzalez* (search may only be upheld as protective sweep if police intend to make an arrest), *Gonzalez* was binding on the trial court.

abandoned on appeal)[14] to justify searching the bedroom closet. Although police *making an arrest* may have justifiable concern about interference, a "rustling noise" during a consensual interview does not supply specific articulable suspicion that danger lurks.

Even in the lawful arrest context, a protective sweep would be unwarranted. The defendant in *U.S. v. Archibald*, 589 F.3d 289 (6th Cir. 2009), who had prior arrests for violent crimes, delayed in answering a knock and announce, and police, who had

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[14] While the Answer Brief's Statement of Facts notes the State's response to the suppression motion argued *in the trial court* that Bayas' hearing a noise after being told no one else was home created exigent circumstances, Answer Brief at 10, the State mentions "exigent circumstances" only once in its Summary of Argument, never in its Argument, and cites no law on exigent circumstances. "Merely making reference to arguments below without further elucidation does not suffice to preserve issues, and these claims are deemed to have been waived." *Beasley v. State*, 18 So.3d 473 (Fla. 2009); *Florida Emergency Physicians-Kang & Assocs., M.D. P.A. v. Parker*, 800 So.2d 631 (Fla. 5th DCA 2001) ("We do not address issues not clearly set out in the issues on appeal"). The Fourth District explained:

> This Court will not depart from its dispassionate role and become an advocate by second guessing counsel and advancing for him theories and defenses which counsel either intentionally or unintentionally has chosen not to mention. It is the duty of counsel to prepare appellate briefs so as to acquaint the Court with the material facts, the points of law involved, and the legal arguments supporting the positions of the respective parties....When points, positions, facts and supporting authorities are omitted from the brief, a court is entitled to believe that such are waived, abandoned, or deemed by counsel to be unworthy. Again, it is not the function of the Court to re-brief an appeal.

Polyglycoat Corp. v. Hirsch Distributors, Inc., 442 So.2d 958, 960 (Fla. 4th DCA 1983), *review denied*, 451 So.2d 848 (Fla.1984) (citations omitted).

"particular vulnerability," heard "noises inside defendant's residence." Although the arrest and sweep were simultaneous, *id*., at 298, the protective sweep was held illegal:

> [C]ases that have found that noises emanating from a residence supported a reasonable belief in the presence of other individuals have required contributing facts or *stronger* evidence than what is presented here supporting the officers' suspicions that more than one person was present.

Id. at 300 (emphasis in original). The facts here are *weaker* than in *Archibald*. In any event, the State may not argue this was a "protective sweep" for the first time on appeal, and has now completely abandoned its claim below it was justified by "exigent circumstances."

B. *Police Lacked Probable Cause to Arrest Wadada*

All three detectives recognized they lacked probable cause to arrest Wadada.[15] The State's assertions that police had probable cause as they "received a description of the shooter that was consistent with Defendant," Answer Brief at 79; that "Berry drove a car consistent with the description of the car used during the murder"; and that police "observed that car parked in front of Defendant's apartment before they

[15] Detective Butchko testified he lacked probable cause, and that when he told local police he had no probable cause or warrant, they refused to assist. R 72 T 56-57, 111-112. Supervising Detective Rayborn foresaw no arrest, R 73 T 7, as the detectives lacked probable cause. R 73 T 55. Detective Bayas testified he intended no arrest and sought no warrant as detectives lacked probable cause. R 73 T 55-56.

approached it," id., at 79, do not fairly assess the descriptions given police.[16] Further, the State's assertion that detectives "knew that Defendant had engaged in actions during their search for Negus that suggested that he had a desire to assist Negus in avoiding arrest," Answer Brief at 79, is also unsupported by the record.[17]

The State relies on *Blanco v. State*, 452 So.2d 520 (Fla. 1984), to argue that facts known to police created probable cause to arrest Wadada. In *Blanco*, a BOLO aired a neighbor's description of a Latin male, 5′8″ to 5′10″, and 180 to 190 lbs., with dark curly hair, in a gray or green jogging suit, and another's of a man in a gray

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[16] Detective Butchko testified witness Weber said the car was a "medium to dark gray Mazda, four-door vehicle with tinted windows," R 72 T 50, later modifying Weber's description to "dark grey," R 72 T 107; that witness Rodriguez described the car "either light or medium gray Mazda with tinted window[s]," R 72 T 51; but that witness Elliot called it a "tan colored vehicle." R 72 T 51, admitting no witness described the car as gold. R 72 T 107. Butchko said: "[P]eople say it is gold, it also looks gray. If you look at certain angles, it looks gray. It is a very light color," R 72 T 108, noting "not all of the witnesses said it was dark," R 72 T 109; that a witness called it white, R 72 T 109; and that he would not call it dark grey. R 72 T 109. Butchko testified that tan was "consistent with" gold. R 72 T 143-144. Butchko agreed the car was either dark gray, gray, tan, or white, and had either 2 or 4 doors. R 72 T 157. Detective Rayborn testified witness Williams called the car a "small, light-colored vehicle with dark tinted windows," R 73 T 54; that Hufnagel told her McCrae said the car was "dark," R 73 T 80; and that eyewitness Stuckey told her the car was a Corolla or Honda. R 73 T 82. The only description of the shooter was one of a young black male, about 5'11'' and 160 pounds. R 73 T 53.

[17] Detective Hoadley spoke to Detective Butchko "very briefly in passing in the office, told him about my concerns about the case, and it was a very brief meeting." R 72 T 28-29. No testimony revealed what Hoadley said "very briefly in passing."

jogging suit heading east. *A half hour later,* an officer to the east saw a man fitting the BOLO and took him to the scene, where a neighbor identified him as having the same profile and jogging suit as the man he had seen. *Id.*, at 522-523. This Court held "the description...over the BOLO, *coupled with the proximity in time and place to the scene of the crime*, furnished reasonable grounds for the officer's belief [he] had committed the murder." *Id.* (emphasis added). At bar, conversely, descriptions were nonspecific, and both time and place separated the killing and police contact.

Krawczuk v. State, 634 So.2d 1070 (Fla. 1994), Answer Brief at 79, is inapposite as learning the accused sold the victim's goods created probable cause. See *State v. Rogers*, 427 So.2d 286 (Fla. 1st DCA 1983) (no probable cause where police knew victim's identity, cause of death, description of her car, that accused was dating her, was seen driving similar car and tried to evade deputy arresting him).

C. *The Illegal Police Conduct Was Not Attenuated from the Statements*

Because the arrest was illegal, any consents or statements are presumed invalid, *Brown v. Illinois*, 422 U.S. 590, 95 S.Ct. 2254 (1975), and must be suppressed, unless the State can show that the causal chain between the illegal arrest and the statement is broken. Id. Here, there was no such break. Wadada was left in an interview room for 10 minutes, R 72 T 134; read *Miranda* warnings, R 72 T 136;

never told he was free to go; interrogated for 2 hours as he continued to maintain his innocence; and was urged to take a polygraph, after which he allegedly confessed, though when a stenographer arrived, he denied any involvement. R 72 T 138-142.

The Fourth Amendment triggers when a show of authority makes a reasonable person feel not free to leave. *Dees v. State*, 564 So.2d 1166 (Fla. 1st DCA 1990). A reasonable person would not feel free to refuse a request to go with police after they dragged him from his room. In *Davis v. State*, 744 So.2d 586 (Fla. 2nd DCA 1999), where police showed a badge and gun, asking Davis to exit her home, a "reasonable person, under such circumstances would believe he had to comply." *Id*. In *Findley v. State*, 771 So.2d 1235 (Fla. 2nd DCA 2000), where "two uniformed police officers walk[ed] uninvited into a person's home and ask[ed] that person to step outside, a reasonable man would feel he had no choice to comply," *id*., at 1237, the court held "illegal police action presumptively taints the voluntariness of a subsequent consent," and the State has the burden of showing 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*. The idea that, since Wadada was told he was not under arrest, the taint of his illegal arrest was purged, was debunked in *Adams v. State,* 830

So.2d 911 (Fla. 3rd DCA 2002), where police told an accused he was not under arrest, took him to the station, repeated he was not under arrest and he denied guilt. Police read *Miranda*, "though they claim he was still not under arrest." As here, "[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 [a] statement, the defendant again denied involvement." *Id.*, at 913. The "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 police at the station which communicated to the defendant that he had freedom to leave." *Id.*, at 914.

State reliance on *Sanchez-Velasco v. State*, 570 So.2d 908 (Fla. 1990), where an illegally arrested man was released from the station before returning to discuss a murder, is unavailing. There, "unlike the situation in *Brown*, there was a significant intervening event between [his] initial arrest and his statements and confessions--he was released from apparent custody and control of the officers." *Id*. As Wadada was never released from the station, there was no such break to dissipate the taint of the original illegality. Wadada was never told he was free to go, was uncuffed only when surrounded by nine officers, and no other intervening event caused a break in

the chain between his illegal arrest and statement. See also *J.P. v. State*, 695 So.2d 464 (Fla. 3rd DCA 1997) (*Miranda* warnings alone do not dissipate taint of illegal arrest); *Johnson v. State*, 813 So.2d 1027 (Fla. 3rd DCA 2002) ("removal of the handcuffs at the car in the officers' presence does not serve as an intervening event").

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

Even though the State claims "evidence regarding weapons has been upheld even where there is no testimony directly linking the weapon to a crime," Answer at 82, in each of its cited cases, evidence linked the weapon and crime. *Cole v. State*, 701 So. 2d 845, 855 (Fla. 1997) (stick found near body admissible to explain episode's entirety as survivor testified it was like one codefendant carried); *Council v. State*, 691 So.2d 1192 (Fla. 4th DCA 1997) (that gun at robbery and gun under accused's bed were silver small-caliber guns with dark handles was sufficient to show gun's probative value).[18] *Herman v. State*, 396 So.2d 222 (Fla.

[18] *O'Connor v. State*, 835 So.2d 1226 (Fla. 4th DCA 2003) ("where the evidence at trial does not link a weapon seized to the crime charged, the weapon is inadmissible." (citing *Sosa v. State*, 639 So.2d 173 (Fla. 3rd DCA 1994) (bullets in accused's car inadmissible at trial for firing gun as bullets not linked to shooting)).

4th DCA 1981) (statement gun was "deep-sixed" and "they're running around looking for a shotgun and they got the damn thing in their possession" made accused's gun admissible).

Admitting a .9 mm round, unlinked to McCrae's killing, from Wadada's book bag was error the Court should be unable to find beyond reasonable doubt did not contribute to the verdict, as it created an illusion tying Wadada to the scene of this .38 cal. or .9 mm killing. *Cooper v. State*, 778 So.2d 542 (Fla. 3rd DCA 2001) (though same type used in murder, bullet not relevant as expert failed to show it was unique or rare, and not harmless as witness credibility was corroborated by erroneously admitted evidence). See also *Knowles v. State*, 848 So.2d 1055, 1058 (Fla. 2003) (citing *Cooper's* harmless error analysis with approval).[19]

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

Wadada rests on the argument and citations of authorities in his Initial Brief.

IX. THE TRIAL COURT ERRED IN OVERRULING DEFENSE OBJECTIONS TO STATE PENALTY PHASE

[19] Police found a .9 mm bullet in a book bag in the Mazda. R 125 T 1672-74. Berry testified she never kept bullets in her car; had no idea why one was found; and that, after the bullet was found in her car, she stopped seeing Wadada. R 124 T 1499. The State repeatedly mentioned the bullet in closing. R 131 T 2422, 2515, 2518.

CLOSING ARGUMENT THAT WADADA'S EVIDENCE IN MITIGATION WERE "EXCUSES"

Although the State's Answer Brief reorganizes the Initial Brief, lumping Points IX and X as one issue, Point IX will be discussed as originally presented.

In its penalty phase closing, the State disparaged Wadada's "every single" item of evidence in mitigation as an "excuse." R 139 T 549-550. The State's sole rationalization on appeal is that this was a "fair response," since the defense presented evidence in mitigation. Answer Brief at 99-100. That argument is circular. As the defense in a capital penalty phase trial generally presents mitigation, the State's rationale, which would apply *almost every time* the defense presents mitigation, fails to explain why this Court has denounced calling mitigating circumstances "excuses" as "clearly an improper denigration of the case offered by [defendants] in mitigation." *Brooks v. State*, 762 So.2d 879 (Fla. 2000).

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

Even though the State's Answer Brief reorganizes the Initial Brief, lumping Points IX and X as one issue, Point X will be discussed as originally presented.

The State claims it "never suggested [Wadada] would be dangerous in the future." Answer at 92. But it suggested future dangerousness by arguing he “can’t be fixed,” R 139 T 560, because whether one can be “fixed” relates to the future. The State’s claim Wadada’s assertion the State’s "comment about [his] effect on others concerned his potential for future dangerous is based on an unobjected to comment that is taken out of context," id., at 93, ignores the objection and context. Upon asking how he is “going to” affect others, the State began: "Is he going to --" R 139 T 556. The defense objected and the judge stated: "Go on, please." Id.

The State argued Wadada is “dangerous,” R 139 T 523, 530, 556, 559, 560; that he “can’t be fixed,” T 560; and urged jurors to consider how he is “going to affect other people,” T 556, inviting jurors’ reliance on an impermissible non-statutory aggravator. *Teffeteller v. State*, 439 So.2d 840, 845 (Fla. 1983) (“There is no place in our system of jurisprudence for [future dangerousness] argument.”).

Despite its denials, Answer Brief at 94-95, the State argued Wadada’s mother was lying for not “recalling” events only the prosecutor alleged. R 139 T 522, 523.

The State impugned mitigation witness Caldwell’s credibility, impeaching her on unrelated pending charges, R 138 T 466-67, *Bedford v. State*, 589 So.2d 245

(Fla. 1991) (state may not impeach witness on pending charges); *Jackson v. State*, 522 So.2d 802 (Fla. 1988) (impeaching on pending charge improper), and cites no law for its claim that Wadada "opened the door" to such charges by testimony Wadada helped and taught her to be responsible, as he "placed at issue what kind of adult Caldwell had become as a result of [his] tutelage." Answer Brief at 95.

Although the State excuses its calling a prior burglary of a structure "violent," imputing Bobo's acts to Wadada, R 139 T 527-528, and claiming Wadada's violence came in through Deputy Lashbrook, Answer Brief at 96, Lashbrook went to a shooting involving Bobo, and did not see Wadada until later that night. R 135 T 175-176. No evidence of violence by Wadada was adduced through Lashbrook.

Also, the State called this offense a "contract kill." R 139 T 532. The CCP aggravator (which the State must prove beyond reasonable doubt, *Jent v. State,* 408 So.2d 1024 (Fla. 1981)), applies in "contract murders." *McCray v. State,* 416 So.2d 804, 807 (Fla.1982). There was no evidence of a "contract kill." R 139 T 532.

CONCLUSION

For the foregoing reasons and those discussed more fully in Appellant's Initial Brief, this Court should reverse and remand this case for a new guilt phase trial, penalty phase proceeding, and/or resentencing hearing.

Respectfully submitted,

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MELODEE A. SMITH
Florida Bar No. 33121

LAW OFFICES OF MELODEE A. SMITH
101 NE 3rd Ave. Suite 1500
Ft. Lauderdale, FL 33301
Tel: (954) 522.9297
Fax: (954) 522.9298
MSmith@SmithCriminalDefense.com

Attorney for Appellant

CERTIFICATE OF SERVICE

I CERTIFY a true and correct copy of the foregoing has been furnished to Assistant Attorney General Sandra Jaggard, Rivergate Plaza, Suite 650, 444 Brickell Avenue, Miami, FL 33131 and Wadada Delhall, L31022, FSP, 7819 NW 228th Street, Raiford, FL 32026 by U.S. Mail, this 24th day of March, 2011.

CERTIFICATE OF FONT AND TYPE SIZE

This brief is word-processed utilizing 14-point Times New Roman type.

MELODEE A. SMITH
Florida Bar No. 33121