IN THE SUPREME COURT OF FLORIDA

CASE NO.: SC10-2363
LT CASE NO.: 2006-CF-018285

RASHEEM DIQUOINE DUBOSE
Appellant,

vs.

STATE OF FLORIDA,
Appellee.

ON APPEAL FROM THE CIRCUIT COURT
OF THE FOURTH JUDICIAL CIRCUIT,
IN AND FOR DUVAL COUNTY, FLORIDA
INITIAL BRIEF OF APPELLANT

RICHARD R. KURITZ, ESQUIRE
Florida Bar No: 0972540
200 East Forsyth Street
Jacksonville, Florida 32202
Telephone: (904) 355-1999
Facsimile: (904) 854-1999
ATTORNEY FOR APPELLANT

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases **Pages**

TABLE OF AUTHORITIES (continued)

Cases **Pages**

U.S. Constitution:

Florida Statutes:

TABLE OF AUTHORITIES (Continued)

Cases **Pages**

Florida Constitution:

Washington Statute:

Learned Treatises:

PRELIMINARY STATEMENT

This is an appeal from judgment and conviction for first degree, pre-meditated and felony murder and the sentence of death imposed upon the Appellant, Rasheem Duquoine Dubose.

The record on appeal consists of forty one (41) volumes, including trial and hearing transcripts. Appellant will cite to the record by the number of the volume followed by "R" for record plus the page number (__R,____).

The supplemental record, consisting of transcripts on certain jury instructions and hearing on juror's allegations, along with Motion to Declare Mistrial and Affidavit, will be cited as Supp. R_____.

The Court docket entries are contained in Volume 1, immediately following a Table of Contents, and are numbered separately. Entries there are referred to as (1 R, Court Docket,____)

STATEMENT OF THE CASE

Appellant, Rasheem Diquoine Dubose, was indicted for first degree murder involving the use of a firearm and throwing deadly missiles on January 3, 2007, to which was later added one count of possession of a firearm by a convicted felon (1 R 13, 37). Notice of Intent to Seek the Death Penalty was filed by the State Attorney on January 10, 2007 (1 R 36).

Appellant was tried along with his two brothers, who were also charged with capital murder. The three brothers were tried together in the same trial, but Appellant was tried before a different jury than the two brothers.

Appellant's first trial resulted in a hung jury and mistrial was declared. The other two brothers were convicted of all counts and sentenced to life in prison. In the second trial, jury selection commenced on February 8, 2010 before the Honorable Lawrence P. Haddock, in the Duval County Circuit Court (R 1 Court Docket 15). Before and during the first trial, a number of pre-trial motions were made by Appellant and his two brothers, including Motion for Change of Venue due to extensive pre-trial publicity (7 R 1000-1132), and a number of Motions challenging the constitutionality of Florida's death penalty as written and applied in this case (1 R 146-185, 2 R 196-310, 336-368, 3 R 396-410, 475-496516-523, 4 R 545-722 6 R 913-931, 956-979). The death penalty Motions included, *inter alia*, requests for findings of fact by the jury (2 R 336-338). Appellant also filed a Motion in Limine to prohibit the State from arguing the theory of felony murder under Florida Statute 782.04 (6 R 991-994). Appellant renewed all applicable motions before beginning the second trial.

The Court denied all of such pre-trial Motions. A jury was seated and the second jury trial commenced for Appellant. After denying Appellant's Motions to

Exclude Jury Instructions for First Degree Murder (8 R 1236-1246), and for Acquittal, (37 R 1672) the jury found Appellant guilty under both theories of first degree murder, as well as shooting or throwing deadly missiles (8 R 1263-1267).

At the penalty phase, the jury recommended the death penalty by an 8-4 vote (10 R 1645-1646). Per Florida law, there were no specific findings relative to the aggravating factor(s) required under Florida law to enhance the sentence to death. (Id). The Judge adopted the recommendations of the jury, and issued his own findings on the existence of aggravating and mitigating factors per his Sentencing Order (11 R 1875-1892). Appellant was sentenced to death by Judge Haddock on December 9, 2010 (11 R 1862-1867).

Appellant moved for a new trial on March 5, 2010 (1 R Court Docket 24), relying, *inter alia*, on the Court's denial of pre-trial motions, including change of venue, and for failure to exclude felony murder and premeditated murder from the State's argument and the jury's consideration, and for denial of Appellant's Motion for Acquittal. The Motion for New Trial also cited the Court's failure to find that the Florida death penalty was unconstitutional. Appellant filed a Notice of Appeal from the Judgment and Sentence on December 10, 2010 (11 R 1895).

Appellant also filed a Motion to Declare Mistrial, based on alleged juror misconduct, and presented an Affidavit of the jurors (Supp. R., 101-123). A

hearing was held by the trial Judge, in which he questioned the juror about her allegations (Supp. R. 1-52). After the hearing, the Judge denied Appellant's Motion to Declare Mistrial. No witnesses or Affidavits were presented to rebut the juror's allegations of juror misconduct.

From the denial of Appellant's Motion for New Trial in a capital conviction, denial of Motion to Declare Mistrial along with the Judgment and Sentence of death, the Appellant appeals directly to the Florida Supreme Court (per Florida Statute 921.141 (4).

STATEMENT OF FACTS

On July, 26, 2008, around 3 p.m., Willie "Psycho" Davis was driving his girlfriend Cinee Tinsley home on the north side of Jacksonville (33 R 854). As he turned onto 4th Ave., he saw Tajuane Dubose, someone he did not know, walking in the middle of the road (34 R 115). Psycho drove his car straight at him (33 R 859; 34 R 1151; 37 R 1624) because he thought that the defendant was "trying" him and not showing him proper respect (34 R 1152). Tajuane Dubose jumped out of the way just in time, and Psycho told him to "get your ass out of the street," (34 R 1152) and "Punk ass nigger, get from out of the road or I'm going to hit you" (34 R 1152). Dubose responded, "fuck you."

Psycho then drove to Tinsley's home nearby (33 R 861). Appellant, Rasheem Dubose, Tajuane's older brother, was standing in front of the house (34 R 1152) with Adrian Tinsley, Cinee Tinsley's brother, and a friend of Rasheem's. Rasheem Dubose saw what had happened with his brother and an argument began between Appellant and Psycho (33 R 862, 34 R 1153). Psycho got back into his car, drove to his father's house, and retrieved a gun (33 R 864; 33 R 1154). Tinsley saw the gun and told him not to "do that round by my mama's house" to which he told her "shut up because he'll (i.e. Psycho) kill me too" and "I'm going to make him get naked in the street" (34 R 1154).

Psycho returned to Tinsley's home, and saw Rasheem Dubose still in the front yard with Cinee Tinsley's older brother, Adrian, (34 R 1155). He got out of the car, grabbed the Appellant by his shirt, pushed him against a wall, put the gun to the back of his head, and screamed at him to empty his pockets (33 R 866-867; 33 R 887). Appellant complied and emptied his pockets as commanded, after which Psycho ridiculed him and called him "unflattering names" (34 R 1156). He ordered the Appellant to drop his pants, which he also did (33 R 867; 33 R 887; 34 R 1157). Psycho sought to humiliate the Appellant by having him dance naked in the street (34 R 888), but Tinsley's mother, who had been inside the house, came outside and, along with Tinsley begged him to stop" (33 R 867, 877-878, 34 R

1157). He stopped, but Appellant allegedly said something that caused Psycho to come back (33 R 888). Tinsley's mother grabbed Appellant and pulled him into her home (33 R 869, 34 R 1157 – 1158). He left a short time later, visibly angry (33 R 891).

Appellant went back to his house and made a phone call, after which he was very angry, threw down the phone and exclaimed to himself, "I'm going to kill this nigger" (33 R 905). Time passed and the Appellant was later found relaxing and having a beer, not angry or violent, not taking any steps to seek revenge upon Psycho.

Psycho and Cinee Tinsley then drove to Psycho's family home, where he parked his car in the front, and went inside (33 R 871, 34 R 1159). He bragged to his mother about what he had just done to Tajuane and Rasheem Dubose (33 R 870).

Meanwhile, Tajuane Dubose got together with a third brother, Terrell Dubose. Tajuane called Maxie "Boobie" Wilson, their cousin and a drug dealer (34 R 1034.) Tajuane was excited because Psycho had just "tried" him and wanted Wilson to come over (34 R 1034-1035).

Wilson drove to the brother's house and they jumped into his car (34 R 1036). When Wilson showed up, he brought a friend (Sherman Eley) with him,

who sat in the passenger seat (33 R 956). The two brothers sat in the back seat (34 R 1038). Appellant, Rasheem, was not with the brothers when the calls were made or when Wilson arrived with guns to pick up the other two brothers. However, a short time later, they located Rasheem, who also sat in the back seat (34 R 1038-1039). Tajuane already had a gun (33 R 962, 964, 34 R 1037), and Wilson had two other guns which he gave to the other brothers (33 R 968, 34 R 1043). Appellant, Rasheem told Wilson that "a nigger put a gun to his head" (34 R 1039).

Because the intent was only to scare and send a message, not hurt anyone, the group initially planned to drive by Psycho's house and shoot up his car, which they recognized as the car parked in front of the house (33 R 965-966; 34 R 1042). One of the brothers, in fact, prepared to shoot Psycho's car from the vehicle they were in, but was stopped by the cousin's friend, Sherman Eley, who said he wanted nothing to do with that (33 R 965-969; 34 R 1042). Wilson thought that they were "not going over to kill anybody", but only to scare Psycho (34 R 1069). Appellant, Rasheem Dubose, was not in possession of any firearms until his cousin arrived with guns. The cousin Wilson, pulled around the corner to the rear of the house, parked the car in a utility company lot, and waited as the three brothers got out and headed towards the Psycho's house (33 R 967-969).

Inside, Psycho, Cinee Tinsley, and Psycho's mother and stepfather were in the living room when they heard the shots (33 R 872-873). In the room farthest from the Defendant's, and farthest from the shooting, were eight year old Dreshawna Davis and her two younger cousins where they had been directed to go to avoid hearing Psycho brag about what he had done to the Dubose brothers (33 R 866-881). Psycho was sitting on the couch in the living room on the south side of the house near the east window (32 R 724, 33 R 872). It is undisputed that none of the Defendants were aware any children were in the home.

Appellant, was handed a gun with an extended clip (33 R 969, 973; 34 R 1044), and fired the most rounds into the house. None of the bullets hit anyone, except for the one that had been fired by Appellant from the southeast window of the house and travelled through two walls of the house and hit Dreshawna Davis on the left side of the chest, killing her (33 R 842; 34 R 1247-1249, 1253).

When the gunfire started, Psycho dropped to the floor (33 R 881), then stood up and went to the front door of the house carrying his gun (36 R 1553). He then exited the house looking for the shooters, and immediately left the home to search for the brothers without checking on the occupants of the home.

At trial, crime scene investigators reconstructed the trajectory of the bullets fired by the three brothers (33 R 808 – 840, 844 – 855). They concluded that the

bullets were fired by the brothers through windows on the rear (west) and the side (southeast) of the house (33 R 813). The bullets wound up scattered throughout the house, some hitting walls, some hitting the ceiling, some hitting furniture or appliances, some going all the way through the house and out the opposite walls or windows. (See State Exhibits 83-169; 9 R 1399-1485)

There was no testimony presented by the crime scene investigators as to any "clustering" pattern of the bullets, nor was there any testimony as to where the alleged target, Psycho, was positioned in relation to the trajectory of the bullets. Further, there was no testimony or evidence presented as to how close any of the bullets came to hitting Psycho. The shots were random in nature and void of any specific target.

According to the diagrams of the CSI team, the brothers were not positioned right next to the windows when they fired, but a number of feet back from the windows (see State Exhibits 206 – 233; 9 R1525 – 1542). There was no reconstruction or demonstration at trial, and no testimony, as to what exactly the brothers could see from their positions when they were firing into the house (see Officer Knox's testimony regarding not knowing what the lighting conditions were at the time of the shooting) (33 R 843 – 844).

The house itself was a small, 2-bedroom frame house (32 R 816), and possibly less than 1,000 square feet. The house had a chain link fence around the yard (22 R 814), with a large opening for the driveway and no gate (State Exhibit 21; 8 R 1337), or any way to close off the yard (32 R 731, 771 – 772).

Based on footprint traces, shell casings, latent fingerprint evidence, and "touch DNA," the officers concluded that some or all of the shooters climbed the fence to get into the yard (34 R 1138 – 1141, 1178 – 1184, 1216 - 1229). There was no testimony presented at trial concluding that the shooters could not have simply walked around the fence and come in to the yard through the open driveway area, other than that it was closer for them to jump over the fence from where the brothers had parked. (33 R 967; State Exhibits 35 – 38; 8 R 1351-1354).

When the shooting was over, the brothers fled in Wilson's car, and he took them to a house he had rented in a wooded area on the south side of Jacksonville (33 R 973; 34 R 1048). Within a short time, the brothers learned from a phone call and from the news media that Dreshawna Davis had been killed in the shooting (33 R 974; 34 R 1052). The brothers were very upset, crying and remorseful as they did not believe it, saying there "weren't no kids" in the house (33 R 975; 34 R 1049, 1052).

A few days later, the owner of the house found the brothers, called the police, and used a stick to keep them from fleeing (34 R 1016-1018). Within a few minutes, the police showed up and arrested the three brothers (34 R 1018).

After their arrests, Appellant gave a nine (9) hour interview to Detectives from the Jacksonville Sheriff's Office (35 R 1277-1288, 1336 – 1400; 36 R 1404-1474). The Appellant indicated that he was very angry at Psycho for holding a gun to his head (35 R 1397; 36 R 1521). He placed himself at the scene and made a number of admissions (e.g. 36 R 1544-1548), but denied throughout that he was ever one of the shooters at the house (36 R 1547) and denied that the group went to the house with the intent of killing Psycho (36 R 1424). Appellant also made the very important, and critical, statement that you couldn't see into the house (36 R 1424-1425).

SUMMARY OF THE ARGUMENTS

1. Based upon the Affidavit and testimony of a juror in this case, there was clearly jury misconduct. Jurors researched material issues on their smart phones and discussed such issues with other jurors. The research and discussions were clearly prejudicial to the Appellant. Further, the jury foreman did not properly perform his duties, to the extent that it is not even clear whether the 8 – 4 death penalty recommendation was even the actual vote of the jury. Consequently, both the death penalty sentence and the verdict itself must be set aside and the case remanded for a new trial.

2. There was insufficient evidence presented at trial to establish a finding of first degree, premeditated murder beyond a reasonable doubt, and hence, the Court should have acquitted Defendant on this charge. The evidence did not establish the intent to kill rather the evidence supported alternative theories of Appellant's plan and design when he shot into the victim's house. With the failure of the State to exclude alternative theories of intent, Appellant's conviction must be set aside.

3. There was no underlying felony to support a finding by the jury of felony murder. This charge should not have been submitted to the jury. The yard of the house wherein the victim was shot was only partially enclosed, and not subject to burglary, as the State claimed. A partially enclosed yard does not establish the type of notice to the public to keep out of the yard necessary for the yard to be part of the property's "curtilage." Only a completely enclosed yard or a yard subject to being completely enclosed (such as closed off with a gate) should be held by this Court to be part of the curtilage required to invoke the finding that a burglary occurred.

4. The pre-trial publicity was so extensive and inflammatory in this case that Appellant could not be guaranteed a fair trial in the local jurisdiction. The Court erred in denying Appellant's Motion for Change of Venue. Sixty of seventy jurors questioned during jury selection were familiar with the case. Appellant and his brothers were called various unflattering names by public officials, including the Mayor and the Sheriff. The denial of Appellant's Motion to Change Venue, under these circumstances, constituted an abuse of discretion and reversible error.

5. The Florida sentencing statutes, as they pertain to imposition of the death penalty, are unconstitutional. The statutes take from the jury the fact finding function which the Supreme Court has found to be their province. Only the Judge makes specific findings of fact, based upon nothing but a simple numerical vote by the jury – in this case 8 - 4. The only meaningful findings are made by the Judge, who determines the balance of aggravating and mitigating factors. There is no showing that a majority of the jurors who voted for the death penalty were even finding the same aggravating factors. Under these circumstances, Appellant has been denied his Sixth and Fourteenth Amendment rights, and his death penalty sentence must be set aside.

6. The death penalty sentence as applied to Appellant is disproportionate to the sentences of the co-defendants, the Appellant's brothers, who received sentences of life imprisonment. Appellant committed exactly the same offense and had the same degree of culpability. The U.S. and Florida Constitutions prohibit the imposition of the death penalty when co-perpetrators with equal culpability receive lesser sentences. Due to the disproportionality of the sentences, the death penalty sentence imposed on Appellant must be vacated and the case remanded for re-sentencing.

7. The trial court erred by refusing to consider as a mitigator Defendant's attempt to enter into a plea agreement with the State of Florida. While the Jury was deliberating in Appellant's first trial, the State approached defense counsel and offered to let the Appellant plea to second degree murder and the State would then waive the death penalty on the two brothers of the Appellant. The Appellant agreed and a hung jury was declared and mistrial resulted. Thereafter the State reneged on their offer and the Appellant was forced to proceed to a second trial

8. The trial court erred by denying multiple defense motions to continue the penalty phase of the trial. Due to JAC funding, a PET scan was not done on the Appellant prior to a funding of guilt. After the finding of guilt, the defense repeatedly moved for a continuance of the penalty phase to have the Appellant undergo a PET scan. Forced to proceed without a PET scan, the jury did not hear that the Appellant has frontal lobe brain damage and suffered from fetal alcohol syndrome.

9. While trial errors may not rise to the level of fundamental error in isolation, the cumulative effect of such errors can result in a denial of due process. Such denial of due process clearly occurred in this case. The denial by the Court of Appellant's Motion to Change Venue, despite the extensive and prejudicial pre-trial publicity, along with the Court's denial of the Motion to Declare a Mistrial due to jury research of trial matters, including "teardrop tattoos", and the actions of the jury foreman in pre-judging Appellant and going through the motions in both the guilt and penalty phases of the trial, denied Appellant his right to due process and a fair trial.

POINTS ON APPEAL

I. THE TRIAL COURT'S DENIAL OF APPELLANT'S MOTION FOR MISTRIAL BASED ON JUROR MISCONDUCT, SUBSTANTIATED BY AN UNREBUTTED AFFIDAVIT OF A TRIAL JUROR, WAS REVERSIBLE ERROR.

II. THE TRIAL COURT COMMITTED REVERSIBLE ERROR IN NOT ACQUITTING DEFENDANT ON THE CHARGE OF PREMEDITATED FIRST DEGREE MURDER WHERE THE EVIDENCE WAS NOT SUFFICIENT TO ESTABLISH THE SPECIFIC INTENT TO COMMIT MURDER AND TO RULE OUT ALTERNATIVE THEORIES IN REGARD TO APPELLANT'S INTENT.

III. THE TRIAL COURT COMMITTED REVERSIBLE ERROR IN NOT EXCLUDING FELONY MURDER FROM JURY INSTRUCTIONS AND FROM ALLOWING THE JURORS TO RETURN A VERDICT OF FELONY MURDER WHERE THE UNDERLYING FELONY, BURGLARY, WAS NOT PROVEN AT TRIAL

IV. THE TRIAL COURT ABUSED ITS DISCRETION IN NOT GRANTING APPELLANTS MOTION FOR CHANGE OF VENUE WHERE THE PUBLICITY IN THE COMMUNITY RIGHT UP TO THE TIME OF TRIAL WAS PERVASIVE AND INFLA.MMATORY

V. FLORIDA'S SENTENCING STATUTES FAILED TO PROVIDE APPELLANT WITH HIS CONSTITUTIONAL RIGHTS UNDER THE SIXTH AND FOURTEENTH AMENDMENTS AS THEY REMOVED FROM THE JURY THE FACTUAL DETERMINATIONS REQUIRED FOR THE ENHANCEMENT OF PUNISHMENT FROM LIFE IMPRISONMENT TO THE DEATH PENALTY.

VI. THE DEATH PENALTY AS APPLIED TO APPELLANT IS DISPROPORTIONATE, AS APPELLANT'S CO-DEFENDANTS, WHO COMMITTED THE EXACT SAME OFFENSE, RECEIVED SENTENCES OF LIFE IMPRISONMENT.

VII. THE TRIAL COURT ERRED BY REFUSING TO CONSIDER AS A MITIGATOR DEFENDANT'S ATTEMPT TO ENTER INTO A PLEA AGREEMENT WITH THE STATE OF FLORIDA SO THAT HIS BROTHERS WOULD AVOID THE DEATH PENALTY.

VIII. THE TRIAL COURT ERRED BY DENYING MULTIPLE DEFENSE MOTIONS TO CONTINUE THE PENALTY PHASE OF THE TRIAL TO HAVE THE APPELLANT TAKE A PET SCAN.

IX. THE CUMULATIVE EFFECT OF TRIAL AND PRE-TRIAL ERRORS DENIED DEFENDANT DUE PROCESS AND A FAIR TRIAL

ARGUMENT

I. THE TRIAL COURT'S DENIAL OF APPELLANT'S MOTION FOR MISTRIAL BASED ON JUROR MISCONDUCT, SUBSTANTIATED BY AN UNREBUTTED AFFIDAVIT OF A TRIAL JUROR, WAS REVERSIBLE ERROR.

A trial juror came forward with evidence of blatant misconduct and impropriety on the part of jurors. The juror in an unrefuted sworn affidavit stated that:

1. The jury laughed and made fun of the Appellant's police interview because he is a black male. The jury made racial references about the defendant being a black male, and stated the police video interview **needed subtitles** because the jury could not understand Appellant's use of the English language because he was a black male.
2. The juror who signed the affidavit commented to the other jurors that the Appellant did not have "dreads" in his hair, as testified to by an eyewitness; other jurors told her that she "was not of **that culture**" and that she could not understand.
3. The juror, and another juror, did not want to vote to convict Appellant. When that was voiced, the other jurors called her a "**heartless bitch**" because she had "**no feelings for the victim**". The

juror was then called other names before the juror caved into the pressure in an attempt to get away from the angry mob the rest of the jury had turned into.

4. The juror then attempted to remain in the jury room after the verdict crying hoping to get away from the other jurors so that she could tell the court what happened and that she did not want to vote Guilty. The Bailiffs would not let her remain sue to security reasons due to the High Profile nature of the case.

5. The juror signed an affidavit advising that the jury had been researching the case during the trial on their smart phones. The jury was aware of the high profile nature of the case and that the majority of the jurors had already made up their minds in advance and most of the jury never considered or discussed the evidence or arguments in violation of their oaths as jurors.

6. The juror swore that the State's Victim's Advocate approached the jury panel as a whole shortly after they were selected as the jury and inquired if they were the jury who would be hearing the Dubose case, the same Victim Advocate then sat next to the victim's family throughout the two week trial and penalty phase.

7. The Jury learned that the home of grandmother of the victim, who was present in the courtroom during the trial, burned down after the verdict in the case. The jurors discussed the extraneous fact and the jury wondered if the guilty verdict and the fire were related.

8. The jury was doing their own independent internet research as to the location the houses and apartments involved in the case.

9. The jury was doing their own internet research into the issue of "tear drop tattoos". The jury was under the mistaken belief that the Appellant had a tear drop tattoo, he does not, he has a tattoo of a small dollar sign ($) under his eye. The internet research into tear drop infected the jury with information regarding gangs and gang killings and rituals.

10. The jury foreman marked the verdict form "Guilty" in ink immediately upon retiring to the jury room and before any deliberations occurred and acted surprised that anyone wanted to actually follow their oaths as jurors and consider the evidence, the law and the arguments of the attorneys and actually have meaningful deliberations.

11. The jury foreman was **drinking wine** at lunch every day of the trial. Further, each day during the two week trial he would take turns buying the other jurors lunch currying favor before he was selected foreman. After being selected foreman and being taken as a group to lunch during deliberations the foreman attempted to pick up the tab of all twelve jurors. He was advised that each juror had a $10.00 meal voucher; he then did indeed pay for any and all of the jurors whose tab went over the $10.00 voucher.

12. The jury had been told to pack an overnight bag in the event they were sequestered. Some jurors failed to follow the court's order and did not pack a bag and instead of deliberating they joked that they had a 5:00p.m. dinner date.

(Supp. 2 R 119-123) (emphasis added).

The juror attempted to contact the trial judge more than once, but the judge never responded. The juror even attempted to go see the judge in person. The juror was so troubled by what the other jurors were doing, that she contacted the Public Defender's office and spoke with an Assistant Public Defender. He merely advised the juror to go see the Trial Judge and did not notify the Judge, the State or the defense.

The juror then contacted a local criminal defense attorney who advised the same. However, this criminal defense attorney took a nominal step further and went to advise the Chief Judge of the Fourth Judicial Circuit. Even the Chief Judge failed to advise the trial judge, the State, or the defense. Frustrated, the juror then attempted to reach the undersigned who was lead defense counsel during the two trials. However, the emails to counsel's website were not being delivered properly and defense counsel did not receive them.

After having made contact with two attorneys between the guilt phase and the penalty phase and having no help or success reaching the trial judge the juror travelled to the courthouse early on the day of the penalty phase to make contact with the judge. However, she was turned away by the bailiff and made to remain with the rest of the jury panel that she wanted to avoid. (Supp. 2 R 120). The juror was not able to speak to the judge. Then while the penalty phase was being conducted the juror began text messaging with the Assistant Public Defender that she originally went to meet with. Instead of taking steps to reach the trial judge, or assist the juror in reaching the trial judge, the Assistant Public Defender advised the juror to wait until the end of the penalty phase to speak to the attorneys. (Supp. 2 R 120-121).

It was only after the penalty phase that the juror obtained the cellular number of the undersigned and on the night of the jury recommendation, began calling, text messaging and emailing the undersigned. The juror was taking steps to stop a miscarriage of justice and an improper death penalty sentence.

Some of the blatant misconduct and extraneous issues in the juror's Affidavit included the State's Victim Advocate approaching the jury panel moments after they were selected; doing internet research on their smart phones, including researching the trial, the locations of the various houses and apartment complexes involved in the case; using the internet to research "tear drop tattoos" (Supp. R. 119-123). The jurors laughed and mocked the Defendant during the guilt phase making racial references and laughing that the video of the *Defendant's police interrogation needed subtitles* so that they could understand his English; and issue at trial was a description of an eyewitness who described the shooters as having dreadlocks, when the juror stated that the Defendant did not have dreadlocks the jury told the juror that she "*was not of that culture*"; when the jurors returned for the penalty phase the judge asked the normal preliminary questions even though the jurors responded "no" that they had not been exposed to any news media the truth is the jury members had learned that the home of the victim's grandmother had burned down a few days after the guilty verdict and wondered if

the fire was set on purpose; on the day the jury was to deliberate and make a recommendation of life or death several jurors did not bring an overnight back as instructed and some jurors "joked that they had a 5:00 p.m. dinner date"; They entered the trial with pre-conceived notions of guilt due to the media exposure in Jacksonville; browbeating jurors who did not wish to find the Defendant guilty, pressuring jurors to change their votes, and trying to change the juror's votes to make the penalty recommendation unanimous. (Supp. 2, R 119-123).

After closing arguments but before deliberations in the penalty phase the foreman asked how they would be polled. (10 R 1647) (31 R 551). The court advised that they would not be asked what their individual vote was. The foreman then began the alleged deliberations by telling the jurors not to voice their opinions or discuss the evidence or the jury instructions with one another. Thus, the jurors had no way of knowing who was voting in what manner and what the actual vote was. (Supp. 2, R 122).

The juror signed an Affidavit stating the jury was researching issues outside of the courtroom and found on the Internet that a tear drop tattoo signified that a gang member had killed someone (Supp. R 121). The jurors mistakenly thought that the Appellant had a tear drop tattoo. The tattoo on the Appellant was a dollar sign ($) near his eye and not a tear drop.

Further, the foreman of the jury had marked "guilty" on the verdict form before the jury had even deliberated. Later, during the actual penalty phase deliberations the court did not take away the juror's phones and the foreman was using his I-phone and was "surprised" when the rest of the jurors actually wanted to deliberate and consider the law as applied to the facts of the case. He was the only one who counted the votes and did not do a polling of the jury after the alleged 8 – 4 recommendation for the death penalty, so other than the foreman's representations that the vote was 8 - 4, there was no way of knowing if that was the actual vote. As will be argued later, not only is it unknown if any single aggravator was found beyond a reasonable doubt by the jurors, it is unknown if the vote was truly 8 – 4 in favor of the death penalty and not in favor of Life.

A Motion to Declare Mistrial was brought by Appellant and the trial judge brought the juror before the Court for questioning. The juror stated under oath that everything in her Affidavit was true and correct. (Supp. R 14). The State offered no testimony, affidavits or evidence to rebut the juror's affidavit. The juror further stated that jurors were using cell phones during both the guilt and penalty phases of the trial to research the issues raised at trial (Supp. R 16), and that they actually used the cell phones during **actual jury deliberations in the penalty phase** (Supp. R. 17) (emphasis added). The juror was actually text messaging an attorney not

involved in the trial complaining about the process while evidence was being presented in the penalty phase. (Supp. 2 R 120-121).

The juror further testified that jurors were using their I-Phones at various times during the trial (Supp. R 21), and that during breaks, the jury discussed "teardrop tattoos" (Supp. R 23), even though they had been advised not to discuss the case amongst themselves until the conclusion of all of the evidence. They then researched teardrop tattoos.

A. Extraneous Influences Consisting of Internet Research Were Brought into the Jury Room and such Influences Were Materially Prejudicial to the Appellant.

Courts generally make a distinction between influences on the jury which are internal to the jury deliberations and extrinsic or outside influences brought into the jury room, which are not intrinsic to or inherently a part of the jury deliberations.

Hence, the Court will not generally overturn a jury verdict based upon allegations of undue jury pressure on a juror, or that a juror misunderstood the court's instructions, or that he miscalculated damages, or, generally, for any matters which arise inherently during the deliberation process. State v. Blasi, 411 So.2d 1320 (Fla. 2nd DCA 1981)

Florida courts will, however, examine the exposure of jurors to improper outside influences, which is not a matter which inheres in the verdict. This includes an independent investigation by a juror using evidence obtained outside the courtroom and reporting such evidence to the other jurors. Snook v. Firestone Tire and Rubber Company, 485 So.2d 496 (5th DCA Fla. 1986)

Fla. Rules of Criminal Procedure 3.900(b) authorizes a new trial if, *inter alia*, any of the following are established, provided the Defendant is substantially prejudiced thereby:

> (2) That the jury received any evidence out of court, other than that resulting from an authorized view of the premises;
>
> (4) That any of the jurors was guilty of misconduct;
>
> (8) For any other cause, not due to the Defendant's own fault, Defendant did not receive a fair and impartial trial.

According to Florida Federal cases, whose rules generally mirror the State rules, if the trial court becomes aware that the jury may have been exposed to improper extraneous influences or information, the Court has a duty to investigate the alleged impropriety (emphasis added). U.S. v. Gaffney, 676 F. Supp. 1544 (9 M.D. Fla. 1987) (emphasis added). The Court should look into the existence of any impermissible influence, its nature and the manner in which it occurred. U.S v. Avarza-Garcia, 819 F.2d 1043 (11th Cir), (Cert Denied 108 S. Ct. 465 (1987).

Once it is established that extrinsic material was available to the jurors, the Court must grant a new trial, unless there is no reasonable possibility that the jury's verdict was influenced by the improper extraneous evidence. U.S. v. Posner, 644 F. Supp. 885, aff'd 828 F.2d 773 (11th Cir. 1987) (emphasis added).

In this case, there were clearly extraneous influences coming into the jury room. According to the testifying juror, research was being conducted by several jurors on their smart phones regarding locations of houses and apartment complexes, and most significantly, in regard to "teardrop tattoos". Racial slurs were made by the jurors and jokes about the Defendant's ability to speak the English language and need for subtitles to understand his police interview were made. Additionally, the jury was exposed to a news story about the grandmother of the victim's house burning down after the verdict and wondered if the two events were related and when asked if they had been exposed to any news media no one disclosed this fact. (Supp. 2 R 119-123).

A number of jurors were apparently under the mistaken belief that the Appellant had a teardrop tattoo and their Internet research showed that a teardrop tattoo is what a gang member gets "after you kill someone", and that was discussed by the jury. (Supp. R. 121). Clearly, this was extrinsic to the verdict and false. A juror in a death penalty case believing a Defendant, one of the three brothers, is

involved in gang activity and has previously killed, is highly prejudicial. The State presented nothing to suggest that this did not affect the verdict in this case. Additionally, as in this case, it was clearly extrinsic to the verdict and patently false.

The issue of race and ethnicity has been found to be extraneous to the verdict and have resulted in new trials in Florida. Writing for the majority, Justice Quince, reversed the trial court in Wright v. CTL Distribution, Inc., 679 So.2d 1233 (2nd DCA 1996) wherein the jurors were making racial slurs. In Wright, Justice Quince cited to the case of Sanchez v. International Park Condominium Association, Inc., 563 So.2d 19 (1990). In that case the jurors were making slurs about the Cuban community. Both cases were reversed and remanded for new trials because race and ethnicity is extraneous and an improper consideration in the judicial system. Clearly, the race or ethnicity of a party to litigation in the State of Florida is extraneous to the evidence presented at trial and improper.

Further, Justice Quince's opinion stated, "we find persuasive the decision in United States v. Heller, 785 F.2d 1524 (11th Cir. 1986), a case in which a juror made anti-Semitic remarks to other jurors during a criminal trial". The court there said:

> The judiciary, as an institution given a constitutional mandate to ensure equality and fairness in the affairs of our country when called on to act in litigated cases, must remain ever vigilant in its responsibility. The obvious difficulty with prejudice in a judicial context is that it prevents the impartial decision-making that both the Sixth Amendment and fundamental fair play require. A racially or religiously biased individual harbors certain negative stereotypes which, despite his protestations to the contrary, may well prevent him or her from making decisions based solely on the facts and law that our jury system requires.

Id. at 1527.

In a 2007 federal case, U.S. v. Hernandez, Crim. No. 07-60027 (S.D. Fla. 2007), a mistrial was declared when, upon questioning, 8 of 12 jurors admitted to doing research about the case during trial. Some of them "googled" the Defendant's name and found negative information on him. The court found that this irreparably tainted the proceedings and that the trial could not continue. This jury incorrectly thought the Appellant had a tear drop tattoo and googled that and became infected with information about gangs and gang rituals. Clearly, that is extrinsic to the verdict, extremely prejudicial and requires a reversal of Appellant's conviction.

In a recent Florida case, Tapanes v. Florida, 43 So.3d 159 (Fla. 4th DCA 2011), the juror used her smart phone to find the definition of "prudent", which was part of the jury instructions in a manslaughter case. She then shared that

definition with the other jury members. The court asked, was there jury misconduct, and then asked, did the misconduct affect the verdict.

The trial court held that there was misconduct, but that it was harmless error. Reversed on appeal, the Court stated that the definition of prudent in this case was important in the jury's finding of manslaughter, and the Court could not say that there was no "reasonable possibility" that the juror's misconduct did not affect the jury verdict.

In this case, the juror's un-rebutted Affidavit and testimony under oath established:

1. The jury laughed and made fun of the Appellant's police interview because he is a black male. The jury made racial references about the defendant being a black male, and stated the police video interview **needed subtitles** because the jury could not understand Appellant's use of the English Language because he was a black male.
2. The juror who signed the affidavit commented to the other jurors that the Appellant did not have "dreads" in his hair, as testified to by an eyewitness; other jurors told her that she "was not of **that culture**" and that she could not understand.

3. The juror, and another juror, did not want to vote to convict Appellant. When that was voiced, the other jurors called her a "**heartless bitch**" because she had "**no feelings for the victim**". The juror was then called other names before the juror caved into the pressure in an attempt to get away from the angry mob the rest of the jury had turned into.

4. The juror then attempted to remain in the jury room after the verdict crying hoping to get away from the other jurors so that she could tell the court what happened and that she did not want to vote Guilty. The Bailiffs would not let her remain sue to security reasons due to the High Profile nature of the case.

5. The juror signed an affidavit advising that the jury had been researching the case during the trial on their smart phones. The jury was aware of the high profile nature of the case and that the majority of the jurors had already made up their minds in advance and most of the jury never considered or discussed the evidence or arguments in violation of their oaths as jurors.

6. The juror swore that the State's Victim's Advocate approached the jury panel as a whole shortly after they were selected as the jury and

inquired if they were the jury who would be hearing the Dubose case, the same Victim Advocate then sat next to the victim's family throughout the two week trial and penalty phase.

7. The Jury learned that the home of grandmother of the victim, who was present in the courtroom during the trial, burned down after the verdict in the case. The jurors discussed the extraneous fact and the jury wondered if the guilty verdict and the fire were related.

8. The jury was doing their own independent internet research as to the location the houses and apartments involved in the case

9. The jury was doing their own internet research into the issue of "tear drop tattoos". The jury was under the mistaken belief that the Appellant had a tear drop tattoo, he does not, he has a tattoo of a small dollar sign ($) under his eye. The internet research into tear drop infected the jury with information regarding gangs and gang killings and rituals.

10. The jury foreman marked the verdict form "Guilty" in ink immediately upon retiring to the jury room and before any deliberations occurred and acted surprised that anyone wanted to actually follow their oaths as jurors and consider the evidence, the law

and the arguments of the attorneys and actually have meaningful deliberations.

11. The jury foreman was **drinking wine** at lunch every day of the trial. Further, each day during the two week trial he would take turns buying the other jurors lunch currying favor before he was selected foreman. After being selected foreman and being taken as a group to lunch during deliberations, the foreman attempted to pick up the tab of all twelve jurors. He was advised that each juror had a $10.00 meal voucher; he then did indeed pay for any and all of the jurors whose tab went over the $10.00 voucher (emphasis added).

12. The jury had been told to pack an overnight bag in the event they were sequestered. Some jurors failed to follow the court's order and did not pack a bag and instead of deliberating they joked that they had a 5:00p.m. dinner date.

(Supp 2 R 119-123) (emphasis added).

This information was clearly extraneous influences, and the jury discussions based on such research, particularly those relating to the teardrop tattoo, race, and arson and locations of the places in the trial were highly prejudicial to the Appellant. Additionally, this is the only detail this juror could provide, because

she had no way of knowing what other issues the jurors were researching. But, we do know they were doing research extrinsic to what was introduced by the State into evidence. The State presented no argument, testimony, evidence or affidavits to rebut the testimony of the juror what came forward.

Once it is established that extrinsic material was available to the jurors, the Court must grant a new trial, unless there is no reasonable possibility that the jury's verdict was influenced by the improper extraneous evidence. U.S. v. Posner, 644 F. Supp. 885, aff'd 828 F.2d 773 (11th Cir. 1987) (emphasis added).

The Court in this case cannot say that there was no "reasonable possibility" that the juror's misconduct did not affect the jury's verdict, both in the guilt and penalty phases.

B. The Jury Foreman's refusal to poll the jury on Death Penalty recommendations or to disclose to the other jurors how the jurors voted should be found to be misconduct by this Court, as such actions tend to case doubt on the validity of the 8 – 4 Death Penalty Recommendation.

As seen in Argument I, the jury recommendations for the penalty in a capital case have been found by the U.S. Supreme Court and lower courts to be crucial to the constitutionality and appropriateness of a death penalty sentence. The actions of the jury foreman, as sworn to by the juror in this case, and absolutely unrebutted

by other jurors, further casts a dark cloud on the death penalty sentence as applied to this Appellant.

It is unrebutted that the jury foreman did not follow his oath as a juror marking "guilty" on the jury verdict form in ink before the jury even deliberated (Supp. R. 105); conducting no deliberations in the penalty phase, counting the votes by himself, and refusing to poll the jury out loud or let the jurors hear the votes of the others to cause meaningful deliberations. It should be noted that this is the foreman who employed these tactics and then sent out a question to the Court wanting to know specifically how they would be polled. (10 R 1647)(31 R 551). The Trial Court answered the question by letting the foreman know that each juror would not be asked specifically what they voted. (31 R 551).

It is not even clear from this record that the vote of 8 – 4 was indeed the actual vote, or if it was 8 – 4 for life. The foreman, who clearly wanted to convict the Appellant and sentence him to death, is really the only person who knows whether the vote he stated as true accurately reflects the jury's recommendations. The jurors were not polled by the Court as to their individual recommendations, but only as to whether the recommendations were the verdict of the jury (Supp. R. 89-91). The jurors had no way of knowing if the vote count was even a majority for death versus a majority vote for life.

To hinge Appellant's life on as thin a reed as the good faith of this jury foreman in counting and stating the votes correctly, denigrates the magnitude of the death penalty verdict and relegates the Appellant's State and Federal due process rights of Appellant to an arbitrary and questionable procedure.

Clearly, the cumulative effect of the misconduct, the extrinsic evidence, as well as the improper intrinsic forces, denied Defendant his State and Federal due process right to a fair trial. This Court should find that the jury foreman's actions, and the jury as a whole constituted "misconduct" and resulted in Appellant not receiving a fair trial pursuant to Fla. Rules of Criminal Procedure 3.600(b)(4) and (8), and violating his State and Federal due process rights. Thus, this Court should reverse the jury verdict and death penalty sentence and remand this case for a new trial.

II. THE TRIAL COURT COMMITTED REVERSIBLE ERROR IN NOT ACQUITTING DEFENDANT ON THE CHARGE OF PREMEDITATED FIRST DEGREE MURDER WHERE THE EVIDENCE WAS NOT SUFFICIENT TO ESTABLISH THE SPECIFIC INTENT TO COMMIT MURDER AND TO RULE OUT ALTERNATIVE THEORIES IN REGARD TO APPELLANT'S INTENT.

There was no evidence Appellant had a premeditated intent to kill anyone. This case is essentially a "run by" (aka "drive by") shooting; random in nature and no specific target in sight. While doing so is imminently dangerous, constituting second degree murder, it does not rise to first degree murder.

To establish the charge of first degree murder (other than felony murder), the evidence must show that the Defendant acted with "a premeditated or fully formed conscious purpose to kill." Assay v. State, 580 So.2d 2610 (Fla. 1991)

First degree murder is a "specific intent" rather than a "general intent" crime. In that respect, it differs from second degree murder, in which the specific intent to murder someone is absent, but is proven by demonstrating "the unlawful killing of a human being when perpetrated by any act imminently dangerous to another and evincing a depraved mind, regardless of human life, although without any premeditated design to effect the death of any particular individual." Florida Statute 782.04 (1991), Kirkland v. State of Florida, 684 So.2d 732 (Fla. 1996).

In this case, there is no direct evidence of intent other than one overheard angry statement by the Appellant immediately after a gun was placed to his head, but hours before the shooting, "I'm going to kill this nigger," which he exclaimed to himself immediately after a gun was put to his head by Psycho. This spur of the moment statement, resulting from extreme provocation, has little if any probative value in establishing a conscious, deliberative purpose to kill, especially in light of the passage of time before the shooting and the undisputed fact that the Defendant took no steps to do so. To the contrary, he was relaxing with a beer when his brothers, cousin and guns found him. Appellant had made no attempts to get any weapons or create a plan to seek revenge.

To prove a first degree, premeditated murder case by circumstantial evidence, the evidence introduced at trial must be inconsistent with every other reasonable inference or conclusion. State v. Law, 559 So.2d 187 (Fla. 1989), Kirkland v. State of Florida, *supra*, Bell v. State of Florida, 786 So.2d 22, (Fla. 1st DCA 2000).

If the State's proof fails to exclude all other reasonable theories or hypotheses other than that of premeditated design, a first degree murder conviction cannot be sustained. Kirkland v. State of Florida, *supra*, citing Hoefert v. State, 617 So.2d 1046 (Fla. 2nd DCA 1993).

There was no evidence presented at trial of a specific, premeditated intent to kill, and considerable circumstantial evidence which pointed to possible other designs on the part of Appellant and his brothers.

This case is remarkably similar to Cummings v. State, 715 So.2d 944 (Fla. 1998) and his companion case, Fisher v. State, 715 So.2d 950 (Fla. 1998). In Fisher, the Defendants got into a fight with another person regarding car lights. Fisher and others rode around town looking for the individual with whom Fisher had the altercation. They passed the offending individual's house, saw his car, and saw someone who looked like the individual standing outside and then going into the house. The Appellant in this case did not even see Psycho enter the residence.

Fisher, along with other passengers in the car, fired thirty five shots at the house from three different guns, a Glock, a Luger, and an Uzi. One of the shots travelled through the kitchen and into the living room, striking and killing a five year old child sleeping on the couch with his mother.

Fisher (and Cummings) was charged with first degree, premeditated murder, and he was convicted by a jury. This Court set aside the conviction, finding that the evidence was insufficient to support a first degree murder conviction. The Court stated that:

> Premeditation is more than a mere intent to kill; it is a fully formed purpose to kill, Wilson v. State, 493 So.2d

> 1019 (Fla. 1986)... premeditation sought to be proven by circumstantial evidence must be inconsistent with every other reasonable inference...If the State's proof fails to exclude a reasonable hypothesis that the homicide occurred other than by premeditated design, a verdict of first degree murder cannot be sustained...

750 So.2d at 950.

As in Fisher and Cummings, the State in this case failed to exclude alternative theories that Appellant acted with criminal intent, but without the premeditated, specific intent to kill.

The Court in Fisher concluded that:

> ...we cannot rule out the possibility that Fisher and his Cohorts merely intended to frighten Johnson or to damage his car which was struck by several of the bullets. We hold that there was insufficient proof of premeditation to convict of first degree murder.
>
> On the other hand, the proof is clearly sufficient for a conviction of second-degree murder, which is defined as the "unlawful killing of a human being, when perpetrated by any act imminently dangerous to another and evincing a depraved mind regardless of human life, although without any premeditate design to affect the death of any particular individual.

715 So.2d at 951

Clearly, the evidence in this case, as in Fisher, is sufficient for a verdict of second degree murder. The truth came out through the cousin who said the plan was to scare Psycho, and the Appellant himself who said the same in his nine (9)

hour interrogation. A random, though deliberate shooting into a house, was decidedly an act "imminently dangerous to another and evincing a depraved mind and did, tragically, result in the death of a young child. (See also Pressley v. State, 305 So.2d 1175 (Fla. 3d DCA 1981) for the proposition that a person firing a gun into a crowd, killing someone, constitutes second degree murder.)

The initial plan by the brothers was to shoot up Psycho's car, to send a message and that is all that would have been done, but the passenger in the car told them not to do that with him in the car (19 R 955). Then, the cousin, not the brothers, drove the car to the back of the house. The three brothers got out of their car with the guns, which had been given to them, and the driver asked if "they wanted to do this", and they said they did (19 R 958). The cousin specifically testified he did not think anyone was going to be hurt and that the plan was to scare Psycho and send a message. Clearly, there is no evidence of premeditated intent to kill.

The brothers then walked beside the house and opened fire from outside the windows, shooting twenty nine bullets into the house. As Appellant had the gun with the extended clip, he shot the most bullets (19) into the house, one of them being the fatal bullet. There was no testimony that the Appellant knew anyone was actually in the house and the fatal shot passed through two walls to strike a child

who could not be seen nor heard from outside the home. No bullets directly entered the room the victim was in from the exterior of the home. Thus, no one shot directly into the room she was in.

Several points stand out when reviewing the testimony of the crime scene investigators and the exhibits they presented at trial. The first point is that there was no evident pattern to the shootings. The bullets were fired into virtually all parts of the house; some were high, some were low. There was no ascertainable "clustering" of the bullets, which would suggest a specific target (see State Exhibits 206-223, 9 R 1525-1542, 1556-1563). If they intended to kill Psycho, they could have simply waited for him to exit the residence.

If the brothers had been blindfolded and pointed in the general direction of the windows in the rear and the side of the house, in the positions from which they fired, it is hard to see that the results would have been much different. While dangerous, as a second degree murder requires it does not rise to the level of premeditated intent to kill.

Second, from the diagrams the State presented estimating the positions from which the bullets were fired, including the fatal bullet, it does appear from such diagrams that all three shooters, including Appellant, were some distance from the house during the shooting. None of the diagrams suggests, and no testimony of the

officers concludes, that anyone went up to the windows, looked in for a target, and fired at such target. The fatal bullet actually travelled through two walls before striking the victim. Not only was no intent to kill ever proven, it was never proven that the Appellant knew there was anyone in the home.

If Appellant and/or his brothers wanted to kill Psycho (the theory of the Prosecution), they could have walked up to the window, located his position in the house, and fired directly at him. Or, they could have waited for him to come out of the house and ambush him at close range; neither happened.

Additionally, there was no testimony that the brothers had any idea of the number of people in the house. In sad reality, the Appellant did not know that there was actually anyone in the house and he definitely did not know that on the opposite side of the house and two rooms or walls away was a child. The testimony was clear that the Appellant was clearly upset and remorseful upon hearing a child had been killed.

Finally, the State argued that Psycho was the target of the Dubose brothers, and that it was specifically he whom the Appellant was trying to kill. Yet, other than the testimony that Psycho was sitting on one of the couches when the shooting started, and then got up and went to the door, there was no evidence presented as to specifically where he was in relation to the fired bullets, and no evidence the

shooters knew where he was. There was no evidence any of the bullets came close to hitting Psycho. The absence of such evidence suggests that the bullets were all fired randomly without any specific intent or design to kill anyone. The testimony introduced by the State from Appellant's nine (9) hour interrogation was that they could not see inside the house.

For premeditated intent to exist to justify a verdict of first degree murder, "it must exist for such time before the homicide as will enable the accused to be conscious of the nature of the deed he is about to commit, and the probable result to flow from it insofar as the life of the victim is concerned." Bell v. State, *supra*, citing Jackson v. State, 575 So.2d 181 (Fla. 1991) and Sireci v. State, 399 So.2d 964 (Fla. 1981).

The problem for the State in this case is that there is no evidence whatsoever of a conscious purpose to kill. Based upon the analysis above, it is problematical to conclude that Appellant would have even believed that standing a distance from a house and shooting a bunch of bullets randomly into it would be likely to result in the death of Psycho or any other person. Such evidence would only support a verdict of Second Degree Murder because intent was never proven.

They wanted to shoot up the car, which was vetoed by the passenger. The plan was never to kill anyone. The testimony was clear they were just trying to put

great fright into Psycho. There are several hypotheses which cannot be ruled out to the exclusion of the State's theory of a premeditated intent to kill Psycho.

Based on the evidence in this case, a second degree murder conviction is justified, while a first degree murder conviction is not. Thus, if this Court does not set aside Appellant's conviction and remand for a new trial, it should at a minimum reverse the court's judgment of first degree murder and sentence and remand for entry of a judgment of second degree murder and re-sentencing.

III. THE TRIAL COURT COMMITTED REVERSIBLE ERROR IN NOT EXCLUDING FELONY MURDER FROM JURY INSTRUCTIONS AND FROM ALLOWING THE JURORS TO RETURN A VERDICT OF FELONY MURDER WHERE THE UNDERLYING FELONY, BURGLARY, WAS NOT PROVEN AT TRIAL.

Appellant filed a Motion in Limine before trial that the State be excluded from arguing felony murder, and at the conclusion of the trial moved that felony murder be excluded from jury instructions. The Court denied these Motions.

The State contended that the homicide in this case took place during the course of a burglary – committed at the home of Psycho. For a burglary to have occurred, the Appellant must have committed a burglary by "entering a dwelling, a structure, or a conveyance with the intent to commit an offense therein, unless the premises are at the time open to the public or the Defendant is licensed or invited to enter." 810.026 (b) (1) Fla. Statutes (2007).

While the common law definition of a dwelling for purpose of a burglary included only a house or interior of a residence, the Florida legislature expanded it to include the "curtilage" surrounding the building.

> As used in chapter:
>
> (1) "structure" means the building of any kind, either temporary or Permanent, which has a roof over it, together with the curtilage thereof. 810.011 (1) Fla. Statutes (2007).

"Curtilage" is not defined in the statute, or anywhere else in the Florida Statutes.

In State v. Hamilton, 660 So.2d 1038 (Fla. 1995), the Florida Supreme Court held that a burglary did not occur where the defendant entered an unattached garage on the yard of the victim for the purpose of committing larceny. The Court held that for a burglary to occur outside of a residence there must be "some form of an enclosure" in order for the area surrounding the residence to be considered part of the "curtilage" as referred to the burglary statute. (Id at 1044). (emphasis added). The Trial Court's error on this topic was compounded because the Trial Judge gave great weight to this in his sentencing order. In the sentencing order, the trial judge found that the Appellant was engaged in the commission of a burglary and for that reason he found it to be an aggravator and gave it great weight. (27 R 2983).

The issue in this case is whether the yard at Psycho's house, where the Dubose brothers entered, constitutes "some form of enclosure" as required in State v. Hamilton, *supra*. This Court in a very well reasoned opinion in Hamilton, pointed out that the Court was "obligated to strictly construe the term 'curtilage' as used in the burglary statute narrowly in (Defendant's) favor." 660 So.2d 1044 The Court made reference to Carawan v. State, 515 So.2d 161 (Fla. 1987) for the

proposition that "criminal statutes are to be construed strictly in favor of the person against whom penalty is to be imposed."

The Court further referenced the "rule of lenity" in Section 775.02(1) Fla. Statutes 1993, which states:

> The provisions of this code and offenses defined by other Statutes shall be strictly construed; where the language is susceptible to differing constructions, it shall be construed most favorably to the accused."

The Court, in approving the common law requirement of "some form of enclosure" for the area surrounding a residence to be considered part of the "curtilage' as referred to in the burglary statute, noted that, "to hold otherwise would be to bring the statute perilously close to violating the constitutional due process argument of vagueness and uncertainty." Hamilton, 660 So.2d at 1044.

The Court also pointed out that it be "unworkable...to apply a constitutional privacy analysis to determine the extent of the 'curtilage' every time a burglary was charged." Hamilton, 660 So.2d at 1045, f.n. 12. That is an issue for the legislature.

Similarly, the State of Florida is asking this Court, not the legislature, to determine the extent of the enclosure required to constitute the curtilage to establish a burglary in a felony murder context. As can be seen by the State's exhibits (particularly State Exhibit 21, 8 R 1337), there is a rather large gap in the

fence from where the driveway starts on the southeast side of the yard to where the fence starts again in the middle of the driveway on the south side of the yard.

The opening in the chain metal fence is such that it virtually invites people to come in and walk up to the house, or to come into the yard to talk to one of the residents who may be gardening, painting the house, or working on their car in the driveway. The "enclosure" is certainly not one which imparts the message, "keep out," or that privacy is the owner's primary concern. Not only was a gate not closing off the entrance, there was no gate at all.

This case presents the question, if a fenced yard is not and cannot be totally enclosed, or closed off to the public, what degree of enclosure is required to make a partially enclosed yard part of the curtilage? What if an additional portion of the fence was missing? The jury actually sent out the following question "what defines an enclosed property does it have to be 100% enclosed?" (7 R 1186). Said question is not for the judiciary, it is a question for the legislature to answer and define. It is definitely not a question that the jury should be asking the court in a question sent out of the jury room.

What type of fence does, then, constitute an enclosure of a yard sufficient for the yard to be part of the curtilage? Three sides? All but ten feet? All but five feet? These are questions for the Florida Legislature, not for the judiciary to

attempt to define. The question, presented in such a way, demonstrates the problem. To strictly construe the statute in a way most favorable to the accused, per his constitutional rights, while determining the extent of a partial enclosure necessary for the fence to create a curtilage, is inherently problematical. To paraphrase this Court in Hamilton, it is "unworkable" to apply a constitutional privacy analysis to determine the extent of an enclosure every time a burglary is charged.

This Court in Hamilton, has already addressed this issue and stated that:

> [w]e acknowledge that the legislature is vested with full authority to amend the burglary statute and give curtilage any definition believed appropriate, including eliminating the requirement of an enclosure for certain areas as has been done in other jurisdictions. Just as the legislature has redefined common-law crime of burglary, it may redefine the concept of cartilage. That is the prerogative of the legislature. See Article III, Section 1, Fla. Const. However, we simply do not have this prerogative to redefine cartilage as it was treated under common law, and, in effect, judicially amend the burglary statute ourselves.

Hamilton at 1045.

This Court's decision in Hamilton, is consistent with the reasoning of Court's like the Washington Supreme Court on this issue. In State v. Engel, 210 P. 3d 1007 (WA 2009), the Court analyzed the issue of curtilage in a circumstance

quite similar to this one, involving a partially enclosed yard. The state legislature had extended the burglary statute from buildings only to include also a "fenced area." If the legislature intended something else, they would have stated so.

The Court in Engel held that "the plain meaning of 'fenced area' is limited to the curtilage of a building or structure that itself qualifies as an object of burglary....The curtilage is an area that is completely enclosed either by fencing alone or...a combination of fencing and other structures." (Interpreting RLW 9 A.04.110(5).

To avoid constitutionally vague interpretations of the statute, and to eliminate the potential of conflicting results in a case by case analysis, this Court should continue to hold that the curtilage, for purposes of the burglary statute (along with felony murder), is limited to "completely enclosed" yards, i.e. yard with fences, gates or other structures capable of totally closing off the yard from the public. The State has proposed no reason for this Court to give up the precedent set in Hamilton.

The 5th DCA has continued to follow Hamilton. In J. L. v. State, 57 So.3d 924 (Fla. 5th DCA 2011), and in Martinez v. State, 700 So.2d 142 (Fla. 5th DCA 1997), the Appeals Courts held that having a fence on two sides of the yard was not sufficient to turn a theft on such yard into a burglary.

A few Florida Courts of Appeal have attempted to recede from this Court's Opinion in Hamilton and have found that a *partially enclosed* yard, i.e. a yard with a fence surrounding most, but not the entire yard, provided sufficient enclosure for the yard to be included in the curtilage of the house (emphasis added). Perhaps, those Court's are attempting to adopt the "enclosure" standard that is applicable in a search and seizure case. However, the issue in this case is cartilage as applicable to the charge of burglary and had nothing to do with the search and seizure case law.

The first such case, Chambers v. State, 700 So.2d 441 (Fla. 4th DCA 1997) held that:

> "We cannot imagine that there should be a distinction between crimes committed by those who illegally enter such a yard, depending on whether there is a closed gate, an open gate, or no gate. Hamilton does not require total enclosure, and accordingly the Court properly responded to the jury's question by telling it that the structure does not have to be totally closed."

The reasoning in Chambers was followed in Jacobs v. State, 41 So.3d 1004 (Fla. 1st DCA 2010) (by way of dicta), and in one of the companion cases to this case, (Terrell) Dubose v. State, case number 16-2006-CF-018284-AXXX, held that a yard substantially enclosed, even with a large opening for the driveway and no

gate constituted "some form of enclosure," thereby satisfying the requirement in Hamilton.

This Court was correct in Hamilton, and that these District Court's of Appeals simply were wrong in concluding that "some sort of enclosure", referred to less than a full enclosure rather than full enclosure by various forms of enclosure, such as different forms of fences, gates, even ponds, which serve to keep the public out. Those Appellate Court's are doing what this Court said should not be done, they are now attempting to define cartilage on a case by case basis....respectfully that is the job of the legislature not the judiciary. This Court should reaffirm its holding in Hamilton that for a fenced yard to be part of the curtilage of a house, it must be totally enclosed. The fence in this case did not have a gate and could not be enclosed.

Applying this interpretation to the present case, Appellant entered a yard open to the public, did not commit burglary, and cannot be convicted of felony murder. The Florida Legislature has had 17 years since the Hamilton decision in 1995 to define curtilage in the manner the State now argues. As the State now argues, this Court made a thorough analysis of this issue in Hamilton. The Statute must be interpreted narrowly in Defendant's favor. The error was prejudicial and the error was compounded because the Trial Judge found that the Appellant was

engaged in the commission of a Burglary and for that reason he found it to be an aggravator and gave it great weight. (27 R 2983). This was clearly error and prejudicial. Therefore, his conviction on this ground should be reversed.

IV. THE COURT ABUSED ITS DISCRETION IN NOT GRANTING APPELLANT'S MOTION FOR CHANGE OF VENUE WHERE THE PUBLICITY IN THE COMMUNITY RIGHT UP TO TIME OF TRIAL WAS PERVASIVE AND INFLA.MMATORY

The extensive pre-trial publicity in this case was documented by the attachments to the Appellant's Motion for Change of Venue in Volume 7 of the Record (7 R, pages 1028 to 1132) (over 100 pages).

The publicity regarding this crime was on the front pages of the papers and on the Internet, and was highly inflammatory. The brothers were referred to as "horrific," "cowardly," "thugs," and "miscreants" (7 R 1001-1003).

The extensive publicity continued right up to the time of trial, and included numerous public quotes berating the Dubose brothers from the local Mayor and Sheriff.

Even when the trial judge was sentencing "Psycho" for putting a gun to the Appellant's head that the "newspaper recently ran a **series of articles** on the murder rate and what could be the causes of it and what various institutions are trying to do about it. **And certainly the death in this case of this eight-year-old girl is one of the cases that's always referred to** as being indicative of what a terrible problem it is for our community." (emphasis added) (7 R 1113-1114)

Appellant's counsel moved the Court to take judicial notice of the pervasive pre-trial publicity as of January 11, 2010, the date of the Motion and just before trial, and offered to advise the Court in greater detail how many times information had been broadcast or available via the Internet.

Appellant moved, in view of all the publicity, to change the venue to a different county, where Appellant's constitutional right to a fair trial could be guaranteed. The trial court denied the Motion, pending the right to renew the Motion after jury selection, and ordered the trial to continue in Jacksonville. The first trial ended in a hung jury and a mistrial was declared. The defense renewed their motion for a change of venue due to the additional publicity of a two week, three co-defendants, two jury trial, with one ending with two guilty verdicts by one jury and the second with a hung jury for this Appellant.

The Florida Supreme Court has posited the following rule in determining whether to change venue due to extensive pre-trial publicity:

> Knowledge of the incident because of its notoriety is not, in and of itself, grounds for a change of venue. The test for determining a change of venue is whether the general state of mind of the inhabitants of a community is so infected by knowledge of the incident and accompanying prejudice, bias, and pre-conceived opinions, that jurors could not possibly put these matters out of their minds, and try the case solely upon the evidence presented in the courtroom.

Kelley v. State, 212 So.2d 27 (Fla. 2nd DCA (1968) See also McCaskill v. State, 344 So 2d 1276 (Fla. 1977), Pietric v. State, 684 So.2d 1347 (Fla. 1994 cert. denied 115 S. Ct. 2588, 1322 L. Ed.2d 836 (1993).

Further, in Manning, v. State, 378 So.2d 274, 276 (1979), the Florida Supreme Court stated that:

> ...A trial judge is bound to grant a motion for change of venue when the evidence presented reflects that the community is so pervasively exposed to the circumstances of the incident that prejudice, bias, and preconceived opinion are the natural result. The trial court may make that determination upon the basis of evidence presented prior to the commencement of the jury selection process, or may withhold making the determination until an attempt is made to obtain impartial jurors to try the case.

Manning's rationale is that in extreme circumstances, the need to change venue may be determined even before an attempt is made to select a jury. Manning, 378 So.2d at 276.

As can be seen from the documents noted above, the pre-trial publicity was so pervasive and so inflammatory that its effect was to inherently create an atmosphere of bias and hostility in the community towards the Appellant and towards his brothers.

The U.S. Supreme Court has weighed in on this issue on a number of occasions, emphasizing that a defendant's due process right to a fair trial is the

paramount consideration in these kinds of cases. The Supreme Court has reversed defendants' convictions in cases where, like the present case, the pre-trial publicity was pervasive and inflammatory.

These cases include Irwin v. Dowd, 366 U.S. 717, 81 S Ct. 1639, 6 L. Ed. 2d 751 (1961), where the Court stated, "With his life at stake, it is not requiring too much that the defendant be tried in an atmosphere undisturbed by so huge a wave of public passion. 366 U.S. at 722

In Shepherd v. Maxwell, 384 U.S. 333, 86 S. Ct. 1507, 16 L. Ed 2d 1600 (1966), the Supreme Court focused on the impact of pre-trial publicity on the defendant's right to a fair trial, and held that the trial judge "did not fulfill his duty to protect the defendant from the inherently prejudicial publicity which saturated the community and to control the disruptive influences in the courtroom. Id at 363, 86 S. Ct. at 522. Because the pre-trial publicity had fatally tainted the jury pool, the Supreme Court reversed the conviction and remanded the case for a new trial. See also Rideau v. Louisiana, 373 U.S. 723 (1963), Estes v. Texas, 381 U.S. 532 (1963), and Marshall v. United States, 360 U.S. 310 (1959).

Appellant also presented, with his Motion for Change of Venue, a learned article, The Effect of Pre-Trial Publicity on Juror Verdicts, 23 Law and Human Behavior 219 (1999). The authors, four psychologists, conducted extensive

analyses and concluded that, "Pre-trial publicity has a significant effect on subjects' judgment regarding the guilt of the defendant, as evidenced by results in both laboratory settings and community setting research" (7 R Page 1020).

In this case, the massive and adverse pre-trial publicity documented by Appellant prior to trial, along with the emotional overlay of the death of an innocent child, so inherently saturated and tainted the community as to render a fair jury trial for Rasheem Dubose in Duval County impossible.

During the first two-week trial, which resulted in a mistrial, there was extensive media coverage, and such coverage continued into the re-trial a few weeks later. The Judge remarked, in fact, on an article in the Times Union, that the Court "had never seen an article that put more facts in it than this one." (18 R 15-16) Nonetheless, the Judge denied the Appellant's Motion for Change of Venue, pending jury selection.

During jury selection, sixty of the seventy potential jurors stated that they were familiar with the case. Many were primarily aware that a little girl had been killed by people shooting at a home. Over 25% of the potential jurors were so aware of the case that they knew that there had been a mistrial in the first case.

As in Irwin v. Dowd, *supra*, the trial judge should have followed the precept that in a capital murder case, it would not have been too much to require "that a

man's life be tried in an atmosphere undisturbed by so huge a wave of public passion." 366 U.S. at 728

Based upon the prejudicial pre-trial publicity in this case, this Court should reverse the conviction and remand the case to the trial judge with orders to grant Appellant's motion to change venue for a new trial in a Florida county where the jury pool is not inherently tainted.

V. FLORIDA'S SENTENCING STATUTES FAILED TO PROVIDE APPELLANT WITH HIS CONSTITUTIONAL RIGHT UNDER THE SIXTH AND FOURTEENTH AMENDMENTS, AS THEY REMOVED FROM THE JURY THE FACTUAL DETERMINATIONS REQUIRED FOR AN ENHANCEMENT OF PUNISHMENT FROM LIFE IMPRISONMENT TO THE DEATH PENALTY

Undersigned counsel recognizes that the issues raised in Ring v. Arizona, 536 U.S. 584, 12 S. Ct. 2348, 153 L Ed 2d 556 (2002) have been unsuccessfully argued to this Court in the past. However, quite humbly but fervently, counsel respectfully submits that under the specific facts of Appellant's case this Ring, claim warrants reconsideration in the State of Florida. The aggravators alleged by the prosecution are not so clear and convincing that this Court can assume that any one of them was proven beyond a reasonable doubt. Counsel herein **will not** attempt to go a step further and argue that there should be a mechanism to assist jury's and courts in determining a process of weighing aggravators versus mitigators (emphasis added).

Appellant argues that for there to be any integrity in the death penalty scheme in the State of Florida there should be a jury vote to prove to the world that at least one aggravator was proven beyond a reasonable doubt by all twelve jurors. That is more than reasonable. It is well settled that presently juries in Florida death penalty cases are not required to make specific findings as to whether any single aggravating circumstance has been proven beyond a reasonable doubt. Candidly,

from a judicial perspective, wouldn't a trial judge, or an appellate judge, want to know that all twelve jurors were convinced beyond a reasonable doubt that at least one aggravator was proven?

In this specific case this issue is compounded and magnified by the juror misconduct discussed infra. Based on the juror affidavit in this case, it is undisputed that not only were there no deliberations on this topic, there was clearly no consensus that any specific aggravator was proven beyond a reasonable doubt. There were no meaningful deliberations, no reference to the jury instructions and no way of knowing what the actual votes were. There is no way possible for this Court, the rest of the United States of America and the World to be assured that any specific aggravator was established beyond a reasonable doubt in this case.

The U.S. Supreme Court in Ring v. Arizona, 536 U.S. 584, 12 S. Ct. 2348, 153 L. Ed. 2d 556 (2002) held that the Arizona sentencing scheme was unconstitutional where it allowed the Judge, sitting alone, to determine the presence or absence of aggravating factors required by Arizona law for imposition of the death penalty.

The Court held that "Capital defendants...are entitled to a jury determination of any fact on which the legislature conditions an increase in the maximum punishment." In other words, the Judge cannot find an aggravating factor, in the

regarding aggravating and mitigating factors. The sentencing Judge then sets out his own conclusions regarding the aggravating and mitigating factors in determining whether to follow the jury's recommendation for the death penalty. The sentencing Judge in this case, Judge Haddock, followed this procedure in imposing the death penalty on Appellant.

Recently, in Florida the U.S. District Court in Evans v. Walter A. McNeil (S.D. Fla., Case No. 08-14402 –CIV 2011), on a writ of habeas corpus, considered a death penalty case procedurally very similar to the present one. The Court held that the statutory procedure set out above for imposition of the death penalty was unconstitutional under the Sixth and Fourteenth Amendments.

Relying upon the Supreme Court's decision in Ring v. Arizona, *supra*, Judge Martinez noted that the jury's recommendation (in a 9-3 vote); (1) contained no specific findings regarding the aggravating factors, and (2) did not clearly establish that a majority of the jurors were finding the same aggravating factors, or combination thereof. The recommendation was even less unanimous in this case, where the vote was 8 – 4.

In essence, the District Court found that the sentencing Judge, under Florida law, is flying blind relative to the findings of the jury because he has no idea what aggravating factors the jury has found, or how the jury has balanced them against

the mitigating factors. The Judge is then making his own findings regarding aggravating and mitigating factors totally *apart from* the unpublished findings of the jury. (emphasis added)

The Court held that this violated Ring v. Arizona in allowing the Judge to make his own separate findings resulting in sentence enhancement, without relying upon specific findings of the jury, as required by the Supreme Court.

> ...the death penalty is an "enhanced" sentence under Florida law and the Sixth Amendment requires that the enumerated factors be found by a jury.

Evans at page 90.

The Court further held that the jury's recommendation "is not a factual finding sufficient to satisfy the Constitution; rather, it is simply a sentencing recommendation made without a clear factual finding. In effect, the only meaningful findings regarding aggravating factors are made by the Judge." Id at 89.

Judge Martinez concluded:

> ...the defendant is entitled to a jury's majority fact finding of the existence of aggravating factors, not simply a majority of jurors finding the existence of any unspecified combination of aggravating factors.

Id at 92.

In the present case, the jury recommendation for the death penalty was by an 8 - 4 vote, only one more than a simple majority. Without any clear showing how the jurors came to that decision, whether a majority even found beyond a reasonable doubt the same aggravating factors, and what aggravating factors were in fact found by the jurors, the jury findings here, as in Evans, were rendered meaningless.

REASONABLE JURORS COULD DIFFER ON WHETHER ANY SINGLE AGGRAVATOR WAS PROVEN BEYOND A REASONABLE DOUBT

Referring specifically to the aggravators the State of Florida attempted to prove beyond a reasonable doubt it is clear that reasonable men and women can differ as to whether the aggravators are so clear as to allow us to speculate that any single aggravator was proven beyond a reasonable doubt.

PROPOSED AGGRAVATOR 1.

The first statutory aggravator that was alleged was that the Appellant "was previously convicted of a felony involving the use of violence to a person." While it is true that the Appellant has a conviction for resisting an officer with violence the testimony that the jury heard at the penalty phase raised reasonable doubt as to whether there was indeed any violence against the officer versus the Appellant merely attempting to flee the officer. (27 R 2981). The testimony of the officer involved in the incident painted a much different picture than the conviction

suggests, and it is a picture that reasonable jurors can see in a different light than it appears at first glance.

When asked questions by the prosecution, the officer testified that Appellant told the officer "...I am sorry. I didn't mean to upset you like that. I wasn't trying to grab your weapon or trying to hurt you. I was just trying to be free." The officer responded that "...**looking back, I believe you** but at the time I didn't know that." The officer further testified that **"[h]e asked me if he could make it up to me. He was sorry. He didn't mean to upset me**. And I asked him, please, when he finishes out whatever criminal charges he had, to go to school and do something with himself and just try to do something with himself" (39 R 98-99) (emphasis added).

Clearly, jurors could differ as to whether the Appellant committed a crime involving violence to another. The officer who was the alleged victim testified in the State's presentation that "looking back, I believe you but at the time I didn't know". The alleged victim of the supposed violence testified that he realized that the Appellant did not intend any harm that Appellant merely wanted to be free and escape the officer. A vote of this Court could differ as to whether this aggravator was proven beyond a reasonable doubt. There is a logical explanation as to why this Court must vote as to which side wins an argument, there is a logical

explanation as to why a jury must vote in a civil case and in a criminal case to establish a unanimous verdict....there is no logical explanation as to why a jury recommending a death sentence is not required to reach a unanimous vote on whether any single aggravator has been proven beyond a reasonable doubt.

PROPOSED AGGRAVATOR 2.

The next aggravator, "that the defendant **knowingly** caused great risk of death to many persons." (27 R 2981) is rebutted by the State's evidence and lack thereof. There was nothing presented to prove that the Appellant had any clue that anyone was in the house much less more than Psycho who had just placed a gun to Appellant's head. The record is void of any testimony that anyone knew there was more than one person in the house. Reasonable jurors could find that the Appellant did not **knowingly** cause great risk of harm to many. Based on the State's best evidence he may have knowingly cause a risk of death to Psycho and his girlfriend, but not to "many persons" (emphasis added).

PROPOSED AGGRAVATOR 3.

The third statutory aggravator is that the death occurred while the defendant was engaged in the commission of a burglary. For the reasons argued infra this aggravator falls miserably short of being an aggravator that is attributed great

weight. There was no burglary under Florida law according to this Court's opinion in Hamilton. Because there was no burglary this proposed aggravator fails.

PROPOSED AGGRAVATOR 4.

The fourth aggravator is that the victim was a person less than 12 years of age. While it is true that the deceased was less than 12 years of age, it is abundantly clear from the evidence that the Appellant did not have a clue that there was a child in the house. To the contrary, the State's key witness testified that **when the defendants learned a child had been killed they all cried and said there wasn't supposed to be any children in the house.** The State did not prove the defendant intended to hurt a child, or that he even had knowledge that his actions could harm a child. Therefore, reasonable jurors could have differed as to whether this aggravator was proven beyond a reasonable doubt (emphasis added).

Finally, none of the four proposed statutory aggravators are so clear and convincing that the world looking in could have confidence that each was proven beyond a reasonable doubt by twelve jurors. No man or woman should be executed by the government without a specific finding that at least one aggravator was proven beyond a reasonable doubt.

As Stated in Ring, findings of this nature should be determined by a jury, not by a single judge subject to re-election, especially in a high profile, highly

emotionally charged homicide involving the death of a child. It is simply not fair to any defendant; this defendant was denied his State and Federal due process rights to equal protection and due process. The present procedure is arbitrary, unfair in its application, and unconstitutional.

While the undersigned counsel respectfully acknowledges this issue has been litigated in the Florida Courts, counsel respectfully suggests this is the case that should change the direction in Florida. Not only does no one know what aggravators were proven beyond a reasonable doubt, due to the jury misconduct and the manner in which the alleged vote of 8 – 4 was reached, no one knows what any of the jurors concluded. While most jury deliberations are never known....the actions of these jurors are now known and un-rebutted. This Court should rule that due to the unusual nature of the facts of this case, the State of Florida from here forward must have accountability when it comes to a jury recommendation of life or death and each juror must find that at least one aggravator was proven beyond a reasonable doubt.

Respectfully stated, Florida's death penalty process will eventually fall. If this Court does not strike it down in this case, it will happen in a case in the near future, if not by this Court now, it will be struck down in Federal Court in the near

future. It is evident that the erosion has begun to happen. Evans v. Walter A. McNeil (S.D. Fla., Case No. 08-14402 –CIV 2011).

This Court can change the course of Florida Death Penalty Jurisprudence and decide that based on the risk raised by the pretrial publicity and the jury misconduct in this case it is now time for a change. Counsel asks this Court to set aside the death penalty sentence in this case and remand the case to the Circuit Court for a new trial or based on this issue alone a new penalty phase.

VI. THE DEATH PENALTY AS APPLIED TO APPELLANT IS DISPROPORTIONATE, AS APPELLANT'S CO-DEFENDANTS, WHO COMMITTED THE EXACT SAME OFFENSE, RECEIVED SENTENCES OF LIFE IMPRISONMENT. THIS IS NOT THE MOST AGGRAVATED AND LEAST MITIGATED CASE WARRANTING THE DEATH PENALTY

In this case, Appellant's two co-Defendants, his brothers, Terrell Dubose and Tajuane Dubose, were tried at first together with Appellant. The brothers were found guilty of first degree murder and sentenced to life imprisonment. A mistrial was declared as to Appellant, and he was re-tried separately. He was then found guilty of first degree murder and sentenced to death. Two other potential defendants were in the car, most notably Maxie Wilson, the drug dealer cousin who personally provided the guns in this shooting. Neither of the other two were ever arrested or charged for their role.

Appellant in this case was no more culpable than his brothers. They all did exactly the same thing – fire multiple bullets into a house, resulting in the death of an 8-year old child. The only differences with Appellant are; (1) that he was given a gun with an extended clip and consequently fired more bullets into the house, and (2) that one of his bullets happened to be the fatal bullet. Otherwise, his actions were exactly the same as his brothers. As stated the drug dealer cousin was never even arrested or charged. Instead of facing Life in Prison or the Death Penalty, he testified for the prosecution and was never even charged. He was never charged,

even though he picked up the brothers, drove them to the scene, provided two guns, drove them away, bought them new clothes and provided a safe house for them.

The differences in roles do not signify more culpability on the part of the Appellant. Had one of the other brothers been given the gun with the extended clip (which was provided by the cousin and did not belong to the brothers), or had one of the other brothers happened to be positioned differently, the result as to who shot the fatal bullet would have been different. The State's evidence established that no one could see in the house, no one could see the victim and no one knew there was a child in the home.

The United States and Florida Constitutions require that the death penalty be imposed in a consistent and rational manner. Miller v. State, 415 So.2d 1262 (Fla. 1982). It is disproportionate and improper to impose the death penalty upon a defendant whose equally guilty co-defendants receive lesser sentences. Puccio v. State, 701 So. 2d 858 (Fla. 1997), Larzelere v. State, 676 So. 2d 394 (Fla. 1996), Sexton v. State, 775 So.2d 923 (Fla. 2000).

As stated in Sexton v. State, *supra,* "the death penalty is reserved "for the most aggravated and unmitigated and most serious crimes." (citing Clark v. State, 609 So. 2d 513, 515 (Fla. 1992), Sexton, 775 So. 2d at 935. The Court also noted,

"This Court performs proportionality review to prevent the imposition of "unusual punishments contrary to Article 1, Section 17 of the Florida Constitution." Sexton, 775 So. 2d at 935.

This case is clearly not the most aggravated and there is a great deal of mitigation. In the simplest of terms, after having a gun placed to his head, robbed, made to strip his clothes off and publicly humiliated, he was found minding his own business when his two brothers, a cousin and another person picked him up, gave him a gun and he and his brothers shot into a house that they believed the person who did those things to him was in. One of the bullets travelled thru two walls and struck a victim who no one knew was even in the house. This is not a case where there are allegations that the case was Heinous, Atrocious and Cruel (HAC), or Cold Calculated and Premeditated (CCP). This was in essence a driveby shooting and counsel has not found any case in Florida in which a driveby shooting has ever been deemed a Death Penalty case in the State of Florida.

There is a great deal of mitigation. Even the Trial Judge acknowledged that it was proven that Appellant saved the life of a drowning child. (17 R 2992). However, the Trial Court found that Appellant saving the life of a drowning child was only entitled to **very slight weight**. Id. One would suspect that the mother of the child whose life was saved would disagree. The Trial Judge acknowledged

Appellant was a father figure and was responsible for waking up, feeding and dressing his younger siblings to get them off to school. (17 R. 2991). The Trial Judge acknowledged that Appellant was good to his grandmother and helped her maintain her home. (17 R. 2992). The Appellant was a loving and caring father. Id.

A. NEUROPSYCHOLOGICAL EXAMINATION BY DR. EISENSTEIN

There was a great deal of mental health mitigation. Dr. Eisenstein completed a neuropsychological examination on Appellant and stated that Appellant suffered from a number of maladies. Dr. Eisenstein completed his post doctoral internship in neuropsychology at the Yale University/Westhaven VA Medical Center.

Appellant's full scale IQ score is 82, placing him in the low average range in the bottom 12 percent of the population. (39 R. 179). Records indicated that neonatally he had brain damage either through alcohol, drugs or physical abuse to his mother while in the womb (39 R. 190). There were indications that Appellant had been abused with a metal pipe and that he had headaches on the right side of his head (39 R. 190). Dr. Eisentstein testified that it was his opinion that Appellant suffered from frontal lobe damage (39 R. 195). Further, that Appellant "clearly [had] and area of brain impairment" (39 R. 193). As will be discussed later, this was confirmed with the PET scan.

Dr. Eisenstein testified that on the Comprehensive Tests of Basic Skills (CTBS), Appellant, Rasheem Dubose, fell in the bottom 2 percent of the population indicating 98 percent of the population could perform better than Appellant. (39 R 157-158). On the high end, Appellant scored in the bottom 18 percent indicating 82 percent of the population performed better than Appellant (39 R 157-158). Appellant's testing demonstrates that he functions at the 2nd grade to 5th grade level. (39 R 158).

Appellant took the Wide Range Achievement Test (WRAT-4) which in part measures sentence comprehension; his scores indicate he was performing in the second percentile or a grade equivalent of four years and seven months (17 R 2832). On the Benton Word Fluency Test he is below the tenth percentile, which means he is moderately to severely impaired (17 R 2845). His executive functioning demonstrates mild to moderate impairment (17 R 2848). Appellant has significant cognitive deficits and on several levels functions within the range or retardation (17 R 2849). The cognitive defects cause a diminished ability to figure out solutions to problems (17 R 2850). Dr. Eisentstein testified that Appellant's ability to think and talk through a situation are profoundly impaired and that it is demonstrated through the convergence of data and the varieties of different

measures in terms of development, in terms of academic achievement, in terms of IQ and the language and executive functioning skills (17 R 2855).

B. NEUROPSYCHIATRIC EXAMINATION BY DR. WALDMAN

The Appellant was also given a neuropsychiatric examination by Alan Waldman, M.D., in addition to the neuropsychological examination just discussed. Dr. Waldman found it significant that Appellant was the product of a single 16 year old mother who was described as "running the streets". (17 R 2869) Even without the benefit of a PET scan, he testified Appellant had problems with visual special acuity and non-dominant hemisphere function. Said finding is significant in terms of frontal impairment because of the impulsivity at which he was asked to perform one of the tests. (17 R 2876). Dr. Waldman opined that Appellant did **miserably** and exhibited echopraxia on nine out of ten trials. (17 R 2879). Dr. Waldman testified that these things were clearly evidence of frontal lobe abnormalities. Id. As will be discussed later, this was confirmed with the PET scan.

As a medical Doctor, Dr. Waldman, also opined that it was his belief that Appellant had Fetal Alcohol Syndrome. (17 R 2887). As will be discussed later, this was ultimately confirmed with the PET scan. He also found it significant that Appellant had headaches since the age of 13. (17 R 2895). It should be noted that

Dr. Waldman was trained by Philip Resnick, the nation's leading expert in malingering mental illness and cognitive illness. (17R 2904). Appellant was at no time malingering.

There were four other people involved, two were never arrested, two are serving life sentences and only Appellant has been sentenced to death. This is not the most aggravated and least mitigated homicide case. A determination that equally guilty defendants received "disparate treatment," according to the Court in Sexton, "may render the defendant's punishment disproportionate." Sexton, 775 So.2d at 935.

Due to the disproportionate sentencing in this case – life imprisonment versus death – for defendants with the same culpability, is reversible error. If this Court does not reverse and remand for a new trial at a minimum the death penalty sentence should be vacated, and the case remanded for re-sentencing to life in prison without the possibility of parole. Puccio v. State, *supra.*

VII. THE TRIAL COURT ERRED BY REFUSING TO CONSIDER AS A MITIGATOR DEFENDANT'S ATTEMPT TO ENTER INTO A PLEA AGREEMENT WITH THE STATE OF FLORIDA

During the deliberations that led to a Hung Jury and ultimately a mistrial the State of Florida approached the Appellant and offered to allow him to plea to second degree murder. The Appellant agreed and a mistrial was declared. Thereafter, the State of Florida indicated that the plea deal would require the Appellant to plea to first degree murder. Prior to trial, Appellant again agreed to enter his plea and admit his guilt. However, the State again failed to go through with the plea deal that they initiated. (10 R 1593-1607).

In the sentencing order the Trial Judge states that it has long been held that settlement offers were inadmissible as a matter of public policy. The order states that the "Court will not consider this proposed mitigator." (17 R 2997). While it may be true that settlement offers are typically not admissible, remorse and acceptance of responsibility as a proposed mitigator in a Capital case are admissible and should be considered as mitigation.

The State opened the door to plea negotiations in the guilt phase by playing portions of the Appellant's nine hour police interview. In that interview, and later argued in closing by the Assistant State Attorney, the detective asked the Appellant

if the State went to the Appellant with an offer to plead guilty was he willing to enter a plea. The Appellant responded in the affirmative. (38 R 1805).

Therefore, the State entered into evidence during the guilt phase that the Appellant was willing to enter a plea of guilty and then argued it in closing argument to prove consciousness of guilt. However, when the defense offers as mitigation that the Appellant was willing to accept responsibility and enter a plea the trial court refuses to consider it as a mitigator because plea negotiations are not admissible. Refusal to consider it is reversible error.

The trial court erred by not considering the Appellant's willingness to accept responsibility and enter a plea of guilty as acceptance of responsibility and thus, mitigation. To follow the trial court's reasoning that the issue is plea negotiations, the State opened the door; to follow the defense reasoning, it is not about plea negotiations at all, it is about acceptance of responsibility. Either way it was error not to consider it as mitigation, This Court should reverse and remand for a new penalty phase or vacate the sentence of death and impose a life sentence.

VIII. THE TRIAL COURT ERRED BY DENYING MULTIPLE DEFENSE MOTIONS TO CONTINUE THE PENALTY PHASES OF THE TRIAL

Penalty phase counsel filed a motion to continue the penalty phase in part because Dr. Miller who initially completed a neuropsychological exam on Appellant passed away. After attempting to get Appellant evaluated again it was learned that Appellant may have brain injuries to include frontal lobe damage. Those motions to continue were denied and the penalty phase with the jury proceeded without the benefit of a PET scan.

After the jury recommended Death by a mere vote of 8-4 the Trial Court did grant a motion to allow a PET scan. However, due to the regulations of the Justice Administration Commission (JAC) there was a delay in getting that authorized and funded.

At the Spencer Hearing defense counsel again made a motion to continue the Spencer hearing because of troubles outside of defense counsel's control as it relates to the PET scan. (17 R 2817-2818) Therefore, the experts who testified in front of the jury and in the Spencer hearing were not able to offer an opinion based on the results of the PET scan that had been done after the jury's recommendation but before the Spencer hearing.

Ultimately, the PET scan was completed and a report provided. Fortunately, the trial judge allowed the report to be entered into evidence but he still denied the defense request for the defense experts to testify as to the findings and how they apply to this Appellant. The PET scan confirmed what the experts believed. However, because they did not have the benefit of the PET scan to confirm their beliefs the State of Florida was able to successfully cross examine the experts to discredit their testimony.

The PET scan results were read by Ruben C. Gur, PhD, who wrote a report indicating that:

> Quantitative analysis of the PET of Mr. Dubose's brain shows abnormal metabolism in parietal, occipital, temporal, limbic and basal ganglia regions, as well as the corpus callosum. These abnormalities are in regions that are very important for regulating behavior. Most notable are the functional abnormalities in amygdala, interfere with learning, memory and emotional regulation. Abnormally low activity in inferior damaged amygdala will misinterpret danger signals and, when excited, it will issue false alarms that require intact frontal components of the limbic system. Unfortunately, in Mr. Dubose's case, the frontal regions that regulate amygdala, specifically orbital and rectal gyri, are also hypometabolic. The part of the brain acts as "mental brakes" and is responsible for providing context to perceived stimuli and deciding how to behave in a car with weak brakes that are already engaged when it begins to race. When Mr. Dubose's amygdala cortex is activated, his cortical "thinking" is unable to exercise control as a normal one would, because his cortex is

> already operating at full capacity in its hyper-vigilant state. The cortex is unable to do its job and acts as the brakes on the primitive emotional impulses emanating from the amygdala when the limbic system reaches its activated stage. A person with this syndrome (the Kuiver-Bucy Syndrome) can appear very cool and seem to have no emotions, but then burst into a violent rage seemingly without provocation. Because Mr. Dubose's amygdala is so hypometabolic, it would take much less threat to stimulate it than in a normal person, resulting in an over abundance of fear and an impulse to attack.
>
> While the etiology of these abnormalities cannot be ascertained from the data, the reduced glucose metabolism seen in the corpus callosum in particular is consistent with fetal alcohol exposure. The abnormally low metabolic activity in the corpus callosum would lead to deficits in integrating verbal reasoning and analytic processing modes of the left hemisphere with intuitive, integrative and affect related processing modes of the right hemisphere. Such white matter damage would also impair speed of processing.

(11 R 1797-1798).

Based on the report cited above it is clear that the results of the PET scan could have been critical to the jury recommendation. Assuming that the 8-4 recommendation was even legitimate, the results of the PET scan could have clearly swayed 2 jurors to a life recommendation. That is all that was necessary for the jury to have recommended life, merely two (2) jurors to have believed that the Defendant suffered from brain damage, fetal alcohol syndrome and as a result lack of impulse control. The trial court's denial of the motion to continue to allow

the testing was error and was prejudicial. Therefore, this Court should reverse and remand for a new trial or at a minimum for a new penalty phase.

IX. THE CUMULATIVE EFFECT OF TRIAL AND PRE-TRIAL ERRORS DENIED DEFENDANT DUE PROCESS AND A FAIR TRIAL.

While one error in isolation may not be sufficient to rise to level of fundamental error, if it contributes to the overall cumulative effect of error, reversal of a conviction is required. Freeman v. State, 717 So. 2d 105 (Fla. 5th DCA 1998); DeFreitas v. State, 701 So.2d 539 (Fla. 4th DCA 1997); Royster v. State, 641 So.2d 61 (Fla. 1st DCA 1994).

As noted in herein, there was considerable and damaging pre-trial publicity to the extent that most of the jurors were familiar with the case and many even knew about the previous mistrial. Add this to:

1. The jury laughed and made fun of the Appellant's police interview because he is a black male. The jury made racial references about the defendant being a black male, and stated the police video interview **needed subtitles** because the jury could not understand Appellant's use of the English Language because he was a black male.
2. The juror who signed the affidavit commented on the fact the Appellant did not have "dreads" in his hair, as testified to by an eyewitness, other jurors told her that she "was not of **that culture**."

3. The juror, and another juror, did not want to vote to convict Appellant. When that was voiced, the juror was called a "**heartless bitch**" because she had "**no feelings for the victim**". The juror was then called other names before the juror caved in an attempt to get away from the angry mob the rest of the jury had turned into.

4. The juror then attempted to remain in the jury room after the verdict crying hoping to get away from the other jurors so that she could tell the court what happened and that she did not want to vote Guilty. The Bailiffs would not let her remain sue to security reasons due to the High Profile nature of the case.

5. The juror signed an affidavit advising that the jury had been researching the case during the trial on their smart phones. The jury was aware of the high profile nature of the case and that the majority of the jurors had already made up their minds in advance and most of the jury never considered or discussed the evidence or arguments in violation of their oaths as jurors.

6. The juror swore that the State's Victim's Advocate approached the jury panel as a whole shortly after they were selected as the jury and inquired if they were the jury who would be hearing the Dubose case,

the same Victim Advocate then sat next to the victim's family throughout the two week trial and penalty phase.

7. The Jury learned that the home of grandmother of the victim, who was present in the courtroom during the trial, burned down after the verdict in the case and the jury wondered if the guilty verdict and the fire were related.

8. The jury was doing their own independent internet research as to the location the houses and apartments involved in the case

9. The jury was doing their own internet research into the issue of "tear drop tattoos". The jury was under the mistaken belief that the Appellant had a tear drop tattoo, he does not, he has a tattoo of a small dollar sign ($) under his eye. The internet research into tear drop infected the jury with information regarding gangs and gang killings and rituals.

10. The jury foreman marked the verdict form "Guilty" in ink immediately upon retiring to the jury room and before any deliberations occurred and acted surprised that anyone wanted to actually follow their oaths as jurors and consider the evidence, the law

and the arguments of the attorneys and actually have meaningful deliberations.

11. The jury foreman was **drinking wine** at lunch every day of the trial. Further, each day during the two week trial he would take turns buying the other jurors lunch currying favor before he was selected foreman. After being selected foreman and being taken as a group to lunch during deliberations the foreman attempted to pick up the tab of all twelve jurors. He was advised that each juror had a $10.00 meal voucher; he then did indeed pay for any and all of the jurors whose tab went over the $10.00 voucher.

12. The jury had been told to pack an overnight bag in the event they were sequestered. Some jurors failed to follow the court's order and did not pack a bag and instead of deliberating they joked that they had a 5:00p.m. dinner date.

(Supp 2 R 119-123).

13. There was no evidence of premeditated intent to commit a murder; no one even knew there was a child in the house. Therefore, the conviction can only be for second degree murder. Cummings v. State, 715 So.2d 944 (Fla. 1998); Fisher v. State, 715 So.2d 950 (Fla. 1998).

14. There was no burglary under Common Law and Florida Supreme Court precedent. State v. Hamilton, 660 So.2d 1038 (Fla. 1995).

15. The State of Florida approached the Appellant and asked him to enter a plea to second degree murder in exchange for taking the death penalty off of the table for his two brothers. Appellant was willing to accept responsibility and plea to second degree murder but the State reneged on their own offer. The trial court refused to consider his willingness to accept responsibility and save his brothers from exposure to the death penalty as mitigation.

16. The court erred by denying the defense motion for a continuance for the Appellant to have a PET scan. Ultimately, the scan was done and the Appellant has frontal lobe brain damage and suffered from fetal alcohol syndrome and the jury that recommended death never got to hear that.

17. That there were five participants and only the Appellant is facing the death penalty. The two brothers ultimately receive life sentences; the drug dealing cousin that provided the guns, the transportation to and from the shooting, new clothes and a safe house was never even charged for his role; the 5th person who stopped the brothers from

merely shooting up an empty car was never arrested either. Appellant's death sentence is disproportionate to the others involved.

18. There is no way of knowing if any single aggravator was proven beyond a reasonable doubt.

(emphasis added)

The cumulative affect of the above make it clear that under these circumstances the Appellant's State and Federal Due Process rights were violated and Appellant did not receive a fair trial. The conviction should be set aside and the case be remanded for a new, fair trial for the Appellant.

CONCLUSION

For all of the foregoing reasons, the conviction and sentence in this case should be reversed. For the Florida death penalty process to have any integrity, this Court should not allow a citizen of this State to be subject to execution based on the evidence in this case. Rasheem Dubose respectfully requests this Court remand with instructions for re-sentencing to a life sentence or, at a minimum remand for a new trial.

Respectfully submitted,

Richard R. Kuritz, Esquire
Florida Bar No: 0972540
200 East Forsyth Street
Jacksonville, Florida 32202
Telephone: 904-355-1999
Facsimile: 904-854-1999
Attorney for Appellant

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished via U.S. Mail to the Office of the Attorney General, The Capitol, PL-01, Tallahassee, Florida 32399-1050, via U.S. Mail to the Office of the State Attorney, Duval County, 220 East Bay Street, Jacksonville, FL 32202; and via U.S. mail to the Appellant, Mr. Rasheem Dubose, DC# 133428, Florida State Prison, 7819 N.W. 228th Street, Raiford, FL 32026 on this 28th day of September, 2012.

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this Brief is typed in Times New Roman font, and it is in size 14 font.

Richard R. Kuritz, Esquire
Florida Bar No: 0972540
200 East Forsyth Street
Jacksonville, Florida 32202
Telephone: 904-355-1999
Facsimile: 904-854-1999
Attorney for Appellant