IN THE SUPREME COURT OF FLORIDA
STATE OF FLORIDA
500 South Duval Street
Tallahassee, Florida 32399-1927

CASE NO.: SC10-1725
L.T. NO.: 2000-CF-1549

LUTHER DOUGLAS,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

PETITION FOR HABEAS CORPUS

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JURISDICTIONAL STATEMENT

The Florida Supreme Court (FSC) has original jurisdiction over this Petition for Habeas Corpus, Mr. Douglas was sentenced to the death penalty, and the instant Petition accompanies Petitioner/Appellant's Initial Brief from the lower tribunal's order on Appellant/Petitioner's denial of his 3.850/3.851 Motion for Post-Conviction Relief. Fla. R. App. Pro. § 9.142(a)(5).

THE FACTS UPON WHICH PETITIONER RELIES

The following factual material is derived from the lower court's order denying 3.851. (5 R 788-792.)

On March 15, 2002, a jury found Douglas guilty, by special verdict, of first-degree felony murder of Mary Ann Hobgood with sexual battery as the underlying felony. The jury did not find that the killing was premeditated. The jury found Douglas guilty of a separate count of sexual battery. Douglas had not presented any witnesses during the guilt phase of his trial.

During the penalty phase of the trial, counsel presented the testimony of 12 family members and friends to establish mitigation. Many of the witnesses admitted that they had little contact with Douglas as an adult. The jury recommended the death penalty by an 11 to 1 vote. The trial court held a Spencer hearing where trial counsel for Douglas presented nothing but a statement from Douglas requesting a life sentence. The court found one statutory mitigator

(defendant had no significant criminal history—little weight) and two aggravating factors: HAC and that the crime was committed in the commission of a sexual battery. Additionally, of the 30 proposed non-statutory mitigators, 14 were rejected. (Please refer to Argument 1 for a briefing of the non-statutory mitigation presented). Finding the aggravating circumstances outweighed the mitigating circumstances, the trial court sentenced Douglas to death for the murder of Mary Ann Hobgood and life imprisonment for the sexual battery.

Following conviction and sentence, Douglas filed a direct appeal with the FSC on or about May 1, 2003, alleging five claims: (1) The trial court erred in admitting numerous enlarged crime scene and autopsy photographs of the slain victim, whether the photographs were inflammatory and had little or no relevance to any material issues; (2) The trial court abused its discretion in rejecting mitigating evidence related to Douglas' background and character and in minimizing the weight given to mitigating circumstances related to Douglas' abusive childhood on the theory that these events occurred in the past; (3) The trial court erred in instructing the jury on and in finding that the murder was especially heinous, atrocious, or cruel; (4) The death sentence is disproportionate to the offense committed in this case; (5) The death sentence was unconstitutionally imposed in violation of Ring v. Arizona, 122 S.Ct. 2428 (2002). Each of these claims was denied by the FSC in Douglas, 878 So. 2d 1246 and Douglas'

conviction(s) and sentence(s) were affirmed and a mandate was issued on July 15, 2004.

Douglas filed a Writ of Certiorari with the United States Supreme Court (USSC) on October 13, 2004, which was denied on January 10, 2005. Douglas v. Florida, 543 U.S. 1061 (2004).

Douglas filed an Amended 3.851 Motion to Vacate Judgment and Sentence on May 17, 2005 raising 28 claims. Douglas filed a Second Amended 3.851 Motion on December 28, 2005 raising 32 claims: (1) Whether rule 3.851, Florida rules of criminal procedure is unconstitutional in that it requires any motion for post-conviction relief to be filed within on year of the date a capital defendant's conviction becomes final; (2) Whether the trial court properly found the HAC aggravator applied in this case; (3) Whether Florida's jury instructions on aggravating circumstances are vague and overboard; (4) Whether Douglas is innocent of first degree murder and denied adversarial testing; (5) Whether newly discovered evidence establishes that Douglas's convictions and sentence are unconstitutionally unreliable in violation of the 5th, 6th, 8th, and 14th amendment; (6) Whether Douglas is innocent of the death penalty; (7) Whether the prosecutor impermissibly suggested to the jury that the law required it to recommend a sentence of death; (8) Whether Douglas's inability to interview jurors violates his rights under the 6th, 8th, and 14th amendments; (9) Whether the trial court erred in

instructing the jury that "No one has the right to violate the rules we all share"; (10) Whether the trial counsel was ineffective during the penalty phase of Douglas's capital trial; (11) Whether Florida's capital sentencing statute fails to prevent the arbitrary and capricious imposition of the death penalty or violates Douglas's constitutional right to due process and to be free from cruel and unusual punishment; (12) Whether Douglas's constitutional rights were violated because no reliable transcript of his capital trial was produced rendering reliable appellate review impossible; (13) Whether Douglas's constitutional rights were violated because the trial court permitted the state to introduce gruesome and shocking photographs to the jury; (14) Whether Douglas's constitutional rights were violated when defense counsel failed to adequately question potential jurors about their views on the death penalty and failed to ensure an impartial jury was seated; (15) Whether the trial judge erred in instructing the jury regarding expert testimony; (16) Whether the trial judge erred in refusing to find and weigh the mitigating circumstances set out in the record; (17) Whether the instruction of non-statutory aggravating factors resulted in the arbitrary and capricious imposition of the death penalty in violation of the 8th and 14th amendments; (18) Whether the prosecutor's comments and jury instructions unconstitutionally diluted the juror's sense of responsibility toward sentencing in violation of the United States Supreme Court's decision in Caldwell v. Mississippi; (18-2) Whether the trial counsel was

ineffective at the guilt and penalty phase of Douglas's capital trial, including the following subclaims: a) counsel was ineffective in failing to subpoena critical penalty phase witnesses; b) counsel was ineffective by failing to present available mental health mitigation; c) counsel was ineffective in failing to object and allowing the state to lead witnesses on direct examination; d) counsel was ineffective in failing to investigate and impeach critical state witnesses; e) counsel was ineffective by failing to investigate, develop, and present readily available defenses based on the Defendant's diminished capacity; g) trial court erred in rejecting mitigating evidence; (19) Whether Douglas was deprived of an adequate mental health evaluation in accord with the United States Supreme Court's decision in Ake v. Oklahoma; (20) Whether the aggravating factors found by the trial judge were unconstitutionally applied; (21) Whether there was improper consideration of the victim impact evidence; (22) Whether the trial judge's instructions improperly shifted the burden to the defendant to prove a life sentence was appropriate; (22-2) Whether the jury was misled about its role in sentencing in violation of the 8th and 14th amendment; (23) Whether the trial judge erred in permitting the state to argue a lack of remorse; (24) Whether the state withheld material and exculpatory evidence, whether counsel was ineffective for failing to investigate and whether Douglas was deprived of an adequate adversarial testing; (25) Whether cumulative error deprived Douglas of a fair trial in violation of the

6th, 8th, and 14th amendments; (31)(sic) Whether the trial was ineffective at the guilt and penalty phase of Douglas's capital trial; (32) Whether the totality of the trial demonstrates counsel was ineffective at the guilt and penalty phase of Douglas's capital trial; (33) Whether the state withheld material and exculpatory evidence in violation of Brady v. Maryland; (34) Whether Florida's capital sentencing scheme is unconstitutionally in light of the United States Supreme Court decision in Ring v. Arizona; (35) Whether Douglas's death sentence is disproportionate.

The court after Huff hearing, in a May 16, 2006 Order, granted evidentiary hearing on Claim 10, in part (only with respect to the claim that trial counsel was ineffective for failing to investigate available mental mitigation evidence and to present the testimony of Dr. Harry Krop during the penalty phase of the Defendant's capital trial), and on Claim 18-2, in part (only with respect to the claim that trial counsel was ineffective during the investigation and presentation of available mental mitigation evidence through Dr. Krop during the penalty phase of the Defendant's capital trial). An evidentiary hearing was conducted on October 12, 2006 and November 21, 2006.[1] On November 20, 2009, in written order, the court denied all claims. This petition follows.

[1] After evidentiary hearing was conducted in this case, post-conviction counsel withdrew from the case due to his Judicial appointment in the Florida Fourth Judicial Circuit. Undersigned assumed representation of Douglas on February 23,

Douglas is currently incarcerated in Union Correctional Institution in Raiford, Florida.

CLAIM I

DIRECT APPELLATE COUNSEL WAS DEFICIENT IN FAILING TO APPEAL THE TRIAL COURT'S RULING TO ADMIT THE STATE'S DEMONSTRATIVE EVIDENCE INTO THE JURY ROOM DURING PENALTY PHASE DELIBERATIONS OVER DEFENSE COUNSEL'S OBJECTIONS

I. Background

After closing arguments in the penalty phase portion of Douglas' trial had concluded, and the jury began deliberations, the jury posed the following question:

> Judge Davis, may we have the boards with full aggravating circumstances, close quotes, definitions, and the ones used by the prosecutor during his summary? It will be helpful for us to use during deliberations.

(17 ROA 1511). Defense lodged a contemporaneous objection to jury's request:

> [C]ertainly the defense doesn't have the mitigating circumstances blown up to that size, so I think that would be unfair to send them a blow-up of the State's presentation.
>
> It's simply demonstrative evidence, it wasn't offered into evidence, so I would just ask the Court to deny that and just ask them to rely on their – I certainly wouldn't be opposed to making each person a copy of the instructions so they can all look at them simultaneously, if that's the issue.

2009. On March 5, 2009 undersigned file a motion with the court to stay ruling on the 3.851 Motions of previous counsel so that undersigned could review the record. This motion was denied by the court on March 24, 2009.

The court, despite defense counsel's objections and despite the fact, as counsel stated, that the state's demonstrative boards used during its penalty phase closing argument had never been offered as evidence or accepted by the defense or the court as evidence, granted the jury's request. (17 ROA 1515). Appellate counsel did not raise this issue on direct appeal.

II. Cognizability

Claims of ineffective assistance of appellate counsel are appropriately raised in a petition for writ of habeas corpus. Freeman v. State, 761 So. 2d 1055, 1069 (Fla. 2000), Brown v. State, 846 So. 2d 1114, 1127 (Fla. 2003). In order to grant habeas relief based on ineffectiveness of counsel**,** this Court must determine:

> [F]irst, whether the alleged omissions are of such magnitude as to constitute a serious error or substantial deficiency falling measurably outside the range of professionally acceptable performance and, second, whether the deficiency in performance compromised the appellate process to such a degree as to undermine confidence in the correctness of the result.

Pope v. Wainwright, 496 So. 2d 798, 800 (Fla. 1986).

III. Deficient performance of appellate counsel

Appellate counsel was deficient where it failed to appeal an erroneous decision of the court which was properly preserved by defense objection. As stated above, counsel contemporaneously objected to the admission of the state's demonstrative aids as evidence into the jury room.

Further, the trial court erred in granting the jury's request to keep the demonstrative exhibit of the state in the jury room during deliberations over trial counsel's objection. In the instant situation, the state enlarged instructions for its proposed aggravating factors and used the blow-ups as demonstrative aids to assist in his penalty phase closing argument. (17 ROA 1469). The blow-ups contained the following information:

> No. 1. The crime for which the defendant is to be sentenced was especially heinous, atrocious or cruel. Heinous means extremely wicked or shockingly evil. Atrocious, wicked and vile. Cruel, designed to inflict a high degree of pain with utter indifference, or even enjoyment of, the suffering of others. The kind of crime intended to be included in heinous, atrocious, or cruel is one by (sic) accompanied by additional acts that show the crime is conscienceless or pitiless and was unnecessarily torturous to the victim.
> …
> No. 2. The crime for which the defendant committed – is to be sentenced, was committed while the defendant was engaged in the commission of a sexual battery.

(17 R. 1469-1470). While there was nothing wrong with the state's use of these demonstrative tools during its closing argument, it was improper for the court to allow the signs into the jury room during deliberations where they had not been offered into evidence.

Generally, it is within the discretion of the court to allow or disallow demonstrative aids where they are relevant to the issues in the case. See Chamberlain v. State, 881 So. 2d 1087, 1102 (Fla. 2004), Brown v. State, 550 So. 2d 527, 528 (Fla. 1st DCA 1989). However, this discretion with regard to

demonstrative aids does not follow where the court further allows demonstrative aids, which were not entered into evidence, into the jury room for deliberations. "Usually demonstrative evidence is not admitted as an exhibit to take to the jury room." Medina v. State, 748 So. 2d 360, 362 (Fla. 4th DCA 2000). The allowance of non-admitted evidence or exhibits into the jury room during deliberations may constitute error. See Vasquez v. State, 54 Fla. 127 (1907), Beard v. State, 104 So. 2d 680 (Fla. 1st DCA 1958)("[J]urors may, if the court permits, take with them to the jury room for use in their deliberations only such things, other than depositions, as have been *received in evidence*")(emphasis original); Strickland v. State, 447 So. 2d 322, 323 (Fla. 1st DCA 1984).

Courts have found that where a demonstrative aid was requested and used by the state, the court did not abuse its discretion in allowing the demonstrative exhibit *where it was not admitted into the jury room for deliberations*. See for example, Chamberlain, 881 So. 2d at 1102 ("We conclude that the trial court did not abuse its discretion in allowing the demonstration in this case…the demonstrative aid was not admitted into evidence, and the State did not claim that it was the same weapon used in the murders"); Hunt v. State, 746 So. 2d 559, 561 (Fla. 1st DCA 1999)(Court ruled that where the trial court instructed the jury that the demonstrative transcript was not evidence and would not be available in the

jury room, the court did not err in allowing the transcript as a demonstrative aid only).

Because the court allowed the state's demonstrative aids to be used by the jury in deliberations, improper emphasis was put on the state's proposed aggravating factors. As pointed out by the defense at trial, the defense did not have its aggravating factors blown up as a demonstrative aid for the jury to use in its deliberations. Thus, the aggravating factors presented by the state were given undue emphasis during the jury's penalty phase deliberations. This is especially true where the court did not provide any curative instructions to the jury explaining that the instruction was not evidence and should be given no greater weight than the information presented by defense counsel in closing. Coates v. State, 855 So. 2d 223 (Fla. 5th DCA 2003).

Courts have found in the context of jury requests for read-back during deliberations, there is no abuse of discretion when a trial court rereads testimony specifically requested by the jury and that testimony is not misleading and *does not place undue emphasis on any particular statements*. Garcia v. State, 644 So. 2d 59, 62 (Fla. 1994); Haliburton v. State, 561 So. 2d 248, 250 (Fla. 1990)(emphasis added). Applying this rationale to the present situation, the court abused its discretion in granting the jury's request, where the very purpose of the

demonstrative exhibits admitted into the jury room was to emphasize the state's proposed aggravating factors.

In sum, demonstrative exhibits, as a general rule, are not allowed into the jury room as evidence. Here, where the very nature of the demonstrative signs created by the state was to place added emphasis on the proposed aggravating factors, the allowance of those signs into the deliberation room placed undue influence on the content therein. This is especially true where no similar display, heralding the 30 defense mitigators, was presented to the jury for use in deliberations.

IV. The performance of appellate counsel compromised the appellate process to such a degree as to undermine confidence in the correctness of the result

The court's decision to allow the state's demonstrative exhibits of proposed aggravating factors into the jury room during penalty phase deliberations is not harmless error in this case. Strickland, 447 So. 2d at 323. Had the state's blown-up proposed aggravating factors, HAC and "the crime was committed in the commission of a sexual battery," not accompanied the jury into the deliberation room, there is a reasonable probability that a death sentence would not have been recommended. While the potential prejudice in this case cannot be measured with exactitude—we cannot know just how many jurors may have voted against death had the state's demonstrative exhibit(s) not been allowed into the deliberation

room—in light of the seriousness of the penalty, the likelihood that the outcome would have been different must not be undermined. The jury was allowed to view the state's death sentence billboard while in penalty phase deliberations while only relying on their independent recollections as to what the proposed mitigation might have been. The court certainly would not have allowed the jury to view blown-up descriptions of the defendant's 30 proposed non-statutory mitigators during deliberations without equal presentation of the state's proposed aggravating factors.

As demonstrated above, the trial court erred in allowing the jury to have the state's demonstrative sign(s) in the jury room during deliberations during the penalty phase of Douglas' trial. Trial counsel objected to the jury's use of the demonstrative aids, but the objection was overruled. There is a reasonable likelihood that had appellate counsel presented the trial court's error in allowing the demonstrative evidence into the penalty phase jury deliberation room to the FSC in direct appeal that Douglas would have been granted a new penalty phase.

CLAIM TWO

DIRECT APPEAL COUNSEL WAS INEFFECTIVE IN FAILING TO RAISE A CLAIM OF FUNDAMENTAL ERROR REQUIRING A NEW TRIAL DUE TO COMMENTS MADE BY THE PROSECUTION IN GUILT PHASE CLOSING ARGUMENT

I. Introduction

In guilt phase closing argument the prosecution made a host of comments improperly attacking defense counsel and defendant's theory of defense at trial. The prosecution branded trial counsel as inept and that he was intentionally misinforming the jury, and derided the entirety of the defense put forth at trial. Specifically, the prosecution made the following improper remarks:

> Yeah, Luther Douglas is a real lady's man. (13 ROA 1137).
>
> We are here because he is entitled to a trial not because this is a close case. This case is a landslide, and it all falls on Luther Douglas. (13 ROA 1139).
>
> About the physical evidence. Mr. Eler (trial counsel) didn't talk a lot about that. He said the DNA was no big deal, no big deal. (13 ROA 1139).
>
> Mr. Eler said in his opening statement the state's star witness is Misty Jones. He was wrong. The state's star witness is Luther Douglas. His statement kills him. (13 ROA 1139).
>
> Mary Ann Hobgood's blood is inside the Escort. Mr. Eler said that's no big deal. (13 ROA 1139).
>
> Her blood is on the leather jacket he gave to Jimela Dozier. Mr. Eler didn't talk about her…Do you know how many questions he asked her about the statement, "Well, if there is blood in the car, it's a buddy of mine."? Zero. (13 ROA 1140).

It's on the passenger side of the car, just as she said it would be. But forensics are no big deal. (13 ROA 1140).

Is that a coincidence that after Mary Ann Hobgood's murder he's in possession of her property? Mr. Eler didn't talk about that. (13 ROA 1140).

He said he got it off a drug dealer, a baser, and he gave it to one of his girlfriends. That's a ladies' man right there. (13 ROA 1144).

He absolutely had one goal in mind and he made sure it happened. Their argument that this wasn't premeditated is ludicrous. (13 ROA 1146).

Is the defense theory that she had consensual sex with this man, and before she got her panties back on she was murdered by Misty Jones? That's crazy. (13 ROA 1147).

The defense attorney said they all went out to have a good time. Yeah, Mary Ann Hobgood had a real good time. (13 ROA 1147).

She's going to murder her childhood friend because she had sex with Luther Douglas? That's crazy…that just doesn't make sense. (13 ROA 1147).

He just smiled at her. The ladies' man. (13 ROA 1149).

Mr. Eler himself said DNA is no big deal. (13 ROA 1151).

Mr. Eler said in his opening statement Misty Jones did this because she was pouting. She left Mary Ann Hobgood like that because she was pouting. Let me go over real quick some common sense reasons why Misty Jones didn't commit this murder, although, I submit to you that theory is ludicrous. (13 ROA 1153).

The only think linking Misty Jones to this case is the Defense Attorney. The only one. (13 ROA 1153).

> Mr. Eler has said already that the Sheriff's office did a great job. Hold him to that. (13 ROA 1154).
>
> Mr. Eler talked about the interview with Detective Hinson. He said it was freely and voluntarily given, and his statement is over here with his signature on it 18 times. So that's not the truth? Hinson is in on it, too? (13 ROA 1154).
>
> Do not allow Mr. Eler to engage in speculation and imagination. (13 ROA 1155).

The prosecutions comments ranged from questioning the competency of defense counsel, to sarcastic derision of the defendant and the theory of defense put forth at trial.

II. Standard of Review

A petitioner may raise claims of ineffective assistance of appellate counsel via a petition for writ of habeas corpus. Freeman v. State, 761 So. 2d 1055, 1069 (Fla. 2000), Brown v. State, 846 So. 2d 1114, 1127 (Fla. 2003). In Pope v. Wainwright, 496 So. 2d 798, 800 (Fla. 1986) this court set forth the standard of review when addressing claims of ineffective assistance of appellate counsel. *See also* Johnson v. Wainwright, 463 So.2d 207 (Fla. 1985).

Fundamental error is defined as error that, "reaches down into the validity of the trial itself to the extent that a verdict of guilty could not have been obtained without the assistance of the alleged error." Barnes v. State, 743 So. 2d 1105, 1108 (Fla. 4th DCA 1999), citing Kilgore v. State, 688 So. 2d 895, 898 (Fla. 1996)

(quoting from State v. Delva, 575 So. 2d 643, 644-45 (Fla. 1991), cert. denied, 118 S. Ct. 103 (1997)).

For an error to be so fundamental that it can be raised for the first time on appeal, the error must be basic to the judicial decision under review and equivalent to a denial of due process. State v. Johnson, 616 So. 2d 1, 3 (Fla. 1993)

III. Argument

What is apparent from the record of the guilt phase closing argument is that the prosecution did not make a single isolated comment that in the overall scope of the proceedings may be viewed as harmless error. The comments of the prosecution went beyond that of mere comments on the evidence presented as the argument reads as if the prosecution was personally offended by the defendant and counsel's efforts to present a defense on his behalf.

In Barnes v. State, 743 So. 2d 1105 (Fla. 4th DCA 1999) the district court overturned a conviction for arson due to a single comment by the prosecutor who labeled defense counsel as a "Mercenary" and "hired gun". Id. at 1106. From the record in the instant case, we see the prosecution continually commenting on counsel's approach during questioning of witnesses, blatantly stating that counsel is "wrong", and stating that defense counsel was "ludicrous" or "crazy" for presenting their theory of defense. (13 ROA 1147, 1153). This therefore is not an instance of an isolate comment. *See* Nowitzke v. State, 572 So. 2d 1346, 1350 (Fla.

1990) (While isolated incidents of overreaching may or may not warrant a mistrial, in this case the cumulative effect of one impropriety after another was so overwhelming as to deprive Nowitzke of a fair trial.)

It is wholly improper for an attorney to give personal beliefs and opinions in closing argument. This court has stated previously in reversing a first degree murder conviction that:

> The role of the attorney in closing argument is "to assist the jury in analyzing, evaluating and applying *the evidence*. It is not for the purpose of permitting counsel to 'testify' as an 'expert witness.' The assistance permitted includes counsel's right to state his contention as to the conclusions that the jury should draw from the evidence." United States v. Morris, 568 F.2d 396, 401 (5th Cir. 1978) (emphasis in original) To the extent an attorney's closing argument ranges beyond these boundaries it is improper**.** Except to the extent he bases any opinion on the evidence in the case, **he may not express his personal opinion on the merits of the case or the credibility of witnesses. Furthermore, he may not suggest that evidence which was not presented at trial provides additional grounds for finding defendant guilty**. (emphasis added)

Ruiz v. State, 743 So. 2d 1, 4 (Fla. 1999). It is difficult to conceive of an alternative explanation which holds that the labeling of the defense's case as "wrong" and "ludicrous" constitutes anything other than the personal opinion of the prosecutor. (13 ROA 1147, 1153). Likewise, the record reflects that the prosecutor made a number of comments on defense counsel's lack of particular questions asked of witnesses and his failure to address certain aspects of testimony. (13 ROA 1139, 1140, 1154). These comments are in direct opposition to the

language of the Ruiz decision as cited above. The comments made in the instant case served to usurp the jury's role as the trier of fact by injecting the prosecutor's opinions as to the validity of the defense's case.

Moreover, in cases where the death penalty is at stake, the prosecution should be held to a higher level of conduct in not exceeding the bounds advocacy to that of improper and flagrant comments:

> Once again, we are compelled to reiterate the need for propriety, particularly where the death penalty is involved:
>
> > Nonetheless, we are deeply disturbed as a Court by continuing violations of prosecutorial duty, propriety and restraint. We have recently addressed incidents of prosecutorial misconduct in several death penalty cases. As a Court, we are constitutionally charged not only with appellate review but also "to regulate . . . the discipline of persons admitted" to the practice of law. This Court considers this sort of prosecutorial misconduct, in the face of repeated admonitions against such overreaching, to be grounds for appropriate disciplinary proceedings. It ill becomes those who represent the state in the application of its lawful penalties to *themselves* ignore the precepts of their profession and their office.

Garcia v. State, 622 So. 2d 1325, 1332 (Fla. 1993), *citing* Bertolotti v. State, 476 So. 2d 130, 133 (Fla. 1985) (citations omitted). *See also* Nowitzke v. State, 572 So. 2d 1346 (Fla. 1990).

IV. Conclusion

Taken as a whole, and given that the frequent occurrences of the improper comments elevate it beyond that of a single isolated instance, the prosecution's

improper comments constitute fundamental error to the level warranting a reversal of defendant's first degree murder conviction. The level of impropriety here rivals that of cases previously reversed by this court due to invasive and repeated prosecutorial misconduct. Appellate counsel's failure to address this claim on direct appeal constitutes fundamental error which affected the outcome of trial.

CONCLUSION

For the reasons as set forth herein, defendant's convictions and sentences should be overturned and the case remanded for retrial.

RESPECTFULLY SUBMITTED,

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CERTIFICATE OF COMPLIANCE AND AS TO FONT

I HEREBY CERTIFY that this brief is submitted by Appellant, using Times New Roman, 14 point font, pursuant to Florida Rules of Appellate Procedure, Rule 9.210. Further, Appellant, pursuant to Florida Rules of Appellate Procedure, Rule 9.210(a) (2), gives Notice and files this Certificate of Compliance as to the font in this immediate brief.

s/Frank Tassone Esq.
A T T O R N E Y

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been sent via U.S. Mail to Assistant Attorney General, Meredith Charbula, Esq. at PL-01, The Capitol, Tallahassee FL 32399 on this 2nd day of September, 2010.

s/Frank Tassone Esq.
A T T O R N E Y