IN THE SUPREME COURT OF FLORIDA

CASE NO. SC15-1095

RAFAEL ANDRES,

Appellant,

-vs-

STATE OF FLORIDA,

Appellee.

INITIAL BRIEF OF APPELLANT

APPEAL FROM THE CIRCUIT COURT OF THE
ELEVENTH JUDICIAL CIRCUIT OF FLORIDA
IN AND FOR MIAMI-DADE COUNTY

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TABLE OF CONTENTS

PAGE

TABLE OF CITATIONS

CASES

Statutes

Other Authorities

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INTRODUCTION

This is a direct appeal from judgments of conviction and a sentence of death, imposed by the Honorable Dava Tunis, Judge of the Eleventh Judicial Circuit in and for Miami-Dade County, Florida. In this brief, the clerk's record on appeal is cited as "R.," the transcript of the proceedings as "T.," and the Supplemental Record as S.R. All emphasis is supplied unless the contrary is indicated.

STATEMENT OF THE CASE AND FACTS

The question at trial was who killed Ivette Farinas in the efficiency she shared with Alberto Ruiz, and why. It was undisputed that Mr. Andres, who worked on the property, had obtained and used Ms. Farinas' ATM card. The State argued that he had entered her efficiency in order to burglarize it, been surprised to find Ms. Farinas at home, and killed her while stealing the ATM card. But there was evidence inconsistent with a theft: Jewelry and a large sum of cash were left behind. Mr. Andres' DNA was found on a cloth in the efficiency, but he had recently done extensive renovations within the unit. The defense argued that Mr. Andres could have stolen the card while he was working there – the card was seldom used and could easily have been kept in the apartment rather than on Ms. Farinas' person. The State's identification witness claimed to have recognized Mr. Andres as the person she saw leaving near the time of the fire, but she did not mention this to police when she gave a description.

At the same time, there was evidence of trouble within Ms. Farinas' relationship with her partner, Alberto Ruiz. They were referred to as engaged, but they had no plans to get married and Ivette would not wear her rings when she went out to work. (T. 3999, 4110). The two had lived together at Ruiz's parents' apartment minutes from their new efficiency. But when construction forced them to move out of their efficiency temporarily, Ruiz alone returned to his parents'

house, while Ivette went to stay with her own parents, twenty to twenty-five minutes away. Ruiz's alibi was his milk delivery route, which admittedly sometimes allowed him to stop home along the way. Right up until he testified, his statements put his route close to the efficiency where Ivette Farinas died.

On January 24, 2005, firefighters responded to a fire in an efficiency attached to a home at 1131 SW 74th Avenue in Miami. (T. 3810-11). The 911 call came in at 12:50 p.m., and the first Fire Rescue officers arrived at 12:52. (T. 3810, 4197). When he entered, Lt. Nelson Pagnacci saw flames and smoke coming from a bedroom to the left. (T. 3818). In front of him, in the kitchen area, he saw a body. (T. 3819). Pagnacci dragged Ivette Farinas' body from the burning building.. (T. 3817-18). There was an electrical cord around her neck. (T. 3879). Medical examiners determined that Ms. Farinas had been beaten, then stabbed, and strangled to death. (T. 6134-35, 6188). The medical examiners could not determine a time of death other than sometime "hours" before Dr. Mott arrived at 5:00 p.m. (T. 6138, 6189-90). A fire examiner determined that the fire had started when someone poured a flammable liquid on the bed and ignited it. (T. 4311-12). The fire, which lasted about thirty minutes, was out before 1:30 p.m. (T. 4274, 4319-20).

Ms. Farinas and her boyfriend, Alberto Ruiz, had lived together for approximately three years. (T. 3854). For the first two years, the couple lived with Mr. Ruiz's parents at SW 74th Avenue and 16th Terrace. They moved about four blocks away to the efficiency at 1131 SW 74th Avenue in April of 2004. (T. 3993, 3998, 4000).

Mr. Ruiz drove a milk delivery truck every day but Wednesday and Sunday. (T. 4000). He would leave at 4:00 in the morning and return 4:00 and 5:00 p.m. (T. 4008-09). Ivette Farinas worked the late shift at the La Carretta restaurant at Miami International Airport, returning home at around 11:00 p.m. (T. 3999-4000). On Wednesdays, Mr. Ruiz worked buying cars at auction. (T. 4001). As a result, he would have between two hundred and two thousand dollars in cash in the apartment. (T. 4001). Ms. Farinas brought home cash tips each night. (T. 4000).

The house at 1131 SW 74th Avenue was sold in November of 2004. (T. 4974). The new owners, Suzelle Rodriguez and Jose Perez, asked Ruiz and Farinas to move out, but permitted them to stay on as tenants while they looked for a new apartment. (T. 4980-81). Rodriguez and Perez embarked on a series of renovations in early December, including electrical work, plumbing, painting, moving an air conditioning unit, plastering, and other repairs. (T. 4986, 4994, 5033-34, 5058). They hired Rafael Andres to do this work. (T. 4986-87, 5032). When Mr. Andres

came to work in the mornings, Ms. Rodriguez would give him the keys to the property, including the main house and the efficiency. (T. 4989-90, 5009).

The owners also moved the door to the efficiency, from the back of the house to a side alleyway. (T. 4996, 5007, 5038). As a result, he had to move the outlet to the refrigerator, and the refrigerator itself. (T. 5023).

The dust from the construction bothered Ivette Farinas, so she and Mr. Ruiz moved out of the efficiency from January fifth through January 19 of 2005. (T. 4003). Alberto returned to the couple's former abode at his parent's house a few blocks away. (T. 4003). Ms. Farinas, however, went to stay at her parents' home, which was twenty to twenty-five minutes away. (T. 3859).

On January 24, 2005, Ivette Farinas and her sister Lisbeth planned to go to run errands together. (T. 3858). Ivette was to pick up Lisbeth at their parents' house between 9:00 and 9:15 a.m., so Lisbeth anticipated that her sister would leave the efficiency no later than 9:00. (T. 3859-60). By 9:30 Lisbeth, worried, began to call Ivette. (T. 3863). She continued to try to call Ivette until noon. (T. 3863). Because she was so worried, Lisbeth also tried to call Alberto Ruiz, finally reaching him at approximately 2:00. (T. 3863). Ruiz tried to call Ivette and also got no answer. (T. 3864). At 6:00 p.m. the police called Lisbeth, and she went to the efficiency. (T. 3865).

Alberto Ruiz testified that he left for work at 4:00 a.m. that day. (T. 4008). Lisbeth called him at about 12:15, and he tried to call Ivette several times, without success. (T. 4010). He called Lisbeth back and told her. (T. 4010). By the time he called, Mr. Ruiz had already finished his route, so he drove back to the distributorship. (T. 4010). He did not stop at the house to check along the way. (T. 4010-11). He removed the empty crates, and filled new ones with milk for the following day. (T. 4011). At 3:05, Mr. Ruiz's brother called and said that the area around the efficiency was blocked off and there were T.V. cameras there. (T. 4011).

Mr. Ruiz arrived at the scene at around 5:00, and he was brought immediately to Miami-Dade Detective Enrique Chavary. (T. 4012-13). Chavary took Ruiz to a police station, questioned him, took a DNA sample, and obtained consents to search. (T. 4013-19). Over repeated objections, detectives were permitted to testify that, based on Detective Chavary's interview with Alberto Ruiz, Ruiz was not a suspect, and that for this reason they did not bother to obtain his phone records, repeat his milk route, or otherwise further investigate him. (T. 4796, 5798-99, 5863).

In a pretrial deposition and at trial, Mr. Ruiz stated that he would sometimes stop at his home while he was making his deliveries. (T. 4087; S.R. 46). During the deposition, counsel asked him about his delivery schedule on January 24, 2005,

and he testified that his route brought him as close to the efficiency as Coral Way and 75th Avenue. (S.R. 45-46). At trial, however, he said that that was not true; he acknowledged the change and said that he had confused January 24 with his Tuesday route. (T. 4088-89). The defense alleged a discovery violation. (T. 4090). The State maintained that this was a "clarification" it was not obliged to disclose, and the judge found no violation. (T. 4091, 4095-97).

The crime scene was an especially bloody one. After he carried Ms. Farinas' body from the apartment, Lt. Pagnacci's jacket was soaked with blood. (T. 3831). Police found blood stains on a lattice gate outside the efficiency and the poles that supported it. (T. 4479-80, 4485, 4486). Blood on the front door matched Ivette Farinas. (T. 5958).

The police found a the cap and spout from a gas can outside the efficiency. (T. 4364-65). On it was DNA left by Ivette Farinas and one other person who was not Rafael Andres. (T. 6032-34).

There was a paring knife and a rice cooker on the counter of the small kitchen area. (T. 4381). There was a floormat in front of the refrigerator, along with a washcloth. (T. 4379). Both were bloody. (T. 4379). The cloth had blood stains belonging to Ivette Farinas. (T. 5967-71). In one location on the cloth there was a sample consistent with a mixture of standards taken from Ivette Farinas and Rafael Andres. (T. 5970).

Police found money in the debris near the table. (T. 4474). In the bedroom, they found a a large number of bills totaling $526. (T. 4475-76). Ms. Farinas' jewelry was retrieved from the efficiency and returned to the family. (T. 3869).

Hazel Vaughn was the neighbor who noticed the fire and called 911. Her back yard was separated from the efficiency by a six-foot wooden fence. (T. 5659-5662). At 3:05 on the day of the fire, Detective Chavary interviewed her about what she had seen. (T. 5161). He asked her for as much information as she could give. (T. 5163). Ms. Vaughn told Chavary that she had seen the top of a man's head walking by the fence. (T. 5163). On January 26, Detective Chavary could Ms. Vaughn to ask her to give a sworn statement. (T. 5164). At this time she first indicated she had seen the top of the head before. (T. 5164-65). Chavary prepared a photo lineup, which included Mr. Andres. (T. 5166). On January 27, he showed the lineup to Ms. Vaughn and asked her to make an identification based on the top of the head, not the face. (T. 5166-67). She selected Mr. Andres.

At trial, Ms. Vaughn testified that on January 24, 2005, she was at home caring for her toddler and her three-month-old niece. (T. 5658). She went into her backyard to set some sneakers out to dry, and she heard a moan. (T. 5560, 5690-91). The moan did not alarm her at the time. (T. 5660, 5691).

Ms. Vaughn went back inside and prepared to give her niece a bath at the kitchen sink. (T. 5658-5661). From her positition at the sink, Ms. Vaughn testified,

she was able to see the door of the efficiency across the fence. (T. 5661). In order to do so, she needed to turn her head, look through a coutout in the wall between the kitchen and Florida room to the Florida room window. (T. 5696-97). That window had horizontal blinds that had not been raised, but were louvered open. (T. 5696-97). In this fashion, Ms. Vaughn saw "what appeared to be a male hand" grabbing the top of the door, and she heard a door slam. (T. 5664, 5697). Later she saw someone walking away from the efficiency. (T. 5665). She could see the top of his head above the fence. (T. 5668). Through the slats of the fence she could perceive that it was a "big, fat man" who was carrying a red plastic container. (T. 5667-68). Later, she noticed smoke coming from the efficiency.[1]

Ms. Vaughn had a bombshell she had not revealed to the detectives in the early days of the investigation: She had known right away that the man she saw over and through the fence was one of the men who had been renovating the property. (T. 5654-56, 5668). Over the course of a month, she had encountered him about twice a week as she walked her son to school. (T. 5655). She recognized him, and she recognized his van. (T. 5655). The State's explanation for this was

[1] Ms. Vaughn estimated that the "moan" happened around 10:00, and that minutes had passed between the moan and the smoke. (T. 5694, 5717). But she also agreed when the State suggested about 2 hours had passed from "the first significant thing" until she called 911 at 12:50 p.m. (T. 5722).

that Chavary never asked Vaughn if she knew who it was she had seen, and she never thought to tell. (T. 5139-41, 5673).

Jose Perez, the owner of 1131 SW 74th Avenue, testified that on January 24 Mr. Andres left a message stating that it was 12:15, and that Mr. Andres had finished at the house and was going to work at another job. (T. 5040). The time on the message, however, was 12:47. (T. 5039). Perez tried to call Mr. Andres several times that afternoon. (T. 5040-41). On at least one occasion, Mr. Andres answered the call. (T. 5041). Mr. Perez went on to testify that Rafael Andres never returned to the house, and never called about helping rebuild after the fire. (T. 5043). The trial court prohibited the defense from cross-examing Perez to establish that he had told Mr. Andres to not come back. (T. 5045-50).

The State introduced a record showing that Mr. Andres checked into Miccosukee Resort and Gaming in western Miami-Dade County on January 25, 2005. (T. 2251-54). He stayed for one night. A portion of his deposit was left unclaimed.

On January 27, the police obtained warrants to search Mr. Andres' home, car, and body. (T. 5850). That same day, they went to his home, where he lived with his wife, son, and daughter. (T. 4573). His wife, Esther Almora was present. (T. 4582). Detectives searched the house and seized a number of items of clothing, including tank tops, T-shirts, jeans, sneakers, and work shoes. (T. 4587-89, 4594-

95). They seized underwear and a belt found in the washing machine. (T. 4604). They also impounded a spoutless gasoline container. (T. 4627). Sgt. McCoy testified that it had a faint odor of gasoline. (T. 4627). The cointainer was in plain view outside on the patio. (T. 4745). The sneakers had been exposed to gasoline. (T. 4902). Criminalist Collene Carbine testified that because they were made of porous canvas, it was not possible to say how long the gasoline may have remained on sneakers. (T. 4910). Gasoline on the sneakers could have been there a month or longer. (T. 4918). All of the clothing tested negative for blood. (T. 5963-5965, 6018-6022).

Police executed the the "body warrant" on January 30, 2005. (T. 4841). Police photographed Mr. Andres' body and took DNA swabs. (T. 4844-49). Photographs of his hands were placed in evidence. (R. 1976-78).

On January 31, Mr. Andres' van was located in an agricultrual area of South Miami-Dade County. (T. 4641, 4644). The ignition was damaged. (T. 4650). The police towed it to the medical examiner's office to be searched and inventoried. (T. 4652-53). The police took numerous swabs and samples for analysis, including a section of seatbelt, the floor mat, the rocker panel, and swabs from the door handle, pedals gearshift, and steering wheel. (T. 4769-70, 4830). Swabs were taken anywhere the driver might have touched. (T. 4784). All of the samples tested were negative for blood. (T. 5963-5965, 6022-23).

In February of 2015, Ms. Farinas' father, Rene, received notice that his daughter's account was overdrawn. (T. 3968). Her statement indicated that there had been several transactions on January 24 and 25. (R. 1517). On the twenty-fourth, there was a $402 withdrawal from a Bank of Atlantic ATM, a $39.87 sale at an Exxon-Mobil near the efficiency, and two $202 ATM transactions at a Regions Bank on Southwest 40th Street. (T. 4672-3; R. 1517). On the twenty-fifth, there was a $99.37 charge at Advance Auto Parts and a $705.46 purchase at home depot. (T. 4674; R. 1517). Video images from Home Depot showed Rafael Andres making a purchase there, and photos obtained from Bank Atlantic showed a man who appeared to be Mr. Andres making a withdrawal. (T. 4691-96, 4704; R. 1949).

In closing argument, the prosecutor told jurors there was: "**No evidence that this defendant is not guilty … No evidence at all**." (T. 6652). She used a visual aid, the "scales of justice" to tally up the evidence weighing in favor of guilt or innocence. The prosecutor dismissed the defense side of the balance as "speculation and guessing" and demanded "**And where is the evidence? Where is the evidence? Where is the evidence before you?**" (T. 6563-64). Among other arguments, the State also warned that the defense was trying to "fool" or "confuse" them, and described it as "mean" and "insulting." (T. 6487, 6551).

The jury returned a verdict of guilty, and the case proceeded to a penalty phase. (T. 6655-67; R. 2399-2403).

In the penalty phase, the State presented evidence of a prior violent felony, the murder of Mr. Andres' friend Linda Azcarreta. (R. 2656-57). The two were smoking crack cocaine together. (T. 6918-20). Mr. Andres could not believe what he had done, and expressed great remorse. (T. 7286). Mr. Andres agreed to plead guilty to second degree murder and was sentenced to 9 years.

The defense introduced a video of a remarkable incident in the county jail. (T. 7083; Defense E). The tape speaks for itself, but as summarized during closing argument, it shows Mr. Andres working as a trustee. (T. 7957). The cell doors unexpectedly open, and two inmates exit their cells on the upper tier armed with shanks and went directly after inmate Kenneth Williams, himself armed. (T. 7957). With nowhere else to flee, Williams leapt to the lower level where Mr. Andres was, breaking his ankle. (T. 7958-59). His pursuers ran to the steps. (T. 7958). Rafael Andres then disarmed Mr. Williams, set the shank aside, and warded off the attackers. (T. 7960-62).

Corrections counselor Mario Mothersil told jurors that Mr. Andres would help maintain order in the jail by warning him about contraband weapons in the jail. (T. 7301). Inmate Charlie Thomas testified that Rafael helped teach him to read and lead him in Bible study. (T. 7330-35). Javor Williams worked together with Mr. Andres in leading Bible Study. (T. 7438-46). He praised Mr. Andres' as a teacher of scripture.

Ted Derose is a teacher from Michigan. (T. 7461). He works with Crossroads, a Bible Study organization that specializes in helping prisoners. (T. 7463). Crossroads provides a rigorous program requiring the prisoner to keep a journal and write essays while exchanging letters with their instructor. (T. 7464-65). Derose described Mr. Andres as unique. (T. 7481). He is prolific and hardworking. (T. 7481). He stood out from other prisoners because he did not ask his instructor to feel sorry for him. (T. 7481).

Mr. Andres' brother, wife, stepson, and daughter all testified on his behalf. Mr. Andres gave his brother, who has a learning disability, guidance and encouragement. (T. 7612-18). He became the father his stepson Carlos needed. (T. 7632). Now grown, Carlos considers Rafael his true father. (T. 7692). Rafael's 13-year-old daughter, Patricia, testified to a strong and constructive relationship that had thrived despite her father's long incarceration. (T. 7733-7739). He has been able to give her encouragement and guidance. (T. 7740-42).

The jury returned a recommended sentence of death by a vote of nine to three. (T. 8005). After a hearing pursuant to *Spencer v. State*, 615 So. 2d 688 (Fla. 1993), the trial court, based on its own factfinding, found sentenced Rafael Andres to die.

SUMMARY OF THE ARGUMENT

I. The prosecution committed a discovery violation when it failed to disclose a material change in the testimony of Alberto Ruiz. His deposition testimony made it clear that his route on the day of the murder would have made it possible for him to return to the efficiency along the way. At trial he changed his testimony and acknowledged the change, saying he had been mistaken during the deposition. The prosecution made clear that it was aware of this change. The trial judge erroneously found no discovery violation and failed to conduct a proper inquiry.

II. The trial court wrongly permitted the State to use hearsay in order to convict Mr. Andres. It allowed police officers to testify that they did not consider Mr. Ruiz to be a suspect based on his interview with Det. Chavarry. This communicated to the jury that the police had gathered information that satisfied them of Mr. Ruiz's innocence. Ms. Vaughn's opinion that Mr. Andres started the fire as part of an insurance fraud scheme was inadmissible, and could not be made admissible by the application of the "present sense impression" exception to the hearsay rule. What Detective Chavarry learned about Juan Bacalau during the investigation was also hearsay, as was a statement concerning his employment on his death certificate.

III. The trial court parsed the right of cross-examination into a nullity. When the prosecutor asked Jose Perez about whether he had spoken to Mr. Andres after the fire, and established that Mr. Andres had never offered to come back to work on the house, the defense was entitled to bring out the fact Perez himself told Mr. Andres to come back. When Lisbeth Farinas testified that Ruiz and her sister had a good relationship, the defense was entitled to explore that opinion. When Alberto Ruiz denied having seen Mr. Andres working in the efficiency, the defense was entitled to confront him with a prior statement without the court threatening to admit his speculation that Mr. Andres had stolen from them before.

IV. The physical evidence seized through the use of warrantless real time cell site tracking should have been suppressed under the Fourth Amendment. This Court's recent decision in *Tracey v. State*, 152 So. 3d 504 (Fla. 2014) established that this type of surveillance is a search for which a warrant is required.

V. The trial court erred in permitting the Staet to make a closing argument in the guise of hypothetical questions to the medical examiner. The testimony went beyond Dr. Lew's expertise, there was no foundation for her ability to offer the opinions, the questions rested on unproven assumptions, and any probabtive value was outweighed by the prejudice engendered by the prosecutor's performance.

VI. The State engaged in serious misconduct during closing argument, and the judge destroyed Mr. Andres' right to a fair trial by condoning it. The prosecutor argued there was "**no evidence … that this defendant is not guilty**," and, among other arguments, accused the defense of trying to **"fool" or "confuse"** jurors, and described it as **"mean" and "insulting."** (T. 6487, 6551).

VII. The court tied defense counsel's hands during closing argument, preventing her from arguing inferences from the evidence and their significance.

VIII. The State is unable to meet its burden of proving these errors harmless beyond a reasonable doubt when they are considered singly. When the cumulative prejudice is considered, the burden is insuperable.

IX. The trial court sentenced Mr. Andres to death based on a nine-to-three recommendation and judicial factfinding. Mr. Andres is entitled to resentencing pursuant to *Hurst v. State*, 202 So. 3d 40 (Fla. Oct. 14, 2016).

X. Det. Roberson's opinion that Mr. Andres was guilty of the prior violent felony was not admissible as a "present sense impression."

XI. The trial court erred in doubling the felony murder and pecuniary gains circumstances, and further erred when it failed to give a requested limiting instruction.

XII. The trial court erred in finding the "Avoid Arrest" aggravating circumstance based on a finding that the fire was started to cover up the murder.

ARGUMENT

I. THE STATE COMMITTED A DISCOVERY VIOLATION WHEN IT FAILED TO DISCLOSE A MATERIAL CHANGE IN TESTIMONY.

Alberto Ruiz changed his testimony concerning his route between his deposition and the trial, amending it to make it more difficult for him to have stopped at the efficiency along the way. (T. 4088-89). The prosecution was obliged to disclose this change, *see* *Scipio v. State*, 928 So. 2d 1138, 1142 (Fla. 2006), but did not. The defense alerted the court to the discovery violation. (T. 4089-91). The judge nevertheless failed to conduct a full *Richardson*[2] inquiry, merely accepting the State's assertion there was no violation. The discovery violation and the failure to conduct a *Richardson* hearing are presumptively harmful, and this Court must reverse.

At trial and in his deposition, Mr. Ruiz stated that he would sometimes stop at his home while he was making his deliveries. (T. 4087; S.R. 46). During the deposition, the defense questioned Mr. Ruiz about his delivery schedule on January 24, 2005, the date of the murder (S.R. 46). Referring to his schedule for that day, provided by the prosecution and made an exhibit to the deposition, defense counsel asked:

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[2] *Richardson v. State*, 246 So. 2d 771 (Fla. 1971).

> Q. And we received the schedule you were on from your boss because the police gave that to the prosecutors. Would you say that was a normal day for you?
>
> A. Yes.
>
> Q. And when you would go to places where you would deliver, make a delivery I know you were all over the place, north, south, east, west, but did you, have a specific order you were supposed to follow or could you make your own plan for the day?
>
> A. When I started working the route was disorganized. and I organized it and every week I would take the same route. It had to be a special case, very rarely somebody would call me because they didn't have milk, then I had to take another route for a moment. That day was a normal day.
>
> Q. Did your route take you anywhere near your apartment?
>
> A. That day specifically the closest I was to the place was Coral Way and 74th Avenue – well, 75th because there was a detour and it becomes 75th.

(S.R. 45-46).

On the witness stand, he changed this testimony, claiming he had misspoken:

> A. … First of all, in addition to all the stops that you went through with the state attorney on January 24th, you also stopped at Coral Way and 74th Avenue?
>
> A. No. That's not correct.
>
> Q. Okay.

MS. BOOTS: Page 46, counsel. And Judge lines 5 to 9.

BY MS. BOOTS:

Q. Let's go back to that deposition. You took this, back on February 18th, 2009, okay. On that day, I asked you the following question, and you gave me the following answer.

Question. Did your route take you anywhere near your apartment?

Answer. That day, specifically, the closest I was to the place, was Coral Way and 74th Avenue. Well, 75th. Because there was a detour. And it becomes 75th.

You answered that, back on February 18th of 2009.

Correct?

A. Yeah. That was my response. But I may clarify. I was, at that point, I was doing a Latin American Restaurant. And I may have confused it, with my Tuesday route, which is when I would stop at that address.

Q. Okay. But you may have confused it, but we were talking about January 24th.

Correct?

A. Yes.

Q. Okay. And you had a chance to review your deposition, before coming to court today?

A. Yes.

Q. All right. And did you notify the state attorney that that was a mistake in there?

A. Well, I did –

MS. HERNANDEZ: Judge, I would object. It's improper impeachment.

THE COURT: Overruled.

THE WITNESS: I did notify them, about some mistakes.

(T. 4088-89).

The defense immediately asked to address the court regarding these mistakes, and alleged a discovery violation. (T. 4090). The State made it clear that it was aware of the change, but maintained that it was not obliged to disclose it because it was a "clarification," "not an explanation that the court reporter was wrong." (T. 4091). The State also disclosed that Mr. Ruiz had made a number of other corrections related to spelling mistakes. (T. 4092-94). The judge ruled there was no discovery violation, and conducted no further inquiry regarding the changed testimony. (T. 4095-97).

Once a witness has given a recorded statement, the State must disclose any material change in that statement. *See Scipio v. State*, 928 So. 2d 1138, 1142 (Fla. 2006). Failure to disclose a change in witness's statement is a discovery violation that triggers a full *Richardson* hearing. *See, e.g.*, *Scipio*; *Smith v. State*, 7 So. 3d

473 (Fla. 2009).[3] On appeal, the trial judge's rulings on a discovery violation are reviewed for abuse of discretion.

The State's argument that the new testimony merely clarified "a crummy question," cannot survive contact with the record. (T. 4092). Defense counsel prefaced her deposition questions by referring to "the day this happened." She called Mr. Ruiz's attention to his schedule for that day, which bore the date January 24, 2005, on its face. (S.R. 45, 65). Asked if his route took him near his apartment, he referred to "that day specifically." (S.R. 46). At trial Mr. Ruiz agreed that the time was talking about January 24, but he now believed he had confused the route. (T. 4089).

"During a *Richardson* hearing, the trial court must inquire as to whether the violation (1) was willful or inadvertent; (2) was substantial or trivial; and (3) had a prejudicial effect on the aggrieved party's trial preparation." *State v. Evans*, 770 So. 2d 1174, 1183 (Fla. 2000); *accord Sinclair v. State*, 657 So. 2d 1138, 1140 (Fla. 1995). The failure to conduct a complete *Richardson* hearing requires reversal unless the State can prove beyond a reasonable doubt that the error was harmless.

[3] *See also Washington v. State*, 151 So. 3d 544 (Fla. 1st DCA 2014); *Acosta v. State*, 856 So. 2d 1143 (Fla. 4th DCA 2003); *Alfaro v. State*, 471 So. 2d 1345, 1345-46 (Fla. 4th DCA 1985); *Neimeyer v. State*, 378 So. 2d 818, 821 (Fla. 2d DCA 1979); *cf. Major v. State*, 979 So. 2d 243 (Fla. 3d DCA 2007) (noting that trial counsel was ineffective for failing to object to changed expert testimony, but affirming where the issue was not preserved for direct appeal).

State v. Schopp, 653 So. 2d 1016 (Fla. 1995). The third inquiry concerns *procedural* prejudice. *See Scipio*, 928 So. 2d 1146-47. "[T]he question of 'prejudice' in a discovery context is not dependent upon the potential impact of the undisclosed evidence on the fact finder but rather upon its impact on the defendant's ability to prepare for trial[.]" *Schopp* at 1019 (quoting *Smith v. State*, 500 So. 2d 125,126 (Fla. 1986)[4]). There is no burden on the defense to prove procedural prejudice during a *Richardson* hearing. *See Thomas v. State*, 63 So. 3d 55, 59 (Fla. 2d DCA 2011). Instead, the State must prove the absence of procedural prejudice. *See Cliff Berry, Inc. v. State*, 116 So. 3d 394, 418-19 (Fla. 3d DCA 2012).

Because the judge failed to recognize the existence of a discovery violation, she failed to conduct a *Richardson* hearing. This error is presumptively harmful. *See Cox v. State*, 819 So. 2d 705, 712 (Fla. 2002); *Stimus v. State*, 886 So. 2d 996, 998 (Fla. 5th DCA 2004). The Court must reverse unless the State establishes beyond a reasonable doubt that defense counsel's preparation or strategy would not have been materially different. *Schopp*, 1147-48. "'[T]he vast majority of cases' will not have a record sufficient to support a finding of harmless error and … there

[4] *Schopp* overruled *Smith* to the extent that *Smith* held a *Richardson* violation to be per se reversible error.

is a 'high probability' that any given error will be found harmful." *Id.* at 1148 (quoting *Schopp* at 1021).

II. THE COURT DENIED MR. ANDRES THE RIGHT TO CONFRONTATION AND CROSS-EXAMINATION WHEN IT PERMITTED THE INTRODUCTION OF HEARSAY AND INFERENTIAL HEARSAY.

The core guarantee of the constitutional right to confront the witnesses is that the government cannot use the hearsay statements of non-testifying witnesses at a defendant's trial. *See Crawford v. Washington*, 541 U.S. 36 (2004); U.S. CONST. AMENDS 6, 14; art. I, §§ 9, 16, Fla. Const. Hearsay is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted. § 90.801(1)(c), Fla. Stat. (2014). The prosecution cannot escape the Sixth Amendment or the hearsay rule by not quoting or paraphrasing the extrajudicial statement. *See Diaz v. State*, 890 So. 2d 556, 558 (Fla. 5th DCA 2005). Where testimony creates the clear inference that a non-testifying witness furnished information, it is "inferential hearsay," subject to the same rules. *See Postell v. State*, 398 So. 2d 851, 854 (Fla. 3d DCA. 1981); *see also Norton v. State*, 709 So. 2d 87, 95 (Fla. 1998); *Wilding v. State*, 674 So. 2d 114, 118-19 (Fla. 1996), *receded from on other grounds*, *Devoney v. State*, 717 So. 2d 501 (Fla. 1998); *Trotman v. State*, 652 So. 2d 506 (Fla. 3d DCA. 1995). The

trial court nonetheless permitted the State to use hearsay in order to dispel reasonable doubt.[5]

A. The hearsay conclusion that Alberto Ruiz was not a suspect was inadmissible.

The trial court permitted detectives to testify that they excluded Alberto Ruiz on the basis of information received by Detective Chavary. They went so far as to tell the jury that it was unnecessary to confirm Mr. Ruiz's alibi. Initially, the court sustained an objection to the prosecutor's question whether, having interviewed Mr. Ruiz, Chavary considered Ruiz a suspect.[6] The judge, however, went on to permit inferential hearsay testimony that the detectives had acquired information that excluded Mr. Ruiz. The prosecutor asked Sgt. McCoy:

> [MS. LEVINE]: Did you send Detective Chavary to interview Alberto Ruiz?
>
> A. Yes.

---

[5] Whether a statement falls within the definition of hearsay is a pure question of law reviewed de novo. *Leonard v. State*, 192 So. 3d 1258, 1259 (Fla. 2d DCA 2016).

[6] "After having the opportunity to see him, and the opportunity to see his reaction, after being told about [Ivette]'s death, in your mind, sir, in your mind was he suspect?" (T. 5123). In this, the court was correct. A police officer's opinion on a defendant's guilt is inadmissible. *See, e.g.*, *Jackson v. State*, 107 So. 3d 328, 339-40 (Fla. 2012) (citing cases); *Martinez v. State*, 761 So. 2d 1074 (Fla. 2000). This same rule applies where the oficer's opinion would negate a defense. *See Sosa-Valdez v. State*, 785 So. 2d 633 (Fla. 3d DCA 2001).

> [MS. LEVINE]: **Subsequent to that interview, was Alberto Ruiz a suspect in this case?**
>
> MS. GEORGI: Objection. Calls for hearsay.
>
> THE COURT: Overruled. You can answer, sir, if you have personal knowledge.
>
> THE WITNESS: No. He was not a subject.

(T. 4796).

The prosecutor drove this point home during Detective Gallagher's testimony:

> [MS. LEVINE]: I would like to talk to you specifically about Alberto Ruiz. Did you, sir, you, ever speak to him personally?
>
> A. No, I did not.
>
> [MS. LEVINE]: Who did you assign that to?
>
> A. Detective Enrique [Chavary].
>
> [MS. LEVINE]: At any time during your investigation after speaking to Detective [Chavary], at any time was Roberto [sic] Ruiz a suspect in this case?
>
> MRS. GEORGI: Objection, calls for hearsay.
>
> THE COURT: Overruled.
>
> A. No.
>
> [MS. LEVINE]: Did you, sir, you, ever drive the route of Alberto Ruiz, the route that he provided to Detective [Chavary]?
>
> A. No, I did not.

[MS. LEVINE]: Why not?

A. He wasn't a suspect.

MRS. GEORGI: Objection, calls for hearsay.

[MS. LEVINE]: Calls for present sense impression of what he did.

THE COURT: Overruled. The question is did you.

THE WITNESS: No, I did not.

[MS. LEVINE]: Why not?

A. He was not a suspect to me.

[MS. LEVINE]: Okay. Did you ever order his cellular telephone records?

A. No, I did not.

[MS. LEVINE]: Why not?

A. Again, he was not a suspect to me.

(T. 5798-99).

When the defense moved for a mistrial, the judge explained: "But see, this is the detective's role in this case. Was this a person of interest that you were investigating or how did they go about investigating …" (T. 5823-25). The prosecutor ended her examination by asking, "Did you make the arrest in this case based on the evidence and the statements that were made by witnesses?" The detective answered, "Yes." (T. 5847). On redirect, the prosecutor introduced inferential hearsay concerning what Mr. Ruiz's employers had told the detective:

[MS. LEVINE]: After you spoke with the Country Milk people did you feel the need to do the route?

[MS. GEORGI]: Objection.

THE COURT: Overruled .

A. I did not.

(T. 5863).

All of this was hearsay designed to convince the jury that the detectives had performed an investigation and learned facts that enabled them to eliminate Mr. Ruiz as a suspect, making it more likely that Mr. Andres was responsible. Where a detective offers conclusions "predicated on information he secured from someone else," the testimony is inadmissible hearsay. *Norton*, 709 So. 2d at 95 (Fla. 1997). This hearsay was not exempt from the rules in order to prove the detective's, "present sense impression of what he did," "the detective's role in the case," or "how did you go about investigating." (T. 5799, 5824). There is no course-of-the-investigation or logical-sequence-of-events exception to the hearsay rule. *See Keen v. State*, 775 So. 2d 263, 274 (Fla. 2000); *State v. Baird*, 572 So. 2d 904, 907 (Fla. 1990).

The State's startling claim that the hearsay was admissible as a "present sense impression" is contrary to the law. When the prosecutor asked Gallagher why he had not driven the route Mr. Ruiz had given to Detective Chavary, the defense objected, "calls for hearsay." The prosecutor countered: "Calls for present

sense impression of what he did." (T. 4799). The fact that Detective Gallagher did not consider Ruiz a subject – based on the hearsay opinion of Chavary, which in turn was based on hearsay information received by Detective Chavary – had nothing to do with the "present sense impression" exception.

The phrase "present sense impression" does not appear among the exceptions to the hearsay rule, but it corresponds to the "spontaneous statement" exception found in § 90.803(1). *See Deparvine v. State*, 995 So. 2d 351, 367-69 (Fla. 2008). That subsection makes admissible:

> A spontaneous statement describing or explaining an event or condition made while the declarant was perceiving the event or condition, or immediately thereafter, except when such statement is made under circumstances that indicate its lack of trustworthiness.

§ 90.803(1), Fla. Stat. (2014). Gallagher's testimony did not describe an "event" or "condition". It merely related a conclusion. Nor did it relate an out-of-court statement made while some declarant was perceiving an event. *See Deparvine*, 995 So. 2d at 371 (excluding statement, "He knows where to get the paperwork done tonight," because it is "not descriptive or explanatory of the current conditions [the witness] was perceiving").[7]

[7] As will be seen, the prosecutor successfully used "present sense impression" as an exception for all seasons, using it to introduce Hazel Vaughn's opinion of the cause of the fire, and Detective Roberson's on-the-scene opinion that Mr. Andres was guilty of the prior murder.

B. Hazel Vaughn's opinion concerning the cause of the fire was not admissible under the "present sense impression" exception.

Over objection the trial court permitted Hazel Vaughn to testify that she initially she believed the fire had been set as part of an insurance fraud scheme. The prosecutor asked: "At that particular time, what was going through your mind when you see this worker with the red container about the cause of the fire?" Ms. Vaughn answered "At that time I though that he was purposely goin g to set his house on fire because maybe trying [sic] to do insurance fraud or something." (T. 5677).

The trial court addressed the defense objection in a sidebar prior to the testimony. (T. 5675-77). The state did claim Vaughn was qualified to offer an opinion, but maintained that the testimony was admissible as a "present sense impression" for the purpose of establishing her "ability to identify."

> [MS. LEVINE]: It's not for the truth of the matter asserted and it is not speculation. It goes to her ability to view and for what she believed the red can was, it goes to her ability to identify. It's not for the truth of the matter asserted that there was a red gas can. It goes to her ability to perceive and to make the identification. Therefore, it is not speculation at all. It is her present sense impression which is an exception to the hearsay rule.

(T. 5675-76).

Ms. Vaughn's opinion as to the cause of the fire was not rendered admissible by an exception to the hearsay rule. It was not even hearsay – an out-of-court

statement. As argued above, the "present sense impression" exception applies to spontaneous *statements* made describing an event at or near to the time it occurred.

Ms. Vaughn did not relate a statement she had made at the time of the fire, nor did her testimony describe the fire. All she testified to was a baseless suspicion about the reason the fire had started. Nor was her inadmissible non-expert opinion relevant to her "ability to perceive." The State offered no theory as to why Vaughn's speculation concerning the purpose of the fire affected her ability to perceive anything. [8]

C. Testimony about what Detective Chavary learned about Juan Bacalau, and statements within his birth certificate, were hearsay.

The state successfully introduced hearsay that Juan Bacalau was a handyman, had worked at the Perez home at the same time as Mr. Andres, and was now deceased. Initially the judge sustained hearsay objections when the prosecutor asked if Detective Chavary knew Baccalau had worked at the home on February 2, 2005, and whether he was a handyman. (T. 5141-42). The court overruled an objection when the prosecutor asked if Mr. Baccalao was alive, and Chavary responded, "I believe he's not." The court next permitted the State to elicit the same hearsay it had just disallowed:

[8] Whether a statement falls within the definition of hearsay is a pure question of law reviewed de novo. *Leonard v. State*, 192 So. 3d 1258, 1259 (Fla. 2d DCA 2016).

[Ms. LEVINE]: **Did you have information**, that he had also worked at the house –

MS. GEORGI: Objection. Calls for hearsay.

MS. LEVINE: It doesn't call for hearsay.

THE COURT: Okay. Overruled.

THE WITNESS: He worked with Mr. Andres, yes.

(T. 5143). The content of "information" an officer "received" is hearsay. *See, e.g.*, *State v. Baird*, 572 So. 2d 904 (Fla. 1990).

The court also permitted the prosecution to introduce a hearsay statement on Juan Baccalau's death certificate in order to prove his occupation. (T. 5156-58). The defense objected that this was hearsay, and there was no way to confront a witness as to the fact of Mr. Baccalau's line of work. (T. 5157). The prosecutor responded, "I will spread out the document that says, occupation landscaper." (T. 5157).

A death certificate can not be used to prove matters beyond the "fact, place, date, and time of death as well as the identity of the decedent." *Marshall v. HQM of Winter Park, LLC*, 959 So. 2d 1207, 1208 (Fla. 5th DCA 2007) (quoting § 731.103(1), Fla. Stat. (2007)); *see also S. Life & Health Ins. Co. v. Medley*, 161 So. 2d 19, 21 (Fla. 3d DCA 1964), *disapproved on other grounds*, *Weinstock v. Prudential Ins. Co. of Am.*, 247 So. 2d 503 (Fla. 3d DCA 1971). It is questionable whether Baccalau's death certificate could establish even that. *See Great S. Life*

Ins. Co. v. Porcaro, 869 So. 2d 585, 587 (Fla. 4th DCA 2004). There is no reason to believe that anyone with knowledge provided non-hearsay knowledge of Bacalao's employment, or that his job at the time he died was the same one he had on January 24, 2005.

The death certificate was also not relevant to any issue in the case. The prosecutor explained only that she was entitled to introduce it because, "I can put that death certificate in, becaue the detective said he spoke to him. I can prove that he is dead." (T. 5156).

III. THE COURT REPEATEDLY LIMITED CROSS-EXAMINATION ON SUBJECTS RAISED BY THE STATE, CREATING A MISLEADING IMPRESSION.

"[W]here a criminal defendant in a capital case, while exercising his sixth amendment right to confront and cross-examine the witnesses against him, inquires of a key prosecution witness regarding matters which are both germane to that witness's testimony on direct examination and plausibly relevant to the defense, an abuse of discretion by the trial judge in curtailing that inquiry may easily constitute reversible error." *McDuffie v. State*, 970 So. 2d 312, 324–25 (Fla. 2007) (quoting *Coxwell v. State*, 361 So.2d 148, 152 (Fla.1978)). "Cross-examination of a witness upon the subjects covered in his direct examination is an invaluable right and when it is denied to him it cannot be said that such ruling does not constitute harmful and fatal error." *Id.* at 325 (quoting *Coco v. State*, 62 So. 2d 892, 894–95 (Fla. 1953)).

In this case the trial court prohibited cross-examination on key issues germane to the testimony of Jose Perez and Lisbeth Farinas, and Alberto Ruiz, in violation of Mr. Andres' rights to confrontation, due process, and a fair trial. U.S. Const. amends. VI, XIV; Art. I, §§ 9 , 16 Fla. Const.[9]

A. Jose Perez

The prosecutor began her closing argument by listing what it considered the key pieces of evidence pointing to guilt, among them: "Disappearing and never showing back up to finish the job." (T. 6457). She included "disappeared" on the guilt side of the "scales of justice" display in closing argument. (R. 2380). The State had indeed established that Mr. Andres never returned to the house after the fire. But the judge precluded cross-examination that would reveal the reason: The owner told him not to.

Jose Perez owned the home at 1131 SW 74th Avenue. He rented the efficiency to Ruiz and Farinas, and he hired Rafael Andres to perform the repairs and alterations to the structure. (T. 5033-34). Mr. Perez testified that on January 24 Mr. Andres called him several times, and left a message. According to Perez, the message stated that it was 12:15, and that Mr. Andres had finished at the house and

[9] "[L]imitation on cross-examination of witnesses is reviewed for abuse of discretion. A trial court's discretion in this area, however, is constrained by the rules of evidence and by recognition of a criminal defendant's Sixth Amendment rights." *MacDuffie* at 324.

was going to work at another job. (T. 5040). The time on the message, however, was 12:47. (T. 5039). Perez tried to call Mr. Andres several times that afternoon. (T. 5040-41). On at least one occasion, Mr. Andres answered the call. (T. 5041).

Mr. Perez went on to testify that Rafael Andres never returned to the house. (T. 5043). Over defense objection, the prosecutor asked whether, "In the process of reconstructing your home and needing workers, do you ever hear from the defendant, about helping you with the reconstruction project[?]" (T. 5043). When the objection was overruled, the prosecutor asked, "Did you ever see the defendant again?" Perez replied: "Negative." (T. 5043).

In fact, Perez had told Mr. Andres to not come back. (T. 5045-47).[10] The State objected that this fact was inadmissible as hearsay and beyond the scope of direct examination. (T. 5046-47). The prosecutor maintained that the scope was narrowly limited by the State's decision to ask whether Mr. Perez had seen Rafael Andres again, and not why, and also by the fact that that it had not asked about that precise phone call. (T. 5047). The trial court agreed. (T. 5047, 5050).

The scope of the right to cross-examination guaranteed by the constitutions is expansive. This Court has explained:

[10] The phone records also showed that Mr. Andres had called Perez's number several times on January 25. (5590-92).

> [W]hen the direct examination opens a general subject, the cross-examination may go into any phase, and may not be restricted to mere parts ... or to the specific facts developed by the direct examination. Cross-examination should always be allowed relative to the details of an event or transaction a portion only of which has been testified to on direct examination. As has been stated, **cross-examination is not confined to the identical details testified to in chief, but extends to its entire subject matter, and to all matters that may modify, supplement, contradict, rebut or make clearer the facts testified to in chief.**

Zerquera v. State, 549 So. 2d 189, 192 (Fla. 1989) (quoting *Coxwell*, 361 So. 2d at 151 (quoting *Coco v. State*, 62 So. 2d 892, 895 (Fla. 1953))) (emphasis supplied).

Mr. Perez's direct testimony touched on the hiring of Mr. Andres, Perez's dissatisfaction with Mr. Andres' work, a number of phone calls between the two on the day of the fire, and the fact that Mr. Andres never returned to the house. The fact that Perez told Andres to stay away fell within the "entire subject matter" of his direct testimony. It also served to "modify, supplement … or make clearer" Perez's tale of Mr. Andres' seeming disappearance. The judge disallowed a question squarely within the scope of cross-examination.[11]

[11] The State's alternate hearsay objection would also fail. Perez's statement that Mr. Andres should not return was not offered for the truth of the fact that Mr. Perez really did not want Mr. Andres to come back. It was a "verbal act" offered for its effect on the listener. *See Armstrong v. State*, 642 So. 2d 730, 736 (Fla. 1994); *Zeigler v. State*, 402 So. 2d 365, 373-74 (Fla. 1981).

The scope of cross-examination may also be expanded where the direct examination creates a misleading impression. *See Romero v.* State, 901 So. 2d 260, 267 (Fla. 4th DCA 2005) (the witness's testimony "left an 'accusatory implication,' which the defendant was barred from refuting"); *see also Felton v. State*, 949 So. 2d 342, 344 (Fla. 4th DCA 2007); *Docekal v. State*, 929 So. 2d 1139, 1143 (Fla. 5th DCA 2006). The State successfully suggested that Mr. Andres had mysteriously disappeared after the fire. The defense had the right to dispel this suggestion by providing the information that solved the manufactured mystery.

B. Lisbeth Farinas

The trial court allowed Lisbeth Farinas to testify that her sister and Alberto Ruiz had a "good relationship," while denying the defense the opportunity to explore that conclusion on cross-examination. (T. 3854). On direct examination, the prosecutor asked: "Did Alberto and your sister have, from what you observed, a good relationship?" Ms. Farinas answered, "Yes." (T. 3854). She also testified that over the six years the couple were together, she had never witnessed "a physical argument" between them. (T. 3854).

The court, however, refused to allow the defense to cross-examine her on nature of this relationship. When counsel argued that this area fell within the scope of direct, the judge responded:

> THE COURT: I understand what you're saying and if this witness were either (a) being impeached or (b) said, yes, I saw something, I'd say you go at it. But that's not what we have. You don't have impeachment of her and you don't have she saying she never saw anything [sic].

(T. 3890). Ultimately, she allowed the defense to ask a single question: "Did you ever witness a verbal argument between them?" (T. 3914-16). The judge would not even permit the defense to follow up on what Ms. Farinas meant when she answered no – not even whether she had heard Mr. Ruiz speak harshly to her sister. (T. 3913-15).

The defense had the right to elicit testimony that might have undermined the picture of an idyllic relationship. As the defense stated, it had a good faith reason to believe that there was conflict around the couple's families. Alberto did not get along with the Farinas; he refused to attend family gatherings or go to dinner at their house. (T. 3891, 3899-3904). The two argued because Mr. Ruiz spent too much time with his own family. (T. 3891, 3899-3904). Notably, when they vacated the efficiency they separated. Despite the fact that Ivette had previously lived with Alberto at his parents home minutes away from the efficiency, she did not join him there but instead went to stay at her own family's home. The defense was not required to simply accept the witness's summary conclusion that the couple never argued. It was entitled to explore "matters that may modify, supplement, contradict, rebut or make clearer the facts testified to in chief."

Zerquera, 549 So. 2d at 192 (Fla. 1989).

The trial court also concluded that the defense could not cross-examine on this subject, "because you're not producing to me any form of impeachment that you could use." Counsel had a good-faith basis to ask Lisbeth Farinas about these subjects because of statements made by Alberto Ruiz and a former coworker of Ivette's, Maria Locayo. (T. 3899-3905). The court had already ruled that Ms. Locayo's testimony about here conversations with Ivette Farinas was inadmissible hearsay. The judge reasoned that, because the defense had no admissible extrinsic evidence of the couple's difficulties, there could be no inquiry into Lisbeth's own knowledge of them. There is no authority for this proposition. A party must have a good faith basis for its questions. *See Del Monte Banana Co. v. Chacon*, 466 So. 2d 1167, 1172 (Fla. 3d DCA 1985). But cross-examination is not limited to subjects on which there is a deposition or other witnesses. Such a limitation would seriously impair the "greatest legal engine ever invented for the discovery of truth." *Connor v. State*, 748 So. 2d 950, 955 (Fla. 1999) (quoting *California v. Green*, 399 U.S. 149, 158 (1970).

C. Alberto Ruiz

The trial court ruled that cross-examining Alberto Ruiz about his knowledge that Mr. Andres had been in the efficiency would open the door to his *opinion* that Mr. Andres had committed a second burglary weeks before the murder. The parties

had agreed before the trial that this incident was inadmissible. (T. 4082). This ruling violated Mr. Andres' right to cross-examination, forcing him to abandon it or face a jury influenced by inadmissible evidence of unrelated crimes.

Mr. Ruiz testified that he did not recall Rafael Andres doing any work inside the efficiency. (T. 4073). The defense attempted to ask him about his statement to the detectives, in which he said that Mr. Andres had done work in the efficiency near the bed. (T. 4074-4077, 4079). The State announced:

> If she goes there, we are going to accuse him of burglary of that prior [sic]. Oh, yeah. That's opening the door.

(T. 4080). The prosecutor explained that Mr. Ruiz, "believed that Rafael Andres saw the money, the jewelry – and the jewelry on the night stand, when he was in the bedroom doing the work." (T. 4080). She further argued:

> Judge, let me go over this again. There was an agreement made between [the prosecution] and the defense and Ms. Georgi, that prior burglary, wouldn't be – that we weren't going to talk about it.
>
> We weren't going to talk about it. How can how can she ask him about this, and then us not be able to go into, hey that's your house. Didn't you think he burglarized the house.
>
> How is that going to be evidence. That's what that's exactly why we stayed away from this.

(T. 4082). The judge agreed that asking Ruiz if Mr. Andres had been in the apartment opened the door to the burglary, and the question was not asked. (T. 4083-85).

The concept of "opening the door" is "based on considerations of fairness and the truth-seeking function of a trial." *Ramirez v. State*, 739 So. 2d 568, 579 (Fla. 1999) (quoting *Bozeman v. State*, 698 So.2d 629, 631 (Fla. 4th DCA 1997)) To open the door, "**the defense must first offer misleading testimony or make a specific factual assertion which the state has the right to correct so that the jury will not be misled**." *Robertson v. State*, 829 So. 2d 901, 913 (Fla. 2002) (quoting *Bozeman* at 630). The defense did not offer misleading testimony. It attempted to cross-examine the Mr. Ruiz about a statement the prosecution conceded he had made. Speculation that Mr. Andres committed a separate crime could correct or clarify nothing.

IV. THE FRUITS OF THE CELL-SITE SIMULATOR SEARCH WERE INADMISSIBLE

The police used a cell-site simulator in order to seize Mr. Andres and execute a body warrant. The warrantless use of real time cell site location information violates the Fourth Amendment to the United States Constitution. *See Tracey v. State*, 152 So. 3d 504 (Fla. 2014). The evidence the police obtained by exploiting the illegal surveillance was the fruit of the Fourth-Amendment violation

and should have been excluded. Its use violated Mr. Andres' rights to be free from warrantless search and seizure and due process of law. U.S. Const. amends. IV, XIV; Art. I, §§ 9, 12, 16, 17, Fla. Const.[12]

On January 26, 2005, detectives obtained a pen register and "trap and trace" order for Mr. Andres' wireless line pursuant to section 934.33. § 934.33, Fla. Stat. (2005). (R. 638-41). "A 'pen register' records the telephone numbers dialed from the target telephone and a 'trap and trace device' records the telephone numbers from incoming calls to the target telephone." *Tracey* at 506. In order to obtain an order for a pen register or trap and trace, the State need only present: "specific and articulable facts showing that there are reasonable grounds to believe the contents of a wire or electronic communication or the records of other information sought are relevant and material to an ongoing criminal investigation." § 934.23(5), Fla. Stat. (2005).[13] There is no requirement of probable cause.

On January 27, the police received a warrant to search Mr. Andres' body. (R. 595-604). The warrant did not authorize any form of surveillance. Nonetheless,

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[12] On appeal from the denial of a motion to suppress, the Court "affords a presumption of correctness to a trial courts findings of fact but reviews de novo the mixed questions of law and fact that arise in the application of the historical facts to the protections of the Fourth Amendment." *Wyche v. State*, 987 So. 2d 23, 25 (Fla. 2008).

[13] For reasons unknown, the application for pen register and trap and trace was lost. (T. 3722).

the State used a cell-site simulator (often referred to as "Stingray") in order to locate Mr. Andres and serve the warrant.[14] Once they found him, the officers took Mr. Andres into custody, photographed his entire body, and took DNA samples. (R. 606). The photographs and samples were later introduced in evidence at trial.

On October 16, 2014, this Court decided *Tracey v. State*. In that case the police obtained a pen register and trap and trace order. *Id.* at 506-07. The police nonetheless received real time cell site location and used it to track Tracey. *Id*. at 507-08. The Court held that a person has a reasonable expectation of privacy in their real time cell site location, and that police must obtain a warrant supported by probable cause in order to employ that form of surveillance. *Id*. at 526. The Court rejected the State's claim that the failure to obtain a warrant was excused by the "good faith" exception. *Id.*

Before opening statements, the defense asked the court to suppress the fruits of the illegal surveillance in light of *Tracey*. (T. 3706). In both *Tracey* and this case, police used real time cell site location to track the defendant. In both cases, the police did not seek a warrant to do so and obtained only a pen register and trap

[14] The nature of this surveillance was the subject of considerable pretrial litigation, with the policle refusing to identify or discuss the nature of the surveillance. By the time of the post-*Tracey* motion at issue here, however, the only controversy was the legal consequence of the use of real time cell site location obtained through the simulator.

and trace order. In *Tracey*, this Court held that this behavior violated the defendant's constitutional rights.

The State argued that *Tracey* was distinguishable because warrants had been issued to search Mr. Andres' home, van, and body. (T. 3714-3718). In the alternative, it argued that under *New York v. Harris*, 495 U.S. 14 (1990), any unconstitutionality in the manner of the seizure would not require the suppression of a subsequent, post-*Miranda* statement at the station. (T. 3718-19). The judge agreed that *Tracey* was distinghishable and denied the motion. (T. 3727).

There is no meaningful distinction between *Tracey* and this case. The Court held that "the use [the defendant's] of cell site location information emanating from his cell phone in order to track him in real time was a search within the purview of the Fourth Amendment," requiring probable cause and a warrant. *Tracey* at 526. The existence of a warrant for one search does not authorize any search outside the warrant's scope. *See, e.g.*, *D.M.D. v. State*, 798 So. 2d 851 (Fla. 1st DCA 2001).

New York v. Harriss does not exempt the fruits of the illegal search from the exclusionary rule. In *Harris* police made a warrantless home arrest in violation of *Payton v. New York*, 445 U.S. 573 (1980). After he was arrested and brought to the police station, the police read Harris *Miranda*[15] warnings and obtained a

[15] *Miranda v. Arizona*, 384 U.S. 436 (1960).

statement. *Id.* 15-16. The Court concluded that the statement need not be suppressed because the statement was not "'come at by the exploitation' of … the defendant's Fourth Amendment rights …" *Harris* at 19 (quoting *United States v. Crews*, 445 U.S. 463, 471 (1980). Here, the photographs, observations, and search of Mr. Andres' body[16] was indeed come at by the exploitation of the illegal real-time tracking. Any cuts, scratches, burns or other marks would only be relevant it they could have been received on January 24. The police did not just want to search Mr. Andres. They wanted to search him *soon*. In order to do so, they resorted to warrantless real-time tracking. The evidence obtained in this case was very much the fruit of the illegality.

The existence of a warrant did not purge the taint of the illegal seizure. Even when there is a warrant, the evidence obtained will be available only, "when the connection between unconstitutional police conduct and the evidence is remote or has been interrupted by some intervening circumstance, so that "the interest protected by the constitutional guarantee that has been violated would not be

[16] Only the items seized under the body warrant are at issue on appeal. The trial court found that the initial statement Mr. Andres made when he was seized was admissible under the Fourth Amendment, but excluded it as more prejudicial than probative. (T. 3727-28). *Compare Harris* at 21 (stating that where *Payton* is violated, any statements made within the home would be suppressed). The State itself elected not to introduce Mr. Andres' subsequent statement made at the police station.

served by suppression of the evidence obtained." *Utah v. Strieff*, 136 S. Ct. 2056, 2061 (2016) (quoting *Hudson v. Michigan*, 547 U.S. 586, 593 (2006).

In *Strieff*, an officer illegally stopped Strieff and a records check revealed an outstanding warrant. *Id*. at 2559-60. A search incident to arrest revealed drugs. The Supreme Court did not treat the warrant as a dispositive intervening circumstance. Instead it conducted a standard attenuation analysis, examining three factors: the temporal proximity between the constitutional violation and the discovery of the evidence, the presence of intervening circumstances, and the "purpose and flagrancy of the initial misconduct," a factor deemed "particularly" significant. *Id.* at 2061-62 (quoting *Brown v. Illinois* , 422 U.S. 590, 604 (1975)). The Court found that the first factor weighed in favor of suppression. Temporal proximity only weighs against suppression when a "substantial time" has elapsed. *Id.* at 2062. The second factor – the intervening warrant – weighed "heavily" against suppression. *Id.* Finally, it concluded that the third factor, the "purpose and flagrancy of the official misconduct," also weighed in favor of the State. *Id.* at 2063. It noted that the officer had been negligent and made "two good-faith mistakes." *Id.* On these facts, the court held that the drugs were admissible.

In this case, there was no "substantial time" between the illegal tracking on the collection of the evidence. Here, as in *Strieff*, the intervening circumstance is a warrant, but with one important distinction: *Strieff* noted that the warrant was

"entirely unconnected" to the illegal stop. *Id.* at 2062. Here, the police violated the constitution precisely because the warrant existed. *Compare State v. Dickey*, 203 So. 3d 958, 963 (Fla. 1st DCA 2016) (distinguishing *Strieff* where officer stopped defendant *in order to* discover a possible warrant). Unlike in *Strieff*, the third factor, the purpose and flagrancy of the misconduct, weighs heavily in favor of suppression. Whereas the officer in *Streff* was negligent and made "good faith mistakes," the officers in this case deliberately conducted an illegal search for the purpose of obtaining the evidence they eventually got. This Court has already held that the constitutional violation at issue here is not a "good faith" mistake. *See Tracey* at 526. The third factor carries special weight because, "The exclusionary rule exists to deter police misconduct." *Strieff* at 2063; *see also Harris*, 20-21. If the exclusionary rule did not apply here, police would be free to use warrantless electronic surveillance to track anyone with an outstanding warrant.

V. THE PROSECUTOR USED IMPROPER HYPOTHETICAL QUESTIONS TO ELLICIT EXPERT OPINIONS OUTSIDE OF THE WITNESS'S EXPERTISE AND BOLSTER ITS SPECULATIVE CRIME REENACTMENT THEORY.

It is "highly objectionable," for a prosecutor to "make a closing argument in the guise" of examining witnesses.[17] Ms. Levine nevertheless asked Dr. Lew

[17] *Gonzalez v. State*, 450 So. 2d 585, 586 (Fla. 3d DCA 1984) (Pearson, J., concurring). *Gonzalez* involved prosecutorial misconduct in cross-examination, rather than direct testimony.

hypothetical questions that did just that. These questions were not designed to obtain Dr. Lew's opinion as a medical examiner. Instead the doctor only confirmed that the opinions she had already given did not disprove the prosecutor's theory of the case, while permitting the prosecutor to preview her closing argument. The prosecutor's questions introduced speculation unsupported by the evidence, went beyond Dr. Lew's expertise, bolstered the prosecution's arguments with the seal of expertise, and its prejudice went far beyond any probative value in having the doctor reaffirm the opinions she had already stated.[18]

Before Dr. Lew took the stand, the defense pointed out that the prosecutors had produced a mannequin and a chair. Counsel asked the judge to address the State's apparent plan to reenact the crime in the guise of expert testimony. (R. 6172). The trial court deferred to the prosecutor's refusal to proffer the testimony for a ruling outside the presence of the jury. (R. 6172).

The prosecutor began by informing the jury that Lew could, "tell us how injuries were sustained without seeing them actually being done …" (R. 6176). She then went on to put her closing argument into Lew's mouth in the form of a "hypothetical question":

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[18] A judge's determination whether an expert is qualified to render an opinion and the propriety of a hypothetical question are reviewed for abuse of discretion. *See Ramirez v. State*, 542 So. 2d 352, 355 (Fla.1989); *McBean v. State*, 688 So. 2d 383, 385 (Fla. 4th DCA 1997); *Pub. Health Found. for Cancer & Blood Pressure Research, Inc. v. Cole*, 352 So. 2d 877, 879 (Fla. 4th DCA 1977).

[MS. LEVINE]: … I would like you to consider this set of facts first, ma'am. If a person was standing at a counter where they were washing some dishes and they were surprised by the entry of someone into their home, surprised where they actually fell out of their shoes and were confronted by somebody –

MR. YERMISH: Objection, Your Honor. These are facts not in evidence .

THE COURT: Okay. Let me do this. I need her to finish what she is saying. She is giving a hypothetical and, you know, that is permissible. Let me just hear what it is.

[MS. LEVINE]: That began to punch that person about her face, specifically on the left side of her face, punch her, more than one time, fast, in a right, with a right hand if they were facing one another, such as this, several times. And then that person is forced to sit on a chair and again be beaten, battered, trying to stop with their hands up, and their elbow is getting in the way. And then that person standing in order to try and defend themselves and that person is stabbed three times, that person falling on the ground – let me use the dummy – with the right side of their face – if the jury needs to stand up, Judge, if you could allow them to.

MR. YERMISH: At this point I have to object again, Your Honor.

THE COURT: Okay. If you can't see, you could stand up, folks. Finish your question.

[MS. LEVINE]: If the woman was lying on the right side of her face, and at this point if she continues to move and struggle and someone ripped the cord and stood over her and right handed began to strangle the person, forcing more right handed damage, right sided damage, because the person would be in the same line as the right side of the person using their hands –

MR. YERMISH: Your Honor, objection. This is compound. This is –

[MS. LEVINE]: And the person –

THE COURT: Please let her finish the question, Mr. Yermish.

[MS. LEVINE]: And the person trying to pull the cord on the left side of their face away, until they couldn't pull any longer. Would that be consistent with the injuries that you saw from [Ivette] Farinas?

MR. YERMISH: Your Honor, objection and I request a side bar.

THE COURT: Overruled. Denied.

MR. YERMISH: Your Honor, for the record, objecting to lack of foundation. I am objecting to speculation. Your Honor, I am objecting because the question itself is compound, speculative, and she is basically giving a closing argument. Those are my objections. Please note my objection.

THE COURT: Overruled. You may continue.

[MS. LEVINE]: Please answer, Dr. Lew.

A. The physical evidence at the scene and on the body is consistent with that.

[MS. LEVINE]: Let me give you another example, another hypothetical, if I could.

Again, a person standing at a counter, surprised at the entrance of someone else. That person coming into their home confronting them, punching them, again and again. Forcing her to be seated on a chair, possibly to give information –

MR. YERMISH: Objection, Your Honor.

THE COURT: Sustained as to that.

MR. YERMISH: Your Honor –

THE COURT: Sustained. Sustained.

[MS. LEVINE]: Seated on a chair where she continued to struggle, where she stood up and was stabbed three times and then fell to the ground. Her right side of her face on the ground. And then, the person that stabbed her left for a period of time within 30 minutes and arrived and found that the person that they had stabbed was moving around on the floor. And then –

MR. YERMISH: Objection, Your Honor. These are facts not in evidence. This goes to the admissibility of a re-enactment. I seek a side bar to address this.

THE COURT: Okay. All right. Let's have a side bar.

(Thereupon, the following side bar conference was had.)

THE COURT: Okay. Let the record reflect that we are side bar. She is allowed to utilize hypotheticals. I sustained when the objection when she started saying things like, she was threatened to get information. I agree with you on that. But if the hypothetical is posed in a way, does this evidence, is the evidence consistent with this, then she is allowed to ask the question and get an answer. Whatever the doctor is going to say, if the doctor says no, the evidence is not consistent or the blood pattern is not consistent or the dripping of the blood is not consistent, then that is the answer that she answers. You were right in your other objection and I sustained it immediately about when Mrs. Levine asked about getting information, you know, the person trying to get information from her, because this doctor can't talk about

that, and I agree with you. But she can talk about the physical evidence and what is consistent with it.

MR. YERMISH: Your Honor –

THE COURT: You know that that is why I wanted to – I just want you – she is allowed to do this.

MR. YERMISH: Your Honor, the hypothetical posed, okay, calls for, completely for speculation. With respect to the new hypothetical with a 30 minute gap, again this 30 minute gap –

THE COURT: I agree with you about the 30 19 minute gap. The point is, in other words, if she wants to say perhaps the person left or came back, there is no evidence -- I mean, in other word as long as your hypothetical is linked to evidence in this case, okay, I as well as framed in a way such as, Doctor, is this consistent with what you found, then it's appropriate. Now, you are right about say 30 minutes, because I don't know that we have that, but that doesn't mean that you can't say because there is some evidence about the door opening and closing, someone leaving and someone coming. We had testimony from the witness that she saw a person going in.

[MS. LEVINE]: Judge, there was a time gap. There was a time gap and the Doctor testified that she could be alive for up to 30 minutes.

THE COURT: Okay. Well, okay. Then maybe I forgot that. She did say minutes. I wrote down minutes.

[MS. LEVINE]: Then I asked her could it be as long as 30 minutes. I asked her that question.

THE COURT: Then -- you are right, you did. And I didn't realize that that was where you were going. I thought that you were going like

MR. YERMISH: But, Your Honor, this is not just a hypothetical, this is a reenactment. And an reenactment requires certain conditions. She is using a chair, she is sing a body dummy.

THE COURT: She is allowed to do that. So are you. You could use all the same stuff and show what it could be. But that is not your defense in this case. Your defense is he is not even there. So I am just saying, hypothetically, right, if your defense was that he acted in self-defense, let's just say, okay – because the last homicide we have done recently, it was a self-defense. They got on the ground and were rolling all over and showing it and everything. I mean, they did it all. They didn't step in a moment, because that was their theory of defense, which was self-defense. Your theory is it is not even your guy. He wasn't even there. You could also do a reenactment, but you might not want to because it's not the theory of where your case is going.

MR. YERMISH: But, Your Honor, what our theory of defense is or is not is not a basis for her to do this.

THE COURT: No, no, no. What I meant was -- this is what I meant from my comment. You are likewise entitled to do what Mrs. Levine is doing right now. You may choose not to because it is not consistent with your theory, but I would never stop you from doing it.

MR. YERMISH: But hypotheticals, among otherthings, and particularly reenactments have to engage the same facts. And the prosecutor is arguing facts that are not in evidence.

THE COURT: And when she says something like "to get information", where there not one bit of evidence in my memory in this trial about getting in my memory in this trial is about getting information –

[MS. LEVINE]: Well, Judge –

THE COURT: The point is – let me finish that is when I sustained your objection. Because I don't – I mean, one could theorize, but we have no, you know – you could make that argument maybe in closings or something, but even then it might be subject to an objection by you if there is no evidence. Closings are supposed to be based on the evidence. So, I mean, I may agree with you immediately on that, okay. So the hypothetical must be based upon evidence and formulated to say, "Doctor, is this consistent with your findings," and that is what she is doing. So I don't know what else you want me to do.

MR. YERMISH: Okay. May I just have one second.

THE COURT: Okay.

MR. YERMISH: Just one second.

THE COURT: Okay. No problem. What are we doing now? Okay.

MR. YERMISH: Your Honor, for the record, we are objecting to the reenactment, okay. There is insufficient foundation, okay. The question is asked in the form of a closing argument, which is designed to elicit the sympathy of the jury. And under 403, we don't believe the condition that the prosecutors are taking them in are probative of the – you know, what this doctor is able to testify to, and it simply has prejudicial impact and that is their intent.

THE COURT: Okay. The Court is going to find that the doctor is able to testify to the evidence in this case and what is consistent with the physical evidence. That is it. Anything else, anything that Mrs. Levine says that is not in evidence in this case, you object to, and you get a sustained from me, okay.

MR. YERMISH: Okay.

THE COURT: Thank you.

(Thereupon, the side bar conference was concluded.)

[MS. LEVINE]: Dr. Lew, I am going to start the question again. Second example. Person standing at their sink, startled by somebody that came in, confronted by somebody face-to-face. A fight ensued where the person that was standing at the sink is punched several times on the right side of the face –

A. Left.

[MS. LEVINE]: – left side of the face, sorry. Left side of the face, okay, by a right hander.

A. Yes.

[MS. LEVINE]: And that person then is seated in a chair where a struggle continues, the person stands up to continue to defend themselves, and they are stabbed three times causing them to fall to their knees and then to fall forward on their face where they end up or lie on the right side of their face. The person that stabbed then leaves for a period of up to 30 minutes and then comes back, and when they come back they notice that the person that they had stabbed was not, in fact, dead because that person could still be moving or moaning, and then the same person takes the rice cord, the cord, stands over the person who is bleeding from the front, and strangles using their right hand with more force on the right side of the victim's body, until that person can no longer struggle and dies. And then that person proceeds at doing whatever they do, like taking a cloth and opening a gas cap and going into another room.

MR. YERMISH: Objection, Your Honor, as to relevance with respect to this witness.

THE COURT: Sustained.

> [MS. LEVINE]: Notwithstanding that, Doctor, would the evidence that you saw on Mrs. Farinas' body be also consistent with that second scenario, meaning that a person left and came back?
>
> A. Yes. The findings during the autopsy would be consistent with that.
>
> [MS. LEVINE]: Could you tell the members of the jury, member of this jury, what is the manner of [Ivette] Farinas' death?
>
> A. The manner of death is homicide.
>
> [MS. LEVINE]: And cause of [Ivette] Farinas' death?
>
> A. The cause of death was stab wounds to the and ligature strangulation.

(R. 6178-88).

This testimony went beyond Dr. Lew's expertise. An expert may not offer an opinion outside her area of expertise. *See Jordan v. State*, 694 So. 2d 708, 715 (1997). Dr. Lew is a medical examiner. (T. 6103). She testified to her training in medicine and pathology, as well as her experience in forensic pathology. (T. 6104-06). A medical examiner is qualified to testify to the cause and manner of death. *McBean v. State*, 688 So. 2d 383, 385 (Fla. 4th DCA 1997). There was no foundation for Dr. Lew to testify to a reconstruction of the crime, or to validate the prosecutor's speculation on details such as whether Ms. Farinas was surprised "out of [her] shoes" by someone unexpected entering her apartment, or took a cloth and opened a gas cap.

The prosecutor's questions, based on unproven assumptions, were also improper "hypotheticals." A hypothetical question must be based on facts in evidence, and must not omit material facts. *See North Broward Hosp. Dist. v. Johnson*, 538 So. 2d 871 (Fla. 4th DCA 1988); *Carnival Cruise Lines, Inc. v. Rodriguez*, 505 So. 2d 550, 552 (Fla. 3d DCA 1987). There was no evidence that Ms. Farinas was at the counter washing dishes, that she was surprised, or that she fell out of her shoes. There was no evidence she was forced to sit in a chair or tried to defend herself by putting her hands up – Dr. Lew testified that there were bruises on the *back* of the hands as well scrapes on her fingers, and she never testified to the existence of defensive wounds. (T. 6142-43). Though Lew said Ms. Farinas could possibly have survived for as long as thirty minutes, there was no evidence that she did. Hazel Vaughn first testified that two hours passed between the "first significant thing" – the "moan" – and the time she called 911. (T. 5723). There was no evidence that the murderer took a cloth and opened a gas cap. None of these unproven facts were even relevant to the opinion Dr. Lew was qualified to make.

Any probative value this hypothetical and opinion may have had was outweighed by the undue prejudice it caused. Before the State could ask a hypothetical question, it was required to establish it was not more prejudicial than probative. *Anderson v. State*, 863 So. 2d 169, 180 (Fla. 2003) (quoting Glendening

v. State, 536 So. 2d 212, 220 (Fla.1988). The hypothetical questions had no probative value. Dr. Lew had already testified to every relevant conclusion within her expertise, including the nature and impact of the stab wounds, the significance of the facial bruising, the meaning of the ligature marks on the neck, and the fact that the marks suggested a continuing struggle. The State was free to make a closing argument based on all of Dr. Lew's legitimate expert opinions. The hypothetical questions added only one thing: An expert's endorsement of each piece of the prosecutor's theory. *Cf. Linn v. Fossum*, 946 So. 2d 1032, 1038 (Fla. 2006); *Maklakiewicz v. Berton*, 652 So. 2d 1208, 1209 (Fla. 3d DCA 1995).

Smith v. State, 7 So. 3d 473 (Fla. 2009), does not excuse the improper questions in this case. In *Smith*, Dr. Lew testified that the victim died of asphyxiation. During cross-examination the defense suggested it might have been a heart attack or autoerotic asphyxia. *Id.* 499-500. On redirect, the prosecutor asked a hypothetical incorporating many of the facts of the case, culminating in the victim being asphyxiated with a pillow. *Id.* 500-01. The defense made objections to the form of the question, which the court sustained. The prosecutor then successfully asked the question without objection. *Id.* at 501. The defense later moved for a mistrial based on the use of a hypothetical that incorporated "exactly the facts of the case." *Id.* The Court affirmed, noting that a hypothetical must be based on the facts in evidence. *Id.*

Smith did not raise any of the issues presented by this appeal. Smith did not argue that the questions called for an answer outside the doctor's expertise. He claimed error because the prosecutor *did* use facts in evidence – precisely the opposite of the error in this case. And there was no discussion of the unduly prejudicial effect of the prosecutor's mid-trial closing argument.

The State Attorney offered no basis for Dr. Lew to testify as an expert in crime reenactment. The State nevertheless used the doctor to place the seal of expertise on the State's closing argument.

VI. PROSECUTORIAL MISCONDUCT IN CLOSING ARGUMENT

A prosecutor has an ethical duty to seek justice rather than pursuing a conviction at all costs. *See Lewis v. State*, 711 So. 2d 205 (Fla. 3d DCA 1998).

> As the United States Supreme Court observed over sixty years ago, "It is as much [the prosecutor's] duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one."

Gore v. State, 719 So. 2d 1197, 1201 (Fla. 1998) (quoting *Berger v. United States*, 295 U.S. 78, 88 (1935)). "While prosecutors should be encouraged to prosecute cases with earnestness and vigor, they should not be at liberty to strike 'foul blows.'" *Id.* This is especially true in a death penalty case. *Brooks v. State*, 762 So. 2d 879, 905 (Fla. 2000).

The prosecutor in this case told jurors there was "**no evidence that this defendant is not guilty**," warned them the defense was trying to distract them, told them "**don't get fooled**," referred to the defense argument as "**speculation and guessing**" and "**a fairytale**," railed against defense counsel as "**mean and insulting**," misstated the law, and emphasized Mr. Ruiz's suffering after his fiancées death. This was a textbook case of what the Court in *Delhall v. State*, 95 So. 3d 13, 170 (Fla. 2012) called, "overzealous and unfair advocacy." This should come as no surprise because the prosecutor in this case is the same the Court singled out for her misconduct in *Delhall*. She is the same prosecutor called out by the Third District Court of Appeal in *Bailey v. State*, 162 So. 2d 344, 348 (Fla. 3d DCA 2015). As in *Delhall* and *Bailey*, Ms. Levine ignored sustained objections and repeated the improper arguments. (T. 6559-61, 6473-74). This prosecutorial misconduct deprived Rafael Andres of due process of law and trial by an impartial jury.[19] U.S. Const. amend. VI, VIII, XIV: Art. I, §§ 9, 16, 17, Fla. Const.

[19] Where the trial court has overruled a defense objection, the Court reviews for harmless error. Where the court has sustained an objection but denied a motion for mistrial, the Court reviews abuse of discretion. Where there was no objection, the Court reviews for fundamental error. *Evans v. State*, 177 So. 3d 1219, 1234 (Fla. 2015).

A. Burden Shifting/Scales of Justice

> **"No evidence that this defendant is not guilty … No evidence at all."**

(T. 6652)

The State may not shift the burden of proof by commenting on "on a defendant's failure to produce evidence to refute an element of the crime …" *Warmington v. State*, 149 So. 3d 648, 652 (Fla. 2014); *see also Gore v. State*, 719 So. 2d 1197, 1200 (Fla. 1998); *Jackson v. State*, 575 So. 2d 181, 188 (Fla. 1991). To do so violates a defendant's constitutional right to due process. *Id.* Nevertheless – and over defense objections – the prosecutor repeatedly shifted the burden and told jurors point blank that there was "no evidence at all" that Mr. Andres was not guilty.

The prosecutor emphasized her desire to shift the burden with a visual aid: "The Scales of Justice." (T. 6562). It was a poster board approximately two feet by three feet with a depiction of a balance scale. (T. 6622- The arms of the scale were in equipoise. (R. 2380). On the side marked, "Guilty," Ms. Levine listed thirteen pieces of evidence, above it writing: "**EVIDENCE, EVIDENCE**." (S.R.).[20] On

[20] The trial court denied the defense request to make the exhibit a part of the record, instead permitting defense counsel to take and submit a photograph for the record. That photograph, photocopied, appears in the record at page 2380, but it is illegible. Appellate counsel is submitting a legible copy of the photograph as a supplement to the record.

the "Not Guilty" side of the scale, she wrote: "Speculation, guess." (S.R.). She began:

> [MS. LEVINE]: I want to talk to you about scales of justice. And I know that we talked about beyond a reasonable doubt. We talked about just slightly. Just slightly, that was more of a preponderance of the evidence. Different standard. We are talking about a heavy standard; a heavy standard. Not all the way to the bottom, but outweighing it much more heavily.
>
> **What is on the not guilty side? Nothing.**
>
> [MS. GEORGI]: Objection. Burden shifting.
>
> THE COURT: Sustained.
>
> [MS. GEORGI]: Ask for an instruction and reserve a motion.
>
> THE COURT: The jury is to disregard the statement made by the prosecutor. Continue, Ms. Levine.
>
> [MS. LEVINE]: **No evidence that this defendant is not guilty.**
>
> [MS. GEORGI]: Objection.
>
> [MS. LEVINE]: **No evidence at all.**
>
> [MS. GEORGI]: Objection. Judge, objection.
>
> THE COURT: Overruled .

(T. 6561).

Later, the prosecutor compared the State's case to the "tightness" of a rope, continuing to use the scale to weigh the evidence for and against guilt:

[MS. LEVINE]: Who else touched that gas cap when it was getting made? But does that change the way and the tightness of this rope? Does it weaken it at all? No, it does not. Because nothing weakens this. **Nothing on this side weakens this**.

[MS. GEORGI]: Objection. I have a motion.

THE COURT: Okay. What is the legal objection?

[MS. GEORGI]: Burden shifting.

THE COURT: Overruled.

[MS. LEVINE]: **Speculation and guessing, that is not guilty. This is evidence of guilt; evidence.**

[MS. GEORGI]: Same objection.

THE COURT: Overruled.

[MS. LEVINE]: Every single one of these items.

(T. 6563-64).

Elsewhere the prosecutor argued:

[MS. LEVINE]: **Innocent people don't need alibis. And where is the evidence? Where is evidence? Where is the evidence before you?** All kinds of police people coming in. You are at Miccasukkee.

[MS. GEORGI]: Objection. Burden shifting.

THE COURT: Overruled.

[MS. LEVINE]: You are at Miccasukkee. You have to call a cab to leave, but you don't call the cops to say that your car was stolen from Miccasukkee gambling? **Where is the report of the stolen car?** Just a BOLO, be on the lockout, from the police.

> [MS. GEORGI]: Objection. Objection. Burden shifting.
>
> THE COURT: Sustained.
>
> [MS. LEVINE]: **There is no evidence to the contrary.**
>
> THE COURT: Overruled.

(T. 6559-60).

The prosecutor meant what she said. Ms. Levine's response to the subsequent motion for mistrial was this:

> Well, I have plenty of responses, because there is nothing objectionable about that. Nothing that I said was objectionable. There was no evidence that showed that the defendant was not guilty. All of that is in the record.

(T. 6623).

There would be reversible error if the prosecutor had only implied that Mr. Andres had the burden to come forward with evidence. *See, e.g.*, *Ramirez v. State*, 1 So. 3d 383 (Fla. 4th DCA 2009). But in this case the prosecutor directly emphasized the defendant's failure to produce evidence of his innocence. In *Bristol v. State*, 987 So. 2d 184. 186 (Fla. 2d DCA 2008), the district court found error where the State argued: "If you find the defendant not guilty, what's the evidence?" In *Ealy v. State*, 915 So. 2d 1288, 1290-92 (Fla. 2d DCA 2005), the State presented evidence of fingerprints and pointed out that the jury had not "heard one thing from that witness stand that contradict[ed]" it. In *Scipio v. State*,

943 So. 2d 942 (Fla. 4th DCA 2006); and *Morgan v. State*, 700 So. 2d 29 (Fla. 2d DCA 1997), the State created a straw-man alibi defense and criticized the defendant's failure to prove it. In this case the prosecutor did all that and more, denying Mr. Andres the due process of law to which he was entitled.

B. Denigrating Defense

"Verbal attacks on the personal integrity of opposing counsel or on the manner in which counsel conducted the defense are improper and have no role in the State's case." *Braddy v. State*, 111 So. 3d 810, 853-54 (Fla. 2012), *cert. denied*, 134 S.Ct. 275 (U.S. 2013). "A prosecutor may not ridicule a defendant or his theory of defense." *Riley v. State*, 560 So. 2d 279, 280 (Fla. 3d DCA 1990), *see also Evans v. State*, 177 So. 3d 1219, 1237 (Fla. 2015). The prosecution nevertheless persistently ridiculed the defense as a "speculation," "guessing," and "coincidences," and warned jurors the defense was trying to "distract" them.

The State's theory was that Rafael Andres had strangled Ms. Fernandez with the cord from a rice cooker. (T. 6473). In her first closing argument, the prosecutor suggested that the defense would point to the absence of his fingerprents on the rice cooker in an effort to distract the jurors from the evidence:

> [MS. LEVINE]:There is no evidence before you that there is any, anyone's fingerprints on that rice cooker. [Ivette]'s included. **Don't get yourself caught up in that. It is a way to distract you from the** –

[MS. GEORGI]: Objection, denigration.

THE COURT: Sustained.

[MS. GEORGI]: Move for an instruction.

THE COURT: Please continue.

[MS. LEVINE]: **It is a way to make you not look at the evidence that we have presented**.

[MS. GEORGI]: Same objection.

THE COURT: Overruled.

(T. 6473-74).

The prosecutor revived this theme her rebuttal closing. The defense maintained that Mr. Andres obtained the ATM card on a previous day when the Ms. Farinas and Mr. Ruiz were not home. The cash and jewelry left behind in the efficiency suggested that money was not the motive for the killing. To defuse this argument, the prosecutor assured the jurors this wasn't so, vouching: "That card wasn't stolen any other day than that day, 1/24. And that's the day that we charged it." (T. 6550). Ms. Levine then explained to the jury that the defense was really just trying to confuse them:

[MS. LEVINE]: The Judge will read you an instruction that the crime occurred on January 24, 2005. There is no theft on January 24, 2005. **You see the confusion?**

[MS. GEORGI]: Objection. Denigration.

THE COURT: Overruled.

> [MS. LEVINE]: The situation is, **if we throw out he did a theft, you will buy it.**
>
> [MS. GEORGI]: Objection.
>
> THE COURT: Overruled.
>
> [MS. GEORGI]: Denigration, Your Honor.
>
> [MS. LEVINE]: But you are not going to do that, because the crime is robbery on the 24th, not theft on some other day. **Don't get fooled**.
>
> [MS. GEORGI]: Objection, Your Honor. Asks an instruction. Move to strike. Denigration.
>
> THE COURT: Overruled.
>
> [MS. LEVINE]: Don't get **confused**.
>
> [MS. GEORGI]: Same objection.
>
> THE COURT: Overruled.

(T. 6551). Criticizing the defense cross-examination of Hazel Vaughn, the prosecutor said, "When you say 'know,' that is different. **Those are all words lawyers like to like to some words that are common-sensicle, make the definition more unreasonable**." (T. 6481-82).

Arguments accusing the defense of trying to "distract" or confuse jurors are improper. *See, e.g.*, *Cardona v. State*, 185 So. 3d 514, 523-25 (Fla. 2016). In *Cardona*, the prosecutor called the defense "diversionary tactics," and said the defense was trying to "cloud" and "muddle" the issues. This Court reversed. *Id.* The Court relied on part on *D'Ambrosio v. State*, 736 So. 2d 44, 48 (Fla. 5th DCA

1999), in which the district court held improper the argument that characterized the defense as a "sea of confusion" which "defense counsel prays you will get lost in."

In *Lewis v. State*, 780 So. 2d 125, 130 (Fla. 3d DCA 2001) (opinion on rehearing en banc), the court held improper the argument: "But [defense counsel] will tell you anything to get you to look away from the man who is sitting next to him, the Defendant." Florida's courts have disapproved arguments like these time and again. *See Caraballo v. State*, 39 So. 3d 1234, 1248-49 (Fla. 2010) (argument that counsel's cross-examination was an attempt to distract the jury); *Fullmer v. State*, 790 So. 2d 480, 481 (Fla. 5th DCA 2001) ("Don't let [the defense] confuse you or mislead you."); *State v. Benton*, 662 So. 2d 1364 (Fla. 3d DCA 1995)(argument that it was defense counsel's "job to cross things up, to muddy the water"); *Carter v. State*, 356 So. 2d 67 (Fla. 1st DCA 1978) (argument that defense counsel was trying to "distort the record" and "mislead [the jury.]"). The prosecutor's statement that the defense thought, "if we throw out he did a theft, you will buy it," resembles one disapproved in *Crew v. State*, 146 So. 3d 101, 110 (Fla. 5th DCA 2014), where the prosecutor "disparage[ed] the defense attorney's choice of the 'lowest offense the law will allow.'"

The prosecutor also mocked and belittled the defense. She derided the defense as "speculation," "guessing," and a "fairy tale," and she sarcastically accused defense counsel of claiming the evidence was a series of coincidences. (T.

6476, 6563). During the burden-shifting arguments described above, the prosecutor told jurors that only two things weighed on the not guilty side of the scale: "**Speculation and guessing**." (T. 6563-64). Ms. Levine argued that the defense "can tell you to speculate," but "they don't have any explanation." (T. 6554). Stating that the defense opening had suggested the evidence would explain the use of the card, Ms. Levine noted that opening statements were not evidence, but went on to say: "Evidence comes from the exhibit and the witnesses, not what someone asks you to **think or speculate; not a story; not a fairytale**." (T. 6476). She asked jurors, "And you know when there is a problem? **When someone makes assumptions. And that is exactly what they ask**[] **you to do**." (T. 6547).

Florida court's have consistently held that these arguments are improper. In *Caraballo v. State*, 762 So. 2d 542, 543 (Fla. 5th DCA 2000), the court found fundamental error based on arguments that included: "[Y]ou don't look to [defense counsel's] imagination or speculation in determining your verdict. In *D'Ambrosio* the court condemned the State's reference to, "All of those unsupported innuendos, unconnected inferences and baseless speculation that [defense counsel] is praying that you will engage in." 736 So. 2d at 47. In *Izquierdo v. State*, 724 So. 2d 124 (Fla. 3d DCA 1998), the court reversed where the prosecution referred to the defense as a "pathetic fantasy."

A prosecutor may not engage in "needless sarcasm." *Gore v. State*, 719 So. 2d 1197, 1201 (Fla. 1998), *see also Davis v. State*, 136 So. 3d 1169, 1204 (Fla. 2014); *Crew v. State*, 146 So. 3d 109-10. Yet Ms. Levine did just that:

> **What a coincidence**. Forty-five minutes after she is dead? **Come on.** That card wasn't stolen any other day than that day, 1/24. And that's the day that we charged it.

(T. 6550).

> It is not the pin number did not come to him magically. How is that an explanation that he took it some other time? **And magically, telepathically, 45 minutes after she was dead he got a sign from the heavens?**

(T. 6552).

> **What a coincidence** that he has got in his house a red gas can **… You know, there seems to be an awful lot of coincidences here.**

(T. 6556).

> She identified number three that had exactly the same hair as the person that she saw in the backyard from here up at the time. **Well, that would be another coincidence, wouldn't it?**

(T. 6557).

> The cap and the spout. **Why don't I put here, "coincidences."** Cap and spout found in his house.

(T. 6562). *Compare Servis v. State*, 855 So. 2d 1190, 1193 (Fla. 5th DCA 2003).

(noting that State "continued its attack by stating serveral times 'the defense wants

you to believe'"). The prosecutor was free to discuss the evidence. She was not free to do so in a demeaning and unprofessional way.

The State also directly attacked defense counsel as "mean and insulting":

> [MS. LEVINE]: What I want to talk to you just briefly about, Alberto Ruiz. **I think that it may have been some implication that he did it. That is insulting.**
>
> [MS. GEORGI]: Objection.
>
> THE COURT: Overruled. The jurors are to rely on their recollection of the evidence.
>
> [MS. LEVINE]: **It's mean and it's insulting.**

(T. 6487).

"Verbal attacks on the personal integrity of opposing counsel are inconsistent with the prosecutor's role and are unprofessional." *Merck v. State*, 975 So. 2d 1054, 1070 (Fla. 2007). A prosecutor may not accuse counsel of "further victimizing the victim," or criticize her for pursuing her client's acquittal. *See Jenkins v. State*, 563 So. 2d 791 (Fla. 1st DCA 1990); *Chambers v. State*, 924 So. 2d 975, 978 (Fla. 2d DCA 2006) (prosecutor "expressed indignation at the need for the victim … to face questioning by defense counsel"). The only relevance to this argument was to invite the jury to convict Mr. Andres because they were mad at his lawyers, or to discount the defense because defense *counsel* were bad people.[21]

[21] *See also Brown v. State*, 593 So. 2d 1210, 1211–12 (Fla. 2d DCA 1992) (prosecutor stated "that it seemed to him that there was something wrong with the

C. Misstating the Law

The State repeatedly told the jury that an intentional killing is necessarily first degree murder. "Premeditation is defined as more than a mere intent to kill …" *Kaczmar v. State*, 104 So. 3d 990, 1003 (Fla. 2012) (quotation omitted).[22] But the prosecutor argued that mere intent marked the border between first and second degree murder. After reviewing the instruction for second-degree murder, she explained:

> So what this means is, this is the crime where you intend to kill -- **where you intend to do an act, but you don't intend to kill them.**
>
> [MS. GEORGI]: Objection. Misstatement of the law. I would ask for an instruction.
>
> THE COURT: The Court is going to read you the instructions that apply this case.
>
> [MS. LEVINE]: A person of ordinary judgement would know is reasonably certain to kill or do serious bodily injury to another, and is done from ill-will, hatred,

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criminal justice system when a victim of a crime has to be victimized again by having to testify concerning the events of a crime and have his character impugned"); *Fuller v. State*, 540 So. 2d 182, 185 (Fla. 5th DCA 1989) (noting "it [was] improper to personally attack defense counsel for cross-examining the child victim"); *Peterson v. State*, 376 So.2d 1230, 1233 (Fla. 4th DCA 1979) (police "have to deal with people like his lawyer and be attacked and slandered").

[22] *Kaczmar* quotes *Bradley v. State*, 787 So. 2d 732, 738 (Fla. 2001), which in turn quoted *Woods v. State*, 733 So. 2d 980, 985 (Fla. 1999).

> spite or evil intent and is of such a nature that the act itself indicates an indifferent to human life. Of course that's murder. But it's murder that you didn't think about it before you did it.
>
> [MS. GEORGI]: Objection. Misstatement of the law.
>
> THE COURT: Overruled.
>
> [MS. LEVINE]: Okay. **When you think about the intent to kill, that's what gives you the crime of premeditated murder**.
>
> [MS. GEORGI]: Objection. Misstatement of the law.
>
> THE COURT: Overruled.

(T. 6494-95). Later, she explained:

> [MS. LEVINE]: That is why they keep telling you it is a second degree murder. What they keep repeating to you is ill-will, hatred and spite. No, no. **Yeah, that is what premeditation includes. Ill-will, hatred, spite, evil intent, and you intend to do the killing, first degree murder.**

(T. 6559).

This was a misstatement of the law. "Premeditation is the essential element that distinguishes first-degree murder from second-degree murder. Premeditation is defined as more that a mere intent to kill …" *Green v. State*, 715 So. 2d 940, 943–44 (Fla. 1998). The prosector nonetheless told the jury that a where a defendant committed what would otherwise be a second-degree murder but intended to kill, premeditation was established. (T. 6559).

D. Inflammatory

Closing argument "must not be used to inflame the minds and passions of the jurors so that their verdict reflects an emotional response to the crime or the defendant rather than the logical analysis of the evidence in light of the applicable law." *Bertolloti v. State*, 476 So. 2d 130, 134 (Fla. 1985) (Fla. 1985). If "comments in closing argument are intended to and do inject elements of emotion and fear into the jury's deliberations, a prosecutor has ventured far outside the scope of proper argument." *Garron v. State*, 528 So.2d 353, 359 (Fla.1988). Yet the prosecutor argued that Mr. Andres took [Ivette] Fernandez to "the torture chair," and painted an emotional picture of her "beginning to choke on her own blood." (T. 6462-63). The defense objected that both were inflammatory. The judge sustained the first objection but overruled the second.

The prosecutor also used the attack on defense counsel as "mean and insulting" to play upon the jurors' sympathies for Alberto Ruiz, victimized by both the killer and the attorneys:

> [MS. LEVINE]: What I want to talk to you just briefly about, Alberto Ruiz. I think that it may have been some implication that he did it. That is insulting.
>
> [MS. GEORGI]: Objection.
>
> THE COURT: Overruled. The jurors are to rely on their recollection of the evidence.
>
> [MS. LEVINE]: It's mean and it's insulting.

> He is a hard-working man who was doing his job that day and at 12:50 was down on South Chrome Avenue in Homestead. And when he took the witness stand he said to Ms. Georgi, "**my life was ruined that day. All of my hopes and my dreams were taken from me. The love of my life at that time was taken from me.**"
>
> [MS. GEORGI]: Objection, improper argument.
>
> THE COURT: Overruled.
>
> [MS. LEVINE]: That is what he said to you.
>
> [MS. GEORGI]: Inflammatory.

(T. 6487).

"[D]uring closing arguments a prosecuting attorney should not attempt to elicit the jury's sympathy by referring to the victim's family." *Johnson v. State*, 442 So. 2d 185, 188 (Fla. 1983); *see also Grant v. State*, 171 So. 2d 361, 365 (Fla. 1965) ("It is unnecessary to enlarge upon the sound rule of practice that the prosecution … will not make inflammatory reference to the victim's family."). In *Johnson* the prosecutor reminded jurors that the victim's family "will be facing this holiday season one short." In *Grant* the prosecutor pointed out that, "Come Christmas there will not be any mother home with those children …" 171 So. 2d at 365 n.14.[23]

[23] *See also Johns v. State*, 832 So. 2d 959, 961 (Fla. 2d DCA 2002) ("Folks, I'm not going to ask you to convict the defendant because you feel sorry for the victim,

Ms. Levine's comments are most similar to those condemned in *Lewis v. State*, 780 So. 2d 125, 129 (Fla. 3d DCA 2001) (en banc). In that case the prosecutor argued: "[A] man has lost his life because of this caper someone is not going to be a father … Someone is not going to grow old and enjoy … [A]nd enjoy the everyday things that you and I take for granted because of this caper." Later, the *Lewis* prosecutor stated: You can't be sympathetic to the victim, Bertram Williams, or his family, because he is dead." The arguments in this case were if anything more inflammatory. The prosecutor spoke through the mouth of the victim, reminding jurors of his anguish.

E. Cumulative Error

Most of the improper comments were preserved by objection. The Court, moreover, considers "the properly preserved comments … combined with additional acts of prosecutorial overreaching …" *Ruiz v. State*, 743 So. 2d 1, 7 (Fla. 1999); *see Merck v. State*, 975 So. 2d 1054, 1061 (Fla. 2007) ("The Court considers the cumulative effect of objected-to and unobjected-to comments when reviewing whether a defendant received a fair trial"). This Court recently stated that its precedent, "mandates reversal where a prosecutor 'exceed[s] the bounds of proper conduct and professionalism and provide[s] a 'textbook' example of

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that's not what I'm asking you to do. I'm not asking you to acquit the defendant because you feel sorry for his family."

overzealous advocacy.'" *Cardona v. State*, 185 So. 3d 514, 516 (Fla. 2016) (quoting *Gore*, 719 So.2d at 1202). In this case the prosecutor took the textbook and turned it into a "how-to."

VII. PREVENTING ARGUMENT RE: LACK OF MOTIVE

The trial judge prevented defense counsel from arguing lack of motive as a basis for reasonable doubt. (T. 6539). While acknowledging that the State need not prove motive, counsel argued:

> [MS. GEORGI]: Their theory that it was for money doesn't work. So what was it about? I don't know. I don't know. And if you have questions about that, if you have questions about that, that means that you have doubts.
>
> MRS. LEVINE: Objection, Judge. That is not an element of the crime.
>
> THE COURT: Sustained.

(T. 6359).

Of course, lack of motive *is* relevant to guilt or reasonable doubt. In *Swafford v. State*, 125 So. 3d 760, 762 (Fla. 2013), the Court described the impact of newly-discovered DNA evidence on Swafford's murder conviction by noting that "the State built its case on the sexual battery as the motive for the murder." Rejecting harmless error in *Washington v. State*, 737 So. 2d 1208, 1219 (Fla. 1st DCA 1999), the court pointed to "…the apparent lack of any motive for

Washington to harm the infant victim … .” This Court’s decisions, as well as the rules of evidence, permit the State to introduce otherwise inadmissible evidence for the purpose of proving motive. *See, e.g.*, § 90.404(2)(a), Fla. Stat. (2014); *Delhall v. State*, 95 So. 3d 134, 166-67 (Fla. 2012). The prosecutor’s objection was particularly cynical in light of the fact that counsel was in the process of disputing the prosecutor’s own argument that the crime was motivated by a need for money. (T. 6539).

The trial court also prevented the defense from arguing inferences from the evidence. The State persuaded the judge that defense counsel could only argue points for which she had direct evidence. Counsel attempted to argue that Mr. Andres would not have entered the efficiency because he would recognize Ms. Farinas’s car and know she was home:

> [MS. GEORGI]: Now he had been working there all along. He knew her car, that little red Chevy that is in front of the house. He knew that. He had the keys. He had the keys. Now, physically …
>
> [MS. LEVINE]: Objection, Judge. Facts not in evidence. Objection, Judge. There is no evidence about the red Chevy, him knowing her car.
>
> THE COURT: Sustained.

(T. 6509-10). There was, however, evidence that the car was there, and that Mr. Andres had been working there for a period of a month. Ms. Georgi suggested one conclusion that might be drawn.

Explaining how the ATM card could have been stolen days earlier without being noticed, counsel pointed to the fact that the card was used infrequently:

> [MS. GEORGI]: In the account itself you are going to see a few checks, a deposit, but you don't see it used by [Ivette] Farinas as an ATM card. Why? Because she and Alberto had cash and paid in cash. What does that mean? This was probably not a card that she carried around with her because she doesn't use it on a daily basis.
>
> [MS. LEVINE]: Objection, Judge. Absolutely no facts in evidence.
>
> THE COURT: Sustained.

(T. 6512).

And the judge blocked the defense's effort to explain why someone may have stolen Mr. Andres's van:

> [MS. GEORGI]: Now, the inference from that is that someone stole the van filled with all of that.
>
> [MS. LEVINE]: Objection, Judge, facts not in evidence.
>
> THE COURT: Sustained.
>
> [MS. GEORGI]: It is a reasonable inference.
>
> THE COURT: Sustained.

(T. 6535).

The defense had a right to make each of these arguments. "The purpose of closing argument is to present a review of the evidence and suggestions for

drawing reasonable inferences from the evidence." *Fleurimond v. State*, 10 So. 3d 1140, 1148 (Fla. 3d DCA 2009). Counsel may argue against the State's case, "using all reasonable inferences that might be drawn from the evidence." *Rogers v. State*, 844 So. 2d 728, 733 (Fla. 5th DCA 2003). "It [is] the jury's province, and not that of the trial judge, to determine the strength or weakness of defense counsel's theory of defense." *Hendrickson v. State*, 851 So. 2d 808 (Fla. 2d DCA 2003). By limiting the defense's ability to argue on his behalf, the trial court denied Mr. Andres his right to trial, effective representation of counsel, and due process. *See Herring v. New York*, 422 U.S. 853 (1975); *Goodrich v. State*, 854 So. 2d 663, 665 (Fla. 3d DCA 2003); U.S. Const. amends. VI, VIII, XIV; Art. I, §§ 9, 16, 17, Fla. Const.[24] The denial of Mr. Andres' right to jury trial was nearly complete. The jury could consider the prosecution's theory of guilt, but it never had the opportunity to fully evaluate Mr. Andres' defense.

VIII. CUMULATIVE ERROR IN GUILT PHASE

Taken together, the harm of the errors in this case is overwhelming. The errors were calculated to shift the burden of proof to the defense while preventing it from even effectively challenging the State's evidence. Even if the State could

[24] Trial courts have discretion to control closing arguments. The Court reviews a judge's rulings for abuse of that discretion. *Crump v. State*, 622 So. 2d 963, 972 (Fla. 1993).

meet its burden of proving one or more of the errors harmless beyond a reasonable doubt, it cannot meet that high burden when the cumulative effect of the error is taken into account.

IX. HURST

The trial court sentenced Mr. Andres to die on the basis of a nine-to-three recommendation and judicial factfinding, pursuant to section 921.141. Both this Court and the Supreme Court of the United States have now held that section to be unconstitutional. *Hurst v. Florida*, 136 S.Ct. 616 (2016); *Hurst v. State*, 202 So. 3d 40 (Fla. Oct. 14, 2016). In light of the jury's non-unanimous recommendation, the State cannot prove the error to be harmless beyond a reasonable doubt, and the Court must reverse the death sentence in this case.

A. 6th Amendment

In *Hurst*, the Court held that section 921.141 Sixth Amendment to the United States Constitution because it permitted a death sentence without unanimous jury findings. The Court held that that the jury must be unanimous as to four findings. :

> [B]efore the trial judge may consider imposing a sentence of death, the jury in a capital case must unanimously and expressly find all the aggravating factors that were proven beyond a reasonable doubt, unanimously find that the aggravating factors are sufficient to impose death, unanimously find that the

> aggravating factors outweigh the mitigating circumstances, and unanimously recommend a sentence of death. We equally emphasize that by so holding, we do not intend to diminish or impair the jury's right to recommend a sentence of life even if it finds aggravating factors were proven, were sufficient to impose death, and that they outweigh the mitigating circumstances. … Once these critical findings are made unanimously by the jury, each juror may then "exercis[e] reasoned judgment" in his or her vote as to a recommended sentence.

Id. Plainly, the sentence imposed in this case violates *Hurst*.

The Court also held that this error is subject to harmless error review, but emphasized the heavy burden this standard places on the State. *Id.* at 57-58. Where the recommendation is not unanimous, it is impossible for the State to meet its burden, and the Court must reverse for resentencing. *See Dubose v. State*, SC10-2363, 2017 WL 526506 (Fla. Feb. 9, 2017); *Franklin v. State*, 41 Fla. L. Weekly S573, 2016 WL 6901498 (Fla. Nov. 23, 2016).

B. 8th Amendment Requirement of Unanimity

The Eighth Amendment error in this case was also harmful. In *Hurst*, the Court held that the Eighth Amendment independently requires a unanimous jury recommendation. Slip Op. at 36. The Court did not discuss whether a violation of the Eighth Amendment right to a unanimous jury is subject to harmless error review. Even assuming it is, the error cannot be harmless in a case such as this where the final recommendation was in fact non-unanimous. Under the Eighth

Amendment, he nine-three recommendation does not authorize a death sentence. It is nonsensical to say that the error did not contribute to the sentence.

C. Caldwell

In light of this Court's opinion in *Hurst*, the jury instructions, which stressed the purely advisory nature of the jurors' recommendation, violated the Eighth Amendment. "[I]t is constitutionally impermissible to rest a death sentence on a determination made by a sentencer who has been led to believe that the responsibility for determining the appropriateness of the defendant's death rests elsewhere." *Caldwell v. Mississippi*, 472 U.S. 320, 328-29 (1985). Mr. Andres's jury was repeatedly instructed that their recommendation was merely advisory, and that the responsibility for deciding the sentence rested with the judge.

Until now, this Court has rejected *Caldwell* challenges to Florida death sentences. *See Combs v. State*, 525 So. 2d 853 (Fla. 1988); *Grossman v. State*, 525 So. 2d 833 (Fla. 1988); *Smith v. State*, 515 So. 2d 182 (Fla. 1987); *Aldridge v. State*, 503 So .2d 1257, 1259 (Fla. 1987); *Pope v. Wainwright*, 496 So. 2d 798, 804 (Fla. 1986); *Darden v. State*, 475 So. 2d 217, 221 (Fla. 1985). In each case, the Court distinguished *Caldwell*, holding that the jury was not misled because their verdict was in fact purely advisory. Combs relied on two federal cases that had applied *Caldwell* to Florida: *Mann v. Dugger*, 817 F.2d 1471 (11th Cir. 1987), and

Adams v. Wainwright, 804 F.2d 1526 (11th Cir. 1986).[25] *Mann* held that *Caldwell* applied to Florida because this Court had held in *Tedder v. State*, 322 So. 2d 908, 910 (Fla. 1975) that a judge must accept the jury's recommendation unless, "the facts are 'so clear and convincing that virtually no reasonable person could differ.'" *See Mann*, 817 F.2d at 1482; *Adams*, 804 F.2d 1529-30.

Rejecting *Mann* and *Adams*, the Court anticipated what would happen if the *Caldwell* required that jurors be aware of the significance of its recommendation under *Tedder*:

> If we were to apply *Caldwell* strictly in accordance with the *Mann* and *Adams* decisions, we would necessarily have to find that our standard jury instructions, as they have existed since 1976, violate the dictates of *Caldwell*. This would result in a resentencing proceeding for virtually every individual sentenced to death in this state since 1976. We find no justification exists for such a holding.

Combs at 858. In *Hurst* this Court determined that the jury's recommendation is much more than what *Tedder* required – a judge is bound by the jury's life

[25] The circuit court subsequently vacated the panel decision in *Mann* and granted rehearing en banc. 828 F. 2d 1498 (1987). Sitting en banc, the circuit court again found a *Caldwell* violation in reliance on *Tedder v. State*, 322 So. 2d 908 (Fla. 1975). The court subsequently receded from *Mann*, relying on reasoning similar to that employed by this Court in *Combs*. *See Davis v. Singletary*, 119 F.3d 1471 (11th Cir. 1997). In *Adams*, the circuit court granted rehearing and revised its analysis of the procedural bar to Adams' claim. *Adams v. Dugger*, 816 F.2d 1493 (11th Cir. 1987). The Supreme Court subsequently reversed, addressing only the procedural bar issue. 109 S.Ct. 1211 (1989).

recommendation. As *Combs* recognized, a defendant such as Mr. Andres it entitled to a new sentencing hearing.

X. PRESENT SENSE IMPRESSION

The trial court allowed a police officer to testify to his opinion that Mr. Andres was guilty of the prior violent felony. Despite initially sustaining an objection, the judge permitted Det. Roberson to testify that his "present sense impression" was that Mr. Andres was guilty:

> [MS. LEVINE]: So you didn't expect to go through an interview that night?
>
> [DET. ROBERSON]: No.
>
> [MS. LEVINE]: Okay. So you made arrangements for him to come the next day?
>
> [DET. ROBERSON]: Yes .
>
> [MS. LEVINE]: And that night you were with Detective Preston?
>
> [MS. LEVINE]: And you were with Detective Moran?
>
> [DET. ROBERSON]: Yes.
>
> [MS. LEVINE]: And when you got back in the car, you said that guy did it?
>
> [DET. ROBERSON]: I believed he was involved.
>
> MS. GEORGI: Objection. Objection, Your Honor

> THE COURT: What is the legal objection?
>
> MS. GEORGI: Hearsay, out of court statement. It's improper opinion. Speculation.
>
> THE COURT: Sustained.
>
> MS. LEVINE: The presence sense impression that you had, sir, was that he did it, right?
>
> MS. GEORGI: Objection.
>
> THE COURT: Overruled.
>
> THE WITNESS: Yes, it was.

(R. 7155-56).

The detective's out-of-court statement that Mr. Andres "did it" was inadmissible as both an improper opinion and hearsay. A witnesses' opinion as to the guilt of a defendant is inadmissible. *See, e.g.*, *Jackson v. State*, 107 So. 3d 328, 339-40 (Fla. 2012) (citing cases). This is particularly so when the witness is a police officer. *Id.* In *Sosa-Valdez v. State*, 785 So. 2d 633 (Fla. 3d DCA 2001), Sosa-Valdez and his codefendant both testified that the alleged victim had in fact orchestrated the entire crime in order to accomplish a theft. Over a defense hearsay objection, the State called the lead detective to testify that, based on his investigation, the victim had not been involved in setting up the theft. *Id.* at 634.

The district court refersed because the State had "elicited impermissible opinion testimony based on hearsay." *Id.* at 633.[26]

The State persuaded the judge that the detective's opinion was not hearsay because it was his "presen[t] sense impression." As argued above, the "present sense impression" exception does not appear among the exceptions to the hearsay rule, but it corresponds to the "spontaneous statement" exception That exception makes admissible a spontaneous statement describing or explaining an event or condition made while the declarant was perceiving the event or condition. § 90.803(1), Fla. Stat. (2014). Detective Roberson's opinion of Mr. Andres' guilt was necessarily the product of reflection since it was a conclusion he had made. The statement did not describe an "event" or "condition". It merely related a conclusion. *See Deparvine v. State*, 995 So. 2d 351, 367-71 (Fla. 2008). [27]

The detective's opinion would not be admissible even if it fell into an exception to the hearsay rule. The prosecutor and judge seem to have believed that once a statement falls within a hearsay exception it is uncondidtionally admissible.

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[26] "The standard of review of a trial court's decision to admit evidence is abuse of discretion. *Williams v. State*, 967 So.2d 735, 747–48 (Fla. 2007); *Johnston v. State*, 863 So. 2d 271, 278 (Fla. 2003). That discretion, however, is guided by the rules of evidence. *Id*." *Jackson v. State*, 107 So. 3d 328, 339 (Fla. 2012).

[27] Whether a statement falls within the definition of hearsay is a pure question of law reviewed de novo. *Leonard v. State*, 192 So. 3d 1258, 1259 (Fla. 2d DCA 2016).

Of course, section 90.803 only shields certain statements from exclusion on hearsay grounds. It does not serve to launder the otherwise inadmissible content of a statement from the rest of the rules of evidence.

XI. DOUBLING

The trial court found and weighed as aggravating factors both that "The Capital Felony Was Commited During the Course of a Burglary"[28] and "The Cap[i]tal Felony Was Committed For Pecuniary Gain."[29] (R. 3113, 3115). The trial court thus improperly "doubled" the effect of the aggravation. *See Provence v. State*, 337 So. 2d 783, 786 (Fla. 1976). The judge further erred when it refused to instruct the jury on the merging of these aggravating factors. *See, e.g.*, *Castro v. State*, 597 So. 2d 259 (Fla. 1992).

"Improper doubling occurs when aggravating factors refer to the same aspect of the crime." *Patrick v. State*, 104 So. 3d 1046, 1066 (Fla. 2012) (quoting *Green v. State*, 641 So. 2d 391, 395 (Fla. 1994)). This Court has made it clear that it is error to double the pecuniary gain and felony-murder aggravators where the underlying felony is robbery **or burglary**:

> [W]e also agree that the trial court improperly doubled the aggravating circumstance that the murders were committed in the

[28] § 921.141(5)(d), Fla. Stat. (2005).

[29] § 921.141(5)(f), Fla. Stat. (2005).

> commission of a robbery or burglary with their being committed for pecuniary gain. Because both aggravating factors arose out of the same episode, these aggravating circumstances must be considered as a single aggravating factor.

Green v. State, 583 So. 2d 647, 652 (Fla. 1991). Where the prosecution alleges both aggravating circumstances, a court must instruct the jury regarding improper doubling. *Monlyn v. State*, 705 So. 2d 1, 6 (Fla. Fla. 1997); *Castro* at 261.

In *Barnhill v. State*, 834 So. 2d 836, 851 (Fla. 2002), the defendant entered the victim's home intending to kill him and steal his car. *Id.* at 840-41. Barnhill strangled the victim and took his money, wallet, and keys. *Id.* This Court held that it was error not to merge the "in the course of a felony" and pecuniary gain aggravators:

> But where two aggravating factors—in this situation, that the capital felony was committed in the course of a burglary and that it was committed for pecuniary gain—are based on the same aspect of the criminal episode, they should be considered a single aggravating circumstance.

Id. at 851. In *Mills v. State*, 476 So. 2d 172 (Fla. 1985), Mills entered a home "intending to find something to steal" and killed the homeowner with a shotgun. *Id.* at 174. The Court explained:

> The aggravating factors that the capital felony was committed in the course of a burglary and that it was committed for pecuniary gain are in this situation both based on the same aspect of the criminal episode and should therefore have been considered as a single aggravating circumstance.

Id. at 178. *See also Quince v. State*, 414 So. 2d 185, 188 (Fla. 1982).[30]

The trial judge accepted the State's argument that *Green*, *Barnhill*, *Mills*, and *Quince* did not apply because none of those cases involved a charge of burglary *with an assault*, but Mr. Andres's case did. These opinions do not discuss whether the burglary was charged as having included an "assault therein," though *Mills* was charged with an committing an aggravated battery within the dwelling. *See* 476 So. 2d at 174.[31] Though it should not be necessary to explain this, whenever the murder-in-the-course-of-a-burglary arises, there has been an assault or battery – in the form of a murder. Of course, courts have routinely merged burglary-murder and pecuniary gain where the burglary was charged as burglary with assault. *See, e.g.*, *Gosciminski v. State*, 132 So. 3d 678, 716 (Fla. 2013); *Perez v. State*, 919 So. 2d 347 (Fla. 2005); *Freeman v. State*; 563 So. 2d 73 (Fla. 1990).

XII. AVOID ARREST

The trial court found and weighed the aggravating circumstance that the murder was for the purpose of avoiding or preventing a lawful arrest.[32] (R. 3114-

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[30] "But doubling has been disallowed when the underlying felony is robbery or burglary and is considered in addition to the aggravating factor of 'committed for pecuniary gain.'"

[31] This Court reversed the aggravated battery count because it was based on the same act – shooting the victim – as the murder. *Id.* at 177.

[32] § 921.141(5)(e), Fla. Stat. (2005).

15). To establish the circumstance, the State must prove beyond a reasonable doubt that "the sole or dominant motive for the murder was witness elimination." *Wilcox v. State*, 143 So. 3d 359, 384 (Fla. 2014). "[P]roof of the intent to avoid arrest or detection must be very strong, and mere speculation on behalf of the State that witness elimination was the dominant motive is insufficient to support the aggravating circumstance." *Id.* "This heightened standard of proof requires more than a simple inference that the defendant might have been motivated by the concern to eliminate a witness. This aggravating circumstance is not satisfied simply because a victim might have been able to identify the defendant." *Mullens v. State*, 197 So. 3d 16, 28 (Fla. 2016).

The Court reviews a judge's finding of an aggravating circumstance to determine (1) whether the trial court applied the correct law and, if so, (2) whether competent, substantial evidence supports the judge's findings. *See Calhoun v. State*, 138 So. 3d 350, 361 (Fla. 2013); *Connor v. State*, 803 So. 2d 598, 610 (Fla. 2001). It is not this Court's role to reweigh the evidence. *See Willacy v. State*, 696 So. 2d 689, 695 (Fla. 2002). In this case the Court need go no further than step one. The trial court failed to apply the correct rule of law.

This Court need look no further than step one. The trial court failed to apply the correct rule of law. Judge Tunis's reasoning concerning this aggravator, in its entirety, was as follows:

> There was testimony in the guilt phase that the owner of the duplex knew that the Defendant was working at the duplex at the time of the murder. Moreover, there was also testimony that the Defendant had previously done work on the side of the duplex, in the efficiency where Ivette and her boyfriend lived. When the Defendant previously worked in Ivette's efficiency, the work created construction dust. Once Ivette developed allergies or difficulties breathing, associated to the work being done within her efficiency, she and her boyfriend moved out of the efficiency for ten days to two weeks. They moved back in, when the construction and work in their efficiency was fully completed.
>
> After murdering Ivette Farinas, the Defendant used her debit card to buy gas. Gas was the accelerant used in the arson of Ms. Farinas' residence. The arson was clearly an attempt to rid the residence of any finger prints or DNA evidence he left behind. The medical examiner testified that Ivette was dead before the fire began, as the toxicology screening showed no carbon monoxide and Dr. Lew did not see any evidence of soot in Ivette's lungs. Therefore, the circumstances create an extremely strong inference that **the sole purpose of the arson was to destroy evidence of the murder**. This is especially true considering the prior murder by the defendant of Linda Azcaretta, in which he was unsuccessful in removing and destroying all the evidence.

(R. 3114-15).

The trial court did not even ask whether witness-elimination was the sole or dominant motive for the crime. The judge did not even ask what the purpose of the *murder* was. Instead, she determined that the "sole purpose of the *arson* was to destroy evidence of the murder." The court applied the wrong rule of law, and it erred in finding the avoid-arrest aggravating circumstance.

CONCLUSION

For the foregoing reasons, the convictions and sentence of death must be vacated, and this cause must be remanded for trial.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the foregoing document was served to counsel for the appellee, Office of the Attorney General, Capital Division, Melissa Jean Roca, Assistant Attorney General, Melissa.roca@myfloridalegal.com and capapp@myfloridalegal.com, One SE Third Avenue, Suite 900, Miami, FL 33131 February 27, 2017.

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Undersigned counsel certifies that the type used in this brief is 14 point proportionately spaced Times New Roman.

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