IN THE SUPREME COURT OF FLORIDA

CASE NO. SC15-1095

RAFAEL ANDRES,

Appellant,

-vs-

STATE OF FLORIDA,

Appellee.

REPLY 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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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.

ARGUMENT

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

Based on his deposition, the defense believed that Mr. Ruiz would admit that on January 24, 2005, he drove a route that took him near his efficiency:

> 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. 4). At trial, he confirmed that he had been referring to January 24, 2005. (T. 4089). But he changed his story, testifying he had taken a different route. (T. 4088). While Mr. Ruiz stated he "may have confused" the route, the reason for the changed testimony is irrelevant. (T. 4089). Whatever the reason, Ruiz had made a material change in his testimony which made his story much worse for the defense.

The Appellee relies on *Bush v. State*, 461 So. 2d 936 (Fla. 1984), in which the Court held that "changed testimony does not rise to the level of a discovery violation." Answer Brief at 18-20. The State acknowledges that the Court clarified *Bush* in *State v. Evans*, 770 So. 2d 1174, 1177–78 (Fla. 2000). In *Evans* the Court stated: [O]ur statements in *Bush* do not control in situations where the State provides the defendant with a witness's "statement" … and thereafter fails to disclose to the defendant that the witness intends to change that statement" – at

least under the circumstances presented by *Evans*, where the witness went from a witness who knew nothing to an eyewitness to the crime. *Id.* at 1182. The State maintains that *Bush* nevertheless controls because *Evans*, "did not recede from the holding which defeats which defeats Appellant's claim."

This Court has since made it clear that there is a discovery violation where the prosecution fails to disclose a material change in a witnesses deposition or other recorded statement. *See Scipio v. State*, 928 So. 2d 1138, 1145 (Fla. 2006); *Smith v. State*, 7 So. 3d 473, 506 (Fla. 2009) (quoting *Scipio*); *compare State v. McFadden*, 50 So. 3d 1131, 1133-34 (Fla. 2010).

"[W]here the State commits a discovery violation, the standard for deeming the violation harmless is extraordinarily high." *Cox v. State*, 819 So. 2d 705, 712 (Fla. 2002). Here, in the absence of a full hearing, the record is insufficient to establish beyond a reasonable doubt that there was no procedural prejudice. The State's only effort in this direction is to claim that counsel "essentially conceded" that she had already impeached Mr. Ruiz, and that she walked him through the stops on his route. Answer Brief at 22-23. Counsel never wavered in her assertion of a discovery violation, and the trial court never gave her an opportunity to explain how the defense was procedurally prejudiced. But it is apparent that the defense had planned its case on the basis that they could place Mr. Ruiz near the efficiency at the time of the murder. Had the prosecution disclosed the changed

testimony, the defense might have pursued a different course. It certainly would have investigated other ways in which to shake Ruiz's alibi.

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

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

Detective Chavary testified that he spoke to Mr. Ruiz and after this conversation he no longer considered a Ruiz a subject. (T. 4796). This communicated to the jury that during that out of court conversation Mr. Ruiz made statements that exonerated him. Detective Gallagher testified that on the basis of out of court statements made to him by Chavary, he did not consider Mr. Ruiz a suspect, raising the inference that Chavary had told Gallagher about evidence that eliminated Mr. Ruiz. Gallagher testified that after he "spoke with the Country Milk people" he did not feel the need to retrace Mr. Ruiz's route, implying that someone at Country Milk had made statements confirming Ruiz's alibi. In each instance the testimony presented classic inferential hearsay. *See, e.g., Norton*, 709 So. 2d 87, 95 (Fla. 1997) (The detective's conclusion is predicated on information he secured

from someone else, and, therefore, constitutes hearsay to which no exception was offered."); *Trotman v. State*, 652 So. 2d 506 (Fla. 3d DCA 1995).

The State argues that the inferential hearsay rule does not apply because the implied statements exonerated Mr. Ruiz rather than suggesting there was hearsay evidence of Mr. Andres's guilt. Answer Brief at 25-28. Mr. Andres's defense was that Mr. Ruiz was the guilty party. Hearsay evidence that exculpated Ruiz negated that defense and had the effect of inculpating Mr. Andres. *Compare Sosa-Valdez v. State*, 785 So. 2d 633 (Fla. 3d DCA 2001).

To the extent the State wanted to prove that the investigation was thorough or Mr. Ruiz was innocent, it was required to do so with admissible evidence rather than inferential hearsay and second-hand opinions.

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

The trial court sustained the defense objection to Ms. Vaughn's opinion as "speculation." (T. 5672). The judge reversed herself and admitted it after the prosecution argued that the opinion was a "present sense impression." (T. 5675-77). The defense argued further that the opinion was irrelevant and was not admissible as a "present sense impression." (T. 5676-77). The issue is preserved.

Ms. Vaugh's speculation had no relevance and did not shed light on her ability to perceive what she claimed she saw.

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

Detective Chavary testified that "he had information" that Baccalau worked at the Perez house with Mr. Andres. The judge overruled the defense hearsay objection. The defense subsequently renewed this objection. (T. 5158-59). The only purpose of this testimony was to communicate "information" someone told Chavary outside the courtroom.

The Appellee argues that the prosecution did not use the the death certificate to prove Baccalau's occupation. Yet, the prosecutor *told* the trial court that it intended to do just this: "So, what we will do now, so it's very clear is, we will ask the Court to admit the death certificate of Juan Baccalau, what it says, as part of his occupation, landscaper." When she moved the certificate into evidence, the prosecutor announced, "Under occupation, landscaper, kind of business, landscaping." (T. 5160. The defense renewed its objection.

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

A. Jose Perez

The prosecution used Jose Perez's testimony to create the impression that Mr. Andres had mysteriously failed to return to work after the fire. It succeeded in hiding the fact that Mr. Perez told Mr. Andres not to come back. The Appellee maintains that this information fell outside the scope of cross-examination because the prosecution did not discuss the content of that phone call, and *the State only asked if Perez ever "saw" him again*. The State does not explain how this parsimonious approach to cross-examinnation can be squared with this Court's repeated statement that, "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 v. State, 361 So. 2d 148, 151 (Fla. 1978) (quoting *Coco v. State*, 62 So. 2d 892, 895 (Fla. 1953))).

The State now argues that the statement would have been "inadmissible self-serving hearsay." The statement was not offered to prove that Mr. Perez did not want Mr. Andres to return. It was offered to show the statement's effect on Mr. Andres. As such, it was not hearsay. *See, e.g., Penalver v. State*, 926 So.2d 1118, 1132 (Fla. 2006); *North v. State*, __ So. 3d __, 2017 WL 2484944 (Fla. 2d DCA

June 9, 2017) (collecting cases). As to harm, the prosecution specifically urged the jury to rely on this "disappearance" as evidence of guilt. (T. 6457).

B. Lisbeth Farinas

The defense should have been allowed to cross-examine Lisbeth Farinas about the nature of her sister's relationship with Alberto Ruiz. The Appellee misunderstands Mr. Andres's argument on this point. The State procedes from the premise that the defense intended to impeach Lisbeth with Ivette Farinas's statements to Maria Locayo. The defense never suggested it could impeach Lisbeth Farinas with these or any other statements. The judge refused to allow the cross-examination precisely because the defense could not impeach Ms. Farinas. The Appellee has provided no authority for the proposition that cross-examination is limited to subjects on which the defense is prepared to provide extrinsic impeaching evidence.

C. Alberto Ruiz

Mr. Ruiz denied that Mr. Andres had previously been in his apartment. (T. 4073). The defense attempted to ask him if he previously stated that Mr. Andres had done work in the efficiency. The State maintains that the probative value of the answer to this question "clearly outweighed by the danger of misleading or confusing the jury." Answer Brief at 44. It does not explain how this would have

misled the jury. Nor does it explain why it would be necessary to "qualify, explain, or limit" the testimony by introducing Mr. Ruiz's speculation that Mr. Andres committed another crime. Absent such an explanation, there can be no defense for the judge's ruling that asking Mr. Ruiz about his prior statement would, "open the door."

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

Detectives used a cell-site simulator to track Mr. Andres' real time cell site location. Under *Tracey v. State*, 152 So. 3d 504 (Fla. 2014), this tracking must be authorized by a warrant. The detectives had no such warrant. The State nonetheless argues that *Tracey* is distinguishable and that the detectives acted in good faith.

The State says that *Tracey* is distinguishable because in *Tracey* there was no probable cause, while here there was probable cause to seize and search Mr. Andres's body. Answer Brief at 48-49. But *Tracey* does not require probable cause alone, it requires a "warrant based on probable cause authoriz[ing] the use of … real time cell site location information to track him." The body warrant did not authorize cell-site tracking. This case may differ from *Tracey* on the facts, but it falls squarely within *Tracey*'s rule.

The Appellee maintains that the detectives acted in good faith because, while they lacked a warrant to track Mr. Andres, they did have warrants allowing them to search his home, van, and body. The Court disposed of this argument in *Tracey*: Where "there was no warrant, court order, or binding appellate precedent authorizing real time cell site location tracking upon which the officers could have reasonably relied, the 'good faith' exception to the exclusionary rule for objectively reasonable law enforcement activity' … is not applicable." *Id.* at 526 (citation omitted).

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

The State makes five arguments in defense of the prosecutor's closing argument in the guise of hypotheticals. Answer Brief at 51-52. (A) The State qualified Dr. Lew as a medical examiner. The endorsement of speculative scenarios "recreating" the crime was not within her expertise. The Appellee claims that defense did not object on this basis. At page 6180 of the transcript, the defense stated:

> Your Honor, for the record, **I am 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 judge overruled the objection. On page 6185, the defense again argued "There is insufficient foundation.

(B) The State argues that "Appellant's claim that the hypothetical questions were unduly prejudicial is not properly preserved." Again, on page 6185 the defense stated:

> 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 licit 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.**

(C) The State argues that the doctor was permitted to give an opinion as to whether the State's theory was consistent with "[I]vette's injuries and the evidence." As argued in the Initial Brief and at trial, the hypotheticals relied on facts not in evidence. (D) The Appellee maintains that there was no reenactment "as the hypothetical questions were not used in conjunction with Dr. Lew's earlier use of the dummy." During the first hypothetical, the prosecutor said:

> And then that person standing in order to try and defend themselves and that person is stabbed three times, and 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.

(T. 6178-79). (E) Dr. Lew, with prompting from the prosecutor, only testified that Ms. Farinas could "possibly" been alive for thirty minutes. (T. 6159).

VI. PROSECUTORIAL MISCONDUCT IN CLOSING ARGUMENT

A. Burden Shifting/Scales of Justice

The State refuses to acknowledge, much less defend, the bulk of the prosecutor's burden-shifting arguments. It does not address the argument that that there was, "No evidence that this defendant is not guilty … no evidence at all." (T. 6561), or the prosecution's theme that the defense had failed to add anything to its side of the scale other than "speculation and guessing," or it's call: "**Where is the evidence? Where is the evidence? Where is the evidence before you?**" It does not come to grips with the Scales of Justice exhibit.

Instead, the Appellee points to the first objection the defense made, which was sustained, arguing (falsely) that the issue was never preserved. Answer Brief at 64-65. The State notes that the judge sustained an objection to the comment: "What is on the not guilty side? Nothing." Based on this, the State claims that the entire issue is unpreserved: "Here, the court granted the defense request for a jury instruction, and no ruling was sought on any 'reserved' motion. Thus there is no ruling to review and this claim should be rejected as procedurally barred."

The State's argument is predicated on a falsehood. In the first instance, the issue was preserved by the overruled defense objections that followed. The defense, moreover, *did* make a motion for mistrial. Twice. Immediately upon the conclusion of the prosecutor's argument, defense counsel moved for a mistrial

based upon the improper arguments, and specifically pointed to the use of the "Scale's of Justice" exhibit. (T. 6565-66). The judge indicated she would address the matter after the jury was instructed. (T. 6566). When the jury retired, the defense raised the issue again:

> Your Honor, I would ask the Court to mark this as a court exhibit. I am holding the state's demonstrative exhibit which has a scale on it, okay, and which they used to make an improper argument pointing out that there was no evidence of innocence in this case. **The Court heard my objections and sustained the first one and then overruled them.** I need this in the record for appeal.

(T. 6620). After a dispute about making the "Scales of Justice" exhibit part of the record, the defense renewed its motion for mistrial. (T. 6631). The Court denied the motion. (T. 6637).

The State defends the "What is on the not guilty side? Nothing …" remark as an exercise of the prosecutor's "right to state his [or her] contention as to the conclusions that the jury should draw from the evidence." Answer Brief at 63 (quoting *Ruiz v. State*, 743 So. 2d 1, 4 (Fla. 1999)). But the Appellee does not explain why the absence of evidence weighing "on the not guilty side" has anything to do with the "conclusions the jury should draw from the evidence.

The State suggests that the prosecutor's arguments were "invited" and proper under *Barwick v. State*, 660 So. 2d 685 (Fla. 1995) and *Dufour v. State*, 495 So. 2d 154, 160 (Fla. 1986). Answer Brief at 63-64. Neither case is applicable. Dufour's lawyer argued that the State's witness, a jailhouse informant, had learned

the details of the case by reading the "legal papers" the defendant had in his cell. The Court found that it was proper for the prosecutor to respond that there was no evidence the papers were even in the cell. *See* 495 So. 2d at 160-61. In *Barwick* the defense suggested that something improper had happened when Barwick made his taped confession, and the prosecutor was permitted to point out that the evidence did not support this claim. *See* 660 So. 2d at 694. This Court has warned that *Dufour* and *Barwick* should be narrowly construed. *See Rodriguez v. State*, 753 So. 2d 29, 39 (Fla. 2000). In *Rodriguez* the Court rejected the statements, "we still haven't heard in any of the arguments, in any of the discussions, what the theory is of who that second person could have been," and "there was nothing in the direct or cross examination of any witness who testified that pointed to any other person being involved other than [one witness and the defendant] ... [t]here were no two sides." The raw contention that the defense had presented no evidence he was not guilty is not a fair response to any argument in this or any other case.

The State's burden-shifting argument about the van was likewise uninvited. The defense argued that a reasonable inference from the evidence was that Mr. Andres's van may have been stolen. (T. 6534-36). The State's response was to argue: "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 lookout, from the police. …

There is no evidence to the contrary." (T. 6559-60). This was no mere suggestion that the evidence did not support the defense argument. It was a naked demand that Mr. Andres produce evidence.

The Answer Brief's "alibi" argument misses the point. Mr. Andres challenges the State's argument: "Innocent people don't need alibis. And where is the evidence? Where is evidence? Where is the evidence before you?" The prosecutor *chanted* for the defense to produce evidence. The Appellant does not intend to suggest that the prosecutor was saying the defense needed to prove an alibi. Ms. Levine was referring to to Mr. Ruiz not needing an alibi. (T. 6559).[1]

B. Denigrating the Defense

Over repeated defense objection, the prosecutor accused the defense of attempting to distract or mislead the jurors no less than seven times. (T. 6473-74, 6551, 6481-82). The Answer Brief maintains that prosecution merely, "questioned the defense's case theory when she concurrently pointed out to the jury evidence that proved otherwise." Answer Brief at 70. What the prosecutor actually did was

[1] The State's contention that Mr. Andres put an alibi in issue simply by claiming he was not present whent the crime was committed misapprehends the meaning of "alibi." "An 'alibi,' as contemplated by rule 3.200, necessarily means that the defendant will attempt affirmatively to establish not only that he was not at the scene of the crime involved but that, in fact, at the time thereof he was elsewhere, at a particular place sufficiently distant from the scene of the crime, so that he could not possibly have been present at its perpetration." *Robinson v. State*, 57 So. 3d 278, 282 (Fla. 4th DCA 2011) (quoting *State ex rel. Mitchell v. Walker*, 294 So.2d 124, 127 (Fla. 2d DCA 1974).

warn that the defense was trying to "distract" jurors, to "make [them] not look at the evidence," to "fool" them, and "confuse" them. The State maintains that the prosecutor's "phrasing" was similar to that employed in *Valentine v. State*, 98 So. 3d 44, 55-56 (Fla. 2012). Answer Brief at 70. In *Valentine*, the State claims, the Court approved an argument that "implied [the defense] statements were a distraction from the evidence actually presented). Answer Brief at 70. There was no distraction argument in *Valentine*, implied or otherwise. Nor did Valentine's prosecutor accuse the defense attempting to confuse or fool the jury.

The State argues that *Cardona v. State*, 185 So. 3d 514 (Fla. 2016), *D'Ambrosio v. State*, 736 So. 2d 44 (Fla. 5th DCA 1999), *Lewis v. State*, 780 So. 2d 125 (Fla. 3d DCA 2001) (en banc), *Fullmer v. State*, 790 So. 2d 480, 481 (Fla. 5th DCA 2001) and *Carter v. State*, 356 So. 2d 67 (Fla. 1st DCA 1978) are distinguishable because in each of those cases the prosecutor made other ,significantly more prejudicial statements …" These cases all hold that comments like those at issue here are improper. The fact that there were other errors in those cases does nothing to contradict this.

The prosecutor improperly mocked the defense as "speculation," "guessing," a "fairytale," and "coincidences." The Attorney General now tells this court that *Franqui v. State*, 59 So. 3d 82 (Fla. 2011), *Anderson v. State*, 863 So. 2d 169 (Fla. 2003), and *Henderson v. State*, 727 So. 2d 84 (Fla. 2d DCA 1999)[2] "**all find[] that**

a prosecutor is permitted to tell the jury that the defense's case theory is based on fantasy if the prosecutor has sufficient evidence to the contrary, and the statement does not taint the jury's decision making." Answer Brief at 75. This is false. In each case the court held that the comment was improper.

Franqui claimed ineffective assistance of counsel because his attorney did not object when the prosecutor argued: "That's the world of Dr. Toomer [Franqui's mental mitigation expert], folks. Through the looking glass at Disney World. Make believe. Use your common sense." *See* 59 So. 3d at 98. This Court found the statement to be improper, and "calling for objection[] by defense counsel." *Id.* It affirmed because Franqui could not establish prejudice under *Strickland v. Washington*, 466 U.S. 668 (1984).

In *Anderson*, the prosecutor referred to "the National Enquire [sic] Defense" and invited jurors to come see him after trial if they had questions. The Court found the comment improper, but held that these two comments alone did not warrant reversal. *See* 863 So. 2d at 187.

In *Henderson*, the made a series of arguments, including: "So what does [Henderson] do? Improvise. Modify. Comes up here with this fairytale." The district court held that this comment was improper. *See* 727 So. 2d 285-86. The defense failed to object, and the court did not find fundamental error.

[2] The Second District receded from *Henderson* on other grounds in *Washington v. State*, 752 So. 2d 16 (Fla. 2d DCA 2000) (en banc).

The Answer Brief argues that the "fairytale" comment was permissible because it was invited. It points to the defense argument: "[Appellant] did not kill Yvette [sic] Farinas … There is indeed some circumstantial evidence to raise a suspicion, but that's where it stops." Answer Brief at 74. If the argument that the evidence does not raise more than a suspicion of guilt invites ridicule as a "fairytale," it is difficult to imagine what would not.

The State further argues that the Court should ignore decisions finding improper argument where the prosecutor derides the defense as speculation, guessing, or fantasy, because those cases involve other improper arguments as well:

> Appellant's reliance on *Carballo v. State*, 762 So. 2d 542, 543-45, 548 (Fla. 5th DCA 2000); *D'Ambrosio* [*v. State*], 736 So. 2d at 47-48; and *Izquierdo v. State*, 724 So. 2d 124, 124-25 (Fla. 3d DCA 1998), is misplaced because those district courts did not analyze just the "fantasy" comment, but were significantly more focused with the other extremely prejudicial comments that the State made in addition to the "fantasy" remark. Thus, Appellant's understanding of these cases is imprecise as the fantasy statement was not considered an abuse of discretion on its own.

Answer Brief at 75. Different cases contain different combinations of error. The fact remains that in each cases the court found an argument similar to the ones used here to be improper. *See Caraballo* at 543 ("[Y]ou don't look to [defense counsel's] imagination or speculation in determining your verdict"); *D'Ambrosio* at 47 ("All of those unsupported innuendos, unconnected inferences and baseless

speculation that [defense counsel] is praying that you will engage in."); *Izquierdo* at 125 ("pathetic fantasy").

With regard to the prosecution's repeated sarcastic remarks, the State points to *Davis v. State*, 136 So. 3d 1169, 1203-04 (Fla. 2014) and *Henderson*. Answer Brief at 76. Both cases found the comments to be improper, but unpreserved and not fundamental error. In this case the defense objected, and the impact of the errors must moreover be considered in light of all the other prosecutorial misconduct in closing argument.

The Answer Brief does not even bother to defend the prosecutor's personal attack on defense counsel, in which she said: "**I think it may have been some implication that he did it. That is insulting … It's mean and insulting.**" Presumably the State concedes the impropriety of these remarks.

C. Misstating the Law

As established in the Initial Brief, the prosecutor misstated the law, claiming that any intentional killing is first-degree premeditated murder. The Appellee maintains that this was not error, because, "the prosecutor was equating 'intent to kill' with premeditation in a colloquial rather than legal context." Answer Brief at 77. A capital murder trial is a decidedly legal context, and a "colloquial" definition is a misstatement of the law. The harm of this error must be evaluated in combination with numerous other improper arguments.

D. Inflammatory

The Appellee maintains that the arguments concerning "the torture chair," Ms. Farinas "beginning to choke on her own blood," the way in which the defense was "insulting" to Mr. Ruiz, and the fact that Mr. Ruiz's "life was ruined," are proper comments and not inflammatory. It first argues that the defense did not preserve the "torture chair" argument because counsel did not move for a mistrial. Answer Brief at 79. But counsel did move for a mistrial immediately after the prosecution concluded its closing argument. (T. 6565-66). After the jury was charged, the defense renewed the motion, and the judge denied it. (T. 6631-37). The State argues that the argument was appropriate "taken in context" because the prosecution maintained that Mr. Andres forced Ms. Farinas to reveal her PIN code. But the objection is not to the theory but to the inflammatory way in which it was delivered in invoking the image of a "torture chair."

The State asserts that it was proper to invoke the image of Ms. Farina "beginning to choke on her own blood," because Dr. Lew testified that blood leaking into her lungs would make it difficult to breathe. Answer Brief at 80. That evidence certainly existed, The error was in allowing the prosecutor to take that medical testimony and turn it into an inflammatory tableau relevant to none of the issues in the case.

The prosecutor told the jury that by suggesting Mr. Ruiz might be guilty the defense was "insulting … it's mean and insulting." (T. 6487). The Appellee says that the Mr. Andres, "opened the door during his closing for the State to comment on rebuttal that Ruiz did not commit the crime," and that the comment "was made to rebut the defense's illogical implication of what the evidence showed …" Answer Brief at 81. The prosecution was free to argue that Mr. Ruiz was innocent. Accusing the defense of being "mean" and "insulting," however, rebutted nothing and served only arouse the jury's sympathy for Mr. Ruiz and it's anger at defense counsel.

The State takes the position was not "reversible error for the prosecutor to argue:

> [Alberto Ruiz] 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.**"

(T. 6487). Appellee offers one case that found no error in referring to the loss suffered by the victim's family, *Johnson v. Wainwright*, 778 F.2d 623, 630 (11th Cir. 1985). That decision concerns a *penalty phase* argument. The remainder of the State's cases echo those cited in the Initial Brief, agreeing that arguments like the one made here are improper. *See See Valle v. State*, 474 So. 2d 796, 805 (Fla.

1985; *Johnson v. State*, 442 So. 2d 185, 188 (Fla. 1983); *Grant v. State*, 171 So. 2d 361, 365-66 (Fla. 1965).

E. Cumulative Error

The improper arguments in this case were pervasive, severe, and preserved. The Court must consider the properly-preserved misconduct … combined with additional acts of prosecutorial overreaching …" *Ruiz v. State*, 743 So. 2d 1, 7 (Fla. 1999). In light of this, the State cannot meet its burdern, which is to prove that the error was harmless beyond a reasonable doubt. *See Cardona*, 185 So. 3d at 523, 525.

The State does not attempt to meet its burden. It ignores the harmless error test, and asks the Court to affirm on the strength of *Card v. State*, 803 So. 2d 613 (Fla. 2001). In *Card*, however, the issue was whether the trial court had erred in denying a mistrial. *Id.* at 621 ("In reviewing Card's closing argument claims, we must determine whether the trial court abused its discretion in denying Card's motions for mistrial."). In this case, Mr. Andres has preserved the issues for harmless-error review.

VII. THE COURT PREVENTED THE DEFENSE FROM ARGUING LACK OF MOTIVE AND OTHER INFERENCES FROM THE EVIDENCE.

The Appellee embraces the position that it was improper for the defense to question the prosecution's theory of motive. Answer Brief at 83-86. It maintains that it was wrong for the defense to suggest that the jury could find a reasonable doubt if it questioned the prosecution's theory that the crime was motivated by theft. For this the State relies on *Belcher v. State*, 961 So. 2d 239, 249 (Fla. 2007), and *Norton v. State*, 709 So. 2d 87, 92 (Fla. 1997). It describes at least one of these as "noting that since motive is not an element of first degree murder, the statement was legally inaccurate and the State does not need to prove motive in a first-degree murder case to establish guilt or reasonable doubt." Answer Brief at 84. Belcher alleged that his attorney was ineffective because, during voir dire, the attorney did not object to a statement that the prosecution did not have to prove motive. The Court agreed that motive is not an element of the offense. In *Norton* the Court observed that motive is not an element of homicide. It also stated: "The State's concession as to the lack of motive is further proof of the absence of premeditiation in this case." Neither case even hints that it is improper to suggest that lack of motive can be relevant to reasonable doubt.

The Appellee argues that it was improper for the defense to argue that Mr. Andres would recognize Ms. Farinas' car because he had worked there over a long

period. The State points out that, "In fact, there was evidence to the contrary that may have suggested to the jury that Appellant was not familiar with Yvette's car, since she moved out for a period of time while Appellant completed construction." Answer Brief at 86. The fact that the evidence could support a *different* inference does not make defense counsel's inference, tethered to the evidence, unreasonable.

The defense argued that Ms. Farinas did not carry her ATM card with her. (T. 6512). It pointed to the evidence that Ms. Farinas did not use it, and the fact that Ruiz and Farinas relied on cash. The State now argues that this was improper because there was no evidence affirmatively showing that Ms. Farinas did *not* carry her ATM card, and no proof that she did not monitor her banks statements for ATM transactions. To require affirmative proof for every interpretation of the evidence is to deny the right to argue inferences from the evidence.

With regard to Mr. Andres's van, the Appellee claims: "Appellant improperly stacked the inference that (1) because the state did not prove Appellant's van was not stolen, it meant it was stolen; and (2) that the real suspect who stole the van is the one who murdered Yvette [sic]." Answer Brief at 86. The defense never suggested that the person who stole the van murdered Ivette Farinas. The van was found alone in a rural area. The State argued that Mr. Andres abandoned the van because he feared it would incriminate him. The defense attempted to argue that van could have been stolen and abandoned by the thief. "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).

The Attorney General argues that this inference was objectively unreasonable because:

> (1) there was no evidence to suggest the van was stolen; (2) Appellant was not charged with falsifying a stolen vehicle report; and thus (3) the State did not bear the burden to prove the van was stolen.

Answer Brief at 86. The absence of evidence to *prove* the van was stolen does not make the inference an impermissible one. The fact that the prosecution did not charge Mr. Andres with falsifying a nonexistent report has no bearing on whether the argument was a proper inference from the facts.

VIII. CUMULATIVE ERROR IN GUILT PHASE

The State bears the burden of proving the errors in this case harmless beyond a reasonable doubt. *See State v. DiGuilio*, 491 So. 2d 1129 (Fla. 1986). It must establish there is "no reasonable possibility " the errors contributed to the verdict. This it cannot do. Each of the errors in this case contributed to the verdict. Taken together, the errors combined to knock down the defense at every turn. The prosecutor was able to undermine the defense that Alberto Ruiz was the true killer. The discovery violation bolstered Ruiz's alibi while leaving the defense no

opportunity to react. The detectives' hearsay opinions of his innocence suggested there was other evidence exonerating him. The argument that the defense was "mean" and "insulting" for suggesting Ruiz was guilty and the inflammatory appeal to the jurors' sympathy told the jury the defense was wrong for even raising the topic.

The prosecutor's closing argument alone would merit reversal. The repeated suggestion that Mr. Andres had failed to prove he was not guilty, the reminders that the defense had in fact introduced no evidence, the chant of **"where is the evidence? Where is the evidence? Where is the evidence before you?**" and the "Scales of Justice" all inevitably contributed to the jury's verdict. The prosecution combined this with arguments belittling the defense as distractions and fairytales to seal the deal. The prosecutor *told* the jurors to consider these and the other improper arguments in reaching their verdict. At the same time, the defense was prevented from countering the the State's case. The State prevented the defense from letting the jury know that Mr. Perez told Mr. Andres not to come back, and then urged the jury to consider his failure to return as evidence of guilt. (S.R. 5). While the prosecutor argued that Mr. Andres was motivated by greed, the defense was prevented from pointing to evidence suggesting money was not the motive for this crime. When the counsel attempted to explain how the evidence might support a conclusion that the ATM card wasn't stolen from Ms. Farinas' person, the court

shut her down. It did the same thing when the defense tried to argue other inferences from the evidence.

When these errors, combined with all the other errors in this case are taken together, it cannot be said that none of them contributed to the jury's verdict. The State certainly can't prove so beyond a reasonable doubt.

IX. HURST

A. 6th Amendment

Hurst v. State, 202 So. 3d 40 (Fla. 2016), *cert. denied* __ U.S. __, 2017 WL 635999 (2017), requires that the sentence be reversed. The Answer Brief simply refuses to accept *Hurst*, arguing that there can be no *Hurst* error where some of the aggravating circumstances are supported by prior convictions. Answer Brief, 88-90. The Court rejected this reasoning in *Hurst*, and it has rejected the same argument since. *See Franklin, v. State*, 209 So. 3d 1241, 1248 (Fla. 2016) (We also reject the State's contention that Franklin's prior convictions for other violent felonies insulate Franklin's death sentence from *Ring* and *Hurst v. Florida*.).

The State argues that this error is harmless. In light of the 9-3 jury recommendation, the State cannot prove the *Hurst* error harmless beyond a reasonable doubt. *See Dubose v. State*, 210 So. 3d 641, 657 (Fla. 2017) ("Because the recommendation of death in this case was not unanimous, we cannot find

beyond a reasonable doubt that the error did not contribute to Dubose's sentence. Accordingly, Dubose is entitled to relief, and we need not address the proportionality of his sentence or his other claims relating to the penalty phase."); *see also Franklin* at 1248 ("In light of the non-unanimous jury recommendation to impose a death sentence, we reject the State's contention that any *Ring*- or *Hurst v. Florida*-related error is harmless.")

B. 8th Amendment Requirement of Unanimity

The Answer brief fails to come to grips with Mr. Andres' argument on this point. The State argues:

> This Court has combined the Sixth Amendment analysis of Hurst v. Florida and added an Eighth Amendment component to determine that Florida's constitution requires a unanimous jury recommendation. In doing so, this Court concluded that weighing is a fact that must be found by the jury. However, the State respectfully maintains that this interpretation of the Eighth Amendment is unsound.

Answer Brief at 89. The State misunderstands the Court's opinion in *Hurst*. The Court determined that the Eighth Amendment to the United States Consitution independently requires juror unanimity before a death sentence can be imposed. *Hurst*, 59-63. It follows that the death sentence in this case, imposed on the basis of a nonunanimous jury recommendation, violates the Eighth Amendment. There can be no argument that this error is harmless.

C. Caldwell

The State contends that the Court has already rejected the argument that the jury instructions in this case did not violate *Caldwell v. Mississippi*, 472 U.S. 320, 328-29 (1985), *Hurst* notwithstanding. It asserts that "This Court recently found that *Hurst* by proxy is NOT an extension of *Caldwell*," citing *Hall v. State*, 212 So. 3d 1001, 1032-33). The Court held no such thing.

The State misapprehends the Court's decision in *Hall*, disregarding the procedural posture of that case. Hall claimed that his appellate attorney had been ineffective in failing to raise a *Caldwell* challenge in his direct appeal. That appeal became final in 2013, more than two years before the United States Supreme Court and this Court issued their *Hurst* opinions. The Court rejected this argument because the issue would have been found to be without merit. *Hall* at 1033. At the time of Hall's appeal, a *Caldwell* argument would have been meritless under this Court's pre-*Hurst* decisions. This case is a post-*Hurst* direct appeal. Mr. Andres submits that in light of *Hurst* the jury instructions misled his jurors as to the importance of their decision.[3]

[3] In *McCloud v. State*, 208 So. 3d 668, 681-82 (Fla. 2016), the Court declined to reach McCloud's *Caldwell* argument because it reversed his sentence on other grounds.

X. PRESENT SENSE IMPRESSION

The trial court erred in admitting Detective Roberson's opinion as a "present sense impression." The detective's out-of-court statement to the other detectives that Mr. Andres "did it" was hearsay. His *opinion* was not hearsay at all and therefore could not be admitted under a "present sense impression" exception to the hearsay rule. "The rules of evidence may be relaxed during the penalty phase of a capital trial, but they emphatically are not to be completely ignored." *Johnson v. State*, 660 So. 2d 637, 645 (Fla. 1995). Though the State maintains the defense "opened the door," that concept does not apply here. "[T]o 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, 912 (Fla. 2002) (quoting *Bozeman v. State*, 698 So. 2d 629, 630 (Fla. 4th DCA 1997). Nothing in the testimony elicited by the defense misled the jury.

XI. DOUBLING

The trial court failed to instruct the jury on improper doubling. The State does not address this error, arguing only that the judge's double-weighting of the felony-murder and pecuniary gain aggravators is defensible. But the Court's "case law now holds that it is error for the trial court not to give a limiting instruction when one is requested." *Cherry v. State*, 781 So. 2d 1040, 1053 (Fla. 2000). It was

for the jury to decide whether the two aggravators were supported by different aspects of the case, and it was error for the trial court to deny the requested instruction. *See Monlyn v. State*, 705 So. 2d 1, 6 (Fla. 1997); *Castro v. State*, 597 So. 2d 259, 261 (Fla. 1992)

As to the judge's findings, the State argues that there was no doubling because the burglary "had a broader purpose" than pecuniary gain, quoting *Brown v. State*, 473 So. 2d 1260, 1267 (Fla. 1985). Answer Brief at 93. It suggests that this case is "Identical to the facts of *Brown* …" In *Brown* the victim was raped, and the burglary thus had a non-pecuniary purpose. Two other cases cited by the State involve the existence of a separate crime not related to pecuniary gain. In *Henry v. State*, 613 So. 2d 429, 433-34 (Fla. 1992), the Court (without discussing doubling) noted: "The state proved that Henry committed both robbery and arson, thereby supporting the pecuniary gain and felony murder aggravators." *Id.* In *Davis v. State*, 207 So. 3d 142, 172 (Fla. 2016), this Court noted that the trial court had concluded there was no improper doubling because the felony murder and pecuniary gain aggravators were supported by different crimes. In *Foster v. State*, 679 So. 2d 747, 754 (Fla. 1996), the felony murder aggravator was based on kidnapping, not robbery or burglary. The Court found that the kidnappings had a purpose beyond pecuniary gain, as evidenced by the fact that the kidnapping continued after the robbery was accomplished.

The State now alleges that Mr. Andres entered the efficiency knowing Ms. Farinas was there with intent of harming for some reason other than pecuniary gain. Answer Brief at 94. There is nothing other than speculation to support this suggestion, and the prosecution below maintained that Mr. Andres entered the efficiency believing it was empty. Even if one were to embrace this speculation, this case would most closely resemble In *Barnhill v. State*, 834 So. 2d 836, 851 (Fla. 2002), in which the defendant entered the victim's home intending to kill him and steal his car. *Id.* at 840-41. The Court held that it was error not to merge the "in the course of a felony" and pecuniary gain aggravators.

XII. AVOID ARREST

The trial court failed to apply the correct rule of law in finding the "avoid arrest" aggravating circumstance. Rather than asking whether "the sole or dominant motive for the murder was witness elimination." *Wilcox v. State*, 143 So. 3d 359, 384 (Fla. 2014), the judge determined that there was "an extremely strong inference that **the sole purpose of the arson was to destroy evidence of the murder**." The Answer Brief repeats this error, pointing to after-the-fact attempts to avoid arrest: the arson, washing clothes, and abandoning the van. Answer Brief, 96-97. None of these things prove that the sole or dominant motive for the *murder* was witness-elimination. In *Calhoun v. State*, 138 So. 3d 350 (Fla. 2013), the Court

held the evidence was insufficient to support this aggravating factor. It explained: "Most of the facts on which the trial court relied in support of finding this aggravator were based on Calhoun's attempts to avoid arrest after Brown's death, not on his motive to kill Brown." *Id.* at 362.

The only relevant factor the State points to is one on which the trial court did not rely: The fact that Ms. Farinas could identify Mr. Andres. However, "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).

CONCLUSION

For the foregoing reasons, the convictions and sentence of death must be vacated, and this cause must be remanded for a new 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, One SE Third Avenue, Suite 900, Miami, FL 33131, via the Court's e-filing portal on July 6, 2017

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CERTIFICATE OF FONT

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

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